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Preventing Trafficking by Protecting Refugees

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PREVENTING TRAFFICKING BY PROTECTING REFUGEES

Rebecca L. Feldmann*

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INTRODUCTION

*Marta*¹ is an asylum-seeker from Honduras. She fled her home country after enduring years of abuse by her husband, a police officer. She has an 18-year-old son whom she is forced to leave behind, as she cannot afford to bring him with her. She hopes to find safety in the United States. Once she is safe, she also hopes she will be able to find work, to help support her son.

Marta pays a coyote to help her escape from her country, travel through Central America, and cross the Mexico-U.S. border. She cannot pay the entire cost of the journey upfront, so the smuggler agrees to let her pay the remainder once they cross into the United States. The smuggler coerces *Marta* into staying at a “stash house” once in Texas, leaving her in the hands of a “friend.” The “friend” steals *Marta*’s phone and identification. If *Marta* wants these things back, he tells her, she has to work for him until she can pay back the money she “owes” for crossing into the United States. He tells her she must cook and clean for him, and abuses her verbally, physically, and sexually if she does not do as he demands. He doubles what *Marta* originally understood to be the cost of taking her to the United States. And, if

¹ “*Marta*” is a fictional character, but her story mirrors the experiences of numerous asylum seekers and trafficked persons in the United States and represents the very real harms that these migrants encounter at and near the U.S.-Mexico border. *See, e.g., In re* 5867535, 2021 Immig. Rptr. LEXIS 2186, at 5 (Mar. 19, 2021) (nonprecedential) (concluding woman who fled Honduras to escape gang violence and was subsequently smuggled into the United States was the victim of sex trafficking due to threats, coercion, and other harm to which she was subjected at a “safehouse” in Texas); *In re* 7778153, 2021 Immig. Rptr. LEXIS 2202, at 5 (Mar. 19, 2021) (nonprecedential) (finding that noncitizen from Mexico qualified as a victim of trafficking as a result of involuntary servitude to which he was subjected during the course of being smuggled into the United States); HUMAN RIGHTS WATCH, “YOU DON’T HAVE RIGHTS HERE”: US BORDER SCREENING AND RETURNS OF CENTRAL AMERICANS TO RISK OF SERIOUS HARM 15–19 (2014), <https://www.hrw.org/report/2014/10/16/you-dont-have-rights-here/us-border-screening-and-returns-central-americans-risk> [<https://perma.cc/6XB5-KEBM>] (describing firsthand accounts of Hondurans seeking asylum in the United States to escape gang violence in Honduras); ELIZABETH CASSIDY & TIFFANY LYNCH, U.S. COMM’N ON INT’L RELIGIOUS FREEDOM, BARRIERS TO PROTECTION: THE TREATMENT OF ASYLUM SEEKERS IN EXPEDITED REMOVAL 7–8 (2016), <https://www.uscifr.gov/sites/default/files/Barriers%20To%20Protection.pdf> [<https://perma.cc/4QB3-TGNK>] (describing wrongful deportation of asylum seekers through the expedited removal process); Lindsay M. Harris, *Withholding Protection*, 50 COLUM. HUM. RTS. L. REV. 1 (2019) (analyzing the failures to protect asylum seekers resulting in their wrongful deportation and inability to return to the United States).

she tries to escape, he threatens to turn her over to immigration authorities for deportation and have his contacts in her home country harm her son.

As part of their normal operations, federal immigration officials encounter the house where Marta and other migrants are living, and arrest everyone therein. In combat gear and wielding weapons, the agents take the migrants to the nearest detention facility and process them for expedited removal proceedings. Although Marta is from Honduras, she speaks limited Spanish. As an indigenous woman, her native language is Garifuna. Marta tries to explain that she is afraid of being sent back to Honduras, but she does not reveal (and is not directly asked) anything about her trafficker. Because of the persecution she suffered in her home country as well as her trafficker's threats, she is terrified of the uniformed officers. They ask her if she was coming to the United States to work. She does not know how to answer, because her main reason for coming was to seek safety. However, she does hope to work, and she doesn't know how to fully express herself in Spanish, so she simply answers "Yes" to this question. She is told that if she wants to apply for asylum, she is going to have to wait in Mexico for a hearing with an immigration judge; otherwise, she can agree to be deported back to Honduras. Marta, who does not have a lawyer and does not understand what rights, if any, she has in this country, agrees to be sent back to Honduras. While she knows she is in danger in Honduras, she fears that her trafficker will more easily find her in Mexico and will kill her son if she reveals any information about her trafficker. She hopes that she will at least have a chance to protect her son if they are together.

Thus, despite a plethora of legal protections available to trafficking victims like Marta, U.S. authorities fail to identify her as a victim and therefore deny her the protections to which she is entitled.

For more than two decades, U.S. federal law has recognized a duty to prevent trafficking in persons and protect victims of trafficking-related crime.² That duty is enshrined in international law in Articles 9 through 11 of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children

² See Trafficking Victims Protection Act of 2000, Pub. L. No. 106-386, Div. A, 114 Stat. 1466, 1466–91 (codified as amended at 18 U.S.C. §§ 1589–1594; 22 U.S.C. §§ 7101–7110). The TVPA was the first of two parts of a comprehensive bill aimed (as its name suggests) at better protecting victims of human trafficking and other forms of violence. The second part of the bill, the Violence Against Women Act of 2000 (VAWA), aimed to afford greater protections to victims of gender-based violence in the United States. See Violence Against Women Act of 2000, Pub. L. No. 106-386, Div. B, 114 Stat. 1466, 1491–1539 (codified as amended at 34 U.S.C §§ 10238, 10551–54, 12421, 12431, 12464, 20122; 42 U.S.C § 280b-1b).

(“Palermo Protocol”),³ which the United States signed in 2000 and ratified in 2005.⁴ U.S. presidential administrations have repeatedly voiced their commitment to combatting human trafficking and protecting victims of this heinous crime.⁵ Yet, too

³ Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, *adopted* Nov. 15, 2000, 2237 U.N.T.S. 319 (entered into force Dec. 25, 2003) [hereinafter Palermo Protocol]. This treaty is one of three protocols to the Convention Against Transnational Organized Crime, Nov. 15, 2000, 2225 U.N.T.S. 209 (entered into force Sep. 29, 2003). The other two protocols are the Protocol Against the Smuggling of Migrants by Land, Sea and Air, *adopted* Nov. 15, 2000, 2241 U.N.T.S. 507 (entered into force Jan. 28, 2004) and the Protocol Against the Illicit Manufacturing of and Trafficking in Firearms, their Parts and Components and Ammunition, *opened for signature* May 31, 2001, 2325 U.N.T.S. 208. A country must first ratify the Convention Against Organized Crime before it can become a party to any of the three protocols. I use “Palermo Protocol” throughout this Article to refer to the Trafficking Protocol, as that abbreviation of the treaty’s name is more common among U.S. policymakers.

⁴ *Status of Ratification, Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children*, U.N. TREATY COLLECTION, https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtmsg_no=XVIII-12-a&chapter=18 [<https://perma.cc/7WGA-3YJL>] (last visited Oct. 3, 2022) (showing status of signature and ratification).

⁵ *See, e.g.*, THE WHITE HOUSE, THE NATIONAL ACTION PLAN TO COMBAT HUMAN TRAFFICKING 2 (2021) [hereinafter NATIONAL ACTION PLAN], <https://www.whitehouse.gov/wp-content/uploads/2021/12/National-Action-Plan-to-Combat-Human-Trafficking.pdf> [<https://perma.cc/LF9R-5ZXC>] (stating the Biden administration’s commitment to “keeping the fight to end human trafficking at the forefront of our national security agenda”); U.S. DEP’T OF STATE, 2021 TRAFFICKING IN PERSONS REPORT 2 (2021) [hereinafter 2021 TIP REPORT], https://www.state.gov/wp-content/uploads/2021/07/TIP_Report_Final_20210701.pdf [<https://perma.cc/XZP9-JMB5>] (quoting President Biden’s promise to “make it a priority to combat this terrible crime, protect those vulnerable to trafficking, and empower survivors to rebuild their lives with safety, dignity, and opportunity”); U.S. DEP’T OF HOMELAND SECURITY, STRATEGY TO COMBAT HUMAN TRAFFICKING, THE IMPORTATION OF GOODS PRODUCED WITH FORCED LABOR, AND CHILD SEXUAL EXPLOITATION 1 (2020) [hereinafter DHS STRATEGY], https://www.dhs.gov/sites/default/files/publications/20_0115_plcy_human-trafficking-forced-labor-child-exploit-strategy.pdf [<https://perma.cc/7X4N-LEMG>] (noting that the “United States has declared it a national priority to end human trafficking”); U.S. DEP’T OF STATE, 2018 TRAFFICKING IN PERSONS REPORT at ii (2018) [hereinafter 2018 TIP REPORT], <https://www.state.gov/wp-content/uploads/2019/01/282798.pdf> [<https://perma.cc/6KSL-4MAP>] (describing the fight to end human trafficking as “a top priority for the [Trump] Administration”); Press Release, The White House: Office of the Press Secretary, Fact Sheet: The Obama Administration Announces Efforts to Combat Human Trafficking at Home and Abroad (Sep. 25, 2012), <https://obamawhitehouse.archives.gov/the-press-office/2012/09/25/fact-sheet-obama-administration-announces-efforts-combat-human-trafficki> [<https://perma.cc/J9HC-WXFK>] (“Our fight against human trafficking is one of the great human rights causes of our time, and the United State will continue to lead it.”); Condoleezza Rice, *Preface to U.S. DEP’T OF STATE, 2005 TRAFFICKING IN PERSONS REPORT 1* (2005), <https://2009-2017.state.gov/documents/organization/47255.pdf> [<https://perma.cc/T9GE-PNGB>] (“President Bush, the Congress, and the American people are united in efforts to eradicate trafficking”); U.S. DEP’T OF

often, efforts aimed at immigration enforcement exacerbate the vulnerabilities of potential trafficking victims and therefore undermine efforts to combat this crime.⁶

In January 2019, then-President Trump signed into law the last of four bills that collectively represent the most recent reauthorization of the Trafficking Victims Protection Act (“TVPA”).⁷ While the legal achievements enacted with the TVPA reauthorizations are important, anti-immigrant rhetoric and policies suggesting that the solution to trafficking is to “build a wall” actively undermined those achievements.⁸ Such rhetoric and actions make the dangerous, but far too common, mistake of conflating human trafficking and human smuggling, ignoring well-established human rights norms, and endangering the lives of potential victims.⁹ In addition, as illustrated by Marta’s story, policies that curtail the availability of asylum and other modes of legal immigration undermine the oft-repeated goal of

STATE, 2002 TRAFFICKING IN PERSONS REPORT 3 (2002), <https://2009-2017.state.gov/documents/organization/10815.pdf> [<https://perma.cc/CKL7-2BQT>] (“The U.S. Government condemns trafficking in persons and remains firmly committed to fighting this scourge and protecting the victims who fall prey to traffickers.”).

⁶ See *infra* Parts II.D, III.

⁷ See *President Donald J. Trump Is Fighting to Eradicate Human Trafficking*, THE WHITE HOUSE: PRESIDENT DONALD J. TRUMP ARCHIVES (Jan. 9, 2019), <https://trumpwhitehouse.archives.gov/briefings-statements/president-donald-j-trump-fighting-eradicate-human-trafficking/> [<https://perma.cc/5RK4-F8G5>]. Notably, this was the first time that the TVPA reauthorization was not passed as a single bill. See *infra* Part I.E. At the time this Article was written, two bills were pending in Congress to re-authorize the TVPA programs that lapsed in September 2021. See International Trafficking Victims Protection Reauthorization Act of 2022, S. 4171, 117th Cong. (2022) (as reported to Senate, June 14, 2022); Frederick Douglass Trafficking Victims Prevention and Protection Reauthorization Act of 2022, H.R. 6552, 117th Cong. (2022) (as referred in Senate July 27, 2022); see also *IJM Statement on International Trafficking Victims Protection Reauthorization Act of 2022*, INT’L JUST. MISSION (June 14, 2022), <https://www.ijm.org/news/ijm-statement-on-international-trafficking-victims-protection-reauthorization-act-of-2022> [<https://perma.cc/4BKY-3272>].

⁸ See *Remarks by President Trump in Meeting on Human Trafficking on the Southern Border*, TRUMP WHITE HOUSE ARCHIVES (Feb. 1, 2019), <https://www.whitehouse.gov/briefings-statements/remarks-president-trump-meeting-human-trafficking-southern-border/> [<https://perma.cc/24T2-X5JR>] (claiming that “[t]he case for building a wall is everything” and that “[h]uman trafficking by airplane is almost impossible”); *Secretary Kirstjen M. Nielsen Remarks at National Sheriffs’ Association Conference*, U.S. DEP’T OF HOMELAND SECURITY, (June 18, 2018), <https://www.dhs.gov/news/2018/06/18/secretary-kirstjen-m-nielsen-remarks-national-sheriffs-association-conference> [<https://perma.cc/K5QW-SGY8>] (“This Administration has a simple message: If you cross the border illegally, we will prosecute you.”); see also *infra* Part II.D.

⁹ See Shahrzad Fouladvand & Tony Ward, *Human Trafficking, Vulnerability and the State*, 81 J. CRIM. L. 39, 40 (2019) (noting that trafficking “is often also (erroneously) equated with people smuggling and used to justify a tightening of border controls” and explaining that this is problematic because border controls “are an important source of situational vulnerability”); see also NATIONAL ACTION PLAN, *supra* note 5, at 10.

ending human trafficking by exacerbating the vulnerability of asylum-seekers and other migrants.

The challenge of identifying and protecting foreign national victims of trafficking is not new. During her 2017 visit to the United States, Special Rapporteur Maria Grazia Giammarinaro explained that the “current approach to migration policies and management . . . create vulnerability to human trafficking, including re-trafficking.”¹⁰ Importantly, she concluded that “[e]conomic inequalities and *social exclusion, discrimination* and insufficient labour protections create a favourable environment for traffickers in the country.”¹¹ These root causes existed long before the Trump administration, but were exacerbated by the more than 1,000 Trump-era policies aimed at closing the border and eroding human rights protections for asylum seekers and other migrants.¹² As the Special Rapporteur explains, “[I]ack of confidence in law enforcement services, fear of arrest, prosecution or deportation are some of the obstacles that increase [trafficking] victims’ insecurity and force them to work underground in dangerous environments, which in turn renders their identification as victims of trafficking more difficult.”¹³

Scholars, non-governmental organizations, and courts have extensively analyzed the ways in which fast track deportations, the expansion of expedited removal, and the behemoth of immigration detention impede access to asylum and violate the rights of asylum seekers.¹⁴ Less scholarship exists, however, on how these same systems impact trafficking victims and impede the government’s ability to have a truly comprehensive approach to ending human trafficking.¹⁵

¹⁰ Maria Grazia Giammarinaro (Special Rapporteur), *Rep. of the Special Rapporteur on Trafficking in Persons, Especially Women and Children on Her Mission to the United States of America* 19, U.N. Doc. A/HRC/35/37/Add.2 (June 23, 2017) [hereinafter Giammarinaro, 2017 *Trafficking in Persons*].

¹¹ *Id.* (emphasis added); see also Megan Ross, *A Diamond in the Rough: The Transnational Duty to Prevent Human Trafficking in the Protocol*, 21 DUKE J. GENDER L. & POL’Y 325, 329 (2014) (“Trafficking thrives when governments fail to protect and promote people’s civil, political, economic and social rights.”).

¹² See *1,047 Trump-Era Immigration Policies (and Their Current Status)*, IMMIGR. POL’Y TRACKING PROJECT, <https://immpolicytracking.org/home/> [<https://perma.cc/NQV4-YC5E>] (last visited Oct. 9, 2022); Complaint at 27–41, *Al Otro Lado v. McAleenan*, No. 3:17-cv-02366 (S.D. Cal. 2017) (challenging the Trump administration’s “turnback” policy and alleging CBP use of threats, intimidation, physical abuse, and other forms of coercion to deny asylum seekers the opportunity to pursue their claims); see also *infra* Part II.

¹³ Giammarinaro, 2017 *Trafficking in Persons*, *supra* note 10, at 10.

¹⁴ See *infra* Part II.

¹⁵ However, there are at least several examples. See, e.g., Jennifer M. Chacón, *Misery and Myopia: Understanding the Failures of the U.S. Efforts to Stop Human Trafficking*, 74 FORDHAM L. REV. 2977 (2006); Britta S. Loftus, *Coordinating U.S. Law on Immigration and Human Trafficking: Lifting the Lamp to Victims*, 43 COLUM. HUM. RTS. L. REV. 143 (2011); Katherine Soltis & Rebecca Walters, ‘What’s in a Name?’: *Mislabeling, Misidentification, and the US Government’s Failure to Protect Human Trafficking Survivors in the Central American Refugee Crisis*, 11 ANTI-TRAFFICKING REV. 85 (2018); Mike Perry, “The Tip of

This Article explores why and how immigration enforcement policies that criminalize refugees and other migrants at the southern border impede the government's ability to prevent trafficking by overlooking adult noncitizens who fail to identify themselves as victims. It focuses on adult, noncitizen victims of labor trafficking because, too often, law enforcement, the public, the media, and even attorneys fail to "look beneath the surface" for this population of survivors.¹⁶ This failure stems from a dangerous combination of several factors, including: a tension within the Palermo Protocol itself;¹⁷ limited awareness of what labor trafficking is and how it occurs;¹⁸ decades of increasingly criminalized immigration enforcement efforts, including the expansion of expedited removal;¹⁹ racist rhetoric and policies that dehumanize migrants;²⁰ the myth of the "perfect victim";²¹ and the erosion of basic human rights protections when the victim is not a citizen of the state in which the exploitation occurred.²² Part of the problem, as Marta's story illustrates, is that it is impossible to determine, without the application of a trauma-informed and truly victim-centered approach, whether a migrant is an asylum-seeker, trafficking survivor, smuggled migrant, or some combination thereof.

This Article proceeds in three parts. Part I introduces the relevant international and domestic framework underlying the duty to prevent human trafficking. After laying this groundwork, Part II explores how increasingly restrictive immigration enforcement policies impede efforts to prevent trafficking in the United States. This Part examines restrictionist immigration policies and explains how the erosion of protections for asylum-seekers undermined the country's stated commitment to eradicating human trafficking and, instead, increased individuals' vulnerability to trafficking. Part II concludes by summarizing how fast-track deportations, the criminalization of migration, and restricted access to humanitarian relief interfere with the United States' obligation to prevent human trafficking. Finally, Part III provides recommendations as to how the U.S. government should work to better

the Iceberg": *Human Trafficking, Borders and the Canada-U.S. North*, 42 CAN.-U.S. L. J. 204 (2018).

¹⁶ See *Look Beneath the Surface*, NAT'L HUM. TRAFFICKING TRAINING & TECH. ASSISTANCE CTR., <https://nhhtac.acf.hhs.gov/resources/look-beneath-the-surface> [<https://perma.cc/S2YB-8BT4>] (last visited Oct. 9, 2022). This focus, however, recognizes that much work remains to be done to fully protect the basic human rights of *all* trafficking victims and survivors, regardless of whether that person is an adult or child, U.S. citizen or not, or exploited for sex or labor.

¹⁷ See *infra* Part I.B.

¹⁸ For a comprehensive discussion of labor trafficking in the United States and analysis of the failure to prosecute this crime, see Annie Smith, *The Underprosecution of Labor Trafficking*, 72 S.C. L. REV. 477 (2020).

¹⁹ See *infra* Part II.

²⁰ See *infra* Parts I.D, II.D.

²¹ See, e.g., John Cotton Richmond, *Human Trafficking: Understanding the Law and Deconstructing Myths*, 60 ST. LOUIS U. L.J. 1, 34–38 (2015).

²² See G.A. Res. 55/25 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).

protect asylum-seekers if it truly hopes to meet its due diligence obligation to prevent human trafficking. These recommendations recognize the need to amend immigration enforcement policies to better identify and protect potential victims, shift the culture surrounding training of individuals responsible for identifying victims of trafficking, end fast-track deportations, and improve data collection to ensure that potential victims are not wrongfully detained and deported.

I. THE DUTY TO PREVENT HUMAN TRAFFICKING

A. *Defining Human Trafficking: The Palermo Protocol and the TVPA*

The Palermo Protocol entered into force globally in 2003 and remains the primary international instrument guiding nation-states' obligations with respect to human trafficking.²³ The Palermo Protocol supplements the U.N. Convention Against Organized Crime and forms an integral part of a cluster of treaties addressing transnational crimes.²⁴

The Palermo Protocol provided the first internationally agreed-upon definition of human trafficking. According to the Palermo Protocol, "trafficking in persons" means:

the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs.²⁵

²³ Palermo Protocol, *supra* note 3.

²⁴ See *supra* notes 3–4. The United States ratified Migrant Smuggling Protocol on December 3, 2005; it has neither signed nor ratified the Firearms Protocol. These treaties stem from a long history of treaties aimed at addressing the trafficking of primarily women and children. For more on the negotiating history of the Palermo Protocol and its predecessor treaties, see ANNE T. GALLAGHER, *THE INTERNATIONAL LAW OF HUMAN TRAFFICKING* 54–95 (2010).

²⁵ Palermo Protocol, *supra* note 3, at art. 3(a).

This definition of human trafficking generally involves three elements: (1) an act (which may include, *but does not require*, the crossing of an international border), (2) a means (involving some form of force, fraud, or coercion), and (3) “the purpose of exploitation.”²⁶ However, the “means” element is not required where the victim is under 18 years old, one of the qualifying acts has occurred, and the end is some form of exploitation.²⁷

These same three elements are present, with some variations, in the primary U.S. law defining human trafficking, the federal TVPA.²⁸ The TVPA and its subsequent reauthorizations define “severe forms of trafficking in persons”²⁹ as

(A) sex trafficking in which a commercial sex act is induced by force, fraud, or coercion, or in which the person induced to perform such act has not attained 18 years of age; or (B) 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.³⁰

Missing from the U.S. definition is an explicit statement that “the abuse of power or of a position of vulnerability” is one of the means by which trafficking occurs. Arguably, though, the “abuse of power or of a position of vulnerability” would come within the scope of “coercion.”³¹ In addition, the TVPA recognized human

²⁶ *Id.*

²⁷ *Id.* at art. 3(a)–(d). Under U.S. law, sex trafficking occurs when something of value is given to the minor in exchange for sex. 22 U.S.C. § 7102(11) (defining human trafficking); 18 U.S.C. § 1591(e)(3) (broadly defining a “commercial sex act” as “any sex act, on account of which anything of value is given to or received by any person”); *see also* U.S. DEP’T OF JUSTICE, *Citizen’s Guide to U.S. Federal Law on Child Sex Trafficking* (May 28, 2020), <https://www.justice.gov/criminal-ceos/citizens-guide-us-federal-law-child-sex-trafficking> [<https://perma.cc/5TMB-ZNWB>].

²⁸ *See* 22 U.S.C. § 7102. For additional background on federal anti-trafficking policy in the United States, *see* NOËL BUSCH-ARMENDARIZ, NICOLE LEVY NALE, MATT KAMMERKERWICK, BRUCE KELLISON, MELISSA IRENE MALDONADO TORRES, LAURIE COOK HEFFRON & JOHN NEHME, UNIV. OF TEX. AT AUSTIN: INST. ON DOMESTIC VIOLENCE & SEXUAL ASSAULT, *HUMAN TRAFFICKING BY THE NUMBERS: THE INITIAL BENCHMARK OF PREVALENCE AND ECONOMIC IMPACT FOR TEXAS 21* (2017); *see also* 2021 TIP REPORT, *supra* note 5.

²⁹ 22 U.S.C. § 7102(11). Thus, in the United States, “severe forms of trafficking in persons” became a term of art with a meaning nearly identical to the Palermo Protocol’s definition of “trafficking in persons.” *Compare* Palermo Protocol, *supra* note 3, at art. 3(a), with 22 U.S.C. § 7102(11). I find it difficult to imagine a form of “trafficking in persons” that is not “severe.” However, under U.S. law, a non-severe form of human trafficking is defined as sex trafficking of an individual over age 18 that is not induced by force, fraud, or coercion. *Id.*

³⁰ 22 U.S.C. § 7102(11).

³¹ *See* 22 U.S.C. § 7102(3); 8 C.F.R. § 214.11(a) (defining coercion as encompassing

trafficking as a federal crime, established protections for victims, and introduced programs to combat human trafficking both domestically and globally.³²

The efforts to define human trafficking and protect victims of this crime are significant. However, for the protections of the Palermo Protocol and TVPA to be fully implemented, victims must first be identified. These victim identification efforts face a number of challenges.

B. The Challenge of Identifying Victims

Accurately estimating the prevalence of human trafficking and identifying victims is notoriously challenging.³³ Anti-trafficking efforts have long focused on combatting sex trafficking, meaning that too many victims of labor trafficking are never identified.³⁴ A groundbreaking empirical study launched by the University of Texas-Austin in 2017 starkly illustrates the challenge of accurately capturing the prevalence of human trafficking.³⁵ The study aimed to paint a more complete picture of the scope of human trafficking in Texas, using a combination of qualitative and quantitative methods.³⁶ The study estimated, *conservatively*,³⁷ that approximately 234,000 victims of labor trafficking and 79,000 victims of child sex trafficking existed *in Texas alone*.³⁸ Yet, *nationwide* in fiscal year (“FY”) 2019, service providers receiving funding from the Department of Justice (“DOJ”) to assist

“any scheme, plan, or pattern intended to cause a person to believe that failure to perform an act would result in serious harm to or physical restraint against any person” as well as “the abuse or threatened abuse of the legal process”). For example, a trafficker’s threat to have a noncitizen victim deported should he or she attempt to escape the trafficker’s control would both constitute “abuse of power or of a position of vulnerability” as well as a form of “coercion.”

³² See Trafficking Victims Protection Reauthorization Act, H.R. 898, 113th Cong. (2013).

