

BEYOND THE U VISA AND CARCERAL
FEMINIST “CRIMMIGRATION”:
TRANSFORMING THE VAWA SELF-PETITION TO
REMEDY SEXUAL VIOLENCE IN IMMIGRATION
DETENTION

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ABSTRACT

When, and on what terms and conditions, do the experiences of an immigrant survivor of sexual violence matter? ¹ On what basis do we, and should we, devise our immigration laws in relation to gender-based violence? In wrestling with these questions, this Article seeks to develop a framework with which to more meaningfully support survivors of sexual violence in immigration detention. Building on a recognition that “the power of narrative turns the legal process into a vehicle for personal and societal definition,”² this Article offers a critical examination of the “victim narratives” underlying carceral feminist and immigration machineries, as well as the structural barriers these narratives create and compound. In discussing how victim narratives move, in all their distortions, through carceral machineries, this Article offers insight into how we can create more robust forms of redress, support, and protection for survivors of sexual violence in immigration detention. It further argues that detained immigrant survivors should be understood as survivors of state violence rather than of atomized acts of sexual

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1. This Article chooses to use “survivor” as its primary terminology for describing individuals who have experienced sexual and/or other forms of gender-based violence. In choosing this terminology, this Article follows a community of scholars and activists who invoke the “survivor” language to honor the subjectivity, agency, and resilience of individuals who have experienced sexual and other forms of gender-based violence. Nonetheless, this Article recognizes and affirms that many who have experienced sexual violence and other forms of gender-based violence deliberately use the term victim, rather than survivor, in relating to their experiences. *See, e.g.,* Parul Sehgal, *The Forced Heroism of the ‘Survivor’*, N.Y. TIMES (May 3, 2016), <https://www.nytimes.com/2016/05/08/magazine/the-forced-heroism-of-the-survivor.html> [<https://perma.cc/K3BP-SSL6>]; RAINN (RAPE, ABUSE, INCEST NATIONAL NETWORK), *Victim or Survivor: Terminology from Investigation through Prosecution*, SEXUAL ASSAULT KIT INITIATIVE, <https://sakitta.org/toolkit/docs/Victim-or-Survivor-Terminology-from-Investigation-Through-Prosecution.pdf> [<https://perma.cc/8LNB-MFDD>] (last visited Apr. 14, 2020); Katie Simon, *I was raped. Call me a victim, not a ‘survivor’*, THE LILY (Apr. 20, 2018), <https://www.thelily.com/i-was-raped-call-me-a-victim-not-a-survivor/> [<https://perma.cc/P9UP-AEP5>].

2. Jessica Mayo, *Court-Mandated Story Time: The Victim Narrative in U.S. Asylum Law*, 89 WASH. U. L. REV. 1485, 1503 (2012).

violence. Using this reconceptualization, this Article calls for the creation of a new form of immigration relief for immigrant survivors of state sexual violence. This relief, the Article concludes, should build on and expand the Violence Against Women Act self-petition.

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I. INTRODUCTION

This Article fixes its gaze upon a problem that continues to fester in the United States immigration landscape: individuals suffering from sexual violence at the hands of state agents while detained in immigration custody lack viable avenues for legal redress. These experiences of violence, gravid with history’s traces, follow generations-long legal genealogies that have politicized sexual violence against immigrants. Historically, sexual

violence against immigrants has been deployed as a tool of nation-state making.³ Conversely, U.S. immigration law has functioned as a technology for strategically and selectively denouncing sexual violence against immigrants. Whether through the Violence Against Women Act (VAWA) self-petition model,⁴ the domestic violence waiver for marriage-based visas,⁵ or gender-based asylum laws,⁶ the U.S. Congress and other governing bodies have recognized—and made interventions against⁷—the ways in which precarious immigration status renders noncitizens more vulnerable to interpersonal violence (IPV),⁸

3. See Sylvanna Falcón, “National Security” and the Violation of Women, in *COLOR OF VIOLENCE: THE INCITE! ANTHOLOGY* 119, 119 (2016) (arguing through its discussion of rape cases involving Department of Homeland Security agents at the United States-Mexico border that “rape is routinely and systematically used by the state in militarization efforts at the U.S.-Mexico border”); Maria Cristina Morales & Cynthia Bejarano, *Transnational Sexual and Gendered Violence: An Application of Border Sexual Conquest at a Mexico–U.S. Border*, 9 *GLOBAL NETWORKS* 420, 424–27 (2009) (describing the sexual and gender-based violence that interweaves with structures and policies as creating a “border sexual conquest” at the United States-Mexico border).

4. For ease of reference, this Article uses the term “VAWA self-petition model” to encompass both the VAWA self-petition and VAWA cancellation of removal. U.S. CITIZENSHIP AND IMMIGRATION SERVICES, *Fact Sheet: USCIS Issues Guidance For Approved Violence Against Women Act (VAWA) Self-Petitioners* (Apr. 11, 2008), <https://www.uscis.gov/archive/archive-news/fact-sheet-uscis-issues-guidance-approved-violence-against-women-act-vawa-self-petitioners> [<https://perma.cc/U6SR-M6Y9>] (outlining the parameters of the VAWA self-petition); Rebecca Story, Cecilia Olavarria & Moira Fisher Preda, *VAWA Cancellation of Removal, in EMPOWERING SURVIVORS: LEGAL RIGHTS OF IMMIGRANT VICTIMS OF SEXUAL ASSAULT* (2013), <http://library.niwap.org/wp-content/uploads/IMM-Man-Ch9-VAWACancellationofRemoval.pdf> [<https://perma.cc/87HL-JU5W>] (describing VAWA cancellation of removal).

5. U.S. CITIZENSHIP AND IMMIGRATION SERVICES, *Information on the Legal Rights Available to Immigrant Victims of Domestic Violence in the United States and Facts about Immigrating on a Marriage-Based Visa Fact Sheet*, <https://www.uscis.gov/news/fact-sheets/information-legal-rights-available-immigrant-victims-domestic-violence-united-states-and-facts-about-immigrating-marriage-based-visa-fact-sheet> [<https://perma.cc/U6SR-M6Y9>] (last visited Apr. 22, 2020).

6. See Blaine Bookey, *Gender-based Asylum Post-Matter of A-R-C-G-: Evolving Standards of the Law*, 1 *SW. J. INT’L L.* 22 (2016); Karen Musalo, *Personal Violence, Public Matter: Evolving Standards in Gender-Based Asylum Law*, *HARV. INT’L REV.* (2014); Karen Musalo & Stephen Knight, *Asylum for Victims of Gender Violence: An Overview of the Law, and an Analysis of 45 Unpublished Decisions*, 03-12 *IMMIGR. BRIEFINGS* 1 (2003).

7. See, e.g., Lianna E. Donovan, *The Violence Against Women Act’s Protection of Immigrant Victims: Past, Present, and Proposals for the Future*, 66 *RUTGERS L. REV.* 745, 758–59 (2014) (describing the intention to “end abusers’ continued use of immigration status as a ‘key tool of control’” as Congress’s intended purpose in enacting the Violence Against Women Act); Deborah Anker, *The History and Future of Gender Asylum Law and Recognition of Domestic Violence as a Basis for Protection in the United States*, *ABA* (Apr. 28, 2020), https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/immigration/the-history-and-future-of-gender-asylum-law/ [<https://perma.cc/D5V7-HA55>] (describing the history of gender-based asylum jurisprudence in U.S. immigration law, including the adoption of the 1995 Gender Asylum Guidelines, which recognize the right to present interpersonal violence asylum claims).

8. This Article defines interpersonal violence as “a pattern of behavior used to establish power and control over another person through fear and intimidation, often including the threat or use of violence. The abuse can take several forms: physical, emotional, sexual, and economic as well as threats, stalking/surveillance, isolation and intimidation.” B.U. FAC. & STAFF ASSISTANCE OFF., *Domestic and Interpersonal Violence*, <https://www.bu.edu/fsao/resources/interpersonal-violence/> [<https://perma.cc/NPF2-KD9S>].

sexual violence, and other forms of gender-based violence. Survivors of sexual violence in immigration detention lie in the maws of these countervailing structures.

Sexual violence in immigrant detention centers continues to run rampant at staggering levels. Despite the existence of certain protections for immigrant survivors, one report after another has detailed a form of gender-based violence that has come to typify many immigrants' experiences in the United States—experiences of sexual violence perpetrated by Immigrant Customs Enforcement (ICE) officers in immigration detention.⁹ What are meaningful forms of redress currently available (or, which forms of redress *should* be available) for these survivors?

A number of existing models attempt to address sexual violence against immigrants. These models include the Prison Rape Elimination Act (PREA), the U visa, and the Violence Against Women Act (VAWA) self-petition. While each model carries prospective benefits, they ultimately suffer from significant deficiencies. While some of these deficiencies have been discussed by other scholars—such as the limitations of the PREA, which covers only a small subset of detention facilities, or the VAWA self-petition's ineffective protections for LGBTQ+ people from sexual violence—there is another crucial problem facing U visas and PREA regulations that has remained unaddressed: how they embody and further entrench carceral feminist values,¹⁰ which in turn exacerbates the problems of “cimmigration,” or the melding of criminal and immigration systems.¹¹

In addressing the issue of sexual violence in immigration detention, this Article raises two important problems for scholarly attention and critical engagement. The first problem is the pervasive lack of access to legal resources and meaningful legal remedies for immigrant survivors. The second problem touches on larger normative questions. Namely, the limited remedies that *do* exist—as well as most models that policymakers contemplate for future remedies—are situated within carceral feminist responses to sexual harm, which

9. Alice Speri, *Detained, the Violated*, THE INTERCEPT (Apr. 11, 2018), <https://theintercept.com/2018/04/11/immigration-detention-sexual-abuse-ice-dhs/> [<https://perma.cc/R9YS-TU45>]; HUMAN RIGHTS WATCH, *DETAINED AND AT RISK: SEXUAL ABUSE AND HARASSMENT IN UNITED STATES IMMIGRATION DETENTION 1* (Aug. 2010), <https://www.hrw.org/sites/default/files/reports/us0810webwcover.pdf> [<https://perma.cc/7M7N-W88A>] [hereinafter “DETAINED AND AT RISK”]; NATIONAL PRISON RAPE ELIMINATION COMMISSION REPORT 22-23 (June 2009), <https://www.ncjrs.gov/pdffiles1/226680.pdf> [<https://perma.cc/YC3E-Z843>]; Matthew Haag, *Thousands of Immigrant Children Said They Were Sexually Abused in U.S. Detention Centers, Report Says*, N.Y. TIMES (Feb. 27, 2019), <https://www.nytimes.com/2019/02/27/us/immigrant-children-sexual-abuse.html> [<https://perma.cc/359T-S2ZM>].

10. Carceral feminism, a phrase originated by Professor Elizabeth Bernstein in her article “The Sexual Politics of the ‘New Abolitionism,’” refers to “a drift . . . to the carceral state as the enforcement apparatus for feminist goals” in which policing, prosecution, and imprisonment are relied upon as the primary mechanisms for resolving gender-based violence. Elizabeth Bernstein, *The Sexual Politics of the ‘New Abolitionism,’* 18(3) DIFFERENCES 128, 143 (2007).

11. Symptoms of this “cimmigration” merger between criminal law and immigration law include: (1) an increasing substantive overlap between immigration law and criminal law; (2) immigration enforcement that increasingly resembles criminal law enforcement, and (3) procedural aspects of prosecuting immigration violations that carry many of the earmarks of criminal procedure. See Juliet Stumpf, *The Cimmigration Crisis: Immigrants, Crime, and Sovereign Power*, 56 AM. U. L. REV. 367, 381 (2006).

predicate state responsiveness upon survivors' proximity to "innocent victim" narratives. As this Article will explain, these responses raise normative concerns because they ultimately serve to further marginalize immigrant survivors. This Article thus seeks to address the yawning gap in remedies available to survivors of sexual violence in immigration detention by advocating for the creation of a new form of immigration relief—an expanded VAWA self-petition based on reparative, rather than carceral feminist, logics.

In the course of forwarding this argument, this Article highlights the problems of the carceral feminist framework, which conditions access to legal recognition and remedy for sexual violence survivors on conformity to "innocent crime victim" narratives. By limiting immigration relief to those who feed the carceral state¹²—a state that disproportionately metes out premature death for immigrants and other marginalized communities—the carceral feminist model harms the very survivors of state and interpersonal violence in whose name it operates. Seeking thus to decouple legal responsiveness from survivors' participation in the carceral state, this Article instead looks to the VAWA self-petition model to locate another basis for immigrants' legal legibility that does not rely on the performance of a carceral feminist "innocent crime victim" narrative: a reparative, or "structural responsibility" conceptualization of immigration law. This conceptualization, grounded in an unwavering appreciation for the inherent dignity of immigrant communities, understands immigration law as playing an important role in intervening against structural gender-based harms rather than brokering a respectability politics focused on the atomized behavior of individual immigrants. This Article accordingly calls for an expansion of the VAWA self-petition model to provide immigration relief to survivors of state sexual violence in immigration detention.

This Article proceeds as follows: Part I describes the nature and scale of the problem of sexual violence in immigration detention. Part II outlines the models for legal relief and intervention that mark the current landscape around this issue. In describing the current models—the PREA, the U visa, and the VAWA self-petition—this Article focuses both on their practical limitations and useful features. Part III of this Article offers a definition of carceral feminism and explains its normative deficiencies, namely, its connections with respectability politics and "innocent victim" narratives.¹³ This section also clarifies how carceral feminism pervades two of the principal approaches to sexual violence against immigrants: the U visa and the VAWA self-petition. It also argues that all current models that could inspire a mode of redress, including the PREA, U visa, and VAWA self-petition, fail because they adhere to a carceral feminist framework. Part IV advocates for a new form of legal redress—a transformed and expanded VAWA self-petition—that can confront the problems of carceral feminism by addressing the structural forces that produce sexual violence against immigrants generally and in detention specifically. Part IV also suggests how to operationalize this expanded VAWA self-petition. Finally, this Article

12. Namely, those whose stories of victimhood and/or survivorship conform to "innocent victim" narratives and thus legitimate the norms and assumptions undergirding carceral feminist frameworks. *See infra* PART IV.B.

13. These narratives include the "good immigrant as victim" and the "innocent victim as worthy" narratives. *See infra* notes 158-63 and accompanying text.

concludes with a discussion of how its proposed interventions can inform future discourses both within and beyond the immigration landscape.

II.

THE LANDSCAPE OF SEXUAL VIOLENCE IN IMMIGRATION DETENTION

The purpose of this section is twofold. First, this section will clarify how and why sexual violence against immigrants in detention constitutes state violence. Second, this section will outline the nature and scale of the problem of sexual violence in immigration detention.

A. *Understanding Officer-Perpetrated Sexual Violence as State Violence*

Some readers may wonder whether violence committed by an immigration agent constitutes “state violence,” or if it is better understood as the result of choices of individuals who happen to be employed by the state. Sexual violence committed by immigration officers is properly understood as state violence for two reasons. First, sexual violence against immigrants functions as a definitional vehicle of the state; namely, it works with other forms of border-reinforcing violence to circumscribe the boundaries of state belonging, and with it, the state norms and values underlie this (in/ex)clusion. Second, these acts of sexual violence do not occur in isolation; rather, they are embedded within interlocking structural forces that create a sociolegal matrix—“the state”—fraught with structural violence. This structural violence, which manifests in inequities along vectors of gender, race, class, and other identities, informs who is made particularly vulnerable to acts of sexual violence, and how and whether these acts are addressed. Moreover, the structures that amplify immigrants’ vulnerability to sexual violence in detention interlock with structures that amplify vulnerability to sexual violence outside of detention; this interconnectedness further points to the larger sociolegal matrix in which this sexual violence is situated.

Under the first and broadest conceptualization, sexual violence constitutes state violence because it is a vehicle through which the state defines and builds itself.¹⁴ Sociologist Max Weber observed that the state, by its own definition, retains a monopoly on violence because it is the only entity authorized to use violence.¹⁵ Building on this analysis, scholars Jake Alimahomed-Wilson and Dana Williams explain that because legitimized and systemized violence “*is* the essence of the state,” conduits of state violence “including border guards, the military, local police forces, spy agencies, and prisons are all not only well-funded, diverse, and empowered components of the US and other states, but also core

14. See M. Gabriela Torres, *State Violence*, in *THE CAMBRIDGE HANDBOOK OF SOC. PROBS.* 381–98 (A. Javier Treviño ed., 2018) (defining state violence as “the use of force and/or other intimidation practices by state agents and state institutions typically for the purposes of state-building”).

15. Max Weber, *Politics As a Vocation*, in *FROM MAX WEBER: ESSAYS IN SOCIOLOGY* 77–128 (H. Gerth & C.W. Mills eds., 1946).

to what *defines and makes* the state.”¹⁶ Thus, sexual violence does not exist in isolation to other kinds of state violence, but subtends them.¹⁷

Additionally, violence functions as an expressive language of statehood. Most notably, states use violence to reinforce borders, which in turn reinforce the boundaries of state identity. This process occurs because state identities are built, in part, through the demarcation between what and whom are imagined as “of” versus “outside” the state. Legal theorists Leti Volpp and Mary Dudziak write of this expressive function in the following terms: “Borders are constructed in law, not only through formal legal controls on entry and exit but also through the construction of rights of citizenship and noncitizenship.”¹⁸ In this sense, violence that reinforces borders contributes to the state building project by bounding the U.S. identity that comes from this “in/out” circumscription.

