

## CLASSIFIED WEBSITES, SEX TRAFFICKING, AND THE LAW: PROBLEM AND PROPOSAL

MARIA LOURDES ASENCIÓN\*

### *I. Delimitation of the Problem*

Since the beginning of the 1600s, slavery was a known issue in the United States (U.S.).<sup>1</sup> Although slavery was abolished in 1863 as a result of the Civil War, slavery persists in the present day.<sup>2</sup> Modern day slavery is human trafficking.<sup>3</sup> Although there is a

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<sup>1</sup> *Africans in America: Europeans Come to Western Africa*, PBS ONLINE (1998) <http://www.pbs.org/wgbh/aia/part1/1narr1.html> (discussing how European ships brought millions of Africans to colonies and plantations in the Americas); see *Slavery in America*, HISTORY.COM (2009) <http://www.history.com/topics/black-history/slavery> (explaining that the first African slaves were brought to aid in production and help build economic foundations of the “new nation”); see also *Slavery in the United States: A Brief History*, CIVIL WAR TRUST (2014), <http://www.civilwar.org/education/history/civil-war-overview/slavery.html> (describing how a Dutch ship loaded African slaves traveled to the United States to work on large farms to work on crops, and tobacco).

<sup>2</sup> Kelly E. Hyland, *Protecting Human Victims of Trafficking: An American Framework*, 16 BERKELEY WOMEN’S L.J. 29, 38–39 (2001) (discussing how human trafficking has become a transnational crime); see also *Slavery Today*, END SLAVERY NOW (2016), <http://www.endslaverynow.org/learn/slavery-today> (explaining how there is an estimated 20.9 million people in slavery today, known as “modern-day slavery”). There are different types of slavery besides sex trafficking, such as forced labor, bonded, child labor, domestic servitude, and forced marriage.

<sup>3</sup> *What is Human Trafficking?*, DEPARTMENT OF HOMELAND SECURITY, <https://www.dhs.gov/blue-campaign/what-human-trafficking> (last visited Dec. 6,

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misconception that human trafficking is only an international issue, victims need not cross international borders to be trafficked.<sup>4</sup> Even though trafficking suggests movement or travel, there is no requirement that victims must be transported in order for trafficking to take place.<sup>5</sup>

Annually, approximately 700,000 victims are trafficked within U.S. borders.<sup>6</sup> In the U.S. alone, there is an estimated

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2016) (defining human trafficking as a “modern-day slavery [involving] the use of force, fraud, or coercion to obtain some type of labor or commercial sex act.”); *Human Trafficking & Modern-Day Slavery*, Schuster Institute, (Jun. 17, 2011) <http://www.brandeis.edu/investigate/slavery/index.html> (explaining how slavery is not as obvious or visible as it once was.); *See also* Karen E. Bravo, *Exploring the Analogy Between Modern Trafficking in Human and the Trans-Atlantic Slave Trade*, 25 B.U. INT’L L.J. 207, 213 (2007). The abolition of slavery throughout the colonies and in the United States post-Civil War is known as the first era of abolition. *Id.* Modern society is experiencing another sense of abolition. *Id.*; *see* Cheryl Nelson Butler, *Kids for Sale: Does America Recognize Its Own Sexually Exploited Minors As Victims of Human Trafficking?*, 44 SETON L. REV. 833 (2014) [hereinafter *Kids for Sale*] (explaining how human trafficking is an epidemic in the United States). The Obama Administration has estimated that more than 20 million men, women, and children are victimized by forced labor and sex trafficking worldwide. *Id.*

<sup>4</sup> *See* Sarah Kujawa, Note, *Modern-Day Slavery: Human Trafficking in Oklahoma*, 38 OKLA. CITY U. L. REV. 105, 107 (2013) (describing how human trafficking does not involve transportation of a person); *see also* *What is Human Trafficking?*, EXODUS CRY, <http://exoduscry.com/about/human-trafficking/> (last visited Dec. 6, 2016) (describing human trafficking as the “recruitment, transfer . . . of persons, by means of threat or use of force or other forms of coercion . . .”). For human trafficking to occur, actual physical transportation of an individual does not need to take place. *Id.*

<sup>5</sup> 22 U.S.C. § 7102(9) (2015). The statute provides the definition for the severe forms of trafficking in persons. *Id.* *See also* Amy Hewat & Kathleen Leslie, *Eradicating Modern Day Slavery*, THE CHRISTIAN LAWYER, 3 (2014) (explaining how the word “trafficking” means movement but does not require movement for the crime to occur); *Trafficking Victims Protection Act*, FIGHT SLAVERY NOW, <https://fightslaverynow.org/why-fight-there-are-27-million-reasons/the-law-and-trafficking/trafficking-victims-protection-act/trafficking-victims-protection-act/> (explaining how the physical transportation of an individual from one location to another is not a requirement). The trafficker uses psychological coercion to control the victim. *Id.*

<sup>6</sup> *See* 22 U.S.C. § 7101(b)(1) (2015). *Id.* *See also* *Trafficking in Persons Report*, U.S. DEPARTMENT OF STATE (Jul. 2015), <http://www.state.gov/documents/>

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100,000 American children trafficked for sex each year.<sup>7</sup> In 2016 in the U.S., 5,748 human trafficking cases were reported.<sup>8</sup> Out of those reported cases, 1,828 were children.<sup>9</sup> The Department of State stated that there are more than twenty million adults and children that qualify as victims of modern slavery worldwide.<sup>10</sup> Human trafficking is deemed to be the third largest criminal activity in the world aside from drugs and the illegal arms industry.<sup>11</sup>

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organization/245365.pdf [hereinafter TRAFFICKING REPORT 2015] (describing how human trafficking is not only an international issue only).

<sup>7</sup> Stephanie Silvano, *Fighting a Losing Battle to Win the War: Can States Combat Domestic Minor Sex Trafficking Despite CDA Preemption?*, 83 FORDHAM L. REV. 375, 380 (2014) (explaining that experts estimate that more than 100,000 American children are victims of sex trafficking within the United States); see *Human Trafficking*, POLARIS (2015) <http://www.polarisproject.org/human-trafficking/overview> (stating that an estimated amount of 100,000 children are in the sex trade in the United States every year).

<sup>8</sup> *Hotline Statistics*, NAT'L HUM. TRAFFICKING RESOURCE CENTER, <http://www.traffickingresourcecenter.org/states> (last visited Dec. 6, 2016) (comparing the amount of cases reported in 2015, a total of 2,795).

<sup>9</sup> See *id.* See also Roza Pati, *Trafficking in Persons and Transnational Organized Crime: A Policy-Oriented Perspective*, in HANDBOOK ON HUMAN TRAFFICKING, PUBLIC HEALTH AND THE LAW 27–31 (Wilhelm Kirch et al. eds., 2013) (explaining how in the Trafficking in Persons Report in 2006, “800,000 people were being trafficked across international borders every year, 80% of them being women and 50% being minors”).

<sup>10</sup> Kari Johnstone, *Seven Things You Should Know About Human Trafficking*, DIPNOTE U.S. DEPARTMENT OF STATE OFFICIAL BLOG (Jul. 27, 2015) (describing how boys can be subject to victimization in sex trafficking), <http://blogs.state.gov/stories/2015/07/27/seven-things-you-should-know-about-human-trafficking>; see also *An Overview of Child Sex Trafficking*, NATIONAL HUMAN TRAFFICKING RESOURCE CENTER (2015) (<http://www.traffickingresourcecenter.org/resources/overview-child-sex-trafficking>) (defining that child sex trafficking is a form of child abuse) [hereinafter *Child Sex Trafficking*]; see *Sex Trafficking in the U.S.*, POLARIS (2015) <http://www.polarisproject.org/human-trafficking/sex-trafficking-in-the-us> (“is a form of modern slavery that exists throughout the United States and globally”).

<sup>11</sup> Pinghua Sun & Yan Xie, *Human Trafficking and Sex Slavery in the Modern World*, 7 ALB. GOV'T L. REV. 91, 93–94 (2014) (describing how drugs and guns are profitable industries in the United States aside from human sex trafficking).

Although illegal, the human trafficking industry makes an estimated thirty-two billion dollars per year.<sup>12</sup> In the U.S., child sex trafficking is one of the most prevalent and unconscionable of crimes.<sup>13</sup> Classified websites such as Backpage, or in the past, Craigslist, have served to enhance sex trafficking in a significant manner.<sup>14</sup> Even though there have been recent criminal charges against the Chief Executive Officer (CEO) of Backpage, nothing seems to be defined or determinative.<sup>15</sup> Up to now, the U.S. lacked landmark civil or criminal cases against websites for their actions to serve as platforms for advertisers of sexual services.

Since the evolution of the Internet, traffickers use websites and social media to recruit their victims, rather than on the streets or public areas.<sup>16</sup> With social media sites at a child's fingertips, such as Skype, Facebook, and Snapchat, there are new avenues to access and

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<sup>12</sup> See Kujawa, *supra* note 4 at 105, 107. See also Janelle Zabresky, *Creating a Safe Harbor for Florida's Children: An Overview of Florida's Legislative Evolution in Domestic Minor Sex Trafficking*, 40 FLA. ST. U. L. REV. 415 (2013) (stating that prostitution is a \$14.5 billion dollar industry in the United States).

<sup>13</sup> *Child Sex Trafficking Statistics*, THORN, <https://www.wearethorn.org/child-trafficking-statistics/> (last visited Dec. 6, 2016) (explaining how 325,000 children run the risk of becoming victims of sex trafficking in North America).

<sup>14</sup> David Wright et al., 'Craigslist: Site for Sex Slaves' Story Saves Girl's Life, ABC NEWS, <http://abcnews.go.com/WN/popular-website-craigslist-outlet-sex-trafficking-child-exploitation/story?id=11367581> (Sept. 6, 2010) (emphasizing how Craigslist was a main contributor to the sex trafficking industry). The website affected more than 300,000 children. *Id.*

<sup>15</sup> Wendy Davis, *Backpage Urges Supreme Court to Reject Appeal Over Escort Ads*, MEDIAPOST (Dec. 1, 2016, 3:15 PM), <http://www.mediapost.com/publications/article/290168/backpage-urges-supreme-court-to-reject-appeal-over.html> (explaining how Backpage is pleading to the United States Supreme Court to "let stand a decision dismissing a lawsuit against the company by a group of sex-trafficking victims.").

<sup>16</sup> *The New Cyber Trend in Human Trafficking: How to Stay Safe Online*, HUMAN TRAFFICKING HELP, <https://www.humantrafficking.help/human-trafficking-goes-cyber-stay-online/> (last visited Dec. 6, 2016) [hereinafter *How to Stay Safe Online*] (comparing how traffickers used to recruit underage children for sexual trafficking on the streets and in public areas); see *Hotline Statistics*, *supra* note 8 (indicating the amount of calls per year and the number of human trafficking cases reported annually).

recruit minors.<sup>17</sup> The traffickers monitor a child's behavior, interests, and habits through the information that a child broadcasts on his or her social media webpage.<sup>18</sup> Thus, the trafficker utilizes the Internet to gain trust of the victim.<sup>19</sup> Usually, the trafficker approaches the victim within forty-eight hours after the victim runs away from home.<sup>20</sup> Traffickers target these victims because they have a preconceived notion that the victims are in need of a "friend."<sup>21</sup>

## II. Conflicting Claims

The proliferation of human trafficking occurs from the actions of traffickers who are acting as "pimps," placing their victims as prostitutes.<sup>22</sup> Although there are many individuals who partake in the advancement of this illicit activity, the victim suffers the consequences of a pimp's actions.

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<sup>17</sup> See *Hotline Statistics*, *supra* note 8. Chat rooms and child profiles are mainly used to determine which child can be lured. *Id.*; see also Lumturiye Akiti, *Facebook Off Limits? Protecting Teachers' Private Speech on Social Networking Sites*, 47 VAL. U. L. REV. 119, 122–23 (2012) (indicating how Facebook reached an estimate of 750 million users worldwide between 2011 and 2012). Traffickers use these types of social media to capture the attention of the victims. *Id.*

<sup>18</sup> See *id.* (explaining how predators use social media to target their victims and study their behavior).

<sup>19</sup> *The Prostitution of Children*, U.S. DEPARTMENT OF JUSTICE (last updated Jun. 3, 2015), <http://www.justice.gov/criminal-ceos/prostitution-children> [hereinafter *Prostitution of Children*] (explaining how the trafficker begins to engage the child in prostitution). Once the trafficker establishes a relationship with the child and creates a false sense of trust the child is engaged in prostitution. *Id.*

<sup>20</sup> Melissa Fletcher, *Sex Traffickers Rely on Charm to Lure Victims*, SAN ANTONIO EXPRESS-NEWS (Apr. 20, 2013, 11:05 AM), [http://www.mysanantonio.com/news/local\\_news/article/Sex-traffickers-rely-on-charm-to-lure-victims-4449182.php](http://www.mysanantonio.com/news/local_news/article/Sex-traffickers-rely-on-charm-to-lure-victims-4449182.php) (stating that criminals lure victims into sex trafficking).

