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Fight Online Sex Trafficking Act and Stop Enabling Sex Traffickers Act: A Shield for Jane Doe

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Fight Online Sex Trafficking Act and Stop Enabling Sex Traffickers Act: A Shield for Jane Doe

ELIZABETH M. DONOVAN

After concluding that the Communications Decency Act of 1996 was never intended to provide legal protection to websites that facilitate traffickers advertising sex trafficking victims, Congress passed the Allow States and Victims to Fight Online Sex Trafficking Act of 2017 and the Stop Enabling Sex Traffickers Act of 2017, commonly known together as FOSTA-SESTA. This Article considers and then rejects the claim by sex workers and sex worker rights advocates that the alleged burdens FOSTA-SESTA puts on those who self-report as freely choosing to work in the sex trade outweigh the potential benefit—fewer sex-trafficked people.

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Fight Online Sex Trafficking and Stop Enabling Sex Traffickers Act: A Shield for Jane Doe

ELIZABETH M. DONOVAN*

*... and down their ranks the fiery-eyed Athena bore
her awesome shield of storm, ageless, deathless—
a hundred golden tassles, all of them braided tight
and each worth a hundred oxen, float along the front.*¹

INTRODUCTION

Jane Doe #1 alleged that men who found her on [www.backpage.com](http://www backpage.com) raped her more than 1000 times.² Jane Doe #2 alleged that men who found her on [www.backpage.com](http://www backpage.com) raped her an estimated 900 times.³ Jane Doe #3, unable to estimate, alleged that men who found her on [www.backpage.com](http://www backpage.com) raped her on “numerous occasions.”⁴ Jane Doe #1, Jane Doe #2, and Jane Doe #3 were all children when traffickers advertised them on [www.backpage.com](http://www backpage.com) in the “Adult Entertainment” category on the website, under the subcategory “Escorts.”⁵ They sued Backpage.com, LLC (Backpage) in the United States District Court for the District of Massachusetts seeking damages under section 1595 of the Victims of Trafficking and Violence Protection Act of 2000, more commonly known as the Trafficking Victims Protection Act of 2000 (TVPA).⁶

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¹ HOMER, THE ILIAD bk. II, at 114, ll. 528–31 (Robert Fagles trans., Penguin Classics 1998). Athena, a daughter of the King of the Gods, Zeus, often carried the shield known as the aegis when going into battle. After Perseus killed the Gorgon Medusa, he cut off her head and gave it to Athena to put on her shield. The aegis then bore Medusa’s image, a monster who had hair of poisonous snakes and whose face turned the onlooker to stone. *Id.* bk. V, at 188, ll. 841–57. Athena is the goddess of wisdom, handicrafts, and war.

² *Doe v. Backpage.com*, 817 F.3d 12, 17 (1st Cir. 2016).

³ *Id.* at 17.

⁴ *Id.*

⁵ *Id.* at 16–17; *Doe ex rel. Roe v. Backpage.com*, 104 F. Supp. 3d 149, 151–53 (D. Mass. 2015).

⁶ Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, 114 Stat. 1464 (2000) (codified as amended throughout various sections within titles 8, 18, and 22 of the United States Code, as relevant here at 18 U.S.C. §§ 1591, 1595), *amended by* Trafficking Victims Protection Reauthorization Act of 2003, Pub. L. No. 108-193, 117 Stat. 2875 (2003), Trafficking Victims Protection Reauthorization Act of 2005, Pub. L. No. 109-164, 119 Stat. 3557 (2005), William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. No. 110-457, 122 Stat. 5044 (2008), Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-4, 127 Stat. 54 (2013), Justice for Victims of Trafficking Act of 2015, Pub. L. No. 114-22, 129 Stat. 227 (2015).

They alleged that Backpage systematically made corporate decisions to enable sex traffickers to evade law enforcement, including: editing advertisements to remove words that might catch the eyes of police, like “barely legal” or “high school” and replacing them with words and phrases such as “brly legal” or “high schl”; removing metadata from photographs that might suggest the date, time, or location; and providing users the option to “hide” their email addresses in postings.⁷ The district court dismissed their complaint, holding that they failed to state a claim, because section 230 of the Communications Decency Act of 1996⁸ protected Backpage from civil liability.⁹ The United States Court of Appeals for the First Circuit affirmed,¹⁰ and the United States Supreme Court on January 9, 2017 denied a petition for writ of certiorari brought on behalf of each Jane Doe.¹¹

