

FEDERAL HUMAN TRAFFICKING REVIEW:
AN ANALYSIS & RECOMMENDATIONS FROM THE
2016 LEGAL DEVELOPMENTS

*John Cotton Richmond**

INTRODUCTION

With each passing year, the law surrounding human trafficking in the United States continues to expand. The Trafficking Victims Protection Act (“TVPA”) is entering its seventeenth year,¹ and a record number of traffickers have been prosecuted.² The year 2016 saw fifteen published federal appellate decisions highlighting a wide variety of issues.³ From the constitutionality of the TVPA to strict liability for the sex trafficking of minors, criminal defendants

* John Cotton Richmond is a Founding Director at the Human Trafficking Institute and served for over a decade as a federal prosecutor in the United States Department of Justice’s Human Trafficking Prosecution Unit. He would like to acknowledge and thank Alice R. Anderson (Pepperdine University School of Law, J.D. 2017), Cameron S. McCullum (Pepperdine University School of Law, J.D. 2017), and Joshua Wade (University of Virginia School of Law, J.D. 2017) for their work as Research Assistants.

1. The TVPA’s effective date was October 28, 2000. *See* Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106–386, 114 Stat. 1548 (codified at 18 U.S.C. §§ 1589, 1591 (2000)).

2. The latest two years of data provided by the Department of Justice in its annual report to Congress show an uptick in both human trafficking indictments and convictions. U.S. ATTORNEY GEN., ATTORNEY GENERAL’S ANNUAL REPORT TO CONGRESS AND ASSESSMENT OF U.S. GOVERNMENTAL ACTIVITIES TO COMBAT TRAFFICKING IN PERSONS 58 (2015). In FY2014 there were 361 indictments and 387 convictions. *Id.* In FY2015 there were 316 indictments and 363 convictions. *Id.*

3. *United States v. Lockhart*, 844 F.3d 501 (5th Cir. 2016); *United States v. Gilliam*, 842 F.3d 801 (2d Cir. 2016); *Mojsilovic v. Oklahoma*, 841 F.3d 1129 (10th Cir. 2016); *United States v. Wei Lin*, 841 F.3d 823 (9th Cir. 2016); *United States v. Gibson*, 840 F.3d 512 (8th Cir. 2016); *United States v. Lustig*, 830 F.3d 1075 (9th Cir. 2016); *United States v. Carrasquillo-Peñaloza*, 826 F.3d 590 (1st Cir. 2016); *United States v. Valas*, 822 F.3d 228 (5th Cir. 2016); *United States v. Golliher*, 820 F.3d 979 (8th Cir. 2016); *United States v. Copeland*, 820 F.3d 809 (5th Cir. 2016); *United States v. Baston*, 818 F.3d 651 (11th Cir. 2016); *United States v. Gemma*, 818 F.3d 23 (1st Cir. 2016); *United States v. Backman*, 817 F.3d 662 (9th Cir. 2016); *United States v. Basa*, 817 F.3d 645 (9th Cir. 2016); *Jane Doe No. 1 v. Backpage.com, LLC*, 817 F.3d 12 (1st Cir. 2016).

brought numerous challenges to the TVPA's elements, the evidence used to convict the traffickers, and the sentences imposed on them.⁴

Thirteen of the fifteen cases were criminal, and all of those thirteen cases involved sex trafficking.⁵ Ten of the sex-trafficking cases involved minor victims, and three involved exploitation of adults.⁶ The sex-trafficking business models in these cases ranged from gangs,⁷ pimps,⁸ and a karaoke bar,⁹ to a mother selling her own daughter.¹⁰ Four of the cases involved the prosecution of purchasers or customers in sex-trafficking cases,¹¹ including a lieutenant colonel in the Army, a firefighter, and a real estate agent.¹²

Although none of the published criminal cases involved the TVPA's forced labor statute, one of the published civil opinions addressed a forced labor challenge arising from the University of Oklahoma.¹³ The other published civil decision has its own remarkable status given the case's emphasis on Backpage.com.¹⁴ In

4. *E.g.*, *Gilliam*, 842 F.3d at 804; *Gibson*, 840 F.3d at 513; *Copeland*, 820 F.3d at 812; *Gemma*, 818 F.3d at 34.

5. *Lockhart*, 844 F.3d at 506–07; *Gilliam*, 842 F.3d at 801; *Wei Lin*, 841 F.3d at 825; *Gibson*, 840 F.3d at 513; *Lustig*, 830 F.3d at 1077; *Carrasquillo-Peñaloza*, 826 F.3d at 591; *Valas*, 822 F.3d at 235; *Golliher*, 820 F.3d at 982; *Copeland*, 820 F.3d at 810; *Baston*, 818 F.3d at 656; *Gemma*, 818 F.3d at 28; *Backman*, 817 F.3d at 664; *Basa*, 817 F.3d at 647.

6. *Lockhart*, 844 F.3d at 506–07; *Gilliam*, 842 F.3d at 801; *Wei Lin*, 841 F.3d at 825; *Gibson*, 840 F.3d at 513; *Lustig*, 830 F.3d at 1078; *Carrasquillo-Peñaloza*, 826 F.3d at 591; *Valas*, 822 F.3d at 235; *Golliher*, 820 F.3d at 982; *Copeland*, 820 F.3d at 810; *Baston*, 818 F.3d at 656; *Gemma*, 818 F.3d at 28; *Backman*, 817 F.3d at 664; *Basa*, 817 F.3d at 647.

7. *Lockhart*, 844 U.S. at 507 (involving the Folk Nation gang's prostitution of teenage girls).

8. *Gilliam*, 842 F.3d at 801; *Gibson*, 840 F.3d at 513; *Copeland*, 820 F.3d at 814; *Gemma*, 818 F.3d at 34.

9. *United States v. Song Ja Cha*, 597 F.3d 995, 997 (9th Cir. 2010).

10. *United States v. Adams*, 789 F.3d 903, 905 (8th Cir. 2015).

11. This Article will discuss three of these cases in detail. The fourth was *United States v. Golliher*, 820 F.3d 984 (8th Cir. 2016) (upholding conviction for attempted § 1591 sex trafficking of a minor and 180-month prison sentence over objections that evidence of the defendant's prior attempts to avoid purchasing sex with minors should have been admitted under the residual hearsay exception).

12. *See* *United States v. Valas*, 822 F.3d 228, 235 (5th Cir. 2016); *see also* Kristina Davis, *Man, 70, Arrested in Child Prostitution Case*, SAN DIEGO UNION-TRIB. (Oct. 1, 2013, 1:25 PM), <http://www.sandiegouniontribune.com/sdut-man-70-arrested-in-child-prostitution-case-2013oct01-story.html> (discussing the *Lustig* case); Ferdie De La Torre, *Basa Appeals Her 17.5-Year Prison Term for Sex Trafficking*, SAIPAN TRIB. (Dec. 19, 2014), <http://www.saipantribune.com/index.php/basa-appeals-17-5-year-prison-term-sex-trafficking/> (discussing the *Basa* case).

13. *Mojsilovic v. Oklahoma*, 841 F.3d 1129, 1130 (10th Cir. 2016).

14. *Jane Doe No. 1 v. Backpage.com, LLC*, 817 F.3d 12, 16 (1st Cir. 2016).

fact, Backpage.com was used to solicit customers in nine of the thirteen sex-trafficking cases.¹⁵

This Article will review and analyze the 2016 published decisions and place them in legal context. It will also make recommendations for solving various recurring problems and offer predictions for what to expect in future human-trafficking litigation. The Article begins with constitutional challenges to the TVPA and the application of its criminal elements before turning to evidence and sentencing issues. The Article will conclude with the two civil human-trafficking cases. Not every issue in each case will be discussed to maintain the Article's focus on the development of human-trafficking law.

I. JURISDICTION & ELEMENTS

A. *Big Bad Baston's Extraterritorial and Constitutional Challenges to the TVPA*

Rarely is *Pimpology* by "Pimpin' Ken"¹⁶ cited alongside *Marbury v. Madison*,¹⁷ and rarely does Dracula share the stage with James Madison. But the Honorable William Pryor brought each of these rare treats together in the pages of the Federal Reporter while simultaneously addressing the extraterritorial reach of trafficking law, the Commerce Clause, and the standard of proof for restitution.¹⁸ However, if *United States v. Baston*¹⁹ draws on a unique set of sources, it is only in response to an even more unique set of facts.

Damion St. Patrick Baston is a Jamaican citizen who immigrated to the United States in 1989.²⁰ A colorful character, Baston called himself Dracula after the Transylvanian lord and occasionally wore yellow contact lenses and gold-plated fangs.²¹ After spending almost ten years in the United States without incident, he was ordered removed in 1998 after being convicted for receipt of stolen property, obstruction of justice (for threatening a witness), and threatening a couple he accused of stealing a necklace.²² Demonstrating impressive determination, Baston

15. *United States v. Lockhart*, 844 F.3d 501, 506 (5th Cir. 2016); *United States v. Gibson*, 840 F.3d 512, 513 (8th Cir. 2016); *Valas*, 822 F.3d at 234; *United States v. Copeland*, 820 F.3d 809, 810 (5th Cir. 2016); *United States v. Baston*, 818 F.3d 651, 658 (11th Cir. 2016).

16. PIMPIN' KEN & KAREN HUNTER, *PIMPOLOGY: THE 48 LAWS OF THE GAME* (2007).

17. 5 U.S. (1 Cranch) 137 (1803).

18. *Baston*, 818 F.3d at 657, 668.

19. *Id.* at 651.

20. Gov't Trial Brief at 5, *United States v. Baston*, No. 1:13-cr-20914-CMA (S.D. Fla. June 8, 2014), ECF No. 73.

21. *Baston*, 818 F.3d at 656.

22. Gov't Trial Brief *supra* note 20, at 6.

returned to the United States in 2001 and began living under a false identity—Rayshawn Bryant—in 2006.²³ Baston used this identity to travel internationally, open bank accounts, and rent apartments throughout the world.²⁴

Baston's pseudonymous existence was not merely a fraudulent charade calculated to inflict economic harms; he used his false identity to “force[] numerous [adult] women to prostitute for him by beating them, humiliating them, and threatening to kill them.”²⁵ The Eleventh Circuit's opinion detailed some of the abuses described by his victims, which included beating a victim often, threatening to slit one victim's throat, biting her cheek until she bled, reminding a victim “that he could bury her in the park,” and telling her “not to ‘fuck with him’ or he would ‘chop . . . [her] body up and have [her] thrown in the Everglades.’”²⁶

This abuse was not limited to the United States—Baston “pimped [victims] around the world, from Florida to Australia to the United Arab Emirates.”²⁷ Thankfully, this abuse was put to an end when he was arrested²⁸ and indicted on twenty-one different counts, ranging from aggravated identity theft to sex trafficking by force.²⁹ His trial included testimony from several victims, and the jury returned a complete prosecution verdict, guilty on all counts.³⁰ In the coming months, the trial court sentenced Baston to 324 months in prison and ordered him to pay \$99,270 in restitution to his victims.³¹

Baston appealed, challenging “the sufficiency of the evidence for one conviction, a supplemental jury instruction, and the award of restitution to his victims.”³² Despite its victory, the government filed a cross-appeal arguing “that the district court erred when it

23. *Id.* at 2. Rayshawn Bryant is a living American citizen born in Columbus, Ohio.

24. *Id.* at 11. Again, somewhat impressively, Baston traveled “to Australia (multiple times), New Zealand, Indonesia (for which he obtained a visa), China, Hong Kong (multiple times), Russia, Japan, Brazil (for which he obtained a visa), Colombia, Argentina, Russia (for which he obtained a visa), the United Kingdom, France (multiple times), the United Arab Emirates (multiple times and for which he obtained a visa), Oman, Jamaica (multiple times), the British Virgin Islands, and of course, the United States.” *Id.* at 10. All this traveling occurred between 2005 and 2013. *Id.* at 2–4.

25. *Baston*, 818 F.3d at 656.

26. *Id.* at 658 (alterations and omissions in original).

27. *Id.* at 656.

28. Gov't Trial Brief *supra* note 20, at 4.

29. Superseding Indictment, *United States v. Baston*, No. 13-20914-CR 1–8 (S.D. Fla. Apr. 18, 2014), ECF No. 36.

30. Verdict, *United States v. Baston*, No. 13-20914-CR (S.D. Fla. July 1, 2014), ECF No. 95.

31. Judgment, *United States v. Baston*, No. 13-20914-CR (S.D. Fla. Feb. 23, 2015), ECF No. 172.

32. *United States v. Baston*, 818 F.3d 651, 657 (11th Cir. 2016).

refused to award restitution to a victim of Baston's sex trafficking in Australia."³³

B. Constitutional Challenge to the TVPA's Extraterritorial Jurisdiction

The government's cross-appeal, which sought an additional \$400,000 in restitution for a victim Baston trafficked throughout Australia, resulted in the first challenge to the TVPA's extraterritorial provisions to reach a circuit court.³⁴ Siding with Baston, "[t]he district court ruled that an award of restitution for Baston's extraterritorial conduct would exceed the power of Congress under Article I of the Constitution and the Due Process Clause of the Fifth Amendment."³⁵ The Eleventh Circuit saw it differently and upheld Congress's enactment of "section 1596(a)(2), which confers extraterritorial jurisdiction over sex trafficking by force, fraud, or coercion," under the Foreign Commerce Clause.³⁶

Eight years after the TVPA became law, it was amended to expand and clarify its jurisdictional reach.³⁷ The 2008 amendments added a new section to the TVPA—§ 1596.³⁸ It states:

(a) In general. – In addition to any domestic or extra-territorial jurisdiction otherwise provided by law, the courts of the United States have extra-territorial jurisdiction over any offense (or any attempt or conspiracy to commit an offense) under section 1581, 1583, 1584, 1589, 1590, or 1591 if (1) an alleged offender is a national of the United States or an alien lawfully admitted for permanent residence (as those terms are defined in section 101 of the Immigration and Nationality Act (8 U.S.C. 1101)); or (2) an alleged offender is present in the United States, irrespective of the nationality of the alleged offender.³⁹

Baston did not contest that he was present in the United States when the offense was committed or at the time of his arrest at his mother's New York home.⁴⁰ Instead, he argued that § 1596 was an

33. *Id.*

34. "To decide those issues, we must examine the scope of the Foreign Commerce Clause, a question of first impression in this Circuit, and the constitutionality of the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 § 223, *a question of first impression in any circuit.*" *Id.* (emphasis added) (internal citations omitted).

35. *Id.* (internal citations omitted).

36. *Id.* at 666.

37. Victims Protection Reauthorization Act of 2008, Pub. L. No. 110–457, 122 Stat. 5046–47 (codified as amended at 18 U.S.C. § 1596 (2012)).

38. *Id.*

39. *Id.*

40. *Baston*, 818 F.3d at 670.

unconstitutional overreach by Congress and President Obama when the 2008 TVPA amendments became law.⁴¹

To reverse the district court's decision and uphold § 1596's constitutionality, the Eleventh Circuit relied on the powers inherent within the Foreign Commerce Clause.⁴² "Article I gives Congress the power '[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.'"⁴³ While the Interstate Commerce Clause and, to a lesser extent, the Indian Commerce Clause have established jurisprudence, the Supreme Court has provided little guidance on the Foreign Commerce Clause.⁴⁴

To fill this jurisprudential void, the Eleventh Circuit, for the sake of argument, made a pioneering assumption:

[That the] Foreign Commerce Clause has the same scope as the Interstate Commerce Clause Congress's power under the Foreign Commerce Clause includes at least the power to regulate the "channels" of commerce between the United States and other countries, the "instrumentalities" of commerce between the United States and other countries, and activities that have a "substantial effect" on commerce between the United States and other countries.⁴⁵

This assumption is not obvious. Just sentences before, the Eleventh Circuit explained that the Indian Commerce Clause did not import Interstate Commerce Clause case law, "because the Indian Commerce Clause does not implicate 'the unique role of the States in our constitutional system.'"⁴⁶ Surely this logic should likewise lead to some hesitancy before transplanting a foreign organ into this young and growing body of law.

The District Court and Baston also both argued that extraterritorial restitution would be "arbitrary or fundamentally unfair" under the Due Process Clause of the Fifth Amendment.⁴⁷ Baston's argument was that it does not accord with due process for the United States to punish citizens of other countries—Baston is a citizen of Jamaica—who engage in illegal behavior in other countries.⁴⁸ Baston failed to note that sex trafficking is also illegal

41. *Id.* at 666.

42. *Id.* at 667.

43. *Id.* (quoting U.S. CONST. art. I, § 8, cl. 3).

44. *Id.*

45. *Id.* at 668.

46. *Id.* at 667 (quoting *Cotton Petrol. Corp. v. New Mexico*, 490 U.S. 163, 192 (1989)).

47. *Id.* at 669.

48. *Id.* at 670. "Crimes are in their nature local, and the jurisdiction of crimes is local." *Rafael v. Verelst*, 96 Eng. Rep. 621, 622 (K.B. 1776). Accordingly, unless there are some very unlikely and extraordinary circumstances, the United States is unable to prosecute someone for smoking

in Australia.⁴⁹ His argument might have made more sense if he was being prosecuted for acts of prostitution in Australia, but that was not the crime at hand. Baston improperly conflated anti-prostitution laws with the sex-trafficking law he violated. Baston's argument was also weakened by the fact that he was physically present in the United States during at least a portion of the time while he compelled one of his adult victims to engage in commercial sex acts for his criminal enterprise.

The government argued, and the Eleventh Circuit held, that it did not violate due process to exercise extraterritorial jurisdiction over Baston because of his extensive ties to the United States.⁵⁰ This conclusion seems right—Baston did run his operations through the United States⁵¹—but what is perhaps more interesting is the way that the Eleventh Circuit analyzed the argument. While the court eventually did consult both international law and domestic law to determine whether this extraterritorial jurisdiction violates due process, Judge Pryor made a point of saying that “due process requires only that an exercise of extraterritorial jurisdiction not be arbitrary or fundamentally unfair, a question of domestic law.”⁵²

marijuana in Kingston. “The general and almost universal rule is that the character of an act as lawful or unlawful must be determined wholly by the law of the country where the act is done.” *Am. Banana Co. v. United Fruit Co.*, 213 U.S. 347, 356 (1909). However, Congress can exercise extraterritorial jurisdiction in certain circumstances. *Baston*, 818 F.3d at 669. There are various limits on Congress's ability to address extraterritorial crime. See CHARLES DOYLE, CONG. RESEARCH SERV., 94-166, EXTRATERRITORIAL APPLICATION OF AMERICAN CRIMINAL LAW 4 (2016); Anthony Colangelo, *Constitutional Limits on Extraterritorial Jurisdiction: Terrorism and the Intersection of National and International Law*, 48 HARV. INT'L. L.J. 121, 122 (2007); Sara A. Solow, *Prosecuting Terrorists as Criminals and the Limits of Extraterritorial Jurisdiction*, 85 ST. JOHN'S L. REV. 1483, 1488 (2011).

49. *Criminal Code Act 1995* divs 270–71 (Austl.). In addition, on September 14, 2005, Australia ratified the United Nations' Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention Against Transnational Organized Crime. *Status of Treaties*, UNITED NATIONS TREATY COLLECTION, https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=XVIII-12-a&chapter=18&clang=_en#EndDec (last visited May 6, 2017).

50. *Baston*, 818 F.3d at 669–70 (“Baston's contacts with the United States, to borrow the word the government used at oral argument, are ‘legion.’ Baston portrayed himself as a citizen of the United States. He resided in Florida, where he rented property, started businesses, and opened bank accounts. He was present at his mother's home in New York when arrested. Baston used a Florida driver's license and a United States passport to facilitate his criminal activities. He trafficked K.L. in both the United States and Australia, and when he trafficked her in Australia, he wired the proceeds back to Miami. In short, Baston used this country as a home base and took advantage of its laws; he cannot now complain about being subjected to those laws.”) (internal citations omitted).

51. *Id.*

52. *Id.* at 669 (citation omitted).

The emphasis on domestic law is an assertion of the primacy of United States law over international approaches to trafficking. The bottom line is that the Eleventh Circuit proclaimed that § 1596 of the TVPA is constitutional and, therefore, Baston must pay his victims an additional \$400,000 in restitution.⁵³

Baston's broader ramifications, for the extraterritorial reach of trafficking law and United States criminal law more generally, flow out of its discussion of the extraterritorial reach of United States law.⁵⁴ In particular, Judge Pryor's reading of the Foreign Commerce Clause is quite broad.⁵⁵ Other lower courts have been more hesitant to read Congress's power to regulate commerce with foreign countries as broadly as its power to regulate commerce among the states.⁵⁶ However, there is authority for this broader reading that mirrors the interstate commerce powers that allow regulation of activities that are part of the "channels" or "instrumentalities" of interstate commerce or that have a "substantial effect" on interstate commerce.⁵⁷ The Fourth Circuit is likely the only circuit that has

53. *Id.* at 671.

54. As a brief aside, Judge Pryor's opinion might be read to weigh in on broader debates about the appropriateness of allowing international law to influence American law. See Stephen C. McCaffrey, *There's a Whole World Out There: Justice Kennedy's Use of International Sources*, 44 MCGEORGE L. REV. 201, 207 (2013) ("Justice Scalia disdains the idea that the United States should conform with the rest of the world."). See generally David J. Seipp, *Our Law, Their Law, History, and the Citation of Foreign Law*, 86 B.U. L. REV. 1417 (2006) (discussing use of foreign law); Osmar J. Benvenuto, Note, *Reevaluating the Debate Surrounding the Supreme Court's Use of Foreign Precedent*, 74 FORDHAM L. REV. 2695 (2006) (detailing the Supreme Court's use of foreign precedent). In particular, Judge Pryor's discussion of due process limits rebuffs any suggestion that these limits should be shaped by international law – instead reiterating that they are ultimately shaped by domestic law. *Baston*, 818 F.3d at 669–70. These issues have danced behind the curtain of recent Supreme Court decisions relating to presumptions of extraterritoriality. See *RJR Nabisco, Inc. v. European Cmty.*, 136 S. Ct. 2090, 2115 (2016) (Ginsburg, J., concurring in part and dissenting in part); *Morrison v. Nat'l Austl. Bank Ltd.*, 561 U.S. 247, 255 (2010).

55. *Baston*, 818 F.3d at 668.

56. *United States v. Yunis*, 681 F. Supp. 896, 907 n.24 (D.D.C. 1988) ("Rather than relying on Congress's direct authority under Art. I Section 8 to define and punish offenses against the law of nations, the government contends that Congress has authority to regulate global air commerce under the commerce clause. U.S. Const. art. I, § 8, c[1]. 3. The government's arguments based on the commerce clause are unpersuasive. Certainly, Congress has plenary power to regulate the flow of commerce within the boundaries of United States territory. But it is not empowered to regulate foreign commerce which has no connection to the United States. Unlike the states, foreign nations have never submitted to the sovereignty of the United States government nor ceded their regulatory powers to the United States.")

