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## **From the Legal Literature: Trafficking and the Shallow State**

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# From the Legal Literature

Francesca Laguardia\*

## TRAFFICKING AND THE SHALLOW STATE

### I. INTRODUCTION

Human trafficking has gained increasing attention over the past thirty years.<sup>1</sup> High profile cases over the 1990s led to political pressure from scholars and activists, which in turn led to the passage of the first federal anti-human trafficking statute in the United States, the Trafficking Victims Protection Act [TVPA] in 2000.<sup>2</sup> In 2003, Washington became the first state to pass an antitrafficking statute and, over the past two decades, every state in the United States has followed suit.<sup>3</sup> The TVPA was reauthorized and expanded in 2003,

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<sup>1</sup>See, e.g., Hila Shamir, *A Labor Paradigm for Human Trafficking*, UCLA L. REV. 76 (2012) (noting that human trafficking has gained “unprecedented national and international attention”); see also AMY FARRELL ET AL., IDENTIFYING CHALLENGES TO IMPROVE THE INVESTIGATION AND PROSECUTION OF STATE AND LOCAL HUMAN TRAFFICKING CASES 1 (Nat'l Inst. Just. Doc. No. 238795, 2012), [http://www.ncdsv.org/images/NEUniv-UrbanInst\\_i\\_IDingChallengesImproveInvesProsecStateLocalHumanTraffickingCases\\_4-2012.pdf](http://www.ncdsv.org/images/NEUniv-UrbanInst_i_IDingChallengesImproveInvesProsecStateLocalHumanTraffickingCases_4-2012.pdf) [<https://perma.cc/5B5H-5WR5>]; Annie Smith, *The Underprosecution of Labor Trafficking*, 72 S.C. L. REV. 477, 478 (2020).

<sup>2</sup>Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, 114 Stat. 1464 (2000) (codified as amended at 18 U.S.C.A. §§ 1589 to 1592); see also Julie Dahlstrom, *Trafficking and the Shallow State*, 12 UC IRVINE L. REV. 61, 76 (2021); Lori Nazry Ross, *See No Evil: A Look at Florida's Legislative Response to Holding Hotels Civilly Liable for “Turning A Blind Eye” to the Sex Trafficking Monster Hiding Behind Closed Doors*, 22 N.Y.U. J. LEGIS. & PUB. POL'Y 375, 387 (2020); Smith, *supra* note 1, at 478.

<sup>3</sup>Off. of Just. Programs, U.S. Dep't of Just., *Human Trafficking Laws: State Laws*, in HUMAN TRAFFICKING TASK FORCE E-GUIDE § 1.4, OFF. FOR VICTIMS OF CRIME TRAINING & TECH. ASSISTANCE CTR. (n.d.), <https://www.ovcttac.gov/taskforceguide/eguide/1-understanding-human-trafficking/14-human-trafficking-laws/state-laws/> [<https://perma.cc/XZD7-UQBQ>] (last visited June 3, 2022); see also *Human Trafficking Overview*, NAT'L CONF. ST. LEGISLATURES (Oct. 21, 2020), <https://www.ncsl.org/research/civil-and-criminal-justice/human-trafficking.aspx> [<https://perma.cc/UL3Y-Y96W>]. Although nearly a decade old at this point, the Polaris Project ranked states on their human trafficking laws using a broad number of criteria. *2014 State Ratings on Human Trafficking Laws*, POLARIS, <https://polarisproject.org/wp-content/uploads/2019/09/2014-State-Ratings.pdf> [<https://perma.cc/GU73-RBSF>].