<sup>21</sup> See *id.*

<sup>22</sup> Kristin Finklea et al., *Sex Trafficking of Children in the United States: Overview and Issues for Congress*, CONG. RES. SERV. (2015) <https://www.fas.org/sgp/crs/misc/R41878.pdf> [hereinafter *Issues for Congress*] (defining a "john" to be a person who buys illegal commercial sex).

### A. *Victims*

According to the United States Department of State (“Department of State”), approximately 80% of the victims of human trafficking are female, and half of them are children.<sup>23</sup> Boys are also targeted.<sup>24</sup> Sex trafficking victims usually suffer from symptoms associated from routinely being victimized by their pimp.<sup>25</sup> Negative impacts on these victims are long-lasting physical and psychological trauma, venereal diseases, drug addiction, unwanted pregnancies, malnutrition, social ostracism, or even death.<sup>26</sup>

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<sup>23</sup> *11 Facts About Human Trafficking*, DOSOMETHING.ORG, <https://www.dosomething.org/facts/11-facts-about-human-trafficking> (last visited Dec. 6, 2016) (describing the percentage estimate of sexual exploitation); Improving Outcomes for Youth at Risk for Sex Trafficking Act of 2013, S. 1518, 113th Cong. (2013) (“Recent reports on sex trafficking estimate that hundreds of thousands of children and youth are at risk for domestic sex trafficking.”).

<sup>24</sup> See Johnstone, *supra* note 10 (describing how boys can be subject to victimization in sex trafficking).

<sup>25</sup> See *The Prostitution of Children*, DEPARTMENT OF JUSTICE, <http://www.justice.gov/criminal-ceos/prostitution-children> (last visited Dec. 6, 2016) (describing how pimps “manipulate children by using physical, emotional, and psychological abuse to keep them trapped in prostitution . . . .”); see also *Human Trafficking*, DEPARTMENT OF HOMELAND SECURITY, <https://www.cbp.gov/border-security/human-trafficking> (last visited Dec. 6, 2016). Some signs of human trafficking include lack of travel documents, individual is restricted from socializing or contacting family, has deprivation of basic necessities to live, seems submissive or fearful of others, and is confused as to where he or she lives. *Id.*

<sup>26</sup> See TRAFFICKING REPORT 2015, *supra* note 6 (detailing the consequences of sex trafficking of minors); see also Zabresky, *supra* note 12 (discussing that victims can suffer from symptoms associated from routinely being victimized by their pimp); *Human Trafficking and HIV/AIDS*, UNODC (2016), <http://www.ungift.org/knowledgehub/en/about/human-trafficking-and-hiv-aids.html> (describing how human trafficking victims are exposed to death threatening diseases such as HIV or AIDS). Not only do these victims get exposed to unprotected sex but they are also injected with drugs to comply, or may choose to inject drugs as a “coping mechanism.” *Id.* See also Jonathan Todres, *The Private Sector’s Pivotal Role in Combating Human Trafficking*, 3 CAL. L. REV. CIR. 80, 82–83 (2012) (“Trafficked individuals frequently suffer beatings and broken bones, face, increased risk of contracting HIV and other sexually transmitted infections,

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Anyone could become a victim of human trafficking; especially those who are economically disadvantaged, or children seeking escape from difficult family circumstances.<sup>27</sup> Many of these victims suffer from low self-esteem and are without dependable guardians, thus, making them vulnerable to traffickers.<sup>28</sup> Sex trafficking victims come from all backgrounds, socioeconomic statuses, and races.<sup>29</sup> However, there are some influences that place a child at risk of being captured into the sex trafficking industry.<sup>30</sup> For instance, history of childhood trauma and abuse, criminal history in the juvenile justice system, children who suffer from lack of supervision, homeless, history of running away, youth living below

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are forced to live in overcrowded and unsanitary conditions with insufficient amounts of food and [exposed to] other harmful substances.”)

<sup>27</sup> See Hewat & Leslie, *supra* note 5 (explaining the traffickers search for certain types of criteria’s in children to recruit them into sexual slavery); see also *In Our Own Backyard: Child Prostitution and Sex Trafficking in the United States: Hearing Before the Subcomm. on Human Rights and the Law of the S. Judiciary Comm.* 9 (2010) (“Runaways, throwaways, children who are chronically truant, or who suffer physical or sexual abuse in the home – these are the types of children who are targeted by pimps.”) The pimps offer these victims love and affection that they yearn for and manipulate them while forcing them into prostitution. *Id.* See Heather J. Clawson et al., U.S. DEPARTMENT OF HEALTH & HUMAN SERVICES, HUMAN TRAFFICKING INTO AND WITHIN THE UNITED STATES: A REVIEW OF THE LITERATURE 9 (Aug. 2009), <https://aspe.hhs.gov/pdf-report/human-trafficking-and-within-united-states-review-literature> (explaining how minors who run away are exposed to the vulnerability of sexual exploitation by traffickers).

<sup>28</sup> *The Prostitution of Children*, U.S. DEPT. OF JUSTICE (last updated Jun. 3, 2015), <http://www.justice.gov/criminal-ceos/prostitution-children> [hereinafter *Prostitution of Children*].

<sup>29</sup> See *id.*; see also Cristina Corbin, *FBI rescues more than 100 children, arrests 150 pimps in sex-trafficking raid*, FOX NEWS (Jul. 29, 2013), <http://www.foxnews.com/us/2013/07/29/fbi-rescues-at-least-105-child-prostitutes-in-nationwide-undercover-operation/> (explaining how the traffickers’ attack children from every socioeconomic level and demographic).

<sup>30</sup> *Child and Youth Sex Trafficking: Raising Awareness & FDS’s Response*, VERMONT DEP’T FOR CHILDREN AND FAMILIES SERVICES DIVISION (2014) <http://dcf.vermont.gov/sites/dcf/files/Prevention/docs/Sex-Trafficking-Powerpoint.pdf> (emphasizing that child sex trafficking impacts children with “great social, economic, and environmental vulnerabilities). Once these victims are being trafficked they will minimize or will not be able to recognize that they are victims. *Id.* These victims often form emotional bonds with the trafficker. *Id.*

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poverty level, or children who grow up in substance abuse households tend to run away from home and become prey to the traffickers.<sup>31</sup>

In Seattle, a fifteen-year-old victim known by the name Natalie was found trafficked via Backpage shortly after she ran away from her home.<sup>32</sup> A sex trafficker picked up Natalie, raped her, and sold her body for sexual services to more than 150 clients.<sup>33</sup> Natalie confessed that her trafficker made more than \$4,000 a weekend, and made her work every single day of the week.<sup>34</sup> Natalie's parents found out that their daughter was being sold through Backpage.<sup>35</sup> After missing for 180 days, Natalie was rescued through a sting operation.<sup>36</sup> Her trafficker was sentenced to twenty-six years in prison for promoting commercial sexual abuse of a minor.<sup>37</sup> Fortunately, Natalie was rescued, but many remain helpless.

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<sup>31</sup> *Child Welfare and Human Trafficking*, CHILDREN'S BUREAU 1, 8 (2015) <https://www.childwelfare.gov/pubPDFs/trafficking.pdf> (explaining how children that are "involved with the child welfare system due to abuse or neglect . . . are all at high risk of being trafficked"); see Corbin, *supra* note 29 (emphasizing how most of the victims that are preyed into human trafficking range from ages 13 to 16); see also *15 Things We All Need To Know About American's Appalling Child Sex Trade*, HUFFINGTONPOST (Jul. 21, 2014, 9:15 AM), [http://new.www.huffingtonpost.com/2014/07/21/child-sex-trafficking\\_n\\_5571554.html](http://new.www.huffingtonpost.com/2014/07/21/child-sex-trafficking_n_5571554.html) (explaining how the majority of children who were found in the foster care system were victims of abuse or had "escaped from an unhappy family life").

<sup>32</sup> See Gloria Riviera et al., *Daughters for Sale: How Young American Girls Are Being Sold Online*, ABC NEWS (May 25, 2016, 9:56 PM), <http://abcnews.go.com/US/daughters-sale-young-american-girls-sold-online/story?id=39350838> [hereinafter *Daughters for Sale*] (explaining how the victim uses the name "Natalie" as a way to state her story but maintain her anonymity). She then went to another trafficker, which offered her a home and some comfort. *Id.* The trafficker stated that if she worked via Backpage it would be "easier" and "harder to get caught." *Id.*

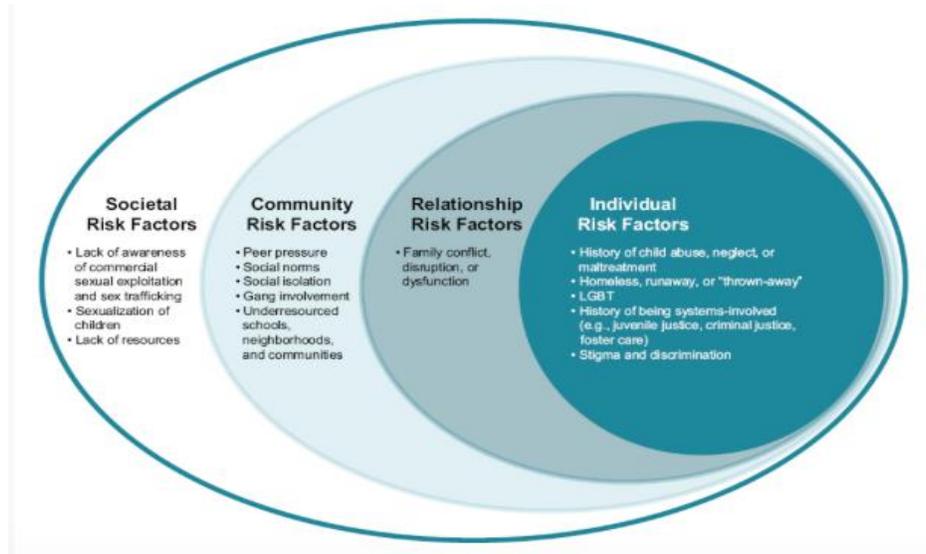
<sup>33</sup> *Daughters for Sale*, *supra* note 32 (explaining how Natalie was a virgin at the time of the incident).

<sup>34</sup> See *id.*

<sup>35</sup> See *id.*

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*



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### B. Traffickers

According to the Department of Justice, the top twenty human trafficking jurisdictions in the country include: "Houston, El Paso, Los Angeles, Atlanta, Chicago, Charlotte, Miami, Las Vegas, New York, Long Island, New Orleans, Washington, D.C., Philadelphia, Phoenix, Richmond, San Diego, San Francisco, St. Louis, Seattle, and Tampa."<sup>39</sup> Traffickers use their victims as means

<sup>38</sup> See *Confronting Commercial Sexual Exploitation and Sex Trafficking of Minors in the United States: 3 Risk Factors for and Consequences of Commercial Sexual Exploitation and Sex Trafficking of Minors*, THE NATIONAL ACADEMIES PRESS (2013), [hereinafter *Confronting Commercial Sexual Exploitation*] <https://www.nap.edu/read/18358/chapter/6> (describing the different risk factors of minors in a diagram, that often lead these minors into being trafficked).

<sup>39</sup> See *Human Trafficking & Online Prostitution Advertising*, <https://wagner.house.gov/Human%20Trafficking%20%26%20Online%20Prostitution%20Advertising> (last visited Dec. 14, 2016) (explaining that children trafficking is most prevalent in this jurisdictions). Traffickers benefit selling minors in the sex trade in these jurisdictions the most. *Id.* Therefore, traffickers profit the most by trafficking minors in these states or cities. *Id.*

to gain economic profit.<sup>40</sup> A trafficker's fundamental purpose is to maximize his or her profits through the sexual exploitation of his or her victims.<sup>41</sup> Traffickers gain a stable economical flow of profit from sexually exploiting their victims and selling their bodies on a repeated basis.<sup>42</sup> Annually, traffickers make \$150,000 to \$200,000 per child.<sup>43</sup> Under their coercion, sex traffickers force victims to have sex up to an estimated amount of thirty times a day.<sup>44</sup> Moreover, sellers keep the profits in their entirety.<sup>45</sup>

However, there is a general misconception that traffickers are usually male.<sup>46</sup> Statistics show that women traffickers make up to thirty-five to forty percent of traffickers within the United States.<sup>47</sup> These individuals are known for using threats of violence against their victims as a means of controlling behavior. Traffickers are known to use blackmail, coercion, threat, fraud, or force towards their victims.<sup>48</sup> Generally, they instill a fear of physical harm towards

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<sup>40</sup> See Hyland, *supra* note 2 (discussing the profitability of human trafficking); see also Meredith Dank & Matthew Johnson, *The Hustle: Economics of the Underground Commercial Sex Industry*, URBAN INSTITUTE (March 2014), <http://apps.urban.org/features/theHustle/index.html> ("Atlanta had the largest underground, commercial sex economy in 2007 at \$290 million" as compared to Dallas, Denver, Miami, San Diego, Seattle and Washington D.C.); see also *Kids For Sale*, *supra* note 3 (explaining how traffickers force minors to reach quotas of \$400 a day). The minors must return all of the money earned to the trafficker. *Id.*

<sup>41</sup> *See id.*

<sup>42</sup> *Id.* (explaining how humans can continue to work and earn money for their traffickers that gain a steady income).

