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Hope in Procedure

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Hope in Procedure: Evaluation of a recent addition to N.Y. Criminal Procedure Law §440.10
Brian Matthews
Introduction

“Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.”¹ Some may think that the thirteenth amendment is outdated because of its one-time direct application to the end of slavery. However, this overlooks the modern day slave trade that persists in the shadows, unnoticed and, too often, without discussion.

Claudia² was lured to the United States from Mexico with promises of a boyfriend, a job at a clothing factory, and a better life.³ However, there was no job, her boyfriend was a pimp, and her life changed forever.⁴ “She endured sleeping with 20 men consecutively on her first day forced into prostitution. And she endured every day of rape and abuse after that, forming, in spite of all odds, a plan to escape.”⁵ Without courage and incredible planning, Claudia may never have escaped a life of forced sex.⁶

Kate,⁷ left home at 14 and soon found herself sleeping with men simply to find a place to stay, eventually she found herself working

¹ U.S. CONST. amend. XIII, § 1.
² Not the victim’s real name.
³ Angela Longerbeam, Sex Trafficking into the U.S.: It’s Not Getting Better, CHANGE.ORG (Sept. 20, 2010, 2:00 PM), http://humantrafficking.change.org/blog/view/sex_trafficking_into_the_us_its_not_getting_better.
⁴ Id.
⁵ Id.
⁶ Id.
⁷ Not the victim’s real name.
as a prostitute in New York.\footnote{Press Release, Urban Justice Center, Governor Patterson Signs First In the Nation Bill Allowing Survivors of Sex Trafficking to Clear Prostitution Convictions (Aug. 16, 2010) (on file with author), available at http://sexworkersproject.org/press/releases/swp-press-release-20100816.html.} Three harrowing years later, Kate was able to escape her pimp and find refuge in “an out-of-state recovery program.”\footnote{Id.} During her time on the streets, Kate was arrested six times for prostitution.\footnote{Id.} Since testifying against her captor, Kate has been perusing education and is working toward a career in finance.\footnote{Id.} However, when applying to jobs, she must disclose her prostitution convictions, diminishing her job prospects.\footnote{Id.}

Similarly, Maria,\footnote{Urban Justice Center, supra note 1.} a Central American immigrant, was forced into prostitution by her husband.\footnote{Not the victim’s real name.} After Maria’s husband disappeared, she was able to get her life on track and eventually obtained a T-visa.\footnote{Though called the T-visa, it is not technically a visa because it is issued by the Department of Homeland Security, while the Department of State is the only Department with the power to issue visas. See CHAD C. HADDAL & RUTH ELLEN WASEM, U.S IMMIGRATION POLICY ON TEMPORARY ADMISSIONS (2009)} However, because she was arrested eight times for prostitution, she was fired from her job at the department of health after her employer ran a fingerprint check.\footnote{Id.}
Fueled by a demand for cheap and exploitable labor and the continued globalization of the world economy, human trafficking has been on the rise.\textsuperscript{18} Hopefully, these situations will not be replayed for the many victims of sex trafficking in New York State.

On August 15, 2010 New York Governor David Paterson signed into law bill A7670/S4429.\textsuperscript{19} Introduced by Assemblyman Richard Gottfried and Senator Thomas Duane;\textsuperscript{20} this bill amends the New York State criminal procedure law, enabling victims of sex trafficking who are convicted of certain prostitution related offenses to apply for a vacatur of this conviction.\textsuperscript{21} The amendment, specifically, is to section 440.10 of the criminal procedure law.\textsuperscript{22} The amended section reads:

\begin{quote}
\textbf{(I)} [If]The judgment is a conviction where the arresting charge was under section 240.37 (loitering for the purpose of engaging in a prostitution offense, provided that the defendant was not alleged to be loitering for the purpose of patronizing a prostitute or promoting prostitution) or 230.00 (prostitution) of the penal law, and the defendant's participation in the offense was a result of having been a victim of sex trafficking under section 230.34 of the penal law or trafficking in persons.
\end{quote}


\textsuperscript{20} Noleen G. Walder, City Bar Urges Passage of Law for Sex-Trafficking Victims, N.Y.L.J., Apr. 12, 2010, at 1.


\textsuperscript{22} N.Y. CRIM. PROC. LAW §440.10 (2010).
under the Trafficking Victims Protection Act (United States Code, title 22, chapter 78); provided that
(i) a motion under this paragraph shall 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 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; and
(ii) official documentation of the defendant's status as a victim of sex trafficking or trafficking in persons at the time of the offense from a federal, state or local government agency shall create a presumption that the defendant's participation in the offense was a result of having been a victim of sex trafficking or trafficking in persons, but shall not be required for granting a motion under this paragraph."²³

This landmark legislation paves the way for victims of sex trafficking to be treated as victims, rather than criminals. This statute is quite narrow; New York currently only allows for the vacation of convictions of prostitution and drug charges.²⁴ There is some difference between "vacatur" and the more common "expungement." "The expungement of a record of conviction is ‘the removal of a conviction (esp. for a first offense) from a person’s criminal record.’"²⁵ While, "[a] vacatur is ‘the act of annulling or setting aside or a rule or order by which a proceeding is vacated.’"²⁶ Essentially, the difference involves the underlying conviction; a vacatur is issued if the underlying

²³ N.Y. CRIM. PROC. Law §440.10 (2010).
²⁶ Id. (citing BLACK’S LAW DICTIONARY 1546 (8th ed. 2008)).
“conviction[] is substantially defective.”\textsuperscript{27} Whereas, an expungement is generally issued for rehabilitative reasons.\textsuperscript{28}

New York advocacy organization, The Sex Workers Project at the Urban Justice Center, provided significant help by partially authoring the legislation.\textsuperscript{29} The bill also received significant support from the New York City Bar Association; the Association’s Sex and the Law Committee recommended that certain provisions of the law be read broadly so that the “relief contemplated by the [b]ill is available widely to victims.”\textsuperscript{30} The law passed the Assembly without a single vote against.\textsuperscript{31} The New York Senate passed the bill by a wide margin 41 – 20 (with one Senator excused).\textsuperscript{32} This law is the first of its kind in the nation.\textsuperscript{33} It comes at a crucial time in the history of sex-trafficking in the United States; recently, for the first time, the State Department has recognized that human trafficking is a problem in

\textsuperscript{27} Id.

\textsuperscript{28} Id.

\textsuperscript{29} Mala Blume, New York Law Clears Records for Survivors of Sex Trafficking, CHANGE.ORG (Aug. 21, 2010, 6:30 PM), http://humantrafficking.change.org/blog/view/new_york_law_clears_records_for_survivors_of_sex_traficking

\textsuperscript{30} Walder, supra, note 20.

\textsuperscript{31} New York State Assembly, A07670 VOTES (2010), available at http://assembly.state.ny.us/leg/?default_fld=&bn=A07670&Votes=Y


\textsuperscript{33} Zraick supra, note 21; Albany Moves to Let Sex Trafficking Victims Clear Criminal Records, WNYC NEWS (June 17, 2010), http://www.wnyc.org/articles/wnyc-news/2010/jun/17/albany-moves-to-let-sex-trafficking-victims-clear-criminal-records/
America. However, it has been evident that America has been a major destination for traffickers since the 1990s.

