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ABUSE-IN(G) THE SYSTEM: HOW ACCUSATIONS OF U VISA FRAUD AND BRADY DISCLOSURES PERPETRATE FURTHER VIOLENCE AGAINST UNDOCUMENTED VICTIMS OF DOMESTIC ABUSE

Imogene Mankin *

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INTRODUCTION

Public defenders do not typically concur with conservative politicians on many things, but they do agree on one thing: undocumented immigrants may be fabricating or exaggerating crimes to get U visas.¹ Designed to “facilitate” immigrant cooperation with law enforcement,² the U visa is an immigration status awarded to victims of certain crimes that took place in the United States. With the U visa, an undocumented immigrant gains nonimmigrant status, the privilege to work legally in the U.S., and a very slow path to citizenship.³ On its face, the U visa is an easy target

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1. See Lauren Smiley, *U-Visa: Illegal Immigrants Become Legal Residents Via Crime Victimization*, S.F. WEEKLY (Mar. 16, 2011), <http://www.sfweekly.com/sanfrancisco/u-visa-illegal-immigrants-become-legal-residents-via-crime-victimization/Content?oid=2180863>; Brendan Kirby, *Illegals Yell ‘Crime,’ Get Status*, POLIZETTE (Nov. 23, 2015), <http://www.lifezette.com/polizette/illegals-yell-crime-get-status/>.

2. See Victims of Trafficking Prevention Act, Pub. L. No. 106-386, 114 Stat. 1534 (2000) (“Creating a new nonimmigrant visa classification will facilitate the reporting of crimes to law enforcement officials by trafficked, exploited, victimized, and abused aliens who do not have lawful immigration status.”).

3. See 8 U.S.C. §§ 1101(a)(15)(U), 1184(p), 1255(m); 8 CFR § 214.14 (2007) (amended 2013). U visa holders are eligible for employment authorization and may apply for lawful permanent residency

for fraud accusations. It seems like an uncharacteristically generous and forgiving⁴ oasis in the otherwise stingy and draconian desert of our immigration law. I will argue that the U visa is not as tempting to fraud as it may seem due to fraud prevention measures baked into its requirements and widespread fear of law enforcement in immigrant communities, ever increasing in the dawn of the Trump administration. There is no indication that Department of Homeland Security⁵ (DHS) has anticipated or observed any significant levels of U visa fraud. However, Republican congressmen report “rampant” U visa fraud, and criminal defense attorneys continue to accuse U visa applicants of fabrication on the stand. Accusations of U visa fraud from such partial actors are not only mostly unsubstantiated but also unreliable because they serve their own vested interests.

Largely controlled by local law enforcement and prosecutors,⁶ the U visa has been vulnerable to accusations of fraud by criminal defendants, who attempt to impeach undocumented victim witnesses by accusing them of making up the crime for the U visa.⁷ Because many prosecutors consider the U visa to be “exculpatory” evidence, they disclose the victim’s⁸ otherwise private immigration information to defendants. This leaves victims vulnerable to aggressive defenses and cross-examination in court, among other injustices.⁹ As discussed in Section V, case law suggests that U visas are exculpatory evidence only because courts have held that other types of law enforcement cooperation visas are exculpatory evidence. I distinguish U visas from these other types of visas and argue that they are not exculpatory evidence in the absence of case law specifically addressing U visas.

Victims of domestic violence are particularly vulnerable to this type of fraud accusation because they can already make for unreliable witnesses as it is.¹⁰ Due to trauma, complicated relationship dynamics, and a desire to protect their families, they often contradict themselves, recant testimony, or refuse to testify altogether.¹¹ As a result, it is easy for a defense attorney to capitalize on this shaky testimony and accuse

after three years of U visa status and continuous physical presence.

4. Unlike most other forms of immigration relief, the U visa is available to applicants with prior deportations and/or criminal records, subject to a discretionary waiver. 8 C.F.R. § 212.17 (2007) (amended 2011). The only applicant ineligible for the discretionary waiver is a “[p]articipant[] in Nazi persecution, genocide, or the commission of any act of torture or extrajudicial killing.” 8 U.S.C. §1182 (a)(3)(E).

5. DHS administers immigration law through three agencies. U.S. Citizenship and Immigration Services (USCIS) adjudicates affirmative benefits such as U visas and lawful permanent residency. Immigration and Customs Enforcement (ICE) investigates fraud, prosecutes deportation proceedings, and enacts removals. Customs and Border Protection (CBP) enforces immigration law at the ports of entry and on or near land borders.

6. Law enforcement and prosecutors have broad discretion in their decision to sign U visa certifications, which is required for U visa applications. *See, infra* Section I.

7. *See, e.g.*, *Commonwealth v. Sealy*, 6 N.E.3d 1052, 1058 (Mass. 2014) (holding that a rape victim may be cross-examined about her U visa application).

8. Although I prefer the use of the term “survivor,” I will defer to the Citizenship and Immigration Service’s language and call U visa applicants “victims.”

9. U visa applicants may also be subpoenaed for their U visa applications. *See* SAMANTHA BARBAS & JOELLE EMERSON, BAY AREA LEGAL AID, UNDERSTANDING AND RESPONDING TO SUBPOENAS: A GUIDE FOR IMMIGRATION LAWYERS REPRESENTING U VISA APPLICANTS (May 2010), http://www.asistahelp.org/documents/resources/Immigration_Lawyers_Subpoena_Guide2_D022E40BC214D.pdf; *see also* LESLYE E. ORLOFF ET AL., U VISA TOOLKIT FOR LAW ENFORCEMENT AGENCIES AND PROSECUTORS (Aug. 2011), http://archive.vera.org/files/U-visa_toolkit_Sept-2011.pdf.

10. Michael Kagan, *Immigrant Victims, Immigrant Accusers*, 48 U. MICH. J.L. REFORM 915, 944 (2015).

11. *Id.*

the U visa applicant of fabricating the domestic violence. Jurors who are unfamiliar with domestic violence may find an incentive to lie for a tangible benefit to be more plausible than a motive to lie because of complicated power dynamics and trauma.

The U visa is too wrapped up in the adversarial criminal justice system, leaving victims vulnerable to re-victimization by the process. Prosecutors are required to make *Brady* disclosures and turn over all “exculpatory” evidence to the defense.¹² Prosecutors dislike the U visa because disclosure of the victim-witness’s U visa application and their subsequent impeachment could ruin an otherwise strong case.¹³ On the other side, defense counsel and defendants often resent the possibility that a U visa applicant can trade an accusation for immigration benefits, even if it is true.¹⁴ Thus, U visa fraud accusations often arise from within the criminal justice system, and not the Department of Homeland Security, the agency in charge of administering the U visa program. For an undocumented victim of domestic violence, the mere suggestion or accusation of fabrication, fraud, or deception may be traumatic, especially coming from an authority figure. This trauma of accusation and cross-examination is a form of psychological violence.

Criminal defendants are not the only ones who are blaming victims. Conservative politicians and advocates have been trying to restrict U visa benefits for years.¹⁵ They claim that immigrants are fabricating crimes, filing false police reports, or otherwise lying about their victimization.¹⁶ In Sections II and III, I will argue that this claim is unsubstantiated and the concern is misplaced. Rather than assume that many of the tens of thousands¹⁷ of U visa applicants are lying, why not express concern about the high rates of violent crime inflicted on undocumented immigrants? Opponents of the U visa would rather demonize the victims than recognize the great violence that many undocumented people live with every day.

I propose to extricate the U visa from the adversarial “crucible”¹⁸ by transferring the power to facilitate U visas away from prosecutors and law enforcement toward the judiciary and other more neutral parties. Advocates can help facilitate this shift by requesting assistance for U visas, known as certifications, from judges.

12. *Brady v. Maryland*, 373 U.S. 83, 86 (1963).

13. *See* Kagan, *supra* note 10, at 949.

14. *Id.*

15. *See* *infra* Section II; *See, e.g.*, Letter from Sen. Chuck Grassley, et al. to Jeh Johnson, Sec’y of the Dep’t of Homeland Security (Dec. 20, 2016), <http://www.grassley.senate.gov/sites/default/files/judiciary/upload/2016-12-20%20CEG%2C%20Goodlatte%20to%20DHS%20-%20U%20Visa%20Management.pdf>; U.S. Congressman Diane Black, *Black Introduces U Visa Reform Act* (Feb. 5, 2013) <https://black.house.gov/press-release/black-introduces-u-visa-reform-act>.

16. *See, e.g.*, Kirby, *supra* note 1 (quoting Ira Mehlman, a spokesperson for the right-wing Federation for American Immigration Reform, who called the U visa “an unnecessary . . . invitation to fraud.”).

17. USCIS is statutorily permitted to issue up to 10,000 U visas each year. 8 U.S.C. §1184(p)(2)(A). USCIS has reached the statutory cap for the last eight years, creating a large backlog. U.S. Citizenship and Immigration Services, *USCIS Approves 10,000 U Visas for 7th Straight Fiscal Year* (Dec. 29, 2015), <https://www.uscis.gov/news/uscis-approves-10000-u-visas-7th-straight-fiscal-year>. In 2016, there was an estimated 140,000 applications pending with USCIS. Catholic Legal Immigration Network, *Changes to U Visa processing in Fiscal Year 2017*, <https://cliniclegal.org/resources/immigration-and-nationality-act-limited-number-u-visas-fiscal-year-2017>.

18. *Crawford v. Washington*, 541 U.S. 36, 61 (2004) (“[The Confrontation Clause] commands . . . that reliability be assessed in a particular manner: by testing in the crucible of cross-examination.”).

I. THE U VISA: PURPOSES AND REQUIREMENTS

The U visa is a type of nonimmigrant status passed in 2000 to fill gaps in the Violence Against Women Act (VAWA).¹⁹ VAWA was originally enacted in 1994 and contained numerous legal protections for victims of domestic violence. The most salient protection for immigrants was the ability for individuals battered by U.S. citizen or legal permanent resident (LPR) spouses to “self-petition” for lawful immigration status without the signature or permission of their abuser.²⁰ The VAWA self-petition was intended to prevent immigrants from feeling trapped in abusive marriages and feeling pressured to stay with their abusers for their immigration status.²¹ Instead, if the individual could prove that they entered into the marriage in good faith and had suffered “extreme cruelty” by their abuser, they could self-petition for a green card, even if they were no longer living with their spouse or had recently divorced.²² The policy goal behind the VAWA self-petition was to remove a tool of psychological oppression from abusers.²³ No longer could abusers hold legal status over their immigrant spouse’s head or threaten them with deportation.