<sup>43</sup> *Trafficked Teen Girls Describe Life In "The Game"*, NPR (Dec. 6, 2010, 4:26 PM), <http://www.npr.org/2010/12/06/131757019/youth-radio-trafficked-teen-girls-describe-life-in-the-game>).

<sup>44</sup> *Human Trafficking Facts*, 5-STONES, <http://5-stones.org/statistics/>, (last visited Dec. 24, 2016) (explaining how victims work seven days out of the week).

<sup>45</sup> *Id.* (stating how the traffickers do not pay their victims and keep them in an inhumane environment).

<sup>46</sup> Jodie Gummow, *10 Surprising and Counterintuitive Facts About Child Sex Trafficking*, ALTERNET (Nov. 2, 2013), <http://www.alternet.org/civil-liberties/10-surprising-and-counterintuitive-facts-about-child-sex-trafficking> (contrasting how women make up to thirty-five to forty percent of traffickers).

<sup>47</sup> *Id.* (explaining how women traffickers are known as "madams").

<sup>48</sup> *See id.*

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their victims such as death threats, arrest, or even harm to the victims' families.<sup>49</sup>

Usually, traffickers are difficult to trace because when they post classified website advertisements (ads) they often use stolen credit cards, fraudulent identification, generic prepaid credit cards, or prepaid cellphones.<sup>50</sup> Technology and social media websites are providing an easy route for traffickers to reach an obscure audience.<sup>51</sup> Thus, traffickers experience a low risk of prosecution by law enforcement due to the "anonymity" that the Internet provides.<sup>52</sup>

Traffickers use sophisticated software in order to guard their anonymity by using hosting services and advanced encryption techniques in order to deviate digital forensic investigations by law enforcement.<sup>53</sup> In 2014, the Polaris Project stated that three main venues where sexual acts commonly take place were: (1) commercial

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<sup>49</sup> See *id.*

<sup>50</sup> Martha Irvine, *Backpage ad site: Aider of traffickers, or way to stop them?*, AP NEWS (Aug. 16, 2015, 12:18 PM), <http://bigstory.ap.org/article/c6c46ce7b1c243e5bb9147cc510d075e/backpage-ad-site-aider-traffickers-or-way-stop-them> (describing the individuals who post these ads use several techniques which make it difficult for law enforcement to prosecute); see M. Alex Johnson, *Authorities Seek to Crack Down Craigslist*, NBCNEWS.COM (last updated May 5, 2009, 8:04 PM), <http://www.nbcnews.com/id/30584416/ns/technology-and-science-techandgadgets/t/authoritiesseek-crack-down-craigslist#.WFHE0DI-Ixd>.

<sup>51</sup> *The Role of Technology in Child Sex Trafficking*, CRIMES AGAINST CHILDREN RESEARCH CENTER, [http://www.unh.edu/ccrc/projects/technology\\_in\\_child\\_sex\\_traffic.html](http://www.unh.edu/ccrc/projects/technology_in_child_sex_traffic.html) (explaining how the target audiences of these traffickers include people with extreme sexual tastes and those interested in child pornography). Technology is used to advertise minors in classified websites. *Id.*

<sup>52</sup> Dominique Roe-Sepowitz et al., *Invisible Offenders: A Study Estimating Online Sex Customers*, ARIZONA STATE UNIVERSITY SCHOOL OF SOCIAL WORK (2013) [http://www.traffickingresourcecenter.org/sites/default/files/Study%20Estimating%20Online%20Sex%20Customers%20-%20ASU\\_0.pdf](http://www.traffickingresourcecenter.org/sites/default/files/Study%20Estimating%20Online%20Sex%20Customers%20-%20ASU_0.pdf) (comparing to the high-level risk of being caught by police like the street level prostitution and pimps do).

<sup>53</sup> See Siddhartha Sarkar, *Use of Technology in Human Trafficking Networks and Sexual Exploitation: A Cross-Sectional Multi-Country Study*, 5 TRANSNATIONAL SOCIAL R. 55 (2015) (describing how traffickers used technological devices to sexually exploit trafficked victims).

front brothels; (2) Internet advertising; and (3) hotels or motels.<sup>54</sup> Further, traffickers will invest time and money into their victims to change their natural resistance and suspicion.<sup>55</sup>

### C. *The Clients*

Individuals, who purchase the sexual services from a minor through “classified websites,” are men or women, rich, poor, married, or divorced.<sup>56</sup> On average, one out of twenty males over the age of eighteen in a metropolitan city are soliciting online sex ads.<sup>57</sup> Generally, trafficked children are sold to white males with a high economic stature between the ages of twenty-five and fifty-five years old.<sup>58</sup> The majority of these clients are individuals who are interested in child pornography or pedophiles.<sup>59</sup> However, there is not set profile for the “typical clientele.”<sup>60</sup>

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<sup>54</sup> *Human Trafficking 2014 Statistics*, POLARIS PROJECT (2014), <http://www.polarisproject.org/storage/documents/2014statistics.pdf> (describing the top three sex trafficking venues); *see also* Obtaining information about Polaris, POLARIS, <http://www.polarisproject.org/what-we-do> (follow “What We Do”; then follow “Overview”) (describing that Polaris is a nonprofit, non-governmental organization that provides client services, data analysis, advisory services, global programs, and manages a National Human Trafficking resource center). Awareness to these areas have been provided by training specific to hotel and motel managers, housekeeping staff and front desk personnel to report any suspicious behavior. *Id.* Hotline numbers have also been provided. *Id.*

<sup>55</sup> *See* Corbin, *supra* note 29. The trafficker preys on children with low self-esteem and minimal family support. *Id.* Traffickers will isolate the victim away from society and have their appearance changed. *Id.*

<sup>56</sup> *Sex Trafficking Frequently Asked Questions*, SOROPTIMIST (2012), <http://www.soroptimist.org/trafficking/faq.html> [hereinafter *Sex Trafficking*] (stating how there is not set profile for the “typical client”).

<sup>57</sup> *See* Roe-Sepowitz et al., *supra* note 34 (comparing to the high-level risk of being caught by police like the street level prostitution and pimps do).

<sup>58</sup> *See Daughters for Sale*, *supra* note 34 and accompanying text.

<sup>59</sup> *See Confronting Commercial Sexual Exploitation*, *supra* note 37.

<sup>60</sup> *Sex Trafficking*, *supra* note 56.

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Unfortunately, law enforcement focuses more on pimps rather than clients of sex trafficking.<sup>61</sup> The clients in question usually shift responsibility on pimps as a true culprit behind the trafficked victims.<sup>62</sup> The theory behind this shift is that some clients may be blind to the “violence, threats, controlling behaviors, false promises, lies, and manipulation” that is installed upon the minors involved in sex trafficking.<sup>63</sup> Others claim they did not know the individual was a minor.<sup>64</sup> Since it is such an obscure line of whether these clients actually knew whether the victim was a minor or not, law enforcement and the courts tend to give these individuals leniency in regards to punishment.<sup>65</sup>

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<sup>61</sup> PROSTITUTION AND HUMAN TRAFFICKING: FOCUS ON CLIENTS 102 (Andrea Di Nicola et al. eds., 2008). The clients deny responsibility of partaking in human trafficking by saying “how can I fight [human] trafficking if I am not able to recognize it?” *Id.*

<sup>62</sup> *See id.* at 104; *see generally* Samantha Healy Verdaman & Christine Raino, *Prosecuting Demand as a Crime of Human Trafficking: The Eighth Circuit Decision in United States v. Jungers*, 43 MEM. L. REV. 917, 931 (2013) (“In 2005, Congress states in findings supporting the End Demand for Sex Trafficking Act of 2005 that eleven females engage in commercial sex acts were arrested in Boston for every one arrest of a male purchaser, nine to one in Chicago, and six to one in New York City.”) The clients are not charged with trafficking, instead they are charged with prostitution. *Id.*; *see* *United States v. Jungers*, 702 F.3d 1066 (8th Cir. 2013) (elaborating how the federal government has found clients of sex with minors criminally liable under the TVPRA); *see also* *Kids for Sale*, *supra* note 3 (explaining the effects of a minor in the illegal sex trade industry). Minors may face criminal prosecution if caught. *Id.*; *see also* S. 29, 113th Cong. (2013) (“[M]any child sex trafficking victims who have not yet attained the age of consent are arrested or detained for juvenile prostitution or status offenses directly related to their exploitation); *see* Wendi J. Adelson, *Child Prostitute or Victim of Trafficking?*, 6 U. ST. THOMAS L.J. 96 (2008).

<sup>63</sup> *See* “John”: *Creating Demand for Child Sex Trafficking*, THORN (April 21, 2014), [https://www.wearethorn.org/john\\_creating\\_demand\\_child\\_sex\\_trafficking/](https://www.wearethorn.org/john_creating_demand_child_sex_trafficking/).

<sup>64</sup> Tiffany Dovydaitis, *Human Trafficking: The Role of the Health Care Provider*, PMC (Sept. 2010), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3125713/> (explaining how the client does not identify him or herself as a trafficked victim).

<sup>65</sup> Jessica Therivel, *Human Trafficking*, EBSCO (Feb. 12, 2016), [https://www.ebscohost.com/assets-sample-content/Human\\_Trafficking.pdf](https://www.ebscohost.com/assets-sample-content/Human_Trafficking.pdf) (stating how victims are in fear to report clients or traffickers to law enforcement).

#### D. Additional Claimants

Additional claimants include religious organizations and non-governmental organizations (NGO's). For instance, the non-profit Covenant House focuses on homeless children who are vulnerable in the eyes of the traffickers.<sup>66</sup> This ministry gives these children housing and familial necessities.<sup>67</sup> The United Nations Children's Fund (UNICEF) worked closely with communities and religious organizations to further provide a change in harmful societal behavior, which makes children vulnerable to trafficking.<sup>68</sup> Another active group is called the Coalition to Abolish Slavery and Trafficking (CAST). It contains over sixty-five community-based groups, which offer services for victims of trafficking.<sup>69</sup> Saving Innocence, another organization within the United States, is determined to rescue and restore children in sex trafficking by offering comprehensive care.<sup>70</sup> This organization gives medical care,

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<sup>66</sup> Karen Ridder, *7 Christian Groups Working to End Human Trafficking*, NEWSMAX (Mar. 26, 2015, 1:59 PM), <http://www.newsmax.com/FastFeatures/christians-human-trafficking-humanitarian-organizations/2015/10/27/id/634700/> (describing how many Christian groups are spreading compassion and hope to help alleviate the victims from modern-day slavery) The NGOs provide services to victims of human trafficking. *Id.*; see Natalie Jesionka, *The Fight for Freedom: 7 Organizations Combatting Human Trafficking*, THE MUSE, <https://www.themuse.com/advice/the-fight-for-freedom-7-organizations-combatting-human-trafficking> (explaining how these organizations against human trafficking promote awareness for the change in the communities that need it the most).

<sup>67</sup> COVENANT HOUSE, <https://www.covenanthouse.org/about-homeless-charity> (last visited Feb. 15, 2017).

<sup>68</sup> See *Child Protection and Development: Child Trafficking*, UNICEF, <https://www.unicefusa.org/mission/protect/trafficking> (describing how UNICEF's efforts include lobbying to develop laws and spread awareness in regards to child violence and abuse).

<sup>69</sup> *Stop Modern Day Slavery—Top 10 Anti-Human Sex Trafficking Organizations*, SHAREFAITH.COM (2015), <http://www.sharefaith.com/blog/2015/05/top-10-anti-human-trafficking-organizations/> (describing how CAST offers shelter, and legal services to trafficking victims). The organization also known as “Zoe International” focuses on creating prevention and awareness campaigns; ministry, vocational, language, dormitories, and safe houses for orphans and victims of human trafficking. *Id.*

<sup>70</sup> See *id.*

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safe housing, counseling, court advocacy, mentorship, and education to these victims.<sup>71</sup> The main goal and priority of these organizations is to offer children a new life, re-establish their mental health, restore their faith, and provide a new future for them.

