The Scholar: St. Mary's Law Review on Race and Social Justice

Volume 22 | Number 1 Article 1

5-2020

What Recourse do Vulnerable Immigrants Have?: Violations of the VAWA Confidentiality Provisions and the Pursuit of an Even Playing Field

Trevor S. Gallaway
Executive Office for Immigration Review

ARTICLE

WHAT RECOURSE DO VULNERABLE IMMIGRANTS HAVE?: VIOLATIONS OF THE VAWA CONFIDENTIALITY PROVISIONS AND THE PURSUIT OF AN EVEN PLAYING FIELD

TREVOR S. GALLAWAY*

* Trevor S. Gallaway is currently an Attorney Advisor with the Executive Office for Immigration Review. Before his current position, he served as a Clinical Fellow in the Immigration and Human Rights Clinic at St. Mary's University School of Law. J.D., St. Mary's University School of Law; B.A. Psychology, Minor, Spanish, University of Oklahoma. The opinions and writings here are solely the author's and do not reflect any official policy or decision of the Executive Office for Immigration Review. The author would like to dedicate his article to M-A-A-. He would also like to thank Professor Erica Schommer for the guidance and mentorship throughout the early stages of his career. Through her mentorship, he learned to engage in diligent and creative lawyering to ensure clients receive the best representation possible. The author would also like to thank his wife for the love, support, and encouragement that has allowed him to thrive both in his professional and personal life.

INTRODUCTION

In the United States, an estimated 142 million adults experience intimate partner violence (IPV) at some point in their lives.[1] Of that 142 million, around 55 million victims (39%) experience IPV from more than one perpetrator.[2] IPV is defined as violence or aggression that occurs in a close relationship, such as a spousal relationship.[3] IPV can be expressed in various forms—including physical violence, sexual violence, stalking, or psychological aggression.[4] Victims of abuse often experience multiple forms of violence at the same time.[5] IPV is an issue that transcends racial lines, gender, and sexual orientation.[6] Further, IPV is so prevalent that the Centers for Disease Control and Prevention consider it to be a "significant public health issue" due to the "considerable societal costs."[7]

Immigrant victims of IPV are among the most vulnerable victims in the United States.[8] Much has been written to argue that immigrant victims are more vulnerable than the general population of victims due to language and cultural differences, a lack of understanding of legal rights,

1. Cora Peterson et al., *Lifetime Number of Perpetrators and Victim-Offender Relationship Status Per U.S. Victim of Intimate Partner, Sexual Violence, or Stalking*, J. INTERPERSONAL VIOLENCE 5–6 (Jan. 24, 2019), https://journals.sagepub.com/doi/pdf/10.1177/0886260518824648 [https://perma.cc/9G57-KR5L].

2. *Id.* at 5, 7.

3. CTRS. FOR DISEASE CONTROL AND PREVENTION, U.S. DEP'T OF HEALTH AND HUMAN SERVS., PREVENTING INTIMATE PARTNER VIOLENCE (2019), https://www.cdc.gov/violence prevention/pdf/ipv-factsheet508.pdf [https://perma.cc/YT5G-XZA5].

4. *See id.* (discussing the different forms of IPV).

5. *See id.* (elaborating on the many ways that victims can suffer from IPV).

6. *See* SHARON G. SMITH ET AL., NAT'L CTR. FOR INJURY PREVENTION AND CONTROL, CTRS. FOR DISEASE CONTROL AND PREVENTION, U.S. DEP'T OF HEALTH AND HUMAN SERVS., THE NAT'L INTIMATE PARTNER AND SEXUAL VIOLENCE SURVEY: 2010-2012 STATE REPORT 121 (Apr. 2017), https://www.cdc.gov/violenceprevention/pdf/NISVS-StateReportBook.pdf#page=135 [https://perma.cc/RYX3-TG4H] (providing statistics on the number of victims of IPV among race, gender, and other demographics); *see also* CTRS. FOR DISEASE CONTROL AND PREVENTION, *supra* note 3 (providing statistics on the number of victims of intimate partner violence among men and women).

7. *See* CTRS. FOR DISEASE CONTROL AND PREVENTION, *supra* note 3 (discussing the percentage of men and women who suffer physical injury due to IPV as well as discussing the percentage of homicides that are linked to IPV).

8. *See* Mariela Olivares, *Battered by Law: The Political Subordination of Immigrant Women*, 64 AM. U. L. REV. 231, 233, 235–39 (2014) (explaining the factors that indicate why immigrant victims of IPV are the most vulnerable class of victims).

and a lack of financial or community support.[9] Taking it a step further, immigrant victims who are members of the LGBTQ+ community and in an abusive relationship may be even more vulnerable.[10] Many immigrants hail from countries where being openly queer, or even suspected of being so, is taboo to the point that they face persecution and in some circumstances death.[11]

Immigrant abusers often employ the same psychologically aggressive tactics to intimidate and control their victims.[12] One common threat abusers utilize on immigrants is reporting them to immigration enforcement for deportation.[13] This threat fills victims with fear as they consider the possibility of being separated from the life they know, potentially their children, and face removal to a country in which they are likely to be in danger.[14] Although this threat often results in the abuser achieving his or her goal of controlling the victim, it is often an empty threat.[15] However, what happens when an abuser actually follows

9. *Cf. id.* at 236 ("Battered immigrants frequently face additional layers of isolation").

10. *See id.* at 261–62 (describing how VAWA funds have provided benefits to specialized groups of marginalized people like immigrants, the LGBTQ+ community, and Native American victims of violence).

11. *See* Jose A. Del Real, '*They Were Abusing Us the Whole Way': A Tough Path for Gay and Trans Migrants*, N.Y. TIMES (July 11, 2018), https://www.nytimes.com/2018/07/11/us/lgbt-migrants-abuse.html [https://perma.cc/HN5X-9UEL] (describing violence and persecution experienced by immigrant LGBTQ+ members in their home countries and during their migration to the United States).

12. *See* NAT'L CTR ON DOMESTIC AND SEXUAL VIOLENCE, IMMIGRANT POWER AND CONTROL WHEEL, http://endingviolence.org/files/uploads/ImmigrantWomenPCwheel.pdf [https://perma.cc/429R-AD6G] (depicting the types of abuse and privilege used to control immigrants); *see also* Roe & Jagodinsky, *Power and Control Wheel for Lesbian, Gay, Bisexual and Trans Relationships*, NAT'L DOMESTIC VIOLENCE HOTLINE, http://www.thehotline.org/wp-content/uploads/sites/3/2015/01/LGBT-Wheel.pdf [https://perma.cc/NKB5-FELS] (describing the types of abuse and intimidation used to assert power and control over LGBTQ+ persons).

13. *See* NAT'L CTR ON DOMESTIC AND SEXUAL VIOLENCE, *supra* note 12 ("Threatening to report [immigrants] to the INS to get [them] deported.").

14. *Contra* Leslye E. Orloff, *VAWA Confidentiality: History, Purpose, DHS Implementation and Violations of VAWA Confidentiality Protections*, NAT'L IMMIGRANT WOMEN'S ADVOCACY PROJECT 5, https://www.lsc.gov/sites/default/files/LSC/pdfs/10.%20%20Appendix%20IX%20%20CH%203%20SA_Confidentiality_Final.pdf [https://perma.cc/LV9T-VNCN] (detailing the creation of VAWA in 1994 and the "suspension of deportation relief" in order to aid "battered immigrant women and children" during deportation procedures).

15. *Contra* U.S. IMMIGR. AND CUSTOMS ENF'T, U.S. DEP'T OF HOMELAND SEC., ICE HSI TIP LINE GENERATES INVESTIGATIVE LEADS (Jan. 18, 2012), https://www.ice.gov/news/releases/

through with his or her threat and reports their victim to immigration?[16] Does the Federal Government have a responsibility to protect immigrants if it has reason to suspect they are victims of IPV?[17] What happens when the Government fails in those duties?[18]

This article will discuss possible remedies immigrant victims may pursue to achieve justice if a government agent has overstepped his or her responsibilities.[19] Part I discusses the history of VAWA and confidentiality provisions, which were created to protect immigrant victims of domestic violence.[20] Part II discusses what circumstances constitute or could constitute a violation of the Confidentiality Provisions.[21] Part III discusses what happens when the VAWA Confidentiality Provisions have been violated.[22] This article proposes excluding evidence in removal proceedings and pursuing mandamus relief in federal court.[23] The article then concludes with recommendations for pursuing various lines of litigation.[24]

---

top-story-ice-hsi-tip-line-generates-investigative-leads [https://perma.cc/SD9K-TFCT] (stating that there were 172,500 people who reported tips to ICE in 2011).

16. *See Deportation*, USAGOV (Oct. 9, 2018), https://www.usa.gov/deportation [https://perma.cc/VJ34-4VES] ("Those who come to U.S. without travel documents or with forged documents may be deported quickly without an immigration court hearing under an order of expedited removal. Others may go before a judge in a longer deportation (removal) process.").