Although the VAWA self-petition was an excellent advancement against the use of immigration law as an abusive tool of manipulation and abuse, gaps remained. It soon became clear both to Democrats and Republicans that they had inadvertently created a perverse incentive for unmarried immigrant victims to marry their abusers because VAWA self-petitions were only available to the spouses of U.S. citizens and LPRs.²⁴ Abusers who were aware of VAWA self-petitions could withhold marriage to manipulate their partners.²⁵ Furthermore, VAWA self-petitions created a perverse incentive against reporting abuse to protect the abuser’s immigration status since certain domestic violence convictions can trigger deportation, even for an LPR.²⁶

VAWA 2000 attempted to resolve these perverse incentives by creating the U visa, which offered a path to legal status that did not depend on marriage to the abuser and that encouraged the reporting of crimes and cooperation with law enforcement.²⁷ The Battered Immigrant Women Protection Act of 1999 (BIWPA) was a section of VAWA 2000, which established the purposes and requirements of the U visa program. The requirements for the U visa are threefold: the applicant must (1) be the victim of a qualifying violent or exploitative crime (domestic violence is typical); (2) have suffered “substantial physical or mental abuse” as a result of the qualifying crime; and (3) be deemed helpful in the investigation or prosecution of the crime, either

19. Victims of Trafficking Prevention Act, Pub. L. No. 106-386, 114 Stat. 1464-1548 (2000) (codified at 8 U.S.C. § 1101(a)(15)(U) (2011)).

20. Mariela Olivares, *Battered by Law: The Political Subordination of Immigrant Women*, 64 AM. U. L. REV. 231, 244 (2014).

21. *Id.* at 241.

22. Immigration & Nationality Act, § 204(a)(1)(A)(iii) (codified at 8 U.S.C. § 1154(a)(1)(A)(3) (2015)).

23. Battered Immigrant Women Protection Act, H.R. 3083, 106th Congress (1999) <https://www.congress.gov/bill/106th-congress/house-bill/3083/text>.

24. See Battered Immigrant Women Protection Act of 1999: Hearing on H.R. 3083 Before the Subcomm. on Immigration and Claims of the H. Comm. on the Judiciary, 106th Cong. 76-77 (1999) [hereinafter BIWPA Hearing] (Statement of Rep. Janice Schakowsky).

25. See *id.*

26. See *id.*

27. Olivares, *supra* note 20, at 248.

in the past, present, or likely to be in the future.²⁸ To fulfill the third prong of the U visa, victims must obtain a certification from a certifying agency, which is defined as “a [f]ederal, [s]tate, or local law enforcement agency, prosecutor, judge,” or other law enforcement agency.²⁹ The agency must certify that the victim “has been helpful, is being helpful, or is likely to be helpful” in the “investigation or prosecution” of the crime.³⁰

A. *U Visa: The Violence in the Requirements*

Most U visa certifications are signed by local law enforcement and prosecutors.³¹ Professor Michael Kagan, director of the Immigration Clinic at the University of Nevada, Las Vegas School of Law, argues that the U visa certification creates a “*quid pro quo* system” that pressures undocumented immigrants into “trad[ing] testimony in order to remain in the United States.”³² This system places the U visa applicant on the side of the prosecution every time. According to Kagan, the U visa effectively asks undocumented immigrants to act as agents of law enforcement by accusing their perpetrators and facilitating punishment.³³ In this way, the U visa is the “knife’s edge” that separates “good” immigrants from “bad” ones.³⁴ Criminal defendants, particularly those who have also been victims of crimes, may resent this categorization caused by the U visa accuser. Although criminal defendants may know that the U visa victim did not fabricate or exaggerate the abuse, they may also know that their best defense in a “he said, she said”³⁵ case is to expose to the jury the victim’s incentive to lie.³⁶

However, U visa applicants are vulnerable to accusations of fraud in the criminal system because of its adversarial nature, which is designed to protect the defendant’s constitutional rights and bring justice to the People by holding perpetrators accountable.³⁷ The Confrontation Clause of the United States Constitution recognizes the particularly high stakes criminal defendants face and meets those high stakes with the right to confront and cross-examine witnesses.³⁸ Thus, when a victim witness’s U visa application is disclosed to defense counsel, they are free to exploit it and introduce it as evidence of the victim’s motive to lie about the abuse.³⁹ This means that if the

28. 8 U.S.C. § 1101(a)(15)(U) (2011).

29. 8 C.F.R. § 214.14 (a)(2).

30. 8 C.F.R. § 214.14 (b)(3).

31. Judges, Child Protective Services social workers, and administrative agencies are also authorized to sign U visa certifications. *See* 8 C.F.R. § 214.14 (a)(2).

32. Kagan, *supra* note 10, at 917.

33. *Id.* at 918.

34. *Id.* at 930.

35. An analogue to this victim-blaming is the now antiquated use of character evidence of victims in sexual assault cases. So-called “rape-shield” laws protect sexual assault victims from evidence and cross-examination about their sexual histories or habits. *See, e.g.*, FED. R. EVID. 412.

36. *See* Kagan, *supra* note 10, at 944 (“In the hands of an aggressive defense attorney, this incentive structure would be called motive to lie.”).

37. *See id.* at 918 (“The U visa creat[es] . . . an extra risk of prejudice to defendants and an additional hardship for victims seeking justice.”).

38. *See* U.S. CONST. amend. VI; *Crawford v. Washington*, 541 U.S. 36, 68 (2004) (holding that the introduction of prior testimonial statements of unavailable witnesses violates the Confrontation Clause because the defendant has no opportunity to cross-examine the witness).

39. Under the Federal Rules of Evidence, there is an exception to the usual ban on character

victim testifies in court, they may be subject to accusations of fraud on cross-examination, or even suggestion of fabrication.⁴⁰

Participating in criminal proceedings is uncomfortable for most victims, but for domestic violence victims it can be particularly traumatic because it can perpetuate the abuse of the relationship.⁴¹ Defense trial strategies such as minimizing the abuser's conduct or attacking the victim's credibility can re-victimize the victim because they may be the same strategies used by the abuser.⁴² For example, "gaslighting" is a common type of emotional manipulation in domestic relationships where the abuser subtly distorts the victim's reality by questioning or denying their perceptions, suggesting that they are crazy or wrong, often about the abuse.⁴³ While it is a constitutionally necessary tool, cross-examination can bear some similarity to this type of emotional manipulation. Typically, defense attorneys ask leading questions, which leave room only for "yes" or "no" answers, and seize upon any inconsistencies in victims' answers to discredit their testimony.⁴⁴ Sometimes the cross-examination may even be calculated to confuse or befuddle the victim⁴⁵ to further a defense theory that the victim fabricated or misperceived the abuse. The issue of re-victimization on the stand is not unique to U visa applicants, but U visa applicants are susceptible to additional fraud accusations, which to a victim can feel like gaslighting.

DHS only requires the certifying law enforcement agency to consider victimhood in a qualifying crime, the helpfulness of the victim, and the information possessed by the victim. Beyond this, however, DHS permits certifying agencies wide discretion to grant or deny certification requests and encourages them to draft their own U visa policies.⁴⁶ This has created a troubling local "laboratory of democracy" situation in which some law enforcement agencies only certify for certain types of cases, or refuse to certify at all.⁴⁷ Short of this, many law enforcement agencies take it

evidence if it is introduced to prove a witness's motive, including a victim's motive to lie. FED. R. EVID. 404(b)(2).

40. Kagan, *supra* note 10, at 918.

41. See Carolyn Copps Hartley, "He Said, She Said:" *The Defense Attack of Credibility in Domestic Violence Felony Trials*, 7 VIOLENCE AGAINST WOMEN 511, 540 (2001) ("[E]xperiencing some of the same manipulations during trial that an abuser used during the abuse may result in a second victimization for battered women . . .").

42. *Id.*

43. Jason B. Whiting, Megan Oka & Stephen T. Fife, *Appraisal Distortions and Intimate Partner Violence: Gender, Power, and Interaction*, 38 J. MARITAL & FAMILY THERAPY 133, 136 (2012).

44. See STEPHEN LUBET, MODERN TRIAL ADVOCACY: ANALYSIS & PRACTICE 78 (3rd ed. 2013) ("Discredit the witness. Can the witness be shown to be biased or interested in the outcome of the case? Does the witness have a reason to stretch, misrepresent, or fabricate the testimony? Has the witness been untruthful in the past? Can it be shown that the witness is otherwise unworthy of belief?").

45. *See id.* at 109.

46. See DEP'T OF HOMELAND SEC., U VISA LAW ENFORCEMENT CERTIFICATION RESOURCE GUIDE 8, https://www.dhs.gov/xlibrary/assets/dhs_u_visa_certification_guide.pdf ("DHS does not endorse or recommend any particular practice, as the certifying agency has the sole authority on the policies and procedures it will use in signing law enforcement certifications.").

47. *See, e.g.*, L.A. CTY. DIST. ATT'Y, "U" VISA CERTIFICATION SPECIAL DIRECTIVE 10-08, 4 (Dec. 9, 2010), <http://da.lacounty.gov/sites/default/files/pdf/uVisa%20SD10-08.pdf>; SAN MATEO CTY. DIST. ATT'Y, U VISA REQUEST INFORMATION, <https://da.smcgov.org/sites/da.smcgov.org/files/SMC-U-Visa-Form-I-918.pdf>; *Charlotte-Mecklenburg Police Department U Visa Law Enforcement Certification Request*, CHARLOTTE, N.C. (Jan. 1, 2016), <http://charlottenc.gov/CMPD/Organization/Pages/SupportSvcs/U-VisaApplication.aspx> (restricting U visa certifications to crimes for which no arrest was made—if an arrest was made, the request is transferred to the District Attorney's Office—and crimes committed in the last five years, with exceptions for certain

upon themselves to deny certifications based on lack of prosecution, a lack of substantial mental or physical abuse, or even the victim's criminal record.⁴⁸ This results in a double-adjudication process, which makes it especially difficult for victims to receive U visas, and forces victims to be even more beholden to law enforcement and particularly vulnerable to fraud accusations.⁴⁹

II. IS THE U VISA AN "INVITATION TO FRAUD"?⁵⁰

Outside of the criminal justice system, some conservative politicians also believe that the U visa program is too vulnerable to fraud. In the final weeks of the Obama administration, the chairmen of the Senate and House Judiciary Committee sent a letter to DHS Secretary Jeh Johnson requesting information and data pertaining to U visa fraud.⁵¹ To support a claim that U visa fraud is increasing and "leaving legitimate victims in the shadows,"⁵² the letter cites a 2016 federal indictment of eleven individuals in Mississippi, five of whom pled guilty to having bribed a police officer to fabricate police reports for their U visa applications.⁵³ The letter further cites "whistleblower reports" that law enforcement officials improperly or falsely certifying U visa forms in exchange for bribes are a "common occurrence."⁵⁴

Only a few years earlier, another Republican congressman claimed "[r]ampant fraud"⁵⁵ in the U visa program to support an anti-U-visa bill. The U Visa Reform Act of 2013 proposed to limit U visas for undocumented victims of crime by removing the path to legal permanent residence.⁵⁶ Furthermore, the bill would have prohibited applicants from including certain family members, known as "derivative

crimes such as domestic violence); Fred Clasen-Kelly, *Gaston Prosecutor Denies Aid to Latino Victims*, THE CHARLOTTE OBSERVER (May 8, 2015), <http://www.charlotteobserver.com/news/local/article20464203.html> (North Carolina prosecutor refusing to sign certifications for Latino-on-Latino crimes); JEAN ABREU ET AL., THE POLITICAL GEOGRAPHY OF THE U VISA: ELIGIBILITY AS A MATTER OF LOCALE 17–19, <http://www.law.unc.edu/documents/clinicalprograms/uvisa/fullreport.pdf> [hereinafter THE POLITICAL GEOGRAPHY OF THE U VISA] (describing several police departments' blanket policies of refusing to sign certifications).

