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Claremont McKenna College

Sex, Money, and Free Speech:
The Many Harms of FOSTA/SESTA

submitted to
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by
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for
Senior Thesis
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Chapter 1: How Did We Get Here?

In 2018, President Donald Trump signed into law a package of bills known as the Fight Online Sex Trafficking Act/Stop Enabling Sex Traffickers Act (FOSTA/SESTA). FOSTA/SESTA removes a form of immunity for online platforms and allows states and sex trafficking victims to take legal action against online platforms that knowingly facilitate sex trafficking or act in "reckless disregard" of such activity occurring on their sites. Championed by a bipartisan group of lawmakers and activists and decried by libertarians and free speech advocacy groups, FOSTA/SESTA has spurred heated debate about its intent, efficacy, and constitutionality before and since its passage. A careful examination of those arguments leads to the conclusion that FOSTA/SESTA is neither effective nor constitutional.

The Crusade Against Sex Work

The story of American anti-sex-trafficking law begins in 1875, when Congress passed its first restriction on immigration: the Page Act. Until then, laws regarding immigrants generally focused on naturalization of friendly aliens and the detention or deportation of hostile aliens rather than on whether aliens could enter the United States at its borders. The Alien and Sedition Acts, for example, dealt with these issues during the presidency of John Adams. The Page Act marked a turning point in immigration law and the federal government's position on sex work, and its effects have lasted until the present day in not only a legal sense but also a cultural and sociopolitical one.¹

¹ Elizabeth Nolan Brown, "Massage Parlor Panic," *Reason*, March 1, 2020, <https://reason.com/2020/02/02/massage-parlor-panic/>.

The Page Act, named after its sponsor, Representative Horace Page of California, prohibited the entry of women from East Asia for any "lewd and immoral purposes."² Page intended to stem the tide of Chinese prostitutes entering San Francisco. Like many anti-sex-trafficking laws today, the law lumped in labor trafficking with prostitution, prohibiting the entry of those whose labor was not "free and voluntary."³ In practice, these restrictions made it difficult for all East Asian women to enter the United States. Many could not prove that they freely intended to work in non-sex professions, so consular officials denied them boarding on ships bound for America.⁴ Seven years later, Congress doubled down on this anti-Asian position and passed the infamous Chinese Exclusion Act, which supplemented the Page Act by prohibiting the entry of Chinese men in addition to Chinese women.

In 1910, anti-sex-trafficking law saw another development in the form of the Mann Act, named after Representative James Mann of Illinois. The Act prohibited the interstate or foreign transportation of "any woman or girl for the purpose of prostitution or debauchery, or for any other immoral purpose."⁵ Over the 112 years from 1910 until 2022, six particularly notable prosecutions have occurred under the Mann Act: those of boxer Jack Johnson, architect Frank Lloyd Wright, actor Charlie Chaplin, musician Chuck Berry, rapper R. Kelly, and Ghislaine Maxwell, the now-infamous associate of

² Eithne Liubheid, *Entry Denied: Controlling Sexuality at the Border* (Minneapolis: University of Minnesota Press, 2002), 182.

³ Ibid.

⁴ Ibid, 42.

⁵ Stephanie Wahab, "For Their Own Good: Sex Work, Social Control, and Social Workers, a Historical Perspective," *Journal of Sociology and Social Welfare* 29, no. 4 (December 2002): 39-50, <https://heinonline.org/HOL/Page?collection=journals&handle=hein.journals/jrlsasw29&id=661>.

Jeffrey Epstein.⁶ The latter three cases involved the kind of sex trafficking about which public outrage is arguably more justified; Berry trafficked a 14-year-old girl with whom he had a sexual relationship, and Kelly's and Maxwell's crimes are so well-publicized as to bear no need for repetition here. But the earlier prosecutions reflect the Act's potential for abuse. Chaplin, arguably harassed by the government as a consequence of his far-left-wing beliefs, was acquitted of the charges against him, Johnson won a posthumous pardon for the racially motivated case against him, and the charges against Wright were dropped.⁷

In Wright's case, the prosecution was only possible because of the Supreme Court's decision in the 1917 case *Caminetti v. United States*, which held that consensual extramarital sex qualified as "immoral sex" within the definition of the Act.⁸ Congress has since amended the law to criminalize only "any sexual activity for which any person can be charged with a criminal offense," effectively making the law applicable only when other state or federal laws would also criminalize the conduct being prosecuted.⁹ Nevertheless, the law's continued existence and ongoing impact on American perceptions of the definition of sex trafficking make it a relevant point for discussion here. New sex trafficking laws fit into the context of the Mann Act, and the Act's criminal provisions

⁶ Eric Weiner, "The Long, Colorful History of the Mann Act," *National Public Radio*, March 11, 2008, <https://www.npr.org/2008/03/11/88104308/the-long-colorful-history-of-the-mann-act>.

⁷ Ibid.

⁸ 242 U.S. 470 (1917).

⁹ Michael Conant, "Federalism, the Mann Act, and the Imperative to Decriminalize Prostitution," *Cornell Journal of Law and Public Policy* 5, no. 2 (Winter 1996): 99, <https://heinonline.org/HOL/Page?handle=hein.journals/cjlp5&id=103&collection=journals>.

are a key feature incorporated by reference in the text of FOSTA/SESTA as conduct constituting the promotion or facilitation of prostitution.¹⁰

In 2016, the broad definition of sex trafficking allowed then-Attorney General of California Kamala Harris to prosecute the executives behind Backpage.com, a website that served as a marketplace for sex work.¹¹ This action is one of the few for which Harris can claim bipartisan agreement. Also in 2016, Texas Attorney General Ken Paxton launched that state's Human Trafficking Initiative, which focused on combatting sex trafficking.¹² In 2022, the Texas Department of Licensing and Regulation revoked the massage therapist licenses of dozens of women with old sex crimes on their criminal records; many of the women are now middle-aged and have put their past long behind them.¹³ Texas is not alone in its focus on massage parlors; fueled by a combination of sex-negative feminism and anti-Asian racism, states across the country have raided massage parlors and arrested or deported the women working there.¹⁴

Two notable tragedies illustrate the consequences of this law enforcement priority. Out of fear of being arrested, massage parlor workers generally avoid forming positive relationships with local police, resulting in disastrous consequences for worker safety. In 2021, a gunman killed eight people in Atlanta, six of whom were Asian

¹⁰ Kendra Albert, Elizabeth Brundige, and Lorelei Lee, *et al.*, "FOSTA in Legal Context," *Columbia Human Rights Law Review* 52, no. 3 (2021): 1084-1158, <https://heinonline.org/HOL/Page?collection=journals&handle=hein.journals/colhr52&id=1084>.

¹¹ "Attorney General Kamala D. Harris Announces New Criminal Charges Against Backpage.com Executives for Money Laundering and Pimping," State of California Department of Justice, Office of the Attorney General, accessed October 1, 2022, <https://oag.ca.gov/news/press-releases/attorney-general-kamala-d-harris-announces-new-criminal-charges-against>.

¹² "Human Trafficking Initiative," Attorney General of Texas, accessed October 1, 2022, <https://www.texasattorneygeneral.gov/initiatives/human-trafficking>.

¹³ Eric Dexheimer, "Texas agency revokes massage therapist licenses over decades-old crimes, even as its leaders wince," *Houston Chronicle*, May 20, 2022, <https://www.houstonchronicle.com/politics/texas/article/Texas-agency-revokes-massage-therapist-licenses-17187657.php>.

¹⁴ Brown, "Massage Parlor Panic."

women, out of frustration over his sex addiction. Rather than being able to rely on law enforcement for their safety, the workers found themselves brutally murdered at work.¹⁵ As evidence of potential bias against Asian immigrants, the Cherokee County Sheriff's Captain who served as a spokesman for the department, Jay Baker, was discovered to have shared a Facebook post featuring a photo of a shirt declaring the COVID-19 virus to be "imported" from China.¹⁶ Another tragedy occurred in 2017, when Yang Song, a 38-year-old massage parlor worker in Queens, either jumped or was pushed out of a fourth-floor balcony during a raid of her workplace in Flushing, Queens.¹⁷ Her death ignited a fresh wave of sex work activism and the founding of the advocacy group Red Canary Song, which continues to operate as one of the most active groups advocating the decriminalization of prostitution and sexual massage therapy.

