

UNTANGLING SESTA/FOSTA: HOW THE INTERNET’S “KNOWLEDGE” THREATENS ANTI-SEX TRAFFICKING LAW

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I. INTRODUCTION

Section 230 of the Communications Decency Act of 1996,¹ called “the bedrock of the Internet,”² has been cited as a critical element enabling the YouTubes and Facebooks of the internet to innovate and flourish.³ Section 230 shields interactive computer services (ICSs)⁴—including internet service providers⁵ and platforms⁶—from liability for content posted by third-party users.⁷

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1. Telecommunications Act of 1996, Pub. L. No. 104-104, tit. V (1996).

2. See Tom Jackman, *Internet companies drop opposition to bill targeting online sex trafficking*, WASH. POST, Nov. 7, 2017.

3. See *Online Sex Trafficking: Hearing on H.R. 1865 Before the H. Comm. On the Judiciary, Subcomm. on Crime, Terrorism, Homeland Security and Investigations*, 115th Cong. (2017) (statement of Chris Cox, Outside Counsel, Netchoice) (“[L]iability protection [under § 230] has not only become the foundation supporting sites like Yelp, eBay, . . . and other well-known web brands . . . but also the entire Web 2.0 revolution through which thousands of smaller, innovative platforms have offered a range of socially useful services.”); *Online Sex Trafficking: Hearing on H.R. 1865 Before the H. Comm. On the Judiciary, Subcomm. on Crime, Terrorism, Homeland Security and Investigations*, 115th Cong. (2017) (statement of Jeff Kosseff, Assistant Professor, United States Naval Academy) (“Section 230 is Responsible for the Internet that Americans Know Today”); see generally Jeff Kosseff, *Defending Section 230: The Value of Intermediary Immunity*, 15 J. TECH. L. & POL’Y 124 (2010).

4. ICSs are “any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server” 47 U.S.C. § 230(f)(2) (2012).

5. H.R. REP. NO. 115-572, pt. 1, at 4 (2018) (“It has been uniformly held that Internet service providers are ‘interactive computer service’ providers.”).

6. See Kosseff, *supra* note 3, at 157 (“[Section 230] is Congress’s chosen method of preserving free speech on an emerging platform.”).

7. See 47 U.S.C. § 230(c) (2012); see, e.g., *Hassell v. Bird*, 420 P.3d 776 (Cal. 2018) (holding that § 230 shielded Yelp in its decision to not take down defamatory remarks posted on the site); see generally Paul Ehrlich, *Communications Decency Act § 230*, 17 BERKELEY TECH. L.J. 401 (2002).

Under § 230, an ICS cannot be “treated as the publisher or speaker” of content posted by third-party users of the ICS.⁸ This shield extends to ICSs that employ good faith monitoring strategies.⁹ For example, if Facebook, in good faith, monitors and takes down user-posted content that violates federal terrorist recruitment statutes, Facebook will not be liable for that criminal content.

Although many have praised § 230’s role in fostering internet innovation, others have criticized it as a defender of inappropriate, or even illegal, activity on the internet.¹⁰ Some of the strongest and most sustained criticism of § 230 focused on Backpage.com. Facially, Backpage was an online classified advertisement service.¹¹ However, victims, advocates, and government officials alleged that Backpage was facilitating and encouraging sex trafficking of children behind the shield of its § 230 immunity.¹² Several parties filed suit against Backpage, but Backpage was consistently successful in wielding this shield.¹³

Then, in January 2017, the Senate Permanent Subcommittee on Investigations published a report condemning Backpage’s conduct.¹⁴ The

8. *See Doe v. Backpage.com, LLC*, 817 F.3d 18 (1st Cir. 2016); 47 U.S.C. § 230(c) (2012).

9. *See Doe*, 817 F.3d at 18 (“[Section 230] allows website operators to engage in blocking and screening of third-party content, free from liability for such good-faith efforts.”); 47 U.S.C. § 230(c) (2012).

10. *See, e.g.*, Danielle Keats Citron & Benjamin Wittes, *The Problem Isn’t Just Backpage: Revising Section 230 Immunity*, 2 GEO. L. TECH. REV. 455 (2018) (“The CDA’s origins in the censorship of ‘offensive’ material and protections against abuse are inconsistent with outlandishly broad interpretations that have served to immunize platforms dedicated to abuse and others that deliberately tolerate users’ illegal activities.”); *see generally* Mary Graw Leary, *The Indecency and Injustice of Section 230 of the Communications Decency Act*, 41 HARV. J. L. & PUB. POL’Y 553 (2018).

11. *See* Tom Jackman & Jonathan O’Connell, *Backpage has always claimed it doesn’t control sex-related ads. New documents show otherwise.*, WASH. POST, July 11, 2017.

12. *See id.* (“For years, Backpage executives have adamantly denied claims made by members of Congress, state attorneys general, law enforcement and sex-abuse victims that the site has facilitated prostitution and child sex trafficking.”).

13. *See, e.g.*, *Backpage.com, LLC v. Hoffman*, Civil Action No. 13-cv-03952 (DMC) (JAD), 2013 U.S. Dist. LEXIS 119811 (D.N.J. Aug. 20, 2013); *Backpage.com, LLC v. Cooper*, No. 3:12-cv-00654, 2013 U.S. Dist. LEXIS 43852 (M.D. Tenn. Mar. 27, 2013); *Backpage.com, LLC v. McKenna*, No. C12-954 RSM, 2012 U.S. Dist. LEXIS 134216 (W.D. Wash. Sept. 18, 2012).

14. *Backpage.com’s Knowing Facilitation of Online Sex Trafficking: Hearing Before the Permanent Subcomm. on Investigations of the Comm. on Homeland Sec. and Gov’tal Affairs*, 115th Cong. 2–3 (2017) (“This report contains three principal findings. **First**, Backpage has knowingly concealed evidence of criminality by systematically editing its ‘adult’ ads. . . . **Second**, Backpage knows that it facilitates prostitution and child sex trafficking. . . . **Third**, despite the reported sale of Backpage to an undisclosed foreign company in 2014, the true beneficial owners of the company are James Larkin, Michael Lacey, and Carl Ferrer.”).

Subcommittee found that Backpage had edited its adult services ads by automatically and manually deleting incriminatory language prior to ad publication. Backpage had also coached its users on how to avoid using incriminatory language.¹⁵ That same day, Backpage took down adult services ads on its website.¹⁶ However, Backpage's practices had already ignited controversy over § 230's twenty-year-old shield.

Three months later, Representative Ann Wagner introduced the Allow Victims and States to Fight Online Sex Trafficking Act of 2017 (FOSTA),¹⁷ which later merged with the Senate's Stop Enabling Sex Trafficking Act of 2017 (SESTA).¹⁸ The legislation progressed at a rapid pace, and President Donald Trump signed SESTA/FOSTA into law in April 2018.¹⁹

SESTA/FOSTA creates new criminal and civil penalties for sex trafficking, attempts to enable states and prosecutors to more easily prosecute sex traffickers, and clarifies that § 230 immunity does not protect ICSs from sex trafficking-related activity by their users.²⁰ Most significantly for the purposes of this Note, SESTA/FOSTA defines a term—"participation in a venture"—in the existing sex trafficking statute.²¹

This Note asserts that SESTA/FOSTA muddles the existing sex trafficking statute by interjecting a "knowledge" standard in the definition of participation in a venture. Part II relates the history of SESTA/FOSTA, touching on the origins of § 230 before turning to SESTA/FOSTA's path through Congress. Part III examines the text of SESTA/FOSTA and the changes it made to existing law. Finally, Part IV asserts that courts, when interpreting SESTA/FOSTA, should not apply traditional knowledge requirements to ICSs with regards to user-posted, sex trafficking-related content. This Note argues that courts should instead draw on other areas of the law as well as real-world ICS practices in defining ICS knowledge.

15. *Id.* at 17–35, 37 (“While Backpage claims its filters and moderation policies actively prohibit and combat illegal content, the company guided its users on how to easily circumvent those measures and post ‘clean’ ads.”).

16. *See* Derek Hawkins, *Backpage.com shuts down adult services ads after relentless pressure from authorities*, WASH. POST, Jan. 10, 2017.

17. 163 *Cong. Rec.* H2629 (2017).

18. *See* Stop Enabling Sex Traffickers Act of 2017, S. 1693, 115th Cong. (as introduced, Aug. 1, 2017).

19. *See* Remarks on Signing the Allow States and Victims To Fight Online Sex Trafficking Act of 2017, Daily Comp. Pres. Docs., 2018 DCPD No. 201800233 (Apr. 11, 2018).

20. *See* Allow States and Victims to Fight Online Sex Trafficking Act of 2017, Pub. L. No. 115-164 §§ 3–4, 6 (2018).

21. *See id.* at § 5.

II. HISTORY OF SESTA/FOSTA

SESTA/FOSTA is rooted in the aspiration to amend § 230 of the Communications Decency Act of 1996 to prevent ICSs from enabling sex trafficking.²² This Part examines this history, beginning with an overview of § 230 before turning to the events—both outside and inside of Congress—that led to the enactment of SESTA/FOSTA.

