

A Letter to Congress: The Communications Decency Act Promotes Human Trafficking

By Abigail Kuzma*

I. INTRODUCTION

Daily news reports outline incidents of the Internet being used to facilitate sex trafficking. Moreover, the U.S. Department of Justice and the Federal Bureau of Investigation (“FBI”) report that sex trafficking victims are often both underage and U.S. citizens. The average age children are *first* used in commercial sex is between twelve and fourteen,¹ and eighty-three percent of all sex trafficking victims found in the United States are U.S. citizens.² Federal courts have recognized that “[t]he Internet has become a favored means of advertising the availability of children for sex.”³ Internet ads can be purchased in multiple locations with the click of a button. This allows pimps to maximize their profit and evade detection by moving victims quickly to lucrative venues, for example sporting events, where there is significant demand for commercial sex.⁴

Nevertheless, sex trafficking cases are not limited to large urban areas or particular regions of the country. In Minnesota, for example, law enforcement and hotel and motel owners joined forces in response to the number of sex trafficking cases originating with the website Backpage.com.⁵ Just last year, a Georgia man fraudulently enticed young males to come to his suburban home and then sold them for sex on Craigslist.⁶ In recent years, sex trafficking cases have increased 545% in San Diego, California.⁷ Racketeering and organized crime groups as well as street gangs are involved, and many of these perpetrators are using the Internet to sell their victims.⁸

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¹ Some research indicates that the average age of entry for U.S. girls is twelve to fourteen, while the average age for U.S. boys and transgender youth is eleven to thirteen. Amanda Walker-Rodriguez & Rodney Hill, *Human Sex Trafficking*, FED. BUREAU OF INVESTIGATION (Mar. 2011), http://www.fbi.gov/stats-services/publications/law-enforcement-bulletin/march_2011/human_sex_trafficking; POLARIS PROJECT, CHILD SEX TRAFFICKING AT-A-GLANCE (2011), http://loveandlighttofreedom.org/uploads/Child_Sex_Trafficking_Polaris_Project-Jan_2012.pdf.

² DUREN BANKS & TRACEY KYCKELHAHN, U.S. DEP’T OF JUSTICE, CHARACTERISTICS OF SUSPECTED HUMAN TRAFFICKING INCIDENTS, 2008-2010 1 (Apr. 2011), <http://bjs.gov/content/pub/pdf/cshti0810.pdf>.

³ Backpage.com v. Cooper, 3:12-CV-00654, 2013 WL 1558785, at *3 (M.D. Tenn. Jan. 3, 2013).

⁴ *Id.*; Lisa Trigg, *The Seedy Side of the Super Bowl: Behind Glitz and Glamour Is the Dark Realm of Human Trafficking*, TRIBSTAR.COM (Jan. 8, 2012), <http://tribstar.com/local/x608924131/The-Seedy-Side-of-the-Super-Bowl>.

⁵ Jennie Olson, *Ramsey County Leaders Take Stand Against Child Trafficking*, KSTP.COM (Aug. 23, 2012), <http://ramsey.kstp.com/news/news/160115-ramsey-county-leaders-take-stand-against-child-trafficking>. Backpage.com is just one of many Internet Service Providers that provide a forum for advertising “adult services” such as escorts or strippers. See Tracy Clark-Flory, *Sex Ads: It Isn’t Just Backpage.com*, SALON (May 24, 2012), http://www.salon.com/2012/05/24/sex_ads_it_isnt_just_backpage_com/. Other “legitimate” sites include: about.com, yp.com, facebook.com, tumblr.com, and twitter.com. *Id.* Backpage.com is the most popular escort site. #AC360 – *Should Backpage Close Their Adult Services Section?*, CNN PRESS ROOM (May 16, 2012), <http://cnnpressroom.blogs.cnn.com/2012/05/16/ac360-should-backpage-close-their-adult-services-section/>. Backpage.com appears to be the biggest forum for sex trafficking of minor girls in the United States. Nicholas D. Kristof, *Financers and Sex Trafficking*, N.Y. TIMES (March, 31 2012), http://www.nytimes.com/2012/04/01/opinion/sunday/kristof-financers-and-sex-trafficking.html?_r=0.

⁶ Kimathi Lewis, *Former Go-Go Dancer Guilty of Molesting, Pimping Teen Boys*, EXAMINER.COM, (Aug. 28, 2012), <http://www.examiner.com/article/former-go-go-dancer-guilty-of-molesting-pimping-teen-boys>.

⁷ Greg Moran, *Child Sex Trafficking, Pornography Cases up 545%*, U-T SAN DIEGO (Aug. 23, 2012), <http://www.utsandiego.com/news/2012/aug/23/child-sex-trafficking-pornography-cases-up-545/>.

⁸ *Id.*

Research indicates that many of these trafficked children are particularly vulnerable to manipulation by traffickers due to their compromised life circumstances, such as prior sex abuse or homelessness. In fact, one report found that youth who run away from home are recruited by a pimp within forty-eight hours of their departure.⁹ A Chicago, Illinois report found that “the most significant predictor of entry into prostitution is running away or being homeless as a youth, particularly if that homeless experience occurs prior to the age of sixteen years.”¹⁰ Researchers have determined that adverse childhood experiences, or ACEs, and the trauma that accompanies these experiences, correlate strongly with the vulnerability of the child to being trafficked.¹¹

Even more concerning, sex trafficking cases often involve tremendous violence. For example, in one recent case, a trafficker beat the victim, forced her naked into a cold shower, covered her with ice, and then made her stand in front of an air conditioner for thirty minutes.¹² In another recent scenario, a trafficker transported a victim from one city to another and stopped multiple times along the way to beat her.¹³ The beatings were so violent that the victim died from her injuries.¹⁴

Law enforcement cannot prevent this horrific abuse, in large part because the proliferation of human trafficking on the Internet is enabled by a federal law called the Communications Decency Act (“CDA”).¹⁵ This law, while intended to facilitate the development of Internet Service Providers, (“ISPs”)¹⁶ has had the unfortunate side effect of rendering law enforcement ineffective at identifying and interdicting ads and solicitations for illicit sex. State Attorneys General have long recognized this critical problem and have sought to protect human trafficking victims, but now find that the CDA has stymied their efforts. This article examines the issue of Internet facilitation of sex trafficking of children and outlines four legislative proposals to protect victims and prevent this horrific crime. These legislative proposals offer practical solutions to the roadblock that the CDA has placed in the path of effective law enforcement interdiction of the trafficking of children on the Internet.

⁹ Mark Clayton, *Sex Trade Lures Kids from Burbs*, CHRISTIAN SCI. MONITOR (Aug. 30, 1996), <http://www.csmonitor.com/1996/0830/083096.intl.intl.1.html>; THE HOFSTEDE COMMITTEE REPORT: JUVENILE PROSTITUTION IN MINNESOTA 6 (1999), <http://www.heart-intl.net/HEART/080105/JuvenileProstitutionMinn.pdf>.

¹⁰ LARA JANSON, ET AL., “OUR GREAT HOBBY” AN ANALYSIS OF ONLINE NETWORKS FOR BUYERS OF SEX IN ILLINOIS 54 (2013), http://g.virbcdn.com/_f2/files/22/FileItem-276524-FinalWeb_OurGreatHobby.pdf (citing TODD STROGER, THE COOK CNTY. COMM’N ON WOMEN’S ISSUES, THE REALITIES OF HUMAN TRAFFICKING IN COOK COUNTY: STRATEGIES FOR ENDING THE EXPLOITATION OF WOMEN AND GIRLS, PUBLIC HEARING REPORT 5 (2007)).

¹¹ Jim Mercy, Div. of Violence Prevention, Nat’l Ctr. for Injury Prevention & Control, PowerPoint Presentation at Johns Hopkins Bloomberg School of Public Health Symposium: The Public Health Implications of Child Sex Trafficking (May 1-2, 2013).

¹² *Id.* In another case, on August 3, 2011, Demetrius Homer, of Atlanta, was sentenced on charges of sex trafficking of a minor. Press Release, Fed. Bureau of Invest., Atlanta Div., Atlanta Man Sentenced for Sex Trafficking of Minors, Demetrius Homer Advertised Juveniles on Backpage.com (Aug. 3, 2011), <http://www.fbi.gov/atlanta/press-releases/2011/atlanta-man-sentenced-for-sex-trafficking-of-minors>. One of Homer’s victims was a fourteen-year-old girl whom he recruited first through romance and then violence, hitting her, threatening her with a knife, and shocking her with a taser in front of another juvenile victim. *Id.* He advertised the juvenile for commercial sex on Backpage.com. *Id.*

¹³ Madeline Buckley, *Local Man Charged with Sex Trafficking*, SOUTHBENDTRIBUNE.COM (May 6, 2013), http://articles.southbendtribune.com/2013-05-06/news/39071809_1_nathan-huey-dingle-rachael-savannah-woods-complaint.

¹⁴ *Id.*

¹⁵ 47 U.S.C.A. § 230 (West 2013).

¹⁶ *Id.*; The term “Internet Service Providers” is not defined in the Communications Decency Act. *See id.* The statute uses the term “provider of interactive computer service.” *Id.* However, courts have labeled entities such as Backpage.com, Craigslist, and other providers of interactive computer services by name different names, including, but not limited to: Internet Service Providers, web-based service providers, online service providers, service providers, and interactive computer service providers. *See, e.g., Doe v. MySpace, Inc.*, 528 F.3d 413 (5th Cir. 2008); *Chi. Lawyers’ Comm. for Civil Rights Under Law, Inc. v. Craigslist, Inc.*, 519 F.3d 666, 668 (7th Cir. 2008); *see infra* Section V. For the sake of consistency with case law, this article will hereinafter refer to such entities as Internet Service Providers (ISPs).

II. WHAT IS HUMAN TRAFFICKING?

Human trafficking is the second largest and the fastest growing criminal industry in the world,¹⁷ generating thirty-two billion dollars per year.¹⁸ The U.S. Department of State indicates that twenty-seven million persons worldwide are victims of human trafficking.¹⁹ As noted above, however, this shocking and violent crime is not found only in foreign countries. Between 14,500 and 17,500 victims are trafficked into the United States each year.²⁰ Worse, much human trafficking targets children already in the United States: the FBI estimates that nearly 300,000 American youths are currently at risk of becoming victims of commercial sexual exploitation.²¹ What's more, most of the children who are trafficked within the United States are U.S. citizens, and many of these children are pre-adolescents.²²

A. Definition of Human Trafficking²³

It is critical to specify what the term “human trafficking” means in the context of this article as well as what it does not mean. The federal definition of human trafficking is divided into two parts: labor trafficking and sex trafficking. Labor trafficking constitutes “the recruitment, harboring, transportation, provision, or obtaining of a person for labor or services, through the use of force, fraud or coercion for the purpose of subjection to involuntary servitude, peonage, debt bondage, or slavery.”²⁴ Sex trafficking is “the recruitment, harboring, transportation, provision, or obtaining of a person for the purpose of a commercial sex act, induced by force, fraud or coercion, or in which the person induced to perform such an act is under the age of 18 years old.”²⁵ It is important to note that under the federal law and many state laws, a victim of sex trafficking who is under the age of eighteen does not have to be forced into trafficking in order to be a victim.²⁶ Requiring evidence of “force, fraud or coercion” to prove the child is being trafficked is inconsistent with a child’s developmental age, and with other laws regarding the exploitation and protection of children.²⁷ The law generally recognizes that a child

¹⁷ See *Human Trafficking*, OFFICE OF THE IND. ATT’Y GEN., <http://www.in.gov/attorneygeneral/2963.htm> (last visited Aug. 13, 2012); *What Is Human Trafficking?*, U.S. DEP’T OF HEALTH & HUMAN SERVS., <http://www.acf.hhs.gov/trafficking/about/index.html> (last visited Jan. 13, 2012).

¹⁸ *Human Trafficking*, *supra* note 17; INT’L LABOR OFFICE, A GLOBAL ALLIANCE AGAINST FORCED LABOR 55 (2005), http://www.ilo.org/wcmsp5/groups/public/@ed_norm/@declaration/documents/publication/wcms_081882.pdf.

¹⁹ U.S. DEP’T OF STATE, TRAFFICKING IN PERSONS REPORT 2013 7 (2013), available at <http://www.state.gov/j/tip/rls/tiprpt/2013/index.htm>.

²⁰ ALISON SISKIN & LIANA SUN WYLER, CONG. RESEARCH SERV., TRAFFICKING IN PERSONS: U.S. POLICY AND ISSUES FOR CONGRESS 2 (2010), <http://www.unhcr.org/refworld/docid/4d2d96e62.html>.

²¹ Walker-Rodriguez & Hill, *supra* note 1; see also NAT’L CTR. FOR MISSING & EXPLOITED CHILD., <http://www.missingkids.com/CSTT> (last visited Nov. 19, 2013) (“1 out of 8 endangered runaways reported to the National Center for Missing & Exploited Children in 2012 were likely child sex trafficking victims.”).

²² Walker-Rodriguez & Hill, *supra* note 1; see POLARIS PROJECT, *supra* note 1.

²³ This section is taken largely from Abigail Lawlis Kuzma, *Game Plan to Fight Human Trafficking: Lessons From Super Bowl XLVI*, 2 DEPAUL J. WOMEN, GENDER & L. 129 (2012).

²⁴ *The Laws*, IND. PROTECTION FOR ABUSED & TRAFFICKED HUMS. TASK FORCE, <http://www.indianaagainstrafficking.org/the-laws/> (last visited Apr. 28, 2012); 18 U.S.C.A. § 1581 (West 2013) (explaining peonage); § 1584 (explaining sale into involuntary servitude); § 1589 (explaining crime of forced labor); § 1590 (explaining crime of trafficking with respect to peonage, slavery, involuntary servitude, or forced labor). While it is important to note the difference between labor trafficking and sex trafficking, this article will primarily focus on human trafficking in the context of sex trafficking.

²⁵ *The Laws*, *supra* note 24; 18 U.S.C.A. § 1591.

²⁶ See, e.g., 18 U.S.C.A. § 1591; IND. CODE ANN. § 35-42-3.5-1(b) (West 2013).

²⁷ For examples of where a legislature distinguished minors from the general population, see IND. CONST. art. 2, § 2 (Voting qualifications); IND. CODE ANN. § 35-42-4-4 (Child exploitation; possession of child pornography; violation classification; exemption;

is unable, and by law not responsible, to care for or support him or herself and may be easily manipulated by others for profit.²⁸

Each case of human trafficking is unique and the facts must be carefully examined to determine if they support a finding of such trafficking. The following example of sex trafficking²⁹ was developed by the Indiana Protection for Abused and Trafficked Humans Task Force (IPATH):³⁰ a fifteen-year-old girl runs away from her abusive family for the second time. She meets a man in his twenties at the mall who befriends her and offers to buy her something pretty. Their romantic relationship grows. She becomes more dependent upon him and believes he loves her. He starts to ask her to do things for him, eventually leading to him pimping her out for profit and resorting to violence and psychological trauma to control her.

As noted above, sex trafficking relates to a third person using a child in commercial sex or sexual conduct to make money. If the victim is eighteen years of age or older, the prosecutor must prove they were trafficked through force, fraud or coercion. Labor trafficking relates to using a person to perform labor through force, fraud, or coercion.³¹ Of course, it is possible to have both types of trafficking in the same case. For example, a man could force a woman to be his domestic slave (controlled by repeated beatings, she works all day cleaning, cooking, and serving him, and may not leave the house or even turn on air conditioning without his permission) and also use her in sex trafficking by selling her to his friends who force her to perform sex acts with them.³²

B. Human Trafficking vs. Other Crimes

Human trafficking is often confused with other crimes and may even be charged as another crime if not all of the elements of trafficking are met or are too difficult to prove.³³ For example, smuggling is the illegal transportation of a person across international borders.³⁴ While a trafficking victim may have been smuggled into the United States, smuggling cases do not have to involve human trafficking: the smuggled person is generally entering into the relationship with the smuggler voluntarily and is free to leave afterwards.³⁵ If the individual is not free to leave, it

definitions; defenses); § 7.1-5-7-7 (prohibiting possession of alcohol by minors); § 30-2-8.5-10 (defining "minor" as a person under twenty-one years of age).

²⁸ IND. CONST. art. 2, § 2; IND. CODE ANN. §§ 7.1-5-7-7, 30-2-8.5-10, 35-42-4-4.

²⁹ To protect the privacy of the victims, the Indiana Protection for Abused and Trafficked Humans Task Force developed this and similar examples; they are not actual cases but contain a combination of typical facts taken from actual cases. See *Training Subcommittee*, IND. PROTECTION FOR ABUSED & TRAFFICKED HUMS. TASK FORCE, <http://www.indianaagainstrafficking.org/training-subcommittee/> (last visited Nov. 22, 2013).

³⁰ The Indiana Attorney General and the U.S. Attorney's Office for the Southern District of Indiana are co-chairs of the Indiana Protection for Abused and Trafficked Humans Task Force ("IPATH"). *About IPATH*, IND. PROTECTION FOR ABUSED & TRAFFICKED HUMS. TASK FORCE, <http://www.indianaagainstrafficking.org/about/> (last visited Apr. 28, 2012). "IPATH is one of forty-two task forces nationwide funded by the Department of Justice's Office of Victims of Crime and the Bureau of Justice Assistance to address human trafficking." *Id.*

³¹ For an example of labor trafficking, see e.g. *U.S. v. Booker*, 655 F.2d 562 (4th Cir. 1981) (where an owner of a migrant camp in North Carolina brought workers to the camp who forced to work and not allowed to leave until their "debts" were paid (debt bondage). Force and threats of force were used to keep the victims working in the fields. When two workers attempted to escape, they were apprehended, returned to the camp and beaten).

³² See *supra* note 29.

³³ For example, trafficking victims are often reluctant to cooperate in the prosecution of the crime due to fear of retaliation by the trafficker, distrust of law enforcement, or a lack of viable alternatives to their trafficking situation. AMY FARRELL ET AL., U.S. DEP'T OF JUSTICE, IDENTIFYING CHALLENGES TO IMPROVE THE INVESTIGATION AND PROSECUTION OF STATE AND LOCAL HUMAN TRAFFICKING CASES 105, 143 (2012), <https://www.ncjrs.gov/pdffiles1/nij/grants/238795.pdf>. When the victim fails to cooperate or does not admit to being forced, it is difficult for the prosecution to make a case. *Id.* at 173.

