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Notes

ON FOSTA AND THE FAILURES OF PUNITIVE SPEECH RESTRICTIONS

Emily Morgan

ABSTRACT—The Allow States and Victims to Fight Online Sex Trafficking Act (FOSTA) has provoked criticism from free-speech advocates, people involved in the commercial sex trade, everyday internet users, and scholars who deem the Act dangerous and ineffective. This Note helps to explain how such a controversial law came to be. Indeed, FOSTA is part of a legacy of failed attempts at reforming laws to comport with feminist goals—in this case, ending online sex trafficking and providing relief for sex-trafficking survivors, a group that consists largely of women and other marginalized people. But FOSTA, like its predecessors, fails to provide real relief to its intended beneficiaries. Instead, it falls into the trap of punitiveness by prioritizing punishing offenders over providing meaningful relief for sex-trafficking survivors. By shifting the focus away from punitiveness and toward actual aid, this Note proposes a solution that helps sex-trafficking survivors without endangering free internet speech, consensual sex workers, or others currently affected by FOSTA's speech restrictions. This solution accords with both First Amendment doctrine and much of the feminist consensus on improving the lives of women, girls, and other marginalized communities.

AUTHOR—J.D. Northwestern University Pritzker School of Law, 2020; B.A. Oberlin College, 2016. Thanks go to Professor Deborah Tuerkheimer for her guidance and advice on the first versions of this piece and to all of the wonderful *Northwestern University Law Review* editors from Volumes 114 and 115 that provided invaluable feedback and edits on this Note.

"*While currently the impact of FOSTA/SESTA is felt most acutely by those of us participating in the commercial sex trade, this bill affects everyone—escorts are just the canaries in the coal mine trying to make our warning call before it's too late*."

—Lucy Khan[†]

INTRODUCTION

After months of public controversy, yet near unanimous congressional approval, the Allow States and Victims to Fight Online Sex Trafficking Act (FOSTA)[1] became law on April 11, 2018.[2] FOSTA modified existing law in

[†] Lucy Khan, *Against FOSTA/SESTA: One Canary's Cry from Inside the Coal Mine*, SLIXA BLOG: EXPERIENCE (Feb. 4, 2019), https://www.slixa.com/blog/experience/against-fosta-sesta-one-canarys-cry-from-inside-the-coal-mine [https://perma.cc/XW89-F5B9] (arguing that FOSTA's main effect so far has been to promote censorship of sexual speech online rather than ending sex trafficking).

[1] Allow States and Victims to Fight Online Sex Trafficking Act (FOSTA), Pub. L. 115-164, 132 Stat. 1253 (2018) (codified as amended at 18 U.S.C. § 2421A & 47 U.S.C § 230). FOSTA also includes key provisions of the Stop Enabling Sex Traffickers Act (SESTA). The Act is commonly known both as "FOSTA" and "FOSTA–SESTA." *See, e.g.*, 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), https://www.vox.com/culture/2018/4/13/17172762/fosta-sesta-backpage-230-internet-freedom [https://perma.cc/6BJC-WFML]. For the sake of brevity, and in accordance with the Act's Short Title, this Note refers to the Act simply as FOSTA.

[2] FOSTA; *see also* World Without Exploitation, *Effective Lobbying Starts with Listening: How Survivor Voices Drove the Fight for Passage of FOSTA-SESTA*, MEDIUM (May 3, 2018),

two ways to help combat online sex trafficking. First, FOSTA amended § 230 of the Communications Decency Act (CDA),[3] abrogating previous interpretations that construed § 230 as an impervious shield for internet service providers, even those who aided sex traffickers.[4] Second, FOSTA amended the Mann Act, an anti-prostitution and antitrafficking law,[5] to provide for civil and criminal liability against an online service provider that "promotes or facilitates . . . prostitution" or operates their services "in reckless disregard of the fact that such conduct contributed to sex trafficking."[6] This amendment further provides a right to civil recovery and restitution for sex-trafficking victims against these providers.[7]

Despite its noble intentions, FOSTA rapidly drew fire for its impact on internet speech. Although "advertising" is the only speech explicitly mentioned in the Act,[8] FOSTA chills internet speech by curtailing immunity for online service providers and providing civil and criminal liability for promoting and facilitating prostitution or acting with "reckless disregard" for sex trafficking.[9] Groups that advocate for free speech and decriminalizing sex work, like the Woodhull Freedom Foundation[10] and Human Rights Watch,[11] argue that the Act impermissibly chills their First Amendment rights, including the First Amendment rights of sex workers, sex-work and antitrafficking advocates, and online speakers in general.[12] Even

https://medium.com/world-without-exploitation/effective-lobbying-starts-with-listening-ec0b3abc3cc1 [https://perma.cc/FE4A-E2CF].

[3] FOSTA, sec. 2, § 230.

[4] *See, e.g.*, Jane Doe No. 1 v. Backpage.com, LLC, 817 F.3d 12, 23 (1st Cir. 2016) (finding that § 230 shields online service providers from liability for criminal content posted by third parties); *see also* Eric Goldman, *The Ten Most Important Section 230 Rulings*, 20 TUL. J. TECH. & INTELL. PROP. 1, 2–9 (2017) (describing § 230, which shields internet service providers from claims based on third-party content, and important § 230 cases that illustrate the provision's breadth).

[5] FOSTA, sec. 3, § 2421A; *see also* Danielle Citron & Quinta Jurecic, *FOSTA: The New Anti-Sex-Trafficking Legislation May Not End the Internet, but It's Not Good Law Either*, LAWFARE (Mar. 28, 2018, 2:41 PM), https://www.lawfareblog.com/fosta-new-anti-sex-trafficking-legislation-may-not-end-internet-its-not-good-law-either [https://perma.cc/9VYZ-YK5Z] (describing FOSTA's provisions and amendments to the CDA and the Mann Act).

[6] FOSTA, sec. 3, § 2421A(b).

[7] *Id.*

[8] *Id.* sec. 2, § 230 ("[S]ection 230 . . . was never intended to provide legal protection to websites that unlawfully promote and facilitate prostitution and websites that facilitate traffickers in *advertising* the sale of unlawful sex acts with sex trafficking victims . . . ." (emphasis added)).

[9] *Id.* sec. 3, § 2421A(b) (prohibiting use of websites to promote or facilitate prostitution and other acts "in reckless disregard" of sex trafficking).

[10] Complaint for Declaratory & Injunctive Relief ¶ 15, Woodhull Freedom Found. v. United States, 334 F. Supp. 3d 185 (D.D.C. 2018) (No. 1:18-cv-01552) [hereinafter Complaint].

[11] *Id.* ¶ 16.

[12] *See id.* ¶¶ 2, 5, 52–53; *see also infra* Section I.C.

nonadvocacy websites, such as Craigslist, have made their fears known to users and eliminated certain sections of their sites.[13]

Advocates of decriminalizing sex work, sex workers themselves,[14] and even some antitrafficking activists have denounced FOSTA for its effects on the online commercial sex trade.[15] Many decriminalization advocates, for example, fear that their work to improve the lives of a disenfranchised, marginalized, and predominately female community of sex workers will subject them to liability under FOSTA.[16] Moreover, upon FOSTA's passage, websites that advocates and sex workers utilized to exchange information about resources for people in or seeking to leave the sex trade either shut down or banned all sex-work-related content for fear of liability.[17] Losing these resources, which provided information about free services available to sex workers and sex-trafficking victims, as well as warnings about violent pimps and clients,[18] also resulted in sex workers losing the ability to screen clients and work indoors rather than on the streets, a much riskier location.[19]

In sum, FOSTA makes sex work more dangerous. Restricting speech related to commercial sex puts people engaged in sex work—including those

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[13] Complaint, *supra* note 10, ¶ 17 (stating that Craigslist had stopped allowing advertisements by a massage therapist); Romano, *supra* note 1 (noting that Craigslist eliminated its "Personals" section due to concerns it might be illegal under FOSTA).

[14] Although FOSTA uses the term "prostitution," this Note uses the term "sex work" where possible in order to be more inclusive of the various forms of sex-related work affected by FOSTA's prohibitions and because many involved in the sex industry prefer this term. *Prostitution and Sex Work*, 14 GEO. J. GENDER & L. 553, 553 n.1 (2013).

[15] *See* Melissa Gira Grant, *Proposed Federal Trafficking Legislation Has Surprising Opponents: Advocates Who Work with Trafficking Victims*, APPEAL (Jan. 26, 2018), https://theappeal.org/proposed-federal-trafficking-legislation-has-surprising-opponents-advocates-who-work-with-bf418c73d5b4 [https://perma.cc/KFB2-X6KR]; Romano, *supra* note 1; *see also* Complaint, *supra* note 10, ¶¶ 73–76 (describing the Woodhull Freedom Foundation's fear of liability based on its political activities regarding decriminalizing sex work and improving sex workers' lives); *id.* ¶¶ 102–10 (describing activist and advocate Alex Andrews's use of the internet to advocate for sex workers' well-being and provide resources for them); Khan, *supra* note † (describing how FOSTA has led to internet censorship and affected her personally as an entrepreneur in the sex industry).

[16] *See* Complaint, *supra* note 10, ¶¶ 110–20 (describing Andrews's fear of liability based on the removal of § 230 immunity).

[17] *See* Emily McCombs, *'This Bill Is Killing Us': 9 Sex Workers on Their Lives in the Wake of FOSTA*, HUFFPOST (May 15, 2018), https://www.huffingtonpost.com/entry/sex-workers-sesta-fosta_us_5ad0d7d0e4b0edca2cb964d9 [https://perma.cc/YP2H-XKFR] (describing FOSTA's impact on resources for sex workers).

[18] *See id.*; *see also* Complaint, *supra* note 10, ¶¶ 103–10 (describing "Rate That Rescue," a website that helps sex workers find resources to improve their health and welfare).

[19] McCombs, *supra* note 17. FOSTA brought increased scrutiny to online platforms that sex workers used to screen and find interested clients; as one woman who works as an escort stated, FOSTA is "forcing me to go back to the streets, walking up and down trying to find clients . . . . [Clients] know this bill is in effect, and trust me, they are taking full advantage of it by being more aggressive." *Id.*

trafficked into sex work—at an elevated risk of physical harm. Indeed, since FOSTA's passage, some law enforcement agencies have noted increased violence against sex workers.[20] This effect is particularly troubling given pimps' propensity to abuse sex workers, transforming their work from arguably voluntary to fully coerced, thereby turning these workers into sex-trafficking victims.[21] Thus, rather than ending sex trafficking as intended,[22] FOSTA makes it easier for traffickers to victimize already vulnerable people.[23]

Overall, despite FOSTA's important goals of combating online sex trafficking and allowing sex-trafficking survivors to obtain financial recovery, it is far from an ideal solution. Notably, FOSTA presents First Amendment concerns regarding its chilling effect on internet speech.[24] Indeed, FOSTA's speech restrictions pose concerns for all kinds of internet speakers; it sets a precedent that could be used to support further speech restrictions in the future.[25] What is more, by significantly curtailing online speech, the law's broad provisions have effectively silenced sex workers' online speech, as well as online speech advocating for decriminalizing prostitution and other forms of sex work.[26] These workers now face threats

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[20] *See* Ted Andersen, Sarah Ravani & Megan Cassidy, *The Scanner: Sex Workers Returned to SF Streets After Backpage.com Shut Down*, S.F. CHRON. (Oct. 15, 2018, 11:45 AM), https://www.sfchronicle.com/crime/article/The-Scanner-Sex-workers-returned-to-SF-streets-13304257.php [https://perma.cc/9V77-6MPC].

[21] *See* McCombs, *supra* note 17 (describing how pimps have begun recruiting formerly independent sex workers); *see also* Crystal A. Jackson & Jenny Heineman, *Repeal FOSTA and Decriminalize Sex Work*, 17 CONTEXTS 74, 75 (2018) (arguing that criminalizing all forms of sex work "pushes some sex workers to rely on managers ('pimps') who may be another source of violence or exploitation"); Allison J. Luzwick, *Human Trafficking and Pornography: Using the Trafficking Victims Protection Act to Prosecute Trafficking for the Production of Internet Pornography*, 112 NW. U. L. REV. 355, 366–67 (2017) (arguing that some pimp–worker relationships that begin as consensual become coercive as pimps manipulate, threaten, defraud, and even drug workers into compliance).

[22] H.R. REP. NO. 115-572, pt. 1, at 3 (2018) ("[FOSTA] is designed to combat online sex trafficking . . . ."); *id.* at 5–6 (noting the "traumatic effects" of sex trafficking and that FOSTA will help survivors recover restitution and file civil claims against online service providers who profit from their exploitation in online ads).

[23] *See* Jackson & Heineman, *supra* note 21, at 74; *see also* Luzwick *supra* note 21, at 361, 365, 371 (describing how many individuals are trafficked into performing unconsented pornography and prostitution, often involving relationships that start as consensual and become exploitative).

[24] *See infra* Sections I.A, II.I.C (explaining First Amendment doctrine and FOSTA's implications for free speech).

[25] *See* Eric Goldman, *The Complicated Story of FOSTA and Section 230*, 17 FIRST AMEND. L. REV. 279, 293 (2019) (arguing that FOSTA could be "just the first of a string of new statutory exceptions to section 230" jeopardizing the future of online speech).

[26] *See* Khan, *supra* note † (describing how sex workers have lost their ability to engage in transactions and advocate for themselves online); Complaint, *supra* note 10, ¶¶ 86–92 (explaining Human Rights

to their livelihoods and their lives, with fewer resources than ever that could provide meaningful aid.[27]

In light of these concerns about FOSTA's impact on online speech and its practical effects on sex trafficking, one might wonder how this law came into being at all. In approaching this question, this Note adds to the growing scholarly conversation around FOSTA by situating it at the intersection of First Amendment doctrine and feminist legal scholarship. FOSTA is part of a legacy of attempts by activists and lawmakers to enact laws with seemingly feminist or otherwise protective aims that violate the First Amendment.[28] But like its predecessors, FOSTA fails to achieve its primary goals because it enacts content-restrictive provisions, the burden of which falls largely on already vulnerable groups. In this case, those vulnerable groups include sex-trafficking survivors and consensual sex workers—a group consisting mostly of women, low-income individuals, people of color, and members of the LGBTQ community.[29]

Part I explores some of the relevant First Amendment doctrine, focusing on previous examples of failed content-based speech restrictions. Part II then describes how FOSTA came to be and the ongoing litigation that may be its undoing. After Part II concludes that FOSTA, although well intentioned, is both unconstitutional and unwise, Part III proposes the creation of a common fund for survivors of sex trafficking. This solution prioritizes the well-being of survivors without sacrificing free-speech rights or further harming already marginalized groups. Survivors, sex workers, speech advocates, and society at large all deserve better than FOSTA. By focusing on how law can best help victims, rather than how it can punish offenders, it is possible to conceive a constitutional alternative that furthers feminist goals.

Watch's concern that their online decriminalization advocacy efforts would be seen as facilitating prostitution).

[27] *See* Complaint, s*upra* note 10, ¶¶ 102–20 (discussing FOSTA's potential censorship of online resources for sex workers and trafficking victims); McCombs, *supra* note 17 (describing the loss of online resources for many sex workers, pushing them into dangerous conditions on the streets).

[28] *See infra* Section I.C.

