

RETHINKING INDIRECT VICTIM ELIGIBILITY FOR U NON-IMMIGRANT VISAS TO BETTER PROTECT IMMIGRANT FAMILIES AND COMMUNITIES

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I. INTRODUCTION

Maria and Claudia are first cousins, and their mothers are sisters. Claudia was born in Mexico. She entered the United States illegally with her mother and Maria's mother when she was only a few months old. Maria was born two years later in the United States. The girls have grown up together. Maria was nine years old and Claudia was twelve when they were both sexually assaulted by Claudia's mother's boyfriend. When their mothers discovered what had happened, they immediately reported the crimes to the police and obtained civil protection orders against the boyfriend. As a result of the mothers' actions, a criminal investigation was initiated and the boyfriend was recently convicted and sentenced to prison. Once his sentence is served, it is likely he will be deported from the United States.

The mothers of both girls assisted in the investigation and prosecution of the boyfriend, and have sought medical treatment and counseling for their daughters in order to deal with the traumatic impacts of the assaults. They hope to be able to remain in the United States so that their daughters can stay in school and continue to receive services. They also worry that if they are forced to return to Mexico they will be unable to protect themselves and their daughters from the boyfriend once he has been released from prison.

Claudia is eligible to apply for a special visa, a U visa, for immigrant crime victims who have been substantially harmed by violent crime and are willing to help police investigate and prosecute those crimes. Since Claudia is

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only twelve, she can qualify based on her mother's cooperation with the police on her behalf. Claudia's mother can also be included as a family member on Claudia's U visa petition to obtain legal status herself. The police detective who investigated the sexual abuse signed the U visa application form certifying that Claudia was a crime victim and that her mother had assisted the police with their investigation. If Claudia's petition is approved, a U visa will allow Claudia and her mother to remain in the United States, to work legally, and to eventually apply for lawful permanent resident status.

Maria and her mother are not so lucky. Because Maria is a U.S. citizen, she is not eligible to apply for a U visa herself. Her mother, therefore, is ineligible to apply for legal status as a family member. In order for Maria's mother to be able to qualify, she must apply as an "indirect victim" of the sexual assault against Maria. In order to be eligible as an indirect victim, she must show that she has been substantially harmed by the crime against Maria, in addition to showing that she has cooperated in the investigation or prosecution of that crime. When Maria's mother asked the same police detective to sign the U visa form in her name certifying that she was a crime victim and had assisted with the investigation of the crime, the detective refused, telling her he could not sign because she was not the victim. Without that certification, Maria's mother cannot be granted a U visa. Unlike Claudia's mother, she must convince the police department and the immigration service that she is herself a crime victim in order to get relief. Because her daughter is a U.S. citizen, it is not enough for her to report the crime, cooperate with police, and be a source of strength and support to her young daughter. And if Maria's mother cannot prove that she too has suffered substantial harm, regardless of the terrible harm suffered by Maria and the family's cooperation with law enforcement, she will be ineligible for a U visa and will be unable to remain legally in the United States with her U.S. citizen daughter.

The story of Maria and Claudia and their mothers is not unique.¹ It is one of countless similar stories of families trying to navigate their way through the uncertain statutory and regulatory maze of the U non-immigrant visa, or as it is commonly known, the "U visa." Congress created the U visa in 2000 in order to encourage non-citizen crime victims to report crimes and to cooperate with law enforcement agencies in the investigation and prosecution of the crimes.² Immigrant victims of domestic abuse and other crime are particularly vulnerable in both the criminal justice and immigration systems. Uncertainty as to their immigration status, coupled with fear of removal and resulting

1. Maria and Claudia are fictional characters whose stories are representative of the real experiences and stories of any number of real immigrant families.

2. See Victims of Trafficking and Violence Prevention Act of 2000, Pub. L. No. 106-386, § 1513(a)(2)(A), 114 Stat. 1464, 1533 (codified as amended at 8 U.S.C. § 1101 note (2006)).

separation from family and support networks, frequently make immigrant crime victims reluctant to report their attackers to authorities or to seek medical treatment or other social services.³ In recent years, as state and local governments and even private vigilante groups have taken on a more active, even if not necessarily authorized, role in the enforcement of federal immigration laws, unauthorized immigrant crime victims or other crime victims living with an unauthorized immigrant family member have become even more afraid to come into contact with law enforcement or government agencies.⁴ In many communities, immigrant families have been targeted by criminals who exploit their fear of detection and removal, confident that their victims will not report the crimes.⁵

In creating the U visa, Congress recognized that unauthorized immigrant⁶ crime victims are often reluctant to contact police because they are afraid of being reported to federal immigration authorities and removed from the United States. Freed from those fears, crime victims who might otherwise stay silent would be able to come forward to help law enforcement agencies apprehend and prosecute the perpetrators, while obtaining protection for themselves from further abuse or exploitation, and enhancing overall public safety.⁷ In exchange for their cooperation with law enforcement, non-citizen victims who could show that they have been substantially harmed as a result of certain enumerated crimes would be eligible to obtain U non-immigrant status for up to four years⁸ and, eventually, become lawful permanent residents of the United States.⁹ In

3. See generally Leslye Orloff et al., *Battered Immigrant Women's Willingness to Call for Help and Police Response*, 13 UCLA WOMEN'S L.J. 43 (2003) (examining barriers battered immigrants face when calling police for assistance or seeking to escape violence).

4. See, e.g., Andrew Wang, *Battle Lines Drawn in Waukegan over Immigration Power*, CHI. TRIB., July 12, 2007, at 6 (reporting reluctance of immigrant residents to report crime in town implementing a 287(g) program). However, proponents of state and local involvement in immigration enforcement have dismissed claims that such involvement discourages crime reporting by immigrant crime victims. See Devona Walker, *Immigrants Fear of Police Aids Criminals: Distrust of Officials Make Foreigners Easy Targets, Authorities Say*, OKLAHOMAN, May 11, 2008, available at 2008 WLNR 8998130 (reporting comments of Steve Camarota of the Center for Immigration Studies that immigrants are apprehensive about police because they come from countries with rampant police abuse and corruption, not because of police involvement in immigration enforcement).

5. Orde F. Kittrie, *Federalism, Deportation, and Crime Victims Afraid to Call the Police*, 91 IOWA L. REV. 1449, 1450-55 (2006) (discussing particular vulnerability of unauthorized immigrants to a variety of crimes because they fear turning to law enforcement will result in deportation, and reporting abuse of migrants by vigilantes who know that they will not contact law enforcement).

6. As used in this Article, the term "unauthorized immigrant" refers to any non-U.S. citizen, regardless of their manner of entry, who is present in the United States without valid documentation of lawful immigration status.

7. Victims of Trafficking and Violence Prevention Act of 2000, Pub. L. No. 106-386, § 1513(a)(2)(B), 114 Stat. 1464, 1533 (codified as amended at 8 U.S.C. § 1101 note (2006)).

8. See *id.* § 1513(b)-(c).

9. See *id.* § 1513(f).

addition, certain family members of the victim would be eligible for relief.¹⁰

Although it has been almost a decade since Congress created the U visa,¹¹ there is still much uncharted territory in the implementation of the statute and regulations, and the adjudication of the visa petitions. This is due in large part to the government's seven-year delay in issuing implementing regulations.¹² In the years before the U visa regulations were issued, one frequently recurring question was whether parents and other non-citizen family members of U.S. citizen victims would be eligible for U visa protection. Since the statute required that the crime victim be an alien, it seemed to exclude from protection the non-citizen family members of U.S. citizen victims. The apparent unavailability of U visa protection for these family members was particularly troubling in cases involving U.S. citizen child victims who, unlike adult U.S. citizens, are not eligible to petition for the legal immigration of their non-citizen parents and siblings.¹³ In addition, an increasing number of U.S. citizen children were living in mixed-status families,¹⁴ and the exclusion of more than half of the unauthorized immigrant families in the United States from eligibility for U visa protections seemed inconsistent with the law enforcement and humanitarian purposes of the statute.¹⁵ The statute's unequal protection of immigrant and U.S. citizen children, especially where it worked to discriminate between two children like Maria and Claudia from the same immigrant family and suffering from the same horrible abuse, seemed particularly irrational and unfair.¹⁶

A second frequently recurring question regarding victim eligibility for U

10. *See id.* § 1513(b)-(f).

11. *Clinton Signs Stronger Violence Against Women Law*, L.A. TIMES, Oct. 29, 2000.

12. *See* Anna Gorman, *Crime Victims to Get US Visas*, L.A. TIMES, Sept. 6, 2007, at 19; Press Release, U.S. Citizenship & Immigration Serv., USCIS Publishes New Rule for Nonimmigrant Victims of Criminal Activity (Sept. 5, 2007).

13. *See* 8 U.S.C. § 1151(b)(2)(A)(i) (limiting petitioning for non-citizen parents to U.S. citizens at least twenty-one years old); *id.* § 1153(a)(4) (limiting petitioning for non-citizen siblings to U.S. citizens at least twenty-one years old).

14. As used here, "mixed-status family" is a reference to families comprised of unauthorized immigrant parents and their U.S. citizen children. *See* JEFFREY PASSEL & D'VERA COHN, PEW HISPANIC CTR., A PORTRAIT OF THE UNAUTHORIZED IMMIGRANTS LIVING IN THE UNITED STATES 8 (2009) ("Since 2003, the number of children (both U.S. born and unauthorized) in these mixed-status families has increased to 4.5 million from 3.3 million. This increase is attributable almost entirely to the increasing number of U.S. citizen children living with undocumented parents."). *Id.* ("In 2003, of the 4.3 million children of unauthorized immigrants, 2.7 million, or 63%, were born in the United States. In 2008, of the 5.5 million children of unauthorized immigrants, 4 million, or 73%, were born in the United States.").

15. *Id.* at 8 ("The 8.8 million people in these [mixed status] families are a slight majority (53%) of the nation's 16.6 million unauthorized immigrants and their family members.").

16. *See* Complaint for Declaratory and Injunctive Relief at 46, *Catholic Charities CYO v. Chertoff*, 622 F. Supp. 2d 865 (N.D. Cal. 2008) (No. C07-1307 PJH); *see also infra* Part III.B.

visas involved family members of victims of murder and manslaughter. The statute includes murder and manslaughter on the list of qualifying crimes for a U visa,¹⁷ so it would seem that Congress clearly intended someone other than the deceased victim to qualify for an immigration benefit. Nevertheless, in the years before the regulations were issued, there was a great deal of uncertainty about who might qualify for a U visa in cases involving murder and manslaughter and under what circumstances.¹⁸ This uncertainty was exacerbated if the deceased person also happened to be a U.S. citizen.

When the regulations were finally issued, they appeared to resolve some of the uncertainty about U visa eligibility in cases involving U.S. citizen child victims and victims of murder and manslaughter. This was accomplished by expanding the definition of “victim of qualifying criminal activity” to include “indirect victims” of crime in cases involving “murder, manslaughter, or incompetent or incapacitated victims.”¹⁹ In those cases, the “alien spouse, child[] under twenty-one years of age and, if the direct victim is under twenty-one years of age, parents and unmarried siblings under eighteen years of age” would also be considered a victim of qualifying criminal activity.²⁰ Advocates for immigrant crime victims were encouraged by this development, which seemed to provide an avenue to relief for the most vulnerable crime victims while enhancing the capacity of law enforcement agencies to investigate and prosecute the most serious crimes. However, in implementation the “indirect victim” provisions have proven to be an imperfect solution that is misunderstood by advocates and law enforcement agencies working with U visa eligible crime victims, and even by United States Citizenship and Immigration Service (USCIS) adjudicators, creating unnecessary hurdles for immigrant crime victims and their families.

The challenges in implementing the “indirect victim” provisions have been further exacerbated by an increasingly volatile national debate over illegal immigration, a debate that tends to cast suspicion on all unauthorized immigrants and frequently characterizes them as undeserving lawbreakers.²¹ Politicians, national anti-immigration groups, and others have expressed suspicion of immigrant crime victims, especially in cases involving domestic violence, and suggested that the U visa is an incentive for fraud by unauthorized immigrants seeking a route to legal immigration status.²²

17. 8 U.S.C. § 1101(a)(15)(U)(iii) (2006).

18. See *infra* note 96 and accompanying text.

19. 72 Fed. Reg. 53,017 (Sept. 17, 2007).

20. *Id.*; see also 8 C.F.R. § 214.14(a)(14)(i) (2011).

21. See, e.g., Stacy Burling, *Candidates Seek Tea Party's Support at Rally*, PHILA. INQUIRER, Apr. 18, 2010 (reporting on Tea Party candidate rally where participants carried signs that read “Seal Our Borders. No Amnesty for Lawbreakers” and one speaker shouted that “America needed to get rid of illegal immigrants and likened calling them ‘undocumented’ to ‘calling a drug dealer an unlicensed pharmacist’”).

22. See *Visa Rules Loose for Immigrant Victims*, ARIZ. REPUBLIC, Aug. 19, 2010, at A1

Similarly, some law enforcement agencies have expressed disagreement with the U visa program, and have been reluctant to participate in a process viewed as rewarding unlawful immigration.²³ As a result of this uncertainty about “indirect victim” eligibility and misgivings about the U visa in general, investigations into crimes committed against immigrant families have been hindered, and deserving family members of U.S. citizen child victims and victims of murder and manslaughter have been denied the protections promised by the Victims of Trafficking and Violence Protection Act (VTVPA).²⁴

Part II of this Article reviews the legislative history of the VTVPA and provides some historical context to the creation of the U visa. It then examines the statutory language creating the U visa and considers whether and to what extent the language of the statute reflects both the law enforcement and humanitarian goals of the U visa. Part III reviews the treatment of the claims of immigrant crime victims and their families during the interim relief period prior to the issuance of the U visa regulations. This Part will also examine and expand upon arguments made in a federal lawsuit against the Department of Homeland Security challenging the constitutionality of the U.S. citizen child victim exclusion. Part IV looks at the indirect victim provisions of the U visa regulations and discusses the challenges raised by the implementation of those provisions in the years since the rules were published in September 2007. This Part also considers how the national debate over illegal immigration and a pervasive anti-immigrant narrative have interfered with non-citizen crime victims’ eligibility for immigration relief. Part V analyzes and rejects an

(reporting suspicions of Arizona law enforcement agencies and elected officials that immigrants looking for a way to stay in the country legally are misusing the U visa); James Pinkerton, *Immigrant Crime Victims Await Relief Under New Visa*, HOUS. CHRON., Aug. 5, 2002, at A1 (reporting statement by Dan Stein, Executive Director, Federation for American Immigration Reform (FAIR), that the U visa has great “potential for fraud and manipulation” and that it represents another avenue for the legislative activists to use the immigration system for another political agenda”); Chris Casey, *Shut Out: U Visa Program for Illegal Immigrants a Hard Sell in Weld County*, GREELEY TRIB., July 18, 2010 (discussing allegations by Jessica Vaughn of the Center for Immigration Studies that the U visa “can be gamed by applicants” and that couples will conspire to falsely report domestic violence to law enforcement agencies in order to get U visas). *But see* 8 C.F.R. § 214.14(a)(14)(iii), (f)(1) (U visa regulations that specifically exclude a person who is culpable of the qualifying criminal activity from eligibility for U visa protection as a crime victim or a qualifying family member with the result that the scenario described by Vaughan could never result in a U visa for the alleged perpetrator).

23. *See* Casey, *supra* note 22 (reporting comments by police officers that they viewed U visas as a form of amnesty and did not want to participate in process); Amy Taxin, *Few Crime Victims Helped by Visa Law OK'd in 2000*, ASSOCIATED PRESS, Feb. 7, 2009, available at <http://www.chron.com/disp/story.mpl/headline/metro/6251878.html> (describing how the law enforcement certification process has become politicized with police and prosecutors in different locations taking varying positions, with some trying to avoid any involvement with “the contentious issue of illegal immigration”).

24. Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, 114 Stat. 1464.

interpretation of “indirect victim” by USCIS that unnecessarily requires a family member of a victim of violent crime to demonstrate that she too has suffered substantial harm, and contends that eligibility should not require the family member to take on the attributes of the vulnerable victim in order to qualify for relief. The Part also proposes amendments to the regulations that will make clear that immigrant family members of U.S. citizen child victims and victims of murder and manslaughter who cooperate with law enforcement agencies in the investigation and prosecution of the crimes qualify for U visa protections. Finally, the Article concludes with a discussion of why these amendments and this result are consistent with the goals of VTPVA and with the broader goals of U.S. immigration law to facilitate family unity.

