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Uniquely Unhelpful: The U Visa's Disparate Treatment of Immigrant Victims of Domestic Violence

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UNIQUELY UNHELPFUL: THE U VISA'S DISPARATE TREATMENT OF IMMIGRANT VICTIMS OF DOMESTIC VIOLENCE

*Rachel Gonzalez Settlege**

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I. INTRODUCTION

Immigrants in the United States without permanent lawful status are particularly vulnerable to domestic violence, and once in a domestic violence relationship, face unique and substantial obstacles to obtaining protection.¹ U.S. immigration laws often exacerbate abusive situations in which battered immigrants may find themselves.² In recognition of this, Congress created several forms of immigration relief for battered immigrants.³ However, these forms of relief were not created equally, as the two stories below demonstrate. For some battered immigrants, obtaining protection and lawful status is out of reach.

Camille is a young woman from Central Africa who fell in love with a U.S. citizen, Dan, after meeting him through some friends.⁴ Approximately three months after they were married in the United States, Dan began to exhibit controlling behavior. He would not allow Camille to leave the house or speak to family or friends. Dan frequently used Camille's lack of immigration status in the United States against her by threatening to call the police and have her deported. Dan had filed a family-based visa petition for Camille to obtain lawful status in

1. See *infra* Section III.C. See generally Leslye Orloff & Olivia Garcia, Nat'l Immigrant Women's Advocacy Project, *Dynamics of Domestic Violence Experienced by Immigrant Victims*, in *BREAKING BARRIERS: A COMPLETE GUIDE TO LEGAL RIGHTS AND RESOURCES FOR BATTERED IMMIGRANTS* 1–24 (2013), <http://iwp.legalmomentum.org/cultural-competency/dynamics-of-violence-against-immigrant-women/1.1-Dynamics-of-Domestic-Violence-in-Immigrant-Families-MANUAL-BB.pdf>.

2. See *infra* Section II.A.

3. See *infra* Section II.B.

4. Camille was a client of the Wayne State Law School Asylum and Immigration Law Clinic. Her name and identifying characteristics have been changed for confidentiality purposes.

the United States, but he would threaten to withdraw his petition when he was angry with her. Dan would also tell Camille that she had no rights in the United States. Eventually, Dan began to physically abuse and sexually assault Camille on a regular basis. Camille was afraid to tell anyone about her abuse for fear that Dan would withdraw his visa petition and have her deported. One evening, after an argument, Dan threatened to kill Camille and attacked her with two knives. Camille locked herself in a bathroom and finally called the police, believing that her life was truly in danger. When the police came to her home, Dan told the officers that Camille was not a U.S. citizen, and that she had attacked him. However, Camille was fortunate. The police believed her, not Dan, and helped her find a domestic violence shelter, which in turn helped her find legal assistance. Camille learned she was eligible for immigration relief under the Violence Against Women Act (VAWA), and that she could file for lawful status on her own without requiring the assistance of Dan.⁵

Under VAWA, Congress created a path to lawful status for battered immigrants married to a U.S. citizen or lawful permanent resident.⁶ Congress created this form of immigration relief in recognition of the particular vulnerabilities of immigrant victims⁷ of domestic violence. Congress acknowledged that U.S. immigration law, which requires that a U.S. citizen or lawful permanent resident initiate an immigrant family member's visa petition, was exacerbating abusive situations.⁸ In Camille's case, because she was eligible for relief under VAWA, she was able to file for, and eventually obtain, lawful status based on the abuse she suffered, without needing Dan's assistance. However, Camille was only eligible for VAWA relief because she was married to a U.S. citizen.

Manuela, a young woman from Southeast Asia, thought she was married to a U.S. citizen.⁹ She had been previously married but was separated from her first husband. She moved to the United States to work and met Richard, a U.S. citizen. After they had dated for some time, Richard obtained a lawyer and told Manuela that he would arrange for her divorce so they could get married. After Richard showed

5. See *infra* Section II.B.2.

6. Immigration and Nationality Act §§ 204(a)(1)(A)(iii), 216(c)(4), 8 U.S.C. §§ 1154(a)(1)(A)(iii), 1186a(c)(4) (2012); 8 C.F.R. §§ 204.2(c), 216.5(a)(1) (2016).

7. I have chosen to use the term "victim" rather than "survivor" because "victim" is the term used in the relevant legislation and by the Department of Homeland Security.

8. H.R. REP NO. 103-395, at 26 (1993).

9. Manuela was a client of the Wayne State Law School Asylum and Immigration Law Clinic. Her name and identifying characteristics have been changed for confidentiality purposes.

Manuela papers finalizing her divorce, they married in a courthouse in Ohio, and Richard's lawyer began the process for Richard to petition for a visa for Manuela. Manuela, who barely spoke any English, left all of the details of her marriage and visa petition to Richard. Approximately a year into their marriage, after Manuela had given birth to their son, Richard began abusing Manuela. Manuela endured years of physical and psychological abuse before she reached out to a domestic violence shelter while Richard was out of the country for work. Manuela would not leave Richard because she was terrified that he would come after her and kill her. Through the shelter, Manuela was able to obtain legal assistance and learned about VAWA relief. Unfortunately, in investigating Manuela's marriage, her attorneys learned that Richard had lied to Manuela, his lawyer, and the state of Ohio about their marriage. He had prepared fraudulent divorce papers for Manuela and thus, she was not lawfully married to Richard. As a result, she was not eligible for relief under VAWA.

In 2000, Congress acknowledged that there were battered immigrants, like Manuela, who were ineligible for relief under VAWA because they were not married to a U.S. citizen or lawful permanent resident, but were nevertheless vulnerable to abuse and needed protection.¹⁰ Consequently, Congress created the U visa, which provides immigration relief for victims of crimes, including domestic violence, in the United States.¹¹ A battered immigrant need not be married to a U.S. citizen or lawful permanent resident abuser in order to qualify for a U visa. However, Congress created the U visa with a dual intent not just to protect victims of crimes in the United States, but also to promote cooperation between law enforcement and immigrant victims who might otherwise be reluctant to report a crime.¹² As a result, in order to demonstrate eligibility for a U visa, a battered immigrant must first obtain a certification from a law enforcement agency certifying that she¹³ has been "helpful" in the investigation or prosecution of the

10. See *infra* Section II.B.3.

11. Immigration and Nationality Act § 101(a)(15)(U); 8 C.F.R. § 214.14(a), (b).

12. Violence Against Women Act of 2000 (VAWA 2000), Pub. L. No. 106-386, § 1512-13, 114 Stat. 1464, 1533-34 (codified in scattered sections of 8 U.S.C.).

13. All of the forms of immigration relief described in this Article are gender neutral and are available to eligible men as well as women. However, because the majority of victims of domestic violence are women, this Article will use female gender references. See SHANNAN CATALANO, U.S. DEPT' OF JUSTICE, NCJ 239203, SPECIAL REPORT: INTIMATE PARTNER VIOLENCE, 1993-2010, at 1 (2015) (noting that from 1994 to 2010, approximately four in five victims of intimate partner violence were female).

domestic violence.¹⁴ This “helpfulness” requirement, which is not required for any other form of immigration relief available to battered immigrants, has proven to be an insurmountable barrier to many immigrant victims of domestic violence.¹⁵

In Manuela’s case, her attorneys recommended that she report her abuse to the local police and cooperate in the investigation and prosecution of Richard; however, Manuela refused. Richard had been a police officer in the small town where they lived, and while he now worked in private security, he maintained regular contact with his former colleagues. Manuela was afraid that if she reported her abuse to the police, they would tell Richard that she had sought help and he would retaliate. She was also afraid that the police would report her to Immigration and Customs Enforcement (ICE), and that she would be deported and separated from her son. Even if Manuela had been willing to report her abuse, she would have needed to obtain a law enforcement certification (LEC) from the police attesting to her helpfulness. However, the police in her town were known among immigration advocates for their unwillingness to sign LECs. Ultimately, Manuela was unable to obtain lawful status in the United States based upon her abuse.

There is much scholarship focusing on the U visa’s requirement of an LEC and its negative impact on battered immigrants attempting to access immigration relief under the U visa.¹⁶ Much of this scholarship has focused on suggested improvements to the LEC requirement; for instance, by making the LEC more consistently obtainable through increased training of law enforcement officials.¹⁷ Scholars have also

14. 8 C.F.R. § 214.14(b)(3).

15. See, e.g., Liz Robbins, *Immigrant Crime Victims Seeking Special Visas Find a Tough Path*, N.Y. TIMES (Mar. 8, 2016), http://www.nytimes.com/2016/03/09/nyregion/immigrant-crime-victims-seeking-special-visas-find-a-tough-path.html?_r=0.

16. Jamie R. Abrams, *The Dual Purposes of the U Visa Thwarted in a Legislative Duel*, 29 ST. LOUIS U. PUB. L. REV. 373, 383–92 (2010) [hereinafter Abrams, *Dual Purposes*]; Joey Hipolito, *Illegal Aliens or Deserving Victims?: The Ambivalent Implementation of the U Visa Program*, 17 ASIAN AM. L.J. 153, 162–64 (2010); Michael Kagan, *Immigrant Victims, Immigrant Accusers*, 48 U. MICH. J.L. REFORM 915, 941–942 (2015); Alizabeth Newman, *Reflections on VAWA’s Strange Bedfellows: The Partnership Between the Battered Immigrant Women’s Movement and Law Enforcement*, 42 U. BALT. L. REV. 229, 268–72 (2013); Leslye E. Orloff et al., *Mandatory U-Visa Certification Unnecessarily Undermines the Purpose of the Violence Against Women Act’s Immigration Protections and Its “Any Credible Evidence” Rules—A Call for Consistency*, 11 GEO. J. GENDER & L. 619, 635–38 (2010) [hereinafter Orloff et al., *Mandatory U-Visa Certification*].

17. Jamie R. Abrams, *Legal Protections for an Invisible Population: An Eligibility and*

suggested amending the U visa regulations to make the U visa more like the Trafficking (T) visa.¹⁸ Instead of requiring an LEC, the T visa allows an applicant to present other credible secondary evidence of her helpfulness to law enforcement, and provides for an exemption to the helpfulness requirement based on trauma.¹⁹

While these suggested changes would favorably impact many immigrant victims of domestic violence, they fail to address the underlying problem with the U visa regulations, namely the “helpfulness” requirement. Requiring that battered immigrants cooperate with law enforcement demonstrates a fundamental misunderstanding of the dynamics of domestic violence, particularly for immigrant victims. Battered immigrants face language and cultural barriers to obtaining help, fear deportation if they seek help, and face significant safety concerns in the form of retaliation from their abuser.²⁰ As a result, the law enforcement cooperation requirement effectively prevents many immigrant victims of domestic violence from obtaining lawful status and its concomitant protection.

The U visa is unique in its requirement of law enforcement cooperation. For all other forms of immigration relief available to battered immigrants, Congress declined to require law enforcement cooperation, recognizing that doing so would dissuade some domestic violence victims from seeking help.²¹ Yet, battered immigrants who are only eligible for a U visa face the same obstacles to seeking help as other battered immigrants, and U.S. immigration laws similarly exacerbate their vulnerabilities in an abusive situation. Even an asylum seeker who bases her claim on having been a victim of domestic violence in her home country does not have to prove that she cooperated with police either in her home country or in the United States.²² There is no reasonable justification for the requirement of “helpfulness” for a U visa applicant and the impact of this disparate treatment is

Impact Analysis of U Visa Protections for Immigrant Victims of Domestic Violence, 4 MOD. AM. 26, 32–33 (2008) [hereinafter Abrams, *Invisible Population*]; Hipolito, *supra* note 16, at 178–79; Newman, *supra* note 16, at 268–70.

18. See, e.g., Abrams, *Dual Purposes*, *supra* note 16, at 408–11; Kagan, *supra* note 16, at 963–65; Orloff et al., *Mandatory U-Visa Certification*, *supra* note 16, at 641–47.

19. Victims of Trafficking and Violence Prevention Act of 2000 § 107(e)(1), 8 U.S.C. § 1101(a)(15)(T) (2012); see Abrams, *Dual Purposes*, *supra* note 16; Orloff et al., *Mandatory U-Visa Certification*, *supra* note 16, at 641; Leticia M. Saucedo, *A New “U”: Organizing Victims and Protecting Immigrant Workers*, 42 U. RICH. L. REV. 891, 923–24 (2008)

20. See *infra* Section III.C.

21. See *infra* Section III.A.

22. See *In re S-A*, 22 I. & N. Dec. 1328, 1333 (B.I.A. 2000).

tremendous. If Congress truly intended that the U visa would provide protection to immigrant victims of crimes, requiring law enforcement cooperation means that this intent will never be fully realized for battered immigrants.

In Part II of this Article, I will provide an overview of the intersection of immigration status and domestic violence. I will also outline the forms of immigration relief available to battered immigrants. In Part III of this Article, I will discuss the uniqueness of the U visa's requirement that victims cooperate with law enforcement. I will also explore the myriad reasons why domestic violence victims might be unable or unwilling to cooperate with law enforcement and the resulting disparate impact on certain battered immigrants' access to immigration relief. Finally, in Part IV, I will argue that there is no reasonable justification for this disparate treatment and that every battered immigrant, regardless of who she is married to or not, or where her abuse occurred, should be eligible for immigration relief without a prerequisite of helpfulness to law enforcement.

II. IMMIGRATION LAW AND THE BATTERED IMMIGRANT

The U.S. government defines domestic violence as “a pattern of abusive behavior in any relationship that is used by one partner to gain or maintain power and control over another intimate partner.”²³ Also referred to as “intimate partner violence,”²⁴ domestic violence can include physical, psychological, emotional, economic, or sexual abuse.²⁵ Domestic violence is widespread in the United States,²⁶ but is grossly

23. *Domestic Violence*, U.S. DEPT. OF JUST., www.justice.gov/ovw/domestic-violence (last updated Oct. 31, 2016); see also NIWAP/LEGAL MOMENTUM, SOMEWHERE TO TURN 5 (2011), <http://library.niwap.org/wp-content/uploads/2015/Somewhere-to-Turn-2011.pdf> (“Domestic violence is a pattern of behavior that one intimate partner or spouse exerts over another as a means of control.”).

24. See Ron Wallace, *Domestic Violence and Intimate Partner Violence: What's The Difference?*, IN PUBLIC SAFETY (Oct. 15, 2015), <http://inpublicsafety.com/2015/10/domestic-violence-and-intimate-partner-violence-whats-the-difference/> (“The concept of intimate partner violence acknowledges that abuse can exist in any type of personal intimate relationship, regardless of sexual orientation, marital status, or gender.”). See generally World Health Org., *Understanding and Addressing Violence Against Women: Intimate Partner Violence*, at 1, WHO/RHR/12.36 (2012), http://apps.who.int/iris/bitstream/10665/77432/1/WHO_RHR_12.36_eng.pdf?ua=1.

25. *Domestic Violence*, *supra* note 23; see also Mary Ann Dutton, Feature, *The Dynamics of Domestic Violence: Understanding the Response from Battered Women*, 68-OCT FLA. B.J. 24, 24 (1994).

26. NAT'L CTR. FOR INJURY PREVENTION & CONTROL, CTRS. FOR DISEASE CONTROL,

underreported, particularly by immigrant women. Studies estimate that only about half of abused women in the United States report domestic violence.²⁷ Immigrant women who have lawful status, including lawful permanent residents or naturalized U.S. citizens, are less likely to report domestic violence: one study estimated that only 34.4% do so.²⁸ The abuse of undocumented immigrant women is particularly underreported. The same study estimated that only 14.8% of undocumented immigrant women report abuse.²⁹ Not only are immigrant women, particularly undocumented immigrant women, less likely to report abuse when it happens, but they are more likely to be victims of domestic abuse in the first place.³⁰ Immigrant women also stay in abusive relationships longer than non-immigrant women.³¹ Further, the abuse that battered immigrant women endure is often more severe than the abuse suffered by non-immigrant women.³²

There are a multitude of reasons why immigrant women are more likely to be victims of domestic violence and less likely to seek help. Immigration laws often put the power to legalize status into the hands

NATIONAL INTIMATE PARTNER AND SEXUAL VIOLENCE SURVEY, 2010 SUMMARY REPORT 2 (2011), https://www.cdc.gov/violenceprevention/pdf/nisvs_executive_summary-a.pdf (“About 1 in 4 women (24.3%) . . . have experienced severe physical violence by an intimate partner (e.g., hit with a fist or something hard, beaten, slammed against something) at some point in their lifetime.”)

27. Orloff & Garcia, *supra* note 1, at 17 n.81.

28. *Id.*

29. *Id.*; see also Juliette Terzieff, *More Services Reach Abused Immigrant Women*, WOMEN’S ENEWS (Aug. 11, 2005), <http://womensnews.org/2005/08/more-services-reach-abused-immigrant-women/>.