[29] *See* David Eichert, *"It Ruined My Life": FOSTA, Male Escorts, and the Construction of Sexual Victimhood in American Politics*, 26 VA. J. SOC. POL'Y & L. 201, 217–18, 244 (2019) (describing the prevalence of gay men in sex work and noting the need for further research in particular to address the needs of nonbinary and genderqueer sex workers); Jackson & Heineman, *supra* note 21, at 75 (discussing the disproportionate effect that prohibition of sex work has on low-income and other marginalized populations); Lura Chamberlain, Note, *FOSTA: A Hostile Law with a Human Cost*, 87 FORDHAM L. REV. 2171, 2210–11 (2019) (describing "at-risk" populations for sex trafficking, including lower-income, undereducated, and (often younger) LGBTQ people); Grant, *supra* note 15 (noting the impact of FOSTA on vulnerable groups of sex workers).

I. BACKGROUND PRINCIPLES: THE FIRST AMENDMENT AND THE FEMINIST PROJECT IN CONFLICT

FOSTA and its flaws sit at the intersection of First Amendment doctrine and feminist jurisprudence. This Part thus briefly explores these two areas of law to help clarify how FOSTA fits into the existing legal landscape. It begins by describing a few relevant First Amendment doctrines that hint at FOSTA's potential downfall. Next, it explores the goals and pitfalls of feminist legislation, specifically legislation arising from the anti-rape and anti-pornography movements. Finally, this Part illustrates the conflict that developed between First Amendment doctrine and protective legislation. In such conflicts, First Amendment principles triumphed.[30]

A. A First Amendment Primer

At its core, the First Amendment prohibits Congress from enacting laws that infringe on the public's freedom of speech.[31] Although the plain text of the Amendment states that "Congress shall make no law . . . abridging the freedom of speech,"[32] the Supreme Court has never interpreted this as an absolute bar on all restrictions potentially affecting speech.[33] The Supreme Court has, however, embraced a wider scope of speech as constitutionally protected over time. The trend toward increased speech protection began in the early to mid-twentieth century[34] and has persisted in recent years.[35] Commercial speech, for example, moved from a lower tier to a higher level of protection throughout the end of the twentieth and early twenty-first centuries.[36] Of course, First Amendment jurisprudence is a nuanced and ever-

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[30] *See, e.g.*, Am. Booksellers Ass'n v. Hudnut, 771 F.2d 323, 325 (7th Cir. 1985), *aff'd*, 475 U.S. 1001 (1986).

[31] U.S. CONST. amend. I. Although not relevant for the purposes of this Note, the First Amendment has also been incorporated to apply to the states through the Fourteenth Amendment. *See* Gitlow v. New York, 268 U.S. 652, 666 (1925) (assuming that the First Amendment's prohibitions on restrictions of the freedom of speech and of the press apply to protect against laws by state governments through the Fourteenth Amendment).

[32] U.S. CONST. amend. I.

[33] *See* United States v. Stevens, 559 U.S. 460, 468–69 (2010) (noting that historically the First Amendment has not prohibited laws against defamation, fraud, obscenity, or certain speech integral to or inciting imminent criminality).

[34] *See* United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938) (explaining that "[t]here may be a narrower scope for operation of the presumption of constitutionality when legislation appears on its face" to implicate individual rights, such as free speech).

[35] *See* Joel M. Gora, *Free Speech Matters: The Roberts Court and the First Amendment*, 25 J.L. & POL'Y 63, 65 (2016) (arguing that the Roberts Court has "created a sort of free speech 'Camelot'").

[36] *See* Troy L. Booher, *Scrutinizing Commercial Speech*, 15 GEO. MASON U. C.R.L.J. 69, 71–72 (2004) (describing the Court's increasing protection of commercial speech).

evolving area of law, the full contours of which lie beyond the scope of this Note.[37]

Two key First Amendment principles are particularly relevant for this Note: (1) a given statute cannot be overbroad in its restriction of speech,[38] and (2) where the government regulates the content of speech—as opposed to its time, place, or manner—the regulation is almost certainly invalid.[39] These are the attacks leveled at FOSTA, and they are also the kind of attacks that have successfully invalidated other legislation promoted by feminists in the past.[40]

1. Overbreadth

A regulation of speech is overbroad if it reaches a significant portion of speech that is protected by the First Amendment.[41] Thus, even if the regulation at issue only intends to target a narrow category of unlawful speech, to the extent it can be construed as reaching protected speech, it will fall victim to the overbreadth doctrine. This overbreadth doctrine therefore provides a lower threshold for First Amendment challenges than challenges based on other constitutional provisions,[42] largely because of concerns about the chilling effect such regulations have on speech.[43] Even if a statute does not directly target constitutionally protected speech and might not be enforced to abridge it, if people fear that it will, they will be less likely to

[37] *See generally* Thomas I. Emerson, *Toward a General Theory of the First Amendment*, 72 YALE L.J. 877, 877 (1963) (describing First Amendment doctrine as confusing and "unsatisfactory"). *See also* Jane R. Bambauer & Derek E. Bambauer, *Information Libertarianism*, 105 CALIF. L. REV. 335, 338–39 (2017) (noting that many scholars today critique First Amendment jurisprudence as "bereft of principle").

[38] *See* Ashcroft v. Free Speech Coal., 535 U.S. 234, 244 (2002) (finding that a regulation of online speech was overly broad based on its impact on constitutionally protected speech).

[39] *See* Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989) (noting that time, place, and manner restrictions may be constitutional so long as they do not impermissibly target speech's content, are justified by a significant state interest, and provide alternative speech mechanisms).

[40] *See infra* Section I.C.

[41] *Free Speech Coal.*, 535 U.S. at 244.

[42] *See* Anna Windemuth, *The First Challenge to FOSTA Was Dismissed—Along with the First Amendment's Unique Standing Doctrine*, MEDIA FREEDOM & INFO. ACCESS CLINIC (Dec. 27, 2018), https://law.yale.edu/mfia/case-disclosed/first-challenge-fosta-was-dismissed-along-first-amendments-unique-standing-doctrine [https://perma.cc/9X39-3F6B].

[43] *See* Laird v. Tatum, 408 U.S. 1, 12–13 (1972) ("[G]overnmental action may be subject to constitutional challenge even though it has only an indirect effect on the exercise of First Amendment rights.").

speak, thus chilling speech.[44] As such, if the Court construes a statute as overbroad on its face, it will invalidate it.[45]

To compound the far-reaching effect of the overbreadth doctrine, the Supreme Court embraces a broad scope of speech within First Amendment protection.[46] Indeed, the Court has only established a few categorically unprotected forms of speech.[47] Some scholars have advocated for interpreting the First Amendment to encompass only political speech or speech that conveys something of scientific, literary, artistic, or educational value.[48] Yet the Court has continuously reaffirmed that speech need not have any political, artistic, educational, or scientific value to be protected by the First Amendment.[49] Further, the government cannot escape invalidation of a regulation by promising not to enforce it to the fullest possible extent; this does nothing to negate the overly broad reach of statute's text, which is what is at issue in an overbreadth challenge.[50] The overbreadth doctrine, then, is one potent weapon against speech regulations.

2. Content-Based Restrictions and Exceptions

A content-based regulation is one where the government seeks to prohibit speech based on what the speaker is saying.[51] For example, a law that prohibits discussing the President would be content-discriminatory.[52] Content-based restrictions are presumed invalid and thus subject to strict

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[44] *See* Leslie Kendrick, *Speech, Intent, and the Chilling Effect*, 54 WM. & MARY L. REV. 1633, 1637 (2013) (describing how people may be afraid to engage in protected speech if they are uncertain about whether it is criminalized).

[45] *See, e.g.*, *Free Speech Coal.*, 535 U.S. at 256 (invalidating portions of the Child Pornography Prevention Act as overbroad on their face).

[46] *See* Gora, *supra* note 35, at 65; *see also* Robert L. Kerr, *Can Postmodernist Analysis Better Explain the First Amendment Jurisprudence of the Roberts Court?*, 4 U. BALT. J. MEDIA L. & ETHICS 1, 7–8 (2014) (arguing that the Roberts Court's First Amendment jurisprudence is eclectic and notable for including speech as constitutionally protected where scholars had argued it likely would not do so).

[47] These include obscenity, defamation, fraud, speech that is "integral to criminal conduct," and speech that incites imminent criminal conduct. United States v. Stevens, 559 U.S. 460, 468–69 (2010).

[48] *See* Jeffrey M. Shaman, *The Theory of Low-Value Speech*, 48 SMU L. REV. 297, 333–39 (1995) (describing scholarly debate on whether the Court should distinguish between "high-value" and "low-value" speech).

[49] *See id.* at 338 (describing the Supreme Court's affirmation of "equality of expression"); *Stevens*, 559 U.S. at 479–80.

[50] *Stevens*, 559 U.S. at 480–81.

[51] *See* Hill v. Colorado, 530 U.S. 703, 722–23 (2000) (describing "viewpoint-based regulation[s]" and "regulation of the subject matter of messages" as constitutionally "objectionable form[s] of content-based regulation").

[52] *See id.* at 723 n.31 ("The First Amendment's hostility to content-based regulation extends not only to restrictions on particular viewpoints, but also to prohibition of public discussion of an entire topic." (citations omitted)).

scrutiny.[53] To survive strict scrutiny and overcome this presumption, the government must show the restriction is narrowly tailored to serve a compelling government interest.[54] That is, the law must use the "least restrictive means" to advance an important governmental goal to avoid chilling constitutionally protected speech.[55] The test for content discrimination therefore overlaps with the overbreadth doctrine where both rules disfavor regulations that touch upon too much protected speech, which includes the vast majority of speech. Notably, this presumption of invalidity becomes even stronger when the content-based restriction appears to discriminate against specific viewpoints.[56] Returning to the earlier example, a law specifically prohibiting speech critical of the President would almost certainly be unconstitutional.[57]

Historically, however, the Supreme Court has allowed content-based regulation of a few unprotected areas of speech, including libel, fighting words, obscenity, incitement, and speech integral to carrying out a crime.[58] These exceptions have been clarified and narrowed over time.[59] With respect to obscenity, for example, the Court in *Reno v. ACLU*[60] invalidated two provisions of the Communications Decency Act (CDA) on First Amendment grounds using the strict scrutiny standard.[61] Although the Court found the

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[53] *See* Reno v. ACLU, 521 U.S. 844, 885 (1997).

[54] Ashcroft v. Free Speech Coal., 535 U.S. 234, 261, 263 (2002) (O'Connor, J., dissenting).

[55] *See Reno*, 521 U.S. at 874 (a burden on speech "is unacceptable if less restrictive alternatives would be at least as effective in achieving the legitimate purpose" of the statute).

[56] *See* Am. Booksellers Ass'n v. Hudnut, 771 F.2d 323, 330–34 (7th Cir. 1985), *aff'd*, 475 U.S. 1001 (1986). In an opinion affirmed by the Supreme Court, the Seventh Circuit Court of Appeals struck down an anti-pornography statute based on its viewpoint discrimination. The court specifically found that the legislation, which prohibited degrading depictions of women, constituted impermissible viewpoint discrimination by attempting to impose a nonmisogynistic mindset on pornographers and viewers. *Id.*

[57] *See Hill*, 530 U.S. at 711 (a state's regulation may not favor one point of view over another). Of course, that the Court itself has not always agreed on what constitutes a content-based restriction somewhat complicates this analysis. *See, e.g.*, *id.* at 743–44 (Scalia, J., dissenting) (arguing that a regulation becomes an impermissible content-based restriction based on its greater context; Justice Scalia would have held a regulation on demonstrations outside of abortion clinics unconstitutional because the context of such a regulation indicates that it necessarily targets anti-abortion protests).

[58] *See* R.A.V. v. City of St. Paul, 505 U.S. 377, 427–28 (1992) (Stevens, J., concurring in the judgment) (describing categories of unprotected and less-protected speech); Miller v. California, 413 U.S. 15, 24–25 (1973) (setting out a three-part test for qualifying speech as obscene and therefore unprotected); Giboney v. Empire Storage & Ice Co., 336 U.S. 490, 498 (1949) (finding that the First Amendment does not protect speech "used as an integral part of conduct in violation of a valid criminal statute").

[59] *See R.A.V.*, 505 U.S. at 428 (Stevens, J., concurring in the judgment) (noting that the categorical exclusions from complete protection have narrowed over time).

[60] 521 U.S. 844.

[61] *Id.*

CDA's prohibition on transmitting "obscene" materials to minors valid,[62] it found prohibitions on transmitting "indecent" and "patently offensive" materials too expansive to withstand strict scrutiny.[63] It did not matter that this legislation was intentionally modeled after the Supreme Court's own obscenity test, which allows regulation of works designed to "appeal to the 'prurient' interest" in sex, lacking "serious literary, artistic, political, or scientific value," and depicting explicit sexual conduct in a way that is "patently offensive."[64]

Another First Amendment exception relevant to FOSTA is speech integral to criminal conduct, which the Court has construed particularly narrowly.[65] Speech falls into this category when it is inextricably intertwined with criminal conduct such that the two feed into each other.[66] Child pornography is one example: pornographic pictures of children are unprotected speech because they can only be obtained through criminal child sexual abuse.[67] As such, laws prohibiting child pornography do not violate the First Amendment.

A related category of unprotected speech is incitement of imminent lawless action.[68] States and the federal government may impose restrictions on preparations for actual, imminent criminal conduct, including speech.[69] As an example, laws against soliciting child pornography fall under this exception because selling and purchasing—although commercial speech—imminently incite the crimes of making, possessing, or distributing child pornography.[70] In contrast, speech that merely advocates lawbreaking but does not directly advance a criminal act is not within this narrow exception.[71]

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[62] *Id.* at 883.

[63] *Id.* at 874, 885.

[64] *Id.* at 873; *see also* Miller v. California, 413 U.S. 15, 24–25 (1973) (delineating a three-prong test for what constitutes obscenity).

[65] *See* Giboney v. Empire Storage & Ice Co., 336 U.S. 490, 498 (1949).

[66] *See id.*

[67] *See* New York v. Ferber, 458 U.S. 747, 759 (1982) ("The distribution of photographs and films depicting sexual activity by juveniles is intrinsically related to the sexual abuse of children . . . .").

[68] *See* Brandenburg v. Ohio, 395 U.S. 444, 448–49 (1969) (per curiam) (holding advocacy for violence is different than inciting imminent violence and thus cannot be regulated).

[69] *See id.* at 448 (noting that advocacy for or "abstract teaching" about the moral need for violent insurrection "is not the same as preparing a group for violent action and steeling it to such action" (quoting Noto v. United States, 367 U.S. 290, 297–98 (1961))).

[70] *See* United States v. Williams, 553 U.S. 285, 298–99 (2008) (upholding prohibitions on the solicitation and pandering of child pornography under *Brandenburg*'s incitement exception doctrine).

[71] *See supra* Section I.C (discussing courts' condemnation of "thought control" statutes).

For example, activists may not be prohibited from advocating for violent revolution as long as their speech is not actually inciting imminent violence.[72]

In sum, the First Amendment protects the vast majority of speech. But, as the next Section explains, at the same time that the Court was expanding the First Amendment's reach, feminist scholars and activists were advocating for very different legal reforms.

B. Emerging Feminist Legislation and Its Challenges

Just as the Supreme Court started broadening the First Amendment's purview, a burgeoning feminist movement began gaining traction in the United States.[73] It is difficult to provide a single, accurate definition of "feminism"; although usually united by broad principles against misogyny, the feminist movement has never been monolithic.[74] Diverse factions emerged during the 1960s and 1970s, including radical feminists who sought to end male hegemony,[75] formal-equality theorists who focused on achieving legal equality for women,[76] Marxist feminists who promoted rethinking socialism with an eye toward gender liberation,[77] womanists and Black feminists who focused on the racism and misogyny experienced by Black women in particular,[78] and numerous others.[79]

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[72] *See Brandenburg*, 395 U.S. at 447 ("[T]he constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action." (footnote omitted)).

