

OPEN FOR THE WRONG KIND OF BUSINESS: AN ANALYSIS OF VIRGINIA'S LEGISLATIVE APPROACH TO COMBATING COMMERCIAL SEXUAL EXPLOITATION

INTRODUCTION

It is 2014¹ in suburban Loudoun, Virginia, the richest county in the United States.² You have retired for the day and settled into the couch for an evening of B-rated television cinema. In the midst of a commercial break, however, your attention span wanes, and you casually turn to MSNBC. It is here you discover a re-run of an undercover program Meredith Vieira once hosted documenting the epidemic of modern day sexual slavery in America.³ Due to recent lobbying efforts in the local D.C. area, you are familiar with the concept of human sex trafficking and intrigued to learn it is occurring in the United States. In fact, within the first thirty seconds of the program one of the victims mentions how she was originally lured from her home country and into sexual slavery with the promise of employment in Virginia.⁴ Throughout the hour, the camera cascades between shots of dilapidated street corners, risqué massage parlors, penitentiaries, and red-light districts.⁵ International victims of human trafficking share their stories, and the narrator sheds light on the horrors of domestic sex trafficking in the United States.⁶

For a short time after the program, you are indignant. This feeling, however, quickly begins to fade. After all, your neighborhood is wealthy and respectable, not riddled with “massage” parlors and prostitution rings. The local schools are secure, and tonight your teenage niece is well protected within the confines of her suburban home. Perhaps human trafficking occurs in the warehouses of New York or on the streets of Vegas, but not in your backyard. Local Virginians are certainly not trafficking the “girl next door” or recruiting minors at the high school

¹ This introductory narrative draws from an actual criminal case, *United States v. Strom*, involving conduct occurring in 2009 and 2012. See Affidavit in Support of a Criminal Complaint and Arrest Warrants at ¶ 2, *United States v. Strom*, 2013 WL 6271932 (E.D. Va. Dec. 4, 2013) (No. 1:12cr159) [hereinafter Affidavit].

² Tom Van Riper, *America's Richest Counties*, FORBES.COM (Apr. 25, 2013, 10:14 AM), www.forbes.com/sites/tomvanriper/2013/04/25/americas-richest-counties/.

³ *MSNBC Undercover: Sex Slaves in America* (MSNBC television broadcast Dec. 3, 2007), transcript available at <http://www.nbcnews.com/id/22056066/ns/msnbc-documentaries/t/msnbc-undercover-sex-slaves-america/#.Us3dlj-eWZF>.

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

across the street. As you prepare to turn in for the night, you hear a knock on the door of your neighbor's apartment. You pay it little mind, and nestle into the safety of your bed free from any thought that Virginia is home to a modern-day slave trade.

Across the hall, Justin Strom, Donyel Dove, Michael Jefferies, Henock Ghile, and one of ten identified victims of human sex trafficking are knocking on your neighbor's door. In an attempt to solicit men to purchase sexual intercourse, Strom or one of his associates from the Fairfax "set" of the Crips is selling the body of a young girl.⁷ In 2009, Victim 1 was 16 years old when Strom "approached her at a Metro station and told her that she was pretty," soliciting her to enter into prostitution and testing her sexual abilities "in the woods behind the Metro station."⁸ Before prostituting herself, Victim 1 was given cocaine, ecstasy, marijuana, and alcohol.⁹ When she expressed her desire to leave the lifestyle, Strom "choked her and threatened her with additional violence."¹⁰ Is she the one knocking? Perhaps it is Victim 2. She is 17 and was approached by a juvenile associate of Strom at her local high school.¹¹ The associate flattered her and continued to solicit Victim 2's "friendship" over Facebook despite Victim 2's assertion she did not want to sleep with anyone.¹² After accepting an invitation to Strom's home under the pretense of this "friendship," members of the gang proceeded to take nude photographs of Victim 2, who eventually began to prostitute herself.¹³

More likely, however, it is Victim 4 knocking. She was solicited by an associate of Strom over a dating website.¹⁴ During her *first* encounter with the gang, she was escorted from door-to-door in an Arlington apartment complex so that she might solicit men for sexual intercourse; she had over ten customers that day.¹⁵ Hopefully, Victim 5 is not the one at your neighbor's door. Victim 5 was 17 when solicited by the gang on Facebook.¹⁶ When she agreed to a meeting and discovered the gang desired to prostitute her, she stated "she did not wish to participate."¹⁷ In a seeming attempt to deter Strom's continued proposition to test her

⁷ See Affidavit, *supra* note 1, ¶¶ 2, 4–6, 12.

⁸ *Id.* ¶ 12.

⁹ *Id.* ¶ 15.

¹⁰ *Id.* ¶ 17.

¹¹ *Id.* ¶¶ 18, 36, 38–39.

¹² *Id.* ¶ 39–40.

¹³ *Id.* ¶ 42–44.

¹⁴ *Id.* ¶ 61.

¹⁵ See *id.* ¶¶ 63–65.

¹⁶ *Id.* ¶ 72.

¹⁷ *Id.* ¶ 73.

sexually after her refusal, she informed him of her age.¹⁸ Undeterred, Strom again propositioned Victim 5 for sex, telling her she needed to have intercourse with the gang members as a type of “gang initiation.”¹⁹ Strom then offered Victim 5 powder cocaine, which she rejected and slapped out of his hand.²⁰ Strom quickly “struck Victim 5, and slammed her head against the window of the vehicle.”²¹ She was then forced to ingest cocaine and pulled out of the car by Strom at knifepoint.²² While holding the knife to her neck, Strom forced her to perform oral and then vaginal sex on him, cutting her when she initially refused.²³ Victim 5 was then taken into a local apartment where she was raped by fourteen men.²⁴ The gang labeled her a “whore” and “slut” who “got what she had coming,” before returning her home and threatening to kill her if she spoke of the events.²⁵

Victim 7 was only 16 when she received a friend request on Facebook from a member of Strom’s gang.²⁶ This new “friend” picked up her and Victim 8 from Victim 7’s home.²⁷ When Victim 7 discovered the nature of the enterprise, she informed Strom she was not interested in participating.²⁸ The girls, however, were told to simply “watch and learn.”²⁹ They were coerced into witnessing certain women working the neighborhood for Strom enter into townhouses and apartments to perform sex acts.³⁰ Furthermore, Strom continued to ask Victims 7 and 8 to prostitute themselves and have sex with the men in the car as a means of “gang initiation.”³¹ A couple of days later, 17-year-old Victim 8 again met with Strom, who stated that he and the gang needed to try her out before utilizing her as a prostitute.³² Victim 8 informed the men that she and Victim 7 were only minors, but “[t]he men replied that younger was better because they could make more money off young girls.”³³

¹⁸ *See id.*

¹⁹ *Id.* ¶ 74.

²⁰ *Id.*

²¹ *Id.*

²² *Id.* ¶ 75.

²³ *Id.*

²⁴ *Id.* ¶ 76.

²⁵ *Id.* ¶ 77.

²⁶ *Id.* ¶ 110.

²⁷ *Id.* ¶¶ 112, 114.

²⁸ *Id.* ¶ 113.

²⁹ *Id.*

³⁰ *Id.* ¶ 114.

³¹ *Id.*

³² *Id.* ¶¶ 114, 118.

³³ *Id.* ¶ 118.

In March of 2012, Justin Strom, Donyel Dove, Michael Jefferies, and Henock Ghile were charged in the United States District Court for the Eastern District of Virginia with “Conspiracy to Transport a Juvenile to Engage in a Commercial Sex Act,” in violation of 18 U.S.C. § 1594.³⁴ In only the first *three months* of 2012, this marked the sixteenth case of human trafficking charged in the Eastern District of Virginia.³⁵ Fortunately, federal prosecutors in Virginia are taking a strong stance against human trafficking,³⁶ especially considering the Commonwealth of Virginia does not itself have a comprehensive human trafficking statute. Whereas, under federal law, minors coerced or solicited into prostitution are considered victims of human sex trafficking,³⁷ under Virginia law, victims of “human trafficking” do not legally exist.

Human trafficking, however, is occurring within the Commonwealth. As highlighted by the recent indictment of Justin Strom and his associates, *Virginians* are trafficking other *Virginians* within *Virginia*. In such situations, the Commonwealth should not have to continually rely on the federal government to manufacture jurisdiction and take legal responsibility for the prosecution of these perpetrators. It is *Virginia’s* responsibility to ensure that its officials are supplied with the proper legislative and financial resources to incapacitate these offenders and rehabilitate their victims. Despite bipartisan support, efforts by legislators such as Frank Wolf (R) and Adam Ebbin (D) have failed to foster the creation of a new anti-trafficking statute.³⁸ Virginia legislators have instead attempted to address the issue by making smaller legislative reforms, such as amending the text of traditional common law felonies within the Virginia Code.³⁹ According to Delegate Ebbin, “[i]f we had a comprehensive trafficking statute, it would be

³⁴ Criminal Complaint, *Strom*, 2013 WL 6271932 (No. 1:12cr159); *see also* 18 U.S.C. §§ 1591, 1594(c) (2012) (criminalizing conspiracy to transport juveniles “to engage in a commercial sex act”).

³⁵ Pierre Thomas & Marisa Taylor, *Gang Members Arrested on Charges of Sex Trafficking Suburban Teens*, ABCNEWS.COM (Mar. 31, 2012), <http://abcnews.go.com/US/gang-members-arrested-alleged-suburban-teen-prostitution-ring/story?id=16046155>.

³⁶ *Id.* (“The message is clear,” said U.S. Attorney [Neil] MacBride. “Law enforcement is looking for you, charging you, and putting you behind bars for the rest of your life.”).

³⁷ 22 U.S.C. § 7102(8) (2012). “The term ‘severe forms of trafficking in persons’ means—(A) sex trafficking in which a commercial sex act is induced by force, fraud, or coercion, or in which the person induced to perform such act has not attained 18 years of age . . .” *Id.*; *see also id.* § 7102(13) (defining “victim of a severe form of trafficking”).

³⁸ Adam Rhew, *Human Trafficking in Virginia Part II*, NBC29.COM, <http://www.nbc29.com/story/13481974/human-trafficking-in-virginia-part-ii> (last updated Nov. 24, 2010).

³⁹ *See id.*

easier for law enforcement and local commonwealth's attorneys to prosecute and it would fill in the holes in our current laws."⁴⁰ Nonetheless, in 2010, then Virginia Attorney General Ken Cuccinelli remarked on the issue that the government was not "at a point where it warrants spending state dollars on creating essentially a new social welfare program."⁴¹ He instead insisted that Virginia's officials are sufficiently equipped with the tools needed to combat trafficking, and that "[t]he structure of the law, to me, isn't the critical thing It's do you cover the battlefield? And we do."⁴²

Is this the case? Is the Virginia legislature's preference for expanding the existing code to incorporate the elements of a human trafficking offense rather than creating a comprehensive anti-trafficking program effective in combating this criminal enterprise?⁴³ Does the Virginia legislature fully understand what the so-called battlefield is? At first glance, it would seem that in this modern era a king does not weigh down his warriors by requiring them to swing the mace, carry the battle-ax, load the crossbow, and build the siege machine when weapons of modern warfare are a vote and signature away. Nevertheless, Virginia's unique legislative approach to combating human trafficking merits further exploration. Could it, in fact, prove to be an effective model in the fight against this modern day slave trade, and are Virginia's officials utilizing the tools the Attorney General claimed were at their disposal? In attempting to answer these questions, Part I addresses the case history and current state of commercial sexual exploitation law within the Commonwealth of Virginia. Part II then specifically focuses on the recent legislative amendments made in response to the anti-trafficking lobbying effort and asks if those amendments are sufficient to accomplish their respective goals. Lastly, Part III compares Virginia's current anti-trafficking "battlefield approach" to that of a representative state's comprehensive legislative model and recommends what changes, if any, must necessarily be made so the Commonwealth might more effectively combat the modern day slave trade that is human sex trafficking.⁴⁴

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.*

⁴³ For purposes of this Note, Virginia's current legislative approach is referred to as the "battlefield approach."

