

2018

## Family Courts as Certifying Agencies: When Family Courts Can Certify U Visa Applications for Survivors of Intimate Partner Violence

Sylvia Lara Altreuter  
*Fordham University School of Law*

---

### Recommended Citation

Sylvia Lara Altreuter, *Family Courts as Certifying Agencies: When Family Courts Can Certify U Visa Applications for Survivors of Intimate Partner Violence*, 86 Fordham L. Rev. 2965 (2018).  
Available at: <https://ir.lawnet.fordham.edu/flr/vol86/iss6/19>

This Note is brought to you for free and open access by FLASH: The Fordham Law Archive of Scholarship and History. It has been accepted for inclusion in Fordham Law Review by an authorized editor of FLASH: The Fordham Law Archive of Scholarship and History. For more information, please contact [tmelnick@law.fordham.edu](mailto:tmelnick@law.fordham.edu).

## NOTES

### **FAMILY COURTS AS CERTIFYING AGENCIES: WHEN FAMILY COURTS CAN CERTIFY U VISA APPLICATIONS FOR SURVIVORS OF INTIMATE PARTNER VIOLENCE**

*Sylvia Lara Altreuter\**

*Undocumented intimate partner violence survivors living in the United States have limited options for immigration relief. One of the only avenues open to them is the U Visa: a nonimmigrant visa established by the Battered Immigrant Women Protection Act of 2000. To apply for a U Visa, a survivor must prove to immigration authorities that she was the victim of a crime; suffered substantial abuse; and was, is, or is likely to be helpful in the investigation of her abuser. The statute requires that all U Visa applications be certified by an appropriate official who testifies to the applicant's helpfulness with the investigation. This certification is a tremendous obstacle for survivors: agencies are under no legal obligation to provide these certifications, the procedure to obtain them is often complicated and time consuming, and the decision-making process is opaque. Moreover, many undocumented survivors fear involvement with the criminal courts or police out of fear of their abusers and deportation.*

*In response, survivor advocates approach certification creatively and seek certification from less obvious authorities. Undocumented survivors are more likely to be involved in family court proceedings—seeking orders of protection from, or adjudicating custody and visitation disputes with, their abusers—than criminal proceedings. Advocates have likewise turned to family courts to certify U Visa applications. Family courts are unclear on whether they are authorized to certify these applications and are often reluctant to make a final decision.*

*This Note proposes that family courts are empowered by statutory language and history to certify U Visa applications for undocumented survivors. After a textual and legal process analysis of the statutory provisions regarding U Visa certification, this Note proposes guidelines for*

---

\* J.D. Candidate, 2019, Fordham University School of Law; B.S., 2012, Smith College. I would like to thank my Note advisor, Professor Clare Huntington, for her encouragement and her example; and my colleagues on the *Fordham Law Review* for their thoughtful feedback all year. I would also like to thank Molly Altreuter, Will Newman, and Dr. Audrey Buxbaum, for making this possible.

*practitioners seeking U Visa certification from a family court and for family court judges ruling on these applications.*

INTRODUCTION.....	2926
I. THE REALITY OF BEING AN UNDOCUMENTED SURVIVOR OF INTIMATE PARTNER VIOLENCE.....	2929
A. <i>Undocumented Immigrants and Intimate Partner Violence ...</i>	2929
B. <i>Family Courts and Undocumented Intimate Partner         Violence Survivors .....</i>	2931
C. <i>Immigration Relief for Intimate Partner Violence Survivors .</i>	2933
II. INTERPRETING THE U VISA STATUTES .....	2936
A. <i>A Textual Analysis of the BIWPA .....</i>	2937
1. Family Court Judges as State Judges .....	2937
2. Family Court Judges as Investigators of Criminal Activity.....	2940
B. <i>A Legal Process Analysis of the BIWPA.....</i>	2945
1. Legislative History of the BIWPA.....	2946
2. Statutory History of the BIWPA.....	2952
III. U VISA CERTIFICATION IN PRACTICE.....	2955
A. <i>Family Court Cases Addressing U Visa Certification.....</i>	2955
1. <i>In re Rosales .....</i>	2956
2. <i>In re Clara F. ....</i>	2956
3. <i>In re Patricia C. ....</i>	2957
B. <i>State Approaches to U Visa Certification.....</i>	2957
C. <i>Administrative Appeals Office Decision.....</i>	2958
IV. A PROPOSED FRAMEWORK: A FAMILY COURT MUST BE ABLE TO CERTIFY THAT THE IPV SURVIVOR WAS HELPFUL IN A PROCEEDING THAT HINGED ON A FINDING OF IPV .....	2959
A. <i>What Constitutes Intimate Partner Violence .....</i>	2960
B. <i>What Constitutes Helpfulness .....</i>	2961
C. <i>Which Proceedings Hinge on a Finding of Intimate Partner         Violence .....</i>	2962
CONCLUSION .....	2963

#### INTRODUCTION

During the congressional hearing on the Battered Immigrant Women Protection Act, one of the bill's sponsors, Representative Sheila Jackson Lee of Texas, told the story of Leticia, one of her constituents.<sup>1</sup> Leticia was an undocumented Filipino immigrant who sought protection from her abusive

---

1. *Battered Immigrant Women Protection Act of 1999: Hearing on H.R. 3083 Before the H. Subcomm. on Immigration & Claims of the H. Comm. on the Judiciary*, 106th Cong. 29 (2000) [hereinafter *BIWPA Hearing*] (statement of Rep. Sheila Jackson Lee).

husband by obtaining a civil order of protection.<sup>2</sup> Leticia’s abuser violated the order of protection and came to her home, so she called the police.<sup>3</sup> When the police arrived, instead of going after Leticia’s husband, they asked for her green card.<sup>4</sup>

The Battered Immigrant Women Protection Act of 2000 (BIWPA) was enacted to protect women like Leticia.<sup>5</sup> BIWPA contains a provision establishing a new nonimmigrant visa—the U Visa—which grants temporary immigration relief to certain noncitizen survivors of “intimate partner violence” (IPV) and victims of similar crimes.<sup>6</sup> The BIWPA was incorporated in the first reauthorization of the Violence Against Women Act (“VAWA 1994”),<sup>7</sup> a landmark law passed in 1994 to address numerous aspects of sexual and intimate partner violence.<sup>8</sup>

U Visa applications must be certified by “a Federal, State, or local law enforcement official, prosecutor, judge, or other Federal, State, or local authority investigating criminal activity.”<sup>9</sup> This certification must attest that the IPV survivor “‘has been helpful, is being helpful, or is likely to be helpful’ in the investigation or prosecution of criminal activity.”<sup>10</sup> This certification requirement presents a significant obstacle for survivors.<sup>11</sup>

Regardless of their immigration status, IPV survivors are often reluctant to cooperate with law enforcement to put their abusers in prison, typically out of fear for their safety, love for their intimate partner, and practical concerns about money and housing.<sup>12</sup> Historically, law enforcement has not treated intimate partner violence as a serious concern, which leads IPV survivors to be doubly reluctant to approach law enforcement.<sup>13</sup> Compounding the

2. *Id.*

3. *Id.*

4. *Id.*

5. *See id.*

6. *See* Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, § 1513(b), 114 Stat. 1464, 1534–35 (codified at 8 U.S.C. § 1101(a)(15)(U) (2012)).

7. *See id.* §§ 1001, 1501.

8. *See generally* Violence Against Women Act of 1994, Pub. L. No. 103-322, tit. IV, 108 Stat. 1796, 1902–55 (codified as amended in scattered sections of U.S.C.); *see also* *About the Office*, U.S. DEP’T JUST., <https://www.justice.gov/ovw/about-office> [<https://perma.cc/5PM2-L3VA>] (last visited Apr. 13, 2018) (describing the creation of the Office on Violence Against Women pursuant to VAWA, an office which has administered \$6 billion in grants to combat domestic and sexual violence).

9. *See* 8 U.S.C. § 1184(p)(1) (2012).

10. *Id.*

11. *See* Natalie Nanasi, *The U Visa’s Failed Promise for Survivors of Domestic Violence* 25–26, 32–37 (SMU Dedman Sch. of Law, Legal Studies Research Paper No. 341, 2017), <https://ssrn.com/abstract=2872866> [<https://perma.cc/8PJV-EBK8>]; *see also* Andres Pertierra, *We All Have a Role to Play in Improving U Visa Process for Immigrant Domestic Violence Victims*, REWIRE (Sept. 7, 2017, 9:19 AM), <https://rewire.news/article/2017/09/07/we-all-have-a-role-to-play-in-improving-u-visa-process-for-immigrant-domestic-violence-victims> [<https://perma.cc/9R9A-LLM9>].

12. *See* Mount Sinai Sexual Assault & Violence Intervention Program, 2017 SAVI Volunteer Advocate Manual & Materials 84–85, 87, 134–36 (2017) [hereinafter SAVI Manual] (on file with author).

13. *See* *Combating Domestic Violence: One Size Doesn’t Fit All*, NPR (Oct. 21, 2013, 11:52 AM), <https://www.npr.org/templates/transcript/transcript.php?storyId=239129010> [<https://perma.cc/4W6R-YTAG>] (“It used to be a time where the police would respond to a

problem, undocumented immigrants are even less likely to get involved with law enforcement out of fear of deportation and cultural barriers to access, like language.<sup>14</sup> In a survey of New York State IPV service providers in the first year of the Trump administration, 74 percent reported having immigrant clients afraid to go to court for fear of encountering immigration enforcement, and 48 percent reported having clients afraid of calling the police for the same reason.<sup>15</sup>

Faced with these fears, advocates often encourage documented and undocumented survivors to seek relief in family court.<sup>16</sup> Through family courts, IPV survivors can, among other things, seek civil orders of protection, secure custody of their children, and divorce their abusers.<sup>17</sup> Family courts allow undocumented survivors to control their own proceedings without the involvement of police or a prosecutor.<sup>18</sup> Reflecting these practices, immigrant advocates have started to turn to family courts to execute law enforcement certifications in support of U Visa applications.<sup>19</sup> The U.S. government has granted U Visas on the basis of these certifications.<sup>20</sup>

Some family courts, however, are reluctant to certify U Visa applications.<sup>21</sup> This Note examines the BIWPA to determine whether family courts can continue, or in some cases begin, to certify U Visa applications. Clarifying the statutory authority for family courts will allow more

---

call of domestic violence and they would tell the offender to go take a walk around the block.”).

14. See SAVI Manual, *supra* note 12, at 25–27.

15. ICE in New York State Courts Survey, IMMIGRANT DEF. PROJECT, <https://www.immdefense.org/ice-courts-survey> [<https://perma.cc/6Q6A-Q534>] (last visited Apr. 13, 2018); see also *Officials Worry Immigrants Not Reporting Crimes Under Trump*, WWLP.COM (Apr. 4, 2017, 4:00 AM), <http://wwlp.com/2017/04/04/officials-worry-immigrants-not-reporting-crimes-under-trump/> [<https://perma.cc/BQ8E-WV2H>] (“In Los Angeles, domestic violence reports are down 10% in the Hispanic community. 10%! Imagine somebody being the victim of domestic violence and not calling the police because they’re afraid that their family will be torn asunder because of immigration enforcement.”).

16. See SAVI Manual, *supra* note 12, at 145.

17. See *infra* Part I.B.

18. See SAVI Manual, *supra* note 12, at 145.

19. See, e.g., NAT’L IMMIGRANT WOMEN’S ADVOCACY PROJECT, U VISA CERTIFICATION TOOL KIT FOR FEDERAL, STATE AND LOCAL JUDGES, COMMISSIONERS, MAGISTRATES AND OTHER JUDICIAL OFFICERS 18–19, 57–68 (2017) [hereinafter NIWAP MEMORANDUM], <http://library.niwap.org/wp-content/uploads/2015/IMM-Tkit-UVisaCertification-02.03.14.pdf> [<https://perma.cc/DNT8-BXB7>] (including a template motion for U Visa certification); Memorandum from the Advisory Council on Immigration Issues in Family Court to Family Court Judges, Chief Clerks & Non-Judicial Staff 2–3 (Feb. 14, 2017) [hereinafter NY Advisory Memorandum], <http://moderncourts.org/wp-content/uploads/2017/05/342742124-U-Visa-Certification-Guidance-Memo-PDF.pdf> [<https://perma.cc/G6GQ-HCNN>].

20. See, e.g., Beth Fertig, *Here’s Why Immigrant Victims May (Still) Be Afraid to Report Crime*, WNYC (Feb. 21, 2017), <https://www.wnyc.org/story/why-immigrant-victims-may-be-afraid-report-crime-despite-federal-program-help> [<https://perma.cc/R59V-9L2B>] (describing an undocumented IPV survivor, Maria, who was granted a U Visa after her application was certified by a family court judge).

21. See *id.*; see also FUND FOR MODERN COURTS, ACHIEVING A CONSISTENT AND LEGALLY SOUND U VISA CERTIFICATION IN NEW YORK FAMILY COURTS 4–7 (2016), <http://moderncourts.org/wp-content/uploads/2016/12/2ModernCourtsU-VisaMemo2016.pdf> [<https://perma.cc/7V66-8MJ2>].

undocumented survivors to access the U Visa, escape their abusers, protect their families, and access necessary support services and government resources.

Part I of this Note provides background on the relevant social and legal issues at stake. Next, Part II interprets the U Visa statute through textual and legal process lenses to determine whether family courts can certify U Visa applications. Part III then surveys how family court certifications are currently treated in practice. Finally, Part IV proposes guidelines for when family courts can certify U Visa applications, and it is intended to act as a guide for practitioners advocating for undocumented clients.

### I. THE REALITY OF BEING AN UNDOCUMENTED SURVIVOR OF INTIMATE PARTNER VIOLENCE

Intimate partner violence is a public health crisis in the United States.<sup>22</sup> The latest CDC survey on IPV estimates that over one-third of women and almost one-sixth of men in the United States experience abuse from an intimate partner in their lifetimes.<sup>23</sup> Seventy-two percent of all murder-suicides committed in the United States are perpetrated by an intimate partner.<sup>24</sup> Vulnerable populations are especially affected: transgender and gender nonconforming people, people with disabilities, LGBTQ people, and the undocumented are particularly vulnerable to intimate partner violence.<sup>25</sup>

This Part explores the intersections of immigration, IPV, and family courts. Part I.A provides an overview of intimate partner violence as it affects undocumented immigrants. Part I.B describes the importance of family courts for undocumented IPV survivors. Part I.C briefly explains the primary avenue of immigration relief available to undocumented IPV survivors: the U Visa.

#### A. *Undocumented Immigrants and Intimate Partner Violence*

In hearings on proposed immigration reform before the House of Representatives, a social worker from the Shelter for Abused Women in Collier County, Florida, shared a drawing and poem by one of her clients, Juana.<sup>26</sup> When Juana was thirteen years old, she followed a family friend,

---

22. See *Intimate Partner Violence*, CDC, <https://www.cdc.gov/violenceprevention/intimatepartnerviolence/index.html> [<https://perma.cc/D6SU-LAAK>] (last visited Apr. 13, 2018).

23. CDC, FINDINGS FROM THE NATIONAL INTIMATE PARTNER AND SEXUAL VIOLENCE SURVEY 1 (2012), <https://www.cdc.gov/violenceprevention/pdf/NISVS-StateReportFactsheet.pdf> [<https://perma.cc/3HB4-A2W6>].

24. *Statistics*, NAT'L COALITION AGAINST DOMESTIC VIOLENCE, <https://ncadv.org/statistics> [<https://perma.cc/TF9A-3Y8R>] (last visited Apr. 13, 2018).

25. Press Release, Nat'l Coal. of Anti-Violence Programs, 2015 Report on Intimate Partner Violence in Lesbian, Gay, Bisexual, Transgender, Queer and HIV-Affected Communities in the U.S. Released Today 1–3 (Oct. 18, 2016), [http://avp.org/wp-content/uploads/2017/05/2015\\_NCAVP\\_IPVReport\\_MR.pdf](http://avp.org/wp-content/uploads/2017/05/2015_NCAVP_IPVReport_MR.pdf) [<https://perma.cc/2CWN-9CZH>].

