

UC Irvine
UC Irvine Law Review

Title

Trafficking and the Shallow State

Permalink

<https://escholarship.org/uc/item/7jq9r6k7>

Journal

UC Irvine Law Review , 12(1)

ISSN

2327-4514

Author

Dahlstrom, Julie

Publication Date

2021-11-01

Trafficking and the Shallow State

Julie Dahlstrom*

More than two decades ago, the Trafficking Victims Protection Act (TVPA) established new, robust protections for immigrant victims of trafficking. In particular, Congress created the T visa, a special form of immigration status, to protect immigrant victims from deportation. Despite lofty ambitions, the annual cap of 5,000 T visas has never been reached, with fewer than 1,200 approved each year. In recent years, denial rates also have climbed. For example, in fiscal year 2020, U.S. Citizenship and Immigration Services denied 42.79% of the T visa applications that the agency adjudicated, compared with just 28.12% in fiscal year 2015. These developments came as former president Donald J. Trump proclaimed a deep commitment to end the “epidemic” of human trafficking and to protect “innocent” victims.

Though scholars have critiqued the general protection framework for immigrant victims of trafficking, this Article unearths an understudied problem: the often-unseen role of the “shallow state.” In contrast to the much-discussed “deep state” of career bureaucrats, this Article suggests that low-level administrative actors adjudicating humanitarian immigration cases have subtly worked to undermine protections for immigrant victims of trafficking. This Article demonstrates how administrative actors through a range of tactics, including delay, rejection, and heightened stakes, have contorted the T visa application process to make it more difficult for immigrant victims to navigate. The Article explores how these actions—often diffuse and obscured—have been hard to identify and subject to judicial review. It warns that these bureaucratic tendencies have resulted in declining approval rates with the potential to erode protections for immigrant victims of trafficking for years to come. It, thus, prescribes not only greater attention to such practices but also administrative and judicial remedies.

* Clinical Associate Professor and Director of the Immigrants’ Rights and Human Trafficking Program, Boston University School of Law. Many thanks to Jane Aiken, Cori Alonso-Yoder, Warren Binford, Daniel Kanstroom, Jocelyn Getgen Kestenbaum, Lori Nessel, Faraz Sanei, and Rachel Wechsler for your insightful comments. I greatly appreciate the feedback received from the NYU Clinical Law Review Writing Workshop. I am immensely grateful to James Cho, Brian Flaherty, Johanna Greenberg, Samantha Lerner, and Sara Perkins for their excellent research assistance. All errors are my own.

Introduction.....	62
I. Contemporary Solutions for Immigrant Victims.....	70
A. Early Tools to Address Human Trafficking.....	70
B. Contemporary Efforts to Address Trafficking.....	74
C. Federal Legislation to Protect Immigrant Victims	76
D. A Flawed Federal Framework.....	81
E. Rationales for Insufficient Protection.....	85
II. The Shallow State	87
A. Trafficking and the Shallow State	87
B. The Shallow State Defined.....	88
C. Immigration Law and the Shallow State.....	89
D. Tactics of the Shallow State.....	92
1. Heightened Stakes.....	92
2. Rejection.....	94
3. Delay	99
4. Narrow Misinterpretation.....	100
5. “Darkside Discretion”.....	103
III. Constraints on the Shallow State.....	105
Conclusion.....	109

INTRODUCTION

To mark the twentieth anniversary of the Trafficking Victims Protection Act (TVPA), former president Donald J. Trump hosted a White House Summit on Human Trafficking.¹ He announced unequivocally: “My administration is 100 percent committed to eradicating human trafficking from the Earth.”² He reminded the audience that “[w]e’ve had a tremendous track record—the best track record in a long time.”³ He then proudly proclaimed how his administration had passed nine pieces of anti-trafficking legislation, authorized \$430 million to fight trafficking, and withheld foreign aid from countries that failed to sufficiently fight trafficking.⁴

President Trump’s summit was not simply a public relations stunt. The Trump administration, like many Republican and Democratic administrations before it, has repeatedly insisted that ending human trafficking was a major foreign policy priority and committed to protect “innocent” victims.⁵ In fact, President Trump gained

1. *Remarks by President Trump at the White House Summit on Human Trafficking: The 20th Anniversary of the Trafficking Victims Protection Act of 2000*, WHITE HOUSE (Jan. 31, 2020, 12:21 PM) [hereinafter *White House Summit*], <https://trumpwhitehouse.archives.gov/briefings-statements/remarks-president-trump-white-house-summit-human-trafficking-20th-anniversary-trafficking-victims-protection-act-2000/> [https://perma.cc/25HX-4E62].

2. *Id.*

3. *Id.*

4. *Id.*

5. See, e.g., *The Trump Administration Is Committed to Combating Human Trafficking and Protecting the Innocent*, TRUMP WHITE HOUSE (Oct. 20, 2020), <https://www.whitehouse.gov/briefings-statements/trump-administration-committed-combating-human-trafficking-protecting->

notoriety when he controversially proclaimed that trafficking is “worse than ever before”⁶ and promised to bring the full force of the U.S. government to bear on the problem.⁷ He accomplished this objective often in a rather cynical, Machiavellian way, by using the rhetoric of human trafficking to justify broad executive actions aimed at immigration enforcement.⁸ When advocates opined that these efforts

innocent/ [https://perma.cc/FZ2F-GCG5] (statement of President Trump) (“We renew our resolve to redouble our efforts to deliver justice to all who contribute to the cruelty of human trafficking, and will tenaciously pursue the promise of freedom for all victims of this terrible crime.”); *see also* Remarks in a Meeting on Human Trafficking at the Mexico-United States Border and an Exchange With Reporters, 2019 DAILY COMP. PRES. DOC. (Feb. 1, 2019); *White House Summit*, *supra* note 1; Rebecca Ballhaus, *Trump Strengthens Efforts Against Human Trafficking, Amid Criticism from Victims’ Advocates*, WALL ST. J. (Jan. 31, 2020, 1:04 PM), <https://www.wsj.com/articles/trump-strengthens-efforts-against-human-trafficking-amid-criticism-from-victims-advocates-11580482657> [https://perma.cc/Y3U6-TRVL] (quoting President Trump, who proclaimed that his administration “will not rest until we’ve stopped every last human trafficker and liberated every last survivor”).

6. *White House Summit*, *supra* note 1. President Trump’s statement that trafficking was “worse” than ever before was heavily criticized by scholars and activists who remarked that there is no evidence to support this assertion. *See, e.g.*, Aaron Blake, *Trump Says Human Trafficking ‘Is Worse than It’s Ever Been in the History of the World.’ Where to Begin?*, WASH. POST (April 19, 2018, 12:19 PM), <https://www.washingtonpost.com/news/the-fix/wp/2018/04/19/trump-says-human-trafficking-is-worse-than-its-ever-been-in-the-history-of-the-world-where-to-even-begin/> [https://perma.cc/VXB4-KDXN] (“It seems this is one of those facts that nobody else knew—because it’s not true.”); Daniella Diaz, *Trump Says Human Trafficking Is ‘Worse Now than It Ever Was,’* CNN (July 28, 2017, 7:24 PM), <https://www.cnn.com/2017/07/28/politics/donald-trump-human-trafficking/index.html> [https://perma.cc/JU5K-TYSR] (citing to statistics related to African slavery to argue that, while human trafficking is a serious problem, it is certainly not “worse” than it has ever been).

7. *President Donald J. Trump Has Made It A Priority to Combat the Heinous Crime of Human Trafficking*, WHITE HOUSE (Oct. 29, 2019), <https://www.whitehouse.gov/briefings-statements/president-donald-j-trump-made-priority-combat-heinous-crime-human-trafficking/> [https://perma.cc/6D4C-YM6G] (“My Administration is committed to leveraging every resource we have to confront this threat, to support the victims and survivors, and to hold traffickers accountable for their heinous crimes.”).

8. President Trump used trafficking as a justification for wide-scale immigration enforcement efforts, which had the impact of separating hundreds of immigrant families, criminally prosecuting immigrants who entered the country unlawfully, and dismantling asylum protections. *See, e.g.*, Julie Dahlstrom, *The Elastic Meaning(s) of Human Trafficking*, 108 CALIF. L. REV. 379, 433 (2020) (citing *Attorney General Sessions Addresses Recent Criticisms of Zero Tolerance by Church Leaders*, U.S. DEP’T JUST. (June 14, 2018), <https://www.justice.gov/opa/speech/attorneygeneral-sessions-addresses-recent-criticisms-zero-tolerance-church-leaders> [https://perma.cc/F1P2-A7BN]) (examining how President Trump used trafficking as a sword to fuel immigration enforcement efforts with serious collateral consequences).

would imperil protections for immigrant victims,⁹ he reassured victims: “You are not alone.”¹⁰

Yet immigrant victims of human trafficking in the United States had never felt so alone. Prominent anti-trafficking advocates boycotted the White House Summit on Human Trafficking.¹¹ They called President Trump’s anti-trafficking rhetoric a “public deception.”¹² Advocates pointed to rising denial rates for T visas, a

9. This Article uses the term “victim” throughout because it is a term of legal significance. Many have argued that the term “victim” is problematic, as it characterizes individuals by weakness or passivity, rather than by strength or courage, and prefer the term “survivor.” *See, e.g.*, Martha Minow, *Surviving Victim Talk*, 40 UCLA L. REV. 1411, 1432 (1993) (“Victimhood is a cramped identity, depending on and reinforcing the faulty idea that a person can be reduced to a trait. The victim is helpless, decimated, pathetic, weak, and ignorant. Departing from this script may mean losing whatever entitlements and compassion victim status may afford.”); Jayashri Srikantiah, *Perfect Victims and Real Survivors: The Iconic Victim in Domestic Human Trafficking Law*, 87 B.U. L. REV. 157, 160 (2007) (discussing the iconic trafficking victim as “meek, passive objects of sexual exploitation . . . exercising no free will during their illegal entry” and suggesting this rhetoric has become a myth to lawmakers and law enforcement agents). However, this Article uses the term “victim” in place of “survivor” because it is a legal term of art that triggers access to important protections, including but not limited to immigration status, public benefits, civil damages, and criminal restitution. *See* Amanda Peters, *Reconsidering Federal and State Obstacles to Human Trafficking Victim Status and Entitlements*, UTAH L. REV. 535, 539 (2016) (“In the human trafficking context, victims receive much more than mere attention by wearing the label [of victim]; they earn legal rights, services, benefits, and freedom from criminal charges.”).

10. *Trump to Trafficking Victims: You Are Not Alone*, CNN (Apr. 11, 2018), <https://www.cnn.com/videos/politics/2018/04/11/trump-signs-sex-trafficking-act.cnn> [<https://perma.cc/4DT2-ECU8>].

11. *See, e.g.*, Jessica Contrera, *Anti-Human-Trafficking Groups Refuse To Attend Ivanka Trump’s White House Summit*, WASH. POST (Jan. 30, 2020, 6:50 AM), https://www.washingtonpost.com/local/human-trafficking-groups-refuse-to-attend-ivanka-trumps-white-house-summit/2020/01/29/6410de32-41d4-11ea-b503-2b077c436617_story.html [<https://perma.cc/B9WR-MJ6E>]; Katie Rogers, *White House Holds Trafficking ‘Summit,’ but Critics Dismiss Lack of Dialogue*, N.Y. TIMES (Jan. 31, 2020), <https://www.nytimes.com/2020/01/31/us/politics/trump-trafficking.html> [<https://perma.cc/5WX6-VH83>] (“[T]he White House event, which lasted the better part of two hours, did nothing to ease the concerns of activists who have said the administration’s previous efforts on the issue have harmed some of those seeking help.”).

12. Contrera, *supra* note 11. Advocates criticized the White House for leveraging anti-trafficking rhetoric to justify immigration enforcement efforts while “abandon[ing] actual survivors of trafficking when they need immigration relief themselves.” *See, e.g.*, Melissa Gira Grant, *The Trump Administration Finally Broke the Anti-Trafficking Movement*, NEW REPUBLIC (Feb. 18, 2020), <https://newrepublic.com/article/156579/trump-administration-finally-broke-anti-trafficking-movement> [<https://perma.cc/92B7-GBNY>] (“While the Trump administration uses a sensationalistic, false narrative of trafficking at the southern border to justify anti-immigrant policies—and stoke racist panic among Trump’s base about threats to white women—it has abandoned actual survivors of trafficking when they need immigration relief themselves.”). As Trump intensified immigration enforcement efforts, many scholars and activists expressed alarm that immigrant victims of trafficking were caught in the crosshairs, targeted with deportation or rendered more vulnerable to trafficking. *See* Susan Tiefenbrun, *The Saga of Susannah, A U.S. Remedy for Sex Trafficking in Women: The Victims of Trafficking and Violence Protection Act of 2002*, UTAH L. REV. 107, 114 (2002) (“[I]mmigration laws that are zealously enforced in the destination countries in an effort to protect victims often have a negative effect on the very victims they seek to protect by requiring their deportation.”); Julie Dahlstrom, Opinion, *Trump’s Harsh Immigration Policies Are a Gift for Human Traffickers*, HILL (July 12, 2018, 6:30 PM), <https://thehill.com/opinion/civil-rights/396781-trumps-harsh-immigration->

specialized form of immigration relief for trafficking victims. They also highlighted new, significant barriers that immigrant victims faced when applying for immigration benefits.¹³ As Martina Vandenberg, founder of the Human Trafficking Legal Center, remarked, “We have such a chasm between rhetoric and reality” as the Executive has “undermin[ed] protections carefully built for trafficking victims over two decades.”¹⁴

The legislative landscape seemed protective. Over two decades ago, Congress recognized the unique challenges faced by immigrant victims of trafficking by passing novel federal anti-trafficking legislation. In the Trafficking Victims Protection Act (TVPA) of 2000, Congress noted that instead of finding refuge, immigrant victims “are repeatedly punished more harshly than the traffickers themselves.”¹⁵ Congress acknowledged that immigrant victims often found themselves subject to both criminal penalties and harsh immigration enforcement efforts.¹⁶ Thus, legislators embraced the need to “protect[] rather than punish[]” trafficking victims¹⁷ and established specialized immigration protections, including T visas,¹⁸ U visas,¹⁹ and Continued Presence.²⁰

Since 2000, however, annual T visa approvals for immigrant victims have remained dismally low.²¹ Despite a cap of 5,000 available annually, fewer than 1,100

policies-are-a-gift-for-human-traffickers [https://perma.cc/AT7S-V8P9] (describing how immigration enforcement efforts under the Trump administration have rendered immigrant victims more vulnerable).

13. Advocates observed that many immigrant victims, afraid of deportation and/or reprisals from traffickers, were unable to step forward to cooperate with law enforcement or to apply for significant immigration protections. See Abigail Abrams, *I Thought I Was Going to Die: How Donald Trump's Immigration Agenda Set Back the Clock on Fighting Human Trafficking*, TIME (Oct. 30, 2020, 10:41 AM), <https://time.com/5905437/human-trafficking-trump-administration/> [https://perma.cc/DL35-9Y3Q].

14. Contrera, *supra* note 11.

15. Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, § 102(b)(17), 114 Stat. 1464, 1468.

16. *See id.*

17. § 102(b)(24), 114 Stat. at 1469.

18. T nonimmigrant status has been called colloquially “T visas.” For consistency, this Article refers to T nonimmigrant status throughout this Article as a “T visa,” and U nonimmigrant status for victims of violent crime as a “U visa.” For a discussion of the requirements to qualify for T visas, see *infra* Section I.C. This Article focuses exclusively on T-1 visas, which are available to victims of a “severe form of trafficking,” rather than derivative T visas. Therefore, this Article uses “T visa” to refer to T-1 visas, unless otherwise noted.

19. For a discussion of the requirements to qualify for U visas, see *infra* Section I.C.

20. For a discussion about Continued Presence, see *infra* Section I.C.

21. *See* U.S. CITIZENSHIP & IMMIGR. SERVS., NUMBER OF FORM I-914, APPLICATION FOR T NONIMMIGRANT STATUS BY FISCAL YEAR, QUARTER, AND CASE STATUS: FISCAL YEARS 2008–2020 (2020), https://www.uscis.gov/sites/default/files/document/reports/I914t_visastatistics_fy2020_qtr4.pdf [https://perma.cc/49U3-AKK3] [hereinafter USCIS STATISTICS]; U.S. CITIZENSHIP & IMMIGR. SERVS., FORM I-914 - APPLICATION FOR T NONIMMIGRANT STATUS, FORM I-918 PETITION FOR U NONIMMIGRANT STATUS VISA, SERVICE-WIDE RECEIPTS, APPROVALS, AND DENIALS, FISCAL YEARS: 2002 THROUGH 2013 (NOVEMBER 2012) (2013), https://www.uscis.gov/sites/default/files/document/data/I914T-I918_visastatistics_2012-nov.pdf [https://perma.cc/PPP7-N8BD]. When referencing approval and denial rates for T visas, this Article refers to USCIS data

T visas have been approved annually.²² Moreover, T visa denial rates climbed dramatically in the last five years.²³ In fiscal year 2020, U.S. Citizenship and Immigration Services (USCIS) denied 42.79% of all T visa applications adjudicated that year, compared with 28.12% in fiscal year 2015.²⁴ At the same time, processing times for T visas have skyrocketed with more applicants receiving denials and requests for additional evidence.²⁵

These trends have had a significant impact on immigrant victims.²⁶ As Martina Vandenberg explained, “Trafficking victims are living in terror.”²⁷ Emelia, an immigrant victim of sex trafficking, applied for a T visa after a decade of silence and fear.²⁸ USCIS, the agency that adjudicates T visa cases, issued a denial notice to her, stating that it “is sensitive to what you have been through and acknowledges the help you have received in relation to your trafficking situation.”²⁹ Nonetheless, USCIS denied Emelia’s claim, claiming that her current presence in the United States was unrelated to the trafficking.³⁰ This finding came despite evidence of significant trauma and the need for ongoing mental health treatment to heal.³¹

Emelia’s story is not an outlier. During the first three months of 2020 when Emelia’s case was decided, USCIS denied 50.00% of all T visa cases it adjudicated.³² These denials included cases of labor and sex trafficking. For example, USCIS also

in USCIS STATISTICS, specifically the column entitled “[v]ictims of [t]rafficking,” which provides the number of applications approved, denied, and pending. All approval or denial rates reference applications decided during the fiscal year, rather than applications received in a given year. *See* USCIS STATISTICS, *supra*.

22. The only fiscal year that T visa approvals for victims of trafficking (not derivative family members) exceeded one thousand was in 2020. *See* USCIS STATISTICS, *supra* note 21.

23. *See id.*

24. *See id.* The author has calculated the approval rates in this Article as the number of “[v]ictims of [t]rafficking” with “approved” applications divided by the sum of the number of “victims of trafficking with “approved” and “denied” applications.

25. *See, e.g.*, U.S. DEP’T OF STATE, TRAFFICKING IN PERSONS REPORT 518 (2020), <https://www.state.gov/wp-content/uploads/2020/06/2020-TIP-Report-Complete-062420-FINAL.pdf> [<https://perma.cc/3TAH-L288>] [hereinafter 2020 TIP REPORT] (“Advocates noted a continuing rise in the number of requests for additional evidence by adjudicators, which tends to increase processing times, and reported increased T visa denials that they believed improperly interpreted relevant statutes and regulations . . .”).

26. *See* Abrams, *supra* note 13 (describing a victim who “because of delays seemingly designed to deter new T visa applications and reduce the total number offered each year . . . finds herself in a prolonged legal purgatory”).

27. *Id.* (quoting Martina Vandenberg) (“The Trump Administration’s immigration policies have made foreign trafficking victims’ lives more dangerous. Those policies have made it more difficult to escape. And those policies have made it more difficult to obtain relief.”).

28. This case is based on a client represented by the BU Law Immigrants’ Rights and Human Trafficking Program. The name has been changed to protect client confidentiality, and the client has consented to the use of her information in this Article.

29. Redacted Letter from Laura B. Zuchowski, Dir. U.S. Citizenship & Immigr. Servs., to Emelia (2020) (on file with author) (denying I-914, Application for T Nonimmigrant Status).

30. *Id.*

31. *See id.*

32. *See* USCIS STATISTICS, *supra* note 21.

denied the T visa application of a Peruvian immigrant, known only as Jane Doe in federal pleadings.³³ Doe, an immigrant victim of labor trafficking, was recruited as a child to work in the United States, but upon arrival, her employers took her passport, paid her only \$100 per month, and made her work long hours with no days off.³⁴ Doe's T visa was denied, and she was placed in removal proceedings.³⁵ Desperate to prevent her own deportation, Doe filed a federal lawsuit against USCIS, challenging the agency's actions as "arbitrary and capricious."³⁶ Mercer Cauley, Doe's attorney, explained, "Basically the government has told her, 'Yes, you are a victim of trafficking, but we're going to deport you anyway.'"³⁷

This Article examines why legislative efforts aimed at protection for immigrant victims of human trafficking are failing. Scholars have offered various explanations for low T visa numbers.³⁸ Some have observed how victims, especially those without legal representation, find it challenging to navigate the burdensome T visa requirements.³⁹ Others have tied low approval rates to a flawed federal framework

33. Complaint at 6, *Doe v. Wolf*, No. 3:20-cv-00481 (W.D.N.C. Aug. 31, 2020).

34. *Id.* at 11.

