

Cyber Technology and Human Trafficking: Problems and Potential

By the Honorable Janet Bond Arterton,
United States District Court, District of Connecticut
September 27, 2013, Barbados

I. Introduction

The advent of new cyber technology creates both new opportunities and serious problems for human rights protections and advancements. The Arab Spring movement demonstrated the role that sites such as Twitter can play in propelling political protests and change. Social networking tools gave “activists unprecedented agility during street operations” and the ability to “organize, debate, plan, and broadcast at a level of coordination that was unavailable, indeed unimaginable, in the past.”¹ More recently, YouTube videos of chemical weapons attacks in Syria have also shown the power of the Internet to document human rights abuses and mobilize a global response. In fact, these videos became a centerpiece of the Obama Administration’s campaign for a global response against the Assad regime.²

At the same time, the power of the Internet has been used by repressive governments to crack down on political protests and movements. Authorities in Egypt responded to the use of Twitter, Facebook, and YouTube to mobilize protests by shutting down much of the country’s phone and Internet service completely. Aside from cutting off the technology favored by activists, governments have been able to use this same technology to crackdown on and combat burgeoning movements. Egypt and Iran have reportedly been able to spy on Internet and cell phone users with sophisticated “real-time

¹ David Wolman, *Facebook, Twitter Help the Arab Spring Blossom*, WIRED MAGAZINE, Apr. 16, 2013, available at <http://www.wired.com/magazine/2013/04/arabspring>.

² Jack Tapper & Mariano Castillo, *Videos Show Glimpse into Evidence for Syria Intervention*, CNN.com, available at <http://www.cnn.com/2013/09/07/politics/us-syria-chemical-attack-videos/index.html> (describing the footage as potentially “vital in the administration’s quest to convince Congress and the American public that the U.S. must launch punitive strikes against Syria.”).

traffic intelligence,” which was used by Iran in 2009 to track, imprison, and “disappear” cyber-dissidents.³

When it comes to human trafficking, the role of the Internet is equally fraught with the potential to both exacerbate the problem and combat it. “[W]ith the growth of the Internet, human trafficking is now being conducted via telephone and satellite transmissions.”⁴ “Modern conveniences such as digital cameras, Internet connections, and social networking websites make it easy for predators to entice, torture and bribe young girls of all backgrounds.”⁵ The Internet provides anonymity for would-be traffickers and consumers, and facilitates their communication in ways that were previously unheard of.⁶ Specifically, “[t]he widespread availability of the Internet allows for sex traffickers to use advertisements to recruit both victims and consumers.”⁷ Further, the Internet permits human traffickers “to organize globally and to victimize people around the world while hiding behind the technology that enables their conduct.”⁸

At the same time, the openness of the Internet provides law enforcement and government with new opportunities to bring both sex traffickers and their victims out of the shadows. The same technologies that have been used as the tools of the trade by sex traffickers to recruit both victims and potential customers have the potential to yield troves of information to law enforcement agencies looking to combat such practices.⁹ While the relationship between law enforcement and the primary Internet sites used by traffickers has generally been adversarial, partnerships between the two could prove

³ Timothy Karr, *One U.S. Corporation’s Role in Egypt’s Brutal Crackdown*, HUFFINGTON POST, Jan. 28, 2011, available at http://www.huffingtonpost.com/timothy-karr/one-us-corporations-role-_b_815281.html.

⁴ Erin I. Kunze, Note, *Sex Trafficking via the Internet: How International Agreements Address the Problem and Fail To Go Far Enough*, 10 J. HIGH TECH. L. 241, 250 (2010).

⁵ *Id.* at 246.

⁶ See Kendall Vitale, Comment, *Barricading the Information Superhighway To Stop the Flow of Traffic: Why International Regulation of the Internet is Necessary To Prevent Sex Trafficking*, 27 AM. UNIV. INT’L L. REV. 91, 106–10 (2012).

⁷ *Id.* at 109.

⁸ Kunze, *supra* note 4, at 252.

