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## Undocumented Crime Victims: Unheard, Unnumbered, and Unprotected

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## COMMENTS

### UNDOCUMENTED CRIME VICTIMS: UNHEARD, UNNUMBERED, AND UNPROTECTED

PAULINE PORTILLO\*

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I. INTRODUCTION

As temperatures reached 100 degrees on July 23, 2017, approximately thirty-nine undocumented immigrants were found in the back of a sweltering semi-truck trailer parked in an uncovered Walmart parking lot in San Antonio.<sup>1</sup> The trapped individuals were finally discovered after a disoriented man escaped the trailer truck and approached a Walmart employee asking for water.<sup>2</sup> Eight individuals were dead when police

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\* St. Mary’s University School of Law, J.D., expected May 2019; University of Maryland, College Park, B.A., Criminal Justice and Criminology, May 2015. First, thank you to my mother for showing me at a young age the beauty of living in a world full of individuals of different cultures and backgrounds. Thank you to my father for his constant sense of humor and support throughout my educational career. Thank you to *The Scholar: St Mary’s Law Review on Race and Social Justice* Volume 20 Editorial Board for providing valuable insight on this topic and the Volume 20 staff writers for their contributions to this piece. Finally, thank you to those individuals, including my friends and past clinical colleagues at the law school, who dedicate their time and careers to advocate for laws that positively impact the lives of undocumented immigrants.

1. Criminal Complaint at 2, *United States v. Bradley*, No. SA:17-MJ-0832 (W.D. Tex. July 24, 2017) [hereinafter *Criminal Complaint, United States v. Bradley*]. Note that some of the undocumented individuals being transported reported the trailer contained between 70 and 180 to 200 people during the transport. *Id.*

2. *At Least 9 Dead, 30 Injured in Sweltering Big Rig Discovered Outside San Antonio Walmart*, KTLA, <http://ktla.com/2017/07/23/8-people-found-dead-30-more-seriously-injured-in->

officials arrived at the scene; two more died after being hospitalized.<sup>3</sup> One of the victims reported it was so hot and crowded in the trailer the passengers took turns breathing through a small hole.<sup>4</sup> In an attempt to get the driver's attention, the immigrants shouted and banged against the trailer walls, but their pleas went unanswered.<sup>5</sup>

The truck was traveling from Laredo, Texas, a major city on the United States-Mexico border.<sup>6</sup> Smugglers loaded immigrants into the truck's trailer at various points after crossing the border.<sup>7</sup> Many of the victims suffered from heatstroke, dehydration, and asphyxiation.<sup>8</sup> Some of the survivors will suffer irreversible brain damage from the extreme heat and lack of air inside the trailer.<sup>9</sup>

James Matthew Bradley Jr., the driver of the semi-truck, claimed to be unaware of the undocumented individuals being transported in the back

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sweltering-tractor-trailer-outside-san-antonio-walmart/ [https://perma.cc/W87H-5HJM] (last updated July 23, 2017, 7:32 PM); Michael Edison Hayden & Alexi Friedman, 'Horrific' Human-Smuggling Case in Texas Not an Isolated Event, Officials Say, ABC NEWS (July 23, 2017, 6:22 PM), <http://abcnews.go.com/US/dead-30-injured-found-inside-semi-trailer-walmart/story?id=48799989> [https://perma.cc/2DXK-KMN3].

3. Criminal Complaint, United States v. Bradley, *supra* note 1, at 1; Holly Yan & Jason Morris, *San Antonio Driver Says He Didn't Know Immigrants Were in Truck*, CNN, <http://www.cnn.com/2017/07/24/us/san-antonio-trailer-migrants/index.html> [https://perma.cc/V4Z5-RWSQ] (last updated July 25, 2017).

4. *San Antonio Driver Could Face Death Penalty Over Death of 10 Migrants*, GUARDIAN (July 24, 2017), <https://www.theguardian.com/us-news/2017/jul/24/san-antonio-migrants-texas-human-trafficking> [http://perma.cc/8PQB-FTMB]; see also NAT'L FOUND. FOR AM. POLICY, 7,000 DEATHS AND COUNTING 2 (2017), <http://nfap.com/wp-content/uploads/2017/08/7000-Deaths-and-Counting.NFAP-Policy-Brief.August-2017.pdf> [http://perma.cc/2HZ3-Q7JQ] ("Trapped with as many as 200 people in the pitch-black trailer, they took turns breathing through a small hole in the side. Some just passed out.") (quoting Maria Sacchetti, et al., *After Deadly Smuggling Case Officials Charge Truck Driver and Decry 'Crime Against Humanity'*, WASH. POST (July 24, 2017)).

5. Yan & Morris, *supra* note 3.

6. Criminal Complaint, United States v. Bradley, *supra* note 1, at 1; Yan & Morris, *supra* note 3.

7. Criminal Complaint, United States v. Bradley, *supra* note 1, at 1; Yan & Morris, *supra* note 3.

8. Yan & Morris, *supra* note 3. Heatstroke and dehydration have been identified as common causes of death for immigrants attempting to cross the US-Mexico border. Seth M. Holmes, "Is it Worth Risking Your Life?": *Ethnography, Risk and Death on the U.S.-Mexico Border*, 99 SOC. SCI. & MED. 153, 153 (2013); see also Samuel M. Keim et al., *Estimating the Incidence of Heat-Related Deaths Among Immigrants in Pima County, Arizona*, 8 J. IMMIGR. & MINORITY HEALTH 185, 188-190 (2006) (noting increase in heat-related deaths among immigrants attempting to cross the border in Southern Arizona).

9. Yan & Morris, *supra* note 3 (quoting San Antonio Fire Chief Charles Hood).

of the trailer.<sup>10</sup> Bradley admitted he did not call the police after discovering the individuals in the back of his truck trailer, but instead called his wife.<sup>11</sup> At that moment, Bradley knew at least one person was dead.<sup>12</sup> The criminal complaint filed against Bradley indicated his crime was a capital offense; he could face the death penalty if convicted.<sup>13</sup> After the grand jury returned a superseding indictment, United States Attorney Richard L. Durbin, Jr. notified the district court the government was not seeking the death penalty.<sup>14</sup> Instead Bradley faces life in prison.<sup>15</sup> Bradley ultimately pled guilty to one count of “conspiracy to transport aliens resulting in death and one count of transporting aliens resulting in death[.]”<sup>16</sup> Bradley was sentenced to life in prison in April of 2018.<sup>17</sup>

News outlets reporting the incident stated the fate of many of the immigrant victims of the human trafficking incident was uncertain.<sup>18</sup> Jack Staton, acting assistant director of intelligence for Homeland Security Investigations at Immigration and Customs Enforcement (ICE), stated whether those injured in human smuggling cases are granted protection from deportation as crime victims hinges on the information

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10. Criminal Complaint, *United States v. Bradley*, *supra* note 1, at 1.

11. *Id.* at 2.

12. *Id.*

13. *Id.*; Tom Cleary, *James Mathew Bradley Jr.: 5 Fast Facts You Need to Know*, HEAVY (July 23, 2017, 3:10 PM), <http://heavy.com/news/2017/07/james-bradley-bradly-san-antonio-walmart-truck-trailer-driver/> [<http://perma.cc/ZY38-E9YR>].

14. *Federal Grand Jury Returns Superseding Indictment in Case Against James Matthew Bradley, Jr.—Government Will Not Seek Death Penalty*, U.S. DEP’T OF JUST. (Sept. 20, 2017), <https://www.justice.gov/usao-wdtx/pr/federal-grand-jury-returns-superseding-indictment-case-against-james-matthew-bradley-jr> [<http://perma.cc/5ZRW-9N86>].

15. *Id.*

16. *James Matthew Bradley, Jr., Pleads Guilty to Transporting Undocumented Aliens Resulting in Death*, U.S. DEP’T OF JUST. (Oct. 16, 2017), <https://www.justice.gov/usao-wdtx/pr/james-matthew-bradley-jr-pleads-guilty-transporting-undocumented-alien-resulting-death> [<http://perma.cc/U4K9-BUDY>].

17. *James Matthew Bradley, Jr., Sentenced to Life in Federal Prison for Transporting Illegal Aliens Resulting in Death*, U.S. DEP’T OF JUST. (Apr. 20, 2018) <https://www.justice.gov/usao-wdtx/pr/james-matthew-bradley-jr-sentenced-life-federal-prison-transporting-illegal-alien> [<http://perma.cc/7CVJ-2USF>]; see Sasha Ingber, *Trucker in Hyman Smuggling Case Sentenced to Life in Prison*, NPR: THE TWO-WAY (Apr. 20, 2018) <https://www.npr.org/sections/thetwo-way/2018/04/20/604411510/trucker-in-human-smuggling-case-sentenced-to-life-in-prison> (reporting Bradley expressed remorse in a video statement regarding his role in the deaths and human smuggling crime).

18. Yan & Morris, *supra* note 3.

provided by them.<sup>19</sup> “In some cases, people could get sent back, and in some cases, people do stay.”<sup>20</sup>

The uncertainty is alarming. The possibility that undocumented immigrant victims, who suffer serious injuries and trauma from crimes committed in the United States, might be deported to their country of origin where they are less likely to receive necessary medical care and psychological treatment presents a serious human rights issue.<sup>21</sup> This issue is further complicated when considering the implications of deporting undocumented crime victims back to their home country without affording them the same protections, services, and justice normally afforded to a person not facing deportation.<sup>22</sup> Deportation of immigrant victims raises many important questions. Are there effective protective measures for immigrant victims of human smuggling and human trafficking? Should the U.S. government offer immunity to undocumented crime victims facing removal proceedings? Are

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19. *Id.*

20. *Id.*

21. International Covenant on Economic, Social and Cultural Rights, art. 12, Jan. 3, 1976, 993 U.N.T.S. 3, 8 (“The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.”); see Jennifer M. Smith, *Screen, Stabilize, and Ship: EMTALA, U.S. Hospitals, and Undocumented Immigrants (International Patient Dumping)*, 10 HOUS. J. HEALTH L. POL’Y 309, 310–11 (2010) (explaining American hospitals are “inappropriately transferring or discharging (i.e. shipping) indigent undocumented immigrants in arguably unstable conditions to Third World medical facilities in the home country of the immigrant . . .”); see also MARIA JIMENEZ, ACLU, HUMANITARIAN CRISIS: MIGRANT DEATHS AT THE U.S. - MEXICO BORDER 7 (2009), <https://www.aclu.org/files/pdfs/immigrants/humanitariancrisisreport.pdf> [http://perma.cc/ME7M-SSCF] (“Under international law, the right to life has to be guaranteed at all times and under all circumstances. This right is violated not only when a life is deprived due to the arbitrary actions of a State, but also when actions are not taken to protect life.”).

22. See, e.g., 18 U.S.C. § 3771 (2012) (listing the rights of crime victims, including restitution); ALASKA CONST. art. I, § 24 (“[T]he right to be treated with dignity, respect, and fairness during all phases of the criminal and juvenile process . . .”); ILL. CONST. art. I, § 8.1(a)(7) (“The right to be reasonably protected from the accused throughout the criminal justice process.”); OKLA. CONST. art. II, § 34 (“To preserve and protect the rights of victims to justice and due process, and ensure that victims are treated with fairness, respect and dignity, and are free from intimidation, harassment, or abuse, throughout the criminal justice process . . .”); TENN. CONST. art. I, § 35(3) (“The right to be present at all proceedings where the defendant has the right to be present.”); see also *Options for Victims*, NAT’L CTR. FOR VICTIMS OF CRIME, <http://victimsofcrime.org/help-for-crime-victims/get-help-bulletins-for-crime-victims/options-for-victims> [http://perma.cc/ELZ6-W79R] (last visited Mar. 28, 2018) (discussing other options for crime victims, such as state victim compensation programs, temporary shelter to victims of domestic violence and stalking, counseling, and available support groups).

undocumented immigrant victims of hate crimes and sexual assault equally protected? Are protected statuses for these individuals accessible? Should protected status be limited only to those immigrants admissible to the United States or who obtain useful information for law enforcement?

This Comment examines many of these questions and establishes a framework of viable solutions available to undocumented immigrant victims of certain crimes committed in the United States. This Comment begins with background information discussing mainstream perceptions of undocumented immigrants followed by discussion of crimes committed against immigrants and their vulnerable status. Under reporting of crimes by undocumented immigrants is also discussed with elaboration on state and federal actions that lead to the suppression of undocumented victims, the chilling effect of undocumented immigrants, and general problems with under reporting of these crimes. This Comment will then discuss current protections including U non-immigrant status and T non-immigrant status for undocumented victims and the respective problems encountered with each. Finally, solutions are offered for protecting undocumented crime victims and encouraging crime reporting, such as investing in law enforcement training and recruiting, reconsidering state laws that mandate law enforcement cooperation, and expanding the class of legal protections to include more crime victims.

## II. BACKGROUND

### A. *Mainstream Perceptions of Undocumented Immigrants*

Over the years, harsh immigration laws and regulations affected many immigrants in the United States causing them to live in the shadows of fear and anxiety.<sup>23</sup> These draconian laws contribute to a general and erroneous belief that immigrants are criminals and high U.S.-crime rates

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23. See, e.g., Immigration Act of 1990, Pub. L. No. 101-649, § 501, 104 Stat. 4978, 5048 (codified as amended at 8 U.S.C. § 1101(a) (2012)) (amending the definition of “aggravated felony” to include money laundering, crimes of violence for which a term of imprisonment is at least five years, and other foreign law violations); Immigration and Nationality Technical Corrections Act of 1994, Pub. L. No. 103-416, § 222, 108 Stat. 4305, 4320 (codified at 8 U.S.C. § 1101(a)(43) (2012)) (further amending the definition of “aggravated felony” to include additional crimes).

are correlated to high immigration rates.<sup>24</sup> Statements by presidential candidate Donald Trump added to the misconception that immigrants commit violent crimes in the United States: “[w]hen Mexico sends it[s] people, they’re not sending their best . . . They’re bringing drugs . . . They’re bringing crime. They’re rapists[.]”<sup>25</sup> Stereotypes are often false and provide a poor basis for unbalanced public policies that negatively impact immigrants.<sup>26</sup> Although the Supreme Court recognized “deportation is a drastic measure and at times the equivalent of banishment or exile[.]”<sup>27</sup> deportation has become a form of punishment for even minor offenses committed by immigrants.<sup>28</sup> The policies enacted into law aimed at ending unauthorized immigration have become unduly punitive for misdemeanor offenses.<sup>29</sup> Essentially, immigrants are being criminalized and punished merely for being immigrants.