However, organizations are not the only actors that are trying to combat human trafficking. Law enforcement pursues investigations of online trafficking activity by members of organized crime families.<sup>72</sup> It is difficult for police officers to help victims because most pictures they encounter in ads are fake or altered images.<sup>73</sup> Thus, many investigations lead to a dead end. Despite these failures, law enforcement continues to investigate any suspicious illegal activity in these types of Internet provider websites, like Backpage.

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<sup>71</sup> See *id.* The organization's goal is "to completely put an end [to] the commercial sexual exploitation of children, and to restore the cultural values of innocence and human worth." *Id.*

<sup>72</sup> See Judge Herbert B. Dixon, Jr., *Human Trafficking and the Internet\* (\*and Other Technologies, too)*, AMERICAN BAR ASSOCIATION (2013) [http://www.americanbar.org/publications/judges\\_journal/2013/winter/human\\_trafficking\\_and\\_internet\\_and\\_other\\_technologies\\_too.html](http://www.americanbar.org/publications/judges_journal/2013/winter/human_trafficking_and_internet_and_other_technologies_too.html) (explaining how law enforcement have been using Internet and technology to expose customer who post online ads offering sex services by victims who are children). The investigators use the information they gather through GPS units and other intel to establish locations of the trafficker's customers and where they hold their victims' hostage. *Id.*; *Human Rescue Trafficking Project*, U.S. ATTORNEY'S OFFICE FOR THE WEST DISTRICT OF MISSOURI (Jun. 27, 2011), <http://www.justice.gov/usao/mow/programs/humantrafficking.html> (explaining how the Human Trafficking Rescue Project was launched in 2006). This taskforce was comprised of the FBI, United States Customs, and two local police departments. *Id.* Described how the taskforces are used to initiate sting operations. *Id.*

<sup>73</sup> *Human Trafficking Online: Cases and Patterns*, USC (2011) <https://technologyandtrafficking.usc.edu/report/human-trafficking-online-cases-patterns/> (describing how difficult it is to "peel back layers and get to the trafficked [victim]").

*III. The Law: Past Trends in Decisions and Conditioning Factors*

In the United States, Congress enacted the Trafficking Victims Protection Act of 2000 (TVPA).<sup>74</sup> In 2000, former President Bill Clinton signed the TVPA into law to combat sex trade, slavery, and involuntary servitude.<sup>75</sup> Further, this Act was passed because trafficking was rising to an all-time high, and the United States used the Act to deter this criminal activity.<sup>76</sup> Under the TVPA, no proof of fraud, force, or coercion is required in trafficking cases involving children because the law assumed that minor victims could not

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<sup>74</sup> Trafficking Victims Protection Act of 2000 (TVPA) (an Act enacted to combat trafficking in person in the sex trade, slavery, and involuntary servitude); see 22 U.S.C. § 7101 (2015); *Id.* See Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106–386, 114 Stat. 1464 (codified as amended in scattered sections 8 U.S.C., 18 U.S.C., 20 U.S.C., 28 U.S.C., and 42 U.S.C.); see generally Mohamed Y. Mattar, *Interpreting Judicial Interpretations of the Criminal Statutes of the Trafficking Victims Protection Act: Ten Years Later*, 19 AM. U. J. GENDER SOC. POL’Y & L. 1247 (2011) (discussing the history of the TVPA and the evolution of the federal human trafficking law over the time period of ten years); see also Jennifer A.L. Sheldon-Sherman, *The Missing “P”: Prosecution, Prevention, and Partnership in the Trafficking Victims Protection Act*, 117 PENN ST. L. REV. 443, 445 (2012) (explaining that the TVPA was passed by Congress and signed into law by President Clinton in 2000). Further, this Act was passed because trafficking was rising and the United States used the Act to deter this criminal activity. *Id.*; see generally Victims of Trafficking and Violence Protection Act, 22 U.S.C. § 7102(8)(A) (2006) (explaining how the TVPA does not allow various forms of human trafficking, including child sex trafficking). The TVPA also allows for programs with humanitarian assistance in support of programs of nongovernmental organizations. *Id.* They also help refugees and disaster relief assistance. *Id.* See *Victims of Trafficking and Violence Protection Act of 2000*, U.S. DEPT. OF STATE (Oct. 28, 2000) <http://www.state.gov/j/tip/laws/61124.htm> (describing the purpose of the TVPA). Additionally, the TVPA was enacted by the Senate and House of Representatives of the United States of America in Congress Assembled to “combat trafficking in persons, especially into the sex trade, slavery, and involuntary servitude, to reauthorize certain Federal programs to prevent violence against women, and for other purposes”; *id.*

<sup>75</sup> See TVPA, *supra* note 75; 18 U.S.C. § 1591(a) (2014).

<sup>76</sup> H.R. 3244, 106th Cong. (2000) (describing that this act was enacted by the Senate and House of Representatives to deter victims in the sex trade and involuntary servitude). This Act was used to protect victims of trafficking both worldwide and domestically within the United States. *Id.*

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consent to a commercial sex act.<sup>77</sup> For example, the number of prosecutions involving trafficking offenses dramatically increased from 1999 to 2000, twenty-four defendants were charged in nine cases.<sup>78</sup> In 2001 and 2002, the United States Justice Department opened 127 trafficking investigations where seventy-nine defendants were charged in twenty cases.<sup>79</sup>

Consequently, Congress enacted the Communications Decency Act (CDA), as their first attempt to regulate the Internet revolution.<sup>80</sup> In *Reno v. American Civil Liberties Union*, the United States Supreme Court removed the original language of the CDA criminal liability provisions.<sup>81</sup> The Court concluded even if the CDA

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<sup>77</sup> 22 U.S.C. § 7102 (defining commercial sex as “any act on account of which anything in value is given to or received by any person.”); see Hewat & Leslie, *supra* note 5, at 3 (explaining how the TVPA does not require evidence of coercion or fraud to determine sex trafficking); see also Mark Latonero, *Human Trafficking Online: The Role of Social Networking Sites and Online Classifieds*, 19 (2001), [https://technologyandtrafficking.usc.edu/files/2011/09/HumanTrafficking\\_FINAL.pdf](https://technologyandtrafficking.usc.edu/files/2011/09/HumanTrafficking_FINAL.pdf) (describing the impact of technology on sex trafficking and online classifieds on the internet); see *Human Trafficking Fact Sheet*, POLARIS PROJECT (2014) [hereinafter POLARIS PROJECT FACT SHEET] <https://www.polarisproject.org/storage/child-trafficking-child-welfare.pdf> (defining use of force as “use of rape, beatings and confinement to control victims). Moreover, forceful violence is used during the beginning stages of victimizations, known as the “seasoning process” which is used to break the victim’s hesitation to make them easier to control. *Id.*; see Zabresky, *supra* note 12 (explaining that due to the nature of the action and the age of the child, one could assume that victim does not need consent to sexually act).

<sup>78</sup> See Elizabeth K. Hopper, *Under-Identification of Human Trafficking Victims in the United States*, 5 J. OF SOC. WORK RES. & EVALUATION 125, 126 (2004) (explaining how the United States government did not monitor trafficking until 1994); see also Frank Laczko, *Human Trafficking: The Need for Better Data*, MIGRATION POLICY INSTITUTE (Nov. 1, 2002), <http://www.migrationpolicy.org/print/4905#.VirZR4QgC98> (describing that until the mid-1990’s trafficking was considered a form of human smuggling and a type of illegal migration into the United States).

<sup>79</sup> *Id.*

<sup>80</sup> 47 U.S.C. § 230(c)(1) (2015); see Silvano, *supra* note 7, at 383 (explaining how the CDA was created to regulate the new and growing internet medium).

<sup>81</sup> *Reno v. Am. Civil Liberties Union*, 521 U.S. 844, 873, 895 (1997) (acknowledging that the government has recognized the interest in protecting victims of human trafficking).

fundamentally protected children from harmful Internet materials, it also burdened adult speech, thus violating the First Amendment of the U.S. Constitution.<sup>82</sup> Also, in *Doe v. GTE Corp.*, the Court held that the CDA protects Internet service providers, such as classified advertisement websites, from liability when minors have been victimized by sexually explicit content.<sup>83</sup> In *Dart v. Craigslist*, the Court found Craigslist immune from liability for the postings pursuant to the CDA.<sup>84</sup> The Court also concluded that the users of Craigslist provided the offensive information, not the website itself.<sup>85</sup> Similarly, in *Doe v. Bates*, the Court held that while there was child pornography taking place in the chat hosted by Yahoo, Congress did not intend to deter the Internet service providers but instead “those who created and posted the illegal material.”<sup>86</sup>

Congress then enacted Section 230 of the CDA, which provides classified websites immunity from liability since they are an “interactive computer service.”<sup>87</sup> An interactive computer service

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<sup>82</sup> *Id.* at 845 ((explaining how the “CDA’s burden on adult speech is unacceptable if less restrictive alternatives would be at least as effective in achieving the Act’s legitimate purposes.”); U.S. CONST. amend. I.

<sup>83</sup> *Doe v. GTE Corp.*, 347 F.3d 655, 656 (7th Cir. 2003); *See Silvano supra* note 7, at 375, 380 (explaining how the Seventh Circuit addressed the need for narrower interpretation of the CDA).

<sup>84</sup> *Dart v. Craigslist, Inc.*, 665 F. Supp. 2d 961, 969 (N.D. Ill. 2009) (explaining that the court concluded that Craigslist does not “induce anyone to post any particular listing and is thus not liable as a publisher.”). The court found that Sheriff Dart’s reference to 18 U.S.C. § 1592 does not bring the case into the CDA’s federal criminal law exception. *Id.*

<sup>85</sup> *Dart v. Craigslist, Inc.*, *supra* note 84, at 967 (explaining the defense that Craigslist used in the court to diminish liability or responsibility of the sexually explicit posts).

<sup>86</sup> *Doe v. Bates*, 35 Media L. Rep. 1435 (E.D. Tex. 2006) (explaining how plaintiff sued Yahoo for hosting pornography on its chat group, and was unsuccessful).

<sup>87</sup> 47 U.S.C. § 230(f)(2) (2015) (defining “interactive computer service” [as] “any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet and such systems operated or services offered by libraries or educational institutions.”).

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cannot be treated as a publisher or a speaker of third content.<sup>88</sup> The legislative's fundamental intent in enacting the CDA was to continue development and preservation of the free Internet market.<sup>89</sup> Furthermore, the CDA intended to "promote prosperity of the Internet as a medium and a marketplace."<sup>90</sup> Section 230 was enacted to improve Internet communication and keep government interference at a minimum.<sup>91</sup> Even though the statute provides little to no intrusion from the U.S. government, CDA opened a floodgate for the Internet to become a "favored means of advertising the availability of children for sex."<sup>92</sup>

The courts used a three-part inquiry test to determine immunity under the CDA, which has become the main topic of controversy.<sup>93</sup> To determine whether a criminal state law claim is consistent with the CDA, the courts look at: (1) whether the defendant is a provider of an interactive computer service; (2) if the posting at issue are information provided by another information content provider; and (3) whether plaintiff's claims seeks to treat

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<sup>88</sup> See Silvano, *supra* note 7 (describing one of the two ways the CDA provides immunity to classified websites); see also Zabresky, *supra* note 12 (explaining that the Communications Decency Act protects Web companies against liability for what users post on their sites).

<sup>89</sup> *Id.* (explaining that the federal statute is to preserve the free market of the Internet which is untouched by the Federal government or States).

<sup>90</sup> See 47 U.S.C. § 230(b)(1)–(5). *Id.*; see also Silvano, *supra* note 7, at 401 (explaining the two primary reasons why Congress enacted the CDA was: (1) to encourage free speech; and (2) develop the internet and encourage computer services to self-police the Internet for obscenity).

<sup>91</sup> 47 U.S.C. § 230(b)(1)–(2) (describing how the purpose of the CDA is to "promote the continued development of the Internet . . . [and] to preserve the vibrant and competitive free market that presently exists for the Internet . . . unfettered by Federal or State regulation); see Abigail Kuzma, *A Letter to Congress: The Communications Decency Act Promotes Human Trafficking*, 34:1 CHILD. LEGAL RTS. J. 23, 35 (2013) (explaining how § 230 was used to maintain the robust nature of Internet communication).

