

LAW JOURNAL FOR SOCIAL JUSTICE

SANDRA DAY O'CONNOR COLLEGE OF LAW
ARIZONA STATE UNIVERSITY

Volume 7

Spring

2017

HOW FEDERAL AND STATE LAW ENFORCEMENT AGENCIES CAN EFFECTIVELY USE SOCIAL MEDIA IN THEIR COOPERATIVE EFFORTS TO COMBAT HUMAN TRAFFICKING

*Catherine Fu**

INTRODUCTION

In Arizona, the youth average age of entry into sex trafficking is fourteen years old.¹ Next door in California, the Federal Bureau of Investigation (“FBI”) identified three cities as some of the highest sex trafficking regions in the United States: Los Angeles, San Diego, and San Francisco.² According to the U.S. Department of Health and Human Services, sex trafficking is the second largest criminal industry in the world today, second only to drug trafficking and tied with illegal arms.³ In response to the prevalence of this form of modern day slavery, law enforcement agencies and non-governmental organizations (“NGOs”) have coordinated efforts both nationally and internationally to target the parties responsible for illegally holding or transporting individuals to engage in prostitution, known in the sex industry as “pimps.”⁴ However, these efforts are generally reactionary and do not include long term prevention strategies.⁵

* J.D. Candidate (2018), Sandra Day O'Connor College of Law, Arizona State University; B.A. Global Studies, University of California, Santa Barbara. Thank you to the professors who inspired me to delve deeper into human rights and sex trafficking issues, and to my family for supporting me in the process.

¹ Dominique Roe Sepowitz, *Report on the Incidence of Sex Trafficking in Arizona's Juvenile Probation Departments*, ASU SCHOOL OF SOCIAL WORK OFFICE OF SEX TRAFFICKING INTERVENTION RESEARCH, Dec. 2015, at 14 (discussing the average age of first sex trafficking victimization).

² *What is Human Trafficking?*, Californians Against Sexual Exploitation (2012) <http://www.caseact.org/learn/humantrafficking>.

³ *Id.*

⁴ *Trafficking Terms*, SharedHope International (Jan. 9, 2017) <http://sharedhope.org/the-problem/trafficking-terms/>.

⁵ LEONARD TERRITO AND GEORGE KIRKHAM, INTERNATIONAL SEX TRAFFICKING OF WOMEN & CHILDREN 43 (Looseleaf Law Publications, Inc., 2010).

This article advocates for an approach that has been successfully used to fight sex trafficking and focuses on prevention rather than reaction to victims who have already been trafficked. Part I will provide a general framework for understanding human trafficking by describing existing anti-trafficking legislation and the remedies they offer trafficking victims, and by explaining current cooperative law enforcement techniques to fight traffickers. Part II will analyze some of the strengths and shortcomings of the existing approaches. Finally, Part III will break down the preventative approach to combat human trafficking in the U.S involving undercover law enforcement agents who use Facebook to target known traffickers. This part will also address legal issues that may be implicated when the Government uses social media communications to target and prosecute traffickers, and how to overcome any potential obstacles to effectively implement this approach.

I. BACKGROUND

A. Current anti-trafficking laws and existing remedies for victims of human trafficking

Sex trafficking, the modern day equivalent of slavery, occurs when someone uses “force, fraud, or coercion to cause a commercial sex act with an adult or causes a minor to commit a commercial sex act,” but does not include prostitution in forms without threats or other forms of non-consensual acts.⁶ A commercial sex act includes “prostitution, pornography, and sexual performance done in exchange for any item of value, such as money, drugs, shelter, food, or clothes.”⁷ U.S. legislation and international treaties and protocols have been passed to fight this form of oppression that continues to thrive today due in large part to high demand.⁸ The United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons (“UN Protocol”) served as the blueprint for subsequent anti-trafficking legislation, and defines trafficking as (a) the recruitment, transportation, transfer, harboring, or receipt of persons, by means of 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

⁶ See Californians Against Sexual Exploitation (2012).

⁷ *Id.*

⁸ *Demand Fosters Human Trafficking*, United Nations Human Rights Office of the High Commissioner (July 2, 2013)
<http://www.ohchr.org/EN/NewsEvents/Pages/Demandfostershumantrafficking.aspx>.

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 labor or services, slavery or practices similar to slavery, servitude or the removal of organs; (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.⁹ The covert nature of sex trafficking can make it difficult to obtain accurate statistics, and both state and federal laws in the U.S. are constantly evolving to meet the existing pressing needs of society.¹⁰

Global Level Remedies

Victims of human trafficking suffer violations of their right to life, right to freedom of movement, and many other essential human rights.¹¹ The UN Human Rights Office of the High Commissioner (“OHCHR”) has played a major role in helping trafficking victims access effective remedies.¹² Because “trafficked persons are often seen as instruments of a criminal investigation, rather than as holders of rights,” in June of 2011 UN expert on trafficking Joy Ngozi Ezeilo introduced a report to the UN Human Rights Council which analyzed the key components of trafficked persons’ right to an effective remedy.¹³ These included restitution, recovery, and compensation, all in the context of trafficked persons.¹⁴ The report emphasized that each element alone is insufficient, particularly when restoring a trafficking victim’s rights and returning him or her to pre-trafficking conditions is next to impossible or where proving the requisite proximate cause for restitution is difficult.¹⁵

⁹ UN General Assembly, *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention Against Transnational Organized Crime*, Nov. 15, 2000.

¹⁰ *Id.*

¹¹ Universal Declaration of Human Rights, Arts. 3, 13, Dec., 10, 1948.

¹² *Human Rights and Human Trafficking Fact Sheet No. 36*, UNITED NATIONS HUMAN RIGHTS OFFICE OF THE HIGH COMMISSIONER, at 30 (2014).

¹³ *Helping Victims of Trafficking Access Effective Remedies*, United Nations Human Rights Office of the High Commissioner (June 15, 2011) <http://www.ohchr.org/EN/NewsEvents/Pages/Helpingvictimsotraffickingaccesseffective Remedies.aspx>.

¹⁴ *Id.*

¹⁵ *Civil Remedies for Trafficking Victims*, Stop Violence Against Women, a Project of the Advocates for Human Rights (June 2014) http://www.stopvaw.org/civil_remedies_for_trafficking_victims.

In 2012, the Human Rights Council held a panel discussion regarding remedies for women subjected to violence as a result of sex trafficking, and a subsequent OHCHR report set forth general principles, challenges, and promising practices.¹⁶ Aside from working to provide effective remedies, the OHCHR has recognized that preventing trafficking requires addressing the causes of trafficking such as factors that “increase the vulnerability of victims and potential victims, create or sustain demand for trafficked persons, and create or sustain an environment within which traffickers and their accomplices can operate with impunity.”¹⁷ International treaties such as the Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others, drafted in 1949 and ratified by only two States, created administrative, enforcement, and social measures aimed at trafficking persons, but its actual impact on sex trafficking levels is minimal due to a lack of State signatories and ratifiers.¹⁸ In the years since the drafting of the earlier treaties, the UN bodies have laid out particular guidelines for targeting sex trafficking that countries around the world have adopted in their respective efforts to stop traffickers and provide victim services.¹⁹ This progress was reflected in countries such as Peru in 2012 when Peruvian Congress finally enacted legislature that made all victims of sexual violence eligible for civil remedies, a welcome relief after years of limiting reparations only to victims of rape.²⁰ However, access to effective remedies hinges on States’ implementation of existing trafficking laws and holding States and others tasked with handling trafficking violations accountable.²¹

¹⁶ *Id.*

¹⁷ *Human Rights and Human Trafficking Fact Sheet No. 36*, UNITED NATIONS HUMAN RIGHTS OFFICE OF THE HIGH COMMISSIONER, at 39 (2014).

¹⁸ UN General Assembly, *Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others*, Dec. 2, 1949.

¹⁹ *Civil Remedies for Trafficking Victims*, Stop Violence Against Women, a Project of the Advocates for Human Rights (June 2014)
http://www.stopvaw.org/civil_remedies_for_trafficking_victims.

