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Online Sex Trafficking Hysteria: Flawed Policies, Ignored Human Rights, and Censorship

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ONLINE SEX TRAFFICKING HYSTERIA: FLAWED POLICIES, IGNORED HUMAN RIGHTS, AND CENSORSHIP

REGINA A. RUSSO*

ABSTRACT

On April 11, 2018, President Donald Trump signed the Allow States and Victims to Fight Online Sex Trafficking Act (FOSTA) into law. The law, passed with bipartisan support, created a new federal offense that prohibits the use or operation of websites with the intent to “promote” or “facilitate” prostitution, expanded existing liability for federal sex trafficking offenses, and amended Section 230 of the Communications Decency Act. Touted as the “most important law protecting Internet speech,” section 230 provides broad protection for online intermediaries that host or republish speech. It immunizes online intermediaries from liability for the things that third-party users post and say. With overbroad language and no clear parameters, FOSTA has led, and will continue to lead, to online intermediaries that host sexual content to shutter their sites and to censor certain speech.

This Note argues that laws such as FOSTA, ones that go after “sex trafficking,” perpetuate stigmatization of those in the sex work industry and are more harmful than they are helpful. Sex trafficking is an easy concept to look at in only black-and-white. However, it is a nuanced topic and, as such, deserves a nuanced analysis before policy makers promulgate laws such as FOSTA.

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CECILIA’S STORY

Cecilia came to America at the age of 20. She was a trans woman and met a man who convinced her to engage in street-based sex work. He would tell her that it was for them both, but it was really for him. He kept all the money she made. Her exploiter would threaten to call immigration authorities on her. He would play on her insecurities as a trans woman. Cecilia thought she needed a masculine figure to validate her and take care of her. After being stuck in this situation for a year, Cecilia realized she could advertise her services online on websites, such as Craigslist and Backpage. With the ability to screen clients, Cecilia no longer needed a male figure to physically protect her. She was able to break free from her situation, to procure her own clients, and to keep her own money that she was making.¹

INTRODUCTION

The fact of the matter is that prostitution has and always will be a part of our society. It has been embedded in the makeup of the world since as early as ancient Sumerian and Babylonian civilizations, dating as far back as 2400 BCE.² Prostitution in most American cities is both illegal and extremely dangerous.³ All around the world, street prostitutes are victims of rape, robbery, harassment, violent physical

¹ Victoria Law, *Anti-Trafficking Laws Are Hurting, Not Helping, but Sex Workers Are Fighting Back*, TRUTHOUT (Aug. 24, 2018), <https://truthout.org/articles/anti-trafficking-laws-are-hurting-more-than-helping-say-sex-workers/>. This story is based off a quote from a former sex worker and advocate, Cecilia Gentili, who told her story to Truthout. She is currently the owner of Trans Equity Consulting, a consulting company founded by her that was created in an effort to improve education and organizing surrounding transgender and gender nonconforming/nonbinary community advocacy with a particular focus on trans women of color, sex work, and substance abuse.

² See Gerda Lerner, *The Origin of Prostitution in Ancient Mesopotamia*, 11 SIGNS 236, 245 (1986) (“The Sumerian word for female prostitute, *kar.kid*, occurs in the earliest lists of professions dating back to ca. 2400 B.C.”).

³ See Ronald Weitzer, *New Directions in Research on Prostitution*, 43 CRIME, L., & SOC. CHANGE 211, 214–16 (2005).

assault, and death.⁴ The estimated workplace homicide rate for female prostitutes is 204 per 100,000.⁵

Instead of outright prohibition and criminalization of prostitution, the more realistic and humanitarian approach is to make it safer. Policy makers must acknowledge basic human rights and reduce the negative consequences associated with the enterprise. Just as safe needle exchange programs and accessibility to Narcan reduce the harms associated with illicit drug use, the internet has reduced the many harms associated with sex work.⁶

The advent of the internet was imperative in reshaping the commercial sex industry, for the better, by making it safer for those involved. Sex workers, such as Cecilia, were able to escape exploitation and work independently with the help of online advertisements. They were able to use the internet to create a whole online community of like-minded individuals. They were able to take advantage of the anonymity of the internet, creating a safeguard. They were able to work indoors instead of on the streets, to screen potential clients, to work together and share lists of dangerous clients, and to simply feel less isolated by communicating with fellow sex workers.

In April of 2018, Congress passed the Allow States and Victims to Fight Online Sex Trafficking Act (FOSTA), which effectively shut down many of the websites that helped protect sex workers' safety.⁷ FOSTA is a combination of two previously proposed bills: the Stop Enabling Sex Traffickers Act (SESTA),⁸ that was introduced and amended in the Senate, and the Allow States and Victims to Fight Online Sex Trafficking Act (FOSTA), that was introduced and amended in the House. Provisions from both SESTA and FOSTA merged to create the final enacted piece of legislation, FOSTA. FOSTA's enactment mooted SESTA itself.⁹

The purported intent of FOSTA is to hold "bad-actor" websites accountable, both criminally and civilly, if their platform is designed to facilitate prostitution and sex

⁴ Jason Prior et al., *Sex Worker Victimization, Modes of Working, and Location in New South Wales, Australia: A Geography of Victimization*, 50 J. SEX RES. 574–586 (2013); Laura Connelly et al., *Violent and Nonviolent Crimes Against Sex Workers: The Influence of the Sex Market on Reporting Practices in the United Kingdom*, J. INTERPERSONAL VIOLENCE 26 (2018).

⁵ John J. Potterat et al., *Mortality in a Long-term Open Cohort of Prostitute Women*. 159 AM. J. EPIDEMIOLOGY. 778, 782 (2003). The next riskiest jobs in the country were male taxicab drivers at 29 per 100,000 and female liquor store workers at 4 per 100,000.

⁶ Centers for Disease Control and Prevention, *Summary of Information on The Safety and Effectiveness of Syringe Services Programs*, (May 23, 2019), <https://www.cdc.gov/ssp/syringe-services-programs-summary.html>; see also Harm Reduction Coalition, *Naloxone Program Case Studies*, <https://harmreduction.org/issues/overdose-prevention/tools-best-practices/naloxone-program-case-studies/> (last visited Jan. 13, 2020).

⁷ H.R. Res. 1865, 115th Cong. (2018) (enacted).

⁸ S. Res. 1693, 115th Cong. (2017).

⁹ In many of the sources for this Note, scholars and journalists refer to either "SESTA," "FOSTA," or "FOSTA/SESTA" when talking about the current law. The accurate name is FOSTA. SESTA was the first bill introduced on the topic in the Senate. It was the bill that sparked the first bits of outrage and caught the attention of sex workers. However, it is inaccurate to refer to the current law as SESTA.

trafficking.¹⁰ Prior to FOSTA, interactive website providers were protected if their users posted content related to prostitution or sex trafficking.¹¹ For example, if somebody posted a covert ad for a sex trafficking victim in the comments section of an online Forbes article, the individual poster would be legally liable for sex trafficking, not Forbes. After FOSTA, Forbes can also be held liable as a sex trafficker in that scenario.

The problem is that often there is no method of easily determining whether a sexual interaction is consensual or coerced. Some argue that there is no difference between consensual sex work and sex trafficking.¹² However, as discussed later in this Note, sex work and sex trafficking are not monolithic. Policy makers must appreciate this fact and tailor legislation accordingly. Both sex work and sex trafficking are illegal. However, that does not mean that they do not deserve differentiation. Recreational marijuana is illegal in many states in America.¹³ So is heroin.¹⁴ While both are illegal, one enjoys more lax legal consequences than the other. Just as legislation for marijuana offenses and heroin offenses are tailored to their respective seriousness, the same should be done for sex work and sex trafficking. Marijuana law offenders are not charged with heroin offenses, just as those who participate in sex work consensually should not be charged under human trafficking laws. However, when it comes to sex crimes, policies often lump consensual sex work under the heading of sex trafficking. There is a notion that nobody would willingly participate in sex work, thus it must be sex trafficking. This thought process denies autonomy to sex workers and simplifies the complexity of sex work and sex trafficking. Further, it criminalizes those it purports to help. The “victims” of sex trafficking are usually the sex workers themselves. Yet, they are the ones who end up in handcuffs and shuffled through the criminal justice system. As is the norm with most sex trafficking legislation, FOSTA does not address this issue or even differentiate between consensual sex work and coerced sex trafficking. FOSTA put increased pressure on internet platforms to censor their users for fear of civil or criminal liability. With limited resources to do so, some sites just shut down completely. This leaves sex workers, like Cecilia, with no place to post their services easily and to communicate safety tactics with other sex workers. Without the shield and tools of the internet, sex workers face an increased proximity to violence and exploitation. Had FOSTA existed at the time of Cecilia’s struggles

¹⁰ H.R. Res. 1865, 115th Cong. (2018) (enacted).

¹¹ Jonathan Bailey, *Comparing FOSTA-SESTA and the DMCA*, PLAGIARISM TODAY (Mar. 27, 2018), <https://www.plagiarismtoday.com/2018/03/27/comparing-fosta-sesta-and-the-dmca/>.

¹² See Donna Hughes, *The “Natasha” Trade: Transnational Sex Trafficking*, NAT’L INST. OF JUST. J. 9 (2001) (“[T]rafficking occurs even if the woman consents.”); See also Melissa Farley, *Prostitution, Trafficking, and Cultural Amnesia: What We Must Not Know in Order To Keep the Business of Sexual Exploitation Running Smoothly*, 18 YALE J. L. & FEMINISM 109, 141 (2006) (“A false distinction between prostitution and trafficking has hindered efforts to abolish prostitution. The word trafficking has been used by sex industry promoters to separate ‘innocent’ victims of trafficking from women who choose prostitution.”).

¹³ See *Map of Marijuana Legality by State*, DISA GLOBAL SOLUTIONS, <https://disa.com/map-of-marijuana-legality-by-state> (last visited 2/4/2020).

¹⁴ See Erik MacLaren, *Heroin History and Statistics*, DRUGABUSE.COM, <https://drugabuse.com/heroin/history-statistics/> (last visited 2/4/2020).

with exploitation, she would not have been able to advertise, and she might have remained trapped.

FOSTA sounds like a fair and noble law: Who supports sex trafficking? But it is not that simple. Under the guise of going after sex traffickers, Congress bypassed any thoughtful process in favor of passing a bipartisan and morally favorable law that ignored the realities and complexities of the sex trafficking trade and commercial sex work. The law is illusory, as it deceptively seems like a law that would help those in the sex trade. However, it will do more harm than good. It will further stigmatize sex workers, cut off their access to harm reduction tools made available through the internet, erase the transparency that existed into legitimate human trafficking, and create the risk of over-censoring certain speech on the internet.

Those with the power to enact legislation have an impact on the community-at-large. Legislation surrounding sex work and human trafficking has done little to help those it purports to help and has even put those involved into more dangerous situations than they would have been without the laws.¹⁵ It is important to recognize when laws have unintended harmful consequences. FOSTA is a recent example of one of these harmful laws. This law not only fails to carry out its intended purpose, but it simultaneously creates serious consequences. Bringing awareness to FOSTA's dangers will hopefully lead to broader changes in the policy governing human trafficking and sex work, as well as more effective and thorough Congressional legislation.

This Note proceeds in five parts. Following this introduction, Part II discusses the issue of public conflation of sex work and human trafficking and briefly outlines the current legal framework governing the two, focusing on relevant federal legislation. Part II also explains the internet's effect on the commercial sex industry and introduces FOSTA into the present legal context. Although FOSTA seems like a good law, this Note argues that Congress took a reactionary approach to the issue of human trafficking online and that they must take a more thoughtful and integrated approach when legislating this complex issue. Part III delves into the problems with FOSTA including the issue of conflation, the true victims of the law, and how FOSTA frustrates law enforcement's efforts to catch legitimate traffickers. In addition, this section further explores the effect FOSTA will have on over-censoring sexual speech on the internet. Part IV proposes policy changes to address human trafficking online without harming sex workers and trafficking victims and urges Congress to consider a broad range of experiences when making laws. Part IV encourages a top-down approach, from the federal level all the way down to the state and community level, changing the public discourse on human trafficking and the commercial sex industry. Part V briefly concludes.

