

GOOD INTENTIONS AND UNINTENDED CONSEQUENCES: SESTA/FOSTA’S FIRST TWO YEARS*

I. INTRODUCTION

Section 230 of the Communications Decency Act¹ is a 1996 law that provides the critical infrastructure of the internet.² At a basic level, the law insulates websites from liability for any illegal or tortious conduct posted by their users.³ It also empowers websites to moderate user content without legal consequence.⁴ In its more than twenty-year existence, Section 230 has transformed from a relatively popular attempt to encourage websites to self-moderate into one of the more controversial laws in the U.S. Code.⁵ Today, politicians on both sides of the political aisle criticize Section 230. While they are united in their distaste, they are extremely divided in their assessment of its problem or solution. Some worry that the law’s liability shield has enabled vile online harassment and criminal activity.⁶ Others complain that, under Section 230, websites overmoderate user speech along partisan lines.⁷ In May 2020, President Trump signed an executive order on preventing online censorship, which took aim at social media companies.⁸ Soon after, Democratic Presidential Nominee Joe Biden put out his own call to revoke Section 230 entirely.⁹ In June 2020 alone there were no fewer than four proposals to reform the law, each in its own unique way.¹⁰

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1. 47 U.S.C. § 230 (2018).

2. See *infra* note 40.

3. See *infra* notes 54–56 and accompanying text for an explanation of the immunity provided to websites under Section 230.

4. *Id.*

5. Eric Goldman, *The Complicated Story of FOSTA and Section 230*, 17 FIRST AMEND. L. REV. 279, 279 (2019) [hereinafter Goldman, *The Complicated Story*].

6. See, e.g., Makena Kelly, *Kamala Harris Vows to Hold Social Media Platforms Responsible for ‘Hate,’* VERGE (May 6, 2019, 11:52 AM), <http://www.theverge.com/2019/5/6/18531181/kamala-harris-social-media-democratic-primary-2020-president> [https://perma.cc/R24C-3WDV].

7. See, e.g., Cristiano Lima, *Josh Hawley Relying Broadside Against Big Tech’s Ad Business, Legal Shield*, POLITICO (June 15, 2020, 6:00 AM), <http://www.politico.com/news/2020/06/15/josh-hawley-big-tech-ad-business-legal-318823> [https://perma.cc/8G5J-DAZT].

8. Exec. Order No. 13,925, 85 Fed. Reg. 34,079 (May 28, 2020).

9. Eli Blumenthal & Queenie Wong, *Joe Biden Slams Facebook, Calls Zuckerberg a ‘Real Problem,’* CNET (Jan. 17, 2020, 4:07 PM), <http://www.cnet.com/news/joe-biden-slams-facebook-calls-zuckerberg-a-real-problem-in-new-york-times-interview/> [https://perma.cc/T87X-J92B].

10. A Department of Justice (DOJ) proposal recommends withholding Section 230 protections from websites that do not “maintain the ability to assist government authorities to obtain content (i.e., evidence) in a comprehensible, readable, and usable format” as a way to discourage websites from allowing criminals to communicate through encrypted channels. U.S. DEP’T OF JUSTICE, SECTION 230 – NURTURING INNOVATION OR FOSTERING UNACCOUNTABILITY? 15 (2020). Senator Josh Hawley (R-MO) proposed a likely toothless bill which would require websites to provide more transparent, good-faith content moderation. See Limiting Section 230 Immunity to Good Samaritans Act, S. 3983, 116th Cong. (2020). The Hawley bill would empower citizens

Though it is too soon to know whether any of these proposals will become law, it seems clear that the tide is turning against Section 230. Two years ago President Donald Trump signed into law the first exception to Section 230 protection—the Allow States To Fight Online Trafficking Act of 2017 (SESTA/FOSTA).¹¹ This law was a rare bipartisan victory, passing overwhelmingly in both houses of Congress with the noble goal of empowering law enforcement and civil plaintiffs to better hold accountable websites that facilitate or aid sex trafficking.¹² In practice, however, SESTA/FOSTA has failed to achieve that goal.¹³ As lawmakers continue to debate additional carve-outs to Section 230, it is important to evaluate the far-reaching and mostly unintended consequences of this first attempt to narrow its scope.

This Comment makes two contributions. First, it adds to the understanding of the legislative history and impact of SESTA/FOSTA. Second, it suggests an amendment to the statute that would clarify the law. In Section II, this Comment discusses the history of internet liability and the SESTA/FOSTA law in order to contextualize the statute and illuminate its shortcomings. In Section III, this Comment argues that, while some initial predictions about the effects of SESTA/FOSTA were overblown, the law has had consequences far beyond its intended scope. As part of that argument, this Comment ultimately recommends that SESTA/FOSTA be amended to immunize internet companies that engage in good-faith efforts to remove offensive content from their platforms. Such a requirement would, hopefully, encourage platforms to engage in thoughtful moderation to remove offensive content without opening them up to additional liability. Given SESTA/FOSTA's widespread and unpredictable impact, this Comment urges legislators to use caution when evaluating any amendments to further erode Section 230 protections.

II. OVERVIEW

In April 2018, Congress enacted SESTA/FOSTA to hold companies operating on the internet accountable for user-generated content relating to sex trafficking.¹⁴ Prior to the enactment of SESTA/FOSTA, Section 230 gave platforms total immunity for torts committed by their users.¹⁵ Supporters of SESTA/FOSTA argue that this amendment is necessary to hold websites accountable for sex trafficking and provide justice for

who believe they have been unjustly censored on social medial platforms to sue for damages. *Id.* Senator Kelly Loeffler (R-GA) introduced her own proposal, which would require that websites undergo “view-point-neutral” content moderation in order to receive Section 230 protections. Stopping Big Tech’s Censorship Act, S. 4062, 116th Cong. (2020). Senators Brian Schatz (D-HI) and John Thune (R-SD) proposed a bipartisan bill that does not directly touch upon Section 230 but requires that internet platforms provide increased transparency and accountability in the way they enforce their terms of service. *See* Platform Accountability and Transparency (PACT) Act, S. 4066, 116th Cong. (2020). *See also infra* Part II.B.5 for a discussion of the Senate EARN IT Act. This bill, which would weaken Section 230 protections for websites that host child abuse imagery, sailed through the Senate earlier this summer. *See infra* note 187 and accompanying text.

11. Pub. L. No. 115-164, 132 Stat. 1253 (codified at 18 U.S.C. §§ 1591, 1595, 2421A (2018) and 47 U.S.C. § 230 (2018)).

12. *See infra* note 114 and accompanying text.

13. *See infra* Part II.C for a discussion of SESTA/FOSTA’s unintended consequences for sex workers, commercial sex ads, and online resources for sex workers.

14. *See infra* Part II.B.2.c for a discussion of how SESTA/FOSTA is intended to operate.

15. *See* 47 U.S.C. § 230(a).

victims.¹⁶ Yet, others worry that, as written, the law's language is overly broad and may lead to an unconstitutional chilling of speech.¹⁷

Part II.A of this Comment provides a brief history of internet platform liability and describes the goals and significance of Section 230 of the Communications Decency Act. Part II.B discusses how Section 230 impeded law enforcement and private civil efforts to hold accountable internet platforms that were responsible for promoting sex trafficking and how those efforts eventually led to the passage of SESTA/FOSTA. Part II.C describes the effect that the law has had on the internet generally. Finally, Part II.D outlines the few civil actions filed against internet platforms since SESTA/FOSTA was passed.

A. *The History of Internet Platform Liability*

SESTA/FOSTA amended Section 230 of the Communications Decency Act to empower law enforcement and civil plaintiffs to sue internet platforms that host commercial sex advertisements.¹⁸ Critics argue that, despite its noble intentions, the law has failed to achieve its goals and has had little impact on the amount of sex trafficking conducted via internet channels.¹⁹ Understanding the significance of SESTA/FOSTA requires understanding the law it amended: Section 230 of the Communications Decency Act. Part II.A.1 discusses the landscape of internet liability before Section 230 was enacted, and Part II.A.2 explains Section 230's legislative history.

1. Competing Views: The Internet Before Section 230

Section 230, one of the internet's foundational laws, was passed as part of the Communications Decency Act amendments to the Telecommunications Act of 1996.²⁰ Legislators hoped Section 230 would remedy a contradiction in the law created by two early internet platform liability cases and clarify how courts should hold internet companies liable for tortious user-generated content moving forward.²¹

The first of these cases is *Cubby, Inc. v. CompuServe, Inc.*²² CompuServe, the defendant, operated a library of message forums that subscribers could access by paying a fee.²³ Importantly, CompuServe did not personally review any posts before it published them but instead contracted with outside moderators.²⁴ The plaintiff, a competing website, sued CompuServe for defamation after discovering a CompuServe user had

16. See *infra* Part II.B.3.

17. See *infra* Part II.B.4 for a discussion of the concerns critics have regarding the free speech rights of sex workers online.

18. Allow States and Victims To Fight Online Sex Trafficking Act of 2017 (SESTA/FOSTA), Pub. L. No. 115-164, 132 Stat. 1253 (codified at 18 U.S.C. §§ 1591, 1595, 2421A (2018) and 47 U.S.C. § 230 (2018)). This Comment uses the term "commercial sex advertisements" to refer to advertisements for paid sex work or prostitution.

19. See *infra* Part II.B.4.

20. See Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996) (codified as amended in scattered sections of 47 U.S.C.).

21. See 141 CONG. REC. 22,044-46 (1995) (statement of Rep. Cox).

22. 776 F. Supp. 135 (S.D.N.Y. 1991).

23. *Cubby*, 776 F. Supp. at 137.

24. See *id.* at 137, 141.

posted defamatory statements on one of CompuServe's forums.²⁵ The *Cubby* court sided with the defendant, finding that because it contracted its moderation responsibilities to an outside company, CompuServe had "no more editorial control over [its] publications than [would] a public library, bookstore, or newsstand."²⁶ As merely a distributor of third-party content, it could not be held liable for reproducing the allegedly defamatory statements.²⁷

Four years later in *Stratton Oakmont, Inc. v. Prodigy Services Co.*,²⁸ a different court, looking at similar facts, reached the opposite conclusion.²⁹ That defendant, Prodigy Services Company (Prodigy), operated an online finance and investment bulletin board.³⁰ Unlike CompuServe, which functioned as a user-driven message board, Prodigy branded itself as an online newspaper and reserved the right to exercise direct editorial control over user content.³¹ Prodigy monitored its own boards by using screening software and authorizing individual users to essentially function as an editorial staff.³² Like CompuServe, Prodigy was sued for defamation.³³ Unlike CompuServe, Prodigy was found liable.³⁴ According to the court, Prodigy's policy of manually reviewing all messages prior to publishing made it a "publisher" of third-party content.³⁵ By exercising editorial control, Prodigy cultivated a safer, more attractive platform than its competitors.³⁶ In the court's view, that choice rightfully exposed Prodigy to greater liability than sites like CompuServe that did not heavily moderate their content or represent themselves as being "family-oriented."³⁷

Taken together, these cases created a kind of binary choice for courts applying intermediary liability to the internet. Platforms that personally moderated their sites would be held strictly liable for all tortious user content,³⁸ while those that chose not to

25. The plaintiff initiated this lawsuit after a post on CompuServe's online gossip newsletter, Rumorville USA, accused a competing online news and gossip database, Skuttlebut, of being a "scam." *Id.* at 138.

26. *Id.* at 140; *cf.* *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 66–67, 71 (1963) (finding a bookseller was not liable for obscene content contained in books it stocked and holding that states seeking to regulate obscene content must have procedures in place to ensure that constitutionally protected expression will not also be censored).

27. *See Cubby*, 776 F. Supp. at 141.

28. No. 31063/94, 1995 WL 323710 (N.Y. Sup. Ct. May 24, 1995).

29. *See Prodigy*, 1995 WL 323710, at *5.

30. *See id.* at *1.

31. *See id.* at *4.

32. *See id.* at *5.

33. The plaintiff, Stratton Oakmont, alleged that Prodigy published false statements about Stratton's dealings on its financial bulletin board, including accusations that the company's president committed criminal and fraudulent acts relating to the company's initial public offering. *Id.* at *1. Ironically, the company's president was eventually convicted of securities fraud and money laundering in connection with his activities at Stratton Oakmont. Andrew Keshner & James Fanelli, 'Wolf of Wall Street' Jordan Belfort Complains Old Pal Doesn't Do Enough to Pay Back Investors, N.Y. DAILY NEWS (Apr. 29, 2018, 4:00 AM), <http://www.nydailynews.com/new-york/belfort-complains-old-pal-doesn-pay-back-investors-article-1.3961239> [<https://perma.cc/5CJ9-58U4>]. The crimes were portrayed in the 2013 film *The Wolf of Wall Street*. *See id.*

34. *See Prodigy*, 1995 WL 323710, at *5.

