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**Title**

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**Permalink**

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**Journal**

Asian Pacific American Law Journal, 19(1)

**ISSN**

2169-7795

**Author**

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**Publication Date**

2014

**DOI**

10.5070/P3191024221

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# **Dreams of My Father, Prison for My Mother: The H-4 Nonimmigrant Visa Dilemma and the Need for an “Immigration-Status Spousal Support”**

Stewart Chang\*

For many years during my public interest practice, I conducted a legal clinic working with the Asian Indian immigrant community in Artesia, California. The advocacy organization that I worked with regularly referred Asian Indian clients having marital difficulties to me. Cases involving women who were admitted as derivative H-4 beneficiaries on their husbands’ H-1B employment-based visas were particularly problematic. Some of these cases involved emotional and physical abuse, others neglect and infidelity, still others simply spouses no longer getting along. Although their stories were varied, they all shared a common thread: their derivative H-4 visas tied their immigration status to that of their husbands, and also prohibited them from legally working in the United States. As such, they were forced into a position of legal dependency. A good number of these clients came to me with divorce papers that their husbands had served them with and were seeking a way of stopping their husbands from leaving them. Divorce, for these women, was an untenable option because termination of their marital status would also end their ability to legally reside in the United States. Their immigration status rendered them utterly dependent on their husbands, thereby limiting the realistic options open to them in family law matters.

Although I was sympathetic to their plights, I felt that there was little to be done except navigate them through the family law process. Because California family law allows no fault divorce, there was nothing that could be done to halt the dissolution of the marriage. Modern family law cannot force people to stay in marriages, but does provide legal means of achieving independence, such as spousal support and property division. Many of the clients reacted to this state of affairs with surprise, questioning why a country like the United States could allow a man to abandon his family so easily, insisting that a husband could not do such a thing in India.<sup>1</sup> I could only explain to

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\* Assistant Professor of Law, Whittier Law School. I am grateful to Erez Aloni, Michelle Chihara, Rose Cuison-Villazor, Sheldon Lyke, Manoj Mate, Betsy Rosenblatt, and Seval Yildirim for their helpful conversation, feedback, and comments.

1. At the time, India required a showing of fault or mutual consent for divorce under the Hindu Marriage Act of 1955 and the Special Marriage Act of 1954. On August 26, 2013,

them that divorce worked differently in the United States than in India, and that they would need to deal with the realities of American family law now that they were living in the United States. Some of these clients rejected my assistance because of these cultural differences. Sadly, several clients in domestic violence situations eventually returned to their husbands, often citing a combination of their own cultural beliefs and the restrictions that come with their immigration status.<sup>2</sup>

These problematic situations resulted from a disconnect between American family law and immigration law. Even if a family law judge was sensitive to the immigration obstacles that dissolution of marriage could pose to a derivative H-4 beneficiary, the judge could legally do nothing to halt the divorce absent a stipulation by both parties. Neither could the judge confer an alternative immigration status on the derivative spouse. These difficult situations reveal the broader quandaries faced by many derivative spouses caught between the competing cultural narratives dually produced by American family and immigration law. On the one hand, the realities of divorce demonstrate the primacy of independence and choice in the American philosophy towards family formation and breakdown. Assimilation into the American way of life requires some degree of subscription to this belief system. On the other hand, the contours of immigration law push H-4 visa holders towards dependency and family unity.<sup>3</sup>

However, because the dependency created by immigration law is not inconsistent with the traditional values of Asian Indian culture, the problem faced by these women is often masked as a cultural rather than a legal problem. Most of the clients I saw in the clinic specifically emphasized their cultural aversion to divorce rather than potential immigration problems as the primary reasons for wanting the marriage to remain intact. They often focused on factors such as the well being of the children, financial dependency, and the stigma of divorce in their culture. Lawyers like myself often advise potential clients in such situations of the differences of life in America, but we do not fully realize that the immigration laws are in part to blame for many of our clients' apparent proclivities to remain dependent. This tension between

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the Rayja Sabha, the upper house of Indian parliament, approved an amendment to the Marriage Acts that would allow for no-fault divorce. The bill is currently awaiting approval by the Lok Sabha, the lower house of Indian parliament, before becoming law. THE MARRIAGE LAWS (AMENDMENT) BILL 2010, Aug. 26, 2013 (Ind.), available at <http://www.prsindia.org/uploads-media/Marriage%20Laws/Marriage%20Laws%20Bill%202010.pdf>.

2. Annaya Bhattacharjee, *Woman, Nation and Identity in the Indian Immigrant Community*, in SOUTH ASIAN MAGAZINE FOR ACTION AND REFLECTION I, 6-12 (1992); see also Ketu Katrak, *South Asian American Literature*, in AN INTERETHNIC COMPANION TO ASIAN AMERICAN LITERATURE 210 (King-Kok Cheung, ed.) (1997) ("for a woman to leave an abusive space of battering and move out of the heterosexual, patriarchal family is tantamount to betraying a 'nationalist' ideal.").

3. Magdalena Bragun, *The Golden Cage: How Immigration Law Turns Foreign Women Into Involuntary Housewives*, 31 SEATTLE U. L. REV 937, 953-55 (2008).

immigrant identity and American identity caused by the H-4 visa program demonstrates how the Indian American community, as well as other Asian immigrant populations, have largely been structured by while simultaneously cast as an antithesis<sup>4</sup> to the civic myth of American citizenship<sup>5</sup> through competing forces of law.

The founding myths of American citizenship suggests that the ideals of individualism and success through merit are fundamental to the American identity.<sup>6</sup> This myth experienced renewal and reaffirmation in the middle of the twentieth century, an era tied to the civil rights and gender equality movements, during which no fault divorce emerged and was adopted nationwide.<sup>7</sup> These movements, moreover, were also directly tied to the immigration reforms<sup>8</sup> through which Asian Indians began to come to the United States in more significant numbers.

While I was in practice, I approached the dilemma facing H-4 clients primarily as a problem of cultural acclimation and assimilation.<sup>9</sup> Yet today I see this dilemma as a structural problem within the laws themselves, and I intend this article to contribute to critical scholarship that examines how immigration laws promote and perpetuate the racial ‘Othering’ and marginalization of immigrant populations in the United States.<sup>10</sup> This ‘Othering’ became most clear for me when dealing with family law issues on behalf of H-4 derivatives. I initially interpreted my Asian Indian H-4 clients as being motivated by their traditional cultural values. Their insistence on avoiding divorce might therefore participate in broader cultural assumptions that traditional Asian Indian values, often associated with patriarchal hierarchies that place

4. Natsu Taylor Saito, *Model Minority, Yellow Peril: Functions of “Foreignness” in the Construction of Asian American Legal Identity*, 4 *Asian L.J.* 71, 77-81 (1997); see also LISA LOWE, *IMMIGRANT ACTS: ON ASIAN AMERICAN CULTURAL POLITICS* 4 (1996) (arguing how “[i]n the last century and a half, the American citizen has been defined over against the Asian immigrant, legally, economically, and culturally”).

5. See generally BROOK THOMAS, *CIVIC MYTHS: A LAW-AND-LITERATURE APPROACH TO CITIZENSHIP* (Univ. of N.C. Press 2007) (defining “civic myths” as popularly-accepted notions of national origin, membership, and values that are actually constructed by the concept of citizenship itself).

6. KENNETH KARST, *BELONGING TO AMERICA: EQUAL CITIZENSHIP AND THE CONSTITUTION* (Yale Univ. 1989).

7. California was the first state to enact no-fault divorce in 1969.

8. See generally LAVINA DHINGRA SHANKAR & RAJINI SRIKANTH, *A PART, YET APART: SOUTH ASIANS IN AMERICA* (Temple Univ. Press 1998) (noting that the experiences of Asian Indians and South Asians are significantly different from other Asian Americans).

9. See Hiroshi Motomura, *Whose Alien Nation?: Two Models of Constitutional Immigration Law*, 94 *MICH. L. REV.* 1927 (1996); Adeno Addis, *Imagining the Homeland from Afar: Community and Peoplehood in the Age of the Diaspora*, 45 *VAND. J. TRANSNAT’L L.* 963, 987 (2012).

10. See Robert S. Chang & Keith Aoki, *Centering the Immigrant in the Inter/National Imagination*, 85 *CALIF. L. REV.* 1395 (1997); Keith Aoki, *The Yellow Pacific: Transnational Identities, Diasporic Racialization, and the Myth(s) of the “Asian Century,”* 44 *U.C. DAVIS L. REV.* 897 (2011); Neil Gotanda, *Race, Citizenship, and the Search for Political Community Among “We the People”:* *A Review Essay on Citizenship Without Consent*, 76 *OR. L. REV.* 233 (1997).

women in subordinate positions to men, are inherently flawed.<sup>11</sup> However, regardless of whether patriarchy is actually endemic, a culture of dependency and family unity that supports patriarchy is enforced and reinforced by the structures of immigration law and the rules initially permitting these immigrants to enter and thereafter allowing them to stay in the United States.

This article uses the situation of H-4 visa derivatives in the Asian Indian immigrant community as a case study to expose and critique larger incongruities within current American immigration policy, which on the one hand has historically extolled individuality, equality, and workforce participation as avenues to the American Dream,<sup>12</sup> while enforcing gender hierarchy and dependency through requirements that prioritize family unity on the other. These incongruities remain largely unnoticed because the culture of dependency is often attributed to traditional ethnic culture, which then becomes the site of scrutiny and blame. The H-4 visa dilemma in the Asian Indian community illustrates how the legal restrictions stipulated in immigration law often produce and perpetuate recursions of 'traditional culture' within immigrant American families that ultimately consign Asian Indian women to perpetually occupy the place of the foreign 'Other' in American society.<sup>13</sup> The 'Othering' of the ethnic alien culture perpetuates the illusion that America is not patriarchal in comparison,<sup>14</sup> which concurrently promotes the idea that the foreign culture is inferior, behind, and incompatible.<sup>15</sup> This constructed inferiority further forecloses these women from other avenues of justice in America, such as family law, which is similarly configured as to be culturally incompatible with the dependent immigrant subject. Thus, these women often voluntarily choose to exclude themselves from the process, as did many of my Asian Indian clients. These are the assumptions and hierarchies regarding the mythos of independence in American identity that this article seeks to overcome, which then open avenues for some nonconventional solutions.

