ARTICLES

BEYOND SEVERITY: A NEW VIEW OF CRIMMIGRATION

by
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While the Trump Administration's harsh crackdown on immigrants builds on an enforcement infrastructure inherited from previous administrations, this Article cautions against characterizing it as merely an escalation of "crimmigration"—the merging of criminal and immigration law evident in recent decades. I argue instead that key contrasts between current policies and the previous era provide an opportunity to understand the crimmigration era in a whole new way. Crimmigration scholars have thoroughly explored the increasingly harsh nature of immigration enforcement as it has developed over the past few decades. However, crimmigration scholarship, framed exclusively as a critique of severity, has neglected to account for significant aspects of the (pre-Trump) crimmigration era that fell outside the severity paradigm. In particular, crimmigration scholars have largely overlooked the advent of new visas and forms of discretionary relief that Congress created between 1990 and 2000 for noncitizens who are victims of domestic violence, trafficking, and other crimes. While both increased enforcement and crime-based relief have been the subject of significant analysis, this Article is the first to bridge the two subjects, proposing a new way to understand

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the relationship between these two key aspects of immigration law as it has developed since the 1980s: the "bad news" narrative of ramped-up enforcement and the "good news" narrative of expanded relief. Utilizing frameworks drawn from both feminist theory and criminology, this Article argues that the expansion of relief was never the counterweight to crimmigration's harsh enforcement policies that it may have seemed but rather an integral component of crimmigration itself, and that crimmigration is best understood not simply as a transition to severity but as a complex phenomenon that produced new categories of favored immigrants at the same time that it expanded the categories of immigrants subject to detention, deportation, and other sanctions. This insight necessitates a new understanding not only of crimmigration but of the advocacy strategies that have taken place in its shadow.

INTRODUCTION

With intensified immigration enforcement forming a centerpiece of the Trump presidency, commentators have begun to try to understand how the current crackdown on immigrants relates to the broader development of immigration enforcement in recent decades. As some have already noted,[1] the Trump Administration's harsh enforcement

[1] *See, e.g.*, Jennifer M. Chacón, *The 1996 Immigration Laws Come of Age*, 9 DREXEL L. REV. 297, 300–02 (2017) (arguing that the 1996 immigration laws "put in place the structures and discourse that gave birth to a rising tide of hatred and fear of foreign nationals" and thereby facilitated the rise of Trump); Anil Kalhan, *Revisiting the 1996*

practices are rooted in longstanding trends. A defining aspect of U.S. immigration law since the 1980s has been its increasing convergence with criminal law, a development that has engendered explosive growth in detention, deportation, and other aspects of immigration enforcement. Legal scholars have been overwhelmingly critical of this trend, often employing the term "crimmigration"[2] to describe the growing severity of the contemporary immigration enforcement system. Commentators have emphasized the absence of proportionality in the deportation system,[3] the "cascading constitutional deprivation" of pretrial immigration detention without counsel,[4] and the corrosive effects that police-immigration cooperation has had on community policing and on the procedural norms of criminal law.[5]

While acknowledging that these developments over the past few decades laid crucial groundwork for the Trump Administration's policies, this Article cautions against characterizing the Trump policies as merely an escalation of crimmigration. I argue instead that key contrasts

Experiment in Comprehensive Immigration Severity in the Age of Trump, 9 DREXEL L. REV. 261, 262 (2017) (arguing that while the restrictionism of the Trump Administration is unprecedented, "the actual strategies that the Trump administration has utilized to carry out this crackdown, to date, have been facilitated by existing legal authority and administrative institutions inherited from its predecessors, both Republican and Democratic").

[2] *See* Juliet Stumpf, *The Crimmigration Crisis: Immigrants, Crime, and Sovereign Power*, 56 AM. U. L. REV. 367, 376 (2006) (coining the term "crimmigration").

[3] *See, e.g.*, Angela M. Banks, *The Normative and Historical Cases for Proportional Deportation*, 62 EMORY L.J. 1243, 1246 (2013); Angela M. Banks, *Proportional Deportation*, 55 WAYNE L. REV. 1651, 1671 (2009); Juliet Stumpf, *Fitting Punishment*, 66 WASH. & LEE L. REV. 1683, 1684 (2009); Michael J. Wishnie, *Proportionality: The Struggle for Balance in U.S. Immigration Policy*, 72 U. PITT. L. REV. 431, 451–66 (2011).

[4] Mark Noferi, *Cascading Constitutional Deprivation: The Right to Appointed Counsel for Mandatorily Detained Immigrants Pending Removal Proceedings*, 18 MICH. J. RACE & L. 63, 68 (2012). On immigration detention, see generally César Cuauhtémoc García Hernández, *Abolishing Immigration Prisons*, 97 B.U. L. REV. 245 (2017); César Cuauhtémoc García Hernández, *Naturalizing Immigration Imprisonment*, 103 CALI. L. REV. 1449 (2015); César Cuauhtémoc García Hernández, *Immigration Detention as Punishment*, 61 UCLA L. REV. 1346 (2014); Geoffrey Heeren, *Pulling Teeth: The State of Mandatory Immigration Detention*, 45 HARV. C.R.-C.L. L. REV. 601 (2010); Anil Kalhan, *Rethinking Immigration Detention*, 110 COLUM. L. REV. SIDEBAR 42 (2010); Stephen H. Legomsky, *The Detention of Aliens: Theories, Rules, and Discretion*, 30 U. MIAMI INTER-AM. L. REV. 531 (1999); Juliet P. Stumpf, *Civil Detention and Other Oxymorons*, 40 QUEEN'S L.J. 55 (2014); Margaret H. Taylor, *Promoting Legal Representation for Detained Aliens: Litigation and Administrative Reform*, 29 CONN. L. REV. 1647 (1997); Philip L. Torrey, *Rethinking Immigration's Mandatory Detention Regime: Politics, Profit, and the Meaning of "Custody,"* 48 U. MICH. J.L. REFORM 879 (2015).

[5] *See generally* Jennifer M. Chacón, *Managing Migration Through Crime*, 109 COLUM. L. REV. SIDEBAR 135 (2009); Ingrid V. Eagly, *Criminal Justice for Noncitizens: An Analysis of Variation in Local Enforcement*, 88 N.Y.U. L. REV. 1126 (2013); Ingrid V. Eagly, *Prosecuting Immigration*, 104 NW. U. L. REV. 1281 (2010).

between current policies and the previous era provide an opportunity to understand crimmigration in a whole new way. Crimmigration scholars have thoroughly explored the increasingly harsh nature of immigration enforcement as it has developed over the past few decades. However, crimmigration scholarship, framed exclusively as a critique of severity, has neglected to account for significant aspects of the crimmigration era that fell outside the severity paradigm. Viewing the pre-2017 era from the vantage point of the current assault on immigrants throws these overlooked aspects of crimmigration into sharp relief and reveals a significant gap in the scholarly literature.

There is no question that President Trump has drawn heavily on tropes that link immigrants and crime.[6] However, at the heart of the Trump Administration's approach to immigration lies an across-the-board restrictionism and an overtly racialized nativism that have not found mainstream acceptance in the United States since the early twentieth century: the notion that *all* forms of immigration should be drastically limited, and that *all* non-white immigrants are potentially suspect.[7] Starkly absent is the particular variety of line drawing that has constituted such a central element of U.S. immigration policy in previous years: the distinction between "good" immigrants and "bad" immigrants.[8]

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[6] *See Full Text: Donald Trump Announces a Presidential Bid*, WASH. POST (June 16, 2015), https://www.washingtonpost.com/news/post-politics/wp/2015/06/16/full-text-donald-trump-announces-a-presidential-bid/?utm_term=.6b7e075267ab ("When Mexico sends its people, they're not sending their best. . . . They're sending people that have lots of problems, and they're bringing those problems with us. They're bringing drugs. They're bringing crime. They're rapists.").

[7] *See* Julie Hirschfeld Davis, Sheryl Gay Stolberg, & Thomas Kaplan, *Trump Alarms Lawmakers with Disparaging Words for Haiti and Africa*, N.Y. TIMES (Jan. 11, 2018), https://www.nytimes.com/2018/01/11/us/politics/trump-shithole-countries.html (describing a meeting in which President Trump "demand[ed] to know . . . why he should accept immigrants from 'shithole countries' [such as Haiti] rather than from places like Norway"). It should be noted that while President Trump has been consistently disparaging in his comments about immigrants from Africa, Latin America, and the Caribbean, his attitude toward Asian immigrants appears to be more variable. Some reports of the January 11, 2018, meeting assert that Trump characterized Asian immigrants, along with northern Europeans, as desirable immigrants. *See* Josh Dawsey, Robert Costa, & Robert Parker, *Inside the Tense, Profane White House Meeting on Immigration*, WASH. POST (Jan. 15, 2018), https://www.washingtonpost.com/politics/inside-the-tense-profane-white-house-meeting-on-immigration/2018/01/15/13e79fa4-fa1e-11e7-8f66-2df0b94bb98a_story.html?utm_term=.b24c3286c38d. On the other hand, Trump's attack on "chain migration" has been interpreted as an attack on Asian immigration. *See, e.g.*, Noah Smith, *Trump's Chain-Migration Plan Takes Aim at Asia*, BLOOMBERG (Feb. 6, 2018), https://www.bloomberg.com/view/articles/2018-02-07/trump-s-chain-immigration-plan-takes-aim-at-asia.

[8] This shift was evident within the first week of the Trump Administration. One of President Trump's first executive orders identified a broad swath of categories as enforcement priorities for detention and removal. *See* Exec. Order No. 13,768, "Enhancing Public Safety in the Interior of the United States," 82 Fed. Reg. 8799

This Article argues that crimmigration as it developed between the 1980s and 2017 is best understood not simply as a transition to severity but as a complex phenomenon that produced new categories of favored immigrants at the same time that it expanded the categories of immigrants to be treated as dangerous and unworthy. In other words, the existing literature on crimmigration tells an important story but an incomplete one. Over the past three decades, shifts in popular opinion and public policy reconfigured undocumented immigrants as "illegals," while recasting lawful residents with even the most minor criminal records as "criminal aliens."[9] As crimmigration scholarship has noted, these changes significantly expanded the number of immigrants who are detained, deported, barred from immigration benefits, or otherwise sanctioned.[10] What has been largely overlooked is that the crimmigration era also saw a proliferation of new visas and forms of relief from removal, most directed at survivors of domestic violence, trafficking, and other crimes.[11] These measures have not reached as broadly as they could, and

(Jan. 25, 2017). This was a sharp departure from the enforcement policies that governed the actions of ICE during the Obama Administration. *See, e.g.*, Memorandum from DHS Secretary Jeh Charles Johnson to Thomas S. Winkowski et al., Policies for the Apprehension, Detention and Removal of Undocumented Immigrants (Nov. 20, 2014), https://www.dhs.gov/sites/default/files/publications/14_1120_memo_prosecutorial_discretion.pdf (identifying enforcement priorities, including threats to national security, public safety, and border security, and stating that "DHS personnel are expected to exercise discretion and pursue these priorities at all stages of the enforcement process—from the earliest investigative stage to enforcing final orders of removal—subject to their chains of command and to the particular responsibilities and authorities applicable to their specific position"). A fact sheet published by the Department of Homeland Security describing actions to be taken pursuant to Executive Order No. 13,768 stated that that "[e]ffective immediately . . . Department personnel shall faithfully execute the immigration laws of the United States against all removable aliens." U.S. Dep't of Homeland Sec., Fact Sheet: Enhancing Public Safety in the Interior of the United States (Feb. 21, 2017), https://www.dhs.gov/news/2017/02/21/fact-sheet-enhancing-public-safety-interior-united-states. Thomas Homan, Director of Immigration and Customs Enforcement, commented: "The president has made it clear in his executive orders: There's no population off the table. If you're in this country illegally, we're looking for you and we're going to apprehend you." Roque Planas & Elise Foley, *Deportations of Noncriminals Rise as ICE Casts Wider Net*, HUFFINGTON POST (Dec. 5, 2017), https://www.huffingtonpost.com/entry/trump-immigrant-deportation-noncriminals_us_5a25dfc8e4b07324e8401714. On prosecutorial discretion in immigration enforcement, see generally Shoba Sivaprasad Wadhia, *The History of Prosecutorial Discretion in Immigration Law*, 64 AM. U.L. REV. 1285 (2015).

[9] *See generally* Angélica Cházaro, *Challenging the "Criminal Alien" Paradigm*, 63 UCLA L. REV. 594 (2016); Kevin R. Johnson, *Doubling Down on Racial Discrimination: The Racially Disparate Impacts of Crime-Based Removals*, 66 CASE W. RES. L. REV. 993 (2016).

[10] *See infra* Part I.

[11] *See infra* Part II.

many commentators have insightfully analyzed their limitations.[12] Nevertheless, they opened up significant new channels for gaining legal status, and in doing so they expanded the groups of immigrants deemed to be worthy of assistance and inclusion. As we watch these channels begin to contract under the Trump Administration,[13] their significance becomes clearer.

Much has been written about the harshness of crimmigration, on the one hand, and about relief for victims of domestic violence and other crimes, on the other. However, few analyses have sought to bridge the two subjects.[14] This Article proposes a way to understand the relationship between these two key aspects of immigration law as it developed over the past few decades: the "bad news" narrative of ramped-up enforcement and the "good news" narrative of expanded relief. It argues that the expansion of relief was never the counterweight to crimmigration's harsh enforcement policies that it may have seemed but rather an integral component of crimmigration itself, and that this insight necessitates a

[12] *See, e.g.*, Linda Kelly, *Domestic Violence Survivors: Surviving the Beatings of 1996*, 11 GEO. IMMIGR. L.J. 303, 312–15 (1997) [hereinafter Kelly, *Domestic Violence Survivors*] (critiquing Violence Against Women Act (VAWA) relief as it stood prior to 2000); Linda Kelly, *Stories from the Front: Seeking Refuge for Battered Immigrants in the Violence Against Women Act*, 92 NW. U. L. REV. 665, 671–87 (1998) [hereinafter Kelly, *Stories from the Front*] (furthering the critique of VAWA as it stood prior to 2000); Leslye E. Orloff & Janice V. Kaguyutan, *Offering a Helping Hand: Legal Protections for Battered Immigrant Women: A History of Legislative Responses*, 10 AM. U. J. GENDER, SOC. POL'Y & L. 95, 168–69 (2002) (analyzing the VAWA 2000 provisions that addressed some of the shortcomings of VAWA 1994, and advocating further reforms).

[13] The laws governing these forms of relief have not changed since the election, but a host of administrative changes have limited access to relief or deterred immigrants from seeking relief. *See, e.g.*, Liz Robbins, *A Rule is Changed for Young Immigrants, and Green Card Hopes Fade*, N.Y. TIMES (Apr. 18, 2018), https://www.nytimes.com/2018/04/18/nyregion/special-immigrant-juvenile-status-trump.html (describing changes to administration of Special Immigrant Juvenile Status program); James Queally, *Fearing Deportation, Many Domestic Violence Victims Are Steering Clear of Police and Courts*, L.A. TIMES (Oct. 9, 2017), http://www.latimes.com/local/lanow/la-me-ln-undocumented-crime-reporting-20171009-story.html (citing statistics showing 18% decline domestic violence reports among Latinos in San Francisco). *See also* notes 251–52 and accompanying text.

[14] Two notable exceptions are Pooja Gehi & Soniya Munshi, *Connecting State Violence and Anti-Violence: An Examination of the Impact of VAWA and Hate Crimes Legislation on Asian American Communities*, 21 ASIAN AM. L.J. 5, 32–34 (2014) and Alizabeth Newman, *Reflections on VAWA's Strange Bedfellows: The Partnership Between the Battered Immigrant Women's Movement and Law Enforcement*, 42 U. BALT. L. REV. 229 (2013). *See infra* Part III.A. For discussions of related themes, see Angélica Cházaro, *Beyond Respectability: Dismantling the Harms of "Illegality,"* 52 HARV. J. ON LEGIS. 355 (2015) (critiquing respectability politics within the context of immigrant rights advocacy); Rebecca Sharpless, *"Immigrants Are Not Criminals": Respectability, Immigration Reform, and Hyperincarceration*, 53 HOUS. L. REV. 691, 711–26 (2016) (same).

new understanding of crimmigration and of the advocacy strategies that have taken place in its shadow.