26. *BIWPA Hearing*, *supra* note 1, at 66, 68.

Juan, from Mexico to Florida, to help him care for his three young children.<sup>27</sup> She came to the United States without documentation.<sup>28</sup> However, shortly after Juana arrived in Florida, Juan began to sexually and physically abuse her.<sup>29</sup> She had their first child at age fourteen.<sup>30</sup> Constantly fearing deportation and continuing abuse, even as he threatened to kill her, Juana never dialed 911 to seek assistance.<sup>31</sup> Translated, Juana's poem read: "I feel that I am alone / in the world / in the town / in the country."<sup>32</sup>

Intimate partner violence, also known as relationship violence, domestic violence, or dating violence, "is a pattern of coercive behavior . . . exerted by one intimate partner over another with the goal of establishing and maintaining power and control."<sup>33</sup> Abusers assault their partners on every front, including physical, sexual, emotional, financial, medical, and technological.<sup>34</sup> Survivors' vulnerabilities are also targeted: for example, people with disabilities, who are more likely to have barriers to financial stability because of employment discrimination and physical isolation, are subjected to a significantly higher level of financial abuse.<sup>35</sup> As a training manual for IPV counselors explains, "In IPV, perpetrators have on-going access to their victims, know their daily routines and vulnerabilities, and can continue after violent episodes to exercise considerable physical and emotional control over their daily lives."<sup>36</sup>

Noncitizens are particularly vulnerable to IPV. One survey estimates that nearly half of noncitizen women in the United States experience IPV.<sup>37</sup> "Undocumented status gives abusers additional tools of power and control to keep victims isolated and intimidated";<sup>38</sup> abusers exploit the immigration status of their intimate partners by threatening to report their undocumented partners to immigration authorities,<sup>39</sup> by isolating them from services that

---

27. *Id.* at 66–67.

28. *See id.* at 66–68.

29. *Id.* at 67.

30. *Id.*

31. *Id.*

32. *Id.* at 68.

33. SAVI Manual, *supra* note 12, at 77.

34. *See What Is Domestic Violence?*, NAT'L DOMESTIC VIOLENCE HOTLINE, <http://www.thehotline.org/is-this-abuse/abuse-defined> [https://perma.cc/FW3S-MPLK] (last visited Apr. 13, 2018).

35. NAT'L COAL. OF ANTI-VIOLENCE PROGRAMS, LESBIAN, GAY, BISEXUAL, TRANSGENDER, QUEER, AND HIV-AFFECTED INTIMATE PARTNER VIOLENCE IN 2015, at 31 (2016), [http://avp.org/wp-content/uploads/2017/04/2015\\_ncavp\\_lgbtqipvreport.pdf](http://avp.org/wp-content/uploads/2017/04/2015_ncavp_lgbtqipvreport.pdf) [https://perma.cc/6Z8J-7P4D].

36. SAVI Manual, *supra* note 12, at 77.

37. *See Reauthorization of the Violence Against Women Act: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 446 (2005) [hereinafter *VAWA 2005 Hearing*].

38. Ashmar Mandou, *Advocates Call for Passage SB 32*, LAWNDALE NEWS (Oct. 19, 2017), <http://www.lawndalenews.com/2017/10/advocates-call-for-passage-sb-32/> [https://perma.cc/L46Q-KR2W] (quoting a representative of Mujeres Latinas en Acción).

39. *See, e.g.*, Shannon Dooling, 'I Was Afraid of Him and of Immigration': Domestic Violence Survivors Take Chance Applying for Special Visa, WBUR (Sept. 12, 2017), <http://www.wbur.org/news/2017/09/12/increase-u-visa-applications> [https://perma.cc/PHG5-QV9D] (quoting an undocumented survivor as saying, "I was afraid of both of them—of him

would help them acclimate to the United States, and by controlling their immigration applications.<sup>40</sup>

Often far from their support systems and unable to speak English, undocumented survivors are cut off from social services and legal assistance.<sup>41</sup> Undocumented survivors frequently fear seeking the assistance of the police or the courts because of the risk of deportation and misunderstandings about their rights.<sup>42</sup> In hearings on the 2005 reauthorization of the Violence Against Women Act (“VAWA 2005”), Legal Momentum, a nonprofit legal services provider, submitted a compendium of stories of noncitizen IPV survivors to Congress, which reflected this fear.<sup>43</sup> These stories demonstrated that while many survivors were reluctant to involve police,<sup>44</sup> many sought refuge in domestic-violence shelters or with other support services,<sup>45</sup> and nearly all went to family court to seek orders of protection<sup>46</sup> or to win custody or support for their children.<sup>47</sup>

### *B. Family Courts and Undocumented Intimate Partner Violence Survivors*

Intimate partner violence is a crime.<sup>48</sup> However, IPV survivors are often reluctant to involve criminal courts for several reasons. Survivors often fear the retribution of their abusers; and often they still love their abusers—frequently their spouse, coparent, and someone on whom they are financially reliant—and do not want them to be punished.<sup>49</sup> Undocumented survivors are especially reluctant to approach criminal authorities because they fear deportation. Thus, advocates often suggest family law proceedings for undocumented survivors to seek relief from their abusers without risking deportation or criminal punishment.<sup>50</sup>

---

and of immigration . . . [A]ny time I’d confront him, he’d tell me he was calling immigration and I was afraid they’d deport me”).

40. See SAVI Manual, *supra* note 12, at 25–27; *Abuse & Immigrants*, NAT’L DOMESTIC VIOLENCE HOTLINE, <http://www.thehotline.org/is-this-abuse/abuse-and-immigrants> [https://perma.cc/9YNA-3KNC] (last visited Apr. 13, 2018); *ICE in New York State Courts Survey*, *supra* note 15.

41. See *VAWA 2005 Hearing*, *supra* note 37, at 446; SAVI Manual, *supra* note 12, at 25–27; cf. Rachel Gonzalez Settlage, *Status in a State of Emergency: U Visas and the Flint Water Crisis*, 20 HARV. LATINX L. REV. 121, 133–42 (2017) (describing the obstacles for undocumented people to access assistance during natural disasters, like language barriers, ineligibility for government services, and fear of deportation).

42. See LETI VOLPP, *WORKING WITH BATTERED IMMIGRANT WOMEN: A HANDBOOK TO MAKE SERVICES ACCESSIBLE* 16–17, 28–29 (Leni Marin, ed., 1995).

43. See *VAWA 2005 Hearing*, *supra* note 37, at 391–416.

44. See *id.*

45. See, e.g., *id.* at 394–95 (Maria); *id.* at 398 (Madeline); *id.* at 400 (Mona).

46. See, e.g., *id.* at 393 (Sara); *id.* at 393–94 (Yesenia); *id.* at 394–95 (Maria); *id.* at 397–98 (Ana).

47. See, e.g., *id.* at 394–95 (Maria); *id.* at 397–98 (Ana); *id.* at 400 (Mona).

48. See 146 CONG. REC. S10,174 (daily ed. Oct. 11, 2000) (statement of Senator Patty Murray) (“I am very proud to have worked to pass the Violence Against Women Act because, for the first time, our Nation recognized domestic violence for what it is—a violent crime and a public health threat.”).

49. See SAVI Manual, *supra* note 12, at 84–85, 87, 134–36.

50. See *id.* at 145; VOLPP, *supra* note 42, at 30–34.



Family law is almost entirely the province of state courts.<sup>51</sup> In medieval England, family law was the province of the church, and ecclesiastical courts had jurisdiction over “all manners of punishment and determination of pleas which touch matrimony or testament . . . and also of all those other things which touch the correction of the soul.”<sup>52</sup> This meant that all suits concerning marriage, divorce, legitimacy of children, establishment of paternity, and domestic support were all brought in ecclesiastical courts.<sup>53</sup> Today, these cases are filed in a state civil court, depending on the structure of the state court system.

Most family law cases are heard in state courts of general jurisdiction.<sup>54</sup> Some jurisdictions assign all family law cases to special divisions within those courts.<sup>55</sup> In other states, family law cases are heard within a separate, general court of equity.<sup>56</sup> Beginning in the twentieth century, states began to create specialized family courts to hear every kind of family case.<sup>57</sup> This Note will use the term “family court” to describe any of these situations: a judge in a court of general jurisdiction or chancery adjudicating a family law proceeding, a family division judge, or the judge of a family court.

Intimate partner violence figures prominently in many family law proceedings. Undocumented IPV survivors can divorce their abusers in family court,<sup>58</sup> which allows them to sever legal and financial ties with their

51. There is a “domestic relation exception” to federal diversity jurisdiction. Meredith Johnson Harbach, *Is the Family a Federal Question?*, 66 WASH. & LEE L. REV. 131, 140 (2009). This exception remains even though the doctrine is in “disarray,” *id.* at 158–59, and marriage and intimate relationships have increasingly been subject to federal litigation, *see, e.g., Obergefell v. Hodges*, 135 S. Ct. 2584 (2015) (same-sex marriage); *United States v. Windsor*, 133 S. Ct. 2675 (2013) (same).

52. SELDEN SOC’Y, THE RIGHTS AND LIBERTIES OF THE ENGLISH CHURCH 74 (Margaret McGlynn ed., 2015).

53. *See* R.H. HELMHOLTZ, THE CANON LAW AND ECCLESIASTICAL JURISDICTION FROM 597 TO THE 1640S, at 523–25, 540, 556–62 (2004) (describing ecclesiastical jurisdiction). These ecclesiastical courts were presided over by clergy and governed by canon law. *See id.* at 475–76. These religious influences are reflected in modern American jurisprudence about family. *See, e.g., Obergefell*, 135 S. Ct. at 2608 (“No union is more profound than marriage, for it embodies the highest ideals of love, fidelity, devotion, sacrifice, and family.”); *Griswold v. Connecticut*, 381 U.S. 479, 486 (1965) (“Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred.”).

54. LYNN D. WARDLE & LAWRENCE C. NOLAN, FUNDAMENTAL PRINCIPLES OF FAMILY LAW 28 (2002); *see, e.g., General Information*, KAN. JUD. BRANCH, <http://www.kscourts.org/kansas-courts/general-information/default.asp> [<https://perma.cc/GK75-7E4P>] (last visited Apr. 13, 2018) (describing how Kansas district courts possess “general original jurisdiction over all civil and criminal cases, including divorce and domestic relations”).

55. *See, e.g.,* L.A. CTY. SUP. CT. LOCAL R. 5.2 (“All matters arising under the Family Code . . . are assigned to the Family Law Division.”).

56. WARDLE & NOLAN, *supra* note 54, at 28. For example, in Mississippi, the chancery court has jurisdiction over “domestic matters including adoptions, custody disputes and divorces.” *About the Courts*, ST. MISS. JUDICIARY, <https://courts.ms.gov/aboutcourts/aboutcourts.html> [<https://perma.cc/P4U2-BKF4>] (last visited Apr. 13, 2018).

57. DOUGLAS E. ABRAMS ET AL., CONTEMPORARY FAMILY LAW 7, 1009–10 (2006); *see, e.g., Family Courts*, HAW. ST. JUDICIARY, [http://www.courts.state.hi.us/courts/family/family\\_courts](http://www.courts.state.hi.us/courts/family/family_courts) [<https://perma.cc/JE7T-QWHF>] (last visited Apr. 13, 2018).

58. *See* VOLPP, *supra* note 42, at 32–33; *see, e.g., supra* notes 54, 56.

abusive partners.<sup>59</sup> Survivors can also petition for child custody and visitation in family court to protect their children from their abusers.<sup>60</sup> And family courts are a place where survivors can petition for civil orders of protection.<sup>61</sup> Orders of protection come in several forms: they can require the respondent to stop abusing the petitioner; to stay away from the petitioner and suspend all contact, including indirect contact; or even to leave the family home—all under threat of criminal penalties.<sup>62</sup>

### C. Immigration Relief for Intimate Partner Violence Survivors

Family courts are available to litigants irrespective of immigration status.<sup>63</sup> However, immigration relief for the undocumented already residing in the United States is limited. There are two types of visas available to noncitizens: immigrant visas and nonimmigrant visas.<sup>64</sup> Immigrant visas are generally available only to noncitizens who are sponsored by an employer<sup>65</sup> or a family member who is a U.S. citizen or permanent resident,<sup>66</sup> or through programs like the visa lottery.<sup>67</sup> Nonimmigrant visas are generally available to travelers, students, reporters, and certain types of professionals like investors, athletes, clergy, and nurses, as well as other workers.<sup>68</sup>

To be granted either type of visa, a noncitizen must be “admissible” to the United States.<sup>69</sup> To be admissible, one must meet a series of stringent requirements. Noncitizens must be healthy;<sup>70</sup> have, at most, minimal criminal records;<sup>71</sup> and be able to support themselves financially in the United States.<sup>72</sup> One of the most significant barriers to admission for

---

59. See Sanctuary for Families, 2017 Autumn Uncontested Divorce Project Orientation 26 (2017) (on file with author) (“[D]ivorce allows [survivors] to reclaim their previous identity which was systematically repressed by their abuser and empowers them by allowing them to break free from the abuser.”).

60. See VOLPP, *supra* note 42, at 33–34.

61. See *id.* at 30–32.

62. See, e.g., N.Y. FAM. CT. ACT § 842 (McKinney 2018) (setting forth the possibilities for orders of protection in New York State family courts).

63. See VOLPP, *supra* note 42, at 30.

64. See *Directory of Visa Categories*, TRAVEL.STATE.GOV, <https://travel.state.gov/content/travel/en/us-visas/visa-information-resources/all-visa-categories.html> [<https://perma.cc/SMR4-2E9W>] (last visited Apr. 13, 2018).

65. 9 U.S. DEP’T OF STATE, FOREIGN AFFAIRS MANUAL § 502.1-1(B) (2018) [hereinafter FOREIGN AFFAIRS MANUAL], <https://fam.state.gov/Fam/FAM.aspx?ID=09FAM> [<https://perma.cc/W7AG-NSW6>].

66. *Id.*

67. *Id.*; see *id.* § 502.6. There are pending executive proposals to eliminate this program. See Donald J. Trump (@realDonaldTrump), TWITTER (Nov. 2, 2017 11:33 AM), <https://twitter.com/realDonaldTrump/status/926155393490878464> [<https://perma.cc/5793-MGT5>] (“I am calling on Congress to TERMINATE the diversity visa lottery program that presents significant vulnerabilities to our national security.”).

68. See FOREIGN AFFAIRS MANUAL, *supra* note 65, § 402.1.

69. 8 U.S.C. § 1182(a) (2012).

70. See *id.* § 1182(a)(1).

71. See *id.* § 1182(a)(2)–(3), (6), (10).

72. See *id.* § 1182(a)(4).

noncitizens is that unlawful presence can bar immigration relief for years,<sup>73</sup> which means that anyone who comes to the United States without documentation or who overstays a student or tourist visa is de facto ineligible for a visa.

The U Visa was novel because the statute allows certain grounds of inadmissibility to be waived, which means that IPV survivors who are otherwise ineligible for visas because they have a criminal record or because they came to or stayed in the United States without documentation can still be granted a U Visa.<sup>74</sup> Thus, for many undocumented IPV survivors, the U Visa is their only option for legal status.