Retroactivity may prove the most important part of this piece of legislation. This enables past victims to receive the same benefits as future victims. The act reads: “[t]his act shall take effect immediately and shall apply to convictions taking place before or after it takes effect.”

Because victims of sex trafficking are generally processed quickly through the criminal justice system, often pleading guilty to whatever crime they are charged with by the police (usually prostitution), and return to their trafficker. The victims find themselves fearing those who would provide the most help. Prostitutes, especially those who are also victims of sex trafficking, are often well coached by their tormenters to avoid and distrust law enforcement officials. Additionally, pimps often can keep law enforcement away with kickbacks in the form of money or sex. Studies

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37 Albany Moves to Let Sex Trafficking Victims Clear Criminal Records, supra note 34.

38 Albany Moves to Let Sex Trafficking Victims Clear Criminal Records, supra note 34.

have shown that, many of these pimps, at a young age, were victims of trafficking.\textsuperscript{40}

Legal remedies are not always the most effective way of reducing the prevalence of human trafficking in sex. Currently, and perhaps shockingly, one of the most effective methods for combating trafficking is the vigilance of the long-haul trucking industry.\textsuperscript{41} This note will focus on §440.10 and how I believe this so called “gap filler”\textsuperscript{42} in New York’s anti trafficking laws\textsuperscript{43} is the ideal method of combating sex trafficking with an eye to helping the victims. The system in the United States is focused on criminalizing prostitution as a method for fighting trafficking and is often criticized for “detrimentally impacting the rights of trafficked persons.”\textsuperscript{44} Currently forty-two states have sex-trafficking statutes, however “[s]uch statutes are only gradually coming into use.”\textsuperscript{45}

\textsuperscript{40} Amanda Kloer, New Study: Most Pimps were Trafficked, Abused as Children, \textsc{Change.org} (Sept. 20, 2010, 7:00 PM), http://humantrafficking.change.org/blog/view/new_study_most_pimps_were_trafficked_abused_as_children.


\textsuperscript{42} Albany Moves to Let Sex Trafficking Victims Clear Criminal Records, supra note 34.

\textsuperscript{43} N.Y. Penal Law §230.34 (2010).

\textsuperscript{44} Melynda H. Barnhart, Sex and Slavery: An Analysis of Three Models of State Human Trafficking Legislation, 16 Wm. & Mary J. of Women & L. 83, 86 (2009)(quoting Grace Chang & Kathleen Kim, Reconceptualizing Approaches to Human Trafficking: New Directions and Perspectives from the Field(s), 3 Stan. J. C.R. & 317, 318 (2007)).

\textsuperscript{45} U.S. DEPT. OF STATE, TRAFFICKING IN PERSONS REPORT 339 (10th ed. 2010), available at www.state.gov/g/tip..
In section I of this note, I will give a background summary of the nexus between sex trafficking and prostitution. Section II will discuss Federal Trafficking Legislation, section III contrasts international legislation. Section IV discusses New York’s own state legislation and the possible interaction between deportation procedures and §440.10.

I. Trafficking and Prostitution Generalized

Women comprise at least 56 percent of the world’s trafficking victims.\(^46\) As prostitution is involved in approximately half of all trafficking cases in the United States.\(^47\) Additionally, approximately three thousand girls aged seventeen and younger are victims of sex-trafficking every month in New York State.\(^48\) “Many victims of trafficking who try to escape . . . end up in immigration detention centers without access to legal aid, counseling, or medical care.\(^49\) “Victims of sex trafficking who are forced into prostitution are frequently . . . saddled with [a] criminal record . . . Even after they escape from sex trafficking, the criminal record victimizes them

\(^{46}\) Trafficking in Persons Report, supra note 45 at 35.

\(^{47}\) Barnhart, supra note 44 at 89. (citing Paul Vitello, From Stand in Long Island Slavery Case, a Snapshot of a Hidden U.S. Problem, N.Y. TIMES, Dec. 3, 2007, at B1)


\(^{49}\) Trafficking in Persons Report, supra note 45 at 40.
for life. This bill would give victims of human trafficking a . . .
. second chance they deserve."\(^50\)

While, this note focuses on the nexus between human trafficking
and prostitution, some commentators have refuted and attempted to
discredit the link between the two.\(^51\) However, the statistics tend to
show “that countries with harsher prostitution laws are subjected to
less trafficking.”\(^52\)

Human trafficking is defined as

“the recruitment, transportation, transfer, [harboring] or
receipt of persons, by means of the threat or use of force
or other forms of coercion, of abduction, of fraud, of
deception, of the abuse of power or of a position of
vulnerability or of the giving or receiving of payments or
benefits to achieve the consent of a person having control
over another person, for the purpose of exploitation.”\(^53\)

The UN’s definition is by no means exclusive, but it provides a
starting point. The UN further divides human trafficking into three
component elements: “the act,”\(^54\) “the means,”\(^55\) and “the purpose.”\(^56\)\(^57\)

\(^50\) New York State Assembly, A07670 MEMO (2010), available at
http://assembly.state.ny.us/leg/?default_fld=&bn=A07670&Memo=Y

\(^51\) See Generally Grace Chang & Kathleen Kim, Reconceptualizing Approaches to
Human Trafficking: New Directions and Perspectives from the Field(s), 3 Stan.

\(^52\) Niklas Jakobsson & Andreas Kotsdamm, The Law and Economics of International
Sex Slavery: Prostitution Laws and Trafficking for Sexual Exploitation, 11
(June 2010)(Working paper in Economics, University of Gothenberg School of
Economics, Business and Law) available at

\(^53\) UNODC.org, Human Trafficking, http://www.unodc.org/unodc/en/human-
trafficking/what-is-human-trafficking.html

\(^54\) “Recruitment, transfer, harboring, or receipt of persons.”

\(^55\) “Threat or use of force, coercion, abduction, fraud, deception, abuse of
power or vulnerability, or giving payments or benefits to a person in control
of the victim”
Combined, these help to put the heinous act in context.\textsuperscript{58} Human Trafficking is one of the largest criminal enterprises in the world, with sex trafficking generating an estimated $7 billion each year.\textsuperscript{59} Prostitution and trafficking, like many organized crime ventures, are often enabled by corruption of the police and the judiciary.\textsuperscript{60} Recently, in Greece, several police officers were arrested for participation in a ring thought to have trafficked hundreds of women from eastern Europe to Greece.\textsuperscript{61} An international study showed that traffickers resist trafficking into countries where prostitution is heavily criminalized because “i) Time is lost since street prostitution is not viable; ii) [men] express fear of being arrested which requires a lot of (costly) discretion; [and] iii) to avoid detection, several brothels have to be used, and this is costly.”\textsuperscript{62} This study reinforces the strong ties between sex trafficking and prostitution. Many traffickers avoid Sweden because of the effects of

\textsuperscript{56} “For the purpose of exploitation, which includes exploiting the prostitution of others, sexual exploitation, forced labour, slavery or similar practices and the removal of organs.”

\textsuperscript{57} UNODC.org, \textit{supra} note 53.

\textsuperscript{58} Additionally, the UN has set up a campaign to fight human trafficking, please visit http://www.unodc.org/blueheart/en/about-us.html to learn more.