Part I briefly summarizes some key themes of what I refer to here as the "severity critique," and traces the influence on crimmigration scholars of work by criminologists such as David Garland and Jonathan Simon.[15] In particular, crimmigration scholars have drawn on Simon's theory that Americans are being "govern[ed] through crime,"[16] citing it to explain both the central focus on "criminal aliens" within contemporary immigration enforcement and the growing criminalization of undocumented immigrants.[17]

Part II presents a revisionist account of one key component of the severity critique: the changes that have occurred in recent decades within the realm of discretionary relief (i.e., the legal mechanisms that enable some deportable immigrants to avoid deportation and to gain lawful status). In contrast to the conventional crimmigration narrative, which focuses on the limits that Congress placed on discretionary relief in 1996, the account offered here traces the elimination of certain forms of relief *in combination* with the growth of other kinds of relief, resulting in a story not so much of increasing severity as of a fundamental shift in the line between "good" immigrants and "bad" immigrants.

Part III looks outside the crimmigration literature for ways to understand the relationship between the increasing harshness of immigration enforcement and the expansion of relief. First, it surveys a growing body of scholarship within feminist theory that casts a critical gaze on the consequences, intended and unintended, of feminist engagement with the state; this literature highlights the ways in which legal reforms in areas such as sex trafficking, rape, and domestic violence have sometimes dovetailed with policies of mass incarceration.[18] It then explores an aspect of the criminology literature on mass incarceration that has been largely overlooked within scholarship on crimmigration. Scholars such as Garland and Simon have argued that the carceral state manifests itself not only in policies that punish but also in those that provide assistance, and that a key element of the turn toward crime as the central framework for policy-making over the past several decades has been the increasing focus on victims of crimes—as Simon puts it, the production of crime victims as the "representative subjects of our time."[19]

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[15] *See infra* Part I.B.

[16] *See* JONATHAN SIMON, GOVERNING THROUGH CRIME: HOW THE WAR ON CRIME TRANSFORMED AMERICAN DEMOCRACY AND CREATED A CULTURE OF FEAR 4 (2007).

[17] *See, e.g.*, JONATHAN XAVIER INDA & JULIE A. DOWLING, *Introduction* to GOVERNING IMMIGRATION THROUGH CRIME: A READER 1, 2 (Julie A. Dowling & Jonathan Xavier Inda eds., 2013); Teresa A. Miller, *Citizenship & Severity: Recent Immigration Reforms and the New Penology*, 17 GEO. IMMIGR. L.J. 611, 618 (2003).

[18] *See infra* Part III.A.

[19] SIMON, *supra* note 16, at 75.

In Part IV, I argue that these perspectives provide a framework for reconceptualizing crimmigration. In place of the severity critique, I propose that crimmigration be understood as a set of policies that have not only punished and excluded but also rewarded and included. The convergence of criminal law enforcement and immigration policy may be most obvious in enforcement programs that widen the net of detention and deportation, but it can also be seen in the success that advocates have had in garnering bipartisan support for measures that provide visas and other forms of relief to immigrant victims of crimes. In closing, I briefly explore the challenging questions that this insight raises, highlighting the divergent ways that immigrant rights advocates have navigated the logic of crimmigration in their advocacy efforts.

I. THE SEVERITY CRITIQUE

There is widespread agreement among immigration scholars that U.S. immigration law has undergone a profound transformation since the mid-1980s. Many have come to use the term "crimmigration" to describe the current era. This Part introduces some of the central themes of crimmigration scholarship and maps the reliance of this scholarship on work by criminology scholars on the rise of the carceral state.

A. The Crimmigration Convergence

In the wake of the passage of two sweeping immigration laws in 1996, the Antiterrorism and Effective Death Penalty Act (AEDPA)[20] and the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA),[21] immigration scholars began to analyze the harsh effects of these laws on immigrants who were newly subject to detention,[22] removal,[23] and other

[20] Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, 110 Stat. 1214 (codified as amended in scattered sections of the U.S. Code).

[21] Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, div. C, 110 Stat. 3009-546 (codified as amended in scattered sections of the U.S. Code).

[22] *See* IIRIRA, Pub. L. No. 104-208, div. C, sec. 303, 110 Stat. 3009-546, 3009-585 (codified as amended at INA § 236(c), 8 U.S.C § 1226 (2012)) (providing that the "Attorney General shall take into custody" any noncitizen who fits enumerated criteria related to convictions and release from criminal custody).

[23] Before 1996, noncitizens apprehended at the border were placed in "exclusion" proceedings, and those apprehended in the interior were placed in "deportation" proceedings. *See* In the Matter of the Application of Imane Phelisna for a Writ of Habeas Corpus, 551 F. Supp. 960 (E.D.N.Y. 1982) (describing statutory scheme as it stood in 1982). In 1996, Congress consolidated these two types of proceedings under the new term "removal." *See* IIRIRA, Pub. L. No. 104-208, div. C, sec. 304(a)(3), 110 Stat. 3009-546, 3009-587 (codified as amended at 8 U.S.C. § 1229 (2012)). This Article uses the term "removal proceedings" when discussing post-1996

sanctions.[24] In a 2003 article, Teresa Miller laid out the components of what at that point was being called the "criminalization" of immigration law.[25] Miller identified five broad trends: (1) the shift from an expansion of substantive and procedural rights within immigration proceedings in the 1960s and 1970s to a sharp curtailment of those rights in the 1990s; (2) the shift from legal and political tolerance of undocumented immigrants, "including the willingness to afford them welfare benefits to nominally prevent them from devolving into a permanent underclass . . . to a belief that criminal punishment and expedited removal of illegal aliens through beefed up law enforcement is the best way to handle illegal immigration"; (3) an expansion of criminal grounds of deportation coupled with "unprecedented cooperation between criminal and immigration law enforcement"; (4) the embrace of local and state police involvement in enforcing ostensibly civil immigration orders; and (5) the shift from viewing immigration as a civil rights issue to viewing it as a critical issue of national security.[26] Miller argued that the term "'criminalization' of immigration law" was inadequate to describe the transformation because it "fail[ed] to capture the dynamic process by which both systems converge at points to create a new system of social control that draws from both immigration and criminal justice, but is purely neither."[27] Three years later, Juliet Stumpf coined a new term for this convergence: "crimmigration."[28]

A growing body of scholarship has by now provided a fairly comprehensive analysis of the contemporary manifestations of this convergence. This literature includes extensive analysis of the detention system;[29] of the immigration consequences of crimes;[30] of the use of state

proceedings. It also uses the term "deportation" in its colloquial sense to refer collectively to orders of deportation, exclusion, and removal.

[24] For early commentary on the 1996 immigration laws, see generally Lenni B. Benson, *Back to the Future: Congress Attacks the Right to Judicial Review of Immigration Proceedings*, 29 CONN. L. REV. 1411 (1997); Nancy Morawetz, *Understanding the Impact of the 1996 Deportation Laws and the Limited Scope of Proposed Reforms*, 113 HARV. L. REV. 1936 (2000); Robert Pauw, *A New Look at Deportation as Punishment: Why at Least Some of the Constitution's Criminal Procedure Protections Must Apply*, 52 ADMIN. L. REV. 305, 332–36 (2000); *see also* Maria Isabel Medina, *The Criminalization of Immigration Law: Employer Sanctions and Marriage Fraud*, 5 GEO. MASON L. REV. 669 (1997) (critiquing the criminalization of immigration law evident in the Immigration Reform and Control Act of 1986).

[25] *See* Miller, *supra* note 17, at 613–15.

[26] *Id.*

[27] *Id.* at 618.

[28] *See* Stumpf, *supra* note 2, at 376.

[29] *See supra* note 4 (listing articles discussing the immigration detention system).

[30] *See generally* Stephen H. Legomsky, *A New Path of Immigration Law: Asymmetric Incorporation of Criminal Justice Norms*, 64 WASH. & LEE L. REV. 469 (2007); Morawetz,

and local police to carry out immigration enforcement;[31] and of the devastating effects that such policies have had on immigrant families and communities.[32] Some have extended this analysis to examine the ways in which this convergence is transforming criminal law and procedure,[33] and the ways that crimmigration functions as a form of racial subordination.[34] Others have begun to explore the historical origins of this convergence, arguing that its trajectory is closely tied to the development of a system of mass incarceration in the United States.[35]

With only rare exceptions,[36] scholarship on recent trends in immigration enforcement has been overwhelmingly critical. The opening line of one recent article succinctly conveys the dominant tone of this literature: "Immigration law has become unmerciful."[37]

supra note 24; Nancy Morawetz, *Rethinking Drug Inadmissibility*, 50 WM. & MARY L. REV. 163 (2008); Stumpf, *supra* note 2.

[31] *See generally* Gabriel J. Chin & Marc L. Miller, *The Unconstitutionality of State Regulation of Immigration Through Criminal Law*, 61 DUKE L.J. 251, 282–91 (2011); Adam B. Cox & Thomas J. Miles, *Policing Immigration*, 80 U. CHI. L. REV. 87, 130–35 (2013); Juliet P. Stumpf, *States of Confusion: The Rise of State and Local Power Over Immigration*, 86 N.C. L. REV. 1557, 1596–1600 (2008); Michael J. Wishnie, *State and Local Police Enforcement of Immigration Laws*, 6 U. PA. J. CONST. L. 1084 (2004).

[32] *See generally* Daniel Kanstroom, *Post-Deportation Human Rights Law: Aspiration, Oxymoron, or Necessity?*, 3 STAN. J. C.R. & C.L. 195, 215–18 (2007); Bryan Lonegan, *American Diaspora: The Deportation of Lawful Residents from the United States and the Destruction of Their Families*, 32 N.Y.U. REV. L. & SOC. CHANGE 55, 70–76 (2007); Morawetz, *supra* note 24, at 1951–54; David B. Thronson, *Creating Crisis: Immigration Raids and the Destabilization of Immigrant Families*, 43 WAKE FOREST L. REV. 391, 403–10 (2008).

[33] *See generally* Chacón, *supra* note 5, at 145–46; Eagly, *supra* note 5, at 1285–86 (2010); Ingrid V. Eagly, *Criminal Justice in an Era of Mass Deportation: Reforms from California,* 20 NEW CRIM. L. REV. 12 (2017); Ingrid V. Eagly, *Local Immigration Prosecution: A Study of Arizona Before SB 1070*, 58 UCLA L. REV. 1749 (2011).

[34] *See, e.g.*, César Cuauhtémoc García Hernández, *Creating Crimmigration*, 2013 BYU L. REV. 1457, 1485; Christopher N. Lasch, *Sanctuary Cities and Dog-Whistle Politics,* 42 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 159, 163–64 (2016); Yolanda Vázquez, *Constructing Crimmigration: Latino Subordination in A "Post-Racial" World*, 76 OHIO ST. L.J. 599, 650 (2015) [hereinafter Vázquez, *Constructing Crimmigration*]; Yolanda Vázquez, *Perpetuating the Marginalization of Latinos: A Collateral Consequence of the Incorporation of Immigration Law into the Criminal Justice System*, 54 HOW. L.J. 639 (2011).

[35] *See generally* García Hernández, *supra* note 34; Rachel E. Rosenbloom, *Policing Sex, Policing Immigrants: What Crimmigration's Past Can Tell Us About Its Present and Its Future*, 104 CALIF. L. REV. 149 (2016).

[36] *See, e.g.*, Kris W. Kobach, *The Quintessential Force Multiplier: The Inherent Authority of Local Police to Make Immigration Arrests*, 69 ALB. L. REV. 179, 183–88 (2005) (arguing for expanded role of local police in immigration enforcement); Peter H. Schuck & John Williams, *Removing Criminal Aliens: The Pitfalls and Promises of Federalism*, 22 HARV. J. L. & PUB. POL'Y 367, 372 (1999) (opining that "[i]t is hard to think of any public policy that is less controversial than the removal of criminal aliens").

[37] Stephen Lee, *Growing Up Outside the Law*, 128 HARV. L. REV. 1405, 1405 (2015) (reviewing HIROSHI MOTOMURA, IMMIGRATION OUTSIDE THE LAW (2014)).

B. Governing Immigration Through Crime

The critique that I have described above, which I call the "severity critique," has drawn on broader critiques of the carceral state, and in particular on the work of criminology scholars such as Jonathan Simon and David Garland.[38] Their scholarship traces the profound changes that have occurred within the criminal justice system in the United States and elsewhere since the 1960s.

Garland has traced the transition from the penal-welfare system that characterized British and American crime control for much of the twentieth century to the "culture of control" that is evident today.[39] The penal-welfare system, he argues, was characterized by "its unquestioning commitment to social engineering; its confidence in the capacities of the state and the possibilities of science; and its unswerving belief that social conditions and individual offenders could be reformed by the interventions of government agencies."[40] The two axioms of this system were that "social reform together with affluence would eventually reduce the frequency of crime" and that "the state [was] responsible for the care of offenders as well as their punishment and control."[41] Today, in contrast, there is "a new and urgent emphasis upon the need for security, the containment of danger, the identification and management of any kind of risk," and the "call for protection *from* the state has been increasingly displaced by the demand for protection *by* the state."[42]

Simon argues that by the late twentieth century, the United States was not merely engaged in "governing crime"—i.e., seeking to prevent or respond to criminal acts—but rather in governing *through* crime.[43] In Simon's analysis, there are three dimensions to this phenomenon. First, "crime has now become a significant strategic issue. Across all kinds of institutional settings, people are seen as acting legitimately when they act to prevent crimes or other troubling behaviors that can be closely analogized to crimes."[44] Second, policymakers "deploy the category of crime to legitimate interventions that have other motivations."[45] Third, "the technologies, discourses, and metaphors of crime and criminal justice have become more visible features of all kinds of institutions,

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[38] *See* DAVID GARLAND, THE CULTURE OF CONTROL: CRIME AND SOCIAL ORDER IN CONTEMPORARY SOCIETY 3 (2001); SIMON, *supra* note 16, at 5; *see also* BERNARD E. HARCOURT, AGAINST PREDICTION: PROFILING, POLICING, AND PUNISHING IN AN ACTUARIAL AGE 16 (2007); BERNARD E. HARCOURT, ILLUSION OF ORDER: THE FALSE PROMISE OF BROKEN WINDOWS POLICING 3–8 (2001).

[39] *See* GARLAND, *supra* note 38, at 185.

[40] *Id.* at 40.

[41] *Id.* at 38–39.

[42] *Id.* at 12.

[43] *See* SIMON, *supra* note 16, at 5.

[44] *Id.* at 4.

[45] *Id.*

where they can easily gravitate into new opportunities for governance."[46] Fighting crime has become the dominant framework in nearly every realm of public policy, even those far removed from traditional law enforcement concerns, such as public education. In this new era of mass incarceration and the prison-industrial complex,

> [p]residents and governors have moved from their post-New Deal role as maestros of a complex ensemble of regulatory and service agencies, to be judged by the social results of their performance, to a set of lonely crime fighters, measured only in how much they seem to share the community's outrage at crime.[47]

Simon's notion of "governing through crime" has particularly resonated with crimmigration scholars.[48] The influence of Simon's scholarship can be seen in the title of a recent edited volume: *Governing Immigration Through Crime*.[49] As the editors write in the introduction to this volume:

> [T]o govern immigration through crime is to make crime and punishment the institutional context in which efforts to guide the conduct of immigrants take place. The objective is to shape the comportment of the undocumented in such a way as to incapacitate them and contain the "threat" they and their actions putatively pose to the security of the nation. The most notable form that this way of governing has assumed over the last twenty years or so is that of intensified law enforcement at the nation's borders . . . . Since 9/11, however, political and other authorities have also placed a strong emphasis on the interior policing of the nation.[50]

[46] *Id.* at 4–5.