⁴⁴ In 2011, Shared Hope International published an in-depth analysis of Virginia's commercial sexual exploitation laws and provided Virginia with some specific statutory recommendations for improving its legislative model. SHARED HOPE INT'L, RAPID ASSESSMENT ON DOMESTIC MINOR SEX TRAFFICKING: VIRGINIA (2011) [hereinafter RAPID ASSESSMENT: VIRGINIA], available at <http://sharedhope.org/wp-content/uploads/2012/09/>

I. COMMERCIAL SEXUAL EXPLOITATION IN VIRGINIA: LEGISLATION AND CASE LAW

Federal law defines human sex trafficking as “sex trafficking in which a commercial sex act is induced by force, fraud, or coercion, or in which the person induced to perform such act has not attained 18 years of age.”⁴⁵ Unlike under federal law, however, the Commonwealth of Virginia lacks an enumerated human trafficking statute, making it difficult, if not impossible, to conduct an analysis of human sex trafficking-related offenses as prosecuted under state law. Furthermore, any type of physical or sexual abuse experienced as a result of a victim’s commercial sexual exploitation in Virginia is not coded or recorded separately from non-commercial abuse, making it practically impossible to distinguish the offenses for analytical purposes.⁴⁶

A. Virginia Legislation and Commercial Sexual Exploitation

As there is no comprehensive human trafficking statute at present, the legislative foundation for this analysis will begin by utilizing the three Virginia statutes most likely to be employed by commonwealth attorneys if faced with a potential sex trafficking prosecution. These seem to be section 18.2-48 of the Virginia Code, concerning abduction for profit; section 18.2-355, concerning detaining someone for prostitution; and section 18.2-356, concerning making a profit by prostituting another. Each statute is reproduced below. In two of these three code sections, however, the provisions that might prove most useful in a human trafficking prosecution were only just approved in April of 2011.⁴⁷ These changes are italicized in the statutes below:

§ 18.2-48. Abduction with intent to extort money or for immoral purpose.

Abduction (i) *of any person* with the intent to extort money or pecuniary benefit, (ii) of any person with intent to defile such person, (iii) of any child under sixteen years of age for the purpose of concubinage or *prostitution*, (iv) *of any person for the purpose of*

VirginiaRA.pdf; *see also* SHARED HOPE INT’L, 2013 PROTECTED INNOCENCE CHALLENGE: STATE REPORT CARDS ON THE LEGAL FRAMEWORK OF PROTECTION FOR THE NATION’S CHILDREN (2013) [hereinafter PROTECTED INNOCENCE], *available at* <http://sharedhope.org/wp-content/uploads/2013/11/ProtectedInnocenceChallenge2013.pdf>. This Note will not attempt to rehash Shared Hope’s research, but will provide a holistic analysis of Virginia’s common law and the legislative changes made following Shared Hope’s report.

⁴⁵ 22 U.S.C. § 7102(8) (2012). For purposes of this Note, “human sex trafficking” is defined in accord with the federal definition of the term “severe forms of trafficking in persons.” *See id.*

⁴⁶ RAPID ASSESSMENT: VIRGINIA, *supra* note 44, at i, 2.

⁴⁷ *See* Act of Apr. 6, 2011, 2011 Va. Acts, ch. 785.

*prostitution, or (v) of any minor for the purpose of manufacturing child pornography shall be punishable as a Class 2 felony.*⁴⁸

§ 18.2-355. Taking, detaining, etc., person for prostitution, etc., or consenting thereto.

Any person who:

(1) For purposes of prostitution or unlawful sexual intercourse, takes any person into, or persuades, encourages or causes any person to enter, a bawdy place, or takes or causes such person to be taken to any place against his or her will for such purposes; or,

(2) Takes or detains a person against his or her will with the intent to compel such person, by force, threats, persuasions, menace or duress, to marry him or her or to marry any other person, or to be defiled; or,

(3) Being parent, guardian, legal custodian or one standing in loco parentis of a person, consents to such person being taken or detained by any person for the purpose of prostitution or unlawful sexual intercourse; is guilty of pandering, and shall be guilty of a Class 4 felony.⁴⁹

§ 18.2-356. Receiving money for procuring person.

Any person who *receives* any money or other valuable thing for or on account of (i) procuring for or placing in a house of prostitution or elsewhere any person for the purpose of causing such person to engage in unlawful sexual intercourse or any act in violation of § 18.2-361 or (ii) *causing any person to engage in forced labor or services, concubinage, prostitution, or the manufacture of any obscene material or child pornography* shall be guilty of a Class 4 felony.⁵⁰

B. Virginia Case Law and Commercial Sexual Exploitation

As Virginia does not have a specifically enumerated “human trafficking” offense, a search for reported Virginia cases utilizing the term “human trafficking” will yield no relevant results.⁵¹ It is necessary,

⁴⁸ VA. CODE ANN. § 18.2-48 (LEXIS through 2013 Spec. Sess. I) (emphasis added); *see also* H.B. 1898, 2011 Gen. Assemb., Reconvened Sess. (Va. 2011) (enacted) (amending § 18.2-48).

⁴⁹ *Id.* § 18.2-355 (LEXIS).

⁵⁰ *Id.* § 18.2-356 (LEXIS) (emphasis added); *see also* Va. H.B. 1898 (enacted) (amending § 18.2-356).

⁵¹ For purposes of this Note, common legal research techniques are utilized that parallel the research steps an average commonwealth attorney might take in searching for applicable human trafficking case law. Relevant but unreported cases, therefore, such as those that never proceed past the trial court level or those cases which never made it to trial at all, will be of little assistance to attorneys who do not have direct knowledge of such cases’ existence. For example, the City of Virginia Beach reported that in May of 2013 Malachi Eric Chang was sentenced to serve 35 years in prison after being convicted, among other crimes, of “Abduction with the Intent to Prostitute and Pandering.” Commonwealth v. Malachi Eric Chang; *35 Years to Serve for Abducting, Prostituting, Woman in “Human Trafficking” Case*, CITY OF VA. BEACH (May 29, 2013, 5:00 PM), <http://www.vbgov.com/>

therefore, to use the terms “prostitution” or “prostitute” in order to determine if any cases containing a fact patten similar to those present in federally prosecuted trafficking cases have been reported in Virginia. Beginning with a basic search for case law in which the above statutes were utilized in the context of “commercial sexual exploitation,” a term relatively interchangeable with “human sex trafficking” and “forced prostitution,”⁵² there is only one reported Virginia case that mentions the term “prostitute” or “prostitution” in relation to any current or previous version of the abduction statute (i.e., of section 18.2-48).⁵³ It is, in fact, the earliest Virginia case on record addressing the issue, having been decided in 1826.⁵⁴ According to Webster’s 1828 dictionary, to “prostitute” meant bringing someone over to lewdness or wickedness in a public manner.⁵⁵ In this particular case, it did not seem the term was being used in the modern context of abducting a person for the purpose of commercially prostituting that individual. A search for cases utilizing the procurement (section 18.2-356) or detention (section 18.2-355) statutes, however, reveal a handful of decisions slightly more on point, though still not sex trafficking cases in themselves.

There are five Virginia cases, stretching from 1954 through 1988, that reference persons who were prosecuted for “procuring a person” under section 18.2-356.⁵⁶ Four of these cases were decided by the

news/Pages/selected.aspx?release=1457. Virginia Beach refers to *Commonwealth v. Chang* as a “‘Human Trafficking’ Case,” *id.*, but a search for references to this case on both Westlaw and Lexis turns up no results. For an out-of-town commonwealth attorney with no direct knowledge of this case, therefore, it is as if it does not exist.

⁵² For the definitions of similar terms in the U.S. Code, see 22 U.S.C. § 7102(3), (8)–(9) (2012).

⁵³ See *Anderson v. Commonwealth*, 26 Va. (5 Rand.) 627, 628 (1826) (“The indictment against the plaintiff in error, contained two counts, the first of which charged that he, being a married man, on the 22d November, 1825, in the said county of Chesterfield, one *Elizabeth F. Hargrove* a maiden, and unmarried, and under the age of twenty-one years, that is to say, of the age of sixteen years, two months, and nineteen days, having no father living, and being then and there under the care and custody of *Elizabeth Hargrove*, a widow, her mother, did entice, inveigle, take and carry away from the care and custody of her said mother, for the purpose of prostituting and carnally knowing her the said *Elizabeth F.* against the peace and dignity of the Commonwealth. The second count in like manner charges him with the enticing, inveigling, taking and carrying away the said infant over the age of sixteen years, and moreover charges that he did, on a subsequent day, deflour, carnally know, and prostitute her the said *Elizabeth F. Hargrove*, against the peace and dignity of the Commonwealth.”).

⁵⁴ *Id.*

⁵⁵ NOAH WEBSTER, AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE, “Prostitute” (1st ed. 1828).

⁵⁶ *Collins v. Commonwealth*, 307 S.E.2d 884, 885 (Va. 1983); *Stewart v. Commonwealth*, 303 S.E.2d 877, 877 (Va. 1983); *Edwards v. Commonwealth*, 243 S.E.2d

Virginia Supreme Court,⁵⁷ including *Martin v. Commonwealth*, which is the only case that cites an equivalent of the detention statute (i.e., the equivalent of current section 18.2-355) with any relevance.⁵⁸ A good representative case for this group, though, is *Edwards v. Commonwealth*.⁵⁹ In *Edwards*, the defendant, Beverley Edwards, managed a Richmond operation called “Joy Girl Dating Service.”⁶⁰ The operation was an escort service through which Edwards would charge girls a \$15 fee in order to send them on “dates” where they could procure “tips” from customers.⁶¹ Edward’s conviction under the then-current text of section 18.2-356 was upheld by the Virginia Supreme Court, which stated that the “operation or business carried on by defendant . . . was a venture by her, for financial gain, to aid and abet and to give information and direction to persons desiring the services of a prostitute, and to procure and assist persons who were *willing to provide* such services.”⁶² The operative phrase distinguishing this case from that of a traditional trafficking scenario is “willing to provide.” Although it cannot be said that most women⁶³ would choose to remain in prostitution if given the financial option,⁶⁴ the stark contrast between the Virginia cases cited and what would amount to human sex trafficking is the missing element of coercion or minority.

834, 835 (Va. 1978); *Martin v. Commonwealth*, 81 S.E.2d 574, 575 (Va. 1954); *Stultz v. Commonwealth*, 369 S.E.2d 215, 216 (Va. Ct. App. 1988).