New immigration policies publicize crimes committed by undocumented immigrants;<sup>30</sup> enlist local and state police agencies to

24. See Stephen H. Legomsky, *Portraits of the Undocumented Immigrant: A Dialogue*, 44 Ga. L. Rev. 65, 145–47 (2009) (discussing the stereotype that immigrants, whether or not undocumented, are associated with high crime rates); see also AMNESTY INT’L, *FACING WALLS: USA AND MEXICO’S VIOLATIONS OF THE RIGHTS OF ASYLUM-SEEKERS* 13 (2017), <https://www.amnestyusa.org/wp-content/uploads/2017/06/USA-Mexico-Facing-Walls-REPORT-ENG.pdf> [<http://perma.cc/9EUQ-C2EK>] (dispelling the myth that immigrants put citizens at risk of crime with evidence demonstrating immigration has no correlation with higher crime rates).

25. Adam Edelman, *A Look at Trump’s Most Outrageous Comments About Mexicans as He Attempts Damage Control by Visiting with Country’s President*, N.Y. DAILY NEWS (Aug. 31, 2016, 4:46 PM), <http://www.nydailynews.com/news/politics/trump-outrageous-comments-mexicans-article-1.2773214> [<https://perma.cc/Q9QV-LS5R>].

26. See RUBÉN G. RUMBAUT, *UNDOCUMENTED IMMIGRATION AND RATES OF CRIME AND IMPRISONMENT: POPULAR MYTHS AND EMPIRICAL REALITIES* 2 (2015) (exploring the ways in which stereotypes about immigrants and crime are reinforced through the media and provide the underpinnings of American public policy and practice).

27. *Fong Haw Tan v. Phelan*, 333 U.S. 6, 10 (1948).

28. See INA § 237(a)(2), 8 U.S.C. § 1227(a)(2) (2012) (listing deportable criminal offenses); WALTER EWING ET AL., *AM. IMMIGRATION COUNCIL, THE CRIMINALIZATION OF IMMIGRATION IN THE UNITED STATES* 1 (2015), [https://www.americanimmigrationcouncil.org/sites/default/files/research/the\\_criminalization\\_of\\_immigration\\_in\\_the\\_united\\_states.pdf](https://www.americanimmigrationcouncil.org/sites/default/files/research/the_criminalization_of_immigration_in_the_united_states.pdf) [<https://perma.cc/G6D3-HUBJ>].

29. See EWING ET AL., *supra* note 28, at 11 (citing DHS statistics reporting 31.3% of “criminal aliens” were removed for being in the country illegally; 15.4% for possession of dangerous drugs including marijuana; and 15% for “criminal traffic violations”).

30. Michael D. Shear & Ron Nixon, *New Trump Deportation Rules Allow Far More Expulsions*, N.Y. TIMES (Feb. 21, 2017), <https://www.nytimes.com/2017/02/21/us/politics/dhs-immigration-trump.html> [<https://nyti.ms/2lrcgKg>].



enforce the nation's immigration laws;<sup>31</sup> and expedite the number of deportations,<sup>32</sup> thereby detracting from the formal due process requirements of removal proceedings.<sup>33</sup> A memorandum issued by former Secretary of Homeland Security John Kelly (Kelly) removed all deportation exemptions for certain classes of immigrants and expanded deportation priority to a wider range of undocumented immigrants regardless of the basis of removability.<sup>34</sup> DHS justifies an expansion in enforcement of the nation's immigration policies by citing public safety as its number one concern.<sup>35</sup> Relentless mass deportation is framed as an efficient crime-fighting technique without any rational basis or empirical data to support its underlying conjecture that immigrants are criminals.<sup>36</sup>

Instead of creating programs for the protection of immigrant crime victims, DHS created the Victims of Immigration Crime Engagement (VOICE), a specialized office dedicated to victims of crime committed by "individuals with a nexus to immigration."<sup>37</sup> VOICE was implemented despite research showing immigrants do not commit more

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31. See Memorandum from John Kelly, Sec'y of Homeland Sec., to Kevin McAleenan, Acting Comm'r, et al. 3-4 (Feb 20, 2017), [https://www.dhs.gov/sites/default/files/publications/17\\_0220\\_S1\\_Enforcement-of-the-Immigration-Laws-to-Serve-the-National-Interest.pdf](https://www.dhs.gov/sites/default/files/publications/17_0220_S1_Enforcement-of-the-Immigration-Laws-to-Serve-the-National-Interest.pdf) [<https://perma.cc/JWP8-V2R9>] [hereinafter Memorandum from John Kelly] (promoting the use of INA § 287(g), which allows state or local law enforcement officers to enforce certain immigration laws).

32. See *id.* at 2 ("Except as specifically noted . . . the Department no longer will exempt classes or categories of removable aliens from potential enforcement.").

33. See *Plyer v. Doe*, 457 U.S. 202, 210 (1982) ("[E]ven [noncitizens] whose presence in this country is unlawful, have long been recognized as 'persons' guaranteed due process of law by the Fifth and Fourteenth Amendments.").

34. See Memorandum from John Kelly, *supra* note 31, at 2 (requiring immigration officials to prioritize for the removal of certain foreign-born individuals, regardless of whether they are in fact removable, for those who, among other things, have been convicted of any criminal offense, have been charged with a criminal offense, or in the judgment of an immigration officer, pose a risk to public safety).

35. *Id.* at 3 ("Criminal aliens have demonstrated their disregard for the rule of law and pose a threat to persons residing in the United States.").

36. *Id.* at 2; See EWING ET AL., *supra* note 28, at 20 ("While lawmakers repeatedly justify their crackdown on immigrants as a means of fighting crime, the reality is that crime in the United States is not caused or even aggravated by immigrants, regardless of their legal status.").

37. See *Victims of Immigration Crime Engagement (VOICE) Office*, ICE.GOV, <https://www.ice.gov/voice> [<https://perma.cc/W7ZY-GKVT>] [hereinafter *Victims*] (last updated Sept. 18, 2017) (discussing the creation of VOICE).

crimes than American citizens,<sup>38</sup> and in rejection of preexisting federal and state laws protecting these victims.<sup>39</sup> In his memorandum, Secretary Kelly ordered ICE to cease all efforts and resources used to advocate on behalf of undocumented immigrants and shift resources to the VOICE office.<sup>40</sup> The VOICE office purports to release the criminal and immigration history of the “criminal immigrant” to victims or their families.<sup>41</sup> Besides the disproportionate allocation of governmental resources, the creation of VOICE potentially demonizes undocumented immigrants, engendering a climate of hostility towards immigrants.<sup>42</sup> Indeed, many opponents of VOICE argue its creation often misleads people into believing undocumented immigrants are responsible for committing a disproportionate number of crimes in the United States.<sup>43</sup>

#### B. *Are Undocumented Individuals in Our Community Creating More Crime?*

Despite the misguided beliefs supporting these policies and programs, studies show immigrants are less likely to commit serious crimes than native-born citizens.<sup>44</sup> Furthermore, high rates of immigration are actually correlated with low rates of crime.<sup>45</sup> Incarceration rates for

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38. EWING ET AL., *supra* note 28, at 4–8; see Andrés Oppenheimer, *Trump’s Office of Anti-Immigrant Propaganda Will Hurt All Immigrants*, MIAMI HERALD (Mar. 8, 2017, 12:03 PM), <http://www.miamiherald.com/news/local/news-columns-blogs/andres-oppenheimer/article137188688.html> [<https://perma.cc/EA2U-6UMZ>] (recognizing the newly developed VOICE office is problematic because high immigration rates are associated with lower, not higher crime rates).

39. See, e.g., 18 U.S.C. § 3771 (2012) (listing the rights of crime victims, including restitution); ALASKA CONST. art. I, § 24 (“[T]he right to be treated with dignity, respect, and fairness during all phases of the criminal and juvenile process . . . .”); ILL. CONST. art. I, § 8.1(a)(7) (“The right to be reasonably protected from the accused throughout the criminal justice process.”); OKLA. CONST. art. II, § 34 (“To preserve and protect the rights of victims to justice and due process, and ensure that victims are treated with fairness, respect and dignity, and are free from intimidation, harassment, or abuse, throughout the criminal justice process . . . .”); TENN. CONST. art. I, § 35(3) (“The right to be present at all proceedings where the defendant has the right to be present.”).

40. Memorandum from John Kelly, *supra* note 31, at 5.

41. *Victims*, *supra* note 37.

42. Oppenheimer, *supra* note 38.

43. Carter Sherman, *Trump’s “VOICE”: What to Know About the New Program for Victims of Crimes by Undocumented Immigrants*, VICE NEWS (Mar. 1, 2017), [https://news.vice.com/en\\_us/article/d3xbq7/what-to-know-about-voice-trumps-program-for-victims-of-crimes-by-undocumented-immigrants](https://news.vice.com/en_us/article/d3xbq7/what-to-know-about-voice-trumps-program-for-victims-of-crimes-by-undocumented-immigrants) [<https://perma.cc/GV8R-T6VK>].

44. EWING ET AL., *supra* note 28, at 4–8.

45. *Id.*

young, less-educated immigrants from Mexico, Guatemala, and El Salvador, who account for a majority of the undocumented population in the United States, are substantially lower than comparable rates for native-born young men without a high school diploma.<sup>46</sup> There are several probable explanations for these disparities. First, immigrants face severe consequences for committing crimes, including deportation, and therefore are less likely to engage in criminal activity.<sup>47</sup> Second, immigrants in the United States are more motivated and willing to work than to commit crimes.<sup>48</sup> Lastly, communities with a large influx of immigrants observe lower crime rates because these communities harbor anti-crime features, such as busy and flourishing street life and young families.<sup>49</sup> “[P]olitical scapegoating and hyperbole are no substitute for scientific evidence.”<sup>50</sup> The rise in immigration in recent years has arguably led to decreased crime rates in the United States.<sup>51</sup> Altogether, punitive immigration practices are ineffective measures for reducing crime.<sup>52</sup>

### III. CRIMES COMMITTED AGAINST IMMIGRANTS

#### A. *Undocumented Victims Are Especially Vulnerable to Certain Crimes*

Although undocumented immigrants fall victim to crimes that similarly affect citizens, they are also victims of serious crimes that would not ordinarily affect citizens at the same rate, as surmised by the Walmart parking lot incident and similar human smuggling tragedies.<sup>53</sup> When undocumented immigrants are on the receiving end of crime, they face more barriers accessing the legal system and are more prone to

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46. *Id.* at 7.

47. *See* INA § 237(a)(2), 8 U.S.C. § 1227(a)(2) (2012) (listing all deportable criminal offenses); Alex Nowraseth, *Immigration and Crime – What the Research Says*, CATO INS.: CATO AT LIBERTY (July 14, 2015, 11:49 AM), <https://www.cato.org/blog/immigration-crime-what-research-says> [<https://perma.cc/C87X-AKUG>].

48. EWING ET AL., *supra* note 28, at 6; Nowraseth, *supra* note 47.

49. Nowraseth, *supra* note 47.

50. RUMBAUT, *supra* note 26, at 17.

51. *See Id.* at 7 (supporting the assertion that increased immigration has led to a decrease in crime rates over the past fifteen years with overwhelming evidence that immigrants commit less crime than native-born).

52. EWING ET AL., *supra* note 28, at 3.

53. Edison & Friedman, *supra* note 2.

victimization than immigrants with legal status and citizens.<sup>54</sup> Undocumented immigrants are frequently targeted and often re-victimized because criminals understand an immigrant's lack of legal status and fear of deportation induces a reluctance to report criminal activity to police.<sup>55</sup> Latino immigrants are more likely to fall victim to certain types of crime compared to United States citizens.<sup>56</sup> Recognizing that undocumented immigrants are more vulnerable to crime is the first step to developing solutions to the unique challenges undocumented immigrant victims face.

ICE's acting Assistant Director for Intelligence, Jack Staton, acknowledged that smuggling incidents occur daily in the United States.<sup>57</sup> In a 2003 Texas tragedy recognized as "the deadliest smuggling incident in U.S. history,"<sup>58</sup> approximately seventy-three undocumented immigrants were stuffed in the back of an unventilated trailer traveling to Houston, leaving nineteen people dead, including a five-year-old boy.<sup>59</sup> Many others were severely injured from dehydration, suffocation, and heat exhaustion.<sup>60</sup> On July 22, 2012, a pick-up truck crammed with twenty-two immigrants crashed along U.S. Highway 59 in Texas, killing

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54. Imogene Mankin, Article: *Abuse-in(g) the System: How Accusations of U Visa Fraud and Brady Disclosures Perpetrate Further Violence Against Undocumented Victims of Domestic Abuse*, 27 BERKELEY LA RAZA L.J. 40, 49 (2017) ("Many undocumented immigrants are already too fearful of the authorities to report any crime. Congress recognized that undocumented immigrant victims of crime face unique barriers to reporting crime to law enforcement, mostly driven by a fear of deportation.").

55. STACEY ALLRED ET AL., UNC SCH. OF LAW, IMMIGRATION & HUMAN RIGHTS CLINIC, A LEGAL ADVOCACY GUIDE TO BUILD INTEGRATED COMMUNITIES IN NORTH CAROLINA 165 (2012), <http://www.law.unc.edu/documents/clinicalprograms/buildingcommunitiesfullreport.pdf> [<https://perma.cc/7CXE-VW5Q>] (explaining that criminals prey upon undocumented immigrants due to the "disconnect" between the undocumented population and the law enforcement).

56. See Alexandra Ricks, *Latinx Immigrant Crime Victims Fear Seeking Help*, URBAN INST. (Sep. 25, 2017), <https://www.urban.org/urban-wire/latinx-immigrant-crime-victims-fear-seeking-help> [<https://perma.cc/YSQ6-57S6>] (reporting that Latinx immigrants often falls victims of crimes, such as sexual assault or robberies, and are less likely to seek victim services).

57. Daniela Silva & Elizabeth Chuck, *San Antonio Tragedy Puts a Spotlight on Smuggling-by-Truck Cases*, NBC News (July 25, 2017, 4:42 AM), <https://www.nbcnews.com/storyline/immigration-border-crisis/san-antonio-tragedy-puts-spotlight-smuggling-truck-cases-n786096> [<https://perma.cc/Q9Y8-TZC5>].

58. *How America's Deadliest Smuggling Incident Unfolded in Victoria, Texas*, ABC13 (July 23, 2017), <http://abc13.com/news/a-look-back-americas-deadliest-smuggling-incident/2203124/> [<https://perma.cc/RJG9-23WK>].

