

2018

# The Indecency and Injustice of Section 230 of the Communications Decency Act

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## Recommended Citation

Mary Graw Leary, The Indecency and Injustice of Section 230 of the Communications Decency Act, 41 HARV. J. L. & PUB. POL'Y 553 (2018).

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# THE INDECENCY AND INJUSTICE OF SECTION 230 OF THE COMMUNICATIONS DECENCY ACT

MARY GRAW LEARY\*

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\* Professor, Columbus School of Law, The Catholic University of America. Special thanks to Robbie Cain, Alexander Mansfield, and Steve Young for patient and thorough research support; to Yiota Souras and Christine Raino for insightful feedback; to Julie Kendrick for endless drafts; to all survivors of sex trafficking for their strength and courage; and to the courageous parents of those who did not survive.

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#### INTRODUCTION

The story of Section 230 of the Communications Decency Act (CDA)<sup>1</sup> is one of legislative action and inaction, justice and injustice, and the weighing of priorities and values. Its origin and entrenchment reveal a great deal about the values of the technology industry and the U.S. Congress. Passed in 1996, the CDA was an attempt by Congress to accommodate competing values and facilitate an uncertain but promising future digital world. Since that time, this digital world has changed drastically. Some argue that § 230 is in part responsible for the growth of the digital economy and the “Internet as we know it.” Others argue that the “Internet as we know it” is not what we want it to be, particularly when it comes to sex trafficking, pornography, child sex-abuse images, and exploitation. It is clear that, whatever § 230 did for the legitimate digital economy, it also did for the illicit digital economy.

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1. 47 U.S.C. § 230 (2012).

Nowhere is this more apparent than in the world of sex trafficking. Since its recognition under federal law in 2000,<sup>2</sup> human trafficking has been identified as the fastest growing criminal enterprise in the world.<sup>3</sup> The International Labour Organization released its Global Estimate on Modern Slavery and concluded that forty million people in the world are victims of modern slavery, including sexual slavery, and that women and girls comprise 99% of victims of forced sexual exploitation, with 25% of those victims being children.<sup>4</sup> This growth, which has similar trends in the United States, is largely attributed to the use of the Internet to facilitate the sale of human beings, including children, for rape and sexual abuse. While exact numbers are difficult to ascertain, it is beyond dispute that the use of online advertising to facilitate sex trafficking is a significant factor in the increase of this form of victimization.<sup>5</sup>

Yet, when survivors<sup>6</sup> or state prosecutors attempt to hold liable the very service providers who permit the advertising of sex-trafficking victims—including children—for sale in the largest market to buy human beings in the world, § 230 ties

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2. See Trafficking Victims Protection Act of 2000, Pub. L. No. 106-386, 114 Stat. 1466 (codified as amended in scattered sections of 8, 18, and 22 U.S.C.).

3. See *id.* § 102(b)(8).

4. See ALLIANCE 8.7, GLOBAL ESTIMATES OF MODERN SLAVERY: FORCED LABOR AND FORCED MARRIAGE 5, 39 (2017) (in partnership with the International Labour Office of the ILO).

5. See, e.g., STAFF OF S. PERMANENT SUBCOMM. ON INVESTIGATIONS, 114TH CONG., BACKPAGE.COM'S KNOWING FACILITATION OF ONLINE SEX TRAFFICKING 4–5 (2016); U.S. DEP'T OF JUSTICE, THE NATIONAL STRATEGY FOR CHILD EXPLOITATION PREVENTION AND INTERDICTION: A REPORT TO CONGRESS 10 (2016); MEREDITH DANK ET AL., URBAN INST., ESTIMATING THE SIZE AND STRUCTURE OF THE UNDERGROUND COMMERCIAL SEX ECONOMY IN EIGHT MAJOR US CITIES 237–38 (2014); DOMINIQUE ROE-SEPOWITZ ET AL., ARIZ. STATE UNIV., A SIX YEAR ANALYSIS OF SEX TRAFFICKERS OF MINORS 13, 42 (2017) (finding traffickers used online advertisements in nearly two-thirds of cases studied and that “Backpage.com being involved in cases of sex trafficking of minors is a constant theme in sex trafficking arrests”).

6. Legal literature, advocacy, and policy pieces use the terms “survivor” and “victim” interchangeably. This Article follows the pattern of the U.S. Council on Human Trafficking, a survivor advisory group to the White House on human trafficking, and utilizes both terms. See generally U.S. ADVISORY COUNCIL ON HUMAN TRAFFICKING, ANNUAL REPORT (2016). It is the view of the Author that regardless of the label, people who have lived through sex trafficking are survivors.

their hands.<sup>7</sup> Defendant websites use § 230 as a sword and argue that it affords such sites immunity from liability, even if accused of participating in child sex trafficking. Despite consensus that § 230 was never designed to create such absolute immunity, courts have struggled to reconcile precedent from an earlier Internet era with the reality of slavery<sup>8</sup> in the current Internet age. The result has been an inability of sex-trafficking victims and state prosecutors to proceed with cases against such businesses that knowingly facilitate sex trafficking.

Since the emergence of this unintended reality, many have called on Congress to update § 230 and address this problem. More recently, sex-trafficking survivors,<sup>9</sup> all fifty state attor-

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7. See generally *Stop Enabling Sex Traffickers Act of 2017: Hearing on S. 1693 Before the S. Comm. on Com., Sci. and Transp.*, 115th Cong. (2017) [hereinafter *Hearing on S. 1693*] (statement of Xavier Becerra, Att’y Gen. of California).

8. The label of human trafficking as modern-day slavery is well accepted with two American presidents, the Department of Justice, the United States Congress, the United Nations, the United States State Department, federal courts, and Pope Francis all invoking the term. See respectively, for example, Proclamation No. 9074, 3 C.F.R. 9074 (Dec. 31, 2012) (Proclamation by President Obama regarding National Slavery and Human Trafficking Prevention Month); President Barack Obama, Remarks by the President to the Clinton Global Initiative (Sept. 25, 2012) (transcript available at <https://www.whitehouse.gov/the-press-office/2012/09/25/remarks-president-clinton-global-initiative> [<https://perma.cc/KE95-A8RP>]); President George W. Bush, Statement by His Excellency Mr. George W. Bush, President of the United States of America: Address to the United Nations General Assembly (Sept. 23, 2003) (transcript available at <http://www.un.org/webcast/ga/58/statements/usaeng030923.htm> [<http://perma.cc/6PU8-7BQ7>]); U.S. DEP’T OF JUSTICE, *Attorney General Alberto R. Gonzales Announces Creation of Human Trafficking Prosecution Unit Within the Civil Rights Division* (Jan. 31, 2007), [http://www.justice.gov/archive/opa/pr/2007/January/07\\_crt\\_060.html](http://www.justice.gov/archive/opa/pr/2007/January/07_crt_060.html) [<http://perma.cc/RH99-BAUB>]; 22 U.S.C. § 7101(a), (b)(1); Ban Ki-Moon, *Secretary-General’s Message on the International Day for the Abolition of Slavery*, UNITED NATIONS (Dec. 2, 2013), <http://www.un.org/sg/statements/?nid=7321> [<http://perma.cc/6ATD-D7MJ>]; John Kerry, U.S. Sec’y of State, Remarks at the Annual Trafficking in Persons Report (June 19, 2013) (transcript available at <http://m.state.gov/md210911.htm> [<http://perma.cc/L64A-QN5U>]); Hillary Rodham Clinton, U.S. Sec’y of State, Remarks at Release of the Ninth Annual Trafficking in Persons Report (June 16, 2009) (transcript available at <http://m.state.gov/md124872.htm> [<http://perma.cc/2G32-VHTG>]); Pope Francis, Address to Congress (Sept. 24, 2015) (transcript available at [https://www.washingtonpost.com/local/social-issues/transcript-pope-franciss-speech-to-congress/2015/09/24/6d7d7ac8-62bf-11e5-8e9e-dce8a2a2a679\\_story.html](https://www.washingtonpost.com/local/social-issues/transcript-pope-franciss-speech-to-congress/2015/09/24/6d7d7ac8-62bf-11e5-8e9e-dce8a2a2a679_story.html) [<https://perma.cc/CME5-VGGE>]).

9. See generally LINDA SMITH ET AL., JOINT STATEMENT IN RESPONSE TO TECH INDUSTRY OBSTRUCTION OF SECTION 230 LEGISLATION, <https://sharedhope.org/wp-content/uploads/2017/08/Joint-Statement-in-Response-to-Tech-Industry-Obstruction-of-Section-230-Legislation-1.pdf> [<https://perma.cc/AR9F-3E8J>].

neys general,<sup>10</sup> and a growing number of courts<sup>11</sup> have called on Congress to amend § 230 to restore it to its original purpose of providing limited, not nearly absolute, protections for interactive computer services. Congress has failed to act thusfar. Nevertheless, in 2017, two bills (one in each chamber) have been proposed to address this reality.

This Article examines the development of the jurisprudence regarding online advertising of sex-trafficking victims and juxtaposes the forces that created § 230 with those preventing its timely amendment. This Article argues that, although § 230 was never intended to create a regime of absolute immunity for defendant websites, a perverse interpretation of the non-sex-trafficking jurisprudence for § 230 has created a regime of de facto absolute immunity from civil liability or enforcement of state sex-trafficking laws. This phenomenon occurred despite the legislative intent behind § 230, and despite the Trafficking Victims Protection Act of 2000 (“TVPA”)<sup>12</sup> and its subsequent reauthorizations.<sup>13</sup> Part I explains the impetus behind § 230, its history, and its text. Part II examines the rise in recognition of sex trafficking in both domestic and international law. It further summarizes the contours of sex trafficking in the modern world and the role online advertisement has played in its emergence. Part III analyzes the intersection of sex trafficking, the Internet, and § 230 and thoroughly assesses the development of jurisprudence culminating in the creation of a regime of de facto immunity. Part IV analyzes recent legislative efforts in both the House and Senate, arguing that the twenty-two-

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10. See Letter from Nat’l Ass’n of Attorneys Gen. to Congress Regarding Amendment of Communications Decency Act (Aug. 16, 2017), available at <http://www.naag.org/assets/redesign/files/sign-on-letter/CDA%20Final%20Letter.pdf> [<https://perma.cc/5T2D-EGDY>].

11. See, e.g., *Jane Doe No. 1 v. Backpage.com, LLC*, 817 F.3d 12, 29 (1st Cir. 2016); *M.A. v. Vill. Voice Media Holdings*, 809 F. Supp. 2d 1041, 1058 (E.D. Mo. 2011).

12. Pub. L. No. 106-386, 114 Stat. 1466 (codified as amended in scattered sections of 8, 18, and 22 U.S.C.).

13. See Justice for Victims of Trafficking Act of 2015, Pub. L. No. 114-22, 129 Stat. 227 (2015); William Wilberforce Victims Protection Reauthorization Act of 2008, Pub. L. No. 110-457, 122 Stat. 5044 (2008); Trafficking Victims Protection Reauthorization Act of 2005, Pub. L. No. 109-164, 119 Stat. 3558 (2006); Trafficking Victims Protection Reauthorization Act of 2003, Pub. L. No. 108-193, 117 Stat. 2875 (2003); Trafficking Victims Protection Reauthorization Act of 2013, H.R. 898, 113th Cong. (1st Sess. 2013).

year-old statute must be amended to reflect current realities of both the Internet and sex trafficking. Furthermore, it asserts that such an amendment is necessary to return § 230 to its original purpose of protecting some Internet companies from specific types of liability, without creating absolute immunity.

## I. SECTION 230 OF THE COMMUNICATIONS DECENCY ACT

### A. Historical Roots

In 1996 the Internet was in its infancy and Congress was struggling with the implications of its development. The Internet of 1996 is unrecognizable today.<sup>14</sup> That “new” “dial up” Internet engine connected people through a novel and experimental “bulletin board” through which events could be organized.<sup>15</sup> Newspapers were just considering having an online presence.<sup>16</sup> “Google” was not a verb, and online research was described as “tough for the amateur researcher.”<sup>17</sup> Congressional debate discussed floppy disk drives, usenet groups, and message boards over telephone lines.<sup>18</sup> In this climate, Congress could not have imagined what the Internet would look like two decades into the twenty-first century.

Congress did, however, recognize a concern about online exploitation. Congress’s concern was not sex trafficking because such a term was not recognized at the time. Rather, Congress acknowledged and expressed concern about the potential of

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14. See, e.g., Nicholas Carlson, *Presenting: This is What the Internet Looked Like in 1996*, BUS. INSIDER AU. (Apr. 15, 2014), <https://www.businessinsider.com.au/the-coolest-web-sites-from-1996-2014-4#-1> [<https://perma.cc/PVB3-N2W2>]; Farhad Manjoo, *Jurassic Web*, SLATE (Feb. 24, 2009), [http://www.slate.com/articles/technology/technology/2009/02/jurassic\\_web.html](http://www.slate.com/articles/technology/technology/2009/02/jurassic_web.html) [<https://perma.cc/B6U9-KDQS>].

15. See Joan E. Rigdon, *Internet’s Top Use: Information Bureau*, ASIAN WALL ST. J., Mar. 14, 1996, at 4.

16. See Peter H. Lewis, *The New York Times Introduces a Website*, N.Y. TIMES, Jan. 22, 1996, at D7.

17. Bart Ziegler, *The Internet – How Can I Find What I Am Looking For?*, ASIAN WALL ST. J., Dec. 9, 1996, at S10.

18. See, e.g., *Cyberporn and Children: The Scope of the Problem, the State of the Technology, and the Need for Congressional Action: Hearing on S. 892, a Bill to Amend Sec. 1464 of Title 18, U.S.C., To Punish Transmission by Computer of Indecent Material to Minors, before the S. Comm. on the Judiciary*, 104th Cong. 136, 161, 181 (1995).

the Internet to spread or expose children to obscene material.<sup>19</sup> Section 230 was a component of a broader effort to limit access to explicit material through the Internet. The CDA intended to limit such access and was attached to Title V of the Telecommunications Act of 1996.<sup>20</sup> The CDA prohibited the knowing dissemination of obscene material to children, and sought to incentivize telecommunication companies to participate in blocking explicit material from reaching children.<sup>21</sup> Section 230 was added to the CDA to protect tech companies. In *Reno v. ACLU*,<sup>22</sup> the Supreme Court struck down as vague some of the more controversial criminal provisions of the CDA, such as the prohibition on the transmission of “indecent material.”<sup>23</sup> However, § 230 was not challenged, and this protection remains effective law to this day.<sup>24</sup> In fact, tech companies arguably achieved the best of both worlds. After *Reno*, much of the CDA that tech companies opposed was eliminated, but the provision that was designed to protect them remained. Thus, when the dust settled, tech companies enjoyed increased protections without the regulations.

The statute itself explicitly outlines the purposes of § 230. The text cannot be fully understood, however, without the context of its addition to the CDA. Because the CDA regulates the Internet, many tech companies opposed it in principle and fought it at every opportunity.<sup>25</sup> In this climate, a state court

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19. See 141 CONG. REC. 15,503 (1995) (statement of Sen. Exon, author of the CDA) (“The fundamental purpose of the Communications Decency Act is to provide much needed protection for children.”).

20. Pub. L. No. 104-104, §§ 501-09, 551-52, 561, 110 Stat. 56, 133-37, 139-43 (1996) (codified in scattered sections of 47 U.S.C.).

21. See S. REP. NO. 104-23, at 59 (1995); see also *Reno v. ACLU*, 521 U.S. 844, 881 (1997).

22. 521 U.S. 844 (1997).

23. See *id.* at 849.

24. See *id.* at 862, 879.

25. See Robert Cannon, *The Legislative History of Senator Exon’s Communications Decency Act: Regulating Barbarians on the Information Superhighway*, FED. COMM’NS L.J. 51, 74 n.112 (1996); see also *Cyberporn and Children*, *supra* note 18, at 72-73; *Child Pornography on the Internet: Hearing on The “Protection of Children from Computer Pornography Act of 1995” Before the S. Comm. On the Judiciary, 104th Cong.* (1995) (testimony of Jerry Berman, Executive Director of the Center for Democracy and Technology); 141 CONG. REC. 19,883-84 (1995) (statement of Sen. Leahy, introducing the Report of Interactive Working Group on Parental Empowerment, Child Protection and Free Speech in Interactive Media); Carlin Meyer, *Reclaiming Sex*



decision caused Congress to respond to tech companies' concerns about regulation and liability.

In 1995, the New York Superior Court decided *Stratton Oakmont, Inc. v. Prodigy Services Co.*<sup>26</sup> Prodigy operated a bulletin board called "Money Talks," where members could post information about the financial world. Widely read in the financial sector, Prodigy held itself out as a "family-oriented" corporation that edited material placed on its bulletin boards that it considered inappropriate.<sup>27</sup> Stratton Oakmont sued Prodigy for libel for statements placed on the Money Talks bulletin board, and the state court found Prodigy responsible for that content in part because of its active role in screening out any material it found inappropriate.<sup>28</sup> Prodigy lost its protection as a mere distributor of third-party information. The court labeled it a publisher of the information and thus responsible for material it published. The court found Prodigy to be a publisher under state law because "it voluntarily deleted some messages . . . and was therefore legally responsible for the content of defamatory messages that it failed to delete."<sup>29</sup>

Opponents of the CDA had already expressed the concern that if the CDA were interpreted broadly, service providers would be held criminally liable for providing minors with access to the Internet.<sup>30</sup> As the Fourth Circuit has observed, "Congress enacted § 230 to remove the disincentives to self-regulation created by the *Stratton Oakmont* decision."<sup>31</sup> This case, and the concerns expressed by tech companies (including Prodigy), prompted Congress to add § 230 to the CDA.<sup>32</sup> Just

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from the Pornographers: Cybersexual Possibilities, 83 GEO. L.J. 1969, 1983 n.77 (1995) (commenting on impossibility of monitoring all transmissions over server computers).

26. No. 31063/94, 1995 WL 323710 (N.Y. Sup. Ct. 1995), *superseded by statute*, Communications Decency Act of 1996, 47 U.S.C. § 230, *as recognized in* *Shiamilli v. Real Est. Grp. of New York, Inc.*, 952 N.E.2d 1011 (N.Y. 2011).

27. *Id.* at \*2.

28. *Id.* at \*4.

29. Fair Hous. Council of San Fernando Valley v. Roommates.com, LLC, 521 F.3d 1157, 1163 (9th Cir. 2008) (citing *Stratton*, 1995 WL 323710, at \*4).

30. See *Child Pornography on the Internet*, *supra* note 26.

31. *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 331 (4th Cir. 1997).

