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July 2012

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### Recommended Citation

Drasin, Whitney J. (2012) "New York's Law Allowing Trafficked Persons to Bring Motions to Vacate Prostitution Convictions: Bridging the Gap or Just Covering it Up?," *Touro Law Review*. Vol. 28: No. 2, Article 8.

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## New York's Law Allowing Trafficked Persons to Bring Motions to Vacate Prostitution Convictions: Bridging the Gap or Just Covering it Up?

### Cover Page Footnote

28 Touro L. Rev. 489 (2012).

**NEW YORK’S LAW ALLOWING TRAFFICKED PERSONS TO  
BRING MOTIONS TO VACATE PROSTITUTION  
CONVICTIONS: BRIDGING THE GAP OR JUST COVERING IT  
UP?**

*by Whitney J. Drasin\**

**I. INTRODUCTION**

On August 13, 2010, former Governor David Paterson signed a bill, which amended New York State Criminal Procedure Law section 440.10, permitting victims of commercial sex trafficking to wipe their records clean of prostitution-related crimes by vacating their convictions.<sup>1</sup> This vacating prostitution convictions law is the first of its kind in the nation.<sup>2</sup> The law permits a defendant to make a motion to vacate any and all judgments entered against them when:

The judgment is a conviction where the arresting charge was under section 240.37 (loitering for the purpose of engaging in a prostitution offense, provided that the defendant was not alleged to be loitering for the purpose of patronizing a prostitute or promoting prostitution) or 230.00 (prostitution) of the penal law, and the defendant’s participation in the offense was a result of having been a victim of sex trafficking under

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\* Juris Doctor Candidate 2012, Touro College Jacob D. Fuchsberg Law Center; B.A. 2006, State University at Buffalo. I would first like to thank my family and friends for their unwavering support over the past three years. I would also like to thank Professor Kennedy for her invaluable critique on this Comment. Lastly, I wish to thank Melissa Sontag Broudo, Esq. and everyone at The Sex Workers Project for the very important work that you do.

<sup>1</sup> See Assemb. 7670, 232nd Leg., Reg. Sess. (N.Y. 2010).

<sup>2</sup> Press Release, Sex Worker’s Project, Urban Justice Center, *Governor Patterson Signs First In the Nation Bill Allowing Survivors of Sex Trafficking to Clear Prostitution Convictions* (Aug. 16, 2010), available at <http://www.sexworkersproject.org/press/releases/swp-press-release-20100816.html>.

section 230.34 of the penal law or trafficking in persons under the Trafficking Victims Protection Act . . . .<sup>3</sup>

The stigmatizing effects of a criminal record create barriers for victims with respect to obtaining housing, jobs, and education. This law, co-authored by The Sex Workers Project, a project of the Urban Justice Center, and Assembly Member Richard N. Gottfried, was drafted to provide relief for all trafficked persons who face these tremendous barriers in trying to rebuild their lives.<sup>4</sup>

Both the federal and New York State legislation was enacted to provide relief to victims and prosecute traffickers, however, despite these laws, victim identification by law enforcement officials is still lacking, thereby creating a need for the vacating prostitution convictions law. This Comment argues that although the vacating prostitution convictions law is a step in the right direction, the gap between federal and State anti-trafficking laws will remain if New York courts do not liberally construe the statute's language to include convictions other than prostitution in order to provide relief to trafficking victims. New York courts must understand that prostitution and prostitution related convictions might not be the only convictions a victim has on their record as a result of being trafficked. Failure to provide relief for victims whose records hold other convictions besides prostitution due to being a victim of trafficking will prevent many victims from moving forward with their lives.

Section II explains the scope of the problem of human trafficking in the United States as well as discusses the current federal and New York State anti-trafficking laws. Section III explains the vacating prostitution convictions law and addresses the concerns of legislators regarding how this law will be construed by New York courts. Further, this section analyzes how New York courts have interpreted the statute using the handful of cases that have been adjudicated thus far. Finally, Section IV concludes by offering recommendations on how this legislation should be interpreted by New York courts in order to be most effective in helping to repair the lives of victims who have suffered irreparable harm.

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<sup>3</sup> Assemb. 7670.

<sup>4</sup> See Sex Worker's Project, *supra* note 2.

## II. THE CURRENT FEDERAL AND NEW YORK ANTI-TRAFFICKING LAWS

### A. Human Trafficking in the United States

Human trafficking is said to be “the fastest growing criminal industry in the world[,] . . . generat[ing] billions of dollars in profits at the expense of victimizing millions of people.”<sup>5</sup> Profits from this industry aid in the “expansion of organized crime in the United States and worldwide.”<sup>6</sup> Under the Trafficking Victims Protection Act (“TVPA”)<sup>7</sup> human trafficking is defined as:

[S]ex trafficking in which a commercial sex act is induced by force, fraud, or coercion, or in which the person induced to perform such act has not attained 18 years of age; or . . . the recruitment, harboring, transportation, provision, or obtaining of a person for labor or services, through the use of force, fraud, or coercion for the purpose of subjection to involuntary servitude, peonage, debt bondage, or slavery.<sup>8</sup>

Further, under the TVPA, a person may be considered a victim of human trafficking despite having previously consented.<sup>9</sup> It is also important to note that a victim does not need to be “physically transported from one location to another” in order to be considered trafficked.<sup>10</sup>

Although sex trafficking makes up a “smaller but still significant percentage of overall human trafficking,”<sup>11</sup> it is one of the most profitable areas and involves many different facets, such as forced

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<sup>5</sup> *What is Human Trafficking?*, RICHMOND JUSTICE INITIATIVE, [http://www.rvaji.com/?page\\_id=80](http://www.rvaji.com/?page_id=80) (last visited March 19, 2012).

<sup>6</sup> 22 U.S.C. § 7101(b)(8) (2012) (effective Oct. 28, 2000).

<sup>7</sup> The TVPA is federal legislation created to combat human trafficking by “ensur[ing] just and effective punishment of traffickers” on a federal level. 22 U.S.C. § 7101(a). The evolution of the TVPA will be explained in further detail later in this Comment.

<sup>8</sup> 22 U.S.C. § 7102(8) (2012) (effective Dec. 23, 2008).

<sup>9</sup> See U.S. DEPT. OF STATE, *TRAFFICKING IN PERSONS REPORT*, 9 (10th ed. 2010) (on file with author) (“It is critical to understand that a person’s initial consent to participate in prostitution is not legally determinative: if they are thereafter held in service through psychological manipulation or physical force, they are trafficking victims . . .”).

<sup>10</sup> *Id.* at 8.

<sup>11</sup> *Id.* at 9.

prostitution, forced pornography, and the sexual exploitation of children.<sup>12</sup> Moreover, due to the nature of the industry, victims of sex trafficking are often exposed to serious health risks and fatal diseases such as HIV and AIDS, as well as significant violence from traffickers and clients.<sup>13</sup> Women and children who are United States citizens and forced to enter the sex industry often do so by way of strip clubs, street-based prostitution, escort services, and brothels.<sup>14</sup> Immigrant women and children brought to the United States by their captors are forced into the commercial sex trade by way of massage parlors, hostess clubs, commercially-fronted brothels, residential brothels, escort services, and strip clubs.<sup>15</sup> Victims are most often coerced into the sex trade due to financial struggle.<sup>16</sup> Some are lured with the promise of “decent working conditions at relatively good pay.”<sup>17</sup> Once captured, traffickers often use threats of physical violence as well as “sexual abuse, torture, starvation, imprisonment . . . [and] psychological abuse” to prevent their victims from leaving.<sup>18</sup> Immigrant victims are often threatened with the “withholding, destroying, or confiscat[ion] [of] any actual or purported passport, immigration document, or any other actual or purported government identification document.”<sup>19</sup>

Under the TVPA, the United States has refused to provide economic assistance to governments that do not “comply with [the] minimum standards for the elimination of trafficking”<sup>20</sup> set forth by this legislation. However, one expert, Louise Shelley, the founder and director of the Terrorism, Transnational Crime and Corruption Center in Washington, D.C., has noted that the United States is “the only advanced democracy in the world” where the majority of human

<sup>12</sup> *What is Human Trafficking?*, *supra* note 5.

<sup>13</sup> See 22 U.S.C. § 7101(b)(11).

<sup>14</sup> See *Street Prostitution*, POLARIS PROJECT, <http://www.polarisproject.org/human-trafficking/sex-trafficking-in-the-us/street-prostitution> (last visited Apr. 2, 2010).

<sup>15</sup> See *Asian Massage Parlors*, POLARIS PROJECT, <http://www.polarisproject.org/human-trafficking/sex-trafficking-in-the-us/massage-parlors> (last visited Apr. 2, 2010).

