

THE COMPLICATED STORY OF FOSTA AND SECTION 230

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INTRODUCTION

In 1996, Congress enacted 47 U.S.C. § 230 (“Section 230”), which effectively protects online services from liability for third party content.¹ This simple policy set the legal foundation for the modern Internet. For many of the most popular online services, publishing third party content is their core value proposition.² Section 230 enables those services to start, grow, and thrive without crippling legal exposure or expensive editorial staffs. The result is that Section 230 now casts a long shadow over the Internet and, by extension, our society. Indeed, many Americans interact with Section 230-immunized services dozens of times per day.³

Section 230 was enacted in the mid-1990s, during the height of optimistic and utopian views about the Internet.⁴ Over the past two decades, the pendulum of public opinion has swung the other direction. Prevailing views about the Internet have turned increasingly pessimistic and cynical.⁵ Given Section 230’s outsized role in the modern Internet, it is not surprising that views about its policy result have similarly degraded.

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¹ See Eric Goldman, *An Overview of the United States’ Section 230 Internet Immunity*, in THE OXFORD HANDBOOK OF ONLINE INTERMEDIARY LIABILITY (Giancarlo Frosio, ed.) (forthcoming 2019), <https://ssrn.com/abstract=3306737> [hereinafter Goldman, *230 Overview*].

² Eric Goldman, *The Ten Most Important Section 230 Rulings*, 20 TUL. J. TECH. & INTELL. PROP. 1, 2 (2017).

³ This includes every time you check your email, use a search engine, visit any social media service like Facebook and Twitter, check Wikipedia, shop at online marketplaces like Amazon or eBay, use a sharing service like Airbnb, play many types of interactive online games, and visit consumer review services like Yelp or TripAdvisor.

⁴ Eric Goldman, *The Third Wave of Internet Exceptionalism*, in THE NEXT DIGITAL DECADE: ESSAYS ON THE FUTURE OF THE INTERNET 165 (Berin Szoka & Adam Marcus eds., 2010).

⁵ E.g., Eve Smith, *The Techlash Against Amazon, Facebook and Google—and What They Can Do*, THE ECONOMIST (Jan. 20, 2018), <https://www.economist.com/briefing/2018/01/20/the-techlash-against-amazon-facebook-and-google-and-what-they-can-do>.

Congress has occasionally tinkered with Section 230 over the decades, generally to enhance its scope.⁶ Congress never materially diminished the scope of Section 230's immunity in its first 22 years.⁷

In 2018, Congress passed the Allow States and Victims to Fight Online Sex Trafficking Act of 2017 ("FOSTA"), designed to attack the online promotion of sex trafficking victims, in part, by, reducing Section 230's scope.⁸ FOSTA thus represents new ground for Congress and the Internet; it peels back Section 230 to create some new legal exposure for online services for the first time in over two decades.

Unfortunately, FOSTA almost certainly will not accomplish Congress' goals of protecting sex trafficking victims and reducing their victimization. This essay explains why Congress passed FOSTA, how FOSTA modified existing law, why FOSTA has little chance of succeeding, and what FOSTA signals about the future of Section 230 and the Internet.

I. BACKGROUND ON ONLINE COMMERCIAL SEX ADS

People have advertised commercial sex online for a long time. In the 2000s, sex worker advertising consolidated in Craigslist's "Erotic Services" category. Not all "Erotic Services" are illegal,⁹ but many listings advertised illegal prostitution.¹⁰ This led to a key lawsuit (plus other threats of lawsuits) against Craigslist, which it defeated on Section 230 grounds because the ads came from third parties.¹¹ Nevertheless, the pressure grew so

⁶ *E.g.*, the SPEECH Act, Pub. L. 111-223 (extending Section 230 protection to certain foreign judgments); the Defend Trade Secrets Act of 2016, Pub. L. 114-153 (making the federal trade secret law subject to Section 230); the Dot Kids Implementation and Efficiency Act of 2002, Pub. L. 107-317 (including a committee report stating that the "courts have correctly interpreted section 230(c)"). *See generally* Eric Goldman, *WARNING: Draft "No Immunity for Sex Traffickers Online Act" Bill Poses Major Threat to Section 230*, TECH. & MKTG. L. BLOG (Mar. 23, 2017), <https://blog.ericgoldman.org/archives/2017/03/warning-draft-no-immunity-for-sex-traffickers-online-act-bill-poses-major-threat-to-section-230.htm> (recounting the history of Section 230's amendments).

⁷ In 2006, Congress enacted the Unlawful Internet Gambling Enforcement Act, which had an ambiguous effect on Section 230's scope. Eric Goldman, *Unlawful Internet Gambling Enforcement Act of 2006*, TECH. & MKTG. L. BLOG (Dec. 13, 2006), https://blog.ericgoldman.org/archives/2006/12/unlawful_intern.htm. I am not aware of any litigation exploring Section 230's revised boundaries due to this amendment.

⁸ *See infra* Part II.