<sup>92</sup> *Backpage.com, LLC v. Cooper*, 939 F. Supp. 2d 805, 825 (M.D. Tenn. 2013) (concluding that criminal statutes are inconsistent with § 230). Further, the court treats Backpage as a publisher of third-party users, thus preempted by the CDA. *Id.*

<sup>93</sup> See Silvano, *supra* note 7, at 375 (explaining how the three-part inquiry used by the CDA to determine whether immunity of liability could be applicable).

defendant as a publisher or speaker of a third-party content.<sup>94</sup> If the response to each question is yes, then immunity from liability should be allowed, thus a state's criminal law "cause of action is inconsistent with the CDA."<sup>95</sup> Therefore, state law claims would not stand because civil and criminal liabilities are preempted by the CDA.<sup>96</sup>

CDA Section 230(c)(1) and 230(c)(2) nearly provides full immunity for Internet service providers insofar as they publish content by others.<sup>97</sup> Considering this, an Internet Service Provider, such as the classified websites at issue, cannot be held liable as an editor of the content of other's postings. Also, Section 230(c)(2)(A) and 230(c)(2)(B) protects Internet service providers if they do perform editorial action if the website's action is "voluntarily taken in good faith" to restrict access or offensive material.<sup>98</sup> The courts have and continue to hold the CDA valid, thus, giving full protection to these websites.<sup>99</sup> Essentially, Internet providers walk away from any liability.

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<sup>94</sup> *Gibson v. Craigslist, Inc.*, No. 08 Civ. 7735 (RMB), 2009 WL 1704355, at \*3 (S.D.N.Y. Jun. 15, 2009) (quoting *Nemet Chevrolet, Ltd. V. Consumeraffairs.com, Inc.*, 564 F. Supp. 2d 544, 548 (E.D. Va. 2008)); see generally *Batzel v. Smith*, 333 F.3d 1018, 1037 (9th Cir. 2003) (Gould, J., concurring in part and dissenting in part); see *Silvano supra* note 7, at 397 (explaining that this framework allows the courts to examine whether the plaintiff was likely to succeed on the merits in determining the likelihood of CDA preemption).

<sup>95</sup> See *Gibson v. Craigslist, Inc.*, at \*3-4; but see *Silvano, supra* note 7, at 375, 380 (explaining how provisions of the CDA are challenging for courts to interpret because it does not define with clarity what type of state laws are consistent with the CDA).

<sup>96</sup> See *Kuzma, supra* note 91, at 38 (explaining that if the state law is preempted by the federal statute of the CDA, liability will not be enforced). Additionally, any case brought under that state law from thereafter would not stand. *Id.*

<sup>97</sup> See *id.* at 34 (explaining how § 230(c)(1) clarifies that an ISP is not a publisher or speaker with respect to the information posted by others on its classified advertising website).

<sup>98</sup> 47 U.S.C. § 230(c)(2)(A).

<sup>99</sup> See *id.* at 34 (explaining how lawsuits against Backpage have held that the CDA protects ISPs from liability when there has been a minor harmed by human sex trafficking).

### A. *Environmental Conditioning Factors*

Since the invention of the Internet, newspapers are fading into history.<sup>100</sup> Within the Internet, there are websites known as “classified advertising websites” which function similarly to newspaper classifieds.<sup>101</sup> Individuals in classified advertising websites can post an advertisement grouped by categories, services, seeking friendship, companionship, or romance.<sup>102</sup> In 2007, 32% of adults in the United States reported using websites, such as Craigslist.com.<sup>103</sup> In 2010, that percentage rose to 53%.<sup>104</sup> Each of these websites includes a section for “adult services” or “dating,” which allows users to post advertisements offering or requesting sexual services.<sup>105</sup> Due to the increase and expansion of classified websites across the nation, a substantial amount of media outlets

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<sup>100</sup> See Silvano *supra* note 7, at 375, 380 (describing the evolution and expansion of the Internet); see also Jonathan D. Bick, *Why Should the Internet Be Any Different?*, 19 PACE L. REV. 41, 45 (1998) (explaining how the Internet has become a key to communication today); Olivera Medenica & Kaiser Wahab, *Does Liability Enhance Credibility?: Lessons from the DMCA Applied to Online Defamation*, 25 CARDOZO ARTS & ENT. L.J. 237, 238 (2007) (referring to the Internet as “the heart and soul of global culture and society.”); Ryan D. O’Day, Note, *Rapists, Sexual Offenders, and Child Molesters: Who Is Your Romantic Match? Why Dating Websites Should Perform Criminal Background Checks*, 48 VAL. U. L. REV. 329, 341–42 (2013) (discussing the evolution of the Internet and the many ways which people use the Internet in the present day).

<sup>101</sup> Maurice A. Deane, *Tax Credits For Tattletales: Legislating To Catch Craigslist Criminals*, 42 HOFSTRA L. REV. 693, 698 (explaining how some classified websites have discussion forums, and several categories of advertisements).

<sup>102</sup> *Online Personal Ads & Dating Chat Abbreviations*, WEBOPEDIA, (June 12, 2009), [http://www.webopedia.com/quick\\_ref/onlinepersonalsabbreviations.asp](http://www.webopedia.com/quick_ref/onlinepersonalsabbreviations.asp) (defining a “personal” to be a posting that an individual post on a classified advertising website looking for individual purposes).

<sup>103</sup> See Latonero, *supra* note 77, at 12 (describing the impact of technology and sex trafficking within online classifieds on the Internet).

<sup>104</sup> See *id.* at 12 (explaining how from September 2007 to May 2010 there was more than a twenty percent increase in Internet users using classified advertising websites).

<sup>105</sup> See Silvano, *supra* note 7, at 382 (explaining what a user needs to do to create a post on Backpage).

sought to expose traffickers using these types of Internet postings to advertise trafficked victims.<sup>106</sup>

**Table 1: Totals of Internet Involvement for Identified Sex Trafficking Incidents**

	All Sex Trafficking Suspects (including minor sex trafficking)	Minor Sex Trafficking Suspects
Number of Suspects	3,306	1,532
Utilized Internet (number/percentage of suspects)	870/26.31%	457/29.83%
Internet Users who Utilized Backpage.com (number/percentage of internet users)	313/35.97%	151/33.04%

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Legal issues began to emerge when the Sheriff of Cook County sued the online classified website, Craigslist, claiming that it was a public nuisance,<sup>108</sup> and that the website contributed to the solicitation of prostitution.<sup>109</sup> When the notice that this lawsuit was dismissed, Attorneys General across the U.S. persisted in placing pressure on Craigslist and other sites that showcased adult services on the Internet.<sup>110</sup> On August 2010, seventeen Attorneys General

<sup>106</sup> See Latonero, *supra* note 77 (describing the purpose behind classified advertising websites).

<sup>107</sup> See *Akron/Canton Backpage Report* (2015) <http://www.victimassistanceprogram.org/media/8731/akron-canton-backpage-report-2015.pdf> (last visited Dec. 12, 2016). The table is describing a breakdown of the Backpage incidents and the total amount within the study that included minors involved in the ads within Backpage. *Id.*

<sup>108</sup> BLACK'S LAW DICTIONARY (10th ed. 2014) (defining public nuisance as "an unreasonable interference with a right common to the general public, such as . . . offensive to community moral standards, or unlawfully obstructing the public in the free use of public property); see also *Dart v. Craigslist, Inc.*, 665 F. Supp. 2d 961, 963 (N.D. Ill. 2009) (finding Craigslist immune from liability with respect to postings under the CDA).

<sup>109</sup> See Latonero, *supra* note 77, at 49 (describing that in March 2009, Sheriff Dart from Illinois, Cook County filed a lawsuit against Craigslist). Further, the lawsuit alleged "Missing children, runaways, abused women, and women trafficked in from foreign countries are routinely forced to have sex with strangers because they [are] being pimped on Craigslist. *Id.*

<sup>110</sup> Linda Smith & Samantha Healy Vardaman, *A Legislative Framework for Combating Domestic Minor Sex Trafficking*, 23 REGENT U. L. REV. 266, 291 (2011) (explaining how an estimated amount of forty Attorney Generals joined to stop the adult services sections from Craigslist); see generally Shahrzad T. Radbod, *Craigslist – A Case for Criminal Liability for Online Service Providers*,

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demanded that Craigslist remove its adult section.<sup>111</sup> Successfully, in September 2010, in response to the pressure of the Attorneys General, Craigslist removed their adult section.<sup>112</sup> However, a new classified website arose named Backpage.com (Backpage).<sup>113</sup> Backpage benefitted a 15% increase in revenue on its webpage from advertisements being posted.<sup>114</sup> Backpage attracted users who formerly advertised commercial sex on Craigslist.

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25 BERKELEY TECH. LAW J. 598, 609 (2010) (describing some of the State Attorney Generals that were opposed to Craigslist “adult services” were from New York, South Carolina, Illinois, and etc.); *see generally* Lawrence G. Walters, *Shooting the Messenger: An Analysis of Theories of Criminal Liability Used against Adult-Themed Online Serv. Providers*, 23 STAN. L. & POL’Y REV. 171, 178 (2012) (discussing recent criminal actions against online service providers, and the potential for more, and the existing protections from civil liability provided to such classified websites). Craigslist was named the leader of prostitution advertising online before Backpage emerged. *Id.*

<sup>111</sup> *See* Kuzma, *supra* note 91, at 31 (explaining that these demands from Attorneys General was due to the increase in prostitution advertising on Backpage); *see also* *Attorneys General Want Craigslist ‘Adult Services’ Shut down*, REUTERS (Aug. 26, 2010) <http://www.reuters.com/assets/print?aid=US419264813320100826>. The seventeen Attorneys General were from: Arkansas, Connecticut, Idaho, Illinois, Iowa, Kansas, Maryland, Michigan, Mississippi, Missouri, New Hampshire, Ohio, Rhode Island, South Carolina, Tennessee, Texas, and Virginia. *Id.*; *see generally* 48 C.F.R. § 2.1702 (2012) (explaining how under Federal law, a minor that is induced to perform a sexual act is considered a victim of human trafficking). Thus, under this federal standard, prostituted children are thought to be trafficked victims. *Id.*

<sup>112</sup> *See id.* at 31 (describing the result after years of criticism and pressure to remove the adults services section from Craigslist).

<sup>113</sup> James R. Hood, *New Village Voice Owners Leave Backpage.com Behind*, NEWS TRIBUNE (Sept. 26, 2012), <http://www.newstribune.com/news/2012/sep/26/new-village-voice-owners-leave-backpagecom-behind/>.

<sup>114</sup> *See* Silvano, *supra* note 7, at 375 (explaining a fifteen percent increase in revenue for Backpage); *see also* Nicholas D. Kristof, *How Pimps Use the Web to Sell Girls*, N.Y. TIMES (Jan. 26, 2012), <http://www.nytimes.com/2012/01/26/opinion/how-pimps-use-the-web-to-sell-girls.html> (stating that Backpage makes more than twenty-two million dollars a year from “adult” advertising); BACKPAGE, <http://www.backpage.com/> (last visited Dec. 13, 2016); *see also* Wendi Adelson, *Child Trafficking and the Unavoidable Internet*, 19 SW. J. INT’L L. 281 (2012–2013) (explaining how Backpage has an estimate of 14,000 adult ads a day). Trying to find ads that are suspicious in nature is like “trying to find a needle in a haystack.” *Id.* *See also* Kimberly A. McCabe, *The Role of Internet Service*

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Even though the Attorneys General used the same strategy to intimidate Backpage, they did not succeed. Backpage claimed that they are not involved in human trafficking since they “corroborate” with law enforcement on any suspicious activity on their website.<sup>115</sup> Backpage has also invoked its First Amendment rights stating that by forcing Backpage to remove its advertisements, it violates its ability to express its free speech and others to perform the act of posting advertisements on Backpage.<sup>116</sup> The U.S. Constitution clearly expresses that “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or the press; or the right of the people peaceable to assemble, and to petition the government for redress of grievances.”<sup>117</sup>

Backpage also invoked CDA Section 230, where the federal statute clearly does not place the culpability of the trafficking of children on these classified websites, because they are classified as “non-publishers.”<sup>118</sup> The courts within district levels are interpreting the Act broadly by not placing these classified websites as “publishers,” therefore, they are not criminally liable to human

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*Providers in Cases of Child Pornography and Child Prostitution*, SOC. SCI. COMPUTER REV. 247, 250 (2008) (“child [sex] trafficking . . . is today more likely to involve the use of the Internet than in any other time in society.”).

