

NOTES

“THE SECOND CHANCE THEY DESERVE”: VACATING CONVICTIONS OF SEX TRAFFICKING VICTIMS

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Section 440.10(1)(i) of the New York Criminal Procedure Law allows victims of sex trafficking to vacate convictions for certain offenses they were forced to commit by their traffickers. This vacatur provision and similar laws in other states have been praised for their ability to give victims of sex trafficking a fresh start, free from the stigma of a criminal record. Unfortunately, these laws have not been widely utilized. This Note argues that procedural and structural flaws in these statutes prohibit them from having their intended effect: ensuring that victims of trafficking are not punished for crimes committed under coercion. Ultimately, this Note proposes judicial and legislative improvements to vacatur statutes designed to make it easier for victims to vacate existing criminal convictions and avoid amassing future ones.

INTRODUCTION

On August 13, 2010, New York Governor David Paterson signed into law Assembly Bill 7670, amending section 440.10(1) of the New York Criminal Procedure Law to provide victims of sex trafficking with post-conviction relief from certain prostitution offenses.¹ Sponsors of the legislation explained that the law was motivated by a desire to close a “glaring loophole” in the criminal law:² Individuals trafficked in the commercial sex industry, who are victims of a serious crime, face criminal penalties for prostitution-related offenses that their traffickers force them to commit.³ Vacatur⁴ of trafficking-related convictions would provide

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1. Act of Aug. 13, 2010, ch. 332, 2010 N.Y. Sess. Laws 1083 (McKinney); Legislative Memorandum Relating to Ch. 332, 2010 N.Y. Sess. Laws 1906, 1906–07 (McKinney); see also N.Y. Crim. Proc. Law § 440.10(1)(i) (McKinney Supp. 2014).

2. Letter from Thomas Duane, Chair, N.Y. Senate Comm. on Health, to David Paterson, Governor, N.Y. (Aug. 12, 2010), in Bill Jacket, Assemb. 7670, 233d Leg., Reg. Sess., 8 (N.Y. 2010), available at <http://image.iarchives.nysed.gov/images/images/171679.pdf> (on file with the *Columbia Law Review*).

3. Letter from Richard N. Gottfried, Chair, N.Y. Assembly Comm. on Health, to Peter Kiernan, Counsel to the Governor (July 20, 2010) [hereinafter July 20 Letter from Richard N. Gottfried], in Bill Jacket, supra note 2, at 10.

these victims the “second chance they deserve.”⁵ Fifteen other states—Connecticut, Florida, Hawaii, Illinois, Maryland, Mississippi, Montana, Nevada, New Jersey, North Carolina, Ohio, Oklahoma, Vermont, Washington, and Wyoming—have since followed suit and enacted similar legislation.⁶ Despite early praise for these laws, however, very few victims have exercised the new legal rights these laws created.⁷ To shed light on why these laws fail to achieve their goal—helping sex trafficking victims start a new life free from the burden of a criminal record—this Note examines the structure of the first such statute, New York’s section 440.10(1)(i). Specifically, this Note will argue that due-diligence requirements, unclear evidentiary requirements, and the lack of an affirmative trafficking defense make it difficult for trafficked individuals to escape their trafficking-related convictions. These obstacles to relief illustrate the tension between traditional criminal treatment of prostitution and emerging understandings of sex trafficking, and reveal the ambivalent system that emerges when one tries to stay faithful to both values.

Part I of this Note details the hardships faced by victims of trafficking, both during and after their victimization, and explores approaches adopted to alleviate these hardships. Part II argues that vacatur statutes, although well intentioned, have not helped many victims of trafficking, in part due to procedural and structural flaws in such statutes. Finally, Part III advocates judicial and legislative improvements to vacatur statutes

4. Vacatur is defined as “[t]he act of annulling or setting aside” or “[a] rule or order by which a proceeding is vacated.” Black’s Law Dictionary 1688 (9th ed. 2009).

5. Legislative Memorandum Relating to Ch. 332, 2010 N.Y. Sess. Laws at 1906–07.

6. See Polaris Project, *Vacating Convictions for Sex Trafficking Victims 1* (2013) [hereinafter Polaris Project, *Vacating Convictions*], available at <http://www.polarisproject.org/storage/documents/2013-Analysis-Category-10-Vacating-Convictions.pdf> (on file with the *Columbia Law Review*) (depicting map of states with vacatur legislation); see also Suzannah Phillips et al., Int’l Women’s Human Rights Clinic, City Univ. of N.Y. Sch. of Law, *Clearing the Slate: Seeking Effective Remedies for Criminalized Trafficking Victims 3* (2014) [hereinafter Phillips et al., *Seeking Effective Remedies*], available at www.law.cuny.edu/academics/clinics/iwhr/publications/Clearing-the-Slate.pdf (on file with the *Columbia Law Review*) (listing fifteen states, in addition to New York, that have enacted legislation allowing trafficking survivors to clear their criminal records); Annie Sweeney, *Cook County Court Clears Sex Trafficking Victim of Prostitution Record*, Chi. Trib. (Aug. 23, 2013), http://articles.chicagotribune.com/2013-08-23/news/ct-met-prostitution-trafficking-adoption-20130823_1_dreamcatcher-foundation-abusive-pimps-brenda-myers-powell (on file with the *Columbia Law Review*) (identifying states with vacatur legislation as of August 2013).

7. See Toko Serita, *In Our Own Backyards: The Need for a Coordinated Judicial Response to Human Trafficking*, 36 N.Y.U. Rev. L. & Soc. Change 635, 650 (2012) (“As of September 2012, there have been eleven cases in which sex trafficking victims’ convictions were dismissed [in New York.]”); see also Sweeney, *supra* note 6 (noting only two women in Illinois have had convictions vacated under applicable statute). Judge Serita is the author of the two most prominent opinions on section 440.10(1)(i): *People v. L.G.*, 972 N.Y.S.2d 418 (Crim. Ct. 2013) and *People v. G.M.*, 922 N.Y.S.2d 761 (Crim. Ct. 2011).

designed to help trafficking victims vacate existing criminal convictions and avoid amassing future ones.

I. STATE RESPONSES TO SEX TRAFFICKING

Sex trafficking is a form of human trafficking defined under federal law as inducing a commercial sex act through “force, threats of force, fraud, [or] coercion.”⁸ The federal definition of sex trafficking also includes inducing any person under the age of eighteen to perform a commercial sex act.⁹ Importantly, an individual need not be physically

8. 18 U.S.C. § 1591 (2012) (criminalizing sex trafficking); see also Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, § 103(8)(A), 114 Stat. 1464, 1470 (codified as amended at 22 U.S.C. § 7102(8)(A) (2012) (defining victim of severe trafficking for purposes of federal benefits). Although not explained in the Victims of Trafficking and Violence Protection Act, the “force, threats of force, fraud, [or] coercion” standard is understood to encompass physical abuse, sexual assault, confinement, blackmail, deception, and threats. See Polaris Project, Domestic Sex Trafficking: The Criminal Operations of the American Pimp 1 [hereinafter Polaris Project, American Pimp], available at https://www.dcj.virginia.gov/victims/humantrafficking/vs/documents/Domestic_Sex_Trafficking_Guide.pdf (on file with the *Columbia Law Review*) (last visited Aug. 30, 2014) (detailing behavior covered by Victims of Trafficking and Violence Protection Act). There are also various definitions of sex trafficking at the state level. See, e.g., N.Y. Penal Law § 230.34 (McKinney 2008) (criminalizing wide range of specific behaviors used to induce commercial sex acts, including deception, confiscation of identification documents, debt bondage, physical force, and threats of various kinds).

The majority of sex trafficking victims are women and girls. See, e.g., 22 U.S.C. § 7101(b)(4) (finding traffickers primarily target women and girls); Polaris Project, Human Trafficking Trends in the United States: National Human Trafficking Resource Center 2007–2012, at 16 (2013) [hereinafter Polaris Project, Human Trafficking Trends], available at https://na4.salesforce.com/sfc/p/#300000006E4S/a/600000004TLG/t7PldV Ctt4Irtx_iljKxiGsERUTm6PUfmNsj9ijA6Sg= (on file with the *Columbia Law Review*) (estimating nearly 90% of sex trafficking victims are female). However, men, boys, and transgender individuals can also be victims of sex trafficking. Thus, this Note consciously avoids the use of gendered pronouns where possible in order to avoid the misconception that trafficking victims are always female. Nonetheless, because the discussion of recruitment and grooming, see *infra* Part I.A.1, focuses on the female trafficking experience, that section uses gendered pronouns as appropriate, see *infra* note 21.

9. 18 U.S.C. § 1591(a); 22 U.S.C. § 7102(8)(A). Despite the breadth of this definition, not all people involved in prostitution are victims of trafficking. Those engaged in independent entrepreneurial prostitution fall outside definitions of sex trafficking. See Serita, *supra* note 7, at 642 n.48 (citing Celia Williamson & Terry Cluse-Tolar, Pimp-Controlled Prostitution: Still an Integral Part of Street Life, 8 Violence Against Women 1074, 1074 (2002)) (contrasting independent entrepreneurial prostitution with violent pimp-controlled prostitution); Sex Workers Project, Urban Justice Ctr., Sex Work and Human Rights Media Toolkit 1, available at <http://sexworkersproject.org/media-toolkit/downloads/SexWorkAndHumanRightsMediaToolkit.pdf> (on file with the *Columbia Law Review*) (last visited Aug. 30, 2014) (distinguishing sex work and sex trafficking); see also Sex Workers Project, Urban Justice Ctr., Revolving Door: An Analysis of Street-Based Prostitution in New York City 51 (2003) [hereinafter Sex Workers Project, Revolving Door], available at <http://sexworkersproject.org/downloads/RevolvingDoor.pdf> (on file with the *Columbia Law Review*) (finding no sex workers interviewed were involved in

transported between two locations, internationally or domestically, to be a victim of sex trafficking.¹⁰ Furthermore, the majority of sex trafficking victims in the United States are children and adults with U.S. citizenship.¹¹

Part I.A of this Note outlines how individuals become victims of sex trafficking and how they accumulate criminal convictions for prostitution-related offenses. Part I.B examines the enactment and interpretation of section 440.10(1)(i) of the New York Criminal Procedure Law, an innovative statute that allows victims of sex trafficking to vacate certain convictions related to their trafficking. Part I.C describes similar statutes enacted in other states.

A. *The Cycle of Accumulating Convictions*

In order to understand the implications of statutes allowing victims of sex trafficking to vacate their convictions, it is important to first understand how individuals become involved in sex trafficking, why they have criminal convictions, and how these convictions impact their ability to leave their traffickers and live productive lives. Such an understanding illustrates the difficulties victims face and the situation that vacatur statutes were enacted to combat.

1. *How Children and Adults Become Involved in Sex Trafficking.* — An estimated 80% of people working in the commercial sex industry in the United States first exchanged sex for money before the age of eighteen.¹²

“stereotypical ‘pimping’ situations”). Debates about the validity of prostitution as a profession are well beyond the scope of this Note. However, insofar as people engaged in “independent entrepreneurial prostitution” exist, they appear to be a minority. See *infra* note 124 and accompanying text (estimating 75% to 95% of prostitution is pimp controlled).

10. See 22 U.S.C. § 7102(9) (defining sex trafficking as “recruitment, harboring, transportation, provision, or obtaining of a person for the purpose of a commercial sex act”); see also U.S. Dep’t of State, *Trafficking in Persons Report: June 2012*, at 8 (2012), available at <http://www.state.gov/documents/organization/192587.pdf> (on file with the *Columbia Law Review*) (“A victim need not be physically transported . . . in order for the crime to fall within [the Victims of Trafficking and Violence Protection Act].”).

11. See Duren Banks & Tracey Kyckelhahn, U.S. Dep’t of Justice, *Characteristics of Suspected Human Trafficking Incidents, 2008–2010*, at 6 (2011), available at <http://www.bjs.gov/content/pub/pdf/cshti0810.pdf> (on file with the *Columbia Law Review*) (finding approximately 80% of victims of confirmed sex trafficking incidents investigated during relevant period were U.S. citizens); Polaris Project, *Human Trafficking Trends*, *supra* note 8, at 16 (noting about 60% of victims of domestic pimp-controlled prostitution were U.S. citizens); see also 22 U.S.C. § 7101(b)(4) (detailing congressional findings that “[t]raffickers primarily target women and girls”); Polaris Project, *Human Trafficking Trends*, *supra* note 8, at 16 (noting almost 90% of sex trafficking victims served by National Human Trafficking Resource Center were female).

12. Tamar R. Birckhead, *The “Youngest Profession”: Consent, Autonomy, and Prostituted Children*, 88 *Wash. U. L. Rev.* 1055, 1061 (2011); Cheryl Hanna, *Somebody’s Daughter: The Domestic Trafficking of Girls for the Commercial Sex Industry and the*

Research suggests that the average age for girls to enter the industry is between twelve and fourteen,¹³ while the average age for boys is between eleven and thirteen¹⁴ (although some people report entering the industry at as young as four¹⁵). Many of these youth are seeking to escape dysfunctional homes, sexual abuse, or other neglect,¹⁶ and may initially engage in “survival sex” to support themselves before attracting the attention of traffickers.¹⁷

Power of Love, 9 Wm. & Mary J. Women & L. 1, 12 (2002); Stephen C. Parker & Jonathan T. Skrmetti, Pimps Down: A Prosecutorial Perspective on Domestic Sex Trafficking, 43 U. Mem. L. Rev. 1013, 1020 (2013); see also Jody Raphael & Deborah L. Shapiro, Sisters Speak Out: The Lives and Needs of Prostituted Women in Chicago 13, 30 (2002), available at www.impactresearch.org/documents/sisterspeakout.pdf (on file with the *Columbia Law Review*) (finding 62% of Chicago women interviewed admitted exchanging sex for money before age of eighteen). A few small-scale studies dispute this figure, claiming the actual number is much lower. See, e.g., Sex Workers Project, Revolving Door, *supra* note 9, at 29–30 (finding eight out of thirty people interviewed admitted they began sex work as minors). These estimates are particularly significant because minors working in the commercial sex industry are victims of severe sex trafficking under federal law. See 22 U.S.C. § 7102(8)(A) (defining “severe forms of trafficking in persons” to include “sex trafficking in which . . . the person induced to perform such act has not attained 18 years of age”).

Admittedly, although the majority of people working in the commercial sex industry begin at a young age, not all do. Those who enter the industry later in life frequently do so due to substance dependency; commercial sex work enables them to pay for their expensive drug habits. See Sex Workers Project, Revolving Door, *supra* note 9, at 29, 54 (noting women in study who entered prostitution at later age “did so uniformly for reasons related to substance dependency”). People struggling with substance dependency are frequently unable to obtain regular employment, so they see prostitution as a way to make “fast money.” *Id.* at 54.

