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Immigrant Victims, Immigrant Accusers

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IMMIGRANT VICTIMS, IMMIGRANT ACCUSERS

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The U visa program provides immigration status to noncitizen victims of crime, ensuring unauthorized immigrants do not become easy prey because they are too afraid to seek help from the police. But under the federal government's structuring of the U visa program, a victim must also become an accuser to receive immigration benefits. Thus, the U visa implicates the rights of third parties: accused defendants. These defendants are often immigrants themselves who may be deported when U visa recipients level their accusations. Recent state court decisions have created complications in the program by permitting defendants to cross-examine accusers about their desire to obtain immigration benefits in exchange for testimony. Defendants in these cases, often male immigrants, have good reason to aggressively cross-examine their accusers in order to combat a system that perceives men of color as violent perpetrators and immigrant women as victims in need of protection. Because of these developments, immigrant victims face new obstacles when seeking law enforcement protection and justice through criminal prosecution. The solution to these emerging problems is to separate the role of victim from the role of accuser as much as possible. This Article suggests several models that might accomplish this goal.

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FIGURE 1: ATTORNEY BILLBOARD IN LAS VEGAS, NV, IN 2014, ADVERTISING "U VISAS FOR VICTIMS OF CRIME IN THE USA."

I. INTRODUCTION

Victims of gender-based violence face many obstacles when they seek justice; chief among them is simply being believed. For immigrant victims, this struggle may be becoming even more daunting. An immigration program set up explicitly to help crime victims may paradoxically decrease immigrant victims' credibility. In fact, this program may allow defense attorneys to attack victims by suggesting that they are testifying simply to obtain immigration benefits.

This emerging challenge stems from the U visa program. The U visa program provides up to 10,000 visas per year to otherwise unauthorized immigrants who are victims of certain—mainly violent—crimes in the United States. To obtain a U visa, a victim must serve as a helpful witness while law enforcement investigates and prosecutes the relevant crimes.[1] Congress established this program to address the concern that unauthorized immigrants who are victims of crime might decline police assistance for fear of being deported.[2] Although Congress established the program in 2000, implementing regulations were not issued until late 2007.[3] The 10,000 visa quota

1. *See* discussion *infra* Part III.

2. *See* discussion *infra* Part II.B.

3. *See* Elizabeth M. McCormick, *Rethinking Indirect Victim Eligibility for U Non-Immigration Visas to Better Protect Immigrant Families and Communities*, 22 STAN. L. & POL'Y REV. 587, 604–08 (2011).

quickly proved inadequate to assist the number of eligible applicants. Unfortunately, efforts to expand the quota sit stagnate along with the larger debate in Congress over comprehensive immigration reform.

Recent developments reveal yet a deeper problem, which is built into the structure of the U visa program. Although criminal defendants may not necessarily cross-examine witnesses generally about their immigration status, the Massachusetts' Supreme Judicial Court held recently that a defendant in a rape trial could impeach his accuser by suggesting the victim fabricated the assault to get a U visa.[4] The federal government made this defense argument considerably stronger because of how it structured the U visa. First, Congress required that U visa recipients be helpful to police and prosecutors. Second, the statute also requires that visa applicants secure a certification from law enforcement, giving local police and prosecutors leverage over immigrants who might be witnesses for the prosecution.[5] In other words, the U visa established a *quid pro quo* system in which unauthorized immigrants face considerable pressure to trade testimony in order to remain in the United States.

Even if a victim does not exchange testimony for a U visa, the program creates the perception that immigrants exaggerate crimes in order to stay in the country.[6] The U visa is part of a special category of immigration programs in which the right to stay in the country depends on victimhood instead of family, employment, or business connections.[7] Some of these victim-based programs, such as asylum and protection under the Convention against Torture, focus on refugees fleeing persecution in other countries.[8] Others, like the T visa program for victims of trafficking and certain provisions of the Violence Against Women Act (VAWA), confer visas to immigrants based on victimization inside the United States.[9] These programs create a danger that applicants might fabricate their victimhood. Normally, the solution to this problem is rigorous scrutiny and adjudication. But the programs raise concerns that false applications may slip through.

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4. Commonwealth v. Sealy, 6 N.E.3d 1052, 1058 (Mass. 2014), discussed *infra* at note 189.

5. *See* discussion *infra* Part III.

6. *See* discussion *infra* Parts V.A–B.

7. *See generally* DEBORAH E. ANKER, LAW OF ASYLUM IN THE UNITED STATES § 1:12–16 (7th ed. 2014) (describing immigration programs in addition to asylum that are based on past or future harm suffered either inside or outside the United States).

8. *Id.* at § 1.12. *See, e.g.*, 8 U.S.C. § 1101(a)(42)(A) (defining refugees); 8 C.F.R. § 208.18 (defining eligibility for protection under the Convention Against Torture).

9. *See* discussion *infra* Parts II.B (VAWA), VI.C (T visa).

The U visa worsens the perception that immigrant victims may fabricate or exaggerate crime reports by forcing victims also to be accusers. It is not enough for a U visa applicant to claim to be a victim of violence or abuse.[10] He or she must formally accuse another person of a crime, likely leading that person to be prosecuted.[11] The goal of the U visa program should be to put noncitizen immigrant victims in a roughly equal position as citizen victims, so that immigrant victims can go to the police for help like anyone else. But the U visa goes to the opposite extreme. It compels immigrant victims to assist police and prosecutors in a way that other victims are not compelled to do.

The American criminal justice system must strike a delicate balance between a desire to protect victims and the guarantee for a fair trial. Striking this balance can be difficult in the best of circumstances. The U visa unnecessarily increases this difficulty, creating an extra risk of prejudice to defendants and an additional hardship for victims seeking justice, since defendants are entitled to cross-examine prosecution witnesses. The result is likely to be bad for both sides. Knowing that witnesses will face tough cross-examination, police and prosecutors may be more wary about whether immigrant victims will be perceived as credible. Prosecutors may offer more lenient plea bargains or not bring charges at all. If prosecutions do go to trial, an immigrant victim will likely endure an especially rough time in the witness chair. Meanwhile, defendants have good reason to aggressively cross-examine their accusers, both to respond to criminal charges and to fight back against the racial and gender dynamics involved in many prosecutions. U visa cases often involve a woman accusing a man of violent abuse because many of the qualifying crimes for a U visa have a significant gender dimension.[12] When the victim of a crime is an immigrant, the perpetrator is often also an immigrant, especially in the domestic violence context.[13] Thus, accused defendants, who are often men of color, face the stereotype that men of color are violent predators.

This Article identifies some of the difficulties that result from the structure of the U visa program, paying particular attention to the problems created by forcing beneficiaries to be both a victim and an accuser. Part II explains why an immigration program to protect victims of crime is absolutely essential and Part III sets out how the

10. *See* discussion *infra* at Part III.
11. *Id.*
12. *See* discussion *infra* Part IV.
13. *See* INTERNATIONAL ASSOCIATION OF CHIEFS OF POLICE, *infra* note 27, at 28.

U visa actually works. Part IV explores the gender dynamics evident in the structure of the U visa, while Part V analyzes some of the U visa's built-in problems, starting with the quota and extending to the way the program interacts with fair trial rights in criminal cases.

Part VI proposes solutions to these problems. The difficulties with mixing the victim and accuser roles are in fact not new, and models already exist that could help solve the U visa program's problems. One approach creates special evidentiary rules that limit the leverage that prosecutors can hold over witnesses who might otherwise retract or change their testimony.[14] Another useful example derives from the American asylum system, which underwent reforms in the 1990s to separate the accuser and victim roles of refugees.[15] Additionally, the T visa program for victims of trafficking offers a useful model because applicants depend less on law enforcement assistance to secure a visa, reducing the danger that genuine victims will lose credibility for seeking immigration benefits.[16] This Article concludes that the role of victim must be disentangled from the role of accuser in order for the U visa program to achieve its goals of aiding law enforcement and protecting victims.

II. WHY IMMIGRANT CRIME VICTIMS NEED A VISA

A. Protection of the Law for People Outside the Law

Any country that establishes a legal means of regulating the entry and presence of non-citizens confronts a series of dilemmas when unauthorized immigrants are present in violation of the law. As long as an unauthorized immigrant remains in the country, questions arise about the relationship between the immigrant and the state. More vividly than perhaps any other group, unauthorized immigrants invoke Hannah Arendt's challenge that liberal democracies do not always recognize the basic right to have rights for non-citizens.[17] Presumably, one consequence of being unauthorized is that a person is entitled to less from the state than a citizen or an authorized immigrant. But they are still entitled to something, simply by virtue of being human. If basic rights depend on legal status, then Arendt's critique will apply: "It seems that a man

14. *See* discussion *infra* Part VI.A.
15. *See* discussion *infra* Part VI.B.
16. *See* discussion *infra* Part VI.C.
17. HANNAH ARENDT, THE ORIGINS OF TOTALITARIANISM 299–300 (Meridian Books 1958).

who is nothing but a man has lost the very qualities which make it possible for other people to treat him as a fellow-man."[18]

In theory, the law acknowledges that some rights flow simply from being human. In international law, governments are required to recognize "everyone . . . as a person before the law."[19] In the United States, the 14th Amendment requires a state to provide "equal protection of the laws" to "any person within its jurisdiction."[20] Based on this guarantee of equal protection, the Supreme Court found that unauthorized immigrant children may not be excluded from primary education. The Court raised the alarm about "a substantial 'shadow population' of illegal migrants."[21] Three decades ago in *Plyler v. Doe*, Justice Brennan wrote:

> This situation raises the specter of a permanent caste of undocumented resident aliens, encouraged by some to remain here as a source of cheap labor, but nevertheless denied the benefits that our society makes available to citizens and lawful residents. The existence of such an underclass presents most difficult problems for a Nation that prides itself on adherence to principles of equality under law.[22]

Another human right that applies regardless of immigration status is access to law enforcement and police—put another way, the right to be protected from crime.[23] This principle, the focus of this Article, is not especially difficult or controversial. Unauthorized immigrants should not be assaulted, robbed, raped, or otherwise targeted for crime. If they are, police and prosecutors should investigate, arrest, and prosecute the perpetrators. A victim's

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18. *Id.* at 299–300.

19. United Nations International Covenant on Civil and Political Rights, art. 16, G.A. Res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, *entered into force* Mar. 23, 1976.

20. U.S. CONST. amend. XIV, § 1. *See also* Plyler v. Doe, 457 U.S. 202, 210 (1982) ("Whatever his status under the immigration laws, an alien is surely a 'person' in any ordinary sense of that term. Aliens, even aliens whose presence in this country is unlawful, have long been recognized as 'persons' guaranteed due process of law by the Fifth and Fourteenth Amendments.").

21. *Plyler*, 457 U.S. at 218 (1982).

22. *Id.* at 218–219.

23. *See* United Nations International Convention on the Elimination of All Forms of Racial Discrimination, art. 1, 5, G.A. Res. 2106 (XX), Annex, 20 U.N. GAOR Supp. (No. 14) at 47, U.N. Doc. A/6014 (1966), 660 U.N.T.S. 195 (States may not engage in discrimination based on "descent, or national or ethnic origin" with regard to "the right to equal treatment before the tribunals and all other organs administering justice [and] The right to security of person and protection by the State against violence or bodily harm, whether inflicted by government officials or by any individual group or institution.").

immigration status has no bearing on the definitions of common crimes, especially violent crimes.[24]

Putting this concept into practice proves difficult, however. If an unauthorized immigrant tells a police officer that he has been mugged at knifepoint, the officer might reasonably believe that two violations of the law have been reported to him. First, there has been an armed robbery. Second, the officer has been made aware of an immigrant who is present in the United States illegally. Immigrants will be hesitant to report robberies if they fear that a police officer might form this opinion. Human Rights Watch has criticized cooperation between local law enforcement and federal immigration enforcement for creating exactly this situation, arguing that immigrants are "afraid to call 911."[25] Echoing this concern, a Virginia police detective wrote that "the fear of deportation has created a class of silent victims."[26]

B. Immigration Law as a Threat to Public Safety

According to the International Association of Chiefs of Police (IACP), "immigrant populations are extremely vulnerable to crime."[27] Among other challenges, law enforcement organizations are concerned that "[i]mmigrant women may be less likely to report abuse than nonimmigrant women due to . . . a fear of deportation if they are not legally documented to live within the United States."[28] The dynamics of this fear are complicated because immigrant communities are not homogenous. As the IACP notes:

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24. This is not to suggest that, but for immigration concerns, law enforcement impacts people equally regardless of race or other immutable identity. *See generally* MICHELLE ALEXANDER, THE NEW JIM CROW (2010).

25. *US: Immigrants 'Afraid to Call 911,'* HUMAN RIGHTS WATCH (May 15, 2014), http://www.hrw.org/news/2014/05/14/us-immigrants-afraid-call-911 (criticizing the Secure Communities program); *see also Cultivating Fear*, HUMAN RIGHTS WATCH (May 16, 2012), http://www.hrw.org/reports/2012/05/15/cultivating-fear (describing vulnerability of immigrant farm workers to sexual assault).

26. Stacey Ivie and Natalie Nanasi, *The U Visa: An Effective Resource for Law Enforcement*, FBI LAW ENFORCEMENT BULLETIN 10, 10 (October 2009).

27. INTERNATIONAL ASSOCIATION OF CHIEFS OF POLICE, POLICE CHIEFS GUIDE TO IMMIGRATION ISSUES 28 (2007), http://www.theiacp.org/Portals/0/pdfs/Publications/PoliceChiefsGuidetoImmigration.pdf.

28. *Id.* at 28.

> Many immigrant families are a combination of documented and undocumented individuals, which may account for a reluctance to report a crime if a victim/witness believes it may lead to a family member's deportation.[29]

Another layer of complexity stems from the fact that "these crimes occur more often by immigrant perpetrators against their own than U.S.-born perpetrators."[30]

In the 1990s, immigrant advocates and government officials devoted considerable effort to address violence against women in the context of immigration law.[31] Part of these efforts concerned the availability of asylum and refugee protection for women who fled gender-related persecution in other countries.[32] But immigrant women in the United States also faced unique problems protecting themselves from domestic violence. As one advocate said in 1996:

> Fear of deportation deters abused immigrant women from coming forward to report abuse. Just as with abuse victims who are not immigrants, batterers threaten that they will take custody of minor children. For immigrant women, that threat is all the more frightening when they are unfamiliar with the U.S. justice system, may not speak English and fear they will never see their children again if separated from them through deportation.[33]

Immigrant women's fears were founded in law and history, for two primary reasons.[34] First, family-based immigration to the U.S. is normally based on a system of sponsorship whereby a U.S. citizen or legal permanent resident applies for his relatives (such as a spouse) to immigrate.[35] Under this system, immigration law does not grant a right directly to the dependent immigrant who would gain a visa

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29. *Id.*

30. *Id.*

31. *See generally* Beth Lubetkin, *Violence Against Women and the U.S. Immigration Laws*, 90 AM. SOC'Y INT'L L. PROC. 616 (1996).

32. *See, e.g.*, Immigration and Naturalization Service, Memorandum on Considerations for Asylum Officers Adjudicating Asylum Claims from Women [Gender Guidelines], May 26, 1995.

