
TECH TRAFFICKING: HOW THE INTERNET HAS TRANSFORMED SEX TRAFFICKING

Kirsten M. Prylinski*

I. Introduction

Human trafficking is the largest manifestation of slavery today, generating billions of dollars each year in illegal proceeds.¹ When first confronted with stories from the news or facts about human trafficking, it seems like there is no way that it could be true.² How is it possible

* J.D. Candidate, Suffolk University Law School, 2020; B.S. in Business Management with a minor in Psychology and Political Science, Auburn University, 2017. Kirsten can be reached at kprylinski@comcast.net.

¹ See PERMANENT SUBCOMM. ON INVESTIGATIONS, BACKPAGE.COM'S KNOWING FACILITATION OF ONLINE SEX TRAFFICKING 1 (2017) [hereinafter SUBCOMM. ON INVESTIGATIONS] (investigating Backpage.com's concealment of children being sold for sex online); *What is Human Trafficking?*, U.S. DEP'T HOMELAND SEC. (Jan. 19, 2019), *archived at* <https://perma.cc/NJY8-P5SA> (noting that due to the substantial amount of money human trafficking generates each year, it is the second most profitable transnational crime right below drug trafficking); I AM JANE DOE (Netflix 2017) (explaining the reason behind human trafficking becoming so profitable is because drug traffickers sell drugs once, but as a human trafficker, "you sell kids over and over again"); *Myths and Misconceptions*, U.S. DEP'T HOMELAND SEC. (Jan. 19, 2020), *archived at* <https://perma.cc/G7DH-ZLCW> (debunking common misconceptions about human trafficking including where it happens and who is commonly affected). Human trafficking exists in every country in the world including the United States. See *Myths and Misconceptions*, *supra*.

² See *What is Human Trafficking?*, *supra* note 1 (highlighting the variety of reasons that traffickers may seek out a victim such as psychological and emotional vulnerability, lack of education, and economic hardship). Human trafficking is a hidden crime as victims rarely come forward to seek help because of "language barriers, fear of traffickers, and/or fear of law enforcement." *Id.*

that women and children are being bought and sold online without a trace?³ Nevertheless, the reality is that human trafficking, and more specifically sex trafficking, is happening at rates that both the government and the public cannot keep up with.⁴

Human trafficking is a hidden crime.⁵ It often includes forced labor, domestic servitude, forced marriages, and most commonly, commercial sex.⁶ Globally, the most common form of human

³ See OFFICE UNDER SEC'Y FOR CIVILIAN SEC., DEMOCRACY & HUMAN RIGHTS, TRAFFICKING IN PERSONS REPORT 2 (2018) [hereinafter TRAFFICKING IN PERSONS REPORT] (noting that national governments are not able to fight human trafficking alone). At the time that this report was written, nearly 170 countries had made the commitment to punish traffickers, care for victims, and prevent human trafficking. *Id.*

⁴ See *Human Trafficking and the Internet*, THE CHILD ADVOC. CTR. LAPEER COUNTY (June 21, 2018), archived at <https://perma.cc/YZ49-T27L> (emphasizing the range of venues where human trafficking often occurs such as fake businesses, online, and hotels). Most victims are kept isolated and live under the constant fear of mental or physical threat. *Id.* See *Sex Trafficking*, INTERNET SAFETY 101 (Feb. 1, 2020), archived at <https://perma.cc/7PWC-6GEJ> (contending that human trafficking still goes underreported due to its covert nature and lack of understanding about its indicators).

⁵ See TRAFFICKING IN PERSONS REPORT, *supra* note 3, at 2 (specifying the common locations throughout communities where human trafficking often occurs). “Despite its global reach, human trafficking takes place locally.” *Id.* Human trafficking can take place in places such as nail salons, restaurants, or popular hotels. *Id.* See Geoffrey Rogers, *Technological tricks can help end sex trafficking: Former IBM vice president*, USA TODAY (Mar. 12, 2019), archived at <https://perma.cc/VXL4-TSB2> (setting forth that the amount of abuse that victims face may be so extraordinary that while they may not seek help on their own, if help is offered to them they make take it).

⁶ See *What is Human Trafficking?*, *supra* note 1 (“Human trafficking involves the use of force, fraud, or coercion to obtain some type of labor or commercial sex act.”). See also *Myths and Misconceptions*, *supra* note 1 (pointing out that sex trafficking is not the only type of human trafficking, though it may be the most prevalent). Human trafficking also includes forced labor in both legitimate and illegitimate industries. *Id.* Forced labor can be found in “sweatshops, massage parlors, agriculture, restaurants, hotels, and domestic service.” *Id.* See also Victims of Trafficking and Violence Protection Act of 2000, H.R. 3244, 106th Cong. § 103(3) (2000) (defining commercial sex as “any sex act on account of which anything of value is given to or received by any person”); OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION, COMMERCIAL SEXUAL EXPLOITATION OF CHILDREN AND SEX TRAFFICKING 1 (Dev. Serv. Grp. ed., 2014) [hereinafter COMMERCIAL SEXUAL EXPLOITATION] (emphasizing that the commercial sexual exploitation of

trafficking is sex trafficking.⁷ Sex trafficking encompasses activities related to prostitution, commercial sexual activities, sex tourism, and pornography.⁸ It undermines core human rights, as well as destroys and threatens the safety of communities.⁹ With the aid of new technologies, women and children are being bought and sold online without a trace.¹⁰ Today, these new technologies continue to outpace the law, taking human trafficking into the deepest corners of the internet, undetectable by law enforcement.¹¹

children includes a range of crimes such as “sexual abuse or exploitation of a child for the financial benefit of any person”).

⁷ See U.S. Dep’t of Just., *Fact Sheet: Human Trafficking*, OFF. OF JUST. PROGRAMS (Dec. 2011) [hereinafter *Fact Sheet: Human Trafficking*], archived at <https://perma.cc/5URD-LRY5> (analyzing that between 2008 and 2010, 82% of reported human trafficking involved sex trafficking, 11% involved labor trafficking, and the remaining 7% accounted for unknown forms of human trafficking).

⁸ See Victims of Trafficking and Violence Protection Act § 102 (outlining the various forms of sexual abuse that women and children may be subjected to). The purpose of the act is to “combat trafficking in persons, a contemporary manifestation of slavery whose victims are predominantly women and children, to ensure just and effective punishment of traffickers, and to protect their victims.” *Id.* § 102(a).

⁹ See PRESIDENT’S INTERAGENCY TASK FORCE, REPORT ON U.S. GOVERNMENT EFFORT TO COMBAT TRAFFICKING IN PERSONS 5 (2017) (noting the threat that human trafficking poses on national security). “Human traffickers will continue to expand and diversify their recruitment tactics and techniques if left unchecked.” *Id.* The President’s Task Force regularly convenes in order to coordinate federal policies linked to the prevention of human trafficking. *Id.*

¹⁰ See TRAFFICKING IN PERSONS REPORT, *supra* note 3, at 3 (pointing out that human trafficking is a global crime that needs the attention of the world’s leaders in order to be resolved). Human trafficking is multifaceted and complex, thus raising significant challenges in developing effective anti-trafficking policies. *Id.* See also PRESIDENT’S INTERAGENCY TASK FORCE, *supra* note 9, at 7 (defining forced labor to include forced child labor, domestic servitude, forced marriage, and unlawful recruitment or use of child soldiers); *Human Trafficking and the Internet*, *supra* note 4 (listing some of the social media apps such as Facebook, Instagram, and Twitter that allow traffickers to quickly “friend” and “follow” potential victims). These social media platforms allow traffickers to reach victims on a larger scale by reaching more victims at a faster rate. See *Human Trafficking and the Internet*, *supra* note 4.

¹¹ See Romina Canessa, *Interrupting the Vicious Cycle of Online Sex Trafficking*, FAIR OBSERVER (July 30, 2018), archived at <https://perma.cc/JM7F-PVKQ> (stressing that the transitory nature of sex trafficking makes it even harder for law enforcement to track). The internet keeps law enforcement from locating pimps, identifying essential witnesses and evidence, and sharing information across jurisdictions. *Id.* See Donna M. Hughes, *The Use of New Communications and Information Technologies for Sexual Exploitation of Women and Children*, 13 HASTINGS WOMEN’S L. J. 129 (2002) [hereinafter *The Use of New Communications*] (asserting how the use of technology not only allows sexual predators the ability to

In 2000, Congress discovered that 700,000 persons annually, primarily women and children, were being trafficked within or across international borders.¹² In 2018, it was estimated that over 100,000 human trafficking victims had been identified globally, thousands of which came in and out of the United States.¹³ With the rise of the internet, the market for sex trafficking went global, with the internet becoming the mecca.¹⁴ Specifically, many victims meet their traffickers over the internet by being coerced with promises of a better

harm and exploit women and children from the privacy of their own homes, but it further enables them to do it more efficiently and effectively, while remaining anonymous). *See also* TRAFFICKING IN PERSONS REPORT, *supra* note 3, at 3 (commanding that putting an end to human trafficking requires a dynamic political framework). Human trafficking needs national governments to start enforcing “robust anti-trafficking laws that criminalize all forms of human trafficking, tangible support for victim protection, and robust coordination with and resources for the various stakeholders required to combat and prevent this crime.” *Id.* *See* MARK LATONERO ET AL., THE RISE OF MOBILE AND THE DIFFUSION OF TECHNOLOGY-FACILITATED TRAFFICKING iv (U.S.C. Annenberg ed., 2012) [hereinafter THE RISE OF MOBILE] (realizing that mobile devices and networks are now of central importance in sex trafficking). The internet played a large role in the rapid growth of sex trafficking. *Id.*

¹² *See* Victims of Trafficking and Violence Protection Act § 102 (finding that the degrading institution of slavery is continuing to grow throughout the world). Traffickers are primarily targeting women and children who have a lack of education, economic opportunities, and who are living below the poverty lines in their countries of origin. *Id.*

Existing legislation and law enforcement in the United States and other countries are inadequate to deter trafficking and bring traffickers to justice, failing to reflect the gravity of the offenses involved Instead, even the most brutal instances of trafficking in the sex industry are often punished under laws that also apply to lesser offenses, so that traffickers typically escape deserved punishment.

Id. § 102(b)(14).

¹³ *See* TRAFFICKING IN PERSONS REPORT, *supra* note 3, at 448 (explaining how the United States is a “source, transit, and destination” of sex trafficking). “Trafficking occurs in both legal and illicit industries including in commercial sex, hospitality, traveling sales crews, agriculture, janitorial service, construction, restaurants, salon services, massage parlors, fairs and carnivals, drug smuggling, and child care and domestic work.” *Id.*

¹⁴ *See* Donna M. Hughes, *Prostitution Online*, 2 J. OF TRAUMA PRAC. 1 (2003) [hereinafter *Prostitution Online*] (exploring how the rise of the internet made available sex related information about every country in the world).

life.¹⁵ Nevertheless, the relationship will quickly turn toxic with the trafficker becoming controlling and abusive.¹⁶ In 2016, the National Center for Missing and Exploited Children reported an 846% increase from 2010 to 2015 in reports of suspected child trafficking.¹⁷ This increase was found to be directly correlated to the increase in the use of the internet in selling children for sex.¹⁸

¹⁵ See Herbert B. Dixon Jr., *Human Trafficking and the Internet*(*and Other Technologies, too)*, A.B.A. (Jan. 1, 2013), archived at <https://perma.cc/L2C7-7X4X> (contending that some traffickers have started to contact their victims on social media sites such as Facebook, where they will build relationships with these victims, eventually enticing them leave home and visit them).