³⁴ See U.S. DEP'T OF STATE, HUMAN SMUGGLING & TRAFFICKING CTR., FACT SHEET: DISTINCTIONS BETWEEN HUMAN SMUGGLING AND HUMAN TRAFFICKING 2 (2006) [hereinafter FACT SHEET], available at <http://www.state.gov/m/ds/hstcenter/90434.htm>.

³⁵ *People Smuggling*, INTERPOL, <http://www.interpol.int/Crime-areas/Trafficking-in-human-beings/People-smuggling> (last visited Nov. 12, 2013).

is possible that both the crimes of smuggling and human trafficking are involved.³⁶ If the prosecution cannot prove each element, however, the crime will not be charged as trafficking.³⁷

While sexual abuse or rape may indicate that force is being used in a labor trafficking case and are almost always a factor in sex trafficking cases, not all sexual abuse is human trafficking. For example, a young girl could be raped by her boyfriend, but unless he is using her (and, if she is at least eighteen years of age, unless he has forced her) to provide sexual services for profit, it is not human trafficking.³⁸ Additionally, prostitution is typically involved in sex trafficking, and the trafficker often takes the profit.³⁹ However, if the sex worker is not underage and there is no force, fraud, or coercion to induce the act of prostitution, there is likely no indication of human trafficking. With a clear understanding of the definition of human trafficking, this article will next examine how the Internet is being used to traffic children.

III. THE PROBLEM: THE INTERNET IS USED TO PROMOTE AND FACILITATE HUMAN TRAFFICKING

The Internet plays a significant role in the trafficking of children. The use of the “adult services sections” on websites such as Backpage.com has created virtual brothels where children are bought and sold using euphemistic labels such as “escorts.”⁴⁰ A strong correlation exists between human trafficking and missing and exploited kids, given the tremendous vulnerability of these children.⁴¹ Ernie Allen, former president and CEO of the National Center for Missing and Exploited Children (“NCMEC”) discussed how pimps exploit children, noting “[t]oday, they market them via the Internet, enabling customers to shop for a child from the privacy of their own homes or hotel rooms.”⁴² John Ryan, current CEO of NCMEC wrote in a letter to Maryland Attorney General Douglas Gansler, then President of NAAG,

³⁶ See FACT SHEET, *supra* note 34 (explaining that although smuggling generally involves the consent of the individual being smuggled, “[f]requently, at the end of the journey, smuggled aliens are held hostage until their debt is paid off”).

³⁷ FARRELL ET AL., *supra*, note 33, at 173.

³⁸ *The Laws*, *supra* note 24; 18 U.S.C.A. §§ 1589, 1590, 1591. Compare *United States v. Carreto*, 583 F.3d 153 (2nd Cir. 2008) (finding a criminal organization compelled young Mexican women into prostitution through force, fraud and coercion. The men recruited young, uneducated women from impoverished backgrounds from Mexico and physically and sexually assaulted their victims and were charged with human trafficking), with Sara Mulkeen, *Cops: Shrewsbury Woman Kidnapped and Repeatedly Raped*, METROWEST DAILY NEWS (Nov. 5, 2013), <http://www.metrowestdailynews.com/news/x1783714371/Cops-Woman-kidnapped-and-repeatedly-raped-in-Shrewsbury> (discussing an incident where a woman was kidnapped by a former boyfriend and repeatedly raped, but he was not charged with human trafficking). See also, Christina Carrega-Woodby, *House-Squatter Thugs Held in Kidnapping, Rape of LI Teen*, N.Y. POST (Mar. 9, 2012), <http://nypost.com/2012/03/09/house-squatter-thugs-held-in-kidnapping-rape-of-li-teen/> (detailing the experience of a fifteen-year-old girl who ran away from home and was walking with a friend when she and the friend were picked up by a gang member, and driven to the house where the gang was illegally squatting. The victim and her friend tried to leave, but were physically forced to stay. Four of the men in the gang tied her up, forced ecstasy pills down her throat and repeatedly raped her. The Madame of the group took nude photos of her and posted them on Backpage.com to advertise sex for money).

³⁹ *Human Trafficking FAQs, How is Pimping a Form of Sex Trafficking?*, POLARIS PROJECT, [http://www.polarisproject.org/human-trafficking/human-trafficking-faqs#How is pimping a form of sex trafficking?](http://www.polarisproject.org/human-trafficking/human-trafficking-faqs#How%20is%20pimping%20a%20form%20of%20sex%20trafficking?) (last visited Apr. 15, 2012); *Human Trafficking*, *supra* note 17; *Domestic Prostitution of Children*, JP SIMS CONSULTING, <http://www.jp sims consulting.com/books-guides-reports/child-predators/domestic-prostitution-children/> (last visited Nov. 12, 2013).

⁴⁰ See, e.g., *Indianapolis Adult Entertainment*, BACKPAGE, <http://indianapolis.backpage.com/adult/> (last visited Oct. 13, 2013); *Indianapolis Escorts*, BACKPAGE, <http://indianapolis.backpage.com/FemaleEscorts/> (last visited Oct. 10, 2013); Letter from the Nat’l Ass’n of Att’y’s Gen. (NAAG) to Samuel Fifer, Counsel for Backpage.com, LLC 3 (Aug. 31, 2011) [hereinafter NAAG Letter], available at <http://www.law.alaska.gov/pdf/press/083111-NAAGletter.pdf>.

⁴¹ Letter from John D. Ryan, CEO, NCMEC, to Douglas Gansler, Att’y Gen. of Md. (Oct. 25, 2012) (the author obtained this letter from NAAG, on file with author); *John D. Ryan, Chief Executive Officer*, NAT’L CTR. FOR MISSING & EXPLOITED CHILD., <http://www.missingkids.com/ExecutiveTeam/JohnRyan> (last visited Nov. 4, 2013); News Release, Wash. State Office of the Att’y Gen., *McKenna Announces Agreement with Craigslist to Crack Down on Illegal Sex Trade Ads* (Nov. 6, 2008), <http://atg.wa.gov/pressrelease.aspx?&id=21328>.

⁴² News Release, *supra* note 41.

Based on our [twenty-eight] years of experience as the nation's clearinghouse on missing and exploited children, NCMEC believes that Backpage's business model facilitates the sexual exploitation of children. The steps taken by Backpage in the past year and a half have fallen short in addressing the problem of children being sold for sex via their site.⁴³

Backpage is just one example⁴⁴ of an ISP⁴⁵ that offers "adult services" on its website. These ISPs provide a forum where individuals can post ads and pimps are known to post ads for sexually oriented services, such as escorts and strippers under the category "adult entertainment."⁴⁶ Liz McDougall, attorney for Backpage, now owned by the corporation Village Voice Media,⁴⁷ states that Backpage is "a site where any illegal activity is unwelcome. Human trafficking, child sexual exploitation, and illegal prostitution."⁴⁸ Yet it is remarkably clear that the adult services section of Backpage is being used for just such activity. In reality, the posting of coded solicitations for illegal sex is a regular occurrence in the adult entertainment section on Backpage.⁴⁹ While Backpage's "Terms of Use" prohibit direct and coded solicitations for illegal services, including "exchanging sexual favors for money or other valuable consideration,"⁵⁰ ads appearing in these sections include titles that are coded solicitations for sex.⁵¹ Furthermore,

⁴³ Letter from John D. Ryan, *supra* note 41.

⁴⁴ Some ISPs, such as Backpage.com and previously Craigslist, offer adult service sections in addition to ads for other services and goods, such as job postings, used car sales, and garage sale listings. *See, e.g.*, BACKPAGE, <http://indianapolis.backpage.com/> (last visited Oct. 10, 2013); CRAIGSLIST, <http://indianapolis.craigslist.org/> (last visited Oct. 10, 2013). Other ISPs, such as Escortdater.com, Erosads.com, and The Erotic Review, are designed to advertise only adult services. *See, e.g.*, ESCORT DATER, <http://www.escortdater.com/> (last visited Oct. 10, 2013); EROS GUIDE, <http://www.eros-guide.com/> (last visited Oct. 10, 2013); THE EROTIC REVIEW, <http://www.theeroticreview.com/main.asp> (last visited Oct. 10, 2013).

⁴⁵ The terms "Internet Service Provider" ("ISP") and "interactive computer service" are used to mean a host for internet postings such as Yahoo!, Facebook, or Backpage, not a provider of Internet service to a household or business such as Comcast or Brighthouse. *See, e.g.*, Doe v. MySpace, Inc., 528 F.3d 413, 419 (5th Cir. 2008); Chi. Lawyers' Comm. for Civil Rights Under Law, Inc. v. Craigslist, Inc., 519 F.3d 666, 668 (7th Cir. 2008); *see infra* Section V.

⁴⁶ BACKPAGE, *supra* note 44.

⁴⁷ Until recently, Backpage operated under the umbrella of an alternative news source, Village Voice Media Holdings, LLC. Keach Hagey, *Village Voice Owner Splits Up*, WALL ST. J. (Sept. 24, 2012), <http://online.wsj.com/news/articles/SB10000872396390444083304578014460623073072>. In September 2012, Village Voice Media separated its print newspapers from its controversial online ad site because its profits and reputation were being diminished by its connection to Backpage. *Id.* Under this new deal, former Village Voice Media executives Mike Lacey and Jim Larkin now operate Backpage as a separate entity. *Id.*; Chris Francesceni & Nadia Damouni, *Village Voice Newspaper Chain to Split from Controversial Ad Site*, REUTERS (Sept. 24, 2012), <http://in.reuters.com/article/2012/09/24/us-usa-villagevoice-backpage-idINBRE88N04020120924>. Prior to its separation from Backpage, Village Voice Media Holdings had been suffering from the actions of Backpage.com, as advertiser after advertiser pulled their ads from the Village Voice Media Holding's flagship publication, the Village Voice. *Id.* Pfizer, "American Airlines, Best Buy, AT&T, Ikea, H&M, IHOP, Macy's and the Miami Dolphins professional football team have all stopped advertising in VVM publications in recent months." *Id.* Scott Tobias, the CEO of Voice Media Group (the new entity that includes the former Village Voice Media Holdings minus Backpage.com), said of the split, "Backpage has been a distraction—there's no question about it—to the core (editorial) properties." *Id.* Village Voice felt pressured to jettison Backpage in order to avoid further deterioration of their profits and reputation. *Id.*

⁴⁸ *Anderson Cooper 360 Degrees: Backpage.com Refuses to Shut down Adult Classifieds* (CNN television broadcast May 10, 2012), transcript available at <http://transcripts.cnn.com/TRANSCRIPTS/120510/acd.02.html>.

⁴⁹ Dave Gibson, *Prostitution: Has Backpage.com Picked up Where Craigslist Left off?*, EXAMINER.COM (Mar. 16, 2011), <http://www.examiner.com/article/prostitution-has-backpage-com-picked-up-where-craigslist-left-off>; *infra* note 176.

⁵⁰ *Terms of Use*, BACKPAGE, <http://indianapolis.Backpage.com/online/TermsOfUse> (last updated May 18, 2010).

⁵¹ Hands DoWn The BeSt << ((((((*★* ..M¥ BÖĐÝ ÁLL ÖVER ¥ÖUR BÖĐÝ BÄBY.*★*))))) – 23, BACKPAGE (Jul. 16, 2012, 4:19 PM), <http://indianapolis.Backpage.com/FemaleEscorts/hands-down-the-bet-andltandlt-m-b-ll-vr-ur-b-bb-23/6386627>; Sexy Leah **40 Kiss Special** In Town For a Couple Nights Only—26, BACKPAGE (Jul. 15, 2012, 11:28 PM), <http://indianapolis.Backpage.com/FemaleEscorts/sexy-leah-40-kiss-special-in-town-for-a-couple-nights-only-26/6380884>.

posters use terms like “fresh,” “cherry,” and “barely legal” in online ads to imply that the individual is underage.⁵²

Despite Backpage attorney Liz McDougall’s statement that Backpage does not welcome ads for illegal prostitution or child sexual exploitation, the website is known for advertising these illegal acts by users seeking to buy sex (i.e., “johns”), pimps or traffickers, law enforcement, and underage victims who have been sold on the site.⁵³ Online chatter between johns also confirms that they go to Backpage.com to look for sex.⁵⁴ Johns even use Backpage forums to share advice regarding local escorts and police encounters.⁵⁵ Pimps and traffickers also turn to Backpage as a means of advertising their victims.⁵⁶ Clearly, both johns and pimps utilize Backpage’s adult entertainment section for the purposes of illegal sex and child sex trafficking, whether or not Backpage welcomes it.

Law enforcement employees involved in sex trafficking cases also point to Backpage as advertising illegal sex and child sex trafficking victims. For example, the Chief of a District Attorney’s Sex Trafficking Unit in New York stated that of thirty-two cases she and her team prosecuted in a year and a half, “typically involving victims aged [twelve] to [twenty-five]—a vast majority of the cases included girls marketed through Backpage ads.”⁵⁷ Similarly, a

⁵² Alan Johnson, *Human Trafficking at the Charlotte, Tampa Conventions*, COLM. DISPATCH (Sept. 5, 2012), <http://www.dispatchpolitics.com/content/blogs/the-daily-briefing/2012/09/5-12-more-than-politics-going-on-in-charlotte-tampa.html>; @@YoungFresh CollegeStudent@@ BubbleYHott petite Professional Ebony Readyand willing to cater ToYou! – 19, BACKPAGE (Oct. 10, 2013, 2:44 AM), <http://indianapolis.backpage.com/FemaleEscorts/youngfresh-collegestudent-bubbleyhott-petite-professional-ebony-readyand-willing-to-cater-toyou-19/9205915>.

⁵³ In a CNN interview, multiple johns admitted to seeking sex through Backpage, and one john responded to the claim that the escort section is not selling sex by asking, “What are they selling then?” Amber Lyon, *Child Sex Trafficking on the Internet- “Selling the Girl Next Door” Documentary*, (CNN television broadcast Mar. 19, 2012), available at <http://www.youtube.com/watch?v=fFRZ1NDR0Rc>. Another john nodded his head in affirmation when Ms. Lyon asked him if he ever suspected that the girls he found on Backpage were underage. *Id.*

⁵⁴ See *Backpage Escorts Advice*, BLOGGER (Apr. 6, 2011, 6:54 PM), <http://backpageescorts.blogspot.com/> (explaining that one john went so far as to create a blog entitled “Backpage Escorts Advice,” where the writer offers other users “helpful” tips for finding and using an escort, such as “bring your own condoms” and “[t]he only things an escort should be refusing to do when she charges \$150, \$200, \$250 or more per hour is to refuse to allow you to perform oral sex ON HER or ANAL, which is extra if she does it at all”).

⁵⁵ A Backpage forum for users entitled “Escorts in Houston, any police experiences?” includes comments from users who seek commercial sex. Backpage Forums: Sex/Obituaries: Escorts in Houston, Any Police Experiences?, BACKPAGE, <http://forums.Backpage.com/showthread.php?t=25065> (last visited Oct. 20, 2013). One pimp wrote, “I think we should do our best to share knowledge about any sting info that may be out there. This would be a great place to discuss the girls we know are real and not under covers. Does anyone here know if HPD is actively monitoring this site?” *Id.* Another added, “[B]elieve me, there are no cops monitoring this board. Now, let’s get back to talking about whores masquerading as escorts, and where we might find them.” *Id.* A Backpage forum on “Legal Advice” even contains a section entitled “Escort Services & the law,” where user comments include statements regarding law enforcement supervision of the site. Backpage Forums: Legal Advice: Escort Services & the Law, BACKPAGE, <http://forums.Backpage.com/showthread.php?t=43531> (last visited Oct. 10, 2013).

One pimp advises:

I have been in the ‘entertainment’ industry in South Florida for over 15 years I have over 50 steady clients .. The [sic] are all clean married and rich. Most ‘Escorts’ get between .. yes it is true \$70 to \$150 ... my ladies make \$5,000 a week or weekend... Miami .. Dade is a tad more lax that is why they call it ‘Da Dirty South’, when it comes to Escorts .. however have you seen many girls working 8th street lately .. no .. they all got nabbed. So go ahead ladies and put your business card on Craids [sic] List and Back Page....

Id. It is not the author’s intent to re-victimize or re-exploit any individuals advertised on Backpage.com or other ISPs. These quotes from Backpage.com have been included to demonstrate the reality of pimps and traffickers utilizing ISPs such as Backpage.com to advertise the commercial sex services of those they exploit.

⁵⁶ Backpage Forums: Legal Advice: Escort Services & the Law, BACKPAGE, <http://forums.Backpage.com/showthread.php?t=43531> (last visited Oct. 10, 2013).

⁵⁷ Nicholas D. Kristof, *How Pimps Use the Web to Sell Girls*, N.Y. TIMES (Jan. 25, 2012), http://www.nytimes.com/2012/01/26/opinion/how-pimps-use-the-web-to-sell-girls.html?_r=1.

Minnesota prosecutor stated, “[w]hen we get a case involving the trafficking of prostitution, usually the story is going to start on Backpage.com.”⁵⁸

Underage victims of sex trafficking have themselves stated that they were sold for sex on Backpage. One sex trafficking victim testified before the New York City Council that as a twelve-year-old, she was sold on Backpage for at least thirty-five “dates” in one night.⁵⁹ A thirteen-year-old victim, who was also advertised on Backpage, told CNN reporter Amber Lyon that she saw two to four men a day.⁶⁰ As of November 2013, news media has reported at least 180 instances of human trafficking that occurred on Backpage, involving 267 children and 299 traffickers.⁶¹ These instances occurred in thirty-five different states, and while the fact patterns may vary, the common element is the use of Backpage to advertise and sell sex with minors.⁶² Unfortunately, new instances of trafficking are reported in the media nearly every day.⁶³

The specific stories may vary, but physical and psychological abuse are usually present in each case.⁶⁴ As noted above, ISPs, such as Backpage, and previously Craigslist, offer adult services sections in addition to ads for other services and goods, such as job postings, used car sales, and garage sale listings.⁶⁵ Other ISPs, such as Escortdater, Erosads, and The Erotic Review, are designed to advertise only adult services.⁶⁶ The proliferation of these sites, as well as their adult services sections, is a major factor in facilitating trafficking of children. The ease of use of these adult services sections to purchase children for sex and the anonymity that these websites afford both the user and the poster/pimp make these sites attractive and lucrative to traffickers.