35. *Id.* at *4–5.

36. *See id.* at *5.

37. *See id.*

38. *See id.* at *5.

moderate or outsourced that responsibility to another entity would face no liability unless they knowingly reproduced tortious content.³⁹

2. “The Twenty-Six Words That Created the Internet”⁴⁰

In response to the *Prodigy* decision, then-Representatives Christopher Cox (R-CA) and Ron Wyden (D-OR) proposed a statute titled the Online Family Empowerment Amendment.⁴¹ They designed the law to encourage private companies to monitor indecent user content without direct government regulation.⁴² The law passed in the Senate and House in February 1996 as Section 230 of the Communications Decency Act within the Telecommunications Act of 1996.⁴³

In the House committee hearing on the amendment, Representative Cox discussed the irony highlighted by the *Cubby* and *Prodigy* decisions.⁴⁴ Under those two decisions, platforms that tried to thoughtfully edit and moderate user-generated content could be liable for any offensive materials that slipped through the cracks, while those that chose to turn a blind eye to that content would face no liability.⁴⁵ According to Representative Cox, this created “backward” incentives for internet companies and discouraged self-moderation.⁴⁶ He intended Section 230 to “protect [online service providers] from taking on liability such as occurred in the [*Prodigy*] case in New York” and to reward “Good Samaritan” platforms that did attempt self-moderation.⁴⁷

39. See *Cubby, Inc. v. CompuServe Inc.*, 776 F. Supp. 135, 142 (S.D.N.Y. 1991).

40. For a discussion about the role Section 230 played in the growth of the modern internet, see JEFF KOSSEFF, *THE TWENTY-SIX WORDS THAT CREATED THE INTERNET* (2019) [hereinafter KOSSEFF, *THE TWENTY-SIX WORDS*].

41. See 141 CONG. REC. 22,044–46 (1995) (debating the Cox-Wyden amendment).

42. *Id.* at 22,045 (statement of Rep. Cox) (“We can make it better. We can make sure that it operates more quickly to solve our problem of keeping pornography away from our kids, keeping offensive material away from our kids, and I am very excited about it.”).

43. See 47 U.S.C. § 230 (2018); see also Telecommunications Act of 1996, Pub. L. No. 104-104, §§ 501, 509, 110 Stat. 56, 133, 137 (1996) (codified as amended in scattered sections of 47 U.S.C.). Senator James Exon (D-NE) proposed an amendment to existing telecommunications law, which he titled the Communications Decency Act, in response to growing concerns about the risk that proliferation of indecent and obscene materials on the internet posed to children. See Telecommunications Act §§ 501–09. This proposal was primarily an attempt to regulate internet pornography and was largely invalidated by the Supreme Court in the case *Reno v. ACLU*, 521 U.S. 844 (1997). This Comment will not address the fascinating legislative history of the Telecommunications Act. More information about this statute and its eventual erosion at the Supreme Court can be found elsewhere. See, e.g., Robert Cannon, *The Legislative History of Senator Exon’s Communications Decency Act: Regulating Barbarians on the Information Superhighway*, 49 FED. COMM. L.J. 51, 93 (1996) (discussing the future of the Communications Decency Act prior to the Supreme Court’s decision in *Reno v. ACLU*).

44. See 141 CONG. REC. 22,045 (1995) (statement of Rep. Cox) (“Ironically, the existing legal system provides a massive disincentive for the people who might best help us control the Internet to do so.”).

45. See *id.* at 22,044–46.

46. *Id.* at 22,045 (“We want to encourage people like Prodigy, like CompuServe, like America Online, like the new Microsoft network, to do everything possible for us, the customer, to help us control, at the portals of our computer, at the front door of our house, what comes in and what our children see.”).

47. *Id.*

Representatives Cox and Wyden saw how Americans increasingly relied on internet services for their news, education, and entertainment⁴⁸ and understood the internet's potential to provide a forum for diversity of thought and discourse.⁴⁹ They hoped that, by removing the financial disincentives created by *Prodigy* and *Cubby*, Section 230 would promote continued development of the internet and encourage the free exchange of ideas without government interference.⁵⁰ The law contains two provisions that act as a "sword" and a "shield" for companies operating internet platforms.⁵¹ The sword empowers those companies to remove offending content without running into First Amendment issues,⁵² while the shield immunizes them from tort liability for any offensive user-generated content they do publish.⁵³

Dubbed "The Twenty-Six Words That Created the Internet,"⁵⁴ Section 230(c)(1) states that "[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider."⁵⁵ Under this provision, social media companies, online forums, internet comment sections, and other websites that host third-party posts are immune from liability for torts committed by those third parties.⁵⁶ In other words, the law stipulates that online platforms are separate from their users and, thus, should not be held responsible for their users' speech or conduct. That being said, Section 230 expressly does not shield internet platforms from prosecution under federal criminal laws.⁵⁷ Nor does it prevent civil actions for violations of intellectual property laws or the Electronics Communications Privacy Act of 1986.⁵⁸

B. *An Uphill Battle: Policing Sex Crimes on the Internet*

In the mid-1990s, when Section 230 was promulgated, the country was optimistic about the internet's potential.⁵⁹ In the decades since, however, public opinion has turned increasingly cynical.⁶⁰ There is a growing concern that internet companies have essentially abrogated responsibility over their users' content and that Section 230 created the cover that allows them to do so.⁶¹ Part II.B.1 discusses how Section 230 impeded

48. See 47 U.S.C. § 230(a)(5).

49. See *id.* § 230(a)(3).

50. See *id.* § 230(b).

51. 164 CONG. REC. S1,868 (daily ed. Mar. 21, 2018) (statement of Sen. Wyden).

52. See 47 U.S.C. § 230(c)(2).

53. See *id.* § 230(e)(1).

54. KOSSEFF, THE TWENTY-SIX WORDS, *supra* note 40.

55. 47 U.S.C. § 230(c)(1).

56. See Jeff Kosseff, *The Gradual Erosion of the Law that Shaped the Internet: Section 230's Evolution over Two Decades*, 18 COLUM. SCI. & TECH. L. REV. 1, 2 (2016).

57. 47 U.S.C. § 230(e)(1).

58. *Id.* §§ 230(e)(2)–(4); see Pub. L. No. 99-508, 100 Stat. 1848 (1986) (codified at 18 U.S.C. § 2510 (2018)).

59. Goldman, *The Complicated Story*, *supra* note 5, at 279.

60. *Id.*

61. See, e.g., Jeff John Roberts, *Big Tech's Favorite Legal Shield is in Danger*, FORTUNE (Nov. 20, 2019, 6:30 AM), <http://fortune.com/2019/11/20/section-230-big-tech-lawsuits-facebook-twitter-reddit/> [https://perma.cc/W69J-5HCG].

early efforts to prosecute internet platforms for facilitating sex trafficking, Part II.B.2 explains how those failures incentivized lawmakers to enact the law that became SESTA/FOSTA, and Parts II.B.3 and II.B.4 summarize the prevailing arguments for and against this law.

1. Backpage.com: The Long Road to Prosecution

SESTA/FOSTA was designed to address sex trafficking on online personals sites—namely, Backpage.com.⁶² Backpage.com was a particularly significant target for lawmakers because its profits came primarily through commercial sex advertising.⁶³ Many lawmakers expressed concern that—despite the company’s claims that it took steps to find and report questionable ads—Backpage.com was complicit in and intended to profit from the victimization of those forced into sex trafficking.⁶⁴ Yet, because ads on Backpage.com were user generated and Section 230 shielded platforms from legal liability for third-party content, early attempts to hold Backpage.com responsible largely failed.⁶⁵

For example, in 2012, Backpage.com sued to enjoin a newly enacted Washington state statute that would have criminalized the offense of “advertising commercial sex abuse of a minor.”⁶⁶ In granting the injunction, the Western District of Washington explained that Section 230’s text expressly preempts state laws that are “inconsistent” with its requirements.⁶⁷ Later New Jersey passed its own law, modeled after the Washington statute, which would have similarly created a criminal offense for “advertising commercial sexual abuse of a minor.”⁶⁸ The District of New Jersey found that Section 230 also preempted the New Jersey statute and issued an injunction preventing the state from enacting the law.⁶⁹

Section 230 was also used to dismiss sex-trafficking victims’ civil lawsuits.⁷⁰ In the high-profile case *Doe v. Backpage.com*,⁷¹ three underage female victims sued Backpage.com under multiple state and federal statutes, including the William

62. Aja Romano, *A New Law Intended To Curb Sex Trafficking Threatens the Future of the Internet as We Know It*, VOX (July 2, 2018, 1:08 PM), <http://www.vox.com/culture/2018/4/13/17172762/fosta-sesta-backpage-230-internet-freedom> [<https://perma.cc/N92P-T34W>].

63. Goldman, *The Complicated Story*, *supra* note 5, at 281–82. Backpage.com was ultimately shut down; it made eighty percent of the total online commercial sex ad revenue in the United States. STAFF OF S. PERMANENT SUBCOMM. ON INVESTIGATIONS, 114TH CONG., BACKPAGE.COM’S KNOWING FACILITATION OF ONLINE SEX TRAFFICKING 2 (Comm. Print 2017).

64. Goldman, *The Complicated Story*, *supra* note 5, at 281.

65. See, e.g., *M.A. ex rel. P.K. v. Vill. Voice Media Holdings*, 809 F. Supp. 2d 1041, 1058 (E.D. Mo. 2011) (holding that Section 230 immunized Backpage.com and its parent company from liability for aiding and abetting sex trafficking).

66. *Backpage.com, LLC v. McKenna*, 881 F. Supp. 2d 1262, 1265 (W.D. Wash. 2012).

67. *Id.* at 1273.

68. *Backpage.com, LLC v. Hoffman*, No. 13-cv-03952, 2013 WL 4502097, at *2 (D.N.J. Aug. 20, 2013) (quoting N.J. STAT. ANN. § 2C:13–10 (West 2012)).

69. *Id.* at *11–12 (relying heavily on *McKenna*, 881 F. Supp. 2d 1262 in its reasoning).

70. E.g., *Doe v. Backpage.com*, 817 F.3d 12 (1st Cir. 2016).

71. 817 F.3d 12 (1st Cir. 2016).

Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 (TVPPRA).⁷² The TVPPRA creates civil penalties for anyone who knowingly benefits, financially or otherwise, from participation in sex trafficking.⁷³

As the United States Court of Appeals for the First Circuit explained, success under the TVPPRA would have been an uphill climb because surviving Section 230 dismissal required the plaintiffs to successfully argue that Backpage.com did something outside of the traditional publishing or editorial functions allowed under Section 230.⁷⁴ The plaintiffs in *Doe* alleged that their injuries came as a direct result of advertisements posted by their traffickers to Backpage.com.⁷⁵ But the First Circuit reasoned that this type of third-party content fell squarely within the coverage of Section 230(c)(1) and was consistent with existing Section 230 case law.⁷⁶ Finding for Backpage.com, the court held “that claims that a website facilitates illegal conduct through its posting rules necessarily treat the website as a publisher or speaker of content provided by third parties and, thus, are precluded by [S]ection 230(c)(1).”⁷⁷

Although the court came to this conclusion quite easily on the law, it did seem to reckon with the moral implications of its decision. The first line of Judge Selya’s opinion reads, “This is a hard case—hard not in the sense that the legal issues defy resolution, but hard in the sense that the law requires that we . . . deny relief to plaintiffs whose circumstances evoke outrage.”⁷⁸ His opinion concluded with a call to Congress, noting that if the country wanted to address the type of content present in this case, “the remedy is through legislation, not through litigation.”⁷⁹

Following the decision in *Doe*, popular outrage against Backpage.com came to a head.⁸⁰ A Senate investigation in early 2017 found that, contrary to claims made in previous court cases, Backpage.com altered seventy to eighty percent of its commercial sex advertisements to obscure potential criminality.⁸¹ These efforts included automatically filtering out words indicating that a particular advertisement displayed an

72. *Doe v. Backpage.com*, 817 F.3d at 17 (appealing from the U.S. District Court of Massachusetts’ decision to dismiss plaintiffs’ complaint).

