

SHIELDING THE DEPORTABLE OUTSIDER: EXPLORING THE RAPE SHIELD LAW AS MODEL EVIDENTIARY RULE FOR PROTECTING U VISA APPLICANTS AS WITNESSES IN CRIMINAL PROCEEDINGS

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Congress created the U non-immigrant visa to bring immigrant victims of crime out of the shadows and encourage their participation in the investigation and prosecution of criminal activity. To this end, to assist in the prosecution of the crime and remain eligible for certification from law enforcement officials, U visa applicants regularly participate as witnesses in criminal trials against the perpetrators of the crimes committed against them. However, serving as a witness in a criminal trial opens up the U visa applicant to cross-examination about her immigration status, employment history, criminal history, and credibility. These attacks in court can be traumatic, intimidating, and have far-reaching consequences in other areas of an applicant's life. What rules of evidence exist to protect U visa applicants from re-traumatization at trial? This Article analyzes the Federal Rules of Evidence to determine the evidentiary safeguards that can be utilized to protect U visa applicants in a criminal trial setting. In concluding that existing rules of evidence leave U visa applicants vulnerable to re-traumatization, the Article explores the possibility of drawing upon rape shield statutes as a model for the development of a new status-shield law. Status-shield laws have the potential to protect U visa applicants at trial and further the laudable goal of encouraging the assistance and participation of undocumented non-citizens in the investigation and prosecution of crime.

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I. IMMIGRATION STATUS ON TRIAL

*“Derecho al silencio”*¹ Maria² stated again and again as the defense attorney peppered her with questions in English about her immigration status and a public defender seated in the courtroom gallery flashed a five-fingered, open-palmed hand at her. *“Derecho al silencio.”* To her right sat a judge in a heavy black robe, to her left, a jury of twelve faces, some of whom she recognized from around town. In front of her sat her perpetrator, an angry glare plastered across his face. Her eyes welled with tears as she realized what was happening: her immigration secrets were being exposed as she testified.

A few weeks earlier, it had been an ordinary day when Maria was preparing to leave for work in her small town in the United States. She was headed to a job cleaning hotels that she had acquired after she illegally

¹ When translated, “right to silence.”

² Names have been changed to protect confidentiality.

entered the United States from El Salvador two years earlier. While she missed her children deeply, Maria took comfort in knowing that she was working so she could send money back to her family. Her goals were simple: work hard, stay out of trouble, and provide her children with a better, safer life in El Salvador.

However, on that fateful day, Maria's life was about to change. One year earlier, Maria had begun a relationship with a U.S. citizen, Daniel. At the beginning of their relationship, Daniel was an attentive and loving partner. Maria hoped that their relationship would grow and mature into something serious. Several months after they began dating, Daniel invited Maria to move in with him, and she accepted. It was the beginning of what she had hoped would be a happy life.

However, for the past few months, Daniel had been staying out late, drinking heavily, and verbally insulting Maria. He would call her an "illegal," and threaten to report her to immigration if she did not accede to his many demands. On several occasions, he pushed her, threatened to hit her, and accused her of cheating. Maria was afraid, both for her safety and for her possible deportation. But because it was difficult for her to live on her own on her meager salary and because she depended on Daniel, she made the decision to remain in the relationship.

The situation changed on the morning of the assault. Shortly before she was about to leave for the day, Daniel stumbled in the door of their apartment, smelling of alcohol and looking as though he had not slept. When Maria told him that she was on her way to work, he began accusing her of having an affair. Before she knew what was happening, Daniel grabbed Maria and threw her to the ground. He kicked her and shouted, telling her that there was nothing she could do because he would have her deported. Fearing for her life, she escaped from the apartment and ran to the neighbors, who insisted that she call the police. Maria had serious fears of phoning law enforcement, but she knew that if she did not seek help, the violence was unlikely to end. Maria gave a statement to the police when they arrived on the scene, and Daniel was subsequently arrested. He was charged with a state offense for assault and domestic violence.

During the investigation of the crime, Maria cooperated closely with police and the district attorney (DA) assigned to the case. She participated in regular meetings with the DA and provided as much helpful information as possible. At the same time, her tenuous situation led her to seek the advice of an immigration attorney, who suggested that she might be eligible for a U non-immigrant visa ("U visa") as the victim of crime. The immigration attorney worked with the district attorney to obtain the necessary certification so that Maria could apply for a U visa with the United States Citizenship and Immigration Service ("USCIS").

Meanwhile, the criminal case proceeded to trial in state court. As part of discovery obligations, the district attorney disclosed to defense counsel that she had signed a U visa certification for the victim, making her eligible

for lawful immigration status on the basis of her cooperation with law enforcement in the investigation and prosecution of the assault. The district attorney also provided defense counsel with a copy of the Form I-918B, which is the law enforcement certification form required in applications for U visa status with USCIS.³

Upon learning that the victim in the case was receiving an immigration benefit, the attorney for the defendant made Maria's immigration status a central focus of his defense strategy. At trial, on cross-examination, he inquired not only into the legality of Maria's entry into the United States, but also her work history in the United States, her current immigration status, and the truthfulness of statements submitted in connection with employment applications. He sent his investigator to her place of employment and acquired I-9 forms that he used as impeachment evidence at trial. The judge in the case allowed the presentation of this evidence for purposes of impeachment.

Because of the nature of the defense attorney's cross-examination, the judge in the case assigned Maria her own defense attorney in order to advise her of her right to plead the Fifth Amendment to many of the questions she faced on cross examination that had potential criminal consequences. As a victim and witness at trial, Maria had her entire immigration history, work history, and immigration status exposed to a jury of her peers. While Maria pled the fifth to many of the questions, jurors were able to draw conclusions about Maria's immigration status and unlawful work history, which no doubt led them to give her testimony less weight. Perhaps even worse, Maria's employers were subpoenaed to testify at trial, which resulted in Maria losing the job that she desperately needed to support herself and her family.

At the end of the trial, the criminal defendant was found not guilty of domestic violence and assault. However, and perhaps more importantly, Maria felt like the perpetrator instead of the victim and as though she had been put on trial. She lost her job, her privacy, and her dignity. Rather than justice being served for Maria, she was further traumatized by the criminal proceedings. Rather than being empowered and encouraged to cooperate with law enforcement in the future through the U visa process, Maria stated that she was unlikely to seek the help of law enforcement or cooperate with the prosecution ever again.

³ In disclosing the information related to the U visa certification, the district attorney complied with her obligations under *Brady v. Maryland*. See *Brady v. Maryland*, 373 U.S. 83, 87 (1963) (requiring prosecutors to disclose exculpatory material evidence to an accused as a matter of due process); see also MODEL RULES OF PROF'L CONDUCT R. 3.8 (AM. BAR ASS'N 1983) (A prosecutor shall "make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense.").

II. INTRODUCTION

This case study illustrates how immigration status intersects with gender, race, and ethnicity to perpetuate the marginalization of undocumented populations within our legal systems—in this instance, inside the courtroom. In the adversarial process in which criminal defendants' rights are paramount, the undocumented witness stands to lose dignity, respect, and anonymity in her quest for justice and potential immigration status. The question then becomes, short of a complete overhaul of our country's immigration laws and regulations, can systematic protections for U visa witnesses bring balance to this courtroom inequality?

Congress created the U visa in 2000 through the Victims of Trafficking and Violence Protection Act (VTVPA).⁴ The legislation was, in part, intended to provide immigration protection to non-citizen victims of crime who were willing to help law enforcement authorities in the investigation or prosecution of criminal activity.⁵ Because of their immigration status, undocumented non-citizens⁶ are statistically less likely to report crime for fear of being reported to federal immigration authorities and subjected to removal from the United States.⁷ This fear is largely well-founded,⁸ as, federal policies encourage state and local police to enforce federal immigration laws when encountering non-citizens in the course of criminal investigations.⁹

⁴ Victims of Trafficking and Violence Protection Act of 2000, 22 U.S.C. § 7101–10 (2012).

⁵ *Victims of Criminal Activity: U Nonimmigrant Status*, DEP'T HOMELAND SEC. (July 28, 2016), <http://www.uscis.gov/humanitarian/victims-human-trafficking-other-crimes/victims-criminal-activity-u-nonimmigrant-status/victims-criminal-activity-u-nonimmigrant-status> [https://perma.cc/RY2Q-2H3Q].

⁶ Under the Immigration and Nationality Act of 1965, as amended, 8 U.S.C. §§ 1101–1537 (2012), (INA) the term “alien” is used to describe any non-citizen of the United States. However, as noted by Legomsky and Rodríguez in their seminal textbook on immigration law, the use of the term “alien” often “connotes dehumanizing qualities of either strangeness or inferiority.” STEPHEN H. LEGOMSKY & CHRISTINA M. RODRÍGUEZ, *IMMIGRATION AND REFUGEE LAW AND POLICY* 1 (6th ed. 2015). In order to avoid the “baggage” associated with the term “alien,” *id.*, this article, unless otherwise noted, will use the word non-citizen or undocumented non-citizen to describe individuals who lack United States citizenship status.

⁷ NIK THEODORE, *INSECURE COMMUNITIES: LATINO PERCEPTIONS OF POLICE INVOLVEMENT IN IMMIGRATION ENFORCEMENT* 6 (2013), http://www.policylink.org/sites/default/files/INSECURE_COMMUNITIES_REPORT_FINAL.PDF [https://perma.cc/L76E-U48P].

⁸ *See US: Immigrants 'Afraid to Call 911,'* HUMAN RIGHTS WATCH (May 14, 2014, 11:55 PM), <https://www.hrw.org/news/2014/05/14/us-immigrants-afraid-call-911> [https://perma.cc/6FVQ-ETVL] (noting comment of non-citizen who ended up in deportation proceedings following a call for help to the police: “All I can say is that if I were in that moment again, I would not call the police. The truth is that that phone call changed my life.”).

⁹ *See* Immigration and Nationality Act § 287(g), 8 U.S.C. § 1357(g). The Secure Communities program was discontinued in November 2014. *See* Memorandum from Jeh Johnson, Sec'y of Homeland Sec., to Thomas S. Winkowski, Acting Dir., U.S. Immigration and Customs Enf't, Megan Mack, Officer, Office of Civil Rights and Civil Liberties, and Philip A. McNamara, Assistant Sec'y for Intergovernmental Affairs (Nov. 20, 2014),

Moreover, understanding that undocumented non-citizens are less likely to report criminal violations to law enforcement, perpetrators of criminal activity have also taken advantage of immigrant communities, relying on a sense of security that their actions will go unreported.¹⁰ Accordingly, this demonstrated need for protection and support in immigrant communities matched Congress' intent in creating the U visa.

Since regulations implementing the program were issued,¹¹ the U visa program has proven beneficial to the immigrant community. Over 65,000 individuals have cooperated with law enforcement in the investigation and prosecution of criminal activity and qualified for the U visa since the program's implementation.¹² Once in U visa status for three years, recipients become eligible for lawful permanent resident status upon proving to the government that they have not subsequently refused assistance to law enforcement and that their adjustment to permanent status is in the public interest.¹³

However, just as the U visa has become a common form of immigration relief for non-citizen victims of crime, the underlying criminal trial has become a more dangerous place for the U visa applicant. As the above case study reveals, defense attorneys' heightened awareness of the U visa and the role it might play in forming defense strategies has increased the likelihood that the U visa application, or a non-citizen victim's immigration status, will become an issue at trial. When U visa applicants are brave enough to come forward from the shadows and cooperate with police and prosecutors, they often find that their testimony exposes them to possible criminal prosecution for illegal entry and document fraud, reveals their immigration status in a public trial, and has far-reaching consequences for their employment and

https://www.dhs.gov/sites/default/files/publications/14_1120_memo_secure_communities.pdf [<https://perma.cc/2DCL-79ZK>]. President Trump has since revived the program. *Executive Order: Enhancing Public Safety in the Interior of the United States*, WHITEHOUSE.GOV (Jan. 25, 2017), <https://www.whitehouse.gov/the-press-office/2017/01/25/presidential-executive-order-enhancing-public-safety-interior-united> [<https://perma.cc/H88A-XTVF>].

¹⁰ See discussion *infra* Part III.A.

¹¹ See Joey Hipolito, *Illegal Aliens or Deserving Victims?: The Ambivalent Implementation of the U Visa Program*, 17 *ASIAN AM. L.J.* 153, 155 (2010) (critiquing the delay in the implementation of the U visa regulations).

¹² *Number of I-918 Petitions for U Nonimmigrant Status (Victims of Certain Criminal Activities and Family Members) by Fiscal Year, Quarter, and Case Status 2009-2016*, U.S. CITIZENSHIP & IMMIGR. SERV. (2016), https://www.uscis.gov/sites/default/files/US-CIS/Resources/Reports%20and%20Studies/Immigration%20Forms%20Data/Victims/I918u_visastatistics_fy2016_qtr1.pdf [<https://perma.cc/8LTQ-NWNP>].

¹³ 8 C.F.R. § 245.24(b) (2012). Under the regulations, the U visa holder bears the burden of proof in establishing her eligibility for adjustment of status to that of a lawful permanent resident. *Id.* She must show by clear and convincing evidence that she meets the requirements of adjustment of status and that adjustment is warranted as a matter of discretion. See *Chawathe*, 25 I. & N. Dec. 369, 375 (U.S. Citizenship and Immigration Servs., Admin. Appeals Office 2010). While statistics are not available, it is the author's experience that most U visa recipients are successful in adjusting to lawful permanent resident status after three years in U visa status.

standing in their communities. Additionally, the potential of the U visa to create problems at trial has had a chilling effect on the willingness of prosecutors to provide the certification necessary for victims to apply for status from USCIS.¹⁴ As scholar Michael Kagan has noted in his article critiquing the U visa program's victim/accuser paradigm, "the structure of the U visa program potentially undermines the program's own noble goals."¹⁵

This catch-22 recalls the problem faced by victims of rape and sexual assault prior to the introduction of rape shield laws in the 1970s and 1980s.¹⁶ State and federal legislatures adopted rape shield laws as a response to feminist legal scholars who asserted that "[e]mbedded within rape law . . . was an informal, though powerful, normative command that women maintain an ideal of sexual abstinence in order to obtain legal protection"¹⁷ Rape shield laws were designed to combat inherent bias and prevent the introduction of evidence of a victim's sexual history at trial. Through rape shield protections, "[l]egislators concluded that it was illogical to assume that the complainant consented to sexual intercourse with the defendant, or was more likely to lie under oath, simply because she had previously consented to sexual intercourse with someone else."¹⁸ In addition, rape shield laws were intended to encourage the participation of victims of sexual assault at trial and avoid the re-traumatization that often occurs in sexual assault cases when a victim's sexual history is paraded before the court. The laws encouraged prosecutors to take to trial difficult rape cases where the victim's history or credibility might have otherwise created an obstacle to prosecution.

This Article considers whether courts, judicial committees, and legislatures should adopt evidentiary protections, similar to rape shield laws, for undocumented victims of crime who apply for the U visa and serve as witnesses in criminal trials. It asks whether questions regarding an undocumented non-citizen's immigration and employment history should be prohibited at trial in an effort to advance the underlying intent of the U visa: encouraging undocumented victims of crime to come out of the shadows and assist in criminal investigation and prosecution while simultaneously encouraging prosecutors to participate in U visa certification and take those cases to trial.

Following the case study and introduction, Part III of this Article reviews the legislative history of the TVPA to understand Congress' intent in creating this protected class of non-citizens through the U visa. It also reviews the confidentiality provisions enacted under the Illegal Immigration

¹⁴ See Michael Kagan, *Immigrant Victims, Immigrant Accusers*, 48 U. MICH. J.L. REFORM 915, 950 (2015).

