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THE GENDER DIMENSION OF U.S. IMMIGRATION POLICY

Joan Fitzpatrick†

I. INTRODUCTION ........................................................................................................23
II. GENDER-“BLIND” IMMIGRATION POLICY—THE U.S. EXPERIENCE ......... 27
   A. Gender Impact of the 1986 Amnesty Programs ......................................... 27
   B. The 1986 Immigration Marriage Fraud Amendments ............................... 31
   C. Limits on Immigration by Household Workers ......................................... 34
   D. Disqualification of Lawful Immigrants From Eligibility for Public Benefits ........................................................................................................ 37
III. FORCED MIGRATION OF WOMEN AND TREATMENT OF ASYLUM-SEEKERS.... 43
IV. CONCLUSION .......................................................................................................... 48

I. INTRODUCTION

The United States is widely regarded as the premier country of immigration, with current levels of lawful immigration approaching historic peaks.1 The place of migrants in the national community figures to a surprising degree in public policy debates over crime, employment, social services and even campaign-finance reform.2 Yet, in this swirl of discourse over migration it is often

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3. The current level of concern over the direction of U.S. immigration policy is reflected in the creation of an expert commission to make wide-ranging recommendations to Congress on revision of the immigration laws. See U.S. COMM’N ON IMMIGRATION REFORM, LEGAL IMMIGRATION: SETTING PRIORITIES 39-200 (1995) [hereinafter LEGAL IMMIGRATION]. Without awaiting the completion of the Commission’s work, however,
overlooked that lawful immigration to the United States has been predominantly female for much of the past half-century.\(^4\)

This pattern is explained largely by the favored position of family-based immigration under U.S. law\(^5\) and the fact that men are more likely to choose a foreign spouse\(^6\) or to immigrate to the United States and subsequently marry a foreign spouse.\(^7\) Equally noteworthy, though of less impact on overall rates of immigration, is sustained female dominance in the family-based immigrant categories for parents of U.S. citizens\(^8\) and adopted orphans.\(^9\)


5. Both U.S. citizens and lawful permanent residents may petition for the admission of foreign-born spouses and children. However, citizens may petition for the admission of their parents and siblings. \(^4\) See Immigration and Nationality Act (INA) § 203(a), 8 U.S.C.A. § 1153(a) (West Supp. 1997). Moreover, while no numerical limits are placed on the entry of immediate family members (spouses, unmarried children under age 21, and parents) of U.S. citizens, numerical ceilings are placed on entry of immediate family members of lawful permanent residents, and on the entry of adult or married children and siblings of U.S. citizens, resulting in backlogs and lengthy delays. See U.S. IMMIGRATION & NATURALIZATION SERVICE, STATISTICAL YEARBOOK OF THE IMMIGRATION AND NATURALIZATION SERVICE 1993, 18 (1995) (hereinafter 1993 STATISTICAL YEARBOOK); \(^5\) LEGAL IMMIGRATION, supra note 3, at 65 (reporting that backlogs in family-based second preference for spouses and children of lawful permanent residents had increased to 1,138,544 by January 1995, that waiting times had increased to more than three years, and that growth in backlog might mean waits as long as ten years except where petitioning spouse naturalizes and escapes numerical limits).

6. This is especially true for members of the armed forces. The popular title of the “War Brides Act” of 1945 is evocative. From 1946 to 1948 “war brides” (who included only 0.3% husbands) constituted 25% of all lawful immigrants to the United States. \(^6\) See Houstoun et al., supra note 4, at 920.

7. Between 1972 and 1979, 366,691 foreign-born wives of U.S. citizens entered the United States as immigrants, compared to 221,721 foreign-born husbands. See id. at 924. In fiscal year 1994, 60% of the admitted spouses of U.S. citizens were female. \(^4\) LEGAL IMMIGRATION, supra note 3, at 51. The same gender disparity characterizes spouses of lawful permanent residents, with wives constituting two-thirds of the entrants in this category between 1972 and 1979, see Houstoun et al., supra note 4, at 925, as well as in fiscal year 1994, see LEGAL IMMIGRATION, supra note 3, at 64.

8. Mothers constituted 66.9% of admitted parents of U.S. citizens between 1972 and 1979, see Houstoun et al., supra note 4, at 924, and nearly 65% in fiscal year 1994, see LEGAL IMMIGRATION, supra note 3, at 55. Admissions of parents totalled 65,000 in fiscal 1992, declining to 62,000 in fiscal 1993, see 1993 STATISTICAL YEARBOOK, supra note 5, at 17 tbl.B, and to 48,382 in fiscal 1995. \(^5\) See Immigration & Naturalization Serv., Immigration to the United States in Fiscal Year 1995 (last modified Oct. 17, 1996) <http://www.usdoj.gov/ins/public/stats.htm> (hereinafter Immigration to the United States in Fiscal Year 1995). Female dominance in this immigration category may be attributed to higher female rates of longevity and economic dependency. \(^6\) See LEGAL IMMIGRATION, supra note 3, at 55. Only U.S. citizens who are at least 21 years of age may petition for the admission of their parents. For a discussion of the gendered impact of recently-enacted restrictions on public benefits for immigrant parents, see infra notes 81-120 and accompanying text.

9. Sixty-one percent of the foreign orphans adopted between 1972 to 1979 were female, see Houstoun et al., supra note 4, at 924; as were 54% in fiscal year 1993, see 1993 STATISTICAL YEARBOOK, supra note 5, at 57 tbl.15; and 62% in fiscal year 1995. \(^4\) See Immigration to the United States in Fiscal Year 1993, supra note 8. In contrast, slightly more male than female children of citizens and lawful permanent residents are admitted. \(^4\) See LEGAL IMMIGRATION, supra note 3, at 64. The difference may reflect both preferences of adoptive parents and higher rates of abandonment of foreign female children.
pattern. Being female, like being male, strongly shapes the direction and consequences of many migrations. Women's greater responsibility for family and household (often referred to as the tasks of social reproduction) affects their labor-force participation and consequently exerts a strong influence on their migratory patterns.

A striking difference exists in the bases for male and female admission, largely because female dominance of lawful immigration derives disproportionately from family ties. Female primary beneficiaries consume only a paltry number of employment-based immigrant visas to the United States. While a substantial number of women immigrate in the employment-based categories, they do so largely by means of derivative status based on a family relationship with a male primary beneficiary. Employment-based immigration increasingly favors those with advanced education, scientific or technical renown, prominent managerial position, or wealth, a shift in valued attributes that is likely to impede rather than to enhance the ability of women to qualify independently for employment-based immigration.

This does not mean that female immigrants to the United States do not work outside the home. Once lawfully admitted on the basis of a family relationship, immigrants receive unrestricted work authorization. While workforce participation rates among immigrant women are comparable to those among female U.S. citizens, they fall short of male rates, reflecting the disparate allocation of household responsibilities.

10. For example, women were the primary beneficiaries of only 3% of the employment-based immigrant visas in 1979. See Andrea Tyree & Katharine Donato, A Demographic Overview of the International Migration of Women, in INTERNATIONAL MIGRATION: THE FEMALE EXPERIENCE 21, 34 (Rita James Simon & Caroline B. Brettell eds., 1986).

11. In fiscal year 1995, for example, admissions under the first employment-based preference category totalled 17,339, including 6,733 priority workers and 10,606 of their family members. See Immigration to the United States in Fiscal Year 1995, supra note 8.


13. As Mirjana Morokvašić observes: "Women always work. They are not in and out of economic activity, but at various stages in their life cycle they are either paid for their work or not and their work is either recognized as economic activity or not." Mirjana Morokvašić, Birds of Passage are Also Women, 18 INT'L MIGRATION REV. 886, 888 (1984). It is thus misleading to say that immigrant women outside the formal labor market do not work. However, Congress has recently chosen to impose new disadvantages on those immigrants, largely female, who lack a lengthy formal work history. See infra notes 93, 97, and 100.

14. According to the 1970 census, 46.5% of recent immigrant women 16 years and older who have lived in the United States for less than five years were employed, whereas 41.6% of the general population of all women 16 years and older were employed. Tyree & Donato, supra note 10, at 34. A Labor Department report, based on 1989 data, found that labor-force participation rates for recent female immigrants tended to be lower than those of native women, but that the disparity lessened with the length of the immigrants' residence. See Joseph R. Meisenheimer II, How Do Immigrants Fare in the U.S. Labor Market?, MONTHLY LABOR REV., Dec. 1992, at 3. Meisenheimer reports that among women aged 35 to 44, 74% of natives and 68% of immigrants participated in the labor force; the rate for immigrant women who have lived in the United States for less than three years was only 49% while those who have lived in the United States thirty or more years ago had a participation rate of 77%, nearly the same as the rate for natives. Id. at 5. Meisenheimer also reports that
disproportionately unable to secure lawful entry based upon their employability forces them either to depend on family-based immigration as the key to access to the U.S. labor market or enter unlawfully. Immigrant women therefore disproportionately face disadvantages, including uncertainty with respect to their right to remain in the United States, diminished economic leverage in the labor market, and threats to their physical security due to their inability to turn to governmental authorities for protection.