IV. THE ROLE OF STATE ATTORNEYS GENERAL

State Attorneys General have long identified the danger of sites such as Backpage in facilitating human trafficking, and more specifically, the use of these sites as a danger to children. In 2008, forty-three state Attorneys General,⁶⁷ led by then Washington Attorney General Rob McKenna, approached Craigslist about the way the site was being used to traffic children. They

⁵⁸ *Anderson Cooper 360 Degrees*, *supra* note 48; see John J. Choi, *Welcome to the Ramsey County Attorney's Office!*, RAMSEY CNTY., <http://www.co.ramsey.mn.us/attorney/> (last visited Oct. 10, 2013).

⁵⁹ *Anderson Cooper 360 Degrees*, *supra* note 48.

⁶⁰ Lyon, *supra* note 53.

⁶¹ Chart Tracking the Number of Minors Advertised on Backpage for Human Trafficking, Office of the Ind. Att'y Gen. (Oct. 11, 2013) [hereinafter Chart Tracking Minors] (unpublished data chart) (on file with author).

⁶² *Id.*

⁶³ See, e.g., John Corrales, *Man Arrested in Forced Prostitution of 14-Year-Old*, ODESSA AM. ONLINE (Apr. 13, 2012), <http://www.oaoa.com/articles/texas-85747-officer-investigations.html> (describing the ordeal of a fourteen-year-old girl who was forced into prostitution and physically abused by a man who advertised her on Backpage); see also Carrega-Woodby, *supra* note 38 (describing a fifteen-year-old runaway and her friend that were picked up by gang members and physically abused, drugged, repeatedly raped, and eventually sold to other johns on Backpage); Marcus Holliday, *Deputies Arrest Man for Sex Trafficking of Two Teens*, ABC24 (Aug. 2, 2012), http://www2.localmemphis.com/news/local/story/Deputies-Arrest-Man-for-Sex-Trafficking-of-Two/vcABiHfz3kKgjfEG0_az_Q.csp (detailing the experience of two girls, nineteen and sixteen years old, who were held against their will and advertised for sex on Backpage. The girls were given drugs, brutally beaten, and forced to undergo strip searches after each encounter with a john.).

⁶⁴ See *supra* note 63.

⁶⁵ CRAIGSLIST, *supra* note 44; BACKPAGE, *supra* note 44.

⁶⁶ ESCORT DATER, *supra* note 44; EROS GUIDE, *supra* note 44; THE EROTIC REVIEW, *supra* note 44.

⁶⁷ News Release, *supra* note 41. The forty-three Attorneys General were: Arizona, Arkansas, Colorado, Connecticut, Delaware, District of Columbia, Georgia, Guam, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Mississippi, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Utah, Vermont, Virgin Islands, Virginia, Washington, West Virginia, Wisconsin, and Wyoming. *Id.*

eventually reached an agreement in which Craigslist would deter, “inappropriate content and illegal activity,” including requiring users who post erotic services ads to pay a fee with a valid credit card and provide a working phone number, and to attach “tags” to the erotic services section that would assist parental screening software and use “digital tagging” to assist in identification and elimination of inappropriate content.⁶⁸ Earlier in 2008, the Attorneys General similarly reached agreements with the social networking sites Facebook and Myspace wherein the sites agreed to take steps to “protect children from unwanted communications.”⁶⁹

Despite these agreements, a growing recognition of the danger to children posed by Internet sites selling children caused the Attorneys General to seek further action against Craigslist. In August 2010, seventeen Attorneys General⁷⁰ wrote a letter to Craigslist requesting that the company remove its adult services section.⁷¹ The letter noted that the site was rampant with “ads for prostitution—including ads trafficking children.”⁷² While the letter acknowledged that Craigslist would lose money by removing the adult services section, it stated that “[n]o amount of money . . . can justify the scourge of illegal prostitution, and the suffering of the women and children who will continue to be victimized, in the market and trafficking provided by Craigslist.”⁷³ In response to this criticism, as well as years of pressure, Craigslist shut down its ‘Adult Services’ listings in September 2010.⁷⁴

Unfortunately, when Craigslist’s ‘Adult Services’ section disappeared, Backpage’s ‘Adult Escorts’ section proliferated.⁷⁵ In 2011, the National Association of Attorneys General (“NAAG”) wrote a letter to Backpage indicating that it had “tracked more than [fifty] instances, in [twenty-two] states over three years, of charges filed against those trafficking or attempting to traffic minors on Backpage.com.”⁷⁶ The letter pointed out that only cases reported in the news were tracked.⁷⁷ The NAAG therefore concluded it was reasonable that Backpage was used to promote many more instances of human trafficking that are unreported.⁷⁸ In response, Backpage argued that “the claims of their opponents are wildly exaggerated and all the money being spent

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *Attorneys General Want Craigslist ‘Adult Services’ Shut down*, REUTERS (Aug. 26, 2010), <http://www.reuters.com/assets/print?aid=US419264813320100826>. The seventeen Attorneys General were from: Arkansas, Connecticut, Idaho, Illinois, Iowa, Kansas, Maryland, Michigan, Mississippi, Missouri, New Hampshire, Ohio, Rhode Island, South Carolina, Tennessee, Texas and Virginia. *Id.*

⁷¹ Letter from Attorneys General to Jim Buckmaster, Craig Newmark, & Edward Wes (Aug. 24, 2010), *available at* http://www.oag.state.va.us/Media%20and%20News%20Releases/News_Releases/Cuccinelli/Craigslist%20Sign%20on%20-%20FINAL.pdf.

⁷² *Id.*

⁷³ *Id.*

⁷⁴ Paul Suarez, *Craigslist Adult Services Section Shut down*, PCWORLD (Sept. 5, 2010), http://www.peworld.com/article/204896/craigslist_adult_services_section_shut_down.html. Craigslist replaced its former Adult Services link with a black bar that read “censored.” *Id.*

⁷⁵ Julie Ruvolo, *Sex Trafficking on Backpage.com: Much Ado About (Statistically) Nothing*, TECH CRUNCH (Oct. 6, 2012), <http://techcrunch.com/2012/10/06/sex-trafficking-on-backpage-com-much-ado-about-statistically-nothing>.

⁷⁶ NAAG Letter, *supra* note 40; *AGs Give Backpage.com Deadline to Substantiate Claims It Limits Prostitution Ads*, NAT’L ASS’N ATT’YS GEN. (Aug. 31, 2011), <http://www.naag.org/ags-give-backpage.com-deadline-to-substantiate-claims-it-limits-prostitution-ads-august-31-2011.php>; *see also* Nicholas D. Kristof, *Where Pimps Peddle Their Goods*, N.Y. TIMES (Mar. 17, 2012), http://www.nytimes.com/2012/03/18/opinion/sunday/kristof-where-pimps-peddle-their-goods.html?_r=1&scp=5&sq=kristof%20human%20trafficking&st=cse (“Backpage accounts for about 70 percent of prostitution advertising among five Web sites that carry such ads in the United States, earning more than \$22 million annually from prostitution ads, according to AIM Group, a media research and consulting company.”).

⁷⁷ NAAG Letter, *supra* note 40.

⁷⁸ *Id.*; Rob McKenna, Wash. State Att’y Gen, Speech at the Nat’l Ass’n of Att’ys Gen. Spring Meeting (Mar. 6, 2012) (transcript available at <http://www.kirk.senate.gov/?p=blog&id=434>).

trying to wipe out advertising would be better spent on the root causes of the problem, including drug addiction, poverty and family abuse.”⁷⁹ In addition to this deflection of responsibility, Backpage also raised the shield of federal law in its response letter by citing the Communications Decency Act of 1996 (CDA).⁸⁰

Most recently, the NAGG sent a letter to members of the U.S. Senate Committee on Commerce, Science, and Transportation, and the U.S. House Committee on Energy and Commerce encouraging an amendment to the CDA.⁸¹ The letter, signed by forty-nine Attorneys General, points out that, “[i]t is ironic that the CDA, which was intended to protect children from indecent material on the internet, is now used as a shield by those who intentionally profit from prostitution and crimes against children.”⁸² The letter further notes that interpretations of the CDA have prevented state and local law enforcement agencies from successfully prosecuting these companies, and proposes a change to the CDA “so that it restores to state and local authorities their traditional jurisdiction to investigate and prosecute those who promote prostitution and endanger our children.”⁸³ As identified by the States Attorneys General, the CDA poses a roadblock to protecting children who are being trafficked on the Internet.

V. SECTION 230 OF THE COMMUNICATIONS DECENCY ACT

The provisions contained in the CDA pose obstacles to protecting children from being trafficked on the Internet. Courts have found that the CDA provides immunity under civil law and criminal law and preempts many, if not all, state laws on point.⁸⁴ The CDA has a complicated history, which explains its somewhat ironic name; in fact it has even been dubbed the “Communications Indecency Act” by certain federal judges.⁸⁵ The language of what is now called the Communications Decency Act was originally an amendment to the

⁷⁹ Letter from Samuel Fifer, Counsel for Backpage.com, to Hedda Letwin, Nat'l Ass'n of Att'ys Gen. (Sept 23, 2011) [hereinafter Letter from Samuel Fifer], available at http://www.atg.wa.gov/uploadedFiles/Another/News/BACKPAGE_com%20RESPONSE%20TO%20NAAG.PDF; see also David Carr, *Fighting Over Online Sex Ads*, N.Y. TIMES (Oct. 30, 2011), <http://www.nytimes.com/2011/10/31/business/media/backpagecom-confronts-new-fight-over-online-sex-ads.html?pagewanted=all> (“There is a lot of mythmaking around the issue and I think it’s a way of avoiding the real problem,” Mr. Lacey said.”). Backpage also outlined the ways in which it was working with law enforcement to eliminate illegal activity. Casey McNerthney, *Backpage.com Responds to Prostitution Complaints*, SEATTLE POST INTELLIGENCER (Sept. 27, 2011), <http://www.seattlepi.com/local/article/Backpage-com-responds-to-attorneys-general-2186162.php>. Backpage.com further promotes its immunity from liability by citing the Act itself. See Letter from Samuel Fifer, *supra* (citing to 47 U.S.C.A. § 230(e)(3) (West 2013) (“No cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section.”)).

⁸⁰ Letter from Samuel Fifer, *supra* note 79.

⁸¹ Letter from 49 Att'ys Gen. to Sen. John Rockefeller IV, Sen. John Thune, Rep. Frederick Upton & Rep. Henry Waxman (July 23, 2013) [hereinafter Letter from 49 Att'ys Gen.], available at <http://www.naag.org/assets/files/pdf/signons/Final%20CDA%20Sign%20On%20Letter.pdf>.

⁸² *Id.* Forty-seven of the signatures were from U.S. states, one was from Guam, and one was from the Virgin Islands. See *id.* The only states not to sign were Connecticut, Virginia, and Wisconsin. See *id.*

⁸³ *Id.* The letter suggests that § 230(e)(1), entitled “No effect on criminal law,” should be amended to read: “[n]othing in this section shall be construed to impair the enforcement of section 223 or 231 of this title, chapter 71 (relating to obscenity) or 110 (relating to sexual exploitation of children) of Title 18, or any other Federal or State criminal statute.” *Id.* (emphasis added). For further discussion, see *infra* Part VI-C.

⁸⁴ See *infra* Part V-A to V-D.

⁸⁵ William H. Freivogel, *Does the Communications Decency Act Foster Indecency?*, 16 COMM. L. & POL'Y 17, 17 (2011) (“[S]ome influential federal judges argue that such broad immunity turns the Communications Decency Act into a communications indecency act.”). The author thinks the CDA could also be called the “Total Liability Protection for Internet Service Providers, Even in the Context of Known Danger to Children Act.”

Telecommunications Act of 1996.⁸⁶ This bill amended the Communications Act of 1934 and significantly altered American telecommunication law by deregulating the broadcasting market in order to “create competitive markets” in the telecommunication arena.⁸⁷

The CDA originally contained anti-indecency and anti-obscenity provisions.⁸⁸ The bill provided criminal liability for a person who knowingly:

- (A) uses an interactive computer service to send to a specific person or persons under 18 years of age, or
- (B) uses any . . . comment, request, suggestion, proposal, image, or other communication that, in context, depicts or describes, in terms patently offensive as measured by contemporary community standards, sexual or excretory activities or organs . . .⁸⁹

In addition, the original language of the CDA provided criminal liability for “the transmission of” materials that were “obscene or indecent” to persons that were known to be less than eighteen years of age.⁹⁰

In 1997, the U.S. Supreme Court struck down these criminal liability provisions in *Reno v. American Civil Liberties Union*.⁹¹ The Court concluded that while it has “repeatedly recognized the governmental interest in protecting children from harmful materials,” the anti-indecency and anti-obscenity provisions of the CDA posed an unacceptable burden on adult speech: “[t]he CDA lacks the precision that the First Amendment requires when a statute regulates the content of speech.”⁹²

Today, all that that remains of the Communications Decency Act is a separate provision found at 47 U.S.C.A. § 230 entitled “Protection for private blocking and screening of offensive material.”⁹³ This provision was not part of the Senate legislation, but was adopted from a House of Representatives bill entitled the “Internet Freedom and Family Empowerment Act.”⁹⁴ It reads in pertinent part:

- (c) Protection for “Good Samaritan” blocking and screening of offensive material
 - (1) Treatment of publisher or speaker
 - No provider or user of an interactive computer services shall be treated as the publisher or speaker of any information provided by another information content provider.
 - (2) Civil Liability
 - No provider or user of an interactive computer service shall be held liable on account of—

⁸⁶ Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (West) (codified in scattered sections of 47 U.S.C.A.); H.R. REP. NO. 104-458, at 81 (1996) (Conf. Rep.), available at <http://www.gpo.gov/fdsys/pkg/CRPT-104hrpt458/pdf/CRPT-104hrpt458.pdf>.

⁸⁷ H.R. REP. NO. 104-458, at 117.

⁸⁸ *Id.* at 187-97. The CDA was added as Title V of the Telecommunications Act of 1996 as an amendment in the Senate that was adopted by Conference Committee. Telecommunications Act of 1996, 110 Stat. 56.

⁸⁹ Telecommunications Act of 1996, 110 Stat. 56.

⁹⁰ *Id.*

⁹¹ *Reno v. Am. Civil Liberties Union*, 521 U.S. 844, 873, 895 (1997).

⁹² *Id.* at 875, 846, 874.

⁹³ 47 U.S.C.A. § 230 (West 2013).

⁹⁴ Howard Rheingold, *Internet Censors Close to Success*, CMC MAG. (Dec. 1, 1995), <http://www.ibiblio.org/cmc/mag/1995/dec/rheingold.html>. The Internet Freedom and Family Empowerment Act was introduced by Rep. Christopher Cox (R-CA) and Rep. Ron Wyden (D-OR). *Id.*

(A) Any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected; or

(B) Any action taken to enable or make available to information content providers or others the technical means to restrict access to materials described in paragraph (1).⁹⁵

Taken together, § 230 (c)(1) and (2) provide nearly complete immunity for ISPs insofar as they publish content provided by others. Section (c)(1) clarifies that an ISP is not a publisher or speaker with respect to information posted by others on its site; thus, an ISP cannot be held liable as an editor of the content of others' specific postings under libel laws or other torts that may be committed by those who post material on the site.⁹⁶ Section (c)(2)(A) and (B) immunize ISPs if they *do* exercise editorial action with respect to content posted on their site when the action is "voluntarily taken in good faith" to restrict access to offensive material. Consequently, courts have found nearly complete civil immunity for ISPs under the CDA. Unfortunately, courts have also consistently held that the CDA protects ISPs from liability when minors have been harmed by sexually explicit content.

A. CDA Immunity Under Civil Law

Courts have consistently held that the CDA protects ISPs from liability with respect to claims of defamation and libel,⁹⁷ false information,⁹⁸ negligence,⁹⁹ and even most allegations of racial or sexual discrimination.¹⁰⁰ For example, the Fifth Circuit Court of Appeals noted that "[c]ourts have construed the immunity provisions in § 230 broadly in all cases arising from the

⁹⁵ 47 U.S.C.A. § 230(c).

⁹⁶ This provision was added in reaction to cases such as *Stratton Oakmont, Inc. v. Prodigy Services. Co.*, which held Prodigy Services liable as a publisher for material published on its site. *See Stratton Oakmont, Inc. v. Prodigy Servs. Co.*, 30163/94, 1995 WL 323710, at *7 (N.Y. Sup. Ct. May 24, 1995) (holding that "Epstein acted as PRODIGY's agent for the purposes of the acts and omissions alleged in the complaint"); *see also Shiamili v. Real Estate Group of New York, Inc.*, 929 N.Y.S.2d 19, 24 (2011) (explaining that section 230 "was a response to cases such as *Stratton Oakmont, Inc. v. Prodigy Servs. Co.*").

⁹⁷ *See, e.g., Carafano v. Metrosplash.com, Inc.*, 339 F.3d 1119, 1121-22 (9th Cir. 2003) (finding an Internet service provider dating site that posted a false profile was immune); *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 328 (4th Cir. 1997) (holding AOL to be immune even where it was accused of being unreasonably delayed in removing defamatory messages).

⁹⁸ *See, e.g., Goddard v. Google, Inc.*, C 08-2738JF(PVT), 2008 WL 5245490, at *1 (N.D. Cal. Dec. 17, 2008) (finding the Internet provider to be immune under the CDA against allegations of money laundering and fraud); *Ben Ezra, Weinstein, & Co. v. Am. Online, Inc.*, 206 F.3d 980, 984-85 (10th Cir. 2000), *cert. denied*, 531 U.S. 824 (2000) (holding that AOL was not considered a publisher by editing stock quotations or working with a third-party provider to correct errors, and therefore AOL could not be held liable for defamation when it displayed the stock quotes on its site). *Id.* at 985-86.

⁹⁹ *Doe v. MySpace, Inc.*, 528 F.3d 413 (5th Cir. 2008).