33. Lubetkin, *supra* note 31, at 620 (statement by Mintsiu Chung).

34. For a lucid discussion of the history of immigration law fostering family violence see Leslye E. Orloff and Janice V. Kaguyutan, *Offering a Helping Hand: Legal Protection for Immigrant Women: A History of Legislative Responses*, 10 AM. U. J. GENDER SOC. POL'Y & L. 95, 100–106 (2002).

35. *See generally* 8 C.F.R. § 204.1 (2015) (describing who can petition for family-based immigration); 8 U.S.C. § 1153(a) (2015) (preference categories for family sponsorship); 8 U.S.C. § 1151(b)(2) (2015) (defining immediate relatives).

through the process; rather the immigration beneficiary is dependent on a petitioner with a more secure status.[36] Moreover, marriage-based visas are conditional on a couple remaining married for two years.[37] This system puts a great deal of power in the hands of an abusive spouse, since his victim depends on him to avoid deportation.[38] Congress addressed this problem in 1994 through the Violence Against Women Act (VAWA), which allows individuals to self-petition rather than depend on an abusive spouse to secure legal residence.[39]

Second, any immigrant unlawfully present in the United States faces a genuine danger of deportation if he or she comes to the attention of federal authorities. VAWA's self-petition mechanism only helps immigrants with spouses who have legal status but are abusive and therefore undesirable sponsors.[40] An unauthorized immigrant, who is married to another unauthorized immigrant, cannot benefit from this law, even in the case of domestic violence.[41] Despite progress with VAWA, any unauthorized immigrant who is the victim of any kind of crime still has reason to hesitate to draw law enforcement attention.

When Congress enacted VAWA in 1994, it also created the S visa to provide a legal status and potential permanent residency for material witnesses in criminal investigations.[42] Arguably, material witnesses include crime victims; therefore, the S visa provides a partial solution for unauthorized immigrants who need police protection. But material witness statutes serve primarily the interests of law enforcement and do not focus on assisting crime victims.[43] Witness statutes permit arrest, detention, and bond to

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36. *See generally* Laura Carothers Graham, *Relief for Battered Immigrants Under the Violence Against Women Act*, 10 DEL. L. REV. 263 (2008) (describing how, pre-VAWA, "the effects of domestic violence on immigrant victims are intensified.").

37. *See* 8 U.S.C. § 1186a(c)(3)(B) (2015).

38. *See* Lubetkin, *supra* note 31, at 620 (statement by Mintsiu Chung). *See also* Deanna Kwong, *Removing Barriers for Battered Immigrant Women: A Comparison of Immigrant Protections Under VAWA I & II*, 17 BERKELEY WOMEN'S L. J. 137 (2002) (summarizing improvements to the VAWA system enacted by Congress in 2000).

39. Violent Crime Control and Law Enforcement Act of 1994, Title IV, Violence Against Women Act of 1994, Pub. L. No. 103-322, § 40701, 108 Stat. 1796 (1994). *See also* Sabrina Balgamwalla, *Bride and Prejudice: How U.S. Immigration Law Discriminated Against Spousal Visa Holders*, 29 BERKLEY J. GENDER L. & JUST. 25, 35–37, 56 (2014) (describing discrimination against spouses that remains in immigration law post-VAWA).

40. *See* 8 U.S.C. § 1154(a)(1)(A)(iii) (2015).

41. *Id.* (defining eligibility for VAWA self-petitions).

42. *See generally* Christina M. Ceballos, *Adjustment of Status for Alien Material Witnesses: Is It Coming Three Years Too Late?*, 54 U. MIAMI L. REV. 75 (1999).

43. *Id.* at 82 (stating that the primary concern of the S visa statute is securing the presence of a material witness in a criminal proceeding).

compel witnesses to testify.[44] Moreover, the S visa program requires that the immigrant possess reliable information about a criminal enterprise,[45] which is information a victim may not have. Although the S visa program fails to assist crime victims who do not know much about perpetrators, the program paradoxically can benefit a criminal or co-conspirator who possesses knowledge about the crime and serves as a material witness for the state. The S visa also requires the person's continued presence in the United States for the criminal investigation or prosecution.[46] If the prosecution has many witnesses available or if the case is closed through a plea bargain this criteria might not be met, leaving immigrant victims without assistance.

The limitations of the S visa became evident in two high profile criminal cases involving large numbers of unauthorized immigrants in the late 1990s.[47] In Florida in 1998, two teenagers escaped from a sex slavery ring that lured Mexican girls to work in a network of brothels around the state.[48] But as the case prepared to go to trial, the young women remained in immigration limbo, without an S visa approved, as they prepared to testify.[49] Even these highly sympathetic crime victims remained unlawfully present in the United States and thus subject to the possibility detention and deportation. In 1997 in New York City, police uncovered an organized criminal enterprise that forced dozens of deaf and mute Mexican immigrants to essentially beg on the city's subways, subjecting them to beatings, starvation and electric shocks if they failed to bring in enough money.[50] After police broke up the ring, immigration authorities detained the victims and their children for nearly a year because they had entered the United States illegally.[51]

The contrast between VAWA and the S visa programs highlights a tension that remains at the heart of newer immigration provisions that aim to benefit victims of crime and human trafficking. VAWA is victim-centered: it requires the applicant be a victim of abuse, but does not require that his or her presence in the United States benefit law enforcement.[52] Conversely, the S visa is law enforcement

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44. *See, e.g.*, N.Y. Crim. Proc. Law § 620.30 (McKinney) (describing material witness orders); 725 Ill. Comp. Stat. 5/—3(d) (bonds for material witnesses).

45. Ceballos, *supra* note 42, at 83.

46. *Id.*

47. Both cases are profiled in Ceballos, *supra* note 42, at 77–80.

48. *Id.* at 77–79.

49. *Id.* at 79.

50. *Id.*

51. *Id.* at 79–80.

52. *See* 8 U.S.C. § 1182(6)(ii) (2015) (establishing eligibility for undocumented immigrants to petition for classification as a VAWA self-petitioner or based on being subject to

centered because it grants immigration status only when the applicant can assist police and prosecutors.

III. HOW THE U VISA WORKS

In 2000, Congress passed the Battered Women Protection Act, which created the new U visa system to address the concern that unauthorized immigrants will not cooperate with law enforcement unless they are shielded from deportation.[53] Unlike VAWA, the U visa was designed for victims who were not married to U.S. citizens or legal permanent residents.[54] The Act's name and purpose highlighted particular concerns about gender-based violence, but it actually created a broader program.[55]

U visas may normally be granted for up to four years.[56] But U visa holders may apply to adjust to legal permanent residence after three years of continuous physical presence, if the person's "continued presence in the United States is justified on humanitarian grounds, to ensure family unity, or is otherwise in the public interest."[57] Permanent residents may eventually apply to naturalize.[58] Thus, in the rhetoric of immigration reform debates, the U visa represents a potential path to citizenship for a person who otherwise would be unlawfully present in the United States.

For a person who would otherwise be unlawfully present in the United States, the opportunity to acquire a green card is just one advantage of the U visa. The U visa's benefits also extend to the victim's immediate family, principally their spouse and minor children.[59] A successful U visa application can cancel an order of removal (in layman's terms, deportation).[60] A U visa can also benefit people who have already been deported, because U visas may be

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"extreme cruelty"); 8 U.S.C. § 1154(a)(1)(D)(iv) (2015) (establishing eligibility for documented immigrants to petition for classification as a VAWA self-petitioner).

53. Pub. L. 106-386, 114 Stat. 1518 Sec. 1502(a) (2000) (included in the Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, 114 Stat. 1464 (2000)).

54. *See* Kwong, *supra* note 38, at 149–50. *See also* 114 Stat. 1518 Sec. 1502(a) (2000) ([Congress finds that] "there are several groups of battered immigrant women and children who do not have access to the immigration protections of the Violence Against Women Act of 1994 . . . .").

55. Like most U.S. immigrant visas, the U visa name derives from the section of the Immigration of Nationality Act that defines it: INA § 101(a)(15)(U), 8 U.S.C. § 1101(a)(15)(U) (2000).

56. 8 C.F.R. § 214.14(g) (2015).

57. 8 U.S.C. § 1255(m) (2015).

58. *See* 8 U.S.C. § 1427 (2015).

59. *See* 8 C.F.R. § 214.14(a)(10) (2007).

60. *See* 8 C.F.R. § 214.14(c)(i).

granted to petitioners who are outside the country if they were victims of crime while they were previously in the U.S.[61] Normally, a noncitizen who had been deported would be barred from reentering the country for ten or twenty years, depending on how many times he or she had been deported.[62]

The U visa's requirements combine the twin goals of helping victims while also aiding law enforcement.[63] On the victim side, visas are available to victims of a list of specific crimes:

- Abduction
- Abusive Sexual Contact
- Blackmail
- Domestic Violence
- Extortion
- False Imprisonment
- Genital Female Mutilation
- Felonious Assault
- Hostage
- Incest
- Involuntary Servitude
- Kidnapping Manslaughter
- Murder
- Obstruction of Justice
- Peonage
- Perjury
- Prostitution
- Rape
- Sexual Assault
- Sexual Exploitation
- Slave Trader
- Torture
- Trafficking
- Witness Tampering

61. *See* 8 C.F.R. § 214.14(c)(5)(i)(B).

62. 8 U.S.C. § 1182(a)(9) (2015).

63. *See* Leticia M. Saucedo, *A New "U": Organizing Victims and Protecting Immigrant Workers*, 42 U. RICH. L. REV. 891, 907–909 (2008) (describing the U visa's dual purposes).

• Unlawful Criminal Restraint[64]

This list represents either Congress's conception about the crimes to which immigrants are most vulnerable or the kinds of crimes that render immigrant victims deserving of a visa. The U visa list differs significantly from immigration law's standard category of serious crime: the "aggravated felony."[65] Aggravated felonies include home invasion burglaries, felony thefts, and a generic definition of "crimes of violence."[66] Conviction of a crime in this category normally makes a legal permanent resident deportable.[67] Congress could have written the U visa statute to reference this well-established category but opted to generate a new one. Although the U visa list mostly consists of serious violent crimes, it includes some that are potentially non-violent and might be prosecuted as misdemeanors, such as prostitution and domestic violence. Crimes such as peonage and slave trading may potentially be used to obtain U visas for victims of workplace exploitation, but it is unclear how often this has actually been done.[68]

By requiring that U visa beneficiaries have "suffered substantial physical or mental abuse," Congress indicated its intent not to grant visas to all crime victims.[69] Although the U visa can be available to the victims of some crimes that criminal law normally does not consider felonies, these victims must show that the crime nevertheless constituted "substantial physical or mental abuse."[70] However, this can be shown through "[a] series of acts taken together . . . even where no single act alone rises to that level."[71]

On the law enforcement side, a noncitizen may receive a U visa only if he or she "possesses information concerning criminal activity" and "has been helpful, is being helpful, or is likely to be helpful to [federal, state, or local authorities] investigating or prosecuting criminal activity."[72] This means that the victims must know "specific facts" about the crime, and must not refuse to provide information to law enforcement when "reasonably requested."[73]

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64. 8 U.S.C. § 1101(a)(15)(U)(iii) (2000) (attempts, conspiracies, or solicitation also qualify).

65. *See* 8 U.S.C. § 1101(a)(43).

66. *Id. See also,* Taylor v. U.S., 495 U.S. 575, 598 (1990) (defining burglary).

67. 8 U.S.C. § 1227(2)(A)(iii) (2012).

68. *See* 8 U.S.C. § 1101(a)(15)(U)(iii). *See generally* Saucedo *supra* note 63 (discussing the U Visa's potential application in cases of workplace exploitation).

69. *See* 8 U.S.C. § 1101(a)(15)(U)(i)(I) (stating victims who suffered substantial physical or mental abuse as a result of criminal activity are eligible).

70. *See id.*

71. 8 C.F.R. § 214.14(b)(1) (2007).

72. 8 U.S.C. § 1101(a)(15)(U)(i) (2012).

73. 8 C.F.R. § 214.14(b).

The INA states that DHS should determine eligibility.[74] But Congress and DHS developed an application procedure that in many ways shifts this determination to local law enforcement agencies. In order to apply for a U visa, a person must submit a personal statement describing their experience as a crime victim, attesting to their suffering and documenting other pertinent evidence bearing on their eligibility.[75] The applicant must include a form signed by a law enforcement agency—typically a police officer, prosecutor, or judge—certifying that the person "has been a victim" of qualifying criminal activity, that the agency is investigating the crime, and that the person possesses information about the crime and is being helpful to the investigation.[76]

The procedure by which the U visa program is implemented creates tension between national immigration policy and the local law enforcement bodies. In effect, the law enforcement certification procedure shifts to local law enforcement the critical assessments that determine eligibility for the U visa: Is the person a genuine victim, and is he or she assisting law enforcement? This shift of responsibility has attracted criticism because it allows for inconsistencies in the implementation of a national program.[77] This runs counter to the usual rule that immigration policy should be uniform across the country and is thus a federal responsibility.[78] It also opens the possibility for law enforcement agencies to exert unusual leverage over immigrant victims.

Some law enforcement officials from areas with strong anti-immigrant sentiments expressed hostility to the idea of providing visas to immigrant crime victims.[79] For example, media reports indicate that prosecutors and police in Maricopa Country, Arizona, home of Sheriff Joe Arpaio, have resisted certifying U visas, especially when

74. 8 U.S.C. § 1101(a)(15)(U)(i).

75. 8 U.S.C. § 1184(p)(1); 8 C.F.R. § 214.14(c)(2) (2007).

76. *Id.*

77. *See, e.g.*, Derek Quizon and Katie Urbaszewski, *Visa rules are loose for illegal immigrants who are victims of crimes*, ARIZ. REPUBLIC (Aug. 19, 2010) (describing differing practices of prosecutors in certifying or not certifying U visas).

78. *See* Arizona v. United States, No. 11-182, slip op. at 3 (U.S. June 25, 2012); *see generally* Stephen Lee, *De Facto Immigration-Courts*, 101 CAL. L. REV. 553, 553 (2013) ("prosecutors can exercise their gatekeeping power to deviate from or completely unsettle federal immigration enforcement priorities . . . ."); Jamie R. Abrams, *The Dual Purposes of the U Visa Thwarted in a Legislative Duel*, 29 ST. LOUIS U. PUB. L REV. 373, 392 (2010) (shifting immigration decision-making power to local officials "fatally alter[s] the symbiotic balance that Congress envisioned . . . .").