32. See *Roommates*, 521 F.3d at 1163. Congressman Christopher Cox, who would later become a paid lobbyist for the tech industry, cosponsored § 230 to protect companies "who take[] steps to screen indecency and offensive material for their

five weeks after the *Stratton Oakmont* decision, the text of what would become § 230 was introduced in the House.<sup>33</sup>

### B. Purpose

According to the Conference Report, “One of the specific purposes of [§ 230] is to overrule *Stratton-Oakmont v. Prodigy* and any other similar decisions which have treated such providers . . . as publishers or speakers of content that is not their own because they have restricted access to objectionable material.”<sup>34</sup> Congress, therefore, sought to address two goals with § 230. First, consistent with the CDA’s effort to protect children from access to obscene or explicit materials, Congress sought to “encourage telecommunications and information service providers to deploy new technologies and policies’ to block or filter offensive material.”<sup>35</sup> On the other hand, it did not want companies to over-screen, as Congress recognized the desire for the Internet to reach its full potential as “a forum for a true diversity of political discourse, unique opportunities for cultural development, and myriad of avenues for intellectual activity.”<sup>36</sup>

The plain language of § 230 also provides insight into this dual purpose by outlining five separate policies of the United States as they existed in 1996. The first two speak to a preference for an Internet with little regulation:

- (1) to promote the continued development of the Internet and other interactive computer services and other interactive media;

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customers.” 141 CONG. REC. 21,999 (1995). Ironically, although *Stratton Oakmont* won that defamation lawsuit, in 1999 its executives pled guilty to a seven-year scheme of stock manipulation and fraud. See Edward Wyatt, *Stratton Oakmont Executives Admit Stock Manipulation*, N.Y. TIMES, Sept. 24, 1999, at C3.

33. See H.R. 1978, 104th Cong. (1995).

34. H. REP. NO. 104-458, at 194 (1996) (Conf. Rep.).

35. Danielle Citron & Benjamin Wittes, *The Internet Won’t Break*, 86 FORDHAM L. REV. 401, 404 (2017) (quoting S. REP. NO. 104-23 (1995)).

36. *Zeran*, 129 F.3d at 330 (quoting 42 U.S.C. § 230(a)(3) (2012)); see also *Backpage.com, LLC v. Cooper*, 939 F. Supp. 2d 805, 824 (M.D. Tenn. 2013). The opposition to the CDA generally included a concern that the Internet would be stifled, that it would be impossible to monitor platforms, and that speech might be chilled due to over-screening. See, e.g., *Cyberporn and Children*, supra note 18, at 9, 14.

(2) to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation[.]<sup>37</sup>

The remaining three, however, speak to Congress's equal goal of shielding children and others from explicit material and, more specifically, incentivizing technology companies to develop technology to block such material:

(3) to encourage the development of technologies which maximize user control over what information is received by individuals, families, and schools who use the Internet and other interactive computer services;

(4) to remove disincentives for the development and utilization of blocking and filtering technologies that empower parents to restrict their children's access to objectionable or inappropriate online material; and

(5) to ensure vigorous enforcement of Federal criminal laws to deter and punish trafficking in obscenity, stalking, and harassment by means of computer.<sup>38</sup>

Congress enacted § 230 believing that it was "devising a *limited* safe harbor from liability for online providers engaged in self-regulation."<sup>39</sup> Importantly, nothing in the language suggests Congress contemplated any sort of *absolute* immunity. To the contrary, Senator Grassley specifically rejected the views of "free-speech absolutists" who believe that "Congress has no role at all to play in protecting America's children . . . ."<sup>40</sup>

### C. Text

In recognition of its dual purpose, § 230(c) provides in relevant part:

(c) Protection for "Good Samaritan" blocking and screening of offensive material

(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.

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37. 47 U.S.C. § 230(b)(1)–(2).

38. *Id.* § 230(b)(3)–(5).

39. Citron & Wittes, *supra* note 35, at 403 (emphasis added).

40. 142 CONG. REC. 1993 (1996) (statement of Sen. Grassley).

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

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

(B) any action taken to enable or make available to information content providers or others the technical means to restrict access to material described in paragraph (1).<sup>41</sup>

Section 230(c)(1) is the first source of protections for an interactive computer service.<sup>42</sup> Under § 230(c)(1) an interactive computer service is protected from claims that it acted as a publisher or speaker of content created by a third party. That is to say, essential to the analysis of a claim against a service is whether the claim treats the provider as a publisher or speaker of another's words. If so, this law precludes such a cause of action. There is no indication in the text or legislative history of the CDA that an interactive computer service could be protected for content it created. Indeed, Congress defined an "information content provider" as "any person or entity that is responsible, in whole or in part, for the creation or development of information provided through the Internet or any other interactive computer service."<sup>43</sup> A party "can be both an interactive computer service and a content provider."<sup>44</sup> If the party is a content provider, then the plain language of the statute offers it no protection.

Second, § 230(c)(2) provides protection for a service provider who takes actions "in good faith to restrict access to or availability of material that the provider or user considers to be ob-

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41. 47 U.S.C. § 230(c).

42. "The term 'interactive computer service' means any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet and such systems operated or services offered by libraries or educational institutions." 47 U.S.C. § 230(f)(2).

43. 47 U.S.C. § 230(f)(3).

44. *Fair Hous. Council of San Fernando Valley v. Roommates.com, LLC*, 521 F.3d 1157, 1162 (9th Cir. 2008).

scene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable” or provides access to technology to do the same.<sup>45</sup> Through this provision, “Congress sought to immunize the *removal* of user-generated content, not the *creation* of content.”<sup>46</sup>

The final indication that Congress envisioned limited protection was its rather lengthy list of laws not affected by the protections included in § 230(c). Not only does the statute provide that “[n]othing in this section shall be construed to impair the enforcement of section 223 or 231 of this title, chapter 71 (relating to obscenity) or 110 (relating to sexual exploitation of children) of title 18, or any other Federal criminal statute.”<sup>47</sup> The statute also does not “prevent any State from enforcing any State law that is consistent with this section.”<sup>48</sup> Finally, it has no effect on communications privacy law or intellectual property law.<sup>49</sup>

These provisions reflect Congress’s attempt to strike a balance between limiting access to explicit material and incentivizing service providers to police their platforms and develop technologies that allow for screening. Congress sought to accomplish these goals by allowing the Internet to flourish with limited regulation. Congress expressly stated that that it is the policy of the United States “to ensure vigorous enforcement of Federal criminal laws to deter and punish trafficking in obscenity, stalking, and harassment by means of computer.”<sup>50</sup> That said, Congress appeared to recognize that unlimited tort-based lawsuits would threaten the then-fragile Internet and the

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45. 47 U.S.C. § 230(c)(2).

46. *Roommates*, 521 F.3d at 1163.

47. 47 U.S.C. § 230(e)(1) (emphasis added). This was echoed even by opponents of the CDA who argued that child exploitation was already illegal under federal law. See, e.g., 141 CONG. REC. 27,969 (1995) (statement of Sen. Feingold); *Cyberporn and Children*, *supra* note 18, at 15.

48. 47 U.S.C. § 230(e)(3). This provision does, however, preclude liability imposed through a state law inconsistent with § 230. *Id.*

49. *Id.* § 230(e)(2), (4).

50. *Id.* § 230(b)(5).

“freedom of speech in the new and burgeoning Internet medium.”<sup>51</sup>

Although these two goals required some balancing, it is clear from the text and legislative history of § 230 that it was never intended to provide a form of absolute immunity for any and all actions taken by interactive computer services. Section 230 is not “a general prohibition of civil liability for web-site operators and other online content hosts.”<sup>52</sup> Rather, Congress sought to provide limited protections for limited actions.

As this Article will discuss, the jurisprudence in this area as it relates to sex trafficking has come unmoored, suggesting a de facto absolute immunity from civil suit and state prosecution for partnering with human traffickers. Prior to analyzing this case law, it is necessary to understand the equally clear intent of Congress to eliminate sex trafficking.

## II. THE EMERGENCE OF SEX TRAFFICKING AND CLEAR CONGRESSIONAL INTENT TO COMBAT IT

Noticeably absent from the list of offenses unaffected by § 230 are the human trafficking offenses present in federal criminal law and the laws of all fifty states. The reason for this is simple: the nation and the world did not codify human trafficking as a crime until four years after the passage of § 230.

### A. *Sex Trafficking Legislation*

2000 was a watershed year for the law’s recognition of human trafficking generally and sex trafficking in particular. The world came together to draft the Protocol to Prevent, Suppress, and Punish the Trafficking in Persons Especially Women and Children (Palermo Protocol).<sup>53</sup> This document reflected the international community’s condemnation of human trafficking, and it included a comprehensive definition of human traffick-

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51. *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 330 (4th Cir. 1997). Specifically, Congress was concerned that over-screening would lead to a decrease in the number or types of messages circulated. *Id.* at 331.

52. *Chi. Lawyers’ Comm. for Civil Rights Under Law, Inc. v. Craigslist, Inc.*, 519 F.3d 666, 669 (7th Cir. 2008).

53. This is one of three optional protocols to the United Nations Convention Against Transnational Organized Crime. *See* G.A. Res. 55/25, at 31 (Jan. 8, 2001).

ing. It further committed parties to create multidisciplinary laws to address labor and sex trafficking. The United States mirrored this growing recognition of human trafficking by passing the Trafficking Victims Protection Act of 2000 (TVPA),<sup>54</sup> which defined and prohibited severe forms of trafficking.

In its recognition of sex trafficking as a “severe form[] of trafficking,” Congress included lengthy findings, among which were the findings that human trafficking was “modern day slavery,” that it was “the fastest growing source of profits for organized criminal enterprises in the world,” and that its perpetrators perniciously “primarily target women and girls, who are disproportionately affected by poverty, the lack of access to education, chronic unemployment, discrimination, and the lack of economic opportunities.”<sup>55</sup> Congress explicitly acknowledged the importance of combatting this crime:

Trafficking in persons is a transnational crime with national implications. To deter international trafficking and bring its perpetrators to justice, nations including the United States must recognize that trafficking is a serious offense. This is done by prescribing appropriate punishment, giving priority to the prosecution of trafficking offenses, and protecting rather than punishing the victims of such offenses.<sup>56</sup>

Importantly, Congress recognized in 2000 that existing legislation, which included the CDA, was “inadequate to deter trafficking and bring traffickers to justice, failing to reflect the gravity of the offenses involved.”<sup>57</sup>

This direct language indicated Congress’s clear intent to radically affect and confront human trafficking.<sup>58</sup> The approach Congress advanced to combat human trafficking became known as the “Four P’s”: protection, prevention, prosecution, and partnership.<sup>59</sup> This comprehensive effort adopted a “vic-

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54. Pub. L. No. 106-386, 114 Stat. 1466 (codified at 22 U.S.C. §§ 7101–7112 (2012)).

55. 22 U.S.C. § 7101(b)(1), (4), (8), (19) (2012).

56. *Id.* § 102(b)(24).

57. *Id.* § 102(b)(14).

58. *Id.*

59. See U.S. DEP’T OF STATE, 3 PS: PROSECUTION, PROTECTION, AND PREVENTION, <https://www.state.gov/j/tip/3p/> [<https://perma.cc/WHB4-BWJV>] (last visited Nov.

tim-centered approach” to combat trafficking. In the original TVPA, Congress recognized that human trafficking could not be eliminated solely through federal criminal law, but instead required diverse stakeholders to participate and support the rights of victims.<sup>60</sup> The hallmarks of this Congressional approach included a comprehensive methodology that encompassed not only criminal sanctions, but also civil lawsuits, recognition of the essential role of states in combatting human trafficking, and recognition of the need to provide victims and survivors with access to justice through civil private rights of action.<sup>61</sup>

This approach created a structure to revisit the legislation regularly through reauthorizations updating Congress’s legal framework as it continued to gain more knowledge about the many forms of human trafficking. Congress had a clear intent to pursue an aggressive approach to human trafficking in 2000, and its fidelity to this approach is evinced through its five reauthorizations.<sup>62</sup>

### 1. *Definition of Sex Trafficking*

Sex trafficking includes the acts of one who “knowingly . . . recruits, entices, harbors, transports, provides, obtains, advertises, maintains, patronizes, or solicits by any means a person . . . to engage in a commercial sex act.”<sup>63</sup> To be convicted of such an offense, a defendant must use “force, fraud, or coercion . . . to cause the victim to engage in [the] commercial sex act,” or the victim must be under the age of eighteen.<sup>64</sup> It is also unlawful to benefit, “financially or by receiving anything of value, from participation” in a sex trafficking venture.<sup>65</sup> Therefore, if one engages in any of the above acts with a person who has been forced, defrauded or coerced into participating in a commercial sex act, or with a minor participating in a commer-

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20, 2017); see also INT’L HUMAN TRAFFICKING INST., THE PROBLEM, <http://theihti.org/the-problem/> [<https://perma.cc/PJZ6-7JFB>] (last visited Nov. 20, 2017).

60. See 22 U.S.C. § 7101(b)(10).

61. See, e.g., 146 CONG. REC. 16,705 (statement of Sen. Wellstone).

62. See *supra* note 13 for TVPA reauthorizations.

63. 18 U.S.C. § 1591(a) (2012).

64. *Id.*

65. *Id.*



cial sex act (regardless of coercion), one has committed the crime of sex trafficking. A commercial sex act includes “any sex act on account of which anything of value is given to or received by any person.”<sup>66</sup> These comprehensive definitions cover more than just traditional prostitution; they also include other methods of sexual exploitation. Similarly, they apply not only to pimps, but also to anyone who participates and benefits from such exploitation. Thus, it is clear that Congress intended a comprehensive attack on sex trafficking from the beginning.

## 2. *Multidisciplinary Approach with Emphasis on Victims*

Congress also recognized that sex trafficking could not be ended only through purely federal criminal law and found that a civil right of action is necessary to combat human trafficking. In 2003, Congress explicitly authorized a private right of action for sex-trafficking victims to enforce the criminal sex-trafficking laws, thus providing them with access to justice and also empowering them to participate in achieving the TVPA’s goals.<sup>67</sup> In 2015, Congress increased compensation and restitution for victims, reiterating the importance of victim access to funds to address the long-term harms caused by human trafficking.<sup>68</sup>

In addition to adopting the victim-centered approach and the right of a federal civil enforcement action, Congress also recognized the need to combat sex trafficking at state and local levels of government. In 2005, Congress explicitly acknowledged the essential role of local law enforcement and prosecutors by adding a section to the TVPA entitled “Enhancing State and Local Efforts to Combat Trafficking in Persons.”<sup>69</sup> This section established grants to “establish, develop, expand, or strengthen pro-

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66. 22 U.S.C. § 7102(4) (2012).

67. See 18 U.S.C. § 1595 (2012); see also, e.g., Kathleen Kim & Kusia Hreshchyshyn, *Human Trafficking Private Right of Action: Civil Rights for the Trafficked Person in the United States*, 16 HASTINGS WOMEN’S L.J. 1, 4 (2004) (recognizing that, because public enforcement lacks resources to enforce civil rights of human trafficking victims, including these private rights of actions in the trafficking statutes “is indicative that the state is willing to rely on private actors to enforce the civil rights of trafficked persons”).

68. See Justice for Victims of Trafficking Act of 2015, Pub. L. No. 114-22, § 105, 129 Stat. 236.

69. 34 U.S.C. § 20705 (2012)

grams . . . to investigate and prosecute acts of severe forms of trafficking in persons.”<sup>70</sup> In so doing, Congress required that such local entities embrace a multidisciplinary approach advocated by Congress.<sup>71</sup> Indeed, the State Department’s most recent Trafficking in Persons Report recognized the critical role state and local prosecutions play in this effort, noting that most prosecutions of human trafficking are based on state laws.<sup>72</sup>

For nearly the past two decades, congressional intent to combat sex trafficking has been unyielding and comprehensive. Congress is the architect of a multi-disciplinary approach that employs the use of a private right of action, a focus on victims, and state and local law enforcement to combat sex trafficking at all levels of society.

### 3. *Obstacle to Achieving the TVPA’s Goal to Ending Sex Trafficking*

Notwithstanding this comprehensive approach, sex trafficking appears to continue to thrive throughout the world and across the country. As a threshold matter, it must be noted that accurate numbers are difficult to ascertain due to the underground nature of sex trafficking, as well as the definitional variations among different studies. Nevertheless, global estimates confirm a trend of increasing numbers of trafficking victims.<sup>73</sup> There are 5.9 adult victims of modern slavery for every 1,000 adults in the world, and 4.4 child victims for every 1,000 children in the world.<sup>74</sup> Consistent with congressional findings in 2000, 99% of the victims that the International Labour Organization characterizes as “sex slaves” are women and girls.<sup>75</sup> Notwithstanding such estimates, the U.S. Department of State reported that in 2016 the legal systems of countries throughout the world only identified approximately 66,520 victims.<sup>76</sup>

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70. *Id.*

71. *See id.* § 20705(b).

72. *See* U.S. DEP’T OF STATE, TRAFFICKING IN PERSONS REPORT 416 (2017), <https://www.state.gov/documents/organization/271339.pdf> [<https://perma.cc/MXY7-PXUC>].

73. Forty million people were victims of modern slavery in the world in 2017. *See* ALLIANCE 8.7, *supra* note 4, at 5.

74. *Id.* at 24.

75. *Id.* at 39.

76. U.S. DEP’T OF STATE, *supra* note 72, at 34.

Moreover, these same governments identified only 14,897 prosecutions.<sup>77</sup>

Similar trends exist in the United States. The Department of Justice only initiated a total of 241 federal human trafficking prosecutions in 2016, a decrease from 257 in 2015.<sup>78</sup> It charged 531 defendants, an increase from 377 the year before, and secured convictions against 439 traffickers, a significant increase from 297 convictions in 2015.<sup>79</sup> While these statistics suggest some improvement, there can be no dispute that these federal prosecutions in no way capture all the victims being sold into sex trafficking each day.

Although likely many reasons exist for this increase in sex trafficking, including simply an increased awareness of the crime, there is little doubt that much of this increase is due to the ease of selling children and adult victims of sex trafficking online. The National Center for Missing and Exploited Children (NCMEC) studied its reports of suspected child sex trafficking over a five-year period and found an 846% increase in reports of suspected child sex trafficking online.<sup>80</sup> NCMEC receives an average of 9,000–10,000 CyberTipline reports relating to child sex trafficking each year.<sup>81</sup> Of those, 81% relate to child sex trafficking online.<sup>82</sup> This crime often targets the most vulnerable in our society. A study of homeless children found that nearly one in five have been the victims of human trafficking.<sup>83</sup> This corroborates NCMEC's reporting that one in six runaways

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77. *Id.*

78. *Id.*

79. *Id.*

80. *Human Trafficking Investigation: Hearing Before the S. Permanent Subcomm. on Investigations*, 114th Cong. 38–47 (2015) (statement of Yiota G. Souras, Senior Vice President and General Counsel, The National Center for Missing and Exploited Children).

81. *See Hearing on S. 1693*, *supra* note 7 (statement of Yiota G. Souras, Senior Vice President and General Counsel, The National Center for Missing and Exploited Children).

