

March 2016

The Commercial Sexual Exploitation of Minors, the First Amendment, and Freedom: Why Backpage.com Should be Prevented from Selling America's Children for Sex

Anna Makatche

Fordham University School of Law

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Recommended Citation

Anna Makatche, *The Commercial Sexual Exploitation of Minors, the First Amendment, and Freedom: Why Backpage.com Should be Prevented from Selling America's Children for Sex*, 41 Fordham Urb. L.J. 227 (2013).

Available at: <https://ir.lawnet.fordham.edu/ulj/vol41/iss1/4>

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**THE COMMERCIAL SEXUAL
EXPLOITATION OF MINORS, THE FIRST
AMENDMENT, AND FREEDOM: WHY
BACKPAGE.COM SHOULD BE PREVENTED
FROM SELLING AMERICA’S CHILDREN FOR
SEX**

*Anna Makatche**

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* J.D. Candidate, Fordham University School of Law, 2013; M.S., Pace University, 2008; B.A., Susquehanna University, 2006. I would like to thank my family and friends for their love, patience, encouragement, and support. I am also grateful to Professor Gaylynn Burroughs for her guidance and helpful suggestions during the writing of this Note.

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INTRODUCTION

An estimated 100,000 to 300,000 American children are prostituted each year.¹ The voice of one such child:

I'll tell you what we've done. We've spent many nights alone and helpless. Probably never made it past eighth grade. We've been hit, arrested by the system. Abused by our boyfriends. We've imagined flying away from all the pain.

We're gaining self-worth back. We've written it all down to share what hurts. Some of us are out, some of us remain in. Some of us are in danger, all of us are scared. None of us know what makes us so different, but we all know what did. Listen to our stories because now we're breaking the silence.²

The freedom of speech, a cornerstone of American democracy, is being twisted beyond its intent to prevent oppression and is providing a shield to those who oppress.

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.³

A booming industry in the United States is the oppressor, shielded by the freedom of speech:

Corporations such as backpage thrive by helping to advertise children for sex. “Five websites that carry prostitution advertisements in the United

1. RICHARD J. ESTES & NEIL ALAN WEINER, *THE COMMERCIAL SEXUAL EXPLOITATION OF CHILDREN IN THE U.S., CANADA AND MEXICO: FULL REPORT OF THE U.S. NATIONAL STUDY* 4, 146–48 (2002).

2. Dominique, *Empowering Survivors: What's Your Story?*, GEMS, <http://www.gems-girls.org/what-we-do/survivor-voices> (last visited Nov. 15, 2014).

3. U.S. CONST. amend. I.

States set a record⁴ with a combined revenue of nearly \$3.3 million during January. . . . About [seventy] percent of the revenue was attributed to Backpage.com.”⁵ Pimps use the freedom of speech to sell American children for sex through Backpage.com (Backpage).⁶

Currently, hundreds of thousands of America’s youth are being sold for sex.⁷ Yet children are now prostituted less on the street and more online.⁸ Websites such as Backpage make this possible. Pimps, as third parties, post advertisements on such websites with thinly veiled offers of prostituted children.⁹ Johns take full advantage of these opportunities, funding the billion-dollar sex industry¹⁰ as they purchase the minors advertised online.¹¹

4. The record is for profits from advertisements for escorts and other adult services sold within one month. Mark Whittaker, *Sites Set Combined Record for Online Prostitution-Ad Revenue*, AIM GROUP (Feb. 24, 2012), <http://aimgroup.com/2012/02/24/sites-set-combined-record-for-online-prostitution-ad-revenue>.

5. Backpage is the leading site for prostitution advertisements. *Id.*

6. *Id.*

7. See ESTES & WEINER, *supra* note 2, at 4 and accompanying text.

8. “[T]he anonymity that the Internet provides for website users and website owners makes it an excellent facilitator of an illicit market.” SHARED HOPE INT’L., DEMAND: A COMPARATIVE EXAMINATION OF SEX TOURISM AND TRAFFICKING IN JAMAICA, JAPAN, THE NETHERLANDS, AND THE UNITED STATES 17 (2007), available at <http://sharedhope.org/wp-content/uploads/2012/09/demand.pdf>. Children are increasingly sold through online advertisements posted in adult escort sections of online classified advertising sites, instead of on the traditional street corner. Pimps, or prostituted minors at the direction of their pimps, simply post a phone number with a picture and/or provocative words. The pimps find prostitution sales easier this way, as johns can immediately purchase sex with a child through one simple click on the Internet or phone call in the comfort and privacy of their homes. Business has skyrocketed for pimps as they have learned to exploit children and the Internet, facilitating the purchase of sex for the johns. See JULIAN SHER, SOMEBODY’S DAUGHTER: THE HIDDEN STORY OF AMERICA’S PROSTITUTED CHILDREN AND THE BATTLE TO SAVE THEM 257–59 (2011).

9. Placing ads for women who are just over the age of majority is one indication that the female may actually be a minor child. Additionally, advertising a ‘new’ girl is often an indication that the advertisement is for a minor child. To provide an illustration of the ads, the first four ads on Backpage.com’s Manhattan Escorts section on November 18, 2013 at 1:14 PM were: 1) “East Indian 36dd-24-34-23;” 2) BEAUTIFUL SLENDER SEXY COLLEGE GIRL Available Now! Hot, Sensual, Stunning Brunette Beauty! 100% Real—25;” 3) “ANNE—Busty Dominican Beauty is BACK!!!!!!!!!!!!—46;” 4) NEW NEW NEW ***** SEXY JAPAN PETITE . . . NURU & KISSING—21;” 5) “Asian Independent MIKA.” *Manhattan Escorts*, BACKPAGE, <http://manhattan.backpage.com/FemaleEscorts> (last visited Nov. 18, 2013) (screenshot on file with author). Each was accompanied by a few photographs of a girl posing provocatively in lingerie. Additionally, a posting advertising a “YOUNG SEXY” girl was accompanied by a picture of a young female in pigtails. Here, the pigtails are indicative of a minor, rather than an adult, being offered for sale. *Id.*

10. The United Nations estimates the total market value of human trafficking is 32 billion U.S. dollars. *Factsheet on Human Trafficking*, UN OFF. ON DRUGS &

Some states,¹² in an attempt to create a comprehensive crackdown on the commercial sexual exploitation of minors, have drafted laws aimed at holding websites such as Backpage accountable for content posted by third-party users such as pimps.¹³ Backpage is fighting

CRIME, http://www.unodc.org/documents/human-trafficking/UNVTF_fs_HT_EN.pdf (last visited Nov. 15, 2013) (citing International Labour Organization estimates). It is second only to the narcotic drug industry as a criminal enterprise. *Resolution in Support of the Principles Embodied Within the NAAAG 2012 Presidential Initiative on Human Trafficking*, NAT'L ASS'N ATTORNEYS GEN. (Mar. 6, 2012), http://www.naag.org/assets/files/pdf/resolution.201203.Human_Trafficking.pdf. In the United States, a pimp makes an average of \$67,200 each year for each person he traffics in the sex industry. See INT'L LABOUR ORG., A GLOBAL ALLIANCE AGAINST FORCED LABOR, REPORT OF THE DIRECTOR-GENERAL 56 (2005).

11. Many scholars and practitioners target demand as the critical cog in the cycle of the commercial sexual exploitation of minors, arguing that johns should shoulder more responsibility in this issue than they currently do. See, e.g., SHARED HOPE INT'L, *supra* note 8, at 14 ("You have to look at the whole market. If there weren't a buyer, there wouldn't be a procurer, and there wouldn't be a victimized woman or child."); *Ending the Demand*, COALITION AGAINST TRAFFICKING WOMEN, <http://www.catwinternational.org/BestPractices/EndingDemand> (last visited Nov. 17, 2013) (promoting the Nordic Model of eliminating sex trafficking, which successfully targeted demand).

12. Tennessee and New Jersey have passed laws aimed at online providers of classified advertising, such as Backpage, that facilitate and profit from the advertisement of the commercial sexual exploitation of minors. N.J. STAT. ANN. § 2C:13-10 (West, Westlaw through 2013 Legis. Sess.); TENN. CODE ANN. § 39-13-315 (West 2013). Connecticut and New York have similar legislation pending. See H.B. 5504, 2012 Gen. Assemb. (Conn. 2012); N.Y.S. 7105A, 2012 Leg. (N.Y. 2012). And groups of government leaders, such as the National Association of Attorneys General, aspire for many states to follow the lead of these five states if their approach is proven successful. See *Resolution in Support of the Principles Embodied Within the NAAAG 2012 Presidential Initiative on Human Trafficking*, *supra* note 10.

13. See, e.g., TENN. CODE ANN. § 39-13-315(a) (criminalizing the act of "advertising commercial sexual abuse of a minor if the person knowingly sells or offers to sell an advertisement that would appear to a reasonable person to be for the purpose of engaging in what would be a commercial sex act . . . with a minor"). This provision would hold online commercial advertising sites, such as Backpage, accountable for displaying the advertisement of a minor for a commercial sex act. Moreover,

it is not a defense that the defendant did not know the age of the minor depicted in the advertisement. It is a defense, which the defendant must prove by a preponderance of the evidence, that at the time of the offense, the defendant made a reasonable bona fide attempt to ascertain the true age of the minor appearing in the advertisement by requiring, prior to publication of the advertisement, production of a driver license, marriage license, birth certificate, or other governmental or educational identification card or paper of the minor depicted in the advertisement and did not rely solely on oral or written allegations of the minor's age or the apparent age of the minor.