¹⁰⁰ *See, e.g., Chi. Lawyers' Comm. for Civil Rights Under Law, Inc. v. Craigslist, Inc.*, 519 F.3d 666, 672 (7th Cir. 2008) (finding Craigslist immune against allegations involving postings of third parties that contained discriminatory statements). *But see Fair Hous. Council of San Fernando Valley v. Roommates.com, LLC*, 521 F.3d 1157, 1161-63 (9th Cir. 2008) (en banc) (where the court did not find immunity under the CDA when discrimination was charged with respect to profiles created by the user based on a series of questions developed by the Internet service provider).

Roommate requires each subscriber to disclose his sex, sexual orientation and whether he would bring children to a household A website operator can be both a service provider and a content provider But as to content that it creates itself, or is 'responsible, in whole or in part' for creating or developing, the website is also a content provider. Thus, a website may be immune from liability for some of the content it displays to the public but be subject to liability for other content.

publication of user-generated content”¹⁰¹ and concluded that the Plaintiff’s “negligence and gross negligence claims are barred by the CDA, which prohibits claims against Web-based interactive computer services based on their publication of third-party content.”¹⁰² In another case, the Fourth Circuit Court of Appeals found, “[b]y its plain language, § 230 creates a federal immunity to any cause of action that would make service providers liable for information originating with a third-party user of the service.”¹⁰³ The court explained that “Congress recognized the threat that tort-based lawsuits pose to freedom of speech in the new and burgeoning Internet medium . . . Section 230 was enacted, in part, to maintain the robust nature of Internet communication and, accordingly, to keep government interference in the medium to a minimum.”¹⁰⁴

In *Chicago Lawyers’ Committee for Civil Rights Under Law, Inc. v. Craigslist, Inc.*, Craigslist was sued for posting notices of third parties that were alleged to be discriminatory under the Fair Housing Act.¹⁰⁵ Although the Seventh Circuit Court of Appeals did not go as far as the court in *Zeran*, it ultimately found that the CDA provides broad civil immunity for ISPs.¹⁰⁶ Under *Chicago Lawyers’*, the court found § 230(c)(1) and (2) protect ISPs that do or do not filter offensive material.¹⁰⁷ The court reasoned “[a] web host that *does* filter out offensive materials is not liable to the censored customer,” which may induce ISPs to take care “to protect the privacy and sensibilities of third parties.”¹⁰⁸ Further, § 230(c)(1) “also blocks civil liability when web hosts and other Internet Service Providers (ISPs) *refrain* from filtering or censoring the information on their sites.”¹⁰⁹ Ultimately, ISPs will receive immunity whether they choose to filter or not.

The Seventh Circuit refrained from finding total immunity, however, when it found that an ISP is eligible for immunity under § 230(c)(2), “as long as the information came from someone else; but it would become a ‘publisher or speaker’ and lose the benefit of § 230(c)(2) if it created the objectionable information.”¹¹⁰ The court also acknowledged a limitation of the immunity in § 230(c)(1): “remember that [ISPs] may be liable for contributory infringement if their system is designed to help people steal music or other material in copyright.”¹¹¹

Nevertheless, Congress has not shied away from regulating other areas of the Internet, including the process by which copyrighted information is transferred over the Internet. In 1998, Congress passed the Digital Millennium Copyright Act (DMCA). Unlike the CDA, which insulates ISPs from liability, the DMCA not only holds liable the individuals illegally transferring the copyrighted information, but also the companies that facilitate the transfer.¹¹² As discussed in

¹⁰¹ *MySpace*, 528 F.3d at 418. This case involved a mother who sued MySpace for negligence for failing to take adequate safety measures to prevent her thirteen-year-old daughter from creating a personal profile on the social network ISP. *Id.* at 416, 421-22.

¹⁰² *Id.* at 422.

¹⁰³ *Zeran v. Am. Online, Inc.*, 129 F.3d 330 (4th Cir. 1997). *Zeran* sued America Online, Inc. (AOL), “arguing that AOL unreasonably delayed in removing defamatory messages posted by an unidentified third party” and also refused to post retractions or screen for similar defamatory postings afterward. *Id.* at 328.

¹⁰⁴ *Id.* at 330.

¹⁰⁵ *Chi. Lawyers’*, 519 F.3d at 668.

¹⁰⁶ *Id.* at 671.

¹⁰⁷ *Id.* at 670.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *Id.* (quoting *Doe v. GTE Corp.*, 347 F.3d 655, 660 (7th Cir. 2003)).

¹¹¹ *Id.* (citing *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913, 931 (2005)).

¹¹² 17 U.S.C.A. § 512(a), (j) (West 2013). Internet service providers must go through specific steps to qualify for safe harbor from liability with regards to copyrighted material; absent these measures, immunity is not provided. *See, e.g., id.* § 512(a)(1)-(5). An ISP will be liable unless the court finds all of the following: 1) the ISP does not know or have reason to know of infringing activities, or

A&M Records, Inc. v. Napster, Inc., Napster was created as a mechanism for peer-to-peer file sharing of music and other audio files on the Internet.¹¹³ Ultimately, the court found that Napster had the right to “supervise its users' conduct” but failed to police its system to prevent the misuse of copyrighted material. Further, the court found Napster had knowledge of this illegal activity: “if a computer system operator learns of specific infringing material available on his system and fails to purge such material from the system, the operator knows of and contributes to direct infringement.”¹¹⁴

Conversely, under the CDA, even when ISPs such as Backpage have knowledge of illegal activity taking place on their websites, no statutory or common law authority requires them to remove the offending material, or to prevent it from being posted in the first place. Therefore, although Backpage admits to contacting NCMEC if it finds suspect material, it is not required to remove the ad even if informed by law enforcement that the ad involves a trafficked victim.¹¹⁵ Alternatively, the DCMA requires ISPs to remove offending copyrighted information from their site upon receipt of knowledge of its illegality, but thus far Congress has not seen it fit to require the same of ISPs with regard to ads trafficking minors and adults. Under current law, ISPs are not permitted to profit from copyright infringement occurring on their servers, but are permitted to profit from ads that traffic and exploit individuals, even if they know about, tolerate, and facilitate the illegal activity being promoted.

B. CDA Immunity Under Criminal Law

The CDA also contains a provision, § 230 (e)(1), entitled “No effect on criminal law,” stating that “[n]othing in this section shall be construed to impair the enforcement of section 223 or 231 of this title, chapter 71 (relating to obscenity) or 110 (relating to sexual exploitation of children) of Title 18, or any other Federal criminal statute.”¹¹⁶ Nonetheless, the court in *Dart v. Craigslist, Inc.* found Craigslist immune from liability with respect to postings under the CDA.¹¹⁷ The Sheriff of Cook County, Illinois, Tom Dart, alleged that the “erotic” (later “adult”) section of Craigslist Internet classifieds, “facilitates prostitution and constitutes a public nuisance” and also “makes it easier for prostitutes, pimps, and patrons to conduct business.”¹¹⁸ Dart acknowledged the “warning & disclaimer” of the listing encouraging users to flag prohibited content,¹¹⁹

does not remove infringing materials upon receipt of such knowledge; 2) the ISP does not profit from infringement where it has the power to control the infringement; and 3) upon receiving notice (in the statutorily-prescribed manner) from the copyright holder, the ISP removes the infringing material. *Id.* § 512(d).

¹¹³ *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1011 (9th Cir. 2001); see also, *Napster*, WIKIPEDIA, <http://en.wikipedia.org/wiki/Napster> (last visited Sept. 17, 2013) (explaining that Napster was originally founded as a “peer-to-peer file sharing Internet service that emphasized sharing audio files, typically music, encoded in MP3 format”). Plaintiff, a recording company, alleged that Napster was a “contributory and vicarious copyright infringer” by “facilitate[ing] the transmission of MP3 files between and among its users,” which allowed Napster to search, store, and transfer exact copies of other users’ MP3 files, including copyrighted material. *Napster*, 239 F.3d at 1011. The court noted that Napster had the right to “supervise its users’ conduct,” yet it failed to police its system to prevent the exchange of copyrighted material and it financially benefitted from the illegal copyright infringing activity because “the availability of infringing material ‘acts as a ‘draw’ for customers.” *Id.* at 1023.

¹¹⁴ *Napster*, 239 F.3d at 1021.

¹¹⁵ See Ruvolo, *supra* note 75; *Backpage.com, LLC v. McKenna*, 881 F. Supp. 2d 1262, 1267 (W.D. Wash. 2012) (granting Plaintiffs’ Motions for Preliminary Injunction).

¹¹⁶ 47 U.S.C.A. § 230(e)(1) (West 2013) (emphasis added). It should be noted that despite this exception to the CDA, criminal immunity has been challenged under the CDA in several instances, albeit unsuccessfully. See, e.g., *Doe v. Bates*, 5:05-CV-91-DF-CMC, 2006 WL 3813758, at *3, *5-6 (E.D. Tex. Dec. 27, 2006) (finding immunity for Yahoo! despite the arguments made (and evidence presented) by Plaintiff that a violation of federal child pornography laws was present).

¹¹⁷ *Dart v. Craigslist, Inc.*, 665 F. Supp. 2d 961, 962 (N.D. Ill. 2009).

¹¹⁸ *Id.* at 961, 963.

¹¹⁹ *Id.* at 962. The “warning & disclaimer” stated that “users entering that [erotic/adult] section agree to ‘flag prohibited’[sic] content that violates craigslist’s Terms of Use including ‘offers for or the solicitation of prostitution.’” *Id.*

however, despite the Terms of Use, users “routinely post advertisements in the erotic-services category ‘openly promis[ing] sex for money.’”¹²⁰

While the *Dart* court cited *Fair Housing Council of San Fernando Valley v. Roommates.com* for the concept that an ISP can be both a service provider and a publisher or content provider,¹²¹ it then concluded that the users of Craigslist, not the site itself, provide the offensive information.¹²² The court reasoned that “newspapers and magazines may be held liable for publishing ads that harm third parties,”¹²³ and “[i]nformation content providers’ may be liable for contributory infringement if their system is designed to help people steal music or other material in copyright.”¹²⁴ It concluded, however, that Craigslist does not induce anyone to post any particular listing and is thus not liable as a publisher.¹²⁵ Finally, the court stated:

[p]laintiff’s argument that Craigslist causes or induces illegal content is further undercut . . . by the fact that Craigslist repeatedly warns users not to post such content. [If] users routinely flout Craigslist’s guidelines, it is not because Craigslist has caused them to do so It does not cause or induce anyone to create, post, or search for illegal content.¹²⁶

In short, Sheriff Dart gave a detailed description of how the site is used to commit illegal acts and how the adult/erotic services section is designed for that purpose. Nevertheless, the court concluded that the CDA provides immunity to Craigslist under federal criminal law as a publisher or speaker, and that providing a category such as “adult services” “is not unlawful in itself nor does it necessarily call for unlawful content.”¹²⁷

Similarly, the court in *Doe v. Bates* concluded that, while Plaintiffs alleged that Yahoo! violated a criminal statute when it hosted illegal child pornography on an e-group discussion forum named “Candyman,” the CDA provided immunity.¹²⁸ “The purpose of the Candyman E-group was to provide a forum for sharing, posting, emailing, and transmitting hard-core, illegal child pornography.”¹²⁹ The court explained, “[w]hile the facts of a child pornography case such as this one may be highly offensive, Congress has decided that the parties to be punished and deterred are not the Internet service providers but rather are those who created and posted the illegal material.”¹³⁰

Equally concerning is the *Doe v. Bates* court’s treatment of the knowledge allegation in the case. Yahoo! knowingly received and displayed the pornographic photographs of children.¹³¹ Nevertheless, the court ignored the plain language of the CDA and stated, “Section 230 does not .

¹²⁰ *Id.*

¹²¹ *Id.* at 968 (citing *Fair Hous. Council of San Fernando Valley v. Roommates.com, LLC*, 521 F.3d 1157, 1162-63 (9th Cir. 2008)).

¹²² *Id.* at 967. The court further stated, “intermediaries like phone companies, ISPs, and computer manufacturers . . . are not culpable for ‘aiding and abetting’ their customers who misuse their services to commit unlawful acts.” *Id.*

¹²³ *Id.* (citing *Braun v. Soldier of Fortune Magazine, Inc.*, 968 F.2d 1110, 1114 (11th Cir. 1992)).

¹²⁴ *Id.* at 968 (citing *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913, 931 (2005)).

¹²⁵ *Id.* at 969.

¹²⁶ *Id.*

¹²⁷ *Id.* at 968.

¹²⁸ *Doe v. Bates*, 5:05-CV-91-DF-CMC, 2006 WL 3813758, at *5 (E.D. Tex. Dec. 27, 2006).

¹²⁹ *Id.* at *5-6.

¹³⁰ *Id.* at *4.

¹³¹ *Id.* at *6. Yahoo! “knew” about the Candyman e-group because co-Defendant Bates had to obtain Yahoo!’s consent and authorization to moderate the group. *Id.* Further, Plaintiffs argued that Yahoo! “knew or had reason to know about the illegal nature” of the Candyman e-group content due to the fact that it was in an adult entertainment subcategory, the introductory webpage specifically indicated that it was for persons who “love kids,” and any type of message, video or picture, including pornography, could be posted on the site. *Id.*

. . . provide that an intentional violation of criminal law should be an exception to the immunity from civil liability given to internet service providers.”¹³² The court further stated that such a finding would, “effectively abrogate the immunity”¹³³ and in support of this conclusion cited the civil law case *Zeran v. AOL, Inc.*, where the court “applied § 230 immunity even where Plaintiff alleged giving the Internet service provider actual knowledge of the tortious content at issue.”¹³⁴ In other words, despite the clear intent of § 230 to clarify that the immunity provisions have “no effect on criminal law,” courts have still found that the immunity provisions trump federal criminal law.

C. CDA State Law Preemption

In addition to the federal criminal law provision discussed above, the CDA also contains a provision that preempts “inconsistent” state law. Section 230(e)(3) states: “Nothing in this section shall be construed to prevent any State from enforcing any State law that is consistent with this section. No cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section.”¹³⁵ Thus, if a state law is consistent with the language of the CDA, it may stand. If the state law is deemed to be inconsistent with the CDA provisions, however, the state law is preempted by the federal CDA, and not only will liability not be imposed, but any case brought under that state law will not stand.

In three recent state court cases that test CDA preemption, the state law at issue was squarely rejected as being preempted by the CDA. In 2012, the state of Washington attempted to enact the criminal offense of “advertising commercial sexual abuse of a minor.”¹³⁶ The proposed law, S.B. 6251 stated, in part:

A person commits the offense of advertising commercial sexual abuse of a minor if he or she knowingly publishes, disseminates, or displays, or causes directly or indirectly, to be published, disseminated, or displayed, any advertisement for a commercial sex act, which is to take place in the state of Washington and that includes the depiction of a minor.¹³⁷

This law would have held Backpage and other ISPs liable if they were found to have knowingly published on their site an ad for a commercial sex act that depicts a child. Backpage and Internet Archive,¹³⁸ another ISP, sought and obtained both a temporary restraining order and a preliminary injunction against Washington from implementing this new law, in part due to the state law preemption section of the CDA.¹³⁹ In a case regarding a preliminary injunction against enforcement of Washington’s law, Plaintiff’s argued that S.B. 6251, “conflicts with and is therefore preempted by the [CDA] of 1996” under § 230(e)(3).¹⁴⁰ The Washington law was found to be “inconsistent with Section 230 because it criminalizes the ‘knowing’ publication,

¹³² *Id.* at *4.

¹³³ *Id.*

¹³⁴ *Id.* (citing *Zeran v. Am. Online, Inc.*, 129 F. 3d 327, 330 (4th Cir. 1997)).

¹³⁵ 47 U.S.C.A. § 230(e)(3) (West 2013).

¹³⁶ S.B. 6251, 62d Leg., Reg. Sess. § 2 (Wa. 2012).

¹³⁷ *Id.*

¹³⁸ Internet Archive was a Plaintiff-Intervenor that filed a Motion Joining in the Motion for a Preliminary Injunction. See *Backpage.com, LLC v. McKenna*, 881 F. Supp. 2d 1262, 1265, 1269 (W.D. Wash. 2012) (granting Plaintiffs’ Motions for Preliminary Injunction).

¹³⁹ *Id.* at 1269.

¹⁴⁰ *Id.* at 1271.

dissemination, or display of specified content. In doing so, it creates an incentive for online service providers *not* to monitor the content that passes through its channels.”¹⁴¹

The court found it likely that S.B. 6251 ran afoul of § (c)(1) and (c)(2)(A), and that the CDA provided complete immunity for Backpage.com and Internet Archive. Citing *Fair Housing Council of San Fernando Valley v. Roommates.com*, the court concluded:

[t]hus, under Section 230 ‘any activity that can be boiled down to deciding whether to exclude material that third parties seek to post online is perforce immune . . . The message to website operators is clear: if you don’t encourage illegal content, or design your website to require users to input illegal content, you will be immune.’¹⁴²

Unfortunately, even if the ISP *does* design the website to encourage illegal activity, the court clarified that the CDA provides immunity. Again citing *Roommates.com*, the court stated:

there will always be close cases where a clever lawyer could argue that *something* the website operator did encouraged the illegality Such close cases . . . must be resolved in favor of immunity, lest we cut the heart out of section 230 by forcing websites to face death by ten thousand duck-bites, fighting off claims that they promoted or encouraged—or at least tacitly assented to—the illegality of third parties.¹⁴³

The Washington court appeared to be impressed with the steps Backpage took to curb illegal use of its site for child sex trafficking, which included a “Terms of Use” policy that prohibited illegal activity, such as posting “obscene lewd and lascivious” graphics or photos, or posting ads for illegal services, such as the exchange of sexual favors for money.¹⁴⁴ Further, the site clarified that adult content and explicit material may only be posted by an adult; prior to entering the adult section, the user must click a disclaimer that states that the user is eighteen or older and, “will report any suspected exploitation of minors and/or human trafficking to the appropriate authorities.”¹⁴⁵ Finally, Backpage claimed that it manually reviewed “nearly all content” submitted for posting to the adult and dating categories.¹⁴⁶

The court in *Backpage.com v. McKenna* also reported that in April 2012, over 3.3 million ads were posted on Backpage, but the site blocked, banned, or removed more than one million, and referred about four hundred to the NCMEC.¹⁴⁷ As the court noted, Backpage does not review all of the content. Unfortunately, its voluntary efforts are not working sufficiently to prevent its site from facilitating child sexual exploitation and human trafficking.¹⁴⁸ as noted by the court, at least twenty-two children from the Seattle area alone were recovered after having been advertised online and trafficked.¹⁴⁹

¹⁴¹ *Id.* at 1273.