82. *Id.*

83. *See* LAURA T. MURPHY, LOYOLA UNIV. NEW ORLEANS, LABOR AND SEX TRAFFICKING AMONG HOMELESS YOUTH: A TEN-CITY STUDY EXECUTIVE SUMMARY 4 (2016), <https://covenanthousestudy.org/landing/trafficking/docs/Loyola-Research-Results.pdf> [https://perma.cc/6WKU-AGAK] (last visited Nov. 20, 2017).

reported to NCMEC were likely victims of sex trafficking.<sup>84</sup> These increasing trends of child sex trafficking seem to correlate with the increased use of the Internet to sell children. Of reports received by NCMEC to the CyberTipline from members of the public regarding suspected child sex trafficking, 73% related to ads on Backpage.<sup>85</sup> A Thorn study observed that 75% of sex-trafficking victims interviewed were advertised online.<sup>86</sup> California Attorney General Xavier Becerra testified before the Senate Committee on Commerce, Science, and Transportation that almost every sex-trafficking case in his office involves online marketing.<sup>87</sup> The consequence of this is significant, as online advertising is associated with an increase in the number of buyers per victim.<sup>88</sup>

These numbers are supported by common sense experience in the business community. Successful businesses move online where they can access potential buyers quickly and at low cost. What the Internet economy has done for legitimate business, it has done exponentially for illicit businesses; it provides all the benefits of an online presence with the additional layer of anonymity. It is not surprising that these businesses have migrated to the Internet, because sex trafficking is not only a crime but also a highly lucrative business. As such, sex trafficking thrives in the ecosystem the Internet creates: low-cost, low-risk, and

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84. See NAT'L CTR. FOR MISSING & EXPLOITED CHILDREN, CHILD SEX TRAFFICKING IN AMERICA: A GUIDE FOR PARENTS AND GUARDIANS 2 (2017), [http://www.missingkids.com/content/dam/ncmec/en\\_us/Child\\_Sex\\_Trafficking\\_in\\_America\\_Parent\\_Guardian.pdf](http://www.missingkids.com/content/dam/ncmec/en_us/Child_Sex_Trafficking_in_America_Parent_Guardian.pdf) [<https://perma.cc/UL67-DCAW>].

85. See *Hearing on S. 1693*, *supra* note 7 (statement of Yiota G. Souras, Senior Vice President and General Counsel, The National Center for Missing and Exploited Children).

86. VANESSA BOUCHÉ, THORN, SURVIVOR INSIGHTS: THE ROLE OF TECHNOLOGY IN DOMESTIC MINOR SEX TRAFFICKING 38 (2018) [hereinafter BOUCHÉ, TECHNOLOGY IN DMST], [https://2715111qnwey246mkc1vzqg0-wpengine.netdna-ssl.com/wp-content/uploads/2018/01/Thorn\\_Survivor\\_Insights\\_012918.pdf](https://2715111qnwey246mkc1vzqg0-wpengine.netdna-ssl.com/wp-content/uploads/2018/01/Thorn_Survivor_Insights_012918.pdf) [<https://perma.cc/FS66-ANN9>]. This is an increase from 63% reported in 2015. See VANESSA BOUCHÉ, THORN, A REPORT ON THE USE OF TECHNOLOGY TO RECRUIT, GROOM AND SELL DOMESTIC MINOR SEX TRAFFICKING VICTIMS 10 (2015), [https://2715111qnwey246mkc1vzqg0-wpengine.netdna-ssl.com/wp-content/uploads/2015/02/Survivor\\_Survey\\_r5.pdf](https://2715111qnwey246mkc1vzqg0-wpengine.netdna-ssl.com/wp-content/uploads/2015/02/Survivor_Survey_r5.pdf) [<https://perma.cc/X8D3-XQV9>].

87. See *Hearing on S. 1693*, *supra* note 7 (statement of Xavier Becerra, Att'y Gen. of California).

88. BOUCHÉ, TECHNOLOGY IN DMST, *supra* note 86, at 41.

high-profit.<sup>89</sup> Legal online advertising platforms provide traffickers and purchasers a highly convenient forum with limited public exposure.<sup>90</sup>

### III. SECTION 230 HAS THWARTED THE CONGRESSIONAL INTENT TO COMBAT HUMAN TRAFFICKING

One of the reasons sex trafficking has continued to grow, despite comprehensive legislative efforts to combat it, has been the growing use of the Internet to facilitate it through online advertising.<sup>91</sup> Online advertising has been allowed to thrive due to both the case law that has emerged regarding § 230 and congressional inaction.

While headlines focus on Craigslist and Backpage, many other sites are eager to partner with sex traffickers to obtain a share of the multibillion-dollar industry.<sup>92</sup> These include EscortAds.xxx, Erosads.com, EroticMugShots.com, among others.<sup>93</sup> The impunity for facilitating sex trafficking that the Internet offers goes beyond advertising to include so called “hobby boards,” where purchasers rate prostituted people and victims of trafficking as they would rate a restaurant on Yelp— except with graphic, vulgar, and violent detail.<sup>94</sup> The misinterpretation of the protections of § 230 and congressional inaction led to a stalemate. Congress’ noble and clear vision to combat online sex trafficking continues to be unrealized and traffickers continue to advertise, buy, and sell victims with impunity. It is important to examine how § 230 was turned on its head and how this section of the CDA, designed to help shield children from explicit material, has been distorted to allow companies to facilitate children becoming the explicit material.

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89. See DANK, *supra* note 5, at 218; BOUCHÉ, TECHNOLOGY IN DMST, *supra* note 86, at 36.

90. BOUCHÉ, TECHNOLOGY IN DMST, *supra* note 86, at 40.

91. *Id.*

92. 161 CONG. REC. S1621 (daily ed. Mar. 18, 2015) (statement of Sen. Feinstein).

93. *Id.*

94. See Katherine Koster, *FBI & Local Police Seize Adult Entertainment Website “The Review Board,”* HUFFINGTON POST (Jan. 6, 2017), [https://www.huffingtonpost.com/katherine-koster/fbi-local-police-seize-th\\_b\\_8927072.html](https://www.huffingtonpost.com/katherine-koster/fbi-local-police-seize-th_b_8927072.html) [https://perma.cc/D7MN-K3RS].

A. *Courts Distorted § 230 and Created a Regime of De Facto Absolute Immunity, Contrary to Congressional Intent.*

While the intent of limited protections for limited actions was clear, since 1996 courts have interpreted § 230 significantly more broadly than the authors intended or than the words of the statute suggest.<sup>95</sup> Of the several hundred § 230 decisions in state and federal court since 1996, the vast majority have found websites immune from liability for events occurring on them.<sup>96</sup> Courts “have treated the relevant statutory language as creating a broad exemption from liability even when the substantive facts underlying a plaintiff’s claim are compelling.”<sup>97</sup>

This state of affairs has real consequences for victims when the cases include sex trafficking. Additionally, it implicates other offenses such as stalking and nonconsensual pornography, which also occur online, sometimes due to the operators of websites.<sup>98</sup> Demonstrating that the defendant computer service is a “bad actor” does not provide for liability.<sup>99</sup> This “over-broad interpretation has left victims of online abuse with no leverage against site operators whose business models facilitate abuse.”<sup>100</sup> As Professor Citron and Mr. Wittes note, “Section 230 of the CDA was by no means meant to immunize services whose business is the active subversion of online decency—businesses that are not merely failing to take ‘Good Samaritan’ steps to protect users from online indecency but are actually being Bad Samaritans.”<sup>101</sup>

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95. See Citron & Wittes, *supra* note 35, at 408 (“The broad construction of the CDA’s immunity provision adopted by the courts has produced an immunity from liability that is far more sweeping than anything the law’s words, context, and history support.”).

96. See, e.g., Hill v. StubHub, Inc., 727 S.E.2d 550, (N.C. Ct. App. 2012). But see Jeffrey Kosseff, *The Gradual Erosion of the Law that Shaped the Internet*, 18 COLUM. SCI. & TECH. L. REV. 1 (2016) (noting that while § 230 remains a strong shield for tech companies, courts do not apply § 230 immunity as broadly as they once did).

97. *StubHub*, 727 S.E.2d at 561 (citing M.A. v. Vill. Voice Media Holdings, 809 F. Supp. 2d 1041 (E.D. Mo. 2011)).

98. See *People v. Bollaert*, 203 Cal. Rptr. 3d 814, 835 (Ct. App. 2016).

99. *Doe v. Backpage.com, LLC*, 817 F.3d 12, 29 (1st Cir. 2016) (“Showing that a website operates through a meretricious business model is not enough to strip away those [CDA] protections.”).

100. Citron & Wittes, *supra* note 35, at 404.

101. *Id.* at 8.

To understand how the case law developed in the manner it did, one must first comprehend the state of the Internet at the time of the early decisions. In 1997, when cases first percolated through the court system, the Internet was in its infancy. The need to protect it as an unregulated bastion of freedom appeared more pressing. Not only could courts not imagine the Internet of today, but they also did not envision the exploitation today's Internet fuels through the three A's: anonymity, access, and affordability.<sup>102</sup> More specifically, they could not imagine the level of human trafficking occurring online.

### 1. *Early CDA Non-Sex Trafficking Cases*

The initial cases did not involve sex trafficking, as it was an unrecognized form of victimization. Hence, the relevant baseline for jurisprudence was from a series of cases having nothing to do with either the typical sex-trafficking scenario or the scope of the problem.

*Zeran v. America Online, Inc.*<sup>103</sup> is one of the earliest cases to address § 230, and it began a string of broad interpretations. In this defamation case, the plaintiff argued that AOL unreasonably delayed the removal of defamatory messages, refused to issue a retraction, and failed to remove similar repeated posts.<sup>104</sup> This 1997 case focused on the legislative history calling for unfettered free speech on the Internet, but it ignored the language of the statute.<sup>105</sup> In granting AOL's motion for judgment on the pleadings, the Fourth Circuit concluded that § 230 barred any cause of action that would make "service providers liable for information originating with a third-party user."<sup>106</sup> The court based its decision on a desire to incentivize companies to self-regulate. It assumed that ruling the opposite way would expose service providers to liability if they knew of defamatory messages on their space, and that this, in turn, would incentivize them to be willfully ignorant and to cease policing

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102. See Al Cooper, *Sexuality and the Internet: Surfing into the New Millennium*, 1 CYBERPSYCHOLOGY & BEHAV. 187, 187-93 (1998).

103. 129 F.3d 327 (4th Cir. 1997).

104. *Id.* at 328.

105. See Citron & Wittes, *supra* note 35, at 408.

106. *Zeran*, 129 F.3d at 330.

their space.<sup>107</sup> Because this was a defamation case, there was no need to balance these concerns with the CDA's other purpose—to limit explicit content. The court's failure to discuss this other goal created fertile ground for courts to maintain a singular focus on only one of § 230's two purposes.

Additionally, the court adopted a broad definition of publisher, finding the plaintiff's claims treated AOL as a publisher: "[L]awsuits seeking to hold a service provider liable for its exercise of a publisher's traditional editorial functions—such as deciding whether to publish, withdraw, postpone, or alter content—are barred."<sup>108</sup> The court further rejected the characterization of AOL as a distributor.<sup>109</sup>

Another important early case was *Doe v. America Online, Inc.*,<sup>110</sup> a Florida civil case in which the plaintiff accused AOL of knowingly distributing and allowing advertisements for child pornography, negligence, and a failure to respond to notification that its services were being utilized to distribute obscene material. Here, the plaintiff argued that AOL was not a publisher, but a distributor. The Florida court rejected that argument, extending *Zeran's* argument that websites are not distributors.<sup>111</sup>

*Doe v. America Online* is important for what it did not say as much as for what it did say. Although the case involved allegations regarding child pornography, it did not rely heavily on the purposes of § 230 consistent with those priorities—such as protecting children from explicit material and exploitation. Instead, the court quoted *Zeran* heavily, and in so doing it helped perpetuate a broad definition of publisher and suggested that Congress favored freedom of the Internet above all other goals. Importantly, the Florida appellate court in *Doe v. America Online* also found that § 230 preempted state law civil claims.<sup>112</sup>

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107. *Id.* at 333. The court was also concerned that policing the "sheer number" of postings on would "be an impossible burden" for an interactive computer service. *Id.*

108. *Id.* at 331.

109. *Id.* at 333.

110. 718 So. 2d 385 (Fla. Dist. Ct. App. 1998).

111. *Id.* at 388–89.

112. *Id.* at 389.



Over the next decade, case law was built on this idea of broad immunity, derived frequently from defamation cases.<sup>113</sup> At the same time, the Internet was growing in strength, and explicit material was proliferating online. Not until 2008 did a published appellate opinion offer some reference to a limited immunity and hope for crime victims. In *Fair Housing Council of San Fernando Valley v. Roommates.com*,<sup>114</sup> the plaintiffs sought to establish that Roommates.com was actually a content provider and, as such, could be held liable for questions asked that violated housing discrimination regulations. As a basis for this claim, plaintiffs noted that Roommates.com provided its users with a drop-down menu that users had to answer to access the service. According to the plaintiffs, this action required users to enter certain discriminatory information such as preferences for roommates of certain races or sexual orientations. As such, Roommates.com was a content provider.<sup>115</sup> The court agreed.

*Roommates* provided some important additions to the jurisprudence. First, holding that Roommates.com was a content provider made it one of the few cases to find potential liability for a website. In so doing it recognized a website could be both an interactive computer service as well as a content provider, at least where the website helped to develop the information:<sup>116</sup>

If [a website] passively displays content that is created entirely by third parties, then it is only a service provider with respect to that content. But as to content that it creates itself, or is “responsible, in whole or in part” for creating or developing, the website is also a content provider.<sup>117</sup>

By focusing on the text of § 230, *Roommates* recognized that defendants were responsible “in part” for each profile on their

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113. See, e.g., *Ezra v. Am. Online*, 206 F.3d 980 (10th Cir. 2000) (defamation); *Whitney Info. Network, Inc. v. Verio, Inc.*, No. 2:04CV462FTM29SPC, 2006 WL 66724 (M.D. Fla. Jan. 11, 2006); *Blumenthal v. Drudge*, 992 F. Supp. 44, 46 (D.D.C. 1998) (finding the *Drudge Report* immune from liability for story that plaintiff abused his wife); *Donato v. Moldow*, 865 A.2d 711 (N.J. Super. Ct. App. Div. 2005) (defamation). *But see* *Doe v. Am. Online, Inc.*, 783 So. 2d 1010 (Fla. 2001) (defendant granted immunity from negligence claim that it markets child pornography).

114. 521 F.3d 1157 (9th Cir. 2008).

115. *Id.* at 1164.

116. *Id.* at 1165.

117. *Id.* at 1162. See also *Dart v. Craigslist, Inc.*, 665 F. Supp. 2d 961, 967–68 (N.D. Ill. 2009).

website even if the content was a collaborative effort between the website and the user.<sup>118</sup> The Ninth Circuit also clarified the term “development” to include not merely augmenting the content generally but “materially contributing to its alleged unlawfulness.”<sup>119</sup>

Critically, *Roommates* also distinguished the typical content provider from the concerns in *Prodigy*. It noted that Prodigy was sued for removing some, but not enough, material from its sites. “Here Roommate is not being sued for removing some harmful messages while failing to remove others.”<sup>120</sup> Rather, it was being sued for causing illegal material to be displayed. The recognition of potential liability was not without limits: “The message to website operators is clear: if you don’t encourage illegal content . . . you will be immune.”<sup>121</sup>

While the early cases set the tone for this jurisprudence, a few, such as *Roommates*, were open to recognizing limitations. Importantly, the *Roommates* court understood the need to update legal reactions to problems. Specifically, it rejected to some extent the knee-jerk argument that § 230 immunity was necessary to buoy a fragile Internet:

The Internet is no longer a fragile new means of communication that could easily be smothered in the cradle by overzealous enforcement of laws and regulations applicable to brick-and-mortar businesses. . . . [W]e must be careful not to exceed the scope of the immunity provided by Congress and thus give online businesses an unfair advantage over their real-world counterparts, which must comply with laws of general applicability.<sup>122</sup>

Therefore, *Roommates* offered an alternative path interpreting § 230 more in line with the text and original purpose of the CDA. However, when courts considered the sex-trafficking cases, they rejected that textual approach.

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118. *Roommates*, 521 F.3d at 1166.

119. *Id.* at 1167–68. Even “encouraging” unlawful content may be enough to lose § 230 protection. *See id.* at 1171.

120. *Id.* at 1170.

121. *Id.* at 1175.

122. *Id.* at 1164 n.15.

## 2. Websites Block Civil Cases

By 2009, online advertising of sex trafficking was rampant, and it had transcended its earlier status as a nuisance. Internet advertisements allowed human traffickers to quickly sell victims to sex buyers in multiple cities.<sup>123</sup> The websites successfully argued that the early cases, which were decided before the advent of online sex trafficking, protected them from any liability. They argued that they were entitled to “broad[] immuni[ty]” for disseminating third-party content.<sup>124</sup>

Frustrated with his inability to contain sex trafficking, Cook County Sheriff Thomas Dart sued a popular platform for such advertisements, Craigslist.com. His federal suit alleged a common law claim of public nuisance, utilizing as evidence Craigslist’s violation of local prostitution laws.<sup>125</sup> The District Court dismissed this diversity jurisdiction suit for a number of reasons. In so doing, the court reframed Dart’s argument, finding that he more accurately presented a “negligent publishing” claim, which § 230 precludes when it “derives from the defendant’s status or conduct as a ‘publisher or speaker.’”<sup>126</sup>

In dismissing this cause of action, the trial court accepted the allegation that traffickers routinely flouted Craigslist’s guidelines and terms of use.<sup>127</sup> However, the court refused to allow the case to proceed and granted the motion for judgment on the pleadings.<sup>128</sup> Unlike in *Roommates*, where the defendants were responsible for the content and caused the illegal activity,<sup>129</sup> the court here found the defendants did not do so and,

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123. See *Hearing on S. 1693*, *supra* note 7 (testimony of Yiota G. Souras, Senior Vice President and General Counsel, The National Center for Missing and Exploited Children).

124. See, e.g., *Dart v. Craigslist, Inc.*, 665 F. Supp. 2d 961, 965 (N.D. Ill. 2009) (quoting Craigslist’s assertion that § 230(c)(1) “broadly immunizes providers of interactive computer services from liability for the dissemination of third-party content.”).

125. *Id.*

126. *Id.* at 967–98.

127. See *id.*

128. See *id.* at 970.

129. *Fair Hous. Council of San Fernando Valley v. Roommates.com*, 521 F.3d 1157 (9th Cir. 2008).

therefore, could not be deemed responsible in whole or in part for the content of the ads.<sup>130</sup>

A different approach was taken in federal court by a survivor of sex trafficking. As a fourteen-year-old runaway girl, M.A. was sexually trafficked.<sup>131</sup> M.A.'s trafficker admitted to taking pornographic photographs of her, displaying her private body parts, and posting them on Backpage as advertisements to sell her for sexual services.<sup>132</sup> Backpage profited from these advertisements.<sup>133</sup>

M.A. sued Village Voice Media, the then-owners of Backpage, in federal court under the private right of action provided for victims of child pornography and sex trafficking.<sup>134</sup> She alleged, *inter alia*, that Backpage aided and abetted her trafficker in violating the child sex-trafficking laws, child pornography laws, and U.S. treaty obligations under the Optional Protocol of the Convention of the Rights of the Child Against the Sale of Children.<sup>135</sup>

M.A. attempted to distinguish her claims from previous plaintiffs' efforts to hold interactive computer services liable. She did not base her allegations on the content of the advertisements, but instead concentrated on the website's role as a sex-trafficking facilitator.<sup>136</sup> She focused on Backpage's conduct in developing and posting the advertisements, instructing the trafficker on how to increase the impact of posted ads, and offering special ad placement.<sup>137</sup> The court accepted *Roommates'* holding that a website operator can be both a content provider and a service provider, and it found Backpage immune from liability.<sup>138</sup>

This early sex-trafficking opinion refers back to the late 1990s' "broad immunity" language—a product of a time before

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130. See *Dart*, 665 F. Supp. 2d at 969.

