Uncloaking the Traffickers: Why the Communications Decency Act Needs to be Amended to Reach Culpable Website Owners and Their Ilk

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UNCLOAKING THE TRAFFICKERS: WHY THE COMMUNICATIONS DEGENCY ACT NEEDS TO BE AMENDED TO REACH CULPABLE WEBSITE OWNERS AND THEIR ILK

By:

Gavrielle Kube

I. INTRODUCTION

Human trafficking is a widespread global issue that nearly every country, including the United States, has to face on a daily basis. It is a multi-billion dollar illegal enterprise that grows larger everyday. With rapid innovations occurring in the technology industry, it is becoming easier than ever for the leaders of human trafficking rings to generate new business by advertising and exploiting victims on the Internet.\(^1\) Even worse, many of these victims are children whose lives will be forever scarred by the nightmare they are forced to live through.

In order to generate business online, human traffickers often use websites that feature a “classified” advertisement system where public users create advertisements featuring items for sale, services for sale, and employment opportunities. These websites often have an “adult,” “dating,” or even an “escort” section where people can post advertisements for sex.\(^2\) Advertisers are charged a fee to publish the ad on the host website and can pay a premium to have their ad featured prominently.\(^3\) The advertisements for sex are famously controlled by pimps who are forcing victims, including children, into prostitution.\(^4\)

The largest and most recent example of classified advertising on the internet is Backpage.com. Backpage earns hundreds of millions of dollars worldwide using this business model, despite the consequences it may have on child victims of sex trafficking.\(^5\) Like other classified websites in the past, Backpage.com’s owners have come under public and government scrutiny for their business practices. Throughout the end of 2016 and into 2017, Backpage.com has been at the center of controversial legal proceedings based on their alleged knowledge of the sexual exploitation of children that was procured by advertisements on their website. This controversial issue has forced lawmakers and government officials to reanalyze the law as it stands today and call into question the immunities it provides to website hosts.

The owners of the 5,000 classified ad websites that allow adult categories are not obligated to do anything about these advertisements and likely will not be held liable for any

5 Id.
wrongdoing due to the Communications Decency Act § 230\textsuperscript{6}. Section 230 of the Act expressly provides that no website provider “of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.”\textsuperscript{7} Further, § 230 preempts any state law to the contrary.\textsuperscript{8}

Due to the language of the Communications Decency Act (the “CDA”), many victims of human trafficking are unable to bring any legal action for damages against the owners of these websites in civil court. Moreover, criminal charges have proved to be futile in light of the current state of the law.

Other countries have legislation similar to §230, but do not provide complete immunity to website owners like the United States. For example, France will not grant a website owner this immunity if the owner was aware of the illegality, but failed to take any measures to remedy the situation under Loi pour la Confiance dans l’Economie Numerique [LCEN, Law for the Trust in the Digital Economy], Article 6. This note is proposing that the United States amend CDA § 230 similar to France’s comparable laws that allow website owners to be held liable, both criminally and civilly, for the content that appears on their websites.

Part one of this note will discuss the background of the business of trafficking children and how widespread the issue has become. Part two will explain the role classified advertising websites play in fostering and facilitating the sexual exploitation of children and why the owners of classified advertising websites should be found liable in criminal or civil proceedings. Part three will discuss the legal environment that immunizes classified advertising website owners from liability, despite evidence of culpability and awareness of illegalities. Part four will propose a solution based on legislation passed in France, which punishes website owners for failing to remove illegal content from their websites when they are aware of the illegality. Part five will conclude this note by exemplifying recent efforts to combat the problem of child trafficking, but still emphasizing the need for change.

The proposed amendment to the Communications Decency Act will not solve the global issue of the sexual exploitation of children, but it is certainly a step in the right direction. We, as a nation, do not need to make it any easier for children to be sexually victimized and should follow in the footsteps of other nations who will not grant immunity to complicit website owners.

II. BACKGROUND

“You may choose to look the other way, but you can never say again that you did not know.”\textsuperscript{9} Human trafficking\textsuperscript{10} affects every nation on this planet.\textsuperscript{11} “Every 30 seconds,
someone is ripped from their freedom and sold into slavery.” Recent estimates show that the number of trafficking victims worldwide is somewhere in the range of twelve to twenty seven million adults and children. The number of people victimized by forced labor and human trafficking has caused the number of slaves today to be higher than it ever was in human history. Although estimates of the number of victims effected by human trafficking vary among nations, there is no dispute that the technological innovations of the twenty-first century are propelling these numbers upwards unlike ever before and is making the lucrative business of sex trafficking an easier enterprise to operate than is has been in the past. Gone are the days of secret brothels, underground hideaways, and quiet word-of-mouth referrals of where to find or where to buy underage males and females for the purposes of sex. These now medieval methods are being rapidly replaced by the high-speed, on-demand, and anonymous methods available on the World Wide Web. Victims of human trafficking around the world are often lured into forced labor by false promises of a better life, wealth, or legitimate employment. Others are targeted due to low-self esteem and emotional issues. The traffickers are manipulating them into believing that they are entering this deadly and dangerous industry voluntarily, when in reality, strong manipulation tactics have been choosing for them the entire time. Once the victims are effectively captured and too afraid to attempt escape, their captors use heinous tactics like torture, violence, physical and psychological abuse to ensure

between the different forms of human trafficking and also distinguishes between adults and minors in the area of sex trafficking. Pursuant to the TVPA § 7102(9)(a), a minor induced to perform a commercial sex act is a victim under the TVPA because the victim is a minor and cannot consent; however, for an adult to be considered a victim under the Act, the adult must be induced to perform a commercial sex act by the use of force, fraud, or coercion. Alternatively, the Convention Against Transnational Organized Crime, to which the United States is a signatory, defines “trafficking in persons” as “the recruitment, transportation, transfer, harbouring, or receipt of persons, by means of threat or use of force or other forms or coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control of another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs.” United Nations Convention Against Transnational Organized Crime and the Protocols Thereto, Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, G.A. Res. 55/25 (II), at 42 (Nov. 15, 2000).