Understanding sexual violence against immigrants as state violence interweaves these conceptualizations. Sexual violence against immigrants contributes to the state-building project by contributing to the reinforcement of borders; namely, sexual violence against immigrants is part of a larger U.S. apparatus that has waged war on immigrants and expelled them outside the boundaries of state belonging. Other elements of this apparatus include the barrage of state policies that dehumanize and threaten immigrant communities,¹⁹ as well as the anti-immigrant narratives that otherize them as “enemies of the state”

16. Jake Alimahomed-Wilson & Dana Williams, *State Violence, Social Control, and Resistance*, 6 J. SOC. JUST. 1, 3 (2016).

17. As but one example of the state-defining definitional quality of sexual violence, states have used sexual violence as a weapon of war throughout history—and war has functioned as one medium through which states have built themselves. See Karen A. Rasler & William R. Thompson, *War Making and the Building of State Capacity: Expanding the Bivariate Relationship*, in OXFORD RES. ENCYCLOPEDIA POL. 2 (2017) (positing that a war’s intensity drives state making); Hendrik Spruyt, *War and State Formation: Amending the Bellicist Theory of State Making*, in DOES WAR MAKE STATES? 73, 75 (Lars Bo Kaspersen & Jeppe Strandsbjerg eds., 2017).

18. LEGAL BORDERLANDS: LAW AND THE CONSTRUCTION OF AMERICAN BORDERS 2, 6 (Mary L. Dudziak & Leti Volpp eds., 2006) (“Which bodies can enter and which bodies are expelled, and the attempted enforcement of those decisions, bounds American identity through the incorporation of some and the exclusion of others.”). see also Leti Volpp, *Feminist, Sexual, and Queer Citizenship*, in THE OXFORD HANDBOOK OF CITIZENSHIP (2017) 153, 153 (“Citizenship is ‘Janus-faced,’ simultaneously projecting the warm embrace of inclusion while excluding those who are outside the borders of belonging. Janus, the Roman god of doors and gates, was portrayed as having two faces, gazing in opposite directions. Citizenship is similarly split. One face of citizenship welcomes ‘we the people’ within the circle of membership; the other face refuses admission to those outside.”).

19. See Alina Camacho-Gingerich & C. Mario Russell, *Introduction*, 24 J. SOC. DISTRESS & HOMELESS 109 (2015); Julia C. Young, *Making America 1920 Again? Nativism and US Immigration, Past and Present*, 5 J. MIGRATION & HUM. SEC. 217 (2017); Daniel Denvir, *The Deep Roots of Trump’s Anti-Immigrant Policies*, JACOBIN (Feb. 8, 2020), <https://jacobinmag.com/2020/02/donald-trump-anti-immigration-policies-history-muslim-ban-racism> [<https://perma.cc/FN9J-TDMN>]; Ian Gordon and Tasneem Raja, *164 Anti-Immigration Laws Passed Since 2010? A MoJo Analysis*, MOTHER JONES (Mar./Apr. 2012), <https://www.motherjones.com/politics/2012/03/anti-immigration-law-database/> [<https://perma.cc/6DAP-AXPN>].

and “foreign invaders.”²⁰ It as an element of the systemized violence that defines “the essence of the state” and the border-reinforcing violence through which the state “bounds its identity” that sexual violence against immigrants operates as state violence.

Second, as Alimahomed-Wilson and Williams have argued, state violence is not limited to discrete instances of harm committed by state actors. Rather, state violence also assumes the form of structural violence:

[State] violence is not always an “event” but rather a process or ongoing social condition embedded in our everyday lives . . . violence takes both physical and structural (non-physical) forms and manifests in racialized, gendered, classed, and sexualized forms. While it is easier to “see” direct violence, such as police killings, or the bloody aftermath of US drone killings around the world, structural violence is a by-product of our highly unequal social system: a social and economic system that is permeated by racial, gender, and class-based inequality.²¹

As Alimahomed-Wilson and Williams further explain, careful sociolegal analysis of state violence requires a lens that looks “beyond [incidents] embodied in physical pain and injury in order to make connections between (macro) structural violence with interpersonal (micro) forms of violence, state or otherwise, that originate in broader social structures.”²²

Understood within this analytical frame, acts of violence committed by ICE officers are not isolated episodes. Rather, they are embedded within a web of state policies and

20. See Falcón, *supra* note 3, at 120 (“Acts of sexual violence which target undocumented (primarily Mexican) women at the U.S.-Mexico border are certainly informed by a legacy of colonialism, which dates back to the forced imposition of a border in 1848. More than 150 years later, migrant women’s bodies continue to denote an ‘alien’ or ‘threatening’ presence subject to colonial domination by U.S. officials. Many women who cross the border report that being rape[d] was the ‘price’ of not being apprehended, deported, or of having their confiscated documents returned. This price is unique to border regions in general; while militarized rapes are part of a continuum of violence against women, I call these violations militarized *border* rapes because of the ‘power’ associated with the border itself. In this setting, even legal documentation can provide a false sense of security, because militarization efforts have socially constructed an ‘enemy’ and Mexican women and other migrants fit that particular profile.”); see also Ben Zimmer, *Where Does Trump’s ‘Invasion’ Rhetoric Come From?*, THE ATLANTIC (Aug. 6, 2019), <https://www.theatlantic.com/entertainment/archive/2019/08/trump-immigrant-invasion-language-origins/595579/> [<https://perma.cc/3JF5-LYT4>]; Andrew Kaczynski, *Trump official has talked about undocumented immigrants as ‘invaders’ since at least 2007*, CNN (Aug. 17, 2019, 9:00 AM), <https://www.cnn.com/2019/08/17/politics/kfile-ken-cuccinelli-immigration-invasion-rhetoric/index.html> [<https://perma.cc/6FT7-TAEY>]; Laura Ingraham, *Laura Ingraham: Immigration truths the Democrats deny*, FOX NEWS (Dec. 13, 2018), <https://www.foxnews.com/opinion/laura-ingraham-immigration-truths-the-democrats-deny> [<https://perma.cc/7UNH-NT4W>] (providing an example of “foreign enemy” language being deployed against immigrants); Aaron Nelsen, *Trump’s Claim of ‘Enemy Combatants’ Pouring Across Southern Border Worries Advocates*, SAN ANTONIO EXPRESS-NEWS (Apr. 2, 2018), <https://www.expressnews.com/news/local/article/Trump-s-claim-that-enemy-combatants-are-12800248.php> [<https://perma.cc/5AQF-CD5U>].

21. Alimahomed-Wilson & Williams, *supra* note 16, at 4; see also CECILIA MENJÍVAR, *A Framework for Examining Violence*, in ENDURING VIOLENCE: LADINA WOMEN’S LIVES IN GUATEMALA 27–40 (2011).

22. Alimahomed-Wilson & Williams, *supra* note 16, at 3–4.

practices that, taken together, enable abuses of power to persist with impunity. It is this larger system—which manifests in everything from lack of legal access to inadequate accountability measures against harmful state agents²³—that renders immigrants more vulnerable to abuse. Sexual violence in immigration detention is therefore state violence because it operates within a matrix of policies that conspire to create vectors of power and vulnerability; these vectors demarcate “social, economic, political, psychological and symbolic borders within the United States that connect to sexuality, gender, race, and class inequalities.”²⁴

The structures that heighten immigrants’ vulnerability to sexual violence within detention interconnect with structures that heighten this vulnerability outside of detention; this interconnectedness further demonstrates that this violence is indeed structural in nature and therefore a form of state violence. Importantly, non-detained immigrants face multivariate vulnerability to sexual violence. A study conducted among school-aged girls found that immigrants are almost twice as likely as their non-immigrant peers to have experienced recurring incidents of sexual assault.²⁵ Other studies have found that immigrants are more vulnerable to sexual assault, interpersonal violence, and other gender-based harm.²⁶ These data highlight structural problems that infiltrate immigrants’ lives both inside and outside of detention. For example, outside the detention context, steep power differentials between abusers and immigrants render them particularly vulnerable to abuses of power, including sexual violence. Many factors conspire to create these steep power differentials. Language barriers, lack of familiarity with U.S. law, and fear of deportation sharpen power differentials by preventing many survivors from seeking help or

23. See Speri, *supra* note 9; NATIONAL PRISON RAPE ELIMINATION COMMISSION REPORT, *supra* note 9, at 22–23.

24. EITHNE LUIBHÉID, ENTRY DENIED: CONTROLLING SEXUALITY AT THE BORDER 129–30 (2002). “Women’s bodies historically serve as the iconic sites for sexual intervention by state and nation-making projects.” *Id.* at xi. “[T]heir presence in the United States is framed as an illegal act. . . .” ANDREA J. RITCHIE, INVISIBLE NO MORE 37, 128 (2017). Immigrant women are

constructed as inherently criminal, imbued with negative qualities, and positioned outside the conventional boundaries of society . . . [and] rapable . . . [t]he borders produced by [sexual violence by government officers] are thus not reducible to the nation’s territorial borders Instead they involve social, economic, political, psychological and symbolic borders within the United States that connect to sexuality, gender, race, and class inequalities. Yet, at the same time, the reproduction of these internal borders articulates with practices for controlling the territorial border Rape inscribes undocumented women within US-based hierarchies of gender, sexuality, race and class.

LUIBHÉID, *supra*, at 128–30. Although Ritchie focuses her analysis on immigrant women, this Article takes the position that while women and gender minorities may be particularly vulnerable, sexual violence against immigrants of all gender identities operates as a site for intervention and nation-making projects.

25. Michele R. Decker, Anita Raj & Jay G. Silverman, *Sexual Violence Against Adolescent Girls: Influences of Immigration and Acculturation*, 13 VIOLENCE AGAINST WOMEN 498, 507 (2007).

26. See Nicole Hallett, *Immigrant Women in the Shadow of #MeToo*, U. BALT. L. REV. 59, 61 (2019).

support.²⁷ Laws that deny work authorization to undocumented immigrants or otherwise bar access to other employment opportunities force many into jobs with threadbare or ill-enforced labor protections, exposing them to unchecked abuses of power.²⁸ When involved, police often fail to provide meaningful interventions for immigrant survivors.²⁹ In one of the strongest analogues to the detention context, non-detained immigrants—many of whom come from communities of color—often face greater risk of sexual violence at the hand of law enforcement agents.³⁰ Policies such as “Remain in Mexico” also render immigrants increasingly vulnerable to sexual violence during their journeys to the United States.³¹ These structural elements, many of which have analogues in the detention

27. See *id.* at 62 (“The fact that immigrant women do not report such high rates of gender-based violence is not surprising. They often do not speak English, are not familiar with the laws in the United States, and fear deportation, particularly if they are undocumented. Perpetrators may target them because of these vulnerabilities, and their fear of reporting may cause them to be repeat victims. Normal power imbalances in the workplace are heightened. Domestic abusers of immigrant women may have more power over them than they otherwise would, particularly when the abuser holds the keys to lawful immigration status.”); Jessica Mindlin, Leslye E. Orloff, Sameera Pochiraju, Amanda Baran & Ericka Echavarria, *Dynamics of Sexual Assault and the Implications for Immigrant Women*, in EMPOWERING SURVIVORS: LEGAL RIGHTS OF IMMIGRANT VICTIMS OF SEXUAL ASSAULT 3 (2013), <http://niwaplibrary.wcl.american.edu/wp-content/uploads/2015/CULT-Man-Ch1-DyanimcsSexualAssaultImplications-07.10.13.pdf> [<https://perma.cc/X7TP-ETYE>] (“Immigrant girls and women particularly those with undocumented or temporary immigration status are afraid to report crime victimization to law enforcement officials out of fear that such reports will lead [to] deportation.”); see also Leslye E. Orloff, Mary Ann Dutton, Giselle Aguilar Hass & Nawal Ammar, *Battered Immigrant Women’s Willingness to Call for Help and Police Response*, 13 UCLA WOMEN’S L.J. 43, 89 (2003).

28. See generally HUMAN RIGHTS WATCH, *Cultivating Fear: The Vulnerability of Immigrant Farmworkers in the US to Sexual Violence and Sexual Harassment* (2012), https://www.hrw.org/sites/default/files/reports/us0512ForUpload_1.pdf [<https://perma.cc/BE8M-33MW>] (describing the U.S. labor and immigration laws that render hundreds of thousands of immigrant farmworkers in the United States at high risk of sexual violence and sexual harassment in their workplaces); Cristina Tanzola, *Barriers of Being Undocumented: Mexican Women, U.S. Immigration Law, and the Reporting of Sexual Assault and Abuse*, 42 Women’s History Theses and Capstones 10 (May 2019), https://digitalcommons.sl.c.edu/womenshistory_etd/42 [<https://perma.cc/G5RD-RCJA>] (describing how “immigrant women have the added vulnerabilities of being forced to accept jobs that place them at greater risk” because “[w]orking in private homes, these women’s isolation and dependency on their employers, can create a relationship that turns exploitative” and “exploitation of immigrant women and their bodies is enhanced by immigration policies”); PIERRETTE HONDAGNEU-SOTELO, DOMÉSTICA: IMMIGRANT WORKERS CLEANING AND CARING IN THE SHADOWS OF AFFLUENCE 227 (2001); S. POVERTY L. CTR., INJUSTICE ON OUR PLATES 41–53 (2010), https://www.splcenter.org/sites/default/files/d6_legacy_files/downloads/publication/Injustice_on_Our_Plates.pdf [<https://perma.cc/7TZG-NS54>] (describing the “constant menace” of sexual violence that plagues immigrant workers in U.S. food industries).

29. Mindlin, Orloff, Pochiraju, Baran & Echavarria, *supra* note 27, at 6.

30. See generally Andrea Ritchie, *Law Enforcement Violence Against Women of Color*, in COLOR OF VIOLENCE: THE INCITE! ANTHOLOGY 138 (2016).

31. Hallett, *supra* note 26, at 74–77; Deborah Bonello & Erin Siegal McIntyre, *Is Rape the Price to Pay for Migrant Women Chasing the American Dream?*, SPLINTER (Sept. 10, 2014, 5:51 PM), <https://splinternews.com/is-rape-the-price-to-pay-for-migrant-women-chasing-the1793842446> [<https://perma.cc/S9LB-VAYE>]; AMNESTY INT’L, INVISIBLE VICTIMS: MIGRANTS ON THE MOVE IN MEXICO 15–16 (2010), <https://www.amnesty.org/download/Documents/36000/amr410242010eng.pdf> [<https://perma.cc/825N-63EJ>].

context,³² interweave to create key facets of a sociolegal matrix—“the state”—fraught with risk of exploitation generally and sexual violence particularly.

It is within this framework that we can understand the rampant sexual violence in immigration detention as state violence. The following section provides a bird’s-eye view of this problem as told through the data and third-person accounts on the issue, as well as through the gaps that riddle the currently existing information.

B. Sexual Violence in Immigrant Detention: A Grisly Picture as Told by the Stories, Statistics, and Silences

Recent history has witnessed an unprecedented surge of immigration detention in the United States.³³ The Department of Homeland Security (DHS) is a system “tasked with the safety of the 40,000 women, men, and children it detains each day in more than 200 jails, prisons, and detention centers across the country.”³⁴ With the numbers of detained immigrants at a staggering high and rising, the prevalence—and awareness—of sexual violence committed by state officers against detainees has also grown.

Despite DHS having formal policies in place to prevent sexual violence,³⁵ these policies have not broken the cycles of sexual violence in which many detainees find themselves trapped.³⁶ A 2017 complaint filed by the California-based nonprofit Community Initiatives for Visiting Immigrants in Confinement (CIVIC) states that the DHS Office of the Inspector General (OIG, the agency tasked with independently reviewing the department’s various agencies) received over 33,000 complaints of sexual and physical abuse by

32. See *infra* PART II.C.

33. For a brief legal history of the surge in detention, see Grace Trueman, *Pocketing A Pretty Penny: Sexual Victimization, Human Rights, and Private Contractors in the U.S. Immigration Detention System*, 89 U. DET. MERCY L. REV. 339 (2012) (“The large numbers are due in part to the enactment of the INA and IIRIRA. IIRIRA effectively broadened the categories for detention, making any noncitizen with a prior criminal conviction and aliens without proper documentation automatic detainees. It also established that throughout their removal proceedings, detainees have no right to judicial review of their detention status and are required to wait in detention facilities.”).

