

1-1-2013

Tax Credits for Tattletales: Legislating to Catch Craigslist Criminals

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Recommended Citation

Ovadia, Michal (2013) "Tax Credits for Tattletales: Legislating to Catch Craigslist Criminals," *Hofstra Law Review*: Vol. 42: Iss. 2, Article 10.

Available at: <http://scholarlycommons.law.hofstra.edu/hlr/vol42/iss2/10>

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NOTE

TAX CREDITS FOR TATTLETALES: LEGISLATING TO CATCH CRAIGSLIST CRIMINALS

I. INTRODUCTION

M.A. was a fourteen-year-old runaway the first time her body was photographed and sold on the Internet.¹ Her pimp, Latasha Jewell McFarland, posted sexually explicit pictures of M.A. on Backpage.com, a classified advertisement website.² McFarland set up numerous advertisements offering to make M.A. available for “sexual liaisons” in exchange for money.³ McFarland coordinated multiple appointments, shuttling M.A. from one location to the next, forcing her to perform sexual acts with adult male customers.⁴ M.A.’s story is not unique.⁵ Each year, nearly one third of the estimated 1.6 million American children who run away from home turn to prostitution for survival.⁶ Although, at first these children are motivated by a need for food, shelter, or drugs, they soon find themselves funneled into a more formalized prostitution industry.⁷ The fact that this industry is becoming increasingly ubiquitous

1. See *M.A. ex rel. P.K. v. Vill. Voice Media Holdings, LLC*, 809 F. Supp. 2d 1041, 1043-44 (E.D. Mo. 2011) (detailing that the plaintiff, fourteen-year-old M.A., was sexually trafficked in the years 2009 and 2010).

2. *Id.* For the purposes of this Note, Backpage.com refers to the website, and Backpage refers to the company.

3. *Id.*

4. *Id.* at 1044.

5. See generally R. BARRI FLOWERS, *RUNAWAY KIDS AND TEENAGE PROSTITUTION: AMERICA’S LOST, ABANDONED, AND SEXUALLY EXPLOITED CHILDREN* (2001) (discussing the epidemic of runaway youth in the United States, and its correlation to the prostitution of teenagers).

6. Ian Urbina, *For Runaways on the Street, Sex Buys Survival*, N.Y. TIMES, Oct. 27, 2009, at A1 (detailing the story of Nicole Clark, a fourteen-year-old girl who became coerced into engaging in prostitution when she ran away from her group home). Ian Urbina’s article describes the prostitution industry as a “revolving door.” *Id.*

7. *Id.* (“Antoin Thurman, who was sentenced in 2006, recalled that as a pimp, he would work to win a girl’s trust: ‘get her nails done, take her to buy an outfit, take her out to eat, make her feel wanted.’”). A pimp is defined as “a person who solicits customers for a prostitute . . . in return for a share of the prostitute’s earnings.” BLACK’S LAW DICTIONARY 1265 (9th ed. 2009).

on the Internet poses an increased danger for each child forced into prostitution.⁸ In other words, the ease with which pimps are able to market minors via online advertisements increases the number of customers that each individual child is forced to serve.⁹ One such victim, a sixteen-year-old, was sold as many as eight times per day to various men.¹⁰

Meanwhile, Congress has sought to shield interactive computer services ("ICSs," singularly "ICS") from litigation stemming from third party content posted by their users online.¹¹ This effort was codified in § 230 of the Communications Decency Act ("CDA").¹² Since the CDA was enacted in 1996, several courts have used § 230 as a basis to reject plaintiffs' arguments that websites should be held liable for the criminal nature of their users' activity.¹³ There have been numerous attempts to

8. See Sasha Aslanian, *Sex Trafficking: Migration to Internet Brings New Victims, Customers*, MPRNEWS (May 30, 2012), <http://www.mprnews.org/story/2012/05/30/underage-sex-trafficking> ("Prostitution has largely migrated from the streets to the Internet, making it difficult for law enforcement to curb illicit behavior."). Sasha Aslanian's article specifically details the story of one girl in Minnesota who had been sold six hundred times, as often as eight times a day. *Id.*

9. See *id.*

10. *Id.*

11. 47 U.S.C. § 230(c)(2) (2006) ("No provider or user of an [ICS] shall be held liable on account of—(A) any action voluntarily taken in good faith to restrict . . . obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable [material], whether or not such material is constitutionally protected . . ."). This portion of the law established immunity for ICSs in suits brought against them for their users' criminal activity on the Internet. *Id.* An ICS is defined by the U.S. Code as:

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.

Id. § 230(f)(2). The Ninth Circuit has found that, "[t]oday, the most common [ICSs] are websites." *Fair Hous. Council of San Fernando Valley v. Roommates.com, LLC*, 521 F.3d 1157, 1162 n.6 (9th Cir. 2008) (en banc). Furthermore, for the purposes of this Note, third party content refers to information that an individual user posts on a website.

12. 47 U.S.C. § 230 (2006).

13. See, e.g., *Roommates.com, LLC*, 521 F.3d at 1174-75 (extending immunity to the defendant website for content posted in the Additional Comments section of Roommates.com, but holding the defendant website liable for the illegal content resulting from questions the defendant posed to its users); *Chi. Lawyers' Comm. for Civil Rights Under Law, Inc. v. Craigslist, Inc.*, 519 F.3d 666, 671 (7th Cir. 2008) (finding that, since Craigslist was not the author of the advertisements at issue, it could not be treated as a publisher under 47 U.S.C. § 230(c)(1)); *Carafano v. Metrosplash.com, Inc.*, 339 F.3d 1119, 1125 (9th Cir. 2003) (holding that, since the defendant online dating website did not create or develop the content at issue, it was entitled to immunity from liability under 47 U.S.C. § 230(c)(1)); *M.A. ex rel. P.K. v. Vill. Voice Media Holdings, LLC*, 809 F. Supp. 2d 1041, 1052, 1058 (E.D. Mo. 2011) (according to § 230 of the CDA, a website is immune from liability for user content that it did not encourage the user to develop); see also Abby R. Perer, Note, *Policing the Virtual Red Light District: A Legislative Solution to the Problems of Internet Prostitution and Sex Trafficking*, 77 BROOK. L. REV. 823, 830-33 (2012) (providing a brief history of the prostitution industry, and discussing § 230 of the CDA).

punish websites for conduct that is not their own.¹⁴ However, this tactic of attacking § 230 has not been successful, as courts have consistently upheld the CDA.¹⁵ Despite the fact that such judicial decisions have reinforced ICSs' lack of liability for third party content that they did not specifically encourage, Craigslist removed portions of its website in an effort to diminish child sex sales.¹⁶ Unfortunately, these efforts were futile because website users simply reposted their advertisements to other sections of Craigslist.org, or moved them to other classified advertisement websites altogether.¹⁷ Accordingly, efforts should be redirected to holding the individual third party content posters liable for their actions.¹⁸ In order to hold these individuals liable for the content that they post, a legislatively instituted program is necessary to recruit ICSs, like Craigslist and Backpage, to work with local police

14. See, e.g., *Doe v. MySpace, Inc.*, 528 F.3d 413, 417 (5th Cir. 2008) (holding that the plaintiff's argument that the defendant should be held liable for third party content posted on its website was devoid of merit because § 230 of the CDA granted the defendant immunity from such liability); *Chi. Lawyers' Comm.*, 519 F.3d at 671-72 (finding that the defendant website should not be held liable for the discriminatory statements its users posted on Craigslist.org because it did not induce such statements); see also Nathan Assel, Note, *Advertising Prostitution: Potential Criminal Liability for Craigslist*, 25 SYRACUSE SCI. & TECH. L. REP. 77, 82-83 (2011) (explaining that the focus of litigation has been on holding websites liable for third party postings). But see *FTC v. Accusearch Inc.*, 570 F.3d 1187, 1196-97 (10th Cir. 2009) (finding that the defendant website was liable because it both developed and published the content at issue, and, therefore, was more than a mere publisher).

15. See Perer, *supra* note 13, at 832-33. For examples of cases upholding § 230 of the CDA, see *Universal Comm'n Sys., Inc. v. Lycos, Inc.*, 478 F.3d 413, 415 (1st Cir. 2007); *Carafano*, 339 F.3d at 1125; *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 328 (4th Cir. 1997); *Gentry v. eBay, Inc.*, 121 Cal. Rptr. 2d 703, 712 (Ct. App. 2002); *Dart v. Craigslist, Inc.*, 665 F. Supp. 2d 961, 969 (N.D. Ill. 2009).

16. See Shahrzad T. Radbod, Note, *Craigslist—A Case for Criminal Liability for Online Service Providers?*, 25 BERKELEY TECH. L.J. (ANN. REV.) 597, 608 (2010) (noting that Craigslist renamed the Erotic Services portion of their website to Adult Services); Associated Press, *'Censored' Bar Won't Stop Online Prostitution*, NDTV (Sept. 6, 2010), <http://www.ndtv.com/article/world/1-censored-bar-won-t-stop-online-prostitution-49846> [hereinafter *1 'Censored' Bar*] (noting that, in 2010, Craigslist completely removed the Adult Services category from its website). For the purposes of this Note, Craigslist.org refers to the website and Craigslist refers to the company.

17. See Adrian Chen, *Your Post-Craigslist Guide to Buying Sex Online*, GAWKER (Sept. 5, 2010, 4:46 PM), <http://www.gawker.com/5630687> (listing numerous websites which advertise sex for sale); Alana Goodman, *Prostitution Ads Still a Problem on Craigslist Despite Recent Crackdowns*, NEWSBUSTERS (Sept. 8, 2010, 1:34 PM), <http://www.newsbusters.org/blogs/alana-goodman/2010/09/08/prostitution-ads-still-problem-craigslist-despite-recent-crackdowns> (noting that, after the Adult Services portion of Craigslist.org was removed on September 4, 2010, advertisements for prostitution could be found in different categories on the website, such as Therapeutic Services).

18. See Mike Masnick, *Political Campaign Against Craigslist Ratchets Up*, TECHDIRT (Aug. 6, 2010, 1:57 PM), <http://www.techdirt.com/articles/20100806/11433810530.shtml> [hereinafter Masnick, *Political Campaign*] (arguing that blaming Craigslist is the wrong approach, and, instead, the website should be employed to help catch online sexual predators).

departments and report criminal activity occurring on their websites.¹⁹ In exchange for their cooperation, websites that comply with the initiative would receive tax breaks in amounts over and above the cost of monitoring website content in order to incentivize continued participation.²⁰ In order to indemnify the government for those tax incentives, the new law would mandate that individuals convicted of sex trafficking and child endangerment crimes pay a sanction as part of their sentence.²¹

This Note proposes a framework meant to guide those in search of a more effective way to discontinue the sexual exploitation of children online.²² Part II of this Note provides background information about Craigslist.org and other classified advertisement websites, including how they function and what features they offer to their users.²³ This Part portrays the extent to which advertisements for underage prostitution are present on the Internet, and also cites specific cases that highlight the dangers posed by the online sex industry.²⁴ Part III of this Note explains § 230 of the CDA and how it functions to shield websites from immunity for content that their users post online.²⁵ Part III also describes the unsuccessful attempts, on behalf of both websites and litigating plaintiffs, to diminish the prevalence of online prostitution advertisements featuring children and to overturn § 230 of the CDA, respectively.²⁶ Part IV of this Note proposes a solution to alleviate the

19. See *infra* Part IV.B.2.

20. See *infra* Part IV.B.2.

21. See *infra* Part IV.C; see also U.S. DEP'T OF STATE, TRAFFICKING IN PERSONS REPORT 33, 44 (2012), available at <http://www.state.gov/documents/organization/192587.pdf> (categorizing child sex trafficking as an internationally recognized crime for which the United States has issued sanctions against other nations). The argument advanced in this Note, though, is that the blame should only fall upon the individuals posting and responding to online advertisements for sex with children. See *infra* Part IV. Responsibility should not lie with websites hosting the advertisements, or the citizens who pay for law enforcement through their tax dollars. See *infra* Part IV. The solution is to craft a legislative scheme that compels criminals not only to face criminal prosecution for their illicit online activities, but to also pay the costs associated with monitoring the advertisement websites where the content is posted. See *infra* Part IV.C.

22. See *infra* Part IV.

23. See *infra* Part II.

24. See *infra* Part II.

25. See *infra* Part III.A.

26. See *infra* Part III.B; see also Radbod, *supra* note 16, at 611 (noting that, despite the creative arguments that plaintiffs have come up with in § 230 cases, none have proven successful in causing a court to rule contrary to the law's grant of immunity to websites for unsolicited third party content); Wendy Davis, *Internet Archive Joins Fight Against New Washington Sex-Trafficking Law*, DAILY ONLINE EXAMINER (June 18, 2012, 4:44 PM), <http://www.mediapost.com/publications/article/177035/internet-archive-joins-fight-against-new-washingto.html> (showing that Craigslist's efforts to diminish sex sales online by removing parts of its website were unsuccessful because users moved their advertisements to different classified advertisement websites altogether).

growing number of children being exploited for sex on the Internet, first by suggesting that the issue can only be resolved if the focus is shifted from website liability to liability for individuals posting the illicit content online.²⁷ Part IV goes on to outline a legislative scheme consisting of website monitoring and reporting, law enforcement sting and reverse sting operations, and tax incentives to promote continued ICS participation under this framework.²⁸

II. THE EVOLUTION OF THE INTERNET AS A PROSTITUTION PROVENANCE: BACKGROUND

In order to evaluate the legal implications of activity occurring on the Internet, it is first helpful to have background information about a given website.²⁹ It is also difficult to assess the content liability issue that websites face without understanding the origin and purpose of the content.³⁰ However, this difficulty is alleviated after even a brief visit to the given website; one may find that much of the third party content is in the form of advertisements soliciting sex from underage girls.³¹ It is upon that discovery that the dangers of Internet misuse come to light, and it becomes easier to understand how liability issues arise.³² These dangers are explained in Subpart B,³³ which is preceded by a discussion of Craigslist.org's general functions as a website in Subpart A.³⁴

A. What Is Craigslist.org?

Craigslist.org is an interactive classified advertisement website that allows users to sell and purchase goods and services.³⁵ It was founded in 1995 by Craig Newmark, and has since grown to international success.³⁶

27. See *infra* Part IV.

28. See *infra* Part IV.B–C.

29. See, e.g., *California v. Aguirre*, No. G045009, 2012 WL 1132777, at *1 (Cal. Ct. App. Apr. 5, 2012) (explaining the various functions and features available to individuals visiting Craigslist.org).

30. See, e.g., *id.*

31. See Cecilia Kang, *Adult Ads Permanently Off U.S. Sites, Craigslist Says*, WASH. POST, Sept. 16, 2010, at A22 (noting that the Internet has made it easier to exploit the 100,000 children who are forced into prostitution each year).