²⁰ *Human Rights and Human Trafficking Fact Sheet No. 36*, UNITED NATIONS HUMAN RIGHTS OFFICE OF THE HIGH COMMISSIONER (2014).

²¹ *Helping Victims of Trafficking Access Effective Remedies*, United Nations Human Rights Office of the High Commissioner (June 15, 2011)
<http://www.ohchr.org/EN/NewsEvents/Pages/Helpingvictimsotraffickingaccesseffective Remedies.aspx>.

Federal Remedies

In 2000, Congress enacted the Victims of Trafficking and Violence Protection Act of 2000 (“TVPA”), and since then the federal government has slowly but steadily increased and improved its modest efforts to combat human trafficking and protect victims from further abuse.²² The joint efforts of the American Bar Association for Human Rights (hereinafter “ABA Center for Human Rights”) and Uniform Law Commission, in recognition of the need to “create uniform state anti-human trafficking legislation,” resulted in the approval of the Uniform Act on Prevention of and Remedies for Human Trafficking (“UAPHRT”) in July 2013.²³ That same year, federal law enforcement agencies together initiated 1,759 human trafficking-related investigations, prosecuted 161 cases, and convicted 174 individuals guilty of human trafficking.²⁴

The UAPHRT was significant because it took a comprehensive approach to combatting human trafficking and instilled more uniformity among states in their methods of prosecuting traffickers, and in the provision of victim services.²⁵ It standardized penalties for traffickers, ensured that trafficking victims are not treated as criminals, provided survivors with tools to re-establish their lives, and promoted collaboration among government, NGOs, and others.²⁶ However, state legislatures have not uniformly adopted the Act in its entirety, and as a result have inadvertently provided safe havens for traffickers.²⁷

Since the TVPA was enacted in 2000, Congress has passed the Trafficking Victims Protection Reauthorization Act of 2003, 2005, and 2008 to rectify the inadequacies of the earlier laws.²⁸ The later versions of the Act reauthorized certain federal programs to prevent violence against women and for other victim protection purposes.²⁹ Other amendments further improved the protections by authorizing appropriations for the Act, enhancing judicial and law enforcement tools to combat violence against women, increasing the scope of services states are obligated to provide for

²² Erin N. Kauffman, *The Uniform Act on Prevention of and Remedies for Human Trafficking: State Law and The National Response to Labor Trafficking*, 41 JOURNAL OF LEG. 2 (2015).

²³ UNIF. ACT ON PREVENTION OF AND REMEDIES FOR HUMAN TRAFFICKING (2013).

²⁴ Kauffman, *supra* note 22.

²⁵ UAPHRT, *supra* note 23 §V.

²⁶ *Id.*

²⁷ Andrew Hall, *The Uniform Act on Prevention of and Remedies for Human Trafficking*, 56 ARIZ. L. REV. 854, ___ (2014).

²⁸ H.R. 898, 113th Cong. (2013).

²⁹ *Id.*

trafficking victims, and advocating for certain violence reduction practices.³⁰

State Level Remedies

In contrast to relatively more successful federal anti-trafficking regimes, state anti-trafficking laws have been significantly less comprehensive.³¹ In the U.S., Wyoming became the last state to criminalize sex trafficking in February 2013.³² Although all 50 states now outlaw trafficking, many still lack basic victim protections and other crucial elements of an effective anti-trafficking regime.³³

Under the uniform federal acts such as the TVPA and UAPRHT and human rights law, states owe a duty to trafficking victims who have suffered human rights violations to ensure they have access to effective remedies.³⁴ For existing laws to be implemented to the fullest extent, states must collaborate both among their internal agencies and with other states and the federal government.³⁵ All 50 states today have some form of human trafficking legislation, but on their own each state is incapable of providing sufficient protection for victims of human trafficking.³⁶ The OHCHR has recognized that determining states' responsibilities for human trafficking can be difficult because of the government's perception that trafficking and the human rights violations associated with the crime are committed by private individuals and not by the state itself.³⁷ Although in theory there is a general consensus that states have an obligation to identify victims of trafficking, provide immediate protection and support, provide legal assistance, offer temporary residence permits, and refrain from detaining and prosecuting trafficked persons, in practice states do not always uniformly carry out the duties they owe to trafficking victims.³⁸ Many

³⁰ Violence Against Women Reauthorization Act of 2013, 113th Cong. (2013).

³¹ Andrew Hall, *supra* note 27 at 864.

³² Press Release, Polaris Project, Wyoming Becomes 50th State to Outlaw Human Trafficking (Feb. 27, 2013) (on file with author).

³³ See 2013 State Ratings on Human Trafficking Laws, Polaris Project, <http://www.polarisproject.org/what-we-do/policy-advocacy/national-policy/state-ratings-on-human-trafficking-laws/2013-state-ratings-on-human-trafficking-laws> (last visited Jan. 24, 2014) (finding only New Jersey and Washington to have fully satisfactory comprehensive anti-trafficking laws across ten categories of analysis).

³⁴ Anne T. Gallagher, *The Right to an Effective Remedy for Victims of Trafficking in Persons: A Survey of International Law and Policy*, UN SPECIAL RAPPORTEUR (2010).

³⁵ Kauffman, *supra* note 22 at 292.

³⁶ *Id.*

³⁷ Andrew Hall, *supra* note 27 at 11.

³⁸ *Id.* at 12.

victims also lack access to information they need to ensure they receive the help they're entitled to.³⁹

B. Existing cooperative inter-agency approaches in the fight to end sex trafficking

In recent years, the FBI has adopted innovative collaborative approaches to crack down on human trafficking.⁴⁰ One such approach, the annual “Super Bowl sex trafficking operation,” relies on local non-profit groups to make contact with victims in the city where the Super Bowl is held before law enforcement agencies step in.⁴¹ The end goal of this operation is to try to get the women and girls selling sex to turn against their traffickers.⁴² Whether this approach is effective remains a hotly debated topic; critics argue that there is no evidence to support an influx in prostitution to serve the Super Bowl market, while advocates counter by pointing to the underground nature of the crime, and the difficulty in capturing the buyers and sellers’ actions.⁴³ While the operation’s effectiveness remains an unresolved question, in 2015 the FBI and local law enforcement agencies in San Francisco arrested 360 sex buyers and 68 sex traffickers over the course of six months in anticipation of the 50th Super Bowl.⁴⁴ The operation also resulted in recovery of 30 juvenile trafficking victims.⁴⁵

This section examines two major cities with some of the highest rates of sex trafficking in the U.S., along with the cooperative techniques their law enforcement agencies have used when working together to target and prosecute traffickers.

³⁹ *Id.*

⁴⁰ *FBI’s new approach to crack down on Super Bowl sex trafficking*, CBS News (Jan. 12, 2016) <http://www.cbsnews.com/news/fbi-trying-new-approach-to-crack-down-on-super-bowl-sex-trafficking/>.

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.*

i. San Diego, California

Operation Hotel Tango

In June 2016, the San Diego Sheriff's Office partnered with the District Attorney's Office, Escondido and San Diego Police Departments, California Highway Patrol (CHP), and the Department of Justice ("DOJ") to carry out a Human Trafficking Task Force Operation known as "Operation Hotel Tango" that uncovered victims who had been pimped out and trafficked for years.⁴⁶ The investigation spanned over a year and agents looked at communications on social media platforms including Twitter, Snapchat, and Instagram.⁴⁷ More than 7 victims were rescued, all of whom had been repeatedly forced to engage in sex acts for money.⁴⁸ Their pimps were sentenced to up to 29 years in prison, and San Diego County District Attorney Bonnie Dumanis called the successful operation evidence of San Diego law enforcement's commitment & cooperation to stop the "scourge of human trafficking."⁴⁹

The success of Operation Hotel Tango was due in large part to the Human Trafficking Grant the San Diego Sheriff's Office received, which allowed them to gather 14 prosecution and law enforcement agencies to form San Diego's Violent Human Trafficking and Child Exploitation Task Force (VHTCE).⁵⁰ Their stated mission is to "disrupt and dismantle human trafficking and child exploitation organizations" through collaborative law enforcement actions in order to identify and rescue victims and hold their traffickers accountable.⁵¹ The Task Force also strives to promote community awareness, increase accessibility to information, and enhance resources and training.⁵² While San Diego law enforcement agencies had previously worked together to fight sex trafficking, this Operation marked

⁴⁶ Press Release, Office of the District Attorney County of San Diego, North County Human Trafficking Ring Busted; Three Defendants Charged (June 20, 2016) (on file with author).