⁹ For example, advertisements for "bachelor party strippers" or "nude housekeeping" may be completely legal. *Cf. Schad v. Borough of Mt. Ephraim*, 452 U.S. 61 (1981) (holding that the First Amendment protects nude dancing).

¹⁰ *E.g.*, *Dart v. Craigslist, Inc.*, 665 F. Supp. 2d 961 (N.D. Ill. 2009).

¹¹ *See id.* at 969.

great that Craigslist finally abandoned the category (which it had renamed “Adult Services”) in 2010.¹²

A. The Rise of Backpage

After a brief period of chaos, commercial sex advertising reconsolidated on another online classified service, Backpage.com.¹³ Unlike Craigslist, which generally viewed such ads as an unavoidable consequence of its open-door approach to classified ads, Backpage allegedly sought to maximize its profits from these advertisements.¹⁴ Backpage’s apparent venality inflamed regulators, who viewed Backpage’s aggressiveness as blatantly illegal and Backpage’s lack of liability for third party classified ads as outrageous.

Furthermore, some listings for commercial sex on Backpage advertised victims of sex trafficking.¹⁵ Backpage claimed it took steps to find those ads and report them to law enforcement.¹⁶ However, many regulators felt that Backpage was not doing enough and instead profited from their victimization.

Despite Backpage’s facilitation of commercial sex advertising and possible complicity in sex trafficking victimization, Backpage won a series of courtroom victories based on Section 230 (because the classified ads were third party content and Section 230 shields websites from liability for third party content), the First Amendment (among other reasons, because holding publishers liable for third party advertisements may not be the least restrictive option), and other grounds.¹⁷ This left regulators aghast—surely Section 230 did not make it impossible to shut down Backpage’s seemingly illegal activity?

¹² *E.g.*, Claire C. Miller, *Craigslist Says It Has Shut Its Section for Sex Ads*, N.Y. TIMES, Sept. 16, 2010, at B1.

¹³ See STAFF OF S. SUBCOMM. ON INVESTIGATIONS, 115TH CONG., REP. ON BACKPAGE.COM’S KNOWING FACILITATION OF ONLINE SEX TRAFFICKING (Comm. Print. 2017), <http://www.hsgac.senate.gov/download/backpagecoms-knowing-facilitation-of-online-sex-trafficking>.

¹⁴ *Id.*

¹⁵ “Sex trafficking” means paid sexual activity by minors or someone compelled or forced to engage in such activity. *See, e.g.*, 18 U.S.C. § 1591(a)(2).

¹⁶ Press Release, Liz McDougall, General Counsel, Village Voice Media Holdings (available at https://www.law.com/image/cc/mcdougall_statement.pdf).

¹⁷ *E.g.*, *Backpage.com, LLC v. Dart*, 807 F.3d 229 (7th Cir. 2015); *Jane Doe No. 1 v. Backpage.com, LLC*, 817 F.3d 12 (1st Cir. 2016); *Backpage.com, LLC v. Cooper*, 939 F. Supp. 2d 805 (M.D. Tenn. 2013); *Backpage.com, LLC v. Hoffman*, 2013 WL 4502097 (D.N.J. Aug. 20, 2013); *Backpage.com, LLC v. McKenna*, 881 F. Supp. 2d 1262 (W.D. Wash. 2012); *M.A. ex rel. P.K. v. Vill. Voice Media Holdings, LLC*, 809 F. Supp. 2d 1041 (E.D. Mo. 2011).

B. Congress Responds to Backpage

Congress routinely introduces numerous legislative proposals to fight sex trafficking.¹⁸ These legislative proposals routinely garner substantial congressional support—appropriately so given the horrors of sex trafficking. The Backpage situation virtually ensured a collision in Congress between some anti-sex trafficking advocates and Section 230 proponents.

In 2015, Congress enacted the SAVE Act, expressly targeting Backpage.¹⁹ Its provisions extended the existing federal sex trafficking crime to include knowingly advertising sex trafficking victims.²⁰ Though the SAVE Act did not amend Section 230 directly, it fit within Section 230's existing exclusion for federal criminal prosecutions.²¹

Backpage unsuccessfully challenged the SAVE Act preemptively. The court dismissed the challenge on procedural grounds and flatly declared that the First Amendment does not protect ads for illegal sex trafficking.²² Despite the SAVE Act's targeting of Backpage, the SAVE Act's new crime apparently has never been used against Backpage or anyone else.

In 2017, despite the SAVE Act's apparent failure to eradicate Backpage, Congress revisited the Backpage problem. In Spring 2017, Representative Ann Wagner, who had sponsored the SAVE Act, introduced a complex and harsh House bill named "Allow States and Victims to Fight Online Sex Trafficking Act" ("FOSTA").²³ In Summer, the Senate introduced a similar, but slightly less harsh, bill: "The Stop Enabling Sex Traffickers Act" ("SESTA").²⁴

The Senate moved more quickly than the House. After a Senate Commerce Committee hearing in September 2017,²⁵ SESTA's sponsors introduced a slightly revised version.²⁶ The

¹⁸ See, e.g., Cary Glynn, *An Overview of Congress' Pending Legislation on Sex Trafficking*, TECH. & MKTG. L. BLOG (Oct. 2, 2017), <https://blog.ericgoldman.org/archives/2017/10/an-overview-of-congress-pending-legislation-on-sex-trafficking-guest-blog-post.htm>.