II. THE PROMISE OF THE U VISA: PROTECTING IMMIGRANT CRIME VICTIMS, THEIR FAMILIES AND COMMUNITIES

On October 28, 2000, President Bill Clinton signed into law the Victims of Trafficking and Violence Protection Act (VTPVA),²⁵ a bipartisan legislative package whose primary purposes were bringing an end to illegal human trafficking and enhancing existing protections in United States law for survivors of domestic violence.²⁶ VTPVA and the U visa provisions in particular were part of a legislative effort dating back to the implementation of the Violence Against Women Act (VAWA) in 1994 through which Congress sought to provide protections to survivors of domestic violence, sexual assault, and other crimes.²⁷ VAWA was the first federal law recognizing domestic violence and sexual assault as crimes and allocating federal resources to develop community-based programs and services to respond to these crimes.²⁸ VAWA sought especially to protect vulnerable women and children, regardless of their immigration status. However, recognizing the special vulnerability of immigrant women and children, VAWA also provided opportunities for certain immigrant women²⁹ and children who had been subjected to domestic violence to seek protection from their abusers without putting themselves at risk of removal. Significantly for this discussion, VAWA provided a mechanism for immigrant parents whose children were victims of domestic violence to seek legal immigration status, whether or not the immigrant parent herself was

25. *See id.*

26. *See House OK's Domestic Violence Bill*, Hous. Chron., Oct. 7, 2000, at A20.

27. Violence Against Women Act, Pub. L. No. 103-322; 108 Stat. 1902 (1994) (codified as amended in scattered sections of 16, 18, and 42 U.S.C.).

28. *See generally* U.S. DEP'T OF JUSTICE, OFFICE OF VIOLENCE AGAINST WOMEN, THE HISTORY OF THE VIOLENCE AGAINST WOMEN ACT (2009), available at <http://www.ovw.usdoj.gov/docs/history-vawa.pdf>.

29. The immigration-related provisions of VAWA are gender neutral and are available to male and female immigrants who have suffered battery or extreme cruelty. The reference to women in the title of the legislation reflects the reality that women are significantly more likely to be subjected to domestic violence than men.

abused and regardless of the immigration or citizenship status of the child victim.³⁰ In doing so, Congress recognized that an unauthorized immigrant parent, fearful of immigration authorities and of separation from her child, could be inhibited in reporting abuse against her child. Indeed, that parent might choose not to report abuse in order to avoid the risk that she might be apprehended by immigration authorities and separated from her child, and that her child might be subjected to further harm and retaliation by the abusive parent in her absence. VAWA offered protection to these immigrant families by providing the immigrant parents of abused children with the protection of legal immigration status.³¹

VTVPA was comprised of two separate but related sections, the Trafficking Victims Protection Act (TVPA 2000)³² and the Violence Against Women Act of 2000 (VAWA 2000),³³ which together offered protection to women and children seeking to escape from the horrors of forced labor in underground brothels and sweatshops and from violent and abusive intimate relationships. The legislation included provisions to increase funding and training for police and prosecutors investigating domestic violence crimes,³⁴ provide grants to establish and expand shelters for battered women and trafficking victims,³⁵ fund legal assistance programs for victims of domestic violence and sexual assault,³⁶ condition aid to foreign countries on their efforts to combat trafficking,³⁷ and create new crimes and increased criminal penalties to target traffickers.³⁸

30. See Immigration and Nationality Act (INA), Pub. L. No. 82-414, § 204(a)(1)(A)(iii)(I)(bb), (B)(ii)(I)(bb), 66 Stat. 163, 178-81 (codified as amended at 8 U.S.C. § 1154 (2006)) (permitting the alien parent of a child who has been abused by the citizen or permanent resident spouse of the parent to self-petition for legal immigration status). VAWA also offered relief in the form of suspension of deportation to the immigrant parent of a child abused by a citizen or lawful permanent resident parent. See INA § 244(a)(3), *repealed by* Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) Pub. L. No. 104-208, § 208(a)(8), 110 Stat. 3009 (1999). VAWA suspension of deportation was available regardless of the immigration status or nationality of the abused child and regardless of whether the immigrant parent was married to the abusive U.S. citizen or lawful permanent resident parent. *Id.* IIRIRA replaced VAWA suspension of deportation with a special form of cancellation of removal for battered spouses and children. INA § 240A(b)(2).

31. See generally Leslye E. Orloff & Janice V. Kaguyutan, *Offering a Helping Hand: Legal Protections for Battered Immigrant Women: A History of Legislative Responses*, 10 AM. U. J. GENDER SOC. POL'Y & L. 95, 108-18 (2002) (discussing purpose and implementation of immigration-related provisions of VAWA).

32. Victims of Trafficking and Violence Prevention Act of 2000, Pub. L. No. 106-386, div. A, 114 Stat. 1464, 1466 (codified as amended in scattered sections of U.S.C.).

33. *Id.* div. B.

34. *Id.* §§ 1103, 1104, 1105.

35. *Id.* § 1202.

36. *Id.* § 1201.

37. *Id.* § 110.

38. *Id.* § 112.

Both TVPA 2000 and VAWA 2000 contained provisions that offered non-citizen victims of trafficking and domestic violence new or expanded opportunities to obtain lawful immigration status. TVPA 2000 created a new category of non-immigrant visa, the T visa, which would allow certain non-citizen victims of human trafficking to remain temporarily in the United States and eventually apply for legal permanent resident status.³⁹ VAWA 2000, in addition to strengthening a number of existing protections for battered immigrant women,⁴⁰ created a second new category of non-immigrant visa, the U visa, that would enable certain non-citizen victims of violent crime to remain temporarily in the United States to assist with the investigation and prosecution of the crimes committed against them and, in certain circumstances, to become permanent residents.⁴¹ The availability of these new T and U visas was intended to serve both of VTVPA's overarching goals—enhancing the ability of law enforcement to prosecute violent crimes and providing protection to the victims of these crimes.⁴²

It is telling that the immigration-related provisions in VTVPA were neither highlighted in the mainstream media coverage of the bill, nor in press statements by the legislation's many sponsors.⁴³ The politics of immigration can be fraught with perils for political campaigns and for the legislative process, and there was a tremendous amount of political will to pass anti-trafficking legislation and to implement VAWA reforms before the end of the 106th Congress.⁴⁴ In order to achieve this, VTVPA sponsors and advocates

39. *Id.* § 107(e).

40. VAWA 2000 reauthorized existing programs created under VAWA 1994 and also made some “targeted improvements” to weaknesses in VAWA 1994 that six years of implementation of the original Act had brought to light. *See* H.R. REP. NO. 106-939, at 102-03 (2000) (Conf. Rep.).

41. *See also* Battered Immigrant Women Protection Act of 2000, Pub. L. No. 106-386, § 1513, 114 Stat. 1518, 1533 (codified as amended at 8 U.S.C. §§ 1101(a)(15)(U), 1184(p) (2006)).

42. *See* Victims of Trafficking and Violence Prevention Act of 2000, Pub. L. No. 106-386, § 102(a), 114 Stat. 1464, 1466 (codified as amended at 22 U.S.C. § 7101 (2006)) (“The purposes of this division are to combat trafficking in persons, a contemporary manifestation of slavery whose victims are predominantly women and children, to ensure just and effective punishment of traffickers, and to protect their victims.”); Battered Immigrant Women Protection Act of 2000, Pub. L. No. 106-386, § 1513(a)(2)(A), 114 Stat. 1518, 1533 (“The purpose of this section is to create a new nonimmigrant visa classification that will strengthen the ability of law enforcement agencies to detect, investigate, and prosecute cases of domestic violence, sexual assault, trafficking of aliens, and other crimes . . . committed against aliens, while offering protection to victims of such offenses in keeping with the humanitarian interests of the United States.”).

43. *See* Jackie Koszczuk & Tracy Van Slyke, *Clinton Likely to OK Bill on Women's Issues*, MIAMI HERALD, Oct. 12, 2000, at A1 (failing to mention benefits for immigrant victims); *Crime Bill Sent to President*, TULSA WORLD, Oct. 12, 2000, at C8 (referencing relief from deportation for trafficking victims who face retribution in the home country but not mentioning other benefits for immigrant victims).

44. The push to secure passage of Victims of Trafficking and Violence Prevention Act

worked strategically to negotiate many of the finer points of the legislation, including addressing Republican concerns that certain VTVPA provisions might encourage illegal immigration.⁴⁵

With virtually unanimous support in both houses of Congress,⁴⁶ VTVPA was widely heralded as both a crime bill and a human rights bill. Passed by Congress in an election year and signed into law barely a week before the November 2000 elections, VTVPA provided a mechanism for legislators from both parties to gain political capital by voting in favor of a bill that offered protection to some of the most vulnerable members of the community, while at the same time promising harsh punishment for the perpetrators of these violent abuses.⁴⁷

Unlike the heated and very public debate occurring simultaneously in Congress over the Latino Immigrant and Fairness Act (LIFA), an immigration bill with strong support from the Clinton administration and Congressional Democrats that included several provisions affording legal status to unauthorized immigrants living in the United States,⁴⁸ there was relatively little *public* controversy surrounding the creation of the two new visa categories for unauthorized immigrant trafficking and crime victims.⁴⁹ In fact, many of the

of 2000 ultimately meant including several completely unrelated measures sponsored by members who insisted on the provisions as a *quid pro quo* arrangement. See Eric Schmitt & Joel Brinkley, *House Passes Bill to Toughen Laws on Forced Labor*, N.Y. TIMES, Oct. 7, 2000, at A1.

45. Ann Moline, *Bipartisan Women Made Anti-Violence Act Happen*, WOMEN'S ENEWS (Dec. 18, 2000), <http://www.womensenews.org/story/washington-outlookcongresswhite-house/001218/bipartisan-women-made-anti-violence-act-happen> (discussing the successful collaboration and "backroom maneuvering" of two high-level Senate aides, one a Republican and one a Democrat, who worked behind the scenes for more than a year with women's advocacy groups to negotiate with and educate members of Congress and their staff in order to reach an agreement on VAWA 2000). The negotiations included working with Republican members who were "cautious about Democratic proposals that the GOP feared could open the door for many immigrants without permanent visas to remain in this country." *Id.*

46. Koszczuk & Van Slyke, *supra* note 43; see also Melissa Lambert & Josh Meyer, *House OKs Crackdown on Trafficking in Sex: Legislation Bill Aims at Protecting Women and Children Smuggled into the U.S. for Prostitution or Slave Labor, a Practice Prevalent in Southern California*, L.A. TIMES, Oct. 7, 2000, at 20 (noting that the Senate bill co-sponsorship by conservative Republican Senator Sam Brownback of Kansas and his "ideological opposite," Democratic Senator Paul Wellstone of Minnesota was "a demonstration of the wide, bipartisan support" for the measure).

47. See Koszczuk & Van Slyke, *supra* note 43 (noting that both political parties were paying "intense attention" to women voters, and that the willingness of the Republican-controlled Congress to increase funding for VAWA 2000 when federal funding for social programs was otherwise being cut was an attempt to appeal to women voters).

48. Gail Russell Chaddock, *Hispanic Voters Watch Immigration Battle*, CHRISTIAN SCI. MONITOR, Oct. 19, 2000, at 3 (describing the political battle over LIFA, with Republicans calling it an unfair amnesty but concerned about the impact on the Hispanic vote if they opposed the legislation).

49. See *supra* notes 43-45 and accompanying text (discussing absence of press

same members of Congress who strongly opposed LIFA and accused the Clinton administration of “reward[ing] lawbreakers” and encouraging “a new wave of illegal immigrants,” voted in favor of and even co-sponsored VTVPA,⁵⁰ even though it offered a path to legal immigration status to thousands of unauthorized immigrants and their families.⁵¹ In the end, VTVPA won near unanimous support precisely because it was characterized not as an immigration bill but as an anti-crime or anti-violence or anti-slavery or pro-women bill for the benefit of *innocent* victims of trafficking, domestic violence and other crimes.⁵²

Several scholars have considered this apparently disparate treatment of unauthorized immigrant trafficking and crime victims by legislators who

coverage of immigration provisions of Victims of Trafficking and Violence Prevention Act of 2000). There were also relatively few references to the T and U visa provisions in the floor debate over H.R. 3244, and the majority of these either expressed approval for the availability of the visas or disappointment that they did not do enough to protect these vulnerable immigrants and their families. *See, e.g.*, 146 CONG. REC. 21,336, 21,338-39 (Oct. 6, 2000) (statement of Rep. John Conyers criticizing the numerical cap on T visas and the failure to provide derivative immigration status to the parents of trafficking victims and statement of Rep. John Gejdenson expressing approval for a new visa for battered immigrant women).

50. House Republican Whip Tom DeLay was a co-sponsor of Victims of Trafficking and Violence Prevention Act of 2000, but opposed LIFA, saying it amounted to “blanket amnesty” and accusing President Clinton of “trying to buy votes through an amnesty.” Eric Schmitt, *G.O.P Fight with Clinton on Immigrants Splits Party*, N.Y. TIMES, Oct. 21, 2000, available at <http://www.nytimes.com/2000/10/22/us/gop-fight-with-clinton-on-immigrants-splits-party.html?scp=1&sq=g.o.p.%20fights%20with%20clinton&st=cse>. Another unlikely sponsor of Victims of Trafficking and Violence Prevention Act of 2000 was Rep. Tom Tancredo of Colorado, who is well known for his opposition to any form of legalization for unauthorized immigrants, *see, e.g.*, Joshua Green, *Tom Tancredo, Illegal Immigrant*, ATLANTIC MONTHLY, Sept. 23, 2010, available at <http://www.theatlantic.com/politics/archive/2010/09/tom-tancredo-illegal-immigrant/63487/> (noting that Tancredo is “known to one and all as the hardest-core anti-immigration guy on earth”), and who called LIFA “an insult to Border Patrol agents, who risk their lives trying to stop illegal immigration, and ‘grossly unfair’ to immigrants who follow the legal process for entering the United States.” Steve Lash, *Clash Erupts on Amnesty Plan for Undocumented Immigrants*, HOUS. CHRON., Oct. 13, 2000, at A14.

51. Victims of Trafficking and Violence Prevention Act of 2000 provided for T visas for up to 5000 trafficking victims each year, as well as an unlimited number of visas for qualifying family members of the victim. *See* Victims of Trafficking and Violence Prevention Act of 2000, Pub. L. No. 106-386, § 107(e)(2)-(3), 114 Stat. 1464, 1478 (codified as amended at 8 U.S.C. § 1184(o)(2)-(3) (2006)). It also provided for U visas for up to 10,000 crime victims each year, as well as an unlimited number of visas for qualifying family members of the victim. *See* Battered Immigrant Women Protection Act of 2000, Pub. L. No. 106-386, § 1513(c), 114 Stat. 1518, 1535 (codified at 8 U.S.C. § 1184(p)(2)-(3) (2006)).

52. According to Rep. Chris Smith, the primary sponsor of the Victims of Trafficking and Violence Prevention Act of 2000 in the House of Representatives, the bill attracted such broad support in part “because it is pro-woman, pro-child, pro-human rights, pro-family values, and anti-crime.” 146 CONG. REC. 21,344 (Oct. 6, 2000) (statement of Rep. Chris Smith).

otherwise had not expressed any particular sympathy for the plight of unauthorized immigrants.⁵³ Particularly in the context of victims of sex trafficking, these scholars have suggested that Congress is willing to offer protection to these non-citizens because, even though they are unauthorized immigrants, they are perceived as blameless, passive victims who are powerless against the trafficker who forces them across the border and exploits them sexually.⁵⁴ Indeed, they suggest that through TVPA, Congress has constructed a particular victim narrative to which a victim must conform if she hopes to get relief under the act.⁵⁵ This characterization of the immigrant victim of crime or trafficking as vulnerable, innocent, blameless, and somehow more worthy than other unauthorized immigrants is a theme that permeated the debate surrounding VTPA,⁵⁶ but as will be discussed more thoroughly in Part IV, has ultimately not been reflected in the implementation of the statute and the regulations. This is especially true in the case of immigrant crime victims seeking U visa relief. For them, the stigma of being undocumented lawbreakers has been much more difficult to overcome, and in many cases interfered with their ability to obtain the protection the U visa was intended to provide.

The U visa provisions are found in Title V of VAWA 2000, in a section entitled the Battered Immigrant Women Protection Act of 2000 (BIWPA). BIWPA included a number of enhancements to existing protections for immigrant victims of domestic violence in order to ensure that unauthorized immigrants and their children who were unintentionally excluded from VAWA protections would be able to escape from violent situations.⁵⁷ With the U visa provisions, Congress also expanded the scope of the protection available to immigrant victims beyond the marital or parent-child relationship, as well as to

53. See Wendy Chapkis, *Trafficking, Migration, and the Law, Protecting Innocents, Punishing Immigrants*, 17 GENDER & SOC'Y 923 (2003); Leticia M. Saucedo, *A New "U": Organizing Victims and Protecting Immigrant Workers*, 42 U. RICH. L. REV. 891 (2008); Jayashri Srikantiah, *Perfect Victims and Real Survivors: The Iconic Victim in Domestic Human Trafficking Law*, 87 B.U. L. REV. 157 (2007).

