

**What State Courts Need to Know
About Immigration and Why:
Human Trafficking and Family
Violence**

Judge Mary Weir and Leslye E. Orloff
Sandestin, Florida
June 5, 2018

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Introductions

- Judge Mary Weir
 - Jackson County, Kansas City, Missouri
- Leslye Orloff
 - National Immigrant Women's Advocacy Project,
American University, Washington College of Law

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Learning Objectives
By the end of this training you will be better able to:

- Know how accurate immigration law information results in just and fair outcomes in state courts
- Recognize facts that indicate a party qualifies for:
 - Legal immigration status
 - Protection from deportation/low priority for removal
- Understand the role Congress envisioned for judges signing U visa certifications
- Make appropriate findings in state court cases needed for or helpful to an immigrant crime victim's immigration case

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Louisiana Demographics (2016)*

*Source: <http://www.migrationpolicy.org/state-profiles/louisiana-demographics-4> (Feb. 2018)

- ❖ Total foreign born population – 189,921
- ❖ 4.1% of the state's 4.7 million people are foreign born
 - 42% naturalized citizens
 - ≈23.3% lawful permanent residents or temporary status
 - ≈34.7% undocumented

<http://www.migrationpolicy.org/state-profiles/immigrant-population/louisiana>

- ❖ 63.9% rise in immigrant population from 2000 to 2016
- ❖ 7.5% of children in the state under age 18 have 1 or more immigrant parents
 - 84.5% of children with immigrant parents in the state are U.S. native.

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Louisiana- Countries/Regions of Origin and Limited English Proficiency (2016)*

<ul style="list-style-type: none"> ▶ Latin America – 54.5% <ul style="list-style-type: none"> ▶ Mexico (17.3%) ▶ South America (5.0%) ▶ El Salvador (3.0%) ▶ Cuba (2.3%) ▶ Asia – 28.6% <ul style="list-style-type: none"> ▶ Vietnam (9.7%) ▶ Philippines (3.0%) ▶ China (5.3%) ▶ India (3.3%) ▶ Middle East – 2.6% ▶ Europe – 8.5% <ul style="list-style-type: none"> ▶ Germany (2.1%) ▶ United Kingdom (2.0%) ▶ Africa – 4.2% 	<p>Limited English Proficiency (Speak English less than very well)</p> <ul style="list-style-type: none"> ▶ Naturalized citizens 32.9% ▶ Non-citizens 57.9% <p>Languages Spoken at Home</p> <ul style="list-style-type: none"> ❖ Spanish (167,160) ❖ French (87,771) ❖ Vietnamese (24,093) ❖ Mandarin or Cantonese (10,758) ❖ Arabic (10,653) ❖ Haitian (5,441) ❖ German (5,419) ❖ Tagalog (5,109)
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*Source: <http://www.migrationpolicy.org/state-profiles/louisiana-demographics-4> (Feb. 2018)



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When litigants and their children learn about and pursue immigration relief legally available to them how might this improve access to justice in family courts?



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Department of
Homeland Security



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Coercive Control Over Immigration Status

- Among abusive spouses who could have filed legal immigration papers for survivors:
 - 72.3% never file immigration papers
 - The 27.7% who did file had a mean delay of **3.97 years**.

Hass, Dutton and Orloff (2000). "Lifetime prevalence of violence against Latina immigrants: Legal and Policy Implications." *International Review of Victimology* 7 93113

- 65% of immigrant survivors report some form of immigration related abuse (NIJ, 2003)

*Edna Erez and Nawal Ammar, *Violence Against Immigrant Women and Systemic Responses: An Exploratory Study* (2003)

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Connection Between Abuse and Control Over Immigration Status

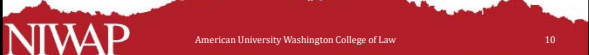
- Abuse rates among immigrant women
 - Lifetime as high as 49.8%
 - Those married to citizens and lawful permanent residents – 50.8%
 - U.S. citizen spouse/former spouse abuse rate rises to 59.5%
- Almost three times the national average

Hass, G. A., Ammar, N., Orloff, L. (2006). *Battered Immigrants and U.S. Citizen Spouses*

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Sexual Assault Rates Among Immigrant Women

- High school aged immigrant girls
 - Twice as likely to have suffered sexual assault as their non-immigrant peers, including recurring sexual assault
 - Decker, M., Raj, A. and Silverman, J., *Sexual Violence Against Adolescent Girls: Influences of Immigration and Acculturation*, 13 *Violence Against Women* 498, 503 (2007).
- Latina college students
 - Experience the highest incidents of attempted rape compared to White, African American and Asian college students
 - Kalof, L., *Ethnic Differences in Female Sexual Victimization*, 4 *Sexuality and Culture* 75-97 (2000).