14 See HUMAN TRAFFICKING, supra note 9.
16 The global slavery index shows that an estimated 29.8 million people are victims of forced labor and human trafficking, “which, if accurate, is over twice the number of Africans enslaved between 1525 and 1866.” Sarah E. Mendelson, How to Prevent Human Trafficking, FOREIGN AFFAIRS MAG. (Sept. 22, 2014), https://www.foreignaffairs.com/articles/2014-09-22/born-free.
17 Due to differences in calculation methods between governments, and the fact that some governments choose not calculate these statistics at all, the true number of trafficking victims globally is virtually unknown. See LATONERO, supra note 13.
18 Id.
19 Id.
20 Id.

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that the victims live in absolute fear. Some victims are kept in cages like animals, given no food or water, and remain in captivity all day while they are repeatedly raped by paying clients.\textsuperscript{21} Worst of all, these cases often go unreported, uninvestigated, and rarely end in criminal prosecution.\textsuperscript{22}

These facts just give traffickers more of an incentive to keep their enterprises running, and they are making billions.\textsuperscript{23} "The buying and selling of humans is a big business. . . estimated to generate anywhere from $32 billion to $150 billion a year."\textsuperscript{24} The huge profits that are gained by the industries’ leaders is one of the reasons why, despite the harrowing nature of the business, human trafficking is said to be “too lucrative” to ever really cease without intervention by the industries’ opponents.\textsuperscript{25}

III. HUMAN TRAFFICKING AND THE INTERNET – THE MODERN TREND

A. The Classified Website Business Model

Today, human traffickers are using internet technology, social media, and classified websites to advertise their victims’ services and have begun to reshape the ways in which human trafficking is facilitated.\textsuperscript{26} One of the most common methods employed is advertisement for prostitution using classified websites. Classified websites operate similar to the classified section of a newspaper, incorporated with the speed and ease of the Internet. For a fee, individual users can create and post advertisements to the public in designated categories.\textsuperscript{27} Such categories include advertisements to buy and sell appliances, furniture, cars, boats, household items, real estate, and jewelry.\textsuperscript{28} These websites allow its users to advertise what they are selling to a vast amount of people in real-time. The owners of these websites generate revenue by charging a fee for posting an advertisement and users can pay an additional fee that would make the user’s advertisement appear at the top of the page for a certain period of time.\textsuperscript{29}

It is important to note that “[n]one of these new technologies are in an of themselves harmful,” but for those criminals searching for means of exploiting their victims [classified websites], [] provide ‘new, efficient, and often anonymous’ methods.”\textsuperscript{30} Because most classified websites allow users to create and post advertisements to the public without any identifying information, these websites are making it possible for human trafficking rings to thrive with little to no risk of prosecution.\textsuperscript{31} The business of human trafficking has become so profitable and classified websites are eliminating so much of the risk that some criminals that were once involved in drug dealing or robberies, have now switched to the illicit crime of

\textsuperscript{21} Id.
\textsuperscript{22} UNODC, supra note 11.
\textsuperscript{23} Id. (emphasis added).
\textsuperscript{24} Mendelson, supra note 14, at 4.
\textsuperscript{25} See HUMAN TRAFFICKING, supra note 9.
\textsuperscript{26} See LATONERO, supra note 13, at 4.
\textsuperscript{27} BACKPAGE.COM supra note 3, at 1.
\textsuperscript{28} Id.
\textsuperscript{29} Id.
\textsuperscript{30} Id. (emphasis in original)
\textsuperscript{31} Id.

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child sex trafficking where "a single child can generate as much as $1000 on a weekend night."32

Internet advertising using classified websites has been further advanced with the invention of web-enabled cellphones that allow users to view advertisements anywhere where there is cellphone reception.33 The trafficking industry benefits from this because their client base has now exponentially expanded and traffickers can schedule more "encounters" per child.34 Additionally, the customers seeking to purchase the services traffickers are offering benefit because they are no longer limited to a desktop computer.35

Taken together, the above facts may be the explanation of why the National Center for Missing and Exploited Children reported an over 800% increase in the number of reports of suspected child trafficking in the last five years36 and why 70% of child sex trafficking victims are sold via the internet today.37

B. Making Millions

A report created by the non-profit organization, A Shared Hope International, identified more than 5,000 websites that "directly or indirectly facilitate the sex trafficking and sex tourism industry."38 These websites are dominating the online escort advertisement industry and reaping millions of dollars in profits based on the sexual exploitation of people across the globe.

Although classified websites offer non-adult related advertising space, the adult and dating services categories are where the majority of their revenue is generated.39 Such "services" include "escorts," "body rubs," and "adult jobs."40 Some classified advertising websites offer no such "adult" categories, but for those websites that do, the owners/hosts are pocketing millions. For example, Classified advertising giant Backpage.com earned 99% of its annual gross income through adult/escort advertising.41 A revenue report spanning from January 2013 through May 2015 shows that Backpage.com earned an astounding $51,723,615.23 in sales with $50,920,739.36 of those sales attributed to adult entertainment advertising in the State of California alone.42 Backpage.com operates globally and generates revenue from well over one hundred countries.43 Global figures show that Backpage.com can

32 Id.
33 Id.
34 Id.
35 Id.
37 Couch, supra note 1, at 1.
38 See LATONERO, supra note 13, at 4.
39 Id.
40 Id.
42 Id. at 12.
43 Riviera, supra note 4, at 2.
generate over $3 million in adult advertising sales in a single week.44 Taken together, domestic and international sales total over $600 million annually.45