¹⁹ It was passed as part of a larger anti-sex trafficking bill, the Justice for Victims of Trafficking Act of 2015, S. 178, Pub. L. 114–22. For more on how the law targeted Backpage, see *Backpage.com, LLC v. Lynch*, 216 F. Supp. 3d 96 (D.D.C. 2016).

²⁰ The SAVE Act amended 18 U.S.C. § 1591(a) & (b). See *Victims of Trafficking Act of 2015*, S. 178, 114th Cong. (2015) (as passed by the Senate, May 29, 2015).

²¹ 47 U.S.C. § 230(e)(1) (2018).

²² *Backpage.com, LLC v. Lynch*, 216 F. Supp. 3d 96, 103 (D.D.C. 2016).

²³ *Allow States and Victims to Fight Online Sex Trafficking Act of 2017*, H.R. 1865, 115th Cong. (2017).

²⁴ *Stop Enabling Sex Traffickers Act of 2017*, S. 1693, 115th Cong. (2017).

²⁵ S. 1693, *The Stop Enabling Sex Traffickers Act of 2017*, U.S. Senate Committee on Commerce, Science, and Transportation, Sept. 19, 2017.

²⁶ *Stop Enabling Sex Traffickers Act of 2017*, S. 1693, 115th Cong., 1st Sess. https://www.commerce.senate.gov/public/_cache/files/ae50378f-df1b-45c0-8a68-

leading Internet trade association, the Internet Association, dropped its opposition and endorsed the revised SESTA.²⁷ Other Internet company advocates still objected, but the bill passed the Senate Commerce Committee.²⁸

In the House, the House Judiciary Committee introduced and passed a substitute version of FOSTA which focused on commercial sex advertising, not sex trafficking.²⁹ The substitute FOSTA version was intended as a policy alternative to SESTA, and SESTA opponents viewed it as less harmful to the Internet.³⁰ However, after some backroom negotiations, a compromise was struck: instead of picking between SESTA and the substitute FOSTA, the two disparate policy solutions were combined into a new “Worst of Both Worlds” version of FOSTA.³¹ The Worst of Both Worlds FOSTA passed both chambers by overwhelming margins—the House in February 2018,³² and the Senate in

6605268597bc/A270E944AE8B0DBCE14176917ACBBBE9.s1693ans.b2s2.pdf.

Among the amendments: (1) a clearer linkage of state criminal prosecutions and civil claims to the federal crime, (2) authorization of civil AG actions in federal court, (3) preserving Section 230(c)(2)(A) as a defense, and (4) a narrowing of the expansion of the federal crime. See Eric Goldman, *Manager’s Amendment for SESTA Slightly Improves a Still-Terrible Bill*, TECH. & MKTG. L. BLOG (Nov. 6, 2017), <https://blog.ericgoldman.org/archives/2017/11/managers-amendment-for-sesta-slightly-improves-a-still-terrible-bill.htm>.

²⁷ Press Release, Internet Association, Statement in Support of the Bipartisan Compromise to the Stop Enabling Sex Traffickers Act (Nov. 3, 2017) (available at <https://internetassociation.org/statement-in-support-of-the-bipartisan-compromise-to-stop-enabling-sex-trafficking-act-sesta/>). It later became clear that the Internet Association changed its position because Facebook, on the recommendation of its public affairs advisors, decided to endorse SESTA to curry political favor in Congress. See Sheera Frenkel et al., *Delay, Deny and Deflect: How Facebook’s Leaders Fought Through Crisis*, N.Y. TIMES (Nov. 14, 2018), <https://www.nytimes.com/2018/11/14/technology/facebook-data-russia-election-racism.html>.

²⁸ Press Release, S. Comm. on Com., Sci., and Tech., Senate Commerce Approves the Passage of S. 1693 by the Committee (Nov. 8, 2017).

²⁹ *Committee Markup of H.R. 1865 Before the H. Comm. on the Judiciary*, 115th Cong. (2017), <https://judiciary.house.gov/press-release/house-judiciary-committee-for-passing-h-r-1865-the-allow-states-and-victims-to-fight-online-sex-trafficking-act/>.