131. *M.A. v. Vill. Voice Media Holdings*, 809 F. Supp. 2d 1041, 1043 (E.D. Mo. 2011).

132. *Id.* at 1043, 1045.

133. *Id.*

134. See 18 U.S.C. § 1595 (2012); see also 18 U.S.C. § 2255 (2012).

135. *M.A.*, 809 F. Supp. 2d at 1045.

136. See *id.* at 1044–45.

137. *Id.* at 1044, 1048.

138. *Id.* at 1059.

the modern Internet, the conceptualization of human trafficking, and the unforeseen explosion of online sex trafficking.<sup>139</sup> Repeatedly citing to defamation cases,<sup>140</sup> which are clearly distinguishable from child trafficking cases, the court concluded that Congress chose a policy of “broad immunity” in all § 230 cases.<sup>141</sup> The court recognized the inherent conflict in cases involving § 230 immunity and cases where individuals are directly harmed, noting that “[t]he legislative resolution of these issues will, indirectly, shape the content of communication over the Internet. For now . . . § 230 of the [CDA] errs on the side of robust communication, and prevents the plaintiffs from moving forward with their claims.”<sup>142</sup> The court, relying on the early cases that did not deal with sex trafficking, asserted that Congress created a policy giving content providers near-absolute immunity.<sup>143</sup>

The tone of this decision reflects the struggle of courts in trying to reconcile two separate congressional purposes. On the one hand, courts are trying to be attentive to § 230’s purpose. Congress clearly listed its dual purposes in § 230(a), and one of those purposes involves the protection of children.<sup>144</sup> Unfortunately, many early cases did not have to address child protection and only referred to the other purpose of § 230.<sup>145</sup> These cases mischaracterized the congressional purpose as one focused primarily on the goal of a free and unfettered Internet; the equally significant goal of protecting children and precluding the dissemination of explicit material was often ignored. As such, courts created an impression that the immunity provided was broader than intended and existed for only one purpose. On the other hand, courts must reconcile this with Congress’s unmistakable intent to combat sex trafficking, which it has demonstrated by authorizing civil enforcement actions and criminal laws that target sex traffickers. Congress intended to

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139. *See id.* at 1051.

140. *See id.* at 1053.

141. *See id.* at 1051.

142. *Id.* at 1053 (alteration in original) (quoting *PatentWizard, Inc. v. Kinko’s Inc.*, 163 F. Supp. 2d 1069, 1071–72 (D. S.D. 2001)).

143. *Id.*

144. *See* 47 U.S.C. § 230(a) (2012).

145. *See id.*

disrupt the sex-trafficking business model at many different pressure points.

Unfortunately, when courts adjudicating sex-trafficking cases look to precedent for guidance, they inevitably find the older cases, which emphasize not the plain language of the statute but only a portion of the statute's findings. *M.A. v. Village Voice Media Holdings*<sup>146</sup> exemplifies this struggle. There, the court acknowledged M.A.'s characterization of immunity for a website "that solicits and facilitates illegal conduct" as "indefensible."<sup>147</sup> However, the opinion follows with the sentiment, "regardless of M.A.'s characterization of the policy choice of denying § 230 immunity in such circumstances as alleged as 'clear,' it nonetheless is a matter Congress has spoken on and is for Congress, not this Court, to revisit."<sup>148</sup> The opinion closes with the court underscoring this point and suggesting a frustration with reconciling these two pieces of legislation: "Congress has declared such websites to be immune from suits arising from such injuries. It is for Congress to change the policy that gave rise to such immunity."<sup>149</sup>

Of course the problem with this analysis is that it is far from clear that Congress declared such websites to be immune from liability. Indeed, the word "immunity" is nowhere to be found in the statute.<sup>150</sup> The statute was designed to limit access to explicit material, not enable a website to successfully claim immunity when such an image appears on its platform and facilitates the actual trafficking of the person depicted. Yet, due to the language of early precedents from a different time regarding a different type of situation—murky defamation as opposed to clear child sex trafficking—the *M.A.* court adopted Backpage's argument that websites are immune even when facilitating sex trafficking.<sup>151</sup>

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146. 809 F. Supp. 2d 1041, 1043 (E.D. Mo. 2011).

147. *Id.*

148. *Id.* at 1053.

149. *Id.* at 1058.

150. See *J.S. v. Vill. Voice Media Holdings, LLC*, 359 P.3d 714, 718 (Wash. 2015) (en banc) (Wiggins, J., concurring).

151. *M.A.*, 809 F. Supp. 2d at 1058.

It is essential to note that this case, like all those that courts dismissed, was dismissed pretrial on immunity grounds.<sup>152</sup> That is to say, survivors as plaintiffs were denied an ability to get through the courthouse door. Importantly, they were also denied discovery to access the documents that would have demonstrated the extent to which these websites facilitated sex trafficking.

### 3. *Backpage Blocks State Regulation*

Having failed to successfully assert state law claims to impede online advertising of sex-trafficking victims for sale in *Dart v. Craigslist, Inc.*,<sup>153</sup> and then federal civil claims in *M.A.*, states and victims found their hands tied. In the wake of these thwarted efforts, a legally protected public market to buy and sell sex-trafficking victims arose. States next attempted to pass new laws prohibiting this business practice. The response from one online advertising company was swift and aggressive. At the time, Backpage was the second largest online advertising platform in the United States. Its revenue was estimated to be \$150 million dollars with much of that deriving from online “adult” advertisements.<sup>154</sup> And in *M.A.*, Backpage had successfully argued that it possessed broad immunity to advertise online for the sale of sex-trafficking victims under § 230.

In an effort to oppose open marketplaces where children were bought for sex, Washington, Tennessee, and New Jersey all passed legislation targeting online advertisements for prostituted persons as well as victims of sex trafficking.<sup>155</sup> The objective of these laws was to end the large marketplaces for online sex trafficking. These laws resulted from states’ growing frustration with their inability to combat this problem. For example, in *Backpage.com v. McKenna*,<sup>156</sup> Washington police identified a minor victim whose images repeatedly appeared in

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152. *Id.* at 1059.

153. 665 F. Supp. 2d 961, 967–68 (N.D. Ill. 2009).

154. See 163 CONG. REC. S3977 (daily ed. July 13, 2017) (statement of Sen. Portman).

155. See N.J. STAT. ANN. § 2C:13-10(b)(1) (West 2013); TENN. CODE ANN. § 39-13-314 (WEST 2013); WASH. REV. CODE ANN. § 9.68A.101 (West 2017).

156. *Backpage.com, LLC v. McKenna*, 881 F. Supp. 2d 1262 (W.D. Wash. 2012).

Backpage's advertisements even after they notified the site.<sup>157</sup> Backpage initially removed the images but they continued to reappear.<sup>158</sup> The seemingly never-ending ability to advertise the same victim spurred these legislative responses.

Backpage successfully enjoined all of these laws from being enforced. Courts found that § 230(e)(3) expressly preempted state laws that were inconsistent with the immunity found therein.<sup>159</sup> Given that one of the purposes of the CDA is to protect children from exposure to explicit materials,<sup>160</sup> one could argue these laws were not inconsistent with the Act. However, *McKenna* found the criminalization of the knowing publishing or displaying of such ads was inconsistent with the CDA, because such criminalization incentivized service providers to not monitor the content that goes through their channels.<sup>161</sup>

This holding is mistaken. The CDA was clearly enacted to protect from liability an ISP who monitors for explicit material, but in good faith fails to capture everything, as the defendant did in *Prodigy*.<sup>162</sup> The CDA was not intended to protect the company that monitors, discovers illegal content, profits from it, and allows it to spread on its platform.<sup>163</sup>

The CDA made this original distinction in the policy section of § 230.<sup>164</sup> However, by the time of these three cases, Backpage and the courts heavily relied upon the early CDA cases that did not involve trafficking. *McKenna* accurately noted that a "majority of federal circuits have interpreted [§ 230] to establish broad federal immunity to any cause of action that would make service providers liable for information originating with a third-

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157. *Id.* at 1267–68.

158. *Id.* at 1268.

159. See *Backpage.com, LLC v. Cooper*, 939 F. Supp. 2d 805, 823 (M.D. Tenn. 2013); *Backpage.com, LLC v. Hoffman*, No. 13-cv-03952, 2013 WL 4502097, at \*18 (D. N.J. Aug. 20, 2013); *McKenna*, 881 F. Supp. 2d at 1273.

160. 47 U.S.C. § 230(a) (2012).

161. *McKenna*, 881 F. Supp. 2d at 1273.

162. See generally *Stratton Oakmont, Inc. v. Prodigy Servs. Co.*, No. 31063194, 1995 WL 323710 (N.Y. Sup. Ct. 1995).

163. *McKenna* also stated that liability upon notice would cause providers to abstain from self-regulation. 881 F. Supp. 2d at 1278. However, the Washington law would not create liability upon knowledge, but upon knowledge and failing to act and remove the illegal content. See WASH. REV. CODE ANN. § 9.68A.101 (West 2017). This is entirely different.

164. 47 U.S.C. § 230(a) (2012).



party user of the services.”<sup>165</sup> While statistically accurate, the assertion of such a broad rule was inconsistent with the intent of the limited protections of the CDA.

Although the constitutionality of these state laws is beyond the scope of this article, the CDA basis for the opinions illustrates its misconstruction. For example in *Backpage.com v. Cooper*,<sup>166</sup> apparently emboldened by the de facto immunity created for these companies in the online advertising arena, Backpage argued even further that the statute “is preempted by the CDA because § 230 of the CDA prohibits state laws from imposing liability on interactive computer services for third-party content, *even if the content is unlawful and the website had reason to know of the unlawfulness.*”<sup>167</sup> Such a position is ironic to say the least. These actors utilized the Good Samaritan provision of the section of the CDA entitled “Protection for Private Blocking and Screening or Offensive Material” to claim immunity for knowingly providing access to unlawful material.<sup>168</sup> Unfortunately, the courts allowed this distortion.<sup>169</sup>

#### 4. *Websites Block Efforts to Disrupt the Business Model of Advertising Sex-Trafficking Victims for Sale*

By 2015, the use of online advertisements to sell human trafficking victims, particularly child sex-trafficking victims, was expansive and significant. NCMEC found the increase in reports of child sex trafficking “directly correlated to the increased use of the Internet to sell children for sex.”<sup>170</sup> An Urban

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165. *McKenna*, 881 F. Supp. 2d at 1273 (citing *Barnes v. Yahoo!*, 570 F.3d 1096, 1101–02 (9th Cir. 2009)) (first emphasis added).

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

167. *Id.* at 821–22 (emphasis added). It should be noted the term “de facto absolute immunity” used throughout this article refers to immunity from civil liability and state prosecution of its sex-trafficking laws. While § 230 does allow for enforcement of federal criminal law, to date the Department of Justice has not prosecuted Backpage.com or similar sex trafficking websites.

168. See 47 U.S.C. § 230(c).

169. *Cooper*, 939 F. Supp. 2d at 822.

170. *Backpage.com’s Knowing Facilitation of Online Sex Trafficking: Hearing Before the Subcomm. on Investigations of the S. Comm. on Homeland Security & Governmental Affairs*, 115th Cong. (2017) [hereinafter *Backpage.com Hearing*] (statement of Sen. Rob Portman, Chairman, Subcomm. on Investigations) (quoting testimony of Yiota G. Souras, Senior Vice President and General Counsel, The National Center for Missing and Exploited Children).

Institute study of eight U.S. cities found that the market for commercial sex and the trafficking of children within it had expanded as a result of the Internet's rise as a new venue to buy and sell women and children for sex.<sup>171</sup> Similarly, the Department of Justice found that there was an increase in the profitability of sex trafficking of children through the Internet, making it a more attractive venue for sex traffickers.<sup>172</sup>

Notwithstanding the undeniable growth in online advertisements and its significant role in increasing sex trafficking, courts continued to deny these aforementioned efforts to civilly sue these companies. As discussed above, courts also rejected state-level legislative approaches. In fact, in 2013, forty-nine state attorneys general wrote to Congress demanding that it amend § 230 back to its original limited protection and allow states to enforce their own criminal laws:

The involvement of these advertising companies is not incidental—these companies have constructed their business models around income gained from participants in the sex trade. But, as it has most recently been interpreted, the Communications Decency Act of 1996 (“CDA”) prevents State and local law enforcement agencies from prosecuting these companies. This must change. The undersigned Attorneys General respectfully request that the U.S. Congress amend the CDA so that it restores to State and local authorities their traditional jurisdiction to investigate and prosecute those who promote prostitution and endanger our children.<sup>173</sup>

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171. DANK, *supra* note 5, at 237–38; BOUCHÉ, TECHNOLOGY IN DMST, *supra* note 86, at 38.

172. U.S. DEP'T OF JUSTICE, THE NATIONAL STRATEGY FOR CHILD EXPLOITATION PREVENTION & INTERDICTION: A REPORT TO CONGRESS (2010). This finding was repeated in the National Strategy Report of 2016, which found that sex traffickers were emboldened by technology including online advertising. U.S. DEP'T OF JUSTICE, *supra* note 5, at 91 (“Internet-based advertising platforms facilitate the commercial sexual exploitation of minors in cities and towns throughout the country.”). Backpage's monthly revenue from advertisements in the “adult” section was estimated to be \$9 million. *Backpage.com, LLC v. Dart*, 807 F.3d 229, 236 (7th Cir. 2015).

173. Letter from Nat'l Ass'n of Attorneys Gen. to Congress to Amend § 230 of the CDA (July 23, 2013), available at <https://digitalcommons.law.scu.edu/cgi/viewcontent.cgi?article=1465&context=historical> [<https://perma.cc/94DQ-PW34>]. All fifty state attorneys general renewed that request in 2017. See Letter from Nat'l Ass'n of Attorneys Gen. to Congress, *supra* note 10.

They, like so many others, recognized Backpage as the leading platform for these advertisements. Congress did not act on these requests.

With their hands tied, members of local legislatures and law enforcement experienced growing frustration regarding their inability to address these problems and enforce state anti-trafficking laws that have been recognized by the federal government as the primary legal weapon against sex trafficking.<sup>174</sup> Unable to sue civilly or utilize state laws, Sheriff Tom Dart took efforts to pressure different aspects of the business model.

On June 29, 2015, Dart sent a letter on official stationery to the Chief Executive Officers of MasterCard and Visa asking these companies to “immediately cease and desist” allowing their credit cards to process payments regarding Backpage.<sup>175</sup> Dart claimed he embarked on this campaign to stop the human trafficking facilitated in Backpage’s “adult” section.<sup>176</sup> Backpage responded with litigation, seeking a preliminary injunction against Dart.<sup>177</sup> Although the district court denied Backpage’s motion,<sup>178</sup> the Court of Appeals for the Seventh Circuit reversed.<sup>179</sup> The Circuit Court found that Sheriff Dart, “in his public capacity,” cannot “issue and publicize dire threats against credit card companies that process payments made through Backpage’s website, including threats of prosecution . . . in an effort to throttle Backpage.”<sup>180</sup> Although Visa filed an affidavit stating it did not feel threatened by Dart’s letter, the Court noted that a letter from a government official in his official capacity that, in its view, contained legal threats, was coercive.<sup>181</sup>

While the holding of the opinion is not surprising, the full-throated support for Backpage is worthy of note. Not only did Judge Posner characterize Dart’s actions as an effort to “throttle

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174. U.S. DEP’T OF STATE, *supra* note 72, at 389.

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

176. *Id.* at 230.

177. *Id.*

178. *See* Backpage.com, LLC v. Dart, 127 F. Supp. 3d 919, 927 (N.D. Ill. 2015), *rev’d*, Backpage.com, LLC v. Dart, 807 F.3d 229 (7th Cir. 2015).

179. *Dart*, 807 F.3d at 239.

180. *Id.* at 235.

181. *Id.* at 233, 236.

Backpage.com,”<sup>182</sup> he also stated that “it is unclear that Backpage is engaged in illegal activity.”<sup>183</sup> This is a point that was disputed by forty-nine state attorneys general and seemingly rejected in *M.A.* despite that court’s interpretation of § 230 immunity as broad enough to cover illegal activity.<sup>184</sup> As will be discussed below, this seems to no longer be an open question. However, without being able to reach discovery, litigants have not been able to solidify their claims.

##### 5. *State Civil Litigation Outside the Scope of § 230*

Having been blocked on every front in their attempts to hold online advertisers accountable for advertising children and human trafficking victims for sale, victims and state attorneys general found themselves unable to proceed past motions to dismiss to even get to the discovery that would substantiate their claims. Not only had efforts to sue in federal court failed, but also efforts to pass state laws had been stopped through litigation from the online advertisers, and efforts to disrupt the business model were enjoined. Plaintiffs then turned to state law claims for allegations based on state torts and not the online advertisements.

In Washington, one case, *J.S. v. Village Voice Media Holdings, LLC*,<sup>185</sup> survived a motion to dismiss and was allowed to proceed to discovery on track for trial. The reasons for this success are many. While the holding is an important departure from the previous jurisprudence, the analysis of the concurring opinion is perhaps more significant.

Plaintiffs, all minors, were advertised and sold for sex on Backpage and alleged in their lawsuit that Backpage knowingly helped their traffickers. Baruti Hopson prostituted J.S. and was convicted of rape, assault, and prostitution.<sup>186</sup> Plaintiffs alleged numerous state law claims including “negligence, outrage, sexual exploitation of children, ratification/vicarious liability, unjust enrichment, invasion of privacy, sexual assault and bat-

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182. *Id.* at 235.

183. *Id.* at 233.

184. *M.A. v. Vill. Voice Media Holdings, LLC*, 809 F. Supp. 2d 1041, 1053 (E.D. Mo. 2011).

185. 359 P.3d 714 (Wash. 2015) (en banc).

186. *Id.* at 716 n.1.

tery, and civil conspiracy.”<sup>187</sup> Backpage moved to dismiss the case, offering its traditional argument that § 230 provided it with such broad immunity that even if the plaintiffs were alleging acts beyond publishing third-party content, it would still be immune from liability.<sup>188</sup> Plaintiffs responded that Backpage received no immunity because its actions involved not simply publishing but also developing rules that were “designed to help pimps develop advertisements that can evade the unwanted attention of law enforcement, while still conveying the illegal message.”<sup>189</sup> The case survived a motion to dismiss on the trial level and the defendant moved for discretionary review by the Washington State Supreme Court. This Court held that the plaintiffs pleaded a case that survived the motion to dismiss and affirmed the trial court’s ruling.<sup>190</sup>

Before analyzing the reasoning of the Washington Supreme Court, it is important to note that the case benefited from two distinctions from previous cases. First, the standard for a 12(b)(6) motion to dismiss in Washington is very high. As the state high court noted, “12(b)(6) motions should be granted ‘sparingly and with care’ and ‘only in the unusual case in which plaintiff includes allegations that show on the face of the complaint that there is some insuperable bar to relief.’”<sup>191</sup> Furthermore, the court noted that “[d]ismissal under CR 12(b)(6) is appropriate only if ‘it appears beyond a reasonable doubt that no facts exist that would justify recovery.’”<sup>192</sup>

In applying this standard, the majority concluded that the claims were permissible. The majority recognized that § 230(e) precluded state causes of action inconsistent with the CDA. Noting that the CDA allows litigation against content providers, the majority identified the issue as whether the allegations treated Backpage as an information content provider that was

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187. *Id.* at 716.