57. "The Constitution gives Congress broad, comprehensive powers '[t]o regulate Commerce with foreign Nations.'" *United States v. 12 200-Foot Reels of Super 8 MM. Film*, 413 U.S. 123, 125 (1973) (alteration in original) (quoting

gone further than the Eleventh Circuit in defining the breadth of Congress's legislative power under the Foreign Commerce Clause.⁵⁸ In *United States v. Bollinger*,⁵⁹ the Fourth Circuit recently expanded *Lopez*'s third category—permitting regulation of activities that substantially affect interstate commerce—in the foreign commerce context to allow regulation of any activities that “demonstrably affect such commerce.”⁶⁰

The enumerated powers of Congress are not the only constitutional limits to Congress's ability to criminalize extraterritorial behavior.⁶¹ Numerous courts have noted that the Due Process Clause of the Fifth Amendment requires at least some nexus to the United States before Congress can criminalize extraterritorial behavior.⁶² Other courts have not engaged in a nexus analysis, and have instead held that the Due Process Clause does not limit Congress when it seeks to penalize extraterritorial conduct in some contexts.⁶³ The *Boston* court agreed with the first

U.S. CONST. art. 1, § 8, cl. 3); *see also* Cal. Bankers Ass'n v. Shultz, 416 U.S. 21, 46 (1974); DOYLE, *supra* note 48, at 1–4, 2 n.10.

58. *See* United States v. Bollinger, 798 F.3d 201, 215–16 (4th Cir. 2015).

59. *Id.*

60. *Id.* at 215–16.

61. *See, e.g.*, United States v. Rojas, 812 F.3d 382, 393 (5th Cir. 2016) (emphasizing that an inquiry into the validity of extraterritoriality necessarily implicates due process considerations).

62. *Id.*; United States v. Medjuck, 156 F.3d 916, 918 (9th Cir. 1998) (“[T]o satisfy the strictures of due process, the Government [must] demonstrate that there exists ‘a sufficient nexus between the conduct condemned and the United States’ such that the application of the statute [to the overseas conduct of an alien defendant] would not be arbitrary or fundamentally unfair to the defendant.” (quoting United States v. Medjuck, 48 F.3d 1107, 1109 (9th Cir. 1995), *superseded by statute*, Coast Guard Authorization Act of 1996, Pub. L. No. 104–324, 110 Stat. 3989, *as stated in* United States v. Moreno-Morillo, 334 F.3d 819 (9th Cir. 2003))); *see also* United States v. al Kassar, 660 F.3d 108, 118 (2d Cir. 2011) (“In order to apply extraterritorially a federal criminal statute to a defendant consistently with due process, there must be a sufficient nexus between the defendant and the United States, so that such application would not be arbitrary or fundamentally unfair.” (internal quotation marks omitted) (quoting United States v. Yousef, 327 F.3d 56, 111 (2d Cir. 2003))). *See generally* DOYLE, *supra* note 48 (describing the expansive view of Congress's foreign commerce power).

63. United States v. Ibarquen-Mosquera, 634 F.3d 1370, 1378–79 (11th Cir. 2011) (holding that the Fifth Amendment does not limit Congress's ability to regulate stateless vessels); United States v. Suerte, 291 F.3d 366, 375 (5th Cir. 2002) (holding that the Fifth Amendment does not limit Congress when it legislates pursuant to the Piracy Clause); United States v. Cardales, 168 F.3d 548, 553 (1st Cir. 1999) (holding that the Fifth Amendment's Due Process Clause does not limit Congress when the foreign nation consents to the application of United States law). The D.C. Circuit has helpfully described this divide. United States v. Ali, 718 F.3d 929, 943–44 (D.C. Cir. 2013). *See generally* DOYLE, *supra* note 48.

camp, stating that “[t]he Due Process Clause requires ‘at least some minimal contact between a State and the regulated subject.’”⁶⁴

C. *Strict Liability for Sex Trafficking of Minors*

In 2016, the Fifth Circuit published three different opinions holding that those who traffic children for sex are strictly liable for their crimes.⁶⁵ The debate over the mens rea element in the § 1591 sex trafficking of minors offense has evolved as the statute itself has been amended over time.⁶⁶

1. *Statutory Evolution*

Under the original language of the sex-trafficking statute as passed in 2000, a conviction for child sex trafficking required a person to:⁶⁷ (1) knowingly engage in one of the prohibited trafficking activities⁶⁸ or benefit from engaging in a trafficking venture,⁶⁹ (2) know that a victim was underage,⁷⁰ and (3) know that the child victim would be compelled to engage in a commercial sex act.⁷¹

In its 2008 amendments⁷² to the TVPA, Congress eased the government’s burden of proof in sex-trafficking cases.⁷³ The 2008 amendments introduced a “reckless disregard” standard to show a defendant “acted in reckless disregard to the fact” that a victim was

64. *United States v. Baston*, 818 F.3d 651, 669 (11th Cir. 2016) (quoting *Am. Charities for Reasonable Fundraising Regulation, Inc. v. Panellas Cty.*, 225 F.3d 1211, 1216 (11th Cir. 2000)).

65. *See United States v. Lockhart*, 844 F.3d 501, 513–14 (5th Cir. 2016); *United States v. Valas*, 822 F.3d 228, 236 (5th Cir. 2016); *United States v. Copeland*, 820 F.3d 809, 814 (5th Cir. 2016).

66. *See infra* Subpart I.C.1.

67. In addition to the three elements listed here, the government had to prove the jurisdictional element of the sex-trafficking offense: that the offense was in or affecting interstate commerce. 18 U.S.C. § 1591(a)(1) (2000).

68. *Id.* § 1591(a)(1). An individual participated in prohibited trafficking activities when she “recruit[ed], entice[d], harbor[ed], transport[ed], provide[d], [or] obtain[ed]” another person for the purposes described in the rest of the statute. *Id.*

69. *Id.* (defining “venture”). The current version of the TVPA defines “venture” at 18 U.S.C. § 1591(e)(5) (2012).

70. 18 U.S.C. § 1591(a) (2000); *see* Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, 11 Stat 1464. Courts could also convict traffickers if they knew that “force, fraud, or coercion . . . [was] used to cause the person to engage in a commercial sex act.” 18 U.S.C. § 1591(a) (2000).

71. 18 U.S.C. § 1591(a) (2000); *see* Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, 11 Stat 1464. The text of the Act stated that sex trafficking required knowledge that “the person ha[d] not attained the age of 18 years and [would] be caused to engage in a commercial sex act.” 18 U.S.C. § 1591(a) (2000).

72. William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. No. 110-457, 122 Stat 5044.

73. *Id.*

a minor⁷⁴ or just that the defendant had a “reasonable opportunity to observe” the minor victim.⁷⁵ This addition freed the government from needing to prove that a defendant had actual knowledge of a child victim’s age during the commission of the sex-trafficking crime.⁷⁶ In addition, the 2008 amendments added a unique provision: “In a prosecution under subsection (a)(1) in which the defendant had a reasonable opportunity to observe the person so recruited, enticed, harbored, transported, provided, obtained or maintained, the Government need not prove that the defendant knew that the person had not attained the age of 18 years.”⁷⁷ At the time these amendments were passed, it was unclear how courts might apply the “knowledge,” “reckless disregard,” and “reasonable opportunity to observe” provisions.⁷⁸

2. *Applying the Standard*

Devon Robinson challenged the TVPA’s “reckless disregard” and “reasonable opportunity to observe” standards in the Second Circuit after a jury convicted him of sex trafficking a minor.⁷⁹ Robinson trafficked a minor runaway, who dropped out of high school in her junior year, by selling her to customers for commercial sex.⁸⁰ Robinson’s seventeen-year-old victim believed that her twenty-five-year-old trafficker was actually her boyfriend.⁸¹ She refused to cooperate with the prosecution and, in an attempt to protect Robinson, testified in court that she told Robinson that she was

74. The “reckless disregard” standard also applies to the means element of “force, fraud, [and] coercion” in sex-trafficking cases. 18 U.S.C. § 1591(a) (2012).

75. *Id.* § 1591(a)(2), (c). The amendment stated that he who behaved “in reckless disregard of the fact . . . that the person has not attained the age of 18 years” is responsible for knowing the victim’s age, and that the government need only prove that he “had a reasonable opportunity to observe” the victim. *Id.* § 1591(a)(2).

76. Compare *id.* § 1591(a)(2) (reckless standard), with *id.* § 1591(a) (2000) (knowledge standard).

77. 18 U.S.C. § 1591(c) (2012) (emphasis added).

78. Cf. Donna M. Hughes, *Combating Sex Trafficking: A Perpetrator-Focused Approach*, 6 U. ST. THOMAS L.J. 28, 51 (2008) (outlining amendments and predicting how they might alter prosecution and adjudication of trafficking crimes); Mark J. Kappelhoff, *Federal Prosecutions of Human Trafficking Cases: Striking A Blow Against Modern Day Slavery*, 6 U. ST. THOMAS L.J. 9, 14 (2008) (examining the possible impacts of the amendments on prosecution and adjudication).

79. *United States v. Robinson*, 702 F.3d 22, 26, 30–31 (2d Cir. 2012). Following the trial, the jury returned a verdict of guilty on two counts of sex trafficking of a minor under 18 U.S.C. § 1591. The first count was charged under the post-2008 amended sex-trafficking statute, and the second count was charged under the pre-2008 sex-trafficking statute. *Id.* at 26–27; see also Appendix at 225, *United States v. Robinson*, No. 11-0301-CR (2d Cir. 2012).

80. *Robinson*, 702 F.3d at 27–29.

81. *Id.* at 27.

nineteen and not a minor, calling into doubt Robinson's actual knowledge of her age.⁸²

Robinson argued that the "reasonable opportunity to observe" provision was required *in addition* to proving reckless disregard, and not as a replacement or alternative to the "knowledge" and "reckless disregard" elements.⁸³ However, the Second Circuit found that the "reasonable opportunity" provision "imposes *strict liability* with regard to the defendant's awareness of the victim's age."⁸⁴ The court concluded that the "reasonable opportunity" provision was an alternative to proving knowledge or reckless disregard of a victim's age after considering the plain language of the statute and its context in legislative history.⁸⁵

The Second Circuit reiterated the TVPA's mens rea requirements in its analysis of Robinson's appeal by echoing that strict liability applies to a trafficker where he had a "reasonable opportunity to observe" his victim.⁸⁶ The Second Circuit recognized that Congress acted with intent by including this new language in a statute.⁸⁷ It then endorsed the "reckless disregard" and the "reasonable opportunity to observe" provision of § 1591(c),⁸⁸ softening the requirements for the defendant's knowledge of the victim's age.

The Second Circuit found that the government did not need to prove the defendant's knowledge of the victim's age when it could prove that the defendant had "reasonable opportunity to observe" the victim, for such an observation suggests the defendant's consideration of the victim's age.⁸⁹ Additionally, because the statute requires proof of either knowledge or reckless disregard, the court found that the reasonable opportunity provision would have no meaning if it did not provide an alternative to *both* mens rea requirements.⁹⁰

The Second Circuit also addressed the presumption that criminal statutes require a mens rea element for every corresponding action.⁹¹ It noted that the presumption does not

82. *Id.*

83. *Id.* at 30.

84. *Id.* at 26 (emphasis added).

85. *Id.* at 31–34.

86. *Id.* at 26.

87. *Id.* at 31–32.

88. *Id.* at 31. The text of 18 USC §1591(c) states, "In a prosecution . . . in which the defendant had a reasonable opportunity to observe the person so recruited, enticed, harbored, transported, provided, obtained, or maintained, the Government need not prove that the defendant knew that the person had not attained the age of 18 years." *Id.* at 30 (quoting 18 U.S.C. § 1591(c) (2008)).

89. *Id.* at 31–32.

90. *Id.* at 32.

91. *Id.* (citing *Staples v. United States*, 511 U.S. 600, 605–06 (1994); *United States v. U.S. Gypsum Co.*, 438 U.S. 422, 437 (1978)).

apply to certain child sex crimes where the defendant is already aware that they are participating in an illegal activity, like a sex crime, or where they intend to commit a crime, even if they do not know the actual age of their victim.⁹² Under these sex crimes statutes, a person is punished for her broader criminal intentions, and she cannot avoid trial merely because she did not happen to know the exact age of her victim.⁹³ The existence of these statutes bolsters the Second Circuit's conclusion that Congress intended to ease the intent requirement in regards to the victim's age when it inserted the "reasonable opportunity to observe" provision into the sex-trafficking statute.⁹⁴

Faced with strict liability from his "reasonable opportunity to observe" his victim, Robinson argued there was insufficient evidence that he had a "reasonable opportunity to observe" the victim.⁹⁵ However, the court found that a reasonable jury could conclude that Robinson had a "reasonable opportunity to observe" the victim, because Robinson met the victim through his sister and started an intimate relationship with her, all before the victim dropped out of her junior year of high school.⁹⁶ The jurors also observed the victim's appearance as she testified during the trial at the age of nineteen years old.⁹⁷ The Second Circuit found that a jury could reasonably conclude that Robinson had a "reasonable opportunity to observe" his victim, triggering the strict liability standard.⁹⁸

92. *Id.* at 32–33. For example, "Aggravated Sexual Abuse of a Minor" and "Sexual Abuse of a Minor or Ward" are both child sexual abuse statutes that show "the Government need not prove that the defendant knew" about the minor's age. 18 U.S.C. §§ 2241, 2243. Title 18 U.S.C. § 2241 is a crime of aggravated sexual abuse. *Id.* § 2241. It contains a section labeled "State of mind proof requirement," which frees the Government from proving that a defendant actually knew that a victim was under twelve years old where he "crossed a State line with intent to engage with a person who has not attained the age of 12 years." *Id.* § 2241(d). Under 18 U.S.C. § 2241, Congress punishes the intent of a person to have sex with someone under twelve years old, even if that individual is not certain that their victim is younger than 12. *Id.* Similarly, 18 U.S.C. § 2243 criminalizes "Sexual abuse of a minor or ward," releasing the Government of the burden of proving that a federal prison guard or agency worker who had sex with a minor actually knew of a child's age where the minor was between twelve and sixteen years old, and at least four years younger than the worker. *Id.* § 2243(d). Congress values the innocence of children, thus protecting them more broadly from sexual abuse by federal workers even if their actual age is unknown under 18 U.S.C. § 2243. *Id.*

93. *Robinson*, 702 F.3d at 33.

94. *Id.*

95. *Id.* at 35.

96. *Id.* at 27.

97. *Id.* at 35.

98. *Id.* at 36. Although the government's case rested on circumstantial evidence, the court highlighted that "knowledge and intent can often be proved through circumstantial evidence and the reasonable inferences drawn therefrom." *Id.* (quoting *United States v. MacPherson*, 424 F.3d 183, 189 (2d Cir. 2005)).

3. *Response to Robinson*

The Second Circuit's 2012 ruling in *Robinson* earned criticism amidst a wave of scrutiny surrounding the harsh penalties for sex crimes involving minors.⁹⁹ However, writers simultaneously highlighted the drastic and lifelong negative effects of child sex trafficking on a child's development in support of laws that allow for the conviction of child sex traffickers and child pornography consumers even where traffickers may not know the exact age of their victims.¹⁰⁰ Courts began to interpret the "reasonable opportunity to observe" provision as a standalone mens rea element in the midst of the ambiguity.¹⁰¹

4. *Solidifying Strict Liability in Sex Trafficking of Minors Cases*

Applying this legal landscape, the Fifth Circuit weighed three cases¹⁰² in 2016 involving the mens rea requirement of the TVPA's sex-trafficking statute.¹⁰³ In May 2016, Malcolm Deandre Copeland

99. Compare *id.* at 31 ("[T]he government may prove that the defendant had a reasonable opportunity to view the victim *in lieu* of proving knowledge."), with *United States v. Wilson*, No. 10-60102-CR, 2010 WL 2991561, at *7 (S.D. Fla. July 27, 2010) ("Section 1591(c) requires the Government to prove beyond a reasonable doubt not only that the defendant acted in reckless disregard, but also that the defendant had a reasonable opportunity to observe the person recruited."). See also Tiffanie N. Choate, Comment, *Protecting the Lydias, Linas, and Tinas from Sex Trafficking: A Call to Eliminate Ambiguities of 18 U.S.C. § 1591*, 65 OKLA. L. REV. 665, 689–90 (2013); Mark Hansen, *A Reluctant Rebellion*, A.B.A. J., June 2009, at 54, 56.

100. ALEXANDRA GELBER, U.S. DEPT OF JUSTICE, RESPONSE TO "A RELUCTANT REBELLION" 2–3 (2009), <https://www.justice.gov/sites/default/files/criminal-ceos/legacy/2012/03/19/ReluctantRebellionResponse.pdf>. "It is evident beyond the need for elaboration that a State's interest in safeguarding the physical and psychological well-being of a minor is compelling . . . [and that] the use of children as subjects of pornographic materials is harmful to the physiological, emotional, and mental health of the child." *Id.* at 2; see also Stephen C. Parker & Jonathan T. Skrmetti, *Pimps Down: A Prosecutorial Perspective on Domestic Sex Trafficking*, 43 U. MEM. L. REV. 1013, 1040–42 (2013).

101. See *United States v. Rivera*, No. 13-CR-149(KAM), 2015 WL 7455504, at *21 (E.D.N.Y. Nov. 23, 2015); *United States v. Davis*, No. CRIM.A. 14-76, 2015 WL 6134013, at *4 (E.D. La. Oct. 19, 2015); *United States v. Mack*, No. 1:13CR278, 2014 WL 356502, at *4 (N.D. Ohio Jan. 31, 2014).

102. This Article will address the *Copeland* and *Valas* cases in detail. The third Fifth Circuit case addressing this issue was *United States v. Lockhart*, 844 F.3d 501 (5th Cir 2016), a sex trafficking of a minor case where the victim was advertised on Backpage.com. *Id.* at 507. *Lockhart's* contribution to the legal landscape is the requirement that prosecutors affirmatively plead "reasonable opportunity to observe" in the indictment language itself. *Id.* at 515–16 (reversing and remanding after finding a constructive amendment to the indictment because the "reasonable opportunity to observe" language was not contained in the indictment).

103. *Lockhart*, 844 F.3d 501; *United States v. Valas*, 822 F.3d 228 (5th Cir. 2016); *United States v. Copeland*, 820 F.3d 809 (5th Cir. 2016).

brought *Robinson's* holding under further scrutiny when he appealed his § 1591 child sex-trafficking conviction.¹⁰⁴ Similar to *Robinson*, *Copeland* argued that the “reasonable opportunity to observe” provision should be in addition to the “knowledge” or “reckless disregard” requirement and not a third way to prove his intent.¹⁰⁵ Furthermore, he took *Robinson's* argument one step further and claimed that imposing strict liability with respect to a defendant’s knowledge of a victim’s age offends the constitutional protection against cruel and unusual punishment.¹⁰⁶

In its response to *Copeland*, the Fifth Circuit echoed the Second Circuit’s plain language interpretation of the statute, stating “the government may prove that the defendant had a reasonable opportunity to view the victim *in lieu of* proving knowledge.”¹⁰⁷ The *Copeland* court added “[s]exual exploitation of children”¹⁰⁸ and “[t]ransportation of minors”¹⁰⁹ to the *Robinson* court’s list of child sexual abuse statutes that include strict liability provisions for knowledge of a minor’s age, further showing that a presumption to include a knowledge requirement in criminal statutes does not apply in cases of sexual abuse of a minor.¹¹⁰

The Fifth Circuit further argued that the “reasonable opportunity to observe” element does not expose a defendant to cruel and unusual punishment because strict liability applies to only one prong—awareness of a victim’s age—of a three-part crime.¹¹¹ The government still has to prove that a person acted knowingly¹¹² and prove that the same person also knew that the individual would be compelled to engage in a commercial sex transaction.¹¹³ Therefore, *Copeland* firmly established that strict liability can apply to a

104. *Copeland*, 820 F.3d at 811. Specifically, *Copeland* appealed the jury instruction that gave the jury three ways to satisfy the scienter requirement related to the victim’s age, namely, knowledge, reckless disregard, or a “reasonable opportunity to observe.” *Id.* *Copeland* argued that “a reasonable opportunity to observe” should not be considered as a third alternative to knowledge. *Id.* at 812.

105. *Id.* at 811.

106. *Id.* The Eighth Amendment to the United States Constitution assures citizens that “[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.” U.S. CONST. amend. VIII.

107. *Copeland*, 820 F.3d at 813 (quoting *United States v. Robinson*, 702 F.3d 22, 31 (2d Cir. 2012)).

108. 18 U.S.C. § 2251 (2012).

109. 18 U.S.C. § 2423 (2012).

110. *Copeland*, 820 F.3d at 814.

111. *Id.* at 813–14.

112. 18 U.S.C. § 1591(a)(1) (2012). The list of actions that a trafficker can be held liable for knowingly committing includes when he “recruits, entices, harbors, transports, provides, obtains, advertises, maintains, patronizes, or solicits.” *Id.*

113. *See* 18 U.S.C. § 1591(a); *see also Copeland*, 820 F.3d at 814.

defendant's knowledge of a victim's age when they have a "reasonable opportunity to observe" the victim.¹¹⁴

5. *What Is Sufficient to Show "Reasonable Opportunity to Observe"?*

Robinson's willingness to bring an objection to the evidence of a "reasonable opportunity to observe" highlights an emerging question: What evidence does it take to prove that a defendant had a "reasonable opportunity to observe" his victim?

Unlike Robinson, Copeland never challenged the sufficiency of the evidence on appeal regarding his "reasonable opportunity to observe" the age of his victim, because in *Copeland*, the victim was a runaway who told Copeland's codefendant that she was fifteen years old.¹¹⁵ Copeland also told his codefendants to photograph his victim for Backpage.com escort advertisements, and he explained to the victim that she would perform sexual acts for money.¹¹⁶ The victim's age, the fact that she directly interacted with Copeland, and her willingness to report Copeland's behavior to the police¹¹⁷ are, however, various forms of evidence to show that Copeland had a "reasonable opportunity to observe" her age.