The BIWPA established U Visa criteria by amending the Immigration and Nationality Act (INA),<sup>75</sup> the primary statutory source of immigration law in the United States.<sup>76</sup> To qualify, an applicant must have been the victim of certain crimes, like domestic abuse and involuntary servitude; been substantially harmed; and aided a “law enforcement official,” prosecutor, judge, immigration authority, or another “local authorit[y]” investigating or prosecuting criminal activity.<sup>77</sup> A U Visa holder is authorized to work in the United States for four years<sup>78</sup> and has the opportunity to become a permanent resident after three years.<sup>79</sup>

U Visas are administered by the United States Customs and Immigration Service (USCIS).<sup>80</sup> USCIS is a division of the Department of Homeland Security (DHS) tasked with processing citizenship applications, managing naturalization procedures, issuing immigrant and nonimmigrant visas,<sup>81</sup> and handling various U.S. humanitarian programs.<sup>82</sup> USCIS’s humanitarian programs grant specific immigration relief to specific classes of noncitizens, like asylum to refugees<sup>83</sup> or expedited processing of applications for foreign nationals stranded in the United States because of a natural disaster.<sup>84</sup> The

---

73. *See id.* § 1182(a)(9) (establishing the three- and ten-year bars for “unlawful presence”).

74. Ann Benson & Jonathan Moore, *A Practice Guide for Representing U Visa Applicants with Criminal Convictions or Criminal History*, ASISTA 4, [http://www.asistahelp.org/documents/resources/annie\\_Us\\_final\\_FA7D9E90456F8.pdf](http://www.asistahelp.org/documents/resources/annie_Us_final_FA7D9E90456F8.pdf) [<https://perma.cc/J4BF-Q9CP>] (last visited Apr. 13, 2018); *see also* 8 U.S.C. § 1182(d)(14).

75. *See* Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, § 1513(b)–(d), 114 Stat. 1464, 1534–36 (codified as amended at 8 U.S.C. §§ 1101(a)(15), 1182, 1184).

76. *See* CHARLES GORDON ET AL., IMMIGRATION LAW AND PROCEDURE § 1.02(3)(c) (2017).

77. *See* 8 U.S.C. § 1184(p) (2012).

78. *See id.* § 1184(o).

79. *See id.* § 1255(l).

80. *See* GORDON ET AL., *supra* note 76, § 28.02(1).

81. *See id.* § 1.02(2).

82. *Humanitarian*, U.S. CITIZENSHIP & IMMIGR. SERVICES, <https://www.uscis.gov/humanitarian> [<https://perma.cc/VKF9-4C99>] (last visited Apr. 13, 2018).

83. *Asylum*, U.S. CITIZENSHIP & IMMIGR. SERVICES, <https://www.uscis.gov/humanitarian/refugees-asylum/asylum> [<https://perma.cc/BV7Y-6BEJ>] (last visited Apr. 13, 2018).

84. *Tips for Foreign Nationals in the United States Impacted by Civil Unrest or Natural Disasters in Their Home Country*, U.S. CITIZENSHIP & IMMIGR. SERVICES, <https://www.uscis.gov/news/alerts/tips-foreign-nationals-united-states-impacted-civil-unrest>

U Visa is one of these programs.<sup>85</sup> The law authorizes USCIS to grant ten thousand U Visas annually.<sup>86</sup>

USCIS has issued formal and informal guidance with respect to the U Visa process. A federal regulation (the “U Visa Regulation”)<sup>87</sup> establishes the required elements of a U Visa application: a Petition for U Nonimmigrant Status (form I-918), a U Nonimmigrant Status Certification (form I-918, Supplement B), a personal statement, and biometric information.<sup>88</sup> Supplement B is the form of the required law enforcement certification indicating to USCIS that the applicant “has been, is being, or is likely to be helpful to an investigation or prosecution of . . . qualifying criminal activity.”<sup>89</sup> USCIS has also issued an informal resource guide (“Resource Guide”),<sup>90</sup> which is intended to explain the U Visa certification requirement to law enforcement agencies.<sup>91</sup> The Resource Guide explains that while certifying an application does not automatically guarantee the applicant a U Visa, it is required for a U Visa petition to be considered.<sup>92</sup>

This certification is one of the most difficult elements for survivors to obtain.<sup>93</sup> Many agencies have instituted complicated, opaque procedures, have long processing times, and some refuse to certify without explanation.<sup>94</sup> In response, nonprofit organizations have long advocated for a broad and creative approach to the pursuit of U Visa applications.<sup>95</sup>

---

or-natural-disasters-their-home-country [https://perma.cc/2XJF-ZZNW] (last visited Apr. 13, 2018); *see, e.g.*, Press Release, USCIS, USCIS Reminds Filipino Nationals Impacted by Typhoon Haiyan of Available Immigration Relief Measures (Nov. 15, 2013), https://www.uscis.gov/news/alerts/uscis-reminds-filipino-nationals-impacted-typhoon-haiyan-available-immigration-relief-measures [https://perma.cc/2VHY-SYED] (reminding victims of the 2013 typhoon “Yolanda” in the Philippines of immigration relief available).

85. *See Humanitarian, supra* note 82 (describing the visas for “Victims of Human Trafficking & Other Crimes”).

86. *See* 8 U.S.C. § 1184(p)(2)(A) (2012).

87. *See* 8 C.F.R. § 214.14 (2018).

88. *See id.* § 214.14(c). The forms and instructions are available at *I-918, Petition for U Nonimmigrant Status*, U.S. CITIZENSHIP & IMMIGR. SERVICES, https://www.uscis.gov/i-918 [https://perma.cc/GD9J-U2TR] (last visited Apr. 13, 2018).

89. *See* 8 C.F.R. § 214.14(c)(2)(i).

90. *See generally* DEP’T OF HOMELAND SEC., U AND T VISA LAW ENFORCEMENT RESOURCE GUIDE (2016) [hereinafter DHS RESOURCE GUIDE], https://www.dhs.gov/sites/default/files/publications/U-and-T-Visa-Law-Enforcement-Resource%20Guide\_1.4.16.pdf [https://perma.cc/F7WM-SRF8].

91. *See id.* at 3.

92. *Id.* at 6 (“[B]y signing a U Visa certification, the certifying agency . . . is not sponsoring or endorsing the victim for a U Visa, and the completed certification does not guarantee that USCIS will approve the U Visa petition.” (emphasis removed)).

93. *See supra* note 11.

94. *See* Nanasi, *supra* note 11 (manuscript at 32–33); *Abuelita Genoveva Sues Department of Homeland Security as Part of Effort to Stop Her Deportation*, OCAD (Sept. 18, 2017), http://organizedcommunities.org/abuelita-genoveva-sues-department-of-homeland-security-as-part-of-effort-to-stop-her-deportation [https://perma.cc/NQM7-WF66] (“Delays in the USCIS adjudication process have caused U Visa applicants to wait as much as three years for decisions on their applications.”).

95. *See, e.g.*, AM. IMMIGRATION LAWYERS ASS’N, RESOURCE LIST: WORKING MORE EFFECTIVELY WITH LAW ENFORCEMENT TO OBTAIN U VISA CERTIFICATIONS (2015), http://www.asistahelp.org/documents/resources/LEAs\_and\_U\_visas\_Resource\_List\_Mar\_0\_D3F1275EDAC4.pdf [https://perma.cc/Y3YZ-8GR3]; NIWPA MEMORANDUM, *supra* note

After submission, USCIS officials engage in an intense review process<sup>96</sup> to determine whether to issue a U Visa.<sup>97</sup> The decision is reviewable *de novo* by the Administrative Appeals Office (AAO).<sup>98</sup> AAO decisions are final.<sup>99</sup>

## II. INTERPRETING THE U VISA STATUTES

USCIS is authorized to grant U Visas where (1) the survivor “has suffered substantial physical or mental abuse as a result of having been a victim of criminal activity”;<sup>100</sup> (2) the survivor “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 [DHS], or to other Federal, State, or local authorities investigating or prosecuting criminal activity”; and (3) “the criminal activity . . . violated the laws of the United States or occurred in the United States.”<sup>101</sup> To enable this fact-finding process, a U Visa petition must include, as set forth in the BIWPA:

[A] certification from a Federal, State, or local law enforcement official, prosecutor, judge, or other Federal, State, or local authority investigating

---

19; *see also* N.Y. STATE JUDICIAL COMM. ON WOMEN IN THE COURTS, IMMIGRATION AND DOMESTIC VIOLENCE: A SHORT GUIDE FOR NEW YORK STATE JUDGES 3 (2009), <http://www.courts.state.ny.us/ip/womeninthecourts/pdfs/ImmigrationandDomesticViolence.pdf> [<https://perma.cc/2L3Y-96Q4>] (“Cooperating in an abuse and neglect proceeding or giving evidence in a family offense case in Family Court, for example, may qualify as assisting with the investigation of a crime.”). Organizations also have a long-standing practice of sharing information about the certification requirements promulgated by different agencies. *See, e.g., ICWC U Visa Zoho Database*, IMMIGR. CTR. FOR WOMEN & CHILDREN, <http://icwclaw.org/services-available/icwc-u-travel-and-certifier-database/> [<https://perma.cc/DHF9-KBQT>] (last visited Apr. 13, 2018) (providing a regularly updated, members-only database that currently lists 983 agencies that have certified U Visa applications, ranging from police departments, district attorneys’ offices, state departments of labor, and local child protective services agencies).

96. DHS RESOURCE GUIDE, *supra* note 90, at 5. For example, USCIS fingerprints and conducts background checks on all applicants. *See* 8 C.F.R. § 214.14(c)(3) (2018). USCIS may also contact the Supplement B signatory for additional information. DHS RESOURCE GUIDE, *supra* note 90, at 5.

97. *See* GORDON ET AL., *supra* note 76, § 28.02(1).

98. USCIS, ADMINISTRATIVE APPEALS OFFICE PRACTICE MANUAL §§ 1.4(a), 3.4 (2016), [https://www.uscis.gov/sites/default/files/USCIS/Laws/AAO/Practice%20Manual/AAO\\_Practice\\_Manual.pdf](https://www.uscis.gov/sites/default/files/USCIS/Laws/AAO/Practice%20Manual/AAO_Practice_Manual.pdf) [<https://perma.cc/WUT5-2CAH>].

99. *See id.* §§ 3.2(d)–(e), 3.14. While an applicant may seek judicial review under the Administrative Procedures Act, any review will likely be highly deferential. *See, e.g., Bazaldua-Hernandez v. Rodriguez*, No. 15-1383, 2016 U.S. Dist. LEXIS 149283, at \*8 (C.D. Cal. Oct. 26, 2016) (describing the standard of review in a petition for judicial review of an AAO denial of a U Visa).

100. 8 U.S.C. § 1101(a)(15)(U)(i)(I) (2012). Qualifying criminal activity is defined as:

[I]nvolving one or more of the following or any similar activity in violation of Federal, State, or local criminal law: 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.

*Id.* § 1101(a)(15)(U)(iii).

101. *Id.* § 1101(a)(15)(U)(i)(IV).

criminal activity . . . . This certification shall state that the alien “has been helpful, is being helpful, or is likely to be helpful” in the investigation or prosecution of criminal activity.<sup>102</sup>

This Part demonstrates that this provision (the “Certification Statute”) authorizes family courts to certify U Visa applications. This Part interprets the Certification Statute using relevant tools of statutory interpretation and construction.

The tools of statutory interpretation are plentiful and heavily debated.<sup>103</sup> This Part analyzes the Certification Statute using two general categories of interpretative tools: textual and legal process.<sup>104</sup> Part II.A will engage in a textual analysis of the Certification Statute, and Part II.B engages in a legal process analysis, examining the BIWPA’s legislative and statutory history.

### A. A Textual Analysis of the BIWPA

Courts and scholars generally agree that any analysis of the law should begin with the text.<sup>105</sup> However, the appropriate approach to the text is less certain, with different judges advocating for different methods.<sup>106</sup> This Note utilizes several of these methods to determine that family courts are authorized by the Certification Statute to certify U Visa applications.

The Certification Statute allows for “a certification from a . . . State . . . judge . . . that the alien ‘has been helpful, is being helpful, or is likely to be helpful’ in the investigation or prosecution of criminal activity.”<sup>107</sup> There are two questions raised by this text: (1) whether “State . . . judge” includes state family court judges and, if so, (2) whether the family court judge must be investigating criminal activity in order to certify.

#### 1. Family Court Judges as State Judges

This first question, whether “State . . . judge” includes state family court judges, can be formulated another way: Does the text surrounding “State . . . judge” narrow the meaning of the term and, thus, exclude family court judges? The key to understanding text is understanding the ordinary meaning of its words: how a reasonable person would read the word in its everyday context.<sup>108</sup> Justice Antonin Scalia described this as “whether you could use the word in that sense at a cocktail party without having people look at you

---

102. *Id.* § 1184(p)(1).

103. See generally Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are to Be Construed*, 3 VAND. L. REV. 395 (1950).

104. See WILLIAM N. ESKRIDGE JR., PHILIP P. FRICKEY, ELIZABETH GARRETT & JAMES J. BRUDNEY, *CASES AND MATERIALS ON LEGISLATION AND REGULATION* 424, 644 (5th ed. 2014).

105. See WILLIAM N. ESKRIDGE JR., *INTERPRETING LAW* 26 (2016) (“Like Justice Scalia, we are all textualists: The starting point and usually the answer to a statutory problem is a fair reading of the statutory text on point.”).

106. See ESKRIDGE JR. ET AL., *supra* note 104, at 645–90.

107. 8 U.S.C. § 1184(p)(1).

108. See ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW* 69–71 (2012).

funny.”<sup>109</sup> If family law is always the jurisdiction of the states,<sup>110</sup> it follows that family court judges are always state judges. In its everyday context, a family court judge is a state judge, and this designation would draw no strange looks over a martini.<sup>111</sup>

However, plain meaning is not always dispositive. For example, in *Yates v. United States*,<sup>112</sup> the U.S. Supreme Court considered whether a fish was a tangible object and decided, all plain meaning and dictionary definitions aside, that a fish was not a tangible object within the meaning of the statute in question.<sup>113</sup> Instead, the Court concluded, “‘Tangible object’ . . . is better read to cover only objects one can use to record or preserve information, not all objects in the physical world.”<sup>114</sup> In *Yates*, the Court applied *noscitur a sociis*<sup>115</sup> to narrow the meaning of “tangible object” in the context of the surrounding terms, which all related to documents and records.<sup>116</sup>

In the Certification Statute, “judge” is surrounded by “law enforcement official,” “prosecutor,” and “other . . . authority investigating criminal activity.”<sup>117</sup> Here, *noscitur a sociis* could be applied to narrow “judge” to include only a criminal judge as the surrounding language implies a criminal nature. However, *noscitur a sociis* “is not dispositive if other statutory context suggests a broader reading.”<sup>118</sup>

Courts utilize other textual aids to determine textual meaning. In *Yates*, Justice Ginsburg discussed another supportive, but not dispositive, textual aid: titles.<sup>119</sup> The title of a statute or section can provide context to help resolve ambiguity in statutory interpretation.<sup>120</sup> In *Yates*, the statute in question included statute and section titles that supported a narrow construction of “tangible object.”<sup>121</sup> Here, the statute and section titles surrounding the Certification Statute are almost uniformly survivor focused: “Establishment of Humanitarian/Material Witness Non-Immigrant Classification,”<sup>122</sup> “Protection for Certain Crime Victims Including Victims of Crimes Against Women,”<sup>123</sup> “Battered Immigrant Women Protection Act

109. *Johnson v. United States*, 529 U.S. 694, 718 (2000) (Scalia, J., dissenting).

110. *See supra* note 51 and accompanying text.

111. *Cf. KRAMER VS. KRAMER* (Columbia Pictures 1979) (“Well the problem is that your mommy and I both want you to live with us, see, so that’s why we decided to go see this man, who I told you is the judge, and we let him decide because he’s very wise and experienced about these things.”); *WHAT MAISIE KNEW* (Red Crown Productions 2012) (“Your mother would have a fit, but I don’t think I’d have a problem squaring it with the judge.”).

112. 135 S. Ct. 1074 (2015).

113. *See id.* at 1081–89.

114. *Id.* at 1081.

115. *See id.* at 1085 (“[T]he principle . . . [that] a word is known by the company it keeps.”).

116. *Id.* at 1085–86.

117. 8 U.S.C. § 1184(p)(1) (2012).

118. *ESKRIDGE JR.*, *supra* note 105, at 408.

