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Human Trafficking in the Age of the New Sharing Economy: Why Victims Should be Able to Pursue Civil Remedies against Airbnb through the Traditional Tort Framework

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Human Trafficking in the Age of the New Sharing Economy: Why Victims Should be Able to Pursue Civil Remedies against Airbnb through the Traditional Tort Framework

Cover Page Footnote
Note

**HUMAN TRAFFICKING IN THE AGE OF THE
NEW SHARING ECONOMY:
WHY VICTIMS SHOULD BE ABLE TO
PURSUE CIVIL REMEDIES AGAINST AIRBNB
THROUGH THE TRADITIONAL TORT FRAMEWORK**

STEPHANIE ROMÁN CABÁN*

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I. INTRODUCTION: BACKGROUND

Prior to discussing how the traditional tort law provides the ideal mechanism for human trafficking victims to procure civil remedies against Airbnb, it is crucial to have an understanding of how globalization led to the emergence of human trafficking and how the international community as a whole, as well as individual states, have attempted to address this phenomenon through developments in the law. The United Nations' initial passage of the United Nations Convention Against Transnational Organized Crime and subsequent Palermo Protocols spearheaded a global cooperation movement against human trafficking by asking countries to adopt appropriate legislative and alternative measures to address human trafficking.¹ The United States is most notably known for attempting to combat human trafficking through the passage of the Victims of Trafficking and Violence Protection Act of 2000 and its subsequent re-authorizations.² Additionally, all fifty states, including the District of Columbia, have followed suit and adopted their own legal frameworks to combat trafficking.³

This Note will proceed in five parts. Part I will discuss the historical background surrounding the emergence of human trafficking as well the United Nations and United States' efforts to combat and prevent it; due to the limited scope of this Note individual state efforts will not be discussed. Part II will delineate the historical background of the new sharing economy and the legal systems reaction to new sharing companies. Furthermore, Part III.A explains how Airbnb's unique business model enables it to avoid being subject to regulations, otherwise imposed on the traditional lodging industry; and creates an attractive environment for human traffickers. Part III.B will explain how victims have held the traditional lodging industry liable for participating in a

1. See, e.g., Convention Against Transnational Organized Crime, Dec. 3, 2005, TIAS 13127 [hereinafter Convention]; Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Dec. 3, 2005, TIAS 13127 [hereinafter Palermo I]; Protocol Against the Smuggling of Migrants by Land, Sea and Air, Dec. 3, 2005, TIAS 13217 [hereinafter Palermo II].

2. See, e.g., Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, 114 Stat. 1464 (2000) [hereinafter TVPA]; Trafficking Victims Protection Reauthorization Act of 2003, Pub. L. No. 108-193, 117 Stat. 2875 (2003) [hereinafter TVPRA of 2003]; Trafficking Victims Protection Reauthorization Act of 2005, Pub. L. No. 109-164, 119 Stat. 3558 (2006) [hereinafter TVPRA of 2005]; William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. No. 110-457, 122 Stat. 5044 (2008) [hereinafter Wilberforce Act].

3. A LOOK BACK: BUILDING A HUMAN TRAFFICKING LEGAL FRAMEWORK, POLARIS, 1-2, <https://polarisproject.org/wp-content/uploads/2019/09/2014-Look-Back.pdf>.

trafficking venture through both the TVPA and tort law; and how victims may pursue claims against Airbnb under either framework. Part IV will discuss Airbnb's counterargument. Finally, Part V will present conclusions.

II. HISTORICAL BACKGROUND

A. The Fall of the Soviet Union: Increased Globalization Leads to Increase in Human Trafficking

In the early 1990s, following the collapse of the Soviet Union and the end of the Cold War, the world experienced an increase in globalization as former communist countries traded and invested in global economic markets.⁴ Meanwhile, these former Soviet countries, still plagued by an economic shock, experienced the "growth of shadow economies and criminal networks" fueled by the decrease in migration barriers.⁵ Transnational organized crime (TOCs) groups shifted their focus from smuggling drugs and guns to trafficking and smuggling persons, a much more lucrative business model.⁶ TOCs began trafficking women and children, both especially vulnerable populations due to "the social and economic conditions" faced by them in their countries of origin.⁷

B. The United Nation's Response to the Emergence of Human Trafficking

TOCs rapidly developed powerful global enterprises, worth billions of dollars, by exploiting the open borders, free markets, and technological advances to traffic people.⁸ The Secretary General of the UN, Kofi A. Annan, recognized that due to the transnational nature of this crime, it was imperative to formulate a mechanism to

4. *Globalization*, KHAN ACADEMY, <https://www.khanacademy.org/humanities/us-history/modern-us/1990s-america/a/globalization> (last visited Mar. 22, 2020).

5. See Yuliya V. Tverdova, *Human Trafficking in Russia and Other Post-Soviet States*, SpringerLink (2010), <https://link.springer.com/article/10.1007/s12142-010-0188-1> (last visited Mar. 22, 2020) (describing the surge in human trafficking in post-soviet states following the fall of the Soviet Union); see also Donna M. Hughes, *The "Natasha" Trade: Transnational Sex Trafficking*, *National Institute of Justice Journal* (2001), <https://www.ncjrs.gov/pdffiles1/jr000246c.pdf> (last visited Mar. 22, 2020) (discussing the impacts socio-economic inequalities on the propensity in victimization of women and children in the human trafficking context).

6. Hughes, *supra* note 5 at 9.

7. United Nations Convention Against Transnational Organized Crime and the Protocols Thereto, United Nations Office on Drugs and Crime, iv, <https://www.unodc.org/documents/treaties/UNTOC/Publications/TOC%20Convention/TOCebook-e.pdf> (last visited Mar. 22, 2020).

8. *Id.* at iii.

foster international cooperation, the key to combating international criminals and helping vulnerable citizens throughout the world.⁹ On Nov. 15, 2000, the United Nations General Assembly adopted the Convention Against Transnational Organized Crime.¹⁰ The Convention effectively calls upon State Parties to adopt appropriate measures to prevent, investigate, and prosecute the offences, ancillary to human trafficking and smuggling of migrants, established in accordance with Articles 5, 6, 8, and 23 of the Convention.¹¹

The UN General Assembly supplemented the Convention, to address the exploitation of persons, through the adoption of the Palermo Protocols; however, our discussion is solely limited to Palermo I and Palermo II, respectively: 1) Protocol to Prevent, Suppress, and Punish Trafficking in Persons, Especially Women and Children; and 2) Protocol Against the Smuggling of Migrants by Land, Sea, and Air.¹²

The purposes behind Palermo I are as follows: “(a) [t]o prevent and combat trafficking in persons, paying particular attention to women and children; (b) [t]o protect and assist the victims of such trafficking, with full respect for their human rights and; (c) [t]o promote cooperation among States Parties in order to meet those objectives.”¹³ Palermo I marks the first attempt at defining trafficking in persons; a definition later modified and adopted by State Parties in their legislative measures. Under Palermo I, “trafficking in persons” is defined as, making consent irrelevant to victim status:

[T]he recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs[.]¹⁴

9. *Id.* at iv.

