

Human Trafficking in the Courtroom: Insights for the Bench and Bar- Part II

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Presentation Goals

- Non-Legal Service Needs
- Common Legal Needs
- Victims of Trafficking in the Juvenile Legal System
- Victims of Trafficking in the Criminal Legal System
- Legal Remedies for Criminalized Survivors in Maryland

Medical Care Needs

Treatment for:

- Headaches
- Memory loss
- Gastrointestinal distress
- Chronic pain
- Broken bones/wound care
- Eating disorders
- Malnutrition
- Sleep disorders
- Dental care needs

Reproductive Health Concerns:

- HIV exposure and treatment
- Treatment for sexually transmitted infections
- Pelvic inflammatory disease (PID)
- Sexual dysfunction
- Unplanned pregnancies
- Forced pregnancy or abortion

Mental Health Care Needs

Treatment for:

- Mood Disorders
- Suicidal Ideation
- Anxiety/Panic Disorders
- Dissociative Disorders
- Somatoform Disorders
- Substance Abuse and Dependence
- Post-Traumatic Stress Disorder (PTSD)
- Complex Trauma

Concrete Service Needs

- Housing/Shelter
- Financial stability
- Access to benefits
 - Foreign nationals face additional challenges
- Education
- Coordination of involvement with multiple systems

Non-Criminal Legal Needs

- **Family Law Matters:**

- Protective orders, child custody/visitation, divorce, abuse/neglect

- **Immigration Law Matters:**

- T and U visas: Provides an avenue for lawful immigration status for victims of severe forms of trafficking or other severe forms of crime
- Asylum and CAT claims: Applicable in circumstances where the victim is living outside their home country and is fearful of returning because of potential persecution on account of their membership in a certain “group”
 - Trafficking victims may be able to make a claim around stigma of commercial sex involvement or fear of their trafficker’s influence in their home country

Non-Criminal Legal Needs

- **Immigration Law Matters:**
 - VAWA Self-Petitions: Provides a route for abused spouses/children to petition independently for immigration relief
 - Battered Spouse Waiver: Provides a legal option for battered spouses to “remove” the conditions associated with conditional residency on their own
 - VAWA Cancellation of Removal: Remedy allows for the cancellation of removal proceedings and the granting of LPR status for victims married to their abusers
 - Less commonly used, as a denial results in deportation

Civil Legal Needs

- **Civil Damages**

- 18 U.S.C.A. § 1595 allows for the filing of civil claims against a trafficker

- **Restitution**

- 18 U.S.C.A. § 1593 states that the ordering of restitution is mandatory in federal anti-trafficking cases
- In a study of federal HT cases over a 4-year period, federal courts failed to order restitution in over half the cases
- In cases involving sex trafficking, the number of cases without restitution orders rose to nearly two-thirds
- Least likely to obtain restitution orders:
 - Minors trafficked for sex

Civil Legal Needs

- **Employment Law Claims**

- Federal Wage and Hour Claims
 - FLSA provide for payment of unpaid wages and damages for survivors who were denied or deprived of compensation for work performed
 - Applies to employees regardless of immigration status!
- Anti-Discrimination/Anti-Harassment Claims
 - Survivors who experienced sexual assault/harassment inside a building or a premises controlled by the employer (who may be the trafficker) may sue for damages under Title VII of the Civil Rights Act
 - Also applicable regardless of immigration status!

- **Tort Remedies**

- Tort = wrongful act resulting in harm
- Intentional acts such as battery and assault may be folded into cases against the trafficker
- Highlights the harm above and beyond the wage claim

Human Trafficking in the Juvenile Legal System

Juvenile courts come into contact with human trafficking victims in many different contexts, including:

- CINA cases
- Delinquency petitions
- Specialized proceedings, such as Special Immigrant Juvenile Status hearings and truancy petitions

Child In Need of Assistance (CINA)

Any youth who is 17 years old or younger and is engaged in commercial sex is a victim of sex trafficking!

