
FIVE REFLECTIONS FROM FIVE YEARS OF
FOSTA/SESTA ♦

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INTRODUCTION

Signed into law in 2018, the Fight Online Sex Trafficking Act (FOSTA/SESTA) represented the first major amendment to § 230 since its passage in 1996.¹ Yet, because of the subject material of the bill, it has received little discussion by mainstream § 230 reform advocates.² Additionally, technology policy advocates who have commented often fail to engage with the substantial background debates that have occurred about either sex trafficking or sex work, coming to FOSTA/SESTA as if it should be understood primarily as an intervention around § 230.

FOSTA/SESTA is better understood as the logical extension of a set of campaigns to make it more difficult for folks engaging in sex work to use mainstream public accommodations, often pushed in the name of fighting sex trafficking. Putting the law in this context, as I have learned to do through my conversations with sex workers, suggests an entirely different set of takeaways, starting with naming the harms done to those in the sex trades in the name of “ending sexual exploitation,” but not ending there.

Before I frame the rest of the essay, and my reflections, I want to make clear the politics of my work with folks in the sex trades. The way I present these findings, namely by including things like my positionality and my experience in advocacy, is unusual for lawyers, who are trained to present dispassionately, especially in law review-style writing. However, I am uninterested in pretending that my experiences working on the fallout of FOSTA/SESTA have not affected me deeply and emotionally. Nor am I capable of ignoring the ways in which my sex worker colleagues have reshaped my understanding of law, in addition to holding me through some of my darkest times. Thus, I do not pretend the thoughts I share here are merely abstract legal propositions. They are my

¹ Generally speaking, I refer to the combined bills as “FOSTA.” See, e.g., Kendra Albert, Emily Armbruster, Elizabeth Brundige, Elizabeth Denning, Kimberly Kim, Lorelei Lee, Lindsey Ruff, Korica Simon & Yueyu Yang, *FOSTA in Legal Context*, 52.3 COLUM. HUM. RTS. L. REV. 1084 (2021). However, in this piece, I use FOSTA/SESTA to refer to the law that was actually passed, because I regularly distinguish between House Bill 1865 (Allow States and Victims to Fight Online Sex Trafficking Act of 2017, H.R. 1865, 115th Cong. (1st Sess. 2017) (known as FOSTA), which as reported out of committee, included a new criminal provision (§ 2421A), and the Senate version, Stop Enabling Online Sex Traffickers Act, S. 1693, 115th Cong. (1st Sess. 2017) (known as SESTA) which contained just the § 230 changes.

² Law review publications critical of FOSTA have primarily been by folks outside of the technology policy/technology law mainstream, see Lura Chamberlain, *FOSTA: A Hostile Law with a Human Cost*, 87 FORDHAM L. REV. 2171 (2019); Emily Morgan, *On FOSTA and the Failures of Punitive Speech Restrictions*, 115 NW. U.L. REV. 503 (2020); Lucy Wiesner, *Good Intentions and Unintended Consequences: SESTA/FOSTA's First Two Years*, 93 TEMP. L. REV. 151 (2020). The main exceptions are Eric Goldman's law review article and extensive blogging about FOSTA, Eric Goldman, *The Complicated Story of FOSTA and Section 230*, 17 FIRST AMEND. L. REV. 279 (2019); and Quinta Jurecic's recent work on what FOSTA can teach advocates about § 230 reform, Quinta Jurecic, *The Politics of Section 230 Reform: Learning From FOSTA's Mistakes*, BROOKINGS INST. (Mar. 1, 2022), <https://www.brookings.edu/research/the-politics-of-section-230-reform-learning-from-fostas-mistakes/> [https://perma.cc/8Y2Z-AMSZ].

reflections that I have come to in conversation with others, and I hold the deepest gratitude to have been given the space and grace to workshop and develop them based on community insights and expertise.³

The rest of the essay proceeds as follows: first, I lay out some background on my place in this work and the politics of sex work. Then, I discuss how FOSTA/SESTA should be best understood as a one-two punch. Contrary to popular belief, it is the combination of federal criminal liability and civil legal risk that led to the forms of systemic de-platforming and violence against sex workers and people who are algorithmically profiled as sex workers. Pretending that FOSTA/SESTA is just about § 230 allows for advocates who were entirely comfortable with criminalization to let themselves off the hook, and it misunderstands how sex work—not just sex trafficking—has been the target of numerous interventions targeting intermediaries.

After elaborating on that point, I move to reflecting on what lessons advocates (primarily people in technology policy, but I suspect the insights hold beyond that space) should learn from what has happened between April 2018 and when I finalize this in April 2023. To briefly summarize those reflections:

1. The failure of technology policy advocates to understand or engage with underlying substantive debates over sex work hamstrung advocacy efforts and led to a failure to build meaningful coalitions both prior to FOSTA's passage as well as after.
2. Mainstream corporate incentives to push for criminal liability as an alternative to removal of civil immunity harmed already criminalized populations and sites that prioritize their needs.
3. Section 230 provided vital cover to those inside organizations who wished to advocate for harm reduction solutions and serve marginalized populations, and thus the impact of liability removal will vary more based on the political power of groups impacted than the letter of the law.
4. Litigation strategy and messaging for constitutional challenges can be at odds with more pragmatic organizing and efforts to push for narrow legal interpretation, as it has been in *Woodhull Freedom Foundation v. United States*, the ongoing constitutional challenge to FOSTA/SESTA.⁴

³ To quote Sophie Lewis from the acknowledgements to her book, *Full Surrogacy Now*, “[i]nsofar as the name on [this essay] refers to me alone . . . it does not keep faith with the argument of the pages inside.” Sophie Lewis, *FULL SURROGACY NOW: FEMINISM AGAINST FAMILY*, VIII (2019). I appreciate Danielle Blunt pointing out that excellent sentiment to me.

⁴ *Woodhull Freedom Foundation v. United States*, No. 18-1552, 2022 U.S. Dist. LEXIS 57747 (D.D.C., Mar. 29, 2022).

5. And finally, taking the needs of criminalized and marginalized populations seriously as an advocate means centering advocacy around their knowledge and needs, not just using their stories as tools to advance an existing agenda.

I conclude by discussing what should come next.

I. POSITIONALITY

I have been working actively on issues surrounding FOSTA/SESTA and speech rights for those who are or have been in the sex trades since early 2019. My primary vehicle for this work is my ongoing collaboration with Hacking//Hustling, “a collective of sex workers, survivors, and accomplices working at the intersection of tech and social justice to interrupt violence facilitated by technology,” for whom I serve as a legal advisor.⁵ That role was a result of my efforts to have members of the Hacking//Hustling collective host a convening at Harvard, which resulted in the development of a legal explainer on FOSTA/SESTA. The explainer became FOSTA in Legal Context, co-written with Lorelei Lee and the Cornell Global Gender Justice Clinic, which was published in the Columbia Human Rights Law Review.⁶ I also met and connected with numerous other collaborators and friends who do work on issues relating to people in the sex trades through that Harvard convening, and the events that followed, including the Informal, Criminalized, Precarious: Sex Workers Organizing Against Barriers series of events at Cornell.⁷ Through these collaborations, I have had the opportunity to learn from survivors and sex workers (and those at the intersection of those identities) as to how the mainstream work of technology policy advocates has often ignored or erased the experiences of those who have been criminalized. I have also advised a variety of clients around questions related to FOSTA/SESTA through my work as a clinician at the Cyberlaw Clinic at Harvard Law School, and some of my reflections, especially those focused on the dynamics of dealing with liability inside platforms, come from that.

In terms of my positionality, I am not a sex worker, a former sex worker, or a survivor of trafficking. My background is in technology policy, including issues of freedom of expression. My training is in law. I am White and come from generational wealth. During the bulk of the work I described above, I have been employed at Harvard Law School,

⁵ *About*, HACKING//HUSTLING, <https://hackinghustling.org/> [https://perma.cc/GV7X-MKM8]. For more on Hacking//Hustling, see Danielle Blunt & Zahra Stardust, *Automating Whorephobia: Sex, Technology and the Violence of Deplatforming*, 8 PORN STUD. 350 (2021).

⁶ *FOSTA in Legal Context*, *supra* note 1.

⁷ *Informal, Criminalized, Precarious: Sex Workers Organizing Against Barriers*, HACKING//HUSTLING, <https://hackinghustling.org/informal-criminalized-precarious-sex-workers-organizing-against-barriers/> [https://perma.cc/2MB7-LW6F].

practicing technology law. Although I have some feminist and gender studies training and now teach gender studies classes, I took no formal classes on gender and the law during my law degree.⁸

It seems, thus, like a strange fit to find much of my scholarship and activism focused on the experiences of those in the sex trades, and it is one that I always feel some discomfort around, as I am well aware of how academics with privilege can take the insights of those marginalized and make careers off of them. In particular, by virtue of my whiteness, my position at HLS, my law degree, and my status as someone who has not sold sexual content or sex, I will often be more politically palatable than the people who experience the harms that I speak about or try to prevent.⁹ But not doing the work is not an option, because the work is necessary and urgent. The answer, so far, has been for me to work on issues around sex work very carefully, constantly learning, listening, and paying people for their time and insights. I believe in centering and platforming sex workers, both through the stories I tell and the people I work with. And I look forward to the day where my contributions have been made fully obsolete because there are folks with lived experience in the sex trades who can do everything I have ever done and more.

One more aspect of my positionality is notable. My experience as a queer and non-binary person has most shaped my engagement on issues related to sex work online. Of course, sex worker rights are an LGBTQ rights issue, both because fear of queerness and non-normative sexuality is intimately tied to whorephobia, and because a huge number of transgender people, primarily transgender women of color and transfeminine people of color, work in the sex trades.¹⁰ But on a more personal note, sex worker advocates and I share the experience of being “political.” As the legendary sex worker rights activist Margo St. James put it, “it takes about two minutes to politicize a hooker.”¹¹ Although

⁸ This was in part because the classes that were on offer were taught by professors who identify strongly with Second Wave anti-porn movements or have taken positions on Title IX that I found out of sync with my experiences. So perhaps the lack of classes worked to my advantage.

⁹ @whoreganizer has discussed this as the phenomenon of people amplifying their own voices to say “listen to sex workers,” without correspondingly opening up spaces to the sex workers as the people producing the knowledge they rely on. @whoreganizer, TWITTER (Apr. 7, 2022, 8:53 PM), <https://twitter.com/whoreganizer/status/1512232036588826645> [<https://perma.cc/9EGQ-DN38>]. Their insights were helpful in articulating for me what I would like to avoid doing, and I am grateful.

