

IN OUR OWN BACKYARDS: THE NEED FOR A COORDINATED JUDICIAL RESPONSE TO HUMAN TRAFFICKING

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I. INTRODUCTION

In a relatively short period of time, New York State has put itself at the vanguard of the battle against human trafficking. New York has passed several laws criminalizing sex and labor trafficking,¹ recognized that anyone younger than eighteen years of age arrested on prostitution charges is a “sexually exploited child” and a “victim of a severe form of trafficking,”² and, most recently, provided a way for sex trafficking victims to vacate their prostitution convictions.³ In the years since these laws took effect, I have observed that our understanding of the dynamics of domestic and foreign sex trafficking, both locally and domestically, has improved. The trafficking cases that are seen in the Human Trafficking Intervention Court (HTIC),⁴ over which I preside,⁵ provide a glimpse of this expanded understanding. These cases discredit the popular notion that modern day slavery and the sexual enslavement of girls, women, and foreign undocumented persons do not occur “in our own backyards.”⁶ And yet, despite

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1. New York’s Anti-Human Trafficking Act of 2006, 2007 N.Y. Sess. Laws 597 (McKinney) (effective Nov. 1, 2007) (commonly known as the human trafficking laws).

2. Safe Harbor for Exploited Children Act, 2008 N.Y. Sess. Laws 1461 (McKinney).

3. N.Y. CRIM. PROC. LAW § 440.10(1)(i) (McKinney Supp. 2012).

4. The HTIC was previously called the Queens Prostitution Diversion Court. The name was changed in October 2012 to better reflect the mission of the court. The name change did not represent any changes in practices or other substantive elements of the court.

5. The HTIC provides alternatives to incarceration for people arrested on prostitution-related charges, premised upon the understanding that many of the defendants are victims of sex trafficking. Thus, the objective of this court is to provide supportive services to enable these defendants to leave the commercial sex trade.

6. See KEVIN BALES & RON SOODALTER, *THE SLAVE NEXT DOOR: HUMAN TRAFFICKING AND*

this improved understanding, defendants arrested on prostitution charges are not generally recognized as victims, but are charged as criminals. The criminal justice system has been unable to adequately identify those defendants that might be victims of trafficking. To date, there has been very little scholarship analyzing either New York's human trafficking laws or the role prostitution diversion courts play in identifying trafficking victims and providing alternatives to incarceration. This article addresses the different types of trafficking cases that are intercepted through the criminal justice system, the current state of sex trafficking law in New York, and, finally, the role of the HTIC in identifying and providing solutions for trafficking victims. It also addresses the necessity of creating a coordinated judicial response to this human rights problem, and recommends ways that this can be accomplished.

II.

THE DIFFERENT FACES OF HUMAN TRAFFICKING IN NEW YORK CITY

A. Overview of Global Trafficking

Human trafficking has been described as a form of “modern day slavery.”⁷ At any given time, 2.4 million people are victims of human trafficking.⁸ Of the individuals trafficked, 80% are women and girls, of which 70% are trafficked into the commercial sex trade.⁹ The United Nations defines human trafficking as:

the recruitment, transportation, transfer, harbouring 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.¹⁰

The United States is considered a major destination country for traffickers, into which approximately 14,500–17,500 people are trafficked every year.¹¹ Sex

SLAVERY IN AMERICA TODAY 91 (2009) (stating that, according to former Assistant Attorney General for the Civil Rights Division of the United States Department of Justice, Wan J. Kim, “[a]ll too often, [domestic trafficking cases] occur right in our own backyards.”) (emphasis added).

7. Theodore R. Sangalis, *Elusive Empowerment: Compensating the Sex Trafficked Person Under the Trafficking Victims Protection Act*, 80 *FORDHAM L. REV.* 403, 407 (2011).

8. *UN Senior Officials Urge Countries to Boost Their Efforts to Combat Human Trafficking*, U.N. NEWS CENTRE (Apr. 3, 2012), www.un.org/ga/61/news/news.asp?NewsID=41696. *But see* Sangalis, *supra* note 7, at 408 n.36 (noting that estimates vary widely and that the U.S. Department of State estimates that there are 12.3 million trafficked individuals worldwide).

9. Sangalis, *supra* note 7, at 409. Although boys and men are sometimes victims of sex trafficking, this article will refer mostly to girls and women as they are the primary victims of sex trafficking.

10. Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the U.N. Convention Against Organized Crime, *adopted* Nov. 15, 2000, 2237 U.N.T.S. 319 (entered into force Dec. 25, 2003).

11. Sangalis, *supra* note 7, at 409.

trafficking is an incredibly lucrative business that brings in anywhere from seven to nineteen billion dollars each year. Sex trafficking is tied with weapons trafficking as the second largest illegal enterprise in the US after drug trafficking.¹²

The human trafficking industry is able to flourish because of a “global demand for cheap labor and prostitution, combined with an ample supply of victims.”¹³ Factors that contribute to human trafficking include poverty, illiteracy, gender inequality, economic crises, globalization, and armed conflict.¹⁴ Developments in modern technology have facilitated seamless global interconnectivity through social media networks and the Internet, making sex trafficking “increasingly accessible, affordable and efficient.”¹⁵ As a result of these developments, the commercial sex industry has expanded both domestically and internationally.

B. Shifting Perceptions of Trafficking Victims in the United States

In the United States, sex trafficking occurs mostly in large metropolitan areas with significant immigrant populations, including New York City.¹⁶ Domestic sex trafficking is a huge problem in this country, but not many people understand its scope or magnitude. The stereotypical image of a trafficking victim is that of a foreign victim who is first transported across international and/or state lines and then sold into sexual slavery.¹⁷ While this image certainly captures one type of trafficking that occurs regularly in New York City, domestic trafficking is also prevalent.

My own experiences as a judge provide an illustration of how significantly judicial treatment of sex trafficking victims has changed in the past several years. The HTIC was initially created to deal with sexually exploited youth arrested on prostitution charges. When I became the judge of the HTIC in 2008, it was not considered a “trafficking” part, nor were the defendants considered victims of trafficking, since the accepted image of trafficking victims did not include Americans.

12. *Id.* (citing U.S. Department of Justice figures from 2008). *But see* Marisa Nack, *The Next Step: The Future of New York State’s Human Trafficking Law*, 18 J.L. & POL’Y 817, 822 (2010) (according to the U.S. Department of Justice, sex trafficking was the third largest illegal enterprise in the United States behind both drug and weapon trafficking as of 2009).

13. Nack, *supra* note 12, at 824.

14. Sangalis, *supra* note 7, at 410. On an individual level, age, gender, poverty, and alienation from family and community can also make people vulnerable to trafficking. *See* Jill Laurie Goodman, *What We Know About Human Trafficking: Research and Resources*, in *LAWYER’S MANUAL ON HUMAN TRAFFICKING: PURSUING JUSTICE FOR VICTIMS* 1, 7 (Jill Goodman & Dorchen A. Leidholdt eds., 2011).

15. Nack, *supra* note 12, at 825.

16. Sangalis, *supra* note 7, at 410.

17. *See* Nicholas D. Kristof, *What About American Girls Sold on the Streets?*, N.Y. TIMES, Apr. 24, 2011, at WK10 [hereinafter “*American Girls*”] (“Americans often think that ‘trafficking’ is about Mexican or Korean or Russian women smuggled into brothels in the United States.”).

I think there were three reasons for this failure of identification. First, New York's sex and labor trafficking statutes had just been enacted the year before I took over the HTIC.¹⁸ It was not until 2009 that the first sex trafficking conviction would be obtained.¹⁹ Until then, the operative statute was the 2000 Federal Trafficking Victims Protection Act (TVPA).²⁰ While nothing in the TVPA limited its application to foreign sex trafficking victims, most of the emphasis was on foreign nationals, not on prostituted American women.²¹

Second, when I took over the HTIC there was a perception of what "true victims" of sex trafficking should look like, and it did not include poor, young prostitutes of color on the streets of New York City, or local "home-grown American runawa[ys]."²² In *Girls Like Us*,²³ Rachel Lloyd, the founder and executive director of the Girls Educational Mentoring Service (GEMS),²⁴ who herself is a survivor of the commercial sex trade, describes what, for many years, had been a two-tiered system of victims. She explains that the system was divided between "those who were seen as 'real' trafficking victims—internationally trafficked children and women—and those who were seen as 'child/teen prostitutes'—girls and young women from the United States."²⁵ American girls enslaved and forced into prostitution, as well as young women of color on the streets of New York City subjected to violent pimp-controlled prostitution, were not considered "trafficked," or victims of human rights violations.²⁶ Nicholas Kristof, a New York Times writer and longtime advocate

18. 2007 N.Y. Sess. Laws 597 (McKinney).

19. Press Release, Queens Cnty. Dist. Att'y's Office, Queens Man First in New York State to be Sentenced Under Sex Trafficking Statute (Feb. 9, 2010), available at http://www.queensda.org/newpressreleases/2010/february/brown_sen_2_9_2010.pdf [hereinafter "Queens Man First in New York State"].

20. Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, Division A, 114 Stat. 1464 (2000) (codified as amended in scattered sections of 8, 18, 20, 22, 28, and 44 U.S.C.). Division A of the 2000 Act is entitled the Trafficking Victims Protection Act (TVPA), and found at 22 U.S.C. § 7101. Since its adoption in 2000, Congress has reauthorized the Act periodically. See Trafficking Victims Protection Reauthorization Act of 2003, Pub. L. No. 108-193, 117 Stat. 2875 (2003); Trafficking Victims Protection Reauthorization Act of 2005, Pub. L. No. 109-164, 119 Stat. 3558 (2005); William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. No. 110-457, 122 Stat. 5044 (2008).

21. See BALES & SOODALTER, *supra* note 6, at 102–05 (noting that in terms of prosecutions under the TVPA and funding for victims, the federal government places more emphasis on foreign sex trafficking victims than on domestic victims).

22. *American Girls*, *supra* note 17, at WK10.

23. RACHEL LLOYD, *GIRLS LIKE US: FIGHTING FOR A WORLD WHERE GIRLS ARE NOT FOR SALE* (2011).

24. See GIRLS EDUCATION AND MENTORING SERVICES, www.gems-girls.org (last visited Oct. 12, 2012) (explaining that GEMS is the "only organization in New York State specifically designed to serve girls and young women who have experienced commercial sexual exploitation and domestic trafficking."). The HTIC was originally founded as a partnership with GEMS, and was known as the "GEMS Part."

25. LLOYD, *supra* note 23, at 217.

26. See *American Girls*, *supra* note 17 ("From johns to judges, Americans often suffer from a profound misunderstanding of how [domestic] teenage prostitution actually works – and fail to

against global trafficking, describes this phenomenon. He writes:

[w]hen we hear about human trafficking in India or Cambodia, our hearts melt. The victim has sometimes been kidnapped and imprisoned, even caged, in a way that conjures our images of slavery. But in the United States we see girls all the time who have been trafficked – and our hearts harden. The problem is that these girls aren't locked in cages. Rather, they're often runaways out on the street wearing short skirts or busting out of low-cut tops, and many Americans perceive them not as trafficking victims but as miscreants who have chosen their way of life. So even when they're 14 years old, we often arrest and prosecute them, even as the trafficker goes free.²⁷

The final reason why I believe that the HTIC was not considered a trafficking court in 2008 was that, even though there were many foreign-born defendants in my courtroom who may have been trafficking victims, they were impossible to identify at first because of several obstacles. Given the underground nature of trafficking, defendants would never disclose to law enforcement or any other governmental entity that they had been trafficked. Traffickers had indoctrinated their victims to keep silent under threat of retribution, death, or harm to their families back home. The identification of trafficking victims did not occur until much later when the court began to collaborate with Chinese-, Korean- and Spanish-speaking service providers.

C. Trafficking in New York City

The first sex trafficking conviction in New York State occurred in Queens County in 2010. David Brown received twenty-five years to life in prison for trafficking and kidnapping a nineteen-year-old woman, whom he forced into prostitution. Brown purchased his victim from his ex-girlfriend, who was an acquaintance of the victim, for two thousand dollars. Brown then advertised his victim's services on Craigslist, forced her into prostitution, and required her to give him all her earnings, including all profits from a twelve-day period in which she was forced to have sex with thirty men. He forbade her from having any contact with friends or family, kept her under constant surveillance, and threatened that if she tried to leave his apartment, he would beat her or cut her up into pieces so that her body could not be found.²⁸ After one escape attempt, Brown and another individual found her, kidnapped her at gunpoint, and brought her back to his apartment, where they hit her, choked her, and raped her.²⁹

Since Brown's conviction, the Special Proceedings Bureau of the Queens

appreciate that it's one of our country's biggest human rights problems").

27. *Id.*

28. Queens Man First in New York State, *supra* note 19, at 1.

29. Nack, *supra* note 12, at 819.

District Attorney's Office³⁰ has been responsible for eight sex trafficking convictions.³¹ These cases typify the brutal enslavement that victims, whether they are minors or young women, endure when they are forced into the commercial sex trade.³² On any given Friday in my courtroom,³³ you will see rows and rows of female and, occasionally, transgender defendants who are present to answer to prostitution charges. The majority are American-born young black or Latina women, or older foreign-born Asian women. There is also a growing number of gay male and transgender female defendants. In 2010, over 2,700 individuals were arrested in New York City on prostitution or loitering charges, 814 of who were arrested in Queens County.³⁴ Virtually all of the cases before my court involve low-level prostitution offenses taking place on the street, or in brothels, massage parlors, and hotels targeted by law enforcement. It is in these areas, the lowest rungs of the sex trade subculture, where most sex-trafficking victims can be found.³⁵

1. *Domestic Trafficking of Minors*

The issue of domestic trafficking—particularly the trafficking of female children—has recently taken the national stage. Trafficking issues have permeated mainstream discourse and “law enforcement officials report that in cities across America, pimps are selling children for sex.”³⁶ A 2001 estimate puts the number of youths involved in prostitution in New York City at five thousand.³⁷ The average age of entry into prostitution in this country is twelve-

30. The Special Proceedings Bureau of the Queens County District Attorney's Office is responsible for Sex Trafficking, Promoting Prostitution, Internet Child Luring, and Child Pornography cases. There are currently sixty-five defendants being prosecuted in these cases. Anthony Communiello, Jr., Bureau Chief, Special Proceedings Bureau, Queens Cnty. Dist. Att'y's Office, Testimony before New York City Council Committees on Women's Issues & Public Safety (Oct. 19, 2011).

31. Press Release, Queens Cnty. Dist. Att'y's Office, Two Men Plead Guilty to Sex Trafficking for Forcing 14 Year-Old Girl into Prostitution (Oct. 4, 2012) [hereinafter “Two Men Plead Guilty”] (describing convictions of Shaquan Gould and Evan Harrington and noting there have been a total of eight convictions obtained in Queens) (on file with author).

32. *See, e.g., id.* (stating victim was told that she could not leave the prostitution trade and was beaten when she told her pimps that she no longer wanted to be a prostitute); Queens Man First in New York State, *supra* note 19, at 1 (explaining victim was kept under constant surveillance, beaten, raped, and forced into prostitution by her pimp).

33. The HTIC operates on Fridays.

34. E-mail from Marge Cohen, New York State Division of Criminal Justice Services, Office of Justice Research and Performance, to author (Sept. 20, 2012) (on file with author).

35. Nack, *supra* note 12, at 822. *See also* Marisa Silenzi Cianciarulo, *What is Choice? Examining Sex Trafficking Legislation Through the Lenses of Rape Law and Prostitution*, 6 U. ST. THOMAS L.J. 54, 59 (“Many sex-trafficking victims are found in brothels, strip clubs, and outwardly legitimate businesses such as massage parlors and escort services.”).

36. Jeannine Amber, *Black Girls for Sale*, ESSENCE, Oct. 2010, at 164, 166 [hereinafter “Black Girls”].

37. MIA SPANGENBERG, PROSTITUTED YOUTH IN NEW YORK CITY: AN OVERVIEW 2 (ECPAT-USA, 2001), available at <http://ecpatusa.org/wp-content/uploads/2010/11/>

to fourteen-years-old.³⁸ Several different studies have shown that a majority of children lured into the commercial sex trade are runaways, street youth, or children who come “from dysfunctional homes where they have suffered physical, psychological and sexual abuse.”³⁹ Sexual abuse is considered a leading cause of entry into the sex trade.⁴⁰ Traffickers consider young women with histories of sexual abuse or childhood trauma to be perfect prey given these women’s profound vulnerability and powerlessness.

Girls are recruited and sometimes kidnapped by pimps,⁴¹ who use a variety of methods to coerce, cajole, or force girls into prostitution.⁴² These girls are often drugged, kept in isolation, brainwashed by a combination of mixed affection and violence, and then sold for sex over the internet, on the “track,”⁴³ in hotel rooms, and at sex parties.

Jamaal Watkins’ case illustrates the strategies that pimps use to manipulate child victims. Watkins pled guilty in Queens in 2009 to promoting the prostitution of a fourteen-year-old he met on a social networking site. Watkins convinced her to run away from a group home in a different state then forced her to have sex five hundred times with different men during a two-month period.⁴⁴ Another illustrative case involved the 2012 indictment of five men and one woman in Queens for kidnapping a fifteen-year-old girl, drugging and gang-raping her, posting naked pictures of her online, and forcing her to have sex with numerous men during a one-week period before she was able to escape.⁴⁵

Prostituted-Youth-in-NYC1.pdf.

38. Dorchen A. Leidholdt & Katherine P. Scully, *Defining and Identifying Human Trafficking*, in *LAWYER’S MANUAL ON HUMAN TRAFFICKING: PURSUING JUSTICE FOR VICTIMS* 27, 33 (Jill Goodman & Dorchen A. Leidholdt, eds., 2011).