Free Speech and Press in an Online Context

As for the issue of the Internet, three provisions of federal law are most relevant: the Communications Decency Act and the First and Fourth Amendments to the United States Constitution. This section covers only the first two provisions, but the Fourth Amendment will appear in a later chapter examining FOSTA/SESTA's potential unconstitutionality.

¹⁵ Tracy Quan, "Don't forget — the Georgia shootings are a hate crime against sex workers," *Los Angeles Times*, March 19, 2021, <https://www.latimes.com/entertainment-arts/books/story/2021-03-19/tracy-quant-dont-forget-the-atlanta-shooting-is-a-hate-crime-against-sex-workers>.

¹⁶ Paul P. Murphy, Jamiel Lynch, and Amanda Watts, "Cherokee County, Georgia, Sheriff's spokesperson allegedly posted a photo of a racist, anti-Asian Covid-19 shirt on Facebook," *CNN*, March 18, 2021, <https://edition.cnn.com/2021/03/18/us/racist-shirt-cherokee-county-sheriff-trnd/index.html>.

¹⁷ Dan Barry and Jeffrey E. Singer, "The Case of Jane Doe Ponytail," *The New York Times*, October 16, 2018, <https://www.nytimes.com/interactive/2018/10/11/nyregion/sex-workers-massage-parlor.html>.

The First Amendment reads, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."¹⁸ The Internet, of course, exists in a sort of space between speech and press. Some audiovisual content is plainly speech, and some online publications are plainly press, but much of the daily activity that occurs online, such as social media, could arguably fall into either category. Regardless of how one treats the precise source of First Amendment protections for online content, there is widespread agreement among constitutional scholars that, in general, such protections exist.

The first true test of free speech on the Internet came in 1996 with the passage of the Communications Decency Act. That law prohibited "indecent" or "obscene" content from being transmitted over the Internet to any recipient under 18 years old.¹⁹ Outrage over the overbreadth of the term "indecent" led to the Great Web Blackout, a 48-hour-long protest in which many websites turned their pages temporarily black to protest the CDA's passage.²⁰ The following June, the Supreme Court unanimously held in *Reno v. ACLU* that the CDA violated the First Amendment by prohibiting "indecent" material rather than solely material considered "obscene."²¹ This victory emboldened online content purveyors, and they came prepared for future battles over free speech on the Internet.

¹⁸ U.S. Const. amend. I.

¹⁹ Communications Decency Act of 1996, Pub. L. No. 104-104.

²⁰ Dan Mitchell, "Remembering the Great Web Blackout," *Wired*, February 8, 1997, <https://www.wired.com/1997/02/remembering-the-great-web-blackout/>.

²¹ 521 U.S. 844 (1997).

The next test of the First Amendment's applicability to the Internet came in 2002. That year, the Supreme Court decided *Ashcroft v. Free Speech Coalition*. The Court held in that case that the Child Pornography Prevention Act of 1996 was unconstitutionally overbroad because it criminalized simulated child pornography rather than limiting its authority to actual child pornography.²² The *Ashcroft* decision applied existing standards of "redeeming artistic value" to creative works on the Internet and made it clear that the Court would not tolerate infringements on the free speech of online content producers.

Although both the Communications Decency Act and the Child Pornography Prevention Act met their demise at the Supreme Court, a key provision of the former law remains in effect. Section 230, as it is widely known, provides immunity from civil and criminal liability for content providers for content appearing on their sites merely because they moderate those platforms. A recent target of bipartisan ire (from the left for its harboring of perceived objectionable content, such as gun marketplaces, and from the right for allowing content moderation, including the perceived censorship of conservatives), Section 230 is the lifeblood of free speech on the Internet because platforms would be unlikely to continue operating if they became subject to liability for the things users post. Beneath this debate lies a philosophical argument about the proper role of a publisher and how that role might evolve in this era of massive online communities.

Consider newspapers. In its physical form, the newspaper carries an innate limitation on the amount of content. Newspaper publishers therefore employ editors to limit the publication to only that content which is, in the words of the *New York Times*,

²² 535 U.S. 234 (2002).

"fit to print." Because they made editorial decisions or had employees do so on their behalf, publishers have historically been liable for the content they publish if it is defamatory or criminal. Conversely, one might imagine an unmoderated community bulletin board where individuals post whatever content they choose. Clearly, the first person to hang the bulletin board should not be liable for the content produced by an individual user.

Neither of these cases is the subject of Section 230. Instead, Section 230 imagines a sort of infinite newspaper, or at least one that is many orders of magnitude larger than a physical newspaper could realistically be. Unlike the bulletin board, this infinite newspaper is published and has editorial rules to moderate content - to keep readers safe, curtail misinformation, or for any other purpose. Applying a conventional publisher's liability to this situation would hold the publisher to an impossibly high standard because its editorial staff cannot review all content at all times with perfect success. Section 230 applies this logic to online platforms, shielding them from liability when users post defamatory or illegal content that the site fails to remove. FOSTA/SESTA's primary change to the law was a carve-out to Section 230, allowing sites to be sued or prosecuted for such content if it is prostitution-related and they knowingly facilitate it or, with reckless disregard, fail to remove it.

ABOLITIONISM AND SEX-NEGATIVE FEMINISM

At the root of the movement to fight sex trafficking is a philosophical stance known as abolitionism. Just as prison abolitionism seeks to rid the world of prisons, sex

work abolitionism seeks to eliminate all forms of paid sexual intercourse.²³ Even before the term “abolitionism” had been used for anything other than slavery in American political discourse, the anti-prostitution viewpoint was a common one. Stigmatized as “whores,” sex workers have often been the subject of fears about the spread of sexually transmitted diseases and an increase in the potential for adultery.²⁴ Modern abolitionism involves a confluence of sex-negative feminists from all parts of the political spectrum. Some left-wing feminists, considering sex buyers to be products of both patriarchy and economic inequality, take issue with such services being available. Some right-wing feminists, believing that sex work undermines the dignity of women and could encourage adultery, wish to maintain criminalization as well. But in both cases, although law enforcement has yet to catch up, the prevailing political focus has shifted away from jailing prostitutes and toward eliminating the market entirely through a focus on sex buyers, pimps, and traffickers.

This shift in focus has led abolitionists to adopt a position that, at first glance, may appear much more palatable than the current criminalization of sex work in 49 of the 50 United States.²⁵ In their proposed arrangement, known as the Nordic Model due to its adoption in Sweden, sex workers are not criminally liable for selling sex, but customers are liable for buying it. In theory, this practice could eliminate the market for sex work

²³ Lua de Mota Stabile, "Sex work abolitionism and hegemonic feminisms: Implications for gender-diverse sex workers and migrants from Brazil," *The Sociological Review* 68, no. 4 (2020), 852–869, <https://doi.org/10.1177/0038026120934710>.

²⁴ Alison Bass, *Getting Screwed: Sex Workers and the Law* (Lebanon, New Hampshire: University Press of New England, 2015).

²⁵ As is widely known, Nevada does not prohibit prostitution. However, it is less widely known that prostitution is actually criminalized in the Las Vegas metropolitan area, where most of Nevada's prostitution takes place, because Clark County has prohibited the practice within its borders. Licensed brothels operate in adjacent Nye County as well as in other counties across the state.

without harming a single sex worker. In practice, consensual sex workers broadly oppose the Nordic Model.²⁶ They raise a variety of concerns. Their profession would still be considered illegitimate as it is in the current model of criminalization. They might not be able to risk having a romantic partner if law enforcement might mistake them for a customer. Perhaps most obviously, the market for their chosen vocation might disappear, forcing them to adopt another line of work. This consequence is, of course, exactly what the abolitionists want. To them, "sex work" is a misnomer, and all paid sexual intercourse is inherently coercive.²⁷

FOSTA/SESTA applies a version of the Nordic Model to the Internet, or at least attempts to do so. Rather than criminalizing the sex workers themselves, it removes immunity for the platforms who profit off the sex market. But just as sex workers tend to oppose the Nordic Model, their opposition to FOSTA/SESTA is widespread and often passionate. In 2019, after FOSTA/SESTA became law, two sex workers who requested anonymity visited the Region 63 meeting of the Libertarian Party of Los Angeles County and spoke about their experiences. They said that they had been forced to take down their websites and begin working the streets, risking the serious health and safety issues inherent in being unable to screen clients over video calls.²⁸ They understood that the intent of FOSTA/SESTA was to curtail sex trafficking, but they supported complete decriminalization as their preferred way to advance that goal.²⁹ Over the course of the next four chapters, this thesis will evaluate their arguments and search for the answer to

²⁶ "The Human Cost of 'Crushing' the Market," Amnesty International, accessed October 1, 2022, https://www.amnestyusa.org/wp-content/uploads/2017/04/norway_report_-_sex_workers_rights_-_embargoed_-_final.pdf.