79. *See* Tahja L. Jensen, Comment, *U Visa "Certification": Overcoming the Local Hurdle in Response to a Federal Statute*, 45 IDAHO L. REV. 691, 704 (2009).

there is no trial and the victim's presence is not required in court.[80] DHS advises that authorities can issue U visa certification even if police are not actively investigating the case or no charges are filed.[81] But the federal government cannot require state and local governments to carry out its policies.[82] As a result, localities may cooperate with victims in obtaining a U visa only when it suits them, which may not be what the federal government intends. DHS itself has advised localities that deciding whether to sign U visa certifications "is under the authority of the agency conducting the investigation or prosecution."[83]

IV. GOOD IMMIGRANTS, BAD IMMIGRANTS, AND GENDER

In the American immigration system, victim visas lie at the crossroads between positive and negative images of immigrants.[84] Most of the beneficiaries would otherwise be unauthorized "illegal aliens," stigmatized for entering the country without permission and for posing an economic, cultural, and security threat.[85] Typically, being lawfully or unlawfully present in the U.S. has been seen as the major dividing line between "good" and "bad" immigrants.[86] But if unauthorized immigrants prove that they are genuine victims of persecution for asylum, of trafficking for the T visa, or of serious crime for the U visa, then the "illegal alien" can be transformed into a victim deserving of protection.[87]

As Fatma Marouf has explained, legally derived labels like "legal immigrant" influence social conceptions of who is inside and who is outside the national community.[88] Although these labels create the

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80. *See Immigrants in Arizona face resistance to getting visas after being victims of crimes*, PUBLIC RADIO INT'L (October 27, 2012), http://www.pri.org/stories/2012-10-27/immigrants-arizona-face-resistance-getting-visas-after-being-victims-crimes.

81. DEP'T OF HOMELAND SEC., U VISA LAW ENFORCEMENT CERTIFICATION RESOURCE GUIDE 4 [hereinafter DHS], *available at* http://www.dhs.gov/xlibrary/assets/dhs_u_visa_certification_guide.pdf.

82. *See* Printz v. United States, 521 U.S. 898 (1997).

83. DHS, *supra* note 81, at 15.

84. *See* Joey Hipolito, *Illegal Aliens or Deserving Victims?: The Ambivalent Implementation of the U visa Program*, 17 ASIAN AM. L. J. 153, 166 (2010) (explaining the positive and negative societal perceptions of immigrant).

85. *See id.* at 166–67.

86. *See* Peter H. Schuck, *Immigration at the Turn of the New Century*, 33 CASE W. RES. J. INT'L L. 1, 7 (2001).

87. Hipolito, *supra* note 84, at 168–69.

88. *See* Fatma E. Marouf, *Regrouping America: Immigration Policies and the Reduction of Prejudice*, 15 HARV. LAT. L. REV. 129, 138–42 (2012).

illusion of an indelible identity, the legal categories are fluid.[89] Elizabeth Keyes has observed that legal complexities often serve as proxies for deeper "questions of worthiness."[90] Mapped onto conceptions of worthiness are two competing narratives of immigration with deep roots in American history, one depicting immigrants as pursuing the American Dream, and the other portraying immigrants as connected to crime and a hazard to American society.[91] The U visa epitomizes this latter conception. By labeling certain immigrants as deserving of inclusion because they are victims of crime, the program facilitates accusations of serious crime. In many cases, these accusations are directed at other immigrants. The U visa program often is the knife's edge that separates good/deserving immigrants from bad/undeserving ones.[92]

By distinguishing between deserving and undeserving immigrants, different visa programs often perpetuate preconceived images or narratives of the ideal beneficiary.[93] But because it encompasses so many different kinds of crime, the U visa does not have an obvious, prototypical victim.[94] Moreover, since the U visa relies on local officials to certify genuine victims, there can be as many conceptions of deserving, ideal victims as there are law enforcement agencies. Visas for victims are often torn between a desire to assist law enforcement and an interest in protecting victims, as the contrast between the VAWA and S visa programs shows. This tension also exists in the contrast—some would say conflict—between the U visa, which offers a visa to crime victims, and programs which allow immigration authorities to identify unauthorized immigrants for deportation after they come in contact with local law enforcement.[95]

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89. *See id.* at 135–37.

90. *See* Elizabeth Keyes, *Race and Immigration, Then and Now: How the Shift to "Worthiness" Undermines the 1965 Immigration Law's Civil Rights Goals*, 57 HOW. L.J. 899, 900 (2014).

91. *See* Elizabeth Keyes, *Beyond Saints and Sinners: Discretion and the Need for New Narratives in the U.S. Immigration System*, 26 GEO. IMMIGR. L.J. 207, 216–17 (2012).

92. *Cf.* Jacqueline Bhabha, *Internationalist Gatekeepers? The Tension Between Asylum Advocacy and Human Rights*, 15 HARV. HUM. RTS. J. 155, 160–61 (2002) (explaining how asylum advocacy and adjudication is a "pressure point" that legitimizes the distinction between genuine refugees and "unworthy forced migrants").

93. Hipolito, *supra* note 84, at 168 (discussing "iconic" concepts of deserving immigrants).

94. *Id.* at 175.

95. *See generally* Lindsey J. Gill, *Secure Communities: Burdening Local Law Enforcement and Undermining the U Visa*, 54 WM. & MARY L. REV. 2055 (2013). The most prominent of the programs through which DHS identifies immigrants after contact with local law enforcement was known as Secure Communities. This program was officially ended in November 2015 because it included provisions by which immigrants were detained after the time when they would otherwise have been released by local law enforcement, which several courts found to raise constitutional problems. *See* Memorandum from Jeh Johnson, Sec'y Dep't Homeland

The dual purposes of protecting victims and assisting law enforcement might be unified not only by a desire to designate deserving victims, but also by a desire to rescue them. Dina Francesca Haynes has explained the impact of this concept of rescuing victims with reference to the T visa program for victims of trafficking, which Congress established the same year as the U visa.[96] T visa applicants are also incentivized to cooperate with law enforcement, though not to the same extent as U visa applicants.[97] Law enforcement agencies have focused their efforts on victims who are rescued, neglecting those who escape on their own and then come forward to ask for a visa.[98] As Haynes explains, trafficking victims often do not fit this image of a rescued victim:

> Most victims of human trafficking are not "rescued" by anyone. They are not found by law enforcement, chained to a bed in a brothel. . . . The false assumption that real victims are those who are rescued by anyone, let alone by a federal agent, and the converse assumption that those who rescue themselves are not or are less likely to be real victims, distorts the government's ability to understand the true nature of the problem.[99]

One practical advantage of being rescued is that the rescuer is an independent witness, who can confirm that the victim's suffering is genuine. By contrast, an immigrant who escapes faces more questions and doubts.[100] But the concept of rescue is more powerful than that. When an American rescues an immigrant, the American feels like a hero. The rescue narrative evokes a relationship between victim and rescuer and suggests a villain, the perpetrator who the victim escaped. Images of victim, villain, and rescuer are highly gendered: both hero and villain are typically masculine, while the victim is feminine. In U visa cases, the masculine and feminine distinctions are literal, as domestic violence accounts for the majority

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Sec., to Thomas S. Winkowski, Acting Director, ICE, Megan Moch, officer, Office of Civil Rights and Civil Liberties, and Philip A. McNamara, Assistant Sec'y for Intergovernmental Affairs (Nov. 20, 2014) *available at* http://www.dhs.gov/sites/default/files/publications/14_1120_memo_secure_communities.pdf. However, while the detention aspects of Secure Communities have been curtailed, DHS continues to identify potentially deportable people through partnerships with local police. *Id.*

96. *See* Dina Francesca Haynes, (*Not) Found Chained to a Bed in a Brothel: Conceptual, Legal, and Procedural Failures to Fulfill the Promise of the Trafficking Victims Protection Act*, 21 GEO. IMMIGR. L.J. 337346 (2007).

97. *See* 8 U.S.C. § 1101(15)(T)(i)(III)(aa) (2012); *see also* discussion, *infra*, at Part VI.C.

98. Haynes, *supra* note 96, at 350-52.

99. *Id.* at 351.

100. *See id.* at 350.

of U visa applications; prototypically, a female victim levels an accusation against a male defendant.[101]

As I discussed in Part II, concern about domestic violence loomed large in the development of the U visa, and has dominated discussion of it since.[102] The government does not publish statistics breaking down the frequency of each crime in applications for U visas. However, of the U visa's twenty-six qualifying crimes, ten have an implicit sexual or gender component.[103] On its face, this does not mean that Congress intended to favor women over men or that men do not benefit from the U visa. With the exception of female genital mutilation, men can be and are victims of these crimes. Rather, the U visa program is strongly attached to a conception of primarily female victims and male perpetrators.[104] At least for the crime of domestic violence, this perception is often true.[105]

To see the impact of gender on the U visa program, it is significant to note that Congress seems to perceive gender and sex as factors that make a crime victim more deserving of immigration benefits.[106] A relatively non-violent crime with a sexual or gender element is more likely to qualify for a U visa. Simple assault must be "felonious assault" to qualify, which typically means it requires an aggravating element such as a weapon or injury. But the Supreme

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101. CECELIA FRIEDMAN LEVIN, U CAP UPDATE FROM USCIS & ADDITIONAL UPDATES FROM VSC STAKEHOLDER TELECONFERENCE 3, Dec. 11, 2013, *available at* http://www.asistahelp.org/documents/news/U_cap_advisory_and_notes_from_stakh_60F50EB294846.pdf ("About 75% of U visas are based in domestic violence or domestic violence/sexual assault crimes."). *See also*, Crick, *infra* note 104 (women are more frequently victims of domestic violence than men).

102. *See* Gill, *supra* note 95, at 2065 ("Although federal law incorporates a long list of qualifying crimes that create U visa eligibility for victims, Congress sought specifically to address concerns about domestic violence."). For examples of media depictions of the U visa program, see *infra* notes 111–112.

103. *See* U.S. CITIZENSHIP & IMMIGRATION SERV., VICTIMS OF CRIMINAL ACTIVITY: U NONIMMIGRANT STATUS, http://www.uscis.gov/humanitarian/victims-human-trafficking-other-crimes/victims-criminal-activity-u-nonimmigrant-status/victims-criminal-activity-u-nonimmigrant-status (abusive sexual conduct, domestic violence, female genital mutilation, incest, prostitution, rape, sexual assault, sexual exploitation, stalking, and trafficking). *See also* 114 Stat. 1518 Sec. 1502(a) (2000) (Congressional findings citing specific concern for "women and children").

104. *Cf.* Melody M. Crick, *Access Denied: The Problem of Abused Men in Washington*, 27 SEATTLE U. L. REV. 1035, 1036 (2004) (" 'domestic violence' is so synonymous with the term 'battered women' that male victims of abuse often find their female abusers labeled as the victim.").

105. *See* Molly Dragiewicz and Yvonne Lindgren, *The Gendered Nature of Domestic Violence: Statistical Data for Lawyers Considering Equal Protection Analysis*, 17 AM. U. J. GENDER SOC. POL'Y & L. 229, 247–251 (2009) (summarizing data that women are more likely than men to be the victims of violence by intimate partners, are much more likely to be injured, and are more likely to be killed).

106. *See, e.g.*, Saucedo, *supra* note 63, at 909 (noting the gendered nature of the U visa qualifying crimes).

Court in 2014 noted that " '[d]omestic violence' is not merely a type of 'violence;' it is a term of art encompassing acts that one might not characterize as 'violent' in a nondomestic context."[107]

Because the list of qualifying crimes prominently feature gender-related offenses, the U visa can be understood as institutionalizing a certain conception of gender roles. In order to apply for the U visa, a noncitizen must: (1) declare herself a victim, both to law enforcement and to CIS, and (2) accuse another person of the crime, in order to cooperate with law enforcement in its investigation.[108] Given the nature of the qualifying crimes, this frequently means a woman accuses a man, since domestic violence is a leading basis for U Visa applications. Moreover, if women report domestic violence, one immigrant is often accusing another immigrant of a crime, which may impose significant immigration consequences for both.[109] While victims of domestic violence are potentially eligible to stay in the U.S. legally through the U visa program, an immigrant convicted of domestic violence is likely deportable, even if he previously enjoyed legal permanent residence.[110]

Female victims of domestic violence dominate the media's sympathetic depiction of the U visa program.[111] Such portrayals consistently depict vulnerable, unauthorized immigrant women falling victim to abusive male partners who are also immigrants. These women are then either afraid to seek help or find salvation through the U visa. One article in *The New York Times* opened by explaining how the U visa allowed a woman in this situation to turn the tables on her abuser:

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107. Castleman v. United States, No. 12-1371, slip op. at 6–7 (U.S. Mar. 26, 2014).

108. *See, supra* Part III.

109. A significant portion of unauthorized immigrant households consist of couples or couples with children. JEFFREY S. PASSEL & D'VERA COHN, PEW HISPANIC CENTER, A PORTRAIT OF UNAUTHORIZED IMMIGRANTS IN THE UNITED STATES 5 (Apr. 14, 2009) (stating that seventy-five percent of households headed by unauthorized immigrants consist of couples, forty-seven percent of all such households were couples with children and fifteen percent couples without children). Thus, if one partner in such a relationship accuses the other of domestic violence, both the victim and the accused will likely be unauthorized immigrants.

110. 8 U.S.C. § 1227(a)(2)(E)(i) (2012).

111. *See, e.g.*, *Some Immigrant Women, Victims of Domestic Violence, Afraid to Seek Help*, PUB. RADIO INT'L (Mar. 21, 2013), http://www.pri.org/stories/2013-03-21/some-immigrant-women-victims-domestic-violence-afraid-seek-help; Devin Sanchez, *Undocumented Immigrants Protected Under the Violence Against Women Act*, NBC LATINO, (Mar. 12, 2013), http://nbclatino.com/2013/03/12/undocumented-immigrants-protected-under-the-violence-against-women-act; Pamela Constable, *For Immigrant Women, Domestic Violence Creates a Double Shadow*, WASH. POST, (Dec. 2, 2013), *available at* http://www.washingtonpost.com/local/for-immigrant-women-domestic-violence-creates-a-double-shadow/2013/12/02/5626b85e-55e6-11e3-8304-caf30787c0a9_story.html; Sarah Childress, *For Shadow Victims of Violence, the "U Visa" Can Help*, PBS FRONTLINE, (June 24, 2013), http://www.pbs.org/wgbh/pages/frontline/social-issues/rape-in-the-fields/for-shadow-victims-of-violence-the-u-visa-can-help/.

> She was 14 when her mother smuggled her into Los Angeles. She met her future husband, a legal resident, two years later.
>
> He had all the cards, and played them cruelly, as she recalls. He would not let her go to school or work, dragged his feet on supporting her citizenship request, and called her fat and ugly after she became pregnant.
>
> She endured it all—until she caught him romancing a 13-year-old girl from their church choir. When she complained, he beat her bloody, tried to rape her, and fled, with the girl, to Arizona, she said in an affidavit that is now part of federal immigration records.
>
> Today, he is in prison, and she is caring for her children in San Francisco, with a driver's license and a legal job baby-sitting. Her legal status came about through what is known as a U visa—a humanitarian "island of niceness," as one advocate called it, in a sea of restrictive United States immigration laws.[112]

This story touches the narrative high points of a prime time television show. The domestic violence survivor is rescued and rebuilds her life. The villain meets justice and is punished. The existence of a government program that makes this happen is praiseworthy. Moreover, the peril and the drama involved are very real. But it is also important to recognize that not every case will present such moral or factual clarity. In a complicated case, the inherent appeal of a narrative that relies on clear distinctions between good and bad can be dangerous. While the system helps the perceived victim, it hurts the perceived perpetrator. That's good if we are sure he is guilty. But precisely because this is such an appealing story, we may be too eager to believe it, which is a problem when the evidence is more conflicted.

