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Combating a Never Ending Battle: Online Human Trafficking and the Communications Decency Act

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I. Introduction

Shockingly, slavery did not end with the 13th Amendment in 1865. Today, there is an overwhelming rise in women and children being used as sex and labor slaves. Human trafficking is a modern day form of slavery which “occurs when a trafficker uses force, fraud or coercion to control another person for the purpose of engaging in commercial sex acts or soliciting labor or services against his/her will.”¹ As of June 30, 2016, the National Human Trafficking Hotline received 13,454 calls during 2016.² However, only 3,646 of those cases were actually reported, and out of those, 2,678 were sex trafficking cases.³ According to the 2011 U.S. Trafficking in Persons Report, “U.S. citizen child victims [of sex trafficking] are often runaways, troubled, and homeless youth.”⁴ While this paper refers mainly to female and minor victims, anyone can become a human trafficking victim; this includes U.S. citizens, foreign nationals, women, men, children, and LGBTQ individuals.⁵

New technologies create new threats to human rights. According to a Shared Hope International Report, “Technology has become the single greatest facilitator of the commercial sex trade in all of the countries observed, with the exception of Jamaica.”⁶

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What Is Human Trafficking? NATIONAL HUMAN TRAFFICKING HOTLINE, <https://traffickingresourcecenter.org/> (Nov. 29, 2016).

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Id.

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Id.

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U.S. Department of State, *Trafficking in Persons Report*, June 2011, 372.

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Sex Trafficking, THE POLARIS PROJECT, <https://polarisproject.org/sex-trafficking> (last visited Nov. 29, 2016).

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The sexual exploitation of women and children is escalating rapidly as new technological advances come along.⁷ Social networking sites, including, Craigslist, Facebook, Backpage, and Myspace aid traffickers in exploiting women and children across vast audiences, efficiently and anonymously.⁸ In 2016, 78% of the United States population has some sort of social media profile.⁹ While these social websites are not dangerous in themselves, their widespread popularity and anonymity provide adequate means for “Johns” to search, lure, and exploit their victims.¹⁰

In recent years, global attempts have been made to combat online human trafficking. First, in 2000, The Trafficking Victims Protection Act was enacted in order to criminalize human trafficking. The Act defines sex trafficking as “the recruitment, harboring, transportation, provision, obtaining, patronizing, or soliciting of a person for the purpose of a commercial sex act.”¹¹ This is the definition that will apply for purposes of this paper. However, a 1996 law continues to provide safe harbors for social media and classified advertising websites, despite human traffickers’ uses. The

Mark Latonero, Ph.D, *Human Trafficking Online: The Role of Social Networking Sites and Online Classifieds*, CENTER ON COMMUNICATION LEADERSHIP & POLICY 8, 14 (2011) (quoting Shared Hope International, *Demand: A Comparative Examination of Sex Tourism and Trafficking in Jamaica, Japan, the Netherlands, and the United States*, n.d., 5.)

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Donna M. Hughes, *The Use of New Communications and Information Technologies for Sexual Exploitation of Women and Children*, 13 HASTING’S WOMEN’S L.J. 127, 127 (2002).

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Id.

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Percentage of U.S. population with a social media profile from 2008 to 2016, Statista: The Statistics Portal, <https://www.statista.com/statistics/273476/percentage-of-us-population-with-a-social-network-profile/> (last visited Nov. 29, 2016).

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Mark Latonero, Ph.D, *Human Trafficking Online: The Role of Social Networking Sites and Online Classifieds*, CENTER ON COMMUNICATION LEADERSHIP & POLICY 8, 13 (2011) (quoting Council of Europe, Group of Specialists on the Impact of the Use of New Information Technologies on Trafficking in Human Beings for the Purpose of Sexual Exploitation, February 17, 2003, 107.).

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Victims of Trafficking and Violence Protection Act of 2000, 22 U.S.C. §7102 (October 28, 2000), as amended.

Communications Decency Act was enacted as the internet continued to grow and now serves as a hurdle for human trafficking victims.¹² Section 230 of the Communications Decency Act exempts social media websites and classified advertising websites from liability in that “no provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.”¹³ Therefore, websites such as Backpage, Craigslist, and Facebook, are rarely found liable in human trafficking cases- leaving victims without recourse and traffickers without punishment.

Aside from federal laws, most states have enacted their own statutes and relied on different statutory interpretations in order to combat online human trafficking. In 2012, New Jersey enacted the N.J. Human Trafficking Prevention, Protection, and Treatment Act, which continued to criminalize human trafficking as a first-degree crime and imposes minimum prison sentences for those in violation of the statute.¹⁴ The Washington Supreme Court remanded *J.S. v. Vill. Voice Media Holdings, L.L.C.*, because it found that the plaintiffs showed enough evidence that the defendants, Backpage, helped produce illegal content, and if true, are subject to liability under state law.¹⁵ This decision is contrary to the First Circuit’s decision in *Doe v. Backpage.com, LLC*, which held §230 of the Communications Decency Act barred Backpage’s liability for sex trafficking.¹⁶

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47 U.S.C. § 230(b)(1) (2012).

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47 U.S.C. §230(c)(1) (2012).

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2012 N.J. A.N. 3352

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J.S. v. Vill. Voice Media Holdings, LLC, 184 Wash. 2d 95, 98 (2015).

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Doe v. Backpage.com, LLC, 817 F.3d 12, 29 (1st Cir. Mass. 2016).

Overall, social media plays a vital role in online human trafficking. Despite attempts to combat this severe crime, the number of victims continues to grow as technology advances. According to the State Department's 2011 *TIP Report*, "while state prosecutions continue to increase, one study found that less than 10% of state and local law enforcement agencies surveyed had protocols or policies on human trafficking."¹⁷ In order to succeed against human trafficking, social networking and classified advertising websites need to be held liable for any trafficking that takes place on their sites. While it may be a struggle to determine which websites have actual knowledge that they are facilitating this crime, it is not a stretch to enforce stricter laws combating online human trafficking.