Raymond Valas's appeal of his § 1591 sex trafficking of a minor conviction to the Fifth Circuit may relax the factual basis necessary for "reasonable opportunity to observe" strict liability.¹¹⁸ Valas, a lieutenant colonel in the United States Army, was a purchaser of commercial sex from Copeland's sex-trafficking operation.¹¹⁹ Valas attended annual training sessions on "Combating Trafficking in Persons" and was aware of "its signs, dangers, and horrors."¹²⁰ He

114. *Copeland*, 820 F.3d at 813–14. Copeland, Valas, and Lockhart were all convicted based on the 2008 TVPA language. In 2015, Congress amended § 1591 again to speak to the "reasonable opportunity to observe" controversy by clarifying the provision: "In a prosecution under subsection (a)(1) in which the defendant had a reasonable opportunity to observe the person so recruited, enticed, harbored, transported, provided, obtained, maintained, *patronized*, or *solicited*, the Government need not prove that the defendant knew, or *recklessly disregarded the fact*, that the person had not attained the age of 18 years." 18 U.S.C. § 1591(c) (2015) (emphasis added). The 2015 TVPA amendments make clear that a "reasonable opportunity to observe" is a third alternative and not an additional requirement, thus codifying the *Robinson* and *Copeland* holdings. See *Robinson*, 702 F.3d at 32.

115. *Copeland*, 820 F.3d 809 at 810.

116. *Id.*

117. Criminal Complaint at 3, *United States v. Copeland*, No. SA13-786M (W.D. Tex. Sept. 10, 2013), ECF No. 1.

118. *United States v. Valas*, 822 F.3d 228, 236 (5th Cir. 2016). The Fifth Circuit applied its analysis of *Copeland* when citing to the rule that a "reasonable opportunity to observe" a victim is one of three ways to find that a trafficker was aware of a victim's minor status. *Id.*

119. *Id.* at 235.

120. *Id.* at 241.

met Copeland's victim twice during his stay at a Hilton Hotel while he was attending an Army conference in San Antonio, Texas.¹²¹ The victim claimed that she visited Valas and spent thirty minutes performing "sexual acts other than intercourse with him" in exchange for \$150 that she gave to her pimp (Copeland and his fellow traffickers).¹²² The victim noted that Valas never "asked her any questions about her background or history."¹²³ The next day, Valas and the victim exchanged "eighteen phone calls and four text messages" before she returned to Valas's hotel room where he had sex with her in exchange for another \$150 that she gave to her pimp.¹²⁴ Based on this relatively limited contact, Valas was convicted of § 1591 sex trafficking after the jury was instructed on the "reasonable opportunity to observe" standard.¹²⁵

Guidance will be necessary as future courts determine what contact or information is sufficient to apply the "reasonable opportunity to observe" standard. Using analysis from *Robinson*, *Copeland*, *Valas*, and the various district courts¹²⁶ applying strict liability concerning a defendant's awareness of age, some factors a

121. *Id.* at 235.

122. *Id.*

123. *Id.*

124. *Id.*

125. *Id.* at 236.

126. *See* United States v. Copeland, 820 F.3d 809, 814 (5th Cir. 2016); United States v. Gemma, 818 F.3d 23, 38 (1st Cir. 2016) (citing directly to the statute to affirm that the "reasonable opportunity to observe" provision is a means by which to prove the mens rea of a trafficker in regards to the victim's age); United States v. Barnes, No. 2:13-CR-423 JCM, 2016 WL 3360944, at *3 (D. Nev. June 10, 2016) (applying directly the "reasonable opportunity to observe" standard to find that the defendant had a "reasonable opportunity to observe" the victim where he texted the sixteen-year-old victim on his phone and spent "a large amount of time" with her over the course of a week while driving her between California and Nevada to sell her for sex); United States v. Lundy, No. 14cr3256 JM, 2016 WL 499167, at *2 (S.D. Cal. Feb. 9, 2016) (citing *Robinson* to refute the trafficker's claim that the "reasonable opportunity to observe" provision was constitutionally vague, affirming his conviction); United States v. Charles, No. 13-558(MAS), 2016 WL 355073, at *2 (D.N.J. Jan. 28, 2016) (applying the statute directly to find that the trafficker had a reasonable opportunity to observe the victim after they met in person, she told him that she was fifteen years old, they saw each other for several days straight, and they had sexual intercourse). Additionally, the victim in *Barnes* actually told the defendant that she was a minor. *Barnes*, 2016 WL 3360944, at *3. The *Barnes* court also found that the victim's lack of identification provides evidence that the defendant had a "reasonable opportunity to observe" the victim. *Id.* Appellate courts had mixed responses to *Robinson*. *See, e.g.*, United States v. Phea, 755 F.3d 255, 263 (5th Cir. 2014) ("In light of the Second Circuit's decision, and because our court has not addressed the issue, it is unnecessary to resolve whether § 1591(a) permits a conviction based solely on a finding that the defendant had a reasonable opportunity to observe the victim.").

court might consider include:

- (1) the actual age of the victim and how close he or she is to turning eighteen;
- (2) how old the victim held himself or herself out to be;
- (3) the length of time that the defendant had contact with the victim;
- (4) the nature of the relationship between the defendant and the victim, e.g. sexual, romantic, etc.;
- (5) the type of communication that the defendant had with the victim, e.g. by phone or in person;
- (6) the defendant's knowledge of the victim's background; and
- (7) the defendant's possession, review, or absence of the victim's identification documents.

In *Robinson*, *Copeland*, and *Valas*, the defendants each had direct and personal interaction with the victims,¹²⁷ but the quality of their contact varied widely.¹²⁸ *Robinson's* connection to his victim lasted for three years, and the victim testified that it was romantic in nature.¹²⁹ In *Copeland*, it is unclear how much time Copeland spent with his victim.¹³⁰ Conversely, *Valas* spent one hour with his victim over a two-day period and never discussed her background or age with her.¹³¹ Despite each defendant having different amounts of personal interaction with their victims, *Robinson*, *Copeland*, and *Valas* all had a "reasonable opportunity to observe" their victims under the law.¹³² What qualifies as a "reasonable opportunity to observe" the victim will likely become a more frequent topic of litigation now that the legal standard appears settled.

127. See *Valas*, 822 F.3d at 235; *Copeland*, 820 F.3d at 810–11; *Robinson*, 702 F.3d at 27.

128. See *Valas*, 822 F.3d at 235; *Copeland*, 820 F.3d at 810–11; *Robinson*, 702 F.3d at 27.

129. *Robinson*, 702 F.3d at 27.

130. *Copeland*, 802 F.3d at 811.

131. *Valas*, 822 F.3d 228 at 235.

132. *Valas*, 822 F.3d at 236; *Copeland*, 820 F.3d at 811; *Robinson*, 702 F.3d at 29.

D. There Is No “But For” Causation Test

The Holiday Club in Saipan¹³³ added to trafficking case law by initiating a “causation” challenge to the TVPA’s sex-trafficking statute.¹³⁴ A number of adult female sex-trafficking victims were identified following an FBI investigation into a karaoke bar and its operator, Ms. Chang Ru Meng Backman.¹³⁵ The bar effectively operated as “Defendant’s brothel.”¹³⁶

Backman had been enticing adult Chinese women to move to Saipan under the promise of work at a hotel or on a farm.¹³⁷ Once the women arrived in Saipan, the promises of lawful employment evaporated, and Backman began to implement her coercive scheme.¹³⁸ She seized her victims’ travel documents and forced them to live in barracks adjacent to the club.¹³⁹ Through manipulating their debts and threatening violence, Backman “effectively imprisoned” her victims and forced them to have sex with customers for her financial gain.¹⁴⁰

The federal grand jury indicted Backman on three counts of § 1591 sex trafficking of adults by force, fraud, and coercion.¹⁴¹ The jury convicted Backman of one of the three counts and acquitted her of the other two.¹⁴² The trial court sentenced Backman to 235 months in prison and ordered her to pay \$9750 in restitution to the victims.¹⁴³

After her conviction, Backman appealed to the Ninth Circuit on several grounds.¹⁴⁴ Backman attempted to insert an additional

133. Saipan is an island in the Northern Mariana Islands and a United States territory. Indictment at 2, *United States v. Backman*, 1:12-cr-00015 (N. Mar. I. May 29, 2012), ECF No. 3. The Holiday Club was located on the second floor of a building in Chalan Canoa Village. *Id.* at 1.

134. *United States v. Backman*, 817 F.3d 662, 666 (9th Cir. 2016).

135. Transcript of Oral Argument at 6, *Backman*, 817 F.3d 662 (No. 14-10078).

136. *Backman*, 817 F.3d at 665.

137. Indictment at 2, *United States v. Backman*, 1:12-cr-00015 (N. Mar. I. May 29, 2012), ECF No. 3.

138. *Backman*, 817 F.3d at 665.

139. Indictment, *supra* note 137, at 2.

140. *Backman*, 817 F.3d at 664.

141. Indictment, *supra* note 137, at 3 (indicating that, in addition to the sex trafficking charges, Backman was also indicted on § 1324 alien harboring charges).

142. *Backman*, 817 F.3d at 671; Verdict Form, *United States v. Backman*, No. 1:12-cr-00015 (N. Mar. I. June 7, 2013), ECF No. 160.

143. Judgment, *United States v. Backman*, No. 1:12-cr-00015 (N. Mar. I. Feb. 14, 2014), ECF No. 191; *see also Backman*, 817 F.3d at 665; Andrew O. De Guzman, *2nd Woman in Sex Trafficking Testifies*, MARIANAS VARIETY (May 29, 2013), <http://www.mvariety.com/cnmi/cnmi-news/local/56255-2nd-woman-in-sex-trafficking-testifies>.

144. The issues raised on appeal include the admissibility of the victims’ sexual history, the interstate commerce element, the application of the vulnerable-victim sentencing enhancement, and the sufficiency of the evidence.

causation element into § 1591.¹⁴⁵ She alleged error by the trial court for not instructing the jury that they must find that the “alleged coercion was the but-for cause of the victim’s commercial sex acts.”¹⁴⁶ Her argument requires the possibility that her victims prostituted for her financial benefit and that she used force and coercion against them but, somehow, those two realities are not causally related.

Backman relied on *Burrage v. United States*¹⁴⁷ to support her but-for causation argument.¹⁴⁸ There, the Supreme Court found that but-for causation was required for criminality when drug distribution was directly linked to death or serious bodily injury from ingesting those drugs.¹⁴⁹ The Ninth Circuit, however, found this argument unavailing.¹⁵⁰ The *Backman* court distinguished from the Supreme Court’s decision in *Burrage* on the plain text of § 1591, noting that “[c]ausation is not an element in a § 1591 prosecution, because a commercial sex act ‘need not even occur . . . for a conviction.’”¹⁵¹ “What the statute requires is that the defendant know in the sense of being aware of an established modus operandi that will in the future coerce a prostitute to engage in prostitution.”¹⁵²

Backman is not the first to attempt this but-for causation argument; in fact, several defendants have made the same argument, but each circuit court reached the same conclusion.¹⁵³ For instance, the defendant in *United States v. Alvarez*,¹⁵⁴ also a sex-trafficking case, similarly relied on *Burrage* to claim that but-for causation was necessary for guilt.¹⁵⁵ The Second Circuit made clear that but-for causation was not necessary by stating “[t]he sex trafficking statute criminalizes certain means when they are ‘used to cause’ an act, and thus is concerned with the means and not with the result. The result itself is not an element of the offense.”¹⁵⁶

Similarly, in *United States v. McIntyre*,¹⁵⁷ defendant Rahim McIntyre was convicted of several counts of violating 18 U.S.C.

Backman, 817 F.3d at 665. Those topics will be addressed in other sections of this Article.

145. *Id.* at 666.

146. *Id.*

147. 134 S. Ct. 881 (2014).

148. *Id.*; *Backman*, 817 F.3d at 666.

149. *Burrage*, 134 S. Ct. at 892.

150. *Backman*, 817 F.3d at 666.

151. *Id.*

152. *Id.* (quoting *United States v. Brooks*, 610 F.3d 1186, 1197 n.4 (9th Cir. 2010)).

153. See, e.g., *United States v. McIntyre*, 612 F. App’x 77, 79–80 (3d Cir. 2015); *United States v. Alvarez*, 601 F. App’x 16, 17–18 (2d Cir. 2015).

154. 601 F. App’x 16 (2d Cir. 2015).

155. *Id.* at 17–18.

156. *Id.* at 18.

157. 612 F. App’x 77, 79–80 (3d Cir. 2015).

§ 1591 for his role in a prostitution scheme.¹⁵⁸ McIntyre appealed the conviction on the ground that his actions did not cause the commercial acts, but that he hit his victims in retaliation for their behavior.¹⁵⁹ There, the Third Circuit agreed with the Ninth and Second Circuits, stating that “[s]ection 1591(a) does not require the direct cause-and-effect connection that McIntyre posits.”¹⁶⁰

E. Interstate Commerce Element Resolved

The interstate commerce element in the sex-trafficking statute was placed front and center in two different 2016 cases: *Backman*¹⁶¹ and *Baston*.¹⁶² Section 1591’s jurisdictional clause requires that the sex-trafficking offense be “in or affecting interstate or foreign commerce, or within the special maritime and territorial jurisdiction of the United States.”¹⁶³

Baston, following his conviction for operating an international sex-trafficking ring and his unsuccessful constitutional challenge to the TVPA, argued his conduct was not “in or affecting interstate or foreign commerce.”¹⁶⁴ Baston contended that the “force, fraud, and coercion” itself had to be in or affecting interstate commerce.¹⁶⁵ “Baston argue[d] that none of his interstate conduct involved force, fraud, or coercion—the actus reus of the statute—and that his actual trafficking of [the victim] occurred exclusively in Florida”¹⁶⁶ The court rejected this argument because Baston had also trafficked at least one of the victims in Louisiana, Texas, Tennessee, and New York.¹⁶⁷ The court proceeded to say that even if Baston had used force, fraud, or coercion only in Florida, he still would have satisfied the elements of the crime because he used channels and instrumentalities (e.g., phones, the Internet, hotels, and buses) to facilitate his commission of the crime.¹⁶⁸

158. *Id.* at 78.

159. *Id.* at 79.

160. *Id.* at 80; *see also* *United States v. Garcia-Gonzalez*, 714 F.3d 306, 312 (5th Cir. 2013) (“The future verb tense of the phrase ‘will be caused’—which precedes ‘to engage in a commercial sex act’—indicates that a sex act does not have to occur to satisfy the elements of the child-sex-trafficking offense. To conclude otherwise erases the meaning of ‘will be’ from the statutory text.”).

161. *United States v. Backman*, 817 F.3d 662, 667 (9th Cir. 2016).

162. *United States v. Baston*, 818 F.3d 651, 663 (11th Cir. 2016).

163. 18 U.S.C. § 1591(a)(1) (2012).

164. *Baston*, 818 F.3d at 656, 663, 668–69.

165. *Id.* at 664.

166. *Id.*

167. *Id.*

168. *Id.* at 664–65 (explaining that Baston utilized many of these “channels” and “instrumentalities” to perform his scheme, namely, phones, text messages, buses, hotels, Backpage.com, and Instagram, and alternatively holding that Baston’s conduct satisfied the statute’s requirement because it “affected commerce,” citing *United States v. Evans*, 476 F.3d 1176, 1179 (11th Cir. 2007), as authority).

1. *No Mens Rea for Interstate Commerce Element*

Both *Baston* and *Backman* attempted to impute a knowledge requirement to the interstate commerce element.¹⁶⁹ *Baston* claimed that he could not violate the law if he did not know his conduct was in or affecting interstate commerce.¹⁷⁰ *Backman* argued that the trial court erred by not instructing the jury that to find her guilty they had to find that she had knowledge that her actions would affect interstate or foreign commerce.¹⁷¹

The *Backman* court found that “it is most natural to read the adverb ‘knowingly’ in [§ 1591] to modify the verbs that follow: ‘recruits, entices, harbors, transports, provides, obtains, or maintains’ . . . [and not] ‘in or affecting interstate or foreign commerce.’”¹⁷² Second, it agreed with the Seventh Circuit’s reasoning for dismissing the same argument, mainly because the “longstanding presumption is that the jurisdictional element of a criminal statute has no mens rea.”¹⁷³ Both the *Baston* and *Backman* courts easily dismissed these arguments and held that a conviction for § 1591 sex trafficking by force does not “requir[e] knowledge by a defendant that his actions are in or affecting interstate commerce.”¹⁷⁴ Consequently, this should now be an area of settled law.¹⁷⁵

169. *Baston*, 818 F.3d at 662; *United States v. Backman*, 817 F.3d 662, 667 (9th Cir. 2016).

170. *Baston*, 818 F.3d at 662.

171. *Backman*, 817 F.3d at 667.

172. *Id.*

173. *Id.*; see also *United States v. Sawyer*, 733 F.3d 228, 229 (7th Cir. 2013).

174. *Baston*, 818 F.3d at 662 (quoting *United States v. Evans*, 476 F.3d 1176, 1180 n.2 (11th Cir. 2007)); *Backman*, 817 F.3d at 667.

175. *United States v. Campbell*, 770 F.3d 556, 574 (7th Cir. 2014) (holding no mens rea requirement for interstate commerce element); *United States v. Sawyer*, 733 F.3d 228, 229 (7th Cir. 2013) (concluding that the interstate commerce language “merely establishes the basis of Congress’s power to legislate and is not subject to any mens rea requirement”); *United States v. Myers*, 430 F. App’x 812, 815 (11th Cir. 2011) (holding that a defendant did not have to know that interstate commerce would be affected and “[i]t is only necessary that the natural consequences of such conduct would affect interstate or foreign commerce in some way”); *United States v. Flint*, 394 F. App’x 273, 275 (6th Cir. 2010) (affirming the conviction for sex trafficking of a minor); *United States v. Anderson*, 560 F.3d 275, 279 (5th Cir. 2009) (“[W]e have held in a variety of contexts, that no mens rea attaches to the interstate nexus element.”); *Evans*, 476 F.3d at 1180 n.2 (“[W]e [do not] construe § 1591(a) as requiring knowledge by a defendant that his actions are in or affecting interstate commerce.”).

II. EVIDENTIARY ISSUES

A. *Protecting Victims from Sexual History Evidence*

The admissibility of evidence regarding prior prostitution has received consistent attention over the last few years.¹⁷⁶ In 2016, the Fifth, Ninth, and Eleventh Circuits all addressed the matter.¹⁷⁷ The most interesting case involved a Massachusetts sex trafficker who confronted the First Circuit with two interlocking questions regarding evidence of prior prostitution.¹⁷⁸ Both the minor victim and the trafficker engaged in prostitution-related activity prior to ever meeting each other.¹⁷⁹ The rationales and applications of Rule 404(b) and Rule 412 of the Federal Rules of Evidence in sex-trafficking cases were brought into sharp contrast.¹⁸⁰

When Massachusetts state troopers pulled over thirty-one-year-old Michael Gemma for speeding,¹⁸¹ they discovered A.L., a sixteen-year-old girl, sitting in the car with him.¹⁸² Gemma was driving a red Nissan Altima rental car in Massachusetts with Pennsylvania plates and a Florida driver's license.¹⁸³ When the troopers asked A.L. for her license, she claimed to not have one and seemed eager to convince the officers that she was born in 1992.¹⁸⁴ She also told the trooper that she had known Gemma for about two years.¹⁸⁵ Gemma told the trooper he had only known her for "about a month."¹⁸⁶ After the officers discovered that Gemma's license was suspended, he was arrested and removed from the scene.¹⁸⁷

176. See, e.g., Katie Patton, Note, *Unfolding Discovery Issues that Plague Sexual Harassment Suits*, 57 HASTINGS L.J. 991, 991–92 (2006) (discussing the evolution of Rule 404 and 412 in sexual harassment suits).

177. See, e.g., *United States v. Lockhart*, 844 F.3d 501, 510 (5th Cir. 2016) (“[E]vidence of the victims’ pre- and post-indictment prostitution is not relevant to prove an element necessary to convict Appellants, and therefore, the district court did not violate the Fifth Amendment when it excluded such evidence pursuant to Rule 412.”); *Baston*, 818 F.3d at 665 (relying on evidence offered by prostitution victims to calculate Baston’s restitution obligations); *Backman*, 817 F.3d at 669 (holding that the district court did not abuse its discretion by denying the defendant’s motion to introduce evidence of the victim’s sexual misconduct).

178. See *United States v. Gemma*, 818 F.3d 23, 29–30 (1st Cir. 2016).

179. *Id.* at 29.

180. *Id.* at 35–36.

181. Gemma was traveling ninety-five miles per hour on September 30, 2011, according to the trooper’s laser speed detection device. *Id.* at 27.

182. *Id.*

183. *Id.*

184. *Id.* at 27–28 (noting that A.L. stated her birth year with a rising inflection, suggesting uncertainty).

185. *Id.* at 28.

186. *Id.*

187. *Id.*

A.L. asked to get her phone from the rental car in order to help verify her mother's phone number.¹⁸⁸ While turning on her phone, the troopers noticed text messages on the phone screen that were consistent with prostitution, with phrases like, "Are you available for an outcall?," and "I have \$200."¹⁸⁹ Later, the police discovered that A.L. had run away from the Department of Children and Families ("DCF"),¹⁹⁰ and that Gemma was selling her for sex through advertisements on Backpage.com¹⁹¹ in New York and New Jersey.¹⁹²

The government charged Gemma with § 1591 sex trafficking by force, fraud, or coercion or knowledge of his minor victim's age.¹⁹³ At trial, A.L. testified and explained to the jury that she met Gemma through a friend after she ran away.¹⁹⁴ Gemma and A.L. communicated via text messages and through Facebook, and A.L. told Gemma that she was sixteen.¹⁹⁵ Gemma took A.L. to a hotel where A.L. learned that she would have to engage in commercial sex acts and give all the money to Gemma.¹⁹⁶ After Gemma posted advertisements online, A.L. began to get calls from potential

188. *Id.* Gemma argued that the district court should have excluded evidence from A.L.'s phone because he had a reasonable expectation of privacy in his car, where the phone was located. *Id.* at 30. The First Circuit highlighted that A.L. did not remove her phone from the car until after the original, unlawful search. *Id.* at 32. Moreover, the local officer acted reasonably under the Fourth Amendment when he encouraged A.L. to use her phone. *Id.* As a local police officer who is frequently "engage[d] in . . . community caretaking functions," the First Circuit found that it was appropriate for the officer in this case to do what he could to try and help a minor who was essentially stranded on the side of the Massachusetts highway after the defendant was arrested. *Id.* Since the officer's motive in interacting with A.L. was not to search her phone, but rather to help address her immediate needs as a stranded young female, the First Circuit concluded that he did not violate any search requirements under the Fourth Amendment. *Id.*

189. *Id.* at 28. Gemma attempted to exclude evidence related to the search of his car before his trial, but the district court excluded his cell phone and laptop computer. *Id.* at 31. However, the court allowed A.L.'s cell phone into trial, finding that Gemma had no ownership of the cell phone, and that A.L. consented to giving it to the police. *Id.*

190. *Id.* at 28. The officers talked to A.L.'s mother using her cell phone, and she shared information with them about A.L.'s situation. *Id.*

191. Motion in Limine to Preclude Evidence of Victim's Sexual History as to Michael Gemma by USA at 3, United States v. Gemma, No. 1:12-cr-10155-GAO (D. Mass. 2014).

