# Practice Advisory:
# Opposing defendants' requests for U and T filings in criminal proceedings[1]
# October 2024

## Introduction

Immigrant survivors of gender-based violence who apply for U and T Nonimmigrant Status are often required by law to have some interaction with the criminal-legal system. Specifically, survivors must report their victimization to law enforcement as a prerequisite to receiving nonimmigrant status. This interaction with the criminal-legal system may come to the attention of offenders' defense attorneys, who may in the course of their representation subpoena survivors and/or their attorneys for U and T Nonimmigrant Status filings in an attempt to impeach the survivor's credibility. This Practice Advisory identifies when U and T filings may arise in a criminal proceeding and, through the framework of crime victims' rights, offers promising practices for defending against subpoenas requesting immigrant survivors' U and T filings.

## Background: U and T Nonimmigrant Status

### U Nonimmigrant Status

U Nonimmigrant Status (sometimes called a "U visa") allows noncitizen victims of serious crimes who cooperate with law enforcement to receive four years of lawful status in the United States.[2] To qualify for U Nonimmigrant Status, the petitioner must:

1) Be a victim of a qualifying crime (qualifying crimes include domestic violence, sexual assault, and stalking);
2) Have information about the crime;
3) Have been helpful in the past, be currently helpful, or be likely to be helpful to a certifying agency in their investigation or prosecution of the qualifying crime;
4) Have "suffered substantial physical or mental abuse" from the qualifying crime[3]; and
5) Be admissible to the United States or eligible for a waiver.[4]

The U petitioner must establish their helpfulness by submitting a signed law enforcement certification (Form I-918B) to United States Citizenship and Immigration

Services ("USCIS") with their U petition.[5] U petitioners typically must have significant interaction with law enforcement in order to meet the certification requirement.

There are several benefits of U Nonimmigrant Status that make it a helpful option for immigrant survivors of gender-based violence. First, the U statute contains a broad list of qualifying crimes, including crimes of domestic and sexual violence.[6] Second, Congress created a generous inadmissibility waiver for U petitioners and derivatives. This waiver allows virtually any inadmissibility ground to be waived if a waiver is in the "public or national interest."[7] The U Nonimmigrant waiver is one of the most generous in all of immigration law.[8] The generosity of the waiver means that U Nonimmigrant Status may be the only immigration option available for many immigrant survivors of gender-based violence. Third, U Nonimmigrant Status is available to principal petitioners and derivative family members who are in active removal proceedings or have removal orders.[9] The eligibility for petitioners in removal distinguishes U Nonimmigrant Status from many other relief options filed with USCIS, which are often unavailable to noncitizens who are in removal proceedings.[10] Finally, U Nonimmigrant Status provides a path to Lawful Permanent Residency and U.S. Citizenship for principal petitioners and derivatives.[11] This distinguishes U Nonimmigrant Status from other forms of immigration relief that do not provide a pathway to citizenship, such as Deferred Action for Childhood Arrivals ("DACA"), Temporary Protected Status ("TPS"), and Deferred Action for Labor Enforcement ("DALE").

## T Nonimmigrant Status[12]

T Nonimmigrant Status (sometimes called a "T visa") allows certain noncitizen victims of human trafficking to receive four years of lawful status in the United States.[13] To qualify for T Nonimmigrant Status, the applicant must:

1) Be a victim of a "severe form of trafficking in persons"[14] (sex or labor trafficking, both of which may involve, among other crimes, sexual assault, stalking, or domestic violence);
2) Be "physically present in" the United States, American Samoa, Commonwealth of the Northern Mariana Islands, or a port of entry on account of the trafficking;
3) Comply "with any reasonable request for assistance in" an investigation or prosecution of trafficking, "or the investigation of crime where acts of trafficking are at least one central reason for the commission of that crime" (there is an exception and exemption to this requirement that will be discussed below);
4) "Suffer extreme hardship involving unusual and severe harm upon removal"; and
5) Be admissible to the United States or eligible for a waiver.[15]

There are several benefits of T Nonimmigrant Status that make it a helpful option for immigrant survivors of human trafficking. First, in some cases T applicants may include more family members as derivatives than U petitioners.[16] Second, T Nonimmigrant Status may require less law enforcement involvement than U Nonimmigrant Status. This is for three reasons. First, unlike U petitioners, T applicants are *not* required to obtain a signed law enforcement certification.[17] Second, the USCIS Policy Manual states that T applicants may generally satisfy the "compliance with reasonable requests for

assistance" requirement by reporting their trafficking victimization to law enforcement (including reports in writing) and then "complying with reasonable requests for assistance."[18] Depending on the case facts, an initial report may be the only interaction that a T applicant has with law enforcement. Third, some T applicants are not required to have *any* contact with law enforcement, not even in the form of an initial report.[19] The T applicant is not required to report to law enforcement if at least some of the trafficking occurred before they were eighteen[20] or if they are unable to cooperate with law enforcement due to trauma.[21]