This paper will focus on the discrepancies in online human trafficking statutes and case law. It will further discuss how social media websites and classified advertising sites are used in facilitating human sex trafficking. For purposes of this paper, it is important to note that 3,058 of the 3,646 reported human trafficking cases, in 2016, involved women.¹⁸ Of the 3,646 reported cases 1,181 of them involved minors.¹⁹ The number of human trafficking cases continues to climb. The federal and state governments must take necessary steps in combating the Communications Decency Act and holding social media websites responsible for facilitating trafficking.

II. The Internet Helps Facilitate Human Trafficking Through Social Media and Classified Advertising Websites

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U.S. Department of State, *Trafficking in Persons Report*, June 2011, 373.

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What Is Human Trafficking? NATIONAL HUMAN TRAFFICKING HOTLINE, <https://traffickingresourcecenter.org/> (Nov. 29, 2016).

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Id.

There are three types of human trafficking: sex, labor, and organ trafficking.²⁰ However, it is harder to measure the internet's role in labor and organ trafficking because victims of these crimes are usually recruited by word of mouth from underprivileged regions.²¹ Therefore, this paper primarily will focus on the internet's facilitation of sex trafficking.

A. Human Trafficking Prevention and Treatment Act

According to the Human Trafficking Prevention and Treatment Act, sex trafficking is defined as: “the recruitment, harboring, transportation, provision, or obtaining of a person for the purposes of a commercial sex act, in which the commercial sex act is induced by force, fraud, or coercion, or in which the person induced to perform such an act has not attained 18 years of age.”²² Under this Act, all minors engaged in commercial sex acts are treated as sex trafficking victims because they are not able to consent as minors.²³

B. “Johns’ and other Traffickers’ Online Techniques

Moreover, the internet is essential in recruiting victims. Some traffickers use social media websites, such as Facebook and MySpace, to contact victims.²⁴ Facebook

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Types of Human Trafficking, INTERPOL: CONNECTING POLICE FOR A SAFER WORLD, <http://www.interpol.int/Crime-areas/Trafficking-in-human-beings/Types-of-human-trafficking> (last visited Nov. 29, 2016).

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Mark Latonero, Ph.D, *Human Trafficking Online: Cases and Patterns*, CENTER ON COMMUNICATION LEADERSHIP & POLICY 8, 2 (2011).

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22 U.S.C.S. §7102; 8 C.F.R. §214.11(a).

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Mark Latonero, Ph.D, *Human Trafficking Online: Cases and Patterns*, CENTER ON COMMUNICATION LEADERSHIP & POLICY 8, 3 (2011)

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Judge Herbert B. Dixon, Jr., *Human Trafficking and the Internet*(*and Other Technologies, too)*, 1 THE JUDGES’ JOURNAL 52, 1 (2013).

and MySpace are social networking websites whereas Craigslist and Backpage are online classified advertising websites.²⁵ After “Johns” contact victims, they use various techniques in order to gain the victims’ trust.²⁶ These techniques include promising to make the victims’ lives better, to make them the “star,” providing transportation to a new location-often far from the victims’ homes, and showing love and affection for the victims.²⁷ According to the National Human Trafficking Resource center, in 2016, 183 of 2,678 reported sex trafficking cases took place through an online advertisement.²⁸ Online venues are popular for sex trafficking, third to only hotels and brothels.²⁹

Some traffickers use these websites to promise potential victims great jobs.³⁰ This technique begins as the victim searches online for employment and is then forced to relocate.³¹ Often times, the traffickers cut the victim off from home communications and will impose physical punishments if he or she does not comply with the “John’s” orders.³² This technique is most common on classified advertising websites such as Craigslist and Backpage. For example, a 19-year-old female responded to a classified

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See facebook.com; myspace.com; backpage.com. craigslist.com

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Dixon at 1.

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Id.

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See *Hotline Statistics*, NATIONAL HUMAN TRAFFICKING HOTLINE, <https://traffickingresourcecenter.org/states> (last visited Nov. 29, 2016).

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Id.

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Dixon at 1.

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Id.

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Id.

advertisement for a modeling opportunity but when she arrived at the hotel room, she was expected to have sex with a client.³³ Her pimp intended to sell her at an hourly rate.³⁴

Classified advertising websites are also used to post advertisements of victims and underage girls.³⁵ There have been multiple cases in which traffickers have used Backpage and Craigslist to advertise sexual services of their victims.³⁶ Byron Thompson plead guilty to sex trafficking in July 2009 because he featured his victims in photographs in the advertisements.³⁷ Craigslist has played a role in online human trafficking for many years. In fact, in September 2010, it shut down its Adult Services section in all United States cities, and by December 2010, the section was shutdown worldwide.³⁸ However, this was not Craigslist's first attempt in combating human trafficking. In 2008, the site charged United States \$5 for adult advertisements and required phone numbers in order to assist police in verifying users.³⁹

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Id. (citing E. I. Kunze, Sex Trafficking Via the Internet: How International Agreements Address the Problem and Fail to Go Far Enough, 10 J. High Tech. L. 247 (2010), http://www.law.suffolk.edu/highlights/stuorgs/jhtl/docs/pdf/Kunze_Formatted_10JHTL241.pdf).

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Id.

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Mark Latonero, Ph.D, *Human Trafficking Online: Cases and Patterns*, CENTER ON COMMUNICATION LEADERSHIP & POLICY 8, 3 (2011).

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Id.

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U.S. Immigration and Customs Enforcement, "Maryland man pleads guilty in sex trafficking conspiracy involving 3 minor girls," news release, July 16, 2009, <http://www.ice.gov/news/releases/0907/090716baltimore.htm>.

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Mark Latonero, Ph.D, *Human Trafficking Online: The Role of Social Networking Sites and Online Classifieds*, CENTER ON COMMUNICATION LEADERSHIP & POLICY 8, 21 (2011).

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Id.

