

PROTECTED INNOCENCE INITIATIVE

Creating A Uniform Standard Across States to Combat Domestic Minor Sex Trafficking



ANALYSIS AND RECOMMENDATIONS WISCONSIN

FRAMEWORK ISSUE 1: CRIMINALIZATION OF DOMESTIC MINOR SEX TRAFFICKING

Legal Components:

- 1.1 *The state human trafficking law addresses sex trafficking and clearly defines a human trafficking victim as any minor under the age of 18 used in a commercial sex act without regard to use of force, fraud, or coercion, aligning to the federal trafficking law.*
- 1.2 *Commercial sexual exploitation of children (CSEC) is identified as a separate and distinct offense from general sexual offenses, which may also be used to prosecute those who commit commercial sex offenses against minors.*
- 1.3 *CSEC or prostitution statutes refer to the sex trafficking statute to identify the commercially sexually exploited minor as a trafficking victim.*

Legal Analysis¹:

- 1.1 *The state human trafficking law addresses sex trafficking and clearly defines a human trafficking victim as any minor under the age of 18 used in a commercial sex act without regard to use of force, fraud, or coercion, aligning to the federal trafficking law.*

Wisconsin criminalizes the sex trafficking of minors in Wis. Stat. § 948.051 (Trafficking of a child),² which states,

(1) Whoever knowingly recruits, entices, provides, obtains, or harbors, or knowingly attempts to recruit, entice, provide, obtain, or harbor, any child³ for the purpose of commercial sex acts, as defined in s. 940.302 (1) (a),⁴ or sexually explicit performance is guilty of a Class C felony.

¹ Unless otherwise specified, all references to Wisconsin statutes were taken from Wisconsin Statutes (LEXIS through Act 8, dated February 4, 2011) and Wisconsin Statutes & Annotations (LEGISLATIVE REFERENCE BUREAU through 2011 Act 44 and August 31, 2011, available at <https://docs.legis.wisconsin.gov/statutes/prefaces/toc>), and all federal statutes were taken from United States Code (LEXIS through PL 112-50, approved 11/12/11).

² The general human trafficking law found at Wis. Stat. § 940.302 (Human trafficking) refers to Wis. Stat. § 948.051 (Trafficking of a child) by stating in part, “Except as provided in s. 948.051, whoever knowingly engages in trafficking is guilty of a Class D felony” if the requirements of the statute are met. Wis. Stat. § 940.302(2)(a).

³ Wis. Stat. § 948.01(1) (Definitions) defines a “child” as “a person who has not attained the age of 18 years, except that for purposes of prosecuting a person who is alleged to have violated a state or federal criminal law, ‘child’ does not include a person who has attained the age of 17 years,” “unless the context of a specific section manifestly requires a different construction.”

(2) Whoever benefits in any manner from a violation of sub. (1) is guilty of a Class C felony if the person knows that the benefits come from an act described in sub. (1).

(3) Any person who incurs an injury or death as a result of a violation of sub. (1) or (2) may bring a civil action against the person who committed the violation. In addition to actual damages, the court may award punitive damages to the injured party, not to exceed treble the amount of actual damages incurred, and reasonable attorney fees.

Pursuant to Wis. Stat. § 939.50(3)(c) (Classification of felonies), a Class C felony is punishable by imprisonment up to 40 years, a fine not to exceed \$100,000, or both.

1.2 *Commercial sexual exploitation of children (CSEC) is identified as a separate and distinct offense from general sexual offenses, which may also be used to prosecute those who commit commercial sex offenses against minors.*

In addition to Wis. Stat. § 948.051 (Trafficking of a child), the following laws criminalize CSEC in Wisconsin:

1. Wis. Stat. § 948.08 (Soliciting a child for prostitution) states, “Whoever intentionally solicits or causes any child to engage in an act of prostitution⁵ or establishes any child in a place of prostitution is guilty of a Class D felony.” A Class D felony is punishable by imprisonment up to 25 years, a fine not to exceed \$100,000, or both. Wis. Stat. § 939.50(3)(d).

2. Wis. Stat. § 948.05 (Sexual exploitation of a child) states in part,

(1) Whoever does any of the following with knowledge of the character and content of the sexually explicit conduct involving the child may be penalized under sub. (2p):

(a) Employs, uses, persuades, induces, entices, or coerces any child to engage in sexually explicit conduct for the purpose of recording or displaying in any way the conduct.

(b) Records or displays in any way a child engaged in sexually explicit conduct.

(1m) Whoever produces, performs in, profits from, promotes, imports into the state, reproduces, advertises, sells, distributes, or possesses with intent to sell or distribute, any recording of a child engaging in sexually explicit conduct may be penalized under sub. (2p) if the person knows the character and content of the sexually explicit conduct involving the child and if the person knows or reasonably should know that the child engaging in the sexually explicit conduct has not attained the age of 18 years.

....

A conviction is punishable as a Class C felony by imprisonment up to 40 years, a fine not to exceed \$100,000, or both. Wis. Stat. §§ 948.05(2p)(a), 939.50(3)(c). However, if the offender is under 18, it is a Class F felony punishable by imprisonment up to 12 ½ years, a fine not to exceed \$25,000, or both. Wis.

⁴ Wis. Stat. § 940.302(1)(a) defines “commercial sex act” as “sexual contact for which anything of value is given to, promised, or received, directly or indirectly, by any person.”

⁵ Although it does not specifically define “act of prostitution,” Wis. Stat. § 944.30 (Prostitution) states,

Any person who intentionally does any of the following is guilty of a Class A misdemeanor:

(1) Has or offers to have or requests to have nonmarital sexual intercourse for anything of value.

(2) Commits or offers to commit or requests to commit an act of sexual gratification, in public or in private, involving the sex organ of one person and the mouth or anus of another for anything of value.

(3) Is an inmate of a place of prostitution.

(4) Masturbates a person or offers to masturbate a person or requests to be masturbated by a person for anything of value.

(5) Commits or offers to commit or requests to commit an act of sexual contact for anything of value.

Stat. §§ 948.05(2p)(b), 939.50(3)(f).⁶ Also, if the offender is 18 or older, “the court shall impose a bifurcated sentence” with a prison portion of no less than 5 years unless “the court finds that the best interests of the community will be served and the public will not be harmed,” in which case a lesser sentence may be imposed. Wis. Stat. § 939.617(1),(2).

3. Wis. Stat. § 948.07 (Child enticement) states,

Whoever, with intent to commit any of the following acts, causes or attempts to cause any child who has not attained the age of 18 years to go into any vehicle, building, room or secluded place is guilty of a Class D felony:

(1) Having sexual contact or sexual intercourse with the child in violation of s. 948.02 [Sexual assault of a child], 948.085 [Sexual assault of a child placed in substitute care], or 948.095 [Sexual assault of a child by a school staff person or a person who works or volunteers with children].

(2) Causing the child to engage in prostitution.

(3) Exposing a sex organ to the child or causing the child to expose a sex organ in violation of s. 948.10.

(4) Recording the child engaging in sexually explicit conduct.

....

A Class D felony is punishable by imprisonment up to 25 years, a fine not to exceed \$100,000, or both. Wis. Stat. § 939.50(3)(d).

Certain sexual offense laws may apply in CSEC cases although they do not specifically refer to commercial sex acts.

1. Wis. Stat. § 948.02 (Sexual assault of a child) consists of two degrees of sexual assault. Wis. Stat. § 948.02(1) establishes the offense of first degree sexual assault as including the following:

(b) Whoever has sexual intercourse with a person who has not attained the age of 12 years is guilty of a Class B felony.

(c) Whoever has sexual intercourse with a person who has not attained the age of 16 years by use or threat of force or violence is guilty of a Class B felony.

(d) Whoever has sexual contact with a person who has not attained the age of 16 years by use or threat of force or violence is guilty of a Class B felony if the actor is at least 18 years of age when the sexual contact occurs.

(e) Whoever has sexual contact with a person who has not attained the age of 13 years is guilty of a Class B felony.

If the victim is less than 12 years of age, a conviction under this statute is punishable as a Class B felony by imprisonment up to 60 years. A court “shall impose a bifurcated sentence under s. 973.01,” and “[t]he term of confinement in prison portion of the bifurcated sentence shall be at least 25 years.” Wis. Stat. §§ 939.616(1r), 939.50(3)(b), 948.02(1)(b), (c).

Second degree sexual assault is prohibited under Wis. Stat. § 948.02(2), which states, “Whoever has sexual contact or sexual intercourse with a person who has not attained the age of 16 years” is guilty of a Class C felony punishable by imprisonment up to 40 years, a fine not to exceed \$100,000, or both. Wis. Stat. §§ 948.02(2), 939.50(3)(c).

⁶ Under Wis. Stat. § 948.05(3), “It is an affirmative defense to prosecution for violation of sub. (1) (a) or (b) or (2) if the defendant had reasonable cause to believe that the child had attained the age of 18 years. A defendant who raises this affirmative defense has the burden of proving this defense by a preponderance of the evidence.”

2. Wis. Stat. § 948.09 (Sexual intercourse with a child age 16 or older) states, “Whoever has sexual intercourse with a child who is not the defendant’s spouse and who has attained the age of 16 years is guilty of a Class A misdemeanor.” A Class A misdemeanor is punishable by imprisonment up to 9 months, a fine not to exceed \$10,000, or both. Wis. Stat. § 939.51(3)(a).

1.3 *CSEC or prostitution statutes refer to the sex trafficking statute to identify the commercially sexually exploited minor as a trafficking victim.*

Wisconsin’s CSEC statutes (listed above in Section 1.2) do not refer to Wis. Stat. § 948.051 (Trafficking of a child).

1.3.1 Recommendation: Amend CSEC and sexual offense laws to refer cases of commercial sexual exploitation of minors to Wis. Stat. § 948.051 (Trafficking of a child) to ensure appropriate penalties are imposed and victims are identified as trafficking victims.

FRAMEWORK ISSUE 2: CRIMINAL PROVISIONS FOR DEMAND

Legal Components:

- 2.1 *The state sex trafficking law can be applied to the buyers of commercial sex acts with a victim of domestic minor sex trafficking.*
- 2.2 *Buyers of commercial sex acts with a minor can be prosecuted under CSEC laws.*
- 2.3 *Solicitation laws differentiate buying sex acts with an adult and buying sex acts with a minor under 18.*
- 2.4 *Penalties for buyers of commercial sex acts with minors are as high as federal penalties.*
- 2.5 *Using the Internet to lure, entice, or purchase, or attempt to lure, entice, or purchase commercial sex acts with a minor is a separate crime or results in an enhanced penalty for buyers.*
- 2.6 *No age mistake defense is permitted for a buyer of commercial sex acts with any minor under 18.*
- 2.7 *Base penalties for buying sex acts with a minor are sufficiently high for all minors under 18 and not reduced for older minors.*
- 2.8 *Financial penalties for buyers of commercial sex acts with minors are sufficiently high to make it difficult for buyers to hide the crime.*
- 2.9 *Buying and possessing child pornography carries penalties as high as similar federal offenses.*
- 2.10 *Convicted buyers of commercial sex acts with minors and child pornography are required to register as sex offenders.*

Legal Analysis:

2.1 *The state sex trafficking law can be applied to the buyers of commercial sex acts with a victim of domestic minor sex trafficking.*

Wis. Stat. § 948.051 (Trafficking of a child) is potentially applicable to buyers. Wis. Stat. § 948.051(1) uses the word “obtains” in its definition of the crime, stating “(1) Whoever knowingly recruits, entices, provides, obtains, or harbors, or knowingly attempts to recruit, entice, provide, obtain, or harbor, any child⁷ for the purpose of commercial sex acts, as defined in s. 940.302 (1)(a),⁸ or sexually explicit performance is guilty of a Class C felony.” Federal prosecutors, under the Trafficking Victims Protection Act (TVPA),⁹ have applied the crime of human trafficking to attempted buyers of commercial sex with minors by charging that the buyers

⁷ See *supra* note 3.

⁸ See *supra* note 4.

⁹ Trafficking Victims Protection Act (TVPA) of 2000, Pub. L. No. 106-386, 114 Stat. 1464, 1466 (codified in scattered sections of 18 and 22 U.S.C.).

attempted to “obtain”¹⁰ a person under 18 to engage in commercial sex.¹¹ It is unsettled whether the courts will uphold this interpretation of the TVPA. It is arguable, therefore, that the term “obtain” in Wisconsin’s trafficking statute may be similarly applied, and could, therefore, implicate buyers under Wis. Stat. § 948.051.

2.1.1 Recommendation: Amend Wis. Stat. § 948.051 (Trafficking of a child) to clarify that Wis. Stat. § 948.051 applies to buyers.

2.2 Buyers of commercial sex acts with a minor can be prosecuted under CSEC laws.

Wis. Stat. § 948.08 (Soliciting a child for prostitution) penalizes “[w]hoever intentionally solicits or causes¹² any child to engage in an act of prostitution” The interpretation of this statute as it applies to buyers has been impacted by amendments made by 2007 Wis. Act 80 § 17 and the case law interpreting the prior version of this statute and its “sister statute,” Wis. Stat. § 944.32 (Soliciting prostitutes) suggest that the current version of Wis. Stat. § 948.08 would be applicable to buyers.¹³ Wis. Stat. § 948.08 is a Class D felony punishable by imprisonment up to 25 years, a fine not to exceed \$100,000, or both. Wis. Stat. §§ 948.08, 939.50(3)(d).

Wis. Stat. § 948.07(1), (Child enticement)¹⁴ applies to a buyer who “with intent to commit any of the following acts, causes or attempts to cause any child who has not attained the age of 18 years to go into any vehicle, building, room or secluded place” to “[h]av[e] sexual contact or sexual intercourse with the child in violation of s. 948.02 [Sexual assault of a child], 948.085 [Sexual assault of a child placed in substitute care].” It may also apply to buyers who “with intent to commit any of the following acts, causes or attempts to cause any child who has not attained the age of 18 years to go into any vehicle, building, room or secluded place” to “[c]aus[e] the child to engage in prostitution.” Wis. Stat. § 948.07(2). A conviction under Wis. Stat. § 948.07 is punishable as a Class D felony by imprisonment up to 25 years, a fine not to exceed \$100,000, or both. Wis. Stat. §§ 948.07, 939.50(3)(d).

The following sex offenses, described in detail in Section 1.2 above, would also apply to some buyers of sex acts with a minor: Wis. Stat. § 948.02 (Sexual assault of a child) and § 948.09 (Sexual intercourse with a child age 16 or older).

¹⁰ 18 U.S.C. 1591(a).

¹¹ See, e.g., Indictment at 1, *United States v. Oflyng*, No. 09-00084-01-CR-W-SOW (W.D. Mo. Mar. 10, 2009); see also News Release, U.S. Department of Justice, Office of the United States Attorney for the Western District of Missouri, Human Trafficking Rescue Project, Operation Guardian Angel, Final Defendant Pleads Guilty to Sex Trafficking of a Child, (Dec. 18, 2009), <http://www.justice.gov/usao/mow/news2009/mikoloyck.ple.htm>.

¹² See *State v. Payette*, 756 N.W.2d 423, 433 (Wis. Ct. App. 2008) (“Although § 948.08 is colloquially referred to as prohibiting ‘solicitation,’ the statute also specifically, and alternatively, prohibits ‘causing’ a child to practice prostitution. As we have seen, ‘cause’ is ‘a substantial factor’ which need not be the first cause, nor the sole cause, of a child practicing prostitution.”)