Political scientists have developed the "chivalry thesis" to explain the role that gender plays in criminal adjudication.[113] Empirical research has demonstrated that women defendants seem to fare

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112. Katherine Ellison, *A Special Visa Program Benefits Abused Illegal Immigrants*, N.Y. TIMES, Jan. 8, 2010, at A19.

113. *See* Margaret Farnsworth & Raymond H.C. Teske, Jr., *Gender Differences in Felony Court Processing: Three Hypothesis of Disparity*, 6 WOMEN & CRIM. JUST. 23 (1995); Steven F. Shatz & Naomi R. Shatz, *Chivalry Is Not Dead: Murder, Gender and the Death Penalty*, 27 BERKELEY J. GENDER L. & JUST. 64 (2012); Chimene I. Keitner, *Victim or Vamp? Images of Violent Women in the Criminal Justice System*, 11 COLUM. J. GENDER & L. 38 (2002); Peter W. Hahn & Susan D. Clayton, *The Effects of Attorney Presentation Style, Attorney Gender, and Juror Gender on Juror Decisions*, 20 L. AND HUM. BEHAV. 533, 543 (1996).

better than men in criminal sentencing of similar cases.[114] Men who commit a single rape-murder of a woman are more likely to be sentenced to death than men who murder multiple people without the sexual assault element.[115] Political scientists theorize that social norms of chivalry call upon men to protect women from harm because they are perceived as helpless. Fernando Rodriguez, Theodore R. Curry, and Gang Lee explain:

> The chivalry thesis posits that gendered stereotypes about women and men influence sentencing outcomes according to the sex of the offenders. Sometimes called paternalism, chivalry asserts that women are stereotyped as fickle and childlike, and therefore not fully responsible for their criminal behavior. Women therefore need to be protected by males who, with all due gallantry, are portrayed as wanting to minimize any pain or suffering women might experience.[116]

The chivalry thesis incorporates stereotyped images of both idealized victims and idealized perpetrators. It has provocative implications when combined with Americans' perceptions of men of color as violent and women from the global south as oppressed. The United States may be acting on a chivalrous impulse to protect foreign women from the perceived threat posed to them by men from their own countries and cultures. The U visa literally does this in many cases by extending a significant benefit to immigrant women who accuse men—also likely to be immigrants—of violence.

Jayashri Srikantiah observed that in the context of anti-trafficking policy, law enforcement tends to imagine an "iconic victim," who contrasts with the criminal trafficker.[117] The preference is to depict "victims as completely blameless," which "allows full blame for the trafficking enterprise to be placed on traffickers."[118] This dichotomy blinds the law to the moral complexity of human relationships especially in trafficking; motivations and actions are often neither entirely coercive nor entirely voluntary, and victims may maintain

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114. *See generally,* Margareth Etienne, *Sentencing Women: Reassessing the Claims of Disparity,* 14 J. GENDER RACE & JUST. 73 (2011); Cassia Spohn, John Grahl & Susan Welch, *The Impact of the Ethnicity and Gender of Defendants on the Decision to Reject or Dismiss Felony Charges,* 25 CRIMINOLOGY 175 (1987); S. Fernando Rodriguez, Theodore R. Curry & Gang Lee, *Gender Differences in Clinical Sentencing: Do Effects Vary Across Violent, Property, and Drug Offenses?,* 87 No. 2 SOC. SCI. Q. 318 (2006).

115. Shatz & Shatz, *supra* note 113, at 98, 101.

116. Rodriguez et al., *supra* note 114, at 320.

117. Jayashri Srikantiah, *Perfect Victims and Real Survivors: The Iconic Victim in Domestic Human Trafficking Law,* 87 BOST. U. L. REV. 157, 195 (2007).

118. *Id.* at 195–96.

affinity for their abusers.[119] The potential for moral complexity may be even greater in many domestic violence cases, which emerge within troubled, intimate relationships.

Lawyers and victim advocates can play a problematic role in filtering complicated human conflicts into simplistic moral narratives.[120] The U visa targets victims from other countries, especially unauthorized immigrants who are especially likely to be nonwhite.[121] Just as critical race and gender scholars observe that domestic violence cases play into stereotypes of black male violence, post-colonial scholars raise a similar critique—the human rights discourse focuses on the oppression of women in the global south, particularly women in Muslim countries.[122] Srikantiah summarizes this stereotype in her description of the "iconic victim" of trafficking:

> Iconic victims originate from cultures in Asia, Latin America, or Africa stereotypes as suppressing the individuality of women and girls and rendering them simple prey for manipulation by clever traffickers. The iconic victim concept is thus consistent with stereotypes of foreign women and women of color as meek, helpless, and belonging to repressive male dominant cultures.[123]

Smeetra Mishra analyzed portrayals of Muslim men and women by *The New York Times* during the two years following the September 11 attacks. Mishra found that *The New York Times* conveyed "dominant representations of Muslim men as violent and dangerous and Muslim women as victims of oppression."[124] Noting that American political leaders justified American military operations against the Taliban in part as a campaign to liberate Afghan women, Mishra wrote that the War on Terror could be described as "saving Muslim women and fighting Muslim men."[125]

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119. *Id.* at 197–98.

120. *See* Bhabha, *supra* note 92, at 162.

121. For instance, the majority of unauthorized immigrants in the United States are from Mexico. *See* JEFFREY S. PASSELL & D'VERA COHN, PEW HISPANIC CENTER, UNAUTHORIZED IMMIGRANT POPULATION: NATIONAL AND STATE TRENDS, 2010, (Feb. 1, 2011), http://www.pewhispanic.org/2011/02/01/unauthorized-immigrant-population-brnational-and-state-trends-2010/.

122. *See generally* LILA ABU-LUGHOD, DO MUSLIM WOMEN NEED SAVING? (2013); Christine M. Jacobsen & Dag Stenvoll, *Muslim Women and Foreign Prostitutes: Victim Discourse, Subjectivity, and Governance*, 17 SOC. POL. 270 (2010).

123. Srikantiah, *supra* note 117, at 201–02.

124. Smeetra Mishra, *"Saving" Muslim Women and Fighting Muslim Men: Analysis of Representations in The New York Times*, 6 GLOBAL MEDIA J. 1, 1 (2007).

125. *Id.*

Such gendered preconceptions of foreign men may benefit crime victims. Jacqueline Bhabha observed that a lawyer representing an asylum-seeker is under "pressure to generate simplistic, even derogatory characterizations of asylum seekers' countries of origin, as areas of barbarism or lack[ing] . . . civility in order to present a clear-cut picture of persecution."[126] To win an asylum case, an applicant must describe his or her country as persecuting; a U visa applicant must depict the criminal perpetrator as villainous and the crime as especially traumatic. Developing a narrative that positions one's client favorably is sound advocacy, but it carries a downside. Bhabha warns:

> While understandable as a pragmatic strategy to maximize the chances of a successful outcome, this approach easily turns into stereotyp[ing], even cultural arrogance. It denies the political complexities in the state of origin, where oppositional forces may mount challenges to the oppressive behaviors cited. Moreover it is reductive: differing conceptions of gender, religious or age-based roles and rights within the state, and the culture or religion of the asylum seeker may be homogenized into a uniform picture—a stereotype may come to stand in for the variety of possible forms of oppression.[127]

In the case of the U visa, the danger is more immediate than the perpetuation of reductive stereotypes. The person on the wrong side of this pragmatic narrative stands to be prosecuted, punished, and possibly deported.

Similarly, some feminist scholars criticize anti-domestic violence campaigns for focusing on a narrow conception of the perfect victim.[128] Elizabeth MacDowell describes this idealized image of a victim as "a fictive construct that floats ghost-like between historical, social and subjective reality, and is generally identified as passive, dependent, white, middle-class, heterosexual, and female."[129] But MacDowell observes that the perfect victim trope and adherence to

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126. Bhabha, *supra* note 92, at 162.

127. Bhabha, *supra* note 92, at 162; *see also* Srikantiah, *supra* note 117, at 196 (noting that focus on victims' rights in criminal justice obscures the fact that "[i]n the real world . . . victims are not perfectly innocent and perpetrators are not perfectly evil.").

128. *See* Leigh Goodmark, *When Is a Battered Woman Not a Battered Woman? When She Fights Back*, 20 YALE J.L. & FEMINISM 75, 91 (2008); Adele Morrison, *Changing the Domestic Violence (Dis)Course: Moving from White Victim to Multi-Cultural Survivor*, 39 U.C. DAVIS L. REV. 1061, 1078-91 (2006).

129. Elizabeth L. MacDowell, *Theorizing from Particularity: Perpetrators and Intersectional Theory on Domestic Violence*, 16 J. GENDER, RACE & JUST. 531, 533 (2013).

its criteria is only one side of this equation.[130] On the other side is a perpetrator, typically a man, and, in the case of domestic assaults involving immigrants, frequently a person of color. A number of critical legal scholars have noted that when African-American men are accused of domestic violence and other crimes, the accusation plays into a stereotype of black male violence.[131] Latino men are similarly stereotyped as criminal and potentially violent.[132]

This is not meant to imply that domestic violence and sexual assault are not major problems in immigrant communities—quite the contrary. Part V.A illustrates that gender-based violence is widespread in immigrant communities, as well as among non-immigrants. This deserves attention and it likely needs more. However, the problem is that the U visa does not only protect a victim; it also involves accusing a person of a serious crime, triggering serious consequences. As MacDowell writes, "A victim requires a perpetrator, an identity that is construed in opposition to the perfect victim."[133] Depicting a more evil perpetrator creates the expectation of a more pure victim, which does not serve the real interests of abused women.[134]

As awareness of gender violence among immigrants increases, some may become more prone to believe accusations against immigrant men. This has dire consequences for defendants who are entitled to the presumption of innocence when charged with crimes. That does not mean that victims should not be protected or believed. The point here is not to minimize domestic violence. Instead, the framework emphasizes that seemingly simplistic narratives of good and evil are often complicated, individualized, and difficult to judge. Even assuming that a large majority of victims are truthful, there can still be a serious problem in some cases where the victim may be exaggerating or fabricating. This poses a danger for innocent criminal defendants. Although defendants should not be convicted without proof beyond a reasonable doubt, innocent defendants may feel pressure to accept a plea bargain rather than risk conviction at trial. Instead of generalizing about

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130. *Id.* at 546.

131. *See* Zanita E. Fenton, *Domestic Violence in Black and White: Racialized Gender Stereotypes in Gender Violence*, 8 COLUM. J. GENDER & L. 1, 10, 16 (1998); Frank Rudy Cooper, *Against Bipolar Black Masculinity: Intersectionality, Assimilation, Identity Performance, and Hierarchy*, 39 U.C. DAVIS L. REV. 853, 875–79 (2006) (describing the image of the "bad black man").

132. *See, e.g.*, Jenny Rivera, *Domestic Violence Against Latinas by Latino Males: An Analysis of Race, National Origin, and Gender Differentials*, 14 B.C. THIRD WORLD L.J. 231, 240 (1994).

133. MacDowell, *supra* note 129, at 547.

134. *See* Leigh Goodmark, *Reframing Domestic Violence Law and Policy: An Anti-Essentialist Proposal*, 31 WASH. U. J. L & POL. 39, 51 (2009) ("essentializing men who batter is as problematic as essentializing women who are battered.").

whether allegations of violence and crime in immigration communities are exaggerated, a balanced system must protect victims without prejudicing the accused.

V. STRUCTURAL PROBLEMS WITH THE U VISA

A. The Quota and the Waiting List

Congress authorizes only 10,000 U visas per year, excluding family members of crime victims.[135] This limitation did not generate immediate problems because implementation of the U visa was slow. Not a single U visa was issued during the first year of the law.[136] The government did not issue regulations governing the U visa program for seven years.[137] However, by the time the program began operation in 2008, many applications had been filed and were backlogged. As a result, DHS issued the maximum number of visas that year, although 10,000 applications had not been filed in 2008 or 2009.[138]

By 2010, the number of applications for U visas exceeded the annual cap.[139] Applications have continued to rise rapidly.[140] At the same time, U.S. Citizenship and Immigration Services (USCIS) finds that because the majority of U visa applicants are eligible on the merits, a long wait has developed.[141] Roughly speaking, at current approval rates, any year in which more than 13,000 people apply for a U visa creates a backlog.[142] In 2012, nearly 25,000 applications were filed.[143] Figures 2 and 3 illustrate the basic problem. If this continues, more and more qualified applicants will have to wait to receive visas, and the waiting times will likely grow. On December 11, 2013, USCIS announced that it had already reached the 10,000

135. 8 U.S.C. § 1184(p)(2) (2012); 8 C.F.R. § 214.14(d) (2013) (applying the annual cap only to U-1 visas, not the U-2, U-3, U-4 and U-5 visas given to family members).

136. Kwong, *supra* note 38, at 151.

137. Hipolito, *supra* note 84, at 155.

138. Press Release, U.S. Citizenship & Immigration Serv., USCIS Approves 10,000 U Visas for 6th Straight Year (Dec. 11, 2014), http://www.uscis.gov/news/uscis-approves-10000-u-visas-6th-straight-fiscal-year. *See also* Hiplito, *supra* note 84, at 155–56.

139. U.S. CITIZENSHIP & IMMIGRATION SERV. (USCIS), PETITION FOR U NONIMMIGRANT STATUS VISA RECEIPTS, APPROVALS AND DENIALS, FISCAL YEARS 2002 THROUGH 2013, *available at* http://www.uscis.gov/sites/default/files/USCIS/Resources/Reports%20and%20Studies/Immigration%20Forms%20Data/Victims/I914t-I918u_visastatistics_2012-dec.pdf.

140. *See id.*

141. *Id.*

142. *Id.* (reporting 10,122 U visa approvals and 2,866 denials in 2012, for an acceptance rate of seventy-seven percent).