¹⁶ See *id.* (emphasizing how traffickers will demand cooperation from victims by threatening harm or death to them or their family). This tactic often forces victims to cut off all communication with their family. *Id.* These are techniques that traffickers use to maintain control over their victims. *Id.* See also Victims of Trafficking and Violence Protection Act § 102 (finding that victims are often forced through physical violence to engage in sex acts or perform slavery-like labor). “Traffickers often make representations to their victims that physical harm may occur to them or others should the victim escape or attempt to escape.” *Id.* § 102(b)(7). See I AM JANE DOE, *supra* note 1 (describing some of the gruesome acts done to one of the victims in the documentary, which were shaving her head, stabbing her, and burning her). See also *Growing Awareness. Growing Impact.*, POLARIS (Feb. 5, 2020), archived at <https://perma.cc/SHB9-Q8AN> (explaining the recruitment tactics that traffickers use in order to lure victims into sex trafficking). Traffickers frequently prey on an individual’s vulnerabilities and use tactics such as marriage propositions, posing as a benefactor, job offers, or false promises. *Id.* See also Rogers, *supra* note 5 (proclaiming the variety of ways that victims of sex trafficking are trapped despite not being physically restrained). Victims become trapped by threats of violence, fear of their abuser, addiction to drugs, or having nowhere to go. *Id.* Alternatively, to avoid abuse, many victims must meet a certain dollar quota each day. *Id.* Also, other traffickers use techniques known as a “Romeo trafficker.” *Id.* Here, these traffickers seek out women and teens with low self-esteem and develop relationships with them as their boyfriends. *Id.* Once trust is established, the cycle of abuse begins by forcing the victims to have sex with others. *Id.*

¹⁷ See SUBCOMM. ON INVESTIGATIONS, *supra* note 1, at 5 (“[I]n 2013 social scientists estimated that there were as many as 27 million victims of human trafficking worldwide, including 4.5 million people trapped in sexual exploitation.”). The percentage for human trafficking is much higher in the United States, with statistics showing that over eight in ten suspected incidents of human trafficking also involve sex trafficking. *Id.*

¹⁸ See COMMERCIAL SEXUAL EXPLOITATION, *supra* note 6, at 7 (finding that online sex transactions are not as easily detected by law enforcement); see also *The Use of New Communications*, *supra* note 11, at 146 (providing that criminals use new technologies such as burner phones to maintain their anonymity). “Mobile phones can be programed to transmit false identifications.” *The Use of New*

The advancement of technology is fueling sex trafficking, and legislation is not moving fast enough.¹⁹ In 2017, Congress passed the Allow States and Victims to Fight Online Sex Trafficking Act (“FOSTA”).²⁰ This Act was passed with the purpose of amending the Communications Decency Act of 1934, and no longer granting immunity to internet service providers (“ISPs”), whose websites “knowingly” publish illegal sex trafficking content.²¹ In hindsight, FOSTA is a progressive enactment to help stop online sex trafficking, but this Act has unintended consequences.²² For instance, instead of

Communications, *supra* note 11. New technologies such as encryption are largely depended on by traffickers to disguise content. *Id.*

¹⁹ See Allow States and Victims to Fight Online Sex Trafficking Act of 2017, H.R. 1865, 115th Cong. (2018) (noting the crisis surrounding sex trafficking on the internet). See also COMMERCIAL SEXUAL EXPLOITATION, *supra* note 6, at 1 (acknowledging the steps taken through antitrafficking legislation). TVPA of 2000 established an evaluation, through the Department of State, that rates nations on their efforts to end human trafficking. *Id.* This evaluation assigns a “tier” to each country as a means to measure how the country complies with U.S. antitrafficking policies with “tier 1” being the highest ranking and “tier 3” being the lowest ranking. *Id.* at 2. The countries that do not comply with U.S. antitrafficking efforts may suffer consequences such as nonhumanitarian and non-trade-related aid. *Id.* See also *Accelerating the use of tech to combat human trafficking*, THE GLOBAL INITIATIVE AGAINST TRANSNAT’L ORGANIZED CRIME (Apr. 30, 2019) [hereinafter *Accelerating the use of tech*], archived at <https://perma.cc/2BQ6-Y7X9> (urging that “diverse technical solutions are needed to combat human trafficking”).

²⁰ See H.R. 1865 (adopting that any websites who knowingly facilitate online sex trafficking will be subject to civil or criminal punishment).

²¹ See Susan Molinari, *Google’s fight against human trafficking*, GOOGLE (Sept. 7, 2017), archived at <https://perma.cc/MC2M-VXEE> (arguing that the fight against online sex trafficking act could backfire if companies seek to avoid knowledge of human trafficking on their websites). While large companies are more likely to continue their proactive enforcement efforts and can afford to fight lawsuits, most smaller platforms are made liable for “knowledge” of human trafficking occurring on their platforms. *Id.* Thus, there is a risk that some will seek to avoid that “knowledge” by no longer looking for it. *Id.*

²² See *id.* (arguing that the implementation of the FOSTA will deter tech companies from acting as a “good Samaritan” in order to track down traffickers on the internet). Google believes that “it’s much better to foster an environment in which all technology companies can continue to clean their platforms and support effective tools for law enforcement and advocacy organizations to find and disrupt these networks.” *Id.* See Mike Godwin, *Why Internet advocates are against the anti-sex trafficking bill*, RSTREET (Mar. 20, 2018), archived at <https://perma.cc/H4YW-585T> (arguing that the FOSTA will hurt the internet because internet service companies may no longer monitor and enforce policies, so as to not risk liability).

promoting companies to better ensure there is no illegal sex trafficking content being published on their websites, these companies are instead taking necessary steps to avoid liability for “knowingly” facilitating online sex trafficking.²³ Therefore, Congress needs to keep working to not only put in place the proper preventative measures, but to also catch up or get ahead in the technological race that is currently being won by sex traffickers.

II. History

A. *The Rise of Technology in Sex Trafficking*

Before the internet became mainstream, newsgroups and newspapers were the main media outlet for sex trafficking advertisements.²⁴ However, with the rise of technology and the internet, there has been a radical transformation in the landscape of sex trafficking.²⁵ With the use of the internet, sex trafficking can be

²³ See Victims of Trafficking and Violence Protection Act of 2000, H.R. 3244, 106th Cong. § 102(b) (2000) (reviewing Congress’s findings of modern-day slavery). See also Molinari, *supra* note 21 (highlighting that Google has made efforts such as developed technology to identify traffickers, as well as connect victims to the resources they need). See SUBCOMM. ON INVESTIGATIONS, *supra* note 1, at 7 (outlining that the Communications Decency Act provides that no internet service provider will be treated as the publisher or speaker of any information provided by another information content provider). See also Complaint at 1, Doe v. Backpage.com, 104 F. Supp. 3d 149 (D. Mass. 2015) (No. 14-13870-RGS) (arguing that Backpage.com should be held liable for their knowing facilitation of sex trafficking despite their website being a neutral forum). ISP websites such as Backpage are “criminal enterprises” that derive their revenue from the illegal postings for commercial sex. *Id.*

²⁴ See *Prostitution Online*, *supra* note 14, at 1 (describing how the sex industry changed once it moved from newspapers to a much larger, unregulated medium on the internet). Prior to the rise of the internet people would have to visit pornography stores or theatres to have access to sex shows. *Id.* at 7. Once VCRs came out, men could watch pornography from home without risking going to poor sections of town, or being seen by someone they know. *Id.* In 2002, sex industry subscribers could watch live sex and strip shows via video chat. *Id.* Subscribers could interact by voice or keyboard and direct the sex acts performed. *Id.* at 4. These subscriptions allowed many users to be linked at one time, or pay extra for a private show. *Id.* With these new technologies, sex offenders and exploiters could record these live shows and repeatedly watch or keep as trophies. *Id.* See Dixon Jr., *supra* note 15 (exploring how the rise of social media has given traffickers greater access to victims).

²⁵ See THE RISE OF MOBILE, *supra* note 11, at iv (realizing that mobile devices and networks are now of central importance in sex trafficking). See *Prostitution Online*,

conducted online.²⁶ By the mid 1990s, women and children were being marketed worldwide.²⁷ In 1994, the first prostitution website was launched.²⁸ This website enabled perpetrators to market women for services around the world.²⁹ Shortly after the establishment of prostitution websites, the “World Sex Guide” launched online.³⁰ Here, men from around the world could leave reviews on women based on how easily they were able to coerce them in to “painful, risky, or humiliating” sex acts.³¹ This later led to the creation of video chatting

supra note 14, at 7 (emphasizing the magnitude of growth in pornography websites and the ability of men to connect with other “like-minded” men). The internet privatized men’s viewing of pornography and sex shows. *Id.* “The increased privacy and anonymity gave men more protection from social stigmatization and law enforcement interference with their exploitation and abuse of women.” *Id.* See Canessa, *supra* note 11 (highlighting that the expansion of sex trafficking is correlated with the growth of the internet). Like any other successful business, sex traffickers use the internet as their means for marketing and communication. *Id.*

²⁶ See THE RISE OF MOBILE, *supra* note 11, at iv (emphasizing how the internet led to the rapid growth of sex trafficking). See Canessa, *supra* note 11 (articulating that the use of the internet for sex trafficking makes things quick, cheap, and simple for traffickers). “Traffickers are able to advertise in multiple locations, test out new markets, locate customers and transport victims to meet buyers while avoiding detection by authorities.” *Id.*

²⁷ See *Prostitution Online*, *supra* note 14, at 1 (explaining that since perpetrators are able to hide their identities behind a computer, the abuse and exploitation of victims online can sometimes be worse than physical abuse). Online sex trafficking brings about abuse and exploitation similar to the regular sex industry, plus additional abuses unique to the internet. *Id.* See *Human Trafficking and the Internet*, *supra* note 4 (reporting that some children are forced in to sex trafficking by their parents).

²⁸ See *Prostitution Online*, *supra* note 14, at 1 (outlining how the internet has enabled pimps to distribute unlimited amounts of pornography due to the growth of the internet). For instance, from January to December of 2001, there was a 350% increase in the number of pornography sites—some of which also included violence against women and children. *Id.* at 2. Further, by 2001, there were around 300,000 pornography websites. *Id.*

²⁹ See *id.* (examining the history of the first online prostitution website).

³⁰ See *id.* (noting the worldwide reach that came from prostitution online). The creation of prostitution websites aided in the global expansion of human trafficking. *Id.* The World Sex Guide provides sex-related information about every country in the world. *Id.* at 3. There are also other websites dedicated to online prostitution, like PunterNet, which “specializes in locating and reviewing women in prostitution in the United Kingdom.” *Id.*

³¹ See *id.* (adding how on these sex forums, they also provide locations of the victim in order for other perpetrators to later find them). See John W. Whitehead, *The Super Bowl’s Biggest Losers: The Boys and Girls Being Sold for Sex 20 Times a Day*,

where with a little less than the click of a mouse, perpetrators had access to victims.³²

The urgency to end sex trafficking came to the world's attention in 1999, due to the establishment of online rape camps.³³ These rape camps were live video chats, where viewers were given the capability to request acts of sexual assault and torture that were then carried out on the victim.³⁴ With new video chat technology, perpetrators were able to record and re-watch the once live sex shows.³⁵ This technology allowed video recordings to be used on websites as a way for traffickers to market women and children.³⁶ These new technological capabilities captured the attention of the legislature and compelled them to act.³⁷

RUTHERFORD INST. (Jan. 28, 2020), *archived at* <https://perma.cc/MV3T-NB2L> (pointing to the high sophistication of sex trafficking that allows the business to operate in towns large and small). “For instance, the Baltimore-Washington area, referred to as The Circuit, with its I-95 corridor dotted with rest stops, bus stations and truck stops, is a hub for the sex trade.” *Id.*

³² See *Prostitution Online*, *supra* note 14, at 2 (emphasizing the popular usage of video chatting allowing men to remain anonymous while still being able to abuse victims); I AM JANE DOE, *supra* note 1 (describing the dangers of human trafficking moving to the depths of the internet); Whitehead, *supra* note 31 (exposing how the internet allows “sex on the fly” with young girls and women).

³³ See *Prostitution Online*, *supra* note 14, at 3–4 (discussing the development of interactive websites in which perpetrators could subscribe to live video sessions to watch or partake in the abuse of women).