54. See Chapkis, *supra* note 53, at 930 ("HR 3244 . . . creat[es] an utterly passive, entirely pure, and extremely vulnerable victim who is above reproach. Victims are portrayed as no more than unwilling goods exchanged between unscrupulous men."); Srikantiah, *supra* note 53, at 160 ("Whereas undocumented "smuggled" economic migrants are vilified as "illegal aliens" who willfully enter the United States without authorization, stereotypically passive trafficking victims are thought to enter under the complete control of the trafficker.").

55. See Saucedo, *supra* note 53, at 909 (arguing that U visa protection was meant primarily for the paradigmatic "disempowered, worthy victim"); Srikantiah, *supra* note 53, at 205 ("Imperfect trafficking victims who fail to meet the restrictive . . . definition are not only non-victims, but they are placed in the category of "illegal aliens" . . . stereotyped as dangerous criminals who manipulate the law and drain U.S. resources.").

56. See Srikantiah, *supra* note 53, at 170-71 (quoting congressional testimony about young girls who were raped, beaten, kidnapped, and lured with false promises of better lives).

57. See Battered Immigrant Women Protection Act of 2000, Pub. L. No. 106-386, § 1502(a)(3), 114 Stat. 1518, 1518 (codified as amended at 8 U.S.C. § 1101 note (2006)).

crimes other than domestic violence.⁵⁸ In doing so, Congress acknowledged the reality that unauthorized immigrants are targeted for a variety of violent crimes and are unable to seek protection and assistance from law enforcement because of their precarious immigration status.⁵⁹ Congress' dual purposes in creating the U visa were quite plainly stated: to provide protection to immigrant crime victims and to facilitate the investigation and prosecution of those crimes.⁶⁰ By protecting individual immigrant crime victims, Congress intended to create safer communities, which is a benefit to all residents, not just unauthorized immigrants.⁶¹ This idea was not lost on police or politicians working in communities with large immigrant populations. During the 2008 presidential campaign, former New York Mayor Rudolph Giuliani acknowledged quite bluntly the societal value of encouraging crime reporting by unauthorized immigrants when he said: “[i]f you are an illegal immigrant in New York City

58. Among the categories of immigrants who could seek protection through a U visa are immigrants in abusive dating relationships or abused by parents or spouses who are not U.S. citizens or permanent residents. Additionally, workplace crimes to which unauthorized immigrants might be particularly vulnerable, including involuntary servitude, false imprisonment, and sexual exploitation, could be the basis for seeking a U visa. *Id.* § 1513(b)(3); *see also* Saucedo, *supra* note 53 (proposing the use of the U visa as a mechanism to protect laborers and enhance collective rights of immigrant workers).

59. *See* Kittrie, *supra* note 5, at 1450-55; Sean Maher & Sam Sutton, *Bay Area Immigrants Face Obstacles When They Are Victims of Crime*, OAKLAND TRIB., Aug. 18, 2010 (reporting particular vulnerabilities and increasingly high rate of victimization in immigrant community).

60. The text of the law read:

Sec. 1513. Protection for Certain Crime Victims Including Victims of Crimes Against Women

(a) Findings and Purpose. ---

....

(2) Purpose. --

(A) The purpose of this section is to create a new nonimmigrant visa classification that will *strengthen the ability of law enforcement agencies to detect, investigate, and prosecute* cases of domestic violence, sexual assault, trafficking of aliens, and other crimes . . . committed against aliens, *while offering protection to victims of such offenses in keeping with the humanitarian interests of the United States*. The visa will *encourage law enforcement officials to better serve immigrant crime victims and to prosecute crimes committed against aliens*.

(B) Creating a new nonimmigrant visa classification will *facilitate the reporting of crimes to law enforcement officials by trafficked, exploited, victimized and abused aliens who are not in lawful immigration status* . . .

Battered Immigrant Women Protection Act of 2000, Pub. L. No. 106-386, § 1513(a), 114 Stat. 1518, 1533-34 (emphases added) (codified as amended at 8 U.S.C. § 1101 note (2006)).

61. Stacey Ivie & Natalie Nanasi, *The U Visa: An Effective Resource for Law Enforcement*, FBI L. ENFORCEMENT BULL., Oct. 2009, at 15, available at <http://www.fbi.gov/stats-services/publications/law-enforcement-bulletin/2009-pdfs/october2009.pdf/view> (“The fear of deportation can cause immigrant communities to cut themselves off from police and not offer information about criminal activity, even when victimized. Consequently, predators remain on the street, emboldened because they know they can strike with impunity. As a result, societies face increased crime, including serious offenses, and the perpetrators victimize and endanger everyone, not just illegal immigrants.”).

and a crime is committed against you, I want you to report that, because lo and behold, the next time a crime is committed, it could be against a citizen or a legal immigrant.”⁶² Although the U visa has been met with skepticism by some segments of the law enforcement community in the decade since the visa was created, there remains broad support among federal, state, and local law enforcement agencies for the U visa and other programs that encourage the immigrant community to trust police and report crimes.⁶³

In order for a non-citizen to be eligible for a U non-immigrant visa, the Attorney General must determine that:

(I) the alien has suffered substantial physical or mental abuse as a result of having been a victim of criminal activity described in clause (iii);

(II) the alien (or in the case of an alien child under the age of 16, the parent, guardian, or next friend of the alien) possesses information concerning criminal activity described in clause (iii);

(III) the alien (or in the case of an alien child under the age of 16, the parent, guardian, or next friend of the alien) has been helpful, is being helpful, or is likely to be helpful to a Federal, State, or local law enforcement official, to a Federal, State or local prosecutor, to a Federal or State judge, to the Service, or the other Federal, State, or local authorities investigating or prosecuting criminal activity described in clause (iii); and

(IV) the criminal activity described in clause (iii) violated the laws of the United States or occurred in the United States (including in Indian county and military installations) or the territories and possessions of the United States.⁶⁴

The list of crimes for which an immigrant victim might qualify for a U visa includes rape, kidnapping, domestic violence, and murder, as well as “any similar activity in violation of Federal, State, or local criminal

62. Editorial, *Visas for Victims, Illegal Immigrants Who Suffer Crimes and Aid Law Enforcement Will Be Eligible for Temporary Legal Status*, L.A. TIMES, Sept. 10, 2007, at 16. Similar comments had been made by New York Mayor Michael Bloomberg and a Los Angeles Assistant Chief of Police, each of whom pointed out the danger to society at large, and U.S. citizens in particular, when an unauthorized immigrant is too afraid to report a crime to the police. See Kittrie, *supra* note 5, at 1454.

63. Ivie & Nanasi, *supra* note 61, at 2-3 (describing advantages to law enforcement including enhanced community policing and declines in recidivism that come from cooperation by immigrant crime victims with police); Michael Ramage, *New Visa Option May Fit Your Human Trafficking Witnesses and Victims to a T*, POLICE CHIEF MAG., Jan. 2007 (describing the value to law enforcement agencies of T and U visas in prosecuting major crimes and encouraging reluctant immigrant victims); *Border Security and Immigration Enforcement: Hearing Before the H. Comm. on Homeland Security, Investigations Subcomm.*, 109th Cong. 115 (Aug. 16, 2006) (statement of Harold Hurt, Chief of Police, Houston Police Department, and President, Major Cities Chiefs of Police Ass'n) (“Assistance and cooperation from immigrant communities is especially important when an immigrant, whether documented or undocumented, is the victim of or witness to a crime. These persons must be encouraged to file reports and come forward with information. Their cooperation is needed to prevent and solve crimes and maintain public order, safety, and security in the whole community.”).

64. Battered Immigrant Women Protection Act of 2000 § 1513(b)(3), 114 Stat. at 1535 (codified at 8 U.S.C. § 1101(a)(15)(U)(i) (2006)).

law”⁶⁵

In addition to showing that she has endured substantial physical or emotional abuse as a result of being a victim of one of the enumerated crimes, a non-citizen applying for a U visa is required to submit with the visa petition a certification from a federal, state, or local law enforcement authority stating that the “alien has been helpful, is being helpful, or is likely to be helpful” in the investigation or prosecution of the qualifying crime.⁶⁶ This requirement that crime victims must cooperate with or assist law enforcement in order to qualify for a U visa is the pillar of the “law enforcement” purpose of the U visa, and is also a significant departure from the evidentiary requirements for VAWA self-petitions and other related forms of relief for victims of domestic violence. Although VAWA self-petitions and U visa petitions are subject to the same very generous “any credible evidence” standard,⁶⁷ the U visa mandates that the supporting evidence include a certification from a law enforcement agency that the immigrant was a victim of a qualifying crime and has been, is being, or is likely to be helpful to the investigation or prosecution.⁶⁸ VAWA self-petitions have no such requirement. During Congressional hearings leading up to the passage of VAWA 2000, several critics of expanded immigration relief for immigrant victims of domestic violence and other crimes objected to the lack of a requirement that victims cooperate with law enforcement.⁶⁹ These criticisms were countered through the testimony of Leslye Orloff, Director of the Immigrant Women Project at NOW Legal Defense and Education Fund. Orloff explained that involvement with the criminal justice system or law enforcement could have lethal results for a woman trying to escape domestic violence and that requiring such cooperation in order to get relief would either get women killed or discourage them from seeking relief at all.⁷⁰ She also pointed out that

65. *See id.* § 1513(b)(3).

66. *Id.* § 1513(c).

67. *See* Immigration and Nationality Act (INA), Pub. L. No. 82-414, § 204(a)(1)(J), 66 Stat. 163, 179 (codified as amended at 8 U.S.C. §§ 1153-1156 (2006)) (establishing “any credible evidence standard for VAWA self-petitions); *id.* § 214(p)(4) (establishing “any credible evidence” standard for U visa petitions). This same standard also applies in cases involving battered immigrants applying for special rule VAWA cancellation of removal and for a waiver of the joint filing requirement in conditional resident cases. *See id.* §§ 240A(b)(2)(D), 216(c)(4).

68. Battered Immigrant Women Protection Act of 2000 § 1513(b)(3).

69. *See Battered Immigrant Women Protection Act of 1999: Hearing on H.R. 3083 Before the H. Comm. on the Judiciary*, 106th Cong. 29-30 (2000) (statement of Rep. Lamar Smith, Chairman, H. Comm. on the Judiciary) (arguing that not requiring battered aliens to cooperate with law enforcement is contrary to the alleged purpose of the bill and that “otherwise the abuse may occur with another spouse and you are not really going to the core problem”); *id.* at 52 (statement of Dwayne “Duke” Austin, former INS Senior Spokesman) (arguing for requirement that victim report domestic violence so perpetrator can be prosecuted); *id.* at 99 (statement of Dan Stein, Executive Director, Federation for American Immigration Reform) (calling the failure to require a victim to report an abuser to police a “one way street of benefits for illegal aliens without the benefits to the country”).

70. *Id.* at 81 (statement of Leslye Orloff, Director of the Immigrant Women Project,

this was precisely the reason that such a requirement had not been included in the original VAWA statute.⁷¹ In the end, the U visa provisions alone included helpfulness to and certification by law enforcement as a requirement for eligibility for the visa.⁷²

Notwithstanding the public safety and security benefits of the U visa, the statutory language defining U nonimmigrant status makes clear that the U visa is intended at least as much as a vehicle for humanitarian relief as for strengthening law enforcement.⁷³ Congress was explicit in its intention to encourage all immigrant crime victims to come forward and report crimes to the police, and to encourage law enforcement agencies to do a better job of serving immigrant crime victims and investigating the crimes against them.⁷⁴ The reduced evidentiary burden placed on U visa petitioners further reflects a desire to protect immigrant crime victims,⁷⁵ as does the very broad waiver of inadmissibility grounds⁷⁶ and the requirement that the Attorney General provide U visa holders with referrals to non-governmental service organizations and work authorization.⁷⁷ Finally, and perhaps most importantly, Congress's humanitarian intent is evident in its decision to allow certain family members of immigrant crime victims to obtain U non-immigrant status and remain legally in the United States, in order to avoid additional hardship to the crime victim.⁷⁸

NOW Legal Defense and Education Fund).

71. *Id.*

72. Battered Immigrant Women Protection Act of 2000 § 1513(c). An early version of the bill that became VAWA 2000 reveals the extent to which victim advocates achieved a compromise on the U visa with members of Congress with predominantly pro-law enforcement perspective. H.R. 357, the Violence Against Women Act of 1999, contained a provision for a non-immigrant visa for crime victims that required evidence of one of the following, each of which is clearly beyond the control of the immigrant victim: (1) that the perpetrator have been arrested; (2) that the prosecutor has filed a case against the perpetrator; (3) that a federal or state administrative agency has brought an action against the perpetrator based on a qualifying crime; or (4) that a federal or state court has made a judicial finding in a civil or criminal case that actions that would constitute a qualifying crime occurred. Violence Against Women Act of 1999, H.R. 357, 106th Cong. § 641 (1999).

73. *See* Battered Immigrant Women Protection Act of 2000 § 1513(b)(3).

74. *Id.* § 1513(a)(1)(B), (2)(A).

75. *Id.* § 1513(c) ("In acting on any petition filed under this subsection, the consular officer or the Attorney General, as appropriate, shall consider any credible evidence relevant to this petition."); *see also* Oropeza-Wong v. González, 406 F.3d 1135, 1144-47 (9th Cir. 2005) (discussing Congress' use of the credible evidence standard twice in BWIPA as evidence of an intent to establish a liberal evidence rule to afford protection to vulnerable immigrants).

76. *See* Battered Immigrant Women Protection Act of 2000 § 1513(e) (allowing the Secretary of Homeland Security to waive the application of all inadmissibility grounds, except participation in Nazi persecution, genocide, or extrajudicial killing, in the case of U non-immigrants, if the Secretary determines that it is in the public or national interest to do so).

77. *See id.* § 1513(c).

78. *See id.* § 1513(b)(3) ("[I]f the Attorney General considers it necessary to avoid

Congress clearly recognized the importance of family support and assistance to vulnerable victims, and this was particularly true in the case of child victims. First, the statute permitted a “parent, guardian, or next friend” to stand in for the child victim in providing information and assistance about the crime to law enforcement.⁷⁹ Although this provision afforded no legal status to the adult providing information and assistance on the child’s behalf, it acknowledged that child victims may be unable to benefit from the protections of the U visa without the help of an adult caregiver. A second provision of the U visa statute did afford an opportunity for legal immigration status to the parents of crime victims under twenty-one years of age.⁸⁰ In this respect, the U visa provisions were similar to the VAWA self-petition and VAWA cancellation of removal provisions that permit the parent of a child abused by the parent’s U.S. citizen or permanent resident spouse or the child’s U.S. citizen or permanent resident parent to obtain legal immigration status based on the abuse to the child.⁸¹ Each of these provisions recognizes that protecting children from harm is not possible without offering protection to the parents who care for them. Offering these kinds of protections to immigrant victims of the very serious violent crimes enumerated in the statute was not only a good law enforcement technique, it was the humanitarian thing to do. This point is worth reiterating here because in the decade since the U visa was created, the humanitarian goals of the visa have been increasingly subordinated to the law enforcement goals, often leaving immigrant crime victims without protection if law enforcement agencies choose not to pursue a criminal investigation or prosecution, or decide that the victim’s assistance is no longer necessary.⁸²

extreme hardship to the spouse, the child, or, in the case of an alien child, the parent of the alien described in clause (i), the Attorney General may also grant status under this paragraph based upon certification of a government official listed in clause (i)(III) that an investigation or prosecution would be harmed without the assistance of the spouse, the child, or, in the case of an alien, child, the parent of the alien.”). This provision was amended in 2005 to remove the requirement that law enforcement certify that an investigation would be harmed without the family member’s assistance, and expanded the list of eligible family members of child victims to include spouses and siblings under 18. Violence Against Women and Department of Justice Reauthorization Act of 2005, Pub. L. No. 109-162, § 801(b), 119 Stat. 2960, 3054 (codified at 8 U.S.C. § 1101 (2006)). Certain family members are also eligible to adjust their status to lawful permanent residence after three years in U non-immigrant status or, for family members who did not have a U visa, permanent resident status may be awarded at the time the principal alien adjusts. *Id.* § 1513(f).

79. *Id.* § 1513(b)(3).

80. *Id.* § 1513(b)(3) (“[I]n the case of an alien described in clause (i) who is under 21 years of age, the spouse, children, unmarried siblings under 18 years of age on the date on which such alien applied for status under such clause, and parents of such alien.”).