17. *See* MICHAEL RUNNER ET AL., INTIMATE PARTNER VIOLENCE IN IMMIGRANT AND REFUGEE COMMUNITIES: CHALLENGES, PROMISING PRACTICES AND RECOMMENDATIONS, FAMILY VIOLENCE PREVENTION FUND FOR THE ROBERT WOOD JOHNSON FOUND. 13–14 (Mar. 2009), https://www.futureswithoutviolence.org/userfiles/file/ImmigrantWomen/IPV_Report_March_2009.pdf [https://perma.cc/35GN-4NU2] (describing the obstacles programs working to end immigrant partner violence must overcome).

18. *See id.* at 12 (listing language proficiencies, disparities in economic and social resources, social isolation, and immigration status as factors impacted by IPV).

19. *See generally id.* (describing the numerous obstacles that immigrants face when seeking protection in the litigation system).

20. *See infra* Part I; *see generally* Lisa N. Sacco, *The Violence Against Women Act (VAWA): Historical Overview, Funding, and Reauthorization*, CONG. RES. SERV. 3 (Apr. 23, 2019), https://crsreports.congress.gov/product/pdf/R/R45410 [https://perma.cc/2JFR-NNTD] (explaining the ways in which the VAWA Confidentiality Provisions help protect victims).

21. *See infra* Part II; *see generally* Sacco, *supra* note 20 at 28–29 (explaining what is classified as a VAWA confidentiality violation).

22. *See infra* Part III; *see generally* Sacco, *supra* note 20 (discussing the remedies for violations of the VAWA Confidentiality Provisions).

23. *See infra* Part III, A.

24. *Infra* Part V.

I. VAWA AND ITS CONFIDENTIALITY PROVISIONS

Abusers using a victim's immigration status against them for control has been a widespread issue for decades.[25] In 1994, Congress sought to address this prevalent issue by passing VAWA.[26] VAWA created avenues for certain victims to gain lawful status independent of their abusive spouses and provided a way for victims to combat their abusers—using immigration law as a weapon.[27] When Congress initially passed VAWA, it also created confidentiality protections that could be considered rudimentary.[28] Congress recognized the risk to domestic violence victims when their abusers are able to locate them.[29] Consequently, Congress created confidentiality protections to ensure shelters and domestic violence service centers could not disclose who was receiving services at their locations.[30] Programs that violated this protection risked losing state or federal funding.[31] The main purpose of these initial protections was to ensure that abusers would not be able to track their victims' locations and further harm them.[32]

While Congress recognized the need to create confidentiality protections, it also recognized the limitations of their initial protections.[33] Thus, it commissioned a study to identify the means in which an abuser

25. *See* Isabela Dias, *Why Immigrants Need the Violence Against Women Act*, SLATE (Oct. 10, 2018), https://slate.com/news-and-politics/2018/10/violence-against-women-act-immigration-domestic-violence.html [https://perma.cc/QT4U-RSBJ] (describing the vulnerabilities female immigrants face and how VAWA can help them escape the grasp of their abusers).

26. *See VAWA Pro Bono Manual,* NAT'L IMMIGRANT JUST. CTR. 10 (May 2019), https://immigrantjustice.org/for-attorneys/legal-resources/file/nijc-pro-bono-manual-representation-vawa-petitions [https://perma.cc/3EZU-M3YC] (explaining how VAWA can be used to protect immigrant women).

27. *See id.* at 19 (describing the two ways the abused can use VAWA to legalize their status without the knowledge of their abusers).

28. *See* Orloff, *supra* note 14 at 3 (describing the confidentiality statement that was created within VAWA).

29. *See id.* (addressing the gaps in the victim protection process and amending VAWA with victim protection provisions).

30. *See id.* at 2 (discussing the history and importance of keeping victims' status confidential).

31. *See id.* (discussing the penalties for shelters or organizations that disclose the information of victims against the VAWA Confidentiality Provisions).

32. *See id.* at 3 (explaining why the confidentiality of victims of domestic abuse is crucial).

33. *See generally id.* (detailing the Congressional intent behind VAWA and similar immigrant protections).

might obtain information and reveal a victim's location to deportation officials.[34] Congress further instructed the Attorney General to "evaluate the need for additional confidentiality protections."[35] By recognizing the limitations of the original confidentiality protections, Congress sought to improve the existing protections of battered immigrant victims in section 384 of the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) of 1996.[36] Congress made additional improvements in the VAWA Reauthorization Acts of 2000 and 2005.[37]

These later provisions included additional confidentiality protections for immigrant victims.[38] Specifically, the VAWA Confidentiality Provisions created three types of protections for immigrant victims.[39] First, the "nondisclosure provisions" prevent abusers from obtaining and using information provided to various governmental agencies, which allows an abuser to locate or harm the victim.[40] Second, "source limitations" prevent immigration enforcement agents from using information provided solely by an abusive spouse—or his or her family members—to make adverse determinations against the immigrant.[41] Lastly, "enforcement limitations" prevent immigration enforcement agents from carrying out enforcement actions at particular locations deemed to be safe locations for immigrant victims.[42]

In an effort to ensure enforcement of the VAWA Confidentiality Protections, Congress further indicated there should be sanctions for

34. *See id.* at 3 (stating that Congress commissioned a study to assess VAWA's Confidentiality Provisions' weaknesses because abusers can find ways to circumvent the implemented confidentiality provisions).

35. *See id.* (stating Congress instructed the Attorney General to conduct its own study evaluating confidentiality concerns).

36. H.R. REP. NO. 109–233, at 574–75 (2005); *see* Orloff, *supra* note 14 at 3 (expanding on Congress' changes to the confidentiality provision for immigrant victims).

37. *See generally* Violence Against Women Act of 2000, H.R. 1248, 106th Cong. (2000) (reauthorizing 1996 VAWA and updating provisions such as the victim services); Violence Against Women Act of 2005, S. 1197, 109th Cong. (2005) (reauthorizing 2000 VAWA).

38. *See* Violence Against Women Act of 2005, S. 1197, 109th Cong. § 827 (2005) (stating the various provisions that provide additional confidentiality protections).

39. *See* Orloff, *supra* note 14 at 3 (providing protection to immigrant victims through various outlets).

40. *Id.*

41. *Id.*

42. *Id.*

violations.[43] Congress created disciplinary actions against officials who violate the provisions of IIRIRA.[44] At the same time, it established a fine for each violation executed by a government official.[45]

Additionally, Congress established that "removal proceedings filed in violation of section 384 of IIRIRA shall be dismissed by immigration judges."[46] Potential violations by government agents of the confidentiality provisions can be reported to the Department of Homeland Security (DHS) Office of Civil Rights and Civil Liberties, which was specifically created to handle and investigate such complaints.[47] If a violation is found, the agent may face disciplinary action, and he or she may be fined up to $5,000 per violation.[48] First, the office determines if a violation has actually occurred, and then determines which action is best to address the violation.[49]

II. VIOLATIONS OF THE VAWA CONFIDENTIALITY PROVISIONS

Violations of the VAWA Confidentiality provisions are serious infractions—as demonstrated by Congress's passing of disciplinary procedures for addressing violations.[50] All advocates and government officials should take any violation, and even the possibility of a violation, seriously.[51] As mentioned in Leslye Orloff's comprehensive overview of the confidentiality provisions:

> "[V]iolations compromise the trust that immigration victims have in the efficacy of services that exist to help them. They lead federal officials to

43. *See id.* at 11 (explaining how failure to comply with the VAWA Confidentiality Provisions could result in a fine or penalty).

44. *See id.* (stating violations could cost up to $5000 for each violation).

45. *Id.*

46. H.R. REP. NO. 109–233, at 121 (2005).

47. U.S. DEP'T OF HOMELAND SEC., VIOLENCE AGAINST WOMEN ACT (VAWA) CONFIDENTIALITY PROVISIONS AT DHS (Apr. 18, 2016), https://www.dhs.gov/violence-against-women-act [https://perma.cc/Q2H5-4Y79].

48. Penalties for Disclosure of Information, 8 U.S.C. § 1367(c) (2018).

49. *See* Orloff, *supra* note 14 at 14 ("Advocates, attorneys, and justice system and immigration professionals need to be aware of the various activities that constitute violations of VAWA confidentiality.").

50. *Id.*; H.R REP. NO. 109–233, at 34 (2005).

