

Sex Trafficking Legislation Under the Scope of the Harm Principle and Moral Panic

LESLEY RAE HAMILTON*

On May 20, 2014 the House of Representatives passed the Stop Advertising Victims of Exploitation Act of 2014 (“SAVE Act”). The SAVE Act would have amended the federal criminal code to prohibit “advertising commercial sex acts involving a minor or an individual engaged in such an act through force, fraud, or coercion.” In so doing, the SAVE Act would provide grounds for legal action against Internet content hosts for crimes—like sex trafficking—resulting from the postings of third-party users.

This Note applies the social theories of the harm principle and moral panic to evaluate the means and ends proposed by the SAVE Act. Using multiple constructions of the harm principle, this Note argues that the SAVE Act is unjustified because it does not directly or indirectly prevent the harm of sex trafficking from occurring, it inappropriately places culpability on Internet content hosts for the criminal acts of others, and it creates new, additional harms to society. Through the lens of moral panic, this Note argues that the SAVE Act is an injudicious reaction to interest group driven moral panic surrounding the misplaced and exaggerated occurrence of sex trafficking through Internet classified sites.

This multi-tiered analysis is particularly important in evaluating legislation like the SAVE Act that seeks to broadly expand the reach of the federal criminal code in response to public outcry. In such cases, there is increased risk that the loud message of the wrong to the victims projected by politicians, activists, and the media will consume well-reasoned lawmaking. Rather than imposing unjustified criminal liability, this Note proposes to harness the innovative and collaborative potential of the Internet to crowd-source solutions to a better scheme for monitoring online forums and prosecuting sex traffickers. This solution contemplates deconstructing the ways criminals propagate harm through online forums and increasing the resources available to dedicate to the cause to devise an approach that actually minimizes sex trafficking and holds the proper actors culpable.

* Editor-in-Chief, *Hastings Law Journal*; J.D. Candidate 2016, University of California Hastings College of the Law; B.A. University of North Carolina at Chapel Hill. I am grateful for the energy, time, and guidance of the UC Hastings faculty, and particularly for Professor Hadar Aviram, whose influence not only inspired me to pursue this Note topic, but also vested me with the confidence to swim from Alcatraz. Thank you also to the Volume 67 Notes staff, and in particular, to Elizabeth Lee, for editorial guidance and mentorship. This Note is dedicated to my mother, Paige, and my father, Brian, for sharing in and supporting my love of writing and education.

TABLE OF CONTENTS

INTRODUCTION.....	532
I. BACKGROUND: SETTING THE STAGE FOR THE SAVE ACT.....	534
II. CONSEQUENCES PRESENTED BY THE SAVE ACT	543
A. THE SAVE ACT’S RECKLESS DISREGARD STANDARD	543
B. THE SAVE ACT AND ECONOMIC IMPROPRIETY	546
C. THE SAVE ACT AND MANDATORY MINIMUM SENTENCING.....	547
III. THE SAVE ACT AND THE HARM PRINCIPLE	548
A. THE SAVE ACT AND THE TRADITIONAL CONSTRUCTION OF THE HARM PRINCIPLE.....	549
B. THE SAVE ACT AND THE CONTEMPORARY HARM PRINCIPLE..	550
C. THE SAVE ACT AND LEGAL MORALISM	553
IV. THE SAVE ACT AND MORAL PANIC	554
A. CONCERN FUELED BY POLITICIANS, ACTIVIST GROUPS, AND MEDIA	555
B. THE ONLINE EXCHANGE OF CASUAL SEX DICHOTOMIZED AS EVIL.....	558
C. IMPROPORTIONATE LEVEL OF CONCERN.....	559
V. PROPOSAL: CROWD-SOURCING TO COMBAT THE ACTUAL HARM.....	561
CONCLUSION	564

INTRODUCTION

On May 20, 2014, the U.S. House of Representatives passed the Stop Advertising Victims of Exploitation Act of 2014 (“SAVE Act”).¹ The SAVE Act sought² to amend the federal criminal code to include “advertising” in a list of conduct prohibited for the purpose of preventing sex trafficking.³ Specifically, if enacted, 18 U.S.C. § 1591 would “prohibit knowingly: (1) advertising commercial sex acts involving a minor or an

1. SAVE Act of 2014, H.R. 4225, 113th Cong. (2d Sess. 2014).

2. Since this Note’s inception, the SAVE Act died while pending consideration by the Senate. See *H.R. 4225 (113th): SAVE Act of 2014*, GOVTRACK.US, <https://www.govtrack.us/congress/bills/113/hr4225> (last visited Feb. 8, 2016) (“This bill was introduced in a previous session of Congress and was passed by the House on May 20, 2014 but was never passed by the Senate.”). Nevertheless, the arguments and conclusions of this Note maintain relevance to guide whether particular legislation is justified. Specifically, the analyses applied in this Note will continue to be relevant—perhaps increasingly so—as the harm principle continues to be applied to advance traditionally moral arguments and as technology and social media further enable the public, politicians, and media to incite interest group driven moral panics.

3. See H.R. 4225; see also 18 U.S.C. § 1591 (2015). The statute currently provides a punishment for “[w]hoever knowingly . . . recruits, entices, harbors, transports, provides, obtains, advertises, maintains, patronizes, or solicits by any means a person[.]” 18 U.S.C. § 1591. The Victims of Trafficking and Violence Protection Act of 2000 defines “sex trafficking” as “the recruitment, harboring, transportation, provision, or obtaining of a person for the purpose of a commercial sex act.” Victims of Trafficking and Violence Protection Act of 2000, H.R. 3244, 106th Cong. (2d Sess. 2000).

individual engaged in such an act through force, fraud, or coercion; or (2) benefitting financially or otherwise from such advertising knowing that the individual involved was a minor or victim of force, fraud, or coercion.”⁴

Proponents of the SAVE Act, including politicians, media, and activist groups, insisted that this amendment to the federal criminal code was a necessary response to rampant sex trafficking that occurs through online platforms.⁵ Specifically, these proponents expressed concern over sex trafficking occurring through online adult services sections of classifieds sites.⁶ The online adult services sections host advertisements for and messages about goods and services offered, created, and posted by independent, third-party users. Thus, the SAVE Act would empower prosecutors to impose criminal liability upon Internet content hosts⁷ for the actions of independent, third-party users.⁸

While the occurrence of commercial sex with underage and coerced individuals through online platforms represents valid and serious harm, this Note argues that the SAVE Act was unjustified legislation because it did not confront that harm. More explicitly, holding an advertising platform like Craigslist liable for an advertisement found to feature a victim of exploitation did not remove that individual from the harmful situation, it did not prosecute the trafficker who placed the individual in that harmful position, and it did not prevent the trafficker from continuing to exploit the victim and other individuals. In addition to demonstrating that the SAVE Act did not confront the harm of sex trafficking, this Note will also establish that, the Act inappropriately placed culpability on Internet content hosts rather than on the traffickers, the purchasers of the exploited individuals, or the actual creators and posters of the fraudulent and malevolent advertisements. Moreover, this Note will explain that the SAVE Act created new, additional harms for potential victims. Finally, this Note analyzes the motives and effects of the SAVE Act to demonstrate that it is a product of cultural constructions, moral ideologies, and opportunistic political agendas.

Part I of this Note provides a background of the events that set the stage for the SAVE Act. This will present a brief history of the targeting of online classifieds sites in connection with the fight against sex

4. H.R. 4225.

5. *Legislators Target Sex-Trafficking Ads*, AIMGROUP.COM (Mar. 13, 2014), <http://aimgroup.com/2014/03/13/legislators-target-sex-trafficking-ads/>.

6. *Id.*

7. This Note intends for the term “Internet content host” to encompass Internet service provider, website, and other persons, businesses, and entities that host data.

8. *CDT to Court: When It Comes to Illegal Online Content, Punish the Poster, Not the Platform*, CTR. FOR DEMOCRACY & TECH. (June 27, 2013), <https://cdt.org/blog/cdt-to-court-when-it-comes-to-illegal-online-content-punish-the-poster-not-the-platform/>.

trafficking. Part I then provides an account of recent attempts to criminalize the advertisement of commercial sex with minors through state statutes, as well as past and pending attempts to hold Internet content hosts liable for third-party content under currently enacted state and federal laws. Part I concludes with an introduction to the SAVE Act, to lay a foundation for its scrutiny through the lens of the harm principle⁹ and as a construct of moral panic to be discussed in Parts III and IV.

Part II of this Note analyzes provisions of the SAVE Act that posed critical potential consequences. This includes an analysis of the SAVE Act's mens rea requirement, its imposition of minimum sentences, its overly broad application, and its potential to chill speech. Part III of this Note examines the SAVE Act through the scope of traditional and contemporary constructions of the harm principle, as well as legal moralism to conclude that the SAVE Act does not find justification rooted in any of the three bases, and is therefore misguided, agenda-driven legislation. Part IV examines the SAVE Act as a product of interest group moral panic, finding it to be a further basis to discredit the legislation's justification. Finally, Part V proposes an alternative that applies crowd-sourcing and crowd-funding to harness the genius and passion of the public, the media, and the Internet content hosts to collectively devise a solution that directly confronts the barriers to better regulation of online marketplaces.

I. BACKGROUND: SETTING THE STAGE FOR THE SAVE ACT

The Internet functions as an optimal forum to facilitate open collaboration, free expression, and economic growth.¹⁰ Acknowledging this fundamental and unique potential for social innovation and participation, Congress has enacted laws "aimed to encourage the unfettered and unregulated development" of the online space for speech and commerce.¹¹

9. The traditional construct of the harm principle provides that "the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others." Bernard E. Harcourt, *The Collapse of the Harm Principle*, 90 J. CRIM. L. & CRIMINOLOGY 109, 120-21 (1999) (citing JOHN STUART MILL, ON LIBERTY 9 (Elizabeth Rapaport ed., 1978)); see *infra* Part III.

10. Dawn C. Nunziato, *The Death of the Public Forum in Cyberspace*, 20 BERKELEY TECH. L.J. 1115, 1120 (2005); *CDT to Court*, *supra* note 8. The Congressional findings for the Communications Decency Act provide:

The Internet and other interactive computer services offer a forum for a true diversity of political discourse, unique opportunities for cultural development, and myriad avenues for intellectual activity. The Internet and other interactive computer services have flourished, to the benefit of all Americans, with a minimum of government regulation. Increasingly Americans are relying on interactive media for a variety of political, educational, cultural, and entertainment services.

Communications Decency Act of 1996 §§ 3-5, 47 U.S.C. § 230 (1998).

11. *Batzel v. Smith*, 333 F.3d 1018, 1026 (9th Cir. 2003) ("Congress decided not to treat providers of interactive computer services like other information providers such as newspapers, magazines or

Specifically, Congress has noted that the Internet's vast potential as a powerful marketplace of ideas, goods, and services, and its history of prospering with minimal government regulation, requires that Internet content providers "be treated differently" than traditional publishers to protect the Internet as a forum for free speech and innovation.¹²

As many harnessed the Internet for the benefit of society—as hoped for by Congress—others seized the opportunity to abuse the Internet for profit in illicit online markets. From narcotics to computer hacking to illegal ivory, the Internet's accessibility and anonymity connects illicit buyers and sellers around the globe with maximum ease and minimal risk.¹³ Among those criminals who abuse the unique offerings of the Internet for profit are traffickers and pimps who sell minors and coerced individuals for sex. The traffickers' use of online marketplaces did not necessarily alter the manner in which the actual harm occurs—that is, it did not radically alter the manner of imprisonment, exploitation, and abuse of the individual. However, the facilitation of the crime through an online marketplace enabled already surreptitious operations to occur behind a layer of insulation from authorities, changing the manner in which authorities look for and combat the harm.