81. See Immigration and Nationality Act (INA), Pub. L. No. 82-414, § 204(a)(1)(A)(iii)(I)(bb), 66 Stat. 163, 178-81 (codified as amended at 8 U.S.C. § 1154 (2006)) (self-petitioning spouse of U.S. citizen); *id.* § 204 (a)(1)(B)(ii)(I)(bb) (self-petitioning spouse of permanent resident); *id.* § 240A(b)(2) (VAWA special rule cancellation).

82. See Casey, *supra* note 22 (describing refusal of certain law enforcement agencies to

There is no doubt the U visa was intended to offer protection to unauthorized immigrant crime victims who might otherwise be reluctant to report crimes and to their families. There is also little doubt that in drafting the U visa provisions, Congress did not fully anticipate how the U visa provisions would play out for family members of U.S. citizen child victims or victims of murder and manslaughter. Even as BIWPA closed gaps in VAWA protections that six years of implementation of the original Act had brought to light, it left unprotected a group of vulnerable immigrant families whose significance would be revealed over the next seven years of uncertainty and delay.

III. THE LONG ROAD TO THE U VISA REGULATIONS: IN SEARCH OF THE INDIRECT VICTIM

A. Interim Relief Limbo

Even before President Clinton signed VTVPA, immigrant advocacy groups were planning and organizing to try to expedite the process for securing U visa protections for their clients.⁸³ Unfortunately, whatever challenges immigrant advocates faced in the VTVPA legislative process did not prepare them for the difficulties that would be faced by immigrant crime victims trying to access the protections of the U visa from October 2000 until October 2007, during which time no regulations were promulgated and no U visas were issued. The immigration service did make available a form of interim relief for applicants who appeared to be qualified for a U visa, using a process that was governed by a series of departmental guidance memoranda.⁸⁴ Over time this informal process developed into something that became known as U Non-Immigrant Status Interim Relief, through which immigrant crime victims could apply for deferred action⁸⁵ and work authorization in order to gain some kind of

provide U visa certifications in closed cases and in cases in which the victim can no longer be of benefit to the law enforcement agency); *Visa Rules Loose for Migrant Victims*, *supra* note 22 (discussing law enforcement agency policies to sign law enforcement certifications only where “victim has information crucial to an ongoing investigation” and refusing to sign certifications if a case is not referred for prosecution or does not go to trial).

83. Nat'l Immigration Law Ctr., *Congress Creates New “T” and “U” Visas for Victims of Exploitation*, 14 IMMIGRANTS' RIGHTS UPDATE (Oct. 19, 2000) <http://www.nilc.org/immlawpolicy/obtainlpr/oblpr039.htm>.

84. See Julie E. Dinnerstein, *The “New” and Exciting U: No Longer Just My Imaginary Friend*, in IMMIGRATION & NATIONALITY LAW HANDBOOK 451 (2008) (listing five government guidance memos related to processing U visa petitions issued between August 2001 and January 2006).

85. Deferred action is a discretionary form of relief provided for by the USCIS. There is no statutory basis for deferred action, but the regulations reference this form of relief and provide a brief description: “deferred action, an act of administrative convenience to the government which gives some cases lower priority.” Memorandum from Prakash Khatri, CIS Ombudsman, to Dr. Emilio T. Gonzalez, Dir., USCIS 1 (Apr. 6, 2007), *available at* http://www.dhs.gov/xlibrary/assets/CISOmbudsman_RR_32_O_Deferred_Action_04-06-

temporary status until regulations were issued and U visas actually became available.⁸⁶ Immigrant crime victims, their family members, and their advocates agonized and strategized over particular case scenarios that seemed to fit within the spirit and purpose of the U visa, even if they did not fit squarely within the eligibility requirements set forth in the statute. In particular, questions were raised about eligibility for family members of victims of murder and manslaughter,⁸⁷ and family members of United States citizen victims.⁸⁸ Because the statute did not provide clear answers, advocates were concerned that filing a petition could place the client at risk of removal.⁸⁹ Many looked to both formal and informal guidance from USCIS, as well as anecdotal information from others who had successfully or unsuccessfully applied for interim relief based on similar facts. Although the U visa guidance memos instructed immigration personnel to broadly interpret the U visa eligibility requirements,⁹⁰ and to “err on the side of caution” in order to avoid removing

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86. See Memorandum from Michael D. Cronin, Acting Exec. Assoc. Comm’r, Office of Programs, to Michael A. Pearson, Exec. Assoc. Comm’r, Office of Field Operations 4 (Aug. 30, 2001), *reprinted in* 78 INTERPRETER RELEASES 1751, at 1758-71 (2001) [hereinafter Cronin Memo] (instructing INS personnel to use existing mechanisms, including deferred action, to prevent removal of and provide work authorization for possible U visa recipients); Memorandum from J. Scott Blackman, Reg’l Dir., to Dist. Dirs. & Officers in Charge 1 (May 23, 2002) (on file with author) (directing the Vermont Service Center to grant deferred action and provide work authorization for all T and U visa applicants whose applications are determined to be bona fide); Memorandum from William R. Yates, Assoc. Dir. of Operations, to Reg’l Dirs. (Oct. 8, 2003) (on file with author) [hereinafter Yates Memo] (centralizing processing of all U interim relief applications at the VAWA Unit at the Vermont Service Center and providing guidance on eligibility determinations).

87. See, e.g., Posting to VAWAexperts@yahoo.com (Nov. 7, 2001) (posing question about eligibility for client who witnessed the murder of his mother and cooperated with police) (on file with author); Posting to VAWAexperts@yahoo.com (Oct. 17, 2004) (questioning eligibility of spouse of victim of 9/11 terrorist attack) (on file with author); Posting to VAWAexperts@yahoo.com (Aug. 14, 2003) (questioning eligibility for mother of murdered U.S. citizen baby) (on file with author).

88. See, e.g., Posting to VAWAexperts@yahoo.com (Aug. 16, 2002) (questioning eligibility for interim relief for mother of 18-month-old U.S. citizen child murdered by her boyfriend) (on file with author); Posting to VAWAexperts@yahoo.com (Oct. 15, 2004) (expressing fear about “pushing the envelope” by filing petition for interim relief for father of U.S. citizen daughter severely abused by mother where child suffered permanent injuries and father testified at mother’s trial) (on file with author).

89. OFFICE OF THE CITIZENSHIP & IMMIGRATION SERVS. OMBUDSMAN, IMPROVING THE PROCESS FOR VICTIMS OF HUMAN TRAFFICKING AND CERTAIN CRIMINAL ACTIVITY: THE T AND U VISA 6 (2009), available at http://www.dhs.gov/xlibrary/assets/cisomb_tandu_visa_recommendation_2009-01-26.pdf [hereinafter JANUARY 2009 OMBUDSMAN REPORT] (“According to stakeholders assisting U visa applicants, some applicants were reluctant to apply for interim relief due to the absence of regulations with clear procedures, and they feared removal from the United States.”).

90. Yates Memo, *supra* note 86, at 5 (calling for a broad interpretation of “substantial physical or mental abuse”).

and causing further harm to a possible victim,⁹¹ none of them specifically addressed whether family members of citizen child victims would qualify for relief.

In an August 2001 memo from Acting Immigration and Naturalization Service (INS) Executive Associate Commissioner Michael Cronin, service personnel were instructed to rely on the statutory definition of victim found in the *Attorney General Guidelines for Victim and Witness Assistance* (AG Guidelines) in identifying possible qualifying victims.⁹² The AG Guidelines⁹³ in place at that time adopted the definition of crime victim in the federal Victims' Rights and Restitution Act:

- the term "victim" means a person that has suffered direct physical, emotional, or pecuniary harm as a result of the commission of a crime, including –
- in the case of a victim that is an institutional entity, an authorized representative of the entity; and
 - in the case of a victim who is under 18 years of age, incompetent, incapacitated, or deceased, one of the following (in order of preference):
 - (i) a spouse;
 - (ii) a legal guardian;
 - (iii) a parent;
 - (iv) a child;
 - (v) a sibling;
 - (vi) another family member; or
 - (vii) another person designated by the court.⁹⁴

Although the memo did not specifically address situations in which there was a question about U visa eligibility for immigrant family members of certain crime victims, the victim definition referenced in the memo provides some useful insights into what role the federal government accorded to family members of crime victims who were children, incompetent, incapacitated, or deceased. In those cases, the definition of victim was expanded to include certain family members or a court appointed guardian. The purpose of the victim definition in the AG Guidelines is to identify qualifying victims and ensure that they are afforded all of the rights and services made available to

91. Cronin Memo, *supra* note 86, at 3 (“[C]ircumstances will vary from case to case, and INS personnel should keep in mind that it is better to err on the side of caution than to remove a possible victim to a country where he or she may be harmed by the trafficker or abuser, or by their associates.”).

92. *Id.* at 5 (“Victims who fall into the statutory definition of victim found in the Attorney General Guidelines for Victim and Witness Assistance must be afforded all the rights contained in this directive.”).

93. OFFICE FOR VICTIMS OF CRIME, U.S. DEP'T OF JUSTICE, ATTORNEY GENERAL GUIDELINES FOR VICTIM AND WITNESS ASSISTANCE 68 (2000) [hereinafter AG GUIDELINES 2000].

94. 42 U.S.C. § 10607(e)(2) (2006).

them under federal law,⁹⁵ including the right to be protected from the offender, the right to be notified about court proceedings, the right to restitution, and the right to information about the disposition of the proceeding against the accused.⁹⁶ Where the actual or direct victim—the person who has suffered direct physical, emotional, or pecuniary harm as a result of the commission of a crime—is under eighteen, incapacitated, incompetent or deceased, one of the individuals listed in 42 U.S.C. § 10607(e)(2)(B) is also considered a victim and may receive those benefits in the victim's place. The AG Guidelines' expansive definition of "victim" offered hope to immigrant crime victims and their advocates that U visas would be available to family members of U.S. citizen child victims and victims of murder and manslaughter.⁹⁷

During the interim relief period, USCIS did in fact grant deferred action to some non-citizen family members of U.S. citizen crime victims and homicide victims.⁹⁸ At least some of these petitions were based on arguments that advocates framed using the definition of victim in § 10607, as suggested in the 2001 Cronin Memo.⁹⁹ In these cases, advocates argued that the family members met the victim definition because they fell into one of the categories protected under § 10607(3)(2)(B) and because they too had suffered substantial harm as a result of the crime against the U.S. citizen child victim or victim of murder or

95. AG GUIDELINES 2000, *supra* note 93, at 3-4.

96. *Id.* at 21.

97. Other definitions of victim found in federal law reflect a similar expansion of the term in cases involving children, or where the victim is incompetent, incapacitated, or dead. *See, e.g.*, 42 U.S.C. § 10603b(a)(2) (2006) (defining victim to include a family member or legal guardian of a victim of terrorism who is less than 18 years of age, incompetent, incapacitated, or deceased); *id.* § 10603c(a)(3)(B) (2006) (providing that family members of victims who are less than 18 years of age, incompetent, incapacitated, or deceased may collect compensation on the victim's behalf); 18 U.S.C. § 3663 (2006) ("[I]n the case of a victim who is under 18 years of age, incompetent, incapacitated, or deceased, the legal guardian of the victim or representative of the victim's estate, another family member, or any other person appointed as suitable by the court, may assume the victim's rights under this section"); *id.* § 3771(b)(2)(D) (2006) ("For purposes of this paragraph, the term 'crime victim' means the person against whom the State offense is committed or, if that person is killed or incapacitated, that person's family member or other lawful representative."). In all of these examples, family members, guardians, friends, or others added to the definition are explicitly included in order to receive some sort of benefit on behalf of the direct victim—some benefit that the child or otherwise incapacitated victim is unable to take advantage of herself.

98. *See, e.g.*, Posting to VAWAexperts@yahoogroups.com (Jul. 19, 2007, 11:04 PM), available at <http://groups.yahoo.com/group/VAWAexperts/message/13606> (reporting grant of interim relief to husband and son of one murder victim, and to wife of another); Posting to VAWAexperts@yahoogroups.com (Oct. 4, 2007, 1:25 PM), available at <http://groups.yahoo.com/group/VAWAexperts/message/14173> (reporting grant of interim relief to father of kidnapped U.S. citizen child).

99. *See, e.g.*, Posting to VAWAexperts@yahoogroups.com (Mar. 16, 2005, 7:08 PM), available at <http://groups.yahoo.com/group/VAWAexperts/message/7930> (reporting use of argument for eligibility of parent of sexually abused U.S. citizen child based on definition of victim in § 10607(e)(2)(B)).

manslaughter. Usually the argument centered around the emotional harm suffered by the family member as a result of the injuries to or death of the direct victim. That these arguments prevailed in many cases is not surprising, particularly given the nature of some of the crimes involved. It is not hard to imagine that the parent of a sexually abused child or the spouse or parent of a murder victim might suffer substantial emotional harm as a result of the harm to their loved one. The incorporation of the victim definition from federal criminal law allowed advocates to convincingly argue for U visa relief for immigrant family members who seemed clearly to fall within the intended scope of the statute, even if the statutory language seemed to exclude them. In cases involving U.S. citizen child victims, these arguments allowed USCIS to protect the most vulnerable crime victims by making sure that their families were able to remain in the United States to assist law enforcement and provide ongoing care and support. In cases involving victims of murder and manslaughter, providing relief to family members not only made sense because the direct victim was not available to benefit from U visa protection, but also because it served the U visa's law enforcement goals by encouraging family to cooperate with the investigation or prosecution of the crime. Advocates were encouraged by the availability of interim relief in these cases, but were not convinced that their arguments would continue to succeed once the regulations were issued.¹⁰⁰

B. Suing for Protection for U.S. Citizen Children and Their Families

In March 2007, more than six years after President Clinton signed VTPVA and U visas became law, a class action lawsuit was filed against the Department of Homeland Security challenging the failure to issue U visa regulations or to adjudicate any U visa petitions.¹⁰¹ The action was filed on

100. Guidance memos from USCIS were not entirely encouraging to immigrant victims uncertain about their eligibility under the statute, since the memos stated that a very generous standard would be applied to interim relief petitions but that a grant of interim relief was nothing more than a prima facie determination that the person *might* be eligible for U nonimmigrant status once the regulations were issued. See Yates Memo, *supra* note 86, at 2-3. Similarly, some advocates expressed concern about seeking interim relief for family members of U.S. citizen child victims after being told by USCIS officials that even if parents of U.S. citizen victims were granted interim relief, it was doubtful that their U visa petitions would be granted once the regulations were issued. See Posting to VAWAexperts@yahoogroups.com (May 17, 2007, 7:55 PM), available at <http://groups.yahoo.com/group/VAWAexperts/message/13136>.

101. See Nina Bernstein, *Special Visas Remain Elusive Despite a Law*, N.Y. TIMES, Mar. 7, 2007, at B1. A related lawsuit had been filed in 2005. See Complaint for Mandamus, Declaratory and Injunctive Relief, Rodriguez Ruiz v. Chertoff, No. EDCV05-0966 (C.D. Cal. Oct. 17, 2005), available at <http://www.ilw.com/immigrationdaily/cases/2005,1201-rodriguez.pdf>. That lawsuit was dismissed by the plaintiffs in March 2006 after Congress set a June 2006 deadline for issuance of the U visa regulations and USCIS agreed to back-date any post-regulation U visa approval to the date interim relief was granted and to count that

behalf of a number of organizations serving immigrant crime victims, as well as eighteen individual immigrant crime victims eligible for U visas.¹⁰² Among other claims, the complaint alleged that denying U visa eligibility to the immigrant parents of United States citizen crime victims who cooperated with law enforcement agencies in the investigation and prosecution of the crimes, while granting that benefit to the immigrant parents of unauthorized immigrant or lawful permanent resident children, violated the equal protection guarantee of the Fifth Amendment to the United States Constitution.¹⁰³ Despite the fact that USCIS had granted interim relief to some immigrant parents of U.S. citizen victims, the lawsuit alleged that this was a quasi-legal, non-statutory status,¹⁰⁴ that the statutory language itself denied these parents eligibility, and that there was no rational basis for this unequal treatment.¹⁰⁵ Plaintiffs argued that, “[i]n essence, the statutory scheme discriminates *against* young U.S. citizen children, allowing alien children under the age of 16 the support and comfort of their parents while forcing identically situated U.S. citizen children to choose between separation from their parents, de facto deportation, or a life of poverty and deprivation as dependents of parents consigned to the undocumented underground.”¹⁰⁶ The plaintiffs alleged that the U visa statute burdened U.S. citizen children’s right to family integrity, and could not survive a constitutional challenge whether the reviewing court applied a “rational basis” test or an intermediate level of review.¹⁰⁷ Plaintiffs also challenged the government’s assertion that the exclusion of “otherwise eligible parents of U.S. citizen child victims” from the protections of the U visa was related to the statute’s legitimate purpose of “offer[ing] alien crime victims a benefit to encourage them to report crimes to law enforcement and to participate in the investigation and prosecution of . . . these crimes.”¹⁰⁸ In particular, plaintiffs

time toward the required three years of U visa status before an applicant could apply for lawful permanent resident status. See Peter Schey, *CHRCL Update on the “U Visa” Litigation*, CALEGALADVOCATES.ORG (May 1, 2008), http://www.calegaladvocates.org/news/article.193304-CHRCL_Update_on_the_U_visa_litigation_immigrant_victims_of_violent_crimes?print=1.