192. *Gemma*, 818 F.3d at 28. Police later found online advertisements depicting A.L., including Gemma's phone number in the contact information. *Id.*

193. Indictment at 1, United States v. Gemma, No. 1:12-cr-10155-GAO (D. Mass. 2014). Gemma was also charged with transporting minors across state lines to engage in commercial sex acts in violation of 18 U.S.C. §§ 1591(a) and 2, and 18 U.S.C. § 2423(a). *Id.* at 2.

194. *Gemma*, 818 F.3d at 29.

195. A.L.'s Facebook page also listed her correct age. *Id.*

196. *Id.* at 29.

customers.¹⁹⁷ She “initially refused” but relented after Gemma threatened to hit her and told her that if she talked to anyone about this she “would not like the outcome.”¹⁹⁸ On one trip to New York, A.L. told Gemma she did not want to prostitute anymore and threatened to call the police.¹⁹⁹ Gemma then pushed A.L.’s head into a car with enough force to cause a concussion.²⁰⁰ Based on the evidence presented during the six-day trial, the jury convicted Gemma of § 1591 sex trafficking.²⁰¹

B. Admissibility of a Sex-Trafficking Victim’s Sexual History

Gemma attempted to present evidence of his sixteen-year-old victim’s sexual history.²⁰² Specifically, Gemma sought records from the DCF that he believed would show that A.L. had previously prostituted.²⁰³ Gemma argued that “[regardless of whether] the records [contained] information regarding previous instances in which A.L. engaged in prostitution, the records would squarely contradict her eventual claim that Gemma acted as her pimp.”²⁰⁴ There is nothing in the record that explains how prior prostitution would make it less likely that Gemma sex trafficked A.L. during the time period charged in the indictment, much less “squarely contradict” the sex-trafficking charge.²⁰⁵ Noting the speculative nature of his motion and applying the protections of Rule 412, a magistrate judge denied Gemma’s motion for production of DCF records.²⁰⁶

Undeterred, Gemma renewed his motion for evidence of A.L.’s sexual history, arguing that the trial court was violating his Fifth Amendment right to a fair trial and Sixth Amendment confrontation right.²⁰⁷ District Judge George O’Toole then conducted an ex parte

197. *Id.*

198. *Id.*

199. *Id.*

200. *Id.*

201. *Id.* Gemma was also convicted of the § 2423 Mann Act charge. Judgment in a Criminal Case at 1, *United States v. Gemma*, No. 1:12-cr-10155-GAO, (D. Mass. 2014).

202. *United States v. Gemma*, 818 F.3d 23, 33 (1st Cir. 2016).

203. *Id.*

204. Order on Defendant’s Motion for Discovery of Records of the Massachusetts Department of Children and Families at 8, *United States v. Gemma*, No. 1:12-cr-10155-GAO (D. Mass. 2014), ECF No. 76.

205. *United States v. Lockhart* additionally highlights that including information about a victim’s prior history cannot help a jury determine whether or not a defendant coerced the victim during a later period of time. *United States v. Lockhart*, 844 F.3d 501, 509–10 (5th Cir. 2016).

206. Rule 412 prohibits the admission of “evidence offered to prove that a victim engaged in other sexual behavior” or “evidence offered to prove any alleged victim’s sexual predisposition” in a case involving allegations of sexual misconduct.” FED. R. EVID. 412(a).

207. *Gemma*, 818 F.3d at 33.

review of the DCF records and partially reversed the magistrate judge's order.²⁰⁸

Judge O'Toole ordered the government to provide Gemma with a document from a social worker containing a statement from an unnamed girl, who had been "on the run" with A.L. The unattributed statement to the social worker conveyed that A.L. had been "wandering the streets offering to sleep with men in exchange for a place to stay."²⁰⁹ Additionally, the trial court allowed Gemma to cross-examine A.L. on these allegations.²¹⁰ While testifying, A.L. denied these allegations and stated that she could not remember the names of the other girls she was with at the time.²¹¹ Gemma then moved the trial court for disclosure of the DCF records identifying their names.²¹² Judge O'Toole denied Gemma's motion, noting that it was speculative and that Gemma already cross-examined A.L. on this topic.²¹³ It was this decision that Gemma appealed to the First Circuit.²¹⁴

The three-judge panel, which included retired Supreme Court Associate Justice David Souter, quickly dispatched Gemma's dubious argument.²¹⁵ Finding no error in Judge O'Toole's decision not to provide additional records after A.L.'s cross-examination, the court stated that the materials Gemma sought were "either entirely irrelevant or of such slight probative value in comparison to its prejudicial effect that a decision to exclude it would not violate Gemma's constitutional rights."²¹⁶

The court went on to explain that even when sex-trafficking victims have actually engaged in prior prostitution, other circuits have held that evidence of prior prostitution is irrelevant to a § 1591 sex-trafficking charge.²¹⁷ For example, the Second Circuit noted that "[t]he very purpose of . . . [Rule 412] is to preclude defendants from arguing that because the victim previously consented to have sex—for love or money—her claims of coercion should not be believed."²¹⁸

Similarly, the Eight Circuit noted that there is no relationship between a victim's involvement in prostitution and whether a defendant "beat her, threatened her, and took the money she made

208. *Id.*

209. *Id.*

210. *Id.*

211. *Id.*

212. *Id.*

213. *Id.*

214. *Id.* at 34.

215. *Id.* at 27, 34.

216. *Id.* at 34.

217. *Id.*

218. *United States v. Rivera*, 799 F.3d 180, 185 (2d. Cir. 2015) (involving the sex trafficking of adult Latin American women in two Long Island, New York, cantina bars).

from prostitution in order to cause her to engage in commercial sex.”²¹⁹ The Eight Circuit noted that the question before the jury was not whether the defendant caused the victim to engage in prostitution for the first time, but rather, the effect of the defendant’s conduct during the time period charged in the indictment.²²⁰ Notably, the Eight Circuit held that Rule 412 makes evidence of prior or subsequent prostitution inadmissible.²²¹ The Fifth Circuit also observed that “evidence of the victims’ pre- and post-indictment acts of prostitution would be irrelevant to [a trafficking] case as it does not ‘make . . . more or less probable’ the fact that Appellants caused their victims to engage in a commercial sex act during the time period alleged in the indictment.”²²²

Moreover, the Seventh Circuit surmised in a sex-trafficking case, that “even if [a victim] knew going in, from her prior experience, that [a person] would probably beat her, it was still a crime for him to do so.”²²³ The Ninth Circuit also stated that even if a victim previously consented to prostitution, it is still possible that

219. *United States v. Roy*, 781 F.3d 416, 420 (8th Cir. 2015).

220. *Id.*

221. *Id.* (“At issue here is not recruiting an individual to engage in commercial sex for the first time but doing an act with the use of force, threats, fraud, or coercion to cause the victim to engage in commercial sex. The victim’s participation in prostitution *either before or after* the time period in the indictment has no relevance to whether Roy beat her, threatened her, and took the money she made from prostitution in order to cause her to engage in commercial sex.” (emphasis added)); *see also* *United States v. Alvarez*, 601 F. App’x 16, 19 (2d Cir. 2015) (“Alvarez has not shown any abuse of discretion in the district court’s application of Rule 412 to exclude only the subsequent history of the victims’ prostitution.”); *United States v. Campbell*, 764 F.3d 880, 888 (8th Cir. 2014) (“Any evidence of [the minor’s] earlier prostitution is immaterial. Since [the minor] ‘could not legally consent, the government did not need to prove the elements of fraud, force, or coercion which are required for adult victims Whether [the minor] engaged in acts of prostitution before or after her encounters with [the defendant] is irrelevant, and would only prove other people may be guilty of similar offenses.” (quoting *United States v. Elbert*, 561 F.3d 771, 777 (8th Cir. 2009))).

222. *United States v. Lockhart*, 844 F.3d 501, 510 (5th Cir. 2016).

223. *United State v. Cephus*, 684 F.3d 703, 708 (7th Cir. 2012) (“[Defendants] wanted to suggest that having already been a prostitute [the victim] would not have been deceived by [one of the Defendants] and therefore her testimony that she was coerced into working for him—an element of one of the charged offenses when the prostitute is not a minor, 18 U.S.C. § 1591(a)—should be disbelieved. But the testimony sought to be elicited by the cross-examination would have been irrelevant. Even if no promises were made to [the victim], this would not be evidence that she consented to be beaten and to receive no share of the fees paid by the johns she serviced.”); *see also* *United States v. Shamsud-Din*, No. 10 CR 927, 2011 WL 5118840, at *2 (N.D. Ill. Oct. 27, 2011) (applying Rule 412 to a § 1591 sex-trafficking case where the victim had worked for a long time as a prostitute).

a defendant could use “force, fraud, or coercion . . . to cause the victim[] to engage in commercial sex.”²²⁴

The First Circuit echoed these other circuits in observing that there is no relationship between A.L.’s potential previous involvement in prostitution and whether she was forced or coerced into a commercial sex act under Gemma’s control, especially because she was unable to consent to sexual acts as a minor.²²⁵ Gemma claimed that he did not force A.L. into prostitution and that allowing evidence of her prior prostitution would prove his position.²²⁶ The First Circuit used Gemma’s appeal to clarify the true question of Gemma’s offenses.²²⁷ In order to successfully convict Gemma of sex trafficking, the jury needed to only find that he either used physical force or coercion (e.g., pushing and threatening A.L.), and that “[Gemma] knowingly recruited, enticed, harbored, transported, provided, or obtained [A.L.], knowing [she] would be caused to engage in commercial sex acts.”²²⁸ Whether the victim had prior involvement in prostitution or initially consented to prostitution has no relevance to determining Gemma’s culpability in this case.²²⁹

The First Circuit also delivered a glancing blow to Judge O’Toole for allowing Gemma to question A.L. at all about her prior sexual experiences. In affirming the denial of additional DCF records, it stated that “this is arguably more than Gemma was entitled to in the first place” and “[i]f Gemma was deprived of anything, it was the opportunity to seek unspecified and presumably inadmissible evidence to engage in additional cross examination on a topic of questionable relevance to begin with.”²³⁰

C. *Evidence of Gemma’s Prior Involvement in Prostitution*

Gemma also appealed Judge O’Toole’s decision to allow evidence that Gemma previously prostituted and physically abused a woman

224. *United States v. Valenzuela*, 495 F. App’x 817, 820 (9th Cir. 2012) (“Evidence of prior prostitution is irrelevant to whether the victims consented to working as prostitutes. Even if some of the victims consented initially, [the trafficker] violated § 1591 by continuing to harbor and maintain them once [the traffickers] realized that force, fraud, or coercion would have to be used to cause the girls to engage in a commercial sex act.”); *see also* *United States v. Jackson*, 627 F. App’x 460, 462–463, (6th Cir. 2015) (the exclusion of evidence of minor victims’ prostitution histories in the child sex-trafficking prosecution did not deny defendant his Sixth Amendment right to confront prosecution witnesses through cross-examination); *United States v. Williams*, 564 F. App’x 568, 575 (11th Cir. 2014) (limiting questioning of a sex-trafficking victim’s “preoffense” sexual activity under Rules 401, 403, and 412 and prohibiting evidence of postoffense sexual activity).

225. *United States v. Gemma*, 818 F.3d 23, 34 (1st Cir. 2016).

226. *Id.*

227. *Id.*

228. *Id.*

229. *Id.*

230. *Id.* at 35.

named Faye.²³¹ In what reads like a “what is good for the goose is good for the gander”-styled argument,²³² Gemma essentially advanced the notion that if A.L.’s alleged history with prostitution was inadmissible under Rule 412, his prior history with prostitution should have been inadmissible under Rule 404(b) as well.²³³

Rule 404 protects defendants by focusing a trial on the issues in the indictment and not allowing evidence of other crimes, wrongs, or bad acts.²³⁴ This prevents “propensity evidence” that suggests a defendant is guilty of the crimes charged because the defendant has engaged in other bad acts in the past.²³⁵ The exception to this rule allows evidence of prior bad acts for the purpose of “proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident.”²³⁶

The First Circuit noted the importance of determining whether Gemma was A.L.’s pimp in this case.²³⁷ To that end, evidence indicating that Gemma had the knowledge or intent to act as a pimp was considered admissible under the Federal Rule of Evidence 404(b) exception.²³⁸ The fact that A.L. had met Faye and knew that she once prostituted for Gemma strengthened the government’s argument. A.L. was also present when Gemma and Faye argued about prostitution, and A.L. witnessed Gemma slap Faye.²³⁹ As a result, the First Circuit affirmed the district court’s decision to allow evidence of Gemma’s prior pimping relationship with Faye under Rule 404(b).²⁴⁰ It is worth noting that evidence of Gemma assaulting Faye while A.L. watched could have been admitted as direct evidence of his sex-trafficking crime against A.L.²⁴¹ It contributed to the “climate of fear,” and threats or assaults on third parties can contribute to a coercive scheme that compels a trafficking victim.²⁴²

231. *Id.* at 30.

232. The First Circuit noted that this argument “might be viewed as the inverse of the [Rule 412] challenge.” *Id.* at 35.

233. *Id.*

234. *Id.*

235. FED. R. EVID. 404(a)(1).

236. FED. R. EVID. 404(b)(2).

237. *Gemma*, 818 F.3d at 35.

238. *Id.* at 36.

239. *Id.*

240. *Id.*

241. See 18 U.S.C. § 1591 (2008).

242. See *United States v. Fuertes*, 803 F.3d 485, 493–94 (4th Cir. 2015) (finding evidence of the defendant threatening a competing trafficker with a handgun relevant to the threat’s effect on the victim); *United States v. Alzanki*, 54 F.3d 994, 999 (1st Cir. 1995) (finding that the defendant’s acts of violence against his codefendant wife contributed to climate of fear that overcame the victim’s will, where the victim witnessed one assault and learned of another from defendant’s wife); *United States v. King*, 840 F.2d 1276, 1281 (6th Cir. 1988) (finding that force, threats, and other coercion created a “pervasive

At first glance, it appears unfair that Gemma's prior prostitution came into evidence even though A.L.'s evidence is kept out, at least in part. However, the fairness of the court's decision lies in the purpose for which the evidence was used in trial. Here, the First Circuit found that under Rule 412 it was too prejudicial to the fairness of the trial to bring in evidence of the victim's sexual history.²⁴³ As stated, Rule 412 is a rule of evidence that is meant to protect victims of crimes from having their prior sexual history shared with the court, especially where it has no bearing on whether a crime was committed against them.²⁴⁴ Here, even if A.L. had been old enough to give sexual consent, her consent became irrelevant when the question of coercion arose. Therefore, it was appropriate to exclude A.L.'s sexual history from evidence.

Similarly, Rule 404 is designed to protect defendants from being condemned multiple times for a crime that they were previously held responsible for.²⁴⁵ At the heart of this rule is the belief that people who have already been convicted of a crime and held accountable for it should not be punished for it again and again if they find themselves before a jury.²⁴⁶ However, the importance of protecting a criminal defendant's due process rights should not shield him or her from being properly convicted of a crime. Therefore, the government can show that Gemma had specific knowledge for how to commit a crime, namely sex trafficking, by showing that he committed the same crime previously. Where, at first glance, the court's reasoning appears inconsistent, the rationales for Rule 412 and Rule 404(b) demand different outcomes.

Interestingly, the Fifth and Ninth Circuits also issued opinions in 2016 regarding the admissibility of a victim's sexual history.²⁴⁷ The Fifth Circuit in *Lockhart* similarly addressed Fifth and Sixth Amendment concerns, finding that the defendant's rights were not offended when the lower court excluded the victim's prior sexual history under Rule 412.²⁴⁸ The court specified that the prior sexual history of a victim determines nothing about the potential coercive behavior of a defendant, nor does the exclusion of questions about a

climate of fear"); *United States v. Warren*, 772 F.2d 827, 833–34 (11th Cir. 1985) (noting "use, or threatened use, of physical force to create a climate of fear"); *United States v. Bibbs*, 564 F.2d 1165, 1168 (5th Cir. 1977) (finding that even victims who had not been beaten themselves remained with the defendants out of fear, because they "were aware that the defendants had beaten other persons who attempted to escape" and affirming conviction of defendants for holding farm workers in involuntary servitude through fear and threats of harm).

243. *Gemma*, 818 F.3d at 33.

244. *Id.*

245. *Id.* at 35.

246. *Id.*

247. *Lockhart*, 844 F.3d at 508; *Backman*, 817 F.3d at 665.

248. *Lockhart*, 844 F.3d at 508–10.

victim's prior history negate an entire cross-examination.²⁴⁹ Consequently, the Fifth Circuit upheld the Rule 412 protections.²⁵⁰

The Ninth Circuit analyzed Rule 412 after Backman protested the trial court's ruling that she could not admit evidence of her victims' prostitution-related activities after the time period in the indictment.²⁵¹ Backman's proffer of evidence to the court came in the form of general allegations of prostitution that did not target any individual victim.²⁵² The trial court found the allegations to be so vague and nondescript that it could not hold the proper in-camera hearing to determine if it should exclude the evidence under Rule 412.²⁵³ The Ninth Circuit agreed that Backman did not proffer sufficiently descriptive allegations of prostitution and upheld the trial court's ruling.²⁵⁴ It then went on in dicta to opine about the application of Rule 412, stating, "We doubt that evidence that the victim engaged in commercial sex acts after she had been coerced into prostitution has a bearing on whether Defendant earlier took coercive actions."²⁵⁵

With the *Gemma* and *Lockhart* decisions, the First and Fifth Circuits joined the Second, Seventh, and Eighth Circuits²⁵⁶ in publishing opinions that specifically extend the protections of Rule 412 to sex-trafficking victims and prevent defendants from putting their victims' sexual histories on trial.²⁵⁷ The Ninth Circuit also appears to agree.²⁵⁸ With no split among the circuits on the horizon, it appears that defendants' efforts to introduce evidence of their victims' prior or subsequent participation in commercial sex acts should be foreclosed.

D. When Are Search Warrants Required in Sex-Trafficking Investigations?

The Second Circuit weighed in on the issue of Fourth Amendment protections in sex-trafficking cases by addressing the following question: Can GPS location information be used to locate a sex-trafficking suspect where there are exigent circumstances?²⁵⁹

249. *Id.* at 510–11.

250. *Id.* at 510.

251. *Backman*, 817 F.3d at 668.

252. *Id.* at 668–69.

253. *Id.* at 669.

254. *Id.*

255. *Id.* at 670.

256. Respectively, the other three circuit decisions are: *United States v. Rivera*, 799 F.3d 180, 185 (2d Cir. 2015); *United State v. Cephus*, 684 F.3d 703, 708 (7th Cir. 2012); *United States v. Roy*, 781 F.3d 416, 420 (8th Cir. 2015).

257. *Rivera*, 799 F.3d at 185; *Roy*, 781 F.3d at 420; *Cephus*, 684 F.3d at 708.

258. *Backman*, 817 F.3d at 665.

259. *United States v. Gilliam*, 842 F.3d 801, 801 (2d Cir. 2016).

In late October or early November of 2011, Jabar Gilliam met a sixteen-year-old girl named Jasmin.²⁶⁰ She told him that she was seventeen.²⁶¹ After Gilliam learned that Jasmin had previously been prostituted by another pimp, Gilliam asked Jasmin to work for him.²⁶² Gilliam started to prostitute Jasmin in Maryland, punching her on two occasions and forcing her to have sex with him against her will.²⁶³ Gilliam then took Jasmin to New York after he threatened to prostitute Jasmin's younger sister²⁶⁴ if she did not continue to have sex with customers and give him the money.²⁶⁵ Once in the Bronx, Gilliam forced Jasmin to have sex with him before he forced her to have sex with his customers.²⁶⁶

On November 30, 2011, Jasmin's foster mother reported Jasmin's absence to the sheriff's office, mentioning a "boyfriend" known as Jabar.²⁶⁷ Three days later, on December 2, 2011, Corporal Chris Heid was assigned to the case.²⁶⁸ Corporal Heid's investigation into this human trafficking began and ended on the same day.²⁶⁹ Corporal Heid spoke to Jasmin's social worker and Jasmin's biological mother, both of whom said that Gilliam contacted Jasmin's biological mother to tell her that he was taking her to New York to prostitute.²⁷⁰ Corporal Heid then contacted Sprint Corporation to request the GPS location information for Gilliam's cell phone, stating that they were looking for a missing child who was in "immediate danger of death or serious bodily injury."²⁷¹ Corporal Heid did not seek or obtain a warrant before contacting Sprint.²⁷² Sprint complied with Corporal Heid's request, giving GPS location information to Maryland state police, which passed it along to the FBI and the New York City Police Department ("NYPD").²⁷³

On that same day, Jasmin called her biological mother from Gilliam's mother's apartment.²⁷⁴ After police questioned Gilliam's mother and learned from Sprint that Gilliam's phone was only a few blocks away, the authorities began to canvas the neighborhood.²⁷⁵

260. *Id.* at 802.

261. *Id.*

262. *Id.*

263. *Id.*

264. Jasmin's younger sister was fifteen years old at the time. *Id.*

265. *Id.*

266. *Id.*

267. Jasmin's foster mother reported Jasmin missing to the sheriff's office in Frederick County, Maryland. *Id.*

268. *Id.*

269. *See id.* at 802–03.

270. *Id.* at 802.

271. *Id.*

272. *Id.* at 803.

273. *Id.* at 802.

274. *Id.*

275. *Id.*

During that process, two NYPD officers saw Jasmin and Gilliam and arrested Gilliam after a scuffle.²⁷⁶

The grand jury indicted Gilliam on one count of § 1591 sex trafficking based on the victim's age and force, fraud, or coercion.²⁷⁷ After a five-day jury trial,²⁷⁸ Gilliam was convicted of sex trafficking of a minor by force, fraud, or coercion, and of transporting a minor in interstate commerce for purposes of prostitution.²⁷⁹ The court sentenced Gilliam to 240 months in prison on each count, to run concurrently, and ordered him to pay \$2100 in restitution to Jasmin.²⁸⁰ Gilliam appealed his conviction, arguing that Sprint should not have shared location information with the police without a warrant.²⁸¹

Section 2702(c)(4) of the Stored Communications Act ("SCA") states that:

A provider . . . may divulge a record or *other information* pertaining to a subscriber . . . if the provider, in good faith, believes that an emergency involving danger of death or serious physical injury to any person requires disclosure without delay of information relating to the emergency.²⁸²

Gilliam challenged whether GPS location data was "other information" and whether these facts qualified as exigent circumstances evidencing an "emergency involving danger of death or serious physical injury" justifying the warrantless sharing of information.²⁸³ The Second Circuit quickly affirmed the ruling of three federal district courts that the location information regarding a customer's cell phone was included in the SCA's "other information" clause.²⁸⁴

Next, the *Gilliam* court took up the issue of whether the facts presented "exigent circumstances" to justify the warrantless search

276. *Id.* at 803.