²⁷ Ibid.

²⁸ Anonymous, Public talk with author present, March 13, 2019.

²⁹ Ibid.

the problems of sex trafficking, sex worker safety, and the limits of the freedom to publish content on the Internet.

Chapter 2: The Congressional History of FOSTA/SESTA

FOSTA/SESTA experienced bipartisan support and passed both houses of Congress by large margins. The opposition was also bipartisan, but in the Senate, it consisted of only two members: Rand Paul (R-KY) and Ron Wyden (D-OR). This unlikely duo could not overcome the onslaught of advocacy for the bill. Nevertheless, the stories of opposition to the bill can provide useful information about the stakeholders.

As its compound name may suggest, FOSTA/SESTA began as two separate bills. In the House, Representative Ann Wagner (R-MO-2) introduced the Allow States and Victims to Fight Online Sex Trafficking Act of 2017, abbreviated to FOSTA.¹ The careful reader may notice the discrepancy between 2017 and 2018; Wagner introduced the bill in April of 2017, though it did not combine with SESTA until the following February.² In the Senate, Ohio Republican Rob Portman introduced the Stop Enabling Sex Traffickers Act, or SESTA, in August of 2017.³ After being reported out of the Committee on the Judiciary in February of 2018, FOSTA absorbed SESTA and passed both houses as a package, with the House voting 388 - 25 in favor and the Senate voting 97 - 2.⁴ These last two votes were those of Senators Wyden and Paul.

Rand Paul has served as a senator from Kentucky since 2011.⁵ While not one of the most traditionally conservative members of the Senate, he tends to lean toward libertarianism. Senator Paul's career began with a medical degree from Duke University,

¹ "Actions Overview H.R. 1865," Congress.gov, <https://www.congress.gov/bill/115th-congress/house-bill/1865/actions>.

² Ibid.

³ "Actions Overview S. 1693," Congress.gov, <https://www.congress.gov/bill/115th-congress/senate-bill/1693/actions>.

⁴ Congress.gov, "Actions Overview H.R. 1865."

⁵ "About Rand," Office of Dr. Rand Paul, United States Senator for Kentucky, <https://www.paul.senate.gov/about-rand>.

and he continues to prefer the appellation "Dr. Paul."⁶ He practiced ophthalmology for nearly twenty years but eventually decided to follow his father, noted Texas Representative (and self-proclaimed libertarian) Ron Paul, into the field of politics.⁷ The younger Paul's recent opposition to pandemic-related restrictions (from the standpoint of both political and medical disagreement) and the size of the aid package for Ukraine have placed him in a rather negative light among Democrats. It is nevertheless worth noting that Senator Paul's opposition to FOSTA/SESTA likely stems from a genuine libertarian concern about the well-being of consensual sex workers and freedom of speech on the Internet.

Ron Wyden has served as a senator from Oregon since 1996.⁸ In some ways, Wyden appears to be the direct opposite of Paul. Though born in Wichita, Kansas, Wyden considers Portland, Oregon his home.⁹ Wyden earned an undergraduate degree from Stanford University and a law degree from the University of Oregon with the intent to practice law in his home state.¹⁰ He worked extensively in elder rights law, establishing his role as an advocate for marginalized communities.¹¹ Since 1996, he has earned a reputation as a staunch progressive.

Wyden explained his opposition to FOSTA/SESTA in a public statement: "I continue to be deeply troubled that this bill's approach will make it harder to catch dangerous criminals, that it will favor big tech companies at the expense of startups, and

⁶ Ibid.

⁷ Ibid.

⁸ "Meet Ron," Office of Ron Wyden, United States Senator for Oregon, <https://www.wyden.senate.gov/meet-ron>.

⁹ Ibid.

¹⁰ Ibid.

¹¹ Ibid.

that it will stifle innovation."¹² The statement notably avoided calling for the full decriminalization of sex work, and politically, it may have been prudent to avoid such a third-rail issue. Moreover, the statement carefully reaffirmed Senator Wyden's commitment to fighting forcible sex trafficking. Senator Wyden's public focus for his opposition was primarily, if not solely, his opposition to making "inadvisable changes to bedrock Internet law."¹³

The Internet Association initially opposed FOSTA/SESTA but came to support an amended version. Founded in 2012 to represent the interests of several major technology companies (including Amazon, Facebook, and Google), the Internet Association lobbied on behalf of these firms for nearly a decade until its dissolution in 2021.¹⁴ The Internet Association's initial concerns with FOSTA/SESTA stemmed from its potential for overbreadth, and these concerns were assuaged by an amendment that clarified the knowledge requirement for civil or criminal liability under the act.¹⁵ The amendment came during committee markup on the bill, before it had reached the House floor.

Several non-profit organizations maintained their opposition to the bill even after the Internet Association had changed its position. The Electronic Frontier Foundation, the Wikimedia Foundation, and the Sex Workers Outreach Project argued that the bill would

¹² "Wyden Issues Warning About SESTA," *Office of Ron Wyden, United States Senator for Oregon*, <https://www.wyden.senate.gov/news/press-releases/wyden-issues-warning-about-sesta>.

¹³ *Ibid.*

¹⁴ Caitlin Oprysko, "The End of the Internet Association," *Politico*, December 15, 2021, <https://www.politico.com/newsletters/politico-influence/2021/12/15/the-end-of-the-internet-association-799494>.

¹⁵ Hayley Tsukayama, "Major tech-industry group drops opposition to sex trafficking bill," *The Washington Post*, November 3, 2017, <https://www.washingtonpost.com/news/the-switch/wp/2017/11/03/major-tech-industry-group-drops-opposition-to-sex-trafficking-bill>.

infringe on the free speech and bodily autonomy of Americans.¹⁶ But as the very large voting margins mentioned above demonstrate, these arguments failed to persuade Congress to vote down the FOSTA/SESTA package. The political challenges of opposing anti-sex-trafficking legislation, as well as the way in which the bill's supporters employed extreme language and passionate rhetoric, may help to explain why even this principled opposition did not prevail.

Sex work is politically unpopular at least in part due to a substantial gender divide on the issue. Women vote far more reliably than men, but they also tend to have significantly more negative views of sex work.¹⁷ As a result, politicians of either major party are unlikely to voice support for legalizing or decriminalizing prostitution. The Libertarian Party has taken no such precautions, explicitly advocating for decriminalization in its platform, but this position is rare in mainstream American political discourse.¹⁸ Although support for legalizing prostitution has increased from the 1970s to the 2010s, this support has not been met with a comparable level of political adoption,¹⁹ perhaps because the pool of likely voters skews female and therefore possesses a tendency to oppose legalization.

In floor speeches on FOSTA/SESTA, many lawmakers argued that the bill was necessary to curb the spread of sex trafficking and prevent Section 230 from hindering efforts to hold online platforms liable for promoting prostitution. Representative Martha

¹⁶ Andrew Liptak, "Wikipedia warns that SESTA will strip away protections vital to its existence," *The Verge*, November 11, 2017, <https://www.theverge.com/2017/11/11/16637774/wikipedia-sesta-serious-concerns-section-230-internet>.

¹⁷ Peter Moore, "Significant gender gap on legalizing prostitution," *YouGov America*, March 10, 2016, <https://today.yougov.com/topics/politics/articles-reports/2016/03/10/prostitution>.

¹⁸ "Platform," The Libertarian Party, accessed November 29, 2022, <https://www.lp.org/platform/>.

¹⁹ "Prostitution Opinion Polls/Surveys," ProCon.org, accessed November 29, 2022, <https://prostitution.procon.org/opinion-polls-surveys/>.

Roby (R-AL-02) said: "It is our responsibility to provide justice for these victims and to do everything we can to protect the most vulnerable members of our society from trafficking. This is modern-day slavery. As it stands now, the sad truth is that criminals can easily and anonymously purchase women and children on the internet using various websites."²⁰ These comments were followed by those of Representative Ted Poe (R-TX-02), who told the story of a teenage victim of sex trafficking:

Mr. Chair, according to most, Alexa was a normal and well-adjusted 15-year-old girl, teenager, but like many young people, she struggled with insecurity and loneliness. So when a handsome and sympathetic man reached out to her on social media, she was immediately taken in by his kind and comforting words.

