



Santa Clara Law Review

Volume 56 | Number 3

Article 2

6-17-2016

From Craigslist to Backpage.com: Conspiracy as a Strategy to Prosecute Third-Party Websites for Sex Trafficking

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**FROM CRAIGSLIST TO BACKPAGE.COM:
CONSPIRACY AS A STRATEGY TO PROSECUTE
THIRD-PARTY WEBSITES FOR SEX TRAFFICKING**

Monica J. DeLateur*

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INTRODUCTION

Improvements in technology have brought with them new means for sexual exploitation.¹ In particular, there has been a shift from solicitation of prostitution occurring on the streets to online.² Classified-advertisements websites like Craigslist and Backpage.com were and are considered “a godsend to pimps, allowing customers to order a girl online as if she were a pizza.”³ Advertisements on these third-party websites are often blatantly for illegal sexual activities.⁴

With this increased ease of illegal sale of sex comes the

1. Donna M. Hughes, *The Internet and Sex Industries*, TECH. & SOCIOLOGY MAGAZINE, Spring 2000, at para. 6; Leary, *infra* note 326, at 309; see MEREDITH DANK ET AL., URBAN INSTITUTE, ESTIMATING THE SIZE AND STRUCTURE OF THE UNDERGROUND COMMERCIAL SEX ECONOMY IN EIGHT MAJOR US CITIES 3, 128 (2014) (noting in their study’s results that availability and expansion of the Internet introduced new forms of recruitment and advertisement to the sex market; finding human trafficking of minors on the Internet in every city studied).

2. Melissa Farley et al., *Online Prostitution & Trafficking*, 77 ALB. L. REV. 1039, 1043 (2013–2014); MICHAEL SHIVELY ET AL., ABT ASSOCIATES, AN OVERVIEW OF WEB-BASED REVERSE STINGS IN THE U.S. 1 (2013); Linda Smith & Samantha Healy Vardaman, *A Legislative Framework for Combating Domestic Minor Sex Trafficking*, 23 REGENT U. L. REV. 265, 288 (2011); see DANK ET AL., *supra* note 1, at 56, 211 (finding underground commercial sex has changed in the last decade, as now the majority of its business is over the Internet, including that finding monetary charges of commercial sex are higher when determined online rather than on the street as they are for time rather than sex act); Leary, *infra* note 326, at 291 (stating online solicitation moves prostitution away from the street, where it is traditionally recognized).

3. Nicholas D. Kristof, *How Pimps Use the Web to Sell Girls*, N.Y. TIMES, Jan. 25, 2012, http://www.nytimes.com/2012/01/26/opinion/how-pimps-use-the-web-to-sell-girls.html?_r=0.

4. See *Dart v. Craigslist, Inc.*, 665 F. Supp. 2d 961, 962 (N.D. Ill., 2009) (discussing Sheriff Dart’s testimony and evidence that many third-party websites’ advertisements are “thinly veiled” to hide their true purpose of commercial sex). Third-party websites are generally defined as those that allow third-party users or customers to upload content. The websites are essentially providing an Internet service to third parties. Walters, *infra* note 38, at 173.

increased likelihood that human sex trafficking of both minors and adults is occurring on these websites.⁵ As defined by 18 U.S.C. § 1591(a), federal minor sex trafficking is knowingly recruiting, enticing, harboring, transporting, providing, obtaining, or maintaining by any means a person for the purpose of a commercial sex act that affects interstate commerce (or foreign commerce, or is within maritime jurisdiction) when the person is under the age of 18, or benefitting from participation in such a venture.⁶ Federal sex trafficking of adults is this occurrence through means of force, threats of force, fraud, or coercion, as defined in 18 U.S.C. § 1591(e)(2). Thus, for the crime of minor sex trafficking, there is no element of force, fraud, or coercion. Minor sex trafficking occurs when there is a commercial sex act involving a minor.⁷

Since the above statute was added to the United States Criminal Code by the Trafficking Victims Protection Act (TVPA) in 2000,⁸ there has been increased attention and resources allocated to combatting human trafficking.⁹ Additionally, since the passage of the TVPA, all fifty of the United States have passed legislation criminalizing human trafficking.¹⁰ Following the high federal mandatory minimum imprisonment terms for human trafficking (10 to 15 years),¹¹

5. See DANK ET AL., *supra* note 1, at 129 (finding in their evaluation of the underground commercial sex market that posting advertisements on the Internet allows pimps to advertise trafficking victims and hide them from law enforcement).

6. 18 U.S.C. § 1591 (2014).

7. This is a different definition than sexual exploitation of a minor, which, for example, can occur when a minor is compelled to be in pornography. Compare 18 U.S.C. § 2251 (2014) (criminalizing sexual exploitation of children), with 18 U.S.C. § 1591(a) (criminalizing sex trafficking of children), and Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime, United Nations Convention Against Transnational Organized Crime and the Protocols Thereto, 42 (having a broader definition of trafficking that includes exploitation).

8. Trafficking Victims Protection Act, H.R. 3244, 106th Cong. (2nd Sess. 2000). The TVPA has been reauthorized in 2003, 2005, and 2008. Trafficking Victims Protection Reauthorization Act (TVPRA) of 2003, H.R. 2620, 108th Cong. (1st Sess. 2003); TVPRA of 2005, H.R. 972, 109th Cong. (1st Sess. 2005); TVPRA of 2008, H.R. 7311, 110th Cong. (2nd Sess. 2008).

9. AMY FARRELL ET AL., NATIONAL INSTITUTE OF JUSTICE, IDENTIFYING CHALLENGES TO IMPROVE INVESTIGATION AND PROSECUTION OF STATE AND LOCAL HUMAN TRAFFICKING CASES 1 (2012).

10. *E.g.* Farrell et al., *infra* note 79, at 141.

11. TVPRA of 2008, H.R. 7311, 110th Cong. (2^d Sess. 2008). At the federal

many states have harsh sentences for human trafficking as well, with a number of states allowing for life imprisonment.¹² Further, due to its increased attention, human trafficking was added as a category to the national Uniform Crime Report in 2013.¹³

Attention has increased particularly regarding the movement and exploitation of people internationally and nationally for the purpose of commercial sex.¹⁴ Sex traffickers have become a focus of the media, law enforcers, and organizations. With this has come a number of estimates of victims of sex trafficking. In 2012, the International Labour Organization estimated that worldwide there are 4.5 million victims of forced sexual exploitation, with 98% of these victims being women or girls, and 21% of these victims estimated to be children.¹⁵ Siddarth Kara estimated that globally one woman or child is trafficked for the purpose of sexual exploitation every minute.¹⁶ Additionally, Kara estimated that in 2007, the sale of sex trafficked victims to brothel owners and pimps generated one-billion dollars in revenue, and the commercial exploitation (from men purchasing sex) of sex trafficking

level this has resulted in a minimum base-offense level of 24 on the Federal sentencing table, under the federal sentencing guidelines, for violation of 18 U.S.C. § 1591. See Celesta A. Albonetti, *Changes in Federal Sentencing for Forced Labor and for Sex Trafficking*, 61 CRIME, L., & SOC. CHANGE, 179, 186–91, 193–202 (tracing the increase in sentencing available for sex trafficking since it was criminalized federally in 2000).

12. See BOUCHE ET AL., *infra* note 200, at 16; e.g. MASS. GEN. LAWS. Ch. 265 § 50 (2016) (stating human trafficking for sexual servitude involving a minor carries a potential maximum sentence of life in prison); MICH. COMP. LAWS § 767.24 (2016) (stating that a violation of the human trafficking provisions is punishable by imprisonment for life).

13. Federal Bureau of Investigation, *UCR Program Adds Human Trafficking Offenses to Data Collection, Includes More Specific Prostitution Offenses*, CJIS LINK (May, 2013), available at <http://www.fbi.gov/about-us/cjis/cjis-link/may-2013/ucr-program-adds-human-trafficking-offenses-to-data-collection-includes-more-specific-prostitution-offenses>.

14. Ko-Lin Chin & James O. Finckenauer, *Chickenheads, agents, mommies, and jockeys: The social organization of transnational commercial sex*, 56 CRIME, L. & SOC. CHANGE 463, 463 (2011).

15. INTERNATIONAL LABOUR OFFICE, ILO GLOBAL ESTIMATE OF FORCED LABOUR 11, 14–15 (2012). International Labour Organization (ILO) used a capture-recapture method of open-source information and data from 2002–2011 to develop these estimates. *Id.* at 21–34. “Human trafficking can also be regarded as forced labour, and so this estimate captures the full realm of human trafficking for. . .sexual exploitation.” *Id.* at 13.

16. SIDDARTH KARA, SEX TRAFFICKING: INSIDE THE BUSINESS OF MODERN SLAVERY 17 (2009).

victims generated 51.3 billion dollars in revenue.¹⁷

Sex trafficking is currently commonly facilitated through third-party websites,¹⁸ with minor sex trafficking mainly occurring on Backpage.com.¹⁹ The growth of sex trafficking in this medium has been exponential.²⁰ Researchers and non-profit organizations propose that the Internet is the most prevalent medium used to facilitate sex trafficking, particularly of minors;²¹ journalists, such as Travis Andersen, and lawyers who represent minor victims, such as Carmen Durso, claim the Internet is the primary way to make contact with minor victims.²² Courts have also taken note of this new method, stating the Internet has become a favored way of

17. *Id.* at 19.

18. See Kimberly A. McCabe, *The Role of Internet Service Providers in Cases of Child Pornography and Child Prostitution*, SOC. SCI. COMPUTER REV. 247, 250 (2008) (“child [sex] trafficking. . . is today more likely to involve the use of the Internet than in any other time in society”); Brandon Gee, *Child-sex suit collides with Internet economy*, MASS. LAWS. WKLY., Apr. 24, 2015, at para. 1.

19. See *infra* Part I.A.

20. See Mary Graw Leary, *Fighting Fire with Fire: Technology in Child Sex Trafficking*, 21 DUKE J. GENDER L. & POL’Y 289, 307 (2014); (“Some experts suggest that technology has helped transform the growth and characteristics of child sex trafficking.”); THORN IN COLLABORATION WITH VANESSA BOUCHÉ, A REPORT ON THE USE OF TECHNOLOGY TO RECRUIT, GROOM AND SELL DOMESTIC MINOR SEX TRAFFICKING VICTIMS 10, 19, 38 (Jan. 2015) (discussing survey results of minor sex trafficking survivors, indicating the internet’s increased facilitation of minor sex trafficking, including for recruitment).

21. Melissa Farley et al., *Online Prostitution & Trafficking*, 77 ALB. L. REV. 1039, 1043 (2013–2014); Michael Shively et al., *ABT Associates, An Overview of Web-Based Reverse Stings in the U.S. 1* (2013); Linda Smith & Samantha Healy Vardaman, *A Legislative Framework for Combating Domestic Minor Sex Trafficking*, 23 REGENT U. L. REV. 265, 288 (2011); see DANK ET AL., *supra* note 1, at 56, 211 (finding underground commercial sex has changed in the last decade, as now the majority of its business is over the Internet, including that finding monetary charges of commercial sex are higher when determined online rather than on the street as they are for time rather than sex act); Leary, *infra* note 326, at 291 (stating online solicitation moves prostitution away from the street, where it is traditionally recognized); *Internet Based*, POLARIS PROJECT, <http://www.polarisproject.org/component/content/article/1-national-human-trafficking-hotline/257-Internet-based> (last visited Dec. 1, 2014).

22. See *Alleged child sex trafficking victims suing Backpage.com*, BOSTON GLOBE, Oct. 17, 2014, available at <http://www.bostonglobe.com/metro/2014/10/16/child-sex-trafficking-victims-suing-backpage-com/7lc02fp91ToEdWt4dKLIVK/story.html>; Nicholas D. Kristof, *Teenagers Stand Up to Backpage*, N.Y. TIMES, Nov. 1, 2014, available at http://www.nytimes.com/2014/11/02/opinion/sunday/teenagers-stand-up-to-backpage.html?_r=0; see also Leary, *infra* note 326, at 309 (discussing the Internet increasing the ability of traffickers to recruit child sex trafficking victims); DANK ET AL., *supra* note 1, at 165 (finding that 22% of respondent pimps/traffickers recruited victims through the Internet).

advertising the availability of children for sex, as the advertisements can be purchased rapidly and victims can be moved quickly.²³ Pimps and sex traffickers also utilize the Internet to “feel out” a potential market for prostitution.²⁴ As such, nonprofits are also using the Internet to curb the demands of minor sex trafficking and to find sex trafficking victims.²⁵ For example, the nonprofit organization FAIR Girls, which helps sex trafficking victims, starts its searches for missing girls on Backpage.com, a site it considers “the number one marketplace where traffickers sell their victims.”²⁶

In response to this new method of facilitating human trafficking, law enforcement agencies now utilize third-party websites to catch sex traffickers.²⁷ As Gilbert Trill, a special

23. Backpage.com, LLC v. Cooper, 939 F. Supp. 2d 805, 815 (M.D. Tenn. 2013).

24. DANK ET AL., *supra* note 1 at 98 (“With the advent of the Internet, pimps are able to take the ‘temperature’ of a city before traveling there-by posting online ads prior to arrival-in order to determine the level of demand.”).

25. See, e.g., *Demand Disruption*, THE EPIK (EVERYMAN PROTECTING INNOCENT KIDS) PROJECT, <http://www.epikproject.org/#/cyber-patrol/demand-disruption> (last visited Jan. 21, 2015); 11: “How Volunteers are Disrupting Thousands of Sex Buyers” with Tom Perez (*The Epik Project*), IN PLAIN SIGHT: STORIES OF HOPE AND FREEDOM (Apr. 12, 2015) (podcast), available at <http://www.inplainsightfilm.com/011-how-volunteers-disrupting-thousands-sex-buyers-tom-perez-the-epik-project/#sthash.kSIDmV7P.bVO5VsMt.dpbs> (discussing The EPIK Project’s “Cyber Patrol,” a project where male volunteers patrol the online sex market and place fake ads for prostitution, directly confront buyers at “point of sale” who respond to the ad, and state they will provide the buyer’s phone number to law enforcement, though there is no formal legal connection with the police); Press Release, Boston Mayor’s Office, Mayor Walsh Launches Cease Boston, Part of National Initiative to Fight Sex Trafficking (Mar. 6, 2015), available at <http://www.cityofboston.gov/news/Default.aspx?id=20027> (discussing CEASE [Cities Empowered Against Sexual Exploitation] Project aiming to reduce online demand for sex including measuring transaction trends on websites and online sex purchasing behaviors, and utilizing deterrent posts and intervention messages).

26. Andrea Powell, *Sex Trafficking in America: The Role of Online Advertisers Alleged child sex trafficking victims suing Backpage.com*, FAIR OBSERVER, Sept. 26, 2013, http://www.fairobserver.com/region/north_america/sex-trafficking-america-role-online-advertisers/; accord THORN IN COLLABORATION WITH BOUCHÉ, *supra* note 20, at 19 (finding that Backpage.com is the most common website used for advertisements among minor sex trafficking survivors surveyed).

27. Mary Graw Leary, *Fighting Fire with Fire: Technology in Child Sex Trafficking*, 21 DUKE J. GENDER L. & POL’Y 289, 314, 317 (2014); DANK ET AL., *supra* note 1, at 192–93 (discussing study results of interviews with pimps, including human traffickers, that the Internet presents many opportunities for law enforcement to set up stings); see Farley et al., *supra* note 2, at 1044; (discussing the development of the Internet requiring new strategies to arrest

agent for the United States Immigration and Customs Enforcement (ICE) Office of Investigations, discusses, “[s]ome child predators mistakenly believe the anonymity of cyberspace [communication over computer networks like the Internet] shields them from scrutiny. In fact, their use of computers and the Internet gives us new tools in our efforts to investigate this insidious behavior.”²⁸ In a review of initiatives targeting demand for commercial sex in the United States from 1995-2002, Shively et al. found that about one-third of the 300 police departments known to have street-level reverse stings implemented web-based reverse stings.²⁹ Further, the usage of the Internet is so common in sex trafficking that some states include enticing a child on the Internet for the purpose of commercial sex as part of their state human trafficking statute.³⁰

Criminalizing the known publication source is another strategy in line with these efforts by legislators and the police to fight sex trafficking on the Internet. However, attempts to prosecute third-party websites, particularly those that provide online-classified advertisements, through legislation and state prosecution have been unsuccessful.³¹ Focus on third-party promoters has increased, apparent in the recent passing of the federal Justice of Victims of Trafficking Act (JVTA), signed into law on May 29, 2015 (the difficulties of which are discussed below).³² In this article, I explore and advocate for a readily-available solution familiar to prosecutors and already validated: federal prosecutors charge online classifieds

traffickers).

28. Press Release, ICE, Kansas man gets 15 years in prison for attempted sex trafficking of a child (Dec. 1, 2009), <http://www.ice.gov/news/releases/kansas-man-gets-15-years-prison-attempted-sex-trafficking-child>, at para. 4.

29. Farley et al., *supra* note 2, at 1.

30. See e.g. H.B. 3808, 110th Cong. (Mass. 2011) (including enticing a child under the age of 18 via electronic communication to engage in prostitution as part of the crime of sex trafficking).

31. *Infra* Part I.C.

32. Justice for Victims of Trafficking Act (JVTA) of 2015, S. 178, 114th Cong. (2015). For example, the JVTA allows for prosecution of those who purchase sexual acts from human trafficking victims. S. 178 at 12-13 (“section 108 of this title amends section 1591 of title 18, United States Code, to add the words ‘solicits or patronizes’ to the sex trafficking statute making absolutely clear for judges, juries, prosecutors, and law enforcement officials that criminals who purchase sexual acts from human trafficking victims may be arrested, prosecuted, and convicted as sex trafficking offenders when this is merited by the facts of a particular case.”).

websites involved in sex trafficking with federal conspiracy to commit sex trafficking.

The purpose of this article is to provide conspiracy as a promising approach to prosecute third-party websites facilitating sex trafficking, particularly Backpage.com. This Article begins by briefly discussing claims of how often the Internet is used in sex trafficking cases, and on what websites. The article then examines limitations and challenges of attempts to prosecute third-party websites, and argues that federal criminal conspiracy, through the explicit federal crime exception of the Communications Decency Act, may be a successful avenue for holding third-party websites accountable. I then extrapolate the elements of conspiracy and analyze four federal human trafficking cases (identified using a fact-centered framework with a comprehensive national dataset of federal and state human trafficking investigations, arrests, and prosecutions from 2003 to 2012) to explore whether conspiracy elements can be met against the involved websites. This analysis provides detailed information to highlight elements of conspiracy and examine conspiracy's utility in prosecuting third-party websites for sex trafficking. The article further discusses the defenses Backpage.com may raise in response to a conspiracy charge and their withstanding. I conclude that conspiracy is a promising approach for a limited, though key, number of cases. Further, I suggest additional facts about cases need to be collected in furtherance of a conspiracy prosecution, particularly regarding the element of intent as a knowledgeable participant.