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *2008 Year in Review*, San Diego County Sheriff's Department (last accessed Jan. 17, 2017) <http://www.sdsheriff.net/2008/lesb.html>.

⁵⁰ Press Release, County Supervisor, District Attorney, US Attorney join DOJ and other Law Enforcement Partners to Form Human Trafficking Task Force (Jan. 20, 2015) (on file with author).

⁵¹ *Id.*

⁵² *Id.*

the first time local, state, and federal agencies shared information and coordinated their efforts in one centralized location.⁵³

Operation Cross Country X

Every year, for the past ten years, the FBI has conducted an annual law enforcement action targeting traffickers of underage victims of prostitution.⁵⁴ Since the first year of “Operation Cross Country,” the FBI has rescued hundreds of sexually exploited juveniles and arrested hundreds of pimps and other individuals responsible.⁵⁵ For the first time in October 2016, the FBI expanded Operation Cross Country to become an international enforcement action that included working with local, state, and federal law enforcement partners.⁵⁶ Altogether, the 10th Operation Cross Country involved more than 400 law enforcement agencies conducting sting operations in areas frequented by pimps, prostitutes, and their customers.⁵⁷ Internationally, countries such as Thailand conducted their own operations in conjunction with the FBI’s legal attaché offices to find American citizens committing sex crimes abroad.⁵⁸ The joint efforts of the Royal Thai Police and the National Center for Missing and Exploited Children (NCMEC) is just one example of the many international partnerships that have formed to fight sex trafficking.⁵⁹

Three of the minors rescued in the 10th Operation Cross Country were from the San Diego area, and participating law enforcement officials included San Diego Police Chief Shelley Zimmerman and special agent Eric Birnbaum in charge of the FBI’s San Diego field office.⁶⁰ At the International Association of Chiefs of Police convention later that year in San Diego, FBI Director James Comey acknowledged the fruits of the Task Force’s efforts, but emphasized that sex trafficking still exists, and that the

⁵³ *Id.*

⁵⁴ *Operation Cross Country X*, FBI (Oct. 17, 2016)

<https://www.fbi.gov/news/stories/operation-cross-country-x>.

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ Press Release, FBI National Press Office, FBI Announces Results of Operation Cross Country X (Oct. 17, 2016) (on file with author)

⁶⁰ Dana Littlefield, *FBI Director: Sex-Trafficking Initiative Rescues 82 Minors in Past Month*, The San Diego Union-Tribune (Oct. 17, 2016) <http://www.sandiegouniontribune.com/sd-me-comey-trafficking-20161017-story.html>.

public must continue to help law enforcement work together in the fight to end the illegal sex trade.⁶¹

ii. Phoenix, Arizona

The Fake Sex-Slave Auction Sting

In the first known operation of its kind, FBI agents and a Valley-wide task force of officers from the Phoenix, Chandler, Mesa, and Scottsdale police departments in Arizona conducted a two-year sting that culminated in the arrest of four suspected sex traffickers at a fake sex-slave auction in Phoenix.⁶² The operation began in 2013 when agents were tipped off to a website that advertised the sale of humans from Malaysia.⁶³ Although that particular website turned out to be a sham, it alerted agents to the demand for sex slaves.⁶⁴ To avoid unnecessary victimization, the agents focused on targeting the buyers, instead of posing as them.⁶⁵ They set up a website with photos of “volunteers” who were women of various ethnicities.⁶⁶ The advertisement stated: “Domestic slave auction to be held. Attendance is limited and details will be provided to selected buyers.”⁶⁷

The posting generated heavy online traffic and received interest from many potential buyers eager to subject women to a lifetime of torture and abuse.⁶⁸ One response stated “Definitely interested...have personal stone dungeon and many years’ experience as trainer/owner”, while another individual became a suspect by exchanging various e-mails & phone calls with undercover agents regarding his interest.⁶⁹ A subsequent visit to his home revealed a dungeon equipped with a “jail cell, restraints, whips, chains, various torture devices and a large wooden cross.”⁷⁰ The undercover sellers ultimately negotiated prices for the women, and the four men were

⁶¹ *Id.*

⁶² Megan Cassidy, *FBI Sex-Slave Sting in Phoenix Sends 4 Men to Prison*, AZ Central, <http://www.azcentral.com/story/news/local/phoenix/2015/09/25/fbi-sex-slave-sting-phoenix-prison/72281246/>, September, 2015.

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ Ray Stern, *FBI “Blown Away” by Sex-Slave Sting Case*, Phoenix New Times (Sept. 11, 2015) <http://www.phoenixnewtimes.com/news/fbi-blown-away-by-sex-slave-sting-case-7648754>.

⁶⁹ *Id.*

⁷⁰ *Id.*

arrested the warehouse on the day of the fake auction.⁷¹ By September 2015, all buyers were sentenced to long prison terms that reflected the cruel intentions each man had, and the strong evidence the prosecution was able to procure was a result of the extensive planning and preparations carried out together by the undercover agents.⁷²

City of Phoenix Compass Plan

Before San Diego's anti-human trafficking task force was created, the mayor of the city of Phoenix established the City of Phoenix Human Trafficking Task Force in 2014.⁷³ Unlike San Diego, the Phoenix task force was only comprised of community leaders and City of Phoenix employees.⁷⁴ Since its creation, the Task Force has held monthly meetings, and at these meetings the Task Force together with residents and other City staff developed the Compass Plan.⁷⁵ Designed to "explore innovative and bold solutions" to end human trafficking, the Plan is constantly evolving and is updated to reflect current needs.⁷⁶

The task force was originally created to develop a "game plan" for a safer 2015 Super Bowl in the host city of Phoenix, but has since gone beyond its original purpose.⁷⁷ Organizations such as the TRUST (Training and Resources United to Stop Trafficking) and the O'Connor House SAFE Action Project collaborate to coordinate responses to trafficking cases, and they were also key contributors in developing the Compass Plan.⁷⁸ The plan specifies four areas for the task force to concentrate on: community awareness and outreach, training, law enforcement, and victim services.⁷⁹ Under the law enforcement prong, the Plan directs Phoenix police departments to collaborate with regional law enforcement agencies, prosecutors, and other community partners to strengthen law enforcement

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Arizona Human Trafficking Council Victim Services Committee Minutes* (May 22, 2014), <http://azgovernor.gov/sites/default/files/minutes/estaz/victimservicescommittee/2014/vsc052214minutes.pdf>.

⁷⁴ *City of Phoenix Compass Plan*, Mayor's Human Trafficking Task Force (last accessed Jan. 21, 2017) <https://www.phoenix.gov/district2site/Documents/City%20of%20Phoenix%20COMPASS%20Plan.pdf>.