73. *Id.* at 20 (citing 18 U.S.C. § 1595(a) (2018)).

74. *See id.* at 19–21.

75. *Id.* at 19.

76. *Id.* at 20.

77. *Id.* at 22.

78. *Id.* at 15.

79. *Id.* at 29.

80. *See Romano, supra* note 62. In February 2017, opponents of Backpage.com expressed their outrage in the documentary *I Am Jane Doe*. *See id.* The documentary—which came in direct response to the First Circuit decision and depicted the stories of sex-trafficking survivors—specifically argued that Section 230 should be amended to remove any shields to holding Backpage.com liable. *Id.*; *see I AM JANE DOE* (50 Eggs Films Feb. 10, 2017). The Washington Post called the film “the rare social-issue documentary that has an effect on a social issue.” John Anderson, *A Movie About Online Sex-Trafficking Might Actually Get Laws Changed*, WASH. POST (May 19, 2017), http://www.washingtonpost.com/entertainment/a-movie-about-online-sex-trafficking-might-actually-get-laws-changed/2017/05/18/039c2824-3a50-11e7-a058-ddbb23c75d82_story.html [<https://perma.cc/3MYU-QHFL>].

81. STAFF OF S. PERMANENT SUBCOMM. ON INVESTIGATIONS, 114TH CONG., BACKPAGE.COM’S KNOWING FACILITATION OF ONLINE SEX TRAFFICKING 2 (Comm. Print 2017).

underage victim.⁸² Disturbingly, Backpage.com chose to hide the illegal nature of these ads rather than remove them or report them to police and then lied about its moderation efforts in lawsuits.⁸³

On April 6, 2018, before the President had even signed SESTA/FOSTA into law, the Department of Justice (DOJ) seized Backpage.com and released a ninety-three-count indictment against seven of the company's officials.⁸⁴ By April 12, Backpage.com CEO Carl Ferrer plead guilty to conspiracy to facilitate prostitution and to engage in money laundering.⁸⁵ In his plea agreement, Ferrer admitted that he had "long been aware that the great majority of Backpage's 'escort' and 'adult' advertisements [were], in fact, advertisements for prostitution services."⁸⁶ Ferrer also admitted to working with other Backpage.com executives to knowingly facilitate prostitution crimes using the site's "moderation" processes.⁸⁷ In total, the DOJ charged seven defendants affiliated with Backpage.com in the ninety-three-count indictment.⁸⁸

Notably, these indictments were filed exclusively under laws that existed before SESTA/FOSTA was signed into law and relied on an investigation that concluded before the bill passed through Congress.⁸⁹ The course of this prosecution suggests that SESTA/FOSTA was not necessary to shut down Backpage.com. Senator Wyden went as far as to say that the indictments "prove[] that it was the failure of federal prosecutors and law-enforcement that allowed Backpage to continue to operate" rather than legal barriers like Section 230.⁹⁰

2. The First Chip in Section 230's Armor

Congress passed SESTA/FOSTA in spring 2018.⁹¹ Legislators designed this law to attack promotion of sex-trafficking victims online by creating new federal criminal

82. Suspect words included "lolita," "teenage," and "amber alert." *Id.*

83. See *id.* at 1–2 (calling Backpage.com's public defense "a fiction"); see also Ben Kochman, *Sex Trafficking Law Could Inadvertently Hurt Smaller Cos.*, LAW 360 (Nov. 8, 2017, 8:16 PM), <http://www.law360.com/articles/982715/sex-trafficking-law-could-inadvertently-hurt-smaller-cos> [<https://perma.cc/QT73-FFYD>] (affirming that Backpage.com edited words that indicated sex trafficking without removing or reporting the associated ads).

84. Kate Knibbs, *How Sex Ads Became a Battleground for the Future of the Internet*, RINGER (Apr. 23, 2018, 6:20 AM), <http://www.theringer.com/tech/2018/4/23/17269196/fosta-section-230-telecommunications-act-backpage-sex-trafficking> [<https://perma.cc/L2MG-GUQR>]. The indictment included charges for "facilitating prostitution, conspiracy, and money laundering, among others." *Id.*

85. Press Release, Office of Pub. Affairs, U.S. Dep't of Justice, Backpage's Co-founder and CEO, As Well As Several Backpage-Related Corporate Entities, Enter Guilty Pleas (Apr. 12, 2018).

86. *Id.*

87. *Id.* As a condition of his plea agreement, the DOJ required Ferrer to assist DOJ officials with immediately shutting down the Backpage.com website. *Id.*

88. *Id.* Ferrer also pled guilty to violating money laundering statutes in California and Texas. Maggie Astor, *Backpage Chief Pleads Guilty to Conspiracy and Money Laundering*, N.Y. TIMES (Apr. 12, 2018), <http://www.nytimes.com/2018/04/12/us/backpage-plea-deal-ferrer.html?searchResultPosition=2> [<https://perma.cc/29H9-5GPC>].

89. See Astor, *supra* note 88.

90. Knibbs, *supra* note 84 (quoting Sen. Wyden).

91. See Allow States and Victims To Fight Online Sex Trafficking Act of 2017 (SESTA/FOSTA), Pub. L. No. 115-164, 132 Stat. 1253 (2018) (codified as amended at 18 U.S.C. §§ 1591, 1595, 2421A (2018) and 47 U.S.C. § 230 (2018)).

penalties and reducing Section 230's scope.⁹² This Act created the first exception to Section 230 in the law's more than twenty-year history.⁹³ Parts II.B.2.a and II.B.2.b discuss the original House and Senate proposals while Part II.B.2.c shows how the two separate laws were combined to become SESTA/FOSTA.

a. The House Proposal: FOSTA

In spring 2017, Representative Ann Wagner (R-MO) introduced the House bill titled Allow States and Victims To Fight Online Sex Trafficking Act (FOSTA).⁹⁴ The House Committee on the Judiciary stated that the proposal's purpose was "to combat online sex trafficking by providing new tools to law enforcement through a new federal criminal statute and by making it easier for states to prosecute criminal actor websites by amending [S]ection 230 of the Communications Decency Act."⁹⁵ The committee believed this bill was necessary to specifically target "channels of sex trafficking" like Backpage.com⁹⁶

Congress felt that the existing federal sex-trafficking statute was inadequate, because as a criminal offense, it carried a high burden of proof.⁹⁷ Further, successful prosecution under existing law required that a potential defendant have knowledge that a specific advertisement depicted a specific victim rather than knowledge that sex trafficking occurred on the platform generally.⁹⁸ To get around these difficulties, the House proposal targeted the "promotion and facilitation of prostitution" rather than sex trafficking alone.⁹⁹ According to the report by the House Judiciary Committee, Wagner's bill would have also amended the Mann Act¹⁰⁰ by imposing a ten-year maximum prison sentence for "the use or operation of an interstate facility with the intent to promote or facilitate the prostitution of another person."¹⁰¹ Additionally, websites that made good-faith attempts to remove or restrict offending materials from their sites would lack

92. *See id.*

93. *See* Goldman, *The Compiled Story*, *supra* note 5, at 279–80.

94. Allow States and Victims To Fight Online Sex Trafficking Act of 2017 (FOSTA), H.R. 1865, 115th Cong. (2017) (as introduced by Rep. Wagner, Apr. 3, 2017).

95. H.R. REP. NO. 115-572, pt. 1, at 3 (2018).

96. *See id.* (naming Backpage.com as well as personals sites Eros, Massage Troll, and cityxguide as targets of the bill).

97. *See id.* at 5. Prosecutors found the mens rea under the existing Section 1591 difficult to prosecute as that statute required proving that a platform knowingly benefitted from commercial sex ads. *See* Letter from Stephen E. Boyd, Assistant Att'y Gen., U.S. Dep't of Justice, to Rep. Robert Goodlatte, Chairman, Comm. on the Judiciary (Feb. 27, 2018). The height of this burden is apparent when looking at how long Backpage.com operated and the extreme nature of the behavior required to overcome Section 230. *See supra* Part II.B.1.

98. *See* H.R. REP. NO. 115-572, pt. 1, at 5.

99. *See id.* ("Prostitution and sex trafficking are inextricably linked, and where prostitution is legalized or tolerated, there is a greater demand for human trafficking victims and nearly always an increase in the number of women and children trafficked.").

100. Ch. 395, 36 Stat. 825 (1910) (codified as amended at 18 U.S.C. §§ 2421–2424 (2018)).

101. H.R. REP. NO. 115-572, pt. 1, at 8; *see also* FOSTA, H.R. 1865, 115th Cong. § 3 (2017) (as reported by H. Comm. on the Judiciary, Feb. 20, 2018). Originally passed in 1910, the Mann Act is the United States' oldest anti-sex-trafficking statute. *See* White-Slave Traffic (Mann) Act, ch. 395, 36 Stat. 825. Under the Mann Act, transporting individuals interstate for the purpose of prostitution carries a penalty of up to ten years. 18 U.S.C. § 2421(a).

the requisite intent to promote sex trafficking.¹⁰² Administrators of sites that promoted or facilitated the trafficking of “[five] or more persons” or acted in “reckless disregard of the fact that the such conduct contributed to sex trafficking” would face up to twenty-five years imprisonment.¹⁰³ The House bill would have also amended Section 230 to allow state prosecutors to enforce their state’s criminal laws without having to overcome the Section 230 hurdle.¹⁰⁴

b. The Senate Proposal: SESTA

Later that year, Senator Rob Portman (R-OH), along with several other senators, proposed a similar bill titled the Stop Enabling Sex Traffickers Act (SESTA).¹⁰⁵ The Senate bill sought to amend Section 230 to allow federal and state criminal and civil claims against sites for sex-trafficking related offenses.¹⁰⁶

The Senate bill would have eliminated the Section 230 defense for websites that knowingly facilitated sex trafficking, empowered state prosecutors to enforce state criminal law against websites, and created a civil cause of action for violations of federal sex-trafficking laws.¹⁰⁷ This proposal sought to better reflect the fact that Section 230 never intended to provide legal protection to websites that facilitated the advertising and sale of unlawful sex acts.¹⁰⁸ Senator Portman believed the proposal was narrowly tailored to hold bad actors accountable and give victims of sex trafficking their day in court.¹⁰⁹ For example, the bill would have maintained immunity for good-faith efforts to remove objectionable content provided by Section 230(c)(2)(A).¹¹⁰ By leaving this provision intact, the Senate believed platforms would not face the liability associated with knowingly facilitating trafficking solely based on the fact that they took action to restrict access to offending materials.¹¹¹ Finally, the Senate proposal would have amended the federal civil remedy statute to allow state attorneys general to bring civil actions against platforms on behalf of the residents of their state.¹¹²

102. H.R. REP. NO. 115-572, pt. 1, at 8–9; *see also* H.R. 1865 (as reported by H. Comm. on the Judiciary, Feb. 20, 2018).

103. H.R. 1865 § 3(a) (as reported by H. Comm. on the Judiciary, Feb. 20, 2018).

104. *See id.* § 4.

105. *See* Stop Enabling Sex Traffickers Act of 2017 (SESTA), S. 1693, 115th Cong. (as introduced by Sen. Portman, Aug. 1, 2017). The Senate Committee for Commerce, Science, and Transportation held a hearing on this statute on September 19, 2017. S. REP. NO. 115-199, at 2 (2018).

106. Stop Enabling Sex Traffickers Act of 2017 (SESTA), S. 1693, 115th Cong. §§ 2–3 (as reported by S. Comm. on Commerce, Sci., & Transp., Jan. 10, 2018).

107. *Id.* §§ 2–5.

108. *Id.* § 2(1).

109. *See* S. REP. NO. 115-199, at 2–3.

110. *Id.* at 4.