A. SECTION 230 OF THE COMMUNICATIONS DECENCY ACT OF 1996

Congress passed the Communications Decency Act (CDA) as Title V of the Telecommunications Act of 1996²³ in an effort to “protect minors from harmful material on the [i]nternet.”²⁴ The CDA prohibited “the knowing transmission of obscene or indecent messages to any recipient under 18 years of age” as well as “the knowing sending or displaying of patently offensive messages in a manner that is available to a person under 18 years of age.”²⁵

While the CDA placed liability on ICSs, the Telecommunications Act overall sought “to remove unnecessary regulation and open the way for freer markets” on the internet.²⁶ Members of Congress developed § 230 to encourage internet innovation, as Senator Ron Wyden described:

What section 230 was all about was laying out the legal rules of the road for the web. There were innovative new businesses sprouting up all over and novel forms of communication and media connecting and informing people in new ways. But it seemed clear that a quick way to strangle this promising set of developments in their infancy was for these new companies to be held legally liable for every piece of content that users posted on their platforms.²⁷

The First Circuit described the shielding activity of § 230:

Section 230(c) limits this sort of liability in two ways. Principally, it shields website operators from being “treated as the publisher or

22. Allow States and Victims to Fight Online Sex Trafficking Act of 2017, Pub. L. No. 115-164 (2018) (stating that the purpose of SESTA/FOSTA is “[t]o amend the Communications Act of 1934 to clarify that section 230 of such Act does not prohibit the enforcement against providers and users of interactive computer services of Federal and State criminal and civil law relating to sexual exploitation of children or sex trafficking, and for other purposes”).

23. Telecommunications Act of 1996, Pub. L. No. 104-104, tit. V (1996).

24. *Reno v. ACLU*, 521 U.S. 844 (1997); see Ehrlich, *supra* note 7, at 401 (“Congress passed the Communications Decency Act (‘CDA’) in 1996 to address the myriad problems surrounding the regulation of obscene, illegal, or otherwise tortious content found on the Internet.”).

25. *Reno*, 521 U.S. at 859 (1997).

26. See Statement on Signing the Telecommunications Act of 1996, Daily Comp. Pres. Docs. (Feb. 8, 1996).

27. S. REP. NO. 115-49, at S1866 (2018).

speaker” of material posted by users of the site, 47 U.S.C. § 230(c)(1), which means that “lawsuits seeking to hold a service provider liable for its exercise of a publisher’s traditional editorial functions—such as deciding whether to publish, withdraw, postpone or alter content—are barred,” *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 330 (4th Cir. 1997). Relatedly, it allows website operators to engage in blocking and screening of third-party content, free from liability for such good-faith efforts. See 47 U.S.C. § 230(c)(2)(A).²⁸

Section 230 never shielded ICSs from liability under federal criminal statutes.²⁹ However, § 230 precluded liability under state criminal statutes when there was a conflict between state and corresponding federal criminal statutes.³⁰ Additionally, § 230 precluded civil suits.³¹

Although the CDA’s ban on “indecent” transmission and “patently offensive” display was struck down,³² § 230 immunity has survived.³³ Circuit courts have broadly interpreted this statutory immunity,³⁴ and some courts have interpreted this immunity to even shield ICSs allegedly involved in sex trafficking.³⁵

Section 230 immunity has been contested since its early days, generating a variety of scholarly praise and criticism. Some scholars and commentators

28. *Doe*, 817 F.3d at 18.

29. See 47 U.S.C. § 230(e)(1) (2000).

30. See 47 U.S.C. § 230(e)(3) (2000).

31. See 47 U.S.C. § 230(e)(1) (2000); *Doe*, 817 F.3d at 23 (“The plain-language reading of section 230(e)(1)’s reference to ‘the enforcement of . . . any . . . Federal criminal statute’ dictates a meaning . . . exclude[ing] civil suits.”).

32. *Reno*, 521 U.S. at 844, 874 (“The Communications Decency Act of 1996 (CDA), 47 U.S.C.S. § 223, presents a great threat of censoring speech that, in fact, falls outside the statute’s scope. Given the vague contours of the coverage of the statute, it unquestionably silences some speakers whose messages would be entitled to constitutional protection. That danger provides further reason for insisting that the statute not be overly broad. The CDA’s burden on protected speech cannot be justified if it could be avoided by a more carefully drafted statute.”).

33. See Leary, *supra* note 10, at 559 (“In *Reno v. ACLU*, the Supreme Court struck down as vague some of the more controversial criminal provisions of the CDA, such as the prohibition on the transmission of ‘indecent material.’ However, § 230 was not challenged, and this protection remains effective law to this day.”) (internal citations omitted).

34. See Mark D. Quisi, Comment, *Plumbing the Depths of the CDA: Weighing the Competing Fourth and Seventh Circuit Standards of ISP Immunity under Section 230 of the Communications Decency Act*, 20 GEO. MASON L. REV. 277 (2012); see, e.g., *Universal Commc’n Sys., Inc. v. Lycos, Inc.*, 478 F.3d 413, 419 (1st Cir. 2007); *Green v. Am. Online (AOL)*, 318 F.3d 465, 470–71 (3d Cir. 2003); *Ben Ezra, Weinstein, & Co. v. Am. Online Inc.*, 206 F.3d 980, 986 (10th Cir. 2000); *Zeran v. Am. Online, Inc.*, 129 F.3d 327 (4th Cir. 1997). But see Chi. Lawyers’ Comm. for Civil Rights Under Law, Inc. v. Craigslist, Inc., 519 F.3d 666 (7th Cir. 2008); *Fair Hous. Council v. Roommates.com, LLC*, 521 F.3d 1157 (9th Cir. 2008); *Doe v. GTE Corp.*, 347 F.3d 655 (7th Cir. 2003).

35. See, e.g., *Doe*, 817 F.3d at 21–23.

praise § 230 for allowing internet-related companies to innovate online platforms.³⁶ Others criticize § 230 for protecting bad actors, enabling them to carry on or facilitate criminal activities.³⁷ Through the praise and criticism, § 230 remained untouched by Congress until SESTA/FOSTA.

B. HISTORY OF SESTA/FOSTA

In the fall of 2015, the Senate Permanent Subcommittee on Investigations (“Subcommittee”) published a report on its “Human Trafficking Investigation.”³⁸ The report alleged that many ICSs—most notably Backpage—were facilitating sex trafficking on the internet.³⁹ The report also highlighted § 230 as a “shield” protecting these ICSs from criminal liability.⁴⁰

Around this time, the Subcommittee subpoenaed Backpage for materials related to Backpage’s “moderation and ad-review, basic financial information, and other topics” to investigate Backpage’s allegedly criminal conduct relating to human trafficking.⁴¹ Backpage refused to comply with the subpoena, claiming that its practices were protected under the First Amendment.⁴² In response, in February 2016, the Subcommittee recommended enforcement of the subpoena, citing further evidence and motivation for investigating

36. See, e.g., Kosseff, *supra* note 3, at 157–58 (“Although Section 230 is far from perfect, it has allowed intermediaries to experiment with various policies and practices that allow free speech to thrive on the Internet.”).

37. See, e.g., Leary, *supra* note 10, at 572–73; Gregory M Dickinson, *An Interpretive Framework for Narrower Immunity Under Section 230 of the Communications Decency Act*, 33 HARV. J.L. & PUB. POL’Y 873–74 (2010); Ehrlich, *supra* note 7, at 414.

38. See *Human Trafficking Investigation: Hearing Before the Permanent Subcomm. on Investigations of the Comm. on Homeland Sec. and Gov’tal Affairs*, 114th Cong. 1 (2015).

39. See *id.* at 7 (“We are here to talk about the online lucrative sale of America’s children for sex, which in our experience occurs most prominently on the website Backpage.com.”).

40. See *id.* at 20–21.

41. *Recommendation to Enforce a Subpoena Issued to the CEO of Backpage.com, LLC: Hearing Before the Permanent Subcomm. on Investigations of the Comm. on Homeland Sec. and Gov’tal Affairs*, 114th Cong. 1 (2016).

42. See *id.*

Backpage.⁴³ A federal court ordered Backpage to produce the subpoenaed documents in August 2016.⁴⁴

Using the obtained documents, the Subcommittee published a follow-up report—“Backpage.com’s Knowing Facilitation of Online Sex Trafficking”—in January 2017.⁴⁵ The report officially condemned Backpage for concealing evidence of criminal conduct, “facilitat[ing] prostitution and child sex trafficking,” and money laundering.⁴⁶ In response, Backpage took down its adult services ads.⁴⁷

A few months later, in April 2017, Representative Ann Wagner introduced the Allow Victims and States to Fight Online Sex Trafficking Act of 2017 (FOSTA) in the House of Representatives.⁴⁸ This bill was intended to

amend the Communications Act of 1934 to clarify that section 230 of such Act does not prohibit the enforcement against providers and users of interactive computer services of Federal and State criminal and civil law relating to sexual exploitation of children or sex trafficking, and for other purposes⁴⁹

The bill would also have amended 18 U.S.C. § 1591—the sex trafficking statute—to define participation in a venture to mean the “knowing or reckless conduct by any person or entity and by any means that furthers or in any way aids or abets” sex trafficking.⁵⁰ On August 1, 2017, Senator Rob Portman introduced a companion bill—the “Stop Enabling Sex Traffickers Act of 2017” (SESTA)—in the Senate.⁵¹

43. *Id.* at 2–3. The Subcommittee explained:

First, we find substantial evidence that Backpage edits the content of some ads, including by deleting words and images, before publication. . . . *Second*, the Subcommittee has additional concerns about the steps Backpage takes to ensure that it can be helpful when called upon to cooperate with law enforcement investigations of potential human trafficking. . . . *Third*, the Subcommittee has attempted to learn more about Backpage’s corporate structure and finances. . . . *Finally*, the Subcommittee has learned that, at least in one case, Backpage customers were able to evade limits placed on its access to credit card networks by a major financial institution.

