

HUMAN TRAFFICKING IN A DIGITAL AGE: WHO SHOULD BE HELD ACCOUNTABLE?

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The Digital Age has transformed the way human traffickers conduct their “business.” Victims are not only trafficked and sexually exploited on the streets, but they are advertised and sold on web-pages, including escort and dating services and “adult” sections of online classifieds. Human trafficking has existed for centuries; however, international and domestic laws have just recently been crafted and implemented to address the lawless conduct. Consequently, laws have not caught up with technological advances, including the Internet and social media. At a click of a button, a “John” sitting in front of a computer can purchase a minor advertised online, and the trafficker remains anonymous throughout the process. The “John” and the trafficker can be prosecuted and held criminally liable for their role in sexually exploiting a child; however, the website that allows for such images to appear is shielded from liability. Human trafficking survivors have come forward and spoken out against protecting Internet Service Providers who help facilitate in their exploitation. They want every individual and entity who profited from their victimization held accountable. This paper seeks to address their concerns by analyzing and comparing current laws in the United States and the European Union to see what is working and what is missing. Most importantly, this paper will discuss possible legal measures and other non-formal solutions to prevent human trafficking, support victims, and stop perpetrators.

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I. INTRODUCTION

“[If] you’re a drug trafficker, you can sell drugs once, [but if] you’re a human trafficker, you can sell a kid over and over and over again,” proclaimed the Executive Director of Covenant House Pennsylvania.¹ Human trafficking is a multi-billion-dollar criminal industry, making it an incredibly profitable crime that affects millions of people from around the globe.² Human trafficking is not a recent phenomenon; instead, it is a form of modern-day slavery.³ It transcends borders, both nationally and internationally; it creates victims without discriminating against race, ethnicity, sexual orientation, gender, age, or socioeconomic status; and it often occurs unnoticed and undetected.⁴ Therefore, it is essential to bring attention to this horrendous crime and all its forms in order to prevent it from continuing and expanding under the radar.

Human trafficking is a subject that grabs society’s attention and has been broadly discussed. The existing literature defines human trafficking, dispels common misconceptions associated with the crime, and discusses the various federal and state laws that penalize traffickers.⁵ However, the more social scientists reveal about human trafficking, the more apparent its complexities are. With the expansion of the Internet and advanced digital technology, new key players involved in trafficking are coming to light.⁶ Human trafficking no longer just involves the traffickers, pimps, and Johns who sell or exploit victims, but also the Internet Service Providers (ISPs) who profit from facilitating and assisting with the

1. I AM JANE DOE (50 Eggs Films Feb. 10, 2017), <https://www.netflix.com/title/80167459>.

2. *The Facts*, POLARIS PROJECT, <https://polarisproject.org/facts> (last visited Feb. 10, 2019) [hereinafter *The Facts*].

3. *What is Human Trafficking?*, U.S. DEP’T JUST., <https://www.justice.gov/humantrafficking/what-is-human-trafficking> (last updated Jan. 6, 2017); see generally *Human Trafficking*, POLARIS PROJECT, <https://polarisproject.org/human-trafficking> (last visited Feb. 11, 2019).

4. *What is Human Trafficking?*, *supra* note 3.

5. See e.g., 2016 U.S. DEP’T ST. TRAFFICKING PERSONS REP.; *Commercial Sexual Exploitation of Children and Sex Trafficking, Literature Review*, OFF. JUV. JUST. & DELINQ. PREVENTION, <https://www.ojjdp.gov/mpg/litreviews/CSECSexTrafficking.pdf> (last updated Aug. 2014).

6. See generally I AM JANE DOE, *supra* note 1.

crime.⁷ This article addresses the role ISPs play in human trafficking, particularly child sex trafficking. It will analyze and compare how the United States⁸ and the European Union⁹ have tackled this issue, focusing on legislation, case law, and actual instances of online trafficking. Additionally, it will highlight various perspectives and approaches in order to answer the question of whether ISPs should be held legally liable (meaning civil liability) for content posted by third-parties.¹⁰

The issue of online human trafficking and ISP involvement is not black and white. ISPs cannot be divided into categories and labeled either a platform versus a publisher/developer, thereby shielding ISPs from liability for third-party content. There are ISPs that overstep their boundaries and knowingly participate, facilitate, and illegally edit the content of advertisements for commercial sex with minors in order to make a profit. Therefore, laws need to exist that address these instances and hold ISPs accountable for their roles in furthering human trafficking. The United States (U.S.) and European Union (EU) Member States have established laws for ISP liability;¹¹ however, they are insufficient because they provide immunity, not accountability. This article will compare the legal frameworks of the U.S. and the EU to get a better understanding of what has worked and what still needs improvement. However, the essence of this article is that implementing laws that remove ISP immunity is not the only solution, but instead, cooperation and collaboration between ISPs and law enforcement agencies is key if progress is to be made.

II. BACKGROUND INFORMATION ON HUMAN TRAFFICKING: GLOBALLY

The United Nations defines human trafficking under Article 3, paragraph (a) of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, which was put into force on December 25, 2003, as the:

7. *Id.*

8. *See infra* Part III.

9. *See infra* Part IV.

10. *See infra* Part V.

11. *See infra* Part III Section A, Part IV Section B.

recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation.¹²

Exploitation includes “sexual exploitation, forced labour or services, slavery, . . . [domestic] servitude [and] the removal of organs.”¹³ The Protocol “is the first global legally binding instrument with an agreed definition on trafficking in persons,” and the definition is meant to provide nations a basis to establish their own domestic criminal offenses.¹⁴

A. Statistics

Statistics on human trafficking are not always accurate or reliable for several reasons. First, many victims of human trafficking are often never detected because either first responders are not trained to identify or understand a trafficking situation, or many victims are afraid to come forward.¹⁵ The figures, therefore, are considered to be under-representative.¹⁶ Second, no comprehensive law enforcement database

12. U.N. Off. on Drug & Crime, Human Trafficking, <https://www.unodc.org/unodc/en/human-trafficking/what-is-human-trafficking.html> (citing G.A. Res. 55/25, annex II, Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime, art.3, ¶ (a) (Dec. 25, 2003)).

13. *Id.*

14. U.N. Off. on Drug & Crime, United Nations Convention Against Transnational Organized Crime and the Protocols Thereto, <https://www.unodc.org/unodc/en/treaties/CTOC/index.html> (last visited Feb. 24, 2019).

15. *See* INST. OF MED./NAT’L RESEARCH COUNCIL REPORT, CONFRONTING COMMERCIAL SEXUAL EXPLOITATION AND SEX TRAFFICKING OF MINORS IN THE UNITED STATES: A GUIDE FOR THE HEALTH CARE SECTOR 13–15 (2014); *see also* AMY FARRELL, JACK McDEVITT & STEPHANIE FAHY, UNDERSTANDING AND IMPROVING LAW ENFORCEMENT RESPONSES TO HUMAN TRAFFICKING: FINAL REPORT 14, 20–21 (June 2008). Jane White, Director, MICHIGAN HUMAN TRAFFICKING TASK FORCE; *see* Jane White, Dir., Mich. Human Trafficking Task Force, Train the Trainer (Dec. 11-12, 2014).

16. *See* FARRELL ET AL., *supra* note 15, at 14 (“Despite efforts to estimate the numbers and record the characteristics of trafficking victims, large gaps remain in the

exists to count the number of human trafficking cases globally.¹⁷ Third, the figures do not always account for all forms of trafficking and generally focus primarily on sex trafficking.¹⁸ Therefore, it is important to depend on statistics that are produced from credible and reliable sources that explain their methodology so the audience understands what the numbers are referencing. The International Labour Organization (ILO) released a new comprehensive study in 2017, stating: “[a]s no single source provides suitable and reliable data for all forms of modern slavery, a combined methodology has been adopted, drawing on a variety of data sources as required.”¹⁹ Specifically, ILO used “54 specially designed, national probabilistic surveys involving interviews with more than 71,000 respondents across 48 countries.” In order to estimate the forced sexual and labor exploitation of children, ILO also relied on the database created by the International Organization for Migration for the number of trafficked victims assisted.²⁰ From the data collected between 2012-2016, ILO estimated that “40.3 million people were victims of modern slavery in 2016.”²¹ Of those 40.3 million victims, 24.9 million people were exploited for forced labor, meaning “they were being forced to work under threat or coercion as domestic workers, on construction sites, in clandestine factories, on farms and fishing boats, in other sectors, and in the *sex industry*.”²² Within the forced labor statistics, forced sexual exploitation of adults and children accounted for 4.8

area of data collection, which significantly limits our knowledge about the scale of trafficking. . . .”).

17. *Id.* at 13, 14. It is difficult to measure the prevalence of human trafficking because currently “no empirically valid analyses of the incidence of human trafficking exist.” *Id.* at 13. Another difficulty with collecting reliable data is that trafficking crimes often overlap with various other crimes, such as smuggling, prostitution, sexual assault, etc. *Id.* at 14.

18. *Id.* at 15 (“attempts to measure the extent of human trafficking and describe the characteristics of either victims or offenders have generally been confined to particular types of trafficking [] e.g. commercial sex trafficking”).

19. INT’L LABOUR ORG., GLOBAL ESTIMATES OF MODERN SLAVERY: FORCED LABOUR AND FORCED MARRIAGE 11 (2017), available at https://www.ilo.org/wcmsp5/groups/public/---dgreports/---dcomm/documents/publication/wcms_575479.pdf [hereinafter GLOBAL ESTIMATES].

20. *Id.*

21. *Id.* at 9, 12.

22. *Id.* at 9–10 (emphasis added).

million people.²³ Even though human trafficking affects both men and women, women accounted for “28.7 million, or 71 [%] of the overall total,” illustrating the disproportionate impact and gender-based nature of this crime.²⁴ Specifically, “women and girls represent[ed] 99[%] of victims of forced labour in the commercial sex industry.”²⁵ Additionally, children were significantly affected with estimates that “one in four” children suffered from human trafficking.²⁶ Children accounted for 21% of the victimized population for commercial sex, which does not include proving the elements of force, fraud, or coercion, since the victims are minors.²⁷ Additionally, ILO estimates that the human trafficking industry accumulates a profit stream of \$150 billion.²⁸

B. Forms of Human Trafficking

As mentioned, human trafficking consists of both labor and sex trafficking.²⁹ Even though this paper primarily addresses sex trafficking of minors, it is important to shed light on the other situations in which human trafficking occurs. Labor trafficking involves the “use of violence, threats, lies, debt bondage, or other forms of coercion to force people to work against their will in . . . [various] industries.”³⁰ Labor traffickers lure victims into terrible working conditions by “mak[ing] false promises of a high-paying job” or educational opportunities.³¹ However, the reality is that the perpetrators control all the victim’s earnings, and the victims work longer hours than initially agreed upon, often in inhumane conditions as domestic servants, farmworkers, or factory workers.³² Once victims are at the mercy of their trafficker, it is

23. *Id.* at 10.

24. *Id.* at 10.

25. *Id.*

26. *Id.* at 5.

27. *Id.* at 10.

28. *The Facts, supra* note 2.

29. *Types of Human Trafficking*, INTERPOL, <https://www.interpol.int/Crime-areas/Trafficking-in-human-beings/Types-of-human-trafficking> (last visited Jan. 30, 2019).

30. *Labor Trafficking*, POLARIS PROJECT, <https://polarisproject.org/human-trafficking/labor-trafficking> (last visited Jan. 30, 2019).

31. *Id.*

32. *Id.*

very hard for them to escape or seek assistance.³³ Victims are often undocumented, they are extremely fearful of getting caught due to the psychological and physical abuse they have experienced, and they are kept isolated from society.³⁴

Similarly, sex traffickers also use violence, threats, “lies, debt bondage, and other forms of coercion to [force] adults and children to engage in commercial sex acts against their will.”³⁵ The situations that sex trafficking victims face are unlike what is portrayed by media outlets and Hollywood films.³⁶ Victims are not usually kidnapped or held hostage in basements; instead, many victims initially become romantically involved with someone and then are groomed, forced or manipulated into prostitution, resulting in the “boyfriend” or “pimp” collecting all the earnings.³⁷ Other victims may be lured in with false promises of a job, such as modeling, but are forced to work at strip clubs or brothels instead.³⁸ Additionally, some victims are forced to sell sex by their parents or other family members for a pay-off.³⁹ Victims of trafficking may be in the situation for a few days or weeks, or may remain controlled for years. The reasons discussed for why labor trafficking victims do not seek support or assistance also apply to many sex trafficking victims.⁴⁰ However, unlike labor trafficking, there is an additional layer because many sex trafficking victims are controlled through drugs and alcohol and “are heavily conditioned to remain loyal

33. *Id.*

34. *Id.*

35. *Sex Trafficking*, POLARIS PROJECT, <https://polarisproject.org/human-trafficking/sex-trafficking> (last visited Jan. 30, 2019).

36. See The Muse, *Human Trafficking: The Myths and the Realities*, FORBES (Jan. 24, 2012, 1:06 PM), <https://www.forbes.com/sites/dailymuse/2012/01/24/human-trafficking-the-myths-and-the-realities/#77446e3876e7>.

37. See Gabrielle Fonrouge, *The sick tactics sex traffickers use to find victims*, N.Y. POST (Apr. 17, 2018), <https://nypost.com/2018/04/17/how-sex-traffickers-hunt-for-victims-and-brainwash-them/>; see also *Human Trafficking Myths and Facts*, POLARIS PROJECT, <https://polarisproject.org/human-trafficking-myths-and-facts> (last visited Mar. 31, 2019).