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11. See generally Leti Volpp, *(Mis)Identifying Culture: Asian Women and the 'Cultural Defense'*, 17 HARV. WOMEN'S L.J. 57 (1994); Leti Volpp, *On Culture, Difference, and Domestic Violence*, 11 AM. U. J. GENDER SOC. POL'Y & L. 393 (2003); Nilda Rimonte, *A Question of Culture: Cultural Approval of Violence Against Women in the Pacific-Asian Community and the Cultural Defense*, 43 STAN. L.R. 1311 (1991).

12. JUDITH SHKLAR, *AMERICAN CITIZENSHIP: THE QUEST FOR INCLUSION* (Harv. Univ. Press 1991) (identifying earning as a central signifier of equal citizenship in the United States historically).

13. Edward Said, *ORIENTALISM* (Vintage Books ed. 1979) (using the term "Orientalism" to critique the construction and marginalization of the East as an "Other" culture against which Western culture defines and legitimates itself as an archetypical standard). See also Edward Said, *CULTURE AND IMPERIALISM* (First Vintage Books ed. 1994).

14. Uma Narayan, *DISLOCATING CULTURES: IDENTITIES, TRADITIONS, AND THIRD WORLD FEMINISM* 84 (Linda Nicholson ed., Routledge 1997) ("Culture is invoked in explanations of forms of violence against Third World women, while it is not similarly invoked in explanations of forms of violence that affect mainstream Western women.")

15. Kamala Visweswaran, *Gendered States: Rethinking Culture as a Site of South Asian Human Rights Work*, 26 HUM. RTS. Q. 483 (2004).

Part I provides the legal history of the H-visa classification that facilitated the modern migration of Asian Indians to the United States in the mid-twentieth century; I then contextualize the H-visa immigration reforms within the larger national narrative of citizenship that developed through contemporaneous movements of racial and gender equality in that era. Part II analyzes and explains the contradictory tensions inherent within the H-visa classifications concerning attainment of the American Dream, assimilation to American values, and how they play out in Asian Indian American families. Whereas the H-1B classification promotes success through individualistic merit for Asian Indian men in the workplace, the H-4 derivative classification restricts employment for their wives, reproducing a patriarchal model of dependency and gender hierarchy that is often constructed as the antithesis to American equality and casts Asian Indian immigrants as non-assimilating ‘Others.’ Part III suggests that this critical analysis of immigration law precipitates a similar analysis of family law. Similar impulses toward individuality and independence drove family law toward no fault divorce in the United States; India has also recently followed suit. However, the presumption of independence as the prevailing norm has led to extremely troubling outcomes in H-4 divorces, such as the transnational separation of parents and children, that are at odds with underlying principles of justice, fairness, and the best interests of the children that are at the core of family law policy. Part IV proposes potential solutions for the H-4 dilemma through a reevaluation of independence in the American mythos of national identity that permeates both immigration and family law policy, and requires the coordination of both fields. I recommend a solution modeled after spousal support, a site where dependency and unequal bargaining position are still residually recognized in family law. I suggest that an H-4 visa holder be granted a legal finding for continued immigration dependency support, which I call “immigration-status spousal support” and functions similarly to a judicial finding of need in a spousal support award, that subsequently qualifies the H-4 visa holder for an extension of status at immigration law.

#### I. ASIAN INDIAN AMERICANS AND THE BUILDING OF A NATIONAL NARRATIVE THROUGH IMMIGRATION REFORM IN THE TWENTIETH CENTURY

Prior to the late twentieth century, Asian Indians comprised a miniscule percentage of the American population.<sup>16</sup> In the early history of the nation, the standards used by the government for determining desirable citizens were largely based on race, and Congress sought to define and limit the immigration of individuals whom they branded as “aliens ineligible for citizenship.” The 1790 Nationality Act limited the right of naturalization to “free white persons”<sup>17</sup> and was affirmed and applied to Asian Indian immigrants in

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16. See JOAN JENSEN, *PASSAGE FROM INDIA: ASIAN INDIAN IMMIGRANTS IN NORTH AMERICA* (1988) (giving a history of early Asian Indian immigrants to the United States).

17. Act of March 26, 1790, Ch. 3, No. 1, 1 Stat. 103.

*United States v. Bhagat Singh Thind*.<sup>18</sup> Spurred on by increasing anti-Asian sentiment in the early twentieth century, Congress enacted the Immigration Act of 1917 which, following the archetype of the Chinese Exclusion Act,<sup>19</sup> prohibited immigration from an “Asiatic barred zone” stretching from Arabia to Indochina.<sup>20</sup> Asian exclusion grew even more stringent with the passage of the Immigration Act of 1924, which not only codified the national origins quota system,<sup>21</sup> but also categorically classified all Asians as “alien[s] ineligible for citizenship.”<sup>22</sup> In that era, the American nation imagined desirable immigrants and citizens as racially white.<sup>23</sup>

When the Luce-Celler Act<sup>24</sup> finally ended Asian Indian exclusion in 1946, there were only 1,500 Asian Indians present in the United States.<sup>25</sup> Furthermore, the Luce-Celler Act provided only a small quota of 100 Asian Indian immigrants each year, making growth extremely limited.<sup>26</sup> The Asian Indian and broader South Asian American population did not increase significantly until the United States began recruiting skilled laborers from Asia with the passage of the Immigration and Nationality Act of 1952 (“1952 INA”),<sup>27</sup> which created the H-1 classification to allow skilled immigrants to enter the United States as temporary workers.<sup>28</sup> Following the passage of the 1952 INA, the South Asian population, of which Asian Indians represented the majority, quickly grew to 10,000 in 1965.<sup>29</sup> That year, Congress passed the more expansive Immigration and Nationality Act of 1965 (“1965 INA”) which eliminated the national quota system and also allowed immigrants to enter based on family reunification.<sup>30</sup> Under the family reunification provisions of the 1965 INA, United States Citizens and Legal Permanent Residents could petition for their foreign relatives to come to the United States and receive green cards.<sup>31</sup> The Immigration Reform and Control Act of 1990 (“IRCA”) removed the temporary classification for employment based im-

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18. *United States v. Thind*, 261 U.S. 204, 207 (1923).

19. Chinese Exclusion Act, 8 U.S.C. § 261 et seq., 1882 (repealed 1943).

20. BILL ONG HING, *MAKING AND REMAKING ASIAN AMERICA THROUGH IMMIGRATION POLICY*, 1850-1990 32 (1993).

21. The percentage of the national quota allotted to each country depended upon the numbers of immigrants from that country living in the United States in 1890, which heavily skewed in favor of northern and western Europeans.

22. Johnson-Reed Act, ch. 190, 43 Stat. 153 (1924).

23. IAN HANLEY LOPEZ, *WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE* (1996).

24. DAVID M REIMERS, *OTHER IMMIGRANTS: THE GLOBAL ORIGINS OF THE AMERICAN PEOPLE* 168 (2005).

25. RONALD TAKAKI, *STRANGERS FROM A DIFFERENT SHORE* 445 (1<sup>st</sup> ed. 1989).

26. Reimers, *supra* note 24, at 168.

27. Immigration and Nationality Act of 1952, Pub. L. No. 82-414, 66 Stat. 163 (1952) (codified as 8 U.S.C. § 1101 (2012)).

28. *Id.*

29. Takaki, *supra* note 17, at 445.

30. S. Rep. No. 748, at 3328 (1965).

31. S. Rep. No. 89-748 (1965), *reprinted in* 1965 U.S.C.C.A.N. 3328, 3329.

migrants and allowed for a new H-1B category of visa holders to remain in the United States while adjusting their status to legal permanent residents.<sup>32</sup> Because of these changes in immigration policy, the number of Asian Indians in the United States has soared in the last half-century.

The influx of Asian Indians into the United States paralleled the development of a new national narrative concerning citizenship and membership. The national origins quota was entirely premised on the racial exclusion of aliens deemed undesirable, unfit, and therefore ineligible for citizenship. The Civil Rights Movement, however, initiated a reevaluation of American citizenship and race-based classifications through renewed attention to the founding principles of equality.<sup>33</sup> As an extension of the Civil Rights Movement,<sup>34</sup> the 1965 INA brought drastic changes to the 1952 INA by eliminating altogether the national quota system and adding family reunification preference categories to already existing skilled laborer provisions.<sup>35</sup> The legislative history of the 1965 bill, steeped in conversation about racial egalitarianism, indicates that Congress intended to repudiate the discriminatory immigration policy of the past.<sup>36</sup>

As Professor Peter Schuck has remarked, “the Immigration Act of 1965 [was] perhaps the most important nation shaping statute ever enacted...in terms of defining the future of our nation, none is more important, with the possible exception of the contemporaneous civil rights legislation of 1964 and 1965.”<sup>37</sup> The passage of the Act was itself full of symbolism as the United States reaffirmed its identity in the midst of the Cold War.<sup>38</sup> President Lyndon Johnson signed the bill into law at the foot of the Statue of Liberty and decried the old quota system, saying, “this system violated the basic principle

32. Immigration Act of 1990, Pub. L. No. 101-649 104 Stat. 4978 (1990).

33. MICHEL ROSENFELD, *LAW, JUSTICE, DEMOCRACY AND THE CLASH OF CULTURES: A PLURALIST ACCOUNT* (2011) (arguing that the American citizen subject emerged through a dialectic of equality across three stages, (1) difference as inequality, (2) equality as identity, and (3) equality as difference).

34. The Congressional Record on August 25, 1965 shows several members of Congress explicitly tying the Hart-Celler Bill, which would become the Immigration and Nationality Act of 1965, to the Civil Rights Movement. For example, Representative Philip Burton of California said, “Just as we sought to eliminate discrimination in our land through the Civil Rights Act, today we seek by phasing out the national origins quota system to eliminate discrimination in immigration to this nation composed of the descendants of immigrants.”

35. S. Rep. No. 89-748 (1965), reprinted in 1965 U.S.C.C.A.N. 3328, 3329.

36. See Gabriel Chin, *The Civil Rights Revolution Comes to Immigration Law: A New Look*, 75 N.C.L. REV. 273, 303 (1996); see also Hing, *supra* note 12, at 79 (suggesting that the 1965 INA was “driven by America’s desire to be seen as the egalitarian champion of the ‘free world’”).