This article contributes analysis of an available option to prosecute third-party websites for sex trafficking. Recent events support research in this area: the seizure of myRedbook.com, an escort-advertising website, in June of 2014, after the websites' administrators were indicted for using the website to facilitate prostitution;³³ the conviction of Ross Ulbricht, the creator of the website Silk Road, for using the website to commit conspiracy to distribute narcotics, aid computer hacking, and commit money laundering (among other charges);³⁴ recent proposed federal legislation to prosecute Internet websites for human trafficking being

33. *Infra* Part II.

34. *Infra* Part II.

subsumed in the JVTA, which largely focuses on third-party liability for human trafficking (as mentioned);³⁵ and a current federal civil lawsuit against Backpage.com in Massachusetts by a human trafficking victim.³⁶ In order to provide this guidance for prosecution, this article utilizes a dataset of incidents of recognized human trafficking investigations, arrests, and prosecutions that indicate the Internet as a venue. From this dataset I perform a case analysis on four chosen federal human trafficking cases. Because of the starting point of incidents with recognized human trafficking elements, the primary contribution of this article is its presentation of a case analysis framework, utilizing facts from recognized federal sex trafficking cases to examine the elements of conspiracy.

I. SEX TRAFFICKING ON THIRD-PARTY WEBSITES

Online classified-advertising websites have become an easy-to-use alternative to traditional print newspapers for advertising commercial sex. Until only a few years ago, the classified-advertisements website of Craigslist was the leader in prostitution advertising online.³⁷ However, Craigslist closed its Adult Services category in 2010 in response to public scrutiny, court cases, and further threats of criminal prosecution.³⁸ For example, Attorney General Henry

35. Stop Advertising Victims of Sexual Exploitation (SAVE) Act, H.R. 4225, 113th Cong. (2014), now H.R. 285, 114th Cong. (2015) [hereinafter *H.R. 4225*] now integrated into S. 178 § 118: “Section 1591(a) of title 18, United States Code, as amended by this Act is further amended by inserting ‘advertises,’ after ‘obtains’ . . . Section 1591(a) of title 18, United States Code, is amended in the undesignated matter following paragraph (2) by inserting ‘except where the act constituting the violation of paragraph (1) is advertising,’ after ‘knowing, or.’”.

36. *Doe v. Backpage.com, LLC*, No. 14-cv-13870, (D. Mass. May 15, 2015). This civil case was ordered dismissed pursuant to a motion for failure to state a claim, by Fed. R. Civ. P. 12(b)(6), but at the time of this article’s writing, an appeal is pending. *Doe v. Backpage.com, LLC*, No. 14-cv-13870, (1st Cir. argued Jan. 6, 2016).

37. AIM GROUP, BACKPAGE REPLACES CRAIGSLIST AS PROSTITUTION-AD LEADER (2010), available at <http://aimgroup.com/2010/10/19/backpage-replaces-craigslist-as-prostitution-ad-leader/>; THE SCHAPIRO GROUP, MEN WHO BUY SEX WITH ADOLESCENT GIRLS: A SCIENTIFIC RESEARCH STUDY (2010) (finding advertisements on Georgia’s Craigslist for sex with young females receiving three-times as many responses compared to identical ads placed on other websites).

38. See generally Lawrence G. Walters, *Shooting the Messenger: An Analysis of Theories of Criminal Liability Used against Adult-Themed Online Serv. Providers*, 23 STAN. L. & POL’Y REV., 171, 178 (2012) (discussing recent criminal actions against online service providers, and the potential for more, and the

McMaster of South Carolina sent Craigslist a letter in May of 2009 stating the site had ten days to remove illegal content, claiming the managers knew the site was used for illegal and unlawful activity.³⁹ This accusation was based on an agreement Craigslist made with the National Center for Missing and Exploited Children requiring anyone who posted an “erotic services” ad to provide a working telephone number and pay a fee with a valid credit card.⁴⁰

Backpage.com, another classified-advertisements website, largely replaced the services from Craigslist’s Adult Services (previously titled “Erotic Services”) category.⁴¹ Backpage.com was previously owned by Village Voice Media, a corporation most notably known for operating the Village Voice newspaper. This infamous “alternative” newspaper “pioneered the alternative daily format,” and profited from selling “adult services” advertisements in its back section.⁴² The website Backpage.com originated from these “back pages,” which traditionally advertised commercial sex encounters in coded language.⁴³ However, in late 2012, Village Voice Media split from the online advertising site, after many corporate advertisers pulled advertisements from the Village Voice following concerns over Backpage.com’s adult services content.⁴⁴

existing protections from civil liability provided to online service providers).

39. M. Alex Johnson, *Authorities seek to crack down Craigslist*, NBC NEWS.COM (last updated May 5, 2009, 8:04 PM), http://www.nbcnews.com/id/30584416/ns/technology_and_science-tech_and_gadgets/t/authorities-seek-crack-down-craigslist/#.VIP3koeRmtA.

40. At the time, Craigslist was already under fire for the murder of Julissa Brisman in Massachusetts; Brisman was a 25-year old massage therapist who advertised on Craigslist and whose killer allegedly found her through her online advertisement. *Id.*

41. SHIVELY ET AL., *supra* note 2, at 1.

42. Sam Gustin, *Goldman Sachs Sells Village Voice Stake After Sex Trafficking Furor*, TIME, Apr. 2, 2012, <http://business.time.com/2012/04/02/goldman-sachs-sells-village-voice-stake-after-sex-trafficking-furor/>.

43. *E.g.*, Complaint at 9, Doe v. Backpage.com, LLC, No. 14-cv-13870 (1st Cir. argued Jan. 6, 2016).

44. Chris Francescani & Nadia Damouni, *Village Voice newspaper chain to split from controversial ad site*, REUTERS (Sep. 24, 2012, 9:33 AM), <http://in.reuters.com/article/2012/09/24/us-usa-villagevoice-backpage-idINBRE88N04020120924>. Shareholders Mike Lacey and Jim Larkin now own Backpage.com as a separate entity. Backpage.com charges \$7.00–\$17.00 for a user to post on the Escorts category of its Adult Entertainment section, and in most areas it is \$12.00; there are also higher rates to run a post multiple times. Complaint at 18, Doe v. Backpage.com, LLC, No. 14-cv-13870 (1st Cir. argued Jan.

According to a 2010 study by Advanced Interactive Media (AIM) Group, Village Voice Media (owners of Backpage.com in 2010) is the leader in prostitution advertising, due in part to Craigslist eliminating its Adult Services advertisement section.⁴⁵ In the month following Craigslist's decision to close their erotic section in September of 2010, Backpage.com's revenue from online prostitution advertisements increased by 15.3% and their online prostitution listings increased by 17.5% (these are likely conservative estimates).⁴⁶ There is also evidence that visitors to Backpage.com migrated from Craigslist.⁴⁷

Backpage.com generated about \$37 million from the sales of advertisements for escorts and body rubs in its adult services section from May 2012 until May 2013, and \$29.1 million from October 2011 to September 2012 (again these are conservative estimates).⁴⁸ According to AIM Group, from June 2012 through May of 2013, Backpage.com generated 82.3% of the total revenue made from online prostitution advertising,⁴⁹ as many advertisements are actually promoting prostitution, including of minors (considered a sex trafficking crime, as discussed).⁵⁰ Sources state that Backpage.com is responsible

6, 2016) (describing Backpage.com's fees for advertisements); *infra* Part IV. Ages need to be included in these advertisements as well, though there is no verification of the age of the poster. Thus, many of the ages are often incorrect. Lacey and Larkin still run the website with CEO Carl Ferrer from the United States despite the website reportedly being sold to an undisclosed Dutch company in December of 2014 (this has only been reported by one source). Korri Kezar, *Backpage.com sold to Dutch company for undisclosed amount*, DALLAS BUSINESS JOURNAL, (Dec. 30, 2014), <http://www.bizjournals.com/dallas/news/2014/12/30/backpage-com-sold-to-dutch-company-for-undisclosed.html>.

45. AIM GROUP, *supra* note 37.

46. AIM GROUP, *supra* note 37.

47. AIM GROUP, *supra* note 37. These results are based on the 23 highest revenue cities out of the 394 markets where Backpage.com operates in the United States. Thus, the total revenue is likely higher. Other websites also found growth in revenue after the closing of Craigslist's escorts section: Eros.com (an escort directory website), CityVibe.com (an escorts directory website), myRedBook.com, and Escorts.com.

48. AIM GROUP, ONLINE PROSTITUTION-AD REVENUE CROSSES CRAIGSLIST BENCHMARK (2013), *available at* <http://aimgroup.com/2013/07/10/online-prostitution-ad-revenue-crosses-craigslist-benchmark/>. Again, this estimate is based on only 23 of the 394 markets where Backpage.com operates in the United States.

49. *Id.*

50. To post on Backpage.com's Escorts category, if rates are to be included they have to be posted as an hourly rate. Letter from National Association of

for 70-80% of America's prostitution advertising.⁵¹

Though not all advertisements on Backpage.com advertise sex trafficking victims,⁵² there are many who claim Backpage.com is "the leading Web site for sex trafficking in America," particularly for sex trafficking of minors, and is well known to sex traffickers.⁵³ In 2011, Judge Michael Hayden, a Superior Court judge in Washington, declared the website as "free speech to prostitute young girls [a sex trafficking crime]."⁵⁴ Service providers also note this prominence. For example, Vendita Carter, founder and executive director of Breaking Free, an organization that helps minor sex trafficking victims, believes 40% of minors that receive services from Breaking Free were advertised on Backpage.com.⁵⁵ Due to its prominence in sex trafficking operations, Backpage.com is the focus of this article.

Attorneys General (NAAG) for Attorney Samuel Fifer, Counsel for Backpage.Com, LLC (Aug. 31, 2011), *available at* http://www.ct.gov/ag/lib/ag/press_releases/2011/083111backpageletter.pdf. It does not take sophisticated knowledge to realize that these advertisements are for prostitution. *Id.* For example, an advertisement found by the author in the Escorts Section of Backpage.com's Queens' (NY) website on February 6, 2014, noted: "Let Me Keep You Warm & Cozy . . . Gentlemen's Companionship; Show Me Your Car, Show Me Your Casa [House] . . . Dominant & Experienced," and includes pictures of a young woman blindfolded in lingerie on top of a bed (<http://queens.backpage.com/FemaleEscorts/tgif-its-payday-and-you-just-hit-the-j-a-c-k-p-o-t-dominican-and-cuban-fun-and-fresh-and-flexible/56377530>). The advertisement also includes a phone number and the poster's age (as required by the website) as 20 years old.

51. *E.g.* AIM GROUP, *supra* note 48; Ruvolo, *infra* note 334; Sam Wood, *Feds: Couple forced underage girl, others into Philly prostitution*, PHILA. INQUIRER, May 2, 2013.

52. Like a traditional classified advertisements newspaper, Backpage.com also sells items, like pets or couches. Though, all advertisements outside of the Adults Section and Dating section are free to post.

53. *See* Nicholas D. Kristof, *Not quite a teen, yet sold for sex*, N.Y. TIMES, Apr. 18, 2012, *available at* http://www.nytimes.com/2012/04/19/opinion/kristof-not-quite-a-teen-yet-sold-for-sex.html?_r=0; *see also* Letter from NAAG to Samuel Fifer (Aug. 31, 2011), *supra* note 50 ("Backpage.com is a hub for such activity [human trafficking, especially of minors]"); ROE-SEPOWITZ ET AL., *infra* note 62; Powell, *supra* note 26.

54. Sara Jean Green, *Convicted Seattle pimp who fled during trial sentenced to 26 years*, SEATTLE TIMES, Mar. 29, 2011, http://seattletimes.com/html/localnews/2014630224_runawaypimp30m.html.

55. Masako Hirsch & Paul Walsh, *Mpls. tells 'Backpage' owner to stop sex ads*, STAR TRIBUNE, Aug. 2, 2012.

A. *How Prevalent is the Usage of Third-Party Websites in Identified Sex Trafficking Cases?*

The purpose of this section is to highlight the claims that third-party websites are highly utilized in sex trafficking cases. These claims linking sex trafficking to the Internet are not usually based on empirical research,⁵⁶ are often provided by advocacy groups,⁵⁷ and do not follow a consistent method. To address these weaknesses, below I conduct a further systematic evaluation of Internet use in sex trafficking cases.

First, prosecutors note a high occurrence of Backpage.com in sex trafficking cases. The National Association of Attorneys General (NAAG) tracked more than 50 instances in 22 states, over three years, of charges filed against those trafficking or attempting to traffic minors on Backpage.com.⁵⁸ Massachusetts Attorney General Maura Healey stated that 75% of the human trafficking cases prosecuted by the Massachusetts Attorney General's office involve advertising on Backpage.com.⁵⁹ Laren Hersh, a prosecutor in Brooklyn, New York, stated the vast majority of prosecuted sex trafficking cases include victims marketed on Backpage.com.⁶⁰ Further, a FBI investigation found that 2,800 advertisements of prostituted children (a sex trafficking offense) were posted on Craigslist in 2008.⁶¹

Some analyses have tried to estimate sex trafficking

56. Mary Graw Leary, *Fighting Fire with Fire: Technology in Child Sex Trafficking*, 21 DUKE J. GENDER L. & POL'Y 289, 291, 294 (2014) (discussing how there is limited research on technology and child sex trafficking).

57. For example, Thorn, a nonprofit agency claiming to be "digital defenders of children," states 63% of minor sex trafficking survivors they surveyed in 2012 were at some point sold online. THORN IN COLLABORATION WITH BOUCHÉ, *supra* note 20, at 19.

58. Letter from NAAG for Samuel Fifer (Aug 31, 2011), *supra* note 50, at para. 3.

59. Brief of *Amicus Curiae* Commonwealth of Massachusetts In Support of Plaintiffs' Opposition to Motion to Dismiss at 7, *Jane Doe No. 1 v. Backpage.com*, No. 14-cv-13870 (D. Mass. Feb. 20, 2015).

60. Kristof, *supra* note 3. It is noteworthy that these results are of human trafficking charges, rather than a human trafficking investigation that may have led to other charges like prostitution even though human trafficking may have occurred. See Mary Graw Leary, *Fighting Fire with Fire: Technology in Child Sex Trafficking*, 21 DUKE J. GENDER L. & POL'Y 289, 300 (2014) for a discussion of why using human trafficking prosecution charges as the basis for study is problematic as often prosecutors pursue cases that are factually human trafficking on different charges.

61. POLARIS PROJECT, *supra* note 21.

occurrences from the usage of the Internet for all commercial sex transactions. For example, Roe-Sepowitz et al. analyzed all advertisements in the Adult Entertainment category of Backpage.com for 12 hours in five cities.⁶² The researchers estimated that nearly 60% of advertisements on Backpage.com were for selling sex, and identified 20% of these advertisements to feature potential adult or minor victims of trafficking (of that 20%, 28.9% were identified as potential minors).⁶³ However, this analysis only accounts for number of advertisements, and was rarely followed through to see if these advertisements resulted in human trafficking incidents (or attempted incidents). It could even be that law enforcement placed some of these advertisements. These analyses also assume the person who is displayed in the advertisements is actually the one being trafficked or engaging in commercial sex, despite the fact cases reveal that many of the advertisements' images are stock photos (images of other people used before in commercial sex advertisements).⁶⁴ Further, studies have noted that it is common to mistake the age of provocatively posed females, with them looking older than they actually are and potentially not raising flags to their age.⁶⁵ In their abovementioned study, Roe-Sepowitz et al.

62. ROE-SEPOWITZ ET AL., ONE-DAY SEX TRAFFICKING SNAPSHOT OF AN INTERNET SERVICE PROVIDER: A RESEARCH BRIEF (2012), available at https://archive.copp.asu.edu/college-news/research-docs/One_Day_Snapshot_Roe_Sepowitz.pdf/ at download/file.

63. The researchers determined if the ads were selling sex and used an identification matrix based on input from law enforcement personnel and "practical" knowledge to predict if the advertisements contained signs of human trafficking. *Id.* at 1. Criteria for determining if the advertisement was for prostitution included a dollar value for a period of time or services, language like "sexy," "kinky," "open to anything," and photos of people in sexual positions or exposing breasts, genitals, or buttocks. *Id.* at 2. Criteria for determining a trafficking victim is vague, including language or images of the text of the advertisement indicating there is a risk of a trafficking victim, and the context/background of the photo to indicate trafficking. *See id.* at 2-3. Criteria for determining sex trafficking victims as minors is also vague, including the text of the advertisement having language or images indicating a minor or suggesting the ad was written by a minor, and the photograph looking like a person under 18. *See id.*

64. THORN IN COLLABORATION WITH BOUCHÉ, *supra* note 20, at 20 (discussing survey findings that pictures used to advertise minors were likely pictures of someone older to hide the victim's young age); *see infra* Part IV.

65. *See* POLARIS PROJECT, *supra* note 21 (discussing that teenagers may be listed as adults to avoid detection of police); THE SCHAPIRO GROUP, *supra* note 37, at 9 (discussing how easy it is for men and women to mistake the age of a

followed up on advertisements with police units in Phoenix and Minneapolis, finding that of the fourteen potential minors identified in Phoenix, only one had been identified by law enforcement, and of nine potential minors in Minneapolis, only one was confirmed to be a trafficking victim under the age of 18.⁶⁶ As it often involves researchers determining human trafficking elements, which can lead to biased results, advertisement research is not an accurate method to estimate the prevalence of human trafficking.

In contrast to previous research, Leary examined a twelve-year period (2000-2012) of child sex trafficking case opinions in federal courts, finding technology plays a significant role in child sex trafficking cases.⁶⁷ Leary determined cases as child sex trafficking through a fact-based inquiry of opinions and press releases from United States Attorneys' offices, developing a research protocol to define cases as minor sex trafficking cases even if the cases were not charged as human trafficking (not including plea bargains unless there was an appeal of a pretrial ruling).⁶⁸ Leary and her team identified that 78% of the 700 federally prosecuted child sex trafficking cases they reviewed⁶⁹ utilized technology (including cellular phones, the Internet, social networking websites, and electronic recording).⁷⁰

The dataset utilized for this article's case analysis, discussed below, also confirms the consistent claim of high proportion of utilization of the internet and Backpage.com in

provocatively-posed female).