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.*

services by providing uniform training to all agencies.⁸⁰ For each area, the plan further laid out short, medium, and long term goals. However, the current Plan looks forward only to January 2020, which may call for another task force meeting soon to reflect on the progress they have made and modify future goals as necessary.⁸¹

II. INADEQUACIES IN EXISTING APPROACHES

State lawmakers and Congress recognize the severity of human trafficking and have enacted laws in every state criminalizing the act and imposing harsh penalties on traffickers.⁸² However, current approaches that strive to curb trafficking focus primarily on prosecuting traffickers, and do not devote sufficient resources toward preventative efforts that stop traffickers before any crime is committed.⁸³ The source of the issue is also frequently framed incorrectly as many people still view sex trafficking as an international problem that occurs only in developing countries.⁸⁴ These issues have resulted in a lack of accurate and comprehensive data regarding the scope of sex trafficking, and hinder the efficiency of social justice systems that work to protect trafficking victims.⁸⁵ Successful strategies to combat this atrocious crime will require positive action on each of these challenges.⁸⁶

A. Current approaches lead from behind in the fight to end sex trafficking

Laws that target sex traffickers for prosecution have enabled law enforcement agencies across the U.S. to rescue hundreds of thousands of child and adult victims of forced prostitution.⁸⁷ Internationally, over a hundred states have ratified the UN Protocol against trafficking and have

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² Chelsea Parsons, *3 Key Challenges in Combatting the Sex Trafficking of Minors in the United States*, Center for American Progress (April 8, 2014) <https://www.americanprogress.org/issues/lgbt/reports/2014/04/08/87293/3-key-challenges-in-combating-the-sex-trafficking-of-minors-in-the-united-states/>.

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ Andrew Hall, *supra* note 27 at 890.

⁸⁶ *Id.*

⁸⁷ Oliva Enos, *Number of Victims Rescued from Human Trafficking Almost Doubled in 2016* (July 1, 2016) <http://dailysignal.com/2016/07/01/number-of-victims-rescued-from-human-trafficking-almost-doubled-in-2016/>.

committed themselves to incorporating the protocol's provisions in their domestic laws.⁸⁸ While the fight against sex trafficking has certainly been progressive on many fronts, ongoing challenges stem from the reactive quality of law enforcement efforts rather than proactive preventative agendas, as well as gaps in uniform implementation of anti-trafficking laws with varied definitions of sex trafficking across the states.⁸⁹

In March 2007, the UN Office on Drugs and Crime (UNODC) launched a Global Initiative to Fight Human Trafficking (GIFT) designed to create a turning point in the world-wide fight to end sex trafficking.⁹⁰ One of the initiative's ultimate goals is to prevent potential victims from falling prey to traffickers.⁹¹ The GIFT aims to strengthen prevention by warning vulnerable groups and alleviating the factors that make particular people vulnerable to trafficking such as poverty, underdevelopment, and lack of opportunity.⁹² Law enforcement and the organizations they collaborate with to fight sex traffickers would significantly increase their efficiency by strengthening preventative measures.⁹³

Furthermore, the U.S. Department of State's Office to Monitor and Combat Trafficking in Persons has also recognized the importance of prevention, and follows a fundamental framework used around the world to combat sex trafficking consisting of the "3Ps" paradigm: prosecution, protection, and prevention.⁹⁴ Prevention efforts are key to combatting sex trafficking, and have included public awareness campaigns to warn vulnerable peoples and developing programs to help reduce demand for sex slaves.⁹⁵ Additionally, preventative methods should include strengthening partnerships between law enforcement, government, and NGOs.⁹⁶

Law enforcement agencies continue to strengthen their cooperative efforts, but collectively place a majority of their efforts towards prosecuting traffickers and protecting victims.⁹⁷ While prosecution, protection, and prevention are all closely intertwined, efforts to end trafficking must

⁸⁸ *The Global Initiative to Fight Human Trafficking*, U.N. Office on Drugs and Crime (last accessed Jan. 21, 2017) <http://www.unodc.org/pdf/gift%20brochure.pdf>.

⁸⁹ Kelly Heinrich and Kavitha Sreeharsha, *The State of State Human Trafficking Laws*, 52 AM. BAR ASSOC. 1, 1 (2013).

⁹⁰ *The Global Initiative to Fight Human Trafficking*, *supra* note 88.

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *3Ps: Prosecution, Protection, and Prevention*, U.S. Department of State (last accessed Jan 17, 2017) <https://www.state.gov/j/tip/3p/index.htm>.

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ *Id.*

balance all three for more effective responses.⁹⁸ The successful operations in Phoenix and San Diego exemplify the cities' dedication to combatting sex trafficking, but they should improve their efficiency by reserving more resources for prevention.⁹⁹ Effective prevention of human trafficking must include recognition of the many layers of the crime, and preventative anti-trafficking efforts should reach as many policy areas as possible, particularly improving education in source countries and increasing police pay in countries with high demand for sex slaves to discourage official bribery.¹⁰⁰

B. A lack of comprehensive data on sex trafficking and incorrect framing of its source hinder law enforcement efficiency

Every state in the U.S. today has a human trafficking or related criminal statute, and the TVPA has been consistently adopted and implemented nationwide.¹⁰¹ There is much more data available today addressing sex trafficking worldwide, and in the U.S. agencies such as the National Center for Missing & Exploited Children and the U.S. Department of Justice Child Exploitation and Obscenity Section have formed partnerships with the FBI to provide better estimates of youth victims of sex trafficking and the underground commercial sex economy.¹⁰² Despite the advances in anti-trafficking strategies, state agencies engage in more inconsistent data collection than its federal counterparts.¹⁰³ Many states also lack laws creating immunity from prosecution for victims forced to engage in prostitution.¹⁰⁴

In 2011, a study conducted by the Urban Institute and Northeastern University found that at the state and local level, investigators focus narrowly on sex trafficking of minors.¹⁰⁵ The study also reiterated that law enforcement is more reactive rather than proactive in their efforts to uncover

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ Ruth Dearnley, *Prevention, Prosecution, and Protection – Human Trafficking*, UN CHRONICLE, Feb. 2010, at 1.

¹⁰¹ Kelly Heinrich and Kavitha Sreeharsha, *supra* note 89.

¹⁰² Chelsea Parsons and Andrew Cray, *supra* note 82.

¹⁰³ *Id.*

¹⁰⁴ Juan David Romero, *Why Do We Treat Child Sex-Trafficking Victims Like Criminals?*, New Republic (Dec. 4, 2014) <https://newrepublic.com/article/120418/underage-sex-trafficking-victims-are-treated-criminals-us>.

¹⁰⁵ Kelly Heinrich and Kavitha Sreeharsha, *supra* note 89.

sex trafficking.¹⁰⁶ Due to miscommunications and biases that arise partially as a result of insufficient resources for training law enforcement, many investigators fail to bring prostitution-related cases to prosecutors, and the local and state prosecutors in turn are unwilling to prosecute trafficking cases if they do not believe justice will be served.¹⁰⁷ Different belief systems have resulted in a disproportionate amount of resources to be devoted to minor sex trafficking cases while cases with adult victims remain undetected and unreported.¹⁰⁸

One such discrepancy between federal and state-level reporting can be seen in a comparison of the TVPA federally-funded task forces, which reported 1,407 suspected cases of trafficking over two and a half years, and the Alameda County District Attorney's Office in California, which only reported 267 cases over one and a half years.¹⁰⁹ One way to rectify this gap between federal and state-level identification is dedicating more resources to training state and local law enforcement agencies on how to identify sex trafficking cases.¹¹⁰ A lack of training has caused many cases to go unnoticed and unreported.¹¹¹ Perhaps most importantly, improving training programs will help Congress to enact appropriate legislature and policy and law enforcement to better craft their anti-trafficking methods.¹¹²

Furthermore, many law enforcement members still view victims of sex trafficking as criminals, which is an unfortunate setback to the progress anti-trafficking programs have made.¹¹³ In 2014, D.C. Council unanimously passed the Trafficking of Minors Prevention Amendment Act (TMPAA), which created immunity from prosecution for minors who involuntarily engaged in prostitution in D.C.¹¹⁴ In addition, New York's Human Trafficking Intervention Initiative provides victims of the sex trade who have been arrested for prostitution-related charges with counseling and other social services instead of treating them as individuals who have broken the law.¹¹⁵ The judges of the Human Trafficking Intervention Courts

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ Chelsea Parsons and Andrew Cray, *supra* note 82.