\textsuperscript{60} The Center for the Study of Democracy, Examining the Links Between Organized Crime and Corruption 135-36 (2010).

\textsuperscript{61} Id. at 136.

\textsuperscript{62} Jakobsson & Kotsdam, \textit{supra} note 52 at 14-15.
the Swedish model on the ultimate profitability of the end enterprise.\footnote{Id. at 15.}

There are two main competing models of prostitution reform, the Neo-abolitionists and the Non-abolitionists. The Neo-abolitionists, comprising an unlikely mixture of Feminists and evangelical Christians, believe that prostitution should be abolished in all forms.\footnote{Chuang, supra note 35 at 1665.} This group tends to believe that all prostitution is violence against women.\footnote{Ibid.} They are particularly sensitive to provisions which separate prostitution from all “severe sex trafficking.”\footnote{Which requires force fraud or coercion. 22 U.S.C. §7102 (8) (2000).} Arguing that all prostitution is severe, and voluntary prostitution should not be considered sex work.\footnote{Alison Siskin & Lian Sun Wyler, Congressional Research Service, Trafficking in Persons: U.S. Policy and Issues for Congress 38 (2010).} Opposing the neo-abolitionists, “[t]he non-abolitionists object to the criminalization of prostitution, but also reject the exploitation of women against their wills.”\footnote{Chuang, supra note 35 1670-72.} Many human rights activists are ignorant of the prostitution debate.\footnote{Janie A. Chuang, Rescuing Trafficking From Ideological Capture: Prostitution Reform and Anti-Trafficking Law and Policy, 158 U. PA. L. REV. 1655, 1673 (2010).} This debate dovetails the addition to the New York Criminal procedure laws, and while the addition does not combat prostitution directly, it does provide assistance to many victims forced into prostitution.
II. Federal Legislation

In order to fully understand the impact of New York’s groundbreaking legislation, an overview of Federal Legislation is warranted. The issue of international human trafficking was not directly tackled until the 106th congress of the United States. However, sex trafficking has been the subject of many previous laws. In 1875 Congress enacted the Alien Prostitution Import Act (“APIA”) of 1875. However, the APIA was focused enacted in response to increased immigration from China and, any focus on prostitution was secondary to this goal. In 1910, with the Progressive Era in full swing, Congress further addressed immigration through the lens of sex trafficking by passing the White Slave Traffic Act (Mann Act). The Mann Act nominally focused on protecting “white slaves” from coercion into prostitution, however its application soon expanded far beyond this goal. This act was often applied indiscriminately, as in Cleveland v. United States. In Cleveland, a fundamentalist Mormon was prosecuted for moving his wives across state lines multiple times in

70 Barnhart, supra note 44 at 97-98
74 Chacon, supra note 72 at 3015.
75 Cleveland v. United States, 399 U.S. 13 (1946)
the western United States. Cleveland turned on the provision in the Mann Act specifically criminalizing the movement of women and girls across state lines for “any immoral purpose.” This provision is emblematic of the broad sweep of the morality language in the Mann Act, and highlights the wide gulf between the stated purpose of the Act and the actual application.

The fundamental language of these early acts, and the cases discussing them, focuses on the morality of trafficking. The use of morality in similar acts becomes a double edged sword, which cuts both ways when used in conjunction with prostitution related offenses. This foreshadows the issue of “crimes of moral turpitude” which will be discussed in relation to modern deportation decisions. The historical development of anti-trafficking laws within the United States, evidences a strong sense of awareness of the evils of trafficking, and the exploitation of women which is inherent in the act of trafficking.

a. Victims of Trafficking and Violence Protection Act

When the Congress passed the Victims of Trafficking and Violence Protection Act (“TVPA”) in October of 2000. The act prohibits “recruit[ing], harbor[ing], transport[ing], provid[ing], or obtain[ing] by any means, any person for labor or services.” The TVPA was passed, in order to “to combat trafficking in persons, a

\begin{itemize}
  \item \textit{Id.} at 16.
  \item \textit{Id.}
  \item 18 U.S.C. 1590 (2008)
\end{itemize}
contemporary manifestation of slavery whose victims are predominantly women and children, to ensure just and effective punishment of traffickers, and to protect their victims." Congress’ findings included nods to both prostitution-based sex trafficking:

Many . . . are trafficked into the international sex trade . . . . It involves sexual exploitation of persons, predominantly women and girls, involving activities related to prostitution, pornography, sex tourism, and other commercial sexual services. The low status of women in many parts of the world has contributed to a burgeoning of the trafficking industry.

Congress also referred to more generalized labor-based human trafficking

 Trafficking in persons is not limited to the sex industry. This growing transnational crime also includes forced labor and involves significant violations of labor, public health, and human rights standards worldwide.

The TVPA was a major leap forward with regard to the national recognition of the problem of sex trafficking. The TVPA essentially incorporates many provisions embodied in the Mann Act without substantial revisions to its short comings.

Specifically, the TVPA is centered around the “three-P’s”: prevention, protection and prosecution.

The “prevention” pillar is divided between “programs” and “sanctions”. The TVPA creates programs to protect victims and to

83 Chacon, supra note 72 at 3016.
fund and create groups which can help prevent more sex trafficking. The sanctions are broad reaching, requiring those who receive “government grants, contracts, and cooperative agreements with private entities receiving U.S. funding” to agree to “a conditional clause terminate[ing] any of the . . . agreements if the . . . party engages in severe forms of trafficking, procures commercial sexual services while the agreement is in force, or uses forced labor in performing the agreement.” These groundbreaking measures, seem obvious in hindsight, and take leaps towards fully protecting victims of sex trafficking.

The pillar of “prosecution” is accomplished by creating four new additions to the United States criminal code. The TVPA provides for criminal penalties ranging from ten to twenty years in prison, or life in prison should the crimes involve “murder, kidnapping, or aggravated sexual abuse.”

In order to qualify for TVPA protection a victim must be found in the United States and qualify as a “victim of severe sex

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85 Developments in the Law – Jobs and Boarders: II. The Trafficking Victims Prevention Act, supra note 84 at 2189.

86 Developments in the Law – Jobs and Boarders: II. The Trafficking Victims Prevention Act, supra note 84 at 2189.


90 Developments in the Law – Jobs and Boarders: II. The Trafficking Victims Prevention Act, supra note 84 at 2189.
A “victim of severe sex trafficking”\textsuperscript{92} is defined as one who is subject to sex trafficking in which a commercial sex act is induced by force, fraud, or coercion, or in which the person induced to perform such act has not attained 18 years of age; or the recruitment, harboring, transportation, provision, or obtaining of a person for labor or services, through the use of force, fraud, or coercion for the purpose of subjection to involuntary servitude, peonage, debt bondage, or slavery.\textsuperscript{93}

The TVPA creates a laundry list of protections including: support for nongovernmental organizations,\textsuperscript{94} education and training for victims,\textsuperscript{95} "integration or reintegration of the trafficked individuals into an appropriate community,"\textsuperscript{96} support and assistance for the location of possible victims,\textsuperscript{97} cooperation and monetary support with international organizations to further help victims.\textsuperscript{98}