Enhancing the visibility of female migration to the United States promotes but does not ensure that women migrants’ particular needs and risks are addressed in immigration policy. Even after rectification of the long-standing scholarly neglect of the gendered aspects of migration, policy neglect persists. Gender-specific constraints on women’s social and spatial mobility continue to be overlooked or discounted by policy-makers, except when their attention is seized by carefully organized, sustained pressure by advocates for women migrants. Such pressure has produced some advancements for battered immigrant women and for female asylum-seekers. Recent U.S. legislation, however, reflects continued complacency toward differential harm to women, especially where the gendered nature of the harm is not immediately obvious. Exposing policy bias and its roots in the gendered allocation of burdens of social reproduction is a first step toward ameliorating harsh, if hidden, adverse effects on women migrants.

immigrant men experience lower rates of labor-force participation during their first three years of residence: 85% of new entrants entered into the workforce as compared to 97% of those entered three to eight years previously. Id. at 4.

A study of 698 Mexican women in the United States found that 467 of the 562 undocumented women and 110 of the 136 lawful female immigrants were employed, primarily in factory work. Rita J. Simon & Margo Corona DeLey, Undocumented Mexican Women: Their Work and Personal Experiences, in INTERNATIONAL MIGRATION: THE FEMALE EXPERIENCE (Rita James Simon & Caroline B. Brettell eds., 1986).

15. See infra notes 48-64 and accompanying text.


17. See Richard E. Bilborslow & Hania Zlotnik, Preliminary Report of the United Nations Expert Group Meeting on the Feminization of Internal Migration, 26 INT’L MIGRATION REV. 138, 140 (1992) (“The problem of viewing women who moved mostly as associational migrants (i.e., moving as passive companions of other family members), while assuming that males were generally autonomous migrants or active decision-makers was recognized as a serious obstacle in advancing the understanding of the causes and consequences of female migration.’’); Houstoun et al., supra note 4, at 908 (“[T]he concept of the international migrant as a young economically motivated male has become so pervasive that it has overshadowed migration streams that are, in fact, dominated by females.’’); see also INTERNATIONAL MIGRATION: THE FEMALE EXPERIENCE (Rita James Simon & Caroline B. Brettell eds., 1986) (discussing women’s migration patterns); Silvia Pedraza, Women and Migration: The Social Consequences of Gender, 17 INT’L REV. SOC. 303, 304-05 (1991) (discussing transformation of migration studies in recent years by addition of a gendered perspective).

18. See infra note 64.

19. See infra notes 120-125 and accompanying text.
II. GENDER-“BLIND” IMMIGRATION POLICY—THE U.S. EXPERIENCE

Women ordinarily constitute a majority of each year’s legal immigrants. One might conclude that women are favorites of U.S. immigration law, since an immigrant visa is “one of the scarcest, and most highly sought after, public benefits” that the U.S. Government confers. In reality, however, immigration statutes adopted for apparently gender-neutral objectives can disrupt female-migration patterns or disadvantage immigrant women because of their gendered social roles.

A. Gender Impact of the 1986 Amnesty Programs

A striking example of facially neutral legislation with an unanticipated gender impact is the 1986 Immigration Reform and Control Act (IRCA), which granted legal status to large numbers of undocumented migrants. Inadvertently, the IRCA resulted in a dramatic, if temporary, shift toward male dominance of lawful migration. More troubling, and possibly more enduring, is the IRCA’s contribution toward the feminization of undocumented migration.

The 1986 Immigration Reform and Control Act effected a marked, and presumably unintended, shift in gender ratios among immigrants from 1988 to 1992 through two “amnesty” programs for undocumented migrants: one permitting legalization for long-time undocumented residents and one permitting legalization for persons who had engaged in agricultural labor (“Special Agricultural Workers” or “SAWs”). Unlike other provisions for lawful immigration, the amnesty programs did not confer derivative benefits upon immediate family members of eligible applicants.

Men were overwhelmingly the beneficiaries of the IRCA’s amnesty programs: fifty-seven percent of the long-time undocumented resident applicants and eighty-two percent of the SAW applicants were male. The effect of the IRCA admissions was so great as to reverse the ordinary female domination of U.S. immigration—lawful immigration in fiscal year 1991, the height of the IRCA’s impact, was sixty-six percent male. By 1993, after the last immigration

20. See supra notes 4, 7-9 and accompanying text.
23. The 1986 Immigration Reform and Control Act provided a process for persons unlawfully present in the United States who had entered prior to 1982 to adjust to lawful immigrant status. As of 1991, 82.3% of legalization applicants reported that they had entered without inspection while 17.7% had entered in lawful non-immigrant status but overstayed or otherwise had violated the terms of their admission. U.S. IMMIGRATION & NATURALIZATION SERVICE, STATISTICAL YEARBOOK OF THE IMMIGRATION AND NATURALIZATION SERVICE 1991, 70 (1993) [hereinafter 1991 STATISTICAL YEARBOOK].
24. Special Agricultural Workers were eligible for the program if they had engaged in seasonal agricultural work for a minimum of 90 days in the year preceding May, 1986. See id.
25. See id. at 70-71.
26. See 1993 STATISTICAL YEARBOOK, supra note 5, at 52 tbl.13 (1,213,767 male immigrants and 613,166 female immigrants).
applicants under the IRCA had been granted legal status, gender ratios quickly shifted back to the familiar pattern of female predominance.\textsuperscript{27}

Certain of the gender disparities encountered under the IRCA can be traced to earlier, distinctively gendered immigration patterns to the United States. Although undocumented immigration to the United States is multifaceted and by no means restricted to surreptitious Mexican entrants,\textsuperscript{28} a strikingly high percentage of beneficiaries of both the IRCA legalization program and the SAW program came from Mexico.\textsuperscript{29} Thus, patterns of Mexico-U.S. migration exerted a strong influence on the overall amnesty experience, including its gender imbalance.

Undocumented Mexican migration to the United States has until recently been male-dominated.\textsuperscript{30} The Bracero Program of 1940-1964, though long since terminated, established enduring patterns of labor migration from Mexico:

Virtually all bracero contracts went to men. This gender-discriminatory labor policy mandated an elastic supply of labor, one that could be synchronized with seasonal agricultural fluctuations and that would externalize labor reproduction costs to Mexico. . . . What the designers of the program had not anticipated, however, was the extent to which the bracero program would stimulate more Mexican immigration, both legal and undocumented. Many of the braceros acquired permanent legal status through labor certification, while others repeatedly migrated without documents or contracts; many of them started social networks that facilitated the future migration of their friends and family. And importantly, the bracero program ultimately germinated large-scale permanent settlement of Mexican immigrants.\textsuperscript{31}

\textsuperscript{27} See id. at 22, 52 tbl.13 (women constituted 53.1\% of total immigrants).

\textsuperscript{28} A generally accepted study by Robert Warren of the INS estimated that 31\% of undocumented migrants residing in the United States in October, 1992 (after the IRCA's amnesty programs had been implemented) were Mexican. See MICHAEL FIX & JEFFREY S. PASSEL, IMMIGRATION AND IMMIGRANTS: SETTING THE RECORD STRAIGHT 24 tbl.2, 86 n.13 (1994). Europe and Canada contributed 13\% of the undocumented immigrants in the United States in 1992. Id. at 24 tbl.2. While 40\% of these immigrants had entered without inspection, 60\% entered legally and later violated the terms of their non-immigrant admission. Id. at 25. An INS study released on February 7, 1997, however, estimates that 54\% of the five million undocumented immigrants are Mexican nationals. The study also assesses the proportion of current visa overstays at 41\% of the total, with illegal entrants comprising 59\% of the total. See OFFICE OF POLICY & PLANNING, U.S. DEP'T OF JUSTICE, ESTIMATES OF THE UNAUTHORIZED IMMIGRANT POPULATION RESIDING IN THE UNITED STATES: OCTOBER 1996, at 4, 3 (1997); Eric Schmitt, Illegal Immigrants Rose to 5 Million in '96, N.Y. Times, Feb. 8, 1997, at A7.

\textsuperscript{29} See 1991 STATISTICAL YEARBOOK, supra note 23, at 70 (69.8\% of the legalization applicants and 81.6\% of the SAW applicants were Mexican).


Men's experiences under the Bracero program help to explain their disproportionate application for legalization under the IRCA.

In addition to the influence of traditional migration patterns from Mexico, the gendered impact of the IRCA amnesty programs may be traceable, at least in part, to role divisions within migrant families. It is plausible that Congress had a male paradigm in view when it decided to legalize the status of long-time undocumented residents. Given patterns of serial migration by family members, with male earners frequently taking the lead, it is possible that among migrant families husbands were more likely to have accrued the necessary years of sustained residence to qualify for legalization. Moreover, even among families where both spouses had accrued the necessary residence, the household economy may have dictated that application for legalization, which required a substantial fee, be restricted to the primary earner. Gendered evaluations of the relative importance of securing legal access to the labor market and lawful residence for the male "head of household," as compared to female and minor family members, could thus have contributed to male numerical dominance among amnesty applicants.