10. Convention, *supra* note 1.

11. *Id.*

12. Palermo I, *supra* note 1; Palermo II, *supra* note 1.

13. Palermo I, *supra* note 1, at art. 2(a).

14. *Id.* at art. 3.

In an attempt to combat and prevent TOCs from smuggling migrants, the UN General Assembly adopted the Palermo II.¹⁵ Under this protocol, “smuggling of migrants” has been defined as “the procurement, in order to obtain, directly or indirectly, a financial or other material benefit, of the illegal entry of a person into a State Party of which the person is not a national or a permanent resident.”¹⁶ Similar to its counterpart, Palermo I, it calls for cooperation among State Parties and adoption of legislative efforts to combat smuggling.¹⁷

*C. United States:
Congressional Response to Trafficking in Persons*

Prior to the adoption of the Convention along with Palermo I and II, existing legislation in the United States, as well as that in other countries, failed to adequately address human trafficking.¹⁸ The first major attempt to combat trafficking in the United States came with Congress’ enactment of the Victims of Trafficking and Violence Protection Act of 2000. This piece of legislation crafted specific offenses for sex and labor trafficking, both of which are pervasive in the United States. The TVPA sets forth criminal penalties for:

(a) [W]hoever knowingly—

(1) [I]n or affecting interstate or foreign commerce, . . . recruits, entices, harbors, transports, provides, obtains, advertises, maintains, patronizes, or solicits by any means a person; or

(2) [B]enefits, financially or by receiving anything of value, from participation in a venture which has engaged in an act described in violation of paragraph (1),

[K]nowing, or, except where the act constituting the violation of paragraph (1) is advertising, in reckless disregard of the fact, that means of force, threats of force, fraud, coercion described in subsection (e)(2), or any combination of such means will be used to cause the person to engage in a commercial sex act, or that the person has not attained the age of 18 years and will be caused to engage in a commercial sex act, shall be punished as provided in subsection (b).¹⁹

15. Palermo II, *supra* note 1.

16. *Id.* at art. 3(a).

17. *Id.* at preamble.

18. TVPA of 2000, *supra* note 2, at § 102(b)(14).

19. 18 U.S.C. § 1591.

However, its strong prosecutorial focus obscures its purpose to protect victims.²⁰ Unfortunately, in a country where approximately 50,000 women and children were being trafficked annually, the TVPA neglected defenseless and vulnerable victims, most of whom had been trafficked into unfamiliar communities for the purpose of engaging in either the sex industry or forced labor.²¹ Congress addressed the shortcomings of the TVPA through the passage of: 1) Trafficking Victims Protection Reauthorization Act of 2003, 2) Trafficking Victims Protection Reauthorization Act of 2005, and 3) William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008.²²

Although the Trafficking Victims Protection Reauthorization Act of 2003 further enhanced prosecution of traffickers, it also provided an invaluable private right of action for victims of human trafficking.²³ Section 1595, of the TVPRA of 2003, entitled “an individual who is a victim of a violation of section 1589, 1590, or 1591 . . . [to] bring a civil action against the perpetrator in an appropriate district court of the United States and [seek to] recover damages and reasonable attorneys’ fees.”²⁴ Although admirable, the TVPRA of 2003 fails to acknowledge potential reluctance in seeking remedies against perpetrators by victims, all of whom have most likely been subject to physical or psychological abuse—an issue not addressed until 2008.²⁵ In an effort to prevent and prosecute trafficking perpetrated by US government personnel and contractors, Congress further amended the TVPA through the passage of the Trafficking Victims Protection Reauthorization Act of 2005.²⁶

The William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, unlike its predecessors, amended the TVPA’s civil remedy provision “to include liability against those who ‘knowingly benefit’ from what they knew or should have known was a trafficking enterprise.”²⁷ Under this statutory scheme, Congress remedied the major failure of the TVPRA of 2003 by allowing victims to seek redress also from those who had knowingly benefited from the criminal enterprise. According to Polaris, the illicit business of human trafficking relies on “other

20. Gallant Fish, *No Rest for the Wicked: Civil Liability Against Hotels in Cases of Sex Trafficking*, 23 *BUFF. HUMS. RTS. L. REV.* 119, 120–21 (2016–2017).

21. TVPA of 2000, *supra* note 2, at § 102(b)(1)-(3).

22. *M.A. v. Wyndham Hotels & Resorts, Inc.*, No. 2:19-cv-849, 2019 WL 4929297, at *6-7 (S.D. Ohio Oct. 7, 2019).

23. TVPRA of 2003, *supra* note 2, at § 4(a)(3).

24. *Id.*

25. TVPRA of 2000, *supra* note 2, at § 102(b)(2), (b)(6)-(7).

26. TVPRA of 2005, *supra* note 2.

27. Fish, *supra* note 19, at 120.

businesses and partners to flourish;” thus, it comes as no surprise that the main enablers and beneficiaries of this illicit trade is comprised of members of the lodging industry.²⁸ Now hotel owners benefiting from sex trafficking occurring within their walls “through increased revenues as a result of visitors renting rooms for sex” may be held civilly liable for their intentional or negligent conduct.²⁹ Although under used, the provision undeniably provides the victim with a potentially less intimidating environment to seek money damages against those who in essence participated in his or her victimization.

II. THE NEW SHARING ECONOMY: ADDRESSING LIABILITY CHALLENGES THROUGH TRADITIONAL TORT FRAMEWORK

A. Evolution of the Sharing Economy

Historically, the sharing economy centered around small scale, non-monetized, one-on-one transactions; however, as new technologies emerged its nature has been transformed.³⁰ Due to the advent of the Internet and mobile devices the sharing economy, now known as the new sharing economy, is “driven by the for-profit motives of behemoth companies” whose business models are centered around acting as intermediaries that facilitate peer-to-peer transactions for goods and services.³¹ Early new sharing economy companies, such as Craigslist and eBay, are known for facilitating and formalizing peer-to-peer transactions by connecting individuals to one another through its streamlined web platforms.³² Continued technological developments resulted in the expansion of new sharing economy companies, these companies now extend and impact a wide array of industries within the economy.³³ These advancements have positively impacted the growth of the economy—these have led to increased employment opportunities, increased availability of services and goods, and increased competition.³⁴ Still, the new sharing economy comes with

28. Brittany Anthony, et al., *On-Ramps, Intersections, and Exit Routes: A Roadmap for Systems and Industries to Prevent and Disrupt Human Trafficking, Hotels & Motels, Polaris* (2018), 5, <https://polarisproject.org/wp-content/uploads/2018/08/A-Roadmap-for-Systems-and-Industries-to-Prevent-and-Disrupt-Human-Trafficking.pdf>.

