

Removing Barriers for Trafficking Survivors through Decriminalization

Kelsey Mullins | Staff Attorney – Underserved Populations



Overview

- What is human trafficking?
- How are survivors of trafficking criminalized?
- What barriers are created for trafficking survivors with criminal records?
- What options exist in Wisconsin to remove barriers and decriminalize trafficking survivors?



Defining Human Trafficking

Human trafficking is...

Act: Recruiting, transporting, transferring, harboring or receiving a person

Means: Force, fraud, or coercion (***note:** this element is not required where victim is a minor*)

Purpose: Commercial sex acts or labor and services

(UNICEF, 2017)

Wisconsin's human trafficking statute – Wis. Stat. 940.302

(1)(d) **“Trafficking”** means recruiting, enticing, harboring, transporting, providing, or obtaining, or attempting to recruit, entice, harbor, transport, provide, or obtain, an individual
[act]

Human trafficking statute *continued*

Whoever knowingly engages in trafficking is guilty of a Class D felony if all of the following apply:

1. One of the following applies: **[purpose]**
 - a. The trafficking is for the purposes of **labor or services**.
 - b. The trafficking is for the purposes of a **commercial sex act**.

Human trafficking statute *continued*

2. The trafficking is done by any of the following: [means]

- a. Causing or threatening to cause bodily harm to any individual.
- b. Causing or threatening to cause financial harm to any individual.
- c. Restraining or threatening to restrain any individual.
- d. Violating or threatening to violate a law.
- e. Destroying, concealing, removing, confiscating, or possessing, or threatening to destroy, conceal, remove, confiscate, or possess, any actual or purported passport or any other actual or purported official identification document of any individual.
- f. Extortion.
- g. Fraud or deception.
- h. Debt bondage.
- i. Controlling or threatening to control any individual's access to an addictive controlled substance.
- j. Using any scheme, pattern, or other means to directly or indirectly coerce, threaten, or intimidate any individual.
- k. Using or threatening to use force or violence on any individual.
- l. Causing or threatening to cause any individual to do any act against the individual's will or without the individual's consenting to violate a law.



Criminalization of Trafficking Survivors

Trafficking survivors accrue criminal records for...

- **Prostitution offenses** – Victims may be prosecuted for engaging in commercial sex acts
- **Drug offenses** – Traffickers often use illegal drugs to make victims more compliant, and victims may use illegal drugs to cope with their experiences of being trafficked
- **Weapons offenses** – Victims may seek to protect themselves with illegally obtained weapons, often provided by their traffickers
- **Lesser offenses** – e.g., *disorderly conduct, loitering, disturbing the peace, etc.* - Offenses like these may accrue when a survivor is charged with a different offense, such as prostitution, and pleads guilty to a lesser charge instead.

Criminalization is a **BIG** problem...

90% of trafficking survivors reported being arrested due to their victimization

- 39.5% were arrested 1-4 times
- 31.6% were arrested 5-10 times
- 17.1% were arrested more than 10 times

Arrest rates by offense:

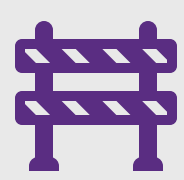
- Prostitution, 65.3%
- Solicitation, 42.7%
- Drug possession, 40%
- Intent to solicit, 25.3%
- Truancy, 10.7%

(National Survivor Network, *Members Survey: Impact of Criminal Arrest and Detention on Survivors of Human Trafficking*, 2016)

Criminalization of trafficking survivors is gaining media attention recently

- Chrystul Kizer, Wisconsin (*see slide 21*)
 - 2018, age 17
 - Charged with murder, being tried as an adult
 - Facing: Life in prison
- Alexis Martin, Ohio
 - 2013, age 15
 - Convicted of murder, granted clemency in 2020
- Cyntoia Brown, Tennessee
 - 2004, age 16
 - Convicted of murder, sentence commuted in 2019

[\(https://www.washingtonpost.com/dc-md-va/interactive/2021/child-sex-trafficking-alexis-martin-ohio/\)](https://www.washingtonpost.com/dc-md-va/interactive/2021/child-sex-trafficking-alexis-martin-ohio/)



Side Effects of Criminalization – Continued Barriers

Having a criminal record can prevent survivors from being empowered, increasing risk of re-victimization

- **Housing** – Difficult to secure housing with a criminal record
- **Employment** – Difficult to obtain gainful employment with a criminal record and some job-related licensures are not accessible
- **Education** – Difficult to receive continued education and especially scholarships
- **Family law** – Traffickers may use a survivor's criminal record to argue that they shouldn't have custody/placement

Statistics help show the extent of barriers...

Respondents in a national survey were prevented from accessing these resources at the following rates:

- **Housing** – 57.6%
- **Employment** – 72.7%
- **Education** – 16.7%

(National Survivor Network, *Members Survey: Impact of Criminal Arrest and Detention on Survivors of Human Trafficking*, 2016)



Decriminalizing Trafficking Survivors

Tools to decriminalize trafficking survivors

(1) Removal of arrest records: Remove arrest records when no conviction occurred

(2) Trafficking affirmative defense: Admit to committing offense, but the defense prevents normal legal consequences

(3) General expungement: Record clearing mechanism not specific to trafficking survivors – new legislation is pending

(4) Pardon/clemency: Forgiveness for a felony

(5) Vacatur/expungement: Specific to trafficking survivors

* **Safe Harbor:** *This is a bill that has not passed to prevent children from being charged and convicted of prostitution*

Note on terminology – Expungement vs. vacatur

Expungement

- Deletes only the record of an arrest or conviction
- Does not change that the conviction may be uncoverable by certain background checks, and a person may still need to disclose the conviction in job applications

Vacatur

- Reopening a case and recognizing the person's innocence
- Makes the conviction itself (not just the record) disappear

(1) Removing arrest records – Eligibility

An arrest record may be removable if for each of the charges in an arrest cycle:

- 1) the person was found to be not guilty,
- 2) the charges were dismissed by the court or prosecutor, or
- 3) no charges were filed by the prosecutor

An “arrest cycle” is all the offenses/charges that occurred related to one arrest.