48. See generally, THE POLITICAL GEOGRAPHY OF THE U VISA, *supra* note 47.

49. If certifying agencies feel empowered to determine the victim's eligibility beyond what is required by DHS, they may also feel empowered to suspect and investigate victims of committing fraud.

50. Kirby, *supra* note 1 (quoting Ira Mehlman, a spokesman for the right-wing Federation for American Immigration Reform).

51. Letter from Sen. Chuck Grassley, et al. to Jeh Johnson, Sec'y. of Dep't of Homeland Security (Dec. 20, 2016), <http://www.grassley.senate.gov/sites/default/files/judiciary/upload/2016-12-20%20CEG%2C%20Goodlatte%20to%20DHS%20-%20U%20Visa%20Management.pdf>.

52. *Id.* at 1–2.

53. *Id.*; *Twelve Defendants Plead Guilty to Marriage and Visa Immigration Fraud*, U.S. DEP'T OF JUSTICE (Oct. 25, 2016), <https://www.justice.gov/usao-sdms/pr/twelve-defendants-plead-guilty-marriage-and-visa-immigration-fraud>. The twelve defendants referenced in the title include one who was only charged with marriage fraud, four who have pled not guilty and are awaiting trial as of this writing, and the immigration attorney and police officer who conspired to falsify the documents, which leaves five would-be U visa applicants who have plead guilty.

54. Letter from Sen. Chuck Grassley, *supra* note 51.

55. U.S. Congressman Diane Black, *Black Introduces U Visa Reform Act* (Feb. 5, 2013) <https://black.house.gov/press-release/black-introduces-u-visa-reform-act>.

56. U Visa Reform Act, H.R. 463, 113th Cong. (2013).

applicants,⁵⁷ in the application to supposedly “reduc[e] chain migration.”⁵⁸ Diane Black (R-Tenn.), who proposed the bill in the House of Representatives, sarcastically stated that “it is not good immigration policy to staple green cards to police reports for those in the country illegally.”⁵⁹ The bill eventually failed, but the sentiment that U visa applicants fabricate crimes or are otherwise deceptive persists.

Although the original U visa bill passed with broad bipartisan support,⁶⁰ some opponents expressed similar concerns for fraud back in 1999. In congressional hearings to pass BIWPA and VAWA 2000, Representative Lamar Smith (R-Tex.) opposed the bill partly due to concern for fraud, pointing out that even immigrants with criminal records could qualify if they “simply . . . claim to have been abused.”⁶¹ Smith warned that the U visa could “open up our immigration system to widespread fraud” as undocumented immigrants “learn that the way to defeat our immigration laws is to claim to be battered.”⁶² A former spokesman for the former Immigration and Naturalization Service (INS) echoed Smith’s concern when he testified at the hearing that because the adjudications would only be based on written affidavits, the U visa was a “recipe for fraud.”⁶³

Contrary to Representative Black’s gross oversimplification of “stapl[ing] green cards to police reports,”⁶⁴ the U visa petition process is vastly longer and more onerous than this. There are several eligibility requirements for U visas beyond the police report.⁶⁵ Only after the victim has reported the crime, cooperated with law enforcement—or the prosecution, depending on the agency’s policy—and obtained a signed certification, can the victim compile the necessary documents to submit to USCIS.⁶⁶ The victim’s access to a certification may depend on whether they live in a U visa friendly locality.⁶⁷ The U visa regulations require a signed statement from the applicant “describing the facts of the victimization,” as well as proper completion of several forms.⁶⁸ Additionally, the regulations invite applicants to submit “any additional evidence” that proves their eligibility, such as medical documents, a

57. *Id.* U visa applicants can include spouses, children and sometimes parents and siblings as derivative applicants, subject to age restrictions. Derivative applicants receive the same benefits as principal U visa holders, including the path to permanent residency and citizenship. 8 U.S.C. § 1101(a)(15)(U)(ii); 8 C.F.R. § 214(a)(10).

58. U.S. Congressman Diane Black, *Black Introduces U Visa Reform Act*, *supra* note 55.

59. U Visa Reform Act, H.R. 463, 113th Cong. (2013); U.S. Congressman Diane Black, *Black Introduces U Visa Reform Act*, *supra* note 55.

60. Olivares, *supra* note 20, at 249.

61. BIWPA Hearing, *supra* note 24, at 62 (statement of Rep. Lamar Smith (R-Tex.)).

62. *Id.* at 60.

63. BIWPA Hearing, *supra* note 24, at 107 (statement of Dwayne “Duke” Austin, former INS Senior Spokesman).

64. U.S. Congressman Diane Black, *Black Introduces U Visa Reform Act*, *supra* note 55.

65. In addition to proving victimhood through a police report, U visa applicants must also prove that they suffered “substantial physical or mental abuse,” and that they have been or are likely to be helpful to law enforcement or prosecutors in the investigation or prosecution of the crime. 8 U.S.C. § 1101(a)(15)(U).

66. See 8 CFR § 214.14(c)(2)(i) (requiring U visa certification signed by law enforcement or other “certifying official” establishing initial evidence of victim helpfulness).

67. See THE POLITICAL GEOGRAPHY OF THE U VISA, *supra* note 47, at 220 (finding that arbitrary certification policies in many localities can block victims’ access to U visas, which the author calls “geographical roulette”).

68. See 8 CFR § 214.14(c)(2).

psychological evaluation, court documents, and the police report.⁶⁹

With all of these requirements, the U visa just might be the slowest existing path to citizenship—currently over fifteen years long. Once the U visa petition is pending, the current processing time with USCIS is approximately two and a half years.⁷⁰ However, due to the high volume of U visa applications, in 2012, the Department of State reached the annual visa quota of 10,000 U visas, which resulted in a massive backlog in U visa adjudications.⁷¹ After the two and a half year wait, the provisionally approved are then placed on a six-to-seven year-long “waiting list” for their U visa.⁷² With a provisional approval, a U visa applicant receives deferred action⁷³ and may become eligible for a work permit and certain public benefits, but remains in legal limbo.⁷⁴ The U visa holder must maintain this provisionally approved status for three years before they are eligible to apply for legal permanent residency,⁷⁵ also known as a “green card.” Thus, the true time lapse between police report and green card is over eleven years—at least two and a half years for provisional approval, six to seven years of visa backlog, and three years of holding U visa status before applying for permanent residency. The path could be much longer than eleven years if the victim does not apply for a U visa shortly after she files the police report. After five years as a lawful permanent resident, the former U visa holder finally becomes eligible for naturalization,⁷⁶ which brings the total time from crime to citizenship to at least sixteen years.

69. Immigrant Legal Resource Center, *Getting a U Visa: Legal Help for Victims of Crime* (Mar. 2012), http://www.ilrc.org/files/documents/proseuvisamanual_english.pdf.

70. The USCIS Vermont Service Center, which is responsible for nationwide adjudication of U visas and VAWA petitions, was adjudicating U visa petitions from June 9, 2014, 2014 when the processing times were updated on December 31, 2016, an approximately 2.5-year-wait. *USCIS Processing Time Information for the Vermont Service Center*, U.S. CITIZENSHIP & IMMIGRATION SERVS., <https://egov.uscis.gov/cris/processTimesDisplay.do> (select “VSC - Vermont Service Center” from the dropdown menu next to “Service Center”; then click on “Service Center Processing Dates”) (last visited Apr. 9, 2017).

71. Kate Linthicum, *Safety for Immigrant Victims Put on Hold by U Visa Delay*, L.A. TIMES (Feb. 1, 2015), <http://www.latimes.com/local/california/la-me-u-visa-20150202-story.html>.

72. 8 C.F.R. 214.14(d)(2) (“All eligible petitioners who, due solely to the cap, are not granted U-1 nonimmigrant status must be placed on a waiting list and receive written notice of such placement”); see Liz Robbins, *Immigrant Crime Victims Seeking Special Visas Find a Tough Path*, N.Y. TIMES (Mar. 8, 2016), https://www.nytimes.com/2016/03/09/nyregion/immigrant-crime-victims-seeking-special-visas-find-a-tough-path.html?_r=0 (estimating a six-to-seven year wait list based on 2016 backlog).

73. Deferred action is “an act of administrative convenience to the government which gives some cases lower priority [for deportation].” 8 C.F.R. § 274a.12(c)(14). A form of prosecutorial discretion, it does not confer any immigration status, but may allow for temporary employment authorization. Memorandum from Janet Napolitano, Sec’y of Homeland Sec., for David V. Aguilar et al., *Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the U.S. as Children* (June 15, 2012), <https://www.dhs.gov/xlibrary/assets/s1-exercising-prosecutorial-discretion-individuals-who-came-to-us-as-children.pdf>.

74. See 8 C.F.R. § 274a.12(c)(14) (An individual granted deferred action is eligible for employment authorization if they “establish an economic necessity for employment.”); CECELIA F. LEVIN, ASISTA, PRACTICE ADVISORY FOR U VISA CONDITIONAL APPROVALS 1 (2015), http://www.asistahelp.org/documents/news/Conditional_Approval_Advisory_FINAL_1A3257835074A.pdf (explaining that the provisionally approved can apply for employment authorization but the time waiting for a U visa will not count toward the three years statutorily required to apply for lawful permanent residency).

75. INA § 245(m); 8 CFR § 245.24(b)(3); see Robbins, *supra* note 72 (estimating a six-to-seven year wait list based on 2016 backlog).

76. INA § 316(a).

Despite conservative politicians' claims over the years that the U visa is an "invitation to fraud," in reality the U visa is too slow and onerous a process to be an invitation to anything. Applicants must not only prove their eligibility but they must also persevere through many years of bureaucratic red tape just to get on the path to legal permanent residency.

III. WHY ISN'T THE DEPARTMENT OF HOMELAND SECURITY WORRIED ABOUT U VISA FRAUD?

If the road to a green card by U visa is over a decade long, it is unlikely that many undocumented immigrants in the U.S. are fabricating crimes and filing false police reports to acquire U visas. Many undocumented immigrants are too afraid to report bona fide crimes to the authorities, let alone defraud law enforcement officials and the federal government. Furthermore, the U visa was created as an incentive to report crimes; it is not fraudulent for undocumented immigrants to report crimes of which they are victims in order to obtain U visas. Since those who are crying fraud are players in the criminal justice system and politicians who have a clear agenda and not the Department of Homeland Security (DHS), it is likely that U visa fraud is not a major problem, or even a problem at all.