¹⁴² *Id.* at 1272 (citing *Fair Hous. Council of San Fernando Valley v. Roommates.com, LLC*, 521 F.3d 1157, 1170-71, 1175 (9th Cir. 2008)).

¹⁴³ *Id.* (citing *Roommates.com, LLC*, 521 F.3d at 1174).

¹⁴⁴ *Id.* at 1266.

¹⁴⁵ *Id.*

¹⁴⁶ *Id.* at 1266-67.

¹⁴⁷ *Id.* at 1267.

¹⁴⁸ *Id.* at 1266-67.

¹⁴⁹ *Id.* These instances do not reflect ads on Backpage.com specifically, but online ads in general.

Similarly, a Tennessee district court struck down a Tennessee statute, S.B. 2371/H.B. 2493 (“S.B. 2371”), which sought to amend the state criminal code to include an offense for human sex trafficking.¹⁵⁰ The Tennessee court found that “section 39-13-315 is likely expressly preempted by CDA [S]ection 230(e)(3) which unequivocally states that ‘no liability may be imposed under any State or local law that is inconsistent with this section.’”¹⁵¹

More recently, on August 20, 2013, a New Jersey district court issued a preliminary injunction¹⁵² prohibiting a similar New Jersey law, the “Human Trafficking Prevention, Protection and Treatment Act,”¹⁵³ from taking effect as scheduled on July 1, 2013, while a challenge brought by Internet Archive and Backpage remained pending.¹⁵⁴ The New Jersey legislature sought to, “limit the marketing of childhood prostitution,”¹⁵⁵ and enacted a law prohibiting advertising commercial sexual abuse of a minor. A person is guilty under the law if, “the person knowingly publishes, disseminates, or displays, or causes directly or indirectly, to be published, disseminated, or displayed, any ad for a commercial sex act, which is to take place in this State and which includes the depiction of a minor.”¹⁵⁶

D. Constitutional Issues Raised in Opposition to State Criminal Law Statutes

In addition to raising state law and CDA preemption provisions in striking down the Washington law, the *Backpage.com v. McKenna* court also found likely constitutional objections to the law. The court ruled that Plaintiffs were likely to succeed on their claim that the Washington law was unconstitutionally vague and overbroad, in violation of the First Amendment, and ran afoul of the Commerce Clause.¹⁵⁷ The court found the statutory language was unconstitutionally vague because it failed to provide fair notice of what constitutes illegal speech.¹⁵⁸ In particular, the court found it problematic that the Washington legislature failed to define the terms: know, indirect, direct, implicit, and offer, and these omissions would likely lead to unconstitutional vagueness.¹⁵⁹

Further, the court found it likely that S.B. 6251 would be overbroad because it restricted the publication, display, and dissemination of both protected and unprotected speech.¹⁶⁰ The court stated that “the statute criminalizes more than offers to engage in illegal transactions because the statute covered transactions that are not illegal” under the Washington statute, such as consensual, non-commercial sexual activity.¹⁶¹

Finally, the court held that Plaintiffs were likely to succeed under their claim that Washington S.B. 6251 was unconstitutional under the Commerce Clause because it allegedly regulated and imposed a heavy burden on commercial conduct that occurs wholly outside the

¹⁵⁰ *Backpage.com, LLC v. Cooper*, No. 3:12-CV-00654, 2013 WL 1558785, at *1, *5 (M.D. Tenn. Jan. 3, 2013) (granting temporary restraining order and preliminary injunction).

¹⁵¹ *Id.* at *12.

¹⁵² *Backpage.com v. Hoffman*, 13-CV-03952 DMC JAD, 2013 WL 4502097 (D.N.J. Aug. 20, 2013).

¹⁵³ Human Trafficking Prevention, Protection, and Treatment Act, P.L. 2013, c.51 § 12.

¹⁵⁴ *Hoffman*, 2013 WL 4502097, at *5.

¹⁵⁵ Katie Zezima, *Web Groups Sue to Block NJ Law on Underage Sex Ads*, SAN JOSE ASSOCIATED PRESS (Jul. 7, 2013), http://www.mercurynews.com/breaking-news/ci_23614612/web-groups-sue-block-nj-law-underage-sex%20posted%2007/07/2013.

¹⁵⁶ Human Trafficking Prevention, Protection, and Treatment Act § 12.

¹⁵⁷ *Backpage.com, LLC v. McKenna*, 881 F. Supp. 2d 1262, 1275, 1286 (W.D. Wash. 2012).

¹⁵⁸ *Id.* at 1279.

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ *Id.* at 1280-81.

state of Washington, such as a person in another state posting an ad offering commercial sex.¹⁶² The criminal act is the posting of the ad, which, because of the lack of geographic boundaries on the Internet, could occur in any state and wholly outside of Washington.¹⁶³ According to the court, “the Internet is likely a unique aspect of commerce that demands national treatment.”¹⁶⁴ Indeed, regulations of ISPs must be carefully crafted so that they impact only the specific boundary intended so as not to run afoul of constitutional protections.

Unfortunately, other states have similarly been enjoined from enforcing such statutes as a violation of the First Amendment and Commerce Clause.¹⁶⁵ This fate is a telling sign for future constitutional claims against similar laws. Because of these unsuccessful state court claims, other solutions must be examined to protect children from being trafficked on the Internet.

VI. SOLUTIONS TO ADDRESS THE SHORTCOMINGS OF THE CDA

As the foregoing discussion demonstrates, the CDA provides nearly complete immunity to ISPs like Backpage that host adult services sections known to be used to traffic children. Moreover, many adult service ISPs utilize only minimal procedures for monitoring user age, and the current “voluntary efforts” employed by some ISPs are simply not working.

Further, the majority of ads on adult services sections are likely to be seeking illegal activity, even if that activity does not rise to the level of human trafficking. A July 2012 article in The Huffington Post stated that Backpage made up, “80 percent of all online prostitution ad revenue.”¹⁶⁶ Moreover, a recent study corroborates that nearly eighty percent of the adult services ads on Backpage involve prostitution.¹⁶⁷ In that study, which examined 2,000 ads, researchers reported eighty-eight girls they believed to be underage to Phoenix police, but police were able to recover only three victims.¹⁶⁸ One recovered victim was again featured on the site after having been reported.¹⁶⁹ Law enforcement has found that the vast majority of ads in the adult services section are for prostitution.¹⁷⁰ Detective Todd Novisedlak stated in a sworn declaration that he has been involved in more than 1,200 prostitution investigations, but “has never encountered any person, posting ads on the escorts section of Backpage.com who was advertising for legitimate escort services.”¹⁷¹

¹⁶² *Id.* at 1285. The Commerce Clause provides that Congress shall have the power to regulate commerce among the several states. See U.S. CONST. art. I, § 8, cl. 3. This affirmative grant of authority to Congress also encompasses an implicit or “dormant” limit on the authority of the states to enact legislation that affects interstate commerce. 15A AM. JUR. 2D *Commerce* § 102 (2013).

¹⁶³ *McKenna*, 881 F. Supp. 2d at 1285.

¹⁶⁴ *Id.* at 1286.

¹⁶⁵ See *Backpage.com, LLC v. Cooper*, 3:12-CV-00654, 2013 WL 1558785, at *5-7 (M.D. Tenn. Jan. 3, 2013) (finding that Backpage would likely prevail on its claims that section 39-13-314 of the Tennessee Code violated the First Amendment and the Commerce Clause and enjoined the state from enforcing the statute); see also *Backpage.com v. Hoffman*, 13-CV-03952 DMC JAD, 2013 WL 4502097, at *12 (D.N.J. Aug. 20, 2013) (similarly enjoining the state of New Jersey from enforcing a Human Trafficking Prevention, Protection and Treatment Act).

¹⁶⁶ Malika Saada Saar, *The Internet, Backpage, Child Trafficking, Congress—And Our Responsibility to Vulnerable Children*, HUFFINGTON POST (Jul. 10, 2012), http://www.huffingtonpost.com/malika-saada-saar/the-internet-Backpage-chi_b_1660413.html.

¹⁶⁷ JJ Hensley, *ASU Study: Most Ads on Backpage’s Adult Section for Prostitution*, REPUBLIC (Aug. 25, 2012), <http://www.azcentral.com/news/articles/20120824backpage-ads-prostitution-asu.html>.

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

¹⁷⁰ Sara Jean Green, *New State Law Targeting Sex-Related Ads on Websites Faces Court Test*, SEATTLE TIMES (Jul. 19, 2012), http://seattletimes.com/html/localnews/2018728919_backpage20m.html.

¹⁷¹ *Id.*

As noted above, although Backpage staff members monitor the site, the staff does not review all content submitted for posting.¹⁷² Further, while the site requires persons accessing and posting in the adult services section to indicate that they are eighteen years of age or older, Backpage has no way to check those representations.¹⁷³ Backpage representatives admit that persons posting ads can lie¹⁷⁴ in their submission, which is why Backpage has its employees attempt to identify whether the person appearing or depicted in an ad is underage.¹⁷⁵ Nevertheless, these scanning and checking procedures fall short,¹⁷⁶ and experts agree that Backpage does a “very poor job of” policing its site.¹⁷⁷

Backpage mistakenly approves so many suspicious ads that every month it reports some four hundred ads to NCMEC.¹⁷⁸ NCMEC refers these reports directly to law enforcement for potential investigation, however, in many instances, the reported ads are not removed from Backpage.¹⁷⁹ Oftentimes, in cases when law enforcement identifies an ad as a situation of child sex trafficking, it directs Backpage to remove the ad.¹⁸⁰ Even when Backpage removes the ad, however, its measures have fallen short of protecting the children involved, as ads may be removed temporarily, only to reappear later.¹⁸¹

Additionally, adult service ads can be paid for using pre-paid credit and gift cards, which facilitates anonymous posting and makes locating suspected traffickers more difficult.¹⁸² John Ryan, CEO of NCMEC recommended, “prohibiting payment sources that mask the customer’s identity—such as gift cards, prepaid credit cards and using another’s credit card.”¹⁸³ More secure and accountable payment options, including requiring identity verification and more stringent

¹⁷² See Hensley, *supra* note 167.

¹⁷³ Anderson Cooper 360 Degrees, *supra* note 48. Excerpt—Anderson Cooper/Liz McDougall Interview:

COOPER: “You say you don’t allow underage people. You have no way of verifying whether or not somebody is underaged. You just have to check off whether—the person just says, “Oh yes, I’m over 18.””

MCDOUGALL: “We do far more than check off whether they’re over 18. We have automated filters for terms, and then we have a [sic] two tiers of manual review that...”

COOPER: “They can lie in the ad about it, though.”

MCDOUGALL: “They can lie on the ad. We have people examining the images to try to identify if someone is underaged and to look for other indicia.”

Id.

¹⁷⁴ *Id.*

¹⁷⁵ *Id.* Liz McDougall, attorney for Backpage, states that Backpage, “scans for 25,000 terms and code words linked to prostitution, sex trafficking, and child exploitation.” *Id.* Some one hundred Backpage employees then check each ad individually before it is posted. Deborah Feyerick & Sheila Steffen, *A Lurid Journey Through Backpage.com*, CNN FREEDOM PROJECT: ENDING MODERN-DAY SLAVERY (May 10, 2012), <http://thecnnfreedomproject.blogs.cnn.com/2012/05/10/a-lurid-journey-through-Backpage-com/>.

¹⁷⁶ When presented with an ad that included the phrase “Make me beg, smack me, spit on me, degrade me, choke me—,” Ms. McDougall admitted that allowing this postings was a mistake, in that it violated the Backpage Terms of Use, and that such an ad “should never be permitted.” Anderson Cooper 360 Degrees, *U.S. Attorneys General Want to Shut down Backpage.com*, (CNN television broadcast May 4, 2012), transcript available at <http://transcripts.cnn.com/TRANSCRIPTS/1205/04/acd.01.html>.

¹⁷⁷ Anderson Cooper 360 Degrees, *Sex, Lies and Backpage.com; Backpage Under Pressure to Shut down*, (CNN television broadcast May 16, 2012), transcript available at <http://transcripts.cnn.com/TRANSCRIPTS/1205/16/acd.01.html>. David Finkelhor, Director of the Crimes Against Children Research Center at the University of New Hampshire, and others recognize that Backpage does “a very poor job of” policing its site, despite its claims of establishing procedures to protect children and prevent illegal activity. *Id.*

¹⁷⁸ Feyerick & Steffen, *supra* note 175.

¹⁷⁹ *Id.*

¹⁸⁰ For example, Seattle Detective Todd Novisedlak contacted Backpage.com to remove an ad, which he identified as depicting a fifteen-year-old girl being used in commercial sex. Green, *supra* note 170.

Although Backpage removed that particular ad, over the following two weeks, “10 more ads were posted [on Backpage] for the same girl, using the same photos and phone number used in the original ad.” *Id.*

¹⁸¹ See *supra* note 180.

¹⁸² See Letter from John D. Ryan, *supra* note 41.

¹⁸³ See *id.*

account setup for ad posters, would help hinder illegal activity and trafficking.¹⁸⁴ Such options are currently used in online banking and brokerage, and in account setups for many websites. For example, a person posting an ad could be required to provide his or her name, date of birth, social security number, and physical address (similar to the Customer Identification Program rule applicable to banks and other financial institutions),¹⁸⁵ which could then be easily and quickly verified through a credit check. Another option would be to require a poster to provide a domestic checking account and routing number, linking that poster to a specific bank.

A. Proposal 1: Federal Law Regulation of ISPs to Protect Children: Internet Protection Against Child Trafficking Act ("IPACT")

1. Civil Regulatory Enforcement

In light of the evidence above, it is clear that children are being trafficked for sex on ISP adult services sections. Thus, it is critical that legislative action be taken to require all hosts of adult services sections to take preventive action against the posting of abusive ads. Such a bill could be drafted as an amendment to the CDA itself, the Children's Online Privacy Protection Act (COPPA),¹⁸⁶ the Trafficking Victims Protection Act (TVPA),¹⁸⁷ or as a state law amendment that could be called the Internet Protection Against Child Trafficking Act (IPACT).

Currently, any person seeking to post an ad or access the adult services section of Backpage merely clicks a box purporting that he or she is eighteen years of age or older.¹⁸⁸ Instead, the ISP should be required to utilize a gateway database program to verify the identity and age of the person seeking to post the ad, any individuals depicted pictorially or in writing on the ad itself, and any users who wish to access the ads in the adult services section.¹⁸⁹ Enacting a statute that does not limit the language or speech of the ad itself, but instead imposes regulatory requirements of ISPs that will protect children, accomplishes the compelling state interest of protecting children without running afoul of the Constitution.

E-Verify, a program operated by the United States Department of Homeland Security to enable employers to confirm employment eligibility, is an example of a regulatory system that provides a gateway database mechanism that could be used to prevent human trafficking.¹⁹⁰ It is currently utilized by hundreds of thousands of employers across the United States to verify the

¹⁸⁴ *Id.*

¹⁸⁵ See Patriot Act, Pub. L. No. 107-56, § 326, 115 Stat. 272 (2001) (Verification of Identification) (explaining certain financial institutions are required to implement procedures to verify the identity of potential account holders "to the extent reasonable and practicable" and to maintain records of information used to verify the identity, such as "name, address, and other identifying information").

¹⁸⁶ 15 U.S.C.A. §§ 6501-6506 (West 2013).

¹⁸⁷ 22 U.S.C.A. §§ 7101-7113 (West 2013).

¹⁸⁸ See *Disclaimer*, BACKPAGE, <http://indianapolis.backpage.com/adult/classifieds/Disclaimer?section=446263> (last visited Oct. 10, 2013).

¹⁸⁹ NCMEC made a similar recommendation of practices for ISPs such as Backpage to reduce sexual exploitation of children on their site. One example of the proposed practice included:

Verifying and knowing your customer. Verifying the identity and age of the person submitting the ad as well as the person depicted in any images in the ad. There are ways to verify this information either in person or online when the ad is purchased. Other classified ad sites have implemented verification processes including database checks and review of government issued identification.

Letter from John D. Ryan, *supra* note 41.

¹⁹⁰ *What Is E-Verify?*, DEPARTMENT HOMELAND SECURITY, U.S. CITIZENSHIP & IMMIGR. SERVICES., <http://www.uscis.gov/portal/site/uscis/> (follow "E-Verify" hyperlink; then follow "What is E-Verify?" hyperlink) (last updated Nov. 1, 2012); Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009 (1996) ("Limited use of system. Any personal information utilized by the system may *not* be made available to Government agencies, employers, and other persons except to the extent necessary to verify that an individual is not an unauthorized alien.") (emphasis added).

age and identity of millions of new employees.¹⁹¹ It is accurate, secure, and takes only seconds to display results.¹⁹²

E-Verify is an Internet-based program that currently allows employers to verify employee eligibility to work in the U.S. by comparing information from their Form I-9, Employment Eligibility Verification to records from the U.S. Department of Homeland Security (DHS) and Social Security Administration (SSA).¹⁹³ Form I-9 requires employees to provide identification information,¹⁹⁴ and documents that prove their eligibility to work in the United States.¹⁹⁵ Additionally, the E-Verify program includes some additional requirements of employees and employers that would be important for protecting children from being trafficked on the Internet. For example, E-Verify requires that employees also provide their Social Security number¹⁹⁶ and photo identification.¹⁹⁷

E-Verify's photo matching component is automatically implemented when an employee presents certain supporting documents with his or her Form I-9, such as an I-551 (Permanent Resident Card), a Form I-766 (Employment Authorization Document), or a U.S. Passport or Passport Card.¹⁹⁸ Further, the photograph presented for age verification can be compared to the photograph proposed for posting to ensure that it is the same individual. If this information does not match, E-Verify issues a "Tentative Nonconfirmation (TNC)" result.¹⁹⁹ If a TNC result is issued, a written notice is provided regarding the cause of the mismatch²⁰⁰ and the person has an option to contest the mismatch.²⁰¹

Photo matching is particularly important for preventing human trafficking because if the person proposed to be sold in the escort ad is not verified as being at least eighteen years old, he or she can be rejected for posting in the first place rather than months or years later when he or

¹⁹¹ *History and Milestones*, DEPARTMENT HOMELAND SECURITY, U.S. CITIZENSHIP & IMMIGR. SERVICES., <http://www.uscis.gov/portal/site/uscis/> (follow "E-Verify" hyperlink; then follow "About the Program" hyperlink; then follow "History and Milestones" hyperlink) (last updated Oct. 1, 2013).