39. LLOYD, *supra* note 23, at 74; SPANGENBERG, *supra* note 37, at 8.

40. SPANGENBERG, *supra* note 37, at 8.

41. My definition of the word “pimp” throughout this article conforms to the definition provided in Alexis Kennedy, Carolin Klein, Jessica T.K. Bristowe, Barry S. Cooper & John Yuille, *Routes of Recruitment: Pimps’ Techniques and Other Circumstances that Lead to Street Prostitution*, 15 *J. AGGRESSION, MALTREATMENT & TRAUMA* 1, 4 (2007), available at <http://alexiskennedy0.tripod.com/lab/id21.html> (“Black’s (1990) law dictionary simply defines a pimp as someone who obtains customers for a prostitute. The reality of most pimps, however, is that they use manipulation, threats, and violence to keep prostitutes from leaving the trade and live entirely off the women they recruit into prostitution.”).

42. See Youth Radio, *Trafficked Teen Girls Describe Life in “The Game,”* NAT’L PUB. RADIO (Dec. 6, 2010), available at <http://www.npr.org/2010/12/06/131757019/youth-radio-trafficked-teen-girls-describe-life-in-the-game> (describing two methods used by pimps to force girls into prostitution—the “guerilla” method, which is characterized by physical force, and the “Romeo” method, where a pimp romances a young girl and then convinces her to sleep with other men to earn money).

43. Term for streets known for high prostitution activity outdoors.

44. Press Release, Queens Cnty. Dist. Att’y’s Office, Queens Pimp Pleads Guilty To Promoting Prostitution (Aug. 13, 2009), available at http://queensda.org/newpressreleases/2009/august/watkins_08_13_09_ple.pdf.

45. See Press Release, Queens Cnty. Dist. Att’y’s Office, Five Men and One Woman Indicted in Connection with Imprisonment, Rape and Sex Trafficking of 15 Year-Old Runaway (Mar. 8, 2012), available at http://queensda.org/newpressreleases/2012/march/council_3_08_2012_ind.pdf;

The increase in child sex trafficking has led to disturbing trends, including recruitment in middle schools and high schools and gang involvement in trafficking.⁴⁶ For example, eight people, some of whom were reputed members of the Bloods gang, were charged with sex trafficking in Brooklyn in 2010 for allegedly forcing at least fifteen girls into prostitution. They recruited girls from high schools in Brownsville and Bushwick by promising many of them cash and a “generous lifestyle.” If these girls did not meet their daily five-hundred-dollar quota, the alleged gang members threatened them with violence.⁴⁷

2. *Pimp-Controlled Prostitution*

Pimp-controlled prostitution is not limited to child prostitution. A significant portion of street-level prostitution of adult women is pimp-controlled.⁴⁸ It has been reported that “the majority of women in prostitution at some point are under the control of a pimp.”⁴⁹ Street-level prostitution “represents that segment of the prostitution industry where there is the most violence.”⁵⁰ Indeed, violence, subjugation, and control are integral aspects of pimp-controlled prostitution,⁵¹ and, therefore, constitute another form of domestic sex trafficking in the United States.

The true culture of pimping is far removed from the glorified portrayal of pimps popularized by the mass media. The “pimping game” includes standardized business practices and strict adherence by both the pimp and the prostitutes he controls to the rules of “the game.”⁵² One commentator notes that

Nicholas D. Kristof, *Where Pimps Peddle Their Goods*, N.Y. TIMES, Mar. 17, 2012, at SR1, available at http://www.nytimes.com/2012/03/18/opinion/sunday/kristof-where-pimps-peddle-their-goods.html?_r=0.

46. See Karen Zraick, *8 Charged in Brooklyn Sex-Trafficking Case*, N.Y. TIMES, June 3, 2010 at A28 (describing eight people charged with sex-trafficking related crimes after an investigation into allegations of sex trafficking at a Brooklyn middle school).

47. *Id.*

48. ‘Street level prostitution’ “entails sexual acts for money or for barter that occur on and off the streets and include sexual activities in cars and motels, as dancers in gentlemen’s clubs, massage parlor, work, truck stops, and crack house work.” Celia Williamson & Terry Cluse-Tolar, *Pimp-Controlled Prostitution: Still an Integral Part of Street Life*, 8 VIOLENCE AGAINST WOMEN 1074, 1074 (Sept. 2002). It is rare that a defendant in the HTIC works “the streets” on her own without a pimp. These independent operators, or “renegades,” often face too much danger on the streets without the protection of a pimp. However, commentators have noted that, “street-level prostitution is comprised of both pimp-controlled prostitution and independent entrepreneurial prostitution.” *Id.*

49. Leidholdt & Scully, *supra* note 38, at 33. In one study, it was reported that “53% of women entered prostitution with a pimp, and more than 80% became involved with pimps over time.” Williamson & Cluse-Tolar, *supra* note 48 at 1075. The US Department of Justice estimates that anywhere from 75% to 95% of prostitution is pimp-controlled. See Child Exploitation and Obscenity Section (CEOS), U.S. Dept. of Justice, Child Prostitution, <http://www.justice.gov/criminal/ceos/prostitution.html>.

50. Williamson & Cruse-Tolar, *supra* note 48, at 1074.

51. See *id.* at 1076.

52. *Id.* at 1078.

pimps live by “myriad rules and codes – all designed to break down the individual will [of a prostitute].”⁵³ Prostituted women who fail to abide by “the rules” of the “game” are severely punished. They may be beaten for not making their “quotas,” looking another pimp directly in the eye, or disagreeing with their pimps.⁵⁴ In some instances, pimps will even brand or tattoo their victims with the pimps’ name or some other identifying marker in order to reinforce their complete domination over their victims.⁵⁵

The dynamics of pimp-controlled prostitution can be very complicated because a pimp may have sexual relationships with many of the women in his “family”⁵⁶ and the victims may even have children by their pimps. In this regard, pimps resemble domestic batterers because the power and control they maintain over women in their stable is similar to the power that domestic batterers often retain over their intimate partners.⁵⁷ Women under the control of a pimp may also resemble victims of domestic violence in that they “often express feelings of love and admiration for the pimp, have their freedom and finances controlled, and may feel they somehow deserve the violence they are dealt.”⁵⁸ This emotional control may help explain why it is often difficult for prostitutes to leave their pimps.

Pimp-controlled women are primarily poor and are particularly vulnerable to exploitation because they are without stable families, jobs, and educational prospects.⁵⁹ Although there are distinct differences in the experiences of domestic and foreign trafficking victims, “[i]n many ways, the process of sexual enslavement for a U.S. citizen parallels that of the foreign-born victim: often her documents are confiscated by her pimp or trafficker, she is taken from her home, initiated—or, “seasoned”—through gang rapes and beatings, assigned a quota to be filled nightly, and held through both threatened and real violence.”⁶⁰

53. *Id.*

54. LLOYD, *supra* note 23, at 96.

55. *See id.* at 244–45.

56. “Family” is a term used by pimps to refer to the group of women that prostitute for them. Personal conversation with A.D.A. Oscar Ruiz, Deputy Bureau Chief, Special Proceedings Bureau, Queens Cnty. Dist. Att’y’s Office (Oct. 20, 2012).

57. Amy Barasch & Barbara C. Kryszko, *The Nexus Between Domestic Violence and Trafficking for Commercial Sexual Exploitation*, in *LAWYER’S MANUAL ON HUMAN TRAFFICKING: PURSUING JUSTICE FOR VICTIMS* 83, 84 (Jill Laurie Goodman & Dorchen A. Leidholdt, eds., 2011); *see also* Leidholdt and Scully, *supra* note 38, at 33 (“Pimps are usually simultaneously sex traffickers and intimate partner batterers and almost invariably enter into sexual relationships with their victims through acts of sexual and physical abuse, promises of protection, devotion, and love, and often through a combination of violence and romance. After they establish their dominance, they “turn out” their victims into prostitution”).

58. Williamson & Cluse-Tolar, *supra* note 48, at 1089.

59. *See* Goodman, *supra* note 14, at 7–8.

60. BALES & SOODALTER, *supra* note 6, at 103.

3. Foreign Sex Trafficking

New York City is not only a destination for pervasive domestic trafficking, it is also a major point of entry for sex traffickers bringing foreign victims into the United States.⁶¹ Queens County, in particular, is a major transportation hub, as both of New York City's airports are located there. In the words of Queens District Attorney Richard Brown, Queens has become "a gateway for sex and human trafficking."⁶² In fact, Queens has been described as the "new epicenter of prostitution in New York City."⁶³

Foreign sex trafficking is aided by poverty and increased migration.⁶⁴ Many trafficked women are lured from impoverished countries by fraudulent offers of legitimate employment, only to be forced into prostitution once they have arrived in the United States.⁶⁵ One famous example of foreign sex trafficking into Queens is the federal prosecution under the TVPA of the Flores-Carreto family, members of which were accused of trafficking Mexican women into New York. The traffickers used tactics including seduction and false employment offers to convince young women to migrate from Mexico to Queens, only to force them into prostitution through beatings and threats against their families once they arrived.⁶⁶ The Flores-Carreto case is one example of a systemic problem in New York City.