277. Indictment at 1–2, *United States v. Gilliam*, No. 1:11-cr-01083-TPG (S.D.N.Y. Dec. 15, 2011), ECF No. 5. The grand jury also indicted Gilliam on one count of transporting a minor for prostitution under 18 U.S.C. § 2423(a) (2012). *Id.* at 2.

278. The trial began on Wednesday, September 19, 2012, and the jury returned a verdict on Tuesday, September 25, 2012. *Gilliam*, 842 F.3d at 803.

279. *Id.*

280. Judgment at 1–2, 5, *United States v. Gilliam*, No.1:11-cr-01083-TPG (S.D.N.Y. Jan. 28, 2015), ECF No. 72.

281. *Gilliam*, 842 F.3d at 802–03.

282. 18 U.S.C. § 2702(c)(4) (2012) (emphasis added) (quoted in *Gilliam*, 842 at 803).

283. *Gilliam*, 842 F.3d at 803.

284. *Id.* (citing *United States v. Graham*, 846 F. Supp. 2d 384, 396 (D. Md. 2012); *In re Application of the United States for an Order Authorizing the Release of Historical Cell–Site Info.*, 809 F. Supp. 2d 113, 125 (E.D.N.Y. 2011); *In re Application of the United States for Prospective Cell Site Location Info. on a Certain Cellular Telephone*, 460 F. Supp. 2d 448, 460–61 (S.D.N.Y. 2006)).

and Gilliam's subsequent warrantless arrest.²⁸⁵ The court noted that "exigent circumstances" under the SCA and the Fourth Amendment include realistic threats of serious injury and completed injuries to a victim.²⁸⁶ In those cases, the Second Circuit asked whether a reasonable, experienced officer would "believe that there was an urgent need to . . . take action."²⁸⁷

In this case, the Second Circuit echoed a prior decision in recognizing that minor sexual exploitation is an exigent circumstance that poses a serious harm.²⁸⁸ Additionally, according to the Ninth Circuit, the risk of contracting a sexually transmitted disease and the risk of physical abuse by pimps and customers more than justifies the finding of an exigent circumstance for minor sex-trafficking cases where a search is conducted.²⁸⁹ Finally, Congress has a compelling interest in "preventing an imminent threat of death or serious bodily injury," which supersedes an individual's privacy rights in their cell phone location information.²⁹⁰

The court noted that the evidence collected during Corporal Heid's one-day investigation into this matter "was compelling."²⁹¹ Citing his discussions with Jasmin's foster mother, the social worker, and the biological mother, the police had "a substantial basis" to believe that Gilliam was bringing Jasmin to New York City to require her to work as a prostitute.²⁹² Given the testimony that Corporal Heid had when he approached Sprint and the high risk of Jasmin's involvement in underage prostitution, the Second Circuit agreed that sex trafficking of a minor supports the "exigent circumstances" requirements of the SCA and the Fourth Amendment.²⁹³

E. Conditional Pleas in Human-Trafficking Cases Take Center Stage

The First and Ninth Circuits dealt with the difficult tangle of plea agreements in the sex-trafficking context this past year and provided significant guidance to practitioners and lower courts on

285. *Gilliam*, 842 F.3d at 803–04.

286. *Id.* at 804.

287. *Id.*; see also *United States v. Daye*, 571 F.3d 225, 234 (2d Cir. 2009), *abrogated by* *Johnson v. United States*, 135 S. Ct. 2551 (2015) ("[C]rimes involving sexual contact between adults and children create a substantial likelihood of forceful, violent, and aggressive behavior on the part of the perpetrator because a child has essentially no ability to deter an adult from using such force to coerce the child into a sexual act.").

288. *Gilliam*, 842 F.3d at 804.

289. *Id.* (citing *United States v. Carter*, 266 F.3d 1089, 1091 (9th Cir. 2001)).

290. *Id.* at 805.

291. *Id.* at 804.

292. *Id.*

293. *Id.*

how conditional and unconditional pleas agreements will be reviewed.²⁹⁴

In *United States v. Lustig*,²⁹⁵ Fourth Amendment violations scuttled the trafficker's conditional plea agreement.²⁹⁶ In 2013, a grand jury indicted San Diego real-estate agent Michael Lustig on two counts of § 1591 sex trafficking of minors based on his knowledge of their age.²⁹⁷ The case sprang from an online sting operation where law enforcement officers proactively sought to investigate the purchasers of commercial sex.²⁹⁸ Lustig, using the alias "George," responded to an advertisement for sex and traveled to a specified Howard Johnson hotel to purchase sex.²⁹⁹ Once there, he entered the hotel room and made advances toward the undercover female officer before she arrested him.³⁰⁰

A series of actual and alleged Fourth Amendment violations followed his arrest, as the police seized two cell phones in his pants pocket and two phones from his car.³⁰¹ The authorities found evidence of Lustig's previous purchases of sex from actual minors on his phones.³⁰² After the authorities located the twelve- and thirteen-year-old girls from whom Lustig had previously purchased sex, these victims both positively identified Lustig.³⁰³ These facts formed the basis of the sex-trafficking charges in the indictment.³⁰⁴

Lustig challenged the admissibility of the phones and the resulting evidence in a complicated motion to suppress.³⁰⁵ The district court denied Lustig's motion to suppress on the theory that any violations were made in good faith reliance on then-governing state court precedent and because other evidence collected in violation of the Fourth Amendment would have been inevitably discovered even without the violation.³⁰⁶ The court then allowed the

294. See *United States v. Lustig*, 830 F.3d 1075, 1086 (9th Cir. 2016); *United States v. Carrasquillo-Peñaloza*, 826 F.3d 590, 592 (1st Cir. 2016).

295. *Lustig*, 830 F.3d at 1075.

296. *Id.* at 1077.

297. The grand jury's indictment charged Lustig with two counts of § 1591 sex trafficking of minors. Neither count alleged that Lustig knew or was in reckless disregard of the fact that force, fraud, or coercion would be used to compel the two minor victims to engage in commercial sex acts. Indictment at 1–2, *United States v. Lustig*, 3 F. Supp. 3d 808 (S.D. Cal. 2014) (No. 13CR3921-BEN).

298. *Lustig*, 830 F.3d at 1077.

299. Trial Memorandum at 3–4, *Lustig*, 3 F. Supp. 3d 808 (No. 13CR3921-BEN).

300. *Id.* at 4.

301. *Lustig*, 830 F.3d 1077–78; see also Indictment, *supra* note 297, at 3.

302. *Lustig*, 830 F.3d at 1077.

303. *Id.* at 1078.

304. See Indictment, *supra* note 297, at 1–3.

305. *Lustig*, 830 F.3d at 1085–86; see also *United States v. Lustig*, 3 F. Supp. 3d 808, 812 (S.D. Cal. 2014).

306. *Lustig*, 3 F. Supp. 3d at 812. The court made a distinction between the phones found on Lustig's person and the phones that were recovered from his

government to use the phones and the resulting information at trial despite the questionable circumstances surrounding the searches.³⁰⁷ Lustig and the government found themselves discussing a possible plea bargain against the backdrop of these rulings.³⁰⁸

Lustig was facing a mandatory minimum sentence of fifteen years and a statutory maximum of life in prison for each sex-trafficking count in the indictment.³⁰⁹ For the government, a trial would require the two minor sex-trafficking victims to testify and provide for the possibility of the Ninth Circuit reversing the district court's decision allowing the dubiously seized cell phones.³¹⁰ A bargain was struck that benefited both parties.³¹¹ Lustig agreed to plead guilty to two § 1952 Interstate Travel in Aid of Racketeering ("ITAR") offenses.³¹² The ITAR crime has no mandatory minimum sentence, and its statutory maximum is only five years.³¹³

When Lustig pleaded guilty, he entered a conditional plea of guilty pursuant to Rule 11, reserving his right to appeal the decision of the district court on his prior evidence motions at the end of the proceedings.³¹⁴ Lustig wasted no time in appealing his case on those grounds.³¹⁵

Lustig's case was heard on appeal by the Ninth Circuit.³¹⁶ The three-judge panel reconsidered the motions to suppress *de novo* and found that the phones seized from Lustig's car were the result of an unconstitutional search that was not cured either by the evidence's

car. *Id.* In 2014, the Supreme Court decided that the police always need a warrant before they search an individual's cell phone. *See Riley v. California*, 134 S. Ct. 2473, 2485 (2014). Despite this ruling, the *Lustig* court found that the police who searched Lustig's personal cell phone were acting reasonably and in good faith in light of the then-prevailing case law on searches. *Lustig*, 3 F. Supp. 3d at 819. As a result, the evidence from those phones was deemed appropriate for consideration. *Id.* at 812.

307. *Id.* at 808.

308. *Lustig*, 830 F.3d at 1079.

309. 18 U.S.C. § 1591(b)(1) (2012).

310. Trial Memorandum, *supra* note 299, at 13.

311. Judgment at 1, *United States v. Lustig*, 3 F. Supp. 3d 808 (No. 13CR3921-BEN).

312. *Id.*

313. 18 U.S.C. §1592(a) (setting out five- and ten-year statutory maximums depending on the specific charges). Lustig pleaded guilty to § 1952(a)(3) counts, which each carried a five-year statutory maximum sentence. Judgment, *supra* note 311, at 1.

314. *United States v. Lustig*, 830 F.3d 1075, 1079 (9th Cir. 2016). Rule 11 states, "With the consent of the court and the government, a defendant may enter a conditional plea of guilty or *nolo contendere*, reserving in writing the right to have an appellate court review an adverse determination of a specified pretrial motion. A defendant who prevails on appeal may then withdraw the plea." FED. R. CRIM. P. 11(a)(2).

315. Lustig filed his Notice of Appeal on December 4, 2014, the day after the district court entered its judgment. Notice of Appeal at 1, *Lustig*, 3 F. Supp. 3d 808 (No. 13-CR-3921-BEN).

316. *Lustig*, 830 F.3d at 1075.

immateriality or by the Fourth Amendment's inevitable discovery exception.³¹⁷ Having won this Fourth Amendment argument, Lustig then looked to challenge his plea agreement.³¹⁸ Lustig's contention was that a "harmless error review does not apply in the Rule 11(a)(2) context, and that *any* error, however slight or tangential, requires reversal with the opportunity to withdraw the plea."³¹⁹ The Ninth Circuit disagreed and held that it must examine the case to determine if the trial court's error was harmless.³²⁰

The court then proceeded with the harmless error analysis and asked what standard should be used for determining if the error was harmless.³²¹ The government argued for the adoption of a "standard that defines an error as harmless when [the court] can conclude, beyond a reasonable doubt, that the evidence erroneously admitted was 'immaterial to [the defendant's] conviction.'"³²² Lustig pleaded guilty to the ITAR offenses and not the original sex-trafficking charges in the indictment, which resulted from the illegal searches.³²³ The record at sentencing made clear that the victims were not located through the improperly seized car phone.³²⁴ Highlighting the gulf between the unconstitutional search and the counts of conviction, the government argued that the trial court's error was harmless.³²⁵ Thus, the government argued, the plea agreement should not be overturned, and Lustig's convictions should stand because the unconstitutionally seized evidence was unrelated to the counts to which Lustig ultimately pleaded guilty.³²⁶

The other option before the court for the harmless error standard focused not on the relationship between the error and the ultimate counts of conviction, but on how the error affected the decision to enter the plea agreement.³²⁷ Specifically, under this second option the court must be able to conclude "beyond a reasonable doubt that the erroneously denied suppression motion did not contribute to the defendant's decision to plead guilty."³²⁸ The court noted that the "critical event for a defendant in a conditional plea context is the *decision* to plead guilty after considering what a trial would entail in light of the failed pretrial motions."³²⁹ Under this decision-based standard, the court noted

317. *Id.* at 1085–86.

318. *Id.* at 1079.

319. *Id.* at 1086.

320. *Id.*

321. *Id.* at 1087.

322. *Id.*

323. *Id.* at 1079.

324. *Id.* at 1091.

325. *Id.*

326. *Id.* at 1079.

327. *Id.* at 1087.

328. *Id.*

329. *Id.*

that Lustig decided to enter the agreement after thoroughly litigating pre-trial motions and in the prospect of a jury considering the illegally seized evidence.³³⁰ Fortunately for Lustig and unfortunately for the government, the Ninth Circuit found that there was reasonable doubt that the erroneous denial of Lustig's motion contributed to Lustig's decision to plead guilty.³³¹ The court recognized that it is very difficult to prove what was going through Lustig's mind when he decided that it was best for him to plead guilty to sex trafficking, and that the jury's exposure to the erroneously admitted evidence may have been one factor Lustig was considering.³³²

The Ninth Circuit concluded that what mattered was Lustig's *decision* to plead guilty, and not the role the unconstitutional evidence played when it was introduced.³³³ In doing so, it asked "whether there is a reasonable possibility that the error *contributed to the plea*."³³⁴ In rejecting the government's argument and adopting the decision-based standard, the Ninth Circuit relied on five other circuit courts that had reached similar conclusions.³³⁵

Although the court did not hold that victorious defendants on appeal automatically get to vacate their plea agreements, the court required the government to meet a very high standard before it would be able to claim an error was harmless.³³⁶ It is difficult to imagine a legal issue so significant that it merits pre-trial litigation, but so insignificant that the trial court's order does not contribute to the plea decision. In these cases, the pleas are specifically "conditioned" on the ability to appeal a specified ruling by the trial court. The condition itself makes it arguably impossible to satisfy the decision-based standard.

In contrast, the First Circuit recently addressed the implications of unconditional guilty pleas in *United States v. Carrasquillo-Peñaloza*.³³⁷ Betsian Carrasquillo-Peñaloza sold access to her fourteen-year-old daughter to customers for sex acts.³³⁸ The

330. *See id.* at 1078–79, 1091.

331. *Id.* at 1091.

332. *Id.* There was very little information in the record about Lustig's state of mind when he made the conditional plea, and the government was forced to rely on the record set by the district court. *Id.* at 1091–92.

333. *Id.* at 1087.

334. *Id.* at 1088.

335. *Id.* at 1088–89 (citing *United States v. Molina-Gomez*, 781 F.3d 13, 24 (1st Cir. 2015); *United States v. Peyton*, 745 F.3d 546, 557 (D.C. Cir. 2014); *United States v. Benard*, 680 F.3d 1206, 1213 (10th Cir. 2012); *United States v. Leake*, 95 F.3d 409, 420 n.21 (6th Cir. 1996); *United States v. Burns*, 684 F.2d 1066, 1076 (2d Cir. 1982)).

336. *Id.* at 1088.

337. 826 F.3d 590 (1st Cir. 2016).

338. *Puerto Rican Mother Charged with Prostituting 14-year-old Daughter, 2 Other Girls at Hotel*, FOX NEWS (Oct. 5, 2012), <http://www.foxnews.com>

grand jury charged Carrasquillo-Peñaloza with one count of § 1591 sex trafficking of a minor³³⁹ and a § 2423(a) Mann Act violation.³⁴⁰ Following the trial court's order rejecting Carrasquillo-Peñaloza's motion to dismiss the Mann Act count because all the conduct occurred in Puerto Rico, she agreed to enter a plea of guilty to the Mann Act charge whereby she avoided the sex-trafficking count's fifteen-year mandatory minimum.³⁴¹

Carrasquillo-Peñaloza's unconditional plea of guilt included a waiver of her right to appeal the trial court's judgment.³⁴² Nevertheless, she subsequently appealed her conviction under § 2423(a) to the First Circuit on the grounds that the trafficking statute exceeded Congress's authority to regulate territorial activity.³⁴³ Specifically, she argued that § 2423(a) did not apply to her actions because she did not transport her daughter across state lines, but rather solely exploited her within Puerto Rico.³⁴⁴ Carrasquillo-Peñaloza claimed that because this was a jurisdictional argument, it could not be waived by the plea agreement.³⁴⁵ The First Circuit applied circuit precedent in finding that the defendant's challenge was nonjurisdictional, and accordingly unavailing, because "she could have tendered a conditional guilty plea and preserved her right to appeal the district court's denial of her Commerce Clause challenge."³⁴⁶ Instead, she waived her right to

/world/2012/10/05/puerto-rican-mother-charged-with-prostituting-14-year-old-daughter-2-other.html.

339. Indictment, United States v. Carrasquillo-Peñaloza, No. 12-728(PG), (D.P.R. Oct. 10, 2012). Interestingly, the Indictment charged the defendant based on her "knowledge" of her daughter's age and did not plead the alternative "reckless disregard" standard for meeting this element of the sex-trafficking offense. *Id.* at 2.

340. Section 2423(a) of the Mann Act states:

A person who knowingly transports an individual who has not attained the age of 18 years in interstate or foreign commerce, or in any commonwealth, territory or possession of the United States, with intent that the individual engage in prostitution, or in any sexual activity for which any person can be charged with a criminal offense, shall be fined under this title and imprisoned not less than 10 years or for life.

18 U.S.C. § 2423(a) (2012).

341. *Id.* § 1591(b)(1) (stating that the punishment for a violation "effected by means of force, threats of force, fraud, or coercion . . . [is] a fine . . . and imprisonment for any term of years not less than 15 or for life . . ."); *Carrasquillo-Peñaloza*, 826 F.3d at 591 (establishing that the defendant pleaded guilty to the Mann Act offense).

342. *Carrasquillo-Peñaloza*, 826 F.3d at 592.

343. *Id.* at 591.

344. *Id.*

345. *Id.* at 592.

346. *Id.* at 593.

appeal when she knowingly and voluntarily entered an unconditional plea of guilt.³⁴⁷

In the context of human-trafficking cases, *Lustig's* high standard makes conditional pleas a more valuable bargaining chip during plea negotiations. Prosecutors likely will be reluctant to run the risk of returning to trial months or years after the appellate process has run its course, as memories fade and victims gain distance from their abuse. Where the government believes there is a potential risk of reversal, a conservative approach may be to offer a defendant more favorable terms and require a waiver of appeal rights in the agreement. Alternatively, the government could dismiss the counts based on the questionable searches before the plea negotiations and proceed with alternate charges. The practical application of this standard may create a slow and laborious version of an interlocutory appeal. Meanwhile, the *Carrasquillo-Peñaloza* decision heralds the consequences of waiving appeal rights and entering an unconditional plea.

Although *Carrasquillo-Peñaloza* has concluded, *Lustig's* case awaits its final rest—he has a currently-pending petition to the United States Supreme Court that appeals the Ninth Circuit's decision.³⁴⁸ A grant of certiorari would bring major developments in the relationship between plea deals and human-trafficking convictions. However, the likely denial of certiorari will probably leave trial judges and prosecutors wary of taking conditional pleas when questionable Fourth Amendment violations are lurking.

III. SENTENCING ISSUES

Four published opinions in 2016 that took up sentencing issues delivered some significant developments regarding how courts sentence convicted traffickers.³⁴⁹ The opinions include a seismic reduction of the Base Offense Level for sex-trafficking conspiracy, application of the “commission of a sex act,” “use of a computer,” “vulnerable victim” enhancements, and the application of “repeat offender” status.³⁵⁰

347. *Id.*

348. Petition for Writ of Certiorari, *Lustig v. United States*, No. 16-7124 (U.S. Dec. 6, 2016).

349. *United States v. Lin*, 841 F.3d 823, 825 (9th Cir. 2016); *United States v. Gibson*, 840 F.3d 512, 513 (8th Cir. 2016); *United States v. Backman*, 817 F.3d 662, 664–65 (9th Cir. 2016); *United States v. Basa*, 817 F.3d 645, 647 (9th Cir. 2016).

350. *Lin*, 841 F.3d at 825–26 (reducing the Base Level Offense for sex-trafficking conspiracy); *Gibson*, 840 F.3d at 514–15 (holding the use of computer enhancement applies despite an Advisory Note requiring direct contact with a minor and applying repeat offender status); *Backman*, 817 F.3d at 670–71 (applying the vulnerable victim enhancement); *Basa*, 817 F.3d at 648–50 (holding that the enhancement applies even if the defendant does not commit the sex act herself).

A. *A Massive Drop in the Base Offense Level for Sex-Trafficking Conspiracy*

The Ninth Circuit decision in *United States v. Lin*³⁵¹ will have far reaching impacts on those convicted of a § 1594 sex-trafficking conspiracy.³⁵²

Tucked away on the second floor of a nondescript building in Saipan was the Rosen Music Studio.³⁵³ In addition to being a typical karaoke bar, the Rosen Music Studio³⁵⁴ was also a place to purchase commercial sex.³⁵⁵ Wei Lin located adult women in China and brought them to Saipan by promising legitimate jobs.³⁵⁶ Upon their arrival, Lin took their passports, threatened them, and used physical force to require them to provide sex to customers of the Rosen Music Studio.³⁵⁷ These facts formed the basis of a federal grand jury indictment for substantive sex-trafficking crimes and a conspiracy³⁵⁸ to engage in sex trafficking.³⁵⁹

After lengthy plea negotiations that involved multiple rounds of attorneys,³⁶⁰ Lin pleaded guilty to a § 1594(c) sex trafficking conspiracy.³⁶¹ Pleading guilty to the sex-trafficking conspiracy allowed Lin to avoid the fifteen-year mandatory minimum sentence that would have been required by the substantive § 1591 sex-trafficking counts.³⁶² In exchange for the plea, the government

351. *Lin*, 841 F.3d 823.

352. *Id.* at 826–27.

353. Superseding Indictment at 2, *United States v. Lin*, No. 1:12-CR-00012, (D. N. Mar. I. Apr. 30, 2012).

354. The Rosen Music Studio was in the village of Chalan Laulau, less than 10 kilometers away from the Holiday Club karaoke bar featured in *United States v. Backman*. See Press Release, U.S. Dep’t of Justice, Jury Convicts CNMI Karaoke Bar Owner of Sex Trafficking (June 10, 2013), <https://www.justice.gov/usao-gu/pr/jury-convicts-cnmi-karaoke-bar-owner-sex-trafficking>.

355. Superseding Indictment, *supra* note 353, at 2.

356. *Id.*

357. *Id.* at 4.