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Best Practice: Screen for Immigration Related Abuse

- Immigration Related Abuse
 - 10 times higher in relationships with physical/sexual abuse as opposed to psychological abuse*
 - May predict abuse escalation
 - Corroborates existence of physical and sexual abuse

*Mary Ann Dutton, Leslye Orloff, and Giselle Hass, *Characteristics of Help-Seeking Behaviors, Resources and Service Needs of Battered Immigrant Latinas: Legal and Policy Implications* (Summer 2000)




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Risks of Removal for Victims

- Perpetrators actively reporting for removal victims with pending immigration cases
 - VAWA self-petitioners 38.3%
 - VAWA petitioners arrested at crime scene instead of the abuser 15.4%
 - U visa victims 26.7%
- Traffic stops
 - VAWA self-petitioners 28.6%
 - U visa victims 26.7%

Krisztina E. Szabo, David Stauffer, Benish Anver, *Authorization For VAWA Self-Petitioners and U Visa Applicants*, NIWAP (Feb. 12, 2014)



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Immigrant Victims and Children Receive

- Protection from deportation
- Legal work authorization which brings access to drivers licenses upon
 - Approval or wait list approval
- Access to some federal public benefits
 - Varies by immigration case type
- VAWA confidentiality protection upon filing VAWA, T or U visa case

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Courts Can Play a Role

- Identify potentially eligible immigrants
- Distribute information
 - DHS brochures
 - Non-profit Legal Services Agencies
- Provide language access
- Know how to obtain accurate information about current immigration laws, policies and practices
 - Technical assistance through NIWAP's Judicial Education Network

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Judicial Findings

- Make detailed findings
 - Family relationships
 - Marriage
 - Parent child relationship
 - Battering, extreme cruelty, child abuse, elder abuse, child abandonment, neglect, sexual assault, stalking
- Federal immigration law role
 - U visa certification
 - Special Immigrant Juvenile Status findings
- Apply and cite state laws



U Visa for Immigrant Victims

- Victim of a listed criminal activity occurred in the U.S. or violated U.S. law;
- The victims possesses information about the crime;
- The victim has been, is being, or is likely to be helpful in the detection, investigation, prosecution, conviction or sentencing of the offense; and
- The victim has suffered substantial physical or mental abuse as a result of the victimization
- Victim must submit a U visa certification with the application



U Visa Regulations Definitions

Although terms are used interchangeably

- As a matter of law (U visa regulations)
 - Helpfulness in the “investigation or prosecution” always means
 - “Detection, investigation, prosecution, conviction, or sentencing”
 - “Crime” always means
 - “criminal activity”
- “Criminal activity” chosen to offer early access to justice system protection
 - Improving stability for crime victims



U Visa Qualifying Criminal Activity

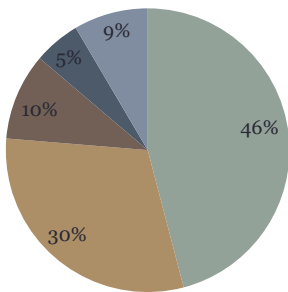
- Domestic violence
- Sexual assault
- Rape
- Incest
- Prostitution
- Torture
- Felonious assault
- Manslaughter
- Murder
- Female genital mutilation
- Kidnapping
- Abduction
- Trafficking
- Involuntary servitude
- Slave trade
- Being held hostage
- Fraud Foreign Labor Contracting
- Peonage
- False Imprisonment
- Blackmail
- Extortion
- Witness tampering
- Obstruction of justice
- Perjury
- Stalking

Attempt, conspiracy or solicitation to commit any of these crimes any similar activity



U-Visa Criminal Activities (11/2011 data)

- Domestic violence- 45.9%
- Rape, Sexual Assault, Incest, Trafficking- 30.4%
- Felonious Assault, Murder, Manslaughter- 9.9%
- Blackmail, extortion, perjury, obstruction of justice, attempts, conspiracy, solicitation- 8.47%
- Kidnapping, being held hostage, unlawful criminal restraint, torture- 5.3%