[47] *Id.* at 7–8.

[48] *See, e.g.*, Jennifer M. Chacón, *Producing Liminal Legality*, 92 DENV. U. L. REV. 709, 763 (2015); Chacón, *supra* note 5, at 135; Ming H. Chen, *Alienated: A Reworking of the Racialization Thesis After September 11*, 18 AM. U. J. GENDER, SOC. POL'Y & L. 411, 426–27 (2010); Eisha Jain, *Arrests as Regulation*, 67 STAN. L. REV. 809, 831 (2015); Won Kidane, *Committing a Crime While a Refugee: Rethinking the Issue of Deportation in Light of the Principle Against Double Jeopardy*, 34 HASTINGS CONST. L.Q. 383, 439 (2007); Legomsky, *supra* note 30, at 475; Allegra M. McLeod, *The U.S. Criminal-Immigration Convergence and Its Possible Undoing*, 49 AM. CRIM. L. REV. 105, 125 (2012); Teresa A. Miller, *Blurring the Boundaries Between Immigration and Crime Control After September 11th*, 25 B.C. THIRD WORLD L.J. 81, 98 (2005); Miller, *supra* note 17, at 618; Vázquez, *Constructing Crimmigration*, *supra* note 34, at 627; Deborah Weissman, *The Politics of Narrative: Law and the Representation of Mexican Criminality*, 38 FORDHAM INT'L L.J. 141, 170 (2015).

[49] INDA & DOWLING, *supra* note 17, at 2.

[50] *Id.*

II. CRIMMIGRATION: AN ALTERNATIVE HISTORY

As the above discussion makes clear, the increasing severity of immigration enforcement has been the big story in immigration law over the past three decades. It is not, however, the only story to be told.

In this Part, I seek to lay the groundwork for moving beyond the severity critique by offering an alternative history of one particular aspect of immigration law—discretionary relief—as it has evolved prior to and during the crimmigration era. The term "discretionary relief," defined in more detail below, encompasses a range of procedures through which noncitizens who are potentially vulnerable to deportation seek to remain lawfully in the United States. Most accounts of crimmigration point to the severe limits that Congress placed on discretionary relief in 1996 as a key element of the increasing severity of immigration law in the crimmigration era.[51] Here, I offer a different interpretation of the path that immigration law has taken over the past three decades. This account emphasizes not only the narrowing of traditional forms of relief but the proliferation of new forms of relief—those directed at immigrant victims of crime—during this same period. It argues that discretionary relief has not been eliminated. Rather, the line between "good" immigrants and "bad" immigrants has been radically reconfigured.

A. Discretionary Relief: A Brief Introduction

The Immigration and Nationality Act (INA)[52] includes a number of provisions authorizing agency adjudicators to grant lawful status, or at least the right to remain in the United States, to those who might otherwise be subject to deportation. Some types of relief, such as

[51] *See, e.g.*, Jason A. Cade, *Judging Immigration Equity: Deportation and Proportionality in the Supreme Court*, 50 U.C. DAVIS L. REV. 1029, 1036–37 (2017) (stating that the equitable discretion of immigration judges to provide relief from removal was "eviscerated" in the 1990s); Jill E. Family, *The Future Relief of Immigration Law*, 9 DREXEL L. REV. 393, 394 (2017) (remarking that "the arc of relief from removal tells a story of constricting relief as removal grounds broaden"); Joanne Gottesman, *Avoiding the "Secret Sentence": A Model for Ensuring that New Jersey Criminal Defendants Are Advised About Immigration Consequences Before Entering Guilty Pleas*, 33 SETON HALL LEGIS. J. 357, 365–67 (2009) (stating that the 1996 amendments "severely restricted the relief from deportation available to immigrants with criminal convictions."); Morawetz, *supra* note 24, at 1938–39 (noting that the 1996 immigration laws "virtually eliminate[d] . . . the individualized assessment of the appropriateness of deportation" that had been an integral part of the deportation process for lawful permanent residents prior to 1996); Allison Brownell Tirres, *Mercy in Immigration Law*, 2013 BYU L. REV. 1563, 1567–68 (2013) (arguing that discretionary provisions of the immigration laws have been "undercut by numerical limits, stringent eligibility criteria, and automatic bars for criminal behavior" while unfettered administrative discretion, in the form of prosecutorial discretion, has increased).

[52] Immigration and Nationality Act (INA), 8 U.S.C. §§ 1101–1537 (2012).

withholding of removal[53] or relief under the Convention Against Torture,[54] can be granted only within the context of a removal proceeding; in such cases, applications are adjudicated by immigration judges within the Executive Office for Immigration Review (EOIR).[55] Some forms of relief, such as asylum,[56] can be applied for either in removal proceedings or, if a removal proceeding has not yet been initiated, by filing an application with United States Citizenship and Immigration Services (USCIS).[57] A third category includes forms of relief over which USCIS has sole jurisdiction, such as U visas; while an Immigration Judge cannot grant such a visa, respondents in removal proceedings are sometimes able to pursue such relief while their removal proceedings are pending.[58]

Strictly speaking, only those measures that a person applies for within a removal proceeding constitute "relief" from removal because their function in a removal proceeding is to terminate the proceeding and thus avoid the issuance of a removal order. In contrast, an affirmative application for a visa or other benefit, filed before a person is the subject of a removal proceeding, does not end a removal proceeding but rather averts the possibility of such a proceeding occurring in the future. However, I refer to these measures collectively as "relief" regardless of the specifics of the procedure through which they are

[53] INA § 241(b)(3), 8 U.S.C. § 1231(b)(3) (2012).

[54] United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) art. 3, Dec. 10, 1984, 1465 U.N.T.S. 85 (entered into force June 26, 1987); Omnibus Consolidated and Emergency Supplemental Appropriations Act, Pub. L. No. 105-277, div. A, 112 Stat. 2681-822 (1998) (codified as amended in 8 U.S.C. § 1231 note); 8 C.F.R. §§ 1208.16–1208.18 (2017).

[55] 8 C.F.R. §§ 208.16(a), 1208.16(a) (2017).

[56] INA § 208, 8 U.S.C. § 1158 (2012).

[57] 8 C.F.R. § 208.3.

[58] On continuances to permit the adjudication of U visas by USCIS, see Ramirez Sanchez v. Mukasey, 508 F.3d 1254, 1255–56 (9th Cir. 2007) (noting that "although United States Citizenship and Immigration Services (USCIS) has sole jurisdiction over the issuance of U Visa petitions, the BIA and the Immigration Judge have the authority to continue their proceedings at the request of a petitioner who has applied for a U Visa or to terminate proceedings without prejudice at the joint request of the petitioner and Immigration and Customs Enforcement (ICE)"); 8 C.F.R. § 214.14(c)(1)(i) (2017) (providing for the filing of a joint petition to terminate removal proceedings where the respondent has a pending U visa petition); New Classification for Victims of Criminal Activity; Eligibility for "U" Nonimmigrant Status, 72 Fed. Reg. 53014-01, n.10 (noting that while 8 C.F.R. § 214.14(c)(1)(i) "specifically addresses joint motions to terminate, it does not preclude the parties from requesting a continuance of the proceeding"). However, the Attorney General's recent decision in *Matter of Castro-Tum* severely constrains the ability of respondents in removal proceedings to apply for U visas and other forms of relief. 27 I. & N. Dec. 271 (A.G. 2018) (holding that immigration judges lack the authority to administratively close removal proceedings).

accessed, because their effect is the same: a person who was previously either the subject or the potential subject of a removal proceeding has now gained (or retained)[59] lawful status and is no longer removable.[60] In addition, as mentioned above, there is considerable overlap between the two categories; some forms of relief can be applied for either affirmatively or in a removal proceeding, or can be applied for affirmatively while a removal proceeding is pending. Almost all of these forms of relief contain an element of administrative discretion,[61] and they are thus commonly referred to collectively as "discretionary relief."

B. Early Forms of Relief: Rewarding Residence, Work, and Family

Relief from deportation developed in the early twentieth century, alongside the deportation system itself, through a mixture of legislative and administrative developments.[62] By mid-century, there were three

[59] In some cases, relief provides long-term legal status to someone who was previously undocumented. *See, e.g.*, INA § 240A(b), 8 U.S.C. § 1229b(b) (2012) (providing that recipients of cancellation of removal will receive lawful permanent resident status). In other cases, for example where a lawful permanent resident is facing removal on the basis of a criminal conviction, relief allows a person to retain a prior status. *See, e.g.*, INA § 240A(a), 8 U.S.C. § 1229b(a) (2012) (cancellation of removal for lawful permanent residents).

[60] While I am employing a broader definition of relief than some might opt to use, it is not unusual for the legal provisions discussed here to be included under the larger umbrella of relief. *See, e.g.*, MARIA BALDINI-POTERMIN, IMMIGRATION TRIAL HANDBOOK, ch. 6 (2017) (covering asylum, U visas, T visas, and various other forms of relief in addition to cancellation of removal). For an insightful and wide-ranging discussion of the role of mercy in immigration law, see generally Allison Brownell Tirres, *supra* note 51 (breaking down the various discretionary provisions of the INA into categories of admission, enforcement, and removal).

[61] The only forms of relief that do not include an element of discretion are those that track the United States' obligations under the Refugee Convention and CAT. *See* INA § 241(b)(3), 8 U.S.C. § 1231(b)(3) (2012) (providing that "the Attorney General may not remove an alien to a country if the Attorney General decides that the alien's life or freedom would be threatened in that country because of the alien's race, religion, nationality, membership in a particular social group, or political opinion"); 8 C.F.R. § 1208.16(d)(1) (2017) (providing that subject to certain conditions, "an application for withholding of deportation or removal to a country of proposed removal shall be granted" if the applicant's eligibility for withholding under CAT is established).

[62] While immigration enforcement at ports of entry began in 1875, deportation of those apprehended in the interior of the country did not reach significant numbers until the passage of the Immigration Act of 1917. *See* DANIEL KANSTROOM, DEPORTATION NATION: OUTSIDERS IN AMERICAN HISTORY 138–59 (2007) (discussing the advent of the deportation system); MAE M. NGAI, IMPOSSIBLE SUBJECTS: ILLEGAL ALIENS AND THE MAKING OF MODERN AMERICA 56–75 (2004) (tracing the growth of the deportation system in the 1920s).

principal forms of relief: Section 212(c),[63] suspension of deportation,[64] and registry.[65] Together, they created a system that rewarded long-term residence, community ties, steady employment, military service, and being an economic provider for one's family.[66]

Section 212(c) relief originated in the Seventh Proviso to Section 3 of the Immigration Act of 1917, which provided that "aliens returning after a temporary absence to an unrelinquished United States domicile of seven consecutive years may be admitted in the discretion of the Secretary of Labor, and under such conditions as he may prescribe."[67] When Congress enacted the INA in 1952, this language (updated to reflect changes in agency structure) was included as Section 212(c).[68] Although the language of the statute appeared to limit Section 212(c) relief to those who were returning from trips abroad, judicial and administrative case law later extended its use to those who faced deportation without having left the United States.[69] Administrative case law delineated the factors to be taken into consideration in evaluating whether an individual merited relief under Section 212(c).[70] Positive factors included family ties in the United States; residence of long duration; evidence that deportation would result in hardship to the individual or to family members in the United States; military service; employment history; property or business ties in the United States; evidence of value and service to the community; rehabilitation in the case of individuals with criminal records; and other evidence attesting to the applicant's character.[71] Section 212(c) relief became a central feature of the deportation laws, providing a key source of relief to lawful permanent

[63] *See* Immigration and Nationality Act (INA), Pub. L. No. 82-414, § 212(c), 66 Stat. 163, 187 (1952) (codified at former 8 U.S.C. § 1182(c) (repealed 1996)).

[64] *See id.* § 244(a)(1), 66 Stat. at 214 (codified at former 8 U.S.C. § 1254(a)(1) (repealed 1996)).

[65] *See id.* § 249(a), 66 Stat. at 219 (codified as amended at 8 U.S.C. § 1259) (2012).

[66] It was also a system that was heavily biased in favor of white immigrants. *See* KANSTROOM, *supra* note 62, at 158; NGAI, *supra* note 62, at 82–86; Rachel E. Rosenbloom, *Policing the Borders of Birthright Citizenship: Some Thoughts on the New (and Old) Restrictionism*, 51 WASHBURN L.J. 311, 327 (2012).

[67] Immigration Act of 1917, ch. 29, § 3, 39 Stat. 874, 878.

[68] INA § 212(c), 66 Stat. at 187 (repealed 1996) (providing that "[a]liens lawfully admitted for permanent residence who temporarily proceeded abroad voluntarily and not under an order of deportation, and who are returning to a lawful unrelinquished domicile of seven consecutive years, may be admitted in the discretion of the Attorney General . . . .").

[69] *See* Francis v. INS, 532 F.2d 268, 271 (2d Cir. 1976).

[70] *See* Matter of Marin, 16 I. & N. Dec. 581, 584 (B.I.A. 1978).

[71] *Id.* at 584–85.

residents (LPRs) who found themselves subject to exclusion or deportation on the basis of a criminal conviction or other grounds.[72]

Registry, enacted in 1929, rewarded long-term residence combined with "good moral character."[73] The original registry statute was enacted to deal with an issue that arose when Congress first began requiring visas in the 1920s: many immigrants who had entered lawfully in prior years lacked the documentation to prove their status, since they had entered at a time when documentation was not necessary.[74] The first registry statute granted relief to those who had arrived by June 3, 1921.[75] Successive amendments moved up the required date of arrival—for example, in 1965 Congress set the cutoff date for registry at June 30, 1948.[76] This transformed registry into something like a rolling amnesty program, providing a way for undocumented immigrants who were longtime residents of the United States to obtain lawful permanent residence.

Suspension of deportation, enacted in 1940, originally provided relief to undocumented immigrants who could show five years of good moral character and evidence that deportation would result in "serious economic detriment" to a parent, child, or spouse who was a U.S. citizen or LPR.[77] Eligibility was later expanded in 1948 to include those who had resided in the United States for seven years and could show good moral character, regardless of economic detriment to a family member.[78] Congress later imposed a requirement that applicants for suspension

[72] *See* INS v. St. Cyr, 533 U.S. 289, 295–96 (2001) ("Thus, the class of aliens whose continued residence in this country has depended on their eligibility for § 212(c) relief is extremely large, and not surprisingly, a substantial percentage of their applications for § 212(c) relief have been granted. Consequently, in the period between 1989 and 1995 alone, § 212(c) relief was granted to over 10,000 aliens.").

[73] Registry Act of 1929, ch. 536, 45 Stat. 1512 (repealed 1940). Good moral character, which is a factor in several different forms of discretionary relief, is currently defined in INA § 101(f), 8 U.S.C. § 1101(f) (2012).

[74] *See* Mae M. Ngai, *The Strange Career of the Illegal Alien: Immigration Restriction and Deportation Policy in the United States, 1921–1965*, 21 LAW & HIST. REV. 69, 98 (2003) (discussing history of registry).

[75] Registry Act § 1(a)(1), 45 Stat. at 1513.

[76] Act of Oct. 3, 1965, Pub. L. No. 89-236, sec. 19, 79 Stat. 911, 920 (codified as amended at INA § 249, 8 U.S.C. § 1259 (2012)). For a comprehensive history of registry, see Richard A. Boswell, *Crafting an Amnesty with Traditional Tools: Registration and Cancellation,* 47 HARV. J. ON LEGIS. 175, 180–89 (2010).

[77] Alien Registration Act of 1940, ch. 439, tit. II, § 20, 54 Stat. 670, 671–72 (amending Act of Feb. 5, 1917, § 19, 39 Stat. 874, 889). As originally enacted, this provision suspended deportation for six months. An applicant was then accorded lawful permanent residence status unless a joint resolution was issued by Congress objecting to the conferral of status. This provision was amended multiple times and included a number of varieties of relief with different requirements. *See* Boswell, *supra* note 76, at 190–95.