³³ See Richmond, *supra* note 21, at 14–21; BUSCH-ARMENDARIZ ET AL., *supra* note 28, at 35.

³⁴ See U.S. DEP’T OF STATE, 2022 TRAFFICKING IN PERSONS REPORT 574 (2022) [hereinafter 2022 TIP REPORT], https://www.state.gov/wp-content/uploads/2022/08/22-00757-TIP-REPORT_072822-inaccessible.pdf [<https://perma.cc/KY24-MQQ8>] (noting the “continued lack of progress to comprehensively address labor trafficking in the United States”); see also *infra* Part I.F. For example, in enacting the TVPA, Congress estimated that 50,000 women and children are trafficked into the country annually. 78 U.S.C. § 7101(b)(1). That estimate, however, entirely overlooks adult men who are trafficked into the United States.

³⁵ See BUSCH-ARMENDARIZ ET AL., *supra* note 28.

³⁶ *Id.* at 12, 14.

³⁷ *Id.* at 28 (stating that the study’s estimates “are preliminary benchmarks that remain a *conservative understatement* of the prevalence of human trafficking in Texas” (emphasis added)).

³⁸ *Id.* at 12, 14.

trafficking victims reported only 8,375 open client cases.³⁹ During the same fiscal year, the DOJ opened only 607 investigations and initiated 220 prosecutions.⁴⁰ Clearly, a focus only on identified victims sheds “light on only a fraction of the problem.”⁴¹

Moreover, and crucially, missing from the story is what happens to those victims who are identified, what happens to those who are not, and why so many victims are never identified and therefore lack protection.⁴² Human trafficking is universally condemned, and it frequently takes a life-long toll on the physical, mental, and emotional health of survivors.⁴³ Statistics fail to describe the “profound pain, fear and damage suffered by the victims” of human trafficking.⁴⁴ Both adult

³⁹ U.S. DEP’T OF STATE, 2020 TRAFFICKING IN PERSONS REPORT 517 (2020) [hereinafter 2020 TIP REPORT], <https://www.state.gov/wp-content/uploads/2020/06/2020-TIP-Report-Complete-062420-FINAL.pdf> [<https://perma.cc/42JV-AUWS>]. Globally in 2018, law enforcement data identified only 85,613 victims of trafficking. U.S. DEP’T OF STATE, 2019 TRAFFICKING IN PERSONS REPORT 38 (2019) [hereinafter 2019 TIP Report], <https://www.state.gov/wp-content/uploads/2019/06/2019-Trafficking-in-Persons-Report.pdf> [<https://perma.cc/Q8KV-LKVL>]; see also John Cotton Richmond, Ambassador-At-Large, Off. to Monitor and Combat Trafficking in Persons, *Testimony before the Tom Lantos Human Rights Commission Hearing on the Trafficking Victims Protection Act at 20: A Look Back – and a Look Ahead* (Jan. 15, 2020), <https://www.state.gov/testimony-before-the-tom-lantos-human-rights-commission-hearing-on-the-trafficking-victims-protection-act-at-20-a-look-back-and-a-look-ahead/> [<https://perma.cc/HQZ6-VGJ6>] (“[W]e are only identifying three-tenths of one percent (0.3%) of global victims . . . [T]his overly narrow view of what constitutes coercion is a contributing factor. This prevents governments from identifying victims, providing trauma-informed services to victims, and criminally prosecuting traffickers.”).

⁴⁰ 2020 TIP REPORT, *supra* note 39, at 515. In FY 2021, DHS opened 1,111 investigations related to human trafficking. 2022 TIP REPORT, *supra* note 34, at 575. DOJ formally opened 603 human trafficking investigations in FY 2021, a decrease from 663 in FY 2020. *Id.* Only 26 of DOJ’s FY 2021 investigations involved labor trafficking. *Id.* These investigations led DOJ to initiate 228 federal trafficking prosecutions in FY 2021. *Id.* By comparison, in FY 2015, “DHS reported opening 1,034 investigations possibly involving human trafficking . . . DOJ formally opened 802 human trafficking investigations . . . and [DOJ-funded] task forces separately initiated 1,011 investigations.” U.S. DEP’T OF STATE, 2016 TRAFFICKING IN PERSONS REPORT 389 (2016) [hereinafter 2016 TIP REPORT], <https://2009-2017.state.gov/documents/organization/258876.pdf> [<https://perma.cc/YP26-2MM2>]. DOJ initiated 257 federal human trafficking prosecutions in FY 2015. *Id.*

⁴¹ BUSCH-ARMENDARIZ ET AL., *supra* note 28, at 13.

⁴² See, e.g., Karen E. Bravo, *Contemporary State Anti-“Slavery” Efforts: Dishonest and Ineffective*, 46 N. KY. L. REV. 106, 129 (2019) (“To be effective, anti-slavery efforts must focus on *why* as well as *how* the exploitation is conducted and must follow the money and power to identify the beneficiaries.”); see also 2022 TIP REPORT, *supra* note 34, at 576 (noting advocates’ calls for better data related to how survivors are treated throughout the criminal justice process).

⁴³ See Smith, *supra* note 18, at 490.

⁴⁴ U.N. OFF. ON DRUGS AND CRIME, TOOLKIT TO COMBAT TRAFFICKING IN PERSONS ix

and child survivors suffer the impacts of trauma long after they escape their trafficker. As the U.N. Office on Drugs and Crime (“UNODC”) has recognized, human trafficking “is dynamic and adaptable and, like many other forms of criminal activity, it is constantly changing in order to defeat efforts by law enforcement to prevent it.”⁴⁵ Because of the “hidden nature of the crime,” it is likely impossible to have complete data on the number of victims impacted.⁴⁶ Therefore, understanding the scope of the problem requires listening to and understanding the stories of survivors like Marta.⁴⁷ It also requires a comprehensive approach, as envisioned in the “4P paradigm.”

C. The 4P Paradigm and the Inherent Tension Underlying the Duty to Prevent Human Trafficking

The Palermo Protocol and TVPA embody a “4P” approach to combatting human trafficking, with provisions aimed at (1) preventing the crime, (2) punishing traffickers, (3) protecting victims, and (4) partnering with civil society organizations.⁴⁸ The treaty recognizes that anti-trafficking efforts must be comprehensive and respect the human rights of victims.⁴⁹ Moreover, the U.S. State Department has acknowledged that “[b]uilding and strengthening a collaborative approach across multidisciplinary perspectives can help communities foster trust between relevant actors and develop systems to provide comprehensive care to

(2006) [hereinafter UNODC TOOLKIT], <https://www.unodc.org/documents/human-trafficking/HT-toolkit-en.pdf> [<https://perma.cc/8BS4-9WJQ>].

⁴⁵ *Id.*

⁴⁶ AMY FARRELL, JACK MCDEVITT & STEPHANIE FAHY, UNDERSTANDING AND IMPROVING LAW ENFORCEMENT RESPONSES TO HUMAN TRAFFICKING 14 (2008) <https://www.ncjrs.gov/pdffiles1/nij/grants/222752.pdf> [<https://perma.cc/YTE6-FFSG>].

⁴⁷ See *supra* note 1 and accompanying text (discussing stories such as Marta’s); see also *Faces of Human Trafficking*, U.S. DEP’T OF JUST. OFF. FOR VICTIMS OF CRIME, <https://ovc.ojp.gov/program/human-trafficking/faces-of-human-trafficking> [<https://perma.cc/6Z7H-4XFX>] (last visited Oct. 9, 2022); 2022 TIP REPORT, *supra* note 34, at 574, 576 (recommending increased survivor engagement in formulating anti-trafficking policies, programs, and trainings); NATIONAL ACTION PLAN, *supra* note 5, at 2, 52–53.

⁴⁸ Palermo Protocol, *supra* note 3, at pmb1.; see also U.N. OFF. ON DRUGS AND CRIME, INTERNATIONAL FRAMEWORK FOR ACTION TO IMPLEMENT THE TRAFFICKING IN PERSONS PROTOCOL 3 (2009), https://www.unodc.org/documents/human-trafficking/Framework_for_Action_TIP.pdf [<https://perma.cc/J82A-J2KC>]. Various administrations in the United States have described the paradigm as either a 3P or 4P approach. *E.g.*, *3Ps: Prosecution, Protection, and Prevention*, U.S. DEP’T OF STATE, <https://www.state.gov/3ps-prosecution-protection-and-prevention/> [<https://perma.cc/M23G-ADNE>] (last visited Oct. 9, 2022). This Article refers to the 4P paradigm, to emphasize the equal importance of the 4th “P”—partnership with civil society organizations—in the fight against trafficking. *Id.*

⁴⁹ Palermo Protocol, *supra* note 3, at pmb1. However, see *infra* Part I.F.2 for a discussion of the rhetoric versus reality of this recognition.

victims and robust law enforcement action against traffickers.”⁵⁰ Thus, to effectively combat and prevent trafficking, law enforcement actors must partner with non-governmental organizations as well as other key stakeholders, including survivors.⁵¹

The 4P paradigm highlights the Protocol’s dual purposes—to both protect the basic human rights of trafficking victims and to provide tools to law enforcement to combat trafficking, including by increasing prosecutions of traffickers.⁵² However, experts have long recognized the tension between these two goals.⁵³ While the drafters of the Palermo Protocol sought to balance these two approaches, implementation of the treaty in the United States has long prioritized the law enforcement focus, to the detriment of human rights.⁵⁴ Perhaps this is not surprising, given that the Palermo Protocol itself came into being under the auspices of UNODC.⁵⁵ Yet the human rights approach is better suited to address the root causes

⁵⁰ U.S. DEP’T OF STATE, 2018 TRAFFICKING IN PERSONS REPORT 4 (2018), <https://www.state.gov/wp-content/uploads/2019/01/282798.pdf> [<https://perma.cc/TLH7-Z2ZX>].

⁵¹ 2019 TIP Report, *supra* note 39, at 21, 24–25; U.S. DEP’T OF STATE, U.S. ADVISORY COUNCIL ON HUMAN TRAFFICKING ANNUAL REPORT 9, 20–21 (2019), <https://www.state.gov/wp-content/uploads/2019/05/US-Advisory-Council-2019-Report.pdf> [<https://perma.cc/K7YV-UVGB>]; *see also* DHS STRATEGY, *supra* note 5, at 23–24 (noting that DHS “values partnerships across the homeland security enterprise” and recognizing that stronger partnerships “will significantly enhance the cumulative value of all stakeholder efforts”); NATIONAL ACTION PLAN, *supra* note 5, at 35–38, 51–55.

⁵² *See* Palermo Protocol, *supra* note 3, at pmb1.; *see also* Vienna Convention on the Law of Treaties, arts. 31–32, May 23, 1969, 1155 U.N.T.S. 331 (explaining that a treaty’s context and purpose, as well as its drafting history, are key to understanding its provisions).

⁵³ *See, e.g.*, Chacón, *supra* note 15, at 2978–79 (noting that, in U.S. implementation of the Palermo Protocol via the Trafficking Victims Protection Act, “the law enforcement components of anti-trafficking initiatives” often “undercut[] the . . . humanitarian goals of assisting trafficking victims”); Bravo, *supra* note 42, at 117 (“[D]espite rhetoric that emphasizes a victim-centered approach, the criminalization model is *not* victim-centered so as to empower and protect the potentially vulnerable.”); Perry, *supra* note 15, at 216 (recognizing that the tension between human rights-based and law-enforcement focused approaches to combatting trafficking, and the resulting debate over which paradigm should guide action, “has endured since before the advent of [the] Trafficking Protocol”).

⁵⁴ *See* FARREL ET AL., *supra* note 46, at 11–25 (describing in detail the U.S. law enforcement response to human trafficking); Jorge Bustamante (Special Rapporteur on the Human Rights of Migrants), *Promotion and Protection of all Human Rights, Civil, Political, Economic, Social and Cultural Rights, including the Right to Development* 2, U.N. Doc. A/HRC/7/12/Add.2 (Mar. 5, 2008) (noting that the United States lacked a “clear, consistent, long-term strategy to improve respect for the human rights of migrants”); *see also* Jean Allain, *No Effective Trafficking Definition Exists: Domestic Implementation of the Palermo Protocol*, 7 ALB. GOV’T L. REV. 111, 142 (“[T]he system meant to facilitate the prevention, suppression, and punishment of trafficking through transnational cooperation cannot do so because the States have created different variations of what constitutes trafficking.”).

⁵⁵ However, as Anne Gallagher notes, “[T]here is no way the international community would have a definition and an international treaty on trafficking if this issue had stayed within the realms of the human rights system.” GALLAGHER, *supra* note 24, at 4.

of trafficking,⁵⁶ including lack of social or economic opportunity, civil unrest, discrimination, oppression, poverty, and the deprivation of other basic human rights, among other factors.⁵⁷

A focus on the duty to prevent trafficking highlights this tension. Article 31 of the Convention Against Transnational Organized Crime⁵⁸ and Articles 9 through 11 of the Palermo Protocol⁵⁹ set forth the obligation to prevent trafficking in persons. Article 9 of the Palermo Protocol requires parties to “establish *comprehensive* policies, programmes and other measures” to prevent and combat trafficking and protect trafficked persons from re-victimization.⁶⁰ Such measures “shall include, as appropriate, cooperation with non-governmental organizations, other relevant organizations and other elements of civil society.”⁶¹ Importantly, Article 9 recognizes the importance of measures aimed at reducing vulnerability to trafficking in prevention efforts.⁶² Moreover, States’ measures taken pursuant to Article 9 “shall be consistent with internationally recognized principles of non-discrimination.”⁶³ In addition, the Protocol recognizes the importance of providing and strengthening training for law enforcement, immigration, and other officials to not only prevent trafficking, but also to protect victims and prosecute traffickers. Such training should “take into account the need to consider human rights and child- and gender-sensitive issues” and should encourage collaboration with NGOs and other partners in the fight against human trafficking.⁶⁴

⁵⁶ See, e.g., Jennifer M. Chacón, *Tensions and Trade-Offs: Protecting Trafficking Victims in the Era of Immigration Enforcement*, 158 U. PA. L. REV. 1609, 1627 (2010) (explaining that a “human rights-centered approach would link the protection of victims directly to the violation, not to the needs of the government seeking to prosecute the violation”); Shelley Case Inglis, *Expanding International and National Protections Against Trafficking for Forced Labor Using a Human Rights Framework*, 7 BUFF. HUM. RTS. L. REV. 55, 56 (2001); see also GALLAGHER, *supra* note 24, at 3 (“Making human rights the center of thinking about trafficking stops us from being sidetracked by the slick arguments of those who would prefer it be approached as a straightforward issue of migration, of public order, or of organized crime.”).

⁵⁷ UNODC TOOLKIT, *supra* note 44, at 169–73.

⁵⁸ Convention against Transnational Organized Crime, *supra* note 3, at art. 31. Article 31 sets forth the obligation of States Parties to develop, evaluate, and promote national policies to prevent transnational organized crime, generally. *Id.* These obligations recognize, inter alia, the importance of strengthening public-private cooperation to combat transnational organized crime, evaluating how legal instruments and administrative practices may be subject to misuse by organized criminal groups, and cooperating with international and regional partners to prevent transnational organized crime, “for example by alleviating the circumstances that render socially marginalized groups vulnerable to the action of transnational organized crime.” *Id.*

⁵⁹ Palermo Protocol, *supra* note 3, at art. 9–11.

⁶⁰ *Id.* at art. 9(1) (emphasis added).

⁶¹ *Id.* at art. 9(3).

⁶² *Id.* at art. 9(4).

⁶³ *Id.* at art. 14(2).

⁶⁴ *Id.* at art. 10(2).

However, Article 11, which focuses on prevention through “Border Measures,” highlights the tension between protecting victims and enforcing immigration laws. Article 11 requires States Parties to strengthen border controls as needed to prevent and detect human trafficking.⁶⁵ At the same time, the drafters of the Protocol were clear that measures taken to prevent trafficking should not compromise internationally recognized human rights, such as the right to seek asylum⁶⁶ and the duty of non-discrimination.⁶⁷

Challenges inevitably arise, then, when countries that have ratified the Palermo Protocol view Article 11 in isolation from the rest of the treaty. Marta’s story illustrates how a focus on immigration enforcement impedes victim identification and therefore means that some victims never receive protection. A focus solely on border controls as the means to prevent human trafficking makes it harder to identify victims and puts trafficked persons at greater risk of harm.⁶⁸ Conversely, countries will fail to meet their obligations under the Protocol where border control officials have limited training or involvement in trafficking identification and prevention, including the role of respect for basic human rights obligations.⁶⁹ For this reason, countries must understand and actively train border officials on the roles that discrimination plays in rendering a person susceptible to trafficking.

D. The Intersecting Roles of Racial and Gender Discrimination in Increasing Vulnerability to Trafficking

The duty to prevent trafficking is closely tied to the duty to identify victims. Where its policies make it impossible to distinguish between trafficker and victim, a country will be unable to adequately identify victims and thus, will be unable to fulfill its duty to prevent human trafficking. Immigration enforcement policies, racial-based discrimination, and gender-based discrimination all increase a person’s vulnerability to trafficking.⁷⁰ Thus, if a country is truly interested in meeting its duty

⁶⁵ *Id.* at art. 11(1).

⁶⁶ GALLAGHER, *supra* note 24, at 89 (citing U.N. High Commissioner for Human Rights, Informal Note, at 2–3, U.N. Doc. A/AC.254/16 (June 1, 1999)); U.N., Ad Hoc Comm. on the Elaboration of a Convention Against Transnational Organized Crime, Note by the Office of the U.N. High Commissioner for Human Rights, the U.N. Children’s Fund and the International Organization for Migration on the Draft Protocols Concerning Migrant Smuggling and Trafficking in Persons, U.N. Doc. A/AC.254/27 (Feb. 8, 2000); U.N., Ad Hoc Comm. on the Elaboration of a Convention against Transnational Organized Crime, Note by the Office of the U.N. High Commissioner for Human Rights, the Office of the U.N. High Commissioner for Refugees, the U.N. Children’s Fund and the International Organization for Migration on the Draft Protocols Concerning Migrant Smuggling and Trafficking in Persons, U.N. Doc. A.A.C.254/27/Corr.1 (Feb. 22, 2000).

⁶⁷ Palermo Protocol, *supra* note 3, at art. 14.

⁶⁸ See Loftus, *supra* note 15, at 147.

⁶⁹ See *infra* Part I.E.

⁷⁰ See U.N. Secretary-General, Violence Against Women Migrant Workers, ¶¶ 3, 8, U.N. Doc. A/72/215 (July 25, 2017) (discussing the vulnerability of migrant women and the

to prevent trafficking, it must look holistically at how a wide range of policies implicate its ability to identify victims.⁷¹

Victims of human trafficking frequently suffer other, related human rights violations both prior to and during the course of the victimization process, including discrimination and gender-based violence.⁷² In short, “[t]rafficking thrives when governments fail to protect *and promote* people’s civil, political, economic and social rights.”⁷³

In 2014, the U.N. Committee on the Elimination of Racial Discrimination discussed the ongoing need to address racial discrimination in the United States.⁷⁴ Many of its observations are highly relevant to the discussion of racial discrimination as a causative factor for human trafficking. For example, the Committee reiterated its “concern at the brutality and excessive use of force by law enforcement officials against members of racial and ethnic minorities, including against unarmed individuals, which has a disparate impact on African Americans and undocumented migrants crossing the United States-Mexico border.”⁷⁵ The Committee also voiced its ongoing concern that “impunity for abuses, in particular

role that the state plays in increasing vulnerability by failing “to differentiate between irregular migrants and victims of trafficking, exposing many migrant women to further violations by treating them as criminals without proper access to justice”); Bravo, *supra* note 42, at 114 (recognizing “the subordination of some groups (based on age, gender, racial and ethnic identities, for example) within individual states and societies” as among the contributing causes of human trafficking); Chie Noyori-Corbett & David P. Moxley, *Inequality of Women as a Factor Influencing Migration from Countries of Origin to the United States and Its Implications for Understanding Human Trafficking*, 59 INT’L SOC. WORK 890, 890 (2016) (discussing how migration of vulnerable women can entrap them within networks of human trafficking); Cheryl Nelson Butler, *The Racial Roots of Human Trafficking*, 62 UCLA L. REV. 1464, 1466 (2015) (discussing the role of race and racism in sex trafficking).

⁷¹ See *infra* Part I.E.

⁷² GALLAGHER, *supra* note 24, at 415. As Gallagher explains, these factors “contribute to creating economic deprivation and social conditions that limit individual choice and make it easier for traffickers and exploiters to operate.” *Id.*

⁷³ Ross, *supra* note 11, at 329 (emphasis added). Like other major human rights treaties, the Palermo Protocol recognizes that the basic human rights in that treaty apply “consistent with internationally recognized principles of non-discrimination.” G.A. Res 55/25, art. 14(2), Palermo Protocol (Nov. 15, 2000); see also G.A. Res. 217 (III) A, Universal Declaration of Human Rights, art. 1, 7 (Dec. 10, 1948); International Convention on the Elimination of All Forms of Racial Discrimination, arts. 2, 5, *opened for signature* Mar. 7, 1966, 660 U.N.T.S. 212, 216, 220; International Covenant on Civil and Political Rights, arts. 2, 8, *opened for signature* Dec. 19, 1966, 999 U.N.T.S. 171, 173, 175; Convention on the Elimination of All Forms of Discrimination Against Women arts. 1–3, 15, *adopted* Dec. 18, 1979, 1249 U.N.T.S. 13; Convention on the Rights of the Child, arts. 2, 32, 34–36, *adopted* Nov. 20, 1989, 1577 U.N.T.S. 44.

⁷⁴ U.N., Comm. on the Elimination of Racial Discrimination, *Concluding Observations on the Combined Seventh to Ninth Periodic Reports of the United States of America*, U.N. Doc. CERD/C/USA/CO/7-9 (Sept. 25, 2014).

⁷⁵ *Id.* at ¶ 17.

those committed by the Customs and Border Protection [“CBP”] against Hispanic/Latino Americans and undocumented migrants, remains a widespread problem.”⁷⁶ Moreover, as the Durban Declaration recognized in 2001, “xenophobia against non-nationals, particularly migrants, refugees and asylum-seekers, constitutes one of the main sources of contemporary racism and . . . human rights violations against members of such groups occur widely in the context of discriminatory, xenophobic and racist practices.”⁷⁷ Obviously, this problem is not new, but unless and until the United States addresses the racism embedded within its criminal justice and immigration enforcement systems, its efforts to prevent human trafficking will fail.⁷⁸

In the fight against trafficking, racial and gender-based discrimination often intersect. The United Nations has long recognized the vulnerabilities facing migrant women, in particular, “owing to deeply entrenched gender inequalities that shape, inter alia, the informality of the sectors in which they work and restrictive immigration controls.”⁷⁹ As U.N. Secretary General António Guterres explained in 2017: “This includes the failure of some criminal justice systems to differentiate between irregular migrants and victims of trafficking, exposing many migrant women to further violations by treating them as criminals without proper access to justice.”⁸⁰

Preventing trafficking requires efforts to address the structural causes of violence against women.⁸¹ In 2018, the Special Rapporteur on Trafficking in Persons, Especially Women and Children set forth a number of measures states should take to address gender-based vulnerabilities in efforts to prevent human

⁷⁶ *Id.* (internal citation omitted).

⁷⁷ World Conference Against Racism, Racial Discrimination, Xenophobia and Related Intolerance, *Durban Declaration and Programme of Action*, ¶ 16, U.N. Doc. A/CONF.189/12 (2001).

⁷⁸ See, e.g., CÉSAR CUAUHTÉMOC GARCÍA HERNÁNDEZ, *MIGRATING TO PRISON: AMERICA’S OBSESSION WITH LOCKING UP IMMIGRANTS* 74 (2019) (“The immigration prison is a reminder that human bondage based on racial and economic markers of undesirability can’t be relegated to some distant past.”); see also 2022 TIP REPORT, *supra* note 34, at 575 (discussing findings that in human trafficking investigations, law enforcement officials “disproportionately arrested *victims* who were Black women and girls during sting operations” and that “bias inhibited victim identification among communities of color”).

⁷⁹ U.N. Secretary-General, *supra* note 70, at ¶ 8.

⁸⁰ *Id.* (citing LIZ HALES & LORAINÉ GELSTHORPE, *THE CRIMINALISATION OF MIGRANT WOMEN* (2012), <https://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.448.56&rep=rep1&type=pdf> [<https://perma.cc/45L6-V58V>]).

⁸¹ Maria Grazia Giammarinaro (Special Rapporteur), *Trafficking in Persons, Especially Women and Children*, U.N. Doc. A/70/260 (Aug. 3, 2015) [hereinafter Giammarinaro, 2015 *Trafficking in Persons*]; see also G.A. Res. 64/293, United Nations Global Plan of Action to Combat Trafficking in Persons 12 (Aug. 12, 2010); OFF. OF THE HIGH COMM’R FOR HUM. RTS., *RECOMMENDED PRINCIPLES AND GUIDELINES ON HUMAN RIGHTS AND HUMAN TRAFFICKING* 9–10 (2002) [hereinafter OHCHR RECOMMENDED PRINCIPLES], <https://www.ohchr.org/sites/default/files/Documents/Publications/Traffickingen.pdf> [<https://perma.cc/WG7E-UQQV>].

trafficking.⁸² These recommendations included, among others, that states should “pay attention to the particular needs of women and girls who are refugees,” and “reinforce and support non-violent, non-militarized expressions of masculinity and promote strategies that mobilize communities against all manifestations of violence against women.”⁸³

The “push” factors for many women seeking asylum in the United States are often the result of rampant gender-based violence and discrimination in their home countries.⁸⁴ In recent years, this has become especially true of women fleeing the Northern Triangle countries of Guatemala, Honduras, and El Salvador.⁸⁵ Gender-based violence and patriarchal attitudes force women to flee the country, having no protection from abuse.⁸⁶ But, as Marta’s story illustrates,⁸⁷ the decision to flee often puts them at risk of being further preyed upon by traffickers, who seek to exploit the vulnerable position in which these refugees find themselves.⁸⁸ Thus, efforts aimed at preventing and combatting trafficking must work to address the various human rights abuses, including gender and racial discrimination, that render individuals vulnerable to human trafficking in the first place.

