

# PROTECTING SEX TRAFFICKING VICTIMS THROUGH EXPUNGEMENT AND VACATUR STATUTES: WILL VIRGINIA JOIN THE REST OF THE NATION?

*S. Ernie Walton*<sup>†</sup>

## INTRODUCTION

In 2015, with overwhelming bipartisan support, the Virginia General Assembly officially criminalized “sex trafficking.”<sup>1</sup> Sponsored by Delegate Tim Hugo and Senators Mark Obenshain, then-Governor Terry McAuliffe, signed HB 1964 and SB 1188 into law on March 27, 2015.<sup>2</sup> The law, among other things, clearly established and defined the offense of “sex trafficking”<sup>3</sup> and criminalized child sex trafficking as a Class 3 Felony without requiring prosecutors to prove force, intimidation, or deception.<sup>4</sup> The passage of the law was a huge victory for Virginia and sex trafficking victims in the Commonwealth. Advocacy groups and residents rightly celebrated the bill and praised the efforts of those who sponsored it.<sup>5</sup> At the same time, however, the

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<sup>†</sup> S. Ernie Walton, Regent University School of Law; Director, Regent University School of Law Center for Global Justice; Assistant Dean of Admissions; B.S. Houghton College, J.D. Regent University School of Law.

<sup>1</sup> Shared Hope Int’l Staff, *Virginia: Last State in Nation to Establish a Human Trafficking Law*, SHARED HOPE INT’L (Apr. 1, 2015), <https://sharedhope.org/2015/04/01/virginia-last-state-in-nation-establishes-first-standalone-sex-trafficking-law/> [hereinafter *Last State in Nation*].

<sup>2</sup> Shared Hope Int’l Staff, *Virginia’s First Sex Trafficking Law*, SHARED HOPE INT’L (April 15, 2015), <https://sharedhope.org/2015/04/15/virginias-first-sex-trafficking-law/>.

<sup>3</sup> VA. CODE ANN. § 18.2-357.1(A) (2019) (“Any person who, with the intent to receive money or other valuable thing or to assist another in receiving money or other valuable thing from the earnings of a person from prostitution or unlawful sexual intercourse in violation of subsection A of § 18.2-346, solicits, invites, recruits, encourages, or otherwise causes or attempts to cause a person to violate subsection A of § 18.2-346 is guilty of a Class 5 felony.”).

<sup>4</sup> VA. CODE ANN. § 18.2-357.1(C) (2019) (“Any adult who violates subsection A with a person under the age of 18 is guilty of a Class 3 felony.”).

<sup>5</sup> The bills were backed by the Kids are Not for Sale Coalition, “a collective effort between Virginia law enforcement, prosecutors, advocacy groups, schools, and hospitals.” Members included Shared Hope International, Richmond Justice Initiative, Virginia Beach Justice

the bill and praised the efforts of those who sponsored it.<sup>6</sup> At the same time, however, the passage of the bill reflected a regrettable reality: Virginia was the last state in the nation to pass a standalone human trafficking statute.<sup>7</sup> In our system of federalism, being the last state to pass certain legislation is not always a bad thing. States often experiment with different ideas, find out what works and what does not, and then adapt legislation to fit the unique needs and culture of their state. Accordingly, being “last” might reflect wisdom and patience—not in the case of sex trafficking. Criminalizing sex trafficking and increasing penalties for those who sell children for sex should not require much experimentation. Virginia was dead wrong to wait so long to clearly criminalize this heinous and growing crime.

One would think that Virginia learned its lesson. Unfortunately, it appears the General Assembly has not. Virginia is again poised to be (and in one sense already is<sup>8</sup>) the last state in the nation to pass critical legislation protecting sex trafficking victims. What makes this recent failure so curious is that, overall, the General Assembly is doing a great job combating sex trafficking. In the 2019 session alone, at the recommendation of the Virginia Crime Commission, the General Assembly passed a number of bills

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Initiative, Regent School of Law Center for Global Justice, Anastasis International, Northern Virginia Human Trafficking Initiative, Central Virginia Justice Initiative, Courtney’s House, Vessels of Mercy International, The Gray Haven, Virginia Catholic Conference, Bon Secours Virginia Health Systems, Release Me International, Virginia Trucking Association, The Family Foundation, Straight Street, and Youth for Tomorrow.” *Last State in Nation*, *supra* note **Error! Bookmark not defined.**

<sup>5</sup> The bills were backed by the Kids are Not for Sale Coalition, “a collective effort between Virginia law enforcement, prosecutors, advocacy groups, schools, and hospitals.” Members included Shared Hope International, Richmond Justice Initiative, Virginia Beach Justice Initiative, Regent School of Law Center for Global Justice, Anastasis International, Northern Virginia Human Trafficking Initiative, Central Virginia Justice Initiative, Courtney’s House, Vessels of Mercy International, The Gray Haven, Virginia Catholic Conference, Bon Secours Virginia Health Systems, Release Me International, Virginia Trucking Association, The Family Foundation, Straight Street, and Youth for Tomorrow.” *Last State in Nation*, *supra* note **Error! Bookmark not defined.**