It appears that these classified websites are fully aware of the profitability of the adult and dating services categories based on the current fee structure. On Backpage.com, if an individual wishes to post a non-adult or a non-dating advertisement, there is either no fee or a nominal fee of $1, however if that same individual wishes to post an advertisement in either the dating or adult category, the fee is raised to $10 per advertisement.46 Moreover, the price of that same advertisement can soar to over $100 if the user wishes to have his advertisement at the top of the search results list to increase the probability that someone will respond to that advertisement.47

While the adult and dating services of classified websites may not be seen as wholesome, their existence would be less troubling were it not true that many of the advertisements that appear in these sections often involve minors under the age of eighteen that are forced to advertise themselves on the internet and perform subsequent sexual acts against their will.48 The National Center for Missing and Exploited Children “has worked on more than 400 cases involving missing children sold for commercial sex” since 2012.49

These advertisements encourage the victimization of young children everyday. For example, in 2015, a 15-year-old female named L.F. testified that she met and began a sexual relationship with 32-year-old, Patrick Simmons.50 The relationship between the two quickly escalated and soon after meeting, L.F. began prostituting for Simmons and used Backpage.com to post her advertisements where she would subsequently have sex for money.51 All money earned by L.F. for performing these sexual acts “went directly to Simmons.”52 In addition to being forced into prostitution, Simmons became physically violent and sexually abusive toward L.F. and this child’s living nightmare only ended after an undercover sting operation performed by law enforcement.53

The case of L.F. is not an isolated one. Hundreds of children are sexually exploited everyday across the world at the hand of classified websites and their owners.54 Even worse, many times the owners of these websites are aware that children are being sexually exploited. Moderators that are supposed to be removing suspicious and prima facie unlawful content on the adult advertising portion of the website, are actively editing and deleting the suspect content and republishing the cleaned up advertisement for all to see. For example, there is evidence showing Backpage.com’s complicity in actively editing adult advertisements that were flagged by their automatic word filtering system.55 Terms such as, “little girl,” “Lolita,”

44 Arrest Warrant, supra note 43, at 12.
45 Riviera, supra note 4, at 2.
46 Arrest Warrant, supra note 43, at 5.
47 Id.
48 Id.
49 Id.
50 Arrest Warrant, supra note 43, at 10.
51 Id.
52 Id.
53 Id.
54 See Arrest Warrant, supra note 43, at 5.
55 Riviera, supra note 4, at 2; see also Homeland Sec. & Gov’t Affairs, Backpage.com’s Knowing Facilitation of Online Sex Trafficking, THE PERMANENT SUBCOM. ON INVESTIGATIONS at 28 (Jan. 11, 2017),
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or “Amber Alert,” were terms that indicated underage trafficking and Backpage moderators would then edit the advertisement, delete the flagged words, and repost the “cleaned up” version back onto the website.56

C. Fighting the Good Fight

These behaviors have not gone unnoticed by the public, law enforcement, and the Department of Justice. In 2010, classified advertising giant Craigslist.org voluntarily removed the entire escort portion from their website.57 Such advertisements were generating millions of dollars in profits annually for Craigslist.58 The removal occurred after months of public backlash, investigations, and a murder trial that ended in suicide. Seventeen Attorneys General wrote a letter to Craigslist.org asking them to remove the adult and escort advertising categories. The Attorneys General explained that “[n]o amount of money . . . can justify the scourge of illegal prostitution, and the suffering of the women and children who will continue to be victimized, in the market and trafficking provided by Craigslist.”59

Most recently, the spotlight has been on Backpage.com, another classified advertising giant. After Craigslist.org shut down their adult and escort categories, many of those users flocked to Backpage.com and began to advertise there, along with the thousands of other websites offering such categories. Public scrutiny of Backpage.com and its business practices soon followed and even led to major credit card companies like Visa, MasterCard, and American Express to pull their payment options from the website, leaving the mysterious and anonymous cryptocurrency Bitcoin60 as virtually the only means to pay for an advertisement for adult services.61

Backpage.com, like Craigslist and other classified websites, was being accused of knowingly facilitating child sex trafficking. The California Department of Justice launched an investigation into the business practices of Backpage.com after numerous reports from the media, law enforcement agencies, and the National Center for Missing and Exploited Children supported those accusations.62 On September 26, 2016, criminal charges were filed by the State of California against the CEO of Backpage.com, Carl Ferrer, and two controlling

56 Id.
58 Id.
60 Bitcoin is a virtual cryptocurrency that is used for online transactions. The essence of Bitcoin is that no banks are needed as middlemen because all transactions are recorded on a public ledger, or the “blockchain”. Although each Bitcoin transaction is posted to the blockchain, the only information pertaining to the identity of the parties involved in each transaction is that party’s wallet-ID, which is numerical. Therefore, the names of buyers and sellers are never used. This anonymity makes it nearly impossible to track down these buyers and sellers, which may be why Bitcoin “has become the currency of choice for people online buying drugs or other illicit activities.” See What is Bitcoin?, CNN MONEY, http://money.cnn.com/infographic/technology/what-is-bitcoin/ (last visited Jan. 18, 2017).
62 See Office of the Attorney General, supra note 36.
shareholders, Michael Lacey and James Larkin on felony charges including four counts of pimping, four counts of pimping of a minor, and one count of conspiracy to commit pimping.\textsuperscript{63}

The California Attorney General outlined Backpage.com’s culpability in the criminal complaint filed by showing evidence that Backpage.com executives “derive support and maintenance in whole or in part from the earnings and proceeds of said prostitution,” which is in violation of the California Penal Law §§ 226h(a), 226h(b)(2).\textsuperscript{64} The arrests were made after a raid of the company’s Dallas headquarters revealed more incriminating evidence.\textsuperscript{65} Backpage responded the charges by calling them an “election year stunt”\textsuperscript{66} by the California Attorney General Kamala Harris and filed a motion to dismiss the next day, which was granted\textsuperscript{67}, the Court found:

\begin{quote}
[T]he prostitution took place as a result of an advertisement placed by a third party. Backpage’s decision to charge money to allow a third party to post content, as well as any decisions regarding posting rules, search engines and information on how a user can increase ad visibility are all traditional publishing decisions and are generally immunized under the CDA. In short, the victimization resulted from the third party’s placement of the ad, not because Backpage profiting from the ad placement.\textsuperscript{68}
\end{quote}