The subversive and illicit nature of the trafficking industry makes it nearly impossible to produce evidence-based data to accurately represent the exact scope and rates of the abuse.¹⁴ As a result, data relied upon vary drastically, and thus should be regarded as dubious estimates.¹⁵ Additionally, data about the rates of sex trafficking are often conflated with profits generated from the online sex industry generally.¹⁶ Nevertheless, the notion of anonymous criminals peddling children for sex online has

television and radio stations, all of which may be held liable for publishing or distributing obscene or defamatory material written or prepared by others." (citing *Blumenthal v. Drudge*, 992 F. Supp. 44, 49 (D.D.C. 1998)); *CDT to Court*, *supra* note 8; see also *CDA 230: The Most Important Law Protecting Internet Speech*, ELECTRONIC FRONTIER FOUND., <http://www.eff.org/issues/cda230/cases/batzel-v-smith> (last visited Feb. 8, 2016).

12. *Batzel*, 333 F.3d at 1026.

13. Press Release, Federal Bureau of Investigation, Manhattan U.S. Attorney Announces Seizure of Additional \$28 Million Worth of Bitcoins Belonging to Ross William Ulbricht, Alleged Owner and Operator of "Silk Road" Website (Oct. 25, 2013) (on file with author). See Beth Allgood et al., *U.S. Ivory Trade: Can a Crackdown on Trafficking Save the Last Titan?* 20 ANIMAL L. 27 (2013) (analyzing data regarding the scope and sale of underground ivory in the United States).

14. See Ronald Weitzer, *New Directions in Research on Human Trafficking*, 653 ANNALS AM. ACAD. POL. & SOC. SCI. 6–8 (2014) (evaluating "four popular claims regarding human trafficking's international magnitude, trends, and seriousness relative to other illicit global activities. [Weitzer] find[s] that the claims are neither evidence-based nor verifiable").

15. *Id.*

16. Consider, for example, how either the inadvertent or the intentional inclusion of profit generated by voluntary, adult sex workers in these figures could drastically skew a value purported to be affiliated with coerced, underage, and trafficked individuals. See Svati P. Shah, *Trafficking and the Conflation with Sex Work: Implications for HIV Control and Prevention 1* (Glob. Comm'n on HIV & the Law, Working Paper July 2011).

functioned as a source of evil sufficient to incite a perception of a new and extraordinary social threat. With a keenly perceived evil and the ready acceptance by the public and media of the statistics and information about the harm, the threat of online sex trafficking amplified into a moral panic ripe for reactionary political and social changes.¹⁷

Reactions to the perceived threat of online sex trafficking grew and evolved within various sectors of society, namely with the public, the media, and politicians. Examining the unique involvement of each sector in aggravating the perceived threat of sex trafficking will illustrate participation and roles “largely encouraged by . . . personal interests,” rather than directly linked to preventing the harm posed to the minors or coerced individuals.¹⁸ In turn, public sector activist groups like FAIR Girls and the Coalition Against Trafficking Women (“CATW”) united with celebrities and parents of victims of online sex trafficking.¹⁹ The media quickly seized upon these individual stories with eye-catching headlines. Likewise, politicians readily voiced condemnation of this modern day form of slavery and pledged to put a stop to such injustices. Under pressure to act upon this problem, but with the sex traffickers operating largely beyond immediate reach, together these various social actors set fierce targets upon businesses running online spaces that traffickers abuse to commit their crime.

Starting in 2009, states’ attorney generals, activist groups, and media outlets identified and fiercely besieged Craigslist, a leading and massive host of online classifieds and community-moderated forums.²⁰ In particular, this movement attacked Craigslist’s “adult and erotic services” section where users could post and search for “friendship, love, romance, companionship, entertainment, and . . . casual encounters.”²¹ Despite being just one of thousands of venues carrying ads for adult services, the movement aggressively characterized Craigslist as a direct facilitator of

17. Charles Krinsky, *Introduction: The Moral Panic Concept*, in *THE ASHGATE RESEARCH COMPANION TO MORAL PANICS I*, 4 (2013).

18. Ronald Burns & Charles Crawford, *School Shootings, the Media, and Public Fear: Ingredients for a Moral Panic*, 1999 *CRIME L. & SOC. CHANGE* 147, 156. For example, consider how a journalist might be more inclined to report more frequently on subject matter—for example, the sex trafficking of children online—that she knows will generate more public attention and profits, *regardless* of whether it reflects new, changing, or notably insightful information. Then, consider how the frequency with which something is represented in the media impacts the perceptions of that issue upon the public. *See id.* at 158–59 (“In discussing the social construction of the missing children problem [scholars] note that [p]oliticians, moral entrepreneurs and journalists used the issue for their own purposes.”).

19. *See, e.g., The Village Voice vs. Ashton Kutcher: The Debate over Child Trafficking Statistics in America*, *HOLLYWOOD REPUBLICAN* (July 15, 2011), <http://www.hollywoodrepublican.net/2011/07/the-village-voice-vs-ashton-kutcher-the-debate-over-child-trafficking-statistics-in-america/>.

20. *Factsheet*, CRAIGSLIST.ORG, <http://www.craigslist.org/about/factsheet> (last visited Feb. 8, 2016).

21. Jim Buckmaster, *Shutting Down CL Personals*, CRAIGSLIST BLOG (Apr. 29, 2010, 12:00 AM), <http://blog.craigslist.org/2010/04/29/shutting-down-cl-personals/>.

the sale of sex with minors resulting from the actions of its third-party users' abuse of the site to break the law.²²

Early on in the crusade against it, Craigslist's CEO Jim Buckmaster acknowledged the company's important role in combating this harm by exercising reasonable care to "[p]revent[] site misuse and improv[e] public safety"²³ Buckmaster called out that criminal use of Craigslist was proportionally low "considering the tens of millions of legitimate ads posted each month."²⁴ Nevertheless, Buckmaster conceded that the use of Craigslist for "criminal purposes [was] utterly unacceptable" and pledged commitment to the continued collaboration with officials as an ally in the fight.²⁵ Thereafter, from 2008 to 2010, Craigslist "implement[ed] sweeping new measures[] in close partnership" with over forty-three U.S. attorney generals, law enforcement, and non-governmental organizations ("NGOs") like the National Center for Missing and Exploited Children ("NCMEC").²⁶ By 2010, Craigslist had implemented the following measures to combat criminal use of its site with respect to sex trafficking:

- educating and encouraging CL users to report trafficking [and] exploitation
- prominently featuring a directory of trafficking [and] exploitation resources
- providing specialized anti-trafficking tools for law enforcement
- providing support for law enforcement anti-crime sweeps and stings
- actively participating in NCMEC's cyber tip line program
- meeting regularly with experts at NGOs and in law enforcement
- manually reviewing every adult service ad submitted
- requiring phone verification for every adult service ad²⁷

Notwithstanding this proactive cooperation and implementation of preventative measures, states' attorney generals, social media campaigns, and news coverage continued to single out Craigslist for its alleged facilitation of sex trafficking.²⁸ South Carolina Attorney General Henry McMaster, who collaborated on and endorsed the above measures, proceeded to threaten criminal prosecution unless Craigslist removed "all

22. Jim Buckmaster, *Misdirected Outrage*, CRAIGSLIST BLOG (Apr. 27, 2010, 12:00 AM), <http://blog.craigslist.org/2010/04/27/misdirected-outrage/>.

23. Jim Buckmaster, *Joint Statement with Attorneys General, NCMEC*, CRAIGSLIST BLOG (Nov. 6, 2008, 12:00 AM), <http://blog.craigslist.org/2008/11/06/joint-statement-with-attorneys-general-ncmec/>.

24. *Id.*

25. *Id.*; see also Buckmaster, *supra* note 22; Jim Buckmaster, *Manual Screening Matters*, CRAIGSLIST BLOG (Aug. 18, 2010, 12:00 AM), <http://blog.craigslist.org/2010/08/18/manual-screening-matters/>.

26. Buckmaster, *supra* note 23.

27. Buckmaster, *supra* note 22.

28. *Attorney General Bob Ferguson Joins Suit Against Backpage.com*, COVINGTON-MAPLE VALLEY REP. (Sept. 11, 2014, 11:22 AM), <http://www.maplevalleyreporter.com/news/274784461.html>.

ads related to prostitution and pornography.”²⁹ A Twitter campaign called for the elimination of all personals classified ads on Craigslist, emphasizing that the ads were an immoral perpetuation of casual sex and prostitution.³⁰ The message similarly gained traction in major news outlets including *The New York Times*, *The Seattle Times*, CNN, and Fox News.³¹ In response to the social pressure, Craigslist eventually and voluntarily closed its “erotic services” and “adult services” sections, although it maintains a “personals” section where individuals can still post and seek connections including, but not limited to, “casual encounters” and “misc. romance.”³²

As Craigslist succumbed to pressures and increased the censorship of its site, social and political efforts redirected to the second largest online classifieds site, Backpage.com.³³ Following a similar pattern of events, Backpage.com worked closely with law enforcement and the NCMEC to draft and implement safety measures to increase the security of its adult services section, including:

- The review of all ads and images in the personals and adult sections of the site.
- The implementation of key word searches to quickly identify banned advertisements and inappropriate discussions.
- The significant increase in staff to quickly identify illegal ads.
- The implementation of roadblocks to prevent minors from accessing mature content.
- The implementation of dedicated tools on the site to educate users regarding online safety and security.
- The empowerment of users to report abuse and an expeditious process to handle user complaints.³⁴

29. Jim Buckmaster, CRAIGSLIST BLOG (May 16, 2009, 12:00 AM), <http://blog.craigslist.org/2009/05/16/206/>; see also Emmanuella Grinberg, *Judge Shields Craigslist from Prosecution in South Carolina*, CNN.COM (May 25, 2009), <http://www.cnn.com/2009/TECH/05/23/south.carolina.craigslist/>.

30. Buckmaster, *supra* note 21.

31. See e.g., Nicholas 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> (“When Baby Face ran away from her pimp and desperately knocked on that apartment door in Brooklyn, she was also in effect pounding on the door of the executive suites of Backpage and Village Voice Media. Those executives should listen to her pleas.”); Thanh Tan, *Backpage.com’s Adult Ads Continue to Normalize, Increase Demand for Sex Trafficking*, SEATTLE TIMES (Apr. 25, 2014, 6:02 AM), <http://blogs.seattletimes.com/opinionnw/2014/04/25/backpage-coms-adult-ads-continue-to-normalize-increase-demand-for-sex-trafficking/> (“Here’s a screenshot of just a few of the hundreds of listings Backpage.com allowed to be posted during the lunch hour on Wednesday. Does this look to you like a website that cares about protecting people—or promoting the dirty work of pimps?”).