358. In addition to Wei Lin, the grand jury also indicted Yan Chun Li in all five counts of the Indictment. Mr. Li entered a guilty plea to an 18 U.S.C. § 371 general conspiracy to commit sex trafficking and was sentenced to 60 months (5 years) on February 21, 2013. Judgment in a Criminal Case at 2, *United States v. Li*, No. 1:12-cr-000012-002 (D. N. Mar. I. Feb. 21, 2013).

359. The indictment also charged Lin with “benefiting” from a sex-trafficking venture (Count 5). The count was arguably superfluous given that benefiting is an alternative means of proving the § 1591 sex-trafficking offenses in Counts 2 through Counts 4. This issue was never ripe after Lin agreed to plead guilty to Count 1 and the government agreed to dismiss the remaining counts in the Superseding Indictment. Superseding Indictment, *supra* note 353, at 5.

360. Decision and Order Denying Wei Lin’s Motion to Withdraw Plea at 2, *United States v. Lin*, No. 1:12-cr-000012-002 (D. N. Mar. I. Nov. 13, 2013).

361. Judgment in a Criminal Case at 1, *United States v. Lin*, No. 1:12-cr-12-00012-001 (D. N. Mar. I. Mar. 23, 2015).

362. *Lin*, 841 F.3d at 825.

agreed to dismiss those counts in the superseding indictment.³⁶³ The trial court sentenced Lin to 235 months imprisonment and ordered him to pay \$21,517.17 in restitution to his three victims.³⁶⁴

On appeal of his sentence to the Ninth Circuit, Lin teed up the issue of § 1594(c)'s base offense level under the Federal Sentencing Guidelines ("Guidelines").³⁶⁵ Lin argued that the Base Offense Level for the § 1594(c) sex-trafficking conspiracy is 14.³⁶⁶ The trial court ruled that the Base Offense Level was 34.³⁶⁷ The impact of this difference is significant. For instance, for a defendant with no criminal history, a Base Offense Level of 14 yields 15–21 months in prison.³⁶⁸ A Base Offense Level of 34 increases that to 151–188 months in prison.³⁶⁹ More than 10 years of incarceration are at issue in this decision.³⁷⁰

At the heart of the issue before the Ninth Circuit was a drafting error in the Guidelines that has never been corrected.³⁷¹ The Guidelines direct that for conspiracy offenses, the court should find the Base Offense Level in the section used for the underlying offense.³⁷² The Guideline section for the underlying offense of the sex trafficking of adults is § 2G1.1.³⁷³ It states:

§2G1.1. Promoting a Commercial Sex Act or Prohibited Sexual Conduct with an Individual Other than a Minor

(a) Base Offense Level:

- (1) 34, if the offense of conviction is 18 U.S.C. § 1591(b)(1); or
- (2) 14, otherwise.³⁷⁴

In this case, the "offense of conviction" was § 1594(c) sex-trafficking conspiracy and not § 1591 sex trafficking.³⁷⁵ The problem with this Guideline is that § 1591(b)(1) does not contain a

363. Superseding Indictment, *supra* note 353, at 4–5.

364. Judgment in a Criminal Case, *supra* note 361, at 2, 4–5.

365. Appellant's Reply Brief at 15, *Lin*, 841 F.3d 823 (No. 15-10152).

366. *Id.*

367. *Id.*

368. *Sentencing Table*, U.S. SENTENCING COMM'N (Nov. 1, 2015), http://www.ussc.gov/sites/default/files/pdf/guidelines-manual/2015/Sentencing_Table.pdf.

369. *Id.*

370. *Id.*

371. Appellant's Reply Brief, *supra* note 365, at 15–19.

372. U.S. SENTENCING GUIDELINES MANUAL § 2X1.1(a) (U.S. SENTENCING COMM'N 2015).

373. Appellant's Reply Brief, *supra* note 365, at 15, 18–19.

374. U.S. SENTENCING GUIDELINES MANUAL § 2G1.1(a) (U.S. SENTENCING COMM'N 2015).

375. Appellant's Reply Brief, *supra* note 365, at 15.

convictable offense.³⁷⁶ Instead, § 1591(b)(1) provides the sentence for the substantive § 1591(a) sex-trafficking offense.³⁷⁷ The fact that the Guidelines say “(b)” instead of “(a)” caused the Ninth Circuit to reverse Lin’s 235-month sentence and remand the case back to the trial court in the Northern Mariana Islands.³⁷⁸

If read literally, the Base Offense Level of 34 could never be applied in sex-trafficking cases because the “offense of conviction” can never be § 1591(b)(1). To avoid this outcome, the trial court and the Ninth Circuit elected different ways to reinterpret the plain language of the Guideline so it could have some application.³⁷⁹ Seeing this problem, the trial court focused on the whether the underlying conduct was punishable by § 1591(b).³⁸⁰ In this case, the underlying conduct in Lin’s sex-trafficking conspiracy was a substantive sex-trafficking offense punishable under § 1591(b).³⁸¹ Therefore, the trial court used the higher Base Offense Level based on Lin’s underlying conduct.³⁸² The Ninth Circuit rejected this

376. Section 1591(b) states:

The punishment for an offense under subsection (a) is—(1) if the offense was effected by means of force, threats of force, fraud, or coercion described in subsection (e)(2), or by any combination of such means, or if the person recruited, enticed, harbored, transported, provided, obtained, advertised, patronized, or solicited had not attained the age of 14 years at the time of such offense, by a fine under this title and imprisonment for any term of years not less than 15 or for life; or (2) if the offense was not so effected, and the person recruited, enticed, harbored, transported, provided, obtained, advertised, patronized, or solicited had attained the age of 14 years but had not attained the age of 18 years at the time of such offense, by a fine under this title and imprisonment for not less than 10 years or for life.

18 U.S.C. § 1591(b) (2012).

377. Section 1591(a) states:

Whoever knowingly—(1) in or affecting interstate or foreign commerce, or within the special maritime and territorial jurisdiction of the United States, 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 participation in a venture 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 (e)(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 act, shall be punished as provided in subsection (b).

Id. § 1591(a) (2012).

378. *United States v. Lin*, 841 F.3d 823, 825–26 (9th Cir. 2016).

379. *Id.* at 827.

380. *Id.* at 825.

381. *Id.* at 825–26.

382. *Id.* at 825.

analysis, calling it “tortured.”³⁸³ Instead, it decided to ask if the “offense of conviction” (and not the underlying conduct) is punishable by § 1591(b).³⁸⁴ In doing so, it allowed the higher Base Offense Level to apply to those convicted of substantive sex-trafficking crimes, but not those convicted of other offenses.³⁸⁵ The result for Lin was a Base Offense Level of 14 because his “offense of conviction” was not punishable by § 1591(b).³⁸⁶

For support, the Ninth Circuit turned to the Guideline that applies to the sex trafficking of minors.³⁸⁷ It prescribes a Base Offense Level of 34 “if the defendant was convicted under 18 U.S.C. § 1591(b)(1)” and a Base Offense Level of 30 “if the defendant was convicted under 18 U.S.C. § 1591(b)(2).”³⁸⁸ In comparing the “convicted under” with the “offense of conviction” distinction, the court reasoned:

If the Sentencing Commission wanted § 2G1.1(a)(1) to apply whenever the defendant’s offense involved conduct described in 18 U.S.C. § 1591(b)(1), the Commission would have used the same language in § 2G1.1(a)(1) as it used in § 2G1.1(c)(1). The Commission’s choice not to use that language indicates that it was not their intention to require an offense conduct comparison.³⁸⁹

Yet, the court made no effort to explain how the “convicted under” language invites an analysis of the underlying conduct. Had the Sentencing Commission used the same “convicted under” language in the Sex Trafficking of Adult Guideline that it used in the Sex Trafficking of Minors Guideline, it would still be subject to multiple interpretations.

The *Lin* court also attempted to justify its functional rewriting of the Guideline by suggesting that the Sentencing Commission only intended § 2G1.1(a)(1) to apply where defendants were subject to the mandatory minimum sentence imposed by § 1591(b),³⁹⁰ stating, “the Commission . . . likely did not want the higher base offense level to apply when the defendant was not subject to § 1591(b)(1)’s fifteen-year mandatory minimum.”³⁹¹ Although the court said³⁹² that the Sentencing Commission’s use of the Base Offense Level of 34 was in

383. *Id.* at 826.

384. *Id.* at 825.

385. *Id.* at 827.

386. *Id.*

387. *Id.* at 825.

388. U.S. SENTENCING GUIDELINES MANUAL § 2G1.3(a) (U.S. SENTENCING COMM’N 2016).

389. *Lin*, 841 F.3d at 827.

390. *Id.*

391. *Id.*

392. *Id.*

response to the addition of the mandatory minimum sentence,³⁹³ it failed to address the drafting error at the heart of this issue.

Although the *Lin* court describes its holding as “close to literal,”³⁹⁴ it effectively rewrote the Guidelines. This confusion could be avoided by the Sentencing Commission correcting their drafting error. The impact of this decision is that those convicted of a § 1594(c) sex-trafficking conspiracy may enjoy a Guideline range that begins at only fifteen months with a statutory maximum of life.³⁹⁵

The *Lin* decision may necessitate action by the Sentencing Commission. It can revise § 2G1.1(a) to read: “34, if the offense of conviction is 18 U.S.C. § 1591(a)(1)” to accomplish the Ninth Circuit’s interpretation, or “34, if the offense of conviction is 18 U.S.C. § 1591(a)(1) or 1594” to side with the trial court. Meanwhile, Wei Lin is scheduled to appear before his sentencing judge to recalculate his sentence beginning with a Base Offense Level of 14.³⁹⁶

B. *Sentencing: Commission of a Sex Act Enhancement*

Beyond the Base Offense Level addressed by the *Lin* court, the sex-trafficking guidelines for offenses against minors present five “Specific Offense Characteristics.”³⁹⁷ If the court finds that these characteristics are present, the defendant’s offense level will increase.³⁹⁸

In *United States v. Basa*,³⁹⁹ the Ninth Circuit addressed the application of the Specific Offense Characteristic for “commission of a sex act.”⁴⁰⁰ In doing so, it rejected the argument that it should not apply the two-level increase because the defendant “did not commit a sex act herself.”⁴⁰¹

The defendant, Annette Nakatsukasa Basa, recruited, groomed, and provided minor girls to adult men who paid Basa to have sex with the victims.⁴⁰² The investigation into Basa’s activities began with an anonymous call to the Northern Mariana Islands’

393. *Id.*

394. *Id.* at 826.

395. 18 U.S.C. § 1594(c) (2012).

396. Sentencing is scheduled for June 19, 2017. See Order on Motion to Withdraw Guilty Plea, *United States v. Lin*, No. 1:12-cr-000012-002 (D. N. Mar. I. Apr. 14, 2017), ECF No. 281.

397. U.S. SENTENCING GUIDELINES MANUAL § 2G1.3(b) (U.S. SENTENCING COMM’N 2015).

398. *Id.*

399. 817 F.3d 645 (9th Cir. 2016).

400. *Id.* at 648.

401. *Id.*

402. *Id.* at 647.

“Crimestoppers tip line” concerning the sexual abuse of a minor.⁴⁰³ This tipster emailed authorities a video depicting an adult male having sex with a minor female, A.J.⁴⁰⁴ The investigation into this tip eventually led the authorities to the adult male in the video, Richard Sullivan Benavente, and then to Basa, who had trafficked the victim.⁴⁰⁵ The investigation revealed that Basa had actually been selling two girls to Benavente for commercial sex.⁴⁰⁶

Benavente, a forty-three-year-old firefighter, and Basa had known each other for ten years.⁴⁰⁷ For at least five of those years, Basa had repeatedly brought Benavente minor females so that he could have sex with them.⁴⁰⁸ In return for this steady stream of minors, Benavente paid Basa in cash and methamphetamine.⁴⁰⁹ Basa brought the victims identified in the investigation to Benavente on two separate occasions.⁴¹⁰ These minors, both fifteen years old, had run away from home before a mutual friend introduced them to Basa.⁴¹¹ They lived with Basa, and she began arranging meetings for them to have sex with adult males.⁴¹² Basa would occasionally “pay” the girls in food or money, but did not even do this consistently.⁴¹³ Basa threatened to throw the girls out of her house if they did not continue to engage in sexual activities with clients.⁴¹⁴ When Benavente purchased sex with the victims from Basa, he recorded the sex acts using a video camera and his cellphone.⁴¹⁵

403. *Id.*; Affidavit in Support of Complaint at 2, United States v. Basa, No. 1:13-cr-00007 (D. N. Mar. I. Aug. 14, 2013), ECF No. 3.

404. *Basa*, 817 F.3d at 647; Affidavit in Support of Complaint, *supra* note 403, at 2.

405. *See* Affidavit in Support of Complaint, *supra* note 403, at 2.

406. *Id.*

407. *Id.* Basa was known to Benavente as the Chamorro “Mamasang.” *Id.* “Chamorro” refers to a prominent ethnic group in the Northern Mariana Islands. *See The Northern Mariana Islands*, ENCYCLOPEDIA BRITANNICA, <https://www.britannica.com/place/Northern-Mariana-Islands> (last visited May 8, 2017).

408. Affidavit in Support of Complaint, *supra* note 403, at 2.

409. *Id.*

410. First on June 23, 2013 and then again on July 10, 2013. *Id.* at 2–3. The first instance occurred in a “shack” on top of Benavente’s Saipan apartment; the second occurred in a hotel in Saipan. *Id.* at 3. Benavente provided the girls with methamphetamine before having sex with them in both instances. *Id.*

411. *Id.* at 2–3.

412. *Id.*

413. United States v. Basa, 817 F.3d 645, 647 (9th Cir. 2016).

414. *Id.*

415. Affidavit in Support of Complaint, *supra* note 403, at 3. The affidavit also lays out sufficient facts for Benavente to face charges for production and possession of child pornography under 18 U.S.C. § 2252A, but he was not indicted on these charges. Indictment at 1, United States v. Benavente, No. 1:13-cr-00008 (D. N. Mar. I. Sept. 23, 2013), ECF No. 12.

A grand jury indicted Benavente on two counts of sexual exploitation of a child and one count of attempted sexual exploitation of a child.⁴¹⁶ Benavente entered a plea of guilty to one count of Sexual Exploitation of a Child and the court sentenced him to 360 months in prison.⁴¹⁷ Basa was indicted on two counts of violating 18 U.S.C. § 1591 sex trafficking of a minor⁴¹⁸ and pleaded guilty to one sex-trafficking count, reserving her right to appeal the sentence.⁴¹⁹ The court sentenced her to 210 months in prison⁴²⁰ and ordered her to pay \$9102.39 in victim restitution.⁴²¹

In the Ninth Circuit, Basa challenged the Guidelines calculation, claiming she never personally engaged in a sex act with the children she exploited.⁴²² The question confronting the Ninth Circuit was whether the “commission of a sex act” enhancement required personal participation in the sexual conduct.⁴²³ The child sex trafficking Guidelines state, “If the offense involved the commission of a sex act or sexual contact . . . increase by 2 levels.”⁴²⁴

Basa’s sole argument rested on the fact she did not have sex with her victims, and that to apply the two-level increase would

416. Indictment, *supra* note 415, at 1. Benavente claimed that Basa told him that A.J. and V.R. were eighteen and nineteen years old—however, the FBI agent who investigated the matter stated in an affidavit that both girls were clearly younger. Had there been strong evidence regarding Benavente’s knowledge or reckless disregard of the victims’ ages, he could have been charged under the § 1591 sex-trafficking statute.

417. Judgment at 1–2, United States v. Benavente, No. 1:13-cr-00008 (D. N. Mar. I. Feb. 23, 2016), ECF No. 84-1.

418. Indictment at 1–2, United States v. Basa, No. 1:13-cr-00007 (D. N. Mar. I. Aug. 22, 2013), ECF No. 12.

419. According to her Presentence Report, Basa’s Sentencing Guidelines had a base offense level of thirty-one and a Criminal History Category of one. Defendant’s Opposition to Government’s Out-of-Time Objections to PSR, United States v. Basa, No. 1:13-cr-00007 (D. N. Mar. I. Dec. 5, 2014), ECF No. 50. The trial court applied a two-level enhancement because the offense involved “the commission of a sex act” and another two-level enhancement because a participant otherwise “unduly influenced a minor to engage in prohibited sexual conduct.” *Basa*, 817 F.3d at 650. These enhancements increased Basa’s Offense Level to thirty-five with a Guidelines range of 168 to 210 months. *Id.* at 48.

420. Interestingly, at sentencing, the prosecution sought a sentence at the low end of the Guidelines (168 months) and Basa’s defense asked for a downward departure to the mandatory minimum (120 months). The trial court, however, gave a sentence at the top end of the sentencing Guidelines of 210 months. *Id.*

421. Judgment at 6, United States v. Basa, No. 1:13-cr-0000 (D. N. Mar. I. Feb. 26, 2007), ECF No. 53.

422. *Basa*, 817 F.3d at 648. The defendant’s plea agreement limited any appeals from the guilt portion of her trial.

423. *Id.*

424. U.S. SENTENCING GUIDELINES MANUAL § 2G1.3(b)(4)(A) (U.S. Sentencing Comm’n 2016).

result in impermissible double counting.⁴²⁵ She reasoned that she was already being penalized in the Base Offense Level for a sex-trafficking offense, to increase her offense level based on Benavete's sex act was unfair.⁴²⁶ The Ninth Circuit rejected Basa's contention that the Specific Offense Characteristic was inappropriate because "she did not commit a sex act herself."⁴²⁷ Instead, the court held that the enhancement is appropriately applied whenever "the offense as a whole 'involved the commission' of a sex act," noting that the Guideline did not specify that the defendant must commit the act.⁴²⁸

In getting to this position, the court relied explicitly on its 2015 decision in *United States v. Hornbuckle*⁴²⁹ and implicitly on a series of related cases from other circuits.⁴³⁰ In *Hornbuckle*, the court confronted four adult siblings and their mother who together ran a prostitution ring that sold homeless minors for sex.⁴³¹ The defendants challenged the entire "commission of a sex act" Specific Offense Characteristic as double counting because they believed that the commission of a sex act was an element of the § 1591 sex trafficking offense.⁴³² The court rejected their argument and held that § 1591 did not require the "commission of a sex act," and so the Specific Offense Characteristic was not double counting.⁴³³ Four other circuits agree with this position.⁴³⁴ For purposes of *Basa*, it is notable that the *Hornbuckle* defendants themselves had not engaged in sexual contact with the victims.⁴³⁵ Although none of these cases have specifically addressed the argument made by Basa—that the defendant must commit the sex act—they applied enhancement to

425. *Basa*, 817 F.3d at 648.

426. *Id.* at 650.

427. *Id.* at 648.

428. *Id.* at 648–49.

429. 784 F.3d 549 (9th Cir. 2015).

430. *See Basa*, 817 F.3d at 649.

431. *Hornbuckle*, 784 F.3d at 551.

432. *Id.* at 553.

433. *Id.*

434. *Id.* at 554 ("Willoughby argues that his § 1591(a) conviction already took this aspect of his conduct into account, because in his view the commission of a sex act was an element of his offense. But every circuit to have reached the issue disagrees with him." (quoting *United States v. Willoughby*, 742 F.3d 229, 241 (6th Cir. 2014))); *see also* *United States v. Weise*, 606 F. App'x 981, 988 (11th Cir. 2015) (holding that the commission of a sex act enhancement was appropriate because § 1591 does not require the consummation of the sex act); *United States v. Jungers*, 702 F.3d 1066, 1075 (8th Cir. 2013) (holding that § 1591 does not require the consummation of the sex act); *United States v. Brooks*, 610 F.3d 1186, 1197 (9th Cir. 2010) (upholding a conviction under § 1591 even though one victim never engaged in a sex act); *United States v. Anderson*, 560 F.3d 275, 283 (5th Cir. 2009) (holding that the commission of a sex act enhancement was appropriate because guideline provision applied to more offenses than § 1591).

435. *Hornbuckle*, 784 F.3d at 553–54.

“the offense as a whole” and not just the defendant.⁴³⁶ Accordingly, they provided very strong guidance for the court in *Basa*.⁴³⁷

C. Using a Computer to Solicit Customers Is Enough for the “Use of a Computer” Increase

The Eighth Circuit turned its attention to another Specific Offense Characteristic in the child sex-trafficking Guidelines: “use of a computer.”⁴³⁸ Gregory Lynnell Gibson was first discovered by law enforcement after they received a tip that Gibson was forcing a sixteen-year-old runaway to engage in prostitution at the Economy Inn in Springdale, Arkansas.⁴³⁹ Local police confirmed that Gibson had rented two rooms in the inn and then contacted the sixteen-year-old victim.⁴⁴⁰ The victim informed the police that Gibson was in the next room with another victim.⁴⁴¹ When the police made entry into the second room, they found Gibson and an eighteen-year-old female crying in the shower.⁴⁴²

During the investigation, law enforcement learned that the sixteen-year-old victim had known Gibson since she was in the sixth grade and that they had recently reconnected on Facebook.⁴⁴³ Law enforcement also found multiple advertisements for the minor victim on Backpage.com, offering “100 \$ specials.”⁴⁴⁴ When they spoke to the victim, she admitted to participating in sex acts with three men and to having eight customers.⁴⁴⁵ The victim told law enforcement that Gibson recruited her to be involved in commercial sex acts while knowing that she was only sixteen.⁴⁴⁶ Images of the minor victim engaging in sex acts were discovered on Gibson’s cell phone.⁴⁴⁷ A grand jury indicted Gibson under § 1591 for sex trafficking based on the victim’s age and production and possession of child pornography.⁴⁴⁸ Gibson’s crimes against his eighteen-year-old victim were not addressed in the Indictment.⁴⁴⁹

436. *United States v. Basa*, 817 F.3d 645, 648 (9th Cir. 2016).

437. *Hornbuckle*, 784 F.3d at 551 (upholding the application of the § 2G1.3(b)(4)(A) enhancement to a trafficker who did not commit a sex act with the victims); *Weise*, 606 F. App’x at 988; *Anderson*, 560 F.3d at 283.

438. U.S. SENTENCING GUIDELINES MANUAL § 2G1.3 (U.S. SENTENCING COMM’N 2016).

439. Plea Agreement at 6, *United States v. Gibson*, No. 5:15-cr-50043 (W.D. Ark. Aug. 26, 2015), ECF No. 21.

440. *Id.*

441. *Id.*

442. *Id.*

443. *Id.* at 7.

444. *United States v. Gibson*, 840 F.3d 512, 513 (8th Cir. 2016).