44. *Backpage.com’s Knowing Facilitation of Online Sex Trafficking: Hearing Before the Permanent Subcomm. on Investigations of the Comm. on Homeland Sec. and Gov’tal Affairs*, 115th Cong. 1 (2017).

45. *Id.*

46. *See id.* at 3, 9.

47. *See* Hawkins, *supra* note 16.

48. 164 *Cong. Rec.* H1319 (2018).

49. 163 *Cong. Rec.* H2629 (2017).

50. Allow Victims and States to Fight Online Sex Trafficking Act of 2017, H.R. 1865, 115th Cong. (as introduced, Apr. 3, 2017).

51. Stop Enabling Sex Traffickers Act of 2017, S. 1693, 115th Cong. (as introduced, Aug. 1, 2017).

The House held a hearing on FOSTA in October 2017.⁵² Several opponents of the bill—including Evan Engstrom (a technology entrepreneur), Jeff Kosseff (an internet law scholar), and Chris Cox (a representative of NetChoice, a trade association representing large technology-based companies)—testified at the hearing.⁵³ These witnesses emphasized the importance of § 230 in promoting internet innovation as well as the myriad of alternatives to FOSTA for fighting online sex trafficking.⁵⁴ One supporter of the bill also testified at the hearing.⁵⁵ Professor Mary Graw Leary testified that the CDA was never meant “to provide absolute immunity to service providers.”⁵⁶

Several stakeholders—including civil rights groups, sex trafficking victim advocacy groups, and some large ICSs⁵⁷—opposed the bill due to concerns

52. *Online Sex Trafficking: Hearing on H.R. 1865 Before the H. Comm. On the Judiciary, Subcomm. on Crime, Terrorism, Homeland Security and Investigations*, 115th Cong. (2017) (statement of Mary Graw Leary, Professor, Catholic University of America, Columbus School of Law) (asserting that the bill would effectively narrow Section 230 immunity and be a “positive step in ending [the Section 230] loophole”).

53. *Online Sex Trafficking: Hearing on H.R. 1865 Before the H. Comm. On the Judiciary, Subcomm. on Crime, Terrorism, Homeland Security and Investigations*, 115th Cong. (2017) (statement of Chris Cox, Outside Counsel, Netchoice) (expressing concern that the “original intent of Congress [in writing Section 230] be upheld”); *Online Sex Trafficking: Hearing on H.R. 1865 Before the H. Comm. On the Judiciary, Subcomm. on Crime, Terrorism, Homeland Security and Investigations*, 115th Cong. (2017) (statement of Evan Engstrom, Executive Director, Engine) (providing “perspective of how some of the proposed solutions to this problem may impact the startup ecosystem in unintended ways”); *Online Sex Trafficking: Hearing on H.R. 1865 Before the H. Comm. On the Judiciary, Subcomm. on Crime, Terrorism, Homeland Security and Investigations*, 115th Cong. (2017) (statement of Jeff Kosseff, Assistant Professor, United States Naval Academy) (discussing how Section 230 has “fundamentally shaped the nature of the Internet”).

54. *See Online Sex Trafficking: Hearing on H.R. 1865 Before the H. Comm. On the Judiciary, Subcomm. on Crime, Terrorism, Homeland Security and Investigations*, 115th Cong. (2017) (statement of Chris Cox, Outside Counsel, Netchoice) (“There are immediate actions [other than SESTA/FOSTA] that Congress can take to advance the cause of law enforcement in pending cases and investigations, both federal and state, involving sex-trafficking.”); *Online Sex Trafficking: Hearing on H.R. 1865 Before the H. Comm. On the Judiciary, Subcomm. on Crime, Terrorism, Homeland Security and Investigations*, 115th Cong. (2017) (statement of Evan Engstrom, Executive Director, Engine) (“[W]e simply would not have the Internet or the startup community we have today without Section 230.”).

55. *Online Sex Trafficking: Hearing on H.R. 1865 Before the H. Comm. On the Judiciary, Subcomm. on Crime, Terrorism, Homeland Security and Investigations*, 115th Cong. (2017) (statement of Mary Graw Leary, Professor, Catholic University of America, Columbus School of Law).

56. *Id.*

57. Although several large ICSs initially opposed SESTA/FOSTA, they eventually dropped their opposition to the bill. Journalist Tom Jackman reported that before dropping their opposition to the bill, several large technology companies (Big Tech) such as Google and Facebook, represented by the Internet Association, had worked with Senate staff members to alter the language of the bill. Jackman, *supra* note 2. First, Big Tech had been concerned about the bill’s definition of participation in a venture as “knowing conduct, by an individual or

regarding freedom of speech,⁵⁸ the potential for the legislation to worsen sex trafficking,⁵⁹ the potential for the legislation to stifle internet innovation,⁶⁰ and the existence of non-legal options for regulating ICSs.⁶¹ Some critics suggested

entity, *by any means*, that assists, supports or facilitates a violation” of sex trafficking laws. *See id.* (emphasis added). As Jackman describes, “Internet companies thought the phrase ‘by any means’ had the potential to be broadly interpreted when analyzing a website’s actions.” *Id.* The compromise between Congress and the technology companies changed the language to define participation in a venture as “knowingly assisting, supporting, or facilitating a violation” of sex trafficking laws. *See id.* The compromise between Congress and Big Tech also changed the language of the bill to “requir[e] [state prosecutors] to meet the federal standard, including the new definition above [of participation in a venture], rather than those established by state law, which can vary widely.” *See id.*

58. *See, e.g.*, Letter from ACLU et al., to Mitch McConnell, Majority Leader, United States Senate and Chuck Schumer, Minority Leader, United States Senate (Aug. 4, 2017) (on file with the Center for Technology and Democracy) (“The risk of federal and state criminal and civil liability for user speech would create an incredibly strong incentive for intermediaries to err on the side of caution and take down any speech that is flagged to them as potentially relating to trafficking.”).

59. Before SESTA/FOSTA became law, some critics asserted that SESTA/FOSTA would incentivize sex traffickers to use harder-to-find websites in “dark[er]” areas of the internet. *See S. REP. NO. 115-49*, at S1866 (2018). By making sex trafficking websites harder to find, the statute may make law enforcement and criminal prosecution more difficult. It has been suggested that SESTA/FOSTA will not prevent sex trafficking—rather it will encourage sex traffickers to revert to pre-internet practices that were more dangerous for consensual sex workers and victims of sex trafficking alike. *See* Scott Cunningham et al., *Craigslist’s Effect on Violence Against Women**, (2017) (unpublished manuscript) (available at <https://www.documentcloud.org/documents/4442319-Craigslist-s-Effect-on-Violence-Against-Women.html>) [<https://perma.cc/A42B-PUH3>] (last visited Feb. 11, 2019) (providing an empirical study suggesting that the availability of online platforms promoted the safety of both consensual and nonconsensual sex workers and finding that Craigslist’s erotic services tab correlated with a reduced female homicide rate in cities where the erotic services tab was available). Additionally, there is anecdotal evidence that SESTA/FOSTA may be leading to more dangerous circumstances for consensual and nonconsensual sex workers. *See, e.g.*, Timothy Williams, *Backpage’s Sex Ads Are Gone. Child Trafficking? Hardly.*, N.Y. TIMES (Mar. 11, 2017), <https://www.nytimes.com/2017/03/11/us/backpage-ads-sex-trafficking.html> [<https://perma.cc/ZG2S-3WGS>]; Ted Anderson et al., *The Scanner: Sex workers returned to SF streets after Backpage.com shut down*, S.F. CHRON. (Oct. 15, 2018, 11:45 AM), <https://www.sfchronicle.com/crime/article/The-Scanner-Sex-workers-returned-to-SF-streets-13304257.php> [<https://perma.cc/N2R7-BEWD>]. As it is currently difficult to draw causal connections between the passing of SESTA/FOSTA and significant changes in sex trafficking, this Note will not further analyze these potential unintended consequences.

60. *See, e.g.*, *Online Sex Trafficking: Hearing on H.R. 1865 Before the H. Comm. On the Judiciary, Subcomm. on Crime, Terrorism, Homeland Security and Investigations*, 115th Cong. (2017) (statement of Evan Engstrom, Executive Director, Engine) (“[W]e simply would not have the Internet or the startup community we have today without Section 230.”).

61. *See, e.g.*, Susan Molinari, *Google’s Fight Against Human Trafficking*, GOOGLE (Sept. 7, 2017), <https://www.blog.google/outreach-initiatives/public-policy/googles-fight-against-human-trafficking/> [<https://perma.cc/DRR8-KDLP>] (“[Google has] helped pioneer the use of technologies that identify trafficking networks to make it easier and quicker for law

that FOSTA was not necessary to ameliorate sex trafficking because websites like Backpage that enable criminal activity could be criminally liable under existing laws.⁶²

On December 12, 2017, the House Judiciary Committee held a markup of the bill and ordered it to be reported to the full House.⁶³ In the process, the committee adopted an amendment in the nature of a substitute proposed by Representative Bob Goodlatte. Significantly, the amendment differed from the introduced bill in that the amendment did not define participation in a venture.⁶⁴ The House Committee on the Judiciary filed its report, with the amendment in the nature of a substitute, on February 20, 2018.⁶⁵

A week later on February 26, the House Committee on Rules held a hearing on the bill as reported in which Members of the House proposed amendments.⁶⁶

The following day, February 27, the Department of Justice (DOJ) provided a letter in which it supported the goals and overall thrust of FOSTA.⁶⁷

enforcement to arrest these abusers.”); Letter from Cope Engine et al., to Rob Portman, Chairman, Senate Permanent Subcommittee on Investigations and Richard Blumenthal, United States Senate (on file with Section 230 Matters) (“[T]he tech industry has been deeply engaged in a number of different programs to help fight trafficking, and these efforts have been found to be among the most effective in actually stopping such trafficking.”).