⁵⁷ See *Collins*, 307 S.E.2d 884; *Stewart*, 303 S.E.2d 877; *Edwards*, 243 S.E.2d 834; *Martin*, 81 S.E.2d 574.

⁵⁸ See *Martin*, 81 S.E.2d at 575–76.

⁵⁹ *Edwards*, 243 S.E.2d 834.

⁶⁰ *Id.* at 835.

⁶¹ *Id.* at 836, 838.

⁶² *Id.* at 838–40 (emphasis added).

⁶³ This Note typically references victims of commercial sexual exploitation in the feminine because females make up the vast majority of victims. See U.S. DEPT OF STATE, *TRAFFICKING IN PERSONS REPORT 8* (2013). This is not intended to exclude, however, males who are victims of such crimes.

⁶⁴ See DONNA M. HUGHES, *BEST PRACTICES TO ADDRESS THE DEMAND SIDE OF SEX TRAFFICKING* 4–5 (2004), available at http://www.uri.edu/artsci/wms/hughes/demand_sex_trafficking.pdf. In a series of studies conducted in San Francisco, eighty-eight percent of women caught in prostitution interviewed stated they wanted to leave the lifestyle. *Id.* at 5. Seventy percent of women interviewed said that, during the course of prostitution, they had been raped or sexually assaulted an average of thirty-one times, and sixty-five percent said they had been either beaten or physically assaulted an average of four times. *Id.* at 10. Furthermore, according to one widely-cited 1984 publication, two-thirds of those in prostitution were sexually abused as children, and over ninety percent of those prostituting “lost their virginity through such child sexual abuse.” Mimi H. Silbert, *Treatment of Prostitute Victims of Sexual Assault*, in *VICTIMS OF SEXUAL AGGRESSION: TREATMENT OF CHILDREN, WOMEN, AND MEN* 251, 253 (Irving R. Stuart & Joanne G. Greer eds., 1984).

Unlike federal law, which recognizes that a person under the age of eighteen induced to perform a commercial sex act is a victim of human trafficking,⁶⁵ the sexual age of consent in Virginia is fifteen.⁶⁶ A fifteen-year-old prostitute in the Commonwealth, therefore, would be considered consenting, and in turn, criminally liable for any commercial sex acts performed or solicited.⁶⁷ As the Virginia prostitution statute currently stands, there is no affirmative defense for minors in a criminal action for prostitution.⁶⁸ In fact, these minors are subject to class 1 misdemeanor penalties.⁶⁹ Furthermore, the Virginia prostitution statute does not contain an affirmative defense for victims of human sex trafficking or those coerced into performing commercial sex acts.⁷⁰ The Virginia prostitution statute does, however, provide for the explicit prosecution of those soliciting the sex acts (purchasers),⁷¹ which is an essential element to combating commercial sexual exploitation in any state.

Aside from the three statutes most likely to be utilized by commonwealth attorneys in a human trafficking prosecution (sections 18.2-48, 355, and 356), Virginia's Attorney General's Office has published a document containing what the Commonwealth considers those code sections relevant for prosecuting human trafficking violations.⁷² The document was published as a resource for commonwealth attorneys to assist them should the situation arise.⁷³ It effectively sets forth twenty-seven individual statutes the Attorney General's office deemed could be used to prosecute the various crimes committed when an individual is trafficked for either labor or sexual purposes.⁷⁴ Included in this list are the three statutes referenced above,⁷⁵

⁶⁵ See 22 U.S.C. § 7102(8)(A) (2012).

⁶⁶ See VA. CODE ANN. § 18.2-370(A) (LEXIS through 2013 Spec. Sess. I).

⁶⁷ *Id.* § 18.2-346(A) (LEXIS).

⁶⁸ See *id.* ("Any person who, for money or its equivalent, (i) commits adultery, fornication, or any act in violation of § 18.2-361 or (ii) offers to commit adultery, fornication, or any act in violation of § 18.2-361 and thereafter does any substantial act in furtherance thereof is guilty of prostitution, which is punishable as a Class 1 misdemeanor.").

⁶⁹ See *id.*

⁷⁰ See *id.*

⁷¹ *Id.* § 18.2-346(B) (LEXIS).

⁷² OFFICE OF THE ATTORNEY GEN. OF VA., VIRGINIA ANTI-TRAFFICKING LAWS: CRIMINAL (2011) [hereinafter VIRGINIA ANTI-TRAFFICKING LAWS], available at <http://www.dcjs.virginia.gov/victims/humantrafficking/ca/documents/VAAnti-TraffickingLaws-Criminal-2011.pdf>.

⁷³ *Human Trafficking Resources for Commonwealth's Attorneys*, VA. DEP'T CRIM. JUST. SERVS., <http://www.dcjs.virginia.gov/victims/humantrafficking/ca/> (last visited Mar. 31, 2014).

⁷⁴ VIRGINIA ANTI-TRAFFICKING LAWS, *supra* note 72.

felonies such as abduction,⁷⁶ extortion,⁷⁷ rape,⁷⁸ and certain major sexual crimes,⁷⁹ and various misdemeanor violations that can usually be charged, such as “frequenting a bawdy place”⁸⁰ and aiding prostitution.⁸¹ The publication even goes so far as to break down the necessary elements of many of the offenses and provides the relevant cases and legal standards to be applied.⁸² The problem is that it seems even the Commonwealth is having trouble finding relevant Virginia cases to reference should a human sex trafficking offense ever find itself on the docket. Of the nineteen cases cited in the Attorney General’s publication,⁸³ only eight deal with subject matter relevant to commercial sexual exploitation,⁸⁴ and only one case comes even remotely close to what may have factually been prosecuted as human trafficking under federal law.⁸⁵ Unfortunately, the Commonwealth of Virginia seems to have little in the realm of *stare decisis* to guide commonwealth attorneys in prosecuting human trafficking violations. This may, at least in part, be attributed to the fact that federal prosecutors, often in partnership with certain state police organizations, have taken to prosecuting these violations in federal district court.⁸⁶ In order to gain a clearer

⁷⁵ VA. CODE ANN. §§ 18.2-48, -355, -356 (LEXIS).

⁷⁶ *Id.* §§ 18.2-47(B), -48 (LEXIS).

⁷⁷ *Id.* § 18.2-59 (LEXIS).

⁷⁸ *Id.* § 18.2-61 (LEXIS).

⁷⁹ *See id.* §§ 18.2-61, -63, -67.1, -67.3, -67.4, -67.4:2, -370, -371 (LEXIS).

⁸⁰ *Id.* § 18.2-347 (LEXIS); *see also* *Lemke v. Commonwealth*, 241 S.E.2d 789, 790 (Va. 1978).

⁸¹ § 18.2-348 (LEXIS); *see also* *Cogdill v. Commonwealth*, 247 S.E.2d 392, 393 (Va. 1978).

⁸² VIRGINIA ANTI-TRAFFICKING LAWS, *supra* note 72.

⁸³ *See id.*

⁸⁴ *Collins v. Commonwealth*, 307 S.E.2d 884, 889–90 (Va. 1983) (finding sufficient evidence of call-girl prostitution); *Stewart v. Commonwealth*, 303 S.E.2d 877, 879 (Va. 1983) (determining whether there was sufficient evidence of pandering); *Edwards v. Commonwealth*, 243 S.E.2d 834, 837 (Va. 1978) (assessing whether the defendant was properly convicted for aiding and abetting prostitution); *Bakran v. Commonwealth*, 700 S.E.2d 471, 472–73 (Va. Ct. App. 2010) (determining whether the evidence was sufficient to convict the defendant of using his vehicle to promote prostitution in violation of § 18.2-349); *Tart v. Commonwealth*, 663 S.E.2d 113, 115 (Va. Ct. App. 2008) (assessing whether the jury instructions were proper for the defendant’s pandering trial); *Fine v. Commonwealth*, 525 S.E.2d 69, 70 (Va. Ct. App. 2000) (analyzing whether there was sufficient evidence to show that the defendant used his vehicle to promote prostitution in violation of § 18.2-349); *Harrison v. City of Norfolk*, 431 S.E.2d 658, 659 (Va. Ct. App. 1993) (examining whether a particular location met the Virginia Code’s definition of a bawdy place); *Ford v. Commonwealth*, 391 S.E.2d 603, 603 (Va. Ct. App. 1990) (analyzing whether the defendant’s conviction for solicitation of oral sodomy was proper).

⁸⁵ *See Tart*, 663 S.E.2d at 115.

⁸⁶ *See Thomas & Taylor*, *supra* note 35.

understanding of how Virginia has dealt with commercial sexual activities in the past, therefore, only one analytical option remains—past prosecutions under the actual Virginia prostitution and pandering statutes, sections 18.2-346 and 18.2-357, respectively.⁸⁷

Aside from one of the Virginia Supreme Court cases previously cited,⁸⁸ there are eight reported cases that utilize the Virginia prostitution statute, section 18.2-346, or its related predecessors in relevant legal analysis.⁸⁹ In *Adams v. Commonwealth*, for example, the Supreme Court of Virginia articulated that “[a]n attempt to commit prostitution requires an offer to engage in sexual intercourse for pay *and* a substantial act performed in furtherance of the offer.”⁹⁰ This two-prong analysis is seemingly still the accepted standard for analyzing the

⁸⁷ VA. CODE ANN. §§ 18.2-346, -357 (LEXIS through 2013 Spec. Sess. I).

A. Any person who, for money or its equivalent, (i) commits adultery, fornication, or any act in violation of § 18.2-361, or (ii) offers to commit adultery, fornication, or any act in violation of § 18.2-361 and thereafter does any substantial act in furtherance thereof is guilty of prostitution, which is punishable as a Class 1 misdemeanor.

B. Any person who offers money or its equivalent to another for the purpose of engaging in sexual acts as enumerated [above] and thereafter does any substantial act in furtherance thereof is guilty of solicitation of prostitution, which is punishable as a Class 1 misdemeanor. However, any person who solicits prostitution from a minor (i) 16 years of age or older is guilty of a Class 6 felony or (ii) younger than 16 years of age is guilty of a Class 5 felony.

§ 18.2-346; *see also* § 18.2-357 (LEXIS) (“Any person who shall knowingly receive any money or other valuable thing from the earnings of any male or female engaged in prostitution, except for a consideration deemed good and valuable in law, shall be guilty of pandering, punishable as a Class 4 felony.”).

⁸⁸ *See Edwards*, 243 S.E.2d 834.

⁸⁹ *See Hensley v. City of Norfolk*, 218 S.E.2d 735, 737, 740, 742 (Va. 1975) (upholding the conviction of a defendant who had solicited undercover officers for prostitution at a “massage” establishment); *Adams v. Commonwealth*, 208 S.E.2d 742, 743–44 (Va. 1974) (*per curiam*) (holding that an offer to engage in sexual intercourse without a substantial act in furtherance thereof is insufficient to affirm a conviction of prostitution); *Chadderton v. Commonwealth*, No. 0827-13-2, 2014 WL 545605, at *1 (Va. Ct. App. Feb. 11, 2014) (affirming the conviction of a defendant for sexual solicitation); *Bakran*, 700 S.E.2d at 472–73 (upholding a trial court conviction of using a vehicle to promote prostitution when soliciting oral sex from an undercover police officer and taking acts in furtherance thereof); *Fine*, 525 S.E.2d at 69–71 (overturning a conviction of using a vehicle to promote prostitution because, after soliciting oral sex from an undercover officer, appellant was arrested before engaging in “any substantial act in furtherance thereof”); *Golden v. Commonwealth*, 519 S.E.2d 378, 379–81 (Va. Ct. App. 1999) (analyzing the nature of an arrest for soliciting an undercover officer to purchase oral sex); *McFadden v. Commonwealth*, 348 S.E.2d 847, 848–49 (Va. Ct. App. 1986) (analyzing an amendment of the prostitution statute and the elements required to sustain a conviction); *Dickerson v. City of Richmond*, 346 S.E.2d 333, 333, 336–37 (Va. Ct. App. 1986) (reversing a conviction of loitering for the purpose of engaging in prostitution due to lack of evidence).

