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Denial of Harm: Sex Trafficking, Backpage, and Free Speech Absolutism

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DENIAL OF HARM: SEX TRAFFICKING, BACKPAGE, AND FREE SPEECH ABSOLUTISM

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AN UNDERCOVER OFFICER responded to an advertisement in the Casual Encounters section of Craigslist in 2015 that read “Come Sleep with Daddy’s Little Girl.” He was offered two hours with the four-year-old daughter of the advertiser in exchange for \$1,000. When the officer arrived at the assignation, he was shown the young girl lying naked under a blanket in a groggy state, perhaps drugged with sleeping pills (Salinger, 2015).

The current market leader in commercial sex advertising is Backpage.com (hereinafter Backpage), netting more than 80% of such advertising revenue in the United States (Permanent Subcommittee on Investigations, 2017). Backpage reportedly received 99% of its revenue from the adult escort portion of its business from 2013 to early 2015 (Harris, 2016).

The National Center for Missing and Exploited Children claims that 73% of the suspected child trafficking reports it receives from the public involve Backpage, and the Massachusetts Attorney General asserts that the vast majority of prosecutions for trafficking for sexual exploitation now involve online advertising, most of it on Backpage (Permanent Subcommittee on Investigations, 2017).

For some years now, law enforcement officials have lobbied Backpage to do more to remove ads of minors from its site. This multi-year law enforcement effort has unleashed a backlash of criticism, revealing distressing attitudes of denial, general ignorance about trafficking for sexual exploitation, and lack of empathy for girls and women in the sex trade.

When negotiations with Backpage proved unavailing, some law enforcement officials and trafficking survivors turned to litigation against the Internet giant, all of which ultimately failed because federal law (Section 230 of the Communications Decency Act) immunizes Internet service providers, which publish content from others, from civil and criminal liability (Permanent Subcommittee on Investigations, 2017). In 2016 California’s Attorney General Kamala Harris charged Backpage’s CEO and founders with felony pimping, but these were also dismissed due to federal Internet law providing immunity (Thompson, 2016).

Most courts have broadly interpreted Section 230 to provide near complete criminal and civil immunity for the content others have created. However, the U.S. Court of Appeals for the Ninth Circuit held that editing the user-created content could eliminate immunity if the changes contribute to the illegality (*Fair Hous. Council v. Roomates*, 2008). Another court (*J.S. v. Village Voice Media Holdings*, 2015) went a little further, indicating that immunity could be lost under Section 230 if the company helped develop the content through its posting rules, screening process, and content requirements. This theory was rejected by another federal court (*Jane Doe v. Backpage.com, LLC*, 2016). When the U.S. Supreme Court denied review of the Doe case late in 2016, the opportunity for settling this controversy was missed.

In response to courts' upholding civil and criminal immunity for Craigslist and Backpage, Congress amended federal anti-trafficking law with the SAVE Act (2015), which made knowingly running advertisements that cause prostitution by force or coercion or with those underage a crime. Enforcement is, however, made difficult by the "knowing" requirement. How is any Internet provider to know who is trafficked or underage? Internet legal expert Eric Goldman explains:

Advertising defendants must know that the ad pertains to a person being coerced into sex or is underage. While that knowledge could arise in the ordinary course of the advertising process, it seems unlikely (Goldman, 2015).

This assertion, however, was soon proven wrong. Following a multi-year subpoena enforcement effort (with the Supreme Court again refusing to become involved), the U.S. Senate's Permanent Subcommittee on Investigations of the Committee on Homeland Security and Government Affairs (2017) issued a report based on its analysis of the long sought after documents. By late 2010, the committee report concluded, Backpage was editing 70 to 80% of the ads in the adult section either manually or automatically. This procedure looked for the use of forbidden words and erased them, eliminating the necessity of rejecting entire ads (and thus losing money). Words such as "Lolita," "young," "little girl," "teen," "fresh," "innocent," and "school girls" were included in the filter. This practice, which changed nothing about the real age of the person being sold on the site, implicates Backpage in designating the content of advertisements, a fact that might interfere with its claims of immunity as interpreted by federal court cases. The Internet provider, it could be argued, was put on notice of instances of potential trafficking, but allowed the ads, simply editing out the red flags and taking no further action.

Once the report was issued, Backpage announced it was closing the entire adult section (Gerstein, 2017), although critics claim the ads have merely moved to other areas on the site (Hawkins, 2017). In light of these facts gleaned from the documents, the California Attorney General has filed new criminal charges (Reuters, 2016).