³⁰ E.g., Eric Goldman, *New House Bill (Substitute FOSTA) Has More Promising Approach to Regulating Online Sex Trafficking*, TECH. & MKTG. L. BLOG (Dec. 11, 2017), <https://blog.ericgoldman.org/archives/2017/12/new-house-bill-substitute-fosta-has-more-promising-approach-to-regulating-online-sex-trafficking.htm>

³¹ Eric Goldman, *Congress Probably Will Ruin Section 230 This Week (SESTA/FOSTA Updates)*, TECH. & MKTG. L. BLOG (Feb. 26, 2018), <https://blog.ericgoldman.org/archives/2018/02/congress-probably-will-ruin-section-230-this-week-sestafosta-updates.htm>; Elliot Harmon, *How Congress Censored the Internet*, EFF (Mar. 21, 2018), <https://www.eff.org/deeplinks/2018/03/how-congress-censored-internet>.

³² *Final Vote Results for Roll Call 91*, OFFICE OF THE CLERK (Feb. 27, 2018, 5:59 PM), <http://clerk.house.gov/evs/2018/roll091.xml>.

March 2018.³³ President Trump signed the bill on April 11, 2018.³⁴

II. WHAT FOSTA DOES

Combining the revised SESTA and substitute FOSTA into a single bill produced an extremely complex bill. The bill consists of six main provisions.

First, FOSTA created a new federal crime (§ 2421A) for anyone who “owns, manages, or operates an interactive computer service” (or conspiring/attempting to do so) with the “intent to promote or facilitate” prostitution.³⁵ There are steep enhanced penalties if the prostitution involves sex trafficking.³⁶

Second, FOSTA expanded the existing federal sex trafficking crime (§ 1591) to include “knowingly assisting, supporting, or facilitating” sex trafficking.³⁷ Like the SAVE Act, both the new § 2421A and the revised § 1591, as changes to federal criminal law, fit into Section 230’s existing exclusion for federal criminal prosecutions.

Third, FOSTA added a new Section 230 exclusion for state criminal prosecutions of activity that violates § 1591.³⁸ Thus, state crimes that are coextensive with § 1591 can be prosecuted without a Section 230 defense.

Fourth, FOSTA added a new Section 230 exclusion for state criminal prosecutions of activity that violates § 2421A.³⁹

Fifth, FOSTA added a new Section 230 exclusion for civil causes of action based on behavior that violates § 1591.⁴⁰ However, as an artifact of the SESTA/FOSTA combination, civil causes of action for behavior that violates § 2421A apparently are not subject to this exclusion, even though that seems inconsistent with FOSTA’s purposes.

Sixth, FOSTA authorizes state attorneys general to bring *parens patriae* civil claim for residents affected by violations of § 1591.⁴¹

³³ Dustin Volz, *Senate Passes Bill to Penalize Websites for Sex Trafficking*, REUTERS (Mar. 21, 2018), <https://uk.reuters.com/article/usa-congress-sextrafficking/update-1-us-senate-passes-bill-to-penalize-websites-for-sex-trafficking-idUKL1N1R325H>.

³⁴ President Donald J. Trump, Remarks at Signing of H.R. 1865 (Apr. 11, 2018), <https://www.whitehouse.gov/briefings-statements/remarks-president-trump-signing-h-r-1865-allow-states-victims-fight-online-sex-trafficking-act-2017/>.

³⁵ 18 U.S.C. § 2421A(a) (2018).

³⁶ *Id.* § 2421A(b).

³⁷ *Id.* § 1591(e)(4).

³⁸ 47 U.S.C. § 230(e)(5)(B) (2018).

³⁹ *Id.* § 230(e)(5)(C).

⁴⁰ *Id.* § 230(e)(5)(A).

⁴¹ 18 U.S.C. § 1595(d) (2018).

Despite FOSTA's addition of new exclusions to Section 230, FOSTA retained Section 230(c)(2)(A)'s⁴² applicability to items 3–5.⁴³ In contrast to Section 230(c)(1), which protects against liability for publishing third party content, Section 230(c)(2) protects good faith content removals.⁴⁴ However, Section 230(c)(2) does not make sense in this context because online services principally face FOSTA-related liability for content they publish, not content they remove.⁴⁵ Defendants could try to argue that Section 230(c)(2) protects them from FOSTA liability for items they missed so long as they made good faith efforts to remove problematic content, but this argument is untested.

III. FOSTA'S DENOUEMENT

FOSTA's story is still being written, but before the end of its first month as law, several notable developments took place.

A. Backpage's Seizure and Prosecution

On April 6, 2018—after Congress passed FOSTA but before President Trump signed it into law—the FBI and other federal government enforcement agencies raided Backpage, seized all of its assets, and shut down the website.⁴⁶ Along with the seizure, the U.S. Department of Justice (“DOJ”) and several state attorneys general filed criminal charges against Backpage and several of its principals, alleging Travel Act⁴⁷ violations (based on prostitution crimes) and money laundering.⁴⁸ In conjunction with the seizure—again, before President Trump signed FOSTA on April 11—the Backpage corporate entity and its CEO, Carl Ferrer, pled guilty to the charges.⁴⁹ Ferrer took a

⁴² 47 U.S.C. § 230(c)(2)(A) (2018).

⁴³ *Id.* § 230(e)(3)(5).