⁹⁰ *Adams*, 208 S.E.2d at 744 (emphasis added and omitted).

nature of an offense committed pursuant to the prostitution statute, section 18.2-346.⁹¹ In Virginia, the mere offer to engage in sexual intercourse for consideration is not enough to sustain a conviction under the prostitution statute as either a buyer or seller.⁹² The Commonwealth must prove the perpetrator committed a substantial act in furtherance thereof.⁹³ Acts deemed sufficient to have met this standard have included the fondling of sexual organs⁹⁴ or undressing in front of an undercover officer.⁹⁵ Acts that do not meet this threshold have included merely propositioning another to engage in a commercial sex act without the removal of clothing⁹⁶ and failure to arrive at a pre-negotiated destination where the act was set to occur.⁹⁷

An analysis of reported cases decided under the Virginia pandering statute, section 18.2-357, concerning “[r]eceiving money from earnings of male or female prostitute,”⁹⁸ yields the most relevant Virginia case to date. Aside from four of the cases previously cited pursuant to the procurement statute,⁹⁹ there are four additional reported cases utilizing the pandering statute (or its predecessor) as related to commercial sexual activity.¹⁰⁰ Of these cases, *Tart v. Commonwealth* contains the only fact pattern that might have been prosecuted as a human trafficking violation under federal law.¹⁰¹ The case was, in fact, prosecuted by the Virginia Attorney General’s Office, at which time former Governor Robert “Bob” McDonnell authored the appellate brief as Attorney General.¹⁰² In *Tart*, a sixteen-year-old girl, referred to only as B.H., ran away from home with defendant Joshua Tart.¹⁰³ As neither had a source of income, Tart took nude photographs of B.H. that B.H. later

⁹¹ See *Fine*, 525 S.E.2d at 70–71.

⁹² *Adams*, 208 S.E.2d at 744; *Fine*, 525 S.E.2d at 71.

⁹³ *Adams*, 208 S.E.2d at 744.

⁹⁴ See, e.g., *Bakran*, 700 S.E.2d at 472, 474.

⁹⁵ See *Dorchincoz v. Commonwealth*, 59 S.E.2d 863, 863–65 (Va. 1950).

⁹⁶ *Adams*, 208 S.E.2d at 743.

⁹⁷ *Fine*, 525 S.E.2d at 70–71.

⁹⁸ VA. CODE ANN. § 18.2-357 (LEXIS through 2013 Spec. Sess. I).

⁹⁹ *Collins v. Commonwealth*, 307 S.E.2d 884, 888 (Va. 1983); *Stewart v. Commonwealth*, 303 S.E.2d 877, 880 (Va. 1983); *Edwards v. Commonwealth*, 243 S.E.2d 834, 837 (Va. 1978); *Martin v. Commonwealth*, 81 S.E.2d 574, 575 (Va. 1954).

¹⁰⁰ *Minor v. Commonwealth*, 191 S.E.2d 825, 826 (Va. 1972) (utilizing § 18.1-208 of the 1950 Code); *Clinton v. Commonwealth*, 130 S.E.2d 437, 438–39 (Va. 1963) (analyzing the offense under § 18.1-208 of the 1950 Code), *rev’d per curiam on Fourth Amendment grounds*, *Clinton v. Virginia*, 377 U.S. 158 (1964); *Saunders v. Commonwealth*, 45 S.E.2d 307, 309 (Va. 1947); *Tart v. Commonwealth*, 663 S.E.2d 113, 115 (Va. Ct. App. 2008).

¹⁰¹ See *Tart*, 663 S.E.2d at 114.

¹⁰² *Id.*

¹⁰³ *Id.*

posted on the Internet as an invitation to those looking to engage in commercial sexual activity.¹⁰⁴ Clients would then arrange to meet B.H., who would rely on Tart for transportation and “protection” as related to her services.¹⁰⁵ After she performed various sexual acts the clients would pay B.H., who then gave the money she earned to Tart.¹⁰⁶ She later testified that “a lot of the money went to drugs’ and alcohol that Tart purchased for their use.”¹⁰⁷ The defendant would also use the money to pay for hotel rooms as well as for various other expenses.¹⁰⁸ Tart was charged and convicted under section 18.2-357 for pandering,¹⁰⁹ which is punishable as a Class 4 felony carrying a minimum sentence of two years and a maximum of ten.¹¹⁰ If this case had been brought in federal court, Tart probably could have been charged with violating 18 U.S.C. § 1591, and, if convicted, would have served a *minimum* of ten years.¹¹¹

Virginia commercial sexual exploitation law is sparse to say the least. Unfortunately, commonwealth attorneys do not seem to have a single “go to” statute or strong body of case law to guide them if faced with prosecuting a human sex trafficking violation. Virginia does have a history of prosecuting those soliciting others to engage in commercial sexual activities; however, a human sex trafficking offense is certainly felonious, and there is only so much similarity between investigating and

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ See VA. CODE ANN. §§ 18.2-10(d), -357 (LEXIS through 2013 Spec. Sess. D) (defining statutorily authorized punishments for each class of felony convictions and establishing pandering as a Class 4 felony).

¹¹¹ Provided federal jurisdiction had been satisfied, the relevant portion of the Code reads as follows:

(a) Whoever knowingly—

(1) . . . recruits, entices, harbors, transports, provides, obtains, or maintains by any means a person; or

(2) benefits, financially or by receiving anything of value, from participation in a venture which has engaged in an act described in violation of paragraph (1),

knowing, or in reckless disregard of the fact . . . that the person has not attained the age of 18 years and will be caused to engage in a commercial sex act, shall be punished as provided in subsection (b).

(b) The punishment for an offense under subsection (a) is—

(1) . . . any term of years not less than 15 or for life [if the person is under 14 years]; or

(2) . . . not less than 10 years or for life [if the person is between 14 and 18 years].

18 U.S.C. § 1591(a)–(b) (2012).

prosecuting a charge for prostitution and going after the organized crime of trafficking in persons.¹¹² Like most high-class felonies, Virginia has recognized that the crime of human trafficking is in itself comprised of various offenses.¹¹³ Although in this matter the Attorney General's Office is making an effort to provide an organized framework for commonwealth attorneys,¹¹⁴ and former Governor McDonnell issued a 2013 Executive Directive calling for a comprehensive and coordinated state response to human trafficking,¹¹⁵ the legislative fruits of this labor have not yet been realized. Following an extensive search utilizing the statutes officially recommended by the Attorney General's Office as those applicable to prosecuting a human sex trafficking violation,¹¹⁶ there are *no* reported state cases that use the statutes in the context of an express sex trafficking prosecution. In fact, the only reported state case that contains a fact pattern similar to that of a domestic trafficking case was prosecuted under the pandering statute.¹¹⁷ Virginia does have a history of prosecuting those aiding individuals *willing* to prostitute themselves, so why are cases involving the coercion of individuals who are *unwilling* to prostitute themselves so difficult to come by?

II. VIRGINIA'S RECENT LEGISLATIVE RESPONSE TO THE INCREASING STATEWIDE AND NATIONAL ANTI-TRAFFICKING LOBBYING EFFORT

In 2009, Shared Hope International, a non-profit organization dedicated to eradicating sex trafficking and slavery worldwide,¹¹⁸ published *The National Report on Domestic Minor Sex Trafficking*¹¹⁹ pursuant to a grant from the U.S. Department of Justice.¹²⁰ This report

¹¹² Human trafficking has now surpassed the weapons trade as the world's second largest criminal enterprise and is the fastest growing sector of organized crime. *What is Human Trafficking?*, UNICEF, <http://www.unicefusa.org/assets/pdf/End-Child-Trafficking-One-Pager.pdf> (last visited Mar. 31, 2014); see *Human Trafficking*, CAL. DEPT JUST., <http://oag.ca.gov/human-trafficking> (last visited Mar. 31, 2014).

¹¹³ See Rhew, *supra* note 38.

¹¹⁴ VIRGINIA ANTI-TRAFFICKING LAWS, *supra* note 72; see also Rhew, *supra* note 38.

¹¹⁵ Va. Exec. Directive No. 7, Comprehensive, Coordinated States Response to the Problem of Human Trafficking (2013).

¹¹⁶ See VIRGINIA ANTI-TRAFFICKING LAWS, *supra* note 72.

¹¹⁷ See *Tart v. Commonwealth*, 663 S.E.2d 113, 115 (Va. Ct. App. 2008).

¹¹⁸ SHARED HOPE INT'L, DOMESTIC MINOR SEX TRAFFICKING IN THE U.S. (2012), available at http://sharedhope.org/wp-content/uploads/2012/09/Infographic_DMST_with_sources.pdf.

¹¹⁹ LINDA A. SMITH ET AL., SHARED HOPE INT'L, THE NATIONAL REPORT ON DOMESTIC MINOR SEX TRAFFICKING: AMERICA'S PROSTITUTED CHILDREN (2009), available at http://sharedhope.org/wp-content/uploads/2012/09/SHI_National_Report_on_DMST_2009.pdf.

¹²⁰ *Id.* at iv.

was a culmination of ten field assessments conducted on child sex trafficking in America,¹²¹ and its success led the organization to conduct fifteen additional domestic field assessments, with only three states receiving a general statewide evaluation.¹²² Virginia was one of these states.¹²³ In October of 2011, Shared Hope published its *Rapid Assessment on Domestic Minor Sex Trafficking: Virginia*.¹²⁴ According to this detailed report, “[b]etween 2005 and 2006, more than 20 bills addressing human trafficking crimes and issues were introduced, but until 2010 only one bill . . . reached the governor’s desk for enactment into law.”¹²⁵ Due to increased advocacy from multiple interests, however, in May of 2011 “Governor McDonnell signed into law three bills aimed at fighting human trafficking in Virginia: HB 1898, HB 2190, and SB 1453.”¹²⁶

It might not be coincidental that the sudden passage of these bills coincided with the publication of Shared Hope’s *State Report Cards on the Legal Framework of Protection for the Nation’s Children*.¹²⁷ This “report card” assigned an overall grade to every state averaged from the grades each received in six individual categories: (1) Criminalization of Domestic Minor Sex Trafficking;¹²⁸ (2) Criminal Provisions Addressing Demand; (3) Criminal Provisions for Traffickers; (4) Criminal Provisions for Facilitators; (5) Protective Provisions for Child Victims; and (6) Tools for Investigation and Prosecution.¹²⁹ When this report was published in 2012, Virginia received an overall grade of “F”; in the 2013 edition, however, Virginia’s overall grade increased to a “D.”¹³⁰ In 2013, it was among a group of states with the lowest scores in the first¹³¹ and second

¹²¹ *Id.*

¹²² For links to these assessments, see *Research*, SHAREDHOPE.ORG, <http://sharedhope.org/what-we-do/prevent/research/> (last visited Mar. 31, 2014).