Most Americans don't realize that the evils of human trafficking are all around us. Traffickers lurk on the phones, on computers, and on the internet, constantly searching for vulnerable victims to lure into their traps.

After months of manipulation, Alexa agreed to meet her new online friend. As soon as she got into his car, she realized that this person was a different person than she believed him to be. He chained her and forced her to have sex for money, and he committed this evil numerous times.

Technology has changed our world in countless positive ways, but it has also given human sex traffickers a direct avenue to our children and their lives. We, as a society, must work harder to capture these criminals and shut down their online schemes. Only then can we protect others from Alexa's fate.²¹

Compared with this kind of story, abstract arguments about the freedom of the Internet were ineffective. They may have even appeared callous. As the next chapter explains, while constitutionality of FOSTA/SESTA likely hinges on its treatment of

²⁰ "Allow States and Victims to Fight Sex Trafficking Act of 2017," *Congressional Record* 164, no. 35. February 27, 2018, <https://www.congress.gov/congressional-record/volume-164/issue-35/house-section/article/H1290-2>.

²¹ *Ibid.*

speech and privacy on the Internet, the policy harms of FOSTA/SESTA lie much less in such matters and much more in the law's potential to worsen safety and bodily autonomy, particularly for consensual sex workers, but quite possibly for sex trafficking victims as well. These harms were not entirely apparent until President Trump signed FOSTA/SESTA into law on April 11, 2018. That day, life changed for every sex worker in the United States.

Chapter 3: The Policy Case Against FOSTA/SESTA

The policy case against FOSTA/SESTA can be summed up in one sentence: the law has led online platforms to shut down sections of their platforms associated with sex workers, forcing these individuals into the more dangerous conditions associated with pre-Internet sex work. This argument contains three key premises. First, it holds that FOSTA/SESTA was responsible for online platforms choosing to discontinue sections of their websites associated with sex work. Next, it holds that sex workers were largely unable to continue their online operations as a result of these discontinuations. Finally, it holds that, rather than switching professions, many sex workers opted to return to practices used for sex work before the Internet, namely streetwalking and other highly dangerous activities.

Regarding the first premise, while no one can be certain of a causal relationship, the correlation between FOSTA/SESTA's passage and the discontinuation of sex-work-related sections of online platforms is a strong one. Kendra Albert and her coauthors note in a 2021 law review article that

[p]rior to FOSTA's passage, critics of the legislation reasonably feared that websites would interpret the relevant civil and criminal statutes broadly and err on the side of censorship in order to protect themselves from liability. This is precisely what happened, with websites like Craigslist shutting down their adult entertainment sections altogether. Other sites, including Google Drive, have removed content, blocked users, and closed forums that sex workers relied on to exchange warnings about dangerous clients.¹

¹ Kendra Albert, Elizabeth Brundige, and Lorelei Lee, *et al.*, "FOSTA in Legal Context," *Columbia Human Rights Law Review* 52, no. 3 (2021): 1084-1158, <https://heinonline.org/HOL/Page?collection=journals&handle=hein.journals/colhr52&id=1084>.

No other events occurred in this time frame that would be more likely causes than FOSTA, and the evidence is strong that platforms like Craigslist and Google felt forced to remove content whose liability came into question as a result of FOSTA's passage.

The case of Craigslist is a notable because the site claims that FOSTA/SESTA was indeed the cause of its decision to remove the "Personals" section. The Craigslist website now displays the following message on one of its "About" pages:

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!²

Though FOSTA's passage is no longer recent, Craigslist has maintained this page in its "About" section rather than taking the message down. The site avoids putting any distracting graphics or other links near the statement, except for a hyperlink in the text of "HR 1865, 'FOSTA,'" which directs users to the Congress.gov page for FOSTA's text and bill history. The reader might at this point get the impression that Craigslist took FOSTA/SESTA quite seriously.

While the idea of a "Personals" section may seem antiquated to the modern reader, it is critical to note just how popular such advertisements had become in the early twenty-first century. In 2009, nearly one-half of Internet users had used an online

² "FOSTA," Craigslist, accessed October 29, 2020, <https://www.craigslist.org/about/FOSTA>.

classified advertisement site such as Craigslist, and traffic to these sites was so high that one-tenth of Internet users visited them on any given day.³ The "Personals" section was one of its most popular offerings. That section saw extensive use by homosexual individuals, particularly those living in rural areas, as well as middle-aged individuals who might worry that their image would limit their ability to attract a partner through a dating website or app.⁴ In addition to these users, many advertisements featured "escorts."⁵ It is unknown how many of these escorts - presumably providing sexual services - were working consensually and how many were being trafficked.

At this point, supporters of FOSTA might argue that no harm has been done. Traffickers who were exploiting the Personals section of Craigslist now cannot use this tool. Moreover, the philosophical disagreements run deep in a case such as that of Craigslist. While the libertarian position tolerates or even embraces the commodification of sex as an inherent part of bodily autonomy, there are strains of feminism that regard such commodification as part of the larger phenomenon of patriarchy. In a world run by men, each woman's body has a price, and sex-negative feminism takes issue with such a system.

Setting aside the moral contentions for a moment (though they will return in a later chapter), the evidence is inconclusive that FOSTA actually helped trafficking victims. One of the sites most notorious for hosting sex work content, including some content relating to sex trafficking and underage prostitutes, was Backpage.com. The

³ Mark S. Rosenbaum, Kate L. Daunt, and Anny Jiang, "Craigslist Exposed: The Internet-Mediated Hookup," *Journal of Homosexuality* 60, no. 4 (2013), doi.org/10.1080/00918369.2013.760305.

⁴ Ibid.

⁵ Ibid.

desire to eliminate Backpage motivated a great deal of the support for FOSTA because of the moving stories of people who had been trafficked on the site. Nevertheless, the Backpage takedown actually occurred *before* FOSTA/SESTA became law.⁶ While the package was still pending in Congress, the Department of Justice took down the site and began the process of investigating and prosecuting its executives for their involvement in illegal activities.⁷ Regardless of whether one finds the prosecutions justified, they commenced before FOSTA/SESTA's enactment under existing laws against the knowing facilitation of sex trafficking.⁸ Moreover, on a larger scale, it is possible for FOSTA/SESTA to worsen the outcomes for sex trafficking victims because sites no longer have an incentive to self-report any trafficking that they find on their site.⁹ Where before, they might expect gratitude from law enforcement for their cooperation, they may now fear civil or criminal liability for having failed to immediately shut down part or all of their platforms upon discovering the illegal activity.¹⁰

The evidence is much more conclusive about what FOSTA/SESTA has done to consensual sex workers. FOSTA/SESTA forced sex workers out of online platforms where they could screen clients and interact with them before an encounter. A law review article written one year after FOSTA/SESTA's enactment noted that "[w]ithin one month of FOSTA's enactment, thirteen sex workers were reported missing, and two were dead from suicide. Sex workers operating independently faced a tremendous and immediate

⁶ Mike Masnick, "Politicians who Said SESTA was Needed to Takedown Backpage Claim Victory Over Backpage Takedown... Without SESTA," *Techdirt*, April 9, 2018, <https://www.techdirt.com/2018/04/09/politicians-who-said-sesta-was-needed-to-takedown-backpage-claim-victory-over-backpage-takedown-without-sesta/>.

⁷ *Ibid.*

⁸ *Ibid.*

⁹ *Ibid.*

¹⁰ *Ibid.*

uptick in unwanted solicitation from individuals offering or demanding to traffic them. Numerous others were raped, assaulted, and rendered homeless or unable to feed their children."¹¹ Even law enforcement professionals, rarely the preferred allies of sex workers, have complained that the difficulty of finding online advertisements for escort services has prevented them from following digital paper trails to apprehend trafficking suspects and sexually violent predators.¹²

The most counterproductive element of FOSTA, however, is its elimination of the Internet as a tool for sex workers to communicate about dangerous and abusive clients. In a profession that involves so much risk, the ability of sex workers to warn one another of potential threats was a key innovation of the Internet age.¹³ Without this ability, sex workers can become the victims of a tragic irony. A serial rapist can agree to meet a sex worker, commit his crime, and then move on to the next sex worker he can find. Sex workers may be reticent to report their victimization to police since doing so would reveal their criminal activity.¹⁴ Without the ability to warn one another online, sex workers can become serial victims of violent predators.