⁴⁴ Eric Goldman, *Online User Account Termination and 47 U.S.C. §230(c)(2)*, 2 U.C. IRVINE L. REV. 659, 661 (2012).

⁴⁵ See Eric Goldman, *How SESTA Undermines Section 230's Good Samaritan Provisions*, TECH. & MKTG. L. BLOG (Nov. 7, 2017), <https://blog.ericgoldman.org/archives/2017/11/how-sesta-undermines-section-230s-good-samaritan-provisions.htm>.

⁴⁶ Press Release, U.S. Dep't of Justice, Justice Department Leads Effort to Seize Backpage.Com, the Internet's Leading Forum for Prostitution Ads, and Obtains 93-Count Federal Indictment (Apr. 9, 2018) (on file with the Department of Justice), <https://www.justice.gov/opa/pr/justice-department-leads-effort-seize-backpagecom-internet-s-leading-forum-prostitution-ads>.

⁴⁷ 18 U.S.C. § 1952 (2018).

⁴⁸ Indictment at 5, U.S. v. Lacey, No. 2:18-cr-00422-SPL (D. Ariz. Mar. 28, 2018), <https://www.justice.gov/file/1050276/download>.

⁴⁹ Plea Agreement at 1, U.S. v. Ferrer 1, No. 2:18-cr-00464-DJH (D. Ariz. Apr. 6, 2018), <https://www.justice.gov/opa/press-release/file/1052531/download>; U.S. v.

plea deal to testify against his collaborators in exchange for a more favorable jail sentence. Both Ferrer and Backpage agreed to make restitution to victims of up to \$500 million.⁵⁰

The seizure and prosecution did not happen overnight. Indeed, a federal grand jury in Phoenix had been investigating Backpage since before February 2017.⁵¹ Yet, the exact timing was curious. Congress had passed the SAVE Act and FOSTA as anti-Backpage measures. Nevertheless, the DOJ and state attorneys general shut down Backpage and obtained a guilty plea from its CEO without using either of the new crimes (§ 2421A or the modifications to § 1591) that Congress had specially designed to target Backpage. Instead, the successful seizure and prosecution was based on crimes that had been on the books from the beginning.⁵²

So why did Congress need to enact the SAVE Act or FOSTA? Why didn't the DOJ bring an enforcement action earlier? Had the seizure and shutdown taken place a couple weeks earlier, the Senate might have decided not to pass FOSTA. With Backpage already out of the market, which mooted the proponents' principal justification for FOSTA,⁵³ why did President Trump sign the law on April 11?

All along, FOSTA's opponents told Congress FOSTA was unneeded because existing crimes already covered Backpage,⁵⁴ and encouraged Congress to wait until the FBI and

Backpage.com, No. 2:18-cr-00465-DJH (D. Ariz. Apr. 5, 2018),

<https://www.justice.gov/opa/press-release/file/1052536/download>.

⁵⁰ Plea Agreement at 4, U.S. v. Ferrer 1, No. 2:18-cr-00464-DJH (D. Ariz. Apr. 6, 2018), <https://www.justice.gov/opa/press-release/file/1052531/download>.

⁵¹ Sarah Jarvis et al., *As Allegations Increase Against Backpage, Founders Have Become Big Political Donors in Arizona*, ARIZ. REPUBLIC (Apr. 14, 2017),

<https://www.azcentral.com/story/news/local/phoenix/2017/04/14/allegations-increase-against-backpage-founders-have-become-big-political-donors-arizona/100421528/>.

⁵² Eric Goldman, *'Worst of Both Worlds' FOSTA Signed Into Law, Completing Section 230's Evisceration*, TECH. & MKTG. L. BLOG (Apr. 11, 2018),

<https://blog.ericgoldman.org/archives/2018/04/worst-of-both-worlds-fosta-signed-into-law-completing-section-230s-evisceration.htm> (explaining the basic structure of the case against Backpage.com).

⁵³ For example, the House Judiciary Committee report references Backpage 17 times. See H.R. Rep. No. 115-572, pt. 1 (2017–2018),

<https://www.congress.gov/congressional-report/115th-congress/house-report/572>.

Of course, FOSTA could be intended to reach “the next Backpage” that would emerge after Backpage's demise, but the legislative drafters could only speculate about what that service might look like, whether it would even emerge, and whether the statutory changes would reach it.

⁵⁴ E.g., Cary Glynn, *The DOJ's Busts of MyRedbook & Rentboy Show How Backpage Might Be Prosecuted* (Guest Blog Post), TECH. & MKTG. L. BLOG (Sept. 28, 2017),

<https://blog.ericgoldman.org/archives/2017/09/the-doj-s-busts-of-myredbook-rentboy-show-how-backpage-might-be-prosecuted-guest-blog-post.htm>.

DOJ completed their work.⁵⁵ The seizure and prosecution seemingly proved that the opponents were 100% correct; Backpage was gone and its CEO destined for jail before FOSTA even became law.