66. ROE-SEPOWITZ ET AL., *supra* note 62, at 4–5.

67. Mary Graw Leary, *Fighting Fire with Fire: Technology in Child Sex Trafficking*, 21 DUKE J. GENDER L. & POL'Y 289, 293–94 (2014). Leary gave broad meaning to the term 'sex act' based on legislative intent, the Department of Justice's considerations, and considerations of the international community. *Id.* at 296–97. Leary thus included in her study "federal cases in which the facts reflected a person was engaged [sic] in the recruitment, enticement, harboring, maintenance, transportation, provision, or obtaining of a child under 18 for a sex act (including any form of sexual exploitation such as the production of pornographic images) where anything of value is exchanged between any party." *Id.* at 297.

68. Mary Graw Leary, *Fighting Fire with Fire: Technology in Child Sex Trafficking*, 21 DUKE J. GENDER L. & POL'Y 289, 295, 300, 302 (2014),

69. *Id.* at 302.

70. *Id.* at 302, 303. The 11th Circuit (including Florida) had the most opinions referencing technology while the 9th Circuit handled the lowest percentage of opinions that referenced technology. *Id.* at 305, 323.

identified sex trafficking incidents.⁷¹ Of the number of recognized minor sex trafficking incidents identified through open-source searches, 30% utilized the Internet as a venue, and of these over one-third of them used Backpage.com.⁷² This high occurrence of utilization of the internet and third-party websites in sex trafficking incidents (also prevalent in all of the above claims), particularly of minors, leads to the question of liability: why are third-party websites not held responsible for their high involvement in these cases?

B. Why Prosecute Third-Party Websites for Sex Trafficking?

There are a number of reasons why third-party websites should be held responsible for the sex trafficking occurring on them. First, as described above, there is a high prevalence of third-party websites involved in human trafficking cases, and the occurrence of sex trafficking on websites is at its highest after extreme growth due to the expansion of the internet.⁷³ Third-party websites are involved at such a high level in sex trafficking occurrences that law enforcement and nonprofit organizations often start on Backpage.com when looking for a potential sex trafficking victim.⁷⁴ Third-party websites should be held responsible for the amount of sex trafficking occurring on their websites, and the amount of profit they are making from these occurrences.⁷⁵

Prosecuting and potentially causing third-party websites to exert more control over what is occurring on their websites could decrease human trafficking. As prostitution has moved online, the result has been a more sheltered haven to advertise sex trafficking victims, as opposed to on the street.⁷⁶ Currently, it is exceptionally easy to post on third party-websites to commit sex trafficking acts. For example, a pimp convicted of sexual exploitation noted in a recent study the accessibility of third-party websites to post victims: you can “post every day, two times a day, three times a day . . . post throughout the day So easy to do it. I got pictures already

71. *Infra* Part IV.

72. *Infra* Part IV.

73. See McCabe, *supra* note 18, at 250.

74. *Infra* Part I.

75. *Infra* Part II.

76. DANK ET AL., *supra* note 1, at 129.

on the laptop. Make a little ad, make the title. Say, ‘I am in town, looking to have a great time if you are interested, show me some experiences.’”⁷⁷ It is such an easy method to get victims involved that it is usually taught amongst sex workers (both those who are or are not victims of human trafficking).⁷⁸

Second, prosecution of human trafficking cases has been difficult.⁷⁹ The ultimate goal of prosecution is to disrupt human trafficking networks and hold offenders responsible. As a low number of human trafficking cases are being prosecuted,⁸⁰ having a human trafficking case linked to conspiracy, which implicates many defendants (discussed below), is highly beneficial. Prosecutors could wait until a case highly impacts third-party websites, allowing them to disrupt many criminal networks with one case. This idea is discussed below in the case analysis (Part VII).

In the face of these benefits of prosecuting third-party websites for human trafficking, there has been difficulty with such prosecutions. The following section discusses this difficulty. It follows with a proposed remedy that can lead to holding third-party websites responsible for sex trafficking, and tests this remedy with a case analysis.

C. Current Difficulty with Prosecution of Third-Party Websites – The CDA

Third-party websites seem to be largely facilitating sex trafficking and involved in recognized sex trafficking cases. However, state criminal prosecutions and civil suits as well as federal civil suits of third-party websites have not been successful, largely because of the Communications Decency Act (CDA), a federal law passed in 1996.⁸¹ This difficulty leads to the proposal of other creative means for criminal prosecution through an explicit exception for federal criminal liability in the CDA (discussed in Part III).

77. DANK ET AL., *supra* note 1, at 193.

78. *Supra* Part IV.

79. Amy Farrell et al., *New laws but few cases: Understanding the challenges of the investigation and prosecution of human trafficking cases*, 61 *Crime, L. & Soc. Change* 139, 139 (2014) (finding in their study of human trafficking case records and interviews with stakeholders legal, institutional, and attitudinal challenges to prosecution of human trafficking cases).

80. *Id.* at 141.

81. Communications Decency Act (CDA), S.652, 104th Cong. Sec. 5 (1996).

The CDA has greatly limited the liability of third-party websites.⁸² Congress passed the CDA as the result of the case *Stratton Oakmont v. Prodigy Services*.⁸³ In *Stratton*, the court found that installation of software to monitor internet posts by Prodigy Services, an Internet service provider (ISP), made Prodigy cross from a simple distributor of content to a publisher.⁸⁴ This made Prodigy liable for comments made by its users.⁸⁵ Congress recognized that this case incentivized online service providers to not monitor or delete offensive content as this could open them to liability. The court in *Stratton* noted that the website's "conscious choice, to gain the benefits of editorial control. . . opened it up to a greater liability than. . . other computer networks that make no such choice."⁸⁶ To encourage the use of technology to shield obscene material, particularly from children, and to ensure the continued growth of free speech and market online, Congress passed the first version of the CDA in 1996.⁸⁷ This first version included indecency provisions that prohibited the transmission of obscene or indecent communications by means of telecommunications to someone under the age of 18, or sending offensive communications through the use of an interactive computer service to persons under the age of 18.⁸⁸ However, these indecency provisions were struck down in *Reno v. American Civil Liberties Union* because of its purported chilling effect on free speech, in violation of the First Amendment.⁸⁹ The CDA provisions that were not affected were those that provided immunity to third-party websites, codified at 47 U.S.C. § 230.

The remaining provisions of the CDA provide some protection to publishers of online advertising posted directly by

82. Walters, *supra* note 38, at 184; see 47 U.S.C. § 230. .

83. Walters, *supra* note 38, at 183; *Stratton Oakmont, Inc. v. Prodigy Services Co.*, 1995 WL 323710 (N.Y.Sup.Ct. 1995).

84. *Stratton Oakmont, Inc.*, 1995 WL 323710, at *4.

85. *See Id.*

86. *Id.* at *5; see also Walters, *supra* note 38, at 183.

87. 47 U.S.C. § 230 (b); see also Walters, *supra* note 38, at 183.

88. *Reno v. American Civil Liberties Union*, 117 S.Ct. 2329, 2338 (1997); CDA, S.652, 104th Cong. Sec. 5, at § 502 (1996).

89. *See Reno v. American Civil Liberties Union*, 117 S.Ct. 2329, 2346 (1997) (holding that the indecency provisions were overbroad and in violation of the First Amendment despite the fact that the legislation was partly enacted to protect children from exposure to sexually explicit material).

advertisers, even if the posts promote illegal behavior. This is despite the intent of the CDA to shield obscene and indecent material. Section (c) of the CDA, titled “Protection for ‘Good Samaritan’ blocking and screening of offensive material,” states that no provider of an interactive computer service may be treated as the publisher or speaker of third-party content provided by another information content provider.⁹⁰ The act defines interactive computer services as “any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server.”⁹¹ No cause of action or liability, civil or criminal, may be imposed under state or local law inconsistent with the CDA.⁹²

1. State Cases

State cases against third-party websites, in both civil and criminal contexts, have been largely unsuccessful due to the CDA. This leads to the lack of a viable state option for criminal prosecution of third-party websites for sex trafficking. In *Chicago Lawyers’ Committee v. Craigslist*, a public interest consortium filed suit against Craigslist for violating the Fair Housing Act⁹³ by allowing housing postings that indicated discrimination.⁹⁴ The court stated that as defined under the CDA, Craigslist was not a publisher or speaker as a third-party user provided the information.⁹⁵ Instead, the court considered Craigslist an interactive computer service. The court considered Craigslist just a messenger who could not be sued because the message revealed a third-party’s plan to engage in

90. 47 U.S.C. § 230 (c).

91. 47 U.S.C. § 230 (f)(2). The second form of immunity in section (c) involves civil liability, stating that an interactive computer services shall not be held liable on account of an action in good faith to restrict availability of material or action taken to make available means to restrict access to that type of material, and thus is not applicable to criminal charges.

92. 47 U.S.C. § 230 (e)(3). There is an explicit exception for federal criminal liability. *See infra* Part III for a discussion of this exception, as this is how third-party websites can be prosecuted (passive-the focus is on third-party websites in this sentence so I am ok with this; otherwise the sentence would have to state that this is how prosecutors can prosecute websites, which is not the focus) for conspiracy.

93. 42 U.S.C. § 3604(a).

94. *Chicago Lawyers’ Committee v. Craigslist*, 519 F.3d 666, 668 (7th Cir. 2008).

95. *Id.* at 671-72.

unlawful discrimination.⁹⁶ The court further stated that the provider did not induce anyone to post any particular listing or preference for discrimination.⁹⁷

In *Voicenet Communications v. Corbett*, an ISP sued law enforcement officials, stating execution of a search warrant based on a state statute violated their rights under the CDA.⁹⁸ The court noted that the plaintiffs stated a valid § 1983 claim based on violations of their civil liberties under the CDA.⁹⁹ Though not a criminal case, in *Voicenet*, the court noted that the immunity under § 230 preempted criminal liability under inconsistent state laws.¹⁰⁰ The court stated, “If Congress had wanted *state* criminal statutes to trump the CDA as well, it knew how to say so.”¹⁰¹

2. Enacted State Legislation

Following the lack of success of state cases, New Jersey, Washington, and Tennessee all enacted statutes expressly criminalizing the known publication of online commercial sex advertisements depicting minors, as a way to prosecute third-party websites.¹⁰² However, none of these statutes were

96. *Id.* at 672.

97. *Id.* at 671.

98. *Voicenet Communications v. Corbett*, 2006 WL 2506318, at *1 (E.D. Pa. 2006).

99. *Id.*

100. *Id.* at *4.

101. *Id.* (emphasis added). The court however found that Voicenet had not established that pre-existing law established their rights at the time of the execution of the search warrant, as no cases had extended the CDA immunity to state criminal laws at the time of the incident. *Id.* at *5.

102. N.J. STAT. ANN. § 2C:13—10(a)(3) (West 2013); S.B. 6251, 62nd Leg. (Wash. 2012) (enacted); TENN. CODE ANN. § 39—13—315 (2012). The three state laws all have similar wording that criminalizes known advertising of commercial sex with a minor, a human trafficking crime. For example, Tennessee’s law contains the following:

(a) A person commits the offense of advertising commercial sexual abuse of a minor if the 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, as defined in § 39—13—301, with a minor.

(b)(1) Advertising commercial sexual abuse of a minor is a Class C felony.

(2) In addition to any authorized period of incarceration, advertising commercial sexual abuse of a minor is punishable by a minimum fine of ten thousand dollars (\$10,000).

(c) In a prosecution under this section, it is not a defense that the defendant did not know the age of the minor depicted in the advertisement. It is a defense, which the defendant must prove by a preponderance of the evidence, that at the time of the offense, the defendant made a reasonable bona fide attempt to

successful. Backpage.com sued in all three of these states and asked for temporary restraining orders and preliminary injunctions against the statutes being enforced,¹⁰³ stating the legislation was unconstitutional as they were preempted by the CDA,¹⁰⁴ in violation of the First Amendment,¹⁰⁵ and in violation of the Commerce Clause.¹⁰⁶ In each of these cases, the district court ruled in favor of Backpage.com, and granted preliminary injunctions that enjoined enforcement of the new legislation.

First, the courts stated that these laws allowing prosecution of Backpage.com were likely preempted by the CDA.¹⁰⁷ The courts in *Hoffman* and *Cooper* found that Backpage.com is an interactive computer service within the meaning of the CDA.¹⁰⁸ Thus, in *Hoffman* and *Cooper*, the court found the enacted state laws conflicted with the CDA because they imposed liability on websites as publishers of third-party information.¹⁰⁹ The court in *McKenna* and *Hoffman* noted that Congress has the power to expressly preempt state law, and this likely occurred with 47 U.S.C. § 230 (e)(3) as it states that no cause of action or liability under inconsistent (with § 230) state law may be imposed.¹¹⁰ Further,

ascertain the true age of the minor appearing in the advertisement by requiring, prior to publication of the advertisement, production of a driver license, marriage license, birth certificate, or other governmental or educational identification card or paper of the minor depicted in the advertisement and did not rely solely on oral or written allegations of the minor's age or the apparent age of the minor. TENN. CODE ANN. § 39—13—315 (2012).

103. Backpage.com, LLC v. Cooper, 939 F. Supp. 2d at 818; Backpage.com, LLC v. Hoffman, 2013 WL 4502097, at *4 (D.N.J. 2013); Backpage.com, LLC v. McKenna, 881 F. Supp. 2d 1262, 1269 (W.D. Wash. 2012).

104. Backpage.com, LLC v. Cooper, 939 F. Supp.2d at 818; Backpage.com, LLC v. Hoffman, 2013 WL 4502097 at *5; Backpage, LLC v. McKenna, 881 F. Supp. 2d at 1269.

105. Backpage.com, LLC v. Hoffman, 2013 WL 4502097 at *7; Backpage.com, LLC v. Cooper, 939 F. Supp. 2d 805, 818 (M.D. Tenn. 2013); Backpage, LLC v. McKenna, 881 F. Supp. 2d at 1269.

106. Backpage.com, LLC v. Cooper, 939 F. Supp. 2d at 818; Backpage.com, LLC v. Hoffman, 2013 WL 4502097 at *11.

107. Courts consider whether movant has a strong likelihood of success on the merits as a factor in a preliminary injunction. FED. R. CIV. P. § 65.

108. Backpage.com, LLC v. Hoffman, 2013 WL 4502097 at *6; Backpage.com, LLC v. Cooper, 939 F. Supp. 2d at 823 (“Backpage.com is the quintessential publisher contemplated by the CDA: it hosts and maintains an ongoing forum for user-generated postings—some paid, others free—that it shares with the public at large.”).

109. Backpage.com, LLC v. Cooper, 939 F. Supp. 2d at 823–25; Backpage.com, LLC v. Hoffman, 2013 WL 4502097 at *6–7.

110. Backpage, LLC v. McKenna, 881 F. Supp. 2d at 1273; Backpage.com,

the courts in *McKenna* and *Hoffman* found that even if the statute did not expressly preempt the proposed state legislation, the state statute still likely conflicted as it stood as an obstacle to the purposes of Congress in the CDA since it could lead to abstaining from self-regulation.¹¹¹

Second, courts found the legislation would likely mingle with interstate commerce, in violation of the dormant commerce clause.¹¹² In all three states, the courts found the passed legislation likely violates the dormant commerce clause, as there was no limit on the geographic scope of the legislation (the legislation could regulate out-of-state publications as an advertisement may make an offer for a sex act outside of the state).¹¹³ Further, *Cooper* and *Hoffman* note the burden the legislation placed on interstate commerce was excessive in relation to local benefits.¹¹⁴ The New Jersey court and Tennessee court also noted that customers would likely lose First Amendment freedoms because of the legislation, which is an irreparable injury.¹¹⁵ Some have noted that the result of these decisions is minimal regulation of *Backpage.com*.¹¹⁶

LLC v. Hoffman, 2013 WL 4502097 at *5–6.

111. *Backpage, LLC v. McKenna*, 881 F. Supp. 2d at 1273; *Backpage.com, LLC v. Hoffman*, 2013 WL 4502097 at *7.

112. *Backpage.com, LLC v. Cooper*, 939 F. Supp. 2d at 841–45; *Backpage.com, LLC v. Hoffman*, 2013 WL 4502097, at *11–12 (D.N.J. 2013); *Backpage.com, LLC v. McKenna*, 881 F. Supp. 2d 1262, 1285–86 (W.D. Wash. 2012). State regulation may be considered a violation of the dormant commerce clause if it controls commerce occurring outside the boundaries of the state, as this exceeds the limits of the enacting state’s authority. The Supreme Court has long recognized the authority in U.S. Const. Art. 1 § 8 (“The Congress shall have power . . . to regulate commerce . . . among the several states”) encompasses a dormant limitation on states to enact legislation affecting interstate commerce.

113. *Backpage.com, LLC v. Cooper*, 939 F. Supp. 2d at 841; *Backpage.com, LLC v. Hoffman*, 2013 WL 4502097 at *11–12; *Backpage, LLC v. McKenna*, 881 F. Supp. 2d at 1285–86.

114. *Backpage.com, LLC v. Cooper*, 939 F. Supp. 2d at 844; *Backpage.com, LLC v. Hoffman*, 2013 WL 4502097 at *11–12.

115. *Backpage.com, LLC v. Hoffman*, 2013 WL 4502097 at *9–11, *12; *Backpage.com, LLC v. Cooper*, 939 F. Supp. 2d at 840, 845. This is particularly interesting after *McCullen v. Coakley*, 134 S.Ct. 2518, 2539 (2014), which stated it may not be enough that other less-restrictive alternative approaches have not worked to achieve government’s legitimate interests.

116. Stephanie Silvano, *Fighting a Losing Battle to Win the War: Can States Combat Domestic Minor Sex Trafficking Despite CDA Preemption?*, 83 *FORDHAM L. REV.*, 375, 375 (2014).