30. See GISELLE AGUILAR HASS ET AL., LEGAL MOMENTUM, BATTERED IMMIGRANTS AND U.S. CITIZEN SPOUSES 2–3 (2006), http://iwp.legalmomentum.org/reference/additional-materials/research-reports-and-data/research-US-VAIW/copy_of_BB_RSRCH_ImmVictims_Battered_Imm.pdf; LEWIS OKUN, WOMAN ABUSE: FACTS REPLACING MYTHS 37–39 (1986); MILDRED DALEY PAGEDLOW, FAMILY VIOLENCE 42–46 (1984); ROBERT T. SIGLER, DOMESTIC VIOLENCE IN CONTEXT: AN ASSESSMENT OF COMMUNITY ATTITUDES 12–13 (1989); Felicia E. Franco, *Unconditional Safety for Conditional Immigrant Women*, 11 BERKELEY WOMEN’S L.J. 99, 101–103 (1996); Wendy Lin, *Is INS Hindering Abused Wives? Rules Said to Undermine Law Meant to Help Them*, NEWSDAY, July 8, 1991, at 21 (noting that in 1990, half of battered clients at New York Asian Women’s Center in Manhattan were conditional residents and ninety percent of victims of domestic violence at the Victims’ Services Agency office in Jackson Heights, Queens, were immigrants).

31. See HASS ET AL., *supra* note 30, at 2.

32. See *id.*; see also Anita Raj & Jay Silverman, *Violence Against Immigrant Women: The Role of Culture, Context, and Legal Immigrant Status on Intimate Partner Violence*, 8 VIOLENCE AGAINST WOMEN 367, 367 (2002) (citing, for example, a New York Center study that found that fifty-one percent of intimate partner homicide victims were foreign-born).

of the abuser.³³ Immigration enforcement policies make battered immigrants fear deportation if they seek help.³⁴ Cultural and social experiences and expectations play a significant role in the perpetuation of domestic violence situations for immigrants, as does cultural, social, and linguistic isolation.³⁵ Thus, immigrant women are both more vulnerable to abuse and face greater marginalization when they seek help.³⁶

As domestic violence became a growing concern on the national stage in the late 1980s and early 1990s, Congress recognized the particular vulnerabilities of battered immigrants and responded by creating several forms of immigration protection.³⁷ First, in 1990, Congress created a battered spouse waiver for conditional permanent residents married to a U.S. citizen or lawful permanent resident.³⁸ In 1994, Congress passed the Violence Against Women Act (VAWA) to comprehensively address efforts to prevent domestic violence in the United States.³⁹ Under VAWA, Congress provided immigration relief for battered immigrants married to U.S. citizens or lawful permanent residents.⁴⁰ In 2000, Congress created the U visa for victims of crimes, including domestic violence, who cooperate with law enforcement in the investigation or prosecution of the crime.⁴¹

33. See RACHEL GONZALEZ SETTLAGE ET AL., IMMIGRATION RELIEF: LEGAL ASSISTANCE FOR NONCITIZEN CRIME VICTIMS 11 (2014).

34. See Orloff & Garcia, *supra* note 1, at 6, 8.

35. See *infra* Section III.C.3.

36. SOMEWHERE TO TURN, *supra* note 23, at 4 (noting that “battered immigrant women are among the most marginalized victims of domestic violence in this country.”).

37. See Nina Rabin, *At the Border Between Public and Private: U.S. Immigration Policy for Victims of Domestic Violence*, 7 LAW & ETHICS HUM. RTS. 109, 118–119 (2013) (noting that “over the past several decades, domestic violence has been transformed into an issue of major public attention.”).

38. Immigration Act of 1990, Pub. L. No. 101-649, § 701(a), 104 Stat. 4978, 5085–86 (codified as amended at 8 U.S.C. § 1186(c)(4) (2012)); 8 C.F.R. § 216.5(a)(1) (2016).

39. Violence Against Women Act of 1994 (VAWA 1994), Pub. L. No. 103-322, §§ 40001–40703, 108 Stat. 1796, 1902–55 (codified at multiple titles of scattered sections of U.S.C.), *invalidated in part* by United States v. Morrison, 529 U.S. 598 (2000); see *Implementation of the Violence Against Women Act: Hearing Before the S. Comm. on the Judiciary*, 103d Cong. 1–4 (1994) (opening statement of Sen. Joe Biden, Chairman, S. Comm. on the Judiciary); see also *Violence Against Women: Hearing Before the Subcomm. on Crime & Criminal Justice of the H. Comm. on the Judiciary*, 102d Cong. 1–3 (1992) (opening statement of Sen. Chuck Schumer, Chairman, S. Comm. on Crime and Criminal Justice); H.R. REP. NO. 103-395, at 26 (1993).

40. Immigration and Nationality Act § 204(a)(1)(A), (B)(ii), 8 U.S.C. § 1154(a)(1)(A), (B)(ii) (2012); 8 C.F.R. § 204.2(c) (2016).

41. VAWA 2000, Pub. L. No. 106-386, §§ 1001–1603, 114 Stat. 1464, 1491–1539

A. *The Unique Vulnerabilities of Battered Immigrants and U.S. Immigration Law's Exacerbation of Abusive Situations.*

In order to understand the unique vulnerabilities of battered immigrants, it is necessary to first understand the dynamics of family-based immigration to the United States.⁴² For an individual seeking to immigrate based on a familial relationship, the sponsoring family member in the United States must be a U.S. citizen or lawful permanent resident.⁴³ The U.S. citizen or lawful permanent resident family member must initiate the process of immigration by petitioning the U.S. government for a visa for the intending immigrant family member.⁴⁴ Once the visa is received, which can take some time,⁴⁵ the intending immigrant is able to apply to become a lawful permanent resident.⁴⁶ As a result of this system, the power to petition for lawful admission to the United States rests completely in the hands of the U.S. citizen or lawful permanent resident family member. The immigrant has no power to begin the application process for lawful status on her own, absent the cooperation of her family member.⁴⁷

In 1986, Congress passed the Immigration Marriage Fraud Act in

(codified at multiple titles of scattered sections of U.S.C.); New Classification for Victims of Criminal Activity; Eligibility for 'U' Nonimmigrant Status, 72 Fed. Reg. 53,014, 53,014 (Sept. 17, 2007).

42. Family-based immigration accounts for approximately sixty-five percent of all lawful immigration to the United States. See DEP'T OF HOMELAND SEC., 2012 YEARBOOK OF IMMIGRATION STATISTICS, tbl.6, <http://www.dhs.gov/yearbook-immigration-statistics-2012-legal-permanent-residents>; see also SETTLAGE ET AL., *supra* note 33, at 3 (noting that "[t]here are essentially four broad categories of lawful immigration: (1) family-based immigration (2) employment-based immigration (3) diversity immigration (as recipients of the diversity visa) and (4) humanitarian admissions (primarily refugees and asylees)." Immigration and Nationality Act § 101(a)(15).

43. U.S. citizens can petition for a visa for parents (if the U.S. citizen is 21 years of age or older), spouses, and children (defined as under the age of 21 and unmarried), as well as for sons and daughters (defined as over the age of 21 or married), and siblings. Immigration and Nationality Act § 201(b)(2)(A)(i). Lawful permanent residents can petition for spouses and unmarried sons and daughters. *Id.* § 203(a).

44. *Id.* §§ 201(b)(2)(A)(i), 203(a).

45. For an immediate relative of a U.S. citizen, defined as a spouse, child, or parent of a U.S. citizen over the age of 21, a visa is generally available immediately once the application is processed. See *id.* § 201(b)(2)(A). The spouse of a lawful permanent resident may have to wait months or years for a visa to become available due to a complex system of numerical limitations on admissions. *Id.* §§ 201-03; see also SETTLAGE ET AL., *supra* note 33, at 11.

46. Immigration and Nationality Act § 245.

47. See SETTLAGE ET AL., *supra* note 33, at 11.

response to concerns that immigrants were becoming lawful permanent residents through fraudulent marriages.⁴⁸ Under this act, if a marriage is less than two years old, the immigrant spouse is only eligible for conditional residency, valid for two years.⁴⁹ At the end of this two-year period, the couple must file a joint petition to remove the conditions of residency so that the immigrant spouse can obtain permanent residency.⁵⁰ If the immigrant's conditional residency expires before the couple jointly petitions to remove the conditions, the immigrant spouse no longer has lawful status and may be put into removal proceedings.⁵¹

As a result of the manner in which family-based immigration law is structured, an abusive U.S. citizen or lawful permanent resident spouse is in a position of power over his immigrant spouse. Abusers who hold the power to sponsor their immigrant spouse for lawful status exploit this power as a form of abuse. Abusers threaten to not file necessary immigration petitions or to withdraw petitions already filed.⁵² Abusers use this power to coerce, isolate, and terrorize their victims.⁵³ Thus, the very nature of our immigration laws makes immigrant spouses more susceptible to abuse and more vulnerable if in an abusive situation.

Some battered immigrants do not have a path to lawful status or citizenship through their abuser. These situations arise when a woman is not married to her abuser, or if her spouse is not a U.S. citizen or lawful permanent resident. Even in these situations, U.S. immigration law and policy often exacerbates the abusive situation. An abuser will exploit a victim's fear of immigration enforcement as a tool of control and abuse. Abusers threaten to report an immigrant partner to U.S. Immigration and Customs Enforcement (ICE), or provide false

48. Immigration Marriage Fraud Act of 1986, Pub. L. No. 99-639, § 2(a), 100 Stat. 3537, 3537–41 (codified at 8 U.S.C. § 1186a (2012)); see also Lee Ann S. Wang, "Of the Law, but Not Its Spirit": Immigration Marriage Fraud as Legal Fiction and Violence Against Asian Immigrant Women", 3 U.C. IRVINE L. REV. 1221, 1221–1222 (2013); *Adjudicator's Field Manual (Redacted Public Version)*, U.S. CITIZENSHIP & IMMIGR. SERVS., <https://www.uscis.gov/ilink/docView/AFM/HTML/AFM/0-0-0-1/0-0-0-11685/0-0-0-11691.html> (last visited Nov. 1, 2016) ("The Marriage Fraud Amendments of 1986 ("IMFA") were enacted in response to a growing concern about aliens seeking permanent residence in the U.S. on the basis of marriage to a citizen or resident when either the alien acting alone, or the alien and his or her reputed spouse acting in concert, married for the sole purpose of obtaining permanent residence.").

49. Immigration Marriage Fraud Act of 1986 § 2(a).

50. Immigration and Nationality Act § 216(c)(1).

51. *Id.* § 216(c)(1), (2).

52. See HASS ET AL., *supra* note 30, at 4; see also Orloff & Garcia, *supra* note 1, at 5, 7.

53. See HASS ET AL., *supra* note 30, at 3; see also Orloff & Garcia, *supra* note 1, at 5–7.

information to ICE, and have her deported.⁵⁴ Abusers also threaten to take away children as a result of the immigrant's lack of status or in the case of the immigrant's deportation.⁵⁵ As a result, an undocumented immigrant in an abusive situation may believe that she has no choice but to remain with her abuser.

Compounding this power dynamic between abusers and immigrant partners is the fact that battered immigrants are frequently isolated for a variety of reasons. Language barriers are often widespread in immigrant communities, and abusers will actively prevent their partners from learning English.⁵⁶ This prevents the battered immigrant from seeking help, or from being able to explain her situation when she does seek help.⁵⁷ Conditions in a battered immigrant's home country may also contribute to her vulnerability. Some battered immigrants come from countries that tolerate abuse and in which cultural norms may prevent a battered immigrant from seeking help or acknowledging that she deserves help.⁵⁸ Abusers also threaten to cause harm to the immigrant in her home country, often by providing information to friends and family members at home that will result in the isolation, shaming, or shunning of the immigrant if she is returned.⁵⁹

A battered immigrant woman who wants help may not know that there are resources available to her and may be misinformed by her abuser about her rights.⁶⁰ Depending upon the laws in her country of origin, she may not be aware that domestic violence is a crime in the United States.⁶¹ Even if aware that domestic violence is a crime, a battered immigrant may fear that the police will deport her if she comes forward, a fear abusers frequently exploit.⁶² Other battered immigrants fear that they will face further abuse because of police misconduct in

54. See HASS ET AL., *supra* note 30, at 2; see also Orloff & Garcia, *supra* note 1, at 5–7.

55. See HASS ET AL., *supra* note 30, at 2; see also Orloff & Garcia, *supra* note 1, at 5–7.

56. See H.R. REP. NO. 106-891, at 89–90 (2000); see also Deanna Kwong, Comment, *Removing Barriers for Battered Immigrant Women: A Comparison of Immigrant Protections Under VAWA I & II*, 17 BERKELEY WOMEN'S L.J. 137, 141 (2002).

57. See *infra* Section III.C.2; see also Abrams, *Invisible Populations*, *supra* note 17, at 32.

58. H.R. REP. NO. 106-891, at 90; see also HASS ET AL., *supra* note 30, at 6; SETTLAGE ET AL., *supra* note 33, at 12.

59. See Orloff & Garcia, *supra* note 1, at 5.

60. See Orloff & Garcia, *supra* note 1, at 5; Gail Pendleton, *Ensuring Fairness and Justice for Noncitizen Survivors of Domestic Violence*, 54 JUV. & FAM. CT. J. 69, 70 (2003); SETTLAGE ET AL., *supra* note 33, at 12; Kwong, *supra* note 56, at 142–43.

61. See SETTLAGE ET AL., *supra* note 33, at 12.

62. See Orloff & Garcia, *supra* note 1, at 5, 7, 8–11.

their home countries.⁶³ Thus, for a multitude of reasons, battered immigrants are particularly vulnerable when in abusive situations.

B. Congressional Efforts to Protect Battered Immigrants

Starting in 1990, Congress implemented several laws to protect battered immigrants, specifically recognizing the unique vulnerabilities of battered immigrants as well as the complicity of U.S. laws in exacerbating abusive situations involving an immigrant victim. These efforts treated battered immigrants more favorably than other immigrants in that they allowed for battered immigrants to apply for lawful status on their own, without requiring a petitioning sponsor. Early efforts, including self-petitions and cancellation of removal under VAWA and the battered spouse waiver for conditional permanent residents, do not require that battered immigrants cooperate with law enforcement. However, the U visa, which provides immigration relief for immigrant crime victims, is unavailable without the quid pro quo of law enforcement cooperation.

1. The Battered Spouse Waiver for Conditional Permanent Residents

Congress first recognized the particular vulnerabilities of immigrant victims of domestic violence in the context of conditional permanent residents. Under the Immigration Marriage Fraud Act, an immigrant spouse must apply for removal of the conditions of her residency jointly with her U.S. citizen or lawful permanent resident spouse.⁶⁴ In the 1990 Immigration Act, Congress introduced a waiver of this joint filing requirement for immigrant spouses in the case of divorce, battery, or extreme hardship.⁶⁵ As a result, a battered immigrant spouse with conditional permanent residency can apply to

63. See 146 CONG. REC. 19,466 (2000) (statement of Rep. Jackson-Lee); see also *Battered Immigrant Women Protection Act of 1999: Hearing on H.R. 3083 Before the H. Subcomm. on Immigration and Claims of the Comm. on the Judiciary*, 106th Cong. 57–65 (2000).

64. Immigration Marriage Fraud Act of 1986, Pub. L. No. 99-639, § 2(a), 100 Stat. 3537, 3537–41.

65. The battered immigrant must prove that she entered into the marriage upon which her status is based in good faith but that during the marriage, she, or her child, was battered by or subjected to extreme cruelty at the hands of the citizen or permanent resident spouse or parent. 8 C.F.R. § 216.5(a)(1) (2016); see also Immigration and Nationality Act § 216(c)(4), 8 U.S.C. § 1186a(c)(4) (2012).

have the conditions of her residency removed without needing her abuser's cooperation.⁶⁶ A conditional resident who has been battered may apply to have her conditions of residency removed even if she is not divorced or separated from her spouse. Furthermore, she does not have to report her abuse to law enforcement in order to be eligible for this form of relief.

2. The Violence Against Women Act

In 1994, Congress passed the first major piece of legislation to comprehensively address domestic violence, the Violence Against Women Act (VAWA).⁶⁷ Lawmakers designed VAWA to provide protection to battered immigrants, as well as to provide substantial resources to both battered immigrants and service providers.⁶⁸ In addressing the need for VAWA relief, Congress specifically addressed the particular vulnerabilities of battered immigrants, and acknowledged that U.S. immigration laws were complicit in aggravating abusive relationships. Congress specifically found that:

[d]omestic battery can be terribly exacerbated in marriages where one spouse is not a citizen, and the non-citizen's legal status depends on his or her marriage to the abuser. Current [immigration] law fosters domestic violence in such situations by placing full and complete control of the alien spouse's ability to gain permanent legal status in the hands of the citizen or lawful permanent resident spouse. . . .⁶⁹

Accordingly, Congress created a new form of immigration relief under VAWA for certain battered immigrant spouses.⁷⁰ In those situations where the U.S. citizen or lawful permanent resident abuser will not file for a visa on behalf of his immigrant spouse, or threatens to

66. See *SETTLAGE ET AL.*, *supra* note 33, at 26.

67. Violence Against Women Act, Pub. L. No. 103-322, §§ 40001-40703, 108 Stat. 1796, 1902-55 (1994).

68. See *Implementation of the Violence Against Women Act: Hearing Before the S. Comm. on the Judiciary*, 103d Cong. 1-4 (1994) (opening statement of Sen. Joe Biden, Chairman, S. Comm. on the Judiciary); see also *Violence Against Women: Hearing before the Subcomm. on Crime & Criminal Justice of the H. Comm. on the Judiciary*, 102d Cong. 1-3 (1992) (opening statement of Sen. Chuck Schumer, Chairman, S. Comm. on Crime & Crim. Justice).