51. *See* Orloff, *supra* note 14 (highlighting the dangers that can happen if the VAWA Confidentiality Provisions are violated and not taken serious by advocates, attorneys, and other professionals in the immigration and justice systems).

unknowingly help crime perpetrators to retaliate, harm and manipulate victims or elude or undermine criminal prosecutions."[52]

A. Violations of Nondisclosure Provisions

The nondisclosure provisions were designed to prevent the release of information contained in a VAWA immigration file.[53] For example, a government official cannot release information of the existence of a VAWA application nor any information regarding the underlying facts of the application.[54] These provisions, like all the provisions, apply to information provided to the DHS, the Department of State (DOS), and Department of Justice (DOJ).[55] DHS has taken the position that information should not be shared or released in family courts, criminal courts, or with law enforcement.[56] The ultimate goal of this provision is to prevent the disclosure of information that an abuser could use to locate the victim.[57]

An Immigration and Customs Enforcement (ICE) Trial Attorney would violate this provision by giving an immigrant's A-file[58] to the abuser and allowing the abuser to make copies (including a copy of the application and underlying evidence).[59] In this example, a scenario that actually happened, ICE agreed to join in a motion to reopen the immigrant's previous removal case.[60] This violation can be extremely

52. *Id.*

53. *See id.* at 2 (previewing the reasons and purpose of the confidentiality protections for immigrants).

54. *Id.* at 14.

55. *Id.*

56. H.R REP. NO. 109–233, at 43 (2005).

57. *See id.* (describing how access to this sensitive information will enable abusers to locate their victims); *see also* Orloff, *supra* note 14 at 15 (supporting Congressional findings that provides protections to victims from abusers who seek information to track and locate their victims).

58. *See* U.S CITIZENSHIP AND IMMIGR SERV., U.S. DEP'T OF HOMELAND SEC., A FILES NUMBERED BELOW 8 MILLION (Feb. 9, 2016), https://www.uscis.gov/history-and-genealogy/genealogy/files-numbered-below-8-million [https://perma.cc/C2FQ-JR4P] (explaining that an "A-file" is an immigrant's file identified by their Alien Registration Number and contains all of the immigrant's information such as applications, visas, and photographs).

59. *See generally* U.S. DEP'T OF HOMELAND SEC., *supra* note 47 (outlining the confidentiality rules and its impacts on DHS).

60. *See* Orloff, *supra* note 14 at 17–18 (showing an example of how dissemination of such information could lead an abuser to their victim); *see, e.g.*, Hannah Rappleye et al., *Immigration Crackdown Makes Women Afraid to Testify Against Abusers, Experts Warn*, NBC (Sept. 22, 2018),

dangerous to the immigrant.[61] If the immigrant has moved out of the abuser's home and is now living in a safe place, immigration applications contain information regarding the current address of the immigrant.[62] This can lead to the abuser directly locating their victim when they otherwise may not have known where they were.[63] If an abuser locates their victim, it could possibly turn into a deadly scenario for the victim—there are many examples of abusers killing their victims who have moved out or tried moving out.[64]

B. Violations of the Prohibited Source Provisions

Prohibited source violations go to the heart of this article.[65] The government is strictly prohibited from relying on information provided by an abusive spouse in making adverse determinations regarding the immigrant victim.[66] This is true regardless of whether the immigrant has applied for VAWA relief.[67] As soon as a government official has reason

---

https://www.nbcnews.com/politics/immigration/immigration-crackdown-makes-women-afraid-testify-against-abusers-experts-warn-n908271 [https://perma.cc/BDC8-WXKQ] (describing a situation where ICE agents arrested a mother and son after appearing in court for the mother's abusive fiancé's arrest, which her attorney suspects ICE agents were tipped off by her fiancé).

61. *Cf.* Orloff, *supra* note 14 at 18 (providing the dangerous ramifications of disclosure of an immigrant's documents, and how such disclosure can prevent an immigrant victim from hiding from their abuser).

62. *See, e.g.*, U.S. CUSTOMS AND IMMIGR. SERVS., U.S. DEP'T OF HOMELAND SEC. THINKING ABOUT APPLYING FOR NATURALIZATION (Aug. 2017), https://www.uscis.gov/files/form/G-1151.pdf [https://perma.cc/BU2B-TG2D] (explaining how the filing of certain confidential information can endanger a victim from their abuser).

63. Orloff, *supra* note 14 at 18.

64. *See id.* at 17–19 (giving two case examples of when the abuser was successfully able to locate their victims even though both victims left the abused relationships, but the release of such sensitive information to the abuser can place people's lives in danger).

65. *Id.* at 3.

66. *See id.* (stating the coverage of the provision regarding information provided by the abuser); *see also* Penalties for Disclosure of Information, 8 U.S.C. § 1367(a)(1)(a) (2018) (prohibiting the federal government from making determinations based on information from the abusive spouse).

67. *See* Penalties for Disclosure of Information, 8 U.S.C. § 1367(a)(1)(f) (2018) (stating the provision covers applicants of VAWA); *see also* Memorandum from Paul Virtue, Acting Exec. Assoc. Comm'r, to All INS Employees (May 5, 1997) http://niwaplibrary.wcl.american.edu/wp-content/uploads/2015/pdf/CONF-VAWA-Gov-INSConfVAWAMemo-05.05.1997.pdf [https://perma.cc/ZV4M-CFKQ] [hereinafter *Memorandum to INS Employees*] (extending coverage to applicants of VAWA relief); Orloff, *supra* note 14 at 3 (providing coverage for applicants of VAWA relief).

to believe the immigrant has been a victim of abuse, the government official is required to take no further action on the information provided by the potential abuser.[68] A government official may discover this information, for example, if there are police reports filed by the immigrant detailing IPV and the official can access the reports.[69]

A government official would be in violation of this provision[70] if they rely on an abuser's information to initiate removal proceedings or take any other adverse action against the immigrant—such as showing up to family court to arrest the victim.[71] Obtaining more information, such as affidavits and statements from the abuser or the abuser's friends and family, would be another violation in and of itself.[72]

Taking it a step further and introducing that information into evidence in an immigrant's removal proceedings would also be a violation.[73] This further puts DOJ employees at risk of a VAWA confidentiality violation.[74] For example, if an immigration judge permits the information to come into the record of proceedings, he or she may also be found to be in violation of the confidentiality provisions and may be held liable for the violation.[75]

---

68. *See* Orloff, *supra* note 14 at 6 (prohibiting government reliance on information provided by the abuser).

69. *See id.* at 16 (explaining that a battered immigrant's attorney should move to terminate removal proceedings when the proceedings are based solely on statements by her abuser, but that relevant facts of abuse may be introduced by police reports).

70. *See* Penalties for Disclosure of Information, 8 U.S.C. § 1367(c) (2018) (stating the penalties for violating the disclosure provisions).

71. *See* Orloff, *supra* note 14 at 19 (providing an example of an abuser reporting a sham marriage and an overstayed visa, and then officials subsequently violated the statute by relying on such information).

72. *See id.* at 18 (stating government consideration of an abuser mailing copies of a relief application to mutual friends and acquaintances was in violation of the statute).

73. *See id.* at 56 (stating the intent of Congress' enacting of the statute was to keep all information confidential regardless of whether the information resides with the government).

74. *See id.* at 57 (explaining that if petitioner filed for protected status under VAWA and held confidential information, the government could not "in turn request VAWA protected information from DHS or other federal agencies, government officials could not disclose that information under any circumstances without violating VAWA confidentiality requirements and subjecting themselves to sanctions.").

75. *See* Penalties for Disclosure of Information, 8 U.S.C. § 1367(b)(3) (2018) (indicating that any action by a judge in a civil or criminal court proceeding which seeks or orders disclosure of information that is not accessible from DHS would constitute coercion and would therefore be contrary to the congressional intent of VAWA).

Initiating removal proceedings against an immigrant victim can have dire consequences for the victim.[76] One aspect of removal proceedings is that immigrants are entitled to legal representation, but not at the expense of the government.[77] Thus, if an immigrant cannot afford to hire a lawyer, he or she must rely on pro bono services.[78] However, he or she may not understand or have the resources to contact and obtain help through pro bono services.[79] This leaves the immigrant unrepresented in immigration court to navigate the U.S. immigration legal system alone. What's more, immigration law is considered to be one of the most complex areas of United States law; thus, unrepresented immigrants are ill-equipped to represent themselves in removal proceedings.[80] If he or she is removed from the country, that often means they are removed from the life they know, including their children, to a country which they may have little to no experience or contacts.[81] This is a reality for some immigrants who were brought to the United States as children and grew up with no status, and then married a United States citizen, only then to be removed to a country which they have no ties to.[82] Further, there may

76. *See* Leslye E. Orloff & Janice V. Kaguyutan, *Offering a Helping Hand: Legal Protections for Battered Immigrant Women: A History of Legislative Responses*, 10 J. AM. U. J. GENDER SOC. POL'Y & L. 95, 127 (2002) (describing the harm caused to victims due to funding cuts made by Congress toward immigrant legal services).

77. *See* Kate M. Manuel, *Alien's Right to Counsel in Removal Proceedings: In Brief* (2016) (stating immigrants are not afforded government appointed counsel in removal proceedings).