§ 39-13-315(c).

back, arguing—among other things—that such legislation infringes on its freedom of speech.¹⁴

This Note argues that holding websites such as Backpage accountable for the advertisement of the commercial sexual exploitation of minors posted by third parties is constitutional because it is an advertisement for illegal activity, and advertisements for illegal activity are categorically excluded from First Amendment protection.¹⁵ Moreover, to the extent that any escort advertisements on online service providers are offering legitimate, legal services, the activity could still be regulated because it is: 1) *commercial speech*; 2) where the government has a *substantial interest* in the well-being of minors; 3) that is *directly advanced* by the proposed, 4) *narrowly drawn* legislation.¹⁶

Part I provides general background on the commercial speech doctrine of the First Amendment, the commercial sexual exploitation of minors in the United States of America, and the current state of legislation in this area. Part II evaluates arguments addressing the issue of whether online service providers that host advertisements for commercial sex with minors are subject to First Amendment protection. Part III proposes that the federal government enact a statute prohibiting the advertisement of the commercial sexual exploitation of minors, and argues that such legislation is constitutional because 1) it is regulating illegal activity; or, in the alternative, 2) it is regulating commercial speech, and can be narrowly tailored to directly affect the substantial interest in protecting minors that it is intended to achieve.

I. THE FIRST AMENDMENT AND COMMERCIAL SEX

The First Amendment freedom of speech component is of paramount importance to our democracy.¹⁷ Our nation chose to

14. Backpage won a lawsuit preventing legislation from being implemented in Washington. *See* Backpage.com, LLC v. McKenna, 881 F. Supp. 2d 1262, 1265 (W.D. Wash. 2012). The statute at issue in that lawsuit has since been repealed. WASH. REV. CODE ANN. § 9.68A.104 (repealed 2013). Backpage is currently engaged in a similar legal battle in New Jersey. *See*, Backpage.com, LLC v. Hoffman, et al., No. 13-cv-03952 DMC JAD, 2013 WL 4502097 (D. N.J. Aug. 20, 2013).

15. *See* Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations, 413 U.S. 376, 388 (1973).

16. This argument follows the four-part test for the constitutionality of commercial speech, as established by the Supreme Court in *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, 447 U.S. 557, 566 (1980).

17. *See, e.g.*, Fed. Election Comm'n v. Mass. Citizens for Life, Inc., 479 U.S. 238, 264 (1986) (characterizing freedom of speech as a fundamental liberty, and

protect speech because it is a cornerstone of democratic self-government, ensures all citizens the opportunity to contribute to and benefit from a rich marketplace of ideas, and doing so allows for individual self-fulfillment and autonomy.¹⁸ These rationales have been argued to be less strong when it comes to commercial speech.¹⁹ As such, the Court has allowed greater government regulation of commercial speech than of noncommercial speech.²⁰

A. *Central Hudson*

1. *The Central Hudson Test*

The Court, in *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York (Central Hudson)*, held that commercial speech is a lesser-protected category of speech, and articulated a four-part test for when government can regulate commercial speech²¹:

identifying it as “the indispensable condition, of nearly every other form of freedom” (internal quotation marks omitted)).

18. See, e.g., Robert Post, *Reconciling Theory and Doctrine in First Amendment Jurisprudence*, 88 CAL. L. REV. 2353 (2000).

19. See *infra* note 20.

20. The Supreme Court has struggled, since 1942 when it first recognized the category of commercial speech, with what level of protection—if any—commercial speech should be afforded under the First Amendment. First, in *Valentine v. Chrestensen*, the Court held that commercial speech is not protected by the First Amendment, reasoning that it is without the political and social value inherent in other forms of speech that make speech warrant protection at all. 316 U.S. 52, 54–55 (1942). However, the Court reversed course in 1975 in *Bigelow v. Virginia*, where it held that commercial speech is, in fact, protected. 421 U.S. 809, 818, 820 (1975). This holding was reinforced a year later in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, reasoning that commercial speech could, in fact, have political and social value. 425 U.S. 748, 770–71 (1976). But, the Court was sure to carve out that the advertising of illegal activities was not protected by the First Amendment. *Id.* at 771. A few years later, in *Central Hudson*, the Court attempted to synthesize its precedent on the Commercial Speech doctrine into a clear position, and articulated a four-part test for when government can regulate commercial speech. 447 U.S. at 566. In recent years, the Court has come out divided on commercial speech. See, e.g., *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484 (1996) (illustrating the various positions assumed by the Justices in more recent years on the commercial speech doctrine). Some justices, such as Justice Scalia and Justice Thomas, advocate for doing away with the commercial speech distinction altogether. See *id.* at 517 (Scalia, J., concurring in part and concurring in the judgment). Other justices, however, advocate retention of the test. *Id.* at 485. The Court has continued to uphold the *Central Hudson* test, at least for now, even though the justices are in wide disagreement on how to handle commercial speech. See *id.* at 485–88. So, for the moment, *Central Hudson* guides First Amendment protection for commercial speech, but the future of commercial speech is far from certain.

21. 447 U.S. at 566. The test is very similar to intermediate scrutiny. *Id.*

- 1) Determine whether the expression is *protected* by the First Amendment (protected speech “must concern lawful activity and not be misleading”);
- 2) Determine whether the asserted governmental *interest is substantial*;
- 3) Determine whether the regulation *directly advances* the governmental interest;
- 4) Determine whether it is “*not more extensive than necessary* to serve that interest.”²²

The first prong—determining whether the speech concerns lawful activity and is not misleading—leaves the government with the ability to regulate any speech relating to unlawful activity. For example, the Court held that an ordinance prohibiting a newspaper from advertising jobs in categories organized by gender was not an infringement of the newspaper’s constitutional right to freedom of speech, as gender discrimination in employment is illegal.²³ Similarly, the government is free to regulate misleading speech.²⁴

Where the speech concerns lawful activity and is not misleading, the Court evaluates the speech regulation with the second, third, and fourth prongs of the *Central Hudson* test. The second prong of the *Central Hudson* test requires that the governmental interest be substantial. The Court has held, *inter alia*, the conservation of energy,²⁵ ensuring the accuracy of commercial information in the marketplace,²⁶ and the protection of potential clients’ privacy²⁷ to be substantial governmental interests.

If the asserted governmental interest is substantial, the third prong requires that the regulation must directly advance that interest.²⁸ The Court held that the goal of energy conservation was directly advanced by a regulation banning an electric utility from advertising the use of electricity.²⁹ By contrast, the Court held that an outright ban on solicitation of business clients by certified public accountants did not directly advance the substantial interests of ensuring the accuracy of

22. *Id.* (emphasis added).

23. *Pittsburgh Press Co. v. Pittsburgh Comm’n on Human Relations*, 413 U.S. 376, 388 (1973).

24. *In re R.M.J.*, 455 U.S. 191, 203 (1982).

25. *Central Hudson*, 447 U.S. at 568.

26. *See Edenfield v. Fane*, 507 U.S. 761, 769 (1993).

27. *See id.*

28. *See Central Hudson*, 447 U.S. at 568.

29. *Id.* at 569. (“There is an immediate connection between advertising and demand for electricity.”)

commercial information in the marketplace or protecting clients' privacy.³⁰

Finally, the fourth prong of the *Central Hudson* test requires that the regulation must not be more extensive than necessary to reach the government's interest.³¹ For example, a complete regulatory ban on advertising alcohol content on beer labels was held more extensive than necessary to reach the State's interest in suppressing strength wars in the beer market.³² By contrast, the Court held that a ban on lottery advertisements in a non-lottery state was no more extensive than necessary to reach the government's interest in supporting the State's anti-lottery laws.³³

Thus, as held in *Central Hudson*, current Supreme Court jurisprudence maintains that where a statute regulates speech regarding lawful activity and is not misleading, as long as the legislation directly advances a substantial governmental interest, and is not more extensive than necessary, the government may regulate commercial speech.³⁴

2. *Commercial v. Noncommercial Speech*

The Court has held that commercial speech is a lesser-protected category of speech.³⁵ However, it has yet to define commercial speech clearly and consistently. In three of the leading commercial speech cases, commercial speech has been defined in three different ways.³⁶

First, the *Virginia State Board of Pharmacy* Court defined commercial speech as expression that "propose[s] a commercial transaction."³⁷ Second, in *Central Hudson*, the court defined commercial speech as "expression related solely to the economic interests of the speaker and its audience."³⁸ Third, and finally, the

30. *Edenfield*, 507 U.S. at 770.

31. *See Central Hudson*, 447 U.S. at 568.

32. *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 490–91 (1995). In other words, the government did not want beer companies to compete with one another for their beer to have the highest alcohol content. But, completely banning the advertisement of alcohol content on beer labels was too strong a measure for the government to take in order to meet this interest, yet still remain within the bounds of the First Amendment.

33. *United States v. Edge Broadcasting Co.*, 509 U.S. 418, 429–31 (1993).

34. *See generally Central Hudson*, 447 U.S. 557.

35. *See supra* notes 17–19 and accompanying text.

36. *Bolger v. Youngs Drug Prods.*, 463 U.S. 60 (1983); *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557 (1980); *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976).

37. *Va. State Bd. of Pharmacy*, 425 U.S. at 762.

38. *Central Hudson*, 447 U.S. at 561.

Court stated in *Bolger v. Youngs Drug Products Corp.* that three characteristics “provide[] strong support for the . . . conclusion that . . . [such speech is] properly characterized as commercial speech.”³⁹ The Court has referred to each of these definitions throughout its commercial speech jurisprudence, and remains unsettled on whether it will adopt one to the exclusion of the others.

B. Constitutional Authority to Act

Even if a prohibition on advertisements that are thinly veiled offers of commercial sex with minors were to pass the *Central Hudson* test, such would not be enough for that prohibition to pass constitutional muster. The government actor must have the authority to act as well.⁴⁰

Statutes prohibiting advertisements of prostituted minors have been passed by some state legislatures.⁴¹ The federal government could also potentially act in this area. This Part will examine the various sources of constitutional authority for both state and federal action.

1. *The Commerce Clause*

The first source of constitutional authority to regulate Internet advertisements, such as those at issue here, is the Commerce Clause. Article I, Section 8, Clause 3 of the Constitution states that Congress shall have power “[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.”⁴² Here, the federal government is granted the power to regulate interstate commerce.⁴³

Because the Commerce Clause reserves to the federal government the sole authority to regulate interstate commerce, the states are barred from regulating in that area. The dormant commerce clause doctrine infers this lack of authority on the part of the states from the

39. *Bolger*, 463 U.S. at 67. The three characteristics are: 1) the speech is said to be an advertisement; 2) the speech refers to a specific product; and 3) there is economic motivation behind the speech; *Id.*

40. *See* U.S. CONST. art. I, § 1 (vesting Congress with the power to legislate that which is granted within the Constitution); *see also id.* amend. X (granting all powers not delegated to the federal government by the Constitution to the States or the people).