Many undocumented immigrants are already too fearful of the authorities to report any crime. Congress recognized that undocumented immigrant victims of crime face unique barriers to reporting crimes to law enforcement, mostly driven by a fear of deportation.⁷⁷ The U visa was intended to show crime victims without legal status that law enforcement does not have anything to gain from deporting them, but is there to help them. The Victims of Trafficking and Violence Protection Act of 2000, which created the U visa after BIWPA established the purpose and requirements,⁷⁸ described the U visa's dual purpose: first, to "strengthen the ability of law enforcement agencies to detect, investigate, and prosecute cases of domestic violence" and certain other crimes; second, to "facilitate the reporting of crimes to law enforcement" by undocumented immigrants.⁷⁹

The U visa does not regulate a victim's intent in filing a police report, as long as there was a bona fide crime. To illustrate this point, there is no statute of limitations to crime reporting for U visas.⁸⁰ That is, a victim can file a police report after they find out about the U visa, even years after the crime occurred, or they can file a U visa application at any time after they filed a police report, even ten or twenty years later.⁸¹ This flexibility allows for the victim to report a crime with knowledge that it could help them acquire U visa, which suggests that DHS is not particularly worried about incentivizing false police reports.

77. *See id.*

78. Olivares, *supra* note 20, at 248 n.72.

79. Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, 114 Stat. 1534 (2000); Violence Against Women Act of 2000 § 1513.

80. *See DEP'T OF HOMELAND SEC.*, *supra* note 46, at 10. ("There is no statute of limitations regarding the time frame in which the crime must have occurred.")

81. Not all crime-based nonimmigrant visas are so flexible and victim-centered. For example, the S visa for police informants is specifically intended to allow the informant to stay in the U.S. while they are needed as an informant or witness and not beyond the scope of the prosecution. Kagan, *supra* note 10, at 924-25.

DHS is otherwise very determined to detect immigration fraud with various of its enforcement arms tasked with rooting it out.⁸² For example, the U.S. Citizenship and Immigration Services, the agency that adjudicates U visas and many other immigration benefits, spent over \$52 million on fraud prevention in fiscal year 2014 and conducted over 30,000 fraud investigations.⁸³ DHS's main enforcement arm, Immigration and Customs Enforcement (ICE), also investigates all types of immigration benefits fraud, such as marriage fraud,⁸⁴ student visa fraud,⁸⁵ document fraud,⁸⁶ and asylum fraud.⁸⁷ While some forms of immigration fraud that ICE investigates are large-scale conspiracy operations, of particular focus for ICE is small-scale marriage fraud which is often committed by only the couple involved.⁸⁸ It is not clear if ICE or USCIS devotes any particular section to U visa fraud.⁸⁹ However, the aforementioned Mississippi police bribery case was investigated along with a marriage fraud conspiracy by Homeland Security Investigations, one of the fraud detection arms of ICE.⁹⁰

The federal government has been fighting against immigration marriage fraud since 1986, with the passage of the Immigration Marriage Fraud Amendments.⁹¹ These amendments created a requirement for immigrants who receive conditional residency through marriage to demonstrate the continued bona fides of their marriage two years later to remove the conditions on their green card.⁹² ICE launched a

82. The USCIS Office of Fraud Detection and National Security refers potential fraud to the Immigration and Customs Enforcement, Homeland Security Investigations, and Identity and Benefit Fraud unit. OFFICE OF THE INSPECTOR GEN., DEP'T OF HOMELAND SEC., REVIEW OF THE USCIS BENEFIT FRAUD REFERRAL PROGRAM 5–8 (Apr. 2008), https://www.oig.dhs.gov/assets/Mgmt/OIGr_08-09_Apr08.pdf.

83. DEP'T OF HOMELAND SEC., BUDGET-IN-BRIEF FISCAL YEAR 2016, at 95, 98 (2016), https://www.dhs.gov/sites/default/files/publications/FY_2016_DHS_Budget_in_Brief.pdf.

84. *Imposter Attorney, Two others Charged in Marriage Fraud Scheme*, U.S. IMMIGRATION & CUSTOMS ENF'T (Sept. 10, 2015), <https://www.ice.gov/news/releases/imposter-attorney-2-others-charged-marriage-fraud-scheme>.

85. *15 Chinese Nationals Charged in Passport, Test-Taking Fraud Schemes*, U.S. IMMIGRATION & CUSTOMS ENF'T (May 28, 2015), <https://www.ice.gov/news/releases/15-chinese-nationals-charged-passport-test-taking-fraud-schemes>.

86. *Guatemalan Authorities Arrest Head of Fraudulent Document Ring, Seize 400 Altered Passports*, U.S. IMMIGRATION & CUSTOMS ENF'T (Apr. 10, 2015), <https://www.ice.gov/news/releases/ice-guatemalan-authorities-arrest-head-fraudulent-document-ring-seize-400-altered>.

87. *SoCal Immigration Consultants Sentenced to Prison in Scheme That Filed Bogus Asylum Applications for Hundreds of Chinese Nationals*, U.S. IMMIGRATION & CUSTOMS ENF'T (May 6, 2014), <https://www.ice.gov/news/releases/socal-immigration-consultants-sentenced-prison-scheme-filed-bogus-asylum-applications>.

88. *ICE Leading Nationwide Campaign to Stop Marriage Fraud*, U.S. IMMIGRATION & CUSTOMS ENF'T (Apr. 2, 2014), <https://www.ice.gov/news/releases/top-story-ice-leaing-nationwide-campaign-stop-marriage-fraud>.

89. This matter is also unclear to the Congressional Judiciary Committees. See Letter from Sen. Chuck Grassley et al., to Jeh Johnson, Sec'y of the Dep't of Homeland Sec. (Dec. 20, 2016), <http://www.grassley.senate.gov/sites/default/files/judiciary/upload/2016-12-20%20CEG%2C%20Goodlatte%20to%20DHS%20-%20U%20Visa%20Management.pdf>. (inquiring “how many cases of U visa fraud were identified . . . and by which component in DHS was the fraud identified?”).

90. *Twelve Defendants Plead Guilty to Marriage and Visa Immigration Fraud*, U.S. DEP'T OF JUSTICE (Oct. 25, 2016), <https://www.justice.gov/usao-sdms/pr/twelve-defendants-plead-guilty-marriage-and-visa-immigration-fraud>.

91. Lee Ann Wang, “Of the Law, but Not Its Spirit”: Immigration Marriage Fraud as Legal Fiction and Violence Against Asian American Women, 3 U.C. IRVINE L. REV. 1221, 1231–32, n.35 (2013).

92. *Id.*

nationwide campaign in 2014 to quell marriage fraud.⁹³ As of this writing, ICE has yet to publish any articles in their news archives relating to U visa fraud. Nor is there any precedential or non-precedential case law from the Administrative Appeals Office, the Board of Immigration Appeals, or Federal circuit courts regarding U visa fraud.⁹⁴ U visa fraud is distinct from marriage fraud because marriage fraud is a problem that DHS reports and recognizes,⁹⁵ while only the criminal justice system and conservative politicians report U visa fraud.⁹⁶

One reason why DHS is not worried about policing U visa fraud may be out of trust in the certification requirement.⁹⁷ Although it was not explicitly created as a fraud prevention safeguard, the certification serves to discourage fraudulent claims by imposing an additional burden of production on the applicant beyond the statutory requirements. The certification requires the applicant to prove that they filed a bona fide police report.⁹⁸ It also requires the applicant to interface with an authority who must certify that the applicant was a victim of a qualifying crime, by *any credible evidence* (and not necessarily that the perpetrator is guilty beyond a reasonable doubt).⁹⁹ In this process the applicant must reveal their undocumented status to a police officer, which under the Trump administration places them at risk of deportation.¹⁰⁰ Although the standard of proof for the certification is low, the burden on the applicant is high, likely discouraging many inchoate temptations to fraud.

Additionally, U visa certifiers serve to filter out fraudulent claims (as well as many more bona fide claims). Certifiers are the first adjudicators of the victimhood requirement: that the applicant, by any credible evidence, was a victim of a qualifying crime.¹⁰¹ In reality, many certifiers misunderstand this requirement and impose a more complicated inquiry. A 2013 study by the University of North Carolina School of Law examined 4,447 certification denials reported by 772 legal service providers in 49 states. Approximately thirty percent of these denials could be attributed to overzealous scrutiny of the victimhood requirement—the explanations ranging from “the criminal was not arrested,” to “the criminal was not successfully prosecuted,” to “the victim’s case was not closed.”¹⁰² This could explain why USCIS does not report fraud; maybe the certification is working as a fraud prevention measure, if overcorrecting for it. However, there are some certifying agencies that have a policy of routinely signing U

93. *ICE Leading Nationwide Campaign to Stop Marriage Fraud*, *supra* note 88.

94. Admittedly, the U visa is fairly new to expect such case law, so perhaps this ought to be re-examined in five or ten years. Promulgated in 2000, the Department of Homeland Security did not enact U visa rules to initiate the program until 2007. Olivares, *supra* note 20, at 248 n.72.

95. *See, e.g., ICE Leading Nationwide Campaign to Stop Marriage Fraud*, *supra* note 88.

96. *See, e.g., Smiley*, *supra* note 1; *Black Introduces U Visa Reform Act*, *supra* note 55.

97. *See* 8 C.F.R. 214.14(c)(2)(i) (certification requirement). The Federal Register analysis accompanying the rule states “the certifying agency is in the best position [as compared with USCIS] to verify certain factual information. Office of the Att’y Gen., New Classification for Victims of Criminal Activity; Eligibility for “U” Nonimmigrant Status; Interim Rule, 72 Fed. Reg. 179, 53024 (Sept. 17, 2007) (codified at 8 C.F.R. 214.14).

98. *See* DEP’T OF HOMELAND SEC., *supra* note 46, at 15 (“The law enforcement certification also acts as a check against fraud and abuse, as the certification is required in order to be eligible for a U visa.”).

99. *See* INA § 214(p)(4).

100. *See infra* pp. 28–29.

101. *See* THE POLITICAL GEOGRAPHY OF THE U VISA, *supra* note 47, at 13–14.

102. *See id.*; DEP’T OF HOMELAND SEC., *supra* note 46, at 11, (“There is no requirement that an arrest, prosecution, or conviction occur for someone to be eligible for a U visa.”).

visa certifications for nearly every victim who meets the statutory helpfulness and victimhood requirements without screening for more.¹⁰³ If immigrants are filing fraudulent U visa applications on a large scale as opponents claim, then these fraudulent applications would be passed on through the certification process at these agencies and USCIS would be alerted to the supposedly large fraud problem. However, this does not appear to be the case since, as mentioned above, there is a noticeable lack of concern at DHS for U visa fraud.