188. *Id.* Backpage also removed the case to federal district court, which then remanded the claims to state court. *Id.* at 716, n.2.

189. *Id.* at 716.

190. *Id.* at 715–16.

191. *Id.* at 716 (quoting *Cutler v. Phillips Petrol Co.*, 881 P.2d 216, 219 (Wash. 1994) (en banc)).

192. *Id.* (quoting *In re C.M.F.*, 314 P.3d 1109 (Wash. 2013) (en banc)).

subject to state law liability.<sup>193</sup> Recognizing *Roommates'* conclusion that a website can be both a content provider and an interactive computer service, the majority concluded that many of the claims "alleged facts that, if proved true, would show that Backpage did more than simply maintain neutral policies prohibiting or limiting certain content."<sup>194</sup> The claims included allegations that Backpage developed content that is designed to allow pimps to traffic underage girls and evade law enforcement, that its posting rules are a fraud aimed to assist evading law enforcement, and that the content requirements are designed to allow pimps to traffic in sex to Backpage's profit.<sup>195</sup> As such, the majority found these allegations were consistent with *Roommates'* standard of contributing materially to illegality of the conduct, and thus survived a motion to dismiss.

While this majority holding is important, as it was the first court to allow a state claim to reach discovery, the more insightful aspect of the opinion arguably arose from the concurrence. The majority appeared to largely accept the conventional framework of § 230 but did not blindly follow these precedents when not on point with present sex-trafficking cases. Justice McCloud, writing in dissent, accepted the conventional view that § 230 provided broad immunity for Backpage even if these allegations were of illegal activity.<sup>196</sup>

Justice Wiggins, writing in concurrence, fully supported the majority approach but wrote separately to clarify that plaintiffs' claims did not treat Backpage as a publisher or speaker and to vehemently reject Backpage and the dissent's view that § 230 provides immunity to such defendants.<sup>197</sup> The crux of his opinion states:

Subsection 230(c)(1) instead provides a narrower protection from liability: the plain language of the statute creates a defense when there is (1) a provider or user of an interactive computer service (2) whom a plaintiff seeks to treat, under a state law cause of action, as a publisher or speaker of infor-

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193. *Id.* at 717.

194. *See id.*

195. *See id.* at 718.

196. *See id.* at 724 (McCloud, J., dissenting).

197. *Id.* at 718 (Wiggins, J., concurring).

mation (3) that is provided by another information content provider.

Thus, when the cause of action does not treat an intermediary as a publisher or speaker, subsection 230(c)(1) cannot be read to protect that intermediary from liability.<sup>198</sup>

For the first time in a sex-trafficking case, a judge did not blindly accept an online advertiser's claim of unbounded immunity, even for actions that are possibly criminal or outside the role of publisher. In so doing, Justice Wiggins first turned to the plain language of the statute, observing it does not recognize any immunity—even a limited one. He noted that the protections afforded interactive computer services are twofold. First, § 230(c)(1) “precludes treating an interactive computer service provider as publisher or speaker of information provided by another provider.”<sup>199</sup> Second, § 230(c)(2) provides that such a service provider cannot be liable for good faith action to restrict access to objectionable material or any action making available the technical means to restrict such access.<sup>200</sup> Therefore, as long as a plaintiff does not treat the defendant as a publisher or a speaker, he can proceed with a cause of action.

Justice Wiggins even challenged the notion that such narrow statutory language created any form of immunity at all: “Backpage.com’s argument that section 230 ‘provides broad immunity to online service providers’ is wholly unsupported by the statute’s plain language—subsection 230(c) says nothing about ‘broad immunity.’”<sup>201</sup> In addition to invoking the plain language of § 230, Justice Wiggins also relied on the context in which it was passed. In so doing, Justice Wiggins resurrected the procedural history regarding protection of children long ignored. The concurrence went on to note:

The main purpose of subsection 230(c) is not to insulate providers from civil liability for objectionable content on their websites, but to protect providers from civil liability for limiting access to objectionable content. Ironically, the dissent

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198. *Id.* at 718–19.

199. *Id.* at 719.

200. *See id.*

201. *Id.*

would turn section 230 upside down, insulating plaintiffs from expanding access to objectionable content.<sup>202</sup>

Indeed, some of the legislative history characterizes § 230 as a provision that “allows an on-line service to defend itself in court by showing a good-faith effort to lock out adult material.”<sup>203</sup>

Turning to the efforts by Backpage in this litigation, as well as those of Craigslist and Village Voice, Justice Wiggins noted the perversity of using § 230 to justify Backpage’s actions: “[I]t would be absurd to ignore [the language about good faith in 230(c)(2)] in order to protect the actions of Backpage.com, taken in bad faith, that have nothing to do with publishing or speaking another’s content.”<sup>204</sup> Justice Wiggins stripped down the defendant’s argument and labeled it what Backpage was in fact demanding: absolute immunity. He correctly noted that the reading advocated by Backpage “would *absolutely immunize* providers who allow third parties freedom to post objectionable materials on the providers’ websites.”<sup>205</sup>

Justice Wiggins’ concurrence reveals Backpage’s claims for what they are: claims of absolute immunity from civil or state-law liability arising from a statute whose language and context do not indicate such an intent. But perhaps even more importantly, Justice Wiggins’ concurrence also chastises other courts for relying on the early § 230 cases to create *de facto* immunity.<sup>206</sup> The concurrence noted that even the Ninth Circuit Court of Appeals had “retreated” from its early language of broad immunity to finding that no “general immunity” is present in the text’s language.<sup>207</sup>

*J.S.* is the only published case to have survived a motion to dismiss and to have been upheld by an appellate court.<sup>208</sup> It

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202. *Id.* at 720.

203. 141 CONG. REC. 15,106 (1995).

204. *J.S.*, 359 P.3d at 720.

205. *Id.* (emphasis added).

206. *Id.* at 721.

207. *See id.* at 721 (citing *Barnes v. Yahoo!*, 570 F.3d 1096, 1100 (9th Cir. 2009)).

208. As of this writing, a pending case in an Alabama state circuit court has denied a motion to dismiss without issuing an opinion and Backpage is appealing. *See K.R. v. Backpage.com, LLC*, No. 38-cv-17-900041 (Ala. Cir. Ct. 2017). A U.S. District Court in Florida has denied Backpage’s motion to stay discovery



was scheduled for trial in October 2017. However, after Senate subcommittee hearings on the CDA and on the night before a House Judiciary Committee hearing on the CDA, Backpage settled the case.<sup>209</sup>

#### 6. Federal Sex Trafficking Civil Cases

Victims who had been similarly trafficked through the use of Backpage filed a federal lawsuit in the District of Massachusetts that was appealed to the Court of Appeals for the First Circuit.<sup>210</sup> Despite Congress's clear intent in 18 U.S.C. § 1595 to allow victims to sue traffickers, the plaintiffs in this lawsuit did not fare as well as those in Washington state court. Three Jane Doe plaintiffs alleged that they were trafficked and advertised on Backpage, resulting in the three being raped over 1,900 times in total. They sued, accusing Backpage of engaging in the trafficking of minors under 18 U.S.C. § 1591 and the parallel civil right of action in 18 U.S.C. § 1595. They also alleged the same claim under the Massachusetts Anti-Human Trafficking Victim Protection Act,<sup>211</sup> violations of the Massachusetts Consumer Protection Act,<sup>212</sup> and some intellectual property claims regarding their images. The district court granted Backpage's motion to dismiss.<sup>213</sup>

On appeal, the First Circuit recognized that in the twenty-first century, courts need to address not only the intent of Congress in 1996 when it passed the CDA, but also the more recent intent of Congress when it passed the TVPRA, and the allowance for a private right of action for victims.<sup>214</sup> The plaintiffs' complaint went beyond alleging that Backpage published in-

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pending its motion to dismiss on § 230 grounds. *See Fla. Abolitionist v. Backpage.com, LLC*, No. 6:17-cv-218-Orl-28TBS (M.D. Fla. Aug. 11, 2017).

209. *See Backpage.com settles suit by 3 Washington women who said they were sold for sex as teens*, SEATTLE TIMES (Oct. 3, 2017), <https://www.seattletimes.com/seattle-news/crime/backpage-com-settles-suit-by-3-washington-women-who-said-they-were-sold-for-sex-as-teens/> [<https://perma.cc/RWP2-AL5U>].

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

211. MASS. GEN. LAWS ANN. ch. 265, § 50(a) (West 2017).

212. MASS. GEN. LAWS ANN. ch. 93A, § 2(a) (West 2017).

213. *Jane Doe No. 1*, 817 F.3d at 17.

214. *See* 18 U.S.C. § 1595 (2012). The Court noted, "These laudable legislative efforts do not fit together seamlessly, and this case reflects the tension between them." *Jane Doe No. 1*, 817 F.3d at 15.

appropriate advertisements; it also alleged that Backpage engaged in a campaign to distract attention from its active role in sex trafficking. These actions included, among other things, making false statements to NCMEC and law enforcement regarding its efforts to fight sex trafficking while, in fact, deliberately creating a website that facilitates sex trafficking.<sup>215</sup> Backpage allegedly did so by establishing payment structures through digital currency, stripping photographs uploaded in advertisements of metadata to prevent law enforcement discovering its location of origin, only charging a fee to “adult entertainment” advertisements, allowing traffickers to sponsor ads in the “escort” section of the platform, and similar actions.<sup>216</sup> Despite these claims being directly tied to legal causes of action outside the role of publisher, the First Circuit found them precluded by § 230.

Citing to the very early § 230 cases, the First Circuit adopted, without analysis, the preference “for broad construction” of the CDA.<sup>217</sup> Indeed, the court characterized this liberal construction as resulting in “a capacious conception of what it means to treat a website operator as the publisher or speaker of information provided by a third party.”<sup>218</sup> With that broad interpretation of the narrowly written CDA, the First Circuit then concluded that the plaintiffs’ claims under the TVPA were, in fact, ones that treated Backpage as a publisher.<sup>219</sup>

Even if that were the case, in determining congressional intent, the First Circuit could have looked at the more recent pronouncement of congressional intent in the TVPA, which made sex trafficking a crime, prioritized prosecution, and provided victims the right to sue their traffickers and those who engage in a sex-trafficking enterprise with sex traffickers, and concluded that congressional intent was more recent and more clear with this legislation.<sup>220</sup> However, citing back to the 1997 *Zeran* case and a 2007 First Circuit case addressing a financial bulletin board, it rejected Justice Wiggins’ concurrence in *J.S.* in

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215. See *Jane Doe No. 1*, 817 F.3d at 16.

216. See *id.* at 16–17 & n.2.

217. *Id.* at 18–19.

218. *Id.* at 19.

219. See *id.* at 22.

220. See 18 U.S.C. §§ 1591, 1595 (2012).

a footnote and concluded that the alleged actions of Backpage were decisions of a publisher deciding what content to circulate and what to not.<sup>221</sup> Regarding the existence of the TVPRA claims, the First Circuit made a stunning statement of absolute immunity:

[E]ven if we assume, for argument's sake, that Backpage's conduct amounts to "participation in a [sex-trafficking] venture"—a phrase that no published opinion has yet interpreted—the TVPRA claims as pleaded premise that participation on Backpage's actions as a publisher or speaker of third-party content. The strictures of Section 230(c) foreclose such suits.<sup>222</sup>

Thus, the First Circuit expanded the concept of broad immunity from 1997 to include immunity for participating in a sex-trafficking venture. In so doing, it asserted that the basis of this immunity was a statute Congress enacted in part to protect children from exposure to explicit materials. No court has gone so far as to conclude that § 230 was designed for this form of absolute immunity—even for criminal sex trafficking. The regime of *de facto* absolute immunity was firmly entrenched through this holding.

The First Circuit did join the early *M.A.* case's chorus to amend the CDA and clarify the tension between the TVPA and the CDA. In so doing, however, the court referenced only one of the purposes of the CDA, ignoring its purpose to protect children from exposure to explicit material, by stating: "If the evils that the appellants have identified are deemed to outweigh the First Amendment values that drive the CDA, the remedy is through legislation, not through litigation."<sup>223</sup>

### 7. State Criminal Law Efforts

In the wake of these attempts to limit the sale of children online over the objection of the tech lobby, Congress passed the

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221. See *Jane Doe No. 1*, 817 F.3d at 18–19, 21 n.5 (citing *Universal Comm'n Sys., Inc. v. Lycos, Inc.* 478 F.3d 413, 422 (1st Cir. 2007); *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 330 (4th Cir. 1997); *J.S. v. Vill. Voice Media Holdings, LLC*, 359 P.3d 714 (Wash. 2015) (en banc)).

222. *Id.* at 21 (footnote omitted). It bears mentioning that "participation in a [sex trafficking] venture" is expressly criminalized by 18 U.S.C. § 1591(a)(2).

223. *Jane Doe No. 1*, 817 F.3d at 29.

SAVE Act which amended 18 U.S.C. § 1591 to include “advertising” among the actus rei that encompassed sex trafficking.<sup>224</sup> As such, advertising a minor knowing she is a minor, to engage in a commercial sex act, as well as advertising a person one knows to be the victim of sex trafficking through force, fraud, or coercion is also illegal. Thus, federal prosecutors could prosecute the pimps who place ads online as human traffickers, as well as the advertisers who know the victims are minors or adult victims of sex trafficking.<sup>225</sup> Emboldened by its successful elimination of three state laws seeking to make advertising illegal, Backpage sued the Department of Justice asserting a pre-enforcement First Amendment challenge to the Act.<sup>226</sup> Indeed, Backpage referenced those prior efforts in its filings attempting to assert standing. However, the District Court granted the government’s motion to dismiss for lack of subject matter jurisdiction because Backpage didn’t and couldn’t claim that it was engaging in a course of conduct that both affected a constitutional interest and was proscribed by the SAVE Act or gave rise to a credible threat of prosecution.<sup>227</sup> Notably, as of this writing, Backpage has not been charged under this section of the act.

Having been unable to proceed against Backpage through federal civil law, state civil laws, federal criminal laws, and the creation of state criminal law, state attorneys general struggled to find a way to combat companies like Backpage. In 2016, the California Attorney General took action not against Backpage itself, but against its owners: Carl Ferrer, Michael Lacey, and James Larkin. California arrested and criminally charged these men initially with conspiracy to pimp, pimping, and pimping of a minor for their roles in running Backpage.<sup>228</sup> California alleged that defendants created and organized a website that al-

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224. Stop Advertising Victims of Exploitation Act of 2015, Pub. L. No. 114-22, tit. I, § 118, 129 Stat. 247.

225. See *Backpage.com, LLC v. Lynch*, 216 F. Supp. 3d 96, 108 (D.D.C. 2016) (noting that “while it might be true that some Congressional members had Backpage.com in mind when enacting the SAVE Act, the statute is ‘aimed’ at individuals who knowingly advertise or benefit from advertising sex trafficking”).

226. See *id.* at 100.

227. See *id.* at 110.

228. *People v. Ferrer*, No. 16FE019224, 2016 WL 7237305 (Cal. Super. Ct. Dec. 9, 2016).

lows sex trafficking to take place “with the intent to derive support and maintenance” from the resulting prostitution, and that they derived that support from the advertisements they and others placed on EvilEmpire.com and BigCity.com.<sup>229</sup> The defendants filed a demurrer, arguing that the CDA had such breadth of immunity that it even applied to state criminal charges of pimping.

The Superior Court granted defendants’ demurrer, but its discussion of the case law on the topic and the need for Congress to amend § 230 to reflect current times is instructive. First, the court recognized that the State had “a strong and legitimate interest in combating human trafficking by all available legal means. Moreover, any rational mind would concur that the selling of minors for the purpose of sex is particularly horrifying and the government has a right and a duty to protect these most vulnerable victims.”<sup>230</sup> However, the court went on to note that this state interest can be overcome. Here, the court noted the origin of the CDA with the *Prodigy* case, and the reality that several courts had interpreted it broadly.<sup>231</sup> Tellingly, however, the court also noted, “Congress has had ample opportunity to statutorily modify the immunity provision if it disagrees with prevailing judicial application of this provision. Congress has not done so, and the current legal framework binds this Court.”<sup>232</sup>

Having expressed this reservation regarding the case law and congressional inaction, the court examined the People’s arguments that the CDA did not protect the defendants when they knowingly committed those crimes. The prosecution focused on its allegation that the defendants were collecting information put onto Backpage by third parties, and repackaging it to create a kind of dating site on BigCity.com as well as a phone directory on EvilEmpire.com.<sup>233</sup> The prosecution analogized this to *People v. Bollaert*,<sup>234</sup> in which the defendant was

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229. *Id.* at \*2.

230. *Id.* at \*1.

231. *Id.*

232. *Id.*

233. *Id.* at \*4–5.

234. 203 Cal. Rptr. 3d 814 (Cal. Ct. App. 2016).

convicted for creating a revenge pornography site where he encouraged people to post illegal information about others.<sup>235</sup>

However, the court rejected this analogy, noting that *Bollaert* required the third parties to post illegal information that violated another's privacy, but the defendants did not require such unlawful information.<sup>236</sup> The court characterized this as simply reposting third-party information which was traditionally a publishing function protected by the CDA.<sup>237</sup>

Regarding the pimping charges, the court noted that the immunity of the CDA "has been extended by the courts to apply to functions traditionally associated with publishing decisions, such as accepting payment for services and editing."<sup>238</sup> As such, the court found that the CDA as currently interpreted, protected the alleged action—as these charges were seeking to treat the defendants as publishers. It joined the First Circuit and the Middle District of Tennessee in asking Congress to clarify this conflict between the legitimate state interest to end sexual exploitation and congressional "foreclosure of prosecution" by stating, "Congress has spoken on this matter and it is for Congress, not this Court, to revisit."<sup>239</sup>

Not to be deterred, however, the State of California again sought criminal charges against these same defendants, this time alleging money laundering as well as pimping.<sup>240</sup> Now, having twice had criminal allegations deemed to be protected by the CDA, the defendants argued that their immunity was "clear" and the charges were now in the category of "bad faith."<sup>241</sup> After rejecting the defendants' arguments to reassign the case to the previous judge who dismissed the original conduct, the court addressed defendants' claim that the First Amendment barred all charges. The court rejected this claim as to the money laundering charges, but accepted it as to the pimping charges, for many of the same reasons as the court

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235. *Ferrer*, 2016 WL 7237305, at \*5.

236. *Id.* at \*5–6.

237. *Id.* at \*7.

238. *Id.* at \*10.

239. *Id.* at \*11.

240. *People v. Ferrer*, No. 16FE024013, slip op. at 2 (Cal. Super. Ct. Aug. 23, 2017).