<sup>16</sup> 22 U.S.C. § 7101(b)(4) (“Traffickers primarily target women and girls, who are disproportionately affected by poverty, the lack of access to education, chronic unemployment, discrimination, and the lack of economic opportunities in countries of origin.”).

<sup>17</sup> *Id.*

<sup>18</sup> *Id.* § 7101(b)(6).

<sup>19</sup> N.Y. PENAL LAW § 230.34(3) (McKinney 2011) (effective Nov. 1, 2007).

<sup>20</sup> 22 U.S.C. § 7107(a).

trafficking victims are its own citizens.<sup>21</sup>

In an effort to track and explain government policies being implemented on an international level to combat the issue of human trafficking, the United States created the Trafficking in Persons Report (“TIP”).<sup>22</sup> In 2010, for the first time in its ten years of existence, TIP included the United States in the ranking of countries’ efforts to combat the issue of human trafficking.<sup>23</sup> “The ranking reflects the contributions of government agencies, public input, and independent research by the Department of State[,]” however, the countries included in the ranking are only those countries that comply with the TVPA.<sup>24</sup> Rankings are based on a country’s willingness to “comply with *minimum* standards set forth in the TVPA as amended[.]”<sup>25</sup> Although the United States ranks as a tier one country, meaning it is in full compliance with the “*minimum* standards set forth in the TVPA as amended[.]”<sup>26</sup> there is still much work to be done.

The “hidden nature of trafficking in persons” hinders the ability to capture accurate statistics;<sup>27</sup> however, it is “estimated [that] 17,500 foreign nationals are trafficked annually in the United States [and] . . . [t]he number of U.S. citizens trafficked within the country is even higher.”<sup>28</sup> “The United States is a source, transit, and destination country for men, women, [transgender men, transgender women], and children subjected to trafficking in persons, specifically forced labor, debt bondage, and forced prostitution.”<sup>29</sup> For the 2009 Fiscal Year, the United States Attorneys’ Offices, in partnership with the Human Trafficking Prosecution Unit (a unit of the Department of Justice’s Civil Rights Division), “charged 114 individuals and obtained 47 convictions in 43 human trafficking prosecutions (21 labor

<sup>21</sup> Andrew F. Tully, *Experts Say Human Trafficking a Major Problem in U.S.*, RADIO FREE EUROPE (Jul. 11, 2008), [http://www.rferl.org/content/Experts\\_Say\\_Human\\_Trafficking\\_A\\_Major\\_Problem\\_In\\_US/1183179.html](http://www.rferl.org/content/Experts_Say_Human_Trafficking_A_Major_Problem_In_US/1183179.html).

<sup>22</sup> See *Trafficking in Persons Report*, U.S. DEPT. OF STATE, <http://www.state.gov/g/tip/rls/tiprpt/> (last visited March 23, 2011).

<sup>23</sup> See U.S. DEPT. OF STATE, *supra* note 9, at 7 (“The United States recognizes that, like other countries, it has a serious problem with human trafficking for both labor and commercial sexual exploitation.”).

<sup>24</sup> *Id.*

<sup>25</sup> *Id.* at 6 (emphasis in original).

<sup>26</sup> *Id.* at 48 (emphasis in original).

<sup>27</sup> See U.S. DEPT. OF STATE, *TRAFFICKING IN PERSONS REPORT*, 18 (2008) (on file with author).

<sup>28</sup> *What is Human Trafficking?*, *supra* note 5.

<sup>29</sup> U.S. DEPT. OF STATE, *supra* note 9, at 338.

trafficking and 22 sex trafficking).”<sup>30</sup> These numbers are significantly lower than the estimated amount of victims being trafficked into and within the United States each year, as mentioned above.

## B. Federal Legislative Efforts

### 1. *Trafficking Victims Protection Act of 2000*

In 2000, the United States enacted the TVPA,<sup>31</sup> the first federal anti-trafficking legislation.<sup>32</sup> Congress recognized the need for such legislation at the start of the 21st century, where “[a]t least 700,000 persons annually, primarily women and children, [were] trafficked within or across international borders . . . [while] [a]pproximately 50,000 women and children [were] trafficked into the United States each year.”<sup>33</sup> Moreover, Congress recognized that “[e]xisting laws often fail to protect victims of [human] trafficking . . . [and] adequate services and facilities do not exist to meet victims’ needs regarding health care, housing, education, and legal assistance.”<sup>34</sup>

The TVPA took a victim-centered approach by enhancing federal government activity in the areas of prosecution, protection, and prevention.<sup>35</sup> With respect to “Prosecution,” the legislation add-

<sup>30</sup> *Id.* at 339.

<sup>31</sup> 22 U.S.C. § 7101.

<sup>32</sup> *Id.* § 7101(a) (“The purposes of this chapter 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.”).

<sup>33</sup> *Id.* § 7101(b)(1).

<sup>34</sup> *Id.* §§ 7101(b)(17)-(18).

<sup>35</sup> See U.S. DEPT. OF STATE, *supra* note 9, at 5:

The TVPA seeks to combat trafficking by promoting a policy of “3 Ps”: prosecution, protection, and prevention: **Prosecution** involves passing the appropriate laws that criminalize trafficking, and jailing the abusers who exploit other humans for profit. **Protection** involves identifying victims, providing them with medical care and shelter (and if necessary witness protection), and, when appropriate, repatriating them. **Prevention** involves raising awareness of the inhumane practices involved in the trafficking trade and promoting a paradigm shift that seeks to reduce the demand for the “fruits” of human trafficking.

ed four criminal offenses to the United States Criminal Code: (1) forced labor; (2) trafficking with respect to peonage, slavery, involuntary servitude, or forced labor; (3) sex trafficking of children by force, fraud, or coercion; and (4) unlawful conduct with respect to documents in furtherance of trafficking.<sup>36</sup> Under the “Protection” prong, the TVPA provided benefits and services under any federal or state program for victims of “severe forms of trafficking in persons.”<sup>37</sup> This type of victim is defined as a person who has been “induced by force, fraud, or coercion” to perform a commercial sex act or in which the person induced to perform this type of act is under the age of eighteen.<sup>38</sup> Notably, the law also established the “T-visa,” allowing victims of human trafficking to become temporary residents of the United States as long as they could show that: (1) they are a victim of a severe form of human trafficking; (2) their physical presence in the United States is a result of such trafficking; (3) they have complied with any reasonable requests for assistance in the investigation and prosecution of trafficking crimes; and (4) they would suffer extreme hardship involving unusual and severe harm if removed from the United States.<sup>39</sup> The law also provided for specific immediate family members, under certain circumstances, to apply for temporary residency as well.<sup>40</sup> Finally, under the “Prevention” prong, the law vested the President of the United States with the power to create an Interagency Task Force (“ITF”) to monitor and combat trafficking.<sup>41</sup> The ITF’s primary responsibility is to assist the Secretary of State in “[m]easur[ing] and evaluat[ing] [the] progress of the United States and other countries in the areas of trafficking prevention, protection, and assistance to victims of trafficking, and prosecution and enforcement against traffickers . . . .”<sup>42</sup> The data is then presented each

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TRAFFICKING VICTIMS PROTECTION ACT, <http://fightslaverynow.org/why-fight-there-are-27-million-reasons/the-law-and-trafficking/trafficking-victims-protection-act/trafficking-victims-protection-act/> (last visited Jan. 9, 2011).

<sup>36</sup> 18 U.S.C. §§ 1589-92 (2006).

<sup>37</sup> 22 U.S.C. § 7105(b)(1)(B) (2006).

<sup>38</sup> *Id.* § 7102(8)(A).

<sup>39</sup> *Id.* § 7105(e); *see also* 8 U.S.C. § 1101(a)(15)(T)(i).

<sup>40</sup> 8 U.S.C. § 1101(a)(15)(T)(ii) (stating that an alien who is under the age of twenty-one applying for a “T-visa” may file for his or her spouse, child, siblings who are under the age eighteen and not married, and his or her parents to accompany them; an alien over the age of twenty-one, under this statute may file to have his or her parent, spouse, children, and any unmarried sibling under the age of eighteen join him or her).

<sup>41</sup> 22 U.S.C. § 7103(a).

<sup>42</sup> *Id.* § 7103(d)(2).

year to the congressional committees in the TIP report.<sup>43</sup>

Although the TVPA of 2000 primarily focused on the elimination of trafficking in persons in general, there is evidence suggesting this legislation was geared towards the prevention of trafficking of international persons.<sup>44</sup> It took three long years for Congress to begin recognizing the needs of its own citizens who were victims of trafficking.