I. BACKGROUND

A. *Sex Work vs. Human Trafficking*

The concept of human trafficking, specifically sex trafficking, in America has garnered moral panic since the late 1990s.¹⁶ The mere utterance of the words 'sex

¹⁵ See *infra* Parts II.B, III.B.

¹⁶ Ronald Weitzer, *The Social Construction of Sex Trafficking: Ideology and Institutionalization of a Moral Crusade*, 35 POL. & SOC'Y 447 (2007); Ashley Crossman, *A Sociological Understanding of Moral Panic*, THOUGHTCO (Jan. 19, 2018), <https://www.thoughtco.com/moral-panic-3026420>. ("A moral panic is a widespread fear, most

trafficking' creates a feeling of disgust and disdain from all sides of the social and political spectrum.¹⁷ Without any profound consideration, the media, politicians, activist organizations, and religious groups alike all create a hysteria around the topic and agree that sex trafficking must be snuffed out no matter what it takes.¹⁸

The most recent wave of sex trafficking panic regarded the fact that people can "order a girl online as if she were pizza"¹⁹ on the "world's top online brothel," Backpage.com.²⁰ Backpage was a classified advertisement website.²¹ Users posted advertisements for items and services ranging from used home appliances to massage therapy services. In the site's adult section, users could find different subcategories of various sex work professions, including escorts, erotic masseuses, strippers, phone sex operators, and more.²² Unsurprisingly, this was the section of the website that concerned politicians and garnered the most attention.²³ Politicians are often the biggest crusaders against human trafficking.²⁴ They introduce anti-trafficking

often an irrational one, that someone or something is a threat to the values, safety, and interests of a community or society at large. Typically, a moral panic is perpetuated by news media, fueled by politicians, and often results in the passage of new laws or policies that target the source of the panic. In this way, moral panic can foster increased social control . . . Additional moral panics include public attention to 'welfare queens,' . . . a so-called 'gay agenda' that threatens the American way of life[,] . . . [and,] after the 9/11 terrorist attacks, Islamophobia, surveillance laws, and racial and religious profiling [] from the fear that all Muslims, Arabs, or brown people overall are dangerous because the terrorists who targeted the World Trade Center and the Pentagon had that background.").

¹⁷ David Rosen, *The Politics of Sex Trafficking*, COUNTERPUNCH (Oct. 2, 2013), <https://www.counterpunch.org/2013/10/02/the-politics-sex-of-trafficking/> (noting that the battle against human trafficking brings together a variety of public figures from George W. Bush to Major League baseball players to Ashton Kutcher).

¹⁸ *Id.*

¹⁹ Nicholas Kristof, Opinion, *How Pimps Use the Web to Sell Girls*, N.Y. TIMES (Jan. 25, 2012), <https://www.nytimes.com/2012/01/26/opinion/how-pimps-use-the-web-to-sell-girls.html>.

²⁰ Attorney General Kamala D. Harris Announces Criminal Charges Against Senior Corporate Officers of Backpage.com for Profiting from Prostitution and Arrest of Carl Ferrer, CEO, STATE OF CALIFORNIA DEPARTMENT OF JUSTICE, (Oct. 6, 2016), <https://oag.ca.gov/news/press-releases/attorney-general-kamala-d-harris-announces-criminal-charges-against-senior> [hereinafter Harris] (referring to backpage.com as "the world's top online brothel" many times throughout the press release).

²¹ Del Quentin Wilber & Lalita Clozel, *U.S. Shuts Down Backpage, a Classified-Ad Website, Indicts Co-Founders* (Apr. 9, 2018), <https://www.wsj.com/articles/u-s-shuts-down-backpage-a-classified-ad-website-indicts-co-founders-1523310499>.

²² *Id.*

²³ Harris, *supra* note 20.

²⁴ See Matt Welch, Opinion, *Op-Ed: At the Sessions Hearing, the Business of Government Is...Hysteria*, L.A. TIMES (Jan. 10, 2017) <https://www.latimes.com/opinion/op-ed/la-oe-welch-sessions-hysteria-20170110-story.html> (explaining Senator Dianne Feinstein of California's factually inaccurate claims about human trafficking that she presented at the Senate confirmation hearing for attorney general nominee Jeff Sessions. These included inaccurate

legislation, staunchly support anti-human trafficking organizations, and run on anti-trafficking platforms.²⁵ Since the Progressive Era, politicians have stoked the moral panic flames of sex trafficking and they continue to do so today.²⁶

As a result of the hysteria surrounding trafficking, legislators take reactionary and less-than-thorough approaches to the issue. It is difficult to estimate the scale of human trafficking because of its illicit and underground nature, however, in the realm of human trafficking, it is common for numbers to be grossly inflated and inaccurate.²⁷

Another issue is the conflation of prostitution and human trafficking. Many assume that prostitution *must* be human trafficking. The person selling sex *must* be exploited. The person selling sex *must* be voiceless. The person selling sex *must* be rescued. These fallacies are purposely injected into human trafficking discourse to demonize sex work and to abolish prostitution altogether by calling it trafficking.²⁸ Legislation often either blurs the two concepts or denies that there is even a difference at all. Then, like with FOSTA, flawed policies result.

This Note defines sex work as the consensual and voluntary provision of sexual services for money or other compensation. Human trafficking, on the other hand, is a grave human rights violation defined by U.S. Federal law as knowingly recruiting, enticing, harboring, transporting, providing, obtaining, or maintaining by any means a person to engage in different forms of labor—including sex and non-sex labor.²⁹ This act must also be accompanied with use of force, fraud, or coercion to compel the

claims that the average age of a trafficking victim is 12 to 14 and that human trafficking is the second largest criminal industry in the United States).

²⁵ See, e.g., *Human Trafficking Legislation Tracker*, U.S. CHAMBER OF COMMERCE, <https://www.uschamber.com/issues/labor/task-force-eradicate-human-trafficking/human-trafficking-legislation-tracker> (last visited Jan. 13, 2020).

²⁶ See generally JESSICA R. PILEY, *POLICING SEXUALITY: THE MANN ACT AND THE MAKING OF THE FBI* (2014) (explaining the history of the Mann Act, the politics behind it, and how it eventually created the FBI that we have today).

²⁷ See Sheldon X. Zhang, *Beyond the 'Natasha' story - a Review and Critique of Current Research on Sex Trafficking*, 10 *GLOBAL CRIME* 3, 178–95 (2009) (describing the flawed techniques used to obtain the numbers associated with human trafficking and determining that often numbers are cited with no real empirical data to back them up in an effort to gain unfettered support for anti-trafficking initiatives).

²⁸ Maggie McNeil, *Lies, Damned Lies, and Sex Work Statistics*, *WASH. POST* (Mar. 27, 2014), https://www.washingtonpost.com/news/the-watch/wp/2014/03/27/lies-damned-lies-and-sex-work-statistics/?utm_term=.765217cd0144 (“Sex work prohibitionists have long seen trafficking and sex slavery as a useful Trojan horse. In its 2010 ‘nation action plan,’ for example, the activist group Demand Abolition writes, ‘Framing the Campaign’s key targets as sexual slavery might garner more support and less resistance, while framing the Campaign as combatting prostitution may be less likely to mobilize similar levels of support and to stimulate stronger opposition.”); see also Glenn Kessler, *Why You Should Be Wary of Statistics on ‘Modern Slavery’ and ‘Trafficking’*, *WASH. POST* (Apr. 24, 2015), <https://www.washingtonpost.com/news/fact-checker/wp/2015/04/24/why-you-should-be-wary-of-statistics-on-modern-slavery-and-trafficking/>.

²⁹ Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, 114 Stat 1464 (2000).

individual to take part in the labor.³⁰ The difference between the sex work and human trafficking hinges heavily on individual autonomy.

While they are different, it is also important to appreciate that prostitution and human trafficking are not on a continuum with one on the left and the other on the right. They are separate, yet complex, concepts. The notion that sex work can only be “exploitation or choice” or “violence or victory” ignores the nuance of the commercial sex industry.³¹ In some instances, human trafficking victims become sex workers.³² In others, the opposite occurs and “sex workers on the margins [are] targeted by traffickers for their vulnerability and isolation,” and become victims.³³

Human rights organizations and sex worker advocates emphasize the importance of recognizing the difference between sex trafficking and sex work.³⁴ In 2016, Amnesty International, the world’s largest human rights organization, published a policy report calling for the decriminalization of sex work altogether.³⁵ While doing so, Amnesty also stated:

Trafficking is an abhorrent abuse of human rights and must be criminalized as a matter of international law. We do not consider a trafficked woman who is forced to sell sex to be a ‘sex worker’. She is a trafficked woman and deserves protection as such The reality is laws which criminalize ‘brothel-keeping’ and ‘promotion’ often lead to sex workers being arrested and prosecuted themselves What we want is a refocusing of laws to tackle acts of exploitation, abuse, and trafficking – rather than catch-all offences that only criminalize and endanger sex workers.³⁶

³⁰ *Id.* If the person being trafficked is under the age of 18, it is automatically a violation of federal human trafficking law even absent the element of force, fraud, or coercion.

³¹ Ine Vanwesenbeeck, *Sex Work Criminalization Is Barking Up the Wrong Tree*, 46 ARCHIVES SEXUAL BEHAVIOR 6 1631, 1638 (2017).

³² See Law, *supra* note 1.

³³ See Ana Glavan, *Human Trafficking: A Sex Workers Rights and Harm Reduction Narrative*, HIV COMMUNITY LINK (Mar. 27, 2015), <https://hivcl.org/2015/03/27/human-trafficking-a-sex-worker-rights-harm-reduction-narrative/>.

³⁴ *Sex Work and Sex Trafficking*, SWOP BEHIND BARS, <https://www.swopbehindbars.org/about-swop-behind-bars/the-difference-between-sex-work-and-sex-trafficking/> (last visited Jan. 15, 2020); *Working Group on Sex Work and Human Rights*, https://www.nswp.org/sites/nswp.org/files/KDTD_Human_Trafficking_And_Sex_Work.pdf (last visited Jan. 15, 2020).

³⁵ See Amnesty International Publishes Policy and Research on Protection of Sex Workers’ Rights, AMNESTY INT’L. (May 26, 2016), <https://www.amnesty.org/en/latest/news/2016/05/amnesty-international-publishes-policy-and-research-on-protection-of-sex-workers-rights/>.

³⁶ Catherine Murphy, *Sex Workers’ Rights are Human Rights*, AMNESTY INTERNATIONAL (Aug. 14, 2015), <https://www.amnesty.org/en/latest/news/2015/08/sex-workers-rights-are-human-rights/>.

Unfortunately, legislation continues to further criminalize prostitution and perpetuate exploitation by refusing to acknowledge the difference between sex work and human trafficking.

B. Prostitution and Human Trafficking Federal Legislation

The Mann Act of 1910, originally titled the White Slave Traffic Act, was the first federal anti-prostitution law. It outlawed the transportation of individuals across state lines for “the purpose of prostitution or debauchery,” or for, “any other immoral purpose.”³⁷ The law was a result of one of the first moral panics in the U.S. around sex trafficking.³⁸ At the time that the law was enacted, prostitution was referred to as a “social evil” and there were mounting social tensions related to immigration, urbanization, and the sexuality of women.³⁹ In 1910, the United States District Attorney in Chicago, Edward W. Sims said,

One thing should be made very clear to the girl who comes up to the city, and that is that the ordinary ice cream parlor is very likely to be a spider’s web for her entanglement. This is perhaps especially true of those ice cream saloons and fruit stores kept by foreigners. Scores of cases are on record where young girls have taken their first step towards “white slavery” in places of this character.⁴⁰

Sims’s rhetoric was, and continues to be, common among many politicians. Leaders fueled fear by creating this narrative of a vulnerable and innocent white girl coming ‘up to the city’ and becoming a sexual victim to a foreigner. Fear of prostitution of young white girls prompted the United States to amend its immigration laws, to join the 1904 International Agreement for the Suppression of the “White Slave Traffic,” and to eventually pass the Mann Act on a domestic level.⁴¹

The White Slave Traffic Act was aimed at protecting innocent white girls from being lured into forced prostitution by foreign-born traffickers.⁴² The irony is that the

³⁷ White-Slave Traffic (Mann) Act, ch. 395, 36 Stat. 825 (1910) (codified as amended at 18 U.S.C. §§ 2421–2424 (2015)).

