

COMMENT

The Buffer Zone: Using Mental Health Detentions as an Alternative to Arresting Victims of Human Trafficking

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Abstract. This Comment will propose a novel approach for law enforcement to separate human trafficking victims from their perpetrators without the need to arrest those victims. Suggesting a more aggressive use of mental health detention processes, this Comment will argue that a mental health detention allows law enforcement to create a “buffer zone” of separation between the victim and her perpetrator long enough to help the victim connect with resources, build trust with law enforcement, and avoid stains on her permanent record—advantages that the status quo fails to provide. Considering Virginia’s mental health detention statutes as a model, this Comment will conclude that a typical human trafficking victim would meet the standards required for law enforcement to temporarily detain her. This Comment will also explore practical and theoretical limits to this solution, such as limited healthcare resources and the potential risk of categorically defining human trafficking victims as mentally ill.

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Introduction

Law enforcement officers face a crossroads when they encounter an uncooperative victim of human sex trafficking. On one hand, they can arrest the victim for prostitution to create a “buffer” between the victim and the trafficker, and hopefully connect the victim with rehabilitative resources.¹ But arresting a victim who has been under duress for years seems unfair, especially because arrests and convictions have lifelong consequences on employment and housing opportunities.² On the other hand, decriminalizing prostitution has not only failed to reduce trafficking worldwide but also reduced the chances that an uncooperative victim gets exposure to social services because of an arrest.³ The current approach to remedying the legal consequences that victims of trafficking face focuses on post-arrest options, not pre-arrest options that can help law enforcement officers during their first encounter with a victim.⁴ The pre-arrest options that do exist are premised on the initial cooperation with a victim, an unlikely situation in the trafficking environment.⁵

Law enforcement need not be stuck between a rock and a hard place. This Comment argues that mental health involuntary detention laws are a preferable alternative to arresting a victim. Involuntary detention laws allow law enforcement officers to temporarily take into custody an individual for whom they have probable cause to believe has a mental illness. Specifically, when a substantial likelihood exists that, as a result of mental illness, the individual will suffer serious harm due to a lack of capacity to protect himself and provide for his basic human needs, an officer has probable cause to take that individual into custody.⁶ Victims of trafficking commonly fit these criteria because their trauma and abuse can cause mental illness.⁷ Moreover, victims who refuse to cooperate with law enforcement will likely return to the trafficking ring and further suffer

¹ Lauren Hersh, *Sex Trafficking Investigations and Prosecutions*, in *LAWYER'S MANUAL ON HUMAN TRAFFICKING: PURSUING JUSTICE FOR VICTIMS* 260 (Jill Laurie Goodman & Dorchen A. Leidholdt eds., 2013).

² Alyssa M. Barnard, Note, “*The Second Chance They Deserve*”: *Vacating Convictions of Sex Trafficking Victims*, 114 *COLUM. L. REV.* 1463, 1471–72 (2014).

³ Merideth J. Hogan, *A Review of Human Trafficking*, 87 *J. KAN. BAR ASS'N* 36, 41 (2018).

⁴ See Veena Subramanian, *Beyond Detention-as-Protection for Child Sex Trafficking Victims*, 35 *BERKELEY J. GENDER, L. & JUST.* 137, 165–66 (2020) (listing model programs); Meghan Hilborn, Comment, *How Oklahoma's Human Trafficking Victim Defense Is Poised to Be the Boldest Stand Against Human Trafficking in the Country*, 54 *TULSA L. REV.* 457, 469, 471 (2019); Karen Wigle Weiss, *A Review of the New York State Safe Harbor Law*, *END CHILD PROSTITUTION & TRAFFICKING* 1, 3–4 (2013); Barnard, *supra* note 2, at 1483–84.

⁵ See Weiss, *supra* note 4, at 3–4.

⁶ See VA. CODE ANN. § 37.2-808 (West, Westlaw through the 2025 Reg. Sess.).

⁷ Hussein Sadruddin, Natalia Walter & Jose Hidalgo, *Human Trafficking in the United States: Expanding Victim Protection Beyond Prosecution Witnesses*, 16 *STAN. L. & POL'Y REV.* 379, 403, 405 (2005).

because of their toxic “trauma bonds” with their traffickers.⁸ Instead of arresting noncooperative victims, law enforcement officers can use mental health involuntary detention laws to create a similar “buffer” for victims without the lifelong consequences of arrest.

Part I summarizes the shortcomings of the pre-arrest and post-arrest solutions that states have created for victims of trafficking. Part II introduces the aims of the mental health detentions and the standard procedures followed for an emergency custody order, reviewing Virginia laws as an example. Part III describes the benefits of using mental health detentions as an alternative to arrest and explains how those statutes can apply to victims of trafficking. Lastly, Part IV addresses practical and theoretical considerations, such as resources and the connotation of victim helplessness, that law enforcement must consider to adequately carry out mental health detentions for victims of trafficking.

I. The Problems with Pre- and Post-Arrests of Human Trafficking Victims

The status quo approach to confronting victims of human trafficking before and after arrest presents several problems. First, trust between victims and law enforcement is difficult to build because of the traits of a human trafficking victim. Victims are influenced by coercion, substance abuse, and traumatic attachment built through the victim’s relationship to her trafficker. Second, law enforcement officers rely on arresting a victim to separate her from her trafficker—a solution that can prohibit employment and further traumatize the victim. Third, post-conviction relief requires substantial resources from victims. Numerous states provide relief through statutes with ambiguous terms that lack statutory definitions and demand more legal resources than victims have on hand. And post-conviction relief does not make a victim whole from her traumatizing arrest.

A. *The Characteristics of a Victim of Human Trafficking*

The United Nations defines human trafficking as “the recruitment, transport, transfer, harbouring or receipt of persons, by such means of the threat or use of force or other forms of coercion, abduction, fraud or deception . . . for the purpose of exploitation.”⁹ Forced labor and sex trafficking are included in this definition.¹⁰

⁸ Hersh, *supra* note 1, at 260 (arguing that a benefit of arresting a victim is that if he or she disappears, prosecutors can seek a warrant for her arrest); Sadruddin et al., *supra* note 7, at 404.

⁹ Hogan, *supra* note 3, at 37; *Human Trafficking*, U.N. OFF. ON DRUGS & CRIME, <https://perma.cc/C249-GYGL>.

¹⁰ Hogan, *supra* note 3, at 36, 37.

With respect to sex trafficking, “human trafficking” is distinct from prostitution. Prostitution is defined as the act or practice of committing some degree of sexual activity or conduct for compensation.¹¹ States differ on whether “intent” is an essential factor.¹² The difference between human trafficking and prostitution is that a victim of the former is coerced, whereas a prostitute may be one who is free from coercion and “intends” to engage in sexual conduct for compensation.¹³

Therefore, all sex trafficking victims commit the act of prostitution. But that does not make them the same as those prostitutes who willingly choose to engage in consensual sexual acts for compensation. For conceptual clarity, this Comment assumes sex trafficking victims do not intend to commit sexual acts for hire whereas prostitutes do.

Human trafficking cases are notoriously “hidden in plain sight.”¹⁴ Recognizing human trafficking often takes the careful observance and interest of an individual to “bring a human trafficking case to the attention of law enforcement.”¹⁵ For example, traffickers will hide trafficking schemes behind legitimate services, such as massage parlors.¹⁶ Alternatively, they will launder their money through what appear to be credible business ventures.¹⁷ Law enforcement may first encounter a victim in a variety of contexts. The top locations for a trafficker’s arrest include hotels, private residences, traffic stops, and restaurants.¹⁸ Recruitment locations, however, are less clear.¹⁹ Currently, most cases concerning sex trafficking and forced labor were predominantly sex trafficking cases.²⁰ Indicia of trafficking include the method of entrance and exit for workers. For example, when all the employees arrive and leave

¹¹ 63C AM. JUR. 2d *Prostitution* § 1 (2005).

¹² Lauren M. Davis, *Prostitution*, 7 GEO. J. GENDER & L. 835, 838 n. 25 (2006) (“Compare State v. Parrish, 465 N.E.2d 873, 875 (Ohio 1984) ([T]he participants in the crime of prostitution . . . must possess some degree of criminal intent . . .) with State v. Butkus, 424 A.2d 659, 661 (Conn. Super. Ct. 1980) (‘A statutory crime need not include an element of intent.’)”).

¹³ There is a broader debate about whether all prostitution, intentional or not, should be considered human trafficking. See generally Janie A. Chuang, *Exploitation Creep and the Unmaking of Human Trafficking Law*, 108 AM. J. INT’L L. 609, 609 (2014). Although the data leans heavily in favor of such a theory, for conceptual clarity, this Comment considers the two activities as distinct.

¹⁴ John Cotton Richmond, *Human Trafficking: Understanding the Law and Deconstructing Myths*, 60 ST. LOUIS U. L.J. 1, 38 (2015).

¹⁵ *Id.*

¹⁶ *Police Raid 3 Massage Parlors in Joplin in Human Trafficking Investigation*, KY3 (Feb. 9, 2018, at 14:25 ET), <https://perma.cc/W2M9-EH2C> (The FBI rescued seven women identified as victims of human trafficking in Joplin, Missouri).

¹⁷ Bryan Yurcan, *Are Human Traffickers Hiding in Your Bank’s Data?*, AM. BANKER (Mar. 29, 2017, 15:12 ET), <https://perma.cc/F98J-97AJ>.

¹⁸ Lindsey Lane, Angela Gray, Alicen Rodolph & Brittany Ferrigno, *2022 Federal Human Trafficking Report*, HUM. TRAFFICKING INST. 31 (2023), <https://perma.cc/R7P7-Q66U>.

¹⁹ *Id.* at 58–59.

²⁰ *Id.* at 56.

work together in a van or series of cars, that arrangement indicates trafficking or forced labor.²¹

To clarify, there is a distinction between willing prostitutes and victims of human trafficking that are forced to effectively be prostitutes.²² Seventy-five to ninety-five percent of prostitution convictions are discovered to be “pimp-controlled” cases that resemble a human trafficking scheme.²³

When law enforcement encounters a victim, they often find that the victim is under the influence or addicted to some sort of intoxicant.²⁴ Traffickers frequently induce substance abuse in their victims as a form of control.²⁵ They may use it as an incentive for the victim to engage in a certain act, either by rewarding victims with a substance for an act or withholding it if they refuse to engage in an act.²⁶ They capitalize on this by becoming a tether, the exclusive supplier of drugs to a victim.²⁷ Further, traffickers use drugs as an anesthetic to impair a victim’s faculties and make them unaware of what is happening, particularly in sex trafficking cases.²⁸

Meanwhile, as a result of the traffickers’ coercive scheme, victims of trafficking will develop permanent damage to their mental health.²⁹ Victims of trafficking are at an extremely high risk for developing medical and mental health consequences from their trauma.³⁰ For example, post-traumatic stress disorder (“PTSD”) is frequently cited among experts as a mental disorder that affects victims’ memories and creates constant feelings of fear and avoidance that last throughout the rest of their lives.³¹ PTSD in particular creates a psychological chain where the victim does

²¹ Richmond, *supra* note 14, at 32.