However, this did not stop the trafficking. Instead, the traffickers moved their advertisements to the Therapeutic Services category on Craigslist.⁴⁰ By 2009, Craigslist renamed its “Erotic Services” section “Adult Services” and increased the advertising fee to \$10.⁴¹ Because Craigslist seemed to be one of the most responsive websites when combating online human trafficking, many traffickers decided to take their business elsewhere. Craigslist has since shut down its Adult Services section causing spikes in traffickers’ use of Backpage and MySpace.⁴² In one month, Backpage “published more than 1.4 million ads in its adult services section in the United States.”⁴³

Despite the increased use of Backpage and Myspace for human trafficking, “underground and quasi-underground chat rooms” are still the most frequently used for trafficking.⁴⁴ The internet gives the traffickers or “Johns” more abilities than ever before. Ambassador Luis CdeBaca at the U.S. Department of State noted that, “Whether it’s...on

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Domestic Minor Sex Trafficking: Hearings on H.R. 5575, Before the Subcommittee on Crime, Terrorism, and Homeland Security, 111th Cong. 175 (2010) (testimony of Elizabeth McDougall).

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Mark Latonero, Ph.D, *Human Trafficking Online: The Role of Social Networking Sites and Online Classifieds*, CENTER ON COMMUNICATION LEADERSHIP & POLICY 8, 21 (2011) (citing Brad Stone, “Under Pressure, Craigslist to

Remove ‘Erotic’ Ads,” *New York Times*, May 13, 2009, <http://www.nytimes.com/2009/05/14/technology/companies/14craigslist.html>).

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Id. at 13.

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Cynthia Lee, *Subverting the Communications Decency Act: J.S. v. Village Voice Media Holdings*, 7 CAL. L. REV. 11, 13(2016) (quoting Nicholas Kristof, *Making Life Harder for Pimps*, *N.Y. Times* (Aug. 6, 2015), <http://www.nytimes.com/2015/08/06/opinion/nicholas-kristof-making-life-harder-for-pimps.html>).

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Mark Latonero, Ph.D, *Human Trafficking Online: Cases and Patterns*, CENTER ON COMMUNICATION LEADERSHIP & POLICY 8, 4 (2011).

Craigslist or on some of these other social network sites, the pimps can offer these women and children for sale across the entire internet.”⁴⁵

III. Combating Online Human Trafficking Halted by The Communications Decency Act

A. Trafficking Victims Protection Act

In 2000, the Trafficking Victims Protection Act became the first federal law to address human trafficking. It was reauthorized in 2003, 2005, 2008, and 2013 and defines severe trafficking in persons as: (A) “sex trafficking in which a commercial sex act is induced by force, fraud, or coercion, or in which the person induced to perform such act has not attained 18 years of age; or” (B) “the recruitment, harboring, transportation, provision, or obtaining of a person for labor or services, through the use of force, fraud, or coercion for the purpose of subjection to involuntary servitude, peonage, debt bondage or slavery.”⁴⁶

In 2003, the Trafficking Victims Protection Reauthorization Act allowed victims to sue their traffickers federally and civilly.⁴⁷ The 2005 reauthorization included a program for sheltering minors who were victims of human trafficking and grant programs for state and local funding in order to combat human trafficking.⁴⁸ Finally in 2013, the act strengthened programs to ensure that people did not buy products made by human

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Mark Latonero, Ph.D, *Human Trafficking Online: The Role of Social Networking Sites and Online Classifieds*, CENTER ON COMMUNICATION LEADERSHIP & POLICY 8, 13 (2011) (quoting “Amb. CdeBaca Combats Sex Trafficking in U.S.,” narrated by Neal Conan, “Talk of the Nation,” NPR, April 28, 2011, <http://www.npr.org/2011/04/28/135808703/amb-cdebacacombats-sex-trafficking-in-the-u-s>).

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22 U.S.C.S. §7102(9)(A)(B)

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Current Federal Laws, THE POLARIS PROJECT, <https://polarisproject.org/current-federal-laws> (last visited Nov. 29, 2016) (citing H.R.2620- Trafficking Victims Protection Reauthorization Act of 2003).

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Id. (citing H.R. 972-Trafficking Victims Protection Reauthorization Act of 2005).

trafficking victims.⁴⁹ While the Trafficking Victims Protection Reauthorization Act may seem as if it one of the most important pieces of legislation in the history of human trafficking, it comes with new struggles as technology continues to grow.

It is also important to note that under the Trafficking Victims Protection Reauthorization Act, all minors engaged in commercial sex acts are treated as victims of trafficking.⁵⁰ Because the law assumes an underage victim cannot provide legal consent, anyone under 18 years of age cannot be said to have participated willingly and voluntarily in sex trafficking.⁵¹

B. **The Communications Decency Act**

Before the Trafficking Victims Protection Reauthorization Act came into play, the 1996 Communications Decency Act (CDA) was created to ensure that the internet would develop.⁵² Unsurprisingly, the Communications Decency Act plays a large role in human trafficking and social media. Section 230 of the law exempts interactive computer services from liability over harmful or offensive content as long as the service does not play a role in the content's development.⁵³ Furthermore, "no provider or user of an interactive computer service shall be treated as the publisher or speaker of any

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Id. (citing H.R. 898- Trafficking Victims Protection Reauthorization Act of 2013).

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22 U.S.C.S. §7102 (9)(A).

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Mark Latonero, Ph.D, *Human Trafficking Online: Cases and Patterns*, CENTER ON COMMUNICATION LEADERSHIP & POLICY 8, 1 (2011).

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47 U.S.C. §230(b)(1)(2012).

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Cynthia Lee, *Subverting the Communications Decency Act: J.S. v. Village Voice Media Holdings*, 7 CAL. L. REV. 11 (2016).

information provided by another information content provider.”⁵⁴ Websites such as Facebook, Backpage, MySpace, and Craigslist are interactive computer services as defined in the statute:

The term “interactive computer service” means 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.⁵⁵

Under the Communications Decency Act, these websites argue that they are not liable for third party content, including advertisements, that is made public through the use of their websites.⁵⁶ Furthermore, no provider or user of an interactive computer service shall be held liable on account of:

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

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47 U.S.C. §230(c)(1)(2012).

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47 U.S.C. §230(f)(2)(2012).