102. Schey, *supra* note 101.

103. Complaint for Declaratory and Injunctive Relief at 47, *Catholic Charities CYO v. Chertoff*, 622 F. Supp. 2d 865 (N.D. Cal. 2008) (No. C07-1307 PJH), ECF No. 1.

104. *Id.* at 24 (“Instead, defendants have granted some U visa-eligible persons a quasi-legal, non-statutory temporary status known as ‘deferred action.’”).

105. *Id.* at 46 (“8 U.S.C. §§ 1101(U)(i)(III) in conjunction with 1184(p) operate to deny U visa eligibility to the immigrant parents of United States citizen children who are the victims of crimes . . . while granting such benefit to the parents of undocumented and lawful permanent resident children. This unequal treatment is irrational and violates the equal protection guarantee of the Fifth Amendment of the United States Constitution.”).

106. Opposition to Motion to Dismiss at 28, *Chertoff*, 622 F. Supp. 2d 865 (No. C07-1307 PJH), ECF No. 26.

107. *Id.* at 32-33.

108. Defendants’ Notice and Motion to Dismiss at 21, *Chertoff*, 622 F. Supp. 2d 865 (No. C07-1307 PJH), ECF No. 19 (emphasis in original).

rejected the government's claim that U visas were made available to the immigrant parents of non-citizen child victims but not the immigrant parents of U.S. citizen child victims because parents of U.S. citizen children have other forms of immigration relief available to them, so would not need or be motivated by *the promise of a U visa in order to report crimes or cooperate with law enforcement*.¹⁰⁹

First, plaintiffs pointed out that the statute itself makes clear that the U visa is available to immigrants who already enjoy other forms of legal immigration status, so the possible availability of other forms of immigration relief to parents of U.S. citizen child victims is not inconsistent with the language or intent of the statute.¹¹⁰ Second, plaintiffs argued that the two forms of relief that the government alleged were available to parents of U.S. citizen victims but not parents of non-citizen child victims—the right of U.S. citizen children twenty-one years of age or older to petition for the legal immigration of their parents¹¹¹ and cancellation of removal¹¹²—are “clearly not substitutes for U visas.”¹¹³ To begin with, the immigrant parents excluded by the VTVPA are parents of children under twenty-one; as such, these children have no right to sponsor their parents for immigrant visas.¹¹⁴ Additionally, parents of U.S. citizen children are not able to apply for cancellation of removal unless and until they are placed in removal proceedings, and the requirements for this form of relief are significantly more onerous than the U visa eligibility requirements.¹¹⁵

109. See Opposition to Motion to Dismiss at 31, *Chertoff*, 622 F. Supp. 2d 865, (No. C07-1307 PJH), ECF No. 26.

110. *Id.* at 31 (citing 8 U.S.C. § 1184(p)(5) (2006) (“Nothing in this subsection limits the ability of aliens who qualify for status under [8 U.S.C. §] 1101(a)(15)(U) to seek any other immigration benefit or status for which the alien may be eligible.”)).

111. See 8 U.S.C. §§ 1151(b)(2)(A)(i), 1154(a)(1)(A)(i) (2006).

112. See *id.* § 1229b (2006).

113. Opposition to Motion to Dismiss at 31, *Chertoff*, 622 F. Supp. 2d 865 (No. C07-1307 PJH), ECF No. 26.

114. It is also worth noting that, even after a U.S. citizen child reaches the age of 21, their immigrant parent who entered the United States without inspection and lived for many years without authorization in the United States still faces substantial obstacles to obtaining legal permanent resident status. See 8 U.S.C. § 1255 (2006) (prohibiting most noncitizens who entered the United States without inspection from adjusting their status to lawful permanent residence); *id.* § 1182(a)(9)(B) (establishing lengthy bars to reentry for noncitizens who depart the United States after having lived without authorization in the United States for 180 days or more).

115. See *id.* § 1229b(1) (2006). Cancellation of removal is a discretionary form of relief that is only available to a noncitizen who has been physically present in the United States for at least 10 years, has been a person of good moral character during that time, has not been convicted of certain crimes, and who can show that their removal would result in “extremely unusual hardship to the alien’s spouse, parent, or child, who is a citizen of the United States or an alien lawfully admitted for permanent residence.” *Id.* For a discussion of the substantial difficulties faced by nonpermanent residents seeking cancellation of removal, see David B. Thronson, *Choiceless Choices: Deportation and the Parent-Child Relationship*, 6 NEVADA L.J. 1165, 1170-72 (2006).

Indeed, plaintiffs asserted that “no parent who is eligible to immigrate through § 1151(b)(2)(A)(i) would also be eligible for a U visa were the statute to grant such visas to those who have U.S. citizen children; and . . . while a small minority of parents might be eligible for both cancellation of removal and U visas but for the challenged classification, the same could be said of the parents of at least some alien children.”¹¹⁶ Consequently, plaintiffs concluded that allowing immigrant parents of U.S. citizen child crime victims to qualify for U visas would actually further the goals of the U visa program by encouraging those parents who derive no immigration benefit from their U.S. citizen child and who are as fearful of immigration consequences as the parents of the immigrant child victims to report crimes and to cooperate with law enforcement.¹¹⁷

It is noteworthy that, in response to plaintiffs’ equal protection claim, the government did not deny that the U visa statutory provisions exclude immigrant parents of U.S. citizen children from obtaining relief. This is despite the fact that the Vermont Service Center of the USCIS had in fact granted interim relief to at least some parents of U.S. citizen child victims. Nor did the government deny that these parents were statutorily excluded¹¹⁸ when plaintiffs filed an amended complaint in February 2008, after the regulations had been issued, in which they again alleged that immigrant parents of U.S. citizen children were unlawfully denied access to U visa protections.¹¹⁹ After reviewing the regulations and the public comments to the regulations, plaintiffs were still not persuaded that the parents of U.S. citizen children crime victims were eligible for U visas, and there was no indication from the government that they disagreed with this conclusion.¹²⁰ Ultimately, the court dismissed this claim without determining whether the statute did in fact exclude immigrant parents of U.S. citizen children or whether such exclusion was a violation of equal protection, finding instead that “no plaintiff ha[d] alleged that he/she/it is a victim of any purposeful discrimination” and that plaintiffs had therefore “not

116. Opposition to Motion to Dismiss at 32, *Chertoff*, 622 F. Supp. 2d 865 (No. C07-1307 PJH), ECF No. 26.

117. *Id.*

118. See Defendants’ Notice and Motion to Dismiss Plaintiffs’ First Amended Complaint at 24-25, *Chertoff*, 622 F. Supp. 2d 865 (No. C07-1307 PJH), ECF No. 48. In response to the plaintiffs’ equal protection claims, the defendants alleged instead that no plaintiffs had claimed membership in a disparately affected classification or group or alleged that they were victims of any purposeful discrimination and as such had failed to state an equal protection claim. *Id.* at 25.

119. See First Amended Complaint at 32-36, *Chertoff*, 622 F. Supp. 2d 865 (No. C07-1307 PJH), ECF No. 45.

120. Schey, *supra* note 101, at 3 (noting the government’s position that “the law’s and regulation’s failure to extend U visa status to the undocumented parents of US citizen crime victim children is rational and therefore Constitutional”); see also *infra* notes 135-43 and accompanying text (discussing numerous public comments to U visa regulations expressing continued confusion over treatment of family members of U.S. citizen child victims and victims of murder and manslaughter).

stated a claim of an equal protection violation.”¹²¹

IV. THE INDIRECT VICTIM: A WELL-INTENTIONED BUT IMPERFECT SOLUTION TO A REAL PROBLEM

A. The Long Awaited Regulations

In September 2007, nearly seven years after Congress created the U visa and more than a year after the July 2006 deadline for issuing regulations that was subsequently imposed by Congress,¹²² USCIS issued the implementing regulations. The regulations expanded upon the definition of “victim of qualifying criminal activity” by creating “indirect victim” eligibility for certain immediate relatives of the victim where the actual (or direct) victim is unable to assist law enforcement because of death, incapacity, or incompetency. This more expansive regulatory definition of victim appeared to respond directly to concerns about the treatment of family members of U.S. citizen child victims and victims of murder and manslaughter:

§214.14 Alien victims of certain qualifying criminal activity

(a) *Definitions.* As used in this section, the term:

...

(14) *Victim of qualifying criminal activity* generally means an alien who has suffered direct and proximate harm as a result of the commission of qualifying criminal activity.

(i) The alien spouse, children under 21 years of age and, if the direct victim is under 21 years of age, parents and unmarried siblings under 18 years of age, will be considered victims of qualifying criminal activity where the direct victim is deceased due to murder or manslaughter, or is incompetent or incapacitated, and therefore unable to provide information concerning the criminal activity or be helpful in the investigation or prosecution of the criminal activity. For purposes of determining eligibility under this definition, USCIS will consider the age of the victim at the time the qualifying criminal activity occurred.¹²³

The regulations do not actually use or define the term “indirect victim,” but the term is discussed extensively in the preamble to the regulations, which make clear USCIS’s intent to make the U visa available to family members of

121. *Chertoff*, 622 F. Supp. 2d at 889. The Ninth Circuit affirmed without reaching the purposeful discrimination issue. *See Catholic Charities CYO v. Napolitano*, 368 F. App’x 750, 753 (9th Cir. 2010).

122. Violence Against Women and Department of Justice Reauthorization Act of 2005, Pub. L. No. 109-162, § 828, 119 Stat. 2960, 3066 (2006) (codified as amended at 8 U.S.C. § 1101 note (2006) (“Not later than 180 days after the date of enactment of this Act, the Attorney General, the Secretary of Homeland Security, and the Secretary of State shall promulgate regulations to implement the provisions contained in the Battered Immigrant Women Protection Act of 2000, this Act, and the amendments made by this Act.”)).

123. 8 C.F.R. § 214.14(a)(14) (2011) (emphasis added).

certain victims in order to encourage them to fully participate in criminal investigations and to provide critical information to law enforcement that would not otherwise be available.¹²⁴ In order to accomplish this, USCIS made a distinction in the definition of “victim of qualifying criminal activity” between “direct victims” and “indirect victims.” Direct victims were defined as aliens who suffer “direct and proximate harm” as a result of qualifying criminal activity.¹²⁵ The category of “indirect victims” was intended to broaden the definition of victim to include family members of certain direct victims who themselves were either unavailable or ineligible to apply. In particular, USCIS intended to extend eligibility to family members of victims of murder and manslaughter who would necessarily be unable to apply for U visas themselves.¹²⁶ In addition, USCIS wanted to extend eligibility in situations where the direct victim, because she was incapacitated or incompetent, was not available or sufficiently able to help in an investigation or prosecution of criminal activity.¹²⁷

In formulating this definition of victim, USCIS drew from existing definitions of victim in federal law including, once again, the Department of Justice’s Attorney General Guidelines for Victim and Witness Assistance.¹²⁸ The victim definition in the Attorney General Guidelines upon which the USCIS relied provides:

Definitions of “Crime Victim”

The term “crime victim” is defined differently by different Federal Statutes. Unless otherwise noted, these *AG Guidelines* use the following definitions:

... For purposes of providing the services described in these *AG Guidelines*, a victim is “a person that has suffered direct physical, emotional, or pecuniary harm as a result of the commission of a crime.” (42 U.S.C. § 10607(e)(2)). If a victim is under 18 years of age, incompetent, incapacitated, or deceased, services may be provided to one of the following (in order of preference) for the victim’s benefit:

- a. A spouse.

124. See New Classification for Victims of Criminal Activity—Eligibility for “U” Nonimmigrant Status, 72 Fed. Reg. 53,014, 53,016-17 (Sept. 17, 2007) (to be codified at 8 C.F.R. pts. 103, 212, 214, 248, 274a, 299).

125. *Id.*

126. *Id.* at 53,017 (“USCIS believes that the U nonimmigrant classification contemplates encompassing certain indirect victims in addition to direct victims. This is because the list of qualifying criminal activity at section 101(a)(15)(U)(iii) of the INA, 8 U.S.C. 1101(a)(15)(U)(iii), includes the crimes of murder and manslaughter, the direct targets of which are deceased.”).

127. *Id.*

128. *Id.* at 53,107 (citing OFFICE FOR VICTIMS OF CRIME, U.S. DEP’T OF JUSTICE, ATTORNEY GENERAL GUIDELINES FOR VICTIM AND WITNESS ASSISTANCE 9 (2005), available at http://www.justice.gov/olp/pdf/ag_guidelines.pdf) [hereinafter AG GUIDELINES 2005] (“The AG Guidelines serve to guide federal investigative, prosecutorial, and correctional agencies in the treatment of crime victims and, therefore, were viewed by USCIS as an informative resource in the development of this rule’s definition of victim.”).

- b. A legal guardian.
 - c. A parent.
 - d. A child.
 - e. A sibling.
 - f. Another family member.
 - g. Another person designated by the court.
- (42 U.S.C. § 10607(e)(2)).¹²⁹

USCIS noted that the Attorney General Guidelines classify as indirect victims a number of individuals who are not direct victims of a crime, including some who are not even family members of the direct victim.¹³⁰ However, from the Attorney General's list of possible indirect victims, only one person may qualify to receive victim benefits and services, a result that USCIS determined would not serve the law enforcement goals of the U visa program,¹³¹ and could lead to the separation of families and other "anomalous results."¹³² As a result, the U visa indirect victim definition allows multiple family members to qualify as indirect victims, but limits the availability of relief to those family members who might otherwise qualify as derivative qualifying family members:

Drawing from the AG Guidelines in conjunction with the U classification statutory provision describing qualifying family members. . . . this rule extends the victim definition to the following list of indirect victims in the case of murder, manslaughter, or incompetent or incapacitated victims: Spouses; children under 21 years of age; and, if the direct victim is or was under 21 years of age, parents and unmarried siblings under 18 years of age This rule does not extend the victim definition beyond these family members since the U nonimmigrant classification does not apply to other individuals.¹³³

Although the definition was limited to the same categories of family members who were already eligible for U nonimmigrant status as derivative family members of victims, this expansion of the qualifying victim definition to include indirect victims was critically important because it would allow qualified family members to petition for U visas as principal applicants where

129. AG GUIDELINES 2005, *supra* note 128, at 9.

130. New Classification for Victims of Criminal Activity—Eligibility for "U" Nonimmigrant Status, 72 Fed. Reg. at 53,017. Although the Attorney General's guidelines do not use the term "indirect victim," USCIS referred to the individuals listed in the guidelines' definition of victim as eligible for victim services as "indirect victims."

131. 72 Fed. Reg. at 53,017 ("Family members of murder, manslaughter, incompetent, or incapacitated victims frequently have valuable information regarding the criminal activity that would not otherwise be available to law enforcement officials because the direct victim is deceased, incapacitated, or incompetent.").

132. *Id.* ("For example, in the case of a mother who is murdered and leaves behind her husband and young children, extending benefits only to the husband, as the first person on the list, could leave minor children without U nonimmigrant status protection.").

133. *Id.*; *see also* 8 U.S.C. §1101(a)(15)(U)(ii) (2006) (providing U nonimmigrant status eligibility for certain family members of immigrant crime victims).

the direct victim was unable or unavailable to qualify as a principal on her own. Unfortunately, while they were clearly intended to provide protection to a group of crime victims and their families who were excluded from protection under the statute, the indirect victim provisions of the regulations did not specifically address the question of eligibility where the direct victim is a U.S. citizen or a child, and were ambiguous in their scope and meaning in other respects.