[78] Act of July 1, 1948, ch. 783, 62 Stat. 1206 (amending 8 U.S.C. § 155(c) (1946)). Suspension was codified at former INA § 244, 8 U.S.C. § 1254 (repealed 1996).

establish that deportation would result in extreme hardship to the applicant or a family member.[79]

C. The Emergence of Humanitarian Relief

Alongside registry, Section 212(c), and suspension of deportation, a new notion arose in the wake of the Holocaust: that someone might be accorded status in the United States not due to having "earned" it through longtime residence, family ties, and the like, but rather on humanitarian grounds.[80] The first statute to link immigration status to protection from harm was the Displaced Persons Act (DPA) of 1948.[81] The DPA provided for the admission of hundreds of thousands of European refugees, based in part on their past history of persecution.[82] With the passage of the INA in 1952, a number of additional need-based paths to status entered the law, including withholding of deportation, which authorized the Attorney General to permit a deportable immigrant to remain in the United States based on the likelihood of physical persecution in the intended country of deportation,[83] and conditional entry, which was available to those fleeing communist regimes or countries in the Middle East.[84] The INA also provided statutory authority

[79] The degree of hardship has varied over the years, from "exceptional and extremely unusual hardship" to "extreme hardship." *See In re* O-J-O, 21 I & N Dec. 381, 398 (B.I.A. 1996) (en banc) (Rosenberg, Board Member, concurring) (discussing evolution of hardship requirement). Hardship had to be to an applicant or to the applicant's parent, child, or spouse who was a U.S. citizen or lawful permanent resident. *See id.* at 382.

[80] It bears noting that some of the forms of "relief" discussed here, including the Displaced Persons Act ("DPA"), conditional entry, parole, and the overseas refugee admissions program, allowed individuals *into* the United States rather than averting their deportation. They are thus conceptually distinct from forms of relief that allow someone to remain in the United States. However, they signaled a shift that led to new forms of relief.

[81] *See* Displaced Persons Act of 1948, ch. 647, § 4, 62 Stat. 1009, 1011.

[82] *See* NGAI, *supra* note 62, at 236.

[83] Former INA § 243(h) authorized the Attorney General to withhold the deportation of "any alien within the United States to any country in which in his opinion the alien would be subject to persecution on account of race, religion, or political opinion." INA § 243(h), 8 U.S.C. § 1253(h) (1976). The current withholding statute, now titled "Restriction on Removal," has been amended to conform to the International Protocol Relating to the Status of Refugees, to which the United States acceded in 1968. *See infra* note 89. Withholding is now mandatory rather than discretionary and applies to those who establish that their "life or freedom would be threatened [on account of] race, religion, nationality, membership in a particular social group, or political opinion." *See* INA § 241(b)(3)(A), 8 U.S.C. § 1231(b)(3)(A) (2012). There are a number of statutory bars to withholding. *See* INA § 241(b)(3)(B), 8 U.S.C. § 1231(b)(3)(B).

[84] Former INA § 203(a)(7) provided, subject to numerical ceilings, that conditional entry could be provided to foreign nationals "(A) that (i) because of

for granting humanitarian parole,[85] which was sometimes used to grant entry to large groups, such as the approximately 120,000 Cubans who arrived as part of the Mariel boatlift in 1980.[86]

In 1960, the Immigration and Naturalization Service (predecessor to the Department of Homeland Security) began designating particular countries for Extended Voluntary Departure,[87] the precursor to what is today called Temporary Protected Status;[88] such a designation temporarily suspended deportations to a particular country due to civil strife or other conditions. In 1968, the United States acceded to the International Protocol relating to the Status of Refugees, which prohibits states from returning refugees to a country where they face serious threats of persecution on account of race, religion, nationality, membership in a particular social group or political opinion.[89] In 1980, Congress passed the Refugee Act,[90] establishing the basic contours of

persecution . . . on account of race, religion, or political opinion they have fled (I) from any Communist or Communist-dominated country or area, or (II) from any country within the general area of the Middle East, and (ii) are unable or unwilling to return to such country or area on account of race, religion, or political opinion, and (iii) are not nationals of the countries or areas in which their application for conditional entry is made . . . ."; 8 U.S.C. § 1153(a)(7)(A) (1976) (repealed 1982). *See generally* Ira J. Kurzban, *A Critical Analysis of Refugee Law,* 36 U. MIAMI L. REV. 865, 867–75 (1982) (discussing history of U.S. refugee laws); Humberto H. Ocariz & Jorge L. Lopez, Comment, *Practical Implications of* INS v. Cardoza-Fonseca*: Evidencing Eligibility for Asylum Under the "Well-Founded Fear of Persecution" Standard*, 19 U. MIAMI INTER-AM. L. REV. 617, 661 (1988) (discussing history of conditional entry).

[85] *See* Immigration and Nationality Act (INA), Pub. L. No. 82-414, § 212(d)(5), 66 Stat. 163, 188 (1952) (codified as amended at 8 U.S.C. § 1182(2)(5)). Parole had been used prior to 1952 without any statutory basis. *See* Geoffrey Heeren, *The Status of Nonstatus*, 64 AM. U. L. REV. 1115, 1134–35 (2015).

[86] *See* Kurzban, *supra* note 84, at 871–73 (discussing use of parole to admit Cubans, Southeast Asians, and other groups of refugees). Parole is now statutorily limited to individual, case-by-case determinations of urgent humanitarian reasons or significant public benefit. *See* INA § 212(d)(5), 8 U.S.C. § 1182(d)(5)(A) (2012). On the changing nature of parole, see Tahl Tyson, Comment, *The Refugee Act of 1980: Suggested Reforms in the Overseas Refugee Program to Safeguard Humanitarian Concerns from Competing Interests*, 65 WASH. L. REV. 921, 922–23 (1990).

[87] *See* Heeren, supra note 85, at 1136–37 (recounting history of Extended Voluntary Departure).

[88] *See* INA § 244, 8 U.S.C. § 1254a (2012).

[89] Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267 (adopting relevant provisions of the United Nations Convention Relating to the Status of Refugees); United Nations Convention Relating to the Status of Refugees art. 33, July 28, 1951, 19 U.S.T. 6259, 189 U.N.T.S. 137.

[90] Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102 (codified as amended in scattered sections of the U.S. Code).

today's overseas Refugee Admissions Program[91] and the domestic asylum system.[92]

To summarize, the period directly preceding the beginning of the crimmigration era can be characterized as one in which forms of relief established in the early part of the century, which privileged conventional markers of worth such as longtime residence, family ties, steady employment, and military service, continued to flourish. During this period, the system also expanded to include humanitarian relief for those fleeing harm abroad.

D. The Demise of Traditional Forms of Relief and the Advent of Crime-Based Relief

A defining feature of the crimmigration era has been the dismantling of the system described above. In 1990, Congress tightened eligibility requirements for Section 212(c) relief.[93] Then, in 1996, Congress repealed Section 212(c) entirely and eliminated suspension of deportation, replacing both forms of relief with the newly created cancellation of removal.[94] Cancellation, however, is much narrower than the forms of relief it replaced; it includes numerous criminal bars and more stringent hardship requirements.[95] For example, many LPRs who would formerly have been eligible for Section 212(c) relief are now disqualified from cancellation on the basis of convictions categorized under the INA as "aggravated felonies."[96] This designation, which

[91] *See* INA § 207, 8 U.S.C. § 1157 (2012).

[92] *See* INA § 208, 8 U.S.C. § 1158 (2012).

[93] Immigration Act of 1990, Pub. L. No. 101-649, sec. 511, 104 Stat. 4978, 5052 (amending former 8 U.S.C. § 1182(c)) (repealed 1996) (barring Section 212(c) relief for those who had been convicted of an "aggravated felony" and had served a term of imprisonment of at least five years). *See generally* Brent S. Wible, *The Strange Afterlife of Section 212(c) Relief: Collateral Attacks on Deportation Orders in Prosecutions for Illegal Reentry After* St. Cyr, 19 GEO. IMMIGR. L.J. 455 (2005) (recounting the history of Section 212(c) relief).

[94] In AEDPA, Congress barred Section 212(c) relief for those convicted of a broad range of offenses. *See* Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, sec. 440(d), 110 Stat. 1214, 1277. Later that same year, in IIRIRA, Congress repealed Section 212(c). *See* Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, div. C, sec. 304, § 240B(b), 110 Stat. 3009-546, 3009-597. AEDPA created a new form of relief, cancellation of removal. *See* § 240A, 110 Stat. at 3009-594.

[95] *See generally* Morawetz, *supra* note 24.

[96] *See* INA § 101(a)(43), 8 U.S.C. § 1101(a)(43) (2012) (aggravated felony definition); INA § 240A(a)(3), 8 U.S.C. § 1229b(a)(3) (2012) (barring those with aggravated felony convictions from cancellation of removal). Another significant limit on cancellation of removal is the so-called "clock-stopping" provision, which halts the accrual of continuous residence at the time of commission of an offense that renders an applicant removable. *See* INA § 240A(d)(1), 8 U.S.C. § 1229b(d)(1). Thus,

Congress broadened significantly in 1996, includes many relatively minor offenses.[97] Virtually any offense involving the sale of drugs, even if it concerns a trivial amount of marijuana, would qualify as an aggravated felony,[98] as would a shoplifting conviction for which someone received a one-year suspended sentence and never spent a day in prison.[99] For undocumented immigrants, who were the principal beneficiaries of suspension, cancellation requires a longer length of residence than suspension did—ten years rather than seven—and a much higher standard of hardship: exceptional and extremely unusual hardship to an applicant's U.S. citizen or permanent resident child, spouse, or parent.[100] This form of cancellation is also numerically capped at four thousand people per year.[101]

The 1996 immigration laws also curtailed the availability of discretionary relief in several other ways. Those found to have illegally reentered the United States following a prior removal are now barred from obtaining discretionary relief,[102] and those who fail to appear at a removal hearing are barred from obtaining discretionary relief for a period of ten years.[103] Congress also imposed significant limits on asylum in 1996, creating a one-year filing deadline[104] and greatly expanding the list of criminal convictions that bar eligibility.[105] While registry was not eliminated, Congress's unwillingness in the 1990s (or since) to update the arrival date required for eligibility has allowed registry to slip largely into irrelevance.[106]

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someone who arrived in the United States as a teenager in 1975 and committed an offense in 1977 would not be able to establish the seven years of continuous residence required to apply for cancellation of removal even if placed in removal proceedings decades later. *See* INA § 240A(a)(2), 8 U.S.C. § 1229b(a)(2); Morawetz, *Rethinking Drug Inadmissibility*, *supra* note 30, at 183–84 (describing the clock-stopping provision and its effect on a lawful permanent resident who was convicted of a crime as a teenager, shortly after arriving in the United States).

[97] For a discussion of the aggravated felony definition, see Legomsky, *supra* note 30, at 483–86; Morawetz, *supra* note 24, at 1940–41.

[98] *See* INA § 101(a)(43)(B), 8 U.S.C. § 1101(a)(43)(B) (designating drug trafficking as an aggravated felony).

[99] *See* INA § 101(a)(43)(G), 8 U.S.C. § 1101(a)(43)(G) (designating theft with a one-year sentence as an aggravated felony); INA § 101(a)(48)(B), 8 U.S.C. § 1101(a)(48)(B) (defining "term of imprisonment" and "sentence" to include suspended sentences).

[100] INA § 240A(b)(1), 8 U.S.C. § 1229b(b)(1).

[101] INA § 240A(e), 8 U.S.C. § 1229b(e)(1).

[102] INA § 241(a)(5), 8 U.S.C. § 1231(a)(5) (2012).

[103] INA § 240(b)(7), 8 U.S.C. § 1229a(b)(7).

[104] INA § 208(a)(2)(B), 8 U.S.C. § 1158(a)(2)(B) (2012).

[105] INA § 208(b)(2), 8 U.S.C. § 1158(b)(2) (2012).

[106] The last update, in 1986, set the required arrival date as prior to January 1, 1972. *See* Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, sec. 203, 100 Stat. 3359, 3405 (codified at INA § 249, 8 U.S.C. § 1259 (2012)). With no updates

The limits that Congress imposed on discretionary relief in 1996 have been among the harshest aspects of the crimmigration era. Many longtime residents who would have been strong candidates for Section 212(c) relief or suspension prior to the 1996 amendments have been torn from their families by deportation. Their stories, and the stories of the family members left behind in the United States, have been told in scholarly analyses, advocacy reports, and the media.[107]

If we view crimmigration exclusively through this lens, crimmigration becomes synonymous with severity. Yet if we broaden the frame, other developments come into view. During the very same period in which Congress dismantled the system of discretionary relief that had provided a relatively stable framework for several decades, Congress also created several new forms of relief, including immigrant visas for abused, neglected, or abandoned children;[108] a self-petitioning procedure through which some victims of domestic violence can seek immigrant visas;[109] visas for victims of a broad range of violent crimes;[110] and visas for victims of trafficking.[111] These new forms of relief are an increasingly central aspect of immigration law and have come to dominate the work of many legal services providers.

Congress first addressed the needs of immigrant survivors of domestic violence in the Immigration Act of 1990,[112] amending some provisions of the 1986 Immigration Marriage Fraud Amendments[113] that had adversely affected immigrants in abusive marriages. The 1986 amendments had established a two-year probationary period in which individuals who receive permanent resident status through marriage are first accorded conditional resident status and only later, after jointly

over the intervening thirty years, a person applying for registry today would have to show nearly a half-century of residence in the United States.

[107] *See, e.g.*, INT'L HUMAN RIGHTS LAW CLINIC, UNIV. OF CAL., BERKELEY, SCHOOL OF LAW ET AL., IN THE CHILD'S BEST INTEREST? THE CONSEQUENCES OF LOSING A LAWFUL IMMIGRANT PARENT TO DEPORTATION 2 (2010), https://www.law.berkeley.edu/files/Human_Rights_report.pdf; HUMAN RIGHTS WATCH, FORCED APART: FAMILIES SEPARATED AND IMMIGRANTS HARMED BY UNITED STATES DEPORTATION POLICY 3 (2007); Anthony Lewis, *Abroad at Home: 'This Has Got Me in Some Kind of Whirlwind*,' N.Y. TIMES, Jan. 8, 2000, at A13; Morawetz, *supra* note 24, at 1950–54.

[108] *See infra* notes 116–120 and associated text.

[109] *See infra* notes 121–124 and associated text.

[110] *See infra* notes 131–137 and associated text.

[111] *See infra* notes 138–140 and associated text.

[112] Immigration Act of 1990, Pub. L. No. 101-649, sec. 701(a)(4), 104 Stat. 4978, 5085 (codified as amended at INA § 216(c)(4)(C), 8 U.S.C. § 1186a(c)(4)(C) (2012)). For a comprehensive history of VAWA immigration relief, see Mariela Olivares, *Battered by Law: The Political Subordination of Immigrant Women*, 64 AM. U. L. REV. 231, 239–62 (2014).

[113] Immigration Marriage Fraud Amendments of 1986, Pub. L. No. 99–639, sec. 2, 100 Stat. 3537, 3537–38 (codified as amended at INA § 216, 8 U.S.C. § 1186a).

filing a petition, are able to have the conditions removed.[114] The joint petition requirement created a dependence on visa sponsors and had serious consequences for immigrants in abusive marriages. The 1990 Act created an exemption to the joint petition requirement for those who have been battered or subjected to extreme cruelty.[115]

Also included in the 1990 Act was Special Immigrant Juvenile Status (SIJS), which provides a pathway to citizenship for noncitizen children who are present in the United States and have been abused, neglected, or abandoned.[116] As originally enacted, the statute defined a Special Immigrant Juvenile as:

> an immigrant (i) who has been declared dependent on a juvenile court located in the United States and has been deemed eligible by that court for long-term foster care, and (ii) for whom it has been determined in administrative or judicial proceedings that it would not be in the alien's best interest to be returned to the alien's or parent's previous country of nationality or country of last habitual residence . . . .[117]

In 1997, Congress amended the statute to require that the applicant be deemed eligible for foster care "due to abuse, neglect, or abandonment,"[118] and to require that the Attorney General expressly consent to the grant of Special Immigrant Juvenile status.[119] The statute was again amended in 2008, this time to make SIJS available to those who met the other requirements and whose "reunification with 1 or both of the immigrant's parents is not viable due to abuse, neglect, abandonment, or a similar basis found under State law . . . ."[120]

In 1994, Congress significantly expanded protections for immigrant survivors of domestic violence with passage of the Violence Against Women Act (VAWA).[121] VAWA created a self-petitioning procedure[122] by

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[114] *Id.*

[115] *See* Immigration Act of 1990, § 701(a)(4), 104 Stat. at 5085 (codified at INA § 216(c)(4), 8 U.S.C. § 1186a(c)(4)).