35. Michael Gordon, *Lured to U.S. at 16, She Sought Visa for Trafficking Victims. Now She May Be Deported.*, CHARLOTTE OBSERVER (Sept. 12, 2020), https://greensboro.com/news/state/lured-to-u-s-at-16-she-sought-visa-for-trafficking-victims-now-she-may/article_da47ff06-f456-11ea-a9c7-f3babaebdd19.html [<https://perma.cc/5E39-Y75B>].

36. Complaint, *supra* note 33, at 4.

37. Gordon, *supra* note 35.

38. See, e.g., Sabrina Balamwalla, *Jobs Looking for People, People Looking for Their Rights: Seeking Relief for Exploited Immigrant Workers in North Dakota*, 91 N.D. L. REV. 483, 494–95 (2015) (describing the challenges that victims face demonstrating they meet the T visa requirements, including that they are a victim of a severe form of trafficking and are in the United States "on account of" the trafficking, among other requirements); Jennifer M. Chacón, *Tensions and Trade-Offs: Protecting Trafficking Victims in the Era of Immigration Enforcement*, 158 U. PA. L. REV. 1609 (2010) (exposing the tensions and trade-offs between immigration policy choices and anti-trafficking efforts) [hereinafter Chacón, *Tensions*]; Marisa Silenzi Cianciarulo, *The Trafficking and Exploitation Victims Assistance Program: A Proposed Early Response Plan for Victims of International Human Trafficking in the United States*, 38 N.M. L. REV. 373, 376 (2008) (pointing to structural challenges in the protection framework and "unrealistic expectations" by law enforcement about what type of protection they can provide to immigrant victims); Dina Francesca Haynes, *(Not) Found Chained to a Bed in a Brothel: Conceptual, Legal, and Procedural Failures to Fulfill the Promise of the Trafficking Victims Protection Act*, 21 GEO. IMMIGR. L.J. 337, 346 (2007) (arguing that the pronounced role of law enforcement in the T visa process has reduced the effectiveness of immigration protections for victims); Srikantiah, *supra* note 9 (arguing that agency regulations have narrowed T visa availability by focusing on prosecutorial goals of the "iconic victim").

39. See NAT'L INST. OF JUST. & OFF. FOR ACCESS TO JUST., U.S. DEP'T OF JUST. WITH NAT'L SCI. FOUND., WHITE HOUSE LEGAL AID INTERAGENCY ROUND TABLE: CIVIL LEGAL AID RESEARCH WORKSHOP REPORT 21–22 (2016), <https://www.ncjrs.gov/pdffiles1/nij/249776.pdf> [<https://perma.cc/6R3A-PX6T>] (highlighting the challenges faced by victims when accessing legal aid and recommending more research dedicated to *pro bono* representation and outcomes); OFF. FOR VICTIMS OF CRIME, U.S. DEP'T OF JUST., OVC FACT SHEET: THE LEGAL RIGHTS AND NEEDS OF VICTIMS OF HUMAN TRAFFICKING IN THE UNITED STATES (2015), https://ovc.ojp.gov/sites/g/files/syckuh226/files/media/document/HT_Legal_Rights_Needs_fact_sheet-508.pdf [<https://perma.cc/X43X-UQKZ>] (describing significant unmet legal needs for victims of trafficking); U.S. DEP'T OF JUST. ET AL., FEDERAL STRATEGIC ACTION PLAN ON SERVICES FOR VICTIMS OF HUMAN TRAFFICKING IN THE UNITED STATES, 2013–2017 (2014), <https://ovc.ojp.gov/sites/g/>

that prioritizes prosecution over victim protection.⁴⁰ More generally, scholars have observed how the existing statutory framework allows racialized and gendered narratives about “rescue” and “escape” to shape who is deserving of relief.⁴¹

This Article argues that these critiques, while important and correct, do not adequately explain declining T visa approvals. It posits that the actions of administrative actors at USCIS in the “shallow state” have played a formative role in curtailing protections.⁴² While much scholarly attention has focused on the “deep state” and acts of bureaucratic resistance,⁴³ this Article examines a more subtle phenomenon: the workings of the often-silent shallow state.⁴⁴ Whereas the deep state is characterized by career bureaucrats who resist the executive, the shallow state involves low-level bureaucratic actors who work in concert with the executive. They act in service of an often hidden executive agenda, one which if promulgated through more formal mechanisms such as rulemaking or legislation would spark a public outcry or legal challenges. Through obscure, often superficial methods, these bureaucratic actors work to impede access to benefits and to avoid legal and political conflict.

This Article traces the actions of the shallow state in the T visa context under the Trump administration. It shows how members of the shallow state enacted diverse, diffuse policies to establish new barriers within the T visa application process.⁴⁵ As an example, in a new policy, USCIS in 2018 began to place all denied

files/xyckuh226/files/media/document/FederalHumanTraffickingStrategicPlan.pdf [https://perma.cc/35VZ-2SB7] (“While human trafficking victims may be eligible for T or U nonimmigrant status, which allows victims to remain and work in the United States and assist law enforcement authorities in the investigation or prosecution of human trafficking cases, many victims continue to face legal constraints challenging their recovery process.”).

40. See, e.g., Balgamwalla, *supra* note 38, at 494 (describing how law enforcement’s “gendered portrayals of trafficking” is a barrier for victims of trafficking and failed efforts to identify trafficking victims can result in incarceration or deportation); Cianciarulo, *supra* note 38 at 388 (arguing that the requirement that victims of trafficking cooperate with law enforcement “expos[es] the [human trafficking] victims to the skepticism and enforcement mentality of law enforcement officials [that] has proven antithetical to the goals of the T visa”); Srikantiah, *supra* note 9, at 160 (“On a structural level, agency regulations place the responsibility of identifying trafficking victims and assessing victims’ cooperation with law enforcement in the hands of prosecutors and agents responsible for investigating traffickers.”).

41. See, e.g., Jennifer M. Chacón, *Misery and Myopia: Understanding the Failures of U.S. Efforts to Stop Human Trafficking*, 74 FORDHAM L. REV. 2977, 3022–23 (2006) [hereinafter Chacón, *Misery*] (asserting that the TVPA’s “unwillingness to extend protections to ‘illegal workers’ absent a showing of their ‘innocence’ embeds into the TVPA the same immigration and labor law policies that have created a haven for trafficking and migrant exploitation”); Haynes, *supra* note 38, at 346 (“[G]overnment officials appear to subscribe to several myths and imperfect syllogistic reasoning which prevent them from seeing a victim when he or she is standing in front of them.”).

42. See *infra* Part II.

43. See *infra* Section II.B.

44. See David Rothkopf, *The Shallow State*, FOREIGN POL’Y (Feb. 22, 2017, 1:01 PM), <https://foreignpolicy.com/2017/02/22/the-shallow-state-trump/> [https://perma.cc/2T53-N4CK]. See *infra* Part II for a greater discussion of the shallow state.

45. Editorial Board, Opinion, *Trump’s Immigration Policies Are Straight Out of Dystopian Fiction*, WASH. POST (Feb. 21, 2020, 3:00 AM), <https://www.washingtonpost.com/opinions/trumps->

T visa applicants immediately in removal (i.e., deportation) proceedings.⁴⁶ Contrary to over a decade of practice, this policy had an immediate chilling effect by raising the stakes for immigrant victims and discouraging them from filing new T visa applications.⁴⁷ Meanwhile, quickly and with little notice, the agency tightened fee waiver standards, raised fees, and summarily rejected new applications that failed to comply with new fee standards.⁴⁸ Around the same time, a simple online alert announced that USCIS would summarily reject T visa applications if even a single field was left blank.⁴⁹ USCIS simultaneously began to issue more requests for additional evidence and denials to T visa applicants.⁵⁰ This trend came despite the fact that trafficking victims often lacked corroborative evidence and that existing regulations required only that immigrant victims present “credible evidence” to meet certain requirements.⁵¹ In the interim, processing times for T visas ballooned from 7.9 months in 2016 to 2.4 years in 2020.⁵² These delays meant that immigrant victims had to wait, most without legal status, for more than two years—some only to find their applications denied.

This Article argues that these disparate policies worked in concert to create “minefields”⁵³ in the T visa application process and to frustrate the purpose of federal anti-trafficking law.⁵⁴ It is true that many of these same policies impacted other types of immigration applications and with devastating consequences. Yet, this Article focuses its attention on the T visa context to provide an example of the

immigration-policies-are-straight-out-of-dystopian-fiction/2020/02/20/4c335dfa-5361-11ea-b119-4faabac6674f_story.html [https://perma.cc/D27F-G5HL] [hereinafter *Dystopian Fiction*] (“Other moves, just as or more effective, are bureaucratic booby traps laid in arcane procedural byways.”).

46. See *infra* Section II.D.1 for a detailed discussion of this policy. This policy also applied to applicants for U visas who were victims of crime.

47. *Id.*

48. See *infra* Section II.D.2 regarding the fee waiver and “no spaces” policy.

49. See Catherine Rampell, Opinion, *This Latest Trick from the Trump Administration Is One of the Most Despicable Yet*, WASH. POST (Feb. 13, 2020, 4:24 PM), https://www.washingtonpost.com/opinions/the-trump-administrations-kafkaesque-new-way-to-thwart-visa-applications/2020/02/13/190a3862-4ea3-11ea-bf44-f5043eb3918a_story.html [https://perma.cc/86C7-45R3] (“The policy change, at first affecting just asylum applicants, was announced without fanfare on the USCIS website sometime in the fall.”).

50. See 2020 TIP REPORT, *supra* note 25, at 518.

51. See 8 C.F.R. § 214.11(d)(2)(i) (2020) (“An application for T nonimmigrant status must include. . . [a]ny credible evidence that the applicant would like USCIS to consider supporting any of the eligibility requirements set out in paragraphs (f), (g), (h) and (i) of this section.”).

52. Abrams, *supra* note 13.

53. See *Dystopian Fiction*, *supra* note 45 (describing administrative policies to make government forms “minefields, intentionally designed to entrap the unsuspecting”); Rampell, *supra* note 49.

54. An October 2020 report to members of Congress called attention to the “underutilization” of the T visa program. ABIGAIL F. KOLKER & KRISTIN FINKLEA, CONG. RSCH. SERV., R46584, IMMIGRATION RELIEF FOR VICTIMS OF TRAFFICKING 12 (2020) [hereinafter IMMIGRATION RELIEF FOR VICTIMS], <https://crsreports.congress.gov/product/pdf/R/R46584> [https://perma.cc/3SPV-ZE6Q] (documenting the failure of T visa approvals to reach the cap of 5,000 and encouraging policymakers to “look at factors that potentially contribute to what some observers consider to be underutilization of [T nonimmigrant] status”).

impact that administrative actors can have on one vulnerable population—immigrant victims of trafficking.

Part I examines the evolution of U.S. federal law regarding human trafficking and immigrant victims. It explores how Congress first conceptualized criminal and immigration enforcement responses. Part I shows how, prior to the TVPA, immigrant victims remained unprotected and subject to harsh immigration measures. It then describes contemporary congressional efforts to remedy this problem by defining new trafficking crimes and establishing more robust immigration protections. Part I then demonstrates how these specialized immigration benefits have remained insufficient.

Part II introduces the concept of the shallow state. It examines how administrative actors, particularly at USCIS, have significantly curtailed statutory protections for immigrant victims. It catalogs the tactics employed by USCIS officials in the T visa context and shows how low-level bureaucratic officials have transformed outcomes for immigrant victims. It also examines how plaintiffs have effectively challenged these policies through federal litigation.

Part III then provides recommendations to guide future efforts to improve adjudications of T visa applications and address harms caused by the shallow state. This Part argues that existing immigration protections can still function well if there is sufficient agency and judicial review, oversight, training, and accountability.

I. CONTEMPORARY SOLUTIONS FOR IMMIGRANT VICTIMS

A. *Early Tools to Address Human Trafficking*

Congress has long been concerned with human trafficking involving immigrant victims. Early congressional action, however, focused on criminal and immigration enforcement, rather than protection efforts.⁵⁵ In the early twentieth century, Congress, motivated in part by nativist impulses to curtail rising immigration, sought to levy new criminal penalties against perpetrators of sex trafficking.⁵⁶ Instead of a protection framework for immigrant victims, Congress instead engaged in racialized and gendered immigration enforcement efforts, often intended to expel or deport immigrants.⁵⁷ These measures exposed the need for a broad protection framework, which Congress would not enact until 2000.⁵⁸

55. See generally Ann Wagner & Rachel Wagley McCann, *Prostitutes or Prey? The Evolution of Congressional Intent in Combating Sex Trafficking*, 54 HARV. J. ON LEGIS. 17, 28–45 (2017) (describing the historical evolution of laws related to sex trafficking).

56. See *id.*

57. See, e.g., Chacón, *Misery*, *supra* note 41, at 2980–81 (2006) (“As before, current anti-trafficking efforts are characterized by: the presumptive criminality of migrants; a willingness to sacrifice the protection of migrants in the furtherance of criminal prosecutions; a conflation of trafficking and prostitution; a racially biased conception of trafficking; and a dogged focus on interdiction efforts over internal enforcement and outreach.”).

58. See *infra* Section I.C.

In the early twentieth century, Congress took aim at sex trafficking in the guise of “white slavery.”⁵⁹ Activists and politicians often drew racialized, sensationalized portraits of the “White Slave Trade.”⁶⁰ Congress often focused on the plight of white, European women, kidnapped or forced into the sex trade, while non-white immigrant women were targeted with harsh immigration measures.⁶¹ For example, in the late nineteenth century, Congress largely viewed Chinese immigrant women as “immoral[]” and deviant; as a result, legislators constructed regulatory and enforcement schemes to limit Chinese female immigration into the United States.⁶² In fact, the very first federal immigration law, the Page Act, targeted many Chinese women with exclusion from the United States based on a mere suspicion of involvement in commercial sex.⁶³

Immigration law slowly evolved to embody even more restrictive tendencies.⁶⁴ Indeed, Congress passed immigration measures in 1903 and 1907 targeting those

59. See, e.g., Tiefenbrun, *supra* note 12, at 131 (describing how the First Congress of the International Abolitionist Federation generated awareness of white slavery in 1877).

60. The term, “White Slave Trade,” is a heavily racialized term, focusing on the trafficking of White, predominantly Eastern European women, as distinguished from African slavery. See, e.g., Jean Allain, *White Slave Traffic in International Law*, 1 J. TRAFFICKING & HUM. EXPLOITATION 1, 3, 6 (2017) (examining the international origins of the fight against “white slave traffic” at the 1902 International Conference on the White Slave Traffic). Historians have pointed to early criminal cases in the twentieth century of “white slavery” as powerful proof of its existence. See, e.g., RUTH ROSEN, *THE LOST SISTERHOOD: PROSTITUTION IN AMERICA, 1900–1918*, at 127–35 (1982). Some scholars have argued that the concept of “white slavery” was exaggerated and mobilized instrumentally by early reformers to address a range of social issues. See, e.g., BRIAN DONOVAN, *WHITE SLAVE CRUSADES: RACE, GENDER, AND ANTI-VICE ACTIVISM, 1887–1917*, at 16 (2006) (examining how “[t]he white slavery genre provided a touchstone for a new set of racial and gender projects”); BARBARA MEIL HOBSON, *UNEASY VIRTUE: THE POLITICS OF PROSTITUTION AND THE AMERICAN REFORM TRADITION* 140, 174 (1987) (arguing that “white slavery” was a rhetorical manifestation of concerns with a range of social issues, including economic inequality, “local government and police corruption from commerce,” “the spread of venereal disease,” and emerging views about the evolving sexuality of women).

61. See, e.g., Mara L. Keire, *The Vice Trust: A Reinterpretation of the White Slavery Scare in the United States, 1907–1917*, 35 J. SOC. HIST. 5, 17 (2001) (describing how at the height of the white slavery “scare,” reformers “fought for a series of white slave traffic acts,” including the Mann Act); Chacón, *Misery*, *supra* note 41, at 3012 (outlining early twentieth-century efforts by Congress that were “at base, anti-immigrant measures dressed in a cloak of morality” and noting that the Page Act, in particular, was “designed as a means of excluding Chinese immigration” using an “apparent moral agenda”); Keire, *supra* (“[S]cholars have emphasized the racialized cast of the white slavery narratives, even as they have discounted the white slavery scare as an almost Freudian manifestation of middle-class fears about urbanization, immigration, and women’s increased mobility.”).

62. See Kerry Abrams, *Polygamy, Prostitution, and the Federalization of Immigration Law*, 105 COLUM. L. REV. 641, 693 (2005).

63. An Act Supplementary to the Acts in Relation to Immigration (Page Act), ch. 141, 18 Stat. 477 (1875) (repealed 1974); see Abrams, *supra* note 62, at 641; Pooja R. Dadhania, *Deporting Undesirable Women*, 9 U.C. IRVINE L. REV. 53, 57 (2018). This Article uses the term “commercial sex” to refer to “any sex act, on account of which anything of value is given to or received by any person,” including both tangible and intangible items. See 18 U.S.C. § 1591(e)(3).

64. Congress passed “An Act To regulate the immigration of aliens into the United States” on March 3, 1903. Immigration Act of 1903, Pub. L. No. 57-162, § 1012, 32 Stat. 1213, 1214 (criminalizing importing individuals involved in commercial sex). On February 20, 1907, Congress revised the law in

involved in commercial sex.⁶⁵ These efforts were controversial.⁶⁶ In 1910, the Commissioner-General of Immigration opined about how, “[g]enerally virtuous when she comes to this country,” the immigrant victim is “ruined and exploited because there is no adequate protection and assistance.”⁶⁷ However, instead of calling for protective measures, he advocated for more “drastic” immigration controls.⁶⁸

Shortly thereafter, Congress passed the White Slave Traffic Act of 1910, commonly known as the Mann Act.⁶⁹ The Mann Act created new federal criminal jurisdiction over commercial sex but failed to establish more robust protections for victims.⁷⁰ This move, too, faced opposition. Kate Waller Barrett, a Special Agent of the U.S. Immigration Service, was convinced that immigrant victims needed protection from deportation.⁷¹ She remarked that “[a] woman accused of prostitution must not be flung out of the country upon flimsy evidence, without due process of law.”⁷² However, her calls remained unheard.

Throughout the twenty-first century, Congress also remained concerned about labor trafficking practices “that mirror the injustices of slavery,” including

“An Act To regulate the immigration of aliens into the United States,” banning noncitizens from engaging in commercial sex within three years of entry. Immigration Act of 1907, Pub. L. No. 59-96, § 1134, 34 Stat. 898, 899–900 (criminalizing importing individuals for commercial sex).

65. See sources cited *supra* note 64.

66. Dr. Maude Miner Hadden, for example, pointed out that immigrant women were “more easily exploited because of ignorance of American customs, language, and agencies to which they might turn for help. . . . They are cowed by threats of deportation [made by procurers].” Kelli Ann McCoy, *Claiming Victims: The Mann Act, Gender, and Class in the American West, 1910–1930s*, at 40 (2010) (Ph.D. dissertation, University of California, San Diego) (citing MAUDE MINER HADDEN, *QUEST FOR PEACE: PERSONAL AND POLITICAL* (1968)), <https://escholarship.org/content/qt8f60q9gt/qt8f60q9gt.pdf> [<https://perma.cc/AQE5-FB7R>]. Jane Addams, another reformer, simply called for “a less punitive policy that protected immigrants from exploitation.” *Id.* (citing JANE ADDAMS, *NEW CONSCIENCE AND AN ANCIENT EVIL* 26, 35 (1912)).

67. VICE COMM’N OF CHICAGO, *THE SOCIAL EVIL IN CHICAGO* 40 (4th ed. 1912). See also U.S. IMMIGR. COMM’N, *ABSTRACTS OF REPORTS OF THE IMMIGRATION COMMISSION*, S. DOC. NO. 61-747, at 342 (3d Sess. 1910) (describing how the immigrant woman “is ignorant of the language of the country, knows nothing beyond a few blocks of the city where she lives, has usually no money, and no knowledge of the rescue homes and institutes which might help her”).

68. Wagner & McCann, *supra* note 55, at 724. For example, “[t]he Commissioner argued that existing immigration laws were ‘not extensive and drastic enough in terms to effectively prevent further additions to the already large numbers of alien prostitutes and procurers in this country’ and did not sufficiently regulate ‘the free passage to and fro of those engaged in [trafficking].’” See also SUPPRESSION OF THE WHITE-SLAVE TRAFFICK: MESSAGE FROM THE PRESIDENT OF THE UNITED STATES, S. DOC. NO. 61-214, pt. 2, at 14 (2d Sess. 1910).

69. White Slave Traffic (Mann) Act, ch. 395, 36 Stat. 825 (1910) (codified as amended at 18 U.S.C. §§ 2421–2424).

70. See *id.* Indeed, some immigrants deemed “helpful” in Mann Act cases at prosecution were eventually deported. See McCoy, *supra* note 66, at 151.

71. See Egal Feldman, *Prostitution, the Alien Woman and the Progressive Imagination, 1910–1915*, at 19 AM. Q. 199, 200 (1967).

