Free Speech or Slavery Profiteering?:
Solutions for Policing Online
Sex-Trafficking Advertisement

ABSTRACT

Online sex trafficking is big business. The Department of Homeland Security estimates that sex trafficking generates billions of dollars per year. The marketplace for sex has moved from the street corner to classified ad websites such as Backpage.com, and all too often the victims of online sex trafficking are minors. The National Center for Missing and Exploited Children reported an 846 percent increase in reports of child sexual exploitation between 2010 and 2015—growth the organization attributes to the availability of sex ads on websites such as Backpage.com. Law enforcement agencies and victims have sought to hold Backpage.com liable for facilitating human sex trafficking. To defend against this barrage of litigation, Backpage.com has argued that a statutory corollary of the First Amendment insulates the company from liability. Using Backpage.com as a paradigm, this Note analyzes the constitutional and policy tensions underlying regulation of online sex trafficking and advocates a crowdsourced model for monitoring online sex advertisement.

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A steel gate caged four young Detroit women in a hellish nightmare of sex slavery. Their captor and pimp, Richard K. Jackson, allegedly coerced the young women into the sex trade, forcing them to have sex with customers to finance his heroin addiction.¹ The women—aged between twelve and thirty-one—were subjected to beatings while locked in Jackson’s two-story home.² It took months for two of the women to escape imprisonment through a window, but only an instant for Jackson to advertise their sex services on Backpage.com, a classified ad website.³

The sex trade is one of the world’s most ancient fields of commerce.⁴ In imperial Rome, men exploited women as commodities,
akin to slave labor.5 Today, the technology has changed, but the basic formula persists. Victims of sex trafficking are similarly “packaged” and “sold” on the Internet, often through classified ad websites like Backpage.com, the market leader for sex-trafficking advertisement.6 In turn, state law enforcement agencies from Tennessee7 to Delaware8 have used Backpage.com and its imitators to identify perpetrators of child sex trafficking. Indeed, between 2008 and 2015, the number of identified victims of sex trafficking rose from just under 31,000 to nearly 78,000.9

In the past decade, Backpage.com’s role within the law enforcement realm transitioned from an undercover tool to a target.10 Since 2015, Backpage.com and its executives were the subjects of multiple state and federal investigations.11 A 2015 US Senate Permanent Subcommittee on Investigations (PSI) report alleged that Backpage.com acted as more than a mere “online bulletin board” for sex traffickers, knowingly and actively facilitating the illegal sex trade in violation of federal trafficking and communication laws.12 A subsequent PSI report from 2017—in which subpoenaed emails showed a companywide practice of failing to report child sex trafficking, editing sex ads with mentions of minors to avoid law enforcement detention, and reaping profits from such ads—vindicated

12. See 2015 PSI REPORT, supra note 6, at 5.
those allegations. At the state criminal level, former California Attorney General Kamala Harris charged Backpage.com CEO Carl Ferrer in October 2016 with conspiracy to commit pimping in violation of state law. Harris, now a US Senator, sits on the committee investigating Backpage.com’s connection to human trafficking.

Backpage.com voluntarily shut down its “adult” section in January 2017, just before the release of the aforementioned 2017 PSI report, which revealed the company’s policy of editing—but still publishing—references to child sex in ads to evade law enforcement detection. Backpage.com’s move to shutter its “adult” section is an incomplete victory for advocates and victims of child sex trafficking. Just days after Backpage.com shut down its “adult” section, sex ads migrated into the website’s “massage” and “miscellaneous” sections. Even if the entire website was removed, it would only be a matter of time before some other online forum filled its void in the sex-trafficking business. On the other hand, First Amendment advocates, online publishers, and sex workers raise concerns about the downstream effects of censoring online content. Thus, lawmakers, advocates, and victims must develop strategies for eliminating the online sex trade without running afoul of First Amendment anticensorship rights.

16. 2017 PSI REPORT, supra note 13, at 18–19.
21. See id.
To counter these legal attacks, Backpage.com and its executives argued that the First Amendment and a federal statutory corollary in the Communications Decency Act (CDA)\(^22\) insulate the company’s activities from both prosecution under the anti-trafficking laws and further government inquiry, in the case of the 2017 Senate investigation.\(^23\) Backpage.com points to a safe harbor provision of the CDA, which states that operators of websites will not be treated as “speakers” of illegal content.\(^24\) However, a later subsection of the same section expressly provides that nothing in the section “shall be construed to impair the enforcement” of federal or state criminal law.\(^25\)

Using the Backpage.com case as a paradigm, this Note evaluates the legal and policy arguments surrounding the prosecution of websites that publish sex-trafficking content, the viability of the CDA, and alternative enforcement solutions. Part I of this Note briefly summarizes the legal history of the US sex trade. Part II examines the extent to which the First Amendment and the CDA’s safe harbor provision protect adult ad websites that publish child sex-trafficking solicitations. Although Section 230 of the CDA excludes mere “publishers” of illegal content from prosecution, courts are split as to what test should apply to trigger the safe harbor preemption and the extent to which the First Amendment protects such sites from disclosure. Part III evaluates the strength of regulators’ ability to prosecute a website under state and federal anti-trafficking laws. Part IV weighs the merits of a constitutional approach to prosecuting Backpage.com and other online publishers of child advertisement under the Thirteenth Amendment. Ultimately, this Note advocates for a practical, collaborative approach to policing online sex trafficking which extends the crowdsourcing model to the enforcement of trafficking laws. Lastly, Part V discusses the free speech policy implications of prosecuting third-party ad websites such as Backpage.com. While this Note’s analysis applies to current and future third-party publishers, “Backpage.com” will serve as a shorthand for all such actors, due to the company’s prominence in the sex-trafficking world and the current litigation ensnaring its executives.