²² See Linda S. Anderson, *Ending the War Against Sex Work: Why It’s Time to Decriminalize Prostitution*, 21 U. MD. L.J. RACE, RELIGION, GENDER & CLASS 72, 72–73 (2021).

²³ Dorchen A. Leidholdt & Katherine P. Scully, *Defining and Identifying Human Trafficking*, in LAWYER’S MANUAL ON HUMAN TRAFFICKING: PURSUING JUSTICE FOR VICTIMS 33 n.32 (Jill Laurie Goodman & Dorchen A. Leidholdt eds., 2013) (citing numerous studies finding between 75% and 95% of prostitution cases are pimp controlled).

²⁴ Richmond, *supra* note 14, at 35.

²⁵ *Id.*

²⁶ *Id.*; see also *United States v. Webster*, 2011 WL 8478276, at *1 (9th Cir. Nov. 28, 2011) (describing the government’s argument that the sex trafficker’s “practice of giving the women cocaine and then refusing to provide drugs unless the women prostituted themselves constituted ‘force’”).

²⁷ Richmond, *supra* note 14, at 36.

²⁸ *Id.*

²⁹ Mary-Ann Burkhart & Joyce Lombardi, *Maryland’s Response to Human Trafficking: A New Statute for New Times*, 41 MD. BAR. J. 12, 14 (2008).

³⁰ JANICE G. RAYMOND, JEAN D’CUNHA, SITI RUHAINI DZUHAYATIN, H. PATRICIA HYNES, ZORAIDA RAMIREZ RODRIGUEZ & AIDA SANTOS, A COMPARATIVE STUDY OF WOMEN TRAFFICKED IN THE MIGRATION PROCESS: PATTERNS, PROFILES AND HEALTH CONSEQUENCES OF SEXUAL EXPLOITATION IN FIVE COUNTRIES 65–73 (2002).

³¹ Sadruddin et al., *supra* note 7, at 401.

not want to escape.³² Even when rescued, the victim will not have a personal sense of security and will “freeze” when confronted with a similar trafficking situation until she is treated for PTSD.³³ Although a victim may not be clinically diagnosed with PTSD, biological alterations can occur, such as the dysregulation of neurochemical and neuroanatomical functioning, which may lead to deeply entrenched personality changes.³⁴ These changes can cause a victim to lose her capacity to manage small amounts of stress.³⁵ Lethargy, suicide attempts, self-loathing, confusion, self-abuse, depression, psychosis, and hallucinations are all common reactions of victims because of their highly stressful conditions.³⁶

Most notably, the victims adopt a “learned helplessness” because of their chronic stress.³⁷ Victims in their previous lives were punished whether they complied or resisted, and that punishment impacts victims’ ability to “react and protect themselves, so they may become very submissive.”³⁸ The traffickers by that point do not need to use threats or violence to control the victim because the victim no longer resists.³⁹

To further compound the difficulty for law enforcement, victims of trafficking rarely self-identify as such.⁴⁰ Victims may fear law enforcement, feel ashamed of their exploitation, or know no other reality than the trafficking scheme.⁴¹ Because of these feelings, victims will often give false statements, making it difficult for law enforcement to identify them and creating problems for prosecutors down the road if they later seek the victim’s testimony.⁴² However, a victim will often give accurate statements once a victim is stabilized and authorities have earned their trust.⁴³

But that trust is difficult to come by. As a result of the coercive schemes and psychological violence described above, a victim may develop a “traumatic attachment” to her trafficker.⁴⁴ Perpetrators may alternate

³² See Elizabeth Hopper & José Hidalgo, *Invisible Chains: Psychological Coercion of Human Trafficking Victims*, 1 INTERCULTURAL HUM. RTS. L. REV. 185, 198 (2006).

³³ U.N. OFF. ON DRUGS & CRIME, TOOLKIT TO COMBAT TRAFFICKING IN PERSONS: GLOBAL PROGRAMME AGAINST TRAFFICKING IN HUMAN BEINGS 221 (2008); Angela A. Jones, *Post-Traumatic Stress Disorder and Victims of Human Sex Trafficking: A Perpetuation of Chronic Indignity*, 4 INTERCULTURAL HUM. RTS. L. REV. 317, 341–42 (2009).

³⁴ Sadruddin et al., *supra* note 7, at 403.

³⁵ *Id.* at 404.

³⁶ Burkhart & Lombardi, *supra* note 29, at 14.

³⁷ Sadruddin et al., *supra* note 7, at 404.

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ Heather J. Clawson & Nicole Dutch, *Identifying Victims of Human Trafficking: Inherent Challenges and Promising Strategies from the Field*, U.S. DEP’T OF HEALTH & HUM. SERVS. (Jan. 19, 2008), <https://perma.cc/XRF2-5TBW>.

⁴¹ Richmond, *supra* note 14, at 37.

⁴² *Id.* at 38.

⁴³ *Id.*

⁴⁴ Sadruddin et al., *supra* note 7, at 404.

between kindness and viciousness, and, as a survival strategy, the victim may develop positive feelings for her perpetrator while ignoring the vicious behavior.⁴⁵ Victims may go so far as to protect their traffickers and excuse their violence against them.⁴⁶ Thus, the typical victim law enforcement confronts may not be the “perfect victim” that immediately cooperates with an investigation. Rather, law enforcement may be dealing with a “willing victim” that does not want assistance and would much rather return to her former lifestyle.⁴⁷ In reality, a victim needs protection and mental health services.⁴⁸

B. *Law Enforcement Arrives*

Law enforcement investigates human trafficking in a variety of ways. The most conventional example is when law enforcement “raids” a location by posing as a client requesting sex for money.⁴⁹ The officer then calls for backup, and law enforcement enters the location to make arrests, question participants, and gather evidence.⁵⁰ These raids offer law enforcement access to potential victims of trafficking and often are opportunities for bringing social service providers to the scene to begin building trust with victims.⁵¹ But other situations may alert law enforcement of trafficking. The “pimp/victim dynamic often resembles” a “boyfriend-girlfriend relationship, so trafficking cases may be misunderstood and found in a domestic violence unit.”⁵² Once law enforcement officers encounter a victim, they must decide whether to arrest the victim for prostitution or another related crime.

Arresting a victim comes with a host of advantages including reliability, information, and a buffer space from her trafficker.⁵³ For investigative purposes, arresting a victim provides law enforcement consistent access to the victim because she is required to make periodic court appearances, and in the event she disappears, a warrant can be sought for her arrest.⁵⁴ Consistent access to the victim is helpful because she may possess important information that she may be willing to offer in exchange for a dismissal. Such negotiations between a prosecutor and a victim can make social services and treatment part of a conditional plea

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ See HEATHER J. CLAWSON, KEVONNE M. SMALL, ELLEN S. GO & BRADLEY W. MYLES, NEEDS ASSESSMENT FOR SERVICE PROVIDERS AND TRAFFICKING VICTIMS 18 (2003).

⁴⁹ Hersh, *supra* note 1, at 258.

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.* at 259.

⁵³ *Id.* at 260.

⁵⁴ *Id.*

to dismiss charges.⁵⁵ Most importantly, arresting a victim creates a “buffer” in time and space from the immediate threat of the trafficker. This time and space can be spent between the victim and a victim advocate on obtaining housing, medical care, and other social services for the victim to break the trafficker’s control.⁵⁶

Arresting a victim, however, can produce significant drawbacks. First, arrest risks sparking distrust between the victim and law enforcement.⁵⁷ Second, by failing to recognize victims of trafficking as victims and instead treating them as criminals, the arrest process re-victimizes and re-traumatizes already fragile victims.⁵⁸ The victims are being punished for crimes that were a result of being trafficked and then face convictions and a criminal record for circumstances out of their control. This only confirms what their traffickers say: that law enforcement will never believe them and lock them up.⁵⁹ However, in the status quo, if a traumatized victim is too scared from coercion to comply with law enforcement, she will be charged and convicted of prostitution with little hope of recourse. Thus, an unlucky victim will first face the coercive methods of her trafficker and then suffer a trip through the criminal justice system for crimes she did not intend to commit.

Alternatively, electing to not arrest a victim means there is no guarantee the victim will respond to any inquiry from law enforcement. A victim may disappear, either because of her own choice to return to the trafficking ring, or the coercive scheme lingering from fellow traffickers who have yet to be discovered. Because of this risk, law enforcement often chooses to arrest the victim for her own good and protection.⁶⁰

But these arrests create lifelong consequences for victims. A criminal conviction can prevent a victim of sex trafficking from obtaining employment.⁶¹ A prostitution-related conviction can prevent a victim from obtaining both private and public housing.⁶² If there is a custody dispute involved, a criminal conviction can be used as evidence of unfit parenting.⁶³ And for those victims who are undocumented immigrants, a

⁵⁵ Hersh, *supra* note 1, at 260.

⁵⁶ *Id.*

⁵⁷ *Id.* at 261.

⁵⁸ Allison L. Cross, Comment, *Slipping Through the Cracks: The Dual Victimization of Human-Trafficking Survivors*, 44 MCGEORGE L. REV. 395, 397 (2013); STEPHANIE RICHARD, “ARREST IS NOT THE ANSWER”: VICTIMS OF HUMAN TRAFFICKING SHOULD NOT BE ARRESTED FOR CRIMES THEIR TRAFFICKERS FORCE THEM TO COMMIT 1 (Coal. to Abolish Slavery & Trafficking ed., 2016).

⁵⁹ Hersh, *supra* note 1, at 261.

⁶⁰ *Id.* at 260–61.

⁶¹ Whitney J. Drasin, Comment, *New York’s Law Allowing Trafficked Persons to Bring Motions to Vacate Prostitution Convictions: Bridging the Gap or Just Covering It Up?*, 28 TOURO L. REV. 489, 490 (2012).

⁶² KATE RUBIN, MCGREGOR SMYTH, PAUL KEEFE & MARISSA BALDACINNI, THE CONSEQUENCES OF CRIMINAL CHARGES: A PEOPLE’S GUIDE 14 (Reentry Net & the Bronx Defenders ed., 2008).