29. Fish, *supra* note 26.

30. Agnieszka A. McPeak, *Sharing Tort Liability in the New Sharing Economy*, 49 CONN. L. REV. 171, 177 (2016).

31. *Id.* at 178.

32. *Id.* at 178–79.

33. *Id.* at 179 (“Notable examples include lodging services, pet care, labor for small jobs, landing services, Wi-Fi sharing, and car-sharing services.”)

34. *Id.* at 180.

negative externalities, such as an increased risk of harm to participants and third parties.³⁵ Due to the rapid growth of the new sharing economy, it is difficult to properly address these negative externalities under existing legal frameworks.³⁶

B. Challenges Arising Out of the New Sharing Economy

1. Regulatory Challenges

For years, the traditional transportation industry has been subject to ample regulations, these include but are not limited to: special operation permits requirements, safety requirements, and price requirements.³⁷ These regulations are imposed in an effort to promote public safety, create fair markets, and mitigate the costs of negative externalities.³⁸ In the age of the new sharing economy, the traditional transportation industry has faced new challenges as transportation network companies (“TNCs”), not subject to the same regulations, have emerged. TNCs have swept the traditional transportation business by altering the business model typically employed by existing taxi companies. These new ridesharing companies’ business model revolves around the company serving as an intermediary, through its mobile platform, which facilitates peer-to-peer transactions between passengers and drivers.³⁹

Notable TNCs’, such as Uber and Lyft, connect passengers with drivers through mobile apps developed and managed by the company itself.⁴⁰ These companies require their users to create accounts in order to access their services.⁴¹ During this process, users provide their personal and financial information; as well as agree to terms and conditions, often including mandatory arbitration clauses.⁴² Uber and Lyft also perform mandatory background checks on users who register as drivers, who are classified as independent contractors.⁴³ The companies, not the drivers, manage payments and set rates through their respective apps.⁴⁴ It is evident that these companies are for-profit enterprises specializing in transportation services rather than online platforms

35. *Id.*

36. *Id.*

37. *Id.* at 184.

38. *Id.*

39. *Id.* at 174.

40. *Id.* at 180.

41. *Id.* at 180–81.

42. *Id.*

43. *Id.* at 181–82.

44. *Id.*

specializing in facilitating peer-to-peer transactions. Still, Uber and Lyft brand themselves as online platforms and vehemently deny being a transportation service provider in order to avoid being subject to common carrier regulations imposed upon members of the traditional transportation industry.⁴⁵ By touting themselves as platforms, these companies have effectively created unique business models that allow them to bypass traditional regulatory structures and gain unfair advantages in the transportation market.⁴⁶

The ability to evade regulations has resulted in a backlash from the taxi lobby, which has brought numerous legal challenges against Uber claiming the ridesharing company is engaging in “unfair competition and trade practices, false advertising, and tortious interference with business relations.”⁴⁷ The rise of ridesharing companies has highlighted the shortcomings of the regulatory system. As governmental entities take notice of these shortcomings, they have begun to create and implement regulations upon these companies.⁴⁸ For example, in a reactionary effort to address these issues, California opted to create a new hybrid regulatory framework tailored to address the unique issues phased when dealing with ridesharing services.⁴⁹ Other approaches include completely exempting TNCs from regulations, otherwise imposed on the traditional transportation industry, and banning TNCs that fail to comply with imposed regulations.⁵⁰ Despite the governmental will to address these new challenges arising due to the new sharing economy, it is unlikely that changes to the regulatory framework will be made in a timely manner due to the politically polarizing nature of the subject.

2. Tort Challenges

Tort law serves as a complimentary legal system that addresses regulatory gaps by providing a system of private liability where, regardless of fault, plaintiffs may hold wrongdoers liable for their wrongful actions.⁵¹ Under a basic negligence claim, wrongdoers may only be held liable if he or she is found to be at fault. This means that plaintiffs must prove, by a preponderance of the evidence, the

45. *Id.* at 183. (describing how these companies only provide “to the public . . . a way to get rides for payment, hire drivers, set prices or expectations for payment, and keep a considerable share of payments made for transportation services.”)

46. *Id.* at 183–84.

47. *Id.* at 184–85.

48. *Id.* at 186.

49. *Id.*

50. *Id.*

51. *Id.* at 189–90.

wrongdoer owed them a duty that was breached as a result of the wrongdoer's actions, and the breach led to the plaintiff suffering damages.⁵² Alternatively, if a wrongdoer is not at fault in the particular circumstance he or she may still be held liable under a theory of strict liability. In strict liability claims, plaintiffs no longer need to prove the duty and breach of duty elements rather the plaintiff must only prove the wrongdoer engaged "in a certain category of activity" which caused the plaintiff's injuries.⁵³

Originally, both negligence and strict liability theories were influenced by the economic realities surrounding legal enterprises or corporations, most of which were highly centralized at that time.⁵⁴ Still, both doctrines morphed and adapted over time to address new economic realities.⁵⁵ For instance, in the early twentieth century, the emergence of the taxi industry imposed various challenges on the tort law framework—defining the scope of liability for a decentralized industry was at the forefront of these challenges.⁵⁶ Taxi service companies did not reflect the traditional employer business models that gave rise to the theories of liabilities previously mentioned. These companies classified themselves as nonprofit-sharing corporations that focused solely on providing its members with a telephone service, to be used to connect drivers with passengers, and the advantages attached to the corporate name.⁵⁷ Drivers were routinely classified as independent contractors rather than employees of these taxi companies.⁵⁸ The new business model made it more difficult for injured passengers and third-parties to bring claims to hold the companies liable for the intentional or negligent actions of its drivers.⁵⁹

Attempts to shield themselves from liability, through their new business model, were of no avail since courts opted to redefine and expand the scope of liability. Courts expanded the scope of liability in order to hold these companies liable for the actions of its drivers, whom the courts likened to employees, not independent contractors. In *Callas v. Independent Taxi Owners Association*, the court found a taxi service company strictly liable for the actions of its driver under the doctrines of respondeat superior and joint venture

52. *Id.* at 190 (citing Oliver W. Holmes, *The Common Law* 5 (Boston: Little Brown, and Co., 1881).