³⁴ See *Sex Trafficking*, *supra* note 4 (classifying some types of pornography as sex trafficking when the “production of pornography involves the use of force, fraud or coercion to prompt the performance of those being shown in the pornography”).

³⁵ See *Prostitution Online*, *supra* note 14, at 5 (acknowledging how men having unlimited access to women via the internet is also influencing offline attitudes and behaviors towards women). See also Whitehead, *supra* note 31 (stressing how the oversexualization of young girls is one of the drivers for sex trafficking). For many years now, young girls have been sexualized via music videos, billboards, television, and clothing stores. *Id.* “Marketers have created a demand for young flesh and a ready supply of over-sexualized children.” *Id.*

³⁶ See *Prostitution Online*, *supra* note 14, at 2 (laying out several of the different ways in which video technology has allowed traffickers to further their business); *Sex Trafficking*, *supra* note 4 (highlighting how traffickers would exploit victims by recording the acts they performed and using those videos for training); Whitehead, *supra* note 31 (noting the different types of ways that pimps are able to find their victims, such as media and social networks, cruising malls and schools, and sometimes even through girl-to-girl recruitment).

³⁷ See Danielle Citron & Quinta Jurecic, *FOSTA: The New Anti-Sex-Trafficking Legislation May Not End the Internet, But It's Not Good Law Either*, LAWFARE (Mar. 28, 2018), *archived at* <https://perma.cc/Y9QT-3YJD> (discussing how Congress was

B. *The Communications Decency Act of 1996*

In 1996, the Communications Decency Act (“CDA”) was enacted by Congress as a way to regulate the distribution of obscene or indecent material on the internet.³⁸ The Act states that “no provider or user of an [ISP] shall be treated as the publisher or speaker of any information provided by another information content provider.”³⁹ Further, Section 230 of the CDA protects websites based on a “good faith” effort to report or block material that the provider considers to be “obscene, lewd, lascivious, filthy, excessively violent, harassing or otherwise objectionable, whether or not such material is constitutionally protected.”⁴⁰ Essentially, Section 230 of the CDA is providing broad immunity to ISPs.⁴¹ Nonetheless, the Ninth Circuit held that if a website plays any part in editing content to make it more acceptable for posting purposes, then they can risk losing their immunity under the CDA.⁴² With Section 230 of the CDA in play, the courts have struggled to assign liability to those truly responsible for the buying and selling of sex online.⁴³

able to slide completely under the radar, and pass one of the most significant pieces of internet legislation).

³⁸ See 47 U.S.C. § 230 (2018) (defining key terms of the Communications Decency Act); see also SUBCOMM. ON INVESTIGATIONS, *supra* note 1, at 1 (outlining the implications of the Communications Decency Act). See Citron & Jurecic, *supra* note 37 (distinguishing that “federal criminal law, intellectual property laws, and the Electronic Communications Privacy Act fall outside the immunity” of the CDA).

³⁹ See SUBCOMM. ON INVESTIGATIONS, *supra* note 1, at 7 (explaining the intentions behind the Communication Decency Act).

⁴⁰ See *id.* at 7 (explaining that most courts have broadly construed Section 230 to provide near complete civil and criminal immunity for neutral forum websites).

⁴¹ See Citron & Jurecic, *supra* note 37 (highlighting that Section 230 of the CDA was never meant to protect ISP websites when illegal content was posted on their site). But see SUBCOMM. ON INVESTIGATIONS, *supra* note 1, at 7 (stressing that ISP websites have received unintended protections from Section 230 of the CDA).

⁴² See *id.* at 7–8 (noting that Section 230 “was not meant to create a lawless no-man’s-land on the internet”). Simply put, if a website operator edits user-created content, then they maintain their immunity so long as the edits do not pertain to the illegality. *Id.* Nevertheless, when a website operator edits in a manner contributing to the illegality, then they are no longer immune. *Id.* at 8.

⁴³ See *id.* at 1 (finding that many websites claim to be mere hosts of the illegal content, but that they do not have any actual knowledge of the illegal content).

C. The Victims of Trafficking and Violence Protection Act of 2000

In 2000, the Victims of Trafficking and Violence Protection Act (“TVPA of 2000”) was enacted by Congress.⁴⁴ This Act served as the first federal law to protect victims and prosecute traffickers.⁴⁵ Moreover, along with this bill came the Interagency Task Force to monitor and combat trafficking.⁴⁶ The Task Force was established with three objectives: (1) to collect data and research on domestic and international trafficking; (2) to evaluate the progress that the United States and other countries were taking to prevent, protect, and prosecute human trafficking; and (3) to cooperate with other nations as an effort to end trafficking globally.⁴⁷

⁴⁴ See 22 U.S.C. § 7101(b)(14) (2000) (establishing that the “[e]xisting legislation and law enforcement in the United States and other countries are inadequate to deter trafficking and bring traffickers to justice, failing to reflect the gravity of the offenses involved”). See also U.S. DEP’T OF HEALTH & HUMAN RES., TRAFFICKING VICTIMS PROTECTION ACT OF 2000: FACT SHEET (highlighting that prior to TVPA there was no comprehensive federal law that existed to address human trafficking). “Human trafficking is increasingly committed by organized, sophisticated criminal groups, and is the fastest growing source of profits for organized criminal enterprises worldwide.” *Id.*

⁴⁵ See 22 U.S.C. § 7101 (noting that “the international community agrees that trafficking in persons involves grave violations of human rights and is a matter of pressing international concern”). See U.S. DEP’T OF HEALTH & HUMAN RES., *supra* note 44 (explaining the major takeaways of the Victims of Trafficking and Violence Protection Act, as well as addressing its main goals). The three main goals of TVPA of 2000 are: “(1) prevent[ing] human trafficking overseas, (2) protect[ing] victims and help[ing] them rebuild their lives in the U.S. with Federal and state support, and (3) prosecut[ing] traffickers of persons under stiff Federal penalties.” *Id.*

⁴⁶ See Victims of Trafficking and Violence Protection Act of 2000, H.R. 3244, 106th Cong. § 105 (2000) (articulating the structure of the interagency task force that was to be set up under the TVPA). The members of the task force would be appointed by the President and would include “the Secretary of State, the Administrator of the United States Agency for International Development, the Attorney General, the Secretary of Labor, the Secretary of Health and Human Services, the Director of Central Intelligence, and such other officials as may be designated by the President.” *Id.* § 105(b).

⁴⁷ See *id.* § 105(d) (setting forth the duties of the Task Force). See THE RISE OF MOBILE, *supra* note 11, at 15–16 (analyzing the past efforts of both state and federal lawmakers to address sex trafficking). While many states now have laws in place that criminalize sex trafficking, they have only recently done so. *Id.* Though states

The TVPA of 2000 was not only meant to help combat human trafficking, but to also give aid to women who were prone to becoming victims of sex trafficking.⁴⁸ The TVPA of 2000 accomplished this goal through establishing various prevention programs with the objective of deterring prostitution.⁴⁹ Further, the Bill established the “T Visa,” which allowed non-residents who were victims of sex trafficking to become temporary residents of the United States, and be eligible for the Witness Protection Program.⁵⁰ Additionally, the TVPA of 2000 made all forms of human trafficking a federal crime.⁵¹ Not

have imposed laws against sex trafficking, they differ significantly in the variations of punishments imposed on perpetrators. *Id.*

⁴⁸ See U.S. DEP’T OF HEALTH & HUMAN RES., *supra* note 44 (outlining the ways in which the TVPA would help victims of human trafficking to rebuild their lives). See also TRAFFICKING IN PERSONS REPORT, *supra* note 3, at 24 (recognizing the need for severe trauma treatment for victims of human trafficking). “To appropriately support survivors, a trauma-informed approach should be incorporated across all human trafficking efforts, including the criminal justice process and while providing victim services.” *Id.* Survivors of trafficking often experience complex trauma that can interrupt the rational thought process and the ability to handle stress and emotions. *Id.* See also H.R. 3244 § 102 (enacting some initial services for victims of human trafficking including reintegration and resettlement). The Act further provides the rights that victims of human trafficking shall have if they are taken into custody. *Id.*

⁴⁹ See S.I. Rosenbaum, *In sex trade debate, everything old is new again*, BOSTON GLOBE (Mar. 10, 2018), archived at <https://perma.cc/4MJE-QHVV> (linking prostitution and human trafficking). See H.R. 3244 § 106 (announcing the initiatives that would be put in place to deter and inform potential victims of the dangers of human trafficking). The TVPA set up international initiatives to enhance economic opportunity for potential victims with the hopes of deterring prostitution. *Id.* The Act further set out to establish and carry out programs to increase public awareness about human trafficking. *Id.* See also U.S. DEP’T OF HEALTH & HUMAN RES., *supra* note 44 (expounding upon the educational programs that will be put in place to help prevent human trafficking). Prevention also included educational programs and grants to nongovernmental organizations to help advance the capacities of women in their political, social, economic and educational roles. *Id.* See also Frederick Douglass Trafficking Victims Prevention and Protection Reauthorization Act of 2018, H.R. 2200, 115th Cong. § 101 (2019) (assisting in awarding grants to local educational agencies to educate school staff and students on the signs of sex trafficking, as well as how to avoid becoming a victim).

⁵⁰ See H.R. 3244 § 107 (describing that the law makes victims of trafficking eligible for benefits and services under federal or state programs that can include money, medical assistance, and social services).

⁵¹ See *id.* § 112 (setting forth that if human trafficking results in death, or if the crime involves kidnapping, an attempted kidnapping, aggravated sexual abuse, attempted aggravated sexual abuse, or an attempt to kill, the trafficker could be sentenced to

only did the United States seek to end trafficking, but they sought to aid and support those who had been victimized by such acts.⁵²

D. Trafficking Victims Protection Reauthorization Act of 2003

In 2003, the Bush Administration enacted the Trafficking Victims Protection Reauthorization Act (“TVPRA of 2003”) to further combat human trafficking.⁵³ This reauthorization added to the TVPA of 2000 by authorizing over \$200 million to combat human trafficking and renewing the United States’ commitment to ending human trafficking.⁵⁴ The TVPRA of 2003 gave victims even more access to aid, and allowed them to bring civil suits against traffickers in order to recover punitive damages.⁵⁵

life in prison). The traffickers who exploit children (under the age of 14) using force, fraud or coercion, for the purpose of sex trafficking can be imprisoned for life. *Id.*
⁵² See Consolidated Appropriations Act, H.R. 2673, 108th Cong. (2004) (noting the economic aid given by the United States to other entities that work to eliminate human trafficking). See COMMERCIAL SEXUAL EXPLOITATION, *supra* note 6, at 3 (pointing out that the traumatization experienced by victims of sex trafficking is well documented). “Sexually exploited persons suffer from high rates of posttraumatic stress disorder (PTSD), Stockholm Syndrome, memory loss, aggression, fear, depression, anxiety, hostility, anger issues, sexually transmitted diseases, physical trauma from beatings, and emotional and psychological trauma from engaging in unwanted sex.” *Id.*

⁵³ See Trafficking Victims Protection Reauthorization Act of 2003, H.R. 2620, 108th Cong. § 6 (2003) (authorizing additional funding to the Trafficking Victims Protection Act of 2000). The TVPRA of 2003 allowed for three major provisions that expanded its reach: (1) allowing for materials to be disseminated, which alerts travelers that sex trafficking is illegal; (2) creating civil action that allowed victims to sue their traffickers in federal district court; and (3) requiring the Attorney General to report annually on anti-trafficking efforts. *Id.* § 3. See U.S. DEP’T OF HEALTH & HUM. RESOURCES, *supra* note 44 (renewing the U.S. government’s commitment to identifying and aiding victims of sex trafficking).