119. *Yates*, 135 S. Ct. at 1083–84.

120. *See ESKRIDGE JR.*, *supra* note 105, at 412; *ESKRIDGE JR. ET AL.*, *supra* note 104, at 675–76; *SCALIA & GARNER*, *supra* note 108, at 221–24.

121. *Yates*, 135 S. Ct. at 1083–84.

122. *See Victims of Trafficking and Violence Protection Act of 2000*, Pub. L. No. 106-386, § 1513(b), 114 Stat. 1464, 1534 (codified as amended at 8 U.S.C. § 1101(a)(15)(U) (2012)).

123. *Id.* § 1513, 114 Stat. at 1533.

of 2000,”<sup>124</sup> “Violence Against Women Act of 2000,”<sup>125</sup> and the “Victims of Trafficking and Violence Protection Act of 2000.”<sup>126</sup> This suggests that a statutory reading should also be survivor focused and that the appropriate reading of the Certification Statute should be broad, to protect as many survivors as possible. To limit “judges” strictly to criminal judges would exclude all IPV survivors where prosecutors have declined to prosecute and law enforcement officials have declined to investigate.<sup>127</sup> It would also deny relief to IPV survivors who do not choose to seek criminal assistance, either out of fear of their abuser or deportation.

Purpose clauses can also aid textual construction.<sup>128</sup> The purpose clause of the U Visa provision of the BIWPA states that the law is designed to “offer[] protection to victims . . . in keeping with the humanitarian interests of the United States.”<sup>129</sup> The purpose clause further explains, without qualification, that “[p]roviding temporary legal status to aliens who have been severely victimized by criminal activity also comports with the humanitarian interests of the United States.”<sup>130</sup> But this clause also expounds another purpose: to “strengthen the ability of law enforcement agencies to detect, investigate, and prosecute cases of domestic violence”<sup>131</sup> with the goal of “facilitat[ing] the reporting of crimes to law enforcement officials by . . . abused aliens who are not in lawful immigration status.”<sup>132</sup> The purpose clause of the entire BIWPA reflects this dual purpose, as well.<sup>133</sup> The first stated purpose of the BIWPA is to “remove barriers to criminal prosecutions of” abusers,<sup>134</sup> while the second stated purpose is “to offer protection” to survivors.<sup>135</sup>

The BIWPA states the congressional findings upon which it is premised in its introductory clause: “[P]roviding battered immigrant women and children who were experiencing domestic violence at home with protection against deportation allows them to obtain protection orders against their abusers *and* frees them to cooperate with law enforcement and prosecutors in criminal cases.”<sup>136</sup> These introductory clauses indicate that a balance must be struck between the government’s interests in protecting survivors and prosecuting abusers. This suggests that “State . . . judge” could mean both the criminal

---

124. *Id.* § 1501, 114 Stat. at 1518.

125. *Id.* § 1001, 114 Stat. at 1491.

126. *Id.* § 1, 114 Stat. at 1464.

127. *See supra* note 13 and accompanying text.

128. ESKRIDGE JR., *supra* note 105, at 412 (“Statutory provisions setting forth Congress’s purposes should be given great weight in understanding the legislative purpose(s).”); SCALIA & GARNER, *supra* note 108, at 217–20 (“A . . . purpose clause . . . is a permissible indicator of meaning.”).

129. Victims of Trafficking and Violence Protection Act § 1513(a)(2)(A), 114 Stat. at 1533–34.

130. *See id.* § 1513(a)(2)(B), 114 Stat. at 1534.

131. *Id.* § 1513(a)(2)(A), 114 Stat. at 1533–34.

132. *Id.* § 1513(a)(2)(B), 114 Stat. at 1534.

133. *See id.* § 1502(b)(1), 114 Stat. at 1518.

134. *Id.*

135. *Id.* § 1502(b)(2), 114 Stat. at 1518.

136. *Id.* § 1502(a)(2), 114 Stat. at 1518 (emphasis added).



judge that oversees prosecution of an abuser and the family court judge that oversees the civil proceeding allowing an IPV survivor to protect herself.

Judge Frank Easterbrook explains that regulations can also be a useful textual aid to statutory interpretation: “Let us not pretend that texts answer every question . . . . [T]he interpreter should go to some other source of rules, including administrative agencies . . . .”<sup>137</sup> This echoes the suggestion by Professors Henry M. Hart and Albert M. Sacks that agencies have useful technical expertise and more time to sensibly interpret statutory language.<sup>138</sup>

The U Visa Regulation enumerates a list of certifying agencies, including “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.”<sup>139</sup> The Resource Guide defines certifying agencies as “Federal, State, Local, Tribal, or Territorial government agencies that have criminal, civil, or administrative investigative or prosecutorial authority.”<sup>140</sup> This shows that USCIS understands the language in the Certification Statute to include civil agencies like the EEOC—one that is, by design, essentially powerless.<sup>141</sup> It must, therefore, understand the language to include a state judge with the power to make substantive rules of law.

Ultimately, the text of the Certification Statute, interpreted with the assistance of textual aids like dictionaries, language canons, and agency interpretation, authorizes family courts to certify U Visa applications.

## 2. Family Court Judges as Investigators of Criminal Activity

Another key issue in interpreting the Certification Statute is whether, to make the certification, the certifying agency must be the entity investigating or prosecuting criminal activity. The Certification Statute requires that the law enforcement certification state that the U Visa petitioner “has been helpful, is being helpful, or is likely to be helpful” in the investigation of criminal activity.<sup>142</sup>

The statute presents two different answers. First, a linguistic canon, the last antecedent rule, suggests that the signatory of the certification is not required to be the authority investigating criminal activity. The last antecedent rule dictates that “qualifying words or phrases refer only to the last antecedent, unless contrary to the apparent legislative intent derived from the sense of the entire enactment.”<sup>143</sup> The Certification Statute defines those

137. Frank H. Easterbrook, *Text, History, and Structure in Statutory Interpretation*, 17 HARV. J. L. & PUB. POL’Y 61, 68 (1993).

138. See HENRY M. HART, JR. & ALBERT M. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* 1290 (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994).

139. 8 C.F.R. § 214.14(a)(2) (2018).

140. DHS RESOURCE GUIDE, *supra* note 90, at 6.

141. See Chuck Henson, *In Defense of McDonnell Douglas: The Domination of Title VII by the At-Will Employment Doctrine*, 89 ST. JOHN’S L. REV. 551, 564–66 (2015).

142. 8 U.S.C. § 1184(p)(1) (2012).

143. ESKRIDGE JR. ET AL., *supra* note 104, at 670–71; see, e.g., *Lockhart v. United States*, 136 S. Ct. 958, 962–63 (2016) (holding that, in a statute listing “aggravated sexual abuse,

who can make a certification as follows: “[A] Federal, State, or local law enforcement official, prosecutor, judge, or other Federal, State, or local authority investigating criminal activity.”<sup>144</sup> Here, the qualifying words are “investigating criminal activity,” and the last antecedent is “other Federal, State, or local authority.” Applying the last antecedent rule, “investigating criminal activity” relates only to the last antecedent, not to the preceding certifying officials. This means that the signatory does not need to be investigating criminal activity unless “structural or contextual evidence . . . ‘rebut[s] the last antecedent inference.’”<sup>145</sup>

Second, and conversely, using agency guidance as a textual aid, as Judge Easterbrook proposed,<sup>146</sup> the U Visa Regulation rebuts the last antecedent inference. The U Visa Regulation states that a certifying judge must have “responsibility for the investigation . . . of a qualifying crime or criminal activity.”<sup>147</sup> Thus, if any judge issuing a U Visa certification is required to conduct an “investigation” of criminal activity, what constitutes an “investigation” must be understood. This Part asks whether a family court does investigate criminal activity by exploring what constitutes an investigation.

An ordinary understanding of investigation is not restricted to the work of a criminal court—the word has wide and general applications beyond criminal law. Documentary filmmakers investigate their subjects,<sup>148</sup> scientists investigate the natural world,<sup>149</sup> artists undertake artistic investigation,<sup>150</sup> and there are investigative journalists,<sup>151</sup> insurance

---

sexual abuse, or abusive sexual conduct involving a minor or ward,” “involving a minor or ward” applies only to “abusive sexual conduct,” not “aggravated sexual abuse” and “sexual abuse”).

144. 8 U.S.C. § 1184(p)(1).

145. See *Lockhart*, 136 S. Ct. at 965 (quoting *Jama v. Immigration & Customs Enf’t*, 543 U.S. 335, 344 n.4 (2005)).

146. See *supra* note 137 and accompanying text.

147. 8 C.F.R. § 214.14(a)(2) (2018). The insertion of the comma after “other authority” indicates USCIS’s intention to rebut the last antecedent rule. See *ESKRIDGE JR. ET AL.*, *supra* note 104, at 671.

148. See, e.g., Jordan Raup, *Errol Morris on Investigation, The B-Side, and Unpredictability*, FILM SOC’Y LINCOLN CTR. (July 10, 2017), <https://www.filmlinc.org/daily/errol-morris-on-investigation-the-b-side-and-unpredictability> [<https://perma.cc/3E2E-8JZY>] (quoting the documentary filmmaker Errol Morris as saying, “I think I’m an investigator at heart”).

149. E.g., JOHN BARTLETT, *FAMILIAR QUOTATIONS* 505 (16th ed. 1992) (quoting biologist Thomas Henry Huxley as saying, “The method of scientific investigation is nothing but the expression of the necessary mode of working of the human mind”).

150. E.g., Holland Cotter, *Ellsworth Kelly, Who Shaped Geometries on a Bold Scale, Dies at 92*, N.Y. TIMES (Dec. 27, 2015), <https://www.nytimes.com/2015/12/28/arts/ellsworth-kelly-artist-who-mixed-european-abstraction-into-everyday-life-dies-at-92.html> [<https://perma.cc/YUK5-6WEG>] (quoting the late abstract artist Ellsworth Kelly as saying, “To me the investigation of perception was of the greatest interest”).

151. E.g., *ALL THE PRESIDENT’S MEN* (Warner Brothers 1976) (“Well, if you’re conducting that kind of investigation, certainly it comes as no surprise to you to know that Howard was with the CIA.”).

investigators,<sup>152</sup> and private investigators.<sup>153</sup> The Google search method, utilized by Judge Richard Posner in *United States v. Costello*,<sup>154</sup> which is meant to offer contextual clues to understanding terms,<sup>155</sup> reveals more examples of criminal investigation than not (“bureau of investigation,” “crime investigation,” “criminal investigation,” “fbi investigation,” “crime scene investigation”),<sup>156</sup> but the results are also driven by recent, high-profile criminal investigations.<sup>157</sup>

Other textual aids echo this broad reading. The Supreme Court uses two other methods to understand ordinary meaning: looking to usages of words by the press<sup>158</sup> and in popular culture.<sup>159</sup> A search of “investigation” in the *New York Times* database from the year of the BIWPA’s enactment echoes a

152. Cf. *DOUBLE INDEMNITY* (Paramount Pictures 1944) (“A claims man is a doctor and a hound and a cop and a judge and a father confessor all in one.”).

153. E.g., *Veronica Mars: Pilot* (UPN television broadcast Sept. 22, 2004) (“My after-school job means tailing philandering spouses or investigating false injury claims.”).

154. 666 F.3d 1040 (7th Cir. 2012).

155. See *id.* at 1044–45 (googling phrases like “harboring fugitives” and “harboring guests” to interpret “to harbor”).

156. *Investigation*, GOOGLE TRENDS, <https://trends.google.com/trends/explore?date=all&geo=US&q=investigation> [<https://perma.cc/7PFL-8RZB>] (last visited Apr. 13, 2018) (“Related queries” box, sorted by “Top,” listing results from 2004 to present).

157. The results include “trump investigation,” “hillary investigation,” “mueller investigation,” and “russia investigation” as of March 13, 2018. See *Investigation*, *supra* note 156 (“Related queries” box, sorted by “Rising,” listing results from 2004 to present). This is echoed in results from previous years. See, e.g., *Investigation*, GOOGLE TRENDS, <https://trends.google.com/trends/explore?date=2006-01-01%202006-12-31&geo=US&q=investigation> [<https://perma.cc/FAR9-8WQ5>] (last visited Apr. 13, 2018) (“Related queries” box, sorted by “Rising,” listing results from 2006, including “duke lacrosse investigation”); *Investigation*, GOOGLE TRENDS, <https://trends.google.com/trends/explore?date=2015-01-01%202015-12-31&geo=US&q=investigation> [<https://perma.cc/HR29-EFMT>] (last visited Apr. 13, 2018) (“Related queries” box, sorted by “Rising,” listing top result for 2015, including “patrick kane investigation”).

158. See, e.g., *Muscarello v. United States*, 524 U.S. 125, 129–30 (1998) (interpreting “to carry” by using citations to the *New York Times*, *Boston Globe*, *Colorado Springs Gazette Telegraph*, *Arkansas Gazette*, and *San Diego Union-Tribune*). The Court’s interpretation in *Muscarello* was subsequently overruled by an act of Congress. See *ESKRIDGE JR. ET AL.*, *supra* note 104, at 707.

159. Compare *Muscarello*, 524 U.S. at 129 (citing *Robinson Crusoe* and *Moby Dick*), with *id.* at 144 n.6 (Ginsburg, J., dissenting) (citing *The Magnificent Seven* and *M\*A\*S\*H*).

primarily,<sup>160</sup> but not exclusively, criminal connotation.<sup>161</sup> Examples from popular culture can be found in criminal<sup>162</sup> and noncriminal contexts.<sup>163</sup>

Dictionaries<sup>164</sup> support this inclusive reading. General dictionaries uniformly define investigation as a detailed and systematic inquiry.<sup>165</sup> Legal dictionaries speak more particularly about official and procedural elements, sometimes criminal<sup>166</sup> and sometimes administrative.<sup>167</sup>

These dictionary definitions are reflected in agency regulations. The U Visa Regulation writes a new word into the Certification Statute: “detection.”<sup>168</sup> As a textual aid to investigation, this addition shows that

160. See, e.g., David Johnston, *The 2000 Campaign: The Investigation; an Old Issue Returns to Haunt Reno Again*, N.Y. TIMES (June 26, 2000), <http://www.nytimes.com/2000/06/26/us/the-2000-campaign-the-investigation-an-old-issue-returns-to-haunt-reno-again.html> [<https://perma.cc/V39S-YKAA>] (discussing the criminal investigation into Al Gore’s 1996 campaign fundraising); Tina Kelley, *Stolen Trailer Found in Queens, but Cargo of Cyanide Is Missing*, N.Y. TIMES (May 13, 2000), <http://www.nytimes.com/2000/05/13/nyregion/stolen-trailer-found-in-queens-but-cargo-of-cyanide-is-missing.html> [<http://perma.cc/6WPZ-8A7V>] (discussing an FBI investigation into stolen toxins).

161. See, e.g., James P. Harley, Letter to the Editor, *Anthrax Hunting*, N.Y. TIMES (Jan. 16, 2000), <http://www.nytimes.com/2000/01/16/books/1-anthrax-hunting-247588.html> [<https://perma.cc/E5LS-2ZLW>] (discussing a book about a 1979 scientific investigation into an anthrax outbreak); Stephanie Strom, *N.T.T. Investigation*, N.Y. TIMES (Oct. 25, 2000), <http://www.nytimes.com/2000/10/25/business/world-business-briefing-asia-ntt-investigation.html> [<https://perma.cc/EF5F-6NMA>] (reporting on a Japanese agency investigation into a possible telecommunications monopoly).

162. E.g., *Law & Order: Aftershock* (NBC television broadcast May 22, 1996) (“In the criminal justice system, the people are represented by two separate yet equally important groups: the police who investigate crime and the district attorneys who prosecute the offenders. These are their stories.”).