53. *Id.*

54. *Id.* at 188–89.

55. *Id.*

56. *Id.* at 203.

57. *Id.* at 205.

58. *Id.*

59. *Id.*

liability.⁶⁰ The court reasoned these doctrines applied due to the company's "specific and unique structure."⁶¹ Similarly, in *Rhone v. Try Me Cab*, the court rejected the company's assertions that it should not be held liable for the negligence of a driver who was classified as an independent contractor.⁶² Courts will find taxi companies liable for the negligence of drivers, regardless of their classification or ownership over the cab, so long as the company has a registered name that is displayed on the cabs, profited from these services, and has authority to operate taxicabs.⁶³

The novel issues arising from the development of ridesharing companies in the new sharing economy parallel the issues previously addressed by courts during the emergence of taxi service companies. As "monetized, large enterprises," neither type of company should be able to escape liability for the tortious conduct of its drivers by employing business models that reject the traditional employer-employee business model.⁶⁴ Despite Uber's classification of its drivers as independent contractors and upon analyzing the actual structure of Uber's business model, a California court held that Uber drivers should be classified as employees.⁶⁵ This finding effectively broadened the scope of liability with respect to Uber and other similar ridesharing companies.⁶⁶ Whether ridesharing companies may be held liable for the tortious conduct of its drivers under a negligence theory will depend on whether and to what extent the company owes a duty to passengers and third parties.⁶⁷ The tort system's adaptable nature and unique ability to provide retrospective remedies provides a more efficient framework to address challenges arising under the new sharing economy, especially when the regulatory framework fails to address them.⁶⁸

60. *Id.* (citing *Callas v. Indep. Taxi Owners' Ass'n*, 66 F.2d 192 (D.C. Cir. 1933)). The doctrine of *respondeat superior* holds "an employer or principal liable for the employee's or agent's wrongful acts committed within the scope of the employment or agency." *Respondeat Superior* Definition, Black's Law Dictionary (11th ed. 2019), available at Westlaw. Joint venture liability holds each partner in a joint venture liable for the actions of the other. A joint venture is defined as "a business undertaking by two or more persons engaged in a single defined project." Joint Venture Definition, Black's Law Dictionary (11th ed. 2019), available at Westlaw.

61. *Id.*

62. *Id.* (citing *Rhone v. Try Me Cab Co.*, 65 F.2d 834 (D.C. Cir. 1933)).

63. *Id.* at 205–06.

64. *Id.* at 216.

65. *Id.* at 218–19 (citing *Berwick v. Uber Techs., Inc.*, No. 11-46739 EK, 2015 WL 4153765, at *6 (Cal. Dep't of Labor June 3, 2015)).

66. *Id.*

67. *Id.* at 218–20.

68. *Id.* at 188.

III. HUMAN TRAFFICKING AND THE AIRBNB

*A. Background:
Airbnb's Business Model*

Two roommates, struggling to afford rent, noticed an increased demand from conference attendees for affordable short-term lodging in San Francisco and began renting air mattresses in their loft.⁶⁹ After noticing the demand for their rentals, they decided to create an online platform, known as *airbedandbreakfast.com*, in order to reach more potential guests seeking accommodations in San Francisco.⁷⁰ *Airbedandbreakfast.com* grew to become Airbnb, a company with over 6 million listings across 191 countries and is currently valued at over \$31 billion, which is more than some of the biggest names in the hotel industry.⁷¹

Airbnb, a new sharing economy company, revolutionized the business model employed by members of the traditional lodging industry. In its unique model, Airbnb acts as an intermediary that facilitates and formalizes peer-to-peer short-term rentals between guests and hosts worldwide. Through Airbnb guests are able to rent a variety of different spaces that better meet their unique needs—guests can rent anything ranging from a small room in an apartment to an entire home. Similar to ridesharing companies, Airbnb requires hosts and guests to sign up on their platform and agree to its terms and conditions prior to being able to avail themselves of the services provided by Airbnb. Airbnb subjects U.S. based guests and hosts to background checks.⁷² Additionally, it provides users with 24/7 support relating to a variety of issues such as rebooking assistance, reimbursements, host insurance claims, and mediation.⁷³ Guests are required to pay their booking fees through Airbnb's online platform. Hosts advertising their spaces on Airbnb's platform are subject to a per booking host service fee, ranging anywhere between three and five percent of the total cost of

69. Josh Krauss, *The Sharing Economy: How State and Local Governments are Failing and Why we Need Congress to Get Involved*, 44 SW. L. Rev. 365, 367 (2014).

70. Rebecca Aydin, *How 3 Guys Turned Renting Air Mattresses in Their Apartment Into a 31 Billion Company, Airbnb*, BUSINESS INSIDER (Sept. 20 2019, 10:27 AM), <https://www.businessinsider.com/how-airbnb-was-founded-a-visual-history-2016-2> (last visited Mar. 22, 2020).

71. AIRBNB, *Your Safety is Our Priority*, <https://www.airbnb.com/trust> (last visited Apr. 26, 2020).

72. AIRBNB, *Airbnb Basics*, <https://www.airbnb.com/help/article/1308/does-airbnb-perform-background-checks-on-members> (last visited Apr. 26, 2020).

73. AIRBNB, *How Airbnb Protects Hosts*, https://www.airbnb.com/d/safety?from_footer=1 (last visited Apr. 26, 2020). Hosts are provided with \$1,000,000 property damage protection and Host Protection insurance that covers up to \$1,000,000 in liability against accidents.

booking; these are collected by Airbnb the moment a reservation is made.⁷⁴ Booking fees are charged by Airbnb in order to cover the costs of running this online platform and customer service.⁷⁵ Airbnb releases payouts to its hosts typically 24 hours after guests have checked into the rental.⁷⁶

1. Unique Dangers Posed by Airbnb's Business Model

Human traffickers, similar to successful entrepreneurs, develop business plans based on “established business models and best practices;” these plans are tailored as new technologies and companies arise.⁷⁷ The lodging industry is a key component of a trafficker's business model; in 2018, approximately 81% of all trafficking cases reported through the National Hotline originated in hotels or motels.⁷⁸ Traffickers find accommodations that provide a “good balance of quality and price” as well as give “a sense of anonymity and safety” to be desirable.⁷⁹ Accommodations that have distracted staff are even more desirable since the staff is more likely to overlook trafficking activity or signs thereof.⁸⁰ Unsurprisingly, a majority of victims surveyed report they were never identified nor received assistance from hotel staff, even when the signs of trafficking were obvious.⁸¹ As new sharing economy companies continue to emerge, especially in the transportation and lodging industries, there is no doubt that traffickers will adapt their existing business models in order to operate in conjunction with and exploit these legal companies.