Rebuffed in his earlier litigation efforts, in 2015 Cook County (Chicago metropolitan area) Sheriff Tom Dart wrote a letter to major credit card companies, requesting that they cease allowing their credit cards to be used to place ads on Backpage.com. Visa and MasterCard complied with his request (*The Economist*, 2015). Backpage then sued Sheriff Dart in federal court, alleging that he had interfered with its First Amendment rights, and later obtained a victory in the 7th Circuit Court of Appeals. It ruled that Dart had violated the Constitution by trying to shut

down “an avenue of expression of ideas and opinions” (Backpage.com, LLC, v. Dart, 2015, p.2), ordering Dart to cease interacting with credit card companies and financial institutions.

The Court’s opinion, mainly sarcastic as will be detailed below, gave reporters and bloggers license to mock the sheriff for his alleged overreach; he became the subject of nasty opprobrium in diatribes that failed to mention trafficking for sexual exploitation or cases like that of the four-year-old. When we analyze these comments making fun of the sheriff, we can see what has gone terribly wrong. Most troubling in the responses are the disregard or the minimization of trafficking prevalence; support for “sex worker” positions with no reference to the voices and experiences of trafficking survivors, and a First Amendment absolutism that provides no room for collaborative efforts to dismantle infrastructures that support trafficking for sexual exploitation.

Ignoring or Minimizing Trafficking for Sexual Exploitation

There is much to object to in Judge Richard Posner’s opinion for the Seventh Circuit Court of Appeals (Backpage.com, LLC, v. Dart, 2015), including a characterization of major international credit card companies as being cowed and coerced by a lowly county sheriff. But more damaging is the judge’s view that the sheriff’s campaign against Backpage is based on a prudish or moralist view of sex, with the sheriff supposedly objecting to fetishism, phone sex, or performances by dominatrices. Nowhere is trafficking or coercion discussed; nor is buying sex from minors. Dart’s campaign is superficially equated with actions against frivolous activities, as this passage from Judge Posner’s opinion reveals:

For where would such official bullying end, were it permitted to begin? Some public officials doubtless disapprove of bars, or pets and therefore pet supplies, or yard sales, or lawyers, or “plug the band” (a listing of music performances that includes such dubious offering as “SUPERCELL Rocks Halloween at The Matchbox Bar & Grill”), or men dating men or women dating women—but ads for all these things can be found in non-adult sections of Backpage and it would be a clear abuse of power for public officials to try to eliminate them not by expressing an opinion but by threatening credit card companies or other suppliers of payment services utilized by customers of Backpage, or other third parties, with legal or other coercive governmental action (Backpage.com, LLC, v. Dart, 2015, p.12).

In truth, the opinion does more than ignore trafficking; Judge Posner trivializes Dart’s motivating concerns and mocks the sheriff. And by totally side-stepping the major issue in the case—trafficking—the Judge stacks the deck so that the First Amendment can only be the clear winner. Ultimately, the Supreme Court refused to be drawn into the matter.

The case did not receive a great deal of attention from the mainstream media, but most of the articles and blogs about the opinion followed the lead of Judge Posner, failing utterly to engage with the issue of trafficking and exploitation. Sheriff Dart was a “vigilante sheriff (Jeong, 2015); “on some kind of crusade with sex on his mind” (Miller, 2015);” a paternalistic legal crusader” (Stern, 2015); on a “seemingly obsessional crusade” (Brown, 2015); “a rouge sheriff” (Somin, 2015); a “thug” (Greenwald, 2015); and a person in a “Government Coercion Hall of

Shame” (Mimesis Law, 2017). Glenn Greenwald, who was involved with whistleblower Edward Snowden, wrote, “What kind of person would become sheriff of *Chicago* and then choose to spend his time worrying about adult sex ads?” (Greenwald, 2015). Echoing Judge Posner’s line, the Cato Institute opined that Backpage obviously contained content that the Senate Subcommittee found “offensive” (Shapiro, 2017). An article in *Slate* averred that Dart cloaked censorial intentions in the garb of a noble battle (stemming trafficking) (Stern, 2015). These characterizations moved Dart’s actions from a campaign against trafficking to a moralistic crusade on the part of a sex-obsessed thuggish sheriff that obviously could not withstand a First Amendment challenge.