32. See CRAIGSLIST, www.craigslist.org/ (last visited Feb. 8, 2016).

33. See BACKPAGE.COM, <http://www.backpage.com> (last visited Feb. 8, 2016).

34. James R. Hood, *New Village Voice Owners Leave Backpage.com Behind*, CONSUMER AFF. (Sept. 24, 2012), <http://www.consumeraffairs.com/craigslist-and-backpage-news>.

Taking one step further than Craigslist, Backpage.com implemented additional procedures for posting to the adult section on Backpage.com by requiring users to read a disclaimer and affirmatively consent to an agreement that reads:

I confirm and represent that I am 18 years of age or older (and am not considered to be a minor in my state of residence) and that I am not located in a community or local jurisdiction where nude pictures or explicit adult materials are prohibited by any law. I agree to report any illegal services or activities which violate the Terms of Use.³⁵

Moreover, Backpage.com presents the user with a link to “report suspected exploitation of minors and/or human trafficking.”³⁶ Ernie Allen, the president of the NCMEC, noted that the above measures and reporting rates demonstrated that Backpage.com had “undertaken the screening and reporting process very aggressively.”³⁷ With additional preventative measures in place and an endorsement from activist leaders like Allen, Backpage.com demonstrated a reasonable commitment and care toward minimizing use of its site for criminal purposes.

Nevertheless, as explicit ads for casual sexual encounters continued to proliferate in the adult section of Backpage.com, and stories of exploitation continued to emerge, the perceived threat posed by online sex traffickers fueled further social and political condemnation and pressure for action. Between 2011 and 2013 at least three states responded by drafting legislation criminalizing the sexual abuse of a minor,³⁸ but Backpage.com successfully enjoined each as violative of the federal Communications Decency Act (“CDA”), which creates immunity from liability for hosts of Internet service platforms that publish information provided by third parties.³⁹ Specifically, courts in those instances routinely found that § 230 of the CDA preempted such state laws. Section 230 states that “no provider . . . of interactive computer services shall be treated as the publisher or speaker of any information provided by another information content provider.”⁴⁰ Thus, each court found that because Backpage.com neither created nor developed the ads, and because it clearly defined in its terms of use that posting to the site

35. *Disclaimer*, BACKPAGE.COM, <http://sf.backpage.com/FemaleEscorts/classifieds/Disclaimer?category=4443> (last visited Feb. 8, 2016).

36. *Id.*

37. Tracy Clark-Flory, *An Uneasy Backpage Alliance*, SALON (May 12, 2012, 5:00 PM), http://www.salon.com/2012/05/13/an_uneasy_backpage_alliance/.

38. *See* WASH. REV. CODE ANN. § 9.68A.104 (West 2012) (addressing “advertising commercial sexual abuse of a minor”); *see, e.g.*, TENN. CODE ANN. § 39-13-315 (West 2015) (making it a felony to “knowingly sell[] or offer[] to sell an advertisement that would appear to a reasonable person to be for the purpose of engaging in what would be a commercial sex act . . . with a minor”).

39. *See* Backpage.com, LLC v. Hoffman, No. 13-cv-03952, 2013 WL 4502097 (D.N.J. Aug. 20, 2013); Backpage.com, LLC v. Cooper, 939 F. Supp. 2d 805 (M.D. Tenn. 2013); Backpage.com, LLC v. McKenna, 881 F. Supp. 2d 1262 (W.D. Wash. 2012).

40. 47 U.S.C. § 230(c)(1)(1998).

for illegal purposes was prohibited, it was not ultimately liable for the content.⁴¹

Meanwhile, individuals also filed lawsuits to hold Backpage.com liable for sexual exploitation that occurred by the third-party users of the website's platform. Specifically, in Massachusetts, Missouri, and Washington, individuals who were sold as prostitutes on Backpage.com filed suits against the site. They claimed that because their traffickers used Backpage.com to find clients to perpetrate the harm, the website should be held liable. Again, the plaintiffs faced the obstacle of immunity granted by the CDA.⁴² In each suit, Backpage.com compellingly maintained that in enacting the CDA, Congress intentionally granted immunity to websites like Backpage.com for the content posted by users for the purpose of "preserv[ing] free speech on the Internet," and that "holding it responsible [for ads it did not create or develop] would chill that speech."⁴³ The district court in Missouri agreed with Backpage.com's reasoning, but the suit in Washington progressed to the Washington Supreme Court.⁴⁴ The Washington courts have been more willing to consider whether providing users with instruction regarding what successful ads should say constitutes "development" of the ads sufficient to designate Backpage.com a content *creator* rather than a content *host*, and thus strip Backpage.com of § 230 immunity.⁴⁵ Last heard on October 21, 2014, the Washington Supreme Court justices also considered whether Backpage.com could be liable for using a "tool to scrub information to make it anonymous," or if further discovery would show that Backpage.com was "deeply . . . involved in the developing and marketing of the ads" sufficient to deem it a content *creator*.⁴⁶ Notably present at each of the hearings have been crowds sporting signs with messages like "End Child Slavery," "People's bodies are not commodities," and "Stop Buying Our Girls,"⁴⁷ as well as members of the media to document them. The popularization and routine dismissal of these cases resulted in increased pressure and support for legislative action.

Meanwhile, Congress responded to this panic surrounding online sex trafficking of minors with proposed federal legislation—the SAVE Act—criminalizing the advertisement of commercial sex with a minor that would be exempt from CDA § 230's immunity.⁴⁸ Specifically, this

41. See *Cooper*, 939 F. Supp. 2d at 805; see also *McKenna*, 881 F. Supp. 2d at 1262; see also Martha Bellisle, *Backpage.com Asks High Court to Throw out Lawsuit*, SEATTLE TIMES (Oct. 22, 2014, 12:01 AM), http://seattletimes.com/html/localnews/2024836124_backpagesuitxml.html.

42. Bellisle, *supra* note 41.

43. *Id.*

44. *Id.*

45. *Id.*

46. *Id.*

47. *Id.*

48. See 47 U.S.C. § 230(e)(1)(1998).

federal legislation would be exempt because § 230(e)(1) of the CDA provides that the immunity under the Act “shall [not] be construed to impair the enforcement of . . . any . . . [f]ederal criminal statute.”⁴⁹ Therefore, a federal statute passed and signed into law criminalizing the advertisement of commercial sex with a minor would leave websites including, but not limited to, Backpage.com and Craigslist, vulnerable to criminal liability for the content created and posted by their third-party users.

The SAVE Act, authored by Republican Congresswoman Ann Wagner,⁵⁰ passed in the House of Representatives on May 20, 2014, by a vote of 392 to 19.⁵¹ The next day, Republican Senators Dianne Feinstein and Mark Kirk introduced the SAVE Act to the Senate.⁵² As passed by the House, the SAVE Act would have amended § 1591 of the Federal Criminal Code to include “advertising” in the list of acts that constitute the crime of federal sex trafficking.⁵³ Specifically, the SAVE Act would “prohibit knowingly . . . advertising commercial sex acts involving a minor or an individual engaged in such an act through force, fraud, or coercion[,] or . . . benefitting financially or otherwise from such advertising knowing that the individual involved was a minor or victim of force, fraud, or coercion.”⁵⁴ Prosecution under this expansion of § 1591 would require the government “to prove that defendants accused of benefitting . . . [from] the sale of such advertising” knew that the featured individual was a “minor or victim of force, fraud, or coercion.”⁵⁵ Congresswoman Wagner and Senators Feinstein and Kirk argued that the SAVE Act’s proposed amendments criminalizing the advertisement of commercial sex with minors or coerced individuals presented a solution to sex trafficking; this contention drew both fierce support and fierce opposition from the various intersecting spheres of society—that is, the public, media, and politicians.

Thorough and evenhanded evaluation of the SAVE Act requires examination of how the actions, motivations, and ideologies of these different social actors influenced the dialogue about preventing the harm of sex trafficking.⁵⁶ Proponents of the legislation included politicians,⁵⁷

49. *Id.*

50. Ann Wagner, *Not for Sale: The SAVE Act*, CONGRESSWOMAN ANN WAGNER, <http://wagner.house.gov/notforsale> (last visited Feb. 8, 2016).

51. SAVE Act of 2014, H.R. 4225, 113th Cong. (2d Sess. 2013).

52. *Id.*

53. See Wagner, *supra* note 50.

54. H.R. 4225.

55. H.R. REP. NO. 113-451 (2014).

56. For a discussion of using this approach to evaluate society’s reaction to school shootings, see Burns & Crawford, *supra* note 18, at 156 (“[W]e chose to focus upon select groups whose involvement/roles/participation in addressing the situation was largely encouraged by their personal

feminist rights groups,⁵⁸ religious activist groups,⁵⁹ and the media.⁶⁰ Generally, these groups contended that the SAVE Act was a critical solution to close the gap of immunity created by the CDA that protects websites like Backpage.com from liability for sex trafficking. On the other side, opponents of the SAVE Act included sex worker groups,⁶¹ advocates of free speech and expression,⁶² and Internet content hosts.⁶³ Free speech activists and Internet content hosts argued that the legislation would misplace criminal liability by targeting the intermediary host of speech rather than the actor actually perpetuating the harm.⁶⁴ Thus, these groups argue, Internet content hosts would be forced to self-censor even legal adult speech in order to avoid exposure to harsh

interests. Such an approach assists in presenting the issue as a moral panic and provides a better understanding of how these particular interest-driven agents can largely impact societal happenings.”).

57. See, e.g., Letter from Nat’l Ass’n of Attorneys General, to Patrick Leahy, Chairman Senate Judiciary Comm. & Chuck Grassley, Ranking Member Senate Judiciary Comm. (Oct. 20, 2014) (on file with author).

58. See, e.g., COALITION AGAINST TRAFFICKING IN WOMEN, <http://www.catwinternational.org> (last visited Feb. 8, 2016).

59. See, e.g., NAT’L ASS’N OF EVANGELICALS, <http://nae.net> (last visited Feb. 8, 2016).

60. See, e.g., Thanh Tan, *U.S. House Should Pass Anti-Sex Trafficking Bills, Crack Down on Backpage.com*, SEATTLE TIMES (May 20, 2014, 6:03 AM), <http://blogs.seattletimes.com/opinionnw/2014/05/20/sex-trafficking-bills-congress-backpage/> (“The SAVE Act is still a first step toward better, stronger policies in the future.”).

61. See, e.g., RED UMBRELLA PROJECT, <http://redumbrellaproject.org/> (last visited Feb. 8, 2016); DESIREE ALLIANCE, <http://www.desireealliance.org> (last visited Feb. 8, 2016); see also Ricci J. Levy, *Civil Liberties Groups Condemn Government Attacks on Escort Service Providers—Cite First Amendment and Human Rights Concerns*, WOODHULL FREEDOM FOUND. (July 2, 2014), <http://www.woodhullalliance.org/2014/sex-and-politics/civil-liberties-groups-condemn-government-attack-on-escort-service-providers-cite-first-amendment-and-human-rights-concerns/> (“While, on the surface, the legislation seems only to explicitly criminalize the advertising of already-criminal commercial sex acts involving minors and unwilling participants, in fact it is a thinly disguised attempt to eliminate internet safety zones for those individuals engaged in legal escort work. If the SAVE Act is signed into law, it will effectively force websites, including advertising directories that provide a safe outlet for escorts to control their exposure and sustain their businesses, to censor escort ads, comments, and discussion boards, or be faced with criminal liability in the event that an individual advertiser is found to be involved in human trafficking.”).