¹⁹² *Business Friendly Features*, DEPARTMENT HOMELAND SECURITY, U.S. CITIZENSHIP & IMMIGR. SERVICES., <http://www.uscis.gov/portal/site/uscis/> (follow "E-Verify" hyperlink; then follow "What is E-Verify?" hyperlink; then follow "Business-Friendly Features" hyperlink) (last updated Oct. 11, 2012).

¹⁹³ *What Is E-Verify?*, *supra* note 190.

¹⁹⁴ *See Instructions for Employment Eligibility Verification, Form I-9*, DEPARTMENT HOMELAND SECURITY, U.S. CITIZENSHIP & IMMIGR. SERVICES., available at <http://www.uscis.gov/files/form/i-9.pdf> (last updated Mar. 8, 2013) (explaining Form I-9 requires employees to provide their name, date of birth, physical address, and legal status in the United States).

¹⁹⁵ Approved documents are broken down into two categories: 1) single documents that prove identity *and* eligibility to work (List A: Documents that Establish Both Identity and Employment Authorization), and 2) combinations of documents that prove *either* identity *or* eligibility to work (List B: Documents that Establish Identity and List C: Documents that Establish Employment Authorization). *See id.* The lists of approved documents can be found on the Form I-9. *See id.*

¹⁹⁶ *Companion to Form I-9*, DEPARTMENT HOMELAND SECURITY, U.S. CITIZENSHIP & IMMIGR. SERVICES., <http://www.uscis.gov/portal/site/uscis/> (follow "E-Verify" hyperlink; then follow "What is E-Verify?" hyperlink; then follow "Companion to Form I-9" hyperlink) (last updated Sept. 8, 2013).

¹⁹⁷ *Id.* E-Verify provides instant verification of the submitted information against 455 million SSA records and 80 million DHS records. *Instant Verification of Work Authorization*, DEPARTMENT HOMELAND SECURITY, U.S. CITIZENSHIP & IMMIGR. SERVICES., <http://www.uscis.gov/portal/site/uscis/> (follow "E-Verify" hyperlink; then follow "What is E-Verify?" hyperlink; then follow "Instant Verification of Work Authorization" hyperlink) (last updated Dec. 8, 2010).

¹⁹⁸ *Photo Matching*, DEPARTMENT HOMELAND SECURITY, U.S. CITIZENSHIP & IMMIGR. SERVICES., <http://www.uscis.gov/portal/site/uscis/> (follow "E-Verify" hyperlink; then follow "For Employees" hyperlink; then follow "Photo Matching" hyperlink) (last updated Dec. 4, 2010).

¹⁹⁹ *Tentative Nonconfirmations*, DEPARTMENT HOMELAND SECURITY, U.S. CITIZENSHIP & IMMIGR. SERVICES., <http://www.uscis.gov/portal/site/uscis/> (follow "E-Verify" hyperlink; then follow "For Employees" hyperlink; then follow "Tentative Nonconfirmations" hyperlink) (last updated Sept. 4, 2010).

²⁰⁰ *Id.*

²⁰¹ *Id.*

she is reported to NCMEC or identified by law enforcement as a trafficked victim.²⁰² Congress could amend the law creating E-Verify to permit usage to help prevent human trafficking and such an amendment would have an enormous positive impact on the prevention of human trafficking of children. Congress could permit E-Verify to be used to check the age and identity of those who post adult services ads, the age and identity of persons appearing or depicted in the ad, and the age and identity of customers seeking access to the ads. This purpose is wholly consistent with current policies of Homeland Security, which has an extensive anti-human trafficking initiative.²⁰³

E-Verify is merely one option for age verification on adult services websites. A similar database could be developed specifically for this purpose, which could be funded by fees collected from each user and poster. Payment of fees, along with age verification through a picture identification document, could be designed as a prerequisite to access to the website. Under this proposal, sites would be required to screen four types of ads posted on the Internet: 1) in an adult services or other designated section of an Internet site that is identified to be used by adults only; 2) to purchase or sell the services of an escort, stripper, lap dancer; 3) to purchase or sell commercial sex, as defined in 22 U.S.C.A. § 7102; or 4) to purchase or sell a sexual act or sexual contact as defined in 18 U.S.C.A. § 2246.²⁰⁴

Under this proposal, if a suspicious ad is found through screening methods or reported to the ISP by a third party, all postings of that ad must be removed and the ad would not be permitted to be uploaded again until a screening process has cleared the poster and the person depicted as being at least eighteen years old or as not advertising for illegal activity. These new measures will improve the current efforts by Backpage and other ISPs because they will be regularly implemented. Consequently, ISPs will be more effective at preventing trafficking from occurring in the first place because the measures they take through such a gateway database model will prevent ads depicting children from being posted.²⁰⁵

Further, this legislative proposal will ensure that ISPs that host adult services content are held accountable for failure to properly use E-Verify or a similar screening system. If it is determined²⁰⁶ that the ISP failed to screen the ads to determine the age and identity of the parties listed, or if the ISP posted an ad after the screening mechanism identified an issue, or failed to

²⁰² In addition, it would further prevent efforts if a “flag” or other indication is automatically recorded when an attempt to post has been rejected due to failure to verify the age of the attempted poster or person to be posted.

²⁰³ The Blue Campaign unites the work of the U.S. Department of Homeland Security (DHS) components to combat human trafficking through a variety of efforts, such as enhanced public awareness, training, victim assistance, and law enforcement investigations. *End Human Trafficking, Blue Campaign*, U.S. DEPARTMENT HOMELAND SECURITY, <http://www.dhs.gov/blue-campaign> (last visited Oct. 29, 2013).

²⁰⁴ For ISPs that have an adult services section of their site, each ad would be subject to the age verification database search. For ISPs that do not have a section of their website designated for adults only, the ISP would be expected to conduct periodic word searches to identify escort or other ads that are legally required to be utilized only by adults, similar to the searches Backpage currently conducts. See Feyerick & Steffen, *supra* note 175 (explaining that Backpage states that it currently “scans for 25,000 terms and code words linked to prostitution, sex trafficking and child exploitation”). These ads could be identified by the use of a word search, using terms common to the sex industry, such as “escort” or “stripper.”

²⁰⁵ Similarly, under this proposal, newspapers that have adult services advertising sections could be required to utilize the age verification database before printing such ads. If newspapers do not have an adult section, then they would be expected to conduct periodic word searches to identify escort ads or others that can only legally be utilized by adults. These newspapers would not be liable unless a third party identifies and reports to the newspaper a possible adult services ad, and the newspaper either fails to subject that ad to E-Verify or a similar process, or fails to remove the ad if the poster fails to comply with the process or a miss-match is identified.

²⁰⁶ If E-Verify were the gateway database mechanism utilized, then it would likely be the United States Department of Homeland Security (DHS) that would be identified as the department with authority to enforce the IPACT amendment, since DHS currently administers E-Verify.

remove an ad when a third party flagged a violation, then the ISP will be fined \$10,000 for the first violation, with the penalty increasing to \$25,000 for each subsequent violation. If the ISP fails to exercise E-Verify or an alternative mechanism and a human trafficking victim is identified as the subject of an unverified ad, the ISP will also face a charge of criminal negligence.

2. Criminal Negligence

In addition to fines for failing to comply with the regulatory obligations outlined above, an IPACT amendment could also include a provision that holds the ISP liable for criminal negligence in the event that the ISP failed to comply with the regulatory verification requirements, and an ad was then posted and was later determined to contain a trafficked victim.

The U.S. Supreme Court has upheld regulatory offenses that bear a charge of criminal negligence. In *Staples v. United States*, the Court stated that these regulatory offenses “involve statutes that regulate potentially harmful or injurious items”²⁰⁷ that “involved statutes that provided for only light penalties such as fines or short jail sentences, not imprisonment in the state penitentiary.”²⁰⁸ As applied to the online trafficking context, the criminal penalty for this proposal is linked to the ISP’s failure to follow a regulatory procedure, rather than a finding that the ISP had specific knowledge a child has been posted on its site for the purpose of trafficking. Under a criminal negligence standard, the government need only prove that a reasonable person would have been aware of the risk of harm.²⁰⁹ A number of federal statutes already operate under a criminal negligence standard.²¹⁰ Similar to these federal statutes, under IPACT, an ISP’s failure to follow the required E-Verify or alternative procedure, if it results in a child trafficking incident or other illegal activity such as prostitution, would allow the government to pursue a charge of criminal negligence.

IPACT’s identification policies, however, would be narrowly tailored to serve the government’s interest in ensuring that children are not using or being used on these websites.²¹¹ Also, while the information submitted is personal and important, under this proposal it would be submitted to a secure website (for example, E-Verify is maintained by the Department of Homeland Security).²¹² In addition, it is information that is routinely required for the purpose of employment, so that nearly every person involved will have undergone the same procedure at some point in order to obtain employment. The information submitted under IPACT will only be seen by trained or authorized ISP employees, who cannot reveal such information to others under penalty of law.²¹³

²⁰⁷ CONG. RESEARCH SERV., MEMORANDUM - CRIMINAL NEGLIGENCE AND LIABILITY OF ONLINE SERVICE PROVIDERS FOR ACTS OF THIRD PARTIES 3 (Nov. 14, 2012) (citing *Staples v. United States*, 511 U.S. 600, 607 (1994)).

²⁰⁸ *Id.* (citing *Staples v. United States*, 511 U.S. 600, 616 (1994)).

²⁰⁹ *Id.*; see e.g., *United States v. Dotterweich*, 320 U.S. 277 (1943) (upholding a charge of criminal negligence under the Food and Drug Act with no requirement of proof of knowledge of misbranded drugs); *United States v. Balint*, 258 U.S. 250 (1922) (upholding a criminal negligence charge under the Federal Narcotic Act with no requirement of proof of knowledge of illegal substance).

²¹⁰ “Officer Permitting Escape,” and “Gathering, transmitting, or losing defense information.” See 33 U.S.C.A. § 1319(c) (West 2013) (providing violations for any person who negligently violates the Clean Water Act); 18 U.S.C.A. § 793(f) (West 2013) (providing criminal liability for gross negligence in the gathering, transmitting, or losing of defense information).

²¹¹ See *infra* text accompanying notes 234-239 for discussion of narrow tailoring.

²¹² *What Is E-Verify?*, *supra* note 190.

²¹³ See *Our Commitment to Privacy*, DEPARTMENT HOMELAND SECURITY, U.S. CITIZENSHIP & IMMIGR. SERVICES., <http://www.uscis.gov/portal/site/uscis/> (follow “E-Verify” hyperlink; then follow “About the Program” hyperlink; then follow “Our Commitment to Privacy” hyperlink) (last updated Aug. 9, 2010). Those who utilize E-Verify are held responsible for the information to which they have access, and mishandling of such information can result in personal fines. *Id.* In addition, current employer users of E-Verify “are required to abide by all security and privacy requirements as agreed to when they enroll in E-Verify.” *Id.* Employer users can lose access to E-Verify if they misuse the system or attempt to avoid security measures. *Id.* The E-Verify Memorandum of Understanding, which must be signed by participating employers, includes the following statements to safeguard employee information:

It is safe to assume that persons who post and use adult services sections sites typically prefer anonymity.²¹⁴ Therefore, not all users of adult services ads would be pleased with having to provide their personal information prior to usage of the site. While individual privacy is a critical concern, the Supreme Court has upheld legislation that regulates constitutionally protected rights when there is a compelling state interest in protecting the public. For example, the Court has upheld regulations that require identity information of the buyer—including a criminal background check when purchasing a weapon,²¹⁵ even though the right to keep and bear arms is protected by the Second Amendment.²¹⁶ While the buyer may not prefer to subject him or herself to the invasion of privacy required to purchase a gun, regulations requiring a certain degree of

SSA agrees to safeguard the information provided by the Employer through the E-Verify program procedures, and to limit access to such information, as is appropriate by law, to individuals responsible for the verification of Social Security Numbers and for evaluation of the E-Verify program or such other persons or entities who may be authorized by SSA as governed by the Privacy Act (5 U.S.C. § 552a), the Social Security Act (42 U.S.C. 1306(a)), and SSA regulations (20 C.F.R. Part 401).

The E-Verify Program for Employment Verification Memorandum of Understanding, U.S. DEPARTMENT HOMELAND SECURITY 1 (Sept. 9, 2009), available at [http://www.uscis.gov/USCIS/E-Verify/Custom%20Support/Employer%20MOU%20\(September%202009\).pdf](http://www.uscis.gov/USCIS/E-Verify/Custom%20Support/Employer%20MOU%20(September%202009).pdf).

DHS agrees to safeguard the information provided to DHS by the Employer, and to limit access to such information to individuals responsible for the verification of employees' employment eligibility and for evaluation of the E-Verify program, or to such other persons or entities as may be authorized by applicable law. Information will be used only to verify the accuracy of Social Security Numbers and employment eligibility, to enforce the Immigration and Nationality Act (INA) and Federal criminal laws, and to administer Federal contracting requirements.

Id. at 2.

The Employer agrees that it will use the information it receives from SSA or DHS pursuant to E-Verify and this MOU only to confirm the employment eligibility of employees as authorized by this MOU. The Employer agrees that it will safeguard this information, and means of access to it (such as PINS and passwords) to ensure that it is not used for any other purpose and as necessary to protect its confidentiality, including ensuring that it is not disseminated to any person other than employees of the Employer who are authorized to perform the Employer's responsibilities under this MOU, except for such dissemination as may be authorized in advance by SSA or DHS for legitimate purposes.

Id. at 6.

The Employer acknowledges that the information which it receives from SSA is governed by the Privacy Act (5 U.S.C. § 552a(i)(1) and (3)) and the Social Security Act (42 U.S.C. 1306(a)), and that any person who obtains this information under false pretenses or uses it for any purpose other than as provided for in this MOU may be subject to criminal penalties.

Id.

²¹⁴ See e.g., *Help- How Can I Post Anonymously and Still Receive Email Replies?*, BACKPAGE, <http://www.backpage.com/gyrobase/help#How%20can%20I%20post%20anonymously%20and%20still%20receive%20email%20replies> (last visited Oct. 29, 2013) (instructing users on how to remain active on the website yet anonymous).

²¹⁵ See Brady Handgun Violence Prevention Act requirements in 18 U.S.C.A. § 922(5)(2) (West 2013) where interim provisions were held unconstitutional by *Printz v. United States*.

Under the interim provisions, a firearms dealer who proposes to transfer a handgun must first: (1) receive from the transferee a statement (the Brady Form), §922(s)(1)(A)(i)(I), containing the name, address and date of birth of the proposed transferee along with a sworn statement that the transferee is not among any of the classes of prohibited purchasers, §922(s)(3); (2) verify the identity of the transferee by examining an identification document, §922(s)(1)(A)(i)(II); and (3) provide the 'chief law enforcement officer' (CLEO) of the transferee's residence with notice of the contents (and a copy) of the Brady Form, §§922(s)(1)(A)(i)(III) and (IV). With some exceptions, the dealer must then wait five business days before consummating the sale, unless the CLEO earlier notifies the dealer that he has no reason to believe the transfer would be illegal. §922(s)(1)(A)(ii).

Printz v. United States, 521 U.S. 898, 935 (1997).

²¹⁶ U.S. CONST. amend II.

identification information have been deemed to be reasonable due to the compelling state interest of protecting the public.²¹⁷

In addition to purchasing a gun, there are similar instances in which verification of age and identity are necessary for the protection of the individual and others. For example, with the enactment of the Combat Methamphetamine Epidemic Act of 2005, individuals who wish to purchase more than a certain amount of pseudoephedrine (most commonly found in, and known as Sudafed) must present a government issued identification card or other document that comports with the E-Verify I-9 form requirements²¹⁸ and sign a written logbook.²¹⁹ Furthermore, even where there is a stigma associated with information, such as an individual having a sexually transmitted disease or HIV, most state laws require the collecting and sharing of this information in the interest of public health.²²⁰ There are also disclosure and age-verification requirements for one who patronizes adult entertainment venues such as strip clubs.²²¹ Certain states already mandate that adult entertainment -locales require patrons to present proof of age either by electronic verification or an established alternative method.²²² In short, state and federal law recognize the need for user identification in order to protect a strong public interest even where the user might prefer anonymity or be uncomfortable with the stigma associated with the activity.

3. Possible Constitutional Challenges to IPACT

As the following subsections will demonstrate, IPACT survives constitutional scrutiny. The proposed amendment does not run afoul of First Amendment free speech concerns because it is commercial speech that is content neutral, regulates time, place, and manner, advances a

²¹⁷ In order to purchase a firearm, the buyer must fill out a Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) Form 4473 and present photo identification. U.S. DEP'T OF JUST., FIREARMS TRANSACTION RECORD PART I – OVER-THE-COUNTER (2012), available at <http://www.atf.gov/files/forms/download/atf-f-4473-1.pdf> (last updated Apr. 2012). The ATF form, "which collects the subject's name and descriptive data (e.g., date of birth, sex, race, state of residence, country of citizenship), also elicits information that may immediately indicate to [a Federal Firearms Licensee] the subject is a prohibited person." U.S. DEP'T OF JUST. & FED. BUREAU OF INVEST., NATIONAL INSTANT CRIMINAL BACKGROUND CHECK SYSTEM (NICS) OPERATIONS I (2011), <http://www.fbi.gov/about-us/cjis/nics/reports/2011-operations-report/operations-report-2011>. The information on ATF Form 4473 is then used to run a background check through the National Instant Criminal Background Check System ("NICS"). *Id.* This system checks the purchaser's information against numerous secure databases to verify eligibility to purchase the firearm. *Id.* Databases include: Interstate Identification Index (III), National Crime Information Center ("NCIC"), NICS Index, and Department of Homeland Security's U.S. Immigration and Customs Enforcement ("ICE"). *Id.*

²¹⁸ Those documents conforming to 8 C.F.R. § 274a.2(b)(1)(v)(A)-(B) (2013).