Third, T Nonimmigrant Status has two generous inadmissibility waivers. One waiver uses the factors in *Matter of Hranka* and is available to waive most grounds of inadmissibility, even if they are not connected to the trafficking victimization.[22] Another waiver is available if the inadmissibility ground is "caused by…or incident to" the trafficking.[23] The generosity of the waivers and the lack of a law enforcement certification requirement means T Nonimmigrant Status may be the only option for many immigrant survivors of human trafficking, particularly if they had minimal contact with law enforcement. Fourth, similar to U Nonimmigrant petitions, T Nonimmigrant Status is available to principal petitioners and derivatives who are in active removal proceedings or have removal orders.[24] Finally, similar to U Nonimmigrant Status, T Nonimmigrant Status provides a path to Lawful Permanent Residency and U.S. Citizenship for principal applicants and derivatives.[25]

## When might a U or T Nonimmigrant filing arise in a criminal prosecution?

A survivor's U or T filing may arise in a criminal prosecution in both general and specific ways. A defendant may subpoena the filing to challenge the survivor's credibility at trial. If defense counsel knows that the survivor has applied for a U or T visa, defense counsel may allege that the survivor fabricated or exaggerated the crime solely to obtain immigration status, because both U and T status allow survivors to receive an immigration benefit if they cooperate with law enforcement. Defense counsel may make such allegations to discredit the survivor before the judge or jury to create "reasonable doubt" as to the defendant's guilt. Defense counsel may take these steps based simply on the fact of application for the visas, without going into the details of the applications. In addition to raising the fact of a survivor's U or T filing, defense counsel may try to obtain copies of U and T filings, arguing that the full filing is necessary to the defense.

Because both forms of relief generally require engagement with law enforcement even if defendant does not request the filings, law enforcement entities may already have information or documents in their possession pertaining to the survivor's U or T filing that they are obligated to turn over to the defense

**Practice Pointer**
For a brief refresher on Brady see What Are Brady Disclosure Obligations?, https://ncvli.org/wp-content/uploads/2023/03/What-are-Brady-Disclosure-Obligations_accessible-PDF.pdf

under *Brady v. Maryland*, 373 U.S. 83 (1963).[26]

As stated above, defense counsel may request the survivor's full U or T filing to impeach the survivor in a criminal prosecution. If a prosecutor raises such a defense request with a survivor's attorney, the survivor's attorney should oppose the request and argue that the *fact* of the survivor's U or T application is sufficient for impeachment purposes and to comply with *Brady*. It is unnecessary for defense counsel to obtain a full copy of the U or T filing to impeach the survivor, when their purpose in raising the filing in court is to suggest that the survivor had a motive to fabricate or exaggerate the crime.

**Practice Pointer**
Due to the state's *Brady* obligation, it is critical that immigrant survivors' attorneys share *only* the information with law enforcement that is necessary to accomplish the survivor's goal(s) – for example, meeting the reporting requirement for T status or obtaining a U certification. If meeting the reporting requirement or obtaining a certification is the survivor's goal, it is unnecessary to share survivor declarations or an entire U or T filing with law enforcement. Such extensive sharing is highly discouraged, since law enforcement may turn over any such material in their possession to defense counsel.

## How to Challenge a Defense Request for U or T Nonimmigrant filing

Unwanted disclosure of U and T filings in a criminal prosecution implicates an immigrant crime victim's rights to privacy, to be protected from the accused, to refuse a discovery request, and to be treated with fairness and dignity. Pretrial disclosure is unnecessary for at least three reasons. First, criminal defendants in criminal prosecutions are not entitled to discovery of U or T visa applications that are not in the possession of the prosecution, as *Brady v. Maryland*, 373 U.S. 83 (1963) does not apply to material not in their possession. Second, defendants do not have pretrial federal constitutional rights that require disclosure. Finally, federal law makes the U or T applications confidential with limited disclosure exceptions that do not include use in state criminal prosecutions.[27]

## Crime Victims' Rights Prevent Disclosure of Filings Not in the Possession of the Prosecution

Crime victims have statutory and/or constitutional victims' rights in all fifty states and the District of Columbia[28], and statutory and constitutional rights in the federal system.[29] While these rights vary in scope and detail, every jurisdiction's victims' rights laws provide a legal basis for victims to refuse a request for their U or T filings. Therefore, when a disclosure request is made, victims, pro se or through counsel[30], may assert their rights to privacy, to refuse a discovery request, to be protected from the accused, and/or to be treated with fairness and dignity to block disclosure. How

these rights apply are discussed in turn.