The TVPA also modifies some immigration laws, “[i]f there would be ‘extreme hardship involving unusual and severe harm upon removal,’ the victim can be granted temporary nonimmigrant alien status—a T-visa—as long as she is under eighteen years old or has provided

\begin{itemize}
\item \textsuperscript{91} 22 U.S.C. §7105 (a), (b)(2)(A) (2000).
\item \textsuperscript{92} 22 U.S.C. §7102 (13) (2000).
\item \textsuperscript{93} 22 U.S.C. §7102 (8) (2000).
\item \textsuperscript{94} 22 U.S.C. §7105 (1)(A), (B) (2000).
\item \textsuperscript{95} 22 U.S.C. §7105 (1)(C) (2000).
\item \textsuperscript{96} 22 U.S.C. §7105 (1)(D) (2000).
\item \textsuperscript{97} 22 U.S.C. §7105 (1)(E) (2000).
\item \textsuperscript{98} 22 U.S.C. §7105 (1)(F) (2000).
\end{itemize}
assistance during investigations or prosecutions.” However, these provisions garnered frequent opposition from members of Congress who take a “hard-line” stance on immigration. Many of these Congressmen decried additions to the TVPA which did not include a provision explicitly denying benefits to those who “participated in their own trafficking.” Because, in their minds, “migrants might use the TVPA to obtain immigration benefits after participating in their own smuggling. This narrow definition of who is eligible for protection under the TVPA is directly attributable to the fear of illegal immigration. This is simply another example of concern over immigrants overtaking and swallowing the “primary purpose” of a bill which was intended to protect victims. The narrowness of the provision may hinder the full potential of not only the TVPA but, because New York’s statute sue the TVPA as a model, also the potential lifeline extended by §440.10. While there is considerable concern over an over expansive statute, the TVPA was designed with protection in mind, and a reading of the statute that is too narrow may subvert its grand vision.

While the “protection” pillar is the most important regarding this note, a fuller understanding of other Sex Trafficking legislation is warranted.


100 Chacon, supra note 72 at 3022.

101 Chacon, supra note 72 at 3022; See Also H.R. Rep. No. 106-939, at 90-91 (2000) (narrowly construing those victims which will be considered eligible under the act).
Many critics have pointed to the assumption that all sex trafficking and prostitution are involuntary decisions. Grace Chang and Kathleen Kim specifically point out two major concerns:

a) The U.S. government's focus on trafficking for prostitution; its assumption that it must be involuntary in all cases; and the explicit, exclusive goal of prosecuting trafficking when equated with prostitution denies protection to exploited laborers who are consenting adults in sex work and many other industries. Those who migrate for work may participate voluntarily in any industry yet still face unlawful exploitation through labor rights abuses, poor working conditions and debt bondage. U.S. and international anti-trafficking policies and practices must recognize this exploitation consistently in the identification and treatment of all victims of trafficking.

b) Victims of trafficking face many threats to their safety and encounter numerous challenges to their livelihoods, health, and rights not necessarily addressed or secured through cooperation with law enforcement agents in the prosecution of trafficking. Thus, law enforcement should offer victims of trafficking autonomy, greater rights, and increased protections if they choose to cooperate with prosecution efforts. Victims of trafficking also need greater access to benefits, regardless of their cooperation or the form of trafficking they have survived.

I believe that New York’s specific alteration of §440.10 does a good job of addressing these concerns. §440.10 allows victims to rehabilitate their lives. By allowing victims a virtual clean slate in order to hopefully turn their lives into something positive, without the weight of a prostitution conviction on their record.

The over-arching goal of sex trafficking legislation is eventual elimination of sex trafficking in all forms. This is done effectively by deterring would-be-traffickers at the earliest possible point. Judge Richard Posner has implied, some feel criminal activity is most

102 Chang & Kim, supra note 51 at 334.
103 Chang & Kim, supra note 51 at 334.
easily curtailed through fines and penalties.\textsuperscript{104} Michelle Crawford Rickert demonstrates Posner’s theory thusly:

The optimal criminal sanction is a fine or penalty that is just sufficient to deter the criminal from engaging in the harmful activity. If the sanction is any harsher, then a criminal may not be constrained from committing a greater offense. For example, if both robbery and murder are punishable by death, the robber who had committed the first crime may not be constrained from also committing the second—especially because if the robber kills the victim, the robber would be eliminating a witness, thus decreasing the probability of getting caught. An efficiently proportioned legal rule would be precise enough to make the crime unprofitable, allowing for the risk of non-detection. For example, if the value of the theft to the criminal is $100 and the probability of detection is 1/3, then the optimal penalty would be a fine of approximately $301, or just enough to make the theft unprofitable.\textsuperscript{105}

However, this rule does not always hold true when the crime is not easily quantified in real dollars. If the fine cannot be accurately fixed so as to deter crime you can instead make it more likely that the trafficker will be apprehended.\textsuperscript{106} Sex trafficking exposes different problems with Posner’s theory because of the complicated relationship between the trafficker and victim.\textsuperscript{107} State legislation and enforcement are the keys to increasing the probability that the trafficker will be caught.


\textsuperscript{105} Id.

\textsuperscript{106} Id.

\textsuperscript{107} Id.
The TVPA is currently authorized through the fiscal year of 2012; perhaps setting up an interesting battle over its reauthorization. The division between “neo-abolitionist” and “non-abolitionist” factions could play a part in any battle to renew the TVPA. Additionally, 74 percent of Americans believe that “illegal immigrants weakened the economy, compared to only 17 percent who said [immigrants] strengthen [the economy].” While one commenter derides the neoconservative as a reprise of the Know Nothing party of the 1850s. Defenders say that this is a response to a sense of unfairness because the United States is “providing taxpayer-funded services to the legal and rightful citizens [of the United States].”

b. The T-Visa

Furthermore, the TVPA created a new immigration status (the T-visa) for victims of severe trafficking. This immigration status allows the holder to remain in the United States for four years, and apply for permanent status after being present in the United States

108 Id. at 42.
continually for three years. In addition to being a victim of severe trafficking to qualify the victim must:

"[1] be physically present in the United States . . . or a U.S. port of entry because of such trafficking including physical presence on account of the alien having been allowed entry in the United States for participation in investigative or judicial processes associated with an act or a perpetrator of trafficking; and [2] have complied with any reasonable request for assistance to law enforcement in the investigation or prosecution of acts of trafficking unless unable to do so due to physical or psychological trauma, or be under the age of 18; and [3] be likely to suffer extreme hardship involving unusual and severe harm upon removal."114

There is a maximum limit of 5,000 T-visas per year (not including “the spouse, children, or parents of an alien under the age of 21”).115 However, in 2010, only 304 T visas were issued (approximately 16% of the total T-visas granted since 2002).116 Some parties were against the creation of the T-visa, fearing that it “rewarded criminal behavior.”117 While others argue that the provision requiring victims to assist law enforcement is a tool the government uses, and procedural hurdle preventing victims from getting the status that they deserve.118

113 Ibid.
114 Ibid.
115 Ibid.
116 Id. at 27.
117 Id. at 38.
118 Ibid.
Furthermore, each year, “14,500 aliens are trafficked into the United States; given the maximum number of T-visas available Congress has predetermined that the Department of Homeland Security will fail in its attempt to protect all possible victims.