Some prosecutors have argued that FOSTA is neither vague nor ambiguous since the “intent to promote or facilitate” prostitution is a standard requiring a substantial amount of evidence.¹⁵ Prosecutors cannot merely make up the charges to go after groups like the Wikimedia Foundation. Instead, they must gather evidence showing that a

¹¹ Lura Chamberlain, "FOSTA: A Hostile Law with a Human Cost," *Fordham Law Review* 87, no. 5 (2019), <https://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=5598&context=flr>.

¹² *Ibid.*

¹³ *Ibid.*

¹⁴ *Ibid.*

¹⁵ Arthur Rizer and Lars Trautman, "A Prosecutor's Case for FOSTA," *R Street*, January 11, 2018, <https://www.rstreet.org/2018/01/11/a-prosecutors-case-for-fosta-2/>.

platform owner actually intended for the platform to make the prostitution more likely to occur or help it occur with greater ease. But while this standard may make the Wikimedia Foundation unlikely to face prosecution, FOSTA/SESTA continues to have a chilling effect on a platform like Craigslist, whose owners likely knew the Personals section featured escort advertisements and were willing to have it used in such a manner. Moreover, this argument does nothing to save FOSTA/SESTA from its cardinal flaw: conflating consensual sex work with forcible sex trafficking.

Ironically, FOSTA/SESTA may effectively turn consensual sex workers into sex trafficking victims by forcing them to turn to pimps for managing the complexities of the sex trade without the benefit of online platforms. Without the ability to use reliable online payment systems in advance of an appointment, sex workers need to demand in-person payment from their clients.¹⁶ When dealing with clients of larger physical stature, sex workers may feel relatively powerless to insist on payment when a client attempts to get the worker's services for free. Pimps may come in to fill the void, and their relationship with a sex worker may quickly become abusive or exploitative.¹⁷ FOSTA/SESTA forced entrepreneurial, independent, consensual sex workers into a system that risks making them victims of sex trafficking, quite the opposite effect from what Congress intended.

The unconstitutionality of FOSTA/SESTA, which the next chapter discusses, is a wholly different beast from this discussion of FOSTA/SESTA's bad policy. While this chapter has dealt with results, the next chapter deals with the broader principles

¹⁶ Heidi Tripp, "All Sex Workers Deserve Protection: How FOSTA/SESTA Overlooks Consensual Sex Workers in an Attempt to Protect Sex Trafficking Victims," *Penn State Law Review* 124, no. 1 (2019), <https://elibrary.law.psu.edu/pslr/vol124/iss1/6>.

¹⁷ *Ibid.*

applicable to nearly every law that affects personal freedom on the Internet. But it is worth pausing for a moment to consider the impact FOSTA/SESTA has had on real lives. As much as abstract arguments about the Constitution may be valid, the reality on the ground is what affects the lives of thousands of sex workers across the country. Even if principles are unconvincing, the cruelly ironic results of FOSTA/SESTA should force Congress and other political figures to reconsider their support for a law that has caused so much harm.

Chapter 4: The Constitutional Case Against FOSTA/SESTA

In addition to the policy failures of FOSTA/SESTA, there are serious questions about its constitutionality. These questions arise under the First, Fourth, Ninth and Fourteenth Amendments. In each of these cases, the argument is far from settled, and constitutional scholars have hardly formed a consensus. Nevertheless, this chapter shall analyze the chief constitutional objections to FOSTA/SESTA and appraise their potential validity.

The familiar language of the First Amendment comes into play here: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."¹ FOSTA/SESTA has had a chilling effect on online speech, but the question remains whether its modification of Section 230 is tantamount to "abridging the freedom of speech." Careful examination of the law under the Overbreadth Doctrine demonstrates that the First Amendment's protections extend to Internet users whose speech FOSTA/SESTA has harmed.

Writing in the *Fordham Law Review*, Lura Chamberlain argues that FOSTA/SESTA is substantially broader than its supporters have claimed, causing it to fail the relevant test of constitutionality: "The simple meanings of the words 'promote' and 'facilitate' connote a broad scope of activities... FOSTA could proscribe significant protected speech: 'facilitation' of prostitution could encompass anything that makes it

¹ U.S. Const. amend. I.

easier for a person to engage in sex work or exist as a sex worker, while 'promotion' of prostitution could include any speech that supports or condones engaging in sex work."² Since criminal laws implicating the First Amendment threaten a fundamental right, they are subject to strict scrutiny. In order to pass strict scrutiny, laws must be both narrowly tailored and the least restrictive means of accomplishing a compelling government interest. Because it lacks a clear definition of "promote" and "facilitate," FOSTA/SESTA is not narrowly tailored. The Overbreadth Doctrine allows parties to sue on these grounds even when their own rights have not been violated if their speech has been chilled by a law violating the First Amendment.³ Thus, groups like the Wikimedia Foundation and the Internet Archive may have standing to challenge the law.

Supporters of FOSTA/SESTA might at this point object that no prosecutor would actually use the law to go after speech beyond the law's intended target: sex trafficking. In other words, if one is not engaging in sex trafficking, one need not fear that FOSTA/SESTA will chill one's speech. But this argument ignores a key concept in constitutional law: the idea that laws may be unconstitutional as written, and the government's insistence that it will not abuse the breadth of the law cannot save it. To quote the Supreme Court, the "Court will not uphold an unconstitutional statute merely because the Government promises to use it responsibly."⁴ An overbroad law cannot survive a constitutional challenge merely because it is implausible that the government

² Lura Chamberlain, "FOSTA: A Hostile Law with a Human Cost," *Fordham Law Review* 87, no. 5 (2019), <https://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=5598&context=flr>.

³ "Overbreadth Doctrine," United States Congress, accessed November 29, 2022, https://constitution.congress.gov/browse/essay/artIII-S2-C1-6-6-6/ALDE_00013008/.

⁴ *United States v. Stevens*, 559 U.S. 460, 462 (2010).

will take advantage of the overbreadth. The threat of possible prosecution is enough to render the law unconstitutional.

In fall of 2022, several plaintiffs brought suit against the United States government, seeking to overturn FOSTA/SESTA on these grounds. The case, *Woodhull Freedom Foundation, et al. v. United States*,⁵ features as plaintiffs the titular advocacy organization as well as Human Rights Watch, the Internet Archive, a massage therapist, and a woman who runs a website dedicated to helping sex workers share information about charitable organizations. This last plaintiff, Alex Andrews, is perhaps the best example of FOSTA/SESTA's potential for misuse. Andrews' work quite literally "facilitates" prostitution by making it easier for sex workers to find aid without giving up their profession.

One criminal defendant charged under FOSTA/SESTA, Wilhan Martono, motioned to have his indictment dismissed on similar grounds.⁶ Martono claimed that the Overbreadth Doctrine makes FOSTA/SESTA unconstitutional given its chilling effect on online speech.⁷ While the judge in his case entertained the motion, he ultimately decided against granting it.⁸ The judge found that FOSTA/SESTA was not overbroad because it restricted itself to prohibiting the promotion of the prostitution of another person, not merely the promotion of prostitution in general.⁹ In other words, speech promoting the sex industry generally without reference to an individual sex worker remains protected speech and not criminalized under FOSTA/SESTA.

⁵ No. 18-1552, slip op. (D.D.C. Mar. 29, 2022); as of November 2022, the case was being appealed to the United States Court of Appeals for the District of Columbia Circuit.

⁶ *United States v. Martono*, Crim. Action No. 3:20-CR-00274-N-1 (N.D. Tex. Jan. 5, 2021)

⁷ *Ibid.*

⁸ *Ibid.*

⁹ *Ibid.*

In light of Martono's failed motion to dismiss, it remains to be seen whether *Woodhull* will successfully overturn FOSTA/SESTA. But a case pending at the Supreme Court in the 2022-2023 term could change Section 230's protections for online platforms in a different way. That case, *Gonzalez v. Google LLC*,¹⁰ involves a question of whether Section 230 immunizes platforms for their targeted recommendations of content to users. If the Supreme Court decides that Section 230 does not immunize online platforms for such activity, the Internet will change - perhaps not fundamentally, but at least in noticeable ways.¹¹ Whatever the Supreme Court decides, its decision is likely to impact Internet law in the future, including amendments to Section 230 like FOSTA/SESTA.