62. See *Online Sex Trafficking: Hearing on H.R. 1865 Before the H. Comm. On the Judiciary, Subcomm. on Crime, Terrorism, Homeland Security and Investigations*, 115th Cong. (2017) (statement of Chris Cox, Outside Counsel, Netchoice) (“Some mistakenly claim that Section 230 prevents action against websites that knowingly engage in, solicit, or support sex- trafficking. . . . Section 230 provides no protection for any website, user, or other person or business involved even in part in the creation or development of content that is tortious or criminal.”). Alternatives to increasing penalties for ICSs include passing legislation to increase penalties for sex traffickers themselves or legislation to increase funds for investigating and prosecuting alleged sex traffickers. See S. REP. NO. 115-49, at S1861 (2018). Some critics have even suggested that the true problem lies with enforcement by the DOJ and not with online platforms. See Letter from R Street et al., to Mitch McConnell, Majority Leader, United States Senate, and Chuck Schumer, Minority Leader, United States Senate (Aug. 3, 2017) (“The problem today is not a lack of legal remedies but under-enforcement . . .”).

63. 163 *Cong. Rec.* D1313 (2017).

64. H.R. REP. NO. 115-572, at 2 (2018).

65. *Id.* at 1 (“The Committee on the Judiciary, to whom was referred the bill (H.R. 1865) to amend the Communications Act of 1934 to clarify that section 230 of such Act does not prohibit the enforcement against providers and users of interactive computer services of Federal and State criminal and civil law relating to sexual exploitation of children or sex trafficking, and for other purposes, having considered the same, report favorably thereon with an amendment and recommend that the bill as amended do pass.”).

66. H.R. REP. NO. 115-583 (2018).

67. Letter from Stephen E. Boyd (Assistant Attorney General) to Representative Robert W. Goodlatte (Feb. 27, 2018) (“H.R. 1865 . . . would take meaningful steps to end the industry of advertising trafficking victims for commercial sex. . . . Section 4 of H.R. 1865 also sets forth

However, the DOJ objected to one proposed amendment—proposed by Representative Mimi Walters—defining “participation in a venture” in a way that the DOJ argued would effectively create new elements for prosecutors to prove.⁶⁸ The DOJ also warned that this amendment might violate the Constitution’s Ex Post Facto Clauses by adding a retroactive clause to FOSTA.⁶⁹

That same day, the bill was considered in the House. The House adopted three amendments. First, the House adopted Representative Goodlatte’s amendment to make “technical changes” to the bill.⁷⁰ Second, in spite of the DOJ’s warnings, the House adopted Representative Mimi Walters’s amendment to “[a]llow[] enforcement of criminal and civil sex trafficking laws against websites that knowingly facilitate online sex trafficking.”⁷¹ This amendment defined participation in a venture to mean “knowingly assisting, supporting, or facilitating a violation of” the sex trafficking statute.⁷² Also, the amendment added a retroactive clause so that the revised § 230(e) would apply “regardless of whether the conduct alleged occurred . . . before, on, or after such date of enactment.”⁷³ Third, the House adopted Representative Sheila Jackson Lee’s amendment to require a GAO study.⁷⁴ The House voted to pass

critical revisions to the CDA to permit state prosecutors to bring criminal actions related to sex trafficking and the use of the internet with the intent to promote or facilitate prostitution. The Department believes that the existence of this exception to the CDA will alter the landscape of the industry involved in advertising prostitution.”).

68. *Id.* at 2.

69. *Id.* (“Insofar as this bill would ‘impose[] a punishment for an act which was not punishable at the time it was committed’ or ‘impose[] additional punishment to that then prescribed’ it would violate the Constitution’s Ex Post Facto Clause. *Cummings v. Missouri*, 4 Wall. 277, 325–326 (1867); see *Beazell v. Ohio*, 269 U.S. 167, 169–70 (1925); U.S. Const. art I, § 9, cl. 3.”). *But see* Memorandum from the American Law Division on the Ex Post Facto Implications of the Allow States and Victims to Fight Online Sex Trafficking Act of 2017 (H.R. 1865), as Passed by the House of Representatives to Representative Ann Wagner (March 7, 2018) (on file with the Congressional Research Service) (“Because [SESTA/FOSTA] would amend the Communications Act to allow states to prosecute online facilitators of sex trafficking but would not create any new federal crimes or enhance the punishment for any existing federal crimes, the Ex Post Facto Clause does not appear likely to bar Congress from making these amendments.”). However, the Ex Post Facto issues regarding SESTA/FOSTA are outside the scope of this Note.

70. H.R. REP. NO. 115-583, at 2–3 (2018) (“[Representative Goodlatte made] technical changes to the bill, add[ed] ‘attempt’ language that had been inadvertently omitted, clarifie[d] that only sex trafficking victims may recover restitution, and permit[ted] the existing affirmative defense to be raised in cases where a defendant is being prosecuted under subsection 2421A(b)(1).”).

71. *Id.*

72. *Id.* at 3–4.

73. *Id.* at 3.

74. *Id.* at 2.

FOSTA, as amended, with a 388–25 vote, with 14 Republicans and 11 Democrats opposed.⁷⁵

Soon after, the House bill was placed on the Senate calendar. On March 21, 2018, the full Senate took up the House bill for immediate consideration. Senator Ron Wyden (a co-author of § 230⁷⁶) objected to the bill, warning that the bill would “send [sex traffickers] . . . to the shadowy corners of the dark web.”⁷⁷ Senator Wyden also emphasized the DOJ’s concerns about the constitutionality of the retroactive clause and that the “legislation . . . [would] make it harder, not easier, to root out and prosecute sex traffickers.”⁷⁸ That same day, the Senate passed, without amendment, the House version of SESTA/FOSTA with a 97–2 vote, with one Republican and one Democrat opposed.⁷⁹ President Donald Trump signed SESTA/FOSTA into law on April 11, 2018.⁸⁰

However, a few days before the enactment of SESTA/FOSTA, federal authorities were able to seize Backpage.com.⁸¹ The DOJ was able to indict Backpage without the legal backing of SESTA/FOSTA, using existing law and judicial findings.⁸² Although a bipartisan Congress enacted SESTA/FOSTA arguably to target Backpage, SESTA/FOSTA was not necessary to achieve the end goal of punishing a bad-acting ICS for facilitating sex trafficking on the internet.

75. 164 *Cong. Rec.* H1317–19 (2018).

76. *See* S. REP. NO. 115-49, at S1866 (2018).

77. *See id.* (“I fear that the legislation before the Senate now is going to be another failure. I fear that it is going to do more to take down ads than to take down traffickers. I that fear it will send these monsters, these evil people who traffic beyond the grasp of law enforcement to the shadowy corners of the dark web, a place where every day search engines don’t go, and it is going to be even easier for criminals—these vicious traffickers—to find a safe haven for their extraordinarily evil acts. . . .”).

78. *See id.* at S1868 (2018).

79. *Id.* at S1872.

80. Allow States and Victims to Fight Online Sex Trafficking Act of 2017, Pub. L. No. 115-164 (2018); Remarks on Signing the Allow States and Victims To Fight Online Sex Trafficking Act of 2017, Daily Comp. Pres. Docs., 2018 DCPD No. 201800233 (Apr. 11, 2018) (“If we work together, we can get the criminal traffickers off our streets and off of the internet. We can bring safety and hope to every community across the country, and we can create a culture that respects the dignity of every child of God.”).

81. *See* Nitasha Tiku, *Feds seize Backpage.com, site linked to sex trafficking*, WIRED (Apr. 6, 2018, 8:40 PM), <https://www.wired.com/story/feds-seize-backpagecom-site-linked-to-sex-trafficking/> [<https://perma.cc/8KYS-HHTN>].

82. Indictment, 5, ¶ 16, *United States v. Lacey* (D. Ariz. 2018) (“[T]he BACKPAGE DEFENDANTS are charged in this indictment with the crimes of facilitating prostitution (18 U.S.C. § 1952), concealment, transactional, and international promotional money laundering (18 U.S.C. §§ 1956 and 1957), and/or conspiracy to commit these offenses (18 U.S.C. § 371 and 1956).”).

III. SESTA/FOSTA

SESTA/FOSTA has five major prongs: (1) creating a federal crime for “[w]hoever . . . owns, manages, or operates an interactive computer service . . . or conspires or attempts to do so, with the intent to promote or facilitate the prostitution of another person”;⁸³ (2) imposing federal civil liability for violating the new federal crime;⁸⁴ (3) imposing state civil liability for sex trafficking by amending 18 U.S.C. § 1595 to authorize state attorneys general to bring civil actions for violations of § 1591 (a sex trafficking statute);⁸⁵ (4) amending § 230 to strip immunity for ICSs that exhibit “the intent to promote or facilitate the prostitution of another person”;⁸⁶ and (5) amending existing sex trafficking law 18 U.S.C. § 1591 to provide a definition for participation in a venture.⁸⁷

A. CREATING A FEDERAL CRIME: 18 U.S.C. § 2421A(A)–(B)

Sex trafficking has been a federal crime in the United States since 2000.⁸⁸ SESTA/FOSTA enacts a new provision—18 U.S.C. § 2421A, “Promotion or facilitation of prostitution and reckless disregard of sex trafficking”—creating criminal liabilities specifically for ICSs.⁸⁹

Section 2421A(a) makes it a crime to “own[], manage[], or operate[] an interactive computer service . . . or conspire[] or attempt[] to do so, with the intent to promote or facilitate the prostitution of another person.”⁹⁰

Section 2421A(b) creates an aggravated felony for

[w]hoever . . . owns, manages, or operates an interactive computer service . . . or conspires or attempts to do so, with the intent to promote or facilitate the prostitution of another person and—

83. Allow States and Victims to Fight Online Sex Trafficking Act of 2017, Pub. L. No. 115-164 § 3 (2018); *see* 18 U.S.C. § 2421A(a) (2012).