3. Federal Civil Cases

Federal civil actions against third-party websites have been unsuccessful due to the CDA as well. In *Dart v. Craigslist*, Thomas Dart, Sheriff of Cook County, Illinois, filed a complaint against Craigslist in federal court for violating state and federal criminal laws prohibiting prostitution, construing Craigslist as a public nuisance.¹¹⁷ Dart noted that Craigslist was the single largest source for prostitution, including child exploitation, in the country. Dart further claimed he had arrested over 200 people since January of 2007 based on Craigslist advertisements, including for pimping of minors.¹¹⁸ The court held that CDA § 230 protects websites such as Craigslist from *civil* liability, as the website operators themselves did not create the offending advertisements and did not induce users to post illegal content.¹¹⁹ This case is discussed further below as it left open federal *criminal* liability of third-party websites.

In 2011, in Missouri, a victim of child sex trafficking (M.A.) brought a federal action against Backpage.com alleging the website violated her primary rights and aided and abetted crimes against her including prostitution, exploitation of children, and child pornography.¹²⁰ According to M.A., a woman used Backpage.com to post explicit, pornographic photographs of her and advertise her as an escort for sex when M.A. was fourteen years old.¹²¹ M.A. claimed that Backpage.com received fees from each of these postings.¹²² M.A. also claimed Backpage.com either explicitly knew or was deliberately ignorant of the crimes committed on the site.¹²³ Further, M.A. alleged that Backpage.com should not be immune to civil liability because it was aware of prior cases of minors being sexually trafficked on their website and that the structure of Backpage.com allowed for her injuries.¹²⁴ However, the court stated Backpage.com was entitled to civil

117. *Dart v. Craigslist, Inc.*, 665 F. Supp. 2d 961, 961 (N.D. Ill. 2009).

118. *Id.* at 962–63.

119. *See id.* at 967, 969.

120. *M.A. ex rel. P.K. v. Village Voice Media Holdings*, 809 F. Supp. 2d 1041, 1043–44 (E.D. Mo. 2011).

121. *Id.*

122. *Id.* at 1044.

123. *Id.* at 1045.

124. *Id.* at 1044–45, 1050.

immunity under the CDA, stating the only relevant question is if the interactive service provider creates or develops content.¹²⁵ The court noted that an interactive computer service providers' civil immunity under the CDA applies even after notice of the potentially unlawful nature of third-party content; thus, neither notice nor profit makes Backpage.com civilly liable under the CDA.¹²⁶

Thus, federal and state civil actions and state prosecutions against third-party websites as interactive service providers have largely been unsuccessful due to the CDA. Further, as discussed, the CDA has been found to preempt state legislation that allows criminal prosecution of third-party websites for sex trafficking. However, there is a federal criminal remedy to the obstacle of the CDA. This is due to an explicit exception within the CDA allowing for the option of federal criminal prosecution of third-party websites.

II. FEDERAL CRIMINAL REMEDY – THE CDA EXCEPTION

The CDA explicitly includes the statement that “nothing in this section shall be construed to impair the enforcement of . . . Title 18, or any other *Federal* criminal statute.”¹²⁷ Some

125. *Id.* at 1050.

126. *M.A.*, 809 F. Supp. 2d at 1051. In *Doe v. Backpage.com, LLC*, the plaintiffs claimed Backpage.com engaged in unfair and deceptive practices. *Jane Doe No. 1 v. Backpage.com, LLC*, 2016 WL 963848, at *2 (1st Cir. 2016). The complaint alleged that Backpage.com took part in a scheme to become dominant in online sexual advertising, and misrepresented its efforts to law enforcement and non-profit organizations. Complaint at 9–10, *Doe v. Backpage.com, LLC*, 104 F. Supp. 3d 149 (D. Mass. 2015), *aff'd*, *Jane Doe No. 1 v. Backpage.com, LLC*, 2016 WL 963848 (1st Cir. 2016). The plaintiffs contended the website did this in order to enable a shield from liability while increasing its share in the online sex advertising market. *Id.*; *Gee, supra* note 18. The plaintiffs also contended that Backpage.com generates its own content by posting illegal materials in sponsored advertisements, stripping metadata, and designing the website in a particular way; thus, immunity under 47 U.S.C. § 230 does not exist. Complaint at 2, 21–22, *Doe v. Backpage.com, LLC*, 104 F. Supp. 3d 149 (D. Mass. 2015), *aff'd*, *Jane Doe No. 1 v. Backpage.com, LLC*, 2016 WL 963848 (1st Cir. 2016). Likewise, in *J.S. v. Village Voice Media Holdings, LLC*, No. 90510–0 (Wash. 2014), plaintiffs stated that federal criminal law is still open under 47 U.S.C. § 230, but argued that Backpage.com is in fact an Internet content provider instead of an Internet service provider as they are in part responsible for the content on their website, particularly because of their posting rules and metadata. *See J.S. v. Village Voice Media Holdings, LLC*, 359 P.3d 714, 715, 717–18 (Wash. 2015).

127. 47 U.S.C. § 230(e)(1) (2012) (emphasis added); *see Voicenet Communications v. Corbett*, 2006 WL 2506318, at *4 (E.D. Pa. 2006) (finding the

scholars have interpreted the holding in *Dart v. Craigslist* to mean that that courts have held a broad interpretation of immunity under 47 U.S.C. § 230, including all criminal charges.¹²⁸ However, in two recent cases, federal prosecutors have prosecuted third-party websites for their actions. First, in *United States v. Ulbricht*, Ulbricht (a.k.a. Silk Road), was criminally prosecuted in federal court for creating Silk Road, essentially an online marketplace.¹²⁹ In February of 2015, Ulbricht was found guilty of seven charges, including conspiracy to distribute narcotics, conspiracy to aid in computer hacking, conspiracy to traffic fraudulent documents, and conspiracy to commit money laundering.¹³⁰ The website was also involved in failed murder-for-hire postings.¹³¹ Ulbricht argued that 47 U.S.C. § 230 provided immunity for Silk Road.¹³² However, the court noted that “[e]ven a quick reading of the statute [the CDA] makes it clear that it is not intended to apply to the type of intentional and criminal acts alleged to have occurred”¹³³ Thus, as explained below, Ulbricht was found to have used the Internet and the Silk Road website to distribute controlled substances with others, facilitate unlawful transactions, and be in a continuing criminal enterprise by designing, launching and administering the website.¹³⁴ Ulbricht was not alleged to have been the buyer or seller himself, but rather the intermediary.¹³⁵

Second, federal law enforcement agencies initiated a federal criminal investigation of the online classifieds website

CDA only states federal criminal statutes will trump the CDA); *Nieman v. VersusLaw, Inc.*, 2012 WL 3201931, at *8–9 (C.D. Ill. 2012) (dictum) (noting that the CDA may not be used to bar a RICO claim as this could impair enforcement of a Federal criminal statute, but leaving this issue unresolved).

128. *Dart v. Craigslist, Inc.*, 665 F. Supp. 2d 961 (N.D. Ill. 2009); e.g. John E.D. Larkin, *Criminal and Civil Liability for User Generated Content: Craigslist, A Case Study*, 15 J. TECH. L. & POL’Y 85, 87 (2010) (noting that some authorities believe Craigslist is now immune from all legal action against it, including all criminal prosecution).

129. See Indictment at 1–2, *United States v. Ulbricht*, 31 F. Supp. 3d 540 (S.D.N.Y. 2014) (No. 14–cr–68).

130. See Verdict Form, *United States v. Ulbricht*, 31 F. Supp. 3d 540 (S.D.N.Y. 2014) (No. 14–cr–68).

131. See Indictment at 2, *United States v. Ulbricht*, 31 F. Supp. 3d 540 (S.D.N.Y. 2014) (No. 14–cr–68).

132. See *United States v. Ulbricht*, 31 F. Supp. 3d 540, 568 (S.D.N.Y. 2014).

133. *Id.*

134. See *id.* at 549–50.

135. *Id.* at 559.

myRedBook.com for the crimes of money laundering and promoting prostitution. Eric Omoru, owner, operator and manager of myRedBook.com, pled guilty to using a facility of interstate commerce with the intent to facilitate prostitution.¹³⁶ Omoru admitted the website hosted advertisements posted by prostituted women containing rates for sexual services.¹³⁷ The website offered enhancements, including featuring an advertisement more prominently for an additional fee.¹³⁸ This is “the first federal conviction of a website operator for the facilitation of prostitution,”¹³⁹ and some advocate that prosecution of Backpage.com should be just as rigorous as the prosecution of myRedBook.com.¹⁴⁰

The court in *Dart v. Craigslist*, where Sheriff Dart of Cook County alleged Craigslist facilitated prostitution and constituted as a public nuisance under state law, did not confront the criminal federal law issue. However, the court stated that Sherriff Dart’s reference of a federal statute in the civil suit did not bring the suit within the federal criminal law exception to § 230.¹⁴¹ In *Doe v. Backpage.com*, the plaintiffs brought a civil action for alleged human trafficking, as allowed under 18 U.S.C § 1591. In its order, the court noted the federal criminal law exception does not allow a civil action for a violation of federal criminal law, but rather “permits law enforcement authorities to bring criminal charges against even interactive service providers in the event that they themselves

136. DEP’T OF JUSTICE, *California Operator of myRedBook.com Website Pleads Guilty to Facilitating Prostitution*, (Dec. 11, 2014), available at <http://www.justice.gov/opa/pr/california-operator-myredbookcom-website-pleads-guilty-facilitating-prostitution>.

137. *Id.*

138. *Id.*

139. *Id.*

140. *See, e.g.*, Press Release, Congresswoman Ann Wagner, Rep. Wagner Statement on Letter to Attorney General regarding Backpage.com (Jan. 29, 2015), available at <http://wagner.house.gov/media-center/press-releases/rep-wagner-statement-on-letter-to-attorney-general-regarding-backpagecom> (stating that because of the similarities between Backpage.com and myRedbook.com that Backpage.com should be prosecuted for sex trafficking; “In all substantive ways Omoru’s factual admissions about his use of myRedBook.com apply equally and are parallel to how Lacey and Larkin use Backpage[.com] to facilitate prostitution.”).

141. *Dart v. Craigslist, Inc.*, 665 F. Supp. 2d 961, 965 n.6 (N.D. Ill. 2009) (finding Sheriff Dart’s reference to 18 U.S.C. § 1592 does not bring the case into the CDA’s federal criminal law exception).

actually violate federal criminal laws.”¹⁴²

One of the stated policy goals of the CDA is to “ensure vigorous enforcement of [f]ederal criminal laws to deter and punish” computer crimes.¹⁴³ In the previous suits brought against them, the operators of Backpage.com even argued there are only exceptions to the immunity of the CDA for enforcing federal criminal laws, as opposed to state laws.¹⁴⁴ This means a federal criminal case against a third-party website would not have to establish the website as a content provider, where state prosecutions have faltered, as discussed above. Further, using federal law would mean the dormant commerce clause does not apply, as the clause only applies to state legislation.

Because of the immunity under the CDA, federal legislation to expand 18 U.S.C. § 1591(a) to include violations when a defendant knowingly advertises a victim for commercial sex (House Bill 4225, also known as the SAVE Act) was recently passed by its inclusion in the JVTA, signed into law in late May of 2015.¹⁴⁵ The House Report for the resolution notes the SAVE Act does not disrupt or modify civil immunity provided by the CDA, but regards federal criminal liability.¹⁴⁶

However, no cases have yet been brought under the JVTA.¹⁴⁷ Further, the success of a case brought under the

142. *Doe v. Backpage.com, LLC*, 104 F. Supp. 3d 149, 159–60 (D. Mass. 2015), *aff'd*, *Jane Doe No. 1 v. Backpage.com, LLC*, 2016 WL 963848 (1st Cir. 2016).

143. 47 U.S.C. § 230 (b)(5) (2012).

144. *See Backpage.com, LLC v. Cooper*, 939 F. Supp. 2d 805, 822 (M.D. Tenn. 2013); *Backpage.com, LLC v. Hoffman*, 2013 WL 4502097, at *5 (D.N.J. 2013); *Backpage.com, LLC v. McKenna*, 881 F. Supp. 2d 1262, 1271 (W.D. Wash. 2012). If future cases are brought against Backpage.com in federal criminal court, and Backpage.com tries to argue they are not liable, it may be useful for prosecutors to argue that Backpage.com is precluded from this position because of judicial estoppel.

145. See discussion *supra* notes 32–36.

146. H.R. Rep. No. 113–451, at 4 (2014).

147. In fact, many called for its usage in the recent case against Jared Fogle, former Subway spokesperson, in late 2015. *See, e.g., Faiza Mathond-Mathieu & Michelle Guelbart, Why wasn't Jared Fogle charged with sex trafficking?*, WASH. POST (Sept. 7, 2015), available at https://www.washingtonpost.com/opinions/why-wasnt-jared-fogle-charged-with-child-sex-trafficking/2015/09/07/752cb7c2-5566-11e5-8bb1-b488d231bba2_story.html; *see also, e.g., Rachel Harper, SHARED HOPE INT'L, Why wasn't Jared Fogle charged with sex trafficking?* (Sept. 4, 2015), <http://sharedhope.org/2015/09/04/why-wasnt-jared-fogle-charged-with-sex-trafficking/>. However, Fogle was not charged with minor sex trafficking and pled guilty to lesser charges of child pornography and traveling to engage in illicit sexual contact with a minor, despite admitting to paying for sex with at least two

JVTA is questionable. The SAVE Act in particular is likely not going to withstand a strict scrutiny analysis, particularly compared to similar legislation in Washington, Tennessee, and New Jersey found to be unconstitutional.¹⁴⁸ The JVTA's addition of the word "advertising" to 18 U.S.C. § 1591 may not serve a compelling government interest nor be the least restrictive means to serve that interest.¹⁴⁹ This section of the Act will likely also be found unconstitutional for being too vague and overbroad.¹⁵⁰ Additionally, due to vagueness, in *Cooper Backpage.com* argued, and the court found, that Tennessee's enacted legislation could result in discriminatory enforcement of the legislation against Backpage.com.¹⁵¹ Considering supporters of SAVE, like Senator Kirk and Cook County State Attorney Alvarez, state the reason behind the legislation is to prosecute Backpage.com,¹⁵² a similar argument may be made in regards to the federal legislation. Lastly, as highlighted by the case analysis below (Part IV), Backpage.com has cooperated with law enforcement investigations, and the JVTA may limit Backpage.com's future cooperation because of this potential liability.

Because of the potential lack of success of a pursuant case and harsh repercussions of the JVTA, federal criminal statutes already available to prosecutors, with their lack of implication under the CDA, may be the appropriate route rather than federal legislation to make third-party websites liable.

minors, defined as minor sex trafficking under federal legislation. *Id.* Fogle does have to pay penalties to the Domestic Trafficking Victims Fund, as required by the JVTA. *Id.* The JVTA's largest impact so far seems be its allocation of new authority to the United States Marshals to help state and local investigations. See *Missing child safe in Virginia, sex offender behind bars*, EXPONENT TELEGRAM (Jul. 7, 2015), http://www.theet.com/news/local/missing-child-recovered-safe-in-virginia-sex-offender-behind-bars/article_609a6079-6e96-57ef-a99d-c9e2ce02064b.html.

148. See *McKenna*, 881 F. Supp. 2d at 1275 (stating requirements for strict scrutiny as serving government's compelling interest with the least restrictive means); discussed in Part I.C.

149. See *id.*

150. See *id.* at 1278–84.

151. See *Backpage.com, LLC v. Cooper*, 939 F. Supp. 2d 805, 833-34 (M.D. Tenn. 2013).

152. Press Release, Office of Senator Mark Kirk, Kirk, Alvarez Outline Anti-Sex Trafficking Agenda (Mar. 10, 2014), available at http://www.kirk.senate.gov/?p=press_release&id=1021.

III. FEDERAL CONSPIRACY PROSECUTION

Though any federal crime is implicated in the explicit CDA exception, because of third-party websites' high involvement in sex trafficking occurrences, federal conspiracy may be a federal crime option for prosecutors seeking liability of third-party websites for sex trafficking. As John Montgomery, lead counsel for plaintiffs in a current lawsuit against Backpage.com in Boston, discusses, "Backpage[.com] has systematically fostered a relationship with traffickers, by which they are, in essence, participating in a venture which traffics kids through their site[.]"¹⁵³ Even if the poster of a sex trafficking transaction (sometimes referred to as a "pimp") ends up incarcerated, Backpage.com still profits from the advertisement. In this section I provide the contemporary standards of federal conspiracy, and the benefits of using federal conspiracy prosecution.

Conspiracy is an inchoate crime, and is essentially an agreement to accomplish an illegal purpose.¹⁵⁴ Federal conspiracy requires four elements: 1) an agreement, 2) to violate United States law, 3) as a knowledgeable participant, with 4) at least one co-conspirator committing an act in furtherance of the conspiracy.¹⁵⁵ The case analysis below applies to the agreement and knowledge prongs.

A. Agreement

In order to prove conspiracy, the government must establish an agreement existed between at least two people. This agreement can be implicit, and the trier of fact can infer its existence.¹⁵⁶ As stated in *American Tobacco Company v.*

153. Travis Andersen, *Alleged child sex trafficking victims suing Backpage.com*, BOSTON GLOBE (Oct., 17, 2014), <http://www.bostonglobe.com/metro/2014/10/16/child-sex-trafficking-victims-suing-backpage-com/7lcO2fP91ToEdWt4dKLIVK/story.html>.

154. *United States v. Falcone*, 311 U.S. 205, 207 (1940) (stating the scope of a conspiracy is an agreement among conspirators to commit an offense); *United States v. Bayer*, 331 U.S. 532, 542 (1947) ("Its [conspiracy's] essence is in the agreement or confederation to commit a crime . . .").

155. *See* 18 U.S.C. § 371 (2012); *see also* *United States v. Parekh*, 926 F.2d 402, 406 (5th Cir. 1991).

156. Filvaroff, *infra* note 191, at 195; *see also* *Salinas v. United States*, 522 U.S. 52, 63–64 (1997) ("A conspiracy may exist even if a conspirator does not agree to commit or facilitate each and every part of the substantive offense [S]upporters are as guilty as the perpetrators.").