⁵⁴ See *id.* (expressing the initiatives by the Bush administration to assist the 18,000-20,000 victims of human trafficking who are trafficked through the United States every year). The TVPRA of 2003 also encouraged the nation’s 21,000 state and local law enforcement agencies to participate in the detection and investigation of human trafficking cases. *Id.*

⁵⁵ See *id.* (noting that the reauthorization act brought even more justice to victims by allowing them to sue in civil court and made their access to aid easier and faster in the new “victim-centered” law); *but see* H.R. 2673 (asserting that while the TVPA has helped victims of sex trafficking, it has also placed unintended obstacles in their way of getting aid).

E. Trafficking Victims Protection Reauthorization Act of 2013

By 2012, President Barack Obama stated that human trafficking was “the most pressing human rights issue of our time.”⁵⁶ This stark realization warranted the enactment of the Trafficking Victims Protection Reauthorization Act of 2013 (“TVPRA of 2013”).⁵⁷ Different from the previous Victim Protection Acts, this Act focused on the rapid growth of technology and how it affected human trafficking.⁵⁸ The goal behind the 2013 Reauthorization was to initiate the use of technology to combat trafficking online.⁵⁹ Law enforcement would use electronic surveillance, and data from cellphones or computers to monitor and find suspected perpetrators involved in human trafficking.⁶⁰

⁵⁶ See *THE RISE OF MOBILE*, *supra* note 11, at iv (quoting President Obama as he referred to human trafficking as a “debasement of our common humanity that tears at the social fabric of our communities, endangers public health, distorts markets, and fuels violence and organized crime”). Obama further noted his plans to “turn the tables on traffickers” by using technology to stop them. *Id.*

⁵⁷ See Trafficking Victims Protection Reauthorization Act of 2013, H.R. 898, 113th Cong. (1st Sess. 2013) (adding additional protections to the original Act); see also *THE RISE OF MOBILE*, *supra* note 11, at 14 (noting that the White House’s Policy Council on Women and Girls has created a group of anti-trafficking experts, “with the explicit purpose of improving information-sharing efforts among law enforcement, improving their training efforts, and utilizing online and mobile technologies to assist victims”).

⁵⁸ See generally, *Summary of the Trafficking Victims Protections Act (TVPA) and Reauthorizations FY 2017*, ATEST (Jan. 11, 2017) [hereinafter *Summary of the TVPA*], archived at <https://perma.cc/P84X-TY5G> (summarizing the progression of the Trafficking Victims Protection Reauthorization Acts). See *THE RISE OF MOBILE*, *supra* note 11, at 14 (noting that technology needed to be incorporated into the plan to combat sex trafficking). “[M]obile devices and networks have risen in prominence and are now of central importance to the sex trafficking of minors in the United States.” *Id.*

⁵⁹ See *Summary of the TVPA*, *supra* note 58 (“This authorization establishes and strengthens programs to ensure that U.S. citizens do not purchase products made by victims of human trafficking, and to prevent child marriage.”). This authorization also puts in place emergency response provisions, and strengthens collaboration between state and local law enforcement. *Id.*

⁶⁰ See *THE RISE OF MOBILE*, *supra* note 11, at 15–16 (setting forth ways in which technology will be used to combat human trafficking). Data compiled from cellphones and mobile networks is extremely helpful in obtaining information and

Additionally, soon after the passing of the 2013 Reauthorization Act, ISP tech companies in the private sector got involved in the fight against human trafficking.⁶¹ ISP tech companies were forming company-wide initiatives to detect traffickers and supply victims with resources to get help.⁶² Nonetheless, ISPs operate as neutral forum websites where users can post their own content to the site.⁶³ Though some websites are enacting protocols to stop trafficking, other websites are enabling buyers and sellers of sex to maintain their anonymity, while remaining free of legal consequences.⁶⁴

evidence to be used against traffickers—this information can further improve identifying, tracking, and prosecuting traffickers. *Id.* at 16–18. Research has indicated that tools such as data mining, mapping, computational linguistics, and advanced analytics could be used by governmental and law enforcement agencies to further anti-trafficking goals of prevention and prosecution. *Id.*

⁶¹ See Canessa, *supra* note 11 (naming some of the industry giants such as Oracle, IBM, Disney, 20th Century Fox and Hewlett Packard who backed the FOSTA). These industry giants backed FOSTA because they believed technology can be used for both good and bad, but it should not be left undefended by criminals. *Id.* Further, Facebook’s Chief Operating Officer noted her support for the FOSTA in a statement explaining that everyone has a responsibility to do their part in the fight against sex trafficking. *Id.*

⁶² See THE RISE OF MOBILE, *supra* note 11, at 16–18 (applauding companies such as Microsoft and Google for their millions of dollars in aid to help combat sex trafficking); see also Jackie Wattles & Donie O’Sullivan, *Facebook’s Mark Zuckerberg calls for regulation of the internet*, CNN BUS. (Mar. 30, 2019), archived at <https://perma.cc/5NCF-V78U> (quoting Mark Zuckerberg’s call for a more active role for governments and regulators on the Internet). Zuckerberg stated that “by updating the rules for the Internet we can preserve what is best about it – the freedom for people to express themselves . . . while also protecting society from broader harms.” This statement came directly after Facebook failed to stop a live stream from the suspected terrorist in New Zealand that killed 50 people. *Id.*

⁶³ See 47 U.S.C. § 230(f)(2) (2018) (defining an interactive computer service).

The term “interactive computer service” means any information service, system, or access service provider that provides or enables computer access by multiple users to a computer sever, including specifically a service or system that provides access to the internet such as systems operated or services offered by libraries or educational institutions.

Id. See *Doe v. Backpage.com, LLC*, 104 F. Supp. 3d 149, 162 (D. Mass. 2015) (pointing out that because ISPs are a neutral forum, websites such as Backpage are intentionally designed to attract advertisements for commercial sex, but will not be held legally responsible for such illegal postings).

⁶⁴ See *Doe v. Backpage.com, LLC*, No. 17-11069-LTS, 2018 U.S. Dist. LEXIS 53198, at *4 (D. Mass. Mar. 29, 2018) (concluding that Backpage attracted perpetrators and traffickers due to the fact that they could remain undetected). See I

F. The Allow States and Victims to Fight Online Sex Trafficking Act

On March 21, 2018, Congress passed into law the Allow States and Victims to Fight Online Sex Trafficking Act (“FOSTA”).⁶⁵ This Act clarified that the CDA “was never intended to provide legal protection to websites that unlawfully promote and facilitate prostitution and websites that facilitate traffickers in the sale of unlawful sex.”⁶⁶ The FOSTA states that to “participate” means to “knowingly assist, support, or facilitate” sex trafficking.⁶⁷ With the

AM JANE DOE, *supra* note 1 (referring to Backpage as the “Walmart” of sex trafficking).

⁶⁵ See Citron & Jurecic, *supra* note 37 (acknowledging that Congress is moving forward with altering the CDA). Under the new law, technology companies could face criminal charges if their conduct also violates 18 U.S.C §1591. *Id.* Companies could also be criminally liable in state court under section 2421A, which prohibits transporting persons across state lines with the intent to engage in prostitution or other criminal activity. *Id.*

See also Allow States and Victims to Fight Online Sex Trafficking Act of 2017, H.R. 1865, 115th Cong. (2018) (amending section 230 of the CDA to allow enforcement against ISPs who promote and facilitate sex trafficking on the sites).

⁶⁶ See H.R. 1865 (noting that clarification of the CDA is warranted to ensure that such protection no longer extends to websites such as Backpage). Prior to this clarification, websites that promoted and facilitated prostitution were carelessly allowing the sale of sex trafficking, and doing nothing to prevent it. *Id.* See also Tom Jackman, *Trump Signs ‘FOSTA’ Bill Targeting Online Sex Trafficking, Enables States and Victims to Pursue Websites*, WASH. POST (Apr. 11, 2018) [hereinafter *Trump Signs FOSTA*], archived at <https://perma.cc/G8HG-CPD5> (pointing out that the new legislation allows state and federal prosecutors to pursue websites that enable sex trafficking). The signing of the FOSTA came just a week after a 93-count indictment issued against seven executives from Backpage.com. *Id.* The indictment alleged that the website facilitated prostitution and laundered tens of millions of dollars from the sale of teenage girls through their site. *Id.* Congress was “invited” to change the law after the courts found in countless lawsuits filed against Backpage.com that Backpage was being protected under the CDA. *Id.*

⁶⁷ See H.R. 1865 (defining what conduct will be punished under the new Act). See Citron & Jurecic, *supra* note 37 (asserting that the FOSTA redefines what “knowingly” means). Further, technology companies will no longer be protected from civil liability if they “knowingly” assist advertising that violates federal sex-trafficking law. *Id.* Currently, advertisers are liable under the CDA only if they “knowingly” benefit from outlawed ads. *Id.*

passing of the FOSTA, ISPs could no longer escape civil and criminal liability relating to the exploitation of children or sex trafficking.⁶⁸

G. *The Trafficking Victims Protection Act of 2018*

In an effort to further combat human trafficking, on January 8, 2019, President Trump signed the Trafficking Victims Protection Reauthorization Act of 2018 (“TVPRA of 2018”).⁶⁹ This Act reauthorized existing efforts that have been in place since the Act’s creation in 2000, as well as launched new initiatives.⁷⁰ This legislation seeks to accomplish three major goals: (1) stronger law enforcement; (2) government and corporate accountability; and (3) prevention efforts.⁷¹ Specifically, this Act will give prosecutors the crucial

⁶⁸ See Allow States and Victims to Fight Online Sex Trafficking Act § 7 (setting forth the civil and criminal liabilities that will be imposed if an ISP facilitates sex trafficking); Canessa, *supra* note 11 (calling the FOSTA a piece of groundbreaking law that interrupts the cycle of violence created by sex trafficking). “FOSTA shrinks the online commercial sex market and opens up legal avenues for prosecutors and victims to take steps against social networks . . . that have failed to act sufficiently against those who post exploitative content.” *Id.*

⁶⁹ See President Donald J. Trump *Is Fighting to Eradicate Human Trafficking*, THE WHITE HOUSE (Jan. 9, 2019) [hereinafter *Eradicate Human Trafficking*], archived at <https://perma.cc/W6PR-3NNJ> (noting that since January 8, 2019, President Trump has signed several pieces of legislation in an effort to combat human trafficking). President Trump has voiced his beliefs that human trafficking is “an urgent humanitarian issue,” and his administration is committed to combatting human trafficking, supporting victims and survivors, and holding traffickers accountable. *Id.* See *Trump Signs FOSTA*, *supra* note 66 (recognizing the immediate effects that the FOSTA has had on sex sites). For instance, after the enactment of the FOSTA, sites have quickly been shutting down any sex-related areas of their websites. *Id.*

⁷⁰ See Cassandra (Cj) Murphy, *Trafficking Victims Protection Reauthorization Act Becomes Law*, THE HUM. TRAFFICKING INST. (Feb. 21, 2019), archived at <https://perma.cc/3SGV-C7YB> (providing an overview for the new enforcement, accountability, and prevention initiatives that were launched with the passing of the TVPRA of 2019). See *Eradicate Human Trafficking*, *supra* note 69 (outlining President Trump’s commitment to ending human trafficking).

⁷¹ See Murphy, *supra* note 70 (highlighting the specific ways in which the TVPRA of 2018 differs from the prior TVPRAs). See Canessa, *supra* note 11 (setting forth that the FOSTA does not target the adult services sector nor individuals, but explicitly targets tech companies). See COMMERCIAL SEXUAL EXPLOITATION, *supra* note 6, at 3 (exposing the fact that many victims of human trafficking were also being charged as offenders). Victims of sex trafficking are being picked up for engaging in prostitution, but then charged for selling sex. *Id.* By charging the victims of sex trafficking they are kept from the resources and treatment options that they truly need. *Id.* See also THE RISE OF MOBILE, *supra* note 11, at vi (warning that in order

resources necessary to efficiently and effectively prosecute human trafficking related crimes.⁷² The law will also develop victim screening protocols as well as foster coordination between federal, state and local law enforcement in order to bring multi-jurisdictional cases.⁷³ Further, corporate and governmental entities will now be held accountable for being involved, either directly or indirectly, for participating in activities that support human trafficking.⁷⁴ Together, the government and corporations can work to ensure that business coming in, or occurring in the United States, is not a product of human

to prevent sex trafficking on the internet, counter-trafficking responses will need to maintain “constant vigilance and adopt mobile technology as a central tool within a comprehensive strategy”).

