

**THE REMOVAL OF SECTION 230 LIABILITY SHIELD
FOR ONLINE PLATFORMS THAT ENGAGE IN HUMAN
TRAFFICKING IN PUERTO RICO**

ARTICLE

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INTRODUCTION

Human trafficking, in all its forms, is the third largest illicit industry in the world, behind the illegal arms and narcotics trade,¹ generating between 5,000-7,000 million a year.² However, unlike the latter, in the former the object of exchange is human beings insisted inanimate objects. With the increased use of technology, “the

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¹ César A. Rey Hernández & Luisa Hernández Angueira, *La trata de personas en Puerto Rico: un reto a la invisibilidad* 1 (2010).

² *Id.*

majority of all sex trafficking [today] occurs online,”³ and an internet users can obliviously consume content created by traffickers.

In 2018 there were two crucial developments in the fight against online sex trafficking. First, federal authorities seized and took down Backpage.com,⁴ at the time “the largest online platform for buying and selling commercial sex,” leaving this market to be fragmented.⁵ Second, the *Allow States and Victims to Fight Online Sex Trafficking Act of 2017* (hereinafter FOSTA) —the object of this paper— was enacted, leading some websites to preventively take down content to avoid violating the Act.⁶ However, there is still much work to be done as online traffickers and the platforms they use continue to profit off the exploitation of mainly vulnerable women and children. For example, Pornhub, the world’s largest porn site, was exposed for profiting from videos depicting the sexual exploitation and assault of trafficking victims.⁷ OnlyFans.com, whose subscription based model of placing content under a paywall “transformed the pornography industry,” also enables “sex predators, rapists, sex traffickers, and other criminal elements the technological means to profit from their crimes while remaining less visible to law enforcement.”⁸ It is not only sites related to pornography that have a human trafficking problem, but any online platform can be subverted and used by traffickers.⁹ We recognize that curving such content presents a wide array of challenges for platforms, such as imposing limits on speech, but it is particularly outrageous when platforms actively solicit or are negligent in moderating their content. As several documented cases show, technology plays a role in the victim’s experience, whether as a tool for recruitment, control, or exploitation.

3 Olivia Parise, *Little Pink Flower with a Darker Story to Tell: The Role of Emojis in Online Human Trafficking and Potential FOSTA-SESTA Liability*, 11 U. MIAMI RACE & SOC. JUST. L. REV. 52, 59 (2020) (citing 114th Congress of the United States Senate Permanent Subcommittee on Investigations, *Backpage.com’s Knowing Facilitation of Online Sex Trafficking*, 5 (2017)).

4 Joseph Tanfani, *Federal authorities take down Backpage.com, accused of being a haven for online prostitution*, LOS ANGELES TIMES (Apr. 7, 2018), <https://www.latimes.com/nation/la-na-pol-backpage-fbi-20180406-story.html>.

5 U.S. GOV’T ACCOUNTABILITY OFFICE, *SEX TRAFFICKING: ONLINE PLATFORMS AND FEDERAL PROSECUTIONS* 1 (2021), <https://www.gao.gov/assets/gao-21-385.pdf>.

6 *Id.*; Nitasha Tiku, *Craigslist Shuts Personal Ads for fear of new internet law*, WIRED (Mar. 23, 2018), <https://www.wired.com/story/craigslist-shuts-personal-ads-for-fear-of-new-internet-law/>.

7 See Nicholas Kristof, *The Children of Pornhub*, N.Y. TIMES (Dec. 4, 2020), <https://www.nytimes.com/2020/12/04/opinion/sunday/pornhub-rape-trafficking.html>.

8 *Open-Source Research Shows Online Child Sex Trafficking and Other Criminal Activity Found on OnlyFans.com*, UNIVERSITY OF NEW HAVEN (Apr. 27, 2022), <https://www.newhaven.edu/news/releases/2022/child-trafficking-study.php>.

9 See for example Clare Duffy, *Facebook has known it has a human trafficking problem for years/ It Still hasn’t fully fixed it*, CNN BUSINESS (Oct. 25, 2021), <https://edition.cnn.com/2021/10/25/tech/facebook-instagram-app-store-ban-human-trafficking/index.html>. See also Parise, *supra* note 3, discussing how traffickers use emojis to hide advertisements in popular social media platforms, and U.S. GOV’T ACCOUNTABILITY OFFICE, *supra* note 5, at 23 (“FBI documents, dated 2018 through 2020, indicate there has been an increased use of social media, dating, hookup, and messaging/communication platforms in sex trafficking, and this trend will likely continue”).

Human trafficking is a crime under federal,¹⁰ Puerto Rican,¹¹ and international law.¹² Many studies point out that most forms of human trafficking that occur in Puerto Rico are hidden in the shadows of both legitimate and illicit activities. Additionally, the lack of an understanding of this phenomenon leads to frequent misclassification and ill-informed refusal to call trafficking cases by their name,¹³ which has led to a worrisome zone of impunity throughout our legal system that allows traffickers and those that enable them to avoid the full extent of their responsibility. Fundamental in the fight against trafficking is enacting the necessary laws and making sure that prosecutors present charges for human trafficking.

Until 2017 one such zone of impunity that shielded traffickers was section 230 of the *Communications Decency Act*,¹⁴ which granted platforms immunity from content posted by their users. For example, Backpage.com used section 230 to defend against state court challenges.¹⁵ The enactment of FOSTA made it clear that section 230 does not protect against federal prosecutions based on sex trafficking law, as well as “a criminal prosecution brought under State law if the conduct underlying the charge would constitute a violation of [federal anti-trafficking law]. . . .”¹⁶ As we shall see, this opens the gates for local prosecutors to press charges against digital platforms under article 160 of Puerto Rico’s Penal Code.

This article provides a guide on applying FOSTA provisions that allow state actions against platforms for enabling human trafficking in Puerto Rico. The paper begins with a survey of modern-day human trafficking both abroad and in Puerto Rico, and on the increasing role that technology has in human trafficking for sexual exploitation. Next is an analysis of section 230, copyright liability shield for platforms, and changes to section 230 under FOSTA. Furthermore, we quickly review federal and Puerto Rico’s anti-sex trafficking criminal provisions, mainly section 1591 of title 18, United States Code, and article 160 of Puerto Rico’s Penal Code. Lastly, this note closes with an analysis if whether current Puerto Rican penal law can be used to prosecute platforms and observations on the shortcomings of a FOSTA approach.

I. HUMAN TRAFFICKING

A. *Defining Human Trafficking*

To understand human trafficking, it is essential to first establish a clear definition of the criminal phenomenon. We will use the definition of human trafficking vested in Ar-

¹⁰ See Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, 114 Stat. 1464 (2018).

¹¹ See Cód. Pen. PR arts. 159-160, 33 LPRA §§ 5225-5226 (2021).

¹² See Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime art. 3, Nov. 15, 2000, 2237 U.N.T.S. 319, <https://www.ohchr.org/sites/default/files/ProtocolonTrafficking.pdf>.

