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Little Pink Flower with a Darker Story to Tell: The Role of Emojis in Online Human Trafficking and Potential FOSTA-SESTA Liability

Olivia Parise

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Little Pink Flower with a Darker Story to Tell: The Role of Emojis in Online Human Trafficking and Potential FOSTA-SESTA Liability

Olivia Parise*

There seems to be an emoji for every expression, thought, and feeling – even for human traffickers. Emojis have evolved into a primary lexicon for online human trafficking. This coded language has allowed online human traffickers to evade detection and prosecution. Courts and law enforcement are confused by the seemingly innocent use of emojis in advertisements and conversations that have serious human trafficking implications. Now, the code is cracked. Researchers have studied the intersection of emojis and human trafficking to such an extent that they have caught on to the secret online language of emojis. As the use of emojis for online human trafficking is more commonly understood among the public, it could mean liability for websites that previously enjoyed protection under the law for their roles in human trafficking. This note explores the use of emojis in online human trafficking, the actual implications it has on law enforcement and the court in prosecuting human traffickers, and potential liability for website owners under The Allow States and Victims to Fight Online Sex Trafficking Act and The Stop Enabling Sex Traffickers Act (FOSTA-SESTA).

* Juris Doctor Candidate, 2021, University of Miami School of Law. I am grateful to the University of Miami Race and Social Justice Law Review for everyone's hard work and dedication in spreading the word about important issues affecting our world. A huge thank you to my fellow E-Board members, old and new, of Alliance Against Human Trafficking for helping me uncover my interest in the legal side of human trafficking, and fostering a need to make an impact. I hope this Note serves as a spark that ignites the readers curiosity to learn more about human trafficking and ultimately a desire to act.

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I. INTRODUCTION

The digital world has become exceedingly important for the world in the twentieth century. Activities that once brought people together physically are now taking place online. Movie theaters have been transported to our living rooms with screen sharing platforms that allow us to watch synchronized movies with friends across the world. Digital marketplaces provide us the ability to order any product right to our doorstep with one click. While these advancements all seem great, the expansion of the digital world has also created a space for crime that provides an unprecedented market.

Scrolling through social media newsfeeds like Facebook and Instagram is a regular pastime. People love sharing their happiest moments with the world, posting pictures of their family outings, sports events, parties with friends—and we love to see it. But what the majority of people scrolling through these happy posts don't know is that they could very well be scrolling right past an advertisement selling underage sex. It is hard to imagine that advertisements for sex could appear on the same website you use to wish your grandmother a happy birthday. Of course, no person selling sex would in their right mind blatantly post an advertisement on Facebook, Instagram, or other social media platforms saying, "Underage girl's sex for sale for \$100," because that would be outrageous—right? But these kinds of posts are exactly what appear online. So how do we miss them? Shouldn't they be easy to detect? Shouldn't the culprits be easy to bring to justice?

The issue that law enforcement and courts face is the cryptic language used in these online advertisement and transactions that mask their true nature. The unsuspecting subject of this language is the commonly used emoji. But now that the code is cracked and researchers have figured out the prevalence of emojis in online human trafficking activity, it may be easier to hold entities that have enjoyed broad protections liable for their roles in criminal business.

This note analyzes the way in which human traffickers have evolved their online practices to circumvent detection through the use of emojis, as well as the real and possible implications of emoji usage on detecting and prosecuting this illegal activity. This note begins with an orientation of modern-day human trafficking and the impact of the internet on human trafficking expansion. Next is an analysis of traffickers' use of emojis to avoid detection and the ways in which this implicates law enforcement and courts' ability to identify and convict these perpetrators. Lastly, this note closes with an analysis of how websites allowing the use of emojis on their forum exposes them to liability under the new anti-trafficking legislation, FOSTA-SESTA.

II. EMOJIS

Emojis have taken the world by storm since their creation in Japan in the 1990s.¹ The emoji is defined as “small images, symbols, or icons used in text fields in electronic communication (as in text messages, e-mail, and social media) to express the emotional attitude of the writer, convey informational succinctly, communicate a message playfully without using words, etc..”² It’s hard to see how these “playful” icons could be involved in something so sinister as the forced sale of sex. However, once you understand the different meanings of each emoji and grasp the extensive ways in which emojis have not only enhanced communication but supplanted the need for words completely in some cases, it makes sense how they would find their way into an enterprise with a need for anonymity.

First appearing largely in personal messages, emojis are now the subject of advertisements, marketing, and even as the basis for court cases.³ Beginning as small pixelated pictures, emojis have evolved to complex depictions of what seems to encompass every feeling, thought, and situation. Now, 92% of the online global population employs emojis as a method of expression,⁴ with over 2 trillion mobile messages expected to contain emojis a year.⁵ One of these tiny pictures have even been named the “Oxford Word of the Year” in 2015, demonstrating the impact they have had on the evolution of human language and expression.⁶ Emojis have evolved into the “most widely used and standardized symbolic language,” and of course this does not only include those who use emojis for their playfulness.⁷ Emojis have played an increasingly integral role in the expansion of online human trafficking.⁸ The same little pink flower

¹ Qiyu Bai, Qi Dan, Zhe Mu and Maokun Yang, A Systematic Review of Emoji: Current Research and Future Perspectives, 4 FRONT. PSYCHOL. 10 (2019).

² *Emoji*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/emoji>.

³ Mike Cherney, *Lawyers Are Faced With Emojis and Emoticons Are All 🍷_/_*, THE WALL STREET JOURNAL (Jan. 29, 2018), https://www.wsj.com/articles/lawyers-faced-with-emojis-and-emoticons-are-all-1517243950?mod=rss_Technology.

⁴ Andrew Cave, *Apple’s Middle Finger: Are Emojis the Fastest Growing Language in History?*, FORBES (Oct. 22, 2015).

⁵ Emogi Research Team, 2016 Emogi Report, CDN 3 (Nov. 16, 2016).

⁶ Yena Oh, *Oxford Dictionaries 2015 Word of the Year is an Emoji*, PBS (Nov. 17, 2015), <https://www.pbs.org/newshour/nation/oxford-dictionary-says-the-2015-word-of-the-year-is-an-emoji>.

⁷ Qiyu Bai et al., *supra* note 1, at 5.

⁸ This note employs the definition of trafficking in persons found in The United Nations’ Trafficking Protocols, which has been adopted or expanded upon in many countries, including the United States. Human trafficking is internationally defined as: “‘Trafficking in persons’ shall mean the 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

you use to signify a beautiful spring day can tell a very different, twisted story in an online advertisement.

This concept of emojis being used for less than literal meanings is not novel. Emojis have been regularly used by the general public to mean things other than what they literally depict, especially in the context of sexual expressions.⁹ Emojis have become such a primary form of communication for the general public, supplanting many expressions and sentiments, that they have become a widely used set of coded language.¹⁰ Emojis are so commonly used as coded language that there are parent guides to helping parents decode the emoji language their children are using.¹¹ However, communications between children and sexting are not the only arenas where emojis are employed as coded language. Emojis have entered into and drastically aided the world of covert criminal activity over the internet and have the ability to impact real legal liability for websites which allow the use of emojis.