72. *Id.*

those involving immigrant workers.⁷³ The Thirteenth Amendment prohibited slavery, involuntary servitude, and related practices, yet such practices persisted.⁷⁴ Many scholars have argued that the Thirteenth Amendment embodied broad guarantees of freedom beyond African slavery.⁷⁵ Nevertheless, courts failed to interpret the Thirteenth Amendment expansively to include affirmative rights or protections for immigrant workers, such as the freedom from deportation.⁷⁶

In 1940, Congress passed enabling statutes pursuant to the Thirteenth Amendment to criminalize peonage, enticement into slavery, and sale into involuntary servitude.⁷⁷ Although such statutes did not define a crime of “labor trafficking,” these statutes would remain the primary criminal enforcement tools aimed at labor trafficking throughout the twentieth century. Yet, even as prosecutions began to move forward, immigrant victims, even those who cooperated fully with federal prosecutors, often faced detention, deportation, and an uncertain future in the United States.⁷⁸

73. See, e.g., Maria L. Ontiveros, *Immigrants Rights and the Thirteenth Amendment*, NEW LAB. F., Spring 2007, at 26, 27 (“[W]hen declaring slavery and involuntary servitude unconstitutional, the Amendment sought to affirmatively protect free labor by establishing a definition of free labor more expansive than the absence of chattel slavery.”).

74. See, e.g., Michele Goodwin, *The Thirteenth Amendment: Modern Slavery, Capitalism, and Mass Incarceration*, 104 CORNELL L. REV. 899, 908 (2019) (exploring how the Thirteenth Amendment “forb[id] one form of slavery while legitimating and preserving others”).

75. See U.S. CONST. amend. XIII; see also Douglas L. Colbert, *Liberating the Thirteenth Amendment*, 30 HARV. C.R.-C.L. L. REV. 1, 8 (1995) (“From the opening gavel, both sides in the legislative debates based their arguments on a common understanding that the Thirteenth Amendment would protect an expansive definition of freedom.”). Lea VanderVelde, through historiography, has examined how the Amendment provided “charter for labor freedom,” which sought to affirmatively protect the rights of labor “autonomy and independence.” Lea S. VanderVelde, *The Labor Vision of the Thirteenth Amendment*, 138 U. PA. L. REV. 437, 438 (1989) [hereinafter VanderVelde, *Labor Vision*] (arguing that the Congressional debate embodied a “free labor” vision, and thus, the Amendment sought to improve the “cause of all working people,” not only those subject to African slavery). Some scholars have critiqued VanderVelde’s expansive vision, calling this historiography “deeply flawed” and “significantly overstating” of the reach of the Thirteenth Amendment. See, e.g., Pamela Brandwein, *The “Labor Vision” of the Thirteenth Amendment, Revisited*, 15 GEO. J.L. & PUB. POL’Y 13, 17 (2017) (“Multiple arrays of evidence support the conclusion that VanderVelde mistakes free labor for a discourse of class leveling and thus mistakes the Thirteenth Amendment as a charter for labor freedom.”).

76. See, e.g., James Gray Pope, *Contract, Race, and Freedom of Labor in the Constitutional Law of “Involuntary Servitude,”* 119 YALE L. J. 1474, 1478 (2010) (“[I]t prohibits two conditions—slavery and involuntary servitude—without specifying what rights are necessary to negate those conditions.”). The Thirteenth Amendment, instead, relied on Congress to “enforce this article by appropriate legislation.” U.S. CONST. amend. XIII.

77. 18 U.S.C. §§ 1581, 1583–1584.

78. See, e.g., KEVIN BALES & STEVEN LIZE, *TRAFFICKING IN PERSONS IN THE UNITED STATES* 70 (2005), <https://www.ncjrs.gov/pdffiles1/nij/grants/211980.pdf> [<https://perma.cc/6WX2-MMER>] (describing the use of detention and fear of removal to coerce immigrant victims to cooperate).

B. Contemporary Efforts to Address Trafficking

In the 1990s, several high-profile cases showcased the brutality of human trafficking and the imperfect tools available to shield immigrant victims from deportation.⁷⁹ In 1995, for example, government officials raided a complex where they found seventy-two Thai nationals working in slave-like conditions in residential duplexes in El Monte, California.⁸⁰ Recruiters forced victims to work while holding their passports and money.⁸¹ The case was followed by a highly publicized labor trafficking case in 1997 in Jackson Heights, New York, involving fifty-seven deaf immigrants.⁸² Renato Paoletti Lemus, the alleged boss of the operation, and his family members recruited Mexican immigrants through “promises of a sweeter life” in the United States.⁸³ Yet, once the victims arrived, Lemus and his associates took their documents, forced them to work, and subjected them to emotional, physical, and sexual abuse.⁸⁴

Sex trafficking, too, was in the headlines.⁸⁵ In 1998, the *New York Times* publicized a fifty-two-count indictment against sixteen people, six of whom were from the same Cadena family, for “enslav[ing]” at least twenty women, some as young as fourteen, for over a year.⁸⁶ Immigrant women were recruited from Mexico to work in “landscaping, health care, housecleaning and restaurants.”⁸⁷ Upon arrival in the United States, the Cadenas forced their victims to have sex with men in agricultural migrant camps to repay their smuggling debt.⁸⁸ Those who tried to escape were beaten and sexually abused.⁸⁹

These cases publicly highlighted the deficiencies of existing protection measures for immigrant victims.⁹⁰ In the El Monte trafficking cases, immigration

79. See ALICIA PETERS, RESPONDING TO HUMAN TRAFFICKING: SEX, GENDER, AND CULTURE IN THE LAW 57–58 (2015).

80. *Id.* at 57.

81. Erin Blakemore, *20th-Century Slavery Was Hiding in Plain Sight*, SMITHSONIAN MAG. (July 31, 2020, 10:00 AM), <https://www.smithsonianmag.com/smithsonian-institution/20th-century-slavery-california-sweatshop-was-hiding-plain-sight-180975441/> [<https://perma.cc/8E3M-Y5WB>].

82. PETERS, *supra* note 79, at 1–2; Deborah Sontag, *Dozens of Deaf Immigrants Discovered in Forced Labor*, N.Y. TIMES (July 20, 1997), <https://www.nytimes.com/1997/07/20/nyregion/dozens-of-deaf-immigrants-discovered-in-forced-labor.html#:~:text=Four%20deaf%20and%20mute%20Mexicans,bunk%20beds%2C%20mattresses%20and%20sleeping> [<https://perma.cc/U9AX-6JWN>].

83. KEVIN BALES & RON SOODALTER, THE SLAVE NEXT DOOR: HUMAN TRAFFICKING AND SLAVERY IN AMERICA TODAY 124 (2009).

84. See, e.g., Joseph P. Fried, *2 Sentenced in Mexican Peddling Ring*, N.Y. TIMES (May 8, 1998), <https://www.nytimes.com/1998/05/08/nyregion/2-sentenced-in-mexican-peddling-ring.html> [<https://perma.cc/RVY9-HKBG>]; BALES & SOODALTER, *supra* note 83, at 124.

85. Mireya Navarro, *Group Forced Illegal Aliens into Prostitution, U.S. Says*, N.Y. TIMES (Apr. 24, 1998), <https://www.nytimes.com/1998/04/24/us/group-forced-illegal-aliens-into-prostitution-us-says.html> [<https://perma.cc/NS2Z-9JWR>].

86. *Id.*

87. *Id.*

88. *Id.*

89. *Id.*

90. AMY O’NEILL RICHARD, CTR. FOR THE STUDY OF INTEL., INTERNATIONAL TRAFFICKING IN WOMEN TO THE UNITED STATES: A CONTEMPORARY MANIFESTATION OF

officials detained and held victims in Immigration and Naturalization Service (INS) custody.⁹¹ Although eventually released after public protests, immigrant victims faced a long, uncertain battle against deportation.⁹² One victim, speaking at a criminal trafficking sentencing hearing, noted: “We were slaves . . . and we have nothing to show for it. I am very angry.”⁹³

These practices were, unfortunately, widespread.⁹⁴ A report entitled *International Trafficking in Women to the United States* drew national attention to continued protection challenges for immigrant victims.⁹⁵ The report unearthed how victims were often detained and placed in jails if they failed to voluntarily depart.⁹⁶ It also shed light on troubling practices of INS officials who—apparently uncomfortable with “play[ing] favorites”—often conflated victims with “other undocumented workers” and subjected both groups to harsh immigration consequences.⁹⁷

Law enforcement continued to rely heavily on an imperfect array of existing immigration benefits, including deferred action,⁹⁸ parole,⁹⁹ and S visas,¹⁰⁰ to protect

SLAVERY AND ORGANIZED CRIME 41–44 (2000), <https://www.cia.gov/static/9dc85527075bc84f9e1f2eef0e7a0915/trafficking.pdf> [<https://perma.cc/U49S-MTJ7>]; see also PETERS, *supra* note 79, at 2 (describing how in the Paoletti case, for example, “[p]ublic sympathy for the victim and the fact that many New Yorkers had encountered these very individuals in their daily commutes promoted the city to offer an enormous amount of public resources to the victims”).

91. Blakemore, *supra* note 81. In the Homeland Security Act of 2002, Congress discontinued the INS and created three agencies under a newly created Department of Homeland Security (DHS), including USCIS, Customs and Border Protection, and Immigration and Customs Enforcement. See USCIS HIST. OFF. & LIBR., U.S. CITIZENSHIP & IMMIGR. SERVS., OVERVIEW OF INS HISTORY 11 (2012), <https://www.uscis.gov/sites/default/files/document/fact-sheets/INSHistory.pdf> [<https://perma.cc/ZSD2-6WBS>].

92. Erik Loomis, *Historian Erik Loomis on the El Monte Sweatshop Raid*, UNITE ALL WORKERS FOR DEMOCRACY (Aug. 3, 2020), <https://uawd.org/historian-erik-loomis-on-the-el-monte-sweatshop-raid/> [<https://perma.cc/5JM2-2FRD>].

93. BALES & SOODALTER, *supra* note 83, at 124.

94. See RICHARD, *supra* note 90, at 35.

95. *Id.*

96. *Id.* at 39 (“Currently, they say that many trafficking victims are placed in INS detention facilities and then deported. Those few trafficking victims, who are designated material witnesses in federal criminal cases brought against the traffickers, may be placed in the US marshals’ custody and held in local jails.”).

97. *Id.* at 36.

98. Deferred action provides access to a work permit and the deferral of removal, but it is not an immigration status. *Frequently Asked Questions*, U.S. CITIZENSHIP & IMMIGR. SERVS., <https://www.uscis.gov/humanitarian/humanitarian-parole/frequently-asked-questions> [<https://perma.cc/LZX7-EZ6J>] (Aug. 31, 2021) (“Deferred action is a discretionary determination to defer a removal action of an individual as an act of prosecutorial discretion.”).

99. Parole allowed victims to be admitted or enter for “urgent humanitarian reasons” and obtain work authorization, but it does not open up a pathway to permanent residency or citizenship. Immigration and Nationality Act, Pub. L. No. 82-414, § 212(d)(5), 66 Stat. 163, 188 (1952) (codified as amended at 8 U.S.C. § 1182(d)(5)(A)).

100. The S visa, colloquially referred to as the “snitch” visa, was established by Congress in 1994 pursuant to the Violent Crime and Law Enforcement Act of 1994. 8 U.S.C. § 1101(a)(15)(S). Congress provided two hundred S visas per year to two categories of noncitizens: (1) those who

against deportation. These ill-fitting remedies were insufficient, leaving immigrant victims at the mercy of unsympathetic governmental officials.¹⁰¹ As a result, victims were left in limbo; some even faced deportation.¹⁰²

Many scholars and advocates called for the creation of a new, specialized form of immigration relief for trafficking victims, known as the T visa. This benefit, they argued, would allow law enforcement to benefit from “material witnesses” while granting victims a “resting period” during which they could receive assistance without fear of deportation.¹⁰³ Well-known immigration advocates, such as Arthur Helton and Eliana Jacobs, proclaimed the great potential of the T visa.¹⁰⁴ Rather than envisioning the T visa as “humanitarian relief for those who have been abused,” Helton and Jacobs noted that “[a] more powerful rationale would be to view the grant of immigration status as an incentive to enlist the victims in identifying and prosecuting traffickers.”¹⁰⁵ The T visa, they argued, would be “a powerful new tool . . . made available to law enforcers in their efforts to curb clandestine trafficking networks.”¹⁰⁶

C. Federal Legislation to Protect Immigrant Victims

In 2000, Congress passed the Trafficking Victims Protection Act (TVPA), the first comprehensive federal human trafficking law.¹⁰⁷ Congress remained largely focused on international human trafficking, involving immigrant victims.¹⁰⁸ Congress recognized trafficking as a “transnational crime with national implications.”¹⁰⁹ Legislators observed that “[a]t least 700,000 persons annually, primarily women and children, are trafficked within or across international borders,” with “[a]pproximately 50,000 women and children . . . trafficked into the United States each year.”¹¹⁰ The TVPA came just days after the United Nations

provided critical information about a criminal enterprise or organization and (2) those who possess information about terrorist activity. See RICHARD, *supra* note 90, at 41; see also Douglas Kash, *Rewarding Confidential Informants: Cashing In on Terrorism and Narcotics Trafficking*, 34 CASE W. RESV. J. INT’L L. 231, 235 (2002).

101. See RICHARD, *supra* note 90, at 39.

102. See *id.* at 39, 41 (describing some victims who were deported and noting that “[i]n essence, many trafficking victims remain in a sort of legal limbo”).

103. See RICHARD, *supra* note 90, at 42.

104. See Arthur C. Helton & Eliana Jacobs, *Combating Human Smuggling by Enlisting the Victims*, 23 DEF. ALIEN 120, 127 (2000).

105. *Id.*

106. *Id.*

107. See Trafficking Victims Protection Act of 2000, Pub. L. No. 106-386, 114 Stat. 1464.

108. See § 102(a), 114 Stat. at 1466; ANTHONY M. DESTEFANO, *THE WAR ON HUMAN TRAFFICKING: U.S. POLICY ASSESSED 32–41* (2007) (examining how Congress was primarily concerned with immigrants trafficked into the United States in 2000 when passing federal anti-trafficking law). The legislation took note that “[a]t least 700,000 persons annually, primarily women and children, are trafficked within or across international borders.” § 102(b)(1), 114 Stat. at 1466.

109. TPVA § 102(b)(24).

110. *Id.* at 102(b)(1).

General Assembly approved the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (Trafficking Protocol).¹¹¹

In the TVPA, Congress utilized a three-pronged approach aimed at protection, prevention, and prosecution of trafficking both abroad and domestically.¹¹² Congress articulated new federal trafficking crimes and increased criminal penalties for a wide range of trafficking-related conduct.¹¹³ In addition, legislators outlined new protections for immigrant victims, including T visas for victims of trafficking, U visas for victims of violent crime, and “Continued Presence”¹¹⁴ for victims of trafficking who were witnesses in potential criminal trafficking investigations.¹¹⁵ The legislation was bipartisan.¹¹⁶ As a result, the immigration remedies embodied a dual purpose: to protect immigrant victims and encourage cooperation with law enforcement.¹¹⁷

T Visas. Congress established T visas for victims of a “severe form of trafficking in persons.”¹¹⁸ The statute defines a “severe form of trafficking in

111. Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention Against Transnational Organized Crime, Nov. 15, 2000, 2237 U.N.T.S. 319 [hereinafter Trafficking Protocol].

112. See, e.g., Kelly E. Hyland, *Protecting Human Victims of Trafficking: An American Framework*, 16 BERKELEY WOMEN’S L.J. 29, 62 (2001) (examining the TVPA’s three-tier approach addressing prevention, protection, and prosecution); Susan Tiefenbrun, *The Cultural, Political, and Legal Climate Behind the Fight to Stop Trafficking in Women: William J. Clinton’s Legacy to Women’s Rights*, 12 CARDOZO J.L. & GENDER 855, 876–77 (2006).

113. Whereas sex trafficking cases had been previously charged often under the Mann Act or involuntary servitude statutes, the TVPA established the new federal sex trafficking crime to address commercial sex induced through force, fraud, or coercion, unless involving a minor under eighteen years of age. See 18 U.S.C. § 1591. In addition, responding to the Supreme Court’s decision in *United States v. Kozminski*, 487 U.S. 931 (1988), Congress created the new crime of forced labor to address “labor or services” involving tactics of psychological coercion. See *id.* § 1589(a).

114. Continued Presence is a form of deferred action that provides victims of a “severe form of trafficking in persons” who assist in a potential trafficking investigation. See 22 U.S.C. § 7105(c)(3)(A). It provides access to employment authorization and decreased prioritization for removal. CTR. FOR COUNTERING HUMAN TRAFFICKING, CONTINUED PRESENCE: TEMPORARY IMMIGRATION DESIGNATION FOR VICTIMS OF HUMAN TRAFFICKING, <https://www.ice.gov/doclib/human-trafficking/pdf/continued-presence.pdf> [<https://perma.cc/EYK2-XZJX>].

115. See Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, §§ 107(c)–(e), 1513(c), 114 Stat. 1464, 1474, 1533.

116. Chacón, *Misery*, *supra* note 41, at 2989 (“The final version of the Act had broad bipartisan support, passing by a vote of 371-1 in the House and 95-0 in the Senate.”).

117. Victims of Trafficking and Violence Protection Act § 108(b)(2), 114 Stat. at 1481 (codified as amended at 22 U.S.C. § 7106(b)(2)) (“Whether the government of the country protects victims of severe forms of trafficking in persons and encourages their assistance in the investigation and prosecution of such trafficking, including provisions for legal alternatives to their removal to countries in which they would face retribution or hardship, and ensures that victims are not inappropriately incarcerated, fined, or otherwise penalized solely for unlawful acts as a direct result of being trafficked . . .”).

118. See Immigration and Nationality Act, Pub. L. No. 82-414, § 101(a)(15), 66 Stat. 163, 167 (1952) (codified as amended at 8 U.S.C. § 1101(a)(15)(I)).

persons,” as distinct from federal trafficking crimes.¹¹⁹ A “severe form of trafficking in persons” means:

- the recruitment, harboring, transportation, provision, obtaining, patronizing, or soliciting of a person for the purpose of a commercial sex act, in which the commercial sex act is induced by force, fraud, or coercion, or in which the person induced to perform such act has not attained fifteen years of age;¹²⁰ (or)
- the recruitment, harboring, transportation, provision, or obtaining of a person for labor or services, through the use of force, fraud, or coercion for the purpose of subjection to involuntary servitude, peonage, debt bondage, or slavery.¹²¹

The definition, which includes sex and labor trafficking, is expansive and encompasses diverse industries, including restaurant, agricultural, and domestic work.¹²² It has evolved to include a range of conduct—from brazen acts of physical violence to subtle forms of coercion, like deportation threats.¹²³

To qualify for a T visa, immigrant victims of a “severe form of trafficking” must also meet other requirements.¹²⁴ The TVPA originally provided that an applicant must: (1) be physically present in the United States or territories “on account of” the trafficking; (2) comply with any reasonable request for assistance in the investigation or prosecution of acts of trafficking (unless under fifteen years of age); (3) suffer extreme hardship involving unusual and severe harm upon removal; and (4) be admissible.¹²⁵ These requirements, thus, significantly narrowed the scope of potential victims who qualify.

For example, many victims found the requirement to engage with law enforcement to be a significant barrier. In order to comply with a reasonable request from law enforcement, adult victims must report to law enforcement and request a

119. *Id.*

120. *See* Victims of Trafficking and Violence Protection Act § 103(8)(A), (9), 114 Stat. at 1481 (codified as amended at 22 U.S.C. § 7102(11)(A), (12)).

121. *See* Victims of Trafficking and Violence Protection Act § 103(8)(B) (codified at 22 U.S.C. § 7102(11)(B)).

122. *See, e.g.*, Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, § 102(b)(4), 114 Stat. 1464, 1466 (“Traffickers lure women and girls into their networks through false promises of decent working conditions at relatively good pay as nannies, maids, dancers, factory workers, restaurant workers, sales clerks, or models.”).

123. *See* Kathleen Kim, *The Coercion of Trafficked Workers*, 96 IOWA L. REV. 409, 438 (2011) (“The TVPA supports a broad vision of coercion. It recognizes that in addition to physical force, psychological abuse and nonviolent coercion create an environment of fear and intimidation that may prevent a worker from leaving an exploitive work situation.”).

124. *See* Immigration and Nationality Act, Pub. L. No. 82-414, § 101(a)(15), 66 Stat. 163, 167 (1952) (codified as amended at § 8 U.S.C. § 1101(a)(15)(I)).

125. Victims of Trafficking and Violence Protection Act § 107(e)(1)(C), (3), 114 Stat. at 1477–78.

special victim certification on Form I-914, Supplement B (I-914B).¹²⁶ However, many victims, due to trauma, stigma, or fear of reprisals, failed to report to law enforcement.¹²⁷ Law enforcement often lacked the training necessary to identify victims of trafficking and refused to issue I-914Bs.¹²⁸ As a result, some victims still faced an uphill battle to qualify for relief.