Prior to June 1, 2017, the CINA statute defined sexual abuse as an act that involves sexual molestation or sexual exploitation by (i) a parent or other individual who has permanent or temporary care or custody or responsibility for supervision of the child; or (ii) a household or family member.

CINAs, cont.

The definition of sexual abuse now includes “sex trafficking of a child **by any individual**.” CJP § 3-801(y)(2). This includes situations where the trafficker is not identified and where the youth is engaging in “survival sex”.

Because of the expanded CINA definition, all youth who are identified as victims of sex trafficking can be deemed CINAs, provided they meet all other criteria and are subject to the court’s oversight. This also means they are eligible to receive services, such as placement in therapeutic foster care.

Special Immigrant Juvenile Status/Unaccompanied Minor

- SIJS status is a federal immigration classification that is predicated on a factual finding of abuse or neglect by the state juvenile court.
- Unaccompanied minors are extremely vulnerable to predation of all kinds.
- Where the minor is released to a sponsor claiming to be the child's relative, it is critical for both judges and lawyers to be attuned to the indicia and dynamics of trafficking.

Department of Juvenile Services (DJS)

The juvenile court also engages with human trafficking in the context of delinquency petitions:

- Maryland has no immunity provision for juveniles who engage in commercial sex, although trafficking is an affirmative defense.
- Significant limitations on use of trafficking as an affirmative defense to prostitution!

DJS intake process includes screening for risk of sex trafficking:

- Youth who are deemed to be at high risk are immediately referred to CPS.
- Most delinquency petitions are the result of an arrest for “masking charges” – an ancillary offense that is not itself related to commercial sex, but is a direct result of being a victim of sex trafficking

Placement

In both CINA and delinquency cases, there are myriad issues to consider when placing a survivor of human sex trafficking. (The court does not make the specific placement decision, only the type or level of placement. Within the category ordered by the court, the facility selection is at the discretion of the agency.)

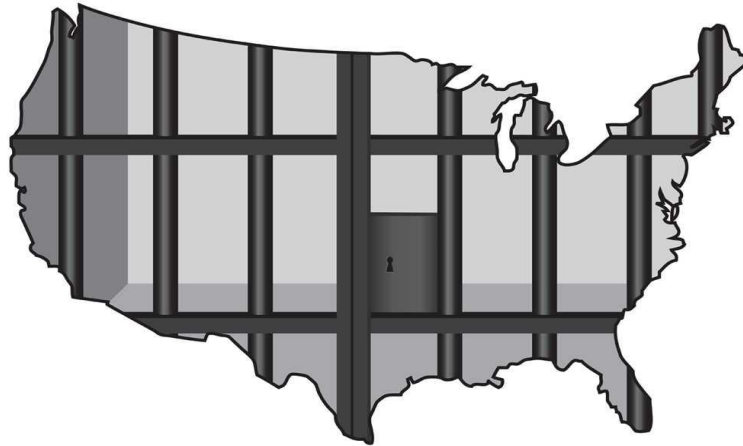
- Level of placement (how restrictive)?
- Location

Truancy Court

- Youth do not have to run away or be absent for long stretches of time in order to be trafficked.
- Many youth are trafficked while at school (the increased availability of anonymous texting apps makes it even easier to make dates, using only a phone).
- **A truancy petition should be a red flag**, and should invite inquiry into whether the youth is being trafficked or at risk of being trafficked.

Human Trafficking Victims in Criminal Legal System

- Victims of trafficking commonly have criminal records
- Arrests or convictions for:
 - Prostitution
 - Other forced criminal activity
 - Crimes common to street survival
 - Immigration proceedings related to above



What Collateral Consequences Flow from an Arrest/Conviction?