78. *See id.* at 4, 10 (demonstrating the need for pro bono counsel for immigrants in removal proceedings).

79. *See* David Lash, *The Critical Need for Pro Bono Immigration Work*, ABOVE THE LAW (Dec. 8, 2016), https://abovethelaw.com/2016/12/the-critical-need-for-pro-bono-immigration-work/ [https://perma.cc/MC6F-CLQ8] (stating the difficulties immigrants face navigating a complex judicial system).

80. *See* Jill E. Family, *Murky Immigration Law and the Challenges Facing Immigration Removal and Benefits Adjudication*, 31 J. Nat'l Ass'n Admin. L. Judiciary 45, 55 (2011) ("Immigration law is indeed a labyrinth. It takes intensive study, even for law professors and seasoned lawyers, to grasp what the immigration laws are trying to say.").

81. *See* Daniel Pena, *What Happens to Deportees Back in Mexico, One Group is Offering A Hand*, NBC (Aug. 5, 2018), https://www.nbcnews.com/storyline/immigration-border-crisis/what-happens-deportees-back-mexico-one-group-offering-hand-n895786 [https://perma.cc/28UZ-C75Z] (recognizing how even though deportees are left with no one in the foreign country, there are nonprofits that help individuals get back on their feet).

82. *See id.* (reporting how one individual who was brought to the United States when he was two years old, stayed after his visa expired, earned a degree from the University of Texas San

be occasions where the immigrant would be in significantly more danger if he or she is removed to their home country—for example, if a bisexual man who married another man in the United States returned to a country that criminally charges and executes someone who has been in a homosexual relationship.[83] Therefore, a violation of this particular provision can result in more danger to the immigrant, and should be taken seriously.[84]

C. Violations of the Enforcement Limitations

The enforcement limitations are fairly simple and self-explanatory.[85] Immigration enforcement officials are prohibited from carrying out enforcement actions in various protected locations—such as victim shelters, courthouses, and family justice centers.[86] If an immigration enforcement official takes action in a protected location, the immigrant's charging document, which place the immigrant in removal proceedings, must disclose that the enforcement action took place in a protected location, and it must explain why that action does not violate the VAWA Confidentiality Provisions.[87] This protection ensures there are safe spaces for immigrants and enhances the sanctity of protection that the United States offers.[88]

Antonio, created a profitable business, was deported and vowed to prevent others from being in the same situation).

83. *See Deportation Can be a Death Sentence for LGBT Immigrants*, IMMIGR. EQUAL. (June 26, 2014), https://www.immigrationequality.org/deportation-can-be-a-death-sentence-for-lgbt-immigrants/#.Xbn4dJpKhyw [https://perma.cc/BJC7-LLL6] (explaining the harsh dangers LGBTQ+ individuals face when they are deported).

84. *See* Orloff, *supra* note 14 at 2 (describing the ways in which an organization could lose federal and state funding for violating the VAWA Confidentiality Provisions).

85. *See id.* (providing that VAWA was created to protect women from being coerced into certain situations and to prevent victims' abusers from using the immigration system as a tool to inflict harm on them).

86. *See id.* at 3. (describing instances in which the prohibition against immigration enforcement was ignored, causing Congress to strengthen its protections in these areas).

87. *See id.* (indicating how violations lead to fines and serious punishments imposed by Section 8 U.S.C. 1367 (c)).

88. *See id.* at 16 ("The law was created so abusers could not use the immigration system as a weapon against domestic violence victims.").

III. POTENTIAL REMEDIES BEYOND WHAT IS WRITTEN IN THE STATUTE

Beyond what is written in the statute, there is very little guidance on other lines of action that can be pursued to address a violation of the confidentiality protections.[89] Immigration advocates should seek to pursue more complex lines of litigation to properly balance the current unbalanced playing field.[90] Part III will undertake an analysis of two potential lines of action either in immigration court or collaterally through federal litigation.

A. Exclusion of Evidence

In the context of removal proceedings, the IIRIRA contemplates the exclusion of evidence.[91] To obtain this remedy, advocates should consider drafting a motion to exclude specific evidence, or they may include such arguments in a brief to the immigration court and argue how the immigrant qualifies for the form of relief he or she is applying for.[92] Alternatively, in the event a government attorney attempts to admit evidence at the time of trial, the advocate should be prepared to make oral arguments.[93] The arguments should mirror the "fruit of the poisonous tree" argument employed in criminal proceedings.[94]

In criminal proceedings, the Supreme Court recognized that on occasion an overzealous government official might overreach and violate

89. *See id.* at 14 (detailing the evolution of the VAWA Confidentiality Provisions to better protect abused immigrants).

90. *See Memorandum to INS Employees*, *supra* note 67 (emphasizing the importance of addressing improperly disclosed information); *see also* AM. IMMIGR. COUNCIL, MANDAMUS ACTIONS: AVOIDING DISMISSAL AND PROVING THE CASE (Mar. 2017), https://www.americanimmigrationcouncil.org/sites/default/files/practice_advisory/mandamus_actions_avoiding_dismissal.pdf [https://perma.cc/SQ9G-25GX] (providing relief for how to remedy the situation when the federal government fails to act even though it had the duty to do so).

91. *See Memorandum to INS Employees*, *supra* note 67 (educating INS employees that the violation of the VAWA Confidentiality Provisions could lead to the exclusion of evidence).

92. *See* Orloff, *supra* note 14 at 16–17 (recommending strategies for attorneys representing VAWA clients to exclude evidence from court).

93. *See id.* at 17 (indicating an advocate "should consider moving to suppress evidence that comes in from the abuser or his family members.").

94. *See* Nardone v. United States, 308 U.S. 338, 339, 341 (1939) (affirming evidence obtained as a result of an illegal action is tainted and therefore excludable).

an individual's constitutionally protected rights.[95] Thus, in an effort to incentivize police officers to protect individual rights, it created the exclusionary rule.[96] The essence of the exclusionary rule is that illegally obtained evidence must be excluded from trial.[97]

The "fruit of the poisonous tree" was later borne out of the exclusionary rule doctrine—which establishes that any evidence derived from illegally obtained evidence is "tainted" and inadmissible at trial.[98] Fourth, Fifth or Sixth Amendment violations trigger a "fruit of the poisonous tree" argument.[99] The hope in establishing the exclusionary rule was that law enforcement officers would be incentivized to honor an individual's rights so as to facilitate a constitutional criminal prosecution.[100]

In removal proceedings, a violation of the VAWA Confidentiality Provision triggers a "fruit of the poisonous tree" argument.[101] Any evidence that is obtained as a result of a violation or obtained in reliance on information from a violation is excludable.[102] Here, the advocate and immigration courts should be concerned with a government trial attorney

95. *See* Silverthorne Lumber Co. v. U.S., 251 U.S. 385, 391–92 (1920) (describing how government action can violate constitutional rights); *see also* Matter of Yau, 14 I&N Dec. 630, 641–42 (BIA 1974) (concurring opinion) ("The law realistically recognizes that on occasion some overzealous Government officials may overreach and may themselves violate constitutionally protected rights in obtaining evidence of wrongdoing on the part of others.").

96. *See* Matter of Yau, 14 I&N Dec. at 641–42 (discussing the creation of exclusionary rule).

97. *See id.* at 642 ("[T]he exclusionary rule was extended to bar not only the evidence itself unlawfully obtained, but also evidence derived from information thus illegally received.").

98. *See* Nardone, 308 U.S. at 341 (providing the accused with the opportunity to demonstrate that evidence illegally obtained in his case is being used against him).

99. *See* Matter of Yau, 14 I&N Dec. at 642 (recognizing unlawfully obtained information is fruit of the poisonous tree because it is a violation of the "alien's" constitutional rights).

100. *See* Arizona v. Evans, 514 U.S. 1, 10–11 (1995) (explaining the exclusionary rule is a judicially created remedy designed to safeguard against future violations of Fourth Amendment rights through its deterrent effect and that it was historically designed as a means of deterring police misconduct).

101. *Cf. Memorandum to INS Employees*, *supra* note 67 (illustrating how the use of any information relating to an "alien" seeking or being approved for immigrant status under VAWA is prohibited, and use of this prohibited information may trigger the "fruit of the poisonous tree" argument).