2005, 2008, 2013, 2015, and 2018, and federal and state law enforcement efforts to combat trafficking have also increased.<sup>4</sup>

But trafficking presents unique difficulties for law enforcement.<sup>5</sup> At the forefront of these challenges is the reluctance of victims to report their victimization.<sup>6</sup> Misconceptions about trafficking and trafficking victims interfere with police ability to identify victims of trafficking.<sup>7</sup> Police rely heavily on victim reporting in order to discover and investigate crime.<sup>8</sup> But trafficking victims are reluctant to report for multiple reasons.<sup>9</sup> One reason, certainly, is that traffickers utilize physical abuse and threats of physical abuse against their victims.<sup>10</sup> A second reason is that trafficking victims may not consider themselves victims, as they may not realize that there are laws against the coercion they are experiencing.<sup>11</sup> But another reason trafficking victims are unlikely to self-identify is that they fear arrest and/or deportation.<sup>12</sup>

It is this third problem that is addressed in Julie Dahlstrom's Article, *Trafficking and the Shallow State*.<sup>13</sup> As Dahlstrom describes, the specific vulnerability of immigrants is a problem that is well known in

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<sup>4</sup>Ross, *supra* note 2 at 388; see also Julie Dahlstrom, *The Elastic Meaning[s] of Human Trafficking*, 108 CAL. L. REV. 379, 390 (2020); Johnny Nahn & Kendra Bowen, *Policing Internet Sex Trafficking*, 9 J. QUALITATIVE CRIM. JUST. & CRIMINOLOGY (2020), <https://doi.org/10.21428/88de04a1.2d5eb46e>.

<sup>5</sup>Farrell et al., *supra* note 1 at 8, 74, 217–24.

<sup>6</sup>Farrell et al., *supra* note 1 at 218–19; U.S. DEP'T OF STATE, *TRAFFICKING IN PERSONS REPORT* (2021), <https://www.state.gov/wp-content/uploads/2021/09/TIPR-GP-A-upload-07222021.pdf> [<https://perma.cc/F7UC-N87B>] [hereinafter USDS, HUM. TRAFFICKING REP.] (noting victims in many countries expressed their reluctance to report and seek assistance).

<sup>7</sup>Susan Mapp, Emily Hornung, Madeleine D'Almeida & Jessica Juhnke, *Local Law Enforcement Officers' Knowledge of Human Trafficking: Ability to Define, Identify, and Assist*, 2 J. HUM. TRAFFICKING 329, 330, 338–39 (2016).

<sup>8</sup>Amy Farrell, Meredith Dank, Ieke de Vries, Matthew Kafafian, Andrea Hughes & Sarah Lockwood, *Failing Victims? Challenges of the Police Response to Human Trafficking*, 18 CRIMINOLOGY & PUB. POL'Y 649, 650 (2019).

<sup>9</sup>Farrell et al., *supra* note 8 at 658, 661.

<sup>10</sup>Farrell et al., *supra* note 1 at 84–86; Laura Shoop, *Uncovering the "Hidden Crime" of Human Trafficking by Empowering Individuals to Respond*, 36 GA. ST. U. L. REV. 1173, 1181 (2020).

<sup>11</sup>Farrell et al., *supra* note 1 at 74, 81–83.

<sup>12</sup>Carole Angel, *Immigration Relief for Human Trafficking Victims: Focusing the lens on the human rights of victims*, 7 U. MD. L. J. RACE, RELIGION, GENDER & CLASS 23, 25 (2007); Jennifer Chacon, *Tensions and Trade-Offs: Protecting Trafficking Victims in the Era of Immigration Enforcement*, 158 U. PA. L. REV. 1609, 1615 (2010); Farrell et al., *supra* note 1 at 82–83; Farrell et al., *supra* note 8 at 651, 662, 668; Shoop, *supra* note 10, at 1181; USDS, HUM. TRAFFICKING REP., *supra* note 6, *passim*.

<sup>13</sup>Dahlstrom, *supra* note 2.

the trafficking field—one that legislators have tried to address in several ways.<sup>14</sup> But these efforts have been undermined by administrative policy changes during the Trump administration, which empowered administrative actors to significantly distort the visa application process.<sup>15</sup> These distortions, in turn, made deportation much more likely, and thereby chilled victims from reporting their victimization to law enforcement.<sup>16</sup>

In focusing on these administrative policies, Dahlstrom highlights the outsized influence that “low-level bureaucratic actors”<sup>17</sup> can have on major criminal justice issues. These low-level actions effectively hide major executive choices which might be challenged if they were officially implemented through legislation.<sup>18</sup> Dahlstrom’s article is reviewed below.