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Cynthia Lee, *Subverting the Communications Decency Act: J.S. v. Village Voice Media Holdings*, 7 CAL. L. REV. 11,12 (2016).

(B) Any action taken to enable or make available information content providers or others the technical means to restrict access to material described in paragraph (1).⁵⁷

Additionally, §230(e) does not apply to criminal trafficking of children or any other federal criminal statute.⁵⁸

Until recently, §230 of the CDA outlived any litigation and challenges. However, in September 2015, the Washington Supreme Court came down with a holding that seemed to shock the conscience.⁵⁹ Essentially, the holding in *J.S. v. Village Voice Media Holdings* created more liability for websites such as Backpage and Craigslist while broadening the interpretation of what constitutes a liable content creator under the CDA.⁶⁰ Under this interpretation, if the plaintiffs' allegations are taken as true, it will show that Backpage aided in the illegal activity that took place on its website.⁶¹ Since this decision, some have argued that *J.S.* defeats the purpose of the CDA's safe harbor provision and does not allow for Internet growth.⁶² However, this paper will focus on the other side of the argument in that this type of interpretation is necessary to combat online human trafficking.

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47 U.S.C. §230(c)(2)(A)(B)(2012).

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Id. at §230(e).

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J.S. v. Vill. Voice Media Holdings, LLC, 184 Wn.2d 95 (Wash. 2015).

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Id.

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Id. at 98.

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Cynthia Lee, *Subverting the Communications Decency Act: J.S. v. Village Voice Media Holdings*, 7 CAL. L. REV. 11, 19 (2016).

Most websites are not found liable for human trafficking because of the CDA's safe harbor provision. However, by holding the social networking and classified advertising websites directly responsible for the human trafficking on their websites, it will force them to take steps in ensuring the trafficking numbers decline.

IV. Case Law Interpretations Differ Across Federal and State Lines

As social media websites continue to expand, litigation involving human traffickers and social network users is becoming an expansive issue. In 2013, the United States District Court for the Middle District of Tennessee struck down a Tennessee law criminalizing the sale of sexual advertisements.⁶³ The decision came from Backpage's motion for a temporary restraining order and preliminary injunction against the State, arguing First Amendment and Commerce Clause violations.⁶⁴ In more recent years, the plaintiffs have turned to another argument- The Communications Decency Act.⁶⁵

The Communications Decency Act together with the First Amendment are constant hurdles for victims of human trafficking to overcome. In 2016, the United States Court of Appeals for the First Circuit held that §230(c) of the Communications Decency Act protected online advertising providers from liability to victims of sex trafficking.⁶⁶ However, the First Circuit's decision is contradictory to the 2015

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Backpage.com, LLC v. Cooper, 939 F.Supp. 2d 805, 813 (M.D. Tenn. 2013)

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Id.

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See Vill. Voice Media Holdings, LLC, 184 Wn.2d at 98.

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See Doe v. Backpage.com, LLC, 817 F.3d 12 (1st Cir. Mass. 2016).

Washington Supreme Court decision in *J.S. v. Village Voice Media Holdings, LLC*.⁶⁷ The Washington Supreme Court has received much backlash regarding its 2015 decision to remand the case and not dismiss the plaintiff's claims against Backpage.com.⁶⁸

Unsurprisingly, §230 of the Communications Decency Act has caused struggles for websites other than Facebook, Backpage, MySpace and Craigslist. In 2008, the United States Court of Appeals for the Ninth Circuit held that Roommates.com was not entitled to §230 immunity for its website's registration process purposely asked for discriminatory content.⁶⁹ However, Roommates.com was entitled to §230 immunity for its "additional comments" section because it "publishes these comments as written. It does not provide any specific guidance as to what the essay should contain, nor does it urge subscribers to input discriminatory preferences."⁷⁰ This case was essential in determining that §230 of the CDA must be harmonized with other laws, especially discrimination laws.⁷¹

A. ***Backpage.com, LLC v. Cooper (2012)***

The constant back and forth across the courts makes it impossible to predict the future of social networking and online human trafficking. In Tennessee, a state statute criminalizes the sale of certain sex advertisements.⁷² The statute made advertising

67 *Vill. Voice Media Holdings, LLC*, 184 Wn.2d at 98.

68 *See Lee* at 12.

69 *Fair Hous. Council v. Roommates.com, LLC*, 521 F.3d 1157 (9th Cir. Cal. 2008).

70 *Id.* at 1173-74.

71 *Id.*

72 *Cooper*, 939 F.Supp. at 813.

commercial sexual abuse of a minor a Class C felony and did not allow for “a defense that the defendant did not know the age of the minor depicted in the advertisement.”⁷³ In 2012, Backpage.com claimed that the Tennessee statute contradicted the federal Communications Decency Act and violated the First Amendment and Constitution’s Commerce Clause.⁷⁴ Therefore, Backpage.com sought to enjoin the law from going into effect.⁷⁵

When determining that the state statute should not be in effect, Backpage.com argued that “by holding websites criminally liable for selling certain advertisements, section 39-13-314 runs afoul of the CDA’s ‘broad federal immunity’ and conflicts with section 230’s goal of protecting Internet freedom.”⁷⁶ Ultimately, the court agreed with Backpage and found that the statute would undermine the CDA in that it would restrict speech and hinder self-policing.⁷⁷ The court went on to note further that “for an online classified service such as Backpage.com, preventing liability could amount to screening millions of advertisements” and that “some online publishers will likely be forced to eliminate user postings alluding to sexual topics, rather than face possible liability, which ‘would eliminate vast amounts of permissible adult-oriented speech.’”⁷⁸ Because Backpage.com voluntarily engages in screening and charges for adult advertisements, the

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Id. at 817 (citing Tenn. Code Ann. §39-13-314).

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Id. at 818.

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Id.

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Id. at 822.

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Id.

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Id. at 825.