## Privacy Protections

Both U and T nonimmigrant applications contain very sensitive and personal information. The I-918 and I-914 application forms[31] contain a broad range of questions that include family history, whether the victim has ever engaged in prostitution or illegal gambling, received or anticipates receiving public assistance, abused an illegal drug, voluntarily participated in a totalitarian political party, and whether the applicant has a physical or mental disorder that has or may cause a threat to self or others.[32] In addition, the requirement to show "substantial abuse" for U Nonimmigrant petitions means that the petition may contain detailed psychological evaluations with significant information about the survivor's past and current mental health status.

**Practice Pointer**

Victims' attorneys may oppose a defendant's request for U and T Visa filings by moving to quash defendant's subpoena (or in some cases it may be a motion objecting to a defendant's motion to compel). A motion to quash is the vehicle for asserting all of the victim's rights outlined in this advisory that are available in that jurisdiction. For information on motions to quash, see the National Crime Victim Law Institute's Tutorial Video: *Motion to Quash*, https://ncvli.org/what-we-do/legal-assistance/rights-enforcement-toolkit/. In addition, a motion to quash template that responds to a defense request for privileged records can be found here: https://ncvli.org/dc-sample-motion-to-quash/. Additional motion to quash samples can be found at NAVRA.org.

There are multiple laws protecting this type of private information, with the strongest and most universal being the right to privacy under the United States Constitution.[33] Similarly, some states explicitly provide all individuals with a state constitutional right to privacy.[34] Some jurisdictions, in recognition of how vital privacy is for crime victims, also explicitly afford a right to privacy in their statutory and/or constitutional victims' rights laws.[35] In addition to these general privacy rights, there may be victim population- or crime-specific laws that protect privacy, such as rape shield laws.[36]

Because the information in visa applications is highly sensitive and personal in nature, Applicants may assert privacy rights to oppose disclosure.

**Practice Pointer**

All relevant sources of privacy protection should be included in an opposition to a request for disclosure. For instance, if the filings contain information pertaining to the applicant's prior sex work or arrests for prostitution, the jurisdiction's rape shield laws may provide additional grounds to oppose a request.

## Right to Refuse Discovery

When the request for U or T visa applications occur in the form of a pretrial discovery request, victims in some jurisdictions may assert their right to refuse a defense request for discovery[37] to object to disclosure.

## Rights to be Treated With Fairness and Dignity

The rights to be treated with fairness and dignity are rights common to most jurisdictions[38] and provide a basis for objecting to the disclosure of U and T filings.

While the right to be treated fairly incorporates notions of procedural due process, requiring notice and opportunity to be heard when their interests are implicated, it also has a substantive meaning consistent with the common meaning of fair treatment which means "treating someone in a way that is right or reasonable."[39] Dignity too has substantive meaning.

State and federal courts define and apply the right to dignity in different ways[40], but the common thread is that dignity requires "honoring individuals and limiting the treatment of victims as a means to an end."[41] In short, the right to dignity is the recognition of a person's humanness – that they matter.[42] Immigrant victims understand all too well how others can overlook them as human beings. Disclosure of a survivor's personal information to the very person accused of harming them is an affront to the most basic notion of fairness and dignity.

## Right to Protection[43]

Victims' rights laws often contain a right to protection from the accused and those acting on behalf of the accused during the victim's involvement with the criminal justice system.[44] This right protects the victim's physical safety, as well as their mental and emotional health, all of which may be implicated when their visa filing is disclosed to the defendant.

Forced disclosure of an immigrant crime victim's personal, confidential information can cause significant harm to their wellbeing.[45] In addition to revealing sensitive information that impacts emotional health, the inadmissibility waiver form that is used for U and T status asks about a survivor's residency and employment history, which may reveal the survivor's location if turned over to the defense. This can also put the victim's physical safety in jeopardy.

**Practice Pointer**
Attorneys should be prepared to argue that unwanted disclosure of a victim's U or T filings to defendant during discovery violates the victims' constitutional and statutory rights and undermines federal law and Congressional intent.
All applicable victims' rights should be used to challenge a request for disclosure of U and T filings.

## Defendants' Interests Do Not Overcome Victims' Rights.

Contrary to the victims' rights that entitle an immigrant victim to object to disclosure of their visa filings, defendants have no federal constitutional right to pretrial discovery from third parties.[46] Nor do defendants have an established federal constitutional right to pretrial discovery of crime victims' confidential information that is in the possession or control of non-government record holders under the Confrontation Clause, the Compulsory Process Clause, or the Due Process Clause.[47] As such, courts may refuse defendants access to the visa applications without violating defendants' rights.[48]

Very few courts have addressed the issue of whether a state criminal defendant may obtain a victim's U Visa filing that is not already in the possession of the state. The few courts that have addressed the issue agreed with the above analysis, finding that defendant's rights were not violated when the filing is kept confidential.[49]

### Practice Pointer

Even if a court finds defendant is entitled to U or T filing, federal law does not provide for an automatic court order. Rather, the request for disclosure would need to go to the Department of Homeland Security's counsel to determine whether disclosure is warranted.