B. Civil Claims Against Backpage.

FOSTA was also intended to provide financial restitution for sex trafficking victims. If Backpage had profited on their victimization, should it not pay for this? However, Section 230 made civil lawsuits against Backpage challenging, including the First Circuit's *Doe v. Backpage* ruling in 2016 which emphatically held that Section 230 prevented the victims' civil claims.⁵⁶ Thus, to FOSTA supporters, Section 230 needed revision to let victims obtain a financial remedy.

Then again, § 1591 has a mandatory victim restitution provision,⁵⁷ and so if the DOJ successfully prosecuted Backpage pursuant to § 1591, victims would be compensated. Plus, Ferrer's and Backpage's restitution plea deal—based on pre-FOSTA law—will provide victim compensation without any further litigation by victims.

Section 230's seemingly impenetrable protection for Backpage degraded during FOSTA's development. Throughout 2017, new evidence emerged about Backpage's involvement with its advertisements that raised increased doubts that Backpage could continue to rely on Section 230 to avoid liability.⁵⁸ Thus, FOSTA opponents argued that Section 230 did not need an amendment because victims were likely to use the new evidence to overcome Section 230 in future litigation.⁵⁹

On March 29, 2018 and March 31, 2018—after the Senate's passage of FOSTA and before President Trump's signing—two federal district courts issued opinions holding that

⁵⁵ *E.g.*, Sophia Cope, *Stop SESTA: Section 230 Is Not Broken*, EFF (Sept. 6, 2017), <https://www.eff.org/deeplinks/2017/09/stop-sesta-section-230-not-broken>.

⁵⁶ *Jane Doe No. 1 v. Backpage.com, LLC*, 817 F.3d 12, 23 (1st Cir. 2016).

⁵⁷ 18 U.S.C. § 1593 (2012).

⁵⁸ STAFF OF S. COMM. ON INVESTIGATIONS, 115TH CONG., REP. ON BACKPAGE.COM'S KNOWING FACILITATION OF ONLINE SEX TRAFFICKING (2017); Tom Jackman & Jonathan O'Connell, *Backpage Has Always Claimed It Doesn't Control Sex-Related Ads. New Documents Show Otherwise*, WASH. POST (July 11, 2017), https://www.washingtonpost.com/local/public-safety/backpage-has-always-claimed-it-doesnt-control-sex-related-ads-new-documents-show-otherwise/2017/07/10/b3158ef6-553c-11e7-b38e-35fd8e0c288f_story.html.

⁵⁹ *Online Sex Trafficking and the Communications Decency Act: Hearing Before the Subcomm. on Crime, Terrorism, Homeland Sec., & Investigations of the H. Comm. on the Judiciary*, 115th Cong. 9–10 (2017) (statement of Jeff Kosseff, Assistant Professor, United States Naval Academy), <https://docs.house.gov/meetings/JU/JU08/20171003/106452/HHRG-115-JU08-Wstate-KosseffJ-20171003.pdf>.

victims' claims against Backpage survived Backpage's Section 230-based motion to dismiss.⁶⁰ While these rulings do not guarantee financial payouts to the victims, they proved—before FOSTA became law—that Section 230 did not prevent civil lawsuits against Backpage.

In short, before President Trump signed FOSTA, Backpage was gone, its CEO was convicted, victim restitution was guaranteed, and two different courts held that Section 230 did not prevent victims' civil claims from going forward. Yet, FOSTA became law anyway.

C. *The Internet Shrank*

Because FOSTA imposes criminal liability based on what online services “know” about third party content, FOSTA effectively resurrects a dilemma that Section 230 had been designed to eliminate: Should Internet services try to moderate third party, even if these moderation efforts are imperfect, or should they simply do the minimum possible moderation?⁶¹ After FOSTA, online services that moderate third party content face a risk that—because of their moderation efforts—they will be deemed to “know” of any sex trafficking promotions on their service (even if they did not want those promotions) and face extreme criminal liability. As a result, services have three primary options:

- (1) Perfectly implement content moderation efforts to ensure no such promotions appear on the service, and if any promotions slip through despite these moderation efforts, hope that the service has done enough to satisfy prosecutors and the courts that they did not “know” of the rogue promotions.
- (2) Turn off content moderation efforts to negate the possibility of “knowing” about the content.
- (3) Exit the industry.

Most of the brand-name players, including Google and Facebook, almost certainly will adopt the first strategy. They will

⁶⁰ Doe No. 1 v. Backpage.com, LLC, 2018 WL 1542056, *2 (D. Mass. Mar. 29, 2018); Florida Abolitionist v. Backpage.com LLC, 2018 WL 1587477, *4–5 (M.D. Fla. Mar. 31, 2018).