69. H.R. REP. NO. 103-395, at 26 (1993).

70. Violence Against Women Act §§ 40001-40703.

withdraw a visa petition already filed, an abused spouse can self-petition for a visa.⁷¹ For battered immigrant spouses who are already in removal proceedings in immigration court,⁷² VAWA created a form of relief known as VAWA cancellation of removal.⁷³ VAWA cancellation of removal prevents the removal of an eligible battered immigrant and allows her to adjust to permanent residency in immigration court without needing the cooperation of her U.S. citizen or lawful permanent resident spouse.⁷⁴ For both self-petitions and cancellation of removal under VAWA, there is no requirement that the immigrant be divorced or separated from her spouse.⁷⁵ There is also no requirement that she report her abuse to law enforcement.⁷⁶

A battered immigrant spouse granted relief under VAWA is permitted to live and work in the United States,⁷⁷ apply for lawful

71. Non-abused spouses of U.S. citizens or lawful permanent residents whose children are abused may also apply for relief under VAWA, as may abused children of U.S. citizens or lawful permanent residents, abused intended spouses (meaning a spouse who entered into a bigamous marriage unknowingly), or an abused parent of adult U.S. citizen children. Immigration and Nationality Act § 204(a), 8 U.S.C. § 1154(a) (2012); *see also* Violence Against Women and Department of Justice Reauthorization Act of 2005, Pub. L. No. 109-162, 119 Stat. 2960. In order to self-petition for residency under VAWA, a battered immigrant spouse must demonstrate (1) that she was married in good faith to a U.S. citizen or a lawful permanent resident; (2) that she was subjected to battery or extreme cruelty by the U.S. citizen or lawful permanent resident spouse during the marriage; (3) that at some point during her marriage, she resided with her spouse; and (4) that she is “of good moral character.” Immigration and Nationality Act § 204(a)(1)(A)(iii), (B)(ii); 8 C.F.R. § 204.2(c)(1) (2016).

72. Prior to 1996, foreign nationals who entered the United States were subject to “deportation” proceedings. Today, foreign nationals who enter the country without inspection or authorization are subject to “removal” proceedings. Illegal Immigrant Reform and Immigration Responsibility Act of 1996 (IIRIRA), Pub. L. No.104-208, § 604(a), 110 Stat. 3009. *See* *SETTLAGE ET AL.*, *supra* note 33, at 9. Immigration Courts are administrative courts in the Department of Justice Executive Office for Immigration Review. Exec. Office for Immigration Review, *Fact Sheet: EOIR at a Glance*, U.S. DEP’T OF JUST. (Sept. 9, 2010), <https://www.justice.gov/eoir/eoir-at-a-glance>.

73. An applicant for VAWA cancellation of removal must demonstrate that (1) she has been “battered or subjected to extreme cruelty by a” U.S. citizen or lawful permanent resident spouse; (2) she has been a person “of good moral character”; (3) she “has been physically present in the United States for a continuous period of not less than 3 years”; and (4) removal from the United States would cause extreme hardship to herself, her child or her parents. Immigration and Nationality Act § 240A(b)(2)(A); *see also* *SETTLAGE ET AL.*, *supra* note 33, at 27.

74. Immigration and Nationality Act § 240A(b)(2).

75. *Id.*; *id.* § 204(a)(1)(A)(iii), (B)(ii); 8 C.F.R. § 204.2(c)(1).

76. Immigration and Nationality Act §§ 204(a)(1)(A)(iii), (B)(ii), 240A(b)(2); 8 C.F.R. § 204.2(c)(1).

77. *See* Immigration and Nationality Act § 204(a)(1)(K); *Battered Spouse, Children &*

permanent residency on her own,⁷⁸ and her unmarried children under the age of twenty-one qualify for derivative status.⁷⁹ The importance of removing the abusive U.S. citizen or lawful permanent resident from the visa petition and lawful permanent residency process cannot be understated. Because a battered immigrant spouse is no longer required to stay with her abuser in order to gain or keep lawful status in the United States, she is more likely to seek help. VAWA has literally saved lives.⁸⁰ However, battered immigrants who are not married to a U.S. citizen or lawful permanent resident are not eligible for the protections offered under VAWA.⁸¹ Thus, despite the importance of VAWA, its reach is incomplete. Congress finally addressed this issue in 2000 with the creation of the U visa.

3. The U Visa

VAWA has remained a work-in-progress with periodic amendments made over the years to improve the law as it pertains to battered immigrants.⁸² Congress reauthorized VAWA in 2000 as part of the Victims of Trafficking and Violence Protection Act of 2000,⁸³ which also included the Battered Immigrant Women Protection Act of 2000.⁸⁴ The stated purpose of Battered Immigrant Women Protection Act was:

- (1) to remove barriers to criminal prosecutions of persons who commit acts of battery or extreme cruelty against immigrant

Parents, U.S. CITIZENSHIP & IMMIGR. SERVS., <http://www.uscis.gov/humanitarian/battered-spouse-children-parents> (last updated Feb. 16, 2016).

78. Immigration and Nationality Act §§ 201(b)(2)(A), 203(a).

79. *Id.* §§ 204(a)(1)(A)(ii), 240A(b)(4).

80. Shannon Heim, *Revisions to Minnesota Domestic Violence Law Affords Greater Protection to Vulnerable Victims*, 37 WM. MITCHELL L. REV. 950, 953 (2011) (“The national legal framework provided by VAWA and the funding allocated by Congress succeeded in training law enforcement, prompting further intervention by previously underfunded social services, and ultimately saving more women.”).

81. Immigration and Nationality Act §§ 204(a)(1)(A)(iii), (B)(ii), 240A(b)(2); 8 C.F.R. § 204.2(c)(1).

82. Congress reauthorized VAWA in 2000, 2005, and 2013, each time improving the protections offered under VAWA. Violence Against Women Act 2000 (VAWA 2000), Pub. L. No. 106-386, 114 Stat. 1464 (2000); Violence Against Women Act 2005, Pub. L. No. 109-162, 119 Stat. 2960 (2006); Violence Against Women Act 2013, Pub. L. No. 113-4, 127 Stat. 54 (2013).

83. Victims of Trafficking and Violence Protection 2000, Pub. L. No. 106-386, 114 Stat. 1464 (2000).

84. Battered Immigrant Women’s Protection Act, Pub. L. No. 106-386, §§ 1501–13, 114 Stat. 1464, 1518–37 (2000).

women and children; and (2) to offer protection against domestic violence occurring in family and intimate relationships that are covered in State and tribal protection orders, domestic violence, and family law statutes.⁸⁵

In explaining the need for Battered Immigrant Women's Protection Act, Congress noted that:

[T]here are several groups of battered immigrant women and children who do not have access to the immigration protections of the Violence Against Women Act of 1994 which means that their abusers are virtually immune from prosecution because their victims can be deported as a result of actions by their abusers and the Immigration and Naturalization Service cannot offer them protection no matter how compelling their case under existing law.⁸⁶

One of the provisions of the Battered Immigrant Women's Protection Act created the U nonimmigrant status, or the U visa.⁸⁷ Because relief under VAWA is only available to the battered spouse of a U.S. citizen or lawful permanent resident, there is no protection under VAWA for an unmarried victim of domestic violence, or for a victim whose spouse is not a U.S. citizen or lawful permanent resident. The U visa filled this gap.

The U visa provides a form of immigration relief for battered immigrants not eligible for VAWA. However, the U visa does not just provide relief to immigrant victims of domestic violence: it also provides relief to immigrant victims of a variety of enumerated crimes regardless of the immigration status of the perpetrator.⁸⁸ These crimes range from murder to fraud in foreign labor contracting.⁸⁹ Under the U visa,

85. *Id.*

86. *Id.*

87. *Id.*; New Classification for Victims of Criminal Activity; Eligibility for 'U' Nonimmigrant Status, 72 Fed. Reg. 53,014, 53,014 (Sept. 17, 2007).

88. VAWA 2000, Pub. L. No. 106-386, § 1513, 114 Stat. 1464, 1533-34.

89. Immigration and Nationality Act § 101(a)(15)(U)(iii), 8 U.S.C. § 1101(a)(15)(U)(iii) (2012); 8 C.F.R. § 214.14(a)(9) (2016). The enumerated qualifying criminal activities are: Abduction, Abusive Sexual Contact, Being Held Hostage, Blackmail, Domestic Violence, Extortion, False Imprisonment, Felonious Assault, Female Genital Mutilation, Fraud in Foreign Labor Contracting, Incest, Involuntary Servitude, Kidnapping, Manslaughter, Murder, Obstruction of Justice, Peonage, Perjury, Prostitution, Rape, Sexual Assault, Sexual Exploitation, Slave Trade, Stalking, Torture, Trafficking, Unlawful Criminal

domestic violence is simply one of the many qualifying criminal activities that might apply to a battered immigrant.⁹⁰

Nevertheless, the U visa is, at its heart, a solution created for battered immigrants who are not eligible for other forms of immigration relief.⁹¹ The U visa was part of a package of amendments to the Immigration and Nationality Act prepared by the National Network to End Violence Against Women.⁹² When Congress created the U visa, it did so as part of the Battered Immigrant Women's Protection Act,⁹³ and it was referred to by legislators as the visa for "battered immigrant women."⁹⁴ The additional qualifying crimes were added as part of the negotiating process with members of Congress.⁹⁵ Even so, seventy-five percent of U visas requested are requested for domestic violence related crimes.⁹⁶

When creating the U visa, Congress had a dual intent: provide protection to immigrant crime victims and promote their cooperation with law enforcement.⁹⁷ Congress's intent to provide protection to immigrant crime victims is found in the language of the Act: "providing temporary legal status to aliens who have been severely victimized by criminal activity also comports with the humanitarian interests of the

Restraint, Witness Tampering, Attempt, Conspiracy, or Solicitation to commit any of these crimes. *Id.*

90. For example, rape, sexual assault, and stalking, among others, are qualifying crimes that may also occur in an abusive relationship. Immigration and Nationality Act § 101(a)(15)(U)(iii); 8 C.F.R. § 214.14(a)(9).

91. See Saucedo, *supra* note 19, at 892. ("Initially, the government implemented the statute to protect domestic violence or sex crime victims because the legislation was a companion to the Violence Against Women Act for which women's groups advocated.")

92. Gail Pendleton, *Winning U Visas After the Regulations*, EXPERT COMMENTARIES (LexisNexis), Jan. 2008, at 2 [hereinafter Pendleton, *Winning U Visas*], http://www.asistahelp.org/documents/resources/ExpCommPendleton0108_CE878261804DB.pdf.

93. See Battered Immigrant Women's Protection Act, Pub. L. No. 106-386, §§ 1501-13, 114 Stat. 1464, 1518-37 (2000).

94. See 146 CONG. REC. H9029, H9041-42 (daily ed. Oct. 6, 2000) (statement of Rep. Gejdenson) (noting that Act "makes some improvements responding to the experience with the original act, including authorizing grants for legal assistance for victims of domestic violence, stalking, and sexual assault and strengthening and refining the protections for battered immigrant women, *including a new visa for battered immigrant women*" (emphasis added)).

95. Pendleton, *Winning U Visas*, *supra* note 92, at 2-3.

96. ASISTA, U CAP UPDATE FROM USCIS & ADDITIONAL UPDATES 3 (2013), http://www.asistahelp.org/documents/news/U_cap_advisory_and_notes_from_stakh_60F50EB294846.pdf.

97. See Abrams, *Dual Purposes*, *supra* note 16, at 379.

United States.”⁹⁸ Congress’s humanitarian intent is also evidenced by the Act’s waivers for almost all grounds of inadmissibility for U visa recipients, thereby allowing U visa recipients to remain in the United States in cases where most other immigrants would be barred from admittance.⁹⁹ Finally, Congress provided for derivative U visa status for qualifying family members so that the families of U visa recipients could stay together.¹⁰⁰

Nevertheless, the U visa was not created solely, or even primarily, in order to provide immigration relief to immigrant victims of crimes.¹⁰¹ Congress also intended for the U visa to encourage the cooperation of immigrant crime victims with law enforcement in the investigation and prosecution of crimes perpetrated against them.¹⁰² Congress recognized that “it is virtually impossible for state and federal law enforcement . . . to punish and hold perpetrators of crimes against non-citizens

98. VAWA 2000, Pub. L. No. 106-386, § 1513, 114 Stat. 1464, 1534; see also MARIA ODOM, U.S. DEPT OF HOMELAND SEC., PAROLE FOR ELIGIBLE U VISA PRINCIPAL AND DERIVATIVE PETITIONERS RESIDING ABROAD 3–4 (2016), <https://www.dhs.gov/sites/default/files/publications/cisomb-u-parole-recommendation-061616.pdf> (“Congress signaled its intent to afford humanitarian protection to certain foreign national victims by creating the U nonimmigrant classification and allocating 10,000 visas annually to this category.”).

99. Immigration and Nationality Act § 212(d)(14), 8 U.S.C. § 1182(d)(14) (2012). Section 212(a) of the INA lists the various categories of immigrants that are excluded from lawful entry or presence in the United States. *Id.* If an immigrant falls into one of these categories, she is inadmissible. See SETTLAGE ET AL., *supra* note 33, at 40 (“In general, most grounds of inadmissibility may be waived for a petitioner granted U nonimmigrant status except for those who were participants in Nazi persecutions or who committed acts of genocide, extrajudicial killings, or torture.”); see also Leticia M. Saucedo, *Immigration Enforcement Versus Employment Law Enforcement: The Case for Integrated Protections in the Immigrant Workplace*, 38 FORDHAM URB. L.J. 308, 314 (2010) (“The broad waiver provisions for U nonimmigrant crime victims indicates the extent to which Congress sought to protect U visa crime victim recipients.”).

100. Immigration and Nationality Act § 101(a)(15)(U)(ii); see Elizabeth McCormick, *Rethinking Indirect Victim Eligibility for U Non-Immigrant Visas to Better Protect Immigrant Families and Communities*, 22 STAN. L. & POL’Y REV. 587, 602 (2011) (“Finally, and perhaps most importantly, Congress’s humanitarian intent is evident in its decision to allow certain family members of immigrant crime victims to obtain U non-immigrant status and remain legally in the United States, in order to avoid additional hardship to the crime victim.”).

101. McCormick, *supra* note 100, at 603 (“[I]n the decade since the U visa was created, the humanitarian goals of the visa have been increasingly subordinated to the law enforcement goals, often leaving immigrant crime victims without protection if law enforcement agencies choose not to pursue a criminal investigation or prosecution, or decide that the victim’s assistance is no longer necessary.”).

102. Pendleton, *Winning U Visas*, *supra* note 92, at 2.

accountable if abusers and other criminals can avoid prosecution by having their victims deported.”¹⁰³ Congress stated that “[t]he purpose of this section is to create a new nonimmigrant visa classification that will strengthen the ability of law enforcement agencies to detect, investigate, and prosecute cases of domestic violence, sexual assault, trafficking of aliens, and other crimes.”¹⁰⁴

In order to qualify for a U visa, the immigrant must demonstrate that: (1) she was a victim of qualifying criminal activity; (2) the criminal activity violated U.S. law or occurred in the United States; (3) she possessed information concerning that criminal activity; (4) she suffered substantial mental or physical abuse as a result of having been a victim of the criminal activity; and (5) *she has been helpful, is being helpful, or is likely to be helpful to a Federal, State or local authority investigating or prosecuting the criminal activity.*¹⁰⁵ The U visa’s “helpfulness” requirement reflects Congress’s intent to promote law enforcement cooperation.

In order to prove helpfulness, the U visa is only available to those immigrant victims who obtain a law enforcement certification (LEC) attesting to their cooperation.¹⁰⁶ However, there is no requirement that the criminal activity be prosecuted in order to obtain an LEC.¹⁰⁷ A victim who files a police report on criminal activity may be eligible for an LEC on that action alone, even if she is never asked for further assistance.¹⁰⁸ Still, in order to demonstrate helpfulness, a U visa

103. New Classification for Victims of Criminal Activity; Eligibility for ‘U’ Nonimmigrant Status, 72 Fed. Reg. 53,014, 53,014 (Sept. 17, 2007).

104. VAWA 2000, Pub. L. No. 106-386, § 1513(a)(2)(A), 114 Stat. 1464, 1533–34 (“This visa will encourage law enforcement to better serve immigrant crime victims and to prosecute crimes committed against aliens.”); *see also* New Classification for Victims of Criminal Activity; Eligibility for ‘U’ Nonimmigrant Status, 72 Fed. Reg. at 53,014.

105. 8 C.F.R. § 214.14(b) (2016) (emphasis added).

106. Immigration and Nationality Act § 101(a)(15)(U)(i)(I), 8 U.S.C. § 1101(a)(15)(U)(i)(I) (2012); 8 C.F.R. § 214.14. One of the reasons Congress added the LEC requirement was to address concerns that the U visa would be subject to fraud. *See infra* Section IV.A.

107. DEP’T OF HOMELAND SEC., U VISA LAW ENFORCEMENT CERTIFICATION RESOURCE GUIDE FOR FEDERAL, STATE, LOCAL, TRIBAL, AND TERRITORIAL LAW ENFORCEMENT 11–12, [hereinafter DEP’T OF HOMELAND SEC., RESOURCE GUIDE] https://www.dhs.gov/xlibrary/assets/dhs_u_visa_certification_guide.pdf.