## 2. *Trafficking Victims Protection Reauthorization Act of 2003*

On December 19, 2003, Congress amended the TVPA of 2000, enacting the Trafficking Victims Protection Reauthorization Act of 2003 (“TVPRA of 2003”).<sup>45</sup> The most significant portion of this legislation amended the United States Code by adding a civil cause of action for victims to bring against their captors.<sup>46</sup> In relevant part, this amendment allows a victim to bring a civil claim against their trafficker “in an appropriate district court of the United States and [to] recover damages and reasonable attorneys fees.”<sup>47</sup> However, a civil action “arising out of the same occurrence” for which there is a criminal action pending will stay the proceeding.<sup>48</sup> A victim may bring a civil claim on the basis of having been a victim of forced labor, forced servitude, or sex trafficking.<sup>49</sup>

Furthermore, the TVPRA of 2003 relaxed the T-visa requirements by increasing the age of victims who are required to cooperate with law enforcement in the investigation of traffickers from fifteen years of age to eighteen years of age.<sup>50</sup>

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<sup>43</sup> *Id.* § 7107(b)(1).

<sup>44</sup> *See id.* § 7103(d). Under the TVPA, many of the duties the ITF was tasked had to do with the collection and evaluation of data with respect to international trafficking of persons as well as facilitate cooperation among countries to prevent trafficking. *See id.*

<sup>45</sup> Trafficking Victims Protection Reauthorization Act of 2003, Pub. L. No. 108-193, 117 Stat. 852 (2003) (prior to 2005 amendment).

<sup>46</sup> *Id.* § 4(a)(4)(A); *see* 18 U.S.C. § 1595.

<sup>47</sup> Trafficking Victims Protection Reauthorization Act of 2003 § 4(a)(4)(A); *see* 18 U.S.C. § 1595(a).

<sup>48</sup> 18 U.S.C. § 1595(b)(1).

<sup>49</sup> KATHLEEN KIM & DANIEL WERTHER, CIVIL LITIGATION ON BEHALF OF VICTIMS OF TRAFFICKING, 29 (2008), available at [http://library.lls.edu/atlast/HumanTraffickingManual\\_web.pdf](http://library.lls.edu/atlast/HumanTraffickingManual_web.pdf).

<sup>50</sup> Trafficking Victims Protection Reauthorization Act of 2003 § 4(b)(1)(A); *see also* 8 U.S.C. § 1101(a)(15)(T)(i)(III)(bb).

### 3. *Trafficking Victims Protection Reauthorization Act of 2005*

After finding that approximately 600,000 to 800,000 people were still being trafficked each year, eighty percent of them being women and girls, Congress once again amended the TVPA in 2006.<sup>51</sup> In passing the Trafficking Victims Protection Reauthorization Act of 2005 (“TVPRA of 2005”), Congress recognized that up until 2006, the United States’ efforts to combat trafficking in persons were “focused primarily on the international trafficking in persons, including the trafficking of foreign citizens into the United States.”<sup>52</sup> Congress also recognized that trafficking exists within the borders of the United States.<sup>53</sup> As a result, Congress amended the law with the addition of “Title II - Combating Domestic Trafficking in Persons.”<sup>54</sup> This section of law embodies the United States’ efforts to expand its knowledge with respect to the issue of domestic trafficking. Specifically, Title II of the TVPRA of 2005 called for two studies to be conducted by the Attorney General.<sup>55</sup> The first study was to “address severe forms of trafficking in persons in the United States,”<sup>56</sup> and the second study was to “address sex trafficking and unlawful commercial sex acts in the United States.”<sup>57</sup> In keeping with the theme of a victim-centered approach, Congress also expanded the law to include the “Pilot Program for Residential Rehabilitative Facilities for Victims of Trafficking,”<sup>58</sup> which would ultimately create “benefits and services [for] victims of trafficking, including shelter, psychological counseling, and assistance in developing independent living skills.”<sup>59</sup>

Finally, Congress established a grant program in order to pro-

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<sup>51</sup> Trafficking Victims Protection Reauthorization Act of 2005, Pub. L. No. 109-164, 119 Stat 3558 (2006) (prior to 2008 amendment).

<sup>52</sup> *Id.* § 2(3).

<sup>53</sup> *Id.* § 2(4).

<sup>54</sup> *Id.* § 201; *see* 42 U.S.C. 14044(a) (2006).

<sup>55</sup> Trafficking Victims Protection Reauthorization Act of 2005 § 201(a)(1)(A); *see* 42 U.S.C. § 14044(a)(1)(A).

<sup>56</sup> Trafficking Victims Protection Reauthorization Act of 2005 § 201(a)(1)(B)(i); *see* 42 U.S.C. § 14044(a)(1)(B)(i).

<sup>57</sup> Trafficking Victims Protection Reauthorization Act of 2005 §201; 42 U.S.C. § 14044(a)(1)(B)(ii).

<sup>58</sup> 22 U.S.C. § 7105(b).

<sup>59</sup> *Id.* § 7105(b)(3)(A).

vide further assistance for victims of human trafficking.<sup>60</sup> This program includes the allocation of grants to state and local governments, as well as non-profit organizations specializing in victim services, in order to strengthen assistance programs for United States citizens or foreign nationals with permanent resident status who have fallen victim to sex trafficking or severe forms of trafficking in persons at least partly within the United States.<sup>61</sup> Overall, the amendments of the TVPRA of 2005 resulted in the significant advancement of services provided for domestic victims of human trafficking.

#### 4. *William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008*

On December 10, 2008, Congress passed the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 (“TVPRA of 2008”).<sup>62</sup> The amended Act further expanded victim protections, chief among them being an expansion of trafficking penalties.<sup>63</sup>

The prosecution of those accused of sex trafficking minors was made easier as proof of force, fraud, or coercion would no longer be necessary.<sup>64</sup> That is, a defendant who knowingly trafficked a minor would be held strictly liable.<sup>65</sup> Additionally, other interested parties, that is, anyone who benefited from the trafficking of a minor, will be held to a “reckless disregard” standard as to knowledge of the victim’s minor age.<sup>66</sup> However, evidence of force, fraud, or coercion is still necessary for successful prosecution with regard to trafficking of adult victims.<sup>67</sup> The burden of proof was adjusted to gauging the “serious harm” suffered by the victim, as a “person of the same background and in the same circumstances” would perceive it as opposed

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<sup>60</sup> Trafficking Victims Protection Reauthorization Act of 2005, § 202; *see* 42 U.S.C. § 14044a.

<sup>61</sup> Trafficking Victims Protection Reauthorization Act of 2005, § 202; *see* 42 U.S.C. § 14044a.

<sup>62</sup> William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. No. 110-457, 122 Stat 5044 (2008).

<sup>63</sup> *See id.* § 222.

<sup>64</sup> *Id.* § 222(b)(5); *see* 18 U.S.C. § 1591(a).

<sup>65</sup> 18 U.S.C. § 1591(a).

<sup>66</sup> *Id.*

<sup>67</sup> William Wilberforce Trafficking Victims Protection Reauthorization Act 2008 § 222(b)(3); *see* 18 U.S.C. §1589(a).

to a reasonable person standard.<sup>68</sup> As a result, proving coercion is easier because a reasonable person who has never been trafficked and exposed to long-term physical and mental abuse by a captor may not perceive the experience the same way as a victim of sexual trafficking.

Victims were further protected by way of immigration status.<sup>69</sup> The amended Act expanded immigration-related protections by extending T-visa status to include victims physically present in the United States “for participation in investigative or judicial processes associated with an act or a perpetrator of trafficking.”<sup>70</sup> Further, the Act expanded the category of family members of victims permitted to apply for T-visas, such as “family members who are in danger as a result of the victim’s escape from the trafficker or cooperation with law enforcement.”<sup>71</sup>

Lastly, the Act provided funding for continued assistance to United States citizens and lawful permanent residents.<sup>72</sup> Among the programs already in place to help survivors of human trafficking, the Act allowed for the allocation of more money to the United States Department of Health and Human Services, in conjunction with the Department of Justice, in order to set up additional programming.<sup>73</sup> Monies allocated included \$2,500,000 for 2008, \$5,000,000 for 2009, and \$7,000,000 per year for the years 2010 to 2011.<sup>74</sup>

### C. New York State Legislative Efforts

#### 1. *Human Trafficking Law*

Despite the passage of the TVPA, New York State lacked the

<sup>68</sup> William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 § 222(b)(3); see 18 U.S.C. § 1589(c)(2).

<sup>69</sup> William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 §§ 201, 204, 205.

<sup>70</sup> William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 § 201(a)(1)(C); see 8 U.S.C. § 1101(a)(15)(T)(i)(II).

<sup>71</sup> See U.S. DEPT. OF STATE, *supra* note 9, at 341.

<sup>72</sup> William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 § 213.