E. Due Diligence in Efforts to Prevent Trafficking

Under international law, the duty to prevent human trafficking is one of due diligence, requiring States to take “all reasonable and necessary measures” toward preventing this crime.⁸⁹ Parties to the Palermo Protocol (such as the United States) have a positive obligation to ensure that would-be traffickers do not interfere with the human rights guaranteed under that convention and other international law.⁹⁰ However, determining what measures are “reasonable and necessary” requires a situation-specific analysis.⁹¹ Under the due diligence standard, the measures taken by a State must “have a real prospect of altering the outcome or mitigating the harm.”⁹²

⁸² Giammarinaro, 2015 *Trafficking in Persons*, *supra* note 81, at 18–23.

⁸³ *Id.* at 19–20.

⁸⁴ U.N., HIGH COMMISSIONER FOR REFUGEES, WOMEN ON THE RUN: FIRST-HAND ACCOUNTS OF REFUGEES FLEEING EL SALVADOR, GUATEMALA, HONDURAS, AND MEXICO 15–27 (2015), <https://www.unhcr.org/en-us/publications/operations/5630f24c6/women-run.html> [<https://perma.cc/9ZC2-D9T5>].

⁸⁵ *Id.*

⁸⁶ *Id.*; *see also* Giammarinaro, 2015 *Trafficking in Persons*, *supra* note 81.

⁸⁷ *See supra* Introduction.

⁸⁸ GALLAGHER, *supra* note 24, at 423–24; *see also* U.N., Comm. on the Elimination of Discrimination Against Women, *General Recommendation 19: Violence Against Women* 14 (1992).

⁸⁹ GALLAGHER, *supra* note 24, at 414; OHCHR RECOMMENDED PRINCIPLES, *supra* note 81, at 2, 6.

⁹⁰ *See* Giammarinaro, 2015 *Trafficking in Persons*, U.N. Doc. A/70/260, *supra* note 81.

⁹¹ *Id.* at ¶ 17; GALLAGHER, *supra* note 24, at 414–15.

⁹² Rashida Manjoo (Special Rapporteur), *Report of the Special Rapporteur on Violence*

Efforts to prevent human trafficking are generally aimed at its root causes.⁹³ Most commonly, these causes include actions and policies that “(1) increase vulnerability of victims and potential victims; (2) create or sustain demand for goods and services produced by trafficked labor; and (3) create or sustain an environment within which traffickers and their accomplices can operate with impunity.”⁹⁴ This Article focuses primarily on the first of these three causative factors, while acknowledging that the latter two factors are equally critical in understanding the duty to prevent trafficking and that all three causes are interrelated.⁹⁵

The due diligence duty to prevent trafficking “often intersects and overlaps with other areas of State obligations,” including other human rights obligations.⁹⁶ Failures by a State to respect the human rights of migrants, laborers, children, and historically marginalized populations often “create the conditions conducive to trafficking by third parties.”⁹⁷ Thus, due diligence in the prevention of human trafficking requires an intersectional and holistic approach that seeks to ensure the realization of basic human rights such as non-discrimination.⁹⁸ Moreover, “due diligence assessment is particularly important when potential infringements come from failures of the State to act with regard to non-State actors as omissions can be particularly difficult to measure.”⁹⁹ Due diligence in preventing human trafficking does not necessarily require more resources, but rather a re-assessment and re-allocation of existing resources toward policies that address the root causes of trafficking, including poverty, inequality, discrimination, and restrictive immigration policies.¹⁰⁰

Understanding the context in which trafficking occurs necessarily entails examining immigration enforcement policies and practices.¹⁰¹ Trafficking may or may not involve movement across international borders.¹⁰² Some victims of

Against Women, Its Causes and Consequences ¶¶ 16, 28, U.N. Doc. A/HRC/23/49 (May 14, 2013).

⁹³ GALLAGHER, *supra* note 24, at 414.

⁹⁴ *Id.* at 414; *see also* Palermo Protocol, *supra* note 3, at art. 9(4)–(5).

⁹⁵ *See infra* Parts II.D, III (discussing how strict immigration enforcement policies targeting asylum-seekers contribute to an environment in which traffickers and their accomplices can operate with impunity).

⁹⁶ Giammarinaro, 2015 *Trafficking in Persons*, U.N. Doc. A/70/260, *supra* note 81, at 8.

⁹⁷ *Id.* at 9.

⁹⁸ *Id.*

⁹⁹ *Id.* at 10.

¹⁰⁰ *Id.* at 20, 22.

¹⁰¹ *Id.* at 11 (“Often, however, States adopt immigration policies in the name of preventing trafficking that in practice deter movement; instead of being preventative, these policies make transborder movement more perilous and foster situations that lead to trafficking.”).

¹⁰² A significant number of identified victims are U.S. citizens. *See, e.g.*, 2022 TIP REPORT, *supra* note 34, at 577 (reporting that 61% of trafficking victims served by DOJ grant recipients were U.S. citizens, 34% were foreign nationals, and the status of 5% was unknown). However, as discussed elsewhere in this Article, existing data likely does not

trafficking enter the country lawfully, only to be exploited later.¹⁰³ Lack of lawful immigration status, though, puts a noncitizen in a position of vulnerability to trafficking.¹⁰⁴ In addition, the old challenge remains of distinguishing between smuggling and trafficking.¹⁰⁵ At least in its immigration enforcement policies, the Trump administration seemed woefully ignorant of this distinction.¹⁰⁶ By failing to identify and protect victims of trafficking who may have been smuggled into the country, U.S. efforts to prevent human trafficking and fully address this crime will continue to fall far short of its rhetoric.¹⁰⁷ Thus, a crucial part of Protocol members' duty of due diligence to prevent trafficking requires officials and policy-makers to identify and adequately address the practices at the border that render men, women, and children vulnerable to human trafficking.

F. Prevention Efforts in the United States

For more than two decades, anti-trafficking efforts in the United States (and elsewhere) have largely focused on combatting sex trafficking, in particular of women and children.¹⁰⁸ As a result, many of the identified victims have been U.S.

accurately capture the number of victims without lawful immigration status, who either may have been smuggled into the country or entered lawfully but remained in the country after their lawful status expired. *See supra* Part I.B (regarding the challenge of accurately estimating the number of trafficking victims) and *infra* Part III.A (proposing improved methods for collecting data).

¹⁰³ *See, e.g., In re 18370173*, 2022 Immig. Rptr. LEXIS 1555 (June 22, 2022) (nonprecedential) (discussing a noncitizen who entered the country on an H-2B nonimmigrant visa and subsequently became the victim of labor trafficking). For another example, see Off. on Trafficking in Persons, *Fact Sheet: Labor Trafficking*, DEP'T OF HEALTH & HUM. SERVS., <https://www.acf.hhs.gov/archive/otip/fact-sheet/fact-sheet-labor-trafficking-english> [<https://perma.cc/VKB7-WHRS>] (last visited Oct. 13, 2022).

¹⁰⁴ *See, e.g., Giammarinaro*, 2015 *Trafficking in Persons*, U.N. Doc. A/70/260, *supra* note 81, at 22 (recognizing restrictive immigration policies as a “root cause that contribute[s] to trafficking in persons”).

¹⁰⁵ This is not, by any means, a new challenge. *See, e.g., Chacón*, *supra* note 15, at 2986; UNODC TOOLKIT, *supra* note 44, at xiii–xv (discussing the differences between trafficking and smuggling).

¹⁰⁶ *See supra* note 8 and accompanying text.

¹⁰⁷ *See Giammarinaro*, 2015 *Trafficking in Persons*, U.N. Doc. A/70/260, *supra* note 81.

¹⁰⁸ *See, e.g., 22 U.S.C. § 7101(b)* (finding, *inter alia*, that traffickers “primarily target women and girls,” that about “50,000 women and children are trafficked into the United States each year,” and that “[m]any of these persons are trafficked into the international sex trade”); 2020 TIP REPORT, *supra* note 39, at 515 (noting that “[a]nti-trafficking advocates reported a continued lack of sustained effort to address labor trafficking” then recommending “[i]ncrease[d] access to victim services for men, boys, LGBTI individuals, and labor trafficking survivors”); Smith, *supra* note 18, at 478–79 (2020) (recognizing that “only a tiny percentage of federal human trafficking prosecutions have involved labor trafficking” and discussing the prevalence of the “myth that all human trafficking is sex trafficking”).

citizens.¹⁰⁹ As the State Department and the U.N. Special Rapporteur on Human Trafficking have recognized, this focus comes at the expense of identifying and protecting foreign national trafficking victims of labor trafficking.¹¹⁰

The TVPA and its subsequent reauthorizations have generally received wide, bipartisan support.¹¹¹ The 2008 Trafficking Victims Protection Reauthorization Act (“TVPRA”) enacted additional protections for unaccompanied alien children (“UACs”). It requires DHS to determine within 48 hours of apprehension whether UACs from Mexico and Canada were trafficked or were at risk of being trafficked if deported.¹¹² For UACs from all other countries, DHS must transfer the child to the Department of Health and Human Services within 72 hours of apprehension, to ensure that such children “are protected from traffickers” and others seeking to harm or exploit them.¹¹³ However, adult noncitizens are afforded far fewer protections than children.¹¹⁴

The 2018–2019 reauthorization of the TVPA, at least on paper, created additional protections for potential victims of human trafficking. That reauthorization took place between December 2018 and January 2019, through a series of four bills:¹¹⁵ the Abolish Human Trafficking Act,¹¹⁶ the Trafficking Victims Protection Act,¹¹⁷ the Frederick Douglass Trafficking Prevention & Protection Act Reauthorization Act (H.R. 2200),¹¹⁸ and the Trafficking Victims Protection

¹⁰⁹ 2020 TIP REPORT, *supra* note 39 (noting that the U.S. “issued fewer victims trafficking-specific immigration benefits” and “increased obstacles for foreign nationals to secure victim protections” in 2020).

¹¹⁰ See 2022 TIP REPORT, *supra* note 34, at 574 (recognizing a “continued lack of progress to comprehensively address labor trafficking in the United States”); Giammarinaro, 2015 *Trafficking in Persons*, *supra* note 10, at 11 (expressing a concern that “the number of identified sex trafficking cases is disproportionate compared to the number of cases of trafficking for labour exploitation, because the former appear to be easier to detect”).

¹¹¹ See, e.g., Press Release, Polaris Project, Congress Passes Trafficking Victims Protection Act Reauthorization (Dec. 21, 2018), <https://polarisproject.org/press-releases/congress-passes-trafficking-victims-protection-act-reauthorization/> [<https://perma.cc/7QNV-25ZW>] (noting that the reauthorization of the TVPA expired in September 2017).

¹¹² 8 U.S.C. § 1232(a)(2), (4).

¹¹³ 8 U.S.C. § 1232(a)(3), (b)(3).

¹¹⁴ See 2022 TIP REPORT, *supra* note 34, at 578 (recognizing that DHS does not mandate screening of foreign national adults for trafficking indicators).

¹¹⁵ Thus, the 2019 re-authorization of the TVPA differed from previous Congressional approaches to reauthorization, which typically takes place in a single bill. For an analysis of the changes made by all four of these bills, see POLARIS PROJECT, THE 2019 TRAFFICKING VICTIMS PROTECTION REAUTHORIZATION ACT: A TOPICAL SUMMARY AND ANALYSIS OF FOUR BILLS (2019), <https://polarisproject.org/wp-content/uploads/2020/01/Polaris-TVPA-2019-Analysis.pdf> [<https://perma.cc/DM4P-U2BR>].

¹¹⁶ Abolish Human Trafficking Act of 2017, Pub. L. No. 115-392, 132 Stat. 5250.

¹¹⁷ Trafficking Victims Protection Act of 2017, Pub. L. No. 115-393, 132 Stat. 5266 (2018).

¹¹⁸ Frederick Douglass Trafficking Victims Prevention and Protection Reauthorization Act of 2018, Pub. L. No. 115-425, 132 Stat. 5472 (2019).

Reauthorization Act.¹¹⁹ In particular, the Abolish Human Trafficking Act set forth several measures aimed at improving the ability of the United States to prevent human trafficking and assist trafficking victims. Among other things, this Act requires victim protection training for DHS and re-emphasizes the importance of implementing a victim-centered approach to human trafficking.¹²⁰ It requires DHS to implement “affirmative measures to avoid arresting, charging, or prosecuting human trafficking victims for any offense that is the direct result of their victimization.”¹²¹ In addition, the Act requires DHS to issue a victim screening protocol for adults.¹²² However, that screening process has yet to be fully implemented and does not appear to be required as part of DHS ERO’s day-to-day enforcement mission.¹²³ Rather, the screening protocol need only apply during “anti-trafficking law enforcement operations in which the Department is involved” and only *after* DHS suspects an individual’s involvement in commercial sexual exploitation, child labor, or “work in violation of labor standards.”¹²⁴ However, the most recent TVPRA authorization bills largely do not change existing immigration law.¹²⁵ Thus, whole categories of foreign national potential victims at the border may still be missed and may, instead of receiving protection, face summary deportation or prosecution for immigration status violations.¹²⁶

Also, as discussed in more detail below, anti-immigrant rhetoric and restrictive immigration policies actively prevent provisions aimed at victim screening and identification from being implemented.¹²⁷ On the same day that he signed the Abolish Human Trafficking Act into law, then-President Trump signaled his belief that the crucial victim protection measures in Section 5 of the Act do not impose any limit on the Department of Homeland Security’s (“DHS”) immigration enforcement

¹¹⁹ Trafficking Victims Protection Reauthorization Act of 2017, Pub. L. No. 115-427, 132 Stat. 5503 (2019).

¹²⁰ See 6 U.S.C. § 645.

¹²¹ *Id.* § 645(b)(2)(B).

¹²² *Id.* at § 645(b)(2)(A).

¹²³ 2022 TIP REPORT, *supra* note 34, at 578 (explaining that DHS does not mandate screening adult foreign nationals who are “apprehended, interdicted, or in detention pending removal from the United States”); NATIONAL ACTION PLAN, *supra* note 5, at 27–28.

¹²⁴ Abolish Human Trafficking Act of 2017, Pub. L. No. 115-392, § 5, 132 Stat. 5250. (codified at 6 U.S.C. § 645(b)).

¹²⁵ See Polaris Project, *supra* note 111, at 24–25.

¹²⁶ See *infra* Part II.

¹²⁷ See *infra* Part II.D.

efforts.¹²⁸ Moreover, as discussed in more detail below, the Trump administration repeatedly pursued immigration enforcement policies that endanger the lives of both potential and identified victims of trafficking.¹²⁹

1. The Role of the Department of Homeland Security in the Fight Against Trafficking

The United States touts a multi-faceted approach to enforcing the laws related to human trafficking.¹³⁰ This approach involves several federal agencies as well as law enforcement officials at the local and state levels. In addition to the federal TVPA, every state now has a law criminalizing human trafficking.¹³¹ Thus, identifying victims and prosecuting offenders frequently involves a collaboration between state and federal law enforcement.¹³²

As mentioned above, the U.S. government utilizes the “4P” paradigm in the fight against trafficking, highlighting the intersecting roles of prevention, prosecution of offenders, and protection of victims.¹³³ At the federal level, execution of the 4P paradigm involves coordination among numerous agencies.¹³⁴ In addition, the federal agencies frequently partner with state task forces in investigating and prosecuting trafficking.¹³⁵ The U.S. Attorneys’ Offices frequently lead state-based task forces, which involve numerous partners, including organizations that work to protect victims.¹³⁶

¹²⁸ Statement on Signing the Abolish Human Trafficking Act of 2017, DAILY COMP. PRES. DOC. 2018 DCPD No. 00863 (Dec. 21, 2018) (claiming that the requirement to take “affirmative measures to avoid arresting, charging, or prosecuting” human trafficking victims “raises a constitutional concern” and that the Trump Administration “will interpret this provision consistent with the prosecutorial discretion of the executive branch and the President’s constitutional responsibility to faithfully execute the laws of the United States”).

¹²⁹ See *infra* Part II.

¹³⁰ See *A Whole-of-Government Approach*, U.S. DEP’T OF JUST., (Sept. 28, 2022) <https://www.justice.gov/humantrafficking/whole-government-approach> [<https://perma.cc/EZ5L-3TNM>] (summarizing the roles of various federal agencies involved in combatting human trafficking). Because this Article focuses on the trafficking of foreign national victims, this section prioritizes discussion of the federal agencies involved in prevention, prosecution, and victim protection efforts.

¹³¹ *Human Trafficking Task Force E-Guide: State Laws*, OFF. FOR VICTIMS OF CRIME TRAINING & TECH. ASSISTANCE CTR., <https://www.ovcttac.gov/taskforceguide/eguide/1-understanding-human-trafficking/14-human-trafficking-laws/state-laws/> [<https://perma.cc/QQR5-2XAL>] (last visited Oct. 9, 2022); 2022 TIP REPORT, *supra* note 34, at 576.

¹³² 2022 TIP REPORT, *supra* note 34, at 576; see also *A Whole-of-Government Approach*, *supra* note 130.

¹³³ See *supra* Part I.C.

¹³⁴ See *A Whole-of-Government Approach*, *supra* note 130.

¹³⁵ See U.S. DEP’T OF JUST., NATIONAL STRATEGY TO COMBAT HUMAN TRAFFICKING 26–35 (2022), <https://www.justice.gov/opa/press-release/file/1467431/download> [<https://perma.cc/4CGC-HRQM>].

¹³⁶ *Id.* at 17–22.

When the victim of trafficking is a foreign national, prosecution and protection efforts primarily involve DHS and DOJ.¹³⁷ Within the DOJ, the Federal Bureau of Investigation (“FBI”), U.S. Attorneys’ Offices, and Office of Justice Programs coordinate efforts to identify victims and prosecute traffickers.¹³⁸ DOJ coordinates with DHS in prosecuting human trafficking.¹³⁹

Multiple DHS components, including Immigration and Customs Enforcement (“ICE”), U.S. Citizenship and Immigration Services (“USCIS”), and CBP, are involved in the fight against trafficking of foreign nationals.¹⁴⁰ ICE has three primary wings through which it carries out its operations—Homeland Security Investigations (“HSI”), Enforcement and Removal Operations (“ERO”), and the Office of the Principle Legal Advisor (“OPLA”).¹⁴¹ For many, ERO—the component responsible for arresting and detaining noncitizens who violate the country’s immigration laws—most easily comes to mind when ICE is mentioned. However, *all* components of ICE have a responsibility to identify victims of human trafficking.¹⁴² HSI, as the investigative arm of ICE, has the most expertise in identifying victims. However, trafficking victims, particularly recent border crossers, are highly likely to be encountered by ICE ERO agents or CBP (a separate DHS component). ICE and CBP play primary roles in identifying and investigating human trafficking crimes, while USCIS plays a critical role in victim protection by administering the immigration benefits designed to protect survivors of trafficking and other violent crimes.¹⁴³

In an effort to outline the role each DHS component plays in the fight against human trafficking, the agency published a comprehensive strategic plan in 2020.¹⁴⁴ DHS Strategy, on paper, follows the “4P” approach to combatting trafficking, with its first four goals centered around prevention, protection, prosecution, and partnership.¹⁴⁵ The fifth identified goal is to “harmonize and organize DHS programs to allow for maximum efficiency and effectiveness in addressing these threats.”¹⁴⁶ On paper, at least, DHS recognizes that trafficking victims may be encountered at any stage of the immigration process.¹⁴⁷ In addition, through its Center for Countering Human Trafficking, DHS emphasizes the importance of taking a

¹³⁷ See, e.g., 2021 TIP Report, *supra* note 5, at 585 (“The Department of Justice (DOJ), DHS, Department of State (State), and Department of Defense (DoD) are the primary investigating agencies for federal human trafficking and other related offenses. DOJ prosecutes federal trafficking cases.”).

¹³⁸ See, e.g., *A Whole-of-Government Approach*, *supra* note 130.

¹³⁹ See, e.g., 2022 TIP REPORT, *supra* note 34, at 574–75.

¹⁴⁰ For a fuller discussion of the roles that various DHS components play in combatting trafficking, see DHS STRATEGY, *supra* note 5, at 30–45.

¹⁴¹ See *Who We Are*, U.S. IMMIGR. & CUSTOMS ENF’T, <https://www.ice.gov/about-ice> [<https://perma.cc/MW5G-EAMD>] (last visited Oct. 9, 2022).

¹⁴² See DHS STRATEGY, *supra* note 5, at 37–39.

¹⁴³ *Id.* at 30–34.

¹⁴⁴ *Id.*

¹⁴⁵ *Id.* at iv.

¹⁴⁶ *Id.*

¹⁴⁷ *Id.* at 2.

“victim-centered” approach to trafficking investigations.¹⁴⁸ The DHS Office for Civil Rights and Civil Liberties provides input on the Blue Campaign’s public awareness materials and human trafficking training courses.¹⁴⁹

However, a disconnect exists between the rhetoric of the 4P paradigm used by DHS and current realities faced by noncitizens, particularly asylum-seekers, encountered by certain DHS subcomponents at the border.

2. Rhetoric Versus Reality of “Victim-Centered” Approaches to Preventing Human Trafficking in the United States

For decades, the rhetoric of efforts to prevent trafficking has not matched the reality of victim-identification efforts.¹⁵⁰ To their credit, the State Department, DOJ, and DHS have, for many years, recognized the importance of joint efforts to combat human trafficking.¹⁵¹ The State Department reports annually on the state of human trafficking worldwide through its *Trafficking in Persons Report*.¹⁵² Multiple federal agencies, including DHS, correctly assert that trafficking efforts can only succeed where a victim-centered and trauma-informed approach is taken to prosecution and protection efforts.¹⁵³

In its rhetoric, the U.S. State Department recognizes that the root causes of trafficking “relate to larger systemic conditions such as poverty, forced migration, racism, and discrimination, among many others.”¹⁵⁴ As examples of how these larger

¹⁴⁸ See *DHS Center for Countering Human Trafficking*, U.S. DEP’T OF HOMELAND SEC., <https://www.dhs.gov/dhs-center-countering-human-trafficking> [<https://perma.cc/2AHW-Y8JA>] (last visited Oct. 15, 2022); see also *Blue Campaign*, U.S. DEP’T OF HOMELAND SEC., <https://www.dhs.gov/blue-campaign> [<https://perma.cc/BKX2-FUJL>] (last visited Oct. 9, 2022); NATIONAL ACTION PLAN, *supra* note 5, at 27–31.

¹⁴⁹ DHS STRATEGY, *supra* note 5, at 41.

¹⁵⁰ See Chacón, *supra* note 15, at 3017 (“While instrumental in bringing to public attention the gravity of the crime of human trafficking, the TVPA has failed to significantly address the ways in which existing laws may actually promote trafficking and other labor exploitation.”); Giammarinaro, 2015 *Trafficking in Persons*, *supra* note 81, at 9 (“Despite regulations set out in international instruments and decades of anti-trafficking initiatives, significant protection gaps persist in practice for victims of trafficking in persons.”); see also Joy Ngozi Ezeilo, (Special Rapporteur), *Report of the Special Rapporteur on Trafficking in Persons, Especially Women and Children*, U.N. Doc. A/HRC/26/37, at 19 (Apr. 1, 2014) (“The mandate has drawn attention to worrying gaps between the obligations of States with regard to trafficking (what States are required to do or refrain from doing) and the extent to which those obligations are met in practice (what actually happens).”).

¹⁵¹ See *supra* Part I.C.

¹⁵² See, e.g., 2022 TIP REPORT, *supra* note 34.

¹⁵³ See *supra* note 140; see also DHS STRATEGY, *supra* note 5, at 11, 15.

¹⁵⁴ 2018 TIP REPORT, *supra* note 5, at 3; see also NATIONAL ACTION PLAN, *supra* note 5, at 2.

systemic issues may enable trafficking to thrive, the State Department explains that traffickers may “recognize a vulnerable community’s fear of engaging law enforcement officials with a reputation for corruption” or “rely on bias and discrimination to keep victims hidden in plain sight.”¹⁵⁵

Yet the actions taken by the United States do not always match its professed commitment to fighting human trafficking.¹⁵⁶ Worse, rhetoric and actions that treat victims as criminals actually serve to empower traffickers (in addition to violating the non-punishment principle set forth in international law).¹⁵⁷ In defining human trafficking, DHS asserts that 80% of trafficking victims globally are victims of forced labor rather than sex trafficking, relying on ILO data from 2014.¹⁵⁸ Yet enforcement efforts in the United States have largely focused on combatting sex trafficking, despite repeated calls by advocates and academics to increase the investigation and prosecution of labor trafficking.¹⁵⁹ In FY 2021, for example, DOJ initiated 577 sex trafficking investigations, but only 26 labor trafficking investigations.¹⁶⁰ In the same fiscal year, however, 68% of the trafficking victims served through the HHS assistance programs were victims of labor trafficking, and an additional 9% of victims had suffered both labor and sex trafficking.¹⁶¹ In its 2022 Trafficking in Persons report, the State Department noted “a continued lack of progress to comprehensively address labor trafficking in the United States,” and documented just 13 labor trafficking convictions by DOJ in FY 2021.¹⁶² Compare this information to the statistics compiled in the 2017 study discussed above,

¹⁵⁵ 2018 TIP REPORT, *supra* note 5, at 3; *see also* 2021 TIP REPORT, *supra* note 5, at 584 (recognizing that the U.S. government “enforced policies that further marginalized communities overrepresented among trafficking victims, increasing their risk to human trafficking”); 2022 TIP REPORT, *supra* note 34, at 579 (documenting advocates’ concern that “foreign national victims remained in trafficking situations because they were afraid to report their cases to law enforcement, pursue immigration options, or seek services”).

¹⁵⁶ *See* 2018 TIP REPORT, *supra* note 5, at ii.