108. *See* SETTLAGE ET AL., *supra* note 33, at 39. The Department of Homeland Security has specifically noted that a “current investigation, the filing of charges, a prosecution or conviction are not required to sign the law enforcement certification. Many instances may occur where the victim has reported a crime, but an arrest or prosecution cannot take place due to evidentiary or other circumstances.” DEP’T OF HOMELAND SEC., *supra* note 107, at 5.

applicant must obtain an LEC from a certifying official in a certifying agency.¹⁰⁹ The decision whether or not to issue an LEC is left entirely to the discretion of the certifying official and is not subject to review.¹¹⁰

A U visa recipient is allowed to live and work in the United States and is granted lawful nonimmigrant status for up to four years.¹¹¹ Qualifying family members may receive derivative U visas as well, and if outside of the United States, may join the primary U visa holder.¹¹² After three years, a recipient of a U visa may be eligible to adjust her status to lawful permanent residence so long as she did not unreasonably refuse to provide continued assistance to law enforcement.¹¹³ Thus, not only must the U visa applicant be helpful to law enforcement to obtain the LEC needed for a U visa, but, in order to adjust status to lawful permanent residency, the applicant must also continue to be helpful during the four-year period of her visa.¹¹⁴

III. THE DISPARATE TREATMENT OF BATTERED IMMIGRANTS SEEKING U VISA PROTECTION

The U visa gives law enforcement agents a valuable tool in investigating and prosecuting criminal activity by creating an incentive for immigrant victims to report crimes and cooperate with law enforcement.¹¹⁵ However, the requirement that a U visa applicant obtain an LEC as proof of her cooperation is a unique requirement

109. 8 C.F.R. § 214.14(c)(2)(i). A certifying official is defined as a Federal, State, or local judge or “[t]he head of the certifying agency, or any person(s) in a supervisory role who has been specifically designated by the head of the certifying agency to issue U nonimmigrant status certifications on behalf of that agency.” 8 C.F.R. § 214.14(a)(3); *see also* U.S. CITIZENSHIP & IMMIGRATION SERVS., DEP’T. OF HOMELAND SEC., OMB NO. 1615-0104, FORM I-918 SUPPLEMENT B, U NONIMMIGRANT STATUS CERTIFICATION 1 (2013), <http://www.uscis.gov/sites/default/files/files/form/i-918supb.pdf>.

110. U.S. CITIZENSHIP & IMMIGRATION SERVS., DEP’T OF HOMELAND SEC., OMB NO. 1615-0104, INSTRUCTIONS FOR I-918 SUPPLEMENT B, U NONIMMIGRANT STATUS CERTIFICATION 1–2 (2013) [hereinafter U.S. CITIZENSHIP & IMMIGRATION SERVS., INSTRUCTIONS FOR I-918 SUPPLEMENT B], <https://www.uscis.gov/sites/default/files/files/form/i-918supbinstr.pdf>.

111. Extensions are available if the recipient’s assistance is still needed in the investigation or prosecution of the criminal activity. 8 C.F.R. §§ 214.14(c)(7), (g).

112. *Id.* § 214.14(f).

113. A U visa applicant may be eligible to adjust to lawful permanent residency if, in addition to providing continued cooperation to law enforcement, her lawful status is justified on humanitarian grounds, for family unity, or is in the public interest. Immigration and Nationality Act § 245(m)(1)(B), 8 U.S.C. § 1255(m)(1)(B) (2012).

114. *See Abrams, Dual Purposes, supra* note 16, at 391–92.

115. Hipolito, *supra* note 16, at 160.

among all other forms of immigration relief for victims of domestic violence. No other form of immigration relief available for battered immigrants requires an LEC, but a U visa is unobtainable without one. The problem is that obtaining an LEC is a significant, if not insurmountable, obstacle for many battered immigrants.

Studies have shown that it can be difficult, if not impossible, to obtain an LEC depending upon the certifying agency from which the LEC is requested.¹¹⁶ However, even if LECs were more readily and consistently obtainable, many battered immigrants would still be unwilling to cooperate with law enforcement for reasons that are both understandable and specific to the dynamics of domestic violence situations. Thus, the underlying requirement of cooperation with law enforcement for a U visa means that for many battered immigrants who are ineligible for other forms of immigration relief, the protection of lawful status is unobtainable. If Congress truly intended for the U visa to provide protection to battered immigrants, even if it was not the primary intent, requiring law enforcement cooperation prevents the realization of that intent.

A. The U Visa is Unique in its Requirement of Law Enforcement Cooperation

The U visa requirement of cooperation with law enforcement is a unique requirement among all other forms of immigration relief available for battered immigrants in the United States. In order to even apply for the U visa, an applicant must first meet the threshold requirement of obtaining an LEC.¹¹⁷ Without an LEC, the Department of Homeland Security will not consider a U visa application.¹¹⁸ However, every other requirement that must be met for immigration relief in domestic violence cases, whether for VAWA or the U visa, is subject only to an “any credible evidence” standard.¹¹⁹ Congress specifically chose the “any credible evidence” standard in acknowledgment that it may be difficult, dangerous, or impossible for

116. See JEAN ABREU ET AL., THE POLITICAL GEOGRAPHY OF THE U VISA: ELIGIBILITY AS A MATTER OF LOCALE 51–53, <http://www.law.unc.edu/documents/clinicalprograms/uvisa/fullreport.pdf>.

117. Immigration and Nationality Act § 101(a)(1)(15)(U); 8 C.F.R. § 214.14(c)(1).

118. 8 C.F.R. § 214.14(c)(2)(i); see also U.S. CITIZENSHIP & IMMIGRATION SERVS., INSTRUCTIONS FOR FORM I-918 SUPPLEMENT B, *supra* note 110, at 2.

119. Immigration and Nationality Act § 204(a)(1)(J); see Orloff et al., *Mandatory U-Visa Certification*, *supra* note 16, at 632.

battered immigrant women to obtain certain evidence.¹²⁰ During the VAWA 2000 reauthorization process, one legislator called for adding a requirement of law enforcement cooperation for VAWA relief.¹²¹ However, after testimony arguing that cooperation with law enforcement could be dangerous or even fatal to a battered immigrant,¹²² Congress declined to add a law enforcement cooperation requirement to any form of relief for battered immigrants, with the exception of the U visa.¹²³

The understanding of the difficulty or danger inherent in obtaining evidence or cooperating with law enforcement in a domestic violence situation is absent in the U visa regulations. The LEC, as proof of cooperation with law enforcement, is a requirement for which no exception applies.¹²⁴ In order to obtain an LEC, a domestic violence victim must, at a minimum, report her abuse to law enforcement.¹²⁵ The victim must do this regardless of the danger she might face in the form of deportation from the United States or retaliation from her abuser.¹²⁶

Even women who have suffered domestic violence in a foreign country may be eligible for immigration relief in the United States in the form of asylum without being required to cooperate with law enforcement.¹²⁷ Establishing eligibility for asylum requires that an

120. Orloff et al., *Mandatory U-Visa Certification*, *supra* note 16, at 627; see also H.R. REP. NO. 103-395, at 26–27 (1993) (“Consequently, a battered spouse may be deterred from taking action to protect himself or herself, such as filing for a civil protection order, filing criminal charges, or calling the police, because of the threat or fear of deportation.”).

121. McCormick, *supra* note 100, at 601–02 (citing *Battered Immigrant Women Protection Act of 1999: Hearing on H.R. 3083 Before the H. Comm. on the Judiciary*, 106th Cong. 29–30 (2000) (statement of Rep. Lamar Smith, Chairman, H. Comm. on the Judiciary)).

122. *Battered Immigrant Women Protection Act of 1999: Hearing on H.R. 3083 Before the H. Subcomm. on the Judiciary*, 106th Cong. 66–253, 167–68 (2000) (testimony of Leslye Orloff, Director of the Immigrant Women Project, NOW Legal Defense and Education Fund) (“One of the problems with that approach [requiring cooperation with law enforcement] is that if you look at FBI statistics it is very clear that the risk of violence goes up upon separation and particularly when there is involvement with the criminal justice system or a divorce pending. And so lots of times you have women who may want to cooperate but are legitimately terrified that if in fact they cooperate with law enforcement they will get killed. And so 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.”).

123. McCormick, *supra* note 100, at 601–02.

124. See 8 C.F.R. § 214.14(c) (2016).

125. See Abrams, *Dual Purposes*, *supra* note 16, at 382–83.

126. See *infra* Section III.C.

127. In order to obtain asylum in the United States, the asylum seeker must

individual have a well-founded fear of persecution if returned to her home country;¹²⁸ however, there is no requirement of helpfulness to law enforcement either in the home country or the United States.¹²⁹ In order to be eligible for asylum, a domestic violence victim subjected to abuse in a foreign country does have to demonstrate that the government in her home country could or would not protect her from her abuser.¹³⁰ Yet, this does not mean that she has to show that she sought help from law enforcement. Rather, this requirement can be met by demonstrating the futility of seeking law enforcement assistance through general country condition information or other evidence.¹³¹

Not only is the U visa's LEC requirement unique among forms of immigration relief for victims of domestic violence, but it is unique

demonstrate a "well-founded fear of persecution . . . on account of" a protected ground, such as membership in a particular social group, if she returns to her home county. 8 C.F.R. § 208.13(b)(2)(i); *see also In re A-R-C-G-*, 26 I. & N. Dec. 388, 395 (B.I.A. 2014); Supplemental Brief for U.S. Department of Homeland Security at 10–11, *In re L-R-* (2009),

http://cgrs.uchastings.edu/sites/default/files/Matter_of_LR_DHS_Brief_4_13_2009.pdf; U.S. CITIZENSHIP & IMMIGRATION SERVS., DEPT OF HOMELAND SEC., USCIS ASYLUM OFFICER BASIC TRAINING, FEMALE ASYLUM APPLICANTS AND GENDER-RELATED CLAIMS 5–6, 15–16 (2009) [hereinafter U.S. CITIZENSHIP & IMMIGRATION SERVS., ASYLUM OFFICER BASIC TRAINING], <https://www.uscis.gov/sites/default/files/USCIS/Humanitarian/Refugees%20%26%20Asylum/Asylum/AOBTC%20Lesson%20Plans/Female-Asylum-Applicants-Gender-Related-Claims-31aug10.pdf>. *See generally* Blaine Bookey, *Domestic Violence as a Basis for Asylum: An Analysis of 206 Case Outcomes in the United States from 1994 to 2012*, 24 HASTINGS WOMEN'S L.J. 107, 112–17 (2013).

128. Asylum seekers must demonstrate that they meet the definition of a refugee, which is

any person who is outside any country of such person's nationality . . . and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.

Immigration and Nationality Act § 101(a)(42), 8 U.S.C. § 1101(a)(42) (2012).

129. *See* 8 C.F.R. § 208.13.

130. *In re A-R-G-C-*, 26 I. & N. Dec. at 391; Supplemental Brief for U.S. Department of Homeland Security, *supra* note 127, at 12–13; U.S. CITIZENSHIP & IMMIGRATION SERVS., ASYLUM OFFICER BASIC TRAINING, *supra* note 127, at 7, 15–16.

131. *See In re S-A-*, 22 I. & N. Dec. 1328, 1333 (B.I.A. 2000) (noting that a U.S. State Department Report demonstrated why women could not report abuse to the police in Morocco); *see also* *Rahimzadeh v. Holder*, 613 F.3d 916, 922 (9th Cir. 2010) (citing *Afriye v. Holder*, 613 F.3d 924, 932–33 (9th Cir. 2010); *Avetova-Elisseva v. Immigration & Naturalization Serv.*, 213 F.3d 1192, 1198 (9th Cir. 2000)) (noting that other evidence "might include showing that others have made reports of similar incidents to no avail," or "establishing that private persecution of a particular sort is widespread and well-known but not controlled by the government.").

among forms of immigration relief created by Congress to promote cooperation with law enforcement. The trafficking visa, or T visa, was also created with a dual intent to protect severe victims of trafficking and to promote cooperation with law enforcement.¹³² Like the U visa, in order to qualify for a T visa, a victim must cooperate with law enforcement and demonstrate that she has complied with all “reasonable requests” in the investigation or prosecution of her traffickers.¹³³ However, unlike the U visa, a T visa applicant does not need to provide a law enforcement certification, but instead may demonstrate that she complied with reasonable law enforcement requests through credible secondary evidence and affidavits.¹³⁴ More importantly, in 2008, Congress added an exemption to the T visa’s requirement of cooperation with law enforcement for victims who are unable to cooperate because of physical or psychological trauma.¹³⁵

During the VAWA 2013 reauthorization process, Senator Leahy introduced an amendment to the U visa regulations that would allow for secondary evidence of a victim’s helpfulness in lieu of an LEC; however, this amendment did not survive in the final bill.¹³⁶ There is also no trauma exception for the U visa LEC requirement even though victims of domestic violence experience high levels of physical and psychological trauma that may prevent them from seeking help.¹³⁷ This means that a battered immigrant seeking a U visa must demonstrate not only that she is a victim of domestic violence, but also that she is deserving of protection as demonstrated by her willingness to cooperate with law enforcement.¹³⁸ Obtaining proof of this cooperation in the form of an LEC is often an insurmountable barrier to a battered immigrant woman.

132. The T visa, created with the passage of the Trafficking Victims Protection Act of 2000 (TVPA), offers temporary immigration status and a path to lawful permanent residence for victims of a severe form of trafficking. Victims of Trafficking and Violence Protection Act § 102(a), (b), 22 U.S.C. § 7101(a), (b) (2012).

133. *Id.* § 107(f); Immigration and Nationality Act § 101(a)(15)(T)(i)(III)(aa).

134. 8 C.F.R. § 214.11(h)(2); *see also* Abrams, *Dual Purposes*, *supra* note 16, at 409–10.

135. William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. 110-457, § 201(a)(1), 122 Stat. 5044, 5052; Immigration and Nationality Act § 101(a)(15)(T)(i)(III)(bb), 8 U.S.C. § 1101(a)(15)(T)(i)(III)(bb) (2012); 8 C.F.R. § 214.11(a), (h).

136. *See* Violence Against Women Act of 2011, S. 1925, 112th Cong., at 148 (2011), <https://www.congress.gov/112/bills/s1925/BILLS-112s1925is.pdf>.

137. *See* Benjamin Thomas Greer & Scott Davidson Dyle, *Determining the Reasonableness of Non-Compliance: Examining the “Trauma Exception” for T-Visa Applicants*, 15 SCHOLAR 385, 404–05 (2013).

138. *See* Newman, *supra* note 16, at 263.

B. There are Significant Problems with the Issuance of Law Enforcement Certifications

While obtaining an LEC is a necessary first step to applying for a U visa, certifying agencies have complete discretion regarding whether or not to issue a law enforcement certification.¹³⁹ Certifying agencies are commonly state or local law enforcement agencies or prosecutors' offices, but can include judicial offices or federal agencies.¹⁴⁰ Unfortunately, in many localities, battered immigrants have found that is it difficult if not impossible, to obtain law enforcement certification.¹⁴¹

First, law enforcement officers are not always willing to respond to reports of domestic abuse or document an investigation.¹⁴² This is particularly true in some immigrant communities, where police historically have engaged in patterns of neglect or harassment.¹⁴³ However, even when law enforcement agencies document instances of

139. The instructions for the I-918 Supplement B law enforcement certification form specifically state that "[a]n agency's decision to provide a certification is entirely discretionary; the agency is under no legal obligation to complete a Form I-918, Supplement B, for any particular alien. However, without a completed Form I-918, Supplement B, the alien will be ineligible for U nonimmigrant status." U.S. CITIZENSHIP & IMMIGRATION SERVS., INSTRUCTIONS FOR FORM I-918 SUPPLEMENT B, *supra* note 110, at 1.

140. 8 C.F.R. § 214.14(a)(2) (2016); see Kristina Gasson, *What's Needed for a U Visa Certification of Helpfulness*, NOLO, <http://www.nolo.com/legal-encyclopedia/whats-needed-u-visa-certification-helpfulness.html> (last visited Nov. 1, 2016).

141. See, e.g., Robbins, *supra* note 15; Kate Linthicum, *Safety for Immigrant Victims Put on Hold by U-Visa Delay*, L.A. TIMES (Feb. 1, 2015, 7:26 PM) <http://www.latimes.com/local/california/la-me-u-visa-20150202-story.html> (discussing officials in Kern county who only approved four out of 160 request for an LEC in the previous three years, compared to thousands signed in other jurisdictions).

142. See, e.g., GRACE MENG, HUMAN RIGHTS WATCH, *CULTIVATING FEAR: THE VULNERABILITY OF IMMIGRANT FARMWORKERS IN THE US TO SEXUAL VIOLENCE AND SEXUAL HARASSMENT* 55–56 (2012), <https://www.hrw.org/report/2012/05/15/cultivating-fear/vulnerability-immigrant-farmworkers-us-sexual-violence-and-sexual>; see also Newman, *supra* note 16, at 268–69; Leslye E. Orloff et al., *Battered Immigrant Women's Willingness to Call for Help and Police Response*, 13 UCLA WOMEN'S L.J. 43, 49–52 (2003) [hereinafter Orloff et al., *Battered Immigrant Women's Willingness*].