In April of 2015, the United States Senate Permanent Subcommittee on Investigations contacted Backpage executives and requested an interview, the purpose of which was to inquire into Backpage’s business practices.\textsuperscript{69} After almost two months of correspondence with Backpage’s legal counsel regarding the details of the interview, it was finally held, but with limited results. Backpage executives refused to answer critical questions about “the details of its much-touted procedures for screening advertisements for illegal content.”\textsuperscript{70} In July of that same year, the Subcommittee issued two subpoenas demanding documents “related to the company’s basic corporate structure, the steps it takes to review

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\textsuperscript{63} Criminal Complaint at 4-9, People v. Ferrer, No. 16FE024013, (Cal. App. Dep’t Super. Ct. 2016) [hereinafter Criminal Complaint].

\textsuperscript{64} Id.


\textsuperscript{66} Matt Hamilton, Backpage Says Criminal Charges by Kamala Harris are ‘Election Year Stunt,’ L.A TIMES (Oct. 7, 2016, 4:55 PM), http://www.latimes.com/local/lanow/la-me-ln-backpage-ceo-arrested-charged-20161006-snap-story.html; Motion to Dismiss at 8, People v. Ferrer, No. 16FE024013, (Cal. App. Dep’t Super. Ct. 2016) [hereinafter Motion to Dismiss].


\textsuperscript{68} Court’s Final Ruling on Dem. at 14, People v. Ferrer, No.16FE019224 (Cal. App. Dep’t Super. Ct. 2016) [hereinafter Court’s Final Ruling].

\textsuperscript{69} Homeland Sec. & Gov’t Affairs, Backpage.com’s Knowing Facilitation of Online Sex Trafficking, THE PERMANENT SUBCOMM. ON INVESTIGATIONS (Jan. 11, 2017), https://www.hsrgac.senate.gov/subcommittees/investigations/hearings/backpagecoms-knowing-facilitation-of-online-sex-trafficking.

\textsuperscript{70} Id.
advertisements for illegal activity, its interaction with law enforcement, and its data retention policies," and demanded a deposition of two Backpage executives. The day before the subpoena was set to be returned, Backpage informed the Subcommittee that they would not produce any of the documents requested and would not be available for deposition, subsequently invoking their Fifth Amendment right against self-incrimination. The courts had to intervene in order for Backpage to comply with the Subcommittee’s subpoenas.

The Subcommittee released a 2017 report detailing their investigation and findings with regard to the business model that Backpage.com operates under. The Subcommittee’s report implicated Backpage in facilitating child sex trafficking by “sanitiz[ing] ads for illegal sex with minors.” The Subcommittee found that Backpage was purposely editing advertisements and deleting taboo words like “teen,” “rape,” and “school girl” from appearing on flagged website advertisements, but never actually made an effort to totally remove the advertisements from public access. The Subcommittee found these actions to be consistent with the knowing facilitation of child sex trafficking online and promised “more action” with respect to resolving the issue.

The Subcommittee next scheduled a hearing after releasing their report where Carl Ferrer, CEO of Backpage.com, was set to testify. On the eve of the hearing, Backpage.com shut down all adult advertising services in the United States after “years of government pressure left it no choice”.

As it stands today, if a person in the United States tries to access Backpage.com’s adult advertisements, he will be met with a large, red “CENSORED” message explaining Backpage’s view of how the “government has unconstitutionally censored” the content.

71 Id.
72 Id.
73 Id.
74 Id.
79 BACKPAGE.COM supra note 3, at 1.
80 Id.
despite the fact that Backpage took the censoring action voluntarily and was not ordered by any government agency or otherwise to remove the salacious material.\textsuperscript{81} Further, Backpage.com is encouraging their users to “support” their company and their campaign to “[p]rotect internet free speech” with social media.\textsuperscript{82}

Although Backpage.com made the decision to shutter the adult services portion of their website, the permanency of such is unknown. It is also important to note that the escort services are still fully functional across the globe where available and Backpage executives are still earning millions in profits based on this model. Further, since the shutdown, users posting advertisements for prostitution in the United States have simply moved to greener pastures and have begun posting these advertisements on alternative classified websites or by simply moving to a different category.\textsuperscript{83} For example, as of January 17, 2017, in New Orleans alone, there were sixty advertisements that were discovered in Backpage.com’s other available categories since the shutdown.\textsuperscript{84} “Some of those ads contained emojis\textsuperscript{85} often used to signify whether the prostitute may be underage,” even though the advertisements’ posted age declared that the woman for sale was an adult.\textsuperscript{86} Users have also grown bolder in the wake of the shutdown and “[n]early all people posting ads” are using explicit language and emojis to convey the youth of women for sale to potential buyers.\textsuperscript{87}

D. An Ever-Growing List

Finally, it is important to reemphasize that the entirety of problem of child sex trafficking via online advertising. Indeed, Backpage.com is by far the largest and currently the most controversial website that practices escort-type advertising today, but the problem certainly does not start and stop there. More than 5,000 websites “directly or indirectly facilitate the sex trafficking and sex tourism industry,”\textsuperscript{88} Peter M. Zollman, founding principal of Advanced Interactive Media Group (AIM), explained, “[a]ds for prostitution are in hundreds or thousands of places online, and anyone looking for them can find them.”\textsuperscript{89} Moreover, a recent AIM study discovered prostitution advertisements on mainstream websites such as, Facebook, Twitter, Tumblr, and the Yellow Pages, as well as other large classified websites where terms like “barely legal” are used to signal underage adult services.\textsuperscript{90}