## II. Julie Dahlstrom, *Trafficking and the Shallow State*<sup>19</sup>

Dahlstrom centers her discussion on T visas.<sup>20</sup> T visas are specifically offered for trafficking victims, and were created in recognition of the harsh treatment that trafficking victims receive when they are deported (in the TVPA “Congress noted that . . . immigrant victims ‘are repeatedly punished more harshly than the traffickers themselves’ ”).<sup>21</sup> Yet T visas are rarely approved; in fact, denials of T visa applications increased by 50% between 2015 and 2020.<sup>22</sup> The process of applying for one has also become significantly more burdensome and processing times increased from under eight months in 2016 to almost two and one half years in 2020.<sup>23</sup> Dahlstrom introduces the reader to the collection of “minefields” that she argues were used to reject applicants, including immediate removal upon rejection of applications, raising fees, tightening fee waiver standards, and summary rejection of applications “if even a single field was left blank.”<sup>24</sup> These changes, she suggests, chilled

<sup>14</sup>Dahlstrom, *supra* note 2, at 77–84.

<sup>15</sup>Dahlstrom, *supra* note 2, at 68–70.

<sup>16</sup>Dahlstrom, *supra* note 2, at 79.

<sup>17</sup>Dahlstrom, *supra* note 2, at 68.

<sup>18</sup>Dahlstrom, *supra* note 2, at 68.

<sup>19</sup>DAHLSTROM, *supra* note 2.

<sup>20</sup>Dahlstrom, *supra* note 2, at 64–65.

<sup>21</sup>Dahlstrom, *supra* note 2, at 65 (quoting TVPA, Pub. L. No. 106-386, § 102(b)(17), 114 Stat. 1464, 1468 (2000)).

<sup>22</sup>Dahlstrom, *supra* note 2, at 65–66.

<sup>23</sup>Dahlstrom, *supra* note 2, at 66, 69.

<sup>24</sup>Dahlstrom, *supra* note 2, at 69.

immigrant applications and frustrated the purpose of federal anti-trafficking law.<sup>25</sup>

To clarify the purposes of those laws, Dahlstrom offers a history of trafficking statutes in the United States.<sup>26</sup> Trafficking laws originated in racialized, sensationalized immigration enforcement statutes that imagined white, European women being kidnapped and forced into sex work, and attempting to exclude non-white immigrant women.<sup>27</sup> Extreme restrictions on immigration were offered as the solution both to admitting women who were involved in sex work and to the terrible ruination that might occur when virtuous immigrants attempted to travel to the United States only to find they were left without resources or aid.<sup>28</sup>

While these concerns continued throughout the twentieth century, and the precursors of labor trafficking laws were passed in 1940, little thought was given to the difficulties faced by immigrants, even those who supported prosecutions under these statutes.<sup>29</sup> However, a series of highly publicized cases in the 1990s reframed the public conversation to acknowledge that immigrant workers were victims, rather than offenders.<sup>30</sup> In response to this, scholars and activists conceived of the T visa as an incentive for victim cooperation with prosecution of traffickers.<sup>31</sup> It was formally established in 2000, as part of the TVPA, which also created federal trafficking crimes, increased criminal penalties for related conduct, created U-Visas for victims of violent crime and allowed for the “continued presence” of trafficking victims who could be witnesses in trafficking investigations.<sup>32</sup>

T visas were only available for immigrant victims of “a severe form of trafficking” who were present in the United States “on account of” the trafficking, had complied with law enforcement requests for assistance, would suffer extreme hardship upon removal, and were otherwise admissible to the country.<sup>33</sup> But, if these conditions were met, T visas offered a status similar to refugee status, allowing for work authorization and a pathway to citizenship, and providing

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<sup>25</sup>Dahlstrom, *supra* note 2, at 69.

<sup>26</sup>Dahlstrom, *supra* note 2, at 70–76.

<sup>27</sup>Dahlstrom, *supra* note 2, at 71.