32. See Perer, *supra* note 13, at 829-30 (suggesting that the controversy surrounding online advertisements selling sexual services from minors hit a breaking point when, in 2010, seventeen attorney generals appealed to Craigslist with a request that it remove the Adult Services category on its website).

33. See *infra* Part II.B.

34. See *infra* Part II.A.

35. *Aguirre*, 2012 WL 1132777, at *1 (“Craigslist is a popular Web site where individuals discuss topics of interest, post personal advertisements, and buy and sell property.”).

36. See Radbod, *supra* note 16, at 597. A description of Craigslist.org's success states that:

Despite its global recognition, Craigslist still has only about forty employees.³⁷ The website lists several categories of advertisements ranging from Community, to Personals, to Jobs.³⁸ Within these categories are further subcategories, which contain more specific sets of advertisements.³⁹ There is a search option, whereby an individual visiting the website may type in key words in order to sort through the advertisements.⁴⁰ Craigslist.org also has discussion forums.⁴¹ This feature allows website users to communicate amongst each other about a whole host of topics including sports, divorce, and religion.⁴²

With all of these tools built into the website, its users can quickly and easily find what they need.⁴³ After clicking on a subcategory on the home page, users can pick from a list of advertisements for goods and services related to the chosen subcategory.⁴⁴ The titles of the advertisements are usually eye-catching, in an attempt to draw responses from other users of the website.⁴⁵ Craigslist.org advertisements either offer or request something of value, and when a prospective buyer is interested in a certain advertisement, he can contact the seller to express interest in what is being sold.⁴⁶ The two can communicate and decide the terms of the purchase, either by using the email system within Craigslist.org, or by other means if the seller lists contact information.⁴⁷

Its pages are divided into broad categories, such as "Jobs" and "Services," and easy to navigate subcategories for more than 450 cities worldwide. Almost fifteen years after its founding, the San Francisco-based website is the seventh most popular English-language webpage in the world, receiving over twenty billion page views per month.

Id.; *Fact Sheet*, CRAIGSLIST, <http://www.craigslist.org/about/factsheet> (last visited Feb. 16, 2014) [hereinafter *Fact Sheet*, CRAIGSLIST].

37. *Fact Sheet*, CRAIGSLIST, *supra* note 36.

38. *See New York City*, CRAIGSLIST, <http://newyork.craigslist.org> (last visited Feb. 16, 2014) [hereinafter *New York City*, CRAIGSLIST] (displaying how Craigslist.org appears to Internet users accessing the website from a location near New York, New York).

39. *See id.*

40. *See Craigslist, Inc. v. Mesiaab*, No. C 08-05064 CW, 2010 WL 5300883, at *1 (N.D. Cal. Nov. 15, 2010) ("Craigslist owns . . . 'on-line computer data bases and on-line searchable databases featuring information, classified listings and announcements.'"); *see also New York City*, CRAIGSLIST, *supra* note 38.

41. *See New York City*, CRAIGSLIST, *supra* note 38.

42. *See id.*

43. *See id.*

44. *See Gorgeous Costume Vintage Jewelry - Many Pieces +++*, CRAIGSLIST (Jan. 8, 2014), <http://newyork.craigslist.org/que/jwl/4278000563.html> [hereinafter *Jewelry Advertisement*, CRAIGSLIST] (displaying an advertisement that was accessed by navigating through the Jewelry subcategory, located beneath the For Sale category on the home page).

45. *See, e.g., Jewelry Advertisement*, CRAIGSLIST, *supra* note 44 (listing an advertisement using the following language: "GORGEOUS COSTUME VINTAGE JEWELRY - MANY PIECES +++ - \$95 (BELLEROSE)").

46. *See, e.g., id.*; *New York City*, CRAIGSLIST, *supra* note 38.

47. *California v. Aguirre*, No. G045009, 2012 WL 1132777, at *1 (Cal. Ct. App. Apr. 5,

The fact that Craigslist.org is easy to use and inexpensive has made it the world's largest classified advertisement website, as well as the eighth overall most popular website on the Internet.⁴⁸ The Help, FAQ, Abuse, and Legal sections on Craigslist.org are available to users, and guides them in their use of the website.⁴⁹ Upon clicking the link to this section, the user is directed to a page with the titles of several informational articles, such as "how to post," and "are all ads free?"⁵⁰ The answer to the latter question is no—not all posts are free.⁵¹ The advertisement posts that are not free are listings for jobs, brokered apartment rentals, therapeutic services, brokered ticket sales, and automobile dealer sales.⁵² The Help section on Craigslist.org explains the varying costs for job posts and apartment listings based on geographical region.⁵³ Besides the fee-required categories listed above, the website does not charge for advertisements posted under other sections of Craigslist.org.⁵⁴

Aside from its terms of use, Craigslist does not impose many restrictions on the users of its website.⁵⁵ To place an advertisement in the Casual Encounters section, the user must represent that they are at least eighteen years of age,⁵⁶ and, before posting an advertisement in that section, the seller is prompted to review and agree to Craigslist.org's terms of use.⁵⁷ These terms state, in relevant part:

2012) ("A user replies to an advertisement by sending an e-mail to the poster through the Craigslist Web site."); see *Jewelry Advertisement*, CRAIGSLIST, *supra* note 44 (listing the seller's contact information, as well as a "contact" button providing the seller's Craigslist.org e-mail address).

48. See Kang, *supra* note 31 (stating that Craigslist.org is the "largest classified site in the world"); Declan McCullagh, *Craigslist Faces New Wave of Political Attacks*, CNET NEWS (Sept. 9, 2010, 4:00 AM), http://news.cnet.com/8301-13578_3-20015916-38.html (stating that Craigslist.org is the "eighth-most-popular Web site" in the United States).

49. See *Help*, CRAIGSLIST, <http://www.craigslist.org/about/help> (last visited Feb. 16, 2014) [hereinafter *Help*, CRAIGSLIST]; *New York City*, CRAIGSLIST, *supra* note 38.

50. *Help*, CRAIGSLIST, *supra* note 49.

51. See *Posting Fees*, CRAIGSLIST, http://www.craigslist.org/about/help/posting_fees (last visited Feb. 16, 2014) [hereinafter *Posting Fees*, CRAIGSLIST] (informing users that "[a]ll craigslist postings are free, except for" a few specified kinds of advertisements).

52. *Id.* For example, the fee for posting a job in the San Francisco Bay Area is seventy-five dollars per job. *Id.* This fee pays for one job in one category. *Id.* The fee for posting a brokered apartment rental in New York City is ten dollars. *Id.* The fee for posting advertisements for therapeutic services is ten dollars, and live advertisements can be re-posted for five dollars. *Id.*

53. *Help*, CRAIGSLIST, *supra* note 49.

54. See *id.*; *Posting Fees*, CRAIGSLIST, *supra* note 51.

55. See *Dart v. Craigslist, Inc.*, 665 F. Supp. 2d 961, 962-63, 968 (N.D. Ill. 2009) (providing a brief description of Craigslist.org's security features, and finding that § 230 of the CDA protects a website from claims that it has facilitated prostitution).

56. *California v. Aguirre*, No. G045009, 2012 WL 1132777, at *1 (Cal. Ct. App. Apr. 5, 2012); *Casual Encounters*, CRAIGSLIST, <http://newyork.craigslist.org/i/personals?category=cas> (last visited Feb. 16, 2014) [hereinafter *Casual Encounters*, CRAIGSLIST].

57. See *Casual Encounters*, CRAIGSLIST, *supra* note 56.

To the extent permitted by law, (1) we make no promise as to [Craigslist.org], its completeness, accuracy, availability, timeliness, propriety, security or reliability; (2) your access and use are at your own risk, and [Craigslist.org] is provided “AS IS” and “AS AVAILABLE”; (3) we are not liable for any harm resulting from (a) user content; (b) user conduct, e.g. illegal conduct; (c) your [Craigslist] use; or (d) our representations⁵⁸

Despite these disclaimers, Craigslist.org and other classified advertisement websites are seen as liable for “facilitat[ing] violence and criminal activity that involves unwilling children and teens by continually allowing third party users to advertise the sale of sex for money.”⁵⁹ This, as well as the number of posts for sexual activity on the website, has been the basis for the tremendous amount of criticism that Craigslist has faced in recent years.⁶⁰

B. The Dangers of Misuse

This Note will not argue that Craigslist is undeserving of the criticism that it has encountered.⁶¹ On the contrary, the purpose of highlighting such criticism in this Note is to stress the general discomfort that society feels towards Internet sex sales.⁶² Craigslist.org is infamously known for its advertisements soliciting illicit sexual acts for money.⁶³ In fact, the volume of these advertisements has earned Craigslist the nickname, “the Wal-Mart of online sex trafficking.”⁶⁴

58. *Terms of Use*, CRAIGSLIST, <http://www.craigslist.org/about/terms.of.use> (last updated Dec. 5, 2013).

59. See Perer, *supra* note 13, at 829.

60. See CMI's Burchfiel: Craigslist Has 'Social Responsibility' to Address Prostitution, NEWSBUSTERS (Sept. 10, 2010, 1:44 PM), <http://newsbusters.org/blogs/nb-staff/2010/09/10/cmi-s-burchfiel-craigslist-has-social-responsibility-address-prostitution> [hereinafter *Craigslist Has Social Responsibility*] (criticizing Craigslist for enabling underage prostitution and sex trafficking); Steve Turnham & Amber Lyon, *Sold on Craigslist: Critics Say Sex Ad Crackdown Inadequate*, CNN (Aug. 4, 2010), <http://www.cnn.com/2010/CRIME/08/03/craigslist.sex.ads> (noting that, for anti-trafficking activists, Craigslist has not done enough to prevent the sale of underage sex services on Craigslist.org).

61. See Goodman, *supra* note 17 (“Craigslist has been criticized for years for selling ad space to sex-peddlers and prostitution rings.”).

62. See *Craigslist Has Social Responsibility*, *supra* note 60 (arguing that Craigslist has a social obligation to address the sex trafficking and prostitution sales taking place on Craigslist.org).

63. See *People v. Swan*, No. H031862, 2009 WL 691128, at *1 (Cal. Ct. App. Mar. 17, 2009) (noting that Craigslist.org is well known as a resource for those who wish to meet and sexually assault young girls).

64. *Why Did Craigslist End 'Adult Services' Section?*, IFRAH LAW (Sept. 6, 2010), <http://www.crimeinthesuites.com/why-did-craigslist-end-adult-services-section> (internal quotation marks omitted). There was speculation as to why Craigslist removed the Adult Services category from Craigslist.org:

Craigslist.org, though, is not the only website of this nature—Village Voice Media Holdings, LLC owns Backpage.com, a classified advertisement website much like Craigslist.org.⁶⁵ Backpage.com, also known as “the eBay of Prostitution,” is notoriously known to feature advertisements for prostitution.⁶⁶ These advertisements are only two clicks away from the home page,⁶⁷ and are just as accessible as those on Craigslist.org.⁶⁸ Nonetheless, it is business as usual for these websites.⁶⁹ Moreover, those running the websites are aware that this situation is problematic.⁷⁰ A top Backpage.com executive has even admitted that more than 400 “adult” advertisements, possibly involving minors, are posted on the website each month.⁷¹

So we doubt that Craigslist took this step the other day because of the risk of legal liability. Instead, we think it's more likely that Craigslist was concerned about its reputation in the “court of public opinion,” and that the profits from the “adult” postings, which may have been fairly substantial, simply weren't worth the bad publicity.

Id.

65. See *Global: Call on Village Voice Media to Stop Facilitating Sex Trafficking*, EQUAL NOW (Mar. 19, 2012), http://www.equalitynow.org/take_action/sex_trafficking_action401 [hereinafter *Call on Village Voice Media*] (explaining that the Internet, specifically Backpage.com, has become a resource often used by those selling and buying sex).

66. See *Do You Know About Backpage.com, A.K.A. the eBay of Prostitution?*, CHILD. AT RISK (July 26, 2013), <http://www.childrenatrisk.org/2013/07/26/do-you-know-about-backpage-com-a-k-a-the-ebay-of-prostitution> [hereinafter *Backpage.com, the eBay of Prostitution*] (educating readers about the growing number of children who are trafficked for sex on Backpage.com). Backpage.com and its advertisements can be accessed in a number of countries worldwide:

Backpage carries “adult” advertisements in hundreds of cities in all 50 U.S. states, as well as in 14 other countries, including the UK, France, Mexico, New Zealand, South Africa and the Dominican Republic. These “adult” sections on mainstream classified websites normalize easy, anonymous ways for traffickers and pimps to recruit, market and deliver women and girls as commodities for sexual exploitation.

Call on Village Voice Media, *supra* note 65.

67. See, e.g., *Manhattan Escorts*, BACKPAGE, <http://manhattan.backpage.com/FemaleEscorts> (last visited Feb. 16, 2014).

68. See *Backpage.com, the eBay of Prostitution*, *supra* note 66 (comparing Backpage.com to Craigslist.org); *Manhattan, NY*, BACKPAGE, <http://manhattan.backpage.com> (last visited Feb. 16, 2014) (listing a number of categories and subcategories that users can search through to find items and services for sale, including a subcategory entitled Escorts).

69. See *Backpage.com, the eBay of Prostitution*, *supra* note 66; see also Perer, *supra* note 13, at 830 (noting that advertisements for sex services on Craigslist.org and other similar websites appear under categories like Casual Encounters).

70. See Assel, *supra* note 14, at 80, 83-84 (noting that Craigslist is aware of the problem concerning prostitution advertisements on its website, and it is for that reason that it removed the Erotic Services category from Craigslist.org).

71. Letter from National Association of Attorneys General, to Samuel Fifer, Counsel for Backpage.com, LLC (Aug. 31, 2011), available at <http://www.naag.org/assets/files/pdf/signons/Backpage%20WG%20Letter%20Aug%202011Final.pdf> (“In a meeting with the Washington State Attorney General’s Office, Backpage.com vice president Carl Ferrer acknowledged that the company identifies more than 400 ‘adult services’ posts every month that may involve minors.”).

This acknowledgement highlights the severity of the situation and supports the argument that minors stand to suffer the most if online sexual exploitation goes unchecked.⁷² Minors, especially runaways, are at risk because their desperation makes them easy prey for pimps.⁷³ Take Juanita, for example; her pimp, Jose, offered her a job “having sex with ‘rich old guys.’”⁷⁴ Jose took pictures of Juanita, as well as her friends, Jessica and Stephanie, who were also coerced into working as prostitutes for Jose.⁷⁵ Posting these photographs in advertisements on Craigslist.org was one of the ways in which Jose acquired his customer base.⁷⁶ The pimp-prostitute relationship went smoothly until Jose found out that Juanita had been complaining about not being paid.⁷⁷ Jose reacted by cornering Juanita and threatening to harm her younger sister if Juanita called the police.⁷⁸ Perhaps the most notable fact about this case is that it was litigated in juvenile court, which signifies that Jose was also a minor.⁷⁹ This is only one of the countless stories depicting how a child was victimized as a result of online prostitution.⁸⁰ The stories are without a doubt tragic, and, in that regard, critics of the CDA and

72. See *California v. Swan*, No. H031862, 2009 WL 691128, at *1 (Cal. Ct. App. Mar. 17, 2009) (noting that predators on the Internet pose an immediate and dangerous threat to minors).

