

NOTES

TOO FAR AND NOT FAR ENOUGH: UNDERSTANDING THE IMPACT OF FOSTA

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In early 2018, President Trump signed the Allow States and Victims to Fight Online Sex Trafficking Act (FOSTA) into law. It was enacted mainly in response to failed civil suits against Backpage.com, a website accused of allowing, and even helping, users to post ads of sex trafficking victims. Plaintiffs, minors with ads for them posted on the website, were almost universally blocked by Section 230 of the Communications Decency Act (CDA), which granted Backpage immunity for what its users post. FOSTA removes that immunity, as well as amends and adds federal offenses. The law has faced much criticism for going too far, but no one has yet asked if it goes far enough. In other words, would Backpage now lose the suits that could not have been filed before FOSTA? To evaluate the law's impact, this Note reconsiders the infamous Doe v. Backpage case in light of FOSTA. After analyzing the law through analogous statutes and case law, this Note concludes the law is at most ambiguous as to its legal effect. Thus, not only is the law creating negative side effects for speech online and creating danger for sex workers, it may not even be achieving its legal objective. This Note looks at the widespread reaction to FOSTA, the self-regulation of many websites in response, and explores reasons for that reaction, including the law's expressive effect.

INTRODUCTION	1624
I. BACKGROUND AND FOSTA'S PASSAGE	1626
A. <i>Backpage and Litigation Attempts Prior to FOSTA</i> .	1626
B. <i>Public Pressure Sparking Political Response</i>	1630
C. <i>FOSTA's Passage</i>	1631
1. <i>The Legal Landscape Before FOSTA</i>	1631
2. <i>FOSTA and Its Evolution</i>	1633
a. Section 230	1634
b. Newly Created Offense	1634
c. "Participation in a Venture" Definition	1635
3. <i>The Final Law</i>	1636
4. <i>Reaction to FOSTA</i>	1637

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II. ANALYZING FOSTA'S LEGAL EFFECT VIA <i>DOE V. BACKPAGE</i>	1637
A. <i>Analyzing the Ambiguities in FOSTA</i>	1638
1. <i>New "Participation in a Venture" Definition</i>	1638
2. <i>Newly Created Offense for Online Service Providers</i>	1641
B. <i>Applying the Law to the Conduct Alleged in Doe v. Backpage</i>	1643
1. <i>New "Participation in a Venture" Definition</i>	1644
2. <i>Newly Created Offense for Online Service Providers</i>	1645
C. <i>Outcome</i>	1646
III. ACCOUNTING FOR FOSTA'S CHILLING EFFECT AND EVALUATING ITS SUCCESS	1647
A. <i>The Reaction to FOSTA</i>	1647
B. <i>Accounting for the Disproportionate Reaction</i>	1649
C. <i>Evaluating FOSTA's "Success"</i>	1651
CONCLUSION	1653

INTRODUCTION

Users who visit Backpage.com today will be met with an error message noting that the website cannot be reached.¹ Prior to its seizure, the once-popular classified ads website was notorious as a place for sex traffickers to post advertisements for sex with minors. In response to mounting public and political outrage aimed at Backpage, President Trump signed the Allow States and Victims to Fight Online Sex Trafficking Act (FOSTA) into law in April of 2018, removing a shield of immunity previously granted to website owners under Section 230 of the Communications Decency Act (CDA).² FOSTA has been widely criticized for casting too wide a net of liability and making consensual sex work more dangerous, but this is the first Note to analyze what its legal impact will be.³

¹ BACKPAGE, <https://backpage.com> (last visited Aug. 18, 2019); see also Sarah N. Lynch & Lisa Lambert, *Sex Ads Website Backpage Shut Down by U.S. Authorities*, REUTERS: U.S. LEGAL NEWS (Apr. 6, 2018, 3:55 PM), <https://www.reuters.com/article/us-usa-backpage-justice/sex-ads-website-backpage-shut-down-by-u-s-authorities-idUSKCN1HD2QP> (showing that after an April 2018 law enforcement operation, Backpage's homepage read "backpage.com and affiliated websites have been seized . . . by the Federal Bureau of Investigation").

² Allow States and Victims to Fight Online Sex Trafficking Act of 2017, Pub. L. No. 115-164, § 4, 132 Stat. 1253, 1254 (amending the Communications Act of 1934, 47 U.S.C. § 230(e) (2018)).

³ See Nash Jenkins, *A New Bill Aims to Fight Sex Trafficking. But Critics Say It Goes Too Far*, TIME (Mar. 27, 2018), <https://time.com/5217280/sex-trafficking-fosta-craigstlist->

While the law was intended to address the important and devastating issue of minors being trafficked online, many criticize the law for creating unintended harmful consequences. Critics focus on two main concerns: that FOSTA will restrict free speech on the internet and that it will harm sex workers. They point to the law's "sweeping language" and raise concerns that the threat of liability will chill speech online.⁴

Additionally, they argue that because the law threatens online platforms utilized by consensual sex workers, these workers will be forced to use less safe methods of finding and communicating with potential clients. In short, workers who would have otherwise benefitted from the security and vetting methods of the internet may be forced to work on the street.⁵ While both criticisms are important, much has already been written on them.⁶ This Note instead focuses on a different critique of the law: FOSTA is not achieving its objective from a legal perspective, in that the language of the law does not unambiguously proscribe the conduct that it intended to. However, as discussed below, this does not necessarily mean the law has been unsuccessful, and this Note will propose other metrics by which to determine success.

This Note proceeds in three parts. Part I provides the relevant background on FOSTA, including the public and political pressure that led to its passage and the law's evolution as it passed through Congress. The second part considers the infamous *Jane Doe No. 1 v. Backpage*⁷ case and analyzes it in light of FOSTA. In doing so, this Note highlights and attempts to resolve the many ambiguities in the law. Part II concludes by positing that the law does not achieve its intended legal effect. Thus, in addition to the criticism that FOSTA

reddit (discussing and identifying the dangers that FOSTA could create for sex workers); Aja Romano, *A New Law Intended to Curb Sex Trafficking Threatens the Future of the Internet as We Know It*, VOX (July 2, 2018, 1:08 PM), <https://www.vox.com/culture/2018/4/13/17172762/fosta-sesta-backpage-230-internet-freedom> (arguing that FOSTA could have harmful effects on free speech online).

⁴ See, e.g., Romano, *supra* note 3 ("What FOSTA-SESTA has actually done, however, is create confusion and immediate repercussions among a range of internet sites as they grapple with the ruling's sweeping language.").

⁵ See Jenkins, *supra* note 3 ("Allowing sex workers to advertise their services online kept them off the streets, and also gave them the opportunity to better screen potential clientele.").

⁶ See, e.g., Ashley Gold, *Tech Groups: Not So Fast on FOSTA-SESTA*, POLITICO (Feb. 23, 2018, 10:00 AM), <https://www.politico.com/newsletters/morning-tech/2018/02/23/tech-groups-not-so-fast-on-fosta-sesta-113560>; Tina Horn, *How a New Senate Bill Will Screw Over Sex Workers*, ROLLING STONE (Mar. 23, 2018, 9:33 PM), <https://www.rollingstone.com/politics/politics-features/how-a-new-senate-bill-will-screw-over-sex-workers-205311>.

⁷ 817 F.3d 12 (1st Cir. 2016).

goes too far, the law may not go far enough in terms of its enforcement objectives. Part III discusses the considerable reaction to FOSTA, including websites that have self-regulated by shutting down entirely or changing their terms to be more restrictive. Given that Part II concludes that the law has ambiguous legal effect, the Note then tries to account for the disproportionate reaction to FOSTA, ultimately settling on the possibility that website operators are reacting to the rhetoric surrounding the law rather than the legal liability the law creates. Finally, considering the expressive effect of the law, this Note turns to the question of whether FOSTA was “successful.” It discusses a few different measures of success: whether the law would have affected pre-FOSTA cases, whether the law was successful as an expression of moral condemnation, and whether the law was successful in curbing sex trafficking.

I

BACKGROUND AND FOSTA’S PASSAGE

This Part provides background on FOSTA. It first describes the events that prompted FOSTA’s passage. Section I.A discusses the Backpage scandal and focuses on *Doe v. Backpage*, in which victims of online sex trafficking were unable to hold Backpage liable. As it was one of the primary factors prompting the drafting and passage of FOSTA, the case is important as both an impetus to the law, and as a way to understand FOSTA’s legal impact. Section I.B then discusses the public and political pressure to pass FOSTA. Section I.C examines how FOSTA functions by explaining how it changed the pre-FOSTA legal scheme and how it evolved as it passed through Congress.

A. *Backpage and Litigation Attempts Prior to FOSTA*

The Backpage scandal, in which minors being trafficked through ads on the website were unable to hold Backpage legally liable because of Section 230 of the CDA, provoked a public outcry that eventually led to the passage of FOSTA. It is important to understand the events that prompted FOSTA’s passage, as one way to evaluate FOSTA’s success is to analyze whether it removes the legal obstacles that prevented the plaintiffs in *Doe v. Backpage* from prevailing.

Backpage, a user-based advertising website similar to Craigslist, was shut down by federal agents in early 2018.⁸ Before the website was seized, it made eighty percent of the total online commercial sex

⁸ See Lynch & Lambert, *supra* note 1 (reporting on Backpage’s shutdown following law enforcement’s seizure of the website).

advertising revenue in the country⁹ and had been called the “leading online marketplace for commercial sex”¹⁰ and “a ‘hub’ of ‘human trafficking, especially the trafficking of minors.’”¹¹ Of all child trafficking reports received by the National Center for Missing and Exploited Children, seventy-three percent involved Backpage.¹²

A Senate investigation into online sex trafficking culminated in a report that was released in January 2017 and shed light on Backpage’s policies and involvement in sex trafficking ads.¹³ According to the Report, Backpage would edit so-called “adult” ads by deleting indicators of criminality: words like “lolita,” “teenage,” “amber alert,” and “fresh” were all automatically deleted via a filter before publication.¹⁴ By 2010, Backpage estimated it edited between seventy and eighty percent of adult section ads in this manner.¹⁵ In later years, if a user attempted to post an ad with a flagged word or phrase, they would receive an error message instructing them that the ad could not be posted with that word.¹⁶ A user was then able to simply delete or replace the word and successfully post their ad.¹⁷ In this way, opponents have asserted, Backpage essentially supplied instructions to sex traffickers on how to post undetectable ads.¹⁸

Many victims of sex trafficking through Backpage who attempted to sue the site were blocked by Section 230 of the CDA, an important part of the legal landscape into which FOSTA was enacted. Section 230 provided protection for website owners against both civil and criminal liability, except for prosecution under federal criminal law.¹⁹

⁹ See STAFF OF S. PERMANENT SUBCOMM. ON INVESTIGATIONS, 114TH CONG., BACKPAGE.COM’S KNOWING FACILITATION OF ONLINE SEX TRAFFICKING 6 (Comm. Print 2017) (citing *Prostitution-Ad Revenue Up 9.8 Percent from Year Ago*, AIM GROUP (Mar. 22, 2012), <https://aimgroup.com/2012/03/22/prostitution-ad-revenue-up-9-8-percent-from-year-ago>).