¹³ REY HERNÁNDEZ & HERNÁNDEZ ANGUEIRA, *LA TRATA DE PERSONAS EN PUERTO RICO*, *supra* note 1 at, 3-4.

¹⁴ See 47 U.S.C. § 230 (2018).

¹⁵ Christine Biederman, *Inside Backpage.com’s Vicious Battle With The Feds*, WIRED (Jun. 18, 2019), <https://web.archive.org/web/20190618114540/https://www.wired.com/story/inside-backpage-vicious-battle-feds/>.

¹⁶ 47 U.S.C. § 230 (e)(5)(C).

title III of the United Nations *Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children* (hereinafter the “Protocol”), which complements the *U.N. Convention against Transnational Organized Crime*. This definition has been used to define the crime of human trafficking in both federal and state legislation. The Protocol illustrates trafficking of persons as:

[T]he recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs.¹⁷

This definition, as discussed by Anne Gallagher, encompasses three elements that “must be present for the convention to become operational within a given fact-situation.”¹⁸ First, there is the *action* of either “[r]ecruitment, transportation, transfer, harboring or receipt of [victims]”.¹⁹ Second, the *means* employed to submit the victims to the trafficker’s whims.²⁰ It is important to emphasize that, when any of these means are employed, the consent of the victim is null.²¹ The third element is that the acts and means used are for the purpose of *exploitation*.²² The words “at a minimum” are crucial in expanding the scope of the Protocol, as they “were included in lieu of a listing of specific forms of exploitation and in order to ensure that unnamed or new forms of exploitation were not excluded by implication.”²³ As such, exploitation in this context can include, but is not limited to, sexual labor, domestic servitude, exploitation of minors, slavery or any activity that seeks to profit from victims’ endeavors or bodies. The 2019 *Trafficking in Persons Report* encapsulates that the “Protocol defines human trafficking by its three elements—a trafficker’s *action* taken through the *means* of force, fraud, or coercion for the *purpose* of exploitation.”²⁴

17 Trafficking Protocol, *supra* note 12, art. 3(a).

18 Anne Gallagher, *Human Rights and the New UN Protocols on Trafficking and Migrant Smuggling: A Preliminary Analysis*, 23 HUMAN RIGHTS QUARTERLY 975, 987 (2001).

19 *Id.* at 986.

20 *Id.* at 986-87.

21 *Id.* at 985 (“[I]ssues of consent should not arise because according to the non-contested parts of the definition, trafficking necessarily involves the presence of some kind of consent-nullifying behavior.”). See also Trafficking Protocol, *supra* note 12, art. 3(b) (“The consent of a victim of trafficking in persons to the intended exploitation set forth in subparagraph (a) of this article shall be irrelevant where any of the means set forth in subparagraph (a) have been used[.]”).

22 Gallagher, *supra* note 18, at 987.

23 *Id.* at 987 (citing United Nations Office for Drug Control and Crime Prevention, *Summary of the United Nations Protocol Against Transnational Organized Crime and Protocols Thereto*, <http://www.odccp.org/palermo/convensumm.htm> (last visited Jan. 2001)).

24 U.S. DEPARTMENT OF STATE, TRAFFICKING IN PERSONS REPORT 8 (2019), <https://www.state.gov/wp-content/uploads/2019/06/2019-Trafficking-in-Persons-Report.pdf>.

Regarding the treaty's stance on prostitution, the definition is the subject of rigorous debate, which focuses on whether the Protocol should take a prohibitionist approach to prostitution.²⁵ This paper is written from the perspective that, although both phenomena are interrelated, prostitution and human trafficking for sexual exploitation are fundamentally different, and in jurisdictions —like Puerto Rico— where sex work is illegal, each should still be differentiated. Not all cases of individuals engaging in the sex industry meet the three elements set out in the *Trafficking Convention*. Those sex workers who willfully and without any coercion choose to offer sexual services for their profit, stand in a completely different situation than those forced to for the financial gain of others. This second group is comprised of victims of humankind's brutality and unwilling actors. Irrespective, the Convention sets out to call on states to adopt anti-trafficking measures within their national legal systems that cover the broad spectrum of trafficking and exploitation defined by article 3.²⁶ Additionally, article 9 of the Protocol beseeches states to “address the structural factors that increase vulnerabilities to trafficking, such as poverty, underdevelopment and a lack of equal opportunity. . . .”²⁷

B. *Human Trafficking in a Globalized World*

The Protocol placed the issue on the global agenda and began a process of increasing national capacities as state parties started evaluating local legislation and allocating resources. According to the United Nations Office on Drugs and Crime's (hereinafter U.N.O.D.C.) *Global Report on Trafficking in Persons of 2020*, “[m]ore traffickers are being brought to justice every year—globally, the number of people convicted per 100,000 population had nearly tripled since 2003, when the protocol entered into force.”²⁸

Because of its clandestine nature, lack of international uniformity in legislation defining trafficking, and the inability of law enforcement to detect most cases, it is impossible to precisely calculate how many people are victims of trafficking.²⁹ Yet, the U.N.O.D.C. report notes that, among the detected trafficking victims globally, 50% of them were trafficked

25 See Gallagher, *supra* note 18, at 985-86. Compare Dorchen A. Leidholdt, *Prostitution and Trafficking in Women: An Intimate Relationship*, 2 JOURNAL OF TRAUMA PRACTICE 167-83 (2003), with LIN LEAN LIM, TRAFFICKING, DEMAND AND THE SEX MARKET (2007), <https://documentation.lastradainternational.org/lsidocs/334%20Lin%20Lean%20Lim%20TraffickingDemand%20Sex%20market.pdf>.

26 Trafficking Protocol, *supra* note 12, art. 5. See also Gallagher, *supra* note 18, at 984, and Lean Lim, *supra* note 25, at 2 (“The Protocol requires States Parties, several of which had hitherto adopted anti-trafficking laws which cover only sexual exploitation of women and children, to adopt or amend their laws in order to have a broader concept of trafficking and exploitation”).

27 U.N.O.D.C., GLOBAL REPORT ON TRAFFICKING IN PERSONS 23 (2020), https://www.unodc.org/documents/data-and-analysis/tip/2021/GLOTiP_2020_15jan_web.pdf. See also Trafficking Protocol, *supra* note 12, art. 9(4).