In my time at the HTIC, I have seen trafficking activity within both the Latino and Asian immigrant communities. Restore,⁶⁷ an anti-trafficking organization that provides services to Asian defendants referred by the HTIC, identified seven out of the seventy-five court-referred women in 2010 as trafficking victims.⁶⁸ Based on my discussions with service providers from

61. See Janice Phaik Lin Goh, *Deterritorialized Women in the Global City: An Analysis of Sex Trafficking in Dubai, Tokyo and New York*, 10 INTERSECTIONS 271, 296 (2009) (describing New York as a destination for 70,000 migrants every year, including those who are brought here as victims of sex trafficking).

62. Anna Gustafson, *Boro Sex Trafficker Sentenced to Prison*, QUEENS CHRON., Feb. 10, 2011.

63. *Sex Trafficking of Women has Nexus in Queens Borough of New York City*, PUB. RADIO INT'L (May 25, 2011), www.pri.org/stories/politics-society/women-trafficked-mexico-queens-10015.html.

64. See Goh, *supra* note 61, at 276.

65. See Goodman, *supra* note 14, at 8–9 ("Women may respond to internet or newspaper advertisements offering opportunities for marriage abroad or positions as nannies, maids, waitresses, dancers, or models, only to discover too late that the agencies that placed the ads are fronts for sex traffickers.").

66. See Goh, *supra* note 61, at 298.

67. Restore works with foreign-national sex trafficking survivors in an attempt to end sex trafficking in New York City. It provides holistic services to address the physical, emotional, and spiritual needs of sex trafficking survivors. Restore also partners with various organizations to advocate on behalf of trafficking survivors. See RESTORE, <http://restorenyc.org/about-us/> (last visited Oct. 12, 2012).

68. Christina Chang, Case Manager, *2010 Year-End Report for Part T-2G [HTIC]*, Restore (Mar. 11, 2011).

Mount Sinai's Sexual Violence Intervention (SAVI) Program,⁶⁹ who also work with Spanish-speaking defendants, I have learned that, in the same year, they identified approximately 10% of the defendants referred to them as trafficking victims.

III.

A REVIEW OF NEW YORK STATE'S ANTI-TRAFFICKING LEGISLATION AND ITS IMPACT ON TRAFFICKING VICTIMS IN THE CRIMINAL JUSTICE SYSTEM

New York State has recently placed itself at the forefront of the fight against human trafficking. In 2007, it enacted the New York's Anti-Human Trafficking Act of 2006, the comprehensive human trafficking laws that criminalized labor and sex trafficking.⁷⁰ In 2008, it enacted the Safe Harbor for Exploited Children Act (SHA) that defined a prostituted minor as a "sexually exploited child" who was entitled to services, rather than deserving of criminal prosecution.⁷¹ Finally, in 2010, New York passed a law that allowed sex trafficking victims to vacate their prostitution convictions. This section discusses these and other laws that shape the treatment of trafficking victims in the criminal justice system. It also discusses some of the inconsistencies among the various anti-trafficking statutes and how those inconsistencies affect sex trafficking victims in New York.

A. Federal Trafficking Laws: The Trafficking Victims Protection Act

Any summary of the legislation that affects trafficking victims in New York would be incomplete without a discussion of the federal anti-trafficking statute. The Trafficking Victims Protection Act (TVPA) of 2000,⁷² and the subsequent Trafficking Victims Protection Reauthorization Acts of 2003, 2005, and 2008,⁷³ represent an ambitious endeavor by Congress to combat human trafficking in the United States and abroad by taking a "holistic approach" to the problem.⁷⁴ This

69. The Mount Sinai SAVI Program works with victims of domestic violence and sex trafficking who have limited resources or limited access to services. The SAVI Program provides a variety of services that include, but are not limited to, counseling, emergency room advocacy, legal support, education, and training to survivors in Queens, East Harlem, and the Upper East Side. See MOUNT SINAI SCHOOL OF MEDICINE, www.mssm.edu/savi/ (follow "About Us" hyperlink) (last visited Oct. 12, 2012).

70. 2007 N.Y. Sess. Laws 597 (McKinney).

71. 2008 N.Y. Sess. Laws 1461 (McKinney).

72. Pub. L. No. 106-386, Division A, 114 Stat. 1464 (2000).

73. Pub. L. No. 108-193, 117 Stat. 2875 (2003); Pub. L. No. 109-164, 119 Stat. 3558 (2005); Pub. L. No. 110-457, 122 Stat. 5044 (2008). See generally Pamela Chen & Monica Ryan, *Federal Prosecution of Human Traffickers*, in *LAWYER'S MANUAL ON HUMAN TRAFFICKING: PURSUING JUSTICE FOR VICTIMS* 271, 271 (Jill Laurie Goodman & Dorchen A. Leidholdt, eds., 2011) ("With each reauthorization and amendment of the TVPA in legislation known as the Trafficking Victims Protection Reauthorization Act (TVPRA), Congress has strengthened and fine-tuned its provisions, as well as extended the reach of its criminal statutes."); Sangalis, *supra* note 7, at 420-24 (discussing each reauthorization act).

74. Chen & Ryan, *supra* note 73, at 271; Sangalis, *supra* note 7, at 417.

was done by focusing on the “three P’s”—prosecuting traffickers, protecting victims of trafficking, and preventing the practice of trafficking.⁷⁵ One relevant portion of the TVPA is its definition of “severe” sex trafficking as “the recruitment, harboring, transportation, provision or obtaining of a person for the purpose of a commercial sex act”⁷⁶ where such an act is “induced by force, fraud, or coercion, or in which the person induced to perform such an act has not attained eighteen years of age.”⁷⁷

B. New York State Human Trafficking Laws

In 2007, several years after the passage of the TVPA, the New York human trafficking laws were enacted.⁷⁸ These laws were considered “groundbreaking” legislation and a model for other states and countries.⁷⁹ Advocates have described them as “the most comprehensive human trafficking laws in the nation.”⁸⁰ The New York laws made sex and labor trafficking new offenses,⁸¹ modified previous laws to strengthen the criminal justice response to buyers of commercial sex,⁸² and created mechanisms for providing services and assistance to human trafficking victims.⁸³ These laws aimed to “shift . . . the paradigm from arresting trafficking victims to protecting them and prosecuting their traffickers.”⁸⁴

The importance of this statute has been demonstrated even during its short existence. As of January 2012, there had been a total of ninety-six arrests for sex and labor trafficking and, since the laws went into effect in 2007, there had been thirty-one convictions.⁸⁵ Eighty-seven of the arrests occurred in New York City.⁸⁶ Queens alone has had eight sex trafficking convictions as of October 2012.⁸⁷ Additionally, New York’s human trafficking laws now allow state and local law enforcement officers to arrest and state prosecutors to charge people for smaller-scale sex trafficking offenses that federal prosecutors would not have

75. Sangalis, *supra* note 7, at 420.

76. 22 U.S.C. § 7102(9) (2008).

77. *Id.* § 7102(8)(A).

78. 2007 N.Y. Sess. Laws 597 (McKinney).

79. BALES & SOODALTER, *supra* note 6, at 114.

80. Andra Ackerman & Christa Stewart, *New York State’s Human Trafficking Law*, in *LAWYER’S MANUAL ON HUMAN TRAFFICKING: PURSUING JUSTICE FOR VICTIMS* 51, 51 (Jill Laurie Goodman & Dorchen A. Leidholdt, eds., 2011); Nack, *supra* note 12, at 821.

81. 2007 N.Y. Sess. Laws 597 Ch. 74 §§ 2, 3 (McKinney).

82. *Id.* at § 5.

83. *Id.* at § 11.

84. Nack, *supra* note 12, at 829.

85. Mirela Iverac, *Even as Arrests Increase, Human Trafficking Remains a Problem*, WNYC NEWS (Jan. 31, 2012), <http://www.wnyc.org/articles/wnyc-news/2012/jan/31/trafficking-remains-problem/>.

86. *Id.*

87. Two Men Plead Guilty, *supra* note 31, at 1.

spent the resources to prosecute under the TVPA.⁸⁸

Under New York anti-trafficking laws, a person is guilty of sex trafficking if he or she “intentionally advances or profits from prostitution” by any one of a number of specified means, including: (1) unlawfully providing drugs with the intent to impair a person’s judgment; (2) making material false statements or omissions to persuade a person to engage, or continue to engage, in prostitution; (3) withholding, destroying, or confiscating any government identification with the intent to impair that person’s freedom of movement; (4) requiring prostitution be performed to repay a real or purported debt; and (5) using force or threats to instill fear that the trafficker will cause certain types of harm to compel a victim’s participation in prostitution.⁸⁹ Sex trafficking is a class B felony,⁹⁰ carrying a maximum sentence of 25 years imprisonment.⁹¹

Notwithstanding the detailed formulation of New York’s sex trafficking laws, there are some notable omissions that merit closer examination. Most importantly, New York does not define “trafficking victim” in the Penal Law, as the federal government has in the TVPA. Part of the federal definition includes a *per se* finding that anyone under the age of eighteen is a victim of a severe form of trafficking if she takes part in a commercial sexual act.⁹² This means that, under federal law, a victim’s age automatically renders her a sex trafficking victim without the necessity of proving “force, fraud or coercion.”⁹³ New York law, on the other hand, does not have a similar provision governing the trafficking of minors. As a result, promoting or advancing the prostitution of a minor does not qualify as sex trafficking unless one of the other provisions in the statute is met. Force, fraud, or coercion must, therefore, be proved in all cases in order to establish the offense of sex trafficking, even when the trafficked person is younger than eighteen-years-old.⁹⁴

88. See generally Nack, *supra* note 12, at 828 (discussing policy reasons for the enactment of state human trafficking laws to fill in gaps left open by the federal law).