## State Courts Lack Authority to Order Disclosure of U and T Filings

The United States Government "has broad, undoubted power over the subject of immigration and the status of [noncitizens]."[50] Federal law makes clear that absent a constitutional right, a defendant in a state criminal case is not entitled to any portion of the U or T filing.[51] A defendant's constitutional rights are only implicated when the visa filing is in the possession of the prosecution. When the prosecution does not possess the U or T filing, there are no applicable exceptions to the statute's nondisclosure provision. Consequently, state courts lack authority to order disclosure because any disclosure of U and T filings is preempted by federal legislation.

Congress intended to protect immigrant victims' privacy by making their U and T filings confidential and subject to disclosure by USCIS in only limited circumstances.[52] State trial courts may not circumvent federal law by ordering the victim or their attorney to disclose these confidential documents that they could not obtain directly from USCIS.[53]

Congress created the U visa in 2000 with five original exceptions to nondisclosure.[54] Since then, Congress twice more enacted new exceptions.[55] In *none* of these legislative moments did the federal government provide an exception for disclosure to defendants or prosecutors in state criminal proceedings.[56] This continued exclusion of an exception to non-disclosure for criminal defendants in state prosecutions is significant. Congress is presumed to know the law.[57] Therefore, time and time again when Congress created nondisclosure exceptions they

determined that the public policy of protecting victims' privacy was a more compelling interest than providing access to state criminal defendants.

Congress understood that immigrant victims face significant risks when reporting their crime and participating in criminal prosecutions. To reduce that risk, Congress created the U and T statuses with a confidential application process and providing only limited exceptions to nondisclosure. There are no exceptions for providing the U and T filings to defendants in a state criminal proceeding.

## Conclusion

Immigrant survivors of gender-based violence who apply for U and T Nonimmigrant Status are frequently required to interact with the criminal-legal system. This interaction may come to the attention of offenders' defense attorneys, who may subpoena survivors or their attorneys for U or T filings in the course of their representation. Immigration attorneys should attempt to proactively head off such requests by sharing the least amount of information possible with the state – that is, *only* the information that is necessary to accomplish the immigrant survivor's goals. Furthermore, attorneys can defend against subpoena requests by invoking the panoply of crime victims' rights available to immigrant survivors.

*This project was supported by Grant No. 15JOVW-23-GK-05161-MUMU awarded by the Office on Violence Against Women, U.S. Department of Justice. The opinions, findings, conclusions, and recommendations expressed in this publication/program/exhibition are those of the author(s) and do not necessarily reflect the views of the U.S. Department of Justice.*

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[1]  This practice advisory was authored by the National Crime Victim Law Institute (special thank you to Terry Campos for her contributions) and Kelly Byrne, Staff Attorney at ASISTA, with valuable input from Cristina Velez, Legal and Policy Director at ASISTA. This practice advisory is intended for authorized legal counsel and is not a substitute for independent legal advice provided by legal counsel familiar with a client's case. Content is current as of date of writing. It is your responsibility to ensure content is up to date.

[2] *See* INA §§ 101(a)(15)(U) (crime victimization and law enforcement cooperation requirements), 214(p)(6) (duration of U Nonimmigrant Status generally cannot exceed 4 years).

[3] INA § 101(a)(15)(U)

[4] *See* INA § 212(d)(14) (contemplates a waiver for inadmissible petitioners), 8 C.F.R. § 214.14(c)(2)(iv) (states a waiver request is required initial evidence for an inadmissible petitioner).

[5] INA § 214(p)(1)