<sup>28</sup>Dahlstrom, *supra* note 2, at 71–72.

<sup>29</sup>Dahlstrom, *supra* note 2, at 73.

<sup>30</sup>Dahlstrom, *supra* note 2, at 74–76.

<sup>31</sup>Dahlstrom, *supra* note 2, at 76.

<sup>32</sup>Dahlstrom, *supra* note 2, at 77.

<sup>33</sup>Dahlstrom, *supra* note 2, at 78.

eligibility for public benefits.<sup>34</sup> In contrast, U Visas do not require that a crime victim be trafficked or would suffer extreme hardship upon removal, but they also do not offer eligibility for public benefits, and the path to permanent residency is more difficult.<sup>35</sup> Additionally, wait times for processing can be over five years, and annual caps are often reached, whereas T visas rarely reach the cap of 5,000 visas annually.<sup>36</sup> Finally, continued presence status offers, essentially, a pathway to a T visa, deferred action, a work permit, and public benefits while the T visa application is processed.<sup>37</sup>

It quickly became apparent that the T visa process was not the incentive Congress had desired.<sup>38</sup> Applications were incredibly rare, and their approval was even less frequent.<sup>39</sup> It is likely that this reluctance to apply is related to victims' reluctance to cooperate with law enforcement, due to trauma or fear.<sup>40</sup> In response, in 2003 and 2008 Congress excepted victims from the cooperation requirement if they were prevented from cooperating by trauma, or if they were up to eighteen years old, and Congress also expanded the length that an applicant could qualify for Continued Presence.<sup>41</sup>

Since 2013 the federal government has also increased its efforts to serve and identify trafficking victims through various federal programs.<sup>42</sup> The federal government has also funded anti-trafficking NGOs and legal representation for trafficking victims.<sup>43</sup> Yet applications for T visas have only modestly increased, and the denial rate for applications has dramatically increased since 2016.<sup>44</sup>

Dahlstrom acknowledges that some portion of the low application and high denial rates may be due to failure to identify trafficking victims and insufficient training, particularly when less blatant forms of coercion are used, or when victims don't conform to racialized narratives of "iconic" victims.<sup>45</sup> She also acknowledges that a hyper focus on immigration enforcement has chilled victims from reporting

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<sup>34</sup>Dahlstrom, *supra* note 2, at 79.

<sup>35</sup>Dahlstrom, *supra* note 2, at 79–80.

<sup>36</sup>Dahlstrom, *supra* note 2, at 80.

<sup>37</sup>Dahlstrom, *supra* note 2, at 81.

<sup>38</sup>Dahlstrom, *supra* note 2, at 81.

<sup>39</sup>Dahlstrom, *supra* note 2, at 81.

<sup>40</sup>Dahlstrom, *supra* note 2, at 78–79.

<sup>41</sup>Dahlstrom, *supra* note 2, at 82.

<sup>42</sup>Dahlstrom, *supra* note 2, at 83–84.

<sup>43</sup>Dahlstrom, *supra* note 2, at 83–84.

<sup>44</sup>Dahlstrom, *supra* note 2, at 82, 84.

<sup>45</sup>Dahlstrom, *supra* note 2, at 85–87.

their victimization.<sup>46</sup> But Dahlstrom argues that the specific history of denial rates between 2016 and 2020 offers insight into the ability of administrative bureaucrats to impact legal practice beyond their perceived authority.<sup>47</sup>

Dahlstrom places her discussion in the context of David Rothkopf's "shallow state," which he uses to describe administrative officials who use the administrative state "instrumentally to serve the hidden agenda of the executive," undermining the statutory regime.<sup>48</sup> She identifies five specific administrative tactics that have empowered bureaucratic actors to gut the promises of the T visa program.<sup>49</sup> These tactics are "(1) heightening the stakes for immigrant victims, (2) rejecting new applications, (3) causing delay, (4) increasing requests for evidence and denials, and (5) expanding 'darkside discretion.'"<sup>50</sup>