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ Batya Ungar-Sargon, *Sex Trafficking Victims, Not 'Prostitutes,' Finally Getting Help (and a New Name) in Court*, *The Daily Beast* (Jan. 12, 2015) <http://www.thedailybeast.com/articles/2015/01/12/sex-trafficking-victims-not-prostitutes-finally-getting-help-and-a-new-name-in-court.html>.

¹¹⁵ *Id.*

assign arrestees of prostitution to counseling sessions, which upon completion their records may be sealed, provided they do not re-offend for 6 months.¹¹⁶ Other states should learn from New York and D.C, and adopt similar policies to allow law enforcement to focus on the real criminals – the perpetrators of sex trafficking.¹¹⁷ The Urban Institute and Northeastern University study concluded that even with recent propagation of human trafficking laws, these cases are rarely prosecuted in the U.S.¹¹⁸ Misconceptions about the source of violence in the sex industry are in large part responsible for the shortage of sex trafficking prosecution.¹¹⁹ As of August 2013, 18 states in the U.S. have enacted “safe harbor” legislation that prevent law enforcement from treating victims as perpetrators of their own crimes.¹²⁰ Minnesota went further by introducing a bill that sought to provide incentives for states to enact safe-harbor laws.¹²¹ Additional work must be done in this area to support the continued efforts of states like Minnesota who seek to ameliorate the criminal justice system by advocating for a more compassionate approach towards trafficking victims.¹²²

III. A NEW APPROACH: USING FACEBOOK AS THE PRIMARY SOCIAL MEDIA PLATFORM TO PREVENT SEX TRAFFICKING

As social media continues to play an increasingly prevalent role in today’s society, a more modern approach to fighting sex trafficking combines the cooperative efforts of law enforcement with technological advancements.¹²³ As of September 30, 2016, Facebook had 1.79 billion active users across the globe and the company estimated that approximately 84.9% of those users were outside the U.S. and Canada.¹²⁴ Although its user growth likely will not continue at the same margins in years to come, Facebook’s 15% growth rate in the second quarter of 2016 completely surpassed that of Twitter, one of its social media platform competitors,

¹¹⁶ *Id.*

¹¹⁷ Chelsea Parsons and Andrew Cray, *supra* note 82.

¹¹⁸ Kelly Heinrich and Kavitha Sreeharsha, *supra* note 89.

¹¹⁹ Batya Ungar-Sargon, *supra* note 114.

¹²⁰ Chelsea Parsons and Andrew Cray, *supra* note 82.

¹²¹ *Id.*

¹²² *Id.*

¹²³ Patrick J. Solar, *How Technology is Changing Law Enforcement*, Police the Law Enforcement Magazine (Dec. 8, 2015) <http://www.policemag.com/blog/technology/story/2015/12/how-technology-is-changing-law-enforcement.aspx>

¹²⁴ FACEBOOK NEWSROOM, <http://newsroom.fb.com/company-info/> (last visited Jan. 17, 2017).

which rang in at just 3% growth.¹²⁵ The first part of this section will explain how law enforcement can create undercover Facebook profiles to target pimps before they traffic individuals to engage in prostitution. The second part then addresses some legal limitations the new approach might face, and offers solutions to any potential issues.

A. Why creating undercover Facebook profiles as the main social media avenue of communication between law enforcement and known sex traffickers should be a widely adopted preventative approach to human trafficking

In August 2015, law enforcement officers in Arizona began communicating with a known pimp (from here on out, “Defendant”) on social media using the fictitious identity of an adult female, “Jane Doe.”¹²⁶ (edited for confidentiality) This communication was initiated as part of an ongoing cooperative effort between law enforcement agencies to identify criminals attempting to traffic women across state lines for prostitution purposes.¹²⁷ Defendant quickly escalated the communications to text messaging on the same day, which eventually led to a recorded telephone call.¹²⁸ He revealed that he ran his prostitution business from where he resided in Texas, and bragged that he was a successful “pimp” who recruited women for his illegal trade.¹²⁹ Within 2 hours of the initial contact, Defendant had offered to book “Jane Doe” a flight to leave Arizona for Texas.¹³⁰

Throughout the next few days following the recorded telephone call, Defendant continued to solicit “Jane Doe” to move to Texas to work for him as a prostitute.¹³¹ He instructed her to call him “daddy” and said she was ready for “the game,” yet another reference to his illegal prostitution business.¹³² When “Jane Doe” agreed to work for him, Defendant advised her he would immediately transport her to Texas so she could begin working

¹²⁵ John Divine, *Facebook’s User Growth Set to Slow Down Soon*, U.S. News & World Report (Sept. 6, 2016) <http://money.usnews.com/investing/articles/2016-09-06/facebook-incs-user-growth-set-to-slow-down-soon-fb>.

¹²⁶ Sentencing Memorandum, *USA v. Hollins*, (2016) (2:15-CR-01135).

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² *Id.*

for him as a prostitute.¹³³ When Defendant arrived, law enforcement agents were already on the scene.¹³⁴ Defendant acknowledged he was the person who had been communicating with “Jane Doe,” but initially denied he was a “pimp” or that he had plans for her to have sex with other people for money, and to bring the money back to him.¹³⁵ Defendant eventually pled guilty and admitted that he knowingly attempted to transport an individual in interstate commerce and attempted to transport her with the intent that she engage in prostitution for him.¹³⁶

In the above example, undercover agents who posed as young troubled women trying to start a new life were able to capture a known pimp before he lured any more women into a life of prostitution and without endangering any more lives in the process.¹³⁷ Because the undercover agents are the “victims”, this approach would limit the number of potential trafficking victims that may arise from alternative methods of targeting pimps.¹³⁸ In addition, during the course of the investigation agents were alerted to other pimps Defendant associated with through his Facebook friends, posts, and groups he was a member of.¹³⁹

There is a tendency to associate a negative stigma with police departments that use Facebook for predictive crime prevention.¹⁴⁰ In response, Facebook’s social media guide for law enforcement officials bans the practice of officers creating fake profiles simply to pose as “members of the community” while gathering personal information on other users.¹⁴¹ However, officers frequently create fictitious profiles to connect with suspects they consider a high risk of committing a future crime or have already committed a crime.¹⁴² Courts have allowed evidence of a suspect’s involvement in the prostitution trade that officers gather from Facebook accounts and text messages from a defendant’s cell phone as long as the prosecution proves authorship of the messages by a preponderance of the

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ Kristan T. Harris, *Police are Creating Fake Accounts on Facebook so They Can Monitor You, How to Identify a Fake Account*, Copblock (Nov. 17, 2015) <http://www.copblock.org/147180/police-are-creating-fake-accounts-on-facebook-so-they-can-monitor-you-how-to-identify-a-fake-account/>.

¹⁴¹ *Id.*

¹⁴² *Id.*

evidence.¹⁴³ In these undercover operations using Facebook, law enforcement successfully prosecute traffickers without causing any unnecessary victimization.¹⁴⁴ Because there are no actual victims and therefore no need for recovery, rehabilitation, or other remedies, law enforcement should widely adopt this preventative approach in the fight against sex trafficking.

B. Legal limitations to access to stored communications and solutions to overcome potential legal issues

The fruits of mass surveillance have been used almost exclusively to convict criminal defendants, and the popularity of social media platforms have drastically increased online communications sources from which law enforcement derive incriminating evidence.¹⁴⁵ This section analyzes several legal issues that may arise when the Government uses Facebook communications to prosecute sex traffickers, along with potential solutions to overcome any obstacles. Part I examines the protections electronic communications receive under the Stored Communications Act, and how far these protections extend. Part II describes Facebook's privacy policies, and applies the company's law enforcement guidelines to the undercover Facebook preventative method this article advocates for. Finally, this approach may also implicate 4th amendment protections, and Part III addresses these potential constitutional implications.

Stored Communications Act

The Fourth Amendment protects the people's right "to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures."¹⁴⁶ After *Katz*, the Fourth Amendment right to privacy has been understood as one that protects people and not places.¹⁴⁷ If the government violates a subjective expectation of privacy that society recognizes as reasonable, the Fourth Amendment prevents any evidence from the search or seizure from being used against the person.¹⁴⁸ This protection may also

¹⁴³ *United States v. Brinson*, 772 F.3d 1314, 1320 (10th Cir. Okla. 2014).

