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AMEND THE COMMUNICATIONS DECENCY ACT TO PROTECT VICTIMS OF SEXUAL EXPLOITATION

Samantha Vardaman

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THE COMMUNICATIONS DECENCY ACT OF 1996 (CDA) Section 230¹ contains protections for certain Internet businesses that are inadvertently blocking access to justice by victims of sex trafficking. Enacted four years before the Trafficking Victims Protection Act of 2000 (TVPA), these protections for Internet businesses now operate in direct conflict with the protections and remedies given to sex trafficking victims under the TVPA and are a blemish on America's leadership in countering the crime of human trafficking. Just as online businesses have expanded exponentially in the years since the CDA was enacted, human trafficking, including sex trafficking of children, has also become one of the fastest growing crimes in the United States. In the last five years, the National Center for Missing and Exploited Children (NCMEC) reported an 846% increase in reports of suspected child sex trafficking to its tip line—an increase NCMEC believes is directly correlated to the use of the Internet to sell children for sex.² The unintended consequence of the protections established in 1996 to protect the nascent Internet business community has been the migration of the sex trafficking industry onto the Internet, creating a new and booming marketplace for the buying and selling of sex trafficking victims.

Shared Hope has been working since 1998 to prevent sex trafficking of women and children, and to restore and bring justice to the victims. Our work stretches across several countries and is documented in research, testimony, documentaries, and activism. In the U.S., we have been single-minded in attacking child sex trafficking in its many forms and through many means. Shared Hope has been working for several years to ensure there is both civil and criminal liability for those who

¹ 47 U.S.C. § 230 (1996).

² Yiota G. Souras (on behalf of the National Center on Missing and Exploited Children), "Human Trafficking Investigation Hearing, Panel I, Witness Statement" U.S. Senate Permanent Subcommittee on Investigations, Committee on Homeland Security and Governmental Affairs, November 19, 2015, <https://www.hsgac.senate.gov/subcommittees/investigations/hearings/human-trafficking-investigation> (accessed March 14, 2017).

facilitate child sex trafficking on the Internet. Most recently, Shared Hope submitted an amicus brief with allied organizations in support of the plaintiffs' writ of certiorari to the United States Supreme Court in *Jane Doe 1, Jane Doe 2, Jane Doe 3 v. Backpage.com*.³ In this case, three child sex trafficking victims who were sold for sex on Backpage.com sought to hold Backpage.com civilly liable for their injuries, alleging that the company knowingly facilitated—and profited from—their exploitation. When the minor victims' claims were denied by the federal district court on the ground that Backpage.com is immune from civil liability under the CDA, Shared Hope joined co-amici to argue for a common-sense interpretation of the CDA that does not allow online classified companies to facilitate criminal activity with impunity. When the Supreme Court denied the petition for writ of certiorari, Congressional clarification became the essential next step to clarify that trafficking victims must not be denied the protections provided under the TVPA merely because they are exploited via the Internet.

When the Communications Decency Act was enacted in 1996, legislators put legal protections in place for Internet-based businesses seeking to strike a balance between an open and vibrant Internet with the risk that this platform could also be abused for criminal purposes. To protect the nascent Internet business community from frivolous lawsuits and overreaching criminal liability, Section 230 of the CDA provides immunity from all civil liability and from state criminal liability. Federal criminal liability was retained in order to balance the protections for businesses with enforcement of criminal laws, as reflected in the policy provisions of Section 230 which describe a range of criminal offenses, including certain forms of trafficking that existed under federal law at the time. Specific inclusion of these offenses as conduct to which the immunity was not intended to apply, reflects the balancing act of protections for Internet businesses while also guarding against criminal activity on the Internet. However, the multi-million-dollar marketplace⁴ for sex trafficking victims that exists online today could not have been contemplated when this balance was struck in 1996.

Indeed, sex trafficking of children at that point in time was largely perceived as a crime that happened overseas in developing countries, or for many it simply was not known to exist. Twenty-one years later, we have a much greater understanding of the nature of sex trafficking and the tremendous harm wreaked on the victims of this insidious crime. Through the leadership of survivor-advocates, we are better able to see into the world of sex trafficking and understand the need to stamp out the means for this crime to persist. Sadly, the immunity provisions in Section 230 have created a barrier to attacking sex trafficking on the front lines of where it is proliferating—on the Internet.

Backpage.com is the current target of anti-trafficking advocates, law enforcement officials, as well as Congressional scrutiny due to its size and aggressive fight against liability for the victimization of minors on its site and lack of accountability for its business practices. But Backpage.com is not likely to be the only entity to exploit the protections of Section 230 in order to profit from the online marketplace for sex trafficking victims. The profits to be made will continue to lure new “bad actors” into the industry as long as they enjoy the broad protections currently

³ *Jane Doe No. 1 v. Backpage.com, LLC*, 2016 WL 963848 (1st Cir. March 14, 2016).

⁴ International Labor Organization, *Profits and Poverty: The Economics of Forced Labour* (Switzerland: ILO Cataloguing in Publication Data, 2014), 36. http://www.ilo.org/wcmsp5/groups/public/---ednorm/---declaration/documents/publication/wcms_243391.pdf (accessed March 12, 2017).

in place under the CDA. In enacting the CDA, it was the intent of Congress to protect those companies which provide platforms for conducting valid business activities and the free exchange of ideas from liability for what some users do on their sites. It was never the intent of Congress to immunize every possible Internet site, including those which are using the language of Section 230 of the CDA to facilitate criminal sex trafficking enterprises in violation of the law.