41. *See supra* note 12.

42. U.S. CONST. art. I, § 8, cl. 3.

43. *See* *Am. Libraries Ass’n v. Pataki*, 969 F. Supp. 160, 167–69 (S.D.N.Y. 1997).

affirmative grant to the federal government the power to regulate interstate commerce.⁴⁴

2. *The Communications Decency Act*

In 1996, Congress passed the Communications Decency Act (CDA), which regulates indecency and obscenity on the Internet.⁴⁵ Additionally, § 230 of the CDA stipulates that online service providers are not to be held as publishers (and therefore speakers) of content posted to their sites by third parties. As a result, 1) states are limited in their ability to promulgate Internet regulations, as the Act prohibits any state action that is contrary to the provisions of the Act, and 2) attempts to hold online service providers accountable for the content of their site are often thwarted by § 230.⁴⁶

In short, the CDA reserved Internet regulation as almost exclusively belonging in the federal domain, and also provided a strong shield for much of the speech posted on the Internet.

3. *The Tenth Amendment*

Still, the Tenth Amendment to the Constitution reserves for the states (or the people) any powers not therein delegated to the federal government.⁴⁷ Therefore, it can be argued that the power to enact protections for minors—such as the regulations proposed to hold online service providers accountable for knowingly allowing thinly veiled offers of prostituted minors to be posted on their sites—are in the regulatory domain of the states, and not the federal government.

A counterargument to this position is the fact that this particular regulation targets advertisements on the Internet.⁴⁸ And, the power to regulate the Internet rests with the federal government under the Commerce Clause.⁴⁹

44. *See id.*

45. Communications Decency Act, 47 U.S.C. § 230 (2006).

46. *See, e.g.,* Backpage.com, LLC v. McKenna, 881 F. Supp. 2d 1262, 1271–72 (W.D. Wash. 2012).

47. U.S. CONST. amend. X (“The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”).

48. Internet Archive, a non-profit founded to build an Internet library, has intervened in the suits brought by Backpage. Internet Archive is concerned about their own potential liability under statutes criminalizing online service providers for content posted to their sites by third parties. *See, e.g.,* Backpage.com, LLC v. Hoffman, 881 F. Supp. 2d 1262, 1267 (D.N.J. 2012).

49. *See supra* notes 34–35 and accompanying text.

C. Commercial Sex

1. Sex Trafficking

a. What Is Sex Trafficking?

Sex trafficking, along with labor trafficking, has been described as modern day slavery.⁵⁰ It is the coerced commercial sexual exploitation of a human being,⁵¹ and is both an international and a national issue.⁵² Sex trafficking does not require a border crossing,⁵³ but rather involves the forced sale of a human being for sex.⁵⁴

Sex trafficking is a form of human trafficking.⁵⁵ There are two broad categories of human trafficking: sex and labor.⁵⁶ While this Note focuses on sex trafficking, it will be helpful to step back and gain a picture of human trafficking in general before moving forward.

50. See e.g., Barack Obama, President of the United States, Remarks to the Clinton Global Initiative (Sept. 25, 2012) (“[Human trafficking] ought to concern every person, because it is a debasement of our common humanity. It ought to concern every community, because it tears at our social fabric. It ought to concern every business, because it distorts markets. It ought to concern every nation, because it endangers public health and fuels violence and organized crime. I’m talking about the injustice, the outrage, of human trafficking, which must be called by its true name—*modern slavery*. Now, I do not use that word “slavery” lightly. It evokes one of the most painful chapters in our nation’s history. But around the world, there’s no denying the awful reality.”) (emphasis added); see also POLARIS PROJECT, MODEL PROVISIONS OF COMPREHENSIVE STATE LEGISLATION TO COMBAT HUMAN TRAFFICKING 1 (2010), available at http://www.polarisproject.org/storage/documents/Final_Comprehensive_ModelLaw_8_2010.pdf (using “human trafficking” and “modern-day slavery” interchangeably). CNN has started a Freedom Project aimed at combating human trafficking, entitled “Ending Modern-Day Slavery”. CNN FREEDOM PROJECT, <http://thecnnfreedomproject.blogs.cnn.com> (last visited Nov. 17, 2013).

51. See William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, 22 U.S.C. § 7102 (2012).

52. See Trafficking Victims Protection Act, 22 U.S.C. § 7101 (2012); *Sex Trafficking in the U.S.*, POLARIS PROJECT, <http://www.polarisproject.org/human-trafficking/sex-trafficking-in-the-us> (last visited Oct. 26, 2013).

53. There is a misconception that human trafficking requires victims to be forced across state lines. While *some* human trafficking is, in fact, an international phenomenon in which the victims are forced across borders to be sold for sex or labor in the destination country, border crossing is not a requirement for human trafficking to occur. The ‘border-crossing’ misconception reflects an outdated, incorrect understanding of human trafficking. See generally STATE DEP’T, FACT SHEET: DISTINCTIONS BETWEEN HUMAN SMUGGLING AND HUMAN TRAFFICKING 2006, available at <http://www.state.gov/documents/organization/90541.pdf>.

54. See 22 U.S.C. § 7102(9) (2012); United Nations Convention Against Transnational Organized Crime, annex 2, art. 3, ¶ a, T.I.A.S. No. 13,127.

55. 22 U.S.C. § 7102(8)(A) (2012).

56. § 7102(8).

There are varying definitions of human trafficking in the wide array of legislative enactments on the issue, the most comprehensive of which is found in the U.N. *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children* (The Trafficking Protocol), which supplements the U.N. *Convention Against Transnational Organized Crime*.⁵⁷ The Trafficking Protocol defines “trafficking in persons” as,

[T]he recruitment, transportation, transfer, harbouring [sic] or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person for the purpose of exploitation.⁵⁸

This definition is notable for two reasons. First, it moves beyond an outdated understanding of human trafficking that focused on crossing state lines.⁵⁹ Second, the Trafficking Protocol definition can be read as reflecting a more nuanced understanding of the power and control tactics abusers utilize than that which has been embraced in the past.⁶⁰ Previously, trafficking was arguably understood as only occurring where explicit, often physical force was used.⁶¹ The Trafficking Protocol definition, however, takes into account individuals who are oppressed by political, social, or economic conditions and are in positions of vulnerability, and further identifies those who exploit this power differential by selling such vulnerable humans for sex or labor as human traffickers.⁶²

As noted above, the definition of trafficking in the Trafficking Protocol is the most comprehensive. Yet, there are other definitions

57. See United Nations Convention Against Transnational Organized Crime, *supra* note 54, annex 2.

58. *Id.*, annex 2, art. 3, ¶ a.

59. See *id.* Because recruiting or harboring a victim for the purpose of exploitation is sufficient to constitute trafficking, the definition is not limited to exploitation that occurs in the context of transferring or transporting victims across state lines. LAWYER’S MANUAL ON HUMAN TRAFFICKING: PURSUING JUSTICE FOR VICTIMS 1, 27–28 (Jill Laurie Goodman & Dorchen A. Leidholdt eds., 2011) [hereinafter, LAWYER’S MANUAL ON HUMAN TRAFFICKING].

60. See United Nations Convention Against Transnational Organized Crime, *supra* note 54, annex 2, art. 3, ¶ a; LAWYER’S MANUAL ON HUMAN TRAFFICKING, *supra* note 59, at 2729.

61. LAWYER’S MANUAL ON HUMAN TRAFFICKING, *supra* note 59, at 28.

62. Because the Trafficking Protocol definition includes “force or . . . the abuse of power or of a position of vulnerability,” it leaves room for such an interpretation. United Nations Convention Against Transnational Organized Crime, *supra* note 54, annex 2, art. 3, ¶ a (emphasis added); see LAWYER’S MANUAL ON HUMAN TRAFFICKING, *supra* note 59, at 28.

within federal, state, and local legislation. These definitions are significant and necessary to understand because they are controlling in their respective jurisdictions.

The federal definition in the Trafficking Victims Protection Act (TVPA)⁶³ narrows the field slightly as to who can be identified as a trafficking victim.⁶⁴ The definition requires a showing of force, fraud, or coercion for adult domestic victims of sex trafficking.⁶⁵ However, no showing of force, fraud, or coercion is necessary for trafficking of minors to be actionable.⁶⁶

Many state and local definitions narrow the field even further. For example, some state anti-trafficking statutes fail to state that sex trafficking occurs even where there is no crossing of a border.⁶⁷ Additionally, some state statutes do not include a provision that exempts minors from showing coercion for actionable trafficking.⁶⁸

63. Trafficking Victims Protection Act, 22 U.S.C. § 7102 (2012). The TVPA was reauthorized most recently in 2008. 22 U.S.C. §§ 7101–7200 (2012).

64. See Lindsay Strauss, *Adult Domestic Trafficking and the William Wilberforce Trafficking Victims Protection Reauthorization Act*, 19 CORNELL J.L. & PUB. POL'Y 495, 532 (2010) (providing a review of the TVPA and alterations in subsequent reauthorizations).

65. See *id.* (arguing that “[t]he force, fraud, or coercion requirement must be removed for all trafficking prosecutions,” thereby granting adult trafficking victims the same legal protection as minors). Compare 22 U.S.C. §§ 7102(8)(A) (2012) (“The term ‘severe forms of trafficking in persons’ means—(A) sex trafficking in which a commercial sex act is *induced by force, fraud, or coercion*, or in which the person induced to perform such act has not attained 18 years of age.” (emphasis added), with United Nations Convention Against Transnational Organized Crime, *supra* note 54, annex 2, art. 3, ¶ a (“[T]he recruitment, transportation, transfer, harbouring [sic] or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the *abuse of power or of a position of vulnerability* or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person for the purpose of exploitation.” (emphasis added)). The Trafficking Protocol definition allows for the interpretation that human trafficking does not require outright force or coercion, whereas the TVPRA definition leaves no room for such interpretation, as it makes explicit that a showing of force, fraud, or coercion is needed for actionable trafficking of adult victims.