In Toronto, Canada, police officers have noticed an emerging trend where traffickers use Airbnb rentals to create pop-up brothels.⁸² Airbnb's unique business model makes it more desirable than traditional lodging companies. Unlike hotels and motels, there is no face-to-face check in process for Airbnb rentals; in fact, once the booking is made online traffickers are not required to have contact with the hosts which results in increased anonymity for

74. AIRBNB, *How to Make Money on Airbnb*, https://www.airbnb.com/d/financials?from_footer=1 (last visited Apr. 26, 2020).

75. AIRBNB, *Earn Money as an Airbnb Host*, https://www.airbnb.com/host/homes?from_footer=1 (last visited Apr. 26, 2020).

76. AIRBNB, *How You Make Money on Airbnb*, <https://www.airbnb.com/d/financials> (last visited Apr. 26, 2020).

77. Anthony, *supra* note 27, at 4.

78. *Id.* at 69.

79. *Id.*

80. *Id.*

81. *Id.* at 74.

82. Jackie Marchildon, *Airbnb Rentals Are Increasingly Being Used for Human Trafficking*, Police Say, GLOBAL CITIZEN (Feb. 23, 2018), <https://www.globalcitizen.org/en/content/airbnb-human-trafficking/> (last visited Apr. 26, 2020).

all parties involved. Increased anonymity means it is less likely that hosts or Airbnb itself will report suspicious activity; those neighboring these properties might also not report the activity. The lack of staff overseeing Airbnb rentals decrease the risk that someone will detect red flags, such as excessive foot traffic, condoms in trash cans, and presence of drugs.⁸³ Airbnb's business model creates an environment ripe for exploitation by human traffickers.

*B. Comparison:
Regulations and Civil Liability as
Applied to the Traditional Lodging Industry and Airbnb*

1. Application and Failures of the Regulatory Regime

The traditional lodging industry is subject to a wide array of regulations imposed by state and local governments in an effort to achieve some of the same objectives as those of the regulations imposed on the taxi industry. Similar to TNCs, Airbnb invokes its unique business model as a means to evade being subject to the same regulations as the traditional lodging industry.⁸⁴ Its ability to operate in a “regulatory gray zone” reveals the dark side of the new sharing economy—“damage to the fabric of local communities, and threats to consumer safety and fair competition.”⁸⁵ Initially, Airbnb ardently fought against all efforts to subject their rentals to the same occupancy taxes imposed on the traditional lodging industry.⁸⁶ Continued backlash resulted in Airbnb reversing its position to an extent; hosts rather than Airbnb are subject to these occupancy taxes.⁸⁷ Still hosts continue to fail to pay these taxes all while Airbnb denies liability for their actions and continues profiting from these non-compliant rentals.⁸⁸ Continued failure and unwillingness to pay occupancy taxes, allows Airbnb to charge lower prices for its accommodations than hotels and motels and continue profiting from unfair advantages.⁸⁹

Additionally, Airbnb rentals are not subject to the same garden variety of regulations already routinely imposed on the traditional lodging industry in order to ensure guest safety.⁹⁰ Airbnb's CEO

83. Anthony, *supra* note 27, at 71.

84. Stephanie J. Knightly, *Regulating Innovation: The Positive Economic Impact of Taxing Airbnb Like the Hotel Industry*, 51 SUFFOLK U.L. REV. 457, 457 (2018).

85. Abbey Stemler, *The Myth of the Sharing Economy and its Implications for Regulating Innovation*, 67 EMORY L.J. 197, 203 (2017).

86. Knightly, *supra* note 83, at 464–65.

87. *Id.* at 465.

88. *Id.* at 465.

89. *Id.*

90. Casey Rockwell, et al., *Legal Ambiguity as a Competitive Advantage: Airbnb's Use of Technological Novelty to Avoid Liability*, 46 REAL EST. L.J. 356, 357 (2017).

believes that there is no need for these regulations to be imposed on them because Airbnb is able to screen out bad behavior through other methods more efficiently.⁹¹ For example, Airbnb's model subjects hosts to reputation systems and delegates to them the responsibility of abiding by local laws, including those imposing taxes and requiring the installation of safety devices.⁹² Airbnb contends that these reputation systems are more effective than governmental regulations because it can screen both guest and host bad behavior.⁹³ Reputation systems predict future performance by relying on the following three basic assumptions: 1) the review provided is an accurate representation of the quality of the past transaction; 2) users cannot manipulate the system by providing fraudulent reviews; and 3) the information is interpreted accurately by users.⁹⁴ Although the system might adequately filter out some bad behavior, the assumptions it relies on makes it an inadequate system for addressing human trafficking. It would be naïve to assume traffickers would not manipulate these reviews or provide accurate representations of the quality of the transaction. Likewise, hosts are unlikely to notice signs of trafficking because they do not exercise a lot of oversight over the properties or their guests; even if hosts notice signs of trafficking leaving a review online about this will not be sufficient deter the guest's behavior. Lack of regulations therefore enable Airbnb to continue profiting and escaping liability while traffickers continue to utilize these rentals.

2. Civil Liability as Applied to the Traditional Lodging Industry

Recently, *In re Hotel Industries Sex Trafficking Litigation*, victims petitioned a federal panel to consolidate over twenty-one lawsuits pending across twelve districts into a single case, to be heard in federal court in Columbus, on the basis that all contain the same basic allegations.⁹⁵ All of these cases involved victims who were regularly trafficked out of the corresponding defendant's hotel properties, while the hotels financially benefited from the criminal

91. Stemler, *supra* note 84, at 218.

92. Michael O'Regan, *Airbnb Must Face the Facts: Human Trafficking and Modern Slavery Happen in Rented Accommodation*, Oct. 30, 2019, THE CONVERSATION, https://theconversation.com/airbnb-must-face-the-facts-human-trafficking-and-modern-slavery-happen-in-rented-accommodation124933?utm_source=twitter&utm_medium=twitterbutton (last visited Mar. 14, 2020).