¹²³ *Id.*

¹²⁴ See RAPID ASSESSMENT: VIRGINIA, *supra* note 44.

¹²⁵ *Id.* at 16.

¹²⁶ *Id.* at 70.

¹²⁷ PROTECTED INNOCENCE, *supra* note 44.

¹²⁸ It should be noted that Shared Hope International specifically focuses on domestic *minor* sex trafficking. Its reports and assessments, therefore, are based on an analysis of laws related to the trafficking of and services available to *minor*, and not adult, victims of trafficking; although this does little to change the nature of the overall legal analysis.

¹²⁹ PROTECTED INNOCENCE, *supra* note 44, at 10–11, 19. Scores are calculated based on the quality of statutory provisions available to meet the necessary legal demands deemed required to effectively combat human trafficking in each categorical stage. *Id.* at 23.

¹³⁰ *Id.* at 11.

¹³¹ *Id.* at 13.

categories,¹³² and it received the seventh lowest score overall.¹³³ According to the rapid assessment published in 2011, Virginia prosecutors have been unwilling to participate in such studies because of a perceived lack of contact with sex trafficking cases, probably because “[c]harging a trafficker with general sex crimes, assault, and abduction . . . further perpetuates the common idea that trafficking is not occurring in Virginia.”¹³⁴

A. House Bill 1898

Since the publication of Shared Hope’s Report Cards, Virginia has made some improvements in its trafficking legislation, beginning with House Bill 1898, “relating to abduction of minors for sexual purposes; penalties.”¹³⁵ According to the legislative summary,

[HB 1898] [e]xpands [the] definition of abduction to include commercial sexual activity involving minors. The bill also expands the definition of abduction for purposes of sexual activity with a minor to include not only concubinage and prostitution but also pornography and sexual performances. The bill also punishes as abduction the use of a minor in the preparation of obscenity.¹³⁶

Enacted unanimously by the Virginia General Assembly in April of 2011,¹³⁷ this bill ultimately amended section 18.2-48 (regarding abduction) of the Virginia Code, section 18.2-67.7 (regarding the rape-shield defense), and section 18.2-356 (regarding procurement) to include language more clearly criminalizing certain elements of human trafficking.¹³⁸ The original bill, offered on January 11, 2011, proposed an

¹³² *Id.*

¹³³ *Id.* at 12.

¹³⁴ RAPID ASSESSMENT: VIRGINIA, *supra* note 44, at 33.

¹³⁵ H.B. 1898, 2011 Gen. Assemb., Reconvened Sess. (Va. 2011) (enacted).

¹³⁶ 2011 Session: HB 1898 Abduction of Minors; for Sexual Purposes, Penalty, VA.’S LEGIS. INFO. SYS., <http://lis.virginia.gov/cgi-bin/legp604.exe?111+sum+HB1898S> (last visited Mar. 31, 2014).

¹³⁷ Va. H.B. 1898 (enacted); *see also* 2011 Session: HB 1898 Abduction of Minors; for Sexual Purposes, Penalty, VA.’S LEGIS. INFO. SYS., <http://lis.virginia.gov/cgi-bin/legp604.exe?111+sum+HB1898> (last visited Mar. 31, 2014).

¹³⁸ Va. H.B. 1898 (enacted). The amended language is indicated below by strikethroughs and italics as it appeared in the original bill.

§ 18.2-48. Abduction with intent to extort money or for immoral purpose.

Abduction (i) of *any person* with the intent to extort money or pecuniary benefit, (ii) of any person with intent to defile such person, ~~or~~ (iii) of any child under sixteen years of age for the purpose of concubinage or *prostitution*, (iv) of *any person for the purpose of prostitution*, or (v) of *any minor for the purpose of manufacturing child pornography* shall be punishable as a Class 2 felony.

§ 18.2-67.7. Admission of evidence [extending the rape-shield defense].

amendment to section 18.2-47, regarding the definition and punishment of abduction,¹³⁹ which would have added sex trafficking as a general abduction offense and increased the list of punishable conduct elements.¹⁴⁰ Furthermore, the original bill proposed amendments to section 18.2-49, regarding “[t]hreatening, attempting or assisting in such abduction,”¹⁴¹ and section 18.2-382, concerning obscene “[p]hotographs,

A. In prosecutions under this article, or under *clause (iii) or (iv) of § 18.2-48* . . . general reputation or opinion evidence of the complaining witness’s unchaste character or prior sexual conduct shall not be admitted.

§ 18.2-356. Receiving money for procuring person.

Any person who ~~shall receive~~ *receives* any money or other valuable thing for or on account of *(i)* procuring for or placing in a house of prostitution or elsewhere any person for the purpose of causing such person to engage in unlawful sexual intercourse or any act in violation of § 18.2-361 or *(ii) causing any person to engage in forced labor or services, concubinage, prostitution, or the manufacture of any obscene material or child pornography* shall be guilty of a Class 4 felony.

Id.

¹³⁹ VA. CODE ANN. § 18.2-47 (LEXIS through 2013 Spec. Sess. I).

¹⁴⁰ Va. H.B. 1898 (as introduced in House, Jan. 12, 2011). The proposed language is indicated below by strikethroughs and italics as it appeared in the original bill.

§ 18.2-47. Abduction and kidnapping defined; punishment.

.
 B. Any person who, *(i)* by force, intimidation or deception, and without legal justification or excuse, seizes, takes, transports, detains ~~or~~, *secretes, recruits, entices, harbors, transports, provides, purchases, or obtains by any means, or attempts to recruit, entice, harbor, provide, purchase, or obtain by any means* another person with the intent to subject him to forced labor or services or *(ii) seizes, takes, transports, detains, secretes, recruits, entices, harbors, provides, purchases, or obtains by any means, or attempts to recruit, entice, harbor, provide, purchase, or obtain by any means a minor for purposes of prostitution, pornography or sexual performance by the minor* shall be deemed guilty of “abduction.” For purposes of this subsection, the term “intimidation” shall include destroying, concealing, confiscating, withholding, or threatening to withhold a passport, immigration document, or other governmental identification or threatening to report another as being illegally present in the United States.

Id.

¹⁴¹ VA. CODE ANN. § 18.2-49 (LEXIS). For the proposed amendments, see Va. HB 1898 (as introduced in House, Jan. 12, 2011). The proposed language is indicated below by strikethroughs and italics as it appeared in the original bill.

Any person who (1) threatens, or attempts, to abduct any other person with intent to extort money, or pecuniary benefit, or (2) assists or aids in the abduction of, or threatens to abduct, any person with the intent to defile such person, or (3) assists or aids in the abduction of, or threatens to abduct, any *minor female under sixteen years of age* for the purpose of concubinage, ~~or prostitution,~~ *shall be pornography or sexual performance by the minor* is guilty of a Class 5 felony.

Id.

slides and motion pictures”;¹⁴² both amendments would have added additional protection for minors, defined as an individual under the age of eighteen,¹⁴³ and prohibited the use of an affirmative defense of consent by a minor to the production of obscene photographs or films.¹⁴⁴ When the bill was returned from the House Committee for the Courts of Justice on January 31, 2011, however, all three amendments were struck, and the committee returned only the proposals for section 18.2-48 and section 18.2-67.7, while moving certain proposed language from section 18.2-47 to section 18.2-356.¹⁴⁵

Furthermore, when the bill was returned from the Senate Committee for the Courts of Justice on February 16, 2011, some very pertinent proposals had been struck.¹⁴⁶ Originally, it was proposed that the language in part (iii) of section 18.2-48 be changed from “any child under sixteen years of age,” to just “any *minor*.”¹⁴⁷ This would have provided greater protection to those under the age of eighteen, as opposed to only those under the age of sixteen. The Senate Committee also struck and agreed with the House committee’s removal of the following proposed language: “*For any prosecution pursuant to clause (iii) [of 18.2-48], (a) a lack of knowledge of the minor victim’s age shall not be a defense and (b) consent of the minor to the sexual act shall not be a defense.*”¹⁴⁸ It would seem in striking the aforementioned clauses along with the recommended amendments to section 18.2-49, which attempted to change the language “female under sixteen years of age” to “*minor*,”¹⁴⁹ and section 18.2-382, which attempted to include the clause “*a minor*

¹⁴² VA. CODE ANN. § 18.2-382 (LEXIS). For the proposed amendments, see Va. H.B. 1898 (as introduced in House, Jan. 12, 2011). The proposed language is indicated below by strikethroughs and italics as it appeared in the original bill.

Every person who knowingly:

.....
 (2) Models, poses, acts, or otherwise assists in the preparation of any obscene film, photograph, negative, slide or motion picture for purposes of sale or distribution; shall be guilty of a Class 3 misdemeanor, *except that a minor cannot consent to such act and the use of a minor in the preparation is a crime of abduction for purposes of prostitution pursuant to subsection B of § 18.2-47 and clause (iii) of § 18.2-48.*

Id.

¹⁴³ VA. CODE ANN. § 1-207 (LEXIS).

¹⁴⁴ Va. H.B. 1898 (as introduced in House, Jan. 12, 2011).

¹⁴⁵ See Va. H.B. 1898 (as proposed by H. Comm. for Courts of Justice, Jan. 31, 2011).

¹⁴⁶ See Va. H.B. 1898 (as proposed by S. Comm. for Courts of Justice, Feb. 16, 2011).

¹⁴⁷ Va. H.B. 1898 (as introduced in House, Jan. 12, 2011).

¹⁴⁸ Compare *id.*, with Va. H.B. 1898 (as proposed by S. Comm. for Courts of Justice, Feb. 16, 2011).

¹⁴⁹ Va. H.B. 1898 (as introduced in House, Jan. 12, 2011).

cannot consent to such [pornographic] act,”¹⁵⁰ the Senate was effectively stating that consent and/or lack of knowledge as to age *were* affirmative defenses to these crimes, sixteen- and seventeen-year-olds did not merit full protection, and assisting in the abduction of a male for the purpose of prostitution was apparently acceptable.¹⁵¹ The final version of the text was approved on April 6, 2011, to take effect on July 1 of that year.¹⁵² Although it succeeded in adding to section 18.2-48 the actual crime of procuring *any* person for the purpose of prostitution and increasing a victim’s protection under Virginia’s equivalent of the rape shield defense,¹⁵³ what the final bill purposefully did not include is somewhat concerning.

B. House Bill 2190

The second major trafficking related bill signed in 2011 was HB 2190. This bill “[r]equire[s] the Department of Social Services to develop a plan for the provision of services to victims of human trafficking,” including plans to help identify victims of human trafficking in the Commonwealth (even though such victims do not legally exist), assist victims in applying for benefits and the delivery thereof, prepare and disperse training and educational resources on human trafficking, and assist willing international victims in returning abroad.¹⁵⁴ This bill was

¹⁵⁰ *Id.*

¹⁵¹ Although the abduction of a male for the purpose of prostitution would probably be punishable under section 18.2-356 of the Virginia Code, the current language of section 18.2-49 still only applies to females under the age of sixteen. VA. CODE ANN. §§ 18.2-49, -356 (LEXIS through 2013 Spec. Sess. I). If one is planning on abducting a person for the purpose of prostitution in Virginia, therefore, it best be a male or take place the day after her Sweet 16.