III. HIGH SPEED HUMAN TRAFFICKING – THE INTERNET REVOLUTION

A. The Role of the Internet in Human Trafficking

The creation of the internet connected humans more than ever, allowing people to communicate via large geographic distances at unparalleled rates. Today, an estimated 4.333 billion people actively use the internet, with one of the highest concentrations in the United States.¹²

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.” This note focuses on sexual exploitation. United Nations Convention Against Transnational Organized Crime and the Protocols Thereto: Protocol to Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention Against Transnational Organized Crime art. 3, September 2004, V.04-56153.

⁹ See e.g. Marissa Gainsburg, *the Ultimate Glossary of Sexting Emojis*, WOMEN’S HEALTH MAGAZINE (June 14, 2019), <https://www.womenshealthmag.com/sex-and-love/g28008142/sexting-emoji/> (explaining the various ways emojis are used for sexual expression).

¹⁰ *Netsanity Parents’ Guide to the Language of Emoji*, NETSANITY (Oct. 6, 2018), <https://netsanity.net/parents-guide-emojis/>.

¹¹ *Id.*

¹² J. Clement, *Worldwide Digital Population as of January 2020*, STATISTA (Feb. 3, 2020), <https://www.statista.com/statistics/617136/digital-population-worldwide/>.

Although an exact number is impossible to calculate,¹³ it is estimated that there are 40.3 million victims of human trafficking, with 4.8 million being victims of sexual exploitation.¹⁴ However, because law enforcement is unable to sufficiently detect human trafficking cases, this figure is expected to represent less than 1% of all cases.¹⁵

The phenomenon of widespread use of information and communication technologies has undoubtedly changed the world for the better in many ways. More meaningful relationships are now possible across large geographic locations. Businesses have become more globally connected, offering more global jobs and perspectives to companies. However, despite the positive contributions the internet has had in society as a whole, it has also contributed to a sharp increase in human trafficking.¹⁶ Online platforms and technologies have drastically changed the field of human trafficking, and have provided traffickers with the “unprecedented ability to exploit a greater number of victims and advertise their services across geographic bounds.”¹⁷

It should be no surprise that online human trafficking is such a large enterprise because the demand is extremely high. An alarming one in twenty men in the United States uses the internet to solicit sex.¹⁸ Additionally, human trafficking is an extremely lucrative business. Drugs and arms can be sold at a high price but can only be sold once. In comparison, a victim of human trafficking can be sold multiple times a

¹³ Alexis Aronowitz, *Overcoming the Challenges to Accurately Measuring the Phenomenon of Human Trafficking*, 81 REVUE INTERNATIONALE DE DROIT PENAL 493, 493 (2010). Accurate, exact statistics of human trafficking are impossible to calculate due to a variety of factors including its clandestine nature, inability of law enforcement to detect most cases, a lack of consensus across countries as to the definition or legislation of human trafficking and the lack of central databases collecting statistics on instances of human trafficking.

¹⁴ International Labour Organization and Walk Free Foundation, *Global Estimates of Modern Slavery: Forced Labour and Forced Marriage*, GENEVA (2017), https://www.ilo.org/wcmsp5/groups/public/---dgreports/--dcomm/documents/publication/wcms_575479.pdf.

¹⁵ What is Human Trafficking?, CALIFORNIANS AGAINST SEXUAL EXPLOITATION, <http://www.caseact.org/wp-content/uploads/2012/07/Prop-35-Human-Trafficking-Fact-Sheet.pdf>.

¹⁶ Michelle Ibanez, *Detection of Domestic Human Trafficking Indicators and Movement Trends Using Content Available in Open Internet Sources*, 2014 47th Hawaii International Conference on System Science, 1556, 1556 (2014).

¹⁷ Mark Latonero, *Human Trafficking Online: The Role of Social Networking Sites and Online Classifieds*, CENTER ON COMMUNICATION LEADERSHIP AND POLICY, iv (Sept. 2011).

¹⁸ Murray E. Jennex & Eric Frost, *Don't Want to Get Caught? Don't Say It: The Use of EMOJIS in Online Sex Trafficking Ads*, 51st Hawaii International Conference on System Sciences 4273, 4274 (Jan. 2018). This doesn't necessarily mean that they are soliciting children online, and there is controversy over whether all forms of sex work are considered to be human trafficking or only if it is forced sex work.

day, especially when human traffickers use the internet. The average income of a trafficker is \$390 per day and figures reaching even \$1,000 for a single weekend—more than the median weekly income of full-time United States workers in 2018.¹⁹ However, these are just the averages; the numbers can differ greatly and especially with the use of the internet sales can skyrocket as more and more clients are able to be reached. In just one year, a pimp can make \$150,000 - \$200,000 off of a single child—and it is rare that a pimp only has control over one child.²⁰ This income is more than triple the amount of the median earnings of a full-time United States worker reported by the Department of Labor Statistics for the year 2019.²¹

Human traffickers have taken hold of the internet and the tools it offers to more easily conduct their business domestically and across borders; expand their clientele and victim pools; and make this business a much more lucrative venture.²² There was a reported “846% increase from 2010 to 2015 in reports of suspected child sex trafficking—an increase . . . found to be ‘directly correlated to the increased use of the Internet.’”²³ By utilizing the internet, human traffickers have new methods of getting in contact with victims: through social media and posting ads on classified websites.²⁴ The use of the internet allows traffickers to expand their reach through the high-speed messaging available to them, reaching a wider variety and quantity of people.²⁵ As of 2016, an estimated 5,000 websites were used to “directly or indirectly facilitate the sex trafficking and sex tourism industry.”²⁶ While many of these websites are dedicated to the sex trafficking industry, for example TheEroticReview.com or NaughtyReviews.com, sex trafficking also occurs on popular social media websites including the most unsuspecting popular social media sites like

¹⁹ United Nations Office on Drugs and Crime, *Global Report on Trafficking in Persons 2018*, 40 (Sec. 2018), https://www.unodc.org/documents/data-and-analysis/glotip/2018/GLOTIP_2018_BOOK_web_small.pdf; Gavrielle Kube, *Unloaking the Traffickers: why the Communications Decency Act Needs to Be Amended to Reach Culpable Website Owners and their ILK*, 17 J. INT’L BUS. & L. 173, 177 (2017); Bureau of Labor Statistics, News Release, Usual Weekly Earnings of Wage and Salary Workers Fourth Quarter 2019 (Jan. 17, 2020), <https://www.bls.gov/news.release/pdf/wkyeng.pdf>.

²⁰ *Trafficked Teen Girls Describe Life in ‘The Game’*, NPR (Dec. 6, 2010), <https://www.npr.org/2010/12/06/131757019/youth-radio-trafficked-teen-girls-describe-life-in-the-game>.

²¹ See Bureau of Labor Statistics, *supra* note 19.

²² United Nations Office on Drugs and Crime, *supra* note 19, at 39, 175.

²³ 114th Congress United States Senate Permanent Subcommittee on Investigations, *Backpage.com’s Knowing Facilitation of Online Sex Trafficking*, 4 (2017).