[6] INA § 101(a)(15)(U)(iii)
[7] INA § 212(d)(14). The only inadmissibility ground that cannot be waived for U petitioners and derivatives is INA § 212(a)(3)(E) (participation in torture, genocide, or extrajudicial killing at any time, or participation in Nazi persecution from March 23, 1933 through May 8, 1945).
[8] *Cf.*, *e.g.*, INA § 245(h) (Special Immigrant Juveniles applying to adjust status cannot have as many inadmissibility grounds waived as U petitioners).
[9] *See* 8 C.F.R. § 214.14(c)(1)(i)-(ii) (principals), (f)(2)(i)-(ii) (derivatives). USCIS has exclusive jurisdiction over U Nonimmigrant Status petitions. See 8 C.F.R. 214.14(c)(1)
[10] *See* 8 C.F.R. §§ 245.2(a)(1) (stating USCIS has jurisdiction over adjustment of status unless the Immigration Court has jurisdiction) and 1245.2(a)(1) (listing many instances when an Immigration Judge has "exclusive jurisdiction" over adjustment of status, including many noncitizens who are in removal proceedings).
[11] *See* INA §§ 245(m) (adjustment of status for U nonimmigrants) and 316 (listing requirements for naturalization, with no indication that § 245(m) adjustment is excluded from naturalization eligibility).
[12] ASISTA recommends consulting with the Coalition to Abolish Slavery and Trafficking ("CAST") for expert guidance on T Nonimmigrant Status and T Adjustment of Status.
[13] *See* INA §§ 101(a)(15)(T) (trafficking victimization requirement), 214(o)(7)(A) (duration of T Nonimmigrant Status generally cannot exceed four years).
[14] As defined in 22 U.S.C. § 7102.
[15] INA §§ 101(a)(15)(T) (T nonimmigrant status requirements), 212(d)(13) (allows for a waiver if a T nonimmigrant is inadmissible), 8 C.F.R § 214.204(d) (inadmissibility waiver form is required for inadmissible T applicants).
[16] *See* INA § 101(a)(15)(T)(ii)(III) (T Nonimmigrant principal applicants can include the following additional family members as derivatives if the family member "faces a present danger of retaliation" because of the principal applicant's escape from trafficking or law enforcement cooperation: any parent or unmarried sibling under 18, regardless of the principal applicant's age, as well as any adult or minor child of a derivative).
[17] *Compare* INA § 214(p)(1) (contains U Nonimmigrant law enforcement certification requirement), *with* 214(o) (contains no law enforcement certification requirement for T Nonimmigrant Status).
[18] *See* 3 USCIS-PM B.2(D)(4)
[19] *See id*. ("An applicant who has never had contact with an LEA regarding the victimization associated with the acts of a severe form of trafficking in persons is not eligible for T nonimmigrant status unless the applicant qualifies for the age-based exemption or trauma-based exception.")
[20] 8 C.F.R. § 214.202(c)(1)
[21] INA § 101(a)(15)(T)(i)(III)(bb)
[22] *See* INA § 212(d)(13)(B) ("In addition to any other waiver that may be available under this section…"). Another waiver available under § 212 is INA § 212(d)(3), which is adjudicated using the factors in *Matter of Hranka*, 16 I&N Dec. 491 (BIA 1978). The *Hranka* factors are: "the risk of harm to society if the applicant is admitted…the seriousness of the applicant's prior immigration law, or criminal law, violations, if any…[and] the nature of the applicant's reasons for wishing to enter the United States." *Hranka,* 16 I&N Dec. at 492.
[23] INA § 212(d)(13)(B)(ii)
[24] 8 C.F.R. § 214.204(b)(1)(i) (principal applicants), 214.211(b)(2)(i) (derivatives). USCIS has exclusive jurisdiction over T Nonimmigrant Status applications. *See* 8 C.F.R. § 214.204(a)
[25] INA §§ 245(l) (adjustment of status for T nonimmigrants) and 316 (listing requirements for naturalization, with no indication that 245(l) adjustment is excluded from naturalization eligibility).
[26] *Brady v. Maryland*, 373 U.S. 83 (1963)
[27] Select cases involving requests for U and T Visa filings are summarized in *Case Law Overview: How Courts Address the Use of Crime Victims' Immigration Information in Criminal Cases*, (Nat'l Crime Victim Law Inst., Portland, Or.), 2017, https://law.lclark.edu/live/files/25185-ncvli-newsletter-how-courts-address-the-use-of.
[28] *Ten Common Victims' Rights*, (Nat'l Crime Victim Law Inst., Portland, Or.), 2023, https://ncvli.org/10-common-victims-rights-2023/.
[29] Crime victims have a federal constitutional right to privacy, *See Whalen v. Roe*, 429 U.S. 589, 600 (1977)(recognizing that the United States Constitution provides a right to personal privacy, which includes an "individual interest in avoiding disclosure of personal matters"), and a Fourth Amendment right against

unreasonable searches and seizures that is implicated by court orders compelling disclosure of the victim's privileged records. *See, e.g., Carpenter v. U.S.*, 138 S. Ct. 2206, 2221 (2018) (finding a violation of the Fourth Amendment where the cell phone location records were acquired pursuant to court orders under the Stored Communications Act); *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 33–34 (1984) (recognizing a trial court order prohibiting disclosure of discovered information before trial is state action that "implicates the First Amendment rights of the restricted party"); *Shelley v. Kraemer*, 334 U.S. 1, 14-19 (1948) (observing that "the action of the States to which the [Fourteenth] Amendment has reference, includes action of state courts and state judicial officials");18 U.S.C. § 3771 (providing statutory victims' rights).