38. The Muse, *supra* note 36.

39. *Id.*

40. See *supra* note 31 and accompanying text.

to [their] trafficker.”⁴¹ Victims of sex trafficking often “includ[e] runaway and homeless youth, as well as victims of domestic violence, sexual assault, war, or social discrimination.”⁴² One commonality between labor and sex traffickers is that both target vulnerable populations: victims that they believe are easier to control and will not seek help.⁴³

C. Technology and Human Trafficking

Technological advances such as the Internet and mobile smart phones have made sex trafficking, particularly with children, a more “convenient worldwide marketing channel.”⁴⁴ The Internet and social media have allowed individuals to easily “advertise, schedule, and purchase sexual encounters with minors.”⁴⁵ These technologies have “also allow[ed] pimps and traffickers to reach a larger clientele base than in the past,” heightening the dangers and risks associated with sexual exploitation.⁴⁶ In 2016, the National Center for Missing and Exploited Children (NCMEC) reported, based on information collected from the U.S., an 846% increase from 2010 to 2015 in reports of suspected child sex trafficking, which the organization attributed to be “directly correlated to the increased use of the Internet to sell children for sex.”⁴⁷ The statistics are similar globally. In 2011, the Internet Watch Foundation (IWF) received 12,752 reports of child sexual abuse images online worldwide;⁴⁸ compared to 2016, when IWF received 57,335 reports of websites

41. *Child Sex Trafficking*, U.S. DEP’T JUST., <https://www.justice.gov/criminal-ceos/child-sex-trafficking> (last updated July 25, 2017).

42. *Sex Trafficking*, *supra* note 35.

43. *The Victims & Traffickers*, POLARIS PROJECT, <https://polarisproject.org/victims-traffickers> (last visited Jan. 30, 2019).

44. *Child Sex Trafficking*, *supra* note 41.

45. *Id.*

46. *Id.*

47. STAFF OF S. PERMANENT SUBCOMM. ON INVESTIGATIONS, 114TH CONG., REP. ON BACKPAGE.COM’S KNOWING FACILITATION OF ONLINE SEX TRAFFICKING 4 (Comm. Print 2017) (testimony of Yiota G. Souras, Senior Vice President & General Counsel, National Center for Missing & Exploited Children) [hereinafter SENATE COMM. REP.].

48. INTERNET WATCH FOUND., ANNUAL AND CHARITY REPORT 14 (2011) [hereinafter 2011 IWF REPORT].

containing child sexual abuse imagery.⁴⁹ Of those websites, in 2011, 440 were used for commercial sexual abuse,⁵⁰ whereas, in 2016, 5,452 were for commercial sexual abuse,⁵¹ a significant increase. In 2016, the majority of child sexual abuse webpages were hosted in Europe and North America, and the top two countries included the Netherlands and the U.S.⁵² Furthermore, EUROPOL stated that there have been several European and worldwide operations that identified thousands of suspects for acts committed against children, with the numbers growing due to the proliferation of child sexual exploitation material on the internet.⁵³

Previously, sex trafficking took place “on the streets, at casinos and truck stops, and in other physical locations,” but now the exchanges occur predominantly online, making sex trafficking an even more lucrative and unmonitored industry.⁵⁴ The Internet is appealing to sex traffickers “because of the high profitability and relatively low risk associated with advertising trafficking victims’ services online.”⁵⁵ Traffickers can, by the click of a button, maximize profits by connecting to buyers through online advertisements, while maintaining anonymity throughout the entire process.⁵⁶ “The Internet offers traffickers unprecedented opportunities, which they have been quick to exploit.”⁵⁷ Generally, traffickers are able to evade law enforcement due to security

49. INTERNET WATCH FOUND., IWF ANNUAL REPORT 8 (2016) [hereinafter 2016 IWF REPORT].

50. 2011 IWF REPORT, *supra* note 48, at 15.

51. 2016 IWF REPORT, *supra* note 49, at 17.

52. *Id.* at 12; *see also* Eur. Consult. Ass., *Group of Specialists on the Impact of the Use of New Information Technologies on Trafficking in Human Beings for the Purpose of Sexual Exploitation*, EG-S-NT 9 rev., 29 (Sept. 16, 2003), available at https://ec.europa.eu/anti-trafficking/publications/group-specialists-impact-use-new-information-technologies-trafficking-human-beings_en [hereinafter *Specialists Report*] (explaining how child pornography cases skyrocketed from 215 in 1997 to 1128 in 1999, which was attributed to the increased volume of pornographic websites available online).

53. EUROPOL, CHILD SEXUAL EXPLOITATION 2010 FACT SHEET 2 (2010).

54. SENATE COMM. REP., *supra* note 47, at 5 (quoting Aff. Of Staca Shehan, *Backpage.com LLC v. Dart*, No. 15-cv-6340, Doc. 88-4, ¶ 17 (N.D. Ill. Oct. 6, 2015)).

55. *Id.*

56. *See generally* Athanassia P. Sykiotou, (Lecturer in Criminology) Directorate Gen. of Human Rights and Legal Affairs, Council of Eur., *Trafficking in human beings: Internet recruitment*, at 21-22, EG-THB-INT (2007).

57. *Id.* at 18.

and privacy protections associated with online websites, as well as the ability to remain anonymous with certain online features.⁵⁸ Online sex trafficking has become so common in the U.S. that police note that when they receive a report for a missing child, depending on what city they are in, the first place they look is the Internet.⁵⁹

Online sex trafficking is closely intertwined with child pornography because traffickers post inappropriate photos of children on certain websites, while simultaneously selling the child for specific sexual acts.⁶⁰ The production of such images creates “a permanent record of a child’s abuse” and allows for the victimization of the child to continue, since many of the images are difficult to remove once they are disseminated online.⁶¹ Therefore, “[t]he children exploited in these images must live with the permanency, longevity, and circulation of such a record of their sexual victimization.”⁶² Not only is being sold for sexual exploitation extremely traumatizing for victims, but the images create lasting psychological damages to a child.⁶³ Therefore, it is essential to hold individuals, including ISPs, accountable for exploiting children and those most vulnerable.

58. See MEREDITH DANK ET AL., ESTIMATING THE SIZE AND STRUCTURE OF THE UNDERGROUND COMMERCIAL SEX ECONOMY IN EIGHT MAJOR US CITIES 88 (2014), available at https://www.urban.org/sites/default/files/publication/22376/413047-estimating-the-size-and-structure-of-the-underground-commercial-sex-economy-in-eight-major-us-cities_0.pdf (noting that “online advertising provides more of a cover from law enforcement than the street”).

59. I AM JANE DOE, *supra* note 1; see also MEREDITH DANK ET AL., *supra* note 58, at 68 (explaining that law enforcement officials in Dallas “believed that the Internet has shifted many of the adults and minors previously found on the street indoors”). In San Diego, police officers noted similar sentiments, “I think that [the Internet] is the driver as to why this is becoming such a huge problem, because there’s probably only five places where you have street walkers in San Diego . . . they’re in very limited areas.” *Id.* at 102. The study as a whole found that “widespread availability and rapid expansion of the Internet has redefined the spatial and social limitations of the sex market by introducing new markets for both recruitment and advertisement.” *Id.* at 3.

60. See generally *Specialists Report*, *supra* note 52, at 29.

61. *Child Pornography*, U.S. DEP’T JUST., <https://www.justice.gov/criminal-ceos/child-pornography> (last updated July 25, 2017).

62. *Id.*

63. *Id.*; See also *Specialists Report*, *supra* note 52, at 29 (“Each time a picture is assessed for sexual purposes it victimizes the individual concerned.”).

III. UNITED STATES

In the U.S., trafficking individuals is a federal crime.⁶⁴ The gravity of this crime is visible when looking at a few key statistics.⁶⁵ The National Human Trafficking Hotline (NHTH), operated by Polaris, stated that in 2017, it received 26,557 calls of suspected human trafficking and 6,081 reported cases of sex trafficking.⁶⁶ Of those cases, 519 involved sexual exploitation via an online ad.⁶⁷ Additionally, since 2007, the NHTH has received 34,700 reports of sex trafficking instances in the U.S.⁶⁸ Lastly, NCMEC estimates in its 2018 report that, based off the nearly 23,500 runaways reported, one in seven were likely victims of child sex trafficking.⁶⁹ The rise in human trafficking victims and cases led Congress to take action in 2000 by passing the Trafficking Victims Protection Act (TVPA), the first comprehensive legislation, which focused on the three main “P’s:” prevention, prosecution, and protection.⁷⁰ In addition, the Act founded the Office to Monitor and Combat Trafficking in Persons, which is responsible for releasing a Trafficking in Persons (TIP) report every year for each country, detailing any progress or set-backs that have occurred with regards to combatting all forms of human trafficking.⁷¹ The TVPA has had four reauthorizations since its enactment, including in 2003, 2005, 2008, and 2013.⁷² During each reauthorization, additional provisions were introduced to provide further support and protection to survivors, such as

64. *Federal Law*, NAT’L HUM. TRAFFICKING HOTLINE, <https://humantraffickinghotline.org/what-human-trafficking/federal-law> (last visited Feb. 27, 2018).

65. *See generally Sex Trafficking*, *supra* note 35; *Hotline Statistics*, NAT’L HUM. TRAFFICKING HOTLINE, <https://humantraffickinghotline.org/states> (last visited Feb. 11, 2019).

66. *Hotline Statistics*, *supra* note 65.

67. *Id.*

68. *Sex Trafficking*, *supra* note 35.

69. *Child Sex Exploitation*, NAT’L CTR. FOR MISSING & EXPLOITED CHILD. (NCMEC), <http://www.missingkids.org/footer/media/keyfacts> (last visited Feb. 11, 2019).

70. *Current Federal Laws*, POLARIS, <https://polarisproject.org/current-federal-laws> (last visited Feb. 11, 2019).

71. *Id.*

72. *Id.*

establishing a federal civil right of action for victims to sue their traffickers.⁷³

Additionally, the U.S. has specific criminal offenses that make it illegal to traffic persons.⁷⁴ The relevant sections include 18 U.S. Code § 1591, *Sex trafficking of children or by force, fraud, or coercion*, which states,

(a) Whoever knowingly-

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

(2) benefits, financially or by receiving anything of value, from participation in a venture which has engaged in an act described in violation of paragraph (1).⁷⁵

As well as 18 U.S. Code § 1595, *Civil Remedy*, which states in pertinent part,

(a) An individual who is a victim of a violation of this chapter may bring a civil action against the perpetrator (or whoever knowingly benefits, financially or by receiving anything of value from participation in a venture which that person knew or should have known has engaged in an act in violation of this chapter) . . . [to recover damages].⁷⁶

Not only are there federal laws prohibiting human trafficking, but individual states have enacted similar legislation making it a criminal and

73. *Id.* This provision has been used to go against other third-party participants of human trafficking, but not Internet Service Providers. See generally Alexandra F. Levy, *Federal Human Trafficking Civil Litigation: 15 Years of the Private Right of Action*, HUMAN TRAFFICKING LEGAL CTR. (Dec. 2018), <http://www.htlegalcenter.org/wp-content/uploads/Federal-Human-Trafficking-Civil-Litigation-1.pdf>.

74. See generally 18 U.S.C. §§ 1581–1597.

75. 18 U.S.C. § 1591(a)(1)–(2) (2013).

76. 18 U.S.C. § 1595(a) (2018).

civil offense as well.⁷⁷ States have recently implemented laws targeting human traffickers, and therefore, many laws are still being improved and developed.⁷⁸ The first state to criminalize human trafficking was Washington in 2003.⁷⁹ Since then, every state has enacted legislation to hold traffickers criminally responsible for profiting from forced labor or sexual servitude.⁸⁰ The state laws do not all mirror the federal law, because states provide different variations for human trafficking definitions, statutory requirements, elements of the crime, and offenses.⁸¹

A. Communications Decency Act and Backpage.com

The U.S. Congress enacted the Communications Decency Act (CDA), also called Title V of the Telecommunications Act, in 1996 in “an attempt to regulate obscenity and indecency online,”⁸² primarily addressing concerns about minors’ access to pornography on the internet.⁸³ The CDA amended the telecommunications law by making it a criminal offense to knowingly transmit “obscene” or “indecent”

77. *Human Trafficking State Laws*, NAT’L CONF. OF ST. LEGISLATURES, <http://www.ncsl.org/research/civil-and-criminal-justice/human-trafficking-laws.aspx> (last visited Feb. 26, 2019); 18 U.S.C. § 1595; *see also* COLLEEN OWENS ET AL., IDENTIFYING CHALLENGES TO IMPROVE THE INVESTIGATION AND PROSECUTION OF STATE AND LOCAL HUMAN TRAFFICKING CASES 246 (Apr. 2012), available at <https://www.urban.org/sites/default/files/publication/25526/412593-Identifying-Challenges-to-Improve-the-Investigation-and-Prosecution-of-State-and-Local-Human-Trafficking-Cases.PDF> (focusing on the Midwest region, stating a civil provision that provides an “affirmative defense clause for victims as well as access to compensation funds”). In the Western Region, a civil provision exists that allows human trafficking victims to sue for damages and other court costs for up to \$250,000. *Id.* at 247. In the Southern region, a civil clause exists that “allows victims to recover threefold profit gained as a result of their trafficking and redefines the current definition of racketeering to include human trafficking.” *Id.* at 250. Another option is the possibility to receive restitution from the trafficker if found guilty of trafficking. *Id.* at 252.

78. *Human Trafficking State Laws*, *supra* note 77.

79. *Id.*

80. *Id.*

81. *Id.*

82. *CDA 230: Legislative History*, ELECTRONIC FRONTIER FOUND., <https://www.eff.org/issues/cda230/legislative-history> (last visited Jan. 14, 2018).