\(^{25}\) Id. § 230(c)(1)–(3).
I. BACKGROUND

A. Child Sex Trafficking is a Form of Slavery

The United Nations broadly defines human trafficking with three constituent parts: the act, the means, and the purpose. The “act” can include “the recruitment, transport, transfer, harboring, or receipt of persons.” The “means” is defined as “the threat or use of force, coercion, abduction, fraud, deception, abuse of power or vulnerability, or giving payments or benefits.” The “purpose” is defined by a nonexclusive list of exploitive activities, including prostitution, the removal of organs, slavery, and forced labor. The Trafficking Victims Protection Act (TVPA) provides a narrower definition of trafficking, labeling the activity a “modern form of slavery.” Under Section 1591 of the TVPA, the “means” of trafficking are irrelevant; the statute will attach to perpetrators of any commercial sex trafficking when the victim is under the age of eighteen. Whether or not the trafficker employs coercion or some other abusive technique to bring the child under his control, a minor victim cannot consent to be sold into the sex trade. Thus, whenever a child engages in prostitution, he or she is a legal victim of sex trafficking no matter whether the trafficker recruited the child under conditions of fraud or coercion.

The United Nations defines “slavery” broadly as “the control over another’s life [and] the restriction of movement [by] the fact that someone is not free to leave or to change an employer.” Sex trafficking falls squarely into the category of slavery. Traffickers often control their victims through financial, chemical, and physical oppression. For example, in the aforementioned Detroit anecdote, the defendant lured victims into the sex trade by getting them

27. Id.
28. Id.
29. Id.
32. See id.
33. See id.
addicted to heroin and withholding the drug from them unless they performed commercial sex acts.\footnote{Williams, supra note 1.} If the women's performance was inadequate, they were often beaten.\footnote{See id.}

This story is not unique to these victims, or to Detroit. Indeed, sex trafficking occurs in all fifty states.\footnote{The Victims, NAT'L HUM. TRAFFICKING HOTLINE, https://humantraffickinghotline.org/what-human-trafficking/human-trafficking/victims [https://perma.cc/NHD2-4D2S] (last visited Sept. 20, 2017).} The National Human Trafficking Resource Center, an organization that provides resources to trafficking victims, reported 5,575 cases of human trafficking in the United States in 2015, 75 percent of which involved sex trafficking.\footnote{Hotline Statistics, NAT'L HUM. TRAFFICKING HOTLINE, https://humantraffickinghotline.org/states [https://perma.cc/7KVG-6E7J].} Though there is no official estimate of the total number of trafficking victims, the Polaris Project, a nonprofit organization that works to combat human trafficking, estimates that the number of victims, both adults and minors, could reach into the hundreds of thousands.\footnote{The Facts, POLARIS PROJECT, https://polarisproject.org/facts [https://perma.cc/4VGN-YWK8] (last visited Oct. 16, 2017).} Both federal legislation and the UN Office on Drugs and Crime labeled the practice modern-day slavery.\footnote{Human Trafficking, supra note 26.}

\textbf{B. Online Sex Trafficking and the Rise (and Fall) of Backpage.com}

Once relegated to street corners and word-of-mouth promotion, the child sex trade now flourishes due to the advent of the Internet.\footnote{See Melissa Farley et al., Online Prostitution and Trafficking, 77 ALB. L. REV. 1039, 1063 (2014).} Between 2010 and 2015, the National Center for Missing and Exploited Children (NCMEC) reported an 846 percent increase in reports of child sex trafficking, which the organization attributes to the ease and anonymity with which the Internet connects buyers and sellers of children for sex.\footnote{See 2015 PSI REPORT, supra note 6, at 4.} Once a trafficker coerces a minor into the sex trade, the trafficker can communicate with a limitless universe of potential buyers by placing advertisements on the web. Traffickers use coded language such as “young,” “fresh,” and “new to town,” as euphemisms for children, tailoring their ads to the demand for commercial child sex.\footnote{Ann Gerhart, Sex-Trafficking Opponents Fight Craigslist's 'Adult Services' Ads, WASH. POST (Aug. 7, 2010), http://www.washingtonpost.com/wp-dyn/content/article/2010/08/06/AR20100806065376.html [https://perma.cc/Y7TH-BMZS].} A cursory review of the Nashville, Tennessee...
“women seeking men” section of Backpage.com—where sex ads have migrated since the “adult” section was shut down in January—yielded dozens of ads containing variations on phrases like “new to town,” along with “young” and similar codes linked to underage commercial sex. On the buyers’ side, message boards provide anonymous social support whereby online sex buyers can validate each other’s predilections for criminal sexual commerce and coach newcomers.

Before Backpage.com, the “adult services” section of Craigslist.com—the minimalist and now ubiquitous classified advertisement website—was the preferred forum for the child sex trade. After pressure from anti-trafficking advocates and law enforcement, Craigslist.com shut down the “adult services” section in 2010. As a result, Backpage.com—another classified advertisement marketplace owned by Village Voice Media—gained the bulk of the sex advertisement business Craigslist.com left behind. The NCMEC received 7,700 reports of child sexual exploitation to its tip line in 2015, a majority of which it claims relate to ads published on Backpage.com.

II. STATUTORY FRAMEWORK

In the debate over whether online forums should be liable for contributing to the modern sex trade, two federal statutes stand in opposition to each other. First, the TVPA enhances punishment and broadens the scope of federal anti-trafficking law. The Act criminalizes sex trafficking and activities that harbor the commercial

47. See Farley et al., supra note 42, at 1069.
49. Id.
51. See Human Trafficking Investigation: Hearing Before the S. Permanent Subcomm. on Investigations of the S. Comm. on Homeland Sec. and Governmental Affairs, 114th Cong. 2–3 (2015) (statement of Yiota Souras, Vice President and General Counsel, National Center for Missing and Exploited Children).
sex trade. The following Section summarizes both statutes and describes their respective obstacles in the fight against child sexual exploitation.

A. The Trafficking Victims Protection Act

In 2000, Congress passed the Victims of Trafficking and Violence Protection Act to combat the domestic sex trade by bolstering the ability to prosecute sex traffickers. Additionally, under Section 1591, any individual who facilitates or financially benefits from the commercial sex trade is subject to prosecution. The statute requires that a defendant have knowledge or, as amended in 2008, have a reckless disregard for the fact that the sex workers in question were coerced into prostitution, either by force, fraud, or virtue of their juvenile status.