59. NAT'L FOUND. FOR AM. POLICY, *supra* note 4, at 2–3.

60. *Id.*

approximately fourteen people and injuring others.<sup>61</sup> The truck was transporting undocumented immigrants to their final U.S. destination.<sup>62</sup>

The innumerable instances of forced labor and exploitation of undocumented immigrants highlights their vulnerability and need for viable protections against further victimization.<sup>63</sup> Undocumented immigrants often suffer from labor trafficking and wage-theft as some employers tend to view them as powerless targets to be exploited.<sup>64</sup> In August 2017, a group of undocumented immigrants from Mexico were rescued by federal agents from a smuggling and forced labor scheme.<sup>65</sup> They were locked in warehouses without running water, transported to and from a job site each day, and forced to work without pay amidst threats that they, or their families, would be harmed.<sup>66</sup>

In addition to forced labor, Latino immigrants working in low-wage labor jobs are more likely to experience sexual and physical assault.<sup>67</sup> Undocumented immigrants, in general, are more likely to be victimized in crimes of sexual abuse, rape, and domestic violence.<sup>68</sup> Undocumented

61. Zeke MacCormack et al., *Death Was Last Stop on Journey for Packed Pickup's Immigrants*, SAN ANTONIO EXPRESS-NEWS, [http://www.mysanantonio.com/news/local\\_news/article/Death-was-last-stop-on-journey-for-packed-3726682.php](http://www.mysanantonio.com/news/local_news/article/Death-was-last-stop-on-journey-for-packed-3726682.php) [https://perma.cc/2MJR-PQ3V] (last updated July 24, 2012).

62. *Id.*

63. Ricks, *supra* note 56.

64. *Id.*; Martin Moylan, *Report: Immigrant Workers May Be Robbed of Wages, Forced Into Bad Conditions*, MPR NEWS (Sept. 27, 2016), <https://www.mprnews.org/story/2016/09/27/report-outlines-immigrant-worker-exploitation> [https://perma.cc/9K97-8VQ2] (“Immigrant and other local workers may be robbed of their wages, forced to work under oppressive conditions and sometimes even treated like virtual slaves.”).

65. Len Ramirez, *Federal Agents Rescue Immigrants in Hayward Forced Labor Scheme*, CBS SF BAY AREA (Aug. 29, 2017, 4:23 PM), <http://sanfrancisco.cbslocal.com/2017/08/29/hayward-undocumented-immigrants-forced-labor/> [https://perma.cc/7UAK-35XE].

66. *Id.*

67. See Joseph S. Guzman, *State Human Trafficking Laws: A New Tool to Fight Sexual Abuse of Farmworkers*, 46 COLUM. HUM. RTS. L. REV. 288, 290–91 (highlighting that female farmworkers are highly susceptible to sexual abuse, but are unlikely to report such abuse); see also Ricks, *supra* note 56 (reporting increased susceptibility of physical and sexual abuse in farm work and meat-packaging jobs).

68. See Barbara Moynihan, et al., *Undocumented and Unprotected Immigrant Women and Children in Harm's Way*, 4 J. FORENSIC NURSING; BALTIMORE 123, 124 (2008) (focusing on the difficulties faced by undocumented women and children who are victims of abuse perpetrated by a U.S.-citizen parent or spouse); see also Ismael Perez, *Undocumented Victim Feared Speaking Out About Domestic Violence*, VICTORIA ADVOC. (July 1, 2017), <https://www.victoriaadvocate.com/news/2017/jul/01/undocumented-victim-feared-speaking-out-about-dome/> [https://perma.cc/46BS-EE72] (using the true story of Laura Leticia Moreno to

female immigrants are especially prone to suffering sexual exploitation and assault at home and in the workplace: they are frequently dependent on their employer or documented partner, vulnerable to their demands, and fearful of deportation.<sup>69</sup> One research study found school-aged immigrants suffer recurring sexual assault more often than non-immigrant students.<sup>70</sup>

The research surrounding sexual violence and assaults of undocumented immigrants<sup>71</sup> establishes immigrants are targeted more often than native-born citizens, and have less access to service providers after suffering a sexually-motivated crime.<sup>72</sup> Undocumented victims of sexual violence face special challenges.<sup>73</sup> In particular, as they cope with the trauma of sexual assault, they must also brave the difficulties of

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illustrate the extent of abuse immigrant women are willing to endure before reporting domestic violence).

69. *Immigrant Women, Backbone of U.S. Food Industry, Targets for Wage Theft, Sexual Harassment and Other Abuses, New SPLC Report Finds*, SPLC (Nov. 16, 2010), <https://www.splcenter.org/news/2010/11/16/immigrant-women-backbone-us-food-industry-target-s-wage-theft-sexual-harassment-and-other> [<https://perma.cc/E9K4-ZCYV>] (“Many of the women . . . said the threat of deportation and the possible destruction of their families keeps them from reporting workplace abuses—even when it means enduring sexual harassment and other indignities.”). Similarly, abused immigrant women endure physical and sexual abuse out of fear their domestic partner will kill them. See Rachel Gonzalez Settlage, *Uniquely Unhelpful: The U Visa’s Disparate Treatment of Immigrant Victims of Domestic Violence*, 68 RUTGERS L. REV. 1747, 1749–750 (2016). For example, Manuela, an undocumented woman from Southeast Asia was in a relationship with Richard, a U.S.-citizen. *Id.* at 1749. Approximately a year after their marriage, Richard began abusing Manuela. *Id.* at 1750. Manuela endured many years of physical and psychological abuse before seeking the help of a domestic abuse shelter as she feared Richard would kill her. *Id.*

70. NAT’L IMMIGRANT WOMEN’S ADVOCACY PROJECT, AMERICAN UNIV. WASH. COLL. OF L., *EMPOWERING SURVIVORS: LEGAL RIGHTS OF IMMIGRANT VICTIMS OF SEXUAL ASSAULT 3* (Leslye Orloff, ed., 2013), <http://library.niwap.org/wp-content/uploads/2015/pdf/FAM-Man-Full-EmpoweringSurvivors07.13.pdf> [<https://perma.cc/ZNY4-Q8LZ>] [hereinafter *EMPOWERING SURVIVORS*].

71. See TEX. DEP’T OF PUB. SAFETY, *ASSESSING THE THREAT OF HUMAN TRAFFICKING IN TEXAS*, TEX. DEP’T OF PUB. SAFETY 11 (2014), [https://www.dps.texas.gov/director\\_staff/media\\_and\\_communications/2014/txHumanTraffickingAssessment.pdf](https://www.dps.texas.gov/director_staff/media_and_communications/2014/txHumanTraffickingAssessment.pdf) [<https://perma.cc/CJH7-NSET>] (referencing a large sex-trafficking ring uncovered in Houston in October 2013 involving undocumented girls and women from Honduras and Mexico who were coerced and forced into prostitution).

72. See *EMPOWERING SURVIVORS*, *supra* note 70, at 2–3 (examining why immigrant women face more difficulties accessing services provided to assist sexual violence victims, and finding it is, in part, due to the agencies’ inability to “meet the diverse needs of immigrant victims”).

73. *Id.*

navigating foreign medical, legal, and social service systems in the United States.<sup>74</sup>

Alarming, anti-immigrant policies seem to encourage hate speech directed toward minority and immigrant communities,<sup>75</sup> incidents of which increased after the 2016 presidential election.<sup>76</sup> Racially motivated violence against Latinos, irrespective of their immigration status, has increased.<sup>77</sup> In Boston, two men beat a homeless Hispanic man and said: “Donald Trump was right, all these illegals need to be deported.”<sup>78</sup> Before a Kansas man shot and killed an Indian immigrant, he told the man: “Get out of my country.”<sup>79</sup> In Massachusetts, a Puerto Rican family’s car was vandalized with the words “Trump” and “Go Home.”<sup>80</sup> They were the only minority family in their community.<sup>81</sup>

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74. See *id.* (“Immigrant women are frequently unaware of, confused about, or face difficulties accessing the services available to them.”); see also Rebecca Campbell, *The Community Response to Rape: Victims’ Experiences with the Legal, Medical, and Mental Health Systems*, 26 AM. J. OF COMMUNITY. PSYCHOL. 355, 356 (1998) (discussing how the distinct functions of the legal, medical, and health systems may not be apparent or meaningful to a sexual assault victim).

75. See Christina Iturralde, *Rhetoric and Violence: Understanding Incidents of Hate Against Latinos*, 12 N.Y. CITY L. REV. 417, 420 (2009) (“Where the debate has risen to a fever pitch and Latino immigrants are made out to be ‘illegals’ who are ‘the problem,’ it is only logical to conclude that the rhetoric has, at least, contributed to the rising number of hate incidents against Latinos.”); see also *Ten Days After: Harassment and Intimidation in the Aftermath of the Election*, SPLC (Nov. 29, 2016), <https://www.splcenter.org/20161129/ten-days-after-harassment-and-intimidation-aftermath-election> [<https://perma.cc/W9PJ-LSMQ>] [hereinafter *Ten Days After*] (reporting approximately 900 reports of hate messages to racial or ethnic individuals after the election); Holly Yan et al., ‘Make America White Again’: Hate Speech and Crimes Post-Election, CNN, <http://www.cnn.com/2016/11/10/us/post-election-hate-crimes-and-fears-trnd/index.html> [<https://perma.cc/A98L-V5BX>] (last updated Dec. 22, 2016).

76. *Ten Days After*, *supra* note 75.

77. Compare *Table 1: Incidents, Offenses, and Known Offenders by Bias Motivation, 2014*, UCR.FBI.GOV, <https://ucr.fbi.gov/hate-crime/2014/tables/table-1> [<https://perma.cc/M3PN-YWLK>] (last visited Mar. 30, 2018) (reporting 299 anti-Hispanic incidents, 376 anti-Hispanic offenses, and 389 Hispanic victims), with *Table 1: Incidents, Offenses, and Known Offenders by Bias Motivation, 2016*, UCR.FBI.GOV, <https://ucr.fbi.gov/hate-crime/2016/tables/table-1> [<https://perma.cc/JVY9-A5ZQ>] (last visited Mar. 30, 2018) (reporting 344 anti-Hispanic incidents, 449 anti-Hispanic offenses, 483 Hispanic victims).

78. Russell Berman, *A Trump-Inspired Hate Crime in Boston*, ATLANTIC (Aug. 20, 2015), <https://www.theatlantic.com/politics/archive/2015/08/a-trump-inspired-hate-crime-in-boston/401906/> [<https://perma.cc/C972-3BRE>].

79. Sameer Rao, *Kansas Man Faces Possible Hate Crime Charges for Killing Indian Immigrant*, COLOR LINES (Feb. 24, 2017, 4:22 PM), <https://www.colorlines.com/articles/kansas-man-faces-possible-hate-crime-charges-killing-indian-immigrant> [<https://perma.cc/ANP4-JBXR>].

80. Yan et al., *supra* note 75.

81. *Id.*

Although national rates of hate crimes against immigrants have not increased, experts suspect hate crimes may be under reported.<sup>82</sup> Most experts agree anti-immigrant rhetoric contributes to the crimes committed against Latino and immigrant communities.<sup>83</sup>

Despite the frequency of undocumented immigrants' victimization in the United States, they seldom benefit from services or laws established to assist crime victims.<sup>84</sup> For example, state laws often provide a process in court where a crime victim may confront their perpetrator and receive restitution.<sup>85</sup> However, immigrant crime victims do not benefit from these protections; ICE sometimes arrests crime victims and witnesses at courthouses.<sup>86</sup> While state criminal proceedings identify the legal rights of a crime victim, no such process exists in an immigration removal proceeding.<sup>87</sup> There are no established standards for law enforcement agencies to follow when encountering undocumented crime victims.<sup>88</sup>

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82. MICHAEL SHIVELY ET AL., *ABT ASSOCS, UNDERSTANDING TRENDS IN HATE CRIMES AGAINST IMMIGRANTS AND HISPANIC-AMERICANS* 60 (2014), <https://www.ncjrs.gov/pdffiles1/nij/grants/244755.pdf> [<https://perma.cc/7P5L-PDND>].

83. *Id.*

84. Mankin, *supra* note 54.

85. *See, e.g.*, ALASKA CONST. art. I, § 24 (“[T]he right to be treated with dignity, respect, and fairness during all phases of the criminal and juvenile process . . . .”); CAL. CONST. art. I, § 28(a) (“The rights of victims pervade the criminal justice system, encompassing not only the right to restitution from the wrongdoers for financial losses suffered as a result of criminal acts, but also the more basic expectation that person who commit felonious acts causing injury to innocent victims will be appropriately detained in custody . . . .”); ILL. CONST. art. I, § 8.1(a)(7) (“The right to be reasonably protected from the accused throughout the criminal justice process.”); OKLA. CONST. art. II, § 34 (“To preserve and protect the rights of victims to justice and due process, and ensure that victims are treated with fairness, respect and dignity, and are free from intimidation, harassment, or abuse, throughout the criminal justice process . . . .”); TENN. CONST. art. I, § 35(3) (“The right to be present at all proceedings where the defendant has the right to be present.”); TEX. CONST. art. I, § 30(b)(1)–(5) (“[T]he right to notification of court proceedings; the right to be present at all public court proceedings . . . the right to confer with a representative of the prosecutor’s office; the right to restitution; and the right to information about the conviction, sentence, imprisonment, and release of the accused.”).

86. U.S. IMMIGRATION & CUSTOMS ENF’T, *DIRECTIVE NO. 11072.1, CIVIL IMMIGRATION ENFORCEMENT ACTIONS INSIDE COURTHOUSES* (2018).

87. *See* INA § 240, 8 U.S.C. § 1229a (2012) (listing the rights of individuals in removal proceedings and not identifying any special rights for victims of crimes other than battered spouses and children).

88. *See* DEBRA A. HOFFMASTER ET AL., *POLICE EXEC. RESEARCH FORUM, POLICE AND IMMIGRATION: HOW CHIEFS ARE LEADING THEIR COMMUNITIES THROUGH CHALLENGES* (2010), [http://www.policeforum.org/assets/docs/Free\\_Online\\_Documents/Immigration/police%20and%20immigration%20-%20how%20chiefs%20are%20leading%20their%20communities%20through%20the%20challenges%202010.pdf](http://www.policeforum.org/assets/docs/Free_Online_Documents/Immigration/police%20and%20immigration%20-%20how%20chiefs%20are%20leading%20their%20communities%20through%20the%20challenges%202010.pdf) [<https://perma.cc/57HC-2MAQ>] (highlighting the lack of



Undocumented immigrant victims undoubtedly require special care and attention, but current federal protections are insufficient.

#### IV. UNDERREPORTING BY IMMIGRANT CRIME VICTIMS

##### A. *State and Federal Actions Lead to Suppression of Undocumented Victims*

In addition to insufficient protections for undocumented victims, ICE officials engage in practices resulting in undocumented immigrants weighing the risks of deportation against the benefits of reporting crime.<sup>89</sup> This chilling effect is the result of President Trump's executive orders prioritizing removal of all undocumented immigrants.<sup>90</sup> ICE has arrested undocumented immigrants at courthouses in Texas and New York.<sup>91</sup> A transgender woman seeking a protective order from her abusive ex-boyfriend was approached and detained by two ICE officers in an El Paso courthouse, responding to a tip regarding her

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uniformity of law enforcement policies when dealing with undocumented crime victims; ultimately leaving the decision to local law enforcement). One concerning finding is that in 9.6% of the police responses (n=265) in which an immigrant sexual assault victim called for help, no police report was taken. In over half of these cases the police were not able to communicate with the victim because they did not secure the assistance of a qualified interpreter or language line. In 60.8% (n=161) of the instances in which no police report was taken, when the police arrived on the scene the victim had visible injuries and/or the police saw evidence that a crime had occurred. NATALIA LEE ET AL., NAT'L IMMIGRANT WOMEN'S ADVOCACY PROJECT, NATIONAL SURVEY OF SERVICE PROVIDERS ON POLICE RESPONSE TO IMMIGRANT CRIME VICTIMS, U VISA CERTIFICATION AND LANGUAGE ACCESS (2013), <http://www.niwap.org/reports/Police-Response-U-Visas-Language-Access-Report-4.6.13.pdf> [<https://perma.cc/L3P9-42SE>].