²⁴ United Nations Office on Drugs and Crime, *supra* note 19, at 38.

²⁵ *Id.*

²⁶ Kube, *supra* note 19, at 176-77, 182; Polaris, *Human Trafficking and Social Media* <https://polarisproject.org/human-trafficking-and-social-media>.

Facebook, Instagram, and Twitter.²⁷ When one website is compromised by law enforcement, the internet provides traffickers with thousands of alternative interactive websites to use as a medium for their business.²⁸ Human traffickers have even been reported to post an advertisement for an apartment for rent or a modeling job.²⁹

Additionally, by cloaking themselves with the anonymity of the internet, human traffickers are able to move their actions off of the street and under the disguise of fake profiles that utilize untraceable information. This offers traffickers an invaluable layer of protection from the eye of law enforcement.³⁰ Traffickers rely on anonymity online to avoid detection and stay in business. The creation of online profiles and advertisements requires little identifying information, and most of what is required can be fabricated or concealed so as to not lead back to the actual person creating the profile or advertisement. In 2017 and 2018, Facebook removed over one billion fake profiles, and this does not represent an eradication of all fake profiles.³¹ While not all of the fake profiles were used in human trafficking, it represents how often this tool could be used and still go undetected. This figure is for only one social media platform alone, but it puts in perspective the ability of human traffickers to utilize fake profiles as a mask to avoid detection.

Today, the majority of all sex trafficking occurs online.³² “Traffickers are no longer bound by geographic limitations.”³³ Traffickers do not need to physically meet their victims in order to traffic them; in fact, 42% of victims who meet their traffickers online never actually meet their

²⁷ Michelle Ibanez & Daniel D. Suthers, *Detection of Domestic Human Trafficking Indicators and Movement Trends Using Context Available on Open Internet Sources*, 47th Hawaii International Conference on System Science, 1556, 1558 (2014); Kube, *supra* note 20, at 182.

²⁸ Kube, *supra* note 19, at 182 (“Peter M Zollman, founding principal of Advanced Interactive Media Group (AIM) explained, “[a]ds for prostitution are in hundreds or thousands of places online, and anyone looking for them can find them.”). For example, although Backpage.com has been seized by authorities, knockoff sites like Miami.ebackpage.com mirror the content of the original Backpage. *See, e.g.* <https://miami.ebackpage.com>.

²⁹ United Nations Office on Drugs and Crime, *supra* note 19, at 38; E. I. Kunze, *Sex Trafficking Via the Internet: How International Agreements Address the Problem and Fail to Go Far Enough*, 10 J. HIGH TECH. L. 247 (2010), http://www.law.suffolk.edu/highlights/stuorgs/jhtl/docs/pdf/Kunze_Formatted_10JHTL241.pdf.

³⁰ Kube, *supra* note 19, at 175.

³¹ Arun Vishwanath, *Why Do So Many People Fall for Fake Profiles Online?* PHYS (Sept. 20, 2018), <https://phys.org/news/2018-09-people-fall-fake-profiles-online.html>.

³² 114th Congress United States Senate Permanent Subcommittee on Investigations, *supra* note 23, at 5.

³³ Ibanez & Suthers, *supra* note 27, at 1558.

traffickers in person.³⁴ Obtaining nude photos or videos from unsuspecting online users is another way in which traffickers have utilized the internet to recruit new victims who may never know that their private content is being sold repeatedly by an online trafficker that they have never met.

B. A Home for Online Trafficking Advertisements

When human trafficking started online, it was largely confined to classified websites such as Craigslist and Backpage, founded in 1995 and 2004, respectively.³⁵ These websites revolutionized how goods were exchanged online. However, among the advertisements for used cars and used couches were categories labeled “personal advertisements” that allowed for much more lewd exchanges. “Personal advertisement” sections changed the landscape of human trafficking.³⁶ These classified websites operated as third party mediums where people could post advertisements for many different categories.³⁷ Eventually, “Adult Services Listings” and “Escort” advertisement categories were introduced when the websites caught on to how lucrative the business could be. Backpage was the site with the highest concentration of human trafficking. The National Center for Missing and Exploited Children attributed 73% of all child trafficking reports to the site until it was federally investigated and seized in 2018.³⁸

After facing a series of lawsuits³⁹ and public scrutiny, Craigslist and other online platforms made attempts to curb the amount of illegal sex advertising that occurred on their websites; however, these efforts went largely unsuccessful.⁴⁰ Identification efforts and fees were required for advertisements in the adult advertisement section, however these safeguard attempts were easily avoided by posting in other sections and using untraceable information to post the advertisements.⁴¹ At this point,

³⁴ *Study Details Link Between Social Media and Sex Trafficking*, PHYS (Oct. 8, 2016), <https://phys.org/news/2018-10-link-social-media-sex-trafficking.html>.

³⁵ Cynthia Rodriguez, *Craigslist and Backpage: The Websites Used for Sex Trafficking*, STMU HISTORY MEDIA (Nov. 3, 2018), <https://stmuhistorymedia.org/craigslist-and-backpage-sex-trafficking-at-your-fingertips/>.

³⁶ *Id.*

³⁷ *Id.*

³⁸ 114th Congress United States Senate Permanent Subcommittee on Investigations, *supra* note 23, at 1; Charlie Savage and Timothy Williams, *U.S. Seizes Backpage.com, A Site Accused of Enabled Prostitution*, NEW YORK TIMES (Apr. 7, 2018), <https://www.nytimes.com/2018/04/07/us/politics/backpage-prostitution-classified.html>.

³⁹ *K.R. v. Backpage.com*, 2017 U.S. Dist. LEXIS 99272 (June 26, 2017); *Doe v. Backpage.com, LLC*, 817 F.3d 12, 18 (1st Cir. 2016); *Backpage.com, LLC v. Cooper*, 939 F. Supp. 2d 805, 821 (M.D. Tenn. 2013).

⁴⁰ Rodriguez, *supra* note 35.

⁴¹ *Id.*

classified websites were making a tremendous profit from these fees—in the millions of dollars.⁴² The site derived 80% to 90% of all its revenue from online commercial sex over the years,⁴³ coming in at over \$50 million.⁴⁴ As such, there was an incentive for these websites to maintain a high level of human trafficking business while at the same time trying to put on a façade to the public that they were trying to stop their website being used for illegal and illicit activities.

C. Human Traffickers' Evolving Online Lexicon

When human traffickers first ventured to the internet, there was not the same level of monitoring by authorities as there is today. This allowed explicit and forthcoming advertisements for sex.⁴⁵ There was no need for coded language. Words and phrases like “barely legal,”⁴⁶ “teenage,” “rape,” and “amber alert” were widely used in online advertisements for sex.⁴⁷ These phrases easily tipped off the authorities and general public that the advertisement was for illegal sex. However, seeing as these advertisements were too easily detected once law enforcement caught on to the vast amount of sex being trafficked online, traffickers had to evolve their advertisements so as to avoid detection.