Other commentators did more; they minimized trafficking prevalence. As one wrote, “Dart has yet to present any credible evidence that Backpage is crawling with traffickers” (Peck, 2015). Another on *The Economist* web site stated we have to “debunk the myth that most sex workers are underage and/or forced” (Naiolei, 2015). Still, another argued that labor trafficking is more prevalent than trafficking for sexual exploitation (O’Hara, 2015), as, if true, this negated sex trafficking as a significant problem. The Cato’s Institute’s brief, filed in the Court of Appeals supporting Backpage’s position (Amicus Brief, Backpage.com, LLC, v. Dart, 2015), goes to great length to challenge the notion that trafficking is a major problem. Quoting the work of sociologist Ronald Weitzer, the Institute claims that reputable data about the extent of trafficking for sexual exploitation is non-existent. However, the lack of data is just that—lack of proof—not evidence that trafficking does not exist.

The Electronic Frontier Foundation was one of the few Internet support groups to deal with the issue of exploitation, admitting that trafficking was “atrocious” (Reitman, 2015.) But it went on: “Backpage, however, is not engaged in human trafficking. It shouldn’t be treated as if it were.” The foundation also wants VISA and Master Card to be neutral, to play no role in the fight against trafficking. This position ignores the fact that the infrastructure supporting trafficking, and without which it could not occur, includes both the Internet and credit card companies. As one activist has written, exploitation continues to exist because “many professionals have enabled it.” (Zobnina, 2017).

“Sex Worker” Positions

Trafficking victims were equally invisible in the responses of “sex workers” who were abundantly quoted in media pieces and blogs. These groups uniformly stated that removing ads from the Internet would put their lives at risk because they would be forced to solicit in the more dangerous streets. In fact, when *The Guardian* newspaper (Levin, 2017) reported on Backpage’s closure of the adult classified section, the article was totally organized around the claims of “sex workers,” with extensive quotes and a headline reading “Backpage’s Halt of Adult Classifieds Will Endanger Sex Workers, Advocates Warn.” Shutting down the web sites will lead to dangerous work on the streets, with sellers subject to increased arrests as well as sexual assaults, “sex worker” groups argued, and more pressure from pimps to rely on them to keep them safe (Levin, 2017). Thus, the anti-trafficking campaign puts sellers “of every age at greater risk” (Berlatsky, 2016).

“Sex worker” groups complained to *The Guardian* reporter (Levin, 2017) that the voices of those in the sex trade industry need to be taken into consideration. Yet nowhere do they express concern for those individuals trafficked into, or held

in prostitution. Indeed, they put themselves forward as speaking for all the individuals in the industry. The reporter is their mouth piece; no trafficking survivors, those subjected to pimp control, were heard from about their views on Backpage's activities.

Helping Victims

Backpage and Sheriff Dart's opponents also maintain that the ads on the site assist law enforcement, which uses them to go undercover to rescue victims and apprehend traffickers (*The Economist*, 2015). Of course, this statement contradicts an earlier argument that the Internet is not crawling with ads for buying sex from trafficked individuals. More importantly, is it reasonable to think that police departments have the resources to respond to every ad on the Internet? Yet that did not stop the Techdirt blog from asserting that Backpage is a key anti-trafficking entity:

In other words, one of the best tools out there for finding and stopping sex trafficking is Backpage.com. And the Senators response is to blame Backpage and make them legally liable? How does that make any sense at all? Now that Backpage has shut down those ads, they'll scatter elsewhere. Sex trafficking won't stop and it will be harder for law enforcement to track down and find actual perpetrators or save actual victims (Masnick, 2017).

First Amendment Absolutism

Concern about Internet censorship is shared by many; the worry is real. However, does shutting down commercial sex ads, all for illegal activities, (except in rural parts of Nevada), become prohibited Internet government censorship? In a short position paper against the muzzling of Backpage, the ACLU (Rottman and Fulton, 2017) writes that the ads aren't illegal; but of course, the activity they advertise is, and many ads undoubtedly violate the SAVE Act. Glenn Greenwald, in another attempt to categorize offers for prostitution as protected speech, finds the matter similar to Wikileaks blockades: "Any attempt by political officials to start blocking Americans' access to political content on the Internet ought to provoke serious uproar and unrest" (Greenwald, 2015).