¹³ Prior to the enactment of Wis. Stat. § 948.08 in 1987, solicitation of prostitution involving a minor was punishable under Wis. Stat. § 944.32, which then stated, “Whoever intentionally solicits or causes any person to practice prostitution or establishes any person in a place of prostitution is guilty of a Class D felony. If the person is under the age of 18, the defendant is guilty of a Class C felony.” 1987 Wis. Act 332 § 46. In applying this statute as written at the time, *State v. Huff*, 367 N.W.2d 226, 230 (Wis. Ct. App. 1985) held that application of Wis. Stat. § 944.32 was not restricted to a defendant who solicited a minor to practice prostitution with a third party and that financial gain need not have been the purpose of the solicitation. The court, however, did note its previous decision where it held that, given the statute’s use of the word “practice,” “sec. 944.32 proscribes inducing a person to engage in ongoing criminal conduct.” *Id.* at 231 (citing *State v. Johnson*, 324 N.W. 2d 447, 451 (Wis. Ct. App. 1982)). 1987 Wis. Act 332 created Wis. Stat. § 948.08 and made solicitation of a child to practice prostitution a separate crime. 1987 Wis. Act 332 § 55. The most recent amendment to that statute, 2007 Wis. Act 80 § 17, changed the language from causing a child to “practice prostitution” to causing a child to “engage in an act of prostitution.” Interpreting the statute’s language as it existed prior to the 2007 amendment, *State v. Payette*, 756 N.W.2d 423, 433 (Wis. Ct. App. 2008) explained that “‘causes’ is ‘a ‘substantial factor’ which need not be the first cause, nor the sole cause, of a child practicing prostitution.” The court found the defendant’s conduct sufficient to meet that requirement. *Id.* The court also noted that “[t]he habitual nature of Payette’s trading cocaine for sex with RS (over thirty times) satisfies the § 948.08 requisite that RS did ‘practice prostitution’ with Payette.” *Id.* at 431. By replacing the word “practice” with the phrase “engage in an act of,” the 2007 amendment seems to aim to criminalize the purchase of a single act of prostitution, rather than an extensive pattern of such acts. 2007 Wis. Act 80.

¹⁴ See discussion of this provision *supra* Section 1.2.

2.2.1 Recommendation: Amend the CSEC and sex offense statutes that are applicable to buyers to refer cases of commercial sexual exploitation of a child to Wis. Stat. § 948.051 (Trafficking of a child) for prosecution.

2.3 *Solicitation laws differentiate buying sex acts with an adult and buying sex acts with a minor under 18.*

Wis. Stat. § 948.08 (Soliciting a child for prostitution) is minor specific. However, Wis. Stat. § 944.31 (Patronizing prostitutes)¹⁵ and § 944.33 (Pandering)¹⁶ do not distinguish between acts with an adult versus acts with a child.

2.3.1 Recommendation: Amend Wis. Stat. § 944.31 (Patronizing prostitutes) and § 944.33 (Pandering) to refer to Wis. Stat. § 948.051 (Trafficking of a child) to ensure that children involved in these crimes are identified as trafficking victims.

2.4 *Penalties for buyers of commercial sex acts with minors are as high as federal penalties.*

If applicable to a buyer, a conviction under Wis. Stat. § 948.051 (Trafficking of a child) is punishable as a Class C felony by imprisonment up to 40 years, a fine not to exceed \$100,000, or both. Wis. Stat. §§ 948.051(1), 939.50(3)(c). A conviction under Wis. Stat. § 948.08 (Soliciting a child for prostitution) is punishable as a Class D felony by imprisonment up to 25 years, a fine not to exceed \$100,000, or both. Wis. Stat. §§ 948.08, 939.50(3)(d). A conviction under Wis. Stat. § 948.07 (Child enticement) is punishable as a Class D felony punishable by imprisonment up to 25 years, a fine not to exceed \$100,000, or both. Wis. Stat. §§ 948.07, 939.50(3)(d).

Buyers who fall under Wisconsin’s sexual offense statutes also face potentially lengthy prison sentences.¹⁷

In comparison, if the victim is under the age of 14, a conviction under the TVPA for child sex trafficking is punishable by 15 years to life imprisonment and a fine not to exceed \$250,000. 18 U.S.C. §§ 1591(b)(1), 3559(a)(1), 3571(b)(3). If the victim is between the ages of 14–17, a conviction is punishable by 10 years to life imprisonment and a fine not to exceed \$250,000. 18 U.S.C. §§ 1591(b)(2), 3559(a)(1), 3571(b)(3). A conviction is punishable by mandatory life imprisonment, however, if the buyer has a prior conviction for a federal sex offense¹⁸ against a minor. 18 U.S.C. § 3559(e)(1). To the extent buyers can be prosecuted under other federal CSEC laws,¹⁹ a conviction is punishable by penalties ranging from a fine not to exceed \$250,000

¹⁵ Wis. Stat. § 944.31 (Patronizing prostitutes) states, “Any person who enters or remains in any place of prostitution with intent to have nonmarital sexual intercourse or to commit an act of sexual gratification, in public or in private, involving the sex organ of one person and the mouth or anus of another, masturbation or sexual contact with a prostitute is guilty of a Class A misdemeanor.”

¹⁶ Wis. Stat. § 944.33 (Pandering) states in part, “(1) Whoever does any of the following is guilty of a Class A misdemeanor: (a) Solicits another to have nonmarital sexual intercourse or to commit an act of sexual gratification, in public or in private, involving the sex organ of one person and the mouth or anus of another, masturbation or sexual contact with a person the solicitor knows is a prostitute”

¹⁷ See *supra* Section 1.2 for the sexual offense statutes that may apply to certain buyers.

¹⁸ Pursuant to 18 U.S.C. § 3559(e)(2), “federal sex offense” is defined as

an offense under section 1591 [18 USCS § 1591] (relating to sex trafficking of children), 2241 [18 USCS § 2241] (relating to aggravated sexual abuse), 2242 [18 USCS § 2242] (relating to sexual abuse), 2244(a)(1) [18 USCS § 2244(a)(1)] (relating to abusive sexual contact), 2245 [18 USCS § 2245] (relating to sexual abuse resulting in death), 2251 [18 USCS § 2251] (relating to sexual exploitation of children), 2251A [18 USCS § 2251A] (relating to selling or buying of children), 2422(b) [18 USCS § 2422(b)] (relating to coercion and enticement of a minor into prostitution), or 2423(a) [18 USCS § 2423(a)] (relating to transportation of minors).

¹⁹ 18 U.S.C. §§ 2251A(b) (Selling or buying of children), 2251(a) (Sexual exploitation of children), 2423(a) (Transportation of a minor with intent for minor to engage in criminal sexual activity), 2422(a) (Coercion and enticement), 2252(a)(2), (a)(4) (Certain activities relating to material involving the sexual exploitation of minors).

to life imprisonment and a fine not to exceed \$250,000.²⁰

2.5 *Using the Internet to lure, entice, or purchase, or attempt to lure, entice, or purchase commercial sex acts with a minor is a separate crime or results in an enhanced penalty for buyers.*

Wisconsin criminalizes use of the Internet to lure or entice a minor to engage in sex acts under Wis. Stat. § 948.075 (Use of a computer to facilitate a child sex crime); however, Wis. Stat. § 948.075 does not refer specifically to a commercial sexual arrangement. Wis. Stat. § 948.075(1r) states, “Whoever uses a computerized communication system to communicate with an individual who the actor believes or has reason to believe has not attained the age of 16 years with intent to have sexual contact or sexual intercourse with the individual in violation of s. 948.02 (1) or (2) [Sexual assault of a child] is guilty of a Class C felony.” Additionally, to obtain a conviction under Wis. Stat. § 948.075(1r), subsection (3) states “[p]roof that the actor did an act, other than use a computerized communication system to communicate with the individual, to effect the actor’s intent under sub. (1r) shall be necessary to prove that intent.” Additionally, pursuant to subsection (2), “This section does not apply if, at the time of the communication, the actor reasonably believed that the age of the person to whom the communication was sent was no more than 24 months less than the age of the actor.” Wis. Stat. § 948.075(2).

A conviction under Wis. Stat. § 948.075 is punishable as a Class C felony punishable by imprisonment up to 40 years, a fine not to exceed \$100,000, or both. Wis. Stat. §§ 948.075(1r), 939.50(3)(c). For offenders 18 and older, Wis. Stat. § 939.617(1) (Minimum sentence for certain child sex offenses) requires imposition of a bifurcated sentence with a minimum prison sentence of 5 years for conviction under Wis. Stat. § 948.075. The court may impose a lesser sentence “only if the court finds that the best interests of the community will be served and the public will not be harmed and if the court places its reasons on the record.” Wis. Stat. § 939.617(2).

2.5.1 Recommendation: Amend Wis. Stat. § 948.075 to prohibit the attempt to commit a violation of Wis. Stat. 948.051 (Trafficking of a child), § 948.08 (Soliciting a child for prostitution) through the use of the Internet and raise the age of the minor to under 18 in order to protect all minors from online exploitation.

2.6 *No age mistake defense is permitted for a buyer of commercial sex acts with any minor under 18.*

Wis. Stat. § 948.051 (Trafficking of a child), § 948.08 (Soliciting a child for prostitution), and § 948.07 (Child enticement) are silent on the availability of a defense based on age mistake. However, Wis. Stat. § 948.075 (Use of a computer to facilitate a child sex crime) “does not apply if, at the time of the communication, the actor reasonably believed that the age of the person to whom the communication was sent was no more than 24 months less than the age of the actor.” Wis. Stat. § 948.075(2). Similarly, Wis. Stat. § 948.05(3) (Sexual exploitation of a child), which is applicable to traffickers rather than buyers, states, “It is an affirmative defense to prosecution for violation of sub. (1)(a) or (b) or (2) if the defendant had reasonable cause to believe that the child had attained the age of 18 years. A defendant who raises this affirmative defense has the burden of proving this defense by a preponderance of the evidence.”

Even under criminal offense statutes that do not specifically provide a mistake of age defense, Wis. Stat. § 939.43(2) (Mistake) provides that “[a] mistake as to the age of a minor or as to the existence or constitutionality of the section under which the actor is prosecuted or the scope or meaning of the terms used in

²⁰ 18 U.S.C. §§ 2251A(b) (conviction punishable by imprisonment for 30 years to life and a fine), 2251(e) (conviction punishable by imprisonment for 15–30 years and a fine), 2423(a) (conviction punishable by imprisonment for 10 years to life and a fine), 2422(a) (conviction punishable by a fine, imprisonment up to 20 years, or both), 2252(a)(2), (4) (stating that a conviction under subsection (a)(2) is punishable by imprisonment for 5–20 years and a fine, while a conviction under subsection (a)(4) is punishable by imprisonment up to 10 years, a fine, or both); *see also* 18 U.S.C §§ 3559(a)(1) (classifying all of the above listed offenses as felonies), 3571(b)(3) (providing a fine up to \$250,000 for any felony conviction).

that section is not a defense.” Wis. Stat. § 939.23(6) (Criminal intent) similarly provides that “[c]riminal intent does not require proof of knowledge of the age of a minor even though age is a material element in the crime in question.”

2.6.1 Recommendation: Amend Wis. Stat. § 948.075 (Use of a computer to facilitate a child sex crime) and § 948.05 (Sexual exploitation of a child) to eliminate the mistake of age defense in cases involving trafficking of minors for commercial sexual exploitation.

2.7 *Base penalties for buying sex acts with a minor are sufficiently high for all minors under 18 and not reduced for older minors.*

Wis. Stat. § 948.051 (Trafficking of a child) § 948.08 (Soliciting a child for prostitution), and § 948.07 (Child enticement) provide equal penalties for offenses against minors of any age. Wis. Stat. § 948.02 (Sexual assault of a child) and Wis. Stat. § 948.09 (Sexual intercourse with a child age 16 or older), both of which are non-CSEC laws, provide staggered penalties for convictions involving minors of different ages. Wis. Stat. § 948.02(2), which defines second degree sexual assault, also does not penalize acts involving a child 16 years of age or older. Similarly, Wis. Stat. § 948.075 (Use of a computer to facilitate a child sex crime) only applies of the actor who “believes or has reason to believe” that the victim is under 16.

2.7.1 Recommendation: Amend Wis. Stat. § 948.075 (Use of a computer to facilitate a child sex crime) to raise the age to under 18.

2.8 *Financial penalties for buyers of commercial sex acts with minors are sufficiently high to make it difficult for buyers to hide the crime.*

If Wis. Stat. § 948.051 (Trafficking of a child) applies to buyers, a fine of \$100,000 may be imposed. Wis. Stat. §§ 948.051(1), 939.50(3)(c). In addition to the criminal fine, Wis. Stat. § 948.051(3) provides victims with a statutory cause of action and states, “Any person who incurs an injury or death as a result of a violation of sub. (1) [trafficking of a child] or (2) [benefitting from trafficking of a child] may bring a civil action against the person who committed the violation. In addition to actual damages, the court may award punitive damages to the injured party, not to exceed treble the amount of actual damages incurred, and reasonable attorney fees.”

Buyers may also face possible \$100,000 fines for convictions under Wis. Stat. § 948.08 (Soliciting a child for prostitution), § 948.07 (Child enticement), § 948.02(2) (Sexual assault of a child in the second degree), or § 948.075 (Use of a computer to facilitate a child sex crime). Wis. Stat. §§ 948.08, 948.05(2p)(a), 948.07, 948.02, 948.025, 948.075, 939.50(3)(c), (d). A \$10,000 fine may be assessed for convictions under Wis. Stat. § 948.09 (Sexual intercourse with a child age 16 or older). Wis. Stat. §§ 948.09, 939.51(3)(a).

Most forfeiture provisions do not apply to buyers. For example, Wis. Stat. § 973.075(1)(a) states, “The following are subject to seizure and forfeiture under ss. 973.075 to 973.077: (a) All property, real or personal, including money, directly or indirectly derived from or realized through the commission of any crime.” However, Wis. Stat. § 973.075(1)(b)(1m)(a),(c) provides for forfeiture of vehicles used “[t]o transport any property or weapon used or to be used or received in the commission of any felony,” or “[i]n the commission of a crime in violation of s. 944.30 [Prostitution], 944.31 [Patronizing prostitutes], 944.32 [Soliciting prostitutes], 944.33 [Pandering] or 944.34 [Keeping place of prostitution].”

Restitution for bodily injury is available to victims of trafficking and CSEC crimes under Wis. Stat. § 973.20(1r) (Restitution), which provides in part, “When imposing sentence or ordering probation for any crime, other than a crime involving conduct that constitutes domestic abuse under s. 813.12(1)(am) or 968.075(1)(a), for which the defendant was convicted, the court, in addition to any other penalty authorized by law, shall order the defendant to make full or partial restitution under this section to any victim of a crime

considered at sentencing or, if the victim is deceased, to his or her estate, unless the court finds substantial reason not to do so and states the reason on the record.”²¹

Subsection (3)(a) states, “If a crime considered at sentencing resulted in bodily injury, the restitution order may require that the defendant do one or more” of the things listed in the statute, including “(a) Pay an amount equal to the cost of necessary medical and related professional services and devices relating to physical, psychiatric and psychological care and treatment.” In addition, subsection (4m) specifically provides restitution to minor victims of trafficking and states,

If the defendant violated s. 940.225 [Sexual assault], 948.02 [Sexual assault of a child], 948.025 [Engaging in repeated acts of sexual assault of the same child], 948.05 [Sexual exploitation of a child], 948.051 [Trafficking of a child], 948.06 [Incest with a child], 948.07 [Child enticement], 948.08 [Soliciting a child for prostitution], or 948.085 [Sexual assault of a child placed in substitute care], or s. 940.302 (2) [Human trafficking], if the court finds that the crime was sexually motivated, as defined in s. 980.01(5),²² and sub. (3)(a) does not apply, the restitution order may require that the defendant pay an amount, not to exceed 10,000, equal to the cost of necessary professional services relating to psychiatric and psychological care and treatment. The 10,000 limit under this subsection does not apply to the amount of any restitution ordered under sub. (3) or (5) for the cost of necessary professional services relating to psychiatric and psychological care and treatment.