163. E.g., *Star Trek: The Galileo Seven* (NBC television broadcast Jan. 5, 1967) (“Captain’s log, star date 2821.5. . . . Our course leads us past Murasaki 312, a quasar-like formation. Vague, undefined. Priceless opportunity for scientific investigation.”).

164. There has been a recent surge in dictionary use in Supreme Court opinions. See generally James J. Brudney & Lawrence Baum, *Oasis or Mirage: The Supreme Court’s Thirst for Dictionaries in the Rehnquist and Roberts Eras*, 55 WM. & MARY L. REV. 483 (2013). Legal scholars examining this phenomenon attribute this rise, at least partially, to the Court attempting to rebut accusations of judicial activism by focusing on these neutral-appearing sources. See *id.* at 490–92. This Note will use the dictionaries favored by the Supreme Court, both general and legal. See *id.* at 529–31. And to understand the meaning of “investigation” at the time of passage of the BIWPA, this Note only uses dictionary editions in circulation at the time of the passage of the BIWPA. See *id.* at 511–12.

165. See *Investigation*, AMERICAN HERITAGE DICTIONARY (3d ed. 1996) (“detailed inquiry or systematic examination”); *Investigation*, RANDOM HOUSE WEBSTER’S UNABRIDGED DICTIONARY (2d ed. 1997) (“a searching inquiry for ascertaining facts”); *Investigation*, OXFORD ENGLISH DICTIONARY (2d ed. 1989) (“the making of a search or inquiry; systematic examination; careful and minute research”); *Investigation*, WEBSTER’S SECOND NEW INTERNATIONAL DICTIONARY (2d ed. 1957) (“thorough inquiry”); *Investigation*, WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY (3d ed. 1986) (“detailed examination” and “searching inquiry”).

166. See *Investigate*, BLACK’S LAW DICTIONARY (7th ed. 1999).

167. See *Investigation*, BALLENTINE’S LAW DICTIONARY (3d ed. 1969) (“[a]n administrative function”).

168. See 8 C.F.R. § 214.14(a)(5) (2018) (defining “investigation or prosecution” as “the detection or investigation of a qualifying crime or criminal activity, as well as to the prosecution, conviction, or sentencing of the perpetrator of the qualifying crime or criminal activity” (emphasis added)).

USCIS understands “investigation” to require something more than simply identifying criminal activity—something like a systematic inquiry.

Guided by these insights, a family court certainly investigates during adjudication. For example, a family court engages in a systematic inquiry of finances in domestic support cases<sup>169</sup> and of parental fitness in custody and visitation cases.<sup>170</sup> And a family court investigates criminal activity in some specific proceedings, like petitions for orders of protection and violations of granted orders of protection, divorce applications, and, often, custody and visitation cases.<sup>171</sup> By a textual analysis alone, a family court does investigate criminal activity<sup>172</sup> and is authorized to certify U Visa applications by its litigants.

This Part discussed two questions: (1) whether “State . . . judge” includes state family court judges and, if so, (2) whether the family court judge must be investigating criminal activity in order to certify. To answer the first question, this Part applied *noscitur a sociis* and examined relevant section and statutory titles, purpose clauses, and agency guidance to determine that state judge does include state family court judges.<sup>173</sup> To answer the second question, this Part applied the last antecedent rule and agency guidance as a textual aid to find ambiguity in the text. According to the last antecedent rule, a family court judge does not need to be investigating criminal activity in order to certify a U Visa application, while agency guidance suggests the opposite interpretation.<sup>174</sup> Further textual analysis indicates that the Certification Statute authorizes family courts to certify U Visa applications in either case. Ordinary meaning, dictionaries, press usage, and the Google-search method define “investigation” broadly as a systematic inquiry,<sup>175</sup> which a family court clearly engages in.<sup>176</sup> Taken together, a textual analysis indicates that the Certification Statute authorizes family courts to certify U Visa applications.

---

169. *E.g.*, *McGill v. McGill*, 801 N.E.2d 1249, 1253 (Ind. Ct. App. 2004) (remanding a child-support case to the trial court for “further investigation” into a parent’s finances).

170. *E.g.*, *Ching v. Ching*, No. 23952, 2003 Haw. App. LEXIS 187, at \*4 (Ct. App. June 16, 2003) (discussing the need for “an investigation of the current custody and visitation arrangements”); *State ex rel. Reitz v. Ringer*, 510 N.W.2d 294, 300 (Neb. 1994) (explaining that the trial court acquired temporary custody of the subject child to “further investigate the issue of permanent custody”).

171. *See, e.g.*, W. VA. RULES OF PRACTICE & PROCEDURE FOR FAM. CT. 48a(b) (prescribing that “the circuit court may utilize the investigative and mandamus process” in child abuse and neglect proceedings).

172. *But see* *Nipper v. Snipes*, 7 F.3d 415, 417 (4th Cir. 1993) (ruling that, for the purposes of one of the hearsay exceptions in the Federal Rules of Evidence, “[a] judge in a civil trial is not an investigator, rather a judge”). The *Nipper* holding, however, is not based on textual arguments. *See id.*

173. *See supra* Part II.A.1.

174. *See supra* Part II.A.2.

175. *See supra* Part II.A.2.i.

176. *See supra* Part II.A.2.i.

*B. A Legal Process Analysis of the BIWPA*

This Part engages with two key methods of legal process theory to address the question of whether family courts are authorized under the Certification Statute to certify U Visa applications. “The legal process methodology was the dominant mode for thinking about statutes for a generation and, in fact, remains highly relevant to issues of statutory interpretation.”<sup>177</sup> Two leading legal process scholars, Professors Hart and Sacks, hypothesized that “[t]he meaning of a statute is never plain unless it fits with some intelligible purpose” and wrote that “[t]he first task in the interpretation of any statute . . . is to determine what purpose ought to be attributed to it.”<sup>178</sup> And as a way of discerning this purpose, courts looked to a statute’s legislative history.<sup>179</sup> New textualists have heavily criticized this method as imprecise, “unnecessary[,] or even inadmissible.”<sup>180</sup> But even new textualists have found it necessary to apply this kind of analysis in certain areas.<sup>181</sup>

Proponents of the legal process school of statutory interpretation maintain that it is the duty of courts, as faithful agents of the legislature,<sup>182</sup> to follow legislative history because, while imperfect, it is the clearest indication of the will of Congress.<sup>183</sup> Courts are especially inclined to apply a legal process analysis to the Immigration and Nationality Act.<sup>184</sup>

177. See ESKRIDGE JR. ET AL., *supra* note 104, at 506.

178. See HART & SACKS, *supra* note 138, at 1124–25 (emphasis omitted).

179. ESKRIDGE JR., *supra* note 105, at 198–99.

180. *Id.* at 201; see, e.g., Easterbrook, *supra* note 137, at 62 (“Am I not a notorious opponent of legislative history? That is indeed my position, and it grows out of a belief that becoming accustomed to mining the debates for clues creates some profound and unwelcome changes in how judges see laws.”).

181. See, e.g., John F. Manning, *The Eleventh Amendment and the Reading of Precise Constitutional Texts*, 113 YALE L.J. 1663, 1686–92 (2004) (describing the Rehnquist Court’s strong purposivist approach to state sovereign immunity jurisprudence).

182. See Judith S. Kaye, *Things Judges Do: State Statutory Interpretation*, 13 TOURO L. REV. 595, 604 (1997) (“[I]n matters of statutory interpretation, the judiciary must bend to the legislative command. That is the oath and obligation of every judge.” (footnote omitted)).

183. See RONALD DWORKIN, *LAW’S EMPIRE* 343 (1986) (“[O]fficial statements of purpose, . . . established by the practice of legislative history, should be treated as themselves acts of the state personified.”); ESKRIDGE JR., *supra* note, 105 at 209 (“Reliable legislative materials ought to be a rich source of guidance when interpreters figure out the ordinary meaning of statutory language, read in light of the statutory purpose, both understood through the eyes of the legislators responsible for the statute.”); A. Raymond Randolph, *Dictionaries, Plain Meaning, and Context in Statutory Interpretation*, 17 HARV. J.L. & PUB. POL’Y 71, 77 (1994) (“Legislative history . . . can supply information about how the statute is expected to operate, what subjects it addresses, what problems it seeks to solve, what objectives it tries to accomplish, and what means it employs to reach those objectives . . .”).

184. In 1973, the Ninth Circuit considered the applications by three paroled noncitizens for permanent residency status. *Yuen Sang Low v. Attorney Gen.*, 479 F.2d 820, 821 (9th Cir. 1973). In evaluating whether the three applicants had met the statutory requirement of being “physically present” in the United States for seven years, the court rejected the literal meaning of “physically present” because “we are in the never-never land of the Immigration and Nationality Act, where plain words do not always mean what they say.” See *id.*; cf. MARY MARTIN & KATHY NOLAN, *Never Never Land, on PETER PAN ORIGINAL BROADWAY CAST* (RCA Victor 1954) (“I have a place where dreams are born and time is never planned, it’s not on any chart, you must find it with your heart: never never land.”). The Ninth Circuit instead looked to other factors, including legislative history. See *Yuen Sang Low*, 479 F.2d at 822–23.

This Part takes two legal process approaches to analyzing the BIWPA. Part II.B.1 examines the legislative history of the statute using a variety of legislative materials. Part II.B.2 seeks to understand the general purpose of the statute using statutory history.

### 1. Legislative History of the BIWPA

The Supreme Court has considered a wide variety of legislative materials—ranging from an unsigned, handwritten “slip of paper”<sup>185</sup> to district court case citations in a committee report<sup>186</sup>—as representative of a statute’s legislative history. However, scholars describe a hierarchy of materials. Conference reports and committee reports are given the most weight, followed by the statements of supporters, congressional silence, and subsequent statutory history.<sup>187</sup> Executive statements, like presidential signing or veto statements, are given the least weight.<sup>188</sup> This Part provides a brief overview of the legislative history of the BIWPA and then examines each of these materials in depth.

The initial version of the BIWPA, the Battered Immigrant Women Protection Act of 1999 (“BIWPA 1999”), contained the first iteration of the U Visa.<sup>189</sup> BIWPA 1999 proposed to grant two thousand U Visas annually to noncitizens who had suffered significant abuse, possessed “material information concerning criminal or other unlawful activity,” and were willing to share, or have shared, that information with a law enforcement or administrative agency.<sup>190</sup>

There was a hearing on BIWPA 1999 in July 2000.<sup>191</sup> A few months later, bill sponsors Representatives Sheila Jackson Lee and Jan Schakowsky successfully moved to include BIWPA 1999 in the Victims of Trafficking and Violence Protection Act of 2000 (VTVPA),<sup>192</sup> a bill aimed at combating human trafficking, especially sex trafficking.<sup>193</sup> In conference, a bipartisan group of senators incorporated the reauthorization of the Violence Against Women Act into VTVPA, as well.<sup>194</sup> The conference report on VTVPA

---

185. RICHARD H. FALLON, JR. ET AL., HART AND WECHSLER’S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 588 (7th ed. 2015) (discussing the importance of such a document, thought to be drafted by Senator Ellsworth during the passage of the Judiciary Act of 1789, in the Court’s decision in *Erie*).

186. *Blanchard v. Bergeron*, 489 U.S. 87, 98–99 (1989) (Scalia, J., concurring in the judgment) (“What a heady feeling it must be for a young staffer, to know that his or her citation of obscure district court cases can transform them into the law of the land, thereafter dutifully to be observed by the Supreme Court itself.”).

187. ESKRIDGE JR., *supra* note 105, at 240; ABNER J. MIKVA & ERIC LANE, AN INTRODUCTION TO STATUTORY INTERPRETATION AND THE LEGISLATIVE PROCESS 36 (1997).

188. *See* ESKRIDGE JR., *supra* note 105, at 254–56.

189. *See* H.R. 3083, 106th Cong. § 13(b) (1999).

190. *Id.* § 13(b)–(c).

191. *See generally* BIWPA Hearing, *supra* note 1.

192. *See* 146 CONG. REC. H7630–31 (daily ed. Sept. 14, 2000).

193. *See* H.R. 3244, 106th Cong. § 2 (1999).

194. *See* 146 CONG. REC. S10,182 (daily ed. Oct. 11, 2000) (statement of Sen. Leahy) (“[I]n light of the unwillingness of the Senate Republican leadership to allow the Senate to act on

included the reauthorization of VAWA (“VAWA 2000”), which included the BIWPA.<sup>195</sup> This report contained a revised version of the U Visa.

BIWPA 1999 proposed only an optional law enforcement certification.<sup>196</sup> And BIWPA 1999 expressly proposed that this optional certification could be made by a civil court or agency.<sup>197</sup> However, the revised U Visa provisions in VTVPA mandate, not suggest, a law enforcement certification, and its text does not expressly include civil court action or investigation.<sup>198</sup> VTVPA, which included this version of the U Visa, was enacted in October 2000.<sup>199</sup>

#### *a. Conference and Committee Reports*

The BIWPA conference report supports broad U Visa certification. In analyzing legislative history, conference and committee reports are given special weight.<sup>200</sup> The discussion of the U Visa in these reports is minimal, but the conference report of VTVPA explains that the BIWPA “makes some targeted improvements that our experience with the original [VAWA] has shown to be necessary,” such as “[s]trengthening and refining the protections for battered immigrant women.”<sup>201</sup> In its section-by-section analysis, the report described the U Visa as being “for victims of certain serious crimes that tend to target vulnerable foreign individuals without immigration status.”<sup>202</sup> It also described the certification requirement: “a judge certifies that the victim has been helpful, is being helpful, or is likely to be helpful in investigating or prosecuting the crime.”<sup>203</sup>

---

[VAWA 2000] and the lapse of its authorization, I joined with Senator Biden and Senator Hatch to add it to the sex trafficking conference report we now consider.”).

195. See H.R. REP. NO. 106-939, at 103, 115 (2000) (Conf. Rep.); 146 CONG. REC. H9034 (daily ed. Oct. 6, 2000) (statement of Rep. Jackson Lee) (“Mr. Speaker, I do want to thank the conference committee for putting in the elements dealing with battered immigrant women . . .”).

196. H.R. 3083, 106th Cong. § 13(b)(3) (1999) (requiring only “credible evidence,” which “may include certification from . . . law enforcement” (emphasis added)).

197. See *id.* (providing that certification could come “from a Federal or State law enforcement officer or prosecutor or a Federal or State official responsible for bringing enforcement actions that the alien is willing to cooperate or has cooperated in a criminal or civil court action or investigation or Federal or State administrative agency enforcement action or investigation”).

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

199. See Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, 114 Stat. 1464 (codified as amended in scattered sections of 8 U.S.C.); see also Press Release, Representative Schakowsky, Schakowsky Provisions to Protect Battered Immigrant Women and to Expand Transitional Housing for Domestic Abuse Victims Passed House, Included in Bill to Reauthorize VAWA and to Combat Trafficking of Women and Children into Sex Trade (Oct. 6, 2000), <https://schakowsky.house.gov/press-releases/schakowsky-provisions-to-protect-battered-immigrant-women-and-to-expand-transitional-housing-for-domestic-abuse-victims-passed-house-included-in-bill-to-reauthorize-vawa-and-to-combat-trafficking-of-women-and-children-into-sex-traden> [https://perma.cc/6UPG-8LNN].

200. ESKRIDGE JR., *supra* note 105, at 240–45.

201. H.R. REP. NO. 106-939, at 103 (2000) (Conf. Rep.).

202. *Id.* at 115.

203. *Id.*



It is important that the U Visa is described only in terms of helping survivors and that the certification requirement is not described as a tool to reduce immigration fraud.<sup>204</sup> This indicates that the congressional purpose was to help as many survivors as possible. And this purpose would be best served by allowing as many agencies as possible to certify U Visa applications, including family courts.