⁶³ See *People v. L.G.*, 972 N.Y.S.2d 418, 422 (Crim. Ct. 2013) (explaining that a criminal record posed a hardship in a custody petition).

criminal conviction can obstruct a pathway to legalizing their immigration status.⁶⁴

C. *Band-Aids on Bullet Wounds: Post-Conviction Relief*

Because law enforcement must, out of necessity, arrest a victim of trafficking, most of the legislative solutions for victims focus on post-conviction relief. Minors receive the best relief. In Illinois, for example, minors are immune from prosecution for prostitution charges, but the law allows a “reasonable detention” for investigative purposes to that end.⁶⁵ When law enforcement encounters a minor suspected of prostitution or related activity, the statute presumes “neglect” that allows police officers to take the juvenile into protective custody.⁶⁶ That temporary custody does not appear on any criminal record.⁶⁷

For adult victims, who are most frequently eighteen to twenty years old for females and in various higher age groups for males, there is no equivalent concept of “neglect” that would allow protective custody by law enforcement.⁶⁸ So, relief without arrest is more difficult to obtain for these adults.⁶⁹ Some states, such as New York, have enacted expungement laws that allow judges to vacate convictions if the victim can demonstrate that her participation in the crime was a result of having been a victim of sex trafficking.⁷⁰ While practical in theory, these expungement laws are rarely used. In the first four years of New York’s expungement law, only thirty-eight sex trafficking victims received vacatur relief.⁷¹ In comparison to the 2,700 potentially eligible convictions each year, the situation is “disheartening.”⁷² Even worse, in the first three years of Maryland’s vacatur statute, only one person received relief.⁷³

Moreover, these expungement laws contain various procedural and practical obstacles.⁷⁴ New York’s law requires “due diligence,” that once a victim has ceased to be a victim or sought services for such trafficking, she

⁶⁴ N.Y.C. BAR ASS’N, REPORT ON LEGISLATION BY THE COMMITTEE ON SEX AND LAW 3–4 (2010) (“For immigrants, a record of prostitution can be fatal to an application for residency or citizenship.”).

⁶⁵ 720 ILL. COMP. STAT. 5/11-14(d) (West, Westlaw through P.A. 103-1082 of the 2024 Reg. Sess.).

⁶⁶ *Id.*; Angela L. Bergman, Note, *For Their Own Good? Exploring Legislative Responses to the Commercial Sexual Exploitation of Children and the Illinois Safe Children Act*, 65 VAND. L. REV. 1361, 1380–81 (2012).

⁶⁷ See 705 ILL. COMP. STAT. 405/2-7(1) (West, Westlaw through P.A. 103-1082 of the 2024 Reg. Sess.).

⁶⁸ *Age of Victims*, COUNTER-TRAFFICKING DATA COLLABORATIVE, <https://perma.cc/Y299-VUBH>.

⁶⁹ See Hersh, *supra* note 1, at 260–61.

⁷⁰ N.Y. CRIM. PROC. LAW § 440.10(1)(i) (McKinney, Westlaw through L. 2025).

⁷¹ Barnard, *supra* note 2, at 1484.

⁷² *Id.* at 1483–84.

⁷³ *Id.*

⁷⁴ *Id.* at 1484–86.

must file the motion in a timely fashion.⁷⁵ And further, victims may not even know about the relief, lack resources to file the motion, fear their traffickers, or simply want to move on with their lives.⁷⁶ And expungements are limited to prostitution convictions specifically.⁷⁷ So if a victim is coerced into drug trafficking and prostitution, the drug charge would remain on her record despite it being a result of being a victim of trafficking.⁷⁸ And while the conviction is expunged, the arrest is not.⁷⁹ To make matters worse, because the nature of human trafficking crosses multiple jurisdictions, victims would have to spend the money and time petitioning each conviction in each jurisdiction.⁸⁰ The expungement law does not create a defense in the first instance, making victims wait until their conviction to actually raise the motion.⁸¹

Moving from post-conviction to pre-conviction, the approaches vary. For example, Oklahoma⁸² created an affirmative defense for human trafficking victims resembling a duress defense.⁸³ The defense is not limited to prostitution provided there is some nexus between trafficking and the offense.⁸⁴ The statute also mandates that once a victim is identified, law enforcement must immediately provide her with medical resources, free her from jail, and protect her from being recaptured by her trafficker.⁸⁵ While promising, Oklahoma's statute suffers from administrative ambiguity. It's unclear when a victim becomes a statutory victim and how long that status remains under the statute.⁸⁶ Equally unclear is whether the affirmative defense must be raised before or during trial.⁸⁷ Nor is there a crime limitation on the defense, so a victim could theoretically commit first-degree murder and raise the defense successfully because the nexus between the crime and trafficking scheme

⁷⁵ N.Y. CRIM. PROC. LAW § 440.10(3)(a) (McKinney, Westlaw through L. 2025).

⁷⁶ Barnard, *supra* note 2, at 1487–88.

⁷⁷ N.Y. CRIM. PROC. LAW § 440.10(1)(i) (McKinney, Westlaw through L. 2025).

⁷⁸ Barnard, *supra* note 2, at 1478.

⁷⁹ *Id.* at 1482.

⁸⁰ Matthew Myatt, Comment, *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, 592 (2019).

⁸¹ Barnard, *supra* note 2, at 1490.

⁸² OKLA. STAT. ANN. tit. 21, § 748 (West, Westlaw through the 2d Reg. Sess. of the 59th Legis. (2024)).

⁸³ Compare OKLA. STAT. ANN. tit. 21, § 748(D) (West, Westlaw through the 2d Reg. Sess. of the 59th Legis. (2024)), with OKLA. STAT. ANN. tit. 21, § 156 (West, Westlaw through the 2025 Reg. Sess.).

⁸⁴ OKLA. STAT. ANN. tit. 21, § 748 (West, Westlaw through the 2d Reg. Sess. of the 59th Legis. (2024)).

⁸⁵ OKLA. STAT. ANN. tit. 21, § 748.2(A)(1–6) (West, Westlaw through the 2d Reg. Sess. of the 59th Legis. (2024)).

⁸⁶ Hilborn, *supra* note 4, at 470.

⁸⁷ *Id.* at 478–79; OKLA. STAT. ANN. tit. 21, § 748 (West, Westlaw through the 2d Reg. Sess. of the 59th Legis. (2024)).

is so loose.⁸⁸ As for other solutions, some have called for a rebuttable presumption of coercion once a victim is identified and arrested.⁸⁹

However effective any pre- or post-conviction solution can be, they all suffer from a lingering deficiency: They involve arresting a victim. That arrest spurs numerous long-term issues for the victim and a prosecutor's relationship with the victim throughout the process. Pre-arrest solutions are sparse, though. Diversion programs require the voluntary cooperation of a victim. Voluntary cooperation, however, is difficult to come by due to the fear of violence against themselves or loved ones if they try to escape the trafficking ring, the fear of shame or being misunderstood, or established substance addictions that only their traffickers can satisfy.⁹⁰ And decriminalizing prostitution not only increases the rate of human trafficking, but gives law enforcement less ground to detain a victim.⁹¹ Creating a buffer zone between the victim and her trafficker is crucial for successful rehabilitation, so there is only one alternative to arrest that could successfully detain a "willing victim" of trafficking: mental health detentions.

II. Mental Health Detentions

A mental health detention is a short-term (usually seventy-two hours) detention conducted by law enforcement to connect the individual with a medical professional and assess whether a long-term civil commitment is necessary.⁹² As discussed below, these detentions are classified as either "Temporary Detention Orders" or "Emergency Custody Orders." Involuntary, mental health detentions fall within the larger scope of civil commitment law.⁹³ Civil commitment laws protect the public and those who are unable to protect themselves.⁹⁴ While the civil commitment process is distinct from criminal law, the implementation of commitment statutes relies heavily on concepts from criminal procedure such as probable cause. Different states have different requirements allowing law

⁸⁸ Hilborn, *supra* note 4, at 478–79.

⁸⁹ Myatt, *supra* note 80, at 594.

⁹⁰ Alice Mutter, *From Criminals to Survivors: Recognizing Domestic Sex Trafficking as Violence Against Women in the District of Columbia*, 26 AM. U. J. GENDER, SOC. POL'Y & L. 593, 609–10 (2017) (describing state statutes that recommend or allow diversion, but do not require admission into a program once an individual is identified as a victim).

⁹¹ See Hersh, *supra* note 1, at 258; Hogan, *supra* note 3, at 40–41.

⁹² VA. CODE ANN. §§ 37.2-808, 809(D) (West, Westlaw through the 2025 Reg. Sess.).

⁹³ HANNAH-ALISE ROGERS, CONG. RSCH. SERV., R47571, INVOLUNTARY CIVIL COMMITMENT: FOURTEENTH AMENDMENT DUE PROCESS PROTECTIONS 3 (2023).

⁹⁴ John Q. La Fond, *An Examination of the Purposes of Involuntary Civil Commitment*, 30 BUFF. L. REV. 499, 501 n.7, 504 (1981).

enforcement to detain an individual.⁹⁵ However, this Comment focuses primarily on Virginia's mental health detention statute.

Virginia law requires a finding of probable cause that an individual has a mental illness and that there is a substantial likelihood of harm to another person or inability to protect oneself because of that mental illness.⁹⁶ Law enforcement may detain individuals who satisfy these elements without a warrant, though an emergency detention hearing is typically required within a certain amount of time for an official detention order.⁹⁷

A. *Justification and General Criteria*

The policy that mental health detention and civil commitment laws pursue is the increase of treatment that would not otherwise be sought by an individual.⁹⁸ The state's authority to detain mentally ill individuals is rooted in two powers. First, it is rooted in the state's police power, the plenary power to make laws to protect the public welfare.⁹⁹ The second authority is the state's *parens patriae* power, the state's responsibility to protect those that cannot care for themselves.¹⁰⁰ Most states require two elements for involuntary detention: (1) mental illness, and (2) threat of imminent harm to oneself or others.¹⁰¹ Where the evidence is uncertain on either element, states will allow involuntary placement of an individual to allow law enforcement to assess the missing element.¹⁰² While states differ on the language of each element, the standard for meeting those elements is probable cause.¹⁰³

States differ on how broadly or narrowly each element is defined. Virginia's statute is broad under both elements.¹⁰⁴ With respect to the first element, Virginia includes substance abuse in its definition. By contrast,

⁹⁵ See, e.g., LISA DAILEY, MICHAEL GRAY, BETSY JOHNSON, SABAH MUHAMMAD, ELIZABETH SINCLAIR & BRAIN STETTIN, *GRADING THE STATES: AN ANALYSIS OF U.S. PSYCHIATRIC TREATMENT LAWS* 33 (2020) (comparing different states' statutes on criteria such as access to courts for petitioners and eligibility requirements).