⁹ See *infra* text accompanying notes 40–43.

mutually beneficial. Law enforcement could gain powerful tools to combat trafficking, while the sites could resolve legal challenges that potentially impact their operations.¹⁰

II. Combating the Internet as a Tool of Traffickers

Modern human trafficking recognizes no borders, and domestic law alone will not be able to address the scope of the problem.¹¹ However, the existing international treaties prohibiting human trafficking do not specifically address the use of the Internet to recruit victims and advertise their services.¹² In the United States, the first federal attempt to police “obscene or indecent” Internet communications directed at children, the Communications Decency Act of 1996 (CDA),¹³ was struck down by the Supreme Court in *Reno v. American Civil Liberties Union* on First Amendment grounds.¹⁴ The CDA criminalized “the knowing transmission of obscene or indecent messages to any recipient under 18 years of age” and “the knowing sending or displaying of patently offensive messages in a manner that is available to a person under 18 years of age.”¹⁵ While the Court recognized “the governmental interest in protecting children from harmful materials,” it held that such an “interest does not justify an unnecessarily broad suppression of speech” that could also be “addressed to adults.”¹⁶ Under established Supreme Court precedent, “[s]exual expression which is indecent but not obscene is protected by the First Amendment.”¹⁷ Accordingly, the Supreme Court struck down the provisions of the CDA that targeted “indecent” sexual communications protected by the First Amendment.

Another section of the CDA,¹⁸ which explicitly preempted any state laws that imposed liability on interactive computer service providers for third party content, such

¹⁰ See *infra* text accompanying note 44.

¹¹ *Id.* at 253.

¹² *Id.*

¹³ 47 U.S.C. §§ 223(a) and 233(d).

¹⁴ 521 U.S. 844 (1997).

¹⁵ *Id.* at 859 (citing 47 U.S.C. §§ 223(a) and 223(d)).

¹⁶ *Id.* at 875.

¹⁷ *Id.* at 874 (alteration in original) (quoting *Sable Commc'ns of California, Inc. v. F.C.C.*, 492 U.S. 115, 126 (1989)).

¹⁸ 47 U.S.C. § 230.

as posts used to facilitate sex trafficking, was not affected by the Court's decision.¹⁹ In contrast to the provisions struck down by the Court, Congress enacted this section of the CDA "to maintain the robust nature of Internet communication and, accordingly, to keep government interference in the medium to a minimum."²⁰ Accordingly, after the Supreme Court's decision in *Reno v. American Civil Liberties Union*, the primary remaining federal law regulating the Internet is seemingly a roadblock to potential legislation by individual states seeking to combat sex trafficking.

Notwithstanding the CDA, several individual States have tried to address the technological advances in human trafficking and undertaken to separately combat the use of the Internet to promote human trafficking. The use of the Internet to promote human trafficking has been most apparent on websites that sell classified advertisements, such as Craigslist and Backpage, which sex traffickers use to advertise the services of their victims.²¹ However, while the United States has prosecuted many individuals who engage in online sex trafficking, it has so far failed to restrict websites like Craigslist and Backpage to counteract the advantage that the Internet provides to human traffickers. Since the CDA was struck down, there has been no federal undertaking to regulate the content of these websites or to address the use of online classifieds to advertise victims of sex trafficking, and the several states which have recently attempted to statutorily impose criminal liability on all individuals and entities responsible for publishing advertisements of minors for commercial sex have thus far encountered constitutional roadblocks.

For example, in 2012, Tennessee enacted a law that criminalized "advertising commercial sexual abuse of a minor" when a "person knowingly sells or offers to sell an advertisement that would appear to a reasonable person to be for the purpose of engaging in what would be a commercial sex act . . . with a minor."²² A "commercial sex act" was in turn defined as "any sexual act for which something of value is given or

¹⁹ Section 230 of the CDA provides that "[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider." 47 U.S.C. § 230(c)(1).

²⁰ *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 330 (4th Cir. 1997).

²¹ Nicholas D. Kristof, *How Pimps Use the Web To Sell Girls*, N.Y. TIMES, Jan. 25, 2012, available at <http://www.nytimes.com/2012/01/26/opinion/how-pimps-use-the-web-to-sell-girls.html>.