241. *Id.* at 3.

had done previously.<sup>242</sup> However, the court also relied heavily on the *Jane Doe* holding from the First Circuit to afford broad immunity to the alleged criminal activity of the defendants.<sup>243</sup>

### B. *Analysis of Case Law*

Over the two decades since the passage of the CDA and eighteen years since the passage of the first TVPA, three questions emerge. First, how did the jurisprudence arrive at a position so diametrically opposed to the intent of these two pieces of legislation? Second, why has Congress failed to act to correct this problem? Third, what brought about and what is the significance of recent congressional activity?

#### 1. *Evolution of the Law*

The arc of this jurisprudence is of concern. A common denominator through these years has been the strength of the tech industry in influencing congressional action and inaction.

In 1996, Congress was primarily concerned with the potential exposure of children to explicit material.<sup>244</sup> This concern was prophetic, as the Internet has proven to be a bastion of pornography and its easy access to children is of real concern. Researcher Michael Seto has described the early and pervasive exposure to Internet pornography among children and youth as “the largest unregulated social experiment of all time,”<sup>245</sup> and the effect this material is having on the juvenile brain is profound.<sup>246</sup> Resistance from the tech industry to any sort of limit on such material was strong.<sup>247</sup> Additionally, Congress intended to permit the Internet to develop with little regulation, in order for it to become a place of free speech. Consequently, Congress created the CDA, but also added to it § 230 to speak to these latter concerns. Specifically, in response to

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242. *See id.* at 11.

243. *Id.* at 14–15, 18.

244. *Supra* note 20.

245. MARY AIKEN, *THE CYBER EFFECT* 16–17 (2016) (quoting Michael Seto).

246. *See generally* NORMAN DOIDGE, *THE BRAIN THAT CHANGES ITSELF: STORIES OF PERSONAL TRIUMPH FROM THE FRONTIERS OF BRAIN SCIENCE* (2007).

247. Parker Higgins, *The Web's First Blackout Protest: The CDA, 20 Years Later*, ELECTRONIC FRONTIER FOUND. (Feb. 23, 2016), <https://www.eff.org/deeplinks/2016/02/webs-first-blackout-protest-cda-20-years-later> [<https://perma.cc/EN7A-QMN7>].

*Prodigy*, Congress sought to protect companies that were good Samaritans from being held liable for trying to limit access to explicit material.

Today the case law, with some exceptions, is anything but reflective of that purpose. Instead, a body of law has developed thwarting congressional intent. Not only are courts espousing “broad immunity” provided by the CDA, but they are even holding that websites that engage in criminal activity are immune from liability. They have done so notwithstanding that immunity is nowhere to be found in the plain language of § 230, and that absolute immunity was never the intent.<sup>248</sup>

Identifiable forces seem to be at play in this development. One is the finding of the early cases such as *Zeran* that the CDA provides “broad immunity” with scarcely a reference to the intent of Congress to limit access to explicit materials. Indeed, this is not surprising given that *Zeran* and many of the earlier cases were defamations cases—a chief concern of service providers. As such, it in some way makes sense that their reference to the other purposes of § 230 is limited.

However, two trends have occurred since those early cases. First, Congress declared sex trafficking a crime in 2000<sup>249</sup> and created a private right of action as an essential enforcement tool in 2003.<sup>250</sup> Congress went on to emphasize the importance of both the private right of civil suit for survivors of trafficking as well as the essential role state and local entities play in combatting what Congress has labeled “modern slavery.”<sup>251</sup>

Secondly, sex trafficking has exploded in large part due to the Internet.<sup>252</sup> Once it became apparent that these websites offered a place where traffickers could actually advertise victims

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248. See Citron & Wittes, *supra* note 36, at 408. See generally Fair Hous. Council of San Fernando Valley v. Roommates.com, 521 F.3d 1157 (9th Cir. 2008).

249. Trafficking Victims Protection Act of 2000, Pub. L. No. 106-386, 114 Stat. 1466, 1487–88 (codified as amended in scattered sections of 8 and 22 U.S.C.).

250. Trafficking Victims Protection Reauthorization Act of 2003, Pub. L. No. 108-193, § 4(a)(4)(A), 117 Stat. 2875, 2878 (codified at 18 U.S.C. § 1595).

251. See *supra* note 8.

252. Phone calls to the National Human Trafficking Hotline have increased steadily since its inception. See *Hotline Statistics*, NAT’L HUMAN TRAFFICKING HOTLINE (June 30, 2017), <https://humantraffickinghotline.org/states> [<https://perma.cc/45F4-786N>].



for sale with impunity, the problem only grew.<sup>253</sup> While Craigslist and Backpage were and are the largest online sites, others, some even more egregious, have emerged.<sup>254</sup> Additionally, related online websites have developed where purchasers rate their victims in the most egregious of terms—a veritable Yelp system to rate prostituted persons—many of whom are victims of trafficking.<sup>255</sup>

As a result, courts have struggled to reconcile these two manifestations of congressional intent. Yet when they turn to precedent for guidance, they are met with a series of pre-sex trafficking cases asserting a “broad immunity.” They are guided to this by litigants that argue for unprecedented immunity—immunity that would not be present if they were brick-and-mortar companies engaged in the exact same behaviors. Yet amici, many of whom are significantly funded by technological companies, also argue that this de facto absolute immunity applies to otherwise-criminal conduct.<sup>256</sup> This is notwithstanding the fact that:

The [CDA] was not meant to create a lawless no-man’s-land on the Internet. The CDA instead prevents website hosts from being liable when they elect to block and screen offensive material, and it encourages the development of the In-

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253. BOUCHÉ, TECHNOLOGY IN DMST, *supra* note 86, at 38.

254. *Id.*; see also Daniel Fisher, *Backpage Takes Heat, But Prostitution Ads Are Everywhere*, FORBES (Jan. 26, 2012), <https://www.forbes.com/sites/danielfisher/2012/01/26/backpages-takes-heat-for-prostitution-ads-that-are-everywhere/#60bb9223095f> [<https://perma.cc/RHE5-EMFM>]; *Human Trafficking Online: Cases and Patterns*, U. S. CAL. TECH. & HUMAN TRAFFICKING PROJECT (2011), [https://technologyandtrafficking.usc.edu/report/human-trafficking-online-cases-patterns/#\\_ftn49](https://technologyandtrafficking.usc.edu/report/human-trafficking-online-cases-patterns/#_ftn49) [<https://perma.cc/SE9Y-733D>]; Marissa Louie, *Craigslist Saga: The Great Migration of Sex Trafficking Ads*, HUFFINGTON POST (Jan. 13, 2011), [https://www.huffingtonpost.com/marissa-louie/craigslist-saga-the-great\\_b\\_808314.html](https://www.huffingtonpost.com/marissa-louie/craigslist-saga-the-great_b_808314.html) [<https://perma.cc/CA3S-GA9J>] (noting the top ten advertisement sites include Eros.com and TheEroticReview.com).

255. *E.g.*, Sasha Aslanian, *Battle against sex trafficking turns to prostitution review sites*, MARKETPLACE (Sept. 16, 2016), <https://www.marketplace.org/2016/09/16/world/battle-against-sex-trafficking-turns-prostitution-review-sites> [<https://perma.cc/MM2F-L28U>].

256. See Brief for Electronic Frontier Foundation & Center for Democracy and Technology as Amici Curiae Supporting Appellants at 8–10, *J.S. v. Vill. Voice Media Holdings, LLC*, 359 P.3d 714 (Wash. 2015) (en banc) (No. 90510-0), 2014 WL 4808971 at \*7–9; see also CONSUMER WATCHDOG, *HOW GOOGLE’S BACKING OF BACKPAGE PROTECTS CHILD SEX TRAFFICKING* 21–25, 27, 32 (2017), <http://www.consumerwatchdog.org/resources/backpagereport.pdf> [<https://perma.cc/VXF3-4H4Y>].

ternet by not permitting courses of action, such as defamation, that would treat the web host as the publisher or speaker of objectionable material. Neither of these directives requires us to blindly accept the early premise of “broad immunity.”<sup>257</sup>

The judicial inability to keep § 230 tied to its original intent has added to confusion.

## 2. *Curious Record of Congressional Action and Inaction*

Given the growth of sex trafficking fueled by online advertising, the lack of congressional action is remarkable. This Article opened with a discussion of justice and injustice. It is here that comparison between congressional action in 1996 and 2017 is necessary.

In 1996 Congress sought to regulate aspects of the Internet related to explicit material, pornography, and children.<sup>258</sup> In response to the opposition to the CDA by service providers and one arguably wrongly decided case, *Prodigy*, Congress included § 230 in the CDA. Congress made an effort to address a nascent Internet and a concern about explicit material. Congress, in 1996, responded to one bad case and the perceived need of corporate interests to enact § 230.

Until late 2017, Congress was unresponsive to several poorly decided cases and the actual needs of sex-trafficking survivors, yet it continued to be responsive to the corporate interests of the tech industry. By 2017, every other institution in society has called for an amendment to the CDA, including victims and survivors,<sup>259</sup> survivor victims’ organizations,<sup>260</sup> law enforcement,<sup>261</sup> all fifty state attorneys general,<sup>262</sup> and several courts. California courts have expressed reservation in dismissing criminal charges, and noted that Congress must act to clarify

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257. *J.S. v. Vill. Voice Media Holdings, LLC*, 359 P.3d 714, 724 (Wash. 2015) (en banc) (Wiggins, J., concurring) (citation omitted).

258. See 141 CONG. REC. 3203 (1995) (statement by Sen. James Exon, referencing Sandy Rovner, *Molesting Children by Computer*, WASH. POST., Aug. 2, 1994, at Z15).

259. *Supra* note 9.

260. *Id.*

261. See *Groups in Support of Amending the Communications Decency Act*, NAT’L CTR. ON SEXUAL EXPLOITATION, <http://endsexualexploitation.org/cda/> [https://perma.cc/R8DA-VG76] (last visited Feb. 23, 2018).

262. Letter from Nat’l Ass’n of Attorneys Gen. to Congress, *supra* note 10.

the status of the law because it is functioning as a protection to human traffickers: “If and until Congress sees fit to amend the immunity law, the broad reach of § 230 of the Communications Decency Act even applies to those alleged to support the exploitation of others by human trafficking.”<sup>263</sup> As far back as 2009, a U.S. district court sounded the alarm when dismissing an early sex-trafficking case, finding that “Congress has declared such websites to be immune from suits arising from such injuries. It is for Congress to change the policy that gave rise to such immunity.”<sup>264</sup> The First Circuit directed survivors to pursue legislative change after expanding CDA protection to criminal activity.<sup>265</sup>

It is remarkable that the 1996 Congress, with little information on what the Internet would become, was willing to respond to the objections of one group and the decision of one court. Yet, when faced with a mountain of information—much of which is from the government itself—about the harm of these advertising sites, no congressional action occurred. In 2008, Congress enacted legislation demanding an annual report to Congress on efforts to combat child sexual exploitation. A “key finding” of the 2016 National Strategy was that “[w]ebsites like Backpage.com have emerged as a primary vehicle for the advertisement of children to engage in prostitution.”<sup>266</sup> Yet, Congress has not amended the CDA to hold such websites accountable.

The numerous cases that have seemed to thwart the TVPA’s intent also did not spark Congress to set § 230 right. Instead,

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263. *People v. Ferrer*, No. 16FE024013, slip op. at 18 (Cal. Super. Ct. Aug. 23, 2017); *see also* *People v. Ferrer*, No. 16FE019224, 2016 WL 7237305, at \*11 (Cal. Super. Ct. Dec. 9, 2016). (“Congress has spoken on this matter and it is for Congress, not this Court to revisit.”).

264. *M.A. v. Vill. Voice Media Holdings, LLC*, 809 F. Supp. 2d 1041, 1058 (E.D. Mo. 2011).

265. *See* *Jane Doe No. 1 v. Backpage.com, LLC*, 817 F.3d 12, 29 (1st Cir. 2016) (“The appellants’ core argument is that Backpage has tailored its website to make trafficking easier. . . . [A]ppellants have made a persuasive case for that proposition. But Congress did not sound an uncertain trumpet when it enacted the CDA, and it chose to grant broad protections to internet publishers. . . . If the evils that the appellants have identified are deemed to outweigh the First Amendment values that drive the CDA, the remedy is through legislation, not through litigation.”).

266. U.S. DEP’T OF JUSTICE, *supra* note 5, at 76.

Congress allowed the regime of de facto absolute immunity to thrive, causing courts to assert that § 230 even protects companies from allegations of criminal activity. This has continued even as courts ask Congress to clarify the state of the law. Observers have offered many explanations for why § 230 has not been amended. One is the power of the tech industry.<sup>267</sup> The tech industry's resistance to amendment of § 230 is not surprising because it offers them a competitive advantage against brick-and-mortar competitors, as well as immunity for all their activities. Indeed, at the time of pending legislation, not only had the industry actively opposed the legislation, it was seeking similar immunity to be added into the NAFTA renegotiations.<sup>268</sup>

#### IV. FUTURE

##### A. *Recent Legislative Actions*

Starting in 2016, some movement in Congress occurred to address this narrow issue of de facto immunity for service providers that partnered with sex traffickers. This was due to a number of factors, the most pressing of which included revelations regarding the activities of one of the major online advertising sites, Backpage.

It is important to remember that when these entities successfully win a Rule 12(b)(6) motion, the case is dismissed prior to discovery. As a result, these defendants can successfully shield their illegal activity from scrutiny. Backpage's litigation and lobbying strategy included both denying the accusations and asserting that it was, in fact, helping to stop sex trafficking.<sup>269</sup> The plaintiffs and state attorneys general were caught in an impossible situation: they could gather some information to form the basis of their allegations, but to truly obtain the doc-

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267. E.g., Hany Farid, *Technology sector should not be shielding sex traffickers online*, HILL (Sept. 19, 2017), <http://thehill.com/opinion/technology/351315-technology-sector-should-not-be-shielding-sex-traffickers-online> [<https://perma.cc/8FA7-L2DR>].

268. Peter Mackay, *New NAFTA must not provide immunity for sex traffickers*, TORONTO STAR (Nov. 2, 2017), <https://www.thestar.com/opinion/commentary/2017/11/02/new-nafta-must-not-provide-immunity-for-sex-traffickers-mackay> [<https://perma.cc/CC57-ULBA>].

269. *Backpage.com Hearing*, *supra* note 170, at 1.

umentation of internal corporate workings needed to prove their arguments at trial, they needed to obtain discovery. Yet they were precluded from doing so, due to Backpage's successful efforts to have cases dismissed before discovery.

As early as 2011, Backpage's outsized role in sex trafficking had started to raise concerns. Forty-five state attorneys general authored a letter outlining several cases involving Backpage, labeling it a "hub" of sex trafficking and requesting documents regarding its business practices.<sup>270</sup> In April 2015, the Senate Permanent Subcommittee on Investigations began an investigation into Internet sex trafficking.<sup>271</sup> As part of that investigation, the Subcommittee sought records and testimony from Backpage and its officers. Backpage refused to comply. Over several months, Backpage's non-compliance continued, culminating in Backpage's CEO, Carl Ferrer, failing to appear before Congress under order of a subpoena.<sup>272</sup> As a result, for only the fifth time in forty years, the United States Senate unanimously adopted a resolution directing Senate Legal Counsel to bring an action under 28 U.S.C. § 1365 in federal court to enforce its subpoena.<sup>273</sup>

Carl Ferrer and Backpage objected, asserting numerous First Amendment arguments in opposition to the subpoenas. The District Court for the District of Columbia rejected all of them. The court noted that Backpage had successfully invoked § 230 to avoid liability and that congressional interest in sex trafficking and in Backpage's procedures is legitimate.<sup>274</sup> In so doing, the court made several important statements about the breadth of Ferrer's First Amendment claims:

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270. Letter from the Nat'l Ass'n of Att'ys Gen. to Samuel Fifer, Esq., Counsel for Backpage.com LLC (Aug. 31, 2011), available at [http://www.ct.gov/ag/lib/ag/press\\_releases/2011/083111backpageletter.pdf](http://www.ct.gov/ag/lib/ag/press_releases/2011/083111backpageletter.pdf) [<https://perma.cc/NRX9-CF7J>].

271. See *Senate Permanent Subcomm. v. Ferrer*, 199 F. Supp. 3d 125 (D.D.C. 2016), vacated as moot, 856 F.3d 1080 (D.C. Cir. 2017).

272. *Backpage.com Hearing*, supra note 168, at 12. For a comprehensive discussion of the machinations of negotiation, response, and non-compliance between the Subcommittee and Backpage.com, see *id.* at 10–16; *Senate Permanent Subcomm.*, 199 F. Supp. 3d at 128–33.

273. See *Backpage.com Hearing*, supra note 170, at 12; 162 CONG. REC. S1561 (daily ed. Mar. 17, 2016) (statement of Sen. Cornyn).

274. *Senate Permanent Subcomm.*, 199 F. Supp. 3d at 136 n.4.

The First Amendment does not give Mr. Ferrer an “unlimited license to talk” or to publish any content he chooses. The Supreme Court has consistently rejected [this view] throughout its history . . . .

. . . .

. . . [T]he Constitution also tells us that Mr. Ferrer cannot use the First Amendment as an omnipotent and unbreakable shield to prevent Congress from properly exercising its constitutional authority.<sup>275</sup>

After more extensive document review as the case went through the appellate courts, the Senate Subcommittee on Investigations finally issued its report.

The report’s title, “Backpage.com’s Knowing Facilitation of Online Sex Trafficking,”<sup>276</sup> indicates its conclusion. The report finds that for years, Backpage had falsely and publicly denied that it was involved in any work with sex traffickers and had held itself out as a leader in protecting people from abuse.<sup>277</sup> Indeed, this denial was in the face of allegations from Thomas Dart, J.S., Jane Doe, and M.A. The Senate Subcommittee found that “internal company documents obtained by the Subcommittee conclusively show that Backpage’s public defense is a fiction.”<sup>278</sup> The Report goes on to make three main findings. First, Backpage knowingly concealed evidence of criminality by editing its advertisements and deleting some words to avoid law enforcement detection. Nevertheless, it still published the advertisement even though this filter “changed nothing about the true nature of the advertised transaction or real age of the person being sold for sex.”<sup>279</sup> Second, Backpage knowingly facilitated child sex trafficking.<sup>280</sup> Finally, Backpage misleadingly claimed that it was sold to a foreign entity when, in fact,

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275. *Id.* at 139. The opinion went on to quote *Flytenow, Inc. v. FAA*, 808 F.3d 882, 894 (D.C. Cir. 2015) (“[T]he advertising of illegal activity has never been protected speech.”) and *Conant v. McCaffrey*, 172 F.R.D. 681, 698 (N.D. Cal. 1997) (“The First Amendment does not protect speech that is itself criminal because it is too intertwined with illegal activity.”). *See id.* at 140.

276. *Backpage.com Hearing*, *supra* note 170.

277. *See id.* at 1.

278. *See id.*

279. *Id.* at 2; *see also id.* at 17–36.