*b. Supporters' Statements*

The statements of a bill's supporters, especially its sponsors, are given some weight in a legal process analysis of specific legislative intent.<sup>205</sup> The statements of supporters about the U Visa in the House and Senate during the legislative process were rich and evocative but not necessarily indicative of the intent of Congress as a whole.<sup>206</sup>

The U Visa had a winding road to enactment. Initially included in the BIWPA proposed in 1999, the provisions were altered and included in VAWA 2000 which was, in conference, incorporated into VTVPA.<sup>207</sup> Supporters and sponsors spoke at length throughout this process, and their statements illuminate the original intent of the U Visa and the meaning of the legislative changes.

The BIWPA was initially proposed in the House of Representatives by Representative Schakowsky.<sup>208</sup> Schakowsky proposed the bill in October 1999, during Domestic Violence Awareness Month.<sup>209</sup> She spoke sympathetically about the wide-ranging effects of intimate partner violence, especially on undocumented immigrants.<sup>210</sup> She explained that the BIWPA “would expand legal protections for battered immigrant women so that they may flee violent homes, obtain court protections, and cooperate in the criminal prosecution of their abusers without fear of deportation.”<sup>211</sup>

At the July hearing, another bill sponsor, Representative Sheila Jackson Lee (D-Tex.), told stories of undocumented IPV survivors failed by existing immigration legislation.<sup>212</sup> In her prepared statement, she explained that “immigrant women are caught in an intersection of immigration, family and welfare laws that do[] not positively reflect on their needs and life

---

204. *See supra* notes 201–03 and accompanying text.

205. ESKRIDGE JR., *supra* note 105, at 245–48. These statements have fallen out of favor in recent Supreme Court terms. *Id.* at 247.

206. DWORKIN, *supra* note 183, at 343 (“It would be absurd, of course, to count every statement any legislator makes about the purpose of a statute as itself the act of the state.”); *see, e.g.,* Montana Wilderness Ass’n v. U.S. Forest Serv., 655 F.2d 951, 956 n.8 (9th Cir. 1981) (“[T]he remarks of but one senator made subsequent to the passage of the bill . . . do not provide a reliable indication of the understanding of the Senate as a whole.”).

207. *See generally infra* notes 208–23 and accompanying text.

208. 145 CONG. REC. 26,577–78 (1999); *About Jan*, CONGRESSWOMAN JAN SCHAKOWSKY, <https://schakowsky.house.gov/about-jan1/> [https://perma.cc/6FTF-NZCT] (last visited Apr. 13, 2018).

209. *See* 145 CONG. REC. 26,577 (1999).

210. *See id.*

211. *Id.*

212. *See BIWPA Hearing, supra* note 1, at 27–30; *see, e.g., supra* notes 1–4 and accompanying text.

experiences, leaving them vulnerable to exploitation with few options to redress their situations.”<sup>213</sup> Likely in an effort to win over her more conservative colleagues, Representative Schakowsky testified at the hearing: “Let me begin by emphasizing what my bill will NOT do: It will NOT open the floodgates to undocumented or unwanted immigrants.”<sup>214</sup>

The bill’s U Visa provisions were watered down in conference.<sup>215</sup> However, its Senate supporters echoed this same intent. Senator Ted Kennedy (D-Mass.), who championed the immigration measures in the Senate,<sup>216</sup> took a similarly balanced tone. Senator Kennedy described the need for undocumented IPV survivors “to seek protective orders and cooperate with law enforcement officials to prosecute crimes of domestic violence.”<sup>217</sup> Still, he described the bill’s purpose as being to “make it easier for these immigrants and their children to escape abusive relationships and obtain the help they deserve.”<sup>218</sup> Senator Barbara Boxer (D-Cal.), another sponsor, explained, “We also, for the first time, look at battered immigrants . . . . They need to understand their rights, that their bodies don’t belong to anyone else, and they have a right to cry out if they are abused.”<sup>219</sup> However, other supporters spoke about how the bill would help to facilitate much-needed prosecution of abusers. Senator Patrick Leahy (D-Vt.) spoke about his time as a prosecutor and explained, “One of the things I learned in my years as a prosecutor is that too often nobody wanted to pursue [IPV] cases. . . . This act, itself, will help focus the attention of law enforcement on this.”<sup>220</sup> And Senator Paul Wellstone (D-Minn.) spoke to the importance of the multiple facets of the bill: “The [domestic violence] hotline is important; the training for police is important; the support for law enforcement is important; the support for battered women shelters is so important . . . . All of this matters.”<sup>221</sup>

The original House sponsors were more measured in their praise of the final bill. Representative Jackson Lee explained that the bill’s intent—to protect the uniquely vulnerable undocumented IPV survivors—was unchanged, but she lamented what was lost.<sup>222</sup> In particular, she lamented the exclusion of BIWPA 1999’s proposal to expand existing law to allow

---

213. *BIWPA Hearing*, *supra* note 1, at 30.

214. *Id.* at 33.

215. *See supra* notes 196–98 and accompanying text.

216. *See* 146 CONG. REC. S10,169 (daily ed. Oct. 11, 2000) (statement of Sen. Wellstone) (“I am sitting next to Senator Kennedy who has done so much with the immigration work.”).

217. *Id.* at S10,170.

218. *Id.*

219. *Id.* at S10,173.

220. *Id.* at S10,176–77.

221. *Id.* at S10,180.

222. *Compare* 146 CONG. REC. H9034 (daily ed. Oct. 6, 2000) (statement of Rep. Jackson Lee) (“The Battered Immigrant Women Protection Act of 1999, would provide much needed access to battered immigrant victims of domestic violence.”), *with id.* at H9041 (“I am very disappointed that some missing provisions that were in [the BIWPA] are not in the Conference Report.”).

undocumented immigrants to access public assistance.<sup>223</sup> While neither she nor Representative Schakowsky spoke directly about the U Visa provisions, Representative Jackson Lee's lukewarm statements indicate that something was lost from the original bill.<sup>224</sup>

Ultimately, these statements indicate that the certification requirement should not be interpreted without caution. The initially optional, very broad certification requirement was transformed into a mandatory, narrower requirement, which disappointed the BIWPA's sponsors.<sup>225</sup> However, the bill's liberal supporters in the Senate were laudatory and enthusiastic, indicating that the U Visa was still intended to aid survivors. In Part IV, this Note proposes guidelines in keeping with this balance.

### *c. Debate*

This balance is echoed in the congressional debates between supporters and detractors. Congressional debates between supporters and detractors carry limited weight in analysis, partly because legislators interject hyperbolic statements to persuade their colleagues.<sup>226</sup> Nevertheless, these debates can help illuminate the issues.<sup>227</sup> Here, the discussions at the July hearing are instructive as they show the two battling impulses of the House: to protect undocumented IPV survivors on the one hand, and to encourage cooperation with law enforcement on the other.

In his opening statement at the hearing, Representative Lamar S. Smith (R-Tex.), the Chairman of the House Subcommittee on Immigration and Claims, iterated his concerns about the bill.<sup>228</sup> He criticized the initial U Visa provisions and pointed out that "many of the benefits created in this bill do not require battered aliens to cooperate with law enforcement officers to enable them to investigate or prosecute the aliens' abusers."<sup>229</sup> He later posed a question to Leslye Orloff, director of the Immigrant Women Program at the NOW Legal Defense Fund,<sup>230</sup> who testified earlier in the hearing: "Do you not think the bill could be improved if we required cooperation with law enforcement officials to go after the abusers?"<sup>231</sup> Ms. Orloff advised against such a requirement,<sup>232</sup> but Representative Smith was unconvinced and stated, "I have a major disagreement with the bill if it is not going to require

---

223. *See id.* at H9041 ("I . . . deeply regret that there are no provisions in the report that provide access to food stamps to battered aliens; and access to housing, and access to benefits that would enable the alien to avoid battery or extreme cruelty in the future.").

224. *Cf. supra* notes 222–23.

225. *See supra* notes 222–23 and accompanying text.

226. *See* MIKVA & LANE, *supra* note 187, at 36–37. Professors Mikva and Lane also distinguish between different types of debate and give hearing and committee debate more weight than "hot" floor debate. *See id.*

227. *See id.*

228. *BIWPA Hearing, supra* note 1, at 24.

229. *Id.* at 24.

230. *Id.* at 57.

231. *Id.* at 73.

232. *See id.* at 73–74 ("I don't think it would be wise to have any piece of legislation that requires such cooperation, and, in fact, original VAWA did not for that reason.").

cooperation with law enforcement officials to try to stop the abuse from occurring.”<sup>233</sup>

This colloquy indicates why the U Visa provisions changed from the suggestion in BIWPA 1999 to the requirement in VTVPA—concern that the original U Visa would not do enough to protect the public safety. This concern is addressed by allowing U Visa applicants to seek certification from an agency that has played some role in helping to “stop the abuse from occurring.” Family courts help to do this in a variety of proceedings.<sup>234</sup>

#### d. Executive Statements

Executive statements, usually presidential signing statements or veto statements, are given limited weight in statutory interpretation.<sup>235</sup> President Clinton made three statements on VTVPA: one on the passage of the bill in the House,<sup>236</sup> one on the passage of the bill in Congress,<sup>237</sup> and a signing statement.<sup>238</sup> All three statements are laudatory,<sup>239</sup> but the only one to address the immigration provisions is the signing statement. In the signing statement, President Clinton said, “Of great importance, [VTVPA] restores and expands VAWA’s protections for battered immigrants by helping them escape abuse and by holding batterers accountable.”<sup>240</sup> He went on to describe the U Visa provision in the same terms as the congressional debate, as a balance between “greater protection to victims” and “strengthening the ability of law enforcement agencies to detect, investigate, and prosecute cases of domestic violence.”<sup>241</sup>

\* \* \*

Ultimately, the Congress that enacted the BIWPA clearly intended to compromise between the goals of protecting undocumented IPV survivors and punishing abusers.<sup>242</sup> As evidenced by the most authoritative sources of legislative history, Congress intended to expand immigration relief for undocumented IPV survivors to protect otherwise incredibly vulnerable people,<sup>243</sup> but it was clearly concerned that permissive U Visa requirements

233. *See id.* at 74.

234. *See infra* Part IV.

235. ESKRIDGE JR., *supra* note 105, at 255–56; *see, e.g.*, Eric Lane, *How to Read a Statute in New York: A Response to Judge Kaye and Some More*, 28 HOFSTRA L. REV. 85, 113–15, 118–19 (1999) (describing the New York Court of Appeals’ reliance on executive statements, like a letter from New York City Mayor Lindsay in one case, as “problematic”).

236. Statement on House of Representatives Action on Victims of Trafficking and Violence Protection Legislation, 2 PUB. PAPERS 2063 (Oct. 6, 2000).

237. Statement on Congressional Action on Victims of Trafficking and Violence Protection Legislation, 2 PUB. PAPERS 2137 (Oct. 11, 2000).

238. Statement on Signing the Victims of Trafficking and Violence Protection Act of 2000, 3 PUB. PAPERS 2352–55 (Oct. 28, 2000).

239. *See generally supra* notes 236–38.

240. Statement on Signing the Victims of Trafficking and Violence Protection Act of 2000, 3 PUB. PAPERS 2353 (Oct. 28, 2000).

241. *See id.*

242. *See supra* Parts II.B.1.b–d.

243. *See supra* Part II.B.1.a.

would “open the floodgates to unwanted immigrants.”<sup>244</sup> Compromise and balance are reflected in the bulk of the U Visa’s legislative history.<sup>245</sup> Any interpretation of the Certification Statute should reflect this compromise.

IPV survivors frequently seek refuge in family court,<sup>246</sup> and Congress, which heard from immigration experts and IPV advocates during the BIWPA’s hearings,<sup>247</sup> knew this. Through the lens of legislative history, family court judges were plausibly authorized by Congress to certify U Visa applications, subject to certain limits. The statements of the bills’ original sponsors especially reflect that the Certification Statute was intended to be narrower than they initially envisioned and that agencies should not freely certify U Visas. The text provides one such limit—that the certifying agency must be the one investigating criminal activity. This intent plausibly rebuts the last antecedent inference and is in keeping with USCIS’s interpretation, expressed through the U Visa Regulation.<sup>248</sup>

## 2. Statutory History of the BIWPA

One of the oldest rules of statutory interpretation is the mischief rule.<sup>249</sup> This rule was described in *Heydon’s Case*,<sup>250</sup> a 1584 case in the English Court of Exchequer.<sup>251</sup> The dispute centered around the definition of “estate” in an English statute.<sup>252</sup> In seeking to resolve this question, Lord Coke designed a sequence of questions to determine the statute’s meaning, which were targeted to identify the “mischief and defect” in the common law that the statute was designed to remedy and then to construct the statutory meaning in order to give weight to that remedy.<sup>253</sup> This method is still used by modern scholars: Professors Hart and Sacks advised that “[t]he court should then proceed to do, in substance, just what Lord Coke said it should do in *Heydon’s Case*.”<sup>254</sup> This Part applies this same method to identify the “mischief and defect” that the BIWPA was designed to remedy using statutory history. Statutory history is used frequently by courts with minimal controversy.<sup>255</sup>

Crime became a dominant public issue in the 1960s,<sup>256</sup> spurred by a sudden and intense rise in violence and increasing anxiety about racial and social

---

244. *See supra* Part II.B.1.b.

245. *See supra* Parts II.B.1.c–d.

246. *See supra* Parts I.B–C.

247. *See generally BIWPA Hearing, supra* note 1.

248. *See* 8 C.F.R. § 214.14(a)(2) (2018).

249. *See* Peter D. Webster et al., *Statutory Construction in Florida: In Search of a Principled Approach*, 9 FLA. COASTAL L. REV. 435, 443 (2008).

250. (1584) 76 Eng. Rep. 637; 3 Co. Rep. 7a.

251. *Id.* at 637; 3 Co. Rep. at 7a.

252. *See id.* at 638; 3 Co. Rep. at 7b.

253. *Id.*

254. HART & SACKS, *supra* note 138, at 1378.

255. ESKRIDGE JR., *supra* note 105, at 204–06; *see, e.g., Crawford v. Washington*, 541 U.S. 36, 43–49, 53–56 (2004); *Leo Sheep Co. v. United States*, 440 U.S. 668, 670–77 (1979).

256. JENNIFER L. DURHAM, *CRIME IN AMERICA* 1, 4 (1996).

change in America.<sup>257</sup> It became a dominant political issue in 1964 when Barry Goldwater, the Republican presidential candidate, campaigned on a platform of “enforcing law and order.”<sup>258</sup> While Goldwater’s candidacy failed dramatically, crime was placed on the national stage and did not leave for over two decades.<sup>259</sup>

The Republican presidencies of those two decades emphasized the punishment of criminals, beginning with President Nixon stoking fears about civil rights protesters and anti-Vietnam protestors.<sup>260</sup> This continued into the 1980s, when President Reagan implemented partisan anticrime policy, which emphasized harsh sentencing and erosion of the criminal justice reforms presided over by the Warren Court in the 1960s.<sup>261</sup>

In 1992, Bill Clinton, then a young Democrat from Arkansas, ran a more conservative kind of campaign than his Democratic predecessors. In its endorsement of his candidacy, the *New York Times* wrote:

Mr. Clinton has taken strong and consistent positions, often notably more moderate than those of traditional liberal Democrats. For instance, he says to deadbeat fathers who fail to pay child support: “Take responsibility for your children, or we will force you to do so.” Note the words *responsibility* and *force*.<sup>262</sup>

President Clinton’s election was described by a critic as emblematic of “an elite-led, extralegal, and often violent intolerance for the disorder inherent in active citizen agency and a democratic public sphere,”<sup>263</sup> while his supporters described him as “devot[ed] to social justice.”<sup>264</sup>

As President, one of the largest reforms Clinton oversaw was the passage of the Violent Crime Control and Law Enforcement Act of 1994 (the “Crime Bill”).<sup>265</sup> The Crime Bill was a massive anticrime initiative passed after a long, nasty legislative battle.<sup>266</sup> It increased funding for police, following Clinton’s campaign promise to put 100,000 new police officers on the streets; increased funding to build new prisons; instituted the “three-strikes rule” and an assault weapons ban; and earmarked billions for crime-prevention programs.<sup>267</sup> One of those spending programs was the Violence Against Women Act of 1994.<sup>268</sup> VAWA 1994 authorized \$1.6 billion for programs

257. *See id.* at 4. *See generally* Angelina Snodgrass Godoy, *America Doesn’t Stop at the Rio Grande: Democracy and the War on Crime*, in *AFTER THE WAR ON CRIME* 37 (Mary Louise Frampton et al. eds., 2008).