13. Bircckhead, *supra* note 12, at 1092 n.193 (citing Richard J. Estes & Neil Alan Weiner, The Commercial Sexual Exploitation of Children in the U.S., Canada and Mexico: Full Report (of the U.S. National Survey) 92 (2002), available at <http://www.hawaii.edu/hivandaids/Commercial%20Sexual%20Exploitation%20of%20Children%20in%20the%20US,%20Canada%20and%20Mexico.pdf> (on file with the *Columbia Law Review*)); Dorchen A. Leidholdt & Katherine P. Scully, Defining and Identifying Human Trafficking, in N.Y. State Judicial Comm. on Women in the Courts, Lawyer’s Manual on Human Trafficking: Pursuing Justice for Victims 27, 33 (Jill Laurie Goodman & Dorchen A. Leidholdt eds., 2013), available at <http://www.nycourts.gov/ip/womeninthecourts/LMHT.pdf> (on file with the *Columbia Law Review*).

14. Bircckhead, *supra* note 12, at 1092 n.193 (citing Estes & Weiner, *supra* note 13, at 92).

15. See Raphael & Shapiro, *supra* note 12, at 13 (reporting woman interviewed first exchanged sex for money at four years old).

16. Bircckhead, *supra* note 12, at 1093–94 (noting homelessness, family dysfunction, family history of substance abuse, and personal history of sexual abuse are risk factors for sexual exploitation); Parker & Skrmetti, *supra* note 12, at 1021–22 (explaining how family dysfunction, abuse, and homelessness make victims vulnerable to traffickers).

17. Bircckhead, *supra* note 12, at 1093; Parker & Skrmetti, *supra* note 12, at 1022. “Survival sex” is trading sex to meet the basic needs for survival (i.e., food and shelter). See Child Exploitation & Obscenity Section Frequently Asked Questions (FAQs), U.S. Dep’t of Justice, <http://www.justice.gov/criminal/ceos/faqs/faqs.html> (on file with the

In the United States, the most common form of domestic sex trafficking is violent pimp-controlled prostitution.¹⁸ These types of traffickers are particularly prone to target underage victims, as young people tend to be more vulnerable and easier to manipulate than adults.¹⁹ To take advantage of these vulnerabilities, traffickers frequently look for potential targets at middle and high schools, foster homes, group homes, homeless shelters, halfway houses, parks, and playgrounds.²⁰ Upon identifying a potential female victim,²¹ a trafficker might initially seek to gain her trust through flattery, gifts, dates, and promises of a bright future together—in short, by showing romantic interest or playing the role of benefactor.²² To foster the illusion of a nurturing relationship, the traf-

Columbia Law Review) (last visited Aug. 30, 2014) (defining “survival sex” as “engag[ing] in sex acts in order to obtain money, food, shelter, clothing, or other items needed in order to survive”); see also Covenant House, Homelessness, Survival Sex, and Human Trafficking: As Experienced by the Youth of Covenant House New York 7, 11–12 (2013), available at <http://www.covenanthouse.org/sites/default/files/attachments/Covenant-House-trafficking-study.pdf> (on file with the *Columbia Law Review*) (describing survival strategies of homeless youth in New York City); Ian Urbina, For Runaways, Sex Buys Survival, N.Y. Times (Oct. 26, 2009), <http://www.nytimes.com/2009/10/27/us/27/runaways.html> (on file with the *Columbia Law Review*) (noting one-third of runaways resort to survival sex to support themselves and describing examples of youths caught up in sex trafficking).

18. Serita, *supra* note 7, at 642. It is estimated that 80% of women in the commercial sex industry work for a pimp at some point and that between 75% and 95% of prostitution is pimp controlled. *Id.* at 642 n.49. While female pimps do exist, the overwhelming majority of pimps are male, so this Note will use male pronouns to describe trafficker pimps. See Parker & Skrmetti, *supra* note 12, at 1029–30 (noting authors have prosecuted both male and female pimps, but approximately 75% of pimps are male).

19. See Parker & Skrmetti, *supra* note 12, at 1018–20 (“The younger the victim, the more susceptible they are to the manipulations and lies of domestic sex traffickers.”).

20. Polaris Project, *American Pimp*, *supra* note 8, at 3; Polaris Project, *Human Trafficking Trends*, *supra* note 8, at 17.

21. In describing the recruitment and grooming process, this Note will focus on the experience of young female victims, the demographic most commonly involved in pimp-controlled prostitution. See *supra* note 8. Thus, this section will use female pronouns to reflect the fact that this summary is based on the female trafficking experience, which differs from the male and transgender trafficking experiences.

22. See Parker & Skrmetti, *supra* note 12, at 1024–29 (explaining recruiting strategy of pimps); see also Polaris Project, *American Pimp*, *supra* note 8, at 3 (describing initial period of false love and feigned affection used by pimps to prey on victims); Polaris Project, *Human Trafficking Trends*, *supra* note 8, at 17 (finding almost 70% of traffickers play role of boyfriend or benefactor in order to recruit victims); Kate Mogulescu, *The Public Defender as Anti-Trafficking Advocate, An Unlikely Role: How Current New York City Arrest and Prosecution Policies Systematically Criminalize Victims of Sex Trafficking*, 15 CUNY L. Rev. 471, 471 (2012) (noting how relationship between pimp and sixteen-year-old trafficking victim began by pimp taking her to movies and buying her food and new clothes); Urbina, *supra* note 17 (“My job is to make sure she has what she needs, personal hygiene, get her nails done, take her to buy an outfit, take her out to eat, make her feel wanted . . . [b]ut I keep the money.”).

ficker will often insist that his victim call him “Daddy.”²³ To increase his victim’s dependence, a trafficker might try to isolate her from friends and family, become her sole source of food and shelter,²⁴ and ply her with drugs.²⁵

Slowly, the trafficker will “groom” his victim through a combination of physical and emotional abuse.²⁶ This grooming process—essentially a form of psychological conditioning—may include beatings, sexual assault, confinement, verbal abuse, brainwashing, document confiscation, and techniques, such as the renaming of the victim or the burning of personal items, intended to erase the victim’s former identity.²⁷ At the same time, the trafficker will institute rules by which the victim is expected to live—what to wear, when to eat, when to sleep, how to walk, how to interact with her trafficker—using physical violence as punishment for disobedience.²⁸

Once a trafficker has control of his victim, the trafficker will insist that she enter the commercial sex industry.²⁹ He might begin this process

23. See Polaris Project, *American Pimp*, supra note 8, at 2 (remarking that forcing victims to call their trafficker “Daddy” helps conceal trafficker’s true identity); Mogulescu, supra note 22, at 472 (noting trafficker made sixteen-year-old victim call him “Daddy”); Parker & Skrmetti, supra note 12, at 1026 (explaining use of “Daddy” is common tactic designed to exploit many victims’ desire for father and family).

24. Parker & Skrmetti, supra note 12, at 1025–26; see also *People v. L.G.*, 972 N.Y.S.2d 418, 420 (Crim. Ct. 2013) (describing how twelve-year-old victim became involved in trafficking when her trafficker took her from her foster home, provided her shelter, and refused to let her leave).

25. See Parker & Skrmetti, supra note 12, at 1026 (noting drug use intensifies victim’s dependence on trafficker); Marihug Cedeño, Note, *Pimps, Johns, and Juvenile Prostitutes: Is New York Doing Enough to Combat the Commercial Sexual Exploitation of Children?*, 22 *Cornell J.L. & Pub. Pol’y* 153, 160 (2012) (explaining drugs are used to “sedate [victims] into submission”). Under New York law, providing an individual illegal drugs “with intent to impair said person’s judgment” and induce him or her to engage in prostitution is a type of sex trafficking, N.Y. Penal Law § 230.34(1) (McKinney 2008).

26. Polaris Project, *American Pimp*, supra note 8, at 3 (describing “grooming” or “seasoning” process as involving physical beatings, rape, torture, and various forms of emotional abuse); Cedeño, supra note 25, at 160 (“This brutal process involves breaking the girls down in order to gain complete control over their identity or individuality.”); see also Parker & Skrmetti, supra note 12, at 1023–29 (explaining physical and emotional aspects of grooming process).

27. Polaris Project, *American Pimp*, supra note 8, at 3; Cedeño, supra note 25, at 160.

28. See Polaris Project, *American Pimp*, supra note 8, at 2 (explaining common rules in domestic sex trafficking); Parker & Skrmetti, supra note 12, at 1028–29 (describing rules, and punishment for breaking rules, as way for traffickers to retain control over victims); see also *L.G.*, 972 N.Y.S.2d at 420 (detailing how trafficker explained “rules of the ‘game’” to victim); Mogulescu, supra note 22, at 471–72 (noting victims who broke traffickers’ rules were punished with violence).

29. See, e.g., Parker & Skrmetti, supra note 12, at 1026–27 (describing how traffickers convince victims to have sex with customers for first time); see also *L.G.*, 972 N.Y.S.2d at 420 (detailing victim’s first time at a “track” at age twelve); Mogulescu, supra note 22, at 471 (explaining how pimp began prostituting sixteen-year-old victim).

by asking his victim to have sex with only a few men in order to earn money for their life together and then slowly escalate, pushing her to sleep with more and more men.³⁰ Once the victim is fully immersed in the commercial sex industry, the trafficker will often impose a monetary quota that his victim must meet each night. If a victim fails to meet the quota, she will be forced to continue working, without eating or sleeping, and frequently will face physical retaliation from her trafficker.³¹

2. *Law-Enforcement (Mis)treatment³² of Sex Trafficking Victims and Consequences of Conviction.* — Prostitution, especially street prostitution, is a paradigmatic “quality of life” offense—a minor offense that, when aggregated, is thought to demoralize communities and diminish the satisfaction of residents in affected neighborhoods.³³ Due to these “quality of life” concerns, local residents and business owners frequently complain to police about prostitution-related activity in their area.³⁴ Consequently, police departments like the New York City Police Department (NYPD) aim to reduce quality-of-life offenses by increasing arrests for low-level crimes.³⁵ Such strategies lead to prostitution-related arrests of thousands of people a year in large cities.³⁶ These arrests frequently result from

30. See Parker & Skrmetti, *supra* note 12, at 1026–28 (describing transition from benefactor to pimp); Urbina, *supra* note 17 (“I might start by asking her to help me by sleeping with a friend. . . . Then I push her from there.”).

31. Polaris Project, *American Pimp*, *supra* note 8, at 4; see also Mogulescu, *supra* note 22, at 472 (noting trafficker imposed quotas on his victims); Parker & Skrmetti, *supra* note 12, at 1015 (describing how trafficker gave victim quota and told her not to return until it was met).

32. This Note is concerned with the systematic treatment of sex trafficking victims by the criminal justice system. Thus, this subsection focuses on arrest and prosecution strategy and practice. It is important to note, however, that sex workers also face routine sexual harassment from police officers, ranging from rude remarks to sexual assault. See Sex Workers Project, *Revolving Door*, *supra* note 9, at 6–7 (interviewing individuals involved in street-based prostitution about sexual misconduct of police officers).

33. See *Quality of Life Offenses*, Bronx District Attorney’s Office, <http://bronxda.nyc.gov/fcrime/qol.htm> (on file with the *Columbia Law Review*) (last visited Aug. 30, 2014) (explaining quality-of-life offenses generally, and providing prostitution as prime example); see also Mogulescu, *supra* note 22, at 486–87 (describing prostitution as quality-of-life offense).

34. See Janice G. Raymond & Donna M. Hughes, *Sex Trafficking of Women in the United States* 31 (Mar. 2000) (unpublished manuscript), available at <http://www.ncjrs.gov/pdffiles1/nij/grants/187774.pdf> (on file with the *Columbia Law Review*) (noting single precinct in Manhattan received 325 complaints about prostitution activity in single year from local residents and business owners).

35. Mogulescu, *supra* note 22, at 486–87; see also Norimitsu Onishi, *Police Announce Crackdown on Quality of Life Offenses*, *N.Y. Times* (Mar. 13, 1994), <http://www.nytimes.com/1994/03/13/nyregion/police-announce-crackdown-on-quality-of-life-offenses.html> (on file with the *Columbia Law Review*) (“[L]eniency toward even these minor infractions lowers New Yorkers’ quality of life, raises fears and leads to greater crimes.”).

36. For example, New York City recorded 2,734 arrests for prostitution and loitering for the purpose of prostitution in 2010, 2,813 such arrests in 2011, and 2,441 such arrests in 2012. N.Y. State Div. of Criminal Justice Servs., *Prostitution Related Arrests in New York*

sting operations where undercover officers solicit sexual favors from individuals thought to be prostitutes³⁷ or from patrols where officers target people dressed in a certain way lingering on known prostitution corners.³⁸ The majority of people arrested for prostitution and loitering for the purpose of prostitution fulfill the legal criteria for sex trafficking,³⁹ perhaps, in part, because those prostitutes most likely to be arrested—street prostitutes—are those most likely to be victims of trafficking.⁴⁰ Despite the prevalence of trafficking in the commercial sex industry, however, those arrested for prostitution, particularly repeat offenders, are routinely prosecuted and convicted.⁴¹ In fact, there is some evidence to suggest that some people are prosecuted precisely because they are trafficked, in order to convince them to share information about their traffickers.⁴²

City (Oct. 22, 2013) [hereinafter Prostitution Related Arrests in New York City] (on file with the *Columbia Law Review*). These data, as well as the state-wide data in note 113, *infra*, were obtained directly from the Division of Criminal Justice Services upon the author's request. In Chicago, the numbers were roughly equivalent, with 2,404 arrests for prostitution in 2010. Chi. Police Dep't, Annual Report 2010: A Year in Review 35 (2010), available at <https://portal.chicagopolice.org/portal/page/portal/ClearPath/News/Statistical%20Reports/Annual%20Reports/10AR.pdf> (on file with the *Columbia Law Review*).

37. See, e.g., *People v. K.U.*, 950 N.Y.S.2d 637, 639 (Sup. Ct. 2012) (arresting woman for prostitution after she agreed with undercover police officer to exchange sex for money).

38. See, e.g., *People v. McGinnis*, 972 N.Y.S.2d 882, 884 (Crim. Ct. 2013) (arresting woman wearing “revealing” clothing and platform shoes after observing her speak with several men at location “frequented by people engaged in prostitution”).

39. See, e.g., *Mogulescu*, *supra* note 22, at 477–78 (arguing people arrested on prostitution-related charges in New York City “overwhelmingly meet all of the legal criteria for sex trafficking under either New York or federal law”); Nicholas D. Kristof, Op-Ed., What About American Girls Sold on the Streets?, *N.Y. Times* (Apr. 23, 2011), <http://www.nytimes.com/2011/04/24/opinion/24kristof.html> (on file with the *Columbia Law Review*) (discussing prevalence of pimp-controlled prostitution of American girls); see also *infra* note 124 and accompanying text (estimating upwards of 75% of prostitution is pimp controlled and thus is sex trafficking).