¹⁴⁴ *Id.*

¹⁴⁵ Joshua A.T. Fairfield and Erik Luna, *Digital Innocence*, 99 CORNELL L. REV. 981, 984 (2014).

¹⁴⁶ 146. U.S. CONST. amend. IV.

¹⁴⁷ *Katz v. United States*, 389 U.S. 347, 351 (U.S. 1967).

¹⁴⁸ *Id.*

extend to electronic searches.¹⁴⁹ However, when applied to content stored online, its constitutional protections are much weaker.¹⁵⁰ This is in part due to the definition of the right “to be secure” in spatial terms that does not extend the “reasonable expectation of privacy” test in an online context.¹⁵¹

In response to the challenges presented when applying Fourth Amendment protections to information stored online and acknowledging that traditional protections were lacking for internet users, Congress enacted the Stored Communications Act (“SCA”) as Title II of the Electronic Communications Privacy Act in 1986 to address both voluntary and compelled disclosure of “stored wire and electronic communications and transactional records” held by third-party internet service providers (“ISPs”).¹⁵² Because internet users knowingly and voluntarily entrust a third-party to protect the security of their online information, the Fourth Amendment and Third-Party doctrines as traditionally applied would usually hold in these situations that they have given up any reasonable expectation of privacy.¹⁵³ The Third-Party doctrine provides that “knowingly revealing information to a third party relinquishes Fourth Amendment protection in that information.”¹⁵⁴ Under this doctrine, once you voluntarily turn over information to a third party, only a subpoena and prior notice - a lower threshold than probable cause - are required to order an ISP to release the contents of an email or files stored in their servers.¹⁵⁵ Later codified under 18 U.S.C. §§2701-2712 – Unlawful Access to Stored Communications – the SCA essentially created Fourth Amendment-like privacy for digital communications by placing limitations on when the Government may compel an ISP to turn over information.¹⁵⁶ It also limited the ability of commercial ISPs to release information to non-government entities.¹⁵⁷

§2702 of the SCA defines two types of online services, “electronic communication services” and “remote computing services.”¹⁵⁸ The Act defines the first type as “...any service which provides to users thereof the

¹⁴⁹ *United States v. White*, 401 U.S. 745,754 (U.S. 1971).

¹⁵⁰ Orin S. Kerr, *A User’s Guide to the Stored Communications Act, and a Legislator’s Guide to Amending It*, 72 *George Washington L. Rev.* 1208, 1210 (2004).

¹⁵¹ U.S. CONST. amend. IV.

¹⁵² 18 U.S.C. 121 §2701 (1986).

¹⁵³ Orin S. Kerr, *The Case for the Third-Party Doctrine*, 107 *MICHIGAN L. REV.* 561, 563 (2009).

¹⁵⁴ *Id.*

¹⁵⁵ Orin S. Kerr, *supra* note 150.

¹⁵⁶ 18 U.S.C. 121 §§2701-2712 (1986).

¹⁵⁷ 18 U.S.C. 121 §2701(a)(1).

¹⁵⁸ 18 U.S.C. 121 §2702(a)(3) (1986).

ability to send or receive wire or electronic communications.”¹⁵⁹ The second type is defined as “the provision to the public of computer storage or processing services by means of an electronic communications system.”¹⁶⁰ Under certain conditions, a public ISP may voluntarily disclose customer communications or records, but ISPs generally are not allowed to share the contents of any electronic communications.¹⁶¹ However, ISPs may share non-content information, which includes log data and the name of the recipient of an email, with any non-governmental entity.¹⁶² An ISP may also share the contents of a user’s communications authorized by that user.¹⁶³ In addition, §2703 of the SCA elaborates on the conditions under which the Government may compel an ISP to share both content and non-content information for electronic communication services and remote computing services.¹⁶⁴ The SCA made a significant distinction between communications held in electronic communications services, which require a search warrant and probable cause, and those in remote computing services, which only require a subpoena or court order, with prior notice.¹⁶⁵

It is widely understood today that stored communications such as emails receive fourth-amendment like protection under the SCA, and courts’ interpretations of the Act have evolved to include social media platforms such as Facebook and Instagram that did not yet exist in the context the legislation addressed at the time of the SCA’s creation.¹⁶⁶ Congress originally intended the Act to apply only to electronic communications that are not supposed to be available to the public.¹⁶⁷ Despite this limitation, courts since then have held that SCA protections can be extended to include social media communication.¹⁶⁸

To determine whether SCA protections can be extended to social media communications, a court must distinguish between electronic communication services and remote computing services.¹⁶⁹ In *Crispin*, the court held that unopened messages on social networking websites are protected electronic communication services in electronic storage because

¹⁵⁹ *Id.*

¹⁶⁰ 18 U.S.C. 121 §2702(b).

¹⁶¹ 18 U.S.C. 121 §2702(b)(1).

¹⁶² *Id.*

¹⁶³ 18 U.S.C. 121 §2702(b)(3).

¹⁶⁴ 18 U.S.C. §2703(a) (1986).

¹⁶⁵ *Id.*

¹⁶⁶ Christopher J. Borchert, *Reasonable Expectations of Privacy Settings: Social Media and the Stored Communications Act*, 13 DUKE L. AND TECH. REV. 36, 38 (2015).

¹⁶⁷ *Id.*

¹⁶⁸ *Crispin v. Christian Audigier, Inc.*, 717 F. Supp. 2d 965, 967 (C.D. Cal. 2010).

¹⁶⁹ *Id.* at 972.

they are included under “temporary, intermediate storage.”¹⁷⁰ Opened messages are remote computing services that provide electronic storage services.¹⁷¹ In contrast, the *Crispin* court held that wall posts and comments are not afforded the same protection as messages in temporary, intermediate storage.¹⁷² Instead, they are stored for backup protection and are covered under a separate SCA subsection.¹⁷³ Courts have classified wall posts and comments as electronic bulletin board services, or BBS. BBS are available to the public and therefore not covered by the SCA, although if a user restricts access to postings and comments, they may become subject to SCA coverage.¹⁷⁴

Inquiries such as whether the number of “friends” a Facebook user is connected to or whether the number of “likes” a comment or post receives is relevant to the level of protection under the SCA remain unanswered. In the meantime, law enforcement can rely on several elements that will not present challenges when they carry out undercover Facebook operations. First, once an undercover officer becomes Facebook “friends” with a suspect or known trafficker, concerns relating to protected messages that are held in “temporary and intermediate storage” no longer apply due to a Facebook user’s ability to access all messages with their friends at any time through Facebook messenger.¹⁷⁵ Further, if a Facebook user does not set their profile to private, content from their profile is also not afforded the same SCA protection as in this situation the information is considered non-restricted BBS.¹⁷⁶ Lastly, courts have held that Facebook may not quash valid search warrants requiring it to disclose user information, but search warrants do not even play a part in these operations as law enforcement already has access to the information they need simply by clicking on a friend’s profile.¹⁷⁷ Facebook’s own policies regarding privacy and cooperation with law enforcement may provide additional answers to questions on when law enforcement may use incriminating evidence from Facebook accounts to prosecute.¹⁷⁸

¹⁷⁰ See 18 U.S.C. §2510(17)(A)

¹⁷¹ See 18 U.S.C. §2702(a)(2).

¹⁷² *Crispin*, *supra* note 168.

¹⁷³ See 18 U.S.C. §2702(B).

¹⁷⁴ *Id.*

¹⁷⁵ FACEBOOK MESSENGER, www.messenger.com (last accessed Jan. 18, 2017).

¹⁷⁶ See 18 U.S.C. §2702(B).

¹⁷⁷ *Search Warrants Directed to Facebook, Inc. v. New York County Dist. Attorney’s Off.*, 132 A.D.3d 11, 14 (N.Y. App. Div. 1st Dep’t. 2015).