Intentionally or unintentionally, Backpage played a large role in helping traffickers to morph their speech to disguise what they were really selling. In another attempt to curb sex trafficking advertisements, classified websites removed “forbidden words” from advertisements that explicitly offered sexual activity.⁴⁸ The filtering process was executed by manually monitoring advertisements, a tedious and near impossible task for the amount of advertisements being posted to these websites on a daily basis.⁴⁹ Backpage’s attempt at “filtering” meant changing the language of the advertisements to mask the illicit activity being advertised, but not prohibiting it from being posted.⁵⁰ Not surprisingly, there was no significant decrease in online sex advertisements. The newly placed limits on advertisements created a new issue for those fighting online human

⁴² Shana M. Judge, *The Effect of Measures Taken by Craigslist to Screen Online Ads for Commercial Sex*, 36 SOC. SCI. COMPUT. REV. 296, 297 (2018).

⁴³ 114th Congress United States Senate Permanent Subcommittee on Investigations, *supra* note 24, at 6; Savage & Williams, *supra* note 38.

⁴⁴ Kube, *supra* note 19, at 177.

⁴⁵ Ibanez & Suthers, *supra* note 27, at 1563.

⁴⁶ See Kube, *supra* note 19, at 178-79.

⁴⁷ See *id.*

⁴⁸ 114th Congress United States Senate Permanent Subcommittee on Investigations, *supra* note 23, at 18-23.

⁴⁹ *Id.*

⁵⁰ *Id.*

trafficking—human traffickers created their own coded language using non-sexually explicit language to convey the same advertisements as before. For example, “kiddie stroll” is a term used to indicate child prostitution, and “new” is a term that replaced the banned label “young.”⁵¹

IV. THE EMOJI’S PLACE IN TRANSFORMING THE ALREADY CRYPTIC WORLD OF HUMAN TRAFFICKING

Emojis have taken the online world by storm—and that is no different for the online world of human trafficking. Emojis can be used in a variety of ways, including to better express the emotion of a message, express gestures or nonverbal behavior,⁵² or most pertinent to the context of online human trafficking, replace words or phrases altogether.⁵³ As noted previously, human traffickers have a need to constantly evolve the language they employ in advertisements and victim solicitation in order to avoid detection, and what better way to do it than by not actually saying anything. Criminal dealings online are “intentionally misleading” to avoid detection.⁵⁴ The versatility coupled with the widespread use of emojis in the worldwide web made them a great, inconspicuous alternative to the previously mentioned words and phrases that led human traffickers to be detected online, either through law enforcement or filters like those used by Backpage. Traffickers found a new language that allowed them to effectively circumvent the filtering processes of advertisements and detection by law enforcement.⁵⁵

A. Cracking the Code

Social scientist Murray Jennex from San Diego University analyzed advertisements from Backpage to crack the code of emoji usage in human trafficking advertisements.⁵⁶ Difficulty in this research understandably arose from the widespread use of emojis in advertisements and communications not related to sex trafficking.⁵⁷ The study found that

⁵¹ *Id.*; A Shared Hope, *Trafficking Terms*, <https://sharedhope.org/the-problem/trafficking-terms/>.

⁵² Marilyn McMahon & Elizabeth Kirley, *When Cute Becomes Criminal: Emoji, Threats and Online Grooming*, 2-3 MINN. J. OF L. (2019).

⁵³ Andrew Cave, *Apple’s Middle Finger: Are Emojis The Fastest Growing Language in History?*, FORBES, <https://www.forbes.com/sites/andrewcave/2015/10/22/apples-middle-finger-are-emojis-the-fastest-growing-language-in-history/#9b356e05059b> (explaining that “LOL” has been widely replaced by the “crying laughing” emoji).

⁵⁴ Ibanez & Suthers, *supra* note 27, at 1558.

⁵⁵ Jennex & Frost, *supra* note 18, at 4279.

⁵⁶ *Id.*

⁵⁷ *Id.* at 4277.

emojis were used intentionally to avoid detection as law enforcement was catching on to the regular indicators and phrases in their online communications.⁵⁸ While the study did find that emojis are likely to be used in conjunction with other phrases or indicators of human trafficking, there are conveyances where emojis have become the primary representation for traffickers.⁵⁹ “Sale of services, underage victim, and restricted movement” are the three indicators of human trafficking in advertisements that were found to be primarily represented in the Backpage ads through the use of emojis.⁶⁰ Other indicators of sex trafficking, including race, ethnicity, nationality, etc., were still found to be predominantly represented by words and keywords.⁶¹

The shift to using representative emojis in advertisements is to avoid law enforcement detection of illegal activities.⁶² It is widely recognized that emojis such as the eggplant or peach can be used to convey “sexually suggestive” messages,⁶³ but these are not the emojis that are used in representing indicators of human trafficking. That would be too easy. The emojis used to represent indicators of human trafficking are not conspicuous. Traffickers, in an attempt to trick law enforcement, use unsuspecting emojis to represent their illegal activity. It logically tracks that the indicators of human trafficking that are the most representative of illegal activity—underage victim, sale of services, and restricted movement—are those that are being switched for emojis.⁶⁴ Other indicators that law enforcement may not automatically correlate to human trafficking concerns have remained in advertisements in keywords and phrases, however this is likely to change as law enforcement can better link these phrases to sex trafficking.⁶⁵ Emojis like the cherry blossom (little pink flower), cherry, and growing heart are indicative of an underage victim, while sale of services (sex) can be represented by a rose.⁶⁶ Even a simple google search of “Backpage” reveals in the top searches “backpage emoji dictionary,” demonstrating the widespread use of emojis in the sex trafficking world.

⁵⁸ *Id.* at 4279.

⁵⁹ *Id.* at 4280.

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.*

⁶³ Zachary Zane, *Facebook and Instagram are Banning the Use of ‘Commonly Sexual Emojis’*, DELISH, (Oct. 28, 2019).

⁶⁴ *Id.*

⁶⁵ *See id.*

⁶⁶ Jennex & Frost, *supra* note 18, at 4280.

B. Grooming and Emojis

Grooming is the process of human traffickers manipulating their victims into engaging in sexual behavior. The grooming process is one of the “key global threats that exposes children to sexual abuse and exploitation.”⁶⁷ An estimated 80% of adult prostitutes started working as children after being groomed into the lifestyle.⁶⁸ Just like the actual sale of sex, the grooming process has been largely taken off of the streets and has found a home on the internet. The internet provides traffickers with a much more secluded and less monitored arena to meet and regularly talk with their victims, many times without parents catching on.⁶⁹ For younger generations especially, digital communication is now the norm.⁷⁰ Traffickers know that children and teenagers have increasingly independent access to communications technology.⁷¹ Instead of having one family computer in the home office, an increasing number of youths have private devices in their rooms.⁷² As cell phones become smarter, the entire internet world is held right at their fingertips.⁷³ The technological advancements in the exchange of photos, videos, and messages provides human traffickers with a relatively anonymous and inconspicuous route to direct contact with individuals whom they target.