89. Tom Dart, *Fearing Deportation, Undocumented Immigrants Wary of Reporting Crimes*, GUARDIAN (Mar. 23, 2017, 6:30 PM), <https://www.theguardian.com/us-news/2017/mar/23/undocumented-immigrants-wary-report-crimes-deportation> [<https://perma.cc/CBP5-3645>].

90. Exec. Order No. 13,768, 82 Fed. Reg. 8,799, 8800 (Jan. 30, 2017) (prioritizing the removal of aliens described in "sections 212(a)(2) [criminal related grounds], (a)(3) [security and related grounds], and (a)(6)(C) [misrepresentation], 235, and 237(a)(2) [criminal offenses] and (4) [security and related grounds] of the INA[.]" as well as other classes of removable aliens).

91. See U.S. IMMIGRATION & CUSTOMS ENF'T, *supra* note 86 (authorizing immigration enforcement in courthouses); Maya Rhodan, *Plainclothes Officers Arrested Immigrants at a Courthouse. Can They Do That?*, TIME (Sept. 18, 2017), <http://time.com/4946747/immigration-plainclothes-brooklyn-courthouse/> [<https://perma.cc/U737-PUZ6>] [hereinafter Rhodan, *Plainclothes Officers Arrest Immigrants*]; Nora Caplan-Bricker, *"I Wish I'd Never Called the Police,"* SLATE (Mar. 19, 2017, 8:12 PM), [http://www.slate.com/articles/news\\_and\\_politics/cover\\_story/2017/03/u\\_visas\\_gave\\_a\\_safe\\_path\\_to\\_citizenship\\_to\\_victims\\_of\\_abuse\\_under\\_trump.html](http://www.slate.com/articles/news_and_politics/cover_story/2017/03/u_visas_gave_a_safe_path_to_citizenship_to_victims_of_abuse_under_trump.html) [<https://perma.cc/F39V-49Q9>].

whereabouts.<sup>92</sup> Before attending criminal proceedings at a Brooklyn courthouse in September 2017, four men charged with misdemeanors were taken into custody by immigration officials.<sup>93</sup> Three of the men had no previous criminal record.<sup>94</sup> In November, Genaro Rojas-Hernandez was awaiting a hearing on assault charges in the hallway of a Brooklyn courthouse when ICE detained him in order to initiate removal proceedings.<sup>95</sup>

Current policies mandate that ICE officials refrain from enforcement activities in “sensitive locations,” such as schools, hospitals, and churches.<sup>96</sup> Courthouses, however, are not designated sensitive locations where immigrants are protected from immigration enforcement.<sup>97</sup> ICE claims these arrests are generally carried out when an individual has prior criminal convictions, pending charges, or are identified as a public safety threat.<sup>98</sup> However, in the case of the four Brooklyn arrests, there was no information confirming the men were

92. Caplan-Bricker, *supra* note 91.

93. Noah Hurowitz & Emma Whitford, *3 Immigrants Arrested by ICE Outside BK Courthouse Had No Criminal Records*, DNAINFO.COM (Sept. 19, 2017, 5:21 PM), <https://www.dnainfo.com/new-york/20170919/downtown-brooklyn/no-priors-for-immigrants-detained-outside-brooklyn-court-ice>.

94. *Id.*

95. *NYC Lawyers Protest After ICE Agents Arrest Immigrant at Brooklyn Courthouse*, PUB. RADIO INT’L (Dec. 1, 2017, 5:00 PM), <https://www.pri.org/stories/2017-12-01/nyc-lawyers-protest-after-ice-agents-arrest-immigrant-brooklyn-courthouse> [https://perma.cc/UH29-GLUF].

96. Memorandum from John Morton, Dir., U.S. Immigration & Customs Enf’t, to Field Office Directors Special Agents in Charge Chief Counsel 1–2 (Oct. 24, 2011), <https://www.ice.gov/doclib/ero-outreach/pdf/10029.2-policy.pdf> [https://perma.cc/RWZ4-W6Y3]. Exceptions to the “sensitive locations” rule exist where there are exigent circumstances. When the actions of other law enforcement officials lead immigration officers to such a location, or when prior approval was obtained, ICE may enter a sensitive location. *Id.* at 2. Exigent circumstances include national security interests; terroristic threats; imminent risk of violence, physical harm, or death; overriding public safety concerns for the arrest of a dangerous felon; terrorist suspect; or imminent risk of destruction of evidence material to a criminal matter. *Id.* at 2–3.

97. *See Id.* at 2–3 (listing the sensitive locations covered by ICE’s enforcement policy and acknowledging the list is not exclusive); Rhodan, *Plainclothes Officers Arrest Immigrants*, *supra* note 91 (noting that courthouses are not explicitly included on the list of sensitive locations under current policy).

98. *See FAQ on Sensitive Locations and Courthouse Arrests*, ICE.GOV, <https://www.ice.gov/ero/enforcement/sensitive-loc> [https://perma.cc/3VTZ-ZVJ8] (last updated Jan. 31, 2018) (specifying that courthouse arrests target undocumented immigrants that have criminal records, are gang members, threaten national or public safety, fugitives, and those that were previously deported, but re-entered the country unlawfully); Rhodan, *Plainclothes Officers Arrest Immigrants*, *supra* note 91.

members of a street gang, as alleged, and therefore were not a risk to public safety as ICE later argued.<sup>99</sup> Uncertainty about the boundaries of ICE arrests leaves undocumented immigrants without any alternative but to stay away or risk deportation, thereby preventing them from accessing these necessary services and attending their court hearings.<sup>100</sup>

As required by regulation, ICE officers often fail to identify themselves and fail to procure an administrative warrant validating an arrest.<sup>101</sup> Recently, videos and images of ICE officials wearing clothing identifying themselves as “police” surfaced.<sup>102</sup> Such conduct conflates the distinction between law enforcement and immigration enforcement, thereby inducing fear of “police” in undocumented immigrant communities.<sup>103</sup> Elected officials representing Latino and immigrant populations requested ICE stop identifying themselves as police officials and refrain from wearing clothing identifying them as such, saying “it [i]s misleading and endangers public safety.”<sup>104</sup> The practice undermines efforts to create a positive relationship between local police organizations and immigrant communities, while simultaneously preventing potential

99. Hurowitz & Whitford, *supra* note 93.

100. See Robert C. Davis & Nicole J. Henderson, *Willingness to Report Crimes: The Role of Ethnic Group Membership and Community Efficacy*, 49 *CRIME & DELINQ.* 564, 576 (2003) (finding immigrants who are not willing to report crime are those that have had involuntary encounters with the police—indicating immigrants are less likely to make themselves available of the criminal justice system if they are being targeted).

101. 8 C.F.R. § 287.8(c)(2)(ii)–(iii) (2017) (requiring immigration officials to obtain a warrant except when the individual is likely to escape before a warrant can be obtained and requiring them to identify themselves as soon as practicable when making the arrest); Rhodan, *Plainclothes Officers Arrest Immigrants*, *supra* note 91.

102. Miranda Green, *New Bill Aims to Block ICE from Identifying as Police Officers*, CNN, <https://www.cnn.com/2017/04/06/politics/ice-officers-police-bill/index.html> [<https://perma.cc/2FW8-2GNM>] (last updated Apr. 6, 2017).

103. Sara Roncero-Menendez, *Bill to Prevent ICE from Wearing “Police” on Their Uniforms Introduced in Congress*, LONG ISLAND WINS (Apr. 7, 2017), <https://longislandwins.com/news/bill-prevent-ice-wearing-police-uniforms-introduced-congress/> [<https://perma.cc/F58B-EADH>].

104. See, e.g., H.R. 2073, 115th Cong. 1st Sess. (2017) (proposing to amend section 287 of the Immigration and Nationality Act (8 U.S.C. § 1357) to state immigration officials “shall not wear any clothing . . . on their person bearing the word ‘police’ while performing duties under the immigration laws.”); Letter from Mike Thompson, et al., to John F. Kelly, Sec’y of Homeland Sec. (Feb. 22, 2017), [https://mikethompson.house.gov/sites/mikethompson.house.gov/files/congress\\_letter\\_to\\_ICE.pdf](https://mikethompson.house.gov/sites/mikethompson.house.gov/files/congress_letter_to_ICE.pdf) [<https://perma.cc/46YC-RN7D>] (urging Secretary of Homeland Security John Kelly to direct ICE to remove the word “Police” from all ICE official uniforms due to concerns the practice undermines law enforcement’s efforts to build trust in immigrant communities).

crime victims and witnesses from assisting the police.<sup>105</sup> Considering the recent signing of bills requiring state law enforcement officials to cooperate with federal immigration agents, effectively ending “sanctuary cities,” this fear may be well-founded.<sup>106</sup>

Texas Governor Greg Abbott recently signed Senate Bill 4 (S.B. 4) into law, which bans “sanctuary cities” in the state of Texas.<sup>107</sup> Although there is no single definition of a “sanctuary city,” the term is commonly used to refer to local governments that limit their cooperation with federal immigration officials, such as ICE.<sup>108</sup> The signing of S.B. 4 prohibits municipalities from adopting policies restricting law enforcement officials from questioning a person about their immigration status during a “lawful detainment.”<sup>109</sup> The bill also allows for the placement of detainers on undocumented immigrants in local detention

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105. Catherine E. Shoichet, *L.A. Officials to ICE: Stop Calling Yourselves Police*, CNN, <http://www.cnn.com/2017/03/10/us/immigration-ice-police-los-angeles/index.html> [<https://perma.cc/K4PY-MHQ6>] (last updated Mar. 13, 2017, 12:34 PM). See also John Burnett, *New Immigration Crackdowns Creating ‘Chilling Effect’ On Crime Reporting*, NPR (May 25, 2017, 4:54 AM), <https://www.npr.org/2017/05/25/529513771/new-immigration-crackdowns-creating-chilling-effect-on-crime-reporting> (referring to the Houston Police Chief’s belief that a chilling effect has been created by the signing of the “sanctuary cities” bill in which immigrants believe society is more interested in deporting them than bringing them justice).

106. See, e.g., 2011 Ala. Laws Act 2011-535 (H.B. 56) (amending ALA. CODE § 31-13-12 (2011) (precluding state or local law enforcement from refusing to assist the federal government in immigration enforcement); 2016 Ga. Laws Acts 370 (S.B. 269) (amending GA. CODE ANN. § 36-80-23) (requiring local agencies show proof of compliance with anti-immigration sanctuary policies as a condition of funding); 2017 Miss. Laws Ch. 383 (S.B. 2710) (amending MISS. CODE ANN. § 25-1-119) (providing any sanctuary policy adopted by a county, municipality, university, or college shall be invalid and void); 2017 N.C. Sess. Laws (S.B. 145) (creating additional incentives for local governments to comply with state laws related to immigration); 2017 Tenn. Pub. Acts (S.B. 155) (prohibiting state governmental officials and entities from adopting sanctuary city policies).

107. S.B. 4, 85th Leg. Sess. (Tex. 2017) (amending Tex. Gov’t Code Ann. Chapter 752); Patrick Svitek, *Texas Gov. Greg Abbott Signs “Sanctuary Cities” Bill into Law*, TEX. TRIBUNE (May 7, 2017, 8:00 PM), <https://www.texastribune.org/2017/05/07/abbott-signs-sanctuary-cities-bill/> [<https://perma.cc/TC9K-D4XF>].

108. Inez Friedman-Boyce et. al., *Legal Analysis: Sanctuary Cities: Distinguishing Rhetoric From Reality*, 61 B.B.J. 8, 8 (2017). The “sanctuary cities” concept has been manifested in Los Angeles as a city-wide order that law enforcement officials refrain from stopping individuals to ask them about their immigration status. See L.A. POLICE DEP’T, OFFICE OF THE CHIEF OF POLICE, SPECIAL ORDER NO. 40 (1979) (recognizing undocumented alien status is not a matter of police action and ordering police officers from initiating police action “with the objective of discovering the alien status of the person”).

109. Tex. Gov’t Code Ann. § 752.053(b) (West 2017).

facilities for up to forty-eight hours after release in order to transfer immigrants to federal detention centers.<sup>110</sup>

In August 2017, a federal district judge in San Antonio enjoined the portion of the bill requiring state law enforcement to comply with federal immigration detainer requests, but allowed the portion permitting law enforcement to question a detainee's immigration status.<sup>111</sup> On March 13, 2018, the Court of Appeals for the Fifth Circuit held the detainer provision was constitutional, but the provisions prohibiting a local entity from implementing a policy limiting their cooperation with immigration officials violated the First Amendment.<sup>112</sup> The Fifth Circuit subsequently withdrew their March opinion in May of 2018, holding that both the detainer provisions of S.B.4 and the policies prohibiting law enforcement agencies discretion to comply with federal immigration enforcement are constitutionally valid.<sup>113</sup>

For the time being, S.B. 4 will remain in full-effect.<sup>114</sup> Citizens and undocumented immigrants alike worry the law will encourage racial profiling by law enforcement, despite the provision expressly prohibiting racial profiling by officers.<sup>115</sup> Only time will reveal the implications of the Court's new holding, however, lawmakers and officials believe Texas's new law will likely result in an increase in fear and anxiety felt

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110. Tex. Code Crim. Proc. Ann. Art. 2.251 (West 2017); U.S. Immigration and Customs Enforcement, Policy No. 10074.2: Issuance of Immigration Detainers by ICE Immigrations Officers (Mar. 24, 2017); Maya Rhodan, *Deportation Fears Silence Some Domestic Violence Victims*, TIME (May 30, 2017), <http://time.com/4798422/domestic-violence-deportation-immigration/> [<https://perma.cc/4UHD-E4WV>] [hereinafter Rhodan, *Deportation Fears Silence Some Domestic Violence Victims*]; Jim Vertuno, *Texas Lawmakers Pass Bill Allowing Police to Ask About Immigration Status*, USA TODAY (May 3, 2017, 9:19 PM), <https://www.usatoday.com/story/news/nation/2017/05/03/texas-sanctuary-cities-bill-immigration-status-police/101268244/> [<https://perma.cc/6YLY-AVVH>].

111. *City of El Cenizo, Texas v. Texas*, 264 F. Supp. 3d 744, 805, 807 (W.D. Tex. 2017).