34. Speri, *supra* note 9.

35. People taken into ICE custody are given an orientation as well as a detainee handbook, available in five languages, which includes a section on sexual abuse and information on the channels available to file a grievance. Speri, *supra* note 9; U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, *National Detainee Handbook* (Apr. 2016), <https://www.ice.gov/sites/default/files/documents/Document/2017/detainee-handbook.PDF> [<https://perma.cc/Q7CH-85AW>]. Additionally, “[f]lyers around detention units call on detainees to ‘break the silence’ and report sexual abuse, and list names for various ICE and DHS offices and hotlines, while mailboxes allow them to post grievances.” Speri, *supra* note 9. The handbook also includes information about detainees’ rights to medical assistance and mental health support—which are regularly denied. *Id.* “It also reminds detainees that they cannot be retaliated against for reporting sexual abuse, and that filing grievances has no impact on their immigration cases.” *Id.* Notably, ICE does stipulate that false allegations can result in disciplinary measures but not immigration consequences. *Id.* The handbook reads: “[s]exual abuse and assault is never the victim’s fault. However, you are better protected if you carry yourself in a confident manner.” *Id.*

36. Speri, *supra* note 9.

its agencies from 2010 until 2016.³⁷ The CIVIC complaint, which is based on several Freedom of Information Act (FOIA) requests, stipulates that the OIG only started categorizing “sexual abuse” complaints in 2014.³⁸ Since then, the agency has received at least 1,016 reports—or more than one complaint of sexual abuse per day.³⁹ The majority of these complaints have come from ICE.⁴⁰ The OIG received 402 complaints of “coerced sexual contact,” 196 complaints of “sexual harassment,” and 380 complaints of “physical or sexual abuse” lodged against ICE.⁴¹ Despite this deluge of complaints, ICE ignored almost 98% of them, deeming them unsubstantiated or referring them back to the agency accused of the abuse with no follow-up.⁴² The agency investigated less than one percent of these cases in total.⁴³

Similarly, in 2018, *The Intercept* released a report sharing the results of a public records request with the OIG.⁴⁴ The records obtained by *The Intercept* include 1,224 sexual abuse complaints filed between 2010 and September 2017, primarily about incidents that took place in ICE custody.⁴⁵ Fifty-nine percent of the documented incidents identified ICE contractors or officers as the abusers; in 34% of these reports, an ICE officer either directly witnessed the alleged abuse or was alerted that the abuse had taken place; 22% of these complaints identified an officer as the alleged perpetrator as well as at least one additional officer as witness.⁴⁶ In earlier responses, the OIG indicated that the office received some 33,000 complaints between 2010 and 2016 alleging a wide range of abuses in immigration detention.⁴⁷ The OIG provided records documenting investigations for just two percent of the complaints it shared with *The Intercept*.⁴⁸ According to *The Intercept* report, although ICE has claimed that it investigates all complaints, between 2012 and 2017, ICE found that only 160, or 12%, of complaints were “substantiated,” while 793, or 59%, were “unsubstantiated,” and 345, or 26%, were “unfounded.”⁴⁹ Of the 1,224 complaints it received in that time period, the OIG investigated 30 according to the data released to *The*

37. COMMUNITY INITIATIVES FOR VISITING IMMIGRANTS IN CONFINEMENT (CIVIC), RE: SEXUAL ABUSE, ASSAULT, AND HARASSMENT IN U.S. IMMIGRATION DETENTION FACILITIES 2–3 (Apr. 11, 2017), http://www.endisolation.org/wp-content/uploads/2017/05/CIVIC_SexualAssault_Complaint.pdf [<https://perma.cc/2W3K-G3KT>].

38. *Id.* at 5.

39. *Id.* at 1.

40. *Id.*

41. *Id.* at 6.

42. *Id.* at 4.

43. *Id.* Notably, this data includes incidents involving sexual violence from other detainees as well as officers.

44. Speri, *supra* note 9.

45. *Id.*

46. *Id.*

47. *Id.*

48. *Id.*

49. *Id.* Notably, three percent of investigations remained open during the publishing of *The Intercept* report.

Intercept.⁵⁰ Conversely, when *The Intercept* staff members reviewed the complaints, they found that

some 56 percent of the reports reviewed [] described instances of sexual assault, while 307, or 25 percent, described sexual harassment without physical contact . . . Seventy-two (6 percent) reports also detailed some form of verbal abuse, and 272 complaints (22 percent) described non-sexual physical violence. In 37 complaints, the victim was a minor, and in about 20, the victim was a member of the LGBTQ community.⁵¹

Cases from Texas, Arizona, Florida, New York, New Jersey, Pennsylvania, and Washington have also detailed sexual atrocities committed against immigrants in detention.⁵² In 2010, Human Rights Watch published a report documenting widespread allegations of sexual violence in ICE facilities around the country, warning that these incidents pointed to an emerging “pattern across the rapidly expanding national immigration detention system.”⁵³ As one example of this emerging pattern, in 2005, detainees at the Hudson County Correctional Center in New Jersey reported that a guard used a camera phone to take pictures of them leaving the shower and the bathroom and when they were sleeping.⁵⁴ Another incident came to light during a National Prison Rape Elimination Commission hearing in which a transgender woman shared her experience of sexual assault and mistreatment while detained at California’s San Pedro Service Processing Center in December 2003.⁵⁵ The report also featured a story of detainees at the Northwest Detention Center in Tacoma, Washington who had relayed their experiences of sexual harassment and assault in a series of interviews between September 2007 and April 2008.⁵⁶

50. *Id.*

51. *Id.*

52. *See id.* (recounting reports of a guard who had assaulted several women held at the privately-operated T. Don Hutto detention center in Taylor, Texas); Olivia P. Tallet, *Immigrant accuses ICE contractor of rape at Houston detention facility*, HOUS. CHRONICLE (May 28, 2020), <https://www.houstonchronicle.com/news/houston-texas/houston/article/immigrant-accuses-ice-contractor-of-rape-detention-15299182.php> [<https://perma.cc/B9AW-KVKV>] (discussing suit against ICE facility in Houston, Texas for sexual violence suffered while in detention); ACLU OF ARIZONA FILES LAWSUIT ON BEHALF OF TRANSGENDER WOMAN SEXUALLY ASSAULTED BY CCA GUARD, ACLU (Dec. 5, 2011), <https://www.aclu.org/press-releases/aclu-arizona-files-lawsuit-be-half-transgender-woman-sexually-assaulted-cca-guard> [<https://perma.cc/876Q-7GXA>] (alleging sexual assault committed by a detention officer in the Eloy Detention Center); Victoria López & Sandra Park, *ICE Detention Center Says It’s Not Responsible for Staff’s Sexual Abuse of Detainees*, ACLU (Nov. 6, 2018), <https://www.aclu.org/blog/immigrants-rights/immigrants-rights-and-detention/ice-detention-center-says-its-not-responsible> [<https://perma.cc/RM2W-EXWT>] (detailing suit against Berks Family Residential Center in Pennsylvania for its failure to protect immigrant from sexual violence she experienced while detained); Trueman, *supra* note 33, at 339; Safia Samee Ali, *Sexual Assaults in Immigration Detention Centers Rarely Get Investigated*, GROUP CHARGES, NBC NEWS (Apr. 12, 2017), <https://www.nbcnews.com/news/us-news/sexual-assaults-immigration-detention-centers-don-t-get-investigated-says-n745616> [<https://perma.cc/RN4C-DT38>].

53. DETAINED AND AT RISK, *supra* note 9, at 1.

54. *Id.* at 13.

55. *Id.* at 13–14.

56. *Id.* at 11.

Additionally, the Human Rights Watch report shared a news story exposing that in 2008, a guard in the Texas Port Isabel Service Processing Center had assaulted five women while they were patients in the infirmary under the guise of operating under physician instructions.⁵⁷ In another incident featured in the report, detainees shared stories of frequent sexual abuse at the South Texas Detention Complex.⁵⁸ Another detainee was called three times for vaginal examinations by a medical staff member during her 14-month detention in an Arizona facility despite never complaining of a gynecological problem.⁵⁹ She told Human Rights Watch that she and six other detainees who had similar experiences decided to file a grievance against the man “because I felt like he is truly hurting my pride as a woman.”⁶⁰

The T. Don Hutto detention center, a privately-operated detention center in Texas, has attracted a rash of news coverage exposing repeated incidents of sexual violence. In 2007, journalists uncovered that a Hutto guard had assaulted a detained woman “while her son was sleeping in his crib inside the cell.”⁶¹ In 2010, reports broke about more assaults that had occurred in the Texas facility, this time committed by a guard who had assaulted several women.⁶² Then, in 2011, a Hutto male guard sexually assaulted eight women he was transporting from the center—despite an agreement between ICE and private operator Corrections Corporation of America (now CoreCivic) that detainees would only be transported by guards of the same gender.⁶³ In 2011, while in the process of filing a federal lawsuit on behalf of women assaulted at Hutto, the American Civil Liberties Union obtained public records detailing nearly 200 allegations of sexual assault in immigration detention since 2007, “from nearly every state in the nation that houses an immigration detention facility.”⁶⁴ The T. Don Hutto detention center made news again in 2018 after a detainee who reported being sexually assaulted by a guard attempted suicide there.⁶⁵

57. *Id.* at 8.

58. *Id.* at 9.

59. *Id.* at 12.

60. *Id.*

61. Ryan Kocian, *CCA Guard Accused of 8 Sexual Assaults*, COURTHOUSE NEWS (Apr. 15, 2015), <https://www.courthousenews.com/cca-guard-accused-of-8-sexual-assaults/> [<https://perma.cc/YMP2-Q2QJ>].

62. *See* Speri, *supra* note 9.

63. *Id.*

64. AMERICAN CIVIL LIBERTIES UNION, DOCUMENTS OBTAINED BY ACLU SHOW SEXUAL ABUSE OF IMMIGRATION DETAINEES IS WIDESPREAD NATIONAL PROBLEM (Oct. 19, 2011), <https://www.aclu.org/news/documents-obtained-aclu-show-sexual-abuse-immigration-detainees-widespread-national-problem> [<https://perma.cc/BB4F-8BYP>].

65. GRASSROOTS LEADERSHIP, *Laura Monterrosa’s mental health dangerously declines in detention* (Feb. 19, 2018), <https://grassrootsleadership.org/releases/2018/02/laura-monterrosa-s-mental-health-dangerously-declines-detention> [<https://perma.cc/H8KU-AEZJ>].

These statistics and stories paint a grisly picture of an insular, closed, self-governing system in which state sexual violence runs rampant with little to no outside accountability.⁶⁶

C. *Structural Barriers Frustrate Access to Justice and Redress for Survivors of State Sexual Violence in Immigration Detention*

Myriad structural problems—including a lack of access to counsel, language barriers, and system-wide unresponsiveness—conspire together to instill feelings of inefficacy and heightened vulnerability in many immigrant survivors.⁶⁷ Due to a lack of data-keeping

66. See Hannah Brenner, Kathleen Darcy & Sheryl Kubiak, *Sexual Violence as an Occupational Hazard & Condition of Confinement in the Closed Institutional Systems of the Military and Detention*, 44 PEPP. L. REV. 881, 886 (2017) (“The closed nature of the military and detention facilities creates an environment in which sexual victimization occurs in isolation, often without knowledge of or intervention by those on the outside. The internal processes for addressing this victimization allow for sweeping discretion on the part of system actors. Within both systems, accusations of sexual violence are addressed by specialized, unique, and complex internal policies and procedures distinct from those in the civilian community.”). See also Speri, *supra* note 9 (“Madhuri Grewal, a policy counsel with the ACLU, told *The Intercept* that not all detention facilities are in compliance with required standards, but even when they officially are, ‘rampant violations’ of those standards are commonplace. Reports by independent agencies, NGOs, and the OIG provide limited oversight, she said, ‘but that’s no way to ensure that this massive system is actually complying with detention standards.’”).

67. Speri, *supra* note 9. *The Intercept* shares many harrowing reports from survivors, including one survivor who reported her abuse through her attorney, only to be interviewed by “officials ‘from Washington’” who ultimately did nothing—leaving the guard who perpetrated the abuse to keep his job and shift, and who continued to abuse detainees, who “never wanted to report it.” *Id.* Another report shares the story of a detainee who

had reported repeated sexual harassment by a fellow detainee at a California facility, called the agency to follow up on his report, only to find that there was no record of his original complaint. “[Detainee] says nothing has been resolved since the assault,” his file reads. “Claims he called into a ‘hotline’ to ask about the report he made on the assault, and they told him there was no history of a sexual assault report. States he believes the situation is not being properly handled. laims [sic] when he asks for help with the situation it only ???backfires??? [sic] on him.”

Id. Yet another report, which appears to have been filed internally by the Office for Civil Rights and Civil Liberties, or CRCL,

notes a breakdown in the redress process and ICE’s failure to comply with guidelines. The report describes communication received by CRCL from a detainee in Arizona who filed a sexual assault report with the facility on the day he was assaulted, but received no response or communication until a week later, “when he was informed there was no evidence of officer misconduct,” his file reads. Then the CRCL officer filing the internal complaint adds a note “reminding” the facility that it is required to report sexual assault allegations.

transparency, discretionary reporting requirements, substantial power differentials between officers and detainees,⁶⁸ deep-seated fear amongst detainees, and a lack of meaningful access to reporting mechanisms within detention centers,⁶⁹ the full extent of sexual violence in immigration detention remains unknown.⁷⁰ As the number of public records requests filed with DHS, and particularly ICE, has increased in recent years, so has the response time, leading to long waits.⁷¹ In both the commission of sexual abuse and in attempts to hold individuals accountable in the aftermath, ICE officers often protect each other, operating akin to the “blue wall of silence” between police officers.⁷² Detainees who are sexually abused by staff often face “the horrifying prospect of having to report the assault to their abuser’s colleagues and friends.”⁷³ Moreover, many of the immigrants who brave the filing hurdles and report complaints are met with little to no positive follow-through; instead, many suffer from retaliatory tactics that include relocation to a different

Id. See also Bessie Muñoz, *Immigrants for Sale: Corporate America Puts A Price Tag on Sexual Abuse*, 17 SCHOLAR: ST. MARY’S L. REV. & SOC. JUST. 553 (2015) (“Even though there was a 400% increase in the number of immigrants in custody between 1994 and 2009, there was very little information collected concerning sexual abuse among immigrant detainees because very few detainees report sexual abuse. This lack of reporting has several reasons. First, immigration detainees are highly vulnerable because of their unusual circumstances, including the feelings of isolation due to their confinement far away from family members, language barriers, and past traumatic experiences. Second, many immigrants fear deportation, which results in victims being coerced into complying with an officer’s sexual demands. Third, immigrant detainees lack knowledge about their rights and not all of them receive legal counseling, giving immigration agencies and correctional officers a high degree of leverage. Finally, but not exhaustively, in many instances where the victim does report abuse, he or she is transferred to another facility. In these instances, the complaint process is derailed, preventing the victim from seeking relief.”).

68. See Brenner, Darcy & Kubiak, *supra* note 66, at 911, 913 (“[D]eportation officers have propositioned women whose cases they control . . . the PREA Commission acknowledges that because immigration detainees are confined by the agency with the power to deport them, officers have an astounding degree of leverage, especially when detainees are not well informed of their rights and access to legal counsel.”) (internal citations omitted).

69. While there have been DHS regulations in place since 2014 that require ICE to release to the public “all aggregated sexual abuse and assault data” “at least annually,” the agency has never done so. Speri, *supra* note 9. Internally, ICE did not begin properly recording sexual abuse and assault data until 2014—more than a decade after the agency was established. *Id.*

70. Trueman, *supra* note 33, at 340.

71. Speri, *supra* note 9. ICE also closes requests arbitrarily every September to clear out its backlog.

72. See *id.* (“*The Intercept* found that 719, or 59 percent, of the narratives (after removing duplicates) identified an officer or private detention center contractor as the perpetrator of the alleged abuse. In 411 (34 percent) reports, an officer either directly witnessed the alleged abuse or was made aware that the abuse had taken place. Two hundred and sixty-nine (22 percent) complaints identified an officer as the alleged perpetrator and at least one additional officer as witness.”).

73. *Id.*

detention center,⁷⁴ punishment,⁷⁵ and adverse immigration interference.⁷⁶ These many factors conspire to create a situation of heightened vulnerability for many survivors.

III.

THE PROBLEMS AND PROMISES OF CURRENTLY EXISTING REMEDIES

The purpose of this section is to describe the legal landscape surrounding the issue of sexual violence in immigration detention. In discussing the current structures marking this landscape—namely, the PREA, the U visa, and the VAWA self-petition model—this section focuses on their shortcomings and strengths, whether actual or prospective. In doing so, Part II will lay the groundwork for Part III, which will examine the underlying logics of these legal structures, with particular emphasis on how they intertwine immigration relief with respectability politics.⁷⁷

A. The Prison Rape Elimination Act (PREA) Offers an Incomplete Step in the Right Direction

In 2003, Congress passed the Prison Rape Elimination Act (PREA) to address rampant sexual assault in corrections facilities across the country.⁷⁸ Initially, Congress intended to include immigration detention facilities within the PREA's purview.⁷⁹ However, when the Department of Justice finally drafted the legally-required PREA standards in 2011, immigration facilities were left out of those standards because "by that point, immigration detention had been placed under the jurisdiction of the relatively new Department of Homeland Security, whose officials argued that DOJ rules did not apply to them."⁸⁰ Instead, ICE facilities operated under a set of "performance-based national detention standards" until DHS finally adopted its own PREA policy in 2014.⁸¹ However, PREA

74. *See id.*

75. *See id.*

76. *See Ali, supra* note 52 (describing one survivor being put in solitary confinement for eleven days as retaliation after filing a sexual harassment complaint); *see also Speri, supra* note 9 ("In one case, for instance, a detainee in Florida said that an ICE officer 'threatened to file additional immigration charges against him in order to deter him from filing a physical abuse complaint.' In another case, a detainee in Virginia said that after filing a sexual abuse report, he was accused of perjury and making a false allegation, and that information that should have remained confidential under PREA standards was used against him in immigration proceedings. Multiple detainees reported being locked in their cells, denied food, or treated with hostility after they filed grievances.").

77. This Article defines "respectability politics" as the notion that the appropriate solution to structural dispossession lies not in the disruption of harmful structures, but rather in marginalized communities approximating hegemonic values, i.e. conforming to "respectability," as much as possible.

78. *Speri, supra* note 9.