The heightened stakes described by Dahlstrom offers the clearest example of the strain between immigration enforcement and trafficking enforcement. She recounts that, in 2018, United States Citizenship and Immigration Services (USCIS) began a policy whereby T visa applicants whose applications were denied would immediately be placed in removal proceedings.<sup>51</sup> Prior to that point, applicants whose applications were denied were essentially otherwise ignored and allowed to remain in the country unless removal proceedings were brought for some other reason.<sup>52</sup> In changing this policy, via a policy memorandum, USCIS placed trafficking victims in a situation where reporting their victimization and attempting to acquire the T visa created specifically for the purpose of encouraging them to do so, would instead jeopardize their presence in the country.<sup>53</sup> Applications decreased immediately after the policy change was announced.<sup>54</sup>

At the same time, USCIS became much more demanding in regards to T visa applications and dramatically increased its rate of summarily rejecting applications.<sup>55</sup> It did this first by severely restrict-

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<sup>46</sup>Dahlstrom, *supra* note 2, at 87.

<sup>47</sup>Dahlstrom, *supra* note 2, at 68, 87–88.

<sup>48</sup>Dahlstrom, *supra* note 2, at 89.

<sup>49</sup>Dahlstrom, *supra* note 2, at 92.

<sup>50</sup>Dahlstrom, *supra* note 2, at 92.

<sup>51</sup>Dahlstrom, *supra* note 2, at 92–93.

<sup>52</sup>Dahlstrom, *supra* note 2, at 92–93.

<sup>53</sup>Dahlstrom, *supra* note 2, at 93.

<sup>54</sup>Dahlstrom, *supra* note 2, at 93–94.

<sup>55</sup>Dahlstrom, *supra* note 2, at 94–95.

ing fee waivers, which were heavily relied upon by T visa applicants.<sup>56</sup> In 2020, however, Public Citizen, representing Northwest Immigrant Rights Project, won an injunction to stop the policy on the basis that it had been enacted without notice and comment, in violation of the Administrative Procedures Act.<sup>57</sup>

USCIS then abandoned the new fee waiver policy, but immediately announced that it would reject any applications that left any fields blank, including fields that were entirely irrelevant.<sup>58</sup> While data is not available as to direct effect on T visa applications, 98% of U Visa applications were rejected over the following three months.<sup>59</sup> Dahlstrom also surveyed attorneys representing T visa applicants and found that 17% of T visa rejections in those first three months were due to the new policy.<sup>60</sup> This policy was also successfully challenged in court, and USCIS ended the policy in December of 2020 as part of a settlement.<sup>61</sup>

Over this same time period, USCIS slowed its processing of T visa applications, such that “processing times for decisions increased from 7.99 months to 17.9 months” and USCIS own estimates warned that processing could take more than two years.<sup>62</sup> This delay functioned as another severe threat to immigrant victims of trafficking who were applying while subject to removal proceedings, as they might not be able to obtain sufficient continuances in those proceedings to allow for their T visa applications to be processed.<sup>63</sup> It also undermined their ability to receive protection from their traffickers.<sup>64</sup>

USCIS also increased denials and requests for evidence in relation to their interpretation of whether a trafficking victim was in the United States “on account of” their having been trafficked.<sup>65</sup> Being in the United States “on account of” being trafficked is one of the requirements to qualify for a T visa, but had been interpreted generously and even expanded in 2016.<sup>66</sup> But in 2017, USCIS began demanding far more evidence than had been required before, includ-

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<sup>56</sup>Dahlstrom, *supra* note 2, at 94–96.

<sup>57</sup>Dahlstrom, *supra* note 2, at 96–97.

<sup>58</sup>Dahlstrom, *supra* note 2, at 97.

<sup>59</sup>Dahlstrom, *supra* note 2, at 98.

<sup>60</sup>Dahlstrom, *supra* note 2, at 98.

<sup>61</sup>Dahlstrom, *supra* note 2, at 99.

<sup>62</sup>Dahlstrom, *supra* note 2, at 99.

<sup>63</sup>Dahlstrom, *supra* note 2, at 100.