[30] This includes the victim's immigration or victim's rights attorney. *See, e.g.*, 18 U.S.C. § 3771(d)(1)(providing that the victim's lawful representative may assert the crime victim's rights); Ariz. Rev. Stat. Ann. § 13-4437(A)(same); Cal. Const., art. I, § 28(c)(1)(same); Fla. Const. art. I, § 16(c)(same); 725 Ill. Comp. Stat. Ann. 120/4(d)(same); Md. Rule 1-326(a)(same); Ohio Rev. Code Ann. § 2930.19(A)(1)(same).

[31] 8 C.F.R. § 214.14(c)(2) (U Visa)

[32] *See* USCIS Form I-918, *Petition for U Nonimmigrant Status*, available online at http://www.uscis.gov/files/form/i-918.pdf (last accessed June 15, 2024); USCIS Form I-914, *Petition for T Nonimmigrant Status*, available online at http://www.uscis.gov/files/form/i-914.pdf (last accessed June 15, 2020).

[33] *See Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215, 273 (2022) (describing the right to privacy as encompassing two components – "the right to shield information from disclosure and the right to make and implement important personal decisions without governmental interference"); *Whalen v. Roe*, 429 U.S. 589, 600, 97 S. Ct. 869, 877, 51 L. Ed. 2d 64 (1977)(recognizing that the United States Constitution provides a right to personal privacy, which includes an "individual interest in avoiding disclosure of personal matters").

[34] *See, e.g.*, Ariz. Const. art. II, § 8 ("No person shall be disturbed in his private affairs, or his home invaded, without authority of law."); Cal. Const. art. I, § 1 ("All people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety, happiness, and privacy."); Fla. Const. art. I, § 23 ("Every natural person has the right to be let alone and free from governmental intrusion into the person's private life except as otherwise provided herein…"); Ill. Const. art. I, § 6 ("The people shall have the right to be secure in their persons, houses, papers and other possessions against unreasonable searches, seizures, invasions of privacy or interceptions of communications by eavesdropping devices or other means…"); La. Const. Ann. art. I, § 5 ("Every person shall be secure in his person, property, communications, houses, papers, and effects against unreasonable searches, seizures, or invasions of privacy."); Mont. Const. art. II, § 10 ("The right of individual privacy is essential to the well-being of a free society and shall not be infringed without the showing of a compelling state interest.").

[35] *See, e.g.*, 18 U.S.C.A. § 3771(a)(8)(affording victims "[t]he right to be treated … with respect for the victim's . . . privacy."); N.D. Const. art. I, § 25(1)(f) (affording victims "[t]he right to privacy, which includes the right to refuse an interview, deposition, or other discovery request made by the defendant, the defendant's attorney, or any person acting on behalf of the defendant, and to set reasonable conditions on the conduct of any such interaction to which the victim consents"); S.D. Const. art. VI, § 29(6) (affording victims "[t]he right, upon request, to privacy, which includes the right to refuse an interview, deposition or other discovery request, and to set reasonable conditions on the conduct of any such interaction to which the victim consents"); Wis. Const. art. I, § 9m(2)(b) (affording victims the right "[t]o privacy"); *see also* Va. Code Ann. § 19.2-11.01(A) (stating that one of the primary purposes of the state's victims' rights laws is to ensure that victims' "privacy is protected to the extent permissible under law").*See, e.g.*, Cal. Const. art. I, § 28(b)(1) (affording victims the right "[t]o be treated with fairness and respect for [the victim's] privacy and dignity . . . throughout the criminal or juvenile justice process"); Idaho Const. art. I, § 22(1) (affording victims the right "[t]o be treated with fairness, respect, dignity and privacy throughout the criminal justice process"); Ill. Const. art. I, § 8.1(a)(1) (affording victims "[t]he right to be treated with fairness and respect for their dignity and privacy . . . throughout the criminal justice process"); Ky. Const. § 26A (affording victims "the right to fairness and due consideration of the crime victim's safety, dignity, and privacy"); Mich. Const. art. I, § 24(1) (affording victims"[t]he right to be treated with fairness and respect for their dignity and privacy throughout the criminal justice process"); N.H. Rev. Stat.

Ann. § 21-M:8-k(II)(a) (affording victims "[t]he right to be treated with fairness and respect for the victim's safety, dignity, and privacy throughout the criminal justice process"); N.M. Stat. Ann. § 31-26-4(A) (affording victims the right to "be treated with fairness and respect for the victim's dignity and privacy throughout the criminal justice process"); Nev. Const. art. I, § 8A(1)(a) (affording victims the right "[t]o be treated with fairness and respect for his or her privacy and dignity, and to be free from intimidation, harassment and abuse, throughout the criminal or juvenile justice process"); N.M. Const. art. II, § 24(A)(1) (affording victims of enumerated crimes "the right to be treated with fairness and respect for the victim's dignity and privacy throughout the criminal justice process"); Ohio Const. art. I, § 10a(A)(1) (affording victims the right "to be treated with fairness and respect for the victim's safety, dignity and privacy"); Okla. Const. art. II, § 34(A) (affording victims the right "to be treated with fairness and respect for the victim's safety, dignity and privacy"); Tex. Const. art. I, § 30(1) (affording victims "the right to be treated with fairness and with respect for the victim's dignity and privacy throughout the criminal justice process"); Okla. Stat. Ann. tit. 21, § 142A-2(A)(2) (affording victims the right to "be treated with fairness and respect for the safety, dignity and privacy of the victim").