445. *Id.*

446. *Id.*

447. *Id.*

448. Indictment at 1–2, *United States v. Gibson*, No. 5:15-cr-50043 (W.D. Ark. June 3, 2015), ECF No. 1.

449. *See id.*

Gibson pleaded guilty to § 1591 sex trafficking of a minor, and the government agreed to dismiss the production and possession of child pornography counts.⁴⁵⁰ The trial court sentenced Gibson to 144 months in prison.⁴⁵¹ This twelve-year sentence is two years more than the ten-year mandatory minimum required in cases with victims over fourteen years old and where no force, fraud, or coercion is alleged.⁴⁵²

In determining a sentence, the district court applied a “Special Offense Characteristic” increase for the “use of a computer”; Gibson appealed.⁴⁵³ The Guidelines state,

If the offense involved the use of a computer or an interactive computer service to (A) persuade, induce, entice, coerce, or facilitate the travel of the minor to engage in prohibited sexual conduct; or (B) entice, encourage, offer, or solicit a person to engage in prohibited sexual conduct with the minor, increase by 2 levels.⁴⁵⁴

Advisory Note 4 of the commentary to the Guidelines states that the “use of a computer” enhancement “is intended to apply *only* to the use of a computer or an interactive computer service to *communicate directly with a minor*.”⁴⁵⁵ Gibson argued that the Advisory Note language limited the entire provision despite the third-party language of subsection (B), which would have otherwise applied to Gibson.⁴⁵⁶

In response to Gibson’s appeal, the Eighth Circuit recognized the inconsistency between Advisory Note 4 and the “use of a computer” Special Offense Characteristic.⁴⁵⁷ The *Gibson* court also

450. Plea Agreement, *supra* note 439, at 1.

451. *Gibson*, 840 F.3d at 513; Judgment at 2, *Gibson*, No. 5:15-cr-50043, ECF No. 42 (also providing for a \$4900 fine, but not victim restitution).

452. Compare 18 U.S.C. § 1591(b)(2) (2012) (“The punishment for an offense under subsection (a) is . . . (2) if the offense was not so effected, and the person recruited, enticed, harbored, transported, provided, or obtained had attained the age of 14 years but had not attained the age of 18 years at the time of such offense, by a fine under this title and imprisonment for not less than 10 years or for life.”), with *id.* § 1591(b)(1) (“The punishment for an offense under subsection (a) is—(1) if the offense was effected by means of force, threats of force, fraud, or coercion described in subsection (e)(2), or by any combination of such means, or if the person recruited, enticed, harbored, transported, provided, or obtained had not attained the age of 14 years at the time of such offense, by a fine under this title and imprisonment for any term of years not less than 15 or for life.”).

453. *Gibson*, 840 F.3d at 514.

454. U.S. SENTENCING GUIDELINES MANUAL § 2G1.3(b)(3)(A)–(B) (U.S. SENTENCING COMM’N 2016).

455. *Id.* § 2G1.3 Advisory Note 4 (emphasis added).

456. *Gibson*, 840 F.3d at 514.

457. *Id.*

noted that the Guidelines control, not the commentaries.⁴⁵⁸ The Eighth Circuit joined the Fourth, Fifth, Seventh, and Eleventh Circuits in reasoning that Advisory Note 4 only applies to subsection (A) because it otherwise “would render Subsection [(B)] inoperable.”⁴⁵⁹ As a result, the Eighth Circuit considered subsection (B) separately from Advisory Note 4 and upheld the two-level increase.⁴⁶⁰ It is unclear why the government did not argue, or why the *Gibson* court did not address, the fact that Gibson used a computer to “reconnect” with his sixteen-year-old victim.⁴⁶¹ Such conduct may have stratified subsection (A).

D. One Case Results in a “Repeat and Dangerous Sex Offender Against Minors” Finding

Gibson also appealed the five-level enhancement under the Guideline regarding “Repeat and Dangerous Sex Offenders Against Minors.”⁴⁶² This enhancement applies where a court has found that an individual engaged in “a pattern of activity involving prohibited sexual conduct.”⁴⁶³ The Eighth Circuit previously established that a pattern of practice can apply to activity that only took place during the present offense, and that no prior offenses are necessary to establish a defendant’s “pattern of activity.”⁴⁶⁴ Although Gibson did not have prior sex-trafficking offenses, there was an overwhelming amount of activity to suggest a pattern of practice in his case.⁴⁶⁵ For example, Gibson posted advertisements multiple times on Backpage.com and encouraged the minor victim to engage in sexual activity with customers multiple times.⁴⁶⁶ Additionally, he produced a sexual video including the minor and also engaged in sexual activity with her.⁴⁶⁷ Given this evidence, the Eighth Circuit upheld

458. *Id.* at 514–15. Other circuits finding that Advisory Note 4 does not apply to subsection (b)(3)(B) include the Second, Fourth, Fifth, Seventh, and Eleventh Circuits. *See* *United States v. Hill*, 783 F.3d 842, 846 (11th Cir. 2015); *United States v. Cramer*, 777 F.3d 597, 606 (2d. Cir. 2015); *United States v. McMillian*, 777 F.3d 444, 450 (7th Cir. 2015); *United States v. Pringler*, 765 F.3d 445, 454 (5th Cir. 2014); *United States v. Winbush*, 524 Fed. App’x. 914, 916 (4th Cir. 2013).

459. *Gibson*, 840 F.3d at 515.

460. *Id.*

461. Plea Agreement, *supra* note 439, at 7.

462. U.S. SENTENCING GUIDELINES MANUAL § 4B1.5(b) (U.S. SENTENCING COMM’N 2015).

463. *Gibson*, 840 F.3d at 513.

464. *Id.* at 515 (“We now hold that subsection (b) [of § 4B1.5] may apply where there is no prior sex offense conviction and the only ‘pattern of . . . conduct’ is conduct involved in the present offense of conviction.” (quoting *United States v. Rojas*, 520 F.3d 876, 883 (8th Cir. 2008)) (alteration in original)).

465. *See id.*

466. *Id.*

467. *Id.*

the five-level sentencing enhancement for “Repeat and Dangerous Sex Offender Against Minors.”⁴⁶⁸

E. Could All Human-Trafficking Victims Be “Vulnerable Victims?”

The final sentencing issues came from the Ninth Circuit application of the “vulnerable victim” enhancement in *United States v. Backman*,⁴⁶⁹ which involved the Holiday Club in Saipan.⁴⁷⁰ Guideline § 3A1.1(b)(1) provides, “If the defendant knew or should have known that a victim of the offense was a vulnerable victim, increase by 2 levels.”⁴⁷¹

Backman argued that because all sex-trafficking victims are “vulnerable” and Congress’s intent in passing the TVPA was to protect such vulnerable people, allowing the two-level increase under § 3B1.5 was effectively double counting.⁴⁷² The *Backman* court acknowledged this concern⁴⁷³ but upheld the application of the vulnerable victim enhancement

because of the high number of vulnerabilities and the depth of the individual vulnerabilities. For example, the victim was not only estranged from her home community, she had no ties at all on the geographically remote island of Saipan. Similarly, she did not merely have poor English skills; she “did not speak or read or understand any English whatsoever,” and she was illiterate in her native language as well.⁴⁷⁴

This holding is consistent with the Seventh Circuit’s position: that the “vulnerable victim” enhancement is not double counting⁴⁷⁵ and that the enhancement should be generously applied in human-trafficking cases.⁴⁷⁶

468. *Id.*

469. 817 F.3d 662 (9th Cir. 2016).

470. Appellant’s Opening Brief at 12, *Backman*, 817 F.3d 662 (No. 14-10078).

471. U.S. SENTENCING GUIDELINES MANUAL § 3A1.1(b)(1) (U.S. SENTENCING COMM’N 2015).

472. *Backman*, 817 F.3d at 670–71.

473. *Id.* at 671.

474. *Id.* (emphasis omitted).

475. *United States v. Calimlim*, 538 F.3d 706, 716–17 (7th Cir. 2008) (allowing the application of the vulnerable victim enhancement in a § 1589 forced labor case).

476. *See, e.g.*, *United States v. Willoughby*, 742 F.3d 229, 241 (6th Cir. 2014); *United States v. Valenzuela*, 495 F. App’x 817, 821 (9th Cir. 2012); *United States v. Royal*, 442 F. App’x 794, 797–98 (4th Cir. 2011); *United States v. Williams*, 428 F. App’x 134, 141 (3d Cir. 2011); *United States v. Sabhnani*, 599 F.3d 215, 254 (2d Cir. 2010); *United States v. Chang*, 237 F. App’x 985, 988–89 (5th Cir. 2007); *United States v. Jimenez-Calderon*, 183 F. App’x 274, 279–80 (3rd Cir. 2006); *United States v. Veerapol*, 312 F.3d 1128, 1132–34 (9th Cir. 2002).

IV. CIVIL SUITS

There were only two published civil decisions in 2016 regarding the TVPA, and they both strain the outer boundaries of the Act.⁴⁷⁷

A. *Are States Immune from Human-Trafficking Suits?*

In *Mojsilovic v. Oklahoma*,⁴⁷⁸ the Tenth Circuit held that states cannot be sued for engaging in forced labor.⁴⁷⁹ The case's tangled web of facts began with an unusual scenario of doctors trafficking other doctors.⁴⁸⁰ The case involved two Serbian scientists who worked as research assistants at the University of Oklahoma Health Service Center (the "Laboratory").⁴⁸¹ Hired through the H-1B visa program, they conducted DNA research and created tissue cultures under the supervision of the Laboratory's director, Dr. Hildebrand.⁴⁸²

At some point after they began working, the scientists allege that Dr. Hildebrand demanded that they also work for Pure Protein, LLC, a company he founded and owned, and where he served as the Chief Executive Officer ("CEO").⁴⁸³ The scientists claim they were not paid for the work at Pure Protein and that Dr. Hildebrand threatened to fire them from their Laboratory jobs if they refused his demands.⁴⁸⁴ Concerned about the impact of a termination on their immigration status, they felt compelled to provide the extra labor for eight years.⁴⁸⁵

These facts led to a civil suit in federal court alleging that the University of Oklahoma, Pure Protein, and Dr. Hildebrand violated the TVPA's forced labor provision.⁴⁸⁶ Section 1595 allows human-trafficking victims to recover monetary damages for violations of the TVPA.⁴⁸⁷ In this suit, the scientists based their claims on a violation

477. *Mojsilovic v. Oklahoma*, 841 F.3d 1129, 1130 (10th Cir. 2016); *Doe v. Backpage.com, LLC*, 817 F.3d 12, 15 (1st Cir. 2016), *cert. denied*, 137 S. Ct. 622 (2017) (mem.).

478. 841 F.3d 1129.

479. *Id.* at 1130.

480. *Id.*

481. *Id.*

482. *Id.*

483. Order Granting in Part and Denying in Part Motion to Dismiss at 1–2, *Mojsilovic*, 841 F.3d 1129 (No. 15-6151).

484. *Id.* at 2.

485. Complaint at 3, 5–7, *Mojsilovic*, 841 F.3d 1129 (No. 15-6151).

486. *Mojsilovic*, 841 F.3d at 1130–31. The Mojsilovics also sued for violations of the Fair Labor Standards Act and the Oklahoma Protection of Labor Act. *Id.*

487. 18 U.S.C. § 1595(a) (2012) ("An individual who is a victim of a violation of this chapter may bring a civil action against the perpetrator (or whoever knowingly benefits, financially or by receiving anything of value from participation in a venture which that person knew or should have known has engaged in an act in violation of this chapter) in an appropriate district court of the United States and may recover damages and reasonable attorneys fees.").

of the TVPA's forced labor statute under § 1589 and the trafficking into servitude provision, § 1590.⁴⁸⁸ All three defendants moved to dismiss the complaint.⁴⁸⁹ The trial court dismissed the § 1590 count against Dr. Hildebrand and Pure Protein, but allowed the remaining counts to stand.⁴⁹⁰ The University of Oklahoma, however sought dismissal based on the sovereign immunity it enjoyed as a state entity.⁴⁹¹

The question on appeal was whether states enjoy immunity to commit forced labor offenses, as defined by the TVPA.⁴⁹² The Tenth Circuit agreed with the University, and held the state entity was immune from forced labor civil suits.⁴⁹³ The court's reasoning required several steps.⁴⁹⁴ First, it noted that sovereign immunity can be abrogated only when Congress makes its intention to do so "unmistakably clear" in a statute.⁴⁹⁵ In such statutes, the law typically states that "governments" or "states" can be sued.⁴⁹⁶

Second, the court noted that the TVPA's forced labor section uses the phrase "whoever" and "perpetrator" and fails to make "unmistakably clear" that it curtails sovereign immunity.⁴⁹⁷ The scientists attempted to side step this analysis by playing their trump card.⁴⁹⁸ They argued that Oklahoma surrendered its sovereign immunity to commit human-trafficking offenses when it ratified the Thirteenth Amendment,⁴⁹⁹ which eradicated legal slavery.⁵⁰⁰ If states can no longer own slaves or commit forced labor, there was no sovereign immunity existing for Congress to abrogate when it passed the TVPA.⁵⁰¹

The Tenth Circuit was not persuaded by the scientists' Thirteenth Amendment argument because it found that the TVPA was passed under the Constitution's Commerce Clause and not the authority granted by the Thirteenth Amendment.⁵⁰² In support of this notion, the court cited two human-trafficking cases that noted the Commerce Clause as the basis for the TVPA.⁵⁰³ The scientists

488. *Mojsilovic*, 841 F.3d at 1130–31.

489. *Id.* at 1131.

490. Order Granting in Part and Denying in Part Motion to Dismiss, *supra* note 483, at 9.

491. *Mojsilovic*, 841 F.3d at 1131.

492. *Id.*

493. *Id.* at 1134.

494. *Id.* at 1131–34.

495. *Id.* at 1131 (quoting *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 73 (2000)).

496. *Id.* at 1132.

497. *Id.*

498. *Id.* at 1333.

499. *Id.*

500. *Id.* at 1133 n.3.

501. *Id.* at 1133.

502. *Id.*

503. *Id.*

responded by citing two cases supporting the theory the Thirteenth Amendment was the basis for the TVPA.⁵⁰⁴ Both pointed to different portions of legislative history to support their positions.⁵⁰⁵ Based on this jurisdictional debate, the Tenth Circuit held that Oklahoma's sovereign immunity had not been clearly abrogated and that because the TVPA was passed pursuant to the Commerce Clause it could not have done so anyway.⁵⁰⁶

The possibility that the Tenth Circuit failed to consider is that both options are true at the same time. That is, Congress passed the TVPA based on the Thirteen Amendment *and* the Commerce Clause. Consider the statute itself. To commit a § 1591 sex-trafficking offense, a trafficker's actions must be "in or affecting" commerce. However, there is no Commerce Clause element of a § 1589 forced labor violation. Congress's power to enact that portion of the TVPA stemmed from the Thirteen Amendment.⁵⁰⁷ Instead of taking the Act as a whole, future courts should consider the basis of individual portions of the TVPA. Meanwhile, the scientists' TVPA forced labor suit shall proceed against Dr. Hildebrand and Pure Protein.⁵⁰⁸

B. *The Backpage Chronicles*

Discussion of 2016 human-trafficking law requires addressing the Backpage.com ("Backpage") litigation.⁵⁰⁹ Backpage is a website that "provides online classified advertising, allowing users to post advertisements in a range of categories based on the product or service being sold."⁵¹⁰ Until recently, these categories included "Adult Entertainment" and a subcategory for "Escorts."⁵¹¹ Senator Kamala Harris accordingly referred to Backpage as an "online

504. *Id.* at 1133 n.4. (citing *Roe v. Bridgestone Corp.*, 492 F. Supp. 2d 988, 1003 (S.D. Ind. 2007); *United States v. Garcia*, No. 02-CR-110S-01, 2003 WL 22938040, at *4-5 (W.D.N.Y. Dec. 2, 2003)).

505. *Id.*

506. *Id.* at 1134.

507. *See* U.S. CONST. amend. XIII, § 1 ("Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.").

508. The trial is set for September 1, 2017. Scheduling Order at 1-2, *Majsilovic v. Okla.*, No. 5:14-cv-00886-R (W.D. Okla. Feb. 7, 2017), ECF No. 78.

509. The authors of this piece filed an amicus brief in support of the petitioner's request for certiorari. *See* Brief for the Human Trafficking Institute and Former Federal Human Trafficking Prosecutors as Amici Curiae Supporting Petitioners at 1, *Doe v. Backpage.com, LLC*, No. 16-276 (U.S. Oct. 5, 2016).

510. *Doe v. Backpage.com, LLC*, 817 F.3d 12, 16 (1st Cir. 2016), *cert. denied*, 137 S. Ct. 622 (2017) (mem.).

511. *Id.*

brothel.”⁵¹² In recent years, Backpage has been a party to multiple major cases at every level of state and federal courts.⁵¹³ Backpage (or its CEO) was a party in three separate cases that made their way (in one form or another) to the Supreme Court in 2016 alone.⁵¹⁴ These cases asked a diverse set of questions, but all featured the same protagonist—or antagonist, depending on your perspective—and were set in the same “scungy world of adult entertainment.”⁵¹⁵ In response to the legal problems that resulted from operating an “online brothel,” Backpage closed down their “Adult Entertainment” section January 9, 2017.⁵¹⁶

Before this grand finale, Backpage’s legal travails dramatically manifested themselves in the First Circuit’s *Doe v. Backpage.com, LLC*⁵¹⁷ opinion (and in the Supreme Court’s consequent denial of certiorari).⁵¹⁸ This case raised the question of “[w]hether [a 1996 communications law] preclude[d] a civil lawsuit [by human-trafficking victims] against a website owner and operator based on its own criminal conduct any time online content created by a third party was a part of the chain of causation leading to the plaintiff’s injuries.”⁵¹⁹ This story will be discussed at length, but first, the stage must be set. “The tale follows.”⁵²⁰

C. *Backpage Moves Center Stage and into the Regulatory Spotlight*

In recent times, classified advertisement websites like Craigslist have maintained “adult advertising section[s].”⁵²¹ Craigslist maintained this section of their website until 2010, when they closed it “due to concerns about sex trafficking.”⁵²² “Spying an opportunity, Backpage expanded its marketing footprint in the adult

512. Robert Burnson & Joshua Brustein, *Backpage.com ‘Online Brothel’ Pimping Charges May Be Tossed*, BLOOMBERG TECH. (Nov. 16, 2016), <https://www.bloomberg.com/news/articles/2016-11-16/backpage-com-online-brothel-pimping-charges-may-be-thrown-out>.

513. See *Doe*, 817 F.3d at 12; *Backpage.com, LLC v. Dart*, 807 F.3d 229, 229 (7th Cir. 2015), *cert. denied sub nom.*, *Dart v. Backpage.com, LLC*, 137 S. Ct. 46 (2016) (mem.); *Senate Permanent Subcomm. v. Ferrer*, 199 F. Supp. 3d 125, 125 (D.D.C. 2016); *Backpage.com, LLC v. Cooper*, 939 F. Supp. 2d 805, 805 (M.D. Tenn. 2013); *Backpage.com, LLC v. Hoffman*, No. 13-cv-03952 (DMC)(JAD), 2013 WL 4502097, at *1 (D.N.J. Aug. 20, 2013); *Backpage.com, LLC v. McKenna*, 881 F. Supp. 2d 1262, 1262 (W.D. Wash. 2012).

514. *Doe*, 817 F.3d at 12; *Dart*, 807 F.3d at 229; *Ferrer*, 199 F.Supp.3d at 125.

515. *Doe v. Backpage.com, LLC*, 104 F. Supp. 3d 149, 152 (D. Mass. 2015).

516. Press Release, Backpage.com, Backpage.com Removes Adult Content Due to Unconstitutional Government Censorship...Vows to Fight First Amendment Battles (Jan. 9, 2017), <http://www.backpage.com/classifieds/Media>.

517. 817 F.3d 12 (1st Cir. 2016), *cert. denied*, 137 S. Ct. 622 (2017) (mem.).

518. *Doe v. Backpage.com, LLC*, 137 S. Ct. 622 (2017) (mem.).

519. Petition for Writ of Certiorari at 10, *Doe*, 137 S. Ct. 622 (No. 16-276).

520. *Doe*, 817 F.3d at 15.

521. *Id.* at 16.

522. *Id.*

advertising arena.”⁵²³ Backpage’s expansion catapulted them into an unrelenting stream of regulatory controversy.

Backpage won their first legal battles. Sherriff Tom Dart of Cook County, Illinois—who had previously sued Craigslist—had sought to “suffocate” Backpage’s business by sending threatening letters to MasterCard and Visa that asked them to stop processing payments for Backpage.⁵²⁴ Judge Posner and the Seventh Circuit granted an injunction against Sheriff Dart’s behavior in *Backpage.com, LLC v. Dart*,⁵²⁵ holding that the Sheriff could not send these letters because they “squelch[ed] the free speech of private citizens.”⁵²⁶

Additionally, state legislatures in Washington, Tennessee, and New Jersey passed statutes that criminalized Backpage’s adult advertising.⁵²⁷ Backpage also successfully obtained injunctions against the application of these laws, with courts holding that the laws were preempted by the Communications Decency Act (“CDA”) and Backpage’s First Amendment rights.⁵²⁸

However, not everything went Backpage’s way. Backpage challenged a federal law that created liability for those who advertise trafficking.⁵²⁹ The D.C. District Court held that Backpage did not have standing to challenge the law.⁵³⁰ Another complication came in 2012, when minor sex-trafficking victims sued Backpage in Washington state court.⁵³¹ Backpage’s defense was that it was immune from the plaintiffs’ claims under the CDA.⁵³² The state trial court rejected Backpage’s CDA defense, and in September

523. *Id.*

524. *Backpage.com, LLC v. Dart*, 807 F.3d 229, 231 (7th Cir. 2015).

525. 807 F.3d 229 (7th Cir. 2015).

526. *Id.* at 235.

527. N.J. STAT. ANN. § 2C:13–10 (West 2017); TENN. CODE ANN. § 39-13-315 (2016); WASH. REV. CODE § 9.68A.104 (2013).

528. *Backpage.com, LLC v. Hoffman*, No. 13-cv-03952 (DMC)(JAD), 2013 WL 4502097, at *6–7 (D.N.J. Aug. 20, 2013); *Backpage.com, LLC v. Cooper*, 939 F. Supp. 2d 805, 845 (M.D. Tenn. 2013); *Backpage.com, LLC v. McKenna*, 881 F. Supp. 2d 1262, 1275 (W.D. Wash. 2012).

529. *Backpage.com, LLC v. Lynch*, No. CV 15-2155 (RBW), 2016 WL 6208368, at *1 (D.D.C. Oct. 24, 2016); *see* 18 U.S.C. § 1591(a) (2012).

530. *Lynch*, 2016 WL 6208368, at *10.

531. *J.S. v. Vill. Voice Media Holdings, LLC*, 359 P.3d 714, 715 (Wash. 2015); *see also* Cynthia Lee, *Subverting the Communications Decency Act: J.S. v. Village Voice Media Holdings*, 7 CAL. L. REV. CIR. 11, 12 (2016).