¹⁰ See ERIN FITZGERALD, SARAH ELSPEETH PATTERSON, DARBY HICKEY & CHERNO BIKO, MEANINGFUL WORK: TRANSGENDER EXPERIENCES IN THE SEX TRADE (2015), https://transequality.org/sites/default/files/Meaningful%20Work-Full%20Report_FINAL3.pdf [<https://perma.cc/8WYQ-BG6R>].

¹¹ Marilyn L. Booth, *New Tricks in the Labor Zone*, HARVARD CRIMSON (Feb. 8, 1976), <https://www.thecrimson.com/article/1976/2/18/new-tricks-in-the-labor-zone/> [<https://perma.cc/6RCV-9CL5>] (interviewing Margo St. James about the formation of COYOTE, a sex workers’ rights activist group), *quoted in* JUNO MAC & MOLLY SMITH, REVOLTING PROSTITUTES: THE FIGHT FOR SEX WORKERS’ RIGHTS, 5, 7 (2018) [hereinafter REVOLTING PROSTITUTES].

when St. James said the phrase, she was referring to the way in which sex workers were ready to engage in activist work, the phrase rings true on multiple levels.

A sex worker speaking for themselves about their own experiences and advocating for policy is a politically polarizing act. It takes a short time to politicize a “hooker.”¹² I recognize the ways in which sex workers navigate complex waters to even speak the truth of their experiences, and it resonates with being out as non-binary. As a non-binary person in public life, people tell me, implicitly or explicitly, that expecting my identity to be respected is a political statement. That I should feel lucky if my pronouns are used correctly, and that for anything beyond that, I need to wait my turn. I too have gone into conversations aware of what it means for the first sentence out of my mouth to be so alienating to some of my audience as to render the second sentence meaningless. I am unfortunately used to being told that I am asking for too much and that I want change too fast. These shared experiences, as well as the political education that resulted from trying to contextualize my own identity, allow me to see how my liberation is bound with those in the sex trades, and guides my solidarity.

II. THE POLITICS OF SEX WORK

Sex work is work, and work sucks sometimes.¹³ Or in the words of Blunt and Wolf, like all forms of labor under capitalism, sex work is “vulnerable to hyper-exploitation” and harm.¹⁴ These harms are not unique to the experience of selling sex or sexually explicit materials. The exploitation of sex workers and people in the sex trades in the United States is a combination of the harms that are inherent in the sale of labor under a disappearing or non-existent social safety net, magnified by the criminalization of in-person sex work and adjacent “legal sex work” economies, and compounded by the stigma that sex workers face.

At a bare minimum, the fact that sex work is work forces us to acknowledge that sex workers deserve space and consideration in technology policy discourse for their experiences with the parts of the

¹² Of course, the notion that a particular marginalized group’s existence in public on their own terms is political but the majority’s is not a fallacy.

¹³ See CAROL LEIGH, *UNREpentant Whore: Collected Works of the Scarlet Harlot* 69 (2004). See also MELISSA GIRA GRANT, *PLAYING THE WHORE: THE WORK OF SEX WORK* 27–34 (2014); REVOLTING PROSTITUTES, *supra* note 11, at 48–51; but see suprihmbé, *Heauxthots: Defined/Definers: My Thoughts on Common Terminology around Erotic Labor & Trafficking*, MEDIUM (Sept. 9, 2019), <https://medium.com/hauxthots/hauxthots-de%EF%AC%81ned-de%EF%AC%81ners-my-thoughts-on-common-terminology-around-erotic-labor-trafficking-f9df45ea2b9a> [<https://perma.cc/73HU-Z7VW>] (critiquing the way in which the sex work paradigm prioritizes white sex worker voices and suggesting that it is better to understand Black erotic labor as anti-work).

¹⁴ Danielle Blunt & Ariel Wolf, *Erased: The Impact of FOSTA-SESTA & the Removal of Backpage on Sex Workers*, *ANTI-TRAFFICKING REV.* 117–21 (2020).

Internet that have harmed them. In fact, since people should matter more than corporations, sex workers are *more* legitimate as stakeholders in online policy than organizations like NetChoice,¹⁵ the now defunct Internet Association,¹⁶ or the Computer and Communications Industry Association (CCIA).¹⁷ But beyond that, sex worker labor and innovations are responsible for shaping what it even means to engage online.¹⁸ Sex workers know more about the Internet than most of us, and their knowledge is relevant to discussions about all forms of policy, FOSTA/SESTA-related or not.

The reluctance to engage with sex workers as stakeholders goes beyond the run of the mill individual lack of access to political processes or online content moderation decisions. Because of whorephobia¹⁹ and whore stigma²⁰, sex workers are not considered legitimate stakeholders for engagement by well, most people. In the technology policy space, platforms often ignore or remove sex workers even as they profit off of their engagement²¹ and legislators will convene hearings about online pornography where no out sex workers or former sex workers are present.²² Sex workers attempted, often in vain, to get meaningful action

¹⁵ NETCHOICE, <https://netchoice.org/> [<https://perma.cc/KB5Q-Q7SA>].

¹⁶ INTERNET ASSOCIATION, <https://web.archive.org/web/20211217094655/https://internetassociation.org/>.

¹⁷ I owe this point to Danielle Blunt, who pointed out that the Hacking//Hustling slogan “people over platforms” applies here.

¹⁸ See Sofia Barrett-Ibarria, *Sex Workers Pioneered the Early Internet—and It Screwed Them Over*, VICE (Oct. 3, 2018, 8:00 AM), <https://www.vice.com/en/article/qvazy7/sex-workers-pioneered-the-early-internet> [<https://perma.cc/P5S9-7EFS>]; see also *Sexual Gentrification: An Internet Sex Workers Built*, HACKING//HUSTLING (Apr. 6, 2021), <https://hackinghustling.org/sexual-gentrification-an-internet-sex-workers-built/> [<https://perma.cc/DB9R-MUDW>] (discussing how histories of gentrification like those in physical red light districts have played out online).

¹⁹ SUPPORT HO(S)E COLLECTIVE, SEX WORKER CENTERED GUIDE FOR ACADEMICS 24 (2021), <https://sxhxcollective.org/wp-content/uploads/2021/03/SxHx-academic-guide-final.pdf> [<https://perma.cc/UL8P-QSU5>] (explaining that whorephobia “refers to the fear and hatred of those involved in the sex trades, as well as what they represent as challenges to hetero/homonormative conceptions of amative relationships and sexualities”).

²⁰ *Id.* at 24 (Whore stigma “refers to the stigmatization of those either involved in, presumed to be involved in, or, crucially, even briefly occupying the subject position of one involved in the sex trades.”); see Gail Pheterson, *The Whore Stigma: Female Dishonor and Male Unworthiness*, 37 SOC. TEXT 39 (1993).

²¹ The summer 2021 announcement and subsequent backtracking from OnlyFans about eliminating pornography from its platform is a surprisingly concise example. See Joe Hernandez, *Reversing A Planned Ban, OnlyFans Will Allow Pornography On Its Site After All*, NPR (Aug. 25, 2021), <https://www.npr.org/2021/08/25/1030949680/onlyfans-explicit-content-pornography-sex-workers-reverses-ban> [<https://perma.cc/7NXT-77QU>]; see Emily Coombes, *When Sex Workers Speak, Who Listens?*, NATION (Sept. 6, 2021), <https://www.thenation.com/article/society/only-fans-sex-work/> [<https://perma.cc/623J-TVNR>]; see also Remarks by Daisy Ducati, *Sexual Gentrification: An Internet Sex Workers Built*, HACKING//HUSTLING, <https://hackinghustling.org/sexual-gentrification-an-internet-sex-workers-built/> [<https://perma.cc/DB9R-MUDW>] (discussing restrictions on sex workers that came out of non-sex worker activity on OnlyFans); Taylor Lorenz, Sinnamon Love & Trixie the Pixie, *OnlyFans And The Future of Sex Work On The Internet*, NPR (Aug. 26, 2021), <https://www.npr.org/2021/08/26/1031404810/onlyfans-and-the-future-of-sex-work-on-the-internet> [<https://perma.cc/C3RY-Z48C>].

²² See, e.g., Prepared Statement of the Federal Trade Commission: Hearing on Online Pornography: Closing the Door on Pervasive Smut Before the Subcomm. on Com., Trade, and

from Congressional staffers during the debate over the passage of FOSTA/SESTA. The idea that sex workers should have some sort of input on the policies that come to define their online lives is so far from on the table, it is hard to find a citation to suggest it.

Things are slowly changing, mostly due to the work of post-FOSTA/SESTA organizers. But still, when sex workers are invited to speak, they are often only asked to speak about their experiences as a sex worker or sex work adjacent topics.²³ Often they have to explain, at length, the difference between sex work and sex trafficking, in part because of the interventions of the religious right as well as anti-sex work feminists, who conflate all sex work with trafficking. Still pervasive is the belief that sex workers who describe their own experiences on a spectrum of choice or circumstance are deluded, lying, or on the payroll/under the thrall of “the pimp lobby”.²⁴ Of course, some advocates have now moved beyond the “pimp lobby” to suggest that sex worker advocates, who frankly spend more time opposed to technology companies than aligned with them, are acting as the technology companies' surrogates.²⁵ Even if no person is throwing around the term “the pimp lobby” in a conversation, the perviousness of such rhetoric often forces advocates to spend valuable time articulating why workers can legitimately speak for themselves.²⁶

Whether the conversation is about FOSTA or OnlyFans or something else, there is a sense that controversy lurks just around the corner as sex workers speak. As Melissa Gira Grant put it in her book *Playing the Whore: The Work of Sex Work*, “sex workers are still understood: as curiosities, maybe, but as the legitimate target of law enforcement crackdowns and charitable concerns—at times simultaneously.”²⁷

It is that status as dual target that FOSTA/SESTA has made even more complicated. As Lorelei Lee has pointed out, FOSTA/SESTA has

Consumer Prot. of the H. Comm. on Energy and Com., 108th Cong. (2004).

²³ Melissa Gira Grant calls this “the debate.” GRANT, *supra* note 13, at 35–36.

²⁴ For an example of how this plays out in practice, see Liz Tung, *FOSTA-SESTA Was Supposed to Thwart Sex Trafficking. Instead, It's Sparked a Movement*, WHYY (July 10, 2020), <https://whyy.org/segments/fosta-sesta-was-supposed-to-thwart-sex-trafficking-instead-its-sparked-a-movement/> [<https://perma.cc/B297-TJZ5>]. See also GRANT, *supra* note 13, at 40.

²⁵ See, e.g., Mary Graw Leary, *History Repeats Itself: Some New Faces Behind Sex Trafficking Are More Familiar Than You Think*, 68 EMORY L.J. ONLINE 1083, 1095–96 (2019).