¹⁰ See *id.* at 1.

¹¹ *Id.* (quoting Letter from the Nat’l Ass’n of Attorneys Gen. to Samuel Fifer, Esq., Counsel for Backpage.com, LLC 1 (Aug. 31, 2011), <http://www.law.alaska.gov/pdf/press/083111-NAAGletter.pdf>).

¹² *Id.*

¹³ See *id.* (identifying Backpage as the ultimate focus of the Subcommittee’s investigation into online sex trafficking).

¹⁴ *Id.* at 2.

¹⁵ *Id.*

¹⁶ *Id.* (“Over time, Backpage reprogrammed its electronic filters to reject an ad . . . if it contained certain egregious words suggestive of sex trafficking. But the company . . . [coached] its customers on how to post ‘clean’ ads for illegal transactions.”).

¹⁷ See *id.* at 2–3.

¹⁸ See, e.g., Second Amended Complaint at 23, *Doe ex rel. Roe v. Backpage.com, LLC*, 104 F. Supp. 3d 149 (D. Mass. 2015) [hereinafter *Backpage.com Complaint*] (No. 14-13870-RGS) (arguing Backpage “developed various means that assist advertisers in posting advertisements for illegal commercial sex”).

¹⁹ 47 U.S.C. § 230(c)(2), (e)(1) (2012) (amended 2018).

Passed in the 1990s, the CDA is intended to promote the growth of the internet and enhance service providers' ability to delete or otherwise monitor content without becoming liable for that content.²⁰ The language of Section 230 states that “[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.”²¹ Essentially, a provider of content is immune, while speakers and publishers are not—a distinction central to the Backpage litigation. Section 230 provides a broad shield from liability and became known as “‘a core pillar of Internet freedom’ and ‘the law that gave us modern Internet.’”²² It can be helpful to think of Section 230 as answering the question, “How much responsibility do online platforms have for how their users behave or get treated?”²³

Many victims of sex trafficking who had ads of them posted on Backpage brought suit against the website. These Jane Does have mostly been unsuccessful, though outcomes have varied based on different courts' interpretation of Section 230.²⁴ Many of the plaintiffs based their claims on the Ninth Circuit's ruling in *Fair Housing Council of San Fernando Valley v. Roommates.com*.²⁵ In *Roommates.com*, the court held that Section 230 did not immunize Roommates, a website that matched people renting rooms with those looking to rent, from liability under housing discrimination laws.²⁶

²⁰ See § 230(b)(1), (c)(1) (2018) (stating that it is United States policy “to promote the continued development of the Internet and other interactive computer services and other interactive media”).

²¹ § 230(c)(1).

²² Alina Selyukh, *Section 230: A Key Legal Shield for Facebook, Google Is About to Change*, NPR (Mar. 21, 2018, 5:11 AM), <https://www.npr.org/sections/alltechconsidered/2018/03/21/591622450/section-230-a-key-legal-shield-for-facebook-google-is-about-to-change>.

²³ *Id.*

²⁴ Compare *M.A. ex rel. P.K. v. Vill. Voice Media Holdings*, 809 F. Supp. 2d 1041, 1050, 1053 (E.D. Mo. 2011) (finding Backpage immune from suit despite allegations that it structured the site to increase adult ad profits), and *People v. Ferrer*, No. 16FE019224, at 14 (Cal. Super. Ct. Dec. 9, 2016), <https://digitalcommons.law.scu.edu/cgi/viewcontent.cgi?article=2358&context=historical> (barring sex trafficking victims' claims as Backpage's decisions are “generally immunized by the CDA”), with *J.S. v. Vill. Voice Media Holdings*, 359 P.3d 714, 717–18 (Wash. 2015) (finding that the plaintiff's claim could proceed past a motion to dismiss, because the facts alleged, if true, would mean Backpage was acting as an “information content provider” and thus not protected by Section 230).

²⁵ 521 F.3d 1157 (9th Cir. 2008); see also, e.g., *M.A. ex rel. P.K.*, 809 F. Supp. 2d at 1051–53 (arguing unsuccessfully that Backpage's website operation is analogous to Roommates's and defeats § 230 immunity); *J.S.*, 359 P.3d at 721–22 (Wiggins, J., concurring) (citing *Roommates* in discussing the plaintiff's argument that Backpage's content rules transform it into an original speaker).

²⁶ 521 F.3d at 1167, 1169–70 (finding that Roommates is not entitled to CDA immunity for the operation of its search system, which filters listings, or of its email notification system, which directs emails to subscribers according to discriminatory criteria).

The website crossed the line between provider and speaker or publisher when it required users to answer questions about gender and sexual orientation.²⁷ Because the website created the discriminatory questions and answer options, the court held, it became the “information content provider” and lost its Section 230 immunity.²⁸

In *Doe v. Backpage*, three minors attempted to sue for ads posted of them on Backpage’s “Escorts” section.²⁹ Each minor had been trafficked beginning at age fifteen and was advertised on the website.³⁰ However, the district court dismissed the plaintiffs’ complaint because Section 230 gave Backpage immunity.³¹ On appeal, Judge Seyla’s opinion affirming the lower court’s decision begins with the simple acknowledgement that “[t]his is a hard case.”³²

The appellants alleged that Backpage “engaged in a course of conduct designed to facilitate sex traffickers’ efforts to advertise their victims on the website.”³³ In support of that characterization, they emphasized that Backpage does not require telephone number or e-mail verification, removes metadata (information that includes the date, time, and location a photograph was taken) from uploaded photos, and automatically filters incriminating phrases.³⁴ However, the court did not address the allegation that Backpage facilitated trafficking—its holding that Backpage was entitled to Section 230 immunity made it unnecessary to determine whether Backpage’s conduct was designed to actually *facilitate* sex trafficking.³⁵

The panel of three judges held that the appellants’ claims addressed practices that “reflect choices about what content can appear on the website and in what form . . . [which] fall within the purview of traditional publisher functions.”³⁶ The court wrote that “even if we assume, for argument’s sake, that Backpage’s conduct amounts to ‘participation in a [sex trafficking] venture,’” Section 230 would still provide immunity.³⁷ The plaintiffs were thus denied relief.

²⁷ *See id.* at 1166.

²⁸ *Id.* at 1164 (“Roommate is undoubtedly the ‘information content provider’ as to the questions and can claim no immunity for posting them on its website . . .”).

²⁹ 817 F.3d 12, 16 (1st Cir. 2016).

³⁰ *Id.* at 17.

³¹ *See Doe ex rel. Roe v. Backpage.com, LLC*, 104 F. Supp. 3d 149, 160 (D. Mass. 2015), *aff’d sub nom. Jane Doe No. 1 v. Backpage.com, LLC*, 817 F.3d 12 (1st Cir. 2016).

³² *Jane Doe No. 1*, 817 F.3d at 15. Judge Seyla goes on to clarify that it is “hard in the sense that the law requires that we . . . deny relief to plaintiffs whose circumstances evoke outrage.” *Id.*

³³ *Id.* at 16.

³⁴ *Id.* at 16–17.

³⁵ *Id.* at 22.

³⁶ *Id.* at 20–21.

³⁷ *Id.* at 21.

This case gained a level of infamy, sparking a large public outcry and political response, and became a major impetus for the eventual passage of FOSTA.³⁸

B. Public Pressure Sparking Political Response

This Section details the public reaction to the Backpage scandal, which contributed to the passage of FOSTA. In 2011, forty-six of the nation's Attorneys General signed a letter to Backpage expressing concern over sex trafficking on the website and requesting information from the company.³⁹ Protests broke out at New York City's Village Voice Media, which owned Backpage at the time.⁴⁰ Members of the public sent a petition with close to 250,000 signatures demanding an end to the ads.⁴¹ Advertisers, including Ikea and AT&T, began pulling their advertisements from Village Voice Media to pressure it to shut down Backpage in response to a Change.org campaign.⁴² The *New York Times's* Nicholas Kristof published a series of editorials slamming the website and sharing the stories of minors trafficked on it.⁴³ Major credit card companies, including MasterCard and Visa, withdrew as payment options for the website's adult section.⁴⁴

In April 2015, the U.S. Senate Permanent Subcommittee on Investigations began investigating Backpage. The Subcommittee released its report entitled *Backpage.com's Knowing Facilitation of*

³⁸ See *infra* Section I.B.

³⁹ See generally Letter from the Nat'l Ass'n of Attorneys Gen. to Samuel Fifer, *supra* note 11.

⁴⁰ See *New York's Village Voice Draws Protests Over Classifieds Linked to Child Sex Trafficking*, FOX NEWS (Mar. 30, 2012), <http://www.foxnews.com/us/2012/03/30/village-voice-media-draws-protests-over-classifieds-being-used-for-child-sex.html>.

⁴¹ See *id.*

⁴² See Elizabeth Stuart, *Companies Pull Ads from Village Voice Media to Protest Child Sex Trafficking*, DESERET NEWS (May 3, 2012, 5:00 PM), <https://www.deseretnews.com/article/865555189/Companies-pull-ads-from-Village-Voice-Media-to-protest-child-sex-trafficking.html> (reporting that "27 companies, including H&M, AT&T and Ikea" pulled advertising from Backpage).