111. *Id.*

112. *Id.* at 4–5.

c. *The “Worst of Both Worlds”*¹¹³: *SESTA/FOSTA*

The law that President Trump would eventually sign on April 11, 2018, SESTA/FOSTA, passed with overwhelming bipartisan support in both chambers of Congress.¹¹⁴ This law, referred to as the “Worst of Both Worlds” by some commentators,¹¹⁵ combined aspects of both the House and Senate proposals.¹¹⁶

Per the statute, it is the “sense of Congress” that Section 230 did not intend to provide legal protection to websites that unlawfully promoted and facilitated prostitution or sex trafficking.¹¹⁷ Yet the law observes, “websites that promote and facilitate prostitution have been reckless in allowing the sale of sex trafficking victims.”¹¹⁸ For that reason, Congress believed it was necessary to clarify Section 230 to ensure the law no longer shielded such websites from appropriate liability.¹¹⁹

To that end, SESTA/FOSTA created a new federal crime under the Mann Act that punishes, by up to ten years in prison, any party that “owns, manages, or operates an interactive computer service . . . or conspires or attempts to do so, with the intent to promote or facilitate the prostitution of another person.”¹²⁰ This provision also makes it an aggravated offense, punishable by up to twenty-five years in prison, to “promote[] or facilitate[] the prostitution of 5 or more persons” or to “act[] in reckless disregard of the fact that such conduct contributed to sex trafficking.”¹²¹ Further, the statute expanded the scope of the existing federal sex-trafficking law to cover “knowingly assisting, supporting, or facilitating [sex trafficking].”¹²² Because these revisions apply to federal criminal offenses, they fit into the existing Section 230 exception for federal criminal prosecution.¹²³

SESTA/FOSTA carved out new Section 230 exceptions for state criminal prosecutions where the underlying conduct would be a crime consistent with Section 1591 or Section 2421A, and for civil actions under Section 1595 where the underlying

113. See Eric Goldman, ‘Worst of Both Worlds’ FOSTA Signed into Law, Completing Section 230’s Evisceration, TECH. & MARKETING L. BLOG. (Apr. 11, 2018), <http://blog.ericgoldman.org/archives/2018/04/worst-of-both-worlds-fosta-signed-into-law-completing-section-230s-evisceration.htm> [<https://perma.cc/WTH9-FP33>] [hereinafter Goldman, ‘Worst of Both Worlds’].

114. See Samantha Cole, *Trump Just Signed SESTA/FOSTA, a Law Sex Workers Say Will Literally Kill Them*, VICE (Apr. 11, 2018, 11:31 AM), http://www.vice.com/en_us/article/qvxyq/trump-signed-fosta-sesta-into-law-sex-work [<https://perma.cc/KYT8-M476>] [hereinafter Cole, *Trump Just Signed SESTA/FOSTA*]. SESTA/FOSTA passed in the House 388–25 and in the Senate 97–2. See H.R. 1865 (115th): *Allow States and Victims to Fight Online Sex Trafficking Act of 2017*, GOVTRACK, <http://www.govtrack.us/congress/bills/115/hr1865/details> [<https://perma.cc/AYZ2-R36T>] (last visited Nov. 1, 2020).

115. See Goldman, ‘Worst of Both Worlds,’ *supra* note 113.

116. Cole, *Trump Just Signed SESTA/FOSTA*, *supra* note 114.

117. Allow States and Victims To Fight Online Sex Trafficking Act of 2017 (SESTA/FOSTA), Pub. L. No. 115-164, § 2(1), 132 Stat. 1253, 1253 (2018) (codified as amended at 18 U.S.C. §§ 1591, 1595, 2421A (2018) and 47 U.S.C. § 230 (2018)).

118. *Id.* § 2(2).

119. See *id.* § 2(3).

120. *Id.* § 3(a)(a); see also 18 U.S.C. § 2421A(a).

121. SESTA/FOSTA § 3(a)(b); 18 U.S.C. § 2421(b).

122. 18 U.S.C. § 1591(e)(4).

123. See 47 U.S.C. § 230(e)(1) (2018).

conduct would constitute a violation of Section 1591.¹²⁴ The law did not create a similar civil cause of action for conduct that violates Section 2421A, presumably an unintended consequence of SESTA/FOSTA's complicated legislative history.¹²⁵ By requiring state prosecutors to bring their charges under federal criminal laws, Congress hoped to ensure consistency and settle concerns that companies would face unpredictable standards depending on which state initiated the action.¹²⁶

SESTA/FOSTA created one affirmative defense for criminal defendants who operate in a jurisdiction where "the promotion or facilitation of prostitution is legal."¹²⁷ This defense cannot be raised in civil lawsuits.¹²⁸ None of these provisions affect the application of Section 230(c)(2)(A), which insulates platforms from liability arising out of good-faith efforts to remove offending content.¹²⁹ Congress believed that leaving this provision intact would protect internet platforms that engage in good-faith efforts to restrict access to objectionable material from facing liability for those actions.¹³⁰

3. All in Favor: Arguments Supporting SESTA/FOSTA

Supporters of SESTA/FOSTA include legislators, advocacy groups, and several large tech companies.¹³¹ Many supporters see this statute as a long-overdue correction of an injustice that Section 230's sweeping protections unintentionally created.¹³² In their view, Section 230 never intended to allow sex traffickers to hide behind the internet.¹³³ The notion that lawmakers can either protect victims or protect free speech represents a false choice.¹³⁴ Consumer Watchdog, a nonprofit consumer protection organization,¹³⁵ strongly supported the bill and stated through a representative, "[j]ust as the First Amendment does not allow you to shout fire in a crowded movie [theatre], or to assist hit men and drug dealers in their criminal activity, CDA Section 230 must not be allowed to protect an exploitative business that is built on child sex-trafficking."¹³⁶

124. SESTA/FOSTA § 4(a) (codified at 47 U.S.C. § 230(e)(5)). The SESTA/FOSTA statute also empowers state attorneys general to bring *parens patriae* civil claims on behalf of residents affected by Section 1591 violations. 18 U.S.C. § 1595(d).

125. See SESTA/FOSTA § 4.

126. See Kochman, *supra* note 83.

127. SESTA/FOSTA § 3(e)(e).

128. See *id.*

129. *Id.* § 4 (a)(5); see also 47 U.S.C. § 230(c)(2)(A).

130. S. REP. NO. 115-199, at 4 (2018).

131. See Kochman, *supra* note 83.

132. See *id.*

133. See *Bill Would Bar CDA Safe Harbor for Hosts of Sex Trafficking Ads*, 83 TELECOMM. REP. 43, 43 (2017) (quoting Sen. Portman).

134. Knibbs, *supra* note 84. See also Abigail W. Balfour, Comment, *Where One Marketplace Closes, (Hopefully) Another Won't Open: In Defense of FOSTA*, 60 B.C. L. REV. 2475 (2019), for a thorough defense of SESTA/FOSTA's legality and an argument for its necessity.

135. *About*, CONSUMER WATCHDOG, <http://consumerwatchdog.org/about> [https://perma.cc/U9Q7-LXT7] (last visited Nov. 1, 2020).

136. *Bill Would Bar CDA Safe Harbor for Hosts of Sex Trafficking Ads*, *supra* note 133, at 44 (quoting Consumer Watchdog's Privacy Project Director John Simpson).

The global antitrafficking society ECPAT also advocated for SESTA/FOSTA.¹³⁷ The organization pushed back against claims that SESTA/FOSTA was a form of internet censorship and instead framed the bill as being about money and accountability.¹³⁸ In its view, the rights of vulnerable and exploited children are infinitely more important than the economic interests of internet companies.¹³⁹ Because criminal activity and child trafficking are not protected by the First Amendment, ECPAT did not believe there was any risk of censorship.¹⁴⁰ ECPAT also took issue with claims that SESTA/FOSTA would interfere with the livelihood of consensual sex workers because the organization questions whether anyone enters into sex work absent coercion.¹⁴¹ Further, it contended that any negative impact on online vetting services for sex workers would be negligible, as those services offer a “false sense of security” and do not actually protect sex workers.¹⁴²

In a letter to Senators Rob Portman and Richard Blumenthal, Kenneth Glueck, senior vice president of the technology company Oracle, offered a “strong endorsement” of the Senate version of this law, stating that he did not believe it would “usher the end of the Internet.”¹⁴³ In that letter, he noted that today’s internet platforms do not blindly run their sites without controlling content, like their predecessors in the 1990s.¹⁴⁴ To be commercially successful, these companies actually rely on the ability to “analyze, arrange and segment applications, data and content, to accurately target . . . their most relevant audiences.”¹⁴⁵ Because today’s companies are capable of screening for this content, he believed SESTA/FOSTA would be the right way to hold platforms that do nothing to stop the exploitation of human beings accountable.¹⁴⁶

4. All Opposed: Arguments Against SESTA/FOSTA

Critics of the bill can be roughly sorted into two groups: those concerned about the negative impact it could have on sex workers and those concerned about consequences to the free internet more generally.¹⁴⁷

137. See *Urge Your Senators to Pass FOSTA-SESTA*, ECPAT, <http://www.ecpatusa.org/fosta-sesta> [<https://perma.cc/P6X4-JTWY>] (last visited Nov. 1, 2020). Formerly known as End Child Prostitution and Trafficking, ECPAT was the first U.S.-based nonprofit to advocate against commercial sexual exploitation of children. *Our Vision*, ECPAT, <http://www.ecpatusa.org/mission> [<https://perma.cc/EZ37-YXPF>] (last visited Nov. 1, 2020).

138. Carol Smolenski & Jason Matthews, *Facts and Myths About SESTA*, ECPAT (Apr. 19, 2018), <http://www.ecpatusa.org/blog/2018/4/19/facts-and-myths-about-sesta> [<https://perma.cc/PKL7-DMHV>].

139. *Id.*

140. *Id.*

141. *Id.*

142. *Id.*

143. Letter from Kenneth Glueck, Senior Vice President, Oracle Corp. to Rob Portman & Richard Blumenthal, Sens., U.S. Senate (Sep. 5, 2017), <http://www.portman.senate.gov/newsroom/press-releases/senators-welcome-support-tech-giant-oracle-stop-enabling-sex-traffickers> [<https://perma.cc/4WQ9-L3PD>].

144. See *id.*

145. *Id.*

146. *Id.*

147. See, e.g., Kochman, *supra* note 83; Smolenski & Matthews, *supra* note 138.

Some opponents have expressed concerns that legislators overstated the dangers of online human trafficking to garner support for SESTA/FOSTA.¹⁴⁸ In doing so they overlooked the fact that giving sex workers a way to advertise and vet clients online makes them safer than they would be offline.¹⁴⁹ Even those who vehemently oppose sex trafficking claim that SESTA/FOSTA makes false promises.¹⁵⁰ Kimberly Mehlman-Orozco, a criminologist and antitrafficking advocate, argues there is no empirical research or even theoretical evidence suggesting this law will reduce instances of sex trafficking.¹⁵¹ She worries that the worst actors will be largely unaffected by the law because many of the sites dedicated to facilitating commercial sex transactions are hosted outside the United States.¹⁵² At the same time, those American companies that have cooperated with law enforcement in the past will be affected and likely shut down, crippling a critical tool and resource for law enforcement.¹⁵³ Prior to the law's passing, Mehlman-Orozco hypothesized that SESTA/FOSTA would simply replace existing commercial sex ads with ads on noncooperative websites based overseas and destroy the hope for productive information exchange between private companies and law enforcement.¹⁵⁴

Others were concerned that, while the goal of eradicating sex trafficking from the internet is "laudable," the method Congress chose could end up stifling smaller internet companies.¹⁵⁵ Under SESTA/FOSTA, platforms can be held liable for knowingly hosting offensive or tortious content in a way they have not been since before Section 230.¹⁵⁶ Critics worried that this risk would likely lead large companies to aggressively moderate their users to ensure no sex-trafficking-related content ends up on their

148. Jenny Heineman & Brooke Wagner, *The Sex Trafficking Panic is Based on Myths*, BUZZFEED NEWS (Apr. 18, 2018, 1:46 PM), <http://www.buzzfeednews.com/article/jennyheineman/sex-trafficking-myths-sesta-fosta> [https://perma.cc/7GC9-TN7K]. Throughout proceedings, legislators used the coercive nature of prostitution to justify passing this law. Yet a recent survey of youth engaged in street prostitution revealed that only twenty-four percent of respondents under the age of eighteen had a pimp or trafficker with whom they shared their earnings. *Id.* (describing a multiyear study which interviewed 949 people engaged in sex work across six cities).

149. Romano, *supra* note 62; see also David McCabe & Kate Conger, *Stamping Out Online Sex Trafficking May Have Pushed It Underground*, N.Y. TIMES (Dec. 17, 2019), <http://www.nytimes.com/2019/12/17/technology/fosta-sex-trafficking-law.html> [https://perma.cc/7NBF-UBTT] ("[SESTA/FOSTA] misunderstands the way that trafficking works, if you think making it less visible reduces the occurrence." (quoting sex workers' rights activist Kate D'Adamo)). Economists at Baylor University found that sex work ads on the Craigslist "Erotic Services" page, which ran from 2002 to 2010, may have helped reduce the overall female homicide rate by ten to seventeen percent. Scott Cunningham, Gregory DeAngelo & John Tripp, *Craigslist Reduced Violence Against Women 1* (Feb. 2019) (unpublished manuscript), <http://scunning.com/craigslist110.pdf> [https://perma.cc/Y7FJ-Y8UW].