<sup>73</sup> William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 § 213(a)(2); see 22 U.S.C. § 7110(b)(2).

<sup>74</sup> William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 § 213(a)(2); see 22 U.S.C. § 7110(b)(2).

statutory authority to identify victims and prosecute traffickers.<sup>75</sup> Victims were mostly treated as criminals in the court system due to lack of awareness on the part of law enforcement.<sup>76</sup> New York passed its first legislation addressing human trafficking on June 6, 2007.<sup>77</sup> One of the main objectives of this legislation was to provide for the recognition of a person's status as a "victim" of trafficking as opposed to their criminalization as prostitutes or illegal immigrants.<sup>78</sup> The law addressed human trafficking in three ways by:

1) Establishing new crimes that specify the methods of inducement and control used by traffickers to exploit their victims; 2) Providing services to human trafficking victims who are unable to obtain assistance . . . due to their immigration status; and 3) Creating an interagency task force to the implementation of the new law and the State's efforts to combat human trafficking.<sup>79</sup>

Section 230.34 of the New York Penal Law classifies sex trafficking as a class B felony, carrying with it a maximum penalty of twenty-five years imprisonment.<sup>80</sup> Under this law, "a person is guilty of sex trafficking if he or she intentionally advances or profits from prostitution by means of" engaging in any one of the enumerated activities listed in the statute in an effort to keep a victim in a life of forced prostitution.<sup>81</sup> Some of the unlawful actions include: drugging victims; making false statements to "induce or maintain" the continuance of a victim's participation in prostitution; withholding or confiscating a victim's government identification "with intent to impair [their] freedom[;]" using force including physical injury; or perform-

<sup>75</sup> NEW YORK STATE INTERAGENCY TASK FORCE ON HUMAN TRAFFICKING, A REPORT BY THE INTERAGENCY TASK FORCE, IMPLEMENTATION OF THE 2007 LAW, 6 (2008) (on file with author)

<sup>76</sup> *See id.* at 6 ("The lack of comprehensive human trafficking law in New York State meant that many state and local law enforcement agencies, and service providers likely never received training on recognizing human trafficking.")

<sup>77</sup> *Id.* at 1.

<sup>78</sup> *Id.* at 7 ("This landmark legislation recognizes that those trafficked for prostitution and labor are victims of crime, and encourages them to be treated as such and not as criminals or illegal immigrants.")

<sup>79</sup> *Id.*

<sup>80</sup> N.Y. PENAL LAW § 230.34 (McKinney 2007); *see* NEW YORK STATE INTERAGENCY TASK FORCE ON HUMAN TRAFFICKING, *supra* note 75, at 7.

<sup>81</sup> N.Y. PENAL LAW § 230.34.

ing any act with intent to materially affect a person's "health, safety, or immigration status."<sup>82</sup>

The New York legislature further recognized that "the demand for prostitution [drove] the sex trafficking industry," and as a result amended existing prostitution laws.<sup>83</sup> These existing laws were amended in two ways: first, by increasing the penalty of "patronizing a prostitute from a class B to class A misdemeanor" and second, by amending section 230.25 of the Penal Law to include the operation of sex tourism businesses as a crime of promoting prostitution, making New York one of five states in the United States to "criminalize the operation of sex tour businesses," as of August 2008.<sup>84</sup>

The current New York laws provide services to human trafficking victims who would not otherwise obtain assistance because of their lack of immigrant status.<sup>85</sup> Some of the services provided under the law include: "case management, emergency temporary housing . . . job training and placement assistance, post-employment services, and services to assist . . . victims . . . establish permanent residence in the U.S."<sup>86</sup> Further, the trafficking laws created an Interagency Task Force on Human Trafficking ("Task Force") "co-chaired by the commissioners of the [Division of Criminal Justice Services ("DCJS")] and [the Office of Temporary and Disability Assistance ("OTDA)]."<sup>87</sup> The Task Force's primary function is to facilitate cohesiveness between the agencies involved in providing assistance to victims.<sup>88</sup>

<sup>82</sup> *Id.*

<sup>83</sup> NEW YORK STATE INTERAGENCY TASK FORCE ON HUMAN TRAFFICKING, *supra* note 75, at 9.

<sup>84</sup> *Id.*

<sup>85</sup> *Id.* at 12 ("Human trafficking victims are historically reluctant to come forward for a wide variety of reasons, including the fact that they fear arrest or deportation . . .").

<sup>86</sup> *Id.*; see N.Y. SOC. SERV. LAW § 483-bb (McKinney 2011).

<sup>87</sup> NEW YORK STATE INTERAGENCY TASK FORCE ON HUMAN TRAFFICKING, *supra* note 75, at 13; see N.Y. SOC. SERV. LAW § 483-ee (McKinney 2011).

<sup>88</sup> See NEW YORK STATE INTERAGENCY TASK FORCE ON HUMAN TRAFFICKING, *supra* note 75, at 14; N.Y. SOC. SERV. LAW § 483-ee(b).

The task force shall: (1) collect and organize data on the nature and extent of trafficking in persons in the state; (2) identify available federal, state and local programs that provide services to victims of trafficking, including but not limited to case management, housing, health care, mental health counseling, drug addiction screening and treatment, language interpretation and translation services, English language instruction, job training and placement assistance, post-employment services for job retention, and services to assist the individual and any of his or

Notably, in order to receive the benefits of public services provided under New York law, a person must be identified as a “human trafficking victim.”<sup>89</sup> That is, “a person who is a victim of sex trafficking as defined in section 230.34 of the penal law.”<sup>90</sup> Law enforcement officials are required to notify the DCJS and the OTDA “[a]s soon as practicable after a first encounter with a person who reasonably appears . . . to be a human trafficking victim . . . [as] that . . . person may be eligible for services under [Article 10-D of the New York Social Services Law].”<sup>91</sup> At that time, the co-chairs along with the referring law enforcement officials will make an assessment as to whether the person in question qualifies for certification “as a victim of a severe form of trafficking in persons as defined in [TVPA]” and will be able to start receiving benefits.<sup>92</sup> This is espe-

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her family members to establish a permanent residence in New York state or the United States; (3) consult with governmental and non-governmental organizations in developing recommendations to strengthen state and local efforts to prevent trafficking, protect and assist victims of trafficking and prosecute traffickers; (4) establish interagency protocols and collaboration between federal, state, and local law enforcement, state and governmental agencies, child welfare agencies, and non-governmental organizations; (5) evaluate approaches to increase public awareness about trafficking and make recommendations on such approaches; (6) evaluate the effectiveness of training programs on human trafficking that have been designed for law enforcement personnel, criminal defense attorneys, social service providers and non-governmental organizations, and make recommendations for improving the quality and effectiveness of such programs; and (7) measure and evaluate the progress of the state in preventing trafficking, protecting and providing assistance to victims of trafficking, and prosecuting persons engaged in trafficking.

*Id.*

<sup>89</sup> N.Y. SOC. SERV. LAW § 483-cc(a) (McKinney 2011).

<sup>90</sup> *Id.* § 483-aa(a).

<sup>91</sup> *Id.* § 483-cc(a).

<sup>92</sup> *Id.* § 483-cc(b).

If it is determined that the victim appears to meet such criteria, the office of temporary and disability assistance shall report the finding to the victim, and to the referring law enforcement agency or district attorney’s office, and may assist that agency or office in having such victim receive services from a case management provider who may be under contract with the office of temporary and disability assistance, or from any other available source. If the victim or possible victim is under the age of eighteen, the office of temporary and disability assistance also shall notify the local department of social services in the county where the child was found.

*Id.*

cially interesting because a person who self-identifies as a trafficking victim may not qualify for public benefits if the circumstances surrounding their victimization do not categorize them as having been induced by force, fraud, or coercion according to the statutory requirements of the TVPA.

## 2. *The Safe Harbor for Exploited Children Act*

The Safe Harbor for Exploited Children Act (“Safe Harbor Act”), amending the New York Family Court Act, was signed into law on September 25, 2008, and became effective April 1, 2010.<sup>93</sup> Prior to this legislation, New York State’s response to the issue of sexually exploited youth had been to prosecute them as criminals.<sup>94</sup>

Pursuant to this Act, any person who is under the age of eighteen and criminally charged with a prostitution offense will be presumed a severely trafficked person, as defined in the TVPA of 2000,<sup>95</sup> thereby avoiding all criminal charges as a juvenile delinquent and presumed to be “a person in need of supervision” (“PINS”).<sup>96</sup> The Act amended the definition of a PINS, found in the Family Court Act, to include any person under the age of eighteen who commits a prostitution offense or “appears to be a sexually exploited child.”<sup>97</sup>

Although a court of competent jurisdiction under this Act shall presume “the respondent meets the criteria as a victim of a severe form of trafficking,” a respondent, at any time during the proceeding, may make a motion to substitute a PINS petition for a delinquency petition.<sup>98</sup> The court will then substitute the petition; however, the court may deny this motion and move forward with a delinquency proceeding if: (1) the respondent has been previously adjudicated as a juvenile delinquent under Article Three of the New

<sup>93</sup> N.Y. SOC. SERV. LAW § 447 (McKinney 2011).