¹⁷⁸ FACEBOOK AND LAW ENFORCEMENT, <https://www.facebook.com/safety/groups/law> (last accessed Jan. 18, 2017).

Facebook and Law Enforcement

Courts have ordered Facebook to disclose substantial amounts of information including all records of a user's searches and all communications between the user and other Facebook members, pursuant to a search warrant supported by probable cause premised on factors such as numerous public Facebook posts supporting illegal activities.¹⁷⁹ Other courts have upheld indictments that rested in large part on evidence uncovered when an undercover officer posing as a minor on Facebook made contact with a suspected trafficker and agreed to a meeting at which pimping charges followed.¹⁸⁰

Online content stored by Facebook is disclosed in accordance with §§2701-2712 of the SCA, under which a valid subpoena is generally required to compel disclosure of basic user information.¹⁸¹ This may include the name of the user, email address(es), and IP address(es), if available.¹⁸² For disclosure of the stored contents of any account including messages, photos, and timeline posts, a search warrant supported by probable cause must be provided.¹⁸³ Facebook has also pledged to work with law enforcement to keep people on Facebook safe.¹⁸⁴ The company has stated that it will provide information to law enforcement if there is an ongoing emergency, or in the case of fraud or other illegal activity.¹⁸⁵ Its privacy and data policies state that they *may* "access, preserve, and share your information in response to a legal request" (such as a search warrant, court order, or subpoena) if they have a good faith belief that the law requires them to do so.¹⁸⁶

Requesting disclosure of content is simple but there are limitations to when law enforcement may obtain and use information from Facebook user profiles.¹⁸⁷ When a law enforcement official subpoenas Facebook or requests information through its online submission service, the company is only required to disclose data that they are "reasonably able" to locate and retrieve, and the subpoena must state with particularity the data it is

¹⁷⁹ *Information for Law Enforcement Authorities*, Facebook (last accessed Jan. 18, 2017) <https://www.facebook.com/safety/groups/law/guidelines/>.

¹⁸⁰ *United States v. Young*, 2016 WL 729584 (N.D. Cal. 2016).

¹⁸¹ See 18 U.S.C. §2703(c)(2).

¹⁸² *Id.*

¹⁸³ Facebook, *supra* note 179.

¹⁸⁴ FACEBOOK AND LAW ENFORCEMENT, *supra* note 178.

¹⁸⁵ *Id.*

¹⁸⁶ *Data Policy*, Facebook (Sept. 29 2016)

https://www.facebook.com/full_data_use_policy.

¹⁸⁷ *Id.*

requesting.¹⁸⁸ Once a user has deleted information from their account, Facebook servers do not retain that data unless they receive a valid law enforcement request for preservation.¹⁸⁹ Furthermore, in the absence of exigent circumstances such as child exploitation cases or other emergencies, the social media giant's policy is to notify users of law enforcement requests for information prior to disclosure.¹⁹⁰ To delay notification, law enforcement agents must obtain a court order or other equivalent process.¹⁹¹ In the previous Jane Doe example, a search warrant was unnecessary as the government already had access to all the incriminating evidence they needed to bring their case against Defendant.¹⁹² Not only were they able to document various phone conversations and text messages, they had Facebook messenger conversations initiated by Defendant in which he induced Jane Doe to engage in prostitution.¹⁹³ More federal agencies are using undercover operations, and the Justice Department has issued guidelines to oversee these operations.¹⁹⁴ These guidelines are in place to prevent law enforcement from using tactics such as creating fake Facebook profiles using photos of another individual without his or her permission.¹⁹⁵ Under the newer proposed undercover Facebook approach, undercover agents are not engaging in prohibited investigative tactics, and also have the advantage of having access to Facebook communications without needing a search warrant.¹⁹⁶ Again, it is important to note that Facebook users who allow the general public to view the content of their accounts are not entitled to the same SCA protections.¹⁹⁷ A user who publishes content under the public setting is allowing everyone to access and use that information, which raises additional questions that may be resolved by turning to the supreme law of the land: the Constitution.¹⁹⁸

¹⁸⁸ FACEBOOK AND LAW ENFORCEMENT, *supra* note 178.

¹⁸⁹ *Id.*

¹⁹⁰ *Id.*

¹⁹¹ *Id.*

¹⁹² USA v. Hollins, *supra* note 126.

¹⁹³ *Id.*

¹⁹⁴ Eric Lichtblau and William M. Arkin, *More Federal Agencies Are Using Undercover Operations*, The New York Times (Nov. 15, 2014) <https://www.nytimes.com/2014/11/16/us/more-federal-agencies-are-using-undercover-operations.html>.

¹⁹⁵ *Id.*

¹⁹⁶ *Id.*

¹⁹⁷ See 18 U.S.C. 2702(a)(1).

¹⁹⁸ U.S. CONST.

C. Constitutional Limitations: Reasonable Expectation of Privacy and the False Friend and Plain View Doctrines in Electronic Communications

As previously stated, the 4th amendment protects individuals from unreasonable searches and seizures.¹⁹⁹ A search is unlawful and violates the 4th amendment when the government intrudes on a subjective expectation of privacy that society recognizes as reasonable.²⁰⁰ In *Katz*, the Supreme Court held that incriminating statements the government obtained against Katz through an electronic listening and recording device placed on the outside of the public phone booth from which Katz placed his calls were obtained in violation of Katz's Fourth Amendment rights.²⁰¹ In contrast, a person who voluntarily turns over information to third parties has no legitimate expectation of ²⁰²In *Smith*, the Supreme Court held that the installation and use of a pen register at a telephone company was not an unconstitutional search because Smith did not have a reasonable expectation of privacy in the phone numbers he dialed.²⁰³ All phone users realize that their phone company has records of all calls they make & receive.²⁰⁴

An expectation of privacy must be reasonable, and the reasonableness element disappears when an individual shares information with a third party.²⁰⁵ Under the false friends' doctrine, there is no right to expect that something you voluntarily reveal to someone else will remain private.²⁰⁶ In *White*, the Supreme Court held that secret electronic recording of conversations between an individual and government informant without a warrant did not violate the 4th amendment.²⁰⁷ The key notion in *White* was that when an individual invites someone into their home, they assume the risk that the third party will divulge any information they receive, regardless of whether the third party turns out to be a confidential informant.²⁰⁸

4th amendment protections also do not extend to searches carried out by government agents that fall under the plain view doctrine.²⁰⁹ In *Horton*, the

¹⁹⁹ U.S. CONST. amend. IV.

²⁰⁰ *Katz*, *supra* note 147.

²⁰¹ *Id.*

²⁰² *Smith v. Maryland*, 442 U.S. 735, 742 (1979).

²⁰³ *Id.*

²⁰⁴ *Id.*

²⁰⁵ *White*, *supra* note 149.

²⁰⁶ *Id.*

²⁰⁷ *Id.*

²⁰⁸ *Id.*

²⁰⁹ *Id.*

Supreme Court held that if officers have a right to be where they are, then they can seize any evidence that is in plain view.²¹⁰ This would mean that if, for example, an officer turns over a pillow looking for stolen coins and finds a gun, the officer can seize that gun.²¹¹ As long as the officer had a prior justification for an intrusion in the course of which he came across a piece of incriminating evidence, and so long as the scope of the search is not enlarged, the seizure is constitutional.²¹²

Since Facebook was launched in 2004, many agencies have utilized the social media giant as a tool in their civil and criminal investigations.²¹³ Like many other social media platforms, Facebook offers its users the option to customize their privacy settings.²¹⁴ Whether government agents violate the 4th amendment when viewing the contents of a Facebook user's profile is a question that requires determining whether Facebook and other social media users have a reasonable expectation of privacy in their online postings.²¹⁵

In an unprecedented ruling, a New York court held that there can be no expectation of privacy in a publicly posted "tweet."²¹⁶ The court in *Harris* ordered the criminal defendant's tweets and Twitter account information be disclosed to the New York District Attorney's Office.²¹⁷ This case was significant because it applied 4th amendment principles of privacy to the evolving medium of social media and served as a guideline for the public's expectations of privacy in the Internet age.²¹⁸ Notably, Judge Sciarrino stated that posting a tweet is analogous to screaming out of a window, a situation where no one can have a reasonable expectation of privacy.²¹⁹ Furthermore, courts have gone further and held that users of social media sites generally don't have a reasonable expectation of privacy.²²⁰ The court in *Romano* held that because social media sites do not guarantee absolute

²¹⁰ *Id.*

²¹¹ *Id.*

²¹² *Id.*

²¹³ Stu Woo, *The Facebook: Not Just for Students*, *The Brown Daily Herald* (Nov. 3, 2005) <http://www.browndailyherald.com/2005/11/03/the-facebook-not-just-for-students>.