83. William A. Sodeman, *Communications Decency Act*, ENCYCLOPEDIA BRITANNICA, <https://www.britannica.com/topic/Communications-Decency-Act> (last visited Jan. 22, 2019).

messages to an individual who is under the age of 18 years.⁸⁴ Additionally, it “prohibited knowingly sending or displaying a ‘patently offensive’ message containing sexual or excretory activities . . . to a minor.”⁸⁵ The Act did include “a defense to senders or displayers of online ‘indecent’ materials if they took reasonable good-faith efforts to exclude children.”⁸⁶ Once the legislation was put into effect, practical issues arose that affected both ISPs and businesses.⁸⁷ For instance, at the time, it was cumbersome for a sender to screen out minors; therefore, it was difficult for senders and displayers to know if they were within the exception.⁸⁸ Some ISPs could request credit card information to validate that the user was over the age of 18; however, that prevented them from conducting business with adults who did not have a credit card.⁸⁹ Furthermore, the terms of the legislation “indecent” and “patently offensive” were ambiguous.⁹⁰ Lastly, there were several free speech concerns, which ultimately led the Supreme Court to decide in *Reno v. ACLU*, 521 U.S. 844 (1997), that certain provisions of the Act violated the First Amendment’s guarantee of freedom of speech.⁹¹

Due to these concerns, Representatives Chris Cox (R-CA) and Ron Wyden (D-OR) introduced an amendment to the CDA, which became the notorious Section 230.⁹² Section 230(c), titled *Protection for “Good Samaritan” Blocking and Screening of Offensive Material*, states:

(1) Treatment of Publisher or Speaker. No provider or user of an interactive computer service *shall be treated as the publisher or speaker of any information provided by another information content provider.*

(2) Civil Liability. No provider or user of an interactive computer service shall be *held liable on account of* –

84. *Id.*

85. *Id.*

86. *Id.* (the Good Samaritan exception).

87. *Id.*

88. *Id.*

89. *Id.*

90. *Id.*

91. *Id.*

92. *CDA 230: Legislative History*, *supra* note 82.

(A) any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected.⁹³

The rationale behind Section 230 was that online service providers would not be held liable for content published by third-parties, unlike newspaper publications that are accountable for the content they print.⁹⁴ The purpose of Section 230 was two-fold: first, it was to “encourage the unfettered and unregulated development of free speech on the Internet;” second, it “was to allow online services [the ability] to implement their own standards for policing content and provid[ing] for child safety.”⁹⁵ Essentially, Section 230 of the CDA, whether intentionally or accidentally, created federal immunity to most causes of actions that could otherwise result in ISP liability for information created by third-party users⁹⁶ However, exceptions for liability under federal criminal law and intellectual property law exist, but have not been readily applied.⁹⁷ Section 230 of the CDA was *not* struck down by the Supreme Court in *Reno v. ACLU*, like the other anti-indecency sections of the bill, because it was considered to be a provision that promoted free speech, not restrained it.⁹⁸

Section 230 of the CDA has had unforeseen implications due to the blanket immunity ISPs have received from civil and criminal litigation. The initial motivation to enact the CDA was to protect children from accessing pornography;⁹⁹ ironically, it now protects websites who promote and facilitate commercial sex trafficking of minors. Case after case, courts have ruled that websites such as Backpage.com (Backpage) and Craigslist, cannot be held legally liable for content posted by third-

93. 47 U.S.C. § 230(c) (1996) (emphasis added).

94. *CDA 230: Legislative History*, *supra* note 82.

95. *Id.* (quoting *Batzel v. Smith*, 333 F.3d 1018, 1027 (9th Cir. 2003)).

96. *Sodeman*, *supra* note 83.

97. *See e.g.*, SENATE COMM. REP., *supra* note 47, at 7; *see also* 47 U.S.C. § 230(e) (this includes under the TVPA since it is a federal criminal law).

98. *CDA 230: Legislative History*, *supra* note 82.

99. *Id.*

party users.¹⁰⁰ There have been several monumental cases that have brought attention to not only the illegal activity occurring on Backpage, but the effects of Section 230.¹⁰¹ This focus has led Congress to rethink and deliberate whether Section 230 is actually protecting free speech or shielding criminals.¹⁰²

“The internet has provided traffickers with a remarkably easy and cost-effective way” to market and sell their product, i.e. human beings.¹⁰³ Websites such as Backpage are major online marketplaces for the sale of illegal sex, especially with children.¹⁰⁴ Backpage operates in 97 countries with 943 locations worldwide.¹⁰⁵ Backpage provides users the opportunity to advertise and post classified listings for a wide variety of products and services.¹⁰⁶ Specifically, Backpage has an “adult” section that is considered “one of the most well-known online classified sites” for commercial sex trafficking.¹⁰⁷ In 2010, Craigslist’s adult services section shut down due to concerns of sex trafficking, which resulted in Backpage taking over and expanding its services to include “the online prostitution business and is now ‘the nation’s leading publisher of online prostitution advertising.’”¹⁰⁸ Backpage has approximately 80% of the market for online sex ads.¹⁰⁹ Nick McKinley, founder of Deliverfund, stated: “Backpage is the Walmart of Human Trafficking.”¹¹⁰ Furthermore, Backpage’s “adult” section is the only section which Backpage charges a posting fee and is the section that brings in the most

100. *Id.*

101. *Id.*

102. *See generally id.*

103. Brief of Amici Curiae at 12, *J.S. v. Village Voice Media Holdings, L.L.C.*, 359 P.3d 714 (Wash. 2015) (No. 90510-0), 2014 WL 4808973 [hereinafter *Amicus Curiae*].

104. *Id.* at 14.

105. SENATE COMM. REP., *supra* note 47, at 1.

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

107. *Amicus Curiae*, *supra* note 103, at 14 (quoting NPR Staff, *Online and Anonymous: New Challenges To Prosecuting Sex Trafficking*, NPR (Aug. 3, 2013, 6:28 PM), <http://www.npr.org/2013/08/03/208664066/online-the-web-of-sex-trafficking-can-be-even-more-obscure>).

108. *Id.*

109. *I AM JANE DOE*, *supra* note 1.

110. *Id.*

revenue.¹¹¹ The net revenue for Backpage and its holding company increased dramatically throughout the years: in 2012—\$71 million, in 2013—\$112.7 million, in 2014—\$134.9 million, and in 2015—\$153.8 million.¹¹² Therefore, it is an extremely lucrative business for Backpage, and one they have fought to protect.

B. Case Law

A case arose out of St. Louis, Missouri in 2011 when a minor victim of human trafficking sued Village Voice, the owner of Backpage.com, alleging that the company aided and abetted her trafficking and violated her primary rights under the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography.¹¹³ Plaintiff M.A., a fourteen-year-old runaway child, was being sexually trafficked by a female adult who admitted in court that:

she photographed minor M.A. displaying private body parts in sexual pornographic poses; she posted this child pornography on [Backpage's] website, backpage.com in advertisements seeking payment for sex; she paid backpage.com for these sex ad postings; she reposted ads; . . . [and] she collected money for minor M.A.'s sexual services from these customers.¹¹⁴

M.A. alleged that Backpage had knowledge of the explicit sexual pornographic photographs that were posted on its website, and by allowing the material to appear in search engines, Backpage “facilitated child sex trafficking and aided and abetted McFarland in violating” the

111. *Jane Doe No. 1*, 817 F.3d at 17; see also Tom Jackman & Jonathan O’Connell, *Backpage has always claimed it doesn’t control sex-related ads. New documents show otherwise*, WASH. POST (July 11, 2017), https://www.washingtonpost.com/local/public-safety/backpage-has-always-claimed-it-doesnt-control-sex-related-ads-new-documents-show-otherwise/2017/07/10/b3158ef6-553c-11e7-b38e-35fd8e0c288f_story.html?utm_term=.fd0846357480 (“93[%] of Backpage’s ad revenue in 2011 came from its adult section”).

112. I AM JANE DOE, *supra* note 1.

113. *M.A. ex rel. P.K. v. Village Voice Media Holdings, LCC*, 809 F. Supp. 2d 1041, 1045 (E.D. Mo. 2011).

114. *Id.* at 1043–44.

law.¹¹⁵ The court analyzed Section 230 of the CDA by considering the text of the statute and the intent of Congress.¹¹⁶ Section 230(f)(3) defines an “information content provider” as “any person or entity that is responsible . . . for the creation or development of information provided through the Internet or any other interactive computer service.”¹¹⁷ The court interpreted Section 230(f)(3) along with the fact that no ISP should be treated as a publisher for information provided by another content provider, as Congress establishing “a general rule that providers of interactive computer services are liable only for [the] speech that is properly attributable to them.”¹¹⁸ In this situation, Backpage can be considered both a service provider and a content provider.¹¹⁹ For instance, if a webpage “passively” displays content created by third parties, then it is only a service provider.¹²⁰ However, if a webpage creates or develops content, whether in whole or in part, then the website is also a content provider.¹²¹

M.A. argued that Backpage is not a service provider for purposes of Section 230’s immunity for five reasons. First, Backpage has a search engine for adult categories, which allows for keyword searches; second, “it developed the value of the posted ads by working to create a highly viewed website;” third, its website is considered to be “a highly tuned marketing site;” fourth, individuals who pay a fee are given instructions on how to increase the impact of the posted ads; and fifth, the website offers “special ad placement and re-posting for a fee.”¹²² The court disagreed with Plaintiff M.A. and believed that those characteristics did not abrogate Backpage’s immunity.¹²³ Specifically, the court stated that the creation of an adult section does not impose liability on Backpage for ads posted in that section because the users create the content of the ads and select which categories their ads will appear in.¹²⁴ The Court stated:

115. *Id.* at 1044–45.

116. *Id.* at 1047–48.

117. *Id.* at 1048 (quoting 47 U.S.C. § 230(f)(3)).

118. *Id.* (quoting *Johnson v. Arden*, 614 F.3d 785, 791 (8th Cir. 2010)).

119. *Id.*

120. *Id.*

121. *Id.*

122. *Id.* (internal quotations omitted).

123. *Id.* at 1049.

124. *Id.*

“the only relevant inquiry is whether the interactive service provider ‘creates’ or ‘develops’ that content.”¹²⁵ Additionally, the fact that Backpage was aware that prior cases of trafficking occurred on its website via the ads is not enough to make it the service provider’s own content.¹²⁶ In conclusion, the Court stated: “Congress has declared such websites to be immune from suits arising from such injuries;” therefore, “[i]t is for Congress to change the policy that gave rise to such immunity.”¹²⁷

In another attempt to hold Backpage accountable for its role in commercial sex trafficking, the prestigious Boston law firm Ropes & Gray filed a civil suit on behalf of Jane Does, representing three child sex trafficking victims.¹²⁸ Ropes & Gray filed its lawsuit in U.S. District Court in Massachusetts in October 2014, complaining that Backpage along with its parent company, “created a business model ‘to knowingly promote, support, contribute to and benefit from child sex trafficking in the United States’ in violation of federal and Massachusetts law.”¹²⁹ This time, the attorneys argued that Backpage was more than a passive host; as stated by the lead attorney John Montgomery, the website was “engaged in affirmative conduct, which directly violates a criminal statute, the Trafficking Victims Protection Act.”¹³⁰ Backpage filed a successful motion to dismiss the complaint filed by Ropes & Gray “on the ground that Backpage is immune from liability under” the CDA.¹³¹ The court stated that the litigation introduced two important public policy issues that collided head on—protecting exploited children or protecting the internet—and the court interpreted from Section 230 of the CDA that Congress chose to protect the internet.¹³²

125. *Id.* at 1050 (quoting *Goddard v. Google*, 2008 WL 5245490, *3 (N. D. Cal. Dec. 17, 2008)).

126. *Id.*

127. *Id.* at 1058.

128. Doug Banks, *Ropes & Gray takes sex-trafficking case to Supreme Court*, BOS. BUS. J. (Aug. 31, 2016, 9:09 PM), <https://www.bizjournals.com/boston/news/2016/08/31/ropes-gray-takes-sex-trafficking-lawsuit-to-u-s.html>.

129. *Id.* (internal quotations omitted).

130. I AM JANE DOE, *supra* note 1.

131. Banks, *supra* note 128.

132. I AM JANE DOE, *supra* note 1.

Ropes & Gray then filed an appeal with the First Circuit Court in January 2016, but the decision again turned to the immunity provided under Section 230.¹³³ Plaintiffs argued that Backpage was a participant in the criminal activity because their activities went beyond the scope of traditional publishing or editorial functions.¹³⁴ For instance,

rules about which terms are permitted or not permitted in a posting, the lack of controls on the display of phone numbers, the option to anonymize e-mail addresses, the stripping of metadata from photographs uploaded to the website, the website's reaction after a forbidden term is entered into an advertisement, and Backpage's acceptance of anonymous payments,¹³⁵

were examples of how Backpage actively edited the content posted by third-parties.

However, the court disagreed.¹³⁶ The court reaffirmed previous holdings "that a website operator's decisions in structuring its website and posting requirements are publisher functions entitled to section 230(c)(1) protection."¹³⁷ Again, the court focused on Congress's intent in passing Section 230, stating that the CDA was drafted so broadly that even if Backpage was "engaged in criminal conduct" it would still be immune from liability.¹³⁸ Refusing to accept the court's judgment, Ropes & Gray filed a writ of certiorari to the U.S. Supreme Court, which was denied in January 2017.¹³⁹

On the other side of the country, in Seattle, Washington, an attorney was able to convince the Supreme Court of Washington to hold in favor of Plaintiffs and allow the suit to proceed to trial.¹⁴⁰ The case started in 2012 when three children between the ages of 13 and 15 years old were advertised for sex on Backpage and as a result were repeatedly raped by

133. *Id.*

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

135. *Id.* at 20.

136. *Id.*

137. *Id.* at 22.

138. Banks, *supra* note 128.

139. *Doe v. Backpage.com LLC*, SCOTUS BLOG, <http://www.scotusblog.com/case-files/cases/doe-v-backpage-com-llc/> (last visited Jan. 25, 2019).