<sup>7</sup> *Id.*

<sup>8</sup> See *infra* text accompanying notes 59–60.

that add key *protections* for child sex trafficking victims; increase *prevention* efforts with the creation of new positions and increased funding; and heighten *penalties* for buyers, also known as “johns.”<sup>9</sup> Among the bills are HB 2464, amending VA Code § 18.2-67.9 to allow some child sex trafficking victims to testify via “two-way closed-circuit television”<sup>10</sup>; HB 2576, creating a new position in the Department of Criminal Justice Services called the “Sex Trafficking Response Coordinator”<sup>11</sup>; HB 2586, increasing penalties from a Class 1 misdemeanor to a Class 6 felony for “any person who commits an act of aiding prostitution or illicit sexual intercourse or using a vehicle to promote prostitution or unlawful sexual intercourse, when such act involves a minor”<sup>12</sup>; HB 2597,

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<sup>9</sup> See *infra* notes 10 and 12. “The ‘3P’ paradigm—prosecution, protection, and prevention—continues to serve as the fundamental framework used around the world to combat human trafficking.” Office to Monitor and Combat Trafficking in Persons, *3Ps: Prosecution, Protection, and Prevention*, U.S. DEP’T OF STATE, <https://www.state.gov/3ps-prosecution-protection-and-prevention/> (last visited Nov. 16, 2019).

<sup>10</sup> H.B. 2464, Gen. Assemb., Reg. Sess. (Va. 2019) (enacted) (amending VA. CODE ANN. § 18.2-67.9, Testimony by child victims and witnesses using two-way closed-circuit television). The bill allows minors who were fourteen or younger at the time of the offense and sixteen or younger at the time of the trial to testify via two-way closed-circuit television upon order of the judge based on certain findings.

<sup>11</sup> H.B. 2576, Gen. Assemb., Reg. Sess. (Va. 2019) (enacted) (creating VA. CODE ANN. § 9.1-116.4, Sex Trafficking Response Coordinator; duties; report). According to the bill, “The Coordinator shall: 1. Create a statewide plan for local and state agencies to identify and respond to victims of sex trafficking; 2. Coordinate the development of standards and guidelines for treatment programs for victims of sex trafficking; 3. Maintain a list of programs that provide treatment or specialized services to victims of sex trafficking and make such list available to law-enforcement agencies, attorneys for the Commonwealth, crime victim and witness assistance programs, the Department of Juvenile Justice, the Department of Social Services, the Department of Education, and school divisions; 4. Oversee the development of a curriculum to be completed by persons convicted of solicitation of prostitution under subsection B of § 18.2-346; and 5. Promote strategies for the education, training, and awareness of sex trafficking and for the reduction of demand for commercial sex.” *Id.*

<sup>12</sup> H.B. 2586 Prostitution and Sex Trafficking; Offenses Involving a Minor, Penalties, 2019 Sess., VA. LEGIS. INFO. SYS., <https://lis.virginia.gov/cgi-bin/legp604.exe?191+sum+HB2586> (last visited Nov. 13 2020). H.B. 2586, Gen. Assemb., Reg. Sess. (Va. 2019) (enacted) (amending VA. CODE ANN. § 18.2-349). This provision is particularly important, as it increases penalties for buyers or “johns,” which is essential to lowering demand. This bill also added felony prostitution and felony human trafficking to the definition of “violent felony” for the purposes of sentencing guidelines. *Id.* (amending VA. CODE ANN. § 17.1-805(C) and established “each violation” of the commercial sex trafficking statute as a “separate and distinct felony.” *Id.* (adding VA. CODE ANN. § 18.2-357.1(D)).

requiring social services “to conduct a sex trafficking assessment upon receiving a complaint of suspected child abuse that is based upon information and allegations that a child is a victim of sex trafficking” and allowing a CPS worker to take a child sex trafficking victim into custody for up to 72 hours<sup>13</sup>; and HB 2651, requiring persons convicted of certain crimes to pay a fee that will fund the “Virginia Prevention of Sex Trafficking Fund.”<sup>14</sup>

### A. *Criminal Record Relief Laws*

2019 truly was a great session for combating sex trafficking in the Commonwealth, and the General Assembly should be commended for its courageous efforts. But while the General Assembly is deserving of serious praise, it is equally deserving of serious critique. Repeatedly, the General Assembly has rejected various bills that arguably serve as the cornerstone of victim protection efforts—bills that would have allowed sex trafficking survivors to clear their criminal records of various crimes committed while they were sex trafficking victims. By the very nature and definition of the crime, sex trafficking victims are forced to engage in criminal activity.<sup>15</sup> Accordingly, despite being victims of a heinous

<sup>13</sup> Va. Legis. Info. Sys., H.B. 2597, Summary, 2019 Sess., <http://lis.virginia.gov/cgi-bin/legp604.exe?191+sum+SB1661>.