In the past, the internet was met with skepticism. However, as it has become so ingrained in everyday life, this skepticism has largely disappeared, especially among younger users.⁷⁴ The concept of “stranger danger” has been left on the streets. A survey of fourth to eighth grade children conducted by the Center for Cyber Safety and Education revealed that 40% of these children had connected with at least one stranger online.⁷⁵ Half of those had provided the stranger with more direct forms of contact such as their cell phone numbers, and over 10% went so far as to meet the stranger in person.⁷⁶ It is noteworthy that at this age, children typically are still under a more watchful eye of their parent than as they progress into high school. The majority of children groomed into the life of sex work are children between the ages of fourteen and eighteen.⁷⁷

⁶⁷ McMahan & Kirley, *supra* note 52, at 14-15.

⁶⁸ Ibanez & Suthers, *supra* note 27, at 1557.

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ McMahan & Kirley, *supra* note 52, at 16.

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.* at 15-16.

⁷⁵ Christopher Carbone, *40 Percent of Children Have Connected With a Stranger Online, Shocking Survey Reveals*, Fox News (Aug. 14, 2019), <https://www.foxnews.com/tech/40-percent-children-connected-stranger-online>.

⁷⁶ *Id.*

⁷⁷ Ibanez & Suthers, *supra* note 27, at 1557.

Unsurprisingly, emojis are commonly used in grooming conversations.⁷⁸ One of the main commonalities of online grooming cases has to do with vulnerability of the victim.⁷⁹ Groomers exploit this vulnerability by “relating” to their victims and offering them the support that they need,⁸⁰ which is an important aspect of becoming close to them. One way groomers can do this is by using the same language as their victim. Of course, a child is going to feel more comfortable speaking to someone who sounds more like themselves than an adult—and the younger generation is no stranger to using emojis as secret language. Children and teenagers already rely on emojis to speak in a way that a reported 85% of parents cannot decipher.⁸¹

Additionally, the cuteness of emojis keep the conversations between traffickers and their younger victims fun and relatable.⁸² They are a useful tool for establishing a level of familiarity between the traffickers and victims, keeping them engaged in the grooming process.⁸³ The playful and cute sentiment emojis give to a conversation can deescalate otherwise risky messages, making “the gradual invitation to sexual activity ‘fun.’”⁸⁴ With human traffickers regularly using emojis in their grooming processes, it is more likely that they will be able to reach and relate to the teenagers and children they are trying to target, while most parents remain clueless.

C. What Emojis Mean for Law Enforcement

Social scientists have uncovered that human traffickers intentionally use emojis to impede law enforcement’s ability to detect their crimes.⁸⁵ Although law enforcement, particularly in human trafficking task forces, have identified that emojis are being used as a tool for online sex trafficking, distinguishing between emoji containing advertisements that are sex trafficking and non-sex trafficking has proven to be a difficult task.⁸⁶ Not only is it difficult, there is simply not enough man power behind these law enforcement agencies to tackle the amount of

⁷⁸ McMahon & Kirley, *supra* note 52, at 17

⁷⁹ Victoria Vanderschaaf, *Spotlight on: How the Internet Facilitates Underage Victimization in Human Trafficking*, 34 CHILD LEGAL RTS. J. 135, 136 (2013).

⁸⁰ *Id.*

⁸¹ Sophie Hines, *Your Kids’ Emojis Could Have a Secret Meaning*, GOOD HOUSE KEEPING (July 2, 2017), <https://www.goodhousekeeping.com/uk/consumer-advice/technology/a566821/your-kids-emojis-could-have-a-secret-meaning/>.

⁸² McMahon & Kirley, *supra* note 52, at 60-62.

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ Jennex & Frost, *supra* note 18, at 4279.

⁸⁶ *Id.* at 4275

advertisements being posted on a variety of forums.⁸⁷ Every day, approximately 146,000 sex ads are posted in the United States.⁸⁸ The president of Mariunus Analytics, a company that works with over one hundred law enforcement agencies to battle human trafficking, called the shutdown of Backpage a “whack-a-mole situation”—when one site is shut down, the illegal activity spreads across other internet platforms.⁸⁹ After Backpage was shut down, the numbers of online sex trafficking ads dramatically dropped as traffickers scrambled to set up other methods of advertising.⁹⁰ However, human traffickers adapted to this development, and the numbers crept back up to where they were before Backpage was shut down.⁹¹

The speed and subtlety of online human trafficking methods illustrate a harsh reality: law enforcement cannot rely solely on manpower to effectively counter trafficking, they must also evolve its use of filtering technology.⁹² While filtering technologies have existed in forms such as Traffic Bot and WAT, which are used to roam classified escort sites, they do not sufficiently reach all of the sites used by sex traffickers, nor do they sufficiently detect all of the advertisements—especially those with emojis.⁹³ The use of emojis have rendered these past filtering systems obsolete. While Murray Jennex’s research helps with the identification of victims of human trafficking that would not have been previously identified,⁹⁴ there is a need for more research into the use of emojis in human trafficking and how technology can be used to monitor advertisements. Jennex’s approach relies on the interaction of emojis with other keywords and indicators that were previously known to be associated with human trafficking.⁹⁵ The interplay of keywords and emojis to convey

⁸⁷ Taylor Goebel, *Human trafficking ‘hub’ backpage is long gone, but the problem still remains*, THE DAILY TIMES (Feb. 7, 2019, 4:24 PM), https://www.gosanangelo.com/story/news/nation/2019/02/07/backpage-gone-sex-trafficking-remains/2800249002/?fbclid=IwAR0Rv58MEnTGih6TOT5Oyx9Y8hJ6F-l0tm-E8-cb6R1eS_EbVqbNiYygSn4.

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ Glenn Kessler, *Has the sex-trafficking law eliminated 90 percent of sex-trafficking ads?*, THE WASHINGTON POST (Aug. 20, 2018, 3:00 AM), <https://www.washingtonpost.com/politics/2018/08/20/has-sex-trafficking-law-eliminated-percent-sex-trafficking-ads/>.

⁹¹ *Id.*

⁹² Jennex & Frost, *supra* note 18, at 4274.

⁹³ *Id.* at 4274.

⁹⁴ *Id.* at 4280.

⁹⁵ *Id.*

an overall message makes them “a lot harder to detect in a system because you can’t just search the keyword.”⁹⁶

Even as law enforcement attempts to deal with the new obstacle of emojis in human trafficking, “traffickers will likely develop new ways and vehicles to contact future sex buyers to avoid detection.”⁹⁷ Already, emojis are being strung together without any keywords or indicators to convey a message of sex for sale.⁹⁸ If eradication, or even a decline, of sex trafficking will ever be possible, law enforcement will need to find better methods of predicting the quick-changing lexicon of human traffickers.

The most recent National Strategy to Combat Human Trafficking has mentioned monitoring the Internet sites where youths are groomed and recruited, but there should have been more of a focus on the internet since that is the most prominent location where human trafficking is occurring in today’s world.⁹⁹ Emojis have infinite representative possibilities, especially when traffickers use them as a coded language and the pictures bear little connection to what they actually represent. Today, the cherry blossom could mean an underage victim, tomorrow it could mean a form of currency. The adaptability of criminal language is what poses an even larger problem for law enforcement because as soon as they begin to crack the code, another one is likely to follow.

