Obtaining Post-Conviction Relief for Survivors of Human Trafficking

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As ground-breaking vacatur laws for trafficking survivors proliferate throughout the country, most states have no infrastructure to identify survivors or connect them to this relief. This workshop will describe how a pro bono partnership that includes both civil and defender advocates can help survivors undo the harm of prior criminalization. Attendees will learn about the key components of vacatur laws and how to implement a model for a pro bono collaboration to obtain post-conviction relief.
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What is Trafficking?

- **Human Trafficking**
  - A crime under federal, international law, and in almost every state
  - Federal Anti-Trafficking Laws – both sex trafficking and labor trafficking

- **Sex trafficking (federal definition):**
  Recruitment, harboring, transportation, provision, or obtaining of a person for the purposes of a commercial sex act, in which the commercial sex act is induced by force, fraud, or coercion, or in which the person induced to perform such an act has not attained 18 years of age. 22 USC § 7102; 8 CFR § 214.11(a)
  - Does not need to involve travel/transporting the victim
  - State law definitions vary
“Defining” Force, Fraud, or Coercion

- **Force:**
  - Physical assaults
  - Sexual assaults
  - Isolation/confinement

- **Fraud:**
  - False or deceptive offers of employment/education/a better life
  - False or deceptive offers of romance or marriage
  - Debt bondage

- **Coercion:**
  - Threats of harm to victim, victim’s family, or other loved ones
  - Psychological abuse/manipulation designed to create dependency (trauma bonding)
  - Threatened abuse of legal or immigration systems
Human Trafficking

- **Demand:**
  - Commercial Sex:
    - Tourism
    - Casinos
    - Sporting Events
    - Conventions
    - Street Prostitution
  - Cheap Labor:
    - Agricultural Work
    - Garment/Textile Work
    - Hospitality Services
    - Domestic Work

- **Supply:**
  - Socioeconomic disparities
  - Lack of employment opportunities
  - Lack of living wage
  - Educational disparities
  - Gender, class, and race discrimination
Anyone can be a target, regardless of race, socioeconomic status, parental involvement, etc. However, traffickers do more frequently target marginalized populations as well as individuals with particular vulnerabilities.

High-Risk Groups:

- Youth
  - Runaway/homeless
  - LGBTQ
  - Child welfare involvement
- Women
- Histories of sexual abuse/assault
- Immigrants
- Substance Use/Abuse
Why are Vacatur Laws Important?

- **Importance of Obtaining Post-Conviction Relief**

  - Sex trafficking victims are convicted for acts over which they had no choice
  - Sex trafficking victims are rarely identified as such at the time of arrest/prosecution
  - Criminal convictions can prevent survivors from:
    - getting a job
    - receiving medical care
    - furthering education
    - receiving housing assistance
    - applying for a loan
    - obtaining immigration relief
“Thank you for all of your help. I am so grateful for all the time, effort and work you all did for me. This would not have happened without all of your hard work. I am so thrilled to have my record clean, and I hope that all victims like me get the chance to do the same!”

- SR, successfully vacated one 1987 prostitution conviction in upstate New York

“I wanted] that stigma off of me. I wasn’t consciously walking around every day thinking ‘I have a criminal record’ but I knew it was there. Also...I want other people to know about this, especially younger women that are working, or who want to get a passport, or get any other kind of governmental opportunity. It doesn’t just affect jobs, it affects your life in so many other areas.”

- BA, successfully vacated numerous convictions from the 1970’s

“It’s almost like walking on eggshells. I have aspirations. I’m looking to get an advanced degree... I want to go as far as I can go. And it’s almost scary, because I’m thinking I’m going to hit [the convictions] and it’s going to just knock me back down... I really just want to put it behind me. People in my life today have no idea of where I’ve been. And I’d like to keep it that way. It’s none of their business.”

- MR, speaking about her convictions prior to her successful motion
Vacating Convictions Law

New York was the first state to pass legislation in 2010.
National Campaign - PASSED

15 states have passed statutes similar to New York’s (current as of 4/1/14)
9 states have pending legislation (current as of 4/1/14)
Effective August 13, 2010

Allows a judgment to be vacated where:

- (1) The judgment is a conviction where the arresting charge was under section 240.37 (loitering for the purpose of engaging in a prostitution offense...) or 230.00 (prostitution) of the penal law
- (2) the defendant's participation in the offense was a result of
- (3) 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

Does not require the survivor to prove that s/he has left the sex industry or been “rehabilitated”

Does not explicitly offer confidentiality provisions to protect the client’s identity but able to do so under civil rights law provisions

Provides for vacatur, most complete remedy possible under the law

States that the Court must vacate the convictions and dismiss the accusatory instrument if an individual meets the elements

Allows the Court to take additional appropriate action beyond the mandate of the statute such as vacatur of additional charges

Is retroactive and inclusive of those with older convictions as long as the motion is made with “due diligence”
## Components of Effective Vacatur Laws