258. TED GEST, *CRIME & POLITICS* 5 (2001).

259. *See id.*

260. DURHAM, *supra* note 256, at 5.

261. GEST, *supra* note 258, at 42–62.

262. *See* Endorsement, *George Bush’s Failure, Bill Clinton’s Promise*, N.Y. TIMES, Oct. 25, 1992, at E14.

263. William Lyons, *Frightening Citizens and a Pedagogy of Violence*, in *AFTER THE WAR ON CRIME*, *supra* note 257, at 123, 128.

264. Endorsement, *supra* note 262.

265. *See* GEST, *supra* note 258, at 243.

266. *See id.* at 219–43.

267. *See id.* at 196–97, 242–44.

268. *See* Joe Biden, Opinion, *20 Years of Change: Joe Biden on the Violence Against Women Act*, TIME (Sept. 10, 2014), <http://time.com/3319325/joe-biden-violence-against->

seeking to end gender-based violence, including intimate partner violence.<sup>269</sup> Recognizing that immigrant IPV survivors are subjected to a particular kind of immigration abuse, VAWA 1994 created a pathway for abused noncitizens married to citizens or lawful permanent residents to handle their own petitions for status.<sup>270</sup>

BIWPA 1999 was proposed when Congress was returning to VAWA 1994 to reauthorize the spending programs, and was eventually included in VAWA 2000.<sup>271</sup> In terms of statutory history, the mischief that VAWA 1994 was intended to cure was clearly crime. The chosen remedy was established by decades of legislation that put more police on the streets, enforced longer sentences for criminals, and built more prisons to house them.<sup>272</sup> Congress was driven by “the three ‘P’s’ of police officers, prisons, and prevention.”<sup>273</sup> This purpose would telegraph a clear, narrow reading of the Certification Statute: If police, prosecutors, and sentencing authorities have always been the chosen statutory remedies, then criminal courts alone should be allowed to certify U Visas.

However, this conclusion is complicated by the discussions surrounding VAWA 2000, which was included in VTVPA. In the debates on VTVPA, legislators spoke of a different “three Ps”: prevention, protection, and prosecution.<sup>274</sup> When BIWPA 1999 was introduced, the mischief remained high crime, but the chosen remedy was no longer so clear. While prosecution of abusers was still preferred, there was a growing recognition that public safety could be achieved through promoting social programs like the National Domestic Violence Hotline and funding local shelters and service providers.<sup>275</sup> This trend continued with the passage of VAWA 2005. The hearings on VAWA 2005 emphasized collaboration between service providers and law enforcement to combat IPV.<sup>276</sup>

Ultimately, the U Visa was established at a turning point, when Congress was no longer so certain that punishment was always the correct remedy to the mischief of IPV. This Note proposes that any interpretation of the Certification Statute should reflect the congressional realization that IPV is not only combated by criminal courts but also by civil courts and agencies.

---

women [<https://perma.cc/YMM4-6WNB>] (“To get it passed . . . I added VAWA to a crime bill I had been working on for years that had bipartisan support, put 100,000 cops on the streets, and provided more assistance for law enforcement.”).

269. See G<sup>EST</sup>, *supra* note 258, at 244.

270. See Violent Crime Control and Law Enforcement Act of 1994, Pub. L. 103-322, § 40701, 108 Stat. 1796, 1953–55 (codified at 8 U.S.C. § 1154 (2012)).

271. See *supra* notes 192–95, 199 and accompanying text.

272. G<sup>EST</sup>, *supra* note 258, at 242.

273. *Id.*

274. 146 CONG. REC. S10,180 (daily ed. Oct. 11, 2000) (statement of Sen. Wellstone).

275. See *supra* note 221 and accompanying text.

276. See, e.g., VAWA 2005 Hearing, *supra* note 37, at 7–9 (statement of Hon. Diane Stuart, Director of the Office on Violence Against Women) (“Through the spirit of [VAWA], the coordinated community response, we have learned that victims are safer and justice is better served when a shelter worker has a strong working relationship with law enforcement and the district attorney, when an emergency room nurse knows to call an advocate . . .”).

### III. U VISA CERTIFICATION IN PRACTICE

This Part surveys the current published practices surrounding family court U Visa certification in the United States to inform this Note's proposed guidelines for family court U Visa certification.

The decision to certify a U Visa application is discretionary and not subject to judicial review or judicial mandamus.<sup>277</sup> Courts<sup>278</sup> and agencies<sup>279</sup> all differ dramatically in their approaches to certification. Family courts themselves are equally uncertain about their power to certify U Visa applications. Some state judiciaries have issued guidance on whether family courts can certify U Visa applications,<sup>280</sup> and the AAO has issued one nonprecedential decision hinting at its approval of the practice of family court certification.<sup>281</sup> Part III.A reviews the limited existing jurisprudence on family court U Visa certification, Part III.B reviews current state-judiciary guidance, and Part III.C describes the sole AAO decision discussing civil court certification.

#### A. Family Court Cases Addressing U Visa Certification

There are only three published opinions that rule on whether family courts can certify U Visa applications: all come from Queens County, New York, two are authored by the same family court judge, and none agree—not even the opinions written by the same judge.

---

277. See *Ordonez Orosco v. Napolitano*, 598 F.3d 222, 225–27 (5th Cir. 2010).

278. Federal district courts presiding over civil proceedings are divided over whether they possess the authority to certify U Visa applications. Compare *Villegas v. Metro. Gov't of Nashville & Davidson Cty.*, 907 F. Supp. 2d 907, 907–14 (M.D. Tenn. 2012) (granting a motion to certify the plaintiff's U Visa application in a section 1983 suit), and *Garcia v. Audubon Cmtys. Mgmt., LLC*, No. 08-1291, 2008 U.S. Dist. LEXIS 31221, at \*4–13 (E.D. La. Apr. 15, 2008) (granting a motion to certify the plaintiffs' U Visa applications in a civil employment litigation), with *Baiju v. U.S. Dep't of Labor*, No. 12-cv-5610, 2014 U.S. Dist. LEXIS 12372, at \*61–71 (E.D.N.Y. Jan. 31, 2014) (denying a motion for U Visa certification in a civil wage and hour suit), and *Agaton v. Hosp. & Catering Servs., Inc.*, No. 11-1716, 2013 U.S. Dist. LEXIS 46966, at \*10–11 (W.D. La. Mar. 28, 2013) (same). In recognition that family courts are unique in the landscape of civil courts, this Note will not discuss the issue of federal civil court certification in depth.

279. There is similarly no uniform standard across government agencies. Compare Memorandum from Naomi C. Earp, Chair, EEOC, to District Directors and Regional Attorneys (July 3, 2008), [http://www.asistahelp.org/documents/resources/EEOC\\_procedures\\_for\\_U\\_visa\\_certific\\_A9ABDA9CC5582.pdf](http://www.asistahelp.org/documents/resources/EEOC_procedures_for_U_visa_certific_A9ABDA9CC5582.pdf) [<https://perma.cc/7YER-HJGY>] (describing a multistep interview process and the written submissions required for EEOC U Visa certification), with *How to Request a Certification for U Nonimmigrant Status (U Visa) from the New York City Police Department (NYPD)*, N.Y. POLICE DEP'T, [https://www1.nyc.gov/assets/nypd/downloads/pdf/domestic\\_violence/u-visa-guidelines.pdf](https://www1.nyc.gov/assets/nypd/downloads/pdf/domestic_violence/u-visa-guidelines.pdf) [<https://perma.cc/9M-SH-R25T>] (last visited Apr. 13, 2018) (describing a single request letter with four pieces of information required: the name, the crime, the survivor's helpfulness, and a mailing address).

280. See *infra* Part III.B.

281. See *infra* Part III.C.



### 1. *In re Rosales*

A family court judge certified a U Visa application in *In re Rosales*.<sup>282</sup> The U Visa applicant, Ms. Rosales, had previously petitioned the Queens County Family Court for an order of protection against her abusive husband.<sup>283</sup> The court held an inquest and granted Ms. Rosales a final two-year “stay away” order of protection.<sup>284</sup> The judge that presided over the original proceeding had since retired, and a different family court judge certified Ms. Rosales’s U Visa application on his review of the transcript of the inquest and her family offense petition.<sup>285</sup> In its opinion, the court ruled, without any analysis, that “[a] State or local Judge qualifies as a certifying official under [the U Visa Regulation].”<sup>286</sup>

### 2. *In re Clara F.*

Three years after the decision in *In re Rosales*, a different family court judge in Queens County, Judge John Hunt, declined to certify a U Visa application. In *In re Clara F.*,<sup>287</sup> the applicant, Ms. F., commenced two family offense proceedings,<sup>288</sup> one visitation proceeding, and one child support proceeding in Westchester County Family Court.<sup>289</sup> In connection with the second family offense proceeding, the Westchester County Family Court found that the respondent committed attempted assault in the third degree and harassment in the second degree and entered a two-year “stay away” order of protection in favor of Ms. F.<sup>290</sup> However, for reasons unclear to the Queens County Family Court judge, Ms. F.’s request for U Visa certification was referred to Queens County.<sup>291</sup>

In refusing to honor Ms. F.’s request, the Queens County court observed that the family offense proceeding was not a criminal one and that “the Family Court had no role in presiding over any prosecution, conviction, or sentencing of a defendant.”<sup>292</sup> However, the court nevertheless directed Ms. F. to make her request to the Westchester judge that adjudicated her family offense petition, which implied that its denial was only the “reasoned judgment” of the court and that other courts might reasonably rule differently.<sup>293</sup>

---

282. No. Z-14920-12, 2013 N.Y. Misc. LEXIS 3172, at \*1–2, \*10 (Fam. Ct. July 22, 2013).

283. *Id.* at \*7–9.

284. *Id.* at \*8.

285. *See id.* at \*7–10.

286. *Id.* at \*1–2.

287. 32 N.Y.S.3d 871 (Fam. Ct. 2016).

288. This is the type of proceeding to seek a civil order of protection in New York State family courts. *See* N.Y. FAM. CT. ACT § 812 (McKinney 2018).

289. *Clara F.*, 32 N.Y.S.3d at 873.

290. *Id.*

291. *Id.* (“Apparently, for reasons of ‘administrative convenience,’ the application was referred to this Court which has had absolutely no contact with either of the parties and no involvement with any of their judicial proceedings.”).

292. *Id.* at 875.

293. *Id.* at 875–76.

### 3. *In re Patricia C.*

Later that year, Judge Hunt again declined a request to certify a U Visa application in *In re Patricia C.*<sup>294</sup> Five months prior to the ruling, Ms. C. sought an order of protection from the court against her husband.<sup>295</sup> Ms. C.'s family offense petition described her husband's verbal, emotional, financial, and physical abuse.<sup>296</sup> She also explained that she filed a report with her local police precinct.<sup>297</sup> At the inquest, the court found that her husband committed aggravated harassment in the second degree and harassment in the Second Degree, and it entered a two-year "stay away" order of protection.<sup>298</sup> Ms. C. then applied to the family court for U Visa certification.<sup>299</sup>

In its refusal, the court explained that "[t]he Family Court is not a criminal court and it exercises no criminal jurisdiction," and "[t]he family offense proceeding which was commenced by Patricia C. is a civil proceeding."<sup>300</sup> It further explained that, while a family offense proceeding has criminal characteristics, the final adjudication "does not constitute a criminal conviction."<sup>301</sup> The court also declined to certify Ms. C.'s U Visa application on the basis of her involvement with the police and suggested that Ms. C. instead bring her request directly to the police department.<sup>302</sup>

Judge Hunt's two opinions clearly conflict: his opinion in *In re Clara F.* suggests that family courts can certify U Visa applications, while his opinion in *In re Patricia C.* states that family courts are never authorized to certify U Visa applications. However, the commonalities in the two opinions are instructive. Both make clear that the applicant has another recourse, which implies that he might have ruled differently had there been no involvement with another court or the police.<sup>303</sup> And both opinions make clear that a family offense proceeding is not a criminal proceeding.<sup>304</sup>

#### B. State Approaches to U Visa Certification

State judiciaries have also taken a stance on the issue of family court U Visa certification. Representative groups of the New York and Minnesota judiciaries have argued that family court judges may issue U Visa certifications. On February 14, 2017, the Advisory Council on Immigration Issues in Family Court circulated an advisory memorandum among the New York family courts, which offered guidance on the role of the family courts in U Visa petitions.<sup>305</sup> The Council's memorandum took a much more liberal

---

294. No. Z-19755/16, 2016 N.Y. Misc. LEXIS 4701, at \*1, \*10 (Fam. Ct. Dec. 23, 2016).

295. *Id.* at \*1.

296. *See id.* at \*1-2.

297. *Id.* at \*2.

298. *Id.* at \*3-4.

299. *Id.*

300. *Id.* at \*6.

301. *Id.* at \*7.

302. *Id.* at \*8-10.

303. *See id.*; *In re Clara F.*, 32 N.Y.S.3d 871, 875-76 (Fam. Ct. 2016).

304. *See Patricia C.*, 2016 N.Y. Misc. LEXIS 4701, at \*6; *Clara F.*, 32 N.Y.S.3d at 875.

305. *See NY Advisory Memorandum, supra* note 19, at 2-3.

approach than that expounded in *In re Clara F.* and *In re Patricia C.* It explains that it is well within the role of family court judges to certify U Visa applications in a wide range of cases.<sup>306</sup> Two years earlier, the Minnesota Supreme Court had issued an advisory opinion allowing for the possibility that a state court judge “presiding over a civil case such as an Order for Protection or dissolution [of marriage] proceeding” may certify a U Visa application, but only if the applicant is likely to be helpful in a later criminal trial.<sup>307</sup>

### C. Administrative Appeals Office Decision

The appeals office within DHS has also considered family court U Visa certification. USCIS’s initial decision on a U Visa petition is reviewable de novo by the AAO.<sup>308</sup> AAO decisions are primarily nonprecedential, meaning they “do not create or modify USCIS policy or practice” and “do not provide a basis for applying new or alternative interpretations of law or policy.”<sup>309</sup> The AAO has issued no precedential decisions on U Visa certification, but in one of its nonprecedential decisions, the AAO ruled that USCIS must grant U Visas based solely on a family court proceeding, even where the IPV survivor refused to pursue criminal prosecution.<sup>310</sup>

In that case, a U Visa applicant sought an order of protection in family court, spoke with the police, and refused to pursue criminal charges.<sup>311</sup> She submitted a certification executed by the presiding Illinois judge.<sup>312</sup> The certification detailed the petitioner’s cooperation in a civil-order-of-protection proceeding.<sup>313</sup> USCIS initially denied her U Visa application because “obtaining a protection order, in itself, does not qualify as reporting criminal activity.”<sup>314</sup> The AAO reversed and held that this statement “misstates the applicable standard.”<sup>315</sup> The AAO also found that the petitioner’s refusal to sign a criminal complaint, in light of the available evidence (her testimony that she was financially dependent on her husband), was not unreasonable and that this also misstated the applicable standard.<sup>316</sup>

---

306. *See id.*

307. Minn. Bd. on Judicial Standards, Opinion 2015-2, U-Visa Certifications 7 (June 26, 2015), <http://www.bjs.state.mn.us/file/advisory-opinions/opinion-2015-2-final.pdf> [<https://perma.cc/X6NQ-ZRL5>]. One other state court system has issued an advisory opinion on the U Visa—North Carolina—but that opinion forbade any judge from certifying U Visa applications for reasons unrelated to the subject of this Note. *See* Judicial Standards Comm’n, State of N.C., 2014-03, Formal Advisory Opinion 2–3 (Aug. 8, 2014), <http://www.aoc.state.nc.us/www/public/html/pdf/JSC/14-03.pdf> [<https://perma.cc/99P9-ENQS>].