93. Stemler, *supra* note 77, at 218.

94. *Id.*

95. Associated Press, *Lawsuits Allege Hotel Chains Ignored Human Trafficking*, USA TODAY Newspaper (Dec. 19, 2019, 8:28 AM), <https://www.usatoday.com/story/travel/hotels/2019/12/19/lawsuits-allege-hotel-chains-ignored-human-trafficking/2696622001/> (last visited Mar. 14, 2020) (discussing *In re Hotel Indus. Sex Trafficking Litig.*, No. MDL No. 2928, 2020 WL 581882, (J.P.M.L. Feb. 5, 2020)).

enterprise—one of these lawsuits alleges that “hotel staff overlooked easily observed signs of trafficking, including trash cans full of condoms, payment for rooms in cash, and refusal of housekeeping services.”⁹⁶ Named defendants range from individual hotel owners to hotel brand franchisors and franchisees.⁹⁷

A hotel is liable in a civil action, brought by a human trafficking victim, if the hotel knowingly benefited, whether financially or by receiving anything of value, as a result of its participation “in a venture which [it] knew or should have known” was in violation of “Chapter 77. Peonage, Slavery, and Trafficking in Persons” (sections 1581-1597).⁹⁸ A hotel is deemed to have participated in a venture if it “knowingly assist[ed], support[ed], or facilitate[ed] a violation of subsection (a)(1)” of section 1591.⁹⁹

Standards for whether a hotel has “knowingly benefited financially” differ across jurisdictions. For example, the Southern District of New York requires the following specific definition be met in order to show a defendant “knowingly benefited” financially from the venture: “plaintiff must show traffickers provided benefits to defendant as a result of defendants “facilitation of [the trafficker’s] sexual misconduct.”¹⁰⁰ District Courts in Colorado and California have interpreted this requirement much more broadly.¹⁰¹ These courts have attached liability in cases where defendants “collect[ed] money through sponsorships, licensing, grants, [and] publicity” as well as when money has not been collected, but rather defendants purchased products traceable to traffickers.¹⁰² Most notably, the United States District Court for the Southern District of Ohio, found that rental of a room does constitute a “financial benefit from a relationship with the trafficker sufficient to meet [the knowing benefit] element.”¹⁰³ Additionally, prior to attaching liability, plaintiff must also demonstrate defendant “knew or should have known” that the venture was engaged in sex trafficking, a much more lenient standard than “willful blindness.”¹⁰⁴ Language

96. *Id.*

97. *In re Hotel Indus. Sex Trafficking Litig.*, No. MDL No. 2928, 2020 WL 581882, at *3 (J.P.M.L. Feb. 5, 2020) (defendants are among major hotel brands such as Best Western, Hilton, Marriott, Wyndham, and Inter-Continental).

98. 18 U.S.C. § 1595 (2018).

99. *M.A. v. Wyndham Hotels & Resorts, Inc.*, 425 F. Supp. 3d 959, 963 (S.D. Ohio 2019). A “venture” has been defined as groups of two or more individuals “associated in fact,” irrespective of the legal status of the entity. 18 U.S.C. § 1591(e)(6).

100. *Id.* at 964 (citing *Geiss v. The Weinstein Co. Holdings, LLC*, 383 F. Supp. 3d 156, (S.D.N.Y. 2019)).

101. *Id.* (citing *Gilbert v. United States Olympic Committee*, No. 18-cv-00981, 2019 WL 4727636, at *16 (D. Colo. Sept. 27, 2019); *Ratha v. Phatthana Seafood Co., Ltd.*, No. cv-16-4271-JFW (ASx), 2017 WL 8293174, at *6, (C.D. Cal. Dec. 21, 2017)).

102. *Id.*

103. *Id.* at 965.

104. *Id.* at 966.

contained in the federal civil remedies provision clearly invokes a negligence standard.¹⁰⁵ Moreover, it requires hotels to monitor prostitution taking place within its premises when it involves force, fraud, or coercion, or underage minors.¹⁰⁶

Approximately 80% of human trafficking related arrests occur in or around hotels across the United States and three-fourths of sex trafficking victims have been subjected to exploitation at hotels.¹⁰⁷ Thus, it is no surprise that in 2014 alone, around 92% of the calls received by the National Human Trafficking Hotline “involved reports of sex trafficking taking place at hotels.”¹⁰⁸ However, despite the availability of this framework almost no civil actions have been brought against hotels under this civil remedy.¹⁰⁹ Those who have brought lawsuits allege that “[h]uman traffickers have capitalized on the hospitality industry’s refusal to adopt and implement industry-wide standards and anti-trafficking policies and procedures, including but not limited to, training hotel staff on how to identify obvious and well-known signs of sex trafficking.”¹¹⁰ There is no doubt that the civil remedies provision acts as a powerful tool in ensuring restoration for victims and sending a powerful message to hotels who tolerate trafficking; still, the tool is underused which results in victims receiving no compensation and lack of deterrence for hotels.¹¹¹

Hotels will not voluntarily undertake the responsibility to monitor for trafficking, instead they are likely to remain apathetic towards traffickers.¹¹² In order to achieve a change in behavior it is imperative that hotels engaging in intentional or negligent behavior face “negative financial and legal consequences.”¹¹³ In the event that human trafficking occurs within the premises of a hotel or motel, these businesses may be held liable for their negligent or intentional actions under the tort law framework. Historically, courts have found that hotel owners owe their guests a heightened duty of care which includes a “duty to ‘take reasonable precautions against criminal assaults on guests.’”¹¹⁴ The extent of a hotel owner’s duty

105. *Id.*

106. Fish, *supra* note 19, at 127.

107. Kate Hodal, *Major Global Hotel Brands Accused of Profiting from Sex Trafficking*, THE GUARDIAN, Dec. 12, 2019, <https://www.theguardian.com/global-development/2019/dec/11/major-global-hotel-brands-accused-of-profiting-from-sex-trafficking> (last visited Mar. 22, 2020).

108. *Id.*

109. *Id.* at 121.

110. Associated Press, *supra* note 94.

111. Fish, *supra* note 19, at 121–22.

112. *Id.* at 133–34.

113. *Id.* at 134.