[36] *See, e.g.*, Fed. R. Evid. 412 (rape shield statute); 34 U.S.C.A. § 12321 (confidentiality of abused person's address).

[37] *See, e.g.*, Ariz. Const. art. II, § 2.1(A)(5) (affording victims the right "[t]o refuse [a]. . .discovery request by the defendant, the defendant's attorney, or other person acting on behalf of the defendant"); N.D. Const. art. I, § 25(1)(f) (affording victims "[t]he right to privacy, which includes . . . discovery request made by the defendant, the defendant's attorney, or any person acting on behalf of the defendant"); Ohio Const. art. I, § 10a(A)(6) (affording victims "except as authorized by section 10 of Article I of this constitution, to refuse . . . discovery request made by the accused or any person acting on behalf of the accused"); Or. Const. art. I, § 42(1)(c) (affording victims "[t]he right to refuse . . . discovery request by the criminal defendant or other person acting on behalf of the criminal defendant provided, however, that nothing in this paragraph shall restrict any other constitutional right of the defendant to discovery against the state"); S.D. Const. art. VI, § 29(6) (affording victims "[t]he right, upon request, to privacy, which includes the right to refuse . . . discovery request"); Wis. Const. art. I, § 9m(L) (affording victims the right "[t]o refuse … discovery request made by the accused or any person acting on behalf of the accused").

[38] *See Ten Common Victims' Rights*, supra note 28, at 2-3.

[39] Cambridge dictionary https://dictionary.cambridge.org/us/dictionary/english/fair

[40] *See* Duane Rudolph, *Dignity and the Promise of Conscience*, 71 Clev. St. L. Rev. 305, 307-29 (2023) (discussing the history of dignity in American law); Mary Margaret Giannini, *The Procreative Power of Dignity: Dignity's Evolution in the Victims' Rights Movement*, 9 Drex. L. Rev. 43 (2016) (discussing the history and contemporary capacity of "dignity" as a right)

[41] *Id*. at 66-67.

[42] *See* Rudolph, 71 Clev. St. L. Rev. at 308 ("The dignity of the human individual means that a human being is also to be respected, among other attributes, by virtue of that individual's inalienable humanity.").

[43] Some jurisdictions protect against intimidation and harassment. *See, e.g.*, Ariz. Const. art. II, § 2.1(A)(1); Cal. Const. art. I, § 28(b)(1); Colo. Rev. Stat. Ann. § 24-4.1-302.5(1)(a); Fla. Const. art. I, § 16(b)(2); Ill. Const. art. I, § 8.1(a)(1); Ind. Code Ann. § 35-40-5-1(2); Kan. Stat. Ann. § 74-7333(a)(7); Mo. Ann. Stat. § 595.201(2)(9); Nev. Const. art. I, § 8A(1)(a); N.J. Stat. Ann. § 52:4B-36(c); Tenn. Const. art. I, § 35(2); Utah Const. art. I, § 28(1)(a). This right may be asserted if it appears that defendant's request for the visa application is done to intimidate or harass the victim.

[44] *See Ten Common Victims' Rights*, *supra* note 28, at 6.

[45] *See*, Lawrence Powell, The Psychology of Privacy: Why Do We Value It? (Sept. 2023) https://medium.com/@th3Powell/the-psychology-of-privacy-why-do-we-value-it-677d74d42689#:~:text=The%20Social%20Benefits&text=Privacy%20allowed%20individuals%20to%20process,the%20cohesiveness%20of%20the%20group ("[U]nauthorized access to personal information . . . can inflict emotional and psychological harm. … Individuals who have been victims of privacy [violations] may suffer from anxiety, depression, and a loss of trust in the institutions responsible for safeguarding their information. The sense of powerlessness that accompanies such breaches can be psychologically distressing and may erode one's overall sense of security."); *Ex parte Fairchild-Porche*, 638 S.W.3d 770, 783 (Tex. App. 2021) (noting that violations of privacy that are sexual in nature is intrinsically harmful and can cause "harassment, job loss, and suicide").

[46] *See Weatherford v. Bursey,* 429 U.S. 545, 559 (1977) ("There is no general constitutional right to discovery in a criminal case, and Brady did not create one[.]").