The even more highly gendered SAW program was added to the IRCA under pressure from large agricultural interests who feared the loss of a low-wage workforce as a consequence of the introduction into federal law of sanctions against employers of undocumented migrants. Congress' primary concern in denying derivative status to family members of SAWs may have been to avoid a multiplier or magnet effect. The denial of derivative status may also reflect policy-makers' attitudes toward the relative social desirability of persons whose work sustains a major industry at low cost, compared to those workers' low-income spouses and children. A more charitable view of denial of derivative status to SAW families is that Congress might have assumed that legalized agricultural workers would maintain their traditional pattern of seasonal presence in the United States, broken by periods of reunion with wives and children in the country of origin. The migration pattern, however, has shifted from temporary stays toward long-term settlement of Mexican laborers in the United States.

The Immigration Reform and Control Act continues to exert a substantial, and significantly gendered, influence on U.S. immigration patterns. After the IRCA beneficiaries gained lawful permanent residence, their spouses and children became eligible to immigrate lawfully in the second family-based

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32. See generally HONDAGNEU-SOTELO, supra note 31 (describing evolution of Mexico-U.S. migration from earlier patterns of solo migration by male heads-of-households and elder sons).
preference category and many chose to pursue this option. They encountered substantial delays in entry because of numerical limits on second-preference visas and per-country limits on immigration. Congress reacted to this serious impediment to family unity by establishing temporary additional visa allocations and special dispensation from deportation for immediate relatives of legalization beneficiaries, but the backlog continued to grow. As the IRCA beneficiaries became naturalized, surges in the rate of entry of immediate family members of U.S. citizens were expected to occur. This trend should have reinforced female dominance of lawful immigration since “[h]igh proportions of young adult legalized aliens were men, many of whom already have petitioned for their wives and children.”

However, severe restrictions on the ability of lower-income U.S. citizens to petition for their alien relatives, enacted as part of the Illegal Immigration Reform and Responsibility Act of 1996, impede lawful immigration by spouses of some naturalized IRCA beneficiaries. No data yet exist on the impact of the restrictions on family members of IRCA beneficiaries, but it is reasonable to assume that especially among the SAW population the new financial demands will pose a high barrier to successful family-based immigrant petitions. The result may be the accelerated feminization of undocumented migration, as couples who have lost the possibility of lawful reunion determine to reunite unlawfully.


36. See Legal Immigration, supra note 3, at 65.

37. Congress allocated 55,000 immigrant visas per year for fiscal years 1992, 1993, and 1994 for dependents seeking legalization. See 1993 Statistical Yearbook, supra note 5, at 16. In fiscal year 1993, 39,243 of the recipients of these visas were Mexican. See id. at 18. Congress also exempted up to 75% of the entrants in the second family-based preference category from the per country limits and the INS instituted "family unity" policies that spared many undocumented family members from being deported while they awaited immigrant visas. See Immigration Act of 1990, 8 U.S.C.A. § 1152(a)(4)(A) (West Supp. 1997).


40. Entry by immediate relatives of U.S. citizens is not subject to numerical limits. See Legal Immigration, supra note 3, at 69-70 (predicting that backlog in second-preference category would be eroded by rapid naturalization of beneficiaries of IRCA and SAW programs because of their ability to secure entry of family members as immediate relatives of U.S. citizens).

41. Id. at 15.

42. See Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, 110 Stat. 3009 (1996), which restricted family visa petitions to persons earning 125% of federal poverty guidelines. Although the specific effects of this measure on spouses of naturalized IRCA beneficiaries are unpredictable, a recent study by the INS found that one half of the lawful permanent residents and 30% of the citizens who successfully petitioned for entry of alien relatives in 1994 would have been unable to do so under the IIRIRA’s new income limits. See Celia Dugger, Immigrant Study Finds Many Below New Income Limit, N.Y. Times, Mar. 16, 1997, at A1. The study, based on a sample of 2,160 statements by sponsors filed in 1994, found that Mexicans and Salvadorans, whose incomes tend to be lower than those of other immigrant groups, are likely to be particularly affected by the income requirements. See id.

43. See Dugger, supra note 42.
The failure to provide automatic derivative immigration benefits to immediate family members of legalization and SAW beneficiaries had already contributed to an increased flow of undocumented female migrants. Many wives (especially those from Mexico) entered unlawfully to join their legalized husbands while awaiting approval of immigrant visas.\(^4\) The greatest predictor of undocumented migration is a previous migration experience;\(^45\) nearly as predictive and valuable is access to a migration network of family members or other acquaintances.\(^46\) Women are increasingly joining these migration networks, and may even be forming specifically female networks.\(^47\)

Unfortunately, the feminization of undocumented migration occurs at a particularly inopportune time. The prospect of another amnesty could not be more remote. As Congress manifests increasing hostility toward lawful and unlawful migrants, little hope exists that the female identity of the new migrants, or their links to family members already resident in the United States, will preserve them from draconian measures of inadmissibility and removal.

B. The 1986 Immigration Marriage Fraud Amendments

Policies that restructure family-based immigration to the United States tend to have a profound impact on the fate of migrating women. Petitioning relatives, not the mostly female beneficiaries, control the family-based immigration process. Especially following the 1986 enactment of the Immigration Marriage Fraud Amendments (IMFA),\(^48\) the leverage U.S. immigration law confers on petitioners over their alien spouses became in many cases "a license to abuse."\(^49\) Advocates for immigrant women and domestic violence victims lobbied successfully for a series of ameliorative changes to the IMFA,\(^50\) establishing a model for reversing other unintended gender-specific consequences of immigration policies.

The Immigration Marriage Fraud Amendments altered the system for marriage-based immigration by restricting most immigrant spouses to conditional residency for a two-year period following entry.\(^51\) Previously, alien spouses of U.S. citizens and lawful permanent residents immediately became

\(44\) See HONDAGNEU-SOTELO, supra note 31, at 26 ("Demographic analyses suggest that after IRCA, women may even compose a majority of the Mexican undocumented immigrant population.").

\(45\) See Donato, supra note 30, at 748, 761.

\(46\) See Kossoudji & Ranney, supra note 31, at 1130.

\(47\) HONDAGNEU-SOTELO, supra note 31, at 92-97.


\(50\) See infra note 64.

\(51\) Spouses married for more than two years prior to entry and those entering in derivative status with an immigrant spouse are exempted from the IMFA. Those affected by the IMFA are alien spouses of U.S. citizens and "after-acquired" (i.e., married after the petitioning spouse has immigrated) alien spouses of lawful permanent residents. See 8 U.S.C.A. § 1251(a)(1)(G) (West Supp. 1996).
lawful permanent residents upon entry with a marriage-based immigrant visa. Under the IMFA both spouses must cooperate in a second petition, two years after entry, to remove conditional status and to confer legal permanent resident status on the alien spouse, permitting her to remain indefinitely in the United States. To remove conditional status the spouses were required to prove that the marriage was not a sham contracted to gain immigration benefits and that the spouses' union remained intact.

The Immigration Marriage Fraud Amendments aggravated power disparities in marriages between petitioning husbands and their alien wives. The leverage that the immigration system confers on the petitioning spouse can be misused in a relationship in which domination and control are sought. Even severely-abused wives may feel compelled to remain in their marriages in order to avoid deportation, which could mean permanent separation from their children and a marginal existence. The migration experience itself aggravates the plight of the battered spouse through isolation from family and friends, language barriers, and unfamiliarity with legal and social services.

52. The idea that entering spouses have ties to the national community, formerly expressed by the immediate grant of lawful permanent resident status to entering alien spouses, is still reflected in the unusually short period of lawful residency (three years) for naturalization by persons who immigrate on the basis of marriage (the normal minimum residency for naturalization being five years). See 8 U.S.C.A. §§ 1427(a) & 1430(a) (West Supp. 1997).

Each petition... shall contain the following facts and information: (A) Statement of proper marriage and petitioning process—The facts are that (i) the qualifying marriage—(I) was entered into in accordance with the laws of the place where the marriage took place, (II) has not been judicially annulled or terminated, other than through the death of the spouse, and (III) was not entered into for the purpose of procuring an alien’s entry as an immigrant; and (ii) no fee or other consideration was given... for filing of a petition.

Id.

54. See Anderson, supra note 49, at 1416-17. Janet Calvo observes:
The 1986 Marriage Fraud Amendments thus gave the citizen or resident spouse enormous power over the alien spouse. He controls whether she and her children can stay, live, and work in the United States. He can make his spouse and her children illegal aliens by refusing to initially file a petition for her, by refusing to file a petition to remove her conditional status, or by refusal to appear at an interview.


55. Abusive and controlling men may seek relationships with foreign women, in the belief that the wife's cultural background conditions her to submissiveness. The "mail-order bride" business exploits the cultural stereotype of subservient Asian women and appears to attract American men with character flaws, including a tendency toward gender-based violence. See Anderson, supra note 49, at 1407-11. One Filipina woman advertised by a mail-order catalogue was murdered by her abusive husband in a Seattle courthouse in 1995, along with her unborn child and two friends. See Vicky Stifter, The Vulnerability of Immigrant Women, SEATTLE TIMES, Mar. 16, 1995, at B5; Alex Tizon, The World of The Mail-Order Matchmaker, SEATTLE TIMES, Mar. 12, 1995, at A1. Another Filipina woman advertised by a mail-order catalogue was murdered by her husband, a retired Army master sergeant who had been convicted of murdering a previous wife. Man is Convicted, Again, of Killing a Wife, N.Y TIMES, Aug. 20, 1996, at A12. Even partners who contract marriages across cultural divides with the best initial intentions risk severe stress and misunderstanding, sometimes fueling domestic violence.