¹⁵⁷ *See* Chacón, *supra* note 15, at 2979 (“Border interdiction strategies, harsh penalties for undocumented migrant workers, and insufficient labor protections for all workers, but particularly undocumented migrants, all interact to facilitate trafficking, notwithstanding the TVPA.”); 2022 TIP REPORT, *supra* note 34, at 575 (reporting results of studies finding that 5 of 10 DOJ-funded, Enhanced Collaborative Model anti-trafficking task forces arrested survivors as part of their investigative strategy, that law enforcement “disproportionately arrested victims who were Black women and girls,” and that “bias inhibited victim identification among communities of color”); *id.* at 579 (noting NGOs’ “concern about the heightened risk of human trafficking for individuals forced to return to Mexico” under Title 42 and the Migrant Protection Protocols, discussed in Section II below); *see also infra* note 363 and accompanying text.

¹⁵⁸ DHS STRATEGY, *supra* note 5, at 2.

¹⁵⁹ *See* 2021 TIP REPORT, *supra* note 5, at 584, 586; 2022 TIP REPORT, *supra* note 34, at 574.

¹⁶⁰ 2022 TIP REPORT, *supra* note 35, at 575.

¹⁶¹ *Id.* at 577.

¹⁶² *Id.* at 574, 575. DOJ secured a total of 203 convictions of traffickers in FY 2021. *Id.* at 575.

estimating that 234,000 victims of labor trafficking exist in Texas alone.¹⁶³ DHS recognizes that labor trafficking occurs in any number of industries, including “agriculture, domestic work, hospitality, food services, and health and beauty services.”¹⁶⁴ However, in its recent strategic plan, DHS treats forced labor largely as a problem that occurs elsewhere, rather than within the United States.¹⁶⁵ Moreover, by its own estimates, DHS identified and assisted only 1,863 foreign-born victims of human trafficking and child sexual exploitation in the five years preceding publication of its strategy.¹⁶⁶

Despite the fact that all DHS components share responsibility for preventing trafficking and protecting victims, the 2020 DHS Strategy is nearly silent on what actions ICE ERO agents are required to take in these efforts. Instead, this strategic document describes ERO’s role in combatting human trafficking as follows:

ERO’s mission is to identify, arrest, and remove aliens who present a danger to national security or are a risk to public safety, *as well as those who enter the United States illegally* or otherwise undermine the integrity of our immigration laws and border control efforts. ERO oversees programs and conducts operations to identify and apprehend removable aliens, to detain these individuals when necessary, and to remove illegal aliens from the United States. ERO *prioritizes the apprehension, arrest, and removal of convicted criminals, those who pose a threat to national security, fugitives, recent border entrants, and aliens who thwart immigration controls.*¹⁶⁷

The same paragraph describes ERO’s role in “all logistical aspects of the removal process” as well as its current size and budget.¹⁶⁸ Thus, DHS appears to envision a limited role, or no role at all, for ERO to play in ensuring that trafficking victims are not subject to deportation. Moreover, such language suggests that while certain ICE components, including HSI and the Blue Campaign tout a “victim-centered” approach, that approach is not applied across all components. Furthermore, even efforts to follow a “victim-centered approach” have assisted a limited number of noncitizen survivors of trafficking.¹⁶⁹ This may be attributed, in part, to the relative

¹⁶³ See *supra* Part I.B.

¹⁶⁴ DHS STRATEGY, *supra* note 5, at 2.

¹⁶⁵ *Id.* at 3 (discussing the risks posed by importing goods produced with forced labor).

¹⁶⁶ *Id.* at 12. By contrast, the agency identified and helped 5,912 U.S. national victims during the same time period. *Id.*

¹⁶⁷ *Id.* at 38 (emphasis added).

¹⁶⁸ *Id.*

¹⁶⁹ See, e.g., *Victim Assistance Program*, U.S. IMMIGR. & CUSTOMS ENF’T (Oct. 13, 2021), <https://www.ice.gov/features/vap> [<https://perma.cc/Y2VV-NGLQ>] (noting that of the 2,188 total victims assisted by ICE-HSI’s Victim Assistance Program in FY 2020, only 477 were not citizens of the United States).

allocation of resources between victim assistance programs and enforcement efforts. For example, in FY 2020, ICE-HSI had just 35 Victim Assistance Specialists and 30 Forensic Interview Specialists nationwide.¹⁷⁰

Under the Trump administration, numerous high-ranking federal officials, from the Attorney General, to the Secretary of Homeland Security, to the President, made repeated statements that, at best, conflated human trafficking with human smuggling and, at worst, demonstrated that the federal government's stated commitment to human trafficking rang hollow when the victim was a foreign national.¹⁷¹ It is true that trafficking often takes place within a single country, targeting citizens or foreign nationals residing in that country.¹⁷² However, rhetoric used by the Trump administration, including DHS officials, frequently conflated human trafficking with human smuggling, or treated them as two entirely distinct crimes.¹⁷³ Both mistakes fail to recognize that human trafficking and human smuggling occur along a spectrum, and the two crimes sometimes overlap. Human smuggling is the crime of knowingly bringing or attempting to bring a noncitizen into the United States without authorization (i.e., a crime against a border), whereas human trafficking is a crime against a person, where the trafficker ultimately seeks to exploit that person for sex or labor.¹⁷⁴ As Marta's story illustrates, some trafficking victims are smuggled from one country to another during the course of the trafficking.¹⁷⁵ A smuggled person may become a trafficking victim before, during, or after the international migration, or that person may never become a victim of trafficking. The key to distinguishing between the two is being able to identify whether the

¹⁷⁰ *Id.*

¹⁷¹ See *President Donald J. Trump Is Fighting to Eradicate Human Trafficking*, *supra* note 7 and accompanying text.

¹⁷² 2019 TIP REPORT, *supra* note 39, at 3 (“[T]he ILO estimated that traffickers exploit 77 percent of all victims in the victims’ countries of residence.”). In fact, the Department of State, in the same report, criticizes the tendency of governments to “concentrate on transnational human trafficking cases at the expense of cases taking place within their borders.” *Id.*

¹⁷³ In a first-of-its kind strategic plan to combat human trafficking, though, the Acting Secretary of Homeland Security recognizes that it is an error to use human trafficking and human smuggling interchangeably. DHS STRATEGY, *supra* note 5, at 5 n.6.

¹⁷⁴ Compare 8 U.S.C. § 1324(a)(1)(A)(i) (defining smuggling), with 22 U.S.C. § 7102 (defining human trafficking). Thus, the key difference between smuggling and trafficking is the element of force, fraud, or coercion involved in human trafficking. See *Fact Sheet: Human Trafficking*, U.S. DEP’T OF HEALTH & HUM. SERVS. OFF. ON TRAFFICKING IN PERSONS, <https://www.acf.hhs.gov/otip/fact-sheet/resource/fshumantrafficking#:~:text=Definition%20of%20Trafficking%20in%20Persons&text=Labor%20trafficking%3A%20the%20recruitment%2C%20harboring,%2C%20debt%20bondage%2C%20or%20slavery> [<https://perma.cc/JG8G-S33H>] (last visited Oct. 9, 2022).

¹⁷⁵ Because smuggling and trafficking occur on a continuum, and because individuals who encounter trafficking victims may not understand how the two crimes differ, it is difficult to estimate how many trafficking victims have been smuggled. Better data collection and improved training on the indicators of trafficking could help address these challenges. See *infra* Part III.A–B.

potential victim was subjected to some form of force, fraud, or coercion in the course of being exploited (either for sex or labor). Because of the inherent difficulties of determining whether a person is being coerced, policies that criminalize everyone who crosses a border illegally risk impeding identification of human trafficking victims.¹⁷⁶ And in fact, Congress recognized this danger in enacting the provisions of the Abolish Human Trafficking Act.¹⁷⁷

Similarly, the State Department recognizes the difficulty trafficking victims often face in sharing “details with law enforcement authorities that could aid in prosecuting their traffickers.”¹⁷⁸ Law enforcement practices of arresting victims (which disproportionately impact Black women and girls), victims’ lack of knowledge about their legal rights (and law enforcement officers’ failure to inform them of those rights), as well as systemic biases impede victims from entrusting law enforcement with their stories.¹⁷⁹ In addition, for foreign national victims, xenophobia and uncertainty related to victims’ immigration status pose significant obstacles to accessing the rights available under U.S. law and impedes prosecutions of their traffickers.¹⁸⁰

Frequently, the challenge in identifying a trafficking victim is in determining the degree of coercion involved in the migration process. Well before enactment of the TVPA, the Supreme Court, in *United States v. Kozminski*,¹⁸¹ recognized that a victim’s “age or special vulnerability may be relevant in determining whether a particular type or a certain degree of physical or legal coercion is sufficient to hold that person to involuntary servitude.”¹⁸² As one example, the Court explained that threatening “an immigrant with deportation could constitute the threat of legal coercion that induces involuntary servitude.”¹⁸³ Traffickers frequently use this method and other forms of coercion to exploit adult undocumented migrant victims.¹⁸⁴ Moreover, psychological coercion is much more commonly used by

¹⁷⁶ See *infra* Part II.D.

¹⁷⁷ See, e.g., Abolish Human Trafficking Act of 2017, Pub. L. No. 115-392, § 5, 132 Stat. 5250. (codified at 6 U.S.C. § 645).

¹⁷⁸ 2019 TIP REPORT, *supra* note 39, at 13.

¹⁷⁹ 2022 TIP REPORT, *supra* note 34, at 575.

¹⁸⁰ *Id.* at 578; *Migrant Caravan: States Have Duty to Protect Human Rights*, U.N. OFF. OF THE HIGH COMM’R FOR HUM. RTS. (Nov. 28, 2018), <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=23941&LangID=E> [<https://perma.cc/XBE9-VU4X>] (criticizing “racist and xenophobic language and practices used by US authorities” in response to the 2018 caravans of migrants travelling through Central American to the U.S. to seek asylum); see also *infra* Part II.

¹⁸¹ *United States v. Kozminski*, 487 U.S. 931, 952–53 (1988) (defining “involuntary servitude” prior to enactment of the TVPA).

¹⁸² *Id.* at 948.

¹⁸³ *Id.*

¹⁸⁴ See, e.g., *David v. Signal Int’l, LLC*, 257 F.R.D. 114, 117–19 (E.D. La. 2009) (explaining that traffickers subjected their victims, 500 Indian men, to threats of deportation, forced labor, discrimination, in addition to several other forms of abuse and exploitation); Smith, *supra* note 18, at 484–85 (providing several examples of how traffickers use threats of deportation and other forms of psychological abuse to exploit migrants).

traffickers than physical abuse as a means of controlling victims.¹⁸⁵ Thus, the scars of human trafficking are frequently invisible.

Failures to identify victims not only leaves those individuals in danger, but also hinders prosecutions. In FY 2018, the DOJ reported a “significant decrease” in the number of human trafficking investigations opened, down to 657 cases opened (as compared to 783 new investigations in FY 2017).¹⁸⁶ In 2020, human trafficking “prosecutions decreased for the second year in a row,” according to the Department of State.¹⁸⁷ In its 2020 Trafficking in Persons Report, the State Department reported that the government “prosecuted fewer cases and secured convictions against fewer traffickers, issued fewer victims trafficking-specific immigration benefits, and did not adequately screen vulnerable populations for human trafficking indicators.”¹⁸⁸

DHS, in its strategic plan, is clear that all components have a responsibility to take a victim-centered approach to the fight against trafficking.¹⁸⁹ However, that mission cannot be met when a potential victim is seen first and foremost as a criminal (i.e., someone who has violated U.S. immigration laws) and therefore a priority for deportation. Therefore, if prevention efforts are to be truly “comprehensive,” the United States must take a hard look at the extent to which immigration enforcement policies impede victim identification.

This Part has explored the basics of the duty to prevent human trafficking in order to explain why due diligence efforts to prevent trafficking must be holistic and comprehensive. With this understanding in mind, the next Parts address how increased criminalization at the border, particularly of asylum-seekers, creates additional risks for a population already vulnerable to human trafficking, and therefore implicates the duty to prevent trafficking.

¹⁸⁵ According to the Counter-Trafficking Data Collaborative, psychological abuse is the most common means traffickers use, on both adults and children, to control their victims. For adult victims, the next two most common means of control are restrictions of movement and threats. *Victims Exploited in the Americas*, COUNTER-TRAFFICKING DATA COLLABORATIVE, <https://www.ctdatacollaborative.org/story/victims-exploited-americas> [<https://perma.cc/2J3M-WYX5>] (last visited Oct. 9, 2022).

¹⁸⁶ 2019 TIP REPORT, *supra* note 39, at 485. However, during that same period, new investigations into human trafficking by DHS increased from 833 to 849. *Id.*

¹⁸⁷ 2020 TIP REPORT, *supra* note 39, at 515–16.

¹⁸⁸ *Id.* at 515. More specifically, “DOJ initiated a total of 220 federal human trafficking prosecutions in FY 2019, a decrease from 230 in FY 2018, and charged 343 defendants, a decrease from 386 in FY 2018. Of these . . . 12 prosecutions involved predominantly labor trafficking, compared to . . . 17 in FY 2018 . . .” *Id.* at 515–16.

¹⁸⁹ DHS STRATEGY, *supra* note 5, at 6.

II. THE INTERSECTION OF TRAFFICKING PREVENTION EFFORTS AND IMMIGRATION ENFORCEMENT IN THE UNITED STATES

Immigration scholars have written extensively on the highly restrictive and punitive nature of immigration enforcement in the United States.¹⁹⁰ While a full discussion of the changes in the immigration laws and policies is beyond the scope of this Article, some understanding of the current state of immigration enforcement in the United States is necessary to develop tools to prevent and combat trafficking of foreign national victims.

This Part provides background on the efforts since 2017 to dismantle the asylum system and discusses pre-existing systems that allow for the fast-track removal and exclusion of non-U.S. citizens.¹⁹¹ The Trump era saw a “fundamental shift in thinking and policy about the direction of immigration and America’s future.”¹⁹² The Trump administration effectively shut down many legal immigration pathways, in particular access to refugee status and asylum.¹⁹³ Its policies systematically curtailed due process rights, tied the hands of immigration judges adjudicating claims for relief, demonized both asylum-seekers and their attorneys, and prevented asylum-seekers from entering the country, much less having a full and fair day in court.¹⁹⁴ As Part II.D explains, all of these actions undermine the goal of ending human trafficking.

At the same time, the Trump-era immigration policies can be seen as an outgrowth of decades of increasingly restrictive policies that marginalize, exploit, and imprison migrants, particularly those who are people of color. Since the 1990s, resources allocated to immigration detention and enforcement have skyrocketed.¹⁹⁵

¹⁹⁰ See, e.g., HERNÁNDEZ, *supra* note 78; SHOBA SIVAPRASAD WADHIA, BANNED: IMMIGRATION ENFORCEMENT IN THE TIME OF TRUMP 29–44 (2019); Jennifer Lee Koh, *When Shadow Removals Collide: Searching for Solutions to the Legal Black Holes Created by Expedited Removal and Reinstatement*, 96 WASH. U. L. REV. 337, 346–49 (2018).

¹⁹¹ For a more comprehensive discussion of the demise of U.S. protections for asylum-seekers under the Trump administration, see ANDREW I. SCHOENHOLTZ, JAYA RAMJI-NOGALES & PHILIP G. SCHRAG, THE END OF ASYLUM (2021).

¹⁹² SARAH PIERCE, JESSICA BOLTER & ANDREW SELEE, MIGRATION POL’Y INST., U.S. IMMIGRATION POLICY UNDER TRUMP: DEEP CHANGES AND LASTING IMPACTS 1 (Jul. 2018), <https://www.migrationpolicy.org/sites/default/files/publications/TCMTrumpSpring2018-FINAL.pdf> [<https://perma.cc/8EQ5-3GXA>]; see also WADHIA, *supra* note 190, at 2 (quoting a former INS official who explains, “You see an enforcement outlook and actions that USCIS is taking that would never have happened in INS days”).

¹⁹³ See *infra* Part II.C.

¹⁹⁴ See *infra* Part II.B–C.

¹⁹⁵ See, e.g., GLOB. DET. PROJECT, UNITED STATES IMMIGRATION DETENTION PROFILE (2021), https://www.globaldetentionproject.org/countries/Americas/united-states#_ftnref65 [<https://perma.cc/725C-NGF5>]; MARIE GOTTSCHALK, CAUGHT: THE PRISON STATE AND THE LOCKDOWN OF AMERICAN POLITICS 215 (2016); see also DORIS MEISSNER, DONALD M. KERWIN, MUZAFFAR CHISHTI & CLAIRE BERGERON, MIGRATION POL’Y INST., IMMIGRATION ENFORCEMENT IN THE UNITED STATES: THE RISE OF A FORMIDABLE MACHINERY 2 (2013),

In fact, expenditures on immigration enforcement “exceed[] funding for all principal federal law enforcement agencies combined.”¹⁹⁶ At the same time, scholars and NGOs have documented and decried a wide range of abuses committed against asylum-seekers and migrants at the hands of immigration officials.¹⁹⁷

As discussed in more detail below, efforts to exclude and deport all undocumented migrants actually serve to increase vulnerability to trafficking. As César Cuauhtémoc García Hernández explains, “Rather than reducing unauthorized migration, more border enforcement means more unauthorized migrants will be cheaper for employers.”¹⁹⁸ When legal options for migration and asylum are foreclosed, those who fear returning to their home countries will turn to illegal routes, thus falling prey to traffickers. Sections A through C below examine the efforts by the Trump administration to foreclose legal immigration options for asylum-seekers and vastly expand the priorities for deportation. Then, Section D explains how these practices and policies impair efforts to identify and protect trafficking victims.

A. Immigration Enforcement Priorities

Since enactment of the TVPA and signing of the Palermo Protocol, presidential administrations have recognized the need to prioritize enforcement resources through the use of prosecutorial discretion.¹⁹⁹ The Obama administration, for

<https://www.migrationpolicy.org/sites/default/files/publications/enforcementpillars.pdf> [<https://perma.cc/XA9P-RUBA>] (stating that in 2012 alone, the U.S. government spent nearly \$18 billion on immigration enforcement).

¹⁹⁶ GOTTSCHALK, *supra* note 195, at 215; *see also* MEISSNER ET AL., *supra* note 195, at 2 (stating that in 2012 alone, the U.S. government spent nearly \$18 billion on immigration enforcement). Indeed, some have decried the current state of affairs as an “immcarceration” or “crimmigration” crisis. GOTTSCHALK, *supra* note 195, at 215; *see also* Juliet Stumpf, *The Crimmigration Crisis: Immigrants, Crime, and Sovereign Power*, 56 AM. U. L. REV. 367 (2006).

¹⁹⁷ *See, e.g.*, EUNICE HYUNHYE CHO, TARA TIDWELL CULLEN & CLARA LONG, AM. C.L. UNION, HUM. RTS. WATCH & NAT’L IMMIGR. JUST. CTR., JUSTICE-FREE ZONES: U.S. IMMIGRATION DETENTION UNDER THE TRUMP ADMINISTRATION 9–13 (2020), https://www.hrw.org/sites/default/files/supporting_resources/justice_free_zones_immigrant_detention.pdf [<https://perma.cc/8DUV-PQTH>].

¹⁹⁸ HERNÁNDEZ, *supra* note 78, at 66.

¹⁹⁹ *See, e.g.*, Memorandum from Doris Meissner, Comm’r, Immigr. & Naturalization Serv., on Exercising Prosecutorial Discretion (Nov. 17, 2000); Memorandum from William J. Howard to All OPLA Chief Counsel, Principal Legal Advisor, U.S. Immigr. & Customs Enf’t on Prosecutorial Discretion (Oct. 24, 2005); Memorandum from William J. Howard, Principal Legal Advisor to All OPLA Chief Counsel, U.S. Immigr. & Customs Enf’t on VAWA 2005 Amendments to Immigration and Nationality Act and 8 U.S.C. § 1367 (Feb. 1, 2007); Memorandum from Julie L. Myers, Assistant Secretary, U.S. Immigr. & Customs Enf’t to All Field Office Directors and All Special Agents on Prosecutorial and Custody Discretion (Nov. 7, 2007); Memorandum from Peter S. Vincent, Principal Legal Advisor,

example, made it explicitly “against ICE policy to initiate removal proceedings against an individual known to be the immediate victim or witness to” crimes, including human trafficking, unless “special circumstances or aggravating factors” existed.²⁰⁰ However, under the Trump administration, the priorities for deportation drastically shifted.²⁰¹ Within his first week in office, the former president “issued a series of executive orders promising major changes to the U.S. immigration system, ranging from sharp cuts to legal immigration and the building of ‘the wall’ across the entire U.S.-Mexico border; to ‘extreme’ vetting of all applicants for admission.”²⁰² His administration’s “Immigration Principles & Policies” highlighted an agenda focused almost exclusively on restricting legal immigration, undermining protections previously afforded to victims of trafficking and other crimes, and deporting noncitizens from the United States.²⁰³

Within days of inauguration, the Trump administration issued two executive orders setting forth his immigration enforcement agenda at the border and inside the United States. The first, Executive Order 13,767, branded noncitizens who entered the United States without authorization as “a significant threat to national security and public safety”²⁰⁴ and prioritized expanding “the wall” along the U.S. Mexico border and increasing immigration detention.²⁰⁵

While not explicitly stated, those subject to those enforcement efforts would include individuals seeking asylum and victims of human trafficking who are undocumented. Executive Order 13,768, issued the same day as Executive Order 13,767, articulated the president’s interior immigration enforcement priorities.²⁰⁶ That order expanded the categories of noncitizens targeted for immigration enforcement and “left the impression that every person without status should be targeted.”²⁰⁷ More bluntly, former ICE Director Thomas Homan claimed: “There’s no population off the table If you’re in the country illegally, we’re looking for

U.S. Immigr. & Customs Enf’t to OPLA Attorneys on Guidance Regarding U Nonimmigrant Status (U visa) Applicants in Removal Proceedings or with Final Orders of Deportation or Removal (Sept. 25, 2009); see also Shoba Sivaprasad Wadhia, *The History of Prosecutorial Discretion in Immigration Law*, 64 AM. U. L. REV. 1285 (2015).

²⁰⁰ Memorandum from John Morton, Director, U.S. Immigr. & Customs Enf’t to All Field Office Directors, All Special Agents in Charge & All Chief Counsel on Prosecutorial Discretion: Certain Victims, Witnesses, and Plaintiffs, 1 (June 17, 2011) [hereinafter Morton Memorandum].

²⁰¹ For a full discussion of the Trump administration’s immigration policies, see SARAH PIERCE, *MIGRATION POL’Y INST., IMMIGRATION-RELATED POLICY CHANGES IN THE FIRST TWO YEARS OF THE TRUMP ADMINISTRATION* (2019).

²⁰² PIERCE ET AL., *supra* note 192, at 1.

²⁰³ White House, *Immigration Principles and Policies*, AILA Doc. No. 17100965 (Oct. 8, 2017), <https://www.aila.org/infonet/wh-immigration-principles-and-policies> [https://perma.cc/FA4K-H4M4].

²⁰⁴ Exec. Order No. 13,767, 82 C.F.R. 8793 (2017).

²⁰⁵ *Id.*

²⁰⁶ Exec. Order No. 13,768, 82 C.F.R. 8799 (2017).

²⁰⁷ WADHIA, *supra* note 190, at 31.

you.”²⁰⁸ As Shoba Sivaprasad Wadhia explains, DHS enforcement policy and Homan’s words “translated into a tragedy on the ground.”²⁰⁹ “By prioritizing an expanded population of noncitizens for removal, and by resuming the practice of arresting people who do not have criminal records or pose a danger to society, the Trump administration . . . significantly broadened the makeup of who is being removed.”²¹⁰ In short, all undocumented migrants in the United States and many noncitizens with lawful immigration status were potential targets for deportation.²¹¹

Early in its tenure, the Biden administration rescinded Executive Orders 13,767 and 13,768 and articulated a new set of priorities for immigration enforcement.²¹² Guidance from then-DHS Acting Secretary Pekoske directed a comprehensive review of DHS enforcement policies, established interim priorities, paused certain removals for 100 days,²¹³ and rescinded several Trump-era policy memoranda as inconsistent with EO 13,993.²¹⁴ Subsequently, ICE Acting Director Tae Johnson provided more detailed guidance on immigration enforcement priorities and actions, including strategic planning.²¹⁵

These early guidance documents did not explicitly protect victims of trafficking from removal.²¹⁶ In addition, the Biden administration has explicitly identified any undocumented noncitizen who entered or attempted to enter the United States on or after November 1, 2020 as “a border security enforcement and removal priority.”²¹⁷

²⁰⁸ Esther Yu His Lee, ‘No Population Is Off the Table’: Data Shows Increase in Immigrants Arrests Inside U.S., THINKPROGRESS (Dec. 5, 2017, 1:31 PM), <https://archive.thinkprogress.org/deportation-arrests-up-year-end-082dc8fa1b32/> [<https://perma.cc/RB3X-KUQJ>].

²⁰⁹ WADHIA, *supra* note 190, at 42.

²¹⁰ PIERCE ET AL., *supra* note 192, at 3.

²¹¹ *See id.*

²¹² Exec. Order No. 13,993, 86 C.F.R. 7051 (2021); Memorandum from David Pekoske, Acting Secretary, U.S. Dep’t of Homeland Security on Review of and Interim Revision to Civil Immigration Enforcement and Removal Policies and Priorities (Jan. 20, 2021) [hereinafter Pekoske Memorandum], https://www.dhs.gov/sites/default/files/publications/21_0120_enforcement-memo_signed.pdf [<https://perma.cc/KR5M-Y3D7>]; Memorandum from Tae Johnson, Acting Director, U.S. Immigration and Customs Enf’t on Civil Immigration Enforcement and Removal Priorities (Feb. 18, 2021) [hereinafter Johnson Memorandum], https://www.ice.gov/doclib/news/releases/2021/021821_civil-immigration-enforcement_interim-guidance.pdf [<https://perma.cc/437D-LDF9>].