37. Peter Schuck, *Immigration Policy: Myths, Realities, and Reforms*, 51 WASHBURN L.J. 189 (2012).

38. Maxine S. Seller, *Historical Perspectives on American Immigration Policy: Case Studies and Current Implications*, 45 LAW & CONTEMP. PROBS. 137, 156 (1982) (suggesting that 1952 and 1965 immigration reforms were motivated by “Cold War concerns about world opinion.”); see also CHERYL SHANKS, *IMMIGRATION AND THE POLITICS OF AMERICAN SOVEREIGNTY 1890-1990* (2001).



of American democracy – the principle that values and rewards each man on the basis of his merit as a man. It has been un-American in the highest sense, because it has been untrue to the faith that brought thousands to these shores even before we were a country.”<sup>39</sup> President Johnson’s choice to sign the law at the foot of the Statue of Liberty, the prototypical icon for the immigrant seeking the American dream, spoke to the core narrative of American identity and a return to foundational principles of liberalism linking reward and success with individual merit. Attorney General Robert Kennedy, advocating for the passage of the bill the day before it came up for Congressional consideration, echoed this sentiment in a letter he wrote to the *New York Times* saying, “the time has come for us to insist that the quota system be replaced by the merit system,” speaking specifically of the skilled laborers provisions in the bill that would attract “able immigrants whose contributions we need.”<sup>40</sup> Senator Edward Kennedy described the 1965 INA as “stand[ing] with legislation in other fields—civil rights, poverty, education, and health—to reaffirm in the 1960s our nation’s continuing pursuit of justice, equality, and freedom.”<sup>41</sup>

Despite its humanitarian presentation, the 1965 INA was in the end also legislation that looked chiefly to the interests of the country. Competition with the Second World during the Cold War spurred the United States to engage in the mass accumulation of foreign scientists and engineers to bolster the technological prowess of the nation, attracting large numbers of educated individuals from India.<sup>42</sup> Medicare and Medicaid were also signed into law that year as part of the Social Security Act, creating a dramatic spike in demand for health care professionals.<sup>43</sup> This demand, coupled with the high availability of English-speaking doctors and nurses from India, other South Asian countries, and the Philippines, spurred the mass migration of health care professionals from Asia to the United States.<sup>44</sup> As a result, many Indian doctors, underemployed in the urban areas of India where they were concentrated, immigrated to the United States.<sup>45</sup>

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39. Remarks at the Signing of the Immigration Bill, Liberty Island, New York, 546 PUB. PAPERS 1037, 1038 (Oct. 3, 1965).

40. Robert Kennedy, *Letter*, THE N.Y. TIMES, Aug. 24, 1964, at 26.

41. Edward M. Kennedy, *The Immigration Act of 1965*, 367 ANNALS AM. ACAD. POL. & SOC. SCI. 137, 138 (1966).

42. MADHULIKA KHANDELWAL, BECOMING AMERICAN, BEING INDIAN: AN IMMIGRANT COMMUNITY IN NEW YORK CITY 92 (2002) (“With the USSR’s surprise launching of Sputnik in 1957, expenditure for research and development in the United States increased from \$7 billion that year to \$14 billion by 1966, and the number of scientists and engineers employed in American industry grew correspondingly. Many of them came from other countries, including India”).

43. S. REP. NO. 89-404, at 1943 (1965).

44. KHANDELWAL, *supra* note 46, at 93 (“America produced only 7,000 physicians in 1963—too few to staff the country’s expanding health care system.”).

45. *Id.* at 92 (“[T]hroughout the 1950s and 1960s, Indian universities churned out thousands of graduates who faced serious unemployment or underemployment. The nascent economy of independent India acutely needed trained people, but either sufficient paid employment was not available, or it was available only in areas without urban standards of living. By 1970, 80 percent

Following the 1965 INA, the Asian Indian American population has been one of the most rapidly growing immigrant populations in the United States. In 1990, the number of Asian Indians in the United States was 815,447; by 2000, the number of people claiming Asian Indian ancestry had grown to 1,678,765, representing a 103% growth in ten years.<sup>46</sup> By 2010, there were 3,183,063 Asian Indians in the United States, representing 68% growth since 2000.<sup>47</sup> Asian Indians who immigrated to the United States in this era, however, represented a narrow and privileged sample of population in India. The Asian Indian American population is one of the most economically prosperous populations in the United States.<sup>48</sup> According to the Year 2000 Census data the median household incomes of Asian Indians is \$61,322, the highest among Asian Americans and well above the national median of \$41,994.<sup>49</sup> By 2009, the median household income of Asian Indians had risen to \$86,660, still the highest among Asian Americans and well beyond the national median of \$51,369.<sup>50</sup> Asian Indians also have the highest degrees of educational attainment among the Asian American population, with 51% holding at least a bachelor's degree and 32% holding an advanced degree according to Year 2000 Census Data.<sup>51</sup> According to 2007-2009 Census Bureau estimates, 68% of Asian Indians hold at least a bachelor's degree.<sup>52</sup> The majority of Asian Indian immigrants coming to the United States after the passage of the 1952 and 1965 INAs have been educated professionals.<sup>53</sup> By 2000, Asian Indians accounted for 60% of all Asian Americans employed in management, professional, and other related occupations.<sup>54</sup>

The legal avenue by which these immigrants enter affects the ways in which they are perceived by others and perceive themselves within their

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of India's doctors resided in urban areas, although these contained less than 20 percent of India's population; and at the same time, 15,000 to 20,000 doctors were without jobs.”)

46. ASIAN PACIFIC AMERICAN LEGAL CENTER, *A COMMUNITY OF CONTRASTS: ASIAN AMERICANS AND PACIFIC ISLANDERS IN THE UNITED STATES* 5, 66 (2006) (this number represents those from the 2000 Census who made a single race response as being Asian Indian alone, meaning that they claimed no other racial identification. If we include respondents who made multi-racial responses, this number grows to 1,899,599 individuals who claim Asian Indian as part of their racial background).

47. ASIAN AMERICAN CENTER FOR ADVANCING JUSTICE, *A COMMUNITY OF CONTRASTS: ASIAN AMERICANS IN THE UNITED STATES* 9 (2011).

48. ASIAN AMERICAN CENTER FOR ADVANCING JUSTICE, *supra* note 26, at 63.

49. ASIAN PACIFIC AMERICAN LEGAL CENTER, *supra* note 25, at 73.

50. ASIAN AMERICAN CENTER FOR ADVANCING JUSTICE, *supra* note 26, at 63.

51. ASIAN PACIFIC AMERICAN LEGAL CENTER, *supra* note 46, at 7.

52. ASIAN AMERICAN CENTER FOR ADVANCING JUSTICE, *supra* note 47, at 31.

53. MADHULIKA KHANDLWAL, *BECOMING AMERICAN, BEING INDIAN: AN IMMIGRANT COMMUNITY IN NEW YORK CITY 93-94* (2002) (“From 1961 to 1968, 67 percent of Indians employed in the United States were in professional categories, and from 1969 to 1971 the figure jumped to 89 percent...Ninety-three percent of Indians admitted in 1975 were ‘professional/technical workers’ and their spouses and children.”).

54. YEN LE ESPIRITU, *ASIAN AMERICAN WOMEN AND MEN: LABOR, LAWS, AND LOVE*, 74 (2nd ed. 2008).

new communities. As far as economic and educational demographics are concerned, Asian Indian Americans may indeed resemble the stereotype of the Asian American model minority,<sup>55</sup> the immigrant group that appears to successfully achieve the American dream through “hard work” and “family values” in contrast to other minority groups.<sup>56</sup> The unusually high socio-economic indicators in the Asian Indian American population can be largely explained by their initial immigration patterns following the 1952 and 1965 INAs. Education played the most pivotal role in the immigration of Asian Indians in that era, in response to a rising demand in medical and technological fields. In the decades following the changes in immigration law,<sup>57</sup> most Asian Indians came into the United States as skilled workers holding advanced degrees. These immigrants would later be eligible to adjust their status to permanent residents<sup>58</sup> and could eventually naturalize.<sup>59</sup> As such, the Asian immigrants eligible for immigration are already those best equipped to achieve, or rather have already attained, the economic and educational markers of what define the American dream. Their immigration stories, in turn, become model stories for success in the national imagination, one based on equality of opportunity.

## II. NEGOTIATING BETWEEN PATRIARCHY AND THE AMERICAN DREAM: EVALUATING THE EFFECTS OF THE H-4 FAMILY UNITY PROVISIONS ON ASIAN INDIAN AMERICAN IMMIGRANTS

Because the majority of Indians who immigrated to the United States in the late twentieth century were skilled laborers, the regulations governing the skilled laborer nonimmigrant visa greatly influenced the ways in which Asian Indian families continued to be structured in the United States. As skilled professionals, many Asian Indians entered through H-1B nonimmigrant visas,<sup>60</sup> where the visa holder is sponsored by an employer and is allowed to

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55. See Miranda Oshige McGowan & James Lindgren, *Testing the “Model Minority Myth,”* 100 NW. U. L. REV. 331 (2006); see also Harvey Gee, *Race, Rights, and the Asian American Experience: A Review Essay*, 13 GEO. IMMIGR. L. J. 635, 643-44 (1999) (reviewing ANGELO N. ANCHETA, *RACE, RIGHTS, AND THE ASIAN AMERICAN EXPERIENCE* (1998)).

56. The Moynihan report, for instance, discusses the problem of broken families in minority populations. OFFICE OF POLICY PLANNING & RESEARCH, U.S. DEP’T OF LABOR, *THE NEGRO FAMILY: THE CASE FOR NATIONAL ACTION* (1965).

57. The 1952 Immigration and Nationality Act, also known as the McCarran-Walter Act, established a preference system for immigration. Under the 1952 Act, first preference was given to skilled laborers who could benefit the United States economy. Secondary preference was given to immigrants with close family relationships with United States citizens and legal permanent residents. Although significantly altered through subsequent acts, the 1952 Act still serves as the foundational basis for immigration today. See generally Immigration and Nationality Act of 1952, Pub. L. No. 82-414, 66 Stat. 163 (1952) (current version at 8 U.S.C. § 1101 (2012)).

58. 8 U.S.C. 1011(a)(15)(H); 8 U.S.C. 1153(b); 8 U.S.C. 1255(a).

59. 8 U.S.C. 1427.