40. See William J. Stuntz, *Race, Class, and Drugs*, 98 *Colum. L. Rev.* 1795, 1830 (1998) (noting “lower-class” street prostitutes in “downscale markets” are much more likely to be arrested than upscale call girls).

41. *Mogulescu*, *supra* note 22, at 480. For a more detailed discussion on the arrest, prosecution, and conviction of sex trafficking victims on prostitution charges, see *infra* notes 112–121 and accompanying text (providing arrest statistics demonstrating over 75% of prostitution arrests in New York City lead to convictions).

42. See Lauren Hersh, *Sex Trafficking Investigations and Prosecutions*, in *Lawyer's Manual on Human Trafficking: Pursuing Justice for Victims*, *supra* note 13, at 255, 260 (describing one benefit of arresting trafficking victims as fact that “arrested victim who fears prosecution may offer useful information in exchange for a dismissal”); see also *Mogulescu*, *supra* note 22, at 480 (noting “heavy-handed” approach used by prosecutors to compel victims to cooperate); Urbina, *supra* note 17 (describing “flip interview” where police try to convince individuals arrested on prostitution charges to “flip,” or turn in their pimps). Hersh's assertions about the benefits of arresting trafficking victims are

Once convicted, victims are subject to additional problems both while they are trafficked and after they manage to leave their traffickers (if they are able to do so). Traffickers frequently tell victims that a criminal record will prevent them from obtaining employment⁴³ and thus will make it difficult to provide for themselves and their families if they attempt to leave the sex industry. Traffickers also tell victims that no one will believe them if they file a report against their traffickers because of their convictions.⁴⁴ Occasionally, traffickers will even use a victim's criminal record to threaten custody or other family-court proceedings.⁴⁵ These threats prevent many victims from leaving their traffickers.⁴⁶

Even if they escape their traffickers, victims' prostitution-related convictions continue to affect their lives. Most significantly, such a conviction can prevent a victim of sex trafficking from obtaining employment.⁴⁷ A prostitution-related conviction can also prevent a victim from obtaining both public and private housing.⁴⁸ Even an individual's ability to raise a family is compromised, as a criminal conviction can serve as evidence of unfit parenting in a custody dispute.⁴⁹ Finally, a prostitution-related conviction poses an obstacle to undocumented victims who wish to legalize

surprising in their candor; predictably, threatening victims of trafficking with arrest is not widely touted as an official strategy. However, this limited anecdotal evidence suggests that it occurs.

43. Mogulescu, *supra* note 22, at 482.

44. *Id.*

45. *Id.* at 483.

46. See Jeff Storey, Q&A: Kate Mogulescu, 250 N.Y. L.J. 5, 5 (2013) (explaining role criminal history plays in difficulty leaving traffickers).

47. Legislative Memorandum Relating to Ch. 332, 2010 N.Y. Sess. Laws 1906, 1906–07 (McKinney); Whitney J. Drasin, Comment, New York's Law Allowing Trafficked Persons to Bring Motions to Vacate Prostitution Convictions: Bridging the Gap or Just Covering It Up?, 28 *Touro L. Rev.* 489, 490 (2012) ("The stigmatizing effects of a criminal record create barriers for victims with respect to obtaining housing, jobs, and education."); see also Kate Rubin et al., Reentry Net & The Bronx Defenders, *The Consequences of Criminal Charges: A People's Guide* 20–23 (2008), available at <http://www.sikhcoalition.org/documents/pdf/criminal-charges.pdf> (on file with the *Columbia Law Review*) (detailing situations in which employers can fire or refuse to hire people on basis of criminal conviction). Even if an individual initially manages to obtain employment, he or she remains at risk of losing that job if his or her employer later runs a background check. See, e.g., *People v. L.G.*, 972 N.Y.S.2d 418, 422 (Crim. Ct. 2013) (describing how victim lost her job as home health aide after employer ran background check).

48. July 20 Letter from Richard N. Gottfried, *supra* note 3, at 10; Rubin et al., *supra* note 47, at 13–18 (noting it is not illegal for landlords to deny housing to individuals with criminal records and public housing has broad discretion to deny benefits to individuals with criminal convictions that "risk the health and safety of other tenants").

49. See, e.g., *L.G.*, 972 N.Y.S.2d at 422 (noting victim's conviction posed hardship in custody petition).

their immigration status.⁵⁰ These problems persist long after a trafficking victim is able to escape his or her traffickers.

B. *New York's Innovative Solution*

In order to understand New York's approach to sex trafficking, it is important to appreciate why a state-level solution is necessary given the federal framework in place. Federal law defines and criminalizes sex trafficking, provides for services to be given to victims of severe forms of sex trafficking, and lays out strategies for the prevention and elimination of sex trafficking in the United States.⁵¹ However, these federal statutes initially had little impact on state-level criminal practice, as they neither enabled states to prosecute traffickers nor prevented states from prosecuting victims.⁵² Thus, the federal regime did not help victims of pimp-controlled street prostitution who faced arrest and prosecution at the state, rather than federal, level.

To begin to address this gap in protection, New York enacted a number of victim-oriented reforms. It was the first state to enact a law specifically criminalizing sex trafficking with the passage of the Anti-Human Trafficking Act of 2006.⁵³ Shortly thereafter, New York enacted the Safe Harbour for Exploited Children Act, which encouraged law enforcement to provide services to prostituted minors in lieu of prosecution.⁵⁴ Most

50. See Mogulescu, *supra* note 22, at 483; see also N.Y.C. Bar Ass'n, Report on Legislation by the Committee of Sex and Law 3–4 (2010), available at <http://www.nycbar.org/pdf/report/uploads/20071848-CommentonLegislationreVictimsofSexTrafficking.pdf> (on file with the *Columbia Law Review*) (“For immigrants, a record of prostitution can be fatal to an application for residency or citizenship.”); also Rubin et. al., *supra* note 47, at 18–19 (noting nonviolent low-level offenses can result in deportation). The New York Bar Association’s report was included in the bill jacket accompanying New York’s vacatur legislation. See Bill Jacket, *supra* note 2, at 32–33.

51. See 18 U.S.C. § 1591 (2012) (criminalizing sex trafficking); 22 U.S.C. §§ 7101–7113 (2012) (laying out comprehensive approach to sex trafficking).

52. See N.Y. State Interagency Task Force on Human Trafficking, A Report by the Interagency Task Force: Implementation of the 2007 Law 5 (2008), available at <http://otda.ny.gov/programs/bria/documents/trafficking-report.pdf> (on file with the *Columbia Law Review*) (“[S]tates—including New York—lacked the statutory authority . . . to fill [gaps left by Victims of Trafficking and Violence Protection Act].”); see also Drasin, *supra* note 47, at 499–500 (“Despite the passage of the [Victims of Trafficking and Violence Protection Act], New York State lacked the statutory authority to identify victims and prosecute traffickers.”).

53. See Serita, *supra* note 7, at 645–47 (discussing “groundbreaking” legislation that put New York “at the forefront of the fight against human trafficking”); see also Act of June 6, 2007, ch. 74, 2007 N.Y. Laws 2753, 2753–54 (creating New York Penal Law section 230.34). The Anti-Human Trafficking Act also criminalized labor trafficking and provided for services for victims of all forms of trafficking. See *id.* at 2754–55, 2757–59.

54. See N.Y. Soc. Serv. Law § 447-a to -b (McKinney 2010). Available services include crisis intervention services, short-term safe-house care, and community-based programming. *Id.* § 447-b(1). Importantly, the Safe Harbour for Exploited Children Act did *not* create a defense to prostitution charges for minors; rather, it focused on providing

recently, in September 2013, Jonathan Lippman, Chief Judge of the New York Court of Appeals, announced that New York would be the first state to operate a system of specialized courts to handle cases potentially involving trafficking victims.⁵⁵ Perhaps most significant, however, was legislation passed in 2010 allowing victims of sex trafficking to vacate prior criminal convictions related to their status as trafficking victims.

1. *Enactment of New York Criminal Procedure Law Section 440.10(1)(i)*. — On August 13, 2010, New York enacted section 440.10(1)(i) of the New York Criminal Procedure Law to provide victims of sex trafficking with postconviction relief.⁵⁶ Explaining why this legislation was necessary, Assemblyperson Richard Gottfried, one of the sponsors of the legislation, noted that “[t]rafficked persons should not suffer ongoing punishment for acts they committed unwillingly under coercion.”⁵⁷ Vacating convictions related to trafficking would grant victims “a clean slate”⁵⁸ and a “desperately needed second chance they deserve.”⁵⁹ Governor Paterson recognized and endorsed these concerns when signing the bill into law.⁶⁰

In its current form, section 440.10(1)(i) allows judges to vacate convictions if the defendant can demonstrate that his or her “participation in the offense was a result of having been a victim of sex trafficking” as defined under either New York or federal law.⁶¹ Additionally, the

services to sexually exploited children. See *id.* § 447-a to -b (defining “sexually exploited child” and directing “every local social services district” to “address the child welfare services needs of sexually exploited children”); *People v. Samatha R.*, No. 2011KN092555, 2011 WL 6303402, at *4 (N.Y. Crim. Ct. Dec. 16, 2011) (“The Safe Harbour Act did not amend the Penal Law and provide a defense . . . to a 16- or 17-year-old charged with a prostitution offense.”).

55. Press Release, N.Y. State Unified Court Sys., NY Judiciary Launches Nation’s First Statewide Human Trafficking Intervention Initiative (Sept. 25, 2013), available at http://www.nycourts.gov/press/PR13_11.pdf (on file with the *Columbia Law Review*) (discussing creation of system of Human Trafficking Courts). For a more detailed analysis of the Human Trafficking Courts, see *infra* Part I.B.3.

56. See Act of Aug. 13, 2010, ch. 332, 2010 N.Y. Sess. Laws 1083, 1083 (McKinney); Legislative Memorandum Relating to Ch. 332, 2010 N.Y. Sess. Laws 1906, 1906–07; see also N.Y. Crim. Proc. Law § 440.10(1)(i) (McKinney Supp. 2014).

57. July 20 Letter from Richard N. Gottfried, *supra* note 3, at 10.

58. Letter from Thomas Duane, *supra* note 2, at 7.

59. Legislative Memorandum Relating to Ch. 332, 2010 N.Y. Sess. Laws at 1907.

60. See Exec. Chamber, Memorandum Filed with Assembly Bill Number 7670, *in* Bill Jacket, *supra* note 2, at 6 (“It is important to recognize the severe physical and emotional exploitation experienced by sex trafficking victims and to provide them with relief that will help them to become productive members of society.”).

61. Crim. Proc. § 440.10(1)(i). Sex trafficking is defined in New York as “advancing or profiting from prostitution” through a wide variety of means, including providing drugs to victims to impair their judgment, making false statements to induce victims to engage in prostitution, confiscating identification documents, employing debt bondage, and using various threats. N.Y. Penal Law § 230.34 (McKinney 2008). For discussion of the federal definition of sex trafficking, see *supra* notes 8–11 and accompanying text (describing federal “force, threats of force, fraud, [or] coercion” standard).

provision makes clear that its protections apply retroactively to convictions incurred before the legislation was adopted.⁶² The law does, however, impose certain limitations on the situations in which relief is available. First, the “arresting charge” for the conviction at issue must be under either New York Penal Law section 240.37 (loitering for the purpose of engaging in prostitution) or New York Penal Law section 230.00 (prostitution).⁶³ Second, motions under this law must be made with due diligence after the party requesting relief has either ceased to be a victim of sex trafficking or has sought services for sex trafficking, “subject to reasonable concerns for the safety of the defendant.”⁶⁴

2. *Defining the Substantive Reach of Section 440.10(1)(i)*: *People v. G.M. to People v. L.G.* — Although section 440.10(1)(i) was initially praised for the innovative relief it provided to victims of sex trafficking,⁶⁵ it soon came under fire for the scope of its protection.⁶⁶ The text plainly provides that individuals can only vacate convictions where the “arresting charge” for the conviction was for prostitution or loitering for the purpose of prostitution.⁶⁷ State Senator Thomas Duane explained this choice of language as follows:

This was intentional. The majority of those arrested under §240.37 and §230 of the Penal Law plea [sic] down and are convicted of a lesser charge. If this legislation was written only to include those *convicted* of these offenses, the legislation would bar the use of this relief to the majority of sex trafficking victims.⁶⁸

Thus, the “arresting charge” language was intended to make relief available as broadly as possible. However, some people expressed concern that this broad language would allow a victim arrested for prostitution but convicted of a much more serious crime to vacate his or her conviction.

62. Legislative Memorandum Relating to Ch. 332, 2010 N.Y. Sess. Laws at 1906–07 (“This act . . . shall apply to convictions taking place before or after it takes effect.”).

63. Crim. Proc. § 440.10(1)(i).

64. *Id.* § 440.10(1)(i)(i).

65. See, e.g., Letter from Laurel W. Eisner, Exec. Dir., Sanctuary for Families, to David Paterson, Governor, N.Y. (Aug. 4, 2010), in Bill Jacket, *supra* note 2, at 25 (“The bill not only offers critical legal relief, but would allow victims to restore their good name, rebuild their lives, and regain their sense of dignity.”); Press Release, Polaris Project, In Support S4429, An Act Amending the Criminal Procedure Law in Relations [sic] to Victims of Sex Trafficking Convicted of Prostitution Offenses 1 (Feb. 18, 2010), available at <http://sexworkersproject.org/downloads/2010/20100510-polaris-s4429-memo-in-support.pdf> (on file with the *Columbia Law Review*) (noting statute would “provide a greater sense of security to human trafficking victims”).

66. See, e.g., Exec. Chamber, Memorandum Filed with Assembly Bill Number 7670, *supra* note 60, at 6 (arguing statute was too broad and provided excessive relief); Drasin, *supra* note 47, at 490, 510–11 (arguing statute was too limited and provided inadequate relief).

67. See Crim. Proc. § 440.10(1)(i).

68. Letter from Thomas Duane, *supra* note 2, at 8–9.

tion.⁶⁹ One prominent supporter of the language responded that in any such situation, the more serious charge would almost certainly involve a new criminal proceeding, and thus a new “arresting charge.”⁷⁰ Additionally, he noted that judges have discretion under the law to deny motions to vacate and would use “common sense” to avoid this undesirable result.⁷¹

On the other side, critics argued that the “arresting charge” language denied relief to individuals forced by traffickers to engage in other illegal conduct.⁷² For example, it is not uncommon for traffickers to induce people into prostitution by providing them with illegal drugs to impair their judgment⁷³—indeed, this practice is so prevalent that New York included it in the state’s definition of sex trafficking.⁷⁴ Furthermore, sex traffickers can belong to criminal enterprises also engaged in drug trafficking;⁷⁵ such traffickers may force their victims to purchase drugs.⁷⁶ As a result, it is common for trafficked individuals to have convictions for possession of controlled substances.⁷⁷ The current text of the law does not provide relief to victims of trafficking in this situation.⁷⁸

69. See Exec. Chamber, Memorandum Filed with Assembly Bill Number 7670, *supra* note 60, at 6 (“[A] defendant arrested for prostitution, but ultimately convicted of assault or murder, could theoretically have his or her convictions vacated . . .”).