United States, no formal agreement is necessary for a conspiracy, as “[o]ften crimes are a matter of inference deduced from the acts of the person accused”¹⁵⁷ Evidence that a middleman has a stake in the illegal sales can infer existence of an agreement.¹⁵⁸ Additionally, there does not have to be such a high-level of agreement that there is a decision on price, quantity, or other details of a transaction.¹⁵⁹ Further, defendants may implicitly agree to a larger conspiracy if they should have known others were committing similar actions.¹⁶⁰

B. Violation of United States Law

To prove the federal crime of conspiracy, the government must also establish that the violation was against United States federal law. For sex trafficking, the conspiracy would be to violate 18 U.S.C. §1591, the federal sex trafficking statute. A defendant accused of conspiracy to commit sex trafficking could be charged under 18 U.S.C. § 1594 (c) (conspiring in trafficking),¹⁶¹ or 18 U.S.C. § 371 (the general conspiracy statute). These two charges are highlighted in the case analysis below.¹⁶²

C. Knowledgeable Participant

The government must also establish that the defendant is a knowledgeable participant of the conspiracy with that intent. The government must present evidence where it can be reasonably inferred that the defendant 1) knew of the existence of the scheme; and, 2) knowingly joined and participated, that they had the intent to further the goals and to be a member of the conspiracy.¹⁶³

157. *American Tobacco Co. v. United States*, 328 U.S. 781, 809 (1946) (finding no formal agreement necessary to constitute an unlawful conspiracy).

158. *United States v. Bey*, 725 F.3d 643, 650 (7th Cir. 2013) (finding evidence a middleman had a stake in a seller’s sales is sufficient for the jury to infer existence of an agreement with the seller).

159. *Id.* (finding conspiracy does not require such a high participation level for one to decide terms of a transaction).

160. *See Blumenthal v. United States*, 332 U.S. 539, 556 (1947).

161. This statute of conspiring in human trafficking was added with the 2008 reauthorization of the TVPA. *See TVPA of 2008*, H.R. Res. 7311, 110th Cong. (2008).

162. *Infra* Part IV.

163. *United States v. Rodriguez*, 392 F.3d 539, 545 (2nd Cir. 2004) (“To sustain a conspiracy conviction, the government must present the person charged with conspiracy knew of the existence of the scheme alleged in the

1. Knowledge

The government does not need to prove that the defendant knew all the details of the conspiracy.¹⁶⁴ The government as prosecutor only needs to prove the defendant knew the essential nature of the plan, that the defendant “became parties to the larger common plan, joined together by knowledge of its essential features and broad scope.”¹⁶⁵ Thus, the conspirator does not need to know of the participation of others or the identities of other co-conspirators for a jury to find there was a single conspiracy.¹⁶⁶

Courts also use deliberate ignorance to infer knowledge in conspiracy cases. An “ostrich instruction” allows fact-finders to equate deliberate ignorance (sometimes called willful blindness) with knowledge.¹⁶⁷ Knowledge can be established if a defendant is aware of a high probability of an offense’s existence and ignorance was a result of conscious decisions to avoid the truth.¹⁶⁸ Most federal courts allow a deliberate ignorance instruction in conspiracy cases to infer this prong of being a knowledgeable participant.¹⁶⁹

indictment and knowingly joined and participated in it.”); see also Jessica A. Kozlov-Davis, *A Hybrid Approach to the Use of Deliberate Ignorance in Conspiracy Cases*, 100 MICH. L. R. 473, 478 (2001).

164. *Blumenthal*, 332 U.S. at 558–59.

165. *Id.* at 558.

166. *Rogers v. United States*, 340 U.S. 367, 375 (1951) (noting that knowing the identity of other members is not needed such that one person can be convicted of conspiring with persons they do not know the names of); *United States v. Jones*, 482 F.3d 60, 72 (2nd Cir. 2006); *United States v. Lewis*, 902 F.2d 1176, 1181 (5th Cir. 2012) (finding one can be convicted of conspiring with unknown people); see *Blumenthal*, 332 U.S. at 559 (finding that a conspiracy occurred even though the defendants differed in knowledge of a member’s identity).

167. Kozlov-Davis, *supra* note 163, at 474.

168. *Leary v. United States*, 395 U.S. 6, 46 n.93 (1969); see *United States v. Giovannetti*, 919 F.2d 1223, 1228 (7th Cir. 1990) (“The ostrich instruction is designed for cases in which there is evidence that the defendant, knowing or strongly suspecting that he is involved in shady dealings, takes steps to make sure that he does not acquire full or exact knowledge of the nature and extent of those dealings. A deliberate effort to avoid guilty knowledge is all the guilty knowledge the law requires.”).

169. Kozlov-Davis, *supra* note 163, at 478; see *United States v. Ferrarini*, 219 F.3d 145, 154–56 (2nd Cir. 2000) (discussing the allowance of a conscious avoidance instruction for the aspect of knowledge of the conspiracy’s unlawful goals); *United States v. Inv. Enter., Inc.*, 10 F.3d 263, 268–69 (5th Cir. 1993) (finding evidence supported deliberate ignorance charge for knowledge of illegal activity in a conspiracy charge).

2. *With that Intent*

Being a participant (fulfilling the intent requirement) can be inferred as well through supplying lawful goods or services.¹⁷⁰ Thus, this element can be established through circumstantial evidence.¹⁷¹ For example, in *People v. Lauria*,¹⁷² the defendant ran a phone answering service that three prostitutes utilized.¹⁷³ The defendant was charged with conspiracy to solicit prostitution.¹⁷⁴ The court stated that knowledge did not suffice for intent, but the court left open three ways to infer intent from knowledge. The first way is when no legitimate use for the goods or service exists.¹⁷⁵ The second is when the purveyor of legal goods for an illegal use has acquired a stake in the venture, also noted above in the element of agreement.¹⁷⁶ The third way to infer intent from knowledge is when the illegitimate use is a high proportion of the business, or when the volume of business with a buyer is grossly disproportionate to any legitimate demand (for example, sale of narcotics to a rural physician being 300 times the normal use).¹⁷⁷

Federal courts disagree on how deliberate ignorance can show intent. For example, the Second Circuit only allows a deliberate ignorance instruction to infer knowledge, not intent.¹⁷⁸ The Tenth Circuit holds that deliberate ignorance is

170. *People v. Lauria*, 251 Cal.App.2d 471, 478 (Cal. App. 1967); *see, e.g.*, *Davidson v. United States*, 274 F. 285, 287–90 (6th Cir. 1921) (finding the inference of intent of conspiracy from the defendant's statements).

171. *United States v. Hassan*, 578 F.3d 108, 122–23 (2nd Cir. 2008) (reviewing evidence through the standard that the government can show intent through circumstantial evidence).

172. *People v. Lauria* is a state case but a number of federal courts utilize it. *See, e.g.*, *United States v. Scotti*, 47 F.3d 1237, 1245–46 (2nd Cir. 1995); *United States v. Blankenship*, 970 F.2d 283, 285–86 (7th Cir. 1992); *United States v. Fountain* 768 F.2d 790, 798 (7th Cir. 1985); *United States v. Allied Asphalt Paving Co.* 451 F. Supp. 804 (N.D. Ill. 1978).

173. *Lauria*, 251 Cal. App. 2d at 474–75.

174. *Id.* at 475.

175. *Id.* at 478.

176. *Id.*

177. *Id.* at 479.

178. *See, e.g.*, *United States v. Ferrarini*, 219 F.3d 145, 155 (2nd Cir. 2000) (finding conscious avoidance may not be used to support finding of knowing participant, but can be used to support knowledge of the unlawful aims of the conspiracy); *United States v. Eltayib*, 88 F.3d 157, 170 (2nd Cir. 1996) (allowing jury to use conscious avoidance to establish defendant's knowledge of unlawful purpose).

only appropriate when a defendant denies knowledge and there is evidence the defendant purposely engaged in acts to avoid knowledge.¹⁷⁹ The Fifth Circuit however allows the prosecution to establish both knowledge and intent with deliberate ignorance.¹⁸⁰

D. Action

The last element of conspiracy prosecutors must prove is that at least one conspirator committed an act in furtherance of the conspiracy. This action does not need to be unlawful or part of the substantive offense.¹⁸¹ The action also does not have to be an overt act by the defendant; a co-conspirator can perform the act. Once it is shown a conspiracy exists and the defendant is a knowledgeable participant, acts of co-conspirators done in furtherance of the conspiracy are attributable to the defendant, and they become liable for them.¹⁸² A conspiracy does not require that every member of the conspiracy participates in every transaction.¹⁸³ Further, as conspiracy is considered “a distinct evil, dangerous to the public,” it is “punishable in itself”; that is, conspiracy may exist whether or not the substantive crime occurs.¹⁸⁴ In a conspiracy to commit sex trafficking, an advertisement or action of a defendant of the substantive crime would be an overt act.

179. Kozlov-Davis, *supra* note 163, at 479; *see, e.g.*, United States v. Francisco-Lopez, 939 F.2d 1405, 1409 (10th Cir. 1991) (finding deliberate ignorance instruction should only be given when there is evidence the defendant purposely avoided learning the truth).

180. *See, e.g.*, United States v. Inv. Enter., Inc., 10 F.3d 263, 268–69 (5th Cir. 1993) (allowing a deliberate ignorance instruction for the inferences of subjective awareness and purposeful conduct to avoid learning of illegal conduct).

181. *Pierce v. United States*, 252 U.S. 239, 244 (1920) (finding overt act does not need to be a criminal act); *Iannelli v. United States*, 420 U.S. 770, 777–78 (1975) (noting that conspiracy and the substantive offense are independent crimes).

182. *Pinkerton v. United States*, 328 U.S. 640, 646–47 (1946) (noting that an overt act of one is attributable to all conspirators); *United States v. Sanchez*, 917 F.2d 607, 612 (5th Cir. 1990) (noting that according to *Pinkerton*, a conspirator may be subjected to criminal liability for crimes committed by co-conspirator).

183. *United States v. Maceo*, 947 F.2d 1191, 1197 (5th Cir. 1991).

184. *Salinas v. United States*, 522 U.S. 52, 65 (1997) (“It is elementary that a conspiracy may exist and be punished whether or not the substantive crime ensues, for the conspiracy is a distinct evil, dangerous to the public, and so punishable in itself.”).

E. Benefits to Utilizing Federal Conspiracy Charges

As corporations are deemed to be “persons” liable for criminal acts,¹⁸⁵ it is possible, and may be beneficial, to use the federal crime of conspiracy as a prosecution remedy to tackle sex trafficking occurring through third-party websites. In addition to the fact that federal criminal prosecutions of conspiracy should not be disrupted by the CDA (due to the explicit exception for federal crimes) or dormant commerce clause (as this only applies to states), there are a few other considerations of why conspiracy is a useful remedy.

Perhaps the most basic gain is that conspiracy can serve as a deterrent, which is a large benefit when considering how often websites are utilized in human trafficking cases, as discussed above. Some believe charging defendants with conspiracy is an effective way to control crime.¹⁸⁶ Conspiracy rests on the belief that groups behave differently than individuals, particularly in their assumptions of risk and ability to perform tasks, making them more dangerous.¹⁸⁷ Conspiracy would not only allow prosecution of websites like Backpage.com, but also add the charge of conspiracy to the co-defendants who post advertisements.¹⁸⁸ As described in 18 U.S.C. § 1594(c), if a defendant is found guilty of conspiracy to commit sex trafficking, he or she can be fined, “imprisoned for any term of years or life, or both.”¹⁸⁹

Accomplice liability theories “impose full punishment on those involved in the periphery of any substantive criminal offense.”¹⁹⁰ Among the inchoate offenses, “conspiracy is the most distant from the completed harm.”¹⁹¹ This leads to conspiracy as an important criminal charge to reach those who

185. *N.Y. Cent. & Hudson River Railroad Co. v. United States*, 212 U.S. 481, 495 (1909) (holding corporations shall be held punishable for the knowledge and intent of their agents); see generally William S. Laufner, *Corporate Bodies and Guilty Minds*, 43 EMORY L. J. 647 (1994).

186. Neal Kumar Katyal, *Conspiracy Theory*, 112 YALE L. J. 1307, 1331 (2003).

187. *Id.*

188. See *Iannelli v. United States*, 420 U.S. 770, 777–78 (1975); e.g. *Judgment, United States v. Jones*, No. 12–cr–60155 (S.D. Fla. Jul. 10, 2012), *aff’d*, No. 13–10819 (11th Cir. 2013) (charging and convicting Jones of conspiracy to commit sex trafficking of minors and sex trafficking of minors).

189. 18 U.S.C. § 1594(c) (2012) (emphasis added).

190. Walters, *supra* note 38, at 191.

191. David B. Filvaroff, *Conspiracy and the First Amendment*, 121 U. PA. L. REV. 189, 195 (1972).

bear responsibility for criminal activity, but whose contribution is difficult to prove.¹⁹² This increased distance should not mean a decrease in responsibility.

Conspiracy is familiar to prosecutors of human trafficking.¹⁹³ A number of cases have utilized conspiracy against partner human traffickers (including three of the four cases in the case analysis below). For example, Bradley Cook, Dennis Henry, Marilyn Bagley and James Noel all pleaded guilty to conspiracy to commit sex trafficking and using the Internet as a facility of interstate commerce.¹⁹⁴ Co-conspirator defendants can be joined together for trial.¹⁹⁵ Further, under *Pinkerton v. United States*, conspirators may be liable for any overt act committed by co-conspirators both prior to, and during the conspiracy.¹⁹⁶ Thus, conspiracy “hits” many defendants at once, highlighting efficiency when there are too many cases to prosecute at one time. This is particularly important in the realm of human trafficking, as there are low numbers of cases prosecuted as human trafficking.¹⁹⁷

Prosecutors can charge defendants with conspiracy whether or not the underlying substantive offense actually occurs.¹⁹⁸ Thus, in the case of sex trafficking, if the sex trafficking crime does not occur, for example, because of an online sting, conspiracy can still be charged against the defendants. Additionally, co-conspirators’ statements can be brought in as evidence under an exemption to hearsay.¹⁹⁹

192. *See id.* at 198.

193. *Human Trafficking: Recent Trends: Hearing before the Subcomm. on Border, Maritime, and Global Counterterrorism of the Comm. on Homeland Sec.*, 111th Cong. 13 (2007) (statement of Lt. Derek Marsh, Co-Director, Orange County (CA) Human Trafficking Task Force) (“The crime of conspiracy is already familiar to investigators, prosecutors, and judges, and its application has a long history of success.”).

194. Plea Agreements, *United States v. Bagley*, No. 10-cr—00244 (W.D. Mo. 2010).

195. *United States v. Townsend*, 924 F.2d 1385, 1388 (7th Cir. 1991); *United States v. Wilson*, 481 F.3d 475, 482 (9th Cir. 2007) (finding preference for co-conspirators jointly tried together, particularly when they are indicted together). Federal Rule of Criminal Procedure 8(b) permits joinder. FED. R. CRIM. P. 8(b).

196. *Pinkerton v. United States*, 328 U.S. 640, 647 (1946).

197. *See Farrell et al.*, *supra* note 79, at 141 (finding low numbers of prosecutions of human trafficking).

198. *Supra* Part III.D.; *Salinas v. United States*, 552 U.S. 52, 65 (1997); *see Neal Katyal, Criminal Law in Cyberspace*, 149 U. PA. L. REV. 1003, 1042–47 (2001) (applying the idea to cybercrime).

199. FED. R. EVID. 801(d)(2)(E). The Trafficking Victims Reauthorization Act

IV. APPLICATION AND CASE ANALYSIS

In order to explore conspiracy as an appropriate strategy to prosecute third-party websites like Backpage.com, as introduced above, I examine if conspiracy elements are met in selected federal sex trafficking prosecutions where the defendant(s) utilized the Internet. I analyze if the third-party websites could be implicated in these cases (in these cases, the third-party websites were not charged). This analysis of sex trafficking cases that used the Internet as a venue allows for adjudication of the value of conspiracy to prosecute third-party websites.

A. *Source of Data*

As introduced above, the present analysis utilized a dataset that identifies state and federal human trafficking investigations, arrests, and prosecutions from 2003 through 2012. The dataset is the result of a National Institute of Justice grant aimed at advancing understanding of the effectiveness of United States anti-trafficking responses.²⁰⁰ As

of 2008 added liability for those who benefit financially (knowingly or in reckless disregard of the fact) from participating in a venture that engages in human trafficking. However, though third-party websites would seem to be criminally liable for human trafficking under this provision, the provision was not added to § 1590 (labor trafficking) or § 1591 (sex trafficking). Congress only added the provision to 18 U.S.C. §§ 1581(a) (peonage), 1589 (forced labor), and 1592 (unlawful conduct with respect to documents, like passports, in furtherance of trafficking, peonage, slavery, involuntary servitude, or forced labor). The Reauthorization Act also added this provision of liability to civil remedies. *See* TVPRA of 2008, H.R. 7311, 110th Cong. (2008). As stated in 18 U.S.C. § 1595, a victim of a violation of 18 U.S.C. Chap. 77 may bring a civil action against whoever knowingly benefits financially from “a venture that that person knew or should have known [is] an act in violation of the chapter.” *Id.* Some of the lawsuits against Backpage.com have used this provision in their lawsuits, including the recent case in Massachusetts. *See Doe v. Backpage.com, LLC*, 104 F. Supp. 3d 149, 158 (D. Mass. 2015), *aff’d*, *Jane Doe No. 1 v. Backpage.com, LLC*, 2016 WL 963848 (1st Cir. 2016).; *J.S. v. Village Voice Media Holdings, LLC*, 359 P.3d 714 (Wash. 2015) (the case is against Village Voice Media as the case was filed in July of 2012). [SS: I don’t see any references to § 1595 in any of the *J.S.* case documents that I have looked at]. In its dismissal, the court in *Doe v. Backpage.com* did not rule on Backpage.com’s liability as part of a joint venture as the court decided the issue based on § 230 immunity, protecting the website from private litigants bringing civil claims based on their own beliefs that service provider’s actions violated criminal laws. *See Doe v. Backpage.com*, 104 F. Supp. 3d at 160–61’.