73. See *Commonwealth v. Matos*, 941 N.E.2d 645, 648 (Mass. App. Ct. 2011) (describing how a child victim became involved in prostitution out of desperation for money after running away from a halfway house).

74. See *In re Jose Z.*, No. D055962, 2011 WL 10605, at *1 (Cal. Ct. App. Jan. 4, 2011) (affirming the juvenile court’s finding that the defendant committed a number of criminal acts, including “pimping”).

75. *Id.*

76. *See id.*

77. *See id.*

78. *Id.*

79. *See id.*

80. *See id.*; see also, e.g., Deborah Feyerick & Sheila Steffen, *A Lurid Journey Through Backpage.com*, CNN FREEDOM PROJECT (May 10, 2012), <http://thecnnfreedomproject.blogs.cnn.com/2012/05/10/a-lurid-journey-through-backpage-com> (showcasing two news segments that portrayed the epidemic of young girls being prostituted on Backpage.com, including stories about specific victims). The first video discussed in a recent CNN article focuses on an interview conducted by Deborah Feyerick—a correspondent for CNN’s Anderson Cooper 360 program—with Liz McDougall, Backpage’s lawyer. Anderson Cooper 360, *Website Denies Advertising Prostitution*, CNN (May 4, 2012), <http://www.cnn.com/video/data/2.0/video/bestoftv/2012/05/05/ac-pkg-feyericks-onlinepimps.cnn.html>. The video also includes interviews of two women whose daughters had run away and fallen prey to the online prostitution industry. *Id.* One woman’s daughter was fifteen years old when she met a man online who later advertised her on Backpage.com. *Id.* The other woman’s daughter went missing at the age of fourteen, and, for the three years that she was gone, she was advertised online and sold for sexual services. *Id.* In an effort to show that this is not just an international problem, but a domestic one as well, the Attorney General of California mentions in the second video that a young girl had been trafficked from Kansas to Las Vegas, then prostituted on Hollywood Boulevard. *See* Anderson Cooper 360, *Should Backpage Remove Adult Section?*, CNN (May 4, 2012), <http://www.cnn.com/video/data/2.0/video/bestoftv/2012/05/05/ac-kristof-backpage-sex-trade.cnn.html>.

classified advertisement websites validly urge that someone must be held responsible for forcing these children into prostitution.⁸¹ However, this serves to show the heightened need for a swift solution to remedy the online prostitution problem—one that is different from previous attempts, all of which have proven unsuccessful.⁸² Implementing such a solution would safeguard minor and adult prostitutes alike, as well as individuals using classified advertisement websites for reasons other than prostitution.⁸³

In fact, the dangers of online sex sales are known not only to minors working at the behest of their pimps, but also to adults using Craigslist.org.⁸⁴ The Internet has made it easier than ever to hire, and sometimes hurt, prostitutes.⁸⁵ Abdikafar Adan found this to be true when he used Craigslist.org to find the two prostitutes he later assaulted.⁸⁶ As for the first woman, she was picking Adan up in her car when suddenly he pulled out a large kitchen knife.⁸⁷ Adan held the knife to her throat and chest as he raped her in the back seat of her car.⁸⁸ According to the second victim, Adan did the same to her—he raped her and held a knife to her neck, warning that he “would slit her throat” if she did not keep quiet.⁸⁹ Although the victims discussed in this Note thus far were minors forced into prostitution, the list of Craigslist.org victims extends beyond this group of individuals.⁹⁰ James Curtis is one such victim; he used

81. See Turnham & Lyon, *supra* note 60 (using the story of a young girl who fell prey to the prostitution industry to highlight anti-trafficking activists’ assertion that websites have not done enough to diminish child prostitution on classified advertisement websites).

82. See Radbod, *supra* note 16, at 601 & n.30 (citing several cases in which courts have upheld § 230 of the CDA); Goodman, *supra* note 17 (clarifying that websites attempting to solve the child prostitution problem did not improve the situation); see also *infra* Part III.B.

83. See *infra* Part IV.B.

84. See, e.g., *People v. Briggs*, No. B204563, 2009 WL 1480360, at *1 (Cal. Ct. App. May 26, 2009) (“Appellant and the codefendant held the victim at gunpoint and robbed him. When the victim attempted to escape, the codefendant repeatedly hit the victim with a baseball bat on the head, shoulders and ribs, and the victim almost died.”). The victim assaulted was an adult who met his assailant online through Craigslist.org. *Id.*

85. See Alex Miller, *Sugar Dating: A New Take on an Old Issue*, 20 BUFF. J. GENDER L. & SOC. POL’Y 33, 44 (2012) (suggesting that the Internet has made it easier than ever to solicit prostitutes); see also *State v. Adan*, No. 64856-O-I, 2011 WL 1107232, at *1 (Wash. Ct. App. Mar. 28, 2011) (affirming the defendant’s convictions for rape in the first degree and robbery in the first degree, based on his acts against a prostitute he had met online).

86. See *Adan*, 2011 WL 1107232, at *1-2.

87. *Id.*

88. *Id.*

89. *Id.* at *2.

90. See *People v. Briggs*, No. B204563, 2009 WL 1480360, at *1 (Cal. Ct. App. May 26, 2009) (affirming the defendant’s convictions of first degree robbery and false imprisonment by violence for robbing and brutally beating a man who the defendant met online through the defendant’s advertisement for sex on Craigslist.org).

Craigslist.org to communicate with Lovine Briggs, a man who stated that he was eighteen years old and was interested in a sexual encounter with Curtis.⁹¹ However, when Curtis invited Briggs to his home, Briggs and the co-defendant, Sherman Jackson, attacked Curtis.⁹² Briggs and Jackson ransacked Curtis's home, and beat Curtis with a baseball bat so badly that he "almost died as a result of the attack."⁹³ This case demonstrates that minors forced into prostitution are not the only ones in need of protection.⁹⁴ Although the victims vary, the offenders remain a constant in all of these cases—regardless of whether they are pimps, rapists, or robbers, they are all abusing the Internet in order to harm others.⁹⁵ However, minors are by far the most vulnerable and least able to protect themselves from the dangerous world of online prostitution.⁹⁶ Nonetheless, a solution aimed at helping child prostitutes would have far-reaching effects, also preventing adults from descending into deadly situations, as did the victims of Briggs and Adan.⁹⁷ Therefore, the problem of people using Craigslist.org to rape and assault others can only be solved once the focus is shifted from punishing the website to punishing the individual offender.⁹⁸

III. THE COMMUNICATIONS DECENCY ACT: THE AFTERMATH OF ITS SHORTCOMINGS

Section 230 of the CDA establishes the legal framework that dictates whether and when websites may be held liable when users post inappropriate content.⁹⁹ However, § 230(c) and § 230(f)(3) together provide a shield of immunity for websites that are sued for illicit content posted by third party users.¹⁰⁰ Although this immunity is plainly stated in

91. *Id.*

92. *Id.* at *1-2.

93. *Id.*

94. *See id.*

95. *See In re Jose Z.*, No. D055962, 2011 WL 10605, at *1 (Cal. Ct. App. Jan. 4, 2011); *Briggs*, 2009 WL 1480360, at *1; *State v. Adan*, No. 64856-O-I, 2011 WL 1107232, at *1-2 (Wash. Ct. App. Mar. 28, 2011).

96. *See Kang*, *supra* note 31 (noting that "each year about 100,000 boys and girls become prostitutes"). According to the National Center for Missing and Exploited Children, "Internet services have made it possible to pimp these kids, offering them to prospective customers with little or no risk." *Id.* (internal quotation marks omitted).

97. *See infra* Part IV.B; *cf. Briggs*, 2009 WL 1480360, at *1; *Adan*, 2011 WL 1107232, at *1-2.

98. *See infra* Part IV.A.

99. *See* 47 U.S.C. § 230 (2006).

100. *See id.*; *Johnson v. Arden*, 614 F.3d 785, 790-92 (8th Cir. 2010) (stating that extending immunity to websites for content originating from third party website users is consistent with common law).

the CDA, many hopeful plaintiffs have tested its bounds time and time again.¹⁰¹ In nearly all such cases, the courts have upheld the immunity provisions of the CDA, and ruled in favor of the defendant website.¹⁰² Even so, Craigslist has taken various steps in an attempt to alleviate the issue posed by child sex sales on its website.¹⁰³ Unfortunately, these efforts have been largely unsuccessful, and the prostitution of minors on the Internet continues to occur.¹⁰⁴ It is also unfortunate that a viable solution has yet to be devised.¹⁰⁵ It is likely, due to the consistency of courts' rulings in this area, that § 230 of the CDA will continue to be upheld.¹⁰⁶ Therefore, targeting websites is not the answer to alleviating

101. § 230(c), (f)(3); see, e.g., *Johnson*, 614 F.3d at 788, 790-92; *FTC v. Accusearch Inc.*, 570 F.3d 1187, 1193, 1200-01, 1204 (10th Cir. 2009) (holding that, although § 230 of the CDA is valid, the defendant was an information content provider, and was therefore not entitled to the protections under § 230); *Universal Commc'n Sys., Inc. v. Lycos, Inc.*, 478 F.3d 413, 415, 427 (1st Cir. 2007) (finding that, pursuant to § 230 of the CDA, an Internet message board operator was protected where the plaintiff alleged that message board users had posted false and defamatory material); *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 328, 335 (4th Cir. 1997) (holding that § 230 of the CDA barred claims against defendant, a commercial ICS provider, for allegedly delaying the removal of defamatory messages posted on the website by a third party user); *Goddard v. Google, Inc.*, 640 F. Supp. 2d 1193, 1196-99, 1202 (N.D. Cal. 2009) (granting defendant website operator's motion to dismiss on the basis that it was immune from liability in the suit under § 230 of the CDA); *M.A. ex rel. P.K. v. Vill. Voice Media Holdings, LLC*, 809 F. Supp. 2d 1041, 1043-44, 1058 (E.D. Mo. 2011) (holding that defendant website operator was entitled to § 230 immunity, and, as such, defendant was found to not have aided and abetted sex trafficking).

102. See, e.g., *Johnson*, 614 F.3d at 791-92; *Universal Commc'n Sys., Inc.*, 478 F.3d at 420-22; *Zeran*, 129 F.3d at 328; *M.A. ex rel. P.K.*, 809 F. Supp. 2d at 1049-50, 1058; *Goddard*, 640 F. Supp. 2d at 1200-02. *But see Accusearch Inc.*, 570 F.3d at 1204 (affirming the lower court's decision that the defendant was an information content provider, and therefore could be held liable for the online content at issue); *Fair Hous. Council of San Fernando Valley v. Roommates.com, LLC*, 521 F.3d 1157, 1174-76 (9th Cir. 2008) (en banc) (finding that CDA immunity did not apply to the defendant in its practice of posing questions and requiring answers of its users); *NPS LLC v. StubHub, Inc.*, No. 06-4874-BLS1, 2009 WL 995483, at *6, *12-13 (Mass. Super. Ct. Jan. 26, 2009) (holding that, because the defendant website knowingly facilitated illegal ticket sales, it was not entitled to immunity as a mere publisher under § 230 of the CDA).

103. See Radbod, *supra* note 16, at 608.

104. See Davis, *supra* note 26; Pete Yost, *Raids Rescue 105 Young People from Child Prostitution*, LUBBOCK AVALANCHE-J. (July 29, 2013), <http://www.lubbockonline.com/national-news/2013-07-30/raids-rescue-105-young-people-child-prostitution#UqdFIKU38t> (describing how the FBI rescued 105 young people and arrested 150 individuals allegedly involved in child prostitution, after monitoring Backpage.com for evidence of sex sales). The operation was part of the FBI's Innocence Lost National Initiative, and this latest rescue was the largest in the ten years since the project began. Yost, *supra*. According to Ron Hosko, the Assistant Director of the FBI's Criminal Investigative Division, "[c]hild prostitution remains a persistent threat to children across the country." *Id.* (internal quotation marks omitted).

105. See Perer, *supra* note 13, at 846-47 (noting that courts have continued to rule in favor of websites in CDA cases because they consider the websites to be mere publishers, as opposed to content creators).

106. See Peter Adamo, *Craigslist, the CDA, and Inconsistent International Standards Regarding Liability for Third-Party Postings on the Internet*, PACE INT'L L. REV. ONLINE COMPANION, Feb. 2011, at 1, 9-13 (discussing cases that interpret the CDA, and how courts

online sex sales, and the solution should, instead, focus on punishing third parties for the content that they, as individuals, post online.¹⁰⁷ Subpart A outlines the genesis and current structure of § 230 of the CDA.¹⁰⁸ Subpart B analyzes the unsuccessful attempts, both on behalf of websites and litigating plaintiffs, to alleviate the issues stemming from the online prostitution industry.¹⁰⁹ Subpart B also elaborates on why these efforts have failed, and how the solution proposed in this Note is comparably superior.¹¹⁰

A. Section 230 of the Communications Decency Act

In 1996, Congress passed § 230 of the CDA, entitled, “Protection for private blocking and screening of offensive material.”¹¹¹ The legislation was passed with the intention to allow “[i]nteractive computer service[s]” to minimally edit content posted on their websites without evoking liability issues.¹¹² This intention surfaced after *Stratton Oakmont, Inc. v. Prodigy Services Co.*,¹¹³ in which the court held that an ICS, or website, is liable for third party content if it screens and edits the content.¹¹⁴ Congress did not want the precedent set in *Stratton Oakmont* to deter websites from filtering the content that their users post, and, hence, § 230 was born.¹¹⁵ The portion of § 230 most pertinent to the issue of ICS liability is subsection (c), which reads as follows:

continue to uphold § 230).

107. See *id.* at 10; *infra* Part IV.A; see also 1 ‘Censored’ Bar, *supra* note 16.

108. See *infra* Part III.A.

109. See *infra* Part III.B.

110. See *infra* Part III.B.

111. 47 U.S.C. § 230 (2006); see also Tyler Patrick Lovejoy, Comment, *A New Playground: Sexual Predators and Pedophiles Online: Criminalizing Cyber Sex Between Adults and Minors*, 20 ST. THOMAS L. REV. 311, 318 (2008) (“Congress has not been hesitant to act and create legislation to protect and prevent children from confronting, firsthand, the Internet’s seedy underbelly.”); Ali Grace Ziegrowsky, Note, *Immoral Immunity: Using a Totality of the Circumstances Approach to Narrow the Scope of Section 230 of the Communications Decency Act*, 61 HASTINGS L.J. 1307, 1309 (2010) (describing how § 230 of the CDA was intended to allow internet service providers to edit and remove online content without being treated as publishers or speakers of the content).