62. See, e.g., Letter from Emma Llansó, Ctr. for Democracy & Tech. and Gabe Rottman, ACLU, to U.S. Senate (Nov. 12, 2014) (on file with author) (“Again, we strongly support anti-trafficking measures that focus on providing support and services for the victims and note that existing federal law already criminalizes the actions of those who intentionally aid or abet a trafficking venture. Unfortunately, the SAVE Act would not be effective in preventing traffickers from using third-party online content hosts, and would create significant burdens on the free speech and privacy rights of millions of wholly innocent Americans who have no connection to trafficking whatsoever. For these reasons, we urge you to oppose the SAVE Act.”).

63. Including, but not limited to, Craigslist, Backpage.com, Facebook, Tumblr, OkCupid, and Tinder. See *infra* Part II.A.

64. See, e.g., Emma Llansó, *SAVE Act Endangers Online Content Platforms*, CTR. FOR DEMOCRACY & TECH. (May 20, 2014), <https://cdt.org/blog/save-act-endangers-online-content-platforms/> (“Intermediaries will almost always be easier to locate than the actual wrong-doers, making them tempting targets for prosecution and litigation. But targeting intermediaries creates dangerous incentives and invites self-censorship.”).

criminal liability. All of these groups pointed out furthermore that these misplaced threats of liability and impositions on free speech would not achieve the primary goal of preventing the harm of sex trafficking. Further, sex worker groups in particular noted that the SAVE Act would not only fail to prevent sex trafficking from occurring, but would also create additional harms for individuals working voluntarily in the sex industry or individuals looking to exchange in casual sex. Part II further examines these positions as they pertain to specific provisions of the SAVE Act.

II. CONSEQUENCES PRESENTED BY THE SAVE ACT

A. THE SAVE ACT'S RECKLESS DISREGARD STANDARD

The SAVE Act criminalizes website operators that “knowingly host adult advertising and ‘recklessly disregard’” that the ad facilitates sex trafficking.⁶⁵ Thus, this reckless disregard mens rea requirement⁶⁶ grants prosecutors broad authority to hold Internet content hosts who knowingly accept posts of ‘adult advertising’ criminally liable for speech created and posted by third parties. The standard presents at least two clear problems.

First, the SAVE Act left the term “advertising” largely undefined.⁶⁷ This ambiguity is especially problematic in the unique and fast-evolving realm of Internet communications. Specifically, while the scope of the Act would certainly encompass an Internet classifieds site that accepts postings for adult services and casual encounters, like Craigslist, it is uncertain whether “advertises” would include communications that are not so clearly categorized as such. For example, it is uncertain whether “advertises” would encompass “any tweet, status update, video, reblog, or pin . . . includ[ing] content that advertises a commercial sex act.”⁶⁸ This ambiguity encourages multiple, conflicting negative behaviors by the implicated businesses. On the one hand, companies could implement draconian self-censorship to demonstrate adherence to the law. On the

65. *SAVE Act Would Chill Online Speech and Innovation*, CTR. FOR DEMOCRACY & TECH. (June 27, 2014, 6:59 PM), <https://cdt.org/insight/save-act-would-chill-online-speech-and-innovation/>.

66. Section 2.02(c) of the Model Penal Code provides that:

A person acts recklessly with respect to a material element of an offense when he consciously disregards a substantial and unjustifiable risk that the material element exists or will result from his conduct. The risk must be of such a nature and degree that, considering the nature and purpose of the actor's conduct and the circumstances known to him, its disregard involves a gross deviation from the standard of conduct that a law-abiding person would observe in the actor's situation.

MODEL PENAL CODE § 2.02(c) (AM. LAW INST. 2015).

67. Llansó, *supra* note 64 (“The SAVE Act adds the term ‘advertises’ without defining it. This is what makes the bill problematically vague and potentially overbroad.”).

68. *Id.*

other hand, companies could drastically decrease their levels of screening so as to claim no knowledge of hosting the material, and thus that they were not acting in reckless disregard that the material facilitated sex trafficking. Thus, the Act's overly vague use of the term "advertising" creates serious problems that are amplified in the online sphere.

Second, the SAVE Act's reckless disregard mens rea requirement likely opens the door to prosecution of any Internet content host who *knowingly* hosts "adult advertising." More specifically, the standard grants prosecutors with broad authority to build cases against websites because there is ambiguity as to what is required to establish reckless disregard in the specific context of adult and sexually themed content. One can imagine the contention that hosting any content explicit in nature in conjunction with the alleged soaring, surging, and rampant⁶⁹ rates of sex trafficking online could amount to reckless disregard of the fact that hosting such content facilitates sex trafficking. If these acutely threatening rates at which sex trafficking online are to be believed, it is reasonable for a website to assume that their hosting of *any* explicit content could be found to consciously disregard the risk such material poses, and that hosting any material of that nature is unjustified. Therefore, the broad scope of prosecuting power here would almost certainly coerce websites to err on the side of caution, and categorically censor adult and explicit material rather than face litigation and criminal liability.

The SAVE Act would be infeasible as applied to Internet content hosts because the vast number of users and rapid rate at which content is created and posted makes constant and effective monitoring nearly impossible.⁷⁰ To illustrate this point, it should be noted that users upload 100 hours of video on YouTube every minute, over one billion unique users now connect on Facebook,⁷¹ and over eighty million classified ads post to Craigslist every month.⁷² In 2012, the number of adult ads on Backpage.com ranged from 14,000 to 19,000 *per day*.⁷³ In attempt to manage the integrity of such a high volume of posting, "Google [for example] screens ads with a combination of automated technologies and human review, but things [nevertheless inevitably] slip through the

69. See, e.g., Appellants' Consolidated Response to Amicus Briefs, J.S., S.L., L.C. v. Village Voice Media Holdings, Backpage.com & New Times Media, No. 00510-0, 2014 WL 5365459 (Wash. Oct. 10, 2014); see *Legislators Target Sex-Trafficking Ads*, *supra* note 5.

70. *CDA 230: The Most Important Law Protecting Internet Speech*, *supra* note 11 ("[I]t would be infeasible for online intermediaries to prevent objectionable content from cropping up on their site. Rather than face potential liability for their users' actions, most would likely not host any user content at all or would need to protect themselves by being actively engaged in censoring what we say, what we see, and what we do online.").

71. *Id.*

72. *Factsheet*, *supra* note 20.

73. Clark-Flory, *supra* note 37.

cracks.”⁷⁴ Even with heightened screening procedures, it is nearly impossible for Internet content hosts to monitor this particularly high volume of content and subsequently remove potentially criminal postings. As a result, the SAVE Act would leave Internet content hosts largely unable to protect themselves from harsh criminal sentences without resorting to broad censorship practices.

The high subjectivity and lack of systematic capacity to screen what is legal from what is illegal here also makes it particularly difficult for Internet content providers to adequately protect themselves without implementing broad censorship regimes. This uncertainty is a result of both the vague language of the statute and the nature of the content involved. First, looking to the language of the proposed statute, the SAVE Act would apply to persons who “maintain an adult ad . . . in a medium whose predominant purpose . . . is to facilitate commercial transactions.”⁷⁵ Because the predominant purpose of mediums online is ambiguous, many websites would err on the side of caution and censor legal material.

While this legislation was largely driven by a heightened concern surrounding sex trafficking on online classified sites, the vague language in the SAVE Act would broadly open the door to prosecution against any website or medium that hosts ads that could be construed as advertising for prostitution.⁷⁶ This includes, but is not limited to, Amazon, eBay, Tinder, Grindr, OkCupid, Twitter, Facebook, Tumblr, or any online marketplace where users might potentially post adult ads.⁷⁷ The intentionally largely unregulated conditions of the web allow millions of mostly well-intentioned individuals to upload videos, post reviews, participate in discussion boards, engage in social media, and place advertisements for goods and services.

Furthermore, the nature of the content to be regulated made the SAVE Act particularly problematic. Specifically, even with substantial training and sophisticated processes, it is inherently difficult to determine when someone in an ad is underage or exploited. Indeed, even state officials acknowledge the difficulty in making this determination: “Nobody puts information out so that when you look at the ad, it’s obvious that they’re underage.”⁷⁸ Moreover, implementation of additional precautionary measures, like credit card verifications or heightened password

74. Laura Sydell, *Beyond Craigslist, Many Markets for Sex Traffickers*, NPR (Sept. 14, 2010), <http://www.npr.org/templates/story/story.php?storyId=129863089>.

75. *SAVE Act Would Chill Online Speech and Innovation*, *supra* note 65.

76. Gabe Rottman & Sandra Fulton, *Anti-Backpage.com Bill Will Shut down Free Speech*, ACLU (May 20, 2014, 12:17 PM), <https://www.aclu.org/blog/free-speech/anti-backpagecom-bill-will-shut-down-free-speech>.

77. *Id.*

78. Sydell, *supra* note 74.

requirements, impose substantial burdens on the Internet service provider and privacy invasions on the users without any showing of effectiveness.⁷⁹ In attempt to protect themselves from liability for the content of third-party users, Internet content providers would have to resort to broad censorship of protected speech and close popular and useful sharing platforms, changing the manner in which information and ideas have been freely shared in the duration of the Internet's existence.⁸⁰

B. THE SAVE ACT AND ECONOMIC IMPROPRIETY

Despite Congressional contentions to the contrary, the SAVE Act would be an inefficient and economically irrational approach to combating sex trafficking. The Congressional Budget Office ("CBO") "estimates that implementing [the SAVE Act] would have no significant cost to the [f]ederal [g]overnment" because it merely would clarify existing laws against sex trafficking and would apply to a "relatively small number of offenders."⁸¹ The CBO also notes that because "those prosecuted and convicted . . . could be subject to criminal fines," the government might have additional revenue as a result of the SAVE Act.⁸²

Despite this reassurance that the SAVE Act is a sound economic endeavor, the CBO's estimate only accounts for a limited audit of the costs and burdens that the SAVE Act will impose on the government as well as the Internet content hosts. First, Internet content hosts would be deterred from pre-screening user-created content to "avoid obtaining knowledge that they are hosting adult advertising."⁸³ Thus, rather than enabling a concerted alliance between authorities and Internet content hosts to combat the problem, the SAVE Act would break down compliance and cooperation, and incentivize websites to take fewer actions to maintain safety on their platforms. By disincentivizing cooperation and imposing criminal liability upon Internet content hosts, the government would lose a critical ally in combating this harm. Further, by eliminating large and sophisticated forums, the traffickers will continue to abuse online marketplaces in boundless scattered corners of the web with Internet content hosts less able and willing to collaborate. By scattering the harm, authorities would have to dedicate increased resources to tracking down the many and decentralized sources of the harm. There will also be excessive costs spent pursuing and

79. *Reno v. ACLU*, 521 U.S. 844, 856–57 (1997); see also *Online Prostitution-Ad Revenue Crosses Craigslist Benchmark*, AIMGROUP.COM (July 10, 2013), <http://aimgroup.com/2013/07/10/online-prostitution-ad-revenue-crosses-craigslist-benchmark/>.