[116] *See* Immigration Act of 1990, § 153, 104 Stat. at 5005–06 (codified as amended at INA § 101(a)(27)(J), 8 U.S.C. § 1101(a)(27)(J) (2012)).

[117] *Id.*

[118] *See* Act of Nov. 26, 1997, Pub. L. No. 105-119, § 113, 111 Stat. 2440, 2460 (codified as amended at INA § 101(a)(27)(J)(i), 8 U.S.C. § 1101(a)(27)(J)(i)).

[119] *Id.* (codified as amended at INA § 101(a)(27)(J)(iii), 8 U.S.C. § 1101(a)(27)(J)(iii)). The amendments also provided that the Attorney General expressly consent to the juvenile court's jurisdiction in the case of any child in the Attorney General's custody. *Id.*

[120] William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. No. 110-457, § 235(d)(1), 122 Stat. 5044, 5079 (codified as amended at INA § 101(a)(27)(J)(i), 8 U.S.C. § 1101(a)(27)(J)(i) (2012)).

[121] Violence Against Women Act (VAWA), Pub. L. No. 103-322, tit. IV, 108 Stat 1796 (1994) (codified as amended in scattered sections of the U.S. Code).

which noncitizen victims of domestic violence who are married to a U.S. citizen or LPR can obtain LPR status without reliance on the abusive spouse. An applicant must show that she was legally married to the U.S. citizen or LPR batterer; is currently residing in the United States and has resided with the U.S. citizen or LPR spouse in the United States; was battered or subjected to extreme cruelty during the marriage; and entered into the marriage in good faith.[123] VAWA provides analogous relief for a child battered by a U.S. citizen or LPR parent; for a parent subjected to abuse by a son or daughter who is a U.S. citizen; and for a spouse of a U.S. citizen or permanent resident whose child has been battered by that person.[124]

VAWA also created a form of relief known as VAWA suspension of deportation.[125] Two years later, when Congress eliminated suspension more generally, VAWA suspension was replaced with VAWA cancellation of removal.[126] Available only to those who are in removal proceedings, VAWA cancellation provides a way for a battered spouse, ex-spouse, or child of a U.S. citizen or LPR, as well as the parent of a child who has been battered by a U.S. citizen or LPR parent, to avoid removal and to gain lawful status in the United States.[127] In its current form,[128] it requires an applicant to show a history of having been battered or subjected to extreme cruelty by a spouse (or, in the case of a battered child, by a parent); three years of continuous physical presence; and good moral character.[129] An applicant also has to establish that she does not fall under certain grounds of removability, and that the removal would result

[122] VAWA § 40701, § 204(a)(1), 108 Stat. at 1953 (codified as amended at INA § 204(a), 8 U.S.C. § 1154(a) (2012)).

[123] *See* INA § 204(a)(1)(A)(iii), 8 U.S.C. § 1154(a)(1)(A)(iii) (2012). VAWA 1994 included a requirement that the applicant show extreme hardship; this was eliminated by VAWA 2000. *See* Violence Against Women Act of 2000, Pub. L. No. 106-386, div. B, § 1503(b), 114 Stat. 1464, 1518–19 (codified at INA § 204(a)(1)(A)(iii), 8 U.S.C. § 1154(a)(1)(A)(iii)).

[124] *See* INA § 204(a)(1)(A)(iv), 8 U.S.C. § 1154(a)(1)(A)(iv) (child of U.S. citizen parent); INA § 204(a)(1)(B)(iii), 8 U.S.C. § 1154(a)(1)(B)(iii) (child of LPR parent); INA § 204(a)(1)(A)(vii), 8 U.S.C. § 1154(a)(1)(A)(vii) (parent of U.S. citizen son or daughter); INA § 204(a)(1)(A)(iii), 8 U.S.C. § 1154(a)(1)(A)(iii) (2012) (parent of child who has been battered).

[125] VAWA, § 40703(a), 108 Stat. at 1955 (amending INA § 244(a), 8 U.S.C. § 1254(a)) (repealed 1996).

[126] *See* Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IRRIRA), Pub. L. No. 104-208, div. C, § 304, 110 Stat. 3009-546, 3009-594 (codified as amended at INA § 240A(b)(2), 8 U.S.C. § 1229b(b)(2) (2012)).

[127] *Id.*

[128] As amended by the Violence Against Women Act of 2000, § 1504(a)(2), 114 Stat. at 1522–23 (codified at § 240A(b)(2), 8 U.S.C. § 1229b(b)(2)).

[129] *Id.*

in extreme hardship to the applicant or to her U.S. citizen or permanent resident child or parent.[130]

In 2000, as part of its reauthorization of VAWA, Congress enacted the Victims of Trafficking and Violence Protection Act (VTVPA),[131] which created U visas for victims of certain crimes. In order to obtain a U visa, an applicant must show that she has suffered substantial physical or mental abuse as a result of having been a victim of an enumerated crime; that she possesses information concerning the criminal activity; and that she has been helpful, is being helpful, or is likely to be helpful to a federal, state, or local law enforcement official, prosecutor, judge, or other authority investigating or prosecuting the criminal activity.[132] Qualifying crimes include rape, torture, trafficking, incest, domestic violence, sexual assault, abusive sexual contact, prostitution, sexual exploitation, female genital mutilation, being held hostage, peonage, involuntary servitude, slavery, kidnapping or abduction, unlawful criminal restraint, false imprisonment, blackmail or extortion, murder or manslaughter, felonious assault, witness tampering, obstruction of justice, and perjury.[133] A successful U visa applicant receives a non-immigrant visa[134] and the opportunity to apply later for lawful permanent residence.[135] Family members of U visa applicants also receive status as derivatives.[136] Ten thousand U visas may be issued annually.[137]

The VTVPA also created the T visa for victims of trafficking. In order to qualify, an applicant must establish that she is or has been a victim of a severe form of human trafficking; is physically present in the United States due to the trafficking; has complied (if over 18 years old and able to do so) with any reasonable request for assistance in the investigation and prosecution of acts of trafficking; and would suffer extreme hardship involving unusual and severe harm upon removal.[138] The statute defines "severe forms of trafficking in persons" as "sex trafficking in which a commercial sex act is induced by force, fraud, or coercion," or in which the victim is under 18; or the "recruitment, harboring, transportation, provision, or obtaining of a person for labor or services, through the use of force, fraud, or coercion for the purpose of subjection to involuntary

[130] *Id.*

[131] Victims of Trafficking and Violence Protection Act (VTVPA) of 2000, Pub. L. No. 106-368, 114 Stat. 1464 (codified as amended in scattered sections of the U.S. Code) Title IV of this Act contains the Violence Against Women Act of 2000.

[132] INA § 101(a)(15)(U), 8 U.S.C. § 1101(a)(15)(U).

[133] *Id.*

[134] 8 C.F.R. § 214.14(c)(7) (2017).

[135] INA § 245(m), 8 U.S.C. § 1255(m) (2012).

[136] 8 C.F.R. § 214.14(f).

[137] 8 C.F.R. § 214.14(d)(1).

[138] INA § 101(a)(15)(T), 8 U.S.C. § 1101(a)(15)(T) (2012).

servitude, peonage, debt bondage, or slavery."[139] Five thousand T visas are available annually.[140]

These legislative changes have been accompanied by the creation of a significant administrative and financial infrastructure. The Office on Violence Against Women was created within the Department of Justice in 1995.[141] As of 2015, it had awarded more than six billion dollars in grants to a broad range of organizations, including some that represent immigrant victims of domestic violence and other crimes.[142] In addition, Congress has exempted immigrant victims of crimes from the funding restrictions that otherwise bar federally funded legal services offices from providing legal assistance to undocumented immigrants.[143] Private funders have also stepped up to fund legal services for immigrants who fall under the protection of these forms of relief.[144]

VAWA relief is often categorized, along with asylum,[145] withholding of removal,[146] temporary protected status,[147] parole,[148] and relief under the Convention Against Torture,[149] under the broad heading of "humanitarian relief."[150] There is perhaps some logic to grouping these

[139] 22 U.S.C. § 7102(9) (2016); 8 C.F.R. § 214.11(a).

[140] INA § 214(o)(2), 8 U.S.C. § 1184(o)(2) (2012).

[141] *See* Lisa N. Sacco, The Violence Against Women Act: Overview, Legislation, and Federal Funding, Congressional Research Service Report R42499, 4 (2015), https://fas.org/sgp/crs/misc/R42499.pdf.

[142] *See id.*; *see also* Office on Violence Against Women, FY 2017 Grant Awards by Program, available at https://www.justice.gov/ovw/awards/fy-2017-ovw-grant-awards-program (last visited May 31, 2018).

[143] For a discussion of the evolution of exemptions from these restrictions, see Sofia Vivero et. al., Report to the Legal Services Corporation: Immigrant Victims of Domestic Violence, Sexual Assault and Human Trafficking and Access to Legal Services (2013), http://library.niwap.org/wp-content/uploads/2015/LSC-Gov-SurveyReportLSC.pdf.

[144] For example, in 2008, internationally acclaimed actress Angelina Jolie and the Microsoft Corporation teamed up with large law firms to launch Kids in Need of Defense (KIND), an organization dedicated to representing unaccompanied immigrant children in applications for SIJS and other forms of relief. *See* "Kids in Need of Defense" (KIND) Launched by Microsoft, Angelina Jolie, Major Law Firms and Corporate Legal Departments, https://supportkind.org/media/kids-in-need-of-defense-kind-launched-by-microsoft-angelina-jolie-major-law-firms-and-corporate-legal-departments/ (last visited May 31, 2018).

[145] INA § 208, 8 U.S.C. § 1158 (2012).

[146] INA § 241(b)(3), 8 U.S.C. § 1231(b)(3) (2012).

[147] INA § 244, 8 U.S.C. § 1254a (2012).

[148] INA § 212(d)(5), 8 U.S.C. § 1182(d)(5) (2012).

[149] United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *supra* note 54; 8 C.F.R. §§ 1208.16–1208.18 (2017).

[150] For example, the USCIS website's page on humanitarian relief lists VAWA self-petitions, U visas, T visas, and SIJS, along with asylum, temporary protected status,

forms of relief together on the theory that all of them are based, in one way or another, on need rather than on factors that have traditionally been measures of worth under U.S. immigration laws (job skills, family ties, etc.). However, grouping them together obscures the shift that new forms of relief represent. Unlike traditional forms of humanitarian relief, which concern conditions in other countries that would subject a person to harm upon return to that country, these new forms of relief are based on an entirely new factor that did not have any place in the immigration laws prior to 1990: harm that has been experienced in the United States. Furthermore, they are for the most part about a very specific kind of harm—crime—that previously played no role in awarding relief. I have opted to refer to them here as "crime-based relief" in order to highlight these differences.[151]

III. CRITICAL PERSPECTIVES ON CRIME-BASED RELIEF

How do we make sense of the relationship between the harshness of the crimmigration era—the increases in detention and deportation, the gutting of traditional forms of discretionary relief—and the post-1990 proliferation of new forms of relief? Crimmigration scholarship has paid surprisingly little attention to this question. This silence suggests an assumption that the recent expansion of relief is a distinct phenomenon from the enforcement-related developments that have captured the attention of crimmigration scholars.

On a practical level, it is understandable that some may view these phenomena as distinct from one another. The enforcement-related developments have heightened the threat of deportation and the new forms of relief have created new possibilities to avert that threat, with the result that the two often appear to operate as separate and countervailing forces. With the elimination or significant narrowing of traditional forms of discretionary relief, VAWA relief, U visas, T visas, and SIJS are often the only possible route to status, and they now comprise a large proportion of the caseload in many legal services organizations.

On an analytical level, however, this answer is unsatisfying, given that the two developments have taken shape in tandem within federal legislation and agency policy over the same time frame. This Part looks outside immigration law scholarship to gain insight into the connection between the two. I locate useful perspectives in two places: in feminist

and deferred action. *See Humanitarian*, U.S. CITIZENSHIP & IMMIGRATION SERVS., https://www.uscis.gov/humanitarian (last visited Nov. 14, 2017).

[151] SIJS is somewhat different from the other forms of relief discussed here in that its connection to the prosecution of crimes is quite attenuated. However, there is some interface between SIJS and the criminal justice system in the sense that child abuse and neglect are criminal offenses as well as grounds for termination of parental rights.

scholarship analyzing the achievements of the feminist anti-violence movement, and in the work of criminologists theorizing the increasing salience of crime victims in U.S. public policy.

A. Perspectives from Feminist Theory

In the years since the emergence of Second Wave feminism in the late 1960s, feminist advocates have achieved a sweeping array of reforms, both domestically and internationally, addressing issues such as rape, domestic violence, sexual harassment, and sex trafficking.[152] In recent years, feminist scholars in a range of disciplines have engaged in lively, and sometimes contentious, debate on the merits of these reforms.

Some of this scholarship has coalesced under the rubric of "Governance Feminism."[153] Legal scholar Janet Halley has described Governance Feminism as "the incremental but by now quite noticeable installation of feminists and feminist ideas in actual legal-institutional power."[154] She and others have advocated undertaking a distributional analysis[155] of the gains achieved by Governance Feminism, taking seriously the background rules[156] against which such reforms operate and looking not at what a particular law is intended to do, but what it actually does in practice. The ultimate aim, in Halley's words, is to arrive at an

[152] On the emergence of Second Wave feminism, see generally ALICE ECHOLS, DARING TO BE BAD: RADICAL FEMINISM IN AMERICA 1967–1975 (1989). On the legal and legislative achievements of the feminist anti-violence movement, see BETH E. RICHIE, ARRESTED JUSTICE: BLACK WOMEN, VIOLENCE, AND AMERICA'S PRISON NATION 77–86 (2012) (recounting reforms in the areas of statutory rape laws, rape shield laws, domestic violence arrest policies, the creation of specialized battered women's courts, the development of the "battered women's defense," child custody laws, and increased funding for battered women's shelters and victim services).

[153] *See, e.g.*, Janet Halley et al., *From the International to the Local in Feminist Legal Responses to Rape, Prostitution/Sex Work, and Sex Trafficking: Four Studies in Contemporary Governance Feminism*, 29 HARV. J. L. & GENDER 335, 336 (2006) [hereinafter, *From the International to the Local*] (Part I: Describing Governance Feminism by Janet Halley).

[154] *Id.* at 340.

[155] *See* JANET HALLEY ET AL., GOVERNANCE FEMINISM: AN INTRODUCTION 253–66 (2018). "The chief advantage of distributional analysis is that it is oriented not to the symbolic 'norm announcing' function of law and legal institutions but to their distributional consequences. It asks of any particular element of governance: what distributions does it leave in place, and what distributions does it shift?" *Id.* at 253.