⁴³ See, e.g., Nicholas Kristof, Opinion, *Not Quite a Teen, Yet Sold for Sex*, N.Y. TIMES (Apr. 18, 2012), <https://www.nytimes.com/2012/04/19/opinion/kristof-not-quite-a-teen-yet-sold-for-sex.html> (telling the story of a then-12-year-old girl trafficked on Backpage); Nicholas Kristof, Opinion, *When Emily Was Sold for Sex*, N.Y. TIMES (Feb. 12, 2014), <https://www.nytimes.com/2014/02/13/opinion/kristof-when-emily-was-sold-for-sex.html> (writing about meeting with parents who discovered ads of their runaway teenage daughter on Backpage).

⁴⁴ Kim Bellware, *Credit Card Companies Abandon Backpage.com Over Sex Trafficking Complaints*, HUFFPOST (July 1, 2015, 12:48 PM), https://www.huffingtonpost.com/2015/07/01/backpagecom-credit-cards_n_7705708.html.

Online Sex Trafficking in 2017.⁴⁵ In the report, the Subcommittee finds that Backpage “knowingly concealed evidence of criminality by systematically editing its ‘adult’ ads,” and that “Backpage knows that it facilitates prostitution and child sex trafficking.”⁴⁶ In response to the report, Backpage closed its adult ad section and replaced it with a red banner that read “CENSORED,” alongside a statement that “[t]he government has unconstitutionally censored this content.”⁴⁷

Additionally, *I Am Jane Doe*, a 2017 documentary narrated by Jessica Chastain, chronicled the story of the three plaintiffs in *Doe v. Backpage* and their attempt to sue the website, emphasizing the obstacles presented by Section 230.⁴⁸ In January of 2018, a public service announcement featuring Amy Schumer, Seth Meyers, and other celebrities advocated for an amendment to Section 230, calling it a “stupid loophole.”⁴⁹

C. FOSTA’s Passage

The lawsuits, public response, and Senate investigation ultimately led to the passage of FOSTA, which attempts to close the loophole available to information content providers that knowingly facilitate prostitution. The bill underwent noteworthy changes, including to its mens rea requirement, between its introduction in the House and its eventual enactment. That evolution was shaped in part by criticism over early versions of the mens rea requirement. This Section first explains the law prior to FOSTA, then describes FOSTA’s passage through the House and Senate, and finally discusses the current law and how it functions.

1. The Legal Landscape Before FOSTA

In order to understand what FOSTA accomplishes, it is necessary to understand how federal sex trafficking law functioned before FOSTA was enacted. Prior to FOSTA, liability for sex trafficking

⁴⁵ STAFF OF S. PERMANENT SUBCOMM. ON INVESTIGATIONS, 114TH CONG., BACKPAGE.COM’S KNOWING FACILITATION OF ONLINE SEX TRAFFICKING (Comm. Print 2017).

⁴⁶ *Id.* at 2–3.

⁴⁷ See Alastair Jamieson & Tracy Connor, *Backpage Pulls Adult Ads, Blames ‘Censorship’ After Report on Sex Trafficking, Prostitution*, NBC NEWS (Jan. 10, 2017, 5:28 AM), <https://www.nbcnews.com/news/us-news/backpage-pulls-adult-ads-blames-censorship-after-report-sex-trafficking-n705056>.

⁴⁸ See *About the Film, I AM JANE DOE FILM*, <https://www.iamjanedofilm.com/the-film> (last visited Aug. 13, 2019).

⁴⁹ Mary Mazzio, *PSA Featuring Seth Meyers, Amy Schumer, Josh Charles, Tony Shalhoub and Others - SESTA*, YOUTUBE (Jan. 11, 2018), <https://www.youtube.com/watch?v=9SB7-uvqnS0>.

under federal law was via the Trafficking Victims Protection Act (TVPA).⁵⁰ Under the TVPA, sex trafficking is causing a person to engage in a commercial sex act when either (1) that person is a minor or (2) coercion is used.⁵¹

The TVPA creates liability for offenders who act directly or who participate in a sex trafficking venture. To be liable for sex trafficking, a person knowingly “recruits, entices, harbors, transports, provides, obtains, advertises, maintains, patronizes, or solicits by any means a person” or benefits from participating in a venture that engaged in any of the above acts while “knowing . . . [or] in reckless disregard of the fact” that coercion will be used to cause a person to engage in a commercial sex act or that a person is a minor and will be caused to engage in a commercial sex act.⁵²

FOSTA clarifies the “participation in a venture” aspect of the TVPA. The TVPA creates liability for anyone who “benefits . . . from participation in a venture” that “recruits, . . . advertises, . . . or solicits” a person who will engage in a commercial sex act while knowing or in reckless disregard of the fact that the person is a minor or will be coerced.⁵³ While the TVPA defines venture as “any group of two or more individuals associated in fact, whether or not a legal entity,”⁵⁴ it did not define “participation in a venture” prior to FOSTA. A major debate during the enactment of FOSTA was how to define participation and what mens rea requirement to use.

FOSTA also works to create an opening for civil suits. Section 1591 of the TVPA creates criminal liability, but Section 1595 creates a private right of action for sex trafficking victims.⁵⁵ This Section allows any victim to bring a civil action for damages or attorney’s fees against the direct perpetrator or any person who benefits from participation in the sex trafficking venture.⁵⁶ However, as discussed above, the main obstacle to victims bringing civil suits prior to FOSTA was Section 230 of the CDA. Recall that the language of the CDA states, “[n]o pro-

⁵⁰ 18 U.S.C. § 1591 (2018) (originally enacted Oct. 28, 2000) (outlawing “[s]ex trafficking of children or by force, fraud, or coercion”).

⁵¹ See *id.* § 1591(a). It is important here to distinguish sex trafficking from prostitution: While both refer to commercial sex acts, trafficking under the TVPA requires either coercion or that the victim be a minor, while prostitution does not normally require either of those elements. See Arianne Plasencia, *Prostitution and Sex Workers*, 9 GEO. J. GENDER & L. 699, 702 (2008) (“The crime of prostitution generally involves three elements: (A) some degree of sexual activity or conduct, (B) compensation and (C) intent to commit prostitution.”).

⁵² *Id.*

⁵³ *Id.* (emphasis added).

⁵⁴ 18 U.S.C. § 1591(e)(5) (2012).

⁵⁵ *Id.* § 1595.

⁵⁶ *Id.*

vider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.”⁵⁷ Section 230, prior to FOSTA, set out a list of categories of laws which were not affected by Section 230 (i.e., laws which website owners could still face liability for violating). Section 230 explicitly stated that it does not affect federal criminal law, intellectual property law, or state law, but it does not mention private rights of action under federal criminal law (which would include the private right for sex trafficking victims under the TVPA).⁵⁸ One goal of FOSTA was to open website owners to civil liability for sex trafficking offenses. This was ultimately achieved, as explained below, by adding “sex trafficking law” to the list of laws explicitly exempted from Section 230.⁵⁹

Prior to FOSTA, there was no offense in federal law specifically for website operators engaged in sex trafficking or prostitution activities. While website operators could theoretically have been liable under the TVPA by benefiting from participation in a sex trafficking venture, no offense contemplated website operators specifically. FOSTA eventually created a new offense that creates liability particularly for website owners who promote or facilitate prostitution or trafficking.⁶⁰

FOSTA, both in its final version and as it proceeded through Congress, set out to do three things: (1) remove the shield of immunity granted by Section 230; (2) create an entirely new offense for website owners; and (3) clarify the TVPA’s “participation in a venture” definition. The following sections explain FOSTA’s evolution and its final version by dividing the law into those three components.

2. *FOSTA and Its Evolution*

Keeping FOSTA conceptually divided into its three component parts, it is next helpful to analyze its evolution through the legislature to understand how the law, especially its mens rea requirements, changed during the legislative process.⁶¹

⁵⁷ 47 U.S.C. § 230(c)(1) (2018).

⁵⁸ 47 U.S.C. § 230(e) (2012) (“Effect on other laws.”).

⁵⁹ 47 U.S.C. § 230(e)(5) (2018) (“No effect on sex trafficking law.”).

⁶⁰ See *infra* Section I.C.2.

⁶¹ The House bill was introduced by Representative Ann Wagner in April of 2017 as H.R. 1865, 115th Cong. (2017). The Senate bill, initially titled the Stop Enabling Sex Traffickers Act of 2017 (SESTA), was introduced by Senator Rob Portman in August of 2017. See S. 1693, 115th Cong. (2017). The final law was enacted in April of 2018. See Allow States and Victims to Fight Online Sex Trafficking Act of 2017, Pub. L. No. 115-164, 132 Stat. 1253 (codified as amended at 18 U.S.C. § 2421A and 47 U.S.C. § 230 (2018)).

a. Section 230

One of the most controversial aspects of FOSTA was its desire to close the Section 230 loophole and open website operators to liability for sex trafficking offenses. When the Senate bill, titled the Stop Enabling Sex Traffickers Act of 2017 (SESTA),⁶² was debated in the Senate, Senator Ron Wyden, an original co-author of Section 230 and one of the two votes against SESTA in the Senate, shared concerns over weakening Section 230, claiming that “in the absence of Section 230, the internet as we know it would shrivel.”⁶³

FOSTA, in its final form, adds a new subsection to Section 230 stating that nothing in Section 230 “shall be construed to impair or limit” any civil action brought under federal sex trafficking law 18 U.S.C. § 1595 or any criminal prosecution brought under state law if the underlying conduct would violate federal sex trafficking law.⁶⁴

b. Newly Created Offense

Each version of FOSTA included a new offense specifically targeting website operators. The enacted law makes it a crime for a website operator to act with the *intent to promote or facilitate prostitution*.⁶⁵ It includes an aggravated violation if the promoted or facilitated prostitution is of five or more persons or if the website operator “acts in *reckless disregard* of the fact that such conduct contributed to sex trafficking.”⁶⁶

The original House bill had a similar offense. In the House bill, however, the provider of an interactive computer service need act only with “*reckless disregard* that the information provided by the information content provider is in furtherance of [a section 1591(a) trafficking offense].”⁶⁷ The final law is both more and less harsh. On the one hand, the House bill contemplated the underlying offense of trafficking, while the final law creates liability for facilitating “the *prostitution* of another person.”⁶⁸ While both trafficking and prostitution refer to commercial sex acts, recall that trafficking under the TVPA requires either coercion or that the victim be a minor.⁶⁹ On the

⁶² S. 1693.