60. Normally, nonimmigrant visa holders must have nonimmigrant intent at the time of their application. Prior to the 1990 Immigration Act, employers seeking to sponsor employees as immigrants, would have to wait several years before the sponsored employee could come

bring over a spouse and unmarried children under 21 years of age as H-4 derivative visa holders.<sup>61</sup> In recent years, the number of H-4 visa holders in the United States has surpassed 100,000, with nearly half of them hailing from South Asian countries, including India.<sup>62</sup> The gender division of Asian India H-1B visa holders, however, skews towards men.<sup>63</sup> In India, men rather than women are encouraged to seek higher education and employment opportunities abroad.<sup>64</sup>

As beneficiaries of this legislation, Asian Indian immigrants find their identity consciousness pulled in competing directions, especially within the family unit. On the one hand, the legal means of the family's immigration is symbolically tied to equality of opportunity and individual merit in the public sphere. On the other hand, the specific details contained within the legal structures of immigration promote dependency and inequity within the private sphere. The immigration status of a H-4 visa holder is entirely dependent on their principal H-1B visa holder, and the H-4 derivatives are not allowed to work unless they obtain H-1B status of their own. The statute mandates that "neither the spouse nor a child of the beneficiary may accept employment unless he or she is the beneficiary of an approved petition filed on his or her behalf and has been granted a nonimmigrant classification authorizing his or her employment."<sup>65</sup> H-4 derivatives generally do not gain authorization to work in the United States until after they have filed for adjustment of status to legal permanent residents, which usually takes six years or more.<sup>66</sup> Since the majority of H-1B visa holders from India are male and it

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the United States and start working for them. Currently, there is at least a five year backlog on employment-based visas because the Immigration Service is allowed to admit only 140,000 employment-based immigrants each year, much less than what is demanded by employers seeking to permanently employ foreign skilled labor. 8 U.S.C. § 1151(d). In order to address the demand for immediate labor, the 1990 Immigration Act allowed H-1B visa applicants to declare dual intent, though it is technically a nonimmigrant visa.

61. Khandelwal, *supra* note 46, at 94.

62. NAYAN SHAH, *STRANGER INTIMACY: CONTESTING RACE, SEXUALITY, AND THE LAW IN THE NORTH AMERICAN WEST* 196 (2011).

63. *More men than women get visas for highly skilled immigrants*, SEATTLE TIMES, Mar. 18, 2013, available at [http://seattletimes.com/html/nationworld/2020590764\\_visasgenderxml.html?syndication=rss](http://seattletimes.com/html/nationworld/2020590764_visasgenderxml.html?syndication=rss) ("The U.S. Office of Immigration Statistics recorded 347,087 male H-1B visa holders entered the country during the 2011 fiscal year compared to 137,522 women. The data is imperfect because it includes many H-1B immigrants traveling to the United States.") See also Ashley Parker, *Gender Bias Seen in Visas for Skilled Workers*, NEW YORK TIMES, Mar. 18, 2013, available at <http://www.nytimes.com/2013/03/19/us/politics/gender-bias-seen-in-visas-for-skilled-workers.html>.

64. Prema Kurien, *Gendered ethnicity: Creating a Hindu Indian identity in the United States*, in *GENDER AND U.S. IMMIGRATION* 648-670 (Pierrette Hondagneu-Sotelo, ed.) (2003).

65. 8 C.F.R. § 214.2(h)(9)(iv).

66. In acknowledgement of the current backlog in processing H-1B adjustment of status cases, Congress enacted the American Competitiveness in the Twenty-First Century Act of 2000, which among other things, allows H-1B visa holders to extend their stay past a six-year cap. Pub. L. No. 106-313, 114 Stat. 1251 (2010).

is their wives who are the derivative H-4 visa holders, their lives in the United States will often replicate patriarchal family models in India where the men are the breadwinners and women assume domestic responsibilities at home. Wives who gain the ability to work legally in the United States upon receiving their green cards through H-4 adjustment, however, often still do not enter the workplace.

Because H-1B visa holders are necessarily skilled professionals in order to qualify for the visas in the first place, they are paid higher incomes that are often enough to support their households during the lengthy wait for adjustment of status.<sup>67</sup> Their derivative wives, during the six or more year process in which they are legally prohibited from working, are not likely to have maintained marketable skills for the workplace when they eventually obtain their work authorizations. Furthermore, in the cases of many of the Asian Indian H-4 derivative wives that I encountered in my prior practice, even women possessing advanced degrees and skills of their own may initially forgo working in the United States because they feel culturally expected to tend to domestic responsibilities at home. The legal restrictions on their ability to obtain work in the United States, in addition to the difficult process of obtaining an independent employer-sponsored visa of their own, further entrenches these cultural values in the status quo.

This structure of the H-visa, where the dependent beneficiary is prohibited from working, has allowed traditional gender roles within Asian Indian culture to survive the process of immigration, unlike in many other Asian American immigrant families where economic conditions push against and eventually overcome the traditional gender expectations wherein the man works and the woman stays at home.<sup>68</sup> Whereas some Asian American families are forced to abandon strict gender hierarchies as female household members are pushed into the workplace to help economically support the family, the prohibition against derivative employment preserves traditional gender hierarchies in Asian Indian immigrant families. Asian Indian women are expected to adhere to these cultural hierarchies and to pass on these expectations to their children, even as they are being told differently by the

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67. See generally Jagdish Bhagwati and William Dellalgar, *The Brain Drain and Income Taxation*, 1 *WORLD DEV.* 94, 96-7 (1973).

68. Espiritu, *supra* note 33, at 9 (observing how in Asian American immigrant families, "Through the process of migration and settlement, patriarchal relations undergo continual renegotiation as women and men rebuild their lives in the new country.") See also Karin Wang, *Battered Asian American Women: Community Responses From The Battered Women's Movement And The Asian American Community*, 3 *ASIAN L. J.* 151, 170 (1996) ("The traditional gender roles ascribed to men and women in Asian cultures create problems which clash with modern-day gender roles. The cultural expectation that a woman should stay at home and care for the family often collides with American social and economic reality. Because recent immigrants are often relegated to low-paying, menial jobs not taken by non-immigrants, immigrant families often need the combined income of both the husband and wife in order to survive.")

American culture in which they live.<sup>69</sup> Indeed, Indian women have traditionally been tasked in their communities with the burden of cultural preservation, formerly against an actualized colonial power during nationalist liberation movements at home in India, and now in a new kind of pseudo-colonial space within the Asian Indian American diaspora.<sup>70</sup>

The continued dependency of Asian Indian wives on their husbands as a matter of immigration policy, coupled with the cultural pressures, account for why Asian Indian women are less likely to leave their abusive husbands or report them to law enforcement.<sup>71</sup> Their behavior stands at odds with the re-configured gender relations that are expected by a nation whose identity has been shaped by equal opportunity within the workplace. Professor Evelyn Nakano Glenn defines the “worker citizen” as a central element of American identity, and has analyzed the link between labor and citizenship in American politics.<sup>72</sup> Because of the gender imbalance in H-1B visas, men are typically those who have the opportunity to obtain legal employment. As a result they are typically the ones afforded access to the “worker citizen” identity. Even in signing the 1965 INA, President Johnson described equality of labor opportunity as a core American principle in gendered terms, saying that democracy fundamentally “values and rewards each man on the basis of his merit as a man.”<sup>73</sup> Ironically, the same value of workplace equality that prompted the immigration reforms ultimately prevented many immigrant women from fully assimilating into the American way of life even as they allowed men to access to the American dream of equal labor.

The narratives of many Asian Indian immigrant households, therefore, remain conflicted. As immigrant subjects who achieve socioeconomic success, their stories are consistent with, and perpetuate the portrait of, America as the land of equality of opportunity. They are perceived as a model of the American dream, of success through individual merit,<sup>74</sup> largely because the rules of immigration will allow only those who evidence the ability to succeed and contribute to enter. All the while, they nevertheless hold to values that

69. See Bacon, at 161-4.

70. APARNA RAYAPROL, *NEGOTIATING IDENTITIES: WOMEN IN THE INDIAN DIASPORA* (1997).

71. Anitha Venkaramani-Kothari, *Understanding South Asian Immigrant Women's Experiences of Violence*, in *BODY EVIDENCE: INTIMATE VIOLENCE AGAINST SOUTH ASIAN WOMEN IN AMERICA* 11, 14-18 (Shamita Das Dasgupta ed., 2007).

72. EVELYN NAKANO GLENN, *UNEQUAL FREEDOM: HOW RACE AND GENDER SHAPED AMERICAN CITIZENSHIP AND LABOR* (2002).

73. Johnson, *supra* note 39, at 1038.

74. Gabriel J. Chin, Sumi Cho, Jerry Kang & Frank Wu, *Beyond Self-Interest: Asian Pacific Americans Toward a Community of Justice, A Policy Analysis of Affirmative Action*, 4 *Asian Pac. Am. L.J.* 129, 148 (1996) (arguing that the “model minority” is myth that emphasizes the success of Asian Americans in order to validate the availability of the American dream). See also ROSALIND CHOU & JOE FAGIN, *THE MYTH OF THE MODEL MINORITY: ASIAN AMERICANS FACING RACISM* 14 (2008); FRANK WU, *YELLOW: RACE IN AMERICA BEYOND BLACK AND WHITE* 44 (2002).

are viewed as foreign and different,<sup>75</sup> which promote hierarchy of relations<sup>76</sup> and dependency within the family unit. These values are associated with a patriarchal model that is regarded as inconsistent with the American vision of equality and merit.<sup>77</sup> These patriarchal values, furthermore, are often viewed as a problem with the traditional cultural values of the Asian immigrant.<sup>78</sup> Yet in actuality, the rules of immigration, which create allowances for family unity but restrict employment for derivatives, produce and reinforce these results. Derivatives, by their legal definition as such, are on dependent visas and their legal status is defined by the nuclear family relationships they hold with the primary visa holders.

In sum, the make-up of the Asian Indian community in the United States is largely determined and shaped by the rules of entry, which in turn shape the sensibilities of the community. When the narrow categories for immigration dictate that a person needs to be a skilled laborer or have an immediate family relationship to a person already legally in the United States, a person who successfully immigrates through those channels will likely already many of the values associated with those traits. If the rules of immigration evidence a demand for educated professionals, those who come in will probably value educational attainment. If the rules make narrow allowances for family unity, those who come will necessarily have intact families and may hold to value systems that prioritize the integrity of the family. Immigrants who make it through legal channels, therefore, represent a limited sampling of the population from their homelands. The rules of immigration, by limiting the types of people who may come from a sending country, create a skewed vision of what the sending culture stands for. Their model minority stories are in essence prewritten even before they set foot on American soil. Thus, the immigration

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75. Natsu Taylor Saito, *Alien and Non-Alien Alike: Citizenship, "Foreignness," and Racial Hierarchy in American Law*, 76 OR. L. REV. 261 (1997).

76. JEAN BACON, *LIFE LINES: COMMUNITY, FAMILY, AND ASSIMILATION AMONG ASIAN INDIAN IMMIGRANTS* 19 (1996) ("a 'holistic' worldview, one in which the whole is greater than the sum of the parts, informs the Indian response. From this holistic worldview follows the 'sociocentric solution' to 'the problem of the relationship of the individual to the group, to society, to the collectivity' — a problem all societies must solve. The sociocentric solution 'subordinates individual interest to the good of the collectivity.' Social relationships and social groups, not individuals, are the fundamental building blocks of society.")