Finally, if the child sex trafficking statute applies to buyers, Wis. Stat. 973.20(4o) states,

If the defendant violated s. 940.302 (2) [Human trafficking] or 948.051 [Trafficking of a child], and sub. (2) or (3) does not apply, the restitution order may require that the defendant pay an amount equal to any of the following:

- (a) The costs of necessary transportation, housing, and child care for the victim.
- (b) The greater of the following:
 1. The gross income gained by the defendant due to the services of the victim.
 2. The value of the victim’s services as provided under the state minimum wage.
- (c) Any expenses incurred by the victim if relocation for personal safety is determined to be necessary by the district attorney.
- (d) The costs of relocating the victim to his or her city, state, or country of origin.

2.8.1 Recommendation: Amend Wis. Stat. § 973.075(1)(a) to include asset forfeiture of a defendant’s property used in, derived from, or otherwise related to, commission of sex trafficking of a minor.

2.9 *Buying and possessing child pornography carries penalties as high as similar federal offenses.*

Wis. Stat. § 948.12(1m) (Possession of child pornography) states,

Whoever possesses any undeveloped film, photographic negative, photograph, motion picture, videotape, or other recording of a child engaged in sexually explicit conduct under all of the following circumstances penalized under sub. (3):

- (a) The person knows that he or she possesses the material.
- (b) The person knows the character and content of the sexually explicit conduct in the material.
- (c) The person knows or reasonably should know that the child engaged in sexually explicit conduct has not attained the age of 18 years.

In addition, pursuant to Wis. Stat. § 948.12(2m) (Possession of child pornography),

²¹ See *infra*, section 5.10 for full discussion of these restitution provisions.

²² Wis. Stat. § 980.01(5) states that “[s]exually motivated” means that one of the purposes for an act is for the actors sexual arousal or gratification or for the sexual humiliation or degradation of the victim.”

Whoever exhibits²³ or plays a recording of a child engaged in sexually explicit conduct, if all of the following apply, may be penalized under sub. (3):

- (a) The person knows that he or she has exhibited or played the recording.
- (b) Before the person exhibited or played the recording, he or she knew the character and content of the sexually explicit conduct.
- (c) Before the person exhibited or played the recording, he or she knew or reasonably should have known that the child engaged in sexually explicit conduct had not attained the age of 18 years.”

Both of the above crimes are Class D felonies punishable by imprisonment up to 25 years, a fine not to exceed \$100,000, or both, unless the defendant is under 18, in which case they are Class I felonies punishable by imprisonment up to 3 ½ years, a fine not to exceed \$10,000, or both. Wis. Stat. §§ 948.12(3)(a), (b), 939.50(3)(d), (i).

Wis. Stat. § 973.042(2) (Child pornography surcharge) provides, “If a court imposes a sentence or places a person on probation for a crime under s. 948.05 [Sexual exploitation of a child] or 948.12 [Possession of child pornography] and the person was at least 18 years of age when the crime was committed, the court shall impose a child pornography surcharge of \$500 for each image or each copy of an image²⁴ associated with the crime. The court shall determine the number of images or copies of images associated with the crime by a preponderance of the evidence and without a jury.”

In comparison, a federal conviction for possession of child pornography²⁵ is generally punishable by imprisonment for 5–20 years and a fine not to exceed \$250,000.²⁶ Subsequent convictions, however, are punishable by imprisonment up to 40 years and a fine not to exceed \$250,000.²⁷

- 2.9.1 Recommendation: Amend Wis. Stat. § 948.12 to include the offense of purchasing child pornography and to make the penalties equivalent to those for convictions under Wis. Stat. § 948.051 (Trafficking of a child).

2.10 *Convicted buyers of commercial sex acts with minors and child pornography are required to register as sex offenders.*

Wis. Stat. § 301.45 (Sex offender registration) sets out the circumstances under which sex offenders must register. Pursuant to Wis. Stat. § 301.45(1g)(a), with certain exceptions, “[A] person shall comply with the reporting requirements under this section if he or she . . . [i]s convicted or adjudicated delinquent on or after

²³ “‘Exhibit,’ with respect to a recording of an image that is not viewable in its recorded form, means to convert the recording of the image into a form in which the image may be viewed.” Wis. Stat. § 948.01(1d).

²⁴ “In this section, ‘image’ includes a video recording, a visual representation, a positive or negative image on exposed film, and data representing a visual image.” Wis. Stat. § 973.042(1).

²⁵ 18 U.S.C. §§ 2252(a)(2), (a)(4) (Certain activities relating to material involving the sexual exploitation of minors), 2252A(a)(2)–(3) (Certain activities relating to material constituting or containing child pornography), 1466A(a), (b) (Obscene visual representations of the sexual abuse of children).

²⁶ 18 U.S.C. §§ 2252(b) (stating that a conviction under subsection (a)(2) is punishable by imprisonment for 5–20 years and a fine, while a conviction under subsection (a)(4) is punishable by imprisonment up to 10 years, a fine, or both), 2252A(b)(1) (a conviction is punishable by imprisonment for 5–20 years and a fine), 1466A(a), (b) (stating that a conviction under subsection (a) is “subject to the penalties provided in section 2252A(b)(1),” imprisonment for 5–20 years and a fine, while a conviction under subsection (b) is “subject to the penalties provided in section 2252A(b)(2),” imprisonment up to 10 years, a fine, or both); *see also* 18 U.S.C §§ 3559(a)(1) (classifying all of the above listed offenses as felonies), 3571(b)(3) (providing a fine up to \$250,000 for any felony conviction).

²⁷ 18 U.S.C. §§ 2252(b) (stating if a person has a prior conviction under subsection (a)(2), or a list of other statutes, a conviction is punishable by a fine and imprisonment for 15–40 years, but if a person has a prior conviction under subsection (a)(4), or a list of other statutes, a conviction is punishable by a fine and imprisonment for 10–20 years), 2252A(b)(1) (stating if a person has a prior conviction under subsection (a)(2), (a)(3), or a list of other statutes, a conviction is punishable by a fine and imprisonment for 15–40 years), 1466A(a), (b) (stating that the penalty scheme for section 2252A(b) applies); *see also* 18 U.S.C. §§ 3559(a)(1) (classifying all of the above listed offenses as felonies), 3571(b)(3) (providing a fine up to \$250,000 for any felony conviction).

December 25, 1993, for a sex offense.” The definition of “sex offense” in Wis. Stat. § 301.45(1d)(b), includes “a violation, or the solicitation, conspiracy, or attempt to commit a violation” of, among other things, Wis. Stat. § 948.02(1) or (2) (Sexual assault of a child), § 948.051 (Trafficking of a child), § 948.07(1)–(4) (Child enticement), § 948.075 (Use of a computer to facilitate a child sex crime), § 948.08 (Soliciting a child for prostitution), and § 948.12 (Possession of child pornography). However, pursuant to subsection (1m)(a),

A person is not required to comply with the reporting requirements under this section if all of the following apply:

1. The person meets the criteria under sub. (1g) (a) to (dd) based on any violation, or on the solicitation, conspiracy or attempt to commit any violation, of s. 948.02 (1) or (2) [Sexual assault of a child], 948.025, or 948.085 (2).
- 1g. The violation, or the solicitation, conspiracy or attempt to commit the violation, of s. 948.02 (1) or (2), 948.025, or 948.085 (2) did not involve sexual intercourse, as defined in s. 948.01 (6), either by the use or threat of force or violence or with a victim under the age of 12 years.
2. At the time of the violation, or of the solicitation, conspiracy or attempt to commit the violation, of s. 948.02 (1) or (2), 948.025, or 948.085 (2), the person had not attained the age of 19 years and was not more than 4 years older or not more than 4 years younger than the child.
3. It is not necessary, in the interest of public protection, to require the person to comply with the reporting requirements under this section.

Furthermore, Wis. Stat. § 939.615(2)(a) (Lifetime supervision of serious sex offenders) states in part that, unless the individual has already been placed on lifetime supervision that has not been terminated, “if a person is convicted of a serious sex offense . . . the court may, in addition to sentencing the person . . . place the person on lifetime supervision by the department” According to Wis. Stat. § 939.615(1)(b), “serious sex offenses” includes, among other things, violations of Wis. Stat. § 948.02 (Sexual assault of a child), § 948.051 (Trafficking of a child), § 948.07 (Child enticement), § 948.075 (Use of a computer to facilitate a child sex crime), § 948.08 (Soliciting a child for prostitution), and § 948.12 (Possession of child pornography).

FRAMEWORK ISSUE 3: CRIMINAL PROVISIONS FOR TRAFFICKERS

Legal Components:

- 3.1 *Penalties for trafficking a child for sexual exploitation are as high as federal penalties.*
- 3.2 *Creating and distributing child pornography carries penalties as high as similar federal offenses.*
- 3.3 *Using the Internet to lure, entice, recruit or sell commercial sex acts with a minor is a separate crime or results in an enhanced penalty for traffickers.*
- 3.4 *Financial penalties for traffickers, including asset forfeiture, are sufficiently high.*
- 3.5 *Convicted traffickers are required to register as sex offenders.*
- 3.6 *Laws relating to termination of parental rights for certain offenses include sex trafficking or CSEC offenses in order to remove the children of traffickers from their control and potential exploitation.*

Legal Analysis:

- 3.1 *Penalties for trafficking a child for sexual exploitation are as high as federal penalties.*

Wis. Stat. § 948.051(1) (Trafficking of a child) provides, “Whoever knowingly recruits, entices, provides, obtains, or harbors, or knowingly attempts to recruit, entice, provide, obtain, or harbor, any child for the purpose of commercial sex acts, as defined in s. 940.302 (1) (a),²⁸ or sexually explicit performance is guilty of a Class C

²⁸ See *supra* note 4.

felony.” A Class C felony is punishable by imprisonment up to 40 years, a fine not to exceed \$100,000, or both. Wis. Stat. § 939.50(3)(c).

Convictions for violating Wis. Stat. § 948.08 (Soliciting a child for prostitution) or § 948.07 (Child enticement) are Class D felonies punishable by imprisonment up to 25 years, a fine not to exceed \$100,000, or both. Wis. Stat. §§ 948.08, 948.07, 939.50(3)(d).

Traffickers who have repeatedly trafficked minors could be convicted under the Wisconsin Organized Crime Control Act. Wis. Stat. § 946.83(1) provides that “[n]o person who has received any proceeds with knowledge that they were derived, directly or indirectly, from a pattern of racketeering activity may use or invest, whether directly or indirectly, any part of the proceeds or the proceeds derived from the investment or use thereof in the acquisition of any title to, or any right, interest, or equity in, real property or in the establishment or operation of any enterprise.” Subsection (2) further provides, “No person, through a pattern of racketeering activity, may acquire or maintain, directly or indirectly, any interest in or control of any enterprise or real property.” Finally, subsection (3) states, “No person employed by, or associated with, any enterprise may conduct or participate, directly or indirectly, in the enterprise through a pattern of racketeering activity.” Wis. Stat. § 946.82(3) defines a “pattern of racketeering activity” as

engaging in at least 3 incidents of racketeering activity that have the same or similar intents, results, accomplices, victims or methods of commission or otherwise are interrelated by distinguishing characteristics, provided at least one of the incidents occurred after April 27, 1982 and that the last of the incidents occurred within 7 years after the first incident of racketeering activity. Acts occurring at the same time and place which may form the basis for crimes punishable under more than one statutory provision may count for only one incident of racketeering activity.

“Racketeering activity” is defined in Wis. Stat. § 946.82(4) as including “the attempt, conspiracy to commit, or commission of, any of the felonies specified in,” among other things, Wis. Stat. § 948.05 (Sexual exploitation of a child), § 948.051 (Trafficking of a child), § 948.08 (Soliciting a child for prostitution), or § 948.12 (Possession of child pornography). Conviction under this section is punishable as a Class E felony by imprisonment up to 15 years, a fine not to exceed \$50,000, or both. Wis. Stat. §§ 946.84(1), 939.50(3)(e).

Similarly, Wis. Stat. § 946.85(1) penalizes “[a]ny person who engages in a continuing criminal enterprise.” Engaging in a continuing criminal enterprise is defined as “engage[ing] in a prohibited activity under [Wis. Stat. § 946.83 (Prohibited activities) of the Wisconsin Organized Crime Control Act] and; (a) The activity is undertaken by the person in concert with 5 or more other persons, each of whom acted with intent to commit a crime and with respect to whom the person occupies a supervisory position; and (b) The person obtains gross income or resources in excess of \$25,000 from the activity.” Wis. Stat. § 946.85(2). Engaging in a continuing criminal enterprise is a Class E felony punishable by imprisonment up to 15 years, a fine not to exceed \$50,000, or both. Wis. Stat. §§ 946.85(1), 939.50(3)(e).

In comparison, if the victim is under the age of 14, a conviction under the Trafficking Victims Protection Act (TVPA)²⁹ for child sex trafficking is punishable by 15 years to life imprisonment and a fine not to exceed \$250,000. 18 U.S.C. §§ 1591(b)(1), 3559(a)(1), 3571(b)(3). If the victim is between the ages of 14–17, a conviction is punishable by 10 years to life imprisonment and a fine not to exceed \$250,000. 18 U.S.C. §§ 1591(b)(2), 3559(a)(1), 3571(b)(3). A conviction is punishable by mandatory life imprisonment, however, if the trafficker has a prior conviction for a federal sex offense³⁰ against a minor.

²⁹ See *supra* note 9.

³⁰ See *supra* note 18.

3.2 *Creating and distributing child pornography carries penalties as high as similar federal offenses.*

Wis. Stat. § 948.05 (Sexual exploitation of a child) states in part,

(1) Whoever does any of the following with knowledge of the character and content of the sexually explicit conduct involving the child may be penalized under sub. (2p):

(a) Employs, uses, persuades, induces, entices, or coerces any child to engage in sexually explicit conduct for the purpose of recording or displaying in any way the conduct.

(b) Records or displays in any way a child engaged in sexually explicit conduct.

(1m) Whoever produces, performs in, profits from, promotes, imports into the state, reproduces, advertises, sells, distributes, or possesses with intent to sell or distribute, any recording of a child engaging in sexually explicit conduct may be penalized under sub. (2p) if the person knows the character and content of the sexually explicit conduct involving the child and if the person knows or reasonably should know that the child engaging in the sexually explicit conduct has not attained the age of 18 years.

....

A conviction is punishable as a Class C felony by imprisonment up to 40 years, a fine not to exceed \$100,000, or both. Wis. Stat. §§ 948.05(2p)(a), 939.50(3)(c). However, if the offender is under 18, it is a Class F felony punishable by imprisonment up to 12 ½ years, a fine not to exceed \$25,000, or both. Wis. Stat. §§ 948.05(2p)(b), 939.50(3)(f). Also, if the offender is 18 or older, “the court shall impose a bifurcated sentence” with a prison portion of no less than 5 years, unless “the court finds that the best interests of the community will be served and the public will not be harmed,” in which case a lesser sentence may be imposed. Wis. Stat. § 939.617(1),(2).

Wis. Stat. § 948.12(2m) (Possession of child pornography) states,

Whoever exhibits³¹ or plays a recording of a child engaged in sexually explicit conduct, if all of the following apply, may be penalized under sub. (3):

(a) The person knows that he or she has exhibited or played the recording.

(b) Before the person exhibited or played the recording, he or she knew the character and content of the sexually explicit conduct.