\textsuperscript{81} See Hawkins, supra note 80.
\textsuperscript{82} BACKPAGE.COM supra note 3, at 1.
\textsuperscript{84} Id.
\textsuperscript{85} An “emoji” is “any of various small images, symbols, or icons used in text fields in electronic communication (as in text messages, e-mail, and social media) to express the emotional attitude of the writer, convey information succinctly, communicate a message playfully without using words.” Emoji, MERRIAM-WEBSTER DICTIONARY, https://www.merriam-webster.com/dictionary/emoji (last visited Jan. 28, 2017).
\textsuperscript{86} Litten, supra, note 85.
\textsuperscript{87} Id.
\textsuperscript{88} See LATONERO, supra note 13, at 4.
\textsuperscript{89} Tracy Clark-Flory, Sex ads: It isn’t just Backpage.com, SALON (May 24, 2012, 11:24AM), http://www.salon.com/2012/05/24/sex_ads_it_isnt_just_backpage_com/.
\textsuperscript{90} Id.
IV. THE COMMUNICATIONS DECENCY ACT

Once familiar with the issue of how the internet and classified advertising have significantly increased the ease and profitability of the child sex trafficking industry, many wonder "[h]ow such a horrific, and morally bankrupt business model found such massive success in the United States. The answer to that is found in a single piece of codified legislation called the Communications Decency Act ("CDA") (1996).

The Act was Congress's way to "promote the continued development of the Internet and other interactive computer services and other interactive media" and "preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation." The Communications Decency Act § 230(c)(1) provides, "[n]o 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." In other words, CDA § 230(c) says that website owners are not held responsible for user-generated content appearing on their websites and are relieved of liability from subsequent civil claims.

Additionally, the CDA’s immunity is asserted as a defense by website owners in court proceedings and it is up to the plaintiff to establish why the website owner should not be afforded §230(c) immunity. Further, despite a provision in the Act which states, “[n]othing in this section shall be construed to impair the enforcement” of criminal laws, CDA § 230 has indeed precluded criminal liability, most recently in the dismissal of Backpage.com’s criminal charges, where the judge found that Backpage’s conduct was “generally immunized” under the Statute.

A. Application of §230(c) Immunity

The CDA § 230(c) limits the liability of website owners by shielding them from being treated as the publisher or speaker of user-generated content, and prohibits civil lawsuits that attempt to hold owners liable for performing “traditional editorial functions,” such as deciding whether to publish, remove, or edit content appearing on their websites.

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93 Id.
97 Court’s Final Ruling, supra note 70, at 14.
99 E.g., Doe v. Backpage.com, 817 F.3d 12 (1st Cir. 2016) (dismissing the plaintiff’s criminal claim under the Trafficking Victims Protection Act because it “did not fall within the scope” of the CDA’s grounds for liability); FTC v. LeadClick Media, LLC, 838 F.3d 158, 173 (2d Cir. 2016) (recognizing that “section 230 immunity” is broad); McDonald v. LG Elecs. U.S.A., Inc., No. RDB-16-1093, 2016 U.S. Dist. LEXIS 156008 at *10 (D. Md. Nov. 10, 2016) (declining to treat Amazon, the defendant, as a “speaker or publisher of third party content”); Google, Inc. v. Hood, 822 F.3d 212, 220 (5th Cir. 2016) (granting “broad immunity” to
CDA § 230(e)(3) provides, "[n]othing in this section shall be construed to prevent any State from enforcing any State law that is consistent with this section," however that same clause also provides that no cause of action may be brought under any State law that is "inconsistent with this section." Additionally, CDA § 230(e)(1) declares, "[n]othing in this section shall be construed to impair the enforcement . . . [of] any other Federal criminal statute." Courts that have analyzed this language determined the Communications Decency Act as being preemptive of state criminal laws. In, Backpage.com, LLC v. McKenna, 881 F. Supp.2d 1262, 1276 (W.D. Wash. 2012), the Court held, "[i]f Congress did not want the CDA to apply in state criminal actions, it would have said so," in finding the appellants were immune from claims of violating Wash. S.B. 6251, which criminalized advertising commercial sexual abuse of a minor under CDA § 230(c).

A court will grant immunity to a website owner for claims falling under CDA § 230(c) if the owners provides evidence sufficient to prove, (1) the plaintiff's claim would treat the website owner as the publisher or speaker of information in dispute, (2) the defendant is the provider or owner of a website in which third parties can upload content, and (3) the claim is based on information uploaded and generated by a third party user of the website. In general, courts have granted website owners "broad immunity" based on §230(c) and decide in favor of such immunity, even in "close cases."  

B. A Brief History of the Communications Decency Act

The Communications Decency Act of 1996 was the first attempt by Congress to regulate the flow of obscene material circulating the Internet during the time in which the use of Internet capabilities was rapidly expanding and becoming part of the everyday lives of United States citizens. The main target of the Act was to protect the Nation's children from being exposed to pornographic materials while browsing the Internet. During the time in which the Act was being drafted, a "thorough survey" of the availability of pornography on the internet showed that an astounding 83.5% of images on the Internet were pornographic in appellant-website owners against "all claims stemming from their publication of information created by third parties").

102 M.A. v. Vill. Voice Holdings, LLC, 809 F. Supp. 2d 1041, 1051 (E.D. Mo. 2011) (characterizing CDA § 230 as granting "broad immunity."); Google, Inc. v. Hood, 822 F.3d 212 (5th Cir. 2016) (acknowledging "Congress's grant of 'broad immunity' to internet service providers."); Senate Permanent Subcomm. on Investigations v. Ferrer, No. 16-mc-621 (RMC), 2016 U.S. Dist. LEXIS 103143 at *22 (examining the "broad immunity" granted by Congress in §230(c) before determining Backpage.com executives must comply with a Congressional subpoena).
103 Fair Hous. Council v. Roommates.com, 521 F.3d 1157, 1174 (9th Cir. 2008) ("Such close cases, we believe, must be resolved in favor of immunity . . . ").
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nature and freely accessible by any member of the public. Senator James Exon first introduced the Act on February 1, 1995 in an effort to prevent the “information superhighway” from becoming a “red light district.” Senator Exon wanted children and families to have protection from the “uninvited indecencies flowing through the Internet.”