84. Allow States and Victims to Fight Online Sex Trafficking Act of 2017, Pub. L. No. 115-164 § 3 (2018); *see* 18 U.S.C. § 2421A(c) (2012).

85. Allow States and Victims to Fight Online Sex Trafficking Act of 2017, Pub. L. No. 115-164 § 6 (2018); *see* 18 U.S.C. § 1595(d) (2012).

86. Allow States and Victims to Fight Online Sex Trafficking Act of 2017, Pub. L. No. 115-164 § 4 (2018); *see* 47 U.S.C. § 230(e)(5) (2012).

87. Allow States and Victims to Fight Online Sex Trafficking Act of 2017, Pub. L. No. 115-164 § 5 (2018); *see* 18 U.S.C. § 1591(e) (2012).

88. Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386 § 112 (creating 18 U.S.C. § 1591 (2012)—“Sex trafficking of children or by force, fraud, or coercion”); Justice for Victims of Trafficking Act of 2015, Pub. L. No. 114-22 (creating 18 U.S.C. § 2421 (2012)—“Transportation generally”).

89. Allow States and Victims to Fight Online Sex Trafficking Act of 2017, Pub. L. No. 115-164 § 3 (2018).

90. *Id.* § 3(a).

- (1) promotes or facilitates the prostitution of 5 or more persons; or
- (2) acts in reckless disregard of the fact that such conduct contributed to sex trafficking, in violation of 1591(a)⁹¹

Although 2421A(a) and 2421A(b)(1) differ in their requirements and punishments, defendants under both 2421A(a) and 2421A(b)(1) may assert the affirmative defense that “promotion or facilitation of prostitution is legal in the jurisdiction where the promotion or facilitation was targeted.”⁹² However, this defense is not available when a defendant exhibits reckless disregard under 2421A(b)(2).

B. IMPOSING FEDERAL CIVIL LIABILITY: 18 U.S.C. § 2421A(c)

Under 18 U.S.C. § 2421A(c), “[a]ny person injured by reason of a violation of section 2421A(b) [an aggravated felony] may recover damages and reasonable attorneys’ fees.”⁹³ Any person injured by sex trafficking is also entitled to mandatory restitution.⁹⁴

C. AUTHORIZING STATE ATTORNEYS GENERAL: 18 U.S.C. § 1595

SESTA/FOSTA amends 18 U.S.C. § 1595⁹⁵ by adding a subsection that authorizes state attorneys general to use § 2421A (ICS promotion or facilitation of sex trafficking) and § 1591 (sex trafficking) to bring state criminal and civil actions against violators of § 2421A and § 1591, respectively.⁹⁶ State court judges wishing to charge a defendant under § 2421A or § 1591 must follow three steps: (1) ask whether the defendant’s conduct violates the state sex trafficking statute, (2) ask whether the defendant’s conduct violates the federal sex trafficking statute, and (3) bring charges under state law for both federal and/or state sex trafficking statute violations. If the defendant’s conduct does not violate the federal sex trafficking statute, then the defendant cannot be liable under the state sex trafficking statute.

91. *Id.*

92. 18 U.S.C. § 2421A(e) (2012). In the United States, prostitution is legal only in certain jurisdictions in the state of Nevada. Nev. Rev. Stat. Ann. § 201.354.

93. 18 U.S.C. § 2421A(c) (2012).

94. 18 U.S.C. § 2421A(d) (2012) (notwithstanding 18 U.S.C. § 3663 (2012) (“Order of restitution”) or 18 U.S.C. § 3663A (2012) (“Mandatory restitution to victims of certain crimes”)) (must be consistent with 18 U.S.C. § 2327(b) (2012) (“Mandatory restitution”).

95. 18 U.S.C. § 1595 (2012) (“Civil remedy”).

96. Allow States and Victims to Fight Online Sex Trafficking Act of 2017, Pub. L. No. 115-164 § 6(a) (2018); H.R. REP. NO. 115-572, pt. 1, at 9–10 (2018) (“The language used in the carve out is designed to ensure that interactive computer services are subject to one set of criminal laws, rather than a patchwork of various state laws. In order to qualify for this carve out, a state law’s elements should mirror those in 2421A and 1591(a).”).

D. AMENDING ICS LIABILITY: 47 U.S.C. § 230(E)(5)

The stated purpose of SESTA/FOSTA is to amend § 230 of the CDA.⁹⁷ SESTA/FOSTA adds a subsection to § 230(e)—“Effect on other laws”—to clarify that § 230 does not shield ICSs from civil actions or criminal prosecution under state law.⁹⁸ This revised § 230 applies “regardless of whether the conduct alleged occurred . . . before, on, or after such date of enactment.”⁹⁹

E. DEFINING “PARTICIPATION IN A VENTURE”: 18 U.S.C. § 1591

SESTA/FOSTA amends 18 U.S.C. § 1591, a sex trafficking statute, to clarify that participation in a venture means “knowingly assisting, supporting, or facilitating a violation.”¹⁰⁰ With the addition of the definition of participation in a venture, 1591(a) effectively reads:

Whoever knowingly—

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

(2) benefits, financially or by receiving anything of value, from **[knowingly assisting, supporting, or facilitating a violation]** which has engaged in an act described in violation of paragraph (1), knowing, or, except where the act constituting the violation of paragraph (1) is advertising, in reckless disregard of the fact, that means of force, threats of force, fraud, coercion described in subsection (2), or any combination of such means will be used to cause the person to engage in a commercial sex act, or that the person has not attained the age of 18 years and will be caused to engage in a commercial sex act¹⁰¹

97. Allow States and Victims to Fight Online Sex Trafficking Act of 2017, Pub. L. No. 115-164 (2018) (stating that the purpose of SESTA/FOSTA is “[t]o amend the Communications Act of 1934 to clarify that section 230 of such Act does not prohibit the enforcement against providers and users of interactive computer services of Federal and State criminal and civil law relating to sexual exploitation of children or sex trafficking, and for other purposes”).

98. *Id.* at § 4 (“Nothing in this section . . . shall be construed to impair or limit—(A) any claim in a civil action brought under [18 U.S.C. § 1595] . . . ; (B) any charge in a criminal prosecution under State law if the conduct underlying the charge would constitute a violation of [18 U.S.C. § 1591] . . . ; or (C) any charge in a criminal prosecution brought under State law if the conduct underlying the charge would constitute a violation of [18 U.S.C. § 2421A] . . .”).

99. *Id.* at §§ 4, 7 (“Nothing in this Act or the amendments made by this Act shall be construed to limit or preempt any civil action or criminal prosecution under Federal law or State law . . . that was not limited or preempted by section 230 of the Communications Act of 1934 (47 U.S.C. 230) . . .”).

100. *Id.* at § 5.

101. 18 U.S.C. § 1591(a) (2012).

Now prosecutors must prove both knowledge with regards to benefitting from the violation and knowledge with regards to “assisting, supporting, or facilitating” the violation.

IV. SESTA/FOSTA AND ICS “KNOWLEDGE”

With regards to ICS knowledge, SESTA/FOSTA amends § 1591 to clarify that it is a crime for

a) Whoever **knowingly**—

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

(2) benefits, financially or by receiving anything of value, from **[knowingly assisting, supporting, or facilitating a violation]** which has engaged in an act [of sex trafficking]¹⁰²

Knowledge in criminal law involves “nothing more than . . . [a] degree of certainty” as it is “nothing more than a man’s firm belief.”¹⁰³ For an ICS to have statutory “knowledge” that its activities are “assisting, supporting, or facilitating a violation” of sex trafficking laws, the ICS must have a degree of certainty that its activities are “assisting, supporting, or facilitating a violation.”¹⁰⁴

The intentions of Congress, in introducing a knowledge standard targeting ICSs in SESTA/FOSTA, must be called into question. Although knowledge as *mens rea* is well-known and unambiguous in criminal law,¹⁰⁵ there are currently no federal criminal statutes that apply *mens rea* knowledge specifically to ICSs. In enacting SESTA/FOSTA, Congress did not explain what might constitute ICS knowledge. Nor did SESTA/FOSTA explain what an ICS’s knowledge looks like in the context of monitoring user content.¹⁰⁶ Although Congress’s intention in imposing an ICS knowledge standard is unclear, courts must now interpret ICS knowledge in the context of SESTA/FOSTA.

102. 18 U.S.C. § 1591(a) (2012) (emphasis added); *see supra* Section III.E.

103. *See What is Knowledge?*, LAW DICTIONARY, <https://thelawdictionary.org/knowledge/> [<https://perma.cc/4WCZ-5RTU>] (last visited Dec. 22, 2018).

104. *See* 18 U.S.C. § 1591(a) (2012).

105. *See Online Sex Trafficking: Hearing on H.R. 1865 Before the H. Comm. On the Judiciary, Subcomm. on Crime, Terrorism, Homeland Security and Investigations*, 115th Cong. (2017) (statement of Mary Graw Leary, Professor, Catholic University of America, Columbus School of Law).