28 U.N.O.D.C., *supra* note 27, at 4.

29 Alexis A. Aronowitz, *Overcoming the Challenges to Accurately Measuring the Phenomenon of Human Trafficking*, 81 REVUE INTERNATIONALE DE DROIT PÉNAL 493 (2010). See also U.N.O.D.C., *supra* note 27, at 38 (citing Omar Martinez & Guadalupe Kelle, *Sex Trafficking of LGBT Individuals: A Call for Service Provision, Research and Action*, 42 INTERNATIONAL LAW NEWS 3-4 (2013)) (“Administrative records reported by most governments are not often helpful in understanding how LGBTQI+ individuals. . . are vulnerable to trafficking in persons. However, a growing body of research shows that LGBTQI+ individuals are at higher risk of becoming victims of trafficking”).

for sexual exploitation, 38% for forced labor, and 12% for other forms such as criminal activity, begging, involuntary marriages, mixed forms, baby selling, and removal of organs.³⁰ In cases of sexual exploitation, women and girls represented 92% of the victims.³¹ The cases studied as part of the U.N.O.D.C. report note that “[i]n 2018, for every [ten] victims detected globally, about five were adult women and two were girls. About one-third of the overall detected victims were children, both girls and boys, while [twenty] percent were adult men.”³² The disproportionate amount of women and children among the victims highlights the fact that traffickers specifically target vulnerable people.³³ Whether it is because of any combination of social, cultural, or economic factors, women and children find themselves more easily marginalized across the globe. This is exponentially more common if the victim has an LGBTQ+ identity.³⁴ Some risk factors include economic necessities, immigration status, and dysfunctional family structures.³⁵ These aspects can cause a person to stay under the control of a trafficker.

The U.N.O.D.C. notes that, among all these components, the most common is economic necessity, with it being present in 51% of reported instances.³⁶ In particular, “[t]rafficking of children, however, disproportionately[,] affects low-income countries, where it is linked to the broader phenomenon of child [labor].”³⁷ It is therefore easy to see why economic necessities play such an important role; people in deteriorating financial situations may fall into a recruiter’s false promises of work and material stability. Additionally, in cases of victims with low-income families, traffickers may remit a small amount to their families, to incentivize them to stay. Likewise, in cases involving minors, the exploiter may pay the child to manipulate them into thinking that they are engaging in a traditional work relationship with their exploiter.

Traffickers are also a diverse group. It should not come as a surprise that the world’s third-largest illicit market is just as complex as any formal financial bazaar. Traffickers can be individual family members, people who share an intimate relationship with the victim or international crime networks.³⁸ Most offenders are adult males, making up 60% of

³⁰ U.N.O.D.C., *supra* note 27, at 34.

³¹ *Id.* at 36 (see fig. 12).

³² *Id.* at 31.

³³ *Id.* at 9. The report defines vulnerability as:

[B]oth to the pre-existing individual and structural factors that may increase the susceptibility of an individual or group to trafficking in persons (further referred to as “susceptibility” to trafficking) and to those elements that may be generated by the trafficker in order to maximize control over the victim in the context in which the exploitation takes place (such as isolation, dependency and irregular legal status).

Id. at 69.

³⁴ *Id.* at 38.

³⁵ *Id.* at 9.

³⁶ *Id.* at 71.

³⁷ *Id.* at 9.

³⁸ *Id.* at 40 (“These traffickers may include young males who recruit their younger schoolmates into sexual exploitation, parents who exploit their children in begging, urban gangs and structured transnational organized criminal groups, brokers negotiating children’s work in rural villages, as well as licensed multinational recruitment agencies and legal companies”).

convicted traffickers worldwide.³⁹ Furthermore, business models are diverse. For example, some traffickers may recruit and exploit their victims, others may only recruit and let others capitalize on them, and some may only serve as an intermediary between the first two.⁴⁰

C. Puerto Rico and Human Trafficking

Puerto Rico serves as a source, transit, and destination for victims of human trafficking.⁴¹ Economic need, one of the previously identified vulnerabilities, is ever-present on the island. Only 21.5% of the civil population form part of the island's labor force, and of that, most are unemployed; 58.3% of people under 18 years live in conditions of poverty.⁴² Likewise, youths form a significant share of the labor force in the illicit drug business, with estimates that child labor is used in 80% of drug markets, or *puntos de droga*, in the island.⁴³ This constitutes human trafficking for criminal activity and it all points toward the existence of an informal economy estimated at 30% of GDP.⁴⁴ The prevalence of the informal economy creates ample opportunities for trafficking to happen. For example, a study conducted on female victims of domestic abuse found a case of forced prostitution to pay for drug-related debts of the consensual partner.⁴⁵ Additionally, cases of human trafficking for forced labor, begging, and sexual exploitation have been identified.⁴⁶

Like the international trend, local traffickers take many shapes and sizes. There is evidence of trafficking of Chinese and Haitian victims into the island through international criminal organizations.⁴⁷ Also, the drug trade on the island is controlled by gangs that exploit child labor. In some cases, girls were not only employed by drug traffickers in their operations, but also sexually exploited by them.⁴⁸ We also see cases of the individual trafficker, sometimes a parent or member of a substitute household, who forced victims into prostitution or exploited them sexually.⁴⁹

The large Dominican migrant community, which is employed in the service industry—subject to the island's xenophobia and racism—presents opportunities for traffickers

³⁹ *Id.* at 37.

⁴⁰ *Id.* at 46-47.

⁴¹ CÉSAR REY HERNÁNDEZ & LUISA HERNÁNDEZ ANGUEIRA, *LA TRATA DE PERSONAS: UNA FORMA MODERNA DE ESCLAVITUD EN PUERTO RICO* (2014).

⁴² César Rey Hernández, *El lado oculto del desarrollo en Puerto Rico: un desafío de justicia*, 88 REV. JUR. UPR 1204, 1206 (2019).

⁴³ *Id.*

⁴⁴ *Id.* at 1207.

⁴⁵ LUISA HERNÁNDEZ ANGUEIRA & CÉSAR REY HERNÁNDEZ, *GENDER VIOLENCE AND TRAFFICKING* 35-36 (2012).

⁴⁶ REY HERNÁNDEZ & HERNÁNDEZ ANGUEIRA, *LA TRATA DE PERSONAS: UNA FORMA MODERNA DE ESCLAVITUD EN PUERTO RICO*, *supra* note 41, at 51.

⁴⁷ REY HERNÁNDEZ & HERNÁNDEZ ANGUEIRA, *LA TRATA DE PERSONAS EN PUERTO RICO: UN RETO A LA INVISIBILIDAD*, *supra* note 1, at 6.

⁴⁸ See REY HERNÁNDEZ & HERNÁNDEZ ANGUEIRA, *LA TRATA DE PERSONAS: UNA FORMA MODERNA DE ESCLAVITUD EN PUERTO RICO*, *supra* note 41, at 37-49 for testimonies of victims of human trafficking, all under aged when exploited by participants of the drug trade.