66. “The term ‘severe forms of trafficking in persons’ means—(A) sex trafficking in which a commercial sex act is induced by force, fraud, or coercion, *or in which the person induced to perform such act has not attained 18 years of age.*” § 7102(8)(A) (emphasis added).

67. See generally POLARIS PROJECT, 2012 MAP (2012) [hereinafter STATE RATINGS], available at <https://na4.salesforce.com/sfc/p/300000006E4SZ2vOAvBtmKICytWEBvS.6oLeE4k>; POLARIS PROJECT, TOP 15 PROBLEM AREAS IN STATE BILLS ON TRAFFICKING IN PERSONS (2006), available at http://www.polarisproject.org/storage/documents/policy_documents/Top%2015%20Problem%20Areas%20in%20state%20Bills%20on%20Trafficking.pdf.

68. See *Top 15 Problem Areas in State Bills on Trafficking in Persons*, *supra* note 67.

As a result, trafficked minors in these states who lack sufficient proof of the coercion they experienced are not identified as victims.

Statutory definitions of sex trafficking vary somewhat significantly across jurisdictions. To the extent that this is true, it is a reflection of how narrowly or broadly each jurisdiction chooses to cast its net when identifying who qualifies as a victim of sex trafficking. In this Note, the purpose of reviewing the definitions is simply to gain a sense at the outset of what sex trafficking is. The main objective here is: 1) to realize that sex trafficking exists, and has been widely recognized under the law; and 2) to tease out from these definitions what the term “sex trafficking” means in the context of this Note.

Here, because this Note concludes with a suggestion for federal legislation to prevent sex trafficking, the definition assumed will be the one that the federal government articulated in the TVPA. This definition, as noted above, defines sex trafficking as “a commercial sex act [which] is induced by force, fraud, or coercion, or in which the person induced to perform such act has not attained 18 years of age.”⁶⁹

Next, this Note will explore what makes an individual vulnerable to sex trafficking, and what societal conditions further the prevalence of sex trafficking.

b. Why Does Sex Trafficking Persist?

Sex trafficking exists where vulnerability meets exploitation.⁷⁰ Thus, some may argue that it persists because the victims are so vulnerable. However, there is a general consensus within the human trafficking community that sex trafficking really persists because it is fueled by the demand for commercial sex.⁷¹ To flesh out the contributing factors to sex trafficking a bit more fully, it is helpful to examine the issue in the context of “push” and “pull factors.”⁷²

69. 22 U.S.C. § 7102(8)(A) (2012).

70. See *supra* note 48 and accompanying text.

71. See, e.g., SHARED HOPE INT’L, *supra* note 8; *Why Trafficking Exists*, POLARIS PROJECT, <http://www.polarisproject.org/human-trafficking/overview/why-trafficking-exists> (last visited Oct. 28, 2013) (describing sex trafficking as a “market-driven criminal industry that is based on the principles of supply and demand,” and arguing that the solution to human trafficking lies in addressing demand and “alter[ing] the overall market incentives of high-profit and low-risk that traffickers currently exploit”).

72. In other words, we will look at push factors (those factors that make certain individuals particularly vulnerable to fall victim to human trafficking), and pull factors (those factors in society that permit—and even encourage—the persistence of sex trafficking).

“Pull factors” are societal conditions that allow sex trafficking to flourish.⁷³ They are factors that fuel the market for commercial sex, and therefore are helpful in understanding why sex trafficking persists.⁷⁴ As mentioned previously, demand is a strong pull factor for sex trafficking.⁷⁵ Demand for prostitution, both in the United States and abroad, creates one of the most profitable markets for organized crime in the world: global demand for human trafficking generates \$32 billion annually,⁷⁶ \$27.8 billion of which is generated by sex trafficking alone.⁷⁷ Additionally, human traffickers glean these profits through a venture which is, currently, fairly low-risk.⁷⁸ Beyond this factor, cultural tolerance of commercial sex—even glorification of the lifestyle surrounding it in the United States⁷⁹—is a pull factor that contributes to the persistence of sex trafficking.⁸⁰ The combination of demand from johns, the low-risk, high-profit attractiveness of the market for traffickers to engage in, and cultural tolerance of both are all strong pull factors that help sex trafficking persist.

“Push factors” are the conditions of individuals that make them especially vulnerable to victimization in sex trafficking.⁸¹ These factors are what make some individuals more likely than others to be drawn in and exploited by the commercial sex industry.⁸² One strong push factor is gender. Females are far more vulnerable to sex trafficking than males.⁸³ Additional push factors are poverty,⁸⁴

73. See *supra* note 72 and accompanying text.

74. *Id.*

75. See *supra* note 36 and accompanying text.

76. Patrick Belsler, *Forced Labor and Human Trafficking: Estimating the Profits*, 1, 15, 18 (Int’l Labour Org. Working Paper No. 42, 2005).

77. *Id.* at 15.

78. See *Why Trafficking Exists*, *supra* note 71 (“When the community is unaware of this issue, when government and community institutions are not trained to respond, when there are ineffective or dormant laws to address the crime, when safety nets for victims do not exist, and when law enforcement does not investigate and prosecute the crime, human traffickers perceive little risk or deterrence to affect their criminal operations.”).

79. See SHARED HOPE INT’L, *supra* note 8 at 2 (identifying the glorification of pimps in popular American culture as contributing to the flourishing of sex trafficking).

80. See *id.*

81. See *supra* note 72 and accompanying text; see also LAWYER’S MANUAL ON HUMAN TRAFFICKING, *supra* note 59, at 7.

82. See LAWYER’S MANUAL ON HUMAN TRAFFICKING, *supra* note 59, at 7.

83. Ninety-eight percent of the individuals exploited in the commercial sex industry are women and girls. INT’L LABOUR ORG., MINIMUM ESTIMATE OF FORCED LABOUR IN THE WORLD 6 (2005), available at http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---declaration/documents/publication/wcms_081913.pdf.

homelessness,⁸⁵ racial discrimination,⁸⁶ mental illness,⁸⁷ and an unstable home life.⁸⁸ Beyond these factors, the majority of girls⁸⁹ who are trafficked in the United States have been sexually abused in the past, and have often run away from home to flee abuse.⁹⁰ In short, many victims have already experienced difficult life circumstances, and are desperate to find a better life.⁹¹

Because of the high demand for commercial sex and the low-risk high-profit nature of the market, traffickers are motivated to continue their work. They continue to seek out vulnerable victims, take advantage of gender, racial, and socioeconomic inequalities, and commercially sexually exploit young women and girls.

c. Commercial Sexual Exploitation of Minors

The commercial sexual exploitation of minors is a common occurrence. Every year, there are 1.2 million children trafficked worldwide.⁹² Domestically, it is estimated that 244,000 to 300,000 American children annually are at risk of commercial sexual

84. Although sex trafficking victims come from every socioeconomic status, individuals living in poverty are more likely to be exploited than their more affluent counterparts. *See* ESTES & WEINER, *supra* note 2, at 41.

85. Children who run away from their homes, or who are thrown out by guardians, are especially at risk for commercial sexual exploitation. They need both shelter and love. Pimps recognize this, and offer both to lure the young. *See* NATIONAL CENTER FOR MISSING AND EXPLOITED CHILDREN, *FEMALE JUVENILE PROSTITUTION: PROBLEM AND RESPONSE* (1992).

86. Although sex trafficking touches all races, minorities are more likely to be commercially sexually exploited than their white counterparts. *See* Jamal Bell, *Race and Human Trafficking in the U.S.: Unclear but Undeniable*, HUFFINGTON POST (May 10, 2010), http://www.huffingtonpost.com/jamaal-bell/race-and-human-traffickin_b_569795.html.

87. For example, depression is a push factor. *See* ESTES & WEINER, *supra* note 2, at 63.

88. Individuals who come from homes of family dysfunction, parental drug dependency, or where there is a history of physical and/or sexual assault are more likely than others to be victims of sex trafficking. *See* ESTES & WEINER, *supra* note 2, at 40.

89. *See* SHARED HOPE INT'L, *supra* note 8, at 86 ("Evidence suggests that children under the age of eighteen now constitute the largest group of trafficking victims in the United States."). Also, for every 1356 girls commercially sexually exploited, there are thirteen boys that have suffered the same fate. *Id.* This, again, emphasizes the gender dynamic at play in commercial sexual exploitation.

90. *See generally* ESTES & WEINER, *supra* note 2.

91. *See generally* *The Victims*, POLARIS PROJECT, <http://www.polarisproject.org/human-trafficking/overview/the-victims>.

92. INT'L PROGRAMME ON THE ELIMINATION OF CHILD LABOUR, *EVERY CHILD COUNTS: NEW GLOBAL ESTIMATES ON CHILD LABOUR 25* (2002).

exploitation.⁹³ In the United States, the average age of entry into the commercial sex industry is twelve to fourteen years old.⁹⁴ The fact that there is an exorbitant number of minors in the sex industry does not indicate that there is a large number of pedophiles seeking commercial sex. Rather, it reflects a desire of regular johns to have sex with very young women.⁹⁵ They want young women because they find them more attractive, and they also think the possibility of contracting a sexually transmitted disease is less.⁹⁶ Beyond those reasons, many children are forced by pimps to present themselves as much older than they are.⁹⁷ So, the children are dressed up to seem too old to be children, but young enough to still entice men's desire for youth.⁹⁸

Accordingly, the majority of commercially sexually exploited women in the United States enter the industry as children.⁹⁹ The fact that they are children is intentionally altered by pimps, and happily ignored by the johns buying sex from these exploited children.¹⁰⁰ The

93. ESTES & WEINER, *supra* note 2, at 146–48.

94. *Chapter 4: Non-Cyber Sexual Exploitation of Children*, U.S. DEP'T JUSTICE, <http://www.justice.gov/oig/reports/FBI/a0908/chapter4.htm> (last visited Nov. 17, 2013).

95. *See, e.g.*, LINDA A. SMITH, ET AL., THE NATIONAL REPORT ON DOMESTIC MINOR SEX TRAFFICKING: AMERICA'S PROSTITUTED CHILDREN 19 (2009), *available at* http://sharedhope.org/wp-content/uploads/2012/09/SHI_National_Report_on_DMST_2009.pdf (“[Sixty-five percent] of the johns that go on the Internet are more responsive if the ads have age descriptors like ‘young’ or ‘barely legal’ attached to them—65% are more responsive to that.”).