89. N.Y. PENAL LAW § 230.34 (McKinney 2008) (explaining that the “certain types of harm” enumerated by Subdivision 5 are to, “(a) cause physical injury, serious physical injury, or death to a person; (b) cause damage to property, other than the property of the actor; (c) engage in other conduct constituting a felony or unlawful imprisonment in the second degree . . . ; (d) accuse some person of a crime or cause criminal charges or deportation proceedings to be instituted against some person . . . ; (e) expose a secret or publicize an asserted fact, whether true or false, tending to subject some person to hatred, contempt or ridicule; (f) testify or provide information or withhold testimony or information with respect to another’s legal claim or defense; (g) use or abuse his or her position as a public servant by performing some act within or related to his or her official duties, or by failing or refusing to perform an official duty, in such manner as to affect some person adversely; or (h) perform any other act which would not in itself materially benefit the actor but which is calculated to harm the person who is patronized materially with respect to his or her health, safety, or immigration status.”).

90. *Id.*

91. N.Y. PENAL LAW § 70.00 (McKinney 2009).

92. 22 U.S.C. § 7102(13) (2008).

93. *Id.* § 7102(8)(A).

94. See N.Y. PENAL LAW § 230.34 (McKinney 2008).

C. The Safe Harbor for Exploited Children Act

One year after the state sex trafficking statute became law, New York's inadequate protection of trafficked juveniles was indirectly addressed by the passage of the Safe Harbor Act (SHA).⁹⁵ The SHA amended provisions of the Family Court Act and the Social Services Law to provide rehabilitative services to sexually exploited youth under the age of eighteen.⁹⁶ For the first time, the New York Legislature recognized that any child under the age of eighteen arrested on prostitution charges was a "sexually exploited child,"⁹⁷ and created a presumption that this child was a victim of severe trafficking as defined by federal law.⁹⁸ The clear import of the SHA is that youths who engage in commercial sex must be treated as victims, not perpetrators, of crimes, and that they are in need of services instead of criminal prosecution.⁹⁹

Despite the profound implications of the SHA, there has been no corresponding amendment to New York's Penal Law.¹⁰⁰ Although the New York legislature has declared that any child arrested for prostitution is a trafficking victim, it has not carried this recognition to its logical conclusion by amending the criminal laws to prohibit prosecution of minors for prostitution. As a result, sixteen- and seventeen-year-olds charged with prostitution offenses may be prosecuted as adults in criminal court,¹⁰¹ where they are treated as criminal defendants instead of as sexually exploited youth.¹⁰²

This was the precise problem faced by a New York City criminal court that considered prostitution charges against a minor in *People v. Samatha R.* The sixteen-year-old defendant in the case was arrested for loitering with the purpose of engaging in prostitution. The issue before that court was whether to dismiss the case, either in light of the legislative intent underlying the enactment of the SHA¹⁰³ or based on its interest in justice jurisdiction.¹⁰⁴ Regarding the former,

95. 2007 N.Y. Sess. Laws 597 (McKinney).

96. *Id.*

97. N.Y. SOC. SERV. LAW § 447-a (McKinney 2010).

98. N.Y. FAMILY CT. ACT LAW § 311.4(3) (McKinney 2010) (creating a presumption that a respondent brought to Family Court for a prostitution-related offense meets the federal TVPA definition).

99. Katherine Mullen & Rachael Lloyd, *The Passage of the Safe Harbor Act and the Voices of Sexually Exploited Youth*, in *LAWYER'S MANUAL ON HUMAN TRAFFICKING: PURSUING JUSTICE FOR VICTIMS* 129, 131 (Jill Laurie Goodman & Dorchen A. Leidholdt, eds., 2011).

100. The sole exception is N.Y. CRIM. PROC. LAW § 440.10(1)(i) (McKinney Supp. 2012). *See infra* Part II(D).

101. *See* N.Y. PENAL LAW § 30.00 (McKinney 2009) (stating that "a person less than sixteen years old is not criminally responsible for conduct.").

102. One of the top priorities of the Chief Judge of New York, Hon. Jonathan Lippman, is the creation of a youth court that would remove all non-violent criminal offenses committed by sixteen- and seventeen-year-olds from criminal court. Instead, their charges would be adjudicated in a hybrid family/criminal court, with an emphasis on rehabilitation, rather than incarceration. *See* John Caher, *Youth Court, DNA Top Lippman's Agenda*, N.Y. L.J., Feb. 15, 2012, at 1.

103. *People v. Samantha R.*, No. 2011KN092555, 2011 WL 6303402 (N.Y. Crim. Ct. Dec. 16, 2011).

while the court acknowledged that the SHA did not amend the Penal Law, it nevertheless reasoned that a criminal prosecution of a sixteen- or seventeen-year-old, whom the New York Legislature defined as a “sexually exploited child” by virtue of her age, was “inconsistent with the ameliorative intent” of the SHA, as well as with other statutes relating to the trafficking of minors.¹⁰⁵ The court emphasized that the legislative sponsors of the SHA recognized the harm caused by prosecuting children for these types of offenses. The court explained,

arresting, prosecuting and incarcerating victimized youth serves to re-traumatize them and to increase their feelings of low self-esteem. This only makes the process of recovery more difficult. Appropriate services for sexually exploited youth do not exist in the juvenile justice system and both federal and international law recognize that sexually exploited youth are the victims of crime and should be treated as such. Therefore, sexually exploited youth should not be prosecuted under the Penal Law for acts of prostitution. Instead services should be created to meet the needs of these youth outside of the justice system.¹⁰⁶

The court further found that the combined impact of the various laws relating to the sex trafficking of minors “would strongly suggest that a criminal prosecution of a sixteen- or seventeen-year-old for a prostitution offense is inappropriate, and that the right response of law enforcement would be to bring the child before Family Court.”¹⁰⁷ The court nevertheless ruled on the more narrow grounds of its interest of justice jurisdiction to dismiss the case against the defendant.¹⁰⁸

A different result, however, was reached in *People v. Lewis*, in which another New York criminal court of concurrent jurisdiction denied an application to dismiss the criminal prosecution of a seventeen-year-old defendant arrested for prostitution. The court reasoned that while the various anti-trafficking statutes cited by the defendant in support of her motion made a convincing case that prostituted children should not be prosecuted in criminal court, it could not conclude that the statutes amounted to a “statutory prohibition” against the prosecution of all minors on prostitution-related charges.¹⁰⁹ The court ruled that to “categorically exempt [minors] from prosecution is beyond the power of this Court” and that such an exemption has to come from the legislature.¹¹⁰

104. N.Y. CRIM. PROC. LAW § 170.40 (McKinney 2007).

105. Samantha R., 2011 WL 6303402, at *5–6. The other laws that the court relied on were the TVPA, New York’s Anti-Human Trafficking Act of 2006, N.Y. CRIM. PROC. LAW § 440.10, and amendments to the immigration code that provided avenues of immigration relief for minor victims of sex trafficking. Samantha R., 2011 WL 6303402, at *2.

106. Samantha R., 2011 WL 6303402, at *1 (citing Sponsor’s Mem, Bill Jacket, Safe Harbor Act, L. 2008, ch. 5690).

107. *Id.* at *4.

108. *Id.*

109. *People v. Lewis*, N.Y. L.J., 1202502663175, at *4 (N.Y. Crim. Ct. July 12, 2011).

110. *Id.*

D. Criminal Procedure Law § 440.10(1)(i)

In August 2010, New York enacted its third, and perhaps most significant, piece of legislation for sex trafficking victims by amending its post-conviction relief statute, Criminal Procedure Law (CPL) § 440.10. The first law of its kind in the country,¹¹¹ CPL § 440.10(1)(i) allows judges to vacate convictions for prostitution or loitering for the purpose of engaging in a prostitution offense if the arrest “was a result of having been a victim of sex trafficking under [the New York statute] or of trafficking in persons under the [TVPA].”¹¹² By explicitly incorporating the federal definition of a trafficking victim, this new post-conviction statute also provides relief to any prostituted minor who can establish that she was a minor at the time of her arrest.