Evidence of Helpfulness: Some Examples in Criminal Case

- Evidence in case that the victim:
 - Called 911
 - Participated in a criminal investigation
 - Identified perpetrator at line up
 - Testified before a grand jury or at trial
 - Appearance in a case
 - Attended criminal court hearings in the case
 - Victim witness statement
 - Testimony at sentencing



**Evidence of Helpfulness:
Some Examples in Family/ Civil Case**

- Filed and/ or appeared at hearing for full protection order
- Plead and or testified about abuse or sexual assault in a court case (e.g. protection order, divorce, custody, small claims, housing, employment)
- Evidence in case that victim called the police, made a police report, cooperated in a criminal investigation
- Serving the perpetrator with notice of case with underlying abuse facts




U Visa Certification: Who Can Certify?

- Federal, state, and local
 - Police, sheriffs, FBI, HSI, ATF...
 - Prosecutors
 - **Judges, Magistrates, Commissioners, Judicial Referees, Masters, Alderman, ALJs, Surrogates, Chancellors**
- Departments of Labor (DOL) and the Equal Employment Opportunity Commission (EEOC)
- Child and Elder Abuse investigators and agencies
- Other government agencies




Why victims seek certification from courts

- Only justice system contact was a protection order, custody, or civil case
- No language access when called police for help
- Police did not investigate and case never sent to the prosecutor




U-visa Facts and Benefits

- Only 10,000 U-visas can be granted annually
 - Waitlist approval backlog 110,000 visas
- The U-visa grants a temporary 4 year stay
- Work authorization (≈ 28-48 months)
- Limited state benefits
- Lawful permanent residency after 3 years if
 - Cooperation or not unreasonably refuse to cooperate
 - + humanitarian need, family unity or public interest
- U.S. citizenship after 5 years of lawful permanent residency + proof of good moral character




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Special Immigrant Juvenile Status (SIJS)

- SIJS is a form of humanitarian immigration relief that provides for a path to lawful permanent resident status
- For children who are unable to be reunited with one or both parents due to abuse, abandonment, neglect
- SIJS provides the hope of stability and safety for vulnerable immigrant children.



SIJS: Congressional Goals


- Included a role for state court judges as experts in child best interests, custody, child welfare matters.
- State court expertise:
 - Adjudicating facts of child abuse, neglect and abandonment
 - Issuing orders regarding child care, custody and placement that further the best interests of children
- Only the DHS can issue SIJS & permanent residency
- DHS uses the state court order as evidence in adjudicating the immigration application



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Special Immigrant Juvenile Status (SIJS)

- Immigration relief for unmarried children under the age of majority under state law who have been
 - Victims of abuse, abandonment, neglect
 - By at least **one parent**
- Eligibility requires state court jurisdiction over
 - the care, custody, or dependency of the child
 - has issued a court order, finding, or declaration on three statutorily required issues
- The state court order does **not** award SIJS
 - **ONLY DHS can provide legal immigration status**




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State Court Findings Needed for SIJS

State Law Applies To Each

- The court issued orders regarding the care or custody, of an immigrant child with
 - An individual (e.g. non-abusive parent, grandparent, kinship care, guardian, next friend) OR
 - State agency, private agency, including foster care system
- It is not in the child's best interest to return to their home country
 - Best caregiver identification/often not necessary to compare countries
- Reunification of the child is not viable with a parent due to the parent's abuse, abandonment, or neglect



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Types of Proceedings With Jurisdiction To Make SIJS Findings:

- Dependency
- Delinquency
- Termination of parental rights
- Guardianship
- Protection orders
- Paternity
- Custody and child support
- Divorce
- Legal Separation
- Adoption
- Motions for a declaratory judgment

Courts with jurisdiction under state law to make judicial determinations regarding the custody, placement, care of children = juvenile courts for SIJS immigration purposes

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Apply State Law

- Apply state law without regard to where abuse, abandonment or neglect occurred
- Definitions: abuse, abandonment, neglect
 - Includes child endangerment, domestic violence as child abuse, forced marriage
- Jurisdiction
 - UCCJEA - Temporary Emergency Jurisdiction
- Follow your state court procedures

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Apply State Law

- Best Interests
 - Placement
 - Non-viability
 - Not returning child to their home country
- Where are best interest factors in state law?
 - Child welfare statutes
 - Custody statutes
 - Case law