In 2003, Congress sought to overhaul prosecution of sex traffickers by adding 18 U.S.C. § 1595—a private civil right of action against those who engage or benefit financially from the coerced commercial sex acts of minors in violation of Section 1591. Despite the amendment, no private suits resulted from Section 1595 between 2003 and 2007. In response to the inaction, Congress added teeth to the measure in 2008, replacing a child victim’s burden of proving his or her own coercion into the sex trade with strict liability against persons who knowingly benefit from a victim’s sex trafficking. Additionally, the 2015 Justice for Victims of Trafficking Act provided incentives for states to prevent the prosecution of child victims whose criminal conduct was a result of their trafficking. In 2015, the

53. Id.
57. Id.
58. Id.
Department of Justice initiated 248 sex-trafficking prosecutions and obtained convictions of 291 sex traffickers—both figures representing an increase from the prior year.\(^62\)

Section 1591 gives law enforcement a heavy sword to prosecute participants in the child sex trade; however, a 2015 amendment introduced by US Senator Mark Kirk distinguishes advertisers from other actors in the commercial sex supply chain.\(^63\) Specifically, the amendment singles out “advertising” from the laundry list of activities that contribute to the sex trade as one that cannot be prosecuted for a mere “reckless disregard” for the illegal conduct.\(^64\) Instead, when the offending contribution to the sex transaction is advertisement, prosecutors or private plaintiffs must prove that the advertiser possessed “actual knowledge” that the sex act was a product of coercion.\(^65\) While including advertising in the list of punishable conduct permits the government to wield the TVPA against websites like Backpage.com, attaching a more onerous mens rea requirement (actual knowledge) makes prosecuting these sites more difficult in practice. This nuance of the TVPA, combined with the countervailing statutory shield of the CDA, stymies the efforts of victims, advocates, and prosecutorial agencies to prosecute publishers of third-party-generated sex ads for their contributions to the sex-trafficking trade.

**B. The Communications Decency Act and Section 230**

1. History

Congress passed the CDA to update the broader Telecommunications Act of 1934, which placed antitrust regulations on the telecommunications industry.\(^66\) Specifically, the CDA aimed to incentivize Internet service providers to create parental controls to filter illicit Internet content and make it illegal to knowingly send to or show minors such materials online.\(^67\)

\(^62\). 2016 Trafficking in Persons Report, supra note 61.
\(^63\). S. 572, 114th Cong. (2015) (as introduced by Sen. Mark Kirk (R–Ill.)).
\(^64\). Id. § 2.
\(^65\). See id.
Section 230 arose in response to a Supreme Court of New York decision, *Stratton Oakmont v. Prodigy Services Co.*, in which an online financial bulletin, Prodigy, was held liable for false and defamatory statements posted by a third party about Stratton Oakmont, a securities firm. The court reasoned that because Prodigy screened third-party-generated content, it was exercising editorial control over the material on its site and should be subject to liability as a publisher because of that control.

Concerned about the chilling effect the law might have on free speech, two representatives introduced Section 230 to balance the need to protect the safety of children using the Internet while encouraging growth among online companies without invasive regulation. Section 230 protects “Good Samaritan” online service providers from liability for taking steps to screen indecent content, so long as those actions to restrict access are “taken in good faith.” Section 230 has come to be known as the CDA’s “safe harbor” provision, as it appears to protect publishers of obscene or illegal content when produced by a third party.

In 1997, the American Civil Liberties Union (ACLU) successfully enjoined enforcement of the CDA’s core obscenity provisions before the US Supreme Court. In *Reno v. ACLU*, the Court held that the CDA’s “indecent transmission” and “patently offensive display” provisions violated the free speech rights protected by the First Amendment. However, Section 230, which relieves third-party publishers of obscene content from liability, survived. Thus, Section 230 of the CDA—once a statute that epitomized the mid-1990’s conservative push for online censorship—is the primary First Amendment shield against liability for websites that host illegal content. For example, Section 230 protects Google from defamation suits whenever a name search reveals unflattering information.

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69. *Andrew P. Bolson, Flawed But Fixable: Section 230 of the Communications Decency Act at 20, 42 Rutgers Computer & Tech. L.J. 1, 5 (2016).*

70. *CDA 230: Legislative History, supra note 67.*


73. *Reno v. ACLU, 521 U.S. 844, 885 (1997).*

74. *Id. at 885.*


provision is why Mark Zuckerberg cannot be successfully sued when cyberbullying via Facebook or Instagram pushes a teenager to commit suicide. Section 230 is also the reason Facebook cannot face liability for hosting the falsified news articles that incited a man to brandish a gun in a Washington, DC pizza parlor. In an era where Internet users and the websites they visit number in the billions, Section 230 protects online publishers from a potentially unending stream of litigation. While First Amendment protections are essential to the free exchange of information on the Internet, Section 230 creates perverse incentives for more nefarious actors to flourish.

2. Applied to Backpage.com

To be sure, websites that do screen the content that third parties post on their websites must act in good faith. The 2017 PSI report makes clear that Backpage.com’s executives lacked good faith in their editorial decisions to moderate commercial sex advertisements posted by their users. For example, one subpoenaed email revealed that Backpage.com supplied employees who edited the website’s “adult” section with a spreadsheet of terms to strip from ads in order to give the ads a “clean” appearance and to allow sex trafficker clients to avoid law enforcement detection. The list included the following terms: “Lolita,” “teenage,” “rape,” “young,” “amber alert” (the name of a national child abduction warning system), “little girl,” “fresh,” “innocent,” and “school girl.” By stripping these terms from their website, without removing the ad itself or alerting law enforcement about these unambiguous signs of child sexual exploitation, Backpage.com demonstrated bad faith, destroying its protection under the CDA.

79. See Letter from James C. Grant to Kamala D. Harris, supra note 23.
80. 47 U.S.C. § 230(c)(2)(A) (“No provider or user of an interactive computer service shall be held liable on account of . . . 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[,]” (emphasis added)).
81. See 2017 PSI REPORT, supra note 13, at 22.
82. Id. at 22–23.
83. See id. at 26.
With the unfavorable Senate investigation now publicly available, previously thwarted state and federal prosecutors may find fewer evidentiary hurdles to bringing claims against the website. But just as Backpage.com replaced Craigslist.com in 2010, it is only a matter of time before another website crops up to fill the digital void Backpage.com now leaves behind in the illegal commercial sex trade.