70. See Letter from Richard N. Gottfried, Chair, N.Y. Assembly Comm. on Health, to Peter Kiernan, Counsel to the Governor (Aug. 11, 2010) [hereinafter August 11 Letter from Richard N. Gottfried], *in* Bill Jacket, *supra* note 2, at 11 (“If someone arrested on a prostitution charge is then charged with something like . . . homicide, the new charge would almost certainly involve a new criminal proceeding. If that new criminal proceeding results in a conviction, the ‘arresting charge’ . . . would not be the prostitution charge; it would be the . . . homicide.”).

71. See *id.* at 12 (“[T]he court would interpret the ‘arresting charge’ language in a manner consistent with common sense to avoid an unreasonable result The court might well exercise its discretion . . . to deny the motion to someone whose conviction was for a more serious offense.”).

72. See, e.g., Drasin, *supra* note 47, at 490, 510–11 (advocating expanding substantive reach of section 440.10(1)(i) through broad interpretation of “arresting charge” language).

73. See Parker & Skrmetti, *supra* note 12, at 1014, 1018, 1026 (describing ways in which traffickers use drugs to make their victims dependent).

74. See N.Y. Penal Law § 230.34(1) (McKinney 2008) (criminalizing “unlawfully providing to a person who is patronized, with intent to impair said person’s judgment . . . a narcotic drug”).

75. See, e.g., Complaint at 5–7, 13–16, *United States v. Rivera*, No. 13-cr-00149-KAM (E.D.N.Y. filed Oct. 7, 2013) (charging defendants with both drug and sex trafficking charges).

76. See, e.g., *People v. G.M.*, 922 N.Y.S.2d 761, 762–63 (Crim. Ct. 2011) (describing how trafficker forced victim to buy narcotics for trafficker’s personal use).

77. See, e.g., *id.* at 762 (detailing victim’s motion to vacate prostitution and drug-possession convictions).

78. See N.Y. Crim. Proc. Law § 440.10(1)(i) (McKinney Supp. 2014) (limiting relief to “arresting charge” for prostitution or loitering for purpose of prostitution).

However, the “arresting charge” language has not seriously constrained courts. In the first published case of a motion to vacate under section 440.10(1)(i), *People v. G.M.*, a woman moved to vacate two prostitution convictions, two criminal-trespass convictions, and two drug-possession convictions.⁷⁹ Prosecutors in the case consented to the vacatur of nonprostitution offenses, calling the victim’s situation “exceptional”; as a result, the court granted the motion without significant discussion of the statute’s substantive reach.⁸⁰ For some time thereafter, no case raised the “arresting charge” issue.⁸¹

People v. L.G., decided in July 2013, marked the first time a court directly took up the question of whether convictions for nonprostitution offenses could be vacated without the prosecution’s consent.⁸² The defendant in *L.G.*, who had been forced into prostitution at the age of twelve, was arrested at the age of seventeen for loitering for the purpose of prostitution, as well as criminal possession of a weapon in the fourth degree.⁸³ Her pimp had forced her to carry a pocketknife for protection against “johns,” several of whom had assaulted her with weapons in the past.⁸⁴ In its opinion, the court focused on three factors: first, legislative history indicating that relief should extend to individuals arrested for prostitution but convicted of another offense;⁸⁵ second, that the defendant’s weapons conviction clearly resulted from her status as a sex trafficking victim;⁸⁶ and third, that section 440.10(6) allows judges to “take such additional action as is appropriate in the circumstances” when considering motions to vacate under section 440.10(1)(i).⁸⁷ Accordingly, the court vacated the weapons charge.⁸⁸ Responding to con-

79. *G.M.*, 922 N.Y.S.2d at 762.

80. *Id.* at 762–64. The victim was pimped out by her husband, who repeatedly imprisoned her in her home, raped her, beat her so severely that she was permanently disfigured, and forced her through repeated actual and threatened physical violence to prostitute herself and purchase narcotics. *Id.*

81. See, e.g., *People v. A.B.*, No. 2005CN007113, 2012 WL 2360942, at *1–*2 (N.Y. Crim. Ct. Jan. 10, 2012) (vacating conviction for loitering for purpose of prostitution); *People v. S.S.*, 948 N.Y.S.2d 520, 521 (Crim. Ct. 2012) (vacating conviction for prostitution); *People v. Doe*, 935 N.Y.S.2d 481, 482, 484 (Sup. Ct. 2011) (vacating three convictions for loitering for purpose of prostitution). One case, *People v. Gonzalez*, potentially raised the issue, as the victim initially moved to vacate a conviction for resisting arrest, but defense counsel voluntarily withdrew the motion with respect to that count, precluding consideration of the question. See 927 N.Y.S.2d 567, 569 (Crim. Ct. 2011).

82. See *People v. L.G.*, 972 N.Y.S.2d 418, 425–26 (Crim. Ct. 2013).

83. *Id.* at 421.

84. *Id.*

85. *Id.* at 425–26.

86. *Id.* at 426.

87. *Id.* at 426; see also N.Y. Crim. Proc. Law § 440.10(6) (McKinney Supp. 2014) (“If the court grants a motion under paragraph (i) . . . it . . . may take such additional action as is appropriate in the circumstances.”).

88. *L.G.*, 972 N.Y.S.2d at 428.

cerns about the breadth of this interpretation,⁸⁹ the court noted that it must use its discretion to “ensure that serious crimes are not vacated merely because the defendant happened to be a victim of trafficking.”⁹⁰ In light of this analysis from a prominent authority on the issue,⁹¹ it seems unlikely that the “arresting charge” language will prevent sex trafficking victims from vacating relatively minor nonprostitution offenses that resulted from their trafficking.⁹²

3. *Human Trafficking Courts*. — Importantly, section 440.10(1)(i) allows sex trafficking victims to obtain postconviction relief, but does not provide a defense to prostitution-related charges.⁹³ Thus, victims of sex trafficking have little recourse in the first instance to avoid incurring prostitution convictions. Indeed, even after the passage of section 440.10(1)(i) amid the growing awareness of domestic sex trafficking, people are still routinely arrested, prosecuted, and convicted of prostitution,⁹⁴ and statistically speaking, a significant percentage of those individuals are likely victims of sex trafficking.⁹⁵

Perhaps to address this gap in protection, in September 2013, Chief Judge Lippman announced that New York would create a statewide system of specialized criminal courts to handle prostitution cases and provide services to trafficking victims.⁹⁶ These courts, known as “Human Trafficking Courts,” would handle all prostitution-related cases after initial arraignment and would operate in all five boroughs of New York City, as well as several other locations in the state.⁹⁷ The specialized courts would be staffed by prosecutors, judges, and defense lawyers

89. See *supra* notes 67–69 and accompanying text (detailing reservations about “arresting charge” language).

90. *L.G.*, 972 N.Y.S.2d at 426.

91. Judge Serita, who authored the opinion in *L.G.*, also issued the first opinion on sex trafficking vacatur in *People v. G.M.*, 922 N.Y.S.2d 761 (Crim. Ct. 2011), and has published academic articles on the topic. See, e.g., Serita, *supra* note 7 (advocating coordination between law enforcement and judiciary to prosecute traffickers and assist victims).

92. Thus, Judge Serita’s expansive interpretation in *L.G.* of the substantive reach of New York’s vacatur provision largely cures the problem noted in Drasin’s Comment, *supra* note 47, namely that the “arresting charge” language would prevent trafficking victims from vacating nonprostitution offenses.

93. See N.Y. Crim. Proc. Law § 440.10(1)(i) (McKinney Supp. 2014) (authorizing motion to vacate rather than defense). The distinction between vacatur and a defense will be more fully explored in Part II.C, *infra*.

94. See *infra* notes 112–121, 176–184 and accompanying text (discussing recent prostitution-related arrests, prosecutions, and convictions).

95. See Leidholdt & Scully, *supra* note 13, at 46 n.32 (citing numerous studies finding between 75% and 95% of prostitution is pimp controlled).

96. Press Release, N.Y. State Unified Court Sys., *supra* note 55.

97. *Id.* The system was an expansion of a pilot program operating in New York, Queens, and Nassau Counties. *Id.*

specially trained in dealing with trafficking victims.⁹⁸ Additionally, social workers employed by the court would help trafficking victims before the court gain access to drug treatment, shelter, immigration assistance, healthcare, education, and job training.⁹⁹

Despite the noble intentions of the Human Trafficking Courts, the project has sparked criticism on several fronts. First, while the new court system is intended to help victims of trafficking, those individuals must necessarily be arrested and arraigned to receive the court's aid. Critics note that, for victims of trafficking, being arrested is harmful in itself, and that creating a system requiring victims to suffer this harm in order to receive services is counterproductive.¹⁰⁰ Other criticism, leveled at the pilot programs of these courts in Manhattan and Queens, applies with equal force to the expanded specialized court system: Services are largely tied to a guilty plea to either an infraction or a misdemeanor charge.¹⁰¹ Thus, people may leave with services if they so choose, but they also will acquire some kind of criminal record. These courts only became operational at the end of October 2013,¹⁰² so it remains to be seen what long-term impact they will have on sex trafficking in New York.

C. Responses of Other States

New York's groundbreaking approach in allowing victims of sex trafficking to vacate their convictions was soon followed by other states enacting similar laws. On August 8, 2011, Illinois Governor Pat Quinn signed into law Senate Bill 1037, a bill amending Illinois's criminal procedure code to allow victims of sex trafficking to file motions to vacate their prostitution-related convictions.¹⁰³ Although heavily inspired by New York's section 440.10(1)(i),¹⁰⁴ the Illinois statute has several significant

98. *Id.*

99. *Id.*

100. Robin Richardson, Letter to the Editor, Court for Prostitution Cases, N.Y. Times (Sept. 27, 2013), <http://www.nytimes.com/2013/09/28/opinion/court-for-prostitution-cases.html> (on file with the *Columbia Law Review*) (“[V]ictims must first be arrested and detained by law enforcement—an experience that is often abusive and results in the victim’s mistrusting law enforcement—in order to get court-mandated services. If we all agree that [victims] are not criminals, why are we . . . arresting them?”).

101. See Mogulescu, *supra* note 22, at 485 (criticizing Manhattan and Queens pilot programs).

102. Press Release, N.Y. State Unified Court Sys., *supra* note 55.

103. See Act of May 11, 2011, Pub. Act 97-0267, 2011 Ill. Laws 7832-34 (codified at 725 Ill. Comp. Stat. Ann. 5/116-2.1 (West 2014)); Press Release, Nat’l Immigrant Justice Ctr., New Illinois Law Upholds Human Rights of Sex Trafficking Survivors (Aug. 9, 2011), http://www.immigrantjustice.org/press_releases/new-illinois-law-upholds-human-rights-sex-trafficking-survivors (on file with the *Columbia Law Review*) (announcing Justice for Victims of Sex Trafficking Crimes Act).

104. Polaris Project, PA 97-0267: Illinois’ Justice for Victims of Sex Trafficking Crimes Act, End Demand Illinois 1 (2010), http://g.virbcdn.com/_f/files/6c/FileItem-147941-

differences. First, it does not use the “arresting charge” language from the New York law, but instead speaks directly to “conviction[s] under Section 11-14 (prostitution).”¹⁰⁵ Second, the Illinois law gives a host of examples of the types of probative evidence for demonstrating one’s status as a victim of sex trafficking.¹⁰⁶ In August 2013, Brenda Myers-Powell, an outspoken advocate for trafficking victims, became only the second person in Illinois to bring a motion under the statute, successfully vacating decades of convictions for prostitution.¹⁰⁷ In addition to New York and Illinois, fourteen other states—Connecticut, Florida, Hawaii, Maryland, Mississippi, Montana, Nevada, New Jersey, North Carolina, Ohio, Oklahoma, Vermont, Washington, and Wyoming—had enacted sex trafficking vacatur provisions as of January 2014.¹⁰⁸

II. EFFICACY OF RECENT STATE RESPONSES TO SEX TRAFFICKING

Sex trafficking vacatur provisions can only benefit victims who actually bring motions to vacate their convictions. There are a host of obstacles that might prevent victims from bringing such motions, with lack of knowledge about the availability of vacatur relief and lack of access to counsel chief among them.¹⁰⁹ In addition to these obstacles, however, are legal obstacles deriving from the provisions themselves in the form of limitations on the availability of relief. This Part will examine what impact the procedural and structural aspects of trafficking vacatur provisions may have on a victim’s ability to obtain relief.

Part II.A of this Note examines the extent to which victims have (or have not) taken advantage of statutes allowing them to vacate trafficking-related convictions. Part II.B analyzes procedural flaws of New York’s section 440.10(1)(i) to shed light on the limited use of such statutes,

IIJusticeforVictimsofSexTraffickingActBillSummaryAugust82011.pdf (on file with the *Columbia Law Review*) (explaining bill builds on New York’s vacatur statute).

105. 725 Ill. Comp. Stat. Ann. 5/116-2.1(a).

106. *Id.* at 5/116-2.1(b). Such evidence may include “a sworn statement from a trained professional staff of a victim services organization, an attorney, a member of the clergy, or a medical or other professional from whom the defendant has sought assistance in addressing the trauma associated with being trafficked.” *Id.*

107. Sweeney, *supra* note 6.

108. See Polaris Project, *Vacating Convictions*, *supra* note 6, at 1 (depicting map of states with vacatur provisions); see also Phillips et al., *Seeking Effective Remedies*, *supra* note 6, at 3 (noting sixteen states had adopted vacatur laws at time of writing). This author found no record after February 2014 indicating that any state had enacted such legislation after that date.

109. See N.Y.C. Bar Ass’n, *supra* note 50, at 31 n.4 (describing lack of access to “information about the remedies” under vacatur provisions as particular problem facing victims of sex trafficking); Advocacy for Human Trafficking Victims, *Delivery Legal Services Newsl.* (Md. State Bar Ass’n, Balt., Md.), Nov. 2013, http://www.msba.org/sec_comm/sections/dlserv/newsletter/november2013.asp (on file with the *Columbia Law Review*) (describing scarcity of lawyers to take on sex trafficking vacatur motions).

focusing in particular on the due-diligence requirement and evidentiary standard. Finally, Part II.C discusses the inherent structural flaw of trafficking vacatur provisions, which only provide postconviction relief and do not prevent victims from being prosecuted in the first instance.