140. I AM JANE DOE, *supra* note 1.

customers.¹⁴¹ The complaint filed against Backpage alleged that they “were well aware that their website was being used in this way” because they “knowingly developed a nationwide online marketplace for illicit commercial sex” and did so “because of the millions of dollars that they generated from the website every month.”¹⁴² Furthermore, Plaintiffs claimed that Backpage developed content requirements that forbade sexually explicit language and material; however, that was merely a façade.¹⁴³ Instead, the content requirements were developed to assist pimps and traffickers in avoiding law enforcement detection so that Backpage could continue profiting from the illegal activities.¹⁴⁴ Such techniques included “altering ads before publication by deleting words, phrases, and images indicative of criminality,” then “publishing the ‘sanitized’ ads” as well as instructing subscribers on what photographs to use, what pricing is allowed, and how to categorize the content.¹⁴⁵

Once again, Backpage argued that it was immune from this lawsuit under the CDA.¹⁴⁶ However, this case was the first in the country where Backpage’s argument was held to be unsubstantiated by the trial court and the Washington Supreme Court.¹⁴⁷ The Supreme Court stated that the blanket immunity provided by the CDA is very dangerous when the allegations involve a website *knowingly contributing* to the illegal activity, rather than acting as a *passive* host.¹⁴⁸ This lawsuit was the first in the country to defeat the website’s CDA claims, which led to Backpage agreeing to a settlement.¹⁴⁹ At the closing of the case, one Plaintiff stated that, “[t]he CDA should not be a defense to profiting from child sex trafficking. Children who are sold for sex online should not be told that they are the cost of doing business for technology companies

141. First Amended Complaint for Damages at 2, *J.S. v. Vill. Voice Media Holdings, L.L.C.*, No: 12-2-11362-4 (Wash. Superior Ct.).

142. *Id.* at 2, 4.

143. *Id.* at 7.

144. *Id.*

145. Second Amended Complaint for Damages, at 7–9, *J.S. v. Vill. Voice Media Holdings, L.L.C.*, No: 12-2-11362-4 (Wash. Superior Ct.).

146. *Backpage.com Settles Sex Trafficking Lawsuit*, PFAU COCHRAN VERTETIS AMALA, (Oct. 03, 2017) https://pcva.law/pcva_news/backpage-lawsuit-and-settlement/.

147. *Id.*

148. *I AM JANE DOE*, *supra* note 1; *see also* *J.S. v. Vill. Voice Media Holdings, LLC*, 359 P.3d 714, 717–18 (Wash. 2015).

149. *See generally Backpage.com Settles Sex Trafficking Lawsuit*, *supra* note 146.

that are older than I am.”¹⁵⁰ The hope is that the evidence used to show that Backpage created a system designed to promote sex trafficking, not prevent it, will assist other cases against the website.¹⁵¹

C. Congress’s Response

These cases demonstrated that Congress needed to change the law to hold websites like Backpage accountable. After pressure and frustration from survivors, victims’ rights advocates, and attorneys, members of Congress started to investigate Backpage.¹⁵² The Senate Permanent Subcommittee on Investigations, chaired by Senator Rob Portman (R-Ohio) and led by other members, investigated Backpage in 2015.¹⁵³ The investigation started with interviewing Backpage general counsel Elizabeth McDougall, but the interview was fruitless, since she was unable to answer key questions on the methods used by Backpage to screen advertisements for illicit content.¹⁵⁴ Therefore, on July 7, 2015, the Subcommittee responded by subpoenaing Backpage for documents related to its policies and procedures for examining illegal advertisements and its communications with law enforcement.¹⁵⁵ However, Backpage refused to produce any documents in response to the

150. See *id.*; *Backpage.com Settles Sex Trafficking Lawsuit*, ARIZ. DAILY INDEP. (Oct. 9, 2017), <https://arizonadailyindependent.com/2017/10/09/backpage-com-settles-sex-trafficking-lawsuit/>.

151. See *Backpage.com Settles Sex Trafficking Lawsuit*, *supra* note 146.

152. See Jonathan O’Connell & Tom Jackman, *Members of Congress press Sessions to investigate sexual ads at Backpage.com*, WASH. POST (July 13, 2017), https://www.washingtonpost.com/local/public-safety/congresswomen-press-sessions-to-investigate-sexual-ads-at-backpagecom/2017/07/13/99ebaed8-6752-11e7-9928-22d00a47778f_story.html?utm_term=.978b487ff1e3; see also I am Jane Doe, *supra* note 1; see generally Tom Jackman, *Trump signs ‘FOSTA’ bill targeting online sex trafficking, enables states and victims to pursue websites*, WASH. POST (APR. 11, 2018), <https://www.washingtonpost.com/news/true-crime/wp/2018/04/11/trump-signs-fosta-bill-targeting-online-sex-trafficking-enables-states-and-victims-to-pursue-websites/>.

153. O’Connell & Jackman, *supra* note 152; Tom Jackman, *Senate launches bill to remove immunity for websites hosting illegal content, spurred by Backpage.com*, WASH. POST (Aug. 1, 2017), https://www.washingtonpost.com/news/true-crime/wp/2017/08/01/senate-launches-bill-to-remove-immunity-for-websites-hosting-illegal-content-spurred-by-backpage-com/?utm_term=.73758d4503cf.

154. SENATE COMM. REP., *supra* note 47, at 10.

155. *Id.*

subpoena.¹⁵⁶ The Subcommittee faced another obstacle when they unsuccessfully subpoenaed two Backpage employees, the head of Backpage's moderation department and the supervisor in charge of training the moderators, for a deposition because the two employees invoked their Fifth Amendment privilege and declined to testify.¹⁵⁷

Afterwards, there were more attempts to acquire documents from Backpage, but the company continued to be uncooperative.¹⁵⁸ It was not until the Senate Legal Counsel brought civil action to enforce the subpoena that Backpage produced the documents, totaling 552,983 documents, comprising 1,112,836 pages.¹⁵⁹ The documents, along with other investigative efforts, assisted the Subcommittee in issuing its report in January 2017.¹⁶⁰ The report presented several findings that demonstrated Backpage's involvement in the criminal activity.¹⁶¹ The report, titled *Backpage.com's Knowing Facilitation of Online Sex Trafficking*, contains three principal findings.¹⁶² First, "Backpage has knowingly concealed evidence of criminality by systematically editing its 'adult' ads."¹⁶³ Second, "Backpage knows that it facilitates prostitution and child sex trafficking."¹⁶⁴ Lastly, "despite the reported sale of Backpage to an undisclosed foreign company in 2014, the true beneficial owners of the company are James Larkin, Michael Lacey, and Carl Ferrer."¹⁶⁵ The first two findings are addressed in further detail below.

a. The Report's Findings

Based on the evidence gathered and analyzed, the committee explained that Backpage "maintained a practice of altering ads before publication by deleting words, phrases, and images indicative of illegal

156. *Id.*

157. *Id.* at 10–11.

158. *Id.* at 11.

159. *Id.* at 12, 16.

160. *See generally* Jackman, *supra* note 153.

161. *Id.*

162. SENATE COMM. REP., *supra* note 47, at 2.

163. *Id.* at 2.

164. *Id.* at 3.

165. *Id.*

transaction.”¹⁶⁶ Initially, Backpage instructed its moderators to reject any advertisements that referenced acts of prostitution or sex in exchange for money.¹⁶⁷ However, shortly after that instruction, a new policy was implemented that directed Backpage employees “to manually *edit* the language of adult ads to conceal the nature of the underlying transaction.”¹⁶⁸ This policy first started on an ad hoc basis, but it soon developed into a “systematic process.”¹⁶⁹ Along with the manual editing, Backpage added another function to its automatic filters: “Strip Term From Ad.”¹⁷⁰ The filter would ban specific words and delete them before publication, whereas previously those forbidden terms would have resulted in the rejection of the entire ad.¹⁷¹ This new function “concealed the illegal nature of countless ads and systematically deleted words indicative of criminality, including child sex trafficking and prostitution of minors.”¹⁷² The Strip Term From Ad filter would automatically delete words from the adult ads, such as: “lolita,” “teenage,” “rape,” “young,” “amber alert,” “little girl,” “daddy,” “teen,” “fresh,” “innocent,” and “school girl,” to make the site cleaner.¹⁷³ The email correspondents illustrated that CEO Carl Ferrer was not only instructed on which words to add to the filter, but he directed or approved the new words and understood their implications for child exploitation.¹⁷⁴ Additionally, the Strip Term From Ad filter was also programmed to “strip scores of words indicative of prostitution from ads before publication,” such as “full service,” “no limits,” and other common terms describing sexual acts.¹⁷⁵ Furthermore, anything related to price or time would also be deleted, for example, “\$50 for 15 minutes.”¹⁷⁶ This practice clearly was designed to conceal the true nature of the ads and raised questions about

166. *Id.* at 17.

167. *Id.* at 18.

168. *Id.* at 18–19.

169. *Id.* at 19.

170. *Id.* at 21.

171. *Id.*

172. *Id.* at 22.

173. *Id.* at 22–23.

174. *Id.* at 24.

175. *Id.* at 24–25.

176. *Id.* at 25.

how cooperative Backpage truly was with law enforcement.¹⁷⁷ It is unclear based on the evidence if or when Backpage discontinued the filter.¹⁷⁸

After Craigslist shut down its adult section, Backpage began to reinstruct its moderators to reject and remove any advertising about sex or money because of the public scrutiny the websites were under.¹⁷⁹ However, that policy conflicted with the company's profit objectives, leading the company to abandon it and revert back to editing the ads rather than removing the ads entirely.¹⁸⁰ Along with the Strip Term From Ad filter, the moderators were instructed to manually edit the ads afterwards, completely losing the original version of the ad.¹⁸¹ The words deleted manually were usually phrases that the automatic filter missed due to many possible variations, i.e. "yung," or "\$\$\$j," or "full servlce."¹⁸² Similarly, Andrew Padilla, the head of Backpage's moderation department, instructed the workers to have these words deleted, and Mr. Ferrer was aware of this, since he was copied in many of the emails and was told that they were indicative of criminality.¹⁸³ Lastly, Backpage executives instructed moderators to "lock" any sex-for-money ads that had been edited by moderators.¹⁸⁴ Most of the sites "default settings permit[ed] users to edit their own live ads after publication;" however, for the adult ads, the lock setting "prevent[ed] users from re-entering the language removed during moderation."¹⁸⁵ This meant that "moderators routinely edited out clear offer[s] of sex for money, locked out further editing, and allowed the ad to go live."¹⁸⁶ A couple of moderators testified under oath to the Committee, stating that their responsibility was to make sure that sex-for-money postings were clean enough to run live, even though it did not change the illegal nature of the advertisement.¹⁸⁷

177. *See generally id.* at 29.

178. *Id.* at 27.

179. *Id.* at 27–28.

180. *Id.* at 28.

181. *Id.*

182. *Id.* at 29.

183. *Id.* at 28–29.

184. *Id.* at 30.

185. *Id.*

186. *Id.* at 31 (internal quotations omitted).

187. *Id.*

The report noted that Backpage eliminated manually editing its ads to a certain extent, but the timeline of the policy shift is uncertain.¹⁸⁸

Lastly, Backpage “coached” the creators of ads with “how tos” for posting “clean” content for “[i]llegal [t]ransactions.”¹⁸⁹ Ferrer instructed that “when a user attempted to post ads with even the most egregious banned words, the user would receive an error message identifying the problematic word choice.”¹⁹⁰ For example, a user was attempting to advertise sex with a “teen” in 2012 and received the error message: “Sorry, ‘teen’ is a banned term.”¹⁹¹ This error message would allow the user to then redraft a cleaner ad and repost it, even though the content and the request did not change.¹⁹² A similar error message would pop up during the age verification process for adult ads.¹⁹³ If a user provided an age of a minor, then the error stated: “Oops! Sorry, the ad poster must be over 18 years of age.”¹⁹⁴ The user was again given the opportunity to change the age and the ad would go live.¹⁹⁵ Based on the Subcommittee’s investigation and these findings, the Report asserts that Backpage employees and executives know that prostitution and child sex trafficking occurs on Backpage, yet they are reluctant to act on such knowledge.¹⁹⁶ This report sheds light on crucial aspects of Backpage’s business philosophy and illustrates that Backpage does in fact possess the requisite knowledge for proving criminal liability.

Surprisingly, after the report and the findings were released, seven top officials of Backpage were arrested on a 93-count indictment alleging conspiracy, facilitation prostitution and money laundering.¹⁹⁷ Of those

188. *Id.* at 34.

189. *Id.*

190. *Id.*

191. *Id.*

192. *Id.* at 34–35.

193. *Id.* at 35.

194. *Id.*

195. *Id.*

196. *Id.* at 39–44.

197. Richard Ruelas & Megan Cassidy, *Feds charge Backpage founder after human-trafficking investigation*, USA TODAY (Apr. 7, 2018, 2:56 AM), <https://www.usatoday.com/story/news/nation-now/2018/04/07/backpage-prostitution-charges/495701002/>; see also Tom Jackman & Mark Berman, *Top officials at Backpage.com indicted after classifieds site taken offline*, WASH. POST (Apr. 9, 2018), <https://www.washingtonpost.com/local/public-safety/top-officials-at-backpagecom->

charged included the site's founders, Michael Lacy and James Larkin, as well as the current chief executive, Carl Ferrer.¹⁹⁸ Mr. Ferrer pled guilty to charges of money laundering and conspiracy to facilitate prostitution and agreed to testify against the co-founders, Lacy and Larkin.¹⁹⁹ In his plea agreement Ferrer wrote: "I conspired with other Backpage principals . . . to find ways to knowingly facilitate the state-law prostitution crimes being committed by Backpage's customers," including hosting ads of children.²⁰⁰

b. Amending the Communications Decency Act

Following the Senate Subcommittee Investigation and findings, the Senate introduced an amendment to the Communications Decency Act (CDA).²⁰¹ Senator Rob Portman (R-Ohio) along with nineteen other senators introduced the Stop Enabling Sex Trafficking Act of 2017 (S.1693), receiving bi-partisan support.²⁰² A similar bill was also introduced in the House of Representatives.²⁰³ The proposed law would clarify three main components of the CDA that have been controversial. First, Section 230 does not shield against criminal (state or federal) prosecution of minor sex trafficking charges; second, civil lawsuits dealing with sex trafficking of minors are not prohibited; and third, ISPs who publish information that facilitates sex trafficking are not immune from federal liability.²⁰⁴ During the introduction of the bill, Sen. Portman

indicted-after-classifieds-site-taken-offline/2018/04/09/0b646f36-39db-11e8-9c0a-85d477d9a226_story.html?utm_term=.d09fa987a0cc.