114. *Id.* at 140 (discussing courts disposition to extend a heightened duty to protect to hotels despite the general lack of a duty to rescue in tort law).

to protect is measured by the foreseeability of the harm; in this scenario it would be the foreseeability that a guest may be subject to sexual exploitation.¹¹⁵

Traditionally, four tests have been applied across jurisdictions to determine a hotel owner's duty to protect guests: 1) "imminent harm rule;" 2) "prior similar incidents" test; 3) "the totality of the circumstances" test; and 4) "balancing test."¹¹⁶ Courts employing the "imminent harm rule" find harm ensuing from criminal activity to be foreseeable only "if the owner had specific knowledge of the imminent harm about to occur to the guest." Such a restrictive rule inadvertently incentivizes hotel owners to ignore signs of trafficking—those ignoring these signs do not satisfy the actual knowledge prerequisite under tort law. On the other hand, under the "prior similar incidents" test the court finds harm to be foreseeable only if there is evidence of prior criminal behavior in the premises of the hotel.¹¹⁷ Jurisdictions differ on whether harm is foreseeable only if the prior criminal behavior must be similar in nature to the harm suffered by the guests; other factors taken into consideration include frequency and extent of past crimes.¹¹⁸ Similarly to the "prior similar incidents" test, the "totality of the circumstances" test looks to prior criminal behavior when determining foreseeability.¹¹⁹ The analytical framework under this test requires courts to take into consideration "the nature, condition, and location of the land, as well as prior similar incidents."¹²⁰ Finally, courts employing the balancing test approach weigh the economic realities of the hotel industry against the safety of guests.¹²¹ Harm is deemed foreseeable and duty to protect will be extended in cases where the degree of harm to guests outweighs the costs of precautions necessary to prevent such harm. Hotel owners may be held liable for their intentional or negligent actions, by trafficking victims, through either of the four aforementioned theories.

In *re* Hotel Industries Sex Trafficking Litigation, plaintiffs sought to consolidate their individual claims for damages under a theory of liability facilitated by the TVPRA against hotels, motels, and Craigslist; under this theory defendants may be held liable if they "knowingly benefited from facilitating a venture that they knew, or at the very least should have known, to be engaging in

115. *Id.*

116. *Id.* at 140–42.

117. *Id.* at 140–41.

118. *Id.* at 141.

119. *Id.*

120. *Id.*

121. *Id.* at 141–42.

sex trafficking in violation of 18 U.S.C. § 1591(a).”¹²² However, the petition was denied by the United States Judicial Panel on Multidistrict Litigation; the Panel held that the centralization of the actions would not “serve the convenience of the parties and witnesses or further the just and efficient conduct of the litigation.”¹²³ Plaintiffs’ mere “assertion of a common claim for relief under the TVPRA” was also deemed insufficient to warrant centralization because the claims were found to be unique from one another; the Panel held each “involve[ed] different alleged sex trafficking ventures, different hotel brands, different owners and employees, different geographic locales, different witnesses, different indicia of sex trafficking, and different time periods.”¹²⁴ Had plaintiffs pursued their claims under the tort law framework rather than the TVPRA, the Panel’s decision would not have changed. Assuming these are negligence claims, jurisdictions nationwide must determine whether these defendants owed a duty to its guests to protect them against human trafficking. In order to evaluate whether a duty is owed, jurisdictions will likely favor either the totality of the circumstances test or the balancing test. Both of these tests are preferable because they seek to strike a balance between the economic realities faced by the lodging industry and the harm suffered by victims of trafficking. Moreover, these fact intensive tests enable courts to weigh the facts better in order to find a duty where the defendant has clearly profited from the trafficking venture and is attempting to dispel liability by turning a blind eye to the criminal activity. On the other hand, the imminent harm rule and prior similar incident tests are not desirable because they encourage perverse incentives; these would allow the lodging industry to shake off liability by turning a blind eye to criminal activity.

C. Civil Liability as a Means of Holding Airbnb Liable for Human Trafficking

In 2018, Airbnb announced a partnership with Polaris, one of the leading anti-trafficking organizations in the United States.¹²⁵ Airbnb has vowed to combat and prevent human trafficking at its properties by investing in new technology that will “combine its

122. *H.G. v. Inter-Continental Hotels Co.*, No. 19-cv-13622, 2020 WL 5653304, at *4 (E. Dist. Mich. Sept. 23, 2020).

123. *In re Hotel Indus. Sex Trafficking Litig.*, 433 F.Supp.3d 1353, 1354-55 (J.P.M.L. 2020).

124. *Id.* at 1356.

125. Kieran Guilbert, *EXCLUSIVE—Airbnb Vows to Tackle Sex Trafficking in Rental Homes*, REUTERS, Feb. 18, 2018, <https://uk.reuters.com/article/airbnb-trafficking/exclusive-airbnb-vows-to-tackle-sex-trafficking-in-rental-homes-idUKL8N1Q6597>.

existing risk analysis—from screening every host and guest to trawling through photos to check for signs of exploitation used to deter bad behavior—with data and insight from Polaris.”¹²⁶ Members of the lodging industry nationwide have formed similar partnerships and undertaken similar efforts to combat human trafficking but they are still subject to civil liability if they negligently or intentionally allow guests to be trafficked within their premises. Human trafficking is a pervasive issue and Airbnb should still be liable if it breaches its duty to protect guests. Airbnb’s increased popularity amongst traffickers seeking to create pop-up brothels will result in victims pursuing claims against Airbnb. Victims may pursue such claims under three distinct legal frameworks: state law, federal law, and tort law; this Note will focus on the latter two.

Under the federal framework, victims may pursue damages against Airbnb on a beneficiary theory. This means that under the TVPA’s civil remedy provision victims have the burden to prove that Airbnb knowingly benefited from participating in a trafficking venture that it either knew or should have known was in violation of section 1595 of the TVPA.¹²⁷ Victims seeking to prove Airbnb benefited from a trafficking venture are not required to allege that the trafficker provided Airbnb with a specific benefit as a result of Airbnb’s facilitation of the trafficker’s misconduct.¹²⁸ Courts recognize that property rentals in and of itself constitute “a financial benefit from a relationship with the trafficker;” thus victims can easily satisfy this element by alleging Airbnb benefited because it collected booking fees on the room rental.¹²⁹ In order to successfully prove the participation element, victims must at very least “allege . . . a showing of a continuous business relationship between the trafficker and [Airbnb] such that it would appear that the trafficker and [Airbnb] have established a pattern of conduct or could be said to have a tacit agreement.”¹³⁰ Establishing this required pattern might prove to be difficult for victims because Airbnb’s business model differs greatly from that of traditional hotels and motels. Traffickers utilizing Airbnb rentals for pop-up brothels are not necessarily renting the same property rather they are renting a wide array of properties from a wide array of hosts through one centralized platform, Airbnb.com. The ease via which traffickers can rent different properties within the same general location means a pattern might not be established.

126. *Id.*

127. *Wyndham Hotels & Resorts, Inc.*, 425 F. Supp. 3d at 963.

128. *Id.* at 964.

129. *Id.* at 965.

130. *Id.* at 970.