<sup>94</sup> Criminal Procedure Law – Victims of Sex Trafficking, 2010 Sess. Law News of N.Y. Legis. Memo Ch. 33 (McKinney 2010) (“Victims of sex trafficking who are forced into prostitution are frequently arrested for prostitution-related offenses and are saddled with the criminal record.”).

<sup>95</sup> 22 U.S.C. § 7102(8)(A); *see* 22 U.S.C. § 7105(b)(1)(c).

<sup>96</sup> N.Y. SOC. SERV. LAW § 477-a (McKinney 2011); *see* N.Y. FAM. CT. ACT § 712 (McKinney 2011) (“‘Person in need of supervision.’ A person less than eighteen years of age . . . who appears to be a sexually exploited child as defined in paragraph (a), (c) or (d) of subdivision one of section four hundred forty-seven-a of the social services law . . .”).

<sup>97</sup> N.Y. FAM. CT. ACT § 712.

<sup>98</sup> N.Y. FAM. CT. ACT §§ 311.4(1), (3).

York Family Court Act for a prostitution offense under the New York Penal Law; or (2) if the respondent “expresses an unwillingness to cooperate with services [provided] for sexually exploited youth.”<sup>99</sup> Should the court decide to move forward with delinquency proceedings, it will be required to present their findings of fact in a written decision and make it part of the court’s record.<sup>100</sup> Further, the court retains the right to reinstate the original delinquency petition in the event that the court finds a PINS respondent is not cooperating with a “lawful order of the court.”<sup>101</sup>

Additionally, the Safe Harbor Act provides social services for sexually exploited children.<sup>102</sup> Such services include safe-housing, whether immediate short-term housing or long-term residential, as well as access to services such as “community based programs.”<sup>103</sup> Subject to available funding, safe houses are made readily available to child victims under the supervision of the New York State Office of Children and Family Services (“OCFS”).<sup>104</sup> They provide short to long-term safe and secure housing “in a geographically appropriate area of the state” so as to avoid access by perpetrators of sexual exploitation.<sup>105</sup> Further, safe houses are mandated to provide access to various necessary services provided by public agencies, including medical care, mental health services, and legal assistance.<sup>106</sup> Finally, “community based programs” are available through not-for-profit organizations, which “provide services such as street outreach, voluntary drop-in services,” counseling services, and “referrals . . . for educational and vocational training.”<sup>107</sup>

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<sup>99</sup> N.Y. FAM. CT. ACT § 311.4(3).

<sup>100</sup> *Id.*

<sup>101</sup> *Id.*

<sup>102</sup> N.Y. SOC. SERV. LAW §§ 447-a, 447-b.

<sup>103</sup> N.Y. SOC. SERV. LAW §§ 447-a, 447-b.

<sup>104</sup> N.Y. SOC. SERV. LAW § 447-b(5).

<sup>105</sup> *Id.*

<sup>106</sup> N.Y. SOC. SERV. LAW § 447-a(4).

<sup>107</sup> N.Y. SOC. SERV. LAW § 447-a(5).

### III. THE VACATING PROSTITUTION CONVICTIONS LAW AND THE NECESSITY FOR BROAD INTERPRETATION BY NEW YORK COURTS IN ORDER TO PROVIDE RELIEF

#### A. Background

Victims who are convicted of prostitution or other criminal offenses under the New York Penal Law often have a difficult time moving forward with their lives. There are numerous consequences of bearing a criminal record, such as difficulty with obtaining adequate employment, access to housing, or immigration status.<sup>108</sup> “[It is] a hard reality that trafficked people are often arrested, convicted, and released without the justice system realizing [what is] really going on.”<sup>109</sup> A person may be arrested multiple times before being identified by law enforcement officials or self-identifying as a victim of human trafficking.<sup>110</sup> The vacating prostitution convictions law was drafted with the intention to bridge the gap between federal and New York State’s Anti-Human Trafficking Legislation.<sup>111</sup>

This new law amending New York’s Criminal Procedure Law Section 440.10, permits victims to make motions to vacate criminal convictions where the arresting charge was for prostitution and related offenses such as loitering for the purpose of engaging in a prostitution offense.<sup>112</sup>

A motion to vacate pursuant to this law may be made at any time after the defendant has ceased to be a victim of such trafficking or has sought services provided for victims of trafficking.<sup>113</sup> The law applies to all qualifying convictions that have occurred before or after

<sup>108</sup> Interview with Melissa Sontag Broudo, Staff Attorney, Sex Workers Project, Urban Justice Center, in N.Y.C., N.Y. (Oct. 15, 2010).

<sup>109</sup> Sex Workers Project, *supra* note 2, at 1.

<sup>110</sup> *Id.* (“Some of our clients, survivors of trafficking into commercial sex, were arrested more than 10 times before escaping their coercive circumstances.”).

<sup>111</sup> *Id.* (“The bill will provide relief to sexually exploited youth defined as trafficked under federal law. Despite New York’s Safe Harbour Act, over 90% of youth arrested for prostitution are charged in Criminal Court, where their convictions could result in a criminal record that until now would follow them through their lives.”).

<sup>112</sup> See Assemb.7670; N.Y. CRIM. PROC. LAW § 440.10 (McKinney 2011).

<sup>113</sup> Victims of Sex Trafficking Act, Ch. 332, 2010 N.Y. Sess. Laws A.7670 (McKinney).

this law has taken effect.<sup>114</sup>

## B. Breaking Down the Law

Though the vacating prostitution convictions law seems far-reaching, a closer look will reveal that it is narrow in scope, but should be interpreted broadly. In order to understand the need for broad interpretation, it is first important to understand how trafficked persons obtain a criminal record when they should instead be considered a victim of sexual exploitation.

### I. *A Victim's Criminal Record and the Need for Increased Victim Identification*

Most cases where the arresting charges are for prostitution and prostitution-related offenses are usually pled out at arraignment or the first appearance in court.<sup>115</sup> Victims are often instructed by their captors to remain silent, and enter a guilty plea so that they will return to their exploiters as soon as possible; and victims comply out of fear.<sup>116</sup> Underage victims are often told by their traffickers to give fake names and ages so that they will not be put into the juvenile system and risk not being released.<sup>117</sup> Additionally, there is added pressure on prosecutors and defense attorneys to “dispose of cases quickly with a plea or [adjournment in contemplation of dismissal] to avoid additional court dates” in an already inundated court system.<sup>118</sup> There is no way to appeal a conviction of this nature because it is the result of a plea.<sup>119</sup> The majority of prostitution related arrests result in a plea of guilty for disorderly conduct, or loitering with intent to prostitute, and often victims are released on the day of arraignment, thereby perpetuating their continued victimization by giving traffickers access to their victims once more.<sup>120</sup>

It is a combination of distrust for the legal system, fear of re-

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<sup>114</sup> *Id.*

<sup>115</sup> Interview with Melissa Sontag Broudo, *supra* note 108.

<sup>116</sup> *Id.*

<sup>117</sup> Courtney Bryan, Representing and Defending Victims of Commercial Sexual Exploitation in Criminal Court 6 (Oct. 6, 2010) (unpublished manuscript) (on file with author).

<sup>118</sup> *Id.* at 3.

<sup>119</sup> *Id.* at 5.

<sup>120</sup> Interview with Melissa Sontag Broudo, *supra* note 108.

taliation, and failure of law enforcement officials to identify persons as trafficked individuals, which leads to their treatment as criminals in the court system.<sup>121</sup> However, there are various ways to increase the likelihood of victim recognition in the courts. Partnerships between social service providers and public defenders to conduct trainings on trafficking are important, particularly in the court system, in order to increase victim identification. Typically, new public defenders begin their careers “handling low-level, seemingly simple cases, like prostitution.”<sup>122</sup> As such, it is critical that new public defenders are hyper-aware of the relationship between prostitution and trafficking, thereby avoiding criminal convictions for victims of trafficking. Victims are less likely to be honest about their circumstances with their lawyer because the arrest and arraignment process can be a harsh and frightening experience. Therefore, it is up to the defense attorney to conduct their client interviews with this premise in mind.