Beyond the certification, USCIS has imposed additional regulations to prevent U visa fraud. For instance, the U visa cannot become a tool for undocumented abusers because the perpetrator of the crime is unable to benefit from the U visa.¹⁰⁴ Additionally, USCIS may deny the U visa application if the applicant does not prove that they were a victim of a qualifying crime.¹⁰⁵ USCIS reserves the right to revoke the U visa for fraud at any time, even at the stage when the victim applies for permanent residency three years later.¹⁰⁶ Despite accusations of “rampant fraud,” DHS seems to believe it is able to adequately prevent fraud.¹⁰⁷

Congress passed the U visa legislation with the understanding that U visas are an incentive to report crime. The policy goal of the U visa was not to reward each abused undocumented immigrant for reporting crime, but its goal is to promote trust in law enforcement from undocumented immigrants to better protect and serve the community at large.¹⁰⁸ When the U visa was promulgated in 2000, Congress had already recognized the barriers undocumented individuals, and women in particular, face when reporting crimes.¹⁰⁹ Since 2008, when federal immigration enforcement policies began to empower local police to identify undocumented immigrants for deportation, undocumented communities became even more fearful of law enforcement.¹¹⁰ Now that distrust in law enforcement and immigration authorities is at an all-time high under the Trump administration, the purpose of the U visa is more important than ever.

Due to the “Secure Communities” program—formerly known as the Priority Enforcement Program under the Obama administration—undocumented people rightfully conflate local police with federal immigration enforcement, and have even

103. See THE POLITICAL GEOGRAPHY OF THE U VISA, *supra* note 47.

104. See 8 C.F.R. 214.14(a)(14)(iii) (“A person who is culpable for the qualifying criminal activity being investigated or prosecuted is excluded from being recognized as a victim of qualifying criminal activity.”).

105. 8 C.F.R. §214.14(b)(2)(2012).

106. 8 C.F.R. §214.14(h)(2)(i)(C)(2012); DEP’T OF HOMELAND SEC., *supra* note 46, at 15.

107. See Kirby, *supra* note 1 (USCIS spokesman emphasizing the inherent safeguards over concerns of fraud); see BIWPA Hearing, *supra* note 24 (INS commissioner Barbara Strack testifying, on legislation that would become the U visa, that she has no concerns about fraud).

108. See Victims of Trafficking Prevention Act, Pub. L. No. 106-386, 114 Stat. 1534 §1513(a)(2)(B) (2000) (codified at 22 USCA § 7101) (Enacted to “facilitate the reporting of crimes to law enforcement” by undocumented immigrants.).

109. Victims of Trafficking Prevention Act, Pub. L. No. 106-386, 114 Stat. 1534 § 1502(b)(1) (2000) (“to remove barriers to criminal prosecutions of persons who commit acts of battery or extreme cruelty against immigrant women and children”).

110. US: ‘Immigrants Afraid to Call 911’, HUMAN RIGHTS WATCH (May 14, 2014), <http://www.hrw.org/news/2014/05/14/us-immigrants-afraid-call-911>; see also Radna Vishnuvajjala, *Insecure Communities: How an Immigration Enforcement Program Encourages Battered Women to Stay Silent*, 32 B.C.J.L. & Soc. Just. 185, 186 (2012).

more cause to be afraid to report crimes to the police.¹¹¹ President Trump's intent to re-deputize local police as agents of immigration enforcement¹¹² has heightened distrust between immigrant communities and law enforcement, working against any trust established by the U visa.¹¹³ Shortly after the January 2017 announcement of the Executive Order, ICE agents in El Paso, Texas arrested an undocumented trans woman outside of the courthouse where she had just obtained a restraining order against her abuser.¹¹⁴ Advocates fear that this arrest has set a "dangerous precedent" that could significantly chill undocumented crime reporting.¹¹⁵

Even before the Trump administration, undocumented victims were afraid to report crimes. A 2013 study found that seventy percent of undocumented immigrants "are less likely to contact law enforcement authorities if they were victims of a crime" than other victims because they are afraid the police will inquire about their immigration status.¹¹⁶ This fear is well-founded. The arrest of the domestic violence victim in El Paso was not an isolated incident, nor was it unique to the Trump administration. In 2010, when Maria Bolaños, an undocumented Salvadoran immigrant, tried to report domestic violence to Maryland local police, she was charged with illegally selling a ten-dollar phone card and placed in removal proceedings.¹¹⁷ Although the charge was ultimately dropped, the removal proceedings were not.¹¹⁸ Fear of reporting crimes extends beyond undocumented individuals. Even victims who are U.S. citizen members of mixed status families may be reluctant to report crimes to protect their undocumented parents or siblings.¹¹⁹

Fear to report abuse in immigrant communities may be especially pronounced in domestic violence situations. First, the dynamics of abusive relationships may cause a victim to protect their abuser from the criminal justice system, and especially from deportation. This impulse to protect may also be a practical consideration, as the abuser may be the sole source of financial support for the victim, and the abuser's incarceration or deportation could leave the victim financially vulnerable or a single parent.¹²⁰ Second, immigration status can increase the power differential between victim and abuser. An abuser with legal status can leverage an undocumented victim's

111. *Id.*

112. Exec. Order 13768, Enhancing Public Safety in the Interior of the United States, 82 Fed. Reg. 8799 (Jan. 25, 2017) (rescinding the Priority Enforcement Program and reinstating Secure Communities Program).

113. Beth Fertig, *Here's Why Undocumented Immigrants May (Still) Be Afraid to Report Crime*, WNYC (Feb. 21, 2017), <http://www.wnyc.org/story/why-immigrant-victims-may-be-afraid-report-crime-despite-federal-program-help/>.

114. Mariana Alfaro, *Critics: El Paso Arrest Could Deter Immigrants from Reporting Crimes*, TEX. TRIBUNE (Feb. 16, 2017), <https://www.texastribune.org/2017/02/16/arrest-alleged-abuse-victim-could-deter-immigrants-reporting-crimes/>.

115. *Id.*

116. NIK THEODORE ET AL., INSECURE COMMUNITIES: LATINO PERCEPTIONS OF POLICE INVOLVEMENT IN LAW ENFORCEMENT (May 2013), http://www.policylink.org/sites/default/files/insecure_communities_report_final.pdf.

117. Shankar Vedantum, *Destined for Deportation?*, WASH. POST (Nov. 2, 2010), <http://www.washingtonpost.com/wp-dyn/content/article/2010/11/01/AR2010110106661.html>.

118. *Id.*

119. Kagan, *supra* note 10, at 917.

120. Michelle Decasas, *Protecting Hispanic Women: The Inadequacy of Domestic Violence Policy*, 24 CHICANO-LATINO L. REV. 56, 72-73 (2003).

immigration status against them to discourage reporting the abuse.¹²¹ If the abuser speaks English more proficiently than the victim, the abuser may also be able to evade arrest by speaking to arriving officers in English, or even accusing the victim of domestic violence of another crime before the victim has a chance to tell officers what happened.¹²² Given this unique dynamic between abuser and victim in domestic settings, undocumented immigrants are even less likely to report domestic violence crimes to authorities.

IV. IMMIGRATION FRAUD AS LEGAL FICTION

Given that the U visa is an incentive to report crimes, it is not fair to presume fraud simply because the program is serving its purpose. Furthermore, as a practical matter, the presumption that the U visa program would incentivize undocumented immigrants to stage or fabricate crimes on any significant scale is a rather outlandish one. As I will discuss in this section, fabricating crimes to get a U visa would be a formidable undertaking given the distrust of law enforcement, the risk of getting caught, and the inevitability of sacrificing an innocent family or other community member to the criminal justice system. For these reasons, I will show that U visa immigration fraud is a legal fiction, in that it does not contemplate a possibility for dual intent. As a result, U visa applications are held to too high a standard that is not supported by the law.

Those who worry about U visa fraud seem to believe that when reporting crime, victims should be required to have an intent that is not tainted by a desire for an immigration benefit.¹²³ Lee Ann Wang writes about a similar concept for marriage-based immigration petitions and argues that immigration marriage fraud is a legal fiction.¹²⁴ The law requires that they have only the intent to marry for love, but in reality many “good-faith” couples decide to get married partly for the immigration benefit.¹²⁵ Wang argues that conceptualizing marriage as a contractual agreement that conveys a direct and enticing immigration benefit makes it impossible for green card applicants to honestly claim that they married only for love.¹²⁶ Yet the immigration law requires them to present as such.¹²⁷ Indeed, as the Marriage Equality movement shows,¹²⁸ modern marriage is often a mixed motive agreement. Even outside of the immigration context, people marry for reasons other than love: the right to adopt, the right to inherit property from their deceased spouse, and the right to tax benefits, to

121. Vishnuvajjala, *supra* note 110, at 187.

122. *Id.* at 194.

123. See, e.g., Smiley, *supra* note 1 (San Francisco public defender stating about U visa applicant witnesses: “They’re motivated more by the immigration benefit they can receive than the actual truth of what really transpired”); BIWPA Hearing, *supra* note 24 (Congressman Conyers questioning INS commissioner at subcommittee hearing: “Now, the main question hanging over the [U visa] bill is simply this: Is this going to open the door for everybody to make excuses that my spouse battered me and beat me up and so now I want to become a citizen? That is the main problem here.”).

124. Wang, *supra* note 91, at 1224.

125. *Id.*

126. *Id.*

127. *Id.*

128. The plaintiffs in last year’s landmark decision for marriage equality were several same-sex couples who had been denied rights, such as adoption, and being listed on the spouse’s death certificate under state laws. Those state laws only afforded such rights to federally-recognized married couples. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2588 (2015).

name a few.¹²⁹

Similarly, critics of the U visa seem to require that a bona fide victim report the crime in a vacuum—i.e., without knowledge of or desire for a U visa. Yet some police departments, such as the San Francisco Police Department, have a policy of informing perceived undocumented victims about the U visa at the scene of a crime.¹³⁰ Nevertheless, if knowledge of U visa relief incentivizes a victim to cooperate and report a crime, this may taint her credibility in court and in getting a certification. Still, the U visa is undoubtedly an incentive for undocumented immigrants to report crimes and cooperate with law enforcement. Just as it is acceptable for an undocumented immigrant to have mixed motives to marry—for love but also for immigration status—it is also acceptable for the U visa applicant to have mixed motives to report a crime—to seek justice and protection from law enforcement but also for immigration status. The U visa applicant should not be required to close her eyes to a possible immigration benefit when she reports her abuser to the police. If the U visa incentivizes an undocumented immigrant to report a crime or testify against the perpetrator, this is not equivalent to fabricating crime, nor is it U visa fraud.

Furthermore, immigration law recognizes mixed motives in other domestic violence contexts. The U visa itself was born out of a contradiction in the existing VAWA legislation that created a perverse incentive to marry or remain married to an abuser in order to qualify for a VAWA self-petition.¹³¹ Congress crafted the U visa with hopes of eliminating this perverse incentive. Congress did not view the desire to marry an abuser for immigration benefits as fraud but as the actions of a domestic violence victim desperate to get out of an abusive relationship.