²¹³ Shortly thereafter, on January 26, the U.S. District Court for the Southern District of Texas enjoined DHS from implementing this pause on removals. *Texas v. United States*, 14 F.4th 332, 334 (5th Cir.), *vacated*, 24 F.4th 407 (5th Cir. 2021).

²¹⁴ Pekoske Memorandum, *supra* note 212.

²¹⁵ Johnson Memorandum, *supra* note 212.

²¹⁶ *Compare* Exec. Order No. 13,993, *supra* note 212, Pekoske Memorandum, *supra* note 212, Johnson Memorandum, *supra* note 212, *with* Morton Memorandum, *supra* note 200.

²¹⁷ Johnson Memorandum, *supra* note 212, at 4.

However, on August 10, 2021, the administration issued ICE Directive 1105.3, setting forth a “victim-centered approach” to ICE enforcement actions with respect to noncitizen crime victims.²¹⁸ The policy directs ICE officers to “exercise prosecutorial discretion in appropriate circumstances to facilitate access to justice and victim-based immigration benefits by noncitizen crime victims.”²¹⁹ The directive explains that, “absent exceptional circumstances,” ICE should not take enforcement actions, such as initiating removal proceedings, against noncitizens who are known to have been granted victim-based immigration relief or who have filed an application for such relief (i.e., T or U nonimmigrant status).²²⁰ However, for victims who have not yet filed an application for immigration relief, the guidance only requires ICE to consider their status as a crime victim as a “discretionary factor” in the decision as to whether to take immigration enforcement action (including the decision of whether to release a noncitizen from detention).²²¹ The policy directive largely echoes the guidance that had been in place under the Morton memo during the Obama administration, which was rescinded in 2019.²²²

The current and future administrations should continue to work to ensure that identified victims of human trafficking are not priorities for deportation. However, as discussed further in the following sections, the current focus on *identified* victims overlooks individuals who are still under the control of their trafficker. Better data is needed about how ICE is implementing its priorities with respect to potential victims subject to the fast-track deportation policies discussed below.²²³

B. Fast-Track Deportations

As Jennifer Lee Koh and other scholars have explained, the vast majority of noncitizens deported from the United States never have their day in court.²²⁴ This section provides an overview of (1) the criminalization of immigration status offenses and (2) the mechanisms, specifically expedited removal and reinstatement of removal, that fast-track removals in the absence of a criminal conviction.

²¹⁸ *Directive 1105.3: Using a Victim-Centered Approach with Noncitizen Crime Victims*, U.S. IMMIGR. & CUSTOMS ENF'T (Aug. 10, 2021), <https://www.ice.gov/doclib/newsp/s/releases/2021/11005.3.pdf> [<https://perma.cc/JX7K-GMH2>].

²¹⁹ *Id.* at 1.

²²⁰ *Id.* at 2.

²²¹ *Id.*

²²² See *supra* note 200 and accompanying text.

²²³ See *infra* Part III.A.

²²⁴ Jennifer Lee Koh, *Removal in the Shadows of Immigration Court*, 90 S. CAL. L. REV. 181, 181 (2017).

1. *Immigration Prosecutions, Operation Streamline, and “Zero Tolerance”*

The statutes criminalizing illegal entry and re-entry into the United States have existed since 1929.²²⁵ However, they were “largely ignored” until George W. Bush’s presidency.²²⁶ Today, they are the two federal crimes most often prosecuted,²²⁷ leaving fewer resources to investigate and prosecute violent crimes, such as human trafficking. In the same year that the federal government prosecuted 105,692 individuals for either illegal entry or re-entry,²²⁸ it initiated only 230 human trafficking prosecutions.²²⁹

Prosecutions for immigration status offenses began rising significantly in 2005 (the same year the United States ratified the Palermo Protocol) with the launch of “Operation Streamline,” a joint initiative between the DOJ and DHS.²³⁰ As its name suggests, this operation “streamlines” the criminalization and deportation of migrants who enter the United States across the Southwest border, steamrolling their due process rights along the way.²³¹ Up to 80 people can be tried and convicted in the same hearing.²³² The entire process of charging, trying, convicting, and sentencing individuals takes place in a matter of hours.²³³ Individuals accused of these non-violent crimes may have only minutes to speak to an attorney in a public setting, and may not even be able to communicate with an attorney due to interpretation challenges.²³⁴ The intention and result is to “deprive[] migrants of an individualized hearing,” and the entire process “raises serious due-process concerns.”²³⁵ Those concerns are heightened significantly when considering the special obligations owed to human trafficking victims and asylum-seekers that are swept up in this process.

Following in step with Operation Streamline, on April 6, 2018, then-Attorney General Jeff Sessions outlined a “zero tolerance” policy requiring federal

²²⁵ See *Undesirable Aliens Act of 1929 (Blease’s Law)*, Immigr. Hist., <https://immigrationhistory.org/item/undesirable-aliens-act-of-1929-bleases-law/> [<https://perma.cc/64ZR-38SH>] (last visited Nov. 15, 2022).

²²⁶ HERNÁNDEZ, *supra* note 78, at 7.

²²⁷ *Id.* at 7–8.

²²⁸ *Id.* at 8.

²²⁹ 2019 TIP REPORT, *supra* note 39, at 485.

²³⁰ AM. IMMIGR. COUNCIL, PROSECUTING PEOPLE FOR COMING TO THE UNITED STATES 3 (Aug. 2021), https://www.americanimmigrationcouncil.org/sites/default/files/research/prosecuting_people_for_coming_to_the_united_states.pdf [<https://perma.cc/RE9M-X8CK>].

²³¹ *Id.*

²³² *Id.*

²³³ *Id.*

²³⁴ *Id.*

²³⁵ *Id.* Immigration Judge Dana Marks has described immigration court proceedings for asylum seekers as “death penalty cases in a traffic court setting.” See Mark A. Drummond, “Death Penalty Cases in a Traffic Court Setting”: *Lessons from the Front Lines of Today’s Immigration Courts*, 44 LITIG. NEWS. 26, 26 (2018) (quoting Judge Dana Marks). In this author’s opinion, Operation Streamline proceedings involving foreign national victims of trafficking raise the same concerns that Judge Marks identified.

prosecutors to prioritize prosecution of immigration status offenses, criminalized at 8 U.S.C. § 1325.²³⁶ A month later, the Justice Department announced that DHS would refer all individuals who crossed the southwest border without authorization for prosecution for illegal entry or re-entry.²³⁷ While touted by the administration as a shift from the supposedly lax enforcement policies of the past, immigration offenses have long led the list of crimes prosecuted by U.S. attorneys.²³⁸

“Zero tolerance” had a devastating impact on families, leading to separation of migrant children from their parents²³⁹ and lasting psychological harm.²⁴⁰ In addition,

²³⁶ Memorandum from Jefferson Sessions, Att’y Gen., U.S. Dep’t Just. to Federal Prosecutors along the Southwest Border on Zero-Tolerance for Offenses Under 8 U.S.C. § 1325(a) (April 6, 2018), <https://www.justice.gov/opa/press-release/file/1049751/download> [<https://perma.cc/FD6V-TB33>].

²³⁷ See *Attorney General Sessions Delivers Remarks Discussing the Immigration Enforcement Actions of the Trump Administration*, U.S. DEP’T. JUST. (May 7, 2018), <https://www.justice.gov/opa/speech/attorney-general-sessions-delivers-remarks-discussing-immigration-enforcement-actions> [<https://perma.cc/7Z8Y-DT3C>]; see also William A. Kandel, *The Trump Administration’s “Zero Tolerance” Immigration Enforcement Policy*, CONG. RSCH. SERV. (Feb. 2, 2021), <https://sgp.fas.org/crs/homsec/R45266.pdf> [<https://perma.cc/R78L-7Y55>].

²³⁸ See *supra* notes 227–228 and accompanying text.

²³⁹ In the spring and summer of 2018, the administration faced sharp criticism and a lawsuit challenging its family separation practices. *Court Cases: Ms. L. v. ICE*, ACLU (March 11, 2021), <https://www.aclu.org/cases/ms-l-v-ice> [<https://perma.cc/Z2NQ-2C8G>]; Camila Domonoske & Richard Gonzales, *What We Know: Family Separation and ‘Zero Tolerance’ at the Border*, NPR (June 19, 2018, 2:17 PM), <https://www.npr.org/2018/06/19/621065383/what-we-know-family-separation-and-zero-tolerance-at-the-border> [<https://perma.cc/98G2-KCAA>]. In June 2018, a federal judge in the Southern District of California enjoined the practice, but the lawsuit challenging the policy is ongoing, and the full impact of this policy remains to be seen. See *Ms. L. v. U.S. Immigr. Customs & Enf’t*, 310 F. Supp. 3d 1133, 1149–50 (S.D. Cal. 2018), *modified*, 330 F.R.D. 284 (S.D. Cal. 2019), *enforcement granted in part, denied in part*, 415 F. Supp. 3d 980 (S.D. Cal. 2020). The total number of children and parents impacted is, according to the OIG, unknown. U.S. DEP’T OF HEALTH & HUM. SERVS.: OFF. OF THE INSPECTOR GEN., HHS OIG ISSUE BRIEF: SEPARATED CHILDREN PLACED IN OFFICE OF REFUGEE RESETTLEMENT CARE 1 (2019), <https://oig.hhs.gov/oei/reports/oei-BL-18-00511.pdf> [<https://perma.cc/S4C8-RGJD>]; see also Arit John & Jennifer Epstein, *U.S. Government Says It Still Doesn’t Know How Many Migrant Children It Separated*, BLOOMBERG: POL. (Feb. 7, 2019, 2:05 PM), <https://www.bloomberg.com/news/articles/2019-02-07/number-of-children-separated-at-border-still-unknown-u-s-says> [<https://perma.cc/AV6R-SLNJ>].

²⁴⁰ See U.S. DEP’T OF HEALTH & HUM. SERVS.: OFF. OF THE INSPECTOR GEN., CARE PROVIDER FACILITIES DESCRIBED CHALLENGES ADDRESSING MENTAL HEALTH NEEDS OF CHILDREN IN HHS CUSTODY 18 (2019), <https://oig.hhs.gov/oei/reports/oei-09-18-00431.pdf> [<https://perma.cc/4EJB-BD7M>]; Michelle Hackman, *Number of Family Separations at U.S. Border Higher than Previously Known*, WALL ST. J.: POL. (Oct. 24, 2019, 11:55 PM), <https://www.wsj.com/articles/number-of-family-separations-at-u-s-border-higher-than-previously-known-11571975720> [<https://perma.cc/C8H7-Z459>] (detailing separation policy that did not account for how to identify children separated).

the policy failed to look beneath the surface²⁴¹ to the reasons why individuals were seeking to enter the United States. This failure is particularly troubling for foreign-born trafficking victims, who may lack valid immigration status. Their lack of status is often intertwined with the exploitation to which they have been subjected and a tool used by traffickers to maintain control over their victims.²⁴² Policies like “zero tolerance” blur the lines between trafficking victim and trafficker, by criminalizing anyone who enters the country illegally. Even if federal prosecutors do not strictly follow the zero-tolerance policy, the danger is that the mere *existence* of these types of federal policies disempower potential victims from seeking help, because they are led to believe that U.S. officials only care about prosecuting and jailing them for their lack of valid immigration status.

2. Expedited Removal and Reinstatement of Removal

Even absent a criminal conviction, the INA permits the fast-track removal of certain noncitizens who cannot prove authorized presence in the United States. Since 1996, U.S. immigration law has permitted this summary deportation without a hearing of individuals who arrive at formal ports of entry without sufficient documentation.²⁴³ This so-called “expedited removal” process allows immigration officials, who are not attorneys or judges, to bypass the immigration courts.²⁴⁴

While originally limited to formal ports of entry, the use of expedited removal has expanded over time.²⁴⁵ Currently, noncitizens encountered *anywhere* in the United States who have not been admitted or paroled and “have not affirmatively shown, to the satisfaction of an immigration officer, that they have been physically present” in the country for the preceding two years are subject to expedited removal.²⁴⁶ If an immigration enforcement officer determines that an arriving alien lacks proper documentation or made a “material misrepresentation” in order to enter

²⁴¹ See *Meet Oree, Look Beneath the Surface*, U.S. DEP’T OF HEALTH & HUM. SERVS. (April 3, 2020), <https://www.acf.hhs.gov/otip/partnerships/look-beneath-surface> [<https://perma.cc/5SY8-9ED4>].

²⁴² See Smith, *supra* note 18, at 506 (explaining that traffickers exploit their victims’ fear of law enforcement and “commonly threaten arrest or deportation”); *id.* at 509 (noting that traffickers “commonly” withhold the immigration documents of foreign national victims as a means of coercion).

²⁴³ 8 U.S.C. § 1225(b)(1)(A)(i); see also HILLEL R. SMITH, CONG. RSCH. SERVS., IF11357, EXPEDITED REMOVAL OF ALIENS: AN INTRODUCTION (Mar. 25, 2022), <https://crsreports.congress.gov/product/pdf/IF/IF11357> [<https://perma.cc/7CAW-JAE5>].

²⁴⁴ SMITH, *supra* note 243.

²⁴⁵ See Koh, *supra* note 190, at 349–50.

²⁴⁶ Press Release, U.S. Immigr. & Customs Enf’t, ICE Implements July 23, 2019 Expedited Removal Designation (Oct. 21, 2020), <https://www.ice.gov/news/releases/ice-implements-july-23-2019-expedited-removal-designation> [<https://perma.cc/T77P-YYAG>]. Democracy Forward, the National Immigrant Justice Center, and Latham & Watkins subsequently filed a lawsuit challenging this expansion of expedited removal, which is pending at time of writing. See *Petition for Writ of Habeas Corpus and Complaint, I.M. v. U.S. Customs & Border Prot.*, No. 1:20-cv-03576-DLF (D.D.C. Dec. 11, 2020).

the United States, that officer “shall order the alien removed from the United States without further hearing or review,” *unless* the noncitizen indicates either an intention to apply for asylum or fear of persecution.²⁴⁷ No exception is made for trafficking victims, and no screening process is required to ensure that potential trafficking victims are not subject to expedited removal.²⁴⁸ Expedited removal has become “the norm at the border.”²⁴⁹ Throughout this process, the same immigration enforcement officer acts as prosecutor, judge, and jailor, and the whole process takes approximately 90 minutes.²⁵⁰ And “[t]he entire process . . . can happen without any check on whether the person understood the proceedings, had an interpreter, or enjoyed any other safeguards.”²⁵¹ This process, which is “fraught with risk of arbitrary, mistaken, or discriminatory behavior”²⁵² accounts for the highest proportion of individuals deported from the United States.²⁵³ Yet, the process is largely shielded from judicial review.²⁵⁴

Like expedited removal, reinstatement of removal permits the swift deportation of noncitizens with extremely limited examination of potential claims for relief.²⁵⁵ As its name implies, this process permits border officials to reinstate any previous removal order (including an expedited removal order) without a hearing before an immigration judge.²⁵⁶ The process is “heavily one-sided,” as immigration officials need only prove that a prior removal order *exists*, the noncitizen’s identity matches that of the prior removal order, and the noncitizen subsequently entered without authorization.²⁵⁷ As with expedited removal, judicial review of reinstatement of removal is extremely rare, and neither the statute nor regulations require the reviewing officer to screen for indicators of trafficking before removing the noncitizen.²⁵⁸ Thus, the “net result of the expedited removal statute combined with the reinstatement statute is a cocktail of jurisdictional bars that courts have read to

²⁴⁷ 8 U.S.C. § 1225(b)(1)(A)(i), 1182; *see also infra* Part II.C.

²⁴⁸ *See* 2021 TIP REPORT, *supra* note 5, at 584–85 (noting that the U.S. government “continued to not mandate human trafficking screening for all foreign national adults in immigration detention or custody”).

²⁴⁹ Koh, *supra* note 190, at 350.

²⁵⁰ *Id.*

²⁵¹ Khan v. Holder, 608 F.3d 325, 329 (7th Cir. 2010).

²⁵² *Id.*

²⁵³ AM. C.L. UNION, AMERICAN EXILE: RAPID DEPORTATIONS THAT BYPASS THE COURTROOM 2 (2014), https://www.aclu.org/sites/default/files/field_document/120214-expeditedremoval_0.pdf [<https://perma.cc/XXE6-WBZW>].

²⁵⁴ *See* Koh, *supra* note 190.

²⁵⁵ 8 U.S.C. § 1231(a)(5); 8 C.F.R. § 241.8.

²⁵⁶ *Id.*

²⁵⁷ Koh, *supra* note 190, at 357–58 (citing AM. IMMIGR. COUNCIL, REMOVAL WITHOUT RECOURSE: THE GROWTH OF SUMMARY DEPORTATIONS FROM THE UNITED STATES 4 (2014), https://www.americanimmigrationcouncil.org/sites/default/files/research/removal_without_recourse.pdf [<https://perma.cc/Z9V8-WK27>]).

²⁵⁸ *Id.* at 356–57.

deprive the federal courts of the ability to review for outright error, lawlessness, and constitutional violations.”²⁵⁹

DHS has greatly expanded the use of expedited removal within the past decade, particularly since 2014. In a 10-year period, the number of expedited removals jumped from 43,920 (in FY 2003) to 193,032 (in FY 2013).²⁶⁰ Over the same time period, expedited removals jumped from accounting for 23% of all removals to 44%.²⁶¹ The danger, though, in using this process is that legitimate asylum seekers can be, and often are, removed without ever having their day in court. This danger is heightened when additional policies actively restrict access to humanitarian relief, as discussed in the next section.

C. Denying Access to Humanitarian Relief

Between 2017 and 2021, the Trump administration created a myriad of legal and procedural barriers to humanitarian forms of immigration relief, targeting the asylum system.²⁶² While a full discussion of these barriers, particularly those related to asylum, is beyond the scope of this Article, this Part explores key policies that most directly impact the duty to prevent trafficking and protect victims.

1. Metering, the Migrant Protection Protocols, the Asylum Transit Ban, and Title 42

In step with its enforcement priorities and “zero tolerance” policy, the Trump administration began implementing the so-called “Migrant Protection Protocols,” (“MPP”)²⁶³ also commonly referred to as “Remain in Mexico,” in January 2019.²⁶⁴ MPP built upon a practice of asylum “turnbacks” and “metering,” by which CBP officials limited the number of individuals who could apply for asylum at port of entry (“POE”) each day.²⁶⁵ As a matter of practice, but not official policy, asylum seekers who arrived at a POE after the daily limit was reached were forced to wait

²⁵⁹ *Id.* at 370.

²⁶⁰ CASSIDY & LYNCH, *supra* note 1, at 13.

²⁶¹ *Id.*

²⁶² See SCHOENHOLTZ ET AL., *supra* note 191, at 31–107.

²⁶³ *Migrant Protection Protocols*, U.S. DEP’T OF HOMELAND SECURITY (Jan. 24, 2019), <https://www.dhs.gov/news/2019/01/24/migrant-protection-protocols> [<https://perma.cc/24HX-CEP4>]; U.S. CUSTOMS & BORDER PROT., MPP GUIDING PRINCIPLES 1 (Jan. 28, 2019), <https://www.cbp.gov/sites/default/files/assets/documents/2019-Jan/MPP%20Guiding%20Principles%201-28-19.pdf> [<https://perma.cc/7E5F-SK99>].

²⁶⁴ *Migrant Protection Protocols*, *supra* note 263.

²⁶⁵ *Policies Affecting Asylum Seekers at the Border: The Migrant Protection Protocols, Prompt Asylum Claim Review, Humanitarian Asylum Review Process, Metering, Asylum Transit Ban, and How They Interact*, AM. IMMIGR. COUNCIL 1 (Jan. 29, 2020), https://www.americanimmigrationcouncil.org/sites/default/files/research/policies_affecting_asylum_seekers_at_the_border.pdf [<https://perma.cc/5UER-P5UB>].

in Mexico for their number in the queue to be reached.²⁶⁶ This metering practice began as early as 2016 at the San Ysidro port of entry, but drastically expanded in 2018.²⁶⁷ With these practices, the Trump administration “effectively closed off the ports of entry to asylum seekers.”²⁶⁸ The MPP formalized this process of forcing asylum-seekers and other migrants to wait in Mexico for a date to be heard on their asylum claims.

U.S. and international law provide that migrants should not be barred from asylum solely due to their manner of entry.²⁶⁹ Even in the context of the fast-track deportation processes discussed above, certain safeguards exist to ensure that individuals seeking refuge are not wrongfully returned to the countries where they fear persecution. Before implementation of the Remain in Mexico program, immigration officials were required to follow the “credible fear process” outlined at INA Section 235(b)(1) for asylum seekers at or near the border who lacked valid entry documents.²⁷⁰ The credible fear process provides one of the only exceptions to expedited removal for individuals who express a fear of persecution or torture. These individuals are entitled to have an interview with an asylum officer, who is specially trained to determine whether the fear of return is credible.²⁷¹ Even before 2017, though, the U.S. Commission on International Religious Freedom documented “major problems” in processing and detaining asylum seekers starting from the moment they enter the United States.²⁷² These problems included inaccurate documentation of asylum seekers’ reports of fear and CBP officers refusing to refer individuals who asserted a fear of persecution to an asylum officer for a credible fear interview.²⁷³

Before January 2019, if an asylum officer determined that an individual had a credible fear of persecution in his or her home country, DHS would place the individual in immigration court proceedings under INA Section 240 and either detain the asylum seeker in the United States or release the asylum seeker on parole until his or her claim could be adjudicated by an immigration judge.²⁷⁴ By contrast,

²⁶⁶ *Id.*

²⁶⁷ *Id.*

²⁶⁸ *Id.*

²⁶⁹ 8 U.S.C. § 1158. The right to apply for asylum does not mean that relief will be granted, and both international and domestic law provide several bars to the granting of asylum.

²⁷⁰ 8 U.S.C. § 1225(b)(1)(A)(i). The government also had (and continues to have) the discretion to bypass the credible fear process and place asylum seekers directly into removal proceedings before an immigration judge. *See, e.g., Matter of E-R-M- & L-R-M-*, 25 I.&N. Dec. 520 (Bd. Immigr. Appeals 2011).

²⁷¹ 8 U.S.C. § 1225(b)(1)(A)(ii), (B).

²⁷² *See* CASSIDY & LYNCH, *supra* note 1, at 15–16; *see also* U.S. COMM’N ON INT’L RELIGIOUS FREEDOM, REPORT ON ASYLUM SEEKERS IN EXPEDITED REMOVAL (2005), <https://www.uscirf.gov/reports-briefs/special-reports/report-asylum-seekers-in-expedited-removal> [<https://perma.cc/N38S-DBXS>].

²⁷³ CASSIDY & LYNCH, *supra* note 1, at 19–23.

²⁷⁴ *See* SCHOENHOLTZ ET AL., *supra* note 191, at 45–52.

the Remain in Mexico policy required asylum seekers, with a few exceptions,²⁷⁵ to wait in Mexico until their claims can be heard by an immigration judge in the United States.²⁷⁶ The administration relied upon INA Section 235(b)(2)(C) as the statutory authority for this policy,²⁷⁷ yet this interpretation is questionable.²⁷⁸ Section 235(b)(2)(C) provides: “*In the case of an alien described in subparagraph (A) who is arriving on land (whether or not at a designated port of arrival) from a foreign territory contiguous to the United States, the Attorney General may return the alien to that territory pending a proceeding under section 1229a of this title.*”²⁷⁹ The plain language of the statute thus does appear to allow *certain* noncitizens to be returned to a contiguous territory. However, it explicitly states that these noncitizens must fall within the scope of INA Section 235(b)(2)(A), and asylum seekers in the process of obtaining a credible or reasonable fear interview are exempted from INA Section 235(b)(2)(A)’s scope.²⁸⁰

On February 14, 2019, the ACLU and the Southern Poverty Law Center challenged the MPP scheme in *Innovation Law Lab v. Nielsen*.²⁸¹ The lawsuit raised claims by eleven asylum seekers and several legal services organizations that the MPP violated their constitutional rights, U.S. asylum law, and the Administrative Procedures Act.²⁸² On April 8, 2019, the Northern District of California enjoined DHS from continuing to implement or expand Remain in Mexico, finding that the

²⁷⁵ The policy exempts unaccompanied minors, Mexican nationals, and any applicant who is “more likely than not” to face persecution or torture in Mexico. *See Migrant Protection Protocols*, *supra* note 263. Additionally, immigration officers exercise discretion in whether or not to return the asylum seekers they inspect. *See Innovation L. Lab v. McAleenan*, 924 F.3d 503, 509–10 (9th Cir. 2019) (staying the district court’s injunction of the MPP pending appeal).

²⁷⁶ *Migrant Protection Protocols*, *supra* note 263.

²⁷⁷ Memorandum from Secretary Kirstjen M. Nielsen on Policy Guidance for Implementation of the Migrant Protection Protocols to L. Francis Cissna, Dir. of U.S. Citizenship and Immigr., Kevin K. McAleena, Comm’r of U.S. Customs and Border Prot. & Ronald D. Vitiello, Deputy Dir. and Senior Official Performing the Duties of Dir. of U.S. Immigr. and Customs Enf’t. (Jan. 25, 2019) (on file with author).

²⁷⁸ *See Innovation L. Lab v. Wolf*, 951 F.3d 1073, 1087 (9th Cir. 2020) (finding “a likelihood of success on the merits of [the] claim that the MPP is inconsistent with 8 U.S.C. § 1225(b) [INA § 235(b)]”); The Supreme Court granted certiorari in this case, but the question ultimately became moot when the Biden administration ended MPP. *Mayorkas v. Innovation L. Lab*, 141 S. Ct. 2842 (2021).

²⁷⁹ 8 U.S.C. § 1225(b)(2)(C) (emphasis added).

²⁸⁰ 8 U.S.C. § 1225(b)(2)(B)(ii) (“Subparagraph (A) shall not apply to an alien . . . to whom paragraph (1) applies.”). Paragraph (1) of INA § 235(b) sets for the screening process for noncitizens arriving in the United States, including those who express a fear of returning to their home countries. *See* 8 U.S.C. § 1225(b)(1)(A)(ii), (B).