112. See § 230(f)(2); Ziegrowsky, *supra* note 111, at 1309 (explaining that Congress enacted § 230 of the CDA with the intent to foster free expression of ideas on the Internet). Websites are the most common forms of ICSs. Fair Hous. Council of San Fernando Valley v. Roommates.com, LLC, 521 F.3d 1157, 1162 n.6 (9th Cir. 2008) (en banc).

113. No. 31063/94, 1995 WL 323710 (N.Y. Sup. Ct. May 24, 1995), *superseded by statute*, § 230, as recognized in *Shiamili v. Real Estate Grp.*, 17 N.Y.3d 281, 287-88 (2011).

114. See *id.* at *5; see also *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 331 (4th Cir. 1997) (citing *Stratton Oakmont, Inc.*, 1995 WL 323710, at *5) (relying on *Stratton Oakmont* to find the defendant ICS liable for posted third party content because the defendant had edited the content to such an extent that the ICS was deemed to have published it).

115. See § 230; *Zeran*, 129 F.3d at 331; *Stratton Oakmont, Inc.*, 1995 WL 323710, at *5.

(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.

(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).¹¹⁶

This section of the CDA has served as a basis for countless court decisions in which judges have ruled that websites enjoy a shield of immunity for the unsolicited posts of their users.¹¹⁷ The fundamental issue in these cases is whether the defendant falls within the category of § 230(f)(3).¹¹⁸ This portion of the CDA states that an information content provider is “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.”¹¹⁹ When read together, subsections (c) and (f)(3) protect websites and other ICSs from suits based on content created and developed by third parties.¹²⁰ A majority of the federal circuit courts have reinforced this interpretation

116. § 230(c) (indicating that paragraph (1) actually refers to subparagraph (A)).

117. See Radbod, *supra* note 16, at 601-05 (analyzing several cases in which CDA immunity was extended to websites).

118. § 230(f)(3).

119. *Id.* ICS and information content provider are not mutually exclusive. Fair Hous. Council of San Fernando Valley v. Roommates.com, LLC, 521 F.3d 1157, 1162 (9th Cir. 2008) (en banc). An ICS, or website, can both offer services and provide content. *Id.* 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.” *Id.* However, with respect to content that it creates or is in some way responsible for developing, the website is considered a content provider. *Id.*

120. See § 230(c); § 230(f)(3); Johnson v. Arden, 614 F.3d 785, 791 (8th Cir. 2010); Roommates.com, LLC, 521 F.3d at 1162 (“This grant of immunity applies only if the interactive computer service provider is not also an ‘information content provider,’ which is defined as someone who is ‘responsible, in whole or in part, for the creation or development of’ the offending content.”).

that the CDA extends immunity to websites when they are sued for content originating from third party users.¹²¹

This immunity is multi-faceted, and the courts have provided detailed precedent on the subject.¹²² The Fourth Circuit was the first court to interpret § 230 when, in 1997, it decided *Zeran v. America Online, Inc.*¹²³ The court determined that notice of illegal content posted by a third party does not impose liability upon the ICS.¹²⁴ This holding is regarded as the national standard for interpreting § 230, and it has served as the foundation upon which other circuit courts continue to construe the CDA.¹²⁵ For example, ten years after *Zeran* was decided, the First Circuit followed its precedent in holding that even after an ICS is notified of the existence of illegal content published online, it is still shielded by § 230 immunity.¹²⁶ This is because websites are only responsible for content that they have specifically encouraged someone to create, as the Tenth Circuit noted in *FTC v. Accusearch Inc.*¹²⁷ In other words, if a website has not elicited the offensive content from the

121. See, e.g., *Johnson*, 614 F.3d at 791 (using other courts' interpretations of § 230 to grant the defendant internet service provider immunity from the third party content at issue in the case); *FTC v. Accusearch Inc.*, 570 F.3d 1187, 1196-97 (10th Cir. 2009) (holding that defendant website operator was not immune from liability because it developed and published the content at issue, but would have been immune had it been an ICS); *Doe*, 528 F.3d at 422 (finding that the CDA barred plaintiff's claims against the defendant for third party content published on the web-based social network); *Chi. Lawyers' Comm.*, 519 F.3d at 671 (granting immunity to Craigslist for allegedly discriminatory statements posted on the website by its users); *Universal Commc'n Sys., Inc. v. Lycos, Inc.*, 478 F.3d 413, 422 (1st Cir. 2007) (holding that Lycos' conduct in operating its website fell within the immunity granted by § 230 of the CDA); *Carafano v. Metrosplash.com, Inc.*, 339 F.3d 1119, 1124-25 (9th Cir. 2003) (finding that Matchmaker.com was an ICS, as opposed to an information content provider, thereby freeing it from liability for the third party content published on its website); *Green v. Am. Online*, 318 F.3d 465, 471 (3d Cir. 2003) (upholding immunity for America Online under § 230 of the CDA because, as the court noted, monitoring and deleting content is a publisher's role); *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 330 (4th Cir. 1997) (deciding that § 230 of the CDA provides immunity to ICSs from claims based on third party content posted online).

122. See, e.g., *Accusearch Inc.*, 570 F.3d at 1199; *Universal Commc'n Sys., Inc.*, 478 F.3d at 420; *Goddard v. Google, Inc.*, 640 F. Supp. 2d 1193, 1196-99 (N.D. Cal. 2009).

123. 129 F.3d 327 (4th Cir. 1997); see Radbod, *supra* note 16, at 600.

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

125. See H.R. REP. NO. 107-449, at 13 (2002) (stating that "[t]he courts have correctly interpreted section 230(c), which was aimed at protecting against liability for such claims as negligence . . . and defamation," referring to *Zeran* as one such correct ruling); Mark D. Quist, Comment, "*Plumbing the Depths*" of the CDA: *Weighing the Competing Fourth and Seventh Circuit Standards of ISP Immunity Under Section 230 of the Communications Decency Act*, 20 GEO. MASON L. REV. 275, 277 (2012) ("*Zeran* remains the national standard, and it is also the reading that best accords with the text of Section 230, with Congress's intent in enacting the statute, as well as with the findings and policy aims announced in Sections 230(a) and (b).") (footnote omitted)).

126. See *Universal Commc'n Sys., Inc.*, 478 F.3d at 420-21.

127. See *Accusearch Inc.*, 570 F.3d at 1199.

third party creating it, then the website cannot be held liable¹²⁸—it is considered a mere publisher, and § 230 of the CDA was intended to protect such entities.¹²⁹ Therefore, as the court held in *Dart v. Craigslist*,¹³⁰ Craigslist cannot be held liable for the prostitution advertisements its third party users post on Craigslist.org.¹³¹ It follows that any notion of websites being held liable for content that is not their own is misguided, and instead, third party posters should be held individually liable for their illegal activity.¹³² Despite the immunity that Craigslist continues to enjoy, the ICS made several good faith attempts to alleviate online prostitution; however, these attempts were largely unsuccessful.¹³³

B. Suggestions that Fall Short of a Solution

This Subpart catalogues two different approaches that have been advanced in order to diminish the number of children sold online for sex; both, however, have been unsuccessful.¹³⁴ Subpart A.1 discusses the various steps that ICSs have taken to diminish the volume of sex sales that occur over the Internet.¹³⁵ Subpart A.2 considers the numerous cases that plaintiffs have brought before the courts in hopes that the CDA will be overturned.¹³⁶ These courts have consistently upheld § 230, and, thus, judicial intervention is not the appropriate avenue for the solution proposed in this Note.¹³⁷

1. ICSs Attempt to Remedy the Situation

In May 2009, Craigslist announced that it would shut down its Erotic Services category and replace it with a category titled Adult

128. See *id.*; see also Chi. Lawyers' Comm. for Civil Rights Under Law, Inc. v. Craigslist, Inc., 519 F.3d 666, 671 (7th Cir. 2008) ("Nothing in the service [C]raigslist offers induces anyone to post any particular listing or express a preference for discrimination . . .").

129. *Accusearch Inc.*, 570 F.3d at 1193, 1197.

130. 665 F. Supp. 2d 961 (N.D. Ill. 2009).

131. See *id.* at 967-68; see also Miller, *supra* note 85, at 66 (noting that the court in *Dart* held that a website cannot be held liable for prostitution if it does not create the advertisements, if it has other advertisements besides those for prostitution, or if it cautions its users not to post content of an illegal nature).

132. See *infra* Part IV.A.

133. See 1 'Censored' Bar, *supra* note 16 (claiming that "prostitution on the Internet is alive and well — even, quite possibly, on Craigslist").

134. See *infra* Part III.B.1-2.

135. See *infra* Part III.B.1; see also Radbod, *supra* note 16, at 608 (noting that Craigslist replaced its Erotic Services category with an Adult Services category); 1 'Censored' Bar, *supra* note 16 (noting that Craigslist later removed the Adult Services category from its website).

136. See *infra* Part III.B.2; see also Radbod, *supra* note 16, at 601-05.

137. See *infra* Part III.B.2; see also Radbod, *supra* note 16, at 601-05.

Services.¹³⁸ Craigslist promised that the individuals advertising in this section of the website would be charged a fee, and that these advertisements would be specifically monitored for illicit content.¹³⁹ This replacement, in effect, was a mere name change, and users continued to post the same advertisements for prostitution in the newly named category.¹⁴⁰ Furthermore, the situation did not improve after Craigslist completely removed the Adult Services portion of its website on September 4, 2010.¹⁴¹ Online prostitution remains a thriving industry, mainly because users who once advertised in the Adult Services category on Craigslist.org have simply moved their advertisements, either to other sections of the website or to other websites entirely.¹⁴²

Internet sex sales remain successful, in part, because ICSs do not have a legal responsibility to take precautions to diminish such activity.¹⁴³ Nonetheless, Craigslist has implemented limited safeguards, such as renaming and removing certain categories, and placing disclaimers on others.¹⁴⁴ For example, a user browsing one of the subcategories within the Personals category on Craigslist.org is met by a list of warnings.¹⁴⁵ The warnings, though, are more like requirements—they caution that the user must be at least eighteen years of age, understand that the chosen subcategory may include adult content, agree to flag online activity that is illegal or is in violation of the website's terms of use, and agree to free Craigslist from any liability that may arise from using the website.¹⁴⁶ These disclaimers reveal, however, that Craigslist is likely aware that prostitution advertisements have migrated to this portion of the website.¹⁴⁷

138. See Radbod, *supra* note 16, at 608.

139. See Assel, *supra* note 14, at 84-85; Alan Duke, *Official: Craigslist to Replace 'Blatant Internet Brothel'*, CNN (May 13, 2009), <http://www.cnn.com/2009/TECH/05/13/craigslist.sex.ads>; see also John E. D. Larkin, *Criminal and Civil Liability for User Generated Content: Craigslist, A Case Study*, 15 J. TECH. L. & POL'Y 85, 95-100 (2010) (suggesting three alternative prosecution strategies for imposing criminal liability on Craigslist).

140. See Assel, *supra* note 14, at 83-84.

141. See 1 'Censored' Bar, *supra* note 16.

142. Davis, *supra* note 26; see *Craigslist Has Social Responsibility*, *supra* note 60.

143. See Perer, *supra* note 13, at 830.

144. See Radbod, *supra* note 16, at 608; 1 'Censored' Bar, *supra* note 16; *Strictly Platonic > Warning & Disclaimer*, CRAIGSLIST, <http://newyork.craigslist.org/i/personals?category=stp> (last visited Feb. 16, 2014) [hereinafter *Strictly Platonic*, CRAIGSLIST].

145. See *Strictly Platonic*, CRAIGSLIST, *supra* note 145 (preceding the *Strictly Platonic* category of Craigslist.org).

146. See *Women Seeking Women > Warning & Disclaimer*, CRAIGSLIST, <http://newyork.craigslist.org/i/personals?category=w4w> (last visited Feb. 16, 2014) (preceding the *Women Seeking Women* category of Craigslist.org).

147. See *id.*; see also Davis, *supra* note 26.

Although the number of prostitution advertisements may have decreased on Craigslist.org, they certainly have not left the Internet as a whole.¹⁴⁸ Many advertisers have moved their posts to Backpage.com.¹⁴⁹ In fact, Backpage.com's users have an even greater opportunity than those of Craigslist.org to buy and sell sex.¹⁵⁰ The home page of Backpage.com lists not only an Adult category, but a Dating category as well.¹⁵¹ Backpage.com lists warnings similar to those posted in the Personals category on Craigslist.org, as well as information about human trafficking and child exploitation on its User Safety page.¹⁵² According to one of Backpage's attorneys, the website utilizes multiple levels of review in order to scan advertisements for "words linked to prostitution, sex trafficking and child exploitation."¹⁵³ However, the suspect advertisements are not removed.¹⁵⁴ Considering the foregoing, it is unlikely that Craigslist or Backpage will take more effective approaches unless they are required to do so.¹⁵⁵ For that reason, Craigslist and other ICSs should be given financial incentives to participate in programs, through which they would help law enforcement catch the third parties that post illegal advertisements online.¹⁵⁶

148. See Davis, *supra* note 26 (criticizing the fact that after Craigslist removed its Adult Services category, prostitution advertisements simply moved to other websites).

149. *Id.*; see Jonah Spangenthal-Lee, *Report: Backpage Sees 50 Percent Increase in Prostitution Ad Revenue*, SEATTLE MET (Oct. 19, 2011, 12:00 PM), <http://www.seattlemet.com/news-and-profiles/publicola/articles/report-backpage-sees-50-percent-increase-in-prostitution-ad-revenue> (noting that Backpage's revenue for "online prostitution advertising" spiked by fifty percent in the year after Craigslist shut down its Adult Advertisement category (internal quotation marks omitted)).

150. See Davis, *supra* note 26 (concluding that in the past two years, the sex advertisements that were once on Craigslist.org have largely migrated to Backpage.com); see also *Long Island, NY*, BACKPAGE, <http://longisland.backpage.com> (last visited Feb. 16, 2014) [hereinafter *Long Island, BACKPAGE*] (displaying how Backpage.com appears to Internet users accessing the website from a location near Long Island, New York).

151. *Long Island, BACKPAGE, supra* note 151.

152. See *Casual Encounters > Warning & Disclaimer*, CRAIGSLIST, <http://newyork.craigslist.org/i/personals?category=cas> (last visited Feb. 16, 2014); *Disclaimer*, BACKPAGE, <http://longisland.backpage.com/Domination/classifieds/Disclaimer?category=2320391> (last visited Feb. 16, 2014); *User Safety*, BACKPAGE, <http://manhattan.backpage.com/online/UserSafety> (last updated Aug. 5, 2011).