¹⁵ *Id.*

¹⁶ See Michelle J. Anderson, *From Chastity Requirement to Sexuality License: Sexual Consent and a New Rape Shield Law*, 70 GEO. WASH. L. REV. 51, 69 (2002).

¹⁷ *Id.* at 53.

¹⁸ *Id.* at 54–55.

Reform and Immigrant Responsibility Act of 1996 § 384, which prohibits the Department of Homeland Security's disclosure of information related to U visa applicants in an effort to determine whether additional Congressional intent can be inferred from these measures.¹⁹

Part IV of this Article explores the law enforcement certification process and the role of police and prosecutors in the U visa application.

Part V analyzes the prosecution's obligations under *Brady v. Maryland*²⁰ during discovery to determine whether a U visa application, and in particular the Form I-1918 Part B, are required disclosures to defense counsel. In addition, this section analyzes evidentiary objections that can be raised on cross-examination. This analysis makes clear that existing protections of undocumented witnesses under the Federal Rules of Evidence do not adequately prevent the re-traumatization of undocumented non-citizens who participate as witnesses in criminal trials.

Part VI discusses the evolution of rape shield laws and analyzes whether such laws have been helpful in preventing the re-traumatization of sexual assault victims at trial and protecting them from false assumptions about their culpability in the underlying crime and their propensity to be truthful. It also looks to Constitutional challenges that rape shield laws have faced to predict resistance to the adoption of similar status shield laws for undocumented victims of crime.

Taking as its premise that undocumented non-citizens deserve protection in the criminal justice system even if they previously violated immigration laws,²¹ the Article concludes by proposing that a corollary evidentiary rule, a "status shield law," should be adopted at both the state and federal levels. Unlike other scholarly articles that have addressed structural problems of the U visa program and seek to provide solutions within the immigration system,²² this Article turns to the criminal trial itself to determine whether evidentiary provisions similar to rape shield laws could overcome the problems of the U visa program for prosecutors and victims alike

¹⁹ 8 U.S.C. § 1367(a)(2) (2012) ("[I]n no case may the Attorney General, or any other official or employee of the Department of Justice, the Secretary of Homeland Security, the Secretary of State, or any other official or employee of the Department of Homeland Security or Department of State . . . permit use by or disclosure to anyone (other than a sworn officer of the Department, or bureau or agency thereof, for legitimate Department, bureau, or agency purposes) of any information which relates to an alien who is the beneficiary of an application for relief under . . . 15(U) . . . of section 101(a) of the [INA] . . .").

²⁰ 373 U.S. 83 (1963).

²¹ In her assessment of rape shield laws, Michelle Anderson relies on a similar premise that criminal laws should vindicate victims of sexual assault regardless of their sexual history. See Anderson, *supra* note 16, at 56. Here, while it is acknowledged that prior sexual history and a history of immigration violations are distinct (one is a legal violation while the other is not), for reasons discussed, *infra*, this article seeks to call into question the over-regulation and criminalization of immigration violations and draw attention to the heightened consequences for U visa witnesses who agree to take the stand.

²² See, e.g., Kagan, *supra* note 14.

while protecting the Constitutional rights of criminal defendants. The adoption of such a rule would protect an important societal interest and further Congressional intent: empowering undocumented victims of violence to take advantage of law enforcement protection and bringing perpetrators of violence and other crimes to justice.

III. THE U VISA: CREATING A NEW CLASS OF COOPERATING WITNESSES

In considering the problem of re-traumatization facing the U visa applicant at trial, it is helpful to shine light on the problems Congress sought to address when it created the U visa. As one law enforcement official noted, “As I’ve said many, many times, if you want crime to grow in a community, just have people too afraid to report it.”²³ With this in mind, along with statistics that indicate that non-citizens are both overrepresented among crime victims and underrepresented as crime reporters, Congress created the U visa. In recognition of undocumented crime victims’ precarious position, the government also enacted a series of confidentiality provisions to support the goals of the U visa program.

A. *The Problem of “Deportable Outsiders”*²⁴

The past several decades have seen an increase in the numbers of non-citizens living within the United States.²⁵ Non-citizens comprise lawful immigrants, non-immigrants, individuals whose immigration status has expired, and those who have entered the United States without authorization.²⁶ As non-citizen populations have grown, so too has the need for law enforcement to effectively respond to the problems specific to immigrant communities. Studies have demonstrated that non-citizens, and particularly undocumented non-citizens, are more likely to be victims of crimes than those who are U.S. citizens or have lawful immigration status.²⁷

²³ Scott Keyes, *Why Undocumented Immigrants Are Terrified to Report Crimes, and How One City is Fixing That*, THINKPROGRESS (Feb. 15, 2013), <http://thinkprogress.org/justice/2013/02/15/1599671/dayton-immigrant-crime/> [<https://perma.cc/3LJE-UZM4>] (citation omitted).

²⁴ See *infra* note 30 and accompanying text.

²⁵ Leslye E. Orloff, Mary Ann Dutton, Giselle Aguilar Hass & Nawal Ammar, *Battered Immigrant Women’s Willingness to Call for Help and Police Response*, 13 UCLA WOMEN’S L.J. 43, 47 (2003) (“The rate of immigrants entering the U.S. has tripled over the past generation.”).

²⁶ See STEPHEN H. LEGOMSKY & CHRISTINA M. RODRÍGUEZ, IMMIGRATION AND REFUGEE LAW AND POLICY 1–2 (5th ed. 2009).

²⁷ See GLEN KERCHER & CONNIE KUO, VICTIMIZATION OF IMMIGRANTS 18 (2008), <http://www.crimevictimsinstitute.org/documents/ImmigrantVictimizationfinalcorrected.pdf> [<https://perma.cc/P9YL-BEYL>] (reporting that 538 out of 907 respondents (59.3%) reported being victimized during the previous three years and that, of the 538 victims, 259 (48%) claimed to have had multiple victimizations).

The reasons for increased victimization are varied,²⁸ but most scholars agree that immigrants' hesitancy to report crimes has "created a class of silent victims,"²⁹ upon which criminal elements are aware and are more likely to prey.³⁰ Seventy percent of undocumented immigrants, and 44 percent of all Latinos, were less likely to tell the police they were the victims of a crime because they feared that an investigation would reveal their immigration status or that of another person.³¹ In a 2012 study, over 39 percent of foreign-born victims of domestic violence reported a fear of calling the police or hesitancy to press criminal charges.³²

Why are non-citizens less likely to report crime to law enforcement? In the domestic violence context, feminist legal scholars point to "battered immigrant women's lack of trust in the system and its officers . . . fear of deportation, fear of retribution by abusers, fear of being the one arrested and separated from children, and fear of future economic, social and/or employability repercussions."³³ Beyond the domestic violence context, 287(g) agreements, which delegate authority for enforcement to state and local law enforcement agencies,³⁴ the Secure Communities Program,³⁵ and the Priority

²⁸ Reasons for victimization include living in marginalized socioeconomic communities, ROBERT C. DAVIS & EDNA EREZ, *IMMIGRANT POPULATIONS AS VICTIMS: TOWARD A MULTICULTURAL CRIMINAL JUSTICE SYSTEM* 5 (1998), http://www.ncdsv.org/images/NIJ_ImmigrantPopulationsAsVictimsTowardAMulticulturalCJsystem_5-1998.pdf [<https://perma.cc/H8FG-Z2P9>], and immigrants' tendency to carry large amounts of cash, Jacob Bucher, Michelle Manasse & Beth Tarasawa, *Undocumented Victims: An Examination of Crime against Undocumented Male Migrant Workers*, 7 SW. J. CRIM. JUST. 159, 162 (2010).

²⁹ Stacey Ivie & Natalie Nanasi, *The U Visa: An Effective Resource for Law Enforcement*, FBI LAW ENF'T BULL. (Oct. 2009), https://www2.fbi.gov/publications/leb/2009/october2009/visa_feature.htm [<https://perma.cc/D8BW-DYGB>].

³⁰ See Amy Braunschweiger, *Nashville Immigrants Too Scared to Call the Police*, HUMAN RIGHTS WATCH (May 19, 2014, 9:20 AM), <https://www.hrw.org/news/2014/05/19/nashville-immigrants-too-scared-call-police> [<https://perma.cc/2SJR-ZMJR>]; see also Orde F. Kittrie, *Federalism, Deportation, and Crime Victims Afraid to Call the Police*, 91 IOWA L. REV. 1449, 1451 (2006) ("Their status as deportable aliens and the resulting possibility that they could at any time and by any person be reported to the authorities and deported, renders them vulnerable to abuse and exploitation by spouses, common criminals, corrupt government officials, border vigilantes, unscrupulous employers, and others.").

³¹ Theodore, *supra* note 7, at 5–6.

³² NAT'L LATIN@ NETWORK FOR HEALTHY FAMILIES AND CMTYS. & NAT'L DOMESTIC VIOLENCE HOTLINE, *REALIDADES LATINAS: THE IMPACT OF IMMIGRATION AND LANGUAGE ACCESS: A NATIONAL DOMESTIC VIOLENCE HOTLINE SURVEY* 8 (2013), http://www.nationallatinonetwork.org/images/files/NLNRealidades_Latinas_The_Impact_of_Immigration_and_Language_Access_FINAL.pdf [<https://perma.cc/NW5L-JN2Q>].

³³ Orloff et al., *supra* note 25, at 55; see also Laura Carothers Graham, *Relief for Battered Immigrants Under the Violence Against Women Act*, 10 DEL. L. REV. 263, 263 (2008) (noting that immigrants report "fears of being reported to immigration authorities by their abuser, the abuser's threats to withdraw the spousal petition filed with immigration authorities on her behalf, or threats of deportation as their main bases for remaining in an abusive relationship," and failing to report domestic violence to law enforcement authorities).

³⁴ See *Delegation of Immigration Authority Section 287(g) Immigration and Nationality Act*, DEP'T HOMELAND SEC., <https://www.ice.gov/factsheets/287g> [<https://perma.cc/>]

Enforcement Program³⁶ have deputized local and state law enforcement officers to enforce immigration laws and intensified the consequences of contact with law enforcement officers. The result is that *any* encounter with a law enforcement official involves the threat of deportation. Accordingly, undocumented non-citizen crime victims are resistant to engage law enforcement for fear of deportation or becoming the subject of investigation.³⁷

Ordie Kittrie, in his Article highlighting problems between law enforcement and undocumented immigrant populations, describes the paradox of choice for deportable outsiders, which can implicate the notion of equal protection of the law itself.

The Supreme Court regularly has rejected the proposition that a person's unauthorized presence in the United States leaves that person without constitutional rights. But when unauthorized aliens either know or fear that turning to the justice system for protection would result in their deportation, the rights that they formally enjoy as persons present in the United States may be rendered practically irrelevant by their status as deportable outsiders.³⁸

Data supports Kittrie's observations. In a recent amicus brief related to the issue of disclosure of a U visa application in the course of civil proceedings, immigrant rights advocates recount story after story of grave criminal and civil rights violations faced by immigrant victims of employment and criminal law violations who are afraid of the legal and practical implications of their interactions with law enforcement.³⁹ Data supports that a victim's immigration status is a key indicator in whether a victim of domestic vio-

FXM8-2U3L] (Section 287(g) agreements allow "a state or local law enforcement entity to enter into a partnership with ICE . . . in order to receive delegated authority for immigration enforcement within their jurisdictions.").

³⁵ See 8 U.S.C. § 1722(a)(2); DEP'T HOMELAND SEC., SECURE COMMUNITIES, <https://www.ice.gov/secure-communities#a1> [<https://perma.cc/ZA3U-74NL>] (describing the process whereby, when state and local law enforcement officers arrest and book someone into custody for a violation of a criminal offense, fingerprints are shared with the Department of Homeland Security in order to determine if an individual is removable from the United States).

³⁶ See *Priority Enforcement Program*, DEP'T HOMELAND SEC., <https://www.ice.gov/pep> [<https://perma.cc/NZ39-LJTA>] (indicating that the Priority Enforcement Program replaced the Secure Communities Policy, and was a process whereby, after arrest by state and local law enforcement, booking information is shared with Immigration and Customs Enforcement (ICE) to determine whether the individual is a priority for removal and a candidate for transfer to ICE following the criminal sentence).

³⁷ See Kagan, *supra* note 14, at 921 ("If an unauthorized immigrant tells a police officer that he has been mugged at knifepoint, the officer might reasonably believe that two violations of the law have been reported to him. First, there has been an armed robbery. Second, the officer has been made aware of an immigrant who is present in the United States illegally. Immigrants will be hesitant to report robberies if they fear that a police officer might form this opinion.").

³⁸ Kittrie, *supra* note 30, at 1450–51 (citations omitted).

³⁹ See Brief for Southern Poverty Law Center et al. as Amici Curiae Supporting Plaintiffs, *Cazorla v. Koch Foods of Mississippi, LLC*, 2014 WL 281979 (S.D. Miss. Jan. 24, 2014), (No. 3:10-CV-135-DPJ-FKB).

lence or other violent crime contacts law enforcement for help.⁴⁰ Because “deportable outsiders”—those with unauthorized immigration status—are both more likely to be victims and less likely to report, Congress recognized that action was necessary to ensure the availability of safeguards for undocumented non-citizens and their communities.

B. The Creation of the U Visa: A Response to Feminists and the Law Enforcement Community

In 2000, Congress enacted the Victims of Trafficking and Violence Protection Act.⁴¹ The Act was part of a broader Violence Against Women Act (VAWA)⁴² reauthorization that not only strengthened protections for immigrant women who had been subjected to domestic violence and sexual assault, but also created the U visa to allow victims of certain crimes the ability to remain in the United States in order to assist in the investigation and prosecution of crime.⁴³

The U visa was, in part, a response to the battered immigrant women’s movement that successfully raised awareness of the fact that perpetrators of domestic violence frequently use a victim’s lack of immigration status as a “weapon of abuse.”⁴⁴ Often, abusive partners of domestic violence victims threaten the victim with deportation or other forms of retribution if the victim reports the crime to the police. In addition, the U visa responded to the feminist critique that the threat of deportation or criminal action against undocumented victims of domestic violence furthered women’s subordination through silencing women and emboldening those who hold societal power.⁴⁵

In response, Congress promulgated the U visa to empower victims of gender-based violence to take advantage of law enforcement protection and bring perpetrators of domestic violence, sexual assault, and trafficking to justice. In creating the U non-immigration visa, Congress clearly stated its intention behind the legislation.

⁴⁰ See Orloff, et al., *supra* note 25, at 68 (noting that “battered immigrants with stable permanent immigration status were significantly more likely to call the police for help in a domestic violence case than other battered immigrant women (43.1 %)”).

⁴¹ Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, 114 Stat. 1464 (codified at 22 U.S.C. §§ 7101-7110, 2151 note, 2152d.) (creating U visa category for crime victims).

⁴² Violence Against Women Act of 2000, Pub. L. No. 106-386, 114 Stat. 1491.

⁴³ See Elizabeth M. McCormick, *Rethinking Indirect Victim Eligibility for U Non-Immigrant Visas to Better Protect Immigrant Families and Communities*, 22 STAN. L. & POL’Y REV. 587, 595 (2011). At the same time the U visa was created, the T visa was also created to provide immigration relief to victims of trafficking and to assist law enforcement in the investigation and prosecution of the crime of trafficking. See 22 U.S.C. § 7101(a) (2012). However, unlike the U visa, the T visa does not require law enforcement certification. 8 C.F.R. § 214.11(f)(1) (2012).

⁴⁴ Orloff et al., *supra* note 25, at 55.

⁴⁵ See Alizabeth Newman, *Reflections on VAWA’s Strange Bedfellows: The Partnership Between the Battered Immigrant Women’s Movement and Law Enforcement*, 42 U. BALT. L. REV. 229, 248–49 (2013).