²⁶ I encountered this dynamic firsthand on a panel about FOSTA at the University of Virginia, where the first question the well-meaning moderator asked a panel of me, a legislative aide, and two current/former workers was about Catharine MacKinnon's views on sex work. MacKinnon believes that sex work is inherently exploitative. Catherine Powell, *A Conversation with Catharine A. MacKinnon: Prostitution as Sex Work or Sexual Exploitation?*, COUNCIL ON FOREIGN RELS. (July 22, 2021, 5:37 PM), <https://www.cfr.org/blog/conversation-catharine-mackinnon-prostitution-sex-work-or-sexual-exploitation/> [<https://perma.cc/ZWY3-WGBT>]. My sex worker/former sex worker colleagues handled the moment much better than I did.

²⁷ GRANT, *supra* note 13, at 26.

made it more difficult to talk about the messy gray areas around sex work, where people experience coercion but do not want to frame their experiences in the ways advocated for by anti-sex-work feminists or the rescue industry.²⁸ Complicating this further is that sex workers and survivors of trafficking have been presented as oppositional and non-overlapping groups, despite the fact that many people have both worked in the sex trades deliberately and experienced coercion, and that they share the need to live lives of safety and abundance.²⁹

III. UNDERSTANDING FOSTA AS ONE-TWO PUNCH

The context of FOSTA/SESTA's passage has been documented across many law review articles, so I will avoid recounting it in detail here.³⁰ I do, however, want to clarify some procedural history that is relevant to understanding the relationship of FOSTA/SESTA's provisions as well as the reflections below.

Originally, both the House and Senate bills proposing amending § 230 to exclude claims based on federal sex trafficking law solely suggested amending § 230.³¹ Both were originally opposed by technology companies and industry groups, along with advocacy organizations and many parts of civil society.³² In November 2017, the Internet Association eventually flipped and supported SESTA, which contained the § 230 changes.³³ This was considered a widespread betrayal by many advocates.³⁴ SESTA had been introduced in the Senate in August 2017, and was reported out of committee with an amendment in January 2018.³⁵

²⁸ Lorelei Lee, *Cash/Consent*, N+1 MAG., Fall 2019 (discussing the complication involved in conversations about sex work, sex trafficking, and deliberate-ness); see also Selena the Stripper, *Foreword*, in *WE TOO: ESSAYS ON SEX WORK AND SURVIVAL* xiv (Natalie West & Tina Horn eds., 2021) [hereinafter *WE TOO*]; Christa Marie Sacco, *Victim-Defendant: Women of Color Complicating Stories about Human Trafficking*, in *WE TOO*, at 60.

²⁹ See Selena the Stripper, *Foreword*, in *WE TOO*, at xiv; Christa Marie Sacco, *Victim-Defendant: Women of Color Complicating Stories About Human Trafficking*, in *WE TOO*, at 60.

³⁰ *FOSTA in Legal Context*, *supra* note 1, at 1100; Eric Goldman, *The Complicated Story of FOSTA and Section 230*, 17 *FIRST AMEND. L. REV.* 279, 282–83 (2019); Chamberlain, *supra* note 2, at 2187.

³¹ See H.R. 1865, 115th Cong. (1st Sess. 2017); S. 1693, 115th Cong. (1st Sess. 2017).

³² Goldman, *supra* note 30, at 283. See also STOP SESTA & FOSTA, <https://stopsesta.org/> [https://perma.cc/HWU4-AFUD].

³³ *Statement In Support of the Bipartisan Compromise to the Stop Enabling Sex Traffickers Act*, INTERNET ASS'N (Nov. 3, 2017), <https://web.archive.org/web/20171104074616/https://internetassociation.org/statement-in-support-of-the-bipartisan-compromise-to-stop-enabling-sex-trafficking-act-sesta/>.

³⁴ See Mike Masnick, *Internet Association Sells Out The Internet: Caves In and Will Now Support Revised SESTA*, TECHDIRT (Nov. 3, 2017), <https://www.techdirt.com/2017/11/03/internet-association-sells-out-internet-caves-will-now-support-revised-sesta/> [https://perma.cc/M7PJ-RHFM].

³⁵ *S. 1693 – Stop Enabling Sex Traffickers Act of 2017: Actions*, CONGRESS.GOV, <https://www.congress.gov/bill/115th-congress/senate-bill/1693/all-actions> [https://perma.cc/ZB4P-VBSK].

In February 2018, H.R. 1865, a bill amending § 230, went before the House Judiciary Committee for a hearing.³⁶ At that hearing on the House version, Chris Cox, a former member of the House of Representatives, original co-author of § 230, and current advocate for NetChoice, a technology industry lobbying group, attached additional criminal provisions that he believed would make it easier for the Department of Justice to prosecute websites that “knowing[ly were] facilitat[ing] prostitution” and suggested changes to the rest of the bill.³⁷ The version of FOSTA that passed out of that committee in the House included some changes to § 230, as well as Cox’s new criminal provision, § 2421A.³⁸

H.R. 1865, which I will call FOSTA, went on to pass the House at the end of February in 2018.³⁹ It was then introduced in the Senate, where it passed without amendment in March 2018, and was signed into law on April 11, 2018.⁴⁰ It resulted in widespread deplatforming, increased violence, precarity, and just full-scale devastation to sex workers, sex worker organizing, and mutual aid efforts.⁴¹

Although the effects of FOSTA/SESTA are usually contextualized in terms of its changes to § 230, the changes to § 230 were only part of the law as passed. It is understandable that the § 230 changes have gotten most of the policy and advocacy attention—they were, after all, what the sponsors of the bill had proposed. The criminal provision was, as far as I can tell, introduced to reduce the likelihood that Congress would amend § 230.⁴²

³⁶ *Online Sex Trafficking and the Communications Decency Act: Hearing Before the Subcomm. on Crime, Terrorism, Homeland Sec. and Investigations of the Comm. on the Judiciary*, 115th Cong. (2017) [hereinafter 115th Cong. Hearing].

³⁷ 115th Cong. Hearing, *supra* note 36, at 16–17 (testimony of Chris Cox, Witness, Outside Counsel, NetChoice). I am grateful to Professor Mary Graw Leary for pointing out during the symposium that the inclusion of additional federal criminal provisions came from Christopher Cox. I had not previously realized this, and it has sharpened my analysis significantly. Of course, Professor Graw Leary still supported § 2421A, with the caveat that it perhaps did not go far enough. See Mary Graw Leary, *The Indecency and Injustice of Section 230 of the Communications Decency Act*, 41 HARV. J.L. PUB. POL’Y 553, 615 (2018).

³⁸ H.R. REP. NO. 115-572, pt. 1, at 5–6 (2018), <https://www.congress.gov/bill/115th-congress/house-bill/1865/text/rh> [<https://perma.cc/2Y88-C7SA>]. Professor Graw Leary discusses this history quite thoroughly in her article on the passage of FOSTA. Graw Leary, *supra* note 37, at 615.

³⁹ *H.R. 1865 – Allow States and Victims to Fight Online Sex Trafficking Act of 2017: Actions*, CONGRESS.GOV, <https://www.congress.gov/bill/115th-congress/house-bill/1865/actions> [<https://perma.cc/5K7Q-FF8A>].

⁴⁰ *Id.*

⁴¹ See generally Danielle Blunt & Ariel Wolf, *Erased: The Impact of FOSTA-SESTA and the Removal of Backpage on Sex Workers*, 14 ANTI-TRAFFICKING REV. 117 (2020); see also Jennifer Musto ET AL., *Anti-Trafficking in the Time of FOSTA/SESTA: Networked Moral Gentrification and Sexual Humanitarian Creep*, 10 SOC. SCIS. 58 (2021) [hereinafter *Anti-Trafficking in the Time of FOSTA/SE*].

⁴² See 115th Cong. Hearing, *supra* note 36, at 16–17.

Chris Cox’s new criminal provision, § 2421A, made it a federal crime to own, operate, or manage an interactive computer service that is used to facilitate or promote prostitution of a person.⁴³ The scope of § 2421A’s language has many similarities with existing federal anti-prostitution statutes, such as the Travel Act and the Mann Act.⁴⁴ However, because of the construction of an “interactive computer service” under § 230, and the potentially broad scope of the words “facilitate” or “promote,” many online platforms that had not been previously worried about liability for Mann or Travel Act violations found themselves potentially subject to federal criminal liability. They reacted accordingly—websites came down within hours of FOSTA/SESTA being signed into law.⁴⁵ And of course, FOSTA/SESTA turned out not to be necessary to prosecute Backpage, where the Department of Justice filed indictments before the law was even signed.⁴⁶

Cox’s introduction of a new criminal provision, whether he meant to or not, had moved a law that was theoretically focused on reducing trafficking and would harm sex workers, to one that placed sex workers and sex worker organizing directly in its crosshairs. Although the Mann Act and the Travel Act certainly can be read to cover online sex work ads, and indeed, the Justice Department did so in prosecutions against Rentboy, among others,⁴⁷ the directness of § 2421A’s language and its definition-less invocation of prostitution caused seismic shifts in how even actors who were friendly to sex workers treated sex worker content.

Likewise, § 2421A also contained a civil provision, allowing individuals harmed by an aggravated violation of § 2421A (i.e., a site that promoted or facilitated the prostitution of five or more people, or which acted in reckless disregard of sex trafficking), to sue the operator of the interactive computer service.⁴⁸ As a testament to how disjointed the bill was, it did not remove § 230 immunity for this newly introduced federal civil claim.

FOSTA/SESTA’s actual changes to § 230 were, well, quite minimal, in part because of the substantial advocacy by civil society and technology policy experts. FOSTA/SESTA eliminated § 230 immunity

⁴³ 18 U.S.C. § 2421A.

⁴⁴ 18 U.S.C. § 1952; 18 U.S.C. § 2421.

⁴⁵ See *Documenting Tech Actions*, SURVIVORS AGAINST SESTA, <https://survivorsagainstsesta.org/documentation/> [<https://perma.cc/3HRP-MZW5>].

⁴⁶ Press Release, U.S. Dep’t of Just., Justice Department Leads Effort to Seize Backpage.Com, the Internet’s Leading Forum for Prostitution Ads, and Obtains 93-Count Federal Indictment (Apr. 9, 2018), <https://www.justice.gov/opa/pr/justice-department-leads-effort-seize-backpagecom-internet-s-leading-forum-prostitution-ads> [<http://perma.cc/KT5S-KVVR>].

⁴⁷ Complaint and Affidavit in Support of Arrest Warrants at 1–2, *United States v. Hurant*, No. 1:16-cr-00045 (E.D.N.Y. Aug. 18, 2015).