General Definitions

- **Collateral Consequences**: The penalties/disqualifications attached to an arrest or a criminal conviction
- **Collateral Sanctions**: A legal penalty imposed automatically upon a person at the time of conviction
- **Discretionary Disqualifications**: A legal penalty that a court, agency, or official is authorized but not required to impose

Housing

- Generally: Feds set housing policy, which local housing authorities then “interpret”
- Retaining Housing: “One Strike” Eviction Policy
 - Created by “Anti-Drug Abuse Act” of 1988; Strengthened by 1996 Executive Order
 - Tenants may be evicted from public housing for the criminal activity of a household member, guest, OR a person “under the tenant’s control,” that occurs *on or off* the premises, *regardless* of whether or not the tenant was aware of the activity OR if the activity resulted in a conviction
 - Upheld by SCOTUS in 2002 in *Dep’t of Hous. & Urban Dev. v. Rucker*
- “Softened” in 2015 & 2016 by HUD guidelines
 - Currently: ????

Housing

- Obtaining Housing:
 - Public Housing Authorities, owners of federally-assisted public housing, and private landlords have broad discretion to set their own screening
 - This can look like:
 - Flat bans on individuals and their family members
 - A ninety-nine year “lookback” policy
 - No appeal process for refusal of tenancy

Employment and Occupational Licensing

Impact of Criminal Records on Employability:

- Between 80-92% of employers run background checks
- A criminal record reduces job callbacks by ~50% and significantly limits earning potential
- 70 million (1 in 3) U.S. adults confront barriers in securing employment

Impact on Occupational Licensing:

- There are presently 16,772 licensing/occupational laws with criminal record provisions, more than 6,000 of which carry mandatory/automatic exclusions*
 - Most heavily licensed: Health Care & Education
 - Disproportionate impact on women!

Employment and Occupational Licensing

Legislative Advancements:

- 1987: EEOC declares blanket bans on hiring people with criminal records to be a violation of civil rights
- 2010: States begin passing “Ban the Box” measures
- 2012: EEOC expands its guidance, stating that exclusions may have disparate racial impact; job-related & individualized assessment recommended instead
- 2018: 30 states have adopted state-wide “Ban the Box” laws or policies

Public Benefits

1996's *Personal Responsibility and Work Opportunity Reconciliation Act*:

- Lifetime ban on receiving public benefits through TANF and SNAP for drug-related felonies

States given option of waiving or modifying the ban:

- As of 2017, all but 6 states have modified or eliminated the bans
- 20 states have eliminated the ban completely
- Ongoing criminal justice issues (felony bench warrants; probation or parole violations) are ineligible for SNAP, TANF, and SSI

Disparate Impact

- Women
- Children
- Communities of Color

Why is Post-Conviction Relief So Important for Survivors?

- Human trafficking victims are often convicted for acts over which they had no control
- Human trafficking victims are rarely identified as such at the time of arrest/prosecution
- Criminal convictions can prevent survivors from:
 - Getting a job
 - Receiving public benefits
 - Furthering education
 - Receiving housing assistance
 - Applying for a loan
 - Obtaining immigration relief
 - Participating in the democratic process
 - Healing from trauma

Why is Post-Conviction Relief So Important for Survivors?

- Remedy past injustice
- Empowerment
- Survivor-controlled
- Opportunity to reclaim space/story
- Impact on criminal justice stakeholders (Judges, Prosecutors, court personnel)

Why is Post-Conviction Relief So Important for Survivors?

“Victims of severe forms of trafficking **should not be inappropriately incarcerated, fined, or otherwise penalized** solely for unlawful acts committed as a direct result of being trafficked, such as using false documents, entering the country without documentation, or working without documentation.”

-22 U.S.C.A. § 7101(b)(19)

Why Is Post-Conviction Relief So Important for Survivors?

“I always felt like a criminal. I never felt like a victim at all. Victims don’t do time in jail, they work on the healing process. I was a criminal because I spent time in jail.”

BOTTOM LINE: A criminal record often keeps survivors trapped in the very industries they seek to escape, prevent healing, and make them vulnerable to re-victimization!