⁴⁹ See REY HERNÁNDEZ & HERNÁNDEZ ANGUEIRA, *LA TRATA DE PERSONAS EN PUERTO RICO: UN RETO A LA INVISIBILIDAD*, *supra* note 1, at 9-14 for accounts of minors being trafficked by parents or people in a position of confidence over a youth.

both at the transportation and force exploitation stages of the trafficking cycles.⁵⁰ Episodes of Dominican women employed in the domestic service and nursing sectors being exploited by their employers have been reported.⁵¹ It is also documented how threat of disclosing immigration status have been used as a tool to control victims of this background.⁵²

D. *Human Trafficking and the Internet Revolution*

A consequence of the wide use of the internet is its misuse by criminal networks. Traffickers use technology as an indispensable tool of the trade to access and intervene with their victims at a local and international level.⁵³ Some trafficking activities have moved almost entirely online, which reduces the risks for the perpetrators and, at times, offers greater profitability.⁵⁴ A recent background paper on the issue of human trafficking and technology concludes that:

Trafficking in persons is a crime characterized by its adaptability because trafficking business models evolve to take advantage of the new opportunities offered by advances in technology. . . Technology is used by traffickers at every step of the crime, from identifying future victims and recruiting them to laundering the proceeds of the exploitation.⁵⁵

For example, technology facilitates the recruitment of victims as traffickers can: (1) quickly obtain personal information on victims via social media and dating platforms; (2) approach individuals in less conspicuous ways than in-person contact, and (3) ignore geographical and national boundaries.⁵⁶ A preferred tool of online traffickers at this stage is fraud, fooling victims into their hands with false promises and hopes. Traffickers not only make use of fake websites to lure in victims but, more worrisome, post fake advertisements on legitimate platforms.⁵⁷ For example, in 2019, the owners and two employees of two pornographic websites were charged with sex trafficking for coercing women into videos that

⁵⁰ *Id.* at 4-6.

⁵¹ See HERNÁNDEZ ANGUEIRA & REY HERNÁNDEZ, *GENDER VIOLENCE AND TRAFFICKING*, *supra* note 45, at 40-41.

⁵² *Id.*

⁵³ REY HERNÁNDEZ & HERNÁNDEZ ANGUEIRA, *LA TRATA DE PERSONAS: UNA FORMA MODERNA DE ESCLAVITUD EN PUERTO RICO*, *supra* note 41, at 9.

⁵⁴ Conference of the Parties to the United Nations Convention against Transnational Organized Crime, *Successful strategies for addressing the use of technology to facilitate trafficking in persons, and to prevent and investigate trafficking in persons: Background paper prepared by the Secretariat*, at 3-4, U.N. Doc. CTOC/COP/WG.4/2021/2 (Jul. 23, 2021) (citing EUROPEAN UNION AGENCY FOR LAW ENFORCEMENT COOPERATION (EUROPOL), EUROPEAN UNION SERIOUS AND ORGANIZED CRIME THREAT ASSESSMENT: A CORRUPTING INFLUENCE – THE INFILTRATION AND UNDERMINING OF EUROPE’S ECONOMY AND SOCIETY BY ORGANIZED CRIME 13 (2021)).

⁵⁵ *Id.* at 4.

⁵⁶ *Id.* at 5.

⁵⁷ See Conference of the Parties to the United Nations Convention against Transnational Organized Crime, *supra* note 53, at 5; U.N.O.D.C., *supra* note 27, at 119 (“Everyday digital platforms are used by traffickers to advertise deceptive job offers and to market exploitative services to potential paying customers”).

they posted on the internet.⁵⁸ In this case, the traffickers “lure women who had answered [false] modeling advertisements on Craigslist to participate in the videos, telling them that their identities would be shielded and that the videos would not be posted online.”⁵⁹ Another example of technologically assisted recruitment is the case of Elena Ocasio Rivera, also known as “*Nenita linda*,” who was seduced by her trafficker online before she relocated and married him in Peru.⁶⁰ Once in Barranca, Peru she was subject to extreme conditions of domestic violence and sexual exploitation by her trafficker and his family.

Additionally, the Protocol conceptualizes as part of the crime of trafficking the use of means “to achieve the consent of a person having control over another person, for the purpose of exploitation.”⁶¹ The increased use of technology also allows traffickers to control their victims by virtual monitoring of a victim’s communication and location.⁶² It can also enable psychological methods of control, for example, by threatening to upload online or send to a victim’s relatives or friends compromising videos or photographs.⁶³ The Secretariate of the Working Group on Trafficking in Persons (hereinafter “the Secretariate”) further concludes that “[t]echnology gives traffickers the ability to control victims remotely sometimes without having ever met them face-to-face.”⁶⁴

When using the internet and social media, even a single trafficker can have the reach and impact comparable to a complex trafficking ring. The Secretariate notes that “technology acts as a force multiplier in cases of trafficking for sexual exploitation as it enables the recruitment, commercialization and exploitation of victims on a potentially massive scale.”⁶⁵ Just as in recruiting victims, traffickers make use of broadly accessible platforms to promote and sell services resulting from their victims’ exploitation.⁶⁶ For example, in Canada a single sex trafficker, “working alone, managed to sexually exploit and connect one victim with over 100 sex buyers over a period of 60 days using online advertisement.”⁶⁷ Furthermore, video streaming and live chats present a powerful tool for traffickers to transmit acts of exploitation without regards to national borders or time,⁶⁸ which is why “victims may be repeatedly exploited through live-streaming on multiple websites, their videos watched limitlessly and their services sold to many clients through the same advertisement on numerous platforms.”⁶⁹ Pornographic video upload sites, in particular, face the

58 Adeel Hassan & Katie Van Syckle, *Porn Producers Accused of Fooling Women Get Sex Trafficking Charges*, NY TIMES (Oct. 11, 2019) <https://www.nytimes.com/2019/10/11/us/pornsextrafficking.html#:~:text=The%20owners%2C%20Michael%20James%20Pratt,by%20oforce%2C%20ofraud%20and%20coercion>.

59 *Id.*

60 HERNÁNDEZ ANGUEIRA & REY HERNÁNDEZ, GENDER VIOLENCE AND TRAFFICKING, *supra* note 45, at 45-47.

61 Trafficking Protocol, *supra* note 17, art. 3.

62 Conference of the Parties to the United Nations Convention against Transnational Organized Crime, *supra* note 54, at 7.

63 *Id.*

64 *Id.*

65 *Id.*

66 U.N.O.D.C., *supra* note 27, at 120-21.

67 *Id.* at 120 (*Citing* U.N.O.D.C., *Case Law Database*, SHERLOC, https://sherloc.unodc.org/cld//case-law-doc/traffickingpersonscrimetype/can/2013/r_v_byron.html?lng=en&tmpl=sherloc (last visited March 29, 2022)).

68 *Id.* at 122.

69 Conference of the Parties to the United Nations Convention against Transnational Organized Crime, *supra* note 54, at 7.

challenge of determining which content is illegal.⁷⁰ Moreover, once uploaded online, a video can take a life of its own even after it has been identified and taken down once.⁷¹ Videos and photos can be reuploaded and shared long after the victim has been rescued, therefore their exploitation never truly ends.⁷² The use of social media is particularly worrisome, as it gives traffickers easy and unsupervised access to youth. Jorge Javier Marrero Gerena, the owner of the charter boat company Yatea Puerto Rico, used Instagram and WhatsApp to approach minors with the intent of coercing them into producing pornography.⁷³

II. INTERNET LIABILITY CARVE-OUTS: SECTION 230 OF THE COMMUNICATIONS DECENCY ACT, THE DIGITAL MILLENNIUM COPYRIGHT ACT, AND FOSTA

A. Section 230 of the Communications Decency Act

Section 230 of the United State Code was created by Congress in 1996 as part of the *Communications Decency Act* (CDA).⁷⁴ It was created in response to early court cases that held platforms liable as a publisher for all third-party content if they moderated any third-party material,⁷⁵ while not if it only passively hosted content regardless of how harmful it was.⁷⁶ Under this precedent platforms could either “try to moderate third-party content but risk being held liable for any and all content posted by third parties, or choose not to moderate content to avoid liability but risk having their services overrun with obscene or unlawful content.”⁷⁷

70 Nicholas Kristof illustrated the following:

A great majority of the 6.8 million new videos posted on the site each year probably involve consenting adults, but many depict child abuse and nonconsensual violence. Because it’s impossible to be sure whether a youth in a video is 14 or 18, neither Pornhub nor anyone else has a clear idea of how much content is illegal.