The underlying rationale for CPL § 440.10(1)(i) was concern about the damaging effects of criminal convictions on the lives of trafficking victims. The New York Legislature recognized that

[v]ictims of sex trafficking who are forced into prostitution are frequently arrested for prostitution-related offenses and are saddled with criminal records. They are blocked from decent jobs and other prospects for rebuilding their lives. Even after they escape from sex trafficking, the criminal record victimizes them for life.¹¹³

Since its enactment in 2010, several convictions have already been vacated under CPL § 440.10(1)(i). As of September 2012, there have been eleven cases in which sex trafficking victims’ convictions were dismissed.¹¹⁴ The first published decision to address this new post-conviction legislation was *People v. G.M.*, in which I vacated six prior convictions of a woman from the Dominican Republic who had been trafficked by her husband/pimp and who had been previously designated as a sex trafficking victim by the federal government.¹¹⁵ Likewise, in *People v. Silvia Gonzalez*, the New York County Criminal Court dismissed the defendant’s eighty-six prostitution convictions, incurred over a two-year period, after finding that the defendant, a Brazilian citizen, was a sex

111. 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), available at <http://www.sexworkersproject.org/press/releases/swp-press-release-20100816.html>.

112. N.Y. CRIM. PROC. LAW § 440.10(1)(i) (McKinney Supp. 2012) (stating that a court may vacate a conviction if “[t]he 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 under the Trafficking Victims Protection Act.”).

113. Sponsor’s Mem, 2010 N.Y. Assembly Bill A7670.

114. Erica Pearson, *New Law Lets Sex Trafficking Victims Clear Their Convictions*, N.Y. DAILY NEWS (Sept. 8, 2012), http://articles.nydailynews.com/2012-09-08/news/33701041_1_kate-mogulescu-convictions-prostitution.

115. *People v. G.M.*, 922 N.Y.S.2d 761 (Crim. Ct. 2011).

trafficking victim.¹¹⁶

More recently, in *People v. Jane Doe*, the Bronx County Supreme Court dismissed the three prostitution convictions of a defendant who was seventeen-years-old at the time of her arrests.¹¹⁷ “Leni Johnson,”¹¹⁸ twenty-two years old at the time her convictions were dismissed, was first trafficked when she was only thirteen years of age. For the next eight years, she was “sold by men to men,” sometimes bringing in 1,600-2,500 dollars a night, all of which went to her various pimps.¹¹⁹ One of her pimps trafficked her to Washington, D.C, Virginia, and Florida, using “physical violence, degradation and other coercive tactics to control [her],” exemplified by him having his nickname tattooed on her forearm so that “everyone would know she belonged to him.”¹²⁰ Describing the post-conviction relief granted in her case as “part of a small, vital revolution in New York State,” New York Times writer Jim Dwyer explained that this new law “recognizes that children and minors who perform sex for money are not criminals but victims [who] . . . should not bear the residual burden of convictions.”¹²¹

CPL § 440.10(1)(i) illustrates a contradiction in the treatment of trafficked youth in the criminal justice system, however. The cruel irony is that while the law explicitly recognizes that children under the age of eighteen are trafficking victims entitled to retroactive relief through the dismissal of their convictions, there are no legal grounds to protect juveniles when they are initially being prosecuted on prostitution charges. It is only post-conviction that courts recognize prostituted minors as trafficking victims.

Another contradiction in the treatment of minors under New York laws is that a minor can be prosecuted for prostitution despite the fact that under the criminal laws a child younger than seventeen-years-old cannot legally consent to any sex act because of infancy.¹²² In New York, a sixteen-year-old who has sex with an adult is deemed legally incapable of giving consent, regardless of whether the sex is actually consensual. A sixteen-year-old is, therefore, considered a victim of rape if she has sex with an adult who is over twenty-one years of age.¹²³ That sixteen-year-old can, however, be arrested for prostitution under the same scenario if there is an exchange of sex for money.¹²⁴ A child who is legally incapable of consenting to sexual intercourse cannot logically be deemed capable of consenting to the crime of prostitution simply because money

116. *People v. Gonzales*, 927 N.Y.S.2d 567 (Crim. Ct. 2011).

117. *People v. Jane Doe*, 935 N.Y.S.2d 481 (Sup. Ct. 2011).

118. Leni Johnson is not her real name. Jim Dwyer, *Snared into Prostitution at 13, and Now Given a Chance for a Clean Legal Slate*, N.Y. TIMES, Sept. 20, 2011, at A22.

119. *Id.*

120. *Jane Doe*, 935 N.Y.S.2d at 482–83.

121. Dwyer, *supra* note 118.

122. N.Y. PENAL LAW § 130.05 (McKinney 2009).

123. N.Y. PENAL LAW § 130.25(2) (McKinney 2009).

124. N.Y. PENAL LAW § 230.00 (McKinney 2008).

is exchanged.

These contradictions demonstrate that, despite the recent protections given to trafficking victims, current laws provide only partial relief to victims navigating the criminal justice system. The new anti-trafficking laws are impressive in their reach and visionary in their recognition of victims of trafficking. On a practical level, however, there has been little impact on the actual experience of trafficking victims in local criminal courts who continue to face repeated arrests and prosecution. Unfortunately, members of this vulnerable group, whether minors or adults, are not treated as potential trafficking victims by law enforcement, prosecutors, or judges; their criminal cases are not dismissed; and they are not provided with the necessary services to aid in their rehabilitation or recovery. The only practical relief they are now entitled to occurs after they have gone through the traumatic experience of being criminally convicted.

IV.

DEVELOPING A COORDINATED JUDICIAL RESPONSE TO HUMAN TRAFFICKING

A. The Human Trafficking Intervention Court—One Judicial Response to Human Trafficking in New York

Justice Fernando Camacho started the HTIC in 2004 when he was a criminal court judge in Queens County.¹²⁵ At that time, there were no other courts in New York that addressed the issue of underage sex trafficking. Justice Camacho sought to address this problem by providing alternatives to criminal punishment for minors accused of prostitution offenses.¹²⁶ He initially partnered with the Girls Educational Mentoring Services (GEMS), which is devoted to providing services for sexually trafficked girls and young women aged twenty-one and younger.¹²⁷ Before long, the court began to provide services for adult women charged with prostitution offenses as well, and partnered with SAVI to provide alternatives to incarceration for those over the age of twenty-one. The HTIC flourished over time, even without additional staff, funding, or institutional intervention.

Today, the HTIC handles most of the prostitution cases in Queens County. Representing a dynamic collaboration between the court, the District Attorney's office, the defense bar, and several trafficking victim service providers, the HTIC is designed to provide meaningful intervention and comprehensive

125. Justice Camacho is now the Administrative Judge of Queens County, Supreme Court, Criminal Term.

126. For a detailed look at the origins of the HTIC, see Fernando Camacho, *Sexually Exploited Youth: A View From the Bench*, in *LAWYER'S MANUAL ON HUMAN TRAFFICKING: PURSUING JUSTICE FOR VICTIMS* 141, 141–47 (Jill Laurie Goodman & Dorchen A. Leidholdt, eds., 2011).

127. The court part became known as the "GEMS Part." That title stuck long after the court no longer dealt solely with underage trafficking victims, even after I took over the court in 2008.

services for individuals arrested on prostitution charges, including victims of trafficking. The underlying premise of the court is that those arrested on prostitution charges should not be treated as criminals, but as victims and survivors of commercial sexual exploitation and trafficking.

The HTIC meets once a week and hears only cases involving people arrested on prostitution or loitering charges.¹²⁸ Most of the prostitution cases in Queens are adjourned directly from arraignments into the HTIC, where all parties attempt to work out a favorable disposition for the defendant, including providing her with services that will meet her needs. The HTIC focuses on connecting defendants to services that are appropriate for their individual situations, including counseling, job training, education, housing, medical assistance, immigration services, as well as substance abuse and mental health treatment. If a defendant is not interested in services, her case will be sent to an all-purpose criminal court part.

There is extensive collaboration between the court, the District Attorney's office, the defense bar, and service providers. The court consists of a dedicated judge and prosecutor, two dedicated defense attorneys, and a variety of service providers, who appear regularly in court as advocates/counselors. In their role as in-court advocates, these service providers not only provide counseling and supportive services to clients, but also offer valuable information about their clients to the court and prosecutor through written updates describing clients' compliance with programs.¹²⁹ The consistent support of service providers contributes to the recovery process of many trafficking victims facing prostitution charges.

There is a regularly assigned prosecutor for the HTIC who has established guidelines governing defendants' eligibility for, and participation in, the HTIC.¹³⁰ Under these guidelines, a defendant may be eligible for an eventual dismissal of the charges for her first arrest if she completes five sessions of a rehabilitation program and does not get rearrested within the subsequent six months.¹³¹ A defendant with more than one arrest may be offered a plea

128. The court does not deal with sex trafficking prosecutions or with cases involving the defendants charged with purchasing commercial sex. Sex trafficking prosecutions and buyers of commercial sex are outside of the scope of this article.

129. The importance of in-court advocacy by the service providers was especially pronounced because we were without any dedicated defense attorneys in our court for several years. For those years, the service providers, rather than the assigned attorney, were the most vocal advocates on behalf of many defendants. It was not until mid-2012 that two defender organizations, the Legal Aid Society and Queens Law Associates, assigned dedicated attorneys to deal with prostitution cases in the HTIC.