Options for Post-Conviction Relief in Maryland

- Expungement
- Shielding
- Vacatur

Expungement

- **Definition:**
 - Removal of certain court and police records from public inspection/eventual destruction of the record
- **Expungement Eligibility:**
 - Generally applies to records that did not result in conviction
 - Wait times apply
 - All charges in the “unit” must be eligible for expungement
 - Cannot apply if you are currently a defendant in a criminal case
 - If successful, disclosure not required on job applications

Expungement Under the Justice Reinvestment Act

Applies to a specific set of misdemeanors and felonies

JRA Expungement Eligibility:

- Wait Times:
 - 10 years after the conviction, or after any assigned parole, probation, or supervision is completed, whichever is later
 - 15 year waiting period for 2nd degree assault, an otherwise eligible crime that is linked with domestic abuse, and all felonies
- “Unit Rule” applies
- Client cannot currently be a defendant in a criminal case
- Subsequent Conviction Provision:
 - If the person receives a subsequent conviction during the 10 or 15 year waiting period, the original crime is no longer expungable, *unless the subsequent conviction becomes expungable!*

Shielding

- **Definition:**

- Removal of court and police records from public view

- **Shielding Eligibility:**

- Only applies to a specific set of convictions
- Wait times: 3 years after completion of the criminal sentence- this includes parole, probation, and supervision
 - Cannot be convicted of a non-shieldable offense during this 3-year period
 - Cannot apply if you are currently a defendant in a criminal case
- All charges in the “unit” must be eligible for shielding
- Record remains fully visible to law enforcement, the criminal justice system, and certain employers
- A person can only be granted one shielding petition in their lifetime, in one jurisdiction, and in one venue

Vacatur

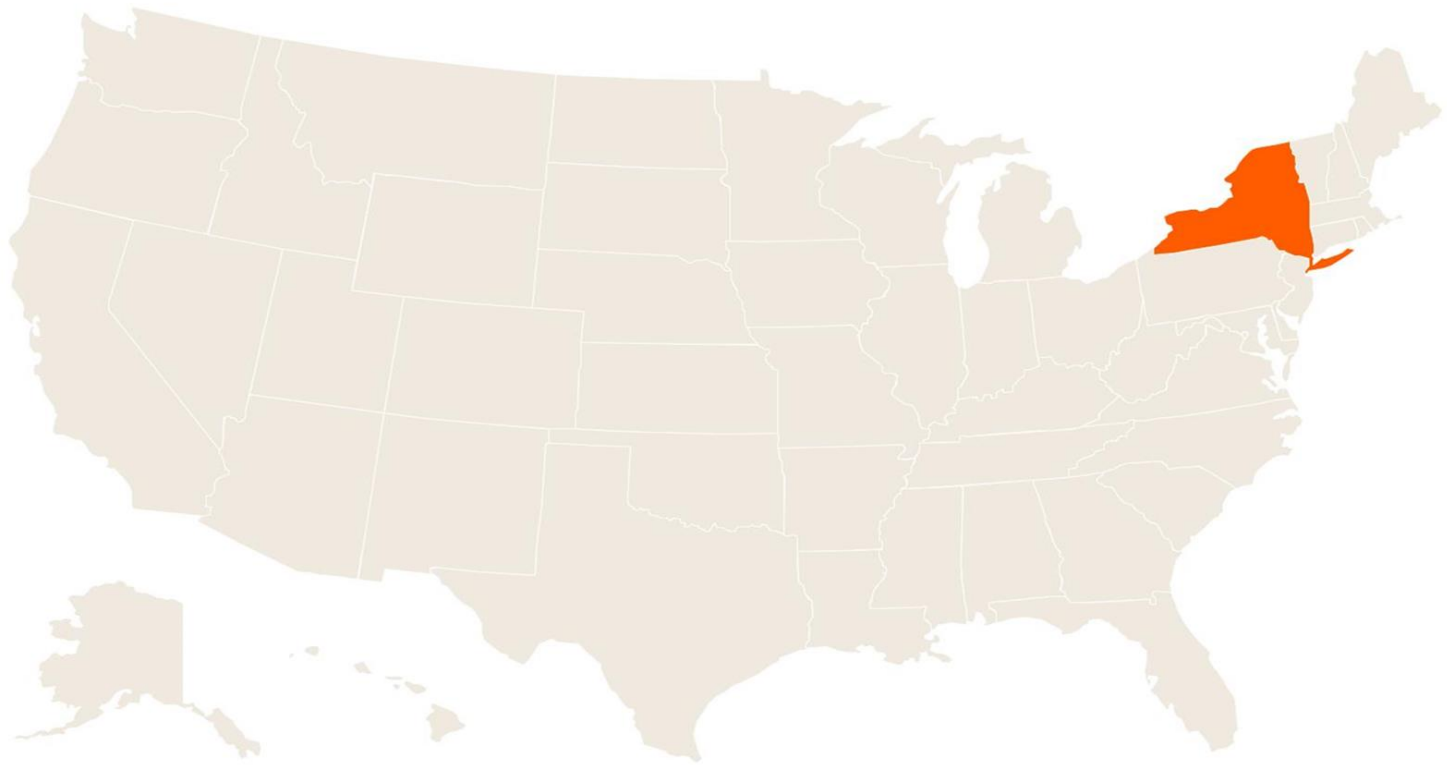
Definition: To *undo* or set aside a court's judgment