143. Bill Ong Hing, *Immigration Sanctuary Policies: Constitutional and Representative of Good Policing and Good Public Policy*, 2 U.C. IRVINE L. REV. 247, 252–55 (2012); Orloff et al., *Battered Immigrant Women's Willingness*, *supra* note 142, at 49–51; Natasha Tidwell, *Fragmenting the Community: Immigration Enforcement and the Unintended Consequences Of Local Police Non-Cooperation Policies*, 88 ST. JOHN'S L. REV. 105, 110–25 (2014); Maria Fernanda Parra-Chico, Note, *An Up-Close Perspective: The Enforcement of Federal Immigration Laws by State and Local Police*, 7 SEATTLE J. SOC. JUST. 321, 323–24 (2008).

domestic violence involving an immigrant victim, they do not consistently issue LECs in accordance with U visa regulations. In 2014, the University of North Carolina Immigration Human Rights Policy Clinic and the nonprofit organization ASISTA published a report on the problems with obtaining LECs for U visa applications.¹⁴⁴ The authors examined the results of a nationwide survey conducted by the National Immigrants Women's Advocacy Data Project and other existing information.¹⁴⁵ Prior to this report, there was very little data on the issuance of LECs for U visa applications.¹⁴⁶ The authors confirmed the experiences of many practitioners and advocates, finding that asking law enforcement for an LEC was tantamount to playing "geographical roulette."¹⁴⁷ While some law enforcement agencies were very conscientious about considering and providing an LEC to victims of crimes when warranted,¹⁴⁸ other law enforcement agencies around the country have refused to issue LECs or will only issue LECs in very limited circumstances.¹⁴⁹

Advocates often cite a lack of widespread comprehensive information or training for law enforcement agencies as a key problem in the reluctance of some agencies to issue LECs.¹⁵⁰ As a result of the lack of training and information, many law enforcement officials do not understand how the U visa certification program works.¹⁵¹ Many admit to not having a process for signing LECs or to not signing LECs as a result of unfamiliarity with the process.¹⁵² This problem is compounded by the fact that only certain individuals within a certifying agency are

144. ABREU ET AL., *supra* note 116, at 1.

145. The National Immigrant Women's Advocacy Program surveyed 772 victims and legal service providers from forty-nine states. *Id.* at 13.

146. *Id.* at 12–13.

147. *Id.* at 22.

148. *Id.* at 3.

149. *Id.* at 4; *see also* Cristina Costantini, *The Problem with the 'Victim Visa'*, ABC NEWS (Jan. 31, 2013), http://abcnews.go.com/ABC_Univision/visas-problem-victim-visa/story?id=18357347 (quoting Susan Bowyer of the Immigration Center for Women and Children: "A person can be a victim of a violent crime and cooperate fully with the police in one city but have no chance of getting a certification, while someone in a neighboring city can be knocked unconscious, not even witness the crime because she was unconscious, and be awarded the certification easily[.] . . . It's hugely unfair, arbitrary, irrational, and inconsistent . . .").

150. *See* Abrams, *Dual Purposes*, *supra* note 16, at 384–85, 384 n.50; Hipolito, *supra* note 16, at 164.

151. *See* Abrams, *Dual Purposes*, *supra* note 16, at 384–85, 384 n.50; Hipolito, *supra* note 16, at 164.

152. ABREU ET AL., *supra* note 116, at 14, 16.

authorized to sign an LEC.¹⁵³ This means that personnel with specialized knowledge and experience in dealing with immigrant communities or with victims of domestic violence are not always those authorized to issue LECs.¹⁵⁴ As a result, some law enforcement agencies are left without certifying officials or with certifying officials that are unwilling to involve themselves in domestic violence cases involving immigrants.¹⁵⁵ In addition, the term “helpfulness” is not defined, leaving individual certifying agencies to define the term for themselves.¹⁵⁶ For example, some agencies are unwilling to sign an LEC unless the victim was “essential” to the investigation or prosecution.¹⁵⁷

Many agencies around the country have policies that conflict with both the intent and letter of the U visa regulations, as well as with one another. For example, some agencies will only provide LECs for open cases in which there is an ongoing investigation or prosecution.¹⁵⁸ Other agencies will only certify closed cases, or only closed cases that resulted in a conviction.¹⁵⁹ Some agencies will only provide LECs for victims of certain crimes, not for all of the crimes enumerated by the statute.¹⁶⁰ If a crime is not “recent” enough, some agencies will not provide an LEC.¹⁶¹ Agencies have refused to issue LECs if the victim was in removal proceedings or had a criminal history, not understanding that she might still be eligible for a U visa.¹⁶²

In none of the above examples do the U visa regulations prohibit issuing an LEC.¹⁶³ Department of Homeland Security training

153. 8 C.F.R. § 214.14(a)(3) (2016). This requirement is more limited than the requirement of the statute, which requires only “certification from a Federal, State or local law enforcement official, prosecutor, judge, or other Federal, State, or local authority investigating criminal activity.” Immigration and Nationality Act § 214(p)(1), 8 U.S.C. § 1184(p)(1) (2012); *see also* New Classification for Victims of Criminal Activity; Eligibility for “U” Nonimmigrant Status, 72 Fed. Reg. 53,014, 53,020 (Sept. 17, 2007). USCIS justified this limitation on certifying individuals by stating it was necessary to “ensure the reliability of certifications.” *Id.* at 52,023.

154. *See Abrams, Dual Purposes, supra* note 16, at 394–95.

155. *See Orloff et al., Mandatory U-Visa Certification, supra* note 16, at 637.

156. *See Newman, supra* note 16, at 271.

157. ABREU ET AL., *supra* note 116, at 16.

158. *Id.* at 14, 16.

159. *Id.*

160. *Id.* at 16.

161. *Id.* at 14, 16. For some agencies, the policy is to refuse to sign an LEC if the crime happened more than one year before the request for the LEC. *Id.* at 16.

162. *Id.* at 14, 16.

163. *See How Law Enforcement is Using the U-Visa*, PRACTICE BRIEF (Vera Inst. of Justice, New York, N.Y.), Oct. 2011, at 2, <http://www.vera.org/sites/default/files/resources/downloads/U-visa-practice-brief.pdf>. *See generally* NATALIA LEE ET AL., NAT’L IMMIGRANT

materials, policies, and regulations also make clear that many of the reasons given by law enforcement agencies for refusing to issue LECs are not legitimate.¹⁶⁴ For example, DHS has specifically advised that a “current investigation, the filing of charges, a prosecution or conviction are not required to sign the law enforcement certification.”¹⁶⁵ Further, “[t]here is no statute of limitations on signing the law enforcement certification. A law enforcement certification can also be submitted for a victim in a closed case.”¹⁶⁶

Some law enforcement officials are simply unwilling to participate in the certification process at all.¹⁶⁷ Some jurisdictions have refused to issue LECs under any circumstance, in contravention of the regulations.¹⁶⁸ Some of these law enforcement agencies are under the impression that they would be giving lawful status to undocumented immigrants,¹⁶⁹ even though the decision as to whether or not an applicant qualifies for immigration status in the form of a U visa is made by U.S. Citizenship and Immigration Services (USCIS).¹⁷⁰ However, this misinformation only partly explains the reluctance on the part of some law enforcement officials to issue LECs. Anti-immigrant sentiment, particularly anti-“illegal immigrant” sentiment, is also unreasonably coloring the decisions of certifying agents. Law enforcement certifiers and agencies in localities around the country have admitted to refusing to issue an LEC because they did not want to help an undocumented immigrant.¹⁷¹ Law enforcement agents in other jurisdictions have expressed concerns about being perceived as pro-immigrant or “soft” on illegal immigration if they issue an LEC to an undocumented immigrant.¹⁷² Given that the issuance of an LEC is solely at the discretion of a certifying official, with no mechanism for review,¹⁷³ anti-immigrant biases can effectively bring a battered

WOMEN’S ADVOCACY PROJECT, DEPARTMENT OF HOMELAND SECURITY POLICY ANSWERS TO LAW ENFORCEMENT REASONS FOR NOT CERTIFYING 2–10 (2013), <http://library.niwap.org/wp-content/uploads/2015/IMM-Qref-DHSAnswersforLawEnforcementNotCertifying-09.27.13.pdf>.

164. See LEE ET AL., *supra* note 163, at 2.

165. DEP’T OF HOMELAND SEC., RESOURCE GUIDE, *supra* note 107, at 4.

166. *Id.*

167. See Orloff et al., *Mandatory U-Visa Certification*, *supra* note 16, at 637.

168. See ABREU ET AL., *supra* note 116, at 3; Newman, *supra* note 16, at 270.

169. See ABREU ET AL., *supra* note 116, at 14; *How Law Enforcement is Using the U-Visa*, *supra* note 163, at 2.

170. 8 C.F.R. § 214.14(b) (2016).

171. ABREU ET AL., *supra* note 116, at 14; see also Linthicum, *supra* note 141.

172. See *How Law Enforcement is Using the U-Visa*, *supra* note 163, at 2.

173. U.S. CITIZENSHIP & IMMIGRATION SERVS., INSTRUCTIONS FOR FORM I-918

immigrant's chances of receiving immigration relief to a standstill.

C. *The Underlying "Helpfulness" Requirement Makes the U Visa Unobtainable for Many Battered Immigrants*

At a minimum, a battered immigrant must report her abuse to law enforcement to receive a U visa, regardless of whether law enforcement officers decide to investigate or prosecute her case.¹⁷⁴ Scholars have emphasized the importance of educating law enforcement agencies about the U visa, and there have been advocacy efforts aimed at providing such education.¹⁷⁵ However, even if law enforcement agencies across the country consistently considered and issued LECs where warranted, many battered immigrants would still not report their abuse. There are many reasons for this, some of which would apply to any immigrant victim of a crime. These reasons include distrust of law enforcement and the judicial system, a fear of deportation, and language and cultural isolation. But there are certain dynamics in domestic violence situations that make battered immigrants even more vulnerable to abuse and less likely to seek assistance or cooperate with law enforcement. These dynamics include emotional and economic abuse and safety concerns particular to domestic violence situations. Requiring victims of domestic violence to cooperate with law enforcement is not only unrealistic in many cases, but puts domestic violence victims in increased danger.

1. Distrust of Police and the Judicial System

Battered immigrants who have experienced or witnessed police indifference or hostility to immigrants fear the reaction they will receive if they report their abuse.¹⁷⁶ The relationship between police and immigrant communities has a long history of tension, harassment, and abuse of discretion.¹⁷⁷ In the context of domestic violence, police

SUPPLEMENT B, *supra* note 110, at 1.

174. See *supra* Section II.B.3.

175. NAT'L IMMIGRANT FAMILY VIOLENCE INST., PROMOTING U VISAS WITH LOCAL OFFICIALS 10–11, <http://www.nifvi.org/Promoting%20U%20Visas%20with%20Local%20Officials.pdf>; ABREU ET AL., *supra* note 116, at 143–44; Abrams, *Dual Purposes*, *supra* note 16, at 384–89; Orloff et al., *Mandatory U-Visa Certification*, *supra* note 16, at 637–38; *How Law Enforcement is Using the U-Visa*, *supra* note 163, at 3–4.

176. Abrams, *Dual Purposes*, *supra* note 16, at 386 n.55.

177. Orloff et al., *Battered Immigrant Women's Willingness*, *supra* note 142, at 49–51; see also S. POVERTY LAW CTR., CLIMATE OF FEAR: LATINO IMMIGRANTS IN SUFFOLK

historically have not always been willing to investigate what they see as private matters.¹⁷⁸ Battered immigrant women, in particular, possess several identity characteristics, including a lack of immigration status, gender, and race, which historically have led to a lack of assistance or even outright hostility from police.¹⁷⁹

For some battered immigrants, the country conditions in their country of origin may increase their reluctance to seek help. In some countries, domestic violence is not seen as a crime, and if reported, is ignored.¹⁸⁰ Women from these countries may have a hard time even recognizing that what they are experiencing is a criminal act.¹⁸¹ Worse, in some countries, the police will further brutalize a battered woman who seeks help.¹⁸² Some battered immigrants thus have a difficult time believing that it would be worthwhile or safe to report their abuse to the police.¹⁸³

Likewise, some battered immigrants come from countries with very different legal systems and standards of evidence. In some countries, a woman is not considered a credible witness, and in court, the word of a male abuser will be taken over her word.¹⁸⁴ Abusers will lie to their victims about their rights in the United States, U.S. law, and whether they will be believed by U.S. law enforcement.¹⁸⁵ When battered immigrants do bring forward a domestic violence claim, they may be mistreated by the court system in the United States.¹⁸⁶ Mandatory

COUNTY, N.Y. 5 (2009), https://www.splcenter.org/sites/default/files/splc_suffolk_report.pdf (noting that in Suffolk County, NY, immigrant victims described being harassed by police officers when reporting a crime); Hing, *supra* note at 143, at 252–60; Tidwell, *supra* note 143, at 136–39; Laura Jontz, Note, *Eighth Circuit to Battered Kenyan: Take a Safari--Battered Immigrants Face New Barrier When Reporting Domestic Violence*, 55 DRAKE L. REV. 195, 203–08 (2006); Parra-Chico, *supra* note 143, at 333–37.

178. Orloff et al., *Battered Immigrant Women's Willingness*, *supra* note 142, at 52.

179. *See id.* at 45–49; *see also* Mariela Olivares, *Battered by Law: The Political Subordination of Immigrant Women*, 64 AM. U. L. REV. 231, 269 (2014) (“As immigrants of color are subordinated by racial and ethnocentric policies inherent within the immigration law system and that permeate broader American societal norms, the policies have a heightened detrimental effect on immigrant domestic violence victims of color.”).

180. *See* Orloff & Garcia, *supra* note 1, at 18.

181. *See id.*; *see also* Donna H. Lee, *Intimate Partner Violence Against Asian American Women: Moving from Theory to Strategy*, 28 COLUM. J. GENDER & L. 315, 333–38 (2014); Orloff et al., *Battered Immigrant Women's Willingness*, *supra* note 142, at 65–66.

182. *See How Law Enforcement is Using the U-Visa*, *supra* note 163, at 11–12.

183. *See* Orloff & Garcia, *supra* note 1, at 18; Orloff et al., *Battered Immigrant Women's Willingness*, *supra* note 142, at 65–66.

184. *See How Law Enforcement is Using the U-Visa*, *supra* note 163, at 12.

185. *Id.*

186. Camille Carey & Robert A. Solomon, *Impossible Choices: Balancing Safety and*

arrest or prosecution laws can exacerbate the negative experiences of battered immigrants.¹⁸⁷ For example, studies have shown that in more than sixty percent of criminal domestic violence cases, the victim stops cooperating with the prosecution, often for defensible reasons including trauma or fear of retaliation.¹⁸⁸ When a domestic violence victim stops cooperating with the prosecution, she may experience harassment from the prosecutor or the judge, civil or criminal penalties, and even incarceration.¹⁸⁹

2. Fear of Deportation

Battered immigrants also fear that if they seek help from law enforcement, they will be reported to ICE and deported.¹⁹⁰ This fear, which is often reinforced by the abuser, is not unfounded.¹⁹¹ Police have arrested immigrant victims after being called to the scene of a domestic violence incident, and some of those victims have ended up in immigration detention.¹⁹² For example, if the abuser, who may speak better English, offers a different version of events, the police may arrest the victim or simply arrest everyone to sort out the truth later.¹⁹³ When such incidents happen, the word spreads quickly in immigrant communities and makes it even less likely that an immigrant victim will call the police for help.¹⁹⁴

This fear is compounded in localities in which police actively cooperate with the Federal Government in immigration enforcement

Security in Domestic Violence Representation, 21 CLINICAL L. REV. 201, 226 (2014).

187. *Id.* at 221–22.

188. *Id.* at 225; *see also* Kagan, *supra* note 16, at 944 (noting that domestic violence victims with genuine claims may stop cooperating with police or prosecutors for any number of reasons, “including trauma, learned helplessness (popularly known as the Battered Woman Syndrome), or pressure from the perpetrator”).

189. Carey & Solomon, *supra* note 186, at 223–25.

190. *See* Orloff & Garcia, *supra* note 1, at 6, 8.

191. *Id.*

192. Rosie Hidalgo, *Advancing a Human Rights Framework to Reimagine the Movement to End Gender Violence*, 5 U. MIAMI RACE & SOC. JUST. L. REV. 559, 574 (2015); *see also* SOMEWHERE TO TURN, *supra* note 23, at 13.

193. *See* Hidalgo, *supra* note 192, at 574; *see also* TK LOGAN & ROBERTA VALENTE, NAT’L DOMESTIC VIOLENCE HOTLINE, WHO WILL HELP ME? DOMESTIC VIOLENCE SURVIVORS SPEAK OUT ABOUT LAW ENFORCEMENT RESPONSES 2 (2015), <http://www.thehotline.org/wp-content/uploads/2015/09/NDVH-2015-Law-Enforcement-Survey-Report.pdf>.