280. *See id.* at 3, 36–42.

through a series of shell corporations, Carl Ferrer, Michael Lacey, and James Larkin had remained its owners. These individuals structured the transactions to hide the fact that they retained ownership.<sup>281</sup>

Despite the scathing nature of this report, Congress took no immediate action to amend the CDA. This was the case, even though a major reason this information did not come to light was Backpage's ability to use § 230 to prevent civil cases from reaching the discovery phase, and to enjoin state criminal laws aimed at such actions. In July 2017, however, a *Washington Post* investigation uncovered further evidence of Backpage partnering with a contractor in the Philippines to create content and facilitate prostitution, from which Backpage profits. The *Post* noted, "For years, Backpage executives have adamantly denied claims made by members of Congress, state attorneys general, law enforcement and sex-abuse victims that the site has facilitated prostitution and child sex trafficking."<sup>282</sup>

Then, in August of 2017, Senators Rob Portman and Richard Blumenthal introduced the Stop Enabling Sex Trafficking Act (SESTA) in the Senate.<sup>283</sup> Earlier that year, Representative Ann Wagner introduced the Allow States and Victims to Fight Online Sex Trafficking Act (FOSTA) in the House of Representatives.<sup>284</sup> Both bills sought to address the actual problem raised by the courts: § 230 immunity.

These bills were originally met with staunch opposition. Google called SESTA "a disaster"<sup>285</sup> and "a mistake of historic proportions,"<sup>286</sup> and dispatched its top lobbyist, former Con-

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281. *See id.* at 3, 42–48.

282. 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](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) [<https://perma.cc/E6ES-LBT8>].

283. S. 1693, 115th Cong. (2017).

284. H.R. 1865, 115th Cong. (2017).

285. Tom Jackman, *Internet companies drop opposition to bill targeting online sex trafficking*, WASH. POST (Nov. 7, 2017), <https://www.washingtonpost.com/news/true-crime/wp/2017/11/07/internet-companies-drop-opposition-to-bill-targeting-online-sex-trafficking/> [<https://perma.cc/5PRB-YUU4>].

286. Tom Jackman, *Tech companies push back as Congress tries to fight online sex trafficking*, WASH. POST (Sept. 18, 2017), <https://www.washingtonpost.com/news/>

gresswoman Susan Molinari, to lead the charge against the legislation.<sup>287</sup>

In the fall of 2017, however, tech companies such as Google, Facebook, and Twitter faced pressure from another front. It was revealed that their sites were used by the Russian government to spread disinformation and possibly affect the 2016 Presidential election.<sup>288</sup> This revelation, combined with a discussion of the role of social media in inspiring white supremacy and violence, caused some to question the passivity with which tech companies approached third-party content.<sup>289</sup> After the revelation of Russia's use of social media to influence the election, the Senate Judiciary Subcommittee on Crime and Terrorism held a hearing regarding this passivity. At the hearing, senators raised numerous questions about the need for government regulation because of those companies' failure to act.<sup>290</sup>

During this hearing, representatives from Google, Facebook, and Twitter repeatedly testified about the work they were doing to self-regulate, despite a growth in sex trafficking and dis-

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true-crime/wp/2017/09/18/tech-companies-push-back-as-congress-tries-to-fight-online-sex-trafficking/?utm\_term=.f6641d4c574c [https://perma.cc/WHQ3-2CPT].

287. See *id.*; see also Nicholas Kristof, *Google and Sex Traffickers Like Backpage.com*, N.Y. TIMES (Sept. 7, 2017), <https://www.nytimes.com/2017/09/07/opinion/google-backpagecom-sex-traffickers.html> [https://nyti.ms/2xRg2Cs].

288. See Nancy Scola & Ashley Gold, *Facebook, Twitter: Russian actors sought to undermine Trump after election*, POLITICO (Oct. 31, 2017), <https://www.politico.com/story/2017/10/31/facebook-twitter-post-election-russian-meddling-sought-to-undermine-trump-244380> [https://perma.cc/3WLA-WHBS].

289. Noah Kulwin, *Twitter is still trying and failing to solve its white supremacy problem*, VICE NEWS (Nov. 16, 2017), [https://news.vice.com/en\\_us/article/gydda7/twitter-is-still-trying-and-failing-to-solve-its-white-supremacy-problem](https://news.vice.com/en_us/article/gydda7/twitter-is-still-trying-and-failing-to-solve-its-white-supremacy-problem) [https://perma.cc/273L-T9W3].

290. See *Extremist Content and Russian Disinformation Online: Working with Tech to Find Solutions: Hearing Before Subcomm. on Crime and Terrorism of the S. Comm. on the Judiciary*, 115th Cong. (2017) [hereinafter *Extremist Content Hearings*] (statements of Sen. Klobuchar, Member, S. Comm. on the Judiciary, on pending legislation and need for an "outside enforcer" and Sen. Graham, Member, S. Comm. on the Judiciary, contrasting regulation in broadcast media and the lack of regulation in social media), <https://www.judiciary.senate.gov/meetings/extremist-content-and-russian-disinformation-online-working-with-tech-to-find-solutions> [https://perma.cc/3TPZ-GAHY].



information.<sup>291</sup> They made similar claims to the Senate Select Committee on Intelligence the following day.<sup>292</sup> Some senators expressed frustration and skepticism.<sup>293</sup> At least one senator, John Cornyn, expressly connected tech companies' inaction with their opposition to the legislation to amend the CDA.<sup>294</sup>

After two days of this testimony, the Internet Association reversed a months-long campaign and announced its support for an amended SESTA with newly drafted changes in its favor.<sup>295</sup> The Internet Association is the trade association representing global Internet companies, though it is unclear how many of their members actually support the legislation or even if the Internet Association itself actually does.<sup>296</sup>

This tactical move should not have been surprising. Considering the scrutiny facing tech and its ability to lobby for even more concessions in this narrower version of SESTA, supporting SESTA was a small price to pay to be able to point to an

291. *See id.* (statements of Richard Salgado, Director of Law Enforcement and Information Security at Google, and Colin Stretch, Facebook Senior VP & General Counsel).

292. *See generally Social Media Influence in the 2016 Elections: Hearing Before S. Select Comm. on Intelligence*, 115th Cong. (2017), <https://www.intelligence.senate.gov/hearings/open-hearing-social-media-influence-2016-us-elections> [<https://perma.cc/A8DJ-VQHA>].

293. *See id.*

294. *See id.* (statements of Sen. Cornyn, Member, S. Select Comm. on Intelligence).

295. *Statement in Support of the Bipartisan Compromise to the Stop Enabling Sex Trafficking Act*, INTERNET ASS'N (Nov. 3, 2017), <https://internetassociation.org/statement-in-support-of-the-bipartisan-compromise-to-stop-enabling-sex-trafficking-act-sesta/> [<https://perma.cc/VE9H-SQYN>]. The Association's members, who are also members of NetChoice, include Facebook, Google, AOL, Airbnb, eBay, Expedia, and Lyft. *Compare Our Members*, INTERNET ASS'N, <https://internetassociation.org/our-members/> [<https://perma.cc/Z788-SZ86>] (last visited Nov. 21, 2017), *with Members Include*, NETCHOICE, <https://netchoice.org/> [<https://perma.cc/5U73-HU37>] (last visited Nov. 21, 2017). Additionally, 21st Century Fox, a NetChoice member, separately supported SESTA. *See Letter from Chip Smith to Sen. Rob Portman and Sen. Richard Blumenthal*, available at <https://www.scribd.com/document/358823893/091317-FOX-Section230> [<https://perma.cc/LTV8-BXHR>] (last visited Nov. 21, 2017).

296. The Internet Association claims to support SESTA. However, as discussed *infra*, the Association supported a substitute House FOSTA bill, which thwarted SESTA's objectives. *See Support for the "Allow States and Victims to Fight Online Sex Trafficking Act," U.S. HOUSE OF REPRESENTATIVES, JUDICIARY COMM.*, <https://judiciary.house.gov/allow-states-victims-fight-online-sex-trafficking-act-supporters/> [<https://perma.cc/8TPU-ATZB>] (last visited Feb. 24, 2018).

action for the common good. Notably, however, Google and Facebook did not vigorously support SESTA, and groups tied to Google and Facebook continued to oppose it.<sup>297</sup>

The Internet Association's one statement in public support of SESTA, however, was belied by tech's actions in the House regarding FOSTA.<sup>298</sup> Initially, of the two bills, FOSTA was the more forceful, holding companies responsible for recklessly disregarding sex trafficking on their platforms. Therefore, it was unsurprising that the Internet Association claimed support for SESTA and not FOSTA after congressional scrutiny. However, some observers have speculated that this was a ruse, particularly because once SESTA gained traction in the Senate, tech moved its efforts to stop any amendment to the CDA to the House of Representatives.<sup>299</sup>

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297. See CONSUMER WATCHDOG, *supra* note 256, at 21–25, 27, 32–33; *Congress Shouldn't Rush SESTA, Amendments to Section 230*, TECH FREEDOM (Sept. 11, 2017), <http://techfreedom.org/congress-shouldnt-rush-sesta-amendments-section-230/> [<https://perma.cc/2GLH-UWH2>]; Elliot Harmon, *Internet Association Endorses Internet Censorship Bill*, ELEC. FRONTIER FOUND. (Nov. 3, 2017), <https://www.eff.org/deeplinks/2017/11/internet-association-endorses-internet-censorship-bill> [<https://perma.cc/LG5G-74XF>]; see also Cecilia Kang, *Internet Giants Face New Political Resistance in Washington*, N.Y. TIMES (Sept. 20, 2017), <https://www.nytimes.com/2017/09/20/technology/internet-giants-face-new-political-resistance-in-washington.html> [<https://nyti.ms/2jLmKqG>].

298. The evidence that the tech industry has effectively controlled Congress through its massive lobbying power continues to mount. See, e.g., Farhad Manjoo, *Can Washington Stop Big Tech Companies? Don't Bet on It*, N.Y. TIMES (Oct. 25, 2017), <https://www.nytimes.com/2017/10/25/technology/regulating-tech-companies.html> [<https://perma.cc/Y5Y7-2Q7A>]; David Pridham, *How Google Tries to Buy Government*, FORBES (July 19, 2017), <https://www.forbes.com/sites/davidpridham/2017/07/19/how-google-tries-to-buy-government/> [<https://perma.cc/RW2R-AU6D>]; Olivia Solon & Sabrina Siddiqui, *Forget Wall Street — Silicon Valley is the New Political Power in Washington*, GUARDIAN (Sept. 5, 2017), <https://www.theguardian.com/technology/2017/sep/03/silicon-valley-politics-lobbying-washington> [<https://perma.cc/9DRM-C9H9>] (noting that Google, Facebook, Microsoft, Apple, and Amazon spent \$49 million in lobbying in 2016).

299. See Nitasha Tiku, *Are Tech Companies Trying to Derail the Sex Trafficking Bill?*, WIRED (Dec. 12, 2017), <https://www.wired.com/story/are-tech-companies-trying-to-derail-sex-trafficking-bill/> [<https://perma.cc/S734-NXSK>]. Indeed, following these events, not only did a new tech-written bill emerge from the House, Craigslist “hired prominent Washington D.C. law firm Sidley Austin to advocate on Capitol Hill against [SESTA].” Jon Gingerich, *Craigslist Calls on Lobbying Support to Fight Sex Trafficking Bill*, O'DWYERS (Dec. 18, 2017), <http://www.odwyerpr.com/story/public/9917/2017-12-18/craigslist-calls-lobbying-support-fight-sex-trafficking-bill.html> [<https://perma.cc/WK5K-E2JD>].

Tech companies opposed both SESTA and FOSTA when they were introduced, treating the bills as equally harmful to their business and unnecessary. In its original form, however, FOSTA was the more aggressive of the two as it included language regarding child pornography and proposed a lower *mens rea* standard of recklessness.<sup>300</sup> This bill also directly amended § 230 to deny immunity from state and federal private rights of action as well as state sex-trafficking and child pornography criminal laws.<sup>301</sup> However, FOSTA changed significantly after SESTA gained momentum.

Within one week of the Internet Association publicly supporting the bill, the Senate Commerce Committee voted the SESTA substitute out of Committee. This event was unprecedented. For years victim and survivor groups had been unable to motivate Congress to clarify § 230. Now, for the first time, the Senate was questioning big tech's blanket immunity. While it at first appeared that tech organizations had bowed to pressure, it seems that they just moved the battleground to the House of Representatives. The day after SESTA passed the Senate Committee, Senator Ron Wyden, one of the original authors of § 230, put a hold on the bill, despite numerous survivors urging him not to do so.<sup>302</sup> In November, over thirty anti-trafficking organizations and advocates wrote a joint letter to members of the House objecting to efforts to propose a new FOSTA bill.<sup>303</sup> Within weeks, the House Judiciary Committee proposed a new version of FOSTA over victims' and survivors' objections, and the new Goodlatte FOSTA substitute version was met with uproar from the victim community. This version no longer included a private right of action on the federal or the state level.<sup>304</sup> Instead it was unresponsive to § 230 problems and created a new federal offense regarding prostitution.<sup>305</sup>

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300. See H.R. 1865, 115th Cong. § 4 (as introduced in House, Apr. 3, 2017).

301. See H.R. 1865 §§ 3–4 (as introduced in House, Apr. 3, 2017).

302. See *World Without Exploitation*, MEDIUM (Nov. 28, 2017), <https://medium.com/world-without-exploitation/senator-wyden-survivors-urge-you-to-support-sesta-b6735afe47c7> [<https://perma.cc/B58B-FFAQ>].

303. See Tiku, *supra* note 299.

304. See H.R. 1865, 115th Cong. (as reported to House, Feb. 20, 2018).

305. See *id.* § 3.

The language of this new version can be traced back to an October 2017 House Judiciary Subcommittee on Crime, Terrorism, Homeland Security, and Investigations. The subcommittee held a hearing on FOSTA in which tech trade associations proposed this approach. At that hearing, one of the original authors of § 230, Chris Cox, testified as a witness.<sup>306</sup> It is no surprise that as a representative from southern California, he worked with lawyers from Prodigy and AOL to create § 230 immunity. At the hearing on amending the CDA, Cox testified not in his capacity as a former congressman, but as a paid representative for NetChoice,<sup>307</sup> a trade group of tech companies partially funded by Google.

Cox acknowledged that “Section 230 was never intended to provide legal protection to websites that promote sex trafficking,”<sup>308</sup> that “in enacting Section 230, it was not [Congress’s] intent to create immunity for *criminal and tortious* activity on the internet,”<sup>309</sup> and that Congress intended a federal policy “that is entirely consistent with robust enforcement of *state criminal and civil law*.”<sup>310</sup> This would seem to suggest that there was a willingness to amend § 230 to clarify those powers. However, the Cox-NetChoice proposal went out of its way to propose everything but amending § 230. Rather, the Cox-NetChoice proposal was to have Congress reaffirm that § 230 does not provide immunity for content creators.<sup>311</sup> This was not

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306. *Online Sex Trafficking and the Communications Decency Act: Hearing Before the Subcomm. on Crime, Terrorism, Homeland Security, and Investigations of the H. Comm. of the Judiciary*, 115th Cong. (2017) ) [hereinafter *Online Sex Trafficking Hearing*] (statement of Chris Cox, Outside Counsel, NetChoice), <https://judiciary.house.gov/wp-content/uploads/2017/09/Testimony-of-Chris-Cox-NetChoice.pdf> [https://perma.cc/UD82-LW55].

307. *Id.*; see also Tom Jackman, *House committee targets online sex trafficking by amending the Mann Act, puzzling advocates*, WASH. POST (Dec. 12, 2017), <https://www.washingtonpost.com/news/true-crime/wp/2017/12/12/house-committee-targets-online-sex-trafficking-by-amending-mann-act-puzzling-advocates/> [https://perma.cc/L8ES-GWAQ].

308. *Online Sex Trafficking Hearing*, *supra* note 306, at ii; see also *id.* at 1 (“It was equally intended to ensure that those who actually commit wrongs will be subject to prosecution by both civil and criminal law enforcement.”); *id.* at 3 (“[T]he investigation and prosecution of sex trafficking must not be impeded by federal law meant to protect the innocent and punish the guilty.”).

309. *Id.* at 7 (emphasis added).

310. *Id.* at 10 (emphasis added).

311. *Id.* at 11.

responsive to the articulated concerns regarding § 230. The Cox-NetChoice proposal then suggested creating a different federal crime attached to the Travel Act.<sup>312</sup>

The Goodlatte substitute FOSTA mirrored the Cox-NetChoice proposal, except instead of amending the Travel Act, it amended the Mann Act and targeted prostitution.<sup>313</sup> In so doing, it removed any substantive amendment to § 230 for human trafficking civil suits, and only carved out the ability for states to prosecute under the new Mann Act statutes if they passed such a law on the state level. It did retain the ability of state prosecutors to prosecute violations of § 1591 on the state level. The House Judiciary Committee passed this out of committee notwithstanding opposition from all major national victim survivors groups and survivors, who noted that they publicly withdrew their support and asked the co-sponsors to do the same.<sup>314</sup>

It bears noting that, notwithstanding critics commenting that these bills would alter the Internet, that view has been significantly rejected. Professor Citron and Mr. Wittes convincingly argue that amending the CDA “will not break” the Internet and that it is the natural historical cycle to have a new industry unregulated in its early years, after which the industry grows to a point that it needs some regulation.<sup>315</sup> Many tech companies, including Oracle, Walt Disney, Hewlett Packard, 21st Century Fox, IBM, and the Recording Industry Association of America,

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312. See *id.* at 26–28.

313. Compare *id.*, with H.R. 1865 § 3 (as reported to House, Feb. 20, 2018).

314. See Mary Mazzio, *Anti-online sex trafficking bill gets crushed under Big Tech's lobbying*, HILL (Dec. 17, 2017), <http://thehill.com/opinion/civil-rights/365295-anti-online-sex-trafficking-bill-gets-crushed-under-big-techs-lobbying> [<https://perma.cc/6KEV-JW8T>]; see also Jackman, *supra* note 307. The House Judiciary Committee highlighted the support of advocacy groups. See *Support for the “Allow States and Victims to Fight Online Sex Trafficking Act,” supra* note 296. Of those groups listed, only three are human trafficking organizations. Over thirty of the leading human trafficking organizations opposed this new bill. See Jackman, *supra* note 307; Tiku, *supra* note 299. Furthering speculation this was a legislative maneuver by tech, the Internet Association also announced support for this Goodlatte substitute FOSTA. See *Statement In Support Of Allow States and Victims to Fight Online Sex Trafficking Act of 2017 (FOSTA)*, INTERNET ASS'N (Dec. 11, 2017), <https://internetassociation.org/statement-support-allow-states-victims-fight-online-sex-trafficking-act-2017-fosta/> [<https://perma.cc/2U4D-T22N>].

315. See generally Citron & Wittes, *supra* note 35.

have come to support one or both bills.<sup>316</sup> Each bill was six pages or less and neither was radical. While at one time, the bills were similar, this legislative move by tech created two different bills, only one supported by victims and survivors. SESTA clarified § 230. FOSTA created a new prostitution-focused federal crime, but did not significantly alter § 230, thus allowing § 230 to remain an obstacle to victims' access to justice.