200. *See generally* VANESSA BOUCHÉ, AMY FARRELL, & DANA WITTMER, SUMMARY REPORT: IDENTIFYING EFFECTIVE COUNTER TRAFFICKING PROGRAMS IN THE U.S.: LEGISLATION, LAW ENFORCEMENT, AND DEMAND REDUCTION

part of this grant, the research team concluded that due to the limitations of current databases, as no dataset catalogues all human trafficking incidents, the most beneficial means to gather information on recognized state and federal incidents of human trafficking was a search of secondary, public sources. The team gathered information on state and federal arrests, investigations, and prosecutions of human trafficking through a public source search using news source databases (LexisNexis, Access World News, and Google News Search) and search engines (Google and Access World News).²⁰¹ The research team also reviewed court records, including of the selected cases below. The dataset identifies online involvement, including recruiting of victims online, advertisements being placed online, and if online stings occurred where police posed as either a seller or buyer. The dataset also indicates the website involved, where available. As often prosecution of human trafficking cases results in charging lesser crimes, like promoting prostitution, indicators of human trafficking arrest or investigation were utilized.²⁰²

The dataset identifies 3,306 individuals nationwide suspected of being involved in sex trafficking cases, with 1,532 of these cases indicated as sex trafficking of minors (see Table 1).²⁰³ Of these sex trafficking cases, 870 (26%) utilized the Internet as a venue; 457 of the identified minor sex trafficking cases (30%) utilized the Internet. Of those suspects that utilized the Internet, over 1/3 of them (36%) used Backpage.com (313 suspects). There are 195 (22%) instances of Craigslist being utilized; 79 (18%) of these are indicated as minor sex trafficking.²⁰⁴ These are likely conservative counts

STRATEGIES THAT WORK, NAT'L INST. OF JUST., OFF. OF JUST. PROGRAMS, DEP'T. OF JUST. (Nov. 2015) (Grant No. 2012-MU-CX-0027).

201. The research team followed an extensive protocol for the systematic search process. The protocol included what databases to search, and in what order, and what search terms to use. The protocol also specified variables in the database, serving as a guide for the information gathered from the news articles.

202. Farrell et al., *supra* note 79, at 139, 149 (finding in their study that most of the state and federal human trafficking cases identified were prosecuted as lesser crimes than human trafficking).

203. The units of the dataset are human trafficking suspect rather than case, as cases can have multiple suspects. This number of suspects is slightly different than that in the summary report for the National Institute of Justice grant project, as the summary report only includes suspects who were *arrested* between the years of 2003 and 2012. See BOUCHÉ ET AL., *supra* note 200, at 4, 6 n.6, 30.

204. It is possible that Backpage.com and Craigslist users overlapped. Future

of internet involvement as the public source information, particularly news articles, may not have noted this utilization. Further, the involvement of particular websites, including Backpage.com, may be underestimated as sources may not have listed which website a suspect used, but rather that the internet was utilized in general.

Table 1: Totals of Internet Involvement for Identified Sex Trafficking Incidents

	All Sex Trafficking Suspects (including minor sex trafficking)	Minor Sex Trafficking Suspects
Number of Suspects	3,306	1,532
Utilized Internet (number/percentage of suspects)	870/26.31%	457/29.83%
Internet Users who Utilized Backpage.com (number/percentage of internet users)	313/35.97%	151/33.04%

B. Case Selection

For the case analysis, four federal human trafficking cases were chosen in the following manner. First, from the entire dataset, incidents that proceeded into human trafficking prosecutions were identified. Second, of these cases, I identified where a suspect utilized a third-party website to facilitate the human trafficking crime. With these cases, I used indicators for the elements of conspiracy to choose particular cases that highlight the potential usage of conspiracy against third-party websites, even though these websites were not charged in the cases. I investigated this selection of cases further by reviewing the official federal case records, using the indicators' framework to investigate these elements in depth (including establishing elements through different avenues). In this review, I also noted cases wherein

study should see if these advertisements occurred after Craigslist shut down its Adult Services category.

not only the elements of conspiracy were present, but so were the benefits of a conspiracy prosecution. There were common elements and fact patterns between these cases, and I chose the following four federal minor sex trafficking cases as they highlighted these commonalities most clearly. Table 2 below indicates the general fact patterns of these four chosen cases.

C. Conspiracy Framework

Along with the general facts of the four chosen cases, Table 2 also highlights which elements of conspiracy from the case analysis framework were present in the four cases. As discussed in detail below, all four cases had all four elements of conspiracy present in some way, though intent was consistently only present through a stake in venture. The strongest case for a conspiracy charge against a third-party website is *Strom*, as the parties in this case exhibited both knowledge and deliberate ignorance.

Table 2: General facts, prosecution charges, and third-party websites' elements of conspiracy of selected cases

Defendants	General Fact Pattern	Prosecution Charges ²⁰⁵	Agreement Element	Violation of US Law Element	Knowledgeable Participant Element	Commission of an Act Element
Johnelle Bell & Brittany Lawson ²⁰⁶	Bell ran an eight-state sex trafficking and prostitution ring between November 2009 and June 2011. Bell and Lawson posted advertisements on backpage.com that solicited customers in Iowa and other states. At least two victims were minors. Advertisements listed victims as "smoking hot babes" and included telephone numbers for purchasers of sex to call and obtain prostitution services provided by the conspiracy.	Bell - Conspiracy to commit sex trafficking of a minor [18 U.S.C. § 1594(c)]*, sex trafficking of a minor [18 U.S.C. 1591(a)(1)]*, coercion or enticement of a female [18 U.S.C. § 2422(a)]*, conspiracy to defraud the United States [18 U.S.C. § 371] for interstate transportation for prostitution [18 U.S.C. § 2421]*. Lawson - Conspiracy to commit sex trafficking of a minor [18 U.S.C. § 1594(c)]*.	Present (inference of an agreement, stake in the venture, environment that instigates sex trafficking)	Present	Knowledge present (essential nature of plan) Intent present only through stake in venture No evidence of deliberate ignorance	Present
Deangelo Jones ²⁰⁷	Three minors (aged 12, 14, and 15) were recruited to be prostitutes through enticement by Jones. Jones and his girlfriend took pictures of the victims with a cellphone and posted the pictures as a prostitution advertisement on Backpage.com. A few hours after the posting, victims began working as prostitutes.	Conspiracy to commit sex trafficking of minor [18 U.S.C. § 1594(c)]*, sex trafficking of minors [18 U.S.C. § 1591(a)(1)]*.	Present (stake in the venture, purposely anonymous, environment that instigates sex trafficking)	Present	Knowledge present (essential nature of plan) Intent present only through stake in venture No evidence of deliberate ignorance	Present

205. Does not include number of counts.

206. Indictment, United States v. Bell, No. 12-cr-27 (S.D. Iowa 2012), *conviction aff'd*, 761 F.3d 900 (8th Cir. 2014).207. Indictment, United States v. Jones, No. 12-cr-60155 (S.D. Fla. Jul. 10, 2012), *conviction aff'd*, No. 13-10819 (11th Cir. 2013).

<p>Craig Johnson,²⁰⁸ Adrian Palmer²⁰⁹</p>	<p>Defendant advertised young females (ages 15 and 16) online as available for purchase for purposes of prostitution. Advertisement contained partially nude pictures, the price for an encounter, and phone number to arrange a meeting. Johnson drove victims to meet customers. Two of the victims were listed on a national database of missing children. Palmer provided protection and assistance out of a motel, and advice on sex trafficking (including in regards to Johnson's backpage.com advertisements).</p>	<p>Johnson - Attempted sex trafficking of minor by force [18 U.S.C. § 1594(d)], sex trafficking of minor [18 U.S.C. § 1591)*, aiding and abetting sex trafficking of a minor [18 U.S.C. § 2). Palmer - Attempted sex trafficking of minor [18 U.S.C. § 1594(a))* aiding and abetting of sex trafficking of a minor [18 U.S.C. § 2)*, conspiracy [18 U.S.C. § 371)*.</p>	<p>Present (stake in the venture)</p>	<p>Present</p>	<p>Knowledge not present Intent present only through stake in venture No evidence of deliberate ignorance</p>	<p>Present</p>
<p>Justin Strom²¹⁰</p>	<p>Defendant maintained a gang-controlled sex trafficking operation. Advertised victims for prostitution on backpage.com. Advertisements solicited customers for prostitution services. Eight victims were aged 16-17. This operation occurred over a span of six years.</p>	<p>Conspiracy to commit sex trafficking of minor [18 U.S.C. § 1594(c)], sex trafficking of a minor [18 U.S.C. § 1591)*, transporting a minor across state lines [18 U.S.C. 2423).</p>	<p>Present (inference of agreement, stake in the venture, purposely anonymous)</p>	<p>Present</p>	<p>Knowledge present (essential nature of plan) Intent present only through stake in venture Deliberate ignorance present</p>	<p>Present</p>

* Convicted of charge.

208. Indictment, United States v. Johnson, No. 12-cr-00571 (E.D. Pa. 2012).

209. Indictment, United States v. Palmer, No. 13-cr-00562 (E.D. Pa. 2013). These are separate indictments based on the same incident.

210. Indictment, United States v. Strom, No. 12-cr-00159 (E.D. Va. 2012), *conviction aff'd*, 596 F. App'x 234 (4th Cir. 2015).

1. Knowledgeable Participant

It seems Backpage.com should know the specific nature of the underlying crimes occurring on its website, more than that *some crime* is being committed.²¹¹ There are many instances that allow for the reasonable inference that Backpage.com knows the existence of sex trafficker's schemes (as discussed, it is not necessary for a conspiracy conviction that Backpage.com have direct contact with or direct knowledge of users involved in the conspiracy).

In *Bell*, Bell posted solicitations on Backpage.com advertising women as escorts with the heading "Exotic Playmate Last Night in Town!!!" and included photographs, services offered, a phone number, and the location of a hotel. An FBI agent noted in the case's detention hearing that there was no doubt in the record that through the advertisement Bell was providing and obtaining people, including minors, for the purposes of prostitution.²¹² The agent noted that through his investigation team's experience, they knew that postings on Backpage.com's escort section are typically Internet solicitations for prostitution.²¹³ Further, the court found that it was known and reasonably foreseeable to the co-conspirators of the case that the prostitution advertisements were created by Bell.²¹⁴

Thus, what Backpage.com is widely used for, local prostitution that includes minor victims, does not seem to be a secret.²¹⁵ Bell and his codefendant even recruited prostitutes from Backpage.com by looking at other postings of commercial sexual services advertised on Backpage.com.²¹⁶ In *Jones*, a Backpage.com representative was prepared to testify that the advertisements in that case, which solicited prostitution dates for minors, were part of regularly conducted activity maintained by Backpage.com in the ordinary course of

211. *Cf.* United States v. Friedman, 300 F.3d 111, 124 (2nd Cir. 2002) (finding that knowing *some crime* will occur is not enough proof for a conspiracy charge).

212. Detention Hearing at 6, United States v. Bell et al., No. 12-cr-27 (S.D. Iowa 2012), *conviction aff'd*, 761 F.3d 900 (8th Cir. 2014).

213. *Id.*

214. Superseding Indictment at 10, *Bell*, No. 12-cr-27; *see supra* Table 2.

215. *See* Shively et al., *supra* note 2, at 1.

216. *See* Indictment at 6-7, 24, United States v. Jones, No. 12-cr-60155 (S.D. Fla. 2012), *conviction aff'd*, No. 13-10819 (11th Cir. 2013).

Backpage.com's business.²¹⁷

A further example was seen in a recent documentary, that noted that one-third of men enrolled in a "John school" (a court diversion program for those convicted of soliciting prostitution; patrons of prostitutes are often called "Johns") arranged their prostitution occurrence through Backpage.com, including with minors.²¹⁸ If sex traffickers, including buyers of minors for sex,²¹⁹ know about Backpage.com, Backpage.com should know about sex trafficking.²²⁰ It can be reasonably inferred that Backpage.com knows the existence of sex traffickers' schemes, the essential nature and scope of their plans.

Similarly, Backpage.com is aware of the suspicious transactions occurring on their website, which can lead to an inference of knowledge. In 2001, BuffNET, an ISP, pled guilty to knowingly providing access to child pornography, following an investigation's findings that the website failed to take action after it was notified that its groups were distributing child pornography.²²¹ Though the website noted the reason for the plea was the emotional stress of the case, some note *BuffNET* highlights that knowledge coupled with failure to act after notification remains the standard for imposing criminal liability.²²² In *United States v. Hassan*, the court found a conviction of conspiracy to launder money could be sustained by knowledge inferred from transactions structured to disguise the source of the funds involved (e.g. unreported income).²²³

Backpage.com reports that 400 advertisements on the website per month are suspected to involve minors, and they report these to the National Center for Exploited Children (NCEC).²²⁴ The vice president of Backpage.com (Carl Ferrer) testified in at least two minor sex trafficking trials to acknowledge a defendant used a credit card to pay for

217. Government's Trial Brief at 4, *Jones*, No. 12-cr-60155.

218. *Transcript: Selling the Girl Next Door*, CNN (Mar. 19, 2012), <http://transcripts.cnn.com/TRANSCRIPTS/1101/23/cp.01.html>.

219. See 18 U.S.C. § 1591 (2012), amended by S. 178.

220. In *Selling the Girl Next Door*, one interviewed "John" in a John school responded to the notion that the Adults Section of Backpage.com is not selling sex with, "You have got to be kidding. What are they selling then?" *Transcript: Selling the Girl Next Door*, *supra* note 218.

221. Walters, *supra* note 38, at 174-75.

222. *Id.*

223. *United States v. Hassan*, 578 F.3d 108, 128 (2nd Cir. 2008).

224. Ruvolo, *infra* note 334.

advertisements they posted on Backpage.com that led to sex trafficking offenses.²²⁵ Backpage.com also still allows customers to purchase web space through cards that cannot be traced (like pre-paid cards) and with other individuals' credit cards.²²⁶ In *Jones and Strom*, pre-paid debit and credit cards (which are anonymous) were used to pay for prostitution advertisements on Backpage.com.²²⁷ Thus, it seems Backpage.com is aware of suspicious transactions, which can infer knowledge. In a following section I discuss how deliberate ignorance can infer knowledge in these cases as well.

Intent may be difficult to prove in a case against Backpage.com. None of the cases show explicit intent by Backpage.com to make profits from human trafficking.²²⁸ However, as discussed in *People v. Lauria*, a way to infer intent from knowledge is if the illegitimate use of a business is "a high proportion of" a business that otherwise supplies lawful services.²²⁹ Backpage.com has not disclosed their revenue, but many have noted that prostitution advertisements compose their primary form of revenue.²³⁰ Further, a related argument could be made that intent occurs if a service is a high proportion of the illegitimate business. As discussed above, the illegal nature of the business is facilitating a large proportion of sex trafficking occurrences. This is different than cases like *Chicago Lawyers Committee for Civil Rights* (where plaintiffs argued Craigslist violated the Fair Housing Act), where the court noted that phone companies and courier services were

225. *United States v. Chappell*, 2011 WL 607385, at *2 (D. Minn. 2011); *United States v. Fuertes*, 435 F. App'x 802, 806 (11th Cir. 2011).

226. Ruvolo, *infra* note 334, at para. 28.

227. See Indictment at 7, *United States v. Strom*, No. 12-cr-00159 (E.D. Va. 2012), *conviction aff'd*, 596 F. App'x 234 (4th Cir. 2015); see Criminal Complaint at 3, *United States v. Jones*, No. 12-cr-60155 (S.D. Fla. 2012), *conviction aff'd*, No. 13-10819 (11th Cir. 2013). It was unclear in *Johnson* if the credit cards were pre-paid or anonymous.

228. For example, in *Ulbricht*, Ulbricht was alleged to have intentionally constructed Silk Road for selling and purchasing narcotic and malicious software, and for laundering money. Thus, the co-conspirators accepted Ulbricht's "offer" and used the site for its intended purpose. *United States v. Ulbricht*, 31 F. Supp. 3d 540, 556-558 (S.D.N.Y. 2014).

229. *People v. Lauria*, 251 Cal. App. 2d 471, 479 (Cal. App. 1967).

230. *E.g.* Brief of *Amicus Curiae* Commonwealth of Massachusetts in Support of Plaintiffs' Opposition to Motion to Dismiss at 9-10, *Doe v. Backpage.com, LLC*, No. 14-cv-13870 (1st Cir. argued Jan. 6, 2016); see AIM GROUP, *supra* note 48.

involved in the same capacity that Craigslist was.²³¹

Additionally, Backpage.com's charging behavior provides support for intent. When Backpage.com began to charge for advertisements in its Adult Services section (where the Escorts category is), advertisements for prostitution migrated to the Dating section, which was free. As a result, Backpage.com began charging for dating advertisements as well, allowing them to continually benefit from prostitution-related advertising, including the high percentage of human trafficking.²³²

Another way to infer intent is to show a stake in a venture.²³³ As discussed below in agreement all four of the minor sex trafficking cases analyzed highlighted this element.

If Backpage.com states they do not know of these transactions and had no intent to further the transactions, their high involvement may sustain an argument that the website is deliberately ignoring their occurrence. For example, in *United States v. Investment Enterprises, Inc.*, the court noted that evidence undercut the defendant's argument that he had no knowledge of unlawful purpose of a conspiracy to transport obscene videos in interstate commerce and no intent to further it.²³⁴ The defendant, Warner, was the president of a company largely devoted to box covers for the sexually explicit videos (though a substantial portion of the business was not implicated) and reviewed said covers, was well-acquainted with distributors, and had a financial stake in the distribution companies.²³⁵ Further, the court noted that Warner purposefully avoided learning of the illegal conduct as he received a substantial amount of money from the arrangement, would avoid board meetings, and sent an employee to collect for printing.²³⁶

As highlighted in Table 2 above, the element of intent was not only seen through the presence of a stake in the venture in one case: *Strom*. In *Strom*, intent was also seen through

231. *Contra* Chicago Lawyers' Committee v. Craigslist, 519 F.3d 666, 668 (7th Cir. 2008).

232. Backpage.com, LLC v. Cooper, 939 F. Supp. 2d 805, 815–16 (M.D. Tenn. 2013).

233. *Lauria*, 251 Cal. App. 2d at 478.

234. *United States v. Inv. Enter., Inc.*, 10.F.3d 263, 267 (5th Cir. 1993).

235. *Id.*

236. *Id.* at 269.

deliberate ignorance. Strom and his co-defendants advertised on Backpage.com with three different advertisements under the same username for six years.²³⁷ The advertisements depicted nude or clad minors that stated “I’m fun, sexy, n[sic] down to have a good time . . . I love what I do and so will you.”²³⁸ The blatant sexual services advertised through many different names for an extended period of time supports the argument that Backpage.com is deliberately ignoring these types of transactions.

As Backpage.com makes a significant amount of money from these online advertisements that implicate human trafficking victims, similar to *Investment Enterprises*, and is implicated in many sex trafficking occurrences, it seems that Backpage.com is aware of the high probability of sex trafficking occurring on its website. What may be harder to argue is that Backpage.com *actively* avoided learning of this illegal conduct. There are, however, a few avenues that may work to prove this. Backpage.com does review advertisements, but only on the Adult Services category of the website, despite the migration of prostitution advertisements.²³⁹ Further, Backpage.com gives reports to NCEC, but has not followed up with those reports. The website also has not utilized analytic methods to identify advertisements, despite promising to.²⁴⁰ Thus, Backpage.com could fit under consciously avoiding the truth, fulfilling the knowledge element, and potentially satisfying intent depending on the court involved (discussed above).