102. *See* Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRAIRA) § 384 (1996) (indicating any information given by a person subjecting someone else to extreme cruelty shall not be considered).

attempting to admit evidence provided by the abuser, or evidence obtained in reliance on such information.[103] The trial attorney may try to admit such evidence at different times during the proceeding—for example, at a master calendar hearing, a bond hearing, or at trial.[104] If a trial attorney attempts to introduce prohibited evidence, it is imperative that the advocate object and that the immigration court consider arguments that such evidence must be excluded from the evidentiary record.[105] The essence of the argument is that the immigrant's statutorily protected rights to confidentiality have been violated and therefore any evidence obtained as a result of that violation is "tainted" and must be excluded.[106]

The argument should specifically articulate that the IIRIRA realistically contemplated the possibility of the occasional overzealous immigration enforcement official overstepping his or her responsibilities and violating an immigrant's rights.[107] To protect the sanctity of the

103. *See id.* (cautioning the criminal justice system of the detrimental impact inadmissible evidence can have on expanded immigration safeguards sought to provide protection when information is derived from abusers to detain, apprehend, or attempt to remove victims of violence against women); *see also* John Conyers Jr., *The 2005 Reauthorization of the Violence Against Women Act*, 13 VIOLENCE AGAINST WOMEN 457, 463 (May 2007) (directing immigration enforcement officials to not rely on information provided by an abuser, family members, or agents to arrest or remove an immigrant victim from the United States).

104. *See generally* U.S. DEP'T OF JUSTICE, IMMIGRATION COURT PRACTICE MANUAL 63–88 (Nov. 2, 2017), https://www.justice.gov/sites/default/files/pages/attachments/2017/11/02/practicemanual.pdf [https://perma.cc/5H9G-PB4K] (explaining the scope of typical evidence presented during master calendar hearings, bond hearings, and trial).

105. *Compare* Lawn v. United States, 355 U.S. 339, 354–55 (1958) (providing an accused's right to examine and cross-examine witnesses to depict derivative use of evidence from leads and clues furnished by materials unlawfully obtained if the voir dire examination is denied by the court), *and* United States v. Giglio, 263 F.2d 410, 412–13 (2d Cir. 1959) (addressing counsel's request for voir dire examination if evidence derived from tainted sources is offered upon trial and there is potential for this evidence to be suppressed by the trial judge if it is in violation of a defendant's constitutional rights), *with* Orloff, *supra* note 14 at 16 (explaining the attorney's role in expunging the tainted evidence).

106. *See e.g.*, Silverthorne Lumber Co. v. United States 251 U.S. 385, 392 (1920) ("The essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the court, but that it shall not be used at all."); *cf.* Orloff, *supra* note 14 at 6 (highlighting the argument by Representative Schroeder that information by an abuser can be tainted if it says the victim did any sort of wrong).

107. *See* Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRAIRA) § 384 (1996) (rendering evidence obtained as a result of information or yielded by the abuser as inadmissible); *see also* Orloff, *supra* note 14 at 3 (eliminating the abuser's ability to influence the

Confidentiality Provisions, a prohibition on the use of evidence provided solely by an abuser—or evidence derived from information provided by an abuser—was created.[108] Immigration courts have a vital role in ensuring such evidence is not admitted.[109] Not only do the immigration courts have a duty to ensure that a trial attorney cannot rely on impermissible evidence, but the courts themselves are bound by the VAWA Confidentiality Provisions, and immigration judges and court staff may be held liable for violations.[110] Further, VAWA imposes a duty that the judge refrain from relying on prohibited information in the course of removal proceedings.[111] An advocate's goal under VAWA is to ensure the court's action of excluding the impermissible evidence.[112]

---

adjudication of the victim's immigration case through strengthened protections); *cf. Memorandum to INS Employees*, *supra* note 67 ("If an INS employee receives information adverse to an alien from the alien's U.S. citizen or lawful permanent resident spouse or parent, or from relatives of that spouse or parent, the INS employee must obtain independent corroborative information from an unrelated person before taking any action based on that information.").

108. *See* Orloff, *supra* note 14 at 7 (ensuring that decisions affecting a battered woman's immigration status are not based on statements of the abuser, and therefore, further perpetuating the abuser's control over the victim); *see also Memorandum to INS Employees*, *supra* note 67 (penalizing any DOJ employee who misuses the information).

109. *Compare* Nardone v. United States, 308 U.S. 338, 340–41 (1939) (analyzing the role of the court in implementing the exclusionary rule by holding that the prosecution is precluded from utilizing the illegally obtained information without retrieving knowledge of the information from an independent source), *with* Orloff, *supra* note 14 at 7 (explaining the consequences for inappropriate conduct by any immigration enforcement personnel or adjudicator), *and Memorandum to INS Employees*, *supra* note 67 ("Violation of either of these prohibitions can result in disciplinary action or in civil penalties of up to $5,000 for each violation.").

110. *See* Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRAIRA) § 384 (1996) (introducing greater protections for battered immigrants to combat violence against women); *see also* Orloff, *supra* note 14 at 15 (extending the disciplinary action or penalties if VAWA's Confidentiality Provisions are violated and demonstrating the need for mandatory guidance and training for DHS officials); *cf. Memorandum to INS Employees*, *supra* note 67 (prohibiting any DOJ employee from making an adverse determination such as admissibility, deportability, or denying victims' applications for immigration benefits relying solely on information drawn from the abuser).

111. *See* Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRAIRA) § 384 (1996) (stating the need for any and all officials to exclude prohibited information); Conyers, *supra* note 103 at 465 ("Removal proceedings filed in violation of Section 384 of IIRAIRA shall be dismissed by immigration judges."); *see also* U.S. DEP'T OF HOMELAND SEC., *supra* note 47 (demonstrating DHS' commitment to complying with confidentiality provisions regarding enforcement actions leading to a removal proceeding).

112. *See* Orloff, *supra* note 14 at 14 (recognizing the chilling consequences if the confidentiality provisions are ignored).

Immigration court case law, however, presents a particular challenge to this argument. The Board of Immigration Appeals has unequivocally held that the exclusionary rule does not apply to removal proceedings.[113] The Supreme Court later elaborated that the exclusionary rule generally does not apply to removal proceedings unless there has been an "egregious" violation of the Fourth Amendment.[114] Various circuit courts have interpreted what would constitute an egregious violation.[115] Advocates should bear in mind, however, that the protection created by

113. *See* Matter of Sandoval, 17 I&N Dec. 70, 77 (BIA 1979) (asserting the purpose of the exclusionary rule is to deter unlawful police conduct and not to injure to a victim's privacy).

114. *See* INS v. Lopez-Mendoza, 468 U.S. 1032, 1050–51 (1984) (concluding the application of the exclusionary rule in civil deportation hearings has little deterrent value while admitting the court may change its mind with evidence of widespread Fourth Amendment violations).

115. *See* Yoc-Us v. Att'y Gen. U.S., 932 F.3d 98, 104 (3d. Cir. 2019) (stating the intensity and scope of a search must be strictly tied to and justified by permissible circumstances at the search's inception); Sehgal v. Lynch, 813 F.3d 1025, 1030–32 (7th Cir. 2016) (recognizing the threat of criminal sanctions for not procuring information is not necessarily coercive and in this case, the defendant's admission of a fraudulent marriage was not obtained under duress); De La Paz v. Coy, 786 F.3d 367, 372–74 (5th Cir. 2015) (distinguishing this case which involved no allegations of excessive force, from cases where immigration officers used excessive force when detaining immigrants on American soil—providing the immigrants with a right to recover damages); Maldonado v. Holder, 763 F.3d 155, 156 (2d Cir. 2014) ("Local law enforcement and immigration officers conducting joint sting operation committed no egregious Fourth Amendment violation when undercover officer drove unmarked vehicle to park, picked up aliens, who were natives and citizens of Ecuador, and others waiting to seek work as day laborers, and drove them to parking lot where they were arrested . . . "); Vanegas-Ramirez v. Holder, 768 F.3d 226, 234–35 (2d Cir. 2014) ("Venegas-Ramirez's concession of removability, while obtained during removal proceedings commenced after the unlawful raid, were not obtained using other information obtained during the raid."); Pretzantzin v. Holder, 736 F.3d 641, 646 (2d. Cir. 2013) (affirming more often than not a warrantless nighttime invasion of a person's home will constitute an egregious violation in a civil deportation proceeding); Cotzojay v. Holder, 725 F.3d 172, 183 (2d Cir. 2013) (entering a residence at night without a warrant or any exigent circumstances to justify the entry was an egregious violation); Gonzalez-Reyes v. Holder, No. 07-60203, 2009 WL 484246 at 9 (5th Cir. 2009) (holding that interviewing an unaccompanied minor in a removal proceeding was not coercion and did not constitute an egregious violation that rendered admission of evidence fundamentally unfair); Miguel v. I.N.S., 359 F.3d 408, 409 (6th Cir. 2004) ("Because Miguel's counsel admitted the relevant facts establishing her removability, and because the Immigration Judge did not rely on any of the evidence that Miguel has asked to be suppressed, this court does not need to reach the potential application of the exclusionary rule to the entry and seizure of evidence from her home in possible violation of the Fourth Amendment."); Ponce-Leiva v. Ashcroft, 331 F.3d 369, 370 (3d Cir. 2003) (holding that denial of a motion for continuance two days before a hearing and allowing the case to proceed on the merits without the attorney present was not an egregious violation nor abuse of discretion by the immigration judge).

the Confidentiality Provisions is a statutorily created protection—not a Court-made protection that protects a constitutional protection.[116] Thus, in their arguments, advocates must clarify that they are not arguing for the exclusionary rule to apply; rather, they should state that the same reasoning applied to the exclusionary rule should be applied to a breach of the VAWA Confidentiality Provisions.[117] That is, any illegally obtained evidence must be excluded.[118]

Under the exclusionary rule, an exception arises when an independent source corroborates the illegally obtained evidence.[119] VAWA provides similar language—a government official may use evidence provided by a spouse if an unrelated source independently corroborates the information.[120] If the government invokes the exception, it must prove to the satisfaction of the immigration judge that an independent source

116. *See generally* Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRAIRA) § 384 (1996) (explaining the instances in which DOJ may not make an adverse determination of admissibility of an alien).