⁶³ Ron Wyden, *Floor Remarks: CDA 230 and SESTA*, MEDIUM (Mar. 21, 2018), <https://medium.com/@RonWyden/floor-remarks-cda-230-and-sesta-32355d669a6e>.

⁶⁴ See Allow States and Victims to Fight Online Sex Trafficking Act § 4 (codified as amended at 47 U.S.C. § 230(e)(5)).

⁶⁵ See 18 U.S.C. § 2421A(a) (2018).

⁶⁶ *Id.* § 2421(b)(2) (emphasis added).

⁶⁷ H.R. 1865, 115th Cong. § 4(a)(3) (2017) (emphasis added).

⁶⁸ 18 U.S.C. § 2421A(a) (emphasis added).

⁶⁹ See *id.* § 1591(a).

other hand, the final law's mens rea requirement is higher: *intent* rather than *reckless disregard*.

When the bill passed the House, it faced criticism for casting too wide a net with what was viewed as a low mens rea requirement. Tech reporters argued that the bill created “*mens rea*, or state of mind, issues whereby a website was compelled to engage in strict moderation for fear of something ‘falling through the cracks.’”⁷⁰ The Electronic Frontier Foundation wrote that one House version would overexpose “platforms to increased criminal and civil liability at both the federal and state levels,”⁷¹ as it “would not require a platform to have *knowledge* that people are using it for sex trafficking purposes.”⁷²

The Senate's version of the new offense in SESTA created liability for website owners that “knowingly” facilitate sex trafficking.⁷³ Many commentators took issue with SESTA's knowledge mens rea attached to the new offense. In a letter addressed to the legislature before the final vote, tech groups urged Congress to rethink FOSTA's incorporation of the Senate bill.⁷⁴ The letter pointed specifically to the differing mens rea requirements in the two bills, noting that the most recent version of FOSTA made it a crime to act with the “intent” to facilitate prostitution, while SESTA made it a crime to “knowingly” facilitate sex trafficking.⁷⁵

c. “Participation in a Venture” Definition

Each version of FOSTA provided a definition for “participation in a venture” as used in the TVPA. The House bill defined “participation in a venture” as “*knowing* or *reckless* conduct by any person or entity and by any means that furthers or in anyway aids or abets the violation of [18 U.S.C. § 1591(a)(1)].”⁷⁶ Notably, FOSTA's final defi-

⁷⁰ Jennifer Huddleston Skees, *Revised FOSTA Is a Big Improvement over SESTA—but Still Not Perfect*, TECH. LIBERATION FRONT (Dec. 15, 2017), <https://techliberation.com/2017/12/15/revised-fosta-is-a-big-improvement-over-sesta-but-still-not-perfect>.

⁷¹ Elliot Harmon, *FOSTA Would Be a Disaster for Online Communities*, ELECTRONIC FRONTIER FOUND.: DEEPLINKS BLOG (Feb. 22, 2018), <https://www.eff.org/deeplinks/2018/02/fosta-would-be-disaster-online-communities>.

⁷² *Id.*

⁷³ See S. 1693, 115th Cong. § 4 (2017).

⁷⁴ See Letter from TechFreedom et al. to Mitch McConnell, Majority Leader, U.S. Senate & Charles Schumer, Minority Leader, U.S. Senate (Feb. 23, 2018), http://docs.techfreedom.org/Letter_SESTA-FOSTA_Hybrid_2-23-18.pdf (arguing that SESTA would create perverse incentives for operators to *not* monitor their webpages and would damage current content moderation efforts).

⁷⁵ See *id.*

⁷⁶ H.R. 1865, 115th Cong. § 4 (2017) (emphasis added).

inition of “participation in a venture” as knowing conduct is a higher standard than the reckless standard earlier proposed in the House.

The original Senate version, SESTA, defined “participation in a venture” as used in 18 U.S.C. § 1591 as “*knowing* conduct by an individual or entity, by any means, that assists, supports, or facilitates a violation of [federal trafficking law in § 1591(a)(1)].”⁷⁷ This definition is closer to the language of the final law than the House version is, as it removes liability for reckless conduct. FOSTA, in its final form, amends the TVPA to define “participation in a venture” as “*knowingly* assisting, supporting, or facilitating a violation” of the pre-existing law.⁷⁸

3. *The Final Law*

This Section briefly outlines the enacted version of FOSTA. The main amendment to Section 230 is the addition of a new subsection stating that nothing in Section 230 “shall be construed to impair or limit” any civil action brought under federal sex trafficking law 18 U.S.C. § 1595 or any criminal prosecution brought under state law if the underlying conduct would violate federal sex trafficking law, including the new offense FOSTA creates.⁷⁹

Section 3 of the Act sets out an entirely new offense, which makes it a crime for a website operator to act with the *intent to promote or facilitate prostitution*.⁸⁰ If a website is liable for intentional promotion or facilitation of prostitution, the offense then includes an aggravated violation if either the prostitution is of five or more persons or if the website owner “acts in *reckless disregard* of the fact that such conduct contributed to sex trafficking.”⁸¹ Thus, the base crime requires only facilitation of *prostitution*, but if a website operator acts in reckless disregard that their conduct contributed to *sex trafficking*, they can also be liable for the aggravated offense.⁸²

FOSTA also defines “participation in a venture,” a phrase in pre-existing federal sex trafficking law that was previously undefined.⁸³

⁷⁷ S. 1693 § 4 (emphasis added).

⁷⁸ Allow States and Victims to Fight Online Sex Trafficking Act of 2017, Pub. L. No. 115-164, § 5, 132 Stat. 1253, 1255 (2018).

⁷⁹ *See id.* § 4.

⁸⁰ *See id.* § 3 (codified as amended at 18 U.S.C. § 2421A(a) (2018)).

⁸¹ *Id.* (emphasis added) (codified as amended at 18 U.S.C. § 2421A(b)).

⁸² Recall that under the TVPA, sex trafficking requires either coercion or that the victim is a minor, as distinct from prostitution. *See supra* Section I.C.1.

⁸³ Compare Allow States and Victims to Fight Online Sex Trafficking Act § 5 (“The term ‘participation in a venture’ means knowingly assisting, supporting, or facilitating a violation of subsection (a)(1).”), with 18 U.S.C. § 1591(e) (2012) (defining “venture” but not defining “participation in a venture”).

The pre-existing TVPA creates liability for anyone who “benefits from participation in a venture” that “recruits, . . . advertises, . . . or solicits” a person who will engage in a commercial sex act while knowing or in reckless disregard of the fact that the person is a minor or will be forced.⁸⁴ FOSTA amends the TVPA to define “participation in a venture” as “knowingly assisting, supporting, or facilitating a violation” of the pre-existing law.⁸⁵ Thus, FOSTA amends the TVPA so that it is now an offense to knowingly benefit from participation in a venture, defined as knowingly assisting, supporting, or facilitating the sex trafficking (through recruiting, enticing, harboring, transporting, advertising, soliciting, etc.) of a person who is a minor or a coerced adult (whether through means of force, threats of force, fraud, or coercion).⁸⁶ FOSTA also allows State Attorneys General to bring suit on behalf of residents of the State against anyone who violates 18 U.S.C. § 1591.⁸⁷

4. Reaction to FOSTA

Despite bipartisan support and mens rea improvements from the original proposals, critics and website owners continue to worry about FOSTA’s harmful impact. A prominent criticism is that it will force website owners to over censor and will make it more dangerous for sex workers.⁸⁸ While both concerns are important, this Note offers a different critique: In some respects, FOSTA does not go far enough. That is, the language of the law does not actually capture the behavior it purports to target. By re-analyzing the *Doe v. Backpage* case that contributed to the passage of FOSTA under the new law, this Note shows that FOSTA is at most ambiguous when it comes to the regulation of the behavior it targets. Thus, not only is the law arguably creating negative side effects for speech online and creating danger for sex workers, it is not even achieving its legal objective.

II

ANALYZING FOSTA’S LEGAL EFFECT VIA *DOE V. BACKPAGE*

As discussed above, outrage over Backpage and the inability of trafficking victims to hold the website liable drove FOSTA’s passage.

⁸⁴ See 18 U.S.C. § 1591(a)–(b) (2012 & Supp. V 2015) (emphasis added).

⁸⁵ Allow States and Victims to Fight Online Sex Trafficking Act § 5.

⁸⁶ See 18 U.S.C. § 1591(a) (2018).

⁸⁷ See Allow States and Victims to Fight Online Sex Trafficking Act § 6 (codified as amended at 18 U.S.C. § 1595(d) (2018)).

⁸⁸ See, e.g., Jenkins, *supra* note 3 (arguing that FOSTA creates dangerous consequences for consensual sex workers).

One way to understand whether FOSTA has accomplished its legal objective is to allow the plaintiffs who lost their suits against Backpage prior to FOSTA to now bring those suits and see whether they are successful. This Part looks at *Doe v. Backpage* to analyze the legal effect of FOSTA. Section II.A examines the ambiguities in FOSTA in light of the facts of *Doe v. Backpage* to determine whether the law has been successful in achieving its intended legal effect. Section II.B concludes that FOSTA's legal impact is ambiguous; the law does not achieve its objectives because it is not certain that FOSTA creates liability for Backpage's actions.

A. *Analyzing the Ambiguities in FOSTA*

To achieve its chief objective, FOSTA needs to create liability in the gap where someone is not a speaker of content but is still acting with knowledge of sex trafficking or with intent to promote or facilitate prostitution. In other words, the court should be able to hold that actors who would otherwise be granted immunity by the CDA given their status as providers of an interactive computer service are now liable because they have knowingly assisted, supported, or facilitated a violation of the TVPA. Alternatively, for Backpage to be criminally liable in these cases, it would need to have acted "with the intent to promote or facilitate the prostitution of another person."⁸⁹ This analysis will require first understanding the new law, highlighting its ambiguities and attempting to resolve them, and then applying it to the facts alleged in *Doe*. This Section proceeds by dividing the law into two separate routes to liability: (1) an offense under the TVPA with the new "participation in a venture" definition, and (2) criminal liability under the newly created offense for online service providers.