Despite these challenges, the benefits of the T visa remain immense. Five thousand T visas are available annually to victims, and Congress authorized additional visas for derivative family members.¹²⁹ T visa applicants are eligible for work authorization.¹³⁰ They have an eventual pathway to citizenship and can petition for certain family members.¹³¹ T visa recipients also receive the same public benefits as refugees, including specialized case management and vocational assistance.¹³² These federal benefits serve as an essential lifeline to many victims who otherwise lack access to basic necessities.

U Visas. In the TVPA, Congress also established U visas for victims of certain violent crimes, including human trafficking.¹³³ To qualify, an applicant must show that (1) they are a victim of a qualifying crime under state or federal law; (2) the crime violates U.S. law or occurred in the United States; (3) they suffered a substantial injury related to the crime; (4) they have information about the crime; (5) they were helpful, are helpful, or are likely to be helpful to law enforcement in

126. § 107(e)(1)(C), 114 Stat. at 1477; 8 C.F.R. § 214.11(a) (2020). While the I-914B was not required, it served as primary evidence of the victim's cooperation for many years. *See id.* § 214.11(d)(3). The 2016 T visa regulations eliminated the distinction between secondary and primary evidence and provided that all evidence, including the victim's personal statement, should carry the same weight. Classification for Victims of Severe Forms of Trafficking in Persons; Eligibility for "T" Nonimmigrant Status, 81 Fed. Reg. 92299 (Dec. 19, 2016), <https://www.govinfo.gov/content/pkg/FR-2016-12-19/pdf/2016-29900.pdf> [<https://perma.cc/GV7X-HWVB>]. In later legislation, Congress clarified that applicants who were victims when they were under 18 and those who met a limited trauma exception need not respond to a reasonable request for assistance with law enforcement to qualify.

127. *See, e.g.,* Carole Angel, *Immigration Relief for Human Trafficking Victims: Focusing the Lens on the Human Rights of Victims*, 7 U. MD. L.J. RACE, RELIGION, GENDER & CLASS 23, 25 n.9 (2007) (noting how the law enforcement requirement is "a giant task when one knows that law enforcement can deport").

128. *See, e.g.,* Haynes, *supra* note 38, at 366 (describing how lack of training for those in the field contributes to reduced identification of victims).

129. Victims of Trafficking and Violence Protection Act § 107(e)(2), 114 Stat. at 1478.

130. 8 C.F.R. § 214.11(c)(1), (d)(11) (2020); 8 C.F.R. § 245.23(a) (2011).

131. Victims of Trafficking and Violence Protection Act § 107(e)(1)(C), 114 Stat. at 1477–78. Victims are eligible to petition to reunify in the United States with certain family members, including spouses and children under 21 for adult victims and even certain siblings and parents for child applicants. *See* Immigration and Nationality Act, Pub. L. No. 82-414, § 101(a)(15), 66 Stat. 163, 167 (1952) (codified as amended at 8 U.S.C. § 1101(a)(15)(I)(ii)).

132. Victims of Trafficking and Violence Protection Act § 107(b)(1)(B), 114 Stat. at 1475 (codified as amended at 22 U.S.C. § 7105(b)(1)(B)) ("Federal agencies shall expand benefits and services to victims of severe forms of trafficking in persons in the United States, and aliens classified as a nonimmigrant under section 1101(a)(15)(I)(ii) of title 8, without regard to the immigration status of such victims.").

133. *See* Immigration and Nationality Act § 101(a)(15), 66 Stat. at 167 (codified as amended at 8 U.S.C. § 1101(a)(15)(U)(iii)).

the investigation or prosecution of the crime;¹³⁴ and (6) they are admissible in the United States.¹³⁵ Qualifying crimes include a range of violent crimes, such as trafficking, sexual exploitation, involuntary servitude, slave trade, and prostitution.¹³⁶

Like the T visa, the U visa provides recipients with a range of benefits. U visa recipients qualify for work authorization and can petition for certain family members.¹³⁷ They have an eventual pathway to citizenship.¹³⁸ Unlike the T visa, however, the U visa processing times are lengthy. Ten thousand U visas are available annually, but the cap is regularly reached.¹³⁹ As a result, processing times often exceed five years, in comparison to roughly two years in the T visa context.¹⁴⁰ U visa recipients also are not eligible for expansive federal public benefits¹⁴¹ and often have to wait longer to apply for permanent residency.¹⁴²

Continued Presence. Congress also established a new, temporary pathway for work authorization called Continued Presence when law enforcement identified an

134. As in the T visa context, Congress required applicants to report the crime and assist in the investigation and/or prosecution of the crime. 8 U.S.C. § 1101(a)(15)(U)(i)(III). However, unlike the T visa context, the applicant *must* receive U nonimmigrant status certification, without which they simply cannot qualify. *See* 8 C.F.R. § 214.14(c)(2)(i) (2021).

135. *See* 8 C.F.R. § 214.14(c)(2)(i) (2021).

136. Immigration and Nationality Act § 101(a)(15), 66 Stat. at 167 (codified as amended at 8 U.S.C. § 1101(a)(15)(U)(ii)(II)(iii)) (defining qualifying crimes as rape, torture, trafficking, incest, domestic violence, sexual assault, abusive sexual contact, prostitution, sexual exploitation, stalking, female genital mutilation, being held hostage, peonage, involuntary servitude, slave trade, kidnapping, abduction, unlawful criminal restraint, false imprisonment, blackmail, extortion, manslaughter, murder, felonious assault, witness tampering, obstruction of justice, perjury, and fraud in foreign labor contracting).

137. 8 C.F.R. § 214.14(c)(7), (f) (2021).

138. Immigration and Nationality Act § 245(m), 66 Stat. at 217 (codified as amended at 8 U.S.C. § 1255(m)); 8 C.F.R. § 245.24 (2021).

139. 8 C.F.R. § 214.14(d) (2021); Natalie Nanasi, *The U Visa's Failed Promise for Survivors of Domestic Violence*, 29 YALE J.L. & FEMINISM 273, 277 (2018).

140. *See* HUM. RTS. INITIATIVE N. TEX. & SMU JUDGE ELMO B. HUNTER LEGAL CTR., *FLAWED DESIGN: HOW THE U VISA IS REVICTIMIZING THE PEOPLE IT WAS CREATED TO HELP* (2020), <https://storymaps.arcgis.com/stories/629a772b95e14b3aa05941ae309909f0> [<https://perma.cc/T3YP-4ZJ7>] (“Because of the cap, people filing a U visa petition today can expect to wait 7 to 10 years for approval.”); *Check Case Processing Times*, U.S. CITIZENSHIP & IMMIGR. SERVS., <https://egov.uscis.gov/processing-times/> [<https://perma.cc/MU86-M5UZ>] (last visited Oct. 9, 2021).

141. *See* ALINA HUSAIN & LESLYE E. ORLOFF, NAT’L IMMIGRANT WOMEN’S ADVOC. PROJECT & AM. UNIV. WASHINGTON COLL. OF L., *PUBLIC BENEFITS FOR U VISA APPLICANTS 1* (June 19, 2015), https://niwaplibrary.wcl.american.edu/wp-content/uploads/PublicBenefits_forUVisaApplicantsfactsheet.pdf [<https://perma.cc/7TCN-RQXE>] (“Among the forms of immigration relief designed to offer protection for immigrant crime victims, the U visa comes with the least access to federal and state funded public benefits.”).

142. *Compare* 8 C.F.R. § 245.24 (2021), *with* 8 C.F.R. § 245.23 (2021) (allowing T visa recipients to adjust earlier than U visa recipients if they have “been physically present in the United States for a continuous period during the investigation or prosecution of acts of trafficking and the Attorney General has determined that the investigation or prosecution is complete”).

immigrant victim as a potential witness in a criminal trafficking investigation.¹⁴³ Unlike the T visa, victims cannot apply on their own for Continued Presence.¹⁴⁴ Rather, federal law enforcement has to effectively sponsor the application.¹⁴⁵ Once eligible, victims can receive deferred action,¹⁴⁶ a work permit, and access to federal public benefits.¹⁴⁷ In this way, Continued Presence provides an important stopgap measure to allow immigrant victims to work and remain while preparing their T visa applications and when their T visa applications are pending.¹⁴⁸

D. A Flawed Federal Framework

The TVPA represented a significant step forward for immigrant victims. Still, in the first ten years of the program, significant barriers remained.¹⁴⁹ In the initial years, fewer than 300 T visas were issued.¹⁵⁰ Continued Presence approvals remained dismally low.¹⁵¹ Meanwhile, U visa application and approval rates skyrocketed.¹⁵² In fiscal year 2009, for example, USCIS received 6,835 U visa applications and approved 5,825 pending cases the same year.¹⁵³ In comparison, USCIS received only 461 T visa applications and approved 290 then-pending applications.¹⁵⁴

Congress responded by easing obstacles within the T visa program for immigrant victims.¹⁵⁵ In legislative reauthorizations in 2003 and 2008, Congress

143. See 22 U.S.C. § 7105(c)(3)(A) (establishing that Continued Presence is available to any individual who is “a victim of a severe form of trafficking and a potential witness to such trafficking”).

144. See 22 U.S.C. § 7105(c)(3)(A)(i).

145. See *id.*

146. USCIS defines deferred action as “a discretionary determination to defer a removal action of an individual as an act of prosecutorial discretion.” *Frequently Asked Questions*, U.S. CITIZENSHIP & IMMIGR. SERVS., <https://www.uscis.gov/humanitarian/consideration-of-deferred-action-for-childhood-arrivals-daca/frequently-asked-questions> [<https://perma.cc/UZ7B-FTBY>] (last visited Oct. 9, 2021).

147. U.S. IMMIGR. & CUSTOMS ENF’T, CONTINUED PRESENCE: TEMPORARY DESIGNATION FOR VICTIMS OF HUMAN TRAFFICKING, https://www.dhs.gov/sites/default/files/publications/blue-campaign/19_1028_bc-pamphlet-continued-presence.pdf [<https://perma.cc/Z5DW-Y698>].

148. Bo Cooper, *A New Approach to Protection and Law Enforcement Under the Victims of Trafficking and Violence Protection Act*, 51 EMORY L.J. 1041, 1052 (2002).

149. See 8 U.S.C. § 1101(a)(15)(I), (U)(iii).

150. See CHRISTAL MOREHOUSE, COMBATING HUMAN TRAFFICKING POLICY GAPS AND HIDDEN POLITICAL AGENDAS IN THE UNITED STATES AND GERMANY 117 (2009) (stating that in 2002, the first year where data was available, 172 victims were granted T visas, 453 applications were submitted, and thirteen were denied).

151. MOREHOUSE, *supra* note 150, at 117.

152. See U.S. CITIZENSHIP & IMMIGR. SERVS., NUMBER OF FORM I-918, PETITION FOR U NONIMMIGRANT STATUS, BY FISCAL YEAR, QUARTER, AND CASE STATUS 2009–2017, https://www.uscis.gov/sites/default/files/document/data/I918u_visastatistics_fy2017_qtr4.pdf [<https://perma.cc/MA6Z-SX39>].

153. *Id.*

154. See USCIS STATISTICS, *supra* note 21.

155. See Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, 114 Stat. 1464 (codified as amended at 8 U.S.C. §§ 8, 22); Trafficking Victims Protection Reauthorization Act of 2003, Pub. L. No. 108-193, § 4(a)(3)(A), 117 Stat. 2875, 2878 [hereinafter TVPRA of 2003];

expanded exceptions to the requirement to respond to a reasonable request from law enforcement.¹⁵⁶ Congress increased the age for children from fifteen to eighteen years of age who need not report to law enforcement to remain eligible for the T visa.¹⁵⁷ Moreover, Congress added a new trauma exception, allowing any victim who “is unable to cooperate with [such] a request [from law enforcement] due to physical or psychological trauma” to qualify.¹⁵⁸ Congress additionally extended Continued Presence to two years and allowed noncitizens to qualify based on a pending federal civil lawsuit against their perpetrator.¹⁵⁹ USCIS also issued regulations to further ease other T visa requirements and encourage more victims to apply.¹⁶⁰

Despite these efforts, T visa approvals¹⁶¹ only increased slightly, and more recently, denial rates have skyrocketed.¹⁶² By fiscal year 2016, USCIS received 955 applications for T visas and approved 748 pending applications.¹⁶³ That year, the agency denied 18.96% of pending T visa applications.¹⁶⁴ The denial rate increased significantly to 42.2% in fiscal year 2019 and 42.79% in 2020.¹⁶⁵ The chart¹⁶⁶ below illustrates these rising rates of denial:

William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. No. 110-457, 122 Stat. 5044 (2008) [hereinafter TVPRA of 2008].

156. See source cited *supra* note 155.

157. *Id.*

158. 8 U.S.C. § 1101(a)(15)(T)(iii); 8 C.F.R. § 214.11(b)(3)(ii) (2012) (establishing that a noncitizen “who, due to physical or psychological trauma, is unable to cooperate with a reasonable request for assistance in the Federal, State, or local investigation or prosecution of acts of trafficking in persons, or the investigation of a crime where acts of trafficking in persons are at least one central reason for the commission of that crime, is not required to comply with such reasonable request”).

159. 22 U.S.C. § 7105(c)(3) (2000) (stating that Continued Presence is available to “a potential witness to such trafficking” and that “the Secretary of Homeland Security may permit the alien to remain in the United States to facilitate the investigation and prosecution of those responsible for such crime”); 28 C.F.R. § 1100.35 (2016).

160. See Classification for Victims of Severe Forms of Trafficking in Persons; Eligibility for “T” Nonimmigrant Status, 81 Fed. Reg. 92266 (Dec. 19, 2016), <https://www.govinfo.gov/content/pkg/FR-2016-12-19/pdf/2016-29900.pdf> [<https://perma.cc/GV7X-HWVB>].

161. T-1 visas are awarded to victims of a “severe form of trafficking,” as opposed to T-2, T-3, T-4, T-5, and T-6 visas for derivative family members. See *id.* at 92266–70. This Article primarily focuses on approval rates for T-1 visas for victims of trafficking. Thus, throughout, the Article uses the term “T visa” as a shorthand for T-1 visa.

162. See USCIS STATISTICS, *supra* note 21.

163. *Id.*

164. See *id.*

165. *Id.*

166. This figure is based on data available from USCIS. See *id.* The percentage represents the number of T visa cases for victims of trafficking (i.e., T-1 visas) adjudicated each fiscal year. The rate is calculated by dividing the number of cases for victims of trafficking denied during a fiscal year by the sum of the number of cases approved and denied each fiscal year.

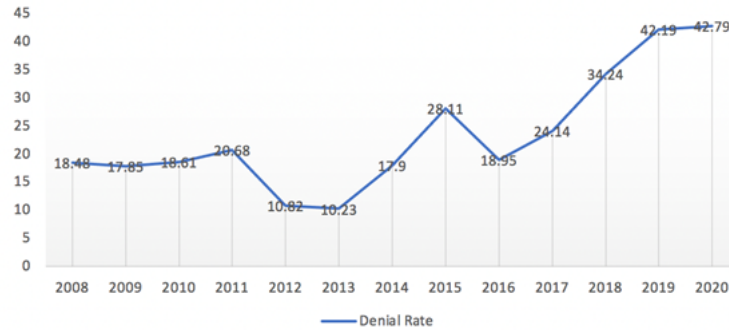


Figure 1: Percentage of T Visa Applications Denied by Fiscal Year (2008 to 2020)

Surprisingly, rising denial rates have coincided with increased identification of and greater access to pro bono legal representation for victims. In the past four years, federally-funded providers have provided services to more immigrant victims of trafficking.¹⁶⁷ The number of immigrant victims and derivative family members identified by certain government-funded programs steadily increased from 915 in 2013 to 1,612 in 2018 and 1,573 in 2019.¹⁶⁸ At the same time, the number of new immigrant victims of trafficking served by programs funded by the U.S. Department of Justice rose from 1,009 in 2013 to 5,090 in 2019.¹⁶⁹ Simultaneously, the number of immigrant children of trafficking identified by the U.S. Department of Health and Human Services grew, rising from 50 in 2009 to 892 in 2019.¹⁷⁰

The federal government simultaneously poured new, unprecedented funding into pro bono legal representation for victims of trafficking—efforts that should improve legal outcomes for trafficking victims.¹⁷¹ In fiscal year 2017, the U.S. Department of Justice provided over \$8.8 million to establish the Crime Victim

167. This data was compiled by the author based on data available from annual Trafficking in Persons Reports issued by the U.S. Department of State (on file with author).

168. *Id.*

169. *Id.*

170. *Id.* The U.S. Department of Health and Human Services issues Interim Assistance and Eligibility Letters to minor victims of a severe form of trafficking. See *Eligibility Letters*, OFF. ON TRAFFICKING IN PERS., <https://www.acf.hhs.gov/otip/victim-assistance/eligibility-letters> [<https://perma.cc/2QGX-Y9MH>] (Oct. 24, 2021).

171. See *Awards Listing*, OFF. FOR VICTIMS OF CRIME, <https://ovc.ojp.gov/funding/awards/list> [<https://perma.cc/5R9M-QRJM>] (last visited Oct. 9, 2021). This included the initiation of new grants to provide specialized services and resulted in \$9.11 million over the following four years. *Id.*

Justice Corps,¹⁷² funding sixty-two new attorney fellows to represent victims.¹⁷³ The federal government also awarded significant funding to the Coalition Against Slavery and Trafficking (CAST), a national anti-trafficking NGO, to formalize training and a technical assistance program to improve outcomes in T visa cases.¹⁷⁴ As a result, in 2018, CAST trained 337 attorneys in thirty states, and responded to 900 individual requests for technical assistance, a fifteen percent increase from 2017.¹⁷⁵

As funding for legal services expanded, applications for T visas increased modestly.¹⁷⁶ Whereas USCIS only received 541 T visa applications in fiscal year 2010, this number rose to 1,242 and 1,110 in 2019 and 2020, respectively.¹⁷⁷ The chart¹⁷⁸ below illustrates the rising T visa applications received, alongside the number of T visas approved and denied by USCIS since 2008:

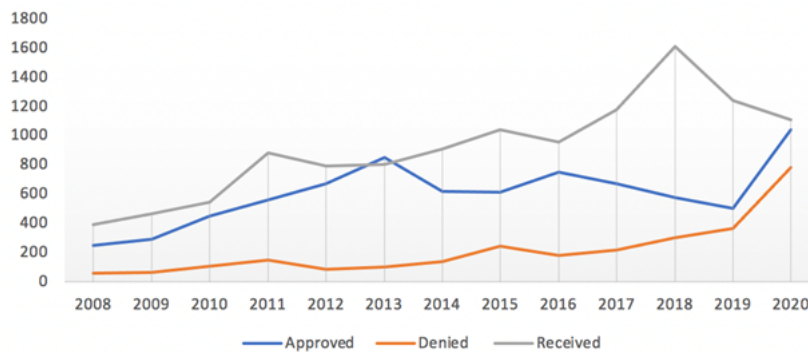


Figure 2: Number of T-1 Visa Applications Received, Approved, and Denied by USCIS by Fiscal Year (2008 to 2020)

Thus, despite greater identification of victims, access to legal services, and slowly rising application rates, approval rates are on the decline.

172. OFF. FOR VICTIMS OF CRIME, U.S. DEP'T OF JUST, CRIME VICTIMS JUSTICE CORPS - LEGAL FELLOWS PROGRAM PURPOSE AREA 1 – INCREASING CAPACITY AND ACCESS TO CIVIL LEGAL HELP FOR CRIME VICTIMS THROUGH LEGAL FELLOWS PROGRAM, <https://external.ojp.usdoj.gov/SelectorServer/awards/pdf/award/2017-MU-MU-K131/2017-40441-DC-VF/2017> [<https://perma.cc/E3SD-Z32M>].

173. See Allie Yang-Green, *Supporting Human Trafficking Survivors Through Civil Legal Aid*, EQUAL JUST. WORKS (Jan. 11, 2021), <https://www.equaljusticeworks.org/news/supporting-human-trafficking-survivors-through-civil-legal-aid/> [<https://perma.cc/T9JK-NUML>].

174. *Id.*

175. COAL. TO ABOLISH SLAVERY & TRAFFICKING, IMPACT REPORT 2018, at 21 (2018), <http://www.castla.org/wp-content/themes/castla/assets/files/Cast-Impact-Report-2018.pdf> [<https://perma.cc/RLX8-8LF2>] (last visited Oct. 2, 2021).