<sup>115</sup> *See id.* (explaining that Backpage became a “hub” for sex trafficking and the Attorneys General identified cases in twenty-two different states where pimps sold underage girls through the website). Additionally, the Attorneys General made countless efforts altering Backpage through letters requesting the company to remove its adult services section. *Id.*

<sup>116</sup> *See* U.S. CONST. amend. I; *see also* Johnson v. Arden, 614 F.3d 785, 790-92 (8th Cir. 2010); *see also* Murawski v. Pataki, 514 F.Supp.2d 577, 590-91 (S.D.N.Y. 2007); *see generally* Backpage.com, LLC v. Hoffman, 2013 WL 4502097 at \*12 (deciding that the enacted New Jersey statute was a violating of the dormant commerce clause and it restricted free speech pursuant to the First Amendment of the United States constitution). In addition, the statute was held to regulate internet activities and projecting its legislation into other states. *Id.* at \*11–12.

<sup>117</sup> U.S. CONST. amend. I.

<sup>118</sup> *See* 47 U.S.C. § 230 (elaborating on the civil and criminal liability immunity the federal statute provides classified websites).

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trafficking minors within their websites.<sup>119</sup> However, these websites include postings that clearly identify minors are being sold in exchange for sex. Third parties use titles such as “barely legal” or “out of college.”<sup>120</sup> Regrettably, the courts and law enforcement are dismissing these websites of any guilt of trafficking minors.<sup>121</sup>

It was believed that the situation for Backpage was changing, but clearly it remained the same. On October 6, 2016, CEO Carl Ferrer and two men, who founded Backpage, were charged with pimping a minor.<sup>122</sup> This was the first time any criminal charges had been brought against Backpage, or any of its executives.<sup>123</sup> The investigation against Backpage took a total of three years, which included interviews of children explaining how they were forced into prostitution via Backpage ads.<sup>124</sup> The CEO was subpoenaed by the U.S. Senate last fall to respond to some concerns in regards to reported child sex-trafficking ads on Backpage, but failed to answer or appear in court. After several months of the charges in dispute, the

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<sup>119</sup> See Silvano, *supra* note 7, at 380 (explaining that the CDA immunity has been applied broadly in the court system).

<sup>120</sup> See Kuzma, *supra* note 86 (describing the vocabulary traffickers’ use to help buyers notice that the individual on the online advertisement is underage).

<sup>121</sup> Dominique Roe-Sepowitz et al., *Invisible Offenders: A Study Estimating Online Sex Customers*, ARIZ. ST. U. SCH. OF SOC. WORK (2013), [http://www.traffickingresourcecenter.org/sites/default/files/Study%20Estimating%20Online%20Sex%20Customers%20-%20ASU\\_0.pdf](http://www.traffickingresourcecenter.org/sites/default/files/Study%20Estimating%20Online%20Sex%20Customers%20-%20ASU_0.pdf) (comparing to the high-level risk of being caught by police like the street level prostitution and pimps do).

<sup>122</sup> Christopher Mele, *C.E.O. of Backpage.com, Known for Escort Ads, Is Charged with Pimping a Minor*, THE N.Y. TIMES (Oct. 6, 2016) [http://www.nytimes.com/2016/10/07/us/carl-ferrer-backpage-ceo-is-arrested.html?\\_r=0](http://www.nytimes.com/2016/10/07/us/carl-ferrer-backpage-ceo-is-arrested.html?_r=0) (explaining how the charges were filed in California Superior Court). The individuals arrested were not charged with trafficking minors. *Id.*

<sup>123</sup> See *id.* (stating that in the warrant filed by a special agent of the California Department of Justice the CEO and the other defendants knew about the illegal sex trade on their websites). The victim(s) included children. *Id.*

<sup>124</sup> See *id.*; Camila Domonoske, *CEO of Backpage.com Arrested, Charged With Pimping*, NPR (Oct. 7, 2016) <http://www.npr.org/sections/thetwo-way/2016/10/07/497006100/ceo-of-backpage-com-arrested-charged-with-pimping> (explaining how California’s Attorney General, Kamala Harris describes Backpage as a “purposefully and unlawfully designed” as an online brothel).

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California court dismissed Backpage's pimping case.<sup>125</sup> The Court reaffirmed the Section 230 of the CDA stating, "Congress has precluded liability for online publishers for the action of publishing third party speech and thus provided for both a foreclosure from prosecution and an affirmative defense at trial."<sup>126</sup>

After this ruling, several attorneys from the Attorney General's office requested to present additional arguments and evidence to demonstrate that Backpage "created content rather than publish[ed] material supplied by third parties, which might make them liable for criminal conduct."<sup>127</sup> Even though the Court allowed these requests to go through, the prosecuting attorneys failed. Defense attorneys for the defendants argued that the Attorney General "cannot cast defendants as 'content creators' simply because they designed and launched websites."<sup>128</sup> The public policy behind this argument is that if every interactive website were to be held accountable for what users post, then this type of industry within the

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<sup>125</sup> *People v. Ferrer*, 2016 WL 6905743 (Cal. Super.); Stephen Lemons, *Kamala Harris' Epic Fail: California Judge Dismisses Backpage Pimping Case*, PHOENIX NEW TIMES (Dec. 10, 2016, 10:14 AM), <http://www.phoenixnewtimes.com/news/kamala-harris-epic-fail-california-judge-dismisses-backpage-pimping-case-8892833> (describing how the Sacramento County Super Court dismissed all criminal charges against Backpage's CEO, Carl Ferrer and two co-founders, Michael Lacey and Jim Larkin). Even though the co-founders had sold their interest in Backpage in 2014, the Attorney General had charged all three men with one count of conspiracy to pimp. *Id.* See also *M.A. v. Village Voice Media*, 809 F.Supp.2d 1041, 1043-44 (E.D. Miss. 2011) (explaining how a minor was trafficked in part because of advertisements through Backpage). The court rejected her claim and held that Backpage retained its immunity pursuant to § 230 of the CDA. *Id.* This case establishes that the creator of the content, not the entity is the one who is held responsible for having aided or abetted any human trafficking. *Id.*

<sup>126</sup> See *People v. Ferrer*, *supra* note 125. (explaining how in Judge Bowman's decision he stated "Congress has spoken on this matter and it is for Congress, not this Court, to revisit."); see also Sophia Cope, *Court Ruling Against Backpage.com is a Setback for Online Speech in Washington State*, ELECTRONIC FRONTIER FOUND. (Sept. 8, 2015), <https://www.eff.org/deeplinks/2015/09/court-ruling-against-backpagecom-setback-online-speech-washington-state>.

<sup>127</sup> See Lemons, *supra* note 125.

<sup>128</sup> See *id.* (explaining how the defense attorneys stated that if this were the rule, then "Section 230 [of the CDA] would be a dead letter").

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Internet would cease to exist.<sup>129</sup> Furthermore, the viable argument stands in regards to the limitation of what an individual can or cannot post. Clearly, there is a bold issue regarding one's free speech and the right to speak freely.<sup>130</sup> Regrettably, the Court used the CDA as a shield to what is happening in these websites.

With the media exposing negative stories, some of its supporters have turned their backs on websites like Backpage. For example, several companies, such as H&M, IKEA, and Barnes and Nobles, decided to cancel advertisements on their webpages related to Backpage.<sup>131</sup> Visa also ended processing payments to Backpage after was accused of promoting prostitution and child trafficking through the website's adult services ads.<sup>132</sup> Backpage's downfall is attributed to the lack of revenues it lost from big corporations. While companies are looking out for their best interests, they do not want to be associated with a website that conducts or promotes illegal activity such as trafficking minor children and exploitation.<sup>133</sup> This was the product and work of Cook County Sheriff Tom Dart, a vocal

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<sup>129</sup> See *id.* (explaining how Judge Bowman stated that "reformatting original content is traditional editorial function"). The victimization that occurred was the result of a third party placing the ad, not Backpage's fee or subsequent republication. *Id.*

<sup>130</sup> See U.S. CONST. amend. I; see generally Paul Ehrlich, *Communications Decency Act § 230*, 17 BERKELEY TECH. L.J. 401, 401 (2002) (providing characteristics of the Internet responsible for a prevalence in harmful speech and discussing the issues related to regulating speech in the Internet field); see also Amanda Groover Hyland, *The Taming of the Internet: A New Approach [to] Third-Party Internet Defamation*, 31 HASTINGS COMM. & ENT. L.J. 79, 109–10 (2008) (discussing the First Amendment Interests at stake in Internet cases involve Section 230 of the CDA).

<sup>131</sup> See *Child and Youth Sex Trafficking*, *supra* note 30.

<sup>132</sup> See Thomas Lee, *Visa Stops Backpage payments, which is bad news for free speech*, SAN FRANCISCO CHRONICLE (Sept. 10, 2015, 4:40 PM), <http://www.sfchronicle.com/business/article/Visa-stops-Backpage-payments-which-is-bad-news-6496927.php> (explaining how Visa stated that they are free to do business with whoever it chooses). Other credit cards such as American Express and Mastercard also cut the cord due to these types of media and public scandals. *Id.*

<sup>133</sup> See *Human Trafficking & Online Prostitution Advertising*, *supra* note 39 (explaining how a listing of "sex-related ads has prompted several companies to pressure the site to remove those listings").

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opponent of Backpage.<sup>134</sup> Sheriff Dart finally saw these companies withdraw their support from Backpage, which was a step closer to ending child trafficking on these websites. Groups, like Google and Facebook, have lobbied to Congress to shut down Backpage.<sup>135</sup> Backpage's response to these attacks is "escort-service advertising online is legal and efforts to curtail Backpage violate[s] the First Amendment."<sup>136</sup>

To counteract these accusations, Backpage donated about \$1 million dollars to Children of the Night.<sup>137</sup> However, one act of kindness cannot bring back the lives of hundreds and thousands of minors trafficked on Backpage every single day. In the end, Backpage will continue to hide behind the CDA as long as the courts

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<sup>134</sup> See Kim Bellware, *Credit Card Companies Abandon Backpage.com Over Sex Trafficking Complaints*, THE HUFFINGTON POST (July 1, 2015, 12:40 PM), [http://www.huffingtonpost.com/2015/07/01/backpagecom-credit-cards\\_n\\_7705708.html](http://www.huffingtonpost.com/2015/07/01/backpagecom-credit-cards_n_7705708.html) (explaining how Sheriff Dart has been fighting sex trafficking and child exploitation for many years). Dart sued Craigslist in the past for the type of ads that Backpage is currently running. *Id.* Since American Express, Visa, and MasterCard have stopped processing payments for Backpage, anyone who desired to put an adult service ad on Backpage needs to pay with cryptocurrency bitcoin. *Id.* Backpage took Sheriff Dart to federal court claiming that it was a violation of the First Amendment pressuring credit-card companies to block Backpage transactions. *Id.* Further, Sheriff Dart appealed this matter to the U.S. Supreme Court; see generally H.R. 3244, *supra* note 76.

<sup>135</sup> See John D. McKinnon, *Is Backpage.com a Champion of Web Freedoms or a "Dystopian Hell"?*, THE WALL STREET J., <http://www.wsj.com/articles/is-backpage-com-a-champion-of-web-freedoms-or-a-dystopian-hell-1468256330> (explaining how Congress has reacted in regards to the lobbyists). They created a bill, which later died, that required firms hosting adult ads to determine the ages of people in the ads. *Id.*

<sup>136</sup> See *id.* (explaining how Backpage's general counsel, Elizabeth McDougall, used the First Amendment as a defense). Ms. McDougall also stated, "I believe that the other industry participants and other industry organizations likely share our beliefs in this regard." *Id.* Backpage has won over half a dozen major cases involving pressure by state and local officials alongside with trafficked victim and alleged civil wrongdoing. *Id.* The courts have ruled based on the CDA, thus, absolving Backpage from responsibility for user posts. Additionally, McDougall claims that Backpage cooperates with the police: "we are able to assist with rescues and arrests and convictions, and I am not going to stop doing that." *Id.*

<sup>137</sup> *Id.* (explaining that Children of the Night provides residential care for victims). "They are First Amendment people, they're not pimps." *Id.*

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and Congress decide otherwise, and will be protected from “internet services that host or republish third-party speech from liability under state civil and criminal laws, and many kinds of federal law.”<sup>138</sup>

The main issue is the courts within the U.S. are not viewing classified websites as publishers, and continue to provide publishers with overbroad immunity from both civil and criminal liability. Generally, the CDA is treating classified websites “similarly to how laws treat common carriers such as, phone companies.”<sup>139</sup> The CDA has been referred to as the “Communications Indecency Act” by some federal judges.<sup>140</sup> Congress has enforced federal criminal laws against the original culpable parties and has encouraged Internet service providers to “self-regulate” the offensive materials in their websites.<sup>141</sup> Under the CDA, even when Internet service providers, such as Backpage, have actual knowledge of illegal activity such as trafficking minors on their websites, there is no statutory or common law authority that compels them to remove offending material.<sup>142</sup> Although numerous states have made countless efforts to enact a law

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<sup>138</sup> *Id.*

<sup>139</sup> *Id.*

<sup>140</sup> William H. Freivogel, *Does the Communications Decency Act Foster Indecency?*, 16 COMM. L. & POL'Y 17, 17 (2011) (explaining how “[s]ome influential federal judges argue that such broad immunity turns the Communications Decency Act into a communications indecency act”). The author believes the CDA could also be classified as the “Total Liability Protection for Internet service providers, Even in the Context of Known Danger to Children Act. *Id.*

<sup>141</sup> *Zeran v. Am. Online, Inc.*, 129 F.3d 327 (4th Cir. 1997) (explaining how the Plaintiff filed civil action against AOL for unreasonably delaying defamatory messages posted by an unidentified third-party and for failing to screen similar postings thereafter). Immunity provision under § 230(c) states that the lawsuits seeking to hold a service provider liable for its exercise of a publisher’s traditional editorial functions are barred. *Id.*; see David R. Sheridan, *Zeran v. AOL and the Effect of Section 230 of the Communications Decency Act Upon Liability for Defamation on the Internet*, 61 ALB. L. REV. 147, 168 (1997) (arguing that Congress knew the true difference between “publisher” and “distributor,” and if it did intend for the CDA to apply to distributors, it would have been expressed within the actual Act).