Court found that Backpage was taking necessary steps in combating sex trafficking and therefore, the state statute is opposite of the CDA’s goals.⁷⁹ The court found the statute was preempted by the CDA, and “invalid, both facially and as applied to online advertising services, such as Backpage.com.”⁸⁰

Backpage, like most social networking and classified advertising sites, went on to argue that the Tennessee statute was also an overbroad First Amendment violation.⁸¹ Once again, the court agreed and found that the state law was “substantially broader than required for its regulatory purpose to protect the health and safety of minors trafficked in Tennessee, and would likely include constitutionally protected speech.”⁸² Therefore, the state was enjoined from enforcing the Tennessee statute.⁸³

B. *J.S. v. Vill. Voice Media Holdings, LLC (2015)*

However, in 2015, the Washington Supreme Court seemed to shed light in favor of online human trafficking victims.⁸⁴ Three minor girls were advertised on Backpage, which is owned by Village Voice Media Holdings, and became victims of sex trafficking.⁸⁵ The girls argued that the defendants helped develop the online sex

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Id.

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Id. at 828.

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Id. at 831.

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Id.

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Id. at 845.

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Vill. Voice Media Holdings, LLC, 184 Wn.2d at 98.

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Id.

trafficking, rather than just provide a forum for the illegal trafficking.⁸⁶ The complaint alleged that Backpage is liable because “its advertisement posting rules were ‘designed to help pimps develop advertisements that can evade the unwanted attention of law enforcement, while still conveying the illegal message.’”⁸⁷ The court held that the plaintiffs provided sufficient arguments and did not dismiss the complaints under the Communications Decency Act.⁸⁸ If taken as true, the plaintiffs’ claims “would show that Backpage did more than simply maintain neutral policies prohibiting or limiting certain content.”⁸⁹

The plaintiffs allegations include: 1) Backpage designed its webpage to encourage illegal trafficking to occur through its page, 2) its content requirements will allow pimps and prostitutes to escape law enforcement, 3) its requirements give the false idea that Backpage does not allow sex trafficking on its website, 4) Backpage designed its content requirements so that pimps and prostitutes can use its site for sex trafficking and Backpage will continue to profit, and 5) Backpage has a “substantial role in creating the content and context of the advertisements on its website.”⁹⁰ Therefore, if these claims are taken as true, the plaintiffs are entitled to recovery and Backpage will be held liable.⁹¹

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Id.

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Id. at 99.

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Id. at 102.

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Id.

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Id. at 102-3.

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Id. at 103.

C. Doe v. Backpage.com, LLC (2016)

Unfortunately, victims of online human trafficking struggle to bring successful claims against social media and classified advertising sites. In 2016, victims lost once again when they brought a claim against Backpage.com.⁹² Although the court noted that it knew its decision would invoke outrage, it dismissed three minors' claims against Backpage.com for online sex trafficking.⁹³ The three minors "allege that Backpage, with an eye to maximizing its profits, engaged in a course of conduct designed to facilitate sex traffickers' efforts to advertise their victims on the website," and caused them to become sex trafficking victims.⁹⁴

Like all human trafficking cases, the facts of this case are disturbing. At the age of 15, three girls, Jane Doe #1, #2, and #3, were trafficked through advertisements posted on Backpage.⁹⁵ The girls indicated that they were raped over 1,000 times and were sometimes forced to post the advertisements themselves.⁹⁶ The advertisements usually included photos of the girls individually and "embodied challenged practices such as anonymous payment for postings, coded terminology meant to refer to underage girls, and altered telephone numbers."⁹⁷

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Backpage.com, LLC, 817 F.3d at 15.

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Id. at 15.

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Id. at 16.

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Id. at 17.

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Id.

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Id.

Overall, the girls filed two complaints: 1) Backpage participated in sex trafficking of minors according to Trafficking Victims Protection Reauthorization Act and the Massachusetts Anti-Human Trafficking and Victim Protection Act of 2010; and 2) Backpage violated a “Massachusetts consumer protection statute which forbids ‘unfair or deceptive acts or practices in the conduct of any trade or commerce.’”⁹⁸ Naturally, Backpage moved to dismiss these claims and the court agreed, finding that §230 of the Communications Decency Act prevented Backpage from liability.⁹⁹ The appellants lost again on appeal.¹⁰⁰

When bringing suit against Backpage, the minors attacked the website’s set up as well as its operations.¹⁰¹ First, the appellants argued that Backpage deliberately met with the National Center for Missing and Exploited Children and provided false and misleading information in order to distract attention from Backpage’s role in sex trafficking.¹⁰² Second, the minors accused Backpage of encouraging sex trafficking because its site does not require phone number or e-mail verification, therefore allowing most traffickers to post anonymously.¹⁰³ Finally, the girls suggested that Backpage was profiting directly from the trafficking in that the site only charges a posting fee for those

98 *Id.* (quoting Mass. Gen. Laws ch. 93A, §2(a)).

99 *Id.* at 18.

100 *Id.*

101 *Id.* at 16.

102 *Id.*

103 *Id.*

advertisements posted in the “Adult Entertainment” section and users can pay an additional fee to ensure “sponsor ads” appear on every “Escorts” page.¹⁰⁴

Moreover, the girls argue that their claims do not treat Backpage as a publisher or speaker of third-party content but rather they base their claims on the Trafficking Victims Protection Reauthorization Act language.¹⁰⁵ Specifically, the appellants rely on the law’s civil remedy provision which allows victims to “bring a civil suit against a perpetrator ‘or whoever knowingly benefits, financially or by receiving anything of value from participation in a venture which that person knew or should have known has engaged in an act’ of sex trafficking.”¹⁰⁶ Regrettably, similarly to the court in *Backpage.com, LLC v. Cooper*, in 2016, the First Circuit defended §230 of the Communications Decency Act and found that Backpage was not liable for the sex trafficking of three minors.¹⁰⁷

The court held that Backpage’s decisions to charge for advertisements and conditions for posting are publisher choices entitled to §230 protections.¹⁰⁸ In response to the appellants’ argument that Backpage deliberately attempted to make sex trafficking easier, the court noted that “Whatever Backpage’s motivations, those motivations do not alter the fact that the complaint premises liability on the decisions that Backpage is making as a publisher with respect to third-parties.”¹⁰⁹ The claims treat Backpage as a

104

Id. at 17.