²¹⁴ FACEBOOK HELP CENTER (last accessed Jan.21, 2017) <https://www.facebook.com/help/325807937506242/>.

²¹⁵ *Id.*

²¹⁶ *People v. Harris*, 2012 WL 2533640 (N.Y. City Crim. Ct. June 30, 2012).

²¹⁷ *Id.*

²¹⁸ *Id.*

²¹⁹ *Id.*

²²⁰ *Romano v. Steelcase, Inc.*, 907 N.Y.S.2d 650, 433 (Sup. Ct. Suffolk Co. 2010).

privacy and because posts on those sites may be accessible by others despite privacy settings, any expectation of privacy cannot be reasonable.²²¹

Further, when law enforcement officers access Facebook profiles to search for incriminating evidence or any other information, they may be implicating the 4th amendment by acting as a false friend.²²² When an undercover officer first requests to add an individual on Facebook by clicking the “Add Friend” button, he or she takes the first step toward acting as a “false friend.”²²³ However, prior case law has shown that courts do not afford individuals who voluntarily provide a third-party information with the same 4th amendment protection as individuals who have a reasonable expectation of privacy.²²⁴ An individual accepting a Facebook friend request is analogous to an individual inviting a confidential informant to enter their home; in both situations, they are assuming the risk.²²⁵

On the other hand, the false friend doctrine does not apply in situations where the individual’s Facebook page is open to the public, and no friend request is necessary.²²⁶ If agents stumble on evidence of criminality on Facebook profiles that have not been made private, the plain view doctrine would squarely cover these types of postings.²²⁷ The plain view doctrine covers anything that is plainly evidence of criminality, so it would cover any communications with references and explicit statements regarding inducing or enticing an individual to engage in prostitution.²²⁸ Further, even if the undercover agent had to add the individual as a Facebook friend, the plain view doctrine would still apply as it emphasizes that any evidence in plain sight is covered as long as the officer had a right to be where he or she was.²²⁹ Everyone has a right to add an individual on Facebook, and it is up to the user to choose their privacy settings.²³⁰

VII. ENTRAPMENT

Entrapment is a complete defense to a criminal charge, and government agents may not induce an innocent person to commit a crime so that the

²²¹ *Id.*

²²² FACEBOOK HELP CENTER, *supra* note 214.

²²³ *Id.*

²²⁴ *Katz*, *supra* note 147.

²²⁵ *White*, *supra* note 149.

²²⁶ *Id.*

²²⁷ *Horton*, *supra* note 209.

²²⁸ *Id.*

²²⁹ *Id.*

²³⁰ FACEBOOK HELP CENTER, *supra* note 214.

Government may then prosecute.²³¹ A criminal defendant must meet two elements for a valid entrapment defense: government inducement of the crime and the defendant's lack of predisposition to commit a crime.²³² Inducement is the threshold issue to an entrapment defense, and requires more than mere solicitation or use of pretense or deceit.²³³ The criminal defendant has the burden of proving that the government acted with at least mild coercion, or took other actions such that "a law-abiding citizens will to obey the law could have been overborne."²³⁴ However, even if a defendant is able to prove the government induced the crime, the government still wins if they are able to show a predisposition to commit the crime.²³⁵

In the Phoenix fake sex-slave auction, the attorneys for the accused pimps relied heavily on entrapment defenses.²³⁶ They heavily emphasized the extravagance of the operation and argued that were it not for the agents who induced the defendants to commit sex crimes by setting up the fake auction, their clients would never have attempted to buy women as sex slaves.²³⁷ Entrapment defenses were unsuccessful for all of the defendants, as the government easily proved how each of them were predisposed to commit their crimes.²³⁸ One of them had in the past allegedly sent \$5,000 for a mail-order bride, while another invited an undercover FBI agent into his home to tour the sex dungeon hidden inside his home.²³⁹ Court records showed the extreme lengths the men took to prepare their homes for the sex slaves they thought they would be acquiring, including soundproof walls and beds with chains attached.²⁴⁰ They were all given chances to "rescue" the fictitious female slaves, but none of them were interested in doing so.

²³¹ *Entrapment – Elements*, Offices of the United States Attorneys (last accessed Jan. 21, 2017) <https://www.justice.gov/usam/criminal-resource-manual-645-entrapment-elements>.

²³² *Mathews v. United States*, 485 U.S. 58, 63 (U.S. 1988).

²³³ *Sorrells v. United States*, 287 U.S. 435, 451 (U.S. 1932).

²³⁴ *United States v. Kelly*, 748 F.2d 691, 698 (D.C. Cir. 1984).

²³⁵ *Id.*

²³⁶ Allan Smith, *The FBI Set Up a Fake Sex Slave Auction in a Wealthy Suburb as Part of a Bizarre Sting Operation*, Business Insider (Jul. 18, 2014)

<http://www.businessinsider.com/fbi-sex-slave-auction-2014-7>.

²³⁷ *Id.*

²³⁸ *Id.*

²³⁹ Kate Briquet, *FBI Uncovers National Sex Dungeon Ring*, The Daily Beast (Oct. 6, 2015) <http://www.thedailybeast.com/articles/2015/10/07/fbi-uncovers-red-state-sex-dungeon-ring.html>.

²⁴⁰ *Id.*

These were the actions that first put the four men on law enforcement's radar.²⁴¹

Because law enforcement only target known traffickers when conducting the newer undercover Facebook operations, a defendant is unlikely to succeed with an entrapment defense.²⁴² There can be a blurry line between proactive law enforcement and inducing known traffickers to solicit vulnerable women to engage in prostitution, but the suspects have landed on government radar as a consequence of prior criminal or suspected criminal activity.²⁴³ As an extra precaution, officers participating in these operations should be trained to wait for the suspect to initiate any suggestions regarding selling sex for money. These cases are "pro-active" because law enforcement are able to act before the offender commits another crime, and as long as undercover agents do not improperly induce the suspect to commit a criminal act by raising the topic of prostitution, they will not need to be concerned with successful entrapment defenses.²⁴⁴

CONCLUSION

In a world where self-driving cars and delivery drones are no longer fictitious visions of the future, it is shocking to confront the reality that so many sex trafficking victims are still deprived of their basic human dignity. The global struggle to combat human trafficking has brought together individuals and groups who have forged alliances to bring our world one step closer to a day when human trafficking ceases to exist, but every state must continue to do its part in the fight to end sex trafficking. Existing anti-trafficking laws and remedies have inspired creative law enforcement approaches that have successfully captured many traffickers who pimped out women and treated them as property, but law enforcement agencies must continue to find more effective solutions. Targeting prevention and increasing resources to train agents at the state level will provide more uniformity in anti-sex trafficking legislation and programs, and widespread adoption of the undercover Facebook approach this article advocates for will help law enforcement agencies take a major step forward in the battle against this form of modern day slavery.

²⁴¹ *Id.*

²⁴² USA v. Hollins, *supra* note 126.

²⁴³ Kate Briquet, *supra* note 239.

²⁴⁴ Anthony J. Colleluori, *Defending the Internet Sex Sting Case*, American Bar GPSLO (Jan.2010)

http://www.americanbar.org/content/newsletter/publications/gp_solo_magazine_home/gp_solo_magazine_index/colleluori.html.