³⁸ “By 1907, a full-fledged moral panic set in. There were rumors, taken as truth, that women were being forced into prostitution and shuttled around the country by vast networks controlled by immigrants, who were arriving in the U.S. by the millions. The plague of ‘white slavery’ was on everyone’s minds. Muckraking journalists fueled the hysteria with sensationalized stories of innocent girls kidnapped off the streets by foreigners, drugged, smuggled across the country and forced to work in brothels.” *All Things Considered: The Long, Colorful History of the Mann Act*, NATIONAL PUBLIC RADIO (Mar. 11, 2008), <https://www.npr.org/templates/story/story.php?storyId=88104308>.

³⁹ Alex Smolak, *White Slavery, Whorehouse Riots, Venereal Disease, and Saving Women: Historical Context of Prostitution Interventions and Harm Reduction in New York City during the Progressive Era*, 28 SOC. WORK IN PUB. HEALTH. 496, 498 (2013).

⁴⁰ ERNEST A. BELL, FIGHTING THE TRAFFIC IN YOUNG GIRLS OR WAR ON THE WHITE SLAVE TRADE 71 (1910).

⁴¹ JESSICA R. PILEY, POLICING SEXUALITY: THE MANN ACT AND THE MAKING OF THE FBI 33–34 (2014).

⁴² *Id.* at 60–70.

prostitutes ran the risk of also being indicted for violations of the Mann Act.⁴³ Although the Act was seen as a paternalistic measure to protect vulnerable women, it criminalized women at the same time. This irony lasts to this day in human trafficking prosecutions. Often, trafficked victims themselves are charged with crimes, and are required to engage in Human Trafficking Intervention Courts.⁴⁴

Following the lead of the federal government, by 1925, every state had enacted legislation criminalizing prostitution.⁴⁵ State laws vary from ones that penalize buyers more harshly than sellers, ones that penalize sellers more harshly than buyers, and a tier-like system that differentiates the penalty for a first offense compared to a third offense for both the buyer and the seller.⁴⁶ Beyond these state prostitution laws, there is an array of other laws that criminalize prostitution at the state level, including loitering for the purposes of committing prostitution and engaging in solicitation of prostitution.⁴⁷ Currently, prostitution is illegal in every state in the U.S. except for a few rural counties in Nevada, where it is legal and regulated.⁴⁸

In the U.S., the concept of human trafficking began emerging as an issue in the mid-1990s and, by the late 90s, it was a prioritized political issue.⁴⁹ In 2000, the United States led negotiations over an international law on trafficking, the United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (the U.N. Trafficking Protocol).⁵⁰ In the same year, the first federal statute in the U.S. to address human trafficking at a domestic level was enacted, the

⁴³ See *United States v. Holte*, 236 U.S. 140, 143–45 (1915) (holding that a prostitute who conspired with a man to transport her from Illinois to Wisconsin for the purpose of prostitution of herself is guilty of violation of The White Slave Act).

⁴⁴ See, e.g., Suzanne Phillips et al., *Clearing the Slate: Seeking Effective Remedies for Criminalized Trafficking Victims*, CUNY SCHOOL OF LAW (2013), <http://www.law.cuny.edu/academics/clinics/iwhr/publications/Clearing-the-Slate.pdf> (“Prostitution and related convictions continue to haunt trafficking survivors long after they have escaped the trafficking situation, posing a serious hurdle to their ability to secure employment, safe housing, and other factors that are key to rebuilding their lives. In this way, criminal convictions often act as a significant barrier to recovery and reintegration for survivors of trafficking.”). See also Melissa Gira Grant, *Inside NY Courts Where Sex Workers Are ‘Painted as Victims and Treated as Criminals’*, THE APPEAL (Sept. 21, 2018), <https://theappeal.org/inside-ny-courts-where-sex-workers-are-painted-as-victims-and-treated-as-criminals/>.

⁴⁵ For a complete overview of the laws of the fifty states regarding prostitution, see *US Federal and State Prostitution Laws and Related Punishments*, PROCON.ORG, <https://prostitution.procon.org/view.resource.php?resourceID=000119> (last visited Jan. 15, 2020).

⁴⁶ *Id.*

⁴⁷ See, e.g., CAL. PENAL CODE § 653.22(a) Loitering with Intent to Commit Prostitution; OHIO REV. CODE § 2907.24 Soliciting.

⁴⁸ NEV. REV. STAT. § 244.345.

⁴⁹ E. O’BRIEN ET AL., *THE POLITICS OF SEX TRAFFICKING: A MORAL GEOGRAPHY* 6 (2013).

⁵⁰ United Nations, Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention Against Transnational Organized Crime, Nov. 15, 2000, 2237 U.N.T.S. 319.

Trafficking Victims Protection Act of 2000 (TVPA).⁵¹ Both the U.N. Trafficking Protocol and the TVPA define trafficking as some type of movement or recruitment of humans for the purpose of subjecting them to involuntary servitude in one or more of a wide variety of sectors.⁵² Trafficking is considered “severe” when the act “is induced by force, fraud, or coercion,” or where the victim is under 18 years of age.⁵³ The TVPA approach calls for a three-pronged response to trafficking: prevention, protection, and prosecution.⁵⁴ However, in practice, the TVPA is a ‘law-and-order’ heavy approach to the issue of trafficking, disproportionately focusing on the third prong.⁵⁵ In enacting the TVPA, Congress referred to trafficking as “modern day slavery” and that its perpetrators “primarily target women and girls, who are disproportionately affected by poverty, the lack of access to education, chronic unemployment, discrimination, and the lack of economic opportunities.”⁵⁶ The intent of the TVPA was to protect and assist victims of human trafficking, but this intent has been distorted in many ways, including the conflation of trafficking with prostitution by politicians and government officials, causing trafficking to be “captured by ideology.”⁵⁷ The 2008 reauthorization of the TVPA created an amendment to facilitate expanded criminalization of pimping, pandering, and *prostitution* as trafficking

⁵¹ Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, 114 Stat. 1464 (2000) (codified as amended throughout various sections within titles 8, 18 and 22 of the United States Code).

⁵² See TVPA § 103(9); U.N. Trafficking Protocol art. 3.

⁵³ TVPA § 103(8).

⁵⁴ TVPA § 105(d)(2).

⁵⁵ Dina Francesca Haynes, *(Not) Found Chained to a Bed in a Brothel: Conceptual, Legal and Procedural Failures to Fulfill the Promise of the Trafficking Victims Protection Act*, 21 GEO. IMMIGR. L.J. 337, 345 (2007) (“The United States approaches its efforts to combat trafficking in human beings from a law enforcement perspective, with the justification for victim assistance emerging from the willingness and ability of victims to cooperate with law enforcement.”).

⁵⁶ 22 U.S.C. § 7101(b)(4) (2012).

⁵⁷ Haynes, *supra* note 55 (outlining major issues with human trafficking legislation and discourse, with a focus on the TVPA, is that, “the root causes of trafficking are obscured, in service to a preferred focus on sex and victimhood and [the] misapplication of the law both by those tasked to interpret it, and by politicians who have tacked their own political agendas onto anti-trafficking initiatives, [which lead] the nation away from a hardnosed and honest look at the problems of causation in trafficking...”). See also Janie A. Chuang, *Rescuing Trafficking from Ideological Capture: Prostitution Reform and Anti-Trafficking Law and Policy*, 158 U. PA. L. REV. 1655, 1659–60 (2010) (exposing the difficulties of translating anti-prostitution ideology, borne out of closely held moral and ethical beliefs, into effective governance strategies and calling for ideological commitments to be set aside and the actual impact of anti-trafficking interventions on both the populations they purport to help and the vulnerable populations they collaterally affect to be objectively evaluated).

offenses.⁵⁸ The TVPA is a criminalization-focused approach to trafficking and is considered a failure by scholars and researchers.⁵⁹

In 2015, Congress passed the Justice for Victims of Trafficking Act (JVTA).⁶⁰ The main goal of this legislation was to ensure a victim-centered approach by improving victim restitution, creating victims-rights safeguards in criminal procedures, and providing training for law enforcement to better identify human trafficking.⁶¹ A notable provision in the JVTA is the addition of Section 118, “Stop Advertising Victims of Exploitation Act of 2015” (SAVE Act). This provision criminalizes advertising sex trafficking, knowingly benefitting financially from participation in a venture that advertises sex trafficking, and engaging in activities related to sex trafficking besides advertising, knowingly or in reckless disregard of the fact that sex trafficking is involved.⁶² The Act did not define “advertise.” The SAVE Act was the beginning of Congress’ attempts to statutorily target sites, such as Backpage.com, by using broad sweeping terms and failing to define them.

The evolution of prostitution from “white slavery” to “modern day slavery” and “trafficking” exemplifies the false narratives surrounding commercial sex work and how many human trafficking laws have resulted from moral panics and ideological warfare, failing to truly address the root causes and concerns around human trafficking, and harming and stigmatizing consensual sex workers in the process.

C. Sex Work in the Age of the Internet

The arrival of the internet swiftly revolutionized the commercial sex industry. The internet entered American households in the early 1990s and “surfing the internet” became commonplace relatively quickly.⁶³ In 1996, the first known website devoted to prostitution was developed by an escort in Dallas.⁶⁴ In 1997, the first nationwide online escort advertising site, Eros.com, appeared.⁶⁵ Finally, in the mid-2000s, sites

⁵⁸ William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 § 225(b), Pub. L. No. 110-457, 122 Stat. 5044, 5072 (2008).

⁵⁹ Amber Horning & Anthony Marcus, *Conflict and Agency Among Sex Workers and Pimps a Closer Look at Domestic Minor Sex Trafficking*, 653 ANNALS AM. ACAD. POL. & SOC. SCI. 1 225, 243. (2014). (“[W]e fear that TVPA may undermine itself by creating a chasm between social service and law enforcement authorities and the many young sex workers and their third parties who could be the eyes and ears of antitrafficking in illicit and semiclandestine sex markets.”).

⁶⁰ Justice for Victims of Trafficking Act of 2015, Pub. L. No. 114-22, 129 Stat 227 (2015); see also Michele Boggiani, *When Is a Trafficking Victim a Trafficking Victim: Anti-Prostitution Statutes and Victim Protection*, 64 CLEV. ST. L. REV. 915, 960 (2016).

⁶¹ Justice for Victims of Trafficking Act of 2015.

⁶² *Id.*

⁶³ *Americans Going Online... Explosive Growth, Uncertain Destinations*, PEW RES. CTR. (Oct. 16, 1995), <https://www.people-press.org/1995/10/16/americans-going-online-explosive-growth-uncertain-destinations/>.

⁶⁴ See Scott Cunningham & Todd D. Kendall, *Prostitution 2.0: The Changing Face of Sex Work*, 69 J. URB. ECON. 273, 273 (2011). (“The popularity of the site grew quickly and within a year had experienced 700,000 page views.”).