<sup>14</sup> H.B. 2651, Gen. Assemb., Reg. Sess. (Va. 2019) (enacted). The General Assembly also passed H.B. 1817, Gen. Assemb., Reg. Sess. (Va. 2019) (enacted) (criminalizing travel agencies that promote prostitution), H.B. 1887, Gen. Assemb., Reg. Sess. (Va. 2019) (enacted) (requiring the Virginia Alcoholic Beverage Control Authority and the Virginia Employment Commission to post notice of the existence of a human trafficking hotline in government stores), and S.B. 1343, Gen. Assemb., Reg. Sess. (Va. 2019) (enacted) (requiring the Commissioner of the DMV to include training on human trafficking in the driver training class for commercial motor vehicles).

<sup>15</sup> Under the federal and commonly accepted definition, “sex trafficking” “means the recruitment, harboring, transportation, provision, obtaining, patronizing, or soliciting of a person for the purpose of a *commercial sex act*.” 22 U.S.C. § 7102(12) (2019) (emphasis added). “Commercial sex act” “means any sex act on account of which anything of *value* is given to or received by any person.” *Id.* § 7102(4) (emphasis added). As even non-lawyers well know, the basic elements of prostitution are (1) a sexual act and (2) the exchange of money (or “value”). Accordingly, when the crime of “sex trafficking” occurs, the crime of prostitution also occurs. In other words, a person effectively cannot be a victim of “sex trafficking” without also being a perpetrator of prostitution.

crime, sex trafficking victims are often arrested and convicted of prostitution and related offenses like loitering and solicitation.<sup>16</sup> Others are charged with drug crimes or weapons possession.<sup>17</sup> And child victims often are charged with truancy or running away.<sup>18</sup> Most often, all of these offenses occur as a direct result of the victim being trafficked. In other words, the trafficker *forces* the victim to have sex with clients and take drugs so he can control them.<sup>19</sup> But rather than identify these individuals as victims in need of care, law enforcement often mistakenly process them as criminals.<sup>20</sup>

With prostitution and related convictions on their records, sex trafficking survivors face significant barriers to obtaining housing, employment, loans, education, public benefits, custody of their children, and medical care, not to mention dealing with the negative social stigma that comes from being labeled a “criminal” and “prostitute.”<sup>21</sup> Indeed, criminal records place a huge barrier on victims that prevent them from moving on with their lives and reintegrating into society. As one victim reported, “After escaping, I found that I could not rent an apartment in my own name because of extensive background checks by property management. I always have a roommate and can’t have my name on mailboxes, report problems, or receive deliveries. Sometimes I have to hide from

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<sup>16</sup> ERIN MARSH ET AL., STATE REPORT CARDS: GRADING CRIMINAL RECORD RELIEF LAW FOR SURVIVORS OF HUMAN TRAFFICKING 4–5 (2019), <https://polarisproject.org/sites/default/files/Grading%20Criminal%20Record%20Relief%20Laws%20for%20Survivors%20of%20Human%20Trafficking.pdf> [hereinafter *State Report Cards*].

<sup>17</sup> *Id.* at 5.

<sup>18</sup> *Id.*

<sup>19</sup> *Human Trafficking*, POLARIS PROJECT <https://polarisproject.org/human-trafficking/> (last visited Nov. 13 2020).

<sup>20</sup> *State Report Cards*, *supra* note 16, at 5.

<sup>21</sup> *State Report Cards*, *supra* note 16, at 5–7. According to one survivor, “I do not choose to identify as a prostitute, but that was what the penal code said I am. Just knowing that the law has labeled me as such played a part in the trauma, and getting past this label is part of the healing.” *Id.* at 4.

landlords.”<sup>22</sup>

Thankfully for this victim and others like her—there is a solution. Known as “criminal record relief laws,”<sup>23</sup> these laws enable sex trafficking victims to clear their criminal records of certain offenses that occurred as a result of their being trafficked.<sup>24</sup> In 2010, New York became the first state to pass a criminal record relief law that enables sex trafficking victims to vacate convictions for prostitution and loitering that occurred as a “result of having been” a sex trafficking victim.<sup>25</sup> Since that time, all but six states have enacted some form of criminal record relief law that is specific to victims of human trafficking.<sup>26</sup> These laws are invaluable not only for allowing victims to obtain basic services, but also to enable them to heal from their trauma. As one victim stated: “I used to obsess about my conviction, constantly replaying the situations and the people who trafficked me in my mind. I could never heal from my trafficking experience. But from the day my record was vacated, I never thought about it again.”<sup>27</sup>

Understandably, these statutes vary significantly across the states. Criminal record relief laws touch on many foundational issues like individual responsibility and the purpose of the criminal justice system. The first area of disagreement is the extent of relief that should be offered. Some states only apply relief to actual “convictions”<sup>28</sup> whereas other states offer relief for virtually everything that could show up on a criminal record including arrests, convictions, adjudications of delinquency (for minors), and “continuances

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<sup>22</sup> *Id.* at 6.

<sup>23</sup> *Id.* at 4. The term “criminal record relief laws” was coined by Polaris Project, a non-profit organization that combats sex trafficking in the United States. See <https://polarisproject.org/> for more information.

<sup>24</sup> *State Report Cards*, *supra* note 16, at 7–8.

<sup>25</sup> N.Y. CRIM. PROC. LAW § 440.10.1(i) (Consol. 2010).