153. Feyerick & Steffen, *supra* note 80 (describing the types of sexually explicit advertisements that can be found on Backpage.com, as well as the backlash that the website has received as a result).

154. *Id.*

155. See Kang, *supra* note 31 (noting that the Internet has made it easier to sell sexual services from a minor); see also Davis, *supra* note 26.

156. See *infra* Part IV.B–C.

2. Futile Attempts at Judicial Intervention

The solution articulated in this Note proposes a widespread shift in the fundamental notions of “website liability.”¹⁵⁷ Presently, many advocates for reform believe that websites and other ICSs should be held liable for online content.¹⁵⁸ Some critics falling within that majority argue for civil liability, while others urge for harsher punishments that might result from imposing criminal liability.¹⁵⁹ Nonetheless, both of these views are grounded in the idea that ICSs are responsible for the content within their control, even if the material wholly originates from their users.¹⁶⁰ However, these proposals have been unsuccessful in reducing the online prostitution industry.¹⁶¹ The reason for this, of course, is because the CDA shields ICSs from liability when lawsuits are brought against them for publishing third party content.¹⁶² Courts have upheld § 230 of the CDA nearly every time it has been the subject of litigation.¹⁶³ In fact, only twice has a court narrowed the scope of CDA liability, and neither case was related to online prostitution.¹⁶⁴ As a result, attacking neither websites nor the CDA is the proper solution.¹⁶⁵

Proposals to amend § 230 of the CDA to reduce online child prostitution suggest ineffective means of reformation because courts have consistently upheld the immunity provisions of § 230, reinforcing the notion that ICSs are not responsible for the content posted on their

157. Compare Assel, *supra* note 14, at 92 (proposing that Craigslist be held criminally liable for “provid[ing] the forum for these advertisements” on the Internet), and Perer, *supra* note 13, at 847-48 (suggesting that websites become liable for third party content once the police find posts of an illegal nature and notify the websites of such), with *infra* Part IV (proposing a solution that targets individual advertisers, rather than websites).

158. See, e.g., Assel, *supra* note 14, at 92.

159. See Larkin, *supra* note 139, at 101 (proposing that websites should be held civilly liable because § 230 of the CDA grants excessive immunity to websites); see also Assel, *supra* note 14, at 92.

160. See Assel, *supra* note 14, at 92 (arguing that by providing a forum for prostitution advertisements, Craigslist does more than merely furnish an avenue for communication). This is based on the notion that Craigslist is akin to a newspaper, in that “the decision of publishing rests solely with the website,” and that, since publishing the content assigns authorship to the website, “[p]ublishing the content imputes liability to Craigslist.” *Id.*

161. See Radbod, *supra* note 16, at 611; Kang, *supra* note 31.

162. See Perer, *supra* note 13, at 832 (explaining the extent to which § 230 of the CDA grants legal immunity to websites and other ICSs).

163. See *id.* at 825.

164. Fair Hous. Council of San Fernando Valley v. Roommates.com, LLC, 521 F.3d 1157, 1174-76 (9th Cir. 2008) (en banc) (holding that CDA immunity did not apply to content created as a result of the defendant posing questions and requiring answers of its users); NPS LLC v. StubHub, Inc., No. 06-4874-BLS1, 2009 WL 995483, at *6, *12-13 (Mass. Super. Ct. Jan. 26, 2009) (holding that the defendant acted as more than a mere publisher of third party content, and was thereby not entitled to CDA immunity).

165. See *infra* Part IV.A; see also Perer, *supra* note 13, at 847-48 (proposing that § 230 of the CDA be amended).

websites that they did not specifically encourage.¹⁶⁶ The solution proposed in this Note shifts away from the website liability framework outlined in § 230, and, instead, recommends a incentive-based financial initiative that would recruit ICSs to aid in the government's investigation of crimes.¹⁶⁷ Nonetheless, liability for the illicit content must fall somewhere, and that is with the individuals who post the criminal advertisement online.¹⁶⁸ This solution is derived from fundamental concepts—individuals are responsible for their own criminal actions.¹⁶⁹ There is no one more culpable for these actions than the individual who has intentionally posted the advertisement for sex online, especially when the advertisement seeks to sell a young girl for sex against her will.¹⁷⁰ Likewise, the individual who responds to such posts for underage prostitutes is liable.¹⁷¹ In an effort to protect victims and promote criminal accountability, ICSs should work with law enforcement to monitor posts and help to apprehend the users selling and buying sex.¹⁷²

IV. PROSTITUTION IS AN INTERNET ENTERPRISE: ALLEVIATE THE ISSUE WITH A BUSINESS SOLUTION

Although there are varied opinions about the blatant sex advertisements on Craigslist.org and other classified advertisement websites, the majority of those opinions are grounded in the perception that these websites should be held liable for such content.¹⁷³ This

166. See *infra* Part IV.B.2.

167. See *infra* Part IV.A.

168. See *FTC v. Accusearch Inc.*, 570 F.3d 1187, 1199 (10th Cir. 2009); *infra* Part IV.

169. See Charles Fethé, *Philosophical Perspectives on Responsibility and Excuse*, in *NEGOTIATING RESPONSIBILITY IN THE CRIMINAL JUSTICE SYSTEM* 15, 20 (Jack B. Kamerman ed., 1998) (discussing how fundamental it is in a civil society to hold people responsible for their wrongful acts); *infra* Part IV.

170. See 1 'Censored' Bar, *supra* note 16 (commenting that the focus should not be put on the websites but instead on the children being exploited); *infra* Part IV.A.

171. See *People v. Swan*, No. H031862, 2009 WL 691128, at *1, *5 (Cal. Ct. App. Mar. 17, 2009) (holding that the defendant was properly convicted because he took substantial steps to meet and have sexual contact with a child).

172. See *infra* Part IV.B–C; see also *Operation Cross Country*, FED. BUREAU OF INVESTIGATION: NEWS BLOG (June 25, 2012, 6:00 PM), http://www.fbi.gov/news/news_blog/operation-cross-country (noting the FBI's successful efforts in rescuing seventy-nine child victims of prostitution and arresting more than one hundred pimps, as part of the FBI's Innocence Lost National Initiative).

173. See Mike Masnick, *Oh Look: Police Can Use Backpage.com to Track Down, Arrest & Convict Pimps & Prostitutes*, TECHDIRT (Oct. 2, 2012, 8:08 PM), <http://www.techdirt.com/articles/20121002/07354820569/oh-look-police-can-use-backpagecom-to-track-down-arrest-convict-pimps-prostitutes.shtml> [hereinafter Masnick, *Police Can Use Backpage.com*] (explaining that classified advertisement websites are the best tool that law enforcement has at its disposal to investigate criminal activity on advertisement websites). As this Note suggests, the efforts to place liability for such crimes on websites should be redirected towards the individuals engaging in child sex trafficking. See *infra* Part IV.A.

position has proven to be meritless by virtue of the fact that courts have continued to uphold § 230 of the CDA.¹⁷⁴ Therefore, projecting responsibility upon websites for content that they did not encourage is an unsuccessful tactic.¹⁷⁵ Craigslist was similarly unsuccessful when it attempted to remedy the issue on its own, by removing and remodeling certain categories on Craigslist.org.¹⁷⁶ These efforts failed because advertisers simply moved their prostitution advertisements either to other parts of Craigslist.org, or to different websites altogether.¹⁷⁷ Subpart A posits that the solution to diminishing the rampant sale of underage prostitutes online can be found when the focus is shifted to holding individual advertisers liable for the material that they post online.¹⁷⁸ A legislative program needs to be implemented in order to further dispel the notion that websites are liable for third party content, and to reinforce the fact that those responsible are the individuals posting and responding to illicit online advertisements.¹⁷⁹ Subpart B suggests that the program's success would depend upon the cooperation of websites in the classified advertisement industry.¹⁸⁰ The ICSs' roles will be to monitor the content they publish, and report illicit posts to law enforcement so the police may then conduct sting operations to catch the

174. See Adamo, *supra* note 106, at 9-13. There is no hope of safeguarding children against the perils of the Internet sex industry if the same faulty legal argument is brought before the courts again and again. See *id.* The fact that the judiciary has upheld the provisions protecting websites and other ICSs under the CDA dictates that the solution must be found elsewhere. See *id.*; *supra* Part III.B.2.

175. See Radbod, *supra* note 16, at 601. But see Assel, *supra* note 14, at 92.

176. See 1 'Censored' Bar, *supra* note 16 (commenting that there was no decrease in the online sale of girls for sex after Craigslist removed its Adult Services category from the website); Davis, *supra* note 26.

177. See Goodman, *supra* note 17.

178. See *infra* Part IV.A; see also *FTC v. Accusearch Inc.*, 570 F.3d 1187, 1199 (10th Cir. 2009). In examining the meaning of the word "responsibility," the Tenth Circuit commented:

[T]o be "responsible" for the development of offensive content, one must be more than a neutral conduit for that content. That is, one is not "responsible" for the development of offensive content if one's conduct was neutral with respect to the offensiveness of the content (as would be the case with the typical Internet bulletin board). We would not ordinarily say that one who builds a highway is "responsible" for the use of that highway by a fleeing bank robber, even though the culprit's escape was facilitated by the availability of the highway.

Accusearch Inc., 570 F.3d at 1199.

179. See *infra* Part IV.B.2; see also 47 U.S.C. § 230 (2006) (establishing that websites and other ICSs are free from liability for publishing unsolicited third party content on the Internet). The CDA does not impose liability upon those individuals posting the advertisements for child sex acts on classified advertisement websites. See § 230. Therefore, there would have to be a new statute implemented to accomplish that which § 230 of the CDA does not provide for. See *infra* Part IV.B.2.

180. See *infra* Part IV.B.

buyers and sellers.¹⁸¹ Subpart C introduces a sanction to be imposed upon individuals convicted of sex related crimes as a result of their involvement with online child sex trafficking.¹⁸² The sanction would serve both to punish the offender and to fund the government tax credits awarded to websites taking part in the monitoring initiative.¹⁸³

A. *Shifting the Focus*

Nearly all of the proposed solutions for diminishing Internet sex sales are based on the concept that websites, upon which individuals post for business of this nature, should be held liable for this third party content.¹⁸⁴ Mark D. Quist explained that “[t]he *Zeran* standard is the one most commonly upheld nationwide,” and, even though the Seventh Circuit has declined to interpret § 230(c)(1) broadly, the court’s decisions “have remained consistent with *Zeran* in their basic holdings.”¹⁸⁵ Various other courts have repeatedly held that advertisements posted on Craigslist.org and other similar websites are third party content for which the advertisement websites are not liable.¹⁸⁶ The courts’ reason that the websites and other ICSs neither solicited the posts from the individual advertisers, nor played a role in the language used in the posts.¹⁸⁷ Considering how consistent the case law is on this

181. See *infra* Part IV.B.1; see also *Dart v. Craigslist, Inc.*, 665 F. Supp. 2d 961, 962-63 (N.D. Ill. 2009) (discussing the fact that there are posts on Craigslist.org that are obviously being used to sell and solicit sexual acts).

182. See *infra* Part IV.C.

183. See *infra* Part IV.C.

184. See *Assel, supra* note 14, at 86; *Perer, supra* note 13, at 847-48; *Ziegrowsky, supra* note 111, at 1325 (suggesting that courts use a totality of the circumstances approach to determine when websites should become liable for third party content).

185. See *Quist, supra* note 125, at 291-92 (explaining that courts most commonly interpret § 230(c)(1) as granting immunity to ICSs for content originating from a third party). This interpretation was first introduced when the Fourth Circuit decided *Zeran v. America Online, Inc.*, 129 F.3d 327 (4th Cir. 1997); *Quist, supra* note 125, at 291-92. The First, Third, and Tenth Circuits later adopted the Fourth Circuit’s interpretation of § 230(c)(1), and, in doing so, granted immunity to ICSs for publishing third party content on their websites. *Univ. Comm’n Sys. v. Lycos, Inc.*, 478 F.3d 413, 420 (1st Cir. 2007); *Green v. Am. Online*, 318 F.3d 465, 471 (3d Cir. 2003); *Ben Ezra, Weinstein, & Co. v. Am. Online, Inc.*, 206 F.3d 980, 986 (10th Cir. 2000).

186. See, e.g., *Chi. Lawyers’ Comm. for Civil Rights Under Law, Inc. v. Craigslist, Inc.*, 519 F.3d 666, 671-72 (7th Cir. 2008); *Universal Comm’n Sys., Inc.*, 478 F.3d at 420-21 (holding that posts on Craigslist.com are third party content for which the website cannot be held liable); *Dart*, 665 F. Supp. 2d at 968-69; *Gibson v. Craigslist, Inc.*, No. 08 Civ. 7735, 2009 WL 1704355, *3-4 (S.D.N.Y. 2009).

187. See *FTC v. Accusearch Inc.*, 570 F.3d 1187, 1199 (10th Cir. 2009) (stating that, in order for a service provider to be liable for third party content, it must have specifically encouraged the development of that content as it is posted on the website).

subject, the focus proposed solutions should avoid placing the blame on websites, and should focus on the criminals, instead.¹⁸⁸

Furthermore, such solutions should be based in legislative, not judicial, action.¹⁸⁹ Courts interpreting § 230 have deferred to Congress's intent in enacting the legislation, as the Fourth Circuit did in *Zeran*.¹⁹⁰ As such, in order to change the legal framework of website liability, the framework must be altered by its source—Congress.¹⁹¹ Section 230 of the CDA was a step in the right direction, but more legislation is needed to supplement and reinforce the immunity it provides to ICSs.¹⁹² Amending the CDA is the wrong route because that is exactly what its critics have advocated for thus far, to no avail.¹⁹³ The solution proposed in this Note is far removed from what critics of the CDA have typically suggested in that it does not seek to impose liability through loopholes or amendments to the immunity extended by the CDA.¹⁹⁴ Amending the CDA is misguided in large part because doing so would unduly affect non-classified advertisement websites that fall within the purview of the statute.¹⁹⁵ Section 230 of the CDA protects all ICSs publishing third

188. See Radbod, *supra* note 16, at 611; *infra* Part IV.B–C.

189. See *infra* Part IV.B.2.

190. See Quist, *supra* note 125, at 286 (“The Fourth Circuit read Section 230(c) as a clear expression of Congress’s intent to liberate the Internet from traditional tort liability in line with findings and aims expressed in the first two parts of the statute . . .”); see also *Chi. Lawyers’ Comm.*, 519 F.3d at 671 (noting that, even though § 230(c)(1) was written in order to codify a decision about “sexually oriented material,” if Congress meant for the Section to only apply to such material, the CDA’s provisions would be written to that effect); *Universal Commc’n Sys., Inc.*, 478 F.3d at 420 (declaring that “impos[ing] liability [on an ICS] would contravene Congress’s intent and eviscerate Section 230 immunity”).