[73] *See* Rosemarie Tong, *Women, Pornography, and the Law*, 73 ACADEME 14, 14–16, 19–20 (1987) (describing the growing feminist, anti-pornography, and anti-rape movements in the United States during the 1970s and 1980s); Rebecca Benson, Note, *Pornography and the First Amendment:* American Booksellers v. Hudnut, 9 HARV. WOMEN'S L.J. 153, 156 (1986) (describing the growing feminist anti-pornography movements of the 1970s).

[74] *See* Emily L. Sherwin, *The Limits of Feminism*, 9 J. CONTEMP. LEGAL ISSUES 249, 249 (1998) (noting that "there is no consensus about what feminism entails or even what its objective should be" but that it has "produced a number of different responses to the question what should be done on behalf of women").

[75] *See* Ellen Willis, *Radical Feminism and Feminist Radicalism*, *in* THE ESSENTIAL ELLEN WILLIS 229, 231 (Nona Willis Aronowitz ed., 1984) (describing the early radical feminist movement).

[76] Sherwin, *supra* note 74, at 249–50.

[77] *See* IMELDA WHELEHAN, MODERN FEMINIST THOUGHT: FROM THE SECOND WAVE TO 'POST-FEMINISM' 45 (1995) (describing how Marxist feminists sought to fuse class analysis with an understanding of the patriarchal system).

[78] *See* Patricia Hill Collins, *What's in a Name? Womanism, Black Feminism, and Beyond*, 26 BLACK SCHOLAR 9, 9–13 (1996) (describing the debate between womanism and Black feminism and the early womanist and Black feminist movements in the United States).

[79] *See* Loretta Kensinger, *In(Quest) of Liberal Feminism*, 12 HYPATIA 178, 178–80 (1997) (describing various categories of feminist thought and critiquing the usefulness of categorizing them at all).

While different groups embraced various approaches to achieve their goals, most relevant for the purposes of this Note were the efforts of some feminists in promoting anti-pornography and anti-rape agendas through legislation.[80] These scholars and activists believed cultural attitudes could not shift fast enough, so misogynistic practices needed to be criminalized to help transform society.[81] But legislation requires majority approval by lawmakers. Thus, feminists seeking to advance legislation to improve women's lives found themselves in an unlikely partnership with law-and-order politicians and cultural conservatives.[82] Law-and-order politics became mainstream throughout the 1970s and 1980s and emphasized tougher policing practices and sentencing for crimes in order to deter and obtain retribution for criminal conduct.[83] Around the same time, cultural conservatives increasingly influenced mainstream politics through promotion of what they saw as traditional Christian values.[84] Anti-rape feminist groups and law-and-order politicians could agree on the need to stigmatize rape as a serious crime; anti-pornography feminists and cultural conservatives could agree on the dangerousness of mainstream

[80] The anti-pornography movement was largely associated with radical feminists, such as scholars Andrea Dworkin and Catharine MacKinnon, who saw pornography not as an expression of sexual freedom, but as a manifestation of violence against women by men. *See* Catharine A. MacKinnon, *Pornography, Civil Rights, and Speech*, 20 HARV. C.R.-C.L. L. REV. 1, 16–17 (1985) (characterizing pornography as a manifestation of violent misogyny). While the anti-rape movement started out as a more radical movement associated with left-wing politics, it gradually became more mainstream as reformers began to see law not solely as an obstacle to reform but as a potential tool to be used in generating social reform. *See* ROSE CORRIGAN, UP AGAINST A WALL: RAPE REFORM AND THE FAILURE OF SUCCESS 29–32 (2013) (describing anti-rape activists' shift toward utilizing legal reforms to combat rape in the United States).

[81] *See* Benson, *supra* note 73, at 155–59 (describing how and why anti-pornography feminists turned to legislation when it became clear that extralegal interventions were not working); CORRIGAN, *supra* note 80, at 31–32 (arguing that feminists began supporting legal reforms as a comprehensive approach to social reform against rape).

[82] *See* Clay Calvert & Robert D. Richards, *Porn in Their Words: Female Leaders in the Adult Entertainment Industry Address Free Speech, Censorship, Feminism, Culture and the Mainstreaming of Adult Content*, 9 VAND. J. ENT. & TECH. L. 255, 258–61 (2006) (comparing and describing the Republican George W. Bush Administration's "campaign against pornography" with Professor MacKinnon's feminist criticism of pornography (footnote omitted)); *see also* Wendy Kaminer, *Feminists Against the First Amendment*, ATLANTIC (Nov. 1992), https://www.theatlantic.com/magazine/archive/1992/11/feminists-against-the-first-amendment/305051 [https://perma.cc/6Ku9-7NUS] (describing the unlikely anti-pornography coalition between radical feminists, like Professors Dworkin and MacKinnon, with conservatives, including Phyllis Schlafly and televangelist Jerry Falwell).

[83] *See* HEATHER SCHOENFELD, BUILDING THE PRISON STATE: RACE AND THE POLITICS OF MASS INCARCERATION 93–96 (2018) (describing how law-and-order politics started with the Nixon Administration and grew to new heights of popularity during the Reagan and Bush Sr. Administrations).

[84] *See* Kaminer, *supra* note 82 (describing the rise of the "New Right" in the early 1980s).

pornography.[85] But despite these surface-level agreements, feminists had very different understandings of the true causes of rape and pornography, seeing them as societal problems relating to male hegemony.[86] Their apparent allies—law-and-order politicians and cultural conservatives—saw both pornography and rape more as individual moral failings deserving of punishment.[87] As a result, the legislation that developed to address these issues was not so much pro-women—in the way feminists envisioned—as it was pro-punishment.[88]

As Professor Marie Gottschalk argues, although feminists succeeded in drawing attention to rape and domestic violence, law enforcement officials and politicians saw these issues not as societal problems, but as criminal acts by specific, violent individuals.[89] Rather than supporting a broader anti-misogyny movement, law-and-order officials adopted policies aimed at increasing arrests and convictions of rapists and abusers.[90] Feminist organizations wanted to increase awareness of the prevalence of rape and domestic abuse and, in doing so, gained state and federal funding to support rape crisis centers.[91] But this funding came with a catch—rape and domestic violence victims in state-funded shelters were often required to file police reports and comply with law enforcement officials before receiving any aid.[92]

Reporting requirements might seem beneficial for ending rape and domestic violence by catching perpetrators. However, evidence indicates

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[85] *See* MARIE GOTTSCHALK, THE PRISON AND THE GALLOWS: THE POLITICS OF MASS INCARCERATION IN AMERICA 124–26 (2006) (describing how law-and-order politicians came to support rape-law reforms); Kaminer, *supra* note 82 (describing how cultural conservatives and anti-pornography feminists agreed on pornography as something to be quashed).

[86] GOTTSCHALK, *supra* note 85, at 122, 124–27 (describing how feminists and lawmakers differed in their views of rape, and how ultimately lawmakers' views predominated because feminist-led rape crisis centers needed government funds).

[87] *See* Kaminer, *supra* note 82 (describing how radical feminists opposed pornography as discrimination against women, while cultural conservatives opposed pornography based on concerns of "changing sexual mores and the decline of the traditional family").

[88] *See* GOTTSCHALK, *supra* note 85, at 131 (noting that "[w]omen's groups entered into some unsavory coalitions and compromises that bolstered the law-and-order agenda and reduced their own capacity" to further their own feminist goals); *see also* Krishna de la Cruz, Comment, *Exploring the Conflicts Within Carceral Feminism: A Call to Revocalize the Women Who Continue to Suffer*, 19 SCHOLAR 79, 95–96 (2016) (noting that domestic violence policies have prioritized punishing offenders over helping domestic violence victims, the majority of which have historically been women).

[89] GOTTSCHALK, *supra* note 85, at 128 (describing how feminists' social movement against rape was coopted and transformed into another part of law-and-order politicians' war on crime).

[90] *See id.* at 129–31.

[91] *Id.* at 124–25 (describing how state and federal actors became involved in feminist anti-rape movements).

[92] *Id.* at 126.

that reporting requirements can discourage victims from coming forward, thus preventing them from receiving the attached aid and hindering law enforcement.[93] Victims might not report for fear of retaliation from their attackers, or they may simply lack the economic or emotional support necessary to endure an investigation and trial.[94] Further, people from communities disproportionately targeted by punitive policing tactics might be extremely reluctant to turn to police at all.[95] But of course, people from these communities—particularly people of color—often found themselves erased by the narratives feminists and lawmakers promoted. Instead, "carceral feminist" legal reforms fed into the growing system of mass incarceration that plundered marginalized communities.[96] So, although feminists were able to draw attention to rape and domestic violence and stigmatize them as offenses, their efforts fell short when it came to actually supporting victims, especially those most in need of aid.

Anti-pornography feminists faced rather different challenges in advancing legal reforms. Feminist scholars such as Professors Andrea Dworkin and Catharine MacKinnon linked violent pornography specifically to violence against women.[97] But as with the anti-rape and domestic-violence movements, people outside the feminist movement—specifically, the lawmakers that would pass and members of the public that would support anti-pornography legislation—were more inclined to see pornography as an individual moral failing than as a widespread manifestation of misogyny.[98] Although some scholars found a causal connection between viewing violent

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[93] *See id.* at 129, 160 (suggesting that reporting requirements are problematic due to their ignorance of the plight of marginalized communities that face discriminatory treatment by police).

[94] *See* Linda S. Williams, *The Classic Rape: When Do Victims Report?*, 31 SOC. PROBS. 459, 459 (1984).

[95] *See* GOTTSCHALK, *supra* note 85, at 129, 160 (describing how anti-rape reformers ignored concerns of Black women and Latinas about overly punitive practices); *see also* de la Cruz, *supra* note 88, at 98–99 (arguing that women of color and immigrant women face increased, unjustified arrest rates and other mistreatment from police, hindering their ability to report and cooperate with law enforcement).

[96] *See* Elizabeth Bernstein, *The Sexual Politics of the "New Abolitionism,"* 18 DIFFERENCES 128, 143 (2007) (describing "carceral feminism," through which feminists achieved rape-law reform through tapping into punitive impulses, thus contributing to mass incarceration); *see also* de la Cruz, *supra* note 88, at 80–81 (defining carceral feminism and the resultant "gender and racial discrimination in the legal system").

[97] Benson, *supra* note 73, at 156–61 (describing the legislation proposed by Professors MacKinnon and Dworkin).

[98] *See generally* Tong, *supra* note 73, at 14 (describing cultural conservatives' view of pornography as an individual moral failing as in contrast to anti-pornography feminists' belief that pornography is a widespread symptom of systemic misogyny).

pornography and sexual violence,[99] feminists struggled to convince people of the connection between pornography and misogyny.[100] As a result, they found themselves allied with cultural conservatives who opposed pornography, not for its violence and misogyny, but for its sexual content, which fell outside of their views of acceptable expressions of sexuality.[101]

Although anti-pornography legislation failed to take hold at state and federal levels in the United States, ordinances made headway in some cities.[102] But jurisdictions that had these rules did not always enforce them the way feminists had hoped. Specifically, enforcement targeted pornography that fell outside mainstream views of acceptable sexual conduct rather than works that depicted rape and violence against women.[103] The ordinances that passed in the United States were either vetoed or enjoined on First Amendment grounds before they could be enforced,[104] but in Canada, where similar rules existed, the content most susceptible to anti-pornography enforcement was actually erotic content geared toward the LGBTQ community.[105] This was the opposite of the result anti-pornography feminists intended, as they viewed pornography portraying heterosexual violence by men against women as most harmful.[106] These enforcement practices

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[99] *See* Lynne Segal, *Pornography and Violence: What the 'Experts' Really Say*, 36 FEMINIST REV. 29, 29 (1990) (arguing that although there might be some evidence linking pornography and violent attitudes, it is inconclusive).

[100] *See, e.g.*, Ellen Willis, *Feminism, Moralism, and Pornography*, 38 N.Y.L. SCH. L. REV. 351, 351–52 (1993) (criticizing the anti-pornography movement's claims as factually incorrect and patronizing).

[101] *See id.* at 358 (arguing that the feminist anti-porn movement began to align itself with cultural conservatives who otherwise disavowed feminism).

[102] Benson, *supra* note 73, at 153 n.2, 155 n.6 (noting that Indianapolis and Minneapolis passed versions of the Dworkin and MacKinnon ordinance, and several other cities and federal lawmakers considered but ultimately declined to adopt similar pornography regulations).

[103] *Compare* Christopher N. Kendall, *Gay Male Pornography After* Little Sisters Book and Art Emporium*: A Call for Gay Male Cooperation in the Struggle for Sex Equality*, 12 WIS. WOMEN'S L.J. 21, 21–24 (1997) (describing how Canada's obscenity laws aimed at pornography were enforced disparately against gay and lesbian pornography), *with* Andrea Dworkin, *Against the Male Flood: Censorship, Pornography, and Equality*, 8 HARV. WOMEN'S L.J. 1, 10–13 (1985) (arguing for banning pornography as material that depicts and promotes extreme violence against women).

[104] *See* Benson, *supra* note 73, at 155 n.6 (describing how an ordinance passed by a city council was vetoed by the mayor and other proposed legislation was defeated); Am. Booksellers Ass'n v. Hudnut, 771 F.2d 323, 334 (7th Cir. 1985) (affirming the district court's injunction against and invalidation of an anti-pornography ordinance), *aff'd*, 475 U.S. 1001 (1986).

[105] *See* Kendall, *supra* note 103, at 21–24 (describing the discriminatory enforcement practices that led to the censorship of pornography targeting gay and lesbian audiences but not pornography created to appeal to straight men); *see also* Little Sisters Book & Art Emporium v. Canada, 2000 SCC 69, [2000] 2 S.C.R. 1120, paras. 112–23 (Can.) (affirming the lower court's findings that gay and lesbian bookstores suffered disproportionate effects from the censorship laws).

[106] *See, e.g.*, MacKinnon, *supra* note 80, at 16–20 (arguing against the proliferation of mainstream pornography that depicts women as victims of sexual violence by men).

demonstrate the problems of adopting content-restrictive measures: they are enforced based on existing societal values and stigmas, such as those against LGBTQ people, rather than with the mindsets of their feminist drafters.[107] The ordinances also received substantial criticism from other feminist scholars, who saw them as harmful to free speech and patronizing to women.[108]

As the next Section explains, such concerns were short-lived. These ordinances and other protective legislation premised on restricting harmful speech soon ran headlong into the First Amendment.

C. The Pornography Cases: Protective Legislation on the Chopping Block

This Section explores some feminist-driven legislation that fell prey to First Amendment challenges, as well as other protective legislation that, while not explicitly feminist, was based on a similar rationale of restricting harmful speech to protect vulnerable groups. This Section thus begins by analyzing the invalidation of Indianapolis's anti-pornography ordinance. Next, it explores the invalidation of provisions of the Child Pornography Prevention Act and the Communications Decency Act, both of which sought to restrict harmful internet speech.

1. American Booksellers Association v. Hudnut

In 1984, Indianapolis adopted an anti-pornography ordinance based on the one proposed by Professors Dworkin and MacKinnon.[109] The ordinance targeted pornographic pictures or texts that depicted women—or anyone else—as "sexual objects" being humiliated, physically abused, tortured, raped, or dominated.[110] A variety of distributors and consumers of literature and films challenged the statute as unconstitutional.[111] The ordinance, they alleged, was so overbroad as to proscribe great swaths of constitutionally

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[107] *See* Kendall, *supra* note 103, at 22 (noting that Professors MacKinnon and Dworkin condemned Canada's discriminatory practices); *see also* de la Cruz, *supra* note 88, at 98–102 (describing how laws intended to protect women may be used against them due to law enforcement biases).