The purpose of this section is to create a new nonimmigrant visa classification that will strengthen the ability of law enforcement agencies to detect, investigate, and prosecute cases of domestic violence, sexual assault, trafficking of aliens, and other crimes . . . committed against aliens, while offering protection to victims of such offenses in keeping with the humanitarian interests of the United States. . . . This visa will encourage law enforcement officials to better serve immigrant crime victims and to prosecute crimes committed against aliens. . . . Creating a new nonimmigrant visa classification will facilitate the reporting of crimes to law enforcement officials by trafficked, exploited, victimized, and abused aliens who are not in lawful immigration status. . . .⁴⁶

The response to the U visa has been largely positive. Local and state law enforcement agencies have found that the U visa has increased their ability to work with the immigrant community and has encouraged the immigrant community to develop trust with law enforcement agencies.⁴⁷ Consequently, undocumented non-citizens have come forward to report crimes in circumstances where they otherwise would have been hesitant to reach out. As a result, policing has become more effective in immigrant communities, and victims of gender-based crimes have become safer and more legally secure in the process.

Congress intended the U visa to be a vehicle to pursue the dual goals of enhancing the ability of law enforcement to investigate and prosecute crimes, while concurrently improving the protections available to undocumented victims of crimes.⁴⁸ Moreover, Congress sought to improve community policing and community relationships, increase prosecution of perpetrators of crimes against immigrant victims, allow victims to report crimes without fear of deportation, enhance victim safety, and keep commu-

⁴⁶ Battered Immigrant Women Protection Act of 2000, Pub. L. No. 106-386, § 1513(a)(2)(A)–(B), 114 Stat. 1518, 1533–34 (codified as amended at 8 U.S.C. § 1101 (2012)).

⁴⁷ See McCormick, *supra* note 43, at 600.

⁴⁸ See Leslye E. Orloff & Janice V. Kaguyutan, *Offering A Helping Hand: Legal Protections for Battered Immigrant Women: A History of Legislative Responses*, 10 AM. U. J. GENDER SOC. POL'Y & L. 95, 163 (2001). Congress created the U visa to achieve the goals of strengthening the ability of law enforcement agencies to prosecute crimes against immigrants and protecting the victims of such crimes. See Violence Against Women Act of 2000, Pub. L. No. 106-386, 114 Stat. 1491, 1533 (finding that “[a]ll women and children who are victims of these crimes committed against them in the United States must be able to report these crimes to law enforcement and fully participate in the investigation of the crimes committed against them and the prosecution of the perpetrators of such crimes”). See also McCormick, *supra* note 43, at 595 (“The availability of these new T and U visas was intended to serve both of VTPVA’s overarching goals—enhancing the ability of law enforcement to prosecute violent crimes and providing protection to the victims of these crimes.”). Congress’ dual purposes in creating the U visa were “quite plainly stated: to provide protection to immigrant crime victims and to facilitate the investigation and prosecution of those crimes.” *Id.* at 599.

nities safe.⁴⁹ Through the promise of regularized immigration status, the U visa created a new class of cooperating witnesses: the undocumented victim of crime.⁵⁰ As Michael Kagan has noted, “the U visa established a *quid pro quo* system” whereby U visa applicants trade cooperation with law enforcement, including testimony at trial if requested, for the ability to remain in the United States.⁵¹

C. Operationalizing Congressional Intent

In creating the U visa, Congress recognized that victims’ concerns for their privacy were one of the primary obstacles to garnering undocumented victims’ cooperation in the investigation and prosecution of crimes. Through its enacting statutes, the U visa program provides several confidentiality provisions to encourage the reporting of crimes by undocumented non-citizens. First, Congress expanded the existing confidentiality provisions of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996⁵² (IIRIRA) through its 2005 Violence Against Women Act reauthorization,⁵³ including the statutory provisions creating the U visa. Under IIRIRA, Immigration and Customs Enforcement or other Department of Homeland Security (DHS) officials are prohibited from releasing information about a U visa applicant’s case to any person and must keep the application confidential.⁵⁴ In addition,

⁴⁹ U.S. Dept. Justice Office On Violence Against Women, Legal Momentum, Nat’l Immigrant Women’s Advocacy Project & Cal. Coalition Against Sexual Assault, *Lessons Learned from Law Enforcement: How Collaborations that Result in U Visa Certifications Support Safer Communities* 7 (Feb. 15, 2013), <http://library.niwap.org/wp-content/uploads/Lessons-Learned-from-Law-Enforcement-Slides.pdf> [<https://perma.cc/VP3M-PQVX>] [hereinafter U.S. Dept. Justice Office On Violence Against Women].

⁵⁰ Leticia M. Saucedo, *A New “U”*: *Organizing Victims and Protecting Immigrant Workers*, 42 U. RICH. L. REV. 891, 908 (2008) (“The purpose of the statute focused on the victim status of cooperating witnesses by ‘[c]reating a new nonimmigrant visa classification [that] will facilitate the reporting of crimes to law enforcement officials by trafficked, exploited, victimized, and abused aliens who are not in lawful immigration status. It also gives law enforcement officials a means to regularize the status of cooperating individuals during investigations or prosecutions.’”) (citations omitted).

⁵¹ Kagan, *supra* note 14, at 917.

⁵² Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009–546 (codified as amended at 8 U.S.C. chapter 12 at various sections (2012)).

⁵³ Violence Against Women Act and Department of Justice Reauthorization of 2005, Pub. L. No. 109-162, 119 Stat. 2960 (2006). The 2005 Violence Against Women Act reauthorization contained additional confidentiality protections “for all persons served by entities receiving Violence Against Women Act grants including governmental (e.g. police, prosecutors, courts) and non-governmental grantees (e.g. shelters, rape crisis centers, legal services programs).” LESLYE E. ORLOFF, *VAWA CONFIDENTIALITY: HISTORY, PURPOSE, DHS IMPLEMENTATION AND VIOLATIONS OF VAWA CONFIDENTIALITY PROTECTIONS* 9-10, http://www.lsc.gov/sites/default/files/LSC/pdfs/10.%20%20Appendix%20IX%20%20CH%203%20SA_Confidentiality_Final.pdf [<https://perma.cc/PX4Z-2D8D>].

⁵⁴ Illegal Information Reform and Immigrant Responsibility Act § 384, 8 U.S.C. § 1367 (“[I]n no case may the Attorney General, or any other official or employee of the Department of Justice, the Secretary of Homeland Security, the Secretary of State, or any other official or employee of the Department of Homeland Security or Department of

these confidentiality provisions also prohibit DHS from using information provided by an abuser or perpetrator of crime to deny an undocumented non-citizen's application for immigration relief.⁵⁵

In crafting these confidentiality provisions, Congress recognized the difficult position U visa applicants find themselves in – reporting crimes at the risk of deportation – and indicated that it wanted to serve a protective role for undocumented victims of crime. Accordingly, to ease the risk of coming forward to apply for a U visa, Congress guaranteed confidentiality of the immigration application in an effort to ensure that undocumented non-citizens' information would not be disseminated. The confidentiality provisions indicate that the statute was designed to respond to the concerns of both the battered immigrant women's community and law enforcement by ensuring a certain level of confidentiality to undocumented victims who experience gender-based violence.

In addition, Congress reduced the evidentiary burden for undocumented victims of crime who were brave enough to come forward to report abuse. Under 8 U.S.C. § 1184(p)(4), an undocumented victim of crime may establish her eligibility for a U visa under an “any credible evidence” standard.⁵⁶ This reduced evidentiary burden indicates that Congress wanted to encourage crime victims to utilize the U visa mechanism and obtain a path to regularized status through cooperation with law enforcement.⁵⁷ The statistics demonstrate that the majority of U visa applications are approved. For example, in 2016, of the 11,889 U visa applications adjudicated by USCIS, approximately 85 percent were approved.⁵⁸

Accordingly, the legislative history establishes that the Congressional purpose of creating the U non-immigrant visa was to “strengthen the ability of law enforcement agencies to detect, investigate, and prosecute [certain crimes] . . . [and] facilitate the reporting of crimes to law enforcement

State . . . permit use by or disclosure to anyone (other than a sworn officer or employee of the Department, or bureau or agency thereof, for legitimate Department, bureau or agency purposes) of any information which relates to an alien who is the beneficiary of an application for relief under . . . 15(U) . . . of section 101(a) of the [INA].”); Orloff & Kaguyutan, *supra* note 48, at 166 (“[A]s with cases under the VAWA 2000, INS and the Department of Justice are required to keep all information about U-visa applications confidential.”).

⁵⁵ 8 U.S.C. § 1367(a)(2). *See also* 151 CONG. REC. E2605, E2606 (daily ed. Dec. 18, 2005) (statement of Rep. Conyers) (“I believe that Section 817 of this Act contains s[o]me of the most important protections for immigrant victims. This section enhances VAWA’s confidentiality protections for immigrant victims”); H.R. REP. NO. 109-233, at 120 (2005).

⁵⁶ 8 U.S.C. § 1184(p)(4) (“In acting on any petition filed under this subsection, the consular officer or the Attorney General, as appropriate, shall consider any credible evidence relevant to this petition.”)

⁵⁷ The reduced evidentiary burden placed on U visa petitioners further reflects a desire to protect immigrant crime victims. *See* McCormick, *supra* note 43, at 602.

⁵⁸ U.S. CITIZENSHIP AND IMMIGRATION SERVS., NUMBER OF I-918 PETITIONS FOR U NONIMMIGRANT STATUS I (2016), https://www.uscis.gov/sites/default/files/USCIS/Resources/Reports%20and%20Studies/Immigration%20Forms%20Data/Victims/I918u_visa_statistics_fy2016_qtr4.pdf [<https://perma.cc/54TL-7JJE>].

officials by trafficked, exploited, victimized and abused aliens who are not in lawful immigration status.”⁵⁹ Proponents of the U visa also understood the sensitive nature of these applicants’ immigration situation and enacted further confidentiality measures and reduced evidentiary burdens to encourage the use of the U visa. These multiple goals frame the discussion of whether the U visa’s laudable goals are undermined when U visa applicant witnesses and their immigration statuses become the focus at criminal trials.

IV. THE U VISA IN PRACTICE

A. *Obtaining a U Visa*

In order for a non-citizen to be eligible for a U non-immigrant visa, the applicant must establish through “any credible evidence”⁶⁰ that:

- (I) the alien has suffered substantial physical or mental abuse as a result of having been a victim of criminal activity. . . ;
- (II) the alien possesses information concerning criminal activity. . . ;
- (III) the alien. . . has been helpful, is being helpful, or is likely to be helpful to a Federal, State, or local law enforcement official, to a Federal, State or local prosecutor, to a Federal or State judge, to the Service, or the other Federal, State, or local authorities investigating or prosecuting criminal activity. . . ; and
- (IV) the criminal activity. . . violated the laws of the United States or occurred in the United States (including in Indian county and military installations) or the territories and possessions of the United States.⁶¹

Only victims of enumerated criminal activity qualify for a U visa. The list of qualifying criminal activity includes “rape; torture; trafficking; incest; domestic violence; sexual assault; abusive sexual contact; prostitution; sexual exploitation; female genital mutilation; being held hostage; peonage; involuntary servitude; slave trade; kidnapping; abduction; unlawful criminal restraint; false imprisonment; blackmail; extortion; manslaughter; murder; felonious assault; witness tampering; obstruction of justice; perjury; or attempt, conspiracy, or solicitation to commit any of the above mentioned crimes.”⁶² This list reflects Congress’ concern with the most serious crimes

⁵⁹ Battered Immigrant Women Protection Act of 2000, Pub. L. No. 106-386, § 1513(a), 114 Stat. 1518, 1533–34 (codified as amended at 8 U.S.C. § 1101 (2012)).

⁶⁰ See Immigration and Nationality Act § 214(p)(4), 8 U.S.C. § 1184(p)(4) (2012) (establishing “any credible evidence” standard for U visa applications).

⁶¹ Battered Immigrant Women Protection Act of 2000 § 1513(b)(3), 8 U.S.C. § 1101(a)(15)(U)(i).

⁶² Immigration and Nationality Act §101(a)(15)(U)(iii).

suffered by undocumented non-citizens⁶³ and also the statutory response to the battered immigrant women's community of activists.

With respect to the third prong of the statute, the non-citizen must prove helpfulness to a law enforcement official by acquiring a signed certification, known as the USCIS Form I-918 Supplement B.⁶⁴ This form can be signed by federal, state, local, or tribal law enforcement agencies, prosecutors and judges, and other agencies that have jurisdiction to detect, investigate, or prosecute in their respective areas of expertise, such as child or family protective services, the Equal Employment Opportunity Commission, and the Department of Labor.⁶⁵

The certification requires the law enforcement official to attest that the applicant possesses information concerning the enumerated criminal activity; has been, is being, or is likely to be helpful in the investigation and/or prosecution of the criminal activity; has not been asked to provide further assistance in the investigation if applicable; and has not unreasonably refused to provide assistance in a criminal investigation or prosecution.⁶⁶ The U visa regulations broadly establish what constitutes an investigation or prosecution, stating that the clause "investigation or prosecution" means "the detection or investigation of a qualifying crime or criminal activity," in addition to, and separate from, "the prosecution, conviction, or sentencing of the perpetrator of the qualifying crime or criminal activity."⁶⁷ Moreover, the certification requires that, should the applicant subsequently unreasonably refuse to assist in the investigation or prosecution of the crime, the law enforcement official will notify USCIS, presumably resulting in disqualification for a U visa.⁶⁸

Individual law enforcement agencies are allowed to develop their own policies on when and whether to sign U visa certifications as a matter of discretion. Practices range from signing U visa certifications in almost all circumstances when the applicants are victims of one of the enumerated crimes and demonstrate helpfulness, to flat-out or blanket refusals to sign the certifications under any and all circumstances.⁶⁹ Some law enforcement of-

⁶³ See Kagan, *supra* note 14 at 927; Orloff et al., *supra* note 25, at 55.

⁶⁴ Immigration and Nationality Act §101(a)(15)(U)(i)(III); Immigration and Nationality Act §214; DEP'T OF HOMELAND SECURITY, FORM I-918 SUPPLEMENT B, U-NONIMMIGRANT STATUS CERTIFICATION 3 (2016), <http://www.uscis.gov/sites/default/files/files/form/i-918supb.pdf> [https://perma.cc/37E6-G6KE].

⁶⁵ See 8 C.F.R. § 214.14(a)(2) (2012).

⁶⁶ See 8 C.F.R. § 214.14(b) (2012).

⁶⁷ 8 C.F.R. § 214.14(a)(5) (2012).

⁶⁸ See 8 U.S.C. § 1184 (p)(1) (2012); DEP'T OF HOMELAND SECURITY, FORM I-918 SUPPLEMENT B, U-NONIMMIGRANT STATUS CERTIFICATION 3 (2016), <http://www.uscis.gov/sites/default/files/files/form/i-918supb.pdf> [https://perma.cc/37E6-G6KE].

⁶⁹ JEAN ABREU, SIDNEY FOWLER, NINA HOLTSBERRY, ASHLEY KLEIN, KEVIN SCHROADER, MELANIE STRATTON LOPEZ & DEBORAH M. WEISSMAN, VISA DENIED: THE POLITICAL GEOGRAPHY OF THE U VISA: ELIGIBILITY AS A MATTER OF LOCALE 23-24 (2014), <http://www.law.unc.edu/documents/clinicalprograms/uvisa/fullreport.pdf> [https://perma.cc/44E5-KWHB].

fices will only sign U visa certifications in open, ongoing cases in order to induce or ensure the cooperation of victims in the criminal proceedings, and some offices have developed a policy to sign certifications only in closed cases to avoid the evidentiary problems that can arise in an ongoing case.⁷⁰

Moreover, there is no definition of what constitutes “helpful in the investigation and/or prosecution of the criminal activity” or “assistance in the investigation of the crime.” From the author’s experience, this requirement can be as minimal as making a call to 911 to report a crime, to as involved as acting as the prosecutor’s key witness in a multi-day trial. Thus, whether law enforcement officials consider an undocumented victim to have been helpful or to have assisted in the investigation and prosecution of the crime is largely a discretionary determination on the part of certifying officials, which officials can use to their advantage in pressing a U visa applicant to become a cooperating witness at trial. If a law enforcement agency declines to sign a law enforcement certification, there is no appeals process or other avenue of redress for the victim.