[156] *See Id.* at 259–62. Such background rules may be far-ranging. For example, "[f]or sex workers at any given moment in the struggle, the key background rules can be landlord/tenant law, land use law, public transportation, access to social security, health care, banking and credit, a minor's incapacity to contract, social media facilities, and immigration law—even the rules governing the job they would be doing if they were not doing this one—domestic labor perhaps, or work in a kitchen or nursing home." *Id.* at 262.

assessment of whether a particular reform is "worth it."[157] In other words, the aim is "to take stock of the inclusions and exclusions—and the upsides and the downsides—across their full range."[158]

Such analyses have acknowledged, and in some cases celebrated, the considerable achievements that feminist advocacy has brought about in its engagement with the state.[159] However, they have also pointed out some significant downsides to such reforms, both for the people that they were supposed to assist and for others. For example, legal scholar Chantal Thomas has argued that feminist anti-trafficking advocacy in the United States has had three unintended consequences.[160] First, "the contribution of anti-trafficking efforts to the border control agendas of states—particularly rich states—at the expense of delivering actual aid to victims of trafficking, may actually harm the very people [reformers] intended to help."[161] Second, the focus "on certain narrowly defined harmful practices, all relating to sex work/prostitution, to the exclusion of other labor practices affecting migratory workers, may serve implicitly to legitimate the conditions of non-sex-based migrant labor."[162] And finally, "abolition produces black and gray markets which may be more harmful to some workers."[163] Thomas argues that "reformers, who may have been quite indifferent to these consequences, may actually have exacerbated them."[164]

Sociologist Elizabeth Bernstein has used the term "carceral feminism" to describe "how a sexual politics that is intricately intertwined with broader agendas of criminalization and incarceration has shaped the framing of trafficking for both conservative Christians and mainstream feminists, helping to align the issue with state interests and to catapult it to its recent position of political and cultural

[157] Janet Halley, *From the International to the Local*, *supra* note 153, at 377–78 (Introduction to Part II by Janet Halley).

[158] *See* HALLEY ET AL., GOVERNANCE FEMINISM: AN INTRODUCTION, *supra* note 155, at xi.

[159] *See* Halley et al., *From the International to the Local, supra* note 153, at 347 (Part I: Describing Governance Feminism by Chantal Thomas) ("Any account of Governance Feminism ('GF') first and foremost requires, to my mind, celebration of a social movement. Against very steep odds of governmental indifference and patriarchal hostility, feminism is succeeding in achieving recognition of and response to social justice claims on behalf of women everywhere.").

[160] *See id.* at 388 (Part II: Developing Methods for Studying Governance Feminism by Chantal Thomas).

[161] *Id.*

[162] *Id. See also* Jennifer M. Chacón, *Misery and Myopia: Understanding the Failures of U.S. Efforts to Stop Human Trafficking*, 74 Fordham L. Rev. 2977, 3027–32 (2006).

[163] Halley et al., *From the International to the Local, supra* note 153, at 388 (Part II: Developing Methods for Studying Governance Feminism by Chantal Thomas).

[164] *Id.*

prominence."[165] Bernstein argues that U.S. anti-trafficking campaigns "have been far more successful at criminalizing marginalized populations, enforcing border control, and measuring other countries' compliance with human rights standards based on the curtailment of prostitution than they have been at issuing any concrete benefits to victims."[166]

Efforts to combat domestic violence have also engendered searching debate. Some have questioned the wisdom of policies that require police officers to make an arrest upon probable cause of domestic violence and that prevent prosecutors from dropping domestic violence cases, both key components of feminist anti-violence advocacy.[167] Legal scholars such as Donna Coker have contended that such policies ignore the dynamics of race and class that make many women deeply distrustful of law enforcement.[168] In the words of one such critic, Aya Gruber:

> Mandatory arrest and prosecution were supposed to be cure-alls that would temper the patriarchal system and better protect interests of women, but something funny happened along the way. Rather than merely police and prosecutors resisting pro-enforcement policies, abused women themselves were reluctant to participate in state intervention. For a variety of social, economic, and emotional reasons, women either wanted to stay out of the system themselves or desired that the system exempt their partners from enforcement.[169]

Gruber notes that "[t]his development threw a significant curveball to feminists," who were "prepared to fight actively against police and prosecutor support of under-enforcement, which reformers could fairly and easily characterize as informed by patriarchy, but [who] . . . now had to account for women's desires to stay out of the system."[170]

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[165] Elizabeth Bernstein, *Militarized Humanitarianism Meets Carceral Feminism: The Politics of Sex, Rights, and Freedom in Contemporary Antitrafficking Campaigns*, 36 SIGNS: J. WOMEN CULTURE & SOC'Y 45, 51 (2010) [hereinafter Bernstein, *Militarized Humanitarianism*]. *See also* Elizabeth Bernstein, *The Sexual Politics of the "New Abolitionism,"* 18 DIFFERENCES 128, 137–43 (2007).

[166] Bernstein, *Militarized Humanitarianism*, *supra* note 165, at 57.

[167] *See, e.g.*, Donna Coker, *Crime Control and Feminist Law Reform in Domestic Violence Law: A Critical Review*, 4 BUFF. CRIM. L. REV. 801, 806–12 (2001); Aya Gruber, *The Feminist War on Crime*, 92 IOWA L. REV. 741, 760–63 (2007); Claire Houston, *How Feminist Theory Became (Criminal) Law: Tracing the Path to Mandatory Criminal Intervention in Domestic Violence Cases*, 21 MICH. J. GENDER & L. 217, 220–21 (2014); Linda G. Mills, Commentary, *Killing Her Softly: Intimate Abuse and the Violence of State Intervention*, 113 HARV. L. REV. 550, 565 (1999).

[168] *See* Coker, *supra* note 167, at 857; RICHIE, *supra* note 152, at 83.

[169] Gruber, *supra* note 167, at 761.

[170] *Id.*

Political scientist Kristin Bumiller has argued that the feminist anti-violence movement, while successful in achieving formal legal victories, has been profoundly shaped by the context in which it has unfolded: the penal-welfare systems of the neoliberal state.[171] She contends that feminist advocacy played a role in the shift to mass incarceration that began in the United States in the 1970s: "Mainstream feminist demands for more certain and severe punishment for crimes against women fed into these reactionary forces. This resulted in a direct alliance between feminist activists and legislators, prosecutors, and other elected officials promoting the crime control business."[172] Bumiller argues that while the push for law enforcement solutions to sexual violence did not have as large an effect on mass incarceration as the War on Drugs, it nevertheless

> contributed to the symbolic message. Sex crimes generated diffuse fears that justified more punitive action by the state. Like other issues on the crime control agenda, the link to an actual rise in the crime rate was less significant than how violence against women shaped a generalized fear of disorder and the image of habitual and recalcitrant criminals.[173]

Immigration law scholars have insightfully analyzed VAWA immigration relief and anti-trafficking efforts both domestically and globally.[174] For the most part, however, these analyses have been focused

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[171] *See* KRISTIN BUMILLER, IN AN ABUSIVE STATE: HOW NEOLIBERALISM APPROPRIATED THE FEMINIST MOVEMENT AGAINST SEXUAL VIOLENCE 7 (2008).

[172] *Id.*

[173] *Id. See also* RICHIE, *supra* note 152, at 105 ("So by 2010, punitive public policy, criminalization of deviations from hegemonic social norms, the erosion of the social support system for disadvantaged groups, and increased surveillance and monitoring of people who are most at risk of the negative effects of poverty, heterosexism, and racism *as well as* gender violence were deeply entrenched in social ideology, and the anti-violence movement was deeply influenced by it.") (emphasis in original); Aya Gruber, *A "Neo-Feminist" Assessment of Rape and Domestic Violence Law Reform*, 15 J. GENDER, RACE & JUST. 583, 585 (2012) (discussing "the alliance between feminism and crime-control ideologies and how an initially progressive set of ideas ended up bolstering conservative ideologies regarding social disorder and undergirding a highly authoritarian, ubiquitous governance structure—the criminal justice system").

[174] On VAWA relief, see generally Karyl Alice Davis, Commentary, *Unlocking the Door by Giving Her the Key: A Comment on the Adequacy of the U-Visa as a Remedy*, 56 ALA. L. REV. 557 (2004); Joey Hipolito, *Illegal Aliens or Deserving Victims?: The Ambivalent Implementation of the U Visa Program*, 17 ASIAN AM. L.J. 153 (2010); Kelly, *Stories from the Front*, *supra* note 12; Kelly, *Domestic Violence Survivors*, *supra* note 12*;* 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 (2011); Orloff & Kaguyutan, *supra* note 12; Hannah R. Shapiro, *Battered Immigrant Women Caught in the Intersection of U.S. Criminal and Immigration Laws: Consequences and Remedies*, 16 TEMP. INT'L & COMP. L.J. 27 (2002). On trafficking, see generally Chacón, *supra* note 162; Jayashri Srikantiah, *Perfect Victims and Real Survivors: The Iconic Victim in Domestic Human Trafficking Law*, 87 B.U. L. REV. 157 (2007).

on how to strengthen and improve such efforts. The questions that have animated Governance Feminism scholarship—questions not just about whether policies have been effective, but also about whether their effects are "worth it"—have garnered little attention.

There is evidence, however, that this is beginning to change. In a 2013 article directed primarily at advocates engaged in representing immigrant domestic violence survivors, Alizabeth Newman examined the growing incorporation of law enforcement goals within advocacy efforts on behalf of battered immigrant women.[175] In Newman's analysis,

> [a] conservative, law enforcement framing of the law has led to a sharp deviation from the fundamental principles of the battered women's movement in terms of defining which battered women can secure relief, and in the degree of agency they are afforded in the process. The focus in the more recent VAWA provisions for immigrant women has strayed from the initial political and social message that no woman should be trapped in an abusive home, and has returned to archaic conceptions of domestic abuse that demand deserving victims and dependence in order to access relief.[176]

Newman applauds the passage of VAWA 1994 and subsequent reauthorizations and expansions as "a grassroots organizing victory for battered immigrant women who gained the only advances for immigrants during that period and did so repeatedly."[177] Her critique centers on the shift over the years, within successive updates to VAWA, to requirements that immigrant survivors of violence demonstrate innocence and worthiness and remain dependent on law enforcement.[178] She argues that while the self-petitioning process created by VAWA 1994 was largely in the hands of domestic violence survivors, U visas create continuing dependence on law enforcement, both for an initial certification of helpfulness at the stage of applying for a visa, and for certification of not refusing further reasonable requests for assistance three years later, at the point of applying for permanent residence.[179]

In a 2014 article centered on issues of race and sexuality, Pooja Gehi and Soniya Munshi draw parallels between VAWA relief and hate crimes legislation, arguing that the alliance with law enforcement on both fronts has had troubling impacts on Asian American communities.[180] They argue that VAWA provides some survivors of violence with relief from otherwise harsh immigration and welfare policies, but "it does so only by shoring up the prison industrial complex; ensuring that survivors

[175] Newman, *supra* note 14, at 275.

[176] *Id.* at 230.

[177] *Id.* at 243.

[178] *Id.* at 259–73.

[179] *Id.* at 268–73.

[180] Gehi & Munshi, *supra* note 14, at 12–13.

cooperate with law enforcement and comply with narrow narratives about violence; reinforcing the dichotomy between 'deserving' and 'undeserving' immigrants, poor people, and survivors; and focusing on interpersonal violence rather than state and institutional violence."[181]

B. Perspectives from Criminology

There is considerable overlap between these Governance Feminism critiques and scholarship within the field of criminology focusing on the rise of the carceral state. As noted above, crimmigration scholars have drawn extensively on the latter.[182] However, they have done so selectively, citing this literature's insights on the growing severity of criminal law while overlooking its other dimensions. In particular, they have shown little interest in its emphasis on the growing significance of crime *victims* over the last several decades. Scholars including Garland and Simon have argued that the carceral state manifests itself not only in policies that punish but also in those that provide assistance, and that the figure of the crime victim is central to the transformation that has occurred.[183]

Garland notes that in the penal-welfare system that existed in the United States and Europe from the 1890s to the 1970s, "individual victims featured hardly at all, other than as members of the public whose complaints triggered state action. Their interests were subsumed under the general public interest, and certainly not counter-posed to the interests of the offender."[184] In the current era, however, "[a]ll of this has now changed. The interests and feelings of victims—actual victims, victims' families, potential victims, the projected figure of 'the victim'—are now routinely invoked in support of measures of punitive segregation."[185]

A key insight of this scholarship is that the interests of victims do not come into play simply as justification for incarceration policies. "Crime victims are in a real sense the representative subjects of our time," Simon writes.[186] "It is as crime victims that Americans are most easily imagined as united; the threat of crime simultaneously de-emphasizes their

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[181] *Id.* at 28.

[182] *See supra* Part I.B.

[183] *See generally* BUMILLER, *supra* note 171; GARLAND, *supra* note 38; MARIE GOTTSCHALK, THE PRISON AND THE GALLOWS: THE POLITICS OF MASS INCARCERATION IN AMERICA (2006); SIMON, *supra* note 16. For debates within legal scholarship on the victims' rights movement, see generally Paul G. Cassell, *Barbarians at the Gates? A Reply to the Critics of the Victims' Rights Amendment*, 1999 UTAH L. REV. 479 (1999); Lynne Henderson, *Revisiting Victim's Rights*, 1999 UTAH L. REV. 383 (1999).

[184] GARLAND, *supra* note 38, at 11.

[185] *Id.*

[186] SIMON, *supra* note 16, at 75.

differences and authorizes them to take dramatic political steps."[187] Simon posits that

> [t]he crime victim is only the latest in a whole parade of idealized subjects of the law, including the yeoman farmer of the nineteenth century, the freedman of the Reconstruction era, the industrial worker of the early twentieth century, and the consumer who became the central concern of economic policy after World War II.[188]

The figure of the crime victim—the white, suburban, and middle-class crime victim[189]—rose to prominence in the Safe Streets Act of 1968,[190] which "reflected for the first time the power of lawmaking about crime to bring together representatives from across the ideological spectrum."[191] Governing through crime has led to mass incarceration and swollen law enforcement budgets, but also to funding for victim services and to community programs aimed at at-risk youth.[192]

This transformation, Simon argues, has led advocates themselves to shift into the framework of governing through crime. One example of this phenomenon is that in the post-Civil Rights era, the "civil rights subject is most successfully reproduced in legislation . . . when it coalesces with the crime victim subject."[193] As Congress had moved away from a concern with civil rights, "hate crimes . . . emerged as the dominant focus for those lobbyists and legislators loyal to that cause."[194] By the 1990s, Simon argues, a "stunning variety of groups [were] now seeking to be represented in crime legislation: women's groups, minority citizens living in urban poverty, the elderly, and law enforcement agencies."[195] Political scientist Marie Gottschalk has also chronicled this development:

> Being for victims and against offenders became a simple equation that helped knit together politically disparate groups ranging from the more traditional, conservative, law-and-order constituencies mobilized around punitive policies like "three-strikes-and-you're-out," to women's groups organized against rape and domestic

[187] *Id.*

[188] *Id.* at 77.

[189] *Id.* at 76.

[190] Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, 82 Stat. 197 (codified as amended in scattered sections of the U.S. Code).

[191] SIMON, *supra* note 16, at 93.

[192] *Id.* at 103.

[193] *Id.* at 107.

[194] *Id.* at 109.

[195] *Id.* at 103.

> violence, to gay and lesbian groups advocating for hate crimes legislation, to the Million Moms pushing for gun control.[196]

Simon points to the Violent Crime Control and Law Enforcement Act of 1994,[197] of which VAWA is a part, as a prime example of this phenomenon. The Act, the largest crime bill ever enacted in the United States, expanded the federal death penalty and provided $9.7 billion dollars in funding for prisons, $1.2 billion for border control, and funding to hire 100,000 additional police officers, alongside funding for prevention programs and victim services.[198] Numerous interest groups found ways to insert provisions for victim services, programs for at-risk youth, battered women's shelters, and other such programs—including the foundational provisions of VAWA relief for immigrant victims of domestic violence—into a bill that was primarily focused on law enforcement.[199]

IV. BEYOND SEVERITY

Drawing on the perspectives outlined above, this Part proposes a reconceptualization of crimmigration as a complex phenomenon that has opened up opportunities for some immigrants at the same time that it has imposed harsh consequences on many others. It then briefly considers the challenging questions that such a conceptualization poses for immigrant rights advocates.