194. *See* Hidalgo, *supra* note 192, at 575 (noting that such instances have a “chilling effect on the willingness of other victims and witnesses to come forward and seek help”).

activities. For example, the Department of Homeland Security's "Secure Communities" program enlisted local law enforcement agencies to identify immigrants in jails and detention centers who might be deportable.¹⁹⁵ Law enforcement agencies that were a part of this program automatically submitted the fingerprints of anyone arrested to U.S. Immigration and Customs Enforcement (ICE).¹⁹⁶ In 2015, the Priority Enforcement Program replaced Secure Communities, but this program also forwards the fingerprints of arrestees to ICE.¹⁹⁷ Even in communities without such programs, massive immigration enforcement efforts in the late 1990s and 2000s led to dramatic increases in the numbers of individuals removed from the United States.¹⁹⁸ With recent executive orders issued by President Trump expanding immigration enforcement activities,¹⁹⁹ there is an understandable and growing fear among many immigrants that any interaction with the police will result in deportation.

The fear that police interaction will result in deportation is a fundamental problem with the LEC requirement. Because certifying agencies have no obligation to issue an LEC, reporting a crime carries a real risk of deportation. If the certifying agency chooses not to issue an LEC, the immigrant victim of domestic violence has brought her lack of lawful status to the attention of the police. When an abuser learns that his victim has sought help from the police, it is not uncommon for the

195. *Secure Communities*, U.S. IMMIGR. & CUSTOMS ENFORCEMENT, <https://www.ice.gov/secure-communities> (last visited Nov. 1, 2016). The Secure Communities program was in place from 2008 to 2014. *Id.*; see also *Priority Enforcement Program*, U.S. IMMIGR. & CUSTOMS ENFORCEMENT, <https://www.ice.gov/pep> (last visited Nov. 1, 2016).

196. *Secure Communities*, *supra* note 195. In September 27, 2011, Secure Communities was present in 1595 jurisdictions in forty-four states and territories, and had removed more than 142,000 persons. *Secure Communities: A Fact Sheet*, AM. IMMIGR. COUNCIL (Nov. 29, 2011), <http://www.immigrationpolicy.org/just-facts/secure-communities-fact-sheet>.

197. See *Secure Communities*, *supra* note 195; see also *Priority Enforcement Program*, *supra* note 195. However, under PEP, ICE will only seek the transfer to its custody of those individuals convicted of offenses listed under the Department of Homeland Security's immigration enforcement priorities or who are a danger to national security. *Priority Enforcement Program*, *supra* note 195.

198. *Interior Immigration Enforcement by the Numbers*, ISSUE BRIEF (Bipartisan Policy Ctr., Washington, D.C.), Mar. 2014, at 2, <http://bipartisanpolicy.org/wp-content/uploads/sites/default/files/files/Interior%20Immigration%20Enforcement.pdf>; see also Hidalgo, *supra* note 192, at 574.

199. See, e.g., Exec. Order 13,767, Border Security and Immigration Enforcement Improvements, 82 Fed. Reg. 8793 (Jan. 25, 2017); Exec. Order 13768, Enhancing Public Safety in the Interior of the United States, 82 Fed. Reg. 8799 (Jan. 25, 2017).

abuser to report his victim's lack of lawful status to both the police and to ICE in an attempt to have her deported before she can bring charges.²⁰⁰ If domestic violence victims are in real or perceived danger of being arrested and deported when they call the police, there is a strong incentive not to call for help.²⁰¹ Many battered immigrants simply will not risk reporting their abuse under these circumstances.

3. Language Barriers and Isolation

Language barriers and cultural and social isolation significantly increase the inability of battered immigrants to seek help.²⁰² For the immigrant victim who does not speak English, obtaining help can be an insurmountable challenge. Simply asking for help, whether from the police or from service providers, may be impossible for the immigrant if those institutions do not have interpreters. Police assistance may be particularly difficult to obtain if officers are not multilingual.²⁰³ In fact, it is not uncommon for police officers responding to a domestic violence call to speak only with the English-speaking abuser and to believe the abuser over the immigrant who cannot express her fear.²⁰⁴

200. Hidalgo, *supra* note 192, at 573.

201. See Hing, *supra* note 143, at 300–01 (“Officials in Providence, Rhode Island . . . want to opt out of ICE’s Secure Communities program City leaders worry that the Secure Communities program will breed fear and mistrust, undermining community policing practices. Witnesses and crime victims—including documented and undocumented immigrants—may shy away from the police, fearing that contact may lead to immigration problems.” (footnotes omitted)); see also Lindsey J. Gill, Note, *Secure Communities: Burdening Local Law Enforcement and Undermining the U Visa*, 54 WM. & MARY L. REV. 2055, 2072 (2013) (“When immigrants lose trust in the police because of their involvement with ICE, crime actually increases because residents stop cooperating and criminals remain at large.” (citing ROBERT KOULISH, IMMIGRATION AND AMERICAN DEMOCRACY: SUBVERTING THE RULE OF LAW 137 (2010))).

202. See LEE ET AL., *supra* note 163, at 342–344; Abrams, *Dual Purposes*, *supra* note 16, at 386 n.55.

203. See Orloff et al., *Battered Immigrant Women’s Willingness*, *supra* note 142, at 74 (citing a study done in the 1990s of police responses to calls from immigrant victims of domestic violence in Washington, D.C., which showed that two-thirds of the time, the officers did not attempt to speak with the battered immigrants in her own language); see also Alexandra Grant, Note, *Intersectional Discrimination in U Visa Certification Denials: An Irremediable Violation of Equal Protection?*, 3 COLUM. J. RACE & L. 253, 264–65 (2013) (describing how police in Suffolk County laughed at or told some battered immigrant women to come back later when the women asked for interpreters); Orloff & Garcia, *supra* note 1, at 15–16.

204. See SOMEWHERE TO TURN, *supra* note 23, at 11; Orloff & Garcia, *supra* note 1, at 16–17; see also Orloff et al., *Battered Immigrant Women’s Willingness*, *supra* note 142, at 55.

In addition, some immigrant women have no friends or family in the United States and are completely dependent on their abuser.²⁰⁵ Abusers will enforce this isolation, limiting trips outside the home and separating their partner from family members and potential social contacts.²⁰⁶ For some battered immigrants such as farm workers, geographical isolation may be an even greater factor than social isolation.²⁰⁷ In such situations, even if the battered immigrant speaks English, she may have no one to turn to for help.

For some immigrant women, simply talking about abuse, much less reporting abuse to the police, is unthinkable due to deep cultural beliefs about a woman's role in the family, and related beliefs about honor and shame.²⁰⁸ Not only will reporting abuse bring shame upon the victim, but it will also bring shame upon her family and community.²⁰⁹ Speaking out against a partner and admitting to abuse in these situations can lead to the loss of family and friends.²¹⁰ Closely tied to this is the fear that reporting abuse will affirm negative stereotypes held by Americans towards people of the victim's or abuser's race, religion, or nationality.²¹¹ As a result, in some communities, immigrant women will be actively discouraged from reporting abuse.²¹² Traditional gender roles or religious beliefs may compound a battered immigrant

205. See Orloff & Garcia, *supra* note 1, at 19.

206. See SOMEWHERE TO TURN, *supra* note 23, at 6.

207. *Id.* at 4.

208. *Id.* at 15 (noting that “[i]n some cases, immigrant women who speak out against their abusive husbands may be blamed for the violence, lose social respect, and cause uninvolved family members to be ridiculed.”). See Lee, *supra* note 163, at 335 (“Multiple studies have discussed the guilt, shame, and loss of face associated with breaching family privacy norms. Disclosing abuse ‘means exposing family weakness to outsiders . . . [and] shaming the family name.’”).

209. Carey & Solomon, *supra* note 186, at 228–29.

210. See Karyl Alice Davis, Commentary, *Unlocking the Door by Giving Her the Key: A Comment on the Adequacy of the U-Visa as a Remedy*, 56 ALA. L. REV. 557, 571 (2004); Orloff & Garcia, *supra* note 1, at 21–22.

211. EDNA EREZ & NAWAL AMMAR, VIOLENCE AGAINST IMMIGRANT WOMEN AND SYSTEMIC RESPONSES: AN EXPLORATORY STUDY 13–35 (2003), <https://www.ncjrs.gov/pdffiles1/nij/grants/202561.pdf> (“If the immigrant women bring their battering experience to the attention of the majority society, they risk exacerbating the racism directed at their community—at both immigrant men and women.”); see also Raj & Silverman, *supra* note 32, at 384 (“[M]any battered immigrant women fear that seeking formal support by disclosing abuse to service agencies of the justice system will result in criticism of their culture or country of origin.”).

212. See Orloff & Garcia, *supra* note 1, at 19; see also Leslye E. Orloff & Janice V. Kaguyutan, *Offering a Helping Hand: Legal Protections for Battered Immigrant Women: A History of Legislative Responses*, 10 AM. U. J. GENDER SOC. POL’Y & L. 95, 135 (2002).

woman's willingness to report abuse.²¹³ In cultures where women are subordinate to the men in their lives, defying a partner by reporting abuse is inconceivable.²¹⁴

4. Dynamics of Domestic Violence

The previously discussed barriers to seeking law enforcement assistance may apply to immigrant victims of any of the crimes enumerated in the U visa regulations. For example, exploited or abused immigrant workers who are working without authorization may equally distrust the police, fear deportation, and experience cultural and linguistic isolation. However, these barriers are often more extreme for an immigrant woman in an abusive situation because of her intimate relationship with her abuser. The dynamics of relationships in which domestic violence is present mean that battered immigrants have a multitude of other reasons for not reporting their abuse.

a. Emotional Attachment and Abuse

Even without status or cultural issues, many women simply cannot bring themselves to initiate criminal investigations against the men they still love and upon whom they depend emotionally.²¹⁵ Battered women often do not want to take action that will result in a break up with their abuser.²¹⁶ It is not uncommon for a battered woman to hold out hope that her relationship will improve.²¹⁷ Abusers are adept at playing on their victims' emotional insecurity. An abuser will follow an incident of abuse with apologies and a honeymoon phase in which he is loving and considerate towards his victim.²¹⁸ As a result, a victim will rationalize and excuse the behavior of her abuser.²¹⁹

Emotional attachment can also prevent a woman from wanting to see her abuser punished.²²⁰ A domestic violence conviction may result in

213. See *SOMEWHERE TO TURN*, *supra* note 23, at 16.

214. See Raj & Silverman, *supra* note 32, at 370–71.

215. See Carey & Solomon, *supra* note 186, at 230–31.

216. See *id.* at 230; Thomas L. Kirsch II, *Problems in Domestic Violence: Should Victims Be Forced to Participate in the Prosecutions of Their Abusers?*, 7 WM. & MARY J. WOMEN & L. 383, 397–98 (2001).

217. See Carey & Solomon, *supra* note 186, at 230–31.

218. See LEE ET AL., *supra* note 163, at 333–38; see also Kirsch, *supra* note 216, at 396–97.

219. See Carey & Solomon, *supra* note 186, at 230.

220. *Id.* at 230.

the incarceration of the abuser or, if the abuser is an immigrant as well, his deportation.²²¹ Reporting an abuser to the police requires the willingness to both end a relationship and punish the abuser. Given the intimate nature of a relationship, many battered women, immigrant or not, do not have this willingness.

b. Economic Abuse and Financial Concerns

Even if a battered immigrant is ready to leave her abuser, she may feel that she cannot for financial reasons. Studies have shown there are extremely high levels of poverty among immigrant women in the United States.²²² Abusers will often forbid their partners from working.²²³ Immigrants in abusive situations may have little job experience and few skills, frequently a deliberate consequence of their enforced isolation.²²⁴ A lack of English language fluency can also limit a battered immigrant's job prospects.²²⁵ In addition, undocumented immigrants in the United States are not permitted to work legally.²²⁶ Thus, it is extremely difficult for an undocumented immigrant to legally support herself financially.

In many domestic violence relationships, economic abuse is also prevalent.²²⁷ If a battered immigrant does work, an abuser will often control aspects of her employment, including monitoring her while she is at work and forcing her to give him any money she earns.²²⁸ In some cases, an abuser will force his partner to work illegally and then use the precariousness of her work situation to further control her.²²⁹

Financial factors can be a significant deterrent to reporting an abuser if he is an immigrant's sole source of financial support.²³⁰ If the

221. A domestic violence conviction is a deportable offense. Immigration and Nationality Act § 237(a)(2)(E)(i), 8 U.S.C. § 1227(a)(2)(E)(i) (2012); see also Carey & Solomon, *supra* note 186, at 229; Orloff & Garcia, *supra* note 1, at 12.

222. Olivares, *supra* note 179, at 236.

223. See SOMEWHERE TO TURN, *supra* note 23, at 4.

224. Carey & Solomon, *supra* note 186, at 218.

225. See Orloff & Garcia, *supra* note 1, at 12; see also Olivares, *supra* note 179, at 236–37.

226. See Orloff & Garcia, *supra* note 1, at 12.

227. Carey & Solomon, *supra* note 186, at 217; see also SOMEWHERE TO TURN, *supra* note 23, at 18 (citing a 1997 study showing that a majority of women who were homeless or on public assistance were victims of domestic violence).

228. Claire Wright, *Torture At Home: Borrowing from the Torture Convention to Define Domestic Violence*, 24 HASTINGS WOMEN'S L.J. 457, 485 (2013).

229. See SOMEWHERE TO TURN, *supra* note 23, at 18.

230. See Carey & Solomon, *supra* note 165, at 216.

abuser is an undocumented immigrant, reporting him to the police will probably end in his deportation and a loss of his financial support.²³¹ Even without deportation, a criminal record would be devastating in a family where the abuser is the breadwinner.²³² The fear of being unable to survive economically can be paralyzing, especially if a victim has children to support.²³³ Not only will an undocumented battered immigrant not be able to find legal work, but her fear of financial devastation is compounded by limited support services.²³⁴ Undocumented immigrants do not have access to most government benefit programs, including welfare, health, housing, and food benefits,²³⁵ and they often have less access to public safety and social services programs.²³⁶

c. Safety Concerns, Including for Children

Battered women, immigrant or not, are often afraid to report their abuse for fear of retaliation by their abusers.²³⁷ In many abusive situations, requiring a woman to report her abuse and cooperate with law enforcement in the investigation and prosecution of that abuse puts that woman at increased risk of harm. The most dangerous time for a woman in an abusive relationship is when she tries to leave that relationship.²³⁸ When a woman attempts to seek help or separate from her abuser, the abuser feels a loss of power and control, and the violence can escalate, often lethally.²³⁹

231. Immigration and Nationality Act § 237(a)(2)(E)(i), 8 U.S.C. § 1227(a)(2)(E)(i) (2012); see also Carey & Solomon, *supra* note 186, at 229; Orloff & Garcia, *supra* note 1, at 12.

232. See Newman, *supra* note 16, at 273; see also SOMEWHERE TO TURN, *supra* note 23, at 14.; Orloff & Garcia, *supra* note 1, at 12.

233. See Carey & Solomon, *supra* note 186, at 218–19.

234. See Orloff & Garcia, *supra* note 1, at 15–16.

235. 8 U.S.C. § 1612 (2012). Undocumented immigrants are entitled to emergency medical assistance. 42 U.S.C. § 1395dd.

236. See Orloff & Garcia, *supra* note 1, at 12.

237. Carey & Solomon, *supra* note 186, at 227.

238. See BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, NCJ 171129 CRIME VICTIMIZATION IN THE UNITED STATES, 1995, at 33–54 (2000) <http://www.bjs.gov/content/pub/pdf/cvus95.pdf>; Michael Vandehey & Shelly Wilbanks, *If She Doesn't Want to Prosecute, Why Should We?*, TEX. DISTRICT & COUNTY ATT'YS ASS'N, <http://www.tdcaa.com/node/7380> (last visited Nov. 1, 2016) (noting that “70 percent of women murdered by their intimate partners are killed during the separation period.”).

239. See Carey & Solomon, *supra* note 186, at 228; see also SOMEWHERE TO TURN, *supra* note 23, at 19 (noting that thirty percent of female homicide victims are killed by former or current partners).

Battered immigrants are particularly vulnerable to retaliation from their abusers. A battered immigrant may have no safe place to which she can escape, nor any family, friends or acquaintances that she can ask for help.²⁴⁰ Without some form of lawful status, a battered immigrant will have difficulty finding shelter, work, or social services.²⁴¹ She is therefore less able to protect herself or her children. In many domestic violence situations, this safety net of lawful status can make the difference between life and death for a battered immigrant. Yet under the U visa, the safety net of lawful status is not obtainable until after the battered immigrant reports her abuse and opens herself up to retaliation.

For other forms of immigration relief available to battered immigrants, there is no requirement that the immigrant report her abuse.²⁴² Thus, a battered immigrant who qualifies for VAWA relief, for example, can wait to leave her abuser until after she receives lawful status.²⁴³ She can likewise wait to report her abuse until she has lawful status, if she chooses to report her abuse at all. This lawful status also gives her the ability to work and obtain certain benefits,²⁴⁴ which increases her chances of leaving her abuser safely.

A battered immigrant whose only form of immigration relief is the U visa cannot wait to report her abuse until she has the safety of lawful status. Many battered immigrants fear that when they report their abuse, their abusers will be notified. There are certain confidentiality provisions that apply to battered immigrants applying for lawful status under the VAWA self-petition or U visa processes.²⁴⁵ Regulations for both forms of relief provide that government agencies are not allowed to use or disclose information about a victim's case to anyone.²⁴⁶ These agencies also cannot use information provided by an abuser against the

240. Battered immigrants often are unaware of the services they might be able to access. See Raj & Silverman, *supra* note 32, at 385.