<sup>26</sup> *State Report Cards*, *supra* note 16, at 10.

<sup>27</sup> *Id.* at 5.

<sup>28</sup> *E.g.*, N.Y. CRIM. PROC. LAW § 440.10.1(i) (Consol. 2010) (“The judgment is a conviction . . .”).

without a finding.”<sup>29</sup> Other differences focus on the offenses that are eligible to be vacated or expunged.<sup>30</sup> On one side of the spectrum is Wyoming. Wyoming allows trafficking victims to vacate convictions for all offenses, even violent felonies, which are “found to have been the result of having been a victim” of human trafficking.<sup>31</sup> North Carolina, on the other hand, only allows victims to expunge “prostitution offenses.”<sup>32</sup>

Next, states differ on the issue of causation, or how closely tied the offense must be to the trafficking. Maryland likely represents the toughest standard, requiring sex trafficking victims to prove that they were “acting *under duress* caused by an act of another committed in violation of the prohibition against human trafficking.”<sup>33</sup> Somewhere in the middle is California, which allows victims to petition for vacatur relief of specified arrests and convictions that were “the *direct result* of being a victim of human trafficking.”<sup>34</sup> And most lenient are states like North Carolina, which merely require victims to prove that the offense “was a *result of* having been a trafficking victim.”<sup>35</sup> States also differ over the burden of proof that a victim must establish, with some states requiring proof beyond a “reasonable probability,”<sup>36</sup> others a “preponderance,”<sup>37</sup> and still others “clear and

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<sup>29</sup> MASS. GEN. LAWS ch. 265, § 59(a) (2016) (“[T]he court in which it was entered shall, upon motion of the defendant, vacate any conviction, adjudication of delinquency or continuance without a finding . . .”).

<sup>30</sup> “Vacating” refers to the actual nullification of a previous judgment that “alters the merits of the underlying offense”; “expunging” a record is the process by which the legal record of an arrest or conviction is physically destroyed, but the court does not actually alter the merits of the judgment. *State Report Cards*, *supra* note 16, at 8. Some states allow records to be vacated, whereas others offer expungement. Still others only allow for records to be “sealed.” *Id.* at 7.

<sup>31</sup> WYO. STAT. ANN. § 6-2-708(c) (2013). (“At any time after the entry of a conviction, the court in which it was entered may vacate the conviction if the defendant’s participation in the offense is found to have been the result of having been a victim.”) *Id.*

<sup>32</sup> N.C. GEN. STAT. § 15A-145.6(b) (2017).

<sup>33</sup> MD. CODE ANN., CRIM. PROC. § 8-302(a) (LexisNexis 2011) (emphasis added).

<sup>34</sup> CAL. PENAL CODE § 236.14(a) (West 2016) (emphasis added).

<sup>35</sup> N.C. GEN. STAT. § 15A-145.6(b)(2)(a) (2017) (emphasis added).

<sup>36</sup> MASS. GEN. LAWS ch. 265, § 59(a)(1) (2016).

<sup>37</sup> FLA. STAT. ANN. § 943.0583(3) (2018).

convincing evidence.”<sup>38</sup> Other areas of disagreement include time limitations,<sup>39</sup> hearing requirements,<sup>40</sup> and confidentiality.<sup>41</sup>

As is apparent from this brief overview, states drastically disagree over the scope of relief that should be offered as well as the process by which that relief is obtained. But equally apparent is the vast agreement over the key issue. With forty-four states passing some form of criminal record relief law,<sup>42</sup> the consensus is clear: sex trafficking victims should be afforded some opportunity to remove the burden of a criminal record that resulted from being a victim of one of the worst crimes imaginable—forced commercial sex.

### *B. Landscape in Virginia*

It is not that the Virginia Crime Commission and General Assembly are ignorant of the issue. On the contrary, the General Assembly has directly considered the issue for the past two years. In January 2018, two different criminal record relief laws were introduced in the General Assembly.<sup>43</sup> The first, HB 961, was a standalone statute that offered relief to sex trafficking victims for all non-violent felony convictions that were “committed as part of a human trafficking scheme or at the direction of an operator of a human trafficking scheme.”<sup>44</sup> The second, HB 962, was much narrower. It

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<sup>38</sup> CAL. PENAL CODE § 236.14(a) (West 2016).

<sup>39</sup> “Time limitations include restricting the amount of time a survivor has to apply for criminal record relief, similar to the statute of limitations for crimes to be prosecuted. . . . Other states impose ‘wait times’ that require a certain period of time to pass before relief is available.” *State Report Cards*, *supra* note 176, at 17.

<sup>40</sup> This requirement “refers to whether the survivor is required to appear in person at hearings related to the criminal record relief process.” *Id.* at 18.

<sup>41</sup> “Criminal record relief statutes should include provisions designed to protect confidentiality throughout the process. For example, the statutes should allow motions to be filed as sealed documents and ensure that documents remain shielded from public disclosure.” *Id.* at 19.

<sup>42</sup> *State Report Cards*, *supra* note 16, at 10.