Nicholas Kristof, *supra* note 7.

71 *Id.* (“[u]nlike YouTube, Pornhub allows these videos to be downloaded directly from its website. So even if a rape video is removed at the request of the authorities, it may already be too late: The video lives on as it is shared with others or uploaded again and again”).

72 Interviewing a victim, Nicholas Kristof recounts that:

“Pornhub became my trafficker,” a woman named Cali told me. She says she was adopted in the United States from China and then trafficked by her adoptive family and forced to appear in pornographic videos beginning when she was 9. Some videos of her being abused ended up on Pornhub and regularly reappear there, she said.

“I’m still getting sold, even though I’m five years out of that life,” Cali said.

Id.

73 U.S. DEP’T. JUST., *Jorge Javier Marrero Gerena Arrested On Charges Of Child Pornography*, U.S. DEP’T. JUST. (October 9, 2020) <https://www.justice.gov/usao-pr/pr/jorge-javier-marrero-gerena-arrested-charges-child-pornography>.

74 47 U.S.C. § 230 (2018).

75 *Cubby, Inc. v. CompuServe, Inc.*, 776 F. Supp. 135 (S.D.N.Y. 1991).

76 *Stratton Oakmont, Inc. v. Prodigy Servs. Co.*, 1995 WL 323710 (N.Y. Sup. Ct. 1995).

77 U.S. DEP’T. JUST., SECTION 230 KEY TAKEAWAYS AND RECOMMENDATIONS 2 (2020), <https://www.justice.gov/file/1286331/download>.

“The statute was meant to nurture emerging internet businesses while also incentivizing them to regulate harmful online content.”⁷⁸ The measure focuses on promoting innovation and protecting free speech by providing internet platforms with a shield from possible liability from what users post. Congress believed at the time that: “The Internet and other interactive computer services offer a forum for a true diversity of political discourse, unique opportunities for cultural development, and myriad avenues for intellectual activity.”⁷⁹ It further adds that it is the policy of the U.S. “to promote the continued development of the Internet . . . [and] to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation.”⁸⁰ As such the measure is a policy choice that seeks to protect the discursive and innovative environment of the internet from government intervention.

In particular, section 230 states that “[n]o provider or user of an interactive computer service shall be treated as *the publisher or speaker* of any information provided by another information content provider.”⁸¹ Likewise, providers cannot be held liable for good faith actions to “restrict access [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.”⁸² Section 230 explicitly preempts State laws that are incompatible with it, as it notes: “Nothing in this section shall be construed to prevent any State from enforcing any State law that is consistent with this section. No cause of action may be brought, and no liability may be imposed *under any State or local law that is inconsistent with this section*.”⁸³ Furthermore, this section does not limit or expand liability under intellectual property law.⁸⁴ This demonstrates that in passing section 230, “Congress made a policy choice, however, not to deter harmful online speech through the separate route of imposing tort liability on companies that serve as intermediaries for other parties’ potentially injurious messages.”⁸⁵

In a literal sense, “[section] 230 precludes courts from entertaining claims that would place a computer service provider in a publisher’s role.”⁸⁶ Section 230 “applies only to the extent that an interactive computer service provider is not also the information content provider of the content at issue.”⁸⁷ In other words, for section 230 to apply, the content in controversy must be provided to the platform by a third party. For example, as in the case

78 *Id.*

79 47 U.S.C. § 230(a).

80 *Id.* § 230(b).

81 *Id.* § 230(c)(1) (emphasis added). Section 230(f)(2) defines Interactive Computer Service 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.” *Id.* § 230(f)(2). Furthermore 230(f)(3) defines information content providers as “any person or entity that is responsible, in whole or in part, for the creation or development of information provided through the Internet or any other interactive computer service.” *Id.* § 230(f)(3).

82 *Id.* § 230(c)(2)(A) (citation omitted).

83 *Id.* § 230 (e)(3) (emphasis added).

84 *Id.* § 230 (e)(2).

85 *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 330–31 (4th Cir. 1997).

86 *Id.* at 330 (alteration in original).

87 *Jones v. Dirty World Ent. Recordings LLC*, 755 F.3d 398, 408 (6th Cir. 2014).

of Backpage.com, the website used section 230 as a defense since the advertisement for victims of human trafficking was content posted by the trafficker and not the webpage. Therefore, under section 230, “lawsuits seeking to hold a service provider liable for its exercise of a publisher’s traditional editorial functions—such as deciding whether to publish, withdraw, postpone or alter content—are barred.”⁸⁸ In short, as enacted, platforms can regulate the content on their websites,⁸⁹ but are not held responsible for the content posted by their users.

Up to this point, we have focused on interpreting the literal language of section 230; however federal courts have taken an “expansive statutory interpretation” and “interpreted the scope of Section 230 immunity very broadly.”⁹⁰ This means that courts extended the liability carve-out of section 230 to other forms of liability, not just publisher liability. In *Zeran v. Am. Online, Inc.*, the U.S. Court of Appeals for the 4th Circuit held that the section also eliminates distributor liability.⁹¹ The court had reasoned that:

If computer service providers were subject to distributor liability, they would face potential liability each time they receive notice of a potentially defamatory statement—from any party, concerning any message. Each notification would require a careful yet rapid investigation of the circumstances surrounding the posted information, a legal judgment concerning the information’s defamatory character, and an on-the-spot editorial decision on whether to risk liability by allowing the continued publication of that information. Although this might be feasible for the traditional print publisher, the sheer number of postings on interactive computer services would create an impossible burden in the Internet context.⁹²

The Court found that permitting distributor liability would defeat the purpose of protecting computer service providers, which is central to section 230. This reasoning is further extended to make section 230 not only an affirmative defense for defamation claims, *but for all types of claims*—except those made under intellectual property law—in which a party seeks to impose liability on a platform as the speaker of content from a third party. In *Zeran*, for example, the plaintiff was seeking to impose liability under the theory that AOL had been negligent in eliminating a false post.⁹³ The appellate court noted that “[b]y its plain language, § 230 creates a federal immunity to any cause of action that would make service providers liable for information originating with a third-party user of the service;”⁹⁴ meaning that if a plaintiff, as a result of information by third parties, suffers damages and seeks to impose liability on the platform, section 230 applies and protects the platform. Supreme Court Justice Clarence Thomas recently noted on his comments to

⁸⁸ *Zeran*, 129 F.3d at 330.