²² Tenn. Code Ann. § 39-13-315 (West 2012).

received.”²³ In response to this legislation, Backpage moved for a temporary restraining order and preliminary injunction, asserting that the law was invalid because it was preempted by federal law and violated the First Amendment and the Commerce Clause of the United States Constitution.²⁴ The Tennessee court found that Backpage had shown a likelihood that it would succeed in proving that the law was constitutionally invalid, justifying its issuance of a preliminary injunction. First, the court held that section 230 of the CDA explicitly preempted state laws that imposed liability on interactive computer service providers, such as Backpage, for third party content, and thus Backpage was likely to prevail on this claim.²⁵ The court also found that the Tennessee law was likely preempted because it would undermine Congress’s goals in enacting the CDA to encourage the self-policing of obscenity and other offensive material on the Internet and was likely an impermissible intrusion on federal authority to regulate interstate commerce.²⁶

Further, the court concluded that the law was likely void for violating the First Amendment because it imposed liability without requiring actual knowledge of the age of anyone featured in an advertisement.²⁷ Instead, a person is liable if he or she knows that an advertisement gives off the appearance of underage sex for sale, even if he or she does not know the actual age of the subject and even if the subject is not in fact a minor.²⁸ Citing Supreme Court cases that require proof of scienter in obscenity laws to avoid undue restrictions on free speech and the risks of self-censorship, the court concluded that

²³ *Backpage.com, LLC v. Cooper*, No. 12-cv-00654 (JTN), 2013 WL 1558785, at *6 (M.D. Tenn. Jan. 3, 2013) (quoting Tenn. Code Ann. § 39–13–301 (West 2012)).

²⁴ *See id.* at *1.

²⁵ *Cooper*, 2013 WL 15585785, at *12. Previous attempts by individuals to hold online classified websites liable for the content of their advertisements have similarly failed as a result of section 230. *See, e.g., Dart v. Craigslist*, 665 F. Supp. 2d 861 (N.D. Ill. 2009) (rejecting a suit brought by the Sheriff of Cook County claiming that Craigslist was responsible for a public nuisance as a result of its ads for “adult services”).

²⁶ *Cooper*, 2013 WL 15585785, at *13, *28.

²⁷ The court further concluded that the law was likely an impermissible content-based restriction on speech, because it imposed liability “for advertisements solely on the basis that they contain certain proscribed content: what appears to be the promotion of a sexual act with minors for something of value. The regulation does not apply to advertisements that appear to promote the sale of non-sexual acts, such as used car sales or hairdressing services.” *Id.* at 24.

²⁸ *Id.* at *17.

Backpage demonstrated that the Tennessee law would impose on it an “impossible burden to review all of their millions of postings or, more likely, shut down their adult services section.”²⁹ Finally, the court concluded that the law was likely unconstitutionally overbroad for regulating advertisements that merely appeared but did not actually involve minors and was impermissibly vague in its use of several terms.³⁰ For example the term “sexual act” could encompass numerous legal activities, such as a phone sex and adult pay-per-view websites.³¹

In enjoining the enforcement of Tennessee’s law, the court noted:

Child sexual exploitation is an evil that states have an undisputed interest in dispelling. However despicable this evil, though, the Constitution stands as a shield against broad assaults by states on the rights of their citizens. The Constitution tells us that—when freedom of speech hangs in the balance—the state may not use a butcher knife on a problem that requires a scalpel to fix. Nor may a state enforce a law that flatly conflicts with federal law. Yet, this appears to be what the Tennessee legislature has done in passing the law at issue.³²

On March 19, 2013, the Tennessee court granted Backpage’s unopposed motion to convert the preliminary injunction into a permanent injunction and entered a final judgment invalidating the law.³³

Also in 2012, the State of Washington passed a similar law, which provided that a person was guilty of “the offense of advertising commercial sexual abuse of a minor” if he “knowingly publishes, disseminates, or displays, or causes directly or indirectly, to be published, disseminated, or displayed, any advertisement for a commercial sex act, which is to take place in the state of Washington and that includes the depiction of a minor.”³⁴ As in Tennessee, a court granted Backpage a preliminary injunction barring the enforcement of the Washington law and demonstrating that it would likely be held invalid, because it was unconstitutionally vague and overbroad, preempted by the CDA,

²⁹ *Id.* at *18.

³⁰ *Id.* at *19, *22.

³¹ *Id.* at *22

³² *Id.* at *1.

³³ *Backpage.com, LLC v. Hoffman*, Civ. No. 13-cv-03952 (DMC)(JAD), 2013 WL 4502097, at *2 (D.N.J. Aug. 20, 2013).