96. *See* SHARED HOPE INT'L, *supra* note 8 at 15–16 (“The marketplace of victimization operates according to the economic laws of supply and demand, much like any legitimate market. As in any market, supply and demand for commercial sexual services are correlated . . . Supply, while it can and will affect the market structure, increases to meet a growing demand for sexual services . . . [E]vidence suggests that supply is becoming younger in response to buyers' demands for youth due to perceptions of healthiness and vulnerability.”). Also, “[i]n a sexually charged society that both encourages promiscuity and covets the innocence of youth, it follows that the demand for young victims will rise to meet the cultural glorification of underage sexuality.” *Id.*

97. *See, e.g.*, LINDA SMITH, RENTING LACY: A STORY OF AMERICA'S PROSTITUTED CHILDREN 12–13 (2011) (discussing the “Packaging of Product (Child)”).

98. *Id.* at 11 (“As with any product, the seller seeks to meet the desire of the buyer. In this case, the buyer desires a young girl who appears to be equal parts innocent child and slut.”).

99. *See supra* note 94 and accompanying text.

100. *See supra* notes 92–98 and accompanying text.

law, however, has begun to recognize the tragedy that thousands of children are being sold for sex on a regular basis,¹⁰¹ as explained next.

2. *Anti-Trafficking Legislation*

a. *History of Anti-Trafficking Legislation in the United States*

The history of anti-trafficking legislation in the United States is, for the most part, fairly recent.¹⁰² In 2000, Congress passed the William Wilberforce Trafficking Victims Protection Act (TVPA) of 2000.¹⁰³ The TVPA is a comprehensive federal law designed to combat trafficking in persons.¹⁰⁴ Its primary aims are prevention, protection, and prosecution.¹⁰⁵ It was reauthorized through the Trafficking Victims Protection Reauthorization Acts (TVPRA) of 2003, 2005, and 2008.¹⁰⁶ However, the federal government failed to reauthorize the law again in 2011.¹⁰⁷ The TVPA also provides penalties for traffickers. It criminalizes the trafficking of an adult victim through the use of force, fraud, or coercion.¹⁰⁸ Additionally, it criminalizes the trafficking of any minor victim.¹⁰⁹

A majority of states have also enacted anti-trafficking legislation.¹¹⁰ Forty-eight out of fifty states have enacted a statute that criminalizes

101. *See, e.g.*, William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, 22 U.S.C. § 7102(14) (2012) (encompassing all commercially sexually exploited minors in the definition of trafficking victim); Safe Harbor for Exploited Children Act, N.Y. SOC. SERV. LAW §§ 447a-b (McKinney 2010) (providing protective measures for child victims of sex trafficking, rather than the criminalization that often occurred in the past).

102. The only prominent exception to the more recent legislation to be detailed in this Part is The Mann Act, which was passed in 1910. The Mann Act made interstate sex trafficking a federal crime. *See* 18 U.S.C. §§ 2421–2424 (2012).

103. Trafficking Victims Protection Act, 22 U.S.C. § 7101 (2012).

104. *See id.*

105. *See id.*

106. William Wilberforce Trafficking Victims Protection Reauthorization Act of 2003, 22 U.S.C. § 7102 (Supp. 2003); William Wilberforce Trafficking Victims Protection Reauthorization Act of 2005, 22 U.S.C. § 7102 (Supp. 2005); William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, 22 U.S.C. § 7102 (2012).

107. This failure means that funding appropriations have not been made for the law, although it will continue in force as good law. *See* Trafficking Victims Protection Reauthorization Act of 2011, S. 1301, 112th Cong.

108. 22 U.S.C. § 7102 (2012).

109. *Id.* The decision to eliminate the coercion requirement for minor victims makes it easier to establish them as trafficking victims, as the definition makes coercion for minor victims understood to be inherent and unnecessary to prove.

110. *See generally* STATE RATINGS, *supra* note 67.

sex trafficking.¹¹¹ Additionally, some states have codified measures to protect victims. For example, some states, in addition to a general anti-trafficking statute, have begun to pass Safe Harbor laws.¹¹² These are additional anti-trafficking measures aimed at protecting minor victims of commercial sexual exploitation.¹¹³ Polaris Project, a leading anti-trafficking agency, has suggested that a model Safe Harbor law includes three elements.¹¹⁴ According to Polaris, the law should: 1) prevent minor victims of sex trafficking from being prosecuted for prostitution; 2) ensure that coercion is not required to prosecute sex trafficking of children; and 3) protect child victims of sex trafficking by providing them with specialized services.¹¹⁵ These measures to criminalize traffickers and provide services to victims combine to reflect the ultimate policy goal of victim protection.

Current legislation, as indicated above, is trending towards prosecuting traffickers and protecting victims. While these steps are laudable, and necessary for the elimination of human trafficking, critical gaps remain in the current legal structure.

b. Critical Gap in the Current Legal Structure

One of the most critical gaps that exists in the current anti-trafficking structure is the failure to address the complete system of parties that further and profit from human trafficking.¹¹⁶ The federal and state governments have focused on the traffickers who commercially sexually exploit women and children.¹¹⁷ Yet, the fact that these traffickers work within an entire system that supports, and also profits from, the criminal enterprise of sex trafficking, has yet to be effectively addressed.

111. *See id.*

112. *See, e.g.*, Safe Harbor for Exploited Children Act, N.Y. SOC. SERV. LAW §§ 447a–b (McKinney 2010). States that have passed Safe Harbor laws include Connecticut, Florida, Illinois, Massachusetts, Minnesota, New Jersey, New York, Ohio, Tennessee, Vermont, and Washington. POLARIS PROJECT, *supra* note 110, at 2.

113. *See* STATE RATINGS, *supra* note 67. The laws aim to provide services to minor victims of commercial sex trafficking, and decrease criminalization of children identified as sex trafficking victims.

114. *See* POLARIS PROJECT, *supra* note 50, at 1.

115. *See id.*

116. Current legislation criminalizes primarily traffickers, the parties who exert force over the victims to sell themselves for sex. *See* William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, 22 U.S.C. § 7102 (2012).

117. *See supra* Part I.D.

Facilitators of sex trafficking, who almost always escape prosecution¹¹⁸ yet still profit from the sexual exploitation of children, include middlemen such as taxicab drivers, hotel workers, owners of adult sexual entertainment venues, and online classified advertising websites.¹¹⁹ These facilitators are instrumental players in a complex system that furthers, and profits from, the sex trafficking of minors.

The facilitators further, and profit from, sex trafficking in a variety of capacities. Taxicab drivers collaborate with traffickers, and receive substantial payments for transporting girls to and from brothels and johns.¹²⁰ Owners of highly profitable sexual entertainment venues often employ minors, claiming they were unaware of the child's age.¹²¹ Online classified advertising websites, such as Craigslist and Backpage, have made millions of dollars in profits by allowing third parties to post advertisements for sexual services on their websites,¹²² turning a blind eye to the reality that many girls advertised on their sites are likely child sex trafficking victims.

In fact, the Internet has not only facilitated the child sex industry, but has allowed it to grow exponentially in recent years. Shared Hope International, a leading anti-trafficking organization, reports that “[t]he Internet and other technological advancements have opened up an avenue to commercial sexual exploitation previously unattainable by most people.”¹²³ The Shared Hope Report goes on to discuss not only how the Internet has facilitated the work of traffickers to exploit their victims, but how it also made the commercial sex market increasingly accessible. Every home with Internet access now has access to commercial sex.¹²⁴ Thus, online classified advertising websites have been heavily criticized for facilitating prostitution, an illegal activity.¹²⁵ As a result, Craigslist

118. *See* SMITH, *supra* note 95, at 28. In only one example of ten assessments across the country was a facilitator arrested.

119. *See id.* at 27–28.

120. For example, taxicab drivers in Las Vegas receive one third of the payment from the johns. *See id.* at 27.

121. *See id.* Owners of a Dallas strip club, Diamond Cabaret, claimed they thought a twelve-year-old in their employ was over eighteen years of age.

122. *See supra* note 5 and accompanying text.

123. *See* SMITH, *supra* note 95, at 19.

124. *See id.* Statistics also support this conclusion. “One service provider reported that over a two-year period, an 800% increase was seen in the number of children reporting that technology was used in some way to facilitate prostitution.” *Id.* at 28.

125. They have been criticized by legislators in Congress, by state Attorneys General, and the public at large. *Id.* at 28.

shuttered their adult services section in 2010.¹²⁶ Backpage almost immediately acquired all of the business, and is now the leading online classified advertising website for the sale of sex.¹²⁷

Current legislation is primarily directed only at two parties—the traffickers and johns—in the complex system that has made sex trafficking into a booming enterprise.¹²⁸ Despite some small steps to hold middlemen such as taxicab drivers accountable, the facilitators of sex trafficking are largely left untouched.¹²⁹ Essentially, “[f]acilitators, or accomplices, avoid direct responsibility for sex trafficking crimes by creating distance from the immediate criminal activity but they profit from and make possible the sex trafficking of children.”¹³⁰

c. Statutes Aimed at Addressing the Critical Gap

Some states have tried to address this gap through legislation.¹³¹ Their primary focus has been to address online websites where advertisements for sex are posted.¹³² These states have drafted, and some have passed, statutes to hold online facilitators accountable for sex trafficking.¹³³ Yet, these states have encountered significant obstacles in drafting and implementing effective legislation.

For example, Washington passed Senate Bill No. 6251, which was scheduled to take effect on June 7, 2012., and was repealed in 2013.¹³⁴

126. “Craigslist told Congress . . . that it had permanently terminated its Adult Services section in response to criticism that it was facilitating child exploitation and prostitution.” Ryan Singel, ‘Adult Services’ Shutdown Is Permanent, *Craigslist Tells Congress*, WIRED (Sept. 15, 2010), <http://www.wired.com/business/2010/09/adult-services-shutdown-is-permanent-craigslist-tells-congress>.