The public comments submitted in response to the interim rule criticized the lack of clarity in the indirect victim definition on several levels. First, a number of advocates noted that the regulations limited indirect victim eligibility to cases in which the direct victim is deceased due to murder or manslaughter, or is incompetent or incapacitated, and voiced concern that the regulations did not specify that family members of direct victims under the age of 21 would be eligible without showing that the direct victim was incompetent or incapacitated.¹³⁴ Each of these commentators pointed to a definition of “crime victim” in federal law that includes family members of direct victims “under 18 years of age, incompetent, incapacitated or deceased” and does not require the family member to show that the direct victim was both under eighteen and incapacitated.¹³⁵ Relying on this definition of “federal victim,” they argued that the U visa definition of “indirect victim” should be read to include family members of direct victims under twenty-one years of age.¹³⁶ This interpretation, some commentators argued, was consistent both with federal and state law definitions of “victim” and with the way in which USCIS had defined “qualifying crime victim” in the adjudication of U interim relief applications.¹³⁷ In addition, it would acknowledge the particular vulnerability of children who have been traumatized as a result of being crime victims and the incapacitating effects that can result.¹³⁸ Advocates also criticized the failure

134. *See, e.g.*, Comment submitted by Dan Kesselbrenner et al., Nat’l Immigration Project (Nov. 15, 2007), at 8; Comment submitted by Lenora Lapidus, ACLU Women’s Rights Project (Nov. 13, 2007), at 3; Comment submitted by Sally Kinoshita, Immigrant Legal Res. Ctr. (Nov. 15, 2007), at 3; Comment submitted by Lynette Parker, Katharine & George Alexander Cmty. Law Ctr. (Nov. 16, 2007), at 4; Comment submitted by Sally Kinoshita et al., Nat’l Network to End Violence Against Immigrant Women (Nov. 15, 2007), at 4. Copies of these comments are on file with the author and are available at <http://www.regulations.gov/#!docketDetail;D=USCIS-2006-0069>.

135. *Id.* Each commentator cited to the victim definition from the Victims’ Rights and Restitution Act of 1990, 42 U.S.C. § 10607 (2006), the same provision referenced in the Attorney General Guidelines’ definition upon which the USCIS relied.

136. *Id.*

137. *Id.*

138. *See* Comment submitted by Alfred Mamlet et al., Steptoe & Johnson LLP (Nov. 16, 2007), at 3 (“Children and adolescents who suffer traumatic or other emotional impacts from criminal activity may be emotionally unable or inconsistent in their ability to talk about their painful experiences and information relating to the crime. The National Institute of Mental Health describes the different ways children and adolescents are known to react to traumatic experiences, as a result either of being victims themselves or through ‘second-hand

of the regulations to clearly provide relief to indirect victim family members in cases in which the direct victim was a U.S. citizen. They argued, first of all, that not providing relief for the family members of U.S. citizen victims was contrary to the intent of Congress to protect crime victims by keeping their families together:

Congress intended for the U visa process to consider family unity as a protection for victims of criminal activity. Social and family support networks play a key role in supporting victims as they access safety protections and heal. U.S. citizen victims will lack a support system if their family members are not eligible to apply for lawful status.¹³⁹

A number of commentators focused in particular on the need to protect parents of child victims of crime, and argued that the regulations should make clear that U visa protections are available to these parents regardless of the immigration status of the child. Arguing against a too-narrow interpretation of indirect victim that would exclude undocumented parents of U.S. citizen children, the National Network to End Violence Against Immigrant Women (National Network) suggested that such a result would be unconscionable:

[U]ndocumented mothers of undocumented children who are victims of child abuse or sexual abuse can access U visa protection while undocumented mothers of U.S. citizen and legal resident child abuse victims are denied access to U visa protections. All non-abusive, undocumented parents of child abuse victims need to be equally encouraged to come forward and be willing to cooperate with law enforcement and offered U visa protection.¹⁴⁰

Finally, several commentators suggested that the definition of indirect victim should include a broader category of family members and other caregivers, including grandparents, adult siblings, and legal guardians of U.S. citizen child victims, arguing that providing immigration protection to these individuals would be consistent with the more expansive definitions of victim in federal law and would serve the same public policy goals as providing relief to parents.¹⁴¹ All of these comments recognized the important role that crime

exposure to violence' that can 'also be traumatic.'").

139. Comment submitted by Kinoshita et al., *supra* note 134, at 5.

140. *Id.* at 6; *see also* Comment submitted by Kathryn Railsback & Starr Shepard, Idaho Coal. Against Sexual and Domestic Violence (Nov. 16, 2007), at 2 ("The assistance of these parents in criminal investigations is just as important as the assistance of the parents of undocumented child victims. If they don't have protection from possible removal, these parents are much less likely to come forward and cooperate with law enforcement officials. . . . Parents in this position should not have to choose between protecting themselves from possible removal and working with law enforcement to solve such heinous crimes.").

141. *See* Parker, *supra* note 134 (arguing that the grandmother of U.S. citizen child victim of sexual assault who was traumatized as a result of witnessing the crime, assisted in the prosecution of the crime, and was granted interim relief should be considered a victim of crime under the regulations); Comment submitted by Rena Cutlip-Mason et al., Tahiri Justice Ctr. (Nov. 16, 2007), at 8 ("The rules treat legal guardians differently from parents, even though the relevant public policy considerations are no different: a parent or a legal

victims' parents, family members, and other caregivers can play in the investigation and prosecution of crime, and also recognized the importance of a family support network to the recovery of children and other particularly vulnerable crime victims.¹⁴² Significantly, though, they also all suggested that the U visa regulations did not adequately protect these victims' families.

B. The Evolving Interpretation of Indirect Victim Eligibility

In the months following the issuance of the regulations, advocates' questions and concerns about how USCIS would apply the new indirect victim definition persisted, and USCIS's initial position was not encouraging. In a public meeting with immigrant advocates in November 2007, USCIS indicated that parents of U.S. citizen child victims were not eligible to apply as indirect victims because the direct victim was a U.S. citizen.¹⁴³ This was particularly troubling because USCIS had granted interim relief to a number of immigrant family members of U.S. citizen victims who faced termination of their interim status if they did not file applications for U visas within 180 days of the date the regulations went into effect.¹⁴⁴ Similarly, advocates were confused about indirect victim eligibility for family members of child victims and victims of murder and manslaughter because of uncertainty about what USCIS would require from indirect victims to satisfy the U visa requirements, in particular the requirements that victims suffer from substantial abuse or harm and are helpful to law enforcement.¹⁴⁵ As a result of the ongoing confusion about who

guardian who is out of status is less likely to encourage a minor victim of crime to cooperate and assist in such cooperation if the ultimate result is removal and separation of the child from his or her parent or guardian.”).

142. See Comment submitted by Kinoshita et al., *supra* note 134, at 5 (“[S]ocial support is important in the healing and recovery of crime victims. Isolation has been found to correlate with the presence of physical and/or sexual abuse and prevents the battered woman or sexual assault victim from developing a social network and a support system. The maintenance and protection of a strong social support system provides an important resource to help the direct victim heal as a sexual assault survivor or a domestic violence victim who has fled her abuser.”).

143. Advanced Special Immigrant Survivors Technical Assistance (ASISTA), Questions for CIS Re: U Visas (Nov. 2007), available at http://www.asistahelp.org/documents/resources/CIS_Q_A_on_Us_2007_9EB4BC84ED006.doc.

144. New Classification for Victims of Criminal Activity; Eligibility for “U” Nonimmigrant Status, 72 Fed. Reg. 53,014, 53,021 (Sep. 17, 2007) (to be codified at scattered parts of 8 C.F.R.) (stating that USCIS will terminate interim relief for individuals who fail to petition for U visa relief within the 180-day time period).

145. The preamble to the regulations states that “family members who are recognized as indirect victims and, therefore, eligible to apply for U nonimmigrant status as principal petitioners must meet all of the eligibility requirements that the direct victim would have had to meet in order to be accorded U nonimmigrant status.” 72 Fed. Reg. at 53,017; see also Posting to VAWAexperts@yahoo.com (Jan. 29, 2008) (on file with author) (describing how USCIS initially denied interim relief to widow of murder victim because it found that her suffering was the result of losing her husband and not being the victim of a

USCIS meant to protect with the creation of the indirect victim provision and how exactly that provision would be applied, many advocates refrained from applying for relief until more definitive guidance was issued by USCIS.

In early September 2008, USCIS notified advocates at the National Network to End Violence Against Immigrant Women that USCIS had amended its position on U visa eligibility for undocumented parents of U.S. citizen child victims and would now view them as “indirect victims whose children (the primary victims) are incapacitated.”¹⁴⁶ This new position was announced informally with the promise of more official guidance in the future.¹⁴⁷ On October 17, 2008, one year to the day after the U visa regulations went into effect, USCIS issued the following response to a question posed through the USCIS Ombudsman’s Office about indirect victim eligibility for parents of U.S. citizen child victims:

The rule extends the victim definition to include certain family members of incapacitated victims. *Direct victims of qualifying crimes, under age 21, are considered to be incapacitated due to their status as a child.* Family members who are recognized as indirect victims and, therefore, are eligible to apply for U nonimmigrant status as principal petitioners must meet all of the eligibility requirements that the direct victim would have had to meet in order to be accorded U nonimmigrant status.¹⁴⁸

While this statement seemed to put to rest questions about indirect victim eligibility for family members of child victims, it still did not specifically answer the question asked, or state that family members of U.S. citizen victims who were dead, incompetent, or incapacitated would qualify. Nevertheless, based on one unwritten, informal statement from USCIS and one ambiguous and non-responsive written answer, advocates began to file and USCIS began to grant U visa petitions to qualifying family members of U.S. citizen child victims and U.S. citizen victims of murder and manslaughter.¹⁴⁹ This is probably best explained by the close working relationship between victim advocacy organizations around the country and the VAWA Unit at the Vermont Service Center, which over the years of interim relief had proven to

crime and was not substantial); Posting to VAWAexperts@yahoogroups.com (Apr. 11, 2008) (on file with author) (questioning indirect victim eligibility for mother of undocumented six-year-old victim of sexual abuse where mother provides assistance to law enforcement on child’s behalf).

146. Posting of Gail Pendleton, Co-Dir., ASISTA, to VAWAupdates@yahoogroups.com (Apr. 11, 2008), available at <http://groups.yahoo.com/group/VAWAexperts/message/16206>.

147. *Id.*

148. *U Visa: One Year After the Final Rule*, DEPARTMENT HOMELAND SECURITY (Aug. 26, 2008), http://www.dhs.gov/xabout/structure/gc_1192724755499.shtm#4 (emphasis added).

149. See, e.g., Posting to VAWAexperts@yahoogroups.com (Apr. 8, 2009) (on file with author) (reporting approval of petition for mother of thirteen-year-old U.S. citizen rape victim); E-mail from Christine Mastin to author (July 6, 2009) (on file with author) (confirming U visa approval for husband of U.S. citizen murder victim).

be sensitive and responsive to the needs of immigrant crime victims and their families.¹⁵⁰ USCIS adjudicators familiar with the gaps in protection left by the statute and, to some extent, by the regulations, wanted to work with immigrant victims and their advocates to find solutions that were in sync with the intent of the U visa statute.

As of August 2010, USCIS had still not issued any detailed formal guidance on its interpretation of indirect victim. However, USCIS had, through a series of teleconferences and meetings with stakeholders, clarified somewhat its position on indirect victim eligibility. In particular, USCIS indicated that the citizenship or immigration status of the direct victim was not relevant to its determination of an indirect victim's eligibility for a U visa.¹⁵¹ USCIS also clarified that indirect victims would be treated as principal applicants for U visas and that they must satisfy all eligibility requirements that a direct victim would have to satisfy, including showing substantial harm and helpfulness to law enforcement.¹⁵² Accordingly, USCIS currently requires an individual

150. See Memorandum from Michael Aytes, Acting Deputy Dir., USCIS, to Richard Flowers, Acting Citizenship & Immigration Servs. Ombusman, USCIS 2 (May 22, 2009) [hereinafter Aytes Memo], available at http://www.dhs.gov/xlibrary/assets/uscis_response_cisomb_rec_39.pdf (explaining that USCIS conducts training sessions for and participates in conferences conducted by non-governmental stakeholders, and maintains a phone line specifically reserved for advocates of U visa applicants); see also JANUARY 2009 OMBUDSMAN REPORT, *supra* note 89, at 3 (noting the "positive reports from stakeholders about the Vermont Service Center and its role in adjudicating T and U visas"). *But cf. id.* at 11 (recommending that USCIS issue specific guidance to U visa applicants to resolve questions and confusion due to the complexity of the U visa eligibility requirements and the regulations).

151. See *Questions and Answers: Filing T, U, and VAWA Petitions with USCIS*, U.S. CITIZENSHIP & IMMIGR. SERVICES, 5 (June 30, 2009) (stating that in certain circumstances parents of child victims may qualify for U nonimmigrant status); *Questions and Answers: Filing T, U, and VAWA Petitions with USCIS*, U.S. CITIZENSHIP & IMMIGR. SERVICES, 5 (July 8, 2009) (clarifying response in June 30, 2009 memo by stating that until guidance is issued on this matter, no cases involving parents of U.S. citizen child victims would be denied); Meeting Minutes, Am. Immigration Lawyer's Ass'n, VSC Liaison Committee's Minutes of VSC Stakeholders Meeting 2 (Aug. 20, 2009) (on file with author) (reporting statement by USCIS representative that parents of sexually abused children qualify as indirect victims, even if the child is a U.S. citizen).

152. See *Advance Questions/Discussion Topics for VSC Meeting*, ASISTA (Aug. 20, 2009), http://www.asistahelp.org/documents/filelibrary/documents/VSC_Stakeholders_AG2_QA_31_81AD661D792C7.doc [hereinafter *Topics for VSC Meeting*] (reporting statement by USCIS that in determining who qualifies for indirect victim status USCIS does not look beyond 8 C.F.R. § 214.14(a)(14) and that an indirect victim is the principal applicant and must be listed as the crime victim on the law enforcement certification); Notes of Catherine Ward-Seitz, Bay Area Legal Aid, VAWA/U Q&A Call with VSC (May 12, 2010) (on file with author) [hereinafter VAWA/U Q&A with VSC] (indicating that indirect victims must satisfy all of the U visa eligibility requirements, including helpfulness to law enforcement and substantial harm). This interpretation is consistent with USCIS's October 2008 statement to the Ombudsman and identical language in the preamble to the regulations. See *New Classification for Victims of Criminal Activity—Eligibility for "U" Nonimmigrant Status*, 72 Fed. Reg. 53,014, 53,017 (Sept. 17, 2007) (to be codified at 8 C.F.R. pts. 103,

seeking relief as an indirect victim to submit a certification confirming that she is a victim of a qualifying crime, that she has information about that crime, and that she has been, is being, or will be helpful in the investigation or prosecution of that crime.¹⁵³ She must also submit evidence, including a personal statement, to show that she has suffered substantial physical or mental abuse as a result of being a victim of the qualifying crime.¹⁵⁴ Essentially, USCIS has determined that in order to be eligible for a U visa as an *indirect victim* of qualifying criminal activity, a U visa applicant is required to show that she qualifies as a *direct victim* of qualifying criminal activity.

For the most part, advocates have welcomed USCIS's willingness to interpret the statute and regulations expansively enough to offer protection to immigrant family members of deceased, incompetent and incapacitated victims regardless of their immigration or citizenship status. Over time, those advocates who work regularly with U visa applicants have come to understand USCIS's position on indirect victim eligibility and have learned to frame indirect victim petitions accordingly. Unfortunately, the lack of clarity in the regulations and the absence of a detailed formal guidance from USCIS on this issue have created obstacles to relief for many immigrant family members seeking U visa protections. In addition, deserving family members have been harmed by USCIS's unnecessary requirement that an indirect victim demonstrate substantial harm to herself, in addition to whatever harm was endured by the direct victim.

C. The Ambiguity of the Indirect Victim Provisions Leaves Victims and Their Families Vulnerable to Abuse and Bias

As part of the U visa application process, a petitioner is required to submit a certification from a law enforcement agency that confirms that the petitioner has been a victim of a qualifying crime, possesses information about that crime, and "has been, is being, or is likely to be helpful to an investigation or prosecution of that crime."¹⁵⁵ This certification is mandatory and the USCIS will not consider the application complete without it.¹⁵⁶ In cases involving indirect victims, USCIS has indicated that the certification should be completed in the name of the indirect victim, and has rejected certifications issued in the name of the direct victim.¹⁵⁷ However, the fact that the regulations do not

212, 214, 248, 274a, 299).

153. 8 C.F.R. § 214.14(b)(2)(i) (2011).

154. *Id.* § 214.14(b)(ii), (iii).

155. *See* 8 U.S.C. § 1184(p)(1) (2006); 8 C.F.R. § 214.14(c)(2)(i) (2011).

156. 72 Fed. Reg. at 53,023.