[108] *See, e.g.*, Willis, *supra* note 100, at 353 (critiquing the feminist anti-pornography movement); Tong, *supra* note 73, at 19–20 (same).

[109] Indianapolis, Ind., City-County General Ordinance No. 24 (1984); *see also* Benson, *supra* note 73, at 153 n.2 (noting the basis of the ordinance was a model law conceived by Professors Dworkin and MacKinnon and describing surrounding scholarship and the legislative history of the law).

[110] Indianapolis, Ind., City-County General Ordinance No. 24 § 16-3(v) (1984); *see also* Am. Booksellers Ass'n v. Hudnut, 771 F.2d 323, 324 (7th Cir. 1985), *aff'd*, 475 U.S. 1001 (1986).

[111] *Am. Booksellers Ass'n*, 771 F.2d at 326–27.

protected speech,[112] even potentially censoring acclaimed literature, such as the works of William Butler Yeats, James Joyce, D.H. Lawrence, and Homer.[113]

Supporters of the ordinance stressed the connection between depictions of violence against women and viewer attitudes, pointing to some evidence that exposure to violent pornography promotes violent, misogynistic attitudes.[114] Although some supporters argued the ordinance's reach was narrower than what the plaintiffs alleged, not all found its potential inclusion of great literature startling. As Professor MacKinnon argued, if something depicts degradation and abuse of women, "why should it matter that the work has other value?"[115]

The federal courts agreed with the plaintiffs who challenged the ordinance. In *American Booksellers v. Hudnut*,[116] the Seventh Circuit focused on the fact that nearly all speech, even speech that most people find detestable, enjoys constitutional protection.[117] Obscenity, which may be lawfully restricted, constitutes a narrow category of speech, limited to the most sexually graphic, "patently offensive," and otherwise valueless content.[118] Thus, any statute likely to censor content containing any artistic or literary value exceeds obscenity's parameters and violates the First Amendment.[119] Because the anti-pornography ordinance's scope reached content with at least some artistic, literary, or other value, the district court correctly found it overbroad.[120]

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[112] *See id.* at 326–27 (explaining the district court's holding that the ordinance was "vague and overbroad" and noting that plaintiffs collectively had interests in a wide range of material that could be affected by the ordinance).

[113] *Id.* at 325, 327.

[114] *Id.* at 325, 329.

[115] *Id.* at 325 (citing MacKinnon, *supra* note 80, at 21).

[116] 771 F.2d 323 (7th Cir. 1985).

[117] *See id.* at 327–29 (describing the breadth of First Amendment protections and explaining that "above all else, the First Amendment means that government has no power to restrict expression because of its message [or] its ideas " (alteration and omission in original) (quoting Police Dep't of Chi. v. Mosley, 408 U.S. 92, 95 (1972))).

[118] *Id.* at 324; Miller v. California, 413 U.S. 15, 24–26 (1973).

[119] *Am. Booksellers Ass'n*, 771 F.2d at 324, 331–32; *see also Miller*, 413 U.S. at 26 (explaining that "patently offensive" depictions or descriptions of sexual content may still be protected if, at a minimum, they have "serious literary, artistic, political, or scientific value").

[120] The district court held that the ordinance was overbroad. *Am. Booksellers Ass'n*, 771 F.2d at 326. The Seventh Circuit focused on the ordinance's viewpoint-discriminatory nature, specifically finding the ordinance was unconstitutional because it "discriminate[d] on the ground of the content of speech." *Id.* at 325; *see also id.* at 328, 332. The Seventh Circuit also noted that "Indianapolis left out of its definition any reference to literary, artistic, political, or scientific value." *Id.* at 331.

The Seventh Circuit further reasoned that the ordinance's specific prohibition on misogynistic pornography constituted not only a content-based restriction on speech, but also impermissible viewpoint discrimination.[121] The ordinance's intent to address the correlation between violent pornography and violent attitudes itself was unlawful; unpleasant though it may be, filmmakers and erotic novelists have the constitutional right to promote violently misogynistic content and beliefs.[122]

Feminist critics particularly revile this line of reasoning. Why should hatred of women be a protected point of view under the First Amendment?[123] Why would courts act in the best interest of pornographers and violent misogynists? Certainly, such critics make strong normative arguments about the value of restricting the promulgation of violent, misogynistic content, and courts are not always paragons of neutrality.[124] But courts have steadfastly maintained First Amendment protections for distasteful sexual content. As the next Section shows, this includes even lewd content appearing to depict children.

2. Ashcroft v. Free Speech Coalition *and* Reno v. ACLU

Although anti-pornography ordinances failed to gain traction, the federal government did adopt legislation targeting pornography in other ways. About a decade after the Indianapolis ordinance's invalidation, Congress passed the Child Pornography Prevention Act (CPPA).[125] Although not an explicitly feminist project like the anti-pornography ordinance, the CPPA relied on similar logic regarding pornography's effects on viewers' thoughts and actions toward those depicted in it. Specifically, the CPPA prohibited not just actual child pornography, but "virtual child pornography" as well.[126] Virtual child pornography may be created using adult actors that

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[121] *Id.* at 328, 332.

[122] *See id.* at 327–32.

[123] *See, e.g.*, Morrison Torrey, Essay, *Thoughts About Why the First Amendment Operates to Stifle the Freedom and Equality of a Subordinated Majority*, 21 WOMEN'S RTS. L. REP. 25, 26, 28–31 (1999) (describing how courts have used the First Amendment to justify allowing women to suffer harms in order to avoid harms to free speech in society at large, particularly protecting speech primarily used by men).

[124] *See, e.g.*, Trump v. Hawaii, 138 S. Ct. 2392, 2446–47 (2018) (Sotomayor, J., dissenting) (arguing that majority decisions have favored religious neutrality for Christians, as in *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*, but not for Muslims under President Trump's travel ban).

[125] Child Pornography Prevention Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009-26 (codified as amended at 18 U.S.C. §§ 2252A, 2256), *invalidated in part by* Ashcroft v. Free Speech Coal., 535 U.S. 234 (2002).

[126] 18 U.S.C. § 2256(8) (defining "child pornography" to include a "computer-generated image or picture" that "appears to be" or "conveys the impression that the material is . . . of a minor engaging in sexually explicit conduct").

pretend to be minors or using completely computer-generated images.[127] Like the proponents of Indianapolis's ordinance, the lawmakers behind the CPPA believed that cutting off access to material depicting sexual abuse of children—even if it did not actually show any real children—would decrease incidents of child sexual abuse and real child pornography.[128] Just as anti-pornography activists argued that violent, misogynistic pornography stoked violent attitudes toward women, lawmakers thought that images of virtual child pornography could transform otherwise nondangerous viewers into full-fledged pedophiles with "appetites" for real child pornography.[129]

As controversial as adult pornography is, child pornography is universally condemned. The Supreme Court has gone so far as to hold that it is inextricably linked to child sexual abuse and thus completely excluded from First Amendment protection.[130] As such, lawmakers believed that even though the CPPA's virtual child-pornography ban went a step beyond actual child pornography, it would nonetheless pass constitutional muster.[131] It did not.

In *Ashcroft v. Free Speech Coalition*, various producers and distributers of erotic literature and film challenged the CPPA's ban on virtual child pornography under the First Amendment.[132] They pointed to numerous works of literature and film that could be censored as a result of the law, including *Romeo and Juliet* and the Oscar-winning films *American Beauty* and *Traffic*.[133] Although the district court found these arguments unpersuasive, the Ninth Circuit and the Supreme Court found the CPPA provisions overbroad on their face.[134] The provisions swept far too much constitutionally protected speech within their grasp, and the Supreme Court thus affirmed the Ninth Circuit's holding.[135]

Moreover, the Supreme Court, like the Seventh Circuit in *American Booksellers*, expressed concerns over the legislation's attempt to influence

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[127] *See Free Speech Coal.*, 535 U.S. at 241–42 (describing what constituted virtual child pornography under the CPPA).

[128] *Id.*

[129] *Id.* at 241, 253.

[130] *See* New York v. Ferber, 458 U.S. 747, 763–64 (1982) (classifying child pornography as unprotected speech).

[131] *See* Child Pornography Prevention Act of 1996, Pub L. No. 104-208, § 121(1), 110 Stat. 3009-26, -27 (congressional findings regarding the problems with actual and virtual child pornography).

[132] 535 U.S. at 243.

[133] *Id.* at 247–48.

[134] *Id.* at 243–44, 256.

[135] *See id.* at 240, 256 (finding that the CPPA went beyond the compelling interest of preventing child sexual abuse as articulated in *Ferber* and abridged a "substantial amount of lawful speech").

thought and behavior.[136] Violent, misogynistic daydreams and perverse thoughts about children are still merely thoughts and therefore beyond government control.[137] The legislature may only proscribe speech that is integral to or directly incites criminal deeds, not speech that advocates for or imagines criminal behavior.[138]

The Court's holding in this case disturbed politicians and advocates, who saw a correlation between the proliferation of virtual child pornography and the demand for actual child pornography.[139] But the decision was consistent with the Court's First Amendment jurisprudence.[140] The Court had narrowly cabined the parameters of unprotected speech,[141] and the CPPA's provisions went beyond those parameters. Like the Indianapolis ordinance, it could not stand, no matter the good intentions of its legislators.

Similarly, in *Reno v. ACLU*,[142] the Supreme Court invalidated provisions of the Communications Decency Act (CDA) that proscribed the "indecent transmission" of sexually graphic and "patently offensive" images to minors over the internet.[143] Like the Indianapolis ordinance and the CPPA, several CDA provisions sought to restrict the dissemination of harmful

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[136] *Id.* at 253; Am. Booksellers Ass'n v. Hudnut, 771 F.2d 323, 328 (7th Cir. 1985), *aff'd*, 475 U.S. 1001 (1986).

[137] *See Am. Booksellers Ass'n*, 771 F.2d at 330 ("Racial bigotry, anti-semitism, violence on television, reporters' biases—these and many more influence the culture and shape our socialization . . . . [A]ll is protected as speech, however insidious."); *see also* Whitney v. California, 274 U.S. 357, 375–76 (1927) (Brandeis, J., concurring) ("[I]t is hazardous to discourage thought, hope and imagination . . . . [The Framers] eschewed silence coerced by law—the argument of force in its worst form.").

[138] *See Whitney*, 274 U.S. at 376 (seeking to prohibit beliefs is not a valid way to reduce crime). *But see* United States v. Williams, 553 U.S. 285, 299 (2008) (upholding prohibiting pandering or soliciting child pornography under the incitement exception); New York v. Ferber, 458 U.S. 747, 761–62 (1982) (noting that advertising and selling child pornography are integral to producing illegal materials).

[139] *See* Sara C. Marcy, *Banning Virtual Child Pornography: Is There Any Way Around* Ashcroft v. Free Speech Coalition*?*, 81 N.C. L. REV. 2136, 2147–48 (2003) (describing how lawmakers responded to *Free Speech Coalition* by "attempting to strengthen the connection between virtual child pornography and harm to actual children").

[140] Gora, *supra* note 35, at 75–80 (arguing that the Roberts Court has rightfully broadened free speech protections).

[141] *See Ferber*, 458 U.S. at 761–64 (describing child pornography as integral to criminal conduct and unprotected due to its lack of any legitimate value); Brandenburg v. Ohio, 395 U.S. 444, 447–48 (1969) (per curiam) (distinguishing advocacy for violence from actual incitement to violence and protecting the former from government regulation).

[142] 521 U.S. 844 (1997).

[143] Communications Decency Act of 1996, Pub. L. No. 104-104, 110 Stat. 133 (codified as amended at 47 U.S.C. § 223), *invalidated in part by* Reno v. ACLU, 521 U.S. 844 (1997).

imagery to an influential audience, specifically children.[144] But the Supreme Court reasoned that no matter the statute's intentions, it was overbroad because it was not narrowly tailored to *only* apply to obscene material.[145] Even though this CDA provision was modeled after the Supreme Court's test, which described obscenity as content specifically designed to appeal to "the prurient interest," features "patently offensive" sexual conduct, and otherwise lacks any other value, the provision was still not narrow enough.[146] That is, material can technically be offensive and violently or sexually graphic without being utterly valueless and obscene, and thus, unprotected. So, the Court struck down the CDA provisions.[147]

The Indianapolis ordinance, the CPPA's ban on virtual child pornography, and the CDA's prohibition on transmitting graphic material to minors were based on similar logic: images and descriptions of graphic sexual content damage viewers, leading them down paths of sexual depravity or violence that feminists, law-and-order politicians, and cultural conservatives condemned for their own reasons.[148] But the First Amendment proscribes legislation premised on controlling thoughts, even if those thoughts tend toward criminality. Thus, the coalition of feminists, cultural conservatives, and lawmakers lost the battle against pornography. Nevertheless, this coalition would go on to take up arms once again against a new societal ill, creating legislation farther away from the old "thought control" model, but still rooted in restricting content. As the next Part argues, this is how FOSTA came to be.

II. FOSTA IN CONTEXT AND IN COURT

This Part describes FOSTA's origins and the ongoing litigation against it. First, it explores § 230 of the Communications Decency Act (CDA) and courts' generous interpretation of it, which allowed online service providers to avoid liability for profiting from online sex trafficking. Second, it

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[144] 47 U.S.C. § 223(a)(1)(B)(ii) (prohibiting the knowing transmission of obscene materials or child pornography to minors using a telecommunications device); *id.* § 223(d) (prohibiting knowingly transmitting patently offensive material over the internet to minors).

[145] *Reno*, 521 U.S. at 873–74 (finding the statute exceeded the narrow confines of unprotected obscenity).

[146] Miller v. California, 413 U.S. 15, 24 (1973).

[147] *Reno*, 521 U.S. at 873–74.

[148] *See* GOTTSCHALK, *supra* note 85, at 124–26 (describing how feminists saw rape and domestic violence as widespread social issues while lawmakers focused on them as individual crimes); Kaminer, *supra* note 82 (explaining how radical feminists opposed pornography as discrimination against women, while cultural conservatives opposed pornography based on concerns of "changing sexual mores and the decline of the traditional family").

describes FOSTA's immediate impact on sex workers, advocates, free-speech proponents, and sex-trafficking survivors. Finally, it assesses FOSTA's defensibility under the First Amendment, concluding that FOSTA is unwise and likely unconstitutional.

A. FOSTA's Origins: Section 230 and the Backpage Investigation

Reno v. ACLU was not the only significant case dealing with the CDA. While the Supreme Court invalidated CDA provisions that penalized the knowing transmission or display of "indecent" or "patently offensive" materials to minors,[149] another provision, § 230, shielded internet service providers from liability for unlawful conduct committed by its users.[150] The catalyst for § 230 was *Stratton Oakmont, Inc. v. Prodigy Services Co.*,[151] wherein a New York state court found an online service provider liable for defamation claims arising from content posted by a third party on its website.[152] Lawmakers feared that such cases would hamper the development of the internet—online service providers would either excessively censor user content or not get into the internet business at all if they thought they might be liable for someone else's unlawful conduct.[153] Section 230 thus promoted the public's interest in the free exchange of ideas by shielding online service providers from punishment for their users' misdeeds.

Although § 230 originally emphasized the need for "good-faith" monitoring by online service providers to protect unwitting users from graphic sexual or violent content, courts interpreted it as an all-inclusive safe harbor.[154] Courts held that § 230 provided broad immunity for all providers that were merely distributing third-party content rather than creating content

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[149] *Reno*, 521 U.S. at 844.

[150] *See generally* Andrew P. Bolson, *Flawed but Fixable: Section 230 of the Communications Decency Act at 20*, 42 RUTGERS COMPUT. & TECH. L.J. 1, 1, 8 (2016) (describing the purposes of § 230 of the CDA, including shielding internet service providers from liability).