80. *CDA 230: The Most Important Law Protecting Internet Speech*, *supra* note 11.

81. H.R. REP. NO. 113-451, at 8 (2014).

82. *Id.*

83. *SAVE Act Would Chill Online Speech and Innovation*, *supra* note 65.

prosecuting online advertisers that are newly subject to criminal liability. The Congressional cost estimates also do not account for the increased expenses imposed upon Internet content hosts resulting from the “impossible task of reviewing every single submission for potential illegality,” which will be sufficiently substantial in many cases to “crush innovation and lead to unnecessary and overbroad censorship by risk-averse companies.”⁸⁴ The above costs were not considered in estimates evaluating the SAVE Act, and such personal and government resources would be better spent on collaborative and sophisticated efforts to prosecute the real criminals who create the content, post the illegal ads, and traffic and exploit the individuals.⁸⁵

C. THE SAVE ACT AND MANDATORY MINIMUM SENTENCING

A dissent in the House Report for the Committee on the Judiciary articulated severe and legitimate concerns regarding the public policy implications of the SAVE Act’s mandatory minimum sentencing provisions.⁸⁶ Under those provisions, any actor found liable under the SAVE Act would be “subject to a mandatory 10- or 15-year sentence . . . [r]egardless of the nature and circumstances surrounding the offense, the role of the offender in the particular crime, and the history and characteristics of the offender.”⁸⁷ The dissenting Congress members emphasized that mandatory minimum sentencing “distort[ed] rational sentencing, waste[d] taxpayer money, and even when applied to serious offenses, often le[d] to sentences that . . . [were] not appropriate under the facts of particular cases.”⁸⁸ The dissent further noted that the mandatory minimums were particularly concerning as applied to the specific circumstances presented by the SAVE Act.⁸⁹ That is, the general language of the SAVE Act had the potential to empower the criminal prosecution of an overly broad group of defendants because the SAVE Act’s general “prohibition on advertising does not explicitly apply only to a sex trafficker who places an ad.”⁹⁰ Rather, the Act stood to impose mandatory minimums on anyone who “knowingly benefits” from participation in the advertisement of sex with minors or coerced individuals.⁹¹ Thus, it is conceivable that the liability and mandatory

84. Andrew McDiarmid, *Shielding the Messengers: StubHub Un-Snubbed in Court Victory for Online Speech and Innovation*, CTR. FOR DEMOCRACY & TECH. (Mar. 9, 2012), <https://cdt.org/blog/shielding-the-messengers-stubhub-un-snubbed-in-court-victory-for-online-speech-and-innovation/>.

85. See *infra* Part V.

86. H.R. REP. NO. 113-451, at 10 (2014).

87. *Id.* at 11.

88. *Id.* at 10.

89. *Id.*

90. *Id.* at 11.

91. *Id.* at 4.

minimums could widely apply “to individuals and entities that facilitate, but have a minor role in, publishing the ad.”⁹²

Acknowledging this detrimental consequence of the legislation, the House Committee to the Judiciary considered an amendment during the SAVE Act’s markup that would have “removed application of the statute’s mandatory minimum prison sentences to advertising and instead allow a judge to apply an appropriate sentence under the circumstances of the case, up to the statutory maximum of life in prison.”⁹³ The amendment would have “provide[d] the appropriate spectrum of sentences for culpability and proportionate punishment,” but was defeated by a vote of eight to twenty.⁹⁴

These significant concerns related to infringing free speech, economic inefficiency, and overly harsh sentencing require additional scrutiny to determine whether the SAVE Act could still be justified. Interpretations and applications of the harm principle and moral panics provide useful foundations to further analyze justification of the SAVE Act.

III. THE SAVE ACT AND THE HARM PRINCIPLE

This Note’s criticism of the SAVE Act does not seek to undercut the severity or deplorability of the harm presented by sex trafficking; rather, this Note demonstrates that in failing to actually prevent this harm, the SAVE Act was not a rightful limitation on speech nor was it a justified imposition of criminal liability.⁹⁵ In the following Subparts, this Note will examine the merit of the SAVE Act through the lens of the traditional and the contemporary harm principle, as well as through the scope of legal moralism. Each takes different approaches to evaluate the justification for imposing control over another. The analysis using the harm principle and legal moralism will demonstrate that the SAVE Act was unjustified under each standard because the SAVE Act did not directly or indirectly prevent the harm of sex trafficking from occurring, it inappropriately placed culpability on Internet content hosts for the criminal acts of others, and it created new, additional harms.

92. *Id.* at 11.

93. *Id.* at 12.

94. *Id.*

95. See generally Mill, *supra* note 9, at 120–21 (“[T]he only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others[.]”).

A. THE SAVE ACT AND THE TRADITIONAL CONSTRUCTION OF THE HARM PRINCIPLE

The traditional concept of the harm principle, famously articulated by John Stuart Mill in *On Liberty*, puts forth that “the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others.”⁹⁶ In extending criminal liability to third-party content hosts who are not necessarily committing harm, the SAVE Act struggles to uphold under this traditional construction. Companies like Backpage.com, which take reasonable measures to keep their platforms safe and post clear notifications dictating that their platforms are to be used by persons of legal age and for legal purposes, are not creators of harm when independent, third-party users commit fraud and abuse those resources.

Even assuming that Backpage.com creates an opportunity for harm by offering a centralized forum for the exchange of services including sexual encounters, it remains speculative that coerced closure of such forums will prevent the harm of sex trafficking. Veteran sex-crime investigator, Sergeant Greg Albin, notes that shutting down online classified sites is not the “answer[] because people will work around it.”⁹⁷ Law enforcement officials also acknowledge that legislation like the SAVE Act would not be likely to prevent the harm because it results in “playing a game of Whac-A-Mole: Every time you shut down one site, . . . another one pops up.”⁹⁸ Malika Saada Sar, an advocate at Human Rights for Girls, adds that “these ads will continue to move from site to site until we address the demand side of the equation: ‘They are not afraid of purchasing a child because we are not arresting and prosecuting buyers of children.’”⁹⁹ Thus, the SAVE Act would not be justified under the traditional construction of the harm principle because the mass, coerced closure and censorship of online forums that engage in advertising for sexual encounters will not prevent the harm of sex trafficking in the boundless corners of the web and online forums, as well as offline in the shadows.

The SAVE Act would not only fail to prevent harm, it could result in increased and additional harm. Parry Aftab, an accredited online safety advocate at Wired Safety, contends that this coerced shutdown will “not make women and minors any safer” because it will result in “a lot more underground websites that are run by people who don’t care as

96. *Id.*

97. Sydell, *supra* note 74.

98. *Id.*

99. Emma Llansó, *Listening to the Experts on Human Trafficking*, CTR. FOR DEMOCRACY & TECH. (Feb. 25, 2015), <https://cdt.org/blog/listening-to-the-experts-on-human-trafficking/>.

much as [Craigslist and Backpage.com].”¹⁰⁰ Thus, without addressing the continued demand for illegal sex, the supply will continue in various other forums that are more difficult to track and that present more harm to sex workers. The broad legislation criminalizing websites that are “designed to facilitate” the advertisement of sex would effectively “eliminate online ‘adult advertising,’ including advertisement of legal adult services.”¹⁰¹ Elimination of the Internet as a platform for speech for sex workers removes “an extensive network of public and private forums offering escorts a place to advertise, be reviewed, blacklist bad clients, screen new ones, and generally support one another in an often solitary and isolating business.”¹⁰² The SAVE Act would not only eliminate the Internet as a safeguard and a source of support for sex workers, but it would simultaneously push many sex workers back to working on the streets where they are likely to “jump too quickly into the cars of customers they haven’t screened, with no time to negotiate payment or services before finding themselves in a small space equipped with child-safety locks in the company of a strange man.”¹⁰³ In addition to creating harms for voluntary sex workers, the elimination of the Internet as a source of advertisement for sex increases the harm presented to individuals coerced or trafficked into the sex industry because the source of the harm will shift to sites less sophisticated and less allied with authorities as well as return and continue on streets where workers face increased dangers.¹⁰⁴ Thus, the SAVE Act would be unjustified under the traditional construction of the harm principle, because in scattering the harm to decentralized, unsophisticated, and more dangerous environments, it would aggravate the harms posed by sex trafficking.

B. THE SAVE ACT AND THE CONTEMPORARY HARM PRINCIPLE

The contemporary harm principle provides a more lenient framework to analyze the SAVE Act than the traditional construction because it arguably encompasses moral offenses masked in harm arguments. In *The Collapse of the Harm Principle*, Bernard Harcourt presents the evolution, unraveling, and contemporary construction of the harm principle, and provides a framework for evaluating the purpose for which certain conduct should be regulated or criminalized.¹⁰⁵ Harcourt explains that traditionally, “[t]he harm principle was used to

100. Sydell, *supra* note 74.

101. Tara Burns, *The War on Sex Workers Escalates with FBI Shutdown of MyRedBook*, VICE (July 17, 2014), <http://www.vice.com/read/the-fbi-shut-down-myredbook-and-thats-dangerous-for-sex-workers-717>.

102. *Id.*

103. *Id.*

104. See Sydell, *supra* note 74.

105. See Harcourt, *supra* note 9, at 109.

exclude certain categories of activities from legal enforcement (necessary condition), but it did not determine what to include (but not sufficient condition), insofar as practical, constitutional[,] or other factors weighed into the ultimate decision whether to regulate a moral offense.”¹⁰⁶ As a result of conflicting interpretations and applications over time, today the harm principle operates “formally” but not in fact as “a necessary condition [to regulation] because non-trivial harm arguments are being made about practically every moral offense.”¹⁰⁷ Thus, while it is still generally acknowledged as unjustified “to limit harmless conduct on the ground that it is immoral,” the increased use of harm arguments where moral arguments used to apply has led to the unraveling of the potency of the harm principle and the clarity with which it is applied.¹⁰⁸ As the “threshold is being satisfied in most categories of moral offense . . . the harm principle no longer acts today as a limiting principle with regard to the legal enforcement of morality.”¹⁰⁹ As a result, we are left weighing different harms with little guidance as to how such process should be executed.¹¹⁰

To illustrate how even moral offenses find safe harbor in this contemporary construction, Harcourt introduces examples of regulations of morality that would have traditionally been precluded by the harm principle, yet survived under the modern, ambiguous framework.¹¹¹ In New York City, for example, Mayor Rudy Giuliani implemented a regime of regulations to shut down legal, commercial sex establishments “in the name of tourism, crime rates, and property value,” rather than emphasizing any moral component.¹¹² Similarly, Professor Catherine MacKinnon’s proposals for the regulation of pornography and prostitution rely heavily on injury, violence, rape, and other harms suffered by women, rather than traditional oppositions based in morality.¹¹³ These examples demonstrate how political and social actors were able to compellingly achieve or advocate for regulation of sexual morality by embedding their movements with harm arguments rather than advocating for the regulation of morality directly.

^{106.} *Id.* at 114.