⁶⁵ *Id.*

such as Craigslist.org and Backpage.com made their way to the internet.⁶⁶ Craigslist and Backpage were both classified advertisement websites. Users were able to post free or low-cost advertisements in a variety of sections including ‘jobs,’ ‘housing,’ ‘items wanted,’ and ‘gigs.’⁶⁷ Originally, on Craigslist, there was a section under ‘services’ titled ‘erotic.’⁶⁸ On Backpage, there was an adult section with various subcategories of sex work.⁶⁹ The ‘erotic services’ section on Craigslist and adult section on Backpage allowed sex workers to post low-cost advertisements for their services to a wide audience.⁷⁰ Referred to as “Prostitution 2.0,”⁷¹ the internet-facilitated wave of prostitution brought with it the opportunity for sex workers to reach many clients with informative advertising at a low cost, the ability to build reputations for high quality service, and to employ screening methods to reduce the risk of discovery and undesirable clients.⁷² However, from the time that Craigslist introduced its ‘erotic services’ section to the time that it was constructively forced to shut it down, the section was at the center of social and legal controversy.⁷³

In 2009, under pressure, Craigslist replaced its ‘erotic services’ section with an ‘adult services’ section.⁷⁴ Further, each listing had to be manually approved by moderators and had fees associated with posting, as opposed to being free.⁷⁵ In 2010, under even further mounting legal pressure that criticized Craigslist for facilitating prostitution and sex trafficking, Craigslist shut down its adult services section altogether.⁷⁶ Backpage’s adult section also faced similar criticism and pressure.⁷⁷ The site shut down its adult section in 2017.⁷⁸ However, although their sources of advertising were whittling away on both Craigslist and Backpage, sex workers found

⁶⁶ *Id.*; Christine Biederman, *Inside Backpage.com’s Vicious Battle With the Feds*, WIRED (June 18, 2019), <https://www.wired.com/story/inside-backpage-vicious-battle-feds/>.

⁶⁷ How To Advertise On Craigslist Effectively - ShivarWeb, SHIVARWEB (2017), <https://www.shivarweb.com/11495/how-to-advertise-on-craigslist/> (last visited Oct 30, 2019).

⁶⁸ Cunningham and Kendall, *supra* note 64 at 275.

⁶⁹ *Id.*

⁷⁰ *Id.* at 274.

⁷¹ *Id.* at 273.

⁷² *Id.* at 274.

⁷³ Jacqui Cheng, *Craigslist Gives in, Will Shut Down Erotic Services Section*, ARS TECHNICA, (May 13, 2009), <https://arstechnica.com/tech-policy/2009/05/craigslist-gives-in-will-shut-down-erotic-services-section/>.

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ Ryan Singel, *Craigslist Shuts Down International “Adult Services” Sections*, WIRED (Dec. 18, 2010), <https://www.wired.com/2010/12/craigslist-adult-services-international/>.

⁷⁷ Derek Hawkins, *Backpage.com Shuts Down Adult Services Ads After Relentless Pressure From Authorities*, WASH. POST (Jan. 10, 2017) <https://www.washingtonpost.com/news/morning-mix/wp/2017/01/10/backpage-com-shuts-down-adult-services-ads-after-relentless-pressure-from-authorities/>.

⁷⁸ *Id.*

ways to covertly continue to advertise their services, whether it was through the ‘Personals’ section on Craigslist or the ‘women seeking men’ section on backpage.⁷⁹

The internet has transformed sex work into a safer profession. *Beyond the Gaze* is a UK-based project at The University of Leicester that formed to examine the working practices, regulations, and safety of internet-based sex work.⁸⁰ *Beyond the Gaze* conducted a study with the goal to “understand the wider theoretical significance of new technologies for changing the social practice of sexual consumption and the sex industry[;] . . . map the trends and understand the working practices in internet-based sex work markets[;] . . . and to] facilitate the integration of online sex work into safety & health related provisions.”⁸¹ The study took place between October 2015 and March 2017. The researchers conducted online surveys of 641 sex workers, online surveys of 1,323 customers of sex workers, and interviews with police representatives.⁸² It concluded, among other things, that sex workers saw the internet “to be of considerable importance in developing services, enabling independent working and greater control over working circumstances, and improving safety strategies.”⁸³ It was also vital for networking, peer communication, and support.⁸⁴ “While certain crimes may be prevalent in online sex work,⁸⁵ the . . . study . . . confirms that levels of violent crime encountered by internet-based sex workers are considerably lower than those reported in studies of street-based workers.”⁸⁶ Further, another study conducted in the U.S. in September of 2017 found that the introduction of the “erotic services” page on

⁷⁹ MICHAEL SHIVELY ET AL., A NATIONAL OVERVIEW OF PROSTITUTION AND SEX TRAFFICKING DEMAND REDUCTION EFFORTS, FINAL REPORT 47 (2012).

⁸⁰ Teela Sanders et al., *Beyond the Gaze: Summary Briefing on Internet Sex Work*, UNIV. OF LEICESTER, 2 (Oct. 2017), <https://www.beyond-the-gaze.com/wp-content/uploads/2018/01/BtGbrieingssummaryoverview.pdf>.

⁸¹ *Id.* at 1.

⁸² *Id.* at 2.

⁸³ *Id.* at 2, 12. (89.4% of those interviewed in the study agreed that the internet helped them avoid reliance on third parties).

⁸⁴ *Id.* at 6. (“Interview participants mentioned using peer forums, some regularly and others more occasionally, for example when they wanted specific information or advice. For instance, Alice (46, independent escort) noted that these forums were helpful for information when touring: ‘just this morning I was asking people’s opinions on two different locations for tour and which one would be preferable, you know, in a particular town’. Boyd (32, working in several sectors, including independent escorting and camming) commented that peer forums could be particularly useful for accessing safety alerts and other business-related information for people new to sex working, ‘guys that are coming into it and don’t have much experience to get to grips with it’. Milena (32, independent escort also providing BDSM services) found regional forums useful for buddying with other sex workers: ‘girls are very open because obviously we started talking about the safety from the very get-go . . . If you didn’t have that internet . . . everything would have been underground and everybody would be scared’.”).

⁸⁵ *Id.* at 8, 12. (65.1% repeated receiving “persistent or repeated unwanted contact or attempts to contact individuals through email text or social media” and 56.2% reported receiving “threatening or harassing texts, calls or emails”).

⁸⁶ *Id.* at 12.

Craigslist's front page reduced the female homicide rate by as much as 10-17%.⁸⁷ In short, the internet has proven to make conditions safer for sex workers.⁸⁸

The internet also provides sex workers with a place to reach out to other sex workers, feel less isolated, and engage in harm reduction strategies amongst each other. Harm reduction principles aim to reduce individual, community, and societal harms associated with dangerous activities.⁸⁹ Harm reduction directly contrasts with prevention and prohibition. In the realm of sex work, harm reduction is a vital tool advanced by many sex work advocacy groups. The internet is indispensable for distribution of harm reduction strategies and supplying easy access for sex workers to these strategies. Some examples of harm reduction literature titles that are easily accessible online are, "Screening 101 for Working Online," "Tricks of the Trade: Health and Safety on the Job," and "Safety Planning with Sex Workers."⁹⁰ Overall, the introduction of the internet was imperative in revolutionizing how sex workers conduct their work and approach their own safety.

D. FOSTA

Classified advertisement site Backpage.com was public enemy #1 in Congress', specifically Senator Kamala Harris's, online sex trafficking hysteria.⁹¹ To take down the enemy, both houses of Congress introduced similar bills that would address the issue of sex trafficking on the internet, specifically Backpage.com.⁹² The Stop Enabling Sex Traffickers Act (SESTA) and Allow States and Victims to Fight Online Sex Trafficking Act (FOSTA) were introduced respectively in the U.S. Senate and

⁸⁷ See Scott Cunningham et al., *Craigslist's Effect on Violence Against Women* 1, 3, 29 (Feb. 2019) (unpublished manuscript), <https://scunning.com/craigslist110.pdf> ("Craigslist's 'erotic services' (ERS) section . . . was used almost exclusively by sex workers offering illegal sex services . . . From 2002 to 2010, Craigslist provided a service on its front page for matching buyers and sellers of erotic services (ERS). ERS originally provided free advertising to legal sex workers such as private dancers, but was quickly captured by illegal sex workers openly soliciting clients. ERS did not exist when Craigslist was initially launched. Rather, ERS was added later at different times in different cities as one of a bundle of 14 unrelated 'services' sections of the website (e.g., legal, events, lessons, financial, real estate). We use the updating of the Craigslist front page with an ERS section in different cities at different points in time to identify the causal effect of ERS on violence against females.").

⁸⁸ *Id.* at 4.

⁸⁹ Russell Newcombe, *The Reduction of Drug-Related Harm: A Conceptual Framework for Theory, Practice and Research*, in *THE REDUCTION OF DRUG-RELATED HARM* 1 (P.A. O'Hare et al. eds., Routledge, 1992).

⁹⁰ *Safety and Harm Reduction*, SURVIVORS AGAINST SESTA, <https://survivorsagainstsesta.org/safety-and-screening-101/> (last visited Nov. 2, 2019).

⁹¹ See generally Nancy Scola, *Kamala Harris' Crusade Against Revenge Porn*, POLITICO (Feb. 1, 2019), <https://www.politico.com/magazine/story/2019/02/01/kamala-harris-porn-california-attorney-general-facebook-twitter-silicon-valley-224534> (describing the politics behind the Backpage takedown).

⁹² Aja Romano, *A New Law Intended to Curb Sex Trafficking Threatens the Future of the Internet as We Know It*, VOX (July 2, 2018), <https://www.vox.com/culture/2018/4/13/17172762/fosta-sesta-backpage-230-internet-freedom>.

House.⁹³ The bills received bipartisan support and convened to create the packaged law now known as FOSTA-SESTA in 2018.⁹⁴ The law made several changes regarding human trafficking legislation, but the most important aspect of the law is that it amended 47 U.S.C. § 230 (Section 230), the “safe harbor” provision of the Communications Decency Act of 1996.⁹⁵ Section 230 provides immunity from civil liability for providers of an “interactive computer service” whose third-party users publish objectionable content on their sites. The relevant portion of the United States Code states:

(c) Protection for “Good Samaritan” blocking and screening of offensive material

(1) Treatment of publisher or speaker

No 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.

(2) Civil liability

No provider or user of an interactive computer service shall be held liable on account of—

(A) any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected; or

(B) any action taken to enable or make available to information content providers or others the technical means to restrict access to material described in paragraph (1).⁹⁶

In other words, Section 230 protects web services including social networks, such as Facebook, Reddit, and blogs from civil liability for hosting or facilitating online speech. Section 230 does not protect against violations of criminal law, such as the SAVE Act.⁹⁷ These sites will be held criminally liable regardless of Section 230. Furthermore, Section 230 is considered “the most important law protecting internet

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ 47 U.S.C. § 230(c).

⁹⁶ *Id.*

⁹⁷ 47 U.S.C. § 230(e)(1); *supra* Part II.B.

speech,”⁹⁸ and the “bedrock” of internet law.⁹⁹ It has made the internet the thriving and diverse marketplace of ideas that we now know today by shielding internet platforms from legal responsibility of user-generated content. It strikes a balance by ensuring that interactive internet platforms are not considered publishers of third-party content, while also encouraging sites to moderate by acting in good faith to restrict access to or availability of material that is considered to be “obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable” without fear of being liable for moderating some content, but not other content.¹⁰⁰ Section 230 was imperative in the development of the internet. Without it, websites would fear being litigated out of existence every time a user posts something considered objectionable.

FOSTA now provides that websites will not receive immunity under Section 230 for civil claims under federal sex trafficking law and state criminal charges for conduct that violates the federal sex trafficking law *or* federal prostitution law.¹⁰¹ Besides amending Section 230, FOSTA further expands current federal prostitution law to include, “own[ing], manag[ing], or operat[ing]” a website “with the intent to promote or facilitate the prostitution of another person.”¹⁰² Moreover, it defines the term, “participation in a venture,” which is unlawful when the venture is sex trafficking, and was previously left undefined. The term is now defined to encompass, “knowingly assisting, supporting, or facilitating [sex trafficking].”¹⁰³ Under FOSTA, website platforms can be considered as directly taking part in a venture with individual human traffickers when those individuals engage in sex trafficking on their website platform. Finally, the law enables victims and their families to sue sites that profit from advertisements deemed to be for sex trafficking.

II. PROBLEMS WITH FOSTA AND ITS EFFECTS

In May of 2016, Amnesty International published policy and research on protection of sex workers’ rights.¹⁰⁴ “The policy made several calls on governments

⁹⁸ See *CDA 230: The Most Important Law Protecting Internet Speech*, ELECTRONIC FRONTIER FOUNDATION, <https://www EFF.ORG/issues/cda230/infographic> (“Site operators and ISPs host and carry enormous amounts of speech and are in no position to evaluate the legality of what their users do. As a result, many sites would simply take down users’ content upon receiving a complaint if they could be held responsible for it. Strong protection for intermediaries is necessary to ensure that the internet remains a place where everyone has an easy, real-time option for free speech.”).