237. Affidavit in Support of a Criminal Complaint and Arrest Warrants at -6, *United States v. Strom*, No. 12-cr-00159 (E.D. Va. Mar. 26, 2012) (Bloomberg Law); *see also* Transcript of Sentencing Before the Honorable James C. Cacheris United States District Judge, *United States v. Strom*, No. 12-cr-00159 (E.D. Va. Oct. 19, 2012) (Bloomberg Law).

238. Affidavit in Support of a Criminal Complaint and Arrest Warrants at 5, *United States v. Strom*, No. 12-cr-00159 (E.D. Va. Mar. 26, 2012) (Bloomberg Law).

239. *Infra* Part V.

240. Complaint at 12-13, *Doe v. Backpage.com, LLC*, No. 14-cv-13870 (D. Mass. Oct. 16, 2014); Aaron Kellogg, *Ropes & Gray litigation team files federal lawsuit against Backpage.com’s online child sex trade*, PRNEWSIRE (Oct. 16 2014), <http://www.prnewswire.com/news-releases/ropes—gray-litigation-team-files-federal-lawsuit-against-backpagecoms-online-child-sex-trade-279484442.html>.

2. Agreement

Knowledge can support the inference of a culpable agreement by “mere acquiescence.”²⁴¹ Though knowledge can support this inference, courts have not dispensed with the requirement of proving agreement.²⁴²

It would be relevant to prove that Backpage.com has a stake in the outcome of the transaction in order to infer an agreement existed.²⁴³ More is required than that the buyers intend to use the product in committing a crime; they must promote the venture or have a stake in the outcome.²⁴⁴ However, this line is blurry.²⁴⁵

As mentioned, in *Ulbricht* the defendant was convicted of conspiracy for creating the website Silk Road to facilitate unlawful transactions, and for being in a continuous criminal enterprise by designing, launching and administering the website.²⁴⁶ The government stated the site was purposely designed for anonymous, untraceable Internet browsing as it only accepted an anonymous, untraceable form of online currency (bitcoin).²⁴⁷ Ulbricht earned a commission each time customers purchased goods or services on the website’s platform.²⁴⁸ The court found the federal indictment properly alleged that Ulbricht created the platform to facilitate unlawful transactions.²⁴⁹ The indictment notes that Ulbricht’s overt acts in furtherance of the conspiracy for trafficking narcotics were creating a platform for drug dealers to sell controlled substances, for the purchase and sale of computer hacking tools, for the purchase and sale of fraudulent identification documents, and money laundering.²⁵⁰ The judge

241. *United States v. Allied Asphalt Paving Co.*, 451 F. Supp. 804, 815 (N.D. Ill. 1978).

242. *Id.*

243. *Supra* Part III.A.; *Doe v. GTE Corp.*, 347 F.3d 655, 659 (7th Cir. 2003); *United States v. Layne*, 192 F.3d 556 (7th Cir. 1999) (finding fact-finder can infer agreement of drug conspiracy because success is dependent on the success of those from whom they buy and to whom they sell).

244. *Id.*

245. *United States v. Blankenship*, 970 F.2d 283, 286 (7th Cir. 1992) (“Where does the ‘mere’ sale end, the conspiracy begin? . . . Locating the line of demarcation is hard.”).

246. *United States v. Ulbricht*, 31 F. Supp. 3d 540, 546 (S.D.N.Y. 2014).

247. *Id.* at 547.

248. *Id.* at 556.

249. 31 F. Supp. 3d. 540.

250. Indictment, *United States v. Ulbricht*, No. 14-cr-00068 (S.D.N.Y. 2014)

stated, “This separates Ulbricht’s alleged conduct from the mass of others whose websites may—without their planning or expectation—be used for unlawful purposes.”²⁵¹ There was no allegation that Ulbricht conspired with anyone *before* the website was launched.²⁵² However, the allegations and conviction occurred around the numerous transactions after the launch of the website.²⁵³

A stake in the outcome may be difficult to prove with Backpage.com, as they receive payment whether or not a crime resulting from an advertisement is committed. For Backpage.com, the potential human trafficking act results in the purchase of the advertisement; Backpage.com’s profit is from the advertisement rather than the trafficking act itself. In all of the analyzed cases, advertisements included telephone numbers for purchasers of sex to call and obtain prostitution services, and Backpage.com received profit from these even if solicitors are arrested and no sexual act occurs.

However, some instances show that Backpage.com does profit from successful sex trafficking occurrences and helps to promote the venture of sex traffickers. Many of the cases discussed how advertisers can repost for an additional fee in order to have their advertisement posted prominently on Backpage.com (similar to the shut-down website myRedBook.com). Further, as seen in Table 2, in *Johnson*, Craig Johnson paid daily payments to Adrian Palmer in order to receive advice on furthering prostitution on the website.²⁵⁴ The co-conspirators in *Bell* researched Backpage.com to find women to prostitute in their “business” venture, leading to an increased usage of Backpage.com and further profits.²⁵⁵ Thus, Backpage.com is promoting the venture of sex traffickers, and is profiting from sex trafficking ventures. Additionally, considering Backpage.com was created from the back pages of the Village Voice and only charges for advertisements on sections likely to have prostitution advertisements (discussed

(Bloomberg Law).

251. 31 F. Supp. 3d at 556.

252. *Id.* at 547.

253. *Id.*

254. Indictment at 2, United States v. Palmer, No. 13-cr-00562 (E.D. Pa. Oct. 17, 2013).

255. *E.g.* Superseding Indictment at 24, United States v. Bell et al., No. 12-cr-00027 (S.D. Iowa Nov. 06, 2012) (Bloomberg Law), *aff’d*, 761 F.3d 900 (8th Cir. 2014).

below), like Silk Road, Backpage.com has this expectation that the website is used for unlawful purposes.

As utilized in current lawsuits against Backpage.com and in *Ulbricht*,²⁵⁶ it may be useful to argue that Backpage.com provides an environment that supports human trafficking occurrences. This includes a development of code words for prostitution and types of sexual acts not screened out. For example, in *Bell*, the postings were for “backyard specials,” referring to anal sex.²⁵⁷

Backpage.com also created a platform convenient for unlawful transactions. Advertisers can use anonymous forms of payment (as introduced above). As mentioned, in *Jones and Strom*, pre-paid credit cards were used to pay for prostitution advertisements on Backpage.com.²⁵⁸ The platform also allows users to post pictures that are not of minors, but adults, thus pretending that the photos are of the “escort” advertised even if the advertisement is for prostituted minors. For example, in *Bell*, advertisements for prostitution with the victims included photos of other people.²⁵⁹

A stake in the outcome however is not always essential to proving an agreement.²⁶⁰ The Seventh Circuit defines venture to succeed in a slightly different way. What seems to be essential is the effect of potential punishment. This circuit believes the determination may be if the imposition of liability in the transactions of the class depicted in the criminal case would deter crime without adding to the costs of legitimate business transactions.²⁶¹ *Blankenship* provides an example of a stationer selling a known prostitute an address book, stating that punishing the stationer would not reduce the amount of prostitution, as the prostitute would simply shop for an address book among others who do not know her “trade.”²⁶²

256. *E.g.*, *Doe v. Backpage.com, LLC*, No. 14-cv-13870 (D. Mass. Oct. 16, 2014).

257. *See, e.g.*, Transcript of Trial Volume IV at 18, 23–24, Superseding Indictment at 10–11, *United States v. Bell et al.*, No. 12-cr-00027.

258. *Supra* Part IV.

259. *See, e.g.*, Transcript of Trial Volume IV at 46–47, *United States v. Bell et al.*, No. 12-cr-00027.

260. *Direct Sales Co. v. United States*, 319 U.S. 703, 713 (1943) (finding that stake in the venture is not essential particularly when there is informed and interested cooperation, stimulation, and instigation).

261. *United States v. Blankenship*, 970 F.2d 283, 287 (7th Cir. 1992).

262. *Id.*

Backpage.com states that this is essentially what would happen if they were to shut down: human trafficking will be pushed overseas to websites that cannot track customers.²⁶³ As discussed above, this is essentially what happened when Craigslist's Adult Services section shut down, with many advertisements moving from Craigslist to Backpage.com.

However, Backpage.com may be closer to the aiding and abetting case of *United States v. Giovannetti*, also a Seventh Circuit case, where the court considered a single transaction extending over a substantial period of time the equivalent of an agreement for an enduring supply.²⁶⁴ In *Giovannetti*, premises were leased for the purpose of illegal gambling.²⁶⁵ There were periodic payments of rent for a wire room.²⁶⁶ In this situation, a "bookie" needs a wire room, and a lessor almost inevitably knows his tenant's business.²⁶⁷ Thus, if the law deters landlords from renting space for this type of operation, it will cut down crime. The court stated that in order for a gambling enterprise to succeed, there needs to be a landlord who knows the purpose of the rental.²⁶⁸ Thus, punishing the landlord will make the gambling enterprise difficult. Though there was no direct evidence that the landlord knew what was occurring in the wire room, the court found it was proper for the jury to infer this knowledge from circumstantial evidence.²⁶⁹ This seems to be synonymous with Backpage.com's situation. If Backpage.com is punished, human trafficking occurrences will be more difficult, as a high number of human trafficking incidents will be implicated, apparent by the amount of sex trafficking incidents that involve Backpage.com and third-party websites.

Another argument for agreement, though it may be weaker, is an inference of an agreement deduced from actions of the accused. This was present in three of the four cases analyzed. In *Bell*, Bell posted and caused others to post

263. Hirsch & Walsh, *supra* note 55. See also DANK ET AL., *supra* note 1, at 102 (quoting a San Diego law enforcement official who noted that if Backpage.com is shut down, the underground sex market will not be able to be found).

264. *United States v. Giovannetti*, 919 F.2d 1223, 1227 (7th Cir. 1990).

265. *Id.* at 1225.

266. *Id.*

267. *Distinguished by United States v. Blankenship*, 970 F.2d 283, 287 (7th Cir. 1992).

268. *Giovanetti*, 919 F.2d at 1227.

269. 919 F.2d at 1227.

solicitations on Backpage.com that were reasonably foreseeable to other co-conspirators to be in furtherance of the conspiracy.²⁷⁰ This argument may also be used with images that are starkly apparent to be of underage minors offering sex for payment. This occurred in the *Jones* case, where the FBI's Minor Vice Task Force in South Florida spotted advertisements by Jones that included "images of *obviously* underage girls offering sex."²⁷¹ This argument could also be made for *Strom*, where it was part of the conspiracy to recruit customers and victims through the Internet, including Backpage.com, in their prostitution enterprise.²⁷²

D. Discussion

Though there were facts of the four cases that fit well into some elements of conspiracy, the only way for all elements to be present within a case was through intent being proven through having stake in the venture (which all cases had present).

Explicit intent was not present in the four cases chosen, which, again, is not surprising. Intent can be proven through: a showing that the illegal activity was a high proportion of the business, the presence of a stake in the venture, or deliberate ignorance. However, the strongest case for conspiracy, *Strom*, does have all elements if deliberate ignorance is used to meet intent. Though, due to some courts' restrictions on the usage of a deliberate ignorance instruction (discussed above), none of the cases present a perfect example for the usage of conspiracy.

Despite this fact, conspiracy still seems like a viable prosecution option. In the cases where elements were present, they were present through many different avenues. For example, in *Jones*, agreement could be met by evidence of Backpage.com's stake in the venture, that the website was not a neutral host, that it provided an environment for anonymous transactions, or that it had a platform that instigated sex trafficking.

Further, these results may be a function of the data that

270. See *United States v. Bell et al.*, No. 12-cr-00027 (S.D. Iowa Apr. 23, 2012) (Bloomberg Law), *aff'd*, 761 F.3d 900 (8th Cir. 2014).

271. Government Trial Brief, *United States v. Jones*, No. 12-cr-60155 (S.D. Fla. Jun. 22, 2012).

272. *United States v. Strom*, No. 12-cr-00159 (E.D. Va. Apr. 25, 2012).

is available through case records. While prosecutors were conducting their investigations, they were not indicting Backpage.com, and thus not focusing on the website in their evaluations. It is particularly difficult to find the intent of a third-party website when the investigation for a case is not geared toward conspiracy of the third-party website. Thus, the analysis results from the four cases are likely conservative and future investigations should gear towards this element.

Further research should also examine more systematically the amount of human trafficking that is occurring on third-party websites and Backpage.com's revenue breakdown. This can provide an argument that, rather than explicit intent of the third-party website, intent can be inferred since the illegitimate use of the business is a high proportion of the business. A related argument could be made that intent occurs if a service is a high proportion of the illegitimate business.

Backpage.com is profiting from being such a large figure in sex trafficking. As Backpage.com is a relatively large part of this illegal industry, the knowledge and intent elements of conspiracy should be met. As discussed by Smith and Vardaman, a "[r]easonable knowledge of sex trafficking occurring within a business venue . . . should result in criminal liability on the part of the business."²⁷³

The cases do indicate the benefits of conspiracy. First, the cases highlight, the efficiency of conspiracy. In *Bell*, Backpage.com was used to find other pimps involved in a nationwide sex trafficking ring. Thus, utilizing a third-party website implicated other potential human traffickers. In *Strom*, the sex trafficking operation was gang-controlled, and thus many defendants were implicated by a conspiracy charge. Second, the cases highlight a number of instances where an underlying substantive offense did not have to occur in order for conspiracy to be charged. In *Bell*, investigators broke up a ring by posing as "customers" during a sting operation.²⁷⁴ Similarly, in *Jones*, a task force conducted an undercover prostitution operation, using Backpage.com to find an

273. Smith & Vardaman, *supra* note 2, at 291.

274. Press Release, Fed. Bureau of Investigation, *New Jersey Man Sentenced on Sex Trafficking Charges* (Jul. 22, 2013), available at <http://www.fbi.gov/omaha/press-releases/2013/new-jersey-man-sentenced-on-sex-trafficking-charges>, at paras. 7, 9 (noting that Bell's charges arose from a prostitution sting operation and the circumstances).

advertisement that displayed a young female, and arranging a prostitution date with that female.²⁷⁵ Johnson and Palmer were charged with attempted sex trafficking of a minor due to their recruitment online.²⁷⁶

The cases also confirm the importance of identification of third-party websites in sex trafficking incidents. First, they do so by presenting law enforcement identification of victims through the usage of third-party websites. Again, in *Jones*, the victims were found in an undercover prostitution operation completed online. A task force conducted the operation and searched Backpage.com for advertisements of young females. After identifying an advertisement, an undercover detective called the advertisement's phone number to arrange a prostitution date.²⁷⁷ The detective met with a young female, gave her money, and talked about engaging in sexual activity.²⁷⁸ The fifteen-year old was then placed in custody and the *Jones* investigation developed from that point.²⁷⁹ Further, these cases confirm the importance of the facilitation of third-party websites in human trafficking. As discussed, in *Johnson*, Backpage.com was considered an important enough institution for a co-defendant to receive daily payments for his advice on how to post on the website.

V. DEFENSES

There are a few defenses Backpage.com may raise if charged with federal conspiracy. A conspirator may rely on the defense of withdrawing from their participation in the conspiracy. In order to withdraw, a conspirator must 1) cease participation and engage in affirmative actions inconsistent with the object of conspiracy; and 2) communicate this in a manner reasonably calculated to reach co-conspirators.²⁸⁰ Defendants bear the burden of proof to demonstrate actual withdrawal,²⁸¹ and this is a difficult standard to meet.²⁸²

275. Criminal Complaint at 3, *United States v. Jones*, No. 12-cr-60155 (S.D. Fla. Jun. 22, 2012).

276. *Supra* Part IV.C.

277. Criminal Complaint at 3, *United States v. Jones*, No. 12-cr-60155 (S.D. Fla. Jun. 22, 2012).

278. *Id.*

279. *Id.*

280. *United States v. U.S. Gypsum Co.*, 438 U.S. 422, 464-65 (1978).

281. *Smith v. United States*, 133 S.Ct. 714, 716 (U.S. 2013).

282. Katyal, *supra* note 186, at 1378.

Backpage.com claims they are committed to preventing those who are intent on using the website for illegal purposes.²⁸³ To post on Backpage.com's Adult Services category, the customer must "click" to indicate they agree not to post any solicitation directly or in code for any illegal service, including exchanging sexual favors for money or other consideration.²⁸⁴ They also must "click" to agree to not post any material on the website that in any way constitutes or assists in human trafficking.²⁸⁵ Users additionally must confirm the age of an advertiser being over 18.²⁸⁶ Thus, these steps were taken in all of the cases analyzed above. Further, a disclaimer states the user must report suspected exploitation of minors and human trafficking victims to the appropriate authorities.²⁸⁷

Backpage.com notes they also have a review process of advertisements, reporting potential posts of prostitution of minors to law enforcement authorities.²⁸⁸ First, Backpage.com purports that all classified ads go through a keyword filter.²⁸⁹ Second, Backpage.com has 110 employees manually reviewing advertisements submitted to the Adult Entertainment section (over 80% of its workforce).²⁹⁰

These advertisements are screened for terms like "teenage," but the terms of "girl," "young," "underage," and "fresh" are still allowed.²⁹¹ Digital numbers are only searched for as well, rather than writing out numbers like "two"; for example, a number written as "one23" will not be detected.²⁹²

Employees then review advertisements subjectively,

283. Letter from NAAG to Samuel Fifer (Aug. 31, 2011), *supra* note 50, at para 2.

284. Backpage.com, Posting Rules, <http://backpage.com/> (follow "post ad" hyperlink; then follow "adult entertainment" hyperlink; then follow "escorts" hyperlink; then follow any listed city hyperlink) (last visited Jan. 21, 2016).

285. Backpage.com, Terms, <http://www.backpage.com/classifieds/TermsOfUse> (last visited Jan. 21, 2016); *see also* Backpage.com, LLC v. Cooper, 939 F. Supp. 2d 805, 813 (M.D. Tenn. 2013).

286. Backpage.com, *supra* note 284.

287. *Id.*; *see also* 939 F. Supp. 2d at 813–14.