⁹⁶ VA. CODE ANN. § 37.2-809(C) (West, Westlaw through the 2025 Reg. Sess.).

⁹⁷ DEP'T OF MAGISTRATE SERVS., *MAGISTRATE MANUAL: EMERGENCY CUSTODY AND TEMP. DET. ORD. 33* (2024) [hereinafter *MAGISTRATE MANUAL*].

⁹⁸ See David F. Chavkin, "For Their Own Good": *Civil Commitment of Alcohol and Drug-Dependent Pregnant Women*, 37 S.D. L. REV. 224, 239 (1992).

⁹⁹ Mark S. Kaufman, Comment, "Crazy" Until Proven Innocent? *Civil Commitment of the Mentally Ill Homeless*, 19 COLUM. HUM. RTS. L. REV. 333, 336 (1988).

¹⁰⁰ *Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez*, 458 U.S. 592, 600 (1982).

¹⁰¹ Victor E. Ramos, Comment, *Saving Homeless Lives Through Established Mental Health Laws*, 25 ANNALS HEALTH L. ADVANCE DIRECTIVE 95, 100-01 (2016).

¹⁰² N.Y. MENTAL HYG. LAW § 9.41 (McKinney, Westlaw through L. 2025).

¹⁰³ See, e.g., VA. CODE ANN. § 37.2 (West, 2025).

¹⁰⁴ VA. CODE ANN. § 37.2-800 (West, Westlaw through the 2025 Reg. Sess.). Compare *id.*, with ARK. CODE ANN. § 20-47-202 (West, Westlaw through the 2025 Reg. Sess.) (explicitly excluding substance abuse from its definition of mental illness).

New York law does not.¹⁰⁵ With respect to the second element, the second prong of Virginia's statute is a "substantial likelihood" that an individual will "suffer serious harm due to his lack of capacity to protect himself from harm or to provide for his basic human needs," thus capturing both safety from external harm and an individual capacity to provide for oneself.¹⁰⁶ To compare Virginia's statute to other states, New York's second element applies merely when an individual "conduct[s] himself . . . in a manner which is likely to result in serious harm."¹⁰⁷ Virginia law is more flexible because its second prong covers both individual capacity for self-defense and taking care of one's own basic needs.¹⁰⁸

States may pass laws or executive orders to broaden the statute's application. For example, New York created a specific executive order that extended its mental health detention law to encompass homeless individuals in sub-freezing temperatures.¹⁰⁹ In response to homeless individuals staying outside in sub-freezing temperatures, New York declared that sub-freezing temperatures are a "threat to life, health, and safety," so an individual who chooses to remain exposed to sub-freezing temperatures thus appears to be mentally ill and engaging in conduct that will result in serious harm.¹¹⁰ Those circumstances give law enforcement the requisite conditions for taking someone into custody to be given a mental health assessment.¹¹¹ Likewise, Virginia could extend its statutory definitions through executive orders to encompass specific, nontraditional circumstances in the trafficking context.

Notably, Virginia is among a growing number of states to implement a standard within the second element—substantial likelihood of serious harm—that includes incapacity to protect or provide for oneself.¹¹² This element, or its functional equivalent, is referred to as "grave disability."¹¹³ Traditionally, mental health detention laws operate by evaluating the

¹⁰⁵ N.Y. MENTAL HYG. LAW § 1.03 (McKinney, Westlaw through L. 2025).

¹⁰⁶ VA. CODE ANN. § 37.2-817(c) (West, Westlaw through the 2025 Reg. Sess.).

¹⁰⁷ N.Y. MENTAL HYG. LAW § 9.41 (McKinney, Westlaw through L. 2025).

¹⁰⁸ VA. CODE ANN. § 37.2-817(c) (West, Westlaw through the 2025 Reg. Sess.).

¹⁰⁹ Ramos, *supra* note 101, at 95.

¹¹⁰ *Id.* at 99.

¹¹¹ N.Y. MENTAL HYG. LAW § 9.41 (West, Westlaw through the 2025 Reg. Sess.); Ramos, *supra* note 101, at 99.

¹¹² Kaufman, *supra* note 99, at 353; *see also* ARK. CODE ANN. § 20-47-202(12)(B) (West, Westlaw through the 2025 Reg. Sess.); ARIZ. REV. STAT. ANN. § 36-526(A) (Westlaw through 1st Reg. Sess. of the 57th Legis. (2025)); CAL. WELF. & INST. CODE § 5150(a) (West, Westlaw through Ch. 1017 of the 2024 Reg. Sess.); COLO. REV. STAT. ANN. § 27-65-102(17) (West, Westlaw through the 1st Reg. Sess. of the 75th Gen. Assemb. (2025)); IDAHO CODE ANN. § 66-329(11) (West, Westlaw through Ch. 175 of the 1st Reg. Sess. of the 68th Legis. (2025)); LA. STAT. ANN. § 28:53(A)(2) (Westlaw through the 2024 1st Extraordinary, 2d Extraordinary, Reg., and 3d Extraordinary Sess.); WASH. REV. CODE ANN. § 71.05.150(1) (West, Westlaw through the 2024 Reg. Sess.).

¹¹³ Kaufman, *supra* note 99, at 353.

physical or imminent danger that an individual presents to another or oneself, not necessarily the inability to protect oneself from future harm.¹¹⁴

B. *Overview of the Virginia Mental Health Detention Process.*

Mental health detentions occur under two different orders: Emergency Custody Orders (“ECOs”), and Temporary Detention Orders (“TDOs”).¹¹⁵ Under an ECO, officers usually need an order from a magistrate to detain an individual for seventy-two hours.¹¹⁶ But an “orderless” detention can occur when officers themselves have probable cause that the criteria are met, and then bring the individual to a certified specialist who will make an expert determination on whether the criteria are met for that individual.¹¹⁷ In either situation, the individual is then presented before a special justice who makes a ruling on whether the individual should be committed for treatment, not to exceed thirty days.¹¹⁸ Commitment hearings often take place in the hospitals where the individuals are admitted.¹¹⁹ Throughout this process, the individual can voluntarily cooperate with law enforcement and seek treatment themselves.

The purpose of an ECO is to obtain a face-to-face meeting between a professional mental health evaluator and a person thought to be mentally ill.¹²⁰ The evaluator then forms an opinion and provides expert evidence as to whether the respondent needs treatment for a mental illness and otherwise meets the statutory criteria for an issuance of a TDO, a longer order that results in civil commitment.¹²¹

Under normal circumstances, law enforcement must receive an ECO from a magistrate.¹²² But law enforcement may initiate “orderless” emergency custody if an officer has probable cause to believe that a person meets the same criteria for emergency custody that a magistrate would apply in an ECO case.¹²³ If the criteria are met, the officer may take the person into custody and transport the person to an appropriate location to assess the need for treatment.¹²⁴ Orderless emergency custody is limited

¹¹⁴ *Id.*

¹¹⁵ MAGISTRATE MANUAL, *supra* note 97, at 18; VA. CODE ANN. §§ 37.2-808(A)–(B), -809(D), -810 (West, Westlaw through the 2025 Reg. Sess.).

¹¹⁶ VA. CODE ANN. § 37.2-809(D) (West, Westlaw through the 2025 Reg. Sess.).

¹¹⁷ VA. CODE ANN. § 37.2-808(G) (West, Westlaw through the 2025 Reg. Sess.).

¹¹⁸ VA. CODE ANN. §§ 37.2-814(B), -817(C) (West, Westlaw through the 2025 Reg. Sess.).

¹¹⁹ See FAIRFAX-FALLS CHURCH CMTY. SERVS. BD., INVOLUNTARY PSYCHIATRIC HOSPITALIZATION OF ADULTS 6–7 (Fairfax-Falls Church Cmty. Servs. Bd. Emergency Servs. Staff ed., 2019).

¹²⁰ MAGISTRATE MANUAL, *supra* note 97, at 4.

¹²¹ *Id.*

¹²² VA. CODE ANN. § 37.2-808(A) (West, Westlaw through the 2025 Reg. Sess.).

¹²³ VA. CODE ANN. § 37.2-808(G) (West, Westlaw through the 2025 Reg. Sess.).

¹²⁴ *Id.*

to eight hours.¹²⁵ Unfortunately, the reasonableness of a seizure in the context of psychiatric evaluations is not as well-defined as in the criminal context.¹²⁶ But the bar for probable cause is relatively low.¹²⁷

During these eight hours, the individual must be evaluated by someone “professionally qualified to provide informed expert evidence on whether a [TDO] should be issued.”¹²⁸ These individuals are known as members of the Community Services Board (“CSB”).¹²⁹ CSBs are “skilled in the diagnosis and treatment of mental illness,” and have “completed a certification program approved by the Department [of Behavioral Health and Developmental Services].”¹³⁰ CSBs are easily accessible to a magistrate.¹³¹ This accessibility is important because time is of the essence in these detention matters—so much so that the magistrate must be available 24/7 to conduct them.¹³² The location for an evaluation must merely be a “convenient location.”¹³³ More often than not, hospital emergency rooms are these locations.¹³⁴

Without a TDO, the orderless eight-hour detention can only be extended while the CSB is searching for a bed.¹³⁵ Once a TDO is issued, the individual may be detained for seventy-two hours longer at a medical

¹²⁵ *Id.*

¹²⁶ See *Gooden v. Howard Cnty., Md.*, 954 F.2d 960, 968 (4th Cir. 1992) (“We are aware of no cases that define ‘dangerousness’ with the requisite particularity or explain what type or amount of evidence would be constitutionally sufficient to establish probable cause of a dangerous condition The lack of clarity in the law governing seizures for psychological evaluations is striking when compared to the standards detailed in other Fourth Amendment contexts, where probable cause to suspect criminal misconduct has been painstakingly defined.”).

¹²⁷ See *id.* at 967 (noting that it is “all too facile . . . that the officers should have walked away from the situation because [plaintiff] evidenced no injuries at the time they were with her [because if] the officers had refused to act until they saw blood, bruises and splintered furniture, it might have been too late”); cf. *Monday v. Oullette*, 118 F.3d 1099, 1102 (6th Cir. 1997) (finding probable cause to detain an individual for a mental evaluation when, despite appearing coherent and denying suicidal thoughts, the individual was drinking and was missing some of his prescription pills); *Ahern v. O’Donnell*, 109 F.3d 809, 817–18 (1st Cir. 1997) (finding probable cause to detain an individual when he threatened another person a day earlier and had a history of harassment and threats, despite the lack of visible mental illness at the time of seizure); *Sherman v. Four Cnty. Counseling Ctr.*, 987 F.2d 397, 401–02 (7th Cir. 1993) (finding probable cause for detaining an individual for a mental health evaluation because of his odd public behavior and threats against others).