Criminal defense attorneys maintain that the U visa creates an incentive not just to report crimes, but also to embellish or alter the truth.¹³² Of course, criminal defense attorneys also have an incentive to accuse victims of embellishing the truth. Even prosecutors suspect undocumented immigrants of fabricating crimes.¹³³ In 2013, Josselin Yuliana Rodas, an undocumented woman residing in Marin County, California, was accused of filing a false police report for the purpose of applying for a U visa.¹³⁴ Rodas was robbed while putting groceries in her car, and sustained a welt and cut to her head.¹³⁵ During the criminal investigation, the police “developed information that the story might be false,” and turned the accusing finger around at Rodas. The police arrested her for committing a robbery and filing a false police report, as they suspected she had staged it.¹³⁶ A few months later the district attorney dropped the charges for lack of evidence, but not before ICE placed Rodas into federal immigration custody—a common practice under the Priority Enforcement Program

129. *See id.*

130. *See* S.F. POLICE DEP’T, U-VISA PROTOCOL FOR ASSISTING IMMIGRANT VICTIMS OF CRIME (Feb. 14, 2011), <http://library.niwap.org/wp-content/uploads/San-Francisco-11-031-U-visa-protocol.pdf>.

131. Olivares, *supra* note 20, at 243.

132. *See* Smiley, *supra* note 1. *See, e.g.,* Commonwealth v. Sealy, 6 N.E.3d 1052, 1058 (Mass. 2014) (holding that a rape victim may be cross-examined about her U visa application).

133. On the other hand, a prosecutor in San Francisco has sworn that he has never seen a false report for a U visa. Smiley, *supra* note 1.

134. Gary Klien, *San Rafael Women Accused of Staging Robbery Against Herself to Obtain Visa*, MARIN INDEPENDENT J. (Mar. 22, 2013) <http://www.marinij.com/article/ZZ/20130322/NEWS/130329037>.

135. *Id.*

136. *Id.*

regime.¹³⁷ Rodas also lost custody of her baby while she was incarcerated.¹³⁸ The media did not report on her ultimate fate, but Rodas may have been deported.

Reports of undocumented immigrants like Rodas fabricating crimes are over-publicized by conservative media with incendiary headlines like “Are Illegal Immigrants Faking Crimes to Stay in the Country?” and “Illegals Yell ‘Crime,’ Get Status.”¹³⁹ Dozens of conservative websites denounce Oscar Beltran, the man who allegedly staged a robbery in 2014 to qualify for a U visa in Charlotte, North Carolina.¹⁴⁰ Police arrested Beltran for “delaying a police investigation,” but it is unclear what evidence the police had against him and whether he was ever convicted.

The general conservative rhetoric regarding the U visa is an expression of outrage at how easy it could be to gain legal status, or worse, to commit fraud.¹⁴¹ Conservative media and politicians ignore the barriers undocumented immigrants face in reporting crimes and find it likely that an undocumented person would stage or fabricate a crime, accuse someone of that crime, and then ask law enforcement to protect them from it.¹⁴² Not only does the right wing media find this scenario tempting to undocumented immigrants, but it also characterizes this scenario as an easy path to legal status or citizenship.¹⁴³ This is ludicrous, especially when viewed in the larger context of the Secure Communities program, in which women, like the women in Maryland and El Paso, Texas, have been placed in removal proceedings for trying to report domestic violence. Furthermore, conservative media and politicians ignore how difficult and long the U visa path is to legal permanent residency.

Professor Andrew Roddin agrees that there is no evidence to suggest that immigrants are staging or fabricating crimes in order to acquire U visas.¹⁴⁴ To investigate the matter, Roddin interviewed a police lieutenant who certifies U visas in New York State.¹⁴⁵ Not only had the lieutenant never seen a fraudulent U visa

137. Gary Klien, *DA Drops Case Against San Rafael Woman Accused of Staging Robbery to Obtain Visa*, MARIN INDEPENDENT J. (Jun. 20, 2013) <http://www.marinij.com/article/zz/20130620/NEWS/130629212>.

138. *Id.* It is unknown at the time of this writing whether Rodas was ultimately deported or able to regain custody of her child.

139. Mark Becker, *Are Illegal Immigrants Faking Crimes to Stay in the Country?*, ATLANTA J.-CONST. (Nov. 11, 2014) <http://www.ajc.com/news/news/national/9-investigates-illegal-immigrants-faking-crimes-st/nh5Gx/>; Kirby, *supra* note 1.

140. Becker, *supra* note 139; *see also*, Kirby, *supra* note 1; Michael Allen, *Undocumented Immigrants Pretend to be Crime Victims to Stay in the U.S.*, OPPOSING VIEWS (Nov. 11, 2014) <http://www.opposingviews.com/i/society/crime/undocumented-immigrants-pretend-be-crime-victims-stay-us-video>; Liz Klimas, *Could This Become a Popular Way Illegal Immigrants Try to Cheat the System to Stay in the United States?*, BLAZE (Nov. 12, 2014) <http://www.theblaze.com/stories/2014/11/12/fake-victims-how-illegal-immigrants-could-stage-crimes-to-obtain-a-special-visa-in-the-u-s/>.

141. Even more moderate conservative media expresses floodgate anxiety about certifying too many U visas. *See, e.g.*, Editorial, *Journal Times Editorial: U visas Serve Greater Good*, J. TIMES (July 8, 2014) http://journaltimes.com/news/opinion/editorial/journal-times-editorial-u-visas-serve-greater-good/article_b94ac4e0-0624-11e4-8d49-0019bb2963f4.html (Racine, Wisconsin news source stating that the U visa “is a tool that should be used sparingly,” and “while you may find yourself indifferent to the fates of people here illegally, such an attitude would disregard the role of law enforcement officers: ‘to protect and serve.’”).

142. *See, e.g.*, Klimas, *supra* note 140 (asking “Could This Become a Popular Way Illegal Immigrants Try to Cheat the System to Stay in the United States?”).

143. *See, e.g.*, Kirby, *supra* note 1 (claiming that “Illegals Yell Crime, Get Status”).

144. Andrew Roddin, *Certified: How the U Visa Petition Prevents Fraud and Promotes Safe Communities*, 12 GEO. J.L. & PUB. POL’Y 805, 816–18 (2014).

145. *Id.*

certification request, but he stated that it would be “‘virtually impossible’ to create one successfully.”¹⁴⁶ Incidentally, the only substantiated incident of U visa fraud I am aware of was executed in conspiracy with a police officer, who fabricated police reports for the applicants.¹⁴⁷

To highlight how implausible fraudulent crime reports are, consider the following remarkable steps an undocumented woman would hypothetically need to take to fraudulently report domestic violence for a U visa. The woman would need to stage a situation in which she could call the police and make it seem likely that her partner or family member abused her. Then, she would need to communicate, despite potential language and education barriers, to police convincingly that she had been a victim of abuse, so that the officer would take her seriously and write a report. Not only would she lie to the police, but she would also frame her partner, spouse, or another member of the community, likely putting them at risk of deportation if they are not a U.S. citizen.¹⁴⁸ If her partner is arrested and charged, she might need to testify in court under penalty of perjury. After all this, the woman would need to convince law enforcement or the prosecutor that her case qualifies for a U visa to get a signed certification. She would need to prepare a credible U visa application, including a fabricated detailed declaration¹⁴⁹ of the events before and after her victimization and substantial harm¹⁵⁰ she faced, and perhaps undergo a psychological evaluation. If DHS believes her claims are valid, the woman would wait approximately 18 months before receiving a work permit.¹⁵¹ If DHS does not believe her story, the woman risks deportation.¹⁵²

V. *BRADY* DISCLOSURES AND THE U VISA

Despite the lack of documented U visa fraud, the adversarial system forces criminal defendants to take advantage of assumptions that the U visa tempts fraud. Accusations of U visa fraud in criminal trials puts the undocumented (or undocumented-appearing) victims further on the defensive in criminal contexts. These accusations also leave them vulnerable to trauma-inducing cross examination that suggests that they fabricated the abuse for immigration benefits. This section will discuss prosecutor policies on the disclosure of a victim’s U visa to defense counsel and call for more direct guidance from the courts on this matter. The most common policy is to disclose U visas liberally to defense counsel. This sort of policy harms U visa applicants because it leaves them more vulnerable to accusations of fraud on the stand, which as discussed in Section I.A., perpetuates the abuser’s violence and gaslighting. A related and often intertwined policy of not signing U visa certifications until the end of the criminal proceedings also harms U visa applicants because it can significantly delay the first step of an already slow and arduous application.

146. *Id.*

147. See *Twelve Defendants Plead Guilty to Marriage and Visa Immigration Fraud*, *supra* note 53 (Mississippi police bribery case).

148. Domestic violence is a ground for removability (deportation) even for legal permanent residents. 8 U.S.C. §1227 (a)(2)(E).

149. 8 C.F.R. § 214.14(c)(2)(iii)

150. 8 C.F.R. § 214.14(c)(2)(ii)

151. See *USCIS Processing Time Information for the Vermont Service Center*, *supra* note 70.

152. 8 C.F.R. § 214.14(i) (“Nothing in this section prohibits USCIS from instituting removal proceedings . . . for misrepresentations of material facts . . .”).

U visas are generally assumed to be exculpatory evidence during criminal proceedings. In other words, the victim's request for a U visa certification from a prosecutor is evidence that may tend to prove the defendant's innocence. Under *Brady v. Maryland*, prosecutors must provide the defense with all "exculpatory" evidence¹⁵³ in discovery, including impeachment evidence that may undermine the witness's credibility.¹⁵⁴ A 2010 survey of five San Francisco Bay Area prosecutors found that all five prosecutors believed they were obligated under *Brady* to disclose to defense counsel the fact that a victim requested a U visa certification.¹⁵⁵ Although it is not known if all prosecutors disclose U visa applications or certifications to the defense, immigration advocates recommend informing U visa applicants that their U visa could be considered exculpatory or impeachment evidence under *Brady*, and maybe used against them in court.¹⁵⁶

Some prosecutors refuse to consider a U visa certification request while the criminal case is pending,¹⁵⁷ perhaps in an attempt to avoid U visa *Brady* disclosure problems altogether.¹⁵⁸ If the prosecution does not know the victim is seeking a U visa until after the case is over, the prosecution would not have to disclose the U visa, and the victim's credibility can remain relatively intact. The Los Angeles County District Attorney's Office (LACDA) has a policy refusing U visa certifications during the pendency of the criminal case, and relatedly, a policy of disclosing U visa certification requests to the defense.¹⁵⁹ Furthermore, it is LACDA policy, "in an abundance of caution," to disclose to the defense a U visa certification for a prior case with the same defendant and victim in a pending case with the same defendant and victim.¹⁶⁰ This means that in all future cases with the same defendant and victim, LACDA will turn over the U visa certification and perhaps the entire U visa application to the defense, leaving the victim vulnerable to aggressive cross examination and potential impeachment for life.