150. See Knibbs, *supra* note 84.

151. *Id.* (quoting Kimberly Mehlman-Orozco).

152. See Kimberly Mehlman-Orozco, *Sex Trafficking Bill Likely To Do More Harm Than Good*, BALTIMORE SUN (Mar. 22, 2018, 9:05 AM), <http://www.baltimoresun.com/opinion/op-ed/bs-ed-op-0323-fosta-trafficking-20180322-story.html> [https://perma.cc/8H3T-UVY4].

153. See *id.*

154. See *id.*

155. See Kochman, *supra* note 83.

156. See Allow States and Victims To Fight Online Sex Trafficking Act of 2017 (SESTA/FOSTA), Pub. L. No. 115-164, § 4, 132 Stat. 1253, 1254 (2018) (codified as amended at 18 U.S.C. §§ 1591, 1595, 2421A (2018) and 47 U.S.C. § 230 (2018)).

platforms.¹⁵⁷ Some warned the increased exposure would cause companies to overfilter and remove even protected, nonviolative speech.¹⁵⁸ While large, established platforms would be able to absorb the increased liability as a cost of doing business, smaller companies may be closed down by the cost of litigation.¹⁵⁹ So, the expense associated with operating a platform in this environment may lead to a “closing down of spaces for diverse viewpoints online.”¹⁶⁰

Senator Wyden, one of Section 230’s original sponsors, called the Senate’s SESTA proposal yet another example of the “technical ignorance of Congress”¹⁶¹ and warned that it would “punch[] a hole in the legal framework of the open internet.”¹⁶² In his view, civil liability under the Senate bill was so broad that even companies that actively policed their platforms could not avoid endless lawsuits.¹⁶³ This, he argued, would backfire by discouraging companies from even attempting to identify and remove illegal activity from the internet,¹⁶⁴ creating the same “backward” incentives that existed under *Cubby* and *Prodigy*.¹⁶⁵ Similarly, President of the Consumer Technology Association¹⁶⁶ Gary Shapiro expressed concern that “[i]nternet platforms would be forced to censor content heavily and [would be] faced with crushing legal liability” without Section 230.¹⁶⁷ He predicted that, well-intended as it was, this attempt to target sex traffickers was likely to create a “trial lawyer bonanza of overly-broad civil lawsuits.”¹⁶⁸

President and CEO of the Computer & Communications Industry Association (CCIA)¹⁶⁹ Ed Black said in a statement that, by undermining Section 230, SESTA/FOSTA would discourage platforms from developing strategies to fight online criminal activity.¹⁷⁰ He noted that many websites already cooperated with law enforcement and nonprofits to target criminals on their platforms.¹⁷¹ In his view, this

157. See Kochman, *supra* note 83.

158. See *id.*

159. See *id.*

160. *Id.*

161. *Bill Would Bar CDA Safe Harbor for Hosts of Sex Trafficking Ads*, *supra* note 133, at 43.

162. 164 CONG. REC. S1869 (daily ed. Mar. 21, 2018) (statement of Sen. Wyden).

163. See *id.*

164. See *id.*

165. See *supra* notes 44–53 and accompanying text for a discussion of these incentives.

166. The Consumer Technology Association is a trade association representing members of the U.S. consumer technology industry. *Who We Are*, CONSUMER TECH. ASS’N, <http://www.cta.tech/Who-We-Are> [https://perma.cc/X7HQ-SETP] (last visited Nov. 1, 2020).

167. *Bill Would Bar CDA Safe Harbor for Hosts of Sex Trafficking Ads*, *supra* note 133, at 44 (alteration in original) (quoting Consumer Technology President Gary Shapiro).

168. *Id.*; see also Letter from Access Now et al., to John Thune, Chairman, S. Commerce Comm. (Nov. 7, 2017), <http://cdt.org/insights/letter-to-senate-commerce-committee-on-censorship-concerns-with-sesta-managers-amendment/> [https://perma.cc/QVV3-ZSTJ] (outlining the concerns of sixteen human rights and civil liberties organizations, trade associations, and individuals that SESTA would lead to increased censorship and liability).

169. CCIA is an international nonprofit membership organization dedicated to promoting full and fair competition in the computer, information technology, telecommunications, and internet industries. *Who We Are*, CCIA, <http://www.cciagnet.org/about/who-we-are/> [https://perma.cc/A4TN-R7CF] (last visited Nov. 1, 2020).

170. See *Bill Would Bar CDA Safe Harbor for Hosts of Sex Trafficking Ads*, *supra* note 133, at 44 (quoting CCIA President and CEO Ed Black).

171. See *id.*

statute would be counterproductive to the goals of those partnerships.¹⁷² By criminalizing “knowing” conduct, SESTA/FOSTA would subject companies that attempt to detect criminal liability to additional legal liabilities.¹⁷³ In a letter signed by nine other technology-related groups, the CCIA echoed the Consumer Technology Association’s concerns, predicting that the law would create opportunities for opportunistic trial lawyers to bring frivolous litigation against law-abiding websites and also lead to potentially unpredictable and inconsistent enforcement by state attorneys general.¹⁷⁴

The Internet Association—an industry group comprised of Google, Amazon, Facebook, Twitter, and other tech industry players—initially joined the CCIA letter opposing SESTA.¹⁷⁵ After Congress combined the Senate and House proposals, however, the organization threw its support behind the law.¹⁷⁶ In response to this shift Senator Wyden stated, “I’ve learned that just because a big technology company says something is good, doesn’t mean it’s good for the internet or innovation.”¹⁷⁷ He went on to state, “Most innovation in the digital economy comes from . . . the same innovators who will be . . . locked out of the market by this bill.”¹⁷⁸ These critics appear united in their prediction that start-ups and smaller platforms would be the hardest hit by this law. Despite these criticisms, the SESTA/FOSTA bill passed through Congress nearly unanimously.¹⁷⁹

5. More to Come?: SESTA/FOSTA as a Template

Some internet freedom advocates are concerned that SESTA/FOSTA may have already fundamentally shifted the frame through which legislators view internet regulation and could represent the first chip in the armor of Section 230 protection.¹⁸⁰ In a September 2018 Senate Intelligence Committee hearing on social media issues, Senator Joe Manchin (D-WV) noted that Section 230 has prevented authorities in his state from prosecuting Instagram, Facebook, and Twitter for their role in enabling dealers to sell opiates to residents of his state and others.¹⁸¹ He expressed interest in passing a bill similar to SESTA/FOSTA to target drug trafficking.¹⁸²

172. *See id.*

173. *See id.*

174. *See id.* at 43–44.

175. *See id.* at 44; Kochman, *supra* note 83.

176. *See* Kochman, *supra* note 83; *see also* Brendan Bordelon, *Why Big Tech Backed Down on Sex-Trafficking Legislation*, NAT’L J. DAILY, Nov. 7, 2017, Gale Academic Onefile, No. A513827087 (“There was such a strategic cost to opposing SESTA . . . if it wasn’t going to be winnable anyway, you cut your losses and move on.” (quoting Professor Eric Goldman)).

177. Kochman, *supra* note 83 (quoting Sen. Wyden).

178. *Id.* (quoting Sen. Wyden).

179. *See supra* note 114 and accompanying text.

180. *See* Alan Rozenshtein, *It’s the Beginning of the End of the Internet’s Legal Immunity*, FOREIGN POL’Y (Nov. 13, 2017, 9:44 AM), <http://foreignpolicy.com/2017/11/13/its-the-beginning-of-the-end-of-the-internets-legal-immunity/> [https://perma.cc/4ZFC-LD6G].

181. *See Open Hearing on Foreign Influence Operations’ Use of Social Media Platforms (Company Witnesses) Before the S. Select Comm. on Intelligence*, 115th Cong. 56–57 (2018) (statement of Sen. Manchin, Member, S. Select Comm. on Intelligence).

182. *See id.* at 57–58 (statement of Sen. Manchin, Member, S. Select Comm. on Intelligence) (“[W]e passed FOSTA and SESTA We passed bills that held you liable and responsible. Don’t you think we should

Some commenters suggest that Section 230 amendments that parallel the language in SESTA/FOSTA are more likely to pass than other types of laws “simply because it has already been implemented” in the sex-trafficking space.¹⁸³ This idea is salient in discussions about holding platforms accountable for online terrorist propaganda and national security offenses.¹⁸⁴ Like sex-trafficking victims, terrorism victims are a sympathetic group likely to conjure support from legislators.¹⁸⁵ One such proposal would expand existing civil causes of action for terrorism victims to allow lawsuits against internet platforms that provided material support for domestic terrorism acts.¹⁸⁶

The Eliminating Abusive and Rampant Neglect of Interactive Technologies Act of 2020 (EARN IT Act), which passed in the Senate Judiciary Committee in early June 2020, is arguably the most serious proposal to amend Section 230 post-SESTA/FOSTA.¹⁸⁷ The EARN IT Act, introduced by Senator Lindsey Graham (R-SC) and SESTA cosponsor Senator Richard Blumenthal (D-CT), intends to curb the spread of child abuse images on social media.¹⁸⁸ Following the framework established by SESTA/FOSTA, the EARN IT Act weakens Section 230 protections for websites that host user-generated “child sexual abuse material” or child pornography.¹⁸⁹ Unlike SESTA/FOSTA, which outright removed Section 230 protections for a specific type of content, the EARN IT Act would condition the Section 230 shield on a website’s compliance with “best practices” to prevent child sexual exploitation.¹⁹⁰

do the same with opiate drugs and the way they’re being used in your platform?”). Senator Manchin’s office has not yet proposed any such bill.

183. T. Noble Foster & David W. Arnesen, *Legal Strategies for Combating Online Terrorist Propaganda*, 21 ATLANTIC L.J. 45, 111 (2019).

184. See, e.g., Rozenshtein, *supra* note 180; Emily B. Tate, Comment, “*Maybe Someone Dies*”: The Dilemma of Domestic Terrorism and Internet Edge Provider Liability, 60 B.C. L. REV. 1731, 1759–60 (2019); Eric Goldman, *Senate’s “Stop Enabling Sex Traffickers Act of 2017” –and Section 230’s Imminent Evisceration*, TECH. & MARKETING L. BLOG (July 31, 2017), <http://blog.ericgoldman.org/archives/2017/07/senates-stop-enabling-sex-traffickers-act-of-2017-and-section-230s-imminent-evisceration.htm> [https://perma.cc/9G62-YWY] (noting an increase in litigation that accuses social media sites of materially supporting terrorism and expressing concern that legislators, in an effort to support those efforts, will take advantage of the “newly plowable regulatory ground” that SESTA/FOSTA created).

185. See Foster & Arnesen, *supra* note 183, at 111.

186. Tate, *supra* note 184, at 1766 (arguing that Section 230 would not prohibit lawsuits alleging that the internet platform was actually complicit in hosting terrorist content).

187. See S. 3398, 116th Cong. (2020).

188. See *id.*

189. See *id.* § 5.

190. See *id.* § 4. These “best practices” would be established and updated by an unelected commission pursuant to EARN IT Act sections 3 and 4. Earlier versions of the EARN IT Act were strongly opposed by privacy advocates because they would have given the DOJ significant influence over that unelected commission. Adi Robertson, *Congress Proposes Anti-Child Abuse Rules to Punish Web Platforms—and Raises Fears About Encryption*, VERGE (Mar. 5, 2020, 1:40 PM), <http://www.theverge.com/2020/3/5/21162983/congress-senate-earn-it-act-lindsey-graham-richard-blumenthal-section-230-encryption-bill-proposed> [https://perma.cc/ZS6U-7XZX]. The DOJ could potentially use that influence to compel companies to break encryption in criminal cases. See *id.*

C. *A Post-SESTA/FOSTA World*

Critics of SESTA/FOSTA made a variety of hypotheses about the law's potential unintended consequences.¹⁹¹ At the same time, the law's supporters argued that any disruption that SESTA/FOSTA creates would be worth it for the good of protecting human-trafficking victims and holding bad actors accountable.¹⁹² This Part explores the impact SESTA/FOSTA has had since its enactment and provides examples of internet companies that have already altered their business practices in response to the new law, for better or for worse. Part II.C.1 discusses the law's impact on sex work generally. Part II.C.2 then discusses what effect, if any, SESTA/FOSTA has had on the prevalence of internet commercial sex ads. Part II.C.3 discusses how the law has impacted online resources and communities used by sex workers. Lastly, Part II.C.4 discusses some collateral effects of the law.