106. *See* Letter from R Street et al., to Mitch McConnell, Majority Leader, United States Senate, and Chuck Schumer, Minority Leader, United States Senate (Aug. 3, 2017) (“[T]he proposed bill is unclear as to what constitutes ‘knowing conduct.’ Is it actual knowledge of specific ads for human trafficking, general awareness that some human trafficking is taking place, or something else?”).

This Part asserts that courts should not apply the traditional *mens rea* knowledge standard to ICSs with regards to user-posted, sex trafficking-related content. First, this Part explains how this ICS knowledge standard imposes vague monitoring expectations on ICSs, suggesting that courts will need to clarify this standard. Second, this Part examines how holding ICSs to an uncertain knowledge standard with regards to user-posted content will have unintended, and potentially perverse, consequences. Finally, this Part argues that, if courts do hold ICSs to the knowledge standard set forth in SESTA/FOSTA, courts should use ICS-specific knowledge standards developed in other areas of the law when interpreting SESTA/FOSTA.

A. VAGUE MONITORING EXPECTATIONS

Neither SESTA/FOSTA nor § 230 impose formal statutory monitoring expectations on ICSs.¹⁰⁷ Under § 230, an ICS will not be treated as the publisher or speaker of user-posted content.¹⁰⁸ Even if an ICS chooses to monitor user-posted content in good faith, the ICS will still not be treated as the publisher or speaker of said content.¹⁰⁹

Because of SESTA/FOSTA, this shield no longer applies when user-posted content violates federal anti-sex trafficking laws.¹¹⁰ In other words, if said user-posted content violates federal anti-sex trafficking laws, the ICS is not immune from liability.¹¹¹ Now, if an ICS is found to violate § 1591—if the ICS “knowingly assist[s], support[s], or facilitate[s]” sex trafficking¹¹²—the ICS will not be able to wield its § 230 shield.¹¹³ However, the knowledge standard in § 1591 is not clear, as Congress did not explain what would constitute ICS knowledge of user-posted content.

Whether or not an ICS has knowledge will likely hinge on the ICS’s monitoring strategy. If an ICS’s monitoring strategy detects sex trafficking-

107. *See* 47 U.S.C. § 230 (2012).

108. *See* 47 U.S.C. § 230(c)(1) (2012).

109. 47 U.S.C. § 230(c)(2) (2012) provides:

(2) Civil liability No provider or user of an interactive computer service shall be held liable on account of—

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

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

110. *See* 47 U.S.C. § 230(e)(5) (2012).

111. *See id.*

112. *See* 18 U.S.C. § 1591 (2012).

113. *See* 47 U.S.C. § 230(e)(5) (2012).

related content, it might be argued that the ICS *knows* that it has “support[ed]” sex trafficking in providing a platform for the sex trafficker.¹¹⁴ It is theoretically possible that an ICS can be criminally and civilly liable if the ICS gains knowledge of sex trafficking-related content in the course of trying to root out sex trafficking-related content. At the moment the ICS gains this knowledge, the ICS *knows* that it has “support[ed]” sex trafficking.¹¹⁵

Although SESTA/FOSTA does not impose a formal duty to monitor, it effectively imposes monitoring expectations if an ICS chooses to monitor. If an ICS does not monitor user content, it is not clear how the ICS can affirmatively act to gain knowledge of criminal sex trafficking content.¹¹⁶ However, if an ICS monitors user content, the ICS must employ a monitoring safety net to avoid liability for criminal sex trafficking content.¹¹⁷

ICSs are able to employ an almost infinite number of monitoring strategies, yet it is unclear which of these monitoring strategies would satisfy § 1591’s knowledge standard. It is extremely difficult to accurately screen millions¹¹⁸ of user-generated posts and other content per day. The complexity of monitoring algorithms only compounds this difficulty. ICSs such as Facebook tend to take a two-pronged approach to monitoring user conduct: (1) manually reviewing content that users have “flagged” as containing objectionable images or messages, and (2) using computer-implemented algorithms to automatically detect objectionable images or messages.¹¹⁹ If the ICS deems an image or

114. *See* 18 U.S.C. § 1591 (2012).

115. *See id.*

116. However, an ICS that does not monitor can still satisfy the knowledge standard if a user or other party notifies the ICS of criminal sex trafficking content. Additionally, under 47 U.S.C. § 230(e)(5), an ICS that does not monitor user-posted content can still be liable for user-posted content that violates federal anti-sex trafficking laws other than § 1591—that is, if the ICS’s conduct relating to the content violates the new 18 U.S.C. § 2421A. Section 2421A contains an “intent” *mens rea* standard as well as a “reckless disregard” *mens rea* standard. This Section focuses only on ICS conduct relating to § 1591’s “knowledge” standard.

117. *See* Eric Goldman, *The Complicated Story of FOSTA and Section 230*, 17 FIRST AMEND. L. REV. 279, 288 (2019) (suggesting that SESTA/FOSTA’s knowledge standard leaves ICSs with three options: “(1) Perfectly implement content moderation efforts to ensure no such promotions appear on the service, and if any promotions slip through despite these moderation efforts, hope that the service has done enough to satisfy prosecutors and the courts that they did not “know” of the rogue promotions. (2) Turn off content moderation efforts to negate the possibility of “knowing” about the content. (3) Exit the industry”).

118. Digital marketing consulting firm Zephoria estimates that 510,000 comments are posted on Facebook every 60 seconds. *See The Top 20 Valuable Facebook Statistics – Updated January 2019*, ZEPHORIA DIGITAL MARKETING, <https://zephoria.com/top-15-valuable-facebook-statistics/> [<https://perma.cc/79KQ-8KRY>] (last visited January 28, 2019).

119. *See* Richard Allan, *Hard Questions: Who Should Decide What Is Hate Speech in an Online Global Community?*, FACEBOOK NEWSROOM (June 27, 2017), <https://newsroom.fb.com/news/2017/06/hard-questions-hate-speech/> [<https://perma.cc/E6MR-GBPW>]; Hayley

message objectionable, the ICS will remove that image or message from the site and send take-down notices as appropriate. ICSs differ in the parameters they use to determine what is “objectionable.” For example, Facebook’s definition of prohibited hate speech is “anything that directly attacks people based on what are known as their ‘protected characteristics’—race, ethnicity, national origin, religious affiliation, sexual orientation, sex, gender, gender identity, or serious disability or disease.”¹²⁰ ICSs design monitoring algorithms to detect user content that falls within these parameters, and particular monitoring algorithms differ in their success rates. SESTA/FOSTA does not distinguish between these parameters or algorithms, calling only for “knowledge.”

SESTA/FOSTA’s knowledge standard may force courts to interpret vague monitoring expectations, which will lead to unintended consequences.

B. UNINTENDED CONSEQUENCES OF AN ICS KNOWLEDGE STANDARD

Imposing knowledge requirements on ICSs might lead to narrowed liability for ICSs stakeholders; broadened liability for ICSs generally, which is likely to increase over-policing of user-generated content; and uncertain litigation prospects for large and small ICSs alike.

1. *Narrow Liability*

Before the enactment of SESTA/FOSTA, the DOJ suggested that inserting a knowledge standard into the definition for participation in a venture would create new elements that prosecutors must prove.¹²¹ This could result in narrowed liability, where some guilty parties will not be found guilty. For example, under the previous law, a shareholder in Website X could be liable for “knowingly . . . benefit[ing], financially . . . from participation in a venture which has engaged” in sex trafficking. Under the previous law, the shareholder did not have to know about the sex trafficking; the shareholder need only knowingly benefit from participation in the venture. Under the new law, a prosecutor must show that the same shareholder (1) knowingly benefitted from participation in the venture and (2) “knowingly assist[ed], support[ed], or facilitate[ed] a violation.”¹²² Now, a prosecutor must prove that the shareholder knew of the violation itself.

Tsukayama, *Facebook adds 3,000 employees to screen for violence as it nears 2 billion users*, WASH. POST, May 3, 2017.

120. See Allan, *supra* note 119.

121. Letter from Stephen E. Boyd (Assistant Attorney General) to Representative Robert W. Goodlatte (Feb. 27, 2018).

122. Allow States and Victims to Fight Online Sex Trafficking Act of 2017, Pub. L. No. 115-164 § 5 (2018) (emphasis added).

Thus, the new § 1591 may exonerate certain guilty parties—such as those financially benefitting in sex trafficking activities—if a prosecutor is unable to prove knowledge of the sex trafficking activity.

2. *Broad Liability and Over-Policing*

On the other hand, the new § 1591 might incriminate ICSs that allow even vague references to sex trafficking. Because ICSs can now be held liable for a single bad judgment call in monitoring sex trafficking-related content, ICSs are likely to alter their user-monitoring practices to over-police user content.

Facebook seemingly responded to this threat of broad liability by adopting its Sexual Solicitation policy in December 2018.¹²³ This was potentially a response to an October 2018 lawsuit filed against Facebook after a sex trafficker recruited a fifteen-year-old girl through Facebook messaging and posted ads for the girl on Backpage.com.¹²⁴ However, the stated rationale behind the policy was that “people use Facebook to discuss and draw attention to sexual violence and exploitation. [Facebook] recognize[s] the importance of and want to allow for this discussion. [Facebook] draw[s] the line, however, when content facilitates, encourages or coordinates sexual encounters between adults.”¹²⁵ The policy prohibits everything from “[c]ontent that attempts to coordinate or recruit for adult sexual activities” to “[c]ontent that engages in implicit sexual solicitation” and “[v]ague suggestive statements, such as ‘looking for a good time tonight.’”¹²⁶

With such a broad definition of sexual solicitation, it would appear as though the fears of civil rights groups such as the Electronic Frontier Foundation are coming true: ICSs are over-policing user content.¹²⁷ Facebook

123. See *Facebook Community Standards, 15. Sexual Solicitation*, FACEBOOK, https://www.facebook.com/communitystandards/sexual_solicitation [https://perma.cc/97CV-BMGX] (last visited Dec. 21, 2018).