112. *City of El Cenizo, Texas v. Texas*, 885 F.3d 332, 334 (5th Cir. 2018), *withdrawn and replaced* by 890 F.3d 164 (5th Cir. May 18, 2018).

113. The Court supports their finding of constitutionality with the fact that S.B. 4's assistance-cooperation provision only allows local officials to act under the direction of federal supervision when "reasonable or necessary." 890 F.3d 134, 174 (5th Cir. May 8, 2018).

114. *Id.*

115. TEX. GOV'T CODE § 752.054 (West 2018); see Camille Garcia, *Local Immigrant Advocate Groups Say 'No' to Pending 'Sanctuary Cities' Law*, RIVARD REPORT (May 11, 2017), <https://therivardreport.com/local-immigrant-advocate-groups-say-no-to-pending-sanctuary-cities-law/> [<https://perma.cc/TLY2-3NND>] (explaining immigrant rights groups, local law enforcement, and even elected officials have pointed out that S.B. 4 could potentially lead to racial profiling).

by undocumented individuals, and lessen their willingness to assist police officers with crime information.<sup>116</sup> Conversely, ICE officials believe that “[b]y working together, local and federal officers can better identify and remove criminal aliens [creating] a tremendous benefit to public safety.”<sup>117</sup> Governor Abbott supports the law citing to cases of undocumented immigrants having committed serious crimes after being released by local law enforcement.<sup>118</sup>

Other states enacted similar laws urging local municipalities to aid federal immigration efforts,<sup>119</sup> however, S.B. 4 is the first to explicitly mandate local departments honor ICE detainer requests.<sup>120</sup> For knowingly refusing to honor a detainer request, Texas’s law imposes jail time,<sup>121</sup> fines of up to \$25,000 for sheriffs and police chiefs,<sup>122</sup> and removal from office.<sup>123</sup> Local entities may apply for grants to offset costs related to complying with the state law.<sup>124</sup> The Texas law extends

116. Burnett, *supra* note 105.

117. NIK THEODORE, *INSECURE COMMUNITIES: LATINO PERCEPTIONS OF POLICE INVOLVEMENT IN IMMIGRATION ENFORCEMENT* 3 (2013).

118. Maria Sacchetti, *Texas Law on Sanctuary Cities Challenged in Federal Court*, WASH. POST (June 26, 2017), [https://www.washingtonpost.com/local/social-issues/challenge-to-harsh-texas-immigration-texas-to-be-heard-monday/2017/06/25/c689254c-59c4-11e7-a9f6-7c3296387341\\_story.html?utm\\_term=.4350ce0e27e0](https://www.washingtonpost.com/local/social-issues/challenge-to-harsh-texas-immigration-texas-to-be-heard-monday/2017/06/25/c689254c-59c4-11e7-a9f6-7c3296387341_story.html?utm_term=.4350ce0e27e0) [<https://perma.cc/SMN8-XVUF>]; see Brandi Grissom, *Abbott Makes Dallas Killer the Face of ‘Sanctuary Cities,’ But Proposed Ban Wouldn’t Have Stopped the Murders*, DALLAS NEWS (Feb. 2017), <https://www.dallasnews.com/news/immigration/2017/02/16/abbott-makes-dallas-killer-face-sanctuary-cities-bill-stopped-murders> [<https://perma.cc/G69T-4AY4>] (reporting Gregg Abbott has used the case of the undocumented immigrant who had been deported three times and later killed two men to make his case for the need of local governments to enforce immigration laws). This is not the first time politicians have used limited criminal cases committed by immigrants to support anti-immigrant policies. For example, prior to the passage of S.B. 1070, an anti-immigrant law in Arizona, politicians and S.B. 1070 advocates used the murder of a prominent Arizona rancher to fuel the demonization of immigrants. Andrea Christina Nill, *Latinos and S.B. 1070: Demonization, Dehumanization, and Disenfranchisement*, 14 HARV. LATINO L. REV. 35, 41 (2011). Although the police chief had no suspect or proof of the killer, politicians instantly speculated the killer was an immigrant. *Id.*

119. See, e.g., 2011 Ala. Laws Act 2011-535 (H.B. 56) (amending ALA. CODE § 31-13-12 (2011)).

120. Tex. Code Crim. Proc. Ann. Art. 2.251(a) (West 2017); Rick Jervis, *Texas Sanctuary Cities Bill Could Impact*, USA TODAY (Apr. 27, 2017, 5:11 PM), <https://www.usatoday.com/story/news/2017/04/27/texas-sanctuary-cities-bill-trump/100988254/> [<https://perma.cc/X57D-BHS6>].

121. Tex. Penal Code Ann. § 39.07 (West 2017).

122. Tex. Gov’t Code § 752.056 (West 2018).

123. *Id.* § 752.0565.

124. *Id.* § 772.0073.

to public university police departments as well,<sup>125</sup> creating concern that immigrant students are unprotected from immigration enforcement at institutions of higher learning.<sup>126</sup>

### B. *The Chilling Effect on Undocumented Immigrants*

Although crimes targeting undocumented immigrants are not a recent development, undocumented immigrant crime victims are more reluctant to report violent crimes committed against them.<sup>127</sup> They are four times less likely to report a crime as opposed to immigrants with legal status.<sup>128</sup> 45% of Latinos, irrespective of their citizenship status, stated they would be unlikely to volunteer crime information or report crimes to police because police may inquire into their immigration status, or the status of people they know.<sup>129</sup> Among a sample of United States citizens, foreign-born immigrants with legal status, and undocumented immigrants, 38% of Latinos stated they felt targeted by law enforcement due to the recent developments in immigration enforcement.<sup>130</sup> Surprisingly, 62% of Latinos felt they were stopped by police without reason or cause.<sup>131</sup> These findings strongly suggest local and state law enforcement's involvement in administering the nation's immigration laws results in a reduction of trust in police.

Undocumented immigrants may choose not to report crime due to negative experiences with law enforcement in their countries of origin.<sup>132</sup> They may not believe their experience with American police

125. *Id.* § 752.051 (West 2017).

126. Sanya Mansoor & Cassandra Pollock, *Everything You Need to Know About Texas' "Sanctuary Cities" Law*, TEX. TRIBUNE (May 8, 2017), <https://www.texastribune.org/2017/05/08/5-things-know-about-sanctuary-cities-law/> [<https://perma.cc/2GWJ-MBLY>].

127. See Dart, *supra* note 89 (“[A]ctivists warn that crimes will go unreported and witnesses will refuse to testify over fears that interaction with police could lead to removal from the country”).

128. STEFANO COMINO ET AL., SILENCE OF THE INNOCENTS: ILLEGAL IMMIGRANTS' UNDERREPORTING OF CRIME AND THEIR VICTIMIZATION 25 (2016), <https://www.iza.org/publications/dp/10306/silence-of-the-innocents-illegal-immigrants-underreporting-of-crime-and-their-victimization> (follow “download” hyperlink).

129. THEODORE, *supra* note 117, at 5–6.

130. *Id.* at i (“[T]he increased involvement of police in immigration enforcement has significantly heightened the fears many Latinos have of police, contributing to their social isolation and exacerbating their mistrust of law enforcement authorities.”).

131. *Id.*

132. Carmen M. Gutierrez & David S. Kirk, *Silence Speaks: The Relationship Between Immigration and the Underreporting of Crime*, 63(8) CRIME & DELINQ. 926, 928 (2015); see Leslye E. Orloff et al., *Recent Development: Battered Immigrant Women's Willingness to Call for*

will be any different.<sup>133</sup> Language and cultural barriers between police and immigrants may contribute to underreporting.<sup>134</sup> One law enforcement official suggested that reporting violent crimes, such as robbery and rape, is viewed as bringing shame and dishonor to the family in some cultures.<sup>135</sup>

The drop in crime reports in Hispanic communities may indicate undocumented immigrants are in fact choosing to forego deportation risks rather than report crimes to the police.<sup>136</sup> This trend was noted by legal service providers who observed a 62 % increase in questions posed to victims of violence related to their immigration status.<sup>137</sup> Police officials in cities with a large Latino population recognize the decrease in witnesses' and victims' willingness to report crime or provide helpful information to the police as a consequence of fear of deportation or detention.<sup>138</sup> Houston's Police Chief noted a 43 % decrease in the amount of rapes reported this year by Latinos compared to the previous year.<sup>139</sup> Additionally, Houston Police Department saw a 13 % decline in violent crime reports from Latinos.<sup>140</sup> Los Angeles similarly observed a 25% drop in rape and domestic violence reports filed by Latinos compared to the previous year.<sup>141</sup> In San Antonio and Austin, where

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*Help and Police Response*, 13 UCLA WOMEN'S L.J. 43, 47 (2003) (“[M]any immigrants have a strong distrust of the police due to negative perceptions or experiences with police in their countries of origin and experiences of racism and prejudice with the police in the United States.”).

133. See Megan McCauley, *Interaction Between State and Federal Law Enforcement: Reversing the ICE AGE: Immigration Reform in California*, 49 U. OF PAC. L. REV. 481, 498 (2018) (explaining that immigrants' perception of the police in their home countries often times transfers to American police as well).

134. Gutierrez & Kirk, *supra* note 132, at 928, 946.

135. *Id.*

136. See Jennifer Medina, *Too Scared to Report Sexual Abuse. The Fear: Deportation.*, N.Y. TIMES (Apr. 30, 2017), <https://www.nytimes.com/2017/04/30/us/immigrants-deportation-sexual-abuse.html> [<https://nyti.ms/2pifXFC>] (discussing lower crime reports in largely Hispanic areas as evidence that undocumented immigrants are increasingly wary of reporting crimes for fear of detainment and deportation).

137. TAHIRIH JUST. CTR. ET AL., 2017 ADVOCATE AND LEGAL SERVICE SURVEY REGARDING IMMIGRANT SURVIVORS (2017), <https://www.tahirih.org/wp-content/uploads/2017/05/2017-Advocate-and-Legal-Service-Survey-Key-Findings.pdf> [<https://perma.cc/9WAL-S8A5>]; Rhodan, *Deportation Fears Silence Some Domestic Violence Victims*, *supra* note 110.

138. Burnett, *supra* note 105.

139. City of Houston Complaint in Intervention at 17, *City of El Cenizo v. Texas*, No. 5:17-CV-00404-OLG (W.D. Tex. June 30, 2017), ECF No. 139.

140. *Id.*

141. Rhodan, *Deportation Fears Silence Some Domestic Violence Victims*, *supra* note 110.



fear of deportation is paramount, there have been instances of dropped domestic violence cases as witnesses and victims refused to cooperate with law enforcement.<sup>142</sup>

This trend has serious consequences for victims of sexual and domestic violence who are forced to live with continuing abuse, as they are unlikely to acquire protective orders for themselves or their children or testify against their abusers.<sup>143</sup> These fears are not irrational. An undocumented victim pursuing battery charges was questioned about her unlawful status by prosecutors during a pretrial hearing.<sup>144</sup> Although the evidence was later excluded, she chose to discontinue a new trial.<sup>145</sup> The District Attorney of the city in which the case was tried noted this was not the first case where defense attorneys attempted to leverage unlawful status against undocumented victims.<sup>146</sup> The undocumented immigrant population observing these events interpret them as risks of discovery, deportation, and detainment, leaving the most vulnerable immigrants trapped in violent situations and hidden in the shadows of crime.<sup>147</sup>

Hostile immigration practices and policies affect both undocumented immigrants and their family members.<sup>148</sup> The critical issue stemming from immigrant crime victims' unwillingness to report crimes is that

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142. See Dart, *supra* note 89 (reporting that four cases were dismissed as a result of lack of witnesses).

143. See Maura K. Finigan, Article: *Intimate Violence, Foreign Solutions: Domestic Violence Policy and Muslim-American Women*, 2 DUKE F. FOR L. & SOC. CHANGE 141, 149–50 (2010) (stating immigrant women in abusive relationships are deterred from seeking a protective order out of fear of deportation); see also Dart, *supra* note 89 (referencing a case involving a U.S.-citizen minor and sexual assault victim with undocumented parents who were faced with the choice of obtaining a protective order and facing deportation or not reporting the incident).

144. James Queally, *Fearing Deportation, Many Domestic Violence Victims Are Steering Clear of Police and Courts*, L.A. TIMES (Oct. 9, 2017, 5:00 AM), <http://www.latimes.com/local/lanow/la-me-ln-undocumented-crime-reporting-20171009-story.html> [<https://perma.cc/6LAE-87JD>]

145. See *id.* (“[W]hen prosecutors sought a retrial, the victim said she would not cooperate, in part, because her immigration status was raised during trial.”).

146. *Id.*

147. See Finigan, *supra* note 143, at 149 (“Most notably, the fear of deportation silences battered immigrant women of all cultures; it is the single largest concern for immigrant women seeking to leave an abusive relationship.”); Rhodan, *Deportation Fears Silence Some Domestic Violence Victims*, *supra* note 110.

148. See THEODORE, *supra* note 117, at 3 (explaining how family and community dynamics are set in motion by law enforcement involvement in immigration policing affect immigrants and non-immigrants alike as most immigrant families are of mixed immigration status).

criminals go unpunished, which affects communities and families.<sup>149</sup> It is estimated 85 % of immigrant families are of “mixed-status,” meaning the family consists of legal immigrants, citizens, or undocumented individuals.<sup>150</sup> Deportation thus frequently results in family separation.<sup>151</sup> Additionally, the failure to notify law enforcement detracts from the community’s ability to disrupt violent crimes, putting the community’s safety at risk.<sup>152</sup>

## V. CURRENT PROTECTIONS

### A. *U Nonimmigrant Status for Undocumented Victims*

Current protections for undocumented immigrant victims of crime are limited.<sup>153</sup> The Victims of Trafficking and Violence Prevention Act (VTVP Act) is a federal law providing undocumented immigrants with U nonimmigrant status (U visa) if they are the victim of a qualifying crime.<sup>154</sup> However, this status does not protect anyone not a victim of a specifically listed qualifying crime.<sup>155</sup> Beneficiaries of a U visa must

149. ALLRED ET AL., *supra* note 55, at 156 (“[C]riminals go unpunished and neighborhoods become more dangerous [a]nd because immigrants have a reputation for being reluctant to contact police, immigrants are often targeted by criminals.”).

150. THEODORE, *supra* note 117, at 3 (defining “mixed-status” families).

151. *See id.* at 16 (noting being an immigrant, having relatives or friends who were previously deported or are currently undocumented immigrants as three reasons why Latinos avoid contact with the police).

152. Debra J. Robbin, *When Undocumented Immigrants Don’t Report Crimes, We All Suffer*, WBUR.ORG (Sep. 22, 2017), <http://www.wbur.org/cognoscenti/2017/09/22/undocumented-immigrants-report-crimes-debra-j-robbin> [<https://perma.cc/3DSF-E4XG>].