⁷² See Murphy, *supra* note 70 (advocating for the importance in emphasizing law enforcement tools). One tool is that each federal judicial district will designate a prosecutor to serve as the Human Trafficking Coordinator. *Id.* Another tool has been raising the maximum penalty for several human trafficking offenses. *Id.* It is important for law enforcement to refer human trafficking victims to services instead of arresting, charging, or prosecuting them for offenses directly related to their victimization. *Id.* See also Canessa, *supra* note 11 (stressing that “[b]efore FOSTA, victims who were trafficked via the Internet were repeatedly prevented from getting justice through the courts”).

⁷³ See 18 U.S.C. § 1583 (2020) (increasing the maximum punishment for “Enticement to slavery” from twenty to thirty years); 18 U.S.C. § 1587 (2020) (increasing the maximum punishment for “Possession of slaves aboard a vessel” from four to ten years); 18 U.S.C. § 1591 (2020) (increasing the maximum punishment of “Sex trafficking children or by force, fraud, or coercion” from twenty to twenty-five years); 18 U.S.C. § 2426 (2020) (amending the punishment for repeat offenders from twice the underlying offense’s maximum prison sentence to three times the underlying offense’s maximum prison sentence); 18 U.S.C. § 2421 (2020) (extending the mandatory restitution provision in human trafficking offenses). See also Murphy, *supra* note 70 (“The TVPRA emphasizes enforcement by providing stronger identification, prosecution, and sentencing tools to law enforcement and prosecutors.”).

⁷⁴ See *List of Goods Produced by Child Labor or Forced Labor*, U.S DEP’T. OF LAB. (Feb. 12, 2020), archived at <https://perma.cc/78X3-J9W3> (listing different types of goods produced by child labor, and connecting them with a country and exploitation type). See Murphy, *supra* note 70 (articulating that a corporation can be indirectly involved in human trafficking when they purchase goods that have been supplied by human trafficking). The law encourages companies to implement policies and practices that will protect their supply chains from forced labor. *Id.* The U.S. Tariff Act, prohibits the import of any products made with forced labor. *Id.* See generally Tariff Act of 1930, 19 U.S.C. Ch. 4 (1930) (listing the requirements for goods that are to be imported into the United States). It also requires that the U.S. investigate imported goods to assure that they are not products of human trafficking. *Id.*

trafficking.⁷⁵ Finally, this Act implements funding for educational programs that teach children the signs of human trafficking.⁷⁶ These educational efforts provide a way to prevent human trafficking before it starts as opposed to merely reacting.⁷⁷ These three major incentives will function to detect human trafficking in both the United States and abroad.⁷⁸

III. Facts

The United States has made continuous efforts to pass evolving legislation that combats the growth of human trafficking, namely sex trafficking.⁷⁹ While the executive branch acknowledges the grave

⁷⁵ See Murphy, *supra* note 70 (articulating the new partnership between public and private entities to aid in human trafficking prevention). This is also established through communication with survivors of human trafficking to gather their input on how governmental human trafficking efforts can be improved. *Id.*

⁷⁶ See *id.* (noting that the new TVPRA of 2019 opens up the U.S. Department of Education grant money for schools to be able to educate kids on the signs of human trafficking). These programs also train flight attendants in identifying human trafficking. *Id.*

⁷⁷ See *id.* (describing the overall goal of the government to ensure that U.S efforts have a meaningful impact on the prevention and education of human trafficking). See Audrey Conklin, *Ivanka Trump confirms \$42M budget increase to support victims of human trafficking*, FOX BUS. (Jan. 31, 2020), archived at <https://perma.cc/XP6E-L2TY> (confirming the \$42 million budget increase proposed by President Trump for 2021 is to support victims and increase efforts to prosecute criminals who take part in human trafficking). An executive order signed by the president will establish a “one-stop-shop” website for the public to go and see all of the federal government’s resources on human trafficking. *Id.*

⁷⁸ See Murphy, *supra* note 70 (outlining the idea behind the State Department’s Trafficking in Persons report being grounded in “demonstrable efforts to combat human trafficking”). See Joe Muwahed, *Trump signs executive order expanding efforts to combat human trafficking ‘monsters’*, ABC NEWS (Jan. 31, 2020), archived at <https://perma.cc/9EYC-JXPF> (noting that President Trump signed an executive order expanding his domestic policy office with a new position solely focused on combating human trafficking). The President stated that his administration is putting “unprecedented pressure” on traffickers and refers to the internet as the main portal for human trafficking. *Id.*

⁷⁹ See THE RISE OF MOBILE, *supra* note 11, at iv (reporting that the extent of human trafficking in modern society is complex and evolving). “Those involved in human trafficking have been quick to adapt to the 21st-century global landscape.” *Id.* See Dennis Sadowski, *Trump signs law to pump \$430 million into anti-human trafficking efforts*, CRUX (Jan. 9, 2019), archived at <https://perma.cc/5DYF-6R6G> (reporting where some of the allocated money in the FOSTA will be going towards). The departments of Justice and Homeland Security will receive \$18 million to fund the International Megan’s Law, “which since 2016 has mandated a visual identifier to

threat that trafficking poses on human rights, the judiciary struggles on where to assign the blame.⁸⁰ Nonetheless, the legislature continues to try to frantically pass laws that will stop crimes online without violating constitutional rights.⁸¹ Much of the human trafficking legislation passed through Congress has focused on the resources provided for victims, but has failed to put significant preventative measures in

be placed on the passports of people convicted of sex offenses involving a minor.” *Id.* The same law also requires that those convicted offenders must notify law enforcement 21-days before traveling abroad. *Id.* The bill also allocates \$78 million to the Department of Health and Human Services to education children on human trafficking prevention, and another \$1 million is used to train airport personnel, flight attendants, and pilots “to recognize potential human trafficking victims in transit.” *Id.*

⁸⁰ See Complaint, *supra* note 23, at 2 (quoting the First Circuit opinion that “Backpage was not responsible for injuries to children trafficked on its website simply because its conduct as a publisher made ‘sex trafficking easier’”). The court found that Section 230 of the CDA protected Backpage from the suit, and that whatever Backpage’s motivation, its editorial behavior was protected because the alleged harmful content was protected since it was created by others. *Id.* See I AM JANE DOE, *supra* note 1 (highlighting the numerous times Backpage has been sued for selling children for sex online, however noting that Backpage has only lost in court once). See Guest Blogger, *TRAFFICKING: VICTIMOLOGY & THE JUDICIAL SYSTEM, DARKNESS TO LIGHT* (Jan. 29, 2019) [hereinafter *TRAFFICKING & THE JUDICIAL SYSTEM*], archived at <https://perma.cc/VWC6-GR9M> (prompting judges, law enforcement, and the judicial branch to have a trauma-informed methodology when looking at human trafficking cases). “In the same way that juries need to be educated on what human trafficking looks like versus the way it is portrayed in movies and television, so too do law enforcement officers, attorneys, and judges.” *Id.*

⁸¹ See Trafficking Victims Protection Reauthorization Act of 2013, H.R. 898, 113th Cong. (1st Sess. 2013) (proposing to amend the TVPA of 2000 by allowing the head of the Department of Labor’s Bureau of International Labor Affairs to carry out specified additional activities to monitor and combat forced labor and child labor in the United States as well as in foreign countries). See *Technology and Trafficking: The Need for a Stronger, Gendered and Cooperative Response*, EQUALITY NOW (Aug. 14, 2019) [hereinafter *Technology and Trafficking*], archived at <https://perma.cc/P7TQ-AERS> (discussing the need to build an international framework, and how the existing legal framework is insufficient “to handle the transnational and ever evolving nature of technology and the internet”).

place.⁸² Simply put, new legislation is not accounting for the technological advancements of society.⁸³

A. *Technology is Outpacing the Law*

Technology is outpacing the law, and traffickers are using this to their advantage.⁸⁴ Many traffickers use technology to recruit,

⁸² See *Fact Sheet: Human Trafficking*, *supra* note 7 (summarizing the purpose and goals of each of the Trafficking Victims Reauthorization Acts to largely include the goal of increased penalties and prosecution for traffickers). See also Victims of Trafficking and Violence Protection Act of 2000, H.R. 3244, 106th Cong. § 102(b)(15)–(18) (2000) (outlining the protection and prevention measures for human trafficking to be taken by the United States).

In the United States, the seriousness of this crime and its components is not reflected in current sentencing guidelines, resulting in weak penalties for convicted traffickers Additionally, adequate services and facilities do not exist to meet victims' needs regarding health care, housing, education, and legal assistance, which safely reintegrate trafficking victims into their home countries.

Id.; see also ICAT, HUMAN TRAFFICKING AND TECHNOLOGY: TRENDS, CHALLENGES AND OPPORTUNITIES 2 (2019) (specifying that insufficient legal frameworks have been laid out which do not provide the tools necessary to enable successful investigations). Further, tools have not been provided that allow prosecutors to counter impunity online. See ICAT, *supra*. The lack of capacity, awareness and expertise of law enforcement, prosecutors and the judiciary, as well as the limited availability of technological tools, has led to the exacerbated misuse of the internet. *Id.*

⁸³ See Yushi Torigoe, *How technology can combat human trafficking*, ITU NEWS (July 30, 2019), archived at <https://perma.cc/NJK6-4C26> (setting forth that technology is the tool to tackling human trafficking). “Artificial intelligence, big data, Blockchain, the Internet of Things and 5G; these new technologies can all aid in the fight to combat human trafficking.” *Id.*

⁸⁴ See ICAT, *supra* note 82, at 2 (explaining that traffickers use technology to control their victims through threats of exploitation or tracking devices). Further, advancements in technology have allowed traffickers to hide identities, facilitate transactions, and expand the marketplace. *Id.* See THE RISE OF MOBILE, *supra* note 11, at iv (asserting that although the rapid diffusion of digital technologies such as mobile phones, social networking sites, and the internet, have provided significant benefits to society—new channels and opportunities for exploitation have also emerged); *Human Trafficking and the Internet*, *supra* note 4 (showing that “the growth of technology and the use of social media, the buying and selling of human beings is as easy as a simple ‘click’ on a keyboard”). On websites such as Backpage.com, men, women, and children were available for ‘purchase’ with sexual acts as their ‘product’ to sell. See *Human Trafficking and the Internet*, *supra* note 4.

control, and exploit victims.⁸⁵ With the use of technology, traffickers are able to meet, keep, and sell their victims.⁸⁶ Typically, ISP websites are a main source for human trafficking.⁸⁷ Traffickers post illegal advertisements for commercial sex with links connecting buyers and sellers to various goods.⁸⁸ Further, these practices of selling children have remained hidden online, and gone undetected by law enforcement.⁸⁹ In the era of technology, traffickers continue to find loopholes that allow them remain undercover.⁹⁰

Nevertheless, ISP websites were exploited to the public during the Backpage.com (“Backpage”) investigation.⁹¹ Backpage, an ISP

⁸⁵ See ICAT, *supra* note 82, at 1 (explaining that there is direct evidence and research that shows that technology is being misused by human traffickers “at all stages of the crime including recruitment, control, and exploitation of victims”). Traffickers are able to hide their identities online. *Id.* They are able to communicate with their associates through encrypted applications or the use of the Dark Web. *Id.* A global report done in 2018 showed that perpetrators identify victims on social media, establish a relationship of trust, and subsequently entrap the victim in an exploitative situation. *Id.* Children are at an even higher risk of being exploited and taken advantage of online due to their specific vulnerabilities. *Id.*

⁸⁶ See *id.* (warning that traffickers are often able to recruit victims through the use of fake social media accounts and fake profiles on applications). Further, traffickers tend to use cryptocurrency, which allows them to conduct financial transactions and move criminal proceeds anonymously. *Id.*

⁸⁷ See SUBCOMM. ON INVESTIGATIONS, *supra* note 1 (alleging that ISP website function as a source for buyers of sex to match easily with traffickers selling minors and adults); 47 U.S.C. § 230(a)(2) (2018) (finding that interactive computer services “offer users a great degree of control over the information that they receive” and “even greater control in the future as technology develops”).