176. See USCIS STATISTICS, *supra* note 21.

177. *Id.*

178. This figure was created by the author based on data available from USCIS. See *id.*

E. Rationales for Insufficient Protection

Scholars have identified diverse rationales for low T visa application and approval rates.¹⁷⁹ Dina Haynes has described how Congress, by requiring adult victims to cooperate with law enforcement, undermined the efficacy of the T visa.¹⁸⁰ Law enforcement agents remain, in many ways, the gatekeepers for immigration protection, and the prominent role of policing in the T visa program has prevented many victims from accessing protection.¹⁸¹ Law enforcement often has been insufficiently trained and unattuned to more subtle forms of trafficking.¹⁸² Further, most immigrant victims also have not been found “chained to a bed in a brothel” and are often left unidentified by law enforcement and unable to access protection.¹⁸³

Building on Haynes’ insights, Jayashri Srikantiah has also examined how Congress, in establishing the T visa, envisioned a simplistic, passive “iconic”

179. See, e.g., Haynes, *supra* note 38 (asserting that the emphasis on prosecution and criminal investigations combined with the lack of training by law enforcement limited the ability of actors to protect immigrant victims); Srikantiah, *supra* note 9 (arguing that administrative officials and law enforcement impermissibly limited the availability of the T visa by focusing on the “iconic” victim, placing too much emphasis on law enforcement cooperation); Ivy C. Lee & Mie Lewis, *Human Trafficking from a Legal Advocate’s Perspective: History, Legal Framework and Current Anti-Trafficking Efforts*, 10 U.C. DAVIS J. INT’L L. & POL’Y 169, 171 (2003) (describing how the twofold congressional focus on prosecution and protection “impacts the kinds of relief that trafficked persons may receive”); Ivy Lee, *An Appeal of a T Visa Denial*, 14 GEO. J. ON POVERTY L. & POL’Y 455 (2007) (analyzing a T visa denial); Cianciarulo, *supra* note 38 (describing how law enforcement’s unrealistic expectations of immigrant victims ability and desire to cooperate imperil victim protections); Marisa Silenzi Cianciarulo, *Modern-Day Slavery and Cultural Bias: Proposals for Reforming the U.S. Visa System for Victims of International Human Trafficking*, 7 NEV. L.J. 826, 835–40 (2007) (providing recommendations to overcome persistent challenges in the T visa framework); Sally Terry Green, *Protection for Victims of Child Sex Trafficking in the United States: Forging the Gap Between U.S. Immigration Laws and Human Trafficking Laws*, 12 U.C. DAVIS J. JUV. L. & POL’Y 309 (2008) (documenting how child victims of sex trafficking face immense challenges obtaining T visas, despite relaxed requirements for victims under 18). Not all scholars were overtly critical of the TVPA’s approach to anti-trafficking protections. See, e.g., Susan W. Tiefenbrun, *Updating the Domestic and International Impact of the U.S. Victims of Trafficking Protection Act of 2000: Does Law Deter Crime?*, 38 CASE W. RES. J. INT’L L. 249, 278–79 (2006–2007) (noting the “positive impact of the TVPA on the enactment of anti-trafficking legislation in foreign countries” and comparing domestic practices with other countries, like Belgium, Italy, and the Netherlands, which had fewer available protections for immigrant victims).

180. Haynes, *supra* note 38, at 346 (“There are consequences to having such an emphasis on prosecution that not only works to the detriment of victims but also undermines the intent of the TVPA.”).

181. *Id.*

182. *Id.*

183. *Id.* at 349 (describing how viewing trafficking through the lens of law enforcement can “exacerbate the tendency of U.S. government personnel to treat trafficked persons as criminals, particularly when the victim does not fit into the expected mold of being rescued after being found chained to a bed in a brothel”). Haynes also described challenges that law enforcement faced in identifying victims when they often “subscribe[d] overtly or covertly to unhelpful myths about the nature of victims and criminals.” *Id.*

victim.¹⁸⁴ Congress “contemplate[d] a victim of sex trafficking who passively waits for rescue by law enforcement, and upon rescue, presents herself as a good witness who cooperates with all law enforcement requests.”¹⁸⁵ This embrace of simplistic victim narratives, embedded in the statutory and regulatory framework, has led to insufficient identification by law enforcement and adjudicators.¹⁸⁶

Moreover, racialized and gendered narratives about trafficking have driven anti-trafficking enforcement and protection agendas.¹⁸⁷ Cheryl Nelson Butler has explored how African slavery and its legacy rendered Black women more vulnerable to sex trafficking, yet anti-trafficking efforts have often ignored non-white victims.¹⁸⁸ Instead, white, cisgender victims have more readily received public support, services, and legal protection.¹⁸⁹ Meanwhile, the myth of the “iconic” white, cisgender victim continues to dominate enforcement efforts and imperil efforts to identify BIPOC and LGBTQ+ victims.¹⁹⁰

Scholars, too, have drawn attention to the incompatibility of immigration enforcement and anti-trafficking agendas.¹⁹¹ Many trafficking victims are

184. Srikantiah, *supra* note 9, at 177 (describing how the regulations and agency implementation of the TVPA envision a prototypical victim with several characteristics: (1) the victim is a woman or girl trafficked for sex; (2) law enforcement assesses her to be a good witness; (3) she cooperates fully with law enforcement investigations; and (4) she is rescued instead of escaping from the trafficking enterprise).

185. *Id.*

186. *Id.* Other scholars, including Sally Green and Bridgette Carr, have further explored these deficiencies, highlighting how the T visa often failed to work even for the most vulnerable. *See* Green, *supra* note 179; Bridgette Carr, *Examining the Reality of Foreign National Child Victims of Human Trafficking in the United States*, 37 WASH. U. J.L. & POL'Y 183 (2011) (examining how child victims face challenging when applying for T visas). They have pointed to evidence that trafficked children frequently cannot effectively access T visas. Green, *supra* note 179, at 313.

187. *See, e.g.*, Cheryl Nelson Butler, *The Racial Roots of Human Trafficking*, 62 UCLA L. REV. 1464 (2015) (examining how race and racism shaped the problem of human trafficking as well as enforcement agendas that focus on the “iconic white female victim”); Karen E. Bravo, *Exploring the Analogy Between Modern Trafficking in Humans and the Trans-Atlantic Slave Trade*, 25 B.U. INT'L L.J. 207, 247 (2007) (examining how early trafficking efforts were aimed at white women, ignoring Black victims).

188. Nelson Butler, *supra* note 187, at 1495–1502.

189. Srikantiah centers this critique in critical theory, explaining how dominant narratives about victimization often have excluded BIPOC and LGBTQ+ victims. Srikantiah, *supra* note 9, at 202 n.235 (citing Linda L. Ammons, *Mules, Madonnas, Babies, Bathwater, Racial Imagery and Stereotypes: The African-American Woman and the Battered Woman Syndrome*, 1995 WIS. L. REV. 1003, 1070–71; Kimberle Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241, 1243–44 (1991); Richard Delgado, *Storytelling for Oppositionists and Others: A Plea for Narrative*, 87 MICH. L. REV. 2411, 2438 (1989); Martha Fineman, *Dominant Discourse, Professional Language, and Legal Change in Child Custody Decisionmaking*, 101 HARV. L. REV. 727, 730 (1988); Leslie Reagan, *Victim or Accomplice?: Crime, Medical Malpractice, and the Construction of the Aborting Woman in American Case Law, 1860s-1970*, 10 COLUM. J. GENDER & L. 311, 314–15 (2001); Lucie White, *Representing “The Real Deal,”* 45 U. MIAMI L. REV. 271, 295–96 (1990–1991).

190. Nelson Butler, *supra* note 187, at 1495–1502.

191. Chacón, *Tensions*, *supra* note 38 (exposing the trade-offs between immigration enforcement and anti-trafficking efforts).

undocumented and, thus, subject to immigration enforcement efforts.¹⁹² As Jennifer Chacón has observed, the “line between voluntary migrants who participate in smuggling schemes and unwilling trafficking victims” is “murky at best” and “has been vigilantly policed.”¹⁹³ The very efforts to root out trafficking often have negative collateral consequences—reinforcing concepts of migrant criminality and deepening the underlying vulnerability of immigrant communities to trafficking and exploitation.¹⁹⁴ This critique has been borne out under the Trump administration, as heightened immigration enforcement efforts have rendered immigrant communities more vulnerable to trafficking.¹⁹⁵ Meanwhile, victims, more fearful of deportation, remained less likely to report abuse or seek protection.¹⁹⁶

II. THE SHALLOW STATE

A. Trafficking and the Shallow State

These scholarly critiques, while important, fail to adequately explain the recent decline in T visa approvals for victims. This Part asserts that rising T visa denial rates have been largely driven by administrative actors, who have erected new roadblocks within the T visa application process. Law and society scholars have shown how administrative, enforcement, and adjudicatory actors play a significant role in shaping legal protections.¹⁹⁷ Despite “law in books,” the actions of administrative, adjudicatory, and enforcement actors can deeply impact “law in action.”¹⁹⁸ While not unique to trafficking cases, this phenomenon is especially apparent here because administrative and law enforcement officials play a formative role in shaping outcomes as applicants apply for T visas.¹⁹⁹ This Part focuses on how low-level administrative actors operated in recent years to erect new barriers

192. See, e.g., POLARIS, THE LATINO FACE OF HUMAN TRAFFICKING AND EXPLOITATION IN THE UNITED STATES 8 (2020), <https://polarisproject.org/wp-content/uploads/2020/04/EXECUTIVE-SUMMARY-The-Latino-Face-of-Human-Trafficking-and-Exploitation-in-the-United-States.pdf> [<https://perma.cc/FP8A-F3X7>] (documenting how a majority of trafficking survivors in domestic work and the agriculture sector are undocumented).

193. Chacón, *Tensions*, *supra* note 38, at 1615.

194. *Id.* (describing how immigration enforcement efforts, often under the guise of combating trafficking, have had “the perhaps unintended effect of reinforcing migrants’ vulnerability to exploitation and made them more vulnerable to exploitation”).

195. See Dahlstrom, *supra* note 12.

196. See 2020 TIP REPORT, *supra* note 25, at 519 (describing a trend wherein “increasing number of foreign national survivors . . . [were] afraid to report their cases to law enforcement, pursue immigration options, or seek services”).

197. See, e.g., Lauren B. Edelman & Mark C. Suchman, *The Legal Environments of Organizations*, 23 ANN. REV. SOCIO. 479 (1997).

198. See Leisy J. Abrego & Sarah M. Lakhani, *Incomplete Inclusion: Legal Violence and Immigrants in Liminal Legal Statuses*, 37 LAW & POL’Y 265, 266 (2015) (citing Roscoe Pound, *Law in Books and Law in Action*, 44 AM. L. REV. 12 (1910)).

199. This Article focuses primarily on administrative, rather than enforcement, actors and their role in limiting immigration protections. However, law enforcement also plays a considerable role in shaping outcomes in the T visa context.

for immigrant victims within the T visa application process and, through their policies and actions, significantly eroded avenues for protection.

B. The Shallow State Defined

In 2017, David Rothkopf, a professor of international relations, defined the term, “shallow state,”²⁰⁰ to refer to “the antithesis of the deep state.”²⁰¹ The term “deep state” has been the subject of much scholarly debate for years.²⁰² Yet, it gained traction in the Trump administration as scholars and journalists sought to explain the actions of career bureaucrats, reportedly working to undermine the objectives of the executive.²⁰³ Scholars originally applied the term “deep state” to executive officials, but it has now evolved to apply to a wider range of actors, including intelligence, national security, and bureaucratic personnel, who may leverage their power and expertise to advance their goals, often to subvert the goals

200. See Rothkopf, *supra* note 44. Other journalists and scholars have added texture to the portrait of the “shallow state.” See, e.g., Rex Nutting, Opinion, *The Shallow State Is Thriving Under Trump*, MARKETWATCH (Apr. 24, 2018, 4:17 PM), <https://www.marketwatch.com/story/the-shallow-state-is-thriving-under-trump-2018-04-24> [<https://perma.cc/XC5T-SD3U>] (defining the term as: “a withering of the government’s capabilities”); Danielle Schulkin & Julia Brooks, *Loyalty Above All: The “Shallow State” of the Trump Administration*, JUST SEC. (Nov. 2, 2020), <https://www.justsecurity.org/73226/loyalty-above-all-the-shallow-state-of-the-trump-administration/> [<https://perma.cc/TK5F-G4HE>] (describing the “shallow state” as characterized by “hollowing” out of expertise with many senior positions left open and others filled “whose most significant attribute appears to be political loyalty to [President Trump] rather than deep experience and professional excellence”).

201. Rothkopf, *supra* note 44.

202. Some scholars have written explicitly about the “deep state,” while others have catalogued more generally the challenges and/or benefits of unelected bureaucrats who act in conflict with the executive. See Rebecca Ingber, *Bureaucratic Resistance and the National Security State*, 104 IOWA L. REV. 139, 143 (2018); CASS SUNSTEIN & ADRIAN VERMEULE, *LAW AND LEVIATHAN: REDEEMING THE ADMINISTRATIVE STATE* 2–7 (2020); MARC AMBINDER & D.B. GRAY, *DEEP STATE: INSIDE THE GOVERNMENT SECRECY INDUSTRY* 4 (2013); STEPHEN SKOWRONEK, JOHN A. DEARBORN & DESMOND KING, *PHANTOMS OF A BELEAGUERED REPUBLIC: THE DEEP STATE AND THE UNITARY EXECUTIVE* 13–23 (2021); MIKE LOFGREN, *THE DEEP STATE: THE FALL OF THE CONSTITUTION AND THE RISE OF A SHADOW GOVERNMENT* 34–36 (2016); Jack Goldsmith, *Paradoxes of the Deep State*, in *CAN IT HAPPEN HERE?: AUTHORITANISM IN AMERICA* (Cass R. Sunstein ed., 2018); MICHAEL J. GLENNON, *NATIONAL SECURITY AND DOUBLE GOVERNMENT* 11–28 (2015).

203. *Supra* note 202; see, e.g., Jon D. Michaels, *The American Deep State*, 93 NOTRE DAME L. REV. 1653, 1654 (2018) (“Whether cast as insidious or cast aside as fictitious, the American ‘deep state’ is an increasingly compelling concept in the Age of Trump.”); Heidi Kitrosser, *Accountability in the Deep State*, 65 UCLA L. REV. 1532 (2018) (“Since taking office, President Trump and his supporters have repeatedly railed against the ‘deep state.’”); JAMES B. STEWART, *DEEP STATE: TRUMP, THE FBI, AND THE RULE OF LAW* (2019) (chronicling efforts by the FBI and the U.S. Department of Justice to investigate President Trump); Frank Bruni, Opinion, *The Deep State Is on a Roll*, N.Y. TIMES (Dec. 2, 2020), <https://www.nytimes.com/2020/12/02/opinion/trump-fauci-deep-state.html> [<https://perma.cc/VLL7-XM4N>] (describing Anthony Fauci as part of the “deep state,” which is engaged in a “righteous defense against the corruption of democracy”).

of the executive.²⁰⁴ Legal scholarship has painted a quite polarized picture of deep state actors.²⁰⁵ As Rebecca Ingber has observed, legal scholars have vacillated between two camps.²⁰⁶ Some have opined about the dangers of a deep state, “conjur[ing] images of shadowy, powerful bureaucrats, evoking and stoking fears of the power that has accrued in the executive branch’s national security bureaucracy.”²⁰⁷ Others have viewed the deep state as a source of “benevolent internal constraints,” providing a key check on the Executive and a safeguard for the “legitimacy of the administrative state.”²⁰⁸

Rothkopf, however, warned of the rise of a different phenomenon—the shallow state. The shallow state, as he conceived it, refers to administrative officials who “actively eschew[ed] experience, knowledge, relationships, insight, craft, special skills, tradition, and shared values.”²⁰⁹ These actors, unlike the deep state, use the administrative state and their knowledge of decision-making and formal rulemaking instrumentally to *serve* the hidden agenda of the executive. They work in service of an often obscure executive agenda, one which if promulgated through more formal mechanisms such as rulemaking or legislation would likely cause a public backlash or legal challenges. Instead, through careful, out of sight, and often unlawful action, they mobilize their knowledge and skills quietly to obstruct, slow, or undermine the statutory regime.²¹⁰

C. Immigration Law and the Shallow State

This Article is particularly focused on the actions of low-level bureaucrats in the immigration context.²¹¹ It deploys the term “bureaucrat” to refer to frontline

204. See Ingber, *supra* note 202, at 143. These figures, Rothkopf argued, can effectively leverage power built over years “to advance their goals regardless of the whims or wants of elected public officials.” Rothkopf, *supra* note 44.

205. See Ingber, *supra* note 202, at 143.

206. *Id.* at 144.

207. *Id.*

208. See *id.* at 142–44.

209. Rothkopf, *supra* note 44.

210. See Sarah Isgur, Opinion, *We in the ‘Shallow State’ Thought We Could Help. Instead, We Obscured the Reality of a Trump Presidency.*, WASH. POST (Dec. 23, 2020, 8:27 PM), https://www.washingtonpost.com/opinions/sarah-igur-shallow-state-trump-doj/2020/12/23/e843da1a-4561-11eb-a277-49a6d1f9dff1_story.html [<https://perma.cc/Z3F4-C7R9>].

211. In the immigration context, while bureaucratic actors can be found in many agencies at the U.S. Department of Homeland Security, this Article focuses on bureaucratic actors at USCIS. USCIS officers adjudicate immigration applications and implement agency guidance. In these roles, they have power to decide the fates of immigrant applicants and informally shape policy that leads to large-scale administrative change. While not the focus of this Article, scholars and journalists have also defined the shallow state as hollowing out of the agency and the lack of competency in administrative agencies. See Schulkin & Brooks, *supra* note 200. Critics remarked how President Trump appointed less competent, less experienced officials, such as Stephen Miller, Kirstjen Nielsen, and Ken Cuccinelli, to prominent roles within the immigration system. See *id.* Some of these political appointments, such as that of Ken Cuccinelli and Chad Wolf, the former director of USCIS, have been patently unlawful and later found to violate the Federal Vacancies Reform Act. See *id.*; see also James Doubek, *Judge Says Ken Cuccinelli Was Appointed Unlawfully To Top Immigration Post*, NPR (Mar. 1, 2020, 11:23 PM), <https://www.npr.com/2020/03/01/821111111>.

workers in an administrative agency.²¹² Sociologists have defined “bureaucrat” in an expansive sense, including a broad range of professional workers from technocrats and policymakers to frontline or “street-level” decisionmakers.²¹³ Sociologists have recognized that such bureaucrats, united by a common culture and expertise, have considerable knowledge, power, and expertise.²¹⁴ They can exercise broad discretion and have considerable power within the administrative agency.²¹⁵

Often, bureaucrats are pictured as parochial office workers—resistant to change—and responsible for repressive policies.²¹⁶ Yet, recent literature has painted a more optimistic view of bureaucrats.²¹⁷ Scholars have pointed out how bureaucrats can engage in “bottom-up” innovation that has the potential to

[/www.npr.org/2020/03/01/811023475/judge-says-ken-cuccinelli-was-appointed-unlawfully-to-top-immigration-post](http://www.npr.org/2020/03/01/811023475/judge-says-ken-cuccinelli-was-appointed-unlawfully-to-top-immigration-post) [<https://perma.cc/W8KC-LR3B>]; Dennis Romero, *Federal Judge Rules Acting DHS Head Chad Wolf Unlawfully Appointed, Invalidates DACA Suspension*, NBC NEWS (Nov. 14, 2020, 2:21 PM), <https://www.nbcnews.com/politics/immigration/federal-judge-rules-acting-dhs-head-chad-wolf-unlawfully-appointed-n1247848> [<https://perma.cc/Y5Y5-3WRV>]. Meanwhile, critics have observed an overall brain drain, as experienced officials have left USCIS and the immigration court system, hollowing out the agency and leaving it with reduced capacity to adjudicate immigration applications. See, e.g., *More Immigration Judges Leaving the Bench*, TRAC IMMIGR. (July 13, 2020), <https://trac.syr.edu/immigration/reports/617/> [<https://perma.cc/EKX9-CBK7>] (“Turnover [in immigration judges] is the highest since records began in FY 1997 over two decades ago.”); Louise Radnofsky, *High Turnover Roils Trump’s Immigration-Policy Ranks*, WALL ST. J. (June 12, 2019, 12:17 pm), <https://www.wsj.com/articles/high-turnover-roils-trumps-immigration-policy-ranks11560355978> [<https://perma.cc/SK7F-KDP5>] (“In the past two months, almost every top job on immigration policy has turned over once—and in some cases, twice—with the administration at times employing creative maneuvers to get officials in place.”).

212. MICHAEL LIPSKY, *STREET-LEVEL BUREAUCRACY: DILEMMAS OF THE INDIVIDUAL IN PUBLIC SERVICES*, at xi (photo. reprt. 2010) (1980).

213. *Id.*

214. *Id.*

215. Max Weber, *The Bureaucratization of Politics and the Economy*, in *ESSAYS IN ECONOMIC SOCIOLOGY* (Richard Swedberg ed., 1999) (“In a modern state the actual ruler is necessarily and unavoidably the bureaucracy, since power is exercised neither through parliamentary speeches nor monarchical enunciations but through the routines of administration.”); Larry B. Hill, *Who Governs the American Administrative State? A Bureaucratic-Centered Image of Governance*, 1 J. PUB. ADMIN. RSCH. & THEORY 261, 266 (1991) (“[B]ureaucracy is a significant actor in the governance process, and the bureaucratic actor is able to rely upon a set of strategic advantages and power bases . . . and exercises an important degree of discretion.”); LIPSKY, *supra* note 212, at 13 (“The policy-making roles of streetlevel bureaucrats are built upon two interrelated facets of their positions: relatively high degrees of discretion and relative autonomy from organizational authority.”).

216. See, e.g., Marie-Amélie George, *Bureaucratic Agency: Administering the Transformation of LGBT Rights*, 36 YALE L. & POL. REV. 83, 83 (2017) (“In the 1940s and 1950s, the administrative state served as a powerful engine of discrimination against homosexuals, with agency officials routinely implementing anti-gay policies that reinforced gays’ and lesbians’ subordinate social and legal status.”).