Is this different from expungement?

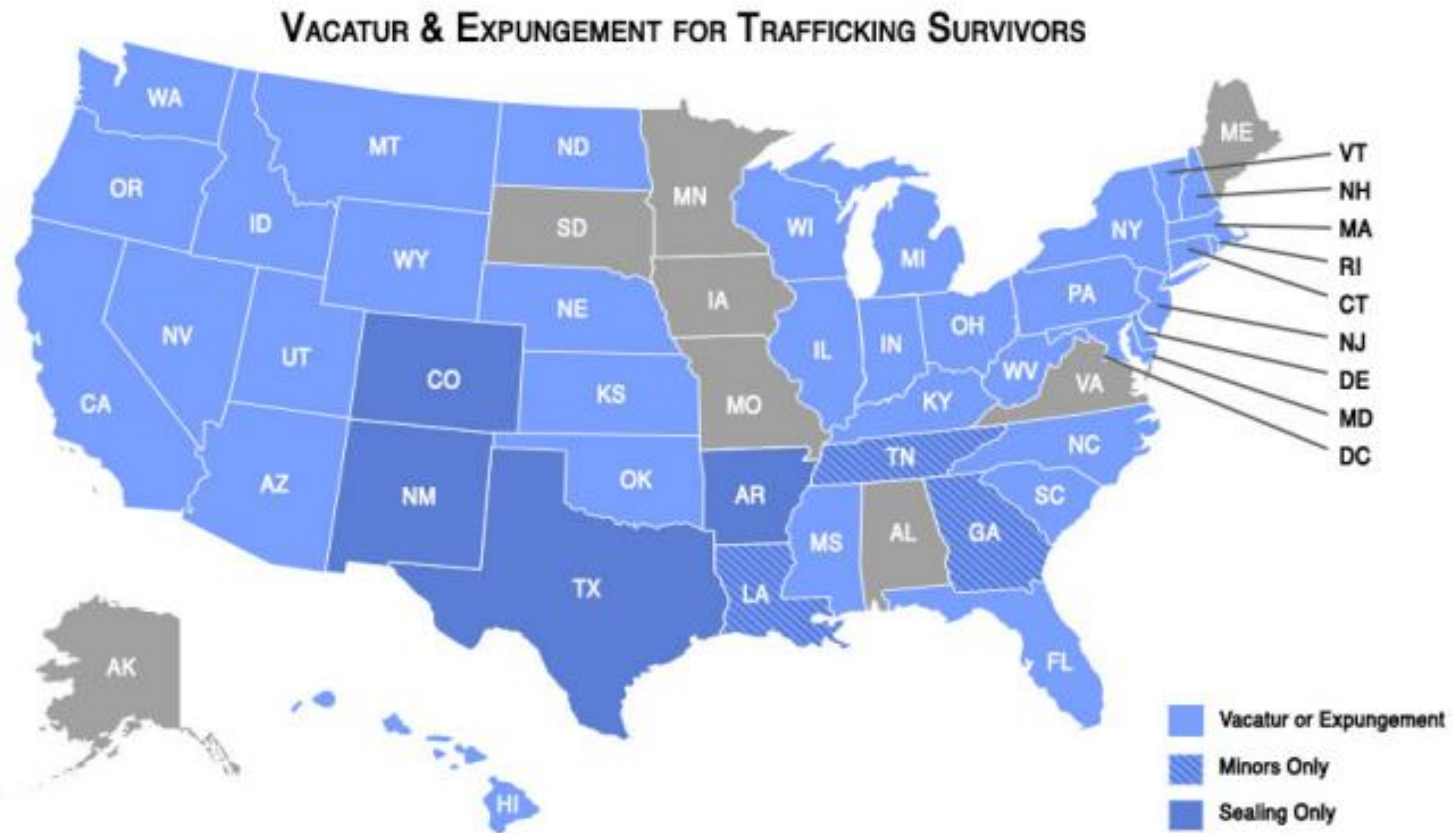
- Yes- vacating a conviction means there was an error in the original judgment/conviction
- While all forms of post-conviction relief help people have an easier time getting housing and jobs, vacatur contains the added emotional benefit of acknowledging that the law made a mistake!