77. *Id.* at 19. (describing the ways in which hierarchy in the Indian worldview specifically clashes with Western ideals of individuality and equality. "In the Western tradition, all people are theoretically equal because each contains within himself or herself, 'in spite of and over and above his particularity, the essence of humanity.' In the Indian worldview, people do not share a fundamental quality that renders them all equal at some level. Instead, by virtue of their position in the network of social relations, people are inherently different from one another and thus inherently unequal.")

78. Karin Wang, *Battered Asian American Women: Community Responses from the Battered Women's Movement and the Asian American Community*, 3 *Asian L.J.* 151, 168 (1996) ("In general, modern American society and laws value individualism and grant women significant rights, however many Asian American communities emphasize the family and place of women in subordinate roles.")

laws are largely responsible for how Asian Indian families are positioned and position themselves within the American national narrative.

### III. WESTERNIZED FEMINISM AND THE GLOBAL DIFFUSION OF NO FAULT DIVORCE

The stories that I encountered in a decade of practice with Asian Indian clients followed a typical pattern. Similar accounts have occurred at other organizations that serve battered South Asian immigrant women.<sup>79</sup> For example, in one representative case, the husband obtained an H-1B visa for work while the wife, even though she possessed an advanced engineering degree herself, came over as his H-4 beneficiary. For over six years--the normal duration of time required before the family could apply for adjustment of status to legal permanent residents--the wife did not work and generally stayed home to tend to domestic responsibilities including childcare. Even though the family had at one time considered having the wife financially contribute in the workplace, they discovered that the wife would need to apply for her own H-1B status in order to legally work. They were unable to find employers willing to sponsor her since she could only work part-time as a result of her childcare responsibilities. By the time the wife was eligible for employment authorization as an adjustment applicant, she was already unemployed for well over six years, rendering her unappealing to potential employers. In the end, the wife continued to stay at home to care for the children even after her employment eligibility during the adjustment process, which was not yet final. Thus, she was at a complete loss when she discovered her husband was leaving her for a younger woman from India. She begged me to legally stop her husband from leaving her, but I told her there was nothing I could do to stop him.

As with many other similar clients, I explained to her that even if the situation was different in India, in America, either spouse could decide to end the marriage for any reason. I felt that part of my duty to her as an attorney was to educate her about the legal processes in America and discourage her from holding to her understandings of family law in India. However, I was assuming that the problem was one of cultural understanding and assimilation. In retrospect, I now see that my method of explaining no fault divorce was a tacit endorsement of the American model of independence and gender equality over any Indian model. In the end, my client could only recognize that her cultural view of marriage and family looked diametrically different from what I was proposing.<sup>80</sup> As she was leaving at the close of our meeting,

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79. Rupaleem Bhuyan, *Navigating Gender, Immigration, and Domestic Violence: Advocacy with Work Visa Holders*, in *BODY EVIDENCE: INTIMATE VIOLENCE AGAINST SOUTH ASIAN WOMEN IN AMERICA* 229 (Shamita Das Dasgupta ed.) (2007). See also Karyl Alice Davis, *Unlocking the Door by Giving Her the Key: A Comment on the Adequacy of the U-visa as a Remedy*, 56 ALA. L. REV. 557 (2004); Bragun, *supra* note 3, at 237-38.

80. See Rachel Struman, *Marriage and Family in Colonial Hindu Law*, in *HINDUISM AND*



she apologized and explained that she could not leave her husband because that is not how she was brought up in India. I never saw her again.

Her capacity to appreciate the possibility of independence was ultimately foreclosed by the legal reality of her H-4 immigration status and not necessarily her cultural beliefs. If anything, my conversation with her left her feeling as though her culture was the problem. Her situation left her feeling less than American, both in the sense that she felt incomplete as an American subject and that her culture was somewhat “un-American.”<sup>81</sup> At the same time, her husband was not entirely foreclosed of the ability to engage in no fault divorce. His ability to be a good “worker citizen”<sup>82</sup> and wield American family law makes it appear as though he is better assimilated. Even if he does still hold to antiquated patriarchal gender norms, those norms are not challenged by his legal situation, but rather may actually be enabled by his legal situation. No fault divorce, though popularly conceived in America as promoting equality and the rights of women,<sup>83</sup> ironically ends up indirectly serving patriarchy in the diasporic context.

No fault divorce had been historically opposed in India because it was seen as threatening to the key social institution of the family.<sup>84</sup> Family is central to the Asian Indian worldview, and virtually all Indians are expected to marry and procreate.<sup>85</sup> Failing to do either is unacceptable. As a result, there

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LAW: AN INTRODUCTION 89, 89-104 (Timothy Lubin et al. eds., 2010).

81. Bacon, *supra* note 76, at 61. (“However, the two worlds story does not consistently place Indian culture in a positive light vis-à-vis American values and practices. Suggesting that Indian may be inferior to American, the two worlds metaphor sometimes contrasts ‘Indian’ and ‘modern’ rather than ‘Indian’ and ‘American’”).

82. Glenn, *supra* note 72.

83. Herma Hill Kay, *From the Second Sex to the Joint Venture: An Overview of Women’s Rights and Family Law in the United States During the Twentieth Century*, 88 Cal. L. Rev. 2017, 2087 (2000) (“no-fault divorce laws have removed the stigma of divorce from both women and men and ensured fair treatment to both parties and federal laws forbidding discrimination in employment and education and requiring equal pay for equal work have contributed to women’s economic independence.”)

84. Bina Agarwa, *A house divided*, THE INDIAN EXPRESS (Sep. 2, 2013, Section 28D), available at <http://www.indianexpress.com/news/a-house-divided/1163180> (“For many years, easy divorce was opposed by both conservatives and liberals. The former argued that it would erode a key social institution, and the latter argued that it would harm women, since men would walk out of marriages and wives would have nowhere to go.”).

85. PRADEEP CHAKKARATH, *What can Western Psychology Learn From Indigenous Psychologies?—Lessons From Hindu Psychology*, in CULTURE AND HUMAN DEVELOPMENT: THE IMPORTANCE OF CROSS-CULTURAL RESEARCH FOR THE SOCIAL SCIENCES 30-50 (Wolfgang Friedlmeir, Pradeep Chakkarath, & Beate Schwarz, eds.) (2005) (in Indian culture, a person’s life is divided into distinct stages or *ashram*. The first stage, *brahmacharya*, is that of the student and encompasses the early life of the individual as he or she develops from a child into an adult under the guidance of a *guru* in preparation for the next stage of life, *gārhastya*, or that of the householder. This stage of life encompasses most of the individual’s lifetime, and it is in this stage of life that a person fulfills his or her three debts: the debt to the ancestors, the debt to the gods, and the debt to the *guru*. The debt to the ancestors is fulfilled through marriage and procreation, the debt to the gods through household rituals and sacrifice, and the debt to the *guru* through passage

is a great pressure on individuals to marry and to remain married. Whereas the stigma against divorce has largely disappeared in American society,<sup>86</sup> the same cannot be said about Indian society. Though the stigma against divorce might be configured in American ideology as cultural patriarchy that restricts the rights of women, there is resistance in Indian culture that questions whether such importation of American norms regarding gender is necessarily right.<sup>87</sup>

K. Srilata, a popular writer and cultural critic in India, discusses how family and feminism have been constructed respectively, as opposing symbols of tradition and modernity in Indian political discourse. Srilata describes how Indian politics has embraced a cultural hierarchy where, “[m]odernity has been constructed within the Indian context as a set of practices either indicative of ‘westernization’ (and therefore, according to modernity’s detractors, morally unsound) or signifying (for modernity’s supporters) the liberatory and the progressive.”<sup>88</sup> As Srilata recounts, neoliberal globalization has led to a movement for women to prioritize American ideals of equality and individuality.<sup>89</sup> These are also the women who fit the socio-economic demographic of individuals most able to take advantage of immigration. On the other hand, the women who are not positioned to leave and stay behind in India retain a greater interest in family, and see a stronger correlation “between ‘women’s’ interests and the welfare of the family; what gets constructed as ‘women issues’ are typically: cooking and housekeeping, child care, marital harmony, maintaining a good relationship with one’s in-laws, and so on.”<sup>90</sup> As such, the family unit also became an emblem of cultural resistance to neocolonial Western liberalism in India.

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of knowledge and instruction to children. After the *gârhastya* comes *vânaprastya*, that of the hermit, where the individual retreats from the world and focuses on more spiritual matters. The final stage of life, *sannyâsa*, that of the ascetic, is available to men only, and this stage involves complete renunciation of the world by assuming the life of wanderer. Once a husband enters the *sannyâsa*, a wife is expected to return to the domestic sphere and tend to the needs of her first son’s household).

86. Amy L. Wax, *Bargaining in the Shadow of Market: Is There a Future for Egalitarian Marriage?*, 84 Va. L. Rev. 509, 667-8 (1998).

87. Even in America, the efficacy of no fault divorce has still been debated. See e.g. *id.* at 668 (“the social stigma of divorce was particularly effective in protecting the well-being of third parties—most notably, children—whose interests in the continuation of an unhappy marriage did not precisely coincide with their parents.”); see also Kay, *supra* note 84, at 2080-88.

88. K. SRILATA, *Feminists Are Modern; Families Are Indian: Women’s Magazines and the Politics of Modernity*, in *BURNING DOWN THE HOUSE: RECYCLING DOMESTICITY* 302 (Rosemary Marangoly George, ed.) (1998).

89. *Id.* at 307 (describing how “[t]he ideal of womanhood in the context of a globalizing economy has shifted from the social reform’s educated-yet-traditional woman to a distinctly different figure, the urban, English-educated, upper-class New Woman...Her defining identity is in fact her innocent upper-class status. Her formation is thus linked to the secularizing projects intrinsic to the making of the global middle class of the last two decades. She is above all an individual with agency that is about being publicly visible (even feminist) and falling in love.”)

90. *Id.* at 319.