In its original form, the Communications Decency Act made it unlawful to knowingly send or display to:

- a person under 18 years of age, any comment, request, suggestion, proposal, image, or other communication that, in context, depicts or describes, in terms patently offensive as measured by contemporary community standards, sexual or excretory activities or organs, regardless of whether the user of such service placed the call or initiated the communication.

The original Communications Decency Act imposed criminal sanctions and fines to the law’s violators, and was signed into law by President Bill Clinton on February 8, 1996. Senator Exon was relentless in his quest to have the Act passed and even created an infamous “Blue Book” containing a collection of pornographic images gathered from the internet that was easily accessible by children. The Blue Book was made available for all to see on the Senate floor to help “reluctant Senators” vote for the CDA as “[n]o senator waned to make . . . a pro-pornography vote.”

Section 230 of the Communications Decency Act was not a part of Senator Exon’s original proposal, rather it was proposed by some of Senator Exon’s biggest critics. Senator Exon’s aspiration to reduce children’s exposure to Internet pornography was strongly opposed by many who did not want the federal government, specifically the Federal Communications Commission, regulating the Internet on behalf of the public. Instead, opponents felt that the burden of protecting children should lie with their parents, not Congress. In order to effectuate that goal, Senators Cox and Wyden created § 230, which passed in the Senate, and was signed into law along as part of Senator Exon’s Communications Decency Act on February 8, 1996.

Senator Exon’s portion of the Act was Constitutionally challenged under the First Amendment soon after in, Reno v. American Civil Liberties Union, 521 U.S. 844 (1997). The Court found that Senator Exon’s obscenity prohibitions as passed were unconstitutional and

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105 Id. at 54.
106 Id. at 53.
108 Id. at 64.
109 Cannon, supra note 106 at 20.
110 Id.
112 Id. at 173.
113 Id.
in violation of the First Amendment. The Court ruled, inter alia, that the indecency and obscenity provisions violated free speech as parents were not permitted to decide what material, pornographic or not, was acceptable for their children and ruled the obscenity provisions as being too broad in general to survive First Amendment scrutiny.

C. The CDA's Impact on Judicial Relief for Underage Trafficking Victims

Section 230 and its immunities were left untouched by the Court and is the law that classified websites are using today to immunize themselves against civil claims from trafficking victims and to escape criminal charges brought by prosecutors.

Classified websites have used CDA § 230(c) multiple times as a basis for noncompliance with law enforcement investigations on child sex trafficking across the United States. Section 230(c) immunity as also used as a defense in civil lawsuits brought by trafficking victims, who are often minors, accusing the classified website of knowingly fostering and profiting from the advertisements of underage prostitutes.

Most recently, the Supreme Court denied certiorari to three minor trafficking victims who were brave enough to come forward and tell the story of the role Backpage.com played in their trafficking nightmare. The girls all alleged that Backpage.com "engaged in a course of conduct designed to facilitate sex traffickers' efforts to advertise their victims on the website." When the case was brought before the First Circuit on appeal, despite the Judge's struggle to "deny relief to plaintiffs whose circumstances evoke outrage," the Judge, calling this a "hard case," was forced to rule in favor of Backpage.com due to CDA § 230 immunities for website owners that host third party content. The Supreme Court made similar findings when it declined to give certiorari to these victims.

Classified websites have used CDA § 230 immunities to defeat criminal charges filed against them as well. In late 2016, a California court dismissed criminal charges filed by then Attorney General, Kamala Harris, which accused Backpage.com's CEO and other executives of pimping, pimping a minor, and conspiracy to pimp.

114 Reno v. Am. Civil Liberties Union, 521 U.S. 844, 849 (1997) (upholding the judgment of the District Court that found the indecency portions of the CDA were unconstitutional and inconsistent with the protections of the First Amendment).
115 Id. at 865 ("Under the CDA . . . neither the parents’ consent—nor even their participation—in the communication would avoid the application of the statute.").
116 See Myers, supra note 113, at 173.
118 See e.g., Doe v. Backpage.com, 817 F.3d 12, 16 (1st Cir. 2016).
120 817 F.3d 12, 16 (1st Cir. 2016).
121 Id. at 15.
122 See Coyle, supra note 121.
124 Court's Final Ruling, supra note 70, at 14.
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Attorney General Kamala Harris was not the first to challenge these classified websites or CDA § 230(c) immunities and fail. A 2013 letter signed by 49 Attorneys General across the United States and its territories, begged Congress to change this law due to the devastating effects it has on the expansion of child sex trafficking. The Attorneys General gave the following examples of what type of behavior the Communications Decency Act § 230 is immunizing by allowing website owners to profit from the sexual exploitation of children:

[On] March 28, Miami police arrested a man for advertising the sex services of a 13-year-old girl on Backpage.com. The perpetrator had tattooed his name across the girl’s eyelids, marking her as his property. Two months earlier, two men were arrested in Fairfax County, Virginia for prostituting four minors on Backpage.com. And on April 10, four males and one female were arrested in St. Paul, Minnesota for running a prostitution ring of eight girls and women ages 15 to 40. The girls and women were advertised on Backpage.com.

The Attorneys General plea was left unanswered, but they have not given up. All who have joined to effort to reduce the sexual exploitation of children on the Internet and the effort to stop website owners from profiting from such, will not give up.