<sup>43</sup> H.B. 961, Gen. Assemb., Reg. Sess. (Va. 2018); H.B. 962, Gen. Assemb., Reg. Sess. (Va. 2018).

<sup>44</sup> H.B. 961, Gen. Assemb., Reg. Sess. (Va. 2018).



merely amended the existing expungement statute, § 19.2-392.2, and offered relief only for “convictions” of prostitution when the victim was “induced to engage in prostitution through the use of force, intimidation, or deception by another.”<sup>45</sup> Both bills died in the House Courts of Justice committee.<sup>46</sup>

Then, in fall 2018, the Virginia Crime Commission did a comprehensive study on sex trafficking in the Commonwealth.<sup>47</sup> The Commission ultimately “endorsed a package of anti-sex-trafficking legislation that would open victim-restitution funds to former prostitutes, create ‘John schools’ for people caught buying sex and make it illegal to charge for ‘masturbatory services.’”<sup>48</sup> Notably absent from the package were HB 961 and HB 962. The Commission voted against both bills, “with all of the Democratic lawmakers on the committee supporting the measure and all of the Republican lawmakers opposing.”<sup>49</sup>

Most recently, in January 2019, a new criminal record relief law was introduced.<sup>50</sup> HB 2778, sponsored by Delegate Herring, permitted “victims of human trafficking” to petition to vacate and expunge “convictions” for certain non-violent felonies and other offenses that were “committed as part of a human trafficking scheme or at the direction of an operator of a human trafficking scheme.”<sup>51</sup> This bill also died in the

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<sup>45</sup> H.B. 962, Gen. Assemb., Reg. Sess. (Va. 2018).

<sup>46</sup> *H.B. 961 Victims of Human Trafficking; Expungement of Police and Court Records, 2018 Sess.*, VA. LEGIS. INFO. SYS., <http://lis.virginia.gov/cgi-bin/legp604.exe?181+sum+HB961>; *H.B. 962, Prostitution; Expungement of Convictions, 2018 Sess.*, VA. LEGIS. INFO. SYS., <https://lis.virginia.gov/cgi-bin/legp604.exe?181+sum+HB962>.

<sup>47</sup> See SEN. MARK D. OBENSHAIN ET AL., *VIRGINIA STATE CRIME COMMISSION, 2018 ANNUAL REPORT: VA. STATE CRIME COMM’N*, (2018).

<sup>48</sup> Ned Oliver, *Sex Trafficking Legislation Calls for ‘John Schools’ and Making ‘Happy Endings’ Illegal, Among Other Policy Changes*, VA. MERCURY (Dec. 4, 2018), <https://www.virginiamercury.com/2018/12/04/sex-trafficking-legislation-calls-for-john-schools-and-making-happy-endings-illegal-among-other-policy-changes/>.

<sup>49</sup> *Id.*

<sup>50</sup> *H.B. 2778 Human Trafficking Victims; Petition for Vacatur and Expungement of Convictions, Etc., 2019 Sess.*, VA. LEGIS. INFO. SYS. <http://lis.virginia.gov/cgi-bin/legp604.exe?191+sum+HB2778>.

<sup>51</sup> H.B. 2778, Gen. Assemb., Reg. Sess. (Va. 2019).

Courts of Justice Committee.<sup>52</sup>

What is particularly disheartening is that the Commission and General Assembly have rejected all bills. At a minimum, the General Assembly could have passed HB 962, which offered the narrowest relief possible in terms of a criminal record relief law—“convictions” for prostitution that were the result of “force, intimidation, or deception.”<sup>53</sup> Endorsing this bill would have at least placed Virginia in the ball park of recognizing the basic principle that individuals who can prove that they are sex trafficking victims should not be forced to bear the burden of a criminal record that directly relates to that victimization.

Beyond the necessity of affirming this basic moral principle, passing such a statute *in Virginia* is particularly important for another reason: the lack of an affirmative defense to prosecutions for prostitution and continued criminalization of minors in Virginia. Whereas criminal record relief laws serve trafficking victims on the back end, after their arrest or conviction, affirmative defense and decriminalization laws aim to prevent victims from ever receiving a record in the first place—ensuring that the system treats them as the victims in need of protection and not criminals in need of punishment. When a sex trafficking victim is charged with a crime that directly relates to their trafficking (in other words, that they engaged in the commercial sex act because of force, fraud, or coercion, or, in the case of a minor, because they were “induced” to do so), affirmative defense laws enable victims to assert that they were a “victim” of sex trafficking and bar the prosecution.<sup>54</sup> A number of states have passed affirmative defense laws, and, like criminal record relief statutes, they vary with respect to

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<sup>52</sup> H.B. 2778 *supra* note 50.

<sup>53</sup> H.B. 962, Gen. Assemb., Reg. Sess. (Va. 2018).