In response to this case and many others,¹² Congress passed the Allow States and Victims to Fight Online Sex Trafficking Act of 2017¹³ and the Stop Enabling Sex Traffickers Act of 2017,¹⁴ commonly known together as FOSTA-SESTA. Section 2 of both acts provides, in part, that “section 230 of the Communications Act of 1934 . . . (commonly known as the ‘Communications Decency Act of 1996’) was never intended to provide legal protection to websites that facilitate traffickers in advertising the sale of unlawful sex acts with sex trafficking victims.”¹⁵ Congress clarified and amended section 230 of the Communications Decency Act of 1996 to ensure that it does not “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.”¹⁶ Some sex workers and their advocates instantly protested, alleging that FOSTA-SESTA makes it less safe for those who willingly choose to sell sexual access to themselves.¹⁷ They contend that FOSTA-SESTA deprives

⁷ *Doe*, 817 F.3d at 16–17; *Doe ex rel. Roe*, 104 F. Supp. 3d at 151–53.

⁸ Telecommunications (Communications Decency) Act of 1996, Pub. L. No. 104-104, § 509, 110 Stat. 133 (1996) (codified at 47 U.S.C. § 230).

⁹ *Doe ex rel. Roe*, 104 F. Supp. 3d at 154–61.

¹⁰ *Doe*, 817 F.3d at 29.

¹¹ *Doe v. Backpage.com*, 137 S. Ct. 622 (2017).

¹² STAFF OF PERMANENT SUBCOMM. ON INVESTIGATIONS, S. COMM. ON HOMELAND SEC. & GOV'T AFFAIRS, 114TH CONG., BACKPAGE.COM'S KNOWING FACILITATION OF ONLINE SEX TRAFFICKING 7 n.31 (2017) (“According to our research, there have been approximately 300 reported decisions addressing immunity claims advanced under 47 U.S.C. § 230 in the lower federal and state courts. All but a handful of these decisions find that the website is entitled to immunity from liability.” (quoting *Hill v. Stubhub, Inc.*, 727 S.E.2d 550, 558 (N.C. Ct. App. 2012))).

¹³ Allow States and Victims to Fight Online Sex Trafficking Act of 2017, Pub. L. No. 115-164, 132 Stat. 1253 (2018). This law is commonly referred to as FOSTA.

¹⁴ S. 1693, 115th Cong. (2018) (enacted). This law is commonly referred to as SESTA.

¹⁵ Allow States and Victims to Fight Online Sex Trafficking Act of 2017 § 2(1); S. 1693 § 2.

¹⁶ Allow States and Victims to Fight Online Sex Trafficking Act of 2017 § 2(1).

¹⁷ Amy Zimmerman, *Sex Workers Fear for Their Future: How SESTA Is Putting Many Prostitutes in Peril*, DAILY BEAST (Apr. 4, 2018, 5:23 AM), <https://www.thedailybeast.com/sex-workers-fear-for->

them of a safe place to screen customers, forcing them to sell on the street or through other venues that law enforcement cannot monitor, and leaving them open to violence from buyers, and from facilitators that websites like [www.backpage.com](http://www backpage.com) had rendered unnecessary.¹⁸

This Article considers the claim of sex workers and sex worker rights advocates that the alleged burdens FOSTA-SESTA puts on those who self-report as freely choosing to work in the sex trade outweigh the potential benefit: fewer sex-trafficked people.¹⁹ First, I survey the nature and scope of the problem that Congress sought to solve through FOSTA-SESTA. I show that websites like Backpage and Craigslist, Inc. (Craigslist) facilitated and promoted sex trafficking, while safely protected by the Communications Decency Act of 1996 from legal responsibility for their conduct. Second, I discuss the risks faced by those in the sex trade, including: rape and other violence by buyers, facilitators, and people who see sex workers as easy targets; and the risk of physical and mental health problems. Third, I explore common circumstances of several populations involved in the sex trade: those involved willingly, those involved unwillingly, and those who do not fit neatly in those two groups. Fourth, I analyze the difficulty in quantifying the numbers of willing sex workers, sex trafficking victims, and others in the sex trade between those two ends of the spectrum. Fifth, I review the results of two sociological studies of persons in the New York City sex trade

their-future-how-sesta-is-putting-many-prostitutes-in-peril [hereinafter Zimmerman, *Sex Workers Fear for Their Future*] (“FOSTA-SESTA is having an immediate effect on the sex-worker community, many of whom are watching websites that they use to screen clients, make money, and stay safe disappear in real time.”).