Are ads for four-year-olds for sexual sale protected political speech? In an opinion by Justice Antonin Scalia in a child pornography case the U.S. Supreme Court confirmed that "offers to engage in illegal transactions are categorically excluded from First Amendment protection" (U.S. v. Williams, 2008). Many criminal prosecutions, the Court stated, such as laws against conspiracy, incitement, and solicitation criminalize speech that is intended to induce or commence illegal activities. When Backpage brought a lawsuit against the United States, challenging the constitutionality of the SAVE Act, the court denied the claims based on technical grounds that the Internet provider had not yet suffered harm under the Act. But Judge Walton continued:

The SAVE Act prohibits advertisements of illegal sex trafficking of a minor or a victim of force, fraud, or coercion (18 U.S.C. Section 1591(a), 2015). And there is no doubt that advertisements that promote these types of conduct are not afforded First Amendment protection (Backpage.com, LLC, v. Lynch, 2016).

Yet only rarely is this settled law acknowledged in the media.

The positions of First Amendment absolutists totally foreclose coalition-building to devise solutions that would reduce harm to those exploited, especially minors. What is the harm of Sheriff Dart's trying to jaw bone Backpage into the removal of the ads? What is wrong with campaigns that focus on voluntary efforts of companies trying to reduce harm? Shouldn't this ultimately be the solution rather than laws that in one way or another censor content on the Internet?

Conclusion

These articles in the media demonstrate that those with agendas around the First Amendment, legalization of prostitution, and making money off the sex trade are working to change the terms of the debate, characterizing anti-trafficking advocates as enemies of the Constitution and human rights. The human right to be free from violence, abuse, and coercion has simply vanished in the discourse around Sheriff Dart. In testimony before the Permanent Subcommittee on Investigations, Tom S., the father of a minor advertised on Backpage, poignantly explained the consequences: somehow children have

become bystanders in the outcome of a fight that's been labeled as being about internet freedom and they are just collateral damage in the huge industry of modern convenience that we all enjoy online. I can't bring myself to accept that these kids are just the cost of doing business in today's world...That Backpage somehow thinks it has the right to sell my child, and that the First Amendment gives them that right to do so and there's nothing anyone can do about it...I can't believe the contempt and lack of humanity they've taken (Tom S., 2017).

Animal welfare receives more sympathy than trafficked children. Consider a recent short essay by Peter Singer, noted bioethicist who has done so much to promote animal welfare, supporting legalization of prostitution. He writes that it is time "to put aside moralistic prejudices, whether based on religion or an idealistic form of feminism and do what is in the best interests of sex workers and the public as a whole" (Singer, 2016). Singer's comment demonstrates just how successful Backpage and its supporters have been in characterizing its opponents as Puritans on a moral crusade. Nowhere does Singer mention abuse and exploitation, all hallmarks of his consideration of animal well-being.

Sheriff Dart (2013) himself makes the comparison. He describes the time when his deputies broke up a dog fight. The next day his web site literally crashed because of the traffic, 99% of which was euphoric. When a trafficking survivor was saved from the clutches of her trafficker and the action described on the site the next day, the response was 50% for and 50% against.

I had no business in breaking up these relationships. Who am I to get involved in business decisions between two people? These were juveniles! People are aware that it is going on, but it is accepted. It is accepted. Whereas dog fighting is not (Dart, 2013).

It should be obvious by now that the voices and views of trafficking survivors are missing in public policy debates and the media. We must rededicate ourselves to making sure they appear more often. Stories only quoting "sex workers" reveal

the laziness, ignorance, and/or bias of mainstream media today in the United States.

There is also evidence of the lack of empathy for victims. This statement on *The Economist* web site is probably not atypical:

I now favor letting people do what they wish to do as regards drugs and sex. I also feel I would be foolish to care what happens to such people. I don't think that brutality and exploitation can ever be eliminated from commercial sex and I also think that legalized drug use will give us a steady yield of Philip Hoffmans.¹ . . . Let them die or prosper as fate decrees. Some will do fine with drugs and some women will live decent lives selling their bodies. I do not care. Others will die from drugs or end up physically and/or mentally ravaged. I don't care about them either (Andros, 2015).

Thus, the harder battle awaits. Even if survivors were given their due, it seems clear that the public has limited ability to accept the existence of evil in their midst (Fritzsche, 2016), a cause of trafficking denial. And, as demonstrated by the above comment, there is yet another problem: a disturbing lack of empathy. On the prostitution issue, large segments of the public apparently cannot feel sympathy for someone whose body has been sold, *regardless of the circumstances*. This is a profound problem that needs to be immediately addressed.

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¹ The author is undoubtedly referring to gifted actor Philip Seymour Hoffman, found dead in 2014 on his bathroom floor with a syringe in his arm. He was found to have died of acute mixed drug intoxication, including heroin, cocaine, benzodiazepines, and amphetamine.

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