Once a defense attorney is able to identify their client as a victim of trafficking, he or she is more likely “[t]o create a compelling picture [for the court] of the circumstances of a client’s sexual exploitation.”<sup>123</sup> Defense attorneys should try their best to identify their client’s age because most underage victims are likely to lie about their age to avoid ending up in the juvenile system.<sup>124</sup> Clients who are under the age of eighteen will be presumed eligible for assistance under the Safe Harbor Act.<sup>125</sup>

As a result of a guilty plea, a domestic-born victim will have a blemished record. That is, a background check using their social security number will reveal a criminal record every time he or she applies for a job, housing, etc. This will often preclude them from

<sup>121</sup> Bryan, *supra* note 117, at 2-3.

<sup>122</sup> *Id.* at 5.

<sup>123</sup> *Id.* at 7.

<sup>124</sup> *Id.* at 6.

Many young people involved in the commercial sex industry are familiar with, and want to avoid, the intrusions of family court. When stopped by law enforcement, teenagers may lie about their age because they know in criminal court they will receive less scrutiny, suffer less consequences, and be subjected to fewer conditions than they would in family court.

*Id.*

<sup>125</sup> Bryan, *supra* note 117, at 6; *see also* N.Y. SOC. SERV. LAW § 447-a (McKinney 2010); *but see* People v. Lewis, 2010NY035660, NYLJ 1202502663175, at \*1 (Crim., NY, Decided July 12, 2011) (holding that the seventeen year old defendant did not qualify for relief under the TVPA, the Safe Harbor for Exploited Children’s Act, or the recent amendments to N.Y.C.P.L. § 440.10).

access to such necessities, but what about an undocumented immigrant who does not have a social security number? How may an undocumented immigrant victim in the United States be saddled with a criminal record? It might seem to be an enigma, but the answer is fairly simple.

Upon a victim's arrest, he or she is fingerprinted and documented in the legal system.<sup>126</sup> In the event the victim is later self-identified; that is, he or she has taken the appropriate steps to reveal themselves as a victim of trafficking to law enforcement officials (or is later found to be a victim of trafficking by some other means), the victim's record now holds a conviction, thereby making it difficult to apply for visa status.<sup>127</sup> The United States government requires immigrants who wish to enter the country to submit to a criminal background check.<sup>128</sup> Under federal law, a noncitizen may be deemed "inadmissible" and thus ineligible for immigration relief if he or she is found to have committed "'crimes involving moral turpitude' and 'controlled substance offenses.'" <sup>129</sup> Thus, a victim of human trafficking applying for a T-visa, who has a criminal record, may be deemed inadmissible, denied relief, and face the likelihood of deportation.<sup>130</sup> Deportation will likely lead to further victimization because the victim will become susceptible to being trafficked once again in their home country.<sup>131</sup> Even worse, a victim deported back to their home country after being forced to engage in prostitution in the United States may face grave danger due to the stigma of having been a prostitute.<sup>132</sup> Many trafficking victims are shunned by their family and communities of original descent, and cannot return home because they face threats of violence, or even death, regardless of the fact that

<sup>126</sup> Interview with Melissa Sontag Broudo, *supra* note 108.

<sup>127</sup> *Id.*; see also Letter from Laurel W. Eisner, J.D., M.S.W., Exec. Director, Sanctuary for Families, to Honorable David A. Paterson, Governor, State of New York (Aug. 4, 2010) (on file with author) (explaining the difficulties of applying for visa status and the high likelihood of deportation as a result of criminal convictions).

<sup>128</sup> Alina Das, *The Immigration Penalties of Criminal Convictions: Resurrecting Categorical Analysis in Immigration Law*, 86 N.Y.U. L. REV. 1669, 1682 (2011).

<sup>129</sup> *Id.* (quoting 8 U.S.C.A. § 1182(a)(2) (West 2010)).

<sup>130</sup> *Id.* at 1681 ("A person's criminal record is relevant to each of these determinations and serves as a basis for the system's most severe penalties, including mandatory detention and deportation.").

<sup>131</sup> Interview with Melissa Sontag Broudo, *supra* note 108.

<sup>132</sup> *Id.*

they were forced into prostitution.<sup>133</sup>

## 2. *Broad Interpretation of the Vacating Prostitution Convictions Law is Necessary to Provide Relief to Trafficking Victims*

Notably, the vacating prostitution convictions law has raised concerns that it is both over and underinclusive.<sup>134</sup> First, the law provides that motions to vacate may only be brought for convictions “where the *arresting charge* was under section 240.37 (loitering for the purpose of engaging in a prostitution offense)” or prostitution as defined by section 230.00 of the Penal Law.<sup>135</sup> The use of the phrase “arresting charges” as opposed to the word “conviction” has been a point of contention among law enforcement officials, recognizing that a criminal defendant may be convicted of a different charge than their initial arresting charge.<sup>136</sup> In the issuance of his official approval of this law, Former Governor Patterson raised the “example, [that] a defendant arrested for prostitution, but ultimately convicted of assault or murder, could theoretically have his or her convictions vacated” under this statute, thus resulting in vacatur of a serious offense.<sup>137</sup> However, this example illustrates a fairly unusual circumstance. The probability that an arresting charge of prostitution may lead to a conviction of murder is highly unlikely because the plain language of section 440.10(1) provides in relevant part: “At any time after the entry of a judgment, the court in which it was entered *may*, upon motion of the defendant, vacate such judgment . . . .”<sup>138</sup> Use of the term “may” in section 440.10(1) gives the court discretion in granting motions to vacate. The very same word will help to “mitigate any overinclusiveness”<sup>139</sup> stemming from the phrase “arresting

<sup>133</sup> *Id.* Many times victims will hear from family or friends who are living in their hometowns that there are threats of physical violence and even murder against them if they should ever return. *Id.*

<sup>134</sup> See Memorandum filed with Assembly Bill Number 7670 from the State of New York Executive Chamber (Aug. 23, 2010) (on file with author) (stating “I urge the legislature to clarify this language to ensure that the intent of the bill is achieved”).

<sup>135</sup> N.Y. CRIM. PROC. LAW § 440.10(h)(i) (McKinney 2010) (emphasis added); see also Victims of Sex Trafficking Act, Ch. 332, 2010 N.Y. Sess. Laws A.7670 (McKinney) (codified as amended at N.Y. CRIM. PROC. LAW § 440.10 (McKinney 2010)).

<sup>136</sup> Memorandum from the State of New York Executive Chamber, *supra* note 134.

<sup>137</sup> *Id.*

<sup>138</sup> N.Y. CRIM. PROC. LAW § 440.10(1) (McKinney 2010) (emphasis added).

<sup>139</sup> Memorandum from the State of New York Executive Chamber, *supra* note 134.

charges” in the law because New York courts are encouraged to adjudicate cases in the interest of justice.<sup>140</sup> For example, in a typical 440.10 situation, vacatur would be legally compelled if a conviction was found to be “procured by duress, misrepresentation, or fraud on the part of the court or prosecutor”<sup>141</sup> thus making the conviction illegal. Vacatur would also be legally compelled if a conviction was obtained in violation of a defendant’s constitutional rights.<sup>142</sup> However, in both instances, the word “may” still leaves an element of discretion for the court in deciding whether to vacate on the merits of the case. The existing use of the word “may” is equally intended to provide the court with the same discretion in deciding whether to grant a motion to vacate in the case of a trafficking victim. “There is nothing in the legislative history [of this bill] that would indicate otherwise.”<sup>143</sup> Thus, the vacating prostitution convictions law “properly permit[s] judicial consideration of the nature or seriousness of a crime” in order to safeguard against vacating convictions where it might be unfair to permit vacatur.<sup>144</sup>

On the other hand, the use of the phrase “arresting charge” has raised the greater concern of underinclusiveness. That is, a defendant arrested for a non-prostitution related offense, but ultimately convicted of prostitution or another offense stemming from having been trafficked, may not be able to receive relief even though they are a victim of sex trafficking.<sup>145</sup> Therefore, a literal interpretation by New York courts of the phrase “arresting charge” could inevitably lead to further alienation of trafficked persons who do not fit neatly into the statutory requirements. It is imperative that New York courts use discretion in determining the scope of the benefit of the phrase “arresting charge” in order to overcome any underinclusiveness and prevent an unreasonable outcome.

Legislative history evidences that the use of the phrase “arresting charge” was intentional to avoid potential underinclusiveness; specifically, the legislature recognized that the majority of arrests for

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<sup>140</sup> Letter from Richard N. Gottfried, New York State Assembly Member, to Peter J. Kiernan, Counsel to the Governor of the State of New York, 1 (Aug. 11, 2010) (on file with author).

<sup>141</sup> N.Y. CRIM. PROC. LAW § 440.10(1)(b).

<sup>142</sup> N.Y. CRIM. PROC. LAW § 440.10(1)(h).

<sup>143</sup> Letter from Richard N. Gottfried, *supra* note 140.