⁹⁹ Mark Buell, *Out of the Section 230 Weeds: Internet Publisher-Providers*, INTERNET SOCIETY (Sept. 27, 2017), <https://www INTERNET SOCIETY.ORG/blog/2017/09/section-230-weeds-internet-publisher-providers/>; see also Letter from The Internet Association to Senators Rob Portman and Richard Blumenthal (Aug. 2, 2017) <https://cdn1 INTERNET ASSOCIATION.ORG/wp-content/uploads/2017/08/S1693-Association-Letter-08-02-2017.pdf>

¹⁰⁰ Buell, *supra* note 99.

¹⁰¹ 18 U.S.C. § 2421A.

¹⁰² *Id.* § 2421A(a).

¹⁰³ *Id.* § 1591.

¹⁰⁴ See *Amnesty International Publishes Policy and Research on Protection of Sex Workers’ Rights*, AMNESTY INT’L. (May 26, 2016), <https://www AMNESTY INT’L. ORG/en/latest/news/2016/05/amnesty-international-publishes-policy-and-research-on-protection-of-sex-workers-rights/>.

including for them to ensure protection from harm, exploitation and coercion; the participation of sex workers in the development of laws that affect their lives and safety; an end to discrimination and access to education and employment options for all.”¹⁰⁵ But, in 2017, Congress ignored all of these human rights-based suggestions and passed FOSTA. They took the same approach that they took in 1910 when the White Slave Trade Act was passed. They played on society’s fears of children being sold “online as if [they] were a pizza.”¹⁰⁶ They chose the same tough-on-crime approach that has been criticized for creating the war on drugs. They decided the best solution to online human trafficking was to just get rid of the place where it happens. Congress completely ignored sex workers and advocacy groups when they expressed fears that FOSTA would be harmful and may even increase exploitation.¹⁰⁷ Overall, the law is problematic in a variety of ways. It affects already-marginalized individuals, hinders law enforcement’s ability to track down traffickers, and over-censors speech on the internet and beyond.

After the Senate passed FOSTA and, before it was even signed into law, Backpage was seized and shuttered by the FBI.¹⁰⁸ Craigslist shut down its personal ads two days after the law’s passage.¹⁰⁹ The Desiree Alliance, which hosts the country’s largest annual conference for sex workers, announced the cancellation of its 2019 conference.¹¹⁰ The Sex Workers Outreach Program of Sacramento closed its safe house in fear of FOSTA liability because it advertises the safe house on their

¹⁰⁵ *Id.*

¹⁰⁶ Kristof, *supra* note 19.

¹⁰⁷ See Sarah Wasko, *Coverage of the SESTA-FOSTA Legislation Must Include Sex Workers’ Voices*, MEDIAMATTERS FOR AMERICA (July 17, 2018), <https://www.mediamatters.org/legacy/coverage-sesta-fosta-legislation-must-include-sex-workers-voices>; Mike Masnick, *DOJ Tells Congress SESTA/FOSTA Will Make it MORE DIFFICULT to Catch Traffickers; House Votes for it Anyway*, TECHDIRT (Feb. 27, 2018), <https://www.techdirt.com/articles/20180227/15314039324/doj-tells-congress-sesta-fosta-will-make-it-more-difficult-to-catch-traffickers-house-votes-it-anyway.shtml>.

¹⁰⁸ See Daniel Politi, *Feds Seize Backpage.com, Slap Charges on Founder of Site Accused of Profiting from Prostitution*, SLATE (Apr. 7, 2018), <https://slate.com/news-and-politics/2018/04/feds-seize-backpage-com-slap-charges-on-founder-of-site.html>.

¹⁰⁹ See Merrit Kennedy, *Craigslist Shuts Down Personals Section After Congress Passes Bill On Trafficking*, NPR (Mar. 23, 2018) <https://www.npr.org/sections/thetwo-way/2018/03/23/596460672/craigslist-shuts-down-personals-section-after-congress-passes-bill-on-trafficking>; Craigslist posted the following message on their site two days after Congress passed FOSTA: “US Congress recently 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 have regretfully taken craigslist personals offline. Hopefully we can bring them back some day. To the millions of spouses, partners, and couples who met through craigslist, we wish you every happiness!” CRAIGSLIST, <https://www.craigslist.org/about/FOSTA> (last visited Feb. 4, 2020).

¹¹⁰ See Courtney Trouble, *Largest Sex Worker Conference in the US Is Canceled Amid FOSTA Fears*, MOTHERBOARD (June 14, 2018), https://motherboard.vice.com/en_us/article/wjbkp9/desiree-conference-canceled-fosta-sesta-sex.

website.¹¹¹ A list of other websites were shut down or removed in response to FOSTA, including Reddit sub-forums Escorts, Male Escorts, and Sugardaddy; “and several platforms and bulletin boards that sex workers and their clients used to screen, review, and verify each other, including Eccie, VerifyHim, the Erotic Review’s U.S. boards, and P411.”¹¹² These initial responses to FOSTA happened immediately but there has since been a continuous, steady stream of site closures and speech censoring.

The sex industry in the United States is complex and intersectional. The makeup of the industry is hard to ascertain because of its underground nature. It is an unfortunate reality that individuals who engage in sex work are often already marginalized individuals ranging from LGBTQ sex workers to disabled sex workers.¹¹³ Though FOSTA will have a negative impact on a large amount of sex workers, it will especially hurt those sex workers that are already living on the margins of society. Transgender sex workers are faced with a lose-lose situation: they are marginalized because they are transgender, and they are marginalized because they are sex workers. This intersection creates a situation where transgender sex workers will undoubtedly become victims of the harms associated with FOSTA. So, this Note analyzes the effect of the law on this specific category of sex workers.

A. *Transgender Sex Workers*

At 17, I ran away with no way of supporting myself. I turned to Internet prostitution, which allowed me to do things for myself that I couldn’t [before], like buy girl clothes, pay out of pocket for my doctor to prescribe [Hormone Replacement Therapy], and put a roof over my head. -Anonymous.¹¹⁴

In a 2015 national survey, “nearly one in five . . . [transgender] respondents reported doing some type of sex work, such as for money, food, or a place to sleep.¹¹⁵ This high percentage results from the stigmatization and variety of social issues the transgender community face on daily basis. Amongst these issues are employment

¹¹¹ See Natasha Leonard, *Law Claiming to Fight Sex Trafficking Is Doing the Opposite — By Cracking Down on Sex Work Advocacy and Organizing*, THE INTERCEPT (June 13, 2018), <https://theintercept.com/2018/06/13/sesta-fosta-sex-work-criminalize-advocacy/> (explaining that post-FOSTA, the Sex Workers Outreach Program of Sacramento did not want to put the volunteers and the people who use their services at greater legal risk).

¹¹² See Emily Witt, *After the Closure of Backpage, Increasingly Vulnerable Sex Workers Are Demanding Their Rights*, THE NEW YORKER (June 8, 2018), <https://www.newyorker.com/news/dispatch/after-the-closure-of-backpage-increasingly-vulnerable-sex-workers-are-demanding-their-rights> (listing all the sites shut down since FOSTA’s passage).

¹¹³ See generally Erin Fitzgerald et al., MEANINGFUL WORK: TRANSGENDER EXPERIENCES IN THE SEX TRADE (Dec. 2015), https://www.transequality.org/sites/default/files/Meaningful%20Work-Full%20Report_FINAL_3.pdf.

¹¹⁴ S.E. James et al., *The Report of the 2015 U.S. Transgender Survey*, WASHINGTON, D.C.: NATIONAL CENTER FOR TRANSGENDER EQUALITY, 161 (2015) <https://www.transequality.org/sites/default/files/docs/USTS-Full-Report-FINAL.PDF>.

¹¹⁵ *Id.* at 158.

discrimination,¹¹⁶ poverty, homelessness, and violence and trauma inflicted by law enforcement, as well as others in society.¹¹⁷ Often, engaging in sex work is a viable option for transgender people.¹¹⁸ The resort to sex work by LGBTQ individuals is sometimes described as ‘survival sex.’¹¹⁹ This is a term often used to describe the engagement of one in the commercial sex industry due to their extreme need. It describes the practice of people who are homeless or otherwise disadvantaged in society, trading sex for food, a place to sleep, or other basic needs, or for drugs.¹²⁰

The fact that many transgender people engage in sex work means that they will be disproportionately vulnerable to the effects of FOSTA.¹²¹ Losing online safety tools

¹¹⁶ In 2015, a D.C. Office of Human Rights study showed that 48% of DC employers preferred a less qualified applicant over a more qualified transgender applicant. See Teresa Rainey & Elliot E. Imse, *Qualified and Transgender: A Report on Results of Resume Testing for Employment Discrimination Based on Gender Identity*, D.C. OFFICE OF HUMAN RIGHTS, 6 (Nov. 2015).

https://ohr.dc.gov/sites/default/files/dc/sites/ohr/publication/attachments/QualifiedAndTransgender_FullReport_1.pdf.

¹¹⁷ See *A National Epidemic: Fatal Anti-Transgender Violence in America in 2018*, HUMAN RIGHTS CAMPAIGN, <https://www.hrc.org/resources/a-national-epidemic-fatal-anti-transgender-violence-in-america-in-2018> (last visited Nov. 3 2019) (noting that 22 transgender people have been killed in the U.S. since the beginning of 2018); see also Meredith Dank et al., *Locked in: Interactions with Criminal Justice and Child Welfare System for LGBT Youth*, URBAN INSTITUTE, 9 (Sept. 2015), <https://www.urban.org/sites/default/files/publication/71446/2000424-Locked-In-Interactions-with-the-Criminal-Justice-and-Child-Welfare-Systems-for-LGBTQ-Youth-YMSM-and-YWSW-Who-Engage-in-Survival-Sex.pdf> (“Transgender youth especially report that police profile them as being engaged in prostitution, mock them, and conduct unlawful strip searches to ‘assign’ gender based on anatomical features.”).

¹¹⁸ See James et al., *supra* note 114, at 154 (69% of transgender people now working in the sex trade say they have faced employment discrimination.); Sara L. Reisner et al., *HIV Risk and Social Networks Among Male-to-Female Transgender Sex Workers in Boston, Massachusetts*, 20 J. OF THE ASS’N OF NURSES IN AIDS CARE 7 (2009) (“Difficulty finding a job contributed most strongly to participants’ financial needs. Inability to obtain or maintain a job was often explicitly tied to actual and/or perceived discrimination resulting from being transgender.”).

¹¹⁹ Dank et al., *supra* note 117.

¹²⁰ See, e.g., Chris Bruckert et al., *Language Matters: Talking about Sex Work*, GLOBAL NETWORK OF SEX WORK PROJECTS: PROMOTING HEALTH AND HUMAN RIGHTS, 3 (2013), <https://www.nswp.org/sites/nswp.org/files/StellaInfoSheetLanguageMatters.pdf> (“Some communities use survival sex work to refer to sex workers who – due to numerous systemic factors or personal circumstances of poverty, homelessness, drug use and mental health – have extremely restricted options and as a result work in dangerous circumstances. The term survival sex work has become analogous to street work and “difficult circumstances.” However, some high earning sex workers on the street and those working indoors also consider themselves survival sex workers. While it is true that people do all kinds of work to survive, they are doing it to survive within the context of systemic constraints that exist on a continuum of power and privilege. Systemic issues, such as poverty and homelessness, should be contested – not sex work itself.”).