The inability to detect human trafficking is one of the main things that shields traffickers from being brought to justice, and leaves the victims helpless.¹⁰⁰ The 2018 Global Report on Trafficking in Persons discovered that the countries that did not “enhance their anti-trafficking actions” experienced a decline in detected victims, and therefore a decline in prosecution of the sex trafficking perpetrators.¹⁰¹ If countries do not adapt their detection methods to the trafficker’s new languages, detecting trafficking will be impossible. Not evolving detection processes allows traffickers to remain undetectable, and consequently unpunished. Interestingly enough, the Report also noted that North America is one of

⁹⁶ Kelsey Weekman, *How sex traffickers use emojis to sell children*, AOL (May 25, 2017), <https://www.aol.com/article/news/2017/05/25/how-sex-traffickers-use-emojis-to-sell-children/22109631/?guccounter=1>.

⁹⁷ *Use of Emojis to Market Victims of Online Sex Trafficking* (July 3, 2019), <https://www.ncrintel.org/post/use-of-emojis-to-market-victims-of-online-sex-trafficking>.

⁹⁸ Joseph Galli, *Human traffickers using emojis, social media to lure victims*, NEWS 4 SAN ANTONIO (Oct. 2, 2018), <https://news4sanantonio.com/news/local/human-traffickers-using-emojis-social-media-to-lure-victims>.

⁹⁹ U.S. Dep’t. of Just., NATIONAL STRATEGY TO COMBAT HUMAN TRAFFICKING 12 (2017), <https://www.justice.gov/humantrafficking/page/file/922791/download>.

¹⁰⁰ United Nations Office on Drugs and Crime, *supra* note 19, at 23.

¹⁰¹ Jennex & Frost, *supra* note 18, at 4280.

the countries that detects the most amount of human trafficking but does not convict a high number of the traffickers discovered.¹⁰²

D. What Emojis Mean for the Courts

“Emojis show up in virtually every practice area” of the law, especially in cases where online communication is a key source of evidence.¹⁰³ The courts are being flooded with cases containing emojis. Thirty percent of all opinions referencing emojis occurred in 2018.¹⁰⁴ In 2019, the number of cases involving emojis only increased, and it is likely that it will continue to increase in the coming years.¹⁰⁵ Interpretation is the key role of the court, especially when it comes to communications.¹⁰⁶ Unsurprisingly, the majority of cases “involving emojis are sexual predation cases.”¹⁰⁷ In 2017 alone, 84.3% of criminal sex trafficking cases involved heavy use of the internet to perpetrate the crime.¹⁰⁸

Although emojis are becoming an increasingly important piece of evidence in every field of the law, courts often ignore or do not fully interpret their meanings.¹⁰⁹ Judges typically do not include actual emojis in their opinions.¹¹⁰ Neither do the popular legal search engines LexisNexis and WestLaw.¹¹¹ Judges have even “ruled to omit the emojis from evidence altogether and just read the transcript” of messages to the jury.¹¹² Other times the actual depicted emoji will be replaced with a verbal description such as “crying face” to describe the crying emoji. These

¹⁰² United Nations Office on Drugs and Crime, *supra* note 19, at 23.

¹⁰³ Eric Goldman, *What's New With Emoji Law? An Interview*, TECHNOLOGY & MARKETING LAW BLOG (Feb. 11, 2019), <https://blog.ericgoldman.org/archives/2019/02/whats-new-with-emoji-law-an-interview.htm>.

¹⁰⁴ *Id.*

¹⁰⁵ Stephen Harrison, *How Emojis Have Invaded the Courtroom*, SLATE (Nov. 26, 2019, 7:30 AM), <https://slate.com/technology/2019/11/emoji-court-cases-crime-free-speech-contract-law.html>.

¹⁰⁶ See Eric Goldman, *Emojis and the Law*, 93 WASH. L. REV. 1227, 1240 (Oct. 2018).

¹⁰⁷ McMahon & Kirley, *supra* note 52, at 60 (citing to Eric Goldman, *What's New with Emoji Law? An Interview*, TECH. & MKTG L. BLOG (Feb. 11, 2019)), <https://blog.ericgoldman.org/archives/2019/02/whats-new-with-emoji-law-an-interview.htm> [<https://perma.cc/9H23-7YZ4>].

¹⁰⁸ THE HUMAN TRAFFICKING INSTITUTE, *2017 Federal Human Trafficking Report*, <https://www.traffickingmatters.com/wp-content/uploads/2018/05/2017-Federal-Human-Trafficking-Report-hi-res.pdf>. (“In 2017, the overwhelming majority (84.3%) of criminal sex trafficking cases relied on the trafficker using the internet to solicit purchasers for sexual services.”)

¹⁰⁹ Goldman, *supra* note 103.

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² Harrison, *supra* note 105.

practices diminish the overall message that the writer is trying to convey and do not give the court a full understanding of the facts.

Emojis are critical forms of evidence that need the right amount of interpretive attention. The inclusion of an emoji is a decisive act that is intended as a form of expression. An emoji can change the entire meaning of the subsequent words or sentences.¹¹³ Furthermore, where emojis do not just add to a conversation, but actually replace full words or phrases, the courts entirely lose vital information.¹¹⁴ Courts would not ignore or decline to interpret vital provisions of a contract if they were in a foreign language, and emojis should not be treated differently.

Interpretation of emojis is crucial in convicting sex traffickers. Interpretation is complicated as the emoji plays a more and more dominant role in recruiting and advertising. Emojis, at the most fundamental level, “have some unique attributes that require extra consideration when interpreted.”¹¹⁵ Courts being unable to properly interpret emojis poses a substantial issue to the justice process.¹¹⁶ Typically, the emojis are a mere addition to an already comprehensive sentence. In a scenario like this, it is quite easy to interpret what the emoji symbolizes based on the context of the sentence or conversation. In these scenarios, it is much easier to interpret what the emoji is meant to mean because of the context of the surrounding text.¹¹⁷

However, the fact that human traffickers put effort into concealing their illicit business with emojis makes their interpretation intentionally difficult. No one’s first inclination when seeing a seemingly innocent emoji, for example the cherry blossom, is that it stands for something as horrible as the sex trafficking of an underage girl. This is especially true when emojis are used in isolation with no key words giving context to the advertisements and transactions. Researchers who study the intersection of emojis and the law advocate for dictionaries depicting the definitions and common interpretations of emojis.¹¹⁸ While this would be a helpful step for the law in general, it would not help in the human trafficking context since emojis are used to represent wholly different concepts than their common interpretations.¹¹⁹

¹¹³ *Id.*

¹¹⁴ Jennex & Frost, *supra* note 18, at 4273.

¹¹⁵ Goldman, *supra* note 103.

¹¹⁶ Samantha Murphy Kelly, *Emojis are increasingly coming up in court cases. Judges are struggling with how to interpret them*, CNN BUSINESS, <https://www.cnn.com/2019/07/08/tech/emoji-law/index.html>.

¹¹⁷ McMahon & Kirley, *supra* note 52, at 21.

¹¹⁸ Goldman, *supra* note 103, at 1273.