¹²⁸ MAGISTRATE MANUAL, *supra* note 97, at 8; see also VA. CODE ANN. §§ 37.2-809, 16.1-336 (West, Westlaw through the 2025 Reg. Sess.).

¹²⁹ *Guide to Psychiatric Crisis and Civil Commitment Process in Virginia*, NAT’L ALL. ON MENTAL ILLNESS 1 [hereinafter *Psychiatric Crisis*].

¹³⁰ VA. CODE ANN. § 37-808(B) (West, Westlaw through the 2025 Reg. Sess.).

¹³¹ VA. CODE ANN. § 37.2-809(J) (West, Westlaw through the 2025 Reg. Sess.).

¹³² *Id.*

¹³³ VA. CODE ANN. § 37.2-808(B) (West, Westlaw through the 2025 Reg. Sess.).

¹³⁴ BRETT M. MERFISH, VIRGINIA CIVIL COMMITMENT PROCEDURE AND PRACTICE: POLICY ANALYSIS AND RECOMMENDATIONS TO INCREASE VOLUNTARY ADMISSION 7 (2010).

¹³⁵ VA. CODE ANN. § 37.2-808(O) (West, Westlaw through the 2025 Reg. Sess.).

facility determined by the magistrate.¹³⁶ That facility cannot be a jail, unless the individual is already an inmate.¹³⁷ During this period, a special justice¹³⁸ holds an involuntary detention hearing, to determine whether by “clear and convincing evidence” the individual appears mentally ill and is substantially likely to be suffering harm due to a lack of capacity to protect himself or provide for his own basic needs.¹³⁹ If that standard is met, then the individual may be civilly committed to a mental health facility—designated by the CSB—or a period of treatment not to exceed thirty days.¹⁴⁰

Throughout this process, the individual may volunteer for treatment at any point. If so, there would be no further formal action. The detention process ends and procedures for voluntary admission in a Virginia state hospital or licensed clinic begin. Virginia law requires the special justice to ask the individual whether they would agree to voluntary admission.¹⁴¹ According to data from Fairfax County’s CSB and the Case Management System, the period in which people were most likely to convert to a voluntary admission occurred after forty-eight hours.¹⁴²

From the initial encounter to the follow-up procedures, law enforcement typically transports the individual.¹⁴³ But the magistrate may assign an alternative transportation provider if needed.¹⁴⁴

The eight-hour detention, seventy-two-hour detention, and long-term detention all provide opportunities for a victim of trafficking to receive treatment from victim advocates and medical professionals. At minimum, the individual will encounter the CSB designee who can screen the individual for mental illness and provide necessary resources for the victim of trafficking. The next question is how effective this method would be in practice. This Comment now turns to the efficacy of Virginia’s mental health detention process as an alternative to arrest for victims of human trafficking.

III. Virginia’s Mental Health Detention Process Is an Effective Alternative to Arresting Victims of Human Trafficking

Mental health detention offers several advantages to addressing an encounter with a trafficking victim when compared to traditional arrests.

¹³⁶ VA. CODE ANN. § 37.2-809(H) (West, Westlaw through the 2025 Reg. Sess.).

¹³⁷ VA. CODE ANN. § 37.2-809(E) (West, Westlaw through the 2025 Reg. Sess.).

¹³⁸ A special justice is usually a retired judge or lawyer appointed by a chief circuit court judge. *Special Justices*, OFF. OF THE EXEC. SEC’Y, SUP. CT. OF VA, <https://perma.cc/YA6P-48T6>.

¹³⁹ VA. CODE ANN. § 37.2-817(C) (West, Westlaw through the 2025 Reg. Sess.).

¹⁴⁰ *Id.*

¹⁴¹ MERFISH, *supra* note 134, at 8.

¹⁴² *Id.* at 9.

¹⁴³ *See* VA. CODE ANN. § 37.2-810(C) (West, Westlaw through the 2025 Reg. Sess.).

¹⁴⁴ VA. CODE ANN. § 37.2-810(E) (West, Westlaw through the 2025 Reg. Sess.).

Practically, victims are provided a buffer zone from their trafficker and appropriate resources, sooner. Psychologically, victims are less traumatized and more likely to trust law enforcement. And legally, victims will no longer have arrests on their permanent records that will potentially prohibit them from future opportunities. While there are still some collateral consequences concerning restrictions on firearm ownership or prohibitions from military service, the advantages outweigh the disadvantages.

Further, the use of involuntary commitment is likely to succeed. When applying relevant case law to the circumstances common to most trafficking victims (discussed above in Section I.A), law enforcement will likely possess probable cause under the detention statute's two elements. Specifically, those circumstances supply ample indicia of major depressive disorder, physical injuries, and forced intoxication. These indicia suggest mental illness and an inability to protect oneself, justifying an initial detention.

A. *Mental Health Detention Is Superior to Arrest Because Victims Receive a Buffer Zone Between Themselves and Their Trafficker Without Significant Changes to Their Permanent Record*

Whether detentions are eight-hours, seventy-two hours, or thirty-days, these options give victims considerably more respect and access to resources than arrest. First, as a practical matter, victims will have access to resources quicker. Whether that is during their initial evaluation or their final destination at a full-service medical facility, social services could present resources to the victim.¹⁴⁵ Second, this buffer period insulates the victim from their traffickers. They cannot return to the trafficking ring or contact another trafficker to arrange for their escape because they would be accompanied by law enforcement at almost all times.¹⁴⁶

Psychologically, a mental health detention is much less traumatizing than an arrest. Victims will be less likely to resent law enforcement because law enforcement will disprove their traffickers' false warnings that the victim will be arrested and never believed.¹⁴⁷ Even if the suspected victim believes that initially, their perspective may change eight hours later. Instead of officers antagonizing the victim through arrest, the victim will realize that what their traffickers told them is not true. Officers can detain victims of trafficking without handcuffs to eliminate any feeling of

¹⁴⁵ See *Human Trafficking Response in Virginia*, VA DEP'T OF CRIM. JUST. SERVS., <https://perma.cc/38UK-N3EX>.

¹⁴⁶ MERFISH, *supra* note 134, at 8.

¹⁴⁷ See *Resources: The Mindset of a Human Trafficking Victim*, DEP'T OF HEALTH & HUM. SERVS., <https://perma.cc/M52U-ZMNV>.

coercion.¹⁴⁸ To avoid the use of intimidating handcuffs, alternative transportation could be arranged with a family member or someone else under the magistrate's discretion.¹⁴⁹ But the obvious issue is that for a victim of trafficking, she may lack family members or not disclose any. Law enforcement could seek alternatives to transporting the victim themselves—such as a friend or social worker—to reduce a feeling of coercion.¹⁵⁰ Reducing that feeling of coercion can reduce the chances of uncooperative behavior with subsequent care.¹⁵¹

The victim, no longer being victimized “again” by the criminal justice system, may reconsider her trust in it. For instance, in Maryland, more than a third of detentions that begin their course as involuntary mental health detentions turn into voluntary detentions, with individuals desiring mental health treatment on their own accord at some point throughout the process.¹⁵² So it is possible that suspected victims of trafficking who legitimately fit the statutory criteria could consider voluntary admission as an option to treating any trauma they have experienced through the trafficking scheme.

That difference can benefit law enforcement and prosecutors. Having gained more trust from victims, law enforcement will be able to conduct better investigations. Also, prosecutors can likely feel more confident calling the suspected victim to the stand and solidifying a conviction of a trafficker.

Further, the suspected victim would not have an arrest on her permanent record due to this law enforcement encounter. Consequently, she will have better access to employment, housing, and other essential needs than if she was arrested.¹⁵³ While a seventy-two-hour order would show up on an individual's record as having been adjudicated mentally incompetent, it is comparatively better than an arrest and produces fewer negative consequences. In the worst-case scenario where a victim goes beyond the eight- or seventy-two-hour detention and is civilly committed long term, that detention would not show up on a general background check. The order is sent only to the Virginia Central Criminal Records Exchange solely to determine firearms eligibility.¹⁵⁴ So a background check from an employer or landlord would not uncover a mental health

¹⁴⁸ MERFISH, *supra* note 134, at 4.

¹⁴⁹ *Psychiatric Crisis*, *supra* note 129, at 5.

¹⁵⁰ *Id.*

¹⁵¹ MERFISH, *supra* note 134, at 4.

¹⁵² SARAH E. BARCLAY, INCREASING THE TEMPORARY DETENTION PERIOD PRIOR TO A CIVIL COMMITMENT HEARING: IMPLICATIONS AND RECOMMENDATIONS FOR THE COMMONWEALTH OF VIRGINIA COMMISSION ON MENTAL HEALTH LAW REFORM 18–19 (2008).

¹⁵³ *Arrest and Conviction Records as a Barrier to Employment*, WASH. LAW'S COMM. (Jan. 20, 2023), <https://perma.cc/R98L-RUET>; Cameron Kimble & Ames Grawert, *Collateral Consequences and the Enduring Nature of Punishment*, BRENNAN CTR. FOR JUST. (June 21, 2021), <https://perma.cc/N8X9-W844>.

¹⁵⁴ VA. CODE ANN. §§ 37.2-819, 18.2-308.1:3(A) (West, Westlaw through the 2025 Reg. Sess.).

detention. Even to the extent that an employer or landlord could find it, under federal and state law, they are both unable to discriminate against an individual on the basis of a mental health condition.¹⁵⁵

However, there are two negative collateral consequences from this arrangement. First, victims who have been involuntarily committed will lose the right to possess firearms or ammunition for the rest of their life.¹⁵⁶ But that can be remedied through Virginia's Gun Rights Restoration provision.¹⁵⁷ An individual may petition the local general district court to restore her firearms rights.¹⁵⁸ Further, a victim who is arrested for and convicted of a felony would also lose her right to a firearm.¹⁵⁹ While prostitution is a misdemeanor in Virginia, victims of trafficking are often arrested for other felonies they were also coerced into such as identity theft or possession of drugs.¹⁶⁰ So this consequence is not unique to mental health detentions. The second consequence is career prospects in law enforcement, the military, or other related fields.¹⁶¹ Those jobs would require the individual to carry a firearm. But there are statutory exceptions for these circumstances.¹⁶²

B. *Victims of Trafficking Will Likely Meet the Probable Cause Criteria for Appearing Mentally Ill and Substantially Likely to Suffer Harm as a Result of Their Mental Illness*

Although not a traditional use of Virginia law, mental health detentions can serve a creative purpose in helping law enforcement avoid some of the dilemmas presented when arresting a victim of human trafficking. The psychological data on victims of human trafficking demonstrate that there are real instances of mental illness, including substance abuse among victims when they are first encountered by law enforcement.¹⁶³ And the data also show that the types of mental illnesses that victims of trafficking suffer can result in an inability to protect

¹⁵⁵ 42 U.S.C. §§ 3604, 12112; VA. CODE ANN. §§ 36-96.1, 2.2-3900 (West, Westlaw through the 2025 Reg. Sess.).