¹²¹ For a firsthand account of the immediate effects of FOSTA on a transgender individual see October Evans, *A 13 Year Journey: Life Before and After SESTA/FOSTA and Life After SESTA/FOSTA - A Non-Binary Trans/Genderqueer Sex Worker’s Story*, MEDIUM (June 5,

means transgender sex workers lose the ability to vet clients, an important resource for their own survival. They will lose the ability to set boundaries and negotiate aspects of the sexual transaction such as time, condom use, price, and meeting place prior to meeting with the client. Transphobia is a significant factor in client-perpetrated violence against transgender sex workers.¹²² This violence is “closely connected to being a preoperative transgender women and being found out during a transactional sexual encounter.”¹²³ Although trans sex workers may be at risk of violence regardless of their choice to divulge their trans identity, some choose to tell clients that they are trans during the negotiation in order to prevent transphobic violence that may occur during the interaction.¹²⁴ In a public setting, this disclosure can lead to immediate violent reactions. In the online setting, this risk is offset. In a 2016 study, researchers found that transgender sex workers had the highest use of risk management messages in their online advertisements, showing that they are tasked with the burden of maintaining their own safety.¹²⁵ The bottom line is that trans sex workers can negotiate risk through the internet by picking and choosing which clients they feel comfortable with. In contrast, when working on the street, trans workers must make a hasty decision and rely on their own intuition when choosing clients, leading to higher risk of violence and death.¹²⁶ Not surprisingly, the week after FOSTA passed and the rug was pulled from beneath trans sex workers, a transgender-led hotline that serves transgender people in crisis, Trans Lifeline’s call volume went up 97%.¹²⁷

B. *Trafficking Victims and Law Enforcement*

Let me be clear: I have never met a sex trafficking victim that was set free because an online venue disappeared, but have met victims who were made less safe when those venues were shut down. - Kristen DiAngelo, Executive Director, Sacramento Sex Workers Outreach Program.¹²⁸

2018), <https://octoberevans.home.blog/2019/08/27/an-13-year-journey-life-before-and-after-sesta-fosta-a-non-binary-trans-genderqueer-sex-workers-story/>.

¹²² Leon Laidlaw, ‘*Playing Two People*’: *Exploring Trans Women’s Experiences in Sex Work*, UNIV. OF OTTAWA, 76 (2017), <https://www.powerottawa.ca/wp-content/uploads/2019/09/Laidlaw-2017-thesis.pdf>.

¹²³ Reisner et al., *supra* note 118, at 8.

¹²⁴ Tara Lyons et al., *Negotiating Violence in the Context of Transphobia and Criminalization: The Experiences of Trans Sex Workers in Vancouver, Canada*, 27 *QUALITATIVE HEALTH RES.*, 1, 6 (2017); Jessica D. Moorman & Kristen Harrison, *Gender, Race, and Risk: Intersectional Risk Management in the Sale of Sex Online*, 53 *J. OF SEX RES.*, 816, 816 (2016).

¹²⁵ *Id.* at 820–21 (Risk management messages are ones that “establish rules for sexual encounters and exclude certain clients based on their behavior or demographics.”).

¹²⁶ Lyons et al., *supra* note 124, at 6.

¹²⁷ Sam Ames, *Transgender Suicide is More Than a Mental Health Issue*, *THE ADVOCATE* (Sept. 25, 2018), <https://www.advocate.com/commentary/2018/9/25/transgender-suicide-more-mental-health-issue>.

¹²⁸ Letter from Kristen DiAngelo, Co-Founder and Executive Director, Sacramento Sex Workers Outreach Project, to Sens. John Thune, Bill Nelson, and Members of the U.S. Senate

Sex workers, human trafficking advocates, and scholars warned Congress that FOSTA would hurt human trafficking victims by pushing them into the dark web or into dangerous situations, away from transparency, and further away from the eyes of law enforcement.¹²⁹ They warned that the digital footprints of human trafficking would be erased and that responsible web administrators would be deterred from trying to identify and report trafficking.¹³⁰ Law enforcement experienced the effects of FOSTA instantaneously.¹³¹ Sergeant John Daggy, an undercover officer with Indianapolis Metropolitan Police Department's vice unit, was interviewed after his unit arrested their first suspected pimp in seven months. Daggy said, "We've been a little bit blinded lately because they shut Backpage down."¹³² Sgt. Daggy went on to call Backpage a useful tool for police trying to find victims who rarely self-report, and perpetrators who rarely come out in the open.¹³³ Law enforcement appreciated that Backpage was a tool that made their jobs easier and helped them locate victims, oftentimes even receiving cooperation from the website.¹³⁴

During a FOSTA debate, Senator Rob Portman of Ohio called trafficking, "a stain on our national character."¹³⁵ Following this sentiment, Congress' solution to getting rid of this "stain" in the form of FOSTA was to cover it up with an "out of sight, out of mind" approach to human trafficking. This is a dangerous approach for the victims of trafficking. Alexandra Levy, a Human Trafficking and Human Markets Professor

Committee on Commerce, Science, and Transportation (Sept. 18, 2017), <https://www.eff.org/files/2017/09/18/sestahearing-sac-swop.pdf>.

¹²⁹ *Id.*; see also *Letters in Opposition*, SURVIVORS AGAINST SESTA, <https://survivorsagainstsesta.org/letters/> (last visited Feb. 24, 2020).

¹³⁰ Elliot Harmon, *Sex Trafficking Experts Say SESTA Is the Wrong Solution*, ELECTRONIC FRONTIER FOUNDATION (Oct. 3, 2017), <https://www.eff.org/deeplinks/2017/10/sex-trafficking-experts-say-sesta-wrong-solution>.

¹³¹ Jordan Fischer, *Running Blind: IMPD Arrests First Suspected Pimp in 7 Months*, THE INDY CHANNEL (July 3, 2018), <https://www.theindychannel.com/longform/running-blind-impd-arrests-first-suspected-pimp-in-7-months>; see also Lynn Casey, *Police Look For More Ways to Investigate Trafficking Without Backpage*, FOX 23 (May 4, 2018) ("Backpage was one of the biggest tools for the Tulsa Police Vice Unit to find victims of sex trafficking and those who are trafficking them.").

¹³² Jordan Fischer, *Running Blind: IMPD Arrests First Suspected Pimp in 7 Months*, THE INDY CHANNEL, (July 3, 2018) <https://www.theindychannel.com/longform/running-blind-impd-arrests-first-suspected-pimp-in-7-months>.

¹³³ *Id.*

¹³⁴ Taylor Goebel, *Sex Trafficking: Backpage Gone, but Not the Problem*, DELMARVA NOW (Feb. 17, 2019), <https://www.delmarvanow.com/story/news/local/delaware/2019/02/07/backpage-gone-but-not-sex-trafficking-police/2539934002/> ("Before Backpage was terminated, Cpl. Chris Heid could locate sex trafficking victims exclusively on the popular classified advertising website. Backpage was responsive to the Maryland State Police corporal's requests for records and his agency's warrants and subpoenas. When he asked the site to remove advertisements he determined were trafficking-related, moderators complied, sometimes within minutes.").

¹³⁵ Press Release, Rob Portman, On Senate Floor, Portman Urges Senate to Pass SESTA, Help Stop Online Sex Trafficking (Jan. 8, 2018), <https://www.portman.senate.gov/newsroom/press-releases/senate-floor-portman-urges-senate-pass-sesta-help-stop-online-sex>.

at Notre Dame College of Law, wrote on the topic of Craigslist and human trafficking: “Removing exploitations from view works at odds with recovering victims. Indeed, many of today’s anti-sex trafficking advocates . . . unwittingly foster abuse by seeking to subvert the spaces in which it sometimes takes place.”¹³⁶ FOSTA’s premise is flawed, it turns on the claim that since websites where human trafficking occurs are now gone, human trafficking must now be gone. But in reality, human trafficking will just disperse among many other websites or migrate to the dark web of encrypted channels.¹³⁷ This means trafficking victims are less likely to be identified as a result of less evidence of their victimization.¹³⁸

C. Censoring the Internet

In addition to being poor policy, FOSTA is at odds with the First Amendment to the U.S. Constitution.¹³⁹ The First Amendment broadly states that “Congress shall make no law . . . abridging the freedom of speech.”¹⁴⁰ The First Amendment exists to facilitate democracy and to make sure that individuals can make their voices heard; it protects the right to freedom of expression from government interference.¹⁴¹ This freedom encompasses sexual expression.¹⁴² Further, the Supreme Court is particularly adamant about protecting internet expression.¹⁴³ It enjoys the same enhanced level of protection that is reserved for print mediums, such as books and newspapers.¹⁴⁴

¹³⁶ Alexandra Levy, *The Virtues of Unvirtuous Spaces*, 50 WAKE FOREST L. REV. 403 (2017) (“Section 230 doesn’t cause lawlessness. Rather it creates a space in which many things—including lawless behavior—come to light.”).

¹³⁷ Goebel, *supra* note 134 (“Backpage posts that police relied on to build cases will be splintered across dozens of websites vying to become the next online sex ad giant, making the jobs of police officers across the country potentially more difficult.”).

¹³⁸ Levy, *supra* note 136.

¹³⁹ There is currently a First Amendment challenge to FOSTA making its way through federal court in *Woodhull Freedom Foundation vs. United States*. The plaintiffs are three non-profit organizations, a licensed massage therapist who used Craigslist to advertise, and an advocate for sex workers’ health, safety, and human rights, who co-founded the website Rate That Rescue, an information sharing site for sex workers. *See* Complaint at 2, *Woodhull Freedom Foundation v. United States*, 334 F. Supp. 3d 185 (D.D.C. 2018) (No. 1:18-cv-01552). The district court decided that none of the plaintiffs had standing to sue and dismissed the case and the plaintiffs appealed the decision. On January 24, 2020, the United States Court of Appeals for the District of Columbia Circuit, finding that the plaintiffs did have standing to bring a pre-enforcement challenge to FOSTA, ordered that the challenge be sent back to the district court for a ruling on the merits. *Woodhull Freedom Foundation v. United States*, 948 F.3d 363, 374 (D.C. C. 2020).

¹⁴⁰ U.S. CONST. amend. I.

¹⁴¹ *Id.*

¹⁴² *Carey v. Population Servs. Int’l*, 431 U.S. 678, 701 (1977).

¹⁴³ *Reno v. ACLU*, 521 U.S. 844, 868–71 (1997).

¹⁴⁴ *Id.* at 870 (“Through the use of chat rooms, any person with a phone line can become a town crier with a voice that resonates farther than it could from a soapbox. Through the use of Web pages, mail exploders and newsgroups, the same individual can become a pamphleteer. As the District Court found, ‘the content of the Internet is as diverse as human thought.’ We agree

However, FOSTA is so broadly-written that internet intermediaries do not know what is allowed and what is not. The law “sweeps in a broad array of advertising and promotional activities far beyond the sex trafficking context and picks up a lot of things under the heading prostitution facilitation or promotion”¹⁴⁵ The only way to deal with this uncertainty is by shuttering websites completely or censoring certain speech that could be dubbed as “promoting” or “facilitating” prostitution. FOSTA falls squarely within the overbreadth doctrine of First Amendment jurisprudence. The overbreadth doctrine invalidates speech regulations that are so sweeping in scope that they punish protected expression, not merely unprotected expression.¹⁴⁶

In *Reno v. ACLU*, the Supreme Court struck down a ban on transmission of indecent materials to persons under the age of 18 via the internet.¹⁴⁷ The regulation was struck down on overbreadth grounds.¹⁴⁸ In its opinion, the court stated, “In order to deny minors access to potentially harmful speech, the [Act] effectively suppresses a large amount of speech that adults have a constitutional right to receive and to address to one another.”¹⁴⁹ This is precisely what FOSTA does. In order to punish online intermediaries that host content that may “promote” or “facilitate” prostitution, FOSTA “effectively suppresses a large amount of speech that adults have a constitutional right to receive and address to one another.”¹⁵⁰ A website that provides health information to sex workers is engaging in constitutionally protected speech. A website that provides safety information and resources such as housing and condoms to sex workers is engaging in constitutionally protected speech. A forum-like website where sex workers ask each other questions, exchange tips, and give advice on how to evade law enforcement is *still* engaging in constitutionally protected speech. However, one could also argue that all those websites are also “promoting” or “facilitating” the prostitution of another, in violation of FOSTA. In *Reno*, Justice Stevens noted that a speaker could not “confidently assume that a serious discussion about birth control practices, homosexuality . . . or the consequences of prison rape would not violate the [Act].”¹⁵¹ The same issue arises as a result of FOSTA. No online intermediary that hosts sexually related content can be confident that the speech they are hosting does not run afoul of FOSTA. Thus, the most viable option is to censor speech or to not even host it in the first place, effectively shutting down certain websites.