117. *Compare* Matter of Sandoval, 17 I&N Dec. at 76 (explaining the purpose of the exclusionary rule is to deter law enforcement from violating Fourth Amendment rights), *and* Pretzantzin, 736 F.3d at 646 (noting in criminal cases evidence obtained through an unlawful, warrantless arrest is suppressible as it is fruit of a poisonous tree), *with Three Prongs of VAWA Confidentiality*, NAT'L IMMIGRANT WOMEN'S ADVOC. PROJECT, http://niwaplibrary.wcl.american.edu/wp-content/uploads/2015/pdf/CONF-VAWA-Bro-3ProngsofConfidentiality-6.19.2014.pdf [https://perma.cc/BK3W-QB8U] (noting two of the purposes of the VAWA Confidentiality Provisions are to protect against disclosure of sensitive information of victims and to prevent DHS from relying on information provided by a perpetrator of IPV).

118. *See* Sherry Colb, *Why Suppress Illegally Obtained Evidence? The U.S. Supreme Court Decides Davis v. United States*, VERDICT (July 27, 2011), https://verdict.justia.com/2011/07/27/why-suppress-illegally-obtained-evidence [https://perma.cc/WRL7-REGY] (explaining the history of the exclusionary rule through multiple supreme court cases and framing suppression as a non-incentive rather than a deterrent).

119. *See Memorandum to INS Employees*, *supra* note 67 ("INS employee must obtain independent corroborative information from an unrelated person before taking any action based on that information . . . "); *see also* Orloff, *supra* note 14 at 17 ("In deciding whether information was obtained about the victim is allowed the court should carefully examine whether there is a connection between DHS learning about the information and the abuser or crime perpetrator that DHS would not have sought or obtained otherwise.").

120. *See* Orloff, *supra* note 14 at 17 ("Attorneys should also consider moving to suppress evidence that comes from the abuser or his family members and ask the court to require that [DHS] prove that any corroborative sources the government wishes to use do not relate back to the abuser.").

corroborated the information the spouse provided.[121] The immigration judge must ensure that the independent source *independently* corroborated the information the abuser provided— that is to say, the government is not permitted to take any action (such as *seeking* corroboration from another source) in reliance on information the spouse provided, unless and until independent corroboration occurs.[122]

There may be other arguments and defenses that arise, which the advocate must be prepared to address and the court must be prepared to consider.[123] This discussion serves as a few examples of the arguments that can be made.[124] The next sub-section undertakes a discussion of pursuing related relief in federal court.

B. Mandamus

As an alternative, advocates may consider pursuing a mandamus action.[125] This action, however, should not be taken lightly and may be

121. *See id.* ("If the information would have been obtained when DHS conducted a criminal background check of the victim in connections with her application for immigration benefits, an immigration judge could reasonably conclude that the information was independently corroborated."); *see generally Memorandum to INS Employees*, *supra* note 67 (" . . . this provision appears to have been enacted in response to concerns from the advocacy community that INS officers have provided information on the whereabouts of self-petitioners or on their pending applications for relief to the allegedly abusive spouse or parent.").

122. *See generally* Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRAIRA) § 384 (1996) (explaining the penalties for the disclosure of information used to make an adverse determination of deportability); *see also Memorandum to INS Employees*, *supra* note 67 (explaining the inappropriateness of disclosing information to the alleged abuser or any other family member).

123. *See* VERONICA T. THRONSON ET AL., UTILIZING VAWA CONFIDENTIALITY PROTECTIONS IN FAMILY COURT PROCEEDINGS, NAT'L IMMIGRANT WOMEN'S ADVOC. PROJECT 1–2 (Feb. 17, 2017), http://niwaplibrary.wcl.american.edu/wp-content/uploads/Chapter-5-UTILIZING-VAWA-CONFIDENTIALITY-PROTECTIONS-IN-FAMILY-COURT-PROCEEDINGS-1.pdf [https://perma.cc/WAH6-6EKB] (illustrating the ways in which an attorney may utilize the VAWA protections available in family court proceedings); *see also Exclusionary Rule*, CORNELL L. SCH.: LEGAL INFO. INST. (June 2017), https://www.law.cornell.edu/wex/exclusionary_rule [https://perma.cc/6Q43-5KHH] (referencing other exceptions to the exclusionary rule that can be used in removal proceedings).

124. *See, e.g.*, CORNELL L. SCH.: LEGAL INFO. INST., *supra* note 123 (referencing other exceptions to the exclusionary rule that can be used in removal proceedings).

125. *See generally* AM. IMMIGR. COUNCIL, *supra* note 90 **(**describing mandamus actions as an alternative remedy for VAWA applicants to obtain relief through the court).

extremely difficult to obtain.[126] Generally, a mandamus action is used as an affirmative relief that forces an agency or official to take an affirmative step—such as forcing the United States Citizenship and Immigration Services (USCIS) to adjudicate an adjustment of status application.[127] To be successful in a mandamus action, a plaintiff must demonstrate: (1) she has a clear right to the relief requested; (2) the defendant (in this case the immigration judge) has a clear duty to perform the act in question; and (3) there is no other adequate remedy available.[128]

A VAWA applicant has a clear right to mandamus relief.[129] The Supreme Court previously held that an individual is entitled to mandamus protection when they come within the "zone of interests" a statute is designed to protect.[130] VAWA was passed specifically to protect battered immigrants.[131] An immigrant is within the "zone of interest" by demonstrating, *inter alia*, that their spouse battered or subjected them to extreme cruelty, the immigrant is a person of good moral character, and removal would result in extreme hardship to the immigrant or their child.[132] Thus, it is clear that a VAWA applicant comes within the "zone of interest" of the statute and is entitled to mandamus protection.[133]

---

126. *See id.* (explaining there are a number of "adverse published decisions," however, plaintiffs should not be discouraged).

127. *See id.* (stating "mandamus [actions] can be used to compel administrative agencies to act.").

128. Iddir v. INS, 301 F.3d 492, 499 (7th Cir. 2002).

129. *See, e.g.*, AM. IMMIGR. COUNCIL, *supra* note 90 at 3 **(**"Courts have found that the INA establishes a clear right to have an adjustment application adjudicated.").

130. *See, e.g.*, Ass'n of Data Processing Serv. Orgs., Inc. v. Camp, 397 U.S. 150, 153 (1970) (referencing Supreme Court cases that have addressed an individual's rights to the provisions of a statute when they come within the "zone of interest" the statute is designed to protect); Hernandez-Avalos v. INS, 50 F.3d 842, 844–45 (10th Cir. 1995) (explaining why the "zone of interest" test applies); Giddings v. Chandler, 979 F.2d 1104, 1108 (5th Cir. 1992) ("When the right alleged stems from a statute, a duty is owed to the plaintiff for the purpose of the Mandamus Act if—but only if—the plaintiff falls within the 'zone of interest' of the underlying statute.").

131. *See* Immigration and Nationality Act § 239, 8 U.S.C. § 1229b(b)(2) (2019) (exhibiting the "special rule" for battered women).

132. *See id.* (outlining how the Attorney General can cancel removal proceedings for a battered immigrant).

133. *See* Hernandez-Avalos, 50 F.3d at 844 (explaining why the "zone of interest" test is applicable in cases brought under the Administrative Procedure Act and how this governs standing to seek mandamus).

The second element may pose more of a challenge.[134] As mentioned above, mandamus is generally used to force an agency to perform an affirmative act.[135] In this case, however, one would be urging an agency to refrain from acting—the immigrant is requesting an immigration judge refrain from considering prohibited information in their removal proceedings.[136] Examined in another light, an immigrant may frame the argument as he or she is urging the federal court to demand the immigration judge to take the affirmative step of *excluding* impermissible evidence.[137] In the context of mandamus, a plaintiff must demonstrate the defendant in the case has a mandatory duty to carry out an action.[138] In removal proceedings, an immigration judge has a mandatory duty to ensure the proceedings are conducted in a fair and just manner.[139] Further, the immigration judge is bound by VAWA Confidentiality Provisions and must not rely on prohibited information in making its decision.[140] In that light, he or she has a duty to exclude impermissible evidence from the proceedings.[141] Thus, the affirmative action a

134. *See* Iddir v. INS, 301 F.3d 492, 499–500 (7th Cir. 2002) (stating the second element necessary for mandamus relief is demonstrating that the defendant has a duty to do the act in question).