¹⁵² Va. H.B. 1898 (enacted); *see also* VA. CONST. art. IV, § 13.

¹⁵³ Va. H.B. 1898 (enacted).

¹⁵⁴ COMMONWEALTH OF VA. GEN. ASSEMB., DIGEST OF THE ACTS 6 (2011). For the text of the added language, see H.B. 2190, 2011 Gen. Assemb., Reg. Sess. (Va. 2011) (enacted).

Be it enacted by the General Assembly of Virginia:

1. § 1. That the Department of Social Services shall develop a plan for the delivery of services to victims of human trafficking. Such plan shall include provisions for (i) identifying victims of human trafficking in the Commonwealth; (ii) assisting victims of human trafficking with applying for federal and state benefits and services to which they may be entitled; (iii) coordinating the delivery of health, mental health, housing, education, job training, victims’ compensation, legal, and other services for victims of human trafficking; (iv) preparing and disseminating educational and training programs and materials to increase awareness of human trafficking and services available to victims of human trafficking among local departments of social services, public and private agencies and service providers, and the public; (v) developing and maintaining community-based services for victims of human trafficking; and (vi) assisting victims of human trafficking with family

important because building a strong foundation for comprehensive human trafficking legislation includes ensuring social services are readily accessible to victims and educational resources are available to prosecutors and first responders. If they are not, future victims might face the same treatment that “Kelly”¹⁵⁵ did, a fourteen-year-old victim of human sex trafficking who was eventually rescued.¹⁵⁶

When Kelly was fourteen, she was “befriended” by an older man while shopping with her friends at the mall.¹⁵⁷ She admits she was naive at the time, and went alone to meet the man where she was subsequently trafficked to Atlantic City and forced into prostitution.¹⁵⁸ A couple days after she was trafficked, the man raped her; it was on that day she finally sought help.¹⁵⁹ She went to a police officer after the incident, but instead of being offered aid and comfort, she was arrested and charged with prostitution.¹⁶⁰ She stated in a Richmond interview, “I mean, they didn’t treat me like a kid. They treated me like a criminal.”¹⁶¹ “The system didn’t know what to do with me,” she said,¹⁶² “dealing with the system was nearly as traumatic as being trafficked, [and] forced to work as a prostitute.”¹⁶³

To illustrate the vital role the basic education of first responders can play in identifying victims of human sex trafficking, one need only examine the comments a Richmond police officer provided to Shared Hope International:

If we have a 17-year-old prostitute, there’s going to be a criminal offense there. We’ll [think] “hey, you’re out here; you’re doing an act of prostitution; we’re going to arrest you as a juvenile . . . [.]” Is this an individual who is in need of some help or this individual is making a

reunification or return to their place of origin if the person so desires. In developing its plan, the Department shall work together with such other state and federal agencies, public and private entities, and other stakeholders as the Department shall deem appropriate.

Id. (emphasis omitted).

¹⁵⁵ “Kelly’s” name and identifying details were changed for her protection when NBC’s Virginia affiliate published her story. Adam Rhew, *Kelly’s Story*, NBC29.COM, <http://www.nbc29.com/story/13474792/kellys-story?clienttype=printable> (last updated Nov. 23, 2010).

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

¹⁶² Rhew, *supra* note 38.

¹⁶³ *Id.*

life choice that this is what they want to do at 17 or 17 and a half years old.¹⁶⁴

The problem is that, in cases such as Kelly's, prostitution is *not* what many of these girls would consider to be a valid "life choice." According to Shared Hope's Virginia assessment, representatives from various Virginia agencies "illustrated a general lack of awareness and understanding of the issue—effectively hindering accurate identification" of victims.¹⁶⁵ As such, the passage of HB 2190 was vital to Virginia's fight against human trafficking. The Commonwealth cannot, however, pass such a bill without proper appropriation for the implementation of these programs. According to the bill's fiscal impact statement, "[t]his statement assumes that the Department of Social Services has adequate resources and staff to develop the plan as outlined. However, additional funding (state or federal) would be needed if some of the specific provisions were to be actually implemented."¹⁶⁶ The bill itself is without backbone, and even executive directives reinforcing and expanding upon the subject matter have not provided the funding necessary to undertake this venture.¹⁶⁷

C. Senate Bill 1453

Recognizing the issues commonwealth attorneys might face in combating human trafficking without a comprehensive statute, the last bill, SB 1453, "[r]equires the Department of Criminal Justice Services to, in conjunction with the Office of the Attorney General, advise law-enforcement agencies and attorneys for the Commonwealth regarding the identification, investigation, and prosecution of human trafficking offenses using the common law and existing Virginia criminal statutes."¹⁶⁸ The bill itself, enacted in March of 2011, simply adds this requirement to the text of Virginia Code section 9.1-102, regarding the "[p]owers and duties of the Board and the Department [of Criminal Justice]."¹⁶⁹ It seems the Virginia Department of Criminal Justice Services, in partnership with the Attorney General's Office, promptly

¹⁶⁴ RAPID ASSESSMENT: VIRGINIA, *supra* note 44, at 27 (alterations except for closing quotation mark in original).

¹⁶⁵ *Id.*

¹⁶⁶ 2011 Fiscal Impact Statement: HB 2190, DEP'T PLANNING & BUDGET (2011), <http://lis.virginia.gov/cgi-bin/legp604.exe?111+oth+HB2190FER122+PDF>.

¹⁶⁷ Va. Exec. Directive No. 7, *supra* note 115 ("Nothing in this Executive Directive should be construed as imposing an unfunded mandate on any Independent or non-Executive branch agency of the Commonwealth of Virginia.").

¹⁶⁸ 2011 Session: SB 1453 Human Trafficking; DCJS, *etc.*, *Regarding Identification, etc., of Offenses Using Existing Statutes*, VA.'S LEGIS. INFO. SYS., <http://lis.virginia.gov/cgi-bin/legp604.exe?111+sum+SB1453> (last visited Mar. 31, 2014).

¹⁶⁹ S.B. 1453, 2011 Gen. Assemb., Reg. Sess. (Va. 2011) (enacted).

complied with these new requirements, adding to its website a human trafficking resource center offering criminal, federal, and non-government resources to officials seeking guidance.¹⁷⁰ At the time of this bill's passage, however, the Virginia General Assembly might not have fully understood how utterly lacking the Commonwealth is in common law resources. As alluded to previously,¹⁷¹ the document that provides a statutory breakdown of the criminal offenses human traffickers and facilitators can be charged with is virtually devoid of factually relevant case law. Although the Department includes citations to various cases as a means of assisting in the interpretation of particular statutory elements,¹⁷² only one case has any factual relevance,¹⁷³ and that case is cited only once—as a source to be used in determining what Virginia considers to be valuable consideration under section 18.2-357 of the Virginia Code.¹⁷⁴

D. An Impact on the Ground?

In summation, the passage of HB 1898, HB 2190, and SB 1453 were somewhat reactionary. Although the bills do provide for some necessary statutory changes and reflect Virginia's understanding of the need for increased human trafficking awareness training and resources, the bills probably make more of an impact on paper than on the ground. Firstly, the amendments made to the Virginia Criminal Code as a result of HB 1898 are somewhat offset by maintaining affirmative age and consent defenses for purchasers and traffickers. Secondly, HB 2190 will have little to no impact provided the Commonwealth does not provide social services with the necessary funding to implement programs for victims of human trafficking. In the same year this bill was passed, however, the Attorney General stated the government was not “at a point where it warrants spending state dollars on creating essentially a new social welfare program.”¹⁷⁵ Considering the blatant way in which the

¹⁷⁰ See VIRGINIA ANTI-TRAFFICKING LAWS, *supra* note 72; *Human Trafficking Resources for Commonwealth's Attorneys*, *supra* note 73.

¹⁷¹ See *supra* Part I.

¹⁷² VIRGINIA ANTI-TRAFFICKING LAWS, *supra* note 72.

¹⁷³ See *Tart v. Commonwealth*, 663 S.E.2d 113, 114, 116–17 (Va. Ct. App. 2008).

¹⁷⁴ VIRGINIA ANTI-TRAFFICKING LAWS, *supra* note 72, at 6–7.

¹⁷⁵ Rhew, *supra* note 38. As of January 2014, Virginia's Office of the Attorney General reported that (now former) Attorney General Ken Cuccinelli “is asking the U.S. Department of Treasury for approval to use \$6 million from money his office obtained from the 2012 Abbott Laboratories Medicaid fraud settlement for creating shelters” for victims of human trafficking in Virginia. See Press Release, Commonwealth Va. Office Attorney Gen., Cuccinelli to Create Shelters for Human Trafficking Victims Around Virginia Using \$6 Million from Criminals (Jan. 8, 2014), available at http://www.oag.state.va.us/Media%20and%20News%20Releases/News_Releases/Cuccinelli/010814_Human_Trafficking.html.

mere mention of funding these necessary services was cast aside, it does not seem this bill will have much of an effect until attitudes change and funds are diverted. Lastly, although SB 1453 has been complied with, a document outlining the twenty-seven various charges that can be brought against a perpetrator of human trafficking does little to educate or encourage commonwealth attorneys to divert resources to prosecuting such violations. Without the guidance of precedent of prior state-level human trafficking prosecutions at commonwealth attorneys' disposal, the Attorney General's Office must take the lead in forging such a path.

III. COVERING THE "BATTLEFIELD" BUT NOT FIGHTING THE WAR

Although Virginia lacks both applicable case law and comprehensive human trafficking legislation, the former Attorney General never claimed that precedent was abundant nor that human sex trafficking was an enumerated criminal offense. Rather, he implied Virginia law as it currently stands can adequately address any cause of action arising from a traditional trafficking violation.¹⁷⁶ In determining whether Virginia adequately covers the proverbial legal "battlefield" that is commercial sexual exploitation, therefore, Virginia's current legislation purporting to address the issue will be contrasted with legislation promulgated under a comprehensive alternative model; after which, the essential elements of a human trafficking offense will be outlined and equated with any applicable sections of the Virginia Code. Although federal human trafficking legislation is by far the most comprehensive and provides for an extensive body of case law, a comparative analysis between federal and state legislation would yield neither fair nor accurate results due to federal jurisdictional requirements and more abundant financial resources.¹⁷⁷ As such, the State of Illinois will serve as Virginia's legislative contrast. Illinois not only adheres to a comprehensive "safe harbor" model of trafficking legislation, but it also received a high score from Shared Hope

This request has not yet been granted, and whether such funds will be released for this purpose remains to be seen.

¹⁷⁶ See Rhew, *supra* note 38.

¹⁷⁷ See 18 U.S.C. § 1591(a)(1) (2012) (applying to actions "in or affecting interstate or foreign commerce"); ALISON SISKIN & LIANA SUN WYLER, CONG. RESEARCH SERV., RL34317, *TRAFFICKING IN PERSONS: U.S. POLICY AND ISSUES FOR CONGRESS* (2013) (stating that the Trafficking Victims Protection Reauthorization Act authorized \$191.3 million for fiscal year 2011 anti-trafficking programs).