217. See, e.g., *id.* (describing how bottom-up innovation can improve LGBTQ+ rights claims); Tatiana Camelia Dogaru, *Street-Level Bureaucrats as Innovative Strategists: An Analytic Approach*, 12 J. PUB. ADMIN. FIN. & L. 51 (2017) (demonstrating how street-level bureaucracy can be beneficial as such actors can effectively adapt policy as they implement it). *But cf.* Richard Weatherley & Michael Lipsky, *Street-Level Bureaucrats and Institutional Innovation: Implementing Special-Education Reform*, 47 HARV. EDUC. REV. 171 (1977) [hereinafter *Street-Level Bureaucrats*] (examining how street-level actors resisted special education reform in Massachusetts).

positively impact rights claims and resist presidential encroachment. Marie-Amélie George has observed how bureaucratic actors, despite top-down policies restricting the rights of LGBTQ+ individuals, worked to cement more protective policies and practices.²¹⁸ Similarly, in the immigration context, Joseph Landau has explored how bureaucratic actors in the Obama administration worked creatively to implement prosecutorial discretion initiatives by channeling feedback upwards from low-level bureaucrats to mid- and top-level officials, allowing them to quickly innovate and improve protections for immigrants.²¹⁹

Bottom-up innovation clearly has some benefits.²²⁰ It allows bureaucratic actors to marshal on-the-ground experience and make better decisions on individual matters because they can weigh the unique facts before them. Bureaucrats also can share lessons upwards to influence policymakers and tweak policies quickly.²²¹ In addition, bottom-up action can contribute to “administrative common law,” the common corpus of law and policy within the administrative agency.²²²

However, there are drawbacks to bottom-up bureaucratic innovation. While low-level bureaucrats can mobilize their knowledge and expertise to support policies that protect minority rights, they can also support repressive policies and, without effective executive oversight, can cause significant harm. As Landau acknowledges, innovation by bureaucratic actors is not a “one-way ratchet.”²²³ Rather, it is capable of “produc[ing] a set of very different, immigrant-unfriendly directives as opposed to the current, more immigrant-affirming ones.”²²⁴ Indeed, the very same

218. George, *supra* note 216, at 84–85 (“[B]y the mid1980s many bureaucrats had become incidental allies, subverting bans on gay and lesbian foster and adoptive parenting and promoting gay-inclusive curricula in public schools.”).

219. Joseph Landau, *Bureaucratic Administration: Experimentation and Immigration Law*, 65 DUKE L.J. 1173 (2016) (arguing that this on-the-ground experimentation led to better results, as officers could exercise discretion and engage in subregulatory guidance to improve initiatives quickly and effectively).

220. I define “bottom-up” action as occurring when frontline workers, exercising the discretion given to them by the agency and top-down directives, shape policies on the ground and then communicate with mid- or top-level officials to create or impact policy.

221. *See, e.g.*, Hill, *supra* note 215, at 268 (describing how bureaucratic actors are influenced by extrabureaucratic actors, but they also can “act so as to influence the other actors”). As Landau points out, low-level actors may, at times, favor subregulatory or nonlegislative rules of notice-and-comment rulemaking, which although less transparent, can result in quicker, beneficial outcomes. Landau, *supra* note 219, at 1232. He offers the example of bureaucratic action during the Obama administration to issue subregulatory guidance on Deferred Action applications, a move that he argues ultimately benefited immigration applicants. *Id.*

222. Landau, *supra* note 219, at 1233–34 (“Perhaps most significant is that frontline officers can report the effectiveness of their experimentation up the chain of command and better enable policymakers to make positive choices regarding ex ante and ex post controls across entire agencies or even entire regulatory fields.”).

223. *Id.* at 1232.

224. *Id.*

circumstances that can encourage innovation by low-level bureaucratic actors, can fuel unlawful, harmful policies, especially without effective executive oversight.²²⁵

It is against this landscape that we view the shallow state. Under the Trump administration, bureaucratic actors leveraged their expertise and experience to restrict access to essential immigration benefits, ranging from asylum to T visas to Deferred Action for Childhood Arrivals (DACA).²²⁶ The T visa context is but one example, but a particularly strident one. As President Trump publicly expressed his deep commitment to trafficking victims, privately the administration oversaw the systematic erosion of protections. It watched as administrative actors implemented new policies to ensure that more T visa applications were rejected, delayed, and denied.

D. Tactics of the Shallow State

“We’ve had the Trafficking Victims Protection Act since 2000. In those [nineteen] years, an entire infrastructure has been constructed to support trafficking survivors. And piece by piece, the Trump administration is eroding and undermining that edifice of protection.”²²⁷

-Martina Vandenberg, Human Trafficking Legal Center

This Part examines the tactics of the shallow state in the T visa context. It highlights the strategies used by bureaucratic actors, including (1) heightening the stakes for immigrant victims, (2) rejecting new applications, (3) causing delay, (4) increasing requests for evidence and denials, and (5) expanding “darkside discretion.”²²⁸ This Part shows how these actions have worked in concert to undermine the T visa program and harm immigrant victims of trafficking.

1. Heightened Stakes

In 2018, USCIS raised the stakes for all T visa applicants. Previously, if denied a T visa, applicants were not placed in removal (deportation) proceedings.²²⁹ Thus,

225. *Id.* (arguing that under the Obama administration, the president exercised careful control over low-level bureaucrats but warning that this oversight might not always be present).

226. *See, e.g., Dystopian Fiction, supra* note 45.

227. *How Trump Is ‘Destroying Protections’ for Victims of Human Trafficking*, WORLD POL. REV. (July 2, 2019), <https://www.worldpoliticsreview.com/insights/27998/under-trump-human-trafficking-protections-have-weakened> [<https://perma.cc/PR9J-DG52>].

228. *See infra* Section III.D.5.

229. U.S. CITIZENSHIP & IMMIGR. SERVS., U.S. DEP’T OF HOMELAND SEC., PM-602-0050.1, UPDATED GUIDANCE FOR THE REFERRAL OF CASES AND ISSUANCE OF NOTICES TO APPEAR (NTAs) IN CASES INVOLVING INADMISSIBLE AND DEPORTABLE ALIENS (2018), <https://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/2018/2018-06-28-PM-602-0050.1-Guidance-for-Referral-of-Cases-and-Issuance-of-NTA.pdf> [<https://perma.cc/E3HH-L2KV>]; U.S. DEP’T OF STATE, TRAFFICKING IN PERSONS REPORT 488 (2019), <https://www.state.gov/wp-content/uploads/2019/06/2019-Trafficking-in-Persons-Report.pdf> [<https://perma.cc/R9G5-5E5F>].

albeit undocumented, they could remain in the United States, unless subject to other immigration enforcement actions or otherwise in removal proceedings. This policy, in place for more than fifteen years, encouraged immigrant victims, often fearful of deportation, to come forward and apply for immigration protection.

Under the Trump administration, in November 2018, USCIS quickly reversed course. In a policy memorandum, USCIS announced that applicants whose T visa applications were denied would be issued a Notice to Appear (NTA), the charging document in immigration court, and placed in removal proceedings.²³⁰ This policy change came amidst new guidance by Immigration and Customs Enforcement (ICE), dramatically altering enforcement priorities and making clear that no one, including an immigrant victim, was off the table in terms of immigration enforcement.²³¹

ICE, established by Congress in 2003, was historically the enforcement branch of the U.S. Department of Homeland Security (DHS),²³² but this new guidance effectively transformed USCIS, the benefit-granting arm of DHS, into an enforcement agency.²³³ The policy had an immediate chilling effect.²³⁴ Applications

[hereinafter 2019 TIP REPORT] (“As of November 2018, DHS may issue NTAs to individuals following the denial of a T visa or denial of adjustment of status from a T visa to permanent resident status, if such individuals are unlawfully present at that time of denial.”).

230. U.S. CITIZENSHIP & IMMIGR. SERVS., *supra* note 229.

231. See Memorandum from John Kelly, Sec’y, U.S. Dep’t of Homeland Sec., to Kevin McAleenan, Acting Comm’r, U.S. Customs & Border Prot., Thomas D. Homan, Acting Dir., U.S. Immigr. & Customs Enft, Lori Scialabba, Acting Dir., U.S. Citizenship & Immigr. Servs., Joseph B. Maher, Acting Gen. Couns., U.S. Dep’t of Homeland Sec., Dimple Shah, Acting Assistant Sec’y for Int’l Affs. & Chip Fulghum, Acting Undersecretary for Mgmt. re Implementing the President’s Border Security and Immigration Enforcement Improvements Policies (Feb. 20, 2017), https://www.dhs.gov/sites/default/files/publications/17_0220_S1_Implementing-the-Presidents-Border-Security-Immigration-Enforcement-Improvement-Policies.pdf [<https://perma.cc/FUA4-8S2C>] (expanding border security and enforcement efforts); Memorandum from John Kelly, Sec’y, U.S. Dep’t of Homeland Sec., to Kevin McAleenan, Acting Comm’r, U.S. Customs & Border Prot., Thomas D. Homan, Acting Dir., U.S. Immigr. & Customs Enft, Lori Scialabba, Acting Dir., U.S. Citizenship & Immigr. Servs., Joseph B. Maher, Acting Gen. Couns., U.S. Dep’t of Homeland Sec., Dimple Shah, Acting Assistant Sec’y for Int’l Affs. & Chip Fulghum, Acting Undersecretary for Mgmt. re Enforcement of the Immigration Laws to Serve the National Interest (Feb. 20, 2017), https://www.dhs.gov/sites/default/files/publications/17_0220_S1_Enforcement-of-the-Immigration-Laws-to-Serve-the-National-Interest.pdf [<https://perma.cc/TG47-GGGA>] (describing new policies to significantly expand immigration enforcement priorities).

232. See *supra* note 91 regarding the agencies within the Department of Homeland Security.

233. See, e.g., Joshua Breisblatt, *USCIS Is Slowly Being Morphed into an Immigration Enforcement Agency*, IMMIGR. IMPACT (July 9, 2018), <https://immigrationimpact.com/2018/07/09/uscis-guidance-immigration-benefit/#.YLqD7TZKj-Z> [<https://perma.cc/5U63-DHYY>] (characterizing the NTA memo as a “major shift in how USCIS operates” because “USCIS was never meant to be tasked with immigration enforcement”).

234. See, e.g., BETSY LAWRENCE & GREG CHEN, AM. IMMIGR. L. ASSOC., AILA POLICY BRIEF: NEW USCIS NOTICE TO APPEAR GUIDANCE (2018) (“The new NTA policy will also have a chilling effect on legal immigration in general, discouraging many people who are eligible for immigration benefits from applying out of fear they will be subject to unjustified enforcement.”); see also *Dystopian Fiction*, *supra* note 45 (“[Since then,] [a]pplications for the special visas have nose-dived.”).

for T visas decreased by twenty-three percent after its announcement.²³⁵ USCIS began to issue NTAs and place applicants in removal proceedings.²³⁶ Martina Vandenberg, founder of a national anti-trafficking NGO, called the risk of deportation “a game-changer.”²³⁷ She noted that it “totally changes the analysis of whether or not it’s worth it for any trafficking victim to cooperate with law enforcement.”²³⁸ Deborah Pembroke, an advocate and trafficking survivor, remarked about the risks faced by T visa applicants, “We hear time and time again: Why would I risk myself? Why would I risk my family?”²³⁹

2. Rejection

As USCIS increased the risk of deportation, the agency simultaneously exerted greater control over the entry point for new T visa applications. It did this by strenuously policing the content and substance of T visa applications. In particular, USCIS issued two new policies that increased the burden on initial T visa applicants. One policy reduced access to fee waivers, and the other required that all blanks on the application be filled. USCIS then began summarily to reject applications that failed to meet these new requirements.²⁴⁰ Both policies are described below at length.

Fee Waiver Policy. In 2018, USCIS abruptly tightened the qualifications for fee waivers and increased the filing fees for certain applications associated with the T visa.²⁴¹ While the T visa itself does not require a fee, many applicants must submit

235. Contrera, *supra* note 11.

236. See Breisblatt, *supra* note 233 (describing how immediately following the issuance of the NTA guidance, USCIS began issuing NTAs, whereas previously this was the duty of ICE).

237. See Gordon, *supra* note 35.

238. *Id.*

239. Contrera, *supra* note 11.

240. Due to a lack of transparency, the exact impact on T visa applicants is unknown. However, USCIS has disclosed initial data in response to FOIA litigation to show that in the U visa context, there was a dramatic increase in rejections. See *infra* notes 296-298.

241. See 8 U.S.C. § 1255(l)(7); U.S. CITIZENSHIP & IMMIGR. SERVS., U.S. DEP’T OF HOMELAND SEC., PM-602-0011.1, FEE WAIVER GUIDELINES AS ESTABLISHED BY THE FINAL RULE OF THE USCIS FEE SCHEDULE; REVISIONS TO *ADJUDICATOR’S FIELD MANUAL* (AFM) CHAPTER 10.9, AFM UPDATE AD11-26 (2011), https://www.uscis.gov/sites/default/files/document/memos/FeeWaiverGuidelines_Established_by_the_Final%20Rule_USCISFeeSchedule.pdf [<https://perma.cc/TK2T-C8RP>] [hereinafter FEE WAIVER GUIDELINES] (describing eligibility criteria for fee waiver requests, including evidence of very low-income). In the summer of 2018, “[n]umerous practitioners . . . reported a significant increase in fee waiver denials from the Vermont Service Center in . . . U visa . . . applications.” Letter from Cecelia Friedman Levin, Sr. Pol’y Couns., ASISTA, to Maureen Dunn, Chief, Fam. Immigr. & Victim Prot. Div., U.S. Citizenship & Immigr. Servs., Dep’t of Homeland Sec. (July 30, 2018), https://drive.google.com/file/d/1Sq_CtrhuAiiKGayzsT9wQld3ZglmFffK/view [<https://perma.cc/N8PQ-DPPN>]; see, e.g., ASISTA, PRACTICE ADVISORY: FEE WAIVERS FOR VAWA SELF-PETITIONS, U AND T VISA APPLICATIONS 1 (Aug. 2018), <https://asistahelp.org/wp-content/uploads/2018/09/ASISTA-Practice-Advisory-Fee-Waivers.pdf> [<https://perma.cc/99LE-DDAB>] [hereinafter ASISTA FEE WAIVERS] (“Practitioners nationwide have recently reported significant rates of fee-waiver denials from the Humanitarian Division of the Vermont Service Center.”); IMMIGRANT LEGAL RES. CTR., FEE WAIVERS AND THEIR IMPACT ON IMMIGRANT

a “waiver of inadmissibility” with the T visa application.²⁴² This waiver, as of October 2021, requires a filing fee of \$930.²⁴³ Many trafficking victims depended heavily on fee waiver applications because they could not otherwise afford the filing fee.

Since the TVPA was passed, USCIS has had a generous practice of granting fee waivers to trafficking victims.²⁴⁴ T visa applicants could qualify for a fee waiver by demonstrating that they received a means-tested benefit,²⁴⁵ had income less than 125% of the federal poverty guidelines, or faced financial hardship.²⁴⁶ As a result, many victims submitted evidence of their income or receipt of public benefits to qualify.

This policy changed significantly on September 27, 2018, when USCIS announced changes to fee waiver practice. USCIS first reported plans to revise the

SURVIVORS OF DOMESTIC VIOLENCE, SEXUAL ASSAULT, AND OTHER CRIMES 2 (2018), https://www.ilrc.org/sites/default/files/resources/fee_waiver_report.pdf [<https://perma.cc/Z7Y2-XNVK>] (“[In 2018,] [a]dvocates for survivors throughout the country reported high numbers of fee waiver request rejections, in cases that clearly met established fee waiver eligibility criteria.”).

242. See ASISTA FEE WAIVERS, *supra* note 241; ASISTA, USCIS FEE RULE & THE IMPACT ON SURVIVOR-BASED PROTECTIONS 3 (2020), <https://asistahelp.org/wp-content/uploads/2020/08/Fee-Rule-Survivor-Protections.pdf> [<https://perma.cc/KJ94-5XHC>] (“VAWA self-petitioners, and U and T visa applicants must often file ancillary forms that do have significant fees, which would rise exponentially . . .”).

243. U.S. CITIZENSHIP & IMMIGR. SERVS., U.S. DEP’T OF HOMELAND SEC., OMB NO. 1615-0017, INSTRUCTIONS FOR APPLICATION FOR ADVANCE PERMISSION TO ENTER AS A NONIMMIGRANT (FORM I-192) (2019), <https://www.uscis.gov/sites/default/files/document/forms/i-192instr.pdf> [<https://perma.cc/T7SJ-HM93>].

244. ASISTA FEE WAIVERS, *supra* note 241, at 1 (citing Petition to Classify Alien as Immediate Relative of a United States Citizen or as a Preference Immigrant; Self-Petitioning for Certain Battered or Abused Spouses and Children, 61 Fed. Reg. 13061, 13069 (Mar. 26, 1996), <https://www.gpo.gov/fdsys/pkg/FR-1996-03-26/pdf/96-7219.pdf> [<https://perma.cc/9USL-KTJY>]; see also New Classification for Victims of Criminal Activity; Eligibility for “U” Nonimmigrant Status, 72 Fed. Reg. 53014, 53021 (Sept. 17, 2007), <https://www.gpo.gov/fdsys/pkg/FR-2007-09-17/pdf/E7-17807.pdf> [<https://perma.cc/45HJ-7JWN>]; Classification for Victims of Severe Forms of Trafficking in Persons; Eligibility for “T” Nonimmigrant Status, 81 Fed. Reg. 92266, 92288 (Dec. 19, 2016), <https://www.gpo.gov/fdsys/pkg/FR-2016-12-19/pdf/2016-29900.pdf> [<https://perma.cc/5AEW-WG6N>] (discussing fee waiver history in T visa context). In 2008, Congress required that the Department of Homeland Security allow certain applicants, including applicants for T visas, to qualify for fee waivers in the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008. William Wilberforce Trafficking Victims Protection Reauthorization Act, Pub. L. No. 110-457, § 201(d)(3), 122 Stat. 5044, 5054 (2008). By regulation, USCIS further specified that discretionary fee waivers are available if the requestor cannot pay the fee and that such a waiver must be “consistent with the status or benefit sought”—thus might not be appropriate if the underlying immigration benefit requires that the immigrant demonstrate, for example, a “substantial financial investment.” 8 C.F.R. § 103.7(c)(1) (2020).

245. 8 C.F.R. § 103.7(c)(1) (2020).

246. U.S. CITIZENSHIP & IMMIGR. SERVS., U.S. DEP’T OF HOMELAND SEC., OMB NO. 1615-0116, INSTRUCTIONS FOR REQUEST FOR FEE WAIVER (FORM I-912) 4-5 (2019), <https://www.uscis.gov/sites/default/files/document/forms/i-912instr-pc.pdf> [<https://perma.cc/L8BD-79NW>] (describing the eligibility standards for USCIS fee waivers).

fee waiver form—Form I-912, Request for Fee Waiver.²⁴⁷ The amendment prohibited applicants who receive a means-tested benefit from qualifying for a fee waiver.²⁴⁸ USCIS stated, in support of this policy, that “inconsistent income levels [were] being used” by states to determine eligibility for means-tested benefits.²⁴⁹ At the same time, USCIS shared plans to significantly raise the filing fees for immigration applications, including the waiver of inadmissibility form used by T visa applicants.

Advocates, lawyers, scholars, and activists raised significant concerns about the changes.²⁵⁰ They warned that the rules would have dramatic implications by significantly reducing application rates and increasing the burden on applicants.²⁵¹ Several commentators noted that “the language runs counter to existing law” as Congress explicitly exempted T visa applicants from fees.²⁵² Others described how the new fee guidance would make victims more vulnerable to abuse because they will have to “turn to jobs with exploitative employers or back to traffickers” to pay filing fees.²⁵³ USCIS, nevertheless, refused to change course and began implementation of the policy.

In 2019, immigrant advocacy organizations filed three federal lawsuits challenging the new fee waiver policy.²⁵⁴ Public Citizen, representing Northwest Immigrant Rights Project, alleged that the new fee waiver form violated the Administrative Procedure Act (APA) due to its failure to undergo notice-and-

247. *Proposed I-912 Fee Waiver Form Revision*, U.S. CITIZENSHIP & IMMIGR. SERVS. (Sept. 27, 2018), <https://www.uscis.gov/news/alerts/proposed-i-912-fee-waiver-form-revision> [<https://perma.cc/QSK9-D8WV>].

248. ALLISON DAVENPORT, IMMIGR. LEGAL RES. CTR., *FEE WAIVERS: STATUS OF PROPOSED CHANGES 3* (2019), https://www.ilrc.org/sites/default/files/resources/fee_waiver_update-final-12.16.19.pdf [<https://perma.cc/ZDD3-CE9K>].

249. Agency Information Collection Activities; Revision of a Currently Approved Collection: Request for Fee Waiver; Exemptions, 83 Fed. Reg. 49120, 49121 (Sept. 28, 2018).