A. Do Victims Take Advantage of These Laws?

One way to evaluate the effectiveness of vacatur relief is to compare the proportion of people who are eligible for relief with the proportion who have sought and received such relief.

1. *Estimating the Number of People Eligible for Vacatur Relief.* — Section 440.10(1)(i) and other vacatur laws allow judges to vacate convictions if the moving party can demonstrate that his or her participation in the offense resulted from being a victim of sex trafficking.¹¹⁰ As a result, victims of sex trafficking with trafficking-related convictions, most commonly for prostitution or loitering for the purpose of prostitution, are eligible to have those convictions, no matter how old,¹¹¹ vacated. However, determining the precise number of sex trafficking victims with trafficking-related convictions, and thus those eligible for vacatur relief, is no easy task.

A starting point for a rough estimate is the number of prostitution-related arrests.¹¹² Between 2008 and 2012, New York City arrests for prostitution and loitering for the purpose of prostitution hovered between 2,400 and 2,800 per year.¹¹³ Several years ago, in 2004 and 2005, arrest figures were much higher: The NYPD arrested over 6,000 people for prostitution or loitering for the purpose of prostitution in each of

110. See, e.g., N.Y. Crim. Proc. Law § 440.10(1)(i) (McKinney Supp. 2014); see also 725 Ill. Comp. Stat. Ann. 5/116-2.1(a).

111. Section 440.10(1)(i) applies to convictions incurred before its enactment. Legislative Memorandum Relating to Ch. 332, 2010 N.Y. Sess. Laws 1906, 1906–07 (McKinney).

112. Admittedly, arrest statistics do not, by themselves, provide an accurate picture of eligibility for vacatur relief. First, some individuals may have been arrested multiple times. Second, not everyone arrested is necessarily convicted. Finally, not every person convicted of prostitution is a victim of sex trafficking. For qualifications that refine this estimate, see *infra* notes 117–125 and accompanying text.

113. See Prostitution Related Arrests in New York City, *supra* note 36. In 2008, there were 2,806 arrests for prostitution and loitering for the purpose of prostitution in New York City. *Id.* In 2009, there were 2,715 such arrests, 2,734 in 2010, 2,813 in 2011, and 2,441 in 2012. *Id.* During this same period, prostitution-related arrests in New York State as a whole hovered between approximately 2,900 and 3,400. See N.Y. State Div. of Criminal Justice Servs., New York State Arrests for Prostitution Offenses (Dec. 17, 2013) [hereinafter New York State Arrests for Prostitution Offenses] (on file with the *Columbia Law Review*) (noting statewide statistics for all prostitution-related offenses, including prostitution and loitering for purpose of prostitution). Note that in 2011, the year after section 440.10(1)(i) was enacted, prostitution-related arrests actually increased. *Id.*

those years.¹¹⁴ In the 1980s and 1990s, the number of such arrests in New York City was even higher, reaching well above 10,000 a year.¹¹⁵ Importantly, New York's statistics are not anomalous; other metropolitan areas have similar figures.¹¹⁶

Arrests alone do not accurately portray eligibility for trafficking vacatur relief because only convictions, not arrests, may be vacated. Thus, it is essential to look at the conviction rate. The majority of prostitution-related arrests end in a guilty plea, often to lesser charges like disorderly conduct.¹¹⁷ Consequently, a high percentage of prostitution-related arrests result in a conviction of some kind. For example, in New York City in 2009, approximately 75% of prostitution-related arrests resulted in a conviction, and approximately one-third of those convictions resulted in a prison sentence.¹¹⁸ Two years later, in 2011, 85% of prostitution-related arrests in New York City resulted in a conviction, and again, one-third of convictions resulted in prison sentence.¹¹⁹ Based on these data, approximately 2,036 people were convicted of a prostitution-related offense in New York City in 2009, and 671 of those people spent time in jail.¹²⁰ Simi-

114. New York State Arrests for Prostitution Offenses, *supra* note 113. During the same period, prostitution-related arrests in New York State were around 7,000. *Id.*

115. In 1980, for example, there were over 12,000 prostitution-related arrests in New York City. Barbara Basler, *City's Prostitutes Invade Residential Communities*, N.Y. Times (Aug. 15, 1981), <http://www.nytimes.com/1981/08/15/nyregion/city-s-prostitutes-invade-residential-communities.html> (on file with the *Columbia Law Review*). In 1983, that number increased to 17,000. Elaine Sciolino, *Off the Street, Prostitution Is Flourishing*, N.Y. Times (Nov. 14, 1984), <http://www.nytimes.com/1984/11/14/nyregion/off-the-street-prostitution-is-flourishing.html> (on file with the *Columbia Law Review*). Although these arrests occurred decades ago, the resulting convictions are eligible for vacatur relief. See *supra* note 62 and accompanying text (establishing retroactivity of section 440.10(1)(i)).

116. For example, in Chicago in 2010, 1,582 women were arrested on prostitution charges. Chi. Police Dep't, *supra* note 36, at 35. In 2003 and 2004, arrest figures were higher, with over 3,200 women arrested each year on prostitution charges. Mayor's Office on Domestic Violence, Chi., *Intersystem Assessment on Prostitution in Chicago 105-06* (2006), available at <http://www.cfw.org/document.doc?id=168> (on file with the *Columbia Law Review*). For reference, Chicago has a population of approximately 2,700,000. See 2010 Population Finder, U.S. Census Bureau, <http://www.census.gov/popfinder/?fl=1714000> (last visited Aug. 30, 2014) (on file with the *Columbia Law Review*).

117. Letter from Thomas Duane, *supra* note 2, at 8; August 11 Letter from Richard N. Gottfried, *supra* note 70, at 11.

118. See Sex Workers Project, *Public Health Crisis: The Impact of Using Condoms as Evidence of Prostitution in New York City 10* (2012), available at <http://sexworkersproject.org/downloads/2012/20120417-public-health-crisis.pdf> (on file with the *Columbia Law Review*) (relying on data from New York's Division of Criminal Justice Services).

119. See Human Rights Watch, *Sex Workers at Risk: Condoms as Evidence of Prostitution in Four US Cities 14-15* (2012), available at http://www.hrw.org/sites/default/files/reports/us0712ForUpload_1.pdf (on file with the *Columbia Law Review*) (relying on data from New York's Division of Criminal Justice Services).

120. See *Prostitution Related Arrests in New York City*, *supra* note 36 (noting 2,715 prostitution and loitering arrests for 2009); see also *supra* note 118 and accompanying text

larly, in 2011 in New York City, approximately 2,391 people were convicted of a prostitution-related offense, 789 of whom spent time in jail.¹²¹

The final step in estimating eligibility for trafficking vacatur relief is distinguishing between sex trafficking and uncoerced sex work.¹²² As discussed above, the most prominent form of domestic sex trafficking in the United States is violent pimp-controlled prostitution.¹²³ Studies by the Department of Justice and various nongovernmental organizations have consistently estimated that upward of 75% of prostitution is pimp controlled.¹²⁴ Consequently, in New York City alone, approximately 1,527 convictions from 2009 and 1,793 convictions from 2011 were likely attributable to sex trafficking and thus eligible for vacatur.¹²⁵ This staggering estimate of trafficking-related convictions for a two-year period in New York City alone suggests that the number of people eligible for trafficking vacatur relief in all states with such provisions is enormous (in the tens of thousands if not higher), especially when considering the astonishingly high prostitution-arrest figures from previous decades.¹²⁶

2. *People Receiving Relief.* — In the almost four years since New York passed its landmark legislation allowing victims of sex trafficking to vacate their trafficking-related convictions, very few people have taken advantage of the law. The first decision vacating a conviction under section 440.10(1)(i) was issued in April 2011, about eight months after

(noting approximately 75% of prostitution-related arrests in New York City in 2009 resulted in conviction).

121. See Prostitution Related Arrests in New York City, *supra* note 36 (noting 2,813 prostitution and loitering arrests for 2011); see also *supra* note 119 and accompanying text (noting approximately 85% of prostitution-related arrests in New York City in 2011 resulted in conviction). Again, these figures do not account for the fact that some individuals may have been convicted or imprisoned multiple times.

122. See N.Y. Crim. Proc. Law § 440.10(1)(i) (McKinney Supp. 2014) (requiring defendant's participation in offense to result from being victim of sex trafficking).

123. See *supra* notes 18–31 and accompanying text (discussing how pimps target and groom victims).

124. See Leidholdt & Scully, *supra* note 13, at 46 n.32 (citing numerous studies finding between 75% and 95% of prostitution is pimp controlled).

125. This calculation assumes that 2,036 people were convicted of prostitution-related offenses in 2009 and that 2,391 people were convicted of such offenses in 2011. See *supra* notes 118–121 and accompanying text. 75% of these totals result in 1,527 convictions in 2009 and 1,793 convictions in 2011.

126. See *supra* note 115 and accompanying text (citing data demonstrating over 10,000 prostitution arrests per year in New York City alone in 1980s). Again, these figures do not take into account the fact that some victims may have been convicted multiple times, perhaps over the course of several decades. However, with raw conviction figures this high, even multiple convictions per victim does not change the fact that thousands of people in New York City alone are likely eligible for vacatur relief.

the enactment of the legislation.¹²⁷ As of March 2014, only thirty-eight sex trafficking victims in New York had received vacatur relief under the provision.¹²⁸

The situation is even more disheartening in other states. In Illinois, which enacted its sex trafficking vacatur provision in 2011,¹²⁹ only two people have successfully vacated their trafficking-related convictions.¹³⁰ Similarly, in Maryland, only one person has vacated an eligible conviction since the passage of its vacatur statute, also in 2011.¹³¹ With respect to the thirteen other states with trafficking vacatur provisions on the books, this author could find no evidence that anyone has ever vacated a trafficking-related conviction.¹³² These figures demonstrate the significant mismatch between those eligible for relief and those seeking relief. Out of tens of thousands of trafficking victims across the country,¹³³ only forty-one have successfully vacated convictions in the almost four years since section 440.10(1)(i) was enacted in New York.¹³⁴

B. *Procedural Obstacles to Relief Under Section 440.10(1)(i)*

The fact that such a small percentage of people eligible for relief has taken advantage of the opportunity to vacate prior offenses under section

127. See *People v. G.M.*, 922 N.Y.S.2d 761, 761–62 (Crim. Ct. 2011) (vacating sex trafficking victim's convictions for two counts each of prostitution, criminal trespass, and drug possession in April 2011).

128. Suzannah Phillips, *Clearing the Slate for Trafficking Survivors*, Trafficking Research Project (June 20, 2014), <http://thetraffickingresearchproject.wordpress.com/2014/06/20/clearing-the-slate-for-trafficking-survivors/> (on file with the *Columbia Law Review*); see also Phillips et al., *Seeking Effective Remedies*, supra note 6, at 26 (noting thirty-two trafficking victims had convictions vacated as of October 9, 2013).

129. Nat'l Immigrant Justice Ctr., supra note 103.

130. Sweeney, supra note 6 (describing August 2013 vacatur of decades-old convictions by second woman to vacate convictions in Illinois). This author could locate no record of any convictions vacated in Illinois after August 2013.

131. Advocacy for Human Trafficking Victims, supra note 109. This author could locate no record of any convictions vacated in Maryland after November 2013.

132. Westlaw, Lexis, and Google searches for published and unpublished court opinions, newspaper articles, bar association memoranda, and various other sources that might detail vacated convictions returned no results. Searches were run for each state individually with the terms "sex traffick! vacat!" in each database. Furthermore, the most recent reports on sex trafficking vacatur across the country make no reference to successful vacatur in any of these states. See, e.g., Phillips et al., *Seeking Effective Remedies*, supra note 6, at 26 (noting number of successful vacatur motions in New York, but nowhere else). Given the lack of available information on vacatur in these states, it is unlikely that it has been granted frequently, if at all.

133. See supra Part II.A.1 (estimating number of sex trafficking victims eligible for vacatur relief).

134. See supra notes 127–131 and accompanying text (noting thirty-eight people in New York, two people in Illinois, and one person in Maryland have successfully vacated trafficking-related convictions).

440.10(1)(i) naturally raises the question: Why? Victims of sex trafficking may not know that such relief is available to them.¹³⁵ Others may not be able to find a lawyer to help them file such a motion.¹³⁶ However, certain aspects of the law itself may exacerbate the problem. Part II.B.1 discusses section 440.10(1)(i)'s due-diligence requirement, which governs when a sex trafficking victim can file a motion to vacate prior convictions. Part II.B.2 discusses section 440.10(1)(i)'s provision regarding evidence required to support such a motion.

1. *Due-Diligence Requirement.* — Like motions to vacate a conviction based on newly discovered evidence, sex trafficking vacatur provisions require that a victim's motion be filed in a timely fashion.¹³⁷ Section 440.10(1)(i) provides that the motion must "be made with due diligence, after the defendant has ceased to be a victim of such trafficking or has sought services for victims of such trafficking, subject to reasonable concerns for . . . safety."¹³⁸ However, vacating trafficking-related convictions differs significantly from other vacatur in ways that make the due-diligence requirement less relevant and more burdensome in trafficking cases, potentially hindering victims from bringing meritorious motions.

Vacating convictions in appropriate circumstances promotes justice and fairness by ensuring that people are not punished for crimes they did not commit.¹³⁹ In light of this overarching purpose, the likelihood that a given conviction is wrongful is an important element in distinguishing between vacatur for newly discovered evidence and sex trafficking vacatur. Although there is some debate on the proper figure, wrongful convictions as a factual matter (and thus, relatedly, successful vacatur on the basis of newly discovered evidence) are relatively uncommon.¹⁴⁰

135. See N.Y.C. Bar Ass'n, *supra* note 50, at 31 n.4 (describing lack of access to "information about the remedies" under vacatur provisions as particular problem facing victims of sex trafficking).

136. See Advocacy for Human Trafficking Victims, *supra* note 109 (describing scarcity of lawyers to take on sex trafficking vacatur motions).

137. See, e.g., N.Y. Crim. Proc. Law § 440.10(1)(g) (McKinney Supp. 2014) (requiring motion based on discovery of new evidence "be made with due diligence after the discovery of such alleged new evidence"); *id.* § 440.30(1)(b)(ii) (providing motion to vacate under section 440.10 should be denied if filed more than five years after date of conviction absent showing of due diligence).

138. *Id.* § 440.10(1)(i)(i).

139. See *People v. Tankleff*, 848 N.Y.S.2d 286, 299 (App. Div. 2007) ("It is abhorrent to our sense of justice and fair play to countenance the possibility that someone innocent of a crime may be incarcerated or otherwise punished for a crime which he or she did not commit.").