### 1. *Goodlatte Substitute FOSTA*

It appeared in February 2018 that the legislative effort to amend § 230 would fail. The Goodlatte Substitute FOSTA supported by tech companies seeking to preserve de facto absolute immunity was substantially different from SESTA in the Senate.

In its original form, FOSTA sought to accomplish the same goals as SESTA, but in a slightly more comprehensive manner. For example, it had a mens rea of recklessness.<sup>317</sup> Further, the original FOSTA recognized the connection between sex trafficking and child pornography, which is referred to as child sexual exploitation in the criminal code.<sup>318</sup> Child pornography constitutes a visual depiction of a child engaged in sexually explicit conduct.<sup>319</sup> Some of these advertisements meet the federal definition of child pornography, and the original FOSTA sought to disallow immunity for a site that knowingly or recklessly engages in such conduct.<sup>320</sup> Additionally, the original FOSTA sought not only to allow state criminal law to be enforced, but also victim restitution under any state criminal statutes for sex trafficking and child pornography as well as a private right of action on both the state and federal levels.<sup>321</sup>

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316. See Press Release, Sen. Rob Portman & Sen. Richard Blumenthal, Senators Welcome Support from IBM for the Stop Enabling Sex Traffickers Act, <https://www.portman.senate.gov/public/index.cfm/press-releases?ID=3ACB83B3-06B2-40B5-84DB-BC16A3D3F765> [<https://perma.cc/VU4G-682E>] (last visited Nov. 11, 2017).

317. See H.R. 1865, 115th Cong. § 4 (as introduced in House, Apr. 3, 2017).

318. See *id.* § 3(a)(2) (as introduced in House, Apr. 3, 2017). These references were eliminated in the modified version of the bill.

319. 18 U.S.C. § 2256(8) (2012).

320. H.R. 1865 § 4(a)(2) (as introduced in House, Apr. 3, 2017).

321. *Id.*

However, the original FOSTA bore little resemblance to the Goodlatte substitute. SESTA and the original FOSTA were responsive to the problem identified by the courts, survivors, and state prosecutors: § 230 immunity. The Goodlatte FOSTA substitute follows the Cox-NetChoice proposal: it proposed a new criminal law having nothing to do with the § 230 immunity problem, it repeats the language of § 230, and it codifies some of the problematic case law that has precluded victim and survivor access to justice.

Central to the Goodlatte FOSTA substitute was the creation of a new crime: Promotion or Facilitation of Prostitution and Reckless Disregard of Sex Trafficking.<sup>322</sup> This section is non-responsive to the § 230 immunity issue. The problem regarding online advertising of trafficking victims has not been a lack of laws. For nearly two decades sex trafficking, conspiring to engage in sex trafficking, and facilitating sex trafficking have been illegal federally and today every state has sex-trafficking laws. The problem is that state prosecutors cannot utilize their laws because of § 230, and courts such as the First Circuit and California Superior Court have stated that until Congress amends § 230, websites seem to be immune from prosecution even if partnering with human traffickers. While there likely is value to a criminal charge for promoting prostitution, this has never been the problem at issue in the § 230 debate.

The proposed crime is an amendment to the Mann Act which addresses prostitution that involves interstate commerce.<sup>323</sup> This makes it illegal to “use[] or operate[] a facility or means of interstate or foreign commerce or attempts to do so with the intent to promote or facilitate the prostitution of another.”<sup>324</sup> The statute has an aggravated penalty if the offender promotes or facilitates the prostitution of five or more people or “acts in reckless disregard of the fact that such conduct contributed to sex trafficking in violation of 1591(a).”<sup>325</sup>

If the statute stopped with this provision, it could possibly have helped address the issue of prostitution websites that are

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322. H.R. 1865 § 3 (as reported to House, Feb. 20, 2018).

323. See 18 U.S.C. §§ 2421–24 (2012).

324. H.R. 1865 § 3(a) (as reported to House, Feb. 20, 2018).

325. *Id.*

clearly related to sex trafficking. The Goodlatte Substitute FOSTA, however, required proof that a website *intentionally* facilitated prostitution. Intent requires the showing of purposeful or knowingly facilitating prostitution. As a result, the use of code language, innuendo, and ambiguity that is prevalent in these ads present similar challenges to prosecutors. Nonetheless, if the proposed new crime were simply these provisions, it could be another tool in the federal prosecutor's arsenal to fight prostitution, even though it does nothing to address the § 230 problem.

However, the proposal did not end there. In the section entitled "Civil Recovery" the proposal stated a victim of this new statute may recover damages in federal court.<sup>326</sup> This seemed to allow a federal civil right of action, but the proposal was very deceptive. The next sentence gutted this intent by stating, "Consistent with section 230 [of the CDA,] a defendant may be held liable, under this subsection, where promotion or facilitation of prostitution activity *includes responsibility for the creation or development in whole or in part of the information or content provided.*"<sup>327</sup> This language is exactly like the Cox-NetChoice proposal and was proposed precisely because it did not create a private right of action. It simply repeated the language of § 230, which has been interpreted to mean that a website is immune from prosecution or civil action unless it is a content creator. Most of the prior cases except *J.S.* have found that the allegations against such websites are precluded because "claims that a website facilitates illegal conduct through its posting rules necessarily treat the website as a publisher or speaker of content provided by third parties and, thus, are precluded by section 230(c)(1)."<sup>328</sup>

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326. *Id.*

327. *Id.* (emphasis added).

328. *Jane Doe No. 1 v. Backpage.com, LLC*, 817 F.3d 12, 22 (1st Cir. 2016); *see also M.A. v. Vill. Voice Media Holdings, LLC*, 809 F. Supp. 2d 1041, 1049–53 (E.D. Mo. 2011) (finding Backpage.com immune from suit because being a website operator who does make editorial decisions about the ads is not sufficient to be considered a content provider and "Congress . . . [has] provid[ed] immunity even where the interactive service provider has an active, even aggressive role in making available content prepared by others.") (quoting *Blumenthal v. Drudge*, 992 F. Supp. 44, 51–52 (D.D.C. 1998)).



Additionally, this version provided an affirmative defense if the defendant can establish by a preponderance of the evidence that prostitution is legal in the jurisdiction where the ad “was targeted.”<sup>329</sup> Given the global nature of the Internet, this was a significant loophole. “Targeted” was undefined and could mean anywhere geographically close to such locations. It is legal to sell sex in Canada,<sup>330</sup> parts of Mexico,<sup>331</sup> and certain counties in Nevada.<sup>332</sup> Furthermore, there are efforts to legalize prostitution in various states throughout the country, including in Washington, D.C., California and New Hampshire.<sup>333</sup> With this broad affirmative defense, a website could simply assert it was “targeting” an audience in one of these locations and be exempt from suit in every state that borders Canada, Mexico, or Nevada. Similarly, with the term “targeted” undefined, it is unclear if that means the act would have to take place there, the prostituted person be located there, or if the potential purchaser be located there.

The Goodlatte FOSTA substitute referenced § 230 and allowed for state prosecution of violations of state sex-trafficking laws for conduct that would violate 18 U.S.C. § 1592(a).<sup>334</sup> Thus, this version did allow states to prosecute websites under this

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329. H.R. 1865 § 3(a) (as reported to House, Feb. 20, 2018).

330. See *Legalities of Prostitution*, EDMONTON POLICE SERV., <http://www.edmontonpolice.ca/CommunityPolicing/FamilyProtection/Prostitution/LegalitiesofProstitution.aspx> [<https://perma.cc/42WB-7MZJ>] (last visited Feb. 24, 2018).

331. See Ronald Weitzer, *Mexico’s State-Run Brothel Shows Us The Benefits Of Making Prostitution Legal*, BUS. INSIDER (Oct. 29, 2013), <http://www.businessinsider.com/galactic-zone-shows-why-we-should-legalize-prostitution-2013-10> [<https://perma.cc/M64W-7ZE8>].

332. See Michael Martinez, *What to know about Nevada’s legal brothels*, CNN (Oct. 19, 2016) <https://www.cnn.com/2015/10/14/us/lamar-odom-nevada-brothels/index.html> [<https://perma.cc/U6SZ-LAQE>].

333. See, e.g., Rachel Chason, ‘A mecca for prostitution’? A new bill proposes decriminalizing sex work in D.C., WASH. POST (Oct. 13, 2017), [https://www.washingtonpost.com/local/dc-politics/a-mecca-for-prostitution-a-new-bill-proposes-decriminalizing-sex-work-in-dc/2017/10/13/18f3dd12-adf4-11e7-a908-a3470754bbb9\\_story.html](https://www.washingtonpost.com/local/dc-politics/a-mecca-for-prostitution-a-new-bill-proposes-decriminalizing-sex-work-in-dc/2017/10/13/18f3dd12-adf4-11e7-a908-a3470754bbb9_story.html) [<https://perma.cc/QSE9-7XJF>]; Ethan DeWitt, *N.H. House votes to create commission studying decriminalizing sex work*, CONCORD MONITOR (Jan. 10, 2018), <http://www.concordmonitor.com/House-passes-bill-creating-study-commission-for-sex-work-legalization-14782126> [<https://perma.cc/LJ3G-CRjX>]; Chris Morris, *California Courts May Consider Legalizing Prostitution*, FORTUNE (Oct. 20, 2017), <http://fortune.com/2017/10/20/california-legal-prostitution/> [<https://perma.cc/C9Z5-8FBW>].

334. H.R. 1865 § 4 (as reported to House, Feb. 20, 2018).

provision. While it also allowed states to prosecute under state laws for conduct violating the proposed § 2421A, this could require states to pass a law substantially similar to this new statute. Given that it took over a decade for every state to pass a human trafficking law, this would be no small task. Moreover, just as tech companies have successfully fought and opposed the effort to pass state laws that prohibit facilitating online sex trafficking, they will fight such statutes in every state. Given that tech companies will be joined by those seeking to legalize prostitution, the chances of a state passing such a law appear to be low. Consequently, this provision offers little to the state attorneys general who have not endorsed this bill but who asked Congress to simply amend § 230 to include state human trafficking laws on the list of exemptions from § 230 immunity.

## 2. *SESTA*

The focus of SESTA is on the shortfalls of § 230 and the demand of courts for clarification, of survivors for access to justice, and of state prosecutors for the ability to enforce their own human trafficking laws. Its new focus is on amending § 230 to include sex trafficking as exempt from § 230 immunity.

Congress did not originally include sex trafficking because sex trafficking was not recognized as a federal crime until four years after the passage of the CDA. SESTA clarifies this by including the non-controversial statement that it is the policy of the United States to “ensure vigorous enforcement of Federal criminal and civil law relating to sex trafficking.”<sup>335</sup> SESTA also provides for the CDA to not preclude a civil action brought under § 1595 for sex-trafficking offenses or any state law criminal prosecution for actions that would violate sex-trafficking laws.<sup>336</sup> This provision would seem to resolve the ambiguity created by the First Circuit when it expanded § 230 immunity to preclude civil cases under § 1595. Therefore, under SESTA, victims have access to the private right of action in federal court created under § 1595, and state prosecutors have the abil-

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335. S. 1693 § 3(a).

336. *Id.*

ity to enforce state sex-trafficking laws that cover behavior illegal under § 1591.

SESTA does not amend § 230 to allow for a private right of action on the state level. However, it does amend § 1595 to allow state attorneys general to sue a website in a federal court on behalf of citizens who have been threatened or adversely affected by a city's violation of § 1591.<sup>337</sup> This provision appears to be modeled after the state enforcement provision of the Consumer Review Fairness Act.<sup>338</sup> While not a private right of action for victims, it is an additional avenue to hold websites that facilitate sex trafficking accountable.

SESTA also responds to the First Circuit's concern that § 1591 does not define "participation in a venture." The revised Senate Bill defines "participation in a venture" as "knowingly assisting, supporting, or facilitating a violation of subsection (a)(1)."<sup>339</sup>

### 3. *Emergence of a FOSTA-SESTA Compromise*

With only one bill, SESTA, having the support of survivors, law enforcement, and the tech industry, it appeared Congress was in a logjam. When the Goodlatte Substitute FOSTA came to a floor vote, however, a significant amendment by Congresswoman Mimi Walters emerged. This amendment effectively preserved the positive components of SESTA, but added the new Mann Act crime that Congressman Goodlatte claimed essential to combatting online sex trafficking.<sup>340</sup> This new House FOSTA eliminated the language that would have codified de facto absolute immunity, included the *federal* private right of action, and enabled enforcement of state sex-trafficking laws.<sup>341</sup> The legislation with the Walters amendments gained the backing of those who supported SESTA and was passed overwhelmingly in the House 388–25.<sup>342</sup> Having passed the House, this version went to the Senate for a vote.

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337. *Id.* § 5.

338. *See* 15 U.S.C. § 45b(e) (2012).

339. S. 1693 § 4(2).

340. H.Amdt. 526 to H.R. 1865, available at <https://www.congress.gov/amendment/115th-congress/house-amendment/526/text> [<https://perma.cc/MFQ7-2JSJ>].

341. H.R. 1865 § 2 (as placed on Senate Calendar March 1, 2018).

342. 164 CONG. REC. H1318–19 (daily ed. Feb. 27, 2018).

This SESTA-FOSTA compromise states that § 230 “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.”<sup>343</sup> It further states that clarification of § 230 of the Communications Act of 1934 is warranted to ensure that that section does not provide legal protection to such websites.<sup>344</sup>

The compromise includes the new Mann Act charge of promotion or facilitation of prostitution.<sup>345</sup> Critically, however, the compromise explicitly eliminates § 230 immunity against civil claims under § 1595 for sex-trafficking violations and state criminal charges, if the conduct is an alleged violation of state sex-trafficking laws, the new promotion of prostitution provision, or other federal law.<sup>346</sup> It also defines the term, “participation in a venture,” which is unlawful when the venture is sex trafficking, and which the First Circuit noted had not yet been defined. This is now defined to encompass “knowingly assisting, supporting, or facilitating sex trafficking.”<sup>347</sup> The legislation also enables state attorneys general to bring a *parens patriae* civil suit against a website on behalf of state residents.<sup>348</sup> Finally, the legislation includes a savings clause, ensuring that claims currently allowed under federal or state law, such as those in *J.S.*, remain permissible.<sup>349</sup>

On March 21, 2018, this compromise bill came to a vote in the Senate. *If* this compromise bill were accepted without change by the Senate the FOSTA-SESTA compromise would become law upon the President’s signature. Suddenly, amending § 230 was in reach.

Senator Ron Wyden, the same Senator who attempted to stop the bill by placing a hold on SESTA, made a last ditch ef-

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343. H.R. 1865 § 2 (as placed on Senate Calendar March 1, 2018).

344. *Id.*

345. *Id.* § 3.

346. *Id.* § 4.

347. *Id.* § 5. The final bill also includes a requirement that the Government Accounting Office report to Congress three years after enactment data regarding civil actions and restitution. *Id.* § 8.

348. *Id.* § 6.

349. S. 1693 § 6; H.R. 1865 § 5.

fort to derail the legislation. This came in the form of two amendments. The first purported to provide additional funding to the Department of Justice to combat human trafficking. While this gesture may appear to represent an effort to stem sex trafficking, it was actually a transparent attempt to halt the bill. If the compromise bill was amended in any way, it would eventually be required to return to the House for a vote. The House would never have accepted such a spending increase, and the bill would have died. This amendment was resoundingly rejected by the Senate.<sup>350</sup>

Senator Wyden's second amendment tried to water down some of the provisions to protect interactive service providers.<sup>351</sup> After the defeat of his funding amendment, however, he withdrew this second amendment.<sup>352</sup> Still, he warned that he would "turn back to this topic in short order . . . for a vote at that time."<sup>353</sup> Curiously, he stated that his reason for withdrawal was that his colleagues faced "so much political headwind" to vote against this version of an anti-trafficking bill.<sup>354</sup> This is curious, because for many years Congress would not even entertain and changes to § 230 in light of tech opposition. For years, Congress ignored the pleas of sex-trafficking survivors and allied itself with the tech industry. The notion that politicians are beholden to survivors is belied by the near-decade wait to amend this law.

### B. Consider the Big Picture

If it took over fifteen years for Congress to act regarding this specific, yet obvious, problem on the Internet, how much more time will it take for Congress to respond to the more fundamental problem of the CDA? Congress was correct about two facts in 1996: the Internet was a nascent industry, perhaps in need of some support to get off the ground, and its potential for distributing exploitative material was massive. Now the Internet is no longer nascent—it is as vital as a utility and as

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350. See 164 CONG. REC. S1871 (daily ed. Mar. 21, 2018) (21–78).

351. S.Amdt. 2212 to H.R. 1865, available at <https://www.congress.gov/amendment/115th-congress/senate-amendment/2212?r=11> [<https://perma.cc/BBW6-G4UT>].

352. 164 CONG. REC. S1871 (daily ed. Mar. 21, 2018) (statement of Sen. Wyden).

353. *Id.*

354. *Id.*

powerful as a superstate. Rather than simply distributing exploitative material, it is exploitative itself. A massive exploitative industry is one perhaps in no need of special protections at all. Rather, the time has come to examine not *whether* the government should protect citizens from these powerful industries, but *how* it should do so. The current system of allowing online businesses to avoid responsibility for “either for what their users do or for the harm that their services can cause”<sup>355</sup> must be reexamined.

## V. CONCLUSION

History tells us that many industries in their infancy thrive with little regulation. When they reach a certain size and import to the citizenry, however, the government may need to regulate them for the sake of public health and safety. Railroads, utilities, and finance have all experienced this cycle.<sup>356</sup> Congress must now consider the viability of a legal regime in which online companies profit from social ills and then claim immunity from criminal liability.

But that is a question for another day. The pressing problem facing society is the open market to sexually traffic the most vulnerable, and the de facto absolute immunity created by courts for the market operators. It appears that congressional action challenging this unintended immunity required significant pressure from victims, courts, and state officials. In the meantime, the victimized continued to be denied justice.

In 1996, Congress responded to one unpopular court decision by legislation to protect tech companies from a perceived threat. After years of online advertisements selling sex-trafficking victims and numerous other victims, court deci-

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355. *Internet Firms' Legal Immunity is Under Threat*, ECONOMIST (Feb. 11, 2017), <https://www.economist.com/news/business/21716661-platforms-have-benefited-greatly-special-legal-and-regulatory-treatment-internet-firms> [<https://perma.cc/35FB-NSFM>].

356. See Citron & Wittes, *supra* note 36, at 422; see also *Extremist Content Hearings*, *supra* note 290 (statements of Sen. Graham, Member, S. Comm. on the Judiciary, and Michael Smith, Fellow at New America), <https://www.judiciary.senate.gov/meetings/extremist-content-and-russian-disinformation-online-working-with-tech-to-find-solutions> [<https://perma.cc/PQ59-7S99>]; *Internet Firms' Legal Immunity is Under Threat*, *supra* note 350.

sions, and state legislators calling for clarification of legislation, Congress failed to respond. Instead, it appeared to continue to protect the tech industry. Now, finally Congress has acted to close this legal loophole. The story for sex-trafficking survivors and their families was one of injustice; now it has become one of justice delayed. While the new legislation is a positive step, delayed justice is not without cost. The cost was borne by hundreds of trafficking victims, sold online and raped repeatedly while Congress failed to act.