None of these observations would surprise anyone attuned to American gender relations, yet Congress seems to have been impervious to them in enacting the IMFA. The obsession with "fraud" that animated the legislation is traceable to a since-debunked Immigration and Naturalization Service (INS) estimate that 30% of the marriages bringing immigrant spouses to the United States were fraudulent.\(^5\) Even though immigrant spouses are predominantly female, the testimony on marriage fraud presented to Congress was oddly restricted to women recounting their manipulation by scheming, insincere immigrant husbands.\(^9\) Congress failed to consider the needs and concerns of immigrant women when legislating on marriage-based immigration, despite the fact that nearly twice as many women as men immigrate as spouses.\(^6\)

While the rate of petitioning for male spouses was on the rise immediately prior to enactment of the IMFA,\(^6\) the rate declined after the IMFA was enacted,\(^2\) possibly because of the indirect effects of male dominance among beneficiaries of the IRCA legalization.\(^6\)

Congress responded to sustained pressure from groups active in combatting violence against women by liberalizing the eligibility of battered spouses for waivers of the IMFA's joint petition requirements, establishing a new form of relief from deportation for domestic violence victims, and making certain immigrants eligible to self-petition for immigration benefits.\(^6\)

Together, these measures significantly diminish the potential for manipulation of the immigration system by spouse batterers. The domestic violence lobby has been particularly effective because it combines the efforts of immigrant advocates with those of feminist, public health, and criminal justice organizations. At a time when the political mood is largely anti-immigrant, such coalition-building is of special value.

58. See Anderson, supra note 49, at 1411-12 n.60 (citing revised INS estimates placing figure closer to 8%); see also Calvo, supra note 54, at 606-07.
59. See Calvo, supra note 54, at 615-16.
60. See id. (noting failure to consider gender composition of immigrant spouse population in enacting the IMFA and inaccurate prediction by Senate Judiciary Committee in context of major revision of immigration laws in early 1950s that "the present preponderance of female immigration will not continue") (citing S. REP. No. 1515, 81st Cong., 2d Sess. 161 (1950)).
61. See id. at 615 n.155 (citing General Accounting Office figures on male spouse-based immigration between 1982 and 1984).
62. LEGAL IMMIGRATION, supra note 3, at 51.
63. See supra notes 22-44 and accompanying text.
C. Limits on Immigration by Household Workers

Despite the lessons that should have been learned from the IMFA, Congress continued to legislate without gender sensitivity and with an attitude of tolerance toward disproportionate damage to women's interests. For example, a strict limitation imposed in 1990 on lawful immigration by unskilled workers was adopted without careful consideration of its impact on the availability of childcare workers and the ensuing impact on employed mothers.

Even as Congress in 1990 was undoing some of the damage caused to women by the IMFA, it created another, possibly unintended, gendered impact by imposing severe limits on the entry of unskilled workers with employment-based visas. The 1990 Immigration Act (IMMACT) restructured legal immigration to shift the balance between family-based and employment-based immigration and, within the latter category, to favor highly-skilled or wealthy immigrants. One of the more obscure provisions of the IMMACT limited the number of "unskilled" workers (those whose occupations require fewer than two years of experience) to 10,000 entries per year. Within the category of unskilled workers are the immigrant housekeepers and nannies upon whom American professional women, entering the work force in an unprecedented wave, have increasingly come to rely.

The extent of this reliance was inadvertently thrust upon American consciousness by the "nannygate" scandals of the Clinton Administration in 1993. There were important differences in the situations of the two principals in the scandal, unsuccessful Attorney General nominees Kimba Wood and Zoë Baird, though these differences seemed lost on the President, Senate, and public at large. Commentary was muted on the fact that male politicians with egregious histories of violating the immigration and tax laws with regard to

65. U.S. COMM'N ON IMMIGRATION REFORM, U.S. IMMIGRATION POLICY: RESTORING CREDIBILITY 189, 202-06 (1994) ("One of the major goals of IMMACT was to increase the number of highly-skilled workers entering the United States") [hereinafter RESTORING CREDIBILITY].
68. Kimba Wood and her husband had employed her nanny prior to the enactment of the employer sanctions in the 1986 IRCA, and thus benefitted from the IRCA's "grandfather" clause which permits employees to remain in pre-existing employment without exposing their employers to penalty. Wood Outlines Legality of Sitter's Employment, L.A. TIMES, Feb. 6, 1993, at A20. Wood not only regularly paid Social Security taxes for her nanny, even prior to the IRCA, she also filed an appropriate and successful petition to enable her household employee to immigrate. Id. Zoë Baird and her husband, in sharp contrast, knowingly hired an undocumented immigrant couple following enactment of the IRCA, failed to pay Social Security taxes on their employees' wages, and did not regularize their employees' immigration status. Confirmation Hearing for Zoë Baird, Attorney General-Designate, Before the Senate Comm. on the Judiciary, 103d Cong. 1st Sess. (1993), available in LEXIS, News Library. Both nominees were rapidly jettisoned by the Clinton Administration following adverse media coverage, without any effort to explain to the public the significant legal distinctions between the two cases.
household workers managed to weather the storm with few ill effects.\(^6\) It almost appeared as if the need to employ a full-time nanny to provide primary care to young children, a need disproportionately felt by women, was itself a black mark against Baird and Wood.

Since the imposition of the IMMACT’s numerical restrictions on the entry of immigrant household workers, the backlog has so increased that an employer filing a immigrant visa petition for an infant’s nanny might find the visa becoming available around the time the “infant” leaves primary school.\(^7\) The categorization of child care as unskilled work has not been entirely uncontested, but efforts to shift trained childcare workers into the skilled category have generally been stymied.\(^7\) The lawful entry of childcare workers, since 1990, has largely been restricted to non-immigrant participants in the disingenuous, time-limited, and troubled *au pair* program administered by the United States Information Agency.\(^7\)

Other nations that value labor-force participation by educated women have created specialized programs for the entry of childcare and household workers,\(^7\) recognizing that women in all income brackets remain burdened with primary responsibility for the tasks of social reproduction. While East Asian states have limited entry to short-term migrants,\(^7\) Canada has offered the prospect of

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\(^{69}\) Governor Pete Wilson of California, renowned for his vitriolic attacks on undocumented immigrants, not only employed an unauthorized housekeeper following the enactment of the IRCA, but failed to pay Social Security taxes on her behalf. While Governor Wilson initially blamed his first wife for these transgressions of the immigration and tax laws, later revelations disclosed that he had employed a succession of three housekeepers, both before and after his divorce and the enactment of the IRCA, without seeking employment authorization or making any attempt to pay Social Security taxes on their behalf. In October, 1995, Wilson paid \$15,000 in back Social Security taxes due to the accounts of the three housekeepers for the years between 1971 and 1990. *California’s Pete Wilson Admits That He Didn’t Pay Taxes on Maids*, DES MOINES REG., Oct. 28, 1995, at 4.

\(^{70}\) See Helene Pepe, *Making Nannies Legal Can Be Done With Ease*, ARIZONA REPUBLIC, Feb. 22, 1993, at A11. The U.S. Commission on Immigration Reform reported in 1994 that the backlog for unskilled workers had grown to 94,000, extending the wait from four years to at least six years. The slow rate of new admissions of unskilled workers extended delays to at least nine years. However, drop-out by discouraged applicants began to slow the lengthening of the delay as of 1994. RESTORING CREDIBILITY, supra note 65, at 205-06.

\(^{71}\) *Labor Certification Applications Continue Downward Spiral*, 70 INTERP. RELEASES 1436, 1437 (1993).


\(^{74}\) Id.
permanent resettlement in exchange for several years' service as a live-in domestic.\textsuperscript{75}

The difficulty in assessing the desirability of these specialized migration programs arises from the conflicting interests of three groups of women: the "foreign domestics," who seek economic and personal gain without exploitation; the employers, who seek effective surrogates to perform their social reproductive tasks at an affordable cost; and the "domestic domestics," citizen or lawful resident household workers who might enjoy better wages and working conditions if entry by additional foreign workers were restricted. Women's disproportionate responsibility for the family and the household makes sorting out these competing interests a highly feminized matter.

The fact that policy-makers act with complete indifference to this complex of women's interests is a sobering reminder of the gender-blind nature of contemporary immigration policy. The U.S. Commission on Immigration Reform recommended the complete abolition of entry by unskilled workers, with no mention of the potential impact on child-care availability.\textsuperscript{76} Congressional discussion of the benefits and drawbacks of the \textit{au pair} program is disconnected from the reality of employed mothers' needs.\textsuperscript{77} In the debate over the IMMAct, Representative Constance Morella of Maryland seemed a voice crying in the wilderness about the decreased availability of laborers for those in dire need of home-care workers for children, the elderly, and the disabled.\textsuperscript{78}

Congress' only response to the "nannygate" crisis was to raise the threshold of eligibility for Social Security coverage for domestic workers.\textsuperscript{79} While this revision eased the tax and paperwork burdens on casual employers, it did nothing to address the needs of full-time employers and damaged the financial futures of both citizen and alien household workers. Exempting part-time domestic workers from Social Security will expose certain immigrant women to potentially dire consequences when they reach retirement age because they will


\textsuperscript{76} See LEGAL IMMIGRATION, supra note 3, at 102-04. Attorney Helen Pepe, who represented Zoë Baird's undocumented chauffeur, pointed out that Congress could reallocate some of the many (up to 87,000) unused visas in the employment-based immigrant categories of the Immigration Act of 1990 to home-care workers without major alterations in the structure of the immigration laws: "It doesn't require overhauling the whole immigration law, it just requires Congressional understanding of the child care crisis." Nicole Wise, \textit{Immigrants, Home Care and the Law}, N.Y. TIMES, June 20, 1993, at 3.