⁸⁹ See 47 U.S.C. § 230(c)(2) (this includes the good faith decision to remove, censor or block content that the provider considers inappropriate or from providing the tools for others to do so).

⁹⁰ U.S. DEP’T OF JUST., *supra* note 77, at 2.

⁹¹ *Zeran*, 129 F.3d at 331-34.

⁹² *Id.* at 333.

⁹³ *Id.* at 332.

⁹⁴ *Id.* at 330.

the denial for a writ of *certiorari* in *Malwarebytes, Inc. v. Enigma Software Group USA, LLC*, that “subsequent decisions, citing *Zeran*, have adopted this holding as a categorical rule across all contexts.”⁹⁵ As such, the federal act effectively protects websites from liability arising from what their users post.⁹⁶

As already discussed, section 230 only applies when the content at issue is posted by a third party, but the statute does not provide guidelines for determining what to do when the content includes some contribution by the platform. As discussed in *Jones v. Dirty World Entertainment Recordings, LLC*:

A website operator can simultaneously act as both a service provider and a content provider. If a website displays content that is created entirely by third parties, then it is only a service provider with respect to that content—and thus is immune from claims predicated on that content. But if a website operator is in part responsible for the creation or development of content, then it is an information content provider as to that content—and is not immune from claims predicated on it.⁹⁷

The relevant case law notes that, in forming a working standard for ‘development’, courts must exercise caution in not lumping in traditional editorial functions that are broadly protected by section 230.⁹⁸ The standard that has been adopted by several circuit courts, as seen in *Jones v. Dirty World Entertainment Recordings, LLC* and *Fair Housing Council of San Fernando Valley v. Roommates.Com, LLC*, is that of material contribution.⁹⁹ Under this standard, a platform develops, in whole or in part, tortious content when its contribution is what makes the display “allegedly unlawful.”¹⁰⁰ “A material contribution to the alleged illegality of the content does not mean merely taking action that is necessary to the display of allegedly illegal content.”¹⁰¹ For example, the act of

⁹⁵ *Malwarebytes, Inc. v. Enigma Software Grp. USA, LLC*, 141 S. Ct. 13, 15 (2020) (Thomas, J., concurring).

⁹⁶ *Section 230 of the Communications Decency Act*, ELECTRONIC FRONTIER FOUNDATION, <https://www.eff.org/issues/cda230> (last visited April 1, 2023).

⁹⁷ *Jones v. Dirty World Entertainment Recordings LLC*, 755 F.3d 398, 408 (6th Cir. 2014).

⁹⁸ *Jones*, 755 F.3d at 409; *Fair Housing Council of San Fernando Valley v. Roommates.Com, LLC*, 521 F.3d 1157, 1167 (9th Cir. 2008). The Sixth Circuit Court clarifies that:

An overly inclusive interpretation of “development” in § 230(f)(3) would posit that a website operator is responsible for the development of content created by a third party merely by displaying or allowing access to it. . . . But to read the term so broadly would defeat the purposes of the CDA and swallow the core immunity that § 230(c) provides for the “exercise of a publisher’s traditional editorial functions.”

Jones, 755 F.3d at 409. The Ninth Circuit Court explains that:

It’s true that the broadest sense of the term “develop” could include the functions of an ordinary search engine—indeed, just about any function performed by a website. But to read the term so broadly would defeat the purposes of section 230 by swallowing up every bit of the immunity that the section otherwise provides.

Fair Housing Council of San Fernando Valley, 521 F.3d. at 1167.

⁹⁹ See *Jones*, 755 F.3d; *Fair Housing Council of San Fernando Valley*, 521 F.3d.

¹⁰⁰ *Jones*, 755 F.3d at 410.

¹⁰¹ *Id.*

publishing written comments is an insufficient material contribution to make the service provider a developer, especially when the website provides no guidance on the content of the comments or urges subscribers to publish their content.¹⁰²

B. Digital Millennium Copyright Act

As previously stated, section 230 of the CDA does not grant immunity to platforms in cases where users create and share content that violates intellectual property law.¹⁰³ When it comes to this field, the applicable federal law for internet platforms is section 512 added to Title 17 of U.S.C. by the *Digital Millennium Copyright Act*.¹⁰⁴ This statute is a counterpoint to section 230's approach to internet liability protection. Under the statute, online intermediaries must first meet the requirements of section 512 to prevent liability for copyright infringement by third parties.¹⁰⁵

Section 512 provides four independent types of immunities relating to distinct functions of online intermediaries, and in some cases, platforms may have immunity under one clause for certain activities, and under another clause for other activities.¹⁰⁶ These immunities are referred to as the safe harbor provisions, and "each limitation [of liability] entails a complete bar on monetary damages, and restricts the availability of injunctive relief in various respects."¹⁰⁷

In the case of social media, section 512 provides a safe harbor when they meet the following conditions:

In general terms, the company must not have actual knowledge of infringement, must not be aware of circumstances from which the infringing activity is apparent, must not receive financial benefit directly attributable to the infringing activity, and must respond efficiently to remove the material claimed to be infringing. In addition, the service provider must designate an agent in the Copyright Office to receive notifications of infringement.¹⁰⁸

Additionally, the service provider must "ha[ve] adopted and reasonably implemented and informed subscribers and account holders of the service provider's system or network of a policy that provides for the termination in appropriate circumstances of subscribers and account holders of the service provider's system or network who are repeat infringers."¹⁰⁹ The removal of infringing material when requested is generally referred to as a

¹⁰² *Fair Housing Council of San Fernando Valley*, 521 F.3d at 1173-74.

¹⁰³ 47 U.S.C. § 230 (e)(2).

¹⁰⁴ Digital Millennium Copyright Act, 17 U.S.C. § 512 (2018).

¹⁰⁵ JAMES GRIMMELMANN, *INTERNET LAW: CASES AND PROBLEMS* 491-92 (2022).

¹⁰⁶ *Id.* at 491.

¹⁰⁷ U.S. Copyright Office, *The Millennium Copyright Act Of 1998: U.S. Copyright Office Summary* 9 (1998), <http://www.copyright.gov/legislation/dmca.pdf>.

¹⁰⁸ Sheila Cruz-Rodríguez, *Recorded Music in a World Driven by Social Media*, 6 UPR BUS. L.J. 50, 53 (2014); see also 17 U.S.C. § 512(c)(1).

¹⁰⁹ 17 U.S.C. § 512 (i)(1)(A).

“notice and takedown” system. Under this system, a copyright holder must first provide a notification to the provider, informing the user of the infringing activity or content.¹¹⁰ Once the provider has received proper notice, the provider has actual knowledge of the infringement and is aware of the circumstances from which the infringing activity is apparent and must take steps to remove the content.