<sup>64</sup>Dahlstrom, *supra* note 2, at 100.

<sup>65</sup>Dahlstrom, *supra* note 2, at 100–02.

<sup>66</sup>Dahlstrom, *supra* note 2, at 100–01.



ing requiring evidence that applicants had only “recently” escaped their trafficker.<sup>67</sup> This change resulted in denials of applicants who had come to the U.S. solely as trafficking victims, but who might have difficulty bringing themselves to report their trafficking and apply for a visa after escaping their situation.<sup>68</sup>

The final bureaucratic barrier Dahlstrom discusses is the use of bureaucratic discretion.<sup>69</sup> The T visa was not intended to rely on discretion, but the requirement that applicants be “otherwise admissible” to the country introduces discretion.<sup>70</sup> This is because, in many cases, applicants have often engaged in commercial sex or entered illegally, or engaged in other conduct rendering them inadmissible.<sup>71</sup> They must then apply for a waiver of inadmissibility, which is granted by discretionary judgments, and is not subject to appeal.<sup>72</sup> In 2020, USCIS published new discretionary guidance that established a twenty-two-factor test for discretionary decisions, and requires that the deciding officer make a record of their deliberations on each factor.<sup>73</sup> Dahlstrom, and others, argue that this new guidance undermines the intended protection for trafficking victims by ignoring that the nature of trafficking undermines victims’ ability to demonstrate “respect for law and order” or “good character” as requested and described in the 22-factor test.<sup>74</sup>

These USCIS actions were not entirely without constraints or oversight, and legal responses to many of these bureaucratic efforts was successful, as outlined above.<sup>75</sup> But legal response is slow, and therefore inadequate, as many immigrants were unjustly deported while awaiting processing, and rectifying that deportation is exponentially more difficult once an immigrant is no longer on U.S. soil.<sup>76</sup> Dahlstrom offers recommendations for more complete remedies to the problems that recent administrative changes have created, including reverting to earlier understandings of the “account of” trafficking requirement, improving training of USCIS officers, inviting perspectives from survivors and advocates, having the Office of the Inspector General in the U.S. Department of Human Security conduct an investigation into underuse of the T visa

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<sup>67</sup>Dahlstrom, *supra* note 2, at 101–02.

<sup>68</sup>Dahlstrom, *supra* note 2, at 102–03.

<sup>69</sup>Dahlstrom, *supra* note 2, at 103–05.

<sup>70</sup>Dahlstrom, *supra* note 2, at 103.

<sup>71</sup>Dahlstrom, *supra* note 2, at 103.

<sup>72</sup>Dahlstrom, *supra* note 2, at 103–04.

<sup>73</sup>Dahlstrom, *supra* note 2, at 104.

<sup>74</sup>Dahlstrom, *supra* note 2, at 105.

<sup>75</sup>Dahlstrom, *supra* note 2, at 105.

<sup>76</sup>Dahlstrom, *supra* note 2, at 105–06.

program, utilizing the oversight capacities of the USCIC Ombudsman to identify T visa applicants who were harmed and rectify that harm, and reinstating the initial filing date of any applicants that were rejected under the fee waiver or “no spaces” policies.<sup>77</sup>

### III. CONCLUSION

The tension between arrest or deportation, and the pursuit of human traffickers is not new.<sup>78</sup> Similarly, the ability of administrative actors to undermine the broader purposes of law is well established, particularly in the immigration context.<sup>79</sup> But Dahlstrom’s article offers an important window into the details of this process, and the conflicts that are inherent in these areas, as well as a valuable admonition to correct the problem.

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<sup>77</sup>Dahlstrom, *supra* note 2, at 106–09.

<sup>78</sup>*See supra* note 12.

<sup>79</sup>*See, e.g.*, Daniel Kanstroom, *Surrounding the Hole in the Doughnut: Discretion and Deference in U.S. Immigration Law*, 71 TUL. L. REV. 703, 752 (1997); Shoba Sivaprasad Wadhia, *Darkside Discretion in Immigration Cases*, 72 ADMIN. L. REV. 367 (2020).