Once a non-citizen obtains a law enforcement certification, the adjudication of the application for a U visa rests with USCIS. USCIS considers whether the applicant has met the criteria for a U visa through “any credible evidence” and is otherwise admissible to the United States.⁷¹ Grounds of inadmissibility under the INA include such wide-ranging criteria as convictions of some crimes involving moral turpitude, security and terrorism related grounds, public health and public charge grounds, and inadmissibility for former immigration law violations.⁷² When an applicant is inadmissible, he or she must apply for a waiver of inadmissibility, which is granted at USCIS’s discretion.⁷³

It is a common misperception among prosecutors and defense attorneys that the acquisition of law enforcement certification guarantees a U visa.⁷⁴ This misperception is then carried into the criminal trial where attorneys, judges, and jurors give undue weight to the certification B and assume that a witness would be motivated to fabricate or lie in exchange for immigration status, which is in fact anything but guaranteed. Therefore, in addition to the proposed clarifying evidentiary rule discussed below, education of the bench and bar about the requirements of a U visa and certification B’s limited role

⁷⁰ STANFORD IMMIGRANTS’ RIGHTS CLINIC & BAY AREA LEGAL AID, UNDERSTANDING AND RESPONDING TO SUBPOENAS: A GUIDE FOR IMMIGRATION ATTORNEYS REPRESENTING U VISA APPLICANTS 7 (2010), http://www.asistahelp.org/documents/resources/Immigration_Lawyers_Subpoena_Guide2_D022E40BC214D.pdf [<https://perma.cc/JV8K-XHYQ>].

⁷¹ Immigration and Nationality Act § 214(p)(4), 8 U.S.C. § 1184(p)(4) (2012).

⁷² Immigration and Nationality Act § 212(a), 8 U.S.C. § 1182 (2012).

⁷³ Immigration and Nationality Act § 212(d)(3)(A), 8 U.S.C. § 1182(d)(3)(A) (2012).

⁷⁴ C.f. DEPT. HOMELAND SEC., U VISA LAW ENFORCEMENT CERTIFICATION RESOURCE GUIDE 4 (2011), https://www.dhs.gov/xlibrary/assets/dhs_u_visa_certification_guide.pdf [perma.cc/G6L4-PYLK].

may go some way in protecting victims and the disclosure of their immigration status and history in the underlying criminal trial.

The U visa is a non-immigrant visa that gives holders permission to remain in the United States for four years.⁷⁵ After three years in U visa status, non-citizens can apply to adjust their status from non-immigrant to lawful permanent resident.⁷⁶ As part of the adjustment of status application, the U visa holder must demonstrate that during her time in U non-immigrant status, she has not unreasonably refused to provide assistance to an official or law enforcement agency.⁷⁷ This usually requires that the U visa holder return to the law enforcement agency and request another Certification B as proof of her willingness to remain helpful in the investigation and prosecution of the crime. If USCIS grants adjustment of status and the U visa holder becomes a lawful permanent resident, she is eligible for naturalization after five years.⁷⁸

As a non-immigrant humanitarian visa,⁷⁹ the U visa provides a broad waiver of inadmissibility,⁸⁰ making it one of the most forgiving forms of immigration relief available. Outside of participation in Nazi persecution and a few limited foreign policy considerations, the waiver available to U visa applicants carries the potential to forgive almost all previous immigration and criminal violations.⁸¹ This is compared to individuals who qualify for lawful permanent resident status but must overcome all grounds of inadmissibility with only a few limited waivers available.⁸² In effect, a person who is eligible for a U visa on the basis of being a victim of crime may ultimately be in a better position than a parent of a U.S. citizen child or the spouse of a U.S. citizen who has minor immigration or criminal violations that bar their adjustment of status.⁸³

⁷⁵ Immigration and Nationality Act § 214(p)(6); 8 U.S.C. § 1184(p)(6) (2012).

⁷⁶ Immigration and Nationality Act § 245(m).

⁷⁷ *Id.*

⁷⁸ See Immigration and Nationality Act § 316(a).

⁷⁹ A humanitarian visa is one that is not issued for a specific purpose such as a family-based visa, an employment-based visa, or specified non-immigrant visa, but rather is one that is given “to assist individuals in need of shelter or aid from disasters, oppression, emergency medical issues and other urgent circumstances.” *Humanitarian*, U.S. CITIZENSHIP & IMMIGRATION SERV., <https://www.uscis.gov/humanitarian> [<https://perma.cc/W9NM-RBZT>].

⁸⁰ See Immigration and Nationality Act § 212(d)(1) (providing for waiver of inadmissibility at discretion of Attorney General).

⁸¹ *Id.*; see also 8 U.S.C. § 1182(a)(3)(E).

⁸² Christina B. LaBrie, *The INA 212(d)(3) Nonimmigrant Waiver—Available to All?*, IMMIGRATION DAILY (Sept. 30, 2003), <https://www.ilw.com/articles/2003,0930-labrie.shtm> [<https://perma.cc/X3CR-ZLTE>] (describing how 212(d)(3) waiver is available to inadmissible individuals that do not have an immigrant waiver available).

⁸³ Compare Immigration and Nationality Act § 245(a) (stating requirements for adjustment of status) and Immigration and Nationality Act § 212(a) (stating grounds of inadmissibility applicable to an applicant for adjustment of status) with Immigration and Nationality Act § 212(d)(1) (waiver of all grounds of inadmissibility (except for Nazis, perpetrators of genocide, or extrajudicial killing) for applicant for U visa).

Accordingly, the U visa is a highly desirable form of immigration relief for those individuals who qualify. It is beneficial to victims to the extent that it provides safety from abusers, protection from deportation, immigration status leading to permanent residence, the ability to extend immigration status to certain family members, legal work authorization, and associated Social Security numbers and driver's licenses.⁸⁴ Furthermore, the U visa has become an ever more popular form of immigration relief as deportations continue to rise and as immigration reforms become more draconian,⁸⁵ stripping immigration officials and judges of their ability to exercise their discretion and avert the removal of non-citizens.⁸⁶ Statutory caps limit USCIS to issuing no more than 10,000 U visas any year, and that cap is regularly reached.⁸⁷ Because of recent backlogs, the wait time for a U visa is now over five years, and by the end of 2016 there were 150,604 applications pending.⁸⁸ While the backlog in U visa numbers is clearly problematic from the perspective of immigrant victims, it also undermines its purpose because it makes immigration relief a distant reality for victims of gender-based crime.

B. Critiques of the U Visa Program

Despite the benefits of the U visa to undocumented victims of crime and the communities in which they live, the program has come under some scrutiny. Advocates in favor of limited immigration point to the U-visa as

⁸⁴ U.S. Dept. Justice Office on Violence Against Women, *supra* note 49, at 9; Ivie & Nanasi, *supra* note 29.

⁸⁵ See Julia Edwards, *Exclusive: U.S. Plans New Wave of Immigrant Deportation Raids*, REUTERS (May 12, 2016), <http://www.reuters.com/article/us-usa-immigration-deportation-exclusive-idUSKCN0Y32J1> [<https://perma.cc/WU84-ERKK>] (reporting immigration officials planned a large wave of deportations in 2016, similar to earlier apprehensions and deportations); Liz Robbins, *Immigrant Crime Victims Seeking Special Visas Find a Tough Path*, N.Y. TIMES (March 8, 2016), <http://www.nytimes.com/2016/03/09/nyregion/immigrant-crime-victims-seeking-special-visas-find-a-tough-path.html> [<https://perma.cc/3RPN-9Y4K>] (reporting on calls on the federal government to increase number of U visas to address backlog).

⁸⁶ Nora V. Demleitner, *Immigration Threats and Rewards: Effective Law Enforcement Tools in the "War" on Terrorism?*, 51 EMORY L.J. 1059, 1074–75 (2002).

⁸⁷ See 8 U.S.C. § 1184(p)(2)(A) (2012); U.S. CITIZENSHIP & IMMIGRATION SERV., NUMBER OF I-918 PETITIONS FOR U NONIMMIGRANT STATUS (VICTIMS OF CERTAIN CRIMINAL ACTIVITIES AND FAMILY MEMBERS) BY FISCAL YEAR, QUARTER, AND CASE STATUS 2009-2016 1 (2016), https://www.uscis.gov/sites/default/files/USCIS/Resources/Reports%20and%20Studies/Immigration%20Forms%20Data/Victims/I918u_visastatistics_fy2016_qtr4.pdf [<https://perma.cc/3VM8-E7QB>].

⁸⁸ Koby L. Polaski, *U Visa Backlog Reaches All-Time High*, JOSEPH LAW FIRM (Apr. 21, 2016), <http://www.immigrationissues.com/u-visa/u-visa-backlog-reaches-all-time-high> [<https://perma.cc/U7HS-6AND>]; U.S. CITIZENSHIP & IMMIGRATION SERV., NUMBER OF I-918 PETITIONS FOR U NONIMMIGRANT STATUS (VICTIMS OF CERTAIN CRIMINAL ACTIVITIES AND FAMILY MEMBERS) BY FISCAL YEAR, QUARTER, AND CASE STATUS 2009-2016 1 (2016), https://www.uscis.gov/sites/default/files/USCIS/Resources/Reports%20and%20Studies/Immigration%20Forms%20Data/Victims/I918u_visastatistics_fy2016_qtr4.pdf [<https://perma.cc/3VM8-E7QB>].

a backdoor for obtaining permanent legal status—which was never the intent of this program. Rampant fraud and abuse of U Visas now undermines its effectiveness for law enforcement and circumvents the law abiding individuals who seek to immigrate to our country through the proper legal channels [I]t is not good immigration policy to staple green cards to police reports for those in the country illegally.⁸⁹

At the same time, immigration advocates have criticized the U visa program for putting undocumented victims of crime in a precarious position, both with respect to their abusers and with respect to their dependence on law enforcement for the future of their immigration status. As noted, in order for a crime victim to be eligible for a U visa, she must be helpful to law enforcement in the investigation or prosecution of the crime. Michael Kagan notes that this requirement forces victims to become accusers in order to receive immigration benefits, a formula that often has consequences for the (usually) undocumented accused as well.⁹⁰

Some scholars have noted that the U visa is yet another example of the tenuous relationship the feminist movement has forged with law enforcement in an effort to combat domestic violence and sexual assault. Elizabeth Newman argues that, by requiring law enforcement certification, the U visa program prioritizes law enforcement over the protection of victims.⁹¹ Newman also critiques the U visa for “codify[ing] dependence of an immigrant survivor of domestic violence on law enforcement”⁹² by requiring a law enforcement certification in order to apply for the visa and requiring the victim to remain under the effective control of law enforcement until three years after initial certification, when the victim can apply for adjustment of status.⁹³

In addition, as discussed above,⁹⁴ each law enforcement agency across the country is allowed to develop its own policies regarding when and whether to sign U visa law enforcement certifications, and many do so “only when it suits them.”⁹⁵ Because of this ad-hoc, localized process, immigration advocates have critiqued the U visa certification system, noting that

⁸⁹ Press Release, U.S. Congressman [sic] Diane Black, Black Introduces U Visa Reform Act (Feb. 5, 2013), <https://black.house.gov/press-release/black-introduces-u-visa-reform-act> [<https://perma.cc/97GK-ZGPA>]; see also H.R. 463, 113th Cong. (2013).

⁹⁰ Kagan, *supra* note 14 at 918 (“The U visa worsens the perception that immigrant victims may fabricate or exaggerate crime reports by forcing victims also to be accusers.”). To avoid the victim/accuser paradigm, Kagan proposes eliminating “the statutory requirement that victims must help the police” and eliminating “law enforcement endorsement or certification entirely.” *Id.* at 964.

⁹¹ Newman, *supra* note 45, at 254.

⁹² *Id.* at 268.

⁹³ *Id.* at 272.

⁹⁴ See ABREU ET AL., *supra* note 699 and accompanying discussion.

⁹⁵ Kagan, *supra* note 14, at 929 (“But the federal government cannot require state and local governments to carry out its policies. As a result, localities may cooperate with victims in obtaining a U visa only when it suits them, which may not be what the federal

[t]he data pertaining to U visa certification practices demonstrates that law enforcement agency policies may be firmly established or else *ad hoc* and constantly evolving. The inconsistent policies and procedures contribute to the problematic phenomenon of “geographical roulette” for U visa applicants, allowing agency and crime location to determine the remedy’s availability rather than the actual merits of an applicant’s petition.⁹⁶

Accordingly, whether or not a victim of crime is able to obtain law enforcement certification is entirely dependent on where the crime occurs, whether local law enforcement understands and is amenable to signing U visa certifications, and whether a victim’s case falls within the rule put in place by the local jurisdiction.

This “geographical roulette” can be attributed in part to the practice of using U visa applications and Form I-198 Supplement Bs in defense strategies by criminal counsel. Practices around defense requests for subpoenas vary widely and, accordingly, prosecutors’ willingness to sign Certification B forms also varies.⁹⁷ Some prosecutors have refused to sign U visa certification until the end of the criminal case, meaning that in some jurisdictions victims can be denied progress in regularizing their status for years.⁹⁸ This problem speaks to a larger need to standardize the U visa certification process and clarify how information contained within the Certification B form, within a witnesses’ immigration file, and related to a victim’s immigration history can be used in the underlying criminal trial. A standardized rule of evidence, discussed below, may go some way toward meeting this need.

V. THE U VISA APPLICANT AT CRIMINAL TRIAL

As noted above, given the U visa’s emancipatory possibilities for undocumented victims of crime, it has become a common form of immigration

government intends. DHS itself has advised localities that deciding whether to sign U visa certifications is under the authority of the agency conducting the investigation or prosecution.”) (citations omitted).

⁹⁶ ABREU ET AL., *supra* note 69, at 3–4. See also Jamie R. Abrams, *The Dual Purposes of the U Visa Thwarted in A Legislative Duel*, 29 ST. LOUIS U. PUB. L. REV. 373, 392 (2010) (noting that the regulations that require the certification to be completed by the head of a law enforcement agency and require ongoing cooperation of the victim risk politicizing the certification process).

⁹⁷ See ABREU ET AL., *supra* note 69, at 53.

⁹⁸ Newman, *supra* note 45, at 271 (“Commonly prosecutors deny consideration of the certificates until the close of a trial, fearing the defense counsel will accuse the victim of ulterior motives in testifying to obtain immigration status. This policy often prolongs the issuance of the certificate, and the applicant’s ability to file and secure any stability for months or even years.”). It should be noted that waiting until a trial is over does not solve the disclosure and evidentiary problems with U visa certification. Should a prosecutor obtain a conviction, that conviction would be subject to reversal should it come to light that a U visa was signed at the conclusion of trial and the information was never disclosed.

relief.⁹⁹ It is no surprise, then, that criminal defense attorneys have grown aware of the U visa program and have made victims' requests for law enforcement certification, as well as victims' undocumented status and its attendant associations, issues at trial.

Because the U visa structure requires a victim to both be "helpful" in the investigation and prosecution of crime, as well as to obtain law enforcement certification attesting to her helpfulness and assistance, the victim is at the command of the prosecutor to testify when requested. If she refuses to serve as a witness at trial, police or prosecutors have the power to withhold the certification required to obtain the U visa. Because of this, defendants can easily argue that applicants are motivated to fabricate or exaggerate the crime and testify as a prosecution witness to increase their chances of obtaining lawful immigration status.¹⁰⁰ As a result, the existence of the U visa application opens up the victim to further defense questions about her immigration status, her history of compliance with immigration laws, her employment status, and her credibility.