⁴⁸ Some courts have ignored the plain language to find that § 2421A civil claims should be exempt from § 230 immunity in dicta. See *J.B. v. Craigslist, Inc.*, 2023 WL 3220913 (9th Cir. May 3, 2023); *Doe v. Twitter, Inc.*, 2023 WL 3220912 (9th Cir. May 3, 2023).

for claims under § 1595, the civil component of federal anti-sex trafficking law that meet the components of § 1591.⁴⁹ It did not eliminate general immunity for state civil sex trafficking claims that do not align with § 1595,⁵⁰ although that has not stopped some courts from interpreting it to eliminate immunity in those cases.⁵¹ Nonetheless, the small changes to § 230 immunity caused massive reactions from general-purpose online platforms, causing changes to content moderation guidelines and widespread efforts to kick off sex workers.⁵² Platforms from Google Drive to Instagram tightened their rules around sexual speech.⁵³ Perhaps some of that was driven by criminal liability; however, it seems likely that technology company lobbyists had been largely correct in their assumption that the Department of Justice was not going to bring federal criminal charges against Instagram for facilitating prostitution. These companies likely viewed potential civil lawsuits against them under § 1595 as a more likely threat, and somehow viewed the elimination of all sexual material as responsive to that.

Indeed, § 2421A also resulted in significant impact to sex worker speech online by platforms that provided harm reduction or wished to support sex workers. If such platforms serve some sex workers who might do work that some jurisdiction considers prostitution, nothing they do to reduce the chances of trafficking will ever reduce their legal risk. Even platforms that cater to certain forms of legal sex work like camming, live streams, or production of custom pornography, or sites that host materials produced by sex workers that are not even arguably illegal, such as artwork, must take substantial steps to comply with § 2421A.⁵⁴

What makes this notable is that it does not matter if zero trafficking has ever or will ever occur on the site. As I have stressed in some of my earlier work, § 2421A is primarily concerned with prostitution, not trafficking, and allegations of knowledge of prostitution is sufficient for a criminal indictment.⁵⁵ So, even if the site has taken all possible steps to minimize the chances of trafficking through tools like verifying workers

⁴⁹ *FOSTA in Legal Context*, *supra* note 1, at 1084.

⁵⁰ *FOSTA in Legal Context*, *supra* note 1, at 1114.

⁵¹ See *In re Facebook, Inc.*, 625 S.W.3d 80, 100 (Tex. 2021). *But see* *Doe v. Reddit, Inc.*, No. SACV 21-768 JVS(KESx), 2021 WL 4348731, at *6 (C.D. Cal. July 12, 2021) (“[T]he Texas Supreme Court’s interpretation of § 230 undermines Congress’s clear intent. Notably, § 230(e)(5) explicitly states that § 230 should not impair civil claims brought under 18 U.S.C. § 1595 and ‘any charge in a criminal prosecution’ under state laws that would constitute violations of 18 U.S.C. §§ 1591 and 2421A.”).

⁵² See *Documenting Tech Actions*, *supra* note 45; BLUNT & WOLF, *supra* note 17, at 4.

⁵³ *Documenting Tech Actions*, *supra* note 45.

⁵⁴ See, e.g., *Rules and Guidelines*, WIKI.MYFREECAMS, https://wiki.myfreecams.com/index.php?title=Rules_and_Guidelines&oldid=3556 [<https://perma.cc/4UJ2-PJSX>].

⁵⁵ Kendra Albert, *Enough About FOSTA’s “Unintended Consequences”*, KENDRA ALBERT (July 28, 2021), <https://kendraalbert.com/blog/2021/07/28/enough-about-fostas-unintended-consequences.html> [<https://perma.cc/LQ5C-DUGK>].

using peer networks, having robust consent rules, only allowing users over the age of eighteen, etc., the chance that they may be seen as promoting or facilitating prostitution creates § 2421A risk.

Likewise, websites or services run by people in solidarity with sex workers must attempt to police a line between legal sex work and illegal sex work, despite the variation across jurisdictions. Thus, § 2421A further entrenched the whorearchy's distinctions between legal and illegal sex work, providing further ammunition for sex workers who were less likely to face criminalization to create their own spaces and police (sometimes literally) their borders.⁵⁶ Some platforms have even moved beyond caring what constitutes legal vs. illegal—having an OnlyFans link, which is absolutely legal, may be enough to flag an account for deletion.⁵⁷

The combination of § 230 carve outs, which primarily incentivize larger institutional actors with sufficient funds to be targets for a civil suit, and a new criminal provision was a one-two punch to sex worker spaces online. General purpose platforms like Facebook, Instagram, Twitter, etc., cracked down on all types of sexual content, either in hopes of reducing the chances of §1595 lawsuits, or just because they saw which way the wind was blowing. Small platforms that could moderate in ways that reduced their risk of being subject to a § 1595 lawsuit were deterred by the possibility of federal criminal investigation, no matter how slight said possibility might be for those that did not directly creating spaces for escort advertisements.⁵⁸ Niche, free, and queer websites were among the first to shut down.⁵⁹ Very few platforms remained, and those that did often picked up and moved outside of the United States, exposing users to a new set of risks from a completely different government regulatory apparatus.⁶⁰ And even that move did not prevent FOSTA/SESTA from having an impact.⁶¹

⁵⁶ A. Hammes, *Sex Worker Centered Guide for Academics* (2021), <https://sxhxcollective.org/wp-content/uploads/2021/03/SxHx-academic-guide-final.pdf> [<https://perma.cc/CMV9-PNSM>] (“In its simplest terms, whorearchy refers to any stratification of sex working people which declares some as morally superior to, or simply separate from, others. It is the vestiges of classist, racist, sexist, colorist, homophobic, transphobic, and anti-migrant alienation within and around sex worker rights movements, and serves as an effective form of division between those whose class interests and subject position as ‘sex worker,’ ‘prostitute,’ or even ‘whore’ (a term itself reclaimed by many within these trades and movements) would be strengthened if united.”).

⁵⁷ Hannah Rimm, *After Instagram Rewrote Its Rules, Sex Workers Had to Get Creative to Survive*, REFINERY29, <https://www.refinery29.com/en-us/2021/01/10273074/instagram-ad-guidelines-onlyfans> [<https://perma.cc/5XMF-MBEU>] (Jan. 21, 2021).

⁵⁸ For a discussion of moderation practices used by those in the sex trades to keep themselves safe, see Hanna Barakat & Elissa M. Redmiles, *Community Under Surveillance: Impacts of Marginalization on an Online Labor Forum*, SOCARXIV, <https://osf.io/preprints/socarxiv/74zw2/> [<https://perma.cc/N6Z8-K765>] (Jan. 7, 2022).

⁵⁹ See generally *Documenting Tech Actions*, *supra* note 45.

⁶⁰ Kendra Albert, Harv. L. Sch., Kate D’Adamo, Reframe Health & Just. & Angela Jones, State Univ. of N.Y., Panel Presentation at USENIX Enigma 2022: Sex Work, Tech, and Surveillance (Feb. 2, 2022).

⁶¹ Angela Jones, *FOSTA: A Transnational Disaster Especially for Marginalized Sex Workers*, 2

Understanding either change to the law in isolation leads to an incomplete picture of the forms of violence that sex workers have experienced post FOSTA. Although deplatforming from the large social media providers has been devastating for many sex workers, it is that combined with § 2421A's imposition of criminal penalties for the creation of websites that specifically allow for sex worker agency and private efforts to eliminate sexual content from public life that have accelerated what Kate D'Adamo, Gabriella Garcia, Danielle Blunt, Jennifer Musto, and others call the "gentrification" of the Internet.⁶²

To state the obvious, prostitution should not be a crime. The evidence is clear that criminalizing prostitution harms those in the sex trades, rather than helping them, and that it creates fewer options for exit, rather than more.⁶³ To create a law that added additional crimes to the list of those that can be charged in the sex trades was a violent step in the wrong direction. Let us name the dynamics involved in FOSTA/SESTA's passage: adding § 2421A to the federal criminal code was considered more acceptable than changes to § 230 because increasing the harms to an already marginalized and criminalized population was an acceptable tradeoff for a decrease in liability for internet platforms. One could attempt to justify a position in terms of the fact that sex work is already criminalized or in terms of the idea that a narrower set of speech restrictions was preferable to a more general chilling effect. But such views make abundantly clear what forms of harms mattered in the run up to FOSTA/SESTA, and those harms underestimate the stigmatization that sex workers face when they advocate for themselves.

IV. REFLECTIONS ON FOSTA/SESTA

Having contextualized the harms of FOSTA/SESTA as being caused both by the creation of new federal criminal liability as well as changes to section 230, I now move to discussing the dynamics that have played out since its passage.

A. Failures to Understand or Engage with Underlying Substantive Debates Can Hamstring Tech Policy Advocates, as they Did with

INT'L J. GENDER, SEXUALITY & L. 73, 75, 88–89 (2022); see also *Anti-Trafficking in the Time of FOSTA/SE*, *supra* note 41; Danielle Blunt, Stefanie Duguay, Tarleton Gillespie, Sinnamon Love & Clarissa Smith, *Deplatforming Sex: A Roundtable Conversation*, 8 PORN STUD. 420, 434 (2021).

⁶² FOSTA, 230 and Digital Gentrification, HACKING//HUSTLING (May 28, 2021), <https://hackinghustling.org/fosta-230-and-digital-gentrification/> [<https://perma.cc/AKM9-FKZW>]; *Anti-Trafficking in the Time of FOSTA/SE*, *supra* note 41; see also Elizabeth Nolan Brown, *The New Campaign for a Sex-Free Internet*, REASON, May 2022, <https://reason.com/2022/04/09/the-new-campaign-for-a-sex-free-internet/> [<https://perma.cc/UQU3-RPAS>].

⁶³ See, e.g., *Why Sex Work Should Be Decriminalized*, HUM. RTS. WATCH (Aug. 7, 2019), <https://www.hrw.org/news/2019/08/07/why-sex-work-should-be-decriminalized> [<https://perma.cc/6KNB-BZ63>]. A full review of the evidence for this claim is beyond the scope of this essay.

FOSTA.

The politics of sex work and the sex trafficking space are complicated and require thoughtful, nuanced analysis. To put it simply, there is a group of organizations that name themselves as anti-trafficking but believe that all sex work is exploitive. They seek to end the buying or selling of sex, independent of whether it comes from choice, circumstance, or coercion.⁶⁴

Additionally, a significant amount of recent anti-sex trafficking focus has come from anti-LGBTQ organizations that view sex trafficking as a way to eliminate spaces for sexual content online.⁶⁵ For example, the “National Center on Sexual Exploitation,” the newest incarnation of the organization historically known as “Morality in Media,” has recently focused on using lawsuits under FOSTA for sex trafficking as part of their long running campaign to eliminate online pornography.⁶⁶ Previous campaigns have targeted library databases and online platforms like Etsy.⁶⁷ Even the language that advocates use (for example, “prostituted persons” vs. “sex worker”) can be a sign of a deeper set of beliefs about the legitimacy of sex work as a political category.