1. Effect on Sex Work

There is some evidence that SESTA/FOSTA may have actually impeded law enforcement efforts to prosecute sex trafficking.¹⁹³ Ironically, Backpage.com, the target of the law, was one of law enforcement's best tools for locating trafficking victims and the criminals who exploited them.¹⁹⁴ In 2018, seventy-three percent of the child sex-trafficking reports received by the National Center for Missing and Exploited Children were related to ads on Backpage.com.¹⁹⁵ Without that platform, some law enforcement officials are having difficulty identifying the ways traffickers and pimps are conducting their business.¹⁹⁶

At the same time, there is evidence that prosecutions for street prostitution have increased in certain jurisdictions.¹⁹⁷ By way of example, law enforcement officers in San Antonio, Texas arrested 296 people for prostitution between March 21, 2018 (the day SESTA/FOSTA passed the Senate) and August 14, 2018, up fifty-eight percent from the same period the year before.¹⁹⁸ In Sacramento, California, law enforcement officials reported fifteen street-prostitution arrests during that period in 2018 compared to only

191. See *supra* Part II.B.4.

192. See *supra* Part II.B.3.

193. For a more thorough discussion on the ways this law has impacted street sex work, see Meghan Peterson, Bella Robinson & Elena Shih, *The New Virtual Crackdown on Sex Workers' Rights: Perspectives from the United States*, 2019 ANTI-TRAFFICKING REV. (SPECIAL ISSUE) 189, 189–93, and Lura Chamberlain, Note, *FOSTA: A Hostile Law with a Human Cost*, 87 FORDHAM L. REV. 2171 (2019).

194. See, e.g., Jordan Fischer, *Running Blind: IMPD Arrests First Suspected Pimp in 7 Months*, RTV 6 INDIANAPOLIS (July 3, 2018, 7:54 PM), <http://www.theindychannel.com/longform/running-blind-impd-arrests-first-suspected-pimp-in-7-months> [https://perma.cc/R6L4-RG9J]; Alexandra Stassinopoulos, *Anti-Trafficking Law Has Unexpected Consequences on Sex Work in Bay Area*, DAILY CALIFORNIAN (May 3, 2019), <http://www.dailycal.org/2019/05/03/anti-trafficking-law-has-unexpected-consequences-on-sex-work-in-bay-area/> [https://perma.cc/QV3C-XHVG].

195. Knibbs, *supra* note 84.

196. See Fischer, *supra* note 194.

197. See Alexandra Villarreal, *Side Effect of Trafficking Law: More Street Prostitution?*, WASH. TIMES (Sept. 24, 2018), <http://www.washingtontimes.com/news/2018/sep/24/side-effect-of-trafficking-law-more-street-prostit/> [https://perma.cc/KPG7-PVE6].

198. *Id.*

three in 2017.¹⁹⁹ Police in the Bay Area have also noted an increase in street-based sex work since Backpage.com went offline, but they do not believe demand for sex work has significantly changed.²⁰⁰ Rather, reports suggest that SESTA/FOSTA's targeting of online commercial sex ads has forced sex workers on to the streets, increasing visibility.²⁰¹

2. Effect on Commercial Sex Ads

Because prostitution is illegal in most of the country, online advertisements for sexual services are not constitutionally protected speech.²⁰² SESTA/FOSTA's supporters in Congress hoped this law would eradicate commercial sex ads depicting victims of sex trafficking from the internet.²⁰³ Unfortunately, despite claims to the contrary, the evidence shows the law has had little effect on the number of ads for sexual services.²⁰⁴

In July 2018, Representative Wagner boasted that SESTA/FOSTA successfully shut down nearly ninety percent of online sex-trafficking businesses and ads.²⁰⁵ To support her claim, she relied on a chart from the Defense Advanced Research Projects Agency.²⁰⁶ While that data does show that weekly global volume of sex-related advertising dropped eighty-seven percent from January 2018 to April 2018, Representative Wagner's characterization is misleading.²⁰⁷ That particular report included ads for any sex-related service and was not limited to cases involving human trafficking or even to cases within the United States.²⁰⁸ Further, the biggest drop in ads came after Backpage.com was shut down by the DOJ's criminal prosecution and before Congress officially enacted the law.²⁰⁹ As discussed, the DOJ relied solely on legal resources available before SESTA/FOSTA to prosecute Backpage.com.²¹⁰

199. *Id.*

200. Elizabeth Nolan Brown, *Foggy Sex Trafficking Stats Pop Up in the Bay Area*, REASON, May 2019, at 16.

201. *See id.* For further discussion of this trend, see Susie Steimle, *New Laws Forced Sex Workers Back on SF Streets, Caused 170% Spike in Human Trafficking*, CBS SF BAY AREA 5 (Feb. 3, 2019, 11:41 PM), <http://sanfrancisco.cbslocal.com/2019/02/03/new-laws-forced-sex-workers-back-on-sf-streets-caused-170-spike-in-human-trafficking/> [<https://perma.cc/5ECU-L8BX>] (discussing an increase in street prostitution in San Francisco); Villarreal, *supra* note 197 (discussing an increase in street prostitution in San Antonio, Phoenix, and other major cities).

202. *See* Balfour, *supra* note 134, at 2493–94.

203. *See* S. REP. NO. 115-199, at 4 (2018). *See also supra* Part II.B.3 for a discussion of SESTA/FOSTA supporters' hopes and motivations.

204. *See* Glenn Kessler, *Has the Sex-Trafficking Law Eliminated 90 Percent of Sex-Trafficking Ads?*, WASH. POST (Aug. 20, 2018, 3:00 AM), <http://www.washingtonpost.com/politics/2018/08/20/has-sex-trafficking-law-eliminated-percent-sex-trafficking-ads/> [<https://perma.cc/Q6MM-YM2X>].

205. *Id.*

206. *Id.*

207. *Id.*

208. *See id.*

209. *Id.*

210. *See id.*; *supra* notes 84–90 and accompanying text.

Additional data show that after that initial drop, advertising for the sex trade has rebounded as users migrate to new platforms.²¹¹ On the date Representative Wagner made her statement, sex-trade related ads were already back to about fifty percent of pre-SESTA/FOSTA levels.²¹² Within months, a number of “Backpage copycat sites” popped up, mostly overseas.²¹³ Many of these new websites contain specific SESTA/FOSTA disclaimers stressing “that they do not moderate their content in any way.”²¹⁴ This practice appears to be an attempt to avoid facing prosecution for “knowingly” facilitating sex trafficking.²¹⁵

3. Effect on Online Resources for Sex Workers

Sex work advocates loudly opposed SESTA/FOSTA before it was passed.²¹⁶ Since then, many sex workers and advocates have been collecting stories and exchanging information about the impacts they have felt.²¹⁷ In the absence of any backward-looking empirical study into the effect of SESTA/FOSTA, this anecdotal information is the best evidence available on the impact of this law.

The website VerifyHim.com is an online verification tool aimed at helping “women to stay safe in the world of online dating.”²¹⁸ Though not exclusively a platform for sex workers, many sex workers relied on the site as a resource for avoiding known abusive clients.²¹⁹ Before SESTA/FOSTA, the site operated a communication tool where users could talk with each other about particular clients they should avoid for safety reasons.²²⁰ After SESTA/FOSTA passed, the site removed its communication feature, effectively preventing third-party discussion aimed at vetting clients interested in sex-work

211. *Id.*; see also Ryan Tarinelli, *Online Sex Ads Rebound, Months After Shutdown of Backpage*, WASH. TIMES (Nov. 28, 2018), <http://www.washingtontimes.com/news/2018/nov/28/online-sex-ads-rebound-months-after-shutdown-of-ba/> [https://perma.cc/A5QK-QEJD].

212. Kessler, *supra* note 204.

213. Rob McKenna, *Fighting Human Trafficking in a Digitally Transformed World*, PROSECUTOR, Mar. 2019, at 10, 11.

214. Knibbs, *supra* note 84; see, e.g., *FOSTA Statement*, ONEBACKPAGE.COM, <http://onebackpage.com/fosta-p60> [https://perma.cc/95EG-MBPP] (last visited Nov. 1, 2020) (“You are responsible for what you post. We also do not review posts or even review them, so we are not aware of any 3rd party content that is posted. This site does not in any way (manual review or automated process) moderate, monitor or review posted content. . . . The Site, it’s [sic] owners, operators and any/all affiliated other parties or other owners are not responsible or are of the content [sic] generated by users or other means on OneBackPage.com, Backpage.ly or any other company operated sites.”).

215. Knibbs, *supra* note 84.

216. See *supra* Part II.B.4.

217. See, e.g., Knibbs, *supra* note 84.

218. *Information and Resources*, VERIFYHIM.COM, <http://www.verifyhim.com/> [https://perma.cc/3L56-MWYT] (last visited Nov. 1, 2020).

219. See Nitasha Tiku, *Craigslist Shuts Personal Ads for Fear of New Internet Law*, WIRED (Mar. 23, 2018, 3:57 PM), <http://www.wired.com/story/craigslist-shuts-personal-ads-for-fear-of-new-internet-law/> [https://perma.cc/A5C3-8X24].

220. Annamarya Scaccia, *SESTA Is Already Having Devastating Impacts on Sex Workers—Just Like They Predicted*, REWIRE.NEWS GROUP (Apr. 2, 2018, 5:33 PM), <http://rewire.news/article/2018/04/02/sesta-already-devastating-impacts-sex-workers-just-like-predicted/> [https://perma.cc/GJY8-ZTLT].

services.²²¹ Other websites providing similar services also shut down their third-party tools following SESTA/FOSTA's enactment.²²²

In the wake of these bans, thousands of sex workers migrated over to their own alternative social media platform called Switter.²²³ Within weeks, the company that hosted the website, Cloudflare, blocked and removed the site from its service.²²⁴ At the time, Switter had more than 376,500 posts created by almost 49,000 members.²²⁵ In response to media pushback, Doug Kramer, general counsel for Cloudflare, explained that the company removed the social network in an attempt to comply with SESTA/FOSTA.²²⁶ He noted that while he believes SESTA/FOSTA "is a very bad law and a very dangerous precedent," his company is obligated to follow the law.²²⁷ He criticized lawmakers for failing to understand how the internet works and urged Congress to specify the obligations of online infrastructure companies like Cloudflare moving forward.²²⁸ As one Switter user lamented, "[c]ensoring the internet was never going to help any victims, it only makes them less likely to be seen."²²⁹

These anecdotes demonstrate ways SESTA/FOSTA's attempt to eradicate sex trafficking by targeting the "promotion of prostitution" has broad consequences on sex workers who are users of online platforms. In December 2019, Representative Ro Khanna (D-CA) introduced legislation calling for a Department of Health and Human Services study to examine the impact of SESTA/FOSTA.²³⁰ The study would investigate how the shutdown of websites in connection with SESTA/FOSTA has affected the health and safety of people who engage in sex work.²³¹ If passed, this would be the first backward-looking study on the impact of this law.²³²

221. *See id.*

222. *See* Knibbs, *supra* note 84.

223. Samantha Cole, *Cloudflare Just Banned a Social Media Refuge for Thousands of Sex Workers*, VICE (Apr. 19, 2018, 8:54 AM), http://www.vice.com/en_us/article/8xk78x/switter-down-cloudflare-banned-sex-workers-sesta-fosta [https://perma.cc/NT43-GZL8] [hereinafter Cole, *Cloudflare Ban*].

224. *Id.* ("The last notable time Cloudflare denied its services to a client was when it canceled protection services for white supremacist website The Daily Stormer."). Switter has since moved to a different domain-hosting company. Knibbs, *supra* note 84.

225. Cole, *Cloudflare Ban*, *supra* note 223.

226. *See* Samantha Cole, *Cloudflare: FOSTA Was a 'Very Bad' Bill' That's Left the Internet's Infrastructure Hanging*, VICE (Apr. 19, 2018, 1:21 PM), http://www.vice.com/en_us/article/9kgvga/cloudflare-switter-down-fosta-sesta [https://perma.cc/QQ2C-V2EA] [hereinafter Cole, *FOSTA Was a 'Very Bad Bill'*].

227. *Id.* (quoting Cloudflare's general counsel Doug Kramer).