^{107.} *Id.* For a discussion of this ‘unraveling’ of the harm principle in the context of the closure of gay bath houses, see *id.* at 111 (“A similar development has taken place in the debate over homosexuality. In the 1980s, the AIDS epidemic became the harm that justified legal intervention. When San Francisco and New York City moved to close gay bathhouses in the mid-1980s, the argument was not about the *immorality* of homosexual conduct. Instead, the debate was about the *harm* associated with the potential spread of AIDS at gay bathhouses.”).

^{108.} *Id.* at 115.

^{109.} *Id.* at 114–15.

^{110.} *See id.*

^{111.} *Id.* at 111.

^{112.} *Id.*

^{113.} *Id.*

Similarly, the SAVE Act's criminalization of advertising certain sex acts in the name of fighting sex trafficking is an example of legislation that would have been precluded under the traditional harm principle, but survives under the expanded and ambiguous modern framework. With the threat of harsh criminal punishment upon websites found to be hosting advertisements for commercial sex with minors, the SAVE Act would induce Internet content hosts to be overly cautious and censor material posted by users. The effect would be the broad elimination of a form of expression that includes legal speech often cast as sexually immoral and rejected by mainstream society. Under its traditional construction, regulation of morally undesirable speech for 'casual' or 'extreme' sex likely would have been precluded by the harm principle. However, by positioning the regulation as one that seeks to combat the sex trafficking of children with the ancillary effect of chilling explicit speech and opportunities to engage in casual sex, the SAVE Act would attempt to evade preclusion as a legislation of morality.

Legislation resulting in censorship of speech that is powerful, yet not broadly valued by mainstream society, should furthermore trigger a heightened standard of review. In the context of pornography, Judge Frank Easterbrook noted that even if one accepts the contention that the industry subordinates and fosters aggression against women that in itself "simply demonstrates the power of pornography as speech."¹¹⁴ Applied here, it can be argued that the high rates of use of these 'adult services' and 'casual encounters' online forums, much of which is legal, demonstrate the power and significance of this speech and its unique ability to connect and engage members in society.¹¹⁵ Gender theorist Judith Butler points out that Professor MacKinnon's "proposed influential administrative and judicial measures to regulate pornography," as well as prostitution, extend excessive power to the state, setting the stage for use of "regulatory power against the interests of minority groups."¹¹⁶ Similarly here, the SAVE Act would extend excessive power to the state to silence or punish expression of sexual lifestyles, practices, or exchanges valued by a minority, but held to be immoral or disfavored by the majority.¹¹⁷ Thus, this type of legislation calls for heightened scrutiny because the individuals engaging in these lifestyles, including casual sex initiated through communication online, are alienated from

114. *Am. Booksellers Ass'n v. Hudnut*, 771 F.2d 323, 329 (7th Cir. 1985).

115. See Buckmaster, *supra* note 21 ("As reported in Wired, [C]raigslist personals are the most used personals site in the US, **dwarfing the total combined usage of match.com and eharmony.com and yahoo personals**. CL personals are highly valued by [C]raigslist users (and by the general public) who use them to find friendship, love, romance, companionship, entertainment, and yes, 'casual encounters.'").

116. Harcourt, *supra* note 9, at 111, 144.

117. Buckmaster, *supra* note 21.

the political mainstream as quasi-insular minorities, and thus do not have equal access to the political process.¹¹⁸

C. THE SAVE ACT AND LEGAL MORALISM

Alternatively, the SAVE Act could be justified under the ideology put forth by legal moralists like Lord James Fitzjames Stephen. According to Lord Stephen, “there are acts of wickedness so gross and outrageous that, self-protection apart, they must be prevented as far as possible at any cost to the offender, and punished, if they occur, with exemplary severity.”¹¹⁹ That is, a select handful of acts are so reprehensible that any imposition of control or power, no matter how drastic, may be exerted in order to prevent those acts. On first consideration here, one might agree with Lord Stephen’s draconian approach as applied to conduct as wicked and unforgiveable as sex trafficking. Indeed, the position of many legislators that even one child trafficked for sex is sufficient to justify legislation like the SAVE Act seems to align with this theory.¹²⁰ Perhaps, prevention of sex trafficking of children (concededly, “so gross and outrageous”) requires the sacrifice of traditional notions of respect for individual liberty (“prevented . . . at any cost to the offender”) that would generally be protected by the harm principle.¹²¹

However, the application of the ideology becomes more controversial when tasked with identifying who the “offender” is in this context. The “offender” in the formal consideration of both the SAVE Act and Lord Stephen’s argument is someone genuinely and definitively culpable of a “gross and outrageous” crime. Thus, if the realistic effect of the SAVE Act would limit the punishment of “exemplary severity” to those genuinely wicked actors (those actually abusing, exploiting, and trafficking individuals for sex), it would likely be justified under Lord Stephen’s construction. On the other hand, the harsh infliction of punishment upon an entity like an Internet content host not acting with such grossly wicked intent, combined with the likelihood that such punishment would not even prevent the gross harm, does not seem to be the outcome Lord Stephen contemplates. Thus, even Lord Stephen might take issue with the SAVE Act’s expansive license to prosecutors to impose harsh punishments like minimum sentences or steep fines upon an actor like Backpage.com who is not necessarily directly committing the “gross and outrageous” crime.¹²² Therefore, *even* under a legal

118. See *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938).

119. Harcourt, *supra* note 9 (citing JAMES FITZJAMES STEPHEN, *LIBERTY, EQUALITY, FRATERNITY*, (R.J. White ed., Cambridge Univ. Press 1967) (1873)).

120. See, e.g., Mark Kirk, *National Association of Attorneys General (NAAG) Speech on Backpage.com* (Mar. 7, 2012), <http://www.kirk.senate.gov/?p=blog&id=434>.

121. Harcourt, *supra* note 9, at 123.

122. *Id.*

moralism analysis, there is still basis to challenge the justification of the SAVE Act.

Because it plainly fails to solve or even directly confront the harm of sex trafficking, the SAVE Act fails to withstand scrutiny under all of the above discussed constructions of the harm principle. Where Part III above has demonstrated why the SAVE Act does not find justification under the harm principle because it does not provide a solution to sex trafficking, Part IV explores the genuine motivation behind the Act, and why it too is an unjustified basis for this extreme legislation.

IV. THE SAVE ACT AND MORAL PANIC

Erich Goode and Nachman Ben-Yehuda's essay *Moral Panics: Culture, Politics, and Social Construction* provides a basic and historical pattern of moral panics from which to examine the perceived concern of the sex trafficker in online classifieds. The essay puts forth:

[Moral panics] represent explosions of fear and concern at a particular time and place about a specific perceived threat. In each case, a specific agent was widely felt to be responsible for the threat; in each case, a sober assessment of the evidence concerning the nature of the supposed threat forced the observer to the conclusion that the fear and concern were, in all likelihood, exaggerated and misplaced.¹²³

Specifically, interest group driven moral panics occur when “[r]ule creators and moral entrepreneurs launch moral crusades . . . to make sure that certain rules take hold and are enforced.”¹²⁴ Successful interest group driven moral panics are also often “cultural constructions assembled by cultural entrepreneurs who . . . draw on cultural resources to convey compelling, narratives, tell riveting stories, and present engaging melodramas.”¹²⁵ Three typical elements present in interest group driven moral panics are concern, hostility, and disproportionality.¹²⁶ In the following Subparts, this Note will establish the presence of each of these elements in the context of online sex trafficking to determine that the SAVE Act was not legislation aptly situated to confront the harm of sex trafficking. Rather, analysis of these elements as applied to online sex trafficking will demonstrate that the SAVE Act was precisely the “exaggerated and misplaced” type of threat contemplated by Goode and Ben-Yehuda¹²⁷—that is, interest group driven moral panic.

123. Erich Goode & Nachman Ben-Yehuda, *Moral Panics: Culture, Politics, and Social Construction*, 1994 ANN. REV. OF SOC. 149, 150.

124. Krinsky, *supra* note 17, at 8.

125. Burns & Crawford, *supra* note 18, at 156.

126. Krinsky, *supra* note 17, at 7.

127. See Goode & Ben-Yehuda, *supra* note 123, at 156–58.

A. CONCERN FUELED BY POLITICIANS, ACTIVIST GROUPS, AND MEDIA

The first element of a moral panic is concern. Specifically, there must be a “heightened level of concern over the behavior (or supposed behavior) of a certain group . . . and the consequences that that behavior presumably causes for the rest of the society.”¹²⁸ The existence of this concern is “manifested . . . through, for example, public opinion polls, media attention, proposed legislation, action groups, or social movement activity.”¹²⁹ Here, the SAVE Act can be interpreted as a response to a moral panic fueled by agenda-driven politicians and attorney generals; conservative and religious interest groups like the CATW¹³⁰ and National Association for Evangelicals; and media actors, including sensationalist news reports and television entertainment programs like *How to Catch a Predator*.¹³¹

First, attorneys general from a collection of states have been key actors in the promotion of the notion of sex trafficking within online classified sites as an acute threat to the public in the ongoing assault upon Craigslist, Backpage.com, and online classified sites, generally. While Connecticut Attorney General Richard Blumenthal initially collaborated with Craigslist and nonprofits like NCMEC to implement protective measures and practices to increase the website’s safety in 2008, he then spearheaded a media and political campaign against the website just six months later.¹³² In press conferences and interviews that coincided with his campaign for senator, Blumenthal’s attacks were characterized by phrases like, “[o]ur message to Craigslist is to put people above profit,” and he voraciously pledged his mission to force the closure of Craigslist’s adult services section for the purpose of eliminating ads that promote prostitution and child trafficking.¹³³ From 2009 to 2010, other politicians similarly leveraged this ‘anti-sex trafficking of children’ message to bolster their political campaigns, resulting in Craigslist’s

128. *Id.* at 156–57.

129. *Id.* at 157.

130. COALITION AGAINST TRAFFICKING IN WOMEN, <http://www.catwinternational.org> (last visited Feb. 8, 2016); The Alonya Show, *Craigslist CENSORS Adult Services*, YouTube (Sept. 7, 2010), <https://www.youtube.com/watch?v=22WZwktCjyg#t=68> (“We at the Coalition Against Trafficking Women see prostitution as the world’s oldest oppression, and we see it as being at odds with any goal of achieving equality rights for women and girls.”).

131. See *Ending Online Pimping and Sex Trafficking: A Case Against Backpage.com*, COALITION AGAINST TRAFFICKING IN WOMEN (Sept. 23, 2014), <http://www.catwinternational.org/Home/Article/575-ending-online-pimping-and-sex-trafficking-a-case-against-backpagecom>; see also Alice E. Marwick, *To Catch a Predator? The MySpace Moral Panic*, FIRST MONDAY (June 2, 2008), <http://journals.uic.edu/ojs/index.php/fm/article/view/2152/1966>.

132. Press Release, Craigslist, Att’y Gen. and Nat’l Ctr. for Missing & Exploited Children, Joint Statement (2008) (on file with author).