¹⁵⁶ 18 U.S.C. § 922(g)(4); VA. CODE ANN. § 18.2-308.1:3 (West, Westlaw through the 2025 Reg. Sess.).

¹⁵⁷ VA. CODE ANN. § 18.2-308.1:3(B) (West, Westlaw through the 2025 Reg. Sess.).

¹⁵⁸ *Id.*

¹⁵⁹ VA. CODE ANN. § 18.2-308 (West, Westlaw through the 2025 Reg. Sess.).

¹⁶⁰ *The Importance of Criminal Record Relief for Human Trafficking Survivors*, POLARIS PROJECT (Mar. 20, 2019), <https://perma.cc/U4SS-D44G>.

¹⁶¹ See, e.g., Elizabeth Hardison, *A Pa. Board Is Sidelining Officers with Mental Health Histories. But Advocates Say It's Proof of a Problematic Law*, PA. CAP-STAR (June 19, 2020, at 06:39 ET), <https://perma.cc/9W7D-JQKE>; Janet A. Aker, *Get the Facts About Mental Health and Security Clearances*, U.S. DEP'T OF DEF. (Oct. 3, 2024), <https://perma.cc/W9WB-JW96>.

¹⁶² See 18 U.S.C. § 925(c).

¹⁶³ Richmond, *supra* note 14, at 35.

themselves.¹⁶⁴ Those findings give reason to believe that victims of trafficking can fit within Virginia's mental health detention law and an officer could use that law to temporarily detain the subgroup of victims who refuse to comply with law enforcement and would likely return to the trafficking ring. Each part of a detention will now be analyzed in turn.

As a preliminary note, law enforcement only needs *probable cause* of the statutory requirements—mental illness and the inability to protect oneself—to place a victim in warrantless emergency custody for eight hours.¹⁶⁵ As discussed above, probable cause is a relatively low standard and does not prove certainty. So, it is not asserted that victims of human trafficking are in fact mentally ill and incapable of protecting themselves. This Comment seeks to avoid implying such a conclusion. Instead, this Comment argues there will likely be enough evidence for law enforcement to at least conduct the warrantless ECO under the typical circumstances of encountering a human trafficking victim. This ability to conduct the ECO creates a more advantageous buffer zone than an actual arrest. This is where the broadness of Virginia's mental health detention law comes in. The first way that law enforcement can take advantage of the broadness of Virginia's definition of mental illness is to first look for evidence of substance abuse by a suspected victim.

- I. First Element: A Strong Likelihood of Law Enforcement Finding Probable Cause of a Mental Illness in the Suspected Victim

As discussed in Section I.A, victims of human trafficking often develop signs or symptoms of mental illness because of their trafficking.¹⁶⁶ Take, for example, a raid on a motel that law enforcement may conduct. When law enforcement enters a room, the officers can first inform the victim that she is not being arrested. Law enforcement can request voluntary compliance with their investigation, and if the suspected victim declines, law enforcement could interview the suspected victim as well as conduct sobriety tests. Depending on a victim's answers or the results of a sobriety test, law enforcement could find probable cause under the totality of the circumstances—based on the common circumstances of victims discussed above—that the suspected victim is suffering the mental illness of substance abuse.

But even absent evidence of substance abuse, acting evasively and uncooperatively in response to law enforcement inquiries can indicate mental illness.¹⁶⁷ For example, in *S.P. v. City of Takoma Park*,¹⁶⁸ law enforcement responded to an emergency call and confronted a woman

¹⁶⁴ Sadruddin et al., *supra* note 7, at 404.

¹⁶⁵ VA. CODE ANN. § 37.2-808 (West, Westlaw through the 2025 Reg. Sess.).

¹⁶⁶ See discussion *supra*, Section I.A.

¹⁶⁷ *S.P. v. City of Takoma Park*, 134 F.3d 260, 267–68 (4th Cir. 1998).

¹⁶⁸ 134 F.3d 260 (4th Cir. 1998).

who had just argued with her husband.¹⁶⁹ While crying and making suicidal statements, the woman was “evasive and uncooperative” with the officers attempting to inquire about her situation.¹⁷⁰ Even though the woman denied any psychiatric problems, the officers believed her to be evasive and uncooperative.¹⁷¹ The officers had ample time to interview the woman.¹⁷² From those circumstances, the court ultimately determined that the officers had probable cause to detain her under Maryland’s mental health detention statute.¹⁷³

Victims of trafficking may act similarly evasive and uncooperative when answering initial questions from law enforcement.¹⁷⁴ Evasiveness, in addition to other facts like those of the woman in *S.P.*, can support probable cause of mental illness. If law enforcement officers also take their time when interviewing the suspected victim and minimize any indication of haste, a court may also find further reason to affirm a finding of probable cause.

That evasive and uncooperative behavior, however, could also be a sign of known criminal guilt.¹⁷⁵ Skeptics of using mental health detentions might argue that interpreting evasive behavior to be a sign of mental illness instead of guilt would excuse numerous other crimes simply because an individual did not cooperate with officer questioning. But the law enforcement officers in this context could advise the victim that their questioning is focusing on her as a victim, not a suspect. That practice would be beneficial because the victim of trafficking is most likely thinking that she is being arrested like her traffickers told her. Dispelling that idea immediately could encourage cooperation from the victim.

To further clarify, the victims in this circumstance have not been arrested of any crime yet, so this situation is not equivalent to an accused refusing to answer an officer’s questions. Nor is this a situation where a suspected accomplice who has yet to be arrested is attempting to hide evidence of his role in a crime. Rather, this is a specific instance of officers inferring from the circumstances that they have encountered a trafficking situation and that the individuals engaging in sexual acts for compensation probably did not do so voluntarily. So those individuals should be detained by some measure other than arrest. While law enforcement should be careful in this regard, the circumstances of human trafficking mandate this different treatment. Because uncooperative behavior is so prevalent among victims of human trafficking, law

¹⁶⁹ *Id.* at 264.

¹⁷⁰ *Id.* at 267–68.

¹⁷¹ *Id.* at 268.

¹⁷² *Id.* at 267.

¹⁷³ *Id.* at 267–68.

¹⁷⁴ Jodi A. Quas, Shreya Mukhopadhyay, Kaitlin M.H. Winks, Rachel E. Dianiska & Thomas D. Lyon, *Successful Criminal Prosecutions of Sex Trafficking and Sexual Abuse of Minors: A Comparative Analysis*, 28 CHILD MALTREATMENT 500, 503, 511 (2023).

¹⁷⁵ *Branham v. Commonwealth*, 720 S.E.2d 74, 78 n.2 (Va. 2012).

enforcement would be justified in interpreting the circumstances to support their probable cause finding of mental illness.¹⁷⁶

If a victim is not intoxicated, an accompanying individual from victim support services could interview the victim to determine whether there are signs of another mental illness. Finding probable cause for depression, for example, would be realistically feasible. The standard classification of mental disorders used by mental health professionals in the U.S., the Diagnostic and Statistical Manual of Mental Disorders (“DSM 5”), lists various criteria that support a diagnosis for major depressive disorder.¹⁷⁷ Those criteria are the following: (1) depressed mood; (2) loss of interest or pleasure in almost all activities; (3) significant unintentional weight loss/gain or decrease/increase in appetite; (4) sleep disturbance; (5) psychomotor changes; (6) tiredness, fatigue, or low energy or decreased efficiency with which routine tasks are completed; (7) a sense of worthlessness or excessive, inappropriate, or delusional guilt; (8) impaired ability to think, concentrate, or make decisions—indicated by subjective reports or observations by others; and (9) recurrent thoughts of death, suicidal ideation, or suicidal attempts.¹⁷⁸ For a positive diagnosis, at least five symptoms must persist for most of the day for at least two consecutive weeks.¹⁷⁹

Given that law enforcement only needs probable cause of a mental illness to detain an individual under the Virginia statute, officers would not need to meet the standards required for diagnosis. Because probable cause is a lower standard than preponderance of the evidence,¹⁸⁰ officers need less evidence than a doctor would need to make a diagnosis of major depressive disorder.

In the trafficking context, finding probable cause for major depressive disorder would be relatively easy. Certain criteria are easier to find because of the subjective nature of the reporting, such as a depressed mood or loss of interest in almost all activities. Those symptoms can be established by subjective reports or observation by others, so the officers or social worker on the scene could simply ask whether the victim has felt

¹⁷⁶ See Richmond, *supra* note 14, at 37–38.

¹⁷⁷ AM. PSYCHIATRIC ASS’N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 183–84 (5th ed. 2022).

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*

¹⁸⁰ See Florida v. Harris, 568 U.S. 237, 243–44 (2013) (“Finely tuned standards such as proof beyond a reasonable doubt or by a preponderance of the evidence . . . have no place in the [probable cause] decision. All we have required is the kind of ‘fair probability’ on which ‘reasonable and prudent [people,] not legal technicians, act.’” (alterations in original) (internal quotation marks omitted) (internal citation omitted)).

such symptoms recently.¹⁸¹ Victims of trafficking could also be questioned about any recurrent thoughts of death or suicide.¹⁸²

Other symptoms can be found because of the nature of the victim's exploitation. Victims of trafficking are likely tired or fatigued from their labor or sexual exploitation, and that tiredness can be observed by a third party.¹⁸³ Also, victims of trafficking may suffer from feelings of worthlessness or delusional guilt because of the psychological tactics used by their traffickers to maintain control.¹⁸⁴

Certain criteria require longer periods of observation, such as weight gain/loss and sleep disturbances. Those criteria would be less relied upon by officers. But if only two or three symptoms of depression were necessary to support a finding of probable cause, these more difficult criteria would not pose any serious impediment on that process.

Beyond those criteria for depression, the added stress of law enforcement arriving might indicate some kind of mental illness because of the split-second decision making a victim might have to make for her own survival within both the trafficking scheme and the law. Of course, many individuals likely would panic at law enforcement showing up at the door and might respond in a manner that indicates mental illness. But once again, law enforcement simply needs evidence of mental illness and the likelihood of harm to begin the detention, not full certainty about the victim's status as such.