However, there has been a recent political movement to reform Indian marital laws to allow for no fault divorce. On August 26, 2013, the Rajya Sabha, the upper house of Indian Parliament, passed the Marriage Laws (Amendment) Bill 2010, which amends the Hindu Marriage Act of 1955 and the Special Marriage Act of 1954 to allow for no fault divorce in India.<sup>91</sup> Within the debate concerning the bill, traditionalism has been aligned with, and thus marginalized as protecting, antiquated patriarchy.<sup>92</sup> The move to reform the law was spurred by a desire to make divorce more egalitarian for women, since the current version of the law requires proof of fault or the consent of both parties.<sup>93</sup> In the widely publicized case of Smriti Shinde, daughter of Union Power Minister Sushil Kumar Shinde, the Bombay High Court dismissed her divorce case because her estranged husband had withdrawn consent. Shinde subsequently challenged the validity of the Hindu Marriage Act to the Supreme Court, citing the social vulnerabilities that the law imposes upon women caught in traumatic marriages.<sup>94</sup> The case highlighted the continuing gender imbalances in Indian society, and eventually spurred the Indian Parliament to respond with reform to the Indian marriage laws.

However, the suggested reforms do not assume absolute egalitarianism in society. In recognition of the remaining gender imbalances in the marital relationship, the Marriage Laws (Amendment) Bill 2010 includes a portion preserving the rights of the wife to object to the divorce due to financial hardship.<sup>95</sup> Thus, under the proposed model in India, there are still limitations on no fault divorce that allow for continued dependency. By allowing for continuing dependency in the proposed reforms, the Indian model also recognizes the need to retain certain cultural attitudes in the midst of reform. Although

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91. See THE MARRIAGE LAWS (AMENDMENT) BILL, *supra* note 1.

92. See Rajat Pandit, *Rajya Sabha passes women-friendly marriage bill*, TIMES OF INDIA (Aug. 26, 2013, 8:46 p.m.) (Ind.), available at [http://articles.timesofindia.indiatimes.com/2013-08-26/india/41454599\\_1\\_special-marriage-act-marriage-laws-rajya-sabha](http://articles.timesofindia.indiatimes.com/2013-08-26/india/41454599_1_special-marriage-act-marriage-laws-rajya-sabha) (describing how “law minister Kapil Sibal said there was an urgent need to ‘protect women rights more’ because the Indian society was still quite patriarchal. ‘So let’s be clear. This historic piece of legislation is a message that MPs are on the side of women in our patriarchal society.’”); see also Payal Gwalani, *Men’s rights activists oppose amendment to marriage law*, TIMES OF INDIA (Aug. 8, 2013, 1:57 p.m.) (Ind.), available at [http://articles.timesofindia.indiatimes.com/2013-08-08/nagpur/41201129\\_1\\_rights-activists-marriage-law-proposed-bill](http://articles.timesofindia.indiatimes.com/2013-08-08/nagpur/41201129_1_rights-activists-marriage-law-proposed-bill); Barkha Mathur, *Amended Marriage Laws Bill 2010 will harm interests of husbands*, TIMES OF INDIA (Sep. 2, 2013, 5:31 p.m.) (Ind.), available at [http://articles.timesofindia.indiatimes.com/2013-09-02/india/41687873\\_1\\_marriage-laws-laws-bill-law-minister](http://articles.timesofindia.indiatimes.com/2013-09-02/india/41687873_1_marriage-laws-laws-bill-law-minister).

93. THE HINDU MARRIAGE ACT, 1955, No. 25, Acts of Parliament, 1955 (India).

94. Krishnadas Rajagopal, Citing own case, Shinde daughter questions law on divorce, THE INDIA EXPRESS (Dec. 17, 2009, 3:39 a.m.), available at <http://www.indianexpress.com/news/citing-own-case-shinde-daughter-questions-law-on-divorce/555213>

95. THE MARRIAGE LAWS (AMENDMENT) BILL, *supra* note 1, at paras 3 and 7 (“Where the wife is the respondent to a petition for the dissolution of marriage by a decree of divorce under section 13C [of the Hindu Marriage Act or 28A of the Special Marriage Act], she may oppose the grant of a decree on the ground that the dissolution of the marriage will result in grave financial hardship to her and that it would in all the circumstances be wrong to dissolve the marriage.”)

cultural patriarchy is often utilized as a method of marginalizing Asia as an “unprogressive” and “backwards” region in terms of gender rights,<sup>96</sup> the acknowledgment of continued patriarchy in the culture at least permits remedies for the injustice that the patriarchy creates. In contrast, the assumed egalitarianism of no fault divorce law in America often masks patriarchy that still survives underneath.<sup>97</sup> Accordingly, it may be useful to reform American family law to deprioritize and not assume independence and egalitarianism as imagined ideals within divorce, particularly when dealing with immigrant communities like the Asian Indian H-4 visa holders.<sup>98</sup>

#### IV. REHABILITATING DEPENDENCY IN AMERICAN IMMIGRATION AND FAMILY LAW: THE NEED FOR AN “IMMIGRATION-STATUS SPOUSAL SUPPORT”

Divorce remains an unrealistic solution for H-4 visa holders not only because of culture. Divorce is not just culturally, but legally, impractical for many immigrant women. As a derivative, an H-4 visa holder’s immigration status is by definition wholly dependent on a qualifying relationship with the primary H-1B visa holder.<sup>99</sup> Shivali Shah, an attorney and advocate in the South Asian community, explains the stark reality that “if an H-4 wife and her H-1B husband divorce, she no longer enjoys H-4 status. For the battered H-4 wife who wants to leave her abusive husband but remain in the United States, the options are limited.”<sup>100</sup> Sharmila Lodhia further explains that for derivative H-4 beneficiaries, “legal status remains conditioned on her spouse and this presents a problem if she decides to leave the abuser (the primary visa holder) before he obtains his green card. If a woman files for divorce during

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96. See Makau Mutua, *Savages, Victims, and Saviors: The Metaphor of Human Rights*, 42 HARV. INT’L L.J. 201 (2001); Patricia Connell, *Understanding Victimization and Agency: Considerations of Race, Class and Gender*, 20 POL. & LEGAL ANTHROPOLOGY REV. 115 (1997).

97. Adriaen M. Morse Jr., *Fault: A Viable Means of Re-Injecting Responsibility in Martial Relations*, 30 U. RICH. L. REV. 605, 606 (1996) (pointing out that no fault divorce has led to “more frequent initiation of divorce by husbands, less frequent alimony awards, reduced child support amounts, reduced awards of family assets to the wife, and increased responsibility of wives for household debts upon divorce.”); see also, Peter Nash Swisher, *Marriage and Some Troubling Issues with No-Fault Divorce*, 17 REGENT U. L. REV. 243 (2004-2005).

98. Bacon, *supra* note 58, at 21 (identifying the disparity between independence and community as the fundamental difference between first-generation immigrants and their second-generation children, but ultimately arguing that “the organizational life of the first generation owes much to the Indian view of the social world and remains an essentially Indian game. Second-generation voluntary organizations, in contrast, reflect an American sensibility about the nature of group life.”)

99. The spouse and unmarried minor children of the beneficiary are entitled to H nonimmigrant classification, subject to the same period of admission and limitations as the beneficiary, if they are accompanying or following to join the beneficiary in the United States. 8 CFR 214.2(h)(9)(iv).

100. Shivali Shah, *Middle Class, Documented, and Helpless: The H-4 Visa Bind*, in BODY EVIDENCE: INTIMATE VIOLENCE AGAINST SOUTH ASIAN WOMEN IN AMERICA, 195, 201 (Shamita Das Dasgupta, ed.) (2007).

the period in which the green card process is taking place, then she can fall ‘out of status,’ or essentially become undocumented in the eyes of the law.”<sup>101</sup>

In response to immigration problems associated specifically with domestic violence, Congress granted the ability for undocumented spouses of abusive United States citizens and Legal Permanent Residents to self-petition for their immigration status under the Violence Against Women Act of 1994 (VAWA).<sup>102</sup> Eligibility for relief under VAWA, however, necessitated that the abusive spouses were themselves United States citizens or green card holders, not just H-1B visa holders. As a result, H-4 derivatives would not be eligible to apply for their immigration status under VAWA until after the H-1B primary visa holder had already adjusted status. As a partial measure to address this issue, Congress enacted the Battered Immigrant Women Protection Act as part of the Victims of Trafficking and Violence Protection Act of 2000;<sup>103</sup> this act created the U-visa, granting victims of certain crimes—including domestic violence—the ability to stay in the country and work if they had suffered substantial physical or mental harm as a result of the crime and if they have been cooperative with law enforcement in investigation or prosecution of the crime.<sup>104</sup> The reliance on law enforcement involvement for U-visa eligibility however, poses special problems for many immigrant communities not just culturally,<sup>105</sup> but also legally.<sup>106</sup> The immigration consequence of a criminal conviction for domestic violence is removal, not just for the H-1B perpetrator,<sup>107</sup> but all the derivative

101. Sharmila Lodhia, *Constructing an Imperfect Citizen-Subject: Globalization, National “Security,” and Violence Against South Asian Women*, 38 *Women’s Studies Quarterly* 161, 166 (2010).

102. Pub. L. No. 103-322, 108 Stat. 1902 (codified as amended in scattered sections of 8 U.S.C., 18 U.S.C., and 42 U.S.C.).

103. §§ 1501-1513, 114 Stat. at 1518-37 (codified in scattered sections of 8 U.S.C., 18 U.S.C., 20 U.S.C., 22 U.S.C., 27 U.S.C., 28 U.S.C., 42 U.S.C., and 44 U.S.C.).

104. 8 C.F.R. 214.14(b)(3) (allowing U-visa eligibility if “the alien has been helpful, is being helpful, or is likely to be helpful to a certifying agency in the investigation or prosecution of the qualifying criminal activity upon which his or her petition is based, and since the initiation of cooperation, has not refused or failed to provide information and assistance reasonably requested.”)

105. Leslye Orloff, Mary Ann Dutton, Giselle Aguilar Hass, Nawal Ammar, *Battered Immigrant Women’s Willingness to Call for Help and Police Response*, 13 *UCLA WOMEN’S L.J.* 43, 74 (2003).

106. Karyl Alice Davis, *Unlocking the Door by Giving Her the Key: A Comment on the Adequacy of the U-visa as a Remedy*, 56 *ALA. L. REV.* 557 (2004).