III. Global Legislation

As required by the TVPA, the US State Department issued its tenth annual Trafficking in Persons Report (“The Report”) in 2010. The Report ranks countries by tiers (tier 1 the best, tier 3 the worst) based on “efforts to prosecute, protect and prevent [trafficking in persons].” Of the 175 countries that were ranked, 82 percent were ranked outside of the top tier. Thirteen countries were ranked in the third tier (Burma, North Korea, Papua New Guinea, Iran, Kuwait, Saudi Arabia, Eritrea, Mauritania, Sudan, Zimbabwe, Democratic Republic of Congo, Cuba and Dominican Republic), a reduction of four from the previous year: Chad, Fiji, Malaysia, Niger, Swaziland and Syria moved to the “tier two watch list,” with Democratic Republic of the Congo and Dominican Republic moving down a tier. In accordance with the TVPA, tier three countries are subject to three possible

119 Ibid.
120 Siskin & Wyler, supra note 112 at 10.
121 Siskin & Wyler, supra note 112 at 10.
122 Siskin & Wyler, supra note 112 at 10-12.
123 Siskin & Wyler, supra note 112 at 14.
124 Siskin & Wyler, supra note 112 at 14.
sanctions: “The President has the option to (1) apply a full prohibitions against nonhumanitarian and nontrade-related foreign assistance, (2) withhold a portion of aid eligible for restriction by granting partial waivers, or (3) waive the restrictions entirely on the basis of national interest reasons.” President Obama decided to only fully withhold assistance from Eritrea and North Korea; while granting partial waivers to Burma, Cuba, Iran, and Zimbabwe.

In late 2000, the U.N. formally adopted the Convention on Transnational Crime and the Protocol on Trafficking, in an effort “to enable countries to work together more closely against criminals engaged in cross-boarder crimes.” “The Protocol on Trafficking commits countries to take law enforcement actions against traffickers, to provide some assistance and protections to [victims of trafficking], and to share intelligence and increase border security cooperation with other countries.”

The George W. Bush Administration placed itself firmly in the “abolitionist” camp when it came to prostitution. The Bush-era tactics focused on eliminating prostitution as a first step to addressing the problem of sex trafficking. Sweden provided the perfect model for the Bush administration, and the Netherlands

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125 Siskin & Wyler, supra note 112 at 15.
126 Siskin & Wyler, supra note 112 at 15.
127 Siskin & Wyler, supra note 112 at 42.
128 Siskin & Wyler, supra note 112 at 42.
129 Chuang, supra note 35 at 1718.
130 Chuang, supra note 35 at 1719
provided the foil. Much like the TVPA, the Swedish law was enacted amid fears of foreigners entering the country. Sweden entered the European Union on January 1, 1995 along with Austria and Finland.  

“In 1998 Sweden became the first country to . . . criminaliz[e] the purchase, but not sale of sex. Two years later, the Netherlands took the opposite approach, acknowledging the sex industry as a legitimate commercial sector, removing consensual adult prostitution from the criminal code, and applying labor laws to the sector.”

These opposing viewpoints, do not necessarily lead to opposite results, both the Swedish and Dutch models leave much to be desired. These laws which deal in absolutes (either acceptance or abolition) mostly have the effect of driving the victims farther underground. There is a link between the criminalization of the purchase of sex in Sweden and the ultimate reduction in the numbers of trafficked women. The Swedish National Council for crime prevention estimated that in 2008, a total of 600 to 700 women were trafficked into

131 European Union Member States and Applicant Countries, EUROPEAN NAVIGATOR: THE AUTHORITATIVE MULTIMEDIA REFERENCE ON THE HISTORY OF EUROPE, www.ena.lu (Follow “European Organizations” hyperlink; then follow “European Union” hyperlink; then follow “Composition” hyperlink; then follow “European Union Member States and Applicant Countries hyperlink).


133 See Chuang, supra note 35 at 1718-21

134 Victims of sex trafficking, rather than victims of the particular crimes.

135 Chuang, supra note 35 at 1720 (citing ELIZABETH BERNSTEIN, Temporarily Yours, Intimacy, Authenticity, and the Commerce of Sex 143 (2007)).

136 Jakobsson & Kotsdam, supra note 52 at 14.
Sweden. These numbers were in line with other Scandinavian countries where prostitution was treated similarly harshly. Contrasting Sweden is Denmark, where prostitution is legal, “half of the prostitutes . . . are said to be victims of trafficking and Finnish criminal intelligence estimate[s] that between 10,000 and 15,000 women are trafficked there each year. While these countries have experienced an increasing trend in the number of trafficked women, Sweden has not.”

This link is further enforced by a study conducted on prostitution in Norway. In 2009, Norway adopted the Swedish model, making it legal to buy sex. The survey data concluded that there was a dramatic drop in the instances of prostitution in Norway, while instances in Sweden remained constant. While the data is yet unavailable, the resulting drop in sex trafficking to Norway is expected to follow.

The patchwork system of the European Union can bring value systems into conflict; however, it also can illuminate dichotomies between the member states. As the European Union has differing laws related to prostitution in the several states (Prostitution is legal and regulated in the Netherlands, Denmark and Greece). Prostitution

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137 Jakobsson & Kotsdam, supra note 52 at 14.
138 Jakobsson & Kotsdam, supra note 52 at 14.
139 Jakobsson & Kotsdam, supra note 52 at 14.
140 Jakobsson & Kotsdam, supra note 52 at 15.
141 Jakobsson & Kotsdam, supra note 52 at 15.
142 Jakobsson & Kotsdam, supra note 52 at 15.
143 Center for the Study of Democracy, supra note 60 at 132.
related offenses are criminalized in many more states ("e.g., profiting from prostitution in France, inducing someone into prostitution in Bulgaria, [and] paying for sexual services in Sweden").\textsuperscript{144} In addition to being a patchwork of legal states, the level of developed-ness in each state also plays a part in prostitution.\textsuperscript{145} When the former communist bloc became democratized, there was a growth in the number of women in prostitution, and (due to the poor economic climate) a drop in demand for prostitution in Eastern Europe.\textsuperscript{146} This increased the numbers of women trafficked to areas where demand was higher, namely Western and Southern Europe.\textsuperscript{147}

Combating corruption is critical in the fight against sex trafficking, because of the potential influence it can have at any step of the trafficking process.\textsuperscript{148} There are several main types of corruption: administrative, political, police, and judicial.\textsuperscript{149}

Administrative corruption is particularly important in states where prostitution is legal; the criminal organizations use bribes and coercion to fly below the necessary procedural hurdles, such as avoiding zoning requirements, procuring work permits and real estate, and visa fraud.\textsuperscript{150} In the Neatherlands, municipal councils (who

\textsuperscript{144} Center for the Study of Democracy, supra note 60 at 132.

\textsuperscript{145} Center for the Study of Democracy, supra note 60 at 132.

\textsuperscript{146} Center for the Study of Democracy, supra note 60 at 132.

\textsuperscript{147} Center for the Study of Democracy, supra note 60 at 132.

\textsuperscript{148} Center for the Study of Democracy, supra note 60 at 132.

\textsuperscript{149} Center for the Study of Democracy, supra note 60 at 134.