⁸⁸ See ICAT, *supra* note 82, at 2 (identifying how the misuse of technology allows traffickers to facilitate transactions and access new venues).

⁸⁹ See SUBCOMM. ON INVESTIGATIONS, *supra* note 1, at 2 (exposing the methods used by Backpage to remain undetected by law enforcement). “By Backpage’s own internal estimate, by late-2010, the company was editing ‘70 to 80% of ads’ in the adult section either manually or automatically.” *Id.*

⁹⁰ See *id.* at 26 (arguing that Backpage designed its ad filter to leave behind no record of the original, unfiltered ad). Even if the original advertisement was not retained by law enforcement, the Subcommittee found that Backpage’s documents did show that Backpage kept records tracking every time an ad was edited. *Id.* In general, Backpage was keeping law enforcement from having a clear view of documents Backpage knew would be subpoenaed. *Id.* at 26–27.

⁹¹ See *id.* at 1 (describing that in 2015, the United States Senate Permanent Subcommittee on Investigations launched what would be a two-year investigation into Backpage and their knowing facilitation of sex trafficking on their website). Backpage refused to cooperate with the investigation by refusing to comply with the

website, became the primary location for the sale of sex online.⁹² On Backpage, traffickers would routinely post ads in the adult section of the site.⁹³ Here, traffickers were able to conduct their illegal activities, while Backpage would profit.⁹⁴ Though Backpage was created in 2004, it was able to remain undetected in its part in editing advertisements until 2016.⁹⁵ During their investigation, the Senate Subcommittee on Investigations concluded that Backpage had introduced an “ad hoc” policy, where moderators would manually remove words, phrases, or images that indicated any illegal

subpoenas to produce documents related to the Subcommittee’s investigation. *Id.* After months of non-compliance, the Senate Subcommittee presented a resolution to Homeland Security and the Governmental Affairs Committee authorizing and directing Senate Legal Counsel to bring civil action to enforce the subpoena requests against Backpage. *Id.* at 12. After almost a year of litigation, the Subcommittee finally received the production of approximately 110,000 pages of documents from Backpage. *Id.* at 14. At the end of all the litigation, Backpage ultimately provided the Subcommittee with an additional 552,983 documents, comprising of 1,112,826 pages in response to the original subpoena. *Id.* at 16. The Subcommittee based its findings off those documents and concluded that Backpage had been altering ads by deleting words, phrases, or images that were indicative of illegal activity to make the ad undetectable by law enforcement. *Id.* at 17.

⁹² See Complaint at 4, *Doe v. Backpage.com*, No. 17-CV-11069-PBS (Mass. Dist. Ct. June 12, 2017) (emphasizing that Backpage controls the online sex market).

Backpage.com has become the primary destination for buying and selling illegal commercial sex online, accounting for 80 percent or more of all revenue from online commercial sex advertising in the United States Virtually all of Backpage’s net revenue—more than 99 percent—is directly attributable to advertisements appearing in its “Adult” category,” and its net profit in 2015 alone was estimated at \$135 million; Backpage.com and its affiliates have been valued at more than \$600 million As of January 2017, Backpage operates in 97 countries and 943 geographic locations across six continents globally.

Id.

⁹³ See *I AM JANE DOE*, *supra* note 1 (clarifying that a majority of children who have been sold for sex online have been sold through Backpage.com). See SUBCOMMITTEE ON INVESTIGATIONS, *supra* note 1, at 5–6 (explaining that marketplace websites are typically used for things such as jobs and merchandise, but usually also consist of an “adult” section).

⁹⁴ See SUBCOMM. ON INVESTIGATIONS, *supra* note 1, at 28 (alleging that the profits Backpage earned came from its knowing facilitation of commercial sex and the selling of children for sex).

⁹⁵ See *id.* at 21 (setting forth that Backpage engaged in “sanitizing” practices in which they made material edits to ads before they were published to the site).

transactions before publishing ads to their site.⁹⁶ This policy allowed Backpage to hide the illegality of the advertisements, while maintaining the purpose—a commercial sex transaction.⁹⁷ Although there were protections for victims of sex trafficking through the prior Acts, ISPs, such as Backpage, were able to escape responsibility for sex trafficking under the CDA.⁹⁸

B. Legislation is Reacting, but Not Doing

The FOSTA is at odds with the CDA and the protection it provides to ISP websites.⁹⁹ The final draft of the FOSTA left

⁹⁶ See *id.* at 19 (explaining that by April of 2010 Backpage staff were “moderating ads on a 24/7 basis”). See *ad hoc*, MERRIAM WEBSTER (Mar. 31, 2019), archived at <https://perma.cc/Y8CH-SQ8Z> (defining *ad hoc* as “formed or used for specific or immediate problems or needs”).

⁹⁷ See SUBCOMM. ON INVESTIGATIONS, *supra* note 1, at 21 (analyzing the Strip Term From Ad filter). “Strip Term From Ad filter” was a tool that sanitized and stripped out any language from the ad that would flag it for criminal activity. *Id.* “The Strip Term From Ad filter concealed the illegal nature of countless ads and systematically deleted words indicative of criminality, including child sex trafficking and prostitution of minors.” *Id.* at 22. Words that were automatically deleted included “teenage”, “rape”, “young”, “little girl”, “fresh”, “innocent”, and “school girl”. *Id.* at 22–23. The purpose of the filter was to change the language of the ad without changing the intent of the commercial sex transaction. *Id.* at 22. “When a user submitted an ad that contained a forbidden word, the “filter would immediately delete the discrete word and the remainder of the ad *would be published* after moderator review.” *Id.* at 23. See MARK LATONERO ET AL., HUMAN TRAFFICKING ONLINE 3 (U.S.C. Annenberg ed., 2011) [hereinafter HUMAN TRAFFICKING ONLINE] (elaborating on the difficulty law enforcement has on tracking down online sex trafficking). “It’s not easy to quantify or to identify someone who is using code words.” *Id.* Without the technological resources needed, law enforcement falls behind when trying to narrow the pool of potentially criminal advertisements. *Id.* “[T]he task of manually reviewing these ads exceeds the limits of what investigators can reasonably expect to achieve.” *Id.*

⁹⁸ See Tom Jackman, *Tech companies push back as Congress tries to fight online sex trafficking*, WASH. POST (Sept. 18, 2017) [hereinafter *Tech companies push back*], archived at <https://perma.cc/553B-34PF> (“The Communications Decency Act, passed in 1996, provides immunity for website hosts so long as they are not ‘the publisher or speaker of any information provided by another content provider.’”).

⁹⁹ See Godwin, *supra* note 22 (indicating that the FOSTA undermines the CDA and the central role it played to allow free speech on the internet); SUBCOMM. ON INVESTIGATIONS, *supra* note 1, at 9 (echoing the decision of the First Circuit that “it is for Congress, not this Court, to revisit the scope of the CDA protection”).

technology companies unclear on what would constitute as “knowing facilitation.”¹⁰⁰ When the FOSTA was in the beginning stages of legislation, tech companies such as Google, who pride themselves on being allies against sex-trafficking, supported the new law.¹⁰¹ However, the unclear language of the bill raised concerns that the “Good Samaritan” rules would no longer apply, thus actually crippling the fight against sex trafficking.¹⁰² For example, if a tech company would be held liable for “knowing” of sex trafficking on their site, even though trying to remove it, they may simply stop looking for it as a means to shield themselves from liability.¹⁰³

Those who argue against the bill suggest that it should have been written more comprehensively.¹⁰⁴ Critics argue that the bill

¹⁰⁰ See Citron & Jurecic, *supra* note 37 (discussing the controversy over the passages of the FOSTA). While major tech companies saw the new legislation as a way to further help the fight against sex-trafficking, many of those opposed viewed the bill as a major step backwards for free speech on the internet. *Id.*

¹⁰¹ See *id.* (highlighting that the Internet Association, who represents Facebook, Google, Microsoft, and other big tech companies endorsed the legislation); Godwin, *supra* note 22 (noting that the internet is arguably broken, but needs to be fixed in the correct way). It is important to hold tech companies more responsible for their bad content. See Godwin, *supra* note 22. See *Accelerating the use of tech*, *supra* note 19 (outlining the Accelerator Program formed by Tech Against Trafficking, which uses technology to combat human trafficking). Tech Against Trafficking is a coalition of technology companies that are working together to combat human trafficking. *Id.* The coalition has worked together to form the Accelerator Program which works with organizations on “deploying a range of technologies to help victims, law enforcement, business, and civil society better understand and combat trafficking with the expertise of the world’s largest and most powerful tech firms including Amazon, AT&T, BT, Microsoft, Nokia, Salesforce.org, and Vodafone.” *Id.*

¹⁰² See Molinari, *supra* note 21 (discussing the idea of a better alternative to the bill that would allow companies to continue to clean their platforms, but also support effective tools for law enforcement). See Citron & Jurecic, *supra* note 37 (noting that companies might “sit on their hands” for fear of incomplete removal of ads which could be used as evidence against them as “knowing facilitation”).

¹⁰³ See Molinari, *supra* note 21 (arguing that smaller tech companies do not have the means to consistently be held liable for sex trafficking on their websites). “While large companies are more likely to continue their protective enforcement efforts and can afford to fight lawsuits, if smaller platforms are made liable for ‘knowledge’ of human trafficking occurring on their platforms, there is some risk that they will seek to avoid that risk of ‘knowledge.’” *Id.*

¹⁰⁴ See Citron & Jurecic, *supra* note 37 (asserting that the language of the FOSTA is confusing, which makes it hard to imagine that state and local prosecutors will be eager to expel resources on enforcement). See Shannon Roddel, *Online sex trafficking bill will make things worse for victims, experts says*, U. NOTRE DAME (Mar. 28, 2018), archived at perma.cc/7DF4-GU36 (disagreeing with the passing of

should have included other forms of illegal activity, as well as be able to grant immunity to sites that can show they reasonably responded to unlawful activity on their site.¹⁰⁵ While big tech companies, such as Google and Facebook, can handle the finances of a lawsuit under this new legislation, they have banded together with small ISP tech companies in advocating against the FOSTA.¹⁰⁶

Alternatively, tech companies could be partly to blame for the necessity of the FOSTA because of industry-wide inattentiveness.¹⁰⁷ For some brief amount of time it is possible that websites, such as Backpage, were unaware of child sex trafficking occurring on their site.¹⁰⁸ Undoubtedly, because of the magnitude of illegal activity

FOSTA, saying that the passing of the new bill is likely to only make sex trafficking online worse). Because of the liability that tech companies now face, the number of reports of sex trafficking online is likely to go down. *Id.* See CONSUMER WATCHDOG ET AL., HOW GOOGLE'S BACKING OF BACKPAGE PROTECTS CHILD SEX TRAFFICKING 3, 13–14 (2017) (noting that the change to the CDA that will allow victims of child sex-trafficking to sue Backpage could also expose Google and other tech companies to the same legal challenges).

¹⁰⁵ See Citron & Jurecic, *supra* note 37 (suggesting a more comprehensive approach to ending all illegal activity taking place on internet platforms). See Roddel, *supra* note 104 (doubting that the FOSTA will protect victims of sex trafficking in the way the legislature intends).

¹⁰⁶ See Molinari, *supra* note 21 (advocating for Google's support of over forty human trafficking pieces of legislation, but noting that small companies may not continue their mediation efforts if there is a constant threat of being held liable for illegal activity). See CONSUMER WATCHDOG ET AL., *supra* note 104, at 3 (alleging that Google has funded companies who have allowed sex trafficking to take place on their site). See Godwin, *supra* note 22 (setting forth that an alteration or even an outright appeal would not hurt companies the size of Facebook).