140. See *Kansas v. Marsh*, 548 U.S. 163, 198 (2006) (Scalia, J., concurring) ("That would make the [wrongful conviction rate] .027 percent—or, to put it another way, a [successful conviction] rate of 99.973 percent." (quoting Joshua Marquis, *The Innocent and the Shammed*, N.Y. Times, Jan. 26, 2006, at A23)); D. Michael Risinger, *Innocents Convicted: An Empirically Justified Factual Wrongful Conviction Rate*, 97 J. Crim. L. & Criminology 761, 762 (2007) (estimating wrongful-conviction rate between 3% and 5%

On the other hand, trafficking victims are routinely convicted of prostitution.¹⁴¹ Given the significant statistical probability that an individual with a prostitution conviction was trafficked,¹⁴² the gatekeeping function of the due-diligence requirement should not subsume the overarching purposes of vacatur: ensuring that victims of trafficking are not criminally punished for crimes they committed under coercion.

Furthermore, sex trafficking vacatur provisions involve a different kind of argument than vacatur based on newly discovered evidence. When moving to vacate a sentence on the grounds of newly discovered evidence, a defendant will generally argue that he did not, as a factual matter, commit the offense for which he was convicted.¹⁴³ In these instances, the due-diligence requirement acts to balance concerns for justice with the integrity of the trial process and respect for the finality of the jury's judgment.¹⁴⁴ Sex trafficking vacatur, however, is different. A victim bringing a motion to vacate is not challenging whether he or she engaged in the criminal conduct as a factual matter, but is instead taking the position that he or she is not culpable for that conduct, given the modern understanding of sex trafficking.¹⁴⁵

Despite these misalignments, one potential justification for the due-diligence requirement in the context of sex trafficking vacatur is that evidence tending to prove that someone was a victim of trafficking will arguably be harder to obtain as time goes on. The due-diligence requirement, however, is hardly responsive to this concern. Because section 440.10(1)(i) was intended to apply retroactively to allow

from 1982 to 1989). The wrongful conviction rate should closely approximate the rate of successful vacatur on the basis of newly discovered evidence, since such a motion can only be successful where the new evidence "create[s] a probability" that the defendant would have been found not guilty had such evidence been presented (and thus that he or she was wrongfully convicted). Crim. Proc. § 440.10(1)(g). Although the standards are not completely interchangeable, they are functionally similar.

141. See supra Part II.A.1 (estimating number of trafficking victims with convictions eligible for vacatur).

142. See supra note 124 and accompanying text (estimating upwards of 75% of prostitution is pimp controlled and thus involves trafficking).

143. See, e.g., Crim. Proc. § 440.10(1)(g) to (g-1) (allowing motions to vacate if new evidence, not available at the time of trial, would "create the probability that had such evidence been received at the trial the verdict would have been more favorable to the defendant").

144. See Edward Connors et al., U.S. Dep't of Justice, *Convicted by Juries, Exonerated by Science: Case Studies in the Use of DNA Evidence to Establish Innocence After Trial* 28–29 (1996), available at <http://www.ncjrs.gov/pdffiles/dnaevd.pdf> (on file with the *Columbia Law Review*) (describing reasons for states' time limits on filing new appeals).

145. See supra notes 56–60 and accompanying text (detailing legislative history supporting modern principle that trafficking victims should not be treated like criminals for acts they committed under coercion).

trafficking victims to vacate old trafficking-related convictions,¹⁴⁶ a victim could have moved to vacate a fifty-year-old conviction the day after the law took effect without raising due-diligence problems. In fact, one of the first women to vacate her convictions in Illinois was Brenda Myers-Powell, an outspoken advocate for trafficking victims who in 2013 vacated a host of prostitution-related convictions dating back to the 1970s.¹⁴⁷ The retroactive nature of section 440.10(1)(i), as well as the sheer number of decades-old convictions eligible for vacatur, makes it difficult to argue that waiting to file a motion to vacate would reduce the quality of evidence available in a forty-year-old prostitution case.

Not only is the due-diligence requirement less appropriate in cases of sex trafficking vacatur than in cases involving newly discovered evidence, but it also imposes distinct burdens on victims of sex trafficking, who are uniquely unlikely to bring such motions in a timely manner. First, the evidence presented to support a sex trafficking vacatur motion is not new. Motions to vacate based on the discovery of new evidence are necessarily predicated on the occurrence of something new, which serves as a logical impetus for filing a motion challenging one's conviction. Sex trafficking vacatur motions, however, are not based on any new information—the nature of the motion requires the defendant to have been a victim of sex trafficking in the past, at the time the offense in question was committed.¹⁴⁸ Because this information is not new, it is not intuitive for the victim that this information can serve as the basis for a motion to vacate a conviction.¹⁴⁹ Unless a victim is aware that escaping his or her trafficker permits him or her to seek vacatur, such an individual would not be on notice of the availability of relief in the same way that a wrongfully convicted individual is intuitively on notice upon discovery of new evidence.

More importantly, the realities of life after trafficking may delay victims from filing motions to vacate. Most obviously, victims may lack knowledge of the availability of relief,¹⁵⁰ lack the resources to seek assistance filing the motion,¹⁵¹ or fear their traffickers.¹⁵² Alternatively, former

146. See *supra* note 62 and accompanying text (noting law's retroactive effect).

147. Sweeney, *supra* note 6.

148. See Crim. Proc. § 440.10(1)(i) (allowing vacatur when “defendant’s participation in the offense was a result of having been a victim of sex trafficking”).

149. Counsel undoubtedly has a role to play in identifying relief for which a client is eligible, but such advice is only available to victims who have counsel. Due to a scarcity of lawyers willing to take on these issues, many victims may lack access to legal advice about opportunities for relief. See *Advocacy for Human Trafficking Victims*, *supra* note 109.

150. See N.Y.C. Bar Ass’n, *supra* note 50, at 31 n.4 (noting trafficking victims “may lack . . . information about the remedies under . . . § 440”).

151. The scarcity of lawyers to take cases for thousands of eligible victims is a particular problem. See *Advocacy for Human Trafficking Victims*, *supra* note 109 (“[L]egal representation meeting the unique needs of trafficking victims remains sparse.”).

victims of sex trafficking, with their convictions behind them, may be focused on moving forward with their lives. Although the effects of a prostitution-related conviction are real and significant,¹⁵³ those effects may not be felt immediately.¹⁵⁴ Unless former convictions pose an immediate obstacle (for example, if the victim wants to work in a field requiring background checks or is engaged in a custody dispute), a victim may not immediately prioritize vacating those convictions.¹⁵⁵

Thus far, courts have not found problematic the failure of a victim to file a vacatur motion immediately, due in large part to the recent vintage of section 440.10(1)(i) and its progeny.¹⁵⁶ As time passes, however, courts and victims cannot continue to rely on the argument that the statute is new.¹⁵⁷

2. *Evidentiary Requirements.* — As with any motion to vacate, motions for sex trafficking vacatur require that the moving party bear the burden of proof.¹⁵⁸ Many sex trafficking vacatur provisions, however, provide lit-

152. The statute does contain a fear exception to the due-diligence requirement, providing that the requirement is “subject to reasonable concerns for the safety of the defendant, family members of the defendant, or other victims of such trafficking.” Crim. Proc. § 440.10(1)(i). However, the significant obstacles presented by the lack of knowledge of availability of relief and lack of resources to seek relief are not addressed in the statute. See *supra* note 109 and accompanying text.

153. See *supra* notes 47–50 and accompanying text (describing impact of criminal record on employment opportunities, available housing, custody disputes, and immigration status).

154. See, e.g., *People v. G.M.*, 922 N.Y.S.2d 761, 763 (Crim. Ct. 2011) (describing how conviction jeopardized victim’s job when employer ran background check five years into her employment).

155. This phenomenon may also play some role in explaining why so few vacatur motions have been filed since the enactment of vacatur legislation—victims might not yet have experienced collateral consequences of their convictions that would cause them to file a motion to vacate. See *supra* text accompanying note 135.

156. See, e.g., *People v. L.G.*, 972 N.Y.S.2d 418, 427 (Crim. Ct. 2013) (rejecting argument that victim did not act with due diligence considering significant amount of effort required to file vacatur motion when statute was enacted only one year prior). Most cases on section 440.10(1)(i) do not even mention the due-diligence requirement as a potential obstacle to relief. See, e.g., *People v. Gonzalez*, 927 N.Y.S.2d 567, 569 (Crim. Ct. 2011) (mentioning due diligence only when quoting statutory language, but engaging in no analysis on subject).

157. As an additional note, due to the retroactive applicability of section 440.10(1)(i), every existing prostitution conviction of a sex trafficking victim is eligible for vacatur relief. As estimated in Part II.A.1, tens of thousands of people are likely eligible for this type of relief. Clearly, tens of thousands of trafficking victims cannot descend upon state courts at the same time to file motions to vacate; it will undoubtedly take time for these motions to work their way through the system. These administrative realities should play a role when evaluating the due-diligence requirement, as victims and courts cannot be expected to file and hear vacatur motions overnight.

158. See, e.g., N.Y. Crim. Proc. Law § 440.30(6) (McKinney Supp. 2014) (“[T]he defendant has the burden of proving by a preponderance of the evidence every fact essential to support the motion.”); Fla. Stat. Ann. § 943.0583(3) (West Supp. 2014)

tle guidance on the kinds of evidence that are acceptable to prove that the moving party was a victim of sex trafficking years prior.¹⁵⁹ New York's section 440.10(1)(i)(ii) merely provides that "official documentation of the defendant's status as a victim of sex trafficking . . . shall create a presumption that the defendant's participation in the offense was a result of having been a victim of sex trafficking."¹⁶⁰ Section 440.10(1)(i)(ii) does not, however, affirmatively require any such official documentation, or indeed any corroborating evidence.¹⁶¹ On the one hand, this rather vague and permissive evidentiary standard benefits victims seeking to vacate prior convictions. As section 440.10(1)(i)(ii) was intended to apply retroactively to allow victims to vacate old convictions,¹⁶² requiring corroborating evidence would make it extremely difficult for those with older convictions to obtain vacatur and would thus substantially impair the purpose of the legislation. On the other hand, given the relative lack of specificity, it is unclear what evidence is sufficient to prove a victim's case.

Evidentiary issues have not yet caused serious problems for victims seeking to vacate convictions under section 440.10(1)(i). In most cases, the state does not contest the motion,¹⁶³ and thus the pressure to produce corroborating evidence is significantly reduced. Even in cases where the state does contest a motion to vacate, courts have nevertheless granted the motion based solely on an evaluation—made without corrob-

("Determination of the petition under this section should be by a preponderance of the evidence."). Interestingly, under the Florida statute, a petitioner lacking official documentation of his or her status as a trafficking victim must prove "that his or her participation in the offense was a result of having been a victim of human trafficking" by clear and convincing evidence, rather than by a preponderance of the evidence. See *id.* § 943.0583(5).

159. See, e.g., Fla. Stat. Ann. § 943.0583(6)(a) (requiring "sworn statement" from victim eligible for relief in absence of official documentation); Md. Code. Ann., Crim. Proc. § 8-302(b)(4) (LexisNexis Supp. 2013) (instructing victims to "describe the evidence" in support of their motion).

160. Crim. Proc. § 440.10(1)(i)(ii).

161. See *id.* ("[O]fficial documentation . . . shall not be required for granting a motion under this paragraph.").

162. See Legislative Memorandum Relating to Ch. 332, 2010 N.Y. Sess. Laws 1906, 1906-07 (McKinney) ("This act shall . . . apply to convictions taking place before or after it takes effect.").

163. See, e.g., *People v. Doe*, 935 N.Y.S.2d 481, 482 (Sup. Ct. 2011) (declining to oppose motion after considering facts "unique" to defendant); *People v. G.M.*, 922 N.Y.S.2d 761, 764 (Crim. Ct. 2011) (declining to oppose motion due to "exceptional" circumstances of defendant). Note that, thus far, the state's opposition to a victim's motion to vacate has largely been relegated to situations where the arresting offense was unrelated to prostitution. See, e.g., *People v. L.G.*, 972 N.Y.S.2d 418, 419 (Crim. Ct. 2013) (noting state's opposition to motion on grounds that weapons charge did not fall within ambit of section 440.10(1)(i)).

orating evidence—that the victim’s testimony was “credible.”¹⁶⁴ As a result, not a single motion to vacate filed pursuant to section 440.10(1)(i) has been denied.¹⁶⁵ However, courts have never been confronted with a situation where a victim without corroborating evidence tells a story that the court, for whatever reason, deems not credible. In the same way courts have pronounced a victim’s testimony credible and truthful with very little explanation,¹⁶⁶ could a court simply pronounce that it found the victim’s testimony not to be credible? How could an appellate court review such a decision?¹⁶⁷ Without clear standards to guide judges on the evidence probative in trafficking vacatur cases, there is a danger that judges will use improper means to evaluate credibility,¹⁶⁸ and that those credibility determinations would be difficult to overturn upon review.¹⁶⁹

C. *Timing of Relief: Postconviction Vacatur Versus Complete Defense*

Section 440.10(1)(i) grants postconviction relief by allowing victims of sex trafficking to vacate convictions after the fact¹⁷⁰ but does not create a defense to prostitution charges in the first instance.¹⁷¹ Furthermore,

164. *People v. Gonzalez*, 927 N.Y.S.2d 567, 569–70 (Crim. Ct. 2011) (finding victim “credible” and asserting victim “appeared to be truthful,” thus discounting argument that lack of corroboration was sufficient to deny motion).

165. See Storey, *supra* note 46, at 7 (noting twenty motions to vacate filed by Legal Aid Society in New York had been granted, while ten remained pending); see also *L.G.*, 972 N.Y.S.2d at 427–28 (granting victim’s motion to vacate); *People v. A.B.*, No. 2005CN0071113, 2012 WL 2360942, at *1–*2 (N.Y. Crim. Ct. Jan. 10, 2012) (same); *People v. S.S.*, 948 N.Y.S.2d 520, 521 (N.Y. Crim. Ct. 2012) (same); *Doe*, 935 N.Y.S.2d at 484 (same); *Gonzalez*, 927 N.Y.S.2d at 569–71 (same); *G.M.*, 922 N.Y.S.2d at 766 (same).

166. See, e.g., *Gonzalez*, 927 N.Y.S.2d at 569 (“The Court finds that the defendant was credible. She testified as to what she could remember [and] gave answers that appeared to be truthful . . .”).

167. Witness-credibility determinations are reviewed under a very deferential “clearly erroneous” standard. 5 Am. Jur. 2d Appellate Review § 641 (2007). As a result, where a lower-court judge offers little explanation for finding a victim not to be credible, it would be very difficult for a reviewing court to overturn a judge’s decision to deny a trafficking victim’s motion to vacate.