⁶¹ I call it the “moderator’s dilemma.” *Latest Developments Combatting Online Sex Trafficking: Hearing Before the H. Comm. on Energy and Com.*, 117th Cong. 3 (2017) (statement of Prof. Eric Goldman), <https://docs.house.gov/meetings/IF/IF16/20171130/106657/HHRG-115-IF16-Wstate-GoldmanE-20171130-U51.pdf>.

expand their content moderation operations, eliminate any content that looks dubious, and pray that they can convince prosecutors and judges that they should not be liable for whatever they missed. For these services, FOSTA increases their legal and business risk and increases their costs, but it will have only a modest effect on their day-to-day operations.

In contrast, several smaller services have already chosen the third option to shut down. The most prominent was Craigslist, which turned off its “Personals” section entirely.⁶² Dozens of other services that enabled dating or catered to the sex worker community shut down as well.⁶³ In addition, there were reports that Microsoft and Google took a number of steps to shut down more content on their services in response to FOSTA’s threat, including deleting private files from Google Drive.⁶⁴

D. Will FOSTA Help Sex Trafficking Victims?

It would be easier to overlook FOSTA’s many flaws if the law actually helped ameliorate sex trafficking. Unfortunately, there are many good reasons to believe that it will not help—and might even hurt. Professor Alex Levy, an expert on sex trafficking, wrote:

There is no good evidence that the internet has caused an increase in child sex trafficking or that it has put more minors at risk of being victimized. FOSTA’s proponents frequently point to a recent rise in reports of suspected commercial sexual exploitation of minors as evidence that platforms are responsible for an “explosion in sex trafficking.” Shared Hope, “*White Paper: Online Facilitation of Domestic Minor Sex Trafficking*” (August 2014), <http://sharedhope.org/wp-content/uploads/2014/09/Online->

⁶² FOSTA, CRAIGSLIST, <https://www.craigslist.org/about/FOSTA> (last visited Mar. 1, 2019).

⁶³ *Documenting Tech Actions*, SURVIVORS AGAINST SESTA, <https://survivorsagainstsesta.org/documentation/> (last visited Mar. 1, 2019); Jenna Rotten, FACEBOOK (Mar. 30, 2018), <https://www.facebook.com/photo.php?fbid=10215635767985093&set=a.2370718505219.2137815.1168185944&type=3&theater>.

⁶⁴ *Documenting Tech Actions*, *supra* note 63.

Faciliator-White-Paper-August2014.pdf (noting that “[t]echnology, including classifieds websites, is widely viewed as responsible for the explosion in sex trafficking in the United States”). Besides the lack of evidence that the internet is causing a rise in sex trafficking, there is some reason to doubt that sex trafficking has increased in the first place. See *Backpage.com, LLC v. Dart*, 807 F.3d 229 (7th Cir. 2015) (No. 15-3047) (discussing evidence that trafficking may have declined in the early 2000s).

The argument that the internet has caused an increase in child sex trafficking is flawed insofar as it conflates the frequency with which sex trafficking is reported with the frequency with which it happens. Indeed, it ignores the critical possibility that the rise in reports is due to the fact that platforms make it easier to notice and alert law enforcement to trafficking.

If FOSTA succeeds in shutting down high-traffic, high-visibility websites, it will suppress a key means of detecting and reporting sex trafficking, thus decreasing trafficking victims’ chances of being recovered. Victims who are trafficked on high-visibility websites are regularly discovered by family members, good Samaritans, and non-profit organizations. See, e.g. Caitlin Randle, *Brother takes action after girl, 14, is advertised online for sex, officers say*, SUN SENTINEL (Aug. 11, 2017), <http://www.sun-sentinel.com/local/broward/deerfield-beach/fl->

sbdeerfield-man-teen-sex-arrest-20170810-story.html (describing how a runaway teenager was recovered when her brother “used [her] ad’s listed phone number to take the action that led to the [trafficker’s] arrest”); Nicholas Kristof, Opinion, *Making Life Harder for Pimps*, N.Y. TIMES (Aug. 6, 2015), <https://www.nytimes.com/2015/08/06/opinion/nicholas-kristof-making-lifeharder-for-pimps.html> (describing how a journalist “pulled out [his] laptop, opened up Backpage and quickly found seminude advertisements for [a teenage runaway],” leading to her recovery). I know of no accounts of victims trafficked in less-visible venues (for instance, on the street) being found or recovered this way.⁶⁵

There have also been numerous reports of how FOSTA and the associated shutdown of Backpage has been devastating to voluntary sex workers.⁶⁶ By advertising on Backpage.com, sex workers were able to develop their own customer base without relying on pimps (and the associated physical coercion and financial control exercised by pimps), and sex workers could vet prospective customers for safety concerns before agreeing to meet with them. Furthermore, making arrangements online with customers allowed sex workers to pick safe venues for their meetings, which markedly differs from the physical safety concerns posed by “walking the streets.” By eliminating online advertising by sex workers, FOSTA pushed sex workers back to the streets, where they once again become subject to the

⁶⁵ Declaration of Alexandra Frell Levy, Woodhull Freedom Found. v. U.S., No. 1:18-cv-01552, 2–3 (D.D.C. June 28, 2018), https://www.eff.org/files/2018/06/28/alex_levy_declaration_filed.pdf.