Another argument, but one that has gotten too little attention, is the potential unconstitutionality of *enforcing* FOSTA/SESTA. As noted in the previous chapter, online advertisements for escort services allowed police to track down sex traffickers and help get their victims to safety.¹² Upon seeing advertisements that appeared to feature underage women, officers could arrange a fake purchase of services and arrest the trafficker with probable cause to believe that he had committed a serious crime. Since FOSTA/SESTA's passage and the elimination of this avenue of investigation, law enforcement no longer has an advertisement to serve as a justification for a search and arrest.¹³ Instead, law enforcement officers are flying blind - potentially implicating the Fourth Amendment.

¹⁰ (9th Cir. 2022) (No. 18-16700).

¹¹ Jeffrey D. Neuburger, "Important CDA Section 230 Case Lands in Supreme Court: Level of Protection Afforded Modern Online Platforms at Stake," *The National Law Review* 12, no. 333 (October 6, 2022), <https://www.natlawreview.com/article/important-cda-section-230-case-lands-supreme-court-level-protection-afforded-modern>.

¹² Chamberlain, "FOSTA: A Hostile Law with a Human Cost," *Fordham Law Review*.

¹³ *Ibid.*

The Fourth Amendment to the United States Constitution reads, "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."¹⁴ In recent decades, the Supreme Court has applied the Fourth Amendment's protections to new contexts in the digital world. If law enforcement officers conduct investigations under FOSTA/SESTA without first securing a warrant, they may violate a defendant's Fourth Amendment rights.

A string of cases from *Kyllo v. United States*¹⁵ to *Carpenter v. United States*¹⁶ has shown the Supreme Court's willingness to adapt the Fourth Amendment to new technologies. In *Kyllo*, the Court held that an officer using a thermal-imaging device to identify the presence of marijuana grow lamps in a suspect's home constituted a search requiring a warrant. In *Carpenter*, the Court held that a warrant is required for law enforcement officers to access cell site location information revealing a smartphone user's location. Given these precedents, the Court would be hard-pressed to sanction the warrantless search of thousands computer records to investigate unproven allegations of sex trafficking, and obtaining warrants could be more difficult with the increased difficulty of finding evidence since FOSTA/SESTA pushed sex work advertisements underground.

The final foreseeable constitutional challenge to FOSTA/SESTA rests on the foundation of the Ninth and Fourteenth Amendments. Debate about the scope of these

¹⁴ U.S. Const. amend. IV.

¹⁵ 533 U.S. 27 (2001).

¹⁶ 138 S. Ct. 2206 (2018).

amendments has returned to the national discourse in the wake of *Dobbs v. Jackson Women's Health Organization*,¹⁷ which overturned *Roe v. Wade* and held that there is not a constitutional right to an abortion. *Roe* proceeded from two particularly notable sexual privacy cases, *Griswold v. Connecticut*¹⁸ and *Eisenstadt v. Baird*.¹⁹ These cases reflect an understanding of the Ninth and Fourteenth Amendments that, if preserved despite *Dobbs*, could invalidate FOSTA/SESTA's prohibition of facilitating prostitution.

The history of *Griswold v. Connecticut* begins with the history of the Ninth Amendment, which reads, "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."²⁰ During the debates over the Constitution, one of the Anti-Federalist movement's major grievances about the Constitution was that it contained no Bill of Rights; to address their dissatisfaction, then-Representative James Madison set to work on creating one. Madison understood and sympathized with Federalist concerns that having a Bill of Rights would allow the government to violate rights simply because they were not mentioned in the Constitution.²¹ In light of these concerns, Madison added to his proposals the sentence that would eventually be ratified as the Ninth Amendment to the Constitution. He explicitly stated that its role was to prevent the government from disparaging the rights of the people on the grounds that the right in question was not enumerated.²² In other words,

¹⁷ 597 U.S. ____ (2022).

¹⁸ 381 U.S. 479 (1965).

¹⁹ 405 U.S. 438 (1972).

²⁰ U.S. Const. amend. IX.

²¹ "Ninth Amendment - Unenumerated Rights," Government Publishing Office, S. Doc. No. 112-9, 2d Sess., at 1771 (2017). Accessed November 4, 2022. <https://www.gpo.gov/content/pkg/GPO-CONAN-REV-2016/pdf/GPO-CONAN-REV-2016-10-10.pdf>.

²² *Ibid*; one could argue that, in this fashion, the text of the Ninth Amendment explicitly contradicts the reasoning of the *Dobbs* opinion, but that argument is beyond the scope of this thesis.

he held the view that certain fundamental rights should be protected by the Constitution even if they are not explicitly mentioned in its text.

Nearly 200 years later, Justice Arthur Goldberg argued that the Ninth Amendment justified his decision in *Griswold*, holding that the Constitution protects a right to marital privacy despite the absence of such a right in the text of the Bill of Rights. Justice Goldberg's words never became the dominant paradigm for sexual liberty cases, but they have survived as a more attractive alternative than the substantially more derisive opinion of Justice Douglas in that case. Justice Douglas wrote for the *Griswold* majority that "specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance. Various guarantees create zones of privacy."²³ Justice Douglas's verbal hand-waving has done his reasoning no favors in the half-century since, with Justice Thomas famously displaying a sign in his chambers reading, "Please Don't Emanate in the Penumbras."

Seven years after *Griswold*, the Court held in *Eisenstadt* that the right to sexual privacy applies to unmarried couples as well. This time, the Court found the relevant right in the Equal Protection Clause of the Fourteenth Amendment. Since *Griswold* had become law, the Commonwealth of Massachusetts had passed a law allowing medical professionals to distribute contraceptives to married couples but preventing all other forms of contraceptive distribution.²⁴ A college lecturer asked the Supreme Court to find the law unconstitutional after he was arrested for distributing a contraceptive to a student, and he won.²⁵ The Court came to two conclusions of great importance. First, because

²³ 381 U.S. 479, 484 (1965).

²⁴ 405 U.S. 438 (1972).

²⁵ *Ibid.*

there is a right to marital privacy under *Griswold*, it would violate a single person's right to equal protection to apply a restriction on sexual privacy against them.²⁶ Second, the lecturer had standing to sue even though he was not the person whose equal protection rights were violated because, were it not for the unconstitutional law's existence, he would not have been arrested.²⁷

The Supreme Court is not likely to soon declare a constitutional right to engage in prostitution, but there is a non-frivolous justification for doing so. If there is a right to sexual privacy, and that right cannot be predicated on a distinction as significant as marital status, then persons whose conduct is criminalized by the unconstitutional restriction of sexual privacy have precedent for legal action to assert their rights. Accordingly, engaging in consensual sexual contact in a private residence²⁸ might plausibly be considered a constitutional right, and future challengers to FOSTA/SESTA may wish to explore the possibility of testing the Supreme Court's willingness to follow through on the precedent of these sexual liberty cases. If Justice Alito was truthful when he wrote in *Dobbs* that *Griswold* is not at risk,²⁹ he is bound to consider the strong possibility that FOSTA/SESTA unconstitutionally infringes on the sexual liberty of sex workers, their clients, and the people who facilitate their work on the Internet.³⁰

²⁶ Ibid.

²⁷ Ibid.

²⁸ Unless the property owner prohibits it, this right arguably extends to temporary accommodations as well.

²⁹ 597 U.S. ____ (2022).

³⁰ In response to this argument, several state courts have held that *Lawrence v. Texas* (539 U.S. 558 (2003)), which found a constitutional right to engage in sodomy, explicitly held that prostitution was not constitutionally protected. This response is a mischaracterization of the opinion in *Lawrence*, which merely stated that the case did not involve public conduct or prostitution, allowing the Court to focus on sodomy alone.

Whether on First Amendment grounds, Fourth Amendment grounds, or Ninth and Fourteenth Amendment grounds, FOSTA/SESTA is either facially unconstitutional or runs a substantial risk of being enforced unconstitutionally. In addition to FOSTA/SESTA's policy failures, its terms implicate constitutional provisions and risk violating fundamental rights. Whether repealed in Congress or overturned by a court, FOSTA/SESTA should no longer be the law.

Chapter 5: The Path Forward

FOSTA/SESTA's chief weakness is its failure to distinguish between consensual sex work and forcible sex trafficking. In the minds of the public, however, the two concepts may be difficult to separate. Sex work often faces perceptions of inherent criminality and associations with phenomena like drug use and organized crime. As a result, discussions of FOSTA/SESTA can benefit from some consideration of the broader issues regarding the legality of sex work, sex buying, pimping, brothel keeping, and other activities related to the industry.