\textsuperscript{77} Critics of the \textit{au pair} program have argued that it should be abolished because it is an unsuitable cultural exchange program. In 1990, the House Committee on the Judiciary concluded that program should not be abolished, but should be geared to providing "unique cultural and educational experience, through travel to U.S. points of interest, national monuments, institutions, and participation in certain courses of academic study," and should retain its limitation of 40 hours of child care per week. H.R. REP. NO. 101-723, at 68-69 (1990), \textit{reprinted in} 1990 U.S.C.C.A.N. 6710, 6748-49. Clearly, a program with such restrictions is unsatisfactory as a source of adequate child care for most mothers employed full-time.


\textsuperscript{79} See 20 C.F.R. § 404.1057 (1996) (Social Security Administration does not count cash wages for domestic service toward qualifying quarters, unless employer pays wages in excess of an applicable dollar threshold; wages paid by different household employers may not be aggregated).
lack a pension but find that their alienage disqualifies them from safety-net programs for the elderly poor.\textsuperscript{80}

It is unlikely that the problems created by the IMMACT will be resolved any time soon. Effective advocacy to increase rates of lawful immigration by household workers is impeded by the conflict of economic interests among the three groups of women most directly affected: foreign domestics, employers, and domestic domestics. During periods of anti-immigrant sentiment, asking Congress to expand entry of working-class aliens is extraordinarily difficult. Moreover, the household worker issue is feminized by its relation to women’s social reproductive role, and is thus easily ignored in policy debate. Childcare in the United States remains a private matter, a problem that women must generally solve without active assistance by policy-makers.

D. Disqualification of Lawful Immigrants From Eligibility for Public Benefits

Congress’s impulse to deprive lawful immigrants of public benefits was expressed most recently in the Personal Responsibility and Work Opportunities Reconciliation Act of 1996 (“1996 Welfare Act” or the “Act”).\textsuperscript{81} With little or no regard for the gender dimension of the policy change, Congress enacted harsh measures that primarily affected a largely female and vulnerable segment of society. The 1996 Welfare Act proclaims the virtue of self-sufficiency as the justification for denying public benefits to immigrants.\textsuperscript{82} As a result of this reasoning, many female immigrants who have devoted their lives to the care of their families will suffer harsh consequences. As is often the case, the disadvantages of women’s social reproductive roles are heightened under policies crafted to suit a male paradigm.

While the public debate on the Act focused on the termination of the sixty-one-year old entitlement of poor women and children to federal financial assistance,\textsuperscript{83} much of the Act’s budget savings are projected to flow from cuts in benefits to lawful immigrants.\textsuperscript{84} Despite popular misconceptions, undocumented immigrants have long been excluded from most federal-benefit programs, including cash assistance to families with dependent children, food stamps,

\textsuperscript{80} See infra notes 81-121.
\textsuperscript{81} See supra note 3.
\textsuperscript{83} See Clinton Still Expected to Sign Welfare Overhaul Bill, 73 INTERP. RELEASES 1069, 1070 (1996). Under the 1996 Welfare Act, the Aid to Families with Dependent Children entitlement program was replaced by Temporary Assistance to Needy Families and was made subject to severe time limits and further restrictions at the state level. See Impact of Welfare Reform on Immigrants and Refugees Assessed, 17 REFUGEE REPTS. 1, 3 (1996) [hereinafter Impact of Welfare Reform].
\textsuperscript{84} See Clinton to Sign Welfare Legislation with Significant Immigration Consequences, 73 INTERP. RELEASES 1029, 1029 (1996) (calculating savings from cuts to legal immigrants at 40% of total savings expected to be extracted by the 1996 Welfare Act); Impact of Welfare Reform, supra note 83, at 2 (National Immigration Law Center estimates 44% of savings from the Act will come from reduction in benefits for legal immigrants).
Supplemental Security Income, Medicare and most Medicaid. 85 Reliance on public benefits occurs disproportionately among refugees and elderly family-based immigrants who enter legally,86 though other lawful immigrants may experience reversals of fortune and turn to programs such as food stamps.87

There was no serious examination of the factors explaining increasing rates of reliance by immigrants on public benefits, especially from a gendered perspective, prior to the passage of the 1996 Welfare Act, nor were the likely effects on needy immigrant women carefully measured.88 A preoccupation with abuse and fraud emerged in the arguments of the Act’s supporters.89 More fundamentally, however, the Act’s sponsors seemed intent on imposing a new vision of moral worthiness and national community, with severe consequences for certain female immigrants.

Lawful immigrants failing the Act’s definition of “self-sufficiency”90 will be deprived of taxpayer support, notwithstanding long residence and close community ties. They may re-enter the community fold and regain their

85. See Johnson, supra note 21, at 1528-29. Under the 1996 Welfare Act, undocumented aliens will be eligible only for emergency medical assistance; short-term, in-kind, non-cash disaster relief, immunizations for communicable diseases; and in-kind, non-means-tested programs, such as soup kitchens, designated by the Attorney General. Personal Responsibility and Work Opportunities Reconciliation Act of 1996, Pub. L. No. 104-193, § 401, 110 Stat. 2105 (1996).

86. See Use of SSI and Other Welfare Programs by Immigrants, Senate Subcomm. on Immigration and Refugee Affairs, Testimony of Michael Fix, Jeffrey S. Passel & Wendy Zimmermann, Feb. 6, 1996, available in LEXIS, Legis Library, Cngtst file; see also Fix & Passel, supra note 28, at 6 (“Welfare use among working-age (15 to 64 years), non-refugee immigrants is very low. Most transfer payments going to immigrants consist of Supplemental Security Income (SSI) for elderly immigrants.”).

87. Immigrants are excludable if they are “likely to become a public charge.” 8 U.S.C.A. § 1182(a)(4) (West Supp. 1997). Immigrants are deportable if they become a public charge within five years of admission for causes not affirmatively shown to have arisen after admission. See 8 U.S.C.A. § 1227(a)(5) (West Supp. 1997). Thus, lawful immigrants who unexpectedly fall on hard times after admission have traditionally not been cast out from the community. The House of Representatives in the 104th Congress attempted a significant reversal of this policy by approving an amendment to Section 237(a)(5) of the Immigration and Nationality Act, which would have made deportable those immigrants who had depended on federal means-tested benefits for more than twelve months in the seven-year period following admission as a lawful permanent resident—even for causes arising after entry. See H.R. Conf. Rep. No. 104-828, § 532, 142 CONG. REC. H10876-77 et seq. (Sept. 24, 1996).

88. See UNITED STATES GENERAL ACCOUNTING OFFICE, WELFARE REFORM: IMPLICATIONS OF PROPOSALS ON LEGAL IMMIGRANTS’ BENEFITS 12-13 (1995) [hereinafter GAO WELFARE REFORM REPORT] (stating data limitations prevented GAO from either fully describing the characteristics of immigrants receiving benefits or assessing their sponsors’ ability to support them).

89. See Impact of Welfare Reform, supra note 83, at 2 (quoting Senator Richard Shelby as stating, “The generous package of welfare benefits available in America is a magnet for literally hundreds of thousands of legal and illegal immigrants,” and Representative Lamar Smith as stating, “Rather than promoting hard work, welfare tempts immigrants to come to America to live off the American taxpayer.”). The rate of welfare dependency among working age, lawful, non-refugee immigrants is lower than that for citizens (2% of lawful non-refugee immigrants between the ages of 15 and 64 who entered in the 1980s depended on public assistance, compared to 3.2% of pre-1980 lawful immigrants and 3.7% of natives, as measured at the time of the 1990 census). See FIX & PASSEL, supra note 28, at 65 fig. 21. Dependency rates among refugees are much higher (over 13% of working-age immigrants from refugee countries, and over 15% of immigrants over 15 years old from refugee countries received public assistance at the time of the 1990 census). See id. Welfare dependency among elderly lawful immigrants is higher than the national average (25.7% of elderly immigrants from non-refugee countries who immigrated in the 1980s received welfare in 1990, as compared to 6.9% of elderly native citizens). See id.

eligibility for public assistance only through three avenues: naturalization, formal sector employment for forty qualifying quarters, or service in the armed forces. The first option is more problematic than it might appear, especially for elderly women, while the latter two criteria are revealing of substantial male bias. Elderly immigrant mothers and divorced immigrant housewives, non-productive from a market point of view, will be among those most disadvantaged.