127. *See supra* note 5 and accompanying text.

128. *See supra* Part I.D.

129. *Id.*

130. *See SMITH, supra* note 95, at 27.

131. For example, Tennessee and New Jersey have already passed legislation. *See supra* note 12. Connecticut and New York have similar legislation pending. *See supra* note 12.

132. Letter Brief in Opposition to Plaintiffs’ Application for Issuance of a Temporary Restraining Order at 2, *Backpage.com, LLC v. Hoffman*, No. 2:13-cv-03952-DMC-JAD (D.N.J. June 27, 2013), ECF No. 9 (referencing the rationale behind the recently enacted New Jersey statute: “The Act addresses a key method of facilitating the human trafficking of minors, specifically advertisements for commercial sex acts with children posted on internet websites and other internet services that actually includes the depiction of a minor.”).

133. *See supra* notes 12–13 and accompanying text.

134. Complaint to Declare Invalid and Enjoin Enforcement of Washington Senate Bill 6251 for Violation of the Communications Decency Act, and the First and Fifth Amendments and Commerce Clause of the United States Constitution at 3,

While in effect, it created the felony offense of “advertising commercial sexual abuse of a minor.”¹³⁵ The substantive provisions provided:

(1) 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.

(a) “Advertisement for a commercial sex act” means any advertisement or offer in electronic or print media, which includes either an explicit or implicit offer for a commercial sex act to occur in Washington.

(b) “Commercial sex act” means any act of sexual contact or sexual intercourse, both as defined in chapter 9A.44 RCW, for which something of value is given or received by any person.

(c) “Depiction” as used in this section means any photograph or visual or printed matter as defined in RCW 9.68A.011(2) and (3).

(2) In a prosecution under this statute, it is not a defense that the defendant did not know the age of the minor depicted in the advertisement. It is a defense, which the defendant must prove by a preponderance of the evidence, that the defendant made a reasonable bona fide attempt to ascertain the true age of the minor depicted in the advertisement by requiring, prior to publication, dissemination, or display of the advertisement, production of a driver’s license, marriage license, birth certificate, or other governmental or educational identification card or paper of the minor depicted in the advertisement and did not rely solely on oral or written representations of the minor’s age, or the apparent age of the minor as depicted. In order to invoke the defense, the defendant must produce for inspection by law enforcement a record of the identification used to verify the age of the person depicted in the advertisement.¹³⁶

Simply put, the statute made it a felony to “knowingly publish, disseminate, or display or to “directly or indirectly” cause content to be published, disseminated, or displayed if it contains a “depiction of a minor” and any “explicit or implicit offer” of sex for “something of

Backpage.com, LLC v. McKenna, 881 F. Supp. 2d 1262 (W.D. Wash. June 4, 2013) (No. 2:12-cv-00954); *see also* WASH. REV. CODE ANN. § 9.68A.104 (repealed 2013).

135. WASH. REV. CODE ANN. § 9.68A.104 (repealed 2013). The repeal of this state statute exemplifies the need for federal action.

136. *Id.* (repealed 2013).

value.”¹³⁷ Under the law, it was not a defense that the defendant did not know the age of the person depicted, and the defendant could not rely on representation by or the apparent age of the person depicted. The only available defense arose if a defendant obtained and retained government or school identification for the person depicted.¹³⁸

A similar law was passed in Tennessee.¹³⁹ The Tennessee legislature, in a 2012 Amendment to the Trafficking for Commercial Sex Act, enacted a provision that “punishes advertising minor victims of sex trafficking if the person knowingly sells or offers to sell an advertisement that would appear to a reasonable person to be for the purpose of engaging in commercial sex.”¹⁴⁰ This provision means that Backpage can be held accountable for selling online classifieds ads that facilitate sex trafficking if they do not make a reasonable attempt to verify the age of the minor.¹⁴¹ Yet, Backpage successfully sued to prevent implementation of this legislation.¹⁴²

New Jersey has also recently passed similar legislation,¹⁴³ and Backpage is again fighting implementation.¹⁴⁴ Thus far, Backpage has again been successful in its efforts to do so.¹⁴⁵ Connecticut and New York are considering similar bills as those passed in New Jersey and Tennessee.¹⁴⁶

Beyond these state laws, in August 2012, the National Association of Attorneys General sent a letter to Backpage expressing concern about human traffickers’ use of their website.¹⁴⁷ Forty-six Attorneys General signed the letter, calling for Backpage to take meaningful action to curb its facilitation of sex trafficking and to provide

137. *Id.* (repealed 2013).

138. *See* Backpage.com, LLC v. McKenna, 881 F. Supp. 2d 1262, 1268 (W.D. Wash. 2012).

139. TENN. CODE ANN. § 39-13-314 (West 2013).

140. *Id.*

141. *See id.*

142. *See* Backpage.com, LLC v. Cooper, No. 3:12-cv-00654, 2013 WL 1558785 (M.D. Tenn. Jan. 3, 2013).

143. N.J. STAT. ANN. § 2C:13-10 (West, Westlaw through 2013 Legis. Sess.).

144. *See* Verified Complaint to Declare Invalid and Enjoin Enforcement of N.J.S.A. §2C:13-10 (P.L. 2013, c.51 § 12), Backpage.com, LLC v. Hoffman, No. 2:13-cv-03952-DMC-JAD, 2013 WL 4502097 (D.N.J. Jun. 26, 2013).

145. *See* Backpage.com, LLC v. Hoffman, No. 2:13-cv-03952-DMC-JAD, 2013 WL 4502097 (D.N.J. Aug. 9, 2013).

146. *See* H.B. 5504, 2012 Gen. Assemb. (Conn. 2012); N.Y.S. 7105A, 2012 Leg. (N.Y. 2012).

147. Letter from Nat’l Ass’n of Attorneys Gen. to Samuel Fifer, Counsel, Backpage.com, LLC (Aug. 31, 2011), *available at* <http://www.tn.gov/attorneygeneral/cases/backpage/backpageletter.pdf>.

substantive assistance to authorities in the prevention, investigation, and prosecution of this crime.¹⁴⁸

There has been some initial action taken to address this gap, but this action has not been without problems. Backpage sued three states (Washington, Tennessee and New Jersey), and won a preliminary injunction preventing enforcement in all three states of their respective statutes aimed at holding online service providers accountable for facilitating the sex trafficking of children.¹⁴⁹ Ultimately, Washington State—the first to be sued—felt compelled to settle with Backpage, as the CDA prevented the promulgation of any effective state legislation to hold Backpage accountable for providing a forum for the commercial sexual exploitation of minors.¹⁵⁰ Based on the provisions of the CDA and the preliminary injunctions granted in Tennessee and New Jersey, a similar outcome is likely in those two states as well.

D. Problems with State Efforts to Restrain Backpage

There are two main obstacles to states' attempts at holding Backpage accountable for its role as a facilitator in the sex trafficking of minors. First, § 230 of the CDA prevents treating online service providers as the speaker of any content that is posted on their sites by a third party.¹⁵¹ Effectively, this federal statute prevents states from holding online service providers criminally liable for content posted by users of their sites.¹⁵² Second, there are First Amendment challenges. The statutes that have been drafted thus far have failed to be narrowly tailored such that: 1) they regulate the unprotected speech of advertising illegal activity without also infringing on the right to engage in the protected speech of advertising legitimate escort services, and 2) they criminalize only the actions of facilitators in the sex industry, rather than also regulating the broader community of online service providers that do not actively facilitate the sexual abuse of children.

148. *See id.*

149. *See, e.g.*, 881 F. Supp. 2d 1262 (W.D. Wash. 2012).

150. *See* Backpage.com, LLC v. Hoffman, No. 2:13-cv-03952-DMC-JAD, 2013 WL 4502097 (D.N.J. Aug. 9, 2013); TENN. CODE ANN. § 39-13-314 (West 2013); Press Release, Wash. State Office of the Attorney Gen., State Attorney General's Office Resolves Backpage Lawsuit (Dec. 7, 2012), <http://www.atg.wa.gov/pressrelease.aspx?id=30787#.UkYM3BaQB8s>.

151. 47 U.S.C. § 230 (2006).

152. *Id.*

II. ARGUMENTS FOR WHY WEBSITES WOULD AND WOULD NOT BE SUBJECT TO FIRST AMENDMENT RIGHTS

This Part examines the application of the First Amendment to the case at hand. It presents arguments addressing why online service providers should be held accountable for their facilitation of the commercial sexual exploitation of children, or on the other hand why they should be immune from criminal prosecution for facilitation because of their First Amendment freedoms.

A. Why Websites Would Be Subject to First Amendment Rights

1. *State Legislation Is Preempted by § 230 of the CDA*

One aim of the CDA is to ensure unfettered speech on the Internet.¹⁵³ To this end, § 230 of the CDA makes explicit that online service providers are not to be held accountable as the speakers of any content posted to their sites.¹⁵⁴ Moreover, this provision trumps any and all state legislation on the matter.¹⁵⁵

As such, § 230 of the CDA ensures that online service providers may freely provide forums for speech, and prevents states from inhibiting action to that end. States cannot hold online service providers accountable for any speech posted to their sites, as the federal government's action in § 230 of the CDA is supreme.

2. *Online Service Providers Are Not the Speakers; They Are Passive Third Parties*

Any state's attempt to hold websites such as Backpage accountable for advertisements for commercial sex with children that have been posted by third parties are thwarted by § 230; the CDA does not allow legislation aimed at treating online service providers as the speakers of information posted to their sites.¹⁵⁶ Rather, the CDA limits accountability for such speech to the speakers themselves. In this case, then, liability for this type of speech is limited to the traffickers who create and post the advertisements; Backpage cannot

153. *See id.*

154. The statute reads, in relevant part, "No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider." § 230(c)(1).

155. U.S. CONST. art. VI, cl. 2. The Supremacy Clause of the United States Constitution holds federal laws over state laws in all circumstances where the federal government has acted within its authority.

156. § 230(c)(1).

be treated as the speaker of the advertisements. Online service providers, under the CDA, are not speakers—they are passive third parties.¹⁵⁷

An argument can be made that neither the states nor the federal government may hold online service providers accountable for third parties' postings offering commercial sex with children.