Comparing Various Models of Legalization and Decriminalization

This thesis would be incomplete if it did not answer a fundamental question: what would it look like to *not* criminalize prostitution? There are a variety of competing models for how a city, state, or nation might partially or fully decriminalize or legalize sex work. Across the world, different countries have chosen different ways to balance the competing interests of safety, bodily autonomy, gender equality, and protection of vulnerable individuals. Sweden and several other nations have adopted the Nordic Model, whose proponents often call it the "Equality Model." Under that system, sex workers are not subject to criminal penalties, but their customers and pimps are. The idea is to continue prohibition's non-recognition of sex work as an acceptable profession while avoiding the politically unpopular and ethically thorny issue of jailing an ostensible victim, the prostitute. Legalization goes a step further and declares that customers will not be prosecuted, but such a system may continue to criminalize pimping, sometimes prohibiting either brothels or street prostitution while allowing the other. Full

decriminalization, often the preferred option for consensual sex workers, would end criminal prohibition of sex work and sex buying without instituting a regulatory regime.

When thinking about legalization, the reader's mind may jump to Las Vegas, Nevada, but it is a common misconception that prostitution is legal there. On the contrary, while the State of Nevada does not prohibit sex work, several counties within the state do prohibit it. Clark County, home to both the incorporated City of Las Vegas and the unincorporated areas that form the Las Vegas Strip, is one such county. Legal prostitution in Nevada is restricted to licensed brothels in rural counties willing to issue such licenses. One county with a longstanding tradition of such issuance is Nye County, which borders Clark County and the California state line and is located just an hour away from Las Vegas. Customers traveling to Las Vegas for sexual services may be able to find illegal options in their own hotels, but their easiest legal option is to call one of Nye County's brothels and ask for a limousine ride to their licensed destination.

Would-be customers in Southern California have a closer option: Tijuana, Mexico. The *Zona Norte*, a row of strip clubs and bars with by-the-hour hotels attached, is entirely legal. Critics and supporters alike may hesitate to point to Tijuana as a success or failure of legalization. The city is notoriously home to some of the worst gang violence in the world, and the *Zona Norte* is no exception.¹ In theory, restricting prostitution to a given zone within a city allows sex workers to operate in an area other than the most violent, crime-prone part of the city. Though the *Zona Norte* is far from a sanctuary, it is located a considerable distance from Eastern Tijuana, the epicenter of gang violence in

¹ Jaime Arredondo Sánchez Lira, *et al.*, "The Resurgence of Violent Crime in Tijuana," *Justice in Mexico* (February 2018), https://justiceinmexico.org/wp-content/uploads/2018/02/180205_TJViolence.pdf.

Baja California.² Having sex work restricted to a geographic area and intensifying the police presence in that area is a popular model of legalization in many places around the world.

A more famous city to have legalized prostitution is Amsterdam. As in Tijuana, sex work in Amsterdam is limited to certain zones, of which *De Wallen* is the most famous. Streetwalking is illegal throughout the Netherlands, so sex workers display themselves in windows and doorways to attract customers.³ There are legitimate concerns about the results of legalization in Amsterdam, particularly regarding allegations that the red-light district has fallen under the control of organized crime. Whether this is true or not, *De Wallen* is a largely safe area, perhaps even an upscale neighborhood by some metrics.⁴ Amsterdam's success from a health and safety standpoint can serve as a model for other locations.

Turning to the Southern Hemisphere, New Zealand decriminalized prostitution on a national basis in 2003. Unlike legalization regimes that may prohibit brothels, street prostitution, or living off the earnings of a prostitute, New Zealand allows all of these activities. Because it adopted a hands-off model long advocated by sex workers but decried by prostitution opponents, New Zealand's law has been the subject of scrutiny and intense debate in the nearly two decades since its passage. In 2008, the Prostitution Law Review Committee, which evaluated the law's effects, released a report finding that

² Ibid.

³ Chrisje Brants, "The Fine Art of Regulated Tolerance: Prostitution in Amsterdam," *Journal of Law and Society* 25, no. 4 (December 1998): 621-35, <https://onlinelibrary.wiley.com/doi/pdf/10.1111/1467-6478.00106>.

⁴ Marthe Singelenberg and Wouter van Gent, "Red light gentrification in Soho, London and De Wallen, Amsterdam," *Journal of Housing and the Built Environment* 35, 723-42, <https://link.springer.com/article/10.1007/s10901-020-09753-5>.

prostitutes were safer in New Zealand because of decriminalization.⁵ Moreover, police were better able to identify and help underage sex workers, and sex workers who were victims of violence could bring such matters to the police's attention rather than declining to report them for fear of prosecution.⁶

The greatest advantage of New Zealand's model, however, is the ability of workers to exit the sex trade at will. Because sex workers no longer face the threat of criminal prosecution, they can seek help from police if they face coercion in opposition to their attempts to leave the industry.⁷ Moreover, although New Zealand law generally requires workers on unemployment benefits to seek work, the country's decriminalization law required that workers not be denied unemployment benefits for refusing to perform sex work, ensuring that New Zealand's social safety net can serve as an alternative to remaining in sex work out of financial desperation.⁸ Since a lack of exit opportunities is frequently cited as a reason to oppose the sex trade, New Zealand's model offers a way to address these serious concerns.

The case study with perhaps the most relevance to potential decriminalization in the United States is that of Rhode Island, which decriminalized indoor prostitution in 1980 but recriminalized it in 2009. Rhode Island's decriminalization was not widely understood until 2003, when a judge found, on careful review of the applicable statute, that the Rhode Island legislature had prohibited only street prostitution, not the indoor

⁵ Prostitution Law Review Committee, "Report of the Prostitution Law Review Committee on the Operation of the Prostitution Reform Act 2003," Government of New Zealand, <http://prostitutescollective.net/wp-content/uploads/2016/10/report-of-the-nz-prostitution-law-committee-2008.pdf>

⁶ Ibid.

⁷ Ibid.

⁸ Ibid.

equivalent of such activities. Rather than going the way of Amsterdam, Rhode Island saw many ostensible "massage parlors" popping up across the state.⁹ Like New Zealand, Rhode Island became the subject of much research, including a study that considered the implications of decriminalization compared with a counterfactual world in which prostitution remained criminalized.

That study, conducted for the National Bureau of Economic Research, found that decriminalization significantly reduced rates of gonorrhea, rape, and other violence against sex workers compared to a synthetic control model.¹⁰ The fact that the experimenters included this synthetic control, a model of a hypothetical world in which rates of violence and sexually transmitted diseases behaved as they likely would have without decriminalization, strengthens their results. A possible objection to observations of decreasing harm following decriminalization is that such results are merely correlative and also might only represent regression to the mean rather than any causal force. But by including a synthetic control to demonstrate what harm rates likely would have been without decriminalization, the experimenters identified not only correlation but also causation between decriminalization and the reduced harm suffered by sex workers. This study is arguably the most compelling evidence that decriminalizing prostitution, at least in indoor settings, would reduce harm to sex workers.

This evidence does not suggest, however, that sex workers were always able to enjoy good working conditions. On the contrary, demand for sexual services in Rhode

⁹ Scott Cunningham and Manisha Shah, "Decriminalizing Indoor Prostitution: Implications for Sexual Violence and Public Health," National Bureau of Economic Research, July 2014, <http://www.nber.org/papers/w20281>.

¹⁰ Ibid.

Island likely increased due to legalization and the fact that the state is located close to population centers such as Boston and New York.¹¹ Rhode Island's long history of organized crime meant that mafiosos with large preexisting resources in the adult entertainment industry were in a prime position to open the newly legal brothels and "massage parlors."¹² Such unseemly characters were not keen on developing reputations for good treatment of sex workers, and as a result, the workers, many of them very poor immigrants from Asia, sometimes lived in harrowing conditions and experienced such pressure to work that their initially consensual participation may have crossed the line into trafficking.¹³ As in Tijuana, the lesson appears to be that decriminalization is often fruitful but can be overshadowed by an area's preexisting criminal elements. Adequately addressing violent crime and sex trafficking is essential for decriminalization to succeed.