Because the goal of the U visa is to bring victims out of the shadows and have them cooperate with law enforcement, the exposure the applicant faces at trial poses a serious threat to Congressional objectives. Scholars have noted these harmful effects that criminal trials pose for vulnerable victims. Mary Fan notes that "the data suggests that victims who choose to seek justice may face serious obstacles and risks to their health, safety, and mental health."¹⁰¹ These concerns are exacerbated when undocumented victims, who have additional concerns related to their immigration status, have their credibility called into question by defense counsel due to a U visa application. This dynamic contributes to lower reporting rates and participation in the criminal justice system, which in turn undermines the goals of the U visa program, creating a chilling effect on victims' willingness to report and cooperate.

Furthermore, as discussed above,¹⁰² the possibility that an undocumented victim's immigration status, rather than the alleged crimes of the defendant, may become a primary focus at trial can have a chilling effect on the willingness of prosecutors to provide U visa certifications. In the calculus of winning trials, "[i]f it is foreseeable that defense lawyers will scrutinize a victim's immigration situation, it may appear better for the pros-

⁹⁹ See U.S. CITIZENSHIP & IMMIGRATION SERV., *supra* note 88. Over 60,000 individuals have received U non-immigrant visas and demand for U visas continues to grow. *Id.* As of the second quarter of 2016, over 121,659 applications for U visa status are pending with USCIS. *Id.*

¹⁰⁰ See Kagan, *supra* note 14, at 946–47.

¹⁰¹ Mary Fan, *Adversarial Justice's Casualties: Defending Victim-Witness Protection*, 55 B.C. L. REV. 775, 788 (2014) (citation omitted). Studies demonstrate the role of the criminal justice system, and courtroom experiences in particular, in exacerbating the harms suffered by crime victims, including the aggravation of post-traumatic stress disorder. *Id.* at 785–86.

¹⁰² See Newman, *supra* note 45 and accompanying discussion.

ecution if the victim has not received any tangible benefits in exchange for her cooperation.”¹⁰³

The danger to the U visa victim at trial is substantial. As noted in the case study to the Article, the exposure of a victim’s U visa application can call into question her credibility and motive for reporting the crime committed against her. In addition, the release of immigration records can open the door to defense questions regarding immigration status, some of which may implicate the U visa applicant criminally. The U visa applicant may be called upon to answer questions regarding her method of entry into the United States, her lawful or unlawful acquisition of work documents, and additional questions regarding her employment and family. Even if the judge ultimately finds the evidence inadmissible, the privacy harm is done and the witness’ criminal liability may be implicated.¹⁰⁴

Do the existing rules of evidence protect a U visa applicant as a witness in a criminal trial? To what extent do the laws of evidence protect an undocumented witness’ immigration history, employment history, and credibility more generally? Is it possible to balance a defendant’s Constitutional rights with the concerns for victim privacy and well-being? The next section of this Article explores these questions and considers whether the rules that govern the conduct of prosecutors, the Federal Rules of Evidence, or other constitutional protections can strike a balance between the rights of a defendant and the well-being of a U visa witness.

A. *Disclosure Obligations under Brady*

The Supreme Court clearly established under *Brady v. Maryland* that prosecutors have affirmative discovery obligations to disclose material and exculpatory evidence to the defense.¹⁰⁵ Some courts have treated applications for immigration relief as absolutely privileged and not appropriate for disclosure.¹⁰⁶ Others have found that U visa applications and, in particular, the willingness of police and prosecutors to sign a law enforcement certification, constitute exculpatory evidence under *Brady*.¹⁰⁷ While there is no consistent case law prescribing when and what U visa-related information must be dis-

¹⁰³ Kagan, *supra* note 14, at 950.

¹⁰⁴ See Fan, *supra* note 101, at 789–90.

¹⁰⁵ *Brady v. Maryland*, 373 U.S. 83, 87 (1963).

¹⁰⁶ See *Hawke v. Dep’t of Homeland Sec.*, No. C-07-03456 RMW, 2008 WL 4460241, at *7 (N.D. Cal. Sept. 29, 2008) (denying alleged batterer’s request that the Department of Homeland Security produce his wife’s immigration records for use in criminal battery proceedings); *Demaj v. Sakaj*, No. 3:09-CV-255, 2012 WL 476168, at *5 (D. Conn. Feb. 14, 2012) (denying motion to compel U-Visa application because “disclosure of these documents for this purpose runs contrary to the intent of the protections afforded by 8 U.S.C. § 1367”).

¹⁰⁷ See STANFORD IMMIGRANTS’ RIGHTS CLINIC & BAY AREA LEGAL AID, *supra* note 70, at 5 (noting that insofar as they have the potential to undermine the credibility of a prosecution witness, prosecutors believe they are required to disclose U visa information to the defense under *Brady*).

closed under this criteria,¹⁰⁸ some prosecutors agree that disclosure to the defense of any information that would show that the U-visa applicant had a motive to lie about the criminal conduct would be required.¹⁰⁹

The question then becomes: what must the prosecution disclose in order to comply with *Brady*? Courts have come to different conclusions and much depends on the context of the case.¹¹⁰ For example, in an ideal situation, the prosecution would only have access to the Form I-918B—the law enforcement certification form. This form contains the applicant’s name, date of birth, the criminal activity that occurred, and information about the helpfulness of the victim.¹¹¹ That the victim has requested a U visa certification is sufficient for the defense to infer that she is seeking immigration status, but it is not conclusive as to a victim’s current immigration status, entry into the country, or any other immigration or criminal law violations.¹¹²

However, in other cases, the prosecution may have a victim’s entire U visa application or immigration file, subject to discovery under *Brady*.¹¹³ In that case, discovery may involve the disclosure of the victim’s address, the victim’s personal statement, places and manner of entry into the United States, information about the victim’s criminal background, information

¹⁰⁸ U and T visa-related discovery in civil litigation over workplace rights has received increasing attention by courts, with request for discovery of U visa applications and immigration files growing as a strategy for employers, raising some of the same concerns as in the criminal context. *See, e.g.*, Brief for Southern Poverty Law Center et al, *supra* note 39.

¹⁰⁹ *See* STANFORD IMMIGRANTS’ RIGHTS CLINIC & BAY AREA LEGAL AID, *supra* note 1070, at 5. In the author’s informal conversations with prosecutors, most indicated that in light of the lack of a clear disclosure rule related to U visas, they would engage in broad disclosure of the U visa certification and application such that any convictions obtained would not be subject to post-conviction reversal based on non-disclosure of the U visa information.

¹¹⁰ *See* *Perez v. United States*, 968 A.2d 39, 64, 69–72 (D.C. 2009) (holding that prosecution’s failure to disclose witness’ false statements about her immigration status may have been a *Brady* violation but was not prejudicial to defendants); *People v. Bartlett*, No. 5860-11, 2013 WL 3199088, at *2 (N.Y. Sup. Ct. 2013) (denying defense’s motion to disclose all documents related to the complainant’s U-Visa application because: (1) the court’s U Visa certification form is “neither exculpatory nor a possibly impeachable statement of the complainant”; and (2) “Congress’ clear intent is to keep these visa applications confidential in order to encourage undocumented women to come forward and report abuse . . .”).

¹¹¹ U.S. CITIZENSHIP & IMMIGRATION SERVS., FORM I-918B (2013), <https://www.uscis.gov/sites/default/files/files/form/i-918supb.pdf> [<https://perma.cc/W8C6-8DZN>].

¹¹² For example, the mere fact that a victim is seeking a U visa says nothing about her current immigration status. While it is true that many applicants for a U visa are undocumented, a non-citizen inside of the United States may be seeking a U visa in order to change non-immigrant status or rectify an overstay of a previous visa. Therefore, a request for law enforcement certification is not conclusive as to someone’s manner of entry, current immigration status, or other immigration or criminal law violations.

¹¹³ As a practical matter, attorneys may limit the amount of information shared with prosecuting attorneys and, likewise, a prosecuting attorney may limit the amount of information requested from the non-citizen’s attorney to strategically avoid some of the disclosure problems noted. However, the disclosure obligations under *Brady* and Model Rule of Professional Conduct 3.8 both require that the prosecutor disclose *any* exculpatory information that they or law enforcement have in their possession.

about the applicant's citizenship and nationality, information about relevant family members, and disclosure of any acts that may make the applicant "inadmissible"¹¹⁴ to the United States.¹¹⁵

If the prosecutor signed a U visa law enforcement certification, or must disclose documentation or information that the victim will be receiving law enforcement certification¹¹⁶ at some point in the process of criminal proceedings or at the end of trial, such disclosure will subject the victim's immigration status, immigration history, credibility, and employment history to exploration by the defense. Accordingly, the next step in analysis becomes whether the rules of evidence provide guidance with respect to the proper scope of cross-examination of a victim witness on these issues.

B. *Scope of Allowable Cross-Examination*

When a U visa applicant takes the stand, there are arguably two main areas that are relevant upon cross examination: (1) whether the victim's manner of entry into the country, immigration status, or methods of employment constitute "instances of conduct" indicative of the victim's truthfulness,¹¹⁷ and (2) whether the victim's receipt or likelihood of law enforcement certification is an allowable subject of inquiry on cross-examination as evidence of bias or motive. In addition, the rules and constitutional protections that apply must be balanced against the harm to the victim that might occur if immigration status is revealed to a jury. While an exhaustive analysis¹¹⁸ of the rules of evidence with respect to allowable cross examination of an undocumented witness is beyond the scope of this Article, this section will provide a brief overview and analysis of some of the rules that may apply.

¹¹⁴ See Immigration and Nationality Act § 212(a), 8 U.S.C. § 1182(a) (2012).

¹¹⁵ See U.S. CITIZENSHIP & IMMIGRATION SERVS., FORMS I-918, I-918A, I-918B, I-192, G-28, AND I-918, <https://www.uscis.gov/forms> [<https://perma.cc/JDF4-9YTG>].

¹¹⁶ An obvious solution to prosecutors having to disclose the Form I-918B would be for law enforcement officials to postpone signing the U visa certification until the conclusion of the criminal trial. However, as noted in the discussion at Parts IV & V, *supra*, given the length of criminal trials and the role that certification plays in garnering cooperation from the victim, postponing certification is not always in the victim's or law enforcement's best interest. In addition, even if no law certification has been signed, the prosecution has often discussed the possibility of a U visa or its willingness to sign a U visa law enforcement certification at some point in the proceedings, which is exculpatory information that must be disclosed under *Brady*. See Stanford Immigrants' Rights Clinic & Bay Area Legal Aid, *supra* note 1070, at 5.

¹¹⁷ FED. R. EVID. 608(b).

¹¹⁸ For a specific analysis of allowable cross examination of undocumented witnesses, see Gabriel J. Chin, *Illegal Entry As Crime, Deportation As Punishment: Immigration Status and the Criminal Process*, 58 UCLA L. REV. 1417, 1426–30 (2011); Colin Miller, *Crossing Over: Why Attorneys (and Judges) Should Not Be Able to Cross-Examine Witnesses Regarding Their Immigration Statuses for Impeachment Purposes*, 104 NW. U. L. REV. COLLOQUY 290, 291–98 (2010); Caleb E. Mason, *The Use of Immigration Status in Cross-Examination of Witnesses: Scope, Limits, Objections*, 33 AM. J. TRIAL ADVOC. 549, 552–63 (2010).

1. *Instances of Conduct Indicative of the Victim's Truthfulness*

Rule 608(b) of the Federal Rules of Evidence specifies that, for the purpose of impeachment, a witness may be cross-examined about “specific instances of conduct” that are probative of truthfulness or untruthfulness.¹¹⁹ In the context of the U visa applicant whose application for a U visa or related information has been revealed through discovery, the defense may point to several instances of immigration-related conduct in an effort to discredit the victim as a witness.

First, the defense may attempt to cross-examine the U visa witness on her immigration status generally, as the existence of a U visa application might indicate that the witness is in the country without authorization and needs a regularized immigration status. Raising this question for a U visa witness is both intimidating and dangerous because admitting to unlawful presence in the country in a public setting such as a trial opens up the possibility of the witness being reported to Immigration and Customs Enforcement for an immigration violation, which can lead to deportation from the country.¹²⁰ In addition, if the U visa witness answers the question honestly, she is exposing a private, confidential legal status to a jury of her peers—a potentially devastating revelation, particularly in a small community. She is also making a statement under oath that could potentially be used against her in later criminal or removal proceedings.

Questioning a U visa applicant about her legal status generally is an improper use of Rule 608(b). A witness's legal status is not “conduct” and has no bearing on that person's propensity for truthfulness.¹²¹ While trial courts have ruled inconsistently on this issue,¹²² most scholars agree that

¹¹⁹ FED. R. EVID. 608(b).

¹²⁰ While confidentiality provisions exist to ensure that information submitted to USCIS in connection with the U visa application is not used by ICE in removal proceedings against applicants, information that comes from other sources, such as individuals present at trial, jury members, or the defendant himself, is not subject to the same confidentiality provisions. ICE has a reporting mechanism for members of the public to use to report undocumented non-citizens. See CUSTOMS AND BORDER PROTECTION, REPORTING ILLEGAL ACTIVITY, https://help.cbp.gov/app/answers/detail/a_id/735/~reporting-illegal-activity [<https://perma.cc/J7XX-2MNU>]. Accordingly, after disclosure of a non-citizen's undocumented status at trial, a member of the public could ostensibly call the local ICE office, report the person as undocumented, and ICE officers could investigate, arrest, and place into removal proceedings the U visa witness. ICE officers could also refer the case to the Assistant U.S. Attorney General for federal prosecution of the entry or illegal reentry. Generally, neither the local ICE detention and removal officers nor the federal prosecutors work in close cooperation with the USCIS office that adjudicates U visa applications.

¹²¹ Chin, *supra* note 118, at 1430.

¹²² See *id.* at 1428–29; see also Solis v. Saraphino's Inc., No. 09-954, 2010 WL 4941953, at *2 (E.D. Wisc. Nov. 30, 2010) (“A person's legal status itself has no bearing on that person's propensity for dishonesty, and thus defendants' assertion that legal status is relevant to credibility is incorrect.”); *Ansoumana v. Gristede's Operating Corp.*, 201 F.R.D. 81, 87 (S.D.N.Y. 2001) (“Defendants' concerns regarding the immigration status of the various named Plaintiffs as bearing on their potential credibility and fitness as class

cross-examination related to mere immigration status alone is impermissible under Federal Rules of Evidence Rule 608(b).¹²³

However, there are several instances of conduct that might be revealed through the discovery of a U visa law enforcement certification or application in a criminal trial. Manner of entry into the United States (which for many U visa applicants was entry without inspection or admission),¹²⁴ misrepresentations of citizenship, working with false documentation, or providing a false Social Security number in order to gain employment are all specific instances of conduct that may give rise to Rule 608(b) questioning.¹²⁵ Criminal defense attorneys cannot be faulted for using this information to discredit a prosecution witness as they are under a duty to present the best defense possible for their clients.¹²⁶ Yet, as noted, such questioning can be devastating to the U visa applicant because many applicants have entered the country without inspection or admission and worked without authorization. Answering these questions truthfully in open court can have serious consequences such as alerting Immigration and Customs Enforcement to immigration violations and removability of the witness, as well as admission of criminal liability.¹²⁷

representatives are without merit.”); *see also* *Mischalski v. Ford Motor Co.*, 935 F.Supp. 203, 207–08 (E.D.N.Y. 1996) (“Here, it is undisputed that plaintiff is a Polish citizen who arrived in this country in 1990 and has remained here after the expiration of his visa. Ford has cited no authority, and the court is aware of none, to support the conclusion that the status of being an illegal alien impugns one’s credibility.”) (footnote omitted). *But see* *Marquez v. State*, 941 P.2d 22, 26 (Wyo. 1997) (concluding that Appellant’s status as an illegal alien was probative of his character for truthfulness and that Appellant had “not directed us to any legal authority which would persuade us otherwise”).