Supplemental Security Income (SSI) dependency, especially dependency on the SSI aged program, is high among immigrants who are both elderly and poor. Immigrating parents of U.S. citizens are disproportionately older and female. Supplemental Security Income benefits have special importance for elderly people who have a limited history of contribution to the Social Security system as wage-earners. Previous "deeming" requirements delayed the eligibility of immigrant parents for SSI for up to five years by attributing the income of their sponsoring citizen children to them. The 1996 Welfare Act

91. Id. at § 412(b)(1)-(3). The definition of qualifying quarters of coverage is set forth at 20 C.F.R. § 404.140 (1996). Under Section 435 of the 1996 Welfare Act, immigrant spouses are eligible for public benefits derivatively through marriage to a person who has been credited with quarters worked during the marriage. This eligibility survives the death of the qualifying spouse but terminates with divorce. The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 extends eligibility for public benefits to certain immigrants who are battered spouses or parents of battered children, where "there is a substantial connection between such battery or cruelty and the need for the benefits to be provided" and where the immigrant no longer resides with the batterer. Pub. L. No. 104-208, § 501(c)(2), 110 Stat. 3009 (1996). See infra note 98.


93. According to a recent study, approximately 12 percent of the 5.9 million SSI recipients in 1993 were legal immigrants. However, about 29 percent of the over 1.4 million of those recipients in the program for the aged were noncitizens . . . . [L]egal immigrants made up only about 10 percent of the SSI recipients in the program for the aged who were receiving Social Security benefits, but they constituted 63 percent of the aged SSI recipients who did not qualify for Social Security.


94. The categories of immigrants with the highest percentage of women include parents of U.S. citizens (61%) and spouses and children of legal permanent residents (57%). U.S. DEPARTMENT OF JUSTICE, IMMIGRATION AND NATURALIZATION SERVICE, IMMIGRATION TO THE UNITED STATES IN FISCAL YEAR 1995, at 9 (Mar. 1996). The oldest entering immigrants were parents of U.S. citizens, who had a median age of 62 years in fiscal year 1995. Id.

95. Paying Social Security taxes for at least 40 quarters of earnings is necessary to establish eligibility to receive Social Security benefits as an earner. See 42 U.S.C.A. § 414(a)(2) (West 1994).

Legal immigrants applying for SSI tend to arrive in this country when they are beyond or near the end of their working years, which is why in many cases they do not qualify for Social Security benefits. Among those nondisabled immigrants who arrived after January 1974 who were receiving SSI from the aged program, about 79 percent were age 60 or over when they entered the United States.

Mont, supra note 93, at 23.

96. See id. at 21-22. The extension (from three to five years) became effective with the passage of the Unemployment Compensation Amendments of 1993, 42 U.S.C. § 1382(c)(a) (1994). The deeming provision did not apply if an immigrant became blind or disabled after admission to the United States as a permanent resident. See GAO WELFARE REFORM REPORT, supra note 88, at 4. Though Medicaid technically had no deeming period, a similar restriction applied to many Medicaid recipients. The income or resources of spouses and parents (for recipients under age 21), but not the income or resources of any other sponsors, were used in calculating the eligibility of potential recipients of Medicaid. See Mont, supra note 93, at 22.
extends the deeming provisions up to the time of the alien's naturalization. Moreover, under the 1996 Welfare Act elderly immigrants lose eligibility for SSI and other public benefits even if their sponsors have fallen on hard times.

By these measures, Congress unmistakably intends to deter U.S. citizens with elderly dependent foreign parents from filing immigrant visa petitions on their behalf. These parents (disproportionately mothers) will be unlikely to qualify for public benefits through ten years of sustained employment, service in the armed forces, or naturalization. In this renegotiation of the social contract, Congress has signaled that filial piety to the foreign-born is a private rather than public matter, despite the unrealism of expecting that even affluent offspring of aged immigrants could assume the full lifetime cost of their physical and medical care. Women generally accrue fewer financial reserves to survive a period of extended dependency in their dotage, and often turn to the community or to their offspring for survival. The 1996 Welfare Act eliminates public support and erects substantial barriers between impoverished foreign parents and their U.S.-resident children.

Immigrants already in the United States will be also be profoundly affected by the Act. After a recertification process, immigrants presently dependent on SSI, Medicaid, food stamps and other vital benefits will be terminated. Immigrant women will be penalized for having dedicated their lives to the unpaid care of their families. Even those who have labored in domestic service for other families may be unable to qualify for the work exception, given extensive noncompliance with Social Security obligations for domestic workers.

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100. Food stamp eligibility was terminated as of April 1, 1997, affecting an estimated 900,000 legal immigrants. Supplemental Security Income will cease upon recertification, affecting an estimated 500,000 immigrants, including refugees. States have been given the option to extend non-emergency Medicaid to legal immigrants, but up to 665,000 legal immigrants could potentially be affected after the effective date of January 1, 1997. See Impact of Welfare Reform, supra note 83, at 4-5.
101. There is a process by which employees whose employers have illegally failed to report earnings and pay FICA taxes may reconstruct their earnings history upon reaching retirement age. See 20 C.F.R. § 404.822 (1997) (requiring "satisfactory evidence"). The standards governing relevant evidence of earnings are flexible. See 20 C.F.R. §§ 404.708-709 (1997) (referring to "convincing evidence"). Impoverished immigrants who have worked in the informal economy for multiple employers are likely to experience acute difficulty providing documentary proof of their earnings even under relaxed evidentiary rules.
Naturalization provides a potential for escape from termination of benefits under the 1996 Welfare Act. The Congressional Budget Office estimates that approximately eighty percent of the legal immigrants receiving SSI benefits who would be affected by the 1996 Welfare Act have been in the United States for at least five years and are thus potentially eligible to apply for naturalization. However, elderly immigrants have much lower rates of naturalization than younger immigrants. Among the obstacles to becoming a citizen are a lack of knowledge of U.S. civics and English, a reluctance to adjust to a new culture, emotional problems stemming from redefined roles within the family, increased difficulty in acquiring a second language at an advanced age, and age-related impediments to access to language or civics classes. These problems may be especially aggravated for those elderly female immigrants who are illiterate in their first language and have little or no formal education. Efforts were underway even prior to passage of the 1996 Welfare Act to provide a disability exemption from the naturalization requirements, but some critics characterize such relief as an impediment to the Welfare Act’s cost-saving objectives. The Clinton Administration has proposed a broad restoration of eligibility for SSI and Medicaid, without regard to naturalization, for those lawful immigrants who become disabled following admission. However, the $14-15 billion cost of this restoration is a serious obstacle to its enactment. Unless state and local authorities fill the gap created by the loss of federal benefits for elderly immigrants who do not or cannot naturalize, some

102. See Mont, supra note 93, at 24.
103. “Only 11 percent of legal immigrants who entered the United States in 1982 and were age 60 or over had become citizens by 1992.” Id. By comparison, the naturalization rate was 37% for legal immigrants who entered in 1982 and were between the ages of 18 and 50. See id.
104. Federal law establishes as prerequisites to naturalization a demonstration of both English language proficiency and an understanding of the fundamentals of the history, principles, and form of government of the United States. See 8 U.S.C. § 1423 (1997). Immigrants over the age of 55 who have resided in the United States for 15 years after admission as a lawful permanent resident are exempted from this requirement, as are immigrants over the age of 50 who have resided as lawful permanent residents for 20 years. See 8 U.S.C. § 1423(1). In 1994, Congress added a further exemption for immigrants who are unable because of physical or developmental disability or mental impairment to meet the English language and civics requirements. See 8 U.S.C. § 1423; see also DONALD E. GELFAND, AGING AND ETHNICITY 39, 44-46, 153-55 (1994).
105. See GELFAND, supra note 104, at 39, 44-46.
106. See id. at 44-46.
108. See GELFAND, supra note 104, at 153-55.
analysts fear that the official response to their plight will be to “put grandma out in the parking lot.”

The gendered impact of the 1996 Welfare Act does not stop with benefit cut-offs. Elderly immigrants who lose benefits will turn to relatives, if possible, to meet their basic needs. Because elder-care, like childcare, remains predominantly assigned to women, these changes will have a predictably disparate impact on the lives of their female relations.

The 1996 Welfare Act’s notion of “self-sufficiency” appears to rest, in part, on an expectation that families can provide physical care to their dependent immigrant members. But that assumption may reflect a gendered disregard for unpaid female labor within the family setting:

Although caregiving work underpins the economy, it is peripheral to the marketplace norms of competition and financial gain as defined by men. Nonmonetized and nontechnological, caregiving has been unrecognized and devalued in a society that defines work in terms of measurable output and wages rather than nurturance and maintenance . . . What this means for women’s roles and status is that women are expected to perform unpaid work in the home that is regarded as nonwork. As a result, assumptions underlying current public policies arise from a social system in which women as a class are at an economic disadvantage.  

113. Welfare Fix Needs Fixing, Say Leavitt, Colleagues, SALT LAKE TRIB., Feb. 1, 1997, available in LEXIS, News Library, Cumws File (quoting Elaine Ryan, Director of Government Affairs for the American Public Welfare Association). Representative Shaw observes that “natural attrition” may solve the narrower problem of mentally-disabled elderly immigrants who face a loss of benefits but are unable to naturalize even under liberalized regulations, indicating that he is optimistic that such persons will not be “pushed out of nursing homes onto the sidewalk.” Dugger, supra note 110.

114. See Raymond T. Coward et al., Demographic Perspectives on Gender & Family Caregiving, in GENDER, FAMILIES, AND ELDER CARE 18, 25 (Jeffrey W. Dwyer & Raymond T. Coward, eds. 1992); see also EMILY K. ABEL, WHO CARES FOR THE ELDERLY? 4 (1991) (stating women represent 72% of all caregivers for the elderly).