²⁸¹ Complaint, *Innovation L. Lab v. Nielsen*, 366 F. Supp. 3d 1110 (N.D. Cal. 2019) (No. 19-cv-00807-RS).

²⁸² *Id.* The plaintiffs included, among others, a lesbian woman from Honduras who was raped because of her sexual orientation and a youth pastor who was “at risk of being forcibly recruited by gangs . . . [a]fter he helped organize a strike to protest the killing of a young member of his church.” *Id.* at 9–10.

Plaintiffs were likely to show that the policy does not comply with the Administrative Procedures Act.²⁸³ However, in May 2019, the Ninth Circuit Court of Appeals stayed the District Court’s injunction.²⁸⁴ Then, in February 2020, the Ninth Circuit affirmed the lower court’s preliminary injunction, finding, among other things, that the MPP does not comply with international *non-refoulement* obligations as codified in the INA.²⁸⁵ On March 11, 2020, the Supreme Court stayed the preliminary injunction at the government’s request, leaving MPP in place “pending the . . . filing and disposition of a petition for a writ of certiorari.”²⁸⁶

Building upon the “metering” practice and Remain in Mexico program, the Trump administration continued its assault on asylum seekers with the so-called “asylum bans” in the summer of 2019. The asylum transit ban imposed a bar to asylum for individuals who entered the United States after July 16, 2019 after traveling through a third country, unless they had first applied for and been denied protection in that country.²⁸⁷ The rule took effect the same day it was published in the Federal Register.²⁸⁸ Among other stated reasons for promulgating this “interim final rule,” the Departments claimed that the rule would deter frivolous claims, prioritize those who have experienced severe forms of human trafficking, and combat smuggling by reducing “the incentive for [noncitizens] without an urgent or genuine need for asylum to cross the border.”²⁸⁹ These justifications, however, were wholly unsupported by evidence and in fact, ignored the reality at the border.²⁹⁰

Immigrant-services organizations in California and Washington, D.C. immediately challenged the legality of the rule, contending that it violated the APA, INA, TVPRA, and asylum-seekers’ due process rights under the Fifth Amendment.²⁹¹ The U.S. District Court for the District of Columbia concluded that

²⁸³ *Innovation L. Lab v. Nielsen*, 366 F. Supp. 3d 1110, 1114 (N.D. Cal. 2019).

²⁸⁴ *Innovation L. Lab v. McAleenan*, 924 F.3d 503 (9th Cir. 2019).

²⁸⁵ *Innovation L. Lab v. Wolf*, 951 F.3d 1073, 1080–81 (9th Cir. 2020); *see also* 8 U.S.C. § 1231(b)(3)(A).

²⁸⁶ *Wolf v. Innovation L. Lab*, 140 S. Ct. 1564 (2020). The Supreme Court subsequently issued a writ of certiorari, but the issues ultimately became moot when the Biden administration retracted the MPP. *Mayorkas v. Innovation L. Lab*, 141 S. Ct. 2842 (2021); *see also infra* Part III.C.

²⁸⁷ Asylum Eligibility and Procedural Modifications, 84 Fed. Reg. 33,829 (July 16, 2019).

²⁸⁸ *Id.* at 33,830.

²⁸⁹ *Id.* at 33,831.

²⁹⁰ *A Sordid Scheme: The Trump Administration’s Illegal Return of Asylum Seekers to Mexico*, HUM. RTS. FIRST (Feb. 13, 2019), <https://humanrightsfirst.org/library/a-sordid-scheme-the-trump-administrations-illegal-return-of-asylum-seekers-to-mexico/> [<https://perma.cc/7SNB-8Z3E>].

²⁹¹ *Complaint, Capital Area Immigrants v. Trump*, 471 F.Supp.3d 25 (D.D.C. 2019) (No. 19-cv-2117); *Complaint, East Bay Sanctuary Covenant v. Barr*, 934 F.3d 1026 (N.D. Cal. July 16, 2019) (No. 19-cv-4073-JST).

DHS and DOJ violated the APA’s notice-and-comment requirement and therefore vacated the interim final rule.²⁹² Subsequently, the Northern District of California enjoined implementation of the final rule issued on December 17, 2020,²⁹³ and the 9th Circuit upheld that injunction.

By January 2020, the U.S. government had returned approximately 60,000 migrants to Mexico.²⁹⁴ In late March 2020, the administration began using what was then a little-known provision of U.S. health law, 42 U.S.C. § 265, to impose an additional barrier to asylum, purportedly as a response to the COVID-19 pandemic.²⁹⁵ That legal provision permits the Director of the Centers for Disease Control and Prevention (“CDC”) to prohibit individuals from entering the United States when the Director believes that “there is serious danger of the introduction of [a communicable] disease” into the country.²⁹⁶ On March 20, 2020, the Department of Health and Human Services (“HHS”) issued an emergency regulation implementing this law and allowing border officials to implement any such order issued by the CDC.²⁹⁷ On the same day, CDC Director Robert Redfield issued an order suspending the admission of certain individuals traveling across the northern or southern border “who would otherwise be introduced into a congregate setting in a land [POE] or Border Patrol station.”²⁹⁸ Relying on the CDC order, Border Patrol officials began expelling migrants at the U.S.-Mexico border, depriving them of the opportunity to seek asylum.²⁹⁹ These so-called Title 42 expulsions effectively closed

²⁹² *Capital Area Immigrants’ Rts. Coal. v. Trump*, 471 F. Supp.3d 25, 32 (D.D.C. 2020).

²⁹³ *East Bay Sanctuary Covenant v. Garland*, 994 F.3d 962 (9th Cir. 2021).

²⁹⁴ AM. IMMIGR. COUNCIL, POLICIES AFFECTING ASYLUM SEEKERS AT THE BORDER 4 (2020) [hereinafter POLICIES AFFECTING ASYLUM SEEKERS AT THE BORDER], https://www.americanimmigrationcouncil.org/sites/default/files/research/policies_affecting_asylum_seekers_at_the_border.pdf [<https://perma.cc/5H7X-4JX7>]; see also U.S. DEP’T OF HOMELAND SEC., ASSESSMENT OF THE MIGRANT PROTECTION PROTOCOLS (MPP) (Oct. 28, 2019), https://www.dhs.gov/sites/default/files/publications/assessment_of_the_migrant_protection_protocols_mpp.pdf [<https://perma.cc/HZ3T-N25S>] (noting that DHS returned more than 55,000 migrants as of October 2019). Between January 29 and the end of February 2019 alone, U.S. immigration officials forced approximately 150 Central American asylum seekers to return to Mexico. HUM. RTS. FIRST, *supra* note 290, at 1.

²⁹⁵ Control of Communicable Diseases; Foreign Quarantine: Suspension of Introduction of Persons into United States from Designated Foreign Countries or Places for Public Health Purposes, 85 Fed. Reg. 16,625, 16,559 (Mar. 24, 2020) (to be codified at 42 C.F.R. pt. 71); see also AM. IMMIGR. COUNCIL, A GUIDE TO TITLE 42 EXPULSIONS AT THE BORDER 1–2 (May 2022) [hereinafter AIC TITLE 42 REPORT], https://www.americanimmigrationcouncil.org/sites/default/files/research/title_42_expulsions_at_the_border_0.pdf [<https://perma.cc/EUU2-J7XN>].

²⁹⁶ 42 U.S.C. § 265.

²⁹⁷ Control of Communicable Diseases, 85 Fed. Reg. at 16,559.

²⁹⁸ Notice of Order under Sections 362 and 365 of the Public Health Service Act Suspending Introduction of Certain Persons from Countries Where a Communicable Disease Exists, 85 Fed. Reg. 16,997, 17,061 (Mar. 26, 2020).

²⁹⁹ AIC TITLE 42 REPORT, *supra* note 295, at 1–2.

the border to asylum-seekers.³⁰⁰ As the American Immigration Council documents, CBP carried out more than 1.8 million expulsions pursuant to Title 42 by April 2022.³⁰¹ Notably, though, this number reflects the fact that Title 42 has significantly *increased* repeat crossings at the border, as “nearly half of those expulsions were of the same people being apprehended and expelled back to Mexico multiple times.”³⁰²

Public health experts outside of the CDC have decried the use of Title 42 as a basis for expelling asylum seekers.³⁰³ These experts note that the expulsions target a relatively small number of people seeking to cross the border for humanitarian reasons, while other COVID-related travel restrictions allow huge numbers of people to cross the border every day.³⁰⁴ In December 2020 alone, over 13 million people passed through ports of entry between Mexico and the United States.³⁰⁵ These same public health experts proposed another way that the government could address the concern that individuals held in “congregate settings” could contribute to the spread of the coronavirus: simply stop detaining asylum-seekers.³⁰⁶

The Biden administration suspended new enrollments in the MPP program in January 2021,³⁰⁷ but due to litigation, Title 42 remained in place as of December

³⁰⁰ *Id.*

³⁰¹ *Id.* at 1, 3. These expulsions accounted for 60.5% of encounters at the U.S.-Mexico border between April 2020 and April 2022. *Id.* at 3.

³⁰² *Id.* at 1. As the AIC reports, only 7% of people arrested at the border had crossed more than once, prior to the beginning of the COVID-19 pandemic and Title 42. *Id.* at 7.

³⁰³ Letter from Joe Amon, Anika Backster, Mary Bassett, Stefano Bertozzi, Chris Beyrer, Jacqueline Bhabha, Joanne Csete, Paula Davis-Olwell, Ayman El-Mohandes, Wafaa El-Sadr et al., to Alex Azar, Sec’y, Dep’t of Health and Hum. Servs. & Robert R. Redfield, Dir., Ctrs. for Disease Control and Prevention (May 18, 2020) [hereinafter Public Health Experts’ Letter], https://www.publichealth.columbia.edu/sites/default/files/public_health_experts_letter_05.18.2020.pdf [<https://perma.cc/ZG5K-272Y>]; see also POLICIES AFFECTING ASYLUM SEEKERS AT THE BORDER, *supra* note 294.

³⁰⁴ Public Health Experts’ Letter, *supra* note 303.

³⁰⁵ *Border Crossing Entry Data: Monthly Data 2022*, DEPT. OF TRANSP., <https://explore.dot.gov/views/BorderCrossingData/Monthly?%3Aembed=y&%3AisGuestRedirectFromVizportal=y> [<https://perma.cc/F62C-ST9W>] (last visited Oct. 17, 2022).

³⁰⁶ Public Health Experts’ Letter, *supra* note 303; see also AIC TITLE 42 REPORT, *supra* note 295. For a summary of the problems with the immigration detention system in the U.S. as well as a proposal for reimagining immigration custody, see RANDY CAPPS & DORIS MEISSNER, MIGRATION POL’Y INST., FROM JAILERS TO CASE MANAGERS REDESIGNING THE U.S. IMMIGRATION DETENTION SYSTEM TO BE EFFECTIVE AND FAIR, (2021), https://www.migrationpolicy.org/sites/default/files/publications/mpi_rethinking-immigration-detention-2021_final.pdf [<https://perma.cc/25F4-GQM2>].

³⁰⁷ Press Release, U.S. Dep’t of Homeland Sec., DHS Statement on the Suspension of New Enrollments in the Migrant Protection Protocols Program (Jan. 20, 2021), <https://www.dhs.gov/news/2021/01/20/dhs-statement-suspension-new-enrollments-migrant-protection-protocols-program> [<https://perma.cc/MTG9-ZV7A>]; Press Release, U.S. Dep’t of Homeland Sec., Court Ordered Reimplementation of the Migrant Protection Protocols (Aug. 8, 2022), <https://www.dhs.gov/migrant-protection-protocols> [<https://perma.cc/MTG9-ZV7A>].

2022,³⁰⁸ leaving thousands of asylum-seekers in limbo and potentially in danger. In July 2022, 37% of migrants encountered at the southwest border were removed from the country pursuant to Title 42.³⁰⁹

Policies like Title 42 and MPP deterred refugees from seeking asylum in the United States and utterly failed to protect migrants, particularly those with claims for humanitarian relief. Among other problems, these policies interfered with asylum seekers' ability to obtain legal representation and collect evidence in support of their cases.³¹⁰

Yet these are only a few of the policies that have impeded asylum-seekers' access to justice in the United States.³¹¹ For decades, immigration scholars have criticized the myriad barriers that prevent asylum-seekers from obtaining legal status

³⁰⁸ See *Huisha-Huisha v. Mayorkas*, 560 F.Supp.3d 146 (D.D.C. 2021); *Huisha-Huisha v. Mayorkas*, 27 F.4th 718 (D.C. Cir. 2022); *Huisha-Huisha v. Mayorkas*, ___ F.Supp.3d ___, 2022 WL 16948610 (D.D.C. 2022); *Arizona v. Mayorkas*, ___ S.Ct. ___, 2022 WL 17750015 (2022). As of the time of writing, Title 42's future remained uncertain. On December 19, 2022, the U.S. Supreme Court temporarily enjoined the expiration of Title 42, which was set to end on December 21, 2022. *Id.* The Biden administration subsequently asked the Court to dismiss the case as moot, given the anticipated end of the public health emergency underlying Title 42 on May 11, 2023. Brief for Federal Respondents at 10–11, *Arizona v. Mayorkas*, ___ U.S. ___ (2023) (No. 22-592), 2023 WL 1882267 at *10-11. See also Amy Howe, *States Ask Supreme Court to Keep Title 42 Border Policy in Effect*, SCOTUSblog (Dec. 19, 2022, 5:17 pm), <https://www.scotusblog.com/2022/12/states-ask-supreme-court-to-keep-title-42-border-policy-in-effect/>.

³⁰⁹ Rick Jervis, *Number of Migrants at U.S.-Mexico Border Again Predicted to Smash Previous Records*, USA TODAY (Aug. 18, 2022, 6:00 AM), <https://www.usatoday.com/story/news/nation/2022/08/18/number-of-migrants-at-us-mexico-border-cbp/10353337002/> [<https://perma.cc/BNT9-3XF3>].

³¹⁰ See *E.O.H.C. v. Sec'y U.S. Dep't of Homeland Security*, 950 F.3d 177, (3d Cir. 2020) (remanding to District Court for determination of the “now-or-never” claim of whether returning the appellants to Mexico would violate their right to counsel under the Due Process Clause of the Fifth Amendment); AM. IMMIGR. LAWS. ASS'N (AILA), POLICY BRIEF: “REMAIN IN MEXICO” PLAN RESTRICTS DUE PROCESS, PUTS ASYLUM SEEKERS LIVES AT RISK 1 (Feb. 1, 2019), <https://www.aila.org/advo-media/aila-policy-briefs/policy-brief-remain-in-mexico-plan-chaos> [<https://perma.cc/4XTH-FZTS>] (explaining that Remain in Mexico policy “dramatically alters processing of asylum claims at the U.S. southern border and makes it far more difficult for asylum seekers to receive a fair and meaningful review of their claims as required under both U.S. and international law”); Press Release, Adam Isacson, Maureen Meyer & Adeline Hite, Relief Web, New “Migrant Protection Protocols” Ignore U.S. Legal Obligations to Asylum Seekers and Exacerbate Humanitarian Border Crisis (Jan. 25, 2019), <https://reliefweb.int/report/united-states-america/new-migrant-protection-protocols-ignore-us-legal-obligations-asylum> [<https://perma.cc/996B-A5LT>].

³¹¹ Significantly, this Article does not include discussion of a proposed regulation issued in June 2020, which would make it all but impossible for many valid asylum claims to succeed and would eviscerate well-established precedent related to asylum claims, contravene U.S. obligations under international law, and directly contradict the plain language of the asylum statute. As of the time of writing, the proposed rule has not been finalized.

in the United States, including: challenges inherent in the expedited removal process;³¹² lack of access to legal representation;³¹³ detention which, in itself, exacerbates trauma and prevents asylum-seekers from fully presenting their cases;³¹⁴ backlogs in the immigration court system that span years;³¹⁵ huge disparities in outcomes depending on which court happens to adjudicate a case;³¹⁶ arbitrary decision-making that seeks to foreclose asylum to those fleeing violence by gangs, abusers, and other private actors whom governments are unable or unwilling to control;³¹⁷ immigration judges' lack of judicial independence;³¹⁸ and the "rapid and staggering convergence of the criminal and immigration regimes" over several decades,³¹⁹ which encourages adjudicators to perceive asylum-seekers as criminals. Thus, the policy changes discussed below are only the first steps toward protecting trafficking victims who also may be seeking asylum.³²⁰

2. Restricting Access to T Visas for Trafficking Survivors

Since the TVPA's beginnings, T nonimmigrant status, known more colloquially as a "T visa," has been a valuable but seriously underutilized tool to protect foreign-born victims of trafficking.³²¹ DHS recognizes that the availability of T visas and other forms of immigration relief for trafficking victims (such as

³¹² See Michele Pistone, *Asylum Rights and Wrongs: What the Proposed Refugee Protection Act Will Do and What More Will Need to Be Done*, 38 *FORDHAM U. L.J.* 247, 262 (2010); Lindsey M. Harris, *Withholding Protection*, 50 *COLUM. HUM. RTS. L. REV.* 1, 32–37 (2019).

³¹³ Soltis & Walters, *supra* note 15, at 92; see also Jean C. Han, *The Good Notario: Exploring Limited Licensure for Non-Attorney Immigration Practitioners*, 64 *VILL. L. REV.* 165, 168–70 (2019).

³¹⁴ See Harris, *supra* note 312, at 32–37.

³¹⁵ See Kate Aschenbrenner, *Ripples Against the Other Shore: The Impact of Trauma Exposure on the Immigration Process Through Adjudicators*, 19 *MICH. J. RACE & L.* 53, 88 (2013).

³¹⁶ See Andrew I. Schoenholtz, Jaya Ramji-Nogales & Philip G. Schrag, *Refugee Roulette: Disparities in Asylum Adjudication and Proposals for Reform*, 60 *STAN. L. REV.* 295, 295–96 (2009).

³¹⁷ *Id.* (discussing Attorney General Sessions' decision in *Matter of A-B-*, 27 *I&N Dec.* 247 (A.G. 2018)).

³¹⁸ See, e.g., Stephen H. Legomsky, *Deportation and the War on Independence*, 91 *CORNELL L. REV.* 369, 371–75 (2006).

³¹⁹ Laila Hlass, *The School to Deportation Pipeline*, 34 *GA. ST. U. L. REV.* 697, 705 (2018); Soltis & Walters, *supra* note 15, at 95 (noting the "increasingly severe penalties for immigrants who have any contact with law enforcement"); see also HERNÁNDEZ, *supra* note 78.

³²⁰ See *infra* Part III.

³²¹ See Smith, *supra* note 18, at 489–90.

continued presence³²² and U nonimmigrant status³²³) helps expedite victims' recovery and "support[s] DHS's ability to identify and arrest traffickers of foreign national victims."³²⁴ Yet, the manner in which DHS implements these legal protections is failing victims,³²⁵ and therefore preventing law enforcement from effectively combatting the trafficking of noncitizen victims.

USCIS may grant up to 5,000 T visas each year.³²⁶ However, this statutory cap has never been met, and frequently, approvals fall far short of the number of visas available.³²⁷ In FY 2019, for example, USCIS granted T nonimmigrant status to just 500 principal applicants.³²⁸ Moreover, applicants wait approximately one and a half years, on average, for a decision in their case.³²⁹

To receive a T visa, trafficking survivors must prove that they have been a victim of a "severe form of trafficking in persons"³³⁰ and are physically present in

³²² 22 U.S.C. § 7105(c)(3); 28 C.F.R. § 1100.35. Continued presence allows noncitizen trafficking victims to legally remain in the United States while an investigation is ongoing and before a T visa has been granted. However, this form of relief can only be initiated by a federal, state, and local law enforcement agency authorized to investigate or prosecute human trafficking. *Id.*; *see also* U.S. IMMIGR. & CUSTOMS ENF'T, CONTINUED PRESENCE RESOURCE GUIDE (July 2021), <https://www.ice.gov/doclib/human-trafficking/ccht/continuedPresenceToolkit.pdf> [<https://perma.cc/HKJ9-JX54>].

³²³ 8 U.S.C. § 1101(15)(a)(U); 8 C.F.R. § 214.14. This status is more colloquially known as a "U visa." The U visa offers protection to a wider variety of crime victims than the T visa, but survivors often encounter different hurdles to obtaining this status. For example, unlike the T visa, the number of applicants for U visas frequently exceeds the statutory cap on this type of relief, resulting in long backlogs for those who qualify. *See* JULIE DAHLSTROM & HEBA GOWAYED, ACCESS DENIED: BARRIERS TO LEGAL PROTECTION FOR IMMIGRANT SURVIVORS OF HUMAN TRAFFICKING 9 (Dec. 2022).

³²⁴ DHS STRATEGY, *supra* note 5, at 16.

³²⁵ *See generally*, DAHLSTROM & GOWAYED, *supra* note 323.

³²⁶ 8 U.S.C. § 1184(o)(2)–(3); *see also* YAEL SCHACHER, REFUGEES INT'L, ABUSED, BLAMED, AND REFUSED: PROTECTION DENIED TO WOMEN AND CHILDREN TRAFFICKED OVER THE U.S. SOUTHERN BORDER 4, 11 (May 2019), <https://www.refugeesinternational.org/reports/2019/5/21/abused-blamed-and-refused-protection-denied-to-women-and-children-trafficked-over-the-us-southern-border> [<https://perma.cc/CJ2Y-9X9J>]; DAHLSTROM & GOWAYED, *supra* note 323, at 9.

³²⁷ SCHACHER, *supra* note 326, at 11; DAHLSTROM & GOWAYED, *supra* note 323, at 9.

³²⁸ U.S. DEP'T OF HOMELAND SECURITY: U.S. CITIZENSHIP & IMMIGR. SERVS., ANNUAL REPORT ON IMMIGRATION APPLICATIONS AND PETITIONS MADE BY VICTIMS OF ABUSE – FISCAL YEAR 2019 (Feb. 14, 2020), <https://www.uscis.gov/sites/default/files/document/reports/Immigration-Applications-Made-by-Victims-of-Abuse-FY-2019.pdf> [<https://perma.cc/BJ37-EBAF>]. In the early 2000s, only a few hundred T visas were granted each year. SCHACHER, *supra* note 326, at 11. While the numbers of visas granted rose after the TVPA reauthorizations in 2008 and 2013, the grants continue to remain far below the statutory cap of 5,000 each year. *Id.*

³²⁹ *Id.*

³³⁰ 8 U.S.C. § 1101(a)(15)(T)(i)(I); 8 U.S.C. § 7102(11). Note that this is a term of art, and is not dependent on the level of severity of the trafficker's actions. Also, this is one of four requirements for a T visa. 8 U.S.C. § 1101(a)(15)(T)(i); 8 CFR § 214.11(b).

the United States “on account of” the trafficking.³³¹ In addition, survivors must comply with “reasonable requests for assistance” from the law enforcement agents investigating and prosecuting their trafficker(s).³³² The law recognizes exceptions to this requirement for children under eighteen and those who are unable to provide assistance due to the effects of trauma.³³³ Finally, survivors must show that they will suffer “extreme hardship involving unusual and severe harm” if forced to return to their country of origin.³³⁴ Recognizing the significant challenges trafficking victims face in reporting this crime and gathering necessary documents, the regulations require USCIS to consider “any credible evidence” filed in support of the T visa application.³³⁵

In revising the T visa regulations in 2016, DHS sought to address several barriers that had previously impeded access to this important form of protection for trafficking survivors.³³⁶ For example, in order to show that he or she is “physically present in the United States on account of” the trafficking, an applicant no longer needs to show the lack of a clear opportunity to depart the United States after escaping his or her traffickers.³³⁷ Instead, pursuant to the 2016 regulations, applicants may submit evidence of the need to remain in the United States as a result of his or her victimization.³³⁸ Moreover, the 2016 regulations clarified that survivors who escaped a trafficker before performing the forced labor or sex for which they were recruited would still qualify for a T visa, if the survivor could establish that the traffickers intended to exploit them before they escaped.³³⁹ In making this change, DHS recognized that “excluding an entire class of potential victims from T nonimmigrant eligibility could thwart the purpose of the visa and hinder prosecutions” and punish victims, and that those results are “illogical and inconsistent with Congressional intent.”³⁴⁰

However, the advances made in the laws on the books were swiftly undermined by USCIS adjudications and DHS policies starting in 2017.³⁴¹ USCIS made it

³³¹ 8 U.S.C. § 1101(a)(15)(T)(i)(II); 8 C.F.R. § 214.11(b)(2).

³³² 8 U.S.C. § 1101(a)(15)(T)(i)(III); 8 C.F.R. § 214.11(b)(3).

³³³ 8 U.S.C. § 1101(a)(15)(T)(i)(III)(bb)-(cc); 8 CFR § 214.11(b)(3)(i)-(ii).

³³⁴ 8 U.S.C. § 1101(a)(15)(T)(i)(IV); 8 CFR § 214.11(b)(4).

³³⁵ 8 C.F.R. § 214.11(d)(2)(ii); *see also* DAHLSTROM & GOWAYED, *supra* note 323, at 5 (explaining that this standard “plays a key role to ensure that survivors can access the T visa program without unnecessarily high barriers”) (internal citations omitted).

³³⁶ *See* Classification for Victims of Severe Forms of Trafficking in Persons; Eligibility for “T” Nonimmigrant Status, 81 Fed. Reg. 92,266, 92,297–98 (Dec. 19, 2016) (codified at 8 C.F.R. pt. 212, 214, 245 and 274a).

³³⁷ *Id.* at 92,273.

³³⁸ *Id.*; *see also* SCHACHER, *supra* note 326, at 13.

³³⁹ SCHACHER, *supra* note 326, at 13; 8 CFR 214.11(g)(i); Classification for Victims of Severe Forms of Trafficking in Persons; Eligibility for “T” Nonimmigrant Status, 81 Fed. Reg. at 92,272.