³⁴ *Backpage.com, LLC v. McKenna*, 881 F. Supp. 2d 1262, 1268 (W.D. Wash. 2012) (quoting Wash. SB 6251).

and in violation of the First Amendment and the Commerce Clause.³⁵ Ultimately, the State of Washington's legislature enacted a measure to repeal the law effective July 28, 2013.³⁶ Most recently, on August 20, 2013, a district court in New Jersey preliminarily enjoined the enforcement of an almost identical New Jersey law on largely the same grounds as those in the Washington and Tennessee lawsuits.³⁷ It bears noting however, that each of these cases was decided at the district court level, and there is as of yet no appellate analysis of the constitutional basis for these injunctions.

III. The Internet as a Potential Tool of Law Enforcement

Policy makers have directed most of their attention towards trying to limit the use of websites by traffickers to recruit victims and customers. Indeed, the websites themselves have made efforts to reduce the use of their classified advertisements to perpetrate sex trafficking. Craigslist voluntarily closed the "adult services" section of its website after coming under pressure from state attorneys general and advocacy groups for its role in facilitating sex trafficking.³⁸ But there has also been recognition by law enforcement agencies that these sites provide a rare opportunity to track what is often an otherwise difficult to detect problem. For example, law enforcement agents have been able to conduct sting operations by posting fake advertisements on sites such as Craigslist and Backpage.³⁹

Backpage has cooperated with federal law enforcement agencies in such sting operations and their attempts to detect and combat the use of its website for sex

³⁵ *Id.* at *1286.

³⁶ *See Hoffman*, 2013 WL 4502097, at *2.

³⁷ *See id.* Connecticut has passed a law similar to the one struck down in Tennessee. *See* Conn. Gen. Stat. § 53a-196i (West 2013). This law has not yet been the subject of a legal challenge.

³⁸ *See* Claire Cain Miller, *Craigslist Says It Has Shut Its Section for Sex Ads*, NY TIMES, Sept. 15, 2010, available at http://www.nytimes.com/2010/09/16/business/16craigslist.html?_r=0.

³⁹ *See, e.g.,* Vera Chinese et al., *Nassau County Nabs 104 Johns who Tried to Pay Undercover Cops for Sex*, N.Y. DAILY NEWS, June 3, 2013, available at <http://www.nydailynews.com/new-york/104-johns-nabbed-nassau-county-pay-sex-article-1.1361717>.

trafficking.⁴⁰ It argues that it can contribute to the fight against human trafficking by monitoring its website for illegal activity, and by providing a valuable investigative tool for law enforcement officers seeking to uncover online sex trafficking.⁴¹ For example, Backpage charges customers for posting ads only in the adult and dating categories, because, according to Backpage’s general counsel, “that provides one of the most reliable evidentiary trails for law enforcement to identify individuals.”⁴² Backpage argues that shutting down its adult classifieds would do more harm than good, because traffickers would just move to venues less willing to cooperate with the authorities.⁴³

Experience has shown that the data from sites like Backpage when used in conjunction with other resources available to law enforcement can be a powerful tool to combat trafficking. For example, a private software company has partnered with the National Center for Missing and Exploited Children to develop technologies to search and analyze information from multiple databases simultaneously, including those listing missing and exploited children and sex offenders. The data and analysis shared with law enforcement agencies can offer them valuable intelligence in their efforts to combat trafficking.⁴⁴

IV. Conclusion

As recent events have shown, the power of the Internet has already fundamentally affected the realm of human trafficking and human rights in general. In the United States, policy makers, law enforcement agencies, and the courts are still struggling to find the appropriate balance between protecting the Internet as a tool for free speech while combating its role in facilitating human trafficking on a previously unknown scale. This balancing process, difficult and slow as it may be, will itself afford a public education on

⁴⁰ See *Online and Anonymous: New Challenges to Prosecuting Sex Trafficking*, NPR, Aug. 3, 2013, available at <http://www.npr.org/2013/08/03/208664066/online-the-web-of-sex-trafficking-can-be-even-more-obscure>.

⁴¹ See *id.*

⁴² *Id.*

⁴³ *Id.*

⁴⁴ See Univ. of S. Cal., *Technology & Human Trafficking: Private-Sector Initiatives*, <http://technologyandtrafficking.usc.edu/private-sector-initiatives> (last visited Sept. 18, 2013.)

the reality and horrors of human trafficking, as well as the imperatives of constitutional values.