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SIJS in State Courts

- Many SIJS cases are for 15-17 year old minors
 - State court order + filing before the child ages out
 - Up to age of majority set by state law
- SIJS is an option any time an abused, abandoned or neglected child is not a
 - Citizen or lawful permanent resident



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Best Practice for Findings

- Make factual findings regarding
 - Facts of abuse, abandonment and/or neglect
 - Regarding each parent
- Cite the state statute(s) on
 - Abuse, abandonment and/or neglect
 - Jurisdiction over the minor
- If “similar basis” explain in court order how it is similar to one of the following
 - Abuse, abandonment and/or neglect



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IMMIGRANT LITIGANTS IN FAMILY COURTS



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Protecting Immigrant Mothers Protects Children

- Immigrant victims who receive help, including immigration relief, child abuse likelihood drops significantly (77% to 23%).
- Children of help seekers 20% less likely to have abuser threaten them
- One third less likely to have abuser threaten to take them away from their mother

Anmar, Orloff, Hass and Dutton, "Children of Battered Immigrant Women: An Assessment of the Cumulative Effects of Violence, Access to Services and Immigrant Status." (September 2004)
<http://niwap.library.ycd.american.edu/pubs/co-occurrenceofchildabuse/>



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Is Immigration Status Relevant to Custody?

- **Relevant to:** Immigrant crime victim presents evidence of immigration related abuse, power and control suffered
 - Either not filing or withdrawing immigration papers
 - Threats to turn victim in for deportation
 - Part of history of violence
- **Not relevant to:**
 - Core primary caretaker determination
 - Evaluation of parenting skills
 - Best interests of the child determination
 - Requirements regarding custody awards to non-abusive parent



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ABA Center on Children & The Law

- "Parties should not be able to raise, and courts should not consider, immigration status of domestic violence victims and their children in civil protection order, custody, divorce or child support proceedings."
- "Batterers whose victims are immigrant parents use threats of deportation to avoid criminal prosecution for battering and to shift the focus of family court proceedings away from their violent acts...When the judicial system condones these tactics, children suffer."
- "This ... will ensure that children of immigrant domestic violence victims will benefit from ...laws (like presumptions against awarding custody or unsupervised visitation to batterers) in the same manner as all other children."



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Myth vs. Fact:
Parents without Legal Immigration Status

Myth	Fact
1. Deportation is imminent	1. DHS policies prevent detention/removal of immigrant parents who are crime victims
2. Parent is likely to flee U.S. with child	2. US citizens and lawful permanent residents are more likely to flee with children, especially when <ul style="list-style-type: none"> - There have been threats of kidnapping children - They are dual nationals - They travel freely to and from U.S.
3. The parent has no livelihood	3. Abused immigrant parents in family court have a path to immigration relief, work authorization & some benefits
4. Legally present parent must have custody in order to file for benefits for child	4. Custody does not affect parent's ability to file for or gain immigration benefits for his children.

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Immigrant Parents and Child Custody
In re Interest of Angelica L., 277 Neb. 984 (2009)

- Parents have a Constitutional right to custody (absent unfitness)
- Applies to all families without regard to:
 - Undocumented immigration status
 - Immigration detention
 - Deportation
- Overriding presumption that:
 - Parent-child relationship is constitutionally protected
 - In children's best interest to stay with/be reunited with their parent(s)
- Child's best interests is most important
 - A comparison of natural vs. adoptive parent's cultures, countries or financial means is **not to be made**


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Detained Parent Directive Aug 2017

- If parents are detained:
 - Placement near family court when ongoing family court/child welfare cases
 - Bring parents to family court to participate in cases involving children
 - Alternate: video or teleconference participation
 - Facilitate visitation when required by family/child welfare court order
 - Help children travel with deported parent - obtain passports for children

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PROTECTION ORDERS



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Protection Orders

- All persons are eligible to receive civil protection orders without regard to the immigration status of any party or child
- Protection order issuance = no effect on immigration status
- A conviction or *finding* of violation of the "protection against abuse provisions" of a protection order is a deportable offense
- Immigrant victims and their children often need creative protection order remedies using the state catch all provisions

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Use Creative Remedies to...