191. See *infra* Part IV.B.2.

192. See Ryan Gerdes, Note, *Scaling Back § 230 Immunity: Why the Communications Decency Act Should Take a Page from the Digital Millennium Copyright Act’s Service Provider Immunity Playbook*, 60 *DRAKE L. REV.* 653, 664 (2012) (“Since Congress’s adoption of § 230 of the CDA and its initial interpretation in *Zeran*, courts have provided nearly absolute immunity to [Internet service providers] when a third party is the creator of the defamatory material.”); *infra* Part IV.B.

193. Melissa Blackerby, *National Association of Attorneys General to Congress: Amend Communications Decency Act to Prevent Child Sex Trafficking!*, ECPAT–USA (July 24, 2013), <http://ecpatusa.org/wp/2013/07/24/national-association-of-attorneys-general-to-congress-amend-communications-decency-act-to-prevent-child-sex-trafficking> (noting that the National Association of Attorneys General sent a letter to Congress calling for an amendment to the CDA that would give state and local law enforcement the authority to hold websites accountable for online child sex trafficking); Razworks Sarasota Web Design, *Amend Communications Decency Act Section 230*, CHANGE.ORG, <http://www.change.org/petitions/the-u-s-senate-amend-communications-decency-act-section-230> (last visited Feb. 16, 2014) (petitioning the U.S. Senate and House of Representatives to amend the CDA in order to prevent cyber bullying and criminal defamation on the Internet).

194. See *infra* Part IV.B–C.

195. See 47 U.S.C. § 230 (2006) (legislating that websites and other ICSs that are not responsible for the creation or development of information they publish, shall not be treated as information content providers as to that content). Therefore, § 230 of the CDA applies to wide range of websites, not solely classified advertisement websites. See *id.*; *Section 230 of the*

party content, not just classified advertisement websites.¹⁹⁶ In other words, any website—not just classified advertisement websites—that allow users to post their own words is shielded from liability for illicit, user-posted content pursuant to § 230.¹⁹⁷ Social networking websites, online message boards, and dating websites all fall within the purview of § 230.¹⁹⁸ The frequency with which these types of websites are used for prostitution pales in comparison to how commonly prostitution advertisements appear on classified advertisement websites, and, therefore, the solution must be narrowly directed at those websites that publish advertisements for sex services from children.¹⁹⁹

B. Creating an Anti-Prostitution Partnership: ICSs and Police

Sting and reverse sting operations are tactics that police departments regularly use in order to catch offenders in the midst of

Communications Decency Act, DIGITAL MEDIA L. PROJECT, <http://www.dmlp.org/section-230> (last updated Feb. 18, 2011) (“Section 230 grants interactive online services of all types, including news websites, blogs, forums, and listserve, broad immunity from certain types of legal liability stemming from content created by others.”).

196. See § 230.

197. See *id.*; Corey M. Dennis, *Social Media Defamation and Reputation Management in the Online Age*, J. INTERNET L., Dec. 2013, at 1, 17 (noting that the ICSs protected under § 230 include online review websites and social media websites); Craig Newmark’s Craigconnects & Electric Frontier Found., *CDA 230: The Most Important Law Protecting Internet Speech*, <http://www.craigconnects.org/CDA230infographic> (last visited Feb. 16, 2014). Immunity under the CDA extends to other ICSs apart from classified advertisement websites:

CDA 230 protects web services and social networks, such as Facebook, Twitter, and blogs, from being held legally responsible for hosting or facilitating online speech. Without it, service providers would become targets for individuals, governments, and corporations who want to limit free expression. Under CDA 230, service providers are categorically protected against most legal claims based on what their users say or do, which means that they can’t be forced to censor user content.

Craig Newmark’s Craigconnects & Electric Frontier Found., *supra*.

198. See *Doe v. MySpace, Inc.*, 528 F.3d 413, 415-18 (5th Cir. 2008) (upholding legislative immunity under § 230 of the CDA for a social networking website); *Universal Commc’n Sys., Inc. v. Lycos, Inc.*, 478 F.3d 413, 415 (1st Cir. 2007) (holding that Lycos, an online message board, was protected from liability under § 230 of the CDA when one of its users posted defamatory statements about the plaintiff); *Carafano v. Metrosplash.com, Inc.*, 339 F.3d 1119, 1121, 1125 (9th Cir. 2003) (finding that a dating website was entitled to the protections under § 230 of the CDA when it was sued for an answer one of its users gave in an online questionnaire offered by the website).

199. See Kang, *supra* note 31 (“Craigslist yielded to the complaints of advocacy groups who say the firm’s Web sites are being widely used in the global sex trade of women and children.”); Masnick, *Political Campaign*, *supra* note 18 (arguing that targeting third party service providers is a misguided approach to solving the online prostitution problem); Meredith Melnick, *Edged Out of Times Square and Off Craigslist, Prostitutes Turn to Facebook*, TIME (Mar. 1, 2011), <http://healthland.time.com/2011/03/01/edged-out-of-times-square-and-off-craigslist-prostitutes-turn-to-facebook> (citing a 2008 survey of sex workers in New York City, which found that eighty-three percent of prostitutes had a Facebook page, and that these pages accounted for twenty-five percent of their clientele); *infra* Part IV.B–C.

committing a criminal act.²⁰⁰ They are employed in order to target a wide range of crimes, including car theft, drug dealing, and fraud.²⁰¹ In addition, these methods are often used to apprehend individuals attempting to engage in sex acts with minors they meet through online classified advertisements.²⁰² The success of these operations suggests that they should continue, and even increase in number.²⁰³ However, because stings and reverse stings are expensive, Congress should pass legislation that would give websites a financial incentive to aid in the police work.²⁰⁴ Websites would bear the cost of monitoring the websites and pointing out illicit advertisements, but they would then be compensated in the form of federal tax exemptions.²⁰⁵ This method would appease those who believe websites have a social responsibility to rid the Internet of sex sales.²⁰⁶ In addition, it would not interfere with § 230 of the CDA because the ICSs would not be punished—in fact, they would benefit from assisting the government to monitor posts for illicit sex trafficking activities.²⁰⁷

1. Sting and Reverse Sting Operations

Since 2007, law enforcement authorities have been combating prostitution with a more preemptory approach than was traditionally used.²⁰⁸ This shift is the direct result of prostitution sales increasingly

200. See GRAEME R. NEWMAN, U.S. DEP'T OF JUSTICE, RESPONSE GUIDES SERIES NO. 6: STING OPERATIONS 2 (2007), available at http://www.popcenter.org/Responses/pdfs/sting_operations.pdf; see also Miller, *supra* note 85, at 44 (suggesting that, in 2007, police began to take a closer look at the Erotic Services category on Craigslist.org). For an explanation of sting and reverse sting operations, see *infra* Part IV.B.1.

201. NEWMAN, *supra* note 200, at 216.

202. See, e.g., *People v. Lopez*, No. A129082, 2012 WL 151736, at *1, *4-5 (Cal. Ct. App. Jan. 19, 2012) (affirming the judgment convicting the defendant of several crimes of child sex abuse after he was apprehended as a result of a sting operation).

203. See Laura J. Lederer, *Addressing Demand: Why and How Policymakers Should Utilize Law and Law Enforcement to Target Customers of Commercial Sexual Exploitation*, 23 REGENT U. L. REV. 297, 307-08 (2011) (arguing that law enforcement officials play a vital role in ridding their communities of prostitution customers); *infra* Part IV.B.1.

204. See *infra* Part IV.B.1-2; see also *Dart v. Craigslist, Inc.*, 665 F. Supp. 2d 961, 962-63 (N.D. Ill. 2009) (stating that the plaintiff's police department spent \$105,081 to arrest 156 individuals involved in prostitution).

205. See *Fact Sheet*, CRAIGSLIST, *supra* note 36 (stating that Craigslist only has about forty employees); *infra* Part IV.B.2.

206. *Craigslist Has Social Responsibility*, *supra* note 60 (arguing that Craigslist has a social obligation to address sex trafficking and prostitution, which is plainly taking place on its website); see *infra* Part IV.B.2.

207. See 47 U.S.C. § 230 (2006); Lederer, *supra* note 203, at 307-08 ("The Internet has added a modern twist to the traditional sting operation. . . . Because the Internet is increasingly being utilized by traffickers, police have successfully uncovered many cases of illegal activity, such as child sex trafficking, in these new sting operations."); *infra* Part IV.B.1.

208. See Miller, *supra* note 85, at 44.

occurring on the Internet.²⁰⁹ Likewise, the Internet now plays a vital role in successfully catching those individuals responsible for facilitating online prostitution.²¹⁰ Sting operations are used to catch customers seeking to pay for sex acts.²¹¹ When conducting a sting operation, a police officer posts an explicit advertisement for sex on a classified advertisement website, like Craigslist.org or Backpage.com, and in doing so, the officer poses as a prostitute or pimp.²¹² Once another user on the website sends a message to the officer expressing interest in the advertisement, the officer will continue the façade and communicate with the prospective customer in order to agree on the terms of the transaction.²¹³ Such terms include location, price, and services to be offered.²¹⁴ This is a delicate task because, if the advertisement involves a

209. R. BARRI FLOWERS, PROSTITUTION IN THE DIGITAL AGE: SELLING SEX FROM THE SUITE TO THE STREET 147 (2011) (explaining the factors contributing to prostitution's expansion as technology continues to develop).

210. See, e.g., *People v. Lopez*, No. A129082, 2012 WL 151736, at *1-2 (Cal. Ct. App. Jan. 19, 2012) (detailing how a detective created the undercover e-mail address "sweettreat1994@yahoo.com," used it to post an advertisement in the Erotic Services category of Craigslist.org, and successfully arrested the defendant in a sting operation after he had responded to the advertisement); *People v. Swan*, No. H031862, 2009 WL 691128, at *1-3 (Cal. Ct. App. Mar. 17, 2009) (describing how an undercover police officer caught the defendant in a sting operation after the officer posed as a thirteen-year-old girl selling sex on Craigslist.org); *People v. Harris*, No. A119299, 2008 WL 5197097, at *1-3 (Cal. Ct. App. Dec. 12, 2008) (detailing the conversations that took place on Craigslist.org between the defendant and who he thought was a child selling sexual services, which preceded police arresting the defendant as part of a sting operation to catch child predators); *People v. Scarberry*, No. A117242, 2008 WL 2791882, at *1 (Cal. Ct. App. July 21, 2008) (describing how a detective conducted an Internet sting operation in order to catch the defendant, who had responded to the detective's decoy advertisement offering oral sex from a thirteen-year-old girl); *Sin v. State*, No. 01-11-00105-CR, 2012 WL 114149, at *1 (Tex. Ct. App. Jan. 12, 2012) (denying the defendant's entrapment-based appeal after an online advertisement for her spa led police to conduct a sting operation, during which they arrested the defendant for engaging in prostitution); *State v. Wilson*, 242 P.3d 19, 21-22 (Wash. Ct. App. 2010) (reciting the facts of the underlying case, in which an undercover officer posed as a woman selling a young girl's sexual services on Craigslist.org, and, when the defendant responded to the advertisement, police arrived at the location to arrest the defendant).

211. See *Lederer*, *supra* note 203, at 307-08 (discussing the differences between sting operations and reverse sting operations).

212. *Id.* at 307 ("In online sting operations, police detectives pose as potential buyers or sellers of sex on Internet-based sites to gather evidence for cases. Law enforcement has especially targeted online personal advertisements, such as those seen on Craigslist and other similar sites.").

213. See, e.g., *Lopez*, 2012 WL 151736, at *1-2 (describing the manner in which police officers carrying out sting operations communicate with the individuals they are attempting to catch).

214. *Id.* In *People v. Lopez*, the officer ("Brittany") communicated with the defendant via e-mail in order to establish a time and place to meet:

After additional emails, Lopez and "Brittany" agreed to meet at 12:15 p.m. next to a movie theater. Brittany said that she would be wearing jeans and a tan shirt, and Lopez said that he would be dressed in all black. Brittany said, "i do bjs for 100 & i don't do nuttin w/o condoms so u hafta bring em."

minor, the officer must remain in the persona of a child, but also communicate with the prospective customer as a prostitute would.²¹⁵ The objective is to secure enough information to charge the individual with a crime, as well as to agree upon a location and time to meet him.²¹⁶ A successful sting operation culminates in the police arresting the individual at the location where he thought that he would be meeting the child from the advertisement.²¹⁷

Reverse sting operations ultimately end the same way, although they start off—as their name implies—opposite from the way that sting operations begin.²¹⁸ The police commence their investigation by visiting websites known for their large number of classified advertisements, like Craigslist.org and Backpage.com.²¹⁹ Once an officer targets an advertisement selling sex acts from a child, the officer poses as a customer and sends a message to the advertiser, expressing his interest in the services being offered.²²⁰ The two communicate and the officer works to set up the arrest scene using the same techniques employed in sting operations.²²¹ The only difference is that in reverse sting operations, the target is the individual who posted the advertisement online.²²²

These techniques have worked in situations involving adult prostitutes and minor prostitutes alike.²²³ For example, “[o]n February 20, 2009, federal and local authorities participated in a nationwide sting,

Id.

215. See, e.g., *Scarberry*, 2008 WL 2791882, at *1 (describing how Detective Brad Connors did not expressly refer to “Brittany’s” age after the first e-mail, but by the jargon and spelling he used, as well as the information he conveyed, tried to make “Brittany’s” messages sound like they were from a young girl).

216. See *id.* at *1-2 (noting that before continuing the sting operation outside the confines of the Internet, Detective Connors ascertained the terms of the transaction that the targeted prostitution customer agreed upon).

217. See, e.g., *People v. Harris*, No. A119299, 2008 WL 5197097, at *1-3 (Cal. Ct. App. Dec. 12, 2008) (describing the circumstances surrounding the defendant’s arrest, he was caught during a police sting operation in a parking garage while he was attempting to meet and have sex with a child).

218. See *Lederer*, *supra* note 203, at 307-08.

219. See *People v. Swan*, No. H031862, 2009 WL 691128, at *1 (Cal. Ct. App. Mar. 17, 2009).

220. *Lederer*, *supra* note 203, at 307-08.