241. Fatma E. Marouf, *Regrouping America: Immigration Policies and the Reduction of Prejudice*, 15 HARV. LATINO L. REV. 129, 136 (2012) (noting that undocumented immigrants "are barred from most public benefits and face significant challenges in everyday life, as more and more states pass laws to prevent them from renting housing, qualifying for in-state tuition, and obtaining drivers licenses").

242. See, e.g., Immigration and Nationality Act §§ 204(a)(1)(A)(iii), (B)(ii), 240A(b)(2), 8 U.S.C. §§ 1154(a)(1)(A)(iii), (B)(ii), 1229b(b)(2) (2012); 8 C.F.R. § 204.2(c)(1) (2016); *supra* Section III.A.

243. VAWA 2000, Pub. L. No. 106-386, § 1512-13, 114 Stat. 1464, 1533-34.

244. See *Battered Spouse, Children & Parents*, *supra* note 77.

245. See, e.g., 8 U.S.C. § 1367(a)(2).

246. Illegal Immigration Reform and Immigrant Responsibility Act of 1996 § 384(a)(2), 8 U.S.C. § 1367(a)(2) (2012).

interests of the victim.²⁴⁷ However, in order to investigate or prosecute a crime of domestic violence, a state or local law enforcement agency must necessarily inform the abuser of the charges against him. Thus, the abuser in a domestic violence relationship will be notified if the battered immigrant reports her abuse to law enforcement. For U visa applicants, this means that the battered immigrant is in danger of retaliation from her abuser before she has obtained any form of lawful status and the safety that such status provides.

Even if a battered immigrant is able to escape her domestic violence relationship, the requirement of continuing cooperation with law enforcement can put her in harm's way. Requiring the battered immigrant to cooperate in the initial criminal investigation in order to obtain an LEC, in addition to the continued cooperation required to keep a U visa, means that she may have to face her abuser again.²⁴⁸ She may also have to return to the place where she filed a report, or where the investigation or prosecution happened. In many cases, this will put the battered immigrant back into the orbit of her abuser and, therefore, back in danger.²⁴⁹

The risk of deportation also plays a significant role in the safety concerns of a battered immigrant. If a battered immigrant is deported, she may fear that her abuser will target her family left behind. She may also fear that her abuser will follow her to a country in which there are no legal or social services to protect her.²⁵⁰ This is particularly true if the abuser has the ability to travel outside the United States.²⁵¹

Finally, concern for the welfare of children may be an overwhelming fear that prevents battered immigrants from seeking help. A battered immigrant often fears that her abuser will try to harm her children if she seeks help, leaves the relationship, or is deported.²⁵² She fears that her children will be left in the hands of the abuser, particularly where the abuser is their father, and will in turn experience abuse.²⁵³ Abusers often tell their victims that if they report the abuse, they will be deported and their children will be taken away from them.²⁵⁴ These

247. *Id.*

248. *See* Orloff et al., *Mandatory U-Visa Certification*, *supra* note 16, at 630.

249. *Id.*

250. Orloff & Garcia, *supra* note 1, at 9; *see also* Orloff & Kaguyutan, *supra* note 212, at 133.

251. *See* Orloff & Garcia, *supra* note 1, at 9.

252. *See* Carey & Solomon, *supra* note 186, at 228.

253. *See* Orloff & Garcia, *supra* note 1, at 4, 5; *see also* McCormick, *supra* note 100 at 594.

254. *See* Orloff & Garcia, *supra* note 1, at 14.

fears may be compounded by a lack of knowledge of U.S. family law and language barriers that prevent a battered immigrant from learning about U.S. law.²⁵⁵ In many foreign countries, the custody of children is given automatically to the father in a separation regardless of a history of abuse.²⁵⁶ Thus, safety concerns are an important and understandable reason why a battered immigrant might choose not to report her abuse, even if it means forgoing a U visa.²⁵⁷

d. The U Visa Cap

Only 10,000 U visas can be issued in a year,²⁵⁸ and this cap impacts the safety of domestic violence victims. This cap was first reached in 2010, the second year in which the U visa was implemented.²⁵⁹ Since that time, the number of U visa applications submitted has far exceeded the 10,000 cap.²⁶⁰ As of fiscal year 2015, there were 63,762 U visa applications pending in which no adverse decision had been reached.²⁶¹

If USCIS determines that an individual is eligible for a U visa, but cannot get one because of the cap, she is placed on a waiting list until a U visa becomes available for her in a future year.²⁶² This wait, given the number of pending applications, now lasts years.²⁶³ In the meantime, the applicant is given deferred action and is allowed to apply for work authorization.²⁶⁴ Deferred action is a form of prosecutorial discretion,

255. See SOMEWHERE TO TURN, *supra* note 23, at 8.

256. See Orloff & Garcia, *supra* note 1, at 12 n.64.

257. Sarah Morando Lakhani, *From Problems of Living to Problems of Law: The Legal Translation and Documentation of Immigrant Abuse and Helpfulness*, 39 LAW & SOC. INQUIRY 643, 662 (2014) (“Study results . . . showed that if immigrants prioritize self-preservation over aiding law enforcement, they can jeopardize their chances of legalization through the U Visa avenue.”).

258. 8 C.F.R. §214.14(d)(1) (2016).

259. U.S. CITIZENSHIP & IMMIGRATION SERVS., DEP’T OF HOMELAND SEC., NUMBER OF I-918 PETITIONS FOR U NONIMMIGRANT STATUS (VICTIMS OF CERTAIN CRIMINAL ACTIVITIES AND FAMILY MEMBERS) BY FISCAL YEAR, QUARTER, AND CASE STATUS 2009–2015, https://www.uscis.gov/sites/default/files/USCIS/Resources/Reports%20and%20Studies/Immigration%20Forms%20Data/Victims/I918u_visastatistics_fy2015_qtr4.pdf.

260. *Id.*

261. *Id.*

262. 8 C.F.R. § 214.14(d)(2).

263. See Rocio S. Becerril, *Current Trends and Issues with the U Visa*, 28 DCBA BRIEF 18, 18–19 (2015) (citing to information from Vermont Service Center staff attending the Freedom Network Conference on April 21, 2015 that U visas will not be available until 2018 at the earliest).

264. 8 C.F.R. § 214.14(d)(2). In addition, qualifying derivative family members who live abroad will soon be permitted to apply for parole in order to join the principle applicant.

and simply means that the individual granted deferred action is not a priority for removal.²⁶⁵ It is not lawful status.

Deferred action also does not count towards the three-year wait to apply for lawful permanent residency status after receiving a U visa.²⁶⁶ In order to be eligible for most forms of federal benefits, including welfare, health, and housing benefits, an individual must have at least five years in lawful permanent residency status.²⁶⁷ As a result, thousands of prima facie eligible U visa applicants must wait years to obtain the lawful status that a U visa conveys. This, in turn, prolongs the amount of time U visa recipients must wait to be eligible for most federal benefits. Thus, these battered immigrants are left in a perilous situation; they have reported their abuse but have years to wait for lawful status and the federal benefits that might help them extricate themselves from their abusive situations. These long delays make it less likely that battered immigrants will come forward to report their abuse.²⁶⁸

During the VAWA reauthorization process in 2013, a proposed measure sought to raise this cap to 15,000 a year.²⁶⁹ However, this measure encountered significant Republican opposition and the sponsors ultimately abandoned this proposal in the face of this opposition and accompanying delay tactics.²⁷⁰ The cap is yet another way that the U visa is unique as a form of immigration relief for battered immigrants. There is no cap on the number of battered spouse waivers, VAWA self-petitions or orders of cancellation of removal that

Memorandum from Leon Rodriguez, Dir., U.S. Citizenship & Immigration Servs., to Maria Odom, Citizenship & Immigration Servs. Ombudsmen 1-2 (Aug. 18, 2016) <https://www.dhs.gov/sites/default/files/publications/2016-0818%20CISOMB%20Formal%20Recommendation%20on%20U%20Parole%20SIGNED.pdf>.

265. 8 C.F.R. § 214.14(d)(2).

266. *Id.* § 214.14(d)(3); CECELIA FRIEDMAN ET AL., ASISTA, PRACTICE ADVISORY FOR U VISA CONDITIONAL APPROVALS 1 (2015), http://www.asistahelp.org/documents/news/Conditional_Approval_Advisory_FINAL_1A3257835074A.pdf (“VSC [Vermont Service Center] indicated that, under the existing regulations, time in deferred action status does NOT count towards the accrual of continuous presence for adjustment under INA 245(m).”).

267. 8 U.S.C. § 1612 (2012).

268. See Linthicum, *supra* note 141.

269. See S. Rep. 1925, 112th Cong. § 805(a)(2) (as passed by Senate, Apr. 26, 2012).

270. See John Gramlich et al., *Obstacle Emerges on Violence Bill*, CQ (May 17, 2012, 11:14 PM), <http://public.cq.com/docs/news/news-000004088503.html>; see also *Where There's a Will, There's a Way*, U.S. SENATE DEMOCRATS (July 25, 2012, 3:38 PM), <http://democrats.senate.gov/2012/07/25/where-theres-a-will-theres-a-way/>.

can be granted in a given year.²⁷¹

IV. THE DUAL INTENT OF THE U VISA DOES NOT JUSTIFY THE DISPARATE TREATMENT OF BATTERED IMMIGRANTS

The dynamics of an abusive relationship hinder the ability and willingness of a battered immigrant to report her abuse to law enforcement. As a result, requiring law enforcement cooperation and an LEC as a predicate step for obtaining a U visa prevents many battered immigrants from obtaining lawful status and protection.²⁷² This frustrates one of the stated purposes of the U visa, namely, providing protection for battered immigrant crime victims who are not eligible for other forms of immigration relief. If protecting crime victims is truly one of the stated purposes of the U visa, even if it is a secondary purpose, the requirement of law enforcement cooperation prevents the realization of this purpose.

Congress adopted the LEC requirement to both prevent fraud and to promote the cooperation of immigrant crime victims with law enforcement. However, the LEC is not needed to prevent fraud and only reinforces negative and erroneous stereotypes of particular groups of undocumented immigrants. Requiring an LEC as proof of cooperation with law enforcement is particularly problematic. For one, in many localities, battered immigrants have found that it is difficult, if not impossible, to obtain an LEC.²⁷³ As a result, the LEC requirement does not actually promote cooperation with law enforcement. On the contrary, since an LEC is not guaranteed, the risk of talking to the police and facing deportation or retaliation from an abuser as a result is often too high.

The only real consequence of the law enforcement cooperation requirement is that it puts U visa applicants in a much more vulnerable and tenuous position than battered immigrants who qualify for other forms of immigration relief. Yet all immigrants without lawful status are vulnerable to abuse and U.S. immigration laws exacerbate this vulnerability, regardless of the marital status of a particular immigrant or the status of her abuser. There is no justifiable reason for this

271. See *Violence Against Women Act (VAWA) Provides Protections for Immigrant Women and Victims of Crime*, AM. IMMIGR. COUNCIL (May 7, 2012), <https://www.americanimmigrationcouncil.org/research/violence-against-women-act-vawa-provides-protections-immigrant-women-and-victims-crime>.

272. See *supra* Section III.B.

273. See, e.g., Linthicum, *supra* note 141; Robbins, *supra* note 15.

disparate treatment. Not only does the law enforcement requirement result in the disparate treatment of U visa applicants, but it also fails to meet either of the purposes for which Congress created the U visa.

A. *The Law Enforcement Certification Requirement Is Not Needed to Prevent Fraud*

Critics of the U visa argue that the U visa is ripe for fraud,²⁷⁴ and that an LEC is necessary to prevent fraud in U visa applications.²⁷⁵ By requiring U visa applicants to report their abuse and then provide continued cooperation with law enforcement, some argue, the certification requirement acts as a deterrent to false claims of abuse.²⁷⁶ However, the LEC is a solution in need of a problem. First, the claims of rampant fraud in applications for U visas remain unsubstantiated by empirical data.²⁷⁷ In addition, U visa eligibility requirements outside of the LEC already protect against fraud. It is extremely difficult to apply for a U visa, even without an LEC requirement. Not only must a U visa applicant demonstrate that she was a direct or indirect victim of an enumerated crime, she must also show that she suffered substantial physical or mental abuse as a result of the crime.²⁷⁸ This requires a

274. See *Weaknesses in the U Visa Program*, FED’N FOR AM. IMMIGR. REFORM (March 2012), http://www.fairus.org/DocServer/U_Visa_Policy_Statement.pdf; see also *Full Committee Markup of H.R. 4970, The Violence Against Women Reauthorization Act of 2012 Before the H. Comm. on the Judiciary*, 112th Cong. 79 (2012) (statement of Rep. Smith) (“The U visa program is already subject to fraud and abuse.”); Press Release, Diane Black, U.S. Representative, Black Introduces U Visa Reform Act (February 5, 2013), <https://black.house.gov/press-release/black-introduces-u-visa-reform-act> (“Rampant fraud and abuse of U Visas now undermines its effectiveness for law enforcement and circumvents the law abiding individuals who seek to immigrate to our country through the proper legal channels.”); Linthicum, *supra* note 141 (“Advocates for stricter immigration enforcement complain that the [U Visa] program is ripe for fraud and shouldn’t be expanded.”)

275. See Pendleton, *Winning U Visas*, *supra* note 92, at 2; see also Andrew Roddin, *Certified: How the U Visa Petition Process Prevents Fraud and Promotes Safe Communities*, 12 GEO. J.L. & PUB. POL’Y 805, 816–18 (2014); see also Olivares, *supra* note 179, at 250.

276. See Roddin, *supra* note 275, at 816–18; see also Olivares, *supra* note 179, at 250.

277. See WILLIAM A. KANDEL, CONG. RESEARCH SERV., R42477, IMMIGRATION PROVISIONS OF THE VIOLENCE AGAINST WOMEN ACT 11 (2012) (“Members of USCIS’ Fraud Detection and National Security (FDNS) Directorate recently told CRS that they had not seen cases of benefit fraud using the U visa.”); see also Kagan, *supra* note 16, at 945; Olivares, *supra* note 179, at 259.

278. Immigration and Nationality Act § 101(a)(15)(U)(i)(I), 8 U.S.C. § 1101(a)(15)(U)(i)(I) (2012); 8 C.F.R. § 214.14 (2016).

great deal of supporting evidence and the ability to prepare a persuasive application.²⁷⁹ In immigration law, a simple or unintended mistake can be fatal to an application.²⁸⁰ In most cases, an immigrant will need the help of a lawyer, or at least an individual proficient in English who has some understanding of immigration law, in order to successfully apply for a U visa.²⁸¹

Providing evidence of cooperation with law enforcement certainly is persuasive evidence that an immigrant was a victim of a crime. But the argument that an LEC is necessary to prevent fraud in U visa applications assumes that the word of an undocumented immigrant regarding her abuse is not enough on its own to establish that she was the victim of a crime.²⁸² Nor is her word enough even if supported by secondary evidence such as witness affidavits, medical records, or psychological evaluations. Only if a law enforcement officer corroborates that a crime occurred is the immigrant to be believed.

Again, this is different than the experience of battered immigrants eligible to apply for other forms of immigration relief, who are not required to obtain an LEC. In these cases, any credible evidence is sufficient for proving eligibility for immigration relief.²⁸³ Thus, the word of other battered immigrants, such as a VAWA self-petitioner or a conditional permanent resident, counts for more in the decision-making process for determining eligibility for immigration relief. A battered immigrant who is not married to her abuser, or whose spouse is not a U.S. citizen or a lawful permanent resident, is treated as less

279. SETTLAGE ET AL., *supra* note 33, at 43.

280. See Rachel D. Settlege, *Affirmatively Denied, The Detrimental Effects of a Reduced Grant Rate for Affirmative Asylum Seekers*, 27 B.U. INT'L. L.J. 61, 83 (2009); see also SETTLAGE ET AL., *supra* note 33, at 43 (discussing the need for a lawyer when applying for a U visa).

281. Many legal service organizations use representatives accredited by the Board of Immigration Appeals (BIA). BIA Accredited Representatives are non-lawyers authorized to appear before the Department of Homeland Security on behalf of an applicant. *Find Legal Services*, U.S. CITIZENSHIP & IMMIGR. SERVS., <https://www.uscis.gov/avoid-scams/find-legal-services> (last updated Aug. 16, 2016). Immigrants may also obtain legal services from law students in law school clinics. *Id.* Finally, friends or family members are permitted to assist an immigrant fill out applications. *Id.*

282. See Lakhani, *supra* note 257, at 661 (“Asking law enforcement authorities to confirm the violent and degrading treatment suffered by immigrants exemplifies the comingling of immigration and criminal law in recent years and means reminding immigrants that their personal truth counts for little to nothing.”); see also Olivares, *supra* note 179, at 250 (“[T]he certification letter thus stands as a proxy for the genuineness of the applicant’s status as a victim.”).

283. Immigration and Nationality Act § 204(a)(1)(J), 8 U.S.C. § 1154(a)(1)(J) (2012).

trustworthy under the law. There is no reasonable justification for this difference in treatment.