\textsuperscript{150} Center for the Study of Democracy, supra note 60 at 134.
administer the law regarding legal brothels) are frequent targets of bribery.\textsuperscript{151} Administrative problems also occur in countries where prostitution is illegal: “[i]n Cyprus . . . trafficked women come to work in cabarets and bars on artist visa[s]. Intermediaries are used and officials may be bribed to turn a blind eye.”\textsuperscript{152}

Political corruption is less common in some areas of the EU than others.\textsuperscript{153} Specifically, corruption is less common in Austria, Belgium, Cyprus, Denmark, France, Finland, Germany, Greece, Ireland, Italy, Luxemburg, Malta, Portugal, Spain, Sweden, The Netherlands and the United Kingdom. While remaining prevalent in Czech Republic, Estonia, Hungary Poland, Latvia, Lithuania Slovakia, Slovenia, Romania and Bulgaria.\textsuperscript{154} Police corruption is the most common form of corruption in the European Union.\textsuperscript{155} In countries with legalized prostitution, the police are often bribed to ignore non-licensed prostitutes.\textsuperscript{156} Intuitively, in countries with criminalized prostitution (or profiting from prostitution) the keeping corrupt police involved in prostitution matters is essential.\textsuperscript{157} Sometimes the police are actively involved, while other times the police are merely “paid” in sexual favors.\textsuperscript{158}

\textsuperscript{151} Center for the Study of Democracy, supra note 60 at 134.
\textsuperscript{152} Center for the Study of Democracy, supra note 60 at 134.
\textsuperscript{153} Center for the Study of Democracy, supra note 60 at 134.
\textsuperscript{154} Center for the Study of Democracy, supra note 60 at 134.
\textsuperscript{155} Center for the Study of Democracy, supra note 60 at 134.
\textsuperscript{156} Center for the Study of Democracy, supra note 60 at 134.
\textsuperscript{157} Center for the Study of Democracy, supra note 60 at 134.
\textsuperscript{158} Center for the Study of Democracy, supra note 60 at 134.
Corruption in the judiciary is similar to corruption in the political arena, difficult to track and the pressure is often placed on the social and professional networks of the judges and politicians.\textsuperscript{159} Regionalized enforcement is key to effectively policing sex trafficking.\textsuperscript{160} And the UN convention has done an effective job of emphasizing the importance of regional groups.\textsuperscript{161} However, there are many hindering factors such as the lack of funding, and the lack of vertical integration of education of enforcement officers.\textsuperscript{162} While there has been growth in the enforcement sectors to fight the international nature of human trafficking, there are still steps which can still be taken in order to more effectively combat.

IV. New York State Sex-Trafficking Legislation

As previously stated, state legislation is an important dovetail to federal legislation, required to increase the amount of criminals apprehended for sex trafficking. However, states are often hesitant to pursue sex trafficking crimes because they can pass the buck to federal agencies.\textsuperscript{163} The relationship between the federal government and the states is a delicate balance between oversight and autonomy.

\textsuperscript{159} Center for the Study of Democracy, supra note 60 at 134.

\textsuperscript{160} Lindsey King, \textit{International Law and Human Trafficking TOPICAL RESEARCH DIGEST: HUMAN RIGHTS AND TRAFFICKING} 89 (2009).

\textsuperscript{161} King, supra note 140 at 89.

\textsuperscript{162} King, supra note 140 at 89.

\textsuperscript{163} Crawford Rickert, supra note 104 at 245 (citing Eileen Overbaugh, \textit{Human Trafficking: The Need for Federal Prosecution of Accused Traffickers}, 39 Seton Hall L. Rev. 635, 636 (2009)).
The states have been referred to as a “laboratories for experimentation” in criminal law;\textsuperscript{164} however, in the area of sex trafficking we have seen a reversal of these roles. The Department of Justice went as far as to draft a model state-level anti-trafficking statute.\textsuperscript{165}

a. History

Governor Elliot Spitzer pressured “by a coalition of organizations that came together around the political goal of eradicating prostitution, as defined by structuralist feminists,”\textsuperscript{166} signed into law New York’s anti-sex trafficking legislation, one of the toughest of such laws in the nation, in May of 2007.\textsuperscript{167} Ironically, Governor Spitzer was considered a champion of the anti prostitution and sex trafficking movements until his resignation because of his

\begin{footnotes}
\item[166] Barnhart, supra note 44 at 118 (citing Nina Bernstein, Foes of Sex Trade Are Stung by the Fall of an Ally, N.Y. TIMES, March 12, 2008, at A1). Structuralist feminist thought about sex trafficking holds that prostitution is emblematic of women’s oppression by men. Structuralist feminists are inapposite to individualist feminists. Individualist feminists “focus on the need for women to be free to make basic choices for their lives, even if those choices turn out to be bad ones.” Barnhart, supra note # at 88 (citing Janet Halley, Prabha Kotiswaran, Hila Shamir & Chantal Thomas, From the International to the Local in Feminis Legal Responses to Rape, Prostitution/Sex Work, and Sex Trafficking: Four Studies in Contemporary Governance Feminism, 29 HARV. J.L. & GENDER 335, 350 (2006).
\end{footnotes}
involvement in a high-priced prostitution ring in May 2008. The primary focus of the law was to account for areas that federal law does a poor job of policing, mostly “smaller operations like sweatshops and brothels.” The law had been in the pipeline for approximately two years, but the New York State Senate did not have enough votes to get beyond Republican objections to provisions in the law which provided services to victims.

The current statute focuses on the “supply side” of the sex trafficking and prostitution transaction. Penalizing those who profit from prostitution by: giving drugs to their victims to “impair [the victim’s] judgment” or, inducing the victim’s continued status as a prostitute through “false statements, misstatements or omissions” or, destroying the victim’s identification with intent to stop the victim from leaving the victimizer or, requiring prostitution to repay a real or perceived debt or, using force to oppress the victim and continue their status as a victim.

The first conviction under the statute occurred in December of 2009. David Brown, of Queens, New York, purchased a teenage woman

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170 Hakim & Confessore, supra note 169.

171 Hakim & Confessore, supra note 169.


from an ex-girlfriend for $2000. He then forced her to work as a prostitute, having sex with upwards of thirty men earning between $60 and $200 per encounter. Brown would tell the victim that she could not talk to her family, and whenever he left the house he would have someone come to his home to make sure that the victim would not leave. David Brown was sentenced to twenty five years to life in prison on February 9, 2010. If New York had not enacted the stringent sex-trafficking statute, Brown would only have received a maximum of seventeen years in prison. This case can be seen as something of a coup for the State of New York; often sex-trafficking goes unprosecuted “[b]ecause of the time and resources required to prove force, fraud, and coercion.” Until this legislation, law enforcement was not taught to look beyond the original crime (prostitution) and only later would the major crime be revealed.