- Stop immigration related abuse
- Protect victims still living with their abusers
- Obtain documents the victim needs for an immigration case or for care of child
- Deter parental kidnapping
- Child/Spousal support
 - Affidavit of support
- Health insurance

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VAWA Confidentiality Prongs

- **Abuser-Provided Information:** DHS, DOJ and the State Department are barred from taking action against a victim based *solely* upon information provided by abusers and crime perpetrators (their family members or associates)
- **Location Prohibitions:** Enforcement locational prohibitions unless comply with specific statutory and policy safeguards
- **Non-Disclosure:** Unless one of the enumerated exceptions apply, DHS, DOJ and the State Department cannot disclose VAWA information to anyone
 - VAWA self-petitioners, VAWA cancellation/suspension, T visa, U visa, Battered Spouse Waiver, Abused Visa Holder Spouses



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Why is VAWA Confidentiality Important for State Courts?

- Prohibited enforcement locations include courthouses in connection with any:
 - Protection order case, child custody case, civil or criminal case involving or related to domestic violence, sexual assault, trafficking, stalking
- New ICE courthouse enforcement policy



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January 2018 ICE Courthouse Enforcement Policy: Targeted Immigrant Limitation

- Civil immigration enforcement at courthouses will only occur when
 - ICE officers have information that leads them to believe that a targeted immigrant will be present at a courthouse
- To be targeted an immigrant must
 - Have criminal conviction(s)
 - Be gang members
 - Be a threat to national security or public safety
 - Have been ordered removed and failed to depart, or
 - Have re-entered the country illegally after being removed



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Why is VAWA Confidentiality Important for State Courts?

- Perpetrators are using state court discovery to obtain federal VAWA confidentiality protected information that
 - DHS will not release
 - Cannot be released under federal law
- Confidentiality protections apply to family, civil and criminal court discovery



Disclosure Limitations

- All DHS instruction 002-02-001
 - Law enforcement exception limited
 - Only “in a manner that protects the confidentiality of such information”
 - “Please note, defense counsel in state cases may sometimes attempt to make the entire A-file discoverable; however the entire file is not discoverable in its entirety under this exception”
- 8 C.F.R. 214.14 (3)(2)
 - “Agencies receiving information under this section, whether governmental or non-governmental, are bound by the confidentiality provisions and other restrictions set out in 8 U.S.C. 1367”



Demaj v Sakaj (D. Conn, 2012) –U Visa Case

- Although relevant to credibility and impeachment
- Family court discovery barred as contrary VAWA confidentiality purpose --
 - Prevent disclosure of documents & information in a protected case file to alleged criminals
 - Stop perpetrator’s actions to interfere with & undermine a victim’s immigration case
- Seeking to obtain protected information through discovery in a custody case = interference with the victim’s immigration case barred by the federal statute
- VAWA confidentiality applies to protect the case file contents, including in cases when
 - the victim discloses in state court that DHS has approved her protected immigration case



Hawke v. Dep't of Homeland Security
(N.D. CA, 2008) – VAWA Self-Petition Case

- VAWA Confidentiality Protects cases:
 - All cases unless denied on the merits
- Judicial exception applies to appeals of victim's immigration case
 - Does not apply to civil or criminal court proceedings
- 6th Amendment right to compulsory process does not permit access to absolutely privileged information
- "primary purposes of the VAWA confidentiality provision, namely to prohibit disclosure of confidential application materials to the accused batterer"

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State v. Marroquin-Aldana

2014 ME 47, ¶ 20, 89 A.3d 519, 525

- "insufficient justification" to disclose additional documentation when the defense had the certification form
- Provided defense opportunity to cross-examine victim and call credibility into question
- Court noted the "high level of protection" given to documents filed with immigration

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People v. Alvarez Alvarez

No. G047701, 2014 WL 1813302, at *5 (Cal. Ct. App. May 7, 2014),
review denied (July 16, 2014)

- "The visa was a tangential, collateral issue, and allowing evidence about it invited speculation about the legal status ... which was completely irrelevant to this case."
- The trial court was well within its discretion in excluding reference to the U visa

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Technical Assistance and Materials

- Power Point presentations and materials for this conference at www.niwap.org/go/LABench-Bar
- Judicial Training Manual at www.niwap.org/go/sji
 - **NIWAP Technical Assistance:**
 - Call (202) 274-4457
 - E-mail info@niwap.org
- Web Library: www.niwaplibrary.wcl.american.edu