79. *See id.*

80. *See id.*

81. *See* U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT (ICE), 2011 OPERATIONS MANUAL ICE PERFORMANCE-BASED NATIONAL DETENTION STANDARDS, <https://www.ice.gov/detention-standards/2011> [<https://perma.cc/SKZ9-UQ82>]; U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT (ICE), PREA, <https://www.ice.gov/prea> [<https://perma.cc/8WUZ-YUAE>] (last visited Apr. 17, 2020).

coverage remains limited because the PREA requirements can only be mandated when the agency enters into new facility contracts or renews or modifies old ones; according to ICE, as of 2016 only 64% of the agency's detainees were protected by PREA standards.⁸² Moreover, the PREA does not apply to privately owned detention facilities.⁸³

While the PREA signals an important step toward protecting incarcerated survivors of sexual violence, this legislation falls short on providing key protections. First, the PREA does not apply to all immigration detention facilities.⁸⁴ There are three different types of immigration detention facilities: Service Processing Centers (SPC), which are ICE-owned facilities; Contract Detention Facilities (CDFs), which are owned and run by private companies that have contracted directly with ICE; and Intergovernmental Service Agreement facilities (IGSA), which are provided by state and local governments to ICE through agreements.⁸⁵ Because CDFs are owned by private government contractors, they are not required to comply with the PREA standards.⁸⁶ And in addition to being exempt from PREA requirements, ICE also lacks the power to terminate many private facilities' personnel—for example, those of the Corrections Corporation of America⁸⁷—for incidents of clear abuse.⁸⁸ This accountability gap carries wide-reaching implications: of the 76 detention centers where the OIG has documented sexual assault, “the top five with the most complaints are run by private detention centers.”⁸⁹ And privatization is increasing.⁹⁰

In addition to lacking supervisory coverage over all immigration detention centers, other shortcomings prevent the PREA from meaningfully protecting survivors in

82. See Speri, *supra* note 9.

83. See Trueman, *supra* note 33, at 340 (“[Private] contractors are not required to follow government standards.”).

84. See Muñoz, *supra* note 67, at 556–57.

85. See *id.* at 556.

86. See *id.*; Brenner, Darcy & Kubiak, *supra* note 66, at 939.

87. Correction Corporation of America, now called CoreCivic, is one of the biggest private prison contractors. See CORRECTIONS CORPORATION OF AMERICA, WHO WE ARE, [www.correctionscorp.com/who-we-are](https://perma.cc/3PLS-5VF6) [https://perma.cc/3PLS-5VF6] (last visited Aug. 19, 2020) (“We are the fifth-largest corrections system in the nation, behind only the federal government and three states.”).

88. See Trueman, *supra* note 33, at 352 (“‘Charles Miller, spokesman with the U.S. Department of Justice, said CCA’s contract with the Office of Federal Detention Trustee . . . doesn’t allow the government to reject CCA’s employees, as long as they pass FBI background checks’ [which] eliminates the most basic recourse ICE has for those who sexually abuse detainees: terminating the abuser’s employment . . . ‘Inmates . . . are technically in the custody of the federal government, but they are in fact in the custody of corporations with little or no federal supervision. So labyrinthine are the contracting and financing arrangements that there are no clear pathways to determine responsibility and accountability.’”) (internal citations omitted).

89. Ali, *supra* note 52.

90. See Muñoz, *supra* note 67, at 558, 561–62 (“Immigration detention is the fastest-growing incarceration system in the country. The privatization of immigration detention centers began in the early 1980s, when the Immigration and Naturalization Services (INS) signed the first contract with Corrections Corporation of America (CCA). . . . Since 2002, the daily population of immigrants detained in private detention facilities has increased by 188%. In contrast, the daily average of detainees in publicly operated facilities has increased by 26%. There are approximately 253 facilities housing detainees, with a daily stay ranging from 0 to 1,695 each. Out of these facilities, forty-five are privately owned. Of the fifty most populated facilities, 62% are privately owned. Eight of the top ten most populated facilities are privately operated.”).

immigration detention. First, even where the PREA does apply, it is not effectively implemented.⁹¹ Currently, compliance with PREA standards is all but voluntary for correctional agencies.⁹² This is because the Department of Justice has not implemented a strong enforcement mechanism for the legislation; the penalty for PREA noncompliance is a nominal five percent reduction in facilities' annual federal grant amount.⁹³ This razor-thin financial margin offers an anemic at best—and pretextual at worst—enforcement schema for PREA protections. Furthermore, even if there were 100% effective PREA implementation in all immigration detention facilities, the PREA would still fail to fully protect survivors because it does not provide a private cause of action with which survivors can pursue legal relief.⁹⁴

B. Logistical Constraints Limit the U visa, the Only Form of Legal Relief Currently Available to Immigrant Survivors in Detention

Congress created the “U nonimmigrant status”—or U visa—in its October 2000 reauthorization of the Violence Against Women Act (“VAWA 2000”).⁹⁵ Established in part to support nonimmigrants suffering from sexual violence and interpersonal violence, the U visa is a temporary form of relief that can lead to green card eligibility for qualified applicants.⁹⁶ In order to qualify for a U visa, a noncitizen must be a “victim[] of certain crimes” who has “suffered mental or physical abuse” and is “helpful to law enforcement or government officials in the investigation or prosecution of criminal activity.”⁹⁷ Notably, unlike the VAWA self-petition, which this Article will discuss below, the U visa does not condition relief upon an immigrant experiencing violence at the hands of a U.S. citizen

91. LENA PALACIOS, THE PRISON RAPE ELIMINATION ACT AND THE LIMITS OF LIBERAL REFORM, UNIVERSITY OF MINNESOTA GENDER POLICY REPORT (Feb. 17, 2017), <http://genderpolicyreport.umn.edu/the-prison-rape-elimination-act-and-the-limits-of-liberal-reform/> [https://perma.cc/SG5K-T47E] (“PREA’s enforcement provisions are virtually non-existent since compliance by corrections agencies is voluntary. The primary means by which PREA attempts to ensure compliance by the states is through a financial incentive. A state is at-risk of losing 5% of federal grant funding ‘for prison purposes’ if it fails to certify that it is in full compliance with PREA. Additionally, as noted by the PREA Resource Center, there is no oversight with respect to a governor’s certification that their state is in compliance with PREA.”); Derek Gilna, *Five Years after Implementation, PREA Standards Remain Inadequate*, PRISON LEGAL NEWS (Nov. 8, 2017), <https://www.prisonlegalnews.org/news/2017/nov/8/five-years-after-implementation-prea-standards-remain-inadequate/> [https://perma.cc/HHJ3-GJCJ].

92. See Muñoz, *supra* note 67, at 571–72.

93. See *id.*

94. PALACIOS, *supra* note 91. Notably, as scholars have shown, the current iteration of the PREA has created adverse and complicating consequences for survivors themselves, with some courts have allowing the current iteration of the PREA to “become both sword and shield in the hands of detention officials.” *Id.*

95. See Donovan, *supra* note 7, at 760–61.

96. See *id.*

97. U.S. CITIZENSHIP AND IMMIGRATION SERVICES (USCIS), VICTIMS OF CRIMINAL ACTIVITY: U NONIMMIGRANT STATUS, <https://www.uscis.gov/humanitarian/victims-of-human-trafficking-and-other-crimes/victims-of-criminal-activity-u-nonimmigrant-status> [https://perma.cc/X2ZA-6RAQ] (last visited Apr. 22, 2020).

or lawful permanent resident spouse.⁹⁸ According to the U.S. Citizenship and Immigration Services agency (USCIS), in creating the U visa, “Congress intended to strengthen the ability of law enforcement agencies to investigate and prosecute cases of domestic violence, sexual assault, trafficking of aliens and other crimes, while also protecting victims of crimes who have suffered substantial mental or physical abuse due to the crime and are willing to help law enforcement authorities in the investigation or prosecution of the criminal activity.”⁹⁹

Although detained survivors of state sexual violence are eligible for a U visa if they meet all other U visa eligibility requirements,¹⁰⁰ a number of logistical difficulties make U visas a non-ideal remedy for survivors seeking immigration relief. One of the biggest logistical problems with the U visa is the extended backlog and subsequent processing times for applicants seeking relief. When the U visa program was established in 2000, the program capped the number of available U visas at 10,000 per year.¹⁰¹ Multiple efforts to raise this cap over the years have consistently been thwarted.¹⁰² As such, a massive U visa backlog has accumulated, with over 200,000 applications pending in the system and a projected processing time of nearly five years.¹⁰³ The logistical barriers that frustrate redress through the U visa become compounded in the immigration detention context, which

98. See Donovan, *supra* note 7, at 761.

99. See VICTIMS OF CRIMINAL ACTIVITY: U NONIMMIGRANT STATUS, *supra* note 97.

100. Regardless of whether this violence is perpetrated by another detainee or by an ICE officer.

101. VICTIMS OF CRIMINAL ACTIVITY: U NONIMMIGRANT STATUS, *supra* note 97; Donovan, *supra* note 7, at 764.

102. Donovan, *supra* note 7, at 764 (“S. 1925, the House-rejected bipartisan bill introduced by Sens. Patrick Leahy and Mike Crapo, would have raised the annual cap on U-visas from 10,000 to 15,000 for the next five years. However, because the provision imposed application fees for certain visas, House Republicans ‘blue-slipped’ the bill, i.e., refused to consider it, because it violated the traditional interpretation of the U.S. Constitution’s Origination Clause that revenue-raising bills generate in the House. The fees were included to allay concerns that the increase in available U-visas ‘could cost taxpayers over \$100,000 in public benefits and other expenses.’ Ultimately, the language authorizing the U-visa increase was stricken from the bill to avoid further delay and the bill was reintroduced as S.47.”) See also H.R. 4145, 115th Congress (2017–2018), <https://www.congress.gov/bill/115th-congress/house-bill/4145> [<https://perma.cc/U9FM-7R38>] (last visited Sept. 21, 2020); Kate Linthicum, *Safety for immigrant victims put on hold by U-visa delay*, L.A. TIMES (Feb. 1, 2015), <https://www.latimes.com/local/california/la-me-u-visa-20150202-story.html> [<https://perma.cc/8Y9K-4EY2>]; *Undocumented Immigrants Face Growing Backlog Of Crime Victim Visas*, NATIONAL PUBLIC RADIO (Feb. 9, 2018), <https://www.npr.org/2018/02/09/582522670/undocumented-immigrants-face-growing-backlog-of-crime-victim-visas> [<https://perma.cc/G6BD-DZS5>].

103. U.S. CITIZENSHIP AND IMMIGRATION SERVICES, NUMBER OF FORM I-918, PETITION FOR U NONIMMIGRANT STATUS, BY FISCAL YEAR, QUARTER, AND CASE STATUS 2009-2018, https://www.uscis.gov/sites/default/files/USCIS/Resources/Reports%20and%20Studies/Immigration%20Forms%20Data/Victims/I918u_visastatistics_fy2018_qtr3.pdf [<https://perma.cc/63J6-DL8P>] (last visited Sept. 6, 2020); U.S. CITIZENSHIP AND IMMIGRATION SERVICES, CHECK CASE PROCESSING TIMES, <https://egov.uscis.gov/processing-times/> [<https://perma.cc/8BZR-4T38>] (last visited Sept. 4, 2020) (estimating a 56-56.5 month average processing time for U-Visas newly submitted to the Nebraska Service Center).

is itself fraught with barriers to accessing legal counsel and relief.¹⁰⁴ Moreover, numerous reports have documented incidents where survivors have attempted to file U visas only to face ICE officers who refuse to provide access to the evidence needed to file a complete application.¹⁰⁵ The logistical limitations and deeper normative concerns that trouble the U visa¹⁰⁶ render it ineffective as a tool for intervention.

C. *The VAWA Self-Petition Model Offers an Imperfect Blueprint for Redress for Immigrant Survivors in Detention*

In 1994, Congress passed the Violence Against Women Act (VAWA 1994)¹⁰⁷ as the first piece of comprehensive federal legislation designed to involve all three branches of federal government—Congress, the courts, and federal government agencies—in curbing gender-based violence, including interpersonal violence (IPV), sexual assault, and stalking.¹⁰⁸

VAWA 1994 became law after four years of exhaustive investigation focused on the extent and severity of IPV, sexual assault, stalking, and other forms of gender-based violence.¹⁰⁹ In a series of committee hearings conducted between 1990 and 1994, Congress heard testimony from various experts, including state attorneys general, federal and state

104. See Muñoz, *supra* note 67, at 553; NATIONAL IMMIGRATION LAW CENTER, *BLAZING A TRAIL: THE FIGHT FOR RIGHT TO COUNSEL IN DETENTION AND BEYOND* 4–6 (2016), <https://www.nilc.org/wp-content/uploads/2016/04/Right-to-Counsel-Blazing-a-Trail-2016-03.pdf> [<https://perma.cc/4QL8-UMHY>]; Kyle Kim, *Immigrants held in remote ICE facilities struggle to find legal aid before they're deported*, L.A. TIMES (Sept. 28, 2017), <https://www.latimes.com/projects/la-na-access-to-counsel-deportation/> [<https://perma.cc/D44R-NSPG>].

105. See Speri, *supra* note 9 (“In a complaint filed by a former detainee’s lawyer, for instance, a woman alleged being sexually assaulted while seeking medical care for an asthma attack. According to the complaint, a male medical staff member at Hutto ‘intentionally molested her by touching her bare breasts and attempting to take off her pants and touch her private parts inappropriately.’ When the victim screamed, two individuals came running into the unit, where they accused her of making up the incident — to which she responded that they should check the surveillance camera footage. ICE officers eventually took a statement from the woman, whom they accused of ‘enticing and leading on the male medical professional.’ According to the complaint, the officers told the woman that if she pursued her claim, she would extend her stay in detention by one more year, but if she signed some documents, she would be released and the government would process a U visa for her, a visa meant for victims of crime. The victim signed documents, but was not given any copies. Her attorney subsequently requested copies of her file through public records and medical records requests, but found that the incident had not been documented. According to the attorney, ‘although the victim was interviewed by two ICE officers, no further action has been taken against the male doctor/nurse.’”)

106. See *infra* PART IV.C.

107. “Violence against women” is better understood as “gender-based violence” that, as a structure, can affect cisgender women, transgender women, gender-non-conforming individuals, and ultimately people of all gender identities—though it does disproportionately harm transgender and cisgender women as well as gender nonconforming people.

108. FAITHTRUST INSTITUTE, *HISTORY OF VAWA*, <http://www.ncdsv.org/images/history-ofvawa.pdf> [<https://perma.cc/QAA7-QEKB>] (last visited July 1, 2020); LEGAL MOMENTUM, *HISTORY OF VAWA*, <https://www.legalmomentum.org/history-vawa> [<https://perma.cc/5FHV-4A6M>] (last visited Apr. 22, 2020).

109. See FAITHTRUST INSTITUTE, *supra* note 108.

law enforcement officials, prosecutors, business and labor representatives, physicians, legal scholars, and survivors of interpersonal violence, sexual assault, and stalking.¹¹⁰ Congress's extensive fact-finding revealed that gender-based violence and interpersonal violence were pervasive problems of national scope.¹¹¹ As a result of these findings, Congress responded with a comprehensive legislative package that comprised VAWA.¹¹² VAWA's 1994 provisions were expanded in the Violence Against Women Act of 2000 (VAWA 2000) and the Violence Against Women and Department of Justice Reauthorization Act of 2005 (VAWA 2005).¹¹³ These expansions included initiatives to address elder abuse and gender-based violence against individuals with disabilities.¹¹⁴

The omnibus VAWA legislation included provisions on abuse and sexual violence focused on prevention and funding for survivor services.¹¹⁵ In particular, VAWA authorized funds to support IPV shelters, rape prevention education, IPV intervention and prevention programs, and legal services responses to gender-based violence.¹¹⁶ VAWA legislation also required states and territories to enforce protection orders issued by other states, tribes, and territories.¹¹⁷ The Office on Violence Against Women (OVW), created in 1995, administers VAWA grant programs, handles the Department of Justice's (DOJ) legal and policy issues regarding gender-based violence, coordinates Departmental efforts, provides national and international leadership, provides technical assistance to communities across the country, and responds to requests for information regarding gender-based violence.¹¹⁸ In 2003, OVW became an independent office within the DOJ; the office is headed by a Presidentially-appointed director who reports to the Attorney General.¹¹⁹

From the outset, Congress sought to use VAWA to end abusers' continued use of immigration status as a "key tool of control."¹²⁰ When Congress initiated a movement to better understand the societal and legal issue of gender-based violence in the early 1990s, numerous reports emerged evidencing that abusive interpersonal dynamics were greatly exacerbated by "placing full and complete control of an alien spouse's ability to gain permanent legal status in the hands of the citizen or [LPR]."¹²¹ Markedly unequal power structures tended to "perpetuate, facilitate and increase" IPV in relationships; these dynamics, when compounded with the additional obstacles that immigrants face, left

110. *See id.*

111. *See id.*

112. *See id.*

113. LEGAL MOMENTUM, *supra* note 108.

114. *See* FAITHTRUST INSTITUTE, *supra* note 108. VAWA 2000 also strengthened the original law by improving protections for abused immigrants, sexual assault survivors, and victims of dating violence and enabling IPV survivors who flee across state lines to obtain custody orders without returning to jurisdictions where they may be in danger and improves the enforcement of protection orders across state and tribal lines. *See id.*

115. *See* LEGAL MOMENTUM, *supra* note 108.