228. *Id.*

229. Cole, *Cloudflare Ban*, *supra* note 223.

230. SESTA/FOSTA Examination of Secondary Effects for Sex Workers Study Act, H.R. 5448, 116th Cong. (2019).

231. *Id.* § 3(a).

232. *See id.* § 2(10); Emily Birnbaum, *Democrats Introduce Bill to Study Impact of Sex Trafficking Law*, HILL (Dec. 17, 2019, 12:27 PM), <http://thehill.com/policy/technology/474906-dems-introduce-bill-to-study-impact-of-sex-trafficking-law> [https://perma.cc/9SLU-5Z7Y].

4. Other Effects on Online Resources

Two days after the Senate passed SESTA/FOSTA, Craigslist eliminated its “Personals” section that contained, in addition to some ads for sex work,²³³ nonsexual categories such as “Missed Connections” and “Strictly Platonic.”²³⁴ In explaining this decision, Craigslist specifically blamed SESTA/FOSTA, stating “[a]ny 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.”²³⁵ That same day, Craigslist also removed its “Therapeutic Services” section and barred users who previously advertised there from relisting in other sections such as “Skilled Trade Services” or “Beauty Services.”²³⁶

D. *A Litigation Bonanza?: SESTA/FOSTA Cases*

Some critics worried that SESTA/FOSTA would lead to an influx of frivolous litigation against otherwise law-abiding platforms and cause unpredictable enforcement by state attorneys general.²³⁷ Yet, at the time of writing, no successful legal challenge has been brought under the new causes of action created by SESTA/FOSTA.²³⁸ That being said, several potentially impactful cases have been filed under related state statutes.

In October 2019, a California judge dismissed with prejudice a lawsuit filed by more than fifty alleged sex-trafficking victims against the online business management

233. When Craigslist banned listings for “Erotic Services” in 2009, “many of the pornographic images and other illegal activities began popping up in the ‘casual encounters’ section of the ‘personals’ category.” Sarah Netter, *Craigslist Clean-Up: Is it Really Working?*, ABC NEWS (June 9, 2009, 2:15PM), <http://abcnews.go.com/Technology/Business/story?id=7795174> [<https://perma.cc/N78A-4J62>].

234. David Greene, *EFF Sues To Invalidate FOSTA, an Unconstitutional Internet Censorship Law*, ELECTRONIC FRONTIER FOUND. (June 28, 2018), <http://www.eff.org/deeplinks/2018/06/eff-sues-invalidate-fosta-unconstitutional-internet-censorship-law> [<https://perma.cc/2ENK-S72K>].

235. *About FOSTA*, CRAIGSLIST, <http://www.craigslist.org/about/FOSTA> [<https://perma.cc/U5BH-2Z2D>] (last visited Nov. 1, 2020).

236. Greene, *supra* note 234.

237. See, e.g., *Bill Would Bar CDA Safe Harbor for Hosts of Sex Trafficking Ads*, *supra* note 133, at 43–44; *supra* notes 161–174 and accompanying text.

238. Craigslist is named in at least two recently filed civil lawsuits regarding sex trafficking that allegedly occurred through its “Erotic Services” page before 2009. See *J. B. v. G6 Hospitality, LLC*, No. 4:19-cv-07848 (N.D. Cal. filed Dec. 2, 2019); *M.L. v. Craigslist Inc.*, No. 3:19-cv-06153 (W.D. Wash. filed Dec 02, 2019). As written, SESTA/FOSTA applies to all violations “whether the conduct alleged occurred, or is alleged to have occurred, before, on, or after” SESTA/FOSTA was enacted. Allow States and Victims To Fight Online Sex Trafficking Act of 2017 (SESTA/FOSTA), Pub. L. No. 115-164, 132 Stat. 1253 (codified at 18 U.S.C. §§ 1591, 1595, 2421A (2018) and 47 U.S.C. § 230 (2018)). However, there is a pending constitutional challenge to SESTA/FOSTA alleging, among other claims, that this portion of the statute is unconstitutional under the ex post facto clause. See *Complaint for Declaratory and Injunctive Relief* at 49–50, *Woodhull Freedom Found. v. United States*, 334 F.Supp.3d 185 (D.D.C. 2018) (No. 1:18-cv-01552), *rev’d and remanded by* 948 F.3d 363 (D.C. Cir. 2020). The DOJ seemed to concede that point in a 2018 letter to House Judiciary Committee Chairman Robert Goodlatte. Letter from Stephen E. Boyd, *supra* note 97 (warning that similar language in the Senate proposal “raises a serious constitutional concern”). In August 2020, the United States District Court for the Southern District of Florida dismissed with prejudice a lawsuit against the messaging platform Kik after finding plaintiff’s allegation “that Defendants knew that other sex trafficking incidents occurred on Kik . . . [did] not satisfy FOSTA’s requirement that the conduct underlying the claim violate[d] 18 U.S.C. § 1591.” *Doe v. Kik Interactive, Inc.*, No. 20-cv-60702, 2020 WL 5156641, at 14 (S.D. Fla. Aug. 31, 2020).

platform Salesforce.²³⁹ In *Does #1 through #90 v. Salesforce.com, Inc.*,²⁴⁰ the plaintiffs alleged that Salesforce facilitated sex trafficking by designing and implementing a customized online infrastructure tailored for Backpage.com's business operations despite knowing that Backpage.com engaged in illegal activity.²⁴¹ The court, applying Section 230, held that because Backpage.com was a third-party user of Salesforce's platform and Salesforce did not create the specific content at issue, the platform could not be held liable.²⁴² In dismissing this lawsuit, the court found that because the plaintiffs filed under a state cause of action rather than the newly created Section 1595 federal cause of action, the SESTA/FOSTA exception did not apply.²⁴³

Elsewhere, in *Doe v. Facebook, Inc.*,²⁴⁴ a Texas judge denied multiple motions by defendant Facebook to dismiss a pending lawsuit alleging that the site breached its duty to warn of the risk that children using its platforms may be lured by pimps into prostitution.²⁴⁵ The plaintiffs are suing for negligence, gross negligence, and statutory damages—three causes of action that existed before SESTA/FOSTA passed—under a state statute allowing recovery from “persons who engage in trafficking or knowingly or intentionally benefit from such traffic.”²⁴⁶ They argue that Facebook profits from using the data it collects to promote interactions between users and that those efforts have connected minors to sexual predators.²⁴⁷ Rather than pursuing recovery for third-party communications, these plaintiffs seek to impose liability for Facebook's failure to warn potential victims and for knowingly facilitating and benefitting from the sex trade.²⁴⁸ While the court has not yet ruled on the merits of this case, it is noteworthy that the plaintiffs were able to survive Section 230 dismissal despite not bringing any cause of action under the SESTA/FOSTA exceptions.²⁴⁹

239. See Order Sustaining Defendant's Demurrer to the Second Amended Complaint and Dismissing Action with Prejudice, *Does #1 through #90, v. Salesforce.com, Inc.*, No. CGC-19-574770 (Cal. Super. Ct., S.F. Cty. Oct. 3, 2019) [hereinafter *Salesforce.com Dismissal*].

240. No. CGC-19-574770 (Cal. Super. Ct., S.F. Cty. Oct. 3, 2019).

241. See Plaintiffs' Original Complaint for Damages (with Jury Demand) at 4, 14–15, *Does #1 through #90*, No. CGC-19-574770 [hereinafter *Salesforce.com Complaint*].

242. See *Salesforce.com Dismissal*, *supra* note 239, at 4–6.

243. See *id.* at 6–7.

244. No. 2018-69816 (Tex. Dist. Ct., Harris Cty. May 22, 2019).

245. See Order Denying Defendants' Motion to Dismiss at 2–3, *Doe v. Facebook*, No. 2018-69816.

246. See *id.* at 2.

247. *Id.*

248. *Id.*

249. See Jack Nicas, *Sex Trafficking via Facebook Sets Off a Lawyer's Novel Crusade*, N.Y. TIMES (Dec. 3, 2019), <http://www.nytimes.com/2019/12/03/technology/facebook-lawsuit-section-230.html> [https://perma.cc/J7ZY-8ZN2]. The same attorney has also filed suit against email marketing service Mailchimp.com for its role in promoting an online forum to a trafficker to sell his sex-trafficking victim. See Alex Kantrowitz, *New Lawsuit Alleges Mailchimp Facilitated Sex Trafficking*, BUZZFEED NEWS (Dec. 3, 2019, 7:12 PM), <http://www.buzzfeednews.com/article/alexkantrowitz/new-lawsuit-alleges-mailchimp-facilitated-sex-trafficking> [https://perma.cc/2FVC-WS22].

III. DISCUSSION

SESTA/FOSTA, though well-intentioned, is flawed. Its vague language and harsh penalties have had a chilling effect on internet speech.²⁵⁰ In Part III.A, this Comment observes that critics' concerns that SESTA/FOSTA would lead to a deluge of frivolous litigation were likely overstated. Part III.B then explains how the instinct for platforms to overmoderate has negative consequences on the internet generally. Building on these observations, Part III.C argues that Congress should amend SESTA/FOSTA and offers two proposals for such amendments.

A. Critics' Fears About Unrestrained Litigation Were Overstated

The absence of any significant criminal prosecutions or civil judgments under SESTA/FOSTA indicates that early concerns that the law would lead to a litigation bonanza were misguided.²⁵¹ According to critics, the greatest risk of SESTA/FOSTA was that it would lead to an unmanageable deluge of civil lawsuits, creating devastating financial liability.²⁵² Yet there has not been any observable increase in Section 1591 or Section 2421A prosecutions or Section 1595 civil lawsuits to date.²⁵³ In fact, the pending cases against Facebook in Texas were brought under existing state causes of action rather than SESTA/FOSTA.²⁵⁴ Similarly, the California court dismissed the *Salesforce.com, Inc.* case because the plaintiffs specifically did not bring their claim under Section 1595.²⁵⁵

One could infer that, because platforms have chosen to self-moderate and remove offensive material themselves, there are simply fewer opportunities for plaintiffs to bring suits or for prosecutors to file charges. To date, the statute has not spurred a litigation bonanza, and it has not led to increased prosecution for online sex trafficking.²⁵⁶ It also has not caused any significant, sustained decrease in commercial sex ads of sex-trafficking victims.²⁵⁷ This leaves observers with the legitimate question: What is this law for?

B. SESTA/FOSTA Has Caused Platforms To Overmoderate

Congress passed Section 230 to correct the "moderators' dilemma" created by the *Cubby* and *Prodigy* cases.²⁵⁸ It believed that the pre-Section 230 environment gave companies two equally problematic choices: either heavily moderate user content and ensure nothing offensive slipped through the cracks or stop moderating at all to avoid

250. See *supra* Part II.C for a discussion on the effect the shutdown of various online forums used by sex workers.

251. See *supra* Part II.D for a discussion of the litigation resulting from SESTA/FOSTA.

252. See *supra* Part II.B.4 for a summary of the arguments against SESTA/FOSTA.

253. See *supra* Part II.D.

254. See *supra* notes 244–249 and accompanying text; see also Order Denying Defendant's Motion to Dismiss, *supra* note 245.

255. See *supra* notes 239–243 and accompanying text.

256. See *supra* Part II.D.

257. See *supra* Part II.C.2 and accompanying text.

258. See *supra* Part II.A and accompanying text.

“knowledge” of their users’ posts.²⁵⁹ SESTA/FOSTA removes Section 230’s shield and forces companies to make that same binary choice.²⁶⁰

The ways companies such as Craigslist and Cloudflare reacted to SESTA/FOSTA show a tendency in this current environment to err on the side of overmoderation.²⁶¹ These moves may seem positive to those who believe the internet should be less welcoming to sex workers and who see any decrease in visible sex trafficking as a positive. Yet they represent a sweeping shift in the way users are allowed to interact with each other on the internet. Platforms operating in sex-work-adjacent spaces have already demonstrated that they value avoiding litigation or civil penalties over thoughtful moderation.²⁶² Sites that provided resources and refuge for sex workers have chosen to limit their capabilities rather than continue to cultivate a safe environment for those users to thrive.²⁶³ This instinct toward self-censorship is concerning and, if left unchecked, will continue to erode the availability of online spaces for marginalized groups. Moreover, because the financial threat to create these types of spaces remains high,²⁶⁴ it is doubtful new entrants and smaller platforms will step in to take their place.