3. Lower Courts Divided

Although the Supreme Court previously addressed the contours of Section 230 protections in _Reno_, lower courts disagree about the extent to which the provision insulates advertising forums like Backpage.com from liability under TVPA and state anti-trafficking laws.

a. _The First Circuit: Section 230 Immunizes Backpage.com_

On the pro–free speech end of the spectrum, the US Court of Appeals for the First Circuit in _Doe v. Backpage.com, LLC_ held that Section 230 of the CDA immunized Backpage.com from prosecution under the TVPA, that the TVPA did not fall within the CDA’s carve-out exception for criminal enforcement, and that the appellant child sex-trafficking victims were not entitled to relief. The appellants pointed to Backpage.com policies surrounding its “escorts” section to suggest that the operator acted as more than a mere conduit for ads for sex and should, therefore, be treated as a speaker and denied Section 230’s publisher immunity. These policies included prohibiting certain terms in postings, lack of verification of phone numbers, anonymizing users’ email addresses, stripping metadata from photographs of the child victims, and Backpage.com’s acceptance

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84. _Backpage.com’s Knowing Facilitation of Online Sex Trafficking: Hearing Before the S. Permanent Subcomm. on Investigations of the S. Comm. on Homeland Sec. and Governmental Affairs_, 115th Cong. 3 (2017) (statement of Sen. Rob Portman, Chairman, S. Permanent Subcomm. on Investigations) (“The evidence is clear that Backpage deliberately edited out words indicative of child sex trafficking and other crimes from ads.”).

85. _Wire, supra_ note 18.

86. _Compare_ Doe v. Backpage.com, LLC, 817 F.3d 12, 24 (1st Cir. 2016) (providing immunity under Section 230), with Fair Hous. Council of San Fernando Valley v. Roommates.com, LLC, 521 F.3d 1157, 1167 (9th Cir. 2008) (rejecting immunity under Section 230 for providing a discriminatory survey on its website), and Chi. Lawyers’ Comm. for Civ. Rights Under Law, Inc. v. Craigslist, Inc., 519 F.3d 666, 669–70 (7th Cir. 2008) (explaining that Section 230 provided website operators “not with a sword but a safety net”).

87. _Doe_, 817 F.3d at 20–24 (“Although the appellants try to distinguish Doe by claiming Backpage.com’s decisions about what measures to implement deliberately attempt to make sex trafficking easier, this is a distinction without a difference.”).

88. _Id_. at 16.
of anonymous payments. The First Circuit rejected this argument, reasoning that Backpage.com’s policies, regardless of its motivations, reflected editorial choices about the “structure and operation” of the website and thus were well within the traditional publisher functions. The Supreme Court denied the appellants’ petition for a writ of certiorari on January 9, 2017, though the new revelations of the 2017 PSI report (released the following day) may complicate Backpage.com’s legal strategy.

b. The Ninth Circuit: No Immunity Where Website “Directly Participates” in Illegality

On the other hand, the Ninth Circuit held that the CDA’s immunity is unavailable where a website “directly participates in developing the alleged illegality.” In Fair Housing Council of San Fernando Valley v. Roommates.com, LLC, the court stated that the roommate-matching website was not precluded from treatment as a “provider” of discriminatory information just because subscribers to the site create most of the content. There, Roommates.com provided its users a survey including questions about sexual orientation preferences. The court held Roommates.com liable under the Fair Housing Act—and unshielded by Section 230—because the website became “much more than a passive transmitter” of the discriminatory information and acted as the “developer” of the content.

Applying the Ninth Circuit’s framework to the sex-trafficking scenario, both victims and prosecutors would have to show that Backpage.com, by its structure, elicited unlawful content from sex trafficker users. Here, parties suing Backpage.com do not base their allegations on the illegality of the content itself; rather, they claim that Backpage.com promotes the illegal sex trade by guiding its users

89. Id. at 16–17.
90. Id. at 21.
93. Fair Hous. Council of San Fernando Valley v. Roommates.com, LLC, 521 F.3d 1157, 1174 (9th Cir. 2008).
94. Id. at 1165–67.
95. Id.
96. Id. at 1166, 1175.
in posting ads that are suggestive enough to attract child sex buyers but vague enough to avoid law enforcement detection.97

The Supreme Court of Washington applied this same reasoning in J.S. v. Village Voice Media Holdings, LLC, a suit brought by a victim of sex trafficking against Backpage.com’s holding company.98 The court refused to grant Backpage.com’s motion to dismiss, reasoning that the court needed more information about the company’s editorial policies—and the degree to which those polices helped child sex traffickers—before Backpage.com could invoke immunity under Section 230 of the CDA.99 A related civil trial is scheduled for January 2018,100 and the 2017 PSI report suggests that immunity will be unavailable for Backpage.com. More recently, unfavorable documents seized from Philippines-based Avion in connection with an unrelated lawsuit in Missouri suggest that Backpage.com hired the overseas firm to target its sex ads and redirect users from rival websites to Backpage.com.101 The documents, provided to NBC News and the Washington Post, undercut Backpage.com’s defense that it exerted no control over the sex ads on the website.102

Relatedly, Seventh Circuit Chief Judge Frank Easterbrook has opined that Section 230’s safe harbor should be unavailable where a website operator designs its services to facilitate illegal conduct.103 Analogizing to Section 230’s application in the intellectual property context, Judge Easterbrook reasoned that if “providers” may be liable for contributory infringement if they design their system to help people evade copyright laws, then Section 230 cannot be read as “a grant of comprehensive immunity from civil liability for content provided by a third party.”104 In that case, defendant Craigslist.com

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99. Id. at 718.
104. See id. (discussing Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd., 545 U.S. 913 (2005)).
was ultimately not held liable for promoting or causing housing discrimination because, unlike the quiz in Roommates.com, nothing about Craigslist.com services induced discriminatory statements from its third-party users.\(^\text{105}\)