The failure of technology policy advocates to understand the beliefs of anti-sex work advocates and name them as anti-sex work made it difficult to fully engage with the politics of FOSTA/SESTA.⁶⁸ These

⁶⁴ See, e.g., *About*, WORLD WITHOUT EXPLOITATION, <https://www.worldwithoutexploitation.org/about> [<https://perma.cc/98Y3-6QAZ>] (“We’re working to create a world that is consistent with our name, where no person is bought, sold, or exploited.”); *About*, COALITION AGAINST TRAFFICKING IN WOMEN, <https://catwinternational.org/about/> [<https://perma.cc/9KFF-XFKE>] (“Creating a world where no woman or girl is ever bought or sold.”). Some organizations are less explicit about how their mission relates to “commercial sex,” but often end up opposing harm reduction or decriminalization efforts. See *Shared Hope Statement Regarding FOSTA-SESTA and the Backpage Seizure*, SHARED HOPE INT’L (Apr. 11, 2018), <https://sharedhope.org/2018/04/11/statement-regarding-fosta-sesta/> [<https://perma.cc/4X63-HL2K>]; Press Release, Polaris, Polaris Statement on Bill to Decriminalize the Sex Trade in Washington, D.C., (Oct. 15, 2019), <https://polarisproject.org/press-releases/polaris-statement-on-bill-to-decriminalize-the-sex-trade-in-washington-d-c/> [<https://perma.cc/UG8H-KS2N>]. See also Melissa Gira Grant, *FOSTA Backers to Sex Workers: Your Work Can Never Be Safe*, THE APPEAL (Apr. 24, 2018), <https://theappeal.org/fosta-backers-to-sex-workers-your-work-can-never-be-safe-5a67582e04f3/> [<https://perma.cc/UJ62-PYRM>].

⁶⁵ See Melissa Gira Grant, *Selling Sexualization*, PAC. STANDARD (June 14, 2017), <https://psmag.com/social-justice/sexualization> [<https://perma.cc/FF9D-ES59>]; Elizabeth Nolan Brown, *The New Campaign for a Sex-Free Internet*, REASON (May, 2022), <https://reason.com/2022/04/09/the-new-campaign-for-a-sex-free-internet/> [<https://perma.cc/4CG9-FRGG>].

⁶⁶ See *Pornography*, NAT’L CTR. ON SEXUAL EXPLOITATION, <https://endsexualexploitation.org/issues/pornography/> [<https://perma.cc/6UQB-JNGY>]. Lest this seem fringe, the Government Accountability Office cites NCOSE in its definition of prostitution in its report on FOSTA. GOV’T ACCOUNTABILITY OFF., *SEX TRAFFICKING: ONLINE PLATFORMS AND FED. PROSECUTIONS* 4 (2021).

⁶⁷ See James LaRue, *False Witness: Morality in Media and EBSCO*, 2 J. INTELL. FREEDOM & PRIV., at 13–14 (2017); *Etsy*, NAT’L CTR. SEXUAL EXPLOITATION, <https://endsexualexploitation.org/etsy/> [<https://perma.cc/5WCX-BTJ8>].

⁶⁸ Kendra Albert, *Enough About FOSTA’s “Unintended Consequences”*, KENDRA ALBERT: BLOG (July 28, 2021), <https://kendraalbert.com/blog/2021/07/28/enough-about-fostas-unintended-consequences.html> [<https://perma.cc/2J8V-3DE8>].

dynamics ultimately contributed to the passage of a bill that killed sex workers and created massive criminalization.⁶⁹

Additionally, technology policy advocates routinely discuss the “anti-trafficking” movement as if it is monolithic, while assuming that folks outside of the technology space should understand the complicated politics of internal divisions between different technology advocacy organizations.⁷⁰ There is an assumption that the work of anti-trafficking and the work of sex worker rights are disjunctive rather than aligned. Despite the fact that anti-trafficking organizations that do not believe that all sex work is exploitative both (a) exist, and (b) were natural allies in opposing FOSTA and getting a better picture of the likely pluses and minuses of SESTA, advocates (with few exceptions, such as the Electronic Frontier Foundation) routinely assumed that all anti-trafficking organizations were aligned.

Likewise, FOSTA/SESTA must be understood in legal context, specifically in relation to the Mann Act (originally called the White Slave Traffic Act of 1910) and the Travel Act as well as efforts to police of sex workers and people profiled as sex workers by intermediaries of all types, from the banking industry to hotels.⁷¹ When sex workers and allied advocates expressed concerns about the SESTA parts of FOSTA/SESTA, it was in relation to the experiences of already having been profiled and excluded from the everyday conveniences of modern society.⁷² When sex workers expressed concerns about FOSTA, it was in the context of Justice Department prosecutions of websites like Rentboy, MyRedbook, and eventually, yes, Backpage.⁷³ All three of those sites had made in-person sex work considerably safer and were taken down before FOSTA was signed into law.⁷⁴ Likewise, for advocates familiar with the space, FOSTA brought to mind the harms against sex workers in countries where providing housing or a ride to a sex worker can create significant

⁶⁹ See discussion *infra* Section IV.B.

⁷⁰ Cf., Caty Simon, *Sex Workers Are Not Collateral Damage: Kate D’Adamo on FOSTA and SESTA*, TITS AND SASS (Mar. 6, 2018), <https://titsandsass.com/sex-workers-are-not-collateral-damage-kate-dadamo-on-fosta-and-sesta/> [<https://perma.cc/293D-8CCN>] (“The tech sector is just as monolithic and singular as ‘people who trade sex.’”).

⁷¹ See Melissa Gira Grant, *The Real Story of the Bipartisan Anti-Sex Trafficking Bill That Failed Miserably on Its Own Terms*, NEW REPUBLIC (June 23, 2021), <https://newrepublic.com/article/162823/sex-trafficking-sex-work-sesta-fosta> [<https://perma.cc/X6PT-8W3T>]; Kate D’Adamo, *Hacking/Hustling - EARN IT Act Community Call*, SURVIVE EARN IT ACT (Mar. 25, 2020), <https://surviveearnit.com/educational-videos/> [<https://perma.cc/8PUG-GE6R>]; see also *FOSTA in Legal Context*, *supra* note 1, at 1084 (arguing that FOSTA/SESTA must be understood in legal context).

⁷² See City Simon, *On Backpage*, TITS AND SASS (Apr. 25, 2018), <https://titsandsass.com/on-the-death-of-backpage/> [<https://perma.cc/N2YU-SSEE>].

⁷³ See *id.*

⁷⁴ Caty Simon, *On Backpage*, TITS AND SASS (Apr. 25, 2018), <https://titsandsass.com/on-the-death-of-backpage/> [<https://perma.cc/DJ9N-WYC5>].

criminal liability.⁷⁵ The plain language criminalization of harm reduction tools, from bad date lists to the ability to be in community and learn safety techniques, was just the cherry on top, adding a new dimension to the potential risks that organizers faced working with at-risk populations.

Yet, even despite the direct relevance of these fights, very little advocacy from technology policy organizations contextualized either the fight within anti-trafficking about sex work or the history of sex work criminalization. As a result, tech's view on FOSTA/SESTA was more susceptible to critique and less rooted in the experience of those in the sex trades. Even when tech advocates were accurate about likely outcomes, they sounded like Chicken Little, yelling about how the sky was falling, but without the historical context to situate their claims in the suppression of sex worker speech or online sexual content bans.⁷⁶ Additionally, sex workers more directly and articulately predicted such outcomes, but they were spoken over or not included as experts in their own right.⁷⁷

B. Mainstream Corporate Incentives to Push for Criminal Liability as an Alternative to Removal of Civil Immunity Harms, Already Criminalized Populations, and Sites that Prioritize Their Needs.

Corporate reactions to FOSTA and SESTA pre-passage were mixed. In the words of Verge reporter Russell Brandom, “[t]he proposed law has split the tech world, with Oracle, IBM, and the Internet Association cheering on the new measures. Notably, companies like Google and Facebook have largely remained silent.”⁷⁸ Likewise, technology policy advocates who widely denounced SESTA saw FOSTA as potentially workable pre-passage.⁷⁹ And, of course, FOSTA's criminal

⁷⁵ See, e.g., GLOBAL NETWORK OF SEX WORK PROJECTS, #4 *Impacts of Other Legislation and Policy – The Danger of Seeing the Swedish Model in a Vacuum*, in *Advocacy Toolkit: The Real Impact of the Swedish Model on Sex Workers*, at 4:2 (2015), <https://www.nswp.org/resource/nswp-publications/advocacy-toolkit-the-real-impact-the-swedish-model-sex-workers> [https://perma.cc/3SN8-HRSB].

⁷⁶ There is plenty of evidence that suppression of sex worker speech was an outcome of FOSTA. See Danielle Blunt, Ariel Wolf, Emily Coombes & Shanelle Mullin, *Posting-Into-the-Void, HACKING/HUSTLING* (Sept. 2020), <https://hackinghustling.org/posting-into-the-void-content-moderation/> [https://perma.cc/65EH-M3VW].

⁷⁷ See Melissa Gira Grant, *Anti-Backpage Law Not Yet Enacted, But the Crackdown on Sex Workers Has Already Begun*, IN JUST. TODAY (Apr. 10, 2018), <https://medium.com/in-justice-today/anti-backpage-law-not-yet-enacted-but-the-crackdown-on-sex-workers-has-already-begun-e5f11d409adf> [https://perma.cc/DF6B-8TRF] (quoting Kate D'Adamo, an advocate behind Survivors Against SESTA, noting that she felt like Chicken Little).

⁷⁸ Russell Brandom, *Controversial Sex-Trafficking Bill Passes the House of Representatives*, VERGE (Feb. 27, 2018), <https://www.theverge.com/2018/2/27/17057754/sesta-fosta-passes-congress-cda-230-house-of-representatives> [https://perma.cc/SK85-EW5G].