153. *See* INA § 245(m), 8 U.S.C. § 1254a(m) (2012) (adjustment of status for victims of crimes against women); *Id.* § 101(a)(15)(U), 8 U.S.C. § 1101(a)(15)(U) (2012) (U Visa for victims of certain qualifying crimes); *Id.* § 101(a)(15)(T), 8 U.S.C. § 1101(a)(15)(T) (2012) (T visa for victims of severe trafficking); *see also* *Immigration Options for Victims of Crimes*, DEP’T HOMELAND SEC., <https://www.dhs.gov/immigration-options-victims-crimes> [<https://perma.cc/KRN6-LQBN>] (last visited Mar. 17, 2018) (listing VAWA, U Visas, and T Visas as the only options for undocumented crime victims).

154. Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, § 1513, 114 Stat. 1464, 1533–537 (2000); INA § 101(a)(15)(U)(iii), 8 U.S.C. § 1101(a)(15)(U)(iii) (2012); Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, § 1513, 114 Stat. 1464, 1535 (2000).

155. The following are the qualifying crimes under the statute:

rape; rape; torture; trafficking; incest; domestic violence; sexual assault; abusive sexual contact; prostitution; sexual exploitation; stalking; female genital mutilation; being held hostage; peonage; involuntary servitude; slave trade; kidnapping; abduction; unlawful criminal restraint; false

suffer substantial physical or mental abuse as a victim of the criminal activity; provide information about the crime or criminal activity; and assist law enforcement in the investigation or prosecution of the crime.<sup>156</sup>

Congress created the U visa to protect undocumented immigrant crime victims who may be deterred from contacting police, out of fear of deportation.<sup>157</sup> The U visa serves as an important anti-crime tool that builds trust and positive relationships between immigrant communities and local law enforcement.<sup>158</sup> Long-term benefits include an opportunity to acquire lawful permanent residency; access to work authorization; and an opportunity for the victim's family members to file for legal status.<sup>159</sup>

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imprisonment; blackmail; extortion; manslaughter; murder; felonious assault; witness tampering; obstruction of justice; perjury; fraud in foreign labor contracting (as defined in section 1351 of title 18, United States Code); or attempt, conspiracy, or solicitation to commit any of the above mentioned crimes[.]

INA § 101(a)(15)(U)(iii), 8 U.S.C. § 1101(a)(15)(U)(iii) (2012).

156. *Id.* § 101(a)(15)(U)(i), 8 U.S.C. § 1101(a)(15)(U)(i) (2012); *Victims of Criminal Activity: U Nonimmigrant Status*, USCIS.GOV, <https://www.uscis.gov/humanitarian/victims-human-trafficking-other-crimes/victims-criminal-activity-u-nonimmigrant-status/victims-criminal-activity-u-nonimmigrant-status#Qualifying%20Criminal%20Activities> [<https://perma.cc/YH5C-6LLT>] (last visited Mar. 23, 2018).

157. Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, § 1513(a)(2), 114 Stat. 1464, 1533-534 (2000); Elizabeth M. McCormick, *Rethinking Indirect Victim Eligibility for U Non-Immigrant Visas to Better Protect Immigrant Families and Communities*, 22 STAN. L. & POL'Y REV. 587, 589 (2011).

158. *See* Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, § 1513(a)(2), 114 Stat. 1464, 1533-534 (2000) ("This visa will encourage law enforcement officials to better serve immigrant crime victims and to prosecute crimes committed against aliens."); *see also* NAT'L IMMIGRANT WOMEN'S ADVOCACY PROJECT, AMERICAN UNIV. WASH. COLL. OF L., THE IMPORTANCE OF THE U-VISA AS A CRIME-FIGHTING TOOL FOR LAW ENFORCEMENT OFFICIALS – VIEWS FROM AROUND THE COUNTRY 1 (2012), <http://library.niwap.org/wp-content/uploads/2015/IMM-Qref-UVisaCrimeFightingTool-12.03.12.pdf> [<https://perma.cc/ML2N-3MYK>] [hereinafter THE IMPORTANCE OF THE U-VISA] (stating the U visa has become an important crime fighting tool). The U visa benefits undocumented crime victims as it offers protection for victims against their perpetrators, and an avenue to report crimes and pursue charges against their perpetrator. Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, § 1513(a)(2), 114 Stat. 1464, 1533-534 (2000); THE IMPORTANCE OF THE U-VISA, *supra* at 1-2.

159. 8 C.F.R. § 245.24 (2017) (adjustment of status for non-citizens in U non-immigrant status).

B. *Problems with the U Visa Process*

i. *Tension Between a Victim's Acquisition of Status and Law Enforcement Cooperation with U Visa Certification*

Immigrant crime victims and their advocates confront many challenges in attempting to obtain a U visa.<sup>160</sup> Before obtaining one, a U visa applicant must submit evidence that he or she was “helpful, is being helpful, or is likely to be helpful” in the investigation or prosecution of the crime committed against them.<sup>161</sup> The applicant meets their burden when a law enforcement agency certifies the applicant was helpful in the investigation or prosecution of the qualifying crime.<sup>162</sup> However, law enforcement agencies are not required to complete or sign the certification for the application of the U visa.<sup>163</sup>

In New York, a domestic violence victim encountered several challenges in securing a certification: “police prejudice[;] ignorance of the law on the part of court officials[;] limited resources from their own organization[;] and suspicion from the authorities that she was trying to get a free pass to stay in the United States by seeking . . . a U visa.”<sup>164</sup> After being robbed at her job as a bank teller, another victim seeking a U visa was refused the necessary certification by law enforcement despite

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160. Kavitha Sreeharsha, *Victims' Rights Unraveling: The Impact of Local Immigration Enforcement Policies on the Violence Against Women Act*, 11 GEO. J. GENDER & L. 649, 669 (2010); see Liz Robins, *Immigrant Crime Victims Seeking Special Visas Find a Tough Path*, N.Y. TIMES (Mar. 8, 2016), <https://www.nytimes.com/2016/03/09/nyregion/immigrant-crime-victims-seeking-special-visas-find-a-tough-path.html> [<https://nyti.ms/1R5qgQG>] (describing the journey of a Honduran woman and her advocate attempting to obtain a U visa and the many obstacles they have faced from authorities).

161. INA § 101(a)(15)(U)(i)(III), 8 U.S.C. § 1101(a)(15)(U)(i)(III) (2012); 8 C.F.R. § 214.14(c)(2) (2017).

162. 8 C.F.R. § 214.14(c)(2) (2017); SALLY KINOSHITA & ALISON KAMHI, IMMIGRANT LEGAL RES. CTR., A GUIDE TO OBTAINING U VISA CERTIFICATIONS 1 (2017), [https://www.ilrc.org/sites/default/files/resources/u\\_visa\\_certification\\_advisory\\_ab.ak\\_.pdf](https://www.ilrc.org/sites/default/files/resources/u_visa_certification_advisory_ab.ak_.pdf) [<https://perma.cc/8ASK-A2VQ>].

163. See, e.g., *Orosco v. Napolitano*, 598 F.3d 222, 226 (5th Cir. 2010) (finding the decision to issue a certification by a law enforcement agency is entirely discretionary); *Baiju v. U.S. Dep't of Labor*, No. 12-cv-5610 (KAM), 2014 WL 349295, at \*19 (E.D.N.Y. Jan. 31, 2014) (“The decision to sign a U-Visa certification form is discretionary.”); see also I-918, Petition for U Nonimmigrant Status, USCIS.GOV, <https://www.uscis.gov/i-918> [<https://perma.cc/RX8T-NXMH>] (last updated Apr. 14, 2017) (follow “Instruction for Form-I-918, Supplement B” hyperlink) (noting the decision to complete the certification form is at the discretion of the certifying agency).

164. Robins, *supra* note 160.

records showing she cooperated with them.<sup>165</sup> A law enforcement official told the victim's lawyer they only help crime victims apply for a U visa if they achieve an arrest and a prosecution from the information provided by the immigrant victim.<sup>166</sup> A police chief from an unrelated case stated he rejects most U visa certification requests for older cases, victims of assault involved in gang activity, or victims remaining in a relationship with their assailant.<sup>167</sup> The federal law is silent regarding if a U visa is preconditioned on whether the information leads to a conviction or an arrest.<sup>168</sup> As evidenced by these stories, the immigrant victims' ability to avoid deportation and acquire legal status is overly burdensome, and the opportunity to gain a U visa rests entirely at the discretion of the certifying agency.<sup>169</sup> Making U-visa protection for victims of crimes like rape, torture, domestic violence, and trafficking contingent on an arbitrary and discretionary decision made by local law enforcement is clearly problematic.<sup>170</sup>

#### ii. U Visas Are Capped Annually

United States Citizenship and Immigration Services (USCIS) may not issue more than 10,000 U visas per year.<sup>171</sup> Once they reach the quota for the year, USCIS will not issue any more visas, but continues

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165. Dan Mihalopoulos & Mick Dumke, *For Immigrant Crime Victims, Police Block Path to Win Special Visas*, CHI. SUN TIMES (Jun. 6, 2017, 1:43 PM), <https://chicago.suntimes.com/chicago-politics/chicago-suburban-police-routinely-block-immigrant-crime-victims-efforts-to-obtain-u-visas-the-watchdogs/> [<https://perma.cc/3DD7-K9P5>].

166. *Id.*

167. *Id.*

168. *Id.*

169. Robins, *supra* note 160; Mihalopoulos & Dumke, *supra* note 165.

170. *See, e.g.*, *Orosco v. Napolitano*, 598 F.3d 222, 224 (5th Cir. 2010) (rejecting the argument of a trafficking victim, whose brother died as a result of the crime, that law enforcement agencies must automatically issue a U visa certification to aliens who satisfy the statutory prerequisites for receiving one); *Nsinano v. Sessions*, 236 F. Supp. 3d 1133, 1137 (C.D. Cal. 2017) (declining to decide whether petitioner was eligible for U nonimmigrant status and compel law enforcement to provide U visa certification); *see also* Cristina Costantini, *The Problem with the 'Victim Visa'*, ABC NEWS (Jan. 31, 2013), [http://abcnews.go.com/ABC\\_Univision/visas-problem-victim-visa/story?id=18357347](http://abcnews.go.com/ABC_Univision/visas-problem-victim-visa/story?id=18357347) [<https://perma.cc/3YKP-7QRL>] (describing the disparity between one city's police department's unwillingness to issue the visa certification and another city's willingness as "arbitrary, irrational, and inconsistent").

171. INA § 214(p)(2)(A), 8 U.S.C. § 1184(p)(2)(A) (2012); 8 C.F.R. § 214.14(d) (2017).

reviewing pending applications.<sup>172</sup> The number of U visa petitions USCIS receives increases each year.<sup>173</sup> USCIS received 26,039 applications in 2014, 30,106 applications in 2015, and 35,044 applications in 2016.<sup>174</sup> The number of petitions generates a significant backlog and hinders the efficacy of the U visa application process.<sup>175</sup>

iii. Delays of Five Years or More to Actually Obtain the U Nonimmigrant Status

One of the most difficult barriers to obtaining a U visa is the amount of time applicants must wait to obtain it.<sup>176</sup> As of 2016, approximately 64,000 U visa applications were pending, resulting in a wait time of up to six to seven years.<sup>177</sup> In the interim, applicants placed on the waiting list are granted deferred action or “parole to U-1 petitioners.”<sup>178</sup> Unfortunately, there is a two-year waiting period to be placed on the deferred action waiting list.<sup>179</sup> Consequently, many undocumented

172. 8 C.F.R. § 214.14(d) (2017); *USCIS Approves 10,000 U Visas for the 5<sup>th</sup> Straight Fiscal Year*, USCIS.GOV (Dec. 11, 2013), <https://www.uscis.gov/news/alerts/uscis-approves-10000-u-visas-5th-straight-fiscal-year>. The fiscal year for USCIS, and corresponding replenishment of 10,000 U-visas, occurs on October 1st. *Id.*

173. *Number of Form I-918, Petition for U Nonimmigrant Status, by Fiscal Year, Quarter, and Case Status 2009-2018*, USCIS.GOV, [https://www.uscis.gov/sites/default/files/USCIS/Resources/Reports%20and%20Studies/Immigration%20Forms%20Data/Victims/I918u\\_visastatistics\\_fy2018\\_qtr1.pdf](https://www.uscis.gov/sites/default/files/USCIS/Resources/Reports%20and%20Studies/Immigration%20Forms%20Data/Victims/I918u_visastatistics_fy2018_qtr1.pdf) [<https://perma.cc/B9RC-EFH8>] (last visited May 20, 2018).

174. *Id.*

175. *Id.*; Sara Ramey, *Eliminating the U Visa Cap Will Help Catch Criminals*, THE HILL (Feb. 14, 2018), <http://thehill.com/opinion/immigration/373808-eliminating-the-u-visa-cap-will-help-catch-criminals> [<https://perma.cc/5EXA-BVVX>].

176. Caplan-Bricker, *supra* note 91; *USCIS Processing Time Information for the Vermont Service Center*, EGOV.USCIS.GOV., <https://egov.uscis.gov/cris/processTimesDisplayInit.do> (last visited Mar. 13, 2018); *U Visa Laws for Crime Victims*, WOMENSLAW.ORG, <https://www.womenslaw.org/laws/federal/immigration/u-visa-crime-victims/basic-info-and-definitions/how-long-does-it-take-get-u> [<https://perma.cc/3JAE-L6FR>] [hereinafter *U Visa Laws for Crime Victims*] (last updated Jan. 30, 2018).

177. Robins, *supra* note 160; *See also U Visa Laws for Crime Victims, supra* note 176 (estimating at least a five year wait period for obtaining a U visa).

178. 8 C.F.R. § 214.14(d)(2) (2017); *Frequently Asked Questions*, USCIS.GOV, <https://www.uscis.gov/archive/frequently-asked-questions> (last updated Mar. 08, 2018) (defining “deferred action”).

179. *See Changes to U Visa Processing in Fiscal Year 2017*, CATH. LEGAL IMMIGR. NETWORK, <https://cliniclegal.org/resources/immigration-and-nationality-act-limited-number-u-visas-fiscal-year-2017> [<https://perma.cc/V6TM-2UKA>] (last visited Mar. 31, 2018) (stating the Vermont Service Center reported there are 24,000 on the waiting list with deferred action and 140,000 petitions pending to be placed on the waiting list and to receive deferred action).

immigrant victims of crimes committed in the United States may be subject to deportation, while their properly completed petitions await placement on the U visa waiting list.<sup>180</sup>

Some attorneys inform eligible clients that filing the U visa application may increase the undocumented victim's chance of detection by ICE and eventual deportation.<sup>181</sup> Many undocumented victims of domestic violence, rape, and other forms of sexually-based gender violence are incapable of realizing the protections the Violence Against Women Act (VAWA) and the U visa provide.<sup>182</sup> Some states promulgated legislation that assists undocumented immigrant victims in applying for a U visa;<sup>183</sup> however, most states, including Texas, have not enacted such legislation. Therefore, no uniform State policies or procedures are in place to aid immigrant victims seeking lawful status.<sup>184</sup>

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180. Caplan-Bricker, *supra* note 91.