<sup>142</sup> See Kuzma, *supra* note 91, at 36 (explaining that even if Backpage does find suspicious material, it is not required to remove the post even if informed by law enforcement that the post involves a trafficked victim).

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that would criminalize classified advertising websites, these states have either failed or have been ignored by the courts.<sup>143</sup>

States like New Jersey and Washington have tried to enact laws to combat sex trafficking of minors online.<sup>144</sup> The overall sole

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<sup>143</sup> See Silvano, *supra* note 7, at 390 (explaining how recent proposed state statutes criminalizing the knowing publication of minor sex trafficking advertisements online led to “contentious litigation in district courts” between Backpage and the states); see also WASH. REV. CODE ANN. § 9.68A.103 (2013). *Id.* Washington enacted a law that criminalized commercial abuse of a minor. *Id.* Washington was one of the first states to fight in the combat against child human trafficking. *Id.*; see Kuzma, *supra* note 91, at 38 (stating that the Washington law was found to be “inconsistent with § 230 because it criminalizes the “knowing” publication, dissemination, or display of specified content.”); but see Fair Hous. Council v. Roommates.com, LLC, 521 F.3d 1157, 1164 (9th Cir. 2008) (stating that the court clarified that the CDA provides immunity). Additionally, the court mentioned “there will always be close cases where a clever lawyer could argue that something the website operator did encouraged the illegality . . . such cases must be resolved in favor of immunity . . . .” *Id.*; see Wendy Davis, *Backpage Seeks Dismissal of Sex-Trafficking Suit*, MEDIAPOST (Jan. 7, 2013, 6:00 PM) <http://www.mediapost.com/publications/article/190496/backpage-seeks-dismissal-of-sex-trafficking-suit.html#axzz2081EqUQf>; see also Sara Lerner, *Washington Settles Over Failed State Sex Trafficking Law*, KUOW.ORG (Dec. 12, 2012, 8:57 AM), <http://kuow.org/post/washington-settles-over-failed-state-sex-trafficking-law> (stating that the law was overturned with Washington State paying \$200,000 in legal fees and that the issue will not be taken to appeal. The Constitutionality of this statute was called into question by a case involving Backpage; see also *Backpage.com, LLC v. McKenna*, 881 F. Supp. 2d 1262, 1270 (W.D. Wash. 2012) Backpage sued the state attorney, claiming among other things, that this law is preempted by the Communications Decency Act. *Id.* at 1271. The court held that injunctive relief was warranted because Backpage is more likely than not to succeed on the merits. *Id.* at 1286.

<sup>144</sup> N.J. STAT. ANN. § 2C:13-10 (2013). *Id.* The statute provides that any person that commits the offense of advertising sexual commercial abuse of a minor shall be guilty of a crime of the first degree. *Id.* See TENN. CODE ANN. § 39-13-315 (2012); see Silvano, *supra* note 7, at 391 (explaining how the Washington and New Jersey statutes are nearly identical in text and they criminalize the knowing publication, dissemination, or display). The Tennessee’s statute is different but it also focuses on the criminalization of the knowing sale or offer for sale of an advertisement including a criminal sex act with a minor, and therefore it has the very same effect as the Washington and New Jersey statutes. *Id.*; but see CONN. GEN. STAT. ANN. § 53a-196i (West 2012) (comparing how the Connecticut statute has not faced judicial scrutiny because it only applies to users of classified advertising websites, not the websites themselves); see generally Radbod, *supra*

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purpose of the states' is to combat sex trafficking minors online.<sup>145</sup> However, these proposed statutes have only led to heavy litigation in district courts between websites like Backpage and the states.<sup>146</sup> The courts blindly rely on Backpage's word that the website's personnel "manually review[s] nearly all content" submitted to posting by third parties.<sup>147</sup> Congress should not entrust these classified websites to self-police third-party posts.<sup>148</sup> Furthermore, by Congress allowing

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note 110 (explaining how the proposed statute in New Jersey could hold operators liable if they do not provide a reporting link). Additionally, if this statute were to have passed by Congress, it would have impacted interactive computer services providers. *Id.*

<sup>145</sup> *See id.* at 392 (explaining how the New Jersey legislature found that there were classified advertising websites that were selling the services of girls as "escorts" falsely claiming that the girls were eighteen years of age). Therefore, the girls that looked like adults were actually minors. *Id.*

<sup>146</sup> Radbod, *supra* note 104, at 390 (explaining that Washington, Tennessee, New Jersey, and Connecticut were the states involved in the litigation issues for the proposed statutes criminalizing Backpage). These proposed statutes described that the prohibited defense was allowed if a defendant made a reasonable, good faith effort to determine the actual age of the of the minor portrayed in the advertisement. *Id.* The proposed statutes expressed that it was not a defense when the defendant did not know the age of the minor depicted in the advertisement. *Id.*

<sup>147</sup> *Id.* at 406 (explaining that Backpage admits to manually filtering the posts).

<sup>148</sup> *Id.* at 394 (explaining how Congress has permitted self-policing to classified advertising websites with the intention of encouraging interactive computer services and restrict online material in a voluntary manner); Patricia Spiccia, *The Best Things In Life Are Not Free: Why Immunity Under Section 230 of the Communications Decency Act Should Be Earned and Not Freely Given*, 48 VAL. U. L. REV. 369, 399 (2013) [hereinafter *The Best Things In Life Are Not Free*] (stating that no incentive exists for ISPs that refuse to self-regulate). Thus, ISPs do not have the incentive to behave like Good Samaritans like Congress sought to protect when it passed § 230. *Id.*; *see generally* *Internship Censorship Listed: How Does Each Country Compare?*, THE GUARDIAN, (Apr. 16, 2012), <https://www.theguardian.com/technology/datablog/2012/apr/16/internet-censorship-country-list>; *see also* Elizabeth Flock, *What Internet Censorship Looks Like Around the World*, WASH. POST (Jan. 18, 2012, 3:41 PM), [http://www.washingtonpost.com/blogs/blogpost/post/internet-censorship-what-does-it-look-like-around-the-world/2012/01/18/glQAdv4q5P\\_blog.html](http://www.washingtonpost.com/blogs/blogpost/post/internet-censorship-what-does-it-look-like-around-the-world/2012/01/18/glQAdv4q5P_blog.html); *see also* Cooper, 939 F. Supp. 2d at 825 (explaining how Congress encouraged self-policing for classified websites to report information on potential sex traffickers to law enforcement officers).

classified websites to have the power to self-police, the third-party posts increased the human trafficking of minors.<sup>149</sup>

#### *IV. Future Trends*

Predictably, courts will take into consideration the increased number of victims being trafficked on these classified websites. Courts will start to narrow their decisions when finding that these websites are responsible for aiding and publishing third party posts.<sup>150</sup> The rationale to this narrow ruling should be if these websites are being “self-policed” and “manually filtered” and if sex trafficking occurs, it will be deemed as an intentional act.<sup>151</sup> Courts will begin to consider that victims need remedy from this illicit conduct. Thus, the courts should also take an approach to listening to the trafficking victims that have had no opportunity to be heard.<sup>152</sup> After all, the Supreme Court has shown an interest in protecting minors from sexual exploitation and abuse.<sup>153</sup> Although, this process will be a slow and a tedious one, the courts will likely take this route and help establish justice to these victims and their family members.

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<sup>149</sup> See Kuzma, *supra* note 91, at 42 (explaining how the checking procedures of Backpage have lacked in thorough scanning, thus falling short on filtering third-party posts).

<sup>150</sup> See *Barnes v. Yahoo!*, 570 F.3d 1096. Liability can attach to a content provider if contract liability obligates the provider to remove material from publication and the provider fails to do so. *Id.*, 1100 (9th Cir. 2009); see also *Fair Hous. Council v. Roommates.com*, 521 F.3d 1157 (9th Cir. 2008); *Chi. Lawyers Comm. for Civ. Rights v. Craigslist, Inc.*, 519 F.3d 666 (7th Cir. 2008).

<sup>151</sup> See *McKenna*, 881 F. Supp. 2d at 1273 (explaining how Backpage claims that they manually review all content submitted by third parties for posting in adult and dating categories).

<sup>152</sup> *Handbook on Justice for Victims*, UNODCCP (1999) [http://www.unodc.org/pdf/crime/publications/standards\\_9857854.pdf](http://www.unodc.org/pdf/crime/publications/standards_9857854.pdf) (stating how victims should be encouraged to enter the justice system). Victims should give “timely notification of critical events and decisions . . . and assistance when there are opportunities to be heard. *Id.* “The structure of the justice system should take into account the obstacles which many victims encounter . . . such as culture, race, language, resources, education, age or citizenship.” *Id.*

<sup>153</sup> See *New York v. Ferber*, 458 U.S. 747, 757 (1982).

The courts would be the first ones to shed light to this change. Moreover, the judicial branch is the only branch that can interpret the law.<sup>154</sup> It is up to the courts to make a difference on how they apply the CDA. In this present moment, the court continues to apply the CDA in the broadest manner. Courts respect Congress's decision with the CDA, and find these classified websites free of criminal or civil liability. Unless the courts start dissecting the CDA and see these classified websites as "publishers", everything will remain the same. The courts are not the only actors that should make a difference in this issue. Local law enforcement should become more involved in monitoring of these classified websites. Thus, law enforcement must implement repercussions on websites maintaining suspicious postings as opposed to being "manually filtered" by the classified website's personnel. This will further keep these websites on their feet in regards to being more cautious on what they "filter" and what they potentially "post."

#### V. *Appraisal of Past and Future Decisions*

Appraising the decisions from U.S. courts and Congress's intention, one can state that there is a lack of human dignity within these past and recent decisions. It seems that the courts have solely focused on what these classified websites have done instead of what they "should have done." While applying the CDA, courts broadly provided these websites to deliberately hide behind the federal statute.<sup>155</sup> In a way, the crime of human trafficking prospered.

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<sup>154</sup> THE JUDICIAL BRANCH, <https://www.whitehouse.gov/1600/judicial-branch> (last visited Dec. 10, 2016) (explaining how the Federal courts have the sole power to interpret the law). "Once the Supreme Court interprets the law, inferior courts need to apply the Supreme Court's interpretation to the facts of a particular case."

<sup>155</sup> See *Green v. America Online*, 318 F.3d 465, 470–41 (3d Cir. 2003) The court held that an ISP is not liable for offensive comments because "monitoring, screening, and deletion of content" are publishing functions, thus ISP's are immune as publishers pursuant to Section 230 of the CDA. *Id.*; see also *Batzel* 333 F.3d at (describing Section 230 as creating a "broad immunity"); *Carafano v. Metrosplash.com* 339 F.3d 1119, 1123–24 (9th Cir. 2003) ("Section 230 provides broad immunity" and "reviewing courts have treated Section 230 immunity as quite robust") Also mentioning that an Internet Service Provider (ISP) is not liable

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Although it has been clearly stated that free speech is critical aspect to a free society, free speech should never “encompass facilitating criminal attacks on children.”<sup>156</sup> The CDA should be amended, and courts should restrict these types of posting on such websites. The future of children is at stake.