Courts apply a negligence standard to determine whether Airbnb knew or should have known about the trafficking venture within its premises rather than a willful blindness standard.¹³¹ Under the negligence standard, Airbnb shall be held liable if it had constructive notice of the trafficking venture.¹³² Findings of constructive notice are guided by two main cases, each standing at opposite ends of the spectrum.¹³³ At one end, Airbnb may be found to have constructive notice if the court deems the trafficking activities were so obvious that by failing to take action against the venture Airbnb effectively acted in reckless disregard.¹³⁴ Whereas on the other end of the spectrum, there will not be a finding of constructive notice if Airbnb “did not have [a] reason to know about the human trafficking.”¹³⁵ Absent actual notice, courts have demonstrated a general unwillingness towards inferring constructive notice from general duty to monitor premises.¹³⁶ Proving Airbnb knew or should have known about the criminal activity occurring within its properties might be a difficult task for victims. Airbnb’s listings are all managed by hosts rather than Airbnb itself. Unlike hotel owners, hosts outsource the maintenance of their properties and do not tend to check up on their properties with frequency which makes it easier for Airbnb to argue that it did not have constructive notice of these activities.

Victims may also bring negligence claims against Airbnb under the tort law framework. Under this theory, victims face the largest hurdle when it comes to establishing a duty was owed to them by Airbnb. Traditionally, the law has imposed upon hotels and motels alike a duty to protect its guests under certain circumstances, including criminal activity. A duty to protect guests should be extended to Airbnb considering it operates in a similar manner as hotels and motels. In order to determine whether Airbnb owed a duty to protect victims, courts should impose either a totality of the circumstances test or a balancing test. Both tests are preferable due to their comprehensive nature. Their application requires balancing various factors in order to evaluate the foreseeability that a victim might be subject to human trafficking with the premises of an Airbnb rental. Unlike the constructive notice standard, imposed under the TVPA’s civil remedy provision, this standard provides courts with greater flexibility when determining whether Airbnb

131. *Id.* at 965.

132. *Id.* at 965–66.

133. *Id.* at 966.

134. *Id.* (citing *Richio v. McLean*, 853 F.3d 553, 555 (1st Cir. 2017)).

135. *Id.* at 966 (citing *Lawson v. Rubin*, No. 17-cv-6404, 2018 WL 2012869, at *13–14 (E.D. N.Y. Apr. 29, 2018)).

136. *Id.*

knew or should have known about the criminal activity. These tests allow courts to extend liability under circumstances where Airbnb has undertaken this duty to protect through its actions or where victims have shown a particular prevalence of trafficking occurring around these properties.

IV. COUNTERARGUMENT: AIRBNB AS A PLATFORM

In order to encourage the continued development of the Internet, Congress adopted the Communications Decency Act of 1996. The CDA encourages development of the Internet as well as other interactive computer service providers by protecting providers and users alike against liability arising from publishing the speech of others.¹³⁷ These protections are detailed under Section 230 of the CDA as follows:

(c) Protection for “Good Samaritan” Blocking and Screening of Offensive Material

(1) Treatment of Publisher or Speaker

No provider or user of an interactive computer service shall be treated as the publisher or speaker or any information provided by another information content provider.

(2) Civil Liability

No provider or user of an interactive computer service shall be held liable on account of—

(A) any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected; or

(B) any action taken to enable or make available to information content providers or others the technical means to restrict access to material described in paragraph (1).¹³⁸

The notorious and now defunct online classified advertising platform for “Adult Entertainment” known as Backpage has been subject to numerous lawsuits under the TVPA.¹³⁹ In these lawsuits, victims alleged “Backpage, with an eye to maximizing its profits,

137. 15 AM. JUR. 2D *Computers and the Internet* § 202 (2020)

138. 47 U.S.C. § 230(c) (2020) [hereinafter the CDA].

139. *Jane Doe No. 1 v. Backpage.com*, 817 F.3d 12, 16 (1st Cir. 2016).

engaged in a course of conduct designed to facilitate sex traffickers' efforts to advertise their victims on the website."¹⁴⁰ Backpage claimed as a defense against these claims that section 230 shielded it "from liability for [its] course of conduct that allegedly amount[ed] to participation in sex trafficking" within the meaning of the TVPA.¹⁴¹ Federal courts upheld the notion that the CDA's safe harbor provision preclude claims seeking to hold websites liable for the content of third parties when such websites are performing traditional publisher or speaker of content roles.¹⁴² Airbnb, similar to Uber and Lyft, has strategically branded itself as a platform that operates a marketplace for hosts and guests; as a result, it is likely that Airbnb will invoke Section 230 as a defense against liability under each of the available frameworks discussed previously.

In an attempt to clarify and reconcile the TVPA with section 230 of the CDA, Congress passed The Stop Enabling Sex Traffickers Act and Allow States and Victims to Fight Online Sex Trafficking Act.¹⁴³ FOSTA-SESTA amended the CDA to include a provision which clarified that nothing under section 230 of the CDA should be construed to impair or limit actions brought under the TVPA.¹⁴⁴ FOSTA-SESTA is currently being challenged on the grounds that it violates the First and Fifth Amendments.¹⁴⁵ In the event that FOSTA-SESTA survives, Airbnb may face difficulties invoking it as a defense. Airbnb's ability to successfully assert this defense will largely depend on the viability of FOSTA-SESTA as well as Airbnb's ability to distinguish itself from platforms such as Backpage, which are clearly excluded from protection under this safe harbor provisions due to FOSTA-SESTA.

V. CONCLUSION

In sum, the ability to create anonymous and temporary pop-up brothels makes Airbnb rentals particularly desirable to human traffickers. Since its inception Airbnb has distinguished itself from hotels and motels by branding themselves as intermediaries whose purpose is simply to facilitate peer-to-peer transactions for short term rentals; in doing so, it has avoided being subject to regulations

140. *Id.*

141. *Id.* at 18.

142. *Id.* at 22.

143. Allow States and Victims to Fight Online Sex Trafficking Act of 2017, Pub. L. No 115-164, 132 Stat. 1253 (2018); Stop Enabling Sex Traffickers Act, S. 1693, 115th Cong. (2018) [hereinafter FOSTA-SESTA].

144. 47 U.S.C. § 230(a)(5) (2020).

145. Woodhull Freedom Found. v. United States, 948 F.3d 363 (D.C. Cir. 2020) (remanding case, challenging the constitutionality of FOSTA-SESTA, to the district court for a review on the merits of the complaint).

imposed on the traditional lodging industry. It is imperative that despite its unique business model, as compared to that of hotels and motels, Airbnb is held liable when it has intentionally or negligently furthered a trafficking venture. In order to adequately combat and prevent human trafficking within Airbnb, society must be willing to extend civil liability under tort law to Airbnb. By allowing victims to pursue claims under tort law, we are deterring negative behavior that would not be deterred otherwise due to the lack of a regulatory framework.