V. UNE SOLUTION DE FRANÇAISE

The First Circuit said it best when it offered a solution to combat the problem of the sexual exploitation of children on the Internet via classified advertising. The Court explained, “[i]f 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,” because “Congress did not sound an uncertain trumpet when it enacted the CDA . . . . it chose to grant broad protections to internet publishers.”

In order to effectually change the CDA, it is necessary for Congress to provide a way for courts to strip CDA § 230(c) immunity from a website owner if that owner has actively participated in, or has failed to take steps to remove exploitative and illegal content from the host website, even if the owner is not the publisher or speaker of such content. Inspiration for change can be found in comparable CDA legislation enacted in France in 2004 called Loi pour la Confiance dans l’Économie Numérique (“LCEN”, Law for Trust in the Digital Economy). Based on the United States’ and France’s common policies of free speech and freedom of the internet, we should look to France as a guide in trying to pass legislation.

126 Id.
127 See Coyle, supra note 121.
128 Doe v. Backpage.com, LLC, 817 F.3d 12, 29 (1st Cir. 2016).
129 Id.
130 See Butts, supra note 96 (“[I]t’s the job of Congress to make sure that we close this loophole and make Backpage and similar websites accountable for what they’re putting out there.”).
that protects the rights of website owners from excess litigation, while at the same time removing that shield if the owners are engaging in illegal behaviors.

A. An Overview of the French Government

In general, France is a nation of liberal democracy, which guarantees freedom of speech and freedom of the press.\(^\text{131}\) Article 11 of the 1789 Déclaration des Droits de l’Homme et du Citoyen [Declaration of the Rights of Man and Citizens] states, “the free communication of thoughts and of opinions is one of the most precious rights of man: any citizen thus may speak, write, print freely, save to respond to the abuse of this liberty, in the cases determined by the law.”\(^\text{132}\) As such, France’s Constitutional guarantee of freedom of speech is a right that is enjoyed by all citizens and is a right the French government must take into consideration during the process of passing new legislation.\(^\text{133}\)

The French government primarily functions by a centralized decision-making process, comparable to the United States. The head of state and the head of the Executive branch is the President, who is selected by the citizens through the voting process.\(^\text{134}\) The President then selects a Prime Minister, who is responsible for, inter alia, the formation of “essential political guidelines.”\(^\text{135}\) The Legislative branch of the French government, like the United States, consists of two separate houses or chambers. The first chamber is the Assemblée Nationale, and the second is the Sénat.\(^\text{136}\) New bills, or projets de loi, must be passed by both chambers of Parliament before becoming law.\(^\text{137}\) The Constitutional Council, or le Conseil Constitutionnel, is a special committee that exists in France, whose duties are determining whether new French legislation is Constitutional. Le Conseil Constitutionnel has the power to strike down a bill before it passes into law if it determines that a law is unconstitutional.\(^\text{138}\)

B. Loi pour la Confiance dans l’Économie Numérique

In France, telecommunications, including the Internet, are regulated by the Conseil Supérieur de l’Audiovisuel [CSA, Higher Audiovisual Council]. The CSA is part of the Executive branch and operates as an independent executive agency, which guarantees the freedom of speech and communication in France where “special attention is paid to the protection of young audiences.”\(^\text{139}\)

\(^{132}\) Id.
\(^{133}\) Id.
\(^{134}\) Id.
\(^{137}\) See French Government, supra note 136.
\(^{138}\) Id.
\(^{139}\) See France, supra note 133.
Much like the United States, France recognized the need for legislation that both protects the rights of website owners from excess litigation, while at the same time removing that shield if the owners are engaging in illegal behaviors. As a solution to a growing problem, France passed the *Loi pour la Confiance dans l’Économie Numérique* [LCEN, Law for Trust in the Digital Economy] in 2004. Article 1 of the LCEN provides that the freedom of communication on the Internet in France is only limited by, “respect for the dignity of the human person, the freedom and property of others . . . safeguarding public order, [and] the needs of national defense . . .” 140

Article 6 of the LCEN provides the standard by which website owners must comply in dealing with matters of illegal content appearing on their websites, even if such content was posted by a member of the public. Article 6, much like the CDA § 230(c), states that a website owner, in general may not be held responsible, criminally or civilly, for content posted by third parties. 141 However, the CDA and LCEN’s similarities end there. Instead of the blanket immunity afforded to website owners under the CDA § 230(c), the LCEN only permits such immunities where the website owner “had no knowledge of illegal activity or material” or if the website “acted promptly to remove or block access to it as soon as they discovered it.” 142 Although the LCEN may be viewed as stringent in the United States, it is important to note that the LCEN does not mandate general monitoring duties on website owners, nor are the owners obligated to actively search for illegal activity. 143 Instead, the LCEN obligates website owners to provide mechanisms by which the public users of the website may report such activities. 144 Thus, websites that promote distasteful content and are aware of such, must take steps to remove it, or otherwise be subject to criminal and/or civil punishment. 145

The language of LCEN Article 6 draws the critical line between immunity for innocent website owners who are actively attempting to provide a safe and legal experience for its users and culpable owners who are facilitating and engaging in illegal activities while attempting to hide behind the shield of the law. 146 The LCEN rewards proactivity and
punishes culpability, which is precisely what we need in the United States to stop classified website owners from profiting off of the backs of sexually exploited children.

The United States should adopt a version of the LCEN limitation on website owner immunity and strip the blanket protections afforded by the CDA § 230(c). Once the immunity is stripped, these websites would be subject to the full extent of all laws in the United States. The proposed amendment to CDA § 230(c)(1) is as follows:

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, so long as the provider is in compliance with the following, (1) the provider offers mechanisms by which public users may report illegal content, (2) where such illegal content is reported and verified, the provider acted promptly to remove or block access to it, and (3) the provider utilizes filtering and monitoring software to, or employs moderators, to remove illegal content from the public.