143. *Id.* (24,768 applications filed in 2012).

visa cap for fiscal year 2014, and it would not begin issuing U visas again until October 1, 2014.[144]

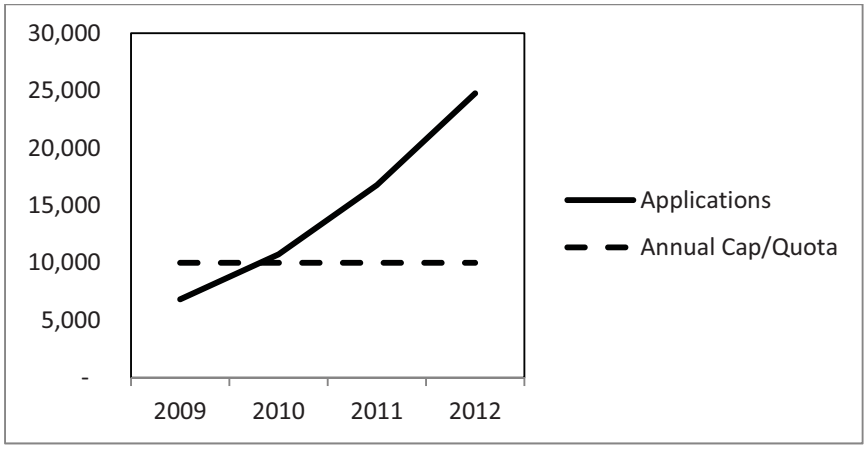

FIGURE 2: RISE IN APPLICATIONS FOR THE U VISA[145]

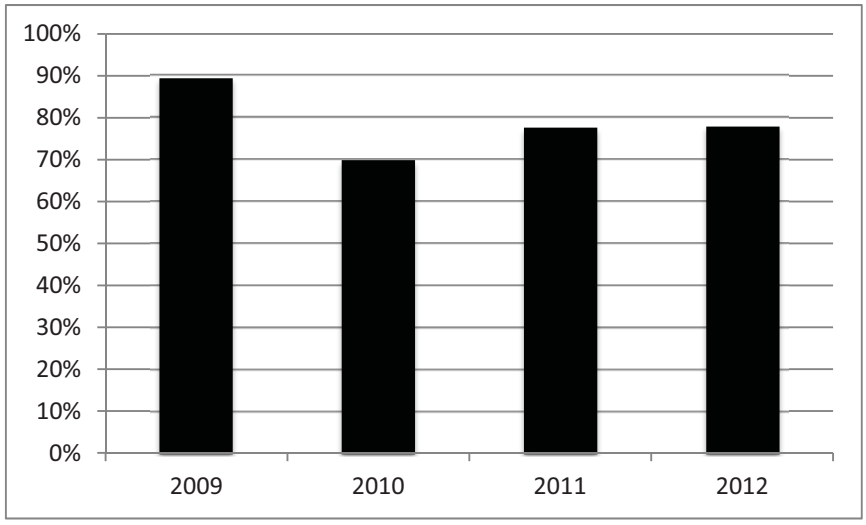

FIGURE 3: APPROVAL RATE OF U VISA APPLICATIONS[146]

Expansion of the U visa program has been caught up in the stalemate over comprehensive immigration reform in Congress, which

144. U.S. CITIZENSHIP & IMMIGRATION SERV., *supra* note 139.
145. *Id.*
146. *Id.*

remains stalled at time of writing (May 2015).[147] Still, some benefits are available to U visa applicants as they wait for a visa to be available under the quota. USCIS adjudicates whether the application is eligible for a visa and sends approval notices accordingly.[148] USCIS maintains a waiting list for eligible petitions and issues visas according to the date the petition was filed.[149] Petitioners on the waiting list may be granted deferred action—that is, prosecutorial discretion to not seek deportation—and will not be considered unlawfully present in the U.S.[150] This allows petitioners to ask for employment authorization during their waiting time.[151]

The Center for Immigration Studies (CIS), an advocate of more restrictive immigration policies, has attacked the U visa program for attracting exaggerated crime reports. CIS claims that the program resulted in "visa-creating crime" because applications for U visas climbed dramatically while overall crime rates declined.[152] This critique is easily answered. No established procedure to apply for a U visa existed before 2008, so applications naturally increased since.[153] Moreover, there is no reason to be surprised by the number of people who have valid U visa applications. According to figures cited by CIS, in 2012, one violent crime was committed for every 258 inhabitants of the United States.[154] Using this as a rough measure for purposes of discussion, with 11 million unauthorized immigrants in the country, it would be reasonable to expect *at least* 42,635 potential U visa applicants each year. This is much higher than both the quota of available visas and the number of actual applicants. If anything, there is reason to consider this an under-estimate of the potential number of valid U Visa applicants. The FBI category of "violent crime" is actually narrower than the U visa list of qualifying

147. *See* Editorial, *Special Visas for Abused Women Hit a Ceiling*, (*U visas Hit a Ceiling*) N. Y. TIMES, Sep. 3, 2012, *available at* http://www.nytimes.com/2012/09/04/opinion/special-visas-for-abused-women-hit-a-ceiling.html; Suzy Khimm, *The Violence Againt Women Act is on Life Support*, WASH. POST, Jan. 25, 2013, *available at* http://www.washingtonpost.com/blogs/wonkblog/wp/2013/01/25/the-violence-against-women-act-is-on-life-support/.

148. 8 C.F.R. § 214.14(c)(5)(i)(A) (2013).

149. 8 C.F.R. § 214.14(d)(2).

150. 8 C.F.R. § 214.14(d)(3).

151. 8 C.F.R. § 214.14(d)(2).

152. David North, *Crime, Generally, in the U.S. Is Down, But Visa-Creating Crime Soars*, CENTER FOR IMMIGRATION STUDIES (BLOG) (December 18, 2013), http://cis.org/north/crime-generally-us-down-visa-creating-crime-soar.

153. *See* Hipolito, *supra* note 84, at 153, 155-156 (describing the slow implementation of the U visa until 2009).

154. North, *supra* note 152 ("The widely used, expensively maintained 'Crime in the United States,' a long-existing FBI research tool, showed that there were 431.9 violent crimes for every 100,000 inhabitants of the United States in 2009. In 2012, the number was 386.9, a decline of 10.4 percent.").

crimes, so the actual number of potential U visa applicants is likely to be higher.[155] Of particular relevance, this FBI category does not include all cases of domestic violence because it only includes aggravated assaults with weapons or deadly force.[156] It also includes "forcible rape," but not lesser forms of sexual assault.[157]

The inadequacy of the U visa quota is even more glaring compared to estimates of the prevalence of domestic violence and sexual assaults. According to data compiled by the American Bar Association, around a quarter of all women in the United States have been the victims of an assault by an intimate partner during their lifetimes.[158] Men are assaulted by their partners more frequently than many realize, but fewer than eight percent of men have been victims of partner assaults.[159] Women account for nearly eighty-five percent of spousal violence victims.[160] Reported rates of domestic violence and sexual assault appear to be similarly high among communities likely to include many immigrants.[161] A survey of "Hispanic Texas females" found that two in five women reported experiencing serious abuse, and one in five women reported being raped.[162] A survey of Filipina women in San Francisco found that one in five women reported being victims of domestic violence.[163]

The implications of these rates of violence against women are staggering in terms of estimating the number of people who could conceivably qualify for U visas. Among the unauthorized immigrant population in the U.S., an estimated 4.1 million are adult women.[164] Even assuming that a modest percentage of these women may be

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155. According to the FBI, "violent crime is composed of four offenses: murder and nonnegligent manslaughter, forcible rape, robbery, and aggravated assault. Violent crimes are defined in the UCR Program as those offenses which involve force or threat of force." FED. BUREAU OF INVESTIGATION, CRIME IN THE UNITED STATES 2010 (Sep. 2011), *available at* http://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2010/crime-in-the-u.s.-2010/violent-crime/violentcrimemain.pdf. The FBI definition of violent crime thus would not include U visa qualifying crimes such as extortion, prostitution, peonage, obstruction of justice, and lower forms of sexual of assault.

156. FED. BUREAU OF INVESTIGATION, CRIME IN THE UNITED STATES 2010, AGGRAVATED ASSAULT (Sep. 2011), *available at* http://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2010/crime-in-the-u.s.-2010/violent-crime/aggravatedassaultmain.pdf.

157. *Id.*

158. AM. BAR ASS'N (ABA), COMMISSION ON DOMESTIC AND SEXUAL VIOLENCE, DOMESTIC VIOLENCE STATISTICS, www.americanbar.org/groups/domestic_violence/resources/statistics.html (last visited Mar. 21, 2015).

159. *Id.*

160. *Id.*

161. *Id.* The data reported here defines populations by ethnicity (i.e. "Hispanic," "Chinese") rather than by immigration and citizenship status.

162. *Id.*

163. *Id.*

164. PASSEL & COHN, *supra* note 109, at 4.

victims of domestic violence, the number of people eligible for U visas far outstrips the quota. Figure 4 illustrates this.

FIGURE 4: ESTIMATES OF NUMBERS OF POTENTIAL FEMALE DOMESTIC VIOLENCE SURVIVORS AMONG UNAUTHORIZED IMMIGRANTS

Assumed Rate of Domestic Violence	Estimated Number of Potential U Visa Beneficiaries	Annual U Visa Quota
1 in 100 women	41,000	10,000
1 in 20 women	205,000	
1 in 5 women	820,000	

**Estimates based on a total population of 4.1 million adult unauthorized immigrant women.*

B. The Suspicion Trap

The U visa can potentially swing the incentives offered to immigrant crime victims. The standard justification for granting visas to crime victims is that, in the words of Orde Kittrie, "[t]heir status as deportable aliens . . . renders them vulnerable to abuse and exploitation."[165] The idea here is that unauthorized immigrants are disadvantaged relative to citizens and legal immigrants. The remedy for this challenge may be to try to equalize the situation for immigrants and citizens, but the U visa does much more. The U visa is an incentive to accuse. The U visa rewards unauthorized immigrants for accusing other people of serious crimes. These rewards are not offered to other people, except perhaps to co-conspirators who testify for the state.

In order to qualify, not only must an immigrant suffer as a victim, but also must assist law enforcement. In effect, victims must accuse others. Moreover, because only certain crimes make an immigrant eligible for a U visa, there is an incentive to make a more serious accusation. Simple assault would not qualify, but aggravated assault would.[166] The immigrant similarly must claim a high degree of suffering because of the crime, which will often make the crime appear to be more serious. In localities where police and prosecutors are more reluctant to certify U visas, immigrants may

165. Orde F. Kittrie, *Federalism, Deportation and Crime Victims Afraid to Call the Police*, 91 IOWA L. REV. 1449, 1451 (2006).

166. *See* discussion *supra* Part III.

experience even greater pressure to make their accusations more serious.

Reasonable people may disagree about whether this incentive is disconcerting. As explained *supra*, no concrete evidence suggests that U visa applications are being fabricated on a wide scale. If anything, more people may be eligible than are applying.[167] The fear of approaching police may be so high for some immigrants that some incentive to report crime is necessary to achieve rough parity with citizens. But even if evidence of widespread fraud has yet to emerge, an incentive to accuse could raise concern that some individual crime reports might be at least exaggerated if not entirely fabricated. For present purposes, it suffices to recognize that this incentive exists in the structure of the U visa system.

In the hands of an aggressive defense attorney, this incentive structure would be called motive to lie. This concern is serious given the close connection between U visas and domestic violence. Domestic violence cases raise considerable concerns due to high rates of witness recantations and false statements[168] and a tendency for victims to stop cooperating with police and prosecutors.[169] There are multiple reasons why a genuine victim may do this, including trauma, learned helplessness (popularly known as the Battered Woman Syndrome), or pressure from the perpetrator.[170] The U visa's requirement that victims continue to assist police uses coercion to counter this. Forcing victims to assist police is consistent with other policies designed to prevent witnesses from undermining prosecution, such as mandatory arrest, compelling immediate sworn witness statements, and "no-drop prosecutions."[171] But these policies can be problematic, considering that recanting and becoming uncooperative sometimes serves as a survivor strategy—a way for a victim to control what happens to her family.[172]

A lawyer developing a defense theory would suggest that a witness recanted simply because their accusation was untrue.[173] When a witness directly recants a previous statement, at least one of their

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167. *See supra*, Part V.A.

168. Njeri Mathis Rutledge, *Turning a Blind Eye: Perjury in Domestic Violence Cases*, 39 N.M. L. REV. 149, 149 (2009) (summarizing research finding false or recanted statements in forty to ninety percent of domestic violence cases).

169. Tom Lininger, *Prosecuting Battered After Crawford*, 91 VA. L. REV. 747, 768 ("Victims of domestic violence are more prone than other crime victims to recant or refuse to cooperate after initially providing information to police.").

170. *See* Rutledge, *supra* note 168, at 166.

171. *Cf. id.* at 177–182 (describing these policies).

172. *See id.* at 170–172 (describing the survivor thesis).

173. *See id.* at 150 (recanting victims may be divided into those who were filing a false report, and those who are genuine victims who recant later for other reasons).

two statements must logically be false. Moreover, an accusation can be only partially true, but still do great harm to the accused. Domestic violence does not require the same level of force or threat that might be required for other violent crimes.[174] In the context of a heated argument between two angry spouses, it takes very little exaggeration to cause a problem for the criminal justice system. The difference between "he threw a plate" and "he threw a plate at me" can be the difference between a bad fight and a criminal offense. For an immigrant with legal residency, these few additional words may be the difference between staying in the country and being deported. Even misdemeanor domestic violence can be a removable offense.[175]

In these cases, the potential defense argument is straightforward. An unauthorized immigrant couple finds their relationship falling apart, and they are likely to split. One of them realizes that this is also an opportunity. The next time they have a fight, she calls the police. If she convinces the police that she is a genuine victim, her partner will be arrested and may be deported, while she and her childrens get U visas and a path to citizenship. The U visa provides fodder for this narrative because it gives witnesses a potentially powerful motive to make false or exaggerated reports. Defendants have every right to pursue this line of defense. It is their constitutional right to expose potential ulterior motives of alleged victims. Yet, this line of impeachment will apply equally to U visa applicants who are genuinely victims. This is the U visa's suspicion trap. The U visa fuels doubts about the credibility of victims—doubts that the victims of gender-based violence do not need.[176]

As knowledge and understanding of the U visa spreads in immigrant communities, this defense narrative becomes more plausible. The growth of attorney advertisements promoting the U visa, such as the billboards in Las Vegas pictured on the first page of this article, enhance this worry. This trend is a double-edged sword. There is a continuing need to inform immigrant communities about the availability of potential protection from deportation for crime victims, especially given that the rate of applications is much lower than the expected rate of qualifying victims. Yet such attorney advertising shifts the focus from protecting vulnerable people to taking advantage of the opportunity to get a visa. This kind of shift

174. *See* Castleman v. United States, No. 12-1371, slip op. at 6-7 (U.S. March 26, 2014).

175. 8 U.S.C. § 1227(a)(2)(E) (2012).

176. *Cf.* Mary Fan, *Adversarial Justice's Casualties: Defending Victim-Witness Protection*, 55 B.C. L. Rev. 775 (2014) (critiquing the tendency for mechanisms intended to protect victims to be turned into weapons against them in the American adversarial system of criminal justice).

is hardly remarkable in the crass arena of attorney advertising. In personal injury law, a tort law textbook might speak idealistically about making the victim whole. But a ubiquitous advertising campaign in Las Vegas reframes it thus: "In a wreck? Need a check?"[177] Although U visa advertising is tame and relatively informative in comparison, spreading information about U visas plays perfectly into a narrative that inherently undermines the credibility of witness-victims. A 2004 California domestic violence case in Santa Clara, California, highlights this point. At trial, the defense cross-examined the victim about how she saw fliers explaining the immigration benefits included in the Violence Against Women Act before she went to the police and filed a VAWA application.[178] The victim hired her own attorney, asserting that answering such questions violated her right against self-incrimination because she would be forced to admit that she was unlawfully present in the country.[179] An appeals court required the victim to answer the cross-examination because "evidence of whether [the victim] had filed a VAWA application was relevant to the defendant's assertion that Sonia manufactured claims of spousal abuses, because a VAWA application provides a shortcut to adjusting an alien's immigration status."[180]

The difficulties with the U visa quota have important practical consequences for this line of impeachment. Although criminal defendants have a right to a speedy trial, the wait for a U visa extends beyond a year and seems to be growing. So, if a crime victim applies for a U visa roughly at the time prosecution commences, the victim's U visa application will likely be pending when the criminal case goes to trial. The application will certainly be pending at the time of a preliminary hearing or plea negotiations. Thus, the witnesses' dependence on the good will of law enforcement peaks at the moment when she must testify. If she does not cooperate with prosecutors or police, they have the power to withhold or retract the certification on which she depends for her visa application.