It is important to note that not having or not implementing these policies would leave the platform with no liability shield and it can thus be subjected to suit as if they were infringers. In *BMG Rights Management (US), LLC v. Cox Communications, Inc.*, the defendant, an Internet service provider, lost access to the safe harbor provisions as Cox Communications “adopted a repeat infringer ‘policy,’ but, both before and after September 2012, made every effort to avoid reasonably implementing that policy.”¹¹¹

C. *Allow States and Victims to Fight Online Sex Trafficking Act of 2017 (FOSTA)*

FOSTA was enacted by Congress in 2018 as a limit on the liability shield provided by section 230 of the CDA. Section 2 of the Act states that section 230 was “never intended to provide legal protection to websites that unlawfully promote and facilitate prostitution and websites that facilitate traffickers in advertising the sale of unlawful sex acts with sex trafficking victims.”¹¹² It also finds that websites “that promote and facilitate prostitution have been reckless in allowing the sale of sex trafficking victims and have done nothing to prevent the trafficking of children and victims of force, fraud, and coercion.”¹¹³ Such conclusion, of providers not effectively gatekeeping and moderating content, was also expressed in a recent Department of Justice report regarding section 230. The report stated that generally, “[u]nder the current expansive interpretation of Section 230, even websites designed to promote or facilitate illegal conduct can still enjoy the protections of Section 230 immunity.”¹¹⁴ Also, in the wording of section 2, Congress equates online prostitution and sex trafficking; consequently, the legislation is not a targeted measure to deal with online trafficking.

The Act seeks to strip websites that promote and facilitate sex trafficking of the protections of CDA. Regarding state-law actions, FOSTA allows “any charge in a criminal prosecution brought under State law if the conduct underlying the charge would constitute a violation of section 1591 of title 18 [of U.S.C.]”, and any state criminal action of the “conduct underlying the charge would constitute a violation of section 2421A of title 18 [of U.S.C.], and promotion or facilitation of prostitution is illegal in the jurisdiction where the defendant’s promotion or facilitation of prostitution was targeted.”¹¹⁵ Therefore, the statute requires that for a website to lose section 230’s liability shield in a state criminal charge, there must be a state law that criminalizes the same conduct as 1591 or 2321A of Title 18.

¹¹⁰ See *Id.* § 512 (c)(3), for requirements of the notification.

¹¹¹ *BMG Rights Management (US) LLC v. Cox Communications, Inc.*, 881 F.3d 293, 303 (4th Cir. 2018).

¹¹² *Allow States and Victims to Fight Online Sex Trafficking Act of 2017*, Pub. L. No. 115-164, 132 Stat. 1253, § 2 (2018).

¹¹³ *Id.*

¹¹⁴ U.S. DEP’T. JUST., *supra* note 77, at 14.

¹¹⁵ 47 U.S.C. § 230(e)(5) (2018).

III. FEDERAL AND STATE ANTI-TRAFFICKING LEGISLATION

The main piece of federal anti-trafficking legislation is the *Victims of Trafficking and Violence Protection Act of 2000* (hereinafter TVPA).¹¹⁶ Among its provisions, the Act imposes criminal penalties for sex trafficking of children or by force.¹¹⁷ Under this provision, an individual engages in sex trafficking if: (1) he or she knowingly either recruited, enticed, harbored, transported, provided, obtained, advertised, maintained, patronized, or solicited a person to engage in a commercial sex act; (2) “knew that the means of force, threats of force, fraud, coercion or any combination of such means would be used to cause the person to engage in a commercial sex act,”¹¹⁸ or “that the person had not attained the age of 18 years and would be caused to engage in a commercial sex act,” and (3) the acts affected interstate or foreign commerce or were committed within the special maritime and territorial jurisdiction of the United States.¹¹⁹ Furthermore, an individual could also be charged with sex trafficking if he or she benefitted from—but did not engage in—a venture that recruited, enticed, harbored, transported, provided, obtained, advertised, maintained, patronized, or solicited a person to engage in a commercial sex act knowing that such person was under the age of 18 or was coerced to engage in such acts.¹²⁰ Regarding the act of benefiting from human trafficking, such benefits need not be economic; rather, it is sufficient to have gained anything in which a person would spend significant effort, time and money in obtaining.¹²¹

In addition to TVPA, section 3 of FOSTA criminalizes owning, managing, or operating an interactive computer service—a webpage—that uses a means of interstate commerce with the intent to promote or assist in the prostitution of another person if the webpage targets a jurisdiction where such acts are illegal.¹²² The act imposes more severe sanctions, and for our purposes we will highlight the following: when a person “acts in reckless disregard of the fact that such conduct contributed to sex trafficking, in violation of 1591(a).”¹²³ This particular section takes a prohibitionist approach not only against sex trafficking, but also against prostitution. Section 3’s immediate impact was taking down websites that allowed sex workers to promote and sell content.¹²⁴ For some, this removed a powerful tool for sex workers to vet potential clients beforehand.¹²⁵

¹¹⁶ Victims of Trafficking and Violence Protection Act of 2000, 22 U.S.C. § 7101 (2018).

¹¹⁷ See Sex Trafficking of Children or by Force, Fraud, or Coercion, 18 U.S.C. § 1591 (a)(1)-(2) (2018).

¹¹⁸ If the conduct is advertisement to a person to engage in a commercial sex act the standard is reckless disregard that that means of force, threats of force were used or that the person had not attained the age of 18, see *Id.*

¹¹⁹ MANUAL MODEL CRIMINAL JURY INSTRUCTION FOR THE DISTRICT COURTS OF THE NINTH CIRCUIT 473 (2022).

¹²⁰ *Id.* at 474.

¹²¹ See *U.S. v. Cook*, 782 F.3d 983, 989 (8th Cir. 2015) (finding that “a person of ordinary intelligence would reasonably understand that sexual acts, photographs, and videos—which are items that many people spend significant time, money, and effort pursuing and acquiring— could constitute “things of value” (emphasis added)).

¹²² Allow States and Victims to Fight Online Sex Trafficking Act of 2017, 18 U.S.C. § 2421A.

¹²³ *Id.*

¹²⁴ Nitasha Tiku, *supra* note 6.

¹²⁵ Aja Romano, *A New Law Intended to Curb Sex Trafficking Threatens the Future of the Internet as we know it*, VOX (Jul. 2, 2018), <https://www.vox.com/culture/2018/4/13/17172762/fosta-sesta-backpage-230-internet-freedom>.