2. Second Element: Finding a Substantial Likelihood of Harm Because of an Inability to Protect Oneself

The second element is also easy to satisfy in the trafficking context. Law enforcement here needs to find probable cause that an incapacity to protect oneself arises *because* of the individual's mental illness, as opposed to other causes. Still, law enforcement can likely find probable cause given what is known about the typical victim encounter. At a basic level, a trafficking victim is often encountered in a situation where she has been coerced into committing crimes, some of which permit a bodily invasion.¹⁸⁵ Victims of sex trafficking may be assaulted in their sex for hire or suffer from non-consensual sexual activities beyond what was agreed

¹⁸¹ See MELANIE ABAS ET AL., CARING FOR TRAFFICKED PERSONS: GUIDANCE FOR HEALTH PROVIDERS 138–43 (Cathy Zimmerman & Rosilyne Borland eds., 2009).

¹⁸² This method could be a double-edged sword because when an individual says that they are not suicidal, courts may also be less likely to find probable cause to support a mental health detention. See *Burruss v. Riley*, 192 F. Supp. 3d 655, 662 (W.D. Va. 2016) (applying Virginia law).

¹⁸³ ABAS ET AL., *supra* note 181, at 18, 100.

¹⁸⁴ *Id.* at 138, 142.

¹⁸⁵ *Id.* at 191; Sadruddin et al., *supra* note 7, at 384, 407.

to.¹⁸⁶ Victims of labor trafficking may suffer from occupational hazards and exhibit symptoms like dehydration, bacterial infections, or injuries from workplace accidents.¹⁸⁷ Victims have little control in the trafficking scheme, and any mental illness they might have frustrates what little control they have.¹⁸⁸ Therefore, when an officer finds probable cause of a mental illness in a victim of human trafficking, the discovery or knowledge of trafficking would then generate the inference that the victim's mental illness was taken advantage of by her trafficker and displays an incapacity to protect oneself.

Further, courts typically discern whether probable cause existed by reviewing the scenario holistically. In *Lawhon v. Edwards*,¹⁸⁹ a court applying Virginia law did not conduct a line-by-line analysis of matching each fact to each element.¹⁹⁰ Rather, it laid out the facts and determined from the totality of the circumstances there was probable cause that the Virginia mental health detention statute was met.¹⁹¹ There is no "checklist" for determining probable cause and the Supreme Court has rejected such an approach.¹⁹²

Those circumstances pair well with the typical raid scenario. The fact that a suspected victim is intoxicated can indicate a substantial likelihood that serious physical harm might occur in the near future as a result of substance abuse. Courts applying Virginia law have recognized intoxication by drugs as indicating probable cause for the second prong of the mental health statute.¹⁹³ While not dispositive by itself, it lends credibility to the idea that officers could find sufficient indicia when coming across a suspected victim of trafficking.¹⁹⁴

¹⁸⁶ AMNESTY INT'L, VIOLENCE AGAINST SEX WORKERS AND SURVIVORS OF TRAFFICKING: SUBMISSION TO THE UN SPECIAL RAPPORTEUR ON VIOLENCE AGAINST WOMEN 5-6 (2024).

¹⁸⁷ ABAS ET AL., *supra* note 181, at 19.

¹⁸⁸ *See id.* at 9, 11.

¹⁸⁹ 477 F. Supp. 3d 428 (E.D. Va. 2020) (applying Virginia law).

¹⁹⁰ *See Lawhon*, 477 F. Supp. 3d at 439-41.

¹⁹¹ *Id.*

¹⁹² *See Florida v. Harris*, 568 U.S. 237, 244 ("We have rejected rigid rules, bright-line tests, and mechanistic inquiries in favor of a more flexible, all-things-considered approach.").

¹⁹³ *See Lawhon*, 477 F. Supp. 3d at 443 (explaining how an individual had consumed drugs before being detained under a Virginia ECO).

¹⁹⁴ It is worthy to note that in the alternative, Virginia could issue an ordinance similar to New York's homelessness ordinance by categorically defining a victim of human trafficking as meeting the statutory requirements. *See Ramos*, *supra* note 101, at 95. But for starters, Virginia could create a statute or ordinance that presumes probable cause is met when a suspected victim of trafficking is encountered by law enforcement because human trafficking is such an atrocious crime. Virginia could narrowly tailor this ordinance more than New York's statute. Instead of stating that all suspected victims of trafficking show probable cause of mental illness and failure to protect oneself, the ordinance could limit its breadth to those suspected victims who refuse to comply with law enforcement's encouragement for victim services. This would avoid the conclusion that all victims of human trafficking are mentally ill and powerless.

IV. Practical and Theoretical Considerations of Using Mental Health Detentions

Using mental health detentions as the primary way of detaining uncooperative victims of trafficking suffers from some logistical barriers and problematic assumptions. Resources are already sparse for law enforcement and mental health professionals, particularly beds at medical facilities, so adding more to their plate could jeopardize their effectiveness.¹⁹⁵ Because of the scarcity of resources, health administrators might be incentivized to release victims of trafficking early because they are not as “dangerous” as other patients.¹⁹⁶

On a political or social level, defaulting to mental health detentions could reinforce the idea that victims of trafficking are helpless and unable to take care of themselves. But that concern can be assuaged by noting that establishing probable cause for mental illness and harm is not the same as labeling victims as mentally ill and harmful. Applying mental health detentions in this context also only applies when victims are uncooperative with law enforcement, so ideally these detentions would be so infrequent that no presumption of mental illness is instilled among society.

The agency of the victim herself also needs to be considered. Despite being oriented around the pursuit of freedom for victims, the involuntary detention process does not lend itself to making the victim feel in control. Serious emphasis on the methods of detention and ensuring that the mental health professions cater to the specific needs of victims are essential to this method’s success. It would also be egregious if a totally competent and sane individual were involuntarily committed under a long-term order merely because she was a victim of trafficking. Thankfully, the standard for long term mental health detentions, clear and convincing evidence, is so high that this risk is unlikely to allow any slips through the cracks.

A. *More Resources Are Needed for Victim Identification and Medical Facility Accommodation*

On the front end of the process, law enforcement officers need more mental health professionals to determine whether a suspected victim has a mental illness and is substantially likely to be unable to protect themselves. Such resources would give the law enforcement officers a higher likelihood of finding probable cause, given that a CSB

¹⁹⁵ See Michael Shellenberger, *Alex V. Barnard: Why So Many of the Homeless Are Mentally Ill*, PUB. (Jan. 21, 2024), <https://perma.cc/KUQ6-XL9V>.

¹⁹⁶ See E. Fuller Torrey, *A Dearth of Psychiatric Beds*, 33 PSYCHIATRIC TIMES 2 (Feb. 25, 2016), <https://perma.cc/F6SU-CLSS>.

professional's opinion is influential in determining whether the victim is ultimately committed.¹⁹⁷

However, in scenarios where an uncompliant victim is screened by an evaluator and deemed mentally healthy—for example, in a situation where substances and intoxication are absent—police would not be able to find probable cause against the evaluator's determination. That possibility may deter law enforcement from bringing an evaluator with them so that officers can find probable cause on their own accord and use the eight-hour hold merely to create a buffer zone even though they know it's possible that the evaluator could find them mentally sane. So, adding CSB designees to a crisis response team would be a double-edged sword.

After an orderless ECO, acquiring the long-term TDO from the magistrate faces one serious roadblock: a lack of beds. Public facilities suffer from a shortage of beds.¹⁹⁸ In Virginia, during 2023, seven of the nine state psychiatric hospitals filled ninety-five percent or more of their staffed beds.¹⁹⁹ Three of the state hospitals filled 100 percent of their beds.²⁰⁰ This shortage creates a safety problem of its own because industry standards recommend that psychiatric hospitals should not exceed eighty-five percent of their beds to maintain a safe environment.²⁰¹ The majority of private psychiatric hospitals do operate under the eighty-five percent capacity standard, but they are not forced to admit any individual whether they have a TDO or not.²⁰² Even when beds are available, if they cannot be located in the immediate area, law enforcement officials would have to drive the individual across the state.²⁰³ And in the situation where a victim then changes her mind to cooperate with law enforcement and seeks her own treatment, those hospitals with available beds would be less likely to admit an individual without a TDO. Additionally, most hospitals fail to update their bed registries, making it difficult for law enforcement to know where an available bed might be.²⁰⁴

This situation is only becoming worse because Virginia is struggling to increase its number of psychiatric beds.²⁰⁵ That struggle is financially driven.²⁰⁶ Psychiatric care is not profitable, especially for the private

¹⁹⁷ See VA. CODE ANN. § 37.2-809(B) (West, Westlaw through the 2025 Reg. Sess.).

¹⁹⁸ JOINT LEGIS. AUDIT & REV. COMM'N, VIRGINIA'S STATE PSYCHIATRIC HOSPITALS 36 (Comm'n Draft Dec. 11, 2023), <https://perma.cc/XEQ5-3WJP> [hereinafter JLARC DRAFT REPORT].

¹⁹⁹ *Id.*

²⁰⁰ *Id.*

²⁰¹ *Id.*

²⁰² *Id.* at iii.

²⁰³ There is a separate form to request an alternative state employee drive the individual to the mental health facility, but the extent of its use is unknown. See MERFISH, *supra* note 134, at 8.

²⁰⁴ Dina Weinstein, *State Report Says Virginia's Mental Health Bed Registry Is Out-of-Date and Unusable*, CARDINAL NEWS (Dec. 16, 2022), <https://perma.cc/GQB9-G28M>.

²⁰⁵ Kate Masters, *Amid a Push to End Mental Health Hospitalizations, Virginia Is Still Funding More Beds*, VA. MERCURY (June 28, 2021, at 12:03 ET), <https://perma.cc/VNW5-FE5J>.