⁷⁹ See, e.g., Eric Goldman, *New House Bill (Substitute FOSTA) Has More Promising Approach to Regulating Online Sex Trafficking*, TECH. & MKTG. L. BLOG (Dec. 11, 2017), <https://blog.ericgoldman.org/archives/2017/12/new-house-bill-substitute-fosta-has-more-promising-approach-to-regulating-online-sex-trafficking.htm> [https://perma.cc/5VSM-MBJF]; *Merging SESTA & FOSTA Would Harm, Not Help, Trafficking Victims*, TECHFREEDOM (Feb. 23, 2018),

provisions came from an advocate who works for a technology trade group.⁸⁰

Part of these reactions to FOSTA and SESTA were likely a realpolitik reaction to the fear of being seen as pro-sex trafficking. Even if platforms realized that over-removal of sex worker content was a likely outcome of changes post-SESTA, such outcomes were not important enough to oppose passage. These issues have been exacerbated by the claims of some anti-trafficking advocates that online platforms profit extensively from human trafficking; a claim which seems designed to incite, especially given the current moral panic of sex trafficking and Q-Anon.⁸¹ Further, as we have seen time and time again, there also always remains the claim that any advocate who opposes changes to § 230 is a shill for big tech.⁸²

As discussed above, tech's prioritization of opposition to SESTA, which made § 230 changes, as opposed to FOSTA, which can be read to criminalize a variety of harm reduction efforts that on-the-ground community members were engaged in, compounded the harm that sex worker advocates faced.⁸³

Mainstream tech sites did not fear Justice Department prosecution, despite the fact that the language of the bill could, in certain circumstances, cover the distribution of harm reduction materials on platforms like Facebook or Google.⁸⁴ In effect, tech companies were betting that the law would only be used to target the “truly bad actors”—a category that often includes websites that actually provided services that sex workers use to keep themselves safe.⁸⁵ Tech companies relied on their

<https://techfreedom.org/merging-sesta-fosta-harm-not-help-trafficking-victims/> [https://perma.cc/6F3H-ZHVT].

⁸⁰ See *supra* Part III and accompanying text.

⁸¹ As far as I can tell, the claim that mainstream online platforms profit from sex trafficking is rooted in the idea that individual traffickers might pay for ads on a service or that tech companies make a profit on users in general, not on the allegations of particular knowledge.

⁸² See Mary Graw Leary, *History Repeats Itself: Some New Faces Behind Sex Trafficking Are More Familiar Than You Think*, 68 EMORY L.J. ONLINE 1083, 1092 n.57 (2019) (calling the proponents of the Woodhull litigation and, as far as I can tell, sex workers, “big tech and its surrogates”). Cf., Nathalie Maréchal, *No, Senator Blumenthal, I Am Not a Big Tech Lobbyist*, TECH POL'Y PRESS (Feb. 12, 2022), <https://techpolicy.press/no-senator-blumenthal-i-am-not-a-big-tech-lobbyist/> [https://perma.cc/6Q2L-A4L7].

⁸³ Such efforts include online services that would make it easier to exchange information about a particular client, sharing physical spaces, or, if FOSTA/SESTA is read broadly, an online service that knows about individual acts of prostitution and takes steps to reduce the likelihood of harm. Chamberlain, *supra* note 2, at 2183, 2204–06, 2206 n.284.

⁸⁴ Christian Sarceño Robles, *Section 230 is Not Broken: Why Most Proposed Section 230 Reforms Will Do More Harm Than Good, and How the Ninth Circuit Got it Right*, 16 FIU L. REV. 213, 230 (2021).

⁸⁵ See Zoe Bedell & John Major, *What's Next for Section 230? A Roundup of Proposals*, LAWFARE (July 29, 2020, 9:01 AM), <https://www.lawfareblog.com/whats-next-section-230-roundup-proposals> [https://perma.cc/T7NP-EEP6] (defining “truly bad actors” and the origin of the notion in a DOJ report). Indeed, Kate D'Adamo has pointed out that online advertising platforms such as Backpage, etc., were safety tools in and of themselves; Kimberly Lawson, *Controversial Online Trafficking Bill Will Endanger Sex Workers, Advocates Say*, VICE (Feb. 27, 2018, 3:00 PM), <https://>

lack of engagement with and support for sex workers to avoid meeting the “knowingly” standard present in § 2421A. A callous disregard for sex worker users becomes a feature if regard becomes criminalized.

The comfort with criminalization in the case of § 2421A is also notable because of efforts by technology companies to combat law enforcement overreach in other contexts. For example, in 2013, Google began requiring that law enforcement obtain a warrant under the Electronic Communications Privacy Act (ECPA) to obtain access to the contents of emails of its users.⁸⁶ Such a requirement was not a codification of existing law—at the time, there was only one federal appellate decision that required a warrant.⁸⁷ And yet, Google was willing to risk the wrath of law enforcement and the Justice Department in order to defend the rights of its users. Likewise, for years, tech companies and others opposed national security letters, including spending years litigating for the right to report on the number of them received.⁸⁸

Still, FOSTA received little meaningful backlash from tech companies, who would now be put in a position of policing their users’ engagement or perceived engagement with prostitution at the risk of criminal liability.⁸⁹ Certainly, the politics of large tech companies are different now than they were from 2013 to 2017. But these differences perhaps suggest that the position of technology companies *vis-a-vis* law enforcement requests for information was more a result of interest convergence than any real belief in maximizing user privacy or autonomy. Interest convergence, as coined by Derrick Bell, refers to the idea that civil rights promoting actions like the decision in *Brown v. Board* by those in power actually occur because of interests that have little to do with support for marginalized folks.⁹⁰ In this case, the

www.vice.com/en/article/7x7m3x/controversial-online-trafficking-bill-will-endanger-sex-workers-advocates-say [https://perma.cc/3N8Q-FNTX].

⁸⁶ David Kravets, *Google Tells Cops to Get Warrants for User E-Mail, Cloud Data*, WIRED (Jan. 23, 2013, 5:29 PM), <https://www.wired.com/2013/01/google-says-get-a-warrant/> [https://perma.cc/NHD9-XF2J].

⁸⁷ *United States v. Warshak*, 631 F.3d 266 (6th Cir. 2010).

⁸⁸ *See, e.g.*, In re Nat’l Sec. Letter, 863 F.3d 1110 (9th Cir. 2017); Angela Sherrer (@alegnada), *#Transparency Update: Twitter Shares More National Security Letters*, TWITTER BLOG, https://blog.twitter.com/en_us/topics/company/2018/transparencyupdatejune2018 [https://perma.cc/4UD4-3APL].

I do not mean to suggest here that it was not the correct position for technology companies to defend their users against law enforcement overreach. However, as someone who worked extensively on some of that litigation, the posture with regards to criminality and who is worthy of investments of time and effort in those cases versus sex workers has been quite different.

⁸⁹ Such policing will always fall more heavily on queer and trans users of color, especially fat queer and trans users of color. *See e.g., Exclusive: An Investigation into Algorithmic Bias in Content Policing on Instagram*, SALT (Oct. 4, 2021), <https://saltyworld.net/algorithmicbiasreport-2/> [https://perma.cc/E8GE-9459]; *see also* Amy Fleming & Nyome Nicholas-Williams, *The Model Who Made Instagram Apologise: Alexandra Cameron’s Best Photograph*, GUARDIAN (Feb. 10, 2021), <https://www.theguardian.com/artanddesign/2021/feb/10/model-instagram-apologise-nyome-nicholas-williams-alexandra-cameron-best-photograph> [https://perma.cc/DDA8-XCLB]. Thank you to Blakeley H. Payne who pointed out this example.

⁹⁰ Derrick A. Bell, *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93

institutional interest that technology companies were protecting by insisting on certain forms of legal process could be the desire to build trust with users and/or to promote the use of digital technologies for sensitive information; perhaps even more cynically, finding a way to limit or triage the influx of law enforcement requests for user data.⁹¹ In circumstances where those interests were not present, i.e. when sex workers speech is being suppressed, the outcome of a similar question—how should we resist law enforcement—was different.

C. Section 230 Can Provide Internal Political Cover Within Companies for “Controversial” Speech, such that Even Narrow Changes Can Eliminate Spaces for Marginalized Communities.

Given the minimal, actual changes to § 230 that were made as result of FOSTA/SESTA, the widespread changes to types of content allowed on particular platforms were notable. In fact, it is hard to explain them by sole reference to the text, which is part of why myths about the law’s contents persist. Perhaps large platforms saw the writing on the wall with regards to court expansion beyond the statute as written.⁹² More likely, the idea of taking on any amount of liability for keeping up speech that is “controversial” was a political non-starter inside tech companies.

At many times in my work in this space, I have heard legal risk articulated as the rationale for restricting sex worker speech or removing sexual content. However, given that this legal risk is often minimal, the actual motives are probably either prudishness (a fundamental discomfort with sexual content, even when users who are of legal age seek it out) or whorephobia.⁹³ Basically, the changes to § 230 and the minimal criminal liability risks to large platforms seem insufficient to justify the radical crackdowns on sexually explicit materials and sex worker speech that have occurred after FOSTA/SESTA’s passage. As advocates such as Jillian York have articulated, America’s comfort with restrictions on sex-related speech is out of step with the rest of its free speech culture, and they limit how everyone engages online.⁹⁴ Fears of sex trafficking allow for restriction of sexual speech in the guise of moral righteousness, and risk of liability is often the claimed harm of those who are uncomfortable or just unwilling to articulate that they do not believe

HARVARD L. REV. 518, 528 (1980) (noting that interest convergence theory does not claim that individuals within institutions do not sincerely believe they are doing the right thing, but rather makes claims about the structural nature of power).

⁹¹ Thank you to Riana Pfefferkorn for pointing out the latter interest.

⁹² See *In re Facebook, Inc.*, 625 S.W.3d 80 (Tex. 2021).

⁹³ As discussed in the conclusion, the current debates over what steps payment processors must take to police adult sexual content is a logical extension of this.

⁹⁴ See JILLIAN YORK, *SILICON VALUES: THE FUTURE OF FREE SPEECH UNDER SURVEILLANCE CAPITALISM* 152–60 (2021).

that sex workers should be “allowed” to exist. If a decisionmaker inside a platform is uncomfortable with sex online, it is far easier to claim that FOSTA/SESTA made you eliminate sexual content than to admit that you never thought sexual material was high value speech in the first place.