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Id. at 19.

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Id. at 20 (quoting 18 U.S.C. §1595(a)).

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Id. at 22.

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Id. at 21.

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Id.

publisher or speaker of content provided by third parties and the website’s structuring and posting decisions are publisher functions, therefore, the claims are precluded by §230(c)(1) of the Communications Decency Act.¹¹⁰

Regarding the appellants’ misrepresentation and intellectual property claims, the court held that there was too many speculations, rather than facts, asserted in the claim.¹¹¹ Finally, the court found that the advertisers were benefitting from the advertisements rather than Backpage itself.¹¹² The court asserts that “matters [may have been] different if Backpage had used the pictures to advertise its own services, but the appellants proffer no such claim.”¹¹³ Once again, the Communications Decency Act precluded victims from success.

D. Fair Housing Council v. Roommate.com, LLC (2008)

In attempt to harmonize §230 of the Communications Decency Act with other laws, the United States Court of Appeals for the Ninth Circuit handed down a split decision regarding Roommate.com.¹¹⁴ Roommate.com is a website that allows people looking to rent rooms to be matched with people who are renting out rooms.¹¹⁵ However, before subscribers can find a room to rent, “Roommate requires each subscriber to disclose his sex, sexual orientation and whether he would bring children to a

110

Id. at 22.

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Id. at 25.

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Id. at 26.

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Id. at 27.

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Fair Hous. Council at 1175.

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Id. at 1161.

household.”¹¹⁶ Then, the subscriber must indicate his roommate preferences using the same criteria-sex, sexual orientation, and whether he would bring children to the household.¹¹⁷ Finally, the website gives subscribers a chance to describe themselves in an open ended “additional comments” section.¹¹⁸

Because of Roommate.com’s registration process, the Fair Housing Councils of the San Fernando Valley and San Diego (Councils) sued Roommate.com.¹¹⁹ The Councils alleged that Roommate.com violated the Federal Fair Housing Act and California housing discrimination laws.¹²⁰ On appeal from the District Court’s decision immunizing Roommate.com, the Court of Appeals held that Roommate.com is liable under §230 of the Communications Decency Act for its registration process.¹²¹ However, the Court indicated that Roommate.com had §230 immunity for its “additional comments” section.¹²²

The Roommate.com decision indicates the court’s attempt to make sense of §230 in regards to other laws, especially discrimination. The court based its reasoning on the fact that “Roommate’s work in developing the discriminatory questions, discriminatory answers and discrimination search mechanism is directly related to the alleged illegality

116

Id.

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Id.

118

Id.

119

Id. at 1162.

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Id.

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Id. at 1172.

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Id. at 1174.

of the site.”¹²³ The site is directly involved with “developing and enforcing a system that subjects subscribers to allegedly discriminatory housing practices,” and is therefore not immune under §230.¹²⁴ Furthermore, Roommate.com became a developer of the discriminatory information in that its website is specifically designed to illicit illegal (discriminatory) information, thus it is not subject to §230 immunity.¹²⁵

However, Roommate.com’s “additional comments” section is immune under §230 because it “publishes [those] comments as written. It does not provide any specific guidance as to what the essay should contain, no does it urge subscribers to input discriminatory preferences.”¹²⁶ Because the “additional comments” section is a generic section, Roommate.com has §230 immunity only to that specific section.¹²⁷

V. How the Court Should Interpret the Communications Decency Act

Unsurprisingly, *J.S. v. Village Voice Media Holdings, LLC* has since received a lot of criticism, especially from social media and classified advertising websites. Most social media websites believe that the Washington Supreme Court’s holding opens the floodgates for a lot more litigation and defines content creation too broadly.¹²⁸ The websites may also argue it “creates a low standard for overcoming summary judgment

123

Id. at 1172.

124

Id.

125

Id.

126

Id. at 1173.

127

Id. at 1774.

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Lee at 12.

challenges and moving into the discovery phase of litigation, thereby imposing administrative and financial burdens on defendant ISPs.”¹²⁹

However, the most compelling argument against the *J.S.* holding is that it completely goes against the goals of the Communications Decency Act.¹³⁰ One of the main goals of the CDA is “to promote the continued development of the internet.”¹³¹ Some argue that this holding will divert resources away from creating technological and operational advances necessary to remove illegal content.¹³² Most internet advertising platforms recruit teams that work to create tools that will insure posts abide by each sites’ policy.¹³³ Cynthia Lee argues that if these teams will have to take part in extensive discovery, their attention will be taken away from creating tools that combat online human trafficking.¹³⁴

Furthermore, in her article “Subverting the Communications Decency Act: *J.S. v. Village Voice Media Holdings*,” Lee points out that the *J.S.* holding may turn to overregulation of speech.¹³⁵ She argues that ISPs may begin to shut down because of the overwhelming amounts of legal threats that could come with the holding.¹³⁶ All in all,

129

Id.

130

Id. at 16.

131

47 U.S.C. §230(b)(1)(2012).

132

Lee at 17.

133

Id.

134

Id.

135

Id. at 18.

136

Id.

many fear that the *J.S.* holding will jeopardize the Communications Decency Act safe harbor provision.

However, what those who oppose the *J.S.* holding fail to recognize is that online human trafficking is an overwhelming trend. A recent news article indicated that “4.5 million people are currently working against their will for sex traffickers. And the underground sex economy in 2014 was worth \$290 million in Atlanta, Georgia, alone, according to an Urban Institute study.”¹³⁷ Thus far, the Communications Decency Act has been interpreted too broadly and does not allow state legislatures to protect citizens against online human sex trafficking. In 1996, when the CDA was enacted, the internet was not as prominent as it is today. In fact, today 78% of the United States population has some sort of social media profile.¹³⁸

As internet use increases, the laws that were once “good enough” are no longer providing adequate protection to victims and responsibilities to internet providers. All in all, state statutes that criminalize human trafficking are consistent with purposes behind §230 of the CDA.¹³⁹ While the Communications Decency Act was enacted to ensure growth of the internet, it came with another goal: to ensure the protection of children.¹⁴⁰

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Ashton Kutcher Rescued 6000 Sex Trafficking Victims. Almost All Of Them Had Something In Common..., THE EARTH CHILD, <http://www.theearthchild.co.za/ashton-kutcher-rescued-6000-sex-trafficking-victims-almost-something-common/> (last visited Nov. 29, 2016).