³⁴⁰ Classification for Victims of Severe Forms of Trafficking in Persons; Eligibility for “T” Nonimmigrant Status, 81 Fed. Reg. at 92,271.

³⁴¹ SCHACHER, *supra* note 326, at 16 (noting that “much of the progress made in the

increasingly difficult for survivors to obtain T visas by failing to recognize that “young age, fear, confusion, and trauma can influence the consistency of a victim’s account” and that “victims sometimes find it difficult to discern traffickers’ motives.”³⁴²

T visa denial rates skyrocketed between 2016 and late 2020. The denial rate rose from 19% between October and December 2016 to 26% from January to September 2017.³⁴³ In FY 2018, 35% of T visa applications were denied.³⁴⁴ In the first quarter of FY 2019, USCIS denied 46% of the T visas applications it adjudicated.³⁴⁵ In FY 2020, 42% of T visa applications were denied.³⁴⁶ The increasing rate of denials has disproportionately impacted applicants from El Salvador, Guatemala, Honduras, and Mexico.³⁴⁷ In 2017, for example, USCIS denied T visas to applicants from these 4 countries at a rate of 39%, whereas the rate of denial for applicants from all other countries was 17%.³⁴⁸ In many cases, denials are based upon “new, overly narrow, and harsh interpretations of the standards to meet the definition” of a trafficking victim and apparent ignorance of the regulatory protections promulgated in 2017.³⁴⁹ For example, in 2018, USCIS denied a T visa to a Honduran trafficking victim after finding that his “ongoing posttraumatic stress disorder was not significant enough to prove that his continued presence in the United States was on account of” the trafficking that caused him to suffer PTSD.³⁵⁰

The restrictive immigration policies discussed above not only harm already-vulnerable individuals, but also impede the nation’s ability to fully prevent and combat human trafficking.

D. How Restrictive Immigration Policies Violate the Duty to Prevent Trafficking and Harm Trafficking Victims

Experts on human trafficking have criticized the criminalization of migration in the United States, as it adversely impacts individuals in need of protection,

previous decade toward a victims-centered approach to trafficking has been reversed” since 2017).

³⁴² *Id.* at 18.

³⁴³ *Id.*

³⁴⁴ *Id.*

³⁴⁵ *Id.*

³⁴⁶ DAHLSTROM & GOWAYED, *supra* note 323, at 9.

³⁴⁷ SCHACHER, *supra* note 326, at 18.

³⁴⁸ *Id.*

³⁴⁹ *Id.* at 19; *see also* DAHLSTROM & GOWAYED, *supra* note 323, at 9–11, 13–15 (discussing legal barriers to obtaining T visa status as reported by legal advocates for immigrant survivors of trafficking); *id.* at 17–19 (analyzing DHS data relating to T visa adjudication trends from 2014 to 2020); *id.* at 20 (finding “evidence of elongated waiting times; rising evidentiary requests, denials, rejections; and a real and present fear of deportation”).

³⁵⁰ SCHACHER, *supra* note 326, at 19 (citing Matter of E-E-H-P-, 2018 Immig. Rptr. LEXIS 4461 (Mar. 1, 2018) (nonprecedential)).

including trafficking victims.³⁵¹ This course must be changed, and more opportunities for safe and legal migration must be created if the United States is to meet its duty to prevent human trafficking.³⁵²

The asylum officers' union has decried the MPP, discussed above, as “fundamentally contrary to the moral fabric of our nation and our international and domestic legal obligations.”³⁵³ While both the INA and treaties such as the Refugee Convention, the Protocol Relating to the Status of Refugees, and the Convention Against Torture prohibit the United States from returning individuals to a country where they would face persecution or torture, Title 42 and other restrictive immigration policies lead border officials to violate these obligations.³⁵⁴ In addition, fast-track removals and attempts to exclude noncitizens without inquiry into their reasons for seeking entry implicate other international obligations, including the duty to prevent human trafficking, identify trafficking victims, and punish human traffickers.³⁵⁵

Asylum-seekers and other migrants at the U.S.-Mexico border face inherently precarious conditions. As noncitizens in a highly dangerous region, they are particularly vulnerable to a variety of crimes, including, but not limited to, human trafficking.³⁵⁶ Expulsions of vulnerable migrants due to Title 42 and its predecessor policies not only fail to identify individuals at risk of trafficking, but actively place them in harm's way.³⁵⁷ As Josiah Heyman and Jeremy Slack explain, the areas around the Mexican-side ports of entry “increase the vulnerability and exploitability of non-Mexican migrants with little knowledge and few resources.”³⁵⁸ Moreover,

³⁵¹ See, e.g., Giammarinaro, 2017 *Trafficking in Persons*, *supra* note 10, at 17 (“Current immigration practices focus on criminalizing, returning or banning certain nationals from entering the country rather than on protecting irregular migrants—both adults and children—including potential victims of trafficking”).

³⁵² *Id.* (recommending that “more opportunities for safe migration, namely legal, gainful and non-exploitative migration, are needed if the United States is to effectively address the demand for cheap and exploitable labour and fulfil its obligations to respect, protect and promote the rights of all workers, including migrants, and prevent trafficking in persons”).

³⁵³ Brief for Local 1924 as Amici Curiae Supporting Plaintiff-Appellees' at 24, *Innovation L. Lab v. McAleenan* (9th Cir. 2019) (No. 19-15716); see also *US: Investigate 'Remain in Mexico' Program*, HUM. RTS. WATCH (June 2, 2020, 10:00 AM), <https://www.hrw.org/news/2020/06/02/us-investigate-remain-mexico-program#> [<https://perma.cc/4JJG-5LX8>].

³⁵⁴ See discussion *supra* Part II.C.1.

³⁵⁵ See, e.g., GALLAGHER, *supra* note 24, at 276.

³⁵⁶ Josiah Heyman & Jeremy Slack, *Blockading Asylum Seekers at Ports of Entry at the US-Mexico Border Puts Them at Increased Risk of Exploitation, Violence, and Death*, CTR. FOR MIGRATION STUD., (June 25, 2018), <http://cmsny.org/publications/heyman-slack-asylum-poe> [<https://perma.cc/ANL4-BN6Y>] (“[B]y turning away vulnerable people at the border, US authorities seriously worsen the risks they face.”).

³⁵⁷ *Id.* (describing the “high level of death, violence, and criminal exploitation” in the northern Mexican border region where many asylum-seekers have been forced to stay).

³⁵⁸ *Id.*

migrant shelters in these areas, “as sites filled with exploitable, vulnerable people . . . can become targets for kidnapping, criminal recruitment, trafficking, domination, and violence.”³⁵⁹ Migrants in Mexico are particularly vulnerable to kidnapping, which, “serves a number of criminal purposes” and “is a key stage in the human trafficking process.”³⁶⁰

By criminalizing all migrants who lack proper entry documents, no distinction is drawn between trafficker and trafficking victim. As multiple scholars and advocates have recognized, the process of identifying victims and even determining whether a situation amounts to trafficking “is notoriously complex and time-consuming.”³⁶¹ Where the trafficking victim is criminalized, prosecuted, and deported based on nothing more than his or her manner of entry, the State is likely to fail in a number of obligations it owes to victims, including the general obligation to identify victims, the non-punishment principle, the obligation to provide protection and support, and the duty to ensure that return to the noncitizen’s country of origin is safe and voluntary.³⁶²

Laws and policies that provide for fast-track deportations, like “Zero Tolerance,” “Operation Streamline,” and expedited removal impede efforts to prevent trafficking in multiple ways. By expending law enforcement resources on non-violent immigration status crimes, such policies limit the available resources to fight violent crimes such as human trafficking. As discussed above, immigration status offenses have long been the most prosecuted crimes at the federal level.³⁶³ However, this phenomenon has largely been a creature of the late twentieth and early twenty-first centuries. New policies that force prosecutors to prioritize charging these types of offenses necessarily means that fewer resources will be allocated to the much more difficult task of distinguishing between migrants who are *victims* of human trafficking and those who are *perpetrators* of this crime. Instead, victims are much more likely to be criminalized, making it much less likely that they will be willing to trust law enforcement officers tasked with screening for human trafficking.³⁶⁴ Once prosecuted, through fast-tracked procedures, it is much easier for victims to be deported and placed back into the hands of their traffickers, rendering them vulnerable to further exploitation and abuse. In addition, the fear of deportation and lack of awareness of their rights will cause many victims to continue to be exploited by their traffickers.

³⁵⁹ *Id.*

³⁶⁰ *Id.*

³⁶¹ GALLAGHER, *supra* note 24, at 277.

³⁶² *Id.* at 276.

³⁶³ See discussion *supra* Part II.B.1.

³⁶⁴ While the focus here is on adult victims of labor trafficking, a parallel challenge exists in the identification and protection of sex trafficking victims, who, too often, are criminalized as prostituted women. See, e.g., Cynthia Godsoe, *Punishment as Protection*, 52 HOUS. L. REV. 1313, 1314 (2015) (explaining that the criminalization of prostituted girls “punish[es] the victims and fail[s] to pursue the real offenders,” thus “ignor[ing], even normaliz[ing] the commercial sexual exploitation of children”).

Moreover, immigration policies focused primarily on detention and removal erode trust between human trafficking victims and law enforcement agents (including prosecutors). A mindset that criminalizes all immigrants makes it far less likely that victims of human trafficking will be properly identified.³⁶⁵ A frequent tool of coercion used by traffickers is to exploit non-immigrants' fears of immigration agents.³⁶⁶ Traffickers threaten to have their victims deported or threaten harm to their victims' family members should the victim turn to the police for help.³⁶⁷ And law enforcement officials who are trained to see immigration status violations as a priority for prosecution will not look beneath the surface to see if the alleged perpetrator of that crime is actually a victim of human trafficking.³⁶⁸

Additionally, rhetoric that criminalizes migrants may make non-governmental partners in the fight against trafficking more hesitant to turn to law enforcement for help where the victim is undocumented, due to the serious risk of enforcement actions being taken against the victim or failure of law enforcement to take necessary steps to protect the victim from traffickers. Indeed, a recent report from Boston University's Immigrants' Rights and Human Trafficking Program highlights the "real harm that comes from policies that expose T visa applicants to greater risk of deportation."³⁶⁹ In addition, law enforcement officials at the state and local level may find it more difficult to identify key strategic partners to help prevent trafficking where rhetoric sows distrust of immigration attorneys³⁷⁰ and others seeking to assist migrants at or near the border.

Finally, the underutilization of the T visa (and other forms of immigration relief designed to protect trafficking victims) signals the failure to properly identify victims of trafficking. The problem is compounded where T visas are wrongfully denied, as discussed above.³⁷¹ This renders the victim subject to deportation and once again potential prey to trafficking and other forms of abuse.

To break the cycle, advocates and policy-makers need to envision a new path forward that fully embraces the basic humanity and human rights of those seeking refuge in the United States.

³⁶⁵ See Shea M. Rhodes & Gina Dietz, *Trauma and the Trafficking Victim: A Barrier to Assistance*, 34 DEL. LAW. 18, 19 (2016) (explaining how traffickers "deliberately instill fear of law enforcement in their victims in several ways").

³⁶⁶ See Smith, *supra* note 18, at 506.

³⁶⁷ *Id.*

³⁶⁸ *Id.* at 511–14.

³⁶⁹ DAHLSTROM & GOWAYED, *supra* note 323, at 20.

³⁷⁰ See, e.g., Tal Kopan, *Sessions Criticizes Immigrants' Attorneys before Immigration Judges*, CNN, (Sept. 10, 2018, 4:39 PM), <https://www.cnn.com/2018/09/10/politics/sessions-immigration-judges> [<https://perma.cc/VH2E-MVMW>].

³⁷¹ See discussion *supra* Part II.C.2.

III. OPPORTUNITIES AND CHALLENGES FOR CURRENT AND FUTURE ADMINISTRATIONS

Where any state fails in its due diligence duty to prevent trafficking, international law demands it provide an effective remedy for victims.³⁷² Constructing such a remedy, however, can be particularly challenging when victims are “hidden in plain sight,” deported to a country where they are placed back into the hands of traffickers, or otherwise rendered vulnerable to further exploitation of abuse. This Part outlines potential remedies for victims that would comport with international law. Section A examines how improving data collection is necessary to better combat and prevent human trafficking. Building upon this suggestion, Section B discusses the importance of re-assessing training for those individuals in the legal system likely to encounter noncitizens who have been or are at risk of being trafficked. With these considerations in mind, Section C proposes reforms aimed at protecting basic human rights, including restoring the right to asylum and decriminalizing the migration process. Finally, in Section D, I encourage evaluation of longer-term, legislative solutions grounded in a human rights framework. All of these proposals bear in mind that, in the human trafficking context, remedies “should have ‘transformative potential,’ [sic] meaning they should not be about returning individuals to the pre-trafficking context, but should ‘subvert instead of reinforce pre-existing patterns’ that cause violations.”³⁷³

³⁷² See Int’l L. Comm’n., *Draft Articles on-Responsibility of States for Internationally Wrongful Acts, with Commentaries*, 2 YEARBOOK OF THE INT’L L. COMM’N 31 (2001) http://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf [<https://perma.cc/7Z58-JAEW>].

³⁷³ Giammarinaro, 2015 *Trafficking in Persons*, *supra* note 81, at 17; *see also* Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *General Comment No. 3*, U.N. Doc. CAT/C/GC/3 (2012); Joy Ngozi Ezeilo (Special Rapporteur), *Trafficking in Persons, Especially Women and Children*, U.N. Doc. A/HRC/17/35 (Apr. 13, 2011); Off. Of the U.N. High Comm’r for Hum. Rts., *Preventing and Eliminating Child, Early and Forced Marriage*, U.N. Doc. A/HRC/26 (Apr. 2, 2014); Rashida Manjoo (Special Rapporteur), *Violence Against Women, Its Causes and Consequences*, U.N. Doc. A/HRC/23/49 (May 14, 2013).

A. Improving Methods for Collecting, Centralizing, and Disseminating Accurate Data About the Prevalence of Human Trafficking

One of the major challenges to combatting trafficking is the dearth of accurate, centralized data about the prevalence of trafficking.³⁷⁴ Such data collection could serve to increase awareness about the dynamics and identification of human trafficking, including its intersection with asylum law.

Scholars, advocates, and governments have long discussed the importance of accurate data, and the lack thereof, in efforts to combat human trafficking. As discussed above, the UT-Austin study on trafficking in Texas exhibited the importance of providing empirically grounded data in the fight against human trafficking, as estimates of the scope of the problem based on calls to the National Human Trafficking Hotline or data from the Texas Human Trafficking Prevention Task Force paled in comparison to the data gathered by this comprehensive study.³⁷⁵ Federal agencies in the United States recognize both the importance of collecting accurate data in the fight against trafficking and the challenge of coordinating data collection to better serve victims.³⁷⁶ However, as Karen Bravo explains, more data is needed to understand *why* we are failing to identify victims.³⁷⁷ The 2022 Boston University report discussed above provides critical information about barriers that noncitizen survivors of trafficking face in accessing the T visa, and lends insight about why these survivors remain hidden.³⁷⁸ As explained there, the requirement that noncitizen survivors must prove cooperation with law enforcement to receive a T visa prevents some survivors from seeking protection, particularly where the fear of deportation or other harm looms.³⁷⁹ Where these survivors “are met with denial [of the T visa] or the threat of deportation, fewer will come forward, and the T visa program will remain underutilized.”³⁸⁰ Additional information is needed, though, on how potential trafficking victims are identified, what resources are provided to the survivor at that point, and the barriers that exist to identification. In addition, more information is needed about those individuals who are prosecuted for immigration status crimes, but may be victims of human trafficking. While the Abolish Human Trafficking Act required DHS to take additional measures to screen for victims of

³⁷⁴ See, e.g., Giammarinaro, 2017 *Trafficking in Persons*, *supra* note 10, at 1, 17 (explaining the “dearth of data on trafficking . . . inhibits the understanding of the extent and prevalence of trafficking in the country” and noting “the lack of comprehensive and centralized statistics with common indicators and disaggregated information makes it a challenge” to properly understanding the scope of trafficking in the US and consequently to developing “targeted prevention action”).

³⁷⁵ See BUSCH-ARMENDARIZ ET AL., *supra* note 28, at 19.

³⁷⁶ See, e.g., U.S. DEP’T OF HEALTH AND HUM. SERVS., OFF. ON TRAFFICKING IN PERS., HUMAN TRAFFICKING DATA COLLECTION PROJECT, <https://www.acf.hhs.gov/otip/research-policy/data-collection> [<https://perma.cc/TX6U-7JPA>] (last updated Sep. 9, 2019).

³⁷⁷ Bravo, *supra* note 42, at 108–09.

³⁷⁸ DAHLSTROM & GOWAYED, *supra* note 323.

³⁷⁹ *Id.* at 20.

³⁸⁰ *Id.*

trafficking,³⁸¹ data about the results of the screening measures would help clarify gaps in protection. DHS should be required to publicly report the number of screenings conducted pursuant to the Abolish Human Trafficking Act, which includes a breakdown of screenings conducted by each DHS component.³⁸²

Once such data is gathered, the information can be used to re-assess how actors in the legal system, including judges, attorneys, and law enforcement officers, are trained to identify and prevent human trafficking.

B. Re-Assessing Training for Law Enforcement, Attorneys, and Judges

While DHS, through its Blue Campaign, has long recognized the importance of a “victim-centered approach” in the fight against trafficking and regularly trains law enforcement officers around the globe, such efforts have failed to slow the spread of human trafficking.³⁸³ Part of the problem in training is the lack of data that accurately captures the scope of trafficking in the United States and the disaggregation of statistics related to human trafficking.³⁸⁴ Thus, the first step in developing improved training should be to improve data collection, aggregation, and dissemination around the prevalence of trafficking and the factors that prevent identification of this crime.³⁸⁵ Such data collection could serve to increase awareness about the dynamics and identification of human trafficking, including its intersection with asylum law.

Moreover, substantive review and critical assessment of current policies are required as a matter of due diligence in the fight against trafficking.³⁸⁶ At least some components of DHS appear to recognize the importance of assessment in efforts to prevent human trafficking.³⁸⁷ The challenge, though, will be to ensure that its actions match its words, across all DHS components.

DHS recognizes that USCIS is a key component in the fight against trafficking. However, DHS seems to view USCIS’s role as limited to the adjudication of T and

³⁸¹ See *supra* notes 120–122 and accompanying text.

³⁸² Such data, should, of course, protect the confidentiality of the individuals screened.

³⁸³ See Bravo, *supra* note 42, at 126–27.

³⁸⁴ See FARRELL ET AL., *supra* note 46, at 13–15; see also *supra* Part III.A.

³⁸⁵ See *supra* Part III.A; see also Giammarinaro, 2017 *Trafficking in Persons*, *supra* note 10, at 1 (explaining the “dearth of data on trafficking . . . inhibits the understanding of the extent and prevalence of trafficking in the country”) and 17 (noting “the lack of comprehensive and centralized statistics with common indicators and disaggregated information remains a challenge” to properly understanding the scope of trafficking in the US and consequently to developing “targeted prevention action”).

³⁸⁶ See, e.g., Giammarinaro, 2015 *Trafficking in Persons*, *supra* note 81, at 10 (“States are also required to undertake substantive review and assessment policies to test results and effectiveness, including whether they are taking appropriate measures to ensure the human rights of trafficked persons.”).

³⁸⁷ DHS STRATEGY, *supra* note 5, at 9 (“DHS will assess its current prevention initiatives and determine areas for growth and improvement. The assessment will leverage research on effective prevention programming and evaluate the effectiveness of DHS’s current initiatives, as well as opportunities to harmonize and de-conflict approaches with other prevention efforts within the Federal Government . . .”).

U visas.³⁸⁸ To more effectively prevent trafficking and better identify potential victims, DHS should include training on human trafficking indicators for asylum officers who are responsible for conducting credible fear interviews at the border, and mandate that these officers screen for such indicators. Such training should be adopted as part of revisions to 8 CFR Parts 1003, 1208, and 1235. It is critical that asylum officers (and other border officials, including ICE and CBP officers) have the tools necessary to gain the trust of potential victims and therefore better identify when trafficking is occurring. Such trust will be nearly impossible to gain, though, if potential victims continue to be held in detention facilities in inhumane conditions. Therefore, strengthening partnerships with community organizations at the border will be critical to properly training DHS officials and more effectively combatting trafficking.³⁸⁹

To accurately identify trafficking and protect victims, training for immigration agents, attorneys, and judges must include components that address the roles that racial- and gender-based discrimination play in rendering individuals vulnerable to exploitation.³⁹⁰ This will require a hard look at the immigration laws and policies determining who is allowed to enter the country and therefore must be a protracted effort. Trainers, therefore, should be willing to address the history of racism in the immigration laws and should have expertise on anti-racist principles.³⁹¹ This is important, for example, in ensuring an accurate understanding, and better implementation, of the non-punishment principle. Such training would also recognize the particular vulnerabilities of migrants of color, particularly women and children.

In addition, while a victim-centered and trauma-informed approach has long been touted by the United States in its anti-trafficking efforts,³⁹² much more needs to be done to make the rhetoric match reality. The idea that various legal systems should be trauma-informed is relatively new.³⁹³ At a basic level, being trauma informed means realizing that the vast majority of people that legal systems

³⁸⁸ *See id.* at 30.

³⁸⁹ Indeed, DHS itself appears to recognize the importance of such partnerships. *See id.* at 18 (“Diversity of perspective and expertise enables better investigations, and widening the backgrounds of those who participate on human trafficking task forces, such as including [CBP’s] participation on task forces near the U.S. southern and northern borders, may improve outcomes.”).

³⁹⁰ *See supra* Part I.D.

³⁹¹ *See supra* note 77 and accompanying text; *see also* 2018 TIP REPORT, *supra* note 5, at 3 (recognizing racism as a root cause of trafficking); Smith, *supra* note 18, at 508 (explaining that the “racism deeply embedded in our institutions, including in law enforcement, likely makes some labor trafficking victims and witnesses more reluctant to interact with law enforcement in any capacity”).

³⁹² *See, e.g., supra* Part I.F.

³⁹³ *See* Melanie Randall & Lori Haskell, *Trauma-Informed Approaches to Law: Why Restorative Justice Must Understand Trauma and Psychological Coping*, 36 DALHOUSIE L.J. 501 (2013).

encounter have trauma histories³⁹⁴ and acknowledging that legal systems in themselves often induce or exaggerate trauma. In addition, truly trauma-informed systems “avoid retraumatizing people through authoritarian or ‘power over’ relationships, or by challenging clients to change in daunting or demanding ways.”³⁹⁵ Trauma-informed initiatives, therefore, seek to explore how to best implement policies and practices throughout organizations and even entire legal systems that help both individuals, and ultimately communities, heal from violence.³⁹⁶

While implementing a truly trauma-informed approach across DHS will require significant reforms to the current immigration enforcement system, it is also consistent with legal obligations that prohibit the use of civil immigration detention as a deterrent or punishment³⁹⁷ as well as with the non-punishment principle.³⁹⁸ The next Section addresses possible ways of making this approach a reality.

C. Restoring the Right to Seek Asylum and Decarcerating Immigration Enforcement

In its first 100 days, the Biden administration rolled back some of the harshest of the Trump-era policies.³⁹⁹ These actions included a string of executive orders that ended the Trump travel bans, reversed the Trump administration’s immigration enforcement priorities, ordered a temporary halt to removals, and halted border wall

³⁹⁴ See Linda Rosenberg, *We Must Do More*, NAT’L COUNCIL MAG., no. 2, 2011, at 8, https://www.thenationalcouncil.org/wp-content/uploads/2021/04/NC_Mag_Trauma_Web-Email.pdf [<https://perma.cc/Y7FD-8LEQ>]; see also Aschenbrenner, *supra* note 315, at 75.

³⁹⁵ CENTRE FOR ADDICTION AND MENTAL HEALTH, BECOMING TRAUMA-INFORMED xx (Nancy Poole & Lorraine Greaves eds., 2012).

³⁹⁶ See SAHMA’S TRAUMA AND JUSTICE STRATEGIC INITIATIVE, SAMHSA’S CONCEPT OF TRAUMA AND GUIDANCE FOR A TRAUMA-INFORMED APPROACH 9–13 (2014), https://ncsacw.samhsa.gov/userfiles/files/SAMHSA_Trauma.pdf [<https://perma.cc/G7P7-BLKT>].

³⁹⁷ See *Zadvydas v. Davis*, 533 U.S. 678, 690 (2001) (explaining government detention violates due process “unless the detention is ordered in a criminal proceeding with adequate procedural protections. . . or, in certain special and ‘narrow’ non-punitive ‘circumstances’”); Convention Relating to the Status of Refugees art. 31, Apr. 22, 1954, 189 U.N.T.S. 137, <https://www.ohchr.org/sites/default/files/refugees.pdf> [<https://perma.cc/ET6P-TNH4>]; U.N. HIGH COMM’R FOR REFUGEES, GUIDELINES ON THE APPLICABLE CRITERIA AND STANDARDS RELATING TO THE DETENTION OF ASYLUM-SEEKERS AND ALTERNATIVES TO DETENTION 19 (2012), <https://www.unhcr.org/en-us/publications/legal/505b10ee9/unhcr-detention-guidelines.html> [<https://perma.cc/ZUH9-23KE>] (stating immigration “detention is not justified as a penalty for illegal entry and/or as a deterrent to seeking asylum”).

³⁹⁸ See *supra* note 362 and accompanying text.