135. *See* Hernandez-Avalos, 50 F.3d at 846–47 (explaining how mandamus is properly sought where the government owes the plaintiff a duty in the administrative context).

136. *Memorandum to INS Employees*, *supra* note 67; *see* Orloff, *supra* note 14 at 16–17 (reinforcing the duty of the immigration judge to not consider confidential evidence of abuse in deportation proceedings).

137. *See* Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRAIRA) § 384 (1996) (highlighting the duty under the INA for an immigration official to not consider impermissible evidence).

138. *See* Hernandez-Avalos, 50 F.3d at 846 ("…[M]andamus is properly sought where government officials 'owe a duty' to the plaintiff.").

139. *See* Michelle Mendez & Rebecca Scholtz, *Immigration Court Practitioner's Guide Responding to Inappropriate Immigration Judge Conduct*, CATH. LEGAL IMMIGR. NETWORK, INC. 9 (2017), https://cliniclegal.org/sites/default/files/responding_to_inappropriate_immigration_judge_conduct_1.pdf [https://perma.cc/LA6E-WTPD] (explaining how immigration judges should be held to a high standard).

140. *See* Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRAIRA) § 384 (1996) (describing how DOJ employees may not make an adverse determination of deportability based solely on information of the immigrant being battered by a spouse, parent, or family member); *see also Memorandum to INS Employees*, *supra* note 67 (identifying immigration judges as employees of the DOJ).

141. *See* Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRAIRA) § 384 (1996) (prohibiting DOJ employees from considering impermissible evidence in determining admissibility or deportability); *see also Memorandum to INS Employees*, *supra* note 67

plaintiff is urging the federal court to impose upon the immigration judge is to exclude the impermissible evidence.[142] VAWA creates this duty and the immigration judge must follow the rules outlined in VAWA.[143]

The government may argue that case law establishes that a federal court cannot compel the government to exercise its discretion.[144] However, VAWA takes this matter out of an exercise of discretion.[145] VAWA plainly outlines that impermissible evidence *must* be excluded.[146] Thus, it is not a matter of discretion for the immigration judge to decide if the evidence may come in—the immigration judge is required to exclude it.[147]

(recognizing immigration judges as DOJ employees and emphasizing their duty to only consider permissible information).

142. *See* Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRAIRA) § 384 (1996) (establishing a DOJ official's duty to not consider impermissible evidence); *see also Memorandum to INS Employees*, *supra* note 67 (acknowledging immigration judges to be DOJ employees).

143. *See* Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRAIRA) § 384 (1996) (outlining the confidentiality duties immigration judges must follow when determining admissibility or deportability of an immigrant); *see also* U.S. DEP'T OF HOMELAND SEC., *supra* note 47 (detailing the VAWA Confidentiality Provisions and the corresponding duties imposed on DHS); *see also* Penalties for Disclosure of Information, 8 U.S.C. § 1367 (2018) (outlining penalties for disclosure of confidential information by the Attorney General, an official or employee or the DOJ, the Secretary of Homeland Security, the Secretary of State, or any other official or employee of DHS or DOS).

144. *See e.g.*, Silveyra v. Moschorak, 989 F.2d 1012, 1015 (9th Cir. 1993) (indicating a mandamus cannot instruct a judge how to use their discretion unless a violation of statutory standards is present).

145. *Compare* Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRAIRA) § 384 (1996) (illustrating the potential consequences and penalties if a DOJ employee improperly uses their discretion to permit evidence), *with* Silveyra, 989 F.2d at 1015 ("Mandamus may not be used to instruct an official how to exercise discretion unless that official has ignored or violated 'statutory or regulatory standards delimiting the scope or manner in which such discretion can be exercised.'"), *and* Nigmadzhanov v. Mueller, 550 F.Supp.2d 540, 546 (S.D.N.Y. 2008) (reiterating the unauthorized means to use discretion notwithstanding an individual's power to do so).

146. *See generally* Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRAIRA) § 384 (1996) (enforcing the disallowance of evidence impeding the protection and confidentiality of victims of domestic violence).

147. *See e.g.*, *Memorandum to INS Employees*, *supra* note 67 (articulating the responsibility of INS officers to preclude information from an abuser paired with the disciplinary actions or civil penalties that can result from a violation of these confidentiality provisions).

Lastly, a plaintiff must show that no other adequate remedy is available.[148] This hurdle may also be difficult to overcome because it is likely that a federal judge may urge that a proper remedy exists in an appeal to the Board of Immigration Appeals.[149] What is required in this element, however, is no other *fully adequate remedy* is available.[150] It may be said that appealing an immigration judge's error is inadequate.[151] Assuming that the immigration judge has admitted the impermissible evidence, relied on that evidence to make his or her decision to deny the case, then issues a decision discussing the impermissible evidence—in such a case, appealing to an appellate body may be inadequate.[152]

According to VAWA, no agency should consider impermissible evidence at any point during the proceedings.[153] Appealing a decision that relies on impermissible evidence in its decision means the appellate body (in this case the Board of Immigration Appeals) will also be considering the impermissible evidence, which is in the record of proceedings.[154] Further, even if the case is remanded

148. *See* Iddir v. INS, 301 F.3d 492, 499 (7th Cir. 2002) (citing the third and final enumerated condition a plaintiff must demonstrate to be granted mandamus relief).

149. *See, e.g.*, Cheknan v. McElroy, 313 F.Supp.2d 270, 274 (S.D.N.Y. 2004) (acknowledging the plaintiff's failure to exhaust all his remedies in seeking the writ of mandamus); Henriquez v. Ashcroft, 269 F.Supp.2d 106, 108 (E.D.N.Y. 2003) (depicting the petitioner's inability to seek mandamus given his failure to appeal the INS' decision and to exhaust all his administrative remedies); *cf.* Ortega-Morales v. Lynch, 168 F.Supp.3d 1228, 1233 (D. Ariz. 2016) ("Here, Plaintiffs have not exhausted all other avenues of relief because 'the alternative of a judicial declaration of nationality under 8 U.S.C. § 1503 is more than adequate' to provide all the relief they have sought by mandamus.").

150. *See* Ortega-Morales, 168 F.Supp.3d at 1233 (providing a remedy is only acceptable if all other possibilities of relief are exhausted); AM. IMMIGR. COUNCIL, *supra* note 90 at 8 (recognizing a plaintiff must exhaust all available remedies because a court will not grant mandamus relief if there is an alternative fully adequate remedy).

151. *See e.g.*, Henriquez, 269 F.Supp.2d at 108 (explaining the petitioner's inability to satisfy exhaustion requirements notwithstanding an appeal of the judge's decision).

152. *See* Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRAIRA) § 384 (1996) (requiring nondisclosure of information pertaining to an individual receiving relief); *see also* Henriquez, 269 F.Supp.2d at 108 (restating that the remedy of mandamus is only available where a petitioner has demonstrated the lack of availability of an adequate remedy for which an appeal does not satisfy).

153. *See* Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRAIRA) § 384 (1996) (rejecting the consideration of any evidence deemed inadmissible).

154. *See id.* (declaring "any information which relates to an alien who is the beneficiary of an application for relief" is inadmissible).

to the immigration judge and he or she receives instruction not to consider the impermissible evidence, that instruction has come too late.[155] The immigration judge has already seen, considered, and written about the impermissible evidence.[156] That cannot be undone.[157] The immigration judge is now biased by the impermissible information.[158] In such a case, the immigrant may urge that the immigration judge and/or trial attorneys be forced to recuse themselves from the case.[159] In short, appealing to the Board of Immigration Appeals may not be a fully adequate remedy.[160]

As mentioned above, a mandamus action is an extreme step to take for an immigrant's advocate.[161] It is an uphill battle that will require skilled

155. *See* Andrew J. Wistrich et al., *Can Judges Ignore Inadmissible Information? The Difficulty of Deliberately Disregarding*, 153 U. PA. L. REV. 1251, 1252, 1275–76, 1278 (2005) (investigating the difficulties judges have in disregarding impermissible evidence and concluding judges are generally unable to avoid being influenced by relevant but inadmissible information).