¹²³ *See* Chin, *supra* note 118.

¹²⁴ *See* Mason, *supra* note 118, at 558–560.

¹²⁵ *See* Chin, *supra* note 118, at 1428–30 (noting that “[t]he critical question is whether entering the country without authorization is a bad act probative of dishonesty. The doctrinal answer in many jurisdictions seems to be that it can be . . . Working in the United States without authorization typically requires using forged or counterfeit documents or false names. This conduct is criminal and may well warrant impeachment.”) (footnotes omitted); *see also* Mason, *supra* note 118, at 558 (“A diligent attorney who suspects that an opposing witness lacks status should always investigate at least enough to find out where the witness lives and works. . . . [I]t ought to be easy enough to determine what sorts of questions, as a general practice, the landlord or employer ask of applicants for apartments or jobs. Investigating these two areas ought to yield a good-faith basis for a question about lies . . .”) (footnote omitted). *But see* Miller, *supra* note 118, at 294 (“[T]he act of illegal entry is usually not an act relating to *crimen falsi* because it does not involve deceit of or false statements to government officials or bodies.”).

¹²⁶ *See* MODEL RULES OF PROF’L CONDUCT pmbl. (AM. BAR ASS’N 1983) (“As advocate, a lawyer zealously asserts the client’s position under the rules of the adversary system.”); *see also* MODEL RULES OF PROF’L CONDUCT r. 1.3 cmt. (AM. BAR ASS’N 1983) (“A lawyer should pursue a matter on behalf of a client despite opposition, obstruction or personal inconvenience to the lawyer, and take whatever lawful and ethical measures are required to vindicate a client’s cause or endeavor. A lawyer must also act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client’s behalf.”).

¹²⁷ Illegal entry or re-entry into the United States is a federal crime. *See* 8 U.S.C. §§ 1325–1326 (2012).

Should the defense engage in a line of questioning that implicates the U visa witness criminally, the witness has the right to plead the Fifth Amendment privilege against self-incrimination.¹²⁸ Yet, in the author's experience, as noted in the case study at the beginning of this Article, the process of advising a U visa witness of the danger of implicating herself criminally is traumatizing and confusing. For undocumented non-citizens, any attention drawn to irregular immigration status, manner of entry, or other civil or criminal violations can result in deportation. In addition, the optics for the jury when a U visa witness pleads the Fifth are damaging in terms of the witness' credibility and reputation.¹²⁹ Juries regularly assume that if a witness is pleading the Fifth, she has something to hide.¹³⁰ It should be noted that there is a legitimate question as to whether or not a court should consider these "instances of conduct" probative of an undocumented witness's credibility.¹³¹ Under Constitutional protections for defendants, close evidentiary decisions are usually decided in favor of the defendant. As such, under the current evidentiary regime, discovery of the U visa witnesses' application for a U visa or request for law enforcement certification opens up the possibility of multiple damaging, traumatizing, and chilling areas of cross-examination.

2. *Evidence of Bias or Motive to Fabricate*

The U visa witness may also face difficult cross-examination questions as the defendant exercises his or her rights under the Confrontation

¹²⁸ U.S. CONST. amend. V.

¹²⁹ Immigration violations are increasingly being criminalized both legislatively and in the public's perception. See Maureen A. Sweeney, *Shadow Immigration Enforcement and Its Constitutional Dangers*, 104 J. CRIM. L. & CRIMINOLOGY 227, 259 (2014) ("Since 2001, immigration violations are increasingly considered and, in many cases, prosecuted as criminal violations or violations that, at a minimum, indicate the perpetrator's general lawlessness.") (footnote omitted).

¹³⁰ In a criminal setting, the invocation of the Fifth cannot be used as evidence against that individual in a criminal trial. See Peter D. Hardy & Matthew T. Newcomer, *Parallel Proceedings and the Perils of the Adverse Inference*, 2 J. HEALTH & LIFE SCI. L. 241, 245 (2009). However, a parallel civil proceeding rule that allows for "adverse inferences against parties to civil actions when they refuse to testify in response to probative evidence offered against them" demonstrates that any invocation of the Fifth Amendment is likely to cause a juror to draw an adverse inference, even when not formally admissible as evidence in the criminal trial. *Id.* (citing *Baxter v. Palmigiano*, 425 U.S. 308, 318 (1976)).

¹³¹ For example, many undocumented witnesses engage in the acts of entry without inspection of admission, falsification of documents, and work without authorization not because they are untruthful or have a propensity to lie but because they are working to support their families and making the best of an immigration system that has been designed to deny them the right to work lawfully. Data supports the proposition that most immigrants come to the United States to work and reunify with family. See MARK GRIMES, ELYSE GOLOB, ALEXANDRA DURCIKOVA & JAY NUNAMAKER, *REASONS AND RESOLVE TO CROSS THE LINE: A POST-APPREHENSION SURVEY OF UNAUTHORIZED IMMIGRANTS ALONG THE U.S.-MEXICO BORDER 1-2* (2013), <http://www.borders.arizona.edu/cms/sites/default/files/Post-Apprehension-Survey-REPORT%20may31-2013.pdf> [<https://perma.cc/CCU4-D4NA>].

Clause.¹³² In a line of Confrontation Clause cases, the Supreme Court held that “the exposure of a witness’ motivation in testifying is a proper and important function of the constitutionally protected right of cross-examination”¹³³ and that limits on cross-examination are unreasonable when there is a “strong potential” to reveal evidence of bias or motive to lie.¹³⁴

There is a strong argument that law enforcement certification, a necessary pre-requisite in order for an applicant to receive a U visa, may provide a U visa applicant with bias or a motive to fabricate testimony or claims of her victimization. It should be noted that no empirical studies prove that fraud in U visa claims is widespread,¹³⁵ although fraudulent assertion of criminal activity is not the litmus test for cross-examination on bias or motive grounds. In addition, while a necessary step to put an undocumented non-citizen on the pathway to permanent residence and citizenship, law enforcement certification itself does not guarantee a U visa applicant success in her visa application.¹³⁶ Nonetheless, the Supreme Court held that the right to confrontation is broad; courts will likely allow broad cross-examination based on the benefit the witness will derive from cooperation with prosecution in the criminal case. Many courts have found that evidence of a U visa application provides a legitimate basis for cross-examination because it is a benefit that flows from the prosecutor to the witness.¹³⁷ Here, such actions would allow an inquiry relating to the U visa and the applicant’s immigration status.

3. *Weighing the Danger of Prejudice*

Even if a trial court finds that a U visa witnesses’ immigration history is probative of her truthfulness or that the U visa law enforcement certification is evidence of bias or motive to fabricate, the court must still undertake a balancing test under FRE 403.¹³⁸ “The court may exclude relevant evidence

¹³² The Confrontation Clause of the Sixth Amendment to the United States Constitution provides that “[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him. . . .” U.S. CONST. amend. VI.

¹³³ *Davis v. Alaska*, 415 U.S. 308, 316–17 (1974).

¹³⁴ *Olden v. Kentucky*, 488 U.S. 227, 232 (1988).

¹³⁵ Mariela Olivares, *Battered by Law: The Political Subordination of Immigrant Women*, 64 AM. U. L. REV. 231, 259 (2014).

¹³⁶ See discussion *supra* Part IV.A.

¹³⁷ See, e.g., *Commonwealth v. Sealy*, 6 N.E.3d 1052, 1058 (Mass. 2014) (finding that a U visa application is grounds for impeachment because it is relevant to whether the victim fabricated the sexual assault in order to get a U visa). Similarly, courts have found that evidence showing a motive to lie for purposes of winning a custody determination is appropriate for cross examination. See *Doumbouya v. County Court*, 224 P.3d 425, 429 (Colo. App. 2009) (“The theory of the defense required a motive for defendant’s estranged wife to accuse him falsely. That motive, according to the defense, was a conviction that would lead to the wife’s being awarded custody of the couple’s son.”).

¹³⁸ See Evan Haglund, *Impeaching the Underworld Informant*, 63 S. CAL. L. REV. 1405, 1430 (1990) (“Appellate courts typically reason that the trial judge is obliged to respect a criminal defendant’s confrontation rights and therefore to permit enough impeachment to satisfy the Sixth Amendment, but that once the Constitution is satisfied, the

if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.”¹³⁹ In the U visa victim witness context, the possibility for unfair prejudice may provide a limit on cross-examination.

Undocumented immigration is a hugely divisive issue among the American public. As noted by Maureen Sweeney,

political parties and politicians in recent years have deliberately—and perhaps cynically—used immigration to motivate their political bases and differentiate themselves from their opponents. The result is that immigration has become a deeply divisive issue, tapping into wells of strongly held beliefs and feelings about the identity of our nation, our way of life, our families, our economic and social future, and, increasingly, the rule of law.¹⁴⁰

In the U visa context, once it is revealed that the U visa witness has violated immigration laws or may regularize her immigration status through cooperation with law enforcement in the attendant criminal case, there is a danger that the jury will not consider the immigration-related information as it relates to the witnesses’ credibility, but it will instead assess her credibility and the defendant’s guilt based on prejudice against undocumented non-citizens. In addition, jurors may also conflate a judgment of the witness’ credibility with a judgment about the state of the immigration system within the country.¹⁴¹ In balancing the relevance of information gained from the U visa witness with the potential for prejudice against the witness, some courts have found that the issue of immigration is so highly divisive and prejudicial that it cannot be the subject of cross examination.¹⁴² However, the majority of courts have found that the relevance of the information related to instances of conduct related to immigration or bias or motive to lie outweighs

trial judge has wide discretion to balance probative value against prejudicial effect.”) (citation omitted).

¹³⁹ FED. R. EVID. 403.

¹⁴⁰ Sweeney, *supra* note 129, at 258–59 (footnote omitted). *See also* Newman, *supra* note 45, at 237 (“More and more, public opinion has equated undocumented immigrants with criminals. The construct of ‘unlawful presence,’ while not a crime, gave fuel to anti-immigrant groups insistent on publicly categorizing immigrants with no status as ‘illegals.’” (footnote omitted)).

¹⁴¹ *See* Chin, *supra* note 118, at 1427. A recent Supreme Court case exposed the danger of bias against undocumented persons in the criminal justice system. *Pena-Rodriguez v. Colorado*, No. 15-606, slip op. at *2–4 (2017). In that case, the defendant and his witness were both Hispanic and the defendant undocumented. *Id.* at *3–4. Following a guilty verdict, two jurors revealed to defense counsel that a juror held bias against “illegals” and “Mexican men.” *Id.* at *3–4. The biased juror expressed opinions revealing that he believed the defendant to be more likely to commit sexual assault and lie under oath because of his status as an undocumented non-citizen. *Id.*

¹⁴² *See* *Salas v. Hi-Tech Erectors*, 177 P.3d 769, 774 (Wash. Ct. App. 2008) (holding that “[t]he issue of immigration status is divisive and prejudicial”); *see also* *People v. Perales-Hernandez*, A135482, 2014 WL 710455, at *6 (Cal. Ct. App. 2014) (trial court feared prejudice against “illegal immigrants” would prejudice the jury).

the possible prejudice the witness might face.¹⁴³ This is particularly true because judges are hesitant to exclude an otherwise legitimate 608(b) or bias inquiry by a criminal defense attorney on the grounds of potential harm to a non-party in a case (i.e. the U visa witness).¹⁴⁴ Thus, no reliable protective principle is found in FRE 403(b).

Finally, courts are also bound by Federal Rule of Evidence 611(a), which provides that the “court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment.” This rule may also be used to protect the U visa witness from the re-traumatization or embarrassment that might come from having her entire immigration history and status exposed through cross examination, like the individuals in the case study to this Article. Yet, this rule too only exempts interrogation rising to the level of harassment and *undue* embarrassment, not just embarrassing or potentially damaging information about the witness. Again, because trial court judges are given ample discretion to make this determination, and the balance is usually weighed in favor of the criminal defendant rather than a non-party witness, protection from disclosure of a U visa applicant’s private information cannot be guaranteed.

4. *The U visa witness: confronted and exposed*

There is no single rule of evidence that would comprehensively protect a U visa applicant from being re-traumatized through her participation as a witness at the trial of her perpetrator. In fact, when a U visa Certification B has been signed and disclosed under *Brady*, there is a high likelihood that the U visa applicant’s immigration status will become an issue at trial. Whether through discovery itself or through questioning on cross-examination in an effort to impeach or expose bias or motive to fabricate, the revelation of the U visa application opens up the U visa applicant to additional questioning that can have an *in terrorem* effect on the witnesses’ willingness to participate in the prosecution of crime. The result is that the intention of Congress—providing a confidential process for undocumented victims of crime to avail themselves of the protection of law enforcement and assist in the prosecution of crime—is undermined by the evidentiary system in place.

Should a comprehensive rule of evidence be created to encourage the participation of undocumented victims in the investigation and prosecution of crimes committed against them, consistent with Congress’ intent in creat-

¹⁴³ See *Marquez v. State*, 941 P.2d 22, 26 (Wyo. 1997) (finding appellant failed to show that admission of his immigration status demonstrated prejudice).

¹⁴⁴ See, e.g., *Williams v. State*, 912 So.2d 66, 68 (Fla. Dist. Ct. App. 2005) (“Because liberty is at risk in a criminal case, a defendant is afforded wide latitude to develop the motive behind a witness’s testimony.”).

ing the U visa? If so, what evidentiary models exist and what are the lessons to be learned?

VI. THE RAPE SHIELD LAW: A MODEL FOR REFORM?

In the search for model evidentiary rules that might protect U visa applicants as witnesses at trial, rape shield laws provide an obvious analog. In the context of prosecutions for sexual assault, rape shield laws protect victim witnesses from the embarrassment, and possible chilling effect, of having their sexual histories exposed and credibility questioned at trial. Similar to the concerns that fueled the creation of the U visa, “[s]exual violence experts agree that confidentiality and privacy concerns are the most significant reasons why sexual assault crimes go unreported.”¹⁴⁵ A similar rationale applies to U visa applicants, who risk embarrassment and exposure through participation in the criminal justice process. The next section of this Article traces the evolution of rape shields statutes and analyzes their application in the criminal trial setting.

A. *Evolution of Rape Shield Statutes*

In the 1970s and 80s, feminist legal scholars gained traction inside the criminal courtroom by exposing the harmful normative framework underlying rape prosecutions: that women must maintain an ideal of sexual abstinence in order to obtain legal protection.¹⁴⁶ To combat this fallacy, legislatures across the country adopted rape shield laws to remedy the effects of the belief that a victim “consented to sexual intercourse with the defendant, or was more likely to lie under oath, simply because she had previously consented to sexual intercourse with someone else.”¹⁴⁷

Congress enacted the federal rape shield statute as part of the Privacy Protection for Rape Victims Act in 1978.¹⁴⁸ Federal Rule of Evidence 412 provides that:

- (a) Prohibited Uses. The following evidence is not admissible in a civil or criminal proceeding involving alleged sexual misconduct:
 - (1) evidence offered to prove that a victim engaged in other sexual behavior; or

¹⁴⁵ JESSICA MINDLIN & LIANI JEAN HEH REEVES, CONFIDENTIALITY AND SEXUAL VIOLENCE SURVIVORS: A TOOLKIT FOR STATE COALITIONS 9 (2005) (footnote omitted), <https://law.lclark.edu/live/files/6471-confidentiality-and-sexual-violence-survivors-a> [<http://perma.cc/CQH9-DM4T>].