133. *Connecticut AG Blumenthal, Anti-Child Trafficking Groups Want Craigslist to Remove Adult Services*, FOX NEWS (Sept. 7, 2010), <http://www.foxnews.com/us/2010/09/07/conn-ag-blumenthal-anti-child-trafficking-groups-want-craigslist-remove-adult/>; see also The Alonya Show, *supra* note 130.

ultimate decision to place a black ‘Censored’ bar over its adult services section in September 2010.¹³⁴

In 2014, politicians again leveraged the anti-sex trafficking of minors message to drive political campaigns and target Backpage.com for its role in “perpetuat[ing] child sex slavery.”¹³⁵ SAVE Act author Congresswoman Wagner explains on her political homepage that “[t]hrough the scourge of human trafficking, children in our own neighborhoods and communities are sold into forced prostitution every single day” because “[s]exual predators can browse advertisements and have child prostitutes sent to their hotel rooms as easily as if they were ordering a pizza.”¹³⁶ When pressed for reliable data to substantiate the scope of the true harm behind these sensationalized statements, Congresswoman Wagner and other politicians and activists respond with broad estimates of trafficking or prostitution rates generally, but emphasize that even “one child trafficked for sex” is so unacceptable and depraved that the “problem is not overstated.”¹³⁷ While few would argue that the sexual abuse of even one child is ever acceptable or justified, legislation should not be passed on the basis of sensationalist statements and appeals to emotion. Passing legislation without consideration of the realistic magnitude or scale of a harm’s authentic threat to society does not honestly contemplate whether the resulting limitations on the liberty of those encompassed in the law are justified in proportion to the resulting benefits to society as a whole. Here, it seems as though the requisite for concrete evidence to substantiate the need for imposing criminal liability upon individuals has been glossed and diluted as a result of this political dialogue compounded with that put forth by activists and media.

Examination of the role, message, and interests of activists groups voicing support for the SAVE Act provide a further background of the snowballing concern surrounding sex trafficking. Key activists here include conservative feminists and conservative Christian groups that are ideologically polarized yet have historically aligned in moral panics grounded in sexual moralism.¹³⁸ These groups include, but are not limited

134. *Connecticut AG Blumenthal*, *supra* note 133.

135. Pete Kasperowicz, *GOP Looks to Shut down Sex Ads on Backpage.com*, HILL (Mar. 14, 2014, 8:59 AM), <http://thehill.com/blogs/floor-action/government-oversight/200809-gop-bill-looks-to-shut-down-sex-services-on>.

136. Wagner, *supra* note 50.

137. Kirk, *supra* note 120.

138. This unlikely union of ideologically discordant groups to influence commonly held objectives is a phenomenon typical of moral panics. See DANIEL OKRENT, *LAST CALL: THE RISE AND FALL OF PROHIBITION* 41–42 (2010) (“In fact, the various factions of the growing anti-alcohol alliance could be encompassed by no imaginable organization: Billy Sunday, meet Jane Addams: you may never realize it, but you’ll be working together now. Industrial Workers of the World, shake hands with the Ku Klux Klan: you’re on the same team. . . . In the two decades leading up to Prohibition’s enactment, five distinct, if occasionally overlapping, components made up this unspoken coalition: racists, progressives, suffragists, populists (whose ranks also included a small socialist auxiliary), and nativists.”).

to, the International Justice Mission; CATW; the National Association of Evangelicals; FAIR Girls; and Catholics for Choice. In a 2014 amicus brief submitted jointly by four activist groups¹³⁹ for a case in the Washington Supreme Court, these interest groups stated that sex trafficking is “soaring” due to the growing “anonymous marketplace for traffickers and buyers to trade in illegal sex” on websites like Backpage.com.¹⁴⁰ They noted that “[t]rafficking for the purpose of commercial sexual exploitation is a grisly reality for millions of girls worldwide and for hundreds of thousands of girls in the [United States].”¹⁴¹ Thus, these groups conclude, Backpage.com is a “facilitator of the ‘most hideous, and possibly least acknowledged, human rights violation of our time.’”¹⁴² Inter-activist group collaboration, participation in law suits, and issuance of formal statements all establish the presence of heightened concern among these groups, as well as with the society as a whole.

As the message surrounding the online sexual predator emerged and grew among these activist groups, the stories were readily reproduced and sensationalized by media. News programs, papers, and reports capitalized off of eye-grabbing phrases and headlines involving the sale of children and exploited women as sex slaves. The introduction and increased popularity of entertainment programs like *Dateline’s To Catch a Predator* perpetuated the perception of the online sex predator’s presence and threat to society. In addition to driving sales and ratings, the use of messaging about the online sale of children as sex slaves in the news continued to fuel the perception that online sex trafficking posed an acute threat to society. Acting in a continuous and cyclical triangle, these groups of political, social, and media actors perpetuated the perceived threat of harm posed by sex trafficking in online forums.¹⁴³ Furthermore, such fervent expression of discontent and relentless demand for action in response to the harm of sex trafficking online certainly satisfies the heightened level of the societal concern element of a moral panic.

139. These groups included the National Crime Victim Law Institute, Shared Hope International, Covenant House, and Human Rights Project for Girls.

140. Brief of Amici Curiae, *supra* note 69, at 4–5.

141. *Id.* at 5.

142. *Id.* at 4.

143. *E.g.*, Burns & Crawford, *supra* note 18, at 161–62 (“While such a cycle involving the media, government, and public is not necessarily harmful to addressing problematic social issues, concern arises when the foundation of their involvement and concern is predicated upon high-profile, select events which are then incorrectly generalized to suggest a much larger problem.”).

B. THE ONLINE EXCHANGE OF CASUAL SEX DICHOTOMIZED AS EVIL

The next typical element of a moral panic is hostility.¹⁴⁴ A moral panic's element of hostility requires that "[m]embers [of a group] are collectively designated as the enemy of respectable, law-abiding society."¹⁴⁵ There is a systematic "dichotomization of 'them' and 'us'" that inevitably becomes characterized as "the morality play of evil versus good."¹⁴⁶ Further, this dichotomization often occurs easily as the demonized groups are generally "already marginalized and don't have the resources not the credibility to counter this stigmatization."¹⁴⁷ In the 1990s, a grass-roots moral panic arose in response to the rise of Internet and social media use among young people.¹⁴⁸ As contemporary notions of privacy modified and use of social media sites became more acceptable and familiar, women's rights activist groups and states' attorney generals shifted criticism and blame to messaging related to commercial and casual sex online, including Craigslist and Backpage.com. The ability to see online expression and communications involving casual, unconventional, or extreme sexual encounters triggered alarm among those unfamiliar with or opposed to such behavior. Specifically, individuals who maintained conservative lifestyles could readily view ads posted by eighteen and nineteen-year-olds in minimal clothing and sexualized contexts, as well as communications seeking kink, sadism, and fetishes and ads seeking slaves or to be dominated. The reaction that these were children and victims of some sort of abuse transpired more naturally than contemplating that someone would be seeking such exchange by choice. Posts depicting individuals who might have been of legal, consenting age, but were still of an age younger than the mainstream was comfortable with being depicted publicly online in a sexualized way incited adverse reactions. Such adverse reactions and generally negative characterization by the mainstream of this type of behavior and communication ultimately led to it being inextricably linked to abuse and coercion. This effectively dichotomized online exchanges for sex—and the businesses that enabled them—as evil, and the rest of mainstream society as good, and thus in need of protection in the form of regulation.

144. Goode & Ben-Yehuda, *supra* note 123, at 158.

145. *Id.* at 157.

146. *Id.*

147. Burns & Crawford, *supra* note 18, at 149.

148. See Marwick, *supra* note 131.

C. DISPROPORTIONATE LEVEL OF CONCERN

Another key component to a moral panic is disproportionality.¹⁴⁹ Specifically, in a moral panic, “the concern is out of proportion to . . . [what] sober empirical evaluation could support,” and while “disseminating numbers is important, [moral panic claims are] mostly exaggerated.”¹⁵⁰ Again, this element of moral panic is present in the context of the SAVE Act and sex trafficking online. Specifically, there is an acute and increasingly publicized concern surrounding sex trafficking via online classified sites, despite the lack of accurate and specific evidence to inform the scope or nature of the actual harm.¹⁵¹ While much of this lack of data can be attributed to the illicit and clandestine nature of the industry, it is also in large part due to imprecise and ambiguous definitions of “sex trafficking.” Often, messaging and figures relied upon to further sex trafficking agendas and policy are not tightly cabined to that attributed to sex trafficking, rather they are conflated with figures attributed to other industries, like prostitution and pornography.¹⁵² In this realm of reporting, “the numbers are often highly suspect but nevertheless popularized and rarely critically scrutinized, and . . . there are strong incentives [by, for example, governments, activists, and media interests] to accept and reproduce rather than challenge and critique them.”¹⁵³ As a result of this careless treatment of data, the perception of the harm is disproportionate to the harm that is actually present, and the policy implemented might be an inappropriate response to the actual harm posed.

In his essay *Sex Trafficking and the Sex Industry: The Need for Evidence-Based Theory and Legislation*, Professor Ronald Weitzer notes that “fus[ing] prostitution with sex trafficking” can serve as evidence to support that “the ultimate goal is not the elimination of trafficking but rather the elimination of prostitution.”¹⁵⁴ By “fusing” prostitution with legal and consenting casual encounters, and/or fusing prostitution and casual sex with sex trafficking, the legislation “misuse[s] [the] cause [of] human trafficking as a pretense for imposing one’s own flavor of religious morality (‘casual sex is evil’).”¹⁵⁵ Further, presenting the revenue value generated from online advertisements for erotic services generally as demonstrative of the need to combat sex trafficking misleadingly connects

149. Goode & Ben-Yehuda, *supra* note 123, at 158.

150. *Id.*

151. See Weitzer, *supra* note 14, at 6.

152. See generally PETER ANDREAS, SEX DRUGS, AND BODY COUNTS: THE POLITICS OF NUMBERS IN GLOBAL CRIME AND CONFLICT 33 (Peter Andreas & Kelly M. Greenhill eds., 2010) (discussing the political influence in data reporting of illicit transnational activities).

153. *Id.* at 33.

154. 101 J. CRIM. L. & CRIMINOLOGY 1337, 1344 (2011).

155. Buckmaster, *supra* note 21.

the industries. For example, the AIM Group, a private interactive media consulting company, estimated that Backpage.com generated \$31.4 million in 2012 from “online prostitution advertising.”¹⁵⁶ While the distinction that this amount was attributed to fees paid for the placement of ads in sections like “female escorts” and “body rubs” may have been clear in the original report, these values get reproduced, inflated, and applied without proper contexts leading to deceptive perceptions of the actual harm.