It may also be that some companies have an unrealistic sense about the types of liability FOSTA created. For example, Cloudflare, a United States company that provides web performance and security services, cut off Switter, a website that was designed as a sex worker alternative to Twitter.⁹⁵ Switter was located in Australia, where sex work is decriminalized in some states. It is unclear exactly why Cloudflare believed it would face legal liability and whether it was under the § 230 carve outs or the § 2421A criminal claim.⁹⁶ Although Switter managed to hang on without Cloudflare’s services for a number of years, it shuttered in February 2022 due to a confluence of bad laws.⁹⁷

These shifts for speech by sex workers have profound consequences for everyone, to the extent that just the impact on sex workers is not enough.⁹⁸ In particular, as efforts to criminalize speech about abortion expand, and fears about transgender kids being “groomed” are stoked by the religious right and trans-exclusionary radical feminists, the consequences of chilling speech based on trace liability and moral panics may go beyond those in the sex trades.⁹⁹ It doesn’t hurt that there is significant overlap between right wing attacks on sex workers, trans folks, and abortion—in fact, they share the same misogynistic, heteronormative roots. Shadowbanning, deplatforming, and the chilling effects that have come along with them may impact sex workers first, but as the invocations of moral panics succeed, the advocates who use them will not stop with those in the sex trades.¹⁰⁰

⁹⁵ See Lola H, *Cloudflare Bans Sex Worker Platform, Switter. First Notable Ban Since Neo Nazis*, HACKER NEWS, <https://news.ycombinator.com/item?id=16876040> [https://perma.cc/6MQD-JC3R] (discussing Cloudflare’s ban of Switter, and notably including a comment from Cloudflare’s CEO Matthew Prince (@eastdakota), saying that his legal counsel insisted that they remove Switter); see also Samantha Cole, *Cloudflare: FOSTA Was a “Very Bad Bill” That’s Left the Internet’s Infrastructure Hanging*, VICE (Apr. 19, 2018, 5:21 PM), <https://www.vice.com/en/article/9kgyga/cloudflare-switter-down-fosta-sesta> [https://perma.cc/857J-2FV2]. For the sake of full disclosure, I worked for Cloudflare during the summer of 2015.

⁹⁶ If Cloudflare’s CEO or General Counsel would like a more nuanced opinion on FOSTA/SESTA compliance, they know where to find me.

⁹⁷ Samantha Cole, *Switter, the Twitter for Sex Workers, Is Shutting Down*, VICE (Feb. 14, 2022, 3:46 PM), <https://www.vice.com/en/article/7kb7vx/switter-the-twitter-for-sex-workers-is-shutting-down> [https://perma.cc/SAN6-HAVF].

⁹⁸ *Posting-Into-the-Void*, *supra* note 76.

⁹⁹ Lynn Greenky, *The Anti-Abortion Movement’s Attempt to Criminalize Abortion Speech*, MS. MAGAZINE (Oct. 12, 2022), <https://msmagazine.com/2022/10/12/anti-abortion-censorship-first-amendment/> [https://perma.cc/WJ5F-BCPG].

¹⁰⁰ It is interesting to contemplate whether the importance of things like abortion to those with political power in Silicon Valley will result in different reactions to trace amounts of liability. I certainly hope so, for the sake of those of us who might need abortions, but I will admit, watching platforms bend over backwards to protect particular users as they throw marginalized groups under the bus grinds my gears.

D. *Constitutional Litigation Strategy Can Be at Odds with More Pragmatic Organizing and Efforts to Push for Narrow Legal Interpretation.*

Another dynamic post-FOSTA/SESTA is the gap between the needs of pragmatic on-the-ground organizers for access to platforms and the efforts to construe FOSTA/SESTA broadly for a successful constitutional challenge. After FOSTA/SESTA passed, the Woodhull Freedom Foundation, along with a number of other plaintiffs, filed a lawsuit challenging its constitutionality.¹⁰¹ In their complaint, the plaintiffs note that the “promote or facilitate” language of FOSTA/SESTA could be “reasonably read” to extend to broad categories of legal speech, including bad date lists¹⁰² and Know-Your-Rights trainings.¹⁰³ This interpretation is necessary to make a claim about unconstitutionality. Because of the press around FOSTA/SESTA, however, it also has been repeated as if it is the only reasonable interpretation of the text of the statute.

Even outside of the necessary interpretation for an overbreadth claim, the scope of the potential risks described in the constitutional litigation are at odds with the text. As an example, the complaint discusses that “pounced.org,” a small site dedicated to the furry community,¹⁰⁴ shut down because it could not face potential liability under § 2421A without the protections of § 230.¹⁰⁵ There is just one problem—the language of FOSTA/SESTA does not actually carve out civil claims based on § 2421A from § 230 protection, other than based on state laws. My point here is not to say that pounced.org did not make the right decision based on their own risk calculus. Certainly, since FOSTA/SESTA’s passage, we have seen instances where courts read the § 230 carve out far beyond its plain language. But litigation documents that describe overcompliance without correcting incorrect information run the risk of exacerbating the harm. The arguments in *Woodhull* have caught the popular imagination, making it more difficult for attorneys (like myself) who must guide clients through the FOSTA/SESTA thicket to discuss what legal risks attach based on the text.

¹⁰¹ Complaint at 1–2, *Woodhull Freedom Found. v. U.S.*, F. Supp. 3d 185 (D.D.C. June 28, 2018) (No. 1:18-CV-01552).

¹⁰² Bad date lists are basically lists of clients who have caused harm to other sex workers and should be avoided. See, e.g., BAD DATE LIST, <https://web.archive.org/web/20220707101509/https://baddatelist.com/>.

¹⁰³ Complaint at ¶ 39, *Woodhull Freedom Found.*, F. Supp. 3d 185 (D.D.C. June 28, 2018) (No. 1:18-CV-01552).

¹⁰⁴ The furry fandom is a set of subcultures interested in anthropomorphic animal characters, sometimes in sexual contexts. See Dylan Matthews, *9 Questions about Furies You Were Too Embarrassed to Ask*, VOX (Mar. 27, 2015, 3:46 PM), <https://www.vox.com/2014/12/10/7362321/9-questions-about-furies-you-were-too-embarrassed-to-ask> [<https://perma.cc/FT4M-W3D5>].

¹⁰⁵ Complaint at ¶ 59, *Woodhull Freedom Found.*, F. Supp. 3d 185 (D.D.C. June 28, 2018) (No. 1:18-CV-01552).

It is not that the constitutional litigators behind Woodhull Freedom Foundation were at fault for trying to frame the facts of their case in a way that best suited their argument. After all, they were hopeful it would result in the overturning of significant provisions of FOSTA/SESTA. Most First Amendment litigation walks a tightrope between suggesting a broader interpretation in hopes of a successful facial challenge and hoping for a narrower reading that constrains less speech.

However, the pace of constitutional law is slow, and the pace of the internet, especially the deplatforming of sex workers, is fast. The idea that FOSTA created criminal liability for any speech related to sex work may have actually caused more significant harm than the law's content itself. And very broad, nuance-free readings of the law that assume that, for example, the § 230 carve-outs cover civil violations of § 2421A, and crack down on sex worker speech, accordingly, may have sticking power that extends far beyond whatever the result in *Woodhull* ultimately is.

At the time of this writing, the D.C. Circuit Court of Appeals is considering the plaintiffs' appeal of the district court's grant of summary judgment for the defendants.¹⁰⁶ The district court found that § 2421A was not overbroad, because "promote or facilitate" should be read to mean aiding or abetting in a particular act of prostitution, and thus FOSTA's reach is limited to "legitimately criminal activity."¹⁰⁷ A decision is still pending.

Five (or six) years may be not too long for a complicated, novel constitutional case, but it is a long time in internet years. In those five years, numerous sites that previously provided support to or platforms for sex workers have shuttered.¹⁰⁸ A successful result in the case—a full-scale rejection of FOSTA/SESTA as unconstitutional, would be welcome, but it will not turn back the clock on the harms caused to sex workers. And with the exception of Craigslist, which has stated that it will put back up its personals section if FOSTA/SESTA is repealed or found unconstitutional, it seems quite unlikely that even a constitutional victory will change some of the minds of those that run major platforms.

¹⁰⁶ Elizabeth Nolan Brown, *Appeals Court Panel Seems Skeptical that FOSTA Doesn't Violate the First Amendment*, REASON (Jan. 18, 2023, 10:46AM), <https://reason.com/2023/01/18/appeals-court-panel-seems-skeptical-that-fosta-doesnt-violate-the-first-amendment/> [<https://perma.cc/86D4-WZF6>].

¹⁰⁷ *Woodhull Freedom Found. v. U.S.*, No. 18-1552, 2022 WL 910600, at *15 (D.D.C. Mar. 29, 2022).

¹⁰⁸ See *Documenting Tech Actions*, SURVIVORS AGAINST SESTA, <https://survivorsagainstsesta.org/documentation/> [<https://perma.cc/Y5TS-2TXT>] (showing a partial list of sites that shut down in the immediate aftermath of FOSTA/SESTA's passage). Since then, there is not a comprehensive list. But see Ashley Lake, *Incomplete List of Legal Discrimination Against Sex Workers*, <https://docs.google.com/document/d/1Y1tUMddf07cQqBVc1hTSV22zKoAXTy6lVG6QIDClm48/edit> [<https://perma.cc/35FY-4MBD>] (listing a number of additional discriminatory actions and shutdowns).

E. Taking the Needs of Criminalized People Seriously Should Reshape Policy Thinking, Not Merely Confirm It.

This may be a rare area where I agree with many of FOSTA/SESTA's proponents. Although many organizations who highlighted the harm to sex workers that would come as a result of SESTA had histories of integrating the concerns of sex workers into their advocacy, some advocates seemed to discover sex worker rights just as those rights overlapped with their goal of preserving § 230 liability at all costs.

Of course, it would be hypocritical of me, as someone who was not actively working against FOSTA/SESTA at the time of its passage, to suggest that one's entry point into the sex worker rights space permanently constrains the work that one does. However, I have witnessed technology policy organizations suddenly discover sex workers rights around SESTA, but go no further in integrating sex worker needs into their policy goals. Nor do they develop methods that would allow sex workers to contribute to their work. Perhaps the underlying assumption is that sex workers are not qualified or likely to have insight on anything outside the narrow bounds of advertising and escort sites, which could not be further from the truth. In the words of Lorelei Lee, "90% of my friends are wh0r3s and can I just say, these bitches are smart as hell. If I'm looking for an in[sightful] analysis or explanation or answer to any question I will ask a wh0re Every. Single. Time."¹⁰⁹ Lorelei is, as usual, correct.

It is positive that the conventional wisdom in technology policy space has shifted, but the shift has been too small. We have seen mainstream institutions that previously did not acknowledge sex worker lives discuss how FOSTA/SESTA was bad because it harmed sex workers. This may be a win on some level, because some of these organizations have never considered that harms to sex workers should be weighed as part of policy analysis before. However, the analysis has not moved past FOSTA/SESTA, and it often focuses on the changes to § 230 and ignores the introduction of a new federal crime. Other harms to sex workers, even ones caused by technology, are out of scope for advocacy. Funding sex workers for their labor and time in doing the work of documenting FOSTA/SESTA's harms is out of scope. Platforming sex workers to talk about their own experiences is out of scope. In short, even suggesting sex workers are legitimate speakers on their own experiences is subversive, and going beyond that is off the table.