3. Central Hudson *Prevents Regulation*

Even if the government were not prevented by the CDA to act in this area, the First Amendment doctrine for commercial speech, under *Central Hudson*, could still prevent the government from regulating the advertisements posted on Backpage.

a. *Prong Three of Central Hudson: The State's Interest Is Not Directly Advanced by the Legislation*

First, the third prong of the *Central Hudson* test requires that regulation of commercial speech *directly advance* a substantial state interest.¹⁵⁸ Here, one argument is that the legislation that has so far been proposed arguably does not directly advance the substantial interest of protecting minors from commercial sexual exploitation.

In the instant case, regulating the fora where advertisements for sex with children are posted is arguably a step removed from the interest of protecting the children. Legislation to inhibit the advertisements—and therefore protect the children—should arguably be aimed directly at those that post the advertisements and sell the children, rather than at the websites that provide the forum for the advertisements to be posted.

Legislation aimed at the traffickers who post advertisements online and sell children for sex would directly advance the substantial interest of protecting children from commercial sexual exploitation. Here, however, one could argue that although regulating online service providers may advance this interest, it arguably does not do so *directly*—as is required by the *Central Hudson* test—but instead would be only indirectly advancing the interest, and therefore unconstitutionally regulating commercial speech.

157. *See id.*

158. *See supra* notes 28–29 and accompanying text.

b. Prong Four of Central Hudson: Legislation Is Not Narrowly Tailored

Moreover, even if regulation of online service providers was held to directly advance the substantial interest of protecting children from sexual abuse, legislation that has thus far been proposed to this end has arguably not been narrowly tailored. Rather than reaching only those websites that actively facilitate sales of children for sex—such as Backpage—the legislation would also arguably include within its ambit other online service providers that, while not serving as regular facilitators in the sale of minors for sex, may nonetheless have advertisements posted on their sites for which they might be held liable.¹⁵⁹ This overbreadth could lead to the chilling of Internet speech, as online service providers eliminate forums for fear of liability.

Because the legislation proposed thus far would arguably reach all service providers—rather than only those that regularly facilitate the commercial sexual abuse of children—it arguably does not meet the fourth prong of the *Central Hudson* test.

B. Why Websites Would Not Be Subject to First Amendment Rights

1. The Government Has a Strong Interest in Protecting Minors from Sexual Exploitation, and has a History of Overcoming Even First Amendment Protections

The founding fathers¹⁶⁰—and the Supreme Court, through constitutional interpretation—have made clear that upholding the First Amendment freedom of speech is of paramount importance in our democracy.¹⁶¹ Nevertheless, the Court has held that freedom of speech does have its limits. It is, under very limited circumstances, balanced with—or trumped by—other highly compelling societal

159. For example, Internet Archive has been partnering with Backpage in the legal battles, and is vehemently opposed to regulation in this area despite the fact that they are not an online facilitator of commercial sexual exploitation of minors. See *Classified Ad Site Backpage in Crosshairs Over Child Sex Ads*, WMSV.COM (July 30, 2013), <http://wsmv.membercenter.worldnow.com/story/22970544/classified-ad-site-backpage-in-crosshairs-over-child-sex-ads>.

160. See U.S. CONST. amend. I.

161. See, e.g., *Fed. Election Comm'n v. Mass. Citizens for Life, Inc.*, 479 U.S. 238, 264 (1986) (characterizing freedom of speech as a fundamental liberty, and identifying it as “the indispensable condition of nearly every other form of freedom”).

concerns.¹⁶² Here, the Court has consistently and unequivocally upheld the protection of minors from sexual abuse as one of those concerns.¹⁶³

2. *A Carve-Out Can Be Made to § 230 Protections Solely for Regulating Websites That Are Facilitators of the Commercial Sexual Abuse of Children*

A regulation preventing online service providers from acting as facilitators of commercial sexual exploitation of children does not necessarily mean that freedom of speech on the Internet would be greatly impaired. Instead, a small carve-out can be made to § 230 exempting these facilitators from the protections therein. While most online service providers could still be held free of liability for third party postings to their sites, the CDA could exclude from its protections those online service providers that knowingly facilitate the sex trafficking of minors. This carve-out would keep the worthy protections of the CDA in effect without allowing the statute to act as a shield for those who knowingly facilitate a criminal enterprise and further the sexual exploitation of America's children.

3. *Central Hudson Allows Regulation of Commercial Speech*

This Part explains why the government can regulate online service providers that facilitate commercial sexual exploitation of minors by applying the *Central Hudson* test. Each factor of the test is addressed in turn.

a. *The First Prong of Central Hudson: The Speech Can Be Regulated Because it Promotes Illegal Activity and Is Misleading*

Under *Central Hudson*,¹⁶⁴ the government may freely regulate any commercial speech that promotes illegal activity or is misleading.¹⁶⁵ In the instant case the government may arguably regulate online service providers that facilitate escort advertisements because they either are promoting the illegal activity of commercial sex or, in the

162. For example, the Court has held that, inter alia, preventing incitement to violence and avoiding defamation of character are two areas where the First Amendment freedom is limited because of other highly compelling societal concerns. See *New York Times Co. v. Sullivan*, 376 U.S. 254, 300–01 (1964); *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572–73 (1942).

163. See *Osborne v. Ohio*, 495 U.S. 103, 111 (1990); *New York v. Ferber*, 458 U.S. 747, 761–62 (1982); *United States v. Hilton*, 167 F.3d 61, 69 (1st Cir. 1999).

164. 447 U.S. 557 (1980).

165. See *supra* note 20 and accompanying text.

alternative, are misleading in that they at least lead recipients of the speech to believe commercial sex is being offered.

i. Promotes Illegal Activity

Advertisements that are thinly veiled offers of commercial sex with minors are promoting illegal activity because they are offering the illegal service of commercial sex. Moreover, not only is commercial sex facially illegal, but also any form of sex with a minor—commercial or not—is illegal. Given that the advertisements at issue here are promoting illegal activity, it is clear that under *Central Hudson* the government may freely regulate this speech.

ii. Misleading Speech

Additionally, any advertisements for escort services that are actually offers for legitimate escorts—and not commercial sex, as most are—are arguably misleading because an advertisement for an escort in our society has come to be understood as nothing more (or less) than an offer for commercial sex.¹⁶⁶

This effectively gives the government the ability to regulate under *Central Hudson* because all escort advertisements are either offers for the illegal activity of commercial sex or, in the alternative, are misleading because recipients now view escort advertisements as offers for commercial sex.¹⁶⁷

b. *Prongs Two, Three, and Four of Central Hudson Are Met*

Although escort advertisements are likely subject to regulation because they are either offers for illegal activity or, at the very least, misleading in that they purport to be offering commercial sex, they would still be subject to regulation if they survived prong one of the *Central Hudson* test because they likely meet prongs two, three, and four.

i. *Central Hudson* Prong Two: Substantial Interest in Protecting Minors From Sexual Abuse

For the government to regulate commercial speech, the *Central Hudson* test requires that the state have a substantial interest in

166. See, e.g., Brian Rokos, *Law Enforcement Targets Backpage.com 'Escort' Ads*, PRESS-ENTERPRISE (Oct. 24, 2012), <http://www.pe.com/local-news/local-news-headlines/20121024-police-target-backpage.com-escort-ads.ece>.

167. See generally *Central Hudson*, 447 U.S. 557.

regulating that speech. Here, the Court has held, *inter alia*, that the conservation of energy,¹⁶⁸ ensuring the accuracy of commercial information in the marketplace,¹⁶⁹ and the protection of potential clients' privacy are all substantial interests.¹⁷⁰ These interests are arguably less significant to the government than the protection of children from sexual abuse,¹⁷¹ and yet are still considered substantial under the Court's *Central Hudson* jurisprudence. Thus, it is highly likely that the protection of minors from commercial sexual exploitation would be held a substantial government interest for the purposes of the *Central Hudson* test.

ii. *Central Hudson* Prong Three: The State Interest Is Directly Advanced by the Proposed Legislation

The *Central Hudson* test not only requires that the interest be substantial, but also that it be *directly advanced* by the means used to regulate.¹⁷² With respect to the issue at hand, regulation aimed at holding online service providers accountable—rather than merely resting liability on the human traffickers that post the advertisements—arguably does, in fact, directly advance the interest of protecting minors from sexual abuse. Rather than being indirect because it targets the forums for advertisements instead of those that post the advertisements themselves, it is actually *directly addressing* the critical gap in the complex system that allows the commercial sexual exploitation of children to flourish: the facilitators.¹⁷³

Under this methodology, the facilitators will finally be held accountable alongside the other players in the system. As discussed in Part I, current sex trafficking legislation has failed to hold facilitators—key players in the commercial sex industry—accountable for their unique and vital role in the furtherance of this criminal enterprise.¹⁷⁴ Passing legislation aimed at holding facilitators accountable will directly thwart this key player, and therefore directly advance the substantial governmental interest of protecting minors from commercial sexual exploitation.

168. *See id.* at 568.

169. *See* *Edenfield v. Fane*, 507 U.S. 761, 769 (1993).

170. *See id.*

171. *See* *New York v. Ferber*, 458 U.S. 747 (1982).

172. *Central Hudson*, 447 U.S. at 566.

173. *See* discussion *supra* Part I.C.2.b.

174. *See* discussion *supra* Part I.C.2.b.

iii. *Central Hudson* Prong Four: The Solution Is Narrowly Tailored Because the Problem Is The Facilitator

Fourth, and finally, legislation to hold online service providers accountable for their role as facilitators of the sexual abuse of children can be narrowly tailored to cover only these facilitators, and avoid far-reaching implications that would chill the speech of online service providers that do not regularly facilitate the criminal sex trafficking enterprise.

Although current drafts of proposed legislation are not narrowly tailored enough, this does not mean that legislation cannot be drafted more narrowly now and in the future. Only a handful of states have made initial attempts at drafting legislation aimed at online facilitators.¹⁷⁵ Arguably, with further effort, narrowly tailored legislation can be drafted and passed in the future to address this issue.