[151] No. 31063/94, 1995 WL 323710 (N.Y. Sup. Ct. May 24, 1995), *superseded by statute*, 47 U.S.C. § 230, *as recognized in* Shiamili v. Real Est. Grp. of N.Y., Inc., 952 N.E.2d 1011 (N.Y. 2011).

[152] *Id.*; *see* Bolson, *supra* note 150, at 3–6 (describing how § 230 functioned as a response to *Stratton Oakmont*).

[153] Bolson, *supra* note 150, at 6–8.

[154] 47 U.S.C. § 230(c); *see also id.* § 230(b)(3)–(5) (describing Congress's intent to incentivize development of filtering and other technologies to protect children from exposure to inappropriate materials); *see also* Mary Graw Leary, *The Indecency and Injustice of Section 230 of the Communications Decency Act*, 41 HARV. J.L. & PUB. POL'Y 553, 563–64 (2018) (describing how § 230 was intended to provide limited immunity for internet service providers).

themselves.[155] Although most of these initial cases dealt with defamation,[156] courts later interpreted the statute to provide broad immunity against other claims as well.[157] Eventually, a line of cases established online service providers as immune from claims regarding the advertisement of sex trafficking and child sexual exploitation on their sites.[158] These cases and their unsettling results captured the attention of feminists, antitrafficking activists, and eventually lawmakers.

In *Jane Doe No. 1 v. Backpage.com, LLC*,[159] for example, the minor plaintiffs brought state and federal law claims against Backpage for hosting posts advertising them for commercial sex.[160] The First Circuit upheld a grant of summary judgment in favor of the defendant Backpage, a website infamous for allowing advertisements for commercial sex, including those posted by traffickers.[161] The First Circuit followed the logic of courts around the country, interpreting § 230 to provide broad immunity for online service providers and emphasizing congressional intent to protect providers and

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[155] *See, e.g.*, Zeran v. Am. Online, Inc., 129 F.3d 327, 331 (4th Cir. 1997) (holding that the defendant online service provider could not be liable for exercising "a publisher's traditional editorial functions" under § 230 where it failed to remove defamatory content in a timely manner); Doe v. Am. Online, Inc., 718 So. 2d 385 (Fla. Dist. Ct. App. 1998) (finding that § 230 preempted state civil law claims against the defendant and that holding it liable would be contrary to Congress's stated intent of promoting internet development). *But see* Fair Hous. Council v. Roommates.com, 521 F.3d 1157, 1164–65 (9th Cir. 2008) (holding that Roommates.com could be liable under § 230 where it functioned as a content provider by requiring users to enter information into the site which illegally discriminated based on race, sexual orientation, and other factors).

[156] *See, e.g.*, *Zeran*, 129 F.3d at 331 (holding defendant service provider not liable in a defamation case); Blumenthal v. Drudge, 992 F. Supp. 44 (D.D.C. 1998) (granting AOL's motion for summary judgment in a defamation case based on § 230); *see also* Leary, *supra* note 154, at 576 ("[C]ase law was built on this idea of broad immunity, derived frequently from defamation cases.").

[157] *See* Leary, *supra* note 154, at 573 (noting that § 230 can be held to protect websites from claims related to stalking and nonconsensual pornography); *id.* at 575 (describing § 230 immunity for online service providers against claims of distributing child pornography); *id.* at 576 & n.113.

[158] *See id.* at 578–82; *see also* Jane Doe No. 1 v. Backpage.com, LLC, 817 F.3d 12 (1st Cir. 2016) (holding sex-trafficking survivors could not hold Backpage owners civilly liable for profiting from exploitative advertisements of them as minors posted on their website); *see also* Backpage.com, LLC v. Dart, 807 F.3d 229 (7th Cir. 2015) (finding Cook County Sheriff could not target credit card companies doing business with Backpage in order to prevent it from coordinating commercial sex transactions).

[159] 817 F.3d 12.

[160] *Id.* at 16. These claims included violations of federal law, specifically the Trafficking Victims Protection Reauthorization Act (TVPRA), which provides a civil remedy for victims of trafficking against traffickers, and copyright laws prohibiting the unauthorized use of one's photograph, as well as state law claims for human trafficking, unfair and deceptive trade practices by Backpage, and unauthorized use of personal images by Backpage for commercial gain. *Id.* at 17, 28.

[161] *See id.* at 29.

avoid chilling internet speech.[162] The court further emphasized that it was a job for Congress—not courts—to change § 230 so that sex-trafficking survivors like the plaintiffs could recover against Backpage.[163]

Bolstered by a coalition of feminists, religious leaders, and law-and-order politicians,[164] Congress took heed. The Senate Permanent Subcommittee on Investigations began examining online sex trafficking in 2015, specifically targeting Backpage and its hosting of sex-trafficking-related advertisements.[165] In 2017, the committee made a formal report of its findings: Backpage's moderators had edited ads hinting at commercial sex with minors by removing banned words to allow the ads to stay up.[166] This active editing actually fell outside of § 230's protection for merely publishing third-party content, so federal officials seized Backpage and shut it down.[167]

Despite the victory against Backpage, Congress decided to tighten § 230's protections to deter future online service providers from engaging in these tactics in an attempt to escape civil or criminal liability.[168] The FOSTA

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[162] *Id.* at 23; *see also* Leary, *supra* note 154, at 575–77 (describing the rise of § 230 immunity for websites that allowed sex-trafficking advertisements).

[163] *See Jane Doe No. 1*, 817 F.3d at 22–23, 29.

[164] *See* Melissa Gira Grant, *Beyond Strange Bedfellows: How the "War on Trafficking" Was Made to Unite the Left and Right*, PUB. EYE, http://feature.politicalresearch.org/beyond-strange-bedfellows [https://perma.cc/5S94-4AGK] (describing how lawmakers were influenced by antitrafficking activists from all along the political spectrum in enacting FOSTA); *see also* Bernstein, *supra* note 96 (describing the alliance between evangelicals, conservative lawmakers, and feminists in the antitrafficking movement in the years prior to FOSTA).

[165] *See* Jonathan O'Connell & Tom Jackman, *Members of Congress Press Sessions to Investigate Sexual Ads at Backpage.com*, WASH. POST (July 13, 2017), https://www.washingtonpost.com/local/public-safety/congresswomen-press-sessions-to-investigate-sexual-ads-at-backpagecom/2017/07/13/99ebaed8-6752-11e7-9928-22d00a47778f_story.html?utm_term=.f5078bf8f64c [https://perma.cc/62B7-56FG].

[166] U.S. SENATE PERMANENT SUBCOMM. ON INVESTIGATIONS, BACKPAGE.COM'S KNOWING FACILITATION OF ONLINE SEX TRAFFICKING 16–21 (2017), https://www.hsgac.senate.gov/imo/media/doc/Backpage%20Report%202017.01.10%20FINAL.pdf [https://perma.cc/N3Y7-HMNF] [hereinafter SUBCOMMITTEE REPORT].

[167] Press Release, U.S. Dep't of Just., Justice Department Leads Efforts to Seize Backpage.com, the Internet's Leading Forum for Prostitution Ads, and Obtains 93-Count Federal Indictment (Apr. 9, 2018) [hereinafter Justice Department Leads Efforts to Seize Backpage.com], https://www.justice.gov/opa/pr/justice-department-leads-effort-seize-backpagecom-internet-s-leading-forum-prostitution-ads [https://perma.cc/G7KG-SX5V] (describing Backpage's seizure by federal law enforcement officials for facilitating prostitution).

[168] FOSTA, Pub. L. 115-164, sec. 2, § 230, 132 Stat. 1253, 1253 (2018); *see also* Tom Jackman, *House Committee Targets Online Sex Trafficking by Amending Mann Act, Puzzling Advocates*, WASH. POST (Dec. 12, 2017, 5:21 PM), https://www.washingtonpost.com/news/true-crime/wp/2017/12/12/house-committee-targets-online-sex-trafficking-by-amending-mann-act-puzzling-

package passed both the House and the Senate with overwhelming bipartisan support,[169] and President Trump signed the bill into law on April 11, 2018.[170] As discussed above, FOSTA amends § 230 to clarify that it does not shield websites that promote or facilitate prostitution or that act with reckless disregard for sex trafficking by allowing advertisements for "unlawful sex acts."[171] It further amends the Mann Act, an existing anti-prostitution law, to provide a right of civil recovery and restitution against internet service providers that promote or facilitate prostitution or recklessly disregard sex trafficking.[172] Despite this apparent bipartisan victory for sex-trafficking survivors, who would ostensibly now be able to hold internet service providers that facilitated their exploitation accountable, public reactions to FOSTA were not uniformly positive.

B. FOSTA's Reality

Although some sex trafficking survivors and advocates hailed FOSTA as a critical step toward achieving justice for survivors and ending sex trafficking,[173] others expressed reservations as to its scope and likely success.[174] Tech companies and free-speech groups spoke out against FOSTA, arguing that it unduly abridges First Amendment rights.[175] Sex workers and decriminalization activists also opposed FOSTA's apparent restrictions on internet speech, arguing that FOSTA would limit their political speech by penalizing the promotion or facilitation of prostitution.[176]

As a preliminary matter, FOSTA's focus on "advertising" does little to assuage these fears; the rest of the Act's broad language clarifies that, while

advocates/?utm_term=.12029d169876 [https://perma.cc/84TQ-7JWD] (describing Congress's attempts to hold websites like Backpage accountable and part of the process of creating FOSTA).

[169] *See H.R. 1865—Allow States and Victims to Fight Online Sex Trafficking Act of 2017*, CONGRESS.GOV, https://www.congress.gov/bill/115th-congress/house-bill/1865/all-actions?overview=closed&q=%7B%22roll-call-vote%22%3A%22all%22%7D [https://perma.cc/ZU8T-S255].

[170] FOSTA; Romano, *supra* note 1.

[171] FOSTA, sec. 2, § 230.

[172] *Id.* sec. 3, § 2421A.

[173] *See, e.g.*, World Without Exploitation, *supra* note 2.

[174] *See* Grant, *supra* note 15 (describing various sex-trafficking survivor–advocates' views opposing FOSTA based on its targeting of prostitution and sex work and its lack of support for victims outside of allowing for civil litigation).

[175] *See* Citron & Jurecic, *supra* note 5; *see also* Note, *Section 230 as First Amendment Rule*, 131 HARV. L. REV. 2027, 2028 (2018) (arguing that § 230 is necessary for fulfilling free-speech values and should be part of the First Amendment rule).

[176] *See* Complaint, *supra* note 10, ¶¶ 76, 91 (describing Woodhull Freedom Foundation's and Human Rights Watch's fears that their political activities advocating for decriminalizing sex work, but not sex trafficking, will render them liable under § 230).

Congress was particularly concerned with sex-trafficking ads, websites that otherwise promote or facilitate prostitution or simply fail to prevent third parties from using their website for trafficking are likewise subject to civil and criminal liability.[177] The Woodhull Freedom Foundation, a human rights group that emphasizes sexual freedom, opposed FOSTA early on, fearing that its online advertisements about a conference featuring speakers advocating for decriminalizing sex work would render it liable under FOSTA.[178] Essentially, Woodhull and other advocates have feared that FOSTA's provisions hamper *all* sex- and sex-work-related speech in violation of the First Amendment.[179]

Although FOSTA has not yet been enforced against advocates, it has incentivized online service providers to restrict perfectly legal speech on their platforms.[180] For example, in December 2018, Tumblr, a popular blogging platform, banned "adult content" in an effort to avoid scrutiny for its users' sex-related posts.[181] Its goal was legitimate and certainly warranted based on Tumblr's continuous issues in ridding its site of illegal child pornography and other distasteful fare.[182] Unfortunately, the algorithms that the site used to execute this mission incorrectly identified countless innocent posts as pornographic, including art, images of political protests, and utterly innocuous images of fully clothed women.[183] A private company like Tumblr may lawfully limit the content it hosts, and it has no duty to do so competently. Still, this provides one example of the kind of speech harms that FOSTA's critics fear. To those concerned with FOSTA's long-term

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[177] *See* FOSTA, sec. 2, § 230 (amending § 230 to clarify that websites could not escape liability for sex-trafficking advertisements posted by their users); *id.* sec. 3, § 2421A (amending the Mann Act to provide for civil and criminal liability for websites that violate the Act's terms).

[178] Complaint, *supra* note 10, ¶¶ 64–78.

[179] *See id.* ¶¶ 1–2.

[180] *See id.* ¶¶ 52–60 (describing FOSTA's immediate impact on online speech).

[181] *See* Shannon Liao, *Tumblr Will Ban All Adult Content on December 17th*, VERGE (Dec. 3, 2018, 12:26 PM), https://www.theverge.com/2018/12/3/18123752/tumblr-adult-content-porn-ban-date-explicit-changes-why-safe-mode [https://perma.cc/B5WB-6V8Y]; Paris Martineau, *Tumblr's Porn Ban Reveals Who Controls What We See Online*, WIRED (Dec. 4, 2018, 2:07 PM), https://www.wired.com/story/tumblrs-porn-ban-reveals-controls-we-see-online [https://perma.cc/R8JT-XRNM] (linking Tumblr's decision to ban adult content, and similar patterns followed by other websites like Craigslist and Patreon, to FOSTA).

[182] Liao, *supra* note 181.

[183] *See* Martineau, *supra* note 181 (describing problems with Tumblr's flagging system that included photos of Jesus Christ, patents for shoes, landscape drawings, and other innocent content); *see also* Kaitlyn Tiffany, *Tumblr's First Year Without Porn*, ATLANTIC (Dec. 3, 2019), https://www.theatlantic.com/technology/archive/2019/12/tumblr-year-review-2019-nsfw-ban-memes/602911 [https://perma.cc/A46F-EZ37] (noting that the adult-content ban "scared users away who might actually have been fine, and it still didn't kill the porn bots and spammy ads").

impact, such restrictions herald the beginning of the end for "the internet as we know it" by discouraging speech that is outside community norms but nonetheless constitutionally protected.[184]

Sex workers and advocates have also argued that FOSTA harms both sex workers and sex-trafficking victims by conflating voluntary sex work and sex trafficking.[185] FOSTA's provisions that equate consensual prostitution with coerced sex trafficking, providing liability for websites that facilitate either, led various websites to shut down portions of their site used by voluntary sex workers to exchange information about free health services and dangerous clients and pimps.[186] This, in turn, forced sex workers to return to the streets to market their services, where they are much more likely to encounter violence.[187] Similarly, rather than putting sex traffickers out of business, some evidence shows that FOSTA only drove them further underground, making it harder to apprehend traffickers and save victims.[188]

Additionally, FOSTA's conflation of sex work and sex trafficking is part of an ongoing trend that discourages sex-trafficking survivors from coming forward for fear of being treated as criminals rather than victims.[189] This seems especially likely given that many sex-trafficking survivors report consenting to some acts at the beginning of their relationship with a trafficker, who may start out by "grooming" victims and acting like a

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[184] *See* Khan, *supra* note †; Romano, *supra* note 1.

[185] *See* McCombs, *supra* note 17; *see also* Grant, *supra* note 15 (noting the argument by some antitrafficking advocates to employ a rights-based response that differentiates between trafficking and sex work, a perspective that has been eroded by policies that link the two).

[186] *See* McCombs, *supra* note 17; Complaint, *supra* note 10, ¶¶ 105–15 (describing one activist's fear that her website providing resources to sex workers and sex-trafficking survivors could lead her to be held liable, and the concern that without this information, sex workers and trafficking survivors will lack access to helpful resources and information pertaining to their safety).