¹⁰⁹ Lorelei Lee (@MissLoreleiLee), TWITTER (Apr. 15, 2022, 12:08 PM), <https://twitter.com/MissLoreleiLee/status/1514999157303435266> [<https://perma.cc/LS5Q-CYJT>].

It is, of course, the nature of coalition work that not everyone will work on or agree on everything. However, it is embarrassing to watch advocates who comfortably deploy sex worker narratives on § 230 fail to engage in even token tweets when Mastercard effectively regulated entire swathes of sexual labor out of existence in October 2021, causing widespread harm to sex workers who were already struggling due to the pandemic.¹¹⁰ Payment card processor regulation comes on top of the systemic redlining of sexual services within the financial ecosystem, forcing anyone who produces sexual content to pay a much higher percentage to payment processors, sometimes ranging from 20-40%. Likewise, the focus on § 230 changes without a simultaneous denouncement of the role of criminalization in constraining the creation or continued running of sex worker-focused websites represents a failure to take sex worker needs seriously.

On the opposite hand, lip service to decriminalization¹¹¹ as a solution to avoid the reality of carceral feminist impacts of criminalized people is also offensive.¹¹² When technology policy advocates who come from outside of communities that are at the most risk of harm carry on with their own proposals that suggest that criminalization will effectively solve problems, they ignore the violence of criminalization.¹¹³

Ultimately, it is for exactly this reason that many sex worker advocates believe in abolishing prisons and the criminal legal system.¹¹⁴

¹¹⁰ See LaLa Holston-Zannell, *How Mastercard's New Policy Violates Sex Workers' Rights* | News & Commentary, ACLU (Oct. 15, 2021), <https://www.aclu.org/news/lgbtq-rights/how-mastercards-new-policy-violates-sex-workers-rights> [https://perma.cc/H7N4-U477]; Valerie Webber, *The Impact of Mastercard's Adult Content Policy on Adult Content Creators*, (Feb. 2022), <https://drive.google.com/file/d/1167acd62YZqc-j7guzeiOqPjbh3pW03w/view> [https://perma.cc/FH8E-K3SR].

¹¹¹ “Decriminalization refers to the removal of all criminal and administrative prohibitions and penalties on sex work, including laws targeting clients and brothel owners.” OPEN SOC’Y FOUND., 10 REASONS TO DECRIMINALIZE SEX WORK (Mar. 2015). Decriminalization is not the same as legalization, which involves regulating sex work. See *Decriminalisation & Legalisation*, SCARLET ALL.: AUSTRALIAN SEX WORKERS ASS’N, <https://scarletalliance.org.au/issues/legalisation/> [https://perma.cc/3NSE-W26Q]; see also Last Week Tonight, *Sex Work: Last Week Tonight with John Oliver* (HBO), YOUTUBE (Feb. 28, 2022), <https://www.youtube.com/watch?v=-gd8yUptg0Q> [https://perma.cc/T5W7-8NQJ].

¹¹² See REVOLTING PROSTITUTES, *supra* note 11, at 17.

¹¹³ And that violence is horrifying. See, e.g., Elise White, Rachel Swaner, Emily Genetta, Suvi Hynynen Lambson, Janell Johnson Dash, Isaac Sederbaum & Ariel Wolf, *Navigating Force and Choice: Experiences in the New York City Sex Trade and the Criminal Justice System's Response*, CTR. FOR CT. INNOVATION 26 (2017), https://www.innovatingjustice.org/sites/default/files/media/documents/2018-03/nyc_sex_trade.pdf [https://perma.cc/EP6J-XLJG] (finding that a quarter of interviewed participants in the sex trades in New York had been threatened with violence by a police officer or harassed because of their gender by a police officer). The report notes that 14.6% of interviewed participants had experienced an incident where an officer often did not arrest them in return for sex—something that facially would appear to be sex trafficking. *Id.* at 26–27. Transgender women had significantly more negative interactions with police than cisgender women. *Id.* at 28.

¹¹⁴ See Niloofar Golkar, *A Roundtable on Sex Work Politics and Prison Abolition*, UPPING THE ANTI (June 28, 2016), <https://uppingtheanti.org/journal/article/18-sexworker> [https://perma.cc/DG7R-ELAN]; Mariame Kaba & Brit Schulte, *Not A Cardboard Cutout: Cyntoia Brown and the*

The idea that we are currently just criminalizing the wrong things, and that the goal should be to decriminalize prostitution while criminalizing some other set of behaviors deemed socially harmful, willfully ignores how criminal laws will always be deployed against the most marginalized.

CONCLUSION: SAFE(ER) SEX AND REPEAL § 2421A NOW

It is quite possible that even a full repeal of FOSTA/SESTA would not cause widespread rollback of the policies that have caused sex worker deplatforming and censorship online. Since 2018, the situation on the ground has changed significantly. There has been (and still is) a global pandemic, and folks in the sex trades struggled to find new, safer ways of working under the threat of COVID.¹¹⁵ Since FOSTA/SESTA's passage, organizations like NCOSE have partnered with other advocates against Backpage and set their sights on the payment layer—advocating for Mastercard's disastrous policy change.¹¹⁶

Just to be clear, there is no evidence that many of the types of actions that platforms took, from freezing Google Docs accounts with sexual content, to keeping sex workers from showing up in Twitter searches, or placing restrictions on emoji use, just to name a few actions, did anything to eliminate sex trafficking. Because digital tools keep people safe, they probably made people in the sex trades more likely to be coerced and harmed. But platforms have already changed their moderation standards to be much more restrictive in terms of sexual content, thus it may be impossible for them to justify rolling back those changes, which would be portrayed as being pro-sex trafficking.

None of this justifies complacency with the disastrous violence that FOSTA/SESTA has caused. As many, including Lura Chamberlain, have said, it is a law with a body count.¹¹⁷

Currently, Congress is considering the SAFE SEX Worker Study Act, which would require agencies to study what FOSTA/SESTA did.

Framing of a Victim, THE APPEAL (Dec. 6, 2017), <https://theappeal.org/not-a-cardboard-cut-out-cyntoia-brown-and-the-framing-of-a-victim-aa61f80f9cbb/> [<https://perma.cc/7VMN-LZ7H>]; Melissa Gira Grant, 'The Police Act Like We Are Nothing,' THE APPEAL (Feb. 25, 2019), <https://theappeal.org/the-police-act-like-we-are-nothing/> [<https://perma.cc/CTL5-KEUF>].

¹¹⁵ See Vaughn Hamilton, Hannah Barakat & Elissa M. Redmiles, *Risk, Resilience and Reward: Impacts of Shifting to Digital Sex Work*, ASS'N FOR COMPUTING MACH. (Mar. 2022) (showing a discussion of how the move to digital sex work changed experiences for workers).

¹¹⁶ Melissa Gira Grant, *Nick Kristof and the Holy War on Pornhub*, NEW REPUBLIC (Dec. 10, 2020), <https://newrepublic.com/article/160488/nick-kristof-holy-war-pornhub> [<https://perma.cc/R62K-S87H>].

¹¹⁷ Chamberlain, *supra* note 2, at 2203; see Laura LeMoon, *SESTA Won't Stop Sex Trafficking, But It Will Kill Sex Workers*, VICE (Apr. 26, 2018, 12:12 PM), <https://www.vice.com/en/article/pax5pv/sesta-wont-stop-sex-trafficking-but-it-will-kill-sex-workers> [<https://perma.cc/T8HL-CPNH>]; see also Isabelle T. Lee, *One Year Later, FOSTA-SESTA Throws Sex Workers Back into the Fire*, BITCH MEDIA (Dec. 17, 2019), <https://www.bitchmedia.org/article/fosta-sesta-throws-sex-workers-into-fire> [<https://perma.cc/RBB6-2DKF>].

Passing it is a no-brainer. And it is long past time to repeal § 2421A. Beyond that, fixing FOSTA/SESTA gets more complicated, as regranting the § 230 immunity seems unlikely to matter much. That is not because § 230 is not important, but because at this point, I have so little faith that the actual text of the law determines policy in the face of such strong evidence that platforms just needed an excuse for whorephobia. I would love to be proven wrong.

At the very least, a repeal of § 2421A would finally align the bill with the narrative that many lawmakers and advocates have told about it, that it was a narrowly scoped set of changes to § 230 that aim to focus on sex trafficking. Of course, it would be unlikely to result in the outcomes predicted by advocates, but at least the text of the bill would align with the claimed goals.

Doing so would also recognize the fundamental reality that sex trafficking is not prevented by criminalizing sex work. In many instances, criminalization exacerbates exploitation in the sex trades. Survivors of trafficking deserve the types of financial and mental health resources that allow them to recover from horrifying experiences of exploitation. Those resources and support should not be contingent upon the pursuit of criminal cases against traffickers, nor the pursuit of civil cases against online platforms. The idea of the zero sum, good vs. evil fights where United States law enforcement represents the “good guys” has always been divorced from the reality of the criminalized and the marginalized.¹¹⁸

Efforts by anti-sex work activists to fight trafficking by eliminating spaces that sex workers use to keep themselves safe make the work more dangerous for sex workers and survivors of trafficking. Such efforts are both doomed to fail and offensive. Indeed, as Juno Mac and Molly Smith point out in their book *Revolted Prostitutes*, trafficking of all types is a result of the way in which Western countries impose racist immigration rules and police whiteness.¹¹⁹ We could be discussing how to eliminate forms of coercion through the elimination of borders. Or as Kate D’Adamo has pointed out, “family violence prevention services ha[ve] gone unreauthorized for a number of years, the amount [of government spending] hasn’t been increased since 2010 to actually prevent family violence, including child abuse.”¹²⁰ We could be funding violence prevention. Yet here we are debating relatively minor changes to § 230 immunity.

¹¹⁸ See, e.g., *REVOLTING PROSTITUTES*, *supra* note 11, at 59.

¹¹⁹ See *id.* at 56–86.

¹²⁰ Kate D’Adamo, Remarks on Brookings Institute Panel (Mar. 14, 2022), https://www.brookings.edu/wp-content/uploads/2022/02/gs_20220314_section230_transcript.pdf [<https://perma.cc/G3M2-AGKQ>].

I am not naive enough to think that FOSTA will be repealed. But I refuse to budge from my position that it should be. It represents the worst of our legislative process—a combination of bad drafting, Congressional failure to take stakeholders with significant expertise seriously about likely outcomes, and perhaps most frustratingly, the desire to be seen as “doing something” trumping any real meaningful policy intervention that prevents harm.