156. *See id.* at 1275–76 (generalizing that when people attempt to ignore inadmissible information, they are likely to be unsuccessful—unless the information is not highly salient or if the decision maker does not have a high cognitive load); *see also* Caitlin Dickerson, *How U.S. Immigration Judges Battle Their Own Prejudice*, N.Y. TIMES (Oct. 4, 2016), https://www.nytimes.com/2016/10/05/us/us-immigration-judges-bias.html [https://perma.cc/4UKJ-GYNV] (noting immigration judges have a high cognitive load as they handle more than 700 cases a year, which is double what a federal district court judge hears).

157. *See* Wistrich et al., *supra* note 155 at 1264–65 (explaining how the brain stores information as a whole rather than in isolated units, which means that suppressing unwanted thoughts will not prevent it from affecting judgment); *cf.* Memorandum from The Office of the Chief Immigration Judge, to All Immigration Judges, All Court Administrators, All Judicial Law Clerks, All Immigration Court Staff (Mar. 21, 2005) https://www.justice.gov/sites/default/files/eoir/legacy/2005/03/22/05-02.pdf [https://perma.cc/37FZ-BHJY] [hereinafter *Memorandum on Issuing Recusal Orders*] (noting the standard for when it is appropriate for a judge to recuse himself or herself based on their inability to be impartial or when that may be reasonably questioned).

158. *See* Wistrich et al., *supra* note 155 at 1260, 1262–64 (noting the ironic processing and mental contamination theories which respectively state that the more a person attempts to disregard information, the more it is thought of and that information once learned influences future thoughts).

159. *See id.* at 1292–93 (indicating while some judges may be able to simply ignore inadmissible evidence, judges should not be hesitant to recuse themselves when they cannot discern which evidence they can reliably ignore).

160. *Cf.* AM. IMMIGR. COUNCIL, *supra* note 90 at 8 n.12 ("…[A]ppealing through the administrative process would be futile because the agency is biased or has predetermined the issue.").

161. *See* Iddir v. INS, 301 F.3d 492, 499 (7th Cir. 2002) (describing the elements of mandamus—including a requirement that no other adequate remedy be available). *But see* AM. IMMIGR. COUNCIL, *supra* note 90 at 8 (emphasizing mandamus actions are attainable and the

lawyering to overcome.[162] However, as advocates, we are required to pursue justice for those we represent.[163]

CONCLUSION

Immigration advocates, immigration courts, and even immigration enforcement officials play a vital role in ensuring immigrant victims of domestic violence are not placed in harm's way.[164] These protagonists also play a role in ensuring immigrants and citizens have confidence in the immigration system's efficiency, fairness, and integrity.[165] Therefore, all parties involved should diligently strive to ensure that the VAWA Confidentiality Provisions are honored.[166]

For immigration advocates, whether they are non-profit pro bono attorneys, working for a large firm, or working for themselves, they must ensure they are making strong, and at times, creative arguments to

---

perception that mandamus actions are difficult to obtain is distorted by the fact that many successful mandamus opinions go unreported).

162. *See* AM. IMMIGR. COUNCIL, *supra* note 90 at 8 (emphasizing the difficulty in obtaining relief from mandamus actions).

163. *See* Deborah Rhode, *Keynote: Law, Lawyers, and the Pursuit of Justice*, 70 FORDHAM L. REV. 1543, 1545 (2002) ("…[A] lawyer is 'a public citizen having special responsibility for the quality of justice.'").

164. *See* Mary B. Clark, *Falling Through the Cracks: The Impact of VAWA 2005's Unfinished Business on Immigrant Victims of Domestic Violence*, 7 U. MD. L.J. RACE, RELIGION, GENDER & CLASS 37, 39–41 (2007) (establishing the many reasons victims of domestic violence are vulnerable and thus rely on systems in place to administer justice); *see also* Dickerson, *supra* note 156 (illustrating the responsibility an immigration judge has in deciding whether to deport a woman who testified she left Honduras because her husband physically abused her).

165. *See generally* EXEC. OFF. FOR IMMIGR. REV. & NAT'L ASS'N OF IMMIGR. JJ., ETHICS AND PROFESSIONALISM GUIDE FOR IMMIGRATION JUDGES 1 (Jan. 26, 2011) https://www.justice.gov/sites/default/files/eoir/legacy/2013/05/23/EthicsandProfessionalismGuideforIJs.pdf [https://perma.cc/Z9EH-Z5NE] ("To preserve and promote integrity and professionalism, Immigration Judges should . . . act in a manner that promotes public confidence in their impartiality . . . ").

166. *Cf.* Amy Gottlieb, *Violence Against Women Act: Remedies for Immigrant Victims of Domestic Violence*, N. J. LAW. 19 (Apr. 2004) (noting that even with the availability of the VAWA Confidentiality Provisions, victims of domestic violence have a high evidentiary burden to show they have experienced abuse—and therefore advocates must take special care to overcome this challenge).

provide the best representation to their clients.[167] Further, there may be instances where an immigration lawyer is unfamiliar with and perhaps not admitted to federal court.[168] Therefore, it is essential that advocates foster relationships with other advocates and join together with other talented and dedicated lawyers who are willing and able to help.[169] It is imperative that immigrants receive the same level of talented and dedicated legal representation as any other person in the United States.[170]

As for the courts, immigration courts should remain open to hearing arguments from advocates.[171] Although the rules of evidence do not apply to immigration courts, the courts should consider the underlying principles from the rules of evidence apply and recognize that such principles are relevant to removal proceedings.[172] Incorporating the rules of evidence prevents disparity in how immigrant judges apply evidentiary rules—creating more uniform and fair proceedings.[173] Thus, courts should be open to and consider implementing rules which ensure the proceedings are fair to all parties involved.[174]

---

167. *See generally* AM. IMMIGR. COUNCIL, *supra* note 90 at 5, 8 (revealing the nuances of the law for immigration attorneys and the need for them to create arguments on issues that seem settled in the courts).

168. *See Staffing Your Immigration Legal Program*, CATH. LEGAL IMMIGR. NETWORK, INC. 37, https://cliniclegal.org/sites/default/files/chapter_3.pdf [https://perma.cc/8TD8-WQ3V] (advising on how to train an inexperienced immigration attorney through the complexities of immigration law).

169. *See id.* (explaining that it is important for inexperienced immigration attorneys to foster and create mentoring relationships with experienced attorneys).

170. *Cf.* Olivares, *supra* note 8 at 283 (comparing how immigrant domestic violence victims face prejudice in the legislative process).

171. *See generally* Orloff, *supra* note 14 at 2 (reminding immigration judges that the VAWA provision was purposefully and lawfully created to promote advocacy for battered immigrants in court).

172. *See* Lilibet Artola, *In Search of Uniformity: Applying the Federal Rules of Evidence in Immigration Removal Proceedings*, 64 RUTGERS L. REV. 863, 864–65 (2012) (discussing how the federal rules of evidence do not apply to removal proceedings, and how their implementation would alleviate disparities in immigration courts).

173. *See id.* (urging for a uniform application of evidentiary rules in immigration removal proceedings).

174. *See id.* at 865 (addressing how "an administrative body that has been criticized for its unsatisfactory performance, standard usage of more formal evidentiary rules of evidence can create [a] much needed uniformity in removal proceedings and can mitigate the many dangers posed by a relaxed set of evidentiary rules.").

Lastly, immigration enforcement officials must strive to ensure the VAWA Confidentially Provisions are not violated.[175] Enforcement officials are generally the first contact for immigrants.[176] Thus, while they should be zealous in enforcing immigration laws, they should do so in a manner that keeps vulnerable populations safe.[177] Immigration officials have an important role in ensuring the integrity of the immigration system, and by upholding this duty, it instills confidence that the United States has been and continues to be a safe haven for the tired, poor, and the "huddled masses yearning to breathe free."[178]

175. *See* Orloff, *supra* note 14 at 14 (discussing VAWA protections that need to be upheld by immigration officials).

176. *See* U.S. CITIZENSHIP AND IMMIGR. SERV. U.S. DEP'T OF HOMELAND SEC., INFORMATION ON THE LEGAL RIGHTS AVAILABLE TO IMMIGRANT VICTIMS OF DOMESTIC VIOLENCE IN THE UNITED STATES AND FACTS ABOUT IMMIGRATING ON A MARRIAGE-BASED VISA FACT SHEET (Jan. 11, 2011), https://www.uscis.gov/news/fact-sheets/information-legal-rights-available-immigrant-victims-domestic-violence-united-states-and-facts-about-immigrating-marriage-based-visa-fact-sheet [https://perma.cc/PKH6-WAPS] (encouraging victim immigrants to call the police regardless of their status when they are facing any dangers).

177. *See id.* (expressing the rights of anyone—regardless of their immigration status—to report a crime in an interest to secure safety).

178. *See The New Colossus*, NAT'L PARK SERV. (Aug. 14, 2019), https://www.nps.gov/stli/learn/historyculture/colossus.htm [https://perma.cc/HEE4-F3M7] (referencing the poem inscribed on the Statue of Liberty—providing freedom for all those within our land).