107. 8 U.S.C. 1227(a)(2)(E)(i) (“Any alien who at any time after admission is convicted of a crime of domestic violence, a crime of stalking, or a crime of child abuse, child neglect, or child abandonment is deportable. For purposes of this clause, the term “crime of domestic violence” means any crime of violence (as defined in section 16 of Title 18) against a person committed by a current or former spouse of the person, by an individual with whom the person shares a child in common, by an individual who is cohabiting with or has cohabited with the person as a spouse, by an individual similarly situated to a spouse of the person under the domestic or family violence laws of the jurisdiction where the offense occurs, or by any other individual against a person who is protected from that individual’s acts under the domestic or family violence laws of the United States or any State, Indian tribal government, or unit of local government.”)

family members,<sup>108</sup> and this creates further barriers to reporting. In order to qualify for possible U-visa relief, a potential U-visa applicant is essentially being asked to jeopardize her already existing status in order to apply for another that may not necessarily be guaranteed. This resulting hesitancy to report and pursue prosecution of domestic violence incidents with law enforcement will often indirectly disqualify Asian Indian immigrant domestic violence survivors from obtaining the requisite certification for the U-visa.<sup>109</sup>

In 2005, Congress amended VAWA to grant eligibility for employment authorization for H-4 derivative visa-holders if they or their children were subject to battery or extreme cruelty by the principal visa-holder spouse.<sup>110</sup> Mary Clark points out however, that “no benefit aside from employment authorization is conferred by this amendment”<sup>111</sup> and “[i]t is unknown how the expiration of the applicant’s nonimmigrant status will impact her eligibility for employment authorization. . . . Guidance needs to be issued to determine the scope of relief for spouses of non-immigrant visa holders and the consequence of the expiration of the non-immigrant visa on their employment eligibility.”<sup>112</sup> This continuing problem has led some scholars to call for VAWA-like solutions for H-4 derivatives in domestic violence situations.<sup>113</sup> These suggested remedies, however, require that there is domestic violence, and do not address the need of immigrant women who are not battered. Unbattered H-4 visa holders face similar disempowering situations when confronted

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108. The spouse and unmarried minor children of the beneficiary are entitled to the H-4 non-immigrant classification when they are accompanying or following to join the beneficiary in the United States, but subject to the same period of admission and limitations as the primary H-1B beneficiary. 8 C.F.R. 214.2(h)(9)(iv).

109. One of the chief requirement of U-visa eligibility is that “the alien has been helpful, is being helpful, or is likely to be helpful to a certifying agency in the investigation or prosecution of the qualifying criminal activity upon which his or her petition is based, and since the initiation of cooperation, has not refused or failed to provide information and assistance reasonably requested.” 8 C.F.R. 214.14(b)(3).

110. 8 U.S.C.A. § 1105a (“In the case of an alien spouse admitted under subparagraph (A), (E)(iii), (G), or (H) of section 1101(a)(15) of this title who is accompanying or following to join a principal alien admitted under subparagraph (A), (E)(iii), (G), or (H) of such section, respectively, the Secretary of Homeland Security may authorize the alien spouse to engage in employment in the United States and provide the spouse with an “employment authorized” endorsement or other appropriate work permit if the alien spouse demonstrates that during the marriage the alien spouse or a child of the alien spouse has been battered or has been the subject of extreme cruelty perpetrated by the spouse of the alien spouse.”)

111. Mary B. Clark, *Falling Through the Cracks: The Impact of VAWA 2005’s Unfinished Business on Immigrant Victims of Domestic Violence*, 7 U. Md. L.J. RACE, RELIGION, GENDER & CLASS 37, 56 (2007).

112. *Id.* at 56-7.

113. See generally Uma Narayan, “Male-Order” Brides: Immigrant Women, Domestic Violence, and Immigration Law, in *FEMINIST ETHICS AND SOCIAL POLICY* 143 (Patrice DiQuinzio & Iris Marion Young eds., 1997); Bragun, *supra* note 3; Shah, *supra* note 100. [Order of authorities: Narayan, Shah, then Bragun]

with divorce, and are unable to even consider divorce as an option for themselves<sup>114</sup> due to their dependent immigration status.

In order to combat perpetual dependency, which further entrenches the patriarchal hierarchies of the culture, Magdalena Bragun proposes a remedy through the authorization of employment for spouses of foreign professionals.<sup>115</sup> She argues that H-4 derivatives should be treated similarly to L-2 derivatives of L-1 intracompany transferees,<sup>116</sup> who are able to obtain work authorizations from the start.<sup>117</sup> However, the provision allowing L-2 visa holders the ability to work<sup>118</sup> is the exception to the normal policy in American immigration law that foreign nonimmigrant visa holders not incur upon domestic labor interests.<sup>119</sup> Bragun asserts that H-4 participation in the workplace would not adversely affect United States domestic labor by comparing them to other H-1B visa holders.<sup>120</sup> However, as a condition of obtaining the H-1B visa, the employer of the H-1B beneficiary must have first provided a certification from the Secretary of Labor that the issuance of the visa will not displace a United States worker.<sup>121</sup> Furthermore, H-1B visa holders who desire to become permanent residents must undergo a rigorous “labor certification” process to ensure that “the employment of such alien will not adversely affect the wages and working conditions of workers in the United States similarly employed.”<sup>122</sup> Thus, it seems unlikely that Congress would support a provision allowing a derivative of the H-1B, who will be granted the derivative visa simply based on a qualifying family relationship to the primary beneficiary rather than any independent evaluation of their effect on domestic labor, to be issued a work authorization.

Yet given the culture of dependency in some immigrant groups such as Asian Indians, it is unclear whether work authorization as a strategy of obtaining independence and equality with the primary H-1B visa holder is the right answer.<sup>123</sup> Rather than seek the Americanized ideal of indepen-

114. As discussed above, a primary impetus behind no fault divorce was to broaden the ability of women to choose to get divorced.

115. Bragun, *supra* note 3, at 939.

116. 8 C.F.R. § 214.2(l)(1)(i) (2006) (“Under section 101(a)(15)(L) of the Act, an alien who within the preceding three years has been employed abroad for one continuous year by a qualifying organization may be admitted temporarily to the United States to be employed by a parent, branch, affiliate, or subsidiary of that employer in a managerial or executive capacity, or in a position requiring specialized knowledge. An alien transferred to the United States under this nonimmigrant classification is referred to as an intracompany transferee and the organization which seeks the classification of an alien as an intracompany transferee is referred to as the petitioner.”)

117. See Bragun, *supra* note 3, at 964.

118. Act of Jan. 16, 2002, Pub. L. No. 107-125, 115 Stat. 2403.

119. See generally Paschal O. Nwokocha, *American Employment-Based Immigration Program in a Competitive Global Marketplace: Need for Reform*, 35 WM. MITCHELL L. REV. 38 (2008).

120. Bragun, *supra* note 3, at 968.

121. Act of Oct. 3, 1965, Pub. L. No. 89-236, 79 Stat. 911.

122. 8 U.S.C. § 1182 (2006).

123. See Michelle A. Travis, *The Future of Work-Family Policy: Is “Choice” the Right Choice? Review of Women and Employment: Changing Lives and New Challenges*, 13 EMP. RTS. & EMP.

dence, which centers on equality of opportunity in the workplace, it may be useful to consider dependency as a positive rather than negative factor in imagining potential alternative solutions. In calling for Asian American jurisprudence, Robert Chang suggests “we can use differences between Asian cultures and Western cultures to question the assumptions of . . . liberal political theory, which celebrates the notion of an individuated autonomous self.”<sup>124</sup> Taking it further, it may be more useful to incorporate the traditional cultural values of Asian Indian immigrants in crafting solutions to their dilemmas in America, rather than view culture as an obstacle to be overcome. In developing a solution to the H-4 dilemma, I suggest investigating overlaps and hybridity between Asian and American values rather than see them as diametrically opposed.

Though the spread of no fault divorce into India seems to suggest an advancing of Western neoliberal individualistic values in family law globally, American family law does not in fact monolithically value individuality and independence. Major pillars of American family law, specifically child custody, child support, and spousal support, maintain continuing legal connectivity and dependency between former spouses well beyond divorce. The former spouses in a family law case are almost never truly individualized, and certain community-focused obligations to the former family unit persist, which often require continued cooperation and coordination between the parties. The resulting termination of immigration status for one party however, often disrupts this goal creating problems that family law courts have difficulties navigating.

For instance, termination of immigration status for one parent creates significant barriers to co-parenting. In *Urbano de Malaluan v. INS*, the 9th Circuit ruled that even de facto deportation of a United States citizen child does not constitute a hardship that would allow relief for a deportable parent.<sup>125</sup> The Urbano court affirmed that “[o]ne of the principal reasons advanced for the rejection of this argument is that it would permit a wholesale avoidance of immigration laws if an alien were to be able to enter the country, have a child shortly thereafter, and prevent deportation.”<sup>126</sup> These immigration rationalizations, however, inevitably conflict with family law interests. Removal of an H-4 derivative due to termination of marital status often leads to the problem of separation of children from at least one of their parents. In an unpublished case, *Israelsson v. Hicks*, the California Court of Appeal reviewed a child custody order allowing the custodial parent, a Swedish citizen

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POL’Y J. 385 (2009); see also JERRY A. JACOBS & KATHLEEN GERSON, *THE TIME DIVIDE: WORK, FAMILY, AND GENDER INEQUALITY* (2004).

124. Robert Chang, *DISORIENTED: ASIAN AMERICANS, LAW, AND THE NATION-STATE* 103 (1999).

125. *Urbano de Malaluan v. INS*, 577 F.2d 589, 594 (9th Cir. 1978).

126. *Id.* See also *Rubio de Cachu v. INS*, 568 F.2d 625 (9th Cir. 1977); *Mamane v. INS*, 566 F.2d 1103 (9th Cir. 1977); *Davidson v. INS*, 558 F.2d 1361 (9th Cir. 1977); *Lee v. INS*, 550 F.2d 554 (9th Cir. 1977); *Gonzalez-Cuevas v. INS*, 515 F.2d 1222 (5th Cir. 1975).



under threat of deportation by the immigration service, to relocate the child, an American citizen, to Sweden.<sup>127</sup> The child custody evaluator however, acknowledged that deportation of an alien parent created a situation in which frequent and continuing contact with both parents would be impossible.<sup>128</sup> In spite of a showing that the proposed relocation would cause a detriment to the child, the trial court still allowed the removal of the child, but expressly recognized the deleterious impact of the forced deportation on the possibility of co-parenting.<sup>129</sup>

Even if there are no children, family law also recognizes the need for continued obligations arising out of the marriage through spousal support. Modern spousal support was concurrently reformed with the advent of no fault divorce in the United States, so that the award of alimony was decreasingly tied to fault of the parties and instead focused on creating equality between the former spouses.<sup>130</sup> In some ways, spousal support was specifically designed to address the problems of unequal access to income for domestic caretaker spouses after years of absence from the workforce. One major theory behind spousal support is continued financial need.<sup>131</sup> Generally, H-4 visa holders have compelling arguments for spousal support based on need because they are legally prohibited from working in the United States.<sup>132</sup> Thus, although spousal support has recently been aligned with the value of independence and self-sufficiency,<sup>133</sup> it might be useful to revisit the historical reasoning for spousal support as the continuing obligation of the husband<sup>134</sup> in

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127. *Israelsson v. Hicks*, No. H029998, 2006 WL 3826698 (Cal. Ct. App. Dec. 29, 2006.).