Removing arrest records – Process

- Obtain Criminal Information Bureau Criminal History record
- Analyze eligibility for removing the arrest record
- Complete the Wisconsin Fingerprint Record Removal Request Form (DJ-LE-250B), including:
 - Identifying information
 - Two fingerprints
 - Signature

(Form and instructions: <https://www.doj.state.wi.us/sites/default/files/dles/cib-forms/record-check-unit/DJ-LE-250B%20%28Draft%2002232017%29%20-%20Fingerprint%20Removal%20Request.pdf>)

(2) Trafficking affirmative defense – Wis. Stat. 939.46(1m)

A victim of a violation of [the human/child trafficking statute] has an affirmative defense for **any offense** committed as a **direct result** of the violation of [the human/child trafficking statute] without regard to whether anyone was prosecuted or convicted for the violation of [the human/child trafficking statute]

Trafficking affirmative defense – *WI v. Kizer*

Caution: New case interpreting the trafficking affirmative defense

- **June 5, 2018:** Then 17-year-old Chrystul Kizer killed her trafficker, 34-year-old Randall Volar III. Kizer was charged with first degree intentional homicide among other felonies
- **December 9, 2019:** Kenosha County Circuit Court judge held that the trafficking affirmative defense was not available to Kizer
- **June 2, 2021:** Court of Appeals decision:
 - Held that the affirmative defense can apply to first degree homicide (Appeal No. 2020AP000192-CR, para. 5)
 - Held that the affirmative defense would be a “complete defense” to the first degree homicide charge that Kizer faces (para. 5)
 - Suggested that in determining whether an offense was a direct result of a human trafficking violation, “a court should consider whether there is ‘some evidence’ to support such a finding based on whether the victim’s offense arises relatively immediately from the trafficking violation of which the victim is a victim, is motivated primarily by the trafficking violation, is a logical and reasonably foreseeable consequence of that violation, and is not in significant part caused by events, circumstances or considerations other than that violation.” (para. 15)

(3) General expungement – Wis. Stat. 939.46(1m)

Wisconsin's expungement mechanism is very strict:

- Crime must have been committed before offender was age 25
- Crime must have a max prison sentence of less than 6 years
 - Misdemeanors
 - Class H felonies – max imprisonment not more than 3 years
 - Class I felonies – max imprisonment not more than 1.5 years
- Court must order expungement *at the time of sentencing*

While not specific to trafficking survivors, if eligible, they could use this statute, too.

Note: Pending legislation proposes to remove the age limit and the requirement that expungement be ordered at sentencing.

(4) Governor's Pardon

A grant of forgiveness from the Governor that can restore certain civil rights and privileges and relieve some legal disabilities

Eligibility for a pardon requires **all** of the following conditions apply to you:

1. You are seeking a pardon for a Wisconsin felony conviction
2. It has been *at least* five (5) years since you finished any criminal sentence. This means you
 - a. Completed all confinement; and
 - b. Completed all supervised release (e.g., probation, parole, or extended supervision).
3. You do not have any pending criminal cases or charges in any jurisdiction.
4. You are not currently required to register as a sex offender.

(5) Vacatur/expungement for sex trafficking survivors – Wis. Stat. 973.015(2m)

A pathway for sex trafficking survivors to vacate or expunge prostitution convictions

- **Vacatur:** Recognition of factual innocence – that the conviction never should have existed
- **Expungement:** Removal of the record of conviction, without recognition of factual innocence

Vacatur for sex trafficking survivors *continued*

A pathway for sex trafficking survivors to vacate or expunge *a prostitution conviction* if all of the following seven elements apply:

- (1) The person was a sex trafficking victim
- (2) The person committed the violation of Wis. Stat. 944.30 (the prostitution statute) *as a result of being a victim of sex trafficking*
- (3) The person submitted a motion that contains a statement of facts, the reason the person did not raise an affirmative defense or allege that the violation was committed as a result of being a victim of sex trafficking

Vacatur for sex trafficking survivors *continued*

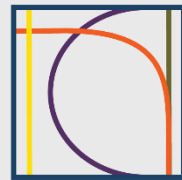
- (4) The person made the motion with due diligence subject to reasonable concern for the safety of themselves, family members, or other sex trafficking victims
- (5) A copy of the motion was served on the office of the district attorney that prosecuted the case resulting in a prostitution conviction (though failure to serve a copy is not grounds for dismissal)
- (6) The court in which the motion was made notified the appropriate district attorney's office and provided opportunity for response
- (7) The court determines that the person will benefit and society will not be harmed by the vacatur or expungement of the person's prostitution conviction

(6) Safe Harbor Bill – *not passed as of 01/13/2022*

- Senate Bill 245
- "Under current law, a person who is under the age of 18 may be prosecuted or adjudicated delinquent for committing an act of prostitution, a Class A misdemeanor. **Under this bill, a person who is under the age of 18 may not be prosecuted or adjudicated delinquent for committing an act of prostitution.**" – Analysis by the Legislative Reference Bureau

End Domestic Abuse Wisconsin: The Wisconsin Coalition Against Domestic Violence

endabusewi.org | ashafamilyservices.org
ncall.us | riselawcenter.org



ncall



End Domestic Abuse Wisconsin is comprised of 4 initiatives incorporating statewide coalition work, culturally specific direct services to survivors and national programming specific to ending abuse of older adults.