198. Daniel Kreps, *Backpage CEO Pleads Guilty to Charges, Assists in Federal Investigation*, ROLLING STONE (Apr. 13, 2018, 3:46 PM), <https://www.rollingstone.com/culture/culture-news/backpage-ceo-pleads-guilty-to-charges-assists-in-federal-investigation-628638/>.

199. Tom Jackman, *Backpage CEO Carl Ferrer pleads guilty in three states, agrees to testify against other website officials*, WASH. POST (Apr. 13, 2018), https://www.washingtonpost.com/news/true-crime/wp/2018/04/13/backpage-ceo-carl-ferrer-pleads-guilty-in-three-states-agrees-to-testify-against-other-website-officials/?utm_term=.7549a4f42dce.

200. *Id.*

201. Jackman, *supra* note 153.

202. *Id.*

203. *Id.*

204. *Id.*

stated: “For too long, courts around the county have ruled that Backpage can continue to facilitate illegal sex trafficking online with no repercussions. The [CDA] is a well-intentioned law, but it was never intended to help protect sex traffickers who prey on the most innocent and vulnerable among us.”²⁰⁵

In response to Congressional action, Backpage closed its adult advertising section in January 2017.²⁰⁶ The website received relentless pressure from government officials, which, according to Backpage, made it too costly to continue its operation of the adult section.²⁰⁷ “For years, the legal system protecting freedom of speech prevailed,” Backpage stated, “but new government tactics, including pressuring credit card companies to cease doing business with Backpage, have left the company with no other choice but to remove the content *in the United States*.”²⁰⁸ Now, when entering Backpage’s adult section it states: “CENSORED” – “The government has unconstitutionally censored this content.”²⁰⁹ However, does this mean that ads displaying illegal sexual content are completely gone? According to law enforcement officials and anti-sex trafficking groups, the ads (along with the people being advertised) have just moved to a new location.²¹⁰ Lt. Curtis Williams, who is a police officer in Atlanta, explained: “They have just moved from the Adult section to what Backpage terms as the Dating section.”²¹¹ A search of Backpage’s dating section uncovers similar postings and

205. *Id.*

206. Derek Hawkins, *Backpage.com shuts down adult services ads after relentless pressure from authorities*, WASH. POST (Jan. 10, 2017), https://www.washingtonpost.com/news/morning-mix/wp/2017/01/10/backpage-com-shuts-down-adult-services-ads-after-relentless-pressure-from-authorities/?utm_term=.d0bfe154256c.

207. *Id.*

208. *Id.* (emphasis added).

209. *Id.*

210. Andrew O’Reilly, *Prostitution still thrives on Backpage despite site shutdown of ‘adult’ section*, FOX NEWS (May 1, 2017), <http://www.foxnews.com/tech/2017/05/01/prostitution-still-thrives-on-backpage-despite-site-shutdown-adult-section.html>; see also Stephen Koff, *Backpage.com still appears to be running ads for prostitutes, sexual services*, CLEVELAND.COM (Jan. 12, 2017), http://www.cleveland.com/metro/index.ssf/2017/01/backpagecom_might_not_have_act.html.

211. See O’Reilly *supra* note 217.

phrases used to solicit sexual services.²¹² Therefore, it is unclear if this is a ploy to mislead the public and members of Congress, or if Backpage is actually serious about preventing human trafficking.

Despite the criticism and attacks the bill received,²¹³ the final bill, titled *Allow States and Victims to Fight Online Sex Trafficking Act of 2017* (H.R. 1865),²¹⁴ was passed by the House on February 27, 2018 and by the Senate on March 21, 2018.²¹⁵ On April 11, 2018, President Donald Trump signed the bill into law, marking a significant step forward to holding sites responsible for sex-trafficking ads.²¹⁶ The Act starts off by proclaiming that the Communications Decency Act “was never intended to provide legal protection to websites that unlawfully promote and facilitate prostitution and websites that facilitate traffickers in advertising the sale of unlawful sex acts with sex trafficking victims.”²¹⁷ The Act, also referred to as “FOSTA,” not only limits the immunity for ISPs provided under Section 230 of the CDA, but it also encourages ISPs to “exercise greater responsibility over sex-trafficking related content,” and provides law enforcement and prosecutors new avenues to pursue those

212. *Id.*

213. See Tom Jackman, *Trump signs ‘FOSTA’ bill targeting online sex trafficking, enables states and victims to pursue websites*, WASH. POST (Apr. 11, 2018), https://www.washingtonpost.com/news/true-crime/wp/2018/04/11/trump-signs-fosta-bill-targeting-online-sex-trafficking-enables-states-and-victims-to-pursue-websites/?utm_term=.9b6f46e0b80e. Even after the bill was passed, many “[c]ivil liberties advocates attacked the bill as too broad, creating new liability for websites that had previously been protected by the [CDA] for content posted by third parties.” *Id.* Other advocates also scrutinized the bill as “depriving them of a safe place to screen customers, as well as removing a tool for law enforcement to track pimps, locate missing children and build criminal cases.” *Id.* The concern, again being, that traffickers will move to overseas websites. *Id.* Paul Pesmark, Detroit Police Dep’t, Presentation at the Michigan Human Trafficking Task Force Conference: Dark Web (Oct. 8, 2018) (a police officer addressed these concerns, stating that many low-level traffickers are not sophisticated enough, nor do they have the time or energy, to create accounts in the dark web).

214. See generally *Allow States and Victims to Fight Online Sex Trafficking Act of 2017*, H.R. 1865, 115th Cong. § 1 (2018).

215. *H.R.1865 – Allow States and Victims to Fight Online Sex Trafficking Act of 2017*, CONGRESS.GOV., <https://www.congress.gov/bill/115th-congress/house-bill/1865/actions>. (last visited Nov. 21, 2018).

216. Jackman, *supra* note 213.

217. *Allow States and Victims to Fight Online Sex Trafficking Act of 2017*, Pub. L. No. 115-164, § 2(1), 132 Stat. 1253, 1253 (2018).

criminally responsible.²¹⁸ As discussed above, the CDA provided an exception to the immunity for federal criminal violations; however, FOSTA takes it a step further and removes CDA immunity for ISPs with respect to state criminal charges if the underlying crime falls within a violation of the anti sex-trafficking statutes described in FOSTA.²¹⁹ Most notably, FOSTA also removes immunity against civil liability suits brought by victims against ISPs who “knowingly promot[e] or facilitate[e] sex trafficking through such activities as hosting third-party posts, listings and advertisements.”²²⁰

IV. EUROPE

Human Trafficking in the Europe Union has been classified as “one of the most prevalent” forms of organized crime.²²¹ As a result, Member State law enforcement agencies have prioritized and concentrated resources to address this problem.²²² In the past decade, Member State authorities have noticed a “considerable increase in intra-EU trafficking.”²²³ According to Europol, there was a significant increase in the number of registered victims and suspects reported between 2013-2014.²²⁴ For instance, in 2013, 3,910 suspects and 3,315 victims were identified; whereas in 2014, 4,127 suspects and 4,185 victims were

218. Jeffrey Neuburger, *FOSTA Signed into Law, Amends CDA Section 230 to Allow Enforcement against Online Providers for Knowingly Facilitating Sex Trafficking*, PROSKAUER (Apr. 11, 2018), <https://newmedialaw.proskauer.com/2018/04/11/fosta-signed-into-law-amends-cda-section-230-to-allow-enforcement-against-online-providers-for-knowingly-facilitating-sex-trafficking/>.

219. *Id.*; see also Allow States and Victims to Fight Online Sex Trafficking Act of 2017 § 4(a)(5)(A)–(C).

220. Neuburger, *supra* note 218; see also Allow States and Victims to Fight Online Sex Trafficking Act of 2017 § 4(a)(5)(A).

221. Donna M. Hughes, *Trafficking in Human Beings in the European Union: Gender, Sexual Exploitation, and Digital Communication Technologies*, SAGE OPEN, Oct. 17, 2014, at 1, 1, available at <http://journals.sagepub.com/doi/pdf/10.1177/2158244014553585> (internal quotations omitted).

222. Europol, Situation Rep.: Trafficking in human beings in the EU, at 5, Doc. Ref. No. 765175 (Feb. 2016), available at <https://www.europol.europa.eu/publications-documents/trafficking-in-human-beings-in-eu> [hereinafter *EU Situation Report*].

223. *Id.* at 9.

224. *Id.*

identified.²²⁵ The trends are not linked to any particular reason, but Europol has been increasingly assisting Member State law enforcement for operational support during cross-border trafficking investigations.²²⁶ Furthermore, the majority of the registered victims, 71%, were EU citizens, demonstrating that the problem is not only prevalent in the EU, but it affects EU nationals.²²⁷

Sexual exploitation is the most reported form of human trafficking in Europe, and most of the victims are female and EU nationals from Central and Eastern Europe.²²⁸ Figuratively, “570 victims of sexual exploitation were identified by Europol . . . [and approximately] 95% were adult victims and 5%” were minors in 2014.”²²⁹ The victims are usually forced into prostitution, and if prostitution is illegal in a country, then the victim’s services are advertised within the “dark market” through various avenues, such as escort and/or dating websites.²³⁰ Europol has also recognized an increase in the number of advertisements used to sexually exploit children.²³¹

A. Websites Involved in Human Trafficking

Even though Backpage exists in over 90 countries,²³² including parts of Europe, it does not receive the same attention for contributing to human trafficking as it does in the U.S. Europol has identified key networks where online child sexual exploitation occurs, such as peer-to-peer services, Darknet webpages, escort services, and live-streaming platforms.²³³ For instance, there was a case involving females who were

225. *Id.*

226. *Id.*

227. *Id.*

228. *Id.* at 20.

229. *Id.*

230. *Id.* at 22.

231. *Id.*

232. SENATE COMM. REP., *supra* note 47, at 1.

233. *Child Sexual Exploitation*, EUROPOL, <https://www.europol.europa.eu/crime-areas-and-trends/crime-areas/child-sexual-exploitation> (last visited Apr. 25, 2019); *see generally* ECPAT, THE COMMERCIAL SEXUAL EXPLOITATION OF CHILDREN IN EUROPE (2014), available at: https://www.ecpat.org/wp-content/uploads/2016/04/Regional%20CSEC%20Overview_Europe.pdf (Throughout the course of this research, locating webpages that were utilized for human trafficking

transported from Estonia into Finland to be sexually exploited and advertised online by Estonian and Finnish criminals.²³⁴ In Estonia, the most popular website where sexual exploitation commonly occurs is *Rate.ee*, which has 360,000 registered users; 130,000 users a day; 350,000 visits per week; and 19 million pages displayed per day.²³⁵ In this case, the traffickers managed to recruit the women and girls and force them into prostitution while serving time in an Estonian prison.²³⁶ The three men were all part of the business scheme and used their girlfriends/wives to assist in the process.²³⁷ The men smuggled phones into the prison and then started to communicate with the young women on *Rate.ee*.²³⁸ Once the women arrived, they were photographed and advertised on another Finnish adult website, *sihteeriopisto.net*.²³⁹ This investigation yielded that a total of fifteen Estonian women were trafficked to Finland between October 2005 – March 2006.²⁴⁰ This case was the first trafficking conviction in Finland,²⁴¹ and the parties involved were convicted of aggravated human trafficking and pimping and their sentences ranged from 2-5 years imprisonment.²⁴² Mr. Nick Garlick, an Intelligence Officer for the Crimes Against Persons Unit at Europol, explained that the operation was “highly sophisticated” and “utilized fully the internet to advertise its ‘products’”²⁴³ After representatives from Europol, Eurojust, and the Finish Police met at the Council of Europe Seminar on the Misuse of the Internet, they started to investigate the ISPs

purposes in Europe was more difficult because of location and lack of access or insight into European illicit websites. As a result, the examples provided below are mainly from secondary accounts and reports).

234. Seminar Proceedings, Council of Eur., Misuse of the Internet for the recruitment of victims of trafficking in human beings, at 23 (June 7–8, 2007), http://lastradainternational.org/lsidocs/358%20CoE%20Seminar%20Proceedings_Misuse%20of%20the%20Internet.pdf [hereinafter *Internet Misuse Seminar*].

235. *Id.* (the portal is primarily utilized by Estonian females ages 15-25).

236. *Id.* at 23–24.

237. *Id.*

238. *Id.* at 24.

239. *Id.*

240. Sykiotou, *supra* note 56, at 35.

241. *Internet Misuse Seminar*, *supra* note 234, at 46.

242. Sykiotou, *supra* note 56, at 35.

243. *Internet Misuse Seminar*, *supra* note 234, at 46.

liability in this case.²⁴⁴ However, it is unclear if anything resulted from the investigation.

The Internet is a main source for advertising women and girls available for sexual services to buyers, and the Netherlands is no exception.²⁴⁵ One of the most popular websites in the Netherlands is *hookers.nl*.²⁴⁶ The website went live in 2002 and within four years it had “formally registered” approximately 80,000 active members.²⁴⁷ The only language option on this website is Dutch.²⁴⁸ The website not only has online advertisements, but it also provides addresses and options for where to go to receive prostitution services for its clientele.²⁴⁹ Due to the website’s possible ties to human trafficking, *hookers.nl* took part in the *Appearances Deceive* campaign, which started in January 2006 by the Report Crime Anonymously Foundation financed by the Ministry of Justice.²⁵⁰ The objective of the campaign was to help users of these websites identify and recognize signs of human trafficking or forced prostitution and anonymously report their suspicions.²⁵¹ *Hookers.nl* endorsed the campaign and spread the information on its website for users to utilize if they witnessed something criminal.²⁵²

Similar sentiments about prosecuting websites who fail to take down sexually explicit photographs of children are arising out of Britain as well.²⁵³ British Prime Minister Theresa May’s “ethics watchdog” requested that the government take action to address the issue of ISP

244. Sykiotou, *supra* note 56, at 35 n.30 (the internet service provider was actually a Netherlands based website because Finland prohibits sexual advertising).