A. The Crime Victim as Deserving Immigrant

One does not have to look far to find Simon's notion of the crime victim as the representative subject of our time manifested in contemporary immigration rhetoric and policy. One of the most obvious ways in which the figure of the crime victim has come into play, of course, is through the specter of the immigrant perpetrator of crime (always figured as male and Latino) and the white, usually female, U.S. citizen victim—an image heavily promoted by right-wing nativists, particularly during the 2016 presidential election,[200] despite the fact that

[196] GOTTSCHALK, *supra* note 183, at 11. *See also* BUMILLER, *supra* note 171, at 64 ("Under the conditions of neoliberalism, the principal focus of the penal/welfare apparatus is on victims, in terms of both retribution in their names and the development of programming to manage their needs.").

[197] Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 1796 (codified as amended in scattered sections of the U.S. Code).

[198] U.S. DEP'T OF JUSTICE, VIOLENT CRIME CONTROL AND LAW ENFORCEMENT ACT OF 1994: FACT SHEET (1994), https://www.ncjrs.gov/txtfiles/billfs.txt.

[199] *See* SIMON, *supra* note 16, at 102–04.

[200] A prime example of this phenomenon was Donald Trump's announcement of his candidacy for President in June of 2015. *See supra* note 6. Another example is the Trump Administration's establishment of a new office within ICE to assist victims of

there is ample data demonstrating that rates of offending are lower among the foreign-born than among those born in the United States.[201] At the same time, however, the focus on immigrant victims of crimes manifested in VAWA—a focus entirely absent from immigration law prior to the 1990s—opened up a space for undocumented immigrants to gain a rare measure of acceptance and inclusion in an era in which they have for the most part encountered legal and social barriers.

For an undocumented immigrant, a crime-based visa holds out the potential for transcending the category of "law-breaker" and entering an entirely new category: that of someone accorded status and belonging. In the words of one U visa recipient, "When I had no papers, I felt like nothing. . . . I [now] feel like a human being. . . . I have a name in this country."[202] Crime-based relief not only provides lawful status to those who lack it; it can even in some cases provide a way to circumvent the otherwise dire effects that a criminal conviction can have on eligibility for immigration benefits. The U visa, for example, includes a provision to waive criminal convictions that is significantly more generous than the waiver provisions that exist for other visas.[203]

It would be difficult to overstate the value of crime-based relief to those who qualify for it.[204] These new forms of relief represent rare examples of expansion in an era in which immigration benefits have for the most part contracted. Beyond the fact that they provide new paths to lawful status—and potentially, down the road, to citizenship—these new forms of relief also address very specific barriers that immigrant victims of

crimes committed by immigrants. *See Victims of Immigration Crime Engagement (VOICE) Office*, U.S. IMMIGRATION & CUSTOMS ENF'T, https://www.ice.gov/voice (last visited Nov. 14, 2017).

[201] *See* Walter Ewing et al., *The Criminalization of Immigration in the United States*, AM. IMMIGRATION COUNCIL (July 13, 2015), https://www.americanimmigrationcouncil.org/research/criminalization-immigration-united-states (reporting that incarceration rates are lower among the foreign-born and that "[a] variety of different studies using different methodologies have found that immigrants are less likely than the native-born to engage in either violent or nonviolent 'antisocial' behaviors; that immigrants are less likely than the native-born to be repeat offenders among 'high risk' adolescents; and that immigrant youth who were students in U.S. middle and high schools in the mid-1990s and are now young adults have among the lowest delinquency rates of all young people").

[202] Nora Caplan-Bricker, *"I Wish I'd Never Called the Police,"* SLATE (Mar. 19, 2017), 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 (quoting Maria, a Mexican immigrant who received a U visa on the basis of domestic violence).

[203] *See* INA § 212(d)(14), 8 U.S.C. § 1182(d)(14) (2012) (providing that inadmissibility based on criminal convictions may be waived for U visa applicants if the Secretary of Homeland Security "considers it to be in the public or national interest to do so").

[204] On the value of crime-based relief to beneficiaries, see Olivares, *supra* note 112, at 235–39, 241.

crime experience. For example, undocumented immigrants in abusive relationships often avoid reporting crimes solely out of fear that their undocumented status will be discovered.[205] The U visa has provided a significant measure of protection for a person in these circumstances.[206]

In a broader sense, the new focus on crime victims evident in VAWA has opened up a discursive space for undocumented immigrants, along with other disfavored groups, to be reimagined as insiders rather than outsiders. This potential for inclusion was evident in comments by Senator Patrick Leahy during a bitter fight over reauthorization of VAWA in 2012–13.[207] The reauthorization debate featured staunch Republican opposition to provisions designed to protect immigrant, LGBTQ, and Native American victims of domestic violence. Leahy, pushing back against this opposition, declared:

> [W]hen I was the State's attorney, I went to crime scenes at 3 o'clock in the morning and there was a battered and bloody victim—we hoped alive, but sometimes not. The police never said: Is this victim a Democrat or a Republican? Is this victim gay or straight? Is this victim an immigrant? Is this victim native born?
>
> They said: This is a victim. How do we find the person who did this and stop them from doing it again? A victim is a victim is a victim. Everybody in law enforcement will tell you that.[208]

In his statement, Leahy repeated one particular mantra—"A victim is a victim is a victim"—five times.[209]

It perhaps goes without saying that repeating these words does not make them true; factors such as race, class, gender, and immigration status profoundly impact the treatment of crime victims.[210] Moreover, the imposition of particular notions of the ideal victim have served to limit the scope of crime-based relief within immigration law.[211] Nevertheless, the repetition of this phrase provides a vivid illustration of the way that

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[205] *See* Orloff & Kaguyutan, *supra* note 12, at 98 (citing a survey finding that "21.7% of the battered immigrant women survey participants listed fear of being reported to immigration as their primary reason for remaining in an abusive relationship").

[206] *See* Caplan-Bricker, *supra* note 202 (profiling immigrants who have benefited from U visas); *see also* Davis, *supra* note 174, at 567 (discussing the value of U visas to H-4 visa holders, who are permitted to accompany their spouses on temporary work visas but are not permitted to work themselves, and are thus economically dependent on their spouses).

[207] For a detailed description of this reauthorization, see Olivares, *supra* note 112, at 253–62.

[208] 158 CONG. REC. 5521 (2012).

[209] *Id.* at 5521–22.

[210] *See* RICHIE, *supra* note 152, at 118–23 (discussing the lack of protection for Black women who are victims of crimes).

[211] *See generally* Srikantiah, *supra* note 174 (discussing iconic trafficking victims).

crime victimhood has come to function discursively as a path to inclusion. The notion that being the victim of a crime might carry the power to erase distinctions of immigration status—a notion put forth in Leahy's speech and to some extent put into practice by forms of relief such as the U visa—is particularly striking given that immigration status has emerged as such a potent dividing line since the early 1990s in both state and federal law.[212] Immigration status has come to matter in virtually every legal context, including many that used to be far removed from immigration concerns, such as getting a driver's license.[213] These days, being the victim of a crime is one of only a handful of contexts in the contemporary United States—others might include being a student in a public elementary or secondary school[214] and being a patient in an emergency room seeking treatment for a life-threatening medical condition[215]—in which one might even think to say that immigration status has no legal significance.

B. The Double-Edged Sword of Crime-Based Relief

At the same time that crime-based relief offers new paths to inclusion, however, it also bears the imprint of VAWA's overall emphasis on law enforcement and incarceration. In many respects, the connection between crime-based relief and the carceral state are explicit. For example, the first stated purpose of the U visa is "to remove barriers to criminal prosecutions of persons who commit acts of battery or extreme cruelty against immigrant women and children,"[216] and the stated purposes of T visas are "to combat trafficking in persons . . . to ensure just and effective punishment of traffickers, and to protect their victims."[217] Beyond these obvious ties, crime-based forms of relief are deeply intertwined with the increasing severity of the deportation system, a confluence that can create wrenching choices for immigrant survivors of domestic violence who wish to obtain relief for themselves and their children but in some cases do not wish to cause the deportation of an abuser. Newman notes that many immigrant survivors of domestic violence

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[212] *See generally* Huyen Pham, *When Immigration Borders Move*, 61 FLA. L. REV. 1115 (2009) (describing increasing significance of immigration and citizenship status).

[213] *See id.* at 1116–17.

[214] *See* Plyler v. Doe, 457 U.S. 202, 230 (1982) (holding that states may not bar undocumented immigrants from attending public elementary and secondary schools).

[215] *See* 42 U.S.C. § 1395dd(b) (2012).

[216] Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, § 1502(b), 114 Stat. 1464, 1518.

[217] *Id.* § 102(a), 114 Stat. at 1466 (codified as amended at 22 U.S.C. § 7101 (2012)).

> will express that calling the police is a measure of last resort. If they do so, it is to stop the violence, but it is not necessarily to have the abuser punished. For the immigrant community, an arrest means more than a tainted record or time served for the abuser—it may also mean deportation or removal. If the abuser is the father of her children or the family breadwinner, a deportation would be a devastating loss for the victim and her family. Mothers are faced with an excruciating decision. Helping law enforcement to prosecute her partner may mean sacrificing him in order to obtain immigration status for herself and her children.[218]

Although Newman touches only briefly on this observation, it is worth pausing for a moment to consider its implications, because it highlights a key point of connection between VAWA relief and the increasing severity of the deportation laws in the crimmigration era. As part of the sweeping changes to the INA in 1996, Congress made domestic violence convictions a deportable offense.[219] Like VAWA itself, this change to the INA reflects the increasing attention to domestic violence within federal law. For some immigrant survivors of domestic violence, VAWA relief and the inclusion of domestic violence within the grounds of deportability may both be welcome developments, but for others, as Newman points out, the combination may put domestic violence survivors in a bind.

The potential tensions that can arise from these points of intersection were on full display in the spring of 2017 as Denver debated a sanctuary city policy.[220] At the state, county, and local level, legislators across the United States have shown new interest in sanctuary policies in the wake of the election of Donald Trump.[221] In Denver, this impulse took the form of a proposal to cap the maximum penalty for violations of local ordinances.[222] Capping sentences at 364 days would limit the immigration effects of such convictions, since an actual or potential

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[218] Newman, *supra* note 14, at 272–73. *See also* Shapiro, *supra* note 174, at 37–39.

[219] *See* Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, § 350, 110 Stat. 3009-546, 3009-639–40 (codified at INA § 241(a)(2)(E), 8 U.S.C. § 1227(a)(2)(E) (2012)).

[220] Many thanks to Christopher Lasch for informing me of these debates.

[221] *See* Shannon Dooling, *To Push Against Trump's Immigration Policies, More Communities Adopt 'Sanctuary City' Status*, WBUR NEWS (May 22, 2017), http://www.wbur.org/news/2017/05/22/sanctuary-cities-trend-massachusetts.

[222] *See* Jon Murray & Noelle Phillips, *Denver is Set to Change Its Sentencing Ordinance to Help Some Immigrants Avoid Deportation*, DENV. POST (Apr. 27, 2017), http://www.denverpost.com/2017/04/27/denver-sentencing-reform-immigrants-deportation/; Samantha Schmidt, *Denver Fights Back Against Trump's Deportation Crackdown with Surprisingly Simple Change in Law*, WASH. POST (May 24, 2017), https://www.washingtonpost.com/news/morning-mix/wp/2017/05/24/denver-fights-back-against-trumps-deportation-crackdown-with-surprisingly-simple-change-in-law/?utm_term=.134d1c887e6e.

sentence of one year can affect whether a noncitizen is rendered deportable or is barred from certain forms of relief.[223] A coalition of immigrant rights organizations proposed capping sentences at 364 days or lower.[224] The bill proposed by Denver's mayor, however, retained the 365-day sentence for several offenses, including third-time domestic violence offenses and assaults that cause injury.[225] The City Council debated whether to lower maximum sentences across the board,[226] but eventually adopted the multi-tiered approach.[227]

While the bill was being debated, a split emerged among advocates regarding which version of the bill to support. The American Civil Liberties Union and immigrant rights groups supported an across-the-board sentence reduction, arguing that the City Council should aim to disentangle local criminal ordinances as much as possible from federal immigration law.[228] Their primary argument was one that has been

[223] The maximum sentence for an offense can affect the consequences of a criminal conviction in various ways. *See, e.g.*, INA § 212(a)(2)(A)(ii)(II), 8 U.S.C. § 1182(a)(2)(A)(ii)(II) (2012) (providing exception to inadmissibility ground based on crime involving moral turpitude where the maximum penalty does not exceed imprisonment for one year and actual sentence was not more than six months); INA § 237(a)(2)(A)(i), 8 U.S.C. § 1227(a)(2)(A)(i) (2012) (rendering a noncitizen deportable if convicted of a crime involving moral turpitude within the first five years after the date of admission, if a sentence of one year or longer may be imposed for the offense). The actual sentence can also be significant. *See, e.g.*, INA § 101(a)(F), 8 U.S.C. § 1101(a)(43)(F) (2012) (designating a conviction for a "crime of violence" as an aggravated felony if a sentence of one year or more is imposed); INA § 101(a)(G), 8 U.S.C. § 1101(a)(43)(G) (same for theft conviction).

[224] The organizations included Mi Familia Vota, the Colorado People's Alliance, Together Colorado, Padres y Jovenes Unidos, the Meyer Law Office, the American Friends Service Committee, the Colorado Immigrant Rights Coalition, and the University of Denver's Criminal Defense Clinic. *See* Chris Walker, *Immigrant-Rights Groups Unveil Sanctuary City Policy*, WESTWORD (Apr. 28, 2017), http://www.westword.com/news/immigrant-rights-groups-unveiled-a-sanctuary-city-policy-they-want-denver-to-adopt-9015058.

[225] *See* Denver, Colo., Council Bill No. 17-0513 (2017), https://denver.legistar.com/LegislationDetail.aspx?ID=3030615&GUID=2AEA246B-2932-4EE4-AB0C-C55FC16DA259&Options=ID%7cText%7c&Search=17-0513.

[226] *See* Noelle Phillips, *Denver City Council Debates Sentencing Changes that Could Protect Some Immigrants from Deportation*, DENV. POST (May 3, 2017), http://www.denverpost.com/2017/05/03/denver-city-council-debates-immigrant-deportation-protection/ ("The most intense discussion during Wednesday's safety committee meeting centered on whether Council should go a step further and reduce the maximum penalty for all city crimes to 364 days, which would eliminate the deportation risk for all immigrants.").

[227] *See supra* note 225.

[228] *See* Written Statement of the Colo. Immigrant Rights Coal., submitted to the Safety, Housing, Education, and Homelessness Committee of the Denver City Council (May 11, 2017), https://denver.legistar.com/View.ashx?M=F&ID=5160192&GUID=5C5AE081-B9B9-46F6-8D77-04903B4A2E71; Written statement of the ACLU of Colo., to the Safety, Housing, Education & Homelessness Committee of the Denver

frequently cited by advocates of sanctuary city policies: that linking local policing to the deportation system makes non-citizens and members of mixed-status families less likely to interact with police as crime victims or witnesses, and thus drives them into the shadows.[229] For example, the Colorado Immigrant Rights Coalition argued that an across-the-board limit on sentences would be in the interests of *all* immigrants, including those who are victims of crimes:

> Because of the 365-day mandatory immigration consequences, many victims will be reluctant to report abuse for fear that their report would result in the deportation of their abuser, who in many cases will be a family member. Deportation of the abuser is not necessarily a desirable outcome for abused immigrant women. The absence of agency is likely to lead to underreporting of [domestic violence]. Eliminating the automatic deportation consequence leaves the abused victim with some agency and allows for "safe" reporting.[230]

These advocates argued that there is no appreciable difference, from a law enforcement perspective, between a 364-day sentence and a 365-day sentence, and that the only significance of retaining the longer sentence was to retain the linkage to the deportation system.[231]

Feminist anti-violence advocates, on the other hand, advocated retaining the one-year sentences for domestic violence offenses. They argued that "[a]ny crime in which the defendant has immediate, easy access to the victim—crimes that include domestic violence—put the victim at increased risk of subsequent and escalated harm" and that "[t]he City's municipal code offers these victims the first level of protection."[232] Unswayed by the arguments put forth by immigrant rights advocates, they contended that the 365-day sentence cap provided a useful tool for addressing domestic violence and should not be changed, even by a day.[233]

City Council (May 2, 2017), https://denver.legistar.com/View.ashx?M=F&ID=5142837&GUID=140FFAC6-4EEF-49BF-AAE9-B4BF5963FC0D; Written statement of the Meyer Law Office, PC, submitted to the Denver City Council (May 11, 2017), https://denver.legistar.com/View.ashx?M=F&ID=5160193&GUID=88BB5711-43A1-43B4-91BF-DD63FEAAF01B; Written statement of Prof. Christopher N. Lasch, submitted to the Denver City Council (May 3, 2017), https://denver.legistar.com/View.ashx?M=F&ID=5142838&GUID=21AF69CB-700B-4BB5-825C-14043FFD5FB2.