250. *See* Agency Information Collection Activities; Revision of a Currently Approved Collection: Request for Fee Waiver; Exemptions, 84 Fed. Reg. 26137, 26138 (June 5, 2019) (providing notice of what changes the agency was making); U.S. Citizenship and Immigration Services Fee Schedule and Changes to Certain Other Immigration Benefit Request Requirements, 85 Fed. Reg. 46788, 46794-889 (Aug. 3, 2020) (summarizing and responding to comments submitted during notice-and-comment rulemaking process).

251. *See* Vasil Yassenov, Michael Hotard, Duncan Lawrence, Jens Hainmueller & David D. Latin, *Reducing Red Tape Allows More People to Become Citizens for Free*, IMMIGR. POL'Y LAB, <https://immigrationlab.org/project/reducing-red-tape-allows-people-become-citizens-free/> [<https://perma.cc/YUN2-576U>] (last visited Dec. 19, 2020) (forecasting decrease by 10 percent of citizenship applications).

252. *See* 85 Fed. Reg. at 46810.

253. *Id.* at 46816.

254. *See* *City of Seattle v. Dep't of Homeland Sec.*, No. 3:19-CV-07151-MMC (N.D. Cal. Dec. 11, 2019); *Nw. Immigrant Rts. Project v. U.S. Citizenship & Immigr. Servs.*, 496 F. Supp. 3d 31 (D.D.C. 2020), *appeal dismissed*, No. 20-5369, 2021 WL 161666 (D.C. Cir. Jan. 12, 2021); *Motion for Leave to File Amicus Curiae Brief of the City of Boston, 34 Additional Cities, Counties and Municipal Agencies, and U.S. Conference of Mayors in Support of Plaintiff's Motion for Preliminary Injunction, Project Citizenship v. Dep't of Homeland Sec.*, No. 1:20-cv-11545-NMG (D. Mass. Sept. 17, 2020).

comment rulemaking.²⁵⁵ Plaintiffs further asserted that the new fee waiver guidance was arbitrary and capricious in violation of the APA and violated provisions of the Immigration and Nationality Act.²⁵⁶ On October 8, 2020, the federal court ruled in favor of the plaintiffs, granting plaintiffs' motion for a preliminary injunction and issuing a national injunction, staying the implementation of the rule.²⁵⁷ The court found that the plaintiffs were likely to succeed on their claim that the rule was arbitrary and capricious under the APA.²⁵⁸ As a result of the injunction, USCIS stopped applying the new fee waiver guidance.²⁵⁹ This outcome provided a temporary win for immigrant applicants and their advocates.

"No Spaces" Policy. However, within weeks of the national injunction, USCIS took new action.²⁶⁰ It issued a new, simple online alert:²⁶¹ effective immediately, USCIS would reject all applications that had a blank field, even if the field was not applicable.²⁶² This "no spaces" policy required that all blank fields be completed with "N/A" or "None." As justification, USCIS cited federal regulations that require that "applications filed with USCIS must be properly completed, submitted, and executed in accordance with the applicable form instructions."²⁶³

Advocates decried the policy as disastrous for immigrant victims.²⁶⁴ Some argued that the policy was colored by bad intent, transforming immigration forms into "minefields, intentionally designed to entrap the unsuspecting."²⁶⁵ Others

255. Complaint, *Nw. Immigrant Rts. Project v. U.S. Citizenship & Immigr. Servs.*, 496 F. Supp. 3d 31 (D.D.C. 2020) (No. 19-3283).

256. *Id.*

257. *Nw. Immigrant Rts. Project*, 496 F. Supp. 3d at 75 (order granting preliminary injunction).

258. *Id.*

259. *Id.*

260. See Rampell, *supra* note 49 ("The policy change, at first affecting just asylum applicants, was announced without fanfare on the USCIS website sometime in the fall."). The "no spaces" policy applied initially to asylum and U visa applications, then eventually to T visa applications. *Id.* USCIS also extended the "no spaces" policy to law enforcement certifications, stating that certifying officials also could not leave a field blank, or the entire T or U visa applications would be rejected. See *Ombudsman Alert: USCIS Publishes Alert for Form I-914*, U.S. DEP'T OF HOMELAND SEC. (March 24, 2020, 9:25 AM), <https://www.dhs.gov/blog/2020/03/24/ombudsman-alert-uscis-publishes-alert-form-i-914> [<https://perma.cc/DA38-RBWN>] [hereinafter T VISA USCIS ALERT].

261. Rampell, *supra* note 49.

262. *Id.*

263. *Application for T Nonimmigrant Status*, U.S. CITIZENSHIP & IMMIGR. SERVS., <https://www.uscis.gov/i-914> [<https://web.archive.org/web/20210424185120/https://www.uscis.gov/i-914>] (Apr. 5, 2021); see 8 C.F.R. § 103.2(a)(1), (b)(1) (2011). In particular, in guidance posted on the USCIS website, "you must provide a response to all required questions, even if the response is 'none,' 'unknown,' or 'n/a.'" T VISA USCIS ALERT, *supra* note 261. The guidance noted that applications for T visas will be rejected "that has, for example, an empty field for gender, other names used, marital status, current immigration status, information about a spouse or child, or tables not completed where appropriate." *Id.*

264. See, e.g., Charles Davis, *Bureaucracy as a Weapon: How the Trump Administration is Slowing Asylum Cases*, GUARDIAN (Dec. 23, 2019, 6:00 AM), <https://www.theguardian.com/us-news/2019/dec/23/us-immigration-trump-asylum-seekers> [<https://perma.cc/A9WK-NUZW>] (describing how the new "no spaces" policy had a devastating impact on asylum applicants).

265. See *Dystopian Fiction*, *supra* note 45.

asserted that the “no spaces” policy lacked a cogent policy rationale and would harm the most vulnerable by immediately (and with little notice) rejecting their applications.²⁶⁶ USCIS, however, maintained that the policy was consistent with its authority to determine what constituted a “completed” application and moved forward to implement it.

For months, USCIS rejected immigration applications. The direct impact on T visa applicants is still unknown. USCIS has yet to release statistics. However, in our survey of 157 lawyers representing T visa applicants,²⁶⁷ 52 practitioners experienced at least one USCIS rejection since January 2016, and 9 of 52 (17.30%) experienced one or more rejections due to the “no spaces policy.”²⁶⁸ This data signals that some T visa applicants were impacted directly, while others were indirectly affected by the anxiety and confusion caused by the policy.

Unlike the T visa context, the U visa context saw extensive rejections.²⁶⁹ In the first three months of the policy, approximately ninety-eight percent of U visa petitions were rejected within three months of the new “no spaces” policy.²⁷⁰ Within nine months, almost 12,000 U visa petitions were returned.²⁷¹ While such applicants

266. For example, on February 6, 2020, ASISTA, a national advocacy organization, described the implications of the USCIS policy, noting that “this significant shift in policy and practice creates enormous hardship for survivors and their families, and strains valuable resources for service providers.” ASISTA, PRACTICE ADVISORY: USCIS FORM ALERT - BLANK SPACES ON FORM I-918, PETITION FOR U NONIMMIGRANT STATUS 7 (2020), <https://asistahelp.org/wp-content/uploads/2020/02/I-918-Practice-Alert-3.pdf> [<https://perma.cc/K4MX-Y85N>] [hereinafter ASISTA PRACTICE ADVISORY]; Letter from Cecelia Levin, Pol’y Dir., ASISTA, to Mark Koumans, Deputy Dir., U.S. Citizenship & Immigr. Servs. & Michael Dougherty, CIS Ombudsman, Dep’t Homeland Sec. (Feb 6, 2020), <https://asistahelp.org/wp-content/uploads/2020/02/ASISTA-Letter-on-I-918-Alert-2.6.2020-7.pdf> [<https://perma.cc/AP79-4QCT>] (noting how USCIS failed to provide “any justification or rationale for this drastic and sudden change, which needlessly undermines a survivor’s access to critical immigration benefits designed by a bipartisan majority in Congress for their protection”).

267. In spring 2021, the author and Professor Heba Gowayed conducted a survey of 160 practitioners with experience representing T visa applicants. Practitioners included lawyers, Board of Immigration Appeals accredited representatives, and paralegals. The results of the survey are forthcoming in a report to be released in 2022. Survey data is on file with author. The survey is part of a larger mixed-methods research project, entitled “Securing a T Visa: An Exploration of Inequality in Trafficking Protection,” funded by the Boston University Center for Antiracist Research. See *2021 Research & Policy Teams*, BOSTON UNIV. CTR. FOR ANTIRACIST RSCH., <https://www.bu.edu/antiracism-center/antiracism-research/2021-research-policy-teams/> [<https://perma.cc/4LWA-88R8>] (last visited Oct. 10, 2021).

268. *Id.* Practitioners reported experiencing a rejection associated with either the T visa application form (Form I-914) or other associated forms, like the waiver of inadmissibility (Form I-192). *Id.*

269. AM. IMMIGR. L. ASS’N, ASISTA & URBAN JUST. CTR., DOMESTIC VIOLENCE PROJECT, PRACTICE ADVISORY: INSIGHT INTO USCIS’S APPLICATION OF THE “NO-BLANKS” POLICY TO U-VISA PETITIONS 2 (Nov. 23, 2020), <https://asistahelp.org/wp-content/uploads/2020/11/No-Blanks-Practice-Advisory-11.20.20.pdf> [<https://perma.cc/4SQM-TDD5>] [hereinafter AILA BLANK SPACE PRACTICE ADVISORY].

270. *Id.*

271. *Id.*

could reapply, some missed significant filing deadlines; for others, it further delayed their pursuit of protection.

On November 19, 2020, NGOs filed a federal lawsuit challenging the “no spaces” policy.²⁷² In *Vangala v. USCIS*, plaintiffs alleged that the “no spaces” policy “led to absurd and unfairly prejudicial results.”²⁷³ Plaintiffs asserted the policy violated the APA by failing to engage in notice-and-comment rulemaking.²⁷⁴ Plaintiffs also argued that the agency’s actions were “arbitrary and capricious.”²⁷⁵ The litigation was eventually successful in prompting settlement negotiations with USCIS.²⁷⁶ As a result, USCIS agreed to stop implementing the policy, beginning on December 24, 2020.²⁷⁷ Then, on July 20, 2021, the U.S. District Court in the Northern District of California granted final approval of a settlement agreement.²⁷⁸ Pursuant to the agreement, class members with rejected applications²⁷⁹ under the “no spaces” policy were permitted resubmit their applications on or before July 20, 2022, and obtain a receipt notice reflecting their original filing date.²⁸⁰

3. Delay

As USCIS raised the bars to entry, the agency significantly slowed adjudications for T visas. From 2015 to 2019, the processing times for decisions increased from 7.99 months to 17.9 months.²⁸¹ As of May 10, 2021, USCIS estimated the processing time for T visas as seventeen months to twenty-nine months.²⁸² Delays meant that immigrant victims of trafficking, most without access to employment authorization, had to survive and avoid deportation even longer before receiving a T visa. They remained in legal limbo, without a clear promise of protection.

272. Class Action Complaint for Injunctive and Declaratory Relief at 2, *Vangala v. U.S. Citizenship & Immigr. Servs.*, No. 3:20-cv-08143 (N.D. Cal. Nov. 19, 2020).

273. *Id.* at 2.

274. *Id.* at 3.

275. *Id.* at 26.

276. *Practice Alert: USCIS Agrees to Stop Rejecting Applications and Petitions for Blank Spaces as of December 28, 2020*, AM. IMMIGR. LAWS. ASS’N (Dec. 28, 2020), <https://www.aila.org/infonet/featured-issue-usciss-blank-space-policy> [<https://perma.cc/B7YN-37MM>].

277. *Id.*

278. See Joint Motion for Approval of Settlement: Order, *Vangala v. U.S. Citizenship & Immigr. Servs.*, No. 4:20-cv-08143 (N.D. Cal. July 20, 2021).

279. The agreement impacts individuals with the following types of forms, which were rejected due to the “no spaces” policy: Form I-589, Application for Asylum and for Withholding of Removal; Form I-918, Petition for U Nonimmigrant Status; and Form I-918 Supplement A, Petition for Qualifying Family Member of U-1 Recipient. Settlement Agreement at 3–4, *Vangala v. U.S. Citizenship & Immigr. Servs.*, No. 4:20-cv-08143 (N.D. Cal. July 19, 2021).

280. *Id.* at 5–8.

281. See chart on file with author based on analysis of U.S. Department of State Trafficking in Persons Reports.

282. *Check Case Processing Times*, U.S. CITIZENSHIP & IMMIGR. SERVS., <https://egov.uscis.gov/processing-times/> [<https://perma.cc/SA8U-XRVV>] (last visited Oct. 10, 2020).

In a 2020 report to Congress, USCIS Ombudsman’s Office noted that adjudication delays by USCIS were a “critical question.”²⁸³ The Office pointedly asked USCIS to describe transparently how it was “managing benefits applications from vulnerable populations (such as victims of human trafficking), where prolonged waiting periods could potentially endanger the applicant’s safety.”²⁸⁴ As the report noted, many trafficking victims risked losing access to time-limited specialized case management services for trafficking survivors as the processing times extended.²⁸⁵ Victims in removal proceedings found it more challenging to obtain continuances and stave off a potential removal order. Some were even removed. At the same time, many victims remained vulnerable to revictimization and reprisals from traffickers.²⁸⁶ Thus, delays left many more vulnerable to abuse and exploitation.

4. Narrow Misinterpretation

As T visa applicants faced delay and new risks of removal, USCIS issued more denials and requests for evidence, as the agency rigidly interpreted existing standards, often contrary to existing law and regulations.²⁸⁷ In the most strident example, USCIS began to interpret the “on account of” requirement for the T visa to establish a new de facto statute of limitations for applicants and to deny any applicants who failed to meet this deadline. To qualify for a T visa, the applicant must show that she is in the United States “on account” of the trafficking.²⁸⁸ This ground requires that the victim demonstrate that they have been

physically present in the United States, American Samoa, or the Commonwealth of the Northern Mariana Islands, or at a port of entry thereto, on account of such trafficking, including physical presence *on account of* the alien having been allowed entry into the United States for participation in investigative or judicial processes associated with an act or a perpetrator of trafficking.²⁸⁹

283. OFF. OF THE CITIZENSHIP & IMMIGR. SERVS. OMBUDSMAN, U.S. DEP’T OF HOMELAND SEC., ANNUAL REPORT 2020, at 8 (June 30, 2020), https://www.dhs.gov/sites/default/files/publications/20_0630_cisomb-2020-annual-report-to-congress.pdf [<https://perma.cc/9ZHU-HG9P>].

284. See U.S. CITIZENSHIP & IMMIGR. SERVS., U.S. DEP’T OF HOMELAND SEC., USCIS RESPONSE TO THE CITIZENSHIP AND IMMIGRATION SERVICES OMBUDSMAN’S 2020 ANNUAL REPORT TO CONGRESS 3 (2020).

285. 2020 TIP REPORT, *supra* note 25, at 518 (“Advocates expressed concern with lengthy and increasing T visa processing times, citing added vulnerabilities for survivors who lack legal status or whose time-limited support services expire.”).

286. *Id.*

287. 2019 TIP REPORT, *supra* note 229, at 487 (“NGOs reported increased obstacles to obtaining a T visa, noting a rising number of requests for additional evidence by adjudicators, including requests that referred to outdated regulations, and called for improved training for adjudicators.”); 2020 TIP REPORT, *supra* note 25, at 518 (“Advocates again reported increased obstacles to obtaining a T visa.”).

288. Immigration and Nationality Act, Pub. L. No. 82-414, § 101(a)(15), 66 Stat. 163, 167 (1952) (codified as amended at 8 U.S.C. § 1101(a)(15)(T)(i)).

289. § 101(a)(15) (codified as amended at 8 U.S.C. 1101(a)(15)(T)(i)(I)) (emphasis added).

Whereas USCIS previously interpreted this requirement broadly, the agency transformed this requirement into a *de facto* statute of limitations, denying applications for survivors of trafficking who failed to report to law enforcement and file their T visa application within a few years of escaping their trafficking experience.²⁹⁰

USCIS historically interpreted the “on account of” requirement generously to mean that the trafficking occurred in the United States and that the victim has not departed from the United States since the trafficking occurred.²⁹¹ However, in 2017, USCIS, without notice or guidance, moved to dramatically narrow its interpretation of the “on account of” ground.²⁹² This troubling shift came after 2016 agency regulations that decreased the burdens on applicants to meet the “on account of” requirement. Previously, to meet the requirement, applicants had to show they had no “clear chance to leave the United States, or an ‘opportunity to depart.’”²⁹³ The regulations, however, eliminated this additional requirement, in recognition the prior interpretation was “burdensome, vague, and may frustrate congressional intent.”²⁹⁴ This change made it easier for applicants to meet the “on account of” standard.²⁹⁵

Then, in 2017, without notice, USCIS unilaterally moved to restrict interpretation of the “on account of” ground.²⁹⁶ The exact contours of this change are unknown because USCIS failed publicly to acknowledge any interpretation shift or to respond to the author’s Freedom of Information Act requests.²⁹⁷ However,

290. See Corie O’Rourke, Cory Sagduyu & Katherine Soltis, *Present Yet Unprotected: USCIS’s Misinterpretation of the T Visa’s Physical Presence Requirement and Failure to Protect Trafficking Survivors*, 3 AILA L.J. 53, 54 (2021) (describing the *de facto* statute of limitations “despite the absence of any explicit T visa filing deadline in the TVPA or federal regulations”).

291. 8 C.F.R. § 214.11(g) (2002).

292. See Gordon, *supra* note 35 (quoting Mercer Cauley, the immigration attorney representing a victim whose T visa was denied, as saying: “They’re using a technicality to revictimize a victim”).

293. See 8 C.F.R. § 214.11(g)(2) (2012). Pursuant to this standard, USCIS may consider “circumstances attributable to the trafficking in persons situation, such as trauma, injury, lack of resources, or travel documents that have been seized by the traffickers.” *Id.*

294. Classification for Victims of Severe Forms of Trafficking in Persons; Eligibility for “T” Nonimmigrant Status, 81 Fed. Reg. 92274 (Dec. 19, 2016) (“Commenters also opposed the requirement that a victim who escaped the traffickers and remains in the United States must show he or she had no clear chance to leave, asserting it is burdensome, vague, and may frustrate congressional intent to protect victims.”). A number of these amendments responded to statutory changes in the TVPRA. See Immigration and Nationality Act, Pub. L. No. 82-414, § 101(a)(15), 66 Stat. 163, 167 (1952) (codified as amended at 8 U.S.C. § 1101(a)(15)(T)(i)(II)) (establishing that immigrant victims who depart the United States and re-enter related to the law enforcement investigation may still qualify for T visas).

295. Immigration and Nationality Act, 66 Stat. at 167 (codified as amended at 8 U.S.C. § 1101(a)(15)(T)(i)(II)). Also, those who left the United States but re-entered were prohibited from meeting the “on account of” requirement, even if their re-entry was to assist law enforcement. *Id.*

296. See Complaint at 9, *Doe v. Wolf*, No. 3:20-cv-00481 (W.D.N.C. Aug. 31, 2020) (“In 2017, without any formal announcement or rule-making process, Defendant USCIS started denying bona fide T visa applications, like the applications denied above, claiming the applicant needs to prove that the trafficking was the reason the applicant was still in the United States.”).

297. See FOIA requests on file with author.

anti-trafficking advocates observed that in cases that would have “soared through,” applicants instead received scathing requests for evidence, some of them pages long.²⁹⁸ They observed that some requests by USCIS included ultra vires language, contravening the regulations regarding the “on account of” requirement.²⁹⁹ For example, some stated that the victim, in order to meet the “on account of” requirement, must have been “recently” liberated by a law enforcement agency, while regulations only note that the person has to be “liberated by” such an agency and include no such time limit.³⁰⁰ Also, the USCIS Administrative Appeals Office, the body that handles T visa appeals, saw a pronounced rise in appeals that challenged the denial of T visa applicants due to the “on account of” requirement.³⁰¹

At least one plaintiff challenged the new “on account of” interpretations in federal court.³⁰² In August 2020, a T visa applicant, who was denied based on the “on account of” ground, filed a federal lawsuit in the U.S. District Court for the Western District of North Carolina.³⁰³ The complaint alleged that the new USCIS interpretation was ultra vires and violated notice-and-comment provisions of the APA.³⁰⁴

The applicant, known only as “Jane Doe,” was recruited by a couple in Georgia from Peru to work as a domestic worker.³⁰⁵ Eventually, she escaped, but it

298. *How Trump Is ‘Destroying Protections’ for Victims of Human Trafficking*, *supra* note 227 (statement of Martina Vandenberg) (“[R]equests for evidence are much more aggressive. Cases that, in the past, might have soared through are now prompting multiple-page demands for additional evidence”).

299. The change came absent any statutory authority for a filing deadline. While adult trafficking survivors victimized prior to October 28, 2000, were required to file their T visa applications before January 31, 2003, this filing deadline was eliminated by USCIS via regulation in 2017. Classification for Victims of Severe Forms of Trafficking in Persons; Eligibility for “T” Nonimmigrant Status, 81 Fed. Reg. 92266, 92301–02 (Dec. 19, 2016). Even when this filing deadline existed, Congress carved out exceptions, including severe trauma that prevented the victim from applying, recognizing the challenges faced by victims of trafficking. 8 C.F.R. § 214.11(d)(4) (2002).