The legislative history of the SAVE Act provides an illustration of this value inflation. To justify the need to criminalize the advertising of commercial sex with minors, proponents of the SAVE Act presented jarring data and statistics that are not only conflated with other industries, as discussed above, but also lack firm supporting evidence, are estimates, and are conclusory. For example, the SAVE Act’s legislative history provides the following premises as justification for the Act:

[T]he Polaris Project . . . has identified online advertisements as the primary platform for buying and selling sex with minors, an FBI study found more than 2800 minor victims were advertised on just one online advertisement service in 2008, and it is estimated that revenue from online advertisements of prostitution generally (not just involving minors) surpassed \$45 million [in 2013].¹⁵⁷

Similarly, on her political homepage, Congresswoman Wagner provides bullet points of sweeping and drastic figures about human trafficking generally to substantiate the need for the SAVE Act, and to support the contention that online sex trafficking of children is an acute and surging threat to society.¹⁵⁸ Her page provides:

- Human trafficking generates \$9.5 billion yearly in the United States. (United Nations)
- Approximately 300,000 children are at risk of being prostituted in the United States. (U.S. Department of Justice)
- The average age of entry in to prostitution for a child . . . in the United States is 13–14 years old. (U.S. Department of Justice)
- A pimp can make \$150,000–\$200,000 per child each year and the average pimp has 4 to 6 girls. (U.S. Department of Justice, National Center for Missing and Exploited Children)¹⁵⁹

These figures about human trafficking are neither concretely substantiated with reliable data nor do they directly indicate a connection to the criminalization of advertising. Importantly, these figures do not show how criminalizing websites like Backpage.com will prevent the

156. Mark Whittaker, *Backpage Raises Rates Again, Escort-Ad Revenue Jumps 55 Percent*, AIMGROUP.COM (Apr. 1, 2013), <http://aimgroup.com/2013/04/01/backpage-raises-rates-again-escort-ad-revenue-jumps-55-percent/>.

157. H.R. REP. NO. 113-451, at 3 (2014).

158. Wagner, *supra* note 50.

159. *Id.*

harm from occurring or confront the systemic issues at the core of sex trafficking. Causally connecting drastic figures representing trafficking generally to figures attributed to online advertisement is inaccurate and thus, misleading and agenda driven, and contributes to the exaggeration of the actual harm that could be supported by a sober consideration of reliable empirical data. Part V proposes that rather than implement an overly broad and harsh regulation that does not effectively confront the harm of sex trafficking, the actors here should leverage their numbers, the sophistication of technology, and the potential for innovation in online forums to unite against the actors perpetuating the actual harm of sex trafficking.

V. PROPOSAL: CROWD-SOURCING TO COMBAT THE ACTUAL HARM

Through the CDA, Congress made clear—and courts have so upheld—that there is immeasurable value in preserving a “free and open Internet.”¹⁶⁰ And indeed, that resulting grant of immunity to Internet content hosts has been validated by the Internet’s short yet powerful history enabling innovations that improve our quality of life and change how we communicate. Indeed, the free and accessible marketplaces for goods, services, and ideas that exist on sites like Backpage.com represent, for the most part, ideal examples of how the world stands to benefit from a free and open Internet. Since preserving the Internet as a largely unregulated forum seems to be widely accepted as valuable, the appropriate solution here requires identifying how to enable Internet content hosts to be better regulators of their own sites and better allies to officials.

Internet content hosts, like Craigslist and Backpage.com, have noted that devising flawless schemes to filter out abusive content from third-party users is not only incredibly challenging under current conditions, but that it might be impossible.¹⁶¹ Thus, rather than subjecting socially valuable companies to objectively infeasible regulatory requirements and criminal liability, or condemning them to shut down entirely, the solution requires a direct examination of where and how the monitoring falls short and what resources are available to confront those shortcomings.

160. Bob McGovern, *Judge: Sex-Trafficking Victims Can't Sue Ad-Hosting Website Backpage.com*, BOS. HERALD (May 19, 2015), http://www.bostonherald.com/news_opinion/local_coverage/2015/05/judge_sex_trafficking_victims_can_t_sue_ad_hosting_website.

161. Elizabeth Nolan Brown, *Backpage.com Lawsuit: Sex Trafficking Doesn't Trump Internet Freedom, Says Federal Judge*, REASON.COM (May 20, 2015, 2:30 PM), <http://reason.com/blog/2015/05/20/backpage-wins-sex-trafficking-lawsuit> (“Keep in mind that Backpage.com services more than 600 cities, runs hundreds of thousands of ads per day, and does not pre-screen user ads. Yet lawmakers at the municipal, state, and federal level argue that because some small percentage of ads may be posted by criminals, the whole site should be shut down, or, at the very least, held criminally responsible for any illegal transactions it unwittingly facilitates.”).

As explained in Part I, Craigslist, Backpage.com, and other Internet content hosts took affirmative actions in collaboration with actors like NCMEC and attorney generals in order to increase the care with which their online spaces were monitored, resulting in a decrease in abuses and an increase in cooperation to report violators to regulatory agencies. Yet instances of abuse still slipped through these safeguards, posted online, and perpetuated the harm of sex trafficking.¹⁶² Specifically, criminals continued to propagate their harm by (1) hiding within the volume of users and postings; (2) relying on the lack of a scientific method to review for abuse; and (3) benefiting off companies' limitation of capital, human, and technological resources to even attempt to adequately monitor. Rather than increased criminalization of actors who are not directly culpable of furthering the harm, this Note proposes to harness the strengths of the actors and resources involved to collectively devise solutions that directly confront the above shortcomings.

This Note proposes to capitalize on the potential for innovation, unification, and collaboration presented by the Internet to crowd-source solutions to the above listed problems. Crowd-sourcing is "the act of getting ideas, information, or funding from a group of people," and can be easily and effectively used for "idea generation and innovation."¹⁶³ Crowd-sourcing has been implemented by some of today's most sophisticated companies and organizations¹⁶⁴ to solve incredibly complex problems.¹⁶⁵ In some applications, the principle relies on the genius, discussion, and collaboration of a collection of specialists to come to an innovative solution to a complicated problem. This acknowledges that solutions to the most complicated issues often require a deconstructed approach, dissecting the massive overlying issue (here, the abuse of online forums for sex trafficking) into components that can be more directly, more efficiently, and more effectively addressed by individuals who are experts in those specific areas. In other applications, crowd-sourcing will run as a competition in which various experts vie for an opportunity to implement their idea or technology.¹⁶⁶ And related,

162. See *supra* Part I.

163. Emily Weisberg, *How Crowdsourcing Can Help Your Small Business*, THRIVEHIVE (Sept. 25, 2014, 9:02 AM), <http://thrivehive.com/how-crowdsourcing-can-help-your-small-business>.

164. For example, NASA and Harvard University created NASA Tournament Lab that hosts competitions to "create the most innovative, most efficient, and most optimized solutions for specific, real-world challenges being faced by NASA researchers." *NASA Tournament Lab Overview*, NASA, <http://www.nasa.gov/ntl/#.VelGo-nVITF> (last visited Feb. 8, 2016); see also CTR. OF EXCELLENCE FOR COLLABORATIVE INNOVATION, NASA, CHALLENGE PLATFORM: NTL, <http://www.nasa.gov/sites/default/files/files/ntl-overview-sheet.pdf>.

165. See Kevin J. Boudreau & Karim R. Lakhani, *Using the Crowd as an Innovation Partner*, HARV. BUS. REV. (Apr. 2013), <https://hbr.org/2013/04/using-the-crowd-as-an-innovation-partner/>; see also IDEA CONNECTION, <http://www.ideaconnection.com> (last visited Feb. 8, 2016); INNOCENTIVE, <http://www.innocentive.com> (last visited Feb. 8, 2016).

166. *Supra* note 164.

crowd-funding is a centralized way of gathering money from mass sources of contributors.¹⁶⁷

Improving methods of review and increasing the amount of capital available to contribute to preventing the harm of sex trafficking could be adequately confronted using crowd-sourcing and crowd-funding. First of all, using crowd-sourcing as a solution to the problem has the potential to identify an undiscovered solution to improve screening and monitoring of adult content because of the unlimited scope of talent and innovation that the initiative could reach. Even though sophisticated Internet content hosts like Google, Craigslist, and Backpage.com employ some of the most intelligent and experienced individuals in these professional spheres, they are admittedly unable to improve due to the complexity and diffused nature of the problem, and the limitations on resources they can viably dedicate toward a resolution. Much like other incredibly advanced and sophisticated companies have done to solve seemingly impossible problems, regulators should open the issue to the savvy tech world to submit proposals for improvement or resolutions. And, similarly to the ambitious diagnosticians of CrowdMed and scientists of NASA Tournament Lab, the importance and the passion driving the need for a solution here creates an “intrinsic motivation” to drive innovative and thoughtful submissions.¹⁶⁸ Crowd-funding the effort to confront sex trafficking by making the Internet safer enables those who lack technical expertise but are passionate about the cause to materially support the fight. Further, the campaign to diminish the sex trafficking of minors on the Internet also contains the emotional appeal and universal support of highly successful crowd-funding campaigns.¹⁶⁹ The acquired funding can pay for the research and development of more sophisticated systems to monitor for abuse, including increased staffing of the sites or of regulatory actors, as well as the potential investments required by the technical contributors to the crowd-sourcing aspect of the solution.

167. Weisberg, *supra* note 163.

168. Boudreau & Lakhani, *supra* note 165 (“In addition to benefits of scale and diversity, crowds offer incentives that companies find difficult to match. Companies operate on traditional incentives—namely, salary and bonuses—and employees are assigned clearly delineated roles and specific responsibilities, which discourages them from seeking challenges outside their purview. But crowds, research shows, are energized by intrinsic motivations—such as the desire to learn—that are more likely to come into play when people decide for themselves what problems to attack.”); *see also The Crowd Will See You Now*, *ECONOMIST*, May 23, 2015, at 68 (“Besides the cash, successful volunteers also get the kudos of rising in the website’s ranking system . . .”).

169. Kai Tao, *5 Proven Ways to Attract More Contributions to Your Crowdfunding Campaign*, *ENTREPRENEUR* (Sept. 2, 2015), <http://www.entrepreneur.com/article/250170> (“You are providing your potential contributors with an opportunity to participate in a unique journey that will result in the success of a project important to both of you.”).

CONCLUSION

When statutory action has long affirmed protections of speech and expression on a largely unregulated environment like the Internet, it should not be assumed that such measures were only intended to protect a viewpoint that is morally endorsed by the majority or mainstream. The SAVE Act's potential to broadly and improperly impose criminal liability, chill speech, incur additional costs, and impose harsh mandatory minimum sentencing presented substantial concerns sufficient to require heightened inquiry into the SAVE Act's justification. While analysis of the SAVE Act under the traditional construction of the harm principle did not yield justification, there would have been more room to argue its merit under either a contemporary interpretation or a basis grounded in legal moralism. The purpose of preventing sex trafficking might contemplate a genuine and evil harm; but there is a compelling argument that the exaggerated level of concern, the level of hostility, and the disproportionality at which this harm is perceived is a product of interest group moral panic. In totality, the significant potential harms created by the SAVE Act, its struggle to find justification even under ambiguous or moral-based harm arguments, and the likelihood that moral panic played a substantial role in its progress strongly support judicious scrutiny or rejection of its enactment.

A crowd-sourced approach to the problem not only avoids the consequences presented by the SAVE Act discussed in Part II, but also is more likely to devise a solution that will actually prevent harm from occurring. This approach would follow the footsteps of organizations like NASA to unite experts driven by a pride for their work, a passion for the cause, and promised financial compensation. Similarly, the scheme would harness the vast public interest in preventing this harm to crowd-fund the resources necessary to incentivize such research and implement additional safeguards. For holding Internet content hosts like Craigslist and Backpage.com liable for proper monitoring for fraudulent postings and preventing harms like sex trafficking from occurring on their forums is only justified once it is possible to do so.