157. *See Topics for VSC Meeting, supra* note 152; VAWA/U Q&A with VSC, *supra* note 152; *see also* Posting to VAWAexperts@yahoo.com (June 9, 2010) (on file with author) (reporting receipt of Request for Further Evidence from USCIS where certification was not issued in the name of indirect victim).

clearly articulate that indirect victim eligibility exists for certain family members of U.S. citizen crime victims and homicide victims, creates an uncertainty and a vulnerability that prevents immigrant victims from seeking relief in the first place and leads to misapplication of the “indirect victim” provisions by law enforcement agencies, particularly those not inclined to assist an immigrant victim obtain lawful immigration status.¹⁵⁸

In fact, some law enforcement agencies have already refused, as a result of misunderstanding, misinformation, or even antipathy toward immigrants to certify U visa petitions in some cases.¹⁵⁹ This has been a widespread issue, not limited to cases involving indirect victims,¹⁶⁰ but has been even more problematic in indirect victim cases because of the lack of clear guidance from USCIS. Law enforcement agencies have refused to sign certifications, for example, in cases where the certifying officer is unfamiliar with or confused by the indirect victim provisions¹⁶¹ and is unwilling to identify someone other than the actual or direct victim as the crime victim.¹⁶² Although USCIS has taken

158. See *supra* notes 21-24 and accompanying text; see also Nora V. Demleitner, *Immigration Threats and Rewards: Effective Law Enforcement Tools in the War on Terrorism*, 51 EMORY L.J. 1059 (2002) (“Any situation in which a law enforcement agency holds substantial power over an individual can lead to abuses. The immigration context is no exception.”).

159. See *Visa Rules Loose for Immigrant Victims*, *supra* note 22 (describing police department refusal to sign certification where victim of domestic violence reported crime but perpetrator was deported so crime was not prosecuted); Posting to VAWAexperts@yahoo.com (July 12, 2010) (on file with author) (describing policy of local prosecutor to refuse to sign law enforcement certifications under any circumstances because of disagreement with the U visa law and with Congress’ intent in passing the legislation); Posting to VAWAexperts@yahoo.com (July 17, 2010) (on file with author) (reporting refusal of otherwise sympathetic police department to sign certification in case involving a minor victim because juvenile records were confidential). It is worth noting that the confusion over this issue is not limited to advocates and law enforcement agencies. See Posting to VAWAexperts@yahoo.com (April 7, 2010) (on file with author) (describing case filed on behalf of indirect victim parent where certification was filed in parent’s name but USCIS initially issued a notice of intent to deny and requested certification in child victim’s name, but granted petition after advocate explained indirect victim eligibility).

160. According to reports submitted to the USCIS Ombudsman, “[s]ome practitioners are having trouble getting the LEA certified by the designated officer because the designated officer has not worked on the case, does not have time, or is reluctant to sign for someone who is undocumented.” *U Visa: One Year After the Final Rule*, *supra* note 148.

161. One source of the confusion may be the instructions to the Form I-918, Supplement B, which incorrectly state that the family member of the direct victim will be considered a victim only where “a violent qualifying criminal activity has caused the direct victim physical harm of a kind and degree that makes the direct victim incompetent or incapacitated, and therefore unable to provide information concerning the criminal activity or to be helpful in the investigation or prosecution of the criminal activity.” See USCIS, DEP’T OF HOMELAND SEC. INSTRUCTIONS FOR I-918, SUPPLEMENT B, U NONIMMIGRANT STATUS CERTIFICATION (2010).

162. Posting to VAWAexperts@yahoo.com (Oct. 1, 2009) (police unwilling to sign certification in name of mother of fifteen-year-old rape victim) (on file with author);

steps to provide training to law enforcement agencies,¹⁶³ uncertainty over the U visa application process and requirements has left families exposed and without recourse, particularly since petitions cannot be granted without law enforcement certifications and law enforcement agencies have no obligation to issue certifications, even if the petitioner is statutorily eligible.¹⁶⁴ Indeed, even if USCIS were to issue a policy memo specifically confirming that it was interpreting the regulations to include family members of U.S. citizen victims in the definition of indirect victim, such an interpretation would not be binding on or necessarily convincing to state or local law enforcement agencies that are charged with certifying that victims have provided assistance and cooperation to law enforcement. Because the law enforcement agency ultimately has complete discretion to grant or deny requests for U visa certification, the potential for abuse of power is tremendous. Especially in jurisdictions where law enforcement may be skeptical about doing anything to support an unauthorized immigrant victim's access to legal immigration status, any statutory or regulatory language that is less than clear on this issue may very well be interpreted to the detriment of the immigrant victim.¹⁶⁵

If unauthorized immigrant crime victims were viewed with suspicion at the time of the passage of VTVPA in 2000, the vulnerability of these immigrants and their families has become even more real in the almost ten years since the U visa was created. In the wake of September 11, 2001, immigration enforcement operations have expanded dramatically, and federal immigration

Posting to VAWAexperts@yahoogroups.com (Mar. 29, 2010) (reporting refusal by sheriff's office to sign indirect victim certification for parent of sixteen-year-old sexual assault victim because sheriff determined that direct victim was old enough to act on her own).

163. See *Questions and Answers: Filing T, U, and VAWA Petitions with USCIS*, *supra* note 151, at 8 (describing law enforcement training sessions and inquiry hotline related to U visas); Aytes Memo, *supra* note 150, at 3 (describing USCIS outreach and education to law enforcement agencies to encourage them to "develop internal policies and procedures so that there is transparency for those seeking certification").

164. *Ordóñez Orosco v. Napolitano*, 598 F.3d 222 (5th Cir. 2010) (holding that writ of mandamus is not available because "decision to decline to issue law enforcement certification for alien to qualify for 'U visa' as victim of criminal activity under Victims of Trafficking and Violence Protection Act (Victims of Trafficking and Violence Prevention Act of 2000) was discretionary").

165. See E.J. Montini, *Will SB 1070 Hinder Help For Abuse Victims?*, ARIZ. REPUBLIC, June 27, 2010, at B1, available at <http://www.azcentral.com/arizonarepublic/local/articles/2010/06/27/20100627montini-arizona-immigration-law.html> (reporting claim by advocate for immigrant victims that Arizona law, that permits local law enforcement to question individuals about their immigration status, is "giving those agencies or those individuals who already abuse their power another tool to be abusive"); Press Release, ACLU of Fla., Lake County Mother of Three to Be Reunited With Family After Nearly Three Weeks of Unlawful Detainment (Mar. 5, 2009), available at http://www.aclufl.org/news_events/?action=viewRelease&emailAlertID=3710 (describing incident where police, responding to a 911 domestic violence call, arrested and detained the unauthorized immigrant sister of the victim when she could not produce evidence of her immigration status and left the abuser in the home).

policies have become inextricably linked to concerns about national security and criminal law enforcement.¹⁶⁶ The involvement of state and local law enforcement agencies in immigration-related enforcement has also expanded substantially, and the very agencies involved in the investigation and prosecution of crimes committed against immigrant families are often simultaneously involved in immigration-related law enforcement, either in collaboration with federal immigration authorities or in support of local efforts to reduce unauthorized immigration.¹⁶⁷ Finally, between 2000 and 2009, the unauthorized immigrant population of the United States increased by about thirty percent overall,¹⁶⁸ and a significant percentage of the unauthorized immigrant population are now living in states and communities not historically accustomed to having large numbers of immigrant residents.¹⁶⁹ These immigrants are trying to survive in communities struggling with the economic downturn, and are frequently condemned for placing an increased demand on school districts, health care systems, law enforcement agencies, and other service providers.¹⁷⁰ During the approach to the 2010 midterm elections, public

166. See Demleitner, *supra* note 158 (discussing the expanded use of immigration law as a criminal law enforcement tool since September 11, 2001); Kavitha Shreeharsha, *Victims' Rights Unraveling: The Impact of Local Immigration Enforcement Policies on the Violence Against Women Act*, 11 GEO. J. GENDER & L. 649, 650 (2010) (discussing how the conflation of criminal and immigration law enforcement works to re-victimize already vulnerable immigrant crime victims).

167. *Id.* at 653-58 (discussing increased local and state collaboration with federal agencies in immigration enforcement since September 11, 2001); Kittrie, *supra* note 5, at 1483 (predicting that local law enforcement agency involvement in immigration matters is "likely to have a corrosive effect on efforts to encourage unauthorized alien reporting of crimes"); see also Scott H. Decker et al., *Immigration and Local Policing: Results From a National Survey of Law Enforcement Executives*, in ANITA KHASHU, THE ROLE OF LOCAL POLICE: STRIKING A BALANCE BETWEEN IMMIGRATION ENFORCEMENT AND CIVIL LIBERTIES 169, 169 (2009), available at <http://www.policefoundation.org/pdf/strikingabalance/Role%20of%20Local%20Police.pdf>.

168. MICHAEL HOEFER ET AL., OFFICE OF IMMIGRATION STATISTICS, DEP'T OF HOMELAND SEC., ESTIMATES OF THE UNAUTHORIZED IMMIGRANT POPULATION RESIDING IN THE UNITED STATES: JANUARY 2009, 1 (2010), available at http://www.dhs.gov/xlibrary/assets/statistics/publications/ois_ill_pe_2009.pdf (reporting 27 percent increase); JEFFREY S. PASSEL ET AL., PEW HISPANIC CTR., U.S. UNAUTHORIZED IMMIGRATION FLOWS ARE DOWN SHARPLY SINCE MID-DECADE, at i-iii (2010), available at <http://pewhispanic.org/files/reports/126.pdf> (reporting a 32 percent increase overall between 2000 and 2009 but also indicating a recent reduction in the number of unauthorized immigrants living in the United States, from 12 million in March 2007 to 11.1 million in March 2009, and noting that this "decrease represents the first significant reversal in the growth of this population over the past two decades").

169. *Id.* at 2-3; see also 2009 American Community Survey and Census Data on the Foreign Born by State: Percent Change in the Foreign Born by State, MIGRATION POL'Y INST. (2009), <http://migrationinformation.org/datahub/acscensus.cfm> (reporting the highest rate of growth in the overall foreign-born population between 2000 and 2008 in ten states that were non-traditional immigrant destinations).

170. See Philip Dine, *Now a 'Destination' Area: But Uneasiness Begins To Surface Among Immigrants as Enforcement Looms*, ST. LOUIS POST-DISPATCH, Sept. 6, 2010, at A1;

debate over unauthorized immigration became even more polarized and volatile,¹⁷¹ and unauthorized immigrants were blamed for high unemployment and crime rates,¹⁷² and generally characterized as lawbreakers undeserving of compassion or protection.¹⁷³ Taken together, the changes in immigration policies and in attitudes toward immigrants that have occurred over the last decade have made it more important than ever that USCIS take deliberate steps to ensure that Congress' intent with the U visa to protect vulnerable immigrant families is realized.

V. INDIRECT VICTIM ELIGIBILITY: ENSURING PROTECTION FOR IMMIGRANT CRIME VICTIMS AND THEIR FAMILIES

A. USCIS Should Not Require Indirect Victims to Show Substantial Harm to Themselves in Order to Qualify

USCIS's reliance on established definitions of "victim" in existing federal statutes in order to craft the definition of victim for U visa purposes was appropriate and commendable. By doing so, USCIS acknowledged that federal law has applied an expansive definition of "victim" in the context of federal laws extending compensation and services to crime victims, in order to ensure that the specific purposes of the statutes in question were carried out. Though USCIS relied predominantly upon the definition of victim found in the AG

Brian C. Mooney, *Milford's Melting Pot Boils Over*, BOS. GLOBE, July 13, 2010, at 1, available at http://www.boston.com/news/local/massachusetts/articles/2010/07/13/milfords_melting_pot_boils_over/.

171. Robert Khoulish, *Immigration Reform, But At What Cost?*, BALT. SUN, Sept. 18, 2009, at 15A (predicting that when Rep. Joe Wilson shouted "You lie!" at President Obama during a speech to Congress on health care reform where he promised that unauthorized immigrants would not have access to medical care, this was a signal that the debate on immigration reform was "going to get ugly").

172. MIKE MALES & DANIEL MACALLAIR, CTR. ON JUVENILE AND CRIMINAL JUSTICE, *SCAPEGOATING IMMIGRANTS: ARIZONA'S REAL CRISIS IS ROOTED IN STATE RESIDENTS' SOARING DRUG ABUSE* (2010), available at http://www.cjcj.org/files/Scapegoating_Immigrants.pdf (quoting Arizona Governor Jan Brewer saying "the majority of the illegal trespassers that are coming into the state of Arizona are under the direction and control of organized drug cartels, and they are bringing drugs in"); *Buchanan Scapegoats Undocumented Immigrants For "Bankrupt" California*, MEDIA MATTERS (April 29, 2010, 8:16 AM), <http://mediamatters.org/research/201004290004> (reporting comment by Pat Buchanan that "We've got 12 to 20 million illegals in the country, they're bankrupting the state of California because they're very poor and unskilled").

173. Katherine Ellison, *A Special Visa Program Benefits Abused Illegal Immigrants*, N.Y. TIMES, Jan. 8, 2010, at A19 (quoting Ira Mehlman of Federation for American Immigration Reform regarding U visas for immigrant crime victims: "[w]hy should we have to provide incentives for people not here legally when we do nothing extra for people who are here legally?"); Editorial, *Immigrants, Criminalized*, N.Y. TIMES, Nov. 26, 2009, at A38 (calling on opponents of comprehensive immigration reform and the Obama administration to stop "conflating illegal immigration and serious crime").

Guidelines, several other federal definitions were referenced in the preamble to the regulations, and are worth mentioning here because they do not support USCIS's current interpretation of the "indirect victim" provisions in the context of U visas.¹⁷⁴ In particular, they do not support USCIS's interpretation of the regulation as requiring indirect victims to demonstrate that they have suffered substantial abuse as a result of being the victim of a crime.

The first definition listed in the preamble comes from a federal law providing for compensation of victims of international terrorism, and includes language that permits a family member or guardian of a victim who is under eighteen years of age, incompetent, incapacitated, or deceased to stand in for the victim in receiving the benefits conveyed under the statute.¹⁷⁵ Although the family member or guardian is included in the definition of "victim," the definition does not require them to demonstrate that she meets the eligibility requirements outlined for victims in general.¹⁷⁶ Rather, it seems clear from the language in section 10603c(a)(3)(C), that the family member or guardian is receiving compensation on behalf of the victim, not because she herself meets the "general" definition of victim found in section 10603(a)(3)(a).¹⁷⁷

USCIS next referred to a definition of victim in a federal statute providing for a court to award restitution to victims of crime when sentencing a criminal defendant.¹⁷⁸ This victim definition also includes language that permits, in cases involving a victim who is under eighteen, incompetent, incapacitated, or

174. New Classification for Victims of Criminal Activity; Eligibility for "U" Nonimmigrant Status, 72 Fed. Reg. 53,014, 53,016 (Sept. 17, 2007) (to be codified at scattered parts of 8 C.F.R.) (noting that USCIS drew from established definitions of "victim" in formulating the "general" definition of victim used in the U visa regulations).

175. The definition is as follows:

(A) In general

The term "victim" means a person who –

. . . suffered direct physical or emotional injury or death as a result of international terrorism occurring on or after October 23, 1983, with respect to which an investigation or civil or criminal prosecution was ongoing after April 24, 1996. . .

(B) Incompetent, incapacitated, or deceased victims

In the case of a victim who is less than 18 years of age, incompetent, incapacitated, or deceased, a family member or legal guardian of the victim may receive compensation under this section *on behalf of the victim*.

42 U.S.C. § 10603c (2006).

176. *Id.*

177. *Id.*

178. That definition read:

(a)(1)(A)The court, when sentencing a defendant convicted of an offense under this title . . . may order . . . that the defendant make restitution to any victim of such offense, or if the victim is deceased, to the victim's estate. . . .

(a)(2)For purposes of this section, the term "victim" means a person directly and proximately harmed as a result of the commission of an offense for which restitution may be ordered . . . In the case of a victim who is under 18 years of age, incompetent, incapacitated, or deceased, the legal guardian of the victim or representative of the victim's estate, another family member, or any other person appointed as suitable by the court, may assume the victim's rights under this section. . . .

18 U.S.C. § 3663 (2006).

deceased, a legal guardian, family member, representative, or other person appointed by the court, to assume the victim's rights to compensation under the statute.¹⁷⁹ Again, there is no requirement that the person standing in for the victim demonstrate that she has also been harmed as a result of the offense. Rather, it is her relationship to the person who has been harmed that permits her to stand in place of the victim to receive the benefits provided under the statute.