International's report card analysis,¹⁷⁸ and is relatively comparable to Virginia in GDP per capita.¹⁷⁹

A. The "Safe Harbor" Model

Unlike in Virginia, the State of Illinois has a comprehensive human trafficking statute.¹⁸⁰ It begins by providing definitions for terms such as "commercial sexual activity," "services," "sexually-explicit performance," and "trafficking victim."¹⁸¹ Already the Illinois statute is distinct from Virginia's model, as Virginia's Attorney General's Office acknowledges that the term "forced labor or services" is undefined in the Virginia Code, and courts must "rely on the plain and ordinary meaning of the words. (Common sense)."¹⁸² The Illinois statute then defines "involuntary servitude," criminalizing within the definition both its attempt and conspiracy.¹⁸³ The next section of the Illinois statute, regarding "[i]nvoluntary sexual servitude of a minor,"¹⁸⁴ specifically mirrors federal

¹⁷⁸ PROTECTED INNOCENCE, *supra* note 44, at 12.

¹⁷⁹ In 2010, Illinois had a per capita real gross domestic product of about \$45,300, and Virginia had a per capita real gross domestic product of around \$47,600. Jonathan E. Avery et al., *Gross Domestic Product by State: Advance Statistics for 2010 and Revised Statistics for 2007-2009*, SURV. CURRENT BUS., July 2011, at 142, 153 tbl.4.

¹⁸⁰ 720 ILL. COMP. STAT. ANN. 5/10-9 (Westlaw through P.A. 98-623, 2013 Reg. Sess.).

¹⁸¹ *See id.* § 5/10-9(a)(2), (8)-(10) (Westlaw).

¹⁸² VIRGINIA ANTI-TRAFFICKING LAWS, *supra* note 72, at 2. More often than not, providing for and acknowledging such vague areas in the code will have defense attorneys salivating.

¹⁸³ § 5/10-9(b) (Westlaw).

(b) Involuntary servitude. A person commits involuntary servitude when he or she knowingly subjects, attempts to subject, or engages in a conspiracy to subject another person to labor or services obtained or maintained through any of the following means, or any combination of these means:

- (1) causes or threatens to cause physical harm to any person;
- (2) physically restrains or threatens to physically restrain another person;
- (3) abuses or threatens to abuse the law or legal process;
- (4) knowingly destroys, conceals, removes, confiscates, or possesses any actual or purported passport or other immigration document, or any other actual or purported government identification document, of another person;
- (5) uses intimidation, or exerts financial control over any person; or
- (6) uses any scheme, plan, or pattern intended to cause the person to believe that, if the person did not perform the labor or services, that person or another person would suffer serious harm or physical restraint.

Sentence. Except as otherwise provided in subsection (e) or (f), a violation of subsection (b)(1) is a Class X felony, (b)(2) is a Class 1 felony, (b)(3) is a Class 2 felony, (b)(4) is a Class 3 felony, (b)(5) and (b)(6) is a Class 4 felony.

Id.

¹⁸⁴ *Id.* § 5/10-9(c) (Westlaw).

legislation in providing that trafficking a person under the age of eighteen requires “no overt force or threat” as would be required if the victim had reached adulthood.¹⁸⁵ No variation of this vital statutory provision is present in the Virginia Code. Furthermore, where the Virginia model of combating human trafficking consists of prosecuting individual offenses as they fall within traditional common law categories, the Illinois human trafficking statute itself includes sections pertaining to aggravating factors,¹⁸⁶ separate sentencing considerations,¹⁸⁷ mandatory restitutionary measures for victims,¹⁸⁸ emergency social services,¹⁸⁹ certification to the federal government of an ongoing investigation so as to assist victims with immigration visas and federal benefits,¹⁹⁰ and a property forfeiture provision for those found to have participated in the victimization.¹⁹¹ There are also separate statutory provisions allowing the court to vacate a victim’s previous prostitution convictions,¹⁹² and providing that persons under the age of eighteen are immune from prosecution for a prostitution related offense.¹⁹³

Along with the provisions set forth in the Illinois Criminal Code, Illinois also provides victims of human trafficking with various civil remedies. According to the Illinois “Predator Accountability Act,”¹⁹⁴

(b) A victim of the sex trade has a cause of action against a person or entity who:

(c) Involuntary sexual servitude of a minor. A person commits involuntary sexual servitude of a minor when he or she knowingly recruits, entices, harbors, transports, provides, or obtains by any means, or attempts to recruit, entice, harbor, provide, or obtain by any means, another person under 18 years of age, knowing that the minor will engage in commercial sexual activity, a sexually-explicit performance, or the production of pornography, or causes or attempts to cause a minor to engage in one or more of those activities

Id.

¹⁸⁵ *Id.* § 5/10-9(c)(1)–(3) (Westlaw).

¹⁸⁶ *Id.* § 5/10-9(e) (Westlaw) (“A violation of this Section involving kidnapping or an attempt to kidnap, aggravated criminal sexual assault or an attempt to commit aggravated criminal sexual assault, or an attempt to commit first degree murder is a Class X felony.”).

¹⁸⁷ *Id.* § 5/10-9(f) (Westlaw).

¹⁸⁸ *Id.* § 5/10-9(g) (Westlaw).

¹⁸⁹ *Id.* § 5/10-9(h) (Westlaw).

¹⁹⁰ *Id.* § 5/10-9(i) (Westlaw).

¹⁹¹ *Id.* § 5/10-9(j) (Westlaw).

¹⁹² 725 ILL. COMP. STAT. ANN. 5/116-2.1 (Westlaw through P.A. 98-623, 2013 Reg. Sess.).

¹⁹³ 720 ILL. COMP. STAT. ANN. 5/11-14(d) (Westlaw through P.A. 98-623, 2013 Reg. Sess.) (setting forth the key provision that causes Illinois’ legislative model to be classified as a “safe harbor” one).

¹⁹⁴ 740 ILL. COMP. STAT. ANN. 128 (Westlaw through P.A. 98-623, 2013 Reg. Sess.).

(1) recruits, profits from, or maintains the victim in any sex trade act;

(2) intentionally abuses, as defined in Section 103 of the Illinois Domestic Violence Act of 1986, or causes bodily harm, as defined in Section 11-0.1 of the Criminal Code of 2012, to the victim in any sex trade act; or

(3) knowingly advertises or publishes advertisements for purposes of recruitment into sex trade activity.¹⁹⁵

Furthermore, the act provides a “prevailing victim of the sex trade shall be entitled to all relief that would make him or her whole,” and includes a non-exhaustive list of recovery options.¹⁹⁶ This accountability act also contains a provision limiting the defenses available to defendants,¹⁹⁷ including, for example, that “the victim of the sex trade made no attempt to escape, flee, or otherwise terminate contact with the defendant.”¹⁹⁸ Finally, in a seeming acknowledgement of the fact minors tend not to enter into a lifestyle of prostitution without the influence of a third-party adult, all minors attempting to engage in prostitution are immediately subject to protective custody provisions.¹⁹⁹ These provisions allow for the minor’s temporary seclusion in order to investigate potential child abuse.²⁰⁰

The model of human trafficking legislation employed by the State of Illinois is known as the “safe harbor” model within advocacy circles.²⁰¹ Such a model is considered to be on the forefront of human trafficking advocacy, and is a structure commonly lobbied for by advocates.²⁰² According to Polaris Project, the implementation of the model requires the adoption of three primary provisions: (1) Prevent minor victims of sex trafficking from being prosecuted for prostitution; (2) Ensure that coercion is not required to prosecute the sex trafficking of children; and (3) Protect child victims of human sex trafficking by providing specialized services for them.²⁰³ Illinois, Massachusetts, Minnesota, New

¹⁹⁵ *Id.* § 128/15(b) (Westlaw).

¹⁹⁶ *Id.* § 128/20 (Westlaw).

¹⁹⁷ *Id.* § 128/25 (Westlaw).

¹⁹⁸ *Id.* § 128/25(a)(5) (Westlaw).

¹⁹⁹ *See* 720 ILL. COMP. STAT. ANN. 5/11-14(d) (Westlaw through P.A. 98-623, 2013 Reg. Sess.); *see also* 705 ILL. COMP. STAT. ANN. 405/2-5 to -6 (Westlaw through P.A. 98-623, 2013 Reg. Sess.).

²⁰⁰ *See* § 5/11-14(d).

²⁰¹ *See* POLARIS PROJECT, SAFE HARBOR—PROTECTING SEXUALLY EXPLOITED MINORS 1–2 (Aug. 2013), *available at* <http://www.polarisproject.org/storage/2013-Analysis-Category-6-Safe-Harbor.pdf>.

²⁰² *See id.* at 1, 4.

²⁰³ POLARIS PROJECT, HUMAN TRAFFICKING LEGISLATIVE ISSUE BRIEF: SEX TRAFFICKING OF MINORS AND “SAFE HARBOR” (2010), *available at*

Jersey, New York, Ohio, Vermont, and Washington have implemented full “safe harbor” programs, while Connecticut, Florida, Michigan, Tennessee, and Texas have partial provisions.²⁰⁴ Virginia does not provide for any of these recommendations. Although the “safe harbor” model primarily focuses on the commercial sexual exploitation of minors—those under the age of eighteen—it is a good starting point for states such as Virginia that have been slow to adopt comprehensive human trafficking legislation.

Due to the unique psychological nature of human trafficking offenses, the “safe harbor” model seeks to combat the common error law enforcement officials make when they misidentify victims of human sex trafficking.²⁰⁵ In a 2006 report submitted to the U.S. Department of Justice, law enforcement officers stated that gaining victims’ trust and encouraging them to come forward is difficult.²⁰⁶ An officer reported that many of the victims do not trust the police because the victims fear deportation.²⁰⁷ One interviewee responded that victims are accustomed to seeing corrupt law enforcement officials in their countries, so they are strongly anti-government.²⁰⁸ The report further indicated that first responders do not normally “have time to conduct the detailed interview necessary to uncover the crime [of sex trafficking].”²⁰⁹ One officer noted that “[i]t is difficult to determine a case without talking to the victim . . . to know if they are forced into prostitution or not. It is often easier to assume they are willing to be in prostitution.”²¹⁰

The Virginia General Assembly seemingly recognized this issue when it passed SB 1453. This bill required the Attorney General’s Office to work with the Department of Criminal Justice to advise law enforcement officers “regarding the identification, investigation, and prosecution of human trafficking offenses using the common law and existing criminal statutes in the Code of Virginia.”²¹¹ However, as the fiscal impact statement submitted with the bill claimed, “[t]he

http://www.polarisproject.org/storage/documents/policy_documents/model%20laws/Issue_Brief_-_Safe_Harbor_7-23-2010.pdf.

²⁰⁴ See *Sex Trafficking of Minors and “Safe Harbor,”* POLARIS PROJECT, <http://www.polarisproject.org/what-we-do/policy-advocacy/assisting-victims/safe-harbor> (last visited Mar. 31, 2014).

²⁰⁵ See RAPID ASSESSMENT: VIRGINIA, *supra* note 44, at 2.

²⁰⁶ HEATHER J. CLAWSON ET AL., LAW ENFORCEMENT RESPONSE TO HUMAN TRAFFICKING AND THE IMPLICATIONS FOR VICTIMS: CURRENT PRACTICES AND LESSONS LEARNED 33 (2006), available at <http://www.ncjrs.gov/pdffiles1/nij/grants/216547.pdf>.

²⁰⁷ *Id.*

²⁰⁸ *Id.*

²⁰⁹ *Id.* (internal quotation marks omitted).