(c) Before the person exhibited or played the recording, he or she knew or reasonably should have known that the child engaged in sexually explicit conduct had not attained the age of 18 years.

A defendant convicted under Wis. Stat. § 948.12(2m) is guilty of a Class D felony punishable by imprisonment up to 25 years, a fine not to exceed \$100,000, or both, unless the defendant is under 18, in which case he is guilty of a Class I felony punishable by imprisonment up to 3 ½ years, a fine not to exceed \$10,000, or both. Wis. Stat. §§ 948.12(3)(a), (b), 939.50(3)(d), (i).

In comparison, if the victim is under the age of 14, a conviction under the TVPA for child sex trafficking is punishable by 15 years to life imprisonment and a fine not to exceed \$250,000. 18 U.S.C. §§ 1591(b)(1), 3559(a)(1), 3571(b)(3). If the victim is between the ages of 14–17, a conviction is punishable by 10 years to life imprisonment and a fine not to exceed \$250,000. 18 U.S.C. §§ 1591(b)(2), 3559(a)(1), 3571(b)(3). A conviction is punishable by mandatory life imprisonment, however, if the trafficker has a prior conviction for a federal sex offense³² against a minor. Additionally, a federal conviction for distribution of child pornography³³

³¹ See *supra* note 23.

³² See *supra* note 18.

³³ 18 U.S.C. §§ 2252(a)(1), (a)(2), (a)(3) (Certain activities relating to material involving the sexual exploitation of minors), 2252A(a)(2), (a)(3) (Certain activities relating to material constituting or containing child pornography), 1466A(a) (Obscene visual representations of the sexual abuse of children).

is generally punishable by imprisonment for 5–20 years and a fine not to exceed \$250,000.³⁴ Subsequent convictions, however, are punishable by imprisonment up to 40 years and a fine not to exceed \$250,000.³⁵

3.3 *Using the Internet to lure, entice, recruit or sell commercial sex acts with a minor is a separate crime or results in an enhanced penalty for traffickers.*

Wisconsin’s law criminalizing use of the Internet to lure or entice a minor to engage in sex acts, Wis. Stat. § 948.075 (Use of a computer to facilitate a child sex crime), does not refer expressly to a commercial arrangement. Also, the statute requires the defendant to lure the child “with intent to have sexual contact or sexual intercourse with the individual in violation of 948.02 (1) or (2)” Therefore, it seems unlikely that traffickers would be prosecuted under this provision. Wis. Stat. § 948.075(1r) states, “Whoever uses a computerized communication system to communicate with an individual who the actor believes or has reason to believe has not attained the age of 16 years with intent to have sexual contact or sexual intercourse with the individual in violation of s. 948.02 (1) or (2) [Sexual assault of a child] is guilty of a Class C felony.” Additionally, under subsection (3), “Proof that the actor did an act, other than use a computerized communication system to communicate with the individual, to effect the actor's intent under sub. (1r) shall be necessary to prove that intent.”

3.3.1 Recommendation: Amend Wis. Stat. § 948.075 (Use of a computer to facilitate a child sex crime) to include use of the Internet for the purpose of violating Wis. Stat. § 948.051 (Trafficking of a child) to ensure application of Wis. Stat. § 948.075 to traffickers.

3.4 *Financial penalties for traffickers, including asset forfeiture, are sufficiently high.*

A trafficker convicted under Wis. Stat. § 948.051 (Trafficking of a child) may face a fine of \$100,000. Wis. Stat. § 948.051(1), 939.50(3)(c). In addition to the criminal fine, Wis. Stat. § 948.051(3) provides victims with a statutory cause of action and states, “Any person who incurs an injury or death as a result of a violation of sub. (1) or (2) may bring a civil action against the person who committed the violation. In addition to actual damages, the court may award punitive damages to the injured party, not to exceed treble the amount of actual damages incurred, and reasonable attorney fees.”

Traffickers may also face \$100,000 fines for convictions under Wis. Stat. § 948.08 (Soliciting a child for prostitution), § 948.05 (Sexual exploitation of a child), and § 948.07 (Child enticement). Wis. Stat. §§ 948.08, 948.05(2p)(a), 948.07, 939.50(3)(c), (d).

Forfeiture of a trafficker’s assets may be required under Wis. Stat. § 973.075 (Forfeiture of property derived from crime and certain vehicles), which provides for forfeiture of “[a]ll property, real or personal, including money, directly or indirectly derived from or realized through the commission of any crime,” and any vehicles used, among other purposes, “[t]o transport any property or weapon used or to be used or received in the commission of any felony” or used “[i]n the commission of a crime in violation of s. 944.30 [Prostitution],

³⁴ 18 U.S.C. §§ 2252(b) (stating that a conviction under subsection (a)(1), (a)(2), or (a)(3) is punishable by imprisonment for 5–20 years and a fine), 2252A(b)(1) (a conviction is punishable by imprisonment for 5–20 years and a fine), 1466A(a), (b) (stating that a conviction under subsection (a) is “subject to the penalties provided in section 2252A(b)(1),” imprisonment for 5–20 years and a fine, while a conviction under subsection (b) is “subject to the penalties provided in section 2252A(b)(2),” imprisonment up to 10 years, a fine, or both); *see also* 18 U.S.C §§ 3559(a)(1) (classifying all of the above listed offenses as felonies), 3571(b)(3) (providing a fine up to \$250,000 for any felony conviction).

³⁵ 18 U.S.C. §§ 2252(b) (stating if a person has a prior conviction under subsection (a)(1), (a)(2), or (a)(3) or a list of other statutes, a conviction is punishable by a fine and imprisonment for 15–40 years), 2252A(b)(1) (stating if a person has a prior conviction under subsection (a)(2), (a)(3), or a list of other statutes, a conviction is punishable by a fine and imprisonment for 15–40 years), 1466A(a), (b) (stating that the penalty scheme for section 2252A(b) applies); *see also* 18 U.S.C §§ 3559(a)(1) (classifying all of the above listed offenses as felonies), 3571(b)(3) (providing a fine up to \$250,000 for any felony conviction).

944.31 [Patronizing prostitutes], 944.32 [Soliciting prostitutes], 944.33 [Pandering] or 944.34 [Keeping place of prostitution].” Wis. Stat. § 973.075(1)(a), (b)(1m)(a), (c).

Conviction under Wis. Stat. § 946.83 (Prohibited activities) of the Wisconsin Organized Crime Control Act, is punishable as a Class E felony subject to a maximum possible fine of \$50,000. Wis. Stat. §§ 946.84(1), 939.50(3)(e). Instead of the fine listed in Wis. Stat. § 939.50(3)(e), “any person convicted of engaging in conduct in violation of s. 946.83, through which he or she derived pecuniary value,³⁶ or by which he or she caused personal injury or property damage or other loss, may be fined not to exceed 2 times the gross value gained or 2 times the gross loss caused, whichever is the greater, plus court costs and the costs of investigation and prosecution, reasonably incurred.” Wis. Stat. § 946.84(2). However, subsection (2) also states, “In calculating the amount of fine based on personal injury, any measurement of pain and suffering shall be excluded.” Wis. Stat. § 946.84(2). A violation of Wis. Stat. § 946.83 or Wis. Stat. § 946.85 may also be grounds for forfeiture “of all real or personal property used in the course of, or intended for use in the course of, derived from or realized through conduct in violation of s. 946.83 or 946.85.” Wis. Stat. § 946.86(1). In addition to criminal penalties and forfeiture, Wis. Stat. § 946.87(2)(a) (Civil remedies) provides for civil forfeiture to the state of “[a]ll property, real or personal, including money, used in the course of, intended for use in the course of, derived from, or realized through, conduct which has resulted in a conviction for violation of s. 946.83 or 946.85.” Wis. Stat. § 946.87(4) also establishes a statutory cause of action stating in part, “Any person who is injured by reason of any violation of s. 946.83 or 946.85 has a cause of action for 2 times the actual damages sustained and, when appropriate, punitive damages. The person shall also recover attorney fees and costs of the investigation and litigation reasonably incurred.” A conviction under of Wis. Stat. § 946.85 (Continuing criminal enterprise) is also punishable as a Class E felony by a maximum possible fine of \$50,000. Wis. Stat. §§ 946.85(1), 939.50(3)(e).

Restitution for bodily injury is available to victims of trafficking and CSEC crimes under Wis. Stat. § 973.20(1r) (Restitution), which provides in part,

When imposing sentence or ordering probation for any crime, other than a crime involving conduct that constitutes domestic abuse under s. 813.12 (1) (am) or 968.075 (1) (a), for which the defendant was convicted, the court, in addition to any other penalty authorized by law, shall order the defendant to make full or partial restitution under this section to any victim of a crime considered at sentencing or, if the victim is deceased, to his or her estate, unless the court finds substantial reason not to do so and states the reason on the record.³⁷

Subsection (3)(a) states, “If a crime considered at sentencing resulted in bodily injury, the restitution order may require that the defendant,” among other things, “(a) Pay an amount equal to the cost of necessary medical and related professional services and devices relating to physical, psychiatric and psychological care and treatment.” In addition, subsection (4m) specifically provides restitution to minor victims of trafficking and states,

If the defendant violated . . . 948.05 [Sexual exploitation of a child], 948.051 [Trafficking of a child] . . . 948.07 [Child enticement], 948.08 [Soliciting a child for prostitution] . . . and sub. (3) (a) does not apply, the restitution order may require that the defendant pay an amount, not to exceed \$10,000, equal to the cost of necessary professional services relating to psychiatric and psychological care and treatment. The \$10,000 limit under this subsection does not apply to the amount of any restitution ordered under sub. (3) or (5) for the cost of necessary professional services relating to psychiatric and psychological care and treatment.

Also, Wis. Stat. 973.20(4o) states,

³⁶ Wis. Stat. § 946.84(4)(a) defines “pecuniary value” as “Anything of value in the form of money, a negotiable instrument, or a commercial interest or anything else the primary significance of which is economic advantage; or (b) Any other property or service that has a value in excess of 100.”

³⁷ See *infra* section 5.10 for full discussion of these restitution provisions.

If the defendant violated s. 940.302 (2) [Human trafficking] or 948.051 [Trafficking of a child], and sub. (2) or (3) does not apply, the restitution order may require that the defendant pay an amount equal to any of the following:

- (a) The costs of necessary transportation, housing, and child care for the victim.
- (b) The greater of the following:
 1. The gross income gained by the defendant due to the services of the victim.
 2. The value of the victims services as provided under the state minimum wage.
- (c) Any expenses incurred by the victim if relocation for personal safety is determined to be necessary by the district attorney.
- (d) The costs of relocating the victim to his or her city, state, or country of origin.

Wis. Stat. § 973.042(2) (Child pornography surcharge) provides, “If a court imposes a sentence or places a person on probation for a crime under s. 948.05 [Sexual exploitation of a child] or 948.12 [Possession of child pornography] and the person was at least 18 years of age when the crime was committed, the court shall impose a child pornography surcharge of \$500 for each image³⁸ or each copy of an image associated with the crime. The court shall determine the number of images or copies of images associated with the crime by a preponderance of the evidence and without a jury.”

Lastly, traffickers who receive a sentence or probation are also subject to Wis. Stat. § 973.045(1) (Crime victim and witness assistance surcharge), which provides that a “crime victim and witness assistance surcharge” of \$67 for every “misdemeanor offense or count” and \$92 for every “felony offense or count” shall be imposed.

3.5 *Convicted traffickers are required to register as sex offenders.*

Pursuant to Wis. Stat. § 301.45(1g)(a), with certain exceptions, “[A] person shall comply with the reporting requirements under this section if he or she . . . [i]s convicted or adjudicated delinquent on or after December 25, 1993, for a sex offense.” The definition of “sex offense” at Wis. Stat. § 301.45(1d)(b), includes “a violation, or the solicitation, conspiracy, or attempt to commit a violation” of, among other things, Wis. Stat. § 948.05 (Sexual exploitation of a child), § 948.051 (Trafficking of a child), § 948.07(1)–(4) (Child enticement), § 948.075 (Use of a computer to facilitate a child sex crime), and § 948.08 (Soliciting a child for prostitution).

Furthermore, Wis. Stat. § 939.615 (Lifetime supervision of serious sex offenders) states in part that , unless the individual has already been placed on lifetime supervision that has not been terminated, “if a person is convicted of a serious sex offense . . . the court may, in addition to sentencing the person . . . place the person on lifetime supervision by the department” According to Wis. Stat. § 939.615(1)(b), “serious sex offenses” includes, among other things, violations of Wis. Stat. § 948.05(1), (1m) (Sexual exploitation of a child), § 948.051 (Trafficking of a child), § 948.07 (Child enticement), § 948.075 (Use of a computer to facilitate a child sex crime), and § 948.08 (Soliciting a child for prostitution).

3.6 *Laws relating to termination of parental rights for certain offenses include sex trafficking or CSEC offenses in order to remove the children of traffickers from their control and potential exploitation.*

Although a conviction under Wis. Stat. § 948.051 (Trafficking of a child) is considered a serious felony offense pursuant to Wis. Stat. § 48.415(9m)(b)(2)(a) (Grounds for involuntary termination of parental rights), Wis. Stat. § 48.415(9m)(a) does not provide for termination of parental rights for violent offenses unless the felony is committed “against one of the person’s children.” However, Wis. Stat. § 48.415(5)(a) provides that “[c]hild abuse, which shall be established by proving that the parent has exhibited a pattern of physically or sexually abusive behavior which is a substantial threat to the health of the child who is the subject of the petition and

³⁸ See *supra* note 24.

proving . . . [t]hat the parent has caused death or injury to a child or children resulting in a felony conviction,” should allow for termination of a convicted trafficker’s parental rights.

- 3.6.1 Recommendation: Amend Wis. Stat. § 48.415 (Grounds for involuntary termination of parental rights) to include convictions under Wis. Stat. § 948.051 (Trafficking of a child) against any child as grounds for termination of parental rights.

FRAMEWORK ISSUE 4: CRIMINAL PROVISIONS FOR FACILITATORS

Legal Components:

- 4.1 *The acts of assisting, enabling, or financially benefitting from child sex trafficking are included as criminal offenses in the state sex trafficking statute.*
- 4.2 *Financial penalties, including asset forfeiture laws, are in place for those who benefit financially from or aid and assist in committing domestic minor sex trafficking.*
- 4.3 *Promoting and selling child sex tourism is illegal.*
- 4.4 *Promoting and selling child pornography is illegal.*

Legal Analysis:

- 4.1 *The acts of assisting, enabling, or financially benefitting from child sex trafficking are included as criminal offenses in the state sex trafficking statute.*

Facilitators of trafficking and those who benefit financially may be charged with trafficking under Wis. Stat. § 948.051 (Trafficking of a child). Subsection (1) states, “Whoever knowingly recruits, entices, provides, obtains, or harbors, or knowingly attempts to recruit, entice, provide, obtain or harbor, any child for the purpose of commercial sex acts, as defined in s. 940.302 (1) (a), or sexually explicit performance is guilty of a Class C felony.” Subsection (2) states, “Whoever benefits in any manner from a violation of sub. (1) is guilty of a Class C felony if the person knows that the benefits come from an act described in sub. (1).” A conviction under either subsection is punishable as a Class C felony punishable by imprisonment up to 40 years, a fine not to exceed \$100,000, or both. Wis. Stat. §§ 948.051(1), (2), 939.50(3)(c).