1. *New "Participation in a Venture" Definition*

As discussed in Part I, FOSTA amends the TVPA so that it is an offense to knowingly benefit from participation in a venture, defined as knowingly assisting, supporting, or facilitating the underlying sex trafficking offense of recruiting, enticing, harboring, transporting, soliciting, etc. a person who is a minor or a coerced adult.⁹⁰

The TVPA, prior to FOSTA, already included an element of knowledge before "benefit."⁹¹ FOSTA then adds a second knowledge requirement before "assisting, supporting, or facilitating."⁹² Finally,

⁸⁹ 18 U.S.C. § 2421A(a) (2018).

⁹⁰ See 18 U.S.C. § 1591(a), (e)(4) (2018).

⁹¹ See 18 U.S.C. § 1591(a) (2012).

⁹² See 18 U.S.C. § 1591(e)(4) (2018) ("The term 'participation in a venture' means knowingly assisting, supporting, or facilitating a violation of subsection (a)(1).").

the law requires that the person caused to engage in a commercial sex act to have been either a minor or forced to do so, which has its own mens rea requirement. It requires knowledge or, except where “the act constituting the violation of paragraph (1) is advertising,”⁹³ reckless disregard.⁹⁴ Since posts on Backpage almost certainly qualify as advertisements, only a “reckless disregard” mens rea will suffice.⁹⁵

Case law and conventional statutory interpretation tell us that “[a]dverbs generally modify verbs”⁹⁶ and thus each instance of “knowingly” will modify the verb it comes before.⁹⁷ There are, therefore, three mens rea requirements contained in the offense, and which plaintiffs would have to prove Backpage’s conduct meets: knowledge as to benefiting, knowledge as to “assisting, supporting, or facilitating,” and knowledge as to the person trafficked being a minor or subject to force. Each raises its own ambiguities. As the TVPA has never been applied to online service providers, who were previously shielded by Section 230, these ambiguities exist especially as applied to a website like Backpage.

It is unclear what it would mean for a website to knowingly benefit financially. Perhaps it is enough that Backpage profits off of the “Adult” ads section generally, or perhaps the site would need to profit off of each ad individually. The case law on this question is limited, but points toward there being some relationship between the underlying act and the benefit.⁹⁸

⁹³ *Id.* § 1591(a).

⁹⁴ In a prosecution, if the defendant “had a reasonable opportunity to observe” the victim, the government need not show knowledge or reckless disregard but that does not apply to this discussion of civil suits. *Id.* § 1591(c).

⁹⁵ See Charlie Savage & Timothy Williams, *U.S. Seizes Backpage.com, a Site Accused of Enabling Prostitution*, N.Y. TIMES (Apr. 7, 2018), <https://www.nytimes.com/2018/04/07/us/politics/backpage-prostitution-classified.html> (referring to Backpage as a “major classified advertising website”).

⁹⁶ *E.g.*, *United States v. Jones*, 471 F.3d 535, 539 (4th Cir. 2006).

⁹⁷ See Darryl K. Brown, *Federal Mens Rea Interpretation and the Limits of Culpability’s Relevance*, 75 L. & CONTEMP. PROBS. 109, 116 (2012) (“Grammar analysis built on the ‘adverb canon’ has the consistent effect of limiting mens rea terms (usually expressed as adverbs) exclusively to conduct elements (verbs).”).

⁹⁸ See, e.g., *Lawson v. Rubin*, No. 17-cv-6404 (BMC), 2018 U.S. Dist. LEXIS 71582, at *32 (E.D.N.Y. Apr. 29, 2018) (finding that the fact a defendant was paid to draft nondisclosure agreements that had the effect of making it more difficult for victims to contact law enforcement was not enough to show the defendant “knowingly benefited” from participating in a trafficking venture under the TVPA); see also *Kolbek v. Twenty First Century Holiness Tabernacle Church, Inc.*, No. 10-CV-4124, 2013 U.S. Dist. LEXIS 180463, at *52 (W.D. Ark. Dec. 24, 2013) (quoting *United States v. Marcus*, 487 F. Supp. 2d 289, 306 (E.D.N.Y. 2007), *rev’d on other grounds*, 538 F.3d 97 (2d Cir. 2008)) (stating there must be a “causal relationship between the sex act” and the benefit purportedly received by the defendant).

Not many courts have yet applied FOSTA's new "participation in a venture" definition as "knowingly assisting, supporting, or facilitating."⁹⁹ A recent case applying the pre-FOSTA TVPA sheds some light on how it should be applied but not yet in the context of liability for a website. The Southern District of New York ruled on a motion to dismiss civil claims against Hollywood producer Harvey Weinstein brought under the TVPA.¹⁰⁰ The complaint alleges a violation of Section 1595 against Weinstein, and importantly, claims for participation in a venture violating Section 1595 against his brother, Robert. The complaint states that Harvey Weinstein showed interest in the plaintiff as an actress and, under the pretenses of discussing her career, invited her to his hotel room where he sexually assaulted her.¹⁰¹

In evaluating the claims, the court noted that Section 1595 requires broad interpretation.¹⁰² As to Robert's participation in the venture, the plaintiff alleged that he "facilitat[ed] Harvey Weinstein's commercial sex acts in foreign commerce,' that he 'enjoyed the promotion and promulgation of TWC projects internationally,' [and] that he 'continued to pay for and facilitate these foreign trips for Harvey Weinstein.'"¹⁰³ The court granted Robert's motion to dismiss, noting that association alone cannot establish liability and that "some participation in the sex trafficking act itself must be shown."¹⁰⁴

To understand what the new definition may mean, it is instructive to look at state law with phrasing similar to "knowingly assisting, supporting, or facilitating" a sex trafficking offense.¹⁰⁵ A Washington state statute makes it a crime to "knowingly advance[] commercial sexual abuse or a sexually explicit act of a minor."¹⁰⁶ Courts have ruled that this statute applies to online advertising of minors, but only

⁹⁹ Using the search "1591(e)(4)" as of April of 2019. *See* *Geiss v. Weinstein Co. Holdings, LLC*, 383 F. Supp. 3d 158, 168–69 (S.D.N.Y. 2019) (dismissing a claim about defendants' alleged participation in sex trafficking because they did not benefit from their participation).

¹⁰⁰ *Noble v. Weinstein*, 355 F. Supp. 3d 504, 515, 523 (S.D.N.Y. 2018) (denying the motion to dismiss as to Harvey Weinstein but granting as to Robert Weinstein and The Weinstein Company).

¹⁰¹ *Id.* at 515.

¹⁰² *Id.* (citing *Peyton v. Rowe*, 391 U.S. 54, 65 (1968) ("[R]emedial statutes should be liberally construed.")).

¹⁰³ *Id.* at 523.

¹⁰⁴ *Id.* at 524.

¹⁰⁵ This Note highlights Washington as an example because it has the most similar phrasing. A few other states also have similar statutes. For instance, Nevada has a criminal statute entitled "Facilitating Sex Trafficking." *NEV. REV. STAT. § 201.301* (2017). Additionally, Virginia's commercial sex trafficking statute applies to those who "assist another." *VA. CODE ANN. § 18.2-357.1(A)* (2019).

¹⁰⁶ *WASH. REV. CODE § 9.68A.101(1)* (2018).

in situations where the defendant was the one actually posting the ads.¹⁰⁷

Turning to knowing that the subject is a minor or being forced, a successful civil claim will at least have to assert that the plaintiff has been a victim of sex trafficking.¹⁰⁸ Backpage will alternatively need knowledge that the victims were minors. It is unclear whether it would suffice for the knowledge requirement if Backpage was aware of code words, like “brly legal,”¹⁰⁹ or whether Backpage would have to be contacted about the age of the individual victim specifically. It is difficult to imagine how a website could know the age of a third party, and the relatively high knowledge mens rea will likely be important in courtroom analysis.

2. *Newly Created Offense for Online Service Providers*

As discussed above, Section 3 of FOSTA sets out a new offense, which makes it a crime for anyone who “owns, manages, or operates an interactive computer service”¹¹⁰ to act with the “*intent to promote or facilitate* the prostitution of another person”¹¹¹ and provides an aggravated violation if the website operator also “(1) promotes or facilitates the prostitution of 5 or more persons; or (2) acts in reckless disregard of the fact that such conduct contributed to sex trafficking.”¹¹² While the civil plaintiffs would of course not have been able to charge Backpage with a criminal offense, it is still interesting to consider whether the conduct alleged here would have risen to the level necessary to make Backpage criminally liable.

This newly created offense has not yet been used to hold a website owner liable, and it remains to be seen what it would mean for a website owner to possess the intent to promote or facilitate prostitu-

¹⁰⁷ See *State v. Terry*, No. 10-1-06234-4 SEA, slip op. at 16 (Wash. Super. Ct. Mar. 30, 2011) (“[Defendant] knowingly and intentionally assisted [the minor] in committing acts of prostitution by photographing her in lingerie or naked in sexually explicit or provocative poses, for the purpose of using these photos in Internet advertisements to find customers willing to pay [the minor] money for sex.”), *aff’d*, No. 67109-1-I, 2013 Wash. App. LEXIS 187 (Wash. Ct. App. Jan. 28, 2013).

¹⁰⁸ See *DeLima v. YouTube, LLC*, No. 17-cv-733-PB, 2018 U.S. Dist. LEXIS 160145, at *15 (D.N.H. Aug. 30, 2018) (“[Plaintiff] has not asserted that she has been a victim of sex trafficking, and thus has not stated any basis to maintain a civil action [under 18 U.S.C. § 1595].”).

¹⁰⁹ *Jane Doe No. 1 v. Backpage.com, LLC*, 817 F.3d 12, 17 (1st Cir. 2016).

¹¹⁰ 18 U.S.C. § 2421A(a) (2018).

¹¹¹ *Id.* (emphasis added).

¹¹² *Id.* § 2421A(b).

tion. There is similar language in other laws,¹¹³ but those have generally been used for traditional “pimp” behavior. It is also unclear whether the intent to promote or facilitate prostitution is satisfied by a general desire or requires a specific offense: In other words, would it be enough to prove that backpage intended to facilitate prostitution generally by providing an Escort section in the first place, or will this offense require that backpage intended to facilitate the prostitution of a specified sex trafficking victim?