A criminal defendant's right to cross-examine prosecution witnesses includes impeaching a witness by exposing "ulterior motives of the witness as they may relate directly to issues or personalities in the case at hand."[181] The promise of immigration benefits in exchange for testimony offers quintessential impeachment material

177. Glen Lerner, *Glen Lerner Injury Lawyers, If you're in a wreck, you need a check!!*, YOUTUBE (Mar. 29,2012), https://www.youtube.com/watch?v=hguh5Ot2bik.

178. People v. Wong, 2004 WL 3015782 at 2-4 (Cal. Ct. App. 2004).

179. *Id.* at 5.

180. *Id.*

181. Davis v. Alaska, 415 U.S. 308, 316 (1974).

for precisely this reason. In 2005, the conviction of Osama Bin Laden's personal secretary Wadih al-Hage was nearly jeopardized because the government had suppressed videotapes showing that the government offered a key witness assistance with his immigration case. Judge Kevin Thomas Duffy of the Southern District of New York wrote:

> In my forty-seven years at the bar and on the bench, I have seen few routes to impeachment that are more effective than words from a witness's own mouth suggesting that he understands he must shade his testimony in order to win the favor of one of the parties. Where the witness seeks to curry favor with the Government, the impression made upon the jury is generally quite significant.[182]

Some state courts have allowed an immigration law violation to be used for witness impeachment on the theory that it is a prior bad act, potentially even an act of fraud.[183] But other judges worry that the immigration status of witnesses and defendants should not be brought into cross-examination without careful analysis for fear of pandering to the jury's prejudices for or against immigrants.[184] A stronger basis for bringing up a witness' immigration status is that unauthorized immigrants are especially vulnerable to pressure from law enforcement that could lead them to bend their testimony in favor of the prosecution.[185] In 2012, the Connecticut Supreme Court held that immigration status could be brought up in cross-examination only if there was a demonstrated link between immigration concerns and a motive to testify falsely.[186]

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182. U.S. v. Bin Laden, 397 F. Supp. 2d 465, 506 (S.D.N.Y. 2005) (but finding that the government's suppression of the information was not deliberate).

183. *See* Gabriel J. Chin, *Illegal Entry as Crime, Deportation as Punishment: Immigration Status and the Criminal Process*, 58 UCLA L. REV. 1417, 1427–29 (2011) (describing case law permitting cross-examination based on immigration violations).

184. *See, e.g.*, People v. Perales-Hernandez, 2014 WL 710455, at 6 (Cal. Ct. App. 2014) (trial court feared prejudice against "illegal immigrants" would prejudice the jury); Doumbouya v. County Court, 224 P.3d 425, 427 (Col. Ct. App. 2009) (trial court feared that telling the jury that convicting a defendant would lead to deportation would elicit unjustified sympathy for the defendant).

185. Chin, *supra* note 183, at 1427–28.

186. State v. Jordan, 44 A.3d. 794, 815 (Conn. 2012); *see also* Arroyo v. State, 259 S.W.3d 831, 835–36 (Tex. App. 2008) (when there is no evidence that witness received immigration benefits from the state, defendant may be barred from cross-examining about witness' immigration status); Perez v. U.S., 968 A2d 39, 64-65 (D.C. Ct. App. 2009) (prosecution's failure to disclose witness' statements about her immigration status did not violate Brady because it would not have undermined her testimony).

Defendants can often show such a nexus, especially in cases involving current or former domestic partners.[187] As a Colorado court found, "[i]t would be constitutionally problematic to preclude relevant impeachment simply because immigration is a 'hot button topic.' "[188] The U visa, along with VAWA and the T visa, make it especially likely that immigration issues will become legitimate grounds for cross-examination and impeachment because these programs explicitly tie immigration benefits to being a victim and to making accusations to law enforcement. Unsurprisingly, in April 2014, the Supreme Judicial Court of Massachusetts found that a U visa application is legitimate grounds for cross-examining a rape victim.[189]

As awareness of the U visa grows both among immigrants and in the defense bar, defendants may more consistently attack the credibility of victims who sought or received immigration benefits from police or prosecutors. This may particularly damage cases that involve the competing credibility of accusers and defendants, typically the "he said/she said" situations inherent in many domestic violence and sexual assault cases. It should be noted that reported cases and cases that go to trial are likely to be only the tip of the iceberg. Since most criminal cases in the U.S. end in plea bargains,[190] the most common result may be to strengthen the hand of defendants in plea negotiations. Prosecutors may fear subjecting victims to cross-examination centering on immigration issues. This could result in lighter convictions and sentences for people who abuse immigrants—precisely the problem the U visa was established to counteract.

Because a U visa application may be fodder for witness impeachment, prosecutors are likely to disclose to the defense any discussion of U visa certification with the witness. Under *Brady v. Maryland*, prosecutors must disclose exculpatory evidence to the defense.[191] This includes materials that may be used to impeach a

187. *See, e.g.*, Doumbouya, 224 P.3d at 429 (risk of defendant being deported was relevant because "[t]he theory of the defense required motive for the defendant's estranged wife to accuse him falsely. That motive, according to the defense, was a conviction that would lead to the wife's being awarded custody of the couple's son.").

188. *Id.* at 428.

189. Commonwealth v. Sealy, 6 N.E.3d 1052, 1058 (Mass. 2014).

190. *See* Padilla v. Kentucky, 559 U.S. 356, 372 (2010) (citing government data showing pleas account for ninety-five percent of criminal convictions); Stephanos Bibas, *Regulating the Plea Bargaining Market: From Caveat Emptor to Consumer Protection*, 99 CAL. L. REV. 1117, 1138-39 (2011) (describing plea bargaining as the norm).

191. Brady v. Maryland, 373 U.S. 83 (1963).

government witness, such as promises of favorable treatment in exchange for testimony.[192] Immigration benefits clearly fall within this category.[193] When a federal prosecutor did not disclose to the defense that a DEA witness, who would otherwise have been undocumented, received immigration benefits in exchange for testifying, the Ninth Circuit Court of Appeals found: "Any competent lawyer would have known that Rivera's special immigration treatment by the INS and the DEA was highly relevant impeachment material."[194]

The Department of Homeland Security has issued ambiguous guidance about how much information about a U visa application may be disclosed to defense counsel.[195] Even if DHS disclosed nothing, however, local law enforcement may disclose information they hold. An informal survey of local prosecutors by the Stanford Immigrants' Rights Clinic found a range of opinions about how much of a U visa application had to be disclosed under *Brady*.[196] There is a strong argument that *Brady* covers immigration assistance in obtaining a visa along with requests for such assistance. But

192. Giglio v. United States, 405 U.S. 150 (1972). State court decisions and court rules have echoed or extended this rule. *See, e.g.*, People v. Westmoreland, 58 Cal.App.3d 32, 43 (Cal. 1976) (material that must be turned over includes "any inducements made to prosecution witnesses for favorable testimony."); Mazzan v. Warden, 993 P.2d 25, 37 (Nev. 2000) ("Evidence must also be disclosed if it provides grounds for the defense . . . to impeach the credibility of the state's witnesses.").

193. *See* Sealy, 6 N.E.3d 1052. *Cf.* U.S. v. Bin Laden, 397 F. Supp. 2d 465, 506 (S.D.N.Y. 2005) (quid pro quo exchange of immigration benefits for testimony could be valid for impeachment). *See also* State v. Jordan, 44 A.3d. 794, 815 (Conn. 2012).

194. United States v. Blanco, 392 F.3d 382, 392 (9th Cir 2004).

195. DEP'T OF HOMELAND SEC., IMPLEMENTATION OF SECTION 1367 INFORMATION PROVISIONS, INSTRUCTION NUMBER 002-02-001 (2013). The policy states that "the entire" alien file of a U visa applicant is not discoverable to defense counsel in state criminal cases. *Id.* at 7. Elsewhere, the policy states:

> In addition to the enumerated statutory exceptions [to confidentiality of files], there may be instances in which disclosure of protected information is mandated by court order or constitutional requirements. For example, disclosure may be required in a federal, state, or local criminal proceeding for purposes of complying with constitutional obligations to provide exculpatory and impeachment material that is relevant either to guilt or punishment of a criminal defendant in a federal criminal proceeding ("Brady" material) or that bears upon the credibility of a prosecution witness ("Giglio" material). If DOJ or a state or local prosecutor requests protected information that is not subject to disclosure under one of the statutory exceptions and that will be disclosed to a court or another agency (other than DOS), please consult DHS counsel.

Id. at 8.

196. *See* STANFORD LEGAL CLINIC AND BAY AREA LEGAL AID, UNDERSTANDING AND RESPONDING TO SUBPOENAS: A GUIDE FOR IMMIGRATION ATTORNEYS REPRESENTING U-VISA APPLICANTS 6 (May 2010).

prosecutors might not be obligated to reveal other aspects of a witness's immigration status.[197] Yet aggressive defense attorneys may be able to subpoena the immigrant witness directly, adding considerable stress for victims even if the case does not go to trial. The Stanford Clinic reports this cautionary tale:

> [I]n one recent case in Northern California, defense counsel subpoenaed a nonprofit immigration attorney's copy of a client's complete U-visa application. The immigration lawyer filed a motion to quash, which the judge denied. The judge then conducted an in camera review of the documents. After reviewing the documents, the judge released a majority of the contents of the U-visa application to the defense. This information was subsequently used to impeach the victim's credibility on the stand, and to request further records from the victim's sexual assault counselors. The immigration lawyer was also required to testify about the timing of the client's request for U-visa assistance.[198]

The prospect of a hostile defendant issuing a subpoena to probe a victim's immigration background potentially increases immigrants' fear of going to the police to begin with. Likewise, if prosecutors perceive that providing U visa certifications will damage the credibility of otherwise believable victim-witnesses, they may become more reluctant to provide such assistance. If it is foreseeable that defense lawyers will scrutinize a victim's immigration situation, it may appear better for the prosecution if the victim has not received any tangible benefits in exchange for her cooperation. Thus, the structure of the U visa program potentially undermines the program's own noble goals.

Any immigration benefit granted in exchange for claiming status as a victim could be material for impeachment.[199] But the structure of the U visa enhances this problem by requiring victims to assist police and prosecutors, making victims dependent on law enforcement to certify their visa applications. Additionally, the U visa certification process could cause difficulties in cases where a victim-witness recants and becomes a witness for the defense, since police and prosecutor may have cause to withdraw their certification.[200]

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197. *See* People v. Walls, 752 N.E.2d 456 (Ill. 2001) (general information about a witness's immigration file not covered by *Brady*).

198. STANFORD LEGAL CLINIC, *supra* note 196, at 2.

199. *See* discussion, *supra*, at Part V.B.

200. *Cf.* United States v. Juan, 704 F.3d 1137 (9th Cir. 2013) (prosecution interference with former accusers who turned into defense witnesses, including threats of perjury charges,

The law enforcement certification procedure also means that local prosecutors will have actual or constructive possession of the impeachment material, which makes it harder for prosecutors to avoid disclosure under *Brady*.[201] But for the certification process, police and prosecutors would not have direct access to a witness' immigration status and could honestly state that they had provided no immigration benefits to the witness.

VI. ALTERNATIVE MODELS FOR FIXING THE U VISA'S BUILT-IN PROBLEMS

A. The Fourth Amendment Model

Forcing victims to become accusers creates problems within the U visa program. The entangling of victimization and accusation stems from Congress' dual desire to extend protection to immigrant victims while also aiding law enforcement. In addition, the regulations implementing the U visa program rely on law enforcement to certify genuine victims, which creates difficulties for both victim applicants and the people they accuse. There is a danger that preconceived notions about what a genuine victim looks like, coupled with a desire to rescue female victims, will prejudice the criminal justice system against immigrant men. On the flip side, the U visa potentially damages the credibility of women who honestly report domestic violence, subjecting them to harsh cross-examination. Thus, in the prototypical domestic violence context of a woman accusing a man, the U visa paradoxically hurts both the victim and the accused. More concretely, the U visa may increase both the risk of wrongful convictions and courts' reluctance to believe victims.

For now, the most visible problem with the U visa is its limited quota and the growing waiting list. These structural problems with the U visa are likely to grow over time, as awareness of the program spreads and issuing U visas becomes a routine part of local law enforcement and criminal law practice. In recognizing these challenges, it is essential to not lose sight of the urgent reasons why

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may violate the right to a fair trial). *See also* Ruth A. Moyer, *Substantial Government Interference with Prosecution Witnesses: The Ninth Circuit's Decision in* United States v. Juan, 98 MINN. L. REV. 22, 28–29 (2013) (discussing the implications of the *Juan* decision including its potential to heighten defendants' rights under the Confrontation Clause).

201. *Brady* applies when exculpatory material is within the actual or constructive possession of officials acting for the state. *See* Banks v. Dretke, 540 U.S. 668, 691 (2004).

the U visa was created. Proper reform efforts should aim to refine the U visa program by minimizing unintended consequences.

Policymakers created the U visa program to address a basic problem of equality.[202] Unauthorized immigrants were severely disadvantaged relative to citizens and legal residents in their ability to access law enforcement assistance. To effectively solve this problem, the U visa program should have equalized the positions of unauthorized immigrants and citizens. Instead, U visa made unauthorized immigrants unequal in a new way. The program created an incentive for unauthorized immigrants to accuse others of crimes, an incentive that citizens and legal residents do not have. How might this be improved?

Before suggesting any solution, it is important to note that immigration status will never become completely irrelevant, nor will all motives for false testimony ever disappear. A witness will always face pressure to stick to the original story he or she gave to police, both to save face and to avoid prosecution.[203] An immigrant who claims to have been a victim of crime in an immigration application and then outright retracts that claim in later testimony could be prosecuted for perjury.[204] But the same may be said of a citizen who makes an allegation of domestic violence while going through a difficult divorce. Any number of things, ranging from personal animus to potential immigration benefits, could influence a witness' testimony about an alleged crime. It would be unrealistic to attempt to eliminate all ulterior motives or potential for perjury. Instead, improvements to the U visa program should focus on minimizing unnecessary influence as much as possible, such that immigrants' credibility is not subject to deeper scrutiny than that of other witnesses.

One approach may be to disentangle immigration enforcement from routine law enforcement's targeting of common crime. After all, local law enforcement demonstrates a growing reluctance to cooperate with federal immigration authorities, especially by refusing to detain people at the request of Immigration and Customs Enforcement (ICE).[205] But this alone is unlikely to address fully the apprehensions of unauthorized immigrants. Anyone who has their fingerprints checked against the national FBI database may have

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202. *See* discussion *supra*, at Part II.

203. I am indebted for this insight to Prof. Gabriel J. Chin. Personal Communication with Prof. Gabriel J. Chin to author (October 13, 2014).

204. *See* 18 U.S.C. § 1623(a) (2012).