⁶⁶ See Alexandra Villarreal, *Side Effect of Trafficking Law: More Street Prostitution?*, ASSOCIATED PRESS (Sept. 24, 2018), <https://www.apnews.com/5866eb2bcf54405694d568e2dd980a28>; see also Ted Andersen et al., *The Scanner: Sex Workers Returned to SF Streets After Backpage.com Shut Down*, S.F. CHRON. (Oct. 15, 2018), <https://www.sfchronicle.com/crime/article/The-Scanner-Sex-workers-returned-to-SF-streets-13304257.php>.

dominion of pimps, and where they lose some of the physical safety protections they had gained through online negotiations.

Worse, post-FOSTA, there have been reports that arrests for sex trafficking have gone down, while arrests for prostitution have increased.⁶⁷ The likely explanation is that pursuing sex trafficking cases have become harder now that law enforcement cannot find potential criminals or victims by perusing Backpage.com or setting up sting operations at Backpage.com or Craigslist. Accordingly, law enforcement resources likely have been redirected away from sex trafficking enforcement and towards more traditional enforcement against sex workers and their customers.

Sex trafficking is a horrific crime, and we should all support legislative efforts to combat it. FOSTA, however, was not that solution. Instead, the in-the-field outcomes of FOSTA include increased physical violence against sex workers, fewer prosecutions against sex trafficking criminals, and lower odds that law enforcement will rescue sex trafficking victims. Especially in light of the fact that FOSTA was not needed to “take down” Backpage.com (assuming that was a good policy goal in the first place), FOSTA appears to have caused more misery for sex workers and sex trafficking victims with zero offsetting policy benefits. Accordingly, FOSTA may be one of Congress’ worst achievements in Internet regulatory policy.

IV. WHAT’S NEXT FOR SECTION 230?

For its first twenty years, Section 230 seemed politically untouchable. Everyone loved the Internet, no one wanted to undermine its potential, and Google and Facebook spent a lot of time and money on lobbying and posed a formidable challenge to potential opponents.⁶⁸

In what felt like an instant, the political calculus changed completely. Some factions of the anti-sex trafficking advocacy community proved to be far more effective at lobbying than the Internet community. At the same time, many people have fallen out of love with the Internet—and especially with Google and Facebook, who many regulators and consumers think have

⁶⁷ Jordan Fisher, *Running Blind: IMPD Arrests First Suspected Pimp in 7 Months*, RTV6 (July 3, 2018), <https://www.theindychannel.com/longform/running-blind-impd-arrests-first-suspected-pimp-in-7-months>.

⁶⁸ Hamza Shaban, *Google for the First Time Outspent Every Other Company to Influence Washington in 2017*, WASH. POST (Jan. 23, 2018), <https://www.washingtonpost.com/news/the-switch/wp/2018/01/23/google-outspent-every-other-company-on-federal-lobbying-in-2017/>.

acquired too much power and therefore require regulatory intervention.⁶⁹

So, what happens to Section 230 post-FOSTA? One scenario is that some anti-sex trafficking advocates were uniquely effective at lobbying due to the extreme sympathy they engender. If so, other victim advocacy groups or anti-Google/Facebook lobbying efforts may find it hard to achieve the same outcome.

Another scenario is that FOSTA is just the first of a string of new statutory exceptions to Section 230, as every victims' group queues up to ask for their exception, and every regulator thinks that amending Section 230 is a good way to stick it to Google and Facebook (even though amendments to Section 230 are far more likely to hurt Google/Facebook rivals and entrench the incumbents' dominant position). If the latter scenario comes to pass, the cumulative effect of the amendments could easily undermine Section 230's integrity, so that plaintiffs can almost always easily maneuver into one of the multitudinous exceptions—making Section 230 functionally worthless.

It will be interesting to see if regulators, and the general population, can fall back in love with the Internet. The Internet enables truly miraculous activity, along with acting as a “mirror” to display the anti-social activity that has always been a part of our society. To the extent we focus on the anti-social behavior, and ignore the Internet's remarkable aspects, further amendments to Section 230 seem inevitable. Or, if we keep in mind the Internet's stunning contributions to society,⁷⁰ we might be more amenable to preserving Section 230. In that sense, future battles over Section 230 will be a proxy for our overall optimism or cynicism about the Internet's impact on society generally.

⁶⁹ Goldman, *230 Overview*, *supra* note 1, at 14.

⁷⁰ *E.g.*, *Economic Impact*, GOOGLE, <https://economicimpact.google.com/> (last visited Mar. 1, 2019); Christian M. Dippon, *Economic Value of Internet Intermediaries and the Role of Liability Protections*, NERA ECON. CONSULTING (June 5, 2017), <https://cdn1.internetassociation.org/wp-content/uploads/2017/06/Economic-Value-of-Internet-Intermediaries-the-Role-of-Liability-Protections.pdf>.