1. **Inclusion of prostitution and other offenses**
   - Sex workers aren’t only arrested for the crime of prostitution
   - Common sex worker crimes: crimes against nature, loitering, vagrancy, disorderly conduct, drug possession, trespassing, unauthorized street vending, possession of a weapon, jostling
   - Should also apply to individuals arrested for these crimes, not just convicted

2. **No official documentation of trafficking requirement**
   - Examples of documentation: T-Visa, letter from Dep’t of Health & Human Services “certifying” someone is a trafficking victim
   - Many victims have no opportunity or need to acquire documentation
   - If official documents are presented, law should have a presumption that the individual’s conviction(s) resulted from having been trafficked

3. **No rehabilitation requirement**
   - Requiring survivors to prove they have left the sex industry shifts the blame from the trafficker to the victim
   - Places another burden on the survivor
Components of Effective Vacatur Laws

4. Ensure Confidentiality
- Survivor face stigma and harassment when employers or co-workers know they have a record of prostitution
- Public records that include the survivor’s name create a potential risk if the trafficker is still at large

5. Offer strongest remedy possible
- Vacatur rather than expungement because it offers the most complete “erasure” of a criminal conviction
- Expunged convictions don’t necessarily eliminate grounds of inadmissibility for immigrant survivors of trafficking

6. If all elements met, Court must vacate convictions
- In the New York law, if a survivor meets all qualifying elements, a Judge must vacate conviction(s) and dismiss accusatory instruments
  - No discretion to the Judge to deny a motion to vacate
Components of Effective Vacatur Laws

7. Allow Court to take additional action
- In practice, the court’s discretionary ability to take additional action has been fundamental to the law’s effectiveness
- It’s difficult to predict circumstances that may require additional action by the court
- Examples in NY: vacating offenses not explicitly covered by law and vacating convictions after survivor escaped physical control of trafficker

8. Ensure retroactive application
- Should apply to convictions that occurred prior to the law’s passage
- Flexible statute of limitations: the motion must be made with “due diligence”

9. Attach funding provisions
- Ensure availability of the remedy by funding legal services attorneys to bring these motions
- Existence of a remedy is worth little without legal advocates to assist survivors
New York Law in Practice

- Statewide, 40 survivors have won vacatur
- Domestic victims (pimp-controlled prostitution) and internationally trafficked victims
- Over 380 convictions vacated
  - Convictions for drugs/weapons possession, jostling, disorderly conduct, etc.
  - Felony conviction vacated in the Bronx
- Convictions after survivor escaped trafficker vacated
Elements of a Successful Pro Bono Model

- The Right Players
  - Knowledge of local courts and procedure
  - Social services connections
- Creativity
- Fearlessness
Challenges

- Availability of resources
- Resistance from local courts and/or prosecutors
- Finding clients
- Training
- Supervision of volunteers
- Nationwide network
Statutes in Other States

- **Interpretation:**
  - Most state statutes regarding vacatur of convictions have not been interpreted by a court.
  - It’s unclear how many statutes will be read as broadly as the New York statute.

- **Scope:**
  - Some statutes explicitly reference prostitution convictions, but not other related crimes, suggesting they may apply to fewer types of convictions than the New York statute.
    - Montana’s and North Carolina’s statutes specifically reference convictions for prostitution, and do not reference other crimes or convictions.
  - Conversely, some statutes are broader than New York.
    - Florida’s statute specifies “any conviction for an offense committed while he or she was a victim of human trafficking.”
    - New Jersey’s statute addresses convictions of “prostitution and related offenses.”
Statutes in Other States

- **Time Period for Requesting Vacatur:**

  - Some statutes limit the time period within which a victim may seek to vacate a prior conviction
    - Maryland, Hawaii, Montana and New Jersey provide that a motion to vacate convictions related to human trafficking must be filed “within a reasonable period of time after the conviction[s]”

  - In contrast, some state statutes allow victims to file motions to vacate a conviction “at any time” after the entry of a judgment
    - Connecticut, Illinois, Mississippi, New York, North Carolina, Vermont and Wyoming
Burden and Standard of Proof:

- Some statutes state that official documents create a presumption but are not required
  - Mississippi, Montana, New Jersey, Wyoming
- Other statutes require that a victim’s motion to vacate a conviction describe supporting evidence with particularity, and provide documentary evidence showing that the victim is entitled to relief
  - Vermont, Maryland
- There are statutes that explicitly place the burden of proof on the trafficking victim seeking to vacate a prior conviction
  - Connecticut, Hawaii, Maryland, Washington as recently amended
  - Washington’s statute goes further and does not permit a trafficking victim to have his or her record for conviction for prostitution vacated if: (i) there are any criminal charges currently pending against him or her in any court (other than for prostitution); (ii) the victim has been convicted of another crime (other than for prostitution) since the date of the conviction at issue; or (iii) the victim has ever had the record of another prostitution conviction vacated
Statutes in Other States

- **Vacating v. Expunging Convictions:**
  - Expunging: Florida, New Jersey

- **Prior Consent of:**
  - Maryland and Hawaii require consent of prosecutor prior to filing motion/hearing
  - Other states require notice to prosecutor