The Nordic Model has several key disadvantages compared with the other models of legalization and decriminalization. The government of Northern Ireland, assessing its own law adopting the Nordic Model, came to several conclusions about the law's failure to accomplish its goals:

- A trend analysis of 173,460 advertisements indicates that the legislation has had little effect on the supply of or demand for sexual services;
...
- Based on the premise that criminalisation would end demand for commercial sexual services there should have been a greater 'tailing off' of sex worker advertising during the period following the implementation of Article 64A. This has not occurred;
...
- Serious crimes against sex workers in Northern Ireland are comparatively rare. However, between 2015 and 2018 there has been an increase in the number of

¹¹ Melanie Shapiro and Donna M. Hughes, "Decriminalized Prostitution: Impunity for Violence and Exploitation," *Wake Forest Law Review* 52 (2017): 533-60, https://works.bepress.com/donna_hughes/94/.

¹² *Ibid.*

¹³ *Ibid.*

reports on the Uglymugs.ie website in relation to, for example, assaults (from 3 to 13) sexual assaults (from 1 to 13) and threatening behaviour (from 10 to 42);

- Sex workers are exposed to higher rates of anti-social and nuisance behaviour;
- Sex workers reported higher levels of anxiety and unease, and increased stigmatisation¹⁴

The government concluded its summary with an even more resounding indictment:

"There is no clear evidence presented in the report to suggest that the legislation has had an impact on the levels of trafficking for sexual exploitation. The research found that the legislation had minimal effect on the demand for sexual services; therefore, it is difficult to see in what way it could impact on human trafficking for sexual exploitation."¹⁵ As the Northern Irish government acknowledged, the Nordic Model does not eliminate sex trafficking and merely forces the sex industry underground in much the same way that prohibition does.

These results do not suggest that arguments for the Nordic Model are entirely without merit. Esperanza Fonseca, a transgender woman and survivor of forcible sex trafficking, notes that six of her friends have died in the sex industry, and rather than being the "world's oldest profession," she prefers that prostitution be known as the "world's oldest *oppression*."¹⁶ An avowed socialist, Fonseca has also written extensively in favor of the Nordic Model¹⁷ because she sees it as a way to dismantle at least one form

¹⁴ Northern Ireland Department of Justice, "Assessment of Review of Operation of Article 64A of the Sexual Offences Order (Northern Ireland) 2008: Offence of Purchasing Sexual Services," September 2019, <https://www.justice-ni.gov.uk/sites/default/files/publications/justice/assessment-of-impact-criminalisation-of-purchasing-sexual-services.pdf>

¹⁵ Ibid.

¹⁶ Esperanza Fonseca, public talk with author present, Claremont McKenna College, November 17, 2022.

¹⁷ Notably, though she shares its goal of eliminating the sex trade, Fonseca has strong reservations about FOSTA/SESTA.

of oppressive wage labor: prostitution.¹⁸ Rejecting the assertion that consensual sex work exists, Fonseca focuses on the financial desperation often facing individuals who enter and remain in the sex trade.¹⁹ Far from being frivolous, these arguments acknowledge the very real harm that befalls individuals who are forced into sexual slavery.

But these individuals are no better off under the Nordic Model. In addition to Northern Ireland, the Republic of Ireland has adopted the Nordic Model and seen similarly poor results. A study published in the *Irish Journal of Sociology* found that violence against sex workers dramatically increased following the criminalization of sex buying, while sex workers remained reluctant to report violence to police.²⁰ Even without being subject to criminal charges themselves, sex workers were hesitant to cooperate with authorities who treated their work as illegitimate.²¹

Within the United States, there is more bad news for the Nordic Model. In the 2010s, the State of Washington shifted its focus of anti-prostitution enforcement to a victim-centered approach known as “Buyer Beware.”²² This program has been met with mixed reviews. While it has succeeded in drastically reducing the number of sex workers sent to jail, it has not managed to increase the number of arrests of alleged sex traffickers.²³ Local business owners also take issue with the approach for its failure to

¹⁸ Esperanza Fonseca, "A Socialist, Feminist, and Transgender Analysis of 'Sex Work,'" *Proletarian Feminist*, July 27, 2020, <https://proletarianfeminist.medium.com/a-socialist-feminist-and-transgender-analysis-of-sex-work-b08aaf1ee4ab>.

¹⁹ *Ibid.*

²⁰ Rosie Campbell, Lucy Smith, and Billie Stoica, "Not collateral damage: Trends in violence and hate crimes experienced by sex workers in the Republic of Ireland," *Irish Journal of Sociology* 28, no. 3 (July 2020), <https://journals.sagepub.com/doi/10.1177/0791603520939794>.

²¹ *Ibid.*

²² David Kroman, "To reduce prostitution, Seattle gets experimental," *Crosscut*, May 27, 2015, <https://crosscut.com/2015/05/to-reduce-prostitution-seattle-gets-experimental>.

²³ *Ibid.*

address the nuisance issue of streetwalking.²⁴ Washington thus provides a prime example of the potential drawbacks to implementing the Nordic Model within the context of American culture and politics. As these examples show, the Nordic Model suffers from serious defects that legalization and decriminalization come closer to solving.

Nullifying FOSTA/SESTA?

One of FOSTA/SESTA's key provisions is that its criminal penalties do not apply in states where the promotion or facilitation of prostitution is legal. This section reads: "AFFIRMATIVE DEFENSE.—It shall be an affirmative defense to a charge of violating subsection (a), or subsection (b)(1) where the defendant proves, by a preponderance of the evidence, that the promotion or facilitation of prostitution is legal in the jurisdiction where the promotion or facilitation was targeted."²⁵ Under state laws as of 2022, this section would only apply in Nevada, where promoting or facilitating a licensed brothel is legal. Nevertheless, it is possible for states to effectively nullify FOSTA/SESTA within their borders by taking their own action to legalize or decriminalize prostitution at the state level.

As the example of Rhode Island shows, it is not so far-fetched for a state to decriminalize prostitution, particularly that which occurs indoors and therefore avoids the nuisance concerns of streetwalking. A state choosing to follow one of the many international or domestic models of legalization or decriminalization would immunize its residents from criminal prosecution under FOSTA/SESTA arising from conduct that

²⁴ Ibid.

²⁵ 18 U.S.C. § 2421A (e).

occurred within the state's borders. For example, Nevada's Alien Cathouse continues to have an operational website.²⁶ However, the affirmative defense provided in FOSTA/SESTA does not apply to the civil liability created by FOSTA/SESTA, and it was this liability that motivated many online platforms to shut down their services for sex workers. State-level decriminalization would need to be accompanied by the reinstatement of Section 230 immunity if states would like to fully undo the harm of FOSTA/SESTA.

New Zealand is the prime example of FOSTA/SESTA's harm spilling over into a jurisdiction where prostitution has been decriminalized. Because of FOSTA/SESTA's worldwide impact on the Internet, sites promoting sex workers in other countries have sometimes been unable to operate. The unavailability of Internet resources has forced some sex workers in New Zealand to operate out of brothels rather than remaining independent.²⁷ As in the United States, this loss of independence can make the difference between safety and brutal exploitation for a sex worker. Until FOSTA/SESTA's carve-out of Section 230 immunity is repealed, it will have negative consequences for sex workers in every jurisdiction around the world.

Conclusion

FOSTA/SESTA is a harmful policy and a potentially unconstitutional law. FOSTA/SESTA has increased harm to sex workers, chilled online speech, and conflated consensual sex workers with victims of sex trafficking. Rather than saving those whom it

²⁶ Alien Cathouse, accessed December 4, 2022, <https://aliencathouse.com>.

²⁷ Erin Tichenor, "'I've never been so exploited': The consequences of FOSTA-SESTA in Aotearoa New Zealand," *Anti-Trafficking Review*, no. 14 (April 2020): 99-115, <https://doi.org/10.14197/atr.201220147>.

claims to protect, FOSTA/SESTA has forced the sex industry even further underground and away from the benefits of transparency. No one knows for certain what proportion of prostitutes are consensual sex workers and what proportion are victims of trafficking. When pimps, illicit substances, and immigration status enter the mix, the line between these groups may indeed become blurred. But the solution is not to blur it entirely by lumping them together. Instead, efforts to clean the industry up through legalization or decriminalization are more likely to help sex trafficking victims escape slavery, help consensual sex workers avoid harm, and help online platforms offer services for which they experience tremendous demand. If the United States is to live up to its appellation as "the land of the free," it should repeal FOSTA/SESTA.

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