³⁹⁹ See JORGE LOWEREE & AARON REICHLIN-MELNICK, AM. IMMIGR. COUNCIL, TRACKING THE BIDEN AGENDA ON IMMIGRATION ENFORCEMENT, https://www.americanimmigrationcouncil.org/sites/default/files/research/tracking_the_biden_agenda_on_immigration_enforcement_0.pdf [<https://perma.cc/E9S7-G7PN>].

construction, among other actions.⁴⁰⁰ In his first month in office, President Biden issued eight separate executive actions related to immigration and outlined his vision for comprehensive immigration reform.⁴⁰¹

In addition, in late August 2021, the Biden administration proposed a new rule that would make significant changes to the asylum system, in the hopes of ensuring more efficient processing of asylum claims.⁴⁰² At the time, roughly 610,000 asylum applications were pending in the immigration courts, and, on average, a noncitizen could expect to wait nearly four years before the court completed its adjudication.⁴⁰³ After receiving 5,235 public comments, USCIS issued an interim final rule in March 2022.⁴⁰⁴ The new rule aims to decrease the workload of immigration judges and provides additional protections to asylum-seekers in a few key ways. First, the rule reimposes the longstanding “significant possibility” screening standard to credible fear screenings, and extends this standard not only to initial screenings for asylum, but also to the initial screenings for withholding of removal and protection under the Convention Against Torture.⁴⁰⁵ Second, the rule gives USCIS Asylum Officers, rather than Immigration Judges, the authority to adjudicate asylum applications of migrants who have passed the credible fear screening in the first instance.⁴⁰⁶ This shift is significant because these officers receive special training with regard to U.S. and international obligations regarding asylum, and the USCIS proceedings are non-adversarial.⁴⁰⁷ Finally, the new rule treats a positive credible fear determination as

⁴⁰⁰ See *id.*; see also John Hudak & Christine Stenglein, *Biden’s Immigration Reset*, BROOKINGS INST. (Feb. 19, 2021), <https://www.brookings.edu/blog/fixgov/2021/02/19/bidens-immigration-reset/> [<https://perma.cc/YTG9-WPDS>].

⁴⁰¹ Hudak & Stenglein, *supra* note 400.

⁴⁰² Procedures for Credible Fear Screening and Consideration of Asylum, Withholding of Removal, and CAT Protection Claims by Asylum Officers, 86 Fed. Reg. 46,906 (Aug. 20, 2021) (to be codified at 8 C.F.R. pts. 208, 235); see also Doris Meissner, *Biden Administration Asylum Processing Revamp at the U.S. Border Could be a Game Changer*, MIGRATION POL’Y INST. (Aug. 2021), <https://www.migrationpolicy.org/news/biden-asylum-processing-proposed-rule> [<https://perma.cc/45DF-YMKM>].

⁴⁰³ Procedures for Credible Fear Screening and Consideration of Asylum, 86 Fed. Reg. at 46908–09.

⁴⁰⁴ Procedures for Credible Fear Screening and Consideration of Asylum, Withholding of Removal, and CAT Protection Claims by Asylum Officers, 87 Fed. Reg. 18078, 18109 (Mar. 29, 2022) (to be codified at 8 C.F.R. pt. 208, 212, and 235) [hereinafter Final Asylum Processing Rule]; see also *Fact Sheet: Implementation of the Credible Fear and Asylum Processing Interim Final Rule*, U.S. CITIZENSHIP & IMMIGR. SERVS. (Aug. 11, 2022), <https://www.uscis.gov/humanitarian/refugees-and-asylum/asylum/fact-sheet-implementation-of-the-credible-fear-and-asylum-processing-interim-final-rule> [<https://perma.cc/7QB6-EH2H>].

⁴⁰⁵ Final Asylum Processing Rule, 87 Fed. Reg. at 18130; see also 8 C.F.R. § 208.30(e)(2)–(3).

⁴⁰⁶ Final Asylum Processing Rule, 87 Fed. Reg. at 18147–48; 8 C.F.R. § 208.9(a).

⁴⁰⁷ Final Asylum Processing Rule, 87 Fed. Reg. at 18147; see also *Human Rights First Expresses Concern on Some Proposed Asylum Changes*, HUM. RTS. FIRST (Sept. 19, 2022),

an application for asylum.⁴⁰⁸ This change is significant, because it helps ensure that the applicant meets the one-year filing deadline and starts the clock for work authorization eligibility.⁴⁰⁹

However, the rule imposes other changes that risk depriving migrants of a full and fair hearing and fail to address the problems identified in the previous Part of this Article, in the name of expediting procedures.⁴¹⁰ Specifically, the rule compresses the timeline for submitting evidence and preparing for hearings, making it “nearly impossible to obtain legal representation.”⁴¹¹ The due process concerns are heightened where asylum seekers are detained during these proceedings. The rule, while allowing parole of these individuals, permits their detention by retaining the “longstanding parole standard” authorizing release only on a “case-by-case basis for urgent humanitarian reasons or significant public benefit.”⁴¹² The concerns here are the same as those that have been repeatedly raised in the context of the fast-track removal procedures discussed above.⁴¹³

Additional measures could be implemented to better protect those asylum seekers who have been trafficked or may be vulnerable to trafficking within the United States. For example, Asylum Officers could conduct screenings as part of the adjudication process to determine whether an applicant has been the victim of human trafficking or other crime. This initial review, in non-adversarial proceedings, would help ensure that such victims are not wrongfully issued an order of removal.

While the asylum processing rule and President Biden’s executive actions are significant steps forward, they cannot in themselves change the reality on the ground. The Trump administration made more than 1,000 changes to immigration policy.⁴¹⁴ The Biden administration, as of September 2022, attempted to revise or revoke more than 60 of those changes.⁴¹⁵ Moreover, despite an effort by the Biden administration to revoke Title 42 in April 2022, the policy remains in effect at the

<https://humanrightsfirst.org/library/human-rights-first-expresses-concern-on-some-proposed-asylum-changes/> [<https://perma.cc/WK9H-8RAA>] (welcoming efforts to “allow asylum seekers to present their claims in a less traumatizing, non-adversarial setting” but criticizing other aspects of the rule that “weaken due process protections” for those seeking asylum).

⁴⁰⁸ Final Asylum Processing Rule, 87 Fed. Reg. at 18085, 18136–37; 8 C.F.R. § 208.3(a)(2).

⁴⁰⁹ Final Asylum Processing Rule, 87 Fed. Reg. at 18085.

⁴¹⁰ See *New Asylum Rule Sacrifices Justice in the Name of Speed*, CTR. FOR GENDER & REFUGEE STUD. (Mar. 24, 2022), <https://cgrs.uchastings.edu/news/new-asylum-rule-sacrifices-justice-name-speed> [<https://perma.cc/GE7P-S52L>].

⁴¹¹ *Id.* (quoting CGRS Director Karen Musalo).

⁴¹² Final Asylum Processing Rule, 87 Fed. Reg. at 18107; 8 C.F.R. § 212.5(b). The proposed rule would have authorized parole where detention was “unavailable or impracticable” but the final rule instead uses a standard that is more familiar to immigration officers. 87 Fed. Reg. at 18107.

⁴¹³ See *supra* Part II.B and II.D.

⁴¹⁴ *1,047 Trump-Era Immigration Policies (and Their Current Status)*, IMMIGR. POL’Y TRACKING PROJECT, <https://immipolicytracking.org/home/> [<https://perma.cc/NQV4-YC5E>] (last visited Oct. 9, 2022).

⁴¹⁵ *Id.*

time of writing due to litigation.⁴¹⁶ Because the Trump administration “completely gutted” systems designed to protect migrants, restoring those systems will take concerted effort over the next several years.⁴¹⁷ Additionally, bringing immigration laws into alignment with the obligation to prevent trafficking and protect victims will require a fundamental narrative shift aimed at decriminalizing and decarcerating immigration enforcement and recognizing the basic humanity of those seeking refuge in the United States.

The United States will never be able to meet its goal of ending human trafficking if its immigration laws and policies continue to prioritize detention and removal over victim identification.⁴¹⁸ Such policies erode trust in public officials and thus interfere with both the right to seek asylum and the stated goal of ending trafficking. If the United States truly cares about protecting and identifying potential victims of trafficking, “any policy idea premised on the security of migrants in Mexico should be abandoned.”⁴¹⁹ This calls for an end to all policies that exacerbate migrant vulnerabilities and lead to the unnecessary and harmful criminalization and detention of potential victims of trafficking.⁴²⁰ More broadly, this calls for the United States to carefully re-examine the course it has followed in its immigration laws and enforcement policies for the last twenty years if it is truly to find an approach to combatting human trafficking that is grounded in human rights and respect for the

⁴¹⁶ See AIC TITLE 42 REPORT, *supra* note 295, at 1–2; Memorandum Ruling at 46–47, *Louisiana v. Ctrs. for Disease Control & Prevention*, No. 6:22-CV-00885 (W.D. La. May 20, 2022). *Supra* note 308.

⁴¹⁷ Sarah Libowsky & Krista Oehlke, *President Biden’s Immigration Executive Actions: A Recap*, LAWFARE BLOG (Mar. 3, 2021, 12:13 PM), <https://www.lawfareblog.com/president-bidens-immigration-executive-actions-recap> [<https://perma.cc/L6QF-6B53>]; see also SCHOENHOLTZ ET. AL., *supra* note 191, at 87–107 (explaining how the Trump administration went “full throttle” in 2020 to “eviscerate” asylum protections in the U.S.).

⁴¹⁸ See Giammarinaro, 2015 *Trafficking in Persons*, *supra* note 81, at 18 (“The rapid and accurate identification of victims of trafficking in persons—as well as being part of a State’s prevention obligation—is also an essential prerequisite to realize the right to a remedy. As such, the detention of victims of trafficking in persons, for example as smuggled or irregular migrants or undocumented migrant workers or as sex workers, *constitutes a failure of this obligation to identify victims and denies them access to an effective remedy.*” (emphasis added) (citing OHCHR RECOMMENDED PRINCIPLES, *supra* note 81)); U.N. Off. on Drugs & Crime, Model Legislative Provisions Against Trafficking in Persons 53 (2020), https://www.unodc.org/documents/human-trafficking/2020/TiP_ModelLegislativeProvisions_Final.pdf [<https://perma.cc/KJ6Y-YKRC>]; U.N. High Comm’r for Hum. Rts., Summary of the Consultations Held on the Draft Basic Principles on the Right to Effective Remedy for Victims of Trafficking in Persons, U.N. Doc. A/HRC/26/18 (May 2, 2014); U.N.: OFF. OF THE HIGH COMMI’R FOR HUM. RTS., RECOMMENDED PRINCIPLES AND GUIDELINES ON HUMAN RIGHTS AND HUMAN TRAFFICKING: COMMENTARY 129 (2010), https://www.ohchr.org/sites/default/files/Documents/Publications/Commentary_Human_Trafficking_en.pdf [<https://perma.cc/HR74-5FUG>].

⁴¹⁹ Heyman & Slack, *supra* note 356.

⁴²⁰ See *supra* Part II.D.

inherent dignity of the victim of trafficking.⁴²¹ This re-examination also requires the United States to recognize the inherent human dignity of each person crossing the border and to confront the racism underlying current immigration laws and policies.⁴²²

As the U.N. Office of the High Commissioner for Human Rights recognizes:

Criminalization and detention of victims of trafficking are important issues because they are often tied to a concurrent or subsequent failure on the part of the State to afford victims the rights to which they are legally entitled under national and international law. For example, criminalization will generally result in the deportation of foreign victims—thereby denying them their right to participate in legal proceedings or to access an effective remedy.⁴²³

As the ABA recognizes: “Trafficking victims are routinely arrested, detained, prosecuted, convicted, and, in some cases, incarcerated or deported, without ever being identified as victims.”⁴²⁴ Laws and policies that fast-track prosecutions for illegal entry and utterly fail to consider individual circumstances increase the likelihood that trafficking victims will be federally prosecuted without being identified as victims.

U.S. law has long demanded that domestic law “ought never to be construed to violate the law of nations if any other possible construction remains.”⁴²⁵ Moreover, the non-punishment principle, which is well-established in the international human rights law of human trafficking, requires that “trafficked persons shall not be detained, charged or prosecuted for the illegality of their entry into or residence in countries of transit and destination, or for their involvement in unlawful activities to the extent that such involvement is a direct consequence of their situation as trafficked persons.”⁴²⁶ A commitment to preventing human trafficking requires the United States to fully and consistently apply this principle. This necessitates an end to policies that criminalize migrants based on the manner in which they enter the country without a full examination of the particular circumstances of their cases.

⁴²¹ *Id.*

⁴²² *See supra* Part I.C.

⁴²³ U.N.: OFF. OF THE HIGH COMMI’R FOR HUM. RTS., FACT SHEET NO. 36: HUMAN RIGHTS AND HUMAN TRAFFICKING 18 (2014), <https://www.ohchr.org/en/publications/fact-sheets/fact-sheet-no-36-human-rights-and-human-trafficking> [https://perma.cc/Y75W-34NJ].

⁴²⁴ A.B.A.: COMMISSION ON DOMESTIC & SEXUAL VIOLENCE, POST-CONVICTION ADVOCACY FOR SURVIVORS OF HUMAN TRAFFICKING: A GUIDE FOR ATTORNEYS 5 (2016), <https://freedomnetworkusa.org/app/uploads/2020/02/survivor-reentry-project-guide-for-attorneys.pdf> [https://perma.cc/HG7B-8J2A].

⁴²⁵ *Murray v. Charming Betsy*, 6 U.S. 64, 118 (1804).

⁴²⁶ *See* Giammarinaro, 2017 *Trafficking in Persons*, *supra* note 10, at 14; OHCHR RECOMMENDED PRINCIPLES *supra* note 81.

Policies aimed primarily at detaining and removing migrants without a careful examination of the reasons for their migration serve to empower traffickers. Trafficking is a crime of power and control over humans. To make any progress in the fight against trafficking, we need policies that match the laws on the books and that match the rhetoric. Ultimately, such policies must be aimed at disempowering traffickers and recognizing the inherent dignity of trafficked people, regardless of gender, color, or migration status.

Policies need to recognize that people migrate for a variety of reasons and having a “one-size-fits-all” policy of detention and deportation will always fail to comply with international and domestic obligations to protect trafficking victims. Instead, policies should allow law enforcement agencies to work in partnership with victims’ advocates, attorneys, and social workers to hear the voices of migrants and recognize that many have been pushed out of their countries by violence and desperation. Absent concerted efforts to protect refugees and other migrants that sense of desperation and lack of choice will continue to fuel trafficking.⁴²⁷

While the Biden administration appears to have recognized the importance of ending the MPP and Title 42, the administration has explicitly stated that its plan to address active MPP cases “does not signal any change to border enforcement.”⁴²⁸ Moreover, because CBP continues to expel migrants pursuant to Title 42, “the southern border remains effectively closed to new asylum seekers.”⁴²⁹ Guidance to ICE on immigration enforcement and removal priorities makes no exception for asylum seekers, victims of human trafficking, or other crime victims. Moreover, DHS does not screen for trafficking among the individuals it returned to Mexico pursuant to Title 42.⁴³⁰ It also remains to be seen to what extent the Biden administration will identify and protect trafficking victims who were wrongfully ensnared by the MPP and Title 42.

⁴²⁷ Siobhán Mullaly (Special Rapporteur), *Trafficking in Persons, Especially Women and Children* ¶ 11, U.N. Doc. A/77/170 (July 15, 2022) (noting that the Special Rapporteur “has repeatedly called upon States to expand opportunities for safe, orderly and regular migration, including through the provision of humanitarian visas” in efforts to combat trafficking); Soltis & Walters, *supra* note 15, at 87 (explaining that the “desperation of many Central Americans to flee their countries of origin, coupled with the US government’s enhanced focus on border control and the criminalization of many forms of migration, has given smuggling networks substantial power over asylum seekers, and has contributed to the growth of an organized criminal industry rampant with exploitation and abuse”); James C. Hathaway, *The Human Rights Quagmire of Human Trafficking*, 49 VA. J. INT’L L. 1, 33–34 (2008) (recognizing that “if those determined to cross [the border] cannot afford the higher prices demanded, they will be more vulnerable to exploitation and even to post-crossing enslavement to repay the smuggling debt”); Chacón, *supra* note 56, at 1612.

⁴²⁸ *Fact Sheet: DHS Announces Process to Address Individuals Outside the United States with Active MPP Cases*, U.S. DEP’T OF HOMELAND SEC. (Feb. 18, 2021), <https://www.dhs.gov/news/2021/02/18/fact-sheet-dhs-announces-process-address-individuals-outside-united-states-active> [<https://perma.cc/7S99-B37E>].

⁴²⁹ Libowsky & Oehlke, *supra* note 417.

⁴³⁰ 2022 TIP REPORT, *supra* note 34, at 579.

The next Section moves from addressing current policies to envisioning longer-term legislative solutions to better identify and protect potential trafficking victims.

D. Enacting Legislative Fixes to Better Protect the Due Process Rights of Asylum Seekers and Potential Trafficking Victims

While the changes to administrative law and presidential rhetoric used by the Biden administration have been necessary, they are only a first step toward fully protecting trafficking victims and preventing the crime. For decades, presidential administrations have relied on the use of executive orders and policy changes in the realm of immigration law, partly due to a failure of Congress to enact comprehensive immigration reform, and partly due to the legacy of the plenary power doctrine.⁴³¹ As a result, actions taken to protect the human rights of migrants in one era can be swiftly revoked by a subsequent administration. While this is problematic in any number of ways, it is particularly dangerous if the United States hopes to ever make its rhetoric surrounding human trafficking prevention match reality.

The immigration laws should more clearly and consistently uphold the right to seek asylum and protect victims of trafficking, who are often traveling without a visa. Both scholars and legislators have recognized the importance of ensuring that a noncitizen seeking entry to the United States has a “meaningful opportunity” to speak to an attorney before being removed—a right of which ICE and CBP have systematically deprived hundreds of thousands of asylum-seekers through current policies.⁴³² However, Congress needs to ensure that the individuals conducting such screenings are fully trained on how to recognize the indicators of human trafficking. Without trauma-informed and victim-centered screenings, it is impossible to determine whether a migrant is a refugee, a human trafficking victim, an economic migrant, or seeking entry for other reasons. Moreover, such screenings must take

⁴³¹ See generally, ADAM B. COX AND CRISTINA M. RODRIGUEZ, *THE PRESIDENT AND IMMIGRATION LAW* (2020).

⁴³² See, e.g., COVID-19 International Response and Recovery Act, S. 3669, 116th Cong., § 231(d)(1) (2020) (proposing to amend 8 U.S.C. § 1157(a) to, among other things, recognize that noncitizens who are seeking entry to avoid persecution or torture are “considered to be engaging in essential travel” and should be “afforded the right to seek asylum”); Access to Counsel Act, H.R. 5581, 116th Cong. (2020) (seeking to amend 8 U.S.C. § 1225 to “clarify the rights of all persons who are held or detained” by the immigration enforcement agencies); Ruthie Epstein & Shaw Drake, *Ban on Attorney Access for Asylum Proceedings in Inhumane CBP Jails Key to Trump’s Attack on Asylum*, ACLU (Feb. 26, 2020), <https://www.aclu.org/news/immigrants-rights/ban-on-attorney-access-for-asylum-proceedings-in-inhumane-cbp-jails-key-to-trumps-attack-on-asylum> [<https://perma.cc/25WQ-HAV7>]; Jennifer Lee Koh, *Waiving Due Process (Goodbye): Stipulated Orders of Removal and the Crisis in Immigration Adjudication*, 91 N.C. L. REV. 475, 495–496 (2013) (explaining that, for detained noncitizens facing removal, “having a lawyer may be one of the most critical factors for prevailing in one’s case” and supporting a “more robust right to counsel” in removal proceedings); Cesar Cuauhtemoc Garcia Hernandez, *Due Process and Immigrant Detainee Prison Transfers: Moving LPRs to Isolated Prisons Violates their Right to Counsel*, 21 BERKELEY LA RAZA L.J. 17 (2011).

place in settings that ensure the privacy of the conversation and, to the greatest extent possible, the freedom and choice of the “covered individual.” Screenings should also promote the immediate release or parole of individuals who pass a credible fear screening, as defined above, rather than returning them to countries where their lives may be in danger. In addition, processes for screening and parole should ensure more robust protection of the right to counsel. As soon as an individual is identified as a potential victim of trafficking through these processes, they should be connected with adequate resources to ensure that they fully understand their rights, have safe housing and other basic needs met, and are adequately protected from their traffickers. In short, this would require ensuring similar protections for adult victims of trafficking as are provided for unaccompanied minors. In this arena, the “partnership” prong of the “4P” approach to fighting trafficking becomes vital.

Moreover, Congress could, and should, take the steps identified above to strengthen the procedural protections afforded to migrants, better identify potential trafficking victims, and lessen the likelihood that trafficking survivors are wrongfully detained or deported. Legislative action would ensure that these protections are enshrined in the immigration laws, rather than subject to executive branch priorities that can change significantly from one administration to the next. As one example of potentially helpful legislative changes, the U.S. Citizenship Act proposed many positive steps which could have helped protect undocumented victims of trafficking.⁴³³ The Biden administration announced the bill on January 20, 2021.⁴³⁴ Subsequently, on February 18, 2021, Senator Bob Menendez and Congresswoman Linda Sanchez introduced the bill to the Senate and House.⁴³⁵ Although never enacted, several provisions of the bill sought to promote the humane treatment of immigrants at the border by requiring alternatives to detention, create a DHS office to investigate abuses by agents, address the root causes of migration (including by expanding refugee and asylum processing in the Western Hemisphere), and open new pathways to legal immigration.⁴³⁶ While efforts like these are laudable, the bill did not explicitly connect its provisions to the duty to provide “comprehensive” policies aimed at fighting human trafficking. At the same time, it seems unlikely that any efforts at “comprehensive” immigration reform will be possible in the near future, given that such efforts have failed multiple times over the past 20 years, most recently in December 2022.⁴³⁷ Because U.S. immigration

⁴³³ S. 348, 117th Cong. (2021); H.R. 1177, 117th Cong. (2021).

⁴³⁴ THE WHITE HOUSE, FACT SHEET: PRESIDENT BIDEN SENDS IMMIGRATION BILL TO CONGRESS AS PART OF HIS COMMITMENT TO MODERNIZE OUR IMMIGRATION SYSTEM (Jan. 20, 2021), <https://www.whitehouse.gov/briefing-room/statements-releases/2021/01/20/fact-sheet-president-biden-sends-immigration-bill-to-congress-as-part-of-his-commitment-to-modernize-our-immigration-system/> [<https://perma.cc/NPD8-MV3F>].

⁴³⁵ S. 348, 117th Cong. (2021); H.R. 1177, 117th Cong. (2021).

⁴³⁶ See *Summary of Key Provisions of the U.S. Citizenship Act*, NAT’L IMMIGR. L. CTR. (Feb. 2021), <https://www.nilc.org/issues/immigration-reform-and-executive-actions/summary-key-provisions-of-usca/> [<https://perma.cc/AK9J-4KH7>].

⁴³⁷ See Steve Benen, *The Rapid Rise and Rapid Fall of a Bipartisan Immigration Deal*,

laws have long diverged from anti-trafficking laws, and given the too-often polarizing and de-humanizing nature of rhetoric surrounding immigration reform, it will likely take sustained effort to enact real, meaningful change that can help those who are simply seeking safety. That effort is critical, though, if we are to shift the narrative around the border to focus on our shared humanity with the men, women, and children most directly impacted by our immigration laws and ensure that foreign-born trafficking victims are properly identified and fully afforded the human rights protections they deserve.

CONCLUSION

An inherent tension underlies the duty to prevent trafficking. On the one hand, nation-states are required to take border control measures aimed at preventing trafficking. At the same time, such measures must respect international obligations toward asylum-seekers and other migrants relating to the free movement of people. In the past twenty years, countries such as the United States have developed increasingly sophisticated systems designed to regulate and restrict the movement of people across borders. However, the same period has seen an increasing disregard for the human rights of the very people who are crossing those borders. In order to fully meet the duty to prevent trafficking, states must come to recognize the importance of involving victims of this crime in the solution, which will never happen if countries demonize all migrants as criminals and traffickers. In short, states that seek to lead the fight against human trafficking need to work with victims (including foreign national victims in the state's territory) and other partners (such as non-governmental organizations and victims' attorneys) to ensure that their rhetoric more closely matches reality.

While the United States consistently lauds the importance of the Palermo Protocol and the TVPA, the country's immigration policies have impeded its ability to identify and protect foreign national victims of trafficking. To adequately address the problem of human trafficking, we must realize that movement is a natural part of the human experience and recognize the basic human rights of migrants. We must also recognize that it is impossible to distinguish, on sight or migration status alone, between a trafficking victim and his or her trafficker. Identifying victims of and preventing this crime requires gaining the trust of individuals who have learned, as a consequence of their victimization, to fear law enforcement officials. Rhetoric that demonizes the migrant and legislation that makes migration a crime only serves to exacerbate that distrust. Ultimately, such rhetoric (as well as laws and policies that amplify this type of rhetoric) only serve to empower the trafficker and those who would profit from others' suffering.

The problem in the fight against trafficking largely is not, nor for several years has it been, the laws that are specifically aimed at this issue, such as the TVPA.

MSNBC: MADDOWBLOG (Dec. 16, 2022, 7:47 AM), <https://www.msnbc.com/rachel-maddow-show/maddowblog/rapid-rise-rapid-fall-bipartisan-immigration-deal-rcna62072> [<https://perma.cc/LF3C-C4HQ>].

Rather, it is the disconnect between laws like the Palermo Protocol and TVPA (which seek to protect victims) and laws aimed at immigration enforcement (which increasingly detain and criminalize migrants, including those seeking humanitarian relief). Since the United States first signed the Palermo Protocol and enacted the TVPA into law, measures aimed at fighting human trafficking have consistently received bipartisan support. Government officials repeatedly recognize the challenges facing victims and tout the need for a “victim-centered approach” to combatting this crime. But immigration policies that imprison huge swaths of migrants and fast-track deportation for unauthorized presence undermine the “victim-centered” rhetoric. Moreover, the perpetuation of the myth of the perfect victim, xenophobic attitudes, and racial and gender inequality prevent us from making our actions match our promises to end modern-day slavery. Only once the United States disentangles its criminal system from its immigration system and respects the inherent dignity of all individuals within its borders—regardless of migration status, color, gender, age, or criminal history—will it truly succeed in its efforts to prevent trafficking.