¹⁴⁶ Anderson, *supra* note 16, at 80.

¹⁴⁷ *Id.* at 54–55.

¹⁴⁸ Privacy Protection for Rape Victims Act of 1978, Pub. L. No. 95-540, 92 Stat. 2046 (enacted as FED. R. EVID. 412).

(2) evidence offered to prove a victim's sexual predisposition.¹⁴⁹

The adoption of rape shield legislation, much like the U visa program, constituted an unlikely alliance between law enforcement and feminists.¹⁵⁰ For feminists, rape shield laws were a way to shield the victims of rape from re-traumatization at trial where their sexual lives might be put on display and their credibility questioned. In addition, the laws contributed to the normative, expressive value of believing women. Law enforcement viewed the legislation as an opportunity to bring more perpetrators to justice through victim cooperation.¹⁵¹ At the time of passage of the federal law, Congress indicated that the legislation would protect victims from answering irrelevant questions during an already traumatic experience on the stand, stop the practice of putting the victim on trial, minimize post-assault trauma, promote the reporting and prosecution of rape, and encourage victims to report rape without the fear that their reputation and private lives would be exposed at trial.¹⁵² These policy reasons mirror Congress' rationales in adopting the U visa, particularly with respect to encouraging victims to report and assist in the prosecution of crime.

B. *Testing the Constitutional Limits of Rape Shield Statutes*

Since their adoption, the rape shield laws, at both the state and federal level, have been challenged in their application, but have not been found unconstitutional. In their application, rape shield statutes cannot violate the criminal defendant's rights of confrontation. The Supreme Court case of *Olden v. Kentucky* provides a salient example of the balancing a court under-

¹⁴⁹ FED. R. EVID. 412(a)(1)–(2).

¹⁵⁰ 23 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, *FEDERAL PRACTICE AND PROCEDURE: FEDERAL RULES OF EVIDENCE* § 5382 (1st ed. 2017); see also Wallace D. Loh, *The Impact of Common Law and Reform Rape Statutes on Prosecution: An Empirical Study*, 55 WASH. L. REV. 543, 569–71 (1980) (“The main force behind the awakening of public consciousness to rape and reform of rape laws was the feminist movement In consciousness-raising group sessions across the country, women began to discover in rape a common concern that cut across class and race Proponents of rape reform hitched their wagon to the crime control movement. Police and prosecutors who supported the reform did not necessarily subscribe to feminist values. They saw it as a means to improve their enforcement effectiveness.”) (footnote omitted).

¹⁵¹ Loh, *supra* note 150, at 571.

¹⁵² Anderson, *supra* note 16, at 88; cf. Signing Statement, President Jimmy Carter, Protection for the Privacy of Rape Victims Statement on Signing H.R. 4727 Into Law (Oct. 30, 1978), <http://www.presidency.ucsb.edu/ws/?pid=30074> [<https://perma.cc/9PNV-QE2Y>] (“There is no question that victims of rape and other sex crimes, predominately women, are reluctant to report these crimes. Too often rape trials have been as humiliating as the sexual assault itself. By restricting testimony on the victim's prior sexual behavior to that genuinely relevant to the defense, the rape victims act will prevent a defendant from making the victim's private life the issue in the trial.”).

takes when weighing evidence of motive to lie or fabricate against the potential prejudice a victim or witness might face from the jury.¹⁵³

In *Olden*, the defendant argued that the alleged rape victim had a motive to fabricate the story of her assault. He attempted to introduce evidence that the victim was cohabitating with her boyfriend, a black man, and that she fabricated the assault in order to prevent her boyfriend from discovering her affair with Olden.¹⁵⁴ In applying the balancing test, the appeals court found that “[t]here were the undisputed facts of race; [the complainant] was white and [her lover] was black. For the trial court to have admitted into evidence testimony that [they] were living together at the time of trial may have created extreme prejudice against [her].”¹⁵⁵

The Supreme Court summarily reversed in a *per curiam* opinion, emphasizing Olden’s right to expose a witness’ motivation in testifying.¹⁵⁶ The Court wrote: “[s]peculation as to the effect of jurors’ racial biases cannot justify exclusion of cross-examination with such strong potential to demonstrate the falsity of [the alleged victim’s] testimony.”¹⁵⁷ The Court reaffirmed that a “criminal defendant states a violation of the Confrontation Clause by showing that he was prohibited from engaging in otherwise appropriate cross-examination designed to show a prototypical form of bias on the part of the witness”¹⁵⁸

Since the Supreme Court’s decision in *Olden*, rape shield statutes have been tested, and lower courts have consistently found that rape shield laws are constitutional because the policy objectives behind the legislation are a rational response to the feminist critique of the treatment of sexual assault victims at trial and are “a valid legislative determination that rape victims deserve heightened protection against surprise, harassment, and unnecessary invasions of privacy.”¹⁵⁹ In addition, courts have found that rape shield statutes are helpful to law enforcement in the prosecution of crime because prosecutors can guarantee a certain level of privacy for victims who agree to testify against their perpetrators.¹⁶⁰ However, in their language and application, rape shield statutes cannot violate a criminal defendant’s constitutional right to confrontation or impeachment of adversarial witnesses. These contours establish a helpful framework in considering model legislation to protect U visa witnesses at trial.

¹⁵³ *Olden v. Kentucky*, 488 U.S. 227, 232–32 (1988).

¹⁵⁴ *See id.* at 230–31.

¹⁵⁵ *Id.* at 231 (citation omitted).

¹⁵⁶ *Id.*

¹⁵⁷ *Id.* at 232.

¹⁵⁸ *Id.* at 231 (citation omitted).

¹⁵⁹ *Michigan v. Lucas*, 500 U.S. 145, 150 (1991); Harriett R. Galvin, *Shielding Rape Victims in the State and Federal Courts: A Proposal for the Second Decade*, 70 MINN. L. REV. 763, 791–801 (1986).

¹⁶⁰ *See Galvin, supra* note 159, at 798–801.

VII. PROPOSAL FOR REFORM: STATUS-SHIELD EVIDENTIARY PROHIBITIONS

As seen from the discussion above,¹⁶¹ when a U visa applicant agrees to participate as a witness in the criminal trial of her perpetrator, she opens herself up to a line of questioning related to her immigration status that can be threatening, traumatizing, and chilling with respect to her willingness to cooperate with law enforcement in the future. In essence, the victim herself can be put on trial as her irregular immigration status and associated acts are used as impeachment material. This has far-reaching consequences for a witness in terms of her risk of deportation, criminal liability, and reputation in her community. These thwart Congress' intent in providing a pathway for undocumented immigrants to come out of the shadows to assist in the prosecution of crime in exchange for confidentiality and the possibility of regularized immigration status.

This catch-22 is analogous to the problem that feminists and law enforcement faced during the 1970s and 1980s in the search for justice for the crimes of rape and sexual assault.¹⁶² Victims were often afraid to report the crime and testify at trial because of fear of their sexual history being exposed through the criminal process—i.e. being re-victimized at trial. One solution to the problem was the adoption, at both the state and federal level, of protectionary evidentiary rules applicable to victims of sexual assault. While the application of rape shield laws has been limited by criminal defendants' constitutional rights to confrontation, courts across the country have found the laws to be rationally related to a legitimate public interest and constitutional in their form.

Equivalent status shield laws may be the answer to protecting the undocumented U visa witness at trial. As some scholars have noted, in some instances, the criminal justice system has taken measures to shelter victims from added harm in the criminal trial. In her article on the protection of vulnerable witnesses, Mary Fan, for example, argues, “[a]verting further harm is an important interest that justifies procedural adaptations that reduce risk while still permitting fair adjudication.”¹⁶³

A. *Proposing a Status Shield Law*

Developing a status shield law for U visa applicants would effectuate the same objectives as existing rape shield laws. A possible formulation of the status shield statute might include the following elements:

¹⁶¹ See discussion *supra* Part V.4.

¹⁶² See Anderson, *supra* note 16, at 69; see also *supra* discussion accompanying note 16.

¹⁶³ Fan, *supra* note 101, at 782. Fan notes that “[t]he rapid growth in law has seemingly overlooked the important difference between crimes against the State and crimes against victims.” *Id.* at 796–97.

Proposed Rule:

(a) Prohibited Uses. The following evidence is not admissible in a civil or criminal proceeding where the victim is an applicant for a U non-immigrant visa under 8 U.S.C. § 1101(a)(15)(U):

- (1) evidence offered to prove immigration status; or
- (2) evidence offered to prove a victim's manner of entry into the United States or unauthorized employment in the United States as probative of a victim's propensity for truthfulness.¹⁶⁴

In order to form a binding rule of evidence that comports with the protections afforded to criminal defendants, the proposed statute must strike a rational balance between furthering an important policy interest while protecting the right of the accused to present a complete defense.¹⁶⁵ As noted above,¹⁶⁶ courts have found analogous rape shield statutes constitutional because protecting the privacy interests of victims of sexual assault is a valid policy interest deserving of evidentiary protection in criminal trials.¹⁶⁷ Here, there is an important public interest in preventing harm to undocumented U visa applicants that is proportionate and rationally related¹⁶⁸ to the proposed status shield law.

B. Protecting Societal Interests, Furthering Congressional Intent

In conducting the balancing test to assess the Constitutionality of the proposed status shield law, the interests advanced by both the battered immi-

¹⁶⁴ Because of its undeniable relevance to bias and motive to fabricate, the proposed Status Shield Law does not attempt to shield evidence of the U visa application itself. For reasons discussed, the U visa application and its associated law enforcement certification would be subject to discovery and remain appropriate subjects for cross-examination in order to comport with constitutional protections for criminal defendants. The proposed status shield rule attempts to shield the more harmful, immigration violation-related lines of inquiry that arise once immigration status is raised on cross-examination.

¹⁶⁵ See *Davis v. Alaska*, 415 U.S. 308, 319–20 (1974).

¹⁶⁶ See discussion *supra* Part VI (relating to the policy objectives of the rape shield statute).

¹⁶⁷ See *Maryland v. Craig*, 497 U.S. 836, 851–57 (1990) (allowing child abuse victim to testify without face-to-face confrontation because it furthers an important policy interest). See generally 18 U.S.C. § 3509(b) (2012) (providing for closed-circuit television testimony by certain vulnerable witnesses); Jason M. Price, *Constitutional Law—Sex, Lies and Rape Shield Statutes: The Constitutionality of Interpreting Rape Shield Statutes to Exclude Evidence Relating to the Victim's Motive to Fabricate*, 18 W. NEW ENG. L. REV. 541, 561 (1996) (arguing “[t]he pertinent inquiry in resolving this conflict is whether the benefit gained by advancing the interests of rape shield statutes is arbitrary and disproportionate when compared to the detrimental effect on the defendant’s right to examine a witness’s motive to fabricate”).

¹⁶⁸ See *Rock v. Arkansas*, 483 U.S. 44, 55–56 (1987) (finding that “[t]he right to present relevant testimony is not without limitation. The right ‘may in appropriate cases bow to accommodate other legitimate interests in the criminal trial process’ . . . But restrictions of a defendant’s right to testify may not be arbitrary or disproportionate to purposes they are designed to serve.” (quoting *Chambers v. Mississippi*, 410 U.S. 284, 295 (1973))).

grant victim community and law enforcement are relevant. For the feminist legal community, the U visa was created to counteract the power dynamics that exist when undocumented victims of crime, particularly victims of domestic violence, are unable to avail themselves of the protection of law enforcement because of fear of deportation or criminal sanction.¹⁶⁹ The concern for undocumented victims of crime extends to the criminal trial, where, as noted, a victim's privacy interests and very physical presence in the United States are at stake. The proposed status shield law furthers the interest of protecting the undocumented U visa applicant at trial such that a victim's undocumented status or immigration history would not be exposed as she attempts to seek justice. Where, as here, an exclusionary rule of evidence prevents "surprise, harassment, and unnecessary invasions of privacy"¹⁷⁰ for the witness, an important policy interest is advanced.

For law enforcement, the U visa provides an opportunity to encourage undocumented victim assistance in the reporting, investigating, and prosecution of under-reported crime. As previously noted, crimes committed against undocumented victims have been historically under-reported, resulting in a "shadowy underworld" where perpetrators of violence can act with impunity.¹⁷¹ The danger of a witnesses' re-traumatization at trial has had a chilling effect on victim cooperation. The proposed status shield law works to solve this problem by ensuring that, if an undocumented U visa applicant agrees to cooperate with law enforcement in exchange for U visa certification, she can be guaranteed a certain level of protection at trial. Again, the proposed evidentiary rule is both rationally related and proportionate to the policy interest served.

Finally, Congressional intent is furthered through the promulgation of the status-shield law. In passing the U visa statute, Congress had both the interests of the battered immigrant community and law enforcement in mind, stating that the U visa has the dual purpose of empowering victims of violence to take advantage of law enforcement protection and bringing perpetrators of violence and other crimes to justice.¹⁷² The proposed status shield law is closely aligned with the empowerment of victims and overcoming the distrust between law enforcement and undocumented victims because it shields unnecessary and prejudicial information about the victim's immigration status from disclosure at trial. Accordingly, the statutory modification satisfies the Supreme Court's balancing test.¹⁷³ In divorcing a U visa appli-

¹⁶⁹ See discussion *supra* Part III.B.

¹⁷⁰ *Michigan v. Lucas*, 500 U.S. 145, 150 (1991).

¹⁷¹ See discussion *supra* Part III.A.

¹⁷² See discussion *supra* Parts III.B–C; *cf.* Carter, *supra* note 152.

¹⁷³ See *Davis v. Alaska*, 415 U.S. 308, 319–20 (1974); see also *Rock v. Arkansas*, 483 U.S. 44, 55–56 (1987) (holding "restrictions of a defendant's right to testify may not be arbitrary or disproportionate to purposes they are designed to serve").

cants' immigration history from her victimization,¹⁷⁴ the status shield law sends a clear message that the criminal laws of the United States apply equally to all people within its borders,¹⁷⁵ which is a legitimate governmental interest.

C. *Shielding Irrelevant and Prejudicial Testimony*

In addition to furthering social and Congressional interests, the proposed status shield law discourages testimony that is largely unrelated to the undocumented witnesses' truthfulness and the "truthfinding process."¹⁷⁶ Federal Rule of Evidence 403, reflecting the fact that the Sixth Amendment does not require the admission of testimony if it is either irrelevant or if its probative value is substantially outweighed by prejudice, underlies this claim.¹⁷⁷ Here, a witness' immigration status, manner of entry into the United States, and employment history, as a matter of policy, should be considered both irrelevant and prejudicial and accordingly shielded from jury consideration.

First, the information shielded by the proposed evidentiary rule is irrelevant because a victim's immigration status, manner of entry into the United States, and employment history are unrelated to truthfulness. With respect to immigration status generally, whether a person entered without inspection and admission, overstayed a visa, or is currently in valid immigration status, says nothing about whether that non-citizen lied about obtaining that status or committed fraud while entering the United States.¹⁷⁸ In addition, most undocumented non-citizens enter the United States simply by physically traversing the southern border, without encountering Customs and Border Protection agents. As such, they make no affirmative misrepresentation to immigration officials.¹⁷⁹ Finally, unauthorized employment does not inherently involve fraud, dishonesty, or deceit. Millions of undocumented non-citizens are able to find employment without the presentation of false docu-

¹⁷⁴ Cf. Anderson, *supra* note 16, at 54 (noting that in the past, rape law sent a clear message: "If you want the criminal law to vindicate you if you are raped, you better have led an unsullied sexual life").

¹⁷⁵ See Kittrie, *supra* note 30, at 1458–1519.