181. *Id.*

182. *See* Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, 114 Stat. 1464 (2000) (discussing improved access to immigration protection, cancellation of removal, and legal services and representation for battered immigrant women as motivating factors underlying creation of the VTVPA); *see also* *Safety for Undocumented Victims of Abuse*, DOMESTICSHELTERS.ORG (Dec. 29, 2014), <https://www.domesticshelters.org/domestic-violence-articles-information/protection-for-undocumented-victims-of-abuse#.WIKcFiOZNJU> [<https://perma.cc/48BY-ELX2>] (stating many immigrant victims do not know they can receive protection under VAWA).

183. *E.g.*, CONN. GEN. STAT. ANN. § 46b-38b(e)(5) (West 2013) (“On and after July 1, 2010, each law enforcement agency shall designate at least one officer with supervisory duties to expeditiously process, upon request of a victim of family violence or other crime who is applying for U Nonimmigrant Status (A) a certification of helpfulness on Form I-918, Supplement B . . . .”); DEL. CODE ANN. tit. 11, § 787(n) (West 2015) (“On request from an individual . . . the police officer or prosecutor, as soon as practicable after receiving the request, shall request that a certifying official in his or her law-enforcement agency complete, sign, and give to the individual the Form I-914B or Form I-918B . . . .”); LA. STAT. ANN. § 46:2162(B) (2013) (“[U]pon the request of such victim, the agency or office shall provide the victim or possible victim of human trafficking with a completed and executed . . . Form I-918, Supplement B, U Nonimmigrant Status Certification”); MONT. CODE ANN. § 44-4-1503 (West 2015) (“On request from a person who a law enforcement officer reasonably believes is a victim who is or has been subjected to a severe form of trafficking or criminal offense required for the person to qualify for a nonimmigrant T or U visa . . . the law enforcement officer, as soon as practicable after receiving the request, shall complete, sign, and give to the person the . . . Form I-918B”).

184. *See* KINOSHITA & KAMHI, *supra* note 162, at 4–6 (explaining that some States have enacted laws that “mandate that law enforcement agencies sign a certification if the person is eligible, provide time limits for responding to the request, establish procedures for responding to certification requests, provide reimbursement for the agencies, clarify law enforcement agencies’ role in the process, among other provisions.”).

### C. *T Nonimmigrant Status for Undocumented Victims*

The T nonimmigrant status, or “T visa”, may be a more viable solution for immigrant victims of human trafficking.<sup>185</sup> The T visa is similar to the U visa in that once acquired, it grants temporary nonimmigrant status to victims of crimes.<sup>186</sup> However T visas are limited to victims of “severe forms of human trafficking.”<sup>187</sup> In particular, sex and labor trafficking fulfill the prerequisites of the T visa.<sup>188</sup> In order to constitute sex trafficking under the regulatory definition, there must be elements of “force, fraud or coercion,” unless the victim is a minor.<sup>189</sup> Labor trafficking is defined as the “recruitment, harboring, transportation, provision, or obtaining of a person for labor or services, through use of force, fraud, or coercion for purposes of involuntary servitude, peonage, debt bondage or slavery.”<sup>190</sup> Similar to the U visa, the immigrant victim may provide assistance to law enforcement upon a reasonable request, unless the applicant is under the age of eighteen.<sup>191</sup>

A T visa does not necessarily require a formal certification from law enforcement showing that victims were helpful as the U visa requires, although it is preferred.<sup>192</sup> This consideration exempts survivors whose trauma prevents them from aiding local law enforcement in the prosecution of the trafficking crime and from “reliving” their

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185. INA § 101(a)(15)(T), 8 U.S.C. § 1101(a)(15)(T) (2012); 8 C.F.R. § 214.11(b) (2017); *Victims of Criminal Activity: T Nonimmigrant Status*, USCIS.GOV, <https://www.uscis.gov/humanitarian/victims-human-trafficking-other-crimes/victims-human-trafficking-t-nonimmigrant-status> [<https://perma.cc/7CUV-5788>] (last visited Mar. 13, 2018).

186. INA § 101(a)(15)(T), 8 U.S.C. § 1101(a)(15)(T) (2012); 8 C.F.R. § 214.11(b) (2017).

187. *Id.* § 101(a)(15)(T), 8 U.S.C. § 1101(a)(15)(T) (2012); 8 C.F.R. § 214.11(b) (2017).

188. 8 C.F.R. § 214.11(a) (2017).

189. INA § 101(a)(15)(T)(i)(I), 8 U.S.C. § 1101(a)(15)(T)(i)(I) (2012) (referencing 22 U.S.C. § 7102(9)(A)); 22 U.S.C. § 7102(8) (2012); 8 C.F.R. § 214.11(a) (2017).

190. *Id.* § 101(a)(15)(T)(i)(I), 8 U.S.C. § 1101(a)(15)(T)(i)(I) (2012) (referencing 22 U.S.C. § 7102(9)(B)); 22 U.S.C. § 7102(8) (2012); 8 C.F.R. § 214.11(a) (2017).

191. *Id.* § 101(a)(15)(T)(i)(II), 8 U.S.C. § 1101(a)(15)(T)(i)(II) (2012); 8 C.F.R. § 214.11(h) (2017).

192. 8 C.F.R. § 214.11(h) (2017) (“An applicant need only show compliance with a reasonable request made by a LEA [law enforcement agency] for assistance in the investigation or prosecution of the acts of trafficking in persons.”); Salima Khakoo et al., *Advanced Issues in T and U Visas, 2012*, IMMIGRANT CRIME, <http://immigrantcrime.com/PDF/Advanced-Issues-in-T-and-U-Visas.pdf> [<https://perma.cc/BAX9-9RSY>] (last visited Mar. 13, 2018) (stating a certification is not required, but preferred).



experiences.<sup>193</sup> Although there is a cap of 5,000 T visas that may be issued in any given year,<sup>194</sup> the cap is rarely met and petitions are not as backlogged as the U visa application process.<sup>195</sup> Unlike the U visa, T visa grantees may access federal benefits that United States citizens are entitled to, such as cash assistance, food stamps, and job training.<sup>196</sup>

#### D. *Problems with T Visas*

Still, there are important considerations for undocumented immigrant victims of human trafficking.<sup>197</sup> Recent changes in immigration policies targeting immigrants convicted of or charged with a criminal offense; or immigrants with a final order of removal may affect eligibility for a T visa.<sup>198</sup> As with any other nonimmigrant visa, the applicant must be admissible to the United States or granted a waiver of admissibility to qualify for a T visa.<sup>199</sup> Due to the criminal nature of many human trafficking violations, victims are often arrested and assumed to be complicit in the trafficking scheme, making them inadmissible for a T visa.<sup>200</sup> This is especially true for victims forced into prostitution.<sup>201</sup>

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193. ALISON KAMHI & RACHEL PRANDINI, IMMIGRANT LEGAL RES. CTR., T VISAS: WHAT THEY ARE AND HOW THEY CAN HELP YOUR CLIENT 2 (2017), [https://www.ilrc.org/sites/default/files/resources/t\\_visas\\_advisory-20170509.pdf](https://www.ilrc.org/sites/default/files/resources/t_visas_advisory-20170509.pdf) [<https://perma.cc/DY4H-Z2MN>].

194. INA § 214(o)(2), 8 U.S.C. § 1184(o)(2) (2012); 8 C.F.R. § 214.11(j) (2017).

195. KAMHI & PRANDINI, *supra* note 193, at 2.

196. *Id.*

197. *Id.*

198. Exec. Order No. 13768, 82 Fed. Reg. 8,799, 8,800 (Jan. 30, 2017) (announcing new executive policy that removes exemptions from deportation for certain classes of immigrants and prioritizes the removal of all immigrants who are removable and charged with criminal misconduct, regardless of whether there has been a formal conviction); INA § 212(a)(2), 8 U.S.C. § 1182(a)(2) (2012) (listing the classes of inadmissible aliens); KAMHI & PRANDINI, *supra* note 193, at 3 (explaining that the new policies under the Trump administration potentially effect eligibility for a T visa).

199. INA § 212(a), 8 U.S.C. § 1182(a) (2012) (listing the grounds of inadmissibility).

200. *See id.* § 212(a)(2)(H), 8 U.S.C. § 1182(a)(2)(H) (2012) (“Any alien who commits or conspires to commit human trafficking offenses in the United States or outside the United States . . . is inadmissible.”); *see also* Rosy Kandathil, *Global Sex Trafficking and the Victims Protection Act of 2000: Legislative Responses to the Problem of Modern Slavery*, 12 MICH. J. GENDER & L. 87, 99 (“Before being identified as a trafficked person, law enforcement officials may view these individuals simply as illegal aliens or worse yet, willing accomplices to trafficking.”); KAMHI & PRANDINI, *supra* note 193, at 3 (reporting that victims of human trafficking are often arrested as complicit in the trafficking scheme).

201. KAMHI & PRANDINI, *supra* note 193, at 3.

despite the coercive and forcible nature of the offense.<sup>202</sup> Recognizing as problematic the admissibility limitation on T visa status when a victim was coerced into committing an offense, the Secretary of Homeland Security has authority to waive the grounds of inadmissibility listed in Section 1182(a) for nonimmigrants and also exempt these victims from the public charge inadmissibility ground.<sup>203</sup> If surviving the scrutiny applied by the Secretary isn't challenging enough, applicants for T visas must also meet the high burden of showing "extreme hardship involving unusual and severe harm upon removal from the United States."<sup>204</sup>

The limited number of viable protections, coupled with challenging burdens of proof and narrow forms of eligibility leave undocumented crime victims without much optimism. Some victims may be unaware of the established protections of the U and T visas. However, even if they were familiar with these protections, the visas require that the undocumented immigrant convince authorities that they deserve the certification. The fear of deportation looms over every decision an undocumented immigrant may take for protection and often leads undocumented crime victims to remain silent and vulnerable to continued harms.

## VI. SOLUTIONS FOR PROTECTING UNDOCUMENTED CRIME VICTIMS AND ENCOURAGING CRIME REPORTING

### A. *Invest in Training and Recruiting That Sensitizes the Law Enforcement's View of Undocumented Crime Victims' Needs*

Undocumented immigrant communities are increasingly multicultural, however law enforcement agencies provide only minimal training and

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202. Coercion is defined as:

[T]hreats of serious harm to or physical restraint against any person; any scheme, plan, or pattern intended to cause a person to believe that failure to perform an act would result in serious harm to or physical restraint against any person; or the abuse or threatened abuse of the legal process.

INA § 101(a)(15)(T)(i)(I), 8 U.S.C. § 1101(a)(15)(T)(i)(I) (2012) (referencing 22 U.S.C. § 7102).

203. *Id.* § 212(d)(13)(A), 8 U.S.C. § 1182(d)(13)(A) (2012); 8 C.F.R. § 214.11(d)(2)(iii) (2017) (inadmissible applicants based on a ground that may be waived must submit a request for a waiver of inadmissibility with the initial T visa application).

204. *Id.* § 101(a)(15)(T)(i)(IV), 8 U.S.C. § 1101(a)(15)(T)(i)(IV) (2012); *see also id.* § 245(l)(1)(ii), 8 U.S.C. § 1255(l)(1)(ii) (2012) (a victim of human trafficking must also show he or she would "suffer extreme hardship involving unusual and severe harm upon removal from the United States" in order to adjust their status to that of a legal permanent resident).

experience in interacting with community members from diverse backgrounds.<sup>205</sup> Cultural sensitivity training and incentives for retaining a diverse, bilingual police force could help diminish misperceptions about diversity.<sup>206</sup> A panel of experts in the law enforcement field stated it was easier to work with undocumented crime victims when the responding officer spoke the same language as the victim and understood their cultural background.<sup>207</sup> Furthermore, undocumented crime victims are more inclined to contact law enforcement and access services when those services are offered in their native language.<sup>208</sup> Law enforcement agencies should provide incentives and programs to foster officers' proficiency in languages commonly spoken by the undocumented population in their jurisdiction.<sup>209</sup> Law enforcement agencies should offer information about local resources and legal aid services in the commonly spoken languages and distribute that information in places frequented by undocumented immigrants such as local churches, hospitals, and doctors' offices.<sup>210</sup>

Law enforcement agents that exhibit similar characteristics as the people they police is one key to fixing the way undocumented immigrants perceive law enforcement. More Latino and immigrant officers trained to forge strong relationships between police and the immigrant community will establish a framework within state and local law enforcement agencies that encourages community relationships and

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205. See U.S. DEP'T OF JUST., ENHANCING COMMUNITY POLICING WITH IMMIGRANT POPULATIONS: RECOMMENDATIONS FROM A ROUNDTABLE MEETING OF IMMIGRANT ADVOCATES AND LAW ENFORCEMENT LEADERS 5 (2012), <https://www.sheriffs.org/sites/default/files/cops-w0747-pub.pdf> [<https://perma.cc/DF44-VQH5>] (identifying lack of officer training among a diverse immigrant population as one of the challenges in creating trust between law enforcement and immigrant communities).

206. SHIVELY ET AL., *supra* note 82, at xvii.

207. *Id.* (identifying language barriers as "one of the most fundamental detriments to determining bias motivation or identifying bias crime victims").

208. See *id.* at xv (reporting on local law enforcements' own desire for increased language diversity in order to better respond to calls); see also Ricks, *supra* note 56 (noting that in addition to language barriers, cultural barriers keep immigrant victims from coming forward and speaking with law enforcement).

209. See U.S. DEP'T OF JUST., *supra* note 205, at 9 (listing this as one of many recommendations to lessen the impact of language barriers).

210. See *id.* at 10 (recommending police departments "translate existing brochures on crime prevention, victim assistance, court procedures, and other such topics into the dominant non-English languages of their locality").

trust.<sup>211</sup> Law enforcement personnel that understand the value in building relationships with immigrant populations are crucial in fostering this trust.<sup>212</sup>

Advocates in the immigrant community such as church leaders, attorneys, and volunteers with immigrant advocacy groups should be identified and included in conversations about policies and practices affecting undocumented immigrant victims to dispel misconceptions that police officers will deport them.<sup>213</sup> Partnerships between police and these organizations ultimately serve immigrant interests and may result in increased reporting of crimes in immigrant communities.<sup>214</sup> Organizations are more likely to work with police to develop solutions to the victimization of undocumented immigrants if they feel their own credibility with these communities will not be jeopardized.<sup>215</sup> Once this symbiotic relationship is established, organizations can encourage undocumented crime victims to contact partnering law enforcement agencies and concurrently, law enforcement agencies can direct immigrant victims to services and treatment centers hosted by partnering community organizations.<sup>216</sup>

There is no need to start from scratch; agencies should work from existing partnerships to assist undocumented immigrants.<sup>217</sup> These

211. *See id.* at 7 (discussing the positive impact improved community policing would have on tensions between immigrant populations and local law enforcement).