¹¹⁹ *Id.*

To put this in perspective, consider *People v. Jamerson*, a case involving a human trafficking operation that led to the arrest of a pimp.¹²⁰ The court analyzed emojis from text messages to determine essential elements of a pandering charge.¹²¹ The main focus was on a crown emoji used in a text message exchange between a pimp and his victim. Testimony from an expert in the area of sex trafficking was needed to help in the interpretation of the crown emoji.¹²² While the emoji could have been interpreted as something innocent, the expert witness opined that a crown is an emoji “specific to commercial . . . sexual exploitation.”¹²³ In this context, the crown signifies “the pimp is king.”¹²⁴ This meaning was not easily determinable. Had the court ignored the emoji or declined to include having an expert help interpret the emoji, it would not have grasped the entire context of the conversation between the pimp and his victim. Consequently, the court might not have been able to categorize the conversation as a recruitment conversation and prove the necessary elements to sustain a pandering charge.

Emoji experts are not commonly used in court proceedings, likely because the courts do not focus on interpreting emojis in their analyses. However, they are an important asset, especially in human trafficking cases.¹²⁵ “Emoji usually have dialects” and their meanings change from situation to situation.¹²⁶ If courts continue to follow the dangerous precedent of ignoring emojis in sex trafficking cases, hundreds of cases will be seldom prosecuted. This lack of prosecution offers human traffickers’ immunity. Consequently, the illicit business has little risk. Considering less than 1% of trafficking is uncovered, and not all those uncovered are prosecuted and convicted, the human trafficking world is operating largely immune to liability while reaping large profits and leaving hundreds of victims behind in their wake.

V. FOSTA-SESTA LIABILITY AND EMOJIS

As we have seen, liability for human traffickers is grossly limited by the ability to detect and prosecute them. But what about the websites where the trafficking happens? Section 230 of The Communications Decency

¹²⁰ See *People v. Jamerson*, 2019 Cl. App. Unpub. LEXIS 940 (Cal. App. Ct. 2019).

¹²¹ *Id.*

¹²² *Id.*

¹²³ *Id.* at 2.

¹²⁴ *Id.*

¹²⁵ Dami Lee, *Emoji are Showing up in Court Cases Exponentially, and Courts Aren't Prepared*, THE VERGE (Feb. 18, 2019), <https://www.theverge.com/2019/2/18/18225231/emoji-emoticon-court-case-reference>.

¹²⁶ *Id.*

Act (CDA)¹²⁷ shielded third-party websites from being liable for what their users posted.¹²⁸ This liability carve-out effectively provides websites with a shield so they can profit from the lucrative sex trafficking industry with little to no incentive to stop it from happening on their websites.¹²⁹ Recent legislation, The Allow States and Victims to Fight Online Sex Trafficking and The Stop Enabling Sex Traffickers Act (FOSTA-SESTA), were signed into law in 2018.¹³⁰ These Acts were aimed at rectifying the shortcomings of the CDA, such as the lack of protection for victims of human trafficking online, by holding these websites more liable for what their third-party users are doing. Now, emojis have the potential to impact that liability.

A. Setting the Stage – Communications Decency Act Section 230

Section 230 of the Communications Decency Act (“the Act”) was introduced in 1996, and its proposed goal was to protect children from the pornographic material that was becoming extremely prevalent on the internet, with 83.5% of images on the Internet containing pornographic material.¹³¹ Senator James Exon, who proposed the Act, declared that he wanted to prevent the internet from becoming a “red light district.”¹³² Unfortunately, by broadly shielding interactive service providers from liability for publishing or restricting what third parties post to their sites, the Act accomplished the exact opposite of what Senator James Exon has

¹²⁷ 47 U.S.C. § 230.

Protection for Private Blocking and Screening of Offensive Material.

(c)(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 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 considers to be obscene, lewd, lascivious, filthy . . . 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).” However, it also stated that it should have “No Effect on Sex Trafficking Law” in the civil or criminal manner.

¹²⁸ *Section 230 of the Communications Decency Act*, ELECTRONIC FRONTIER FOUNDATION, <https://www.eff.org/issues/cda230>.

¹²⁹ *Id.*

¹³⁰ Allow States and Victims to Fight Online Sex Trafficking Act of 2017, Public Law 115-164, 115th Cong. (2018) [hereinafter Public Law 115-164], <https://www.congress.gov/115/plaws/publ164/PLAW-115publ164.pdf>.

¹³¹ Kube, *supra* note 19, at 184.

¹³² *Id.* at 185 (A red light district is where there is a high concentration of sex-oriented business).

intended.¹³³ However, Section 230 shielded providers only from being labeled, and subjected to the law, as publishers of the third party user's content.¹³⁴ These providers were still supposedly liable for content that the provider created or helped to develop.¹³⁵ Despite this, Section 230 immunity was still interpreted by the courts as a strong protection for providers with control over the content posted to their websites.¹³⁶ It even protected providers when they made editorial changes to user content.¹³⁷ For example, despite the extent of Backpage's editorial processes basically rephrasing the vast majority of posts, Section 230 immunity provided an extremely effective defense for Backpage in court.¹³⁸

B. The Allow States and Victims to Fight Online Sex Trafficking and The Stop Enabling Sex Traffickers Act (FOSTA-SESTA)

The Allow States and Victims to Fight Online Sex Trafficking Act of 2017 ("FOSTA"), FOSTA-SESTA¹³⁹ joint House and Senate Bills, were signed into law by President Donald Trump on April 11, 2018. FOSTA is a response to the adverse impact the Communications Decency Act had on "provid[ing] legal protection to websites that unlawfully promote and facilitate" human trafficking on their websites.¹⁴⁰ Congress sought to clarify its original intent in passing the Communications Decency Act through FOSTA by stripping away the legal protection for websites who used the CDA as a protection to profit off of human trafficking.

FOSTA holds liable anyone who "owns, manages, or operates an interactive computer service . . . or conspires or attempts to do so, with the intent to promote or facilitate the prostitution of another person."¹⁴¹ The aggravated violation comes into effect when the general provisions outlined above pertain to more than five persons or where the person "acts in reckless disregard of the fact that such conduct contributed to sex trafficking."¹⁴² FOSTA additionally amended 18 USC § 1591 Sex Trafficking of Children liability for someone who knowingly participates

¹³³ See Valerie C. Brannon, *Liability for Content Hosts: An Overview of the Communication Decency Act's Section 230*, CONGRESSIONAL RESEARCH SERVICE (June 6, 2019), <https://fas.org/sgp/crs/misc/LSB10306.pdf>.

¹³⁴ *Id.* at 2.

¹³⁵ *Id.* at 2-3.

¹³⁶ *Id.*

¹³⁷ *Id.* at 3.

¹³⁸ 114th Congress United States Senate Permanent Subcommittee on Investigations, *supra* note 23.

¹³⁹ Public Law 115-164, *supra* note 130.