130. Those defendants with extensive criminal histories, including prostitution arrests, are generally considered to be outside of the guidelines and are not eligible for participation in the court. The court is not bound by this, however, and may offer a program if the defendant, despite her criminal record, states that she is very interested in services.

131. This is referred to as an "ACD," an Adjournment in Contemplation of Dismissal, pursuant to N.Y. CRIM. PROC. LAW § 170.55 (McKinney 2007).

requiring additional court-mandated sessions, or a plea to a higher charge, depending upon the circumstances.¹³² A defendant with several open cases before the court may be required to complete ten to fifteen program sessions in order to satisfy her court mandate.

There is great diversity among the defendants before the HTIC and it is imperative to match defendants with culturally sensitive and language-specific services. For example, female defendants that are twenty-one years of age and younger are referred to GEMS, while SAVI offers services for female defendants over 21, foreign-born Latinas, and LGBT and/or transgender. The HTIC has also collaborated with Midtown Community Court to provide services for transgender defendants.¹³³ Restore and the New York Asian Women's Center¹³⁴ both work extensively with trafficking victims of Asian descent. It is important that any organization to which a defendant is referred has extensive experience working with victims of trafficking.¹³⁵

Certain features of the HTIC have, I believe, been key to its success. First, designating a judge, a prosecutor, defense attorneys, and service providers is important because consistency ensures a deeper understanding of the issues facing defendants. Second, the assignment of a prosecutor with supervisory authority is critical in many of these cases because she is able to depart from the guidelines, when appropriate, she can review each case individually, and she can offer dispositions tailored to its unique facts.¹³⁶ Finally, it is essential that the prosecutor, the defense attorneys, and the court fully understand the dynamics of sex trafficking, the realities of the defendants' lives, and the difficulties of

132. For example, as defendants accrue more arrests, the offense offered for the plea bargain may go from a non-criminal disposition, such as disorderly conduct (N.Y. PENAL LAW § 240.20 (McKinney 2008)), to a non-criminal violation such as loitering for prostitution (N.Y. PENAL LAW § 240.37 (McKinney 2008)), to misdemeanors such as loitering for prostitution and prostitution (N.Y. PENAL LAW §§ 240.37, 230.00 (McKinney 2008)). It should be noted, however, that these are not fixed, rigid guidelines, and the dispositions are based on extensive review of each individual case.

133. Through a partnership with Midtown Community Court, the HTIC developed specific programs for English- and Spanish-speaking defendants as well as for transgender defendants. Tranciones is a program for Spanish-speaking transgender defendants, and Transwomen Empowerment is designed for English-speaking transgender defendants.

134. "The New York Asian Women's Center helps women and their children overcome domestic violence and other forms of abuse by empowering them to govern their own lives. The Center provides a safe haven through multi-lingual support programs and shelter services. In addition, the Center works to raise public awareness about violence against women, advocates for the rights of survivors, and acts as an agent of social change." N.Y. ASIAN WOMEN'S CENTER, <http://www.nyawc.org/> (last visited Oct. 12, 2012).

135. In addition to the organizations mentioned above, the HTIC has also partnered with Sanctuary for Families, the Sylvia Rivera Law Project, and the Sex Workers Project of the Urban Justice Center. *See generally* SANCTUARY FOR FAMILIES, <http://www.sanctuaryforfamilies.org/> (last visited Oct. 12, 2012); SYLVIA RIVERA L. PROJECT, <http://srlp.org/> (last visited Oct. 12, 2012); SEX WORKERS PROJECT, <http://www.sexworkersproject.org/> (last visited Oct. 12, 2012).

136. The regularly assigned prosecutor in HTIC is ADA Kimberly Affronti, the Deputy Bureau Chief of the Criminal Court.

escaping the commercial sex trade.¹³⁷

All persons working in the HTIC recognize that prostituted women suffer a myriad of afflictions. These include long-term physical and psychological trauma,¹³⁸ post-traumatic stress disorder,¹³⁹ high rates of health problems and infections, and mental health and substance abuse issues.¹⁴⁰ Physical violence at the hands of a trafficker is “almost always the rule.”¹⁴¹ Many defendants in the HTIC come from unstable homes and lack safety nets in the form of family ties, housing, or any type of solid support network.¹⁴² Often, they lack even basic documentation, such as identification papers or birth certificates, which their pimps have taken as a mechanism of control.¹⁴³

We are also aware of the practical obstacles that make it difficult for girls and young women to take advantage of the services offered to them. One of the most significant obstacles is the “coercive and controlling nature of the traffickers.”¹⁴⁴ Many women are still “in the game”¹⁴⁵ while their cases are pending, sometimes having to put in long hours late at night and then go to their sessions during the day while completely sleep deprived. Sometimes a defendant’s pimp will prevent her from going to her sessions, or call her incessantly during these sessions, controlling her every movement, both physically and psychologically.¹⁴⁶

Furthermore, when it comes to adult defendants in the HTIC, we recognize that the majority of adults in prostitution were initially prostituted as children

137. It is important to note that the prosecutor never requires that defendants cooperate with the prosecutions of their traffickers in order to receive a better plea deal. This removes an element of coercion from the plea bargaining process.

138. Rebecca J. Macy & Natalie Johns, *Aftercare Services for international Sex Trafficking Survivors: Informing U.S. Service and Program Development in an Emerging Practice Area*, 13 no.2 TRAUMA, VIOLENCE & ABUSE 87, 88 (2011), available at <http://tva.sagepub.com/content/12/2/87>; GREGORY M. MANEY, TINEKA BROWN, TAYLOR GREGORY, RAFIA MALLICK, STEVEN SIMONESCHI, CHARISSE WHEBY, NICOLE WIKTOR, MEETING THE SERVICE NEEDS OF HUMAN TRAFFICKING SURVIVORS IN THE NEW YORK CITY METROPOLITAN AREA: ASSESSMENT AND RECOMMENDATIONS 13 (Hofstra Univ. 2011), available at <http://lifewaynetwork.org/wp-content/uploads/2011/11/Hofstra-University-LifeWay-Network-Report-2011.pdf> [hereinafter “MEETING THE SERVICE NEEDS OF HUMAN TRAFFICKING SURVIVORS”].

139. See Macy & Johns, *supra* note 138, at 88; MEETING THE SERVICE NEEDS OF HUMAN TRAFFICKING SURVIVORS, *supra* note 138, at 13; SPANGENBERG, *supra* note 37, at 8.

140. See Macy & Johns, *supra* note 138, at 88; SPANGENBERG, *supra* note 37, at 2.

141. Ruiz, *supra* note 56.

142. See Zena Watson, ATI Coordinator, *GEMS 2010 T-2G [HTIC] Services Provided*, Girls Educational Mentoring Services (GEMS) (Feb. 2011) (noting that most GEMS clients are “runaways, throwaways, or street homeless”).

143. *Id.*

144. *Id.*

145. A term for being involved in prostitution activity.

146. Watson, *supra* note 142. I have also had defendants in my court appear with bruises on their faces. Some have needed to be escorted by their service provider to the emergency room of a hospital. In other instances, defendants have called their counselors to report that they had been kidnapped by a pimp/trafficker, locked inside of hotels, or feared for their lives.

(seventeen-years-old or younger).¹⁴⁷ But after many years of being in the game, adult defendants have aged out of consideration for many programs that are directed towards young women and girls, as well as sympathy by an unsparing public. They likely have more arrests and convictions than younger victims and few or no educational prospects or skills. They have been in “the life” for so long that they have been deprived of any other opportunities for growth.¹⁴⁸ Reintegration into society is incredibly difficult for these women, who are often without any of the basic tools or resources necessary for participation in society that most “average” citizens take for granted.

Another common feature of HTIC defendants is their recidivism. Recidivism and multiple arrests are often unavoidable, especially for women who are still under the control of a trafficker. The HTIC recognizes that a zero tolerance approach does not work, and that it is often counterproductive to penalize an individual for having more than one prostitution arrest. Based on our work in the diversion court, we have found that, for many individuals who are entrenched in “the life,” it may take longer than and more arrests than one anticipates before they can successfully exit from the commercial sex trade. However, when defendants in the HTIC have been given resources and opportunities to thrive, many have shown their resilience as survivors. I have seen countless defendants in the HTIC regain control over important aspects of their lives, including leaving their pimps, returning to school or to their families, and regaining custody of their children.

*B. Recommendations for a Coordinated Judicial Response
to Human Trafficking*

In order to effectively address the problem of sex trafficking, it is necessary to develop a coordinated response that acknowledges weaknesses and opportunities for improvement at all levels of the criminal justice system. There needs to be holistic reform of the criminal justice system’s treatment and criminalization of prostitutes and consideration of the consequences of its failure to identify trafficking victims among this population. Throughout the years of my involvement with the HTIC, it has become evident that we need to develop a much more systematic and comprehensive approach to the issue of trafficking in the courts.