B. The Law Enforcement Certification Requirement Does Not Effectively Promote Cooperation with Law Enforcement

One of the dual purposes of the U visa, and increasingly the most promoted purpose, is the encouragement of cooperation between law enforcement and immigrant crime victims.²⁸⁴ Some scholars maintain that the LEC requirement is necessary to compel cooperation with law enforcement that would not otherwise be forthcoming.²⁸⁵ At the very least, some scholars have argued, the requirement of an LEC creates a strong incentive for victims of abuse to report the abuse to law enforcement.²⁸⁶ The ability to issue an LEC can be a valuable tool for law enforcement agencies to use when seeking the cooperation of a reluctant victim without immigration status. If a law enforcement agent offers an LEC to a reluctant victim, that victim can come forward with less fear of deportation knowing that they can apply for a U visa. In addition, proof of law enforcement cooperation can be persuasive evidence that a crime actually occurred. However, allowing the introduction of an LEC as evidence of cooperation with law enforcement is different from requiring it as a necessary predicate step to applying for a U visa. Requiring an LEC makes it more than just a useful tool; it makes it an inappropriate determinate of a victim's worthiness for protection.²⁸⁷

In many cases, the LEC requirement actually discourages cooperation from victims of domestic violence. In order to receive an LEC, a victim must present herself to law enforcement and face the risks of deportation and retaliation from her abuser.²⁸⁸ Yet, there is no guarantee that she will receive an LEC, and in some jurisdictions, it is guaranteed that she will not.²⁸⁹ Without an LEC, a battered immigrant has no hope of obtaining lawful status through a U visa and, thus, no protection from deportation or from her abuser. For battered immigrants who are aware of the risks of asking for an LEC, there is

284. VAWA 2000, Pub. L. No. 106-386, § 1513, 114 Stat. 1464, 1533-34; *see Abrams, Dual Purposes*, *supra* note 16, at 378-79; McCormick, *supra* note 100, at 603.

285. *See, e.g., Hipolito, supra* note 16, at 155-57.

286. *See id.*

287. *See supra* Section IV.A.

288. *See supra* Section III.B.

289. *See supra* Section III.C.

often little incentive to do so. This is particularly true in localities where immigration enforcement is a priority.

Even if Congress abolished the LEC requirement as proof of cooperation with law enforcement, there remains a multitude of reasons why battered immigrants would avoid cooperating with law enforcement before obtaining some form of lawful status.²⁹⁰ If not required to first cooperate with law enforcement before applying for a U visa, a battered immigrant could apply for lawful status before reporting her abuse to the police. This would allow the battered immigrant to delay leaving her abuser until she had obtained lawful status and the safety that status provides. In addition, even if the police were to report the immigrant to ICE, she would be able to avoid deportation if she already had a U visa. Likewise, if a U visa applicant decided to stop cooperating with law enforcement for any reason, including safety concerns,²⁹¹ she would still be able to continue her legalization process.

For all other forms of immigration relief available to victims of domestic violence, there is no requirement of cooperation with law enforcement in recognition of the dangers inherent in such cooperation.²⁹² Thus, for other forms of immigration relief, a battered immigrant can still move forward with her immigration process without being forced to cooperate with law enforcement or even if law enforcement is unwilling to provide evidence of her cooperation.

C. All Immigrant Victims of Domestic Violence are Equally Worthy of Protection Regardless of Law Enforcement Cooperation

The U visa regulations treat immigrant domestic violence victims differently than do all other forms of protection offered to battered immigrants. Battered immigrants who are eligible only for U visa relief are the only battered immigrants required to cooperate with law enforcement in the investigation or prosecution of their abuse. This requirement makes a battered immigrant who is only eligible for a U visa less likely to seek help because she is unable to obtain the safety of lawful status before putting herself in harm's way by reporting her abuse. Is there some other identifiable characteristic that justifies making the process to lawful status easier for one group over the other? What is it that makes a battered immigrant who is only eligible for a U

290. See *supra* Section III.C.

291. See Kagan, *supra* note 16, at 944.

292. See *supra* Section III.A.

visa less deserving of protection unless she is willing to cooperate with law enforcement?

It is not as simple as saying that battered immigrants who are only eligible for a U visa are undocumented, whereas other battered immigrants already have some form of status. A battered spouse who wishes to self-petition or cancel her removal under VAWA, like applicants for a U visa, need not have entered the country legally, and often do not.²⁹³ Battered immigrants need not be lawfully present in the United States at the time they apply for other forms of immigration relief, and often they are not.²⁹⁴ U visa applicants also need not be lawfully present, but sometimes do have another temporary lawful status such as a student visa or a derivative worker visa.²⁹⁵ The status of the abuser is also not a determining factor alone, nor is the marital status of the victim. An applicant for a U visa may be married, although her spouse may not be a U.S. citizen or lawful permanent resident. In contrast, she may be battered by her U.S. citizen or lawful permanent resident partner to whom she is not married.

The factor which determines whether a battered immigrant may self-petition or cancel removal under VAWA is the combination of the abuser's status and the victim's marital status, i.e., an applicant must be married to a U.S. citizen or lawful permanent resident.²⁹⁶ This is also true for a conditional permanent resident seeking to remove her conditions of residency on the basis of being a battered spouse.²⁹⁷ Fundamentally, the difference between these groups is that battered immigrants who are eligible for forms of relief other than the U visa already had a path to lawful status and citizenship based on their marriage, and they could have followed that path but for their abuse.²⁹⁸ Battered immigrants who are not married to a U.S. citizen or lawful permanent resident did not have a previous path to status on the basis

293. Immigration and Nationality Act §§ 204(a)(1)(A)(iii), (B)(ii), 240A(b)(2), 8 U.S.C. §§ 1154(a)(1)(A)(iii), (B)(ii), 1229b(b)(2) (2012); 8 C.F.R. § 204.2(c)(1) (2016).

294. Immigration and Nationality Act §§ 204(a)(1)(A)(iii), (B)(ii), 240A(b)(2); 8 C.F.R. § 204.2(c)(1).

295. See, e.g., Sabrina Balgamwalla, *Bride and Prejudice: How U.S. Immigration Law Discriminates Against Spousal Visa Holders*, 29 BERKELEY J. GENDER L. & JUST. 25, 38-40 (2014).

296. 8 C.F.R. § 216.5(a)(1); see also Immigration and Nationality Act § 216(c)(4).

297. 8 C.F.R. § 216.5(a)(1).

298. Olivares, *supra* note 179, at 281 ("The history of the self-petitioning process contemplates, then, that this particular category of immigrant victim of domestic violence was worthy of VAWA relief only because of this perceived entitlement to the family-based petition process.").

of their relationship.

Even though that path to lawful status exists for the immigrant married to a U.S. citizen or lawful permanent resident, U.S. immigration laws still treat the battered immigrant spouse more favorably than a non-battered immigrant spouse whose U.S. citizen or lawful permanent resident spouse simply will not cooperate in petitioning for lawful status on her behalf. This is because Congress recognized the complicity of U.S. immigration laws in exacerbating an abusive situation by “trapping” a spouse in an abusive marriage if that is the only way for her to obtain status.²⁹⁹ But U.S. immigration laws are also complicit in trapping undocumented immigrants not married to a U.S. citizen or lawful permanent resident in abusive situations. Fear of deportation or detention, as well as an inability to work, obtain a driver’s license, or access social services because of a lack of status, means battered immigrants are prevented from leaving an abusive relationship.³⁰⁰ Yet U.S. immigration laws treat battered immigrants married to a U.S. citizen or lawful permanent resident differently and more favorably. Those battered immigrants not eligible for any form of immigration relief other than a U visa are the only battered immigrants forced to cooperate with law enforcement in order to receive lawful status. As discussed previously, this means that for many of these battered immigrants, protection is unobtainable.³⁰¹

The unwillingness to help battered immigrants only eligible for a U visa unless they cooperate with law enforcement reflects a reluctance to aid those who, because they would otherwise have no path to lawful permanent status unless they had the misfortune to be a crime victim, are perceived to be circumventing immigration laws. The U visa essentially perpetuates the notion that undocumented immigrants are less deserving of protection from battery.³⁰² The U visa regulations thus reflect negative societal and political views held towards undocumented immigrants.³⁰³ The political and social environment in the United States in the last decade, when the U visa regulations were issued, has become increasingly hostile to undocumented immigrants as compared

299. H.R. REP NO. 103-395, at 26 (1993).

300. See *supra* Section III.C.

301. See *supra* Section III.C.

302. See Kagan, *supra* note 16, at 930 (“By distinguishing between deserving and undeserving immigrants, different visa programs often perpetuate preconceived images or narratives of the ideal beneficiary.”).

303. Chapter 4: *U.S. Public Has Mixed Views of Immigrants and Immigration*, PEW RESEARCH CTR: HISPANIC TRENDS (Sept. 28, 2015), <http://www.pewhispanic.org/2015/09/28/chapter-4-u-s-public-has-mixed-views-of-immigrants-and-immigration/>.

to 1994 when Congress first authorized VAWA.³⁰⁴ The VAWA 2013 reauthorization fight reaffirmed this hostility and demonstrated that those opposing reauthorization considered immigrants in general to be less worthy of protection than other domestic violence victims.³⁰⁵ Thus, the benefit of immigration relief based upon being a crime victim must be balanced by a quid pro quo of law enforcement cooperation, regardless of the dangers of such cooperation for victims of domestic violence.

Even an immigrant battered in her home country can apply for asylum in the United States on the basis of that battery without having to cooperate with law enforcement.³⁰⁶ Asylum seekers whose claims are based on domestic violence are also immigrants who did not have a path to lawful status in the United States but for the abuse they experienced in their home country. It is true that an asylum applicant must prove that the government was the abuser, or that the government was unable or unwilling to control the abuser.³⁰⁷ However, secondary evidence of the futility of seeking assistance from law enforcement is enough to demonstrate eligibility.³⁰⁸ Thus, inherent in a grant of asylum is a condemnation of the foreign government.³⁰⁹

For U visa applicants in the United States, there is an inherent assumption that if the U visa applicant seeks help, U.S. law enforcement agencies will offer her protection. Yet, depending on where

304. McCormick, *supra* note 100, at 623–24. (“These immigrants are trying to survive in communities struggling with the economic downturn, and are frequently condemned for placing an increased demand on school districts, health care systems, law enforcement agencies, and other service providers.”).

305. See Olivares, *supra* note 179, at 262–63; see also Adam Serwer, *Republicans Are Blocking the Violence Against Women Act: Here’s Why*, MOTHER JONES (Mar. 20, 2012, 6:00 AM), <http://www.motherjones.com/politics/2012/03/republicans-violence-against-women-act>; Jonathan Weisman, *Women Figure Anew in Senate’s Latest Battle*, N.Y. TIMES (Mar. 14, 2012), http://www.nytimes.com/2012/03/15/us/politics/violence-against-women-act-divides-senate.html?_r=0.

306. 8 C.F.R. § 208.13 (2016); see also *In re A-R-G-C-*, 26 I. & N. Dec. 388, 390 (B.I.A. 2014); U.S. Department of Homeland Supplemental Brief, *supra* note 127, at 11–12. See generally Bookey, *supra* note 127, at 107–09, 122–47.

307. See *In re H-*, 21 I. & N. Dec. 337 (B.I.A. 1996); *In re Villalta*, 20 I. & N. Dec. 142, 147 (B.I.A. 1990).

308. See *In re S-A-*, 22 I. & N. Dec. 1328, 1333 (B.I.A. 2000); see also *Rahimzadeh v. Holder*, 613 F.3d 916, 922 (9th Cir. 2010).

309. Matthew E. Price, *Politics or Humanitarianism? Recovering the Political Roots of Asylum*, 19 GEO. IMMIGR. L.J. 277, 310 (2005) (“Historically, a grant of asylum implied condemnation of the asylum-seeker’s state of origin—it reflected a judgment that the asylum-seeker was being *abused*, not merely that she was suffering.”).

the domestic violence victim lives, this is not true.³¹⁰ U.S. immigration laws and enforcement programs further exacerbate the vulnerabilities of undocumented immigrants in abusive situations.³¹¹ Thus, U.S. immigration laws are complicit in making immigrants vulnerable to abuse. Battered immigrants at the heart of this disparity should be eligible for protection even if they do not cooperate with law enforcement, regardless of whether or not they had a preexisting path to lawful status, or whether their abuse happened in another country.

V. CONCLUSION

Under VAWA and the battered spouse waiver, Congress created forms of immigration relief for battered immigrants married to U.S. citizens or lawful permanent residents. In creating these forms of relief, Congress recognized both the unique vulnerabilities of battered immigrants, as well as the complicity of U.S. immigration laws in exacerbating abusive situations involving immigrant victims. Congress created the U visa to provide protection for immigrant crime victims in the United States, including battered immigrants not married to a U.S. citizen or lawful permanent resident. But Congress also intended for the U visa to promote cooperation with law enforcement, and to further this intent, Congress required proof of law enforcement cooperation in the form of an LEC. Other forms of relief for battered immigrants do not require cooperation with law enforcement in recognition of the potential dangers of such cooperation.³¹² Yet, the U visa is unavailable without the quid pro quo of law enforcement cooperation.

Much scholarship has been written about the problems inherent in the LEC requirement for the U visa.³¹³ Some scholars have recommended amending the LEC requirement to reflect similar pieces of legislation such as the T visa, which allows for a waiver of the law enforcement cooperation requirement in the case of trauma.³¹⁴ Advocacy efforts have explored ways to make the LEC requirement less of a barrier to immigrant victims, including through increased training for

310. See *supra* Section III.C.1.

311. See *supra* Sections II, III.C.

312. See *supra* Section III.A.

313. See Abrams, *Dual Purposes*, *supra* note 16, at 383–92; Abrams, *Invisible Population*, *supra* note 17, at 32–33; Hipolito, *supra* note 16, at 162–64; Kagan, *supra* note 16, at 941–942; Newman, *supra* note 16, at 268–72; Olivares, *supra* note 179, at 248–62; Orloff et al., *Mandatory U-Visa Certification*, *supra* note 16, at 635–38.

314. See ABREU ET AL., *supra* note 116, at 120; Abrams, *Dual Purposes*, *supra* note 16, at 408–11; Orloff et al., *Mandatory U-Visa Certification*, *supra* note 16, at 641–47.

law enforcement agencies and personnel,³¹⁵ or through changes in state law.³¹⁶

These proposals would be helpful changes, but they do not go far enough. Inherent in these solutions is an acceptance of the dual intent of the U visa, not just to protect immigrant crime victims, but to encourage their cooperation with law enforcement. In other words, rather than purely promoting the protection of immigrant victims, U visa protection is only offered to certain domestic violence victims if they help law enforcement. While the U visa covers much more than domestic violence, Congress created the U visa primarily as a solution for immigrants in domestic violence relationships who are not eligible for other forms of immigration relief.³¹⁷ Requiring law enforcement cooperation is not reasonable for immigrant victims of domestic violence who share multiple unique vulnerabilities as a result of their lack of lawful status. Furthermore, requiring a law enforcement certification as proof of cooperation with law enforcement actually discourages law enforcement cooperation. Finally, this is a requirement that immigrant victims of domestic violence who are eligible for other forms of immigration relief need not meet.

There is no justifiable reason for the disparity in treatment. U.S. immigration laws are complicit in exacerbating the vulnerabilities of immigrants in abusive situations regardless of whether the battered immigrant already had a path to status through her abuser.³¹⁸ All battered immigrants face the same dangers if they are forced to cooperate with law enforcement, dangers that Congress recognized when creating all other forms of immigration relief except for the U visa.³¹⁹ Immigrant women battered in the United States who are only eligible for a U visa because they are not married to a U.S. citizen or lawful permanent resident should be put on equal footing with other battered immigrants.

This disparity can be remedied in several ways, first and foremost by eliminating the LEC requirement entirely for a U visa application. However, unless eliminating the LEC requirement includes eliminating

315. See Abrams, *Dual Purposes*, *supra* note 16, at 411.

316. ABREU ET AL., *supra* note 116, at 135; see also Patrick McGreevy, *Immigrant Crime Victims Get Help from California Governor*, L.A. TIMES (Oct. 9, 2015, 4:20 PM), <http://www.latimes.com/local/political/la-me-pc-immigrant-crime-victims-20151005-story.html> (noting that the California legislature recently passed one of the first bills requiring law enforcement to issue certifications for immigrant crime victims).

317. See *supra* Section II.B.3.

318. See *supra* Section II.A.

319. See *supra* Section III.A.

the “helpfulness” requirement, battered immigrants will still face significant barriers to obtaining protection. Alternatively, all victims of domestic violence could be allowed to self-petition for a visa under current VAWA regulations regardless of whether or not they were married to a U.S. citizen or lawful permanent resident. This would require amending the VAWA regulations to focus on intimate partner relationships rather than marriage. Finally, a new visa for immigrant victims of domestic violence that does not require cooperation with law enforcement could be created. It is true that there may be little political will to pursue any of these options at the present time. However, it is important that the discussion around U visas be shifted from recommendations to make the LEC more obtainable. Instead, the underlying requirement of cooperation with law enforcement needs to be recognized as an inappropriate requirement for domestic violence victims and should be abolished.