<sup>54</sup> 22 U.S.C. § 7102(11)(a) (2000) (defining “severe forms of 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”) *Id.*

many of the same issues previously discussed.<sup>55</sup> Similarly, some states have started to decriminalize prostitution for minors,<sup>56</sup> recognizing that “punishing commercially sexually exploited [children] creates social and legal contradictions that undermine the fight against juvenile sex trafficking—further harming victims and hindering a needed shift in cultural attitudes.”<sup>57</sup>

Virginia has neither an affirmative defense for sex trafficking victims nor a decriminalization provision for minors.<sup>58</sup> What is more, the other five states that have not enacted a criminal record relief law<sup>59</sup> all provide an affirmative defense to sex trafficking victims for prostitution prosecutions.<sup>60</sup> Therefore, Virginia is the *only* state in the

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<sup>55</sup> Compare S.C. Code Ann. § 16-3-2020 (“In a prosecution of a person who is a victim of trafficking in persons, it is an affirmative defense that he was *under duress or coerced* into committing the offenses for which he is subject to prosecution, if the offenses were committed as a direct result of, or incidental or related to, trafficking.” (emphasis added)) with Texas Penal Code § 43.02(d) (“It is a defense to prosecution for [prostitution] that the actor engaged in the conduct that constitutes the offense because the actor was the victim of conduct that constitutes an offense under Section 20A.02 [Trafficking in Persons] or 43.05 [Compelling Prostitution].”) and Iowa Code Ann. § 710A.3 (“It shall be an affirmative defense . . . to a prosecution for a criminal violation directly related to the defendant’s status as a victim of a crime that is a violation of section 710A.2 [Human Trafficking], that the defendant committed the violation under compulsion by another’s threat of serious injury, provided that the defendant reasonably believed that such injury was imminent.”).

<sup>56</sup> See, e.g., N.C. GEN. STAT. §§ 14-204(c) (“Notwithstanding any other provision of this section, if it is determined, after a reasonable detention for investigative purposes, that a person suspected of or charged with a violation of this section is a minor, that person shall be immune from prosecution under this section and instead shall be taken into temporary protective custody as an undisciplined juvenile . . . .”); Neb. Rev. Stat. Ann. § 28-801(5)(b) (“If the law enforcement officer determines, after a reasonable detention for investigative purposes, that a person suspected of or charged with a violation of subsection (1) [Prostitution] of this section is . . . (b) a person under eighteen years of age, such person shall be immune from prosecution for a prostitution offense under this section and shall be subject to temporary custody . . . .”); 720 Ill. Comp. Stat. Ann. 5/11-14(d) (“[I]f it is determined, after a reasonable detention for investigative purposes, that a person suspected of or charged with a violation of this Section is a person under the age of 18, that person shall be immune from prosecution for a prostitution offense under this Section, and shall be subject to the temporary protective custody provisions . . . .”).

<sup>57</sup> SHARED HOPE INT’L, *Just Response Policy Paper: Non-Criminalization of Juvenile Sex Trafficking Victims* 1 (Jan. 2016).

<sup>58</sup> VA. CODE ANN. § 18.2-346(A) (2014) (criminalizing “any person” for prostitution).

<sup>59</sup> Those states are Alaska, Iowa, Maine, Minnesota, and South Dakota. *State Report Cards*, *supra* note 16, at 10.

<sup>60</sup> ALASKA STAT. § 11.66.100(a)(2016) (providing an affirmative defense to sex trafficking victims for prosecution for prostitution if the “person witnessed or was a victim of, and

entire nation that does not provide sex trafficking victims with either an affirmative defense to prosecutions or a criminal record relief law that enables them to expunge or vacate crimes that resulted from their being trafficked.<sup>61</sup>

### C. *The Common Law*

Given that Virginia is the only state in this position, one might think that there is some principle inherent in Virginia law that is preventing, or at least discouraging, the General Assembly from acting. The opposite is actually true. Critically for Virginia, criminalizing sex trafficking victims for prostitution and related crimes is inconsistent with principles recognized at common law—the governing law of Virginia—except where the General Assembly by statute has expressly overridden it. According to VA Code § 1-200, “The common law of England, insofar as it is not repugnant to the principles of the Bill of Rights and Constitution of this Commonwealth, shall continue in full force within the same, and be the rule of decision, except as altered by the General Assembly.”<sup>62</sup> This statute isn’t merely lip service or

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reported to law enforcement in good faith” various crimes, including sex trafficking); IOWA CODE § 710A.3 (2015) (“It shall be an affirmative defense, in addition to any other affirmative defenses for which the victim might be eligible, to a prosecution for a criminal violation directly related to the defendant’s status as a victim of a crime that is a violation of section 710A.2, that the defendant committed the violation under compulsion by another’s threat of serious injury, provided that the defendant reasonably believed that such injury was imminent.”); ME. STAT. tit. 17-A, § 853-A(4) (2019) (Engaging in prostitution) (“[i]t is an affirmative defense to prosecution under this section that the person engaged in prostitution because the person was compelled to do so . . . .”); MINN. STAT. § 609.325(4)(2019) (“It is an affirmative defense to a charge [of prostitution] if the defendant proves by a preponderance of the evidence that the defendant is a labor trafficking victim, as defined in section 609.281, or a sex trafficking victim, as defined in section 609.321, and that the defendant committed the acts underlying the charge as a result of being a labor trafficking or sex trafficking victim.”); S.D. CODIFIED LAWS § 22-23-1.2(2012) (“It is an affirmative defense to a charge of prostitution under § 22-23-1 if the defendant proves by a preponderance of the evidence that the defendant is a victim of human trafficking . . . .”).