¹⁷⁶ Galvin, *supra* note 159, at 805–06 ("Both types of statutes also seek to promote certain ends that are unrelated to the truthfinding process. With respect to rape-shield laws, the interests furthered are those of both the complainant and the state. The complainant is shielded from humiliating invasions of her privacy, and the state benefits from the resulting increase in reporting of rape and in the more effective enforcement of rape laws. The Court in *Davis* did not clarify what state interests, if any, might weigh more heavily in the balance than those at stake in that case. The opinion strongly suggests, however, that whenever rules exclude evidence to further nontruthfinding, albeit substantial, state interests, they must yield to the accused's need to elicit 'crucial' defense evidence.").

¹⁷⁷ FED. R. EVID. 403.

¹⁷⁸ See Mason, *supra* note 118, at 556 ("[T]here is no inherent reason why lacking status necessitates that a person lie about having status.").

¹⁷⁹ See *id.* at 560 ("[E]ntry by stealth is not going to be probative of untruthfulness under Rule 608.").

mentation or other dishonesty because of the willingness of U.S. employers to turn a blind eye toward immigration status.¹⁸⁰ Thus, while many might consider entering and remaining in the country without authorization to be tantamount to fraud or otherwise relevant to credibility, it would be a valid legislative determination to shield this type of information to prevent confusion of the jury and embarrassment and harassment of the witness.¹⁸¹

Second, information about a person's immigration status, manner of entry, or unauthorized employment can be highly prejudicial. As noted above,¹⁸² immigration is a divisive political topic that evokes strong reactions across the political spectrum. For many jurors, merely hearing the words "undocumented" or "illegal alien" could completely obscure the U visa applicant's alleged victimization and turn the victim into the criminal.¹⁸³ This is supported by a legal regime that has increasingly criminalized immigration law, turning minor immigration violations into federal crimes.¹⁸⁴ Moreover, immigration law is a highly technical, complicated area of the law that takes specialization to thoroughly understand and apply.¹⁸⁵ There is

¹⁸⁰ To be clear, working with a false Social Security Number, presenting false documentation in order to gain employment, or misrepresenting citizenship or immigration status may all be specific acts probative of truthfulness and ripe for cross-examination under FRE Rule 608(b). *See, e.g.,* *United States v. Lora-Pena*, 227 F. App'x 162, 167–70 (3d Cir. 2007) (holding that evidence regarding defendant's use of false name and false documents was admissible on cross-examination in prosecution for assault on federal officer and resisting arrest as bearing to defendant's credibility); *United States v. Williams*, 986 F.2d 86, 89 (4th Cir. 1993) (finding that defendant's possession and use of false identification to cash stolen check were probative of defendant's truthfulness and credibly as witness). However, the mere act of working without authorization, without more, does not necessarily involve any type of fraud, dishonesty, or deceit. In fact, many employers happily and knowingly employ undocumented non-citizens without requiring the presentation of a valid SSN or immigrant documentation. *See, e.g.* Jeff Tyler, *Major American Companies Benefit from Undocumented Workers*, MARKETPLACE, <https://www.marketplace.org/2013/04/30/wealth-poverty/special-report-raiteros/major-american-companies-benefit-undocumented-workers> [<https://perma.cc/7PM6-GMFP>].

¹⁸¹ *Cf. Michigan v. Lucas*, 500 U.S. 145, 149–51 (1991).

¹⁸² *See* discussion *supra* Part V.B.3.

¹⁸³ *See* *Pena-Rodriguez v. Colorado*, No. 15-606, slip op. at *3–4 (2017).

¹⁸⁴ *See* Sweeney, *supra* note 129, at 239–40; *see also* Newman, *supra* note 45, at 238 (“This policy changed radically in 2005 with the Bush administration's Operation Streamline that removed discretion and mandated criminal prosecution. First-time offenders were charged with misdemeanor illegal entry, while those with prior deportations, felony illegal reentry. Laborers working under false social security numbers were arraigned with federal crimes ranging from false identification to being found in the U.S. after removal. The very act of immigrating and participating in the natural flow of labor following capital, became criminal.” (citations omitted)).

¹⁸⁵ In fact, many individuals who enter the country without authorization or overstay their visas are eligible for legal status in the form of asylum, family-based, or other humanitarian relief from deportation. Tom K. Wong, Donald Kerwin, Jeanne M. Atkinson & Mary Meg McCarthy, *Paths to Lawful Immigration Status: Results and Implications from the PERSON Survey*, 2 J. ON MIGRATION & HUM. SEC. 287, 287–304 (2014). However, because of the complicated nature of the immigration regime and because many immigrants lack the resources necessary to hire representation, they are unable to explore the possible relief that might be available to them, and prosecutors, attorneys, and jurors are not in a position to understand.

a considerable prejudicial danger that prosecutors and defense attorneys alike will fail to undertake the necessary technical analysis to understand a witnesses' immigration status and raise the issue in a legally accurate manner.

Finally, data supports the proposition that most immigrants who come to the United States without authorization do so for very basic reasons: working in order to support their families, pursue a better life, and reunify with family members already living in the United States.¹⁸⁶ Undocumented witnesses engage in the acts or entry without inspection of admission and work without authorization not because they are untruthful or have a propensity to lie, but because they are working to support their families and making the best of an immigration system that has been designed to deny them the right to work lawfully. Again, while many potential jurors might consider a willingness to work without authorization indicative of an individual's credibility, like in the sexual assault context, the information should be shielded because of its potential for "surprise, harassment, and unnecessary invasions of privacy."¹⁸⁷ The potential for confusion, the politicized nature of immigration, and the reality of working without authorization in a byzantine, harsh immigration regime all point to shielding immigration status and immigration-related activity from a jury.

D. *Allowing Space for Confrontation*

The police officer or prosecutor¹⁸⁸ must sign a law enforcement certification in order for the U visa witness to proceed with her application for immigration status from the federal government.¹⁸⁹ Therefore, when a U visa applicant agrees to testify at the criminal trial of her perpetrator, she often does so in exchange for the necessary law enforcement certification she needs for her request for immigration status to succeed. As immigration law scholar Michael Kagan notes, "[t]he U visa is an incentive to accuse. The U visa rewards unauthorized immigrants for accusing other people of serious crimes."¹⁹⁰ Accordingly, there is a legitimate defense argument that the law enforcement certification, and the possibility of gaining lawful immigration status, provides the U visa witness with bias or motive to lie.

In the rape shield context, the Supreme Court held that the rape shield law cannot infringe on the defendant's right to question the witness on her

¹⁸⁶ See Grimes, *supra* note 131.

¹⁸⁷ Michigan v. Lucas, 500 U.S. 145, 150 (1991); Galvin, *supra* note 159, at 800.

¹⁸⁸ Any "Federal, State, or local law enforcement agency, prosecutor, judge, or other authority, that has responsibility for the investigation or prosecution of a qualifying crime or criminal activity" may sign a U visa certification. 8 C.F.R. § 214.14(a)(2). "This definition includes agencies that have criminal investigative jurisdiction in their respective areas of expertise, including, but not limited to, child protective services, the Equal Employment Opportunity Commission, and the Department of Labor." *Id.*

¹⁸⁹ 8 U.S.C.A. §§ 1101(a)(15)(U)(i), 1184(p)(1) (2012).

¹⁹⁰ Kagan, *supra* note 14, at 943.

motive to fabricate¹⁹¹ or with respect to any “prototypical form of bias on the part of the witness.”¹⁹² Prototypical forms of bias include “the witness’s criminal history or status as a parolee or probationer, any immunity or plea deals between the witness and the state, and other ‘prejudices, or ulterior motives’ from which ‘jurors . . . could appropriately draw inferences relating to the reliability of the witness.’”¹⁹³

Here, the analog would apply, as the U visa certification would seem to fall under the prototypical forms of bias outlined by the Supreme Court as appropriate for cross-examination. Thus, the status-shield statute does not prevent a criminal defendant from questioning a U visa applicant about (1) the existence of the U visa application itself; and (2) the benefit of the law enforcement certification she will receive through her cooperation with law enforcement in the case. Nor does the proposed status shield law attempt to shield the defense from introducing evidence of the existence of a U visa application on the part of the victim witness or shield the jury from information related to the required law enforcement certification. Rather, it allows space for confrontation and protects the criminal defendant’s constitutional rights to broadly question a witness with respect to bias or motive to fabricate.

E. Considering Existing Systematic Checks for Fraud and Abuse

Outside of the evidentiary system, several protections within the U visa process check unfettered criminal accusations by witnesses hoping to get an immigration benefit from their cooperation with law enforcement. These systematic checks are a response to critics who might argue that a status shield law only increases the likelihood that a non-citizen will fabricate a crime, lie about it on the stand under the protection of the evidentiary rule, and obtain immigration status due to these actions.

First, a U visa witness who fabricates a criminal accusation merely for the sake of obtaining a visa could be prosecuted either for the filing of a false police report or perjury.¹⁹⁴ Second, even if a witness makes a false accusation, the problem of “geographic roulette” in law enforcement certifi-

¹⁹¹ See *Olden v. Kentucky*, 488 U.S. 227, 232 (1988); see also *Price*, *supra* note 167, at 562–63.

¹⁹² *Delaware v. Van Arsdall*, 475 U.S. 673, 680 (1986).

¹⁹³ *Blackston v. Rapelje*, 769 F.3d 411, 419–20 (6th Cir. 2014), *opinion amended and superseded*, 780 F.3d 340 (6th Cir. 2015) (citations omitted).

¹⁹⁴ See *Kagan*, *supra* note 14, at 952 (noting that “[a]n immigrant who claims to have been a victim of crime in an immigration application and then outright retracts that claim in later testimony could be prosecuted for perjury”); *Kittrie*, *supra* note 30, at 1506 (“But that temptation would be counterbalanced by the statutes in most jurisdictions that penalize the filing of a false police report. In addition, it seems unlikely that an unauthorized alien who is successfully evading detection would wish to take the risk of revealing himself to the police in order to file a false crime report.”) (footnote omitted). See also Andrew Roddin, *Certified: How the U Visa Petition Process Prevents Fraud and Promotes Safe Communities*, 12 GEO. J.L. & PUB. POL’Y 805, 819 (2014).

cation does not guarantee that a U visa applicant's cooperation will result in certification.¹⁹⁵ In fact, because the certification is entirely discretionary, prosecutors and law enforcement officials can decline to sign the certification for any reason or no reason at all, even if the victim is cooperative. Accordingly, there is never a guarantee of U visa law enforcement certification.

Moreover, data suggests fraud is a negligible problem in the U visa program.¹⁹⁶ To the contrary, because of the high levels of crime committed against women and undocumented victims, it is a highly utilized form of immigration relief, which underscores its need. In addition, should a U visa hopeful take the risk of fabricating a criminal accusation in exchange for law enforcement certification, immigration status is not guaranteed.¹⁹⁷ In order to obtain a U visa, the victim must also demonstrate that she was a victim of one of the statutorily enumerated crimes and that she suffered substantial mental or emotional abuse as a result of the crime.¹⁹⁸ She must also show that she is eligible for a waiver of all grounds of applicable inadmissibility, which is a discretionary grant in the public interest.¹⁹⁹ This multi-step process attenuates the relationship between cooperating with law enforcement and immigration status.

Should the applicant be granted visa status, she must not have "unreasonably refused to provide assistance" to law enforcement officials in order to be eligible for lawful permanent resident status.²⁰⁰ At the end of the three year period in U visa status, the applicant must return to the law enforcement agency that originally signed her certification and request re-certification to prove she remained available and willing to assist law enforcement.²⁰¹ While practically speaking most U visa applicants do not have further interaction with law enforcement after the conclusion of the criminal case, should law enforcement officials discover that the U visa witness lied or fabricated the criminal accusations, they will likely refuse recertification, barring the U visa applicant from permanent immigration status.²⁰²

Finally, the U visa program is currently over-subscribed. United States Citizenship and Immigration Services may grant no more than 10,000 U visas per year.²⁰³ Each year, there are far more successful applicants than visas available. The statutory cap on U visas has created a substantial back-

¹⁹⁵ See ABREU ET AL, *supra* note 69; see also discussion *supra* Part IV.B.

¹⁹⁶ See Kagan, *supra* note 14, at 941–42.

¹⁹⁷ See Roddin, *supra* note 194, at 817–19.

¹⁹⁸ 8 U.S.C. § 1101(a)(15)(U)(i) (2012).

¹⁹⁹ See Battered Immigrant Women Protection Act of 2000 § 1513(e), 8 U.S.C. § 1182(d)(14) (2012) (allowing the Secretary of Homeland Security to waive the application of all inadmissibility grounds, except participation in Nazi persecution, genocide, or extrajudicial killing, in the case of U non-immigrants, if the Secretary determines that it is in the public or national interest to do so).

²⁰⁰ 8 C.F.R. § 245.24(b)(5) (2012)

²⁰¹ 8 C.F.R. § 245.24(c–d) (2012)

²⁰² Cf. Abrams, *supra* note 96, at 396.

²⁰³ See 8 U.S.C. § 1184 (p)(2)(A).

log, and as of the first quarter of 2016, over 120,000 applications for U visas were pending. At the time this Article was written, it took almost 5-6 years for a successful applicant to be awarded full U visa status.²⁰⁴ During the time the application is pending, the applicant is not eligible for employment authorization. This attenuated process also serves as a check on U visa applicants who might fabricate a criminal accusation in order to obtain lawful immigration status. It seems unlikely, although not completely extraordinary, that a U visa applicant would lie to law enforcement officials today for the possibility of being awarded a visa in five to six year's time.

Accordingly, considering the "geographic roulette" of U visa law enforcement certification, the risk of criminal prosecution for fabricating claims, the uncertainty as to whether a U visa will be ultimately granted by the federal government, the continued reliance on law enforcement until adjustment of status is granted, and the current processing delays in the U visa program, it is unlikely that a U visa applicant will completely fabricate a claim. The proposed status shield law, supported by these systematic checks, ensures that the U visa program works toward protecting victims and assisting law enforcement.

VIII. CONCLUSION

When a U visa applicant serves as a prosecution witness in the trial of her perpetrators, she exposes herself to questions about her immigration status, manner of entry into the United States, employment history, and motive to fabricate her claims. Intrusive questioning into areas of the victim's private life can have a chilling effect on the victim's willingness to cooperate with law enforcement in the future. Because Congress' dual purpose in implementing the U visa program was to bring victims out of the shadows and assist law enforcement in the prosecution of crimes committed against non-citizens, the re-traumatization of the victim on the stand undermines Congress' intent.

The dangers to U visa witnesses in criminal trials closely mirrors those faced by victims of sexual assault and rape. Prior to the enactment of rape shield statutes, many were afraid to testify against their perpetrators because their entire sexual history would be exposed on cross-examination. Due to advocacy by feminists and law enforcement alike, rape shield statutes were enacted in order to protect the victim and exclude prejudicial and irrelevant information about a victim's sexual history from trial. While the application of rape shield statutes has been limited in instances where the accused right's to present evidence of bias or motive has been restricted, the statutes themselves have been found a valid policy response to a societal interest in protecting victim's privacy and advancing law enforcement interests.

²⁰⁴ Polaski, *supra* note 87.

Considering the parallels between the privacy invasions faced by victims of sexual assault and those faced by undocumented U visa applicants at trial, this Article proposes a new status-shield law that would apply to U visa applicants who agree to serve as witnesses against their perpetrators. The proposed evidentiary rule would prevent irrelevant and prejudicial information about the victims from being introduced in the record, while at the same time leaving open the possibility for the criminal defendant to question the U visa applicant about the benefit she might receive from her cooperation with law enforcement. While many checks make it unlikely that a U visa applicant would fabricate her claim merely for the benefit of potentially obtaining a visa, the proposed status shield law strikes a balance between protecting the rights of the criminal defendant to confrontation and shielding the important privacy interests of victims and furthering Congressional intent.