138

Percentage of U.S. population with a social media profile from 2008 to 2016, Statista: The Statistics Portal, <https://www.statista.com/statistics/273476/percentage-of-us-population-with-a-social-network-profile/> (last visited Nov. 29, 2016).

139

Stephanie Silvano, NOTE: FIGHTING A LOSING BATTLE TO WIN THE WAR: CAN STATES COMBAT DOMESTIC MINOR SEX TRAFFICKING DESPITE CDA PREEMPTION?, 83 *Fordham L. Rev.* 375.

140

Id. at 385 (citing §230(b)(4)-(5)).

§230(b)(4)-(5) of the CDA reads as follows: (4)“to remove disincentives for the development and utilization of blocking and filtering technologies that empower parents to restrict their children’s access to objectionable or inappropriate online material;” and (5) “to ensure vigorous enforcement of Federal criminal laws to deter and punish trafficking in obscenity, stalking, and harassment by means of computer.”¹⁴¹

The language of §230(b)(4)-(5) indicates that one of the goals of the CDA was to protect children and trafficking. This goal is satisfied by holding social networking and classified advertising websites criminally liable for online human trafficking. With the CDA’s current safe harbor provision, online trafficking victims are discouraged to come forward. There have been more jurisdictions that adopt the majority view—the CDA preempts state law that criminalized the trafficking. As is, the safe harbor provision is too broad and allows traffickers to continue to utilized some of the most popular websites for criminal activity.

As evident by Backpage’s current monitoring process, it is not economically burdensome for these websites to filter content that is transmitted through their sites.¹⁴² Therefore, if these sites were held criminally liable, it would require that each site initiates an intricate screening process to ensure that trafficking was not taking place through third party content. Furthermore, §230(e) of the CDA does not apply to criminal trafficking of children.¹⁴³ To further Congress’s goal of protecting children, it could be

141 §230(b)(4)-(5).

142 Silvano at 412.

143 *See* §230(e).

said that Congress intended to allow states to criminalize child trafficking and therefore, §230 should be interpreted to hold websites criminally liable.¹⁴⁴

Finally, when interpreting §230 of the CDA, courts should look the *Roommates.com* decision. Websites that allow “adult advertising” elicit illegal content similarly to Roommates.com. Backpage, Craigslist, MySpace, Facebook, etc. should be treated as developers because their websites elicit illegal activity by allowing “Johns” to advertise victims.¹⁴⁵ However, the websites will argue that they are similar to search engines and the “additional comments” section of Roommates.com.¹⁴⁶ However, the §230 definition of developer is interpreted too narrowly. While the websites will argue their advertising pages are immune because they essentially provide an open ended forum and do not control what “Johns” post, they should be held liable as developers because of the way their advertising processes are set up.¹⁴⁷ In order to prevent online human trafficking, these websites should not be immune under §230 of the CDA because they are essentially assisting “Johns” in developing information advertising and trafficking victims.

VI. Steps Taken to Combat Online Human Trafficking

On October 13, 2016, actor Ashton Kutcher told The Today Show “We’ve built a tool to help law enforcement prioritize their caseload and recover victims and find

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Id.

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See Fair Hous. Council 521 F.3d at 1175.

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Id.

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Id. (Roommate.com set up a registration process that deliberately elicited illegal and discriminatory information, just as other websites elicit information from “JohnJohns” that allow advertising of victims against their will).

traffickers. And we've found and identified and recovered over 6,000 trafficking victims this year. And we've found, identified, and recovered 2,000 traffickers."¹⁴⁸ His international anti-human trafficking organization, Thorn, partners with the technology, government, and NGOs to combat the sexual exploitation of children.¹⁴⁹ Ashton Kutcher is one of many who is working to combat online human trafficking. However, he learned quickly that "almost all sex trafficking victims have one thing in common—they're targeted online."¹⁵⁰

In his address to the Clinton Global Initiative, President Barack Obama stated, "We're turning the tables on the traffickers. Just as they are now using technology and the Internet to exploit their victims, we're going to harness technology to stop them."¹⁵¹ Aside from state legislation and federal law, other measures are currently in use in hopes of combating online human trafficking. For example, crowdsourcing is a non-law enforcement attempt to stop the trafficking. Crowdsourcing takes place when a designated agent posts online if he or she suspects someone is susceptible to trafficking.¹⁵² The agent posts an online plea to an anti-human trafficking discussion

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Ashton Kutcher Rescued 6000 Sex Trafficking Victims. Almost All Of Them Had Something In Common..., THE EARTH CHILD, <http://www.theearthchild.co.za/ashton-kutcher-rescued-6000-sex-trafficking-victims-almost-something-common/> (last visited Nov. 29, 2016).

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Id.

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Id.

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Judge Herbert B. Dixon, Jr., *Human Trafficking and the Internet*(*and Other Technologies, too)*, 1 THE JUDGES' JOURNAL 52, 1 (2013).

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Id.

board and members of the group are able to take action.¹⁵³ One crowdsourcing success story ended when “one member of the discussion did meet the women at the bus depot upon their arrival in New York and convinced them not to meet the ‘exchange program’ contact.”¹⁵⁴ This technique allows for a vast amount of people to take part in combating online human trafficking.

As mentioned earlier, in 2010, Craigslist shut down its “adult services” section in hopes of eliminating human trafficking through its site.¹⁵⁵ Some believe Craigslist was most responsive in combating trafficking, however other private industries seem to be taking similar steps.¹⁵⁶ William Powell, direct of customer service and law enforcement relations for Craigslist noted, “I have personally been told many times by law-enforcement agents that Craigslist is by far the most responsive Internet company that they deal with.”¹⁵⁷ Craigslist actively participates in the National Center for Missing & Exploited Children’s cyber tip line, by reporting suspicious advertisements immediately.¹⁵⁸ The classified advertising website has also participated in anti-trafficking sweeps and Powell further indicated that “[Craigslist has] engineered special tools to facilitate the work of NCMEC and law enforcement. These include creation of multiple

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Id.