²⁰⁶ MERFISH, *supra* note 134, at 14.

hospitals.²⁰⁷ Medicaid reimbursements from the state often “fall short of the actual cost of care.”²⁰⁸ Virginia’s funding structure is not need-based but instead linked to whether a facility’s patients are voluntarily or involuntarily admitted, the latter of which are more profitable.²⁰⁹

Another cause for the lack of beds is the broadness of Virginia’s mental health statute. While its broadness is beneficial in the trafficking context, it is so broad that it also allows individuals with neurocognitive disorders and neurodevelopmental disorders, like dementia and autism spectrum disorders, to meet the criteria for a mental health detention under a TDO.²¹⁰ Psychiatric hospitals can do little for these kinds of patients.²¹¹ So adding more patients under TDOs would increase the strain on state hospitals. The counterargument is that victims of human trafficking are not suffering from neurocognitive or neurodevelopmental disorders but instead are suffering from more treatable mental illnesses like substance abuse or depression. Amending the statutory definition of mental illness to exclude neurocognitive and neurodevelopmental disorders from the list of diagnoses to qualify an individual from a TDO has been suggested, but even the recommenders of such a change are wary of unintended consequences from narrowing the definition.²¹²

The practical roadblock driven by a lack of beds is the likelihood that mental health evaluators will target victims of human trafficking as the first to be released. It is a consequence of this situation not being the traditional use of the statute. Virginia Hospitals are already suffering from a significant number of inappropriate admissions because they are required to admit anyone with a TDO if no other facility accepted them.²¹³ Private hospitals in Virginia discharge “about 10 times as many patients as state-run hospitals every year.”²¹⁴ Mental health facility beds are primarily for those who are at immediate risk of suicide and individuals who will likely commit serious injury against others. Individuals who are unable to protect themselves, unfortunately, are a lower priority because the individuals who pose harm to others technically pose a greater threat to the public. Assuming trafficking victims are less dangerous than other demographics, the mental health professionals might find that the individual no longer fits the statutory criteria and would be better served by outpatient services. In other words, victims of trafficking might not be dangerous enough to justify occupying beds that would be occupied by more dangerous people. This result is not necessarily bad, but it does limit

²⁰⁷ *Id.* at 13.

²⁰⁸ Sarah Vogelsong, *State Report Recommends Sweeping Changes to Virginia Psychiatric Hospital System*, VA. MERCURY (Dec. 12, 2023, at 19:29 ET), <https://perma.cc/ESE6-KJ4R>.

²⁰⁹ See MERFISH, *supra* note 134, at 25.

²¹⁰ JLARC DRAFT REPORT, *supra* note 198, at 15.

²¹¹ *Id.*

²¹² Vogelsong, *supra* note 208.

²¹³ JLARC DRAFT REPORT, *supra* note 198, at 5–6.

²¹⁴ *Id.* at 27.

the state's time and ability to help a victim obtain assistance for her situation.

Increasing beds appears to be the only solution to these issues. Perhaps broadening what facilities can qualify under the statute for mental health detention would help. For example, women's shelters could provide support on this front for seventy-two hour holds. But without more beds, medical facilities will face the incentive to push victims out and only admit those who are involuntarily admitted.

From the victim's standpoint, there are other logistical considerations. Some victims of trafficking do not speak English, so making it clear that they aren't being arrested would require resources like interpreters on the scene.²¹⁵ Involuntary detentions also may require handcuffing the suspected victim, which would seem functionally equivalent to arrest and could trigger some of the retaliatory sentiment that her traffickers instilled in her.²¹⁶ Even though mental health detentions can eliminate some of the issues on paper that cause long-term problems, the moment of detention may still feel hostile and antagonistic for the victim.

Despite these roadblocks and considerations, law enforcement may at least conduct an eight-hour detention so long as there is probable cause for the statutory criteria. That orderless ECO still provides a unique buffer for the suspected victim to change her mind about treatment and voluntarily seek it. In fact, a small number of detentions end in voluntary commitment even when the individual is found to be competent under the statute.²¹⁷ And the orderless ECO won't show up on the permanent record. The eight-hour hold is a low-risk, high-reward option for law enforcement to take advantage of so long as they have probable cause. The only specific impediment to this approach is when the suspected victim is so intoxicated that the buffer zone becomes useless for her.

B. *Doesn't This Solution Categorically Define Victims as Helpless and Mentally Ill?*

It must be emphasized that this proposal does not purport to be perfect. Rather, a mental health detention is the first step of many in better assisting victims of trafficking. This approach seeks to ensure that they do not undergo further trauma or suffer the experience of being

²¹⁵ See ABAS ET AL., *supra* note 181, at 27–28.

²¹⁶ MERFISH, *supra* note 134, at 4.

²¹⁷ *Id.* at 30 (“When questioned whether individuals who are competent agree to voluntary admission, the special justices from areas with high mental health detention rates . . . estimated that individuals only agree anywhere from 10%, 20%, or 30% of the time. . . . [T]he special justices in areas with lower rates of mental health detention estimated that competent individuals agreed to voluntary admission about half of the time.”).

criminalized again through their encounters with law enforcement. Each case must be handled with care. There is no one-size-fits all solution.

That being said, any concern for trafficking victims being categorically defined as mentally ill and “dangerous” can be quelled for a few reasons. First, this is not a traditional use of Virginia’s mental health statute. Rather, the purpose of Virginia’s statute is to provide tangible assistance while better solutions are created.

Second, law enforcement officers will always need probable cause to conduct an orderless ECO. That is required by statute. Officers will always need to point to something other than the fact that the individual is a victim of trafficking to find probable cause. So, victims of trafficking who do not show signs of mental illness or who do indicate an ability to protect oneself would be outside the scope of Virginia’s mental health statute.

Officer accountability to meet probable cause is ensured by 42 U.S.C. § 1983 (“Section 1983”). Individuals who are detained unreasonably under an ECO can file a civil claim against the officers who conducted the detention.²¹⁸ The plaintiff would simply have to argue that their seizure was unreasonable, which would only arise if the officers conducted an orderless ECO without probable cause.²¹⁹ With Section 1983 as a deterrent, the scenario where officers recklessly detain persons is unlikely.

Yet Section 1983 actions are difficult to win.²²⁰ Officers are afforded qualified immunity, especially in gray areas where they need to make guesses.²²¹ So the remedy may be constrained by unique fact patterns that could give rise to the inference of a reasonable mistake by law enforcement. Nevertheless, the prospect of Section 1983 liability would encourage law enforcement officers to exercise due diligence in establishing probable cause.

Third, this proposal covers a narrow area of interaction with victims of trafficking. Most victims will cooperate willingly with law enforcement and participate in pre-arrest diversion programs where available. It is only when victims do not cooperate with law enforcement or seek treatment after encouragement, *and* meet the statutory criteria, where this proposal would be applied. This narrow use of the mental health statute does not diminish the logistical issues facing law enforcement. Beds are scarce in Virginia in the status quo, so finding a bed for even one victim under this proposal would prove difficult.

²¹⁸ *Goines v. Valley Cmty. Servs. Bd.*, 822 F.3d 159, 169 (4th Cir. 2016) (describing the exception of qualified immunity for officers in the mental health seizure context and upholding plaintiff’s Fourth Amendment claim under Section 1983 against an officer).

²¹⁹ *See Burruss v. Riley*, 192 F. Supp. 3d 655, 661–63 (W.D. Va. 2016) (refusing to apply qualified immunity to a Section 1983 claim concerning mental health detentions when officers detained an individual for a mental health evaluation without probable cause).

²²⁰ *See id.* (“[Q]ualified immunity ‘extends to “all but the plainly incompetent or those who knowingly violate the law.”’” (quoting *Raub v. Campbell*, 785 F.3d 876, 881 (4th Cir. 2015))).

²²¹ *Marciariello v. Sumner*, 973 F.2d 295, 298 (4th Cir. 1992) (“Officials are not liable for bad guesses in gray areas; they are liable for transgressing bright lines.”).

Lastly, this proposal would be a step toward removing the “criminal” label from human trafficking victims. The status quo risks an “arrest first, remedy any issues later” policy. The ideal situation is to never arrest the victim in the first place, and this is one way of doing so.

C. *The Agency of the Victim*

Another issue is that if victims are capable of making a choice for themselves, then detaining them under the presumption that they are incapable of doing so would violate their autonomy. This loss of autonomy and self-determination can negatively impact their mental health.²²² The mental health detention process is also notorious for making patients feel coerced because of forced medicine consumption, unclear communications about rights, and a lack of information about patient options.²²³

But a fear of a total loss of agency can also be dispelled. First, Virginia, like many other states, has been active in improving its conditions in psychiatric hospitals, such as improved discharge determinations and pursuing larger numbers of staff at each facility.²²⁴

Second, in the later stages of the commitment process, the evidentiary standards are so high that the only victims who end up being committed are those who appropriately need to be there.²²⁵ Clear and convincing evidence is a significantly higher bar than probable cause. And individuals are always able to petition for a writ of habeas corpus to challenge their detention.²²⁶ To further clarify, the standard for commitment is high, while the standard for initial custody is low. The high standard does not impede the objectives of the state. While it is true that not every victim will be committed and separated from their traffickers, the buffer zone for giving the victim an opportunity to obtain resources and break free—without criminal charges—is achieved.

Third, between initial detention and the mental health hearing, the victim may change her mind about the treatment she needs and voluntarily seek the treatment that law enforcement provides, a situation that occurs frequently.²²⁷ Thus, the victim’s agency would be respected and maintained.

Fourth, even while under police custody, when a victim interacts with the CSB designee, the guidance for care of trafficking victims is oriented

²²² Judy Ann Clausen & Joanmarie Davoli, *No-One Receives Psychiatric Treatment in a Squad Car*, 54 TEX. TECH. L. REV. 645, 655 (2022).

²²³ Aaron Goldman, *Continued Overreliance on Involuntary Commitment: The Need for a Less Restrictive Alternative*, 36 J. LEGAL MED. 233, 233–34 (2015).

²²⁴ See generally JLARC DRAFT REPORT, *supra* note 198, at 65, 92.

²²⁵ VA. CODE ANN. § 37.2-817(C) (West, Westlaw through the 2025 Reg. Sess.).

²²⁶ VA. CODE ANN. § 37.2-844 (West, Westlaw through the 2025 Reg. Sess.).

²²⁷ See MERFISH, *supra* note 134, at 30.

towards making her feel a sense of agency.²²⁸ These medical interactions can help de-escalate any intense feelings or reactions coming from a victim who has just been detained.

Conclusion

Law enforcement has access to more tools than arrest for protecting victims of human trafficking. Officers and social workers can initiate an Emergency Custody Order to remove a victim away from her trafficker, where she can experience support and hope of a better life. Using mental health detentions instead of arrests can increase the trust between law enforcement and victims while preventing the victims from facing long-term consequences of crimes they were coerced into committing. While law enforcement would need a massive amount of resources to conduct these emergency detentions consistently and reliably, even an eight-hour detention could potentially be enough for a victim to realize that a better life awaits. Whereas the status quo labels victims as criminals, mental health detentions are a first step to providing victims with needed treatment.

²²⁸ See ABAS ET AL., *supra* note 181, at 138–39.