“Vacatur Laws” and Human Trafficking

Vacatur Laws for Trafficking Survivors



“Vacatur Laws” and Human Trafficking



MD Criminal Procedure §8-302:

A Less Than Ideal Vacatur Law

Grounds for motion to vacate judgment

(a) A person convicted of prostitution . . . may file a motion to vacate the judgment if, when the person committed the act or acts of prostitution, the person was acting under duress caused by an act of another committed in violation of the prohibition against human trafficking under [state or] federal law.

Advantages of Maryland's Vacatur Law

- Does not require official documentation of trafficking or cooperation with law enforcement
- Does not require the survivor to prove that s/he left the sex industry or has been “rehabilitated”
- Retroactive, therefore inclusive of those with older convictions

Limitations of Maryland's Vacatur Law

Only applies to convictions for prostitution

- Most victims of trafficking are forced to commit crimes other than prostitution
- Effectively limits the statute to survivors of sex trafficking only

Does not allow the Court to take additional appropriate action beyond the plain language of the statute

- Other statutes include language allowing the court to “take any additional action that the court deems appropriate under the circumstances”

Limitations of Maryland's Vacatur Law

Does not require vacatur of eligible convictions

- Judge may vacate the conviction, modify the sentence, or grant a new trial
- Allows discretion where it is far less helpful to survivors

Requires that the motion be signed and consented to prior to eligibility for hearing

- Serious separation of powers issue!

Does not automatically expunge the arrest or the resulting non-conviction

Best Practices

When Working with a Survivor:

- ALWAYS ask about arrest history
- Identify ways survivor has interacted with criminal legal system
- Explore extent to which criminal history has impacted survivor's independence & stability
- Share information about post-conviction relief
- Make referrals as needed

Suggested Assessment Questions

Were you ever arrested during the time you were trafficked?

What states were you arrested in?

Do you know what you were arrested for?

Do you have any current criminal court cases or open warrants?

Have you gotten a fingerprint record?

Post-Conviction Referrals/ Opportunities for Attorneys

- Human Trafficking Prevention Project at the University of Baltimore School of Law
 - Clinical law program providing individual representation to survivors and those individuals most at risk for exploitation
 - Contact Person: Jessica Emerson, Director
 - (410) 837-4566; jemerson@ubalt.edu
- MVLS Human Trafficking Prevention Project
 - Individual representation; pro bono training available for MD barred attorneys
 - Contact person: Susan Francis, Deputy Director
 - (410) 539-6800; sfrancis@mvslaw.org
- ABA Survivor Re-Entry Project
 - Referral source for survivors living around the country
 - Training and technical assistance
 - Resources for service providers