The district attorney's policies studied here fail to represent the paucity of legal authority for *Brady* disclosures of U visas, beyond the general requirement of exculpatory and impeachment evidence. There is no published case law addressing how U visa certifications fit into *Brady*. LACDA relies on an unpublished opinion, *United States v. Mills*, to distinguish post-conviction certification requests from pre-conviction certification requests.¹⁶¹ Based on *Mills*, LACDA states that post-conviction certification requests need not be disclosed to the defense under *Brady*, but pre-conviction requests necessarily must be disclosed.¹⁶² *Mills* does not mention anything about pre-conviction requests, however. In fact, *Mills* is not even a U visa

153. *Brady v. Maryland*, 373 U.S. 83 (1963).

154. *Giglio v. United States*, 405 U.S. 150 (1972) (holding that *Brady* extended to impeachment evidence). *See, e.g., State v. Valle*, 298 P.3d 1237, 1240 (Or. Ct. App. 2013) (en banc) (holding that evidence about whether a party applied for a U visa on the basis of the alleged abuse currently under consideration in prosecution proceedings was relevant impeachment evidence).

155. BARBAS & EMERSON, *supra* note 9.

156. BARBAS & EMERSON, *supra* note 9, at 5. *See also, ORLOFF ET AL., supra* note 9.

157. *See, e.g., L.A. CTY. DIST. ATT'Y, supra* note 47; SAN MATEO CTY. DIST. ATT'Y, *supra* note 47.

158. BARBAS & EMERSON, *supra* note 9, at 7.

159. *See L.A. CTY. DIST. ATT'Y, supra* note 48.

160. *Id.*

161. *Id.*

162. *Id.*

case.

In *Mills*, the prosecutor's witness was an informant who received Significant Public Benefit Parole (SPBP), an immigration benefit for law enforcement informants.¹⁶³ The SPBP application contained information that conflicted with the DEA agent's testimony about how long he had known the informant, which was material information for the defendant's entrapment defense.¹⁶⁴ The court found that since the SPBP application was dated 21 days after the end of the trial and, as a result, did not exist for disclosure at the time of the trial, it did not fall under the required *Brady* disclosure of exculpatory evidence.¹⁶⁵ The evidence at issue in *Mills* was information on an immigration application tending to prove that a federal agent had perjured himself.¹⁶⁶ *Mills* did not concern the immigrant informant or his intentions in cooperating with law enforcement.

It is clear that SPBP applications must be disclosed to the defense, but prosecutors mistakenly conflate SPBP applicants with U visa applicants.¹⁶⁷ U visa applicants are distinguishable from SPBP applicants because U visa applicants are victims and SPBP applicants are criminal informants. As direct compensation for informing on co-defendants, SPBP agreements often also include monetary compensation for the informant.¹⁶⁸ While the U visa also functions as a reward of sorts, U visa victims are not performing beyond what is asked of every victim in the criminal justice system under any other circumstance: reporting the crime, cooperating with authorities, and testifying in court. Thus, the U visa is a collateral benefit rather than compensation. Since it is not considered compensation, it should not be included in the same category as the SPBP and S visas for the purpose of *Brady* disclosures. The absence of case law regarding U visa *Brady* disclosures suggests that prosecutors exercise an "abundance of caution"¹⁶⁹ and over-disclose U visa certifications to defense counsel absent prompting by the defense counsel, trial judges, or higher courts.

Not only are prosecutors exercising an abundance of caution with these U visa policies, but they also have something to gain by dangling the carrot of the U visa certification until the end of the criminal case. The victim will likely feel compelled to be at the prosecutor's beck and call, and will not ignore subpoenas and recant testimony as many domestic violence victims are wont to do.¹⁷⁰ This creates a power dynamic in which the victim is beholden to the prosecutor, but it can also significantly delay the U visa certification process. As discussed in Section III, the U visa application can take several years to adjudicate and up to a decade to provide permanent immigration status for the victim and their family. Criminal courts have their own backlogs,¹⁷¹ and requiring all victims to wait until the criminal case is over

163. United States v. Mills, 334 F. App'x 946, 947 (11th Cir. 2009).

164. *Id.*

165. *Id.*

166. *Id.*

167. See L.A. CTY. DIST. ATT'Y, *supra* note 47 (citing *Mills* to support the mandatory disclosure of U visa certifications to the defense).

168. Trevor Aaronson, *The Informants*, MOTHER JONES (Sept./Oct. 2011), <http://www.motherjones.com/politics/2011/08/fbi-terrorist-informants>.

169. See L.A. CTY. DIST. ATT'Y, *supra* note 47.

170. See Kagan, *supra* note 10, at 944.

171. See, e.g., Benjamin Weiser & James C. McKinley Jr., *Chronic Bronx Court Delays Deny Defendants Due Process, Suit Says*, N.Y. TIMES (May 10, 2016),

to begin the first step in the U visa process is unjust because the victims have long since fulfilled their obligation.

Clear guidance from higher courts might help U visa applicants better navigate the discovery waters. A lack of clarity on U visa *Brady* disclosures leaves immigration advocates confused or ambivalent on what they should advise their clients to say to prosecutors.¹⁷² The case law leaves immigration advocates between a rock and a hard place. If they tell their clients to inform the prosecutor that they are seeking a U visa, the prosecutor might feel compelled to turn that over to the defense, potentially exposing the victim to accusations of fraud. If they do not tell their clients to inform the prosecutor, the prosecutor and the victim could be blindsided by a U visa fraud defense, or worse, the prosecutor might take it to mean the victim has not been cooperative and refuse to sign a certification. No matter what she chooses to do, a victim in a pending case risks trauma or losing her U visa case, or both.

As it stands in the adversarial criminal justice system, U visa applicants are pitted against defendants as their accusers.¹⁷³ Public defenders can scapegoat U visa applicants in cross-examination, suggesting to the jury that the victim framed the defendant,¹⁷⁴ and in turn prosecutors can wield the U visa as a tool to get victims to cooperate.¹⁷⁵ Defense attorneys and prosecutors alike are contributing to further trauma and oppression of immigrant victims. Given the many barriers criminal defendants already face in the justice system, I would not necessarily advocate for a narrower requirement regarding *Brady* disclosures. But I nonetheless disagree with the practice of getting criminal defendants acquitted by shaming and exposing undocumented victims of crime. Rather than change the rules regarding *Brady* disclosures, I would opt to migrate U visa certifications away from law enforcement and prosecutors in order to stabilize the power dynamic and return to the original purpose of the U visa: facilitating undocumented victims' crime reports. I believe that a solution to the problem of *Brady* disclosures and the U visa's adoption of components of the adversarial system will be to move toward more judicial and administrative agency certifications.

VI. POTENTIAL SOLUTIONS: TOWARD JUDICIAL CERTIFICATION

Many immigration advocates and experts have weighed in on the problems with the U visa certification and have proposed potential solutions. I will briefly summarize two of these proposed solutions and then endorse a third solution: an advocate-facilitated move away from prosecutor and law enforcement certifications altogether.

Veteran VAWA policy advocate Leslye Orloff suggests doing away entirely with the U visa certification requirement to allow more victims to access the U visa.¹⁷⁶

<https://www.nytimes.com/2016/05/11/nyregion/chronic-bronx-court-delays-deny-defendants-due-process-suit-says.html>. ("Misdemeanor defendants must wait on average 642 days for a bench trial and 827 days for a jury trial in the Bronx.")

172. BARBAS & EMERSON, *supra* note 9, at 2.

173. Kagan, *supra* note 10, at 918.

174. *See, e.g., State v. Valle*, 298 P.3d 1237, 1240 (Or. Ct. App. 2013) (en banc) (holding that evidence pertaining to whether a party applied for a U visa on the basis of the alleged abuse currently under consideration in prosecution proceedings was relevant impeachment evidence).

175. *See, e.g., L.A. CTY. DIST. ATT'Y*, *supra* note 47.

176. Leslie Orloff, *Mandatory U Visa Certification Unnecessarily Undermines the Purpose of*

Removing the U visa certification requirement would also help to remedy the coercive power dynamic between prosecutors and victims.¹⁷⁷ However, this proposal seems somewhat unrealistic in the current political climate, with conservative politicians believing there is fraud, even with the certification requirement.

Michael Kagan proposes a hybrid approach incorporating other types of victim-based immigration remedies, such as the T visa¹⁷⁸ and asylum.¹⁷⁹ The T visa does not require a certification, but prefers one, called an “endorsement,” and USCIS reserves the option to interview T visas applicants.¹⁸⁰ Kagan suggests the creation of a federal Crime Victims Unit, an analogue to the Asylum Office within the USCIS, to separate the U visa certifications from law enforcement.¹⁸¹ Under this model, victims could request U visa endorsements—borrowed from the T visa model—from law enforcement agencies, but they would still have the option of applying through the Crime Victims Unit without an endorsement, involving a DHS investigation and optional interview.¹⁸² A Crime Victims Unit is an excellent goal for the U visa, but one that will take time and substantial immigration reform to enact.

Rather than create a new sub-agency or reject certifications, I prefer Andrew Roddin’s more subtle reform: a shift to more certifications by the judiciary and other non-traditional certifiers.¹⁸³ Judges are already designated certifiers¹⁸⁴ and are a neutral party who would not have any requirement to disclose U visa certifications to anyone. Although it may seem burdensome to ask judges to sign U visa certifications, judges regularly certify Emergency Protective Orders¹⁸⁵ and warrants.¹⁸⁶ In practice, few judges certify U visa certifications.¹⁸⁷ If advocates were to adopt policies asking more judges to issue U visa certifications, it could solve the problem of *Brady* disclosures and the common misconception of U visa fraud. However, judges, like police and prosecutors, still have varying interpretations of their role as certifiers. Advocacy

the Violence Against Women Act’s Immigration Protections and Its “Any Credible Evidence” Rules—A Call for Consistency, 11 GEO. J. GENDER & L. 619, 621 (2010).

177. *Id.*

178. The T visa benefits victims of labor or sex trafficking, and because trafficking victims are also victims of crime, it overlaps with the U visa. Kagan, *supra* note 10, at 47–48. To avoid the U visa backlog, some advocates may now advise their clients who may qualify for both U visas and T visas to apply for T visas.

179. Kagan, *supra* note 10, at 962.

180. *Id.* at 962–63.

181. *Id.* at 959.

182. *Id.* at 963.

183. The federal regulations also appoint the Equal Employment Opportunity Commission, child protective services, and the Department of Labor as official U visa certifiers. 8 C.F.R. § 214.14(a)(2). The City of New York announced in 2016 that the New York Commission on Human Rights will begin to certify U visas. Robbins, *supra* note 72.

184. 8 C.F.R. § 214.14(a)(2).