245. SHARED HOPE INT’L, DEMAND. A COMPARATIVE EXAMINATION OF SEX TOURISM AND TRAFFICKING IN JAMAICA, JAPAN, THE NETHERLANDS, AND THE UNITED STATES 5, 60 (2007).

246. *Id.*

247. PROSTITUTION AND HUMAN TRAFFICKING FOCUS ON CLIENTS 71 (Andrea Di Nicola et al. eds., 2009) [hereinafter FOCUS ON CLIENTS].

248. SHARED HOPE INT’L, *supra* note 245, at 60.

249. *Id.*

250. FOCUS ON CLIENTS, *supra* note 247, at 101.

251. *Id.*

252. *Id.*

253. See Kieran Guilbert, *Punish web giants who host child sex abuse: UK watchdog*, REUTERS (Dec. 13, 2017), <https://www.reuters.com/article/us-britain-internet-sexcrimes-children/punish-web-giants-who-host-child-sex-abuse-uk-watchdog-idUSKBN1E72NC> [hereinafter *Punish Web Giants*].

liability for websites who host “racist, extremist, and child sex abuse material.”²⁵⁴ David Westlake, head of anti-slavery group International Justice Mission UK, stated: “Internet service providers, are increasingly finding their . . . platforms as vulnerable mediums for exploitation and abuse.”²⁵⁵ Therefore, businesses have a critical role in ensuring child safety and should have a statutory obligation if they fail to monitor and take down illegal content.²⁵⁶ Similar to the U.S., debates are arising in the UK about the degree of care companies should exercise over what is posted on their platforms and what they should be shielded from.²⁵⁷ An advocate from Anti-Slavery International stated: “[T]hey shouldn’t just be able to sit back and allow content constituting child sexual abuse on their sites.”²⁵⁸ Currently, social media companies and ISPs do not have liability for the content on their sites, even if it is illegal due to the E-Commerce Directive (discussed in detail below).²⁵⁹ Therefore, the Committee on Standards in Public Life made the recommendation to shift liability in its recent report.²⁶⁰ The Committee stated: “[r]evising this legal framework which applies to the social media companies would incentivize the prompt, automated identification of illegal content.”²⁶¹ It appears that the traction the U.S. is receiving for altering its laws is setting an example for other countries to follow.²⁶²

254. *Id.*

255. *Id.*

256. *Id.*

257. *Id.*

258. *Id.*

259. *UK government called on to shift liability for illegal online content to social media companies*, OUT-LAW.COM (Dec. 13, 2017), <https://www.out-law.com/en/articles/2017/december/uk-government-called-on-to-shift-liability-for-illegal-online-content-online-to-social-media-companies1/> [hereinafter *E-commerce Directive*].

260. *See id.* For access to the full report, *see generally* COMM. ON STANDARDS IN PUB. LIFE, INTIMIDATION IN PUBLIC LIFE (Dec. 2017), available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/666927/6.3637_CO_v6_061217_Web3.1__2_.pdf.

261. COMM. ON STANDARDS IN PUB. LIFE, *supra* note 260, at 36.

262. *See e.g., Punish Web Giants, supra* note 253.

B. EU Laws on Human Trafficking and the Internet

On an international level, there are no binding policies addressing trafficking online.²⁶³ However, there are several other policies that exist for EU Member States that address this issue.²⁶⁴ The EU is comprised of twenty-eight European States, however, each State maintains its sovereignty because “the EU does not legislate or implement policy on purely national matters.”²⁶⁵ Instead, “the Union only acts where action will be more effective at EU level than at national level.”²⁶⁶ Therefore, since the issues of human trafficking and child sexual exploitation require international collaboration, the EU has released a few relevant Directives (or legislation) to address and combat them.²⁶⁷ The three Directives are: *2011/36/EU on preventing and combating trafficking in human beings and protecting its victims*; *2011/93/EU on combating the sexual abuse and sexual exploitation of children and child pornography*;²⁶⁸ and *2000/31/EU on certain legal aspects of information society services, in particular, electronic commerce*.²⁶⁹ Directives are binding upon Members States and set a goal that must be achieved by national governments by a specified date.²⁷⁰ However, national governments are able to decide in what manner it wishes to meet the goals outlined in the Directive.²⁷¹ “The EU has the power to determine the broad approach, but cannot prescribe how [M]ember [S]tates implement policy or which agencies take responsibility for the changes.”²⁷² In addition to the Directives, the twenty-eight EU Member States are part of the Council of Europe, which establishes Conventions to tackle important issues.²⁷³ If Members States voluntarily sign onto a

263. Sykiotou, *supra* note 56, at 66.

264. See generally GENEVIEVE CAMERON ET AL., *CHILD SEXUAL EXPLOITATION: A STUDY OF INTERNATIONAL COMPARISONS* (David N. Jones & Anton Florek eds., 2015).

265. *Id.* at 59.

266. *Id.*

267. *Id.*

268. *Id.*

269. Sykiotou, *supra* note 56, at 72.

270. CAMERON, *supra* note 264, at 59.

271. *Id.*

272. *Id.*

273. *Id.* at 64.

Convention, than they are obligated to abide by the text of the Council Convention.²⁷⁴ The main instruments that address human trafficking prevention are two Council of Europe Conventions: the Convention on Action against Trafficking in Human Beings and the Convention on Cybercrime.²⁷⁵

First, the Convention on Action against Trafficking in Human Beings was adopted by the Committee of Ministers of the Council of Europe on May 3, 2005, after a series of other initiatives were introduced to combat human trafficking.²⁷⁶ The Convention, however, did not enter into force until February 1, 2008, following its tenth ratification.²⁷⁷ The Convention addresses a wide range of issues and encompasses all forms of trafficking, i.e. national or transnational, linked to organized crime or not, sexual exploitation, forced labor or services, slavery or similar practices, servitude, and organ removal.²⁷⁸ Additionally, the Convention recognizes that victims of trafficking include men, women, and children.²⁷⁹ The Convention has a victim-centered approach by defining human trafficking “as a violation of human rights and an offence to the dignity and integrity of the human being.”²⁸⁰ This is an important approach because it frames the way Members States address the issue, especially with regards to online human trafficking.²⁸¹ Lastly, the Convention sets up monitoring mechanisms to ensure that parties abide by its provisions in practice.²⁸² Since 2008, there have been forty-seven ratifications of the Convention.²⁸³ The Convention, following the definition laid out in the Palermo Protocol, defines trafficking to include the three main factors: force, fraud, or coercion.²⁸⁴ The document does

274. *Id.*

275. Sykiotou, *supra* note 56, at 66.

276. *About the Convention*, COUNCIL EUR., <https://www.coe.int/en/web/anti-human-trafficking/about-the-convention> (last visited Feb. 25, 2018).

277. *Id.*

278. *Id.*

279. *Id.*

280. *Id.*

281. *See generally id.*

282. Sykiotou, *supra* note 56, at 68.

283. *About the Convention*, *supra* note 276. For the full text of the Convention, *see generally* Council of Europe Convention on Action against Trafficking in Human Beings, May 16, 2005, C.E.T.S. No. 197.

284. C.E.T.S. No. 197, ch. 1, art. 4(a).

not specifically address online forms of trafficking; however, an inference can be drawn to include Internet exploitation based on its broad definitions and scope.²⁸⁵ Therefore, for purposes of liability, the internet is covered.²⁸⁶

Second, the Cybercrime Convention, which was signed in Budapest on November 23, 2001 and has been in force since July 1, 2004, is the main internationally binding legal instrument on cybercrime.²⁸⁷ Even though the Cybercrime Convention does not directly address human trafficking, Article 9 focuses on sexual exploitation of children, making it a criminal offense “not only to produce child pornography for distribution via computer, but also to offer it, make it available, distribute, transmit or procure it via computer, or possess it in a computer system.”²⁸⁸ Additionally, this Convention offers procedural and investigative tools to assist police departments throughout the world in combatting illegal activity committed on or via the Internet, including human trafficking.²⁸⁹ One of the investigative tools provided by this Convention is the ability of authorities to compel service providers to provide content data, in real time, of “specified communications in its territory transmitted by means of a computer system.”²⁹⁰ Furthermore, if the “requested Party discovers that a service provider in another State was involved in the transmission of the communication,” then the requested Party is obligated to “expeditiously disclose to the requesting Party” information to identify that service provider and any communication that was transmitted.²⁹¹ Article 1 of the Cybercrime Convention defines “service provider” as:

285. *See id.* arts. 2 (“appli[es] to all forms of trafficking in human beings”), 4, 15, 19 (“establish as criminal offences . . . the use of services which are the object of exploitation as referred to in Article 4.”); see also Sykiotou, *supra* note 56, at 69–70 (The authors of the Convention considered the use of new information technologies by traffickers, but decided that the definition of trafficking in human beings was broad enough to cover trafficking involving use of such technologies).

286. Sykiotou, *supra* note 56, at 69–70; C.E.T.S. No. 197, art. 22(3).

287. Sykiotou, *supra* note 56, at 66.

288. *Id.* See also Eur. Consult. Ass., *Convention on Cybercrime*, 23.XI.2001, Doc. No. 185, art. 9 (2001) [hereinafter *Convention on Cybercrime*].

289. Sykiotou, *supra* note 56, at 66.

290. *Convention on Cybercrime*, *supra* note 288, arts. 20–21.

291. *Id.* art. 30.

- i. any public or private entity that provides to users of its service the ability to communicate by means of a computer system, and
- ii. any other entity that processes or stores computer data on behalf of such communication service or users of such service.²⁹²

The Cybercrime Convention does not separate the issue of third party content hosted by internet service providers.²⁹³ Instead, it holds all internet service providers accountable for the material that is communicated or stored on its service, especially with regards to child pornography, since Article 9 encompasses all forms, from producing to offering, distributing, transmitting, or possessing child pornography.²⁹⁴

When assessing the compatibility of the two Council of Europe Conventions, it appears as though the Anti-Trafficking Convention's criminal provisions and the investigative tools provided for in the Cybercrime Convention comprehensively address the issues of internet trafficking of human beings.²⁹⁵ For example, law enforcement authorities can use the "production orders" referred to in Article 18 of the Cybercrime Convention "to compel suspects to release specified computer-stored data in their possession or under their control."²⁹⁶ Similarly, authorities have access to "expedited preservation of stored computer data" (Article 17), "search and seizure of stored computer data" (Article 19), [and] "real-time collection of traffic data" (Article 20).²⁹⁷ These investigative tools are very important for the investigation and prosecution of trafficking offenses committed online.²⁹⁸

The two Directives on trafficking issued by the EU follow the sentiments of the Convention on Action against Trafficking in Human Beings. Directive 2011/36/EU defines the subject matter (Article 1); lists the offences concerning trafficking, ranging from sexual exploitation and

292. *Id.* art. 1.

293. *See generally id.*

294. *Id.* art. 9.

295. Sykiotou, *supra* note 56, at 70.

296. *Id.*

297. *Id.*

298. *Id.* at 70–71.

forced labor to forced begging and forced marriages²⁹⁹ (Article 2); and details the penalties associated with the crime (Article 4).³⁰⁰ Most notably, Articles 13 to 16 recognize the particular vulnerabilities of children and set out mechanisms to support and protect child victims.³⁰¹ Directive 2011/93/EU criminalizes offenses concerning sexual exploitation of children, including child prostitution and pornography.³⁰² Interestingly, the Directive includes the elements of force, fraud, and coercion even for children, whereas under U.S. law, the elements are not required for criminalization if a minor is involved because the law automatically assumes that one of those elements exist for a minor who legally cannot consent.³⁰³ The Directive is not limited to “offline exploitation,” but includes information communicated or solicited via technology as a form of sexual exploitation, an important step in recognizing the increase in online sexual exploitation.³⁰⁴ The purpose of this Directive is to “harmonise legislation across EU members, establishing minimal rules concerning the definition and sanctions related to child sexual exploitation.”³⁰⁵ This Directive is very important because it creates one source that combines several years of EU legislation on trafficking and child sexual exploitation.³⁰⁶ Furthermore, this Directive allows Member States to remove or block websites that contain or spread child pornography, but this portion of the legislation

299. Council Directive 2011/36/EU, of the European Parliament and of the Council of 5 April 2011 on Preventing and Combating Trafficking in Human Beings and Protecting Its Victims, and Replacing Council Framework Decision 2002/629/JHA, at 2, recital 11, 2011 O.J. (L101).

300. *Id.* arts. 1, 2, 4.

301. *Se generally id.* arts. 13–16.

302. Directive 2011/93/EU, of the European Parliament and of the Council of 13 December 2011 on Combating the Sexual Abuse and Sexual Exploitation of Children and Child Pornography, and Replacing Council Framework Decision 2004/68/JHA, 2011 O.J. (L 335) 4.

303. *Id.* art. 4(3), 4(6), *but see* 18 U.S.C. § 1591(a)(2).

304. CAMERON, *supra* note 264, at 60; Directive 2011/93/EU, *supra* note 302, Recital 12.

305. CAMERON, *supra* note 264, at 60.

306. *Id.*

fueled many heated debates.³⁰⁷ One argument is that deletion of such sites may take too long, and therefore, is not a quick enough response,³⁰⁸ while the time needed to block a website requires minutes, not hours or days.³⁰⁹ For instance, the International Watch Foundation (IWF) reported that within 60 minutes it was able to block 43% of UK based websites that contained child sexual abuse content, but removal took days.³¹⁰ Furthermore, INHOPE³¹¹ reported that “worldwide on average 93% of these sites are removed within a week,” and IWF shared similar findings estimating that in Europe it took 10 days to remove 91% of these illegal websites.³¹² The time lapse is dangerous because the amount of time it takes to remove a website, compared to the minutes it takes to block, creates a window of opportunity for the “operators to multiply, move or transfer content to other hosts.”³¹³ Therefore, a key child protection measure in the EU is blocking such websites.³¹⁴

Lastly, Directive 2000/31/EC issued on electronic communications does not directly deal with human trafficking, but it addresses the regulation and liability of providers and intermediaries of online content, which is crucial for online sexual exploitation.³¹⁵ Under Article 15 of 2000/31/EC, providers do not have a general obligation “to monitor the information which they transmit or store” or “actively to seek facts or circumstances indicating illegal activity.”³¹⁶ Therefore, a service provider cannot be held liable for being a “mere conduit.”³¹⁷ However, if a service provider initiates the transmission, selects the receiver of the transmission, or modifies the information contained in the transmission,

307. Petra Jeney (Senior Lecturer), *Combatting Child Sexual Abuse Online: Study*, Study for the LIBE Comm., at 42, PE 536.481 (2015); see also Directive 2011/93/EU, *supra* note 302, Recital 47.