Applying Judge Easterbrook’s reasoning to Backpage.com, Section 230 protection would not be available to Ferrer, the CEO of Backpage.com, if the website was designed to help sex traffickers evade the criminal and civil law.\(^\text{106}\) Thus, efforts to prosecute the website will hinge on what Backpage.com executives and employees knew about the illicit use of “escort” ads and the degree to which they geared the website’s services to facilitate the commercial sex trade of minors.\(^\text{107}\) The 2017 PSI report suggests that executives not only knew about user involvement in the child sex trade but actively assisted them by filtering ads with particularly egregious references to child sex prior to publishing them on Backpage.com.\(^\text{108}\)

### III. Analysis: Proposed Strategies for Amending Section 230 of the CDA

The Senate’s investigation exposing Backpage.com’s participation in the illegal sex trade partially vindicated lawmakers, victims, and advocates fighting to hold all parties accountable in the crusade to eliminate child sex exploitation in the United States. Lawmakers continue to grapple with shaping policy that protects victims of child sex trafficking from future iterations of Backpage.com while avoiding undue censorship.\(^\text{109}\) For First Amendment advocates, the stakes may be particularly high in the coming years, as President Donald J. Trump pledged to “open up our libel laws”\(^\text{110}\) and publicly

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105. Id. at 671–72.
106. See id.
108. 2017 PSI REPORT, supra note 13, at 22.
shamed journalists, actors, satirists, and political critics who disagree with his rhetoric. Weakening Section 230 of the CDA may help victims of sex trafficking seeking restitution from the websites that profit from their exploitation. But without careful drafting, future amendments might achieve this policy goal at the expense of legitimate free speech.

A. Digital Millennium Copyright Act Approach

One approach offers to amend the CDA to model the Digital Millennium Copyright Act’s (DMCA’s) “notice and takedown” mechanism. The DMCA provides online content providers civil immunity for copyright infringement when they meet certain requirements, such as removing content as soon as the provider learns of its infringing nature. When the provider removes the material, they must then notify the original publisher of the alleged infringing content and permit that poster the opportunity to dispute the removal. If disputed, the individual or business that requested the removal must file a lawsuit in federal court within fourteen days, or else the website is free to repost the allegedly infringing material.

Applied to the online classified ad websites where child sex trafficking has proliferated, a DMCA approach to the CDA would properly incentivize website operators to remove ads offering commercial sex with children to secure their immunity under Section 230. The scheme’s appeals process also provides a safety valve to protect against undue censorship of unconventional, yet legally protected, speech. Consider an example highlighted by Judge Richard

118. Id.
119. See id.
Posner in Backpage.com, LLC v. Dart, discussing an ad for the services of a dominatrix—one who makes a living by “hitting, humiliating, dressing up, verbally attacking and otherwise fulfilling men’s weird fantasies about being dominated.” In that case, the Seventh Circuit reversed a lower court’s denial of Backpage.com’s motion for an injunction against the Cook County Sheriff. Backpage.com sought to enjoin Sheriff Dart from using his position to coerce credit card companies from providing services to Backpage.com. Judge Posner writes:

It’s not obvious that such conduct endangers women or children or violates any laws, including laws against prostitution. The district judge remarked “that the majority of the advertisements [in Backpage.com’s adult section] are for sex”—but a majority is not all, and not all advertisements for sex are advertisements for illegal sex.

Applying the dominatrix ad example to a DCMA “notice and takedown” model, an individual who erroneously reported such an ad to a website operator for its “illegal” character would ultimately fail to achieve removal—either the complaining party would fail to file a suit or a court would dismiss a suit because the objectionable content does not violate the law. However, this model needs to be crafted to avoid a “heckler’s veto” cycle, a First Amendment doctrine under which the government may not suppress speech solely because of an actual or anticipated violent reaction from the audience of the speech. Because any party could request the removal of third-party-generated content, a “notice and takedown” scheme could chill legal (if perhaps unconventional) speech, such as the dominatrix ad. Moreover, nothing prevents a motivated trafficker from reposting similar posts until they are removed—a situation that imposes significant monitoring costs.

Additionally, the DMCA model fails to recognize the special problem of the online child sex-trafficking market. What allowed Backpage.com to foster the online market for child sex was its filtering policy, whereby Backpage.com’s “moderators” would scrub “adult” section ads for words like “Lolita” or “young” to avoid law enforcement

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120. Backpage.com, LLC v. Dart, 807 F.3d 229, 234 (7th Cir. 2015).
121. Id. at 239.
122. Id. at 234 (alterations in original).
Backpage.com may face criminal liability for this policy; however, individual traffickers may become more savvy in posting ads online by self-filtering and using more sophisticated coded language, further obscuring the substance of advertisements for child sex. In other words, if the illegal content is invisible to potential reporters, the DMCA model becomes less effective.

B. Exclude the Worst Actors

Professor Danielle Keats Citron, a noted privacy scholar, advocates amending Section 230’s safe harbor provision to “exclude the very worst actors: sites that encourage cyber stalking or nonconsensual pornography and make money from its removal or that principally host” those activities. By this method, Citron seeks to preserve immunity for “Good Samaritan” Internet operators while confiscating that First Amendment shield from actors that facilitate crime by providing an online marketplace for activities like nonconsensual pornography or cyberstalking.

Extending such exclusion of Section 230 immunity to sex traffickers and sites that “principally host” such activity presents administrative concerns. First, exclusion from Section 230 immunity would attach only if the government could show that the operator “principally hosted” sex-trafficking ads. In the case of Backpage.com, the website certainly hosted ads for illegal commercial sex, but it also hosted ads for mundane commodities like furniture, sports equipment, and housing. Second, excluding the “worst” actors from Section 230 safe harbor requires making extralegal determinations of moral value, a practice which is highly subjective in

125. See 2017 PSI REPORT, supra note 13, at 2.
128. Id.
129. See Backpage.com, LLC v. Dart, 807 F.3d 229, 235 (7th Cir. 2015) (noting that determinations regarding moral nature of content are subjective in nature); Bolson, supra note 69, at 15 (describing that the government would still need to determine if an operator “principally hosted” sex-trafficking ads).
nature. The sexual exploitation of children is obviously both morally and legally reprehensible. However, creating a list of excluded actors might invite lawmakers to categorize closer calls, like the dominatrix ad mentioned above, as “bad” based on their moral views.