300. *See* O’Rourke et al., *supra* note 290, at 58.

301. *See id.* at 54 (“Appeals to the Administrative Appeals Office (AAO) involving physical presence rose sharply following this change in interpretation, amounting to nearly one-half of all T visa appeals in 2020.”); Complaint at 8, *Doe v. Wolf*, No. 3:20-cv-00481 (W.D.N.C. Aug. 31, 2020) (“A review of the AAO decisions concerning USCIS’ denial of T visas based on the presence ‘on account of’ requirement shows an increase in appeals filed in 2019 requesting [sic] *de novo* review of the agency’s application of the law in this matter.”); *see, e.g.*, Matter of E-T-M-, ID# 3385363 (AAO May 8, 2019) (unpublished) (“AAO overturned USCIS’s denial and found that the Applicant’s continuous physical presence was directly related to her past trafficking as described at 8 C.F.R. § 214.11(g)(1)(iv).”); Matter of D-A-A-, ID# 2987735 (AAO Apr. 3, 2019) (unpublished) (finding that USCIS had erred in denying the claim, noting that evidence that the applicant’s significant trauma, including “post-traumatic stress disorder (PTSD) relating to his trafficking,” “trichotillomania (hair-pulling disorder),” and “major depressive disorder, severe, which interferes with his daily life” was sufficient to meet the “on account of” standard).

302. *See generally* Complaint, *supra* note 296.

303. *See id.* at 9.

304. *Id.* at 4.

305. *See* Gordon, *supra* note 35.

took her over ten years to come forward and apply for a T visa.³⁰⁶ In response, USCIS denied her application in February 2020, claiming that she was no longer in the United States “on account” of the trafficking.³⁰⁷ While the plaintiff eventually withdrew the lawsuit,³⁰⁸ the agency has yet to publicly acknowledge a shift in interpretation.

5. “Darkside Discretion”

USCIS also threatened to deliver another deadly blow for T visa applicants by changing its standards on discretion in July 2020.³⁰⁹ These new discretion standards imposed significant new burdens on applicants, above and beyond existing statutory or regulatory requirements.³¹⁰ The policy represented a dramatic shift from prior guidance that encouraged adjudicators to look to case law and avoid “arbitrary” or “inconsistent” decisions based on discretion.³¹¹ No such language was present in new standards.

Congress intended for the T visa to be a nondiscretionary immigration benefit.³¹² Thus, if an applicant meets the statutory requirements for the T visa, USCIS must grant the benefit. Yet, T visa applicants are not free from the ambit of discretion. Most T visa applicants trigger grounds of inadmissibility because they entered without inspection, had a prior removal order, or engaged in commercial sex, among other reasons.³¹³ For this reason, they also must submit a waiver of inadmissibility to receive the T visa. This waiver of inadmissibility, unlike the T visa, is expressly discretionary and therefore governed by new guidance on discretion.³¹⁴

306. *Id.*

307. *See* Complaint, *supra* note 296, at 6.

308. *See* Docket, *Doe v. Wolf*, No. 3:20-cv-00481 (W.D.N.C. Aug. 31, 2020). The author filed two Freedom of Information Act requests with USCIS, dated August 7 and 21, 2020, and as of the date of this writing, has not received a response (requests on file with author).

309. On July 15, 2020, USCIS published discretion guidance impacting a variety of immigration applications at USCIS-PM E.8. *Policy Manual: Chapter 8 – Discretionary Analysis*, U.S. CITIZENSHIP & IMMIGR. SERVS., <https://www.uscis.gov/policy-manual/volume-1-part-e-chapter-8> [<https://perma.cc/8PYW-HMKF>]. *See also* U.S. CITIZENSHIP & IMMIGR. SERVS., U.S. Dep’t of Homeland Sec., PA-2020-10, POLICY ALERT: APPLYING DISCRETION IN USCIS ADJUDICATION (2020) [hereinafter 2020 USCIS DISCRETION GUIDANCE], <https://www.uscis.gov/sites/default/files/document/policy-manual-updates/20200715-Discretion.pdf> [<https://perma.cc/3YV9-KFY5>].

310. *See* Peggy Gleason, *USCIS Policy Manual Makes Sweeping Changes to Discretion*, IMMIGR. LEGAL RES. CTR. (2021), https://www.ilrc.org/sites/default/files/resources/sweeping_changes_in_uscis_policy_manual_for_discretion_3.19.21.pdf [<https://perma.cc/D7MB-QTPA>] (“The changes represent an attempt to impose new substantive eligibility requirements on applicants that do not exist in the governing statutes or regulations.”).

311. *See* U.S. CITIZENSHIP & IMMIGR. SERVS., ADJUDICATOR’S FIELD MANUAL § 10.15 (AFM) 10.15 (“Like an exercise of discretion, a subjective consideration of facts does not mean the decision can be arbitrary, inconsistent or dependent upon intangible or imagined circumstance.”).

312. A non-discretionary benefit is one for which USCIS must grant if the applicant meets the statutory requirements.

313. *See generally* 8 U.S.C. §1182(a) for inadmissibility grounds.

314. *See* 8 C.F.R. § 212.4(c)(1)(viii) (2011).

Also, the denial of the waiver is not subject to appeal, and thus, the stakes for applicants are high.

Scholars have long critiqued the role of discretion in immigration cases.³¹⁵ Shoba Sivaprasad Wadhia, for example, coined the term “darkside discretion” to refer “to a situation where the noncitizen satisfies the statutory criteria set by Congress to be eligible for a remedy, but is denied by an adjudicator unfairly in the exercise of discretion.”³¹⁶ She argued that because discretion can be misused, its exercise should “center on humanitarian concerns and be informed by compassion;” thus, she argues that discretion as a general matter should be “exercised favorably toward the noncitizen” rather than being designed as a mechanism to deny or deter otherwise eligible applicants.³¹⁷

USCIS’s new changes to the Adjudicator’s Field Manual makes the exercise of discretion by adjudicators substantially more complicated.³¹⁸ It increases the burdens on applicants,³¹⁹ by establishing a new, twenty-two-factor test for every discretionary decision.³²⁰ Every file must contain a record of the officer’s deliberations, including the weight given to each factor.³²¹ There is no mention of centering humanitarian concerns or exercising discretion favorably for crime victims.³²²

Advocates described the policy as “USCIS’s latest attempt to leverage bureaucracy to limit access to protections.”³²³ In a comment from seventy-nine organizations serving immigrant survivors, they expressed “deep[] concern[] about the myriad ways this guidance will foreclose such survivors from the humanitarian relief that Congress specifically created for them, putting them at risk of continued harm.”³²⁴ The new guidance also contradicted recent regulations, issued in 2016,

315. Shoba Sivaprasad Wadhia, *Darkside Discretion in Immigration Cases*, 72 ADMIN. L. REV. 367, 369 (2020).

316. *Id.*

317. *Id.* at 367–68.

318. 2020 USCIS DISCRETION GUIDANCE, *supra* note 309.

319. *Id.*

320. *Id.* The policy made clear that “[f]or benefits involving discretion, a discretionary analysis is a separate component of the adjudication of the benefit request; it is typically assessed at the end of the review, after an officer has determined that the requestor meets all other applicable eligibility requirements.” *Id.* at 1.

321. *Id.*

322. *Id.*

323. Letter from 79 Organizations on Behalf of Immigrant Survivors of Domestic Violence, Sexual Assault, Human Trafficking and Other Abuses, to Kenneth T. Cuccinelli, Senior Off. Performing the Duties of the Dir., U.S. Citizenship & Immigr. Servs. (Aug. 14, 2020), <https://umdsafecenter.org/wp-content/uploads/2020/09/Joint-Comment-USCIS-Policy-Manual-USCIS-Policy-Manual-Appling-Discretion-in-USCIS-Adjudications-1-USCIS-PM-E.8-and-10-USCIS-PM-A.5-Aug-14-2020.pdf> [<https://perma.cc/NYD7-LU7M>].

324. *Id.* Advocates described how the new discretion policy ran counter to congressional intent because Congress “aim[ed] to spare survivors from being forced to choose between living with abuse and facing deportation and possible separation from their children.” *Id.* at 2. Significantly, commenters argued that the discretion policy “undercut[s]” this desire “by creating additional documentary

wherein DHS “acknowledge[d] that victims of trafficking in persons are an especially vulnerable population.”³²⁵ Advocates pleaded that USCIS should consider the unique circumstances of victims when deciding waiver applications and argued that new guidance does not go far enough.³²⁶

Advocates pointed to the fact that trafficking victims often trigger negative discretionary factors by virtue of their victimization, and the new policy provides no exceptions for victims. The policy requires that adjudicators take account of factors like “evidence regarding respect for law and order, good character, and the intent to hold family responsibilities.”³²⁷ The guidance further provides no exceptions for victims of trafficking or other populations who may, by virtue of their victimization, be less able to demonstrate “good character.” Some trafficking victims also have criminal histories related to their victimization. Yet, the policy does not articulate exceptions related to crime victim status. Similarly, the policy asks adjudicators to consider the “applicant or beneficiary’s value and service to the community,”³²⁸ without noting how victims, especially those who have been isolated or fearful, may have difficulty proving community engagement. For these reasons, advocates have argued that the new discretion policy will significantly impact discretionary adjudications and lead to new denials. In denied cases, applicants will ultimately find themselves with no opportunity to appeal and unable to access the T visa.

III. CONSTRAINTS ON THE SHALLOW STATE

The USCIS tactics described above were remarkably effective at slowing and impeding the T visa application process. T visa applicants faced longer wait times; their applications had a greater risk of rejection. Applicants were more likely to receive requests for evidence and denials as USCIS applied a new *de facto* statute of limitations. Some applicants were placed in removal proceedings, while others were deported. Apart from these direct consequences, the policies and practices at USCIS injected great uncertainty in the T visa process. As word got out, it had a chilling impact, discouraging new applicants from coming forward to apply for protection.

In light of these changes, the federal courts, at times, functioned as an effective constraint on unlawful administrative action. Judicial review exposed some USCIS policies as unlawful, provided redress for harmed applicants, and in some cases, stopped the practice altogether. In the context of the fee waiver policy, for example, federal litigation resulted in a national injunction, which temporarily halted the

requirements based on overbroad discretionary factors and by imposing requirements outside the statutory framework for survivor-based cases.” *Id.*

325. See Classification for Victims of Severe Forms of Trafficking in Persons; Eligibility for “T” Nonimmigrant Status, 81 Fed. Reg. 92284 (Dec. 19, 2016).

326. *Id.*

327. See *Policy Manual: Chapter 8 – Discretionary Analysis*, *supra* note 309.

328. *Id.* at 7.

practice and allowed applicants to receive needed fee waivers.³²⁹ Similarly, as plaintiffs challenged the “no spaces” policy, USCIS eventually entered into a settlement, stopping the implementation of the policy and providing a pathway to address those harmed.³³⁰

Federal litigation, however, was also an imperfect remedy. It took time. It required immigrant victims to have access to pro bono legal representation, which was not always available. Meanwhile, some applicants faced harsh consequences. Some applicants were placed in removal proceedings; others were ordered removed.³³¹ For those, access to legal representation were even more scarce and the consequences tremendous. Once deported, applicants faced tremendous vulnerability to trafficking and exploitation. At the same time, many applicants were no longer eligible to pursue the T visa because they could not show they were in the United States “on account of” the trafficking and left without avenues for redress. Thus, judicial review was insufficient alone to fully address the harms of USCIS action.

Ongoing gaps in protection remain, and swift action is still needed. President Joe Biden immediately took steps in the right direction. On his first day in office, DHS rescinded the June 2018 policy memorandum, which called for denied T visa applicants to be placed in removal proceedings.³³² USCIS then ended the “no spaces” policy.³³³ Since then, USCIS has entered into a settlement agreement to remedy class members impacted by the policy.³³⁴

Yet, additional efforts are required. USCIS must end unlawful interpretations of the “on account of” interpretation and amend the new discretion policy to take account of the lived realities of immigrant victims. USCIS should speed up the adjudication of T visa applications. USCIS should improve oversight, training, and public engagement to ensure that adjudicators apply the law fairly and invite perspectives from survivors and advocates to ensure that applicants can effectively navigate the T visa application process. In addition, individual remedies are essential to counteract efforts by the shallow state and restore trust in the T visa program. In particular, this Article recommends (1) an investigation by the DHS Office of Inspector General (OIG), an independent body that can identify and address

329. See *supra* Section II.D.2.

330. *Id.*

331. O’Rourke et al., *supra* note 290, at 65 (“There have been reports of survivors with pending T visa applications or appeals being removed from the United States.”).

332. See Memorandum from David Pecoske, Acting Sec’y, U.S. Dep’t of Homeland Sec., to Troy Miller, Senior Off. Performing the Duties of the Comm’r, U.S. Customs & Border Prot., Tae Johnson, Acting Dir., U.S. Immigr. & Customs Enf’t, Tracey Renaud, Senior Off. Performing the Duties of the Dir., U.S. Citizenship & Immigr. Servs. & Karen Olick, Chief of Staff 5 (Jan. 20, 2021).

333. *USCIS Confirms Elimination of “Blank Space” Criteria*, U.S. CITIZENSHIP & IMMIGR. SERVS. (April 1, 2021), <https://www.uscis.gov/news/alerts/uscis-confirms-elimination-of-blank-space-criteria> [<https://perma.cc/2NZP-T5R9>].

334. See Joint Motion for Approval of Settlement: Order, Vangala v. U.S. Citizenship & Immigr. Servs., No. 4:20-cv-08143 (N.D. Cal. July 20, 2021).

mismanagement, fraud, and abuse in DHS operations; (2) additional agency oversight by the Office of the Citizenship and Immigration Services Ombudsman (Ombudsman); (3) increased USCIS training, transparency, and engagement; and (4) remedies for individuals harmed by unlawful USCIS policies.

DHS OIG Investigation. An October 2020 report to Congress urged policymakers to investigate factors that contribute to the “underutilization” of the T visa program.³³⁵ DHS OIG, should respond by conducting a complete, thorough audit of the T visa application process.³³⁶ This audit process must evaluate why applicants may fear applying for the T visa and any barriers that applicants face during the application process. The audit should include a review of all correspondence among USCIS officials regarding these new policies and guidance, as well as interviews with USCIS officials and site visits with the USCIS Vermont Service Center, the office where T visa applications are decided.

The audit should unearth any restrictive unlawful interpretations of T visa requirements, such as the “on account of” standard. It should involve physical file reviews to compare case file information to determine compliance with statutory and regulatory guidance.³³⁷ At the conclusion of the investigation, OIG should provide recommendations for improving the T visa application process and addressing the lasting impact of past unlawful or inappropriate policies. The OIG should report directly to Congress, which has the authority to address any obstacles identified through legislation or other means.

Agency Oversight. The USCIS Ombudsman also has authority to engage in oversight. The Ombudsman should identify any T visa applicants impacted by unlawful policies and engage with USCIS to rectify such harms, especially of policies deemed unlawful by federal courts. For example, if T visa applicants had applications improperly rejected due to the fee waiver and “no spaces” policy, the Ombudsman should move expeditiously to request that USCIS reinstate the initial date of receipt of the application. This move will ensure that the rejection does not delay the ultimate adjudication of their T visa application and will not impact the eligibility of derivative family members.³³⁸

Furthermore, the Ombudsman should encourage applicants who have received erroneous denials or requests for evidence to contact their office for

335. IMMIGRATION RELIEF FOR VICTIMS, *supra* note 54, at 12.

336. DHS is well-situated because it has the authority and experience engaging with USCIS related to human trafficking. *See* OFF. OF INSPECTOR GEN., U.S. DEPT OF HOMELAND SEC., OIG-16-17, ICE AND USCIS COULD IMPROVE DATA QUALITY AND EXCHANGE TO HELP IDENTIFY POTENTIAL HUMAN TRAFFICKING CASES (2016), <https://www.oig.dhs.gov/sites/default/files/assets/Mgmt/2016/OIG-16-17-Jan16.pdf> [<https://perma.cc/BC74-FHVG>] (conducting an audit examining how Immigrant & Customs Enforcement and USCIS could “improve data quality and exchange” to improve identification of trafficking cases).

337. *Id.* at 16.

338. For example, T visa applicants under twenty-one at time of filing may qualify to file petitions for certain derivative family members, and thus, if the application is received after the applicant’s twenty-first birthday, the applicant could lose eligibility to apply for certain family members.

review. If the USCIS adjudicatory practice is unlawful, the Ombudsman should advocate with USCIS to establish a pathway for applicants to refile or reopen their cases with USCIS, while retaining the initial filing date. The Ombudsman also should investigate whether there is evidence of gross misapplication of law. In such cases, the Ombudsman already has the power expeditiously to intervene with USCIS in individual cases and encourage that USCIS reopen such cases. Finally, the Ombudsman should report any findings related to the T visa application process in its annual report to Congress.

Increased USCIS Training, Transparency, and Engagement. In addition, USCIS must improve training for adjudicators who decide T visa cases. Importantly, USCIS should institute further specialized training to the adjudicators assigned to adjudicating T visa claims. Currently, all T visa applications are decided by a specialized unit at the Vermont Service Center. It is essential that officers receive additional training on (1) existing statutory and regulatory requirements, including the “on account of” requirement; (2) challenges that immigrant victims of trafficking may face when gathering evidence; (3) the “any credible evidence” requirement for immigrant victims applying for T visas; and (4) evolving federal case law interpreting federal trafficking statutes. This regular, tailored training will ensure that officers are equipped to make consistent, lawful decisions.

Moreover, USCIS should improve public transparency and accountability. USCIS must engage in notice-and-comment rulemaking, as required by the APA for all new policies, and provide stakeholders with an adequate opportunity to raise concerns early in the process. USCIS also should respond in a timely manner to Freedom of Information Act Requests filed to obtain USCIS policies, guidance, and correspondence. In addition, the USCIS Vermont Service Center should increase engagement with the public, including immigrant victims, stakeholders, and advocates. USCIS should engage in regular, frequent stakeholder calls. In such calls, USCIS should report regularly about data related to T visas, provide any updates in policies and trends, and respond directly to concerns from the public. This engagement will ensure that USCIS learns quickly if new policies negatively impact T visa applicants and remedy them early.

Individual Remedies. Finally, it is essential that T visa applicants harmed by these policies have available remedies. For those who successfully bring federal lawsuits, a federal court may order relief to either individual(s) or class members harmed by the policy.³³⁹ However, there may be other impacted immigrant victims, who are difficult to identify.³⁴⁰ As a result, USCIS should consider affirmative ways to identify any immigrant victims negatively impacted by unlawful practices and ensure

339. See *supra* Section II.D.2.

340. Krystin Roehl, Logan Schmidt & Hayne Yoon, *The Shocking Lack of Due Process for Immigrants*, VERA INST. OF JUST. (Jan. 2, 2020), <https://www.vera.org/blog/target-2020/the-shocking-lack-of-due-process-for-immigrants> [<https://perma.cc/7BDD-9U8Q>] (describing the profound lack of access to *pro bono* representation for immigrant victims).

that they have effective remedies. USCIS should reinstate the initial filing date of any applications that were rejected unlawfully by the fee waiver or “no spaces” policy. Applicants harmed by the “on account of” interpretation, if found to be unlawful, should be permitted to reopen their T visa applications and associated waiver applications without cost. In addition, any erroneously denied T visa applicants who were deported from the United States should be permitted to file a motion to reopen with the Executive Office for Immigration Review based on equitable tolling. Also, unlawfully denied T visa applicants with final orders of removal should be granted an automatic stay of removal and be able to qualify for a motion to reopen based on agency error.³⁴¹ While exceptional measures, these efforts are essential to remedy past harm and to reestablish trust in the T visa program for decades to come.

CONCLUSION

On October 28, 2020, the Congressional Research Service issued a report to members of Congress, asking policymakers to “look at factors that potentially contribute to what some observers consider to be underutilization” of the T visa program.³⁴² It encouraged investigation of elements of the application process that “impede victims from applying for T status or create difficulties for victims.”³⁴³ As this Article has shown, policies of the shallow state have established new barriers in the T visa process. These obstacles were diffuse and often hidden. They acted as “minefields” to trap the vulnerable and expose them to greater risk of deportation.

The harms of shallow state cannot be undone swiftly. Recent USCIS policies and actions have an enduring impact on applicants and the perceived legitimacy of the T visa program. Future administrations must roll back unlawful policies. They must examine what obstacles remain hidden within the T visa application process. They must work to restore trust. They must remain vigilant to identify new barriers faced by T visa applicants when accessing immigration relief. Only then will the T visa endure as the viable, robust protection for immigrant victims of human trafficking that Congress envisioned.

341. Equitable tolling is a concept that allows an applicant to file a motion to reopen after the relevant statute of limitations if they did not discover the circumstances giving rise to the claim until after the filing deadline has passed. If the agency engaged in an unlawful policy or interpretation that resulted in the denial, the applicant should automatically qualify for a motion to reopen based on equitable tolling.

342. See IMMIGRATION RELIEF FOR VICTIMS, *supra* note 54, at 12.

343. See *id.*