Similarly, the definition of victim found in the Crime Victims' Rights Act identifies a number of individuals who are eligible, where the actual victim is under eighteen, incompetent, incapacitated, or deceased, to assume the rights of the crime victim that are enumerated in the statute.¹⁸⁰ The individual standing in for the victim is not required to show that she also suffered direct or proximate harm as a result of the crime, but instead stands in where the direct victim is not able to do so, to ensure that the rights guaranteed under the statute are afforded.¹⁸¹ This definition is the first of two victim definitions incorporated into the Attorney General Guidelines.¹⁸² The second definition is the one found at 42 U.S.C. § 10607(e)(2), and specifically referenced by USCIS in the preamble to the regulations,¹⁸³ which defines a victim as "a person who has suffered direct physical, emotional, or pecuniary harm as a result of the commission of a crime" and also permits one of a number of listed individuals to receive services for the victim's benefit where the victim is under eighteen, incompetent, incapacitated, or deceased.¹⁸⁴ As with the other victim definitions above, this definition was created for the purpose of identifying individuals entitled to receive certain benefits under the statute, either as a result of being victims or on behalf of victims. And again, as with the others, "victim" is defined to include "a person that has suffered direct physical, emotional, or pecuniary harm as a result of the commission of a crime," and "in the case of a

179. *Id.*

180. The law reads as follows:

For the purposes of this chapter, the term 'crime victim' means a person directly and proximately harmed as a result of the commission of a Federal offense or an offense in the District of Columbia. In the case of a crime victim who is under 18 years of age, incompetent, incapacitated, or deceased, the legal guardians of the crime victim or the representatives of the crime victim's estate, family members, or any other persons appointed as suitable by the court, may assume the crime victim's rights under this chapter, but in no event shall the defendant be named as such guardian or representative.

Crime Victims' Rights Act, 18 U.S.C. § 3771(e) (2006).

181. *Id.*

182. AG GUIDELINES 2005, *supra* note 128, at 9 (indicating that this definition will be used for purposes of enforcing the victims' rights enumerated in 18 U.S.C. §3771(e) and article I.B of the Attorney General's guidelines).

183. New Classification for Victims of Criminal Activity; Eligibility for "U" Nonimmigrant Status, 72 Fed. Reg. 53,014, 53,016-17 (Sept. 17, 2007) (to be codified at scattered parts of 8 C.F.R.).

184. 42 U.S.C. § 10607(e)(2) (2006); *see also supra* notes 92-95 and accompanying text.

victim who is under 18 years of age, incompetent, incapacitated, or deceased,” one of a number of individuals who might be able to act on the victim’s behalf.¹⁸⁵ It would be incorrect and counterproductive to read any of these definitions as requiring the person acting on behalf of the victim to show that she was herself harmed as a result of being a crime victim in order to receive the benefits or services provided under the statute.

In the context of the U visa, reading the regulations to require indirect victims to prove that they have suffered substantial harm as a result of being victims of qualifying criminal activity makes even less sense. First of all, the regulations state that “victim of qualifying criminal activity *generally* means an alien who has suffered direct and proximate harm as a result of the commission of qualifying criminal activity.”¹⁸⁶ According to the Oxford English Dictionary, *generally* means “with respect to the majority of individuals or cases; for the most part; widely, extensively.”¹⁸⁷ Generally does not mean “always” or “in every case,” and the regulations indicate in which cases the general definition does not apply. In particular, in cases in which the “direct victim is deceased due to murder or manslaughter, or is incompetent or incapacitated, and therefore unable to provide information concerning the criminal activity or be helpful in the investigation or prosecution of the criminal activity,” certain alien family members will be considered victims of qualifying criminal activity.¹⁸⁸ In these cases, the family members qualify as “indirect victims” because of their relationship with an individual, the direct victim, who has suffered direct and proximate harm as the result of criminal activity but who is unable or unavailable to provide information and assistance to law enforcement. A fair reading of the regulations makes clear that the harm requirement should not be read to apply to indirect victims.

There is no question that the family members of homicide victims or child victims are harmed as a result of the crimes committed against their loved ones.¹⁸⁹ Nevertheless, they should not be required to prove that in order to qualify as indirect victims. Unlike the other federal victim definitions, under which a family member or guardian can obtain benefits or services on behalf of the actual victim simply by virtue of the relationship with that victim, U visa indirect victims are required to provide information and assistance to law

185. 42 U.S.C. § 10607(e)(2) (2006) (emphasis added).

186. 8 C.F.R. § 214.14(a)(14) (2011) (emphasis added).

187. See *Definition of Generally*, OXFORD ENGLISH DICTIONARY ONLINE (March 2011), <http://www.oed.com/view/Entry/48886?redirectedFrom=Definition#eid>. In the absence of a statutory definition, “we construe a statutory term in accordance with its ordinary or natural meaning.” *FDIC v. Meyer*, 510 U.S. 471, 476 (1994).

188. 8 C.F.R. § 214.14(a)(14)(i) (2011).

189. See, e.g., Comment submitted by Kinoshita et al., *supra* note 134 (“Research has well established that trauma can be produced by indirect exposure to an event; this is known as secondary trauma (also called vicarious or bystander trauma. Living in a household with domestic violence has an impact in the psychological functioning of the children and family members even when they were not directly involved.”). *Id.* at 4 (internal citations omitted).

enforcement in order to be eligible for U visa benefits. The indirect victim category was created not just as a mechanism to assist or compensate a vulnerable crime victim, but also as a way to support law enforcement in cases in which the victim would not otherwise be able or available. The need for this category became apparent in the years prior to the issuance of regulations, when family members of homicide victims and U.S. citizen child victims were afraid to come forward with information about criminal activity, thwarting the humanitarian and law enforcement goals of the U visa. The indirect victim, who takes the risk of coming forward to cooperate with law enforcement, has earned the protection of the U visa and should not be required to present herself as the vulnerable, deserving immigrant in order to obtain that relief.

Practically speaking the substantial harm requirement also imposes burdens on the indirect victim that do nothing to further the purposes of the U visa. She is already required to submit evidence of the substantial physical or mental abuse suffered by the direct victim which, depending on the qualifying crime, could include medical records, counseling records, psychological reports, coroner reports, police reports, or witness statements, all detailing the harm to the direct victim. After all, it is the substantial abuse suffered by the direct victim as a result of being a victim of a qualifying crime that is the basis for indirect victim eligibility in the first place. Without that harm, the direct victim would not qualify as a victim and eligibility for the indirect victim would not exist. Therefore, to require the indirect victim to produce additional evidence of any harm she also endured—even if it is substantial—serves no legal purpose and creates another evidentiary hurdle that she must overcome before she can obtain relief. The requirement also potentially sends a confusing message to law enforcement agencies who will be asked to sign off on indirect victim certifications and who may determine, in cases where the harm to the indirect victim does not appear substantial, that the individual does not qualify as an indirect victim and is therefore not entitled to a certification.¹⁹⁰

Finally, the requirement that the indirect victim demonstrate that she has suffered substantial abuse as a result of being a victim of the qualifying crime is unjustifiable because it forces the indirect victim to portray herself as a vulnerable, wounded immigrant victim in order to be found deserving of relief.

190. The determination that the victim has suffered substantial physical or mental abuse is a determination to be made by USCIS, not by the certifying law enforcement agency. However, not all law enforcement agencies have a thorough understanding of the U visa requirements or adjudication process and so may not fully understand their role. *See supra* notes 159-64 and accompanying text. In addition, because these agencies have a great deal of discretion in determining whether to sign a certification, they could deny a certification in a case where they determined that the individual had not met all of the eligibility requirements for an indirect victim, even if making that determination in the first place is not their call. *See Casey, supra* note 22 (describing policy of Colorado prosecutor to run criminal background checks on victims before signing certifications and to deny where victim has criminal background, even though eligibility for law enforcement certification is unrelated to victim's criminal history).

This gloss of helplessness and worthiness that comes from being a victim who has suffered harm may serve to distinguish the U visa applicant from the millions of unauthorized immigrants who are often viewed as culpable, undeserving lawbreakers.¹⁹¹ However, the narrative of the immigrant as the deserving but powerless victim then displaces the alternative narrative of the immigrant as a helper, caregiver, and empowered participant in the process, even though by definition the indirect victim is an individual who is needed rather than needy. In fact, she is eligible for relief because of her ability to provide information and assistance to law enforcement where the direct victim is unable to do so. While on the one hand it is more politically palatable to continue to frame the U visa as a form of humanitarian relief limited to the most vulnerable and deserving immigrants, on the other hand it is a form of relief that demands something from the victim in return.¹⁹² The *quid pro quo* built into the U visa requirements makes clear that the U visa petitioner has something of value—information and cooperation—that she can exchange for U visa protection. It is not enough just to be a victim. This is perhaps even more true in the case of the indirect victim, who is standing in the place of the actual victim and offering assistance where the victim is unable to act for herself. The dual goals of the U visa can be served without requiring indirect victims to portray themselves as disempowered and abused.

B. Proposals for Regulatory Amendments

In a perfect world, the U visa statute and regulations could be amended to ensure that all immigrant crime victims could come forward to report crimes and seek the protection and assistance of law enforcement. Even short of that perfect world, there are any number of amendments to the U visa provisions which might make them more responsive to the needs and realities of immigrant crime victims and their families. The proposals I make here are modest in that they amend the regulations to make them consistent with the current policy of USCIS to provide indirect victim eligibility for certain family members of U.S. citizen victims and of victims who are incompetent, incapacitated or deceased. These amended regulations also attempt to clarify the substantial abuse requirement for indirect victims. Given the lack of any formal written guidance on this, a regulatory fix is critical to ensure that immigrant crime victims, their advocates, and law enforcement agencies have a

191. See Kevin R. Johnson, “Aliens” and the U.S. Immigration Laws: *The Social and Legal Construction of Nonpersons*, 28 U. MIAMI INTER-AM. L. REV. 263, 276 (1997) (“Illegal aliens is a pejorative term that implies criminality, thereby suggesting that the persons who fall in this category deserve punishment, not legal protection.”).

192. See *supra* Part I.A; see also Saucedo, *supra* note 53, at 901 (“In a sense, the paradigmatic U visa grantee is the essentialized victim of bad behavior This it seems is the disempowered, worthy victim the legislation aimed to protect.”) (internal citations omitted).

clear and consistent directive from USCIS about indirect victim eligibility in these cases.

The definition of victim of qualifying criminal activity at 8 C.F.R. § 214.14 should be amended to read as follows:

§214.14 Alien victims of certain qualifying criminal activity

(a) Definitions. As used in this section, the term:

. . . .

(14) *Victim of qualifying criminal activity* generally means an alien who has suffered direct and proximate harm as a result of the commission of qualifying criminal activity.

(i) *Indirect victim of qualifying criminal activity*. The alien spouse, children under 21 years of age and, if the direct victim is under 21 years of age, parents and unmarried siblings under 18 years of age, will be considered victims of qualifying criminal activity where the direct victim is deceased due to murder or manslaughter, or is incompetent or incapacitated, and therefore unable to provide information concerning the criminal activity or be helpful in the investigation or prosecution of the criminal activity, or is under 21 years of age. For purposes of determining eligibility under this definition, USCIS will consider the age of the direct victim at the time the qualifying criminal activity occurred. The nationality and immigration status of the direct victim shall have no bearing on a determination of eligibility under this definition.

The additional language makes clear that family members of direct victims who are U.S. citizens may still be eligible. It also expands the definition of direct victim to include individuals under the age of twenty-one, so that family members of child victims will not be required to prove incapacity or incompetency in order to qualify as indirect victims. Both of these amendments reflect USCIS's current position on these issues.

In addition, the following amendments should be made in order to eliminate the requirement by USCIS that indirect victims demonstrate that they have suffered substantial physical or emotional abuse as a result of a crime. First, 8 C.F.R. § 214.14(b) should be amended as follows:

(b) *Eligibility*. An alien is eligible for U-1 nonimmigrant status if he or she demonstrates all of the following in accordance with paragraph (c) of this section:

(1) The alien has suffered substantial physical or mental abuse as a result of having been a victim of qualifying criminal activity. Where the alien is an indirect victim of qualifying criminal activity pursuant to 8 C.F.R. § 214.14(i), it shall be presumed that the alien has suffered substantial physical or mental abuse where the direct victim has suffered substantial physical or mental abuse as a result of having been a victim of qualifying criminal activity.

Additionally, 8 C.F.R. § 214.14(c)(2)(ii) should also be amended as follows:

Any additional evidence that the petitioner wants USCIS to consider to establish that . . . the petitioner or, where the petitioner is an indirect victim of qualifying criminal activity pursuant to 8 C.F.R. §214.14(i), the direct victim

has suffered substantial physical or mental abuse as a result of being a victim of qualifying criminal activity;

These fairly simple and straightforward amendments would bring clarity to an issue that continues to create anxiety for immigrant families trying to obtain U visa protections. These clarifications would enhance the ability of immigrant parents to protect their children from further harm and would provide law enforcement with the assistance it needs to investigate and prevent crimes against immigrants and throughout the community.

VI. CONCLUSION

In closing, we return to the story of Maria and Claudia, both victims of horrific abuse, both daughters of mothers who love them and would do anything to protect them and keep them safe. Claudia and her mother have been granted U visas and have a chance to remain legally in the United States and eventually become permanent residents. Claudia's mother will be able to work, and they will both be able to access the resources and services that will help them heal and recover. Maria and her mother are without options. Because the police refused to sign a law enforcement certification on her behalf, she cannot even apply for a U visa. She is not authorized to work. Although Maria is a United States citizen, she is unable to petition for legal immigration status for her mother until she is twenty-one years old. In the meantime, her mother and aunt have received threats from the family members of the man who assaulted her, but they are afraid to call the police for fear that Maria's mother might be turned over to immigration officials. For the moment, Maria and her mother continue to live in the United States with the knowledge that her mother might at some point be apprehended by immigration officials and removed from the United States. If that happens, Maria would be faced with the choice of remaining in the United States without her mother, or returning with her to Mexico, a place she has never been and where she knows no one. Although she is a citizen of the United States, Maria has not been able to access the protections and services made available to her cousin Claudia through the U visa.

Maria's situation is not unique. Four million U.S. citizen children live with unauthorized immigrant parents in the United States.¹⁹³ One in every twelve children under the age of seventeen has a parent who is an unauthorized immigrant.¹⁹⁴ The likelihood that immigrant crime victims and their families will continue to struggle with the uncertainties of the U visa indirect victim provisions described in this Article is very real. Even well-meaning law

193. JEFFREY S. PASSEL ET AL., PEW HISPANIC CTR., UNAUTHORIZED IMMIGRANTS AND THEIR U.S.-BORN CHILDREN 1 (2010), available at <http://pewhispanic.org/reports/report.php?ReportID=125>.

194. *Id.*

enforcement agencies can misunderstand the U visa requirements and their role in the U visa application process. And where there is antipathy or suspicion surrounding the U visa process or unauthorized immigration in general, the possibility that deserving and qualified immigrant family members could be harmed is even more real. Indeed, the very fact that there are so many U.S. citizen children with unauthorized parents has become a source of controversy. Even the U.S. citizen children of unauthorized immigrants are treated with contempt.¹⁹⁵ In recent months, a number of prominent politicians have called for the repeal of birthright citizenship in response to assertions about unauthorized mothers coming to the United States and giving birth for the sole purpose of deriving legal immigration status through these U.S. citizen children.¹⁹⁶ In general, empathy for unauthorized immigrants is running low, including the immigrant crime victims whom Congress identified for protection almost a decade ago. Even President Obama has recently been accused of encouraging the use of the U visas as part of a “political strategy to maximize the number of people here illegally who get to remain.”¹⁹⁷

The U visa will never fully achieve its dual goal of enhancing public safety and protecting immigrant crime victims and their families, unless all immigrant families feel confident that they will be protected if they come forward and cooperate with law enforcement. Without that certainty, many immigrant crime victims will remain in dangerous or abusive situations, and law enforcement agencies will be unable to prosecute the perpetrators of violent crimes. The amendments proposed here are a modest step toward instilling fairness and reliability into a process that is more and more frequently unjust and arbitrary, thereby ensuring U visa protection for immigrant families who are no less than deserving.

195. Connie Schultz, *Babies No Longer Innocent*, CLEVELAND PLAIN DEALER, Aug. 4, 2010, at A7 (quoting California anti-immigration activist Barbara Coe referring to the U.S.-born children of unauthorized immigrants as “invasion by birth canal”); *see also id.* (“A Google search for ‘anchor babies’ produces more than 400,000 links. Scroll through them, and you’ll notice the epithet is increasingly free of quotation marks, which suggests the effort to dehumanize the smallest of humans is catching on.”).

196. Op-Ed., *The Wrong Way to Fix a Broken Border Policy*, S.F. CHRON., Aug. 22, 2010, at E10 (reporting support for repeal of birthright citizenship by North Carolina Senator Lindsey Graham, Arizona Senator John McCain, and Kentucky Senator Mitch McConnell); Schultz, *supra* note 195 (quoting Arizona State Senator Russell Pearce, author of S.B. 1070, saying, “[t]his is an orchestrated effort by them to come here and have children to gain access to the great welfare state we’ve created”).

197. Derek Quizon & Katie Urbaszewski, *Visa Rules Are Loose for Illegal Immigrants Who Are Victims of Crimes*, ARIZ. REPUBLIC (Aug. 19, 2010), <http://www.azcentral.com/arizonarepublic/news/articles/2010/08/19/20100819arizona-illegal-immigrants-visas.html>.