Facilitators who benefit from assisting a trafficking enterprise in violation of Wis. Stat. § 948.051 (Trafficking of a child) may also face penalties for violating Wis. Stat. § 946.83(3) (Prohibited activities) of the Wisconsin Organized Crime Control Act. Wis. Stat. § 946.83(3), which provides, “No person employed by, or associated with, any enterprise may conduct or participate, directly or indirectly, in the enterprise through a pattern of racketeering activity.” Wis. Stat. § 946.82(3) defines a “pattern of racketeering activity” as

engaging in at least 3 incidents of racketeering activity that have the same or similar intents, results, accomplices, victims or methods of commission or otherwise are interrelated by distinguishing characteristics, provided at least one of the incidents occurred after April 27, 1982 and that the last of the incidents occurred within 7 years after the first incident of racketeering activity. Acts occurring at the same time and place which may form the basis for crimes punishable under more than one statutory provision may count for only one incident of racketeering activity.

“Racketeering activity” is defined in Wis. Stat. § 946.82(4) as including “the attempt, conspiracy to commit, or commission of, any of the felonies specified in,” among other things, Wis. Stat. § 948.051 (Trafficking of a child). A conviction under Wis. Stat. § 946.83 is punishable as a Class E felony by imprisonment up to 15 years, a fine not to exceed \$50,000, or both. Wis. Stat. §§ 946.84(1), 939.50(3)(e).

4.2 *Financial penalties, including asset forfeiture laws, are in place for those who benefit financially from or aid and assist in committing domestic minor sex trafficking.*

Wis. Stat. § 948.051(3) (Trafficking of a child) states, “Any person who incurs an injury or death as a result of a violation of sub. (1) [trafficking of a child] or (2) [benefitting from trafficking of a child] may bring a civil action against the person who committed the violation. In addition to actual damages, the court may award punitive damages to the injured party, not to exceed treble the amount of actual damages incurred, and reasonable attorney fees.”

Forfeiture of a facilitator’s assets may be available under Wis. Stat. § 973.075, which provides for forfeiture of “[a]ll property, real or personal, including money, directly or indirectly derived from or realized through the commission of any crime,” and any vehicles used, among other purposes, “[t]o transport any property or weapon used or to be used or received in the commission of any felony” or vehicles used “[i]n the commission of a crime in violation of s. 944.30 [Prostitution], 944.31 [Patronizing prostitutes], 944.32 [Soliciting prostitutes], 944.33 [Pandering] or 944.34 [Keeping place of prostitution].” Wis. Stat. § 973.075(1)(a), (b)(1m)(a), (c).

To the extent that it applies to facilitators, a conviction under Wis. Stat. § 946.83(3) (Prohibited activities) of the Wisconsin Organized Crime Control Act, is punishable as a Class E felony by a maximum fine of \$50,000. Wis. Stat. §§ 946.84(1), 939.50(3)(e). Instead of the fine listed in Wis. Stat. § 939.50(3)(e), “any person convicted of engaging in conduct in violation of s. 946.83, through which he or she derived pecuniary value, or by which he or she caused personal injury or property damage or other loss, may be fined not to exceed 2 times the gross value gained or 2 times the gross loss caused, whichever is the greater, plus court costs and the costs of investigation and prosecution, reasonably incurred.” Wis. Stat. § 946.84(2). A violation of Wis. Stat. § 946.83(3) may also be grounds for forfeiture “of all real or personal property used in the course of, or intended for use in the course of, derived from or realized through conduct in violation of s. 946.83 . . .” Wis. Stat. § 946.86(1). In addition to criminal penalties and forfeiture, Wis. Stat. § 946.87(2)(a) (Civil remedies) provides for civil forfeiture to the state of “[a]ll property, real or personal, including money, used in the course of, intended for use in the course of, derived from, or realized through, conduct which has resulted in a conviction for violation of s. 946.83 . . .” Wis. Stat. § 946.87(4) also establishes a statutory cause of action stating in part, “Any person who is injured by reason of any violation of s. 946.83 or 946.85 has a cause of action for 2 times the actual damages sustained and, when appropriate, punitive damages. The person shall also recover attorney fees and costs of the investigation and litigation reasonably incurred.”

Restitution for bodily injury is available to victims of trafficking and CSEC crimes under Wis. Stat. § 973.20(1r) (Restitution), which provides in part,

When imposing sentence or ordering probation for any crime, other than a crime involving conduct that constitutes domestic abuse under s. 813.12 (1) (am) or 968.075 (1) (a), for which the defendant was convicted, the court, in addition to any other penalty authorized by law, shall order the defendant to make full or partial restitution under this section to any victim of a crime considered at sentencing or, if the victim is deceased, to his or her estate, unless the court finds substantial reason not to do so and states the reason on the record.

Subsection (3)(a) states, “If a crime considered at sentencing resulted in bodily injury, the restitution order may require that the defendant,” among other things, “(a) Pay an amount equal to the cost of necessary medical and related professional services and devices relating to physical, psychiatric and psychological care and treatment.” In addition, subsection (4m) specifically provides restitution to minor victims of trafficking and states in part,

If the defendant violated . . . 948.051 [Trafficking of a child] . . . and sub. (3) (a) does not apply, the restitution order may require that the defendant pay an amount, not to exceed \$10,000, equal to the cost of necessary professional services relating to psychiatric and psychological care and treatment. The

\$10,000 limit under this subsection does not apply to the amount of any restitution ordered under sub. (3) or (5) for the cost of necessary professional services relating to psychiatric and psychological care and treatment.

Also, Wis. Stat. § 973.20(4o) states,

If the defendant violated s. 940.302 (2) [Human trafficking] or 948.051 [Trafficking of a child], and sub. (2) or (3) does not apply, the restitution order may require that the defendant pay an amount equal to any of the following:

- (a) The costs of necessary transportation, housing, and child care for the victim.
- (b) The greater of the following:
 - 1. The gross income gained by the defendant due to the services of the victim.
 - 2. The value of the victims services as provided under the state minimum wage.
- (c) Any expenses incurred by the victim if relocation for personal safety is determined to be necessary by the district attorney.
- (d) The costs of relocating the victim to his or her city, state, or country of origin.

4.3 *Promoting and selling child sex tourism is illegal.*

Wisconsin has no statute specifically related to sex tourism.

- 4.3.1 Recommendation: Enact a law prohibiting selling or offering to sell travel services that include or facilitate travel for the purpose of engaging in commercial sexual exploitation of a minor or prostitution of a minor in Wisconsin.

4.4 *Promoting and selling child pornography is illegal.*

Wis. Stat. § 948.05 (Sexual exploitation of a child) provides penalties for promoting or selling child pornography. Wis. Stat. § 948.05(1)(b) states, “Whoever . . . with knowledge of the character and content of the sexually explicit conduct involving the child . . . Records or displays in any way a child engaged in sexually explicit conduct.” In addition, Wis. Stat. § 948.05(1m) states, “Whoever produces, performs in, profits from, promotes, imports into the state, reproduces, advertises, sells, distributes, or possesses with intent to sell or distribute, any recording of a child engaging in sexually explicit conduct may be penalized under sub. (2p) if the person knows the character and content of the sexually explicit conduct involving the child and if the person knows or reasonably should know that the child engaging in the sexually explicit conduct has not attained the age of 18 years.” Convictions by those over 18 of the above provisions are punishable as Class C felonies by imprisonment up to 40 years, a fine not to exceed \$100,000, or both. Wis. Stat. §§ 948.05(2p)(a), 939.50(3)(c). Also, “the court shall impose a bifurcated sentence” with a prison portion of no less than 5 years, unless “the court finds that the best interests of the community will be served and the public will not be harmed,” in which case a lesser sentence may be imposed. Wis. Stat. § 939.617(1), (2). If the actor is under 18, a conviction of either provision is punishable as a Class F felony punishable by imprisonment up to 12 ½ years, a fine not to exceed \$25,000, or both. Wis. Stat. §§ 948.05(2p)(b), 939.50(3)(f).

Wis. Stat. § 948.12(2m) states,

Whoever exhibits or plays a recording of a child engaged in sexually explicit conduct, if all of the following apply, may be penalized . . . :

- (a) The person knows that he or she has exhibited or played the recording.
- (b) Before the person exhibited or played the recording, he or she knew the character and content of the sexually explicit conduct.
- (c) Before the person exhibited or played the recording, he or she knew or reasonably should have known that the child engaged in sexually explicit conduct had not attained the age of 18 years.

A conviction under Wis. Stat. § 948.12(2m) is punishable as a Class D felony by imprisonment up to 25 years, a fine not to exceed \$100,000, or both, unless the defendant is under 18, in which case it is punishable as a Class I felony by imprisonment up to 3 ½ years, a fine not to exceed \$10,000, or both. Wis. Stat. §§ 948.12(3)(a), (b), 939.50(3)(d), (i).

Wis. Stat. § 973.042(2) (Child pornography surcharge) provides,

If a court imposes a sentence or places a person on probation for a crime under s. 948.05 [Sexual exploitation of a child] or 948.12 [Possession of child pornography] and the person was at least 18 years of age when the crime was committed, the court shall impose a child pornography surcharge of \$500 for each image or each copy of an image associated with the crime. The court shall determine the number of images or copies of images associated with the crime by a preponderance of the evidence and without a jury.

Legal Components:

- 5.1 *A victim of domestic minor sex trafficking or CSEC is defined as a victim for purposes of qualifying for crime victims' compensation and other victim benefits.*
- 5.2 *The state sex trafficking statute expressly prohibits a defendant from raising consent of the minor to the commercial sex acts as a defense.*
- 5.3 *Prostitution laws apply only to adults, making minors under 18 specifically immune from this offense.*
- 5.4 *Commercially sexually exploited children are provided with a child protection response, including specialized shelter and services, and are not detained in juvenile detention facilities.*
- 5.5 *Commercial sexual exploitation is identified as a type of abuse and neglect within child protection statutes.*
- 5.6 *The definition of "caregiver" (or similar term) in the child welfare statutes is broad enough to include a trafficker who has custody or control of a child in order to bring a trafficked child into protection of child protective services.*
- 5.7 *Crime victims' compensation is specifically available to a child victim of sex trafficking or CSEC without regard to ineligibility factors.*
- 5.8 *Victim-friendly procedures and protections are provided in the trial process for minors under 18.*
- 5.9 *Expungement or sealing of juvenile arrest or criminal records resulting from arrests or adjudications for prostitution-related offenses committed as a result of, or in the course of, the commercial sexual exploitation of a minor is available within a reasonable time after turning 18.*
- 5.10 *Victim restitution and civil remedies are authorized by law for minor victims of sex trafficking or CSEC.*
- 5.11 *Statutes of limitations for civil and criminal actions for child sex trafficking or CSEC offenses are eliminated or lengthened sufficiently to allow prosecutors and victims a realistic opportunity to pursue criminal actions and legal remedies.*

Legal Analysis:

- 5.1 *A victim of domestic minor sex trafficking or CSEC is defined as a victim for purposes of qualifying for crime victims' compensation and other victim benefits.*

A commercially sexually exploited child is defined as a victim in two sections of the Criminal Code. First, in Wis. Stat. § 950.02(4)(a)(1) (Definitions) in Chapter 950 (Rights of victims and witnesses of crime) of the Criminal Code, "victim" is defined in part as "[a] person against whom a crime³⁹ has been committed."

Second, in Wis. Stat. § 949.01(6) (Definitions) of the Crime Victim Compensation law, a "victim" is defined as "a person who is injured or killed by an incident specified in s. 949.03(1)(a),⁴⁰ or by any act or omission of any other person that is within the description of any of the offenses listed in s. 949.03(1)(b)⁴¹ or within the description of the offense listed and the condition provided in s. 949.03(1)(c)."

³⁹ "Crime" is defined as "an act committed in this state which, if committed by a competent adult, would constitute a crime, as defined in s. 939.12." Wis. Stat. § 950.02(1m). Wis. Stat. § 939.12 states, "crime is conduct which is prohibited by state law and punishable by fine or imprisonment or both. Conduct punishable only by a forfeiture is not a crime."

⁴⁰ The incident specified in Wis. Stat. § 949.03(1)(a) is "[p]reventing or attempting to prevent the commission of a crime; apprehending or attempting to apprehend a suspected criminal; aiding or attempting to aid a police officer to apprehend or arrest a suspected criminal; aiding or attempting to aid a victim of a crime specified in par. (b); or aiding or attempting to aid a victim of the crime specified and the condition provided in par. (c)."

⁴¹ The offenses listed in Wis. Stat. § 949.03(1)(b) include violations of, among other things, Wis. Stat. § 940.225 (Sexual assault), § 948.02 (Sexual assault of a child), § 948.025 (Engaging in repeated acts of sexual assault of the same child), § 948.051 (Trafficking of a child), and § 948.07 (Child enticement).

5.1.1 Recommendation: Amend Wis. Stat. § 949.03(1)(b) (Compensable acts) to include Wis. Stat. § 948.08 (Soliciting a child for prostitution), § 948.05 (Sexual exploitation of a child), and § 948.075 (Use of a computer to facilitate a child sex crime).

5.2 *The state sex trafficking statute expressly prohibits a defendant from raising consent of the minor to the commercial sex acts as a defense.*

The trafficking, CSEC, and sexual offenses specific to children are silent as to consent of the minor as a defense.

5.3 *Prostitution laws apply only to adults, making minors under 18 specifically immune from this offense.*

Wisconsin's prostitution law does not distinguish between minors and adults. Wis. Stat. § 944.30 (Prostitution) states,

Any person who intentionally does any of the following is guilty of a Class A misdemeanor:

- (1) Has or offers to have or requests to have nonmarital sexual intercourse for anything of value.
- (2) Commits or offers to commit or requests to commit an act of sexual gratification, in public or in private, involving the sex organ of one person and the mouth or anus of another for anything of value.
- (3) Is an inmate of a place of prostitution.
- (4) Masturbates a person or offers to masturbate a person or requests to be masturbated by a person for anything of value.
- (5) Commits or offers to commit or requests to commit an act of sexual contact for anything of value.

5.3.1 Recommendation: Amend Wis. Stat. § 944.30 (Prostitution) to make minors immune from prosecution under this offense and refer cases of minors in prostitution to Wis. Stat. § 948.051 (Trafficking of a child).

5.4 *Commercially sexually exploited children are provided with a child protection response, including specialized shelter and services, and are not detained in juvenile detention facilities.*

A child may be taken into custody either as an abused child or as a juvenile delinquent. Wis. Stat. § 48.981⁴² provides that certain persons, including certain health care providers, school officials, and law enforcement officers who “ha[ve] reasonable cause to suspect that a child seen by the person in the course of professional duties has been abused⁴³ or neglected,⁴⁴ or who has reason to believe that a child seen by the person in the course of professional duties has been threatened with abuse or neglect and that abuse or neglect of the child will occur” must immediately inform the county department or a licensed child welfare agency. Wis. Stat.

⁴² Here and elsewhere in this report that Wis. Stat. § 48.981 is quoted or cited, it has been updated to reflect the amendments added by the passage of Assembly Bill 40. 2011 Wis. Act 32.

⁴³ “Abuse” is defined in Wis. Stat. § 48.02(1) in part as

(b) [s]exual intercourse or sexual contact under s. 940.225 [Sexual assault], 948.02 [Sexual assault of a child], 948.025 [Engaging in repeated acts of sexual assault of the same child], or 948.085 [Sexual assault of a child placed in substitute care].

(c) A violation of s. 948.05 [Sexual exploitation of a child].

(d) Permitting, allowing or encouraging a child to violate s. 944.30 [Prostitution].

(e) A violation of s. 948.055 [Causing a child to view or listen to sexual activity].

(f) A violation of s. 948.10 [Exposing genitals or pubic area].

⁴⁴ “Neglect” is defined in Wis. Stat. § 48.02(12g) as “failure, refusal or inability on the part of a caregiver, for reasons other than poverty, to provide necessary care, food, clothing, medical or dental care or shelter so as to seriously endanger the physical health of the child.”