532. *Vill. Voice Media Holdings, LLC*, 359 P.3d at 716. Backpage unsuccessfully attempted to remove the case to federal court. *See* *J.S. v. Vill. Voice Media Holdings, LLC*, No. 3:12-cv-06031-BHS, 2013 WL 811438, at *1 (W.D. Wash. Mar. 5, 2013). Backpage attempted to make the same CDA defense there. *See* Motion of Defendants to Dismiss Pursuant to Rule 12(b)(6) at 2–3, *J.S. v. Vill. Voice Media Holdings, LLC*, No. 3:12-cv-06031-BHS (W.D. Wash. Jan. 3, 2013), 2013 WL 6829115.

2015, the Supreme Court of Washington affirmed the denial of the motion to dismiss, allowing the plaintiffs' case to proceed.⁵³³

Congress has also kept an eye on Backpage. In March 2012, senators and representatives wrote to Backpage's parent company demanding the removal of "the adult services section of Backpage.com" and passed various resolutions to the same effect.⁵³⁴ In June 2015, the Senate Permanent Subcommittee for Investigations interviewed Backpage's general counsel, Elizabeth McDougall.⁵³⁵ Various subpoenas for records followed, but Backpage objected to the subpoenas as being part of the same shadow war that the *Dart* case and the state statutes were fighting.⁵³⁶ The Senate brought suit against Backpage to enforce its subpoenas, and on August 5, 2016, a district court held that Carl Ferrer, the CEO of Backpage, was required to produce the requested documents, over Ferrer's protestations: "Mr. Ferrer does not possess an absolute [First Amendment] right to be free from government investigation when there are valid justifications for the inquiry."⁵³⁷ Backpage appealed the district court's decision, and the D.C. Circuit agreed to hear an expedited appeal on March 3, 2017.⁵³⁸

Mr. Ferrer and other Backpage executives were still required to attend a Congressional hearing on January 9, 2017.⁵³⁹ Each executive refused to testify.⁵⁴⁰ At the hearing, Senators Rob Portman and Claire McCaskill announced that they had found that Backpage "has been more deeply complicit in online sex trafficking than anyone imagined."⁵⁴¹ The Subcommittee also released a report that concluded that Backpage had "knowingly conceal[ed] evidence of criminality by systematically editing its 'adult' ads."⁵⁴² These findings could lead to future criminal liability.⁵⁴³

533. *Vill. Voice Media Holdings, L.L.C.*, 359 P.3d at 717–18.

534. Complaint for Declaratory and Injunctive Relief at 7, *Lynch*, 2016 WL 6208368 (No. 15-CV-02155); *see also* H.R. Res. 649, 112th Cong. (2012); S. Res. 439, 112th Cong. (2012).

535. Senate Permanent Subcomm. v. Ferrer, 199 F. Supp. 3d 125, 129 (D.D.C. 2016).

536. *Id.* at 138.

537. *Id.*

538. Order at 1, Senate Permanent Subcomm. v. Ferrer, No. 16-5274, (D.C. Cir. Jan. 13, 2017).

539. Gloria Riviera et al., *Emotional Senate Hearing Finds Backpage.com Complicit in Underage Sex Trafficking as Victim's Families Testify*, ABC NEWS (Jan. 13, 2017, 5:41 PM), <http://abcnews.go.com/US/emotional-senate-hearing-finds-backpage-complicit-underage-sex/story?id=44762342>.

540. *Id.*

541. Janelle Nanos, *Backpage.com Faces Harsh Senate Scrutiny*, BOS. GLOBE (Jan. 10, 2017), <https://www.bostonglobe.com/business/2017/01/10/backpage-com-shuts-down-adult-services-ads-after-relentless-pressure-from-authorities/TSGpV9Ie7IUkUt9djHCKpM/story.html>.

542. *Id.*

543. Riviera et al., *supra* note 539 ("The Senate Subcommittee is considering referring the case to the Department of Justice.").

D. California Lands a Blow?

On October 6, 2016, Ferrer found himself in handcuffs after being arrested on California state pimping charges.⁵⁴⁴ Ferrer quickly filed a demurrer to the charges on CDA grounds,⁵⁴⁵ and the state court dismissed the charges, relying on the First Circuit's *Doe v. Backpage.com, LLC* decision.⁵⁴⁶ The state prosecutor filed a second set of charges related to pimping and money laundering.⁵⁴⁷ Ferrer and two of Backpage's former owners argued that these new charges were merely a repackaging of the dismissed first set of charges, but the judge seemed unsympathetic to these claims.⁵⁴⁸ The closure of the "Adult Entertainment" section of the website has not ended the prosecution, and at the time of this Article's writing, the next hearing was scheduled for March 10, 2017.⁵⁴⁹

E. The First Circuit Decision and the CDA

Doe v. Backpage.com, LLC was litigated against this turbulent backdrop. The district court opinion in that case came down on May 15, 2015,⁵⁵⁰ the First Circuit's opinion was filed almost exactly a year later, on March 14, 2016,⁵⁵¹ and the Supreme Court denied petitioner's writ of certiorari on January 9, 2017.⁵⁵² This outcome, and its implications for trafficking law going forward, deserve analysis.

"Beginning at age 15, each of the [plaintiffs] was trafficked through advertisements posted on Backpage."⁵⁵³ Jane Doe Number One ran away from home before being found by her trafficker.⁵⁵⁴ She "was raped over 1,000 times" by paying sex purchasers.⁵⁵⁵ Jane Doe Number Two "absconded from a residential program."⁵⁵⁶ She "was raped over 900 times."⁵⁵⁷ Jane Doe Number Three left a

544. Notice of Demurrer and Demurrer of Defendants at 2, *People v. Ferrer*, No. 16FE019224 (Cal. Super. Ct. Oct. 19, 2016).

545. *See id.*

546. Court's Final Ruling on Demurrer at 7, *People v. Ferrer*, No. 16FE019224 (Cal. Super. Ct. Dec. 9, 2016).

547. Felony Criminal Complaint, *People v. Ferrer*, No. 16FE024013 (Cal. App. Dep't Super. Ct. Dec. 23, 2016).

548. Darrell Smith, *Backpage.com Attorneys Say Criminal Charges Threaten Publisher of Free Speech*, SACRAMENTO BEE (Feb. 9, 2017, 6:10 PM), <http://www.sacbee.com/news/local/crime/article131859449.html>.

549. *Id.*

550. *Doe v. Backpage.com, LLC*, 104 F. Supp. 3d 149, 149 (D. Mass. 2015).

551. *Doe v. Backpage.com, LLC*, 817 F.3d 12, 12 (1st Cir. 2016), *cert. denied*, 137 S. Ct. 622 (2017) (mem.).

552. *Doe v. Backpage.com, LLC*, 137 S. Ct. 622 (2017) (mem.).

553. *Doe*, 817 F.3d at 17. Each victim was trafficked by different traffickers, but each set of traffickers used Backpage.

554. *Doe*, 104 F. Supp. 3d at 153.

555. *Doe*, 817 F.3d at 17.

556. *Doe*, 104 F. Supp. 3d at 153.

557. *Doe*, 817 F.3d at 17.

friend's house with a man and woman to whom she had just been introduced.⁵⁵⁸ She was also "raped on numerous occasions."⁵⁵⁹ Traffickers photographed each Jane Doe, posted the pictures and information on Backpage, and profited while customers raped the victims from 2010 until 2013.⁵⁶⁰

The victims brought a civil suit under the TVPA's civil cause of action.⁵⁶¹ The TVPA allows victims of trafficking violations to recover damages and attorney's fees from their perpetrators "or whoever knowingly benefits, financially or by receiving anything of value from participation in a venture which that person knew or should have known has engaged in an act in violation of [trafficking laws]."⁵⁶² The victims alleged that Backpage engaged in sex trafficking as defined by the TVPA because Backpage benefitted from participation in a human-trafficking venture.⁵⁶³ The suit turned on whether the CDA, a 1996 communications act, should shield Backpage from the liability that the TVPA's civil cause of action imposed on them.

This raises two questions: what is the CDA, and why was this communications law determinative in a human-trafficking case? As Internet usage rose in the mid-1990s, the CDA was passed to promote development of technologies, to preserve a free market unfettered by regulation, and to ensure vigorous enforcement of criminal obscenity, stalking, and harassment laws.⁵⁶⁴ As part of pursuing these goals, the CDA included a "Good Samaritan" provision that protects "interactive computer service[s]" from civil liability when a third party is providing the content to "interactive computer service[s]" websites.⁵⁶⁵ The Good Samaritan provision states:

(1) 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.

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

558. Second Amended Complaint at 37, *Doe*, 104 F. Supp. 3d 149 (No. 14-13870-RGS), ECF No. 22.

559. *Doe*, 817 F.3d at 17.

560. *Id.*

561. Second Amended Complaint, *supra* note 558, at 5; *see* 18 U.S.C. § 1595 (2012).

562. 18 U.S.C. § 1595(a).

563. Plaintiffs also alleged that Backpage engaged in "unfair and deceptive acts and practices" in violation of state law and infringed on the victims' intellectual property rights. Second Amended Complaint, *supra* note 558, at 5.

564. 47 U.S.C. § 230(b)(1)-(5) (2012).

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

(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).⁵⁶⁶

The provision shields the defendant's actions when the defendant "(1) is a 'provider or user of an interactive computer service'; (2) the claim is based on 'information provided by another information content provider'; and (3) the claim would treat [the defendant] 'as the publisher or speaker' of that information."⁵⁶⁷ This provision grants "interactive computer service[s]" civil immunity from content that third parties post to their websites.⁵⁶⁸ The provision was aimed at protecting Internet publishers from claims, like defamation, that arose from third party use of their websites.⁵⁶⁹ The vast majority of applications of the Good Samaritan provision do just this.⁵⁷⁰ However, the First Circuit plaintiffs alleged that Backpage should not be treated as a traditional "publisher or speaker" of "information provided by another information content provider" and consequently should not receive Good Samaritan immunity.⁵⁷¹

In the district court, the plaintiffs alleged that Backpage affirmatively supported human trafficking by charging a fee for advertisements in the adult entertainment section (but not in other sections), by not requiring posters in the adult entertainment section to verify their identities, by not requiring posters to verify the age of an "escort," by not requiring verification of telephone numbers, by stripping out metadata from photographs, and by refusing to filter out advertisements that use words like "girl," "young," "underage," and "fresh."⁵⁷² The district court disagreed and held that Backpage was immune as a traditional publisher under the "Good Samaritan" provision of the CDA.⁵⁷³

566. 47 U.S.C. § 230(c).

567. *Doe*, 817 F.3d at 19 (quoting *Universal Commc'n Sys., Inc. v. Lycos, Inc.*, 478 F.3d 413, 418 (1st Cir. 2007)).

568. 47 U.S.C. § 230(c).

569. *See, e.g.*, *Fields v. Twitter, Inc.*, 200 F. Supp. 3d 964, 969 (N.D. Cal. 2016).

570. *See id.*

571. *Doe*, 817 F.3d at 19 (quoting *Universal Commc'n Sys.*, 478 F.3d at 418).

572. *Doe v. Backpage.com, LLC*, 104 F. Supp. 3d 149, 152 (D. Ma. 2015).

573. *Id.* at 162.

On appeal, a First Circuit panel that included retired U.S. Supreme Court Associate Justice Souter held that “claims that a website facilitates illegal [human-trafficking-related] conduct through its posting rules necessarily treat the website as a publisher or speaker of content provided by third parties and, thus, are precluded by section 230(c)(1).”⁵⁷⁴ The court noted that some of Backpage’s practices, like “the choice of what words or phrases can be displayed on the site,” are the traditional activities of a publisher.⁵⁷⁵ The court did not systematically walk through all of the alleged behavior—and some of that behavior would have been harder to characterize as traditional publisher activity (e.g., not requiring age verification for posts in the adult section).⁵⁷⁶ The court claimed that previous First Circuit authority and authority from other circuits supported this broad reading of publishing activities.⁵⁷⁷ The First Circuit did acknowledge that there could be some website behavior so egregious that a website could be liable, but it set a high bar for this sort of behavior by providing an example of a website that procured the underage, trafficked youths.⁵⁷⁸

This application of CDA immunity to Backpage’s conduct undermines, or potentially just ignores, the TVPA’s “benefiting” provision. While many provisions of the TVPA target more traditional trafficking defendants (e.g., those who violate 18 U.S.C. § 589(a)(1) by obtaining labor “by means of force”), the TVPA also makes it illegal for an individual to “benefit[], financially or by receiving anything of value,” from sex trafficking.⁵⁷⁹ The TVPA also creates civil liability for violating the “benefiting” provision.⁵⁸⁰ The First Circuit denied that those who benefit from human trafficking should face liability if they are also publishers under the CDA.⁵⁸¹ In fact, the First Circuit went even farther, stating that even if “Backpage’s conduct amount[ed] to ‘participation in a [sex-trafficking] venture,’” the TVPA “claims as pleaded premise that participation on Backpage’s actions as a publisher or speaker of third-party content” and accordingly Backpage would be immune from suit.⁵⁸² This view of the TVPA weakens the “benefiting” provision. The Department of Justice currently enforces the TVPA’s “benefiting” provision in criminal and civil suits, and this weakened

574. *Doe*, 817 F.3d at 22.

575. *Id.* at 20.

576. *Id.* at 20–21.

577. *Id.* at 18–19.

578. *Id.* at 21.

579. *See* 18 U.S.C. § 1591(a)(2) (2012).

580. *See id.* § 1595(a).

581. *Doe*, 817 F.3d at 21.

582. *Id.* (alteration in original).

understanding of the provision could end up limiting even criminal liability.⁵⁸³

While Backpage succeeded with this defense in this case, it unsuccessfully asserted the exact same defense in both the Washington Supreme Court case and the D.C. District Court case addressing the Senate's subpoena.⁵⁸⁴ While the D.C. District Court case raised slightly different issues, the Washington Supreme Court case is almost identical—three trafficking victims who had been advertised on Backpage sued Backpage—but there the court denied a motion to dismiss on CDA grounds.⁵⁸⁵ In that case, the court held that if the facts alleged by the plaintiffs were ultimately proven true, they would show that Backpage “did more than just provide a forum for illegal content.”⁵⁸⁶ But Backpage did nothing differently in Washington than it did in Massachusetts—these are courts interpreting the law differently in scenarios with identical facts.

The relationship between the CDA and the First Amendment lingers in the background of many of these cases. Backpage appears to believe that the First Amendment protects its advertisements—it has begun asserting this position in the most recent cases.⁵⁸⁷ This position appears to elide the distinction between two different doctrinal bodies. The First Amendment certainly protects the publication of outrageous portrayals of public figures,⁵⁸⁸ and yet it is equally well established that one can still engage in a crime through one's speech (e.g., through incitement or communicating a true threat of harm).⁵⁸⁹ Presumably even the First Circuit would agree

583. Criminal suits can be brought solely under the “benefiting” provision. *See, e.g.*, *United States v. Patel*, No. CR 13-286, 2016 WL 80566, at *1 (E.D. La. Jan. 7, 2016); John Cotton Richmond, *Human Trafficking: Understanding the Law and Deconstructing Myths*, 60 ST. LOUIS U. L.J. 1, 9 (2015); Press Release, U.S. Dep't of Justice, Louisiana Motel Owner Pleads Guilty in Sex Trafficking Case (July 1, 2015), <http://www.justice.gov/opa/pr/louisiana-motel-owner-pleads-guilty-sex-trafficking-case>. Many claims brought under the benefiting provision are brought alongside claims under other provisions. *See, e.g.*, *United States v. Cook*, 782 F.3d 983, 985 (8th Cir. 2015), *cert. denied*, 136 S. Ct. 262 (2015) (mem.). Civil suits have also been brought under the “benefiting” provision. *See, e.g.*, *St. Louis v. Perlitz*, No. 3:13-CV-1132 (RNC), 2016 WL 1408076, at *2 (D. Conn. Apr. 8, 2016).

584. Senate Permanent Subcomm. v. Ferrer, 199 F. Supp. 3d 125, 135 (D.D.C. 2016); *J.S. v. Vill. Voice Media Holdings, LLC*, 359 P.3d 714, 717–18 (Wash. 2015).

585. *Vill. Voice Media Holdings, LLC*, 359 P.3d at 718.

586. *Id.* at 715.

587. *E.g.*, *People v. Ferrer*, No. 16FE019224, at 4 (Cal. Super. Ct. Dec. 9, 2016), <http://digitalcommons.law.scu.edu/cgi/viewcontent.cgi?article=2358&context=historical> (“Defendants contend that the First Amendment bars prosecution, as the People are seeking to prosecute individuals for the act of publishing third party content.”).

588. *See, e.g.*, *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 55 (1988).

589. *Virginia v. Black*, 538 U.S. 343, 359 (2003); *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969).

that it would be problematic if Backpage was running “hitman.com” instead of a website that has some illegal applications. The distinction between these two distinct doctrinal bases is important to understanding the arguments made by Backpage.⁵⁹⁰

F. How Doe v. Backpage.com, LLC Affects the Human-Trafficking Landscape Moving Forward

With the Supreme Court’s denial of certiorari,⁵⁹¹ the First Circuit’s vision of the CDA and trafficking law prevails for now (in the First Circuit). At least, Backpage’s decision to shutter its “Adult Entertainment” section appears to have put an end to the use of that website for trafficking. But these developments have neither muted nor stopped the ongoing debate about Backpage’s use of the Internet to advertise trafficking. In its press releases announcing the close of its “Adult Entertainment” section, Backpage alleged that they had been unconstitutionally censored.⁵⁹² Additionally, the famous litigator David Boies has filed two new civil suits against Backpage on behalf of trafficking victims that will surely implicate the CDA.⁵⁹³ The issues raised by *Doe v. Backpage.com, LLC* are not going away anytime soon.

Congress could preempt these debates by amending the CDA to clearly deny any immunity for Backpage. Congress, both through investigations and public statements quoted above, has repeatedly demonstrated frustration with Backpage and its business model and may be willing to pass legislation to end this fight. In fact, the First Circuit asked Congress to do just this, suggesting that the tension between the purposes of the TVPA and the CDA’s Good Samaritan provision must be resolved by the legislature: “If the evils that the appellants have identified are deemed to outweigh the First Amendment values that drive the CDA, the remedy is through legislation, not through litigation.”⁵⁹⁴

The implications of the First Circuit’s ruling extend beyond the TVPA and may frustrate other criminal and civil enforcement provisions. Congress has created private rights of action in statutes

590. See, e.g., *Backpage.com, LLC v. Lynch*, No. CV 15-2155 (RBW), 2016 WL 6208368, at *5 (D.D.C. Oct. 24, 2016) (separating legal activity that could be burdened but was not by the SAVE Act from illegal activity that cannot be burdened precisely because it is not protected by the First Amendment).

591. See *Doe v. Backpage.com, LLC*, 137 S. Ct. 622 (2017) (mem.).

592. Press Release, Backpage.com, Statement of Backpage.com Regarding the U.S. Permanent Subcommittee on Investigations’ Censorship of Adult Classified Advertisements (Jan. 9, 2017), <http://www.backpage.com/statements/Backpage-Statement-20170109.pdf>.

593. Dune Lawrence, *Sex Trafficking Just Got a Dangerous New Enemy*, BLOOMBERG BUSINESSWEEK (Feb. 8, 2017), <https://www.bloomberg.com/news/articles/2017-02-08/nov-david-boies-is-coming-after-backpage-com>.

594. *Doe v. Backpage.com, LLC*, 817 F.3d 12, 29 (1st Cir. 2016), cert. denied, 137 S. Ct. 622 (2017) (mem.).

as diverse as the False Claims Act,⁵⁹⁵ the Racketeer Influenced and Corrupt Organizations Act,⁵⁹⁶ and the Anti-Terrorism Act.⁵⁹⁷ The First Circuit's interpretation of § 230 of the CDA could foreclose these civil actions whenever website operators can point to a third party who contributed to the commission of the violation of law. A federal district court rejected the contention that § 230 of the CDA provided the operator of an online marketplace for drugs and criminal activity with immunity.⁵⁹⁸ The First Circuit's ruling seemingly disagrees with this outcome.⁵⁹⁹ The First Circuit's ruling has the potential to immunize defendants from similar civil liability arising from the production of child pornography,⁶⁰⁰ terrorism,⁶⁰¹ and RICO offenses.⁶⁰² In addition to private rights of action, the First Circuit's logic could also inhibit the government's own civil enforcement actions. While § 230 of the CDA has a carve out for federal criminal prosecutions,⁶⁰³ it does not have a similar carve out for federal civil enforcement actions.

The First Circuit case raises some of the most interesting and intricate questions facing human-trafficking law. And yet, now that Backpage has voluntarily closed its "Adult Entertainment" section, its direct effect may appear to be mooted. However, Backpage's business will migrate to other portions of the Internet (just as it moved from Craigslist to Backpage), and this holding will follow it. There are many lessons to learn and areas to explore based on the plethora of opinions discussed above, and the resolution of the problems raised by Backpage will undoubtedly bleed into the coming years. Whether through an act of Congress, a Supreme Court decision, or ongoing state criminal charges, this promises to be an area of continuing evolution in trafficking law.

CONCLUSION

Among other things, the 2016 cases have resolved the confusion surrounding the "reasonable opportunity to observe" standard and teed up future litigation over the quantum of evidence sufficient to trigger its application. There is now a consensus among the circuits that a victim's sexual history is inadmissible during trial⁶⁰⁴ and that the TVPA's extra-territorial provision passes Constitutional muster.

595. 31 U.S.C. § 3730(b) (2012).

596. 18 U.S.C. § 1964(c) (2012).

597. *Id.* § 2333(a).

598. *United States v. Ulbricht*, 31 F. Supp. 3d 540, 568 (S.D.N.Y. 2014).

599. *See Doe*, 817 F.3d at 22.

600. 18 U.S.C. § 2252A.

601. *Id.* § 2333(a).

602. *Id.* § 1964(c).

603. 47 U.S.C. § 230(e)(1) (2012).

604. *See, e.g., United States v. Copeland*, 820 F.3d 809, 813–14 (5th Cir. 2016); *United States v. Elbert*, 561 F.3d 771, 776–77 (8th Cir. 2009).

Meanwhile, evidentiary and sentencing issues continue to work their way through the courts. Backpage's legal victories may be merely pyrrhic given the disruption to its business model, generated by relentless litigation.

Yet, at the heart of each of these cases are the individual victims whom individual human traffickers exploited. The survivors bear the personal and painful cost imposed by this economically motivated crime. It is for them that the TVPA's protections exist. The stories and holdings of the 2016 cases mark clear advancement in human-trafficking law.