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Id.

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Id.

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Id.

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Latonero at 10 (quoting *Domestic Minor Sex Trafficking: Hearings on H.R. 5575, Before the Subcommittee on Crime, Terroism, and Homeland Security*, 111th Cong. 169 (2010) (testimony of William Clinton Powell).

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Id.

special search interfaces that facilitate the search for missing children across all Craigslist sites.”¹⁵⁹ Google, Microsoft, LexisNexis, JP Morgan Chase, and Palantir Technologies have also donated time, research, and money in hopes of assisting law enforcement with online human trafficking.¹⁶⁰ However, according to the growing numbers of trafficking victims, these efforts are not enough.

Because the Communications Decency Act is a powerful federal law, perhaps federal law is the best way to combat online human trafficking.¹⁶¹ However, if federal law is not enough, there are civil remedies available to victims of online trafficking.¹⁶² Civil remedies focus on “increasing the life possibilities available to sexually exploited individuals,” and are made available to commercial sexual exploitation of children victims.¹⁶³ In order for civil remedies to address human trafficking victims’ concerns, victims must become aware of their rights and remedies. While civil remedies have existed statewide and federally for a while, “in at least 35 U.S. states, in Washington, D.C., and abroad, they remain a vastly under-utilized tool.”¹⁶⁴

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Id. (quoting testimony of William Clinton Powell).

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See Dixon.

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Silvano at 415.

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Charisa Smith, *No Quick Fix: The Failure of Criminal Law and the Promise of Civil Law Remedies for Domestic Child Sex Trafficking*, 71 U. MIAMI L. REV. 1, 1 (2016).

163

Id. at 71.

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Id. (citing Siddharth Kara, *Designing More Effective Laws Against Human Trafficking*, 9 NW. U. J. INT’L HUM. RTS. 123, 131 (2011) (using the United Kingdom as a case study); Frances Simmons, *Making Possibilities Realities: Compensation for Trafficked People*, 34 SYDNEY L. REV. 511, 516 (2012)).

Some possible civil remedies include recovering “monetary damages from a pimp who coerced them into sex work, or from producers and distributors of pornography.”¹⁶⁵ In fact, the Trafficking Victims Protection Act of 2003 allowed civil suits against traffickers and the 2008 revised Act “permits trafficking survivors to ‘recover damages and reasonable attorney fees’ from exploiters and other individuals or corporations complicit in trafficking.”¹⁶⁶ While civil remedies are often hidden alternatives for online trafficking victims, they may be some victims’ best options.

These remedies allow victims to hold multiple parties liable while serving as deterrents to those who may become involved in the future.¹⁶⁷ For example, if websites fear that they will be held civilly liable for human trafficking, they may take steps to prevent “Johns” from using their sites for advertising. Furthermore, the websites will want to protect their reputations. Finally, civil remedies “compensate survivors for the damage they have suffered, offset survivors’ ‘ongoing costs for treatment and rehabilitation,’ and fund essential survivor housing and reintegration.”¹⁶⁸

VII. Conclusion

The internet and its use is expanding rapidly with time. It is necessary for the courts to change their narrow interpretations regarding the Communications Decency Act and hold websites accountable. Today, countless minors and women are victims of online human trafficking. While states are enacting anti-human trafficking laws, they are

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Id.

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Id. (quoting 18 U.S.C. §1595(a) (2012)).

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Id.

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Id. at 73-74.

constantly preempted by the federal Communications Decency Act. Innocent victims suffer because federal law allows social networking and classified advertising websites to escape liability. Traffickers, or “Johns,” get away with one of the most heinous crimes of the century. It is up to both the federal and state governments to work together to ensure that this trafficking comes to an end.

Perhaps one of the most upsetting realities of online human trafficking is that victims of sex trafficking may become romantically involved with their traffickers, while others are “lured in with false promises of a job such as modeling or dancing.”¹⁶⁹ However, thousands of human trafficking cases go unreported each year.¹⁷⁰ Online websites are one of the top venues for sex trafficking.¹⁷¹ By holding one of the top human sex trafficking venues criminally liable for trafficking content, victims may be able to hold on to hope.

The Communications Decency Act was enacted in 1996, a time when the Internet was barely alive. In the world today, more than 3 billion people are using the internet.¹⁷² This number has increased from 738 million in 2000, to 3.2 billion in 2015, according to the International Telecommunication Union.¹⁷³ Such a large increase in internet use must lead to changing laws. Just as privacy laws continue to change as more and more people

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Sex Trafficking, THE POLARIS PROJECT, <https://polarisproject.org/sex-trafficking> (last visited Nov. 29, 2016).

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See Hotline Statistics, NATIONAL HUMAN TRAFFICKING HOTLINE, <https://traffickingresourcecenter.org/states> (last visited Nov. 29, 2016).

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Id.

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Here's How Many Internet Users There Are, MONEY MAGAZINE, <http://time.com/money/3896219/internet-users-worldwide/> (last visited Nov. 29, 2016).

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Id.

post online, the Communications Decency Act and other federal laws must adapt to the changing times. Websites, such as Facebook, Backpage, and Craigslist have enough money to institute privacy policies-therefore, it is unlikely they do not have the funds to combat online human trafficking.

Again, online human trafficking is not a small problem. It is a severe problem that will continue to grow unless state and federal governments team up with websites around the world. Since 2007, there have been 28,399 reported victims of human trafficking in the United States alone.¹⁷⁴ However, thousands of cases go unreported making it difficult to determine exactly how many trafficking victims are affected daily.¹⁷⁵

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See Hotline Statistics, NATIONAL HUMAN TRAFFICKING HOTLINE, <https://traffickingresourcecenter.org/states> (Nov. 29, 2016).

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Id.