124. See Juan A. Lozano, *Lawsuit Accuses Facebook of Enabling Human Traffickers*, U.S. NEWS (Oct. 2, 2018, 7:11 PM), <https://www.usnews.com/news/best-states/texas/articles/2018-10-02/lawsuit-accuses-facebook-of-enabling-human-traffickers> [https://perma.cc/B9XU-TQR7]; Dan Whitcomb, *Facebook, responding to lawsuit, says sex trafficking banned on site*, REUTERS (Oct. 3, 2018, 6:11 PM), <https://www.reuters.com/article/us-sex-trafficking-facebook-lawsuit/facebook-responding-to-lawsuit-says-sex-trafficking-banned-on-site-idUSKCN1ME038> [https://perma.cc/3HNT-S9N7].

125. *Facebook Community Standards*, *supra* note 123.

126. See *id.*

127. Civil rights groups including the Electronic Frontier Foundation filed a case challenging the constitutionality of SESTA/FOSTA. See *Woodhull Freedom Found. v. United States*, 334 F. Supp. 3d 185 (D.D.C. 2018); *Woodhull Freedom Foundation et al. v. United States*, ELECTRONIC FRONTIER FOUND., <https://www EFF.ORG/cases/woodhull-freedom-foundation-et-al-v-united-states> [https://perma.cc/HWT6-TLHN] (last visited Dec. 21, 2018) (“Both through direct restrictions and because of multiple layers of ambiguity, FOSTA is driving constitutionally protected speech off the Internet at a rapid pace . . .”).

has developed a broad monitoring net, catching a wide variety of content that might be related to sex trafficking. It is likely Facebook's hope that this broad monitoring net will prevent Facebook from gaining knowledge of the conduct, protecting it from criminal liability under § 1591.

3. *Concerns Involving ICS Litigation*

Due to the uncertainty surrounding the judicial interpretation of SESTA/FOSTA's ICS knowledge standard, there is increased uncertainty surrounding potential civil and criminal suits against ICSs. With regard to civil litigation, some critics have predicted that the new liability imposed by SESTA/FOSTA will lead to a "barrage of frivolous litigation targeting platforms."¹²⁸ When there is an unclear scope of liability, plaintiffs are more likely to pursue suits against ICSs than suits against individual content creators, as ICSs tend to have deeper pockets and are easier to identify and track down than individual content creators.¹²⁹

This uncertainty is likely to affect large ICSs and small ICSs in different ways. Large ICSs are likely to respond to this barrage of litigation in two ways: (1) through settling frivolous lawsuits¹³⁰ and (2) altering their content monitoring strategies. To the first point, instead of risking an adverse judicial ruling, large ICSs are likely to find that it is more economical to settle.¹³¹ And to the second point, large ICSs will likely have to alter their content monitoring strategies to avoid liability. Pre-SESTA/FOSTA, some critics argued that large ICSs would likely "err on the side of caution" when monitoring user content, resulting in the take down of relatively benign speech, as discussed in previous Section.¹³² Based on Facebook's example of setting a wide net for sex trafficking-related content, this concern might soon be a reality. On the other

128. See *Online Sex Trafficking: Hearing on H.R. 1865 Before the H. Comm. On the Judiciary, Subcomm. on Crime, Terrorism, Homeland Security and Investigations*, 115th Cong. (2017) (statement of Evan Engstrom, Executive Director, Engine) (warning against "fishing expeditions searching for any evidence that might be used against" online platforms); Emma Llansó, *SESTA Would Undermine Free Speech Online*, CTR. FOR DEMOCRACY & TECH. (Aug. 1, 2018), <https://cdt.org/blog/sesta-would-undermine-free-speech-online/> [<https://perma.cc/85M3-R7L6>] ("[O]ne of the key problems with [SESTA] . . . is that it creates potential liability for a broad and dynamic range of intermediaries.").

129. See *id.* (noting that "it is often far easier to pressure intermediaries into serving as online censors with the threat of litigation than it is to find an individual speaker and hold her accountable").

130. See Daphne Keller, *SESTA and the Teachings of Intermediary Liability*, 3 (Nov. 2, 2017) (available at <http://dx.doi.org/10.2139/ssrn.3121296>).

131. See *id.*

132. See Letter from ACLU et al., to Mitch McConnell, Majority Leader, United States Senate and Chuck Schumer, Minority Leader, United States Senate (Aug. 4, 2017); Llansó, *supra* note 128 ("[M]any intermediaries would face the choice of risking potentially bankrupting lawsuits, or erring in favor of taking down challenged speech.").

hand, some critics argued that large ICSs would be tempted to under-police user-generated content, in an effort to prevent gaining knowledge of sex trafficking-related content.¹³³ Alternatively, it is possible that large ICSs will largely not be affected by SESTA/FOSTA, as they have the resources to develop more stringent monitoring strategies to prevent liability altogether.

While the uncertainty of ICS knowledge might constrain large ICSs, it could stifle small ICSs that lack the resources of large ICSs.¹³⁴ For example, small ICSs lack the capital needed to settle frivolous lawsuits. These ICSs might also lack the technical and financial power to develop additional and more stringent monitoring strategies.¹³⁵ In turn, this judicial uncertainty might discourage entrepreneurs from building new platforms and discourage investors from investing in new platforms.¹³⁶ Thus, by imposing an ICS knowledge standard, SESTA/FOSTA might have the unintended consequence of impeding both small ICS-driven innovation and large ICS-driven innovation.

133. See Molinari, *supra* note 61 (“While large companies are more likely to continue their proactive enforcement efforts and can afford to fight lawsuits, if smaller platforms are made liable for ‘knowledge’ of human trafficking occurring on their platforms, there is a risk that some will seek to avoid that ‘knowledge’; they will simply stop looking for it. This would be a disaster.”); Letter from ACLU et al., to Mitch McConnell, Majority Leader, United States Senate and Chuck Schumer, Minority Leader, United States Senate (Aug. 4, 2017) (on file with the ACLU) (“[T]he risk of liability would likely discourage intermediaries from engaging in good-faith efforts to screen or moderate content, since such review of content could create “actual knowledge” for the intermediary of potentially illegal content and trigger potential criminal and civil penalties.”); *Online Sex Trafficking: Hearing on H.R. 1865 Before the H. Comm. On the Judiciary, Subcomm. on Crime, Terrorism, Homeland Security and Investigations*, 115th Cong. (2017) (statement of Evan Engstrom, Executive Director, Engine) (“These provisions [of SESTA/FOSTA] could end up disincentivizing platforms from engaging in proactive monitoring efforts. As currently drafted, this legislation could potentially subject platforms to liability for facilitating trafficking activity on their sites even if they do not have any actual knowledge that any trafficking is occurring.”).

134. See, e.g., *House Judiciary Committee Hearing on Social Media Filtering Practices: Hearing on H.R. 1865 Before the H. Comm. On the Judiciary*, 115th Cong. (2018) (statement of Berin Szoka, President, Techfreedom) (“Ironically, a Fairness Doctrine for social media would benefit the largest websites by insulating them against competition from smaller sites: large, well-funded companies like Facebook, Twitter and Google already have thousands of people handling content moderation issues and the resources to face litigation over how they administer their platforms. While they would surely resent having to administer such a vague and arbitrary standard, they would also be able to manage the burden, while the startups vying to become the next Facebook, Twitter or Google would not.”).

135. See *id.*

136. See Keller, *supra* note 130, at 3 (“[T]he same uncertainty will make . . . new entrepreneurs and investors less likely to build new platforms to compete against today’s tech giants.”).

SESTA/FOSTA's knowledge standard may lead to several unintended consequences. But if courts appropriately apply this standard, they may be able to mitigate these harms.

C. POSSIBLE INTERPRETATIONS OF "KNOWLEDGE" FOR ICSS

Although it is unclear how courts will interpret SESTA/FOSTA's ICS knowledge standard, courts should draw upon existing standards of ICS knowledge in determining ICS knowledge of sex trafficking-related content. In particular, courts could draw on the standards of knowledge used in contributory trademark infringement and the Digital Millennium Copyright Act's (DMCA) safe harbor provisions to determine what constitutes ICS knowledge in the context of § 1591. Courts might also draw on the ICSSs themselves and consider how an ICS such as Facebook monitors user content and defines their own knowledge of user content.

1. *Contributory Trademark Infringement*

One possible interpretation of "knowledge" for an ICS comes from contributory trademark infringement. In *Tiffany Inc. v. eBay Inc.*, Tiffany (the renowned jeweler) filed a lawsuit against eBay, claiming that some eBay users were selling counterfeit Tiffany jewelry.¹³⁷ In order for eBay to be liable for contributory trademark infringement, it must "intentionally induce[] another to infringe a trademark, or . . . continue[] to supply its product to one whom it *knows or has reason to know* is engaging in trademark infringement."¹³⁸ The court reasoned that

if eBay had reason to suspect that counterfeit Tiffany goods were being sold through its website, and intentionally shielded itself from discovering the offending listings or the identity of the sellers behind them, eBay might very well have been charged with knowledge of those sales A service provider is not, we think, permitted willful blindness.¹³⁹

The court went on to hold that knowledge of violating activity as a "general matter" was not enough to trigger a mental state of knowledge.¹⁴⁰

The court considered that eBay took several actions after receiving notice of counterfeit goods. These actions included deleting the product listing, warning sellers and buyers, and canceling fees it earned from the listing of the counterfeited product.¹⁴¹ Although eBay may have briefly known of trademark

137. *Tiffany Inc. v. eBay Inc.*, 600 F.3d 96 (2d Cir. 2010).