116. *See id.*

117. *See id.*

118. *See id.*

119. *See id.*

120. Donovan, *supra* note 7, at 759.

121. H.R. REP. NO. 112-480, pt. 1, at 230 (2012).

immigrant survivors in particularly difficult situations.¹²² By granting abusers the ability to heavily influence or even outright control their victims' immigration status, the reports showed that abusers were empowered with considerable leverage to coerce, dominate, and ensure their partners were rendered powerless to seek protective legal remedies.¹²³ These reports spurred calls for federal avenues to assist immigrant IPV survivors.¹²⁴ Based on these findings, Congress specifically included immigration protections in VAWA 1994.¹²⁵ VAWA was thus conceived to protect immigrants who lived "trapped and isolated in violent homes, afraid to turn to anyone for help," fearing "both continued abuse if they stay with their batterers and deportation if they attempt to leave."¹²⁶

To address the plight of immigrants suffering from abusive inter-partner dynamics exacerbated by their immigration status, VAWA 1994 created an avenue to obtain immigration relief: the VAWA self-petition.¹²⁷ Underlying the VAWA self-petition was a recognition that IPV is often "terribly exacerbated in marriages where one spouse is not a citizen and the non-citizen's legal status depends on his or her marriage to the abuser" and that obtaining LPR status can provide a powerful bargaining chip in the hands of those who have a role in the process—in this case, abusive green card holders and/or U.S. citizens.¹²⁸ Using the VAWA self-petition provision, immigrant IPV survivors can petition for legal status for themselves and their children without their abusers' knowledge or

122. Donovan, *supra* note 7, at 752; *see also* Giselle Aguilar Hass, Nawal Ammar & Leslye Orloff, LEGAL MOMENTUM, BATTERED IMMIGRANTS AND U.S. CITIZEN SPOUSES (Apr. 24, 2016), http://www.ncdsv.org/images/LM_BatteredImmigrantsAndUSCitizenSpouses_4-24-2006.pdf [<https://perma.cc/D434-NAVL>] (documenting the growing body of research data indicating that immigrants are a particularly vulnerable group to IPV). "They tend to have fewer resources, stay longer in the relationship, and sustain more severe physical and emotional consequences as a result of the abuse and the duration of the abuse than other [IPV survivors] in the United States." *Id.* Studies have found that abusers of immigrant IPV survivors actively use their power to control their spouse and children's immigration status and threats of deportation as tools that play upon their victims' fears so as to keep them from seeking help or from calling the police to report the abuse. *Id.*

123. Donovan, *supra* note 7, at 752.

124. In coming to this conclusion, Congress relied on testimony taken at hearings, "Untold Stories," a compendium of case stories illustrating experiences of immigrant victims trapped in abusive relationships (FVPPF, 1993) and a survey conducted in the District of Columbia by AYUDA that found that abuser's power and control over a victim's immigration status significantly increased the likelihood of abuse for immigrant victims. H.R. REP. NO. 103-395 (1993).

125. Hass, Ammar & Orloff, *supra* note 122. "Current law fosters domestic violence in such situations by placing full and complete control of the alien spouse's ability to gain permanent legal status in the hands of the citizen . . . Consequently, a battered spouse may be deterred from taking action to protect himself or herself, such as filing a civil protection order, filing criminal charges or calling the police, because of the threat or fear of deportation." H.R. REP. NO. 103-395, at 26 (1994).

126. LESLYE E. ORLOFF, LEGAL MOMENTUM, VAWA CONFIDENTIALITY: HISTORY, PURPOSE, DHS IMPLEMENTATION AND VIOLATIONS OF VAWA CONFIDENTIALITY PROTECTIONS, https://www.lsc.gov/sites/default/files/LSC/pdfs/10.%20%20Appendix%20IX%20%20CH%203%20SA_Confidentiality_Final.pdf [<https://perma.cc/TQ8N-H8EP>] (last visited Apr. 14, 2020).

127. Donovan, *supra* note 7, at 746.

128. *Id.* at 751.

cooperation.¹²⁹ The VAWA self-petition thus reflects Congressional intent to ameliorate immigrant survivors' dependency on, and increased vulnerability against, their abusers.¹³⁰ The VAWA self-petition is therefore expressly designed to provide a legal tool for immigrant survivors to break the cycle of violence in which they often find themselves trapped.¹³¹ Subsequent re-authorizations of VAWA have expanded eligibility provisions for the VAWA self-petition.¹³²

The VAWA self-petition offers an imperfect but useful blueprint for designing remedies to redress sexual violence in immigration detention. As discussed further below,¹³³ the VAWA self-petition is helpful insofar as it models a form of redress based on a structural accountability logic. Namely, the VAWA self-petition is grounded in principles that recognize the existence of structural harm and seek to inscribe structural accountability to mitigate that harm. Under the VAWA self-petition, survivors of sexual violence are recognized as being disproportionately vulnerable due to their immigration status; moreover, the self-petition is conceptualized as a tool for intervening against one element of the power differential that is abused in incidents of sexual violence. Nonetheless, the VAWA self-petition is not a perfect tool for addressing and redressing interpersonal violence against immigrants. Scholars have rightly pointed to evidentiary,¹³⁴ financial,¹³⁵

129. See *Latina Portrait: the Reauthorization of the Violence Against Women Act and Latinas*, CASA DE ESPERANZA AND MUJERES LATINAS EN ACCION (2012), http://nationallatinonetwork.org/images/MMLEA_REPORT2012FINALOL.pdf [<https://perma.cc/D434-NAVL>]. See also Donovan, *supra* note 7, at 759.

130. See *Latina Portrait: the Reauthorization of the Violence Against Women Act and Latinas*, *supra* note 129; Ashley Arcidiacono, *Silencing the Voices of Battered Women: How Arizona's New Anti-Immigration Law "SB1070" Prevents Undocumented Women from Seeking Relief Under the Violence Against Women Act*, 47 CAL. W.L. REV. 173, 180 (2010) (stating that allowing undocumented battered women married to violent U.S. citizen or LPR spouses to self-petition for immigration status was "Congress's primary intent in enacting VAWA").

131. See Donovan, *supra* note 7, at 772.

132. See *id.* at 765; MOIRA FISHER PRED, CECILIA OLAVARRIA, JANICE KAGUYUTAN, AND ALICIA (LACY) CARRA, LEGAL MOMENTUM, PREPARING THE VAWA SELF-PETITION AND APPLYING FOR RESIDENCE, <https://www.lsc.gov/sites/default/files/LSC/pdfs/11.%20Appendix%20X%20%20BB%20CHP%20Self-Petitioning.pdf> [<https://perma.cc/5FHV-4A6M>] (last visited Apr. 22, 2020).

133. See *infra* PART V.C.

134. Maia Ingram, Deborah Jean McClelland, Jessica Martin, Montserrat F. Caballero, Maria Theresa Mayorga & Katie Gillespie, *Experiences of Immigrant Women Who Self-Petition Under the Violence Against Women Act*, 16 VIOLENCE AGAINST WOMEN 858, 867 (2010) (describing one barrier to self-petition applicant being the amount of evidence required to demonstrate eligibility).

Eleven interviewees were overwhelmed by "the evidence that has to be presented—my testimony, photos, marriage license, (and) testimony from other people that saw the abuse." In some cases, evidence was difficult to obtain, and one woman advised, "When I know someone else in this situation, I am going to tell them that before they leave their house they better get all their papers together."

Id.

135. The length of time a self-petitioner has to wait for employment authorization can create substantial financial hardship. *Id.* This is especially true for petitioners who have to wait for approval of their self-petition before applying for employment authorization. *Id.*

emotional,¹³⁶ and other burdens¹³⁷ that can thwart access to the VAWA self-petition process. Moreover, research indicates that LGBTQ+ immigrants often struggle to demonstrate VAWA self-petition eligibility more than their heterosexual counterparts, given that many adjudicators—in all realms of IPV prevention and response work—often rely on heteronormative frameworks that can prevent them from correctly identifying patterns of abuse in queer partnerships.¹³⁸ Yet another gap within the current VAWA self-petition model is that it offers little recourse for individuals in relationships that fall outside the structure of marriage and the nuclear family, which creates formidable barriers to access for many immigrant IPV survivors. However, despite these blemishes, the VAWA self-petition model offers a valuable blueprint from which to construct a mechanism for legal redress for immigrant survivors, as will be explained further in Part IV.B of this Article.

IV.

THE TROUBLE WITH RESPECTABILITY: CRIMMIGRATION AND CARCERAL FEMINISM IN U.S. IMMIGRATION LAW

To adumbrate the normative landscapes that surround the problem of sexual violence in immigration detention, I will begin by unpacking a few terms that provide helpful frameworks for situating our understanding of the U visa and the VAWA self-petition: crimmigration, respectability politics, and carceral feminism. Following this discussion, I will examine one form of legal redress currently available to survivors of sexual violence in immigration detention—the U visa—alongside one form of redress currently unavailable to detained survivors of state sexual violence¹³⁹ that nonetheless addresses immigrants' vulnerability to gender-based violence in the United States—the VAWA self-petition. Following this discussion, I will examine how the logics that underlie the extant legal remedies described in Part II intertwine immigration relief with a carceral feminist victimhood. By examining the overlay and interaction between crimmigration, respectability politics, and carceral feminism in the context of the U visa and the VAWA self-petition, I will

136. In a study where researchers interviewed self-petitioners about their experiences with the self-petition process, multiple interviews described “suffering humiliation and frustration at the hands of police officers, legal services personnel, and social service providers” in the course of attempting to file their petitions. *See id.* at 869.

137. For example, domestic violence shelters cannot support self-petitioners and their families for the 12-month period it currently takes USCIS to adjudicate a self-petition and then grant employment authorization. *See id.* at 877.

138. *See* Clare Cannon & Frederick Buttell, *Illusion of Inclusion: The Failure of the Gender Paradigm to Account for Intimate Partner Violence in LGBT Relationships*, 6 PARTNER ABUSE 65, 71–75 (2015). *See generally* TAYLOR N.T. BROWN AND JODY L. HERMAN, THE WILLIAMS INSTITUTE, INTIMATE PARTNER VIOLENCE AND SEXUAL ABUSE AMONG LGBT PEOPLE: A REVIEW OF EXISTING RESEARCH (2015), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/Intimate-Partner-Violence-and-Sexual-Abuse-among-LGBT-People.pdf> [<https://perma.cc/2V93-ZFHM>]. These disparities in relief are not disconnected from the legislation's history; earlier iterations of VAWA limited relief to cisgender women in heterosexual marriages. *See* Christina Samons, *Same-Sex Domestic Violence: The Need For Affirmative Legal Protections At All Levels Of Government*, 22 S. CAL. REV. L. & SOC. JUST. 417, 424–26 (2013).

139. By this I mean that the VAWA self-petition currently remains unavailable to detained immigrants on the *sole* basis of state sexual violence.

elucidate the legal topography upon which survivors of gender-based violence (and specifically sexual violence) are situated—and the crucial gaps, tensions, and problems within this landscape.

A. *Crimmigration and a Respectability Politics of the “Innocent Immigrant Victim”*

Legal scholar Juliet Stumpf first coined the term “crimmigration” in her article *The Crimmigration Crisis: Immigrants, Crime, and Sovereign Power*, by describing a system in which criminal law has “swallow[ed] immigration law” and immigration law has become “clothed with so many attributes of criminal law that the line between them has grown indistinct.”¹⁴⁰ According to Stumpf, symptoms of this merger between criminal law and immigration law include: (1) an increasing substantive overlap between immigration law and criminal law; (2) immigration enforcement that increasingly resembles criminal law enforcement, and (3) procedural aspects of prosecuting immigration violations that carry many of the earmarks of criminal procedure.¹⁴¹

César Cuauhtémoc García Hernández and other scholars have added panoramic dimensions to this description, variously defining crimmigration as an “the intertwining of crime control and migration control,”¹⁴² as a function of “shifts within both the policing and deportation systems that have rendered far more people vulnerable to the intersection of the two,”¹⁴³ and as the historical outgrowth of distinct, highly racialized system of “post-entry social control” that started with the 1917 Immigration Act.¹⁴⁴ Legal scholar Mona Lynch offers another helpful framework for understanding crimmigration machineries: in her article *Backpacking the Border*, she describes a “subsumption of immigration law into the criminal justice field” in which immigration enforcement goals are “dispersed and devolved down to local criminal justice actors” and, more importantly, immigration law “is absorbed into the ‘preexisting logics, structures, and modes of action’ that characterize the host [criminal] institutions.”¹⁴⁵ By absorbing carceral logics, U.S. immigration policy and enforcement goals have shifted “away from regulation and toward enforcement,

140. See Stumpf, *supra* note 11, at 367; see also César Cuauhtémoc García Hernández, *The Life of Crimmigration Law*, 92 DENV. U. L. REV. 697, 697 (2015) (confirming Stumpf’s role in coining the term “crimmigration law”).

141. See Stumpf, *supra* note 11, at 381.

142. See César Cuauhtémoc García Hernández, *Creating Crimmigration*, 2013 B.Y.U. L. REV. 1457, 1467 (2013) (“Starting in the 1980s, this ‘intertwinement’ has rapidly expanded in the United States and changed the procedure and substance of criminal and immigration law such that as a person becomes entangled in one, she suffers increasingly adverse consequences in the other.”).

143. Rachel E. Rosenbloom, *Policing Sex, Policing Immigrants: What Crimmigration’s Past Can Tell Us About Its Present and Its Future*, 104 CALIF. 149, 153 (2016).

144. See *id.* at 166 (citing DANIEL KANSTROOM, *DEPORTATION NATION: OUTSIDERS IN AMERICAN HISTORY* 91–130 (2007) to explain the difference between deportability grounds that function as forms of extended border control and those aimed at controlling post-entry conduct).

145. Mona Lynch, *Intersection of Drug and Immigration Prosecutions in a High-Volume U.S. Court*, 57 BRIT. J. CRIMINOL. 112, 115 (2017).

punishment, and deterrence.”¹⁴⁶ With this increased reliance upon immigration enforcement as a tool in the “crime-fighting arsenal” “comes added powers to intervene in the lives of ‘suspect’ populations; expanded legal, social and spatial jurisdictions; and ultimately the reinforcement of ‘cimmigration’ ideology and practice.”¹⁴⁷

Although scholars debate the precise genealogy of U.S. crimmigration,¹⁴⁸ most agree that the intensified criminalization of immigrants resulted, in part, from the more aggressive policing of communities of color that mushroomed three decades ago.¹⁴⁹

In the 1980s and ‘90s, law enforcement agencies across the nation implemented broken windows and stop-and-frisk strategies, claiming that mass arrests for low-level offenses would prevent more serious crime. As immigrants who lived in these communities fell victim to racialized policing and mass incarceration, the federal government’s rosters of criminalized immigrants exploded.¹⁵⁰

Scholars also attribute the expanded state apparatus for identifying, incarcerating, and deporting criminalized immigrants to recent changes in U.S. immigration law. By successively redefining what it means to be a “criminal alien” through increasingly stringent definitions of “criminality” that do not apply to U.S. citizens,¹⁵¹ recent changes in immigration laws have created more and more “criminal aliens,” swelling the detention and deportation machinery and “casting a widening dragnet” over the U.S. noncitizen population.¹⁵² Thus, crimmigration laws and policies have effectively created a system of “justice” for noncitizens that is distinct from the system which applies to citizens.”¹⁵³

146. Allison S. Hartry, *Gendering Crimmigration: The Intersection of Gender, Immigration, and the Criminal Justice System*, 27 BERKELEY J. GENDER L. & JUST. 1, 5 (2012).

147. See Lynch, *supra* note 145, at 115.

148. See García Hernández, *supra* note 140, at 1467 (“Starting in the 1980s, this “intertwinement” has rapidly expanded in the United States and changed the procedure and substance of criminal and immigration law such that as a person becomes entangled in one, she suffers increasingly adverse consequences in the other.”); cf. Rosenbloom, *supra* note 143, at 152–55; Alan A. Aja & Alejandra Marchevsky, *How Immigrants Became Criminals*, BOS. REV. (Mar. 17, 2017), <http://bostonreview.net/politics/alan-aja-alejandra-marchevsky-how-immigrants-became-criminals> [<https://perma.cc/K2Q8-X2GY>].

149. See García Hernández, *supra* note 140, at 1467; Aja & Marchevsky, *supra* note 148.

150. See Aja & Marchevsky, *supra* note 148.

151. See Walter A. Ewing, Daniel E. Martínez & Rubén G. Rumbaut, AMERICAN IMMIGRATION COUNCIL, THE CRIMINALIZATION OF IMMIGRATION IN THE UNITED STATES, 2 (July 13, 2015), <https://www.americanimmigrationcouncil.org/research/criminalization-immigration-united-states> [<https://perma.cc/M8AJ-MMJE>].

152. See *id.* at 4 (“Whole new classes of ‘felonies’ have been created which apply only to immigrants, deportation has become a punishment for even minor offenses, and policies aimed at trying to end unauthorized immigration have been made more punitive rather than more rational and practical”). Moreover, as a growing body of “cimmigration” law has reimagined noncitizens as criminals and security risks, immigration law enforcement has increasingly adopted the securitized approach of criminal law enforcement. *Id.*

153. See *id.* at 2–3.

In a United States increasingly characterized by this “crimmigration” merger, criminal law and procedure are used to do what race has historically done: “sort the desirable newcomers from the undesirable.”¹⁵⁴ Through media actors,¹⁵⁵ legal actors,¹⁵⁶ and other politicizing forces, immigrant subjects are constructed as more or less “deserving” based on how closely they contest or legitimate crimmigration logics.¹⁵⁷ Through this iterative construction, “unauthorized immigrants come to be viewed publicly and politically as criminal subjects who need to be managed through criminal justice means.”¹⁵⁸

It is against the backdrop of this constructed “desirable” and the “undesirable” immigrant that an immigrant respectability politics emerges. As applied to the crimmigration landscape, respectability politics is a narrative structure that construes some immigrants as more deserving than others; in this construct, those who embrace dominant values—including, among others, an embrace of the U.S. carceral state and the heteronormative nuclear unit—are seen as deserving of the full rights and responsibilities of U.S. citizenship, while those who supposedly do not are viewed as unworthy, creating a hierarchy of deservingness.¹⁵⁹

One narrative that predominates this respectability discourse is the “good immigrant as victim” narrative.¹⁶⁰ This narrative creates a “structure that focuses on the sources of suffering and death that shape [immigrants] into recognizable victims” in order to “paint [immigrants] as sympathetic figures for the American audience which receives them.”¹⁶¹ A dominant strain of the victim narrative is the “innocent victim” narrative, which is designed to link the victim-object as “worthy” based on how much the victim’s narrative of suffering evokes pity in the imagination of the U.S. public—and how much this pity “leads to a feeling of superiority.”¹⁶² Legal, political, and social actors strategically engage and employ the “innocent victim” narrative in an effort to access immigration relief against an increasingly hostile crimmigration landscape.¹⁶³ This messaging relies on an implicit

154. See García Hernández, *supra* note 140, at 1459.

155. See Grace Yukich, *Constructing the Model Immigrant: Movement Strategy and Immigrant Deservingness in the New Sanctuary Movement*, 60 SOC. PROBS. 302, 303–04 (2013).