As stated earlier in this Note, the preemptive action taken by websites was swift. Over 300 sites that sex workers used have been shuttered.¹⁵² Even more daunting,

with its conclusion that our cases provide no basis for qualifying the level of First Amendment scrutiny that should be applied to this medium.”) (citation omitted).

¹⁴⁵ See *infra* notes 138–141 and accompanying text.

¹⁴⁶ See *Bd. of Airport Comm’rs v. Jews for Jesus, Inc.*, 482 U.S. 569 (1987); *City of Houston v. Hill*, 482 U.S. 451 (1987); *Reno*, 521 U.S. at 844.

¹⁴⁷ *Reno*, 521 U.S. at 859.

¹⁴⁸ *Id.* at 885.

¹⁴⁹ *Id.* at 874.

¹⁵⁰ *Id.*

¹⁵¹ *Id.* at 871.

¹⁵² Elle Stranger, a stripper and sex worker, wrote, “[t]he last few months have been a hot potato game of how-will-I-get-banned-from-the-internet-while-trying-to-feed-myself,” in reference to a website Xoticspot.com shutting down in fear of FOSTA-related repercussions.

some sites that are not even related to sex work or trafficking have also shuttered.¹⁵³ Beyond the complete shuttering of websites, it's easy to see the impact that this ramp-up in liability will have on online speech: facing the risk of ruinous litigation, online platforms will have little choice but to become much more restrictive in what sorts of discussion—and what sorts of users—they allow, censoring innocent people in the process.¹⁵⁴ Recently, YouTube banned a video titled “In Conversation with Sex Workers,” where people were simply talking to and interviewing sex workers.¹⁵⁵ Even if all the site shutdowns and censoring are not directly evidenced to be FOSTA-related, FOSTA has set a tone of erring on the side of caution when it comes to sexual speech. The law has undone years of progress for the sex work community.¹⁵⁶

FOSTA has chilled sexual speech and has curtailed access to sexual content. Even while FOSTA was being debated by the Congress, many tech companies were quietly

She used the site for 9 years to post her stripping schedule to attract clients. *See* Elle Stranger, *Why Is Instagram Coming Down on Strippers*, PLAYBOY (Aug. 1, 2018), <https://www.playboy.com/read/why-is-instagram-coming-down-on-strippers>.

¹⁵³ For example, a website titled Pounced.org was shut down. Pounced was a personals website for furies to meet up and find romantic partners. Furies are a subculture of people interested in anthropomorphic animal characters with human personalities and characteristics. The website cited FOSTA as its reasoning for closure: “FOSTA attempts to make Internet sites such as pounced.org liable for the way users use the site in an effort to address sex trafficking and prostitution. 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 we previously had been offered to us by Section 230 of the Communications Decency Act.” Samantha Cole, *Furry Dating Site Shuts Down Because of FOSTA*, MOTHERBOARD (April 2, 2018) https://www.vice.com/en_us/article/8xk8m4/furry-dating-site-pounced-is-down-fosta-sesta; *see also* the “Personals” section of Craigslist.org. The ‘personals’ section was removed from the site after FOSTA passed the House. The personals section allowed for local postings that are for “strictly platonic,” “dating/romance,” and “casual encounters.” After citing FOSTA the reason for the removal, Craigslist wrote: “To the millions of spouses, partners, and couples who met through craigslist, we wish you every happiness!” *See* Merrit Kennedy, *Craigslist Shuts Down Personals Section After Congress Passes Bill on Trafficking*, NPR (Mar. 23, 2018) <https://www.npr.org/sections/thetwo-way/2018/03/23/596460672/craigslist-shuts-down-personals-section-after-congress-passes-bill-on-traffickin>.

¹⁵⁴ Caitlin Rockett, *Collateral Damage*, BOULDER WEEKLY (Jan. 24, 2019), <https://www.boulderweekly.com/news/collateral-damage/> (noting that Facebook unveiled a new set of community standards that cracks down on content that “facilitates, encourages, or coordinates sexual encounters between adults”).

¹⁵⁵ Samantha Cole, *Youtube Banned an Erotic Film Production Company After It Posted Interviews with Sex Workers*, VICE (July 13, 2018), https://motherboard.vice.com/en_us/article/gy3gdb/youtube-banned-erica-lust-in-conversation-with-sex-workers.

¹⁵⁶ Violet Blue, *How Sex Censorship Killed the Internet We Love*, ENGADGET (Jan. 31, 2019), <https://www.engadget.com/2019/01/31/sex-censorship-killed-internet-fosta-sesta/> (“It was an incredible moment because before free blogging and social-media sites, the only way we heard the voices of sex workers and porn performers was through media outlets that portrayed them as broken rape victims – or sex-trafficked children. Adults having consensual sex for entertainment were not given a voice unless it validated a narrative of sin, of pain, of regret. Now all the women (and LGBTQ, PoC) who could speak truth to any of this have been driven underground, silenced by algorithms, bans, and FOSTA-empowered 4chan troll brigades.”).

altering their terms of service and enforcing with previously unseen vigor their “community standards” provisions.¹⁵⁷ As a result, advocates, activists, and users of sites and services, such as Google, Microsoft, Facebook, Instagram, Twitter, Reddit, Patreon, and PayPal, have seen content censored or removed for merely referring to sex work or sexual expression without warning or a process for contesting removal.¹⁵⁸

III. SOLUTIONS

Ostensibly, FOSTA is an honorable law. While it passed easily with bipartisan support, it was not the correct approach to addressing human trafficking online. Not only does the law perpetuate the conflation of human trafficking and sex work, and harm and stigmatize people in doing so, it further impedes online free expression in violation of the First Amendment. Holding websites liable for anything that the government interprets as “facilitating” or “promoting” prostitution results in the shuttering of many small websites and over-censoring of larger ones. With the shuttering of sites, sex workers have lost their forums to engage with each other, their blacklists of dangerous clients, and means to advertise from indoors. To address online human trafficking without demolishing the safety and rights of others and further stigmatizing sex workers, a completely different approach than FOSTA is necessary.

A. *Public Discourse and Policy*

Lura Chamberlain, in her article titled “FOSTA: A Hostile Law with A Human Cost,” argues for complete decriminalization of sex work as a response to the negative impacts of FOSTA.¹⁵⁹ However, on a nationwide level, decriminalization of prostitution in America is not realistic at this point.¹⁶⁰ Only *eleven* states and the District of Columbia have fully legalized marijuana in the U.S.¹⁶¹ The Supreme Court of the United States lifted the federal ban on sports betting on May 14, 2018.¹⁶² Same-

¹⁵⁷ Witt, *supra* note 112.

¹⁵⁸ Violet Blue, *How Sex Censorship Killed the Internet We Love*, ENGADGET (Jan. 31, 2019), <https://www.engadget.com/2019/01/31/sex-censorship-killed-internet-fosta-sesta/> (“It was an incredible moment because before free blogging and social-media sites, the only way we heard the voices of sex workers and porn performers was through media outlets that portrayed them as broken rape victims – or sex-trafficked children. Adults having consensual sex for entertainment were not given a voice unless it validated a narrative of sin, of pain, of regret. Now all the women (and LGBTQ, PoC) who could speak truth to any of this have been driven underground, silenced by algorithms, bans, and FOSTA-empowered 4chan troll brigades.”).

¹⁵⁹ Lura Chamberlain, *FOSTA: A Hostile Law with A Human Cost*, 87 *FORDHAM L. REV.* 2171, 2208 (2019).

¹⁶⁰ See Anne Gunderson, *The Effect of Decriminalizing Prostitution on Public Health and Safety*, *CHICAGO POL’Y REV.* (Feb. 26, 2018), <https://chicagopolicyreview.org/2018/02/26/the-effect-of-decriminalizing-prostitution-on-public-health-and-safety/>.

¹⁶¹ *State Marijuana Laws in 2019 Map*, GOVERNING (2019), <https://www.governing.com/gov-data/safety-justice/state-marijuana-laws-map-medical-recreational.html> (last visited Jan. 15, 2020).

¹⁶² *Murphy v. Nat’l Collegiate Athletic Ass’n*, 138 S. Ct 1461 (2018); see also Alexandria Licata, *42 States Have or Are Moving Towards Legalizing Sports Betting – Here Are the States*

sex marriage was legalized in all fifty states on June 26, 2015, only *four years ago*.¹⁶³ It took the country *twenty-four years* to somewhat remedy the 100-to-1 crack-cocaine sentencing disparity by reducing the ratio to an 18-to-1 ratio.¹⁶⁴ *Twenty-eight* state legislatures introduced a variety of abortion bans in the first quarter of 2019.¹⁶⁵ America is not at the point that decriminalization of sex work is a viable option. The U.S. is a country of incremental progress when it comes to social issues and sex work is no different.

Complete decriminalization of sex work in the U.S.—as Chamberlain suggests—jumps the gun. Thus, I propose, at the most basic level, before legitimate calls for decriminalization can begin, a change in the public discourse on the topic of sex work. As one infographic by a Canadian sex work organization created by sex workers themselves puts it, “language matters” when talking about sex work.¹⁶⁶ This notion that “language matters” must be applied to our public discussions about sex work. The infographic opens with the following:

Sex work and sex workers are often framed in very simplistic and stereotypical ways that erase the complexity of our realities: good or bad, forced or chosen, glamorized or exploitative. When choosing language to talk about sex work we are trying to balance self-identification, our desire to represent our diversity and the importance of breaking through stereotypes and binary categories. When our choice of words differs from the beliefs and stereotypes that people have about us, people are quick to discredit us.¹⁶⁷

The infographic proceeds to explain words and phrases that are used to talk about sex work, and why they matter. One of the phrases explained in the infographic is “prostituted women.”¹⁶⁸ Below is the reason that this word matters according to the infographic:

Where Sports Betting Is Legal, BUSINESS INSIDER (Aug. 2, 2019), <https://www.businessinsider.com/states-where-sports-betting-legal-usa-2019-7>.

¹⁶³ *Obergefell v. Hodges*, 135 S. Ct 2584, 2584 (2015).

¹⁶⁴ Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207 (1986) (repealed 2010); Fair Sentencing Act of 2010, Pub. L. No. 111-220, 124 Stat. 2372 (2010); *see also* Editorial, *The Fair Sentencing Act Corrects Long-Time Wrong in Cocaine Cases*, WASH. POST (Aug. 3, 2010), <http://www.washingtonpost.com/wp-dyn/content/article/2010/08/02/AR2010080204360.html>.

¹⁶⁵ Melissa Locker, *This Map of Abortion Ban Proposals and Laws Show Where Rights Are Under Fire in 2019*, FAST COMPANY (May 5, 2019), <https://www.fastcompany.com/90350385/this-map-shows-abortion-bans-by-u-s-state-in-2019>.

¹⁶⁶ *Language Matters: Talking About Sex Work*, GLOBAL NETWORK OF SEX WORK PROJECTS: PROMOTING HEALTH AND HUMAN RIGHTS (2013), <https://www.nswp.org/resource/language-matters-talking-about-sex-work>.