168. For example, the court could place undue emphasis on lack of corroborating evidence. Prosecutors have taken this approach in their arguments opposing vacatur, see *Gonzalez*, 927 N.Y.S.2d at 570 (detailing prosecution’s argument that lack of corroboration justified denying motion), and a court could adopt the same position, despite the fact that the statute does not require such corroboration.

169. See *supra* note 167 (explaining deferential “clearly erroneous” standard applied to credibility determinations upon review).

170. See, e.g., N.Y. Crim. Proc. Law § 440.10(1)(i) (McKinney Supp. 2014) (allowing victims of sex trafficking to vacate prior convictions for prostitution after they cease to be victims of trafficking).

171. See *id.* (constituting part of “Motion to vacate” section of Criminal Procedure Law, rather than substantive portion of Penal Law). Note that a few states have enacted laws to create a defense to prostitution charges for victims of sex trafficking. Laurel

under the New York Penal Law, being a victim of sex trafficking is unlikely to be a defense to a prostitution-related charge. The only possible candidate to encompass a victim of sex trafficking would be duress, which, under New York law, provides a defense to conduct engaged in as a result of “use or threatened imminent use of unlawful physical force.”¹⁷²

Admittedly, some types of sex trafficking might fall within this definition—certainly, violent pimps threatening to assault their victims if they do not prostitute themselves would constitute duress. However, many types of trafficking fall outside of this definition. Providing illegal drugs to impair a victim’s judgment, withholding identification documentation, forcing victims into debt bondage, and making nonviolent threats of various kinds are common sex trafficking tactics specifically criminalized under New York law,¹⁷³ but none of these behaviors fits neatly in the “duress” defense because they do not involve use or threatened imminent use of unlawful *physical* force. As a result, many victims cannot rely on their status as victims of sex trafficking to be a defense to their charges in the first instance.¹⁷⁴

The lack of defense is problematic because, despite increasing awareness that many individuals working in the commercial sex industry are victims of sex trafficking,¹⁷⁵ people continue to be arrested for prostitution-related offenses.¹⁷⁶ For example, Florida, which in early 2013 enacted legislation to allow victims of sex trafficking to vacate convic-

Bellows, Op-Ed., *Victims of Human Trafficking Need Our Help*, Stamford Advocate (Jan. 10, 2013), <http://www.stamfordadvocate.com/opinion/article/Op-Ed-Victims-of-human-trafficking-need-our-help-4184054.php> (on file with the *Columbia Law Review*). New York has not enacted legislation of this kind. *Id.*

172. N.Y. Penal Law § 40.00 (McKinney 2009).

173. See *id.* § 230.34 (McKinney 2008) (defining sex trafficking). Nonviolent threats that constitute sex trafficking include threats to damage property; threats to engage in conduct constituting a felony; threats to accuse the victim of a crime; threats to initiate deportation proceedings; and threats to expose a secret that would subject the victim to hatred, contempt, or ridicule. *Id.* § 230.34(5).

174. But see *People v. Samatha R.*, No. 2011KN092555, 2011 WL 6303402, at *5 (N.Y. Crim. Ct. Dec. 16, 2011) (dismissing prostitution charges against underage victim, not based on section 440.10(1)(i), but under judge’s discretionary power to dismiss charges when prosecution would constitute injustice). The court in *Samatha R.* was heavily influenced by New York’s Safe Harbour for Exploited Children Act, which is concerned with the sexual exploitation of minors but does not create a defense to prostitution charges for minors. See *id.* at *4; see also *supra* note 54. While the case suggests that there may be some room for minors who are victims of sex trafficking to escape conviction for prostitution in the first instance, no court has demonstrated a willingness to extend this reasoning to adult victims.

175. See *supra* notes 51–55, 103–108 and accompanying text (describing recent action at state and federal level to combat sex trafficking); *supra* note 124 and accompanying text (discussing prominence of sex trafficking in commercial sex industry).

176. See *supra* notes 113–116 and accompanying text (detailing arrest statistics for New York and Chicago between 2010 and 2012).

tions,¹⁷⁷ is aggressively targeting prostitution through undercover investigations. In a May 2013 sting operation, the Polk County Sheriff's Office arrested for prostitution a fifteen-year-old girl accompanied by her pimp, along with nine other adult women admittedly accompanied by their pimps.¹⁷⁸ In a December 2013 sting operation, the same office arrested a sixteen-year-old girl who was "clearly a victim of sex trafficking," along with seventy-nine others.¹⁷⁹ Even in New York City, the birthplace of sex trafficking vacatur¹⁸⁰ and a leader in the fight against sex trafficking,¹⁸¹ prostitution arrests actually increased after the passage of section 440.10(1)(i),¹⁸² and those arrested continue to be prosecuted¹⁸³ and convicted.¹⁸⁴

Because many people cannot defend themselves under the narrow duress defense, postconviction vacatur is their only option. This use of vacatur creates a paradoxical system for sex trafficking victims where they are treated radically differently pre- and postconviction. As expressed in the legislative history, section 440.10(1)(i) was motivated by the belief that victims of trafficking should not be punished for crimes they commit

177. See Fla. Stat. Ann. § 943.0583 (West Supp. 2014); Act of May 30, 2013, ch. 2013-98, 2013 Fla. Sess. Law Serv. 1131, 1131-33 (West).

178. Press Release, Polk Cnty. Sheriff's Office, PCSO Detectives Make 92 Arrests During Four-Day-Long Undercover Prostitution Investigation (May 13, 2013), <http://www.polksheriff.org/NewsRoom/News%20Releases/Pages/05-13-2013PCSOdetectivesMake92ArrestsDuringFour-Day-Long.aspx> (on file with the *Columbia Law Review*). A total of ninety-two arrests were made in the sting, resulting in arrests of twelve pimps, thirty-nine johns, thirty-nine prostitutes, and two others. *Id.*

179. Press Release, Polk Cnty. Sheriff's Office, PCSO Detectives Make 80 Arrests During Four Day Undercover Prostitution Investigation (Dec. 16, 2013), <http://www.polksheriff.org/NewsRoom/News%20Releases/Pages/12-16-2013PCSOdetectivesMake80ArrestsDuringFourDay.aspx> (on file with the *Columbia Law Review*).

180. Both the General Assembly and Senate sponsors of Assembly Bill 7670 represented districts in Manhattan. See Biography, Assemblymember Richard N. Gottfried Assembly District 75, <http://assembly.state.ny.us/mem/Richard-N-Gottfried/bio/> (on file with the *Columbia Law Review*) (last visited Aug. 30, 2014); Biography, N.Y. State Senator Thomas K. Duane (Former), <http://www.nysenate.gov/senator/thomas-duane/bio> (on file with the *Columbia Law Review*) (last visited Aug. 30, 2014).

181. See *supra* notes 53-56 and accompanying text (describing New York State's prominent role in enacting legislation criminalizing sex trafficking and protecting victims).

182. Prostitution Related Arrests in New York City, *supra* note 36 (noting arrests increased from 2,734 in 2010 to 2,813 in 2011). Although arrests decreased slightly in 2012 and 2013, over 2,000 people a year continue to be arrested in New York City for prostitution and loitering for the purpose of prostitution. See New York State Arrests for Prostitution Offenses, *supra* note 113.

183. See, e.g., *People v. McGinnis*, 972 N.Y.S.2d 882, 883-84 (Crim. Ct. 2013) (outlining charges against defendant after January 2013 arrest).

184. See *supra* note 119 and accompanying text (discussing conviction statistics for prostitution-related arrests in New York City for 2011).

under coercion.¹⁸⁵ Making relief for these people available through vacatur only after arrest, prosecution, and conviction, however, suggests the legislature is less than fully committed to that principle.

Despite apparent legislative ambivalence, the New York judiciary's recent creation, Human Trafficking Courts, might have a role in filling the gap created by the lack of a defense coupled with postconviction relief. In this new system, prostitution cases will be referred to courts specially trained to deal with trafficking victims.¹⁸⁶ Unfortunately, these courts are not available in all parts of New York State.¹⁸⁷ Furthermore, reception of services in the Human Trafficking Courts is tied to a guilty plea.¹⁸⁸ Finally, the services of the Human Trafficking Courts may not be available for repeat offenders.¹⁸⁹ Because most Human Trafficking Courts only opened their doors at the end of October 2013,¹⁹⁰ it is still too early to tell what long-term impact they will have on the cycle of accumulating criminal convictions that many victims of sex trafficking experience.¹⁹¹

III. IMPROVING RELIEF AVAILABLE TO VICTIMS OF SEX TRAFFICKING

Although sex trafficking vacatur provisions like New York's section 440.10(1)(i) are important, innovative tools to give victims of sex trafficking a second chance, they are flawed and underutilized. The situation, however, is not irremediable. Part III.A proposes ways to reduce the

185. See *supra* notes 56–60 and accompanying text (examining legislative history indicating law was intended to give victims of trafficking second chance instead of treating them like criminals).

186. Press Release, N.Y. State Unified Court Sys., *supra* note 55.

187. See William K. Rashbaum, With Special Courts, State Aims to Steer Women Away from Sex Trade, *N.Y. Times* (Sept. 25, 2013), <http://www.nytimes.com/2013/09/26/nyregion/special-courts-for-human-trafficking-and-prostitution-cases-are-planned-in-new-york.html> (on file with the *Columbia Law Review*) (noting eleven Human Trafficking Courts will be situated throughout New York: five in New York City alone, but only six covering rest of state “from Long Island to Buffalo”).

188. Mogulescu, *supra* note 22, at 485; Sathbh Walshe, New Court Helps New York's Human Trafficking Victims, *Al Jazeera Am.* (Oct. 31, 2013, 5:06 PM), <http://america.aljazeera.com/articles/2013/10/31/new-court-systemhelpsvictimsofhumantraffickinginnewyork.html> (on file with the *Columbia Law Review*) (interviewing Kate Mogulescu, who noted, even under Human Trafficking Courts, her clients “are still prosecuted as defendants even though we know they are victims”).

189. See Walshe, *supra* note 188 (quoting Judge Serita, who told trafficking victim arrested twice in same location one week apart that “if this happens again, the offer that is being made now [dismissing the case] might not happen”). The lack of relief for repeat offenders when attempting to help victims of trafficking is particularly problematic because many victims may be “simply unable to get out from under their trafficker's control,” *id.*, and are thus likely to reoffend.

190. Press Release, N.Y. State Unified Court Sys., *supra* note 55.

191. See *supra* Part I.A (describing how victims of sex trafficking accumulate criminal convictions).

impediment to relief created by due-diligence requirements. Part III.B suggests how to make the evidentiary provision of section 440.10(1)(i) more specific in order to provide better guidance to victims and courts. Part III.C argues in favor of a specific defense for trafficking victims that would allow them to avoid trafficking-related convictions in the first instance.

A. Rethinking Due Diligence

Section 440.10(1)(i) and its progeny contain due-diligence requirements that may impair a sex trafficking victim's ability to bring a motion to vacate his or her trafficking-related convictions.¹⁹² Because such statutes are quite new, no court has yet refused to grant a motion to vacate a victim's conviction on due-diligence grounds.¹⁹³ As these statutes get older, however, the due-diligence requirement is likely to become a more significant obstacle, as judges will no longer be able to dismiss the issue simply by pointing to the recent vintage of the statutes. In light of this problem, Part III.A.1 argues that eliminating the due-diligence requirement would best serve the purpose of trafficking vacatur provisions without compromising the integrity of the process. Part III.A.2 suggests, in the alternative, that the exceptions to the due-diligence requirement be expanded. Finally, Part III.A.3 proposes judicial interpretations that would minimize the obstacle posed by the due-diligence requirement in the absence of legislative amendment.

1. *Eliminating the Due-Diligence Requirement.* — In the context of sex trafficking vacatur, the due-diligence requirement could be eliminated without compromising the principles motivating the requirement in other situations. As traditionally used in the context of wrongful conviction, the due-diligence requirement acts to ensure the integrity of the trial process and jury verdict in the interest of finality of judgment.¹⁹⁴ Because the vast majority of prostitution convictions do not involve trials,¹⁹⁵ respect for the sanctity of a jury verdict is not a consideration in such cases. Furthermore, sex trafficking motions to vacate do not contest the factual underpinnings of the conviction. Instead, the motions are predicated on an evolving understanding of the realities of sex traffick-

192. See *supra* notes 148–156 and accompanying text (detailing unique impact of due-diligence requirement on sex trafficking victims).

193. See *supra* note 156 and accompanying text.

194. Connors et al., *supra* note 144, at 28–29.

195. Most people charged with prostitution-related offenses plead guilty. See Letter from Thomas Duane, *supra* note 2, at 8 (noting majority of those arrested under New York prostitution statutes plead guilty and are convicted of lesser charge). Even cases that proceed to trial often take place in a bench trial rather than a jury trial. See, e.g., *People v. Solis*, 989 N.E.2d 618, 618 (Ill. App. Ct. 2013) (affirming twenty-seven-month sentence for prostitution imposed after bench trial).

ing.¹⁹⁶ Because trafficking vacatur neither calls into question jury verdicts nor challenges factual findings, the due-diligence requirement in this context does not further these traditional goals.

Additionally, provisions like section 440.10(1)(i) have significant retroactive effect—any trafficking-related conviction, no matter how old, became eligible for vacatur upon passage of the legislation.¹⁹⁷ This retroactive design defies the typical paradigm of due diligence, which requires parties to file motions within a reasonable time of the discovery of new evidence.¹⁹⁸ In the trafficking vacatur context, many convictions vacated thus far have been decades old;¹⁹⁹ the evidence supporting the motions tends to be equally old. As a result, the evidence in play will seldom be fresh; it is thus difficult to see what harm could come from further delay.²⁰⁰

Finally, the primary purpose of allowing motions to vacate in the first place is to permit wrongly convicted individuals to escape punishment for crimes they did not commit.²⁰¹ Statistically speaking, a significant majority of people with prostitution convictions are (or were) genuinely victims of sex trafficking.²⁰² The prevalence of sex trafficking in the commercial sex industry sets trafficking vacatur relief apart from other vacatur, which is the exception rather than the norm.²⁰³ Given the high statistical probability that an individual with a prostitution conviction was

196. See *supra* notes 56–60 and accompanying text (explaining motivations behind section 440.10(1)(i)).

197. Legislative Memorandum Relating to Ch. 332, 2010 N.Y. Sess. Laws 1906, 1906–07 (McKinney) (“This act . . . shall apply to convictions taking place before or after it takes effect.”).

198. See, e.g., N.Y. Crim. Proc. Law § 440.10(1)(g) (McKinney 2012) (“[A] motion based upon [new evidence] must be made with due diligence after the discovery of such alleged new evidence.”).