221. *Id.*

222. *Id.*

223. See *Sin v. State*, No. 01-11-00105-CR, 2012 WL 114149, at *1 (Tex. Ct. App. Jan. 12, 2012) (affirming defendant’s conviction for misdemeanor prostitution, which she was charged with after she offered to perform a “full service” on a massage client, who in fact was an undercover police officer); *State v. Wilson*, 242 P.3d 19, 20-22 (Wash. Ct. App. 2010) (affirming defendant’s conviction for attempted rape of a child in the second degree, which resulted from a sting operation in which an undercover officer posed as a woman selling sexual services from a thirteen-year-old girl on Craigslist.org).

arresting more than 571 individuals on prostitution related charges. They also uncovered 48 teenage prostitutes, some as young as thirteen.”²²⁴ As of June 2012, the FBI’s Open Cross Country program of sting operations had recovered more than 2200 children and resulted in over 1000 convictions of pimps, madams, and other individuals involved in child exploitation.²²⁵ Even on a smaller scale, specialized units in local police departments set up sting and reverse sting operations in order to facilitate arrests.²²⁶ These methods are proven to work and, therefore, greater numbers of police officers across the nation should be trained and placed into units like these.²²⁷

224. Complaint at 14, *Dart v. Craigslist, Inc.*, 665 F. Supp. 2d 961 (N.D. Ill. 2009) (No. 09 CV 1385).

225. See *Operation Cross Country*, *supra* note 172. A madam is defined as “the female head of a house of prostitution.” MERRIAM-WEBSTER DICTIONARY 294 (new ed. 2005).

226. See, e.g., *People v. Swan*, No. H031862, 2009 WL 691128, at *1-2 (Cal. Ct. App. Mar. 17, 2009) (“In December 2005, San Jose Police Officer David Gonzales was assigned as a detective in the Child Exploitation Unit. He has taken and taught classes on internet crimes against children, and is knowledgeable about how children and adults access the internet sites My Space and Craigslist.”); see also *14 Arrested in San Jose Prostitution Sting; 16-Year-Old Girl Rescued*, CBS S.F. (Feb. 19, 2013, 3:02 PM), <http://sanfrancisco.cbslocal.com/2013/02/19/14-arrested-in-san-jose-prostitution-sting-16-year-old-girl-rescued> (reporting that two prostitution stings, which the San Jose Police Department’s human trafficking task force carried out in February 2013, resulted in the arrest of fourteen individuals and the rescue of a sixteen-year-old girl who had been forced to work as a prostitute since age eleven).

227. See *Operation Cross Country*, *supra* note 172; *infra* Part IV.B.2. Detective Conners is a prime example of the type of officer fit to take down criminals involved in selling minors for sex acts. See *People v. Lopez*, No. A129082, 2012 WL 151736, at *3 (Cal. Ct. App. Jan. 19, 2012) (noting that Detective Conners testified as an expert in Internet prostitution and sexual exploitation). Detective Conners is part of the Silicon Valley Internet Crimes Against Children Task Force. *Silicon Valley Internet Crimes Against Children Task Force—Affiliates*, SAN JOSE POLICE DEP’T, <http://www.sjpd.org/BOI/svicac/affiliates.html> (last updated Oct. 30, 2013) [hereinafter *Silicon Valley ICAC*] (listing Detective Conners as involved in this task force). Throughout the course of his work, he has set up several sting operations “in an effort to fight the exploitation of children and child prostitution.” *People v. Harris*, No. A119299, 2008 WL 5197097, at *1 (Cal. Ct. App. Dec. 12, 2008); see, e.g., *Lopez*, 2012 WL 151736, at *1-2; *People v. Scarberry*, No. A117242, 2008 WL 2791882, at *1 (Cal. Ct. App. July 21, 2008). He has also testified as an expert in child sexual assault and online child exploitation in numerous trials, many of which have taken place as the result of his successful sting and reverse sting operations. See *Harris*, 2008 WL 5197097, at *7 (noting that one of Detective Conners’s fields of expertise is “online child exploitation”); *Scarberry*, 2008 WL 2791882, at *2 (stating that Detective Conners has “testified as an expert in child sexual assault and exploitation of children online”). As such, Detective Conners has played an integral role in ridding his community of child predators. *Scarberry*, 2008 WL 2791882, at *1-2, *5; see *Lederer*, *supra* note 203, at 307-08 (suggesting that law enforcement officers play an important role in the elimination of prostitution in their communities by carrying out sting and reverse sting operations). Accordingly, the success of his programs and others should serve as a model for a broad, nationwide solution aimed at diminishing the number of minors who are sold for sex on the Internet. See *Lederer*, *supra* note 203, at 307-08; *infra* Part IV.B.2.

2. A Legislative Solution

Although the sting and reverse sting operations are successful, they are costly for the police departments that organize them.²²⁸ However, “[f]ew studies other than those on storefront stings have computed the cost of stings, except to observe that they are very expensive in personnel time.”²²⁹ In preparing for Internet prostitution stings, personnel time includes the “time required to train officers in how to carry out a successful sting operation,” as well as the time needed to seek out or post online advertisements for prostitution.²³⁰ One view is that it should be incumbent upon Craigslist, Backpage, and other ICSs to monitor their websites for criminal activity and bear the cost of doing such.²³¹ In other words, these ICSs would take on the first step in a sting operation—targeting the prostitution advertisements.²³² This approach would likely gain extensive public support considering the widespread opinion that these websites should be held liable for third party content—the public’s opinion is that ICSs have a “social responsibility” to remove sexually explicit, illegal posts.²³³ However, this opinion is impractical because it is anchored in the notion that websites are responsible for the content that their users post—a perception that embodies the antithesis of § 230 of the CDA.²³⁴

Some websites claim to regularly inspect the advertisements their users post and notify police of illegal activity.²³⁵ However, the

228. See *Dart*, 665 F. Supp. 2d at 962-63 (noting that the police department that the plaintiff worked for spent \$105,081 to arrest 156 individuals for prostitution-related activities).

229. NEWMAN, *supra* note 200, at 13.

230. *Id.* at 32 (“[T]here is also the greater financial cost of staff time—undercover work required in complex stings is very time-demanding and may take months or even years.”); see *Dart*, 665 F.3d at 962-93.

231. See *Doe v. MySpace, Inc.*, 528 F.3d 413, 419-20 (5th Cir. 2008) (disagreeing with the plaintiff’s argument that the defendant ICS should have implemented safety measures on MySpace.com to protect minors using the website); *Green v. Am. Online*, 318 F.3d 465, 471 (3d Cir. 2003) (“[Defendant] thus attempts to hold [America Online] liable for decisions relating to the monitoring, screening, and deletion of content from its network — actions quintessentially related to a publisher’s role.”).

232. See Lederer, *supra* note 203, at 307.

233. See Assel, *supra* note 14, at 92 (explaining that the focus has been on holding websites liable for third party postings); *Craigslist Has Social Responsibility*, *supra* note 60 (arguing that Craigslist has a social obligation to address the issue of sex trafficking and prostitution, which is plainly taking place on its website).

234. 47 U.S.C. § 230 (2006).

235. Turnham & Lyon, *supra* note 60 (“According to its own rules, Craigslist requires anyone using its adult services section to immediately report any suspicious ads to a national tip-line run by the Center for Missing and Exploited Children. The head of Washington’s Metropolitan Police anti-prostitution unit said Craigslist ‘never’ reports suspicious ads to his department.”). This Note does not delve into whether or not Craigslist and other classified advertisement websites have reported suspicious advertisements to law enforcement authorities. Instead, this Note puts forth a plan that

legislative scheme proposed in this Note would establish more accountability on the part of websites by making the monitoring and reporting process more transparent.²³⁶ Therefore, a compromise—between imposing financial burdens on websites on the one hand and continuing to battle § 230 on the other—would both pacify the critics and legitimize classified advertisement websites.²³⁷ Above all, such a plan would be consistent with the case law upholding § 230 because it would reinforce the finding that ICSs are not legally culpable for third party content published on their websites.²³⁸

The compromise should be codified in new legislation from Congress.²³⁹ The law would establish a program for monitoring and reporting Internet crime, which websites could opt into at their discretion.²⁴⁰ If Craigslist, for example, decided to participate in the initiative, it would be required to monitor the third party content posted on Craigslist.org.²⁴¹ The ICS would then be obligated to report its findings of criminal activity to designated federal or local law enforcement authorities.²⁴² The law would detail guidelines for monitoring and reporting procedures, and websites would be expected to comply accordingly if they wish to reap the benefits of their participation.²⁴³ Those benefits would be in the form of federal tax credits intended to compensate the ICS for the finances expended in monitoring its website.²⁴⁴ However, the tax credit would not merely

would make classified advertisement websites more accountable for the content that they publish, but not do so involuntarily because that would be contrary to the objective of § 230 of the CDA. See *infra* notes 253-57 and accompanying text.

236. See *infra* notes 241-43 and accompanying text.

237. See *supra* notes 231-34 and accompanying text; see also Kang, *supra* note 31 (noting that, “[t]hough they were invited to the hearing, [Craigslist’s] chief executive, Jim Buckmaster, and its founder, Craig Newmark, did not attend”); McCullagh, *supra* note 48 (stating that the founder of Craigslist was asked to speak at a congressional committee hearing on domestic minor sex trafficking).

238. See Perer, *supra* note 13, at 832-33 (discussing several cases in which courts have upheld § 230 of the CDA); *supra* Part III.B.2.

239. See *supra* notes 189-94 and accompanying text.

240. See *infra* notes 252-53 and accompanying text.

241. See Radbod, *supra* note 16, at 608 (stating that Craigslist claimed its employees would be reviewing advertisements on its website for illegal content); *supra* notes 180-81 and accompanying text.

242. Cf. INT’L CTR. FOR MISSING & EXPLOITED CHILDREN, CHILD PORNOGRAPHY: MODEL LEGISLATION & GLOBAL REVIEW 4-5 (7th ed. 2012), available at http://www.icmec.org/en_X1/pdf/Child_Pornography_Model_Law_English_7th_Edition_2012.pdf (suggesting that Internet service providers be required to notify law enforcement of suspected child pornography offenses, and that statutory protections be enacted to facilitate this reporting process).

243. See *supra* notes 240-42 and accompanying text.

244. Cf. U.S. DEP’T OF AGRIC., BIOMASS CROP ASSISTANCE PROGRAM: ENERGY FEEDSTOCKS FROM FARMERS & FORESTERS 20 (2013), available at http://www.fsa.usda.gov/Internet/FSA_File/

match the amount of money that the ICS expended in complying with the law—the amount of the tax credit would be greater so as to incentivize participation in the program.²⁴⁵ The tax credit would be based on a percentage, in that an ICS would receive a tax credit equaling, for example, 110% of the cost to monitor its website.²⁴⁶ There also remains the task of deciding which websites would be allowed to participate in the program.²⁴⁷ One option would be to structure the legislation in a way that permits any ICS falling within the purview of § 230 of the CDA to opt into the program.²⁴⁸

This proposed tax credit framework has been implemented in the field of environmental law.²⁴⁹ The manner in which tax credits would incentivize ICS self-monitoring is nearly identical to the way in which tax credits work to limit environmental pollution.²⁵⁰ In seeking to protect the environment, federal and state governments offer tax credits in exchange for individuals and businesses acting in environmentally

bcap_documentation.pdf (explaining that the Biomass Crop Assistance Program (“BCAP”) provides eligible producers with a seventy-five percent reimbursement for the costs associated with farming a biomass feedstock crop).

245. *Cf. id.* at 13-14. This Note proposes a tax credit in an amount greater than the cost to monitor a website, because a lesser tax credit would force ICSs to bear the residual monitoring costs. Instituting a program whereby ICSs bear their own monitoring costs is akin to making them liable for third party content because the courts have held that ICSs have no responsibility to monitor or report anything that their users post online. *See, e.g., Green v. Am. Online*, 318 F.3d 465, 471 (3rd Cir. 2003); *infra* notes 253-55 and accompanying text.

246. *Cf. U.S. DEP’T OF AGRIC., supra* note 244, at 20 (noting that “incentives ranged from twenty percent to fifty percent above the weighted average soil rental rate”).

247. *See People v. Swan*, No. H031862, 2009 WL 691128, at *1 (Cal. Ct. App. Mar. 17, 2009) (noting that a detective stated that MySpace.com is becoming a problem for police with regard to child sex predators); Elizabeth P. Stedman, Comment, *MySpace, but Whose Responsibility? Liability of Social-Networking Websites When Offline Sexual Assault of Minors Follows Online Interaction*, 14 VILL. SPORTS & ENT. L.J. 363, 396 (2007). Congress has taken action to protect children against Internet misuse:

The United States House of Representatives has responded to the dangers of social-networking websites by recently passing the Deleting Online Predators Act (“DOPA”). DOPA, which passed through the House of Representatives by a landslide vote of 410 to fifteen, requires schools and libraries to block access to commercial websites that allow users to create pages or profiles or to offer communication with other users via forums, chat rooms, email, or instant messaging. . . . DOPA’s constitutionality is thus yet to be determined.

Stedman, *supra*, at 396 (internal quotation marks omitted).

248. *See* 47 U.S.C. § 230 (2006).

249. *See Federal Laws and Incentives for Tax Incentives*, U.S. DEP’T OF ENERGY, <http://www.afdc.energy.gov/laws/laws/US/incentive/3234> (last updated Nov. 12, 2013) (summarizing federal laws and tax incentives as per the Alternative Fuels Data Center).

250. *See supra* notes 240-44 and accompanying text (referring to the CDA-friendly method by which ICSs may monitor their websites and report illicit content to police in order to obtain tax credits); *cf. Federal Laws and Incentives for Tax Incentives, supra* note 249 (explaining that individuals and businesses may obtain tax credits by using certain environmentally-friendly equipment and methods).

conscious ways.²⁵¹ Similarly, in carrying out the legislative solution to online child prostitution proposed herein, the government would impose financial incentives (tax credits) for self-monitoring activities that incentivize ICSs' to behave in socially desirable manners.²⁵²

Unlike some anti-pollution approaches, though, the ICS monitoring initiative should not be mandatory.²⁵³ Mandating that ICSs comply with the proposed initiative would be akin to making them liable for third party content published on their websites—an argument that the courts have repeatedly dispelled.²⁵⁴ The case law is clear that websites have absolutely no obligation with regard to published content that the ICS did not specifically encourage or solicit.²⁵⁵ Instead of fighting the CDA, as many plaintiffs have attempted, this Note's proposed legislation adopts a business-oriented framework to keep ICSs involved in the effort to investigate child prostitution advertisements on the Internet.²⁵⁶ ICS involvement in this endeavor is key to changing society's impression that ICSs are willfully blind to harmful practices of prostitution facilitated through classified advertisement websites.²⁵⁷

C. Crime and Punishment: A Program that Pays for Itself

The monitoring initiative, as it has thus far been explained in this Note, appears to shift the burden from ICSs and place it upon the American taxpayers.²⁵⁸ On the contrary, this Note identifies the individuals involved in online child prostitution as the most at fault, and the solution proposed herein is consistent with that notion.²⁵⁹ As such, the only appropriate way to fund the tax credits awarded to websites for their participation in the monitoring initiative is to make convicted

251. *All Laws and Incentives Sorted by Incentive*, U.S. DEP'T OF ENERGY, <http://www.afdc.energy.gov/laws/matrix/incentive> (last updated Nov. 12, 2013) (listing the "clean transportation laws, regulations, and funding opportunities" in all fifty states as compiled by the Alternative Fuels Data Center); *Federal Laws and Incentives for Tax Incentives*, *supra* note 249.