308. *Id.*

309. *Id.*

310. *Id.*

311. *What we do*, INHOPE, <http://inhope.org/gns/internet-concerns/overview-of-the-problem/illegal-content.aspx> (last visited Apr. 13, 2019).

312. *Id.*

313. *Id.*

314. *Id.*

315. Sykiotou, *supra* note 56, at 73.

316. Council Directive 2000/31, art. 15, 2000 O.J. (L 178).

317. *Id.* art. 12.

then the provider can be held liable.³¹⁸ Additionally, if the service provider had actual knowledge of illicit content or became aware of illicit content and did not act promptly to remove it or block access to it, then liability exists.³¹⁹ Part 2 of Article 15 requests service providers to inform law enforcement promptly “of alleged illegal activities undertaken or information provided by recipients of their service.”³²⁰ However, in practice, service providers do not always follow this procedure, unless the information is requested by authorities in specific cases.³²¹ Consequently, since monitoring is not required, providers cannot be instructed by Member States to screen for illegal content hosted or shared on its platforms.³²² Based on Article 15 of the Directive, providers are exempt unless they have actual knowledge of illegal content within their services.³²³

C. EU Member States’ Legal Measures

European Union Member States have been working towards implementing laws that address both ISPs and trafficking in human persons for purposes of sexual exploitation.³²⁴ Much work remains, but many countries have made progress. The majority of the EU Member States have ratified or signed both the Council of Europe’s Convention on Action against Trafficking in Human Beings and the Cybercrime Convention, as well as adopted certain aspects of Directive 2000/31.³²⁵ For instance, Romania is the only EU member country to have ratified both Conventions; whereas, Belgium, Italy, Germany, Greece, Poland, Portugal, Sweden, and the United Kingdom have merely signed the Conventions.³²⁶ Other countries, such as Denmark, Croatia, Cyprus, and Estonia have only ratified the Cybercrime Convention.³²⁷

318. *Id.*

319. *Id.* art. 14.

320. *Id.* art. 15.

321. Sykiotou, *supra* note 56, at 73.

322. *Id.*

323. *Id.*

324. *See id.* at 75.

325. *Id.* at 76; *see also About the Convention, supra* note 276.

326. *Id.* at 76–92.

327. *Id.*

Some countries have developed other measures to assist victims of online sexual exploitation. For instance, the UK established the Internet Watch Foundation (IWF).³²⁸ IWF “is the only authorised organisation in the UK operating an internet ‘Hotline’ for the public and IT professionals to report their exposure to potentially illegal content online.”³²⁹ IWF collaborates with UK Government departments, such as the Home Office and the Department of Trade and Industry, as well as law enforcement agencies like CEOP Centre, Interpol, Europol, and local forces.³³⁰ The aim of IWF is to minimize the availability of potentially illegal content, such as child sexual abuse images and other criminally obscene content.³³¹ The public is able to report suspected online child sexual abuse images anonymously and then IWF analysts assess the reports and remove the content.³³² IMF is able to remove content based on case law and various legal guidelines, such as the 2000/31/EU Directive mentioned above.³³³ For the last two decades, IWF has evaluated roughly 700,000 reports, 281,781 of which depicted child sexual content.³³⁴ Currently, IWF assesses over 1,000 websites per week and is able to remove the content in the UK within two hours.³³⁵ Furthermore, as a “direct result of [its] work, child sexual abuse content hosted in the UK has reduced from 18% in 1996 to below 1% today.”³³⁶

Additionally, some Member States have relied on “less formal mechanisms designed to encourage ISPs to eliminate child pornography from their systems and to collaborate with law enforcement to identify those responsible for disseminating contraband.”³³⁷ For example, in Cyprus, if an ISP is informed by authorities or has actual knowledge that child exploitation content appears on its website, then the ISP has a duty

328. *Internet Misuse Seminar*, *supra* note 234, at 49.

329. *Id.*

330. *Id.* at 49–50.

331. *What we do*, INTERNET WATCH FOUND., <https://www.iwf.org.uk/what-we-do> (last visited Feb. 07, 2018).

332. *Id.*

333. *Id.* at *The laws and assessment levels*.

334. *Id.* at *What we do*.

335. *Id.*

336. *Id.*

337. DEP’T OF JUSTICE, GLOBAL ALLIANCE AGAINST CHILD SEXUAL ABUSE ONLINE 34 (2015).

to restrict access to the illicit content regardless of a court order.³³⁸ Similar legislation was implemented in Greece as well.³³⁹ Other Member States, such as Bulgaria, hosted a conference in partnership with its five largest Internet providers to explore and analyze possible solutions to combat online sexual exploitation of children.³⁴⁰ The representatives who attended volunteered to participate in a pilot program aimed at “develop[ing] a model for blocking certain domain addresses” known to contain materials involving the sexual exploitation of children.³⁴¹ Furthermore, countries such as Italy, Malta, the Netherlands, and Ireland have implemented “successful blocking or filtering schemes, either legally mandated or voluntary on the part of the ISPs.”³⁴²

V. ANALYSIS

The international community recognizes that the Internet is a new means for human trafficking; however, not everyone agrees on how to address the issue of participating ISPs. It is evident that lawmakers both in the EU and the U.S. believe that ISPs should be held legally liable if they knowingly facilitate or modify illegal content, especially sexually explicit photographs of minors.³⁴³ However, some critics complain that targeting websites like Backpage “will only displace the sex ads to other websites” and that closing sites down that have adult ads does not “address the underlying problem of adult male demand for underage commercial sex.”³⁴⁴ The concern is that by shutting down certain websites, the content will just be moved to the dark web, foreign sites, or small sites, where tracking down the traffickers and helping the victims becomes much more difficult.³⁴⁵ Law enforcement officials are put in a

338. *Id.*

339. *Id.*

340. *Id.*

341. *Id.*

342. *Id.* at 42.

343. *See generally* Stop Enabling Sex Traffickers Act of 2017, S. 1693 115th Cong. (2018); *Convention on Cybercrime*, *supra* note 288.

344. Jackman, *supra* note 153.

345. Tom Jackman, *Under attack, Backpage.com has its supporters as anti-trafficking tool. But many differ.*, WASH. POST (July 18, 2017), <https://www.washingtonpost.com/news/true-crime/wp/2017/07/18/under-attack->

difficult situation, especially in the U.S., because they rely on Backpage's cooperation for information to locate missing children; information that would not be as easily accessible if the traffickers turned elsewhere.³⁴⁶ For instance, a police sergeant from Minneapolis, who has been fighting human trafficking for more than twenty years, stated, "Backpage is far more responsive to [my] requests for help than phone companies or social media, and [I have] run into dead ends trying to get information from non-U.S. websites."³⁴⁷ The reliance by law enforcement officers on websites such as Craigslist and Backpage is obvious, another officer stated, "[g]etting rid of Craigslist.com was actually a disservice to law enforcement because they were cooperating. They are legitimate business but they just have this illegitimate side."³⁴⁸ Ironically, law enforcement recognize the illegality and danger of these websites, but they prefer to keep them running because it requires less resources and makes their jobs easier.³⁴⁹ But are those good enough reasons to allow the illegality to continue? Other stakeholders have different opinions: "[t]he fact that taking out one sex trafficker doesn't solve the problem doesn't mean you shouldn't take it on, particularly when it's the most pervasive."³⁵⁰ A Sheriff from Cook County, Illinois, who has attempted to shut down Backpage previously, explained, "[w]e can't have something that's right in front of our faces, so actively involved with different crimes. We can't just stand there and do nothing. It could get worse? Its's already pretty bad."³⁵¹ It is difficult to know whether or not the isolated cases Backpage has assisted with is enough to overlook the fact that an overwhelming number of victims are trafficked through Backpage.³⁵²

It is unclear how interactive law enforcement agencies in the EU deal with websites who advertise "adult content," since there is not just one main website like Backpage. However, law enforcement officials of

backpage-com-has-its-supporters-as-anti-trafficking-tool-but-many-differ/?utm_term=.f4745a473214 [hereinafter *Backpage Under Attack*].

346. *Id.*

347. *Id.*

348. MEREDITH DANK ET AL., *supra* note 58, at 102.

349. *Id.*

350. *Backpage under attack*, *supra* note 345.

351. *Id.*

352. *Id.*

certain Member States actively monitor online classifieds for evidence of human trafficking.³⁵³ For instance, in Greece, the Computer Crime Unit discovered a website advertising the sexual services of “famous models” while screening for such content.³⁵⁴ The police posed as clients, booked the website’s services, and came across women who were being trafficked.³⁵⁵ As a result, the website was shut down.³⁵⁶ However, as discussed above, shutting down a website is not necessarily the best and fastest method to remove child abuse content.³⁵⁷ Therefore, countries should consider temporary solutions such as blocking the webpage, so that the content does not stay visible during the time it takes for a website to be shutdown.³⁵⁸ Similarly, not all EU Member States agree that shutting down online classifieds is the only solution.³⁵⁹ Britain’s Prime Minister, Theresa May, stated that “[w]eb companies must do more to stop victims of modern slavery being sold and exploited over the internet.”³⁶⁰ She further explained that “Internet companies cannot stand by while their platforms are used to facilitate child abuse, [and] modern slavery.”³⁶¹ Many advocates in the U.S. agree, urging that ISPs need to be more proactive in their approaches.³⁶² Websites could be a great partner in combatting human trafficking, but they need to be willing to actively make changes and cooperate with law enforcement to detect illegal content.³⁶³

Oddly, the U.S. and the EU currently have very similar laws on the books for shielding ISPs that feature illegal content. When reviewing Section 230 of the Communications Decency Act and EU Directive

353. See generally Sykiotou, *supra* note 56.

354. *Id.* at 37.

355. *Id.*

356. *Id.* at 38.

357. See JENEY, *supra* note 307, at 42.

358. *Id.*; see also *supra* text accompanying note 337.

359. See e.g., Kieran Guilbert, *Tackling slavery online, UK urges web firms to crack down on trafficking*, REUTERS (Feb. 27, 2018), <https://www.reuters.com/article/us-britain-slavery-internet/tackling-slavery-online-uk-urges-web-firms-to-crack-down-on-trafficking-idUSKCN1GC06Y>.

360. *Id.*

361. *Id.*

362. *Backpage Under Attack*, *supra* note 345.

363. *Id.*

2000/31, the similarities are uncanny.³⁶⁴ Both the CDA and the Directive have provisions for merely being a *host*—that is, the provider’s relationship to the content is considered to be passive and technical.³⁶⁵ In other words, online intermediaries that host or spread speech are protected against being considered the developer and are thereby also protected against any liability.³⁶⁶ Furthermore, both acts have a *good faith* provision that states a provider will not be held liable if they observe obscene or objectionable things and take action to restrict access.³⁶⁷ However, the Directive takes it a step further by stating that a service provider cannot have *actual knowledge* of illegal activity or information, and if it obtains such knowledge, it must act “expeditiously” to remove the content.³⁶⁸ Even though the CDA does not include the language about knowledge, certain U.S. courts have expressed that immunity is not enforceable if a website knowingly contributes and assists with the development of the illegal content and does not act as passive host.³⁶⁹ Additionally, the release of the Subcommittee Report and the amendment to Section 230 demonstrates that websites who knowingly facilitate child sex trafficking will no longer be considered *hosts* of third-party content and can be held liable.³⁷⁰ Therefore, it appears that the U.S. might incorporate that aspect of the Directive into its law.

The main difference between Section 230 of the CDA and EU Directive 2000/31 is that the Directive directly states in Article 15 that no Member State is allowed to impose on the providers the duty to monitor content for illegal activity.³⁷¹ Under EU law, this means that ISPs “are legally envisaged to have a passive, rather than proactive, role in

364. See *supra* Part III Section A, Part IV Section B.

365. CDA 230: *Legislative History*, *supra* note 82; *E-commerce Directive*, *supra* note 259.

366. CDA 230: *Legislative History*, *supra* note 82; *E-commerce Directive*, *supra* note 259.

367. 47 U.S.C. § 230 (c)(2)(A); Council Directive 2000/31, *supra* note 316, art. 14.

368. Council Directive 2000/31, *supra* note 316, art. 14(1)(a–b).

369. See *supra* Part III Section B.

370. See *supra* Part III Section C.a–b.

371. Council Directive 2000/31, *supra* note 316, art. 15.

identifying and removing illegal content.”³⁷² Since EU Member States are prohibited from enforcing such measures, the only options are to either change the language of the Directive or have Member States withdraw from the EU.³⁷³ For instance, in the UK, there has been a push towards introducing laws that would shift the liability for child sex abuse material and other illegal content onto web firms.³⁷⁴ However, in order for the UK to “tip the balance of liability,” it must cease to have obligations under EU law.³⁷⁵ Therefore, it may be advantageous for the EU to edit its monitoring regulations, since websites already use their own algorithms to analyze and select content based on various factors.³⁷⁶ Shifting the legal framework to fit the current times “would help remove the current perverse incentives for companies to avoid any form of active moderation using machine learning.”³⁷⁷

The legal protections provided by the U.S. through the CDA and the EU through the Directive exist to allow high levels of internet access and to protect the right to freedom of speech.³⁷⁸ Technology companies have adamantly described their sites as enabling communication, rather than publishing or creating content; therefore, they have vocalized their opposition to altering laws that would “jeopardize a free and open internet.”³⁷⁹ On the other hand, both the U.S. and the EU have implemented comprehensive anti-human trafficking legislation.³⁸⁰ The U.S. established the Trafficking Victims Protection Act (TVPA), which

372. COMM. ON STANDARDS IN PUB. LIFE, *supra* note 260, at 35.

373. *See e.g., id.*

374. *Id.*

375. *Id.*; *see also* *Brexit: Your simple guide to the UK leaving the EU*, BBC NEWS (Mar. 14, 2019), <https://www.bbc.com/news/uk-46318565> (explaining that the UK has since decided to withdraw from the EU).