[187] *See* McCombs, *supra* note 17; Anderson et al., *supra* note 20 (describing increased violence against and arrests of sex workers since FOSTA's passage).

[188] *See* Anderson et al., *supra* note 20; *see also* Jordan Fischer, *Running Blind: IMPD Arrests First Suspected Pimp in 7 Months*, INDY CHANNEL (Dec. 12, 2018, 10:40 AM), https://www.theindychannel.com/longform/running-blind-impd-arrests-first-suspected-pimp-in-7-months [https://perma.cc/JX4H-NQLM] (describing how the absence of Backpage or other sources of online advertising for sex work has dried up police information on sex traffickers and pimps); *see also* Eichert, *supra* note 29, at 208 (describing how sex traffickers have either moved offline or to platforms hosted on servers in foreign countries that do not cooperate with U.S. law enforcement).

[189] *See* Kate DeCou, *U.S. Social Policy on Prostitution: Whose Welfare Is Served?*, 24 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 427, 438–39 (1998) (describing how women engaged in sex work are often criminalized while purchasers of sex work, typically men, are not); *see also* Elizabeth Kaigh, Note, *Whores and Other Sex Slaves: Why the Equation of Prostitution with Sex Trafficking in the William Wilberforce Reauthorization Act of 2008 Promotes Gender Discrimination*, 12 SCHOLAR 139, 159–62 (2009) (describing how law enforcement's confusion between consensual sex workers and trafficking victims makes focusing on enforcing anti-prostitution laws against sex workers all the more troubling).

romantic partner before assuming the role of trafficker.[190] Moreover, anti-prostitution laws have historically been overenforced against those "selling" sex, usually women, rather than those soliciting sex, usually men.[191] Fears of wrongful enforcement against victims and voluntary sex workers are also supported by some of the effects of previous feminist legislation, which was enforced against marginalized communities rather than the legislation's original targets.[192] And at least one scholar has empirically documented FOSTA's consequences for gay and queer men in the San Francisco area, who have lost income and increasingly fear for their safety as much of the online sex industry in all its iterations significantly contracted.[193] Yet another commentator deemed FOSTA "a law with a body count" based on data demonstrating increased violence against sex workers of all kinds in the months since its passage.[194]

Finally, for all of FOSTA's good intentions, it actually does little to help the vast majority of sex-trafficking victims, who do not fit the mold that many lawmakers have in mind—a middle-class white female.[195] Many victims are neither white nor female and may come from low-income communities that are overpoliced, resulting in distrust and decreased likelihood of cooperation with law enforcement officials.[196] These victims may fear criminalization or be reluctant to rely on a system that has otherwise failed to protect them.[197] Because these victims are less likely to report their abuse to police, they are hampered in their ability to recover restitution under

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[190] Luzwick, *supra* note 21, at 366–67.

[191] DeCou, *supra* note 189, at 435–36; Kaigh, *supra* note 189, at 160.

[192] *See* de la Cruz, *supra* note 88, at 89–90 (arguing that police have been known to arrest women of color, especially transgender women of color, for prostitution rather than arresting their clients).

[193] Eichert, *supra* note 29, at 217–26.

[194] Chamberlain, *supra* note 29, at 2203.

[195] *See* Eichert, *supra* note 29, at 212–16 (empirically documenting lawmakers' gendering of sex-trafficking victims and perpetrators, as well as analyzing lawmakers' reliance on anecdotal evidence, usually "melodramatic, episodic depictions of women and girls, typically of Caucasian descent" being sex-trafficked). *See generally* Claudia Cojocaru, *Sex Trafficking, Captivity, and Narrative: Constructing Victimhood with the Goal of Salvation*, 39 DIALECTICAL ANTHROPOLOGY 183, 191–93 (2015) (arguing that the antitrafficking movement has ignored and even harmed victims from marginalized communities by focusing on stereotypical notions of victimhood and erasing the autonomy of both victims and consensual sex workers).

[196] *See supra* note 95 and accompanying text; Cojocaru, *supra* note 195, at 192; *see also* GOTTSCHALK, *supra* note 85, at 129 (describing how people of color in the United States frequently have more negative contact with police); Eichert, *supra* note 29, at 236, 243–44 (emphasizing FOSTA's impact on men and the need for more research on its effects on genderqueer and nonbinary individuals).

[197] *See* Cojocaru, *supra* note 195, at 189–93 (describing her experience as a sex-crime victim who distrusted antitrafficking activists); de la Cruz, *supra* note 88, at 90–91 (describing the punitive treatment of women of color and transgender women by police).

FOSTA, which emphasizes the role of law enforcement.[198] Further, many trafficking survivors lack the means to pursue civil litigation against internet service providers in the way FOSTA contemplates.[199] Even if they do sue, there is still no guarantee that victims will prevail; FOSTA's drafters indicated that these provisions might apply to only a few providers.[200] If FOSTA really is interpreted *that* narrowly, then it is unclear whether it will really benefit survivors who are able to litigate any more than prior laws did.[201]

Perhaps more cynically, as commentators like Professor A.F. Levy have suggested, lawmakers' focus on internet service providers' role in trafficking may be mere "pageantry" intended to placate feminists and antitrafficking activists while achieving no real reform.[202] FOSTA was passed immediately after the highly publicized Backpage investigation and shutdown.[203] This swift reaction could indicate genuine concern, but it could also be the result of purely political motivations.[204] Moreover, Backpage's founders were indicted for violating the Travel Act, a preexisting anti-prostitution law, and a law criminalizing money laundering—these laws existed before FOSTA and remain in effect.[205] Thus, FOSTA is little more than a paper tiger in the supposed war on online sex trafficking.[206]

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198 *See* H.R. REP. NO. 115-572, pt. 1, at 7 (2018) (revenues collected through FOSTA claims will be used to contribute to the Crime Victim's Fund, through which FOSTA survivors can obtain restitution like other victims of federal crimes).

199 Grant, *supra* note 15.

200 *See* H.R. REP. NO. 115-572, *supra* note 198, at pt.1, at 7 (noting that FOSTA will likely only apply to a few offenders).

201 *See id.*; *see also* J.S. v. Vill. Voice Media Holdings, L.L.C., 359 P.3d 714, 718 (Wash. 2015) (holding that a sex-trafficking survivor could state a claim against Backpage not barred by § 230).

202 A.F. Levy, *The Virtues of Unvirtuous Spaces*, 52 WAKE FOREST L. REV. 403, 422 (2017) ("The war on Internet platforms is pageantry: a kind of theater designed to satisfy people's need to identify and fight bad guys without regard to nuance or long-term outcome.").

203 *See, e.g.*, Charlie Savage & Timothy Williams, *U.S. Seizes Backpage.com, a Site Accused of Enabling Prostitution*, N.Y. TIMES (Apr. 7, 2018), https://www.nytimes.com/2018/04/07/us/politics/backpage-prostitution-classified.html [https://perma.cc/AR2V-P5Z8].

204 *See* Levy, *supra* note 202, at 422 (describing Congress's efforts to target internet service providers to end online sex trafficking as "a kind of theater designed to satisfy people's need to identify and fight bad guys without regard to nuance or long-term outcome").

205 *See* Indictment at 1, United States v. Lacey, No. 2:18-cr-00422-SPL (D. Ariz. Mar. 28, 2018).

206 *See* Glenn Kessler, *Has the Sex-Trafficking Law Eliminated 90 Percent of Sex-Trafficking Ads?*, WASH. POST (Aug. 20, 2018, 2:00 AM), https://www.washingtonpost.com/politics/2018/08/20/has-sex-trafficking-law-eliminated-percent-sex-trafficking-ads [https://perma.cc/J8B8-DPW9] (fact-checking claims that FOSTA has seriously curtailed sex trafficking by pointing to the lack of data supporting this assertion as ads dropped after Backpage was shut down, but before the passage of FOSTA, and the volume has since been increasing).

Overall, FOSTA, like other legislation that seeks to promote goals associated with the feminist movement—such as ending violence against and exploitation of women and other marginalized groups—has failed to serve many of its intended beneficiaries. Instead, it emphasized punishing perpetrators, leaving already vulnerable groups caught in the crossfire. Given these numerous arguments against FOSTA, it is unsurprising that the law is already facing legal challenges. Still, laws are not invalidated merely for being ineffective or unwise. FOSTA's challengers must marshal their best arguments against FOSTA's constitutionality. The argument that most commentators and critics have latched onto is that FOSTA, like some of the protective speech restrictions that came before it,[207] violates the First Amendment.

C. The First Amendment Case Against FOSTA

Just two months after FOSTA became law, it was challenged on First Amendment grounds. This Section analyzes the ongoing First Amendment case against FOSTA and the arguments that could invalidate it, concluding that courts should find FOSTA unconstitutional.

1. Woodhull Freedom Foundation v. United States*: Procedural Hurdles to Victory*

On June 28, 2018, the Woodhull Freedom Foundation[208] and several other individuals and groups sued to declare FOSTA unconstitutional under the First Amendment and to enjoin its enforcement.[209] In their complaint, the plaintiffs stressed FOSTA's chilling effect on political, sex-related speech and the need to protect the internet from speech regulations due to its role as "an indispensable place to exchange ideas."[210]

The Woodhull Freedom Foundation, for example, advertises online its annual conference on decriminalizing sex work;[211] Woodhull fears that these advertisements may lead to liability under FOSTA's broad provisions which prohibit advertisements that promote and facilitate prostitution.[212] Another plaintiff, Alex Andrews, advocates for sex workers' health and welfare.[213] She believes that FOSTA's vague provisions may target her work online,

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[207] *See supra* Section I.C.

[208] *See* Complaint, *supra* note 10, ¶¶ 61–63 (describing the Woodhull Freedom Foundation, a group that promotes sexual freedom, particularly free sexual speech, and its political activities).

[209] *Id.* ¶¶ 1–2.

[210] *Id.* ¶¶ 2–6, 9.

[211] *Id.* ¶¶ 61–62, 66.

[212] *Id.* ¶ 64.

[213] *Id.* ¶¶ 102–03.

which aims to help people involved in sex work find free services for health, educational, and other needs.[214] Yet another plaintiff, Eric Koszyk, is a certified massage therapist who has historically advertised online; the main site he relied on, Craigslist, banned his advertisements in response to FOSTA.[215]

These plaintiffs allege that FOSTA is overbroad, reaching far too much constitutionally protected speech.[216] Further, because FOSTA aims to regulate a specific type of speech—speech promoting commercial sex—the plaintiffs contend that it is a viewpoint-discriminatory, content-based restriction on speech.[217] As such, FOSTA is not narrowly tailored enough to survive the First Amendment's strict scrutiny test for content-discriminatory speech restrictions.[218]

The plaintiffs went to federal district court and were promptly thrown out for lack of standing. The court found their allegations of the Act's breadth unpersuasive,[219] specifically finding it unlikely that FOSTA could actually reach their conduct, thus meaning they faced no imminent injury.[220] Absent any injury caused by the statute, the plaintiffs had no standing to sue.[221] Additionally, in one pointed footnote, the court called out Alex Andrews's previous criminal record for participating in sex work. The court seemed to suggest that if she was afraid of FOSTA, maybe it was because she was still working in the sex trade and not because of her advocacy efforts.[222]

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[214] *Id.* ¶¶ 105–12.

[215] *Id.* ¶¶ 93–97.

[216] *Id.* ¶¶ 127–34.

[217] *Id.* ¶¶ 1, 3, 114 (describing plaintiffs' various concerns over FOSTA's targeting of pro-sex-work views); *id.* ¶ 4 (arguing that "FOSTA's prohibitions are entirely content-based" speech restrictions).

[218] *Id.* ¶¶ 141–44 (arguing that such regulations are presumptively invalid and that the law fails strict scrutiny because it "does not directly advance the government's objective"). The plaintiffs also alleged that FOSTA is unconstitutional under the Fifth Amendment because it is unlawfully vague and it applies retroactively in violation of the Fifth Amendment and Article I of the U.S. Constitution. *Id.* ¶¶ 149–52, 169.

[219] Woodhull Freedom Found. v. United States, 334 F. Supp. 3d 185, 196–204 (D.D.C. 2018), *rev'd*, 948 F.3d 363 (D.C. Cir. 2020); *see also* Woodhull Freedom Found. v. United States, 948 F.3d 363, 370 (D.C. Cir. 2020) (describing the district court opinion).

[220] *Woodhull Freedom Found.*, 334 F. Supp. 3d at 198–204 (finding § 2421A was "plainly calculated to ensnare only specific unlawful acts with respect to a particular individual, not the broad subject-matter of prostitution"); *see also Woodhull Freedom Found.*, 948 F.3d. at 370.

[221] *Woodhull Freedom Found.*, 334 F. Supp. 3d at 201–03; *see also Woodhull Freedom Found.*, 948 F.3d. at 370.

[222] *Woodhull Freedom Found.*, 334 F. Supp. 3d at 193, 194 n.8 (describing Alex Andrews—also known as Jesse Maley—and her history with prostitution charges despite the fact that those charges were not at issue).

The plaintiffs appealed, and the D.C. Circuit proved more sympathetic, reasoning that the statute could reasonably reach the plaintiffs' online speech.[223] It specifically noted that Andrews's advocacy likely did fall within the vagaries of FOSTA's prohibition on promoting prostitution and that Koszyk's financial injury after Craigslist banned his ads was sufficiently linked to FOSTA.[224] It therefore remanded the case to the district court for further proceedings on the merits.[225] The D.C. Circuit's opinion arrived in January 2020, meaning that the challenge to FOSTA's merits has not yet been fully developed. Below, this Note explores some of the arguments that should be made against FOSTA and its dangers to free speech.

2. FOSTA's First Amendment Implications

The plaintiffs argue that FOSTA runs afoul of the First Amendment in two ways. First, its provisions include a substantial amount of protected speech, rendering it facially overbroad.[226] Second, since it contains content-based restrictions—specifically viewpoint discrimination—it fails a strict scrutiny analysis.[227] As explained below, both arguments have merit. Furthermore, despite the government's protestations, neither the criminality and incitement exception nor the obscenity exception should shield FOSTA from invalidation.

To begin, FOSTA's sweep may indeed be overbroad as it includes a substantial amount of constitutionally protected speech. FOSTA proscribes promoting or facilitating prostitution but fails to explain what online speech qualifies under either category.[228] This opens FOSTA up to restricting far more than only sex-trafficking advertisements, which, while numerous, were far from the only sex-adjacent content on websites like Backpage or Craigslist.[229] For example, a court could consider speech that seeks to improve the health and welfare of sex workers as constituting promotion or facilitation of prostitution. This speech enables sex workers to engage in

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[223] *Woodhull Freedom Found.*, 948 F.3d at 371–74 (finding that the plaintiffs had standing).

[224] *See id.* at 373 (finding "ample reason to conclude that the threat of future enforcement against Andrews is substantial"); *id.* at 374 (noting that FOSTA led to the "drying up" of Koszyk's stream of clients).

[225] *See id.* at 374. The D.C. Circuit noted that because all of the remaining plaintiffs had substantially similar claims, there was no need to evaluate their standing individually. *See id.* at 371.

[226] Complaint, *supra* note 10, ¶¶ 127–34.

[227] *See id.* ¶¶ 1, 3, 114 (arguing FOSTA discriminates against pro-sex-work views expressed online).

[228] *See* FOSTA, Pub. L. 115-164, sec. 3, § 2421A, 132 Stat. 1253, 1253–54 (2018).