128. *Id.* at 2 (“Dr. Muccilli testified that Evalene was ‘comfortable with both parents,’ and that the move to Sweden would have a ‘deleterious effect’ on the father-daughter relationship; this was a ‘lose-lose situation.’ However, because Israelsson was clearly the ‘primary parent’ who was facing arrest and deportation, the only viable option was to ‘cut the losses’ and allow the move.”).

129. *Id.* at 6 (noting the “threat of separation of the child from her mother if deportation occurs is a huge concern for the court.”).

130. Larry R. Spain, *The Elimination of Marital Fault in Awarding Spousal Support: The Minnesota Experience*, 28 WM. MITCHELL L. REV. 861, 866 (2001).

131. Ira Mark Ellman, *The Theory of Alimony*, 77 CALIF. L. REV. 1, 4 (1989).

132. In my experience, however, I have encountered a few instances when family law judges still imputed income on H-4 clients, saying that they could still work “under the table” illegally.

133. John Lande, *The Revolution in Family Law Dispute Resolution*, 24 J. AM. ACAD. MATRIMONIAL LAW. 411, 412 (2011/2012) (“The law of alimony has changed so that both husbands and wives can receive alimony (often called ‘spousal support’ or ‘maintenance’) and, instead of a lifelong commitment, it is intended to be transitional assistance promoting self-sufficiency.”).

134. Robert Kirkman Collins, *The Theory of Marital Residuals: Applying An Income Adjustment Calculus to the Enigma of Alimony*, 24 HARV. WOMEN’S L.J. 23, 28 (2001) (“Spousal support payments—which originated as the simple continuation of the ongoing duty of a husband to support his wife following a judicial separation—were uncritically extended both in England and the United States during the nineteenth century to cases in which the marital relationship was being terminated by absolute divorce.”); see also Carl E. Schneider, *Moral Discourse and the Transformation of American Family Law*, 83 MICH. L. REV. 1803, 1812-14 (1985) (discussing spousal and child support as continuing moral obligations of marriage).

light of the H-4 dilemma due to ongoing need.<sup>135</sup> Whereas the globalization of no fault divorce appears to indicate the increasing worldwide acceptance of a more egalitarian model of marriage, H-4 derivative visa holders are nevertheless caught in a model containing legally-imposed imbalances. In other words, although family law may have evolved towards independence and self-sufficiency in both the United States and in India, diasporic Asian Indian American families may now find themselves legally marginalized as a result of their immigration law restrictions in a way similar to American women earlier in history when marriage defined women's legal status.<sup>136</sup> Thus, some ordinary common law policy reasons in family law, which might seem antiquated today, may nevertheless be appropriate to apply to these families.

As Robert Collins has observed, English common law justifications for spousal support were largely based on the legal limitations placed on women historically.<sup>137</sup> Though the conditions of women have dramatically changed since those times, H-4 derivative spouses in divorce proceedings have very similar legal restrictions imposed upon them, though not as a matter of gender but of immigration status. A possible solution to the H-4 dilemma would involve a coordination of family law and immigration law, utilizing principles similar to spousal support. In the same way that a family law judge could extend the financial obligations of one spouse to another through an award of spousal support or through orders of cooperative parenting, a family law judge may also be permitted to order continued immigration status support if immigration law is concurrently reformed to allow for such an order. That is, if a family law judge makes a judicial finding that a derivative H-4 spouse requires ongoing immigration status support from the primary H-1B beneficiary, that can then be used by the United States Citizenship and Immigration Services (USCIS) to either extend H-4 derivative status or grant some other type of status pending the adjustment of status of the H-1B primary beneficiary. Existing family based immigration policy already recognizes obligations that continue after divorce – in the required Affidavit of Support, a sponsoring petitioner promises to reimburse the government if the beneficiary receives

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135. Carl Schneider, *Rethinking Alimony: Marital Decisions and Moral Discourse*, 1991 BYU L. REV. 197, 248-9 (1991) (“One spouse may come to owe the other support after marriage because of the moral relationships between spouses that are generally part of marriage. In short, the riddle of alimony has a traditional answer. It is not that need gives rise to obligation. It is that entering into the special relationship that is marriage and behaving in some kinds of ways in that relationship can give rise to an obligation to a former spouse who is in need”).

136. Kay, *supra* note 83, at 2021-22.

137. Collins, *supra* note 134, at 29 (“alimony was simply an extension of the payments due from a husband to his wife that needed to continue despite the couple's legal and physical separation. Since married women were barred by the doctrine of unity from holding certain property, signing contracts, working at many professions, or retaining their own earnings when they did work, continuation of this support for a separated wife could, in many instances, have been a literal matter of life or death”).

public benefits even in the event of divorce.<sup>138</sup> Moreover, this would not be inconsistent with existing immigration provisions that require certifications from other legal bodies, such as the S, T, U, or even H-1B visa.<sup>139</sup>

The immigration laws would also need to be reformed to allow such an “extended” H-4 derivative self-petition to adjust status after the primary H-1B has obtained legal permanent resident status. Existing immigration law already allows a Conditional Permanent Resident whose marriage has been legally terminated to self-petition for their permanent status through the good faith marriage waiver under the Immigration Marriage Fraud Amendments (IMFA).<sup>140</sup> Thus, the immigration law could be reformed to allow for similar self-petitioning of an “extended” H-4 derivative who can demonstrate that the marriage to the primary H-1B was terminated through no fault of his or her own. Because this would occur after the primary H-1B had already adjusted status, this remedy is not inconsistent with the notion that the person getting the benefit would have actually qualified for that benefit but for the breakdown in the relationship. As such, if the primary H-1B beneficiary somehow loses the ability to stay in the United States, a situation that would force the entire family to move anyway, the extended H-4 status would also cease.<sup>141</sup>

Such a solution would alleviate crucial needs of the H-4 visa holder community and simultaneously acknowledge continuing ties of dependency that family formation necessitates, regardless of cultural background, while still offering a bridge towards independence and autonomy. This solution specifically addresses the problem of access to justice that I repeatedly encountered in my legal clinic in the Asian Indian community. Many Asian Indian H-4 derivative clients ultimately denied themselves access to remedies at family law, not necessarily because they were culturally resistant to the independent and egalitarian vision of gender relations promoted by American culture, but because they were disincentivized by their legal situations. Divorce was ironically an option that Asian Indian H-1B primary visa holders had access to, not because they were better assimilated to American ideals of independence and equal gender relations, but because their legal situations permitted them to access divorce with no consequence on their immigration status. Unlike their H-4 derivative spouses, their ability to stay in the country

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138. Illegal Immigration Reform and Immigrant Responsibility Act of 1996, 8 U.S.C. § 1182(a)(4)(C)(ii). See also Geoffrey A. Hoffman, *Immigration Form I-864 (Affidavit of Support) and Efforts to Collect Damages as Support Obligations Against Divorced Spouses - What Practitioners Need to Know*, 83 FLA. B.J. 53 (2009).

139. The S, T, and U visas require a certification from law enforcement officials, which can include judges. 8 U.S.C. § 1101(a)(15)(S), (T), (U). The H-1B requires a certification from the Department of Labor. 8 U.S.C. § 1101(a)(15)(H).

140. 8 U.S.C. § 1186a(c)(4)(B).

141. This, however, would have the same problem as U-visa relief in possibly dissuading the reporting of domestic violence, since a conviction would expose the entire family to removal. See *supra* note 96.

and work was independent of their continued marital status. My proposed “immigration-status spousal support” would increase access to divorce to these immigrant groups, which is consistent with the egalitarian policy reasoning for no fault divorce.<sup>142</sup>

This solution also addresses legal blind spots in existing immigration policy. As discussed earlier, the 1952 and 1965 immigration reforms were birthed in an era where equality of opportunity was celebrated as a national ideal. Yet the specific immigration provisions are set up in such a way so that Asian Indian immigrants simultaneously serve as archetypes and antitheses of those ideals. They are brought in as skilled laborers who exemplify the American dream of equality of opportunity. At the same time, they are marginalized as foreign others who are resistant to equality due to their seeming adherence to patriarchal family hierarchies. Many of these families held to more patriarchal models of family not necessarily because they are not amenable to change, but because the laws do not facilitate change.

The H-4 dilemma in the Asian Indian immigrant community provides insight into some contradictions in the American narrative of equality and independence in both immigration and family law. The unjust situations H-4 visa holders currently face as a matter of family law also expose problems produced by, but not normally associated with, immigration protocols, which as a result, also demonstrate some inherent inconsistencies within the American discourse of equality. The preferences categories of employment-based immigration law, though gender-neutral on its face, act in tandem with existing patriarchal norms within the sending country to produce numerical imbalances in gender representation of skilled immigrant labor. The prohibition on H-4 derivatives from working, which also appears gender-neutral, maintains the existing patriarchal gender hierarchies of immigrant families after their arrival to the United States. The H-4 dilemma demonstrates that certain immigration laws are not gender neutral because they perpetuate patriarchy as the status quo. The prominence of culture as the reason for gender inequities in popular imaginings of immigrant communities, however, masks the inherent gender bias in immigration law.

Like many diasporic immigrants, the H-4 derivative clients I encountered in my clinic found that their ancestral culture felt increasingly foreign when American assimilationist principles are set up as countervailing ideals. Rather than treat the American law as unquestionably egalitarian in contrast to their patriarchal cultural values, there is a need to recognize and redress inequalities that are caused by the combination of both. In this way, my proposed solution of an “immigration-status spousal support” also seeks to avert the continued “Othering” of not only Asian Indian culture, but of the general Asian immigrant cultures<sup>143</sup> that occurs through the recursion of pa-

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142. Kay, *supra* note 84, at 2019-20.

143. See Teemu Ruskola, *Where is Asia? When is Asia? Theorizing Comparative and*

triarchy allowed by immigration laws that perpetuate inequalities within the immigrant family unit. If egalitarianism is indeed a marker of cultural assimilation, then American immigration and family law needs to be reformed so that it can truly facilitate equality and independence in the lived experiences of immigrant families, not just in the realm of myth and symbols.