²¹⁰ *Id.* (alteration in original) (internal quotation marks omitted).

²¹¹ S.B. 1453, 2011 Gen. Assemb., Reg. Sess. (Va. 2011) (enacted).

Department of Criminal Justice Services and the Office of the Attorney General report the workload associated with the bill should be minimal and if so, the fiscal impact can be absorbed.”²¹² If providing the entire law enforcement community of Virginia with the intricate education necessary in order to assist in the identification of trafficking victims has only a minimal workload, the General Assembly probably does not fully comprehend the training and resources necessary to assist with victim identification. According to Shared Hope International’s assessment of Virginia, Child Protective Services’ staff reported having no training regarding human trafficking, nor did they have formal methods of identification or a classification system for victims of commercial sexual exploitation.²¹³ The first improvement the Commonwealth of Virginia must make, therefore, is to increase the educational resources provided to law enforcement and social service professionals regarding the identification, protection, and rehabilitation of victims. There is little point in drafting intricate statutory provisions if the victims whom such provisions are enacted to protect are left in the shadows.

B. The Criminal Elements of Human Trafficking

Once the Commonwealth endeavors to improve the methods used in the identification of and services provided to victims of human trafficking, the next step requires determining the nature of the crimes actually committed. Commonly, a human trafficking offense consists of the following three phases of criminality, which have been broken down here to include any potentially applicable Virginia statutes. Firstly, abduction takes place through force (physical taking), fraud (i.e., promise of lawful employment), and/or coercion (i.e., either you or your sister).²¹⁴ During the abduction (Virginia Code sections 18.2-47, 48, and 49) or “recruitment” phase of trafficking, crimes including document forgery (sections 18.2-168, 169, 171, 172, 172.2, and 178), bribery of officials (sections 18.2-439 and 444), false imprisonment (section 18.2-47), and assault and battery (sections 18.2-42 and 57) can occur.²¹⁵ Secondly, the victim enters the “transportation and entry” phase of the offense, which consists primarily of using vehicles and other means of transportation for the purpose of furthering commercial sexual exploitation (section 18.2-349), receiving money for procuring the person

²¹² 2011 Fiscal Impact Statement: SB1453, DEPT. PLANNING AND BUDGET (2011), <http://lis.virginia.gov/cgi-bin/legp604.exe?111+oth+SB1453FER122+PDF>.

²¹³ RAPID ASSESSMENT: VIRGINIA, *supra* note 44, at 3.

²¹⁴ See U.N. OFFICE ON DRUGS & CRIME, TOOLKIT TO COMBAT TRAFFICKING IN PERSONS 107–09, U.N. Sales No. E.08.V.14 (2008).

²¹⁵ *Id.* at 108 (listing some aspects of the recruitment phase).

(section 18.2-356), placing that person in a bawdy place (sections 18.2-347 and 355), withholding documents (section 18.2-47), and committing additional acts of false imprisonment and violence.²¹⁶

The third phase is known as the “exploitation” phase,²¹⁷ and consists of the most brutal offenses. Depending on the nature of the trafficking organization, this phase commonly consists of gang rape (sections 18.2-61, 63, and 67.5), sexual battery (sections 18.2-67.4, 67.1, 67.2, 67.3, 67.4:1, and 67.4:2), physical and emotional abuse, extortion (section 18.2-59), torture or sadomasochistic abuse (see section 18.2-390), forced abortion (sections 18.2-71 and 76.1), forced ingestion of controlled substances, threats to abuse the legal system (see section 18.2-59), theft of property (sections 18.2-95 and 96), and denial of medical care.²¹⁸ Furthermore, individuals participating in the enterprise at only certain intervals could be guilty of aiding and abetting (sections 18.2-18 and 348), conspiracy (section 18.2-22), solicitation (sections 18.2-29 and 346), taking indecent liberties with children (sections 18.2-370 and 371), money laundering (section 18.2-246.3), and receiving money to further prostitution (section 18.2-357).²¹⁹ An indictment for a human trafficking offense would likely include multiple counts for each criminal element.

For Virginia law enforcement officials, the time and resources it would take to investigate and prosecute all of the individual criminal elements commonly associated with a human trafficking offense would be exponential. Virginia does indeed have individual statutes to cover the majority of offenses present, but it is highly unlikely that more than a handful of charges would be brought. For example, the first statute the Attorney General’s Office lists under “Sex Trafficking” in the prosecution guide for commonwealth attorneys concerns “Abduction” (section 18.2-48).²²⁰ As a conviction under the abduction statute is good for twenty years to life in prison,²²¹ is it likely a prosecutor is going to take the time to prosecute misdemeanor charges such as frequenting a bawdy place?²²² Considering the magnitude of the crime, however, is the labeling of traffickers as only abductors, extortionists, or promoters of prostitution sufficient? When Virginia officials claim the Criminal Code is “covering the battlefield,” it seems what they really mean to say is

²¹⁶ See *id.* at 107–09 (listing some aspects of the transportation and entry phase).

²¹⁷ *Id.* at 107–08.

²¹⁸ See *id.* at 108–10 (listing some aspects of the exploitation phase).

²¹⁹ See *id.* at 107–09 (describing possible crimes that can be committed by traffickers).

²²⁰ VIRGINIA ANTI-TRAFFICKING LAWS, *supra* note 72, at 3.

²²¹ VA. CODE ANN. § 18.2-10(b) (LEXIS through 2013 Spec. Sess. I).

²²² *Id.* § 18.2-347 (LEXIS); Lemke v. Commonwealth, 241 S.E.2d 789, 790 (Va. 1978).

“we’ll get traffickers on enough to put them away for life,” not “we recognize the horrors of human trafficking and intend to use our legal resources to ensure the crime in its holistic sense is being prosecuted.” Herein lies the problem with Virginia’s legislative approach to combating human trafficking.

C. *Fighting the War*

If a man is on trial for the commission of rape and murder, one does not simply forgo prosecuting the murder charge because a conviction under the rape statute would put him away for life. When *malum in se* crimes are committed, punishing those who commit the offenses is about more than simply imprisoning someone for a decent term. Punishment is also a means of showing society that such crime, especially crime that violates the conscience, will not be tolerated. Combating human trafficking is about more than covering a single legal “battlefield”; it is about waging social, political, and spiritual war. One cannot wage war, however, until one declares it. Without the adoption of a comprehensive human trafficking statute or even a basic reporting system that would bring to light the magnitude of commercial sexual exploitation within the Commonwealth, Virginia’s efforts to combat human trafficking will remain nominal.

Human trafficking is a *malum in se* crime, one unlike many others. Trafficking is more than abduction and extortion, which are crimes many associate only with personal vendettas or perverted interests. Trafficking is an active criminal enterprise, the second largest in the world.²²³ It is cold, it is cruel, and it is devoid of justification and excuse. Although recognized executively, Virginia’s refusal to legislatively recognize it as the unique crime it is helps the Commonwealth gloss over its horrors. Without a comprehensive, or even basic, statute that explicitly recognizes the felony of “human trafficking,” the notion that human trafficking is not occurring within the Commonwealth is aided.²²⁴ By prosecuting a human trafficking offense based only on the individual criminal elements that constitute it, the Commonwealth is effectively perpetrating the notion that *human trafficking is not a crime!* It is telling Virginians that abduction, extortion, prostitution, and running brothels are crimes. It is not telling Virginians that the Commonwealth legally recognizes and will take action specifically against the perpetrators of *human trafficking*. Furthermore, the Virginia rules of criminal procedure define the term “victim” as “a person who suffers

²²³ See *Human Trafficking*, *supra* note 112; *What is Human Trafficking*, *supra* note 112.

²²⁴ RAPID ASSESSMENT: VIRGINIA, *supra* note 44, at 2.

personal physical injury or death as a direct result of a crime.”²²⁵ Despite what positive, albeit legislatively toothless, executive directives and human trafficking summits might imply,²²⁶ when there is no legal crime, there can be no legal victims. Logically, it would seem human trafficking is not occurring in Virginia, and the Commonwealth has no victims of it. What kind of trafficker would not see Virginia as open for the business of trafficking in persons?!

CONCLUSION

If the question is whether, when faced with prosecuting a human trafficking violation, a commonwealth attorney would be able to take that trafficker off the streets, the answer is “yes.” If the question is whether Virginia really covers the “battlefield” of human trafficking, however, the answer is a resounding “no.” The specific nature and elements of a human trafficking offense might be covered within the Virginia Code, but the average citizen will not likely come to the realization that “abduction” means “human trafficking” as well. The perpetrators of human trafficking deserve the label, and the victims of human trafficking deserve to be legally recognized as such. The Commonwealth of Virginia does not provide its law enforcement and social service professionals with the proper educational and financial resources to recognize and aid victims of trafficking. The Attorney General’s Office has virtually no common law resources to provide to commonwealth attorneys, and it has not set an example for them by seeking out and prosecuting the perpetrators of human trafficking. The Virginia Code, although prehistorically workable, does not provide an efficient way for attorneys to prosecute the perpetrators of human trafficking whereby the criminal will be punished as a trafficker and the victim at least partially avenged as his or her trafficking victim.

The Virginia model, or lack thereof, for combating human trafficking is flawed to say the least. Even if commonwealth attorneys were to start vigorously seeking out and prosecuting intrastate human trafficking offenses, where would the appropriations come from? What would happen to the victims? Would seventeen-year-old girls continue to be prosecuted for prostitution? Would victims like Kelly continue to exclaim that “dealing with the system was nearly as traumatic as being trafficked”?²²⁷ Is the Virginia General Assembly asking itself any of these questions? Even if the resources are not currently available to reorganize the entirety of Virginia’s social service system, this does not

²²⁵ VA. CODE ANN. § 19.2-368.2 (LEXIS).

²²⁶ See, e.g., Va. Exec. Directive No. 7, *supra* note 115.

²²⁷ Rhew, *supra* note 38.

mean the Commonwealth should avoid recognizing the comprehensive crime of human trafficking, even solely as a means of mobilizing private society to action. If the Commonwealth is serious about combating human sex trafficking, not simply using a handful of bills and executive orders to save face in the midst of embarrassing assessments,²²⁸ then it must begin to wage a holistic war against human trafficking's monumental physical, emotional, and spiritual effects. The Commonwealth simply cannot cover this expansive "battlefield" using old weapons that were not designed to fight the slave trade of this generation.

*Nicole Tutrani**

²²⁸ See, e.g., PROTECTED INNOCENCE, *supra* note 44, at 11–15; SHARED HOPE INT'L, PROTECTED INNOCENCE CHALLENGE: STATE REPORT CARDS ON THE LEGAL FRAMEWORK OF PROTECTION FOR THE NATION'S CHILDREN 11–15 (2012), available at http://sharedhope.org/wp-content/uploads/2012/09/ProtectedInnocenceChallenge_FINAL_2012_web2.pdf; SHARED HOPE INT'L, PROTECTED INNOCENCE CHALLENGE: STATE REPORT CARDS ON THE LEGAL FRAMEWORK OF PROTECTION FOR THE NATION'S CHILDREN 11, 13–16 (2011), available at http://sharedhope.org/wp-content/uploads/2012/10/PIC_ChallengeReport_2011.pdf; RAPID ASSESSMENT: VIRGINIA, *supra* note 44, at 2–3.

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