[229] *See* McCombs, *supra* note 17 (discussing Backpage's predominant use for voluntary sex workers); *see also* Levy, *supra* note 202, at 408–10, 410 n.38 (arguing that increases in online advertisements for voluntary prostitution do not necessarily indicate a proportionate preponderance of sex trafficking).

commercial sex by helping them access free services, without which they might be unable to work or even survive. Additionally, speech that advocates decriminalizing all sex work could technically be considered "promoting" prostitution by literally promoting its legalization.[230]

In this way, FOSTA's apparent overbreadth chills the legitimate advocacy and discussion of sex work, which remain protected under the First Amendment.[231] FOSTA does have an affirmative defense that allows speakers to claim safe harbor if their speech is directed at a jurisdiction where prostitution is legal, such as several counties in Nevada.[232] Nevertheless, even if they invoke this clause as a defense, potential defendants will already have suffered repercussions for their speech by being threatened with prosecution.[233] The threat of criminal prosecution, regardless of ultimate liability, likely suffices to give users and providers pause, therefore chilling legal speech. More to the point, most United States jurisdictions have not legalized prostitution, and that is where the bulk of decriminalization advocacy is likely to occur.

Moreover, even if the Government promises not to enforce FOSTA to its full breadth, this similarly fails to cure its deficiencies; such promises are matters of executive discretion and do not bind future administrations.[234] And promises of enforcement do nothing to ameliorate the actual text of the statute, which is what is at issue here.[235] Thus, no matter what the government says it will do, with FOSTA still on the books, plaintiffs continue to feel the law's chilling effect. FOSTA's inclusion of a substantial amount of constitutionally protected speech should therefore render it invalid for overbreadth under the First Amendment.

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[230] *See Woodhull Freedom Found.*, 948 F.3d at 372–73 (noting that FOSTA's prohibitions on promoting or facilitating prostitution could plausibly include advocacy and speech of the sort the plaintiffs carry out).

[231] *See* Chamberlain, *supra* note 29, at 2196–2200 (arguing that FOSTA is likely unconstitutional due to its plausible inclusion of all speech that makes sex work easier to engage in, which could reach harm reduction, advocacy, and decriminalization efforts like those of the plaintiffs in *Woodhull*).

[232] FOSTA, sec. 3, § 2421A(e); *see also Prostitution and Sex Work*, *supra* note 14, at 567–68 (prostitution is completely legal within seven counties in Nevada and may be permitted in certain areas of six other counties).

[233] *See* United States v. Stevens, 559 U.S. 460, 476, 481–82 (2010) (finding that a safe harbor provision pertaining to conduct lawful in some jurisdictions but unlawful in others did not sufficiently narrow the scope of an unlawful speech regulation).

[234] *See* Wayte v. United States, 470 U.S. 598, 607 (1985) ("[T]he Government retains broad discretion as to whom to prosecute." (internal quotation marks omitted)).

[235] *See Stevens*, 559 U.S. at 480–81 (noting that promising not to enforce a law against specific persons or forms of conduct does not cure its overbreadth based on its actual text).

FOSTA is also a content-based restriction on speech. Content-based restrictions—particularly those that discriminate against specific viewpoints—are presumptively invalid and evaluated under strict scrutiny.[236] In FOSTA's case, the government certainly has a compelling interest in preventing sex trafficking, which is, of course, illegal throughout the United States.[237] The question is whether FOSTA's restrictions are sufficiently narrowly tailored in relation to its compelling interest, and the answer is that they are not.

First, FOSTA regulates internet speech, which has historically been entitled to heightened First Amendment protection.[238] The Court has time and again noted the importance of the internet for disseminating and engaging with new information and ideas and has been reluctant to allow regulation of this increasingly important medium of communication and education.[239] Second, and critically, FOSTA specifically discriminates against a specific viewpoint: the promotion of prostitution.[240] Although prostitution is mostly illegal in the United States, it is not illegal to campaign for its decriminalization or even expound its positive attributes. FOSTA, therefore, constitutes unlawful viewpoint discrimination insofar as it prohibits speech promoting pro-prostitution and pro-sex-work views.[241] Indeed, under the pornography cases,[242] Congress cannot even prohibit pro-trafficking, pro-abuse, or pro-rape views, as reprehensible as most find them to be.[243] FOSTA's discriminatory prohibitions therefore seem unlikely to survive under prevailing precedent.

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[236] Erica Goldberg, *Free Speech Consequentialism*, 116 COLUM. L. REV. 687, 692 ("Laws that suppress speech on the basis of content are subject to the strictest constitutional scrutiny, which is often outcome determinative."); *see also* Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 829–30 (1995) ("[V]iewpoint discrimination . . . is presumed impermissible . . . .").

[237] *See* Ronald Weitzer, *Sex Trafficking and the Sex Industry: The Need for Evidence-Based Theory and Legislation*, 101 J. CRIM. L. & CRIMINOLOGY 1337, 1337 (2012) (describing and defining U.S. law prohibiting sex trafficking).

[238] Reno v. ACLU, 521 U.S. 844, 867–70 (1997). The Court has found that some forms of media (such as television and radio broadcasts) may be subject to more regulation because of their nature, which allows immediate exposure to possibly harmful material simply by turning a television or radio on. In contrast, the internet more often requires users to take active steps to find any material—harmful or otherwise—and so may be subject to fewer regulations. *See id.* at 867.

[239] *See id.* at 850–53, 863.

[240] Am. Booksellers Ass'n v. Hudnut, 771 F.2d 323 (7th Cir. 1985) (holding an anti-pornography ordinance unconstitutional under the First Amendment due to its viewpoint discrimination against pornography viewers and people with degrading views of women), *aff'd*, 475 U.S. 1001 (1986).

[241] *See id.*

[242] *See supra* Section I.C.

[243] *See Am. Booksellers Ass'n*, 771 F.2d at 330.

FOSTA's supporters might suggest that its restrictions are permissible under the First Amendment exceptions for speech integral to criminal conduct and incitement because posting "advertisements" aids in unlawful commercial sex transactions. But these First Amendment exceptions are narrow. If FOSTA's provisions go beyond speech that is *intertwined* with unlawful commercial sex transactions or likely to incite *imminent* criminal conduct, then it is not narrowly tailored.[244] Here, FOSTA's prohibition on promoting prostitution exceeds the narrow limits of either exception. Unlike prohibitions on possessing, selling, or purchasing child pornography, for example, "promotion" can include political advocacy and abstract speech regarding the morality of prostitution.[245] Likewise, FOSTA's provisions fall far outside the narrow limits of obscenity.[246] If statutes that are modeled after the Supreme Court's own obscenity test are not narrow enough for the obscenity exception,[247] then neither is FOSTA, which does not explicitly cabin its reach.

Overall, the plaintiffs have strong arguments for FOSTA's unconstitutionality. These arguments seem even sturdier in light of precedent invalidating attempts to restrict speech based on its content, particularly on the internet.[248] Of course, much litigation is still to come, and the plaintiffs could ultimately lose. Prostitution remains illegal in all but a few counties in Nevada and other forms of sex work remain stigmatized, and these elements could color a court's analysis. Sentiments of this stigma rang true in the district court's opinion dismissing the plaintiffs' claims, where it dug into one plaintiff's sex-worker past, despite its irrelevance to the case at hand.[249] Likewise, scholars have noted that a law's important or admirable goals may likewise influence a court's analysis;[250] FOSTA's noble goal of combating sex trafficking may thus be similarly influential, leading a court to take a more generous view of the Act. As such, FOSTA's fate remains uncertain;

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[244] *See supra* notes 67–70 and accompanying text.

[245] *Compare* United States v. Williams, 553 U.S. 285, 298–99 (2008) (upholding laws prohibiting selling or soliciting child pornography), *with* Brandenburg v. Ohio, 395 U.S. 444, 447–48 (1969) (advocacy for the morality of a criminal act cannot be restricted under the First Amendment).

[246] *See, e.g.*, Reno v. ACLU, 521 U.S. 844, 873–74 (1997).

[247] *See id.*

[248] *See* United States v. Stevens, 559 U.S. 460, 464–70 (2010) (invalidating a law targeting "crush videos" on the internet); *Reno*, 521 U.S. at 863, 867 (noting that some forms of communication may receive the highest protection).

[249] *See* Woodhull Freedom Found. v. United States, 334 F. Supp. 3d 185, 194 n.8 (D.D.C. 2018), *rev'd*, 948 F.3d 363 (D.C. Cir. 2020).

[250] *See, e.g.*, Goldberg, *supra* note 236, at 692–93 (noting that the Supreme Court's First Amendment decisions have at times been influenced by a potential balancing of the harms and benefits of a challenged law despite its clearly violative nature).

invalidating it would accord with First Amendment doctrine, but sustaining it would play into a trend of ignoring speech harms to marginalized groups[251] and encouraging "carceral feminis[t]" legislation.[252] Only time will tell if FOSTA's flawed provisions will be stricken. As of June 2020, the plaintiffs' case against FOSTA remains pending in the district court.

III. SOLUTIONS FOR SURVIVORS

This Note has argued FOSTA is unwise and likely unconstitutional. But FOSTA's flaws do not render its goals irrelevant. As such, this Part advocates for adopting alternative reforms that better serve sex-trafficking survivors and mitigate FOSTA's harms to other internet speakers. First, it assesses FOSTA through a feminist lens, arguing that FOSTA should focus on improving the lives of sex-trafficking survivors rather than focusing on punishment and thereby inadvertently harming sex workers and other internet speakers. As a result, this Note proposes a common-fund solution, which would benefit more survivors without further endangering voluntary sex workers or free speech.

A. Returning to Feminist Values for Real Reform

As discussed in Section II.A, FOSTA did not come out of nowhere. Like previous laws inspired by feminist factions, FOSTA was the product of an unlikely coalition of feminist activists and political conservatives; FOSTA passed with little opposition because of its broad coalition of support.[253] FOSTA combined the early anti-rape movement's focus on punishing perpetrators[254] with the anti-pornography movement's content-based speech restrictions,[255] and it targets online speech, which has been given heightened protections.[256] FOSTA thus creates a perfect storm of

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[251] *See generally* Mary Anne Franks, *Witch Hunts: Free Speech, #MeToo, and the Fear of Women's Words*, 2019 U. CHI. LEGAL F. 123 (arguing that while the First Amendment is often used to defend repugnant male speech, courts have allowed women to be silenced and censored).

[252] *See* Bernstein, *supra* note 96, at 142–43 (internal quotation marks omitted).

[253] *See* Eichert, *supra* note 29, at 210 (arguing that both conservative politicians and left-wing, radical feminists promote similarly restrictive policies that proscribe sexual expression that deviates from either group's limited range of acceptable sexual speech or conduct); *cf.* Bernstein, *supra* note 96, at 143 (characterizing the anti-sex-trafficking movement behind the TVPRA as a collaboration between "devoted evangelical and feminist antitrafficking activists and neoconservative Washington think tanks").

[254] *See* GOTTSCHALK, *supra* note 85, at 125.

[255] *See* Willis, *supra* note 100, at 351–52, 356–57. Though the anti-pornography ordinances were ultimately unsuccessful, they did gain some initial traction. *See supra* Section I.C.

[256] *See supra* note 238 and accompanying text.

punitive speech restrictions. As a result, it leaves sex-trafficking survivors and other internet speakers out to dry.

One likely counterargument to this Note is that many (if not all) of those affected by FOSTA's speech restrictions are engaging in or supporting unlawful sex work. Although not all forms of sex work are currently criminalized,[257] prostitution is, and prostitution is what FOSTA targets. So why should "law-abiding" Americans care? To begin, as Lucy Khan writes in her essay on FOSTA's impact on sex workers and society, FOSTA's broad prohibitions on internet speech set a dangerous precedent.[258] Although FOSTA itself only deals with speech related to commercial sex, it has already affected nonsex workers who advertise online.[259]

As such, if FOSTA remains in place, it could become precedent for future content-restrictive laws. At a time when Americans increasingly distrust government,[260] allowing lawmakers to control the proliferation of internet speech seems dubious at best. The internet has become the ultimate "marketplace of ideas," a marketplace that free speech scholars have called essential for the exchange of ideas and knowledge.[261] This has its drawbacks—some scholars have already critiqued failures to regulate harassment online, which in turn drives women, people of color, and LGBTQ people offline[262]—but it is not clear that the answer to this should be top-down federal intervention as opposed to bottom-up cultural reforms. This is

[257] The terms "sex work" and "the sex work industry" generally refer to and encompass various commercial sex-related acts, many of which are not prohibited by prostitution laws. *See Prostitution and Sex Work*, *supra* note 14, at 553–54.

[258] *See* Khan, *supra* note †. Additionally, if FOSTA reaches the kind of political speech critics believe, it offends even those scholars who disagree with the Court's all-inclusive approach to the First Amendment. *See* Alexander Meiklejohn, *The First Amendment Is an Absolute*, 1961 SUP. CT. REV. 245, 255 (arguing that the First Amendment's central concern is not the power to speak, but "the freedom of those activities of thought and communication by which we 'govern'").

[259] *See* Complaint, *supra* note 10, ¶¶ 93–97 (describing FOSTA's impact on massage therapist Eric Koszyk's livelihood).

[260] *See, e.g.*, Christopher Robertson, D. Alex Winkelman, Kelly Bergstrand & Darren Modzelewski, *The Appearance and the Reality of* Quid Pro Quo *Corruption: An Empirical Investigation*, 8 J. LEGAL ANALYSIS 375, 376 (2016) (describing increasing public distrust of government officials).

[261] *See* Meiklejohn, *supra* note 258 (arguing that the First Amendment's protections are essential for maintaining a democratic system).

[262] *See* Mary Anne Franks & Ari Ezra Waldman, *Sex, Lies, and Videotape: Deep Fakes and Free Speech Delusions*, 78 MD. L. REV. 892, 892–93, 896 (2019) (arguing that expansive free-speech rights have been weaponized against "women, queer people, persons of color, and other racial and ethnic minorities").

especially true given that top-down "thought control" measures have been largely repudiated.[263]

Furthermore, even if one is not compelled by the free-speech perspective,[264] there are other normative concerns that direct reformers away from laws that harm sex workers. Feminists are split on the ethics of sex work, just as they are split on pornography.[265] Some, like Professor MacKinnon, argue that all commercial sex subordinates women as a class.[266] Relatedly, Professor Cheryl Nelson Butler has suggested that many sex workers, especially women of color, were effectively coerced into the trade due to lack of economic and educational opportunities.[267] But these approaches are not universal. Others, such as Professor I. India Thusi, argue that feminist scholars opposing sex work often fail to actually account for the perspectives of the sex workers themselves.[268] She argues that feminists who seek to improve the welfare of all women and marginalized people should listen to these often-marginalized people as well, even if they disagree with feminists' contentions about the exploitative nature of sex work.[269]

Despite their varying views on sex work, these scholars agree that current laws that focus on criminalizing conduct related to commercial sex harm more than they help.[270] Professor MacKinnon highlights that prostitution laws are enforced against "sellers" of sex, typically women, far more often than they are enforced against "buyers," who are typically men.[271] Professor Butler likewise highlights the problems with criminalizing sex work for women of color in particular, who are already disproportionately

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[263] *See, e.g.*, Am. Booksellers Ass'n v. Hudnut, 771 F.2d 323, 327–28 (7th Cir. 1985), *aff'd*, 475 U.S. 1001 (1986).

[264] *See e.g.*, Torrey, *supra* note 123, at 26–31 (describing how courts have used the First Amendment to justify allowing women to suffer harms in order to avoid speech harms to society at large, particularly men).

[265] *See* Sylvia A. Law, *Commercial Sex: Beyond Decriminalization*, 73 S. CAL. L. REV. 523, 532–42 (2000) (describing feminist agreements and disagreements on commercial sex).

[266] *See* Catharine A. MacKinnon, *Prostitution and Civil Rights*, 1 MICH. J. GENDER & L. 13, 20 (1993).