One indicator of what this offense requires may be the Travel Act, which, in part, criminalizes acting with intent to promote prostitution.¹¹⁴ However, the law has traditionally applied to those acting in the role of a “pimp.”¹¹⁵ Further, courts have noted the “close connection between ‘promoting’ and ‘facilitating’ and the underlying, particular criminal act.”¹¹⁶

In a federal law setting out reporting procedures for the FBI, a separate report is mandated for “incidents of assisting or promoting prostitution.”¹¹⁷ The statute defines these incidents as including “crimes committed by persons who—(A) do not directly engage in commercial sex acts; and (B) direct, manage, or profit from such acts, such as State pimping and pandering crimes.”¹¹⁸ The law also requires those reports of incidents of “assisting or promoting prostitution” to be distinguished from both “incidents of purchasing prostitution” and “incidents of prostitution,” among others.¹¹⁹ Thus, “promoting prostitution” in this context is behavior including or similar to pimping.

¹¹³ See *infra* notes 114–16 and accompanying text (discussing courts’ reading of intent-related language in the Travel Act and other laws to apply to situations in which defendants engage in pimping or prostitution businesses).

¹¹⁴ See 18 U.S.C. § 1952(a)–(b) (2018). The law reaches “(a) Whoever travels in interstate or foreign commerce or uses the mail or any facility in interstate or foreign commerce, with intent to . . . (3) otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity.” *Id.* § 1952(a)(3). The definition of “unlawful activity” then includes “any business enterprise involving . . . prostitution offenses.” *Id.* § 1952(b). It thus can be applied to an actor that possesses the intent to promote a business enterprise involving prostitution. See *United States v. Bennett*, Nos. 95-30252 and 95-30384, 1996 U.S. App. LEXIS 21879, at *16–17 (9th Cir. Aug. 21, 1996) (affirming a jury instruction, in a prosecution under the Travel Act for promoting or facilitating a business enterprise involving prostitution offenses, that read “‘to promote’ or ‘facilitate the promotion of’ any illegal activity means to do an act that would cause the activity to be accomplished or to assist in the activity”).

¹¹⁵ See, e.g., *United States v. Curtis*, 481 F.3d 836, 837 (D.C. Cir. 2007) (noting that the defendant admitted that he was the pimp of two minor girls).

¹¹⁶ *Woodhull Freedom Found. v. United States*, 334 F. Supp. 3d 185, 200 (D.D.C. 2018) (citing *United States v. Reiner*, 500 F.3d 10, 12–19 (1st Cir. 2007); *United States v. Seals*, No. 5:10-CR-50127, 2014 WL 3847916, at *7–8 (W.D. Ark. Aug. 5, 2014)).

¹¹⁷ 34 U.S.C. § 41309(b)(1) (2018).

¹¹⁸ *Id.*

¹¹⁹ See *id.* § 41309(b)(1)–(5).

One federal court has attempted to interpret the new law.¹²⁰ Three plaintiffs brought pre-enforcement challenges to the law. While the case was ultimately dismissed for lack of standing, the District Court for the District of Columbia spent some time interpreting the new offense. The court wrote that the offense contains “key textual indications that make clear that FOSTA targets specific acts of illegal prostitution – not the abstract topic of prostitution or sex work.”¹²¹ The court reasoned that the statute’s reference to “the prostitution of another person” is intended “to ensnare only specific unlawful acts with respect to a particular individual.”¹²² Furthermore, the court found that the statutory creation of the affirmative defense that prostitution is legal in the jurisdiction where the promotion was targeted is evidence that the promotion or facilitation must be tied to a specific act of prostitution.¹²³ The court also pointed to the separate mens rea requirement in the offense, noting that it “further narrows that provision’s scope.”¹²⁴ In other words, “Section 2421A will require the Government to show not simply that the defendant was aware of a potential result of the criminal offense, but instead that the defendant intended to ‘explicitly further[]’ a specified unlawful act.”¹²⁵

B. *Applying the Law to the Conduct Alleged in Doe v. Backpage*

Given the above understanding of the law, this Section uses the facts of *Doe v. Backpage* to determine whether the law would clearly capture Backpage’s conduct. Again, because this conduct prompted the passage of FOSTA in the first place, the law should theoretically create liability for that conduct. The FOSTA amendments to Section 230 should remove the main barrier to the Jane Does’ success, in that Section 230 alone will likely no longer be able to protect website owners. However, while removing immunity under Section 230, the TVPA and FOSTA include other barriers to liability that may not have been surmountable in *Doe*. As a result, it is unclear whether FOSTA would have been effective in the very case that inspired its passage.

¹²⁰ See *Woodhull Freedom Found.*, 334 F. Supp. 3d at 198–203 (construing various provisions of 18 U.S.C. § 2421A (2018)).

¹²¹ *Id.* at 200 (citing *United States v. Williams*, 553 U.S. 285, 294 (2008)).

¹²² *Id.*

¹²³ See *id.* (citing 18 U.S.C. § 2421A(e)).

¹²⁴ *Id.* at 201.

¹²⁵ *Id.* (alteration in original) (quoting *United States v. Brown*, 186 F.3d 661, 668 (5th Cir. 1999)).

1. New “Participation in a Venture” Definition

As discussed above, for Backpage to be found liable under the TVPA for “participation in a venture,”¹²⁶ the website would need to have knowledge as to benefiting, knowledge as to “assisting, supporting, or facilitating,”¹²⁷ and knowledge as to the person trafficked being a minor or subject to force.¹²⁸ It is crucial to note that the court in *Doe* made its holding without evaluating whether the website’s conduct did in fact amount to a violation of 18 U.S.C. § 1591. It is also noteworthy that the court recognized that “no published opinion has yet interpreted” the phrase “participation in a venture.”¹²⁹

Whether the website knowingly benefitted is unclear. Backpage did not make money off of individual postings, but, as alleged by the plaintiffs’ district court complaint, the website did make money off of advertising.¹³⁰ Even if these profits counted as “benefiting” from a venture, a judge would then have to find that Backpage did so with knowledge of the individual sex trafficking acts.

Whether the website knowingly assisted, supported, or facilitated a specific sex trafficking act would likely be the most difficult element for future plaintiffs to prove. In support of their allegation that Backpage partook in a “deliberate structuring of its website to facilitate sex trafficking,” appellants alleged that the website “selectively removed certain postings made in the ‘Escorts’ section,” including those “by victim support organizations and law enforcement ‘sting’ advertisements.”¹³¹ They also alleged that the website made sex trafficking easier via its posting requirements: Backpage did not require users posting in the “Escorts” section to provide identifying information, entering an age below eighteen (though the website requires posters in the “Escorts” section to be over eighteen) did not block subsequent attempts to enter, and the site allowed users to pay posting fees anonymously.¹³² Further, the plaintiffs alleged that posting did not require phone number or e-mail verification and uploaded photographs were “shorn of their metadata.”¹³³ The website

¹²⁶ 18 U.S.C. § 1591(a)(2) (2018).

¹²⁷ *Id.* § 1591(e)(4).

¹²⁸ *See supra* Section II.A.1 (outlining the three mens rea requirements involved in a prosecution for participation in a sex trafficking venture under 18 U.S.C. § 1591).

¹²⁹ *Jane Doe No. 1 v. Backpage.com, LLC*, 817 F.3d 12, 21 (1st Cir. 2016).

¹³⁰ *See Backpage.com Complaint, supra* note 18, at 14 (“Annual profits for Backpage.com were estimated by experts in 2010 . . . at \$22 million Since then, . . . [Backpage] increased its total market share from little more than 20 percent to more than 80 percent, and increased the overall size of the market.”).

¹³¹ *Jane Doe No. 1*, 817 F.3d at 16.

¹³² *See id.* at 16 n.2.

¹³³ *Id.* at 16.

also employed an automated filtering system, which screened out ads containing prohibited language, but did not prevent a poster from retrying with substituted words. For example, an ad reading “barely legal” would be screened out, but a poster could successfully upload an ad with “brly legal.”¹³⁴

However, as discussed above, association alone cannot establish liability and so “some participation in the sex trafficking act itself must be shown.”¹³⁵ No facts alleged tied Backpage to the specific sex trafficking allegation or sufficed to show the requisite *knowledge*. This seems to be a fatal flaw in the case. A court may rule otherwise, but given the existing case law, it is difficult to see how Backpage’s conduct as alleged would bring the website within the purview of the TVPA. The complaint alleges motive (namely, profit: “the availability of children on their website enhances the perceived advantages of the website in the eyes of many potential pimps and traffickers, which thereby allows the Backpage defendants to reap greater profits from their business venture”),¹³⁶ but it is missing intent—they fail to assert that Backpage knowingly assisted in trafficking.

The *Jane Doe No. 1* court’s analysis accepted that the victims were minors at the time the trafficking occurred.¹³⁷ The plaintiffs would, however, need to establish that Backpage knew or recklessly disregarded that the victims were minors.¹³⁸ The plaintiffs alleged that Backpage’s “Escorts” subcategory was “created for the purpose of organizing advertisements for illegal commercial sex,”¹³⁹ and that “a significant percentage of the advertisements . . . involve minors between ages 12 and 17.”¹⁴⁰ The complaint alleges that “various studies known to the Backpage defendants estimate that perhaps 10 percent of the advertisements on Backpage.com [sic] feature children who are being sold for sex.”¹⁴¹ It is, however, unclear that these general statistics would suffice to meet the requisite *mens rea*.

2. *Newly Created Offense for Online Service Providers*

FOSTA’s newly created offense did not exist at the time the case was filed, and thus the facts alleged were not meant to attempt to

¹³⁴ *Id.* at 17.

¹³⁵ *Noble v. Weinstein*, 335 F. Supp. 3d 504, 524 (S.D.N.Y. 2018) (citing *United States v. Afvare*, 632 F. App’x 272, 285 (6th Cir. 2016)).

¹³⁶ Backpage.com Complaint, *supra* note 18, at 3.

¹³⁷ *See Jane Doe No. 1*, 817 F.3d at 16 (identifying each of the three plaintiffs as “minors at the relevant times”).

¹³⁸ *See* 18 U.S.C. § 1591(a) (2018); *see also supra* notes 93–95 and accompanying text.

¹³⁹ Backpage.com Complaint, *supra* note 18, at 15–16.

¹⁴⁰ *Id.* at 2.