212. *See id.* at 8 (recommending that police departments recruit “staff who are willing to take on the challenge of, and who see the value in, building relations with immigrant populations”).

213. *See id.* at 11–12 (indicating communication with immigration community within the law enforcement’s jurisdiction and communication with neighboring jurisdictions can help develop local policies).

214. *See id.* at 7 (suggesting law enforcement leadership can show its support by “expecting officers to take extra time to build positive relations within the immigrant community” and assuring “the payoff in reduced tension between immigrants and law enforcement is worth the commitment of time.”).

215. *Id.*

216. *Id.* at 8 (highlighting how staff at local health departments can report incidents of sexual assault within immigrant communities while also encouraging immigrant victims to report the crimes and access victim services).

217. *See* SONIA PARAS KONDRAD & LESLYE E. ORLOFF, NAT’L IMMIGRANT WOMEN’S ADVOCACY PROJECT, THE U-VISA REMEDY FOR IMMIGRANT VICTIMS OF SEXUAL ASSAULT AND THE NEED FOR MULTIDIMENSIONAL COLLABORATION 12 (2013), <http://library.niwap.org/wp-content/uploads/2015/IMM-Man-CH4-SA-Multidimensional-Collaboration.pdf> [<https://perma.cc/FV2P-CMJE>] (explaining that law enforcement agencies should build on what is already in place and expand the advocacy and work for the undocumented victim population, such as collaboration with judges or prosecutor’s office).

partnerships must be reciprocal in that law enforcement officials dedicate time and resources to listening to immigrants' and attorneys' concerns. If those concerns are addressed by implementing suggestions into revised police procedures and practices, then trust in the community will follow.<sup>218</sup> Advocacy groups could help create stronger communities and improve the quality of life for undocumented immigrants by serving as a channel for access to legal services; report crime; or provide criminal activity information to police, supplied anonymously by undocumented immigrants.<sup>219</sup> Establishing partnerships between police and community requires a willingness to share power; a desire to learn from others; and open-mindedness as immigrant advocates in the community may propose solutions that deviate from the law enforcement's traditional methods of operation.<sup>220</sup>

B. *Repeal State Laws that Mandate Law Enforcement Cooperation with Federal Immigration Officials*

Laws that strip police officials of their discretion to comply with federal immigration requests exacerbate problems facing undocumented crime victims.<sup>221</sup> Police should be seen as a source of help and support rather than immigration enforcement officials charged with detecting and removing undocumented individuals.<sup>222</sup> When police roles are fused with federal immigration enforcement, undocumented immigrants are unable to distinguish between the two separate groups.<sup>223</sup>

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218. See *id.* at 3–4 (referencing the “collaborative, power-sharing model” between law enforcement, attorneys, and advocates to best assist victims of crime bring forth their claims); see also U.S. DEP’T OF JUST., *supra* note 205, at 11–12 (suggesting law enforcement agencies should train their officers on how to deal with the complexities of working with immigrant populations by utilizing input from immigrant advocacy organizations and coordinating a clear policy to prevent confusion that could lead immigrants to distrust law enforcement.).

219. U.S. DEP’T OF JUST., *supra* note 205, at 7.

220. THE IMPORTANCE OF THE U-VISA, *supra* note 158, at 4.

221. See Burnett, *supra* note 105 (reporting that new laws, such as S.B. 4 are creating a chilling effect on crime reporting in the immigrant communities).

222. See SHIVELY ET AL., *supra* note 82, at 57 (“There are a number of reasons for [lack of reporting], but generally it is based on negative experiences in which police became associated with efforts to discover and deport undocumented person, rather than being seen as a source of help and support.”).

223. U.S. DEP’T OF JUST., *supra* note 205, at 16.

Undocumented immigrants believe all “police” serve the same priorities, which may deter them from seeking help from law enforcement.<sup>224</sup> This hinders local and state police officials’ ability to gain the trust of undocumented immigrants and respond to crime in these communities.<sup>225</sup> Prohibiting local law enforcement from exercising discretion in terms of investigating a victim’s immigration status, as Texas and other jurisdictions have focused on in passing anti-sanctuary city legislation, only deters undocumented victims from working with police and diminishes law enforcement’s ability to protect life and property and serve communities.<sup>226</sup> In a perfect world, police officials would not question members of the community solely about their immigration status, and many take the position that state and local law enforcement should not be required to aid in the enforcement the nation’s immigration laws.<sup>227</sup> However, until (and if) the Supreme Court of the United States decides to examine the ban on sanctuary cities, the law allowing detainer requests and inquiry into individuals’ status will be upheld.<sup>228</sup>

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224. See Theodore W. Maya, Comment: *To Serve and Protect or to Betray and Neglect?: The LAPD and Undocumented Immigrants*, 49 UCLA L. REV. 1611, 1626 (2002) (recognizing the danger of commingling the role of local law enforcement with the role of immigration officers); see also U.S. DEP’T OF JUST., *supra* note 205, at 16 (“[T]his uncertainty and concern about local law enforcement’s role in immigration enforcement cause many immigrants to fear that any contact with officers could potentially bring about their deportation and/or that of undocumented family members.”); Dart, *supra* note 89 (“[S]ome departments are concerned that blurring the boundaries between immigration enforcers and city cops weakens community confidence.”).

225. See S.B. 54, Ch. 495 (Cal. 2017) (noting the special level of trust state and local law enforcement agencies create with their communities and how the entanglement with federal agents could destroy that trust).

226. See Joey Palacios, *McManus, Sheriff Salazar Denounce Newly Signed Sanctuary Cities Law*, TEXAS PUBLIC RADIO (May 8, 2017), <http://tpr.org/post/mcmanus-sheriff-salazar-denounce-newly-signed-sanctuary-cities-law> [<https://perma.cc/FD5M-SV7S>] (showing a concern among Texas law enforcement agencies that S.B. 4 will deter undocumented immigrants from calling the police for help).

227. See *Arizona v. United States*, 567 U.S. 387, 394, 408 (2012) (explaining that the power over immigration belongs to the federal government, and discussing the limited circumstances in which the States can enforce federal immigration laws); INA § 287, 8 U.S.C. § 1357 (2012) (enumerating the powers of immigration officials and employees, such as the right to interrogate an individual suspected of being in the United States unlawfully or arresting an individual upon probable cause that he or she has the immigration law of the United States).

228. *City of El Cenizo, Texas v. Texas*, 890 F.3d 134 (5th Cir. May 8, 2018).

C. *Expand Class of Legal Protections to Include More Undocumented Crime Victims, Increase Caps, and Establish Uniform Certification Requirements*

The U visa does not currently list robbery or minor forms of assault that would qualify as only misdemeanors under the law's qualifying criminal activity, despite the often violent nature of these crimes.<sup>229</sup> T and U visas could be expanded to cover a wider range of crimes than the existing protected statuses. In that way, immigrants will not be prioritized by the severity of the crime that was committed against them, or the degree of harm they suffered from it. If the ultimate goal of these protections is crime prevention and trust of police, then government officials must take the position that all crimes are worth reporting and preventing.

The 10,000 cap for U visa issuances has not been raised since the U-visa's creation was established by Congress in 2008.<sup>230</sup> The Senate has recognized the need to modify this portion of the law to accommodate the increase of applications overtime, and has proposed raising the U visa cap to 18,000 in the past.<sup>231</sup> Raising the caps on both visas to reflect the increasing number of applicants<sup>232</sup> would ensure the original purpose of the U and T visa is better served.<sup>233</sup> To truly be effective, the cap would likely have to be raised well past 18,000 allowances per year, given the 36,531 petitions received in 2017.<sup>234</sup> At the very least, USCIS could use the remainder of the T visas to accommodate the overflow of U visa

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229. 8 C.F.R. § 214.14(a)(9) (2013).

230. Jennifer Scarborough & Lisa Koop, *U.S. Reaches U Visa Cap in Less Than 3 Months; Immigrant Victims Left in Limbo*, NAT'L IMMIGRANT JUST. CTR. (Dec. 18, 2013), <https://www.immigrantjustice.org/staff/blog/us-reaches-u-visa-cap-less-3-months-immigrant-victims-left-limbo> [<https://perma.cc/AT3X-MP3P>].

231. *Id.*

232. *See* INA § 214(p)(2)(A), 8 U.S.C. § 1184(p)(2)(A) (2012) (limiting the number of U visa availability to 10,000).

233. *See* Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, § 1513(a)(2), 114 Stat. 1464, 1533–534 (2000) (“This visa will encourage law enforcement officials to better serve immigrant crime victims and to prosecute crimes committed against aliens.”); *see also* McCormick, *supra* note 157, at 589 (stating the original purpose of the U visa was to encourage unauthorized immigrant crime victims to come forward and in return offer them protection them).

234. Sara Ramey, immigration attorney and Executive Director of the Migrant Center for Human Rights, argues that while the Senate's proposition to increase the U visa cap by 8,000 would be helpful, it would be ultimately insufficient. Ramey, *supra* note 175.

applications and apply the remainder to U visa applications until the T visa cap is reached.<sup>235</sup>

Additionally, uniform law enforcement agency standards should be established in terms of providing U visa certification.<sup>236</sup> Establishing standards prepares law enforcement to consistently respond to undocumented immigrant victim inquiries based on the facts of the victim's case.<sup>237</sup> By creating a U visa certification bill standardizing the certification process, arbitrary and capricious participation by law enforcement agencies can be avoided.<sup>238</sup> These policies and practices demonstrate to undocumented immigrant victims that law enforcement is sincerely concerned with protecting them from harm. Similar to obtaining a T visa that does not require certification by law enforcement, U visas could fashion standards that *prefer* certification rather than *require* certification by law enforcement.<sup>239</sup> Such a shift ensures all properly designated undocumented immigrant victims seeking temporary immigration status receive equal treatment.<sup>240</sup>

## VII. CONCLUSION

Undocumented crime victims may not immediately recognize they have been victimized and are less likely to know what legal services are available to them as a result.<sup>241</sup> They often believe their victimization was their own fault because of their disassociation with American culture

235. Compare 8 C.F.R. § 214.11 (j) (2017) (“DHS may not grant T-1 nonimmigrant status to more than 5,000 aliens in any fiscal year.”) with 8 C.F.R. § 214.14 (d) (2017) (“[T]he total number of aliens who may be issued a U-1 nonimmigrant visa or granted U-1 nonimmigrant status may not exceed 10,000 in any fiscal year.”).

236. See KONDRAD & ORLOFF, *supra* note 217, at 11 (“[D]eveloping a protocol can be beneficial . . . [and] can also be helpful in correcting misinformation agency staff may have about U-visa certifications.”).

237. *Id.* at 12

238. See U.S. DEP'T OF JUST., *supra* note 205, at 7–8.

239. See Yesenia L. Polanco, *Adding Insult to Injury: U Visa 918B Requirement Must be Eliminated as Many Victims Denied Certification*, FAYAD LAW, P.C. (Oct. 7, 2014), <http://www.fayadlaw.com/In-The-Media/Law-Blog/2014/October/Adding-Insult-to-Injury-U-Visa-918B-Requirement-.aspx> [<https://perma.cc/KFW8-4L7U>] (calling for the elimination of the certification requirement).

240. See *id.* (explaining many undocumented victims of crimes are not able to obtain certification).

241. See Ricks, *supra* note 56 (“Latinx [immigrant] victims across the board are less likely than white victims to know about the services available to help them, even though they are interested in accessing services.”).



and behavior.<sup>242</sup> This self-limiting perception contributes to a diminished understanding of the rights and protections afforded to them<sup>243</sup> Undocumented immigrants may feel that the criminal conduct inflicted upon them is merely “part of a broader pattern that includes not being paid at fair rates, not having access to affordable housing, and not being able to obtain a driver’s license.”<sup>244</sup> Given the current political climate and negative mainstream perceptions of them, undocumented crime victims may feel that all odds are against them, and will forego seeking help against their victimizers.

When immigrant victims do attempt to report criminal activity, they “face a lack of cultural understanding and relevance, patience, and sometimes, even a belief in their stories . . . .”<sup>245</sup> This perception is understandable; some police organizations refuse to assist victims of violence who continue a relationship with their abuser or were involved with criminal activity themselves.<sup>246</sup> Law enforcement agencies are in the best position to dispel this impression by publicizing policies reflecting a duty to uphold the rights of all members of the community in their jurisdiction, regardless of immigration status.<sup>247</sup> Although some law enforcement agencies may be bound by laws in their jurisdictions, as Texas officers now are with the upholding of S.B.4, they should seek to minimize unnecessary, unreasonable, or arbitrary inquiries into the immigration status of individuals. Additionally, they should strive to create internal policies and procedures as guidelines for following new laws to minimize opportunities for racial profiling. These actions will unquestionably improve the fragile status of the relationship between the undocumented population and police entities.<sup>248</sup>

ICE has demonstrated a disregard for the fragile status of this relationship by failing to identify themselves as immigration officials and

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242. See SHIVELY ET AL., *supra* note 82, at 56.

243. See *id.* (“Immigrants are keenly aware of their immigration status and their societal location as different from Americans. . . . result[ing] in them being unaware of their rights and seeing their victimization as just part of being in America.”).

244. *Id.* at 57.

245. Ricks, *supra* note 56.

246. See Mihalopoulos & Dumke, *supra* note 165.

247. U.S. DEP’T OF JUST., *supra* note 205, at 10.

248. See HOFFMASTER ET AL., *supra* note 88 (recognizing that relationships built on trust are key components to working with the immigrant population and that it is currently difficult to establish trust when federal and local law enforcement duties remain comingled).

wearing clothing and protective gear that instead identifies them as police. ICE should cease arrests of undocumented immigrants in courthouses, unless they clearly pose an immediate public safety risk. Navigating the court system and attending hearings is nerve-wracking enough when individuals are unfamiliar with these procedures. When federal immigration officials show up to courthouses to make arrests and identify themselves as police officers, undocumented victims may become scared, isolated, and less likely to report crime. Current immigration policies and practices contribute to this chilling effect and will only lead to more crime and violence unless there is reform in the way ICE conducts immigration enforcement.

Better federal protections will also help calm the uncertainty of what happens to undocumented crime victims who may be eligible for removal. Expanding protections to cover additional types of violent crime, and raising the out-dated visa cap is a start. Giving immigrant victims the chance to come forward without any risk of deportation would be beneficial to not only the individual affected, but for society at large by creating a sense of community in a positive and meaningful way and reduce crime.

Too often, tragedies such as the San Antonio smuggling incident demonstrate the indifference of individuals toward other human beings' lives and wellbeing. These events are frequently forgotten, along with considerations about what could be done to help these individuals who are routinely targeted. Undocumented crime victims often endure severe trauma and pain, followed by a feeling of insignificance in a society that prioritizes their immigration status and detaining them over their safety. As we take into consideration the loss of dignity, security and livelihood that all crime victims experience when creating laws that protect and shield them, we must strive to do the same for undocumented crime victims.