Free speech is used to express one’s feelings, political or religious views.<sup>157</sup> The First Amendment should not be used as a cloak to cover this type of criminality posted on these websites.<sup>158</sup> Additionally, the majority of these children suffer from long-lasting physical and psychological injuries, and the judicial system is not doing enough to help facilitate recuperation.<sup>159</sup>

There are not many hospitals or medical institutions cooperating with these victims.<sup>160</sup> The courts and the local or federal government should unite with the medical field to provide efficient therapy for both physical and mental health care for a victim of human trafficking.<sup>161</sup> This system should be available not only to victims from a low socioeconomic class, but also middle and upper

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when a third-party creates a sexually offensive dating profile of another, using the ISP’s “pre-formed” categories because in reality the ISP did not create the profile. *Id.*; *Ben Ezra v. America Online*, 205 F.3d 980, 984–85 (10th Cir. 2000) (“Section 230 creates a federal immunity to any state law cause of action that would hold computer service providers liable for information originating with a third party.”).

<sup>156</sup> Wendi Adelson, *Children Don’t Belong on Backpage*, HUFFINGTON POST (July 11, 2012, 11:10 AM), <http://www.huffingtonpost.com/wendi-adelson/children-dont-belong-on-t-b-1663726.html>.

<sup>157</sup> See U.S. CONST. amend. I.

<sup>158</sup> See U.S. CONST. amend. I.

<sup>159</sup> Jessica Reichert & Amy Sylwestrzak, *National survey of residential programs for victims of sex trafficking*, ICJIA (2013) (explaining how lack of funding is a major issue when providing services to trafficked victims). Many of these services needed by trafficked victims are expensive and time consuming. *Id.*

<sup>160</sup> See generally *supra* note 41 and accompanying text.

<sup>161</sup> See generally Andrea Muraskin, *For Victims of Sex Trafficking, A Therapeutic Court Provides A Way Out*, SIDE EFFECTS PUBLIC MEDIA (Jul. 7, 2016) (explaining how therapeutic programs are rare due to the lack of funding). Many of the trafficked victims are sentenced to jail for prostitution. *Id.*; see *The Mental Health Consequences of Human Trafficking*, CMDA.ORG (2012), <https://cmda.org/library/doclib/TIP-Module-4.pdf> (last visited on Feb. 15, 2017). There are possible barriers for a victim of human trafficking such as “lack of access to trained professionals none in area, [and] lack of funds.” *Id.*

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classes as well. The courts must engage in a more humanitarian approach as opposed to interpreting the four corners of the CDA imposed by Congress.

Furthermore, Congress should consider amending its statute and creating a *mens rea* aspect. If courts narrowly focus on what these websites do, such as manually filtering these third-party posts, then it would be able to see how *mens rea* is satisfied.<sup>162</sup> In order to commit a crime, one needs an act, *actus reus*<sup>163</sup>, and the state of mind, *mens rea*.<sup>164</sup> If the websites receive posts from third parties and personally filter these websites to ensure it contains no illicit content, then they are having the state of mind of actually seeing these posts.<sup>165</sup> When an individual revises a post and ultimately posts the advertisement, then *actus reus* is complete.<sup>166</sup> The elements of the crime would be satisfied, and websites would be liable for the criminal activity due to said posts.

Overall, there should be an amendment to Section 230(e)(1).<sup>167</sup> The amendment should read:

If a provider or a user of the Internet Service  
Provider fails to fully perform the duty of filtering

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<sup>162</sup> See generally 47 U.S.C. § 230(e)(1).

<sup>163</sup> BLACK'S LAW DICTIONARY (10th ed. 2015) ("The wrongful deed that comprises the physical components of a crime and that generally must be coupled with *mens rea* to establish criminal liability; a forbidden act.").

<sup>164</sup> *Criminal Law – Elements of a Crime: Mens Rea and Actus Reus*, NET INDUSTRIES (2015), <http://law.jrank.org/pages/22506/Criminal-Law-Elements-Crime-Mens-Rea-Actus-Reus.html> [hereinafter *Elements of a Crime*] ("To constitute criminal behavior, the *actus reus* and the *mens rea* must occur simultaneously.").

<sup>165</sup> See generally *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1011 (9th Cir. 2001) (explaining how the ISP like Napster had knowledge of illegal activity). Additionally, "if a computer system operator learns of specific infringing material available on his system and fails to purge such material from the system, the operator knows of and contributes to direct infringement." *Id.* at 1021.

<sup>166</sup> See *Elements of a Crime*, *supra* note 164 (explaining that *actus reus* is a guilty act that generally refers to an over act in furtherance of a crime).

<sup>167</sup> 47 U.S.C. § 230(e)(1) (describing how this section expresses how publishers do not have an effect on criminal law).

third-party posts in a knowingly, recklessly, purposefully, or in a negligent manner in such a way as to dissatisfy good faith efforts of this aforementioned statute that resulted in failure to perform stated duties as an internet service provider, then the provider or user shall be held accountable and criminally liable within the state's police power if an illegal act occurs from the state.<sup>168</sup>

Furthermore, within the word "knowingly", the amended exception should include a definition to read:

An Internet service provider who is aware of the content of the third-party posting illicit content and is certain that his or her non-diligent conduct to filter content in good faith can cause the result of criminal activity of human trafficking adults or minors.<sup>169</sup>

CDA section 230(c)(2)(A) should also be amended to contain an actual definition of what good faith should mean within the statute's purpose.<sup>170</sup> An expressed definition within the statute would create uniformity within the Internet service providers and these websites.<sup>171</sup> Classified websites keep using the defense of "good faith

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<sup>168</sup> 47 U.S.C. § 230(e)(1) ("No effect on criminal law.").

<sup>169</sup> *Id.* ("Nothing in this section shall be construed to impair . . . any other Federal criminal statute.").

<sup>170</sup> *See* 47 U.S.C. § 230(c)(2)(A).

<sup>171</sup> *See generally* *AFP Internet Guidelines*, AFP (2000), <http://www.afpnet.org/ResourceCenter/ArticleDetail.cfm?ItemNumber=3287> ("Standardization and uniformity of practices among Internet-based service providers may be a desirable outcome."); *see also* San Murugesan et al., *Web Engineering: A New Discipline for Development of Web-based Systems*, DEPT. OF COMPUTING AND INFO. SYS. (2001), <http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.325.9486&rep=rep1&type=pdf> (explaining that when there is no discipline process for developing Web-

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efforts” of inspecting third-party postings before being posted.<sup>172</sup> However, most of the times this is not an accurate statement from classified websites.<sup>173</sup> The proposed amendment should expressly define good faith as:

An ISP who monitors with due diligence, inspects the material of third-party, and assures with substantial certainty and reasonable means that the available information posted is free from misrepresentation pertaining from any and all kind of pictures, or written information.<sup>174</sup>

Good faith should include the due diligence of these websites to filter and analyze postings in a thorough manner, and stay updated on the terminology trafficker’s use on the title’s postings.<sup>175</sup>

Consequently, there should be a proposed amendment to Section 230(c)(2)(A) to include a time limit stated within the statute.<sup>176</sup> Internet service providers should implement a time limit of

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based systems there are issues in the ISPs development, deployment, and operation of maintenance).

<sup>172</sup> See Julie Ruvolo, *Sex Trafficking on Backpage.com: Much Ado About (Statistically) Nothing*, TECHCRUNCH (Oct. 6, 2012), <http://techcrunch.com/2012/10/06/sex-trafficking-on-backpage-com-much-ado-about-statistically-nothing/> (explaining how Backpage has stated that they have taken steps to combat online prostitution and trafficking).

<sup>173</sup> Letter from the Nat’l Ass’n of Att’ys Gen. (NAGG) to Samuel Fifer, Counsel for Backpage.com, LLC 3 (Aug. 31, 2011) [hereinafter NAAG Letter], available at <http://www.law.alaska.gov/pdf/press/083111-NAAGletter.pdf> (explaining how the National Association of Attorneys General wrote a letter to Backpage stating that it had tracked instances of trafficking minors on the website).

<sup>174</sup> 47 U.S.C. § 230(c)(2)(A) (explaining how no provider or user of an ISP will be held civilly liable if the ISP such as Backpage voluntarily acts in good faith to restrict access).

<sup>175</sup> 47 U.S.C. § 230(c)(1); see Silvano *supra* note 7, at 383 (explaining how the CDA was created to regulate the new and growing internet medium).

<sup>176</sup> 47 U.S.C. § 230(c)(2)(A) (stating how no provider or user of ISP can be held civilly liable if the ISP acts in good faith to voluntarily remove illegal postings from third-parties).

at least twenty-four hours for third-party users to revise the postings of the day. If the CDA is amended, it should aim to create uniformity and control within the Internet and states in reducing human trafficking of minors that occurs on a day-to-day basis.<sup>177</sup>

Additionally, the courts should focus on punishing the website operators as an entity at fault and not individuals who “filter” out the posts,<sup>178</sup> recognizing they are likely allowing these posts to be visible to the public eye. These classified websites would monitor what they post in a more cautious manner. Even though these websites could argue that this would be an economic burden, the courts should be stern on imposing punishment(s) for this type of activity.<sup>179</sup> These websites need a more efficient manner in verifying who submitted the posts. In case there is an illicit post, then the websites can report it to the correct authorities and contribute to prosecuting these traffickers.<sup>180</sup>

Victims and their families need closure and proper remedies. The initial purpose of the CDA was to avoid obscenity on the Internet, and stop the trafficking of minors.<sup>181</sup> Congress and the courts should pursue to impose harsher sentences on these websites, help victims from human trafficking by cooperating with hospitals and medical institutions, and stop giving complete control to these classified websites.<sup>182</sup> The federal government should help local law enforcement economically to develop new monitoring systems for these websites, or hire more personnel.

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<sup>177</sup> INSTITUTE OF MEDICINE, *CONFRONTING COMMERCIAL SEXUAL EXPLOITATION AND SEX TRAFFICKING OF MINORS IN THE UNITED STATES 1* (2014) [hereinafter *MINORS IN THE UNITED STATES*] (explaining how sex trafficking in minors occurs every day within the United States).

<sup>178</sup> See *supra* note 141 and accompanying text.

<sup>179</sup> See Amer Madhani, *Backpage.com thumbs nose at sheriff after Visa, MasterCard cut ties*, USA TODAY (July 9, 2015, 6:26 PM) <http://www.usatoday.com/story/money/2015/07/09/backpage-free-adult-services-ads-mastercard-visa/29931651/> (explaining how Backpage makes an approximate \$9 million in revenue per month). In 2012, Backpage earned more than \$22 million annually from prostitution ads. *Id.*

<sup>180</sup> See *supra* note 51.

<sup>181</sup> See *supra* Part IV.

<sup>182</sup> See *supra* note 142 and accompanying text.

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Furthermore, the CDA should allow statutes using New Jersey and Washington proposed statutes as examples.<sup>183</sup> This would provide individuals with a detailed law that would allow criminalization regarding these types of advertisements. Also, these classified websites should ask for additional documentation of who is posting these advertisements.<sup>184</sup> This would help identify the individuals who are behind trafficking minors. Thus, this criminal behavior would be punished. If these solutions were to be applied, it would allow the CDA to criminally and civilly prosecute these classified websites.<sup>185</sup> The federal statute would have a clearly expressed definition(s) and guidelines that websites would need to abide by to prevent and terminate trafficking of minors over the Internet once and for all.<sup>186</sup>

Congress and the courts together need to set politics aside and truly interpret the meaning of the CDA. The current interpretation of CDA is allowing traffickers to continue selling and exploiting children.<sup>187</sup> American general Douglas MacArthur once said, “*The soldier above all others prays for peace, for it is the soldier who must suffer and bear the deepest wounds and scars of war.*”<sup>188</sup> It seems that many trafficked children will suffer before the CDA changes. Over time, one should believe that the media, NGOs, and other anti-human trafficking activists will create positive results, and help stop human trafficking.

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<sup>183</sup> See *supra* Part IV.

<sup>184</sup> See *supra* note 102 and accompanying text. For example, the websites can ask for government issued identification, ask for the age of the individual, date of birth, and other certified documentation. *Id.*

<sup>185</sup> See *supra* Part IV.

<sup>186</sup> 47 U.S.C. § 230(e)(1) (expressing how the CDA imposes no criminal liability on classified websites).

<sup>187</sup> See *supra* note 59 and accompanying text.

<sup>188</sup> See *Top 10 War Quotes*, [https://www.brainyquote.com/slideshow/topics/top\\_10\\_war\\_quotes.html](https://www.brainyquote.com/slideshow/topics/top_10_war_quotes.html) (last visited Dec. 13, 2016). The quote is attributed to Douglas MacArthur. *Id.*; see also *Douglas MacArthur Biography*, BIO, <http://www.biography.com/people/douglas-macArthur-9390257#synopsis> (explaining how Douglas MacArthur was “an American general best known for his command of Allied forces in the Pacific Theater during World War II”).