288. Ruvolo, *infra* note 334.

289. Ruvolo, *infra* note 334.

290. Backpage.com, LLC v. McKenna, 881 F.Supp.2d 1262, 1267 (W.D. Wash. 2012); Ruvolo, *infra* note 334.

291. Andersen, *supra* note 153, at para. 10.

292. Andersen, *supra* note 153, at para. 10; Kristof, *supra* note 22.

based on estimates of age and legality.²⁹³ If the employee reviewer believes the person depicted in an advertisement is over 18 and is not a human trafficking victim, they may not report the advertisement. This is troublesome as many advertisements are filled with code words, falsified ages, and sometimes stock photographs (as discussed).²⁹⁴ As mentioned, a recent lawsuit against Backpage.com in Massachusetts states the website does not utilize analytic methods to identify advertisements, like keeping an advertisement photo's metadata, though it once promised to.²⁹⁵ Thus, there seems to be a deliberate, determined choice to not use certain analytic tools that can detect when a sexual advertisement involves a trafficking victim.

Could Backpage.com's preventive efforts be considered a renunciation, a defense to conspiracy? As for the first prong of successful withdrawal, that a conspirator must *cease* participation and engage in affirmative actions inconsistent with the conspiracy, Backpage.com is still participating in these ventures. The cases presented in the case analysis implicate events as late as 2012,²⁹⁶ and as stated above there are recent incidents of sex trafficking with Backpage.com.²⁹⁷ Backpage.com is still involved with recognized cases and accepts money from human traffickers and pimps.

As for the second requirement (communicating the cease of participation and affirmative actions in a manner reasonably calculated to reach co-conspirators), Backpage.com's efforts seem to not be forceful enough to reach co-conspirators. Even a cursory look at Backpage.com shows that the guidelines discussed above are not enforced fully or are not effective.²⁹⁸

293. Ruvolo, *infra* note 334.

294. See, e.g., Brief for Defendant, Backpage.com, LLC v. Hoffman, 2013 WL 4502097 (D.N.J. 2013) (noting an example of a Backpage.com advertisement that stated a fake age of 19 and "let's shine together").

295. Complaint at 12–13, Doe v. Backpage.com, LLC, No. 14–cv–13870 (D. Mass. Oct. 16, 2014); see also Aaron Kellogg, *Ropes & Gray litigation team files federal lawsuit against Backpage.com's online child sex trade*, PRNEWSIRE (Oct. 16, 2014), <http://www.prnewswire.com/news-releases/ropes—gray-litigation-team-files-federal-lawsuit-against-backpagecoms-online-child-sex-trade-279484442.html>.

296. E.g. Indictment, United States v. Johnson, No. 12–cr–00571 (E.D. Pa. Oct. 11, 2012) (stating criminal events occurred in 2012).

297. *Supra* Introduction, Part I.

298. Letter from NAAG to Samuel Fifer (Aug. 31, 2011), *supra* note 50, at

There are numerous examples of this discrepancy in addition to the cases highlighted above. In their study estimating the population of customers of online sex ads, Roe-Sepowitz et al. posted online decoy advertisements created by the researchers that advertised for sex customers.²⁹⁹ The researchers found that Craigslist.com took down the study's decoy advertisements for prostitution almost immediately.³⁰⁰ However, on Backpage.com, the same advertisements received a total of 677 contacts.³⁰¹ According to the National Association of Attorneys General (NAAG), no amount of change in postings for prostitution services on Backpage.com occurred on a regional basis as a result of Backpage.com's efforts.³⁰² In Missouri, the NAAG notes investigators flagged 25 new postings advertising prostitution between July 28th and 29th of 2011, but by August 1st, Backpage.com's review procedures only removed five of these posting.³⁰³ In their search for a missing girl, FAIR Girls, a nonprofit organization that assists human trafficking victims, notified Backpage.com of prostitution advertisements of a missing girl (the advertisements called her a "sexual slave"), but no action was taken by Backpage.com.³⁰⁴ A Seattle detective contacted Backpage.com to remove an advertisement that depicted a fifteen-year old girl for prostitution; the ad was removed, but over the next two weeks at least seven more ads were posted for the same girl with the same photos and phone number as the original ad.³⁰⁵ Further, Yiota Souras, the general counsel of NCEC, states, "Backpage[.com]'s reporting [to them] is not conducted in good faith."³⁰⁶

paras. 2, 9; see McCabe, *supra* note 18, at 250 (supporting that Internet users can easily avoid detection by ISPs, and thus questioning ISPs' dedication to identify child pornography and child sex trafficking cases).

299. DOMINIQUE ROE-SEPOWITZ ET AL., OFFICE OF SEX TRAFFICKING INTERVENTION RESEARCH, ARIZONA STATE UNIVERSITY SCHOOL OF SOCIAL WORK, INVISIBLE OFFENDERS: A STUDY ESTIMATING ONLINE SEX CUSTOMERS 5 (2013).

300. *Id.* at 8.

301. *Id.*

302. Letter from NAAG to Samuel Fifer (Aug. 31, 2011), *supra* note 50, at para. 6.

303. *Id.* at para. 8.

304. Powell, *supra* note 26, at para. 13.

305. See *Backpage.com, LLC v. McKenna*, 881 F. Supp. 2d 1262, 1267–68 (W.D. Wash. 2012).

306. Kristof, *supra* note 22, at para. 15.

Any visit to Backpage.com shows these ads are not just apparent in the Adult Services section. For example, I visited the website on October 28, 2014, and found that the number one category visited was that of therapeutic massage, not part of the Adult Services section and thus not monitored by Backpage.com employees (only subjected to keyword screening). Advertisements in this section consistently were for “happy ending” massages and massages with “very young girls;” the advertisements are blatantly for commercial sex.³⁰⁷ These ads flow into the health and beauty sections of Backpage.com as well.³⁰⁸ In fact, it is likely Backpage.com knows the advertisements migrate. As discussed, when Backpage.com began to charge for advertisements in its Adult Services section, ads for prostitution migrated to the free Dating section, resulting in Backpage.com charging for dating advertisements as well.³⁰⁹

Further, according to a case filed in Massachusetts, Backpage.com provides users an unlimited number of attempts to enter an age and description of an advertisement when they are posting.³¹⁰ The website also still allows customers to pay for advertisements with pre-paid credit cards, which are difficult to trace.³¹¹ Thus, it is likely that Backpage.com’s preventive efforts would not be considered a renunciation.

An additional difficulty with federal conspiracy prosecution is that some suggest advertising websites could pose a defense of commercial speech protection under the First Amendment.³¹² However, this is generally the case when

307. See, e.g., Johnson, *supra* note 39, at para. 12. In the words of the court in *Ulbricht*, “[n]o person of ordinary intelligence could believe that such conduct is somehow legal.” Order at 45, *United States v. Ulbricht*, No. 14-cr-00068 (S.D.N.Y. 2014).

308. For example an advertisement found in the Health and Services Section of Backpage.com’s Miami website on November 30, 2014 noted: “RELAXATION BY FLAWLESS BRUNETTE BEAUTY. . .100% Independent; Not A Spa; Photos are 100% me or my time is free!; Camila; 26 Yrs. Old, 5’2”, 115lbs., All Natural 34B-24-38,” and included photos and videos of a female in string bikini and thong (<http://miami.backpage.com/HealthServices/relaxation-by-flawless-brunette-beauty-52-115lbs-natural-34b-24-38-call-today-954-607-9608/28665542>).

309. *Backpage.com, LLC v. Cooper*, 939 F. Supp. 2d 805, 815–816 (M.D. Tenn. 2013).

310. Brief of *Amicus Curiae* Commonwealth of Massachusetts in Support of Plaintiffs’ Opposition to Motion to Dismiss at paras. 47–49, *Doe v. Backpage.com, LLC*, No. 14-cv-13870 (D. Mass. Feb. 20, 2015).

311. Ruvolo, *infra* note 334, at para. 28.

312. See, e.g., Walters, *supra* note 38, at 194.

advertisements do not imply sexual activity for hire,³¹³ which is not what is happening on Backpage.com. This is apparent from the recent federal cases, discussed above.

Another potential defense is that of statute of limitations. As 18 U.S.C. § 1594 does not state a statute of limitations for conspiracy, the five-year limitation for federal non-capital criminal offenses applies, running from the last date an overt act was committed in furtherance of the conspiracy.³¹⁴

VI. CHALLENGES WITH USING FEDERAL CONSPIRACY

There are a few challenges to consider with using federal conspiracy. First, some argue that criminally prosecuting these websites would cause an infringement of a user's First Amendment rights.³¹⁵ Critics of criminalizing websites note that free speech interests are implicated if a popular venue for speech disappears because of uncertain legal exposure.³¹⁶ Thus, users may self-censor rather than risk the perils of a criminal trial.³¹⁷ Further, placing liability on a website like Backpage.com may result in the website eliminating risky users broadly.³¹⁸ As discussed, lawsuits by Backpage.com in response to state legislation examined this argument.³¹⁹ However, speech that is part of a crime or an offense committed through speech would not be immunized. If the speech in advertisements on Backpage.com is found to be criminal solicitation, procurement of criminal activity, or conspiracy, then prosecution would be permissible and the speech is not protected.³²⁰ Further, as noted in the order dismissing the complaint in *Doe et al. v. Backpage.com*, criminal prosecutions

313. *Id.*

314. 18 U.S.C. § 3282 (2014).

315. *See generally* Walters, *supra* note 38.

316. Walters, *supra* note 38, at 174.

317. *See* Katyal, *infra* note 318, at 1059–60 (emphasizing that the government must ask whether prohibiting an illegal form of internet conduct will ‘chill’ legitimate use).

318. Neal Kumar Katyal, *Criminal Law in Cyberspace*, 149 U. Pa. L. Rev. 1003, 1007–08, 1093, 1098 (2001).

319. *Backpage.com, LLC v. Cooper*, 939 F. Supp. 2d 805, 829 (M.D. Tenn. 2013); *Backpage.com, LLC v. Hoffman*, 2013 WL 4502097, at *12 (D.N.J. 2013); *Backpage.com, LLC v. McKenna*, 881 F. Supp. 2d 1262, 1271 (W.D. Wash. 2012).

320. *United States v. Rahman*, 189 F.3d 88, 117 (2nd Cir. 1999); *see* *United States v. Spock*, 416 F.2d 165, 169–71 (1st Cir. 1969); *see generally* *Arcara v. Cloud Books & News Store, Inc.*, 478 U.S. 697, 705–07 (1986) (finding solicitation of sexual activity in an adult bookstore did not constitute protected expression).

are subject to prosecutorial discretion as well as a heightened standard of proof (beyond a reasonable doubt rather than preponderance of the evidence).³²¹ This makes the criminal prosecutions less likely to have a “chilling effect on the freedom of online speech.”³²²

Another consideration is that federal criminal conspiracy cases to commit sex trafficking need to have elements of a federal nexus in order to bring a federal charge. Federal conspiracy cases receive their federal jurisdiction within the crime itself, in which the agreement is to commit a crime against the United States.³²³ The interstate commerce element of § 1591 is satisfied by movement of funds through accounts and servers in various states,³²⁴ or when victims are transported across state lines or countries.³²⁵ The Internet often provides this interstate nexus.³²⁶ Further, if encounters through these advertisements are arranged through phone calls or text messages, their use affects interstate or foreign commerce as well; courts have repeatedly held that phones are instruments of interstate or foreign commerce.³²⁷ This interstate nexus can also be met by sex traffickers’ use of hotels that serve interstate travelers,³²⁸ and even by providing prostituted victims with condoms manufactured out of state.³²⁹ Additionally, courts consistently hold that defendants need not have knowledge of facts that confer federal jurisdiction at the

321. Memorandum and order on defendant’s motion to dismiss at 23, *Doe v. Backpage.com, LLC*, No. 14–cv–13870 (D. Mass. May 15, 2015).

322. *Id.*

323. 18 U.S.C. § 3791 (2014).

324. *United States v. Myers*, 430 Fed. App’x 812, 817 (11th Cir. 2011) (finding that as Craigslist’s servers were in Arizona and California, and payment ended up in accounts in California, the minor sex trafficking case effected interstate commerce in some way); see *United States v. Chappell*, 2011 WL 607385, at *2 (D. Minn. 2011) (reviewing interstate commerce element met as the server for Backpage.com is in Arizona).

325. See 22 U.S.C. § 7101 (2000).

326. Mary Graw Leary, *Fighting Fire with Fire: Technology in Child Sex Trafficking*, 21 DUKE J. GENDER L. & POL’Y 289, 306 (2014); see also Indictment at 2, Statement of Facts at 2, *United States v. Strom*, No. 12–cr–00159 (E.D. Va. Apr. 25, 2012) (Bloomberg Law) (stating the Internet, including Backpage.com, is an avenue of interstate commerce).

327. *United States v. Evans*, 476 F.3d 1176, 1180 (11th Cir. 2007).

328. *Id.* at 1179.

329. *United States v. Pipkins*, 378 F.3d 1281, 1295 (11th Cir. 2004), *vacated on other grounds*, 544 U.S. 902, *opinion reinstated*, 412 F.3d 1251 (11th Cir. 2005); see also Indictment at 3, *United States v. Strom*, No. 12–cr–00159.

time of the crime.³³⁰ Therefore, in most cases involving third-party websites, federal jurisdiction will be met, without conflict from the CDA.

CONCLUSIONS AND FUTURE RESEARCH

There is a call for laws to allow for criminal investigation and prosecution of websites' involvement, like Backpage.com's, in sex trafficking.³³¹ However, considering the state criminal case law applying CDA immunity to third-party websites, it has been challenging to prosecute third-party websites for human trafficking. Because of the CDA exception of federal criminal statutes, and because of the number of cases that involve websites like Backpage.com, I have proposed that prosecution by federal conspiracy may be a possible alternative. This article explored this alternative through a case analysis of four federal sex trafficking cases that utilized the internet, identified through a dataset of recognized human trafficking investigations, arrests, and prosecutions (which did not specifically focus on Backpage.com). The analysis shows that most elements of conspiracy are present in these cases, but intent consistently was only present through the argument of existence of a stake in the joint venture. One of the four cases had all elements present by using deliberate ignorance to meet the element of intent. Again, these results were limited by the data available, where prosecutors were not prosecuting Backpage.com and thus not focused on the intent of the third-party websites. As shown, conspiracy still seems to be a viable option when investigations are geared toward gaining this information regarding intent.

Prosecutors may be able to use federal criminal conspiracy statutes already in place, which they are familiar with. This prosecution argument does however have its challenges, as shown by the precedent of actions against Backpage.com, previous research, and the case analysis above. Conspiracy may be a promising approach, but not for all cases. As seen

330. *United States v. Feola*, 420 U.S. 671, 677 n.9 (1975) (holding that knowledge of facts that give rise to federal jurisdiction is not necessary for conviction of an offense that has a mens rea requirement); *United States v. Myers*, 430 Fed. App'x at 816 (finding the government is not required to prove beyond a reasonable doubt that a defendant charged with sex trafficking of a minor knew that his actions affected interstate commerce).

331. *Smith & Vardaman*, *supra* note 2, at 289.

above, a comprehensive search did not find an “ideal case” for prosecution, but many of the elements were present in cases in more than one way. In particular, considering how often third-party websites are used in sex trafficking cases (in the utilized dataset, 30% of minor sex trafficking cases), highlighted by the analysis discussed, along with the use of deliberate ignorance, knowledge can be inferred. This supports the element of the existing agreement as well.

What seems to be necessary is information obtained and an investigation aimed toward third-party facilitators and their roles in sex trafficking cases. First, future case investigations should take a different investigative approach, and aim towards investigating intent of websites, including deliberate ignorance. Second, as discussed, systematic investigation of how often Backpage.com is utilized in sex trafficking incidents, particularly of minors, would be helpful. Many state the prevalence of the Internet in sex trafficking occurrences,³³² but there is little research that properly estimates how often the Internet is utilized for human trafficking.³³³ These claims are not usually based on empirical research, nor follow a consistent method.³³⁴ Third, as intent may be inferred from knowledge when the illegitimate use of a business that supplies lawful services is a high proportion of that business,³³⁵ investigations should try to examine what proportion of Backpage.com’s profits is from prostitution advertisements. As noted above, Backpage.com has refused to release their annual revenue numbers. This estimation could tap into a method of inferring intent discussed in *Lauria*.

Future legislation in the human trafficking realm may allow for these investigations to prepare a prosecution (similar to previous legislation like the JVTAs allowing for interference of electronic communication and wiretapping in human trafficking investigations).³³⁶ This is possible considering the

332. See *supra* Introduction.

333. See Leary, *supra* note 326, at 291, 294 (discussing the limited research on technology and child sex trafficking).

334. *Id.*; Julie Ruvolo, *Sex Trafficking on Backpage.com*, TechCrunch (Oct. 6, 2012), <http://techcrunch.com/2012/10/06/sex-trafficking-on-backpage-com-much-ado-about-statistically-nothing/>.

335. *People v. Lauria*, 251 Cal. App. 2d 471, 479 (Cal. App. 1967).

336. *E.g.*, JVTAs of 2015, S. 178, 114th Cong. (2015) (stating Sec. 106 amends 18 U.S.C. § 2516 by adding 18 U.S.C. §§ 1590 and 1591 to a list of offenses where there can be streamlined orders of interception of wire or oral communications to

amount of federal legislation and cases recently that involve third-party websites, as discussed. Further research should also examine state cases that may be fit for conspiracy and that affect interstate commerce, which would make the case available for federal prosecution.³³⁷ The loophole in the CDA will allow them to be prosecuted at the federal level. The presented case analysis may also be useful as well for hotels or other businesses involved in sex trafficking ventures.

The rationale for criminalizing conspiracy is the “increased danger to society from the existence of a group bent on criminal activity.”³³⁸ As discussed, third-party websites like Backpage.com allow too great a danger to society for their activity to continue. Once the risks are too high for Backpage.com, even from a few cases, to justify their anticipated profit, they should cease offering their platforms.³³⁹ Making Backpage.com as criminally liable as the pimps that freely peruse their webpages may finally make them listen.

gather evidence).

337. *E.g.*, *Commonwealth v. McGhee*, 472 Mass. 405 (2015) (the *McGhee* case is a state case where the victims understood Backpage.com as a place where girls posted for prostitution advertisements, or “sexual dating”).

338. Filvaroff, *supra* note 191, at 195; *see* Katyal, *supra* note 186, at 1314.

339. *Human Trafficking Hearing*, *supra* note 193; *See* Walters, *supra* note 38, at 174.