C. Maintain the Status Quo of Section 230

Of course, the least costly option would be to keep Section 230 in its current form. Keeping the statute unchanged limits unnecessary compliance costs for online service providers covered by the CDA and avoids the extralegal moral assumptions inherent in categorizing “good” and “bad” content. However, with the lives of sex-trafficking victims held in the balance, efficiency arguments should give way to a more prescriptive solution. The rise in identified victims of sex trafficking, arguably attributable to the success of Backpage.com, has not been met with a commensurate increase in convictions of those traffickers that advertise online. A more robust, collaborative regulatory regime could help bridge the enforcement gap that afflicts domestic trafficking laws and could protect the First Amendment rights of online publishers.

IV. SOLUTION: THIRTEENTH AMENDMENT INVOCATION AND CROWDSOURCED MONITORING

The Senate’s discovery that Backpage.com executives knowingly facilitated child sex trafficking will likely destroy the company’s chance at protection under Section 230 of the CDA. The filtering policy allegedly designed by CEO Carl Ferrer and his associates demonstrates a bad faith motive to profit from their sex-trafficking customers that excludes a defendant from evading civil liability. But any successful civil lawsuit or criminal prosecution of Backpage.com is an incomplete victory for victims of sex trafficking and their advocates. While the threat of prosecution itself is a deterrent for operators, similar classified ad websites might draw from

132. See Dart, 807 F.3d at 235.
133. Id.
134. 2017 PSI REPORT, supra note 13, at 3.
135. See id. at 9.
136. See id. at 7–8.
Backpage.com’s playbook and occupy a now vacant—and ever profitable—space in the online sex-trafficking market.137

Child sex trafficking is modern day slavery, an activity explicitly prohibited by the Thirteenth Amendment.138 Until recently, Backpage.com successfully evaded disclosure of its practices and subsequent conviction by relying on a countervailing, paramount constitutional provision: the First Amendment right to free speech.139 Free speech rights, even as attached to “low-value” speech, have been a strong legal defense for Backpage.com.140 To counter this defense against future distributors of online sex-trafficking ads, victims of sex trafficking and prosecutorial agencies should invoke an equally weighty constitutional value—the Thirteenth Amendment’s prohibition on slavery.141

Though Congress indeed promulgated federal anti-trafficking laws under Thirteenth Amendment authority, this Note argues that invoking the constitutional argument—albeit duplicative—adds symbolic heft to victims’ claims. The following Section briefly summarizes the Supreme Court’s Thirteenth Amendment precedent and presents the merits and constraints of invoking a pure constitutional challenge against online hosts of child sex-trafficking activity. Though the significance of a Thirteenth Amendment argument would be largely symbolic, invoking the constitutional slavery prohibition supplies parties with a weighty constitutional sword to counter free speech defenses, does not require the costly and dubiously efficacious legislative process of amending Section 230, and builds public awareness of sex trafficking as a form of modern-day slavery.

Ultimately, this Note suggests that Backpage.com and other successive classified ad websites draw on “crowdsourcing” theory to monitor the spread of illegal commercial sex ads online. By implementing a crowdsourced model of citizen-based enforcement, classified ad websites can mitigate liability associated with hosting

137. See Wire, supra note 18 (“While the website shut down its adult services section last night, to my great relief, other websites will undoubtedly seek to profit off the exploitation of minor trafficking victims’ [Sen. Dianne Feinstein (D-Cal.)] said.”).


140. See Backpage.com, LLC v. Dart, 807 F.3d 229, 238 (7th Cir. 2015) (finding that Backpage.com’s free speech rights had been violated when a Sheriff sent threatening letters to credit card companies to deter them from providing payment services to Backpage.com).

141. U.S. Const. amend. XIII.
potentially illegal ads while enjoying the protection of Section 230’s Good Samaritan provision. This Note suggests that classified ad websites should work with the existing reporting mechanisms of victims’ rights groups to lower monitoring costs, rebuild a sordid reputation, and insulate such websites from government overreach.

A. Thirteenth Amendment Precedent

The Thirteenth Amendment declares that “[n]either slavery nor involuntary servitude, except as punishment for a crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.”142 In The Civil Rights Cases, the Supreme Court controversially held that the Thirteenth Amendment is “self-executing without any ancillary legislation, so far as its terms are applicable to any existing state of circumstances.”143 Though the primary purpose of the Amendment was to abolish slavery of involuntary African immigrants in the Civil War era, Congress intended the inclusion of “involuntary servitude” to cover similar forms of compulsory labor.144 Additionally, in contrast to the Fourteenth Amendment, the Thirteenth Amendment extends to private action.145

More recently, in United States v. Kozminski, the Supreme Court narrowly defined the concept of “involuntary servitude” as applied through a federal statute as:

[A] condition of servitude in which the victim is forced to work for the defendant by the use or threat of physical restraint or physical injury, or by the use or threat of coercion through law or the legal process. This definition encompasses those cases in which the defendant holds the victim in servitude by placing the victim in fear of such physical restraint or injury in legal coercion. . . . We hold only that the jury must be instructed that compulsion of services by the use or threatened use of physical or legal coercion is a necessary incident of a condition of involuntary servitude.146

Justice O’Connor, writing for the majority, narrowly construed involuntary servitude in Kozminski to preclude the conviction of a couple who subjected two intellectually disabled men to physical and verbal abuse for failing to do work on the family’s dairy farm—work

142. Id.
145. Jones v. Alfred H. Mayer Co., 392 U.S. 409, 429 (1968) (holding that Congress has the authority under the Thirteenth Amendment to eliminate racial barriers in private real estate transactions).
for which they ultimately received no pay.\textsuperscript{147} Despite these sympathetic conditions, the Court held that the government could only succeed on a Thirteenth Amendment claim if the plaintiffs’ labor was demanded through the use or threat of physical or legal coercion.\textsuperscript{148} In \textit{Kozminski}, because the government relied on the farmers’ “psychological coercion” of the intellectually disabled workers in showing involuntary servitude, the Thirteenth Amendment was unavailable.\textsuperscript{149}