C. *SESTA/FOSTA Should be Amended*

It is clear that perpetrators should be held accountable for online sex trafficking. It is equally clear that SESTA/FOSTA has, thus far, failed to accomplish that goal. As it stands, this law has been an ineffective method of holding sex traffickers—and the platforms that enable them—liable for their conduct²⁶⁵ while being an effective method of censoring sexual content on the internet.²⁶⁶ Those who believe limiting sexual content on the internet also limits instances of sex trafficking improperly conflate visibility and victimization.²⁶⁷ There is little evidence that this law has had any significant impact on the number of sex-trafficking victims writ large,²⁶⁸ despite there being some evidence that commercial sex ads for trafficking victims may have temporarily decreased.²⁶⁹

At the same time, strict moderation under SESTA/FOSTA has proved dangerous to the vulnerable communities Congress intended to help.²⁷⁰ The incentive for platforms to overmoderate likely resulted from the fact that SESTA/FOSTA did not affect the sword

259. See *supra* Part II.A.1 and accompanying text for an explanation of how intermediary liability was applied to the internet before Section 230.

260. See *supra* Part II.B.2.c for a discussion of the version of SESTA/FOSTA that was signed into law.

261. See *supra* Parts II.C.3, II.C.4.

262. See *supra* Parts II.C.3, II.C.4.

263. See *supra* Part II.C.3.

264. See *supra* notes 159–160 and accompanying text.

265. See *supra* Part II.D.

266. See *supra* Part II.C for examples of SESTA/FOSTA’s effect on sex work, commercial sex ads, and online resources both for sex workers and in general.

267. For a more thorough discussion about the differences between consensual and non-consensual sex work see, for example, Heidi Tripp, Comment, *All Sex Workers Deserve Protection: How FOSTA/SESTA Overlooks Consensual Sex Workers in an Attempt To Protect Sex Trafficking Victims*, 124 PENN. ST. L. REV. 219 (2019).

268. See *supra* Part II.C.1.

269. See *supra* Part II.C.2.

270. See *supra* Parts II.C.3, II.C.4.

provided under Section 230(c)(2)(A).²⁷¹ While the law removed the shield provided under Section 230(c)(1), platforms remain insulated from liability for injuries to users that occur during good-faith efforts to remove offending content.²⁷² In other words, users cannot challenge a website's decision to delete a post, even if its subject matter is protected by the First Amendment.²⁷³ Under the current law, when faced with a choice to remove a suspect post or leave it, websites know that removal is the only decision guaranteed to avert a lawsuit.²⁷⁴ The resulting incentive structure is arguably worse than the pre-Section 230 environment. Before, companies had a choice between strict moderation and avoiding moderation altogether. Today, the law protects one decision but not the other, tipping the scales in favor of strict moderation.

SESTA/FOSTA already provides an affirmative defense for activity in jurisdictions where prostitution is legal.²⁷⁵ Platforms should also be able to raise an affirmative defense when they engage in reasonable moderation efforts or take steps to remedy illegal content of which they become aware.²⁷⁶ This affirmative defense would not be available to online platforms that encourage or deliberately turn a blind eye to sex-trafficking ads or related activities.²⁷⁷

As a policy matter, grants of immunity are used in the tort system to encourage specific behaviors.²⁷⁸ Under Section 230, as originally written, Congress used immunity as a way to encourage platforms to engage in self-moderation.²⁷⁹ For various reasons, it is clear that immunity alone failed as a means of restricting online sex trafficking.²⁸⁰ Yet it also appears that removing immunity altogether has had little impact on the number of commercial sex ads and instances of sex trafficking generally.²⁸¹ The statute's drafters and supporters have repeatedly stated that they believe SESTA/FOSTA is narrowly targeted to apply solely to companies that actively engage in sex trafficking.²⁸² Yet the way platforms have reacted to the law indicates, at best, that its boundaries are unclear or, at worst, that these legislators were mistaken about the law they had written. Explicitly clarifying what does and does not constitute "knowledge" under this statute will go a long way to clarify the law and ensure it truly is narrowly tailored.

271. See 47 U.S.C. § 230(c)(2)(A) (2018) (providing an affirmative defense for providers of interactive computer services when they make good-faith efforts to screen offensive material).

272. See *id.*

273. See *id.*

274. See *id.* For instances in which websites have removed content from their platforms to proactively prevent a lawsuit, see *supra* Part II.D.

275. Allow States and Victims To Fight Online Sex Trafficking Act of 2017 (SESTA/FOSTA), Pub. L. No. 115-164, § 3(a)(e), 132 Stat. 1253, 1254 (2018) (codified as amended at 18 U.S.C. § 2421A(e) (2018)).

276. Danielle Keats Citron & Benjamin Wittes, *The Problem Isn't Just Backpage: Revising Section 230 Immunity*, 2 GEO. L. TECH. REV. 453, 469 (2018).

277. *Id.*

278. See Howard A. Latin, *Problem-Solving Behavior and Theories of Tort Liability*, 73 CALIF. L. REV. 677 (1985), for a discussion of ways that imposition of liability can be used to modify behavior.

279. See 141 CONG. REC. 22,044-46 (1995) (statement of Rep. Cox).

280. See *supra* Part II.B.1.

281. See Kessler, *supra* note 204.

282. See S. REP. NO. 115-199, at 4 (2018).

One approach would mirror the language used in SESTA/FOSTA's existing affirmative defense under the Mann Act for defendants operating in jurisdictions where the promotion or facilitation of prostitution is legal. Such a defense could state:

It shall be an affirmative defense to a charge of violating subsection (a)²⁸³ or subsection (b)(1)²⁸⁴ where the defendant proves, by a preponderance of the evidence, that it engages in good-faith efforts to monitor its site for violative content and to remove such content when it is made aware of it.

Mitigating the risk associated with potential criminal prosecution by creating a clear affirmative defense would soften the incentive for platforms to preemptively remove suggestive, but not illegal, content.

However, this language alone would not address the potential for civil penalties. The lower standard of proof for civil liability means challenges are easier to prove and more likely to be successful. The risk of financial liability as a result of a plaintiff's successful lawsuit is likely a significant driver of platforms' behavior.²⁸⁵ To account for those incentives, legislators should consider revising Section 230 itself to carve out a specific exception for platforms that engage in good-faith moderation.

Under the original House FOSTA proposal, websites that made good-faith attempts to remove or restrict offending materials from their sites would have lacked the *intent* to promote sex trafficking that is required to face liability.²⁸⁶ That language seems to suggest that companies that tried to thoughtfully moderate their platforms could still rely on a Section 230 defense or at least could deny having the specific intent required to face liability under the law. While Section 230(c)(2) provides a good-faith provision,²⁸⁷ SESTA/FOSTA explicitly provides that Section 230 has no effect on criminal prosecutions under the Mann Act which includes no affirmative defense for good faith.²⁸⁸

283. IN GENERAL.—Whoever, using a facility or means of interstate or foreign commerce or in or affecting interstate or foreign commerce, owns, manages, or operates an interactive computer service (as such term is defined in defined in section 230(f) the Communications Act of 1934 (47 U.S.C. 230(f))), or conspires or attempts to do so, with the intent to promote or facilitate the prostitution of another person shall be fined under this title, imprisoned for not more than 10 years, or both.

18 U.S.C. § 2421A(a) (2018) (footnote omitted).

284. AGGRAVATED VIOLATION.—Whoever, using a facility or means of interstate or foreign commerce or in or affecting interstate or foreign commerce, owns, manages, or operates an interactive computer service (as such term is defined in defined in section 230(f) the Communications Act of 1934 (47 U.S.C. 230(f))), or conspires or attempts to do so, with the intent to promote or facilitate the prostitution of another person and—
(1) promotes or facilitates the prostitution of 5 or more persons . . . shall be fined under this title, imprisoned for not more than 25 years, or both.

18 U.S.C. § 2421A(b)(1) (2018) (footnote omitted).

285. See John A. Siliciano, *Corporate Behavior and the Social Efficiency of Tort Law*, 85 MICH. L. REV. 1820, 1821 (1987).

286. See Allow States and Victims To Fight Online Sex Trafficking Act of 2017 (FOSTA), H.R. 1865, 115th Cong. § 3(a)(a) (as reported by H. Comm. on the Judiciary, Feb. 20, 2018).

287. 47 U.S.C. § 230(c)(2) (2018).

288. Allow States and Victims To Fight Online Sex Trafficking Act of 2017 (SESTA/FOSTA), Pub. L. No. 115-164, § 4(a)(5), 132 Stat. 1253, 1254 (2018) (codified as amended at 47 U.S.C. § 230(e)(5)(C)); see also 18 U.S.C. 2421A (2018). The only affirmative defense allowed under Section 2421A is for defendants in jurisdictions where “the promotion or facilitation of prostitution is legal.” *Id.* § 2421A(e).

In addition to proposing an affirmative defense for good-faith moderation, this Comment recommends that the statute be amended to specifically state that a platform cannot be presumed to have knowledge of sex trafficking solely because it engages in monitoring. Under this standard, “knowledge” would require something more—such as actual knowledge or constructive knowledge in the form of user complaints or notification from law enforcement.

D. Legislators Should Use Caution when Enacting Additional 230 Amendments

The most striking feature of SESTA/FOSTA’s consequences has been their breadth. Fear of liability under the law has led to significant consequences for non-sex-trafficking or prostitution-related online content.²⁸⁹ Further, there is evidence that the law has actually made it harder for law enforcement to locate offenders and rescue victims.²⁹⁰ Despite those consequences, some legislators and commenters have looked at SESTA/FOSTA as a template for future legislation to target drug trafficking, online terrorist propaganda,²⁹¹ “liberal bias,”²⁹² and child pornography.²⁹³ They see the law’s broad impact as a success and see additional amendments as a way to penetrate Section 230’s strong shield.²⁹⁴ However, those legislators should tread lightly, as it is likely these proposals would suffer from the same shortcomings as SESTA/FOSTA.

The SESTA/FOSTA model has already demonstrated how attempts to hold platforms legally accountable for their users’ posts can backfire by silencing already marginalized communities.²⁹⁵ Further, this model of regulation encourages platforms to limit their users’ speech rather than undertake thoughtful moderation.²⁹⁶ Given the nature of drug regulations, attempts to monitor platforms that host drug-related content are likely to have even more catastrophic effects on free speech. While sex trafficking is illegal nationwide and prostitution is prohibited in almost every state, each state has its own unique drug laws.²⁹⁷ Further, terrorism facilitated through online platforms can be difficult to spot and is so intertwined with issues of free speech that the consequences of a SESTA/FOSTA-like regulation would be essentially impossible to predict. The

289. See *supra* Part II.C.4.

290. See *supra* notes 193–196 and accompanying text.

291. See *supra* notes 180–186.

292. See *supra* note 10 for a brief analysis of legislative proposals aimed at curbing unjust censorship online.

293. See *supra* notes 187–190 and accompanying text.

294. See *supra* Part II.B.5.

295. See *supra* Part II.C.

296. See *supra* Part III.C.

297. “Sex work” is a multibillion dollar industry that encompasses a wide range of legal and illegal sexual services, “including pornography, stripping, phone and internet sex, and sexual services obtained in brothels, massage parlors, through escort services, or on the street.” *Prostitution and Sex Work*, 14 GEO. J. GENDER & L. 553, 553–54 (2013). “Prostitution” is generally defined as “the exchange of sexual activity for money or other financial compensation.” *Id.* at 555–56. While prostitution is prohibited in almost every state, many forms of sex work are not illegal. *Id.* at 556–57 (noting there are several counties in Nevada where prostitution is legal but highly regulated). Further, many activities that fall under the umbrella of sex work—including pornography and communications between sex workers—expressly do not fall under the general definition of prostitution. See *id.* at 553–58.

complicated nature of these regulations would lead to even greater uncertainty and likely more censorship on the internet.

IV. CONCLUSION

SESTA/FOSTA sets the internet back twenty years by holding platforms liable for knowingly hosting content related to sex trafficking. Victims of sex trafficking undoubtedly deserve justice, but this law is a solution to the wrong problem. It isolates vulnerable individuals from their communities while failing to have the desired impact on instances of sex trafficking. If left as is, SESTA/FOSTA threatens to change the way people interact on the internet permanently, all without accomplishing its goals.

This Comment discussed the impact SESTA/FOSTA has had since it was passed and proposed one way the statute could be amended to better serve its goals. Creating an affirmative defense for platforms that can show they have some moderation procedures in place would narrow the scope of this law and limit its unintended consequences. As legislators continue to debate newer and more sweeping Section 230 carve-outs, they should consider the lessons of SESTA/FOSTA and proceed with caution.