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² *Id.*

in a venture to mean “knowingly assisting, supporting, or facilitating” in child human trafficking.¹⁴³

The law has become increasingly controversial. Sex workers claim that this legislation has made their work more dangerous by making them return to the streets instead of being able to vet their clients online.¹⁴⁴ First amendment advocates dread the thought of censoring online speech.¹⁴⁵ This legislation was drafted so broadly so as to not narrowly target the sale of forced sex and is being used as a tool to target consensual pornography and sex work as well.¹⁴⁶ Controversy aside, the effects of this legislation can already be seen across platforms.¹⁴⁷

C. How Emojis Could Contribute to FOSTA Liability

The language of FOSTA does not enumerate factors to be considered in determining “intent to promote or facilitate the prostitution of another person.”¹⁴⁸ Nor does FOSTA define “promote” or “facilitate.”¹⁴⁹ Additionally, the subsequent case law regarding FOSTA does not shed much more light on the terms other than to allude that they do not encompass educational or rescue elements of human trafficking.¹⁵⁰ There is very little guidance for individuals to follow to make sure that they are not in violation of FOSTA. So, what does this mean for websites human traffickers use for business and also allow the use of emojis?

It has been established that emojis are becoming the predominate form of advertising for online human traffickers and play a large part in the grooming process. In recent years, human trafficking has become more of a hot topic among not only researchers, but also the general public. In 2018, the first Federal Human Trafficking Report was published outlining the status of human trafficking in the United States.¹⁵¹ The report

¹⁴³ *Id.*

¹⁴⁴ See Aja Romano, *A New Law Intended to Curb Sex Trafficking Threatens the Future of the Internet as we Know it*, VOX (July 2, 2018), <https://www.vox.com/culture/2018/4/13/17172762/fosta-sesta-backpage-230-internet-freedom>.

¹⁴⁵ *Id.*; Alexandra Stassinopoulos, *Anti-Trafficking Law Has Unexpected Consequences on Sex Work in Bay Area*, DAILY CALIFORNIAN (May 3, 2019), <https://www.dailycal.org/2019/05/03/anti-trafficking-law-has-unexpected-consequences-on-sex-work-in-bay-area/>.

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ Public Law 115-164, *supra* note 130.

¹⁴⁹ *Id.*

¹⁵⁰ Woodhull Freedom Found. v. United States, 334 F.Supp.3d 185 (D.D.C. 2018); DeLima v. YouTube, LLC, LEXIS 160145 (D.N.H. 2018); Green v. YouTube, LLC, LEXIS 55577 (D.N.H. 2019); Igbonwa v. Facebook, Inc., LEXIS 173769 (N.D. Cal. 2018).

¹⁵¹ Kelli L. Ross, *Federal Human Trafficking Report Finds U.S. Federal Courts Handled 771 Human Trafficking Cases in 2018*, TRAFFICKING INSTITUTE (Apr. 16, 2019), <https://www.traffickinginstitute.org/federal-human-trafficking-report-finds-u-s-federal-courts-handled-771-human-trafficking-cases-in-2018/>.

contained many warnings about the use of the internet with respect to sex trafficking, noting that the majority of sex trafficking cases were “internet-based.”¹⁵² This public attention is bolstered by warnings to parents and children about human traffickers using emojis to sell and recruit children and other individuals online.¹⁵³ While it may not be one’s first instinct to think of emojis as tools for human trafficking, it is certainly becoming more widespread knowledge.

Because it is increasingly common knowledge that emojis are regularly used in online human trafficking, website owners may be liable under the sweeping language of FOSTA if they allow the use of emojis on their platforms. Backpage was an extreme example of a third-party website’s involvement in online sex advertising. Not only did Backpage *know* their website was being used as a medium to sell victims of human trafficking, it actively edited advertisements to *help* the traffickers evade law enforcement detection by “conceal[ing] evidence of criminality.”¹⁵⁴ Backpage’s efforts to conceal human trafficking so that it could still profit from it would undoubtedly fall under FOSTA liability, but it is unclear what level of knowledge or facilitation is needed to be liable. It is not probable that FOSTA would be interpreted to extend liability to all platforms that allow emojis to be used on them, but it is not impossible under the very vague guidelines either. It is likewise not impossible that these FOSTA provisions will continue to provide protection to platforms if the criminal acts in the statute are interpreted to have a very high standard of action on the website’s part.

For those still thinking that a harmless emoji could not push interactive providers to make changes, the effects of FOSTA can already be seen. Popular platforms are clearly worried about their liability under FOSTA, as they should be. It is highly unlikely that any website where human trafficking occurs is ignorant to its role as a medium for the illegal business. Some of the most popular sites are beginning to make changes. Reddit already banned multiple categories of threads including those related to escorts, hookers, and sugar daddies.¹⁵⁵ Tumblr, a site that was considered a safe place for those looking to express themselves pornographically, purged itself of its pornographic content.¹⁵⁶ After its

¹⁵² *Id.*

¹⁵³ Weekman, *supra* note 96.

¹⁵⁴ Kube, *supra* note 19, at 178; 114th Congress United States Senate Permanent Subcommittee on Investigations, *supra* note 23, at 2.

¹⁵⁵ Romano, *supra* note 144.

¹⁵⁶ Bijan Stephen, *Tumblr’s Porn Ban Could Be It’s Downfall – After All, It Happened to LiveJournal*, THE VERGE (Dec. 6, 2019), <https://www.theverge.com/2018/12/6/18127869/tumblr-livejournal-porn-ban-strikethrough>.

pornography ban, Tumblr took a massive hit to its user base, and still remains a pornography free site.¹⁵⁷

Even the most popular social media sites, Facebook and Instagram, have made significant changes in filtering their content. Although not explicitly stated to be in response to FOSTA, shortly after the law was enacted, Facebook and Instagram took small steps that seem to be in reaction to the new liability laws. The platforms have banned emojis that are typically associated with sexual content, for example the peach and eggplant emojis.¹⁵⁸ In Section 16 of Facebooks Community Standards, Facebook asserts that it will not allow content that “facilitates, encourages or coordinates sexual encounters between adults.”¹⁵⁹ Facebook explicitly forbids “contextually specific and commonly sexual emojis or emoji strings” from the content on their page.¹⁶⁰

VI. CONCLUSION AND RECOMMENDATIONS

The fight against human trafficking is far from over, it has really just begun. Shedding light on the business that has largely operated in the dark and with perpetrators who go largely unpunished is a valiant start, however much progress is still needed. On the enforcement side, much more work needs to be done to develop systems that can easily detect and decode traffickers’ changing lexicon so that perpetrators can be detected. Once detection occurs, courts need to develop a deeper understanding of interpretations of emojis. Case law needs to represent the role that emojis play in online cases of human trafficking in order to increase successful prosecution of traffickers.

Importantly, FOSTA needs to be refined. There is no doubt that if the goal is to provide justice to victims of human trafficking, Section 230 of the Communications Decency Act needs to be limited. However, FOSTA’s failure to define what “facilitate” and “promote” means, leaves these terms ambiguous and open to limitless interpretations. If websites are expected to know what they can be held liable for, there needs to be substantially more guidance and clarification. Something as simple as allowing emojis to be used on a website could open up the website owner to potential liability depending on how broadly courts interpret the terms “promote” and “facilitate.” If the goal is to catch and hold responsible online human traffickers, the dark role a little pink flower can play in human trafficking cannot be ignored.

¹⁵⁷ *Id.*

¹⁵⁸ Zane, *supra* note 63.

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*