²¹⁹ The logbook is maintained for a minimum of two years, and the individual must enter his or her name, address, and the date and time of sale. 21 U.S.C.A. § 830(e)(1)(A)(iv) (West 2013).

²²⁰ See Kimberly A. Workowski & Stuart M. Berman, *Sexually Transmitted Diseases Treatment Guidelines, 2006*, in 55 MORBIDITY & MORTALITY WEEKLY REP. 332 (2006), available at <http://www.cdc.gov/MMWR/preview/mmwrhtml/rr5511a1.htm> (explaining the requirements for reporting other STDs differ by state, and clinicians should be familiar with state and local reporting requirements. "Reporting can be provider- and/or laboratory-based. Clinicians who are unsure of state and local reporting requirements should seek advice from state or local health departments or STD programs. STD and HIV reports are kept strictly confidential"); see also *HIV Disclosure Policies and Procedures*, AIDS.GOV (Jun. 1, 2012), <http://aids.gov/hiv-aids-basics/just-diagnosed-with-hiv-aids/your-legal-rights/legal-disclosure/> ("If your HIV test is positive, the clinic or other testing site will report the results to your state health department. They do this so that public health officials can monitor what's happening with the HIV epidemic in your city and state Many states and some cities have *partner-notification* laws—meaning that, if you test positive for HIV, you (or your healthcare provider) may be legally obligated to tell your sex or needle-sharing partner(s).").

²²¹ Strip clubs are also associated with a potential stigma, especially considering that walking into a strip club affords far less privacy than using the Internet in the privacy of one's own home to purchase commercial sex. See e.g., Eli Bildner & June Torbati, *The Naked Truth: Inside Catwalk Club*, YALE DAILY NEWS (Apr. 10, 2007), <http://yaledailynews.com/blog/2007/04/10/the-naked-truth-inside-catwalk-club/>; Daniel Person, *Gallatin Gateway Strip Club Owners Try to Duck Stigmas Unique to Their Business*, BOZEMAN DAILY CHRON. (Nov. 19, 2009), http://www.bozemandailychronicle.com/news/article_a6810772-cc90-56da-acff-97508f0ab384.html?mode=story.

²²² See UTAH CODE ANN. § 32B-1-407 (West 2013) (requiring dining and social club licensees to verify proof of age of persons who appear to be thirty-five years of age or younger either by an electronic age verification device or an acceptable alternate process established by commission rule); UTAH ADMIN. CODE r.81-5-18 (2013) (identifying further age verification at dining and social clubs).

compelling governmental interest, and is narrowly tailored to serve that interest. Further, it is not unconstitutionally vague under constitutional criminal law analysis.

i. The commercial speech at issue is not protected by the First Amendment under the Central Hudson four-part test

IPACT avoids the free speech challenges that plagued the previous state law attempts to protect children from being sold on the Internet. First, it is commercial speech. The Supreme Court has found that commercial speech is held to lower scrutiny standard.²²³ When an ISP allows an ad to be posted for the sale of an escort, the speech involved is commercial insofar as the ad seeks to induce a customer to pay for a service that is promised in return for a fee. In *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, the Supreme Court identified a four-part test to analyze when commercial speech is protected by the First Amendment.²²⁴ First, the speech must concern lawful activity and not be misleading.²²⁵ Second, the asserted governmental interest must be substantial.²²⁶ Third, the regulation must directly advance the governmental interest asserted.²²⁷ Lastly, the regulation is not more extensive than is necessary to serve that interest.²²⁸ Each part will be discussed in turn.

a. Lawful activity and not misleading

As noted above, the speech in adult escort ads is likely to fail the first prong of the *Central Hudson* test because the activity that the government seeks to regulate is usually illegal prostitution and sometimes human trafficking. Because nearly eighty percent of the ads have been found to be for prostitution,²²⁹ to label these ads as selling “escorts” is misleading. The U.S. Supreme Court stated in *Pittsburgh* that “[d]iscrimination in employment is not only commercial activity; it is *illegal* commercial activity under the Ordinance. We have no doubt that a newspaper constitutionally could be forbidden to publish a want ad proposing a sale of narcotics or soliciting prostitutes.”²³⁰ Indeed, similar to the discriminatory ads in *Pittsburgh*, the vast majority of adult services ads involve illegal activity, such as human trafficking and prostitution, and it is specifically this illegal activity that IPACT seeks to regulate. Therefore, IPACT will reduce the number of ads for illegal activity being posted on the Internet.

b. Directly advance a compelling government objective

With respect to the second and third prongs of *Central Hudson*, the asserted governmental interest in IPACT is not only substantial, but also the legislation directly advances the governmental interest asserted. IPACT bears a clear compelling government interest in its objective: protecting children from being trafficked for sex on the Internet. In *Reno v. American Civil Liberties Union*, the Supreme Court acknowledged that it has “repeatedly recognized the governmental interest in protecting children. . . .”²³¹ As noted above, twelve to fourteen is the

²²³ See *Pittsburgh Press Co. v. Pittsburgh Comm’n on Human Relations*, 413 U.S. 376, 391 (1973) (upholding an ordinance that prohibited newspapers from carrying sexually discriminatory ads); *Capital Broad. Co. v. Mitchell*, 333 F. Supp. 582, 584 (D.D.C. 1971), *aff’d sub nom.* *Capital Broad. Co. v. Kleindienst*, 405 U.S. 1000 (1972) (affirming a district court decision that prohibited electronic media from carrying cigarette advertising); *Head v. New Mexico Bd. of Examiners in Optometry*, 374 U.S. 424, 425 (1963) (upholding an injunction prohibiting a newspaper and a radio station from carrying optometrists’ ads which violated New Mexico law).

²²⁴ *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n of N.Y.*, 447 U.S. 557, 566 (1980).

²²⁵ *Id.*

²²⁶ *Id.*

²²⁷ *Id.*

²²⁸ *Id.*

²²⁹ Hensley, *supra* note 167.

²³⁰ *Pittsburgh Press*, 413 U.S. at 388.

²³¹ *Reno v. Am. Civil Liberties Union*, 521 U.S. 844, 875 (1997).

average age children are pulled into commercial sex,²³² and at least 267 children have been found to have been trafficked on Backpage alone,²³³ with new cases reported almost daily. Further, the objective of the proposed legislation is to prevent children from being trafficked through age verification. When those persons who are not 18 are blocked from using, posting or being posted on the site, the objective to protect children is met. Thus, IPACT clearly satisfies the second and third prong of the *Central Hudson* test since the governmental interest in protecting children is substantial and the regulation directly advances the governmental interest asserted.

c. Narrow tailoring

With respect to the fourth prong of *Central Hudson*, IPACT is “not more extensive than is necessary”²³⁴ to serve the governmental interest in protecting children. A content-neutral law regulating the time, place, or manner of speech need only have a “reasonable fit” with its objective to be sufficiently narrowly tailored.²³⁵ The Supreme Court has further clarified that a “fit” between the legislature’s ends and means need not be perfect, but merely reasonable in accomplishing those ends.²³⁶ The IPACT regulatory objective—protecting children from being trafficked on the Internet—not only fits the purpose of IPACT—but is an objective that the Supreme Court has determined to be a compelling state/governmental interest. Further, the regulatory requirements that will protect children are narrowly tailored to serve this state interest because the gateway database prevents children from being posted on or using the site, yet does not prevent posting entirely. Therefore, the speech is not needlessly limited, and the regulation serves its stated purpose.

IPACT is also the least restrictive way to adequately verify the age and identity of an ad’s poster, persons depicted in the ad, and anyone viewing the ad. The voluntary efforts currently employed by Backpage are simply not sufficient to ensure that underage persons are not illegally exploited on these Internet sites. Moreover, these voluntary efforts do nothing to curb illegal activity such as prostitution. The gateway database provides a more effective means to ensure that children are not trafficked, and that underage persons are not using or posting on adult services sites. Currently, for example, Backpage has a checkbox that asks users to click a box saying they are over eighteen years of age.²³⁷ While this, combined with the voluntary efforts of Backpage to regulate ads, is less restrictive than IPACT, it does not adequately serve the compelling state interest of protecting children from being trafficked on the Internet.

What is more, ISPs like Backpage would be hard pressed to argue that IPACT’s regulations are burdensome. Backpage already exercises extensive voluntary measures to ascertain when the subjects of ads posted are children, including the provisions (in the case of Backpage) of the ISP’s own “terms of use.”²³⁸ Alternatively, hundreds of thousands of employers are enrolled in E-Verify, a much quicker and simpler process to ensure the age and identity of employees.²³⁹ In fact, the ISPs may determine that the IPACT regulations are less burdensome than their current voluntary efforts.

ii. *IPACT is content neutral: strict scrutiny does not apply.*

²³² Walker-Rodriguez & Hill, *supra* note 1; POLARIS PROJECT, *supra* note 1.

²³³ Chart Tracking Minors, *supra* note 61.

²³⁴ Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n of N.Y., 447 U.S. 557, 566 (1980).

²³⁵ Bd. of Trs. of the State Univ. of N.Y. v. Fox, 492 U.S. 469, 480 (1989) (internal citation omitted).

²³⁶ *Id.*

²³⁷ See *Disclaimer*, *supra* note 188.

²³⁸ *Terms of Use*, *supra* note 50.

²³⁹ *History and Milestones*, *supra* note 191.

Even if IPACT did not regulate commercial speech, IPACT is subject to lower scrutiny because it does not regulate the content of speech. Instead, as outlined above, this law would establish a procedure that provides a reasonable regulation of the time, place, and manner of the ads posted. Under IPACT procedures, where E-Verify or an alternative system is utilized to ensure the age and identity of participants, the speech itself is not regulated or restricted; the content of the ad may remain the same as it was previously. The regulation merely ensures that the participants are complying with existing law regarding the required age for participation: one must be eighteen years of age or older.

The Supreme Court has determined that laws regulating the time, place and manner of speech are not subject to strict scrutiny.²⁴⁰ For example, in *City of Renton v. Playtime Theatres, Inc.*, the Court held that a city ordinance regulating the location of an adult motion picture theater is valid as long as the regulation is designed to serve a substantial government interest and allows for reasonable alternative avenues of communication.²⁴¹ The Court concluded,

[t]he Renton ordinance, like the one in *American Mini Theatres*, does not ban adult theaters altogether, but merely provides that such theaters may not be located within 1000 feet of any residential zone, single- or multiple-family dwelling, church, park, or school. The ordinance is therefore properly analyzed as a form of time, place, and manner regulation.²⁴²

Similarly, the IPACT proposal will not ban adult services ads on the Internet altogether, but merely provide a mechanism to ensure that those using such services are of legal age. Further, the Court in *Renton* determined that the city ordinance in question was not regulating the speech itself, but was content-neutral:

[T]he Renton ordinance is aimed not at the *content* of the films shown at “adult motion picture theatres,” but rather at the *secondary effects* of such theaters on the surrounding community. The District Court found that the City Council’s “*predominate concerns*” were with the secondary effects of adult theaters, and not with the content of adult films themselves.²⁴³

Similarly, the “predominate concerns” of the IPACT regulation are to protect children and ensure that children are not sold on the Internet through “adult services” sections or any other site. The regulation is not concerned with the content of such ads, nor is it attempting to control or suppress the speech within the ads. Therefore, if enacted, IPACT will merely regulate the manner in which the ads are presented; IPACT is content neutral with respect to the speech itself.

Similarly, in *Arcara v. Cloud Books, Inc.*, a New York statute was invoked to close an “adult” bookstore found to be a public health nuisance because individuals used it as a place for prostitution and “lewdness.”²⁴⁴ The Supreme Court concluded that, “the First Amendment is not implicated by the enforcement of a public health regulation of general application against the physical premises in which respondents happen to sell books.”²⁴⁵ The Court determined that the

²⁴⁰ See *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 47 (1986).

²⁴¹ *Id.* at 50. The city ordinance prohibited an adult motion picture theater from locating within one thousand feet of any residential zone, family dwelling, church, or park, or within one mile of a school. *Id.* at 44-45.

²⁴² *Id.* at 46.

²⁴³ *Id.* at 47.

²⁴⁴ *Arcara v. Cloud Books, Inc.*, 478 U.S. 697, 699 (1986). An undercover law enforcement investigation revealed that illegal sexual activities, including solicitation of prostitution, occurred on the premises. *Id.* at 698-99.

²⁴⁵ *Id.* at 707.

statute “was directed at unlawful conduct having nothing to do with books or other expressive activity.”²⁴⁶ The fact that the proprietors were also selling books in “an establishment used for prostitution does not confer First Amendment coverage to defeat a valid statute aimed at penalizing and terminating illegal uses of premises.”²⁴⁷ Indeed, the Court found that “the legislature properly sought to protect the environment of the community by directing the sanction at premises knowingly used for lawless activities.”²⁴⁸ Just as this proprietor’s legal bookselling did not cloak his illegal activities, an ISP’s legal goods and services for sale do not provide immunity for the illegal activities that occur alongside them.

iii. IPACT is not unconstitutionally vague

The regulations in IPACT are not unconstitutionally vague. First, as noted above, the proposal regulates the time, place and manner of the speech, but not its content. The content of the posting remains unchanged, it is merely the manner in which it is posted that is regulated. Further, the definitions contained in the IPACT amendment²⁴⁹ are clear and have long been tested through federal litigation.

Statutes regulating speech may be found to be void for vagueness when a reasonable person could not tell what expression or speech is being regulated.²⁵⁰ The Supreme Court has ruled that “standards of permissible statutory vagueness are strict in the area of free expression . . . [b]ecause First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity.”²⁵¹ This is particularly true if it involves a criminal statute, because the stigma of a criminal conviction could influence the speaker.²⁵² Thus, the Court will carefully scrutinize the statute for unconstitutional vagueness if the statute is both criminal and content-based.²⁵³ A critical focus of the vagueness doctrine is to prevent arbitrary enforcement of the law—in this case the IPACT amendment—resulting from unclear standards.²⁵⁴ However, “perfect clarity and precise guidance have never been required even of regulations that restrict expressive activity.”²⁵⁵

Moreover, ISPs are only liable when they fail to follow the clear requirement that, before an ad is posted on an adult services section, the ISP must verify the identity and age through E-Verify or a similar alternative of each of the players—the person seeking to view the ad, the person posting the ad, and the individual depicted in the ad—and confirm they are thus legally eligible to utilize the adult services section. It will be clear which ads must be scrutinized.²⁵⁶ ISPs must evaluate every adult services ad to determine that it does not involve illegal activity. This regulation is therefore not unconstitutionally vague because it provides fair notice of what constitutes a violation, and thereby does not allow for arbitrary enforcement.

²⁴⁶ *Id.*

²⁴⁷ *Id.*

²⁴⁸ *Id.*

²⁴⁹ See *supra* text accompanying note 204.

²⁵⁰ See, e.g., *Coates v. City of Cincinnati*, 402 U.S. 611, 613 (1971).

²⁵¹ *Nat'l Ass'n for Advancement of Colored People v. Button*, 371 U.S. 415, 432-33 (1963).

²⁵² See, e.g., *Reno v. Am. Civil Liberties Union*, 521 U.S. 844, 872 (1997).

²⁵³ See, e.g., *Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 495, 499 (1982).

²⁵⁴ See *supra* note 251 and accompanying text.

²⁵⁵ *United States v. Williams*, 553 U.S. 285, 304 (2008) (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 794 (1989)); see also *Holder v. Humanitarian Law Project*, 130 S. Ct. 2705, 2720 (2010) (explaining that a federal criminal statute’s terms making it a federal crime to “knowingly provide material support or resources to a foreign terrorist organization” were “clear in their application to plaintiffs’ proposed conduct” even assuming a “heightened standard applies because the material-support statute potentially implicates speech” and not void for vagueness).

²⁵⁶ See text accompanying note 199 (explaining that if the photograph presented for age verification does not match the photograph proposed for the posting, E-Verify will issue a “Tentative Nonconfirmation (TNC)” result).

B. Proposal 2: Federal Criminal Law Record Keeping Requirements

Another federal regulatory approach would be to require adult services users and posters to submit to record-keeping requirements, similar to those that are currently provided in the area of pornography.²⁵⁷ In the pornography industry, this provision requires producers of sexually explicit material to maintain records concerning the identity and age of performers or those depicted and used in the images, in order to assist law enforcement in monitoring the industry.²⁵⁸ Congress enacted this record-keeping requirement because “[t]he identity of every performer is critical to determining and ensuring that no performer is a minor.”²⁵⁹ Additionally, Congress “recognized that minors warrant special concern in this area as children are incapable of giving voluntary consent to perform, or enter into contracts to perform, in visual depictions of sexually explicit conduct.”²⁶⁰ The FBI further explains that these requirements help ensure that producers will not exploit minors, either deliberately or recklessly, since the producer is required to ascertain the age of performers in their depictions and to maintain records evidencing such compliance.²⁶¹

The identity documents required under 18 U.S.C.A. § 2257 must include the performer's name and date of birth²⁶² and may include documents such as a passport, driver's license or Permanent Resident Card.²⁶³ The statute requires producers to “maintain the records required by this section at his business premises, or at such other place as the Attorney General may by regulation prescribe and shall make such records available to the Attorney General for inspection at all reasonable times.”²⁶⁴

Certainly, providing a similar record-keeping requirement in the adult services context could be helpful. Adult services sections provided by ISPs like Backpage could similarly be required to maintain records concerning the identity and age of the persons advertised, as required by 18 U.S.C.A. § 2257. This information would assist law enforcement in monitoring the adult services industry to determine if and when illegal activity, such as child exploitation or prostitution, is taking place. If this record-keeping concept were employed in the adult services arena, owners of adult services establishments and ISPs could be required to keep records of the identity and age of the person posting the escort, as well as the customers who access the ad, since all are required to be over eighteen.²⁶⁵ Further, the ISP offering adult services could be fined if it fails to follow the regulatory record keeping requirements.

²⁵⁷ 18 U.S.C.A. § 2257 (West 2013) (Sexual exploitation and other abuse of children – record keeping requirement).