175 Press Release, District Attorney of Queens County, supra note 174.

176 Thomas Zambito, Pimp who 'bought' young woman for $2,000 and advertised her on Craigslist is sentenced to 25 years, NEW YORK DAILY NEWS (Feb. 9, 2010, 8:24 PM), http://www.nydailynews.com/news/ny_crime/2010/02/10/2010-02-10_sesxslave_pimp_gets_25_years.html

177 Press Release, District Attorney of Queens County, supra note 174.

178 Press Release, District Attorney of Queens County, supra note 174.


Like the TVPA, the New York statute creates two crimes sex trafficking\textsuperscript{181} and labor trafficking\textsuperscript{182} However, the statute focuses mostly on sex trafficking, effectively leaving victims of labor trafficking with fewer protections.\textsuperscript{183} This has raised some criticism by authors who argue that sex traffickers may simply shift to forced labor in order to lower their risks.\textsuperscript{184} Additionally, the legislature enacted N.Y. Soc. Serv. Law §483-cc,\textsuperscript{185} requiring law enforcement to “notify the Division of Criminal Justice Services and the Office of Temporary Disability and Assistance (OTDA) after a first encounter with a person who reasonably appears to be a human trafficking victim.”\textsuperscript{186} This paradigm shift is particularly important; because, it creates a vertically integrated power structure, enabling victims to gain access to help more effectively.

When the legislature enacted this statute, it officially created the crime of sex trafficking, which became a Class B Felony.\textsuperscript{187} A Class B felony in New York “can result in up 25 years in state prison and fines of up to $30,000. ... If the defendant has no prior criminal history, the sentence may be lighter. Anyone who has prior felony

\textsuperscript{181} N.Y. Penal Law § 230.25 (McKinney 2010).
\textsuperscript{182} N.Y. Penal Law § 230.34 (McKinney 2010).
\textsuperscript{183} Barnhart, supra note 44 at 121.
\textsuperscript{184} Barnhart, supra note 44 at 127.
\textsuperscript{185} N.Y. Soc. Serv. Law § 483-cc (McKinney 2010).
\textsuperscript{186} O’Donnell, supra note 180.
\textsuperscript{187} William C. Donnino, Practice Commentary to N.Y. Penal Law §230.25
convictions may be viewed as a persistent offender and could face life in prison.”

b. The Statute

New York has received high marks for its anti-sex trafficking legislation, and is ranked in the top twelve states for comprehensive legislation (according to watchdog group The Polaris Project). However, the New York law is far from perfect, at least one commenter has advocated for changes in the law, including removing the requirement of showing “force, fraud or coercion,” to convict under the statute; and, additionally, creating a civil action where victims could personally sue their captors (The Polaris project removed points from New York State’s score for not having these provisions).

The New York Interagency Taskforce on Human Trafficking was charged by the statute to report to the Governor about the progress of the State trafficking law. The Task Force involved members of ten

\footnote{188}{Brian Adams, What is the Penalty for a Class B Felony in New York, CriminalDefenseLawyer.com (Nov. 13, 2010), http://www.criminaldefenselawyer.com/legal-advice/criminal-defense/criminal-offense/what-the-penalty-class-b-felony-conviction-n}


\footnote{190}{Nack, supra note 59 at 832.}

different state agencies.\textsuperscript{192} The Task Force also made several
suggestions to the governor which would improve implementation:

Expand training of and coordination between state law
enforcement agencies, U.S. Customs and Immigration
Enforcement (ICE), service providers, and non-law
enforcement agencies likely to encounter human trafficking
victims. Expand outreach and public awareness efforts.
Establish a statewide directory of service providers
capable of serving human trafficking victims. Improve the
delivery of services for U.S. citizen, eligible alien and
child human trafficking victims who do not qualify for the
full range of Response to Human Trafficking Program-funded
services. Expand safe housing options for human trafficking
victims. Promote federal legislation to facilitate the
ability of foreign-born human trafficking victims to obtain
lawful immigration status and federal assistance. Enhance
law enforcement strategies directed toward persons who
exploit prostitutes and employ forced labor in New York
State; and explore the development of prostitution
diversion courts.\textsuperscript{193}

The recommendations of the Task Force are critical to improving the
reach of $230.25; and, by extension, the potential of $440.10.

D. Potential Lasting Effects of $440.10

a. Victims

As discussed above, many were excited about the potential
rehabilitive affects of modifications to § 440.10.\textsuperscript{194} However, whether
this law will have a lasting effect on the ability for victims of sex-
trafficking to change their lives by simply vacating prostitution-
related offenses, it may be too soon to tell. While this change will

\textsuperscript{192} O’Donnel & Hansell, supra note 191 at 13.

\textsuperscript{193} O’Donnel & Hansell, supra note 191 at 3.

\textsuperscript{194} Press Release, Urban Justice Center, Governor Patterson Signs First In the
Nation Bill Allowing Survivors of Sex Trafficking to Clear Prostitution
Convictions (Aug. 16, 2010) (on file with author), available at
almost certainly have an effect, the high hopes of many advocates may not be met.

Pursuant to the Immigration and Nationality Act (hereinafter “INA”), “any alien . . . convicted of . . . a crime of moral turpitude . . . is inadmissible.”\textsuperscript{195} A crime of moral turpitude (hereinafter CMIT) “is a crime which is intrinsically wrong and ‘contrary to the accepted rules of morality and duties owed between persons, or to society in general.’”\textsuperscript{196} In determining whether a crime is a CMIT requires a court to “look at the state statute and the record of conviction to determine whether the elements of the crime include elements of fraud, theft or serious violence, as well as some element of intent.”\textsuperscript{197} This involves examining the state statute to determine whether it is overly broad and “may include elements beyond the generic meaning of the crime.”\textsuperscript{198} This method of examination comes from Taylor v. United States.\textsuperscript{199}

As discussed above, the TVPA does create exceptions in order to give victims of sex-trafficking improved immigration status, however these exceptions are quite narrow. The TVPA states, in relevant part: “If there would be ‘extreme hardship involving unusual and severe


\textsuperscript{197} Id. (Citing Mary E. Kramer, Immigration Consequences of Criminal Activity: A Guide to Representing Foreign-Born Defendants, 135-36 (2nd ed. 2006))

\textsuperscript{198} Id. (citing Taylor v. United States, 495 U.S. 575, 588 (1990)).

\textsuperscript{199} Taylor v. United States, 495 U.S. 575 (1990).
harm upon removal,’ the victim can be granted temporary nonimmigrant alien status\(^{200}\) as long as she is under eighteen years old or has provided assistance during investigations or prosecutions."\(^{201}\) However, there are a maximum amount of T-visas available each year, and the Attorney General can deny applicants at her discretion.\(^{202}\)

The INA does not have a special provision for vacatur of offenses, however the Board of Immigration Appeals (hereinafter “BIA”) has taken a disturbing stance. Prior to the Illegal Immigration Reform and Immigrant Responsibility Act of 1996,\(^{203}\) the BIA would not uphold a removal proceeding based on a crime of moral turpitude if the conviction has been expunged or vacated.\(^{204}\) In 1996 Congress amended the INA to include a definition of the word “conviction;”;\(^{205}\) the updated statute reads: “The term ‘conviction’ means, with respect to an alien, a formal judgment of guilt of the alien entered by a court.”\(^{206}\)

However, the BIA has applied this definition “to allow removal of the convicted alien ‘notwithstanding a subsequent state action purporting to erase all evidence of the original determination of

\(^{200}\) T-visa


\(^{202}\) Developments in the Law – Jobs and Boarders: II. The Trafficking Victims Prevention Act, supra, note 84. (citing 8 U.S.C. § 1182(d)(13)).