§ 48.981(2)(a), (3)(a)(1). However, exceptions to the reporting requirement apply to health care providers pursuant to Wis. Stat. § 48.981(2m)(c), which states,

Except as provided under pars. (d) and (e), the following persons are not required to report as suspected or threatened abuse, as defined in s. 48.02 (1) (b), sexual intercourse or sexual contact involving a child:

1. A health care provider⁴⁵ who provides any health care service⁴⁶ to a child.
4. A person who obtains information about a child who is receiving or has received health care services from a health care provider.

This exception to the reporting requirement is limited by Wis. Stat. § 48.981(2m)(d), (e), which state,

(d) Any person described under par. (c) 1. or 4. shall report as required under sub. (2) if he or she has reason to suspect any of the following:

1. That the sexual intercourse or sexual contact occurred or is likely to occur with a caregiver.
2. That the child suffered or suffers from a mental illness or mental deficiency that rendered or renders the child temporarily or permanently incapable of understanding or evaluating the consequences of his or her actions.
3. That the child, because of his or her age or immaturity, was or is incapable of understanding the nature or consequences of sexual intercourse or sexual contact.
4. That the child was unconscious at the time of the act or for any other reason was physically unable to communicate unwillingness to engage in sexual intercourse or sexual contact.
5. That another participant in the sexual contact or sexual intercourse was or is exploiting the child.

(e) In addition to the reporting requirements under par. (d), a person described under par. (c) 1. or 4. shall report as required under sub. (2) if he or she has any reasonable doubt as to the voluntariness of the child's participation in the sexual contact or sexual intercourse.

Once a report is made, "the agency shall evaluate the report to determine whether there is reason to suspect that a caregiver has abused or neglected the child, has threatened the child with abuse or neglect, or has facilitated or failed to take action to prevent the suspected or threatened abuse or neglect of the child." Wis. Stat.

§ 48.981(3)(c)(1)(a). Under Wis. Stat. § 48.981(3)(c)(1)(a),

Except as provided in sub. (3m), if the agency determines that a caregiver is suspected of abuse or neglect or of threatened abuse or neglect of the child, determines that a caregiver is suspected of facilitating or failing to take action to prevent the suspected or threatened abuse or neglect of the child, or cannot determine who abused or neglected the child, within 24 hours after receiving the report the agency shall . . . initiate a diligent investigation to determine if the child is in need of protection or services. If the agency determines that a person who is not a caregiver is suspected of abuse or of threatened abuse, the agency may, in accordance with that authority, initiate a diligent investigation to determine if the child is in need or protection or services. . . .

Under Wis. Stat. § 48.981(3)(c)(2),

a. If the person making the investigation is an employee of the county department or, in a county having a population of 500,000 or more, the department or a licensed child welfare agency under contract with the department and he or she determines that it is consistent with the child's best interest in terms of physical safety and physical health to remove the child from his or her home for immediate protection, he or she shall take the child into custody under s. 48.08 (2) or 48.19 (1) (c) and deliver the child to the intake worker under s. 48.20.

⁴⁵ "'Health care provider' means a physician, as defined under s. 448.01 (5), a physician assistant, as defined under s. 448.01 (6), or a nurse holding a certificate of registration under s. 441.06 (1) or a license under s. 441.10 (3)." Wis. Stat. § 48.981(2m)(b)(1).

⁴⁶ "'Health care service' means family planning services, as defined in s. 253.07 (1) (b), 1995 stats., pregnancy testing, obstetrical health care or screening, diagnosis and treatment for a sexually transmitted disease." Wis. Stat. § 48.981(2m)(b)(2).

b. If the person making the investigation is an employee of a licensed child welfare agency which is under contract with the county department and he or she determines that any child in the home requires immediate protection, he or she shall notify the county department of the circumstances and together with an employee of the county department shall take the child into custody under s. 48.08 (2) or 48.19 (1) (c) and deliver the child to the intake worker under s. 48.20.

A child may be taken into custody under, among other things, “[a]n order of the judge if made upon a showing satisfactory to the judge that the welfare of the child demands that the child be immediately removed from his or her present custody.” Wis. Stat. § 48.19(c). Additionally, a child can be taken into custody if there are “[c]ircumstances in which a law enforcement officer believes on reasonable grounds that any of the following conditions exists: . . . 4. The child has run away from his or her parents, guardian or legal or physical custodian. 5. The child is suffering from illness or injury or is in immediate danger from his or her surroundings and removal from those surroundings is necessary.” Wis. Stat. § 48.19(d)(4), (5).

Once taken into custody, Wis. Stat. § 48.20(2)(ag) (Release or delivery of child from custody) provides that “[e]xcept as provided in pars. (b) to (d), a person taking a child into custody shall make every effort to release the child immediately to the child’s parent, guardian, [or] legal custodian” Under subsections (2)(b)–(d),

- (b) If the child’s parent, guardian, legal custodian, or Indian custodian is unavailable, unwilling, or unable to provide supervision for the child, the person who took the child into custody may release the child to a responsible adult after counseling or warning the child as may be appropriate.
- (c) If the child is 15 years of age or older, the person who took the child into custody may release the child without immediate adult supervision after counseling or warning the child as may be appropriate.
- (d) If the child is a runaway, the person who took the child into custody may release the child to a home authorized under s. 48.227 [Runaway homes].

Wis. Stat. § 48.20(3) (Release or delivery of child from custody) further provides in part, “If the child is not released under sub. (2), the person who took the child into custody shall arrange in a manner determined by the court and law enforcement agencies for the child to be interviewed by the intake worker under s. 48.067 (2).”⁴⁷ Pursuant to Wis. Stat. § 48.20(7)(b), “The intake worker shall review the need to hold the child in custody and shall make every effort to release the child from custody as provided in par. (c). The intake worker shall base his or her decision as to whether to release the child or to continue to hold the child in custody on the criteria specified in s. 48.205 (1) and criteria established under s. 48.06 (1) or (2).” If the child is held in custody, Wis. Stat. § 48.20(8)(a) provides in part that, “the intake worker shall notify the child’s parent, guardian, legal custodian, and Indian custodian of the reasons for holding the child in custody and of the child’s whereabouts unless there is reason to believe that notice would present imminent danger to the child.”

Under Wis. Stat. § 48.205(1) (Criteria for holding a child or expectant mother in physical custody),

- (1) A child may be held under s. 48.207 (1), 48.208 or 48.209 if the intake worker determines that there is probable cause to believe the child is within the jurisdiction of the court and:

⁴⁷ Wis. Stat. 48.067(2) provides,

To carry out the objectives and provisions of this chapter but subject to its limitations, intake workers shall:

....

- (2) Interview, unless impossible, any child or expectant mother of an unborn child who is taken into physical custody and not released, and when appropriate interview other available concerned parties. If the child cannot be interviewed, the intake worker shall consult with the child’s parent or a responsible adult. If an adult expectant mother of an unborn child cannot be interviewed, the intake worker shall consult with an adult relative or friend of the adult expectant mother. No child may be placed in a juvenile detention facility unless the child has been interviewed in person by an intake worker, except that if the intake worker is in a place which is distant from the place where the child is or the hour is unreasonable, as defined by written court intake rules, and if the child meets the criteria under s. 48.208, the intake worker, after consulting by telephone with the law enforcement officer who took the child into custody, may authorize the secure holding of the child while the intake worker is en route to the in-person interview or until 8 a.m. of the morning after the night on which the child was taken into custody.

(a) Probable cause exists to believe that if the child is not held he or she will cause injury to himself or herself or be subject to injury by others.

....

(b) Probable cause exists to believe that the parent, guardian or legal custodian of the child or other responsible adult is neglecting, refusing, unable or unavailable to provide adequate supervision and care and that services to ensure the child's safety and well-being are not available or would be inadequate.

....

(c) Probable cause exists to believe that the child will run away or be taken away so as to be unavailable for proceedings of the court or its officers.

....

Under Wis. Stat. § 48.21(1) (Hearing for child in custody), if the child is not released, a hearing must be held within 48 hours of the decision to detain the child, excluding holidays and weekends. "By the time of the hearing a petition under s. 48.25 shall be filed, except that no petition need be filed when the child is taken into custody under s. 48.19 (1) (b) or (d) 2. or 7. or when the child is a runaway from another state, in which case a written statement of the reasons for holding the child in custody shall be substituted if the petition is not filed." Wis. Stat. § 48.21(1)(a). If a hearing is not held and no petition or statement filed, unless an extension is permitted, the child is to be released. Wis. Stat. § 48.21(1)(a). A 72-hour extension can be given under subsection (1)(b) if no petition has been filed and the judge determines, based on facts from the hearing, that "probable cause exists to believe," among other things, "[t]hat the child is an imminent danger to himself or herself or to others" or that "the parent, guardian, or legal custodian of the child or other responsible adult is neglecting, refusing, unable, or unavailable to provide adequate supervision and care." Wis. Stat. § 48.21(1)(b)(2), (3).

Under Wis. Stat. § 48.21(4),

If the judge or circuit court commissioner finds that the child should be continued in custody under the criteria of s. 48.205 [Criteria for holding a child or expectant mother in physical custody], he or she shall enter one of the following orders:

- (a) Place the child with a parent, guardian, legal custodian or other responsible person and may impose reasonable restrictions on the child's travel, association with other persons or places of abode during the period of placement, including a condition requiring the child to return to other custody as requested; or subject the child to the supervision of an agency agreeing to supervise the child. Reasonable restrictions may be placed upon the conduct of the parent, guardian, legal custodian or other responsible person which may be necessary to ensure the safety of the child.
- (b) Order the child held in an appropriate manner under s. 48.207 [Places where a child or expectant mother may be held in nonsecure custody], 48.208 [Criteria for holding a child in a juvenile detention facility] or 48.209 [Criteria for holding a child in county jail].

Wis. Stat. § 48.207(3) states, "A child taken into custody under s. 48.981 [Abused or neglected children and abused unborn children] may be held in a hospital, foster home, relatives home, or other appropriate medical or child welfare facility that is not used primarily for the detention of delinquent children."⁴⁸ A child may only be

⁴⁸ Wis. Stat. § 48.207(1) states,

A child held in physical custody under s. 48.205 (1) may be held in any of the following places:

- (a) The home of a parent or guardian, [unless the parent or guardian has committed first or second degree intentional homicide of the child's parent] The person making the custody decision shall consider the wishes of the child in making that determination.
- (b) The home of a relative, [unless the relative has committed first or second degree intentional homicide of the child's parent] The person making the custody decision shall consider the wishes of the child in making that determination.
- (c) A licensed foster home if the placement does not violate the conditions of the license.

held in a juvenile detention facility if the child consents to it to protect the child from a threat and it is “ordered by the judge in a protective order” or if probable cause exists to believe that the child has run away from nonsecure custody or committed a delinquent act “and no other suitable alternative exists.” Wis. Stat. § 48.208(3), (4). Furthermore, a child may not be held in a county jail with other incarcerated adults unless no other facility is available and certain criteria are met or the criteria are met, the child receives a hearing, the judge orders the transfer, and the child “presents a substantial risk of physical harm to other persons in the juvenile detention facility, as evidenced by previous acts or attempts, which can only be avoided by transfer to the jail.” Wis. Stat. § 48.209(1), (2).

On the other hand, commercially sexually exploited children may be treated as juveniles⁴⁹ within Chapter 938 (The Juvenile Justice Code) rather than being treated as abused children. Wis. Stat. § 938.13 states,

Except as provided in s. 938.028 (3), the court has exclusive original jurisdiction over a juvenile alleged to be in need of protection or services which can be ordered by the court if any of the following conditions applies:

- (4) Uncontrollable. The juvenile’s parent or guardian signs the petition requesting jurisdiction under this subsection and is unable or needs assistance to control the juvenile.
- (6) Habitually truant from school. Except as provided under s. 938.17 (2), the juvenile is habitually truant from school and evidence is provided by the school attendance officer that the activities under s. 118.16 (5) have been completed or were not required to be completed as provided in s. 118.16 (5m).
- (6m) School dropout. The juvenile is a school dropout, as defined in s. 118.153 (1) (b).
- (7) Habitually truant from home. The juvenile is habitually truant from home and either the juvenile, a parent or guardian, or a relative in whose home the juvenile resides signs the petition requesting jurisdiction and attests in court that reconciliation efforts have been attempted and have failed.
- (12) Delinquent act before age 10. The juvenile is under 10 years of age and has committed a delinquent act.
- (14) Not responsible or not competent. The juvenile has been determined, under s. 938.30 (5) (c), to be not responsible for a delinquent act by reason of mental disease or defect or has been determined, under s. 938.30 (5) (d), to be not competent to proceed.

Pursuant to Wis. Stat. § 938.12(1) (Jurisdiction over juveniles alleged to be delinquent), “The court has exclusive jurisdiction, except as provided in ss. 938.17, 938.18, and 938.183, over any juvenile 10 years of age or older who is alleged to be delinquent.”⁵⁰ Under subsection (2), “If a petition alleging that a juvenile is

(cm) A licensed group home provided that the placement does not violate the conditions of the license.

(d) A nonsecure facility operated by a licensed child welfare agency.

(e) A licensed private or public shelter care facility.

(f) The home of a person not a relative, if the placement does not exceed 30 days, though the placement may be extended for an additional 30 days for cause by the court, and if the person has not had a license under s. 48.62 refused, revoked, or suspended within the last 2 years.

(g) A hospital as defined in s. 50.33 (2) (a) and (c) or physician’s office if the child is held under s. 48.20 (4) or (4m).

(h) A place listed in s. 51.15 (2) if the child is held under s. 48.20 (5).

(i) An approved public treatment facility for emergency treatment if the child is held under s. 48.20 (6).

(k) A facility under s. 48.58.

⁴⁹ Wis. Stat. § 938.02(10m) defines “juvenile” as “when used without further qualification, . . . a person who is less than 18 years of age, except that for purposes of investigating or prosecuting a person who is alleged to have violated a state or federal criminal law or any civil law or municipal ordinance, ‘juvenile’ does not include a person who has attained 17 years of age.”

⁵⁰ Wis. Stat. § 938.02(3m) defines “delinquent” as “a juvenile who is 10 years of age or older who has violated any state or federal criminal law, except as provided in ss. 938.17 [Jurisdiction over traffic, boating, snowmobile, and all-terrain vehicle violations and over civil law and ordinance violations], 938.18 [Jurisdiction for criminal proceedings for juveniles 14 or older; waiver hearing] and 938.183 [Original adult court jurisdiction for criminal proceedings], or who has committed a contempt of court, as defined in s. 785.01(1), as specified in s. 938.355(6g).”

delinquent is filed before the juvenile is 17 years of age, but the juvenile becomes 17 years of age before admitting the facts of the petition at the plea hearing or if the juvenile denies the facts, before an adjudication, the court retains jurisdiction over the case.”⁵¹ Wis. Stat. § 938.125 states,

The court has exclusive jurisdiction over a juvenile alleged to have violated a law punishable by forfeiture or a county, town, or other municipal ordinance, except as follows:

- (1) As provided under s. 938.17 [Jurisdiction over traffic, boating, snowmobile, and all-terrain vehicle violations and over civil law and ordinance violations].
- (2) The court has exclusive jurisdiction over a juvenile alleged to have violated an ordinance enacted under s. 118.163 (2) [Municipal truancy and school dropout ordinances] only if evidence is provided by the school attendance officer that the activities under s. 118.16 (5) [Truancy committee and plan] have been completed or were not required to be completed as provided in s. 118.16 (5m).