376. *E-commerce Directive*, *supra* note 259.

377. COMM. ON STANDARDS IN PUB. LIFE, *supra* note 260, at 36.

378. *See generally* *CDA 230: Legislative History*, *supra* note 82.

379. *See* Cecilia Kang, *In Reversal, Tech Companies Back Sex Trafficking Bill*, NY TIMES (Nov. 3, 2017), <https://www.nytimes.com/2017/11/03/technology/sex-trafficking-bill.html>; *see also* Tom Jackman, *Tech Companies Push Back as Congress Tries to Fight Online Sex Trafficking*, WASH. POST (Sept. 18, 2017) (companies described the bill as “a mistake of historic proportions,” and stated that the CDA is a “bedrock legal protection for online services” because without its protection, websites would be discouraged “from aggressively policing their content.”).

380. *See supra* Part III, Part IV Section B.

states that it is a criminal offense to traffic human beings and provides certain civil remedies,³⁸¹ whereas the EU has the two Directives—one on preventing and combatting trafficking in human beings and protecting victims (2011/36/EU), and the other on combating sexual abuse and sexual exploitation of children and child pornography (2011/93/EU).³⁸² Not to mention, the two Council of Europe Conventions on Cybercrime and Action Against Trafficking in Human Beings.³⁸³ Therefore, both regions have two very important laws, one protecting freedom of speech and the other protecting victims of human trafficking. Here, the problem is not that the appropriate legislation does not exist, it is that the legislations clash. As a result, a new balance has to be formed because ISPs should not be considered full publishers of the content on their sites, but they also cannot be considered as mere platforms when they knowingly facilitate child sexual abuse.

The case of Backpage is a perfect example of striking that balance and preventing an ISP from crossing the line and profiting off of someone else's victimization.³⁸⁴ From one of the early lawsuits against Backpage, the court made it clear that once a website creates or develops the content, it can no longer be thought of solely as a service provider.³⁸⁵ The First Circuit Court reaffirmed previous holdings by stating that an ISP's decision on how it structures its website or what posting requirements it has are merely publisher functions, not content development.³⁸⁶ However, it was recently uncovered that Backpage was doing exactly what the Courts said was not protected by Section 230 of the CDA: it was acting as a creator.³⁸⁷ The Senate Subcommittee Report shed light on the fact that Backpage instructed its moderators to modify and alter ads before publication so that they appear "clean" and are undetected by law enforcement, instead of removing them.³⁸⁸ Backpage not only edited the content of the ads, but it also instructed traffickers and pimps on what

381. *See supra* Part III.

382. *See supra* Part IV Section B.

383. *See supra* Part IV Section B.

384. *See generally supra* Part III Section A.

385. *M.A. ex rel. P.K. v. Vill. Voice Media Holdings, LCC*, 809 F. Supp. 2d 1041, 1048, 1050 (E.D. Mo. 2011).

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

387. *See supra* Part III Section C.a.

388. *See supra* Part III Section C.a.

was appropriate and legal, even though Backpage had knowledge that by doing so they were facilitating prostitution and child sex trafficking.³⁸⁹

A similar argument was made in front of the Washington Supreme Court in *J.S. v. Village Voice Holdings*, where the plaintiffs asserted that Backpage acted beyond its publishing duties when it developed and required content requirements for sex advertisements of underage girls and profited from those advertisements.³⁹⁰ This time, the Court agreed with the plaintiffs, and the case was not automatically dismissed because of Section 230 of the CDA.³⁹¹ Arguably, when an ISP, especially one that offers escort or dating services, crosses the line and develops, modifies, or instructs the content of an advertisement, it must be held liable for its role in the criminal activity.³⁹² In this instance, Backpage did not actively assist law enforcement in detecting child sex trafficking ads, it did not remove ads that were indicative of child prostitution, and it did not act as a passive host.³⁹³ Therefore, Backpage's right to free speech cannot and should not be protected, since the website was actively and knowingly engaged in the sexual exploitation of minors.³⁹⁴ This sort of standard needs to be implemented both in the U.S. and in the EU in order to hold certain ISPs accountable for their role in facilitating sex trafficking.

Another important consideration when comparing the two approaches to ISP liability is the fact that the U.S. is more of a litigious country than Member States in the EU.³⁹⁵ In the U.S., people and businesses often fear being sued for frivolous actions.³⁹⁶ As a result, the CDA is endorsed by the technology industry, because it not only protects the First Amendment right to Freedom of Speech, but it also protects ISPs from potential lawsuits for the actions of others.³⁹⁷ By contrast, "Europeans do

389. See *supra* Part III Section C.a.

390. See *J.S. v. Vill. Voice Media Holdings, LLC*, 359 P.3d 714, 717–18 (Wash. 2015).

391. *Id.* at 718.

392. See *supra* Part III Section C.b

393. See *supra* Part III Sections B, C.a.

394. See *supra* Part III Sections B, C.

395. Kevin Drum, *Why We Sue*, MOTHER JONES (Aug. 25, 2010), <https://www.motherjones.com/kevin-drum/2010/08/why-we-sue/>.

396. *Id.*

397. Kang, *supra* note 379; see also *Infographic: Why CDA 230 Is So Important*, ELECTRONIC FRONTIER FOUND., <https://www.eff.org/issues/cda230/infographic> (last visited Apr. 13, 2019).

not operate under the constant specter of litigation.³⁹⁸ During the course of this research, finding a lawsuit against an ISP in the U.S. was quite simple; however, it was very difficult to track down similar lawsuits in one of the twenty-eight Member States of the EU. This discrepancy exists because Europe has more rules and regulations, yet tighter enforcement of those rules, which means that private litigation is less common.³⁹⁹ The difference is not only a policy preference, but one deeply rooted in tradition.⁴⁰⁰ Furthermore, many European countries have implemented a ‘loser pays’ policy in civil cases, which essentially deters frivolous claims because if the individual who is suing loses, then he or she is responsible for paying the other side’s costs.⁴⁰¹ The purpose of this article is not to examine which system is better or more advantageous, but it is an important factor when considering the practical consequences of changing ISP liability. In the EU, the issue turns to whether victims will have an actual civil recourse and remedy, or if it will primarily involve criminal liability, whereas in the U.S., the concern is whether the lawsuits will be taken seriously. As previously mentioned, the U.S. Congress amended the CDA and only time will tell what the practical implications are, however, if the language is crafted narrowly enough and aimed at the actual purpose, then First Amendment rights will not be infringed upon.

Liability is not the only solution to combatting online sex trafficking. Internet service providers are not the source of the problem,⁴⁰² since human trafficking existed before the internet and will continue to exist without it.⁴⁰³ Therefore, law enforcement agencies should partner with ISPs in order to receive the technical assistance required to stop the sexual exploitation of children.⁴⁰⁴ Technology can be used as an

398. Carrie Lukas, *A Policy Area In Which Europe Has The U.S. Beat, And It’s Not Even Close*, FORBES (Mar. 26, 2013), <https://www.forbes.com/sites/carrielukas/2013/03/26/a-policy-area-in-which-europe-has-the-u-s-beat-and-its-not-even-close/#485410fc6350/>.

399. Drum, *supra* note 395.

400. *Id.*

401. *Id.*

402. *Backpage Under Attack*, *supra* note 345.

403. Sykiotou, *supra* note 56, at 22.

404. *See generally*, MARK LATONERO, HUMAN TRAFFICKING ONLINE: THE ROLE OF SOCIAL NETWORKING SITES AND ONLINE CLASSIFIEDS (Univ. S. Cal. Sept. 2011).

intervention for human trafficking, instead of a tool for traffickers and pimps.⁴⁰⁵ Programs and software, such as photo recognition and flagging, have been developed and can be used to detect such illegal content.⁴⁰⁶ For instance, Google “develop[ed] a tool that scans online ads to flag possible child victims for anti-exploitation charity Thorn,”⁴⁰⁷ and Microsoft-created “PhotoDNA, which [assists] in identifying images of children who are sexually exploited.”⁴⁰⁸ Therefore, online classified websites can take a proactive role and aid law enforcement in removing illicit activity, identifying patterns, locating possible victims, and collecting data to track down assailants.⁴⁰⁹ Additionally, ISPs can partner with human trafficking hotlines or anti-trafficking campaigns and post helpful information on their websites so participants or outsiders can identify victims, just like *hookers.nl* did with the *Appearances Deceive* campaign.⁴¹⁰ Finally, data retention and preservation provisions help ensure that digital evidence is available to law enforcement.⁴¹¹ Therefore, ISPs should be required to develop and implement data retention policies that collect both content-based data, such as the actual text of the advertisement, and non-content based data, such as subscriber information ranging from personal to traffic data.⁴¹² If ISPs retain data, they would be able to assist law enforcement in tracking down missing and exploited children.⁴¹³

Cooperation between law enforcement agencies and ISPs is essential in order to effectively combat online sexual exploitation. Such collaborative efforts are visible in EU Member States who have turned to

405. *Id.* at v–vi.

406. *Id.* at 31–33.

407. Olivia Solon & Sabrina Siddiqui, *Why is Silicon Valley fighting a sex trafficking bill?*, GUARDIAN (Sept. 7, 2017), <https://www.theguardian.com/law/2017/sep/07/online-sex-trafficking-backpage-bill-communications-decency-act>.

408. Rebecca Sadwick, *7 Ways Technology Is Fighting Human Trafficking*, FORBES (Jan. 11, 2016), <https://www.forbes.com/sites/rebeccasadwick/2016/01/11/tech-fighting-human-trafficking/#a5671c26cac9>.

409. *Id.*; see also *Backpage Under Attack*, *supra* note 345.

410. FOCUS ON CLIENTS, *supra* note 247, at 101.

411. INT’L CTR. FOR MISSING & EXPLOITED CHILDREN, *CHILD PORNOGRAPHY: MODEL LEGISLATION & GLOBAL REVIEW* 6–8 (8th ed. 2016).

412. *Id.* at 6–7.

413. *Id.* at 6.

informal mechanisms in order to detect and remove sexually explicit content of children.⁴¹⁴ In the U.S., Cook County Sheriff, Tom Dart, stated that he wrote to Backpage providing suggestions on how to better monitor their ads, such as hiring retired police detectives to assist in identifying illegal content.⁴¹⁵ Dart explained, “they [Backpage] theoretically could be a great partner.”⁴¹⁶ In accordance with this principal of collaboration, the European Commission announced a set of “guidelines and principles” aimed at working with technology platforms to takedown illegal content more effectively and efficiently.⁴¹⁷ The Commission urged that “they build tools to automate flagging and re-uploading” of illegal content.⁴¹⁸ Vice President of the EU’s Digital Single Market, Andrus Ansip, described the partnership between the Commission and technology platforms as a safeguard, stating the guidance “avoid[s] over-removal and ensure[s] transparency and the protection of fundamental rights such as freedom of speech.”⁴¹⁹ Another important step toward this cooperation unfolded in the U.S. when big internet companies, including Facebook and Google, agreed to withdraw their opposition to the legislation, which helped clear the path for the FOSTA legislation to be passed.⁴²⁰

VI. CONCLUSION

Online sexual exploitation of children continues to pose serious challenges to the international community. Fortunately, the U.S. and EU Member States are on the right track to combat this issue. However, there

414. See DEP’T OF JUSTICE, *supra* note 337, at 34–35.

415. *Backpage Under Attack*, *supra* note 345.

416. *Id.*

417. Natasha Lomas, *Tech giants pressured to auto-flag “illegal” content in Europe*, TECHCRUNCH, <https://techcrunch.com/2017/09/28/tech-giants-pressured-to-auto-flag-illegal-content-in-europe/> (last visited Mar. 17, 2019).

418. *Id.*

419. *Id.*

420. Kang, *supra* note 379; see also Cecilia Kang, *House Passes Online Sex-Trafficking Bill After Big Tech Companies Back Off*, N.Y. TIMES (Feb. 27, 2018), <https://www.nytimes.com/2018/02/27/business/online-sex-trafficking-bill.html>; Steven Overly & Ashley Gold, *How tech lost on the sex trafficking bill*, POLITICO (Mar. 22, 2018), <https://www.politico.com/story/2018/03/22/how-tech-lost-on-the-sex-trafficking-bill-423364>.

is still more work to be accomplished, since newer and more advanced technologies are created every day, giving traffickers more ways to exploit their victims. Comprehensive substantive laws already exist that criminalize the facilitation of human trafficking,⁴²¹ but now those laws need to expand to hold all parties accountable, including ISPs. Backpage's active concealment of criminality and its altering of ads is unacceptable behavior that should not be protected by the Communications Decency Act.⁴²² Any website that engages in such conduct should be held legally (both civilly and criminally) accountable for its role in exploiting minors for a profit. In order to deter websites from participating in human trafficking, civil legal consequences need to exist.⁴²³ If the legal consequences are severe enough, ISPs would be incentivized to cooperate and collaborate with law enforcement agencies. EU Member States have demonstrated various ways in which they are partnering with ISPs in order to better approach this problem.⁴²⁴ Such cooperation with the private sector will not only keep sexually explicit ads of children off the Internet, but it can help "prevent, detect, and disrupt online child sexual abuse and exploitation and to identify and prosecute offenders."⁴²⁵

421. *See generally* 18 U.S.C. §§ 1581–1597 (2013); *see also supra* Part IV Section B.

422. *See supra* Part III Section C.a.

423. *See supra* Part III Section C.b. It will be interesting to see if or how the change to the new legislative amendment to the CDA will impact civil lawsuits against ISPs, as well as any deterring effects.

424. *See supra* Part IV Section C.

425. DEP'T OF JUSTICE, *supra* note 337, at 43–44.