\textbf{B. Thirteenth Amendment Applied to Sex Trafficking}

The Court’s limited holding in \textit{Kozminski} presents a challenge to a pure application of the Thirteenth Amendment in the sex-trafficking context. This challenge complicates bringing a claim against collateral actors in the commercial sex trade, such as advertising platforms like Backpage.com. Though the Thirteenth Amendment \textit{does} reach private conduct, \textit{Kozminski}’s narrow construction of “involuntary servitude” (requiring objective indicia of physical or legal coercion) would not reach the vast majority of sex-trafficking cases.\textsuperscript{150} Most sex-trafficking victims are lured into servitude by the kind of psychological coercion expressly excluded from application of the Thirteenth Amendment in \textit{Kozminski}.\textsuperscript{151} While some sex traffickers use physical coercion like kidnapping, more often they deploy psychological manipulation to establish a relationship of trust with their vulnerable victims.\textsuperscript{152} Take the paradigmatic example of “boyfriending”: Traffickers will feign a romantic interest or friendship with a victim, often a young person who lacks emotional support from family members or friends, to exploit her low self-esteem.\textsuperscript{153} Once the victim becomes reliant on the trafficker or recruiter for emotional support, that individual turns her over to the sex trade.\textsuperscript{154} Such psychological tactics would fall outside of the Court’s current definition of “involuntary servitude.”\textsuperscript{155}

\begin{itemize}
\item 147. \textit{Id}. at 934–36, 953.
\item 148. \textit{Id}. at 952.
\item 149. \textit{Id}. at 944 (“The guarantee of freedom from involuntary servitude has never been interpreted specifically to prohibit compulsion of labor by other means, such as psychological coercion.”).
\item 150. \textit{See} McAward, supra note 144, at 833–34.
\item 151. \textit{OVC PLAN}, supra note 138, at 6.
\item 152. \textit{See Tactics}, supra note 35.
\item 153. \textit{Id}.
\item 154. \textit{Id}.
\end{itemize}
On the other hand, Congress passed the TVPA, which included involuntary servitude under the umbrella category of “human trafficking.”\textsuperscript{156} Under the TVPA, human trafficking includes nonphysical coercion and was promulgated under the enforcement power of Section 2 of the Thirteenth Amendment.\textsuperscript{157} Yet sex-trafficking victim claimants largely refrain from expressly invoking the Amendment in their complaints against Backpage.com.\textsuperscript{158} However duplicative, invoking both the Thirteenth Amendment and the TVPA against Backpage.com could provide symbolic constitutional weight to the pleadings of victims exploited on Backpage.com.

C. Crowdsourcing: A Technological Solution to Monitoring Online Sex Trafficking

1. What Is Crowdsourcing?

First coined in 2005, “crowdsourcing” describes the business practice of replacing traditional employees with an “open call” to all Internet users.\textsuperscript{159} Now a well-established means of business production, crowdsourcing enables companies to garner new ideas by leveraging the vast and low-cost online community.\textsuperscript{160} For example, Frito-Lay crowdsourced new product flavors through its “Do Us A Flavor”\textsuperscript{161} contest, effectively outsourcing the creative process to the public.\textsuperscript{162} Incentives for members of the “crowd” to complete work vary from cash payment to simply altruistic fulfillment.\textsuperscript{163}

“Lawsourcing” is the specific application of crowdsourcing to achieve a legal goal.\textsuperscript{164} Crowdsourcing, due to its low transaction costs, may be particularly effective in “correcting the legal services delivery mismatch” and providing long-term social benefits to a vastly underserved legal services market. Prominent firms that have

\textsuperscript{157}. See McAward, supra note 144, at 833.
\textsuperscript{160}. Id. at 146.
\textsuperscript{161}. Id. at 152–53.
\textsuperscript{162}. See id. at 151 (describing how crowdsourcing has replaced traditional outsourcing techniques).
\textsuperscript{163}. Id. at 152.
\textsuperscript{164}. Id. at 154.
adopted the lawsourcing model include LegalZoom and Rocket Lawyer, which connect crowdworker attorneys to potential clients to conduct basic legal services such as contract review, simple estate planning, and entity formation. Professor David Orozco identifies three major categories of lawsourcing: (1) legal question and answer platforms, (2) government participation forums, and (3) strategic nonmarket behavior. This Section evaluates the government participation forum as a model for identifying cases of sex trafficking online while preserving the First Amendment rights of third-party platforms.

2. Crowdsourcing the Sex-Trafficking Problem

In the context of the online sex-trafficking trade, crowdsourcing could provide online advertising platforms, law enforcement agencies, and victim advocates a creative solution to the proliferation of sex-trafficking ads online. As mentioned in Part I, a whack-a-mole approach to monitoring illegal sex ads online is insufficient—when Backpage.com shut down the “adults” section of its website, traffickers simply migrated their posts to other sections of the website, such as “miscellaneous” or “massage.” Internally removing ads with sex-trafficking content exposes future websites to liability for incomplete removal and imposes monitoring costs on those individual firms. Instead, this Note suggests that online ad forums implement a crowdsourced model.

In practice, websites could leverage low-cost crowdworkers by inviting the public to report child sex-trafficking ads. In a coordinated scheme, those reports could then automatically flow to a

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168. Orozco, supra note 159, at 159.
169. See id. at 163–64.
171. See 2015 PSI REPORT, supra note 6, at 10 (describing a Washington Supreme Court case in which the court found that Backpage.com would lose Section 230 CDA immunity if it contributed to the offending content through, inter alia, “its posting rules, screening process, and content requirements”).
172. See Orozco, supra note 159, at 163.
victims’ rights organization, such as the Polaris Project.\textsuperscript{173} The Polaris Project operates a national hotline\textsuperscript{174} through which victims and advocates can report cases of human trafficking via phone or text message.\textsuperscript{175} The Polaris Project then refers those cases to law enforcement agencies, which in turn respond to the reports by facilitating victims’ escape and successfully prosecuting traffickers.\textsuperscript{176} By coordinating with the Polaris Project, Backpage.com could utilize that organization’s existing hotline and client services infrastructure to curb the proliferation of sex-trafficking content on its website.\textsuperscript{177} In addition, by outsourcing its reporting mechanism to a victims’ rights organization, Backpage.com could avoid scrutiny for inconsistent reporting.\textsuperscript{178}

As of this writing, Backpage.com provides a “Report Ad” button on each of its ads, with a message to email an internal address if the ad “involves a threat to a child or an image of child exploitation.”\textsuperscript{179} While this reporting function is a good start, a more proactive invitation would encourage potential crowdworkers to monitor the site.\textsuperscript{180} Moreover, the 2017 PSI report makes clear that Backpage.com’s existing reporting mechanisms lacked transparency and consistency in pursuing flagged ads.\textsuperscript{181} A more participatory approach that involves law enforcement on the front end could provide transparency for the public, protect online classified websites from liability while building good will, and enable law enforcement to more robustly enforce anti-trafficking laws.