[267] Cheryl Nelson Butler, *A Critical Race Feminist Perspective on Prostitution & Sex Trafficking in America*, 27 YALE J.L. & FEMINISM 95, 101–02, 135 (2015).

[268] *See* I. India Thusi, *Radical Feminist Harms on Sex Workers*, 22 LEWIS & CLARK L. REV. 185, 186–88 (2018); *see also* R. Claire Snyder-Hall, *Third-Wave Feminism and the Defense of "Choice,"* 8 PERSPS. ON POL. 255, 257–58 (2010) (critiquing "the judgmental stance" that some radical feminists like Professor Dworkin adopted toward sex workers and other women who they saw as reinforcing patriarchal ideals).

[269] *See* Thusi, *supra* note 268, at 215–18, 229.

[270] *See* Grant, *supra* note 15; MacKinnon, *supra* note 266; Butler, *supra* note 267; Thusi, *supra* note 268.

[271] MacKinnon, *supra* note 266, at 16–20.

targeted and mistreated by law enforcement.[272] And Professor Thusi advocates for a position on sex work that actively accounts for the views and experiences of sex workers themselves, who largely oppose criminalization.[273]

The dangers that these scholars highlight apply to those who choose to engage in sex work as well as to those who are coerced—including sex-trafficking survivors. As such, there is feminist consensus that U.S. law's current emphasis on punishing sex workers is no solution at all.

Feminist consensus on the need to mitigate harms to women and other marginalized people demonstrates the need to reform FOSTA. Although FOSTA does not specifically target sex workers—like other prostitution laws—it has a net-negative effect on vulnerable and marginalized groups.[274] FOSTA was meant to punish powerful internet service providers.[275] But in reality, FOSTA harms voluntary sex workers and, alongside them, sex-trafficking victims. Additionally, law enforcement is having an even harder time apprehending actual traffickers than they did when traffickers were able to post on Backpage.[276] Meanwhile, survivors are not able to reap FOSTA's promised benefits due to its failure to account for victims who cannot litigate or rely on law enforcement. Feminist ideals—and First Amendment law—call for a new solution that serves FOSTA's intended beneficiaries without causing undue harm to others.

B. Proposing a Common Fund

As scholars such as Professor Gottschalk have noted, one of the key factors that drove feminists to support punitive reforms, as opposed to comprehensive support for victims of domestic violence, was the United States' lack of social safety nets.[277] Increasing social supports for everyone

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[272] Butler, *supra* note 267, at 114, 135 (describing sex workers'—particularly those who are Black or other people of color—fears of police and of facing mistreatment by law enforcement).

[273] Thusi, *supra* note 268.

[274] *See* Eichert, *supra* note 29, at 217–18, 244 (arguing that male, genderqueer, and nonbinary sex workers are also affected by FOSTA); *see also* Evan Urquhart, *Decriminalizing Prostitution Is Central to Transgender Rights*, SLATE (Feb. 27, 2018, 4:57 PM), https://slate.com/human-interest/2018/02/decriminalizing-prostitution-is-central-to-transgender-rights.html [https://perma.cc/3WRJ-EMF3] (arguing against the criminalization of LGBTQ people in sex work, who are often pushed into the industry by social forces).

[275] *See* H.R. REP. NO. 115-572, *supra* note 198, at pt. 1, at 3 (highlighting Craigslist, Backpage, and eBay as targets for FOSTA's provisions).

[276] *See* Grant, *supra* note 15; Fischer, *supra* note 188.

[277] *See* GOTTSCHALK, *supra* note 85, at 116, 122–24, 126–29 (noting that existing institutional and ideological frameworks in the United States prompted anti-rape activists to work with government to provide special support systems for rape victims because of the impact of a lack of social safety nets).

would provide the greatest benefit to the largest number of people—including those particularly at risk for being drawn into sex trafficking and other coerced sex work.[278] Making benefits widely available would help solve FOSTA's failure to support survivors, as survivors would no longer need to become involved with law enforcement to obtain restitution or find the funds to litigate against internet service providers. But such a solution seems unlikely to occur anytime soon. The United States remains unlikely to increase financial assistance to residents, as public opinion and politicians have often tended against broadening social supports, with many Americans believing that their fellow citizens already expect too much from government.[279]

As such, this Note proposes the creation of a special common fund for sex-trafficking survivors. Common funds allow a large group of similarly situated individuals to obtain recovery for the harms they have suffered.[280] Although common funds are usually established for class action plaintiffs, they can also be established by legislation.[281] For example, following the attacks on the World Trade Center on September 11, 2001, Congress established a common fund from which victims of the attacks or their families could obtain financial relief.[282] The common fund helped streamline the claim and recovery process for those affected, and helped shield airlines from countless negligence suits which could have harmed the industry.[283]

Congress could establish a similar type of fund for sex-trafficking survivors to obtain financial relief as an alternative to FOSTA's civil and criminal claims. Such a fund could streamline the recovery process by utilizing the existing networks of advocacy organizations that provide

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[278] *See* Butler, *supra* note 267, at 134–39 (describing how current conditions of poverty, lack of educational opportunities, and inadequate health care push women of color in particular into sex work).

[279] *See, e.g.*, *Government*, GALLUP, https://news.gallup.com/poll/27286/government.aspx [https://perma.cc/8P3L-VTU7] (noting that a 2010 poll found that 56% of Americans surveyed believed that "most Americans demand more from the government than they are willing to pay" and a recent 2019 poll found that 42% supported reducing government services in order to cut taxes); *see also* SCHOENFELD, *supra* note 83, at 93 (describing the trend in American politics away from providing government support and toward gutting "welfare state" expenditures).

[280] *See* RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 29 (AM. L. INST. 2011).

[281] *See id.* § 29 cmt. a; Marshall S. Shapo, *Compensation for Victims of Terror: A Specialized Jurisprudence of Injury*, 30 HOFSTRA L. REV. 1245, 1245–46, 1248–50 (2002) (describing Congress's establishment of the 9/11 victims' fund).

[282] *See* Shapo, *supra* note 281, at 1248–50 (explaining the establishment of the 9/11 fund and how funds are allocated to victim–claimants).

[283] *See id.* at 1253–55 (explaining that claimants may not recover from the fund unless they waive their claims against the airlines).

services to sex-trafficking survivors and encouraging these advocates to help survivors participate in the claim and recovery process. Notably, these advocates, who have significant experience working with and getting resources to survivors, are less likely to perpetuate the kind of stigma and stereotypes about people involved in the sex trade that disincentivize survivors from coming forward to law enforcement officials.[284] The recovery process could, like the 9/11 fund, utilize a simple website format, which allows the direct submission of claims by victims and their families and provide links to these advocacy groups that could help survivors submit their claims successfully.[285]

A common fund would therefore remedy the central weaknesses of FOSTA. First, it contains no speech restrictions, meaning it does not implicate the First Amendment whatsoever. And there are critical practical benefits too. For one thing, FOSTA assumes that survivors can litigate their claims against exploitative online service providers. Litigation, however, is expensive and time-consuming, and survivors who are unable to litigate may be in especially dire need of financial resources and other forms of support. FOSTA's restitution provisions also require cooperation with law enforcement, which some survivors may be reluctant to do.[286] In contrast, the proposed common fund could be created such that it totally avoids the need for litigation or contact with law enforcement to obtain compensation.

Another troubling aspect of FOSTA is that, for many survivors, it comes too late. Although the exact number of sex-trafficking victims is hard to quantify,[287] scholars estimate that hundreds of trafficking victims have been exploited through online advertisements while § 230 provided blanket immunity to online service providers.[288] With the passage of time, evidence may be lost and memories of witnesses faded, making it that much harder

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[284] *See* de la Cruz, *supra* note 88, at 90–91 (describing how women involved in the sex industry, especially women of color, are less likely to report crimes against them to law enforcement based on fears of mistreatment or even physical violence from law enforcement); Grant, *supra* note 15 (describing how antitrafficking advocates are more attuned to different experiences within the commercial sex trade as compared to law enforcement officials and lawmakers who often conflate voluntary and coerced sex work).

[285] *See September 11th Victim Compensation Fund Claim Form*, SEPT. 11TH VICTIM COMP. FUND, https://www.vcf.gov/sites/vcf/files/resources/VCFClaimForm.pdf [https://perma.cc/SJ7U-QFZ9] (instructing people affected by the September 11 attacks how to submit claims).

[286] *See* Kaigh, *supra* note 189, at 166 (arguing that conflating sex work and sex trafficking negatively affects trafficking survivors by deterring them from coming forward to police for fear of arrest for prostitution).

[287] *See* Weitzer, *supra* note 237, at 1353–57 (arguing that data on human trafficking are often inaccurate, based on shoddy methods, and, in some cases, merely conjecture).

[288] *See* Leary, *supra* note 154, at 622.

for these survivors to attempt to recover under FOSTA's litigation provisions. For many of these survivors, FOSTA may not just be justice delayed, but justice denied.

On the other hand, the creation of a common fund, from which any sex-trafficking survivor could obtain at least some financial relief, would help victims of past crimes obtain the support they need. The 9/11 fund, of course, pertains to the specific time period of the attacks; nonetheless, victims and family members remain able to submit claims.[289] A recent reauthorization of the fund extended the deadline for filing claims to October 2090.[290] A common fund for sex-trafficking survivors could cover a smaller timeframe, such as from 2000 (when human trafficking was officially recognized under federal law)[291] to 2030, and still provide significant relief to many survivors who may not be able to bring a civil or criminal case. Moreover, a common-fund recovery process would not require the same level of proof as a criminal or even a civil trial,[292] and although the survivor's compensation might be smaller than with a lawsuit, it would be less expensive and time-consuming to pursue, just as with the 9/11 fund.[293]

One might argue that a common fund is unreasonable because of the problem of finding sufficient funds. However, Congress need not necessarily even dedicate new funds to this project. Rather, Congress could utilize the government's ongoing case against Backpage's founders to obtain the requisite finances. Congress identified Backpage as a "market leader" with tremendous assets; prior to being seized in the spring of 2018, Backpage was valued at more than $500 million and collected over 80% of all revenue generated by the online sex trade in the United States.[294] Federal prosecutors are currently trying to seize the assets of Backpage's former owners in the

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[289] *See September 11th Victim Compensation Fund Claim Form*, *supra* note 285.

[290] *September 11th Victim Compensation Fund*, SEPT. 11TH VICTIM COMP. FUND, https://www.vcf.gov/ [https://perma.cc/K8ZV-ZBFH].

[291] Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, 114 Stat. 1464 (codified as amended in 22 U.S.C.).

[292] The 9/11 fund claim form consists of a twenty-page questionnaire inquiring about the claimants and their specific experiences and injuries. While somewhat lengthy, it is still something that could be completed over a period of days, as compared to months or even years for a lawsuit. *See September 11th Victims Compensation Fund Claim Form*, *supra* note 285.

[293] This fund would be unlikely to receive the same level of financing that the 9/11 fund has; as of 2019, claimants received anywhere from $86 to over $7 million. *September 11 Victim Aid and Compensation Fast Facts*, CNN (Sept. 2, 2019, 4:15 PM), https://www.cnn.com/2013/07/27/us/september-11th-victim-aid-and-compensation-fast-facts/index.html [https://perma.cc/FL5G-QEG4].

[294] *See* SUBCOMMITTEE REPORT, *supra* note 166, at 1–3, 6.

ongoing case against them,[295] and FOSTA already provides for asset appropriation and redistribution in accordance with existing restitution law.[296] This Note only proposes modifying this scheme to make it easier for survivors to access funds through a direct request to the fund rather than going through law enforcement channels.

On the other hand, this asset-forfeiture mechanism might still play into the pitfalls of punitiveness[297] or possibly present its own constitutional concerns.[298] Alternatively, implementing a shared payment scheme among online service providers provides a less punitive option. Like other forms of risk-sharing, such as workers' compensation,[299] online service providers could buy into a risk-sharing pool by paying into the common fund. These funds could then be allocated to claimants injured by being advertised for commercial sex online.

In essence, a common-fund scheme would prioritize providing benefits to victims over attributing blame to online service providers. Just as workers' compensation sought to encourage employers to improve safety conditions without increasing litigation, this risk-spreading scheme could encourage online service providers to monitor for sex trafficking on their sites while not creating as great of an incentive to unduly censor all sex- or sex-work-related content because there would be no unexpected, expensive lawsuits.[300] Such a scheme would not pose as great a chilling effect on internet speech as FOSTA's current language, but would still provide benefits to victims and promote good-faith monitoring as § 230 originally promised.[301] Furthermore, focusing on benefits over blame addresses feminist scholars' concerns with current anti-prostitution laws, thus helping survivors without harming voluntary sex workers.[302]

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[295] Justice Department Leads Efforts to Seize Backpage.com, *supra* note 167.

[296] FOSTA, Pub. L. 115-164, sec. 3, § 2421A(d), 132 Stat. 1253, 1254 (2018); 18 U.S.C. § 2327(b).

[297] *See* Bernstein, *supra* note 96, at 143 (describing the pitfalls of carceral feminism).

[298] *See generally* Note, *How Crime Pays: The Unconstitutionality of Modern Civil Asset Forfeiture as a Tool of Criminal Law Enforcement*, 131 HARV. L. REV. 2387 (2018) (discussing the questionable constitutionality of civil and criminal asset forfeiture schemes).

[299] *See* Paul Raymond Gurtler, Comment, *The Workers' Compensation Principle: A Historical Abstract of the Nature of Workers' Compensation*, 9 HAMLINE J. PUB. L. & POL'Y 285, 292–94 (1989) (describing the evolution of workers' compensation laws in the United States).

[300] *See id.* at 295 (describing workers' compensation's usefulness at reducing civil suits, providing relief for injured employees, and incentivizing reasonable safety measures as compared to a pre-workers' compensation scheme).

[301] *See* 47 U.S.C. § 230(c)(2); *see also* Leary, *supra* note 154, at 161–62 (discussing the original purpose of § 230).

[302] *See* Grant, *supra* note 15; MacKinnon, *supra* note 266; Butler, *supra* note 267; Thusi, *supra* note 268, at 228.

In this way, establishing a common fund would allow sex-trafficking survivors to recover compensation without contravening the First Amendment. Further, by existing outside of the very expensive and time-consuming litigation framework, a common fund allows recovery for all survivors, not just those with the means to litigate or the privilege to cooperate with law enforcement without being treated as a criminal.[303] Although a common fund would not end online sex trafficking, neither has FOSTA. Recent data indicate it has merely driven traffickers underground or to harder-to-find platforms rather than out of existence.[304] At the very least, a common fund would provide benefits for a greater number of survivors with lower costs to them and with less risk of endangering voluntary sex workers, advocates, or any other internet speakers.

CONCLUSION

FOSTA's fate remains uncertain. A growing number of scholars and commentators have called for its repeal or invalidation, and the D.C. Circuit gave the go-ahead for just that result. But FOSTA's demise would not end the project of supporting sex-trafficking survivors. Indeed, FOSTA's invalidation or repeal presents a new opportunity to enact meaningful reform tailored to the needs of survivors. Although the idea of punishing bad actors appeals to many, FOSTA's form of punishment endangers not only online service providers that profit from commercial sex, but also free internet speech, consensual sex workers, and even sex-trafficking victims themselves. Because FOSTA infringes on the First Amendment, incentivizes websites to censor consensual sex workers and advocates, and does not adequately aid sex-trafficking survivors, Congress should enact a solution to address all of these concerns. A common fund does just that.

[303] *See* DeCou, *supra* note 189, at 436–39; GOTTSCHALK, *supra* note 85, at 129.

[304] *See supra* notes 188, 206, 276 and accompanying text.