Because escort advertisements would arguably fail prong one or, in the alternative, meet prong one and also meet each of the three remaining prongs of the *Central Hudson* test, it is highly likely that escort advertisements are subject to regulation under the *Central Hudson* test.

III. THE FEDERAL GOVERNMENT SHOULD PASS LEGISLATION TO PREVENT ONLINE SERVICE PROVIDERS FROM FACILITATING—AND PROFITING FROM—THE COMMERCIAL SEXUAL EXPLOITATION OF MINORS

This Note proposes that the federal government enact legislation similar to the statutes passed in Washington, Tennessee and New Jersey that will combat the commercial sexual exploitation of America's children. Passing this legislation can be accomplished with minimal, narrow limitations on speech and no interference with § 230 of the CDA.

A. Why Regulate Online Service Providers?

First, as established in Part I, online service providers allow, and even encourage, the commercial sex market of minors to thrive. Legislation to address this issue then, is necessary to protect minors from commercial sexual exploitation.

The Supreme Court, in *New York v. Ferber*, acknowledged that in the realm of child pornography the best way to eliminate the sexual

175. See *supra* note 12.

abuse of children was to dry up the market: “The most expeditious if not the only practical method of law enforcement may be to dry up the market for this material by imposing severe criminal penalties on persons selling, *advertising, or otherwise promoting* the product.”¹⁷⁶

Backpage is both “advertising” and, through providing a forum for child sex advertisements, “otherwise promoting the market” for prostituted children. Thus, regulation of online service providers is needed to stop the advertising and promotion of child sex abuse, and consequently “eliminate the sexual abuse of children.”¹⁷⁷ Of course, completely eliminating child sexual abuse by implementing this regulation is highly unlikely, if not impossible. But, the regulation will at least reduce—arguably, to a great degree—the number of children trafficked in the sex industry on a daily basis.

Additionally, Congress is uniquely situated to address the problem. The market for sex with children must be dried up by imposing severe penalties on entities advertising and promoting the sexual abuse of children. Yet, courts cannot hold facilitators accountable if there is no law upon which to hold them to account. Police and other law enforcement agents that are working tirelessly to address the issue of domestic sex trafficking are unable to act effectively against online service providers as the law now stands. The first step to eliminating the commercial sexual exploitation of minors is to enact effective legislation.

And, as the law now stands, a critical actor in the enterprise that allows the commercial sexual exploitation of minors to thrive is untouchable by the authorities that are acting to eliminate this horrific crime. To protect children from commercial sexual exploitation, legislation needs to be enacted to fill the current gap: there needs to be a law that criminalizes the facilitators’ actions.¹⁷⁸

B. Why Federal Legislation Is Necessary

Although legislation should exist, the states are not best suited to act in this area.¹⁷⁹ Rather, the federal government should enact legislation similar to those statutes passed by Washington, Tennessee and New Jersey. This Part explains how the federal government could constitutionally act in this area. Additionally, this Part will show why

176. 458 U.S.747, 760 (1982) (emphasis added).

177. *Id.*

178. This Note argues for a law aimed at one specific facilitator: the online service provider that allows traffickers to advertise minors on their websites and makes a profit from the transaction.

179. See discussion *supra* Parts I.B., II.A.1.

federal regulation, as opposed to state regulation, is preferable to address the aforementioned issue.

First, for Congress to regulate, it must find the power to do so in the Constitution.¹⁸⁰ For the matter at hand, this power lies in the Commerce Clause.¹⁸¹ Not only does Congress have the authority to regulate here, but the states may run into difficulties trying to regulate conduct on the Internet. The dormant Commerce Clause prevents states from regulating in an area that is overwhelmingly in the domain of interstate commerce.¹⁸² The Internet is arguably an area that functions in this domain.¹⁸³ Given the dormant Commerce Clause's reach, states likely do not even have the constitutional authority to regulate commercial sex advertisements online.

As a result, Congress should regulate in this area. In addition to having authority to regulate the facilitation of the commercial sexual exploitation of minors by online service providers, Congress is also uniquely well-positioned to do so. Congress can deal with a national issue consistently, rather than having the crime be attacked piecemeal state by state.¹⁸⁴ Federal legislation in this area will not be hampered by the provisions of § 230 of the CDA, as discussed in the next section.

The advertisement of commercial sex acts on the Internet is inextricably related to interstate commerce, making this an area uniquely suited to the federal government for regulation. Although the states have a vested interest in regulating this area, the federal government can regulate it more effectively; the federal government can, with one statute, protect the minors of all states that the legislators in each state are interested in protecting.

180. *See* U.S. CONST. art. I, § 1. The Constitution sets up a government of enumerated powers, which limits the control of the federal government to leave proper room for the states in the structure of federalism.

181. *See id.* at § 8, cl. 3.

182. *See id.* The Court has inferred the dormant commerce clause from the federal government's affirmative power to regulate interstate commerce, as granted here.

183. The Internet cannot be contained to merely one state; as it is omnipresent, it is more appropriate for the federal government to be regulating here, pursuant to the authority granted in Article I, Section 8, Clause 3 of the U.S. Constitution.

184. *See, e.g.,* *Gonzales v. Raich*, 545 U.S. 1, 2 (2005) (holding that the federal government is the preferable source for marijuana regulation, as it can thus effectively deal with the illicit national market in drugs). Here, similarly, the federal government is best positioned to deal with the national, illicit market in sex.

C. There Is No Conflict with CDA § 230

As indicated above, § 230 of the CDA could pose statutory concerns when drafting legislation to hold online service providers accountable for the facilitation of the commercial sexual abuse of minors.¹⁸⁵ CDA § 230 ensures a robust Internet, and greatly restricts any regulation on Internet speech.¹⁸⁶ Yet, the federal government would not be restricted by its provisions in the same way as the states.¹⁸⁷

CDA § 230 has an exception carved out for federal criminal laws: “Nothing in this section shall be construed to impair the enforcement of . . . any . . . Federal criminal statute.”¹⁸⁸ The concern for statutory conflict and preemption is therefore eliminated where the federal government, rather than the states, is enacting the legislation. Even were this carve-out not made available, the new legislation would likely supersede the CDA, as it would be more recent. As an additional measure, Congress could insert a provision into the statute making this explicit. Apart from this, the CDA would remain intact, and would continue its effectiveness at ensuring an unfettered Internet in the United States of America.

Because the CDA’s reach is only to preempt state laws,¹⁸⁹ federal criminal laws that do, in fact, rein in speech on the Internet could remain a concern. Nevertheless, the exemption for federal criminal laws should not be disconcerting. By allowing an exemption for federal criminal laws, Congress is not giving a free pass to future federal criminal regulation that completely prohibits free speech. The Constitution still is the supreme law of the land, and remains paramount no matter what statute is passed; any statute in contravention of the Constitution is void.¹⁹⁰ The congressionally drafted exemption, instead of making room for inroads into the freedom of speech on the Internet, simply provides an ability to

185. 47 U.S.C. § 230 (2006).

186. *Id.*

187. *See* § 230(e)(1); *Backpage.com, LLC v. McKenna*, 881 F. Supp. 2d 1262, 1273 (W.D. Wash. 2012) (granting a preliminary injunction preventing enforcement of SB 6251, in part because of a conflict with CDA § 230). Also, on December 6, 2012, *Backpage* and *McKenna* settled the suit, as *McKenna* noted it would be too costly and difficult to appeal the preliminary injunction order. Since then, he has called on Congress to amend the Communications Decency Act. This likely indicates his recognition that CDA § 230 provides insurmountable barriers for states to regulate in this area. *See* Press Release, *supra* note 150.

188. § 230(e)(1).

189. *Id.*

190. *See* *Marbury v. Madison*, 5 U.S. 137, 177 (1803).

conduct a careful balancing of important policy goals that, at times—as here—are in tension with one another. By leaving the federal exemption, Congress has left space for necessary Internet regulation to be implemented to protect our children from sexual abuse, but the Constitution still ensures that such regulation will only extend as far as necessary to protect children, and will not infringe too greatly on the First Amendment freedom of speech.

Ultimately, this exception, then, is not a source of concern. Instead, in the midst of a statute that upholds free speech on the Internet to the soaring level it deserves, it ensures that free speech on the Internet does not become deified to the point of allowing the sexual abuse and exploitation of children at its expense.

CONCLUSION

The federal government should pass a statute that holds online service providers such as Backpage accountable for facilitating the crimes of human trafficking and the commercial sexual exploitation of minors. Although a robust Internet with unfettered speech is a cornerstone of our American democracy, the conflict presented is one narrow exception where the Internet should be regulated to protect the dignity and well being of American children.

The freedom of speech, while a freedom foundational to our democratic society, does have limits. These limits are determined by other narrow, but highly compelling goals for our society: goals such as preventing incitement to violence;¹⁹¹ avoiding defamation of character;¹⁹² and protecting children from sexual abuse.¹⁹³ Here, the goal of protecting children from sexual abuse can—and must—be upheld. If not, we will be fostering in our society the very phenomenon that the First Amendment was designed to avoid: oppression. Instead of a people oppressed by a tyrannical government, though, it is children oppressed into sexual slavery by abusive adults and greedy corporations. The First Amendment cannot act as a shield to such abuse, and should not provide refuge for those who oppress.

Rob McKenna, the Washington State Attorney General has stated, “I think we have to be careful to protect the First Amendment rights of publishers, but free speech does not extend to the knowing

191. *See* *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572–73 (1942).

192. *See* *New York Times Co. v. Sullivan*, 376 U.S. 254, 301–02 (1964).

193. *See* *New York v. Ferber*, 458 U.S. 747, 761–62 (1982).

facilitation of criminal activity. This . . . is about human beings being trafficked into the sex trades.”¹⁹⁴

The federal government protects freedom of speech. It should also protect the freedom of our children to an equal—if not higher—degree. Here, the government can—and should—do both.

194. Michael van Baker, *Seattle Weekly Tries Soft-Pedaling the Whole Juvenile Prostitution Thing*, SUNBREAK (Mar. 27, 2012), <http://thesunbreak.com/2012/03/27/seattle-weekly-tries-soft-pedaling-the-whole-juvenile-prostitution-thing>.