156. See Lynch, *supra* note 145, at 115 (“Within criminal justice operations, immigrant criminal subjects are often viewed, by virtue of their cultural otherness, by system actors as posing additional risk—of being especially violent; of posing an enhanced flight risk if released pending legal proceedings[.]”).

157. See Rebecca Sharpless, “*Immigrants Are Not Criminals*”: *Respectability, Immigration Reform, and Hyperincarceration*, 53 HOUS. L. REV. 691, 707 (2016).

158. See Lynch, *supra* note 145, at 115 (“Moreover, as immigrants come to be seen as criminals, support for using law enforcement resources for immigration control increases.”).

159. See Aja & Marchevsky, *supra* note 148 (“For strategic reasons immigration advocacy has coalesced around Dreamers and families of ‘law-abiding’ immigrants, while keeping in the shadows those who are deported on criminal grounds. The consequences of this tactic to emphasize immigrant respectability have been catastrophic for those who have been deported under the guise of criminality, perpetuating a silence that provides cover for a massive deportation regime that must be questioned and dismantled.”); see also Yukich, *supra* note 155, at 303–04.

160. See Sharpless, *supra* note 157, at 760; Mayo, *supra* note 2, at 1498.

161. Mayo, *supra* note 2, at 1498.

162. See *id.*

163. See *id.* (examining this phenomenon in the context of asylum applications).

contrast between the worthy immigrant, “the innocent victim of crime” and the unworthy immigrant, “the immigrant who create[s] victims by committing crimes.” Moreover, the category of “immigrant victim,” like the broader category of victim, connotes a bright-line, good/bad distinction between “victims” and “lawbreakers” that flattens a much more nuanced reality.¹⁶⁴

In the increasingly hostile atmosphere in which many U.S. immigrants find themselves, hierarchies created by the “good-immigrant-as-victim” narrative often reinscribe and reinforce the racialized, gendered, and classed structures that reduce the most marginalized immigrants to “bad immigrant criminals.”¹⁶⁵ This strategy of linking deservingness to “innocent victimhood” obstructs access to humanized and equitable treatment for many of the most vulnerable immigrants living in the United States.¹⁶⁶ As scholar Rebecca Sharpless writes in *Immigrants Are Not Criminals*, “[i]n the simple world of victim and perpetrator, there is no room for the latter.”¹⁶⁷ This construct thwarts efforts to understand noncitizens with criminal histories as multidimensional human beings inherently deserving of dignified and equitable treatment rather than as deviant contrasts to “more respectable” immigrants.¹⁶⁸

B. *Carceral Feminism and its Victim Narratives*

Carceral feminism, a phrase originated by Professor Elizabeth Bernstein in her article *The Sexual Politics of the “New Abolitionism,”* refers to “a drift . . . to the carceral state as the enforcement apparatus for feminist goals”¹⁶⁹ in which policing, prosecution, and imprisonment are relied upon as the primary mechanisms for resolving gender-based violence.¹⁷⁰ As legal scholar Jonathan Simon describes, criminalizing interpersonal violence (IPV) exemplifies an increased tendency to address social problems by “governing through crime.”¹⁷¹ As Simon explains, “[d]omestic violence has emerged over the last three decades as one of the clearest cases where a civil rights movement has turned to criminalization as a primary tool of social justice.”¹⁷²

During the anti-violence movement of the 1980s and 1990s, carceral feminists lobbied for institutional change by strategically rallying around the language of “gender violence as a crime” in order to drum up popular support for what was “already becoming the

164. See Sharpless, *supra* note 157, at 760.

165. See Aja and Marchevsky, *supra* note 148; see also Yukich *supra* note 155, at 303–04.

166. See Sharpless, *supra* note 157, at 760.

167. See *id.*

168. See *id.* at 764.

169. See Bernstein, *supra* note 10, at 143.

170. See Alex Press, #MeToo must avoid “carceral feminism,” VOX: THE BIG IDEA (Feb. 1, 2018), <https://www.vox.com/the-big-idea/2018/2/1/16952744/me-too-larry-nassar-judge-aquilina-feminism> [<https://perma.cc/W7BF-QDTC>].

171. See Leigh Goodmark, *Should Domestic Violence Be Decriminalized?*, 40 HARV. J.L. & GENDER 53, 70 (2017) (citing JONATHAN SIMON, GOVERNING THROUGH CRIME: HOW THE WAR ON CRIME TRANSFORMED AMERICAN DEMOCRACY AND CREATED A CULTURE OF FEAR, 159 (2007)).

172. See *id.* at 70 (citing SIMON, *supra* note 171, at 180).

growing preoccupation with crime.”¹⁷³ Through this campaign, a “feminist anti-violence collaboration with the carceral state or that part of the government most associated with the institutions of police, prosecution, courts, and the system of jails, prisons, probation, and parole” was born, creating a carceral feminist state that legitimates its activities of surveilling, arresting, and incarcerating marginalized populations by invoking feminist logics.¹⁷⁴ One major result of this carceral-feminist collusion is that since 1980, the incarceration rate in the United States has increased exponentially.¹⁷⁵

Critics of carceral feminism, also known as anti-carceral feminists, have focused their criticisms on a number of fronts, pointing out that the carceral feminist model is ineffective,¹⁷⁶ focuses disproportionately on people of color and low-income people,¹⁷⁷ ignores the larger structural issues that drive gender-based violence,¹⁷⁸ strips people subjected to abuse of their autonomy,¹⁷⁹ and ignores the pressing economic and social needs of survivors.¹⁸⁰ Anti-carceral feminists have also lambasted the ways that neoliberal criminalization tactics have been used to address social and political problems in the United States.¹⁸¹ Namely, these scholars have argued that, although criminal law is ill-equipped to solve deep structural problems like poverty, mental illness, and housing, employment, and food insecurity, the carceral feminist state has increasingly poured resources into the criminal legal system rather than providing vulnerable, under-resourced communities with social services.¹⁸²

173. Mimi E. Kim, *From carceral feminism to transformative justice: Women-of-color feminism and alternatives to incarceration*, 27 J. ETHNIC & CULTURAL DIVERSITY IN SOC. WORK 219, 222 (2018) (“While feminist antiviolence movement actors were often explicitly anti-racist, they also became aware that gender violence in the form of rape and domestic violence would gain public support and resources if seen through the lens of crime control[.]”).

174. *See id.* at 220; *see also* Goodmark, *supra* note 171, at 56 (“As criminologist Beth Richie explains, ‘Right alongside of our evolution as an antiviolence movement came the conservative apparatus that was deeply committed to building a prison nation. That buildup fell right into the open arms, as if we were waiting for it, of the anti-violence movement that had aligned itself with the criminal legal system.’”).

175. *See* Goodmark, *supra* note 171, at 56 (“Levels of incarceration have increased by five times during the life of the anti-domestic violence movement.”).

176. *See* ANGELA DAVIS, OPENING KEYNOTE ADDRESS AT COLOR OF VIOLENCE: VIOLENCE AGAINST WOMEN OF COLOR CONFERENCE 5 (Apr. 28, 2000), http://www.incite-national.org/sites/default/files/incite_files/resource_docs/5573_coviproceedings.pdf [<https://perma.cc/KGB4-H3XC>] (“The major strategy relied on by the women’s anti-violence movement of criminalizing violence against women will not put an end to violence against women—just as imprisonment has not put an end to ‘crime’ in general.”); *see also* Goodmark, *supra* note 171, at 76–83; Jennifer M. Chacon, *Unsecured Borders: Immigration Restrictions, Crime Control and National Security*, 28 IMMIGR. & NAT’Y L. REV. 613, 618 (2007) (“[T]here is little reason to believe that [the recent] expansion in the removal of non-citizens will serve as an effective or efficient means of decreasing domestic crime or preventing undocumented migration.”).

177. *See* Goodmark, *supra* note 171, at 58.

178. *See id.*

179. *See id.*

180. *See id.* at 57–58.

181. *See id.* at 69–70.

182. *See id.*

Anti-carceral feminist critiques also include concerns specific to the criminalization of IPV. For instance, critics point to the harm that this criminalization enacts on women, originally intended to be among the primary beneficiaries of these policies.¹⁸³ Since the inception of more stringent arrest policies, for example, arrest rates among women have increased significantly.¹⁸⁴ At least part of this increase “is directly attributable to the implementation of mandatory arrest policies and not simply an increased use of violence by women in intimate relationships.”¹⁸⁵

C. *Placing the U Visa and VAWA Self-Petition in Conversation with Respectability Politics and Carceral Feminism*

Critiques of respectability politics and carceral feminism offer a high-resolution lens through which to assess the problems and possibilities arising from the U visa and VAWA self-petition. Beyond the logistical hurdles that frustrate access, deeper normative concerns arise when contemplating the U visa as a form of relief. Namely, the underlying logic of the U visa is one that relies on a carceral feminist understanding of the “innocent immigrant victim”—that is, the survivor worthy of immigration relief is a victim of a “crime” willing to cooperate with law enforcement and the criminal legal system. By reinforcing a system that links legal redress for state sexual harm against detainees to their willingness to cooperate with the carceral state, the U visa locates its valuation of immigrants based not on structural concerns regarding gender-based harm or immigrants’ inherent dignity, but on their functionality as units in a criminal justice machinery. Ultimately, the logic underpinning the U visa is a valuation of the immigrant applicant that is limited to their capacity and willingness to be useful to the operations of the carceral feminist state.¹⁸⁶

Moreover, by construing the “worthy immigrant” as the “innocent victim of crime,” the U visa normalizes its inverse logic: the “unworthy immigrant” as the individual with a criminal history. By linking deservingness to a “victim of a crime” identity, the U visa

183. *See id.* at 71.

184. *See id.*

185. *See id.* As Goodmark further notes:

Many women who are arrested have been subjected to abuse, and are less likely than males who are also arrested to have physically assaulted, injured, or threatened to kill their partner. If women were committing acts of violence at rates commensurate to the rates of arrest, these policies might be justified by formal equality arguments—women and men should face the same consequences for their use of violence. But the research suggests that women are being penalized by arrest policies without justification.

Id.

186. *See Sharpless, supra* note 157, at 691–92; 698. These criticisms are not meant to discount or shame immigrants who, navigating this landscape with constrained options and desperate circumstances, may use the U visa in this manner; rather, this Article focuses its attention on how we might construct meaningful strategies for the future. As Rebecca Sharpless has discussed, “it is critical to understand the limitations of this framing of immigrants as victims for the purposes of immigration reform” even as we resist “diminishing the importance of the life-saving remedies now available to immigrant victims.” *Id.* at 760.

“risks being understood as legitimizing the category criminal, the stigma it carries, and the use of deportation as a crime control measure.”¹⁸⁷ Moreover, because the U visa model equates worth to being an “innocent victim of crime,” survivors of violence who do not conform to this schema—those caught in the crimmigration dragnet, or those whose victimization falls at the hands of the carceral state, itself—are left with little recourse.

Ironically, the U visa’s respectability messaging which pits the “innocent victim of crime” against “the criminal” disproportionately harms immigrant communities—especially the low-income, LGBTQ+, and/or BIPOC¹⁸⁸ immigrants often caught within the crosshairs of criminalization and racialization schemas casting them as “bad criminal immigrants.”¹⁸⁹ Sociolegal literature indicates that noncitizens with criminal records are overwhelmingly low-income people of color.¹⁹⁰ Myriad factors contribute to this phenomenon, including: inequitable access to resources, hyper-surveillance and over-policing directed at low-income communities and communities of color, racialized stereotypes,¹⁹¹ and other structures that perpetuate racialized mass incarceration schemas.¹⁹² As immigration enforcement has increasingly focused on people with minor criminal histories—which disproportionately means immigrant women, who are among the individuals most vulnerable to gender-based violence¹⁹³—high levels of gender-based violence continue to persist without adequate improvement in the lives of women of color, immigrants, and

187. *See id.* at 694.

188. The term “BIPOC” refers to Black, indigenous, and people of color communities.

189. *See Sharpless, supra* note 157, at 749.

190. *See id.* at 694.

191. *See Yukich, supra* note 155, at 304 (“Stereotypes of immigrants as criminals are also prevalent today, with the average American believing that 27 percent of crimes are committed by Hispanics even though the population of Hispanics in state and federal prisons is significantly lower[.]”).

192. *See Sharpless, supra* note 157, at 749 (“An accurate analysis of the causes of crime would focus on the larger economic and social forces in play, resisting the temptation to understand crime control as a simple matter of deporting or locking up certain groups of people. Deporting convicted noncitizens, like an overly punitive approach to criminal law enforcement, fails to engage with the structural causes of crime. A more inclusive vision of immigration reform takes a big picture view of crime, casting it as largely a function of economic and social forces for which we as a nation bear collective responsibility.”).

193. *See id.* at 727.

poor women.¹⁹⁴ Thus, the U visa model enacts larger harms on communities of color, low-income communities, LGBTQ+ communities, and immigrant communities—and especially on individuals at the intersection of these identities, namely low-income immigrants of color that identity as women and/or LGBTQ+.¹⁹⁵

Additionally, by linking deservingness with a “victim of crime” identity, this “innocent-rule breaker vs. criminal” paradigm¹⁹⁶ uses sexual violence experienced by immigrants to legitimate a “governing through crime” system. It is helpful here to turn to Grace Yukich’s concepts of “casting” and “scripting” in the immigrant respectability politics discourse. In her article *Constructing the Model Immigrant: Movement Strategy and Immigrant Deservingness in the New Sanctuary Movement*, Yukich defines respectability politics “casting” as the selective inclusion of “good immigrants” for sanctuary, and “scripting” as the strategic use of language that describes the “good immigrants” as those associated with dominant cultural and religious values.¹⁹⁷ Similarly, the U visa model “casts” the “victim of crime” as the worthy immigrant, scripting the “good immigrant” based on conformity with the “savior” U.S. carceral state narrative. As Rebecca Sharpless discusses in her article *Immigrants are Not Criminals*:

194. See, e.g., ANANNYA BHATTACHARJEE, WHOSE SAFETY? WOMEN OF COLOR AND THE VIOLENCE OF LAW ENFORCEMENT AM. FRIENDS AERV. COMM 26–27 (2001) (discussing how the movement against gender violence has failed to improve the lives of women of color and vulnerable immigrant women); ELIZABETH M. SCHNEIDER, BATTERED WOMEN AND FEMINIST LAWMAKING 69–70 (2000) (arguing for the need to expand the definition of interpersonal violence beyond the “traditional heterosexual framework” in order for the anti-violence movement to reach queer women’s communities); Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241, 1255 (1991); Beth E. Richie, *A Black Feminist Reflection on the Antiviolence Movement*, 25 SIGNS 1133, 1135–36 (2000) (discussing how the “assumed race and class neutrality of gender violence led to the erasure of low-income women and women of color” from IPV discourses); Karin Wang, *Battered Asian American Women: Community Responses from the Battered Women’s Movement and the Asian American Community*, 3 ASIAN L.J. 151, 153–54 (1996) (“American society and laws, which are constructed largely along binary lines . . . have great difficulty recognizing intersectionalities and effectively ignore those—such as battered Asian American women who exist at intersections of identity.”); Matthew Graham, *Domestic Violence Victims and Welfare “Reform”: The Family Violence Option in Illinois*, 5 J. GENDER RACE JUST. 433, 470, 476 (2002) (observing that IPV advocates “garner support . . . by unfortunately appealing to the ideology of the ‘deserving poor’ and the ‘victim’” and that “[s]uch tactics may be a concession to political reality, but political expediency may come at the price of eroding a broader coalition working for true welfare reform, which tackles the problem of poverty”); Hartry, *supra* note 146, at 18–19.

195. See Pooja Gehi, *Gendered (In)security: Migration and Criminalization in the Security State*, 35 HARV. J.L. & GENDER 357, 362, 384–88 (2012) (describing how “LGBTQ immigrants, especially transgender and gender-nonconforming immigrants, are particularly vulnerable” to profiling, anti-immigrant bias, and other harmful effects of the crimmigration merger). Gehi describes police stops as “almost inevitable” for low-income transgender people of color, a phenomenon known as “walking while trans.” *Id.* at 369. In addition, due to high levels of violence directed at transgender and gender nonconforming defendants in jails and prisons, such defendants are “often willing to take a guilty plea for a crime that they did not commit so that they can minimize jail time—even if this results in known or unknown future immigration repercussions.” *Id.* at 375–76.