²⁵⁸ *Id.*

²⁵⁹ 2257 Program—Verifying the Age of Performers in Sexually Explicit Matter, FED. BUREAU INVESTIGATION, http://www.fbi.gov/about-us/investigate/vc_majorthefts/cac/2257-program (last visited Oct. 30, 2013).

²⁶⁰ *Id.* Children under the age of eighteen often are involuntarily forced to engage in sexually explicit conduct, visual depictions of which constitute child pornography. *Id.* Child pornography could also constitute human trafficking, and cases have involved both charges. *See, e.g.,* Matthew Burns, *Fayetteville Man Faces Federal Sex Trafficking Charges*, WRAL.COM (May 24, 2013), <http://www.wral.com/fayetteville-man-charged-with-sex-trafficking/12482317/> (detailing the story of a man who was charged with both federal sex trafficking and child pornography crimes). When a child is not only subjected to having his or her picture taken in a sexually explicit manner, but the photos also depict someone sexually molesting the child, the crime of human trafficking, as well as child pornography, may be charged. *See, e.g.,* News Release, Immigr. & Customs Enforcement, Los Angeles-Area Woman Accused of Child Sex Trafficking (Feb. 5, 2013), <https://www.ice.gov/news/releases/1302/130205losangeles.htm>. Conversely, labor trafficking may be charged even if the perpetrator kept the pictures for himself, since a child may be presumed to have been forced or coerced into the sex act that is depicted in the pictures, resulting in labor trafficking. *See The Laws, supra* note 24.

²⁶¹ 2257 Program, *supra* note 259.

²⁶² 18 U.S.C.A. § 2257(b).

²⁶³ 28 C.F.R. § 75.1(b) (2013).

²⁶⁴ 18 U.S.C.A. § 2257(c).

²⁶⁵ Because newspapers also offer adult services ads, they could be required to collect and maintain such records as well.

Unlike the IPACT proposal, however, the proposed record-keeping requirement would likely have less preventive impact, since the records would merely be kept available for inspection by law enforcement when a human trafficking case is suspected. At the point that federal law enforcement determines that a child is being unlawfully advertised, the damage will already be done: that child will have been trafficked, her body used, misused and traumatized by thousands of men.²⁶⁶ However, requiring accountability of the users and posters could reduce demand for illegal activity. This is because typically, a major attraction of the Internet is anonymity, and requiring users and posters to provide identification will discourage those who use the internet to solicit a prostitute because they prefer their activity to be less visible to their friends and family.²⁶⁷ While this record-keeping proposal could make a significant impact in reducing demand and assisting law enforcement efforts to investigate and interdict possible traffickers, it does not prevent particular children from being trafficked. Therefore, it would be more effective if implemented in conjunction with the IPACT regulatory mechanism.

C. Proposal 3: State Criminal Law

As noted previously, Washington, Tennessee, and New Jersey have sought to enact state laws attempting to hold ISPs like Backpage criminally liable for advertising commercial sexual abuse of a minor. All of these states' statutes have been enjoined from enforcement, in part due to the preemption section of the CDA, which states, "no liability may be imposed under any State or local law that is inconsistent with this section."²⁶⁸ Another CDA provision, titled "No effect on criminal law," states that the CDA is not intended to impair enforcement or prosecution under federal criminal statutes.²⁶⁹ Utilizing this section, § 230 (e)(1), a number of state Attorneys General have encouraged Congress to amend this section to add the words "or state" to read: that "[n]othing in this section shall be construed to impair the enforcement of § 223 or 231 of this title, chapter 71 (relating to obscenity) or 110 (relating to sexual exploitation of children) of Title 18, or any other Federal **or state** criminal statute."²⁷⁰

While this approach appears wonderfully simple, it is likely to be challenged. First, while amending the CDA to add "or state" will create new authority under the criminal law section of the CDA, the defendant ISP being prosecuted under such a state criminal law would almost certainly point to the existing CDA immunity language²⁷¹ to say that the state statute nonetheless remains in violation of the CDA. As noted above, this section of the CDA states: "Nothing in this section shall be construed to prevent any State from enforcing any State law that is consistent with this section."²⁷² The defendant ISP would likely argue that this CDA § 230 (e)(3) language invalidates any state criminal law finding an ISP liable as being inconsistent with the CDA immunity. In fact, Backpage has sued to enjoin each of these three state statutes from

²⁶⁶ See, e.g., *supra* text accompanying notes 12-14, 63. "Utilizing a conservative estimate, a victim would be raped by 6,000 johns during the course of her victimization." Abigail L. Kuzma, *Demand Reduction: Critical Next Step in the Fight Against Sex Trafficking*, A.B.A. INT'L L. NEWS, Fall 2013, at 27, 28-30; LINDA A. SMITH ET AL., SHARED HOPE INT'L, THE NATIONAL REPORT ON DOMESTIC MINOR SEX TRAFFICKING 20 (2009), http://sharedhope.org/wp-content/uploads/2012/09/SHI_National_Report_on_DMST_2009.pdf.

²⁶⁷ Kuzma, *supra* note 266.

²⁶⁸ 47 U.S.C.A. § 230(e)(3) (West 2013).

²⁶⁹ *Id.* § 230(e)(1) (emphasis added). It should be noted that despite this exception to the CDA, a number of different types of federal criminal statutes have been unsuccessful in challenging the immunity of the CDA. For example, in *Doe v. Bates*, the court ultimately found immunity for Yahoo! despite the arguments made (and evidence presented) by Plaintiff that a violation of federal child pornography laws was present. *Doe v. Bates*, 5:05-CV-91-DF-CMC, 2006 WL 3813758, at *5-6 (E.D. Tex. Dec. 27, 2006).

²⁷⁰ Letter from 49 Att'ys Gen., *supra* note 81 (emphasis in original).

²⁷¹ 47 U.S.C.A. § 230(e)(3).

²⁷² *Id.*

being implemented immediately upon their enactment by their respective state legislatures.²⁷³ Certainly in such a case where the ISP is challenging the state statute, the state could argue in defense of their legislation that Congress would have determined in adding “or state” to the CDA that state criminal law must not be automatically inconsistent. Congress would not have enacted language including the words “state law” in the federal criminal law exception if it were automatically inconsistent with the remaining CDA provisions. As a matter of legislative interpretation, a court would most likely consider that the addition of this language at a later date was intended to be a substantive change, and therefore should not be interpreted as being inconsistent and thereby meaningless.

Even when the state legislation survives that hurdle, however, it should be noted that previous attempts to use the § 230(e)(1) federal criminal law exception have thus far proved unsuccessful, even with respect to federal criminal statutes. As outlined in detail above, despite the clear language of the CDA,²⁷⁴ lower courts have nonetheless found that the CDA provides immunity from federal criminal statutes.²⁷⁵ Further, the courts at issue have also found criminal, constitutional (void for vagueness), and First Amendment arguments persuasive when they have failed to find ISPs like Backpage liable under criminal statutes. Nonetheless, these were lower court cases and were decided some years ago. With a greater understanding of sex trafficking and its impact and a clearer analysis of the CDA language, it is possible future courts would not find these previous decisions persuasive.

In short, even though this approach fails to prevent the trafficking in the first place (only after a child has been found trafficked is the ISP liable) it has advantages. It holds ISPs liable for their part in trafficking children on the Internet and will fight trafficking by ultimately reducing the number of ads that traffic children. While this approach is more law enforcement focused rather than victim focused, it would reduce trafficking on the Internet.

D. Proposal 4: State Consumer Protection Regulatory Approach

One of the most promising proposals to protect children from online trafficking is a state consumer protection regulatory approach. Under this approach, a particular state statute provides both a registration system and a regulatory database. This can serve to both capture identity and age information and prevent children from being trafficked on the Internet. Essentially, this approach is a combination of Proposals 1 (IPACT) and 2 (Record- Keeping), applied at the state level. This approach is promising because, like the IPACT proposal, it passes constitutional muster, is not inconsistent with the CDA, and also works to prevent trafficking.

Gateway types of computer systems have been implemented for many legal and commercial purposes.²⁷⁶ Gateway systems perform one or more verification operations on prospective system users, allowing the person seeking access to proceed only when the requisite legal or commercial requirements are met. Such gateway systems all include the following components: 1) a front-end portal to which the would-be user applies and provides information; 2) an internal automated procedure that applies a set of verification rules to the user’s information; and 3) an internal database that stores the information required to ensure verification; this information is used by the verification rules.²⁷⁷ As noted above, E-Verify is an

²⁷³ See *supra* text accompanying notes 136-137, 150-154.

²⁷⁴ “Nothing in this section shall be construed to impair the enforcement of Section 223 or 231 of this title, . . . or any other Federal criminal statute.” 47 U.S.C.A. § 230 (e)(1).

²⁷⁵ See *supra* Part V-B.

²⁷⁶ Email from Eduard Hovy, Carnegie Mellon Univ., to author (Jul. 21, 2013) (on file with the author).

²⁷⁷ *Id.*

example of such a system, used by employers to verify whether prospective employees have permission to work in the United States.²⁷⁸

It is possible to build a similar system that controls advertisers' ability to publish ads for adult services. The specific purpose of such a system would be to prevent minors from advertising, being advertised, or accessing the site as a consumer. In this case, verification and access rules would be crafted to ensure that the poster, the person being advertised, and the person seeking access to the ads are in fact of age. For example, these rules may require:

- The stated age of the person being advertised and the person seeking access to the ads, entered directly into the portal;
- The driver's license, or State ID of the poster, person being advertised, and person seeking access to the ads, which could be used to access the individual's home state's driver's license database (or a copy of it) for an age check;
- One or more photos of the face of the individual being advertised, which could be supplied to face recognition and age estimation software;
- The school certificate(s) of the poster, person being advertised, and person seeking access to the ads, which could be compared to a database of school graduation dates; etc.²⁷⁹

Under this approach, the state IPACT would require ISPs that wish to do business in that state (for this discussion, we will call it State X) to purchase a \$25,000 surety bond that would be posted on State X Attorney General's website. Next, the ISP must develop and employ a gateway database program for their adult services site.²⁸⁰ The program would automatically identify persons from State X who want to access the site as well as persons who want to post adult services ads that provide services in State X. The site would block these persons from proceeding until they comply with the regulatory verification procedure, which consists of providing a copy of verification document(s), such as a valid driver's license, which will be used to verify that the person is at least eighteen years of age. If the person seeking access posts an adult services advertisement, he or she must provide a copy of the advertisement with a form of photo identification of the person depicted in the advertisement.

When the requisite documents are scanned and submitted to the program, the database will verify age and block users and posters whose documents do not verify that the user, poster, and person depicted are at least eighteen years of age or older or if the document presented is expired. Further, a face recognition application could be employed to compare the picture of the person purported to be depicted in the driver's license with the image in the ad proposed to be posted.²⁸¹

²⁷⁸ *Id.*; See *supra* text accompanying notes 190-204. More information about verifying IDs can be found at *Real ID Act*, WIKIPEDIA, http://en.wikipedia.org/wiki/REAL_ID_Act (last updated Sept. 18, 2013).

²⁷⁹ While the driver's license check is reliable, the school graduation information may help when the advertiser has no license, and the facial recognition based age estimation software might provide supportive information that is merely used to bolster or weaken the results of the other rules.

²⁸⁰ Under this proposal, the state legislation requires the ISP that wishes to do business in that state to pay the expense of developing and implementing the gateway database. The state could also develop and maintain the gateway database itself, but that would require a significant initial state fiscal impact for the statute; therefore, this proposal recommends shifting the cost for developing the database to the ISP.

²⁸¹ This function could also be performed by an employee of the state Attorney General's office. Under this approach, when the requisite documents are presented, a designated State X Attorney General employee will check the age depicted on the document and verify the validity of the document with the appropriate State X agency. The employee will also compare the picture on the identification document with the picture in the advertisement to ensure that it is the same person. Further, that employee may check

The person seeking to post and the person seeking access to the site would also have to pay a fee²⁸² to the ISP which would be used to offset the cost of maintaining and operating the database. The fee could be divided so that half goes to the ISP for maintaining the database and half goes to the state for human trafficking victim services and law enforcement efforts.

Advertisers would be required to register if they are advertising for a service to be provided within State X and the advertisement is for escorts, stripping, or lap dancing, or the advertisement suggests or implies the provision of sexual arousal or gratification through physical contact in connection with the payment of money. Registration would also be required if the advertisement is posted in a forum designed for individuals eighteen years of age or older. The identification information from the person posting the ad, the person depicted in the ad, and the consumer would be stored by database.

Further, until the documents have been submitted and verified and the fees paid, the person seeking to post the advertisement and the person seeking to view the advertisement would be unable to access the ISP. Backpage or other ISPs offering adult services would be required to provide a notice on their site stating that persons seeking to provide business in State X and that state's residents must follow this regulatory procedure and follow the gateway verification procedures. This information would be stored and maintained on the database for five years.²⁸³

Similar to IPACT, the ISP would violate the state consumer protection statute for failing to follow the state regulatory procedure. Noncompliance with the statute due to an ISP's failure to abide by the registration process could result in civil prosecution. In the event that the ISP fails to follow the statutory requirements to compel registration, and if a person depicted in a post is determined to be underage or is found to be engaging in illegal activity such as prostitution, the ISP could be found liable for criminal negligence. Thus, both civil and criminal liability would be based on failure to comply with the state-established consumer protection regulatory requirements. Thus, no actual knowledge of criminal activity is needed.

One advantage of the state consumer protection regulatory approach is that, like the federal IPACT proposal, it is the time, place, and manner regulation of commercial speech that is narrowly tailored to address the compelling state interest of protecting children. It does not regulate the content of the advertisements. Therefore, it does not run afoul of First Amendment protections. Further, because it is narrowly tailored to regulate only business activity that takes place in the particular state and that state's residents, it does not run afoul of dormant Commerce Clause concerns.²⁸⁴ Thus, because this state consumer protection regulatory approach only affects business in its own state and its own residents, it does not inappropriately affect interstate commerce.

with a database listing runaway children or other law enforcement data available to determine if the person depicted is underage and/or has previously been a suspected victim of human trafficking. The employee could also check law enforcement data to determine whether any of the parties have been arrested/convicted of prostitution related charges.

²⁸² A fee of \$250 per use might be an appropriate fee. This fee would be a high enough amount to be a deterrent as well as a high enough amount to pay for the development of the verification system.

²⁸³ This photo/ID database would be available to law enforcement to run background checks if there is indication of illegal activity. For example, if a picture of a person posted is identified as a missing or exploited child, law enforcement may access information stored in the database to perform background checks and other investigation.

²⁸⁴ The Commerce Clause provides that Congress shall have the power to regulate commerce among the several states. U.S. CONST. art. I, § 8, cl. 3. This affirmative grant of authority to Congress also encompasses an implicit or "dormant" limit on the authority of the States to enact legislation that affects interstate commerce. James L. Buchwalter, *Construction and Application of Dormant Commerce Clause*, U.S. Const. Art. I, § 8, cl. 3—*Supreme Court Cases*, 41 A.L.R. FED. 2d 1, 1-8 (2009).

Another advantage is that it is consistent with regulatory systems established by many states' legislatures that oversee business models deemed to be dangerous to consumers.²⁸⁵ In state consumer protection law, a type of business that has been found to be dangerous to consumers may be heavily regulated to reduce the chance that consumers will be taken advantage of. For example, under Indiana law, a registration system like IPACT is found in the areas of mortgage consultants,²⁸⁶ credit services,²⁸⁷ fundraising solicitors,²⁸⁸ and telemarketing.²⁸⁹

Further, a state consumer protection law is not inconsistent with the CDA. The CDA provides that an ISP may not be treated as a publisher or speaker with respect to the content of ads posted on their site. The state IPACT does not hold the ISP liable for the content of the ads but only for its failure to comply with the regulatory requirements of the act. The state IPACT will hold the ISP responsible if it fails to pay the surety bond and establish or implement a gateway database that will restrict persons under the age of eighteen from accessing, posting or being posted on their site. Thus, a state consumer protection law that provides a regulatory mechanism to protect at-risk consumers—in this case to children who could be trafficked on the Internet—is not likely to run afoul of § 230(e)(3).²⁹⁰

VII. CONCLUSION

Sex trafficking of children is rapidly proliferating on the Internet. Nevertheless, the federal CDA provides nearly total protection from liability for ads posted by pimps and traffickers, rendering law enforcement helpless to protect these children. Unless these individuals and traffickers are prevented from posting children for sale on the Internet, the trafficking will continue. This article outlined four proposals to protect children from this horrific abuse. Each proposal seeks to curtail the use of Internet sites to exploit children through human trafficking. However, only the federal and state IPACT regulatory approaches will also work to prevent trafficking of children through verifying the age of the person posting the ad, depicted in the ad, and viewing the ad to be at least eighteen years of age. Given the increasing numbers of minor victims being trafficked on the Internet, it is time to take action and implement means that may be available to protect and recover our children.

²⁸⁵ See, e.g., IND. CODE ANN. § 24-5-15, 24-5.5, 24-9, 24-5-0.5 (West 2013); see also 765 ILL. COMP. STAT. ANN. 940 (West 2013) (Mortgage Rescue Fraud Act); 815 ILL. COMP. STAT. ANN. 402/35(b) (West 2013) (discussing telemarketing regulation).

²⁸⁶ IND. CODE ANN. § 24-5-15 (mortgage consultants are considered part of the credit services organization under section 24-5-15-2 and also held civilly liable under section 24-5-14-9); § 24-5.5 (discussing foreclosure consultants); § 24-9 (discussing home loan practices); § 24-5-0.5 (discussing deceptive consumer sales).

²⁸⁷ Indiana provides regulation of settlement and credit repair companies that assist a consumer with reducing his or her credit card or other debt, usually by obtaining settlements with the creditor under IND. CODE ANN. § 24-5-15.

²⁸⁸ Indiana charitable solicitors are regulated under IND. CODE ANN. § 23-7-8-1 to 23-7-8-9.

²⁸⁹ Indiana regulates telemarketing under IND. CODE ANN. § 24-4.7, 24-5-14.5, and 24-5-14.

²⁹⁰ 47 U.S.C.A. § 230(e)(3) (West 2013) (“Nothing in this section shall be construed to prevent any [s]tate from enforcing any [s]tate law that is consistent with this section. No cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section.”).