Apart from some specialized laws, Puerto Rico's criminal statutes are codified as part of the Penal Code, as is the case with local anti-trafficking statutes. Human trafficking was first enacted and codified as a crime under state law in the Penal Code of 2012.¹²⁶ However, these provisions were deficient as the 2015 *Trafficking in Persons Report* noted that: “[w]hile three sections of Puerto Rico’s penal code address human trafficking and slavery, it has not been updated to reflect modern anti-trafficking laws.”¹²⁷

With that in mind, in 2020, the legislature enacted Act No. 159-2020, amending the Penal Code with the goal of clearly defining and typifying the crime of human trafficking in its different forms.¹²⁸ In particular, the Act eliminated prostitution of minors and forced prostitution of a person as circumstances that aggravated the crime of pimping, ruffianism, and people trading (as differentiated from human trafficking) in article 142, for understanding that these were circumstances of human trafficking for sexual exploitation.¹²⁹ More importantly, for this paper, it amended article 160 of the Penal Code that typified the crime of human trafficking for the purpose of sexual exploitation. Under this revision, a person can commit one of three manners of human trafficking for sexual exploitation. First, when this person (1) recruits, entices, harbors, transports, provides, maintains, or retains another person; (2) by means of force, threats of force, deception, fraud, coercion, violence, kidnapping, abuse of power or authority, or using any other situation of vulnerability, and (3) with the *purpose of or knowingly* submitting the person to a sexual act.¹³⁰

Second, when these traffickers: “(1) Obtain any benefit from a sexual activity, and (2) knowing that it was obtained by force, threat of force, deceit, fraud, duress, coercion, violence, kidnapping, abuse of power or authority, or by taking advantage of any other situation of vulnerability of the victim.”¹³¹ Third, when they: “(1) Participate in a sexual act, and (2) knowing that either force, threat of force, deception, fraud, duress, coercion, violence, kidnapping, abuse of power or authority, or the taking advantage of any other situation of vulnerability of the alleged victim was used.”¹³²

Article 160 is also clear that if the victim is underage, there is no need to show that any means were used to force the person to commit a sexual act.¹³³ From these elements, we can conclude that the Puerto Rican legislature followed the Protocol acts by means of coercion for the purpose of exploitation definition to human trafficking. Furthermore, article 160 of the Penal Code is analogous to the TVPA’s sex trafficking criminal provision, section 1591, Title 18 of U.S.C., discussed beforehand.¹³⁴ In other words, both statutes crim-

¹²⁶ See CÓD. PEN. PR arts. 160, 33 LPRÁ § 5226 (2021).

¹²⁷ U.S. DEP’T STATE, *TRAFFICKING IN PERSONS REPORT 357* (2015), [HTTPS://2009-2017.STATE.GOV/DOCUMENTS/ORGANIZATION/245365.PDF](https://2009-2017.STATE.GOV/DOCUMENTS/ORGANIZATION/245365.PDF).

¹²⁸ See Act No. 159-2020.

¹²⁹ *Id.*, Exposición de motivos; see CÓD. PEN. PR art. 142, 33 LPRÁ § 5203.

¹³⁰ PODER JUDICIAL DE PUERTO RICO, *LIBRO DE INSTRUCCIONES AL JURADO 243* (2021) (translation added).

¹³¹ *Id.* at 244 (translation added).

¹³² *Id.* (translation added).

¹³³ CÓD. PEN. PR arts. 160, 33 LPRÁ § 5226.

¹³⁴ 18 U.S.C. § 1591 (2018).

inalize the same conduct, one at the state and the other at the federal level. Therefore, article 160 meets the threshold set by FOSTA for a platform to lose section 230 immunity.¹³⁵

However, article 160 does not criminalize the same conduct as section 2421A of Title 18 of U.S.C., that is: operating a webpage with the intent to promote or assist in the prostitution of another person where prostitution is illegal, which is aggravated if the operator has a reckless disregard that such webpage facilitates human trafficking.¹³⁶ The closest state statute is article 141 of the Penal Code that deals with pimping, ruffianism and trade in people generally, and not mainly, by operating a webpage.¹³⁷

CONCLUSION: FOSTA AS AN INADEQUATE INCENTIVE?

As discussed, section 230 of CDA, as a matter of a pro-innovation public policy, protects interactive computer services from state and federal civil and criminal suits. Secondly, such policy led to the unintended consequence “that even websites designed to promote or facilitate illegal conduct can still enjoy the protections of Section 230 immunity.”¹³⁸ As a consequence, Congress thought it necessary to clarify its original intent and enacted FOSTA to strip websites that promote and facilitate sex trafficking of the protections of CDA. By adding section 2421A, FOSTA takes a prohibitionist approach to prostitution and makes a broadside attack on online prostitution as part of a strategy to fight online trafficking. As part of FOSTA, websites that engage in conduct that violates TVPA, section 1591 of Title 18 of U.S.C., can be prosecuted at a state and federal level. The same conduct is prohibited in Puerto Rico by article 160 of the Penal Code. Therefore, a webpage in Puerto Rico would lose its liability carve-out under section 230 of CDA if charged at a state level with engaging in sex trafficking. For this to happen, a webpage must purposely or knowingly benefit or assist from the forced sexual labor of a victim.

On the other hand, we have also discussed human trafficking on both a global and local scale. The internet works as a force multiplier in the trafficking business, and many stages are now happening online. Fraud seems to be the method of choice of traffickers in digital spaces, whether in recruiting or exploiting victims. Online traffickers look to scam victims into their hands. Additionally, because the clear web is more profitable than the dark web, traffickers seek to fraud legitimate websites and consumers into hosting and consuming the content they create of victims.

Equating prostitution with sex trafficking in FOSTA incentivizes platforms to take down all explicit content to comply with the law and not engage in a meaningful evaluation to identify content created by sex traffickers. Such acts by platforms push traffickers to put additional care into hiding their activities. The reality is that platforms passively gather information —IP addresses, geographic location, and metadata in general— from their users that could facilitate the identification of traffickers offline. While removing the

¹³⁵ This being that the “conduct underlying the [state] charge would constitute a violation of section 1591 of Title 18 [U.S.C.]” See 47 U.S.C. § 230(e)(5)(B) (2018).

¹³⁶ 18 U.S.C. § 2421A.

¹³⁷ CÓD. PEN. PR arts. 141, 33 LPRA § 5202 (2021).

¹³⁸ U.S. DEP’T. JUST., *supra* note 77, at 14.

protections of section 230 to bad actors that willfully benefit and facilitate exploitation is the first step, the challenge lies in incentivizing websites to do more to combat the problem. Social media platforms can be unaffected by the threat of FOSTA liability as they are unwilling participants and beneficiaries of trafficking activities; most have policies to address such content and what we see is a failure in detection and reporting. Lawmakers could instead hold the protections they have thus far given platforms as a reward for compliance with specific minimum requirements.

A starting point is an approach like the one taken in the *Digital Millennium Copyright Act* and only provide a liability shield when: (1) the website does not benefit directly from trafficking; (2) does not have actual knowledge of trafficking activity; (3) it has effective policies to address, and (4) must promptly take down any identified material. This regulatory arrangement withholds legal protections behind the requirement of affirmative actions by platforms. The reasoning in *BMG Rights Management (US) LLC v. Cox Communications, Inc.*, would also apply; platforms must not only have an anti-trafficking policy, but also reasonably implement the policy.¹³⁹ Also, the arrangement has low implementation cost as most platforms have a report or flag mechanism on their websites that could be seamlessly adapted to include a tag for human trafficking and allow a space for non-governmental organizations to actively cooperate with platforms by facilitating communications across companies or investigations.

139 *BMG Rights Management (US) LLC v. Cox Communications, Inc.*, 881 F.3d 293, 303 (4th Cir. 2018).