Once a juvenile is taken into custody under Wis. Stat. § 938.19 (Taking a juvenile into custody), the process for releasing or retaining custody closely tracks the procedures for release of a child reported as abused under the Children’s Code. Wis. Stat. § 938.19(1) states in part,

A juvenile may be taken into custody under any of the following:

- (a) A warrant.
-
- (c) A court order if there is a showing that the welfare of the juvenile demands that the juvenile be immediately removed from his or her present custody. The order shall specify that the juvenile be held in custody under s. 938.207.
- (d) Circumstances in which a law enforcement officer believes on reasonable grounds that any of the following conditions exists:
 -
 3. The juvenile is committing or has committed an act which is a violation of a state or federal criminal law.
 4. The juvenile has run away from his or her parents, guardian or legal or physical custodian.
 5. The juvenile is suffering from illness or injury or is in immediate danger from his or her surroundings and removal from those surroundings is necessary.
 -
 10. The juvenile is absent from school without an acceptable excuse under s. 118.15.

Under Wis. Stat. § 938.20 (Release or delivery from custody), the juvenile may be released to a parent or legal guardian or if a parent or legal guardian is unavailable or unwilling, the juvenile may be release to a responsible adult with counseling or warning if appropriate. Wis. Stat. § 938.20(2)(ag), (b). A juvenile over the age of 15 may be released without supervision after counseling or warning if appropriate. Wis. Stat. § 938.20(2)(c). “If the juvenile is a runaway, the person who took the juvenile into custody may release the juvenile to a home under s. 48.227 [Runaway homes].” Wis. Stat. § 938.20(2)(d). An intake worker “shall review the need to hold the juvenile in custody and shall make every effort to release the juvenile from custody as provided in par. (c) The intake worker shall base his or her decision as to whether to release the juvenile or to continue to hold the juvenile in custody on the criteria under s. 938.205 and criteria established under s. 938.06 (1) or (2).” Wis. Stat. § 938.20(7)(b). Under Wis. Stat. § 938.205(1),

⁵¹ Wis. Stat. § 938.02(1) (Definitions) defines “adult” as “a person who is 18 years of age or older, except that for purposes of investigating or prosecuting a person who is alleged to have violated any state or federal criminal law or any civil law or municipal ordinance, ‘adult’ means a person who has attained 17 years of age.”

A juvenile may be held under s. 938.207, 938.208, or 938.209 (1) if the intake worker determines that there is probable cause to believe the juvenile is within the jurisdiction of the court and if probable cause exists to believe any of the following:

- (a) That the juvenile will commit injury to the person or property of others if not held.
- (b) That the parent, guardian, or legal custodian of the juvenile or other responsible adult is neglecting, refusing, unable, or unavailable to provide adequate supervision and care and that services to ensure the juveniles safety and well-being are not available or would be inadequate.
- (c) That the juvenile will run away or be taken away so as to be unavailable for proceedings of the court or its officers, proceedings of the division of hearings and appeals in the department of administration for revocation of aftercare supervision, or action by the department or county department relating to a violation of a condition of the juveniles placement in a Type 2 juvenile correctional facility or a Type 2 residential care center for children and youth or a condition of the juveniles participation in the intensive supervision program under s. 938.534.

Various nonsecure placement options are listed in Wis. Stat. § 938.207(1)(a)–(k). A child may only be held in a juvenile detention facility if “the intake worker determines that one of” certain conditions apply, including “[t]he juvenile consents in writing to being held in order to protect him or her from an imminent physical threat from another and such secure custody is ordered by the court in a protective order” or “[p]robable cause exists to believe that the juvenile, having been placed in nonsecure custody by an intake worker under s. 938.207 or by the court under s. 938.21 (4), has run away or committed a delinquent act and no other suitable alternative exists.” Wis. Stat. § 938.208(3), (4).

If detention in a juvenile detention facility is deemed appropriate pursuant to Wis. Stat. § 938.208, the child may be held in a county jail pursuant to Wis. Stat. § 938.209(a), (b) under either of the following circumstances:

- (a) There is no other juvenile detention facility approved by the department or a county which is available and all of the following conditions are met:
 - 1. The jail meets the standards for juvenile detention facilities established by the department.
 - 2. The juvenile is held in a room separated and removed from incarcerated adults.
 - 3. The juvenile is not held in a cell designed for the administrative or disciplinary segregation of adults.
 - 4. Adequate supervision is provided.
 - 5. The court reviews the status of the juvenile every 3 days.
- (b) The juvenile presents a substantial risk of physical harm to other persons in the juvenile detention facility, as evidenced by previous acts or attempts, which can only be avoided by transfer to the jail. The conditions of par. (a) 1. to 5. shall be met. The juvenile shall be given a hearing and transferred only upon a court order.

5.4.1 Recommendation: Establish a mandatory response law directing any minor involved in prostitution or who is a victim of trafficking for sexual servitude away from the criminal justice system and into a protective system.

5.5 *Commercial sexual exploitation is identified as a type of abuse and neglect within child protection statutes.*

Wis. Stat. § 48.02(1) (Definitions), which is in the Children’s Code, defines “abuse” as, among other things,

- (b) Sexual intercourse or sexual contact under s. 940.225 [Sexual assault], 948.02 [Sexual assault of a child], 948.025 [Engaging in repeated acts of sexual assault of the same child], or 948.085 [Sexual assault of a child placed in substitute care].
- (c) A violation of s. 948.05 [Sexual exploitation of a child].
- (d) Permitting, allowing or encouraging a child to violate s. 944.30 [Prostitution].
- (e) A violation of s. 948.055 [Causing a child to view or listen to sexual activity].

(f) A violation of s. 948.10 [Exposing genitals or pubic area].

....

5.5.1 Recommendation: Amend Wis. Stat. § 48.02(1) (Definitions) to include violations of Wis. Stat. § 948.051 (Trafficking of a child), § 948.08 (Soliciting a child for prostitution) and § 948.07 (Child enticement) in the definition of abuse.

5.6 *The definition of “caregiver” (or similar term) in the child welfare statutes is broad enough to include a trafficker who has custody or control of a child in order to bring a trafficked child into protection of child protective services.*

Wis. Stat. § 48.981(am) (Abused or neglected children and abused unborn children), which sets out the requirements for reporting neglect and abuse, states, for purposes of that section,

‘Caregiver’ means, with respect to a child who is the victim or alleged victim of abuse or neglect or who is threatened with abuse or neglect, any of the following persons:

1. The child’s parent, grandparent, greatgrandparent, stepparent, brother, sister, stepbrother, stepsister, half brother, or half sister.
2. The child’s guardian.
3. The child’s legal custodian.
4. A person who resides or has resided regularly or intermittently in the same dwelling as the child.
5. An employee of a residential facility or residential care center for children and youth in which the child was or is placed.
6. A person who provides or has provided care for the child in or outside of the child’s home.
7. Any other person who exercises or has exercised temporary or permanent control over the child or who temporarily or permanently supervises or has supervised the child.
8. Any relative of the child other than a relative specified in subd.1.

5.7 *Crime victims’ compensation is specifically available to a child victim of sex trafficking or CSEC without regard to ineligibility factors.*

Wis. Stat. § 949.03(1)(b) (Compensable acts) specifically includes the following CSEC, trafficking and sex offenses as offenses for which victims may be compensated: Wis. Stat. § 948.02 (Sexual assault of a child), § 948.025 (Engaging in repeated acts of sexual assault of the same child), § 948.051 (Trafficking of a child), and § 948.07 (Child enticement). Wis. Stat. § 949.03(1)(b).

However, Wis. Stat. § 949.08 (Limitations on awards) does not provide exceptions for minor victims of trafficking or other commercial sexual exploitation crimes from the limitations on awards. Wis. Stat. § 949.08(1) requires that “the application was made within 1 year after the date of the personal injury or death, and the personal injury or death was the result of an incident or offense which had been reported to the police within 5 days of its occurrence or, if the incident or offense could not reasonably have been reported within such period, within 5 days of the time when a report could reasonably have been made. The department may waive the one-year requirement under this subsection in the interest of justice.” In addition, Wis. Stat. § 949.08(2), (2m) state in part,

- (2) No award may be ordered if the victim:
 - (a) Engaged in conduct which substantially contributed to the infliction of the victim’s injury or death or in which the victim could have reasonably foreseen could lead to the injury or death. This does not apply to awards to victims under s. 949.03 (1) (a).
 - (b) Committed a crime which caused or contributed to the victim’s injury or death.
 - (d) Has not cooperated with appropriate law enforcement agencies.

....

(2m) If a claimant other than a victim has not cooperated with the department in the administration of the program, no award may be ordered for the claimant.

- 5.7.1 Recommendation: Amend Wis. Stat. § 949.08 (Limitations on awards) to make the listed limitations on awards inapplicable to victims of trafficking and CSEC crimes, with a good cause exception to the limitation in Wis. Stat. § 949.08(2)(d).

5.8 *Victim-friendly procedures and protections are provided in the trial process for minors under 18.*

Wis. Stat. § 972.11(2) (Evidence and practice; civil rules applicable) provides special rules for the admission of evidence in cases involving certain sex offenses and crimes against children, including trafficking of a child under Wis. Stat. § 948.051. Wis. Stat. § 972.11(2)(b) (commonly called a “rape shield law”) provides,

(b) If the defendant is accused of a crime under s. 940.225 [Sexual assault], 948.02 [Sexual assault of a child], 948.025 [Engaging in repeated acts of sexual assault against the same child], 948.05 [Sexual exploitation of a child], 948.051 [Trafficking of a child], . . . or under s. 940.302 (2) [Human trafficking], if the court finds that the crime was sexually motivated, as defined in s. 980.01 (5), any evidence concerning the complaining witness’s prior sexual conduct⁵² or opinions of the witness’s prior sexual conduct and reputation as to prior sexual conduct shall not be admitted into evidence during the course of the hearing or trial, nor shall any reference to such conduct be made in the presence of the jury, except the following, subject to s. 971.31 (11):⁵³

1. Evidence of the complaining witness’s past conduct with the defendant.
2. Evidence of specific instances of sexual conduct showing the source or origin of semen, pregnancy or disease, for use in determining the degree of sexual assault or the extent of injury suffered.
3. Evidence of prior untruthful allegations of sexual assault made by the complaining witness.

The court may order testimony of any child witness to be taken via closed-circuit television under Wis. Stat. § 972.11(2m), if all of the following things apply. First, the court must find that the “the presence of the defendant during the taking of the child’s testimony will result in the child suffering serious emotional distress such that the child cannot reasonably communicate” and that taking the child’s testimony in another room and “simultaneously televising the testimony in the courtroom by means of closed-circuit audiovisual equipment is necessary to minimize the trauma to the child of testifying in the courtroom setting and to provide a setting more amenable to securing the child witness’s uninhibited, truthful testimony.” Wis. Stat. § 972.11(2m)(a)(1). Second, the trial in which the child witness may be called will start before the child turns 12 or before the child turns 16 if “the court finds that the interests of justice warrant that the child’s testimony be taken in a room other than the courtroom and simultaneously televised in the courtroom by means of closed-circuit audiovisual equipment.” Wis. Stat. § 972.11(2m)(a)(2). In determining “interests of justice,” the court may consider the following factors under Wis. Stat. § 972.11(2m)(b), including,

1. The child’s chronological age, level of development and capacity to comprehend the significance of the events and to verbalize about them.
2. The child’s general physical and mental health.
3. Whether the events about which the child will testify constituted criminal or antisocial conduct against the child or a person with whom the child had a close emotional relationship and, if the conduct constituted a battery or a sexual assault, its duration and the extent of physical or emotional injury

⁵² Wis. Stat. § 972.11(2)(a) states, “In this subsection, ‘sexual conduct’ means any conduct or behavior relating to sexual activities of the complaining witness, including but not limited to prior experience of sexual intercourse or sexual contact, use of contraceptives, living arrangement and life-style.”

⁵³ Wis. Stat. § 971.31(11) states in part that “evidence which is admissible under s. 972.11 (2) must be determined by the court upon pretrial motion to be material to a fact at issue in the case and of sufficient probative value to outweigh its inflammatory and prejudicial nature before it may be introduced at trial.”

thereby caused.

4. The child's custodial situation and the attitude of other household members to the events about which the child will testify and to the underlying proceeding.

5. The child's familial or emotional relationship to those involved in the underlying proceeding.

6. The child's behavior at or reaction to previous interviews concerning the events involved.

7. Whether the child blames himself or herself for the events involved or has ever been told by any person not to disclose them; whether the child's prior reports to associates or authorities of the events have been disbelieved or not acted upon; and the child's subjective belief regarding what consequences to himself or herself, or persons with whom the child has a close emotional relationship, will ensue from providing testimony.

8. Whether the child manifests or has manifested symptoms associated with posttraumatic stress disorder or other mental disorders, including, without limitation, reexperiencing the events, fear of their repetition, withdrawal, regression, guilt, anxiety, stress, nightmares, enuresis, lack of self-esteem, mood changes, compulsive behaviors, school problems, delinquent or antisocial behavior, phobias or changes in interpersonal relationships.

....

If the court orders a child's testimony is taken by closed-circuit television, the court is directed to do several things, including, scheduling the testimony during a time when the child's energy and attention span should be the greatest and on a date when the child's recollection should be fresh, provide a room for the testimony that has adequate privacy, try to put the child at ease before questioning begins, and decide if the child understands that "it is wrong to tell a lie and will testify truthfully if the child's developmental level or verbal skills are such that administration of an oath or affirmation in the usual form would be inappropriate." Wis. Stat. § 972.11(2m)(bm).

Wis. Stat. § 972.11(2m)(c) restricts the persons who may be present during the child's testimony to include only the camera operator, the parents or guardian of the child, and "[o]ne person designated by the attorney for the state and approved by the court and one person designated by either the defendant or the attorney for the defendant and approved by the court."

5.8.1 Amend Wis. Stat. § 972.11(2)(b) to include Wis. Stat. § 948.08 (Soliciting a child for prostitution) and § 948.05 (Sexual exploitation of a child) as instances in which a minor victim witness can be protected from traumatizing cross-examination regarding prior sexual activity.

5.9 *Expungement or sealing of juvenile arrest or criminal records resulting from arrests or adjudications for prostitution-related offenses committed as a result of, or in the course of, the commercial sexual exploitation of a minor is available within a reasonable time after turning 18.*

Expungement of juvenile records is not automatic, but Wis. Stat. § 938.355(4m) (Dispositional orders) provides for expungement of juvenile records upon the filing of a petition. Wis. Stat. § 938.355(4m)(a) states,

(a) A juvenile who has been adjudged delinquent under s. 48.12, 1993 stats., or s. 938.12 may, on attaining 17 years of age, petition the court to expunge the courts record of the juveniles adjudication. Subject to par. (b), the court may expunge the record if the court determines that the juvenile has satisfactorily complied with the conditions of his or her dispositional order and that the juvenile will benefit from, and society will not be harmed by, the expungement.

Expungement is also available under Wis. Stat. § 973.015(1)(a) (Special disposition), which provides in part, “Subject to par. (b)⁵⁴ and except as provided in par. (c),⁵⁵ when a person is under the age of 25 at the time of the commission of an offense for which the person has been found guilty in a court for violation of a law for which the maximum period of imprisonment is 6 years or less, the court may order at the time of sentencing that the record be expunged upon successful completion of the sentence if the court determines the person will benefit and society will not be harmed by this disposition.” Pursuant to section (2),

A person has successfully completed the sentence if the person has not been convicted of a subsequent offense and, if on probation, the probation has not been revoked and the probationer has satisfied the conditions of probation. Upon successful completion of the sentence the detaining or probationary authority shall issue a certificate of discharge which shall be forwarded to the court of record and which shall have the effect of expunging the record. If the person has been imprisoned, the detaining authority shall also forward a copy of the certificate of discharge to the department.