¹⁶⁷ *Id.*

¹⁶⁸ *Id.* Another example of a word that matters according to this infographic is the word ‘victim’: “The term victim is highly contested in sex worker rights and Violence Against Women communities. Sex workers and other people can be victimized or experience violence. Sex work does not make sex workers victims, which suggests helplessness and a lack of agency. Sometimes we are victims of crime and this victimization should be recognized as the crime it

The gendered term prostituted women is sometimes used to refer to sex workers. This term denies the agency of sex workers by suggesting that prostitution is something done to us. Many sex workers consider this framing and language around prostitution or sex work as disrespectful, alienating and invisibilizing of our realities.¹⁶⁹

The simple term “prostituted women” carries with it a negative connotation that, in turn, has negative impacts on sex workers and further stigmatizes the profession and those involved in it. Sex work stigmatization, “plays a role in fostering an environment where disrespect, devaluation, and even violence are acceptable responses.”¹⁷⁰ This Note humbly proposes to stop this stigmatization. The way to do this is to change the way we talk about both sex work and human trafficking. This starts from the top with the President, the media, politicians, and federal legislation and must work its way down to local communities.¹⁷¹ When speaking about human trafficking, politicians must stop fueling fear and exaggerating or mischaracterizing the issue. When speaking about sex work, they must not dehumanize sex workers and speak about it only in terms of “prostituted women” with no autonomy. The fact that there is a difference between consensual sex work and human trafficking must be acknowledged by the media, public officials, and legislation. FOSTA failed to do so and harmed many sex workers and legitimate human trafficking victims in the process.

Future legislation must define human trafficking with specificity. The conflation of the two cannot keep being swept under the rug in our discussions about human trafficking. Attempting to eradicate prostitution by bootstrapping it to human trafficking is unfair to trafficking victims and ineffective. Those with the ability to reach the masses and influence public opinion must do so in a way that does not trample upon the human rights of others. Only when our public discussions and politics around sex work are altered appropriately can we consider decriminalization of the industry.

Beyond the public discourse around the topics of human trafficking and sex work, policy must change, too. A harm reduction framework must replace the prohibitionist

is. Unfortunately, in a criminalized context when sex workers are victims of crimes, not only is the violence against is seen as inevitable, but also our legal rights are not respected.” *Id.*

¹⁶⁹ *Id.*

¹⁷⁰ Cecilia Benoit et al., *Prostitution Stigma and Its Effect on the Working Conditions Personal Lives, and Health of Sex Workers*, 55 J. SEX RES. 1, 4 (2017).

¹⁷¹ In an example of negative and exaggerated discourse on trafficking, defending his plan to build a border wall, President Donald Trump has repeatedly made reference to women who are kidnapped and trafficked over the boarder: “Women are tied up, they’re bound, duct tape put around their faces, around their mouths.” Sara Jorgenson, *Experts: Trump’s Tape-Bound Women Trafficking Claim Is Misleading*, CNN (Jan. 28, 2019), <https://www.cnn.com/2019/01/27/us/human-trafficking-fact-check/index.html>; Ronald Weitzer, *Resistance to Sex Work Stigma*, SEXUALITIES 717, 721 (“[T]here is negativity bias in mass media representations of sex work. The news media highlight worst cases of abuse, conflate prostitution with human trafficking, and rarely offer a positive (or even neutral) picture of sex workers and their clients.”).

legal framework.¹⁷² Prohibition of morally objectionable conduct such drugs, alcohol, and sex work has proven fruitless and costly.¹⁷³ Since prohibition of sex work is ineffective and decriminalization of sex work is ahead of its time, the solution, post-FOSTA, is to adopt a harm reduction legal framework. A harm reduction approach calls for the government to concede that sex work is a dangerous profession and that it is not on the path to eradication. With this knowledge, Congress must not proactively make policies that put sex workers in more danger than they are already in, as FOSTA did. Any further criminalization of sex work must end. Vice stings by law enforcement must end.¹⁷⁴ Overzealous policing of sex work must end.¹⁷⁵ Raids on sex work establishments must end. Laws that use condoms as evidence of prostitution must end.¹⁷⁶ Further surveillance of the sex industry must end. Just as several city prosecutors have vowed to stop prosecuting misdemeanor marijuana offenses, the same must happen for sex work crimes, with the goal of eventual decriminalization.¹⁷⁷ Decriminalization is a large step for the United States. However, that does not mean the country is not ready to make the first step towards decriminalization by ending proactive enforcement of anti sex work laws and refraining from enacting any new anti sex work legislation.

As noted earlier, Amnesty International recognized that laws that criminalize the ‘promotion’ of prostitution often lead to the arrest and prosecution of sex workers,

¹⁷² Charles H. Whitebread, *Freeing Ourselves from the Prohibition Idea in The Twenty-First Century*, 33 SUFFOLK U. L. REV. 235, 246 (2000) (explaining the failures of prohibition within the contexts of alcohol, prostitution, and drugs).

¹⁷³ *Id.* at 239–46.

¹⁷⁴ Melissa Gira Grant & Emma Whitford, *Family, Former Attorney of Queens Woman Who Fell to Her Death in Vice Sting Says She Was Sexually Assaulted, Pressured to Become an Informant*, THE APPEAL (Dec. 15, 2017), <https://theappeal.org/family-former-attorney-of-queens-woman-who-fell-to-her-death-in-vice-sting-say-she-was-sexually-d67461a12f1/> (chronicling the story of Yang Song, a woman who leapt to her death during an NYPD vice sting operation in November 2017); see also Melissa Mira Grant, *Family of Donna Dalton, Who Was Shot By A Columbus Police Officer During Arrest, Demands Independent Inquiry*, THE APPEAL (Feb. 1, 2019), <https://theappeal.org/family-of-donna-dalton-who-was-shot-by-a-columbus-police-officer-during-arrest-demands-independent-inquiry/> (“[O]fficer Andrew Mitchell killed 23-year-old Donna Dalton during what police say was an undercover prostitution sting[.]”).

¹⁷⁵ Fabian Luis Fernandez, *Hands Up: A Systematized Review of Policing Sex Workers in The U.S.*, YALE UNIV. (Jan. 2016); Meredith Dank et al., *Consequences of Policing Prostitution: An Analysis of Individuals Arrested and Prosecuted for Commercial Sex in New York City*, URBAN INSTITUTE (Apr. 2017), <https://www.urban.org/sites/default/files/publication/89451/consequences-of-policing-prostitution.pdf>.

¹⁷⁶ This practice reduces condom use among vulnerable populations, increasing the risk of STI’s, HIV transmission, and pregnancy, directly contrary to harm reduction policy.

¹⁷⁷ Shaila Dewan, *A Growing Chorus of Big City Prosecutors Say No to Marijuana Convictions*, N.Y. TIMES (Jan. 29, 2019), <https://www.nytimes.com/2019/01/29/us/baltimore-marijuana-possession.html> (explaining that prosecutors from Baltimore, Chicago, Philadelphia, Manhattan, and Brooklyn have all moved away from prosecuting marijuana cases).

themselves.¹⁷⁸ FOSTA does exactly this. Going after interactive website providers as “promoters” of prostitution puts the sex workers in harm’s way themselves. Thus, a law like FOSTA is contrary to harm reduction in the sex work industry. Lastly, when it comes to policy, sex workers and sex work advocacy groups need a seat at the table.¹⁷⁹ Lawmakers must involve them in the reform process as they are the ones who are impacted firsthand by domestic policies.

B. Research

Next, accurate and comprehensive research must be conducted. In the case of FOSTA, Congress was reactionary and did not take into consideration a broad range of experiences, as should always be done when making a law. Instead of singling out technology as the root cause of human trafficking, nuanced research is needed in this area before making hasty decisions.

One example of such research is a study done by the University of Southern California Annenberg School for Communication and Journalism in 2011.¹⁸⁰ The study acknowledged that online technology plays a role in human trafficking while also asking if this technology can be leveraged to aid anti-trafficking efforts and law enforcement.¹⁸¹ The study concluded with a plethora of guiding principles for the government, the private sector, nongovernmental organizations, and the academic community to further anti-trafficking without upending the internet.¹⁸² Examples include incentivizing corporate social responsibility in the private sector, technology companies coordinating to create an industry code of conduct to combat online trafficking, and cooperation between NGOs and technological companies to improve the collection of data on trafficking and the sharing of information resources.¹⁸³

Studies such as these should have been considered when Congress was debating FOSTA. Further, since Congress did not take research considerations into account prior to the passage of FOSTA, the least that Congress can do is conduct studies on the impact that FOSTA has had since its passage. Representative Ro Khannah of California intends to introduce a bill that calls on the Department of Health and Human Services and the National Institutes of Health to study the impacts of the law.¹⁸⁴ This

¹⁷⁸ See *Amnesty International Publishes Policy and Research on Protection of Sex Workers’ Rights*, AMNESTY INT’L (May 26, 2016), <https://www.amnesty.org/en/latest/news/2016/05/amnesty-international-publishes-policy-and-research-on-protection-of-sex-workers-rights/>.

¹⁷⁹ *Understanding Sex Work in an Open Society*, OPEN SOC’Y FOUND., (Oct. 2015), <https://www.opensocietyfoundations.org/explainers/understanding-sex-work-open-society>.

¹⁸⁰ Mark Latonero, *Human Trafficking Online: The Role of Social Networking Sites and Online Classifieds*, UNC ANNENBERG CENTER ON COMMUNICATION LEADERSHIP & POLICY (Sep. 2011).

¹⁸¹ *Id.*

¹⁸² *Id.*

¹⁸³ *Id.*

¹⁸⁴ Dominic Holden, *Democratic Voters are Opening Up to Decriminalizing Sex Work. This Lobbyist Wants to Get Congress on Board*, BUZZFEED (Sept. 12, 2019),

is a step in the right direction and hopefully the results highlight the need for an alternative approach.

Beyond technological research, detailed empirical research on human trafficking must be conducted. Among other things, the research should address what causes human trafficking, how many people are actually involved in it, the patterns present in victimization, and other attributes of the trafficking organization. This research should include sex workers, their needs, things that are hurting them, and things that can lead to exploitation. Risk factors should be identified and addressed. In one study of minor domestic sex workers, the subjects favored policies that may help them find steady employment, fight addiction, continue their education, obtain stable housing, build marketable skills, and address abusive parental relationships.¹⁸⁵ If policies addressed these issues, youth might be less susceptible to exploitation. More research like this should be conducted and adhered to in efforts to combat sex trafficking, instead of reactionary legislation.

C. Uniform Standard

Lastly, after repealing FOSTA, Congress must create a uniform standard for internet platforms when trafficking is suspected. FOSTA is a Band-Aid approach to a complex problem. Human trafficking is a real issue that evolves with time. It has made its way to the internet, so legislators must carefully devise a way to combat it without harming so many other people in the process, including those trafficked themselves. A uniform standard for websites and its users to adhere to when trafficking is suspected could save many trafficking victims, while also not infringing on consensual sex workers' ability to use the internet or stifling speech on sex work. In this uniform standard, Congress must explicitly distinguish between human trafficking and prostitution. The stated intent of FOSTA is to curb human trafficking on the internet, and it must stay that way. For the reasons stated in this Note, Congress should not attempt to eradicate prostitution altogether. A uniform standard will also solve the issue of over-censoring on the internet. When it is clear what conduct is legal and what is illegal, interactive websites will not scrub their sites of sex work-related speech in fears of prosecution.

IV. CONCLUSION

Human trafficking is a very serious problem in the world today. Technology gave traffickers an ability to exploit victims while simultaneously giving sex workers a tool to increase their safety. FOSTA was not the correct way to remedy the issue of sex trafficking on the internet. It simplifies an extremely complex issue and ignores so many other factors involved in human trafficking and the commercial sex industry. FOSTA does not consider situations like Cecilia's, where the internet helped her escape exploitation. Congress owes it to Cecilia, and people like her, to take more

<https://www.buzzfeednews.com/article/dominicholden/sex-work-legalization-congress-kate-dadamo-lobby>.

¹⁸⁵ Horning, *supra* note 59; see Ana Glavan, *Human Trafficking: A Sex Workers Rights and Harm Reduction Narrative*, HIV COMMUNITY LINK (Mar. 27, 2015), <https://hivcl.org/2015/03/27/human-trafficking-a-sex-worker-rights-harm-reduction-narrative/> ("Timely access to safe, affordable, harm-reduction housing has been the top need identified by those we have supported after seeing trafficking.").

thoughtful approaches in their lawmaking capacity. Members of Congress must realize who is affected every time a law that *sounds* good, like The Allow States and Victims to Fight Online Sex Trafficking Act (FOSTA), passes and not just treat such laws as a check mark on their political resume.