The compelling need to protect sex trafficking victims nevertheless raises concerns for the Internet companies that are not in the business of profiting from the exploitation of sex trafficking victims. For this reason, a strategic approach to amending the current immunity is critical to avoid putting “good actors” in the technology industry in the untenable position of advocating for the status quo, even though the status quo is leading to gross human rights violations of sex trafficking victims across the globe. In addition to strategic, the approach must be adequately comprehensive. To be comprehensive, any CDA amendment must be inclusive of adult sex trafficking victim protections and access to justice. Extending protections to adult victims is critical to ensure that the protections for child sex trafficking victims are not undermined by claims of perceived age or consent, as well as to protect adults who were initially exploited as children and remain in their trafficking situation as adults.

Three problems persist within Section 230 of the CDA. First, the section grants civil immunity to “interactive computer service providers” (ICSPs),⁵ defined broadly to include many online businesses. Second, the section establishes federal preemption for any state prosecutions of ICSPs. And third, the *mens rea* required to establish intent under the federal criminal law, 18 U.S.C. § 1591, is set at a level unrealizable to prove a criminal case against an online “bad actor” whose passively culpable role in facilitating sex trafficking does not clearly fall within the parameters of the existing law.

Civil lawsuits by minor victims against the largest actor identified, Backpage.com, have worked their way through the courts including the petition for certiorari filed in the U.S. Supreme Court that was denied in January 2017. New suits have recently been filed in Florida and Arizona based on evidence that Backpage.com actively participated in preparing the content of advertisements offering children and others for commercial sex. But this is not limited to Backpage.com and action against this one very bad actor will not stop the crime from flourishing on existing ICSPs, or future bad actors from recognizing the profit to be made in this lawless landscape.

Various efforts to eliminate the federal prosecution preemption have been made with respect to state offenses being committed on certain of these websites. Most notably the National Association of Attorneys General submitted a letter signed by 47 state attorneys general in 2013 proffering a surgical fix to the language of Section 230 of the CDA that returns to state and local authorities the jurisdiction to investigate and prosecute those who promote prostitution and endanger our children anywhere, including online. This is significant because to date, the U.S.

⁵ “Interactive computer service” means any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet and such systems operated or services offered by libraries or educational institutions.

Department of Justice has not brought a criminal action for sex trafficking against an online entity advertising commercial sex.

18 USC § 1591 (sex trafficking of children or by force, fraud, or coercion) states:

(a) Whoever knowingly—

(1) in or affecting interstate or foreign commerce, or within the special maritime and territorial jurisdiction of the United States, recruits, entices, harbors, transports, provides, obtains, advertises, maintains, patronizes, or solicits by any means a person; or

(2) benefits, financially or by receiving anything of value, from participation in a venture which has engaged in an act described in violation of paragraph (1), knowing, 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).

The *mens rea* proof required to sustain a prosecution is high—so high as to be a barrier to prosecution. Even with the attempt by the SAVE Act of 2015, passed as a provision in the Justice for Victims of Trafficking Act of 2015 to bring that *mens rea* to one of reckless disregard, federal prosecutions have not increased. A disparity in resources could also explain the lack of prosecutions, as federal prosecutors number about 3,000 versus the approximate 30,000 state prosecutors, many of whom are eager to bring actions to stop the sex trafficking of their citizens on offending websites.

In summary, the four essential objectives of a CDA amendment are:

- 1) lift civil immunity in cases of sex trafficking;
- 2) eliminate federal preemption for criminal prosecutions of sex trafficking;
- 3) lower the *mens rea* for ICSPs under 18 USC 1591; and,
- 4) include all sex trafficking, not just child sex trafficking.

The TVPA is the shining example of the United States' deep commitment to fighting human trafficking. The fact that it is currently superseded by and in conflict with the CDA Section 230, effectively undermining America's proclaimed commitment to human rights, compels action to resolve this conflict. The status quo of protections for Internet businesses must not persist in the face of unintended consequences, especially when those consequences are gross human rights violations committed against vulnerable victims of sex trafficking.

AUTHOR BIOGRAPHY

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Samantha is senior director and counsel for Shared Hope International, a nonprofit working to prevent sex trafficking and restore and bring justice to survivors. She directed the DEMAND research for the U.S. Department of State and the domestic minor sex trafficking research for the U.S. Department of Justice, the findings of which have provided a foundation for specialized approaches to responding to sex trafficking of citizen juveniles in the U.S. and the demand that drives this market globally. Samantha designed the Protected Innocence Challenge, which establishes a framework of laws necessary to combat child sex trafficking in each state, issues annual report cards on existing frameworks, and directs advocacy efforts to institute and implement these laws. She provides direct assistance on legislation drafting, advocacy and monitoring at the state and federal levels and works to leverage the efforts of allied organizations and agencies to make the most impact. Previously, Samantha served as the director of the American Bar Association Central European and Eurasian Law Initiative's Moldova office rule of law program. She is a graduate of Boston College and the University of Miami School of Law.

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