252. See *supra* notes 240-46 and accompanying text.

253. See Robert N. Stavins & Bradley W. Whitehead, *Pollution Charges for Environmental Protection: A Policy Link Between Energy and Environment*, 17 ANN. REV. ENERGY & ENV'T 187, 194-95 (1992) (describing various approaches to environmental law initiatives to reduce pollution, including a mandatory pollution control approach); *infra* notes 254-55 and accompanying text.

254. See Perer, *supra* note 13, at 832 (discussing a number of cases in which § 230 of the CDA has been upheld).

255. See *FTC v. Accusearch Inc.*, 570 F.3d 1187, 1199 (10th Cir. 2009).

256. See, e.g., *M.A. ex rel. P.K. v. Vill. Voice Media Holdings, LLC*, 809 F. Supp. 2d 1041, 1049-50 (E.D. Mo. 2011); *supra* Part III.B.2.

257. See *supra* Part IV.A.

258. See *supra* Part IV.B.2.

259. See *supra* Part IV.A-B.

pimps and johns pay for them.²⁶⁰ Such a legislative scheme would ensure that the cause of the problem also provides the solution to fixing it.²⁶¹ The ultimate goal is for federal and state governments to include in their sentencing guidelines criminal sanctions for those convicted of sex trafficking, child exploitation, and other related crimes.²⁶² If a convicted defendant does not have the funds to satisfy the sentence, the government would be authorized to seize personal property to then be sold at auction.²⁶³ The auction proceeds and the sanctions in satisfaction of the sentence would be used to compensate the government for the tax credits it allocates to ICSs monitoring their websites for users advertising prostitution.²⁶⁴

Members of the federal legislature would be tasked with determining the amount of the sanctions in such cases.²⁶⁵ The law would

260. Cf. Directive 2011/18, of the European Parliament and of the Council of 13 December 2011 on Combating the Sexual Abuse and Sexual Exploitation of Children and Child Pornography and Replacing Council Framework Decision 2004/68/JHA, 2011 O.J. (L335) 1, 10 (proposing that Member States of the European Union take appropriate measures to ensure that people convicted of offenses concerning sexual abuse, sexual exploitation, solicitation of children for sexual purposes, and inciting or aiding and abetting or attempting any of these offenses, be punished with "effective, proportionate and dissuasive sanctions, which shall include criminal or non-criminal fines and may include other sanctions"). A john is defined as "a prostitute's client." MERRIAM-WEBSTER DICTIONARY 268 (new ed. 2005).

261. Cf. *supra* Part IV.A–B (explaining that Craigslist users posting and responding to prostitution advertisements are the problem).

262. See MICHAEL TONRY, U.S. DEP'T OF JUSTICE, INTERMEDIATE SANCTIONS IN SENTENCING GUIDELINES 29 (1997), available at <https://www.ncjrs.gov/pdffiles/165043.pdf> (describing the interplay between sanctions and sentencing guidelines). This publication provides support for the idea that structuring sentences for these crimes so as to include sanctions would be a workable model. *Id.*

263. See 18 U.S.C. § 983 (2006) (delineating the general rules for civil forfeiture proceedings); *United States v. One 2007 Toyota FJ Cruiser*, 824 F. Supp. 2d 1369, 1377-79 (N.D. Ga. 2011) (holding that the claimant, who was found guilty of attempting to commit aggravated child molestation, was not entitled to present the affirmative defense of entrapment). The claimant had initiated online contact with an individual whom he believed to be a minor, but who was in fact an undercover officer. *One 2007 Toyota FJ Cruiser*, 824 F. Supp. 2d at 1372-74. The claimant introduced sexual topics into their conversations and indicated that he wanted to meet the female child. *Id.* When police caught the defendant as part of their sting operation, the defendant was driving his Toyota FJ Cruiser, which became subject to forfeiture. *Id.* at 1374, 1377; see also JOHN L. WORRALL, U.S. DEP'T OF JUSTICE, RESPONSE GUIDE SERIES NO. 7: ASSET FORFEITURE 7 (2008), available at <http://www.cops.usdoj.gov/Publications/e1108-Asset-Forfeiture.pdf> (noting that, under federal law, "[p]ersonal and real property is sold at auction, and, once sales costs are deducted, remaining proceeds are deposited into the [U.S. Department of Justice Assets Forfeiture] [Fund]").

264. See 18 U.S.C. § 983; WORRALL, *supra* note 263, at 7. Akin to how auction proceeds are deposited into the U.S. Department of Justice Assets Forfeiture Fund, some of the proceeds would be set aside to compensate the federal government for tax credits allocated to ICSs who participate in the monitoring program. See WORRALL, *supra* note 263, at 7; *supra* notes 244-46 and accompanying text.

265. Cf. 16 U.S.C. § 668 (2012) (providing that any person who possesses, sells, or buys a live or dead bald eagle "shall be fined not more than \$5,000 or imprisoned not more than one year or

also provide judges with discretion to increase the amount of the sanction in cases where the defendant's acts were particularly egregious, or when the defendant has been previously convicted of similar crimes.²⁶⁶ Requiring more funds from defendants in such cases has the purpose of deterring future crime.²⁶⁷ Essentially, the monitoring initiative is meant to pay for itself. This is a viable way to safeguard children from the dangers of online prostitution without running afoul of the immunity granted ICSs under § 230.²⁶⁸ The program will work long-term because criminals convicted under it will effectively pay the costs expended in apprehending them.²⁶⁹ This is an ideal way to prevent websites from wrongfully accepting the blame for the criminal actions of its users, while also ensuring that costs related to law enforcement's investigations of online sex trafficking do not fall entirely upon society.²⁷⁰

both").

266. Cf. *id.* (providing for fines and terms of imprisonment for a second violation); *Sexual Assault Penalties and Sentencing*, FINDLAW, http://files.findlaw.com/pdf/criminal/criminal.findlaw.com_criminal-charges_sexual-assault-penalties-and-sentencing.pdf (last visited Feb. 16, 2014) (noting that, after a jury finds a defendant guilty of sexual assault, the judge is tasked with determining an appropriate sentence). In coming to that conclusion, the judge must let criminal statutes guide his decision, but he may also consider aggravating factors such as the defendant's criminal history and the severity of the crime. See *Sexual Assault Penalties and Sentencing*, *supra*. The sentencing guidelines suggested in this Note mandate that judges in child sexual abuse cases impose sanctions upon convicted defendants, and that they sentence defendants to especially high sanctions when aggravating factors make it appropriate to do so. See *id.*

267. See *Project Safe Childhood Fact Sheet*, U.S. DEP'T OF JUSTICE, http://www.justice.gov/psc/docs/psc-fact-sheet_2-21-12_.pdf (last visited Feb. 16, 2014) (commenting that, in order for Project Safe Childhood to be successful going forward, "efforts must expand beyond enforcement and prosecutions to include proven prevention and deterrence efforts"). The solution suggested in this Note expands current efforts beyond enforcement and prosecution because it proposes legislation that would revamp the current enforcement and prosecution scheme as it currently exists. See *supra* Part IV.B.2. The former would be completely reworked so that law enforcement agencies work together with ICSs to single out individual offenders. See *supra* Part IV.A–B. The latter would be completely overhauled for two reasons: First, the defendants would no longer be ICSs like Craigslist, but would instead be the individuals posting for and responding to online advertisements for sex with minors. See *supra* Part IV.B. Second, the criminal statutes would now mandate that convicted defendants pay sanctions in order to reimburse the entities that worked to investigate their online activity. See *supra* notes 260–64 and accompanying text.

268. See Perer, *supra* note 13, at 833–52 (arguing that previous strategies attacking § 230 of the CDA through litigation have failed, and proposing a legislative solution that would make an ICS the distributor of illicit third party content once law enforcement provides the ICS with notice of illicit behaviors); Masnick, *Police Can Use Backpage.com*, *supra* note 173 (proposing that the "political grandstanding against Craigslist" effectively made it harder to catch law breakers because once Craigslist removed certain categories from its website, the prostitution advertisements moved elsewhere). Masnick argues that instead of attacking Craigslist.org and other websites, police should target "those actually responsible," meaning the users posting prostitution advertisements online. Masnick, *Police Can Use Backpage.com*, *supra* note 173; see *supra* Part IV.A–B.

269. See *supra* notes 262–64 and accompanying text.

270. See *supra* notes 258–60 and accompanying text.

V. CONCLUSION

The thrust of the argument set forth in this Note is that litigating the provisions of the CDA has not proven successful, and, therefore, a new solution to prevent the online exploitation of minors must be devised.²⁷¹ The arguments in favor of maintaining an ICS's immunity for third party content are sparse, and mainly come from judges writing court opinions interpreting § 230 of the CDA.²⁷² On the other hand, the criticism directed at Craigslist.org and other classified advertisement websites is plentiful.²⁷³ It is not disputed that sexual acts are commonly solicited and sold on classified advertisement websites.²⁷⁴ In fact, the ICSs that own such websites acknowledge this fact.²⁷⁵ One such ICS, Craigslist, made efforts to reduce the volume of sexually illicit posts on its website when it took down the Adult Services section on Craigslist.org.²⁷⁶ However, these efforts were futile because the posts were not reduced—they merely migrated either to different categories of the same website or to other similar websites.²⁷⁷ It is for these reasons that a new approach is warranted—one that is not centered upon the CDA—which would focus on criminally punishing the individuals who post the advertisements, not the websites where they are published.²⁷⁸ This new initiative would

271. See Radbod, *supra* note 16, at 611 (stating that no plaintiff has yet been successful in an action to make an online service provider liable for third party content under § 230 of the CDA); *supra* Part IV.A.

272. See, e.g., *Johnson v. Arden*, 614 F.3d 785, 791 (8th Cir. 2010); *Doe v. MySpace, Inc.*, 528 F.3d 413, 422 (5th Cir. 2008) (affirming the district court's decision in favor of MySpace, which granted the ICS immunity from liability for the sexual assault of a minor who was posting content on the website); *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 330 (4th Cir. 1997) (acknowledging "the threat that tort-based lawsuits pose to freedom of speech in the new and burgeoning Internet medium," as well as the fact that "Section 230 was enacted, in part, to maintain the robust nature of Internet communication").

273. See, e.g., Davis, *supra* note 26 (criticizing the fact that even after Craigslist removed its Adult Services category, the number of prostitution advertisements on the Internet had not declined); see also Masnick, *Police Can Use Backpage.com*, *supra* note 173 (stating that, at the time Mike Masnick's article was written, the "crusading against Backpage.com ha[d] become increasingly intense and increasingly misguided").

274. See Kang, *supra* note 31 (noting that the Internet has made it easier for adults to sell sexual services provided by children).

275. See *Call on Village Voice Media*, *supra* note 65.

276. Assel, *supra* note 14, at 83-84 (explaining that Craigslist took down their Adult Services category after being pressured to do so).

277. See Kang, *supra* note 31 (highlighting that those individuals who previously posted advertisements for sexual activity on Craigslist.org have found other venues online where they may do so); McCullagh, *supra* note 48 (noting that the amount of advertisements for illegal activity on Craigslist.org has not significantly changed now that the website took down its Adult Services category).

278. See *supra* Part IV; see also *FTC v. Accusearch Inc.*, 570 F.3d 1187, 1199 (10th Cir. 2009) (stating that it is well settled that Craigslist and other ICSs cannot be held responsible under the CDA for third party content of individuals posting on their websites).

involve recruiting ICSs to work with specially trained police, who in turn would catch advertisers, as well as those individuals who have taken significant steps to meet and engage in sex acts with underage prostitutes.²⁷⁹ These pimps and customers are at the root of the problem, and, therefore, the main priority should not be seeking a loophole to make ICSs liable, but, instead, should focus on finding a way to catch child predators that operate on the Internet.²⁸⁰

*Michal Ovadia**

279. *See supra* Part IV.B; *see also* *People v. Swan*, No. H031862, 2009 WL 691128, at *1, *5 (Cal. Ct. App. Mar. 17, 2009) (deciding that the defendant was properly convicted because he took substantial steps to meet and have sexual contact with a child).

280. *See supra* Part IV.

* J.D. candidate, 2014; Maurice A. Deane School of Law at Hofstra University; B.A., 2012, Hofstra University. First, I must thank my father, Uzi Ovadia, whose tough love and unwavering support has made me the person I am today. I would like to thank the Honorable Stacy D. Bennett who graciously allowed me to intern in her courtroom throughout my college years, and who, since that time, has been one of my biggest cheerleaders. Thank you to Cristina Colon of the Nassau County District Attorney's Office, Special Victims Bureau, under whose guidance I worked on a case that ultimately served as the inspiration for this Note. I am indebted to Brian Sullivan, Sarah Freeman, and Tyler Evans—my Managing Board, and more importantly, my friends. I would like to express my gratitude to Professor Theo Liebmann and Ana Getiashvili for their insight, as well as Brendan Friedman and W. Thomas Hughes for their valuable contributions. And finally, thank you to my entire family and my friends, who have become family during this crazy thing called law school.

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HOFSTRA LAW REVIEW

Volume 42, No. 3
Spring 2014

HEMPSTEAD, NEW YORK 11549

The *Law Review* is pleased to consider unsolicited manuscripts for publication. All manuscripts should conform to *The Bluebook: A Uniform System of Citation*, 19th Edition. Manuscripts should be addressed to: Managing Editor of Articles, *Hofstra Law Review*, Maurice A. Deane School of Law at Hofstra University, 121 Hofstra University, Hempstead, New York 11549. Unsolicited manuscripts will not be returned except upon specific request at time of submission.

The *Hofstra Law Review* (ISSN 0091-4029) is published quarterly by the Hofstra Law Review Association. Maurice A. Deane School of Law at Hofstra University, 121 Hofstra University, Hempstead, NY 11549. Periodicals postage is paid at Hempstead, NY, and additional mailing offices. The current subscription rate is thirty-five dollars per volume. Postmaster: Send address changes to *Hofstra Law Review*, Maurice A. Deane School of Law at Hofstra University, 121 Hofstra University, Hempstead, New York 11549.

Individual issues are available from William S. Hein & Co., Inc., 2350 North Forest Road, Getzville, NY 14068, (800) 828-7571. Orders may also be placed by fax, (716) 883-8100, or by e-mail: order@wshein.com. Subscription renewals will be automatic unless notice to the contrary is received. All communications should be addressed to Business Editor, *Hofstra Law Review*, Maurice A. Deane School of Law at Hofstra University, 121 Hofstra University, Hempstead, New York 11549.

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Volume 42, No. 3

Spring 2014

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