¹⁴¹ *Id.* at 8.

show Backpage was liable for this offense. Further, the offense creates criminal liability. Still, it is interesting to consider whether the conduct described would make Backpage vulnerable to prosecution. In order to show Backpage had “the intent to promote or facilitate the prostitution of another person,”¹⁴² the Government would likely have to show that it intended to explicitly further a specific act of prostitution.¹⁴³ This seems difficult to prove based on the facts of *Doe*, which speak only generally to Backpage’s awareness of prostitution on the website.¹⁴⁴ Of course, the plaintiffs in the case would not have been trying to bring a criminal case against Backpage, something only federal, and now state, prosecutors can do under FOSTA. Still, given that the law was passed partly in response to this case, it is interesting to briefly consider whether the behavior alleged would have also given rise to criminal liability. No evidence posited points to Backpage’s knowledge of these specific victims, let alone an effort to facilitate their prostitution or trafficking. Given that “facilitating prostitution” has traditionally meant pimp-like behavior, it is difficult to see how a court would find Backpage liable.¹⁴⁵

C. Outcome

As an illustration of the legal impact of FOSTA, the previous Section applied the new law to the facts as alleged in the infamous *Doe* case. Turning to the new definition of “participation in a venture” in the TVPA, it is difficult to see how Backpage’s conduct would give rise to liability. Because all three elements of the offense require a knowledge *mens rea*, plaintiffs would have to show that Backpage *knew* it was benefitting, *knew* it was assisting, supporting, or facilitating a sex trafficking offense, and *knew* the victims were minors. Given the facts as alleged, it is unlikely Backpage’s conduct amounts to knowingly assisting what would likely need to be a specific trafficking offense, and not just trafficking in general.¹⁴⁶

As for the newly created criminal offense for online service providers, the case law is more open, but it is still difficult to see how

¹⁴² 18 U.S.C. § 2421A(a).

¹⁴³ See *Woodhull Freedom Found. v. United States*, 334 F. Supp. 3d 185, 200 (D.D.C. 2018) (explaining that § 2421A(a) is “plainly calculated to ensnare only specific unlawful acts with respect to a particular individual”).

¹⁴⁴ See generally Backpage.com Complaint, *supra* note 18.

¹⁴⁵ It may be that if the facts of the case do not rise to the conduct that the law proscribes, the law has failed. It also may be that if we accept the premise that Congress’s goal was to change the outcome of the case, then the conduct alleged must be enough to impute liability under FOSTA—in that case, this exercise gives us an example of the kind of conduct that FOSTA encompasses.

¹⁴⁶ See *supra* notes 142–44 and accompanying text.

Backpage's conduct could amount to intending to promote or facilitate the prostitution of another. This offense only contemplates an underlying offense of prostitution, but it remains unclear how a website could intend to promote another's prostitution without knowledge of specific prostitution acts and efforts to further them. The one district court that has addressed 18 U.S.C. § 2421A indicates that to be liable for the offense, a website operator would need to facilitate a "specific unlawful act[] . . . not the broad subject-matter of prostitution" more generally.¹⁴⁷ Looking to statutes with similar language, "facilitating prostitution" traditionally means acting as a pimp, which Backpage was not.¹⁴⁸

Thus, while it is clear FOSTA intended to target conduct like that of Backpage in *Doe v. Backpage*, the text of the law does not necessarily encompass that behavior and certainly does not do so unambiguously. The law has been criticized widely for its negative externalities,¹⁴⁹ but this Section gets at another criticism: Not only is the law creating issues for sex workers and free speech, but it is not even accomplishing its law enforcement objective because it does not necessarily create liability for the type of behavior it was enacted in response to.

III

ACCOUNTING FOR FOSTA'S CHILLING EFFECT AND EVALUATING ITS SUCCESS

Given the above, FOSTA does not proscribe the conduct it intends to or is at least ambiguous. Yet, numerous websites have either shut down completely or implemented restrictive rules or terms of conditions. Because FOSTA's legal effect is ambiguous, this self-regulatory response is disproportionate to the text of the law. This Part attempts to account for that disproportionate response. Considering the expressive effect of the law, this Part addresses the question of whether FOSTA was "successful."

A. *The Reaction to FOSTA*

Days after FOSTA passed the House, when Craigslist closed its "Personals" section, users trying to visit the page received a message which said:

¹⁴⁷ *Woodhull Freedom Found.*, 334 F. Supp. 3d at 200.

¹⁴⁸ See *supra* notes 105–07 and accompanying text.

¹⁴⁹ See *supra* note 3 (citing sources in which critics contend that FOSTA foreshadows the possibility of websites' policing user content, threatening free speech, and forces sex workers to forgo safer internet-based sex work for more dangerous kinds of sex work).

US Congress just passed HR 1865, “FOSTA,” seeking to subject websites to criminal and civil liability when third parties (users) misuse online personals unlawfully. Any tool or service can be misused. We can’t take such risk without jeopardizing all our other services, so we are regretfully taking Craigslist personals offline. Hopefully we can bring them back some day.¹⁵⁰

Cityvibe.com, an escort service website, shut down completely.¹⁵¹ After FOSTA passed in the Senate, Pounced.org, a website for “furries” to post personal advertisements, shut down, leaving a message which stated: “FOSTA increases our liability significantly and chips away at one of the primary reasons we as a small organization can provide services to the community - the protection that had previously been offered to us by Section 230 of the Communications Decency [A]ct.”¹⁵²

As more time has passed, the impact of the law has grown more pronounced. There has been a trend of online photo-sharing websites, including Tumblr and Instagram, deleting photos they consider obscene or demoting content that violates new policies, which many commentators attribute to concern about FOSTA liability.¹⁵³ One observer wrote that “SESTA and FOSTA are written in such vague terms that any website, app, or platform that seems to foster sexual meetups is put under scrutiny.”¹⁵⁴

¹⁵⁰ See Tom Jackman, *Trump Signs ‘FOSTA’ Bill Targeting Online Sex Trafficking, Enables States and Victims to Pursue Websites*, WASH. POST: TRUE CRIME (Apr. 11, 2018), <https://www.washingtonpost.com/news/true-crime/wp/2018/04/11/trump-signs-fosta-bill-targeting-online-sex-trafficking-enables-states-and-victims-to-pursue-websites>.

¹⁵¹ See Melissa Gira Grant, *Broad Anti-Trafficking Law Faces Its First Constitutional Challenge*, APPEAL (June 28, 2018), <https://theappeal.org/broad-anti-trafficking-law-faces-its-first-constitutional-challenge>.

¹⁵² See Samantha Cole, *Furry Dating Site Shuts Down Because of FOSTA*, VICE: MOTHERBOARD (Apr. 2, 2018, 10:00 AM), https://www.vice.com/en_us/article/8xk8m4/furry-dating-site-pounced-is-down-fosta-sesta (reporting on Pounced.org’s shutdown).

¹⁵³ See, e.g., Hanna Kozłowska, *Instagram Will Demote “Inappropriate Content”—and Self-Expression Along the Way*, QUARTZ (Apr. 13, 2019), <https://qz.com/1594392/instagram-will-demote-inappropriate-content-and-self-expression-along-the-way> (reporting on commentator speculation that Instagram’s and Tumblr’s actions are a result of FOSTA); Daniel Villarreal, *Instagram Just Banned Longtime Gay Historian Tom Bianchi, & It’s Part of a Troubling Anti-Gay Trend*, LGBTQ NATION (Feb. 3, 2019), <https://www.lgbtqnation.com/2019/02/instagram-just-banned-longtime-gay-historian-tom-bianchi-part-troubling-anti-gay-trend> (discussing the story of one Instagram user who was banned after his photos were deemed obscene).

¹⁵⁴ Alexander Cheves, *The Queer Sex Panic Is Just Beginning*, ADVOCATE (Jan. 30, 2019, 6:24 AM), <https://www.advocate.com/commentary/2019/1/30/queer-sex-panic-just-beginning>.

Many sites revised their guidelines, including Facebook, Craigslist, and Tumblr.¹⁵⁵ As of December 17, 2018, Tumblr banned “adult content,” meaning, in essence, content depicting naked bodies or sex acts.¹⁵⁶ The site then set out to purge “adult content” on the website.¹⁵⁷ Though Tumblr has not explicitly attributed the new policy to the passage of FOSTA, reporters note that “these sorts of decisions aren’t made in a vacuum.”¹⁵⁸ Many point to FOSTA as the true cause.¹⁵⁹

Facebook’s “Sexual Solicitation” policy bans content that “facilitates, encourages or coordinates sexual encounters between adults.”¹⁶⁰ The language of the policy is notably similar to the “facilitation” language used in FOSTA, and the policy then delineates banned behavior, including content that makes an ask or offer for sexual solicitation using “suggestive elements,” such as sexual “hints,” “sexualized slang,” and “sexualized language.”¹⁶¹ The policy may not be a coincidence, as it was established after the passage of FOSTA.¹⁶²

B. Accounting for the Disproportionate Reaction

If FOSTA’s effect is ambiguous as to the case it was designed to reach, the question becomes why there was such a reaction on the part of online service providers. Given the rhetoric surrounding FOSTA’s

¹⁵⁵ See Villarreal, *supra* note 153 (noting the relationship between FOSTA’s enactment and changes in user polices at Facebook, Craigslist, and Tumblr).

¹⁵⁶ See *Adult Content*, TUMBLR, <https://tumblr.zendesk.com/hc/en-us/articles/231885248-Sensitive-content> (last visited Aug. 11, 2019); Jeff D’Onofrio, *A Better, More Positive Tumblr*, TUMBLR: STAFF (Dec. 3, 2018), <https://staff.tumblr.com/post/180758987165/a-better-more-positive-tumblr> (announcing new Tumblr policy to ban adult content).

¹⁵⁷ See D’Onofrio, *supra* note 156 (noting implementation date for the new Tumblr policy that results in “adult content” being removed from the site).

¹⁵⁸ Paris Martineau, *Tumblr’s Porn Ban Reveals Who Controls What We See Online*, WIRED (Dec. 4, 2018, 2:07 PM), <https://www.wired.com/story/tumblrs-porn-ban-reveals-controls-we-see-online>.