308. *See supra* notes 98–99 and accompanying text.

309. USCIS, *supra* note 98, § 1.5.

310. Petitioner (Admin. Appeals Office Mar. 17, 2015), 2015 WL 1505717. The file number and the petitioner’s name were redacted by USCIS. *See* USCIS, *supra* note 98, § 3.15.

311. *Petitioner*, 2015 WL 1505717, at \*3.

312. *Id.* at \*4.

313. *See id.* at \*3.

314. *Id.*

315. *Id.*

316. *Id.* at \*3 n.2.

There is clearly no consensus on whether family courts can certify U Visa applications. The jurisprudence is unsettled, and the AAO has issued no final determination. Undocumented IPV survivors, already vulnerable in so many ways, need a settled legal standard.

IV. A PROPOSED FRAMEWORK: A FAMILY COURT MUST BE ABLE TO  
CERTIFY THAT THE IPV SURVIVOR WAS HELPFUL  
IN A PROCEEDING THAT HINGED ON A FINDING OF IPV

Part II of this Note explained that family courts are authorized to certify U Visa applications.<sup>317</sup> A textual analysis of the BIWPA shows there is a limit to this authority; while on its face the statute empowers any state judge to certify a U Visa application,<sup>318</sup> its surrounding text somewhat narrows the definition by requiring some kind of involvement with investigating IPV,<sup>319</sup> protecting IPV survivors,<sup>320</sup> or facilitating the reporting of IPV.<sup>321</sup> The legislative history of the BIWPA shows that the Certification Statute was a compromise between two forces in Congress: one interested in protecting undocumented IPV survivors and the other interested in facilitating the cooperation of undocumented survivors with police and prosecutors.<sup>322</sup> The statutory history of the BIWPA, compared with the Violence Against Women Act, shows a shift, albeit an incomplete one, from a punitive approach to crime to a collaborative approach to intimate partner violence.<sup>323</sup> This Part proposes guidelines for family court U Visa certification within these bounds.

No court or agency has yet established a framework that is supported by the Certification Statute. The Queens County Family Court—the only court to have published decisions on the subject—offers three different options: a family court may unequivocally certify on the basis of observed criminal activity,<sup>324</sup> a family court must be presiding over the fact-finding stage of a proceeding in order to certify an application,<sup>325</sup> or a family court may unequivocally not certify.<sup>326</sup> The judicial opinions on whether a federal court presiding over a civil proceeding can certify a U Visa application offer another array of options for certification.<sup>327</sup> In response to this vacuum, this Part proposes a framework for family court U Visa certification that is supported by the Certification Statute.

This Note proposes that to certify a U Visa application, a family court must be able to certify that the IPV survivor was helpful in a family court proceeding that hinged on a finding of intimate partner violence.

---

317. *See supra* Part II.

318. *See supra* notes 110–11 and accompanying text.

319. *See supra* Part I.A.1.

320. *See supra* notes 122–36, 201–04 and accompanying text.

321. *See supra* Part II.B.1.

322. *See supra* Part II.B.1.

323. *See supra* Part II.B.2.

324. *See supra* Part III.A.1.

325. *See supra* Part III.A.2.

326. *See supra* Part III.A.3.

327. *See supra* note 278.

By a textual analysis alone, family courts are authorized to certify U Visa applications whether or not they are adjudicating a proceeding hinging on IPV.<sup>328</sup> Reading its text in a vacuum, the Certification Statute only requires helpfulness to an investigation of criminal activity, regardless of who conducts it.<sup>329</sup> However, the role of the judiciary is to act as a faithful agent of the legislature, not to interpret in a vacuum.<sup>330</sup> Part II analyzed the purpose of the legislature in enacting the BIWPA by looking to its legislative and statutory histories. The legislative history indicates that Congress intended to limit the ability of the government to grant U Visas while still protecting IPV survivors.<sup>331</sup> The statutory history indicates that the BIWPA came at a turning point in Congress's approach to violent crime.<sup>332</sup> And because the statute was written at this turning point, this Part proposes a guideline that both balances the desire to facilitate the punishment of criminals with the desire to stop crime and empowers IPV survivors to protect themselves.<sup>333</sup> This proposed guideline is supported by textual interpretation that allows family courts to certify U Visa applications, legislative history that requires limits on that certification, and statutory history that allows those limits to be relaxed.

Part III.A offers a framework for what constitutes intimate partner violence, Part III.B offers a framework for what constitutes helpfulness, and Part III.C offers a survey of which types of proceedings hinge on a finding of intimate partner violence.

#### A. What Constitutes Intimate Partner Violence

This Note proposes that family court judges are only authorized to certify U Visa applications where the intimate partner violence is in violation of criminal statutes. Intimate partner violence encompasses a great deal of behavior that is not codified as criminal. For example, abusers sometimes publish intimate photos of their partners to humiliate them or exert control over their lives, a practice called “revenge porn” or “nonconsensual pornography.”<sup>334</sup> Nonconsensual pornography is not illegal in every state,<sup>335</sup> but it is clearly IPV.<sup>336</sup>

This Part proposes that family court judges should, in order to fulfill the balance required by the Certification Statute, only certify U Visa applications

---

328. See *supra* notes 110–11 and accompanying text.

329. See *supra* notes 143–45 and accompanying text.

330. See Kaye, *supra* note 182, at 604.

331. See *supra* Part II.B.1.

332. See *supra* Part II.B.2.

333. See *supra* Part II.B.2.

334. See Danielle Keats Citron & Mary Anne Franks, *Criminalizing Revenge Porn*, 49 WAKE FOREST L. REV. 345, 346 (2014); *Frequently Asked Questions*, CYBER C.R. INITIATIVE, <https://www.cybercivilrights.org/faqs/> [https://perma.cc/G6RX-FXS9] (last visited Apr. 13, 2018).

335. See *38 States + DC Have Revenge Porn Laws*, CYBER C.R. INITIATIVE, <https://www.cybercivilrights.org/revenge-porn-laws/> [https://perma.cc/4C9S-4HXW] (last visited Apr. 13, 2018).

336. See Citron & Franks, *supra* note 334, at 351.

when there is a violation of existing criminal law. Since the decision to certify a U Visa is committed solely to the discretion of the certifying authority,<sup>337</sup> how a family court judge determines a violation of existing criminal law should be left to her discretion.

### B. What Constitutes Helpfulness

This Part offers examples of what actions survivors can take to meet the helpfulness requirement of the Certification Statute, including filing initial family court pleadings, testifying in family court, and entering into settlement agreements with their abuser.

First, filing initial pleadings is helpful. An investigation is a broad and systematic inquiry.<sup>338</sup> IPV survivors who petition the court for relief from IPV are initiating that systematic inquiry. A family court may certify a U Visa application at this early pleading stage. Not only has the IPV survivor already been helpful but the filing indicates a willingness on the part of the survivor to be helpful in the future at the fact-finding stages. Even if the petition is withdrawn, as is often the situation in IPV cases,<sup>339</sup> the survivor has indicated a willingness to be helpful.

Second, testifying in family court is helpful. It takes tremendous bravery for IPV survivors to testify in open court about their abuse. By testifying about their abuse, survivors are helping family courts in the fact-finding process. In fact, most family court proceedings call for testimony to aid in making a final determination.<sup>340</sup> IPV survivors who testify about their abuse at any point meet the helpfulness element.

Finally, entering into a settlement agreement is helpful. IPV survivors who testify or file a pleading demonstrate helpfulness with family court investigation even if they reach a settlement. Settlement indicates, at minimum, a willingness to be helpful in the investigation of criminal activity in two ways. First, a survivor who settles with her abuser has still likely detailed the IPV she suffered in her initial pleadings. Second, entering into a settlement agreement plausibly indicates a willingness to enforce that agreement. It is a crime to violate orders of protection (even those entered on consent),<sup>341</sup> custody agreements,<sup>342</sup> and child support agreements.<sup>343</sup> A survivor who enters into one of these agreements thus has indicated a willingness to pursue these criminal penalties in the event of violation.

---

337. See *supra* note 277 and accompanying text.

338. See *supra* notes 165–67 and accompanying text.

339. See, e.g., Catherine F. Klein & Leslye E. Orloff, *Providing Legal Protection for Battered Women: An Analysis of State Statutes and Case Law*, 21 HOFSTRA L. REV. 801, 1068–70 (1993).

340. See, e.g., N.Y. FAM. CT. ACT §§ 832, 835 (McKinney 2018) (requiring a fact-finding hearing before entering a final order of protection).

341. See, e.g., CAL. PENAL CODE § 273.6 (2018) (providing that violating a protective order is a misdemeanor punishable by fine or imprisonment).

342. See, e.g., TEX. PENAL CODE ANN. § 25.03 (West 2017) (providing that violating a custody order is a felony).

343. See, e.g., N.Y. PENAL LAW §§ 260.05–.06 (McKinney 2018) (providing that refusal to pay child support is a class A misdemeanor or class E felony).

C. *Which Proceedings Hinge on a Finding of Intimate Partner Violence*

This Part outlines certain proceedings where a family court is investigating criminal activity and is therefore authorized to certify a litigant's U Visa application. Family law is a matter of state law.<sup>344</sup> Therefore, which types of proceedings hinge on a finding of IPV vary from state to state. This Part analyzes a few different types of proceedings that would qualify under this framework based on the laws of three of the states with the highest numbers of undocumented people: California, Texas, and New York.<sup>345</sup>

Every state has some version of a civil order of protection that is intended to aid survivors of intimate partner violence.<sup>346</sup> Statutory requirements vary, but family court judges typically must make a factual or legal determination that IPV occurred or is imminent.<sup>347</sup> For example, in California, a family court must find that there is "reasonable proof of a past act or acts of abuse" before entering a protective order.<sup>348</sup> Family courts adjudicating an order of protection are always empowered to certify a U Visa of the petitioner because these proceedings always hinge on a finding of intimate partner violence.

A family court judge is also authorized to certify U Visa applications in certain state divorce proceedings. Every state has some version of no-fault divorce.<sup>349</sup> However, most state no-fault divorce laws require a finding of something like "'irreconcilable differences' or 'irretrievable breakdown of the marriage'" before granting a divorce.<sup>350</sup> If intimate partner violence is argued as a basis for that irretrievable breakdown, this Part proposes that the presiding family court judge is authorized to certify a U Visa application. Some states enacted no-fault divorce law to supplement the fault schemes.<sup>351</sup> For example, in Texas, cruelty is a ground for divorce.<sup>352</sup> Cruelty is established by "[a]ny conduct of one spouse sufficient to raise a reasonable fear of bodily harm in the other,"<sup>353</sup> including physical and verbal abuse,<sup>354</sup> threats,<sup>355</sup> and sexual abuse.<sup>356</sup> Ultimately, a family court adjudicating a

---

344. See *supra* note 51 and accompanying text.

345. See U.S. *Unauthorized Immigration Population Estimates*, PEW RES. CTR., <http://www.pewhispanic.org/interactives/unauthorized-immigrants/> [https://perma.cc/5PAT-E5BV] (last visited Apr. 13, 2018).

346. See Nawal H. Ammar et al., *Battered Immigrant Women in the United States and Protection Orders: An Exploratory Research*, 37 CRIM. JUST. REV. 337, 338 (2012).

347. See Klein & Orloff, *supra* note 339, at 1043–48.

348. See CAL. FAM. CODE § 6300 (2017).

349. FAMILY LAW & PRACTICE § 4.02 (Arnold H. Rutkin ed., 2017).

350. See William N. Eskridge Jr., *Family Law Pluralism: The Guided-Choice Regime of Menus, Default Rules, and Override Rules*, 100 GEO. L.J. 1881, 1922 (2012); see, e.g., TEX. FAM. CODE ANN. § 6.001 (West 2017) ("[T]he court may grant a divorce without regard to fault if the marriage has become insupportable because of discord or conflict of personalities that destroys the legitimate ends of the marital relationship and prevents any reasonable expectation of reconciliation.").

351. See, e.g., 48 N.Y. JUR. 2D *Domestic Relations* § 2270 (2017).

352. TEX. FAM. CODE ANN. § 6.002.

353. 39 TEX. JUR. 3D *Family Law* § 353 (2017).

354. See *id.*

355. *Id.* § 355.

356. See *id.* § 357.

divorce where the divorce could only be granted on a finding of IPV, as in the no-fault or fault-based schemes described above, is authorized to certify a U Visa application.

Some states require that courts consider IPV in custody and visitation determinations.<sup>357</sup> Where an IPV survivor is helpful in a custody and visitation proceeding in which IPV is alleged and investigated—where, for example, she describes IPV in her custody petition or testifies to IPV in the adjudication—the family court is authorized to certify her U Visa application.

Family court determinations of spousal and child support can also hinge on IPV.<sup>358</sup> However, this is rare. In New York, only “egregious conduct” is relevant in fixing a domestic support obligation<sup>359</sup>—for example, in *Stevens v. Stevens*,<sup>360</sup> an intermediate appellate court in New York affirmed a downward modification of spousal support where the recipient was physically abusive, verbally abusive, and unfaithful in the marriage.<sup>361</sup> Family courts adjudicating domestic support proceedings should, thus, only certify U Visa applications in the rare case where IPV is a factor considered by the court.

Family court determinations of paternity can also, in rare cases, consider IPV. California law recognizes multiple types of legal fathers.<sup>362</sup> Biology is not the determinative factor, and courts may consider domestic violence in granting paternal rights.<sup>363</sup> However, in New York, paternity is established solely by biology, which can be proven by DNA testing or by evidence of a sexual relationship between the parents around the time of conception.<sup>364</sup> In a state like New York, a family court should not certify a U Visa application for a parent who testifies about intimate partner violence during a paternity proceeding because it has no weight in judicial analysis. However, a court may certify a U Visa application for the parent that testifies about IPV during a California-style paternity proceeding, where the proceeding may hinge on that testimony.

#### CONCLUSION

Undocumented IPV survivors are in an incredibly vulnerable position. Survivors are often in immediate physical danger from their abusers who use the survivors’ immigration status as a weapon. And there are often many obstacles barring undocumented survivors from seeking assistance.

---

357. See, e.g., CAL. FAM. CODE § 3044 (2017); TEX. FAM. CODE ANN. § 153.004 (West 2017).

358. See, e.g., *In re Denton*, No. G044821, 2012 Cal. App. Unpub. LEXIS 2328, at \*26–28 (Mar. 27, 2012).

359. 48 N.Y. JUR. 2D *Domestic Relations* § 2577 (2017).

360. 484 N.Y.S.2d 708 (App. Div. 1985).

361. See *id.* at 710.

362. *In re P.A.*, 130 Cal. Rptr. 3d 556, 561 (Ct. App. 2011) (“There are three types of fathers in juvenile dependency law: presumed, biological, and alleged.”).

363. See *id.* at 561–65 (declining to automatically grant parental rights to a child’s biological father despite genetic testing results).

364. See 46 N.Y. JUR. 2D *Domestic Relations* § 903 (2017).



Obtaining temporary legal status allows survivors to access that assistance. The BIWPA was intended to facilitate this access.

Although the law enforcement certification requirement restricts who can access the U Visa, statutory interpretation shows that this requirement was not intended to bar immigration relief to survivors who choose to protect themselves and their families by going to family court instead of approaching a prosecutor. Legal authorities should recognize that family courts may certify U Visa applications where the IPV survivor was, is, or is likely to be helpful in a proceeding hinging on a finding of intimate partner violence. This Note recommends guidelines for U Visa certification in the hopes that IPV advocates will be able to obtain certification for as many clients as possible, that family courts will confidently certify the U Visa applications of its litigants, and that as many undocumented survivors as possible will be able to overcome one more unnecessary obstacle to safety and obtain legal status.