115. See Personal Responsibility and Work Opportunities Reconciliation Act of 1996, Pub. L. No. 104-193, § 400, 110 Stat. 2105 (1996) (“[A]liens within the nation’s borders [should] not depend on public resources to meet their needs, but rather rely on their own capabilities and the resources of their families, their sponsors, and private organizations.”).

116. Congress has provided that affidavits of support, which sponsoring relatives provide to overcome the exclusion ground for aliens likely to become a public charge, be enforceable against the sponsor. See Personal Responsibility and Work Opportunities Reconciliation Act of 1996, Pub. L. No. 104-193, § 423, 110 Stat. 2105, 2271 (1996). The public charge ground is set forth at 8 U.S.C. § 1182(a)(4) (Supp. 1996) (“Any alien who, in the opinion of the consular officer at the time of application for a visa, or in the opinion of the Attorney General at the time of application for admission or adjustment of status, is likely at any time to become a public charge is excludable.”). The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 adds a set of criteria on which officials may base their prediction whether the alien applicant for admission is likely to become a public charge. Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, § 531(a),110 Stat. 3009 (1996).

These general observations aptly describe attitudes implicit in the 1996 Welfare Act's immigration-related provisions.

Elderly men in the United States have less to fear from public policies constructed on an assumption that unpaid family members will meet their basic caregiving needs. While 67.8% of impaired older males receive help from their wives, only 21.6% of impaired older females receive similar assistance from their husbands. Among the very old (those aged eighty-five or over) this disparity widens to 42.6% for men relying upon their wives, as compared to a mere 4.3% of women with helping husbands. Since immigrant parents are disproportionately female and elderly, they are unlikely to have spouses who can insulate them from the loss of public benefits.

Building a coalition to amend to the immigration-related provisions of the 1996 Welfare Act will be extraordinarily difficult, despite the dire circumstances facing those affected. The Act reflects a confluence of hostile attitudes both toward immigrants and toward the welfare-dependent. To an unusual degree, the support of governmental officials at the state and local level is crucial to securing a reversal of policies that have harsh effects on immigrants. These officials fear that the federal cutbacks will shift costs to states and counties. But given the pivotal importance of immigrant-benefit reductions to the overall federal cost-savings objectives of the 1996 Welfare Act, it cannot be safely predicted that immigrant women will receive the dispensation now proposed by the Clinton Administration.

III. FORCED MIGRATION OF WOMEN AND TREATMENT OF ASYLUM-SEEKERS

Significant, if belated, strides have been taken in recent years to recognize the dangers faced by women refugees. Women and children constitute 80% of refugees. Yet only in recent years have the specific risks faced by women refugees been given any serious attention by policy-makers. The United Nations

118. See Coward et al., supra note 114, at 26.
119. See id. at 28.
120. See supra notes 93-94. 
122. Refugees in this context are defined as persons who have crossed an international border in flight from man-made disaster, whether persecution or armed conflict. See Elizabeth Hull, At Long Last: Asylum Law Is Beginning to Address Violence Against Women, 18 IN DEFENSE OF THE ALIEN 186, 186 (1995).
High Commissioner for Refugees has adopted a series of guidelines and programmatic improvements to deal sensitively and effectively with gender-specific risks and barriers.\(^\text{123}\) Important asylum states, including Canada and the United States, have adopted guidelines\(^\text{124}\) and announced precedent-setting decisions accepting the cognizability of gender-based asylum claims and improving adjudication processes so as to draw out rather than suppress the stories of female claimants.\(^\text{125}\) Yet even now, adjudicators are more receptive to arguments premised on the physical vulnerability of women (for example, to the risk of female genital mutilation) than to the enhanced dangers women face as a result of prescribed social roles or gender-based constraints on mobility.

Because the developments favoring gender-based persecution claims have received much scholarly attention they do not require thorough treatment here.\(^\text{126}\) The important point is to recognize that, without sustained and extraordinary efforts by refugee advocates, these advances would have been unlikely.\(^\text{127}\) Moreover, it must be acknowledged that these developments will bring material improvement to few women.\(^\text{128}\) In an ironic coincidence, just as the theoretical legitimacy of gender-based persecution claims is being accepted, reception states are erecting onerous barriers to access to their systems for asylum adjudication.\(^\text{129}\)

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123. See UNHCR GUIDELINES supra note 121.
124. See CANADA GUIDELINES supra note 121.
128. See Deborah Anker et al., The BIA’s New Asylum Jurisprudence and Its Relevance for Women’s Claims, 73 INTERP. RELEASES 1173, 1173-74 (1996). Three of the leading gender-based persecution cases that have been reviewed by United States Courts of Appeals ended in denial of asylum to the claimant. See Fisher v. INS, 79 F.3d 955 (9th Cir. 1996); Safaie v. INS, 25 F.3d 636 (8th Cir. 1994); Fatin v. INS, 12 F.3d 1233 (3d Cir. 1993).
129. For example, Fauziya Kasinga would probably never have received full consideration of her claim of gender-based persecution had the summary removal provisions imposed by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) been in effect at the time she entered without proper documents. Karen Musalo, In re Kasinga: A Big Step Forward for Gender-Based Asylum Claims, 73 INTERP. RELEASES 853, 993-96 (1996) [hereinafter Musalo] (discussing provisions of the AEDPA that could have the effect of sending deserving refugees back to countries where they face prosecution); see also Michele R. Pistone, Asylum and Exclusion Provisions in New and Pending Legislation: A Summary and Practice Guide, 73 INTERP. RELEASES 993, 993-96 (1996) (discussing provisions of the AEDPA that could have the effect of sending deserving refugees back to countries where they face persecution).
Within the European Union, for example, the impulse to harmonize standards for asylum eligibility produced a definition of "refugee" that severely limits the possibility of persecution by non-state actors.\(^{130}\) Intended to placate member states that adhere strictly to a state-focused theory of human rights, the measure was animated in part by French fears of a wave of Algerians fleeing attacks by militant Islamist groups.\(^{131}\) Not so widely recognized is the fact that feminists are prime targets of Islamist violence in Algeria.\(^{132}\) Gender-based persecution frequently involves a state's failure to protect women from private violence such as female genital mutilation, rape by insurgent forces, and domestic violence.\(^{133}\) In these instances, it is improbable that a claimant could meet the European Union definition by proving that the harm inflicted on her was "encouraged or permitted by the [state] authorities" or that the state's failure to prevent the harm was "deliberate."\(^{134}\)

Even where the legal cognizability of gender-based asylum claims involving non-state actors is conceded, various grounds for denying the claims of individual women are advanced. The growing significance of the internal flight alternative as a basis for denial of asylum, for example, requires that it be seriously reconsidered from a gendered perspective. Too heavy reliance on an internal flight alternative as a basis for denying asylum masks women's continued lack of social, economic, and spatial mobility within many countries. In some cases, the unavailability of internal safe havens is obvious. For example, following the end of its civil war, Yemen reverted to traditions of seclusion and subordination of women.\(^{135}\) Recognizing the potential impact of the change on educated women, the U.S. ambassador asked how his country could assist those

\(^{130}\) The European Union's definition of "refugee" is as follows:
Persecution by third parties will be considered to fall within the scope of the Geneva Convention where it is based on one of the grounds in Article 1A, is individual in nature and is encouraged or permitted by the authorities. Where the official authorities fail to act, such persecution should give rise to individual examination of each application for refugee status, in accordance with national judicial practice, in the light in particular of whether or not the failure to act was deliberate. The persons concerned may be eligible in any event for appropriate forms of protection under national law.


\(^{133}\) See, e.g., In re Kasinga, Interim Decision 3278, 1996 WL 379826 (Board of Immigration Appeals June 13, 1996).

\(^{134}\) EU JOINT POSITION, supra note 130, § 5.2.

\(^{135}\) In 1994, the more traditional North won a victory over the secular and modern South, to the detriment of women who became subject to shari'a law. See Maxine Molyneux, Women's Rights and Political Contingency: The Case of Yemen, 1990-1994, 49 MIDDLE EAST J. 418, 430 (1995).
whose freedom would be constrained by the new restrictions. The answer reportedly was “10,000 green cards,”136 signalling despair that internal solutions could be found.

In other cases, government officials seem unaware of the fact that internal safe havens may not be available to women. In the brief filed by the Immigration and Naturalization Service (INS) in In re Kasinga,137 the “internal flight alternative” was raised as a possible ground for denial.138 Yet in Togo, rebellious teenage girls fleeing forced marriage and mutilation have few if any opportunities for autonomous existence. Police and other officials are more likely to facilitate the persecution than to protect against it.139 Even the prospect of a female rebel finding shelter with her natal family is unrealistic in a highly patriarchal society.140 The INS urged that a risk of “ostracism or economic pressures” for refusing to submit to genital mutilation should not suffice to justify a grant of asylum.141 Yet the fundamental premise of refugee law is that some persons must rely upon the international community for a safe place to exist, given their own state’s failure to provide it. Asylum applicants such as Kasinga pose an acute example of this need for external safety. Similarly, the German Administrative Court recently ruled that Bosnian Muslim asylum-seekers, including rape victims who fled in 1992, are ineligible for asylum under German law because, at the present time, they may find refuge within non-Serb

136. See id. at 430 n.50.

137. See Government’s Brief in Response to Applicant’s Appeal from Decision of Immigration Judge, In re Kasinga, Interim Decision 3278 (Board of Immigration Appeals) (Feb. 28, 1996) (on file with the Yale Journal of Law and Feminism) [hereinafter Government’s Brief].