¹⁰⁷ See Citron & Jurecic, *supra* note 37 (emphasizing the broad disagreement over whether a law can or should do more to incentivize platforms to moderate content). See *Technology and Trafficking*, *supra* note 81 (arguing that tech companies can be a force for good and do more than just avoid liability—they can provide solutions); *Trump Signs FOSTA*, *supra* note 66 (alleging that the technology sector has a responsibility to help policy makers and law enforcement combat illegal criminal activity on the internet, especially sex trafficking).

¹⁰⁸ See Citron & Jurecic, *supra* note 37 (warning that tech companies play a major role in fostering a civil environment on the internet). See CONSUMER WATCHDOG ET AL., *supra* note 104, at 13 (criticizing Google's support of Section 230 of the CDA). In July of 2013, Google "raised the ire" of child sex advocates in the UK by rejecting a warning system that would flash a cautionary message when people were searching for child abuse content online. *Id.* Google's rejection of the system came after news stories revealed that the murderer of a five-year-old girl had collected a "library" of child abuse images by searching for the content on Google and Bing. *Id.*

taking place on their site, it became clear that Backpage was knowingly facilitating sex trafficking.¹⁰⁹ With this, ISP websites should bear some liability for not monitoring their site closely enough to recognize illegal activity taking place.¹¹⁰

C. *The Risks of Censoring Internet Service Provider Websites*

Advocates for free speech have cautioned that censoring ISPs could put sex trafficking victims in danger.¹¹¹ A number of free speech organizations raised concerns about the regulation of speech for consensual sex online.¹¹² However, these arguments go head-to-head with a number of Supreme Court decisions on illegal speech.¹¹³ The Supreme Court has issued decisions that specifically relate to child pornography and the protection of children from sexual abuse.¹¹⁴ But,

¹⁰⁹ See SUBCOMM. ON INVESTIGATIONS, *supra* note 1, at 16 (finding that it was clear that Backpage knew it was facilitating sex trafficking). By editing ads to avoid detection by law enforcement there was little doubt that the underlying transaction had anything to do with sex trafficking. *Id.* “The evidentiary record makes clear that Backpage’s executive knew their websites facilitated illegal activity, including child sex trafficking.” *Id.* 16–17.

¹¹⁰ See Citron & Jurecic, *supra* note 37 (admitting that it is “too soon to say with any certainty what the FOSTA’s long-term effects on the internet ecosystem will be”). There is still broad disagreement over whether this new law can and should do more to incentivize platforms to moderate the content on their sites. *Id.*

¹¹¹ See Aaron Mackey & Elliot Harmon, *Sex Trafficking Experts Say SESTA Is the Wrong Solution*, ELECTRONIC FRONTIER FOUND. (Oct. 3, 2017), *archived at* <https://perma.cc/9YVD-T559> (highlighting that if ISPs stop looking for human trafficking online then nothing has been done to help the victims by passing the FOSTA).

¹¹² See *id.* (arguing that the new law makes sex trafficking victims less safe while also criminalizing the protected speech of those who advocate for, and provide resources to, adult consensual sex workers). See David L. Hudson Jr., *Free speech or censorship? Social media litigation is a hot legal battleground*, ABA J. (Apr. 1, 2019), *archived at* <https://perma.cc/P4RV-LDMW> (summarizing the opinion of now retired Justice Anthony Kennedy that social media is one of the greatest battlegrounds for free expression both nationally and globally).

¹¹³ See *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571 (1942) (holding “that the right of free speech is not absolute at all times and under all circumstances”); *United States v. Alvarez*, 567 U.S. 709, 717 (2012) (holding that certain speech such as defamation, fighting words, and incitement are not subject to First Amendment protection).

¹¹⁴ See *Miller v. California*, 413 U.S. 15, 23–24 (1973) (ruling that obscene material is unprotected by the first amendment, but carefully limited, can be regulated by the state); *New York v. Ferber*, 458 U.S. 747, 756–63 (1982) (listing five reasons for prohibiting the distribution of material depicting children engaged in sexual

in order for the government to restrict a constitutionally granted right, there must be a compelling governmental interest.¹¹⁵ It is clear that the government's interest in protecting children from sexual abuse substantially outweighs some forms of free speech online.¹¹⁶ The government's desire to protect these children thwarts tech companies' arguments that censoring their online activities would be a violation of free speech.¹¹⁷

IV. Analysis

A. *The FOSTA Needs to be Updated*

The FOSTA is the most significant piece of internet legislation in the last two decades.¹¹⁸ Nevertheless, its use of ambiguous

conduct). First, there is an interest in protecting the physical and psychological well-being of a child. *Id.* at 756–57. Second, it is a supported fact that the distribution of child pornography links to the sexual abuse of children. *Id.* at 759. Third, marketing child pornography provides an economic incentive for the production of such materials. *Id.* at 761. Fourth, the minimal “value of permitting live performance and photographic reproductions of children engaged in lewd sexual conduct” is insignificant. *Id.* at 762. Lastly, categorizing child pornography as material outside of First Amendment protection is compatible with earlier Court decisions. *Id.* at 763. *See also* *Osborne v. Ohio*, 495 U.S. 103, 109–10 (1990) (upholding that the mere possession of child pornography is unlawful). *See generally* *Compelling-State-Interest-Test Law and Legal Definition*, USLEGAL (Feb. 24, 2019) [hereinafter *Compelling State Interest Test*], archived at <https://perma.cc/7KQL-MGE8> (explaining that under the compelling state interest test, the government's interest is balanced against the individual's constitutional right to be free of law).

¹¹⁵ *See id.* (defining a compelling state interest as a method of determining the constitutional validity of a law). “Under this test, the government's interest is balanced against the individual's constitutional right to be free of law.” *Id.*

¹¹⁶ *See* *Chaplinsky*, 315 U.S. at 571 (expressing that free speech is not an absolute right); *Compelling State Interest Test*, *supra* note 114 (noting that if there is a substantial reason for the government's interest to outweigh free speech, it may be regulated).

¹¹⁷ *See* Godwin, *supra* note 22 (arguing that there are good intentions behind the passing of the FOSTA, but it will hurt the internet). “If Congress follows through and passes this legislation, it not only will fail to achieve the bill's stated goals—it also will fundamentally change, and arguably cripple, the internet you've grown to rely on these past two decades.” *Id.*

¹¹⁸ *See* Citron & Jurecic, *supra* note 37 (setting forth that for the first time in twenty years, FOSTA carves out a statutory exception for the immunity granted to tech companies through section 230 of the CDA). *Id.* “The idea is that online platforms

language is having devastating consequences.¹¹⁹ The language of the FOSTA calls for civil or criminal liability against sites that “knowingly” allow sex trafficking to occur on their websites, which is practically forcing sites to turn a blind eye to illegal activity on their sites.¹²⁰ In hindsight, the FOSTA is a major step in the right direction, but at a second glance, the new legislation has the ability to lead to a larger human trafficking crisis.¹²¹

Before the FOSTA, tech companies could put forth a “good-faith” effort by working with law enforcement to combat sex trafficking online.¹²² However, this new legislation demands that every byte of content is monitored with small margin for error.¹²³ Thus, countless lawsuits are being filed for failure to get illegal content off of a website.¹²⁴ Big tech companies, such as Google, Microsoft, or Facebook, have the resources to monitor content and defend

should face the same liability for enabling illegal sex-trafficking, as offline outlets do.” *Id.*

¹¹⁹ See Allow States and Victims to Fight Online Sex Trafficking Act of 2017, H.R. 1865, 115th Cong. (2018) (defining the “‘participation in a venture’ as knowingly, assisting, supporting, or facilitating” sex trafficking on their site).

¹²⁰ See Citron & Jurecic, *supra* note 37 (describing the effects of the FOSTA on ISP websites). Critics of the bill point out that the FOSTA creates a “moderator’s dilemma” which is exactly what the bill sought to avoid. *Id.* “The unclear ‘knowingly facilitating’ language could perversely push platforms to engage in no moderation at all.” *Id.* See Molinari, *supra* note 21 (arguing that the FOSTA could have the unintended impact of causing companies to stop looking for sex trafficking on their sites).

¹²¹ See Roddel, *supra* note 104 (stressing that websites such as ISPs are relied on by law enforcement to track down sex trafficking). Websites have become the eyes and ears for law enforcement in finding and stopping sex trafficking. *Id.*

¹²² See *id.* (arguing that there is no credible evidence that the internet has caused the explosion of sex trafficking, but rather, the internet is exposing sex trafficking). While the FOSTA may show decreases in sex trafficking, that is likely not because of an actual decrease in sex trafficking, but instead because traffickers are hiding their victims deeper within the dark corners of the internet. *Id.*

¹²³ See *Tech companies push back*, *supra* note 98 (disagreeing with supporters of the bill who claim that “the internet and its potential for misdeeds are far too large for the Justice Department to police alone”). See Molinari, *supra* note 21 (highlighting that Google has supported over 40 bills on human trafficking, but is concerned that the most recent law will have unintentional consequences). “While we agree with the intentions of the bill, we are concerned that it erodes the ‘Good Samaritan’ protection and would actually hinder the fight against sex trafficking.” *Id.*

¹²⁴ See *id.* (alleging that the new law will open companies up to massive lawsuits).

themselves against litigation.¹²⁵ However, smaller tech companies do not have the same capabilities.¹²⁶ This has led to small tech companies no longer seeking out illegal activity on their sites.¹²⁷ Instead of the FOSTA putting an end to online sex trafficking, it has put the full responsibility of finding and stopping illegal content on the internet onto ISPs.¹²⁸ The FOSTA has placed immense pressure on tech companies, and may not actually end online sex trafficking.¹²⁹

Further, the FOSTA remains unclear through its ambiguous language on the expectations that are now in place for ISP websites.¹³⁰ Alternatively, if this new legislation is meant to incentivize tech companies to vigilantly find and stop the illegal activity on their sites, then sex trafficking is just one of the countless number of crimes ISPs could potentially be liable for reporting.¹³¹ This could leave Facebook on the hook for drug transactions that are initiated through a status

¹²⁵ See *Tech companies push back*, *supra* note 98 (emphasizing the threat that the new legislation will have on smaller tech companies who may not be able to financially handle countless lawsuits).

¹²⁶ See Molinari, *supra* note 21 (demonstrating an alternative to the FOSTA that will help foster the fight against human trafficking without punishing companies who put forth a good faith effort).

¹²⁷ See *Tech companies push back*, *supra* note 98 (insisting that the FOSTA will discourage websites from aggressively policing their websites out of fear that doing so could expose the website to legal liability). *But see Trump Signs FOSTA*, *supra* note 66 (insisting that the CDA was “never intended to provide legal protection to websites that unlawfully promote and facilitate prostitution”).

¹²⁸ See Roddel, *supra* note 104 (explaining that websites provide unlimited and crucial information to law enforcement and anti-trafficking advocates). Additionally, criminal indictments and news articles have evidenced just how valuable these websites are and the connection they have between police and victims. *Id.*

¹²⁹ See CONSUMER WATCHDOG ET AL., *supra* note 104, at 13 (noting that the change to the CDA that will allow victims of child sex-trafficking to sue Backpage could also expose Google and other tech companies to the same legal challenges).