<sup>144</sup> Memorandum from the State of New York Executive Chamber, *supra* note 136.

<sup>145</sup> *Id.*

prostitution related offenses result in a guilty plea and conviction of disorderly conduct.<sup>146</sup> While this is certainly true, it is important to note that trafficking victims are not solely arrested for prostitution and prostitution related offenses. A victim of trafficking could likely be arrested on charges such as drug possession, selling drugs, theft, and the like; all stemming from their captors forcing them to commit these crimes.<sup>147</sup> The language of the statute should be amended to include the aforementioned arrest charges; however, if this cannot be done, then it is imperative that New York courts also use the discretion afforded to them in order to promote vacatur of convictions that would be unreasonable to let stand.

Finally, under the vacating prostitution convictions law, a victim may only make a motion to vacate provided that he or she has been identified or self-identified as a victim of human trafficking, or has sought services provided for victims of trafficking.<sup>148</sup> While official documentation is not required, it nonetheless will create a presumption under the statute that the “defendant’s participation in the offense” was a direct result of having been a victim of trafficking.<sup>149</sup> Law enforcement officials have been apprehensive about this provision as it does not absolutely require official documentation of a defendant’s status as a victim of trafficking, arguing that the lack of a requirement of proof of status as a victim through government documents may invite frivolous motions from defendants.<sup>150</sup> However, the current requirement that a defendant must first be established as a victim presents a significant obstacle when making a motion to vacate, as law enforcement officials rarely identify trafficked persons even if the victim recognizes that he or she has been trafficked.<sup>151</sup>

For those who self-identify as victims, proving that they are

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<sup>146</sup> See Letter from Richard N. Gottfried, *supra* note 140, at 1 (“The bill is keyed to the ‘arresting charge’ because it is common for a person arrested on prostitution-related charges to plead guilty to some other lower-level offense such as disorderly conduct.”).

<sup>147</sup> Interview with Melissa Sontag Broudo, *supra* note 108.

<sup>148</sup> N.Y. CRIM. PROC. LAW § 440.10(1)(i)(ii).

<sup>149</sup> *Id.*

<sup>150</sup> See Letter from Gina L. Bianchi, Deputy commissioner and Counsel, to Honorable Peter J. Kiernan, Counsel to the Governor of the State of New York, 2 (Jun. 23, 2010) (on file with author).

<sup>151</sup> *The Use of Raids to Fight Trafficking in Persons*, THE SEX WORKERS PROJECT, 8 (2009), <http://www.sexworkersproject.org/publications/reports/raids-and-trafficking> (explaining that in a study of fifteen trafficked victims, none had been identified as trafficked by local law enforcement following a raid, despite having self-identified).

indeed victims of human trafficking can be a daunting task.<sup>152</sup> All victims have is their word, making an affidavit the heart of their proof.<sup>153</sup> A victim may provide letters to the court from social workers and/or therapists in order to satisfy the requirement that the defendant has sought services for victims of human trafficking.<sup>154</sup> As this is a difficult enough obstacle to overcome, the Legislature was correct in not making official documentation a requirement in order to bring a motion. New York courts should interpret this provision as broadly as possible so that documentation such as affidavits and letters of recognition also create the presumption that the defendant's participation in the offense was a result of having been trafficked.<sup>155</sup>

### 3. *New York Courts' Current Interpretation of the Vacating Prostitution Convictions Law*

The small amount of cases that have been adjudicated pursuant to this law thus far tend to show that while New York courts are sympathetic to the human trafficking issue, they do not feel inclined in all cases to use the discretion afforded under the statute to vacate convictions which may be a result of trafficking, but are nonetheless unrelated to prostitution. In *People v. G.M.*,<sup>156</sup> the Queens County Criminal Court granted vacatur of G.M.'s prior convictions of prostitution, criminal trespass, and drug possession in light of the fact that the G.M. had been a victim of human trafficking.<sup>157</sup> Here, G.M., a native of the Dominican Republic, was "forced [by her husband] to engage in these illegal activities, including prostitution, upon threat

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<sup>152</sup> See Memorandum from the New York City Bar at 4 (Mar. 2010) (on file with author) ("Sex trafficking victims may face a host of obstacles, from administrative hurdles to real risks to their safety, in obtaining official documentation of their status."); Letter from Laurel W. Eisner, *supra* note 122, at 2 (explaining that the Criminal Procedure Law recognizes the political, economic and jurisdictional barriers placed on victims in trying to obtain government documentation; this provision will put victims who cannot obtain government documentation on equal playing ground as those who can).

<sup>153</sup> Interview with Melissa Sontag Broudo, *supra* note 108.

<sup>154</sup> *Id.*

<sup>155</sup> See Memorandum from the New York City Bar, *supra* note 152, at 4 (warning that while the provision does not preclude a motion to be granted without official documentation, there is a real possibility that defendants who seek a motion without official documentation may be denied relief by the courts).

<sup>156</sup> 922 N.Y.S.2d 761 (Crim. Ct. Queens Cnty 2011).

<sup>157</sup> *Id.* at 766.

of physical harm or actual violence if she did not comply.”<sup>158</sup> Fortunately, G.M. was able to obtain a T-visa after her husband left her in the United States and did not return.<sup>159</sup> However, as a result of these convictions, G.M. was let go from her job as a “home health care attendant, which she held for approximately five years . . . [until] the Department of Health did a background check on her and discovered her criminal convictions.”<sup>160</sup> In reaching its conclusion, the court did not touch the issue of whether the convictions for trespass and drug possession should be dismissed as “the People had consented to the defendant’s motion in its entirety.”<sup>161</sup> However, both the People and the court were in agreement that G.M.’s convictions “were the product of years of brutal, physical, psychological and sexual violence by her husband, which resulted in having been trafficked by him.”<sup>162</sup> Equally noteworthy was the court’s recognition, in spite of the People having consented to vacate all convictions, that section 440.10(6) gives the court discretion “to take additional action as is appropriate in the circumstances[.]”<sup>163</sup>

G.M. also made a motion to the New York County Criminal Court to vacate three additional convictions: two for prostitution and one for criminal possession of a controlled substance, all of which were the result of a plea of guilty at arraignment.<sup>164</sup> Here, the court granted vacatur of both of the prostitution convictions pursuant to the vacating prostitution convictions law; and because the People consented due to G.M.’s “presumptive status as a trafficking victim” based on her T-visa nonimmigrant status.<sup>165</sup> The court also granted vacatur of the drug possession charge; however, similar to the Queens County Criminal Court, the New York County Criminal Court never reached the question in this case of whether this charge should be vacated pursuant to the new vacating prostitution convictions law.<sup>166</sup> Rather, the court based the vacatur of G.M.’s drug possession conviction on the fact that the People had withdrawn their

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<sup>158</sup> *Id.* at 762.

<sup>159</sup> *Id.* at 763.

<sup>160</sup> *Id.*

<sup>161</sup> *G.M.*, 922 N.Y.S.2d at 766.

<sup>162</sup> *Id.* at 765.

<sup>163</sup> *Id.* at 765-66 n.7.

<sup>164</sup> *People v. G.M.*, No. 99N033880, 99N037565, 2003NY008722 (Crim. Ct. N.Y. Cnty 2011).

<sup>165</sup> *Id.* at 3.

<sup>166</sup> *Id.* at 4.

opposition to vacatur of the conviction in the interest of justice.<sup>167</sup> The People “[did] not concede to any of [G.M.’s] legal arguments” made under this motion.<sup>168</sup> Although the New York County Criminal Court did not reach the issue of whether vacatur of the drug conviction could be achieved under the vacating prostitution convictions law, the court did however acknowledge that it did not find any reason to deny the specific relief requested based on the victims status as a trafficking victim.<sup>169</sup>

In *People v. Doe*,<sup>170</sup> the Bronx County Supreme Court granted a motion made pursuant to the vacating prostitution convictions law vacating Doe’s three prostitution related convictions.<sup>171</sup> Here, Doe’s possessive captor forced her into prostitution in multiple states, including New York, Virginia, and Florida, as well as Washington D.C. (where she was gang-raped).<sup>172</sup> Similar to the *G.M.* cases, the People consented to vacatur of Doe’s convictions pursuant to the new law.<sup>173</sup> However, unlike *G.M.*, Doe was seventeen years old at the time of her arrests, making her a trafficked minor.<sup>174</sup> The People’s consent to this motion was based on the fact that Doe was a minor and as a result of her victimization she was entitled to relief under the Safe Harbor Act at the time of her arrests; and the court agreed.<sup>175</sup> Further, the court pointed out that all three of her convictions were for Loitering for the Purpose of Engaging in Prostitution (PL § 240.37), a crime covered by the new law.<sup>176</sup> However, the defendant in *People v. Gonzalez*,<sup>177</sup> was not a minor at the time of her arrests, did not have the same luck in the New York County Criminal Court as the victim in *Doe*.