Sex trafficking laws need to place a greater emphasis on identifying and helping sex trafficking victims. One of the principle criticisms of the federal anti-trafficking legislation is its “over-emphasis on prosecution and under-emphasis on protection.”¹⁴⁹ Some have argued that “the protection and

147. Leidholdt & Scully, *supra* note 38, at 33.

148. DANIELLE LATIMER, SAVI 2010 SUMMARY FOR THE HTIC, Mount Sinai Sexual Assault and Violence Intervention (SAVI) Program (Feb. 2011).

149. Sangalis, *supra* note 7, at 424. *See also* Goh, *supra* 61, at 283 (“The growing body of anti-trafficking legislation has prioritized crime, punishment and immigration control instead of

rehabilitation of victims should take priority over pursuing prosecutions.”¹⁵⁰ While the prosecution of sex traffickers may be an important goal, in New York it should not come at the expense of helping trafficking victims.

First, law enforcement and prosecutors should make it a priority to identify potential victims of trafficking. Trafficking victims are routinely arrested and prosecuted without regard to whether they are being trafficked, resulting in a “criminal justice system [that] continues to systematically criminalize victims of trafficking.”¹⁵¹ Indeed, out of the 139 defendants represented by the Legal Aid Society’s Trafficking Victims Legal Defense & Advocacy Project¹⁵² between March and October 2011, 40 of them were identified as victims of trafficking.¹⁵³ Trafficking victims face continued arrests, numerous convictions, and re-victimization by the criminal justice system, in addition to the trauma and brutal exploitation they experience at the hands of their traffickers.¹⁵⁴ Arrest and prosecution can be traumatizing, and make it less likely that trafficking victims will confide in law enforcement officers that they have been trafficked.¹⁵⁵ This problem is exacerbated by the fact that traffickers “teach victims to instinctively distrust anyone connected to law enforcement.”¹⁵⁶ Law enforcement must, therefore, be educated about the realities of sex trafficking and trained to look for trafficking victims.¹⁵⁷ Prosecutors also need a full understanding of the

concerns with social justice and human rights.”).

150. Nack, *supra* note 12, at 453.

151. Kate Mogulescu & Katherine Mullen, *Oversight: Combatting Sex Trafficking in NYC: Examining Law Enforcement Efforts – Prevention and Prosecution*, Testimony before the Council of the City of New York, Committee on Women’s Issues & the Committee on Public Safety, 3 (Oct. 19, 2011), *available at* http://www.legalaid.org/media/151071/nyc_council_testimony_101911_sex_trafficking_nyc.pdf.

152. The Trafficking Victims Legal Defense & Advocacy Project (“TVLDAP”), headed by Kate Mogulescu, Esq., is a “specialized pilot project that focuses on its representation of those individuals charged with prostitution.” The TVLDAP “began in March [2011] and represents the first effort by a public defender office to address the problem of systemic criminalization of victims of trafficking and exploitation. The project uses an interdisciplinary team of attorneys and social workers to screen each case and connect clients to important services. The project further seeks to slow the pace of the criminal court process to allow time for clients to be adequately assessed, and build closer relationships with the project team. The project works closely with several service providers in New York City, and nationwide, to ensure this marginalized client group has options for assistance and support.” *Id.* at 4.

153. *Id.*

154. *Id.* at 5.

155. See Nack, *supra* note 12, at 843; MEETING THE SERVICE NEEDS OF HUMAN TRAFFICKING SURVIVORS, *supra* note 138, at 13 (“[E]ncounters with law enforcement can be traumatic to trafficking victims”).

156. Nack, *supra* note 12, at 843.

157. MEETING THE SERVICE NEEDS OF HUMAN TRAFFICKING SURVIVORS, *supra* note 138, at 27. One service provider observed, “[l]aw enforcement are rarely trained to identify victims, which makes the default mechanism to be the criminal justice system – a system that continues to criminalize victims.”). See also Nack, *supra* note 12, at 843 (suggesting that law enforcement should be trained to conduct raids on places where trafficking victims are being held in a way that is less likely to traumatize the victims); Sangalis, *supra* note 7, at 416 (noting that part of the problem identifying victims of trafficking stems from law enforcement’s confusion about the

dynamics of the sex trade and its severe exploitation of prostitutes. Otherwise, they may be unsympathetic to their plight, pursuing harsh jail sentences for repeat offenders, or punitive plea offers for first time offenders.¹⁵⁸

Second, in addition to training law enforcement and prosecutors to be more sensitive to the problem of human trafficking, it is equally vital to develop a coordinated judicial response to the problem. Such a response would necessarily require that judges understand: (1) human trafficking and how the courts intersect with potential victims of trafficking; (2) that prostitutes must be viewed as potential sex trafficking victims; (3) that identification of trafficking victims is extremely difficult, but is not impossible; and (4) that, once identified, trafficking victims should be provided with the necessary services to adequately address their situation.

Developing this coordinated response is only possible if courts address entrenched notions about prostitution and the stigma surrounding it. The courts often mirror the prevailing views of society, considering those labeled as “prostitutes”¹⁵⁹ to be unworthy of sympathy because they engage in conduct perceived to be degrading and objectionable. The taboos surrounding prostitution remain incredibly strong, and there is a tendency to blame “prostitutes” for their predicament. As was often the case with domestic violence victims more than twenty years ago, there seems to be a pervasive view that prostituted defendants have chosen their situation, that they are free to leave at any time, and that they are to blame for choosing to remain in “the life.” It is important, on an institutional level, to provide the training and education necessary to change these attitudes and begin the more formidable task of reforming the criminal justice system’s approach to trafficking cases.

One way of developing a coordinated judicial response is the creation of specialized prostitution diversion parts that are equipped to identify victims of trafficking. Given the difficulties inherent to identifying trafficking victims, a court that is specifically devoted to prostitution cases can address the problem of trafficking in a way that a generalized court could not. A specialized part is necessary because, without it, prostitution cases would be neglected among the frenetic bustle of a criminal court’s “all-purpose part,”¹⁶⁰ which, in New York

definition of the word trafficking).

158. Some District Attorney’s Offices are taking a more holistic, victim-centered approach to sex-trafficking prosecutions, as demonstrated by the creation of the Human Trafficking Program in the Manhattan District Attorney’s Office, <http://manhattanda.org/human-trafficking-0>, and the Sex Trafficking Unit of the Kings County District Attorney’s Office, http://www.brooklynda.org/press_releases/2010/pr_oct_10.htm#10, both of which were created in 2010.

159. I have consciously avoided using the term “prostitute” throughout this article because of the stigma attached to it. However, the other term commonly used, “sex worker,” is not entirely applicable to the defendants I have observed in my courtroom because the term suggests a level of choice and agency regarding the act of working in the commercial sex industry that does not adequately describe the situation of these individuals.

160. Term for a pre-trial part designed to take as many dispositions as possible while moving cases along for trial.

City, typically handles over one hundred cases a day.¹⁶¹ Trafficking victims face many subsidiary issues, including housing problems, unemployment, drug abuse, trauma, and violence, and are often in desperate need of more comprehensive intervention than can be provided in a regular criminal court part.¹⁶² Staffing the part with trained professionals who are knowledgeable about trafficking issues affords the possibility of success. In addition to a prosecutor, judge, and defense attorney, the service providers in the HTIC play an important role, as they are usually the ones to whom victims will disclose that they have been trafficked.

In the past decade or so, the court system has advanced a different model of adjudicating criminal cases and has created various “problem solving courts” that address issues related to, *inter alia*, domestic violence, substance abuse, mental health, and veterans’ experiences. This type of “therapeutic jurisprudence”¹⁶³ has rarely extended to the treatment and adjudication of prostitution cases, however. And yet, given the undeniable intersection between trafficking and the commercial sex trade, the traditional response by the criminal justice system has not only been inadequate, but may have devastating consequences for trafficked individuals who are being re-victimized by the very institutions that should be protecting them.

V. CONCLUSION

New York State has been responsible for the passage of a very impressive body of anti-trafficking legislation in the past six years. Through these legislative efforts, more attention has been focused on domestic trafficking, as well as international victims of trafficking in New York City and State. These laws have provided the framework for the establishment of a coherent anti-trafficking policy that acknowledges the importance of protecting and assisting victims of trafficking, as well as prosecuting traffickers. Even with improved laws, however, many victims of trafficking remain unidentified. It is imperative that the courts coordinate a judicial response to address this problem. The existence of a prostitution diversion court such as the HTIC makes the identification and treatment of victims of trafficking a much more realizable goal. The HTIC should serve as a model for other courts, inspiring the development of similar diversion parts that can properly identify and provide supportive services for victims and survivors of trafficking.

161. It is important to note that the judicial approach of the HTIC is not the only viable approach with which to address trafficking cases. The Midtown Community Court (MCC) represents another successful approach—instead of a part devoted *only* to addressing prostitution cases, the MCC addresses prostitution cases as well as other “quality of life” cases.

162. As demonstrated by the HTIC, such a diversion court, which meets only once a week in Queens, can be created without any additional resources or funds to ensure its operations or success.

163. See generally David B. Wexler, *Therapeutic Jurisprudence and the Criminal Courts*, 35 WM. & MARY L. REV. 279 (1993).