196. See Sharpless, *supra* note 157, at 704.

197. See Yukich, *supra* note 155, at 310.

The practice of placing only [those] deemed respectable by mainstream society at the center of the antiviolence movement not only leaves other women more vulnerable to harm, but it shifts the focus away from remedying the underlying conditions in which violence occurs . . . the downside of respectability messaging is that it not only limits the benefits of social change to a favored class, but it legitimizes the status quo economic, political, and social arrangements, making it less likely that more fundamental change will occur.¹⁹⁸

In this vein, the U visa logic legitimates a “governing through crime” structure that tethers immigration policy to criminal law, thus perpetuating a system that marginalizes many vulnerable immigrants.¹⁹⁹ Rather than holding our immigration laws accountable for the gender-based harms they may perpetuate, the U visa model uses “innocent victims of crimes” as exemplars of respectability compared to noncitizens with criminal records, whom are reduced to “irredeemable others—legitimate targets for enforcement.”²⁰⁰ In this way, the U visa logic typifies a kind of respectability politics where “attaining gains for the ‘respectable’ leaves others out” because the definition of the “respectable” complies with hegemonic values, and, in doing so “reinforces and reproduces [] social and economic inequalities.”²⁰¹ By shoring up a deserving/undeserving distinction premised on participation in the carceral state, the U visa model misses an opportunity to recognize immigration law’s potential to effect “more fundamental, structural change” in the problem of gender-based harm faced by immigrant populations.²⁰² In doing so, the U visa fails toward efforts that would hold the U.S. accountable for mitigating the gender-based harms that arise from the heightened vulnerability its very laws and systems have created.

Notably, despite its grounding in a structural accountability logic,²⁰³ the current VAWA self-petition model is also not without its own carceral feminist attachments. Nowhere are these attachments more prominent than in the “good moral character” eligibility requirement, which demands that the self-petitioner show that they “possess[] good moral character” in order to establish eligibility.²⁰⁴ This requirement renders many survivors with a criminal history ineligible for the VAWA self-petition, and links “deservingness” to “innocence” narratives that are deeply racialized, classed, and gendered. These lacunae

198. Sharpless, *supra* note 157, at 711.

199. See generally SIMON, *supra* note 171 (arguing that the U.S. system of governance has increasingly built itself around sociopolitical constructions of crime).

200. See Sharpless, *supra* note 157, at 711.

201. *Id.* at 707.

202. *Id.* at 707–08.

203. Underlying logic of the VAWA self-petition is one that recognizes the existence of structural harm and seeks to inscribe structural accountability. Under the VAWA self-petition, survivors of sexual violence are recognized as being disproportionately vulnerable due to their immigration status. Furthermore, the self-petition is conceptualized as a tool for intervening against one element of the power differential being abused in incidents of sexual violence.

204. *Battered Spouse, Children & Parents*, U.S. CITIZENSHIP & IMMIGR. SERV’S (USCIS), <https://www.uscis.gov/humanitarian/battered-spouse-children-parents> [https://perma.cc/7V7A-NV6J] (last visited Apr. 17, 2020).

and barriers in access suggest that, while the VAWA self-petition model offers an important alternative framing—one that understands immigration law as a system playing a significant role in making immigrants more or less vulnerable to gender-based harm—it is not without its own problematic “victim narratives.”²⁰⁵ Careful attention to the normative problems of the current VAWA self-petition model is required if this Article’s proposed form of redress, an expanded VAWA self-petition, is to avoid the failings of its predecessor.

V.

A TRANSFORMED VAWA SELF-PETITION: FACING CARCERAL FEMINISM AND STRUCTURAL INJUSTICE HEAD ON

A. *Addressing Sexual Violence in Immigration Detention Requires Structural Interventions on Every Level*

State sexual violence in immigration detention is an atrocity of horrifying proportions. Address and redress for this atrocity requires interventions on all levels.²⁰⁶ From the Congressional bed mandate²⁰⁷ to the privatization of immigration detention, we must eliminate policies that incentivize the continuation and expansion inhumane detention practices.²⁰⁸ Moreover, we must strengthen the power and breadth of the PREA. By eliminating privatization, we can close the current PREA coverage gaps over immigration detention centers.²⁰⁹ By strengthening the PREA’s enforceability mechanisms beyond the threat of a mere five percent cut in federal grant funds, we can ensure that the PREA is not consigned to be a defanged piece of public relations legislation for a carceral system laden with human rights abuses. As another important measure, we must eliminate ICE officer

205. It is also important to note that, while the VAWA self-petition does not contemplate criminalization as the solution for addressing the abuse of immigrant partners, many other provisions within the omnibus VAWA legislation—including the U visa, as discussed above—have been hugely instrumental in perpetuating carceral feminist schemas. See Goodmark, *supra* note 171, at 55 (“[F]unding through the Violence Against Women Act, originally enacted in 1994 and reauthorized several times since, created powerful incentives for police, prosecutors, and courts to seriously invest in criminal legal interventions.”).

206. As discussed in greater detail below, *see infra* PART V.C, this Article takes the position that the most effective and ethical solution for eliminating sexual violence in immigration detention is the abolition of detention—and other carceral structures—altogether. Nonetheless, this Article proposes the above structural interventions as tools to mitigate harm barring the immediate abolition of detention facilities.

207. U.S. Immigration and Customs Enforcement (ICE) has been instructed by Congress since 2009 to fill 34,000 beds in detention facilities across the country with immigrant detainees every day. See JUSTICE FOR IMMIGRANTS, IMMIGRANT DETENTION BED MANDATE (2017), <https://justiceforimmigrants.org/wp-content/uploads/2017/01/Detention-Bed-Mandate-1-18-17.pdf> [<https://perma.cc/7P5Q-H36F>]; NATIONAL IMMIGRANT JUSTICE CENTER, IMMIGRATION DETENTION BED QUOTA TIMELINE (Jan. 2017), https://immigrantjustice.org/sites/default/files/content-type/commentary-item/documents/2017-01/Immigration%20Detention%20Bed%20Quota%20Timeline%202017_01_05.pdf [<https://perma.cc/J5FX-BH7P>].

208. See Muñoz, *supra* note 67, at 558–63.

209. See *id.* at 587–88.

immunity.²¹⁰ We must also change data-keeping practices of and around carceral settings so as to ensure that comprehensive, accurate, and publicly available records are kept.²¹¹ Last but certainly not least, access to counsel for detained immigrants must become a bed-rock principle in our immigration system—not only for supporting immigrants who have suffered from sexual violence while detained, but also for ensuring that immigrants can enjoy fair and meaningful access to the provisions of our immigration system.

Underlying these proposed changes is a call to disrupt the closed-loop system that currently characterizes immigration detention.²¹² While this Article does not take up the problem of sexual violence committed by other detainees in immigration detention within its primary scope, it is the hope that these larger structural changes will help to address the problem of inter-detainee sexual violence as well.

In sounding the call for accountability, some have suggested litigation and administrative remedies;²¹³ others have echoed this Article’s exhortation to eliminate privately contracted detention;²¹⁴ others still have looked to international law to provide a framework for legal redress.²¹⁵ While these theories merit serious consideration and implementation, legal redress must also include an avenue to immigration relief for detained immigrant survivors such as that promised by a transformed VAWA self-petition.

B. Expanding the VAWA Self-Petition Model Provides a Structural Intervention for Survivors of Sexual Violence in Immigration Detention

As in the case of the prototypical VAWA self-petition claim, immigration status plays a huge exacerbating factor in the dynamics that can trap an immigrant in cycles of abuse perpetrated by a U.S. citizen. While immigration relief is not enough to fully redress these harms, especially in the immigration detention context, it does offer a uniquely important key to escaping abusive dynamics: a successful self-petition confers legal permanent

210. *See id.*

211. For issues around data keeping and transparency in detention facilities, *see Speri, supra* note 9 (“Getting an accurate estimate of just how many women and men have been abused in immigration detention is virtually impossible. DHS regulations in place since 2014 require ICE to release to the public ‘all aggregated sexual abuse and assault data’ ‘at least annually’ — but the agency has never done so. Internally, ICE didn’t begin to properly record sexual abuse and assault data until that year, more than a decade after the agency was established.”); *DETAINED AND AT RISK, supra* note 9, at 1 (“Due to a shortage of publicly available data and the closed nature of the detention system, the extent to which ICE detainees are subject to sexual abuse nationwide is unclear . . .”).

212. *See Brenner, Darcy & Kubiak, supra* note 66, at 886 (“The closed nature of the military and detention facilities creates an environment in which sexual victimization occurs in isolation, often without knowledge of or intervention by those on the outside. The internal processes for addressing this victimization allow for sweeping discretion on the part of system actors.”).

213. *See generally id.*

214. *See Trueman, supra* note 33, at 368.

215. *See id.* at 353–58 (examining theories for legal redress stemming from the Universal Declaration of Human Rights, the Convention on the Elimination of All Forms of Discrimination Against Women, the International Covenant on Civil and Political Rights, and the United Nations Standard Minimum Rules for the Treatment of Prisoners).

resident status, which could provide grounds for release from immigration detention.²¹⁶ Moreover, accessing the necessary resources to secure financial, emotional, and other forms of relief—violence response services, financial resources, access to counsel, for example—becomes much easier once released from detention. As such, although immigration relief should not preclude other forms of relief, it can provide a crucial first step in survivors securing these other forms of relief. To this end, this Article calls for an expanded VAWA self-petition model that encompasses cases of sexual violence at the hands of immigration officers.

The wisdom in expanding the VAWA self-petition model becomes increasingly evident after examining the striking similarities between cases of sexual violence in immigration detention and the abusive dynamics at play in a prototypical VAWA self-petition claim. As in the case of a standard VAWA self-petition, sexual violence in immigration detention relies, in part, on abusers using immigrants' precarious status to engage in abusive behaviors with impunity. Much like the abusive spouses against whom Congress hoped to protect immigrants with the VAWA self-petition, abusive ICE officers use "control over their [victim's] immigration status and the threat of deportation and permanent

216. U.S. CITIZENSHIP AND IMMIGRATION SERVICES, *Green Card for VAWA Self-Petitioner*, USCIS (June 16, 2020), <https://www.uscis.gov/green-card/green-card-eligibility/green-card-for-ava-self-petitioner> [<https://perma.cc/V9PP-XB4W>]; AMERICAN IMMIGRATION COUNCIL, VIOLENCE AGAINST WOMEN ACT (VAWA) PROVIDES PROTECTIONS FOR IMMIGRANT WOMEN AND VICTIMS OF CRIME (Nov. 23, 2019), <https://www.americanimmigrationcouncil.org/research/violence-against-women-act-ava-immigration> [<https://perma.cc/X2D6-DHA5>] ("VAWA cancellation of removal is a form of relief designed to keep victims of abusive U.S.-citizen or LPR spouses or parents from being deported. It is a form of relief that a noncitizen victim can seek in immigration court after being placed in removal proceedings. Successful cancellation of removal results in LPR status for the victim, and his or her noncitizen children ultimately receive a green card as well."). As a general matter, immigrants with legal permanent resident status cannot be subject to detention. U.S. CITIZENSHIP AND IMMIGRATION SERVICES, *Rights and Responsibilities of a Green Card Holder (Permanent Resident)*, USCIS (Jul. 15, 2015), [https://www.uscis.gov/green-card/after-we-grant-your-green-card/rights-and-responsibilities-of-a-green-card-holder-permanent-resident#:~:text=As%20a%20permanent%20resident%20\(Green,you%20removable%20under%20immigration%20law&text=Be%20protected%20by%20all%20laws,of%20residence%20and%20local%20jurisdictions](https://www.uscis.gov/green-card/after-we-grant-your-green-card/rights-and-responsibilities-of-a-green-card-holder-permanent-resident#:~:text=As%20a%20permanent%20resident%20(Green,you%20removable%20under%20immigration%20law&text=Be%20protected%20by%20all%20laws,of%20residence%20and%20local%20jurisdictions) [<https://perma.cc/YT7C-HKW2>]. Despite this general rule, certain crimes can cause legal permanent residents to lose their status and become subject to removal proceedings; immigrants can be detained during the pendency of their removal proceedings. U.S. CITIZENSHIP AND IMMIGRATION SERVICES, *Maintaining Permanent Residence*, USCIS (Feb. 17, 2016), <https://www.uscis.gov/green-card/after-we-grant-your-green-card/maintaining-permanent-residence> [<https://perma.cc/3TBZ-N9J6>]; Bryan Longan, LEGAL AID SOCIETY IMMIGRATION UNIT, IMMIGRATION DETENTION AND REMOVAL: A GUIDE FOR DETAINEES AND THEIR FAMILIES 5–6 (2006), https://www.nilc.org/wp-content/uploads/2015/12/detentionremovalguide_2006-02.pdf [<https://perma.cc/M32G-9T5Q>]; IMMIGRANT LEGAL RESOURCE CENTER, THE RIGHTS OF LAWFUL PERMANENT RESIDENTS (Mar. 2017), https://www.ilrc.org/sites/default/files/resources/lpr_info_sheet_final_march_2017.pdf [<https://perma.cc/XH99-WN86>]. The VAWA self-petition model, which includes the VAWA cancellation of removal, would provide a pathway to valid legal permanent resident status and, ultimately, termination of removal proceedings and release from detention. See Story, Olavarria & Fisher Preda, *supra* note 4, at 2. This Article proposes, see *infra* PART V.C, that the transformed VAWA self-petition eliminate the good moral character requirements that would bar legal permanent resident status to otherwise successful applicants on the basis of criminal histories.

separation from the United States” as a means to maintain power over immigrants.²¹⁷ Although the VAWA self-petition case involves abusive spouses (or former spouses) wielding power over their partners through the marriage petition process, ICE officers can hold a similar power over detainees by obfuscating evidence, threatening to harm them if they attempt to report, and other tactics.²¹⁸ Even where the ICE officers lack the direct power to deport detainees, these officers often can—and do—mischaracterize their power to manipulate detainees into believing that the officers hold access to immigration relief in the palm of their hands.²¹⁹ As the PREA Commission acknowledges, “[b]ecause immigration detainees are confined by the agency with the power to deport them, officers have an astounding degree of leverage, especially when detainees are not well informed of their rights and access to legal counsel.”²²⁰ This degree of leverage is no more clearly exploited than in instances where ICE officers have sexually propositioned immigrants whose cases they control.²²¹

Examples of the immigration-related abuse that could be contemplated by the VAWA self-petition model include, but are not limited to: threatening to report an immigrant or their children to the Department of Homeland Security; telling an immigrant that if they call the police for help, the abuser will have the immigrant deported; not filing papers to confer legal immigration status for an immigrant and/or their children; threatening to withdraw or withdrawing immigration papers filed for an immigrant and/or their children, and; not giving an immigrant access to documents that needed to apply for lawful immigration status.²²² The currently available record of sexual violence in immigration detention, though grossly incomplete, evidences a striking pattern of immigration-related abuse intertwined with sexual abuse. For instance, the 2014 complaint filed by the Mexican American Legal Defense and Educational Fund alleged that guards at the privately-run Karnes County Residential Center referred to detainees they sexually abused as their novias—Spanish for girlfriends—while forcing them to engage in sexual acts; many of these guards had linked these sexual favors with promises of assistance with immigration cases.²²³ The 2017 case *E.D. v. Sharkey* alleges that an ICE officer used threats of deportation to coerce a detained asylum-seeker and IPV survivor.²²⁴ These and other cases²²⁵ describe incident

217. Donovan, *supra* note 7, at 771.

218. See Speri, *supra* note 9.

219. See *id.*; see also Muñoz, *supra* note 67, at 566.

220. See Brenner, Darcy & Kubiak, *supra* note 66, at 913.

221. See *id.* at 911.

222. See Hass, Ammar & Orloff, *supra* note 122.

223. MEXICAN AMERICAN LEGAL DEFENSE FUND (MALDEF), RE: COMPLAINTS REGARDING SEXUAL ABUSE OF WOMEN IN DHS CUSTODY AT KARNES COUNTY RESIDENTIAL CENTER (Sep. 30, 2014), http://www.maldef.org/assets/pdf/2014-09-30_Karnes_PREA_Letter_Complaint.pdf [<https://perma.cc/GGV4-R77B>]. In 2015, the DHS said it found “no evidence” that women were being sexually assaulted at Karnes. See Speri, *supra* note 9.

224. VICTORIA LÓPEZ AND SANDRA PARK, AMERICAN CIVIL LIBERTIES UNION, *ICE Detention Center Says It's Not Responsible for Staff's Sexual Abuse of Detainees* (Nov. 6, 2018), <https://www.aclu.org/blog/immigrants-rights/immigrants-rights-and-detention/ice-detention-center-says-its-not-responsible> [<https://perma.cc/RM2W-EXWT>].

225. See DETAINED AND AT RISK, *supra* note 9.

after incident of officers using immigrants' precarious status as a tool to sexually abuse with impunity.

Like the prototypical VAWA self-petition abuser, an ICE officer can prevent a vulnerable immigrant from attaining legal immigration status in the United States through retaliatory deportation or other tactics.²²⁶ And, as is the case for the prototypical VAWA self-petitioner, for many immigrant detainees this form of power and control is particularly pernicious and effective.²²⁷ Much like IPV survivors trapped in the cycle of violence with abusive partners, detained immigrants are both literally trapped by the confines of their detention and trapped by abusive power dynamics. The fear induced by this pattern of sexual and immigration-related abuse makes it extremely difficult for a survivor not only to break from the cycle of violence, but also to find the support services needed to heal and recover.²²⁸ Given that the current VAWA self-petition model was designed to mitigate harms resulting from abusive dynamics between immigrants and their abusers, and that similar dynamics pervade the detention context, this legal mechanism lends itself well as a basis for a remedy for IPV against detained immigrants.

