



Appeals court orders Chicago sheriff to stop attacks on Backpage.com escort business

In which Judge Posner quotes Backpage's "dom & fetish" section.

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November 30, 2015

In a sharply worded [opinion \(PDF\)](#), a panel of appeals judges has ordered Cook County Sheriff Thomas Dart to stop his campaign seeking to "crush" Backpage.com's adult advertisement section.

Ars last wrote about the dispute between Dart and Backpage in July, when US District Judge John Tharp Jr. issued a temporary restraining order stopping some of Dart's pushier behavior, when he confronted Visa and MasterCard over their relationships with Backpage. But Tharp changed his tune the following month, denying Backpage a preliminary injunction that would have stopped Dart from trying to "coerce, threaten, or intimate repercussions" to card companies or other financial institutions. The credit card companies stayed away from Backpage.

US Circuit Judge Richard Posner, writing for a unanimous three-judge panel, writes today that the district court judge was wrong, and he grants Backpage the injunction it sought. In Posner's view, Dart was using his power as sheriff of a populous county to bully payment processors into backing away from a site that hosted ads he didn't like, a clear violation of the First Amendment. It's telling, Posner writes, that Dart didn't just sue Backpage.com. Dart had already tried that strategy against Craigslist, and lost.

"The suit against Craigslist having failed, the sheriff decided to proceed against Backpage not by litigation but instead by suffocation, depriving the company of ad revenues by scaring off its payments-service providers," Posner writes. "The analogy is to killing a person by cutting off his oxygen supply rather than by shooting him."

Dart views Backpage as a haven for underage prostitution and let the credit card providers know he believed they shared some responsibility.

"Your [credit] cards have and will continue to be used to buy ads that sell children for sex on sites like Backpage.com," Dart said in a June letter to the card companies, quoted by Posner. "The use of credit cards in this violent industry implies an undeserved credibility and sense of normalcy to such illicit transactions and only serves to increase demand."

Within a few days MasterCard and Visa cut all ties with Backpage. "So the threats had worked," wrote Posner, noting that the sheriff sent out a "triumphant press release" a few days later.

Dart's office had threatened to specifically single out Visa in a summer press conference about human trafficking. The company had taken one day longer to comply than Mastercard.

"Obviously the tone of the press conference will change considerably if your executives see fit to sever ties with Backpage and its imitators," Dart's director of communications told Visa via e-mail. "Of course we would need to know tonight if that is the case so that we can ensure the Sheriff's messaging celebrates Visa's change in direction as opposed to pointing out its ties to sex trafficking."

"Love the subtle messages they've been sending us that could easily be taken for blackmail," one Visa employee later wrote in an internal exchange. (All quotes in this article are from Posner's opinion.)

"Visa and MasterCard were victims of government coercion aimed at shutting up or shutting down Backpage's adult section," Posner concluded. He continues:

As a citizen or father, or in any other private capacity, Sheriff Dart can denounce Backpage to his heart's content. He is in good company; many people are disturbed or revolted by the kind of sex ads found on Backpage's website. And even in his official capacity the sheriff can express his distaste for Backpage and its look-alikes. A government entity, including therefore the Cook County Sheriff's Office, is entitled to say what it wants to say—but only within limits. It is not permitted to employ threats to squelch the free speech of private citizens.

The district court judge agreed with Dart that most of the Backpage adult ads were illegally selling sex, and that was that. But to Posner, the important thing is that some of the adult ads, which generate about \$9 million per month in revenue, are clearly legal. Dart is wrong to assume that everything there is "criminal, violent, or exploitive." He writes:

Fetishism? Phone sex? Performances by striptease artists? (Vulgar is not violent.) One ad in the category "dom & fetish" is for the services of a "professional dominatrix"—a woman who is paid to whip or otherwise humiliate a customer in order to arouse him sexually.... It's not obvious that such conduct endangers women or children or violates any laws, including laws against prostitution.

That section is accompanied by citations to the Wikipedia entry on "Dominatrix" and an article at xoJane called "What it's Actually Like Being a Dominatrix (According to One Dominatrix)."

Posner also called Dart's entire claim that sex trafficking is on the rise specious. He took note of an amicus brief (PDF) supplied by the Cato Institute and other libertarian groups that argues there's no scientific evidence that sex trafficking is on the rise and that "the war on sex trafficking mimics the war on drugs."

The case now goes back to district court where the parties are scheduled to engage in discovery and discuss whether there should be a permanent injunction. Given the appellate slap-down of Dart's position, however, it will be interesting to see how hard the sheriff's office fights what now looks like a losing battle.