185. California police officers give emergency protective orders to domestic violence victims at all hours of the day and night with authorization from an on-call judge. See *Domestic Violence*, CAL. COURTS (2016), <http://www.courts.ca.gov/selfhelp-domesticviolence.htm>.

186. See *Coolidge v. New Hampshire*, 403 U.S. 443, 450 (1971) (holding that prosecutor review and signing of a search warrant was not a “neutral and detached magistrate [judge]” within the meaning of the Fourth Amendment).

187. See Andrew Roddin, *Certified: How the U Visa Petition Prevents Fraud and Promotes Safe Communities*, 12 GEO. J.L. & PUB. POL’Y 805 at n.39 (2014). But see, Cindy Culp, *Waco Judge Grants U visa to Girl After DA Denied Paperwork*, WACO TRIBUNE (Dec. 14, 2012), http://www.wacotrib.com/news/police/waco-judge-grants-u-visa-to-girl-after-da-denied/article_40990ccd-b5ba-53b3-8d5d-4efffd8405e.html.

efforts to shift to more judicial certifications should also strive for more uniformity among judicial (and all) certifiers, to re-focus on the merits of the U visa claim and not their geographical location of the applicant. The federal regulations explicitly provide for judicial certification, construing conviction and sentencing as extensions of investigations and prosecutions.¹⁸⁸ However, state judicial ethics boards disagree on whether ethical standards permit judges to sign U visa certifications. Judicial ethics determinations on U visa certifications align predictably with state policies on undocumented immigrants, U visas, and domestic violence. For example, the judicial standards board in Minnesota, a state known as a pioneer of domestic violence victim advocacy,¹⁸⁹ has found that state ethical guidelines do not preclude judges from signing U visa certifications, and encourages its judges to sign certifications.¹⁹⁰ On the other hand, a North Carolina¹⁹¹ judicial standards board found that judicial certification of U visas would provide improper character evidence, would take the judge out of her impartial role, and would be an “improper comment on the merits of a pending proceeding.” The North Carolina judicial standards board also instituted a state policy forbidding judicial certification, even after the court case has been closed.¹⁹²

Notwithstanding the North Carolina board findings, a U visa certification does not require a judge to step out of her neutral role or comment improperly on the merits of a case because the evidentiary standard for U visa certification is very low: “any credible evidence.”¹⁹³ Certifiers are not deciding definitively that the victim was helpful or that the crime occurred, but are merely providing a *prima facie* determination.¹⁹⁴ Former Judge Alan Pendleton¹⁹⁵ of Minnesota likens the U visa certification to a probable cause determination, because of the relatively low evidentiary standard.¹⁹⁶ In California, lawmakers have recently lowered this standard,

188. 8 C.F.R. § 214.14(a)(2).

189. Advocates in Duluth, Minnesota revolutionized local domestic violence response and prevention in the 1980s. Now the most widely used approach in the U.S., the “Duluth Model,” emphasizes victim safety and teaches prevention to men and women through the “Power and Control Wheel,” a visual aid that captures the power dynamics between abuser and victim. DOMESTIC ABUSE INTERVENTION PROGRAMS, *What is the Duluth Model?* (2011) <http://www.theduluthmodel.org/about/index.html>; Bob Kelleher, *Duluth Treatment Model is 30 Years Old; Its Effectiveness Hotly Debated*, MINN. PUB. RADIO NEWS (Oct. 22, 2010), <http://www.mprnews.org/story/2010/10/21/duluth-treatment-model>.

190. Minn. Bd. on Judicial Standards, Opinion 2015-2: U Visa Certifications (Jun. 25, 2015), <http://www.bjs.state.mn.us/file/advisory-opinions/opinion-2015-2-final.pdf>.

191. Note that this is the home state of the prosecutor office who refuses to sign Latino-on-Latino crime certifications.

192. N.C. Judicial Standards Comm’n, Formal Advisory Opinion 2014-03 (Aug. 8, 2014), <http://www.aoc.state.nc.us/www/public/html/pdf/JSC/14-03.pdf>.

193. 8 C.F.R. 214.14(c)(4).

194. See *Villegas v. Nashville*, 907 F. Supp. 2d 907, 912–14 (M.D. Tenn. 2012) (issuing U visa certification for plaintiff who made a *prima facie* showing of qualifying potential criminal activity); See also *Garcia v. Audubon Cmty. Mgmt.*, 2008 WL 1774584, at *4 (E.D. La. Apr. 15, 2008).

195. Unrelated to his endorsement of judicial U visas certification, Alan Pendleton has recently been removed from the bench for lying about his residence in violation of state law. Karen Zamora, *Former Anoka County District Judge Alan Pendleton Suspended from Practicing Law for 90 Days*, STAR TRIBUNE (Mar. 9, 2016), <http://www.startribune.com/alan-pendleton-former-anoka-county-district-judge-suspended-from-practicing-law-for-90-days/371567201/>.

196. Alan Pendleton, *Immigrant Crimes and U Visa Certification: What is it and Why Should Judges Care?*, PENDLETON JUDICIAL TRAINING & EDUC. BLOG (Jul. 8, 2015), <https://blogpendleton.files.wordpress.com/2015/07/national-judicial-training-update-15-13-with-aba-standards-final.pdf>.

imposing a “rebuttable presumption” of helpfulness on U visa applicants for the purpose of law enforcement and judicial certifications, as long as they have not refused or failed to provide information or assistance.¹⁹⁷ Presumptions of helpfulness or determinations by “any credible evidence” are so far removed from the comparatively high evidentiary standards of criminal law,¹⁹⁸ that a judge should not be accused of taking sides if she certifies a U visa for a victim. Like a probable cause determination, the certification could be seen as part of the criminal trial procedure, but not dispositive of the verdict.

Better yet, civil judges hearing civil rights claims¹⁹⁹ and family law matters, or even administrative law judges, can also certify U visas,²⁰⁰ taking the U visa entirely out of the criminal court context and *Brady* disclosures. In New York City, some applicants have requested certifications from family court judges, with varying success.²⁰¹ In a 2016 study, U visa certifications in New York City were still overwhelmingly requested from police and prosecutors, with only about five percent requested from family court judges.²⁰² At least one family court judge in Queens, New York refused to sign a certification for a domestic violence victim on the grounds that the judge had no connection to the criminal activity because the victim had sought a restraining order in another jurisdiction.²⁰³ Indeed, a New York family court confidential memorandum restricts judges to certifying only in certain circumstances, namely when they have made formal findings on the case.²⁰⁴ Recent reports by the Fund for Modern Courts recommend U visa training and guidance for family court judges, who remain confused about the process and reluctant to certify.²⁰⁵

In addition to prosecutors, police and judges, the federal regulations also enumerate the Equal Employment Opportunity Commission and the Department of Labor as official U visa certifying agencies.²⁰⁶ In 2016, the New York City Human

197. Immigrant Victims of Crime Equity Act, Cal. Penal Code § 679.10 (2015). The new California law also strives to eliminate discriminatory and inconsistent U visa certification denials and imposes tight certification deadlines on certifiers.

198. In a criminal trial, guilt must be proven “beyond a reasonable doubt.”

199. *See, e.g.,* Villegas, 907 F. Supp. 2d at 912–14 (issuing U visa certification for civil rights plaintiff who made a prima facie showing that she was a victim of qualifying potential criminal activity and a showing of future helpfulness) (emphasis added). *But see* Agaton v. Hospitality & Catering Servs., 2013 WL 1282454, at *10 (W.D. La. Mar. 28, 2013) (holding that the regulations “do not allow certification by a federal judge when that judge has no responsibilities regarding any pending investigation or prosecution of the qualifying crime”).

200. The Minnesota Board on Judicial Standards permits civil court judges to certify U visas as long as they have an “adequate basis” for knowledge of the victim’s helpfulness. Minn. Bd. on Judicial Standards, *supra* note 190.

201. *See* FUND FOR MODERN COURTS, THE INTERSECTION OF IMMIGRATION STATUS AND THE NEW YORK FAMILY COURTS 7 (Feb. 2015), <http://moderncourts.org/files/2014/03/Modern-Courts-Statewide-Report-The-Intersection-of-Immigration-Status-and-the-New-York-Family-Courts.pdf> (finding that certification requests from family court in New York City are “reasonably common” and have their own docket. Requests from family court in other parts of the state are rare.).

202. Fertig, *supra* note 113.

203. *Matter of Clara F.*, 2016 N.Y. Slip Op. 26168 (N.Y. Fam. Ct. 2016).

204. FUND FOR MODERN COURTS, ACHIEVING A CONSISTENT AND LEGALLY SOUND U VISA CERTIFICATION PROCESS IN NEW YORK FAMILY COURTS 8 (Nov. 2016), <http://moderncourts.org/files/2013/10/2Modern-Courts-U-Visa-Memo-Final-2016.pdf>.

205. THE INTERSECTION OF IMMIGRATION STATUS AND THE NEW YORK FAMILY COURTS, *supra* note 201; ACHIEVING A CONSISTENT AND LEGALLY SOUND U VISA CERTIFICATION PROCESS IN NEW YORK FAMILY COURTS, *supra* note 204.

206. 8 C.F.R. §214.14(a)(2).

Rights Commission announced that they would begin certifying U visas for victims of discrimination and human rights violations.²⁰⁷ State and local agencies can follow this example and create more non-criminal opportunities for certification.

Out of concern for overburdening the judiciary, I do not propose that all U visa applicants seek certifications from judges.²⁰⁸ However, judicial certifications as well as certifications from non-criminal and administrative agencies will help keep the important constitutional considerations for criminal defendants from interfering with U visas for victims. Isolating the U visa from the adversarial criminal system is important to preserve fairness and justice for victims and defendants alike.

CONCLUSION

With the blurring of federal and local law enforcement and the ever increasing criminalization of undocumented immigrants, the U visa's purpose of facilitating and rewarding undocumented victims' reports of crimes is of utmost importance. While on its face the U visa might seem like it tempts fraudulent claims, in reality, the burdensome certification process, the fifteen-year path to citizenship, and widespread distrust of law enforcement and immigration authorities amongst undocumented immigrants serve to discourage many bona fide claims as well as most inchoate fraudulent claims. Those who accuse U visa applicants of fabricating crimes ignore or do not understand the underlying purpose of the U visa. Additionally, they lack awareness of the multiple obstacles many undocumented immigrants must overcome in seeking protection from the police. The solution to accusations of U visa fraud is not to remove U visa benefits from victims, but to remove U visa certifications from the adversarial criminal system.

207. Press Release, City of N.Y., *Mayor de Blasio Announces NYC Commission on Human Rights First Such Agency in Major U.S. City to Issue U and T Visa Certifications* (Feb. 9, 2016), <http://www1.nyc.gov/office-of-the-mayor/news/148-16/mayor-de-blasio-nyc-commission-human-rights-first-such-agency-major-u-s-city-to>.

208. The regulations still require that the certifier have knowledge of the crime and the victim's helpfulness, meaning not all victims will have this option. 8 C.F.R. § 214.14(a)(2).