C. Operationalizing a Transformed VAWA Self-petition

Clarion calls for a transformed VAWA self-petition model would be incomplete without discussing how to operationalize this proposed transformation. First and foremost, this Article takes the position that the primary strategy for destabilizing sexual violence in immigration detention should center around the abolition of immigration detention altogether. So long as immigrants are forced into cages, extreme power imbalances will continue to exist, allowing abuses of power—including sexual violence—to fester.²²⁹

226. See Hass, Ammar & Orloff, *supra* note 122. For examples of retaliatory deportation, see REBECCA WALLACE, SARA NEEL & ARASH JAHANIAN, AMERICAN CIVIL LIBERTIES UNION, *ICE Is Abusing the ACLU's Clients Because They are Fighting Trump's Deportation Machine* (Aug. 31, 2017), <https://www.aclu.org/blog/immigrants-rights/immigrants-rights-and-detention/ice-abusing-aclus-clients-because-they-are> [<https://perma.cc/ZH2Q-NV5Y>]; *ICE Can Deport Those Who Complain of Abuse By the Agency*, NBC NEWS (Aug. 5, 2014), <https://www.nbcnews.com/news/latino/ice-can-deport-those-who-complain-abuse-agency-n173186> [<https://perma.cc/UEE8-L3F8>].

227. See Hass, Ammar & Orloff, *supra* note 122.

228. See *id.*

229. See, e.g., Dean Spade, *The Only Way to End Racialized Gender Violence in Prisons is to End Prisons: A Response to Russell Robinson's "Masculinity as Prison"*, 3 CAL. L. REV. CIR. 184, 193 <https://racism.org/articles/law-and-justice/criminal-justice-and-racism/137-prison-industrial-complex-and-mass-incarceration/1562-endprisons?showall=1> [<https://perma.cc/W4DS-FLLB>] (last visited Aug. 27, 2020) (“Because of the nature of our criminal systems and prisons, there is not a fair or safe way for queer, trans, and gender non-conforming people, or anyone, to be imprisoned. Starting from that premise, we can take different approaches to questions of reform, focusing more on decarcerating and dismantling systems of criminalization, and being extremely wary of reforms that purport to offer recognition and inclusion but actually expand and legitimize violent institutions. The best ways to protect queer, trans, and gender non-conforming people from police and prison violence is to keep them out of contact with police and prisons and to support them while they are locked up.”); Brenner, Darcy & Kubiak, *supra* note 66, at 890–91 (describing how immigration detention centers and prisons, among other systems, share tenets as “closed system[s] that obstruct victims from being able to successfully report and receive justice for sexual violence perpetrated against them”).

Moreover, superficial interventions will not curb these abuses: the carceral system is a plastic microbe, constantly evolving new adaptations to survive and thrive against surface-level reforms.²³⁰ In this sense, the complex of crimmigration structures—the laws that comprise its scaffolding,²³¹ the media narratives that fuel its engine,²³² the cluster of cages that swarm at its center—will continue to metastasize without full excision. However, this Article also takes the position that calls for abolition and reform are not necessarily mutually exclusive. Rather, as abolitionist thinkers have clarified, while “reformist reforms” expand the reach of carceral structures under the guise of “improving” them, abolitionist reforms “work to chip away and reduce [the] overall impact” of these

230. See ANGELA Y. DAVIS, ARE PRISONS OBSOLETE? 20 (2003); *The Challenge of Prison Abolition: A Conversation Between Angela Y. Davis and Dylan Rodriguez*, History is a Weapon, <https://www.historyisaweapon.com/defcon1/davisinterview.html> [<https://perma.cc/6MUK-5U5H>] (last visited Aug. 9, 2020) (capturing an interview with Angela Davis where she describes “[t]he seemingly unbreakable link between prison reform and prison development” and how it “has created a situation in which progress in prison reform has tended to render the prison more impermeable to change and has resulted in bigger, and what are considered ‘better,’ prisons.”); Ruth Wilson Gilmore & James Kilgore, *The Case for Abolition*, THE MARSHALL PROJECT (June. 19, 2019), <https://www.themarshallproject.org/2019/06/19/the-case-for-abolition> [<https://perma.cc/U8AM-QAG3>] (“Our work thrives because we recognize that reform has assumed new, troubling shapes . . . jail expansion has been chugging along largely because law enforcement continues to absorb social welfare work—mental and physical health, education, family unification.”); ANGELA Y. DAVIS, FREEDOM IS A CONSTANT STRUGGLE 22 (2016) (hereinafter “FREEDOM IS A CONSTANT STRUGGLE”) (“Reform doesn’t come after the advent of prison; it accompanies the birth of the prison. So prison reform has always only created better prisons. In the process of creating better prisons, more people are brought under the surveillance of the correctional and law enforcement networks.”); Carl Takei, *From Mass Incarceration to Mass Control, and Back Again: How Bipartisan Criminal Justice Reform May Lead To A For-Profit Nightmare*, 20 U. PENN. J. OF L. AND SOC. CHANGE 125, 170–83 (2017).

231. See, e.g., Leisy Abrego, Mat Coleman, Daniel E. Martinez, Cecilia Menjivar & Jeremy Slack, *Making Immigrants into Criminals: Legal Processes of Criminalization in the Post-IIRIRA Era*, 5 J. ON MIGRATION AND HUM. SEC. 694, 697-99 (2017).

232. See, e.g., Andrea Figueroa-Caballero & Dana Mastro, *Examining the Effects of News Coverage Linking Undocumented Immigrants with Criminality: Policy and Punitive Implications*, 86 COMM. MONOGRAPHS 36 (2018); FREEDOM IS A CONSTANT STRUGGLE, *supra* note 231, at 91–93.

structures.²³³ So long as detention centers continue to exist, laws and policies should be implemented to reduce harm arising from experiences in these facilities. The transformed VAWA-self petition, if enacted conscientiously, can represent an abolitionist reform that reduces harm without bootstrapping more elaborate crimmigration machineries.

It is with abolitionist reform in mind that this Article takes up questions around operationalizing the transformed VAWA self-petition model. In order to effectuate this model, a number of global issues must be addressed alongside the transformation of the VAWA self-petition. For example, as previously reviewed, the current VAWA self-petition suffers from barriers to access which pervade the larger immigration landscape; these barriers include language barriers, failures to maintain transparent data keeping, and lack of access to advocates and lawyers.²³⁴ To create meaningful relief through the VAWA self-petition model, laws and policies must address and mitigate these barriers. Additionally, certain doctrinal changes are necessary for effectuating a transformed VAWA. Namely, policy-makers must eliminate “good moral character” requirements in order to cleave from the respectability politics and “innocent victim” narratives they inhere.

In addition to these global interventions, policymakers must craft a careful plan for the implementation of the transformed VAWA self-petition model. This Article proposes the appointment of an independent, publicly operated third-party agency or organization to provide meaningful oversight over ICE practices and facilitate self-petition processes. This entity would maintain transparent data-keeping practices, facilitate requests to file

233. CRITICAL RESISTANCE, REFORMIST REFORMS VS. ABOLITIONIST STEPS IN POLICING, https://static1.squarespace.com/static/59ead8f9692ebee25b72f17ff/t/5b65cd58758d46d34254f22c/1533398363539/CR_NoCops_reform_vs_abolition_CRside.pdf [<https://perma.cc/5KWL-RCNV>] (last visited Aug. 27, 2020). Julia Sudbury, *Reform or Abolition? Using Popular Mobilisations to Dismantle The ‘Prison-Industrial Complex’*, 77 *CTR. FOR CRIME & JUST. STUD.* 26, 27 (2009) (“While abolitionists point out that reform in isolation of a broader decarcerative strategy serves to legitimate and even expand the prison-industrial complex, we also work in solidarity with prisoners to challenge inhumane conditions inside. Described by Angela Y. Davis as ‘non-reformist reforms’, these efforts are assessed first in terms of whether they contribute toward decreasing or increasing prison budgets and the reach of the criminal justice system. For anti-prison activists, however, reform is not the primary objective. Rather we work toward dual priorities. First, we aim to transform popular consciousness, so that people can believe that a world without prisons is possible. Second, we take practical steps toward dismantling the prison industrial complex. These steps include campaigns for a moratorium on prison expansion, mobilising community power to prevent the construction of proposed new prisons, shrinking the system through decarcerative efforts and creating community-based alternatives to imprisonment.”); HISTORY IS A WEAPON, *supra* note 231 (capturing an interview with Angela Davis in which she posits that “[t]he most difficult question for advocates of prison abolition is how to establish a balance between reforms that are clearly necessary to safeguard the lives of prisoners and those strategies designed to promote the eventual abolition of prisons as the dominant mode of punishment” because “there is [not] a strict dividing line between reform and abolition” and “[d]emands for improved health care, including protection from sexual abuse and challenges to the myriad ways in which prisons violate prisoners’ human rights, can be integrated into an abolitionist context that elaborates specific decarceration strategies and helps to develop a popular discourse on the need to shift resources from punishment to education, housing, health care, and other public resources and services.”).

234. *See infra* PART III.C.

VAWA self-petitions, and process the submission of VAWA self-petitions to USCIS.²³⁵ To ensure timely facilitation of requests to file petitions, this organization would maintain direct lines of contact and communication with immigrants in detention. Instantiating this line of communication could take the form of a direct line telephone system or weekly audits. One model for the weekly audits system can be found in the nonprofit Disability Rights California, which has special authority to enter ICE facilities directly to conduct audits relating to disability rights violations.²³⁶ Alternatively, the *Lyon v. ICE* telephone system can provide a blueprint for a direct communication line.²³⁷ In addition to these measures, the deputized organization should be given resources to facilitate connections between legal advocates and self-petitioners seeking counsel, as well as to collect evidence on its own by securing timely and confidential declarations from self-petitioners. The proposed nonprofit and/or public third-party agency model offers many advantages as an implementation system. First, ensuring that the organization is completely removed from ICE's jurisdiction promotes impartiality and prevents an expansion of ICE's budget, which could result from building additional programming within ICE itself. Second, housing these functions within one third-party agency would streamline the filing of claims. Third, investing the organization with resources to facilitate access to counsel and take real-time declarations from self-petitioners would address concerns regarding lack of legal access as well as evidence preservation issues.

A VAWA self-petition under the proposed schema would operate as follows. First, a person suffering from sexual violence in immigration detention would contact the third-party agency tasked with facilitating claims. After completing a self-petition through the agency, the agency would then send the claim to USCIS, the government agency that already reviews VAWA self-petitions. Successful self-petitions would result in two outcomes. First and foremost, a successful self-petitioner would receive a green card and be released from detention. Second, the independent agency would conduct an audit of the

235. As with the standard VAWA self-petition, this Article contemplates that claims under the transformed VAWA self-petition would be adjudicated within USCIS; moreover, as with other VAWA self-petitions, successful claims through this expanded relief would result in receipt of a green card.

236. DISABILITY RIGHTS CALIFORNIA, *THERE IS NO SAFETY HERE: THE DANGERS FOR PEOPLE WITH MENTAL ILLNESS AND OTHER DISABILITIES IN IMMIGRATION DETENTION AT GEO GROUP'S ADELANTO ICE PROCESSING CENTER* (2019), https://www.disabilityrightsca.org/system/files/file-attachments/DRC_REPORT_ADELANTO-IMMIG_DETENTION_MARCH2019.pdf [<https://perma.cc/5RVV-GQ47>] (“Disability Rights California (DRC) is the state’s designated protection and advocacy system, charged with protecting the rights of people with disabilities. DRC has the legal authority to inspect and monitor conditions in facilities that provide care and treatment to people with mental illness and other disabilities.”); DISABILITY RIGHTS CALIFORNIA, *Summary of Disability Rights California’s Authority under state and federal law* (Jan. 28, 2020), <https://www.disabilityrightsca.org/publications/summary-of-disability-rights-californias-authority-under-state-and-federal-law> [<https://perma.cc/Y63D-NA8D>].

237. ACLU NORCAL, *Lyon v. ICE (Telephone Access for Immigration Detainees)*, (Apr. 23, 2019), <https://www.aclunc.org/our-work/legal-docket/lyon-v-ice-telephone-access-immigration-detainees> [<https://perma.cc/2ZDD-2R6Q>]; ACLU NORCAL, *NOTICE OF PROPOSED SETTLEMENT REGARDING TELEPHONE ACCESS IN IMMIGRATION DETENTION* (Sept. 26, 2016), <https://www.aclunc.org/sites/default/files/2016.09.26%20Notice%20of%20Proposed%20Settlement.pdf> [<https://perma.cc/7ZN4-3N96>].

detention facility where the underlying incident occurred.²³⁸ If the agency finds the facility to be in violation of the statutory and constitutional rights of immigrants in detention,²³⁹ the facility would face a number of severe financial and other penalties.

This proposed expansion of the VAWA self-petition is not without its own problems. For instance, as discussed above, the current iteration of the self-petition struggles with a number of practical limitations.²⁴⁰ In particular, it is limited insofar as it does not provide access to compensatory relief, and in that it is reactionary rather than preventative. To this end, the expanded VAWA petition must be coupled with other preventative solutions and increased access to other forms of relief.

Despite these shortcomings, the VAWA self-petition model offers major advantages as a means of providing immigration relief for immigrant survivors of state sexual violence. One major logistical advantage is that, unlike the U visa, there are no caps on VAWA self-petitions. On a deeper normative level, the VAWA self-petition model embodies the values of redressing sexual violence in detention on the basis of structural accountability, rather than carceral feminist logic. From its inception, the VAWA self-petition was created in contemplation of the structural forces that perpetuate gender-based violence and injustice. Following this model, the transformed VAWA self-petition understands immigration law as a tool for addressing structural harms along lines of gender and immigration status, rather than premising immigration relief on a carceral feminist “victim” typecast. By basing access to an independent avenue for immigration relief on two key insights—first, that immigrants are made more vulnerable to abuse because of their status and second, that this heightened vulnerability arises from interlacing structures of gender-based and immigration-based harm—the transformed VAWA self-petition builds on a reparative vision of legal relief. This vision is based on a clear-eyed view that the solutions to the problem of sexual violence in immigration detention must connect to the structural causes of immigrant sexual abuse.

The transformed VAWA self-petition lays the foundation for a reimagined basis for immigration relief. In this reimagination, state responsiveness is connected to a recognition of the structural policies and practices placed survivors in harm’s way; it is this recognition that compels a state commitment to repairing this harm through immigration relief,

238. This Article rejects “bad apple” theories that would focus attention on individual officers and instead calls for efforts that focus on the institutions that enable sexual violence to continue with impunity. See Jay Stanley, *We Need to Move Beyond the Frame of the “Bad Apple Cop”*, ACLU (Mar. 19, 2015), <https://www.aclu.org/blog/national-security/we-need-move-beyond-frame-bad-apple-cop> [<https://perma.cc/T889-KHRE>] (describing “bad apple” theories about law enforcement abuses).

239. For a review of some of the laws that protect against sexual violence in detention, see STOP PRISONER RAPE, IN THE SHADOWS: SEXUAL VIOLENCE IN U.S. DETENTION FACILITIES A SHADOW REPORT TO THE U.N. COMMITTEE AGAINST TORTURE 6–7 (2006), <https://justdetention.org/wp-content/uploads/2015/10/In-The-Shadows-Sexual-Violence-in-U.S.-Detention-Facilities.pdf> [<https://perma.cc/PKV3-YKYN>]. As discussed earlier in this Article, see *infra* PART III, these laws carry their own lacunae; further advocacy efforts are required to expand protections under these legal structures.

240. See Ingram, McClelland, Martin, Caballero, Mayorga & Gillespie, *supra* note 134, at 867; Orloff, *supra* note 126.

regardless of how “respectable” the survivor appears to be. Thus, the reimagined VAWA self-petition can represent an important step toward advancing abolitionist reform, disrupting carceral feminist logics, and building reparative logics into U.S. immigration laws.

VI. CONCLUSION

Rather than expanding the U visa—which relies on a carceral feminist logic and fails to account the power imbalances that lead to violence—this Article calls for the adoption of a transformed VAWA self-petition. Shedding entanglements with carceral feminism and respectability politics, this transformed VAWA self-petition carries a number of important advantages. First, it is grounded in a structural, reparative logic. As a result, this model is not only able to recognize the power imbalances leading to violence, but also to change those imbalances. Second, this transformed self-petition can broker important changes in our understandings of the purposes that immigration relief should serve—purposes that must include assuming structural responsibility for the gender-based harms for which immigrants are particularly vulnerable. Third, because it is grounded in notions of structural responsibility, the transformed petition has the ability to hold U.S. systems of government accountable for their part in producing sexual violence. Fourth, in embracing structural accountability, the transformed model casts off a respectability politics that either unjustly attributes sexual violence to atomized acts of individual immigrants or reduces them to mere characters in an “innocent victim of crime” script; rather, the transformed model humanizes immigrants as people inherently deserving of dignified and equitable treatment.

Transforming the VAWA self-petition through applying a philosophy of structural responsibility carries implications that reach far beyond the context of sexual violence in immigration detention. This expansion can create an opening in much-needed discourse around how we reimagine the role and responsibility of the state in addressing harms against its vulnerable constituents, and how we design laws and policies with these reimagined relationships in mind. Building from a structural accountability logic bursts open opportunities to divest from value systems that tie state responses to harm to proximity to respectability politics, and instead invest in value systems that tie responsiveness to reparative commitments. Future work building from this discourse can examine how structural accountability logics may be applied to other responses to state violence in the criminal justice system, education system, and beyond.