138. Id. at 19. Asylum claims may be denied where the asylum-seeker is believed to have had an opportunity to find safety in another part of his or her own country. Deportation may be ordered even though the claimant suffered past persecution and cannot in safety return to his or her home or town. The United Nations High Commissioner for Refugees cautions against using the internal flight alternative too rigidly to deny claims:

The fear of being persecuted need not always extend to the whole territory of the refugee’s country of nationality. . . . [A] person will not be excluded from refugee status merely because he could have sought refuge in another part of the same country, if under all the circumstances it would not have been reasonable to expect him to do so.


139. See Musalo, supra note 129, at 858 (stating husband whom Kasinga was forced to marry was friendly with Togolese police).

140. The INS suggested at oral argument that Kasinga could have been sheltered by her married sisters, without proof of their ability to make a decision independent of their husbands concerning the resident-members of the household. Interview with Karen Musalo, counsel to Fauziya Kasinga, in Boulder, Colo. (June 1, 1996). Kasinga’s (her actual surname is Kassindja) mother was required to humiliate herself in a family ceremony, at which she was not permitted to speak on her own behalf, to atone for providing the funds from her meager inheritance for her daughter’s escape from mutilation, and to secure the family patriarch’s permission to live in the family compound. Id.; see also Celia W. Dugger, A Refugee’s Body Is Intact But Her Family Is Torn, N.Y. Times, Sept. 11, 1996, at A1. The sister who assisted Kasinga’s flight to Ghana briefly separated from her disapproving husband; he thereafter took another wife without her consent. Id. Having female relatives is thus not necessarily a girl’s salvation. It was Kasinga’s paternal aunt who originally sold her as the fourth wife of an older man and arranged her planned mutilation. Id.

141. Government’s Brief, supra note 137, at 19.
controlled portions of Bosnia-Herzegovina. The Court denied their claims even while acknowledging that they had been victims of persecution within the meaning of German asylum law.

Afghanistan presents an extreme example of women's relative lack of spatial, social, and economic mobility and their subjection to domination by male household members or self-appointed guardians of female social norms. The recent advances by the Taliban, a fundamentalist Islamist insurgent group presently in occupation of nearly all of Afghanistan, pose a severe threat to women. Taliban adherents are predominantly young, poorly educated men empowered by their access to sophisticated weapons and adherence to a set of values that exalts their moral superiority. In Taliban-controlled areas, strict rules of seclusion are imposed on women and girls, who are forbidden to work outside the home or to attend school, making autonomous existence simply impossible. Taliban rules on female seclusion in the city of Herat are so severe that war widows without male protectors are forbidden to leave their homes in order to obtain food for their children.

Emerging, though unevenly, in the evolving jurisprudence of gender-based asylum is a recognition that familiar forms of harm to women, such as domestic violence, can support a claim to refugee status under international standards. Asylum law in the United States may begin to provide a haven from gender-based dangers faced by women, examining the structural inequalities

142. [T]he applicants have no right to asylum, because the Republic of Bosnia and Herzegovina, whose citizens the applicants are, still effectually controls part of its territory. Inside that territory the applicants are not persecuted. Also, persecution by the "Republika Srpska" cannot be expected to take place inside that territory. Those who can obtain protection from their own State do not need asylum in Germany.

Press statement from the German Federal Administrative Court (Aug. 6, 1996) (translation on file with the Yale Journal of Law and Feminism).

143. See id. (noting that Administrative Appeals Court reasoned that "Republika Srpska" was capable of inflicting persecution on claimants as a "quasi-State").


145. See REPORT ON AFGHANISTAN, supra note 144, ¶ 69-76. UNICEF suspended its operations in Taliban-controlled areas where women and girls had been denied access to education and other services funded by the agency. See id. ¶ 76.

146. In Kabul, where educated Afghan women have been concentrated during the lengthy war, one of the Taliban's first "governmental" decrees ordered women to abandon their employment and not to appear in public unless shrouded completely, with one small netted slit for their eyes. See Guerrillas Take Afghan Capital as Troops Flee, N.Y. TIMES, Sept. 28, 1996, at A1.

147. See REPORT ON AFGHANISTAN, supra note 144, ¶ 70.

148. The Court of Appeals for the Third Circuit refused to adopt a rationale that potentially would have brought all Iranian women within the refugee definition, despite the severe gender-discriminatory laws to which they are subjected. See Fatin v. INS, 12 F.3d 1233, 1238-42 (3d Cir. 1993).

149. One well-reasoned recent decision granted asylum to a Bangladeshi woman who was fleeing severe abuse by her husband. The Immigration Judge specifically rejected as "highly unrealistic and almost fanciful" the INS argument that the applicant could have found protection in Bangladesh by, for example, moving out and establishing an independent life. See IJ Grants Asylum to Battered Bangladeshi Woman, 74 INTERP. RELEASES 174, 176 (1997).
constraining women's lives and moving beyond a focus on particularly aggravated forms of gender-based violence.

While refugee advocates rightly celebrate regulatory and litigation successes, it is significant that a legislative strategy has not been a central component of their efforts. Instead, advances in gender-based asylum doctrine have come from approaching a presidential administration that is sensitive to "gender-gap" politics and adjudicators who can reasonably be expected to respond favorably to evolving international refugee standards. The only recent legislative expansion of the refugee definition is the product primarily of anti-abortion politics, redefining coercive family-planning measures as persecutory. While forced abortion is clearly a form of gender-specific violence, forced sterilization is not and men are likely to predominate among asylum claimants relying upon this expanded definition.

IV. CONCLUSION

The migration experience is deeply gendered. Women have lately emerged from the shadows of migration studies to a position of some prominence as research subjects, with complex and varied migration stories. While the experiences and hopes of female migrants have been illuminated by recent scholarship, legal policies have lagged in responding to these realities.

In the United States, a country with a strong immigration history and with female-dominant migration patterns for much of this century, laws are framed, sometimes with tragic consequences, in disregard of adverse gender-specific effects. Both the legalization programs of the Immigration Reform and Control Act of 1986 (IRCA) and the Immigration Marriage Fraud Amendments (IMFA) unexpectedly operated to the disadvantage of women. Congress adopted some ameliorative steps regarding the primarily female spouses of IRCA beneficiaries, but not consistently enough to stem the trend toward the feminization of undocumented migration. Responding to sustained pressure from groups concerned with the IMFA's aggravation of domestic violence against immigrant women, Congress gradually softened the IMFA's impact and introduced into the immigration laws a substantial amount of flexibility for the benefit of battered immigrant spouses.

Despite moderating the unintentionally gendered consequences of these two measures, Congress continues to evince indifference to the compelling needs of immigrant women. Even in the aftermath of the "nannygate" scandals of 1993, policy-makers treat immigration of household workers as a non-issue. Recently-enacted restrictions on the availability of public benefits to lawful immigrants

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151. For example, many of the Chinese passengers on the grounded smuggling ship Golden Venture, who will now be permitted to renew their asylum claims under the amended law, are men. See Celia W. Dugger, Chinese Immigrants From Stranded Ship Are to Be Released, N.Y. TIMES, Feb. 15, 1997, at A1.
will have devastating consequences for female immigrants, particularly elderly mothers of U.S. citizens and divorced immigrant housewives. In designating the deserving lawful immigrants who will be spared the budget axe, Congress chose astoundingly male-biased criteria: service in the armed forces and lengthy employment in the formal labor market. These criteria denigrate the contributions of those, mostly female, whose lives have been devoted to the unpaid tasks of social reproduction.

While the international community is increasingly aware of gender-based violence and some advances have been made in the conceptual realm relating to gender-based persecution, few female refugees are likely to enjoy the benefits of these doctrinal advances because of onerous barriers to asylum. One of these obstacles is the presumed availability of an internal flight alternative, which may be misjudged due to ignorance concerning the severe constraints upon women’s mobility. Whether evolving asylum jurisprudence will offer meaningful protection to a substantial number of women depends on whether law-makers and adjudicators bring within the scope of the refugee definition the more common forms of violence and social restrictions faced by women. The ordinariness of this violence and discrimination has, until recently, prevented its recognition as a form of persecution. Yet the tolerance of gender-specific harm by foreign authorities provides the rationale for applying refugee law in this context.

Women are more mobile and more active agents of migration than had previously been assumed. Individual women experience migration differently. Some women migrate in hope of a better life and others migrate out of necessity; some significantly improve their lives through migration while others are reduced to virtual slavery. Legal policy remains largely impervious to the rich tapestry of female migration, and law-makers continue to enact laws that have differential adverse effects on migrating women. This Article seeks to take a step toward gender-sensitive immigration laws by illuminating certain gendered aspects of migration. Bringing the concerns of immigrant women into policy-making depends upon their advocates’ success either in building coalitions in the legislative arena or in convincing either executive officials or the judiciary that women migrants’ claims are valid.