¹⁵⁹ See, e.g., Cookie Cyboid, *Want to Know Why Tumblr Is Cracking Down on Sex? Look to FOSTA/SESTA*, MEDIUM: THE ESTABLISHMENT (Dec. 25, 2018), <https://medium.com/the-establishment/want-to-know-why-tumblr-is-cracking-down-on-sex-look-to-fosta-sesta-15c4174944a6> (arguing that SESTA/FOSTA is the reason for Tumblr’s ban of adult content).

¹⁶⁰ *Community Standards—14. Sexual Solicitation*, FACEBOOK, https://www.facebook.com/communitystandards/sexual_solicitation (last visited Aug. 14, 2019); see also Elliot Harmon, *Facebook’s Sexual Solicitation Policy Is a Honeypot for Trolls*, ELECTRONIC FRONTIER FOUND. (Dec. 7, 2018), <https://www.eff.org/deeplinks/2018/12/facebooks-sexual-solicitation-policy-honeypot-trolls> (noting the broad reach of Facebook’s new Sexual Solicitation policy).

¹⁶¹ *Community Standards—14. Sexual Solicitation*, *supra* note 160.

¹⁶² See Harmon, *supra* note 160 (explaining the rollout of Facebook’s new user guidelines and its connection to the passage of FOSTA).

passage, a likely explanation is that the law's expressive effect carries more weight than its actual text.

"Expressive effect" can mean multiple things. It might refer to a law's "statement" on a given issue, which can be designed to affect norms.¹⁶³ It can also mean, however, laws in which the "statement" is the sole motivation, even when there may be no practical consequences or impact of legislation.¹⁶⁴ One scholar points out that "[f]or those who endorse the expressive function of law, the most important testing cases arise when (a) people support laws because of the statement made by such laws but (b) the effects of such laws seem bad or ambiguous, even by reference to the values held by their supporters."¹⁶⁵ FOSTA may be one such case.

Despite the complexity of the issue of sex trafficking, the President and other politicians were quick to capitalize on the bill's passage. The nature of the issue provides good opportunity for politicians who can "use trafficking rhetoric to portray themselves as defenders of the downtrodden, and generate laudatory press coverage."¹⁶⁶ In reality, sex trafficking looks a lot different than it is portrayed by politicians and activists.¹⁶⁷ While horrific and certainly worth criminal justice resources, "trafficking" more often involves issues of undocumented immigration, the exploitation of the labor of otherwise consensual sex workers, or non-sexual forced labor.¹⁶⁸ That reality is less politically appealing however, and the plight of sex workers is often ignored in the political mainstream.

At the signing of the bill, President Trump called it "crucial legislation to combat online sex trafficking and bring criminals to justice,"¹⁶⁹ adding that the politicians present would do "everything in

¹⁶³ See Cass R. Sunstein, *On the Expressive Function of Law*, 144 U. PA. L. REV. 2021, 2025 (1996) (discussing the various expressive functions of law and highlighting its influence on social norms).

¹⁶⁴ See *id.* at 2026 ("[S]ometimes people support a law, not because of its effects on norms, but because they believe that it is intrinsically valuable for the relevant 'statement' to be made." (citing *id.* at 2023 n.9)).

¹⁶⁵ *Id.* at 2045.

¹⁶⁶ Noah Berlatsky, "Human Trafficking" Has Become a Meaningless Term, *NEW REPUBLIC* (Oct. 30, 2015), <https://newrepublic.com/article/123302/human-trafficking-has-become-meaningless-term>.

¹⁶⁷ See *id.* (discussing various popular public misconceptions of human and sex trafficking).

¹⁶⁸ See *id.* ("[Trafficking] usually refers to one or more of the following: being underage and selling sex; illegally immigrating; being subjected to any kind of forced labor or abusive labor practices; engaging in consensual sex work.").

¹⁶⁹ Oval Office, *Remarks by President Trump at Signing of H.R. 1865, the "Allow States and Victims to Fight Online Sex Trafficking Act of 2017,"* WHITEHOUSE.GOV (Apr. 11, 2018, 11:08 AM), <https://www.whitehouse.gov/briefings-statements/remarks-president-trump-signing-h-r-1865-allow-states-victims-fight-online-sex-trafficking-act-2017>.

[their] power to make sure that traffickers are brought to a swift and firm justice.”¹⁷⁰ House Majority Leader Kevin McCarthy told the President, “[y]ou are saving lives.”¹⁷¹ The Attorney General of Michigan, Bill Schuette, told him the bill “will give me and others [sic] attorneys general and county prosecutors the ability to shut down these bad actors And so this is a monumental day.”¹⁷²

This political rhetoric drove the passage of the law and impacted the way it was perceived afterwards. Research in political psychology suggests that in some cases the “point of legal regulation may instead be an attempt to co-opt the expressive capital of the law to advance a more symbolic agenda.”¹⁷³ One possibility explaining the reaction to FOSTA is that politicians capitalized on a relatively uncontroversial (albeit, extremely complex) issue and used the opportunity to express moral condemnation, which then scared website operators into believing the law would be harsher than it actually is. This may thus be a case where the expressive sentiment behind the law gained support, but the effectiveness of the law in addressing the harm that inspired it is questionable.

C. Evaluating FOSTA’s “Success”

As a final thought, this Note turns to the question of whether FOSTA is “successful.” The answer depends on which metric is used: Does success mean, as discussed above, that FOSTA would hold Backpage liable for the behavior litigated prior to FOSTA’s passage? Does success mean that sex trafficking has decreased? Or perhaps success means that the law expressed a moral stance and prompted actors to change their own behavior.

In evaluating success, one metric is whether FOSTA would have proscribed the behavior in the cases that were lost prior to its passage. This Note determines that it likely would not have;¹⁷⁴ the law is ambiguous and may not even have the intended law enforcement effect. To some, this may mean that FOSTA is an unsuccessful law. However, it is possible to measure success in ways other than potential litigation impact.

¹⁷⁰ *Id.*

¹⁷¹ *Id.*

¹⁷² *Id.*

¹⁷³ Kenworthy Bilz & Janice Nadler, *Law, Moral Attitudes, and Behavioral Change*, in *THE OXFORD HANDBOOK OF BEHAVIORAL ECONOMICS AND THE LAW* 241, 258 (Eyal Zamir & Doron Teichman eds., 2014).

¹⁷⁴ See *supra* Part II (considering whether the facts of *Doe v. Backpage* would generate liability under FOSTA and concluding that the answer is at best ambiguous, with no legal accountability being the likely outcome).

It is possible to think of FOSTA's goal not as creating legal liability for websites like Backpage, but instead to think of it in broader terms as decreasing sex trafficking. However, research since the law's passage shows that it is unsuccessful on this metric as well. In the wake of FOSTA's passage and Backpage shutting down, the number of sex ads online decreased by 75%.¹⁷⁵ By July 2018, the numbers were back up to about half of what they were previously.¹⁷⁶ Many reports also show sex trafficking getting worse. In San Francisco, for instance, there was a 170% jump in the reported incidence of human trafficking in 2018.¹⁷⁷ Law enforcement in San Antonio arrested 296 people for prostitution between March 21, 2018, when FOSTA passed Congress, and August 14—"a 58 percent increase from the same span the year before, when police made 187 arrests."¹⁷⁸ It is too soon to determine FOSTA's precise impact on sex trafficking, but it seems likely that it has not led to a decrease in sex trafficking incidents. Thus, if we are to define FOSTA's goal as decreasing sex trafficking, the law may not have been successful, though it could be too early to tell.

A final possibility is that regardless of whether FOSTA goes too far or does not go far enough, the law has been a success because it has forced websites like Backpage to self-regulate. In other words, it could be a success because many websites have responded to FOSTA out of fear of liability, whether or not that fear is legitimate.¹⁷⁹ Thus, even if FOSTA does not achieve its legal objective and has not reduced sex trafficking, it has forced websites to self-regulate and stop the behavior that the public and politicians found morally objectionable prior to FOSTA. If the true purpose in enacting FOSTA was to express a moral stance and stop websites known to allow "adult" advertisements, then FOSTA has done so. In this way, some may consider FOSTA a success—even without holding the sites legally accountable or necessarily decreasing the incidence of sex trafficking.

¹⁷⁵ Alexandra Villarreal, *Side Effect of Trafficking Law: More Street Prostitution?*, AP NEWS (Sept. 24, 2018), <https://www.apnews.com/5866eb2bcf54405694d568e2dd980a28> (recording a drop from 100,000 adult service ads posted worldwide per day to 76,000 after FOSTA passed Congress, and then to 25,000 when Backpage shut down).

¹⁷⁶ *Id.* ("[B]y July, the numbers had rebounded to more than 50,000 ads per day.")

¹⁷⁷ Susie Steimle, *New Laws Forced Sex Workers Back on SF Streets, Caused 170% Spike in Human Trafficking*, KPIX 5 (Feb. 3, 2019, 11:41 PM), <https://sanfrancisco.cbslocal.com/2019/02/03/new-laws-forced-sex-workers-back-on-sf-streets-caused-170-spike-in-human-trafficking>.

¹⁷⁸ Villarreal, *supra* note 175.

¹⁷⁹ See *supra* Section III.A (discussing online service providers' disproportionate self-regulatory reaction to FOSTA's enactment).

CONCLUSION

FOSTA has gained much notoriety for the negative impact it may have on both free speech online and the endangerment of consensual sex workers. While both of these criticisms are important, this Note addressed a separate overlooked problem: FOSTA does not actually accomplish its legal objective.

To explore that possibility, this Note analyzed the infamous *Doe v. Backpage* case in light of FOSTA. In doing so, it highlighted the many ambiguities in the law and determined that it does not achieve its intended legal effect. It also discussed the reaction to FOSTA by many websites that have self-regulated through shutting down entirely or changing their terms to be more restrictive. Given the conclusion that FOSTA's legal impact is ambiguous, the disproportionate reaction to FOSTA could be explained by the possibility that website operators are reacting to the law's expressive effect rather than the legal liability it creates.

Finally, this Note turned to the question of whether FOSTA was "successful." That answer ultimately depends on how success is defined. If success means that the law would change the outcomes of the cases that inspired FOSTA, then the answer is unclear. If the goal was truly to stop sex trafficking, however, the answer is more pessimistic: Research shows, if anything, it has gotten worse. If, however, the true purpose of the law was to express moral condemnation, then the self-censorship of so many websites makes the law more clearly a success.