In *Gonzalez*, the New York County Criminal Court had its chance to adjudicate a motion made pursuant to the new vacating prostitution convictions law wherein “the People oppose[d] the mo-

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<sup>167</sup> *Id.*

<sup>168</sup> *Id.*

<sup>169</sup> *G.M.*, No. 99N033880, 99N037565, 2003NY008722, at 4.

<sup>170</sup> 34 Misc. 3d 237 (N.Y. Sup. Ct. Bronx Cnty 2011).

<sup>171</sup> *Id.* at 238.

<sup>172</sup> *Id.* at 238-39 (noting that defendant was forced into prostitution at the age of thirteen by other traffickers).

<sup>173</sup> *Id.* at 238, 241 (dismissing and sealing defendant’s previous convictions).

<sup>174</sup> *Id.* at 238.

<sup>175</sup> *Doe*, 34 Misc. 3d at 240.

<sup>176</sup> *Id.* at 238; N.Y. CRIM. PROC. LAW §440.10.1(i).

<sup>177</sup> 927 N.Y.S.2d 567 (Crim. Ct. N.Y. Cnty 2011).

tion in its entirety.”<sup>178</sup> The court declined to utilize the discretion afforded to it under the statute to vacate the entirety of defendant’s criminal record, instead leaving a conviction for resisting arrest to remain on Gonzalez’s record.<sup>179</sup> Here, Gonzalez “move[d] to vacate eighty-seven convictions she accrued over the course of three years”<sup>180</sup> so that she could apply for legal immigrant status in the United States.<sup>181</sup> Gonzalez was an undocumented immigrant forced into prostitution after her identifying documents were taken from her by her captor under the guise of offering to help her achieve immigration status in the United States.<sup>182</sup> In an unusual twist, Gonzalez’s captor gave her immigration documents back to her after her last arrest in 1995, allowing her to try to move forward with her life and apply for legal status.<sup>183</sup> However, her prior convictions stood as an obstacle to her application for valid status, thus prompting her to make a motion to vacate pursuant to the vacating prostitution convictions law.<sup>184</sup>

Gonzalez testified that she would sometimes approach the police and ask to be arrested as a means to escape the street and forced prostitution, clarifying for the court her unusually high number of arrests within approximately a three-year span.<sup>185</sup> In opposition to Gonzalez’s motion the People made the “flood gate” warning that granting this motion would likely result in an abundance of motions made by other defendants with prostitution convictions claiming to be victims “without any further corroboration and have their convictions vacated.”<sup>186</sup> The court swiftly categorized this argument as

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<sup>178</sup> *Id.*

<sup>179</sup> *Id.* at 569-71.

<sup>180</sup> *Id.* at 567.

<sup>181</sup>

She lives with her mother, who she takes care of. Her mother is a U.S. citizen, so the defendant applied as her daughter for an adjustment of status here in the United States. The status of the defendant’s current immigration application is unclear to the Court, but it is apparent that the instant convictions are an obstacle to her proposed adjustment of status.

*Id.* at 569.

<sup>182</sup> *Gonzalez*, 927 N.Y.S.2d at 568 (“[Defendant’s captor] told the defendant that she would have to ‘sleep with men in the street’ in order to get her immigration documents back.”).

<sup>183</sup> *Id.* at 568-69.

<sup>184</sup> *Id.* at 569.

<sup>185</sup> *Id.* at 568.

<sup>186</sup> *Id.* at 570.

“dogmatic and unpersuasive[.]” highlighting that the Legislature deliberately gave the courts the power to use its discretion when deciding whether to grant relief “when a defendant could show by a preponderance of the evidence that he or she [is] a victim of sex trafficking.”<sup>187</sup> Although the court granted vacatur of eighty-six prostitution-related convictions, it nonetheless denied Gonzalez’s request for relief as to her conviction for resisting arrest finding that it was not a prostitution-related offense.<sup>188</sup>

*Gonzalez* is the only case that has been decided where the People have opposed vacatur of an identified victim’s criminal record. If the *Gonzalez* case is any indication of how the vacating prostitution convictions law is interpreted by New York courts, then trafficking victims may still face the same trouble getting the relief they so desperately need.

#### 4. Recommendation to New York Courts

While the vacating prostitution convictions law was drafted narrowly, it is crucial that this law is interpreted broadly in order to provide victims the relief they deserve. Some of the drafters of this law, specifically the Sex Workers Project, intended its interpretation and application to be broad, defining the law as ameliorative and encompassing of all arresting charges and convictions victims of sex trafficking may have on their records.<sup>189</sup> Notwithstanding this intent, there is always a chance that New York courts will use the discretion given to them to adopt a strict construction of this statute, effectively blocking victims from relief. In order to prevent this from happening, courts should recognize that a remedial statute such as this should be afforded liberal construction by the courts to promote legislative intent.<sup>190</sup> The use of the phrase “arresting charges” should not be viewed by New York courts as “exclusive or exhaustive,” as there may be a high likelihood that arrest charges other than prostitution

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<sup>187</sup> *Gonzalez*, 927 N.Y.S.2d at 570.

<sup>188</sup> *Id.* at 569.

<sup>189</sup> Interview with Melissa Sontag Broudo, *supra* note 108 (explaining the difficulties of drafting broad legislation of this nature when it is the first of its kind).

<sup>190</sup> See *Asman v. Ambach*, 478 N.E.2d 182, 184 (N.Y. 1985) (“Where the amended law ‘is procedural and remedial in nature . . . it should be liberally construed to spread its beneficial effects as widely as possible.’”) (quoting *Post v. 120 E. End Ave. Corp.*, 464 N.E.2d 125, 127 (N.Y. 1984)).

related offenses will uncover victims of trafficking.<sup>191</sup> New York courts should also recognize that failure to construe this statute as encompassing convictions which may not be prostitution-related, would be a frustration of legislative intent resulting in failure to provide relief to those who need it.<sup>192</sup>

Even if courts choose strict construction of the statute and find it impossible to grant vacatur of convictions that are not prostitution-related, then at the very least, the courts should remember to use its discretion to take the necessary action to ensure justice for victims of trafficking.

#### **IV. CONCLUSION: THERE IS STILL WORK TO BE DONE**

The vacating prostitution convictions law is the first of its kind in the nation and while it is certainly innovative, there is still much work to be done. While it is still too soon to review the success rate of motions made under the amended statute, it is essential to keep in mind the need for this legislation would not be as crucial as it is today if there was increased awareness by law enforcement officials with respect to victim identification.

What good is federal and state legislation that recognizes the problem of human trafficking when law enforcement fails to identify victims in the first place?<sup>193</sup> The need for increased awareness through education and training regarding victim identification is vital if existing legislation is going to be useful. Lack of knowledge and training regarding victim identification coupled with victims' distrust of law enforcement has been a recipe for failure. It is imperative that law enforcement and the judiciary are trained to ask the right questions and have a heightened sense of awareness when coming in contact with a possible victim of human trafficking. Increased victim identification would eliminate a backlog of litigation in an already inundated legal system. After all, it is because of lack of victim iden-

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<sup>191</sup> *In re Grand Jury Subpoena Duces Tecum Served on Museum of Modern Art*, 719 N.E.2d 897, 900 (N.Y. 1999).

<sup>192</sup> *See United States v. Campos-Serrano*, 404 U.S. 293, 298 (1971) ("If an absolutely literal reading of a statutory provision is irreconcilably at war with the clear congressional purpose, a less literal construction must be considered.").

<sup>193</sup> The TVPRA is presently up for reauthorization and awaiting approval by the United States Senate. For more information on this please visit: <http://www.polarisproject.org/take-action/advocate/569-tell-congress-to-act-on-critical-anti-trafficking-legislation-now>.

tification that victims are forced to go through the judicial system in the first place thereby facilitating the need for the vacating prostitution convictions law.

It is difficult at this point to gauge the success the vacating prostitution convictions law will have in clearing victims' records. The existence of the law is not enough. New York courts interpretation and execution of this law is what truly matters. Time will tell whether a broad interpretation of this statute will be the prevailing trend among New York courts. However, if the statute is interpreted narrowly, victims with criminal records other than prostitution related offenses will be left without the relief they deserve. Increased victim identification, along with the recognition that prostitution related offenses are not the only convictions victims may have on their record, is instrumental in bridging the gaps in current legislation. Courts should be cognizant of the Legislature's remedial intent in enacting this statute when adjudicating these motions. As such, New York courts should construe the vacating prostitution convictions law broadly in order to include more criminal convictions, which are not prostitution related for which victims may bring motions to vacate.