138. *Id.* at 104 (quoting *Inwood Labs. v. Ives Labs.*, 456 U.S. 844, 854 (1982)).

139. *Id.* at 110.

140. *See id.*

141. *See id.* at 106.

infringement, it did not continue to support the product listing. Additionally, eBay did not exhibit that it was willfully blind to the counterfeit products, as it took several measures to prevent counterfeit products from being sold on the site. Therefore, eBay was not liable for trademark infringement.¹⁴²

In the context of § 1591, a court may be able to relate *Tiffany's* definition of knowledge to ICS knowledge of sex trafficking activities. First, eBay was not liable where it had knowledge of trademark infringement but immediately acted to remove the infringing material.¹⁴³ Similarly, in the context of § 1591, a court may find that an ICS is not liable if it knows about the sex trafficking content but then immediately takes adequate measures to remove the content. Also, eBay would have been liable if it had been willfully blind to the trademark infringement.¹⁴⁴ In the context of § 1591, this could mean that a court might similarly hold an ICS liable if it exhibits willful blindness towards sex trafficking content. In the case of an ICS, this could take the form of under-policing user-posted content. Lastly, eBay was not liable for having general knowledge of the infringing activity.¹⁴⁵ In the context of § 1591, a court could extend this principle to ICSs by holding that an ICS will not be held liable if it had only general knowledge of sex trafficking activity.

2. DMCA Safe Harbors

A second possible interpretation of ICS knowledge comes from 17 U.S.C. § 512(c), a DMCA “safe harbor” provision. This provision protects a “service provider” from copyright infringement liability that occurs when a user stores copyright-infringing material on the service provider’s system.¹⁴⁶ If the service provider has actual knowledge of the infringing material, then the service provider is not protected by § 512(c).¹⁴⁷ Additionally, in order to retain the safe harbor, the service provider must also implement a “repeat infringer” policy—“the termination in appropriate circumstances of subscribers and account holders of the service provider’s system or network”¹⁴⁸—as well as “standard technical measures . . . used by copyright owners to identify or protect copyrighted works.”¹⁴⁹ The service provider must also “not receive a financial

142. *See id.* at 110.

143. *See id.* at 106.

144. *See id.* at 109.

145. *See id.* at 107.

146. *Viacom Int'l, Inc. v. YouTube*, 676 F.3d 26 (2d Cir. 2012) (quoting 17 U.S.C. § 512(c) (2012)).

147. *See id.* at 32.

148. 17 U.S.C. §§ 512(k)(1)(B), 512(i)(1)(A) (2012).

149. 17 U.S.C. §§ 512(i)(1)(A), 512(i)(1)(B), 512(i)(2) (2012).

benefit directly attributable to the infringing activity, in a case in which the service provider has the right and ability to control such activity.”¹⁵⁰

In *Viacom Int’l, Inc. v. YouTube*, plaintiffs filed a lawsuit against YouTube for direct and secondary copyright infringement for video clips posted on the site.¹⁵¹ The court held that “actual knowledge or awareness of facts or circumstances that indicate specific and identifiable instances of infringement will disqualify a service provider from the safe harbor.”¹⁵² For example, receiving a takedown notice would constitute “actual knowledge or awareness.”¹⁵³ However, a service provider retains the protection of the safe harbor if it “acts expeditiously to remove, or disable access to, the material.”¹⁵⁴

In the case of YouTube, there was evidence of YouTube executives emailing about particular clips that were likely infringing copyright.¹⁵⁵ The executives knew of this infringing activity, yet they chose to wait until they received cease and desist letters before taking the clips down.¹⁵⁶ YouTube did not “act[] expeditiously to remove, or disable access to, the material” even though YouTube executives had identified instances of copyright infringement.¹⁵⁷

In the context of § 1591, a court may be able to analogize *Viacom*’s definition of knowledge to ICS knowledge of sex trafficking activities. In *Viacom*, the court’s definition of knowledge required “specific and identifiable instances of infringement” instead of a “general awareness that infringement may be occurring.”¹⁵⁸ This is similar to *Tiffany*, where eBay was not liable for having general knowledge of the infringing activity.¹⁵⁹ When analyzing a potential § 1591 violation, a court might rely on this definition in reasoning that an ICS must have “specific and identifiable instances” of sex trafficking in order for the ICS to be held liable for its knowledge. A general awareness of sex trafficking occurring on an ICS would not be enough to constitute knowledge of sex trafficking.

3. ICS Standards of Best Practices

Lastly, a court may rely on existing ICS monitoring strategies to determine an appropriate definition for ICS knowledge. Courts commonly rely on

150. 17 U.S.C. § 512(c)(1)(B) (2012).

151. *See Viacom*, 676 F.3d at 25.

152. *Id.* at 32.

153. *See id.* at 27–28.

154. *See id.* at 30 (quoting 17 U.S.C. § 512(c)(1)(A)(iii) (2012)).

155. *See id.* at 33–34.

156. *See id.*

157. *See id.* at 30 (quoting 17 U.S.C. § 512(c)(1)(A)(iii) (2012)).

158. *See id.* at 26, 35.

159. *See Tiffany Inc. v. eBay Inc.*, 600 F.3d 96, 109 (2d Cir. 2010).

industry customs when determining cases involving other areas of the law, including contract law and tort law. For example, courts have interpreted industry custom to be a minimum threshold in determining negligence in torts cases.¹⁶⁰

In determining industry customs for ICSs, a court may look to high-profile ICSs—such as Facebook—which might be able to set best practice standards for the industry. If a court views Facebook’s policy as a standard of best practices, then any ICS that monitors any less than Facebook may not be adequately monitoring user content for evidence of sex trafficking. However, Facebook is one of the largest, most sophisticated players in the ICS field, and therefore likely has more advanced monitoring capabilities than smaller ICSs. A small ICS might have fairly strong monitoring algorithms that still pale in comparison to algorithms developed by Facebook’s world-class engineering teams. For that reason, it would be more appropriate for a court to look at ICS monitoring practices more broadly instead of holding small ICSs to the best practices of Facebook or similar large ICSs.

If an ICS is not adequately monitoring user content, then the ICS may be accused of under-policing or willful blindness. As discussed in *Tiffany*’s definition of knowledge above, a court might equate willful blindness to a form of knowledge. Additionally, a court might determine that adequate monitoring strategies require ICSs to monitor a wide range of content parameters, such as Facebook detecting and removing content with “[v]ague suggestive statements.”¹⁶¹

4. *How Should Courts Define SESTA/FOSTA’s ICS Knowledge Standard?*

Overall, courts should draw on ICS knowledge standards from trademark and copyright law as well as real-world monitoring practices in interpreting SESTA/FOSTA’s ICS knowledge standard. In particular, ICS knowledge should require specific instances of knowledge rather than general knowledge. Additionally, willful blindness should be a form of knowledge. Although § 1591 does not impose a duty to monitor, courts might be more likely to infer willful blindness where an ICS does not use adequate monitoring strategies. In turn, adequate monitoring strategies are best determined by examining the industry customs in the ICS field.

Under this application of ICS knowledge, ICSs will be incentivized to immediately remove sex trafficking-related content as soon as they have knowledge of said content. Where an ICS does not have a monitoring strategy, this application of ICS knowledge will encourage the ICS to develop a

160. *See, e.g.*, *The T.J. Hooper*, 60 F.2d 737 (2d Cir. 1932).

161. *See* Facebook Community Standards, *supra* note 123.

monitoring strategy to root out sex trafficking rather than be found willfully blind. This is in the best interest of sex trafficking victims—ICSs are in the best position to monitor user content. If ICSs are incentivized to more stringently monitor and quickly take down sex trafficking-related content, more victims may ultimately be saved.

ICSs should be liable for sex trafficking-related content if the ICSs under-police user-posted content or exhibit other forms of willful blindness towards sex trafficking-related content. ICSs should not be liable for letting a single piece of sex trafficking-related content slip through the cracks where the ICSs have good faith, stringent monitoring strategies. This Note's application of the ICS knowledge standard accounts for both of these concerns.

However, as most cases will not be so clear, it will be up to the courts to develop an appropriate balance in the ICS knowledge standard.

V. CONCLUSION

With the enactment of SESTA/FOSTA, Congress has amended § 230 for the first time in twenty years. It is too soon to see if this chip in § 230 immunity will lead down a slippery slope towards broad intermediary liability. But legislation incriminating ICS knowledge of other forms of deplorable and illegal content—such as revenge porn and terrorist recruitment—is now plausible. In turn, the infrastructure ICSs are developing to prevent liability for user-posted, sex trafficking-related content might be used to prevent liability for other kinds of user-posted content.

If Congress continues to chip at § 230 immunity, this could mean changes—both policy-related and technical—for ICSs. In the meantime, the courts must apply these new laws in such a way as to punish the horrible crimes associated with sex trafficking while mitigating the unintended consequences of SESTA/FOSTA.