<sup>61</sup> Moreover, Virginia still criminalizes minors for prostitution. Sonia Lunn, *Safe Harbor: Does Your State Arrest Minors for Prostitution?*, HUM. TRAFFICKING SEARCH (2018), <https://humantraffickingsearch.org/safe-harbor-does-your-state-arrest-minors-for-prostitution/>.

<sup>62</sup> VA. CODE ANN. § 1-200 (2014).

aspirational. On the contrary, Virginia courts have used the common law to decide numerous cases ranging from the availability of jury trials on statutory claims<sup>63</sup> to tort liability for falling trees<sup>64</sup> to the absence of an inherent judicial power to acquit a guilty criminal defendant.<sup>65</sup> Moreover, the Virginia Supreme Court has repeatedly used the common law as a “jurisprudential guide”<sup>66</sup> and reaffirmed its foundational role in Virginia’s legal architecture. As Justice D. Arthur Kelsey explained, “the impact of English common law is one of the least understood and most underestimated aspects of our jurisprudence.”<sup>67</sup>

The common law supports passing a criminal record relief law (and an affirmative defense statute). In 1894, in *Queen v. Tyrell*, the court held that a girl aged 13–16 could not be held criminally responsible for aiding and abetting a male in her own statutory rape.<sup>68</sup> Why? Because the legislature could have intended nothing else. As Commissioner Kerr explained, “It is impossible that the legislature, in passing the Criminal Law Amendment Act, 1885, can have intended that the women and girls for whose protection it was passed should be liable to prosecution and punishment under it.”<sup>69</sup> In a separate opinion, Lord Coleridge

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<sup>63</sup> *Ingram v. Commonwealth*, 741 S.E.2d 62, 68 (Va. Ct. App. 2013) (“Since the constitutional guarantee of jury trial in civil cases attaches only to common law actions as they existed in 1776, statutes creating a new cause of action need not provide for trial by jury.”).

<sup>64</sup> *Cline v. Dunlora S., LLC*, 726 S.E.2d 14, 16 (Va. 2012) (noting that, under “common law, a landowner owed no duty to those outside the land with respect to natural conditions existing on the land, regardless of their dangerous condition.”).

<sup>65</sup> *Taylor v. Commonwealth*, 710 S.E.2d 518, 523 (Va. Ct. App. 2011) (noting there “simply was no such thing as a judicial pardon” under English common law). See Hon. D. Arthur Kelsey, *The Commonwealth’s Common Law*, 40 VBA J. 26, 27 (Winter 2013–2014) [hereinafter Kelsey].

<sup>66</sup> See, e.g., *Tvardek v. Powhatan Vill. Homeowners Ass’n, Inc.*, 784 S.E.2d 280, 283 (Va. 2016); *Id.* at 276 n. 4 (“One might think that the modern age of statutes would have marginalized the role of English common law, but this is not so. ‘Abrogation of the common law requires that the General Assembly plainly manifest an intent to do so.’ *Linhart v. Lawson*, 540 S.E.2d 875, 877 (2001). We do not casually presume this intent.”).

<sup>67</sup> Kelsey, *supra* note 65 at 26.

<sup>68</sup> *The Queen v. Tyrell* [1894] 1 QB 709 at 711(Eng.).

<sup>69</sup> *Id.*

extended the rationale to “inciting” or “soliciting”: “[I]t is impossible to say that the Act, which is absolutely silent about aiding and abetting, or soliciting or inciting, can have intended that the girls for whose protection it was passed should be punishable under it for the offences committed upon themselves.”<sup>70</sup> *Tyrell* therefore stands for the proposition that at common law a victim of a crime should not bear any criminal responsibility for that crime.

Admittedly, the case is not directly on point, which is why passing a criminal record relief law is so important. If victims of sex trafficking were being charged with conspiring to commit or aiding and abetting “sex trafficking” simply because they engaged in the “commercial sex act,” then *Tyrell* would be dispositive. But here the primary issue is whether sex trafficking victims can be charged with prostitution (and related offenses)—a different crime.<sup>71</sup> Despite this distinction, the principle underlying *Tyrell’s* reasoning is still

<sup>70</sup> *Id.* at 712 (Coleridge, C.J.).