\(^{205}\) Cruz-Garza v. Ashcroft, 396 F.3d 1125, 1128 (10th Cir. 2005).

guilt through a rehabilitative procedure.'”207 “The . . . BIA . . . started to address the issue of post-conviction relief in the 1940s and 1950s.”208 The Supreme Court ruled on the effect of post-conviction remedies on deportation cases in Pino v. Landon.209 The Court held “that the proceedings had not attained sufficient finality,” and therefore could not support deportation, where the defendant had a “suspended sentence that was revoked after one year.”210 “In 1959, the Attorney General, who retains the ultimate authority to decide deportation cases, concluded . . . expungements for narcotics offenses have no effect on immigration proceedings,” therefore state vacatur and expungments have no effect on removal.211 The ultimate goal of the INS is to carry out goals set by Congress.212 “However, other than narcotics convictions, the BIA and the federal courts did not find a Congressional intent to ignore post-conviction relief mainly because Congress did not define the term conviction or indicate that nonuniformity was generally a problem.”213

In Cruz-Garza v. Ashcroft, Appellant Raul Cruz-Garza appealed the BIA’s decision to deport him based on a prior felony conviction which

207 Cruz-Garza at 1128. (citing In re Roldan-Santovo, 22 I.& N. Dec. 512, 523, 1999 WL 126433 (BIA 1999), (en banc), order vacated sub nom. on other grounds by Lujan-Armendariz v. INS, 222 F.3d 729 (9th Cir. 2000).


210 Moore, supra note 196 (citing Pino v. Landon, 349 U.S. 901 (1955)).

211 In re A --- F ---, 8 I & N Dec. 429 (1959) (internal quotations omitted).

212 Moore, supra note 196 at 681.

213 Moore, supra note 196 at 681.
was vacated by the state of Utah. Mr. Raul-Garza was a lawful permanent resident, living in Utah, married to a US citizen with whom he had two children. “In November 1995, [Garza] was granted lawful permanent resident status. After an incident in which he used his brother’s social security card at a car dealership to purchase a vehicle later repossessed for non payment, [he] was charged with . . . a second-degree felony.”

Based on this conviction, “the Immigration and Naturalization Service ("INS") initiated removal proceedings" five months after Garza pled guilty to the crime. Upon completion of his probation, on September 22, 1997, the court vacated the felony conviction and changed his conviction to “attempted theft by deception (amended)-class B [m]isdemeanor.” In response to Cruz-Garza’s appeal “[t]he INS had to prove by clear and convincing evidence that the petitioner was subject to removal, i.e., that his conviction fell within [the crime Cruz-Garza committed] and thus supported removal.” Despite failing to actually fulfill this burden, the Court upheld Cruz-Garza’s removal. The BIA did this based on implications that the conviction was vacated based on “the interest of justice” rather than procedural

214 Cruz-Garza at 1126.
215 Id.
216 Id.
217 Id.
218 Id.
219 Id. (internal quotations and citations omitted).
220 Id.
failure on the part of the INS.\textsuperscript{221} However, the Tenth Circuit overruled the BIA, finding that the INS’s procedural shortcomings could not support deportation.\textsuperscript{222}

The BIA’s hard-line stance rejecting “those circumstances where an alien has been the beneficiary of a state rehabilitative statute which purports to erase the record of guilt.”\textsuperscript{223} The 9th Circuit, however, declined to follow the BIA with regards to vacated convictions, favoring instead for a rule which would not allow removal based on vacatur.\textsuperscript{224} Opposing the 9th circuit, the 5th circuit has adopted a policy of disregarding any post-conviction relief, including a vacated conviction.\textsuperscript{225} While other circuits follow the BIA’s policy.\textsuperscript{226}

In In Re Song,\textsuperscript{227} the BIA analyzed another change of charge to avoid deportation. Originally, the defendant was sentenced to a one year sentence for an aggravated felony.\textsuperscript{228} The defendant’s sentence was subsequently reduced to less than one year. This “change to three

\textsuperscript{221} Id. at 1131.

\textsuperscript{222} Id. at 1132.

\textsuperscript{223} Id. (citing In re Roldan-Santovo, 22 I. & N. Dec. 512, 523, 1999 WL 126433 (BIA 1999), (en banc), order vacated sub nom. on other grounds by Lujan-Armendariz v. INS, 222 F.3d 729 (9th Cir. 2000) (internal quotations omitted).

\textsuperscript{224} Lujan-Armendariz v. INS, 222 F.3d 729; Murillo-Espinoza v. INS, 261 F.3d 771 (9th Cir. 2001).

\textsuperscript{225} Renteria-Gonzales v. INS, 322 F.3d 804 (5th Cir. 2002); see also Discipio v. Ashcroft, 369 F.3d 472, 473 (5th Cir. 2004) (expressing regret at being bound to this precedent and being “out of step with the rest of the nation.”).

\textsuperscript{226} Cruz-Garza at 1128.


\textsuperscript{228} Moore, supra note 196 at 684.
hundred and sixty days meant the imprisonment lasted for less than a
year. This decision was consistent with BIA precedent.”

Because the charge was for less than a year, the removal proceedings were
terminated.

On March 24, 1999 Miguel Ignacio Rodriguez-Ruiz pled guilty to
third degree sexual abuse in New York. In August of that year, the
INS began Removal proceedings, “charging that the respondent [was]
removable as an aggravated felon.” Then, “[o]n October 1, 1999, the
Sweden Town Court, which is the authority that accepted the
respondent’s guilty plea, explicitly vacated his conviction pursuant
to Article 440 of the New York Criminal Procedure Law. The issue
before the Board of Immigration appeals was “whether [Rodriguez-
Ruiz]’s conviction constitutes a ‘conviction’ as defined in . . . 8
language of the state court judgment vacated his conviction, and
therefore the charge of removability based on that conviction [could
not be] sustained.” Rodriguez-Ruiz based this on the wording of the
Town Court’s order:

229 Moore, supra note 196 at 686.
231 NY Penal Law §130.55 (2010).
233 Id.
234 Id.
235 Id.
236 Id.
“pursuant to CPL 440, the judgment had in this Court on March 24, 1999 based upon a plea colloquy dated February 5, 1999 convicting [Rodriguez-Ruiz] of the crime of Sexual Abuse 3rd and the sentence of one (1) year probation are in all respects vacated, on the legal merits, as if said conviction had never occurred.”

While the INS maintained that the vacatur was primarily issued in order to avoid deportation. The BIA upheld the appeal and terminated the removal.

At first glance the decision in In Re Rodriguez Ruiz is a clear victory for victims of sex-trafficking who seek to remove prostitution convictions from their record through § 440.10, however that may be putting the cart in front of the horse. The BIA declined “to go behind the state court judgment and question whether the . . . court acted in accordance with its own state law.” This decision was based on giving full faith and credit to state court rulings. This seems to rely very heavily on the careful wording of state court judgments, and does not give sufficient protection to victims of sex-trafficking who are facing INS removal proceedings.

V. Conclusion

The New York State Legislature continued its trend in breaking new ground in protecting those who have been trafficked. While the

237 Id.
238 Id.
239 Id. at 1380.
240 In Re Rodriguez Ruiz, at 1379.
statute may not be a perfect addition to the Criminal Procedure statute, it will hopefully be able to help as many as people as it aims to help. The State took the first step by prosecuting those who would traffic women and too another leap in providing a second chance for those victims.