199. See, e.g., *People v. L.G.*, 972 N.Y.S.2d 418, 425–26 (Crim. Ct. 2013) (vacating convictions from 2000 and 2003); *People v. Gonzalez*, 927 N.Y.S.2d 567, 571 (Crim. Ct. 2011) (vacating convictions dating back to 1992); *People v. G.M.*, 922 N.Y.S.2d 761, 765–66 (Crim. Ct. 2011) (vacating convictions from 1997 and 1998); Sweeney, *supra* note 6 (discussing vacatur of Brenda Myers-Powell’s numerous convictions relating to her forced prostitution beginning in 1970s).

200. See *supra* notes 146–147 and accompanying text (noting due-diligence requirement not responsive to desire for fresh evidence in trafficking vacatur context).

201. *People v. Tankleff*, 848 N.Y.S.2d 286, 299 (App. Div. 2007) (“It is abhorrent to our sense of justice and fair play to countenance the possibility that someone innocent . . . may be . . . punished for a crime which he . . . did not commit. A motion pursuant to CPL 440.10 is a vehicle which ‘enables convicted defendants to fully vindicate their rights.’”).

202. See *supra* note 124 and accompanying text (estimating over 75% of prostitution is pimp controlled); see also *supra* note 40 and accompanying text (noting those in commercial sex industry most likely to be arrested are also most likely to be victims of trafficking).

203. See *supra* note 140 and accompanying text (providing estimates of wrongful conviction rate ranging from .027% to 5%).

trafficked, the due-diligence requirement—largely motivated by a desire to separate meritorious from unmeritorious claims—should not prevent the vacatur of convictions of bona fide victims of sex trafficking.

2. *Expanding Due-Diligence Exceptions.* — If legislators are unwilling to eliminate due-diligence requirements from section 440.10(1)(i) and similar statutes, revising the exceptions to the due-diligence requirement to address more problems faced by trafficking victims would reduce the requirement's potential to impede victims seeking relief. The most important of these obstacles are lack of knowledge of the availability of relief, lack of access to counsel, and lack of awareness of the severity of the impact of a prostitution conviction on future employment, housing, custody, and immigration prospects.²⁰⁴ Revisions to section 440.10(1)(i) and similar laws could explicitly recognize these considerations when discussing the due-diligence requirement.

To acknowledge victims' delayed realization of the consequences of conviction, legislators could include a provision preventing a motion from being denied on due-diligence grounds if the defendant brought the motion within a reasonable time of experiencing discrimination or disadvantage on the basis of the trafficking-related conviction.²⁰⁵ With regard to availability of legal counsel, the law could be amended to provide that the due-diligence requirement will not bar a motion to vacate if the victim had difficulty locating qualified counsel.²⁰⁶ Finally, to address limited knowledge of the availability of vacatur relief, trafficking vacatur provisions could allow motions to proceed if the victim was previously unaware that such relief was available.²⁰⁷ Specifically targeting these problems in the statute itself would reduce the impediment of the due-

204. See *supra* notes 150–154 and accompanying text (describing obstacles that might delay victims of sex trafficking in filing motion).

205. See *supra* notes 153–155 and accompanying text (describing how victims might not think to vacate convictions until experiencing specific hardships). Linking the due-diligence requirement to these hardships would key the due-diligence “clock” to an event more likely to prompt victims to seek vacatur than escaping from trafficking in the first instance.

206. See *supra* note 151 and accompanying text (describing scarcity of attorneys working on trafficking vacatur issues). Suspending the due-diligence requirement when a victim cannot locate counsel to aid in filing a vacatur motion would take into account a serious obstacle that trafficking victims face in seeking vacatur relief and may also incentivize providing more resources to help victims file such motions.

207. See *supra* note 150 and accompanying text (describing victims' lack of information regarding availability of relief under section 440(1)(i)). This last solution would both increase access to relief for victims dealing with a relatively obscure law and also incentivize increasing awareness about the availability of relief.

diligence requirement, allow more motions to proceed on the merits, and better fulfill the purpose of trafficking vacatur provisions.²⁰⁸

3. *Broadening Judicial Interpretations of Due Diligence.* — While New York Assembly Bill 7670 was awaiting Governor Paterson’s signature, the New York City Bar Association’s Committee on Sex and Law, cognizant of the potential hurdles the due-diligence requirement posed for victims of sex trafficking seeking to vacate their convictions, urged a “broad interpretation and application” of the due-diligence requirement.²⁰⁹ The text of section 440.10(1)(i) could serve as the hook for such an interpretation: Section 440.10(1)(i) provides that the due-diligence requirement is subject to safety concerns, as well as “other reasons consistent with this paragraph.”²¹⁰ The paragraph at issue focuses specifically on the safety of trafficking victims and their families,²¹¹ but perhaps could be thought of as a list of legitimate reasons a victim would delay filing a vacatur motion. Such an interpretation could pave the way for courts to consider other legitimate delays, effectively expanding exceptions to the due-diligence requirement in the absence of legislative intervention and ensuring greater access to much-needed vacatur relief.

This approach finds support in the New York case law on the due-diligence requirement generally. In the paradigmatic situation of a motion to vacate on the basis of new evidence, New York courts have clearly stated that the due-diligence requirement must be “measured against the defendant’s available resources and the practicalities of the particular situation.”²¹² The relative obscurity of trafficking vacatur relief, the lack of sufficient attorneys to handle trafficking vacatur cases, and the delayed impact of prostitution convictions certainly seem to fall within the “available resources and practicalities” facing trafficking victims and thus may be properly considered by courts evaluating such motions. When combined with the due-diligence catchall from section 440.10(1)(i)(i), this highly contextualized consideration provides courts

208. See Legislative Memorandum Relating to Ch. 332, 2010 N.Y. Sess. Laws 1906, 1906–07 (McKinney) (“This bill would give victims of human trafficking a desperately needed second chance they deserve.”).

209. N.Y.C. Bar Ass’n, *supra* note 50, at 2 n.4.

210. N.Y. Crim. Proc. Law § 440.10(1)(i)(i) (McKinney Supp. 2014).

211. See *id.* (explaining due-diligence requirement is “subject to reasonable concerns for the safety of the defendant, family members of the defendant, or other victims of such trafficking that may be jeopardized by the bringing of such motion, or for other reasons consistent with the purpose of this paragraph”).

212. *People v. Tankleff*, 848 N.Y.S.2d 286, 301 (App. Div. 2007) (allowing motion to proceed because defendant’s evidence “required time to accumulate”); cf. *People v. Neal*, No. 1482-1989, 2012 WL 4373090, at *2 (N.Y. Sup. Ct. Sept. 25, 2012) (holding thirteen-year delay in producing exculpatory evidence without explanation unacceptable (citing *Tankleff*, 848 N.Y.S.2d 286)).

with discretion to adopt a broad interpretation of due diligence, allowing more trafficking vacatur motions to proceed.²¹³

B. *Clarifying Evidentiary Standards*

Section 440.10(1)(i) provides little guidance to trafficking victims about the evidence they should present in support of their motions and little guidance to judges on the evidence they should consider in evaluating a motion.²¹⁴ Although evidentiary issues have not yet prevented a judge from granting a motion to vacate,²¹⁵ evidentiary disputes may become more common as the number of motions increases. To further the goals of predictability, uniformity, and reviewability, it may be desirable to provide more specific evidentiary guidance in the statute.

In considering ways to improve the clarity of the evidentiary standards in section 440.10(1)(i), New York should look to other jurisdictions with more detailed evidentiary guidance in their trafficking vacatur provisions. The Illinois statute, for example, specifically invites sworn statements by “a trained professional staff of a victim services organization, an attorney, a member of the clergy, or a medical or other professional from whom the defendant has sought assistance.”²¹⁶ This enumeration does not purport to limit the types of admissible evidence,²¹⁷ but does give victims guidance on the types of documentation that can support their claim. Additionally, the more detailed evidentiary provision circumscribes judicial discretion to some degree by implicitly instructing judges to give some weight to the enumerated items, as the statute specifically authorizes their production as evidence. Amending section 440.10(1)(i) to include a similar provision, a rather minor change, would grant more clarity to all parties.

C. *Creating a Defense for Victims of Sex Trafficking*

Although section 440.10(1)(i) allows victims of sex trafficking to vacate prior convictions, it does not provide a defense to victims facing imminent criminal charges. Despite increasing awareness that a signifi-

213. The danger of the broad judicial-interpretation approach, however, is that unless and until such an interpretation is adopted by the highest court in the state, individual lower courts would be free to accept or to not accept such an interpretation.

214. See *supra* notes 159–162 and accompanying text (discussing evidentiary requirements of section 440.10(1)(i)).

215. See *supra* notes 163–165 and accompanying text (describing courts’ treatment of corroborating evidence in motions to vacate trafficking-related convictions).

216. 725 Ill. Comp. Stat. Ann. 5/116-2.1 (West Supp. 2014).

217. *Id.* (“Evidence of such may include, but is not limited to: [enumerated items].”).

cant percentage of prostitution involves sex trafficking,²¹⁸ the criminal justice system continues to target prostitution-related offenses. In fact, prostitution arrests in New York actually increased in 2011, the year after section 440.10(1)(i) was adopted.²¹⁹ Not only are individuals being arrested for prostitution, but they continue to be prosecuted and convicted.²²⁰

New York's Human Trafficking Courts have the potential to reduce the number of victims convicted of trafficking-related prostitution crimes. These courts, staffed by specially trained prosecutors, judges, and defense lawyers,²²¹ should be sensitive to the needs of victims. However, these courts are not operational in all parts of New York State,²²² and thus not all victims will have access to the specialized services they provide. Further, services in the Human Trafficking Courts are largely linked to guilty pleas.²²³ As a result, even victims who receive specialized services will leave the court with a criminal record.

Creating a trafficking-victim defense to complement section 440.10(1)(i) and the Human Trafficking Courts would close the gap in protection for sex trafficking victims.²²⁴ This approach has several advantages. First, a defense would allow victims to completely avoid convictions for crimes they were forced to commit by their traffickers. This would eliminate the procedural runaround of being convicted, only to

218. See *supra* notes 51–73, 103–108 and accompanying text (describing recent action at state and federal level to combat sex trafficking).

219. See *Prostitution Related Arrests in New York City*, *supra* note 36 (noting arrests increased from 2,734 in 2010 to 2,813 in 2011).

220. See, e.g., *People v. McGinnis*, 972 N.Y.S.2d 882, 884 (Crim. Ct. 2013) (involving Manhattan woman charged with prostitution offense in January 2013); *People v. Leach*, No. CR13-0050, 2013 WL 2402853 (N.Y. Crim. Ct. June 3, 2013) (involving upstate New York woman charged with prostitution offense in January 2013); *People v. K.U.*, 950 N.Y.S.2d 637 (Sup. Ct. 2012) (involving Bronx woman charged with prostitution offense in July 2011); see also *supra* note 119 and accompanying text (presenting prostitution conviction rate for 2011 in New York City).

221. Press Release, N.Y. State Unified Court Sys., *supra* note 55.

222. See Rashbaum, *supra* note 187 (explaining courts operate in eleven locations throughout New York State).

223. See *supra* notes 100–101 and accompanying text (criticizing Human Trafficking Courts for requiring victims to undergo damaging process of being arrested and convicted in order to receive services).

224. In fact, an affirmative defense to prostitution charges predicated upon sex trafficking has been proposed in New York State as part of the Trafficking Victims Protection and Justice Act. See Assemb. 2240, 235th Leg., Reg. Sess. (N.Y. 2013). However, this obscure bill has never gained traction and has been stuck in committee for almost two years. See A02240 Summary, N.Y. State Assembly, http://assembly.state.ny.us/leg/?default_fld=&bn=A02240&term=2013&Summary=Y&Actions=Y&Memo=Y (on file with the *Columbia Law Review*) (last visited Aug. 30, 2014) (providing summary of action on bill and noting bill was referred to committee in January 2013). Several previous versions of the bill, dating back to 2008, had the same fate. See *id.* (noting A2240 was “same as” or “similar to” four other assembly bills dating back to 2008 that all died in committee).

turn around and vacate the conviction. Additionally, proving that someone is a victim of trafficking is likely to be easier to do in the first instance, rather than months or years later. Granted, some victims still under the control of their traffickers may be too frightened to come forward and utilize an available defense.²²⁵ However, the creation of a trafficking-victim defense would send a message to victims that they would not be treated like criminals if they were to leave their traffickers, undermining traffickers' threats to the contrary²²⁶ and perhaps encouraging victims to leave their traffickers sooner. Additionally, vacatur would remain as a backstop for those victims who feel they cannot safely leave their traffickers at the time of their arrest. The combination of section 440.10(1)(i) and a new trafficking-victim defense would strengthen New York's commitment to stop treating trafficking victims like criminals²²⁷ and would help correct a paradoxical system that treats victims radically differently pre- and postconviction.

CONCLUSION

Section 440.10(1)(i) and its progeny are important developments in the fight against sex trafficking. By enabling victims to rid themselves of a criminal history that can compromise their employment, their housing, and their families, these statutes allow victims to escape the stigma resulting from their victimization. Though admirable, these statutes are flawed: They are procedurally difficult to use and do not prevent sex trafficking victims from accumulating convictions in the first instance. These flaws suggest ambivalence about trafficking victims in a system torn between the traditional criminal treatment of prostitution and the belief that victims of trafficking should not be punished for crimes committed under coercion. Keeping one foot in each world, the New York Legislature has created a deeply contradictory system: Sex trafficking victims are routinely prosecuted and convicted for crimes that the legislature admits victims are not culpable for committing and that victims may later seek to vacate. Legislators should acknowledge these contradictions and take steps to bring the rest of the criminal justice system in line with the motivations behind section 440.10(1)(i). Reducing the burden of the due-diligence requirement, providing more specific guidance on eviden-

225. See Storey, *supra* note 46 (describing culture of manipulation, fear, and coercion that prevents trafficking victims from leaving or turning in traffickers). Note that, under the author's proposed solution, failure to utilize an available trafficking-victim defense would not preclude later vacatur relief.

226. See *supra* notes 43–46 and accompanying text (describing intimidation based on convictions).

227. See *supra* notes 56–60 (describing motivations behind enactment of N.Y. Crim. Proc. Law § 440.10(1)(i) (McKinney Supp. 2014)); see also July 20 Letter from Richard N. Gottfried, *supra* note 3, at 10 (“Trafficked persons should not suffer ongoing punishment for acts they committed unwillingly under coercion.”).

tiary issues, and creating a separate trafficking-victim defense would achieve this goal by strengthening section 440.10(1)(i) and providing even more protection to trafficked persons. New York has led the fight against trafficking thus far, and taking these steps to bolster its protections and unify its treatment of trafficking victims would solidify that reputation.