205. *See, e.g.*, Julia Preston, *Sheriffs Limit Detention of Immigrants*, N.Y. TIMES, April 18, 2014, at A11(L).

their data forwarded to DHS for immigration checks.[206] Thus, a crime victim seeking police assistance can reasonably anticipate that his or her immigration status will be brought to the attention of federal authorities. This danger is heightened if local law enforcement officials actively pursue unauthorized immigrants and are likely to alert DHS. But this danger exists even when police run fingerprints merely as a routine part of investigating a crime and are not interested in immigration enforcement.

Orde Kittrie suggested protecting immigrant crime victims by enacting a special rule of evidence that prohibits immigration authorities from using any evidence they learned from a person having come forward to report a crime during deportation proceedings.[207] In essence, Kittrie suggested creating a new exclusionary rule of evidence for immigration cases in immigration court, similar to the rule that excludes evidence in criminal cases that was obtained through an illegal search.[208] On its own, this may be too narrow to be useful in many cases. DHS may not need any evidence from recent police contact in order to prove removability.[209] However, Kittrie's model could be expanded analogously to the exclusionary rule in Fourth Amendment cases, with application of the "fruit of the poisonous tree" doctrine. This doctrine extends the exclusionary rule to evidence that is derived from the initial constitutional violation; the government may use the evidence only if it would have been obtained independently.[210] Another evidentiary exclusion that may be useful would be to prohibit using a witness' statements in a criminal trial to impeach his or her assertions in an immigration application. This would leave an immigrant witness free to tell the truth on the stand in a criminal case, without fear that truthful testimony might be used to undermine his or her chance at a visa.[211]

Exclusionary rules would force immigration enforcement to operate entirely separate from regular law enforcement. Imagine that a person overstayed a visa or entered without inspection several years ago and now reports a crime to police. Today, if this person tells police that she is an unauthorized immigrant, this statement

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206. *See* Aarti Kohli, et al., Secure Communities by the Numbers: An Analysis of Demographics and Due Process 1 (2011) *available at https://www.law.berkeley.edu/files/Secure_Communities_by_the_Numbers.pdf.*

207. Kittrie, *supra* note 166, at 1503.

208. *See* Mapp v. Ohio, 367 U.S. 643, 655 (1961) (holding "that all evidence obtained by searches and seizures in violation of the Constitution is . . . [i]nadmissible in a state court.").

209. *See* 8 U.S.C. § 1227(a) (2012) (grounds of removeability).

210. *See* WAYNE R. LAFAVE, 6 SEARCH & SEIZURE § 11.4 (5TH ED.) (Dec. 2013).

211. This idea was suggested by Prof. Chin. Personal Communication, *supra* note 203.

might be excluded from use in Immigration Court. But now that immigration authorities are aware of her presence, they could prove by other means that she is present in violation of the law, perhaps by showing evidence that her visa expired. This would make her deportable.[212] But the expanded exclusionary rule would bar DHS from initiating removal proceedings against a person unless he or she would have come to the attention of DHS despite his or contact with police for unrelated criminal matters.

Kittrie's proposal is intriguing because it attempts to equalize the standing of unauthorized immigrant crime victims without providing any immigration benefits. Instead, the proposal creates a firewall between routine law enforcement and immigration enforcement. In the abstract, it may have considerable potential, but it will likely encounter political and practical obstacles as well. First, recent decades reflect a trend of marrying immigration control and crime control.[213] Second, this approach would eliminate an immigration benefit that currently exists, and thus would likely attract opposition from immigrant advocates who want to create more opportunities for millions of unauthorized immigrants in the country to normalize their status.

B. The Asylum Model

The U visa program could also be improved by separating the role of victim from the role of accuser. At the outset, it should be clear that the victim and the accuser are the same person. But policymakers could separate the roles to a significant degree. This would ideally allow victims to feel confident enough to help law enforcement bring perpetrators to justice. But for most people, doing one thing does not necessitate doing the other. If a person were severely injured in an assault and robbery, he would need medical treatment and perhaps trauma therapy. He also might tell police who attacked him, but this is a different role. Seeking medical care for injuries does not entangle the rights of any third party, but accusing another person of a violent felony does.

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212. 8 U.S.C. § 1227(a)(1)(B).

213. *See generally* Jennifer M. Chacón, *Unsecured Borders: Immigration Restrictions, Crime Control and National Security*, 39 CONN. L. REV. 1827 (2007) (exploring the history of the blurred boundaries between immigration control, crime control and national security); Jennifer M. Chacón, *Overcriminalizing Immigration*, 102 J. CRIM. L. & CRIMINOLOGY 613 (2012) (tracing the major developments in immigration law and enforcement that have increased the criminalization of immigration).

Our immigration system already has considerable experience operating a victim-based visa system that keeps the role of the victim separate from the role of accuser. The asylum system grants visas and potential permanent residency and citizenship on the basis of a well-founded fear of persecution in a foreign country.[214] Three related immigration benefits may be relevant in a case where an immigrant fears returning to his or her country of origin: asylum, withholding of removal, and protection under the Convention against Torture.[215] Each has its own legal criteria and differs in the benefits awarded.[216] But for present purposes, what matters is their common focus on people who are victims of human rights abuses abroad. For ease of discussion, I will group all of these under the rubric "asylum" because of this common element, even though these categories operate differently in other respects.

To state a claim for asylum, a victim must explain why he or she is in danger of a serious human rights violation.[217] Applicants must cite either direct violations by agents of a foreign government or others' failure to stop such violations.[218] Thus, asylum-seekers must make claims that accuse a foreign government of potentially criminal activity. Asylum applicants' claims may be problematic outside the immigration context. The statements made by asylum-seekers to support their asylum applications could be evidence in a war crimes trial, in an alien tort claims action, or in a case for sanctions. More commonly, such accusations of human rights violations could fuel diplomatic tension or media scrutiny.

In comparison, the potential impact of a victim's accusation appears more immediate in the case of a U visa, where a victim typically accuses a person who is in close proximity, under the same legal jurisdiction, and subject to immediate arrest and prosecution. By contrast, it is unlikely that a human rights abuser in a far off place will face formal legal action. And yet, international refugee law historically struggled to separate the roles of victim and accuser because of the potential diplomatic tensions that can result from asylum claims. Governments worried that granting asylum would appear to validate the asylum-seeker's allegations against another country. Prominent agreements on asylum in Africa and Latin

214. *See generally* ANKER, *supra* note 7, at § 1:6.

215. *See generally id.* at §§ 1:8–1:9. I am not discussing Temporary Protected Status, which is discretionary for the Secretary of Homeland Security and is not necessarily predicated on human rights violations.

216. *Id.*

217. *See id.* at § 4:3.

218. *See id.* at §§ 4, 7.

America specify that granting asylum is "a peaceful and humanitarian act," not "an unfriendly act" toward another government.[219]

Such concerns played a significant role in the development of the American asylum system. During the heart of the Cold War, American asylum policy was explicitly tied to U.S. ideological and strategic interests. As Gil Loescher and John A. Scanlan wrote in a history of early U.S. asylum policy, "A clear 'double standard' which governed the acceptability of migrants from particular countries emerged as the principal feature of American refugee policy."[220] This was epitomized by how the U.S. treated Cubans fleeing from the Castro regime differently than it treated Haitians fleeing a government allied with the U.S.[221] In 1965, Congress enshrined this ideological and anti-Communist bias in statute, guaranteeing a certain number of visas to people who fled "from any Communist or Communist-dominated country or area."[222]

In 1980, Congress changed course by enacting a new asylum law, founded on the international treaty-based refugee definition, so that fleeing from Communism was no longer a requirement for asylum in the United States.[223] Nevertheless, the strategic, diplomatic, and ideological influence remained an explicit part of the system for considerably longer, especially when people sought asylum from governments allied with the United States. In the 1990 Supreme Court case of *INS v. Doherty*, the Attorney General argued that foreign policy concerns were legitimate grounds for denying asylum claims.[224] A divided Supreme Court resolved the case on other grounds.[225]

The question of whether asylum decisions can be dictated by foreign policy carried considerable urgency in the 1980s. During the civil wars in Central America, asylum-seekers fled governments and militia that, in many cases, were allied with and actively supported

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219. Cartagena Declaration on Refugees, art. III (4), Nov. 22, 1984, *available at* http://www.oas.org/dil/1984_cartagena_declarations_on_refugess.pdf ("To confirm the peaceful, non-political and exclusively humanitarian nature of grant of asylum or recognition of the status of refugee and to underline the importance of the internationally accepted principle that nothing in either shall be interpreted as an unfriendly act towards the country of origin of refugees."); Convention Governing the Specific Aspects of Refugee Problems in Africa, art. II(2), Sept. 10, 1969, 1001 U.N.T.S. 45, ("The grant of asylum to refugees is a peaceful and humanitarian act and shall not be regarded as an unfriendly act by any Member State.").

220. GIL LOESCHER & JOHN A. SCANLAN, CALCULATED KINDNESS: REFUGEES AND AMERICA'S HALF-OPEN DOOR, 1945 TO THE PRESENT 69 (1986).

221. *Id.*

222. *Id.* at 73.

223. *Id.* at 213–214.

224. *See, e.g.*, Joan Fitzpatrick & Robert Pauw, *Foreign Policy, Asylum and Discretion*, 28 WILLAMETTE L. REV. 751 (1992).

225. Immigration and Naturalization Serv. v. Doherty, 502 U.S. 314, 322 (1990).

by the United States. At that time, asylum adjudicators looked to State Department advisory opinions. These opinions accounted for foreign policy considerations and minimized the scale of human rights violations by U.S. allies.[226] Until 1990, asylum adjudicators had limited access to independent evidence of country conditions.[227] In many cases, State Department desk officers, who were directly responsible for U.S. relations with the country at issue, conducted the decisive assessment of asylum cases.[228] To illustrate the impact of this system, in 1989 the U.S. granted ninety-one percent of asylum claims from the Soviet Union, and just two percent of claims from El Salvador.[229]

Foreign policy considerations can swing both ways in asylum cases. As the statistics comparing the Soviet Union and El Salvador illustrate, some asylum-seekers benefitted. Under this system, some dubious Soviet asylum claims succeeded while the United States failed to take special responsibility for asylum-seekers who were victims of American foreign policy.[230]

A class action lawsuit, *American Baptist Churches v. Thornburgh* (commonly called the "ABC settlement"), brought in 1990 by Salvadoran and Guatemalan asylum applicants, addressed these issues.[231] The *ABC* settlement coincided with sweeping new asylum regulations promulgated in 1990. Reversing the position that the government had taken just a few months earlier in *Doherty*, the government now conceded that:

> [F]oreign policy and border enforcement considerations are not relevant to the determination of whether an applicant for asylum has a well-founded fear of persecution;
>
> [T]he fact that an individual is from a country whose government the United States supports or with which it has

226. *See* Maureen O'Connor Hurley, *The Asylum Process: Past, Present, and Future*, 26 NEW ENG. L. REV. 995, 997 (1992).

227. *Id*, at 1033–1034.

228. LAWYERS COMM. FOR HUMAN RIGHTS, THE IMPLEMENTATION OF THE REFUGEE ACT OF 1980: A DECADE OF EXPERIENCE 33–34 (1990); *see also* Richard K. Preston, *Asylum Adjudications: Do State Department Advisory Opinions Violate Refugees' Rights and U.S. International Obligations?*, 45 MD. L. REV. 91, 117 (1986).

229. Hurley, *supra* note 226, at 1032 n.351.

230. *See, e.g.*, MARIA CRISTINA GARCIA, SEEKING REFUGE: CENTRAL AMERICAN MIGRATION TO MEXICO, THE UNITED STATES, AND CANADA 92 (2006) (arguing that the U.S. had an obligation to Central American refugees because of its role fomenting conflict in their countries of origin). *Compare* Eleanor E. Downes, *Fulfilling the Promise?: When Humanitarian Obligations and Foreign Policy Goals Conflict in the United States*, 27 B.C. THIRD WORLD L.J. 477 (2007) (arguing that human rights concerns should drive asylum policy, independent of foreign policy).

231. American Baptist Churches v. Thornburgh, 760 F. Supp. 796 (N.D. Cal. 1991) (approving settlement agreement) [hereinafter ABC].

> favorable relations is not relevant to the determination of whether an applicant for asylum has a well-founded fear of persecution;
>
> [W]hether or not the United States Government agrees with the political or ideological beliefs of the individual is not relevant to the determination of whether an applicant for asylum has a well-founded fear of persecution.[232]

Under the new system, the government created a new corps of Asylum Officers, with specialized training, separate from the INS officers who handled other kinds of immigration cases.[233] Adjudications relied on both governmental and non-governmental sources to document human rights conditions.[234] Although some concern remains that the State Department human rights reports have disproportionate weight with some adjudicators, the State Department is no longer playing the decisive role in deciding asylum cases that it did pre-1990.[235]

Importantly, the 1990 asylum reforms went beyond statements of principle. They enacted bureaucratic changes that implemented the principle. Since asylum needed to be independent of both immigration enforcement and foreign policy considerations, it made sense to create an independent government unit devoted to it and to remove the government's foreign policy department from the process. Unlike in the previous system, the State Department no longer routinely opines on the merits of an individual asylum claim. Instead, adjudicators consider the State Department's published Country Reports on Human Rights Practices along with other evidence.[236]

The U visa system today is loosely analogous to the pre-1990 asylum system. The law enforcement certification process plays a similar role to the State Department opinions, bureaucratically permitting an agency with interests in law enforcement and prosecution to decide whether a victim should receive a form of protection. As a result, victims are under pressure to conform their testimony to the inclinations of law enforcement. The likelihood of

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232. *Id.* at 799.

233. *See* Gregg A. Beyer, *Affirmative Asylum Adjudication in the United States*, 6 GEO. IMMIGR. L.J. 253, 274–276 (1992).

234. *See* ANKER, *supra* note 7, at §3:12 n.5.

235. *See* Daniel L. Swanwick, *Foreign Policy and Humanitarianism in U.S. Asylum Adjudication: Revisiting the Debate in the Wake of the War on Terror*, 21 GEO. IMMIGR. L.J. 129, 147 (2006) ("[T]oday's asylum adjudication biases are relatively subtle when compared with those observed during the Cold War."); *see also* ANKER, *supra* note 7, at §3:12 n.5.

236. ANKER, *supra* note 7, at § 3:12 n.5.

receiving benefits depends on the specific orientations of the police agency in the jurisdiction. In this system, the roles of victim and accuser cannot be separated.

Using the 1990 asylum reforms as a model, reforming the U visa program's bureaucratic administration could head off looming problems with the program. This requires a partly statutory change so that the U visa no longer formally requires crime victims to assist police; other reforms, however, could be regulatory. In order to eliminate law enforcement agencies' certification of crimes, a Crime Victims Unit, modeled loosely on the Asylum Office, could be created within the Citizenship and Immigration Office.