Furthermore, Backpage.com could make simple changes to its website to encourage and incentivize the online community to report potential illegal commercial sex advertisements. For example, the website could feature a button on its main landing page inviting users

\textsuperscript{177} See Orozco, supra note 159, at 163.
\textsuperscript{178} See 2017 PSI REPORT, supra note 13, at 33–34 (referencing Backpage.com’s inconsistent advertisement editing practices).
\textsuperscript{180} See Orozco, supra note 159, at 163–64 (discussing the general advantages of crowdsourcing).
\textsuperscript{181} 2017 PSI REPORT, supra note 13, at 18.
to report instances of illegal sex trafficking. Crowdworkers could receive a nominal gift for their services, such as a t-shirt with a socially conscious message or a small-dollar donation to the partner victims’ rights nonprofit in the proposed cooperative scheme. These incentive programs would provide a low-cost way for Backpage.com, or future classified ad websites, to build a positive brand and avoid liability for facilitating the commercial sex industry. To educate crowdworkers about how to identify commercial sex-trafficking ads and anti-trafficking laws, Backpage.com could supply a Q&A page for its users, much like Craigslist.com did to counter discriminatory housing ads. To discourage non-meritorious reporting, Backpage.com could require its crowdworkers to complete an online training module for identifying illegal sex advertisements before engaging in any reporting. Borrowing from the reputational rating systems of ridesharing applications like Uber or restaurant reviews in Yelp, crowdworkers could earn more premium status as Backpage.com users if they report ads that are ultimately removed.

A crowdsourced model for reporting illegal content would provide Backpage.com and successive classified ad websites a low-cost solution that would preserve its First Amendment rights. By deploying the crowd to monitor illegal content, websites could keep their “adult” section active without running afoul of the CDA’s safe harbor provision. Because Section 230 protects websites from liability when they act as mere conduits of information, Backpage.com could avoid liability by returning to a more laissez-faire approach to its internal monitoring systems. Moreover, a more transparent, unregulated flow of published ads will keep trafficking ads in the daylight and thus visible to crowdworkers and law enforcement entities.

Conversely, the proposed crowdsourced model could present significant challenges for websites like Backpage.com, including privacy concerns, a collective action problem, and spam. First,
classified ad websites may be concerned that such a cooperative, open model with a nonprofit could permit user information to be shared with law enforcement.\textsuperscript{188} This risk would be most salient when the content of the ad is legal but indicative of non-normative moral behavior, such as Judge Posner’s dominatrix example discussed in Part III. To manage this privacy risk, Backpage.com could contract with its nonprofit partner to ensure protection of users’ information from government intrusion.\textsuperscript{189} Next, the crowdsourced participatory model presents a collective action problem, which arises when the costs of individual action outweigh the public benefit of that action.\textsuperscript{190} The ubiquity of the Internet and the ease with which crowdsourced reporters could flag illegal content lessen the individual costs that give rise to this collective action problem.\textsuperscript{191} However, the offensive nature of the advertisements may discourage some users from screening ads, perhaps even for fear that visiting the website will implicate them as potential customers instead of monitors. Lastly, Backpage.com may be subject to abusive over-reporting by spammers and robots.\textsuperscript{192} However, machine learning technologies like Google’s reCAPTCHA can successfully weed out such bad faith reporting by requiring human effort before a user can pass through a website.\textsuperscript{193} This free adaptive technology service, which Backpage.com already uses, would permit classified ad websites to provide illegal content reporting


\textsuperscript{190} See Orozco, supra note 159, at 185.

\textsuperscript{191} Id.; see also Cook, supra note 124, at 28–29 (proposing a flagging system to highlight misleading information on the Internet because such information “can be damaging to a person’s ability to get a job, loan, or apartment”).


mechanisms while filtering abusive, spam-like reports from automated software.\textsuperscript{194}

V. CONCLUSION

Prosecuting classified ad websites that are complicit in the illegal sex trade is only one step in the fight against modern-day slavery. To be sure, the strategy must also include preventative screening of potential victims by school and social service authorities, education about the tactics and warning signs of sex trafficking, and victim immunity. Ideally, the recent exposure of Backpage.com will serve as a cautionary tale to other classified websites. But any subsequent claims against the perpetrators of the illegal sex trade would be bolstered by invoking the Thirteenth Amendment’s prohibition on slavery. Websites should adopt a proactive monitoring strategy through a crowdsourced model. Such a public call to action may signal to sex traffickers that they will not be safe from law enforcement detection on traditional online classified websites. This carries a risk that traffickers will deploy more covert means to advertise,\textsuperscript{195} which could hinder law enforcement’s ability to identify illegal sex traffickers and rescue victims. Conversely, customers may be deterred from seeking out sex online if access to the market requires the use of anonymous networks or encryption technologies.\textsuperscript{196} Still, a crowdsourced model of monitoring insulates these companies from liability under the TVPA and Thirteenth Amendment. Crowdsourcing will allow companies to enjoy Section 230’s safe harbor provision by acting as mere channels for information while outsourcing the role of Good Samaritan to the crowd.

\textit{Marguerite A. O’Brien*}

\textsuperscript{194} Privacy Policy, supra note 188.


* J.D. Candidate, 2018, Vanderbilt University Law School; B.A., The University of Delaware, 2014. The Author would like to thank her parents, Kevin and Alice O’Brien, for nurturing her academic curiosity and for their boundless support. The Author also thanks the staff of the Vanderbilt Journal of Entertainment & Technology Law—particularly Claire Piepenberg, Jeffrey Sureck, and Samuel Mallick—for their thoughtful editorial guidance.