C. State Criminal Law

Separately, if Congress adopts the LCEN limitation so that website owners may be stripped of their CDA § 230(c) immunity, Congress should further amend the Act to allow state criminal charges to be brought against website owners when they are found to have engaged in illegal activities.147 “Those on the front lines of the battle against the sexual exploitation of children—State and local law enforcement—must be granted the authority to investigate and prosecute those who facilitate these horrible crimes.”148 Currently, CDA § 230(e)(1) states, “[n]othing in this section shall be construed to impair the enforcement of... any other Federal criminal statute.”149 The 49 Attorneys General that signed a letter asking Congress to amend the CDA correctly recognized that “Federal enforcement alone has proven insufficient to stem the growth of internet-facilitated child sex trafficking.”150 Based on the letter written by the Attorneys General, the best change to CDA § 230(e)(1) would be as follows:

Nothing 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 or State criminal statute.151

148 Id.
150 Letter to Senator Rockefeller, supra note 149.
151 Id. (emphasis in original)
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Amending the CDA to allow State criminal charges to be brought against classified website owners who knowingly participate in such reprehensible activities, is critical because it would subject them to charges such as conspiracy, facilitation, operating a business for the purpose of facilitating prostitution, living off of the proceeds of prostitution, and endangering the welfare of a minor, which are charges generally not available at the Federal level.

D. The First Amendment

One may argue that freedom of speech protected under the First Amendment to the United States Constitution is a roadblock on the path to amending the Communications Decency Act. The First Amendment to the United States Constitution states, “Congress shall make no law . . . abridging the freedom of speech.” 152 Under the First Amendment, United States citizens have the right to speak and write about certain activities, which, if turned into actions, would be considered illegal. 153 Classified website owners have successfully used this First Amendment protection as a defense when they are confronted with civil actions or criminal charges, along with CDA § 230(c) immunity. 154

Although the First Amendment offers broad protection to citizens of the United States, the right to free speech is not absolute. Congress and the courts have recognized that there are some instances in which freedom of speech must be limited and curtailed. 155 Since precedent “for criminalizing other communicative activities such as solicitation of murder, extortion or assignation of prostitution” 156 already exists, the removal of the blanket immunities provided by the CDA § 230(c) for culpable website owners would not disturb the important protections that the First Amendment provides. The amendment would simply be a much greater and more effective deterrent for these website owners than we currently have now under CDA §230(c).

VI. CONCLUSION

The sexual exploitation of children is a global epidemic that spans to almost every corner of our planet. While it will take a global effort to stem the growth of this gruesome, multi-billion dollar industry, we, in the United States, need not make it any easier for traffickers to make a profit from it. By allowing the Communications Decency Act to stand as it is today, we, as a nation are lining the pockets of website owners that care more about net income than they do about the lives of our children. Website owners should not be allowed to profit off of the backs of children forced into the slave trade by allowing traffickers to

154 See e.g., Cheryl Miller, Backpage.com Execs Plan First Amendment Challenge to ‘Online Brothel’ Charges, THE RECORDER (Oct. 12, 2016), http://www.therecorder.com/id=1202769808843/Backpagecom-Execs-Plan-First-Amendment-Challenge-to-Online-Brothel-Charges?return=20170104145903; Motion to Dismiss, supra note 68, at 9 (arguing criminal charges should be dismissed against the classified advertising company, Backpage.com on First Amendment grounds).
155 See e.g., Morse v. Frederick, 551 U.S. 393 (2007) (explaining that the First Amendment right to free speech does not apply to the advocating the use of illegal drugs at a school-sponsored event); 18 U.S.C. § 373(a) (1994) (criminalizing solicitation to commit a crime of violence).
156 See Walters, supra note 155.
advertise and sexually exploit children using an online classified advertising model. Website owners that engage in these practices should be subject to every available statute that we have in the United States that can stop them. Young victims should be able to successfully argue cases against and collect damages from these classified website owners without being blocked by legislation originally intended to help them. And while amending the Communications Decency Act will not totally solve the problem of human trafficking in the United States or elsewhere, it would certainly send a loud message to the entire industry: The United States of America will fight to protect our children from becoming victims in every way possible.

That message has already begun to take root. Ordinary citizens, law enforcement, government officials, and attorneys are rallying behind these child-victims and are taking a stand against blanket CDA immunity, child trafficking, child trafficking online, and the classified websites that are facilitating such activities.

Thorn is a non-profit organization created by Ashton Kutcher and his ex-wife, Demi Moore, dedicated to combating the sexual exploitation and trafficking of children using the same technology that traffickers use, the Internet.\textsuperscript{157} Thorn has recruited dozens of technology organizations along with public volunteers to aid them in the fight against child trafficking online.\textsuperscript{158} Using Internet technologies, Thorn has developed programs to help identify and locate child victims online, clean up the deep web from abusive behaviors, and intercept online abuses that may be negatively impacting children.\textsuperscript{159}

An increasing number of state officials and a number of attorneys have vowed to join Kamala Harris’ efforts to reduce the spread of child sex trafficking online by fighting for a change to the Communications Decency Act.\textsuperscript{160} Law enforcement offices around the country are taking notice to the growing problem of child sex trafficking, taking steps to combat it, and even rescuing children from the bounds of slavery.\textsuperscript{161}

All of these efforts, however, do not supersede the fact that thousands of children are being sexually exploited via online classified advertising every single day. When one of these classified advertising websites shuts down, another opens. The cycle will not stop, the sexual victimization of children will not stop, until we make a fundamental change to our existing legislation to punish all offenders, including website owners. That change starts with

\textsuperscript{157} \textsc{We Are Thorn}, https://www.wearethorn.org.
\textsuperscript{158} \textsc{Id.}
\textsuperscript{159} \textsc{Id.}
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the Communications Decency Act and lowering the shield that has immunized and protected them thus far.