Much as the Asylum Office does for asylum applications, the Crime Victims Unit would adjudicate applications for U visas. Because law enforcement would no longer certify, applications, this new unit would have to scrutinize applications more seriously than USCIS currently does. The burden to assess whether the applicant is in fact a genuine victim of a qualifying crime would shift back to the federal government. Making such assessments is not easy, but it is also not a new challenge for USCIS. Assessing whether the applicant faces a genuine danger of persecution is a central part of asylum adjudication.[237] Assessing an applicant's credibility is a critical part of this inquiry.[238] It may actually be somewhat easier to make these assessments in U visa cases than in asylum cases. Because asylum cases concern persecution in other countries, there is often little probative evidence available other than the applicant's own statements.[239] Because U visas concern crime in the United States, more reliable documentation and evidence might be available. Nonetheless, the new USCIS unit would need to conduct significant inquiry into cases, including in depth interviews with applicants, much as the Asylum Office does routinely.[240]

One immediate benefit of this system is that it would be centralized and national, so that only the federal government would make immigration decisions. Immigrant victims of crime would not be subject to inconsistent implementation by local governments.[241] Significantly, law enforcement agencies responsible for combatting

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237. *See* ANKER, *supra* note 7, at § 2:3.

238. *See* Michael Kagan, *Is Truth in the Eye of the Beholder? Objective Credibility Assessment in Refugee Status Determination*, 17 GEO. IMMIGR. L.J. 367, 369 (2003); ANKER, *supra* note 7, at §§ 3:19-3:27.

239. *See id.* at 368-374.

240. *See* 8 C.F.R. § 1208.9 (2012) (describing procedures for an interview with an asylum officer).

241. *Cf.* Srikantiah, *supra* note 117, at 207 (proposing centralized federal decision making on T visas for similar reasons).

common crime—in most cases, local police and prosecutors—would no longer be in a position to provide any immigration benefits to victims. Police reports and other law enforcement documents would likely be central parts of U visa applications. For this reason, a defendant could still argue that the immigrant reported a crime in hopes of getting a visa. But this argument would be significantly weakened because the victim would no longer be required by law to help local police. Instead, an immigrant who obtains a U visa through USCIS would be put in a position similar that of a citizen in deciding whether to assist police and prosecutors. This would thus achieve the primary goal that the U visa was established to pursue.

However, significant problems arise with reforming the U visa program to parallel the asylum system. First, Congress deliberately required cooperation with law enforcement in both the U and T visas, and they may not want to eliminate this requirement. But Congress need not surrender the policy goal of assisting law enforcement entirely. Instead, Congress should be concerned, first, that crime victims are secure enough to come forward, and second, that victims' testimony will not be tainted because of immigration incentives. Prosecutions will be stronger if witnesses can testify without the defense impeaching the victim's credibility by raising potential immigration benefit.

Because there would no longer be a quid pro quo exchange of testimony for immigration benefits, prosecutors and victims would be in a better position to resist subpoenas and *Brady* demands. As we have seen, state courts are sometimes reluctant to allow unfettered scrutiny of witnesses' immigration status, since this is not inherently relevant to most criminal cases. Moreover, in terms of *Brady*, state prosecutors would in fact have relatively little to disclose since local law enforcement would no longer be certifying U visa applications. It may still come to light that a victim asked about or sought a U visa. But prosecutors would be better able to resuscitate the victim's credibility by asking if the immigration benefit required a victim to testify for the prosecution. The honest answer would be no.

Second, this proposal would be expensive. By relying on local law enforcement to certify applications, the federal government effectively deflected an administrative burden assigned to it by

Congress.[242] USCIS, which adjudicates U visas at its Vermont Service Center, already shoulders much of this burden.[243] But there would be real costs in terms of hiring staff, training skilled adjudicators, and establishing the necessary offices and administrative support. Today, USCIS typically adjudicates these applications on the basis of paper applications alone.[244] Without the local law enforcement certification, individual interviews would likely be necessary, along with a more thorough review of evidence that the person is a genuine victim. This would entail a much greater administrative and adjudicatory burden.

When the new Asylum Corps was established after the *ABC* settlement, the government hired eighty-two new asylum officers in 1991 and another sixty-eight in 1992.[245] It established seven regional asylum offices around the country based on an expectation of needing to adjudicate 80,000 applications per year.[246] By 2007, the Asylum Office was actually handling 25,700 applications per year, but its staffing had grown to include 291 asylum officers and supervisors.[247] As demonstrated in Part V.A, there is good reason to expect a comparable number of U visa applications. The Asylum Office therefore provides a helpful model, which could be used to estimate the potential administrative burden of a new USCIS unit.

Third, this process would impose new burdens on U visa applicants. Requiring an intensive interview in every case will necessarily make the application process far more stressful and intimidating for applicants, which may undermine the purpose of encouraging crime victims to seek assistance. It may also make the application process more time consuming and expensive, so applicants might need to pay much more money to secure competent legal assistance with an application.

For these reasons, the asylum model may offer useful lessons illustrating an alternative approach to a victim-based visa program,

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242. *See* 8 U.S.C. § 1101(a)(15)(U)(i) (2012) (stating a U visa shall issue "if the Secretary of Homeland Security determines that [eligibility criteria are met].").

243. *See* U.S. CITIZENSHIP & IMMIGRATION SERV., I-918, PETITION FOR U NONIMMIGRANT STATUS, *available at* http://www.uscis.gov/i-918 (last visited Mar. 21, 2015).

244. *See* U.S. CITIZENSHIP & IMMIGRATION SERV., FORM I-918 INSTRUCTIONS at 8 (explaining that after initial application, USCIS may ask for more evidence in writing, and may schedule an interview, but is not required to do so).

245. Beyer, *supra* note 233, at 275.

246. *See id.* (summarizing the estimates used to establish the asylum offices).

247. U.S. Gov't ACCOUNTABILITY OFFICE, GAO-08-935, US ASYLUM SYSTEM: AGENCIES HAVE TAKEN ACTIONS TO HELP ENSURE QUALITY IN THE ASYLUM ADJUDICATION PROCESS, BUT CHALLENGES REMAIN 18, 150 (2008); UNHCR, Statistical Yearbook 2007: Trends in Displacement, Protection and Solutions 46 n.43 (2008), *available at* http://www.unhcr.org/4981c37c2.html.

but it may not perfectly fit the U visa context without additional adaptations.

C. The Trafficking Victim Model

A hybrid approach may be loosely suggested by the system used to administer the T visa for victims of trafficking. The T visa bears substantial similarities to the U visa. To be eligible for a T visa, a noncitizen must be a victim of a certain kind of crime and must be willing to assist law enforcement.[248] However, Congress adopted somewhat different language to define the law enforcement assistance requirement for the T visa. As we have seen, the U visa requires that the victim "possesses information" about the crime and vaguely demands that he or she be "helpful" to law enforcement.[249] This leaves local police and prosecutors to decide what they consider to be sufficiently helpful, particularly when combined with the demand for a law enforcement certification. By contrast, under the T visa, Congress required only that the victim "compl[y] with any reasonable request for assistance" from law enforcement, and provides for an exception when the victim "is unable to cooperate . . . due to physical or psychological trauma."[250] Because the T visa only requires victims to comply with requests from law enforcement, it is less of a problem if the police simply take little interest in the case.

There are also important differences in the T visa's application procedures. First, law enforcement certification, known in T visa applications as an "endorsement," is preferred but not required.[251] Such an endorsement is certainly best for the applicant because USCIS will consider it "as primary evidence that the applicant has been the victim of a severe form of trafficking in persons."[252] But if the victim does not obtain an endorsement, "[c]redible secondary evidence and affidavits may be submitted to explain the nonexistence or unavailability of the primary evidence and to otherwise establish the requirement that the applicant be a victim of a severe form of trafficking in persons."[253]

248. *See* 8 U.S.C. § 1101(15)(T)(i) (2012).

249. 8 U.S.C. § 1101(15)(U)(i).

250. 8 U.S.C. § 1101(15)(T)(i)(III).

251. 8 C.F.R. § 214.11(f)(1) (2007) ("An LEA endorsement is not required.").

252. 8 C.F.R. § 214.11(f)(2).

253. 8 C.F.R. § 214.11(f)(3).

Second, the T visa regulations provide that USCIS "may require an applicant to participate in a personal interview."[254] This allows a T visa application to proceed on two alternative tracks. If a law enforcement endorsement is available, a T visa application simply proceeds much like a U visa application. But it is also possible for an applicant to circumvent the local law enforcement endorsement and for USCIS to investigate further on its own. The personal interview component makes a T visa application similar to the asylum process, which relies on in-depth, personal interviews of applicants in nearly every case.[255] By contrast, the U visa regulations do not provide for a personal interview and the statute requires law enforcement certification in all cases.[256] The T visa system thus allows a victim to be somewhat less dependent on police and prosecutors to secure a visa.

The T visa process may be a preferable model compared to the asylum process. The U visa program could mimic the T visa program, making the personal interview optional for USCIS. This would spare both the government and the applicant the burden of conducting an interview in every case. Asylum applications typically lack independent evidence of the violations that occurred abroad. For this reason, the applicant's own testimony is central to the case.[257] It makes sense to assume that the government needs to conduct an extensive personal interview in every case. But when crime occurs in the United States, police reports, contemporaneous witness statements, and documentation are much more likely to be available. As a result, it may not always be necessary to conduct a personal interview to conclude that the applicant is a genuine victim. USCIS need only use this scarce resource in cases where it is actually necessary.

The T visa model could be further improved in several other ways. Although making the law enforcement endorsement optional lessens the power law enforcement exerts over a witness, the endorsement is still a significant advantage. Thus, this program easily creates grounds for impeachment. Questions like these, if answered honestly, would still leave an unfavorable impression of an immigrant's victim's potential motivations:

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254. 8 C.F.R. § 214.11(d)(6) ("After the filing of an application for T nonimmigrant status, the Service may require an applicant to participate in a personal interview. The necessity of an interview is to be determined solely by the Service.").

255. *See* U.S. CITIZENSHIP & IMMIGRATION SERV., THE AFFIRMATIVE ASYLUM PROCESS, http://www.uscis.gov/humanitarian/refugees-asylum/asylum/affirmative-asylum-process.

256. *See* 8 C.F.R. § 214.14; 8 U.S.C. § 1184(p)(1) (2012).

257. *See* Kagan, *supra* note 238, at 368–371.

- Isn't it true that the police/prosecutor is helping you avoid deportation?
- Isn't it true that if they were not helping you, you would be in greater danger of being deported, but instead you and your children now have the chance to stay in this country?
- Isn't it true that if you did not agree to testify for the prosecution, they could decide to not help you with your immigration problem?
- Isn't it true that if your testimony does not make the prosecutor happy, they could choose not to help you with immigration?
- So, isn't it true that if you want to stay in this country, and if you want your children to not be in danger of being deported, you need to say whatever it takes to keep the prosecutor happy?

Even with the T visa structure, this is a valid line of cross-examination because the accurate answer to all of the questions is probably yes.

This line of cross-examination could be muted significantly through two changes to both the U visa program and the T visa program. First, policymakers could eliminate the statutory requirements that victims must help the police. Immigrant victims' ability to stay in the country would then no longer depend on keeping the police and prosecutor happy. When citizens are victims of crime, they are not normally under such pressure to cooperate with law enforcement. By equalizing unauthorized immigrants' standing relative to other crime victims, they may be able to assist law enforcement without undermining their credibility.

The second change would be to eliminate law enforcement endorsement or certification entirely. These endorsements set up a quid pro quo between the immigrant victim and the police or prosecutor, which implies a motive to lie. Applicants for T and U visas should submit police reports, witness statements, and criminal complaints with their visa applications. But pressuring victims to request extra assistance from law enforcement adds little. It only creates the impression that victims are trading testimony for immigration benefits. Without certification or endorsement, local police and prosecutors would no longer provide victims direct help with immigration. The honest answers to the cross-examination questions posed above would then be no instead of yes.

This proposal would not entirely eliminate the theoretical motivation to invent crime in order to obtain immigration benefits. It

would reduce the motivation considerably and equalize the situations unauthorized immigrants, legal residents, and citizens face. An immigrant might still make a fraudulent police report in order to buttress an immigration application, but a similar potential motive exists for anyone who reports a theft to police and then files an insurance claim for lost property.[258] This is less potent as impeachment material because there is no clear quid pro quo in which benefits are exchanged for testimony. Moreover, the police do not have continuing leverage over the victim. The potential motive to fabricate is more easily counterbalanced by other checks, such as the risk of prosecution for filing a false police report.[259] Additionally, encouraging early police investigation facilitates contemporaneous, neutral fact-gathering, which decreases the possibility that fraud will go undetected.

VII. CONCLUSION

The U visa is only a few years old, but it has already encountered significant difficulties that seem likely to grow. The most obvious is its limited quota, which is smaller than the number of immigrants who could be reasonably expected to be victims of qualifying criminal offenses. Additionally, emerging problems with U visas suggest that the program fails to put unauthorized immigrant victims in the same position as other victims of crime. The U visa requires victims to help police and prosecutors, giving law enforcement leverage over immigrant victims. Defendants may impeach victims' credibility based on their immigration predicament, which in turn creates a new reason for immigrants to fear helping law enforcement. It also creates a new concern for law enforcement responding to immigrants claiming to be victims, who must wonder if they will unwittingly give ammunition to aggressive defense attorneys when they try to provide assistance to victims of crime. The structure of the U visa thus undermines the objectives for which it was originally created. Despite these problems, the U visa is essential. Without a

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258. Insurance claims for theft typically require submitting police reports and other investigatory documents. *See, e.g.*, *How to Report a Homeowners Claim*, STATE FARM, http://www.statefarm.com/insurance/home-and-property/claims (last visited Mar. 21, 2015) ("If the loss is caused by theft, notify the police."); Andrea Siedsma, *What to expect from your insurance company after a burglary*, INSURE (Feb. 15, 2012), http://www.insure.com/home-insurance/after-a-burglary.html ("You will need to file a police report to get the ball rolling on a theft claim.").

259. *See, e.g.*, CAL. PENAL CODE § 148.5 (West 2014) (stating that a person who reports to police "that a felony or misdemeanor has been committed, knowing the report to be false, is guilty of a misdemeanor.").

program like this, unauthorized immigrants may be too afraid to seek help from law enforcement, leaving a class of silent victims who are deterred from contacting police.

To achieve its essential purpose, the U visa program should separate the role of victim from the role of accuser in a criminal case. This shift would benefit criminal prosecutions by removing a defendant's opportunity to impeach the credibility of the victim. This shift would also protect victims who, especially in cases of gender-based violence, are likely to face disbelief. The good news is that we know how to run such a program.

The challenges that are built into the structure of the U visa should offer a lesson about immigration programs generally. While family ties and employment have been the primary avenues of American immigration, the United States also has a number of immigration programs that benefit foreigners on the basis of their victim status. These are noble programs, but they carry an inherent problem. Most claims of victimhood include an inherent accusation of wrongdoing by someone else. It is thus tempting for Congress to merge the roles of victim and accuser, as it has done with the U visa and to a slightly lesser extent with the T visa. But whenever this happens, benefits offered to victims will begin to implicate the rights of third parties or other vital interests, which over time may undermine a well-intentioned effort to protect victims. Immigrants should be able to seek protection as victims, and to levy accusations against those who have done them harm. But it is a mistake to force them to do both at the same time, or to make being an accuser a condition for being recognized as a victim.