¹³⁰ See Molinari, *supra* note 21 (suggesting that the internet would be better off by fostering an environment in which all tech companies can continue to clean up their platforms, support effective tools for law enforcement, and create advocacy organizations to find and disrupt these networks). Many tech companies like Microsoft, Twitter, Facebook, and Amazon are willing to work with Congress to make changes to the FOSTA that will include measures to fight trafficking and protect victims. *Id.*

¹³¹ See Rosenbaum, *supra* note 48 (disagreeing with how lawmakers are viewing the actual threat of sex trafficking). Lawmakers compare it to the movie ‘Taken,’ where everyday kids are getting drugged, smuggled, and tossed around by some gang. *Id.*

update.¹³² It could also lead Google to censor content for legal activity in one state that is a crime in another state.¹³³ The law remains unclear about whether or not sex trafficking is the only crime sites should be looking for.¹³⁴

With this in mind, one thing remains clear after considering opinions on the FOSTA.¹³⁵ The passing of the FOSTA is long overdue as it pertains to ending sex trafficking online, especially for children.¹³⁶ But, there needs to be a much brighter line drawn for ISP websites that identify what “knowingly facilitating” illegal activity on their sites means.¹³⁷ The legislation needs to specifically state what activities ISP websites need to be looking for.¹³⁸ Clarity is essential for law enforcement to comprehend the circumstances surrounding the illegal activity found on a given website.¹³⁹ Furthermore, in order for the judiciary to achieve justice, the rules must be clear so they can

¹³² See Citron & Jurecic, *supra* note 37 (highlighting that the FOSTA carves out additional statutory exceptions for the immunity granted to sites under the CDA).

¹³³ See *id.* (proposing that the reasonable standard of care for websites would consider one sites efforts as compared to the efforts of others).

¹³⁴ See *id.* (arguing that the FOSTA deals with sex trafficking but does not address the countless other crimes that the CDA protects companies from having to grapple with including hate speech, harassment, defamation, or the use of platforms by terrorist organizations).

¹³⁵ See Godwin, *supra* note 22 (acknowledging that the legislature had the right intent when passing the FOSTA, but it may have negative effects on the internet); *but see* Allow States and Victims to Fight Online Sex Trafficking Act of 2017, H.R. 1865, 115th Cong. § 2 (2018) (stressing the urgency in amending section 230 of the CDA in order to protect victims of sex trafficking).

¹³⁶ See Godwin, *supra* note 22 (pointing out that the purpose of the bill is aimed at making internet companies more subject to prosecution and more prone to censor user’s speech online).

¹³⁷ See *Tech companies push back*, *supra* note 98 (outlining some of the fears that ISP websites have due to the broad language of the FOSTA). “The internet companies fear the costs of having to monitor every byte of content on their site.” *Id.*

¹³⁸ See *Trump Signs FOSTA*, *supra* note 66 (reporting how the Internet Association, which represents many large technology companies, has stated that the new law would cause “mass removals of legitimate content” and make companies more apprehensive to monitor content posted on their platforms).

¹³⁹ See Citron & Jurecic, *supra* note 37 (suggesting a way in which law enforcement can assess if an ISP was in fact “knowingly facilitating” illegal activity on their site). “[A] broader though more balanced legislative fix, under which platforms would enjoy immunity from liability [would be] if they could show that their response to unlawful uses of their services was reasonable.” *Id.*

investigate and determine if the site was in fact “knowingly facilitating” illegal activity.¹⁴⁰

B. *The Significance of the TVPA of 2018*

While disputes continue about the FOSTA, the signing of the TVPA of 2018 has been well received.¹⁴¹ President Trump stands firm on his commitment to ending sex trafficking, and has made it clear that the United States will not tolerate human trafficking, including sex trafficking.¹⁴² Throughout history, legislation has merely reacted to sex trafficking.¹⁴³ Though the United States has implemented programs to help the victims of trafficking, as well as give funding to initiatives to combat trafficking, the crime continues to increase.¹⁴⁴ The rehabilitation of victims is imperative, but it is more imperative that sex trafficking be stopped before it even starts.¹⁴⁵

¹⁴⁰ See *id.* (outlining the standard of reasonability for ISPs trying to prevent illegal activity on their sites). “The determination of what constitutes a reasonable standard of care would take into account differences among online entities, reducing opportunities for abuses without interfering with the further development of a vibrant internet or unintentionally turning innocent platforms into involuntary insurers for those injured through their sites.” *Id.* The legislation’s downside is that it may cause companies to use “over-the-top moderation” to prove that they did not knowingly endorse content relating to human trafficking. *Id.*

¹⁴¹ See *Eradicate Human Trafficking*, *supra* note 69 (emphasizing the scale of the human trafficking problem in the United States). “In the United States, more than 8,500 human trafficking cases were reported to the National Human Trafficking Hotline last year alone.”

¹⁴² See Murphy, *supra* note 70 (explaining that President Trump’s plan to end human trafficking includes removing goods produced through forced labor from supply chains).

¹⁴³ See Canessa, *supra* note 11 (warning that the FOSTA alone will not end the problem of human trafficking). “We have to end the cycle of abuse at the beginning—and that means ending demand.” *Id.*

¹⁴⁴ See Torigoe, *supra* note 83 (highlighting that “over 40 million people globally are victims of human trafficking . . . and more victims are being detected and reported every year”). See also *Accelerating the use of tech*, *supra* note 19 (emphasizing that “human trafficking is a complex, thriving crime with a global foothold, affecting an estimated 40.3 million people”).

¹⁴⁵ See Torigoe, *supra* note 83 (exploring initiatives that leverage the power of technology to combat child sex trafficking). Engineers from across the technology industry, including Facebook and Microsoft, are working together to tackle the issue. *Id.* In 2017, they helped launch a Child Finder Service which matches up the faces of missing children with those being advertised for sex online. *Id.*

Fortunately, the signing of the TVPA of 2018 implements major resources for prosecutors so they can efficiently investigate and effectively prosecute traffickers.¹⁴⁶ This new legislation pours resources into educating every person, including children, to the signs of sex trafficking.¹⁴⁷ Educating children about the signs of sex trafficking, especially online, has yet to be seen in prior legislation, and not knowing what to be aware of put children at a heightened risk of being trafficked.¹⁴⁸ Further, trafficked victims are normally people who are already at risk, thus educating people on the signs of sex trafficking is critical.¹⁴⁹ These crucial steps taken are imperative if the United States is going to stay ahead of sex trafficking, instead of continuing to be outpaced by technology.

C. The Need for Collaboration Between Tech Companies and the Government

Sex trafficking is a global problem that is going to require the collaboration of technology companies and the government if they want to be successful at ending it.¹⁵⁰ Perpetrators of sex trafficking have become experts in social media, fake profiles, and the hidden sex

¹⁴⁶ See Frederick Douglass Trafficking Victims Prevention and Protection Reauthorization Act of 2018, H.R. 2200, 115th Cong. (2019) (pointing out the number of tools and resources such as specialized prosecutors that have been implemented for law enforcement). The Department of Justice will be given grants that may be used for programs that provide trauma-informed care or long-term housing for youth transitioning from foster care, or women or girls in underserved populations. *Id.* § 103. The Department of Justice law enforcement grants may also be used to “designate at least [one] prosecutor for cases of severe forms of trafficking in persons.” *Id.* § 122.

¹⁴⁷ See *id.* (acknowledging that Frederick Douglass Trafficking Victims Prevention and Protection Reauthorization Act of 2018 expands prevention efforts of human trafficking through funding, training, and resources for victims of human trafficking).

¹⁴⁸ See *TRAFFICKING & THE JUDICIAL SYSTEM*, *supra* note 80 (asserting the importance of “[making] sure children around you understand you are someone who will listen to them if they ever want to talk about something”).

¹⁴⁹ See *id.* (understanding that when it comes to human trafficking victims, they are not apt to identify themselves as victims, and may have been a victim for days, weeks, months, or possibly years).

¹⁵⁰ See *Technology and Trafficking*, *supra* note 81 (advocating that all bodies that are involved in the “trafficking chain,” including international bodies, tech companies, and civil society, should be working together to come up with solutions. *Id.* See also Rogers, *supra* note 5 (pointing out that technology hasn’t just made trafficking women and children easier—it is also how we can stop it).

markets of the internet.¹⁵¹ They use technology to their advantage to outsmart and remain hidden from law enforcement.¹⁵² Nevertheless, with the help of tech companies, law enforcement may be able to more easily detect and remove perpetrators from online.¹⁵³ While tech companies right now may just be avoiding liability, they can do so much more than that.¹⁵⁴ They can work with law enforcement to understand how technology is used to traffic, and then provide viable solutions.¹⁵⁵ Sex trafficking cannot be stopped without the help and

¹⁵¹ See *Sex Trafficking*, *supra* note 4 (warning that traffickers often pretend to be someone that they are not by setting up fake profiles online to “friend” a teen and then groom them using a variety of techniques to earn their trust).

¹⁵² See *TRAFFICKING & THE JUDICIAL SYSTEM*, *supra* note 80 (explaining the importance of law enforcement officers, attorneys, and judges being educated on the way human trafficking looks in real life). In a human trafficking case there is typically many victims, multiple suspects, and multiple crime scenes spread across multiple jurisdictions. *Id.* More importantly, it is imperative that those in law enforcement and the judicial system identify those who have been charged for truancy, habitual runaway, prostitution, or drug possession as possible human trafficking victims. *Id.*

¹⁵³ See *Accelerating the use of tech*, *supra* note 19 (explaining that the biggest opportunities to stop human trafficking with technology lie in web and cloud-based platforms, mobile platforms, blockchain technology, and satellite tracking).

¹⁵⁴ See *CONSUMER WATCHDOG ET AL.*, *supra* note 104, at 4 (noting how certain bills may red flag tech companies in the eyes of law enforcement, so they avoid bringing attention to illegal activity); *but see ICAT*, *supra* note 82, at 3 (explaining how there are numerous tools that tech companies can implement and use to help law enforcement in the fight against human trafficking).

¹⁵⁵ See *Technology and Trafficking*, *supra* note 81 (urging that the collection and research on the misuse of technology to facilitate human trafficking needs to be significantly expanded). See *Rogers*, *supra* note 5 (outlining a human trafficking pilot program in Tampa Bay Florida in which Reach Out Campaign partnered with Seattle Against Slavery to use web scraping technology to obtain phone numbers off sites selling sex). The program found that most of the numbers on the sites directly linked to cellphones of individuals who were being sold for sex. *Id.* In Tampa alone, 10,000 phone numbers were identified and mass texts were sent to these numbers with a phone number and website offering help and ways to get out of the industry. *Id.* Buyers were also informed of the consequences of buying sex. *Id.* See *Accelerating the use of tech*, *supra* note 19 (setting forth that technology can be used to disrupt human trafficking). “While online platforms have become low cost hotspots for remote victim recruitment through advertisements, social media, and job sites, innovative tech tools can help to empower, educate, and protect potential victims, youth, and workers.” *Id.*

effort of everyone involved—whether by choice or not.¹⁵⁶ Further, with sex trafficking taking on such a technology based platform, it is quickly pushing its way to the headlines of the news, and Americans are becoming acutely aware of the growing dangers that sex trafficking poses.¹⁵⁷ Now, all eyes are on both tech companies and the government to see how these two forces will work to end sex trafficking.¹⁵⁸ The solutions are there, but it will take the collaboration from everyone to find and execute them.¹⁵⁹

V. Conclusion

Sex trafficking is happening in every neighborhood, every city and every country around the world, and the internet is only accelerating the market. The advancement of technology has allowed traffickers to take their business to the darkest corners of the internet and remain largely undetectable. Though past legislation has missed the mark or caused push-back, it was still progress. Nevertheless, the newest Trafficking Victims Reauthorization Act signed by President Trump is paving the way for tackling sex trafficking head on. As sex trafficking emerges from the hidden corners of the internet, it is imperative that the United States stays on the cutting edge of the fight against sex trafficking.

¹⁵⁶ See *Technology and Trafficking*, *supra* note 81 (“It is imperative that all stakeholders - including governments, the UN, tech companies, CSOs, and survivors - are at the table and come together to develop stronger and coordinated legal, policy and technological solutions.”).

¹⁵⁷ See Rogers, *supra* note 5 (noting that with Robert Kraft’s charges for prostitution, many Americans are “becoming aware for the first time of the dark underworld of sex trafficking in this country”).

¹⁵⁸ See *id.* (urging Americans to educate themselves on the realities of sex trafficking).

¹⁵⁹ See ICAT, *supra* note 82, at 6 (laying out ten different recommendations to minimize perpetrators using technology to facilitate human trafficking).