[229] *See* Written Statement of Prof. Christopher N. Lasch, *supra* note 228; Written Statement of Meyer Law Office, *supra* note 228.

[230] Statement of Colo. Immigrant Rights Coal., *supra* note 228.

[231] *See* Written Statement of Prof. Christopher N. Lasch, *supra* note 228.

[232] Written Statement of Rose Andom Ctr., submitted to Denver City Council (Apr. 26, 2017), https://denver.legistar.com/View.ashx?M=F&ID=5138120&GUID=401FECDA-0E69-4ECB-A0EC-54383B04EBEC.

[233] *Id. See also* Written Statement of Domestic Violence Initiative, submitted to Denver City Council (Apr. 30, 2017), https://denver.legistar.com/View.ashx?M=

C. Advocacy in the Shadow of Crimmigration

The debate over Denver's sanctuary city policy highlights the complexity of advocacy in the shadow of crimmigration. In a sense, both sides of the debate situated themselves within the rhetoric of fighting crime. Feminist advocates did so by pushing for harsher penalties for domestic violence offenses.[234] Immigrant rights advocates did so by contending that delinking local ordinances from federal immigration consequences would increase the reporting of crimes.[235]

While crimmigration's critics have generally focused on the need to roll back the most pernicious recent changes to the immigration laws, another key question looms: is it possible to move beyond the framework of crimmigration within advocacy efforts focused on expanding relief for immigrants? With immigrant rights advocates on the defensive (to put it mildly) under the Trump Administration, this question may be moot for the time being at the federal level. However, this question remains relevant at the state and local level, where many pro-immigrant reforms are being considered, and may well become relevant again at the federal level in a future administration.

A variety of approaches to this question can be seen in immigrant rights advocacy. As the expansion of crime-based relief makes clear, advocates have encountered success in making arguments that resonate with the tough-on-crime zeitgeist.[236] At the other end of the spectrum is an explicit resistance to this logic: groups such as Families for Freedom and the Black Alliance for Just Immigration have positioned themselves in opposition to the carceral state in all of its forms.[237]

In some cases, advocacy efforts have recalibrated themselves midstream. Activism by young undocumented immigrants provides an example of how advocates have grappled with the logic of crimmigration.

F&ID=5141207&GUID=5E33D722-4B9A-4A4C-B5D0-194EE3869270; Written Statement of SafeHouse Denver, to Denver City Council (Apr. 26, 2017), https://denver.legistar.com/View.ashx?M=F&ID=5133984&GUID=54F18772-6F3A-4273-9264-7883A42F39E9.

[234] *See supra* notes 232–33 and associated text.

[235] *See supra* notes 228–31 and associated text.

[236] For insightful analyses of "respectability politics" as it has played out within immigrant rights advocacy, see generally Cházaro, *supra* note 14; Sharpless, *supra* note 14.

[237] *See The History of Families for Freedom*, FAMILIES FOR FREEDOM, http://familiesforfreedom.org/history-families-freedom#history (last visited Nov. 14, 2017) (describing the "new division [that] emerged between the 'good immigrant' and the 'bad immigrant' [with] much of the national debate focusing on allowing the 'hard workers' to stay while deporting those with criminal convictions, even after they served their sentences," and stating that "Families for Freedom once again stood against this schism, recognizing these divisionary tactics as toxic for immigrant justice"); *The Real Crime: Mass Criminalization of Our Communities*, BLACK ALL. FOR JUST IMMIGRATION, http://blackalliance.org/therealcrime/ (last visited Nov. 14, 2017).

Early efforts to pass the DREAM Act,[238] which would have provided a path to citizenship for undocumented immigrants who were brought to the United States as children, relied heavily on the notion that this group bore no fault for having violated U.S. immigration laws.[239] Much of the rhetoric revolved around tropes of worthiness and blamelessness.[240] While not explicitly tied to crime, these tropes often implied that undocumented children were not merely morally distinct from their parents' law breaking, but were in fact *victims* of it.[241] For example, then-Congressman Blake Farenthold, a conservative Republican who has been known to take a harsh stance on unauthorized immigration, told a town hall meeting in 2013 that he supported a narrower version of the DREAM Act, because "I believe that the kids are innocent victims in this."[242]

While early advocacy efforts to pass the DREAM Act often played into these tropes, young undocumented immigrants eventually began pushing back against them. As one activist, Jonathan Perez, explains:

> If at first the DREAMer narrative was strategic, then it quickly became annoying. . . . We began to see how quickly people were ready to throw our parents and "criminals" under the bus. For people who live in low income communities of color the reality was

[238] Development, Relief, and Education for Alien Minors (DREAM) Act, S. 1291, 107th Cong. (1st Sess. 2001); Student Adjustment Act of 2001, H.R. 1918, 107th Cong. (1st Sess.). For a history of the DREAM Act, see generally Elisha Barron, *The Development, Relief, and Education for Alien Minors (DREAM) Act,* 48 HARV. J. ON LEGIS. 623 (2011).

[239] *See, e.g.*, Press Release, U.S. Senators Schumer, McCain, Durbin, Graham, Menendez, Rubio, Bennet, and Flake, Bipartisan Framework for Comprehensive Immigration Reform (Jan. 29, 2013), https://www.mccain.senate.gov/public/index.cfm/press-releases?ID=87AFA1C7-C0AC-6131-5E8E-9BF8904159E6 (stating that "individuals who entered the United States as minor children did not knowingly choose to violate any immigration laws"). The same trope appeared in the announcement of DACA, when the White House website said that the program was intended to "stop punishing innocent young people brought to the country through no fault of their own by their parents." *Earned Citizenship*, THE WHITE HOUSE: PRESIDENT BARACK OBAMA, https://obamawhitehouse.archives.gov/issues/immigration/earned-citizenship (last visited Nov. 14, 2017).

[240] *See generally* Elizabeth Keyes, *Beyond Saints and Sinners: Discretion and the Need for New Narratives in the U.S. Immigration System*, 26 GEO. IMMIGR. L.J. 207 (2012).

[241] *See* David Bacon, *Undocumented Youth Are Here Through No Fault of Their Own. But It's Not Their Parents' Fault, Either*, IN THESE TIMES (Nov. 5, 2015), http://inthesetimes.com/article/18568/dreams-deported-undocumented-unafraid-dream-act ("The phrase 'no fault of their own' casts young people as innocent victims of their parents' actions.").

[242] Esther Yu Hsi Lee & Scott Keyes, *Congressman Says Giving DREAMers a Path to Citizenship but Deporting Their Parents is a 'Compassionate Solution,'* THINKPROGRESS (Aug. 12, 2013), https://thinkprogress.org/congressman-says-giving-dreamers-a-path-to-citizenship-but-deporting-their-parents-is-a-compassionat-767b2902312c/.

> that most youth do not fit into the DREAMer identity. And neither did we.
>
> Non-profits pushed a narrative in which we had no agency in coming to this country. So who was to blame? Our parents. The dreamer narrative served as a wedge between youth who qualify for the DREAM Act and the rest of the community who didn't.[243]

Such insights have led many to begin advocating for a "clean DREAM Act" that would provide relief for young undocumented immigrants without punishing others.[244]

Discarding the logic of crimmigration is easier said than done, however. Looking at the successes and failures of immigrant rights advocacy over the past three decades reveals that the logic of crimmigration can pervade reforms even when advocates seek to avoid that result. A prime example of this phenomenon was the announcement by President Obama of a set of executive actions to benefit immigrants in November 2014.[245] On the one hand, the actions that the Obama Administration took embodied the goal that Jonathan Perez voices in the above quote: to extend protections not just to those viewed as "innocent victims" but to undocumented immigrants more broadly. These included the creation of a new program (later blocked by the courts) that would have provided temporary relief to many undocumented immigrants who arrived as adults, not just those who arrived as children,[246] and scaling back the Secure Communities program,[247] a key symbol of the crimmigration convergence. Yet the sound bite that emerged from President Obama's announcement—that the target of enforcement actions should be "felons, not families"[248]—left no doubt that he

[243] Jonathan Perez, *Challenging the "DREAMer" Narrative*, HUFFINGTON POST: BLOG (Nov. 16, 2014), http://www.huffingtonpost.com/jonathan-perez/challenging-the-dreamerna_b_6163008.html.

[244] *See, e.g.*, "Support a Clean Dream Act," Statement by the UndocuBlack Network, http://undocublack.org/cleandream/ (last visited Jan. 8, 2018).

[245] President Barack Obama, Remarks by the President in Address to the Nation on Immigration (Nov. 20, 2014), https://www.whitehouse.gov/the-press-office/2014/11/20/remarks-president-address-nation-immigration.

[246] *See 2014 Executive Actions on Immigration*, U.S. CITIZENSHIP & IMMIGRATION SERVS., https://www.uscis.gov/immigrationaction (Apr. 15, 2015); United States v. Texas, 136 S. Ct. 2271, 2272 (2016) (per curiam) (affirming lower court's injunction blocking implementation of 2014 executive action on immigration).

[247] The termination of Secure Communities was announced on November 20, 2014. Memorandum from Jeh Charles Johnson, Sec'y of the U.S. Dep't of Homeland Sec., to Thomas S. Winkowski, Acting Dir., U.S. Immigration & Customs Enf't, et al. (Nov. 20, 2014), http://www.dhs.gov/sites/default/files/publications/14_1120_memo_secure_communities.pdf.

[248] *See* President Barack Obama, *supra* note 245. For an in-depth analysis of the 2014 executive actions in the context of crimmigration, see generally Cházaro, *supra* note 9.

perceived a need to cloak any immigration reforms in the mantle of crimmigration.

A full analysis of such advocacy efforts is beyond the scope of this Article. Immigration law scholars Rebecca Sharpless and Angelica Cházaro have begun this inquiry,[249] and hopefully further analyses will follow. Taking stock of both the benefits and the costs of immigrant rights advocacy strategies is a crucial component of the analysis of crimmigration. As Janet Halley noted in justifying the study of Governance Feminism, advocacy has costs as well as benefits, and can at times "respond to more general discursive or strategic demands making victimization and identity the prerequisites for legal intelligibility and leave behind questions about the costs of these formations."[250]

CONCLUSION

This Article has argued that the end result of the shifts that took place over the past few decades was a transformation not only of who is considered a "bad" immigrant—a development comprehensively chronicled by crimmigration scholars—but also of what it means to be a "good" immigrant. At the dawn of the discretionary relief system in the early twentieth century, to be a good immigrant meant being a worker and an economic provider for one's family. At midcentury, this category expanded to include those fleeing persecution. While the immigration laws still bear the marks of these earlier value systems, such factors no longer hold the power that they once did. In the 1990s, a new notion arose in their place: that being a good immigrant means being the victim of a crime, particularly a victim who might be useful in the prosecution of that crime. This profound shift is as emblematic of crimmigration as the building boom in detention centers and the merging of police and immigration databases.

To say that the expansion of crime-based relief over the past three decades is an integral component of crimmigration is not to say that such forms of relief are necessarily undesirable; it may be that some or even all of them are, in a distributional analysis, "worth it." Rather, it is to recognize the uncomfortable fact that the advocacy gains that have been made over the past three decades are as closely linked to the carceral state as the severity that has garnered so much attention from crimmigration scholars. This more expansive notion of crimmigration makes it difficult to divide the developments of the crimmigration era along neat lines of wins and losses. However, it will ultimately produce a more robust analysis of the profound changes that have taken place in U.S. immigration law and policy over the past several decades.

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[249] *See* Sharpless, *supra* note 14; Cházaro, *supra* note 14.

[250] HALLEY ET AL., GOVERNANCE FEMINISM: AN INTRODUCTION, *supra* note 155, at xi.

Taking a critical view of the expansion of discretionary relief may seem heretical in an era in which immigration advocacy wins have been few and far between. With the broad-based assault on immigrants that has taken shape under the Trump Administration[251] and with anti-immigrant sentiment running strong in both houses of Congress, it is unclear if even those forms of relief that have found favor in the crimmigration era will hold.[252] Nevertheless, nascent critiques of crime-based relief warrant the attention of crimmigration scholars. If we focus only on those aspects of contemporary immigration law that embody severity, our understanding of crimmigration—and of how to move beyond it—will be incomplete.

[251] *See* Caitlin Dickerson, *Immigration Arrests Rise Sharply as Trump Mandate is Carried Out*, N.Y. TIMES (May 17, 2017), https://www.nytimes.com/2017/05/17/us/immigration-enforcement-ice-arrests.html; Michael D. Shear & Julie Hirschfeld Davis, *Stoking Fears, Trump Defied Bureaucracy to Advance Immigration Agenda*, N.Y. TIMES (Dec. 23, 2017), https://www.nytimes.com/2017/12/23/us/politics/trump-immigration.html.

[252] VAWA-related relief, which garnered bipartisan support in the 1990s, was the subject of sharp partisan divides in 2013. *See* Olivares, *supra* note 112, at 253–57; Jessica Reynolds, *GOP Hearts Women? Not Exactly*, CHI. TRIB. (Mar. 6, 2013), http://articles.chicagotribune.com/2013-03-06/opinion/ct-perspec-0306-women-20130306_1_transgender-victims-house-republicans-violence-against-women-act; Amanda Terkel, *Violence Against Women Act Becomes Partisan Issue*, HUFFINGTON POST (Feb. 14, 2012), http://www.huffingtonpost.com/2012/02/14/violence-against-women-act_n_1273097.html. There have been numerous signals since President Trump's inauguration that protections for victims of domestic violence are eroding. *See* Caplan-Bricker, *supra* note 202 (describing fear among immigrant survivors of domestic violence since the Trump Administration came into office); Katie Mettler, *'This Is Really Unprecedented': ICE Detains Woman Seeking Domestic Abuse Protection at Texas Courthouse*, WASH. POST (Feb. 16, 2017), https://www.washingtonpost.com/news/morning-mix/wp/2017/02/16/this-is-really-unprecedented-ice-detains-woman-seeking-domestic-abuse-protection-at-texas-courthouse/?hpid=hp_hp-morning-mix_mm-ice%3Ahomepage%2Fstory&utm_term=.e85df32ad93f (quoting County Attorney Jo Anne Bernal commenting on the courthouse arrest of a domestic violence survivor, "It has an incredible chilling effect for all undocumented victims of any crime in our community."); Marty Schladen, *ICE Detains Alleged Domestic Violence Victim*, EL PASO TIMES (Feb. 15, 2017), http://www.elpasotimes.com/story/news/2017/02/15/ice-detains-domestic-violence-victim-court/97965624/ (describing arrest by ICE of undocumented domestic violence victim when she went to court to obtain a restraining order, possibly as a result of a tip obtained by her abuser, and reporting that "[t]he detention has alarmed [County Attorney] Bernal and other county officials who fear that the arrest will scare undocumented victims of domestic abuse into staying with their abusers for fear of being deported and separated from their children or other family members"). In addition, the Trump Administration has undertaken many administrative changes that constrain the ability of immigrants to apply for crime-based relief. *See supra* note 58 (discussing the Attorney General's recent decision in *Matter of Castro-Tum*).