<sup>71</sup> The common law that governs in Virginia is the common law that existed in 1776, when the General Assembly first adopted Va. Code Ann. § 1-200. See Kelsey, *supra* note 65; Foster v. Commonwealth, 31 S.E. 503 (Va. 1898); Taylor v. Commonwealth, 710 S.E.2d 519, 523 (Va. Ct. App. 2011) (“In his 1803 edition of Blackstone’s Commentaries, St. George Tucker acknowledged a certain elasticity in the incorporation of English common law into the corpus of our law at the time of the 1776 Virginia Constitutional Convention.”). *Tyrell* was decided in 1893, well after 1776, so it might be argued that *Tyrell* is not relevant. This is false. The Virginia Supreme Court has relied on English common law cases decided after 1776 to inform its opinion of what the common law is in Virginia. In Carter v. Hinkle, for example, the Court relied on an 1884 English case, Brunsden v. Humphrey (1884), L.R. 14 Q.B.D. 141, to hold that a plaintiff injured in property and in person by the same negligent act had two separate causes of action. Carter v. Hinkle, 52 S.E.2d 136, 140 (Va. 1949). Brunsden was central to the Court’s holding, and the Court relied on it to depart from the majority rule in the United States: “The weight of American authority, as we have previously stated, disagrees with the decision in Brunsden v. Humphrey, but we believe that the principles announced in that case, upon which the minority rule is founded, are more logical and better suited to our practice in Virginia.” *Id.* at 139. The Court even went so far as to say that it was bound by Brunsden by virtue of Section 2 of the Virginia Code: “In addition, in the background is the fact that in Virginia we still have as a part of our law, the common law, including common law pleading and practice. Under that system, originally, two actions could have been maintained and still can be maintained today because the General Assembly has not, in its wisdom, seen fit to change or alter the common law in that respect. Under section 2 of the Code the common law touching this subject remains the law of Virginia.” *Id.* at 140. Carter therefore affirms that common law cases decided after 1776—and even those decided in the late 19<sup>th</sup> century—can be controlling authority.

relevant and persuasive. In passing the statutory rape law, the English legislature intended to protect minor girls. Likewise, in criminalizing sex trafficking, the General Assembly (and legislatures across the world) intend to protect women (and men) who are exploited for commercial sex.

Accordingly, sex trafficking victims should never be charged with a crime that involves the “commercial sex act,” i.e., prostitution, loitering, residing in a “bawdy house,”<sup>72</sup> etc. To be sure, not every prostitute is a sex trafficking victim. But now that sex trafficking is a distinct and recognized crime on the books in Virginia, the rationale in *Tyrell* should mandate that before a person is charged with prostitution they be given an opportunity to prove that they are a sex trafficking victim. If they can make such a showing, they should be able to bar the prosecution for prostitution through an affirmative defense statute or, at a minimum, expunge or vacate those charges from their records after they are convicted.<sup>73</sup>

#### *D. Objections*

So how could Virginia be in this position? In other words, why is Virginia the only state in the nation that has not passed an affirmative defense provision or a criminal record relief law, particularly when the law of Virginia—the common law—supports, if not compels, such a result? Various objections have surfaced but none of them are persuasive.

Among them are “selective compassion”; that the expungement petitions will overburden the court systems; and that traffickers will actually use expungement laws to

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<sup>72</sup> VA. CODE ANN. § 18.2-347 (2019). (“It is unlawful for any person to keep any bawdy place, or to reside in or at or visit for immoral purposes any such bawdy place.”). *Id.*

<sup>73</sup> See Darian Etienne, *Victims, Not Criminals: Exempting and Immunizing Children Subjected to Sex Trafficking from Prosecution for Prostitution*, 16 WHITTIER J. CHILD & FAM. ADVOC. 44, 58–60 (2017) (discussing *Tyrell* and other cases supporting the doctrine).

control victims.<sup>74</sup> Regarding selective compassion, i.e., that sex trafficking victims are being given special treatment far and above what other similar victims receive, it simply isn't true. Domestic violence victims, for example, may commit crimes "as a result" of the abuse, but none of those crimes are inherent to their status as a domestic violence victim. Sex trafficking victims seem to be the only category of victims that—by definition—must commit a crime to be a victim. For that reason, they require special legislation. Second, the evidence simply doesn't support the notion that sex trafficking victims are going to flock to the courts and flood the system.

Finally, some have argued that a criminal record relief law will encourage traffickers to encourage victims to commit more crimes because their records will be expunged.<sup>75</sup> First, the objection fails to understand the nature of trafficking. Trafficking victims are already indoctrinated with the idea that the legal system is their enemy and continuing to criminalize them for conduct that is inherent in their status as victims will only give more credibility to the lies of the traffickers. Second, this objection, if really believed, can be addressed by adopting a narrower version of a criminal record relief law—one that only allows expungement for prostitution and related offenses. In short, no morally or legally sound objections exist to passing a criminal relief law in Virginia.

## CONCLUSION

So, the question remains: what will the General Assembly do next? Last time, Virginia waited fifteen years from the passage of the federal anti-trafficking legislation to

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<sup>74</sup> See Matthew Myatt, *The Victim-Perpetrator Dilemma: The Role of State Safe Harbor Laws in Creating a Presumption of Coercion for Human Trafficking Victims*, 25 WM. & MARY J. RACE GENDER & SOC. JUST. 555, 569 (2019).

<sup>75</sup> Oliver, *supra* note 48 (According to Delegate Todd Gilbert, "expungement could become a tool of the psychological game of the abuser, that they could say to this person, 'Hey, don't worry about it, don't cooperate and later you can get all this off your record.'").



pass its sex trafficking statute. It's been nine years since New York passed the first criminal record relief law. With all of the great work that the General Assembly is doing to combat sex trafficking, let's pray that it also acts right now in this key area instead of waiting for another six years.