[47] *See Pennsylvania v. Ritchie*, 480 U.S. 39, 52 (1987) ("If we were to adopt this broad interpretation of *Davis [v. Alaska*], the effect would be to transform the Confrontation Clause into a constitutionally compelled rule of pretrial discovery. Nothing in the case law supports such a view.") (plurality opinion); *id.* at 56-57 (majority opinion) (recognizing that the Court "has never squarely held that the Compulsory Process Clause guarantees the right to [pretrial discovery]" and declining to reach the issue; but concluding that the Due Process Clause could provide the basis for the requested discovery in that case because, inter alia, a government agency and not a third party had possession or control of the records at issue).

[48] *See, e.g.*, *State v. Marroquin-Aldana*, 2014 ME 47, ¶ 32, 89 A.3d 519, 528 (finding no error in quashing defendant's subpoena for the victim's U visa file despite his claim that it was "critical to his ability to impeach [the victim] and develop her motive to fabricate" because defendant failed to show what specific information the application would contain that would be relevant to his defense and was able to "vigorously" cross-examine the victim regarding her immigration issues and her motive to fabricate in order to resolve those issues).

[49] *See, e.g.*, *Ramirez v. Marsh*, Nos. S-1-SC-39966, S-1-SC-40114 (N.M. May 7, 2024) (opinion pending) (granting writs of superintending control and ordering trial courts to reconsider and grant victims' motions to quash subpoenas compelling the production of T or U-Visa nonimmigrant status applications and related materials, to compel the return or destruction of any visa materials previously produced, and to prohibit further production or use of any such related materials in future proceedings); *Gomez v. State*, 245 So.3d 950 (Fla. Dist. Ct. App. 2018) (finding no Brady violation for the State's failure to produce impeaching evidence of the victim's U Visa application where the State neither had possession of the visa application nor did it have control over it, and it was equally available to the defense, who knew about it and could have subpoenaed the application).

[50] *Arizona v. United States*, 567 U.S. 387, 394 (2012).

[51] *See* 8 U.S.C. § 1367(a)(2) (prohibiting federal officials in any case to "permit use by or disclosure to anyone (other than a sworn officer or employee of the Department, or bureau or agency thereof, for legitimate Department, bureau, or agency purposes) of any information which relates to an alien who is the beneficiary of an application for relief [via U or T filing]"); 8 U.S.C. § 1367(b) (establishing eight specific exceptions to the nondisclosure).

[52] 8 U.S.C. § 1367(b).

[53] *See* Arizona, 567 U.S. at 299 (finding that absent an express preemption of state law in the federal statute, state laws are preempted when the state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress"); "In discerning [Congress'] purpose, courts look to whether Congress has expressly preempted state law and, in the absence of express preemption, to whether such a purpose can be implied from the structure and purpose of the federal legislation in question." *Herrera*, 2014-NMCA-003, ¶ 7 (citing *Gade v. Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 96, 98, 112 S.Ct. 2374, 120 L.Ed.2d 73 (1992)).

[54] *See* V*ictims of Trafficking And Violence Protection Act of 2000*, PL 106–386, October 28, 2000, 114 Stat 1464 (amending statute to include the U Visa); *see also Omnibus Consolidated Appropriations Act*, 1997, PL 104–208, September 30, 1996, 110 Stat 3009 (creating the (b)(1)-(4), the first four exceptions to nondisclosure); *Balanced Budget*, PL 105–33, August 5, 1997, 111 Stat 251 (adding (b)(5), the fifth exception to nondisclosure).

[55] *Violence Against Women and Department Of Justice Reauthorization Act of 2005*, PL 109–162, January 5, 2006, 119 Stat 2960; *Violence Against Women Reauthorization Act of 2013*, PL 113-4, March 7, 2013, 127 Stat 54. In 2006, an additional exception to nondisclosure was added to the federal regulations. Dept. of Homeland Security, *New Classification for Victims of Criminal Activity; Eligibility for "U" Nonimmigrant Status*, 72 FR 53014-01 (September 17, 2007) ("In addition to disclosures to investigative agencies, DHS may have an obligation to provide portions of petitions for U nonimmigrant status to federal prosecutors for disclosure to defendants in pending criminal proceedings. This obligation stems from constitutional requirements that pertain to the government's duty to disclose information, including exculpatory evidence or impeachment material, to defendants. *See* U.S. Const. amend. V & VI; *Brady v. Maryland*, 373 U.S. 83, 87 (1963); *Giglio v. United States*, 405 U.S. 150, 154 (1972). Accordingly, this rule incorporates this requirement at new 8 CFR 214.14(e)(1)(ix).").

[56] *See* 8 U.S.C. § 1367 (b)(1)-(8).

[57] *See June Med. Servs. LLC v. Kliebert*, 158 F. Supp. 3d 473, 532 (M.D. La. 2016) (finding Congress is "presumed to know the [existing] law, including judicial interpretation of that law, when it legislates.").