5.10 Victim restitution and civil remedies are authorized by law for minor victims of sex trafficking or CSEC.

Restitution for bodily injury is available to victims of trafficking and CSEC crimes under Wis. Stat. § 973.20(1r) (Restitution), which provides in part, “When imposing sentence or ordering probation for any crime, other than a crime involving conduct that constitutes domestic abuse under s. 813.12(1)(am) or 968.075(1)(a), for which the defendant was convicted, the court, in addition to any other penalty authorized by law, shall order the defendant to make full or partial restitution under this section to any victim of a crime considered at sentencing or, if the victim is deceased, to his or her estate, unless the court finds substantial reason not to do so and states the reason on the record.” Wis. Stat. § 973.20(3)(a) states, “If a crime considered at sentencing resulted in bodily injury, the restitution order may require that the defendant,” among other things, “(a) Pay an amount equal to the cost of necessary medical and related professional services and devices relating to physical, psychiatric and psychological care and treatment.” In addition, Wis. Stat. § 973.20(5) states,

In any case, the restitution order may require that the defendant do one or more of the following:

- (a) Pay all special damages, but not general damages, substantiated by evidence in the record, which could be recovered in a civil action against the defendant for his or her conduct in the commission of a crime considered at sentencing.
- (b) Pay an amount equal to the income lost, and reasonable out-of-pocket expenses incurred, by the person against whom a crime considered at sentencing was committed resulting from the filing of charges or cooperating in the investigation and prosecution of the crime.
- (c) Reimburse any person or agency for amounts paid as rewards for information leading to the apprehension or successful prosecution of the defendant for a crime for which the defendant was convicted or to the apprehension or prosecution of the defendant for a read-in crime.
- (d) If justice so requires, reimburse any insurer, surety or other person who has compensated a victim for a loss otherwise compensable under this section.

⁵⁴ Wis. Stat. § 973.015(1)(b) states, “The court shall order at the time of sentencing that the record be expunged upon successful completion of the sentence if the offense was a violation of s. 942.08 (2) (b), (c), or (d) [Invasion of privacy], and the person was under the age of 18 when he or she committed it.”

⁵⁵ Wis. Stat. § 973.015(1)(c) provides,

No court may order that a record of a conviction for any of the following be expunged:

1. A Class H felony, if the person has, in his or her lifetime, been convicted of a prior felony offense, or if the felony is a violent offense, as defined in s. 301.048 (2) (bm), or is a violation of s. 940.32 [Stalking], 948.03 (2) or (3) [Physical abuse of a child], or 948.095 [Sexual assault of a child by a school staff person or a person who works or volunteers with children]
2. A Class I felony, if the person has, in his or her lifetime, been convicted of a prior felony offense, or if the felony is a violent offense, as defined in s. 301.048 (2) (bm), or is a violation of s. 948.23 [Concealing death of child].

Wis. Stat. § 973.20(4m) specifically provides restitution to minor victims of trafficking by stating,

If the defendant violated s. 940.225 [Sexual assault], 948.02 [Sexual assault of a child], 948.025 [Engaging in repeated acts of sexual assault of the same child], 948.05 [Sexual exploitation of a child], 948.051 [Trafficking of a child], 948.06, 948.07 [Child enticement], 948.08 [Soliciting a child for prostitution], or 948.085 [Sexual assault of a child placed in substitute care] or s. 940.302 (2) [Human trafficking], if the court finds that the crime was sexually motivated, as defined in s. 980.01 (5) [Definitions],⁵⁶ and sub. (3) (a) does not apply, the restitution order may require that the defendant pay an amount, not to exceed \$10,000, equal to the cost of necessary professional services relating to psychiatric and psychological care and treatment. The \$10,000 limit under this subsection does not apply to the amount of any restitution ordered under sub. (3) or (5) for the cost of necessary professional services relating to psychiatric and psychological care and treatment.

Finally, Wis. Stat. § 973.20(4o) states,

If the defendant violated s. 940.302 (2) [Human trafficking] or 948.051 [Trafficking of a child], and sub. (2) or (3) does not apply, the restitution order may require that the defendant pay an amount equal to any of the following:

- (a) The costs of necessary transportation, housing, and child care for the victim.
- (b) The greater of the following:
 1. The gross income gained by the defendant due to the services of the victim.
 2. The value of the victims services as provided under the state minimum wage.
- (c) Any expenses incurred by the victim to his or her city, state, or country of origin.
- (d) The costs of relocating the victim to his or her city, state, or country of origin.

Wis. Stat. § 948.051 (Trafficking of a child) provides victims with a civil cause of action. Wis. Stat. § 948.051(3) states, “Any person who incurs an injury or death as a result of a violation of sub. (1) or (2) may bring a civil action against the person who committed the violation. In addition to actual damages, the court may award punitive damages to the injured party, not to exceed treble the amount of actual damages incurred, and reasonable attorney fees.”

In addition, if racketeering crimes are committed under Wis. Stat. § 946.83 (Prohibited activities), Wis. Stat. § 946.87(4) establishes a statutory cause of action permitting an injured victim to recover “2 times the actual damages sustained and, when appropriate, punitive damages. The person shall also recover attorney fees and costs of the investigation and litigation reasonably incurred.” Wis. Stat. § 946.87(4).

5.11 Statutes of limitations for civil and criminal actions for child sex trafficking or CSEC offenses are eliminated or lengthened sufficiently to allow prosecutors and victims a realistic opportunity to pursue criminal actions and legal remedies.

Under Wis. Stat. § 939.74(1) (Time limitations on prosecutions), the general statute of limitations for criminal prosecutions is 6 years for felonies and 3 years for misdemeanors. Wis. Stat. § 939.74(1). Wis. Stat. § 939.74(2) sets out one set of exception to the general statute of limitations. Prosecutions for violations of Wis. Stat. § 948.02(1) (Sexual assault of a child) and § 948.025(1)(a)–(d) (Engaging in repeated acts of sexual assault of the same child), among other listed crimes, can be brought at any time. Wis. Stat. § 939.74(2)(a). Prosecutions for violations of Wis. Stat. § 948.02(2) (Sexual assault of a child), § 948.025(1)(b) (Engaging in repeated acts of sexual assault of the same child), § 948.05 (Sexual exploitation of a child), § 948.07(1)–(4) (Child enticement), and § 948.08 (Soliciting a child for prostitution), among other listed crimes, must be brought “before the victim reaches the age of 45 years.” Wis. Stat. § 939.74(2)(c). Prosecutions for violations of Wis. Stat. § 948.07(5), (6) (Child enticement), among other listed crimes, must be brought “before the victim

⁵⁶ See *supra* note 22.

reaches the age of 26 years.” Wis. Stat. § 939.74(2)(cm). Finally, barring exceptions, prosecutions for violations of Wis. Stat. § 948.051 (Trafficking of a child) must be brought “before the victim reaches the age of 24.” Wis. Stat. § 939.74(2)(d).

With regard to civil actions, the statute of limitations is tolled for minor victims until 2 years after they reach the age of majority. Wis. Stat. § 893.16(1). Additionally, Wis. Stat. § 893.587 (Sexual assault of a child; limitation) states, “An action to recover damages for injury caused by an act that would constitute a violation of s. 948.02 [Sexual assault of a child], [or] 948.025 [Engaging in repeated acts of sexual assault of the same child] . . . shall be commenced before the injured party reaches the age of 35 years or be barred.” However, this extension of the statute of limitations does not apply to the civil cause of action in Wis. Stat. § 948.051 (Trafficking of a child), which would most likely fall under the 3 year limitation in Wis. Stat. § 893.54(1) (Injury to the person), which states that a 3 year statute of limitations applies for “action[s] to recover damages for injuries to the person.”

5.11.1 Recommendation: Amend Wis. Stat. § 939.74(2)(d) to eliminate entirely the statute of limitations for Wis. Stat. § 948.051 (Trafficking of a child).

Framework Issue 6: Criminal justice tools for investigation and prosecutions

Legal Components:

- 6.1 *Training on human trafficking and domestic minor sex trafficking for law enforcement is statutorily mandated.*
- 6.2 *Single party consent to audiotaping is permitted in law enforcement investigations.*
- 6.3 *Domestic minor sex trafficking investigations may use wiretapping to investigate the crime.*
- 6.4 *Using a law enforcement decoy posing as a minor to investigate buying or selling of commercial sex acts is not a defense to soliciting, purchasing, or selling sex with a minor.*
- 6.5 *Using the Internet to investigate buyers and traffickers is a permissible investigative technique.*
- 6.6 *Law enforcement and child welfare agencies are mandated to promptly report missing and recovered children.*

Legal Analysis:

- 6.1 *Training on human trafficking and domestic minor sex trafficking for law enforcement is statutorily mandated.*

Wis. Stat. § 165.86(2) (Law enforcement training) requires the state department of justice to

(a) . . . supply the training required for all recruits in the state under the preparatory training standards and time limits set by the board and for law enforcement officers, jail officers and juvenile detention officers in this state.

(b) Organize a program of training, which shall encourage utilization of existing facilities and programs through cooperation with federal, state, and local agencies and institutions presently active in this field. . . . [T]he department shall cooperate in the creation and operation of other advanced and special courses, . . . that meet the curriculum standards recommended by the board. . . .

Specialized training on child abuse is direct through Wis. Stat. § 48.981(8)(a) (Abused or neglected children and abused unborn children), which states in part,

The department, the county departments, and a licensed child welfare agency under contract with the department in a county having a population of 500,000 or more to the extent feasible shall conduct continuing education and training programs for staff of the department, the county departments, licensed child welfare agencies under contract with the department or a county department, law

enforcement agencies, and the tribal social services departments, persons and officials required to report, the general public, and others as appropriate. . . .

Although this training does not expressly include identification of or reporting on commercial sexual exploitation of children, this subject could be included with the scope of abuse and neglect.

6.1.1 Recommendation: Amend Wis. Stat. § 165.86 (Law enforcement training) to include the identification and treatment of domestic minor sex trafficking victims in the required training for all law enforcement officers.

6.2 *Single party consent to audiotaping is permitted in law enforcement investigations.*

Pursuant to Wis. Stat. § 968.31(2) (Interception and disclosure of wire, electronic or oral communications prohibited),

(2) It is not unlawful under ss. 968.28 to 968.37:

....

(b) For a person acting under color of law to intercept a wire, electronic or oral communication, where the person is a party to the communication or one of the parties to the communication has given prior consent to the interception.

(c) For a person not acting under color of law to intercept a wire, electronic or oral communication where the person is a party to the communication or where one of the parties to the communication has given prior consent to the interception unless the communication is intercepted for the purpose of committing any criminal or tortious act in violation of the constitution or laws of the United States or of any state or for the purpose of committing any other injurious act.

....

6.3 *Domestic minor sex trafficking investigations may use wiretapping to investigate the crime.*

Wisconsin's wiretapping law does not permit wiretapping for investigations of suspected trafficking and CSEC crimes. Wis. Stat. § 968.28 (Application for court order to intercept communications) states,

The attorney general together with the district attorney of any county may approve a request of an investigative or law enforcement officer to apply to the chief judge of the judicial administrative district for the county where the interception is to take place for an order authorizing or approving the interception of wire, electronic or oral communications. The chief judge may under s. 968.30 grant an order authorizing or approving the interception of wire, electronic or oral communications by investigative or law enforcement officers having responsibility for the investigation of the offense for which the application is made. The authorization shall be permitted only if the interception may provide or has provided evidence of the commission of the offense of homicide, felony murder, kidnapping, commercial gambling, bribery, extortion, dealing in controlled substances or controlled substance analogs, a computer crime that is a felony under s. 943.70, or any conspiracy to commit any of the foregoing offenses.

6.3.1 Recommendation: Amend Wis. Stat. § 968.28 (Application for court order to intercept communications) to include violations of Wis. Stat. § 948.051 (Trafficking of a child), § 948.08 (Soliciting a child for prostitution) and § 948.07 (Child enticement) as offenses for which investigation using wiretapping is authorized.

6.4 *Using a law enforcement decoy posing as a minor to investigate buying or selling of commercial sex acts is not a defense to soliciting, purchasing, or selling sex with a minor.*

No statutory permission to utilize undercover law enforcement officers or agents to investigate the sex trafficking of minors through prostitution is found in the code. A close analogy is the use of the Internet to investigate traffickers and buyers of minors. The language of Wis. Stat. § 948.075(1r) (Use of a computer to facilitate a child sex crime) seems to contemplate online investigations using law enforcement decoys to investigate potential buyers. It states, “Whoever uses a computerized communication system to communicate with an individual who the actor believes or has reason to believe has not attained the age of 16 years with intent to have sexual contact or sexual intercourse with the individual in violation of s. 948.02 (1) or (2) is guilty of a Class C felony.” Wis. Stat. § 948.075(1r). However, subsection (3) requires that “[p]roof that the actor did an act, other than use a computerized communication system to communicate with the individual, to affect the actors intent under sub. (1r) shall be necessary to prove that intent.”

6.4.1 Recommendation: Add a provision to expressly permit law enforcement to utilize decoys in investigating child sex trafficking through prostitution and to prohibit a defendant in such a case from asserting a defense that the person engaged in prostitution was not, in fact, a minor.

6.5 *Using the Internet to investigate buyers and traffickers is a permissible investigative technique.*

Wis. Stat. § 948.075(1r) (Use of a computer to facilitate a child sex crime) suggests that law enforcement may be able to use the Internet to investigate potential buyers. It states, “Whoever uses a computerized communication system to communicate with an individual who the actor believes or has reason to believe has not attained the age of 16 years with intent to have sexual contact or sexual intercourse with the individual in violation of s. 948.02 (1) or (2) is guilty of a Class C felony.” Wis. Stat. § 948.075(1r). However, subsection (3) requires that “[p]roof that the actor did an act, other than use a computerized communication system to communicate with the individual, to affect the actors intent under sub. (1r) shall be necessary to prove that intent.”

In addition, case law supports the use of the Internet in investigating an offense under Wis. Stat. § 948.07 (Child enticement) which prohibits intentionally causing or attempting to cause a minor under 18 “to go into any vehicle, building, room or secluded place” for the purpose of, among other things, engaging in prostitution, and recording the child engaging in sexually explicit conduct.⁵⁷

6.6 *Law enforcement and child welfare agencies are mandated to promptly report missing and recovered children.*

There is no law in Wisconsin requiring the reporting of missing children. However, Wis. Stat. § 165.785 (Crime alert network) provides that “the department [of justice] may develop, administer, and maintain an integrated crime alert network to provide information regarding known or suspected criminal activity, crime prevention, and missing or endangered persons to state agencies, law enforcement officers, and members of the private sector.” Wis. Stat. § 165.785(1).

6.6.1 Recommendation: Amend Wis. Stat. § 165.785 (Crime alert network) to mandate the crime alert network to track missing and exploited children as well as rescued children.

⁵⁷ In *State v. Robins*, 646 N.W. 2d 287, 288 (Wis. 2002) (footnote omitted), the Wisconsin Supreme Court stated,

This is a prosecution for attempted child enticement arising out of an internet ‘sting’ operation by the Department of Justice (DOJ). The primary issue is whether the child enticement statute is violated when there is no actual child victim, but, rather, an adult government agent posing online as a child. . . . We conclude that an attempted child enticement under Wis. Stat. § 948.07 (1999-2000) may be charged where the intervening extraneous factor that makes the offense an attempted rather than completed crime is the fact that unbeknownst to the defendant, the ‘victim’ is not a child at all, but an adult posing as a child. . . . Finally, because the child enticement statute regulates conduct rather than speech or expression, the First Amendment is not implicated by this prosecution.

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