¹⁸ Tom Jackman, *Trump Signs ‘FOSTA’ Bill Targeting Online Sex Trafficking, Enables States and Victims to Pursue Websites*, WASH. POST (Apr. 11, 2018), https://www.washingtonpost.com/news/true-crime/wp/2018/04/11/trump-signs-fosta-bill-targeting-online-sex-trafficking-enables-states-and-victims-to-pursue-websites/?utm_term=.dba4cfa93d8d. See also Ian S. Thompson, *Congress Proposes to Fight Online Trafficking by Harming Sex Workers*, ACLU WASH. LEGIS. OFF. (Mar. 16, 2018), <https://www.aclu.org/blog/criminal-law-reform/congress-proposes-fight-online-trafficking-harming-sex-workers> (noting that FOSTA takes away “critical harm reduction and anti-violence tactics that sex workers depend on to survive,” including: “screening clients for violence; online advertising, which allows people to work in safer locations off the street and to be more discerning about clients; and ‘Bad Date Lists,’ which host information online about individuals who have previously victimized those who trade sex”).

¹⁹ This analysis uses the terms “sex work” and “sex worker” as defined by Cheryl Overs, founder and former first director of the Prostitutes Collective of Victoria, the Scarlet Alliance in Australia, and the Global Network of Sex Work Projects, in her work for the United Nations’ World Health Organization: “Sex work is the provision of sexual services for money or goods. Sex workers are women, men and transgendered people who receive money or goods in exchange for sexual services, and who consciously define those activities as income generating even if they do not consider sex work as their occupation.” CHERYL OVERS, *SEX WORKERS: PART OF THE SOLUTION 2* (2002), https://www.who.int/hiv/topics/vct/sw_toolkit/115solution.pdf. I distinguish sex trafficking victims from sex workers. Sex trafficking victims are persons in the sex trade through force, fraud, or coercion, or who are under eighteen years old. See 22 U.S.C. § 7102(11) (2019) (defining “severe forms of trafficking in persons”).

to show how those sex workers view the challenges of their sex work experience. Finally, I weigh the burden of FOSTA-SESTA on sex workers against the potential benefit of FOSTA-SESTA—fewer sex trafficking victims—and conclude that, even viewing sex workers’ arguments in their best light, the burden on them is outweighed by the potential benefit.²⁰

I. FEDERAL LAW ALLOWED WEBSITES TO FACILITATE SEX TRAFFICKING

In 2000, Congress passed the TVPA to take on human trafficking, “the fastest growing source of profits for organized criminal enterprises worldwide.”²¹ Congress found that traffickers “primarily target women and girls, who are disproportionately affected by poverty, the lack of access to education, chronic unemployment, discrimination, and the lack of economic opportunities in countries of origin.”²² Although Congress’ finding refers to “countries of origin,” the TVPA applies equally to any person, wherever born, including in the United States.²³ Human trafficking continues to increase,²⁴ with sex trafficking, particularly of women and girls, accounting for 79% of all reported human trafficking as of 2009,²⁵ and with women and children accounting for 79% of all detected trafficking victims as of 2016.²⁶ The Department of Justice’s Office of Juvenile Justice and Delinquency Prevention reported in 2014 that more than half of all sex trafficking victims

²⁰ By viewing sex workers’ and sex worker rights advocates’ arguments in their best light, I do not intend to suggest that society should: treat selling sexual services as work like any other; decriminalize either the sale or the purchase of sexual services; establish workplace regulations; or take other actions that make the sale of sexual services normal and ordinary. Those analyses exceed the scope of this Article, which is limited to the question whether FOSTA-SESTA unfairly burdens those who self-identify as sex workers.

²¹ 22 U.S.C. § 7101(b)(8) (2012).

²² *Id.* § 7101(4).

²³ *Fact Sheet: Human Trafficking*, OFF. ON TRAFFICKING PERSONS (Nov. 21, 2017), <https://www.acf.hhs.gov/otip/resource/fshumantrafficking>.

²⁴ *Online Sex Trafficking and the Communications Decency Act: Hearing Before the Subcomm. on Crime, Terrorism, Homeland Security, and Investigations of the H. Comm. on the Judiciary 2–3* (2017) (testimony of Mary Graw Leary, Professor of Law, Catholic University of America, Columbus School of Law), <https://republicans-judiciary.house.gov/wp-content/uploads/2017/09/Leary-Testimony-Final.pdf> [hereinafter *Leary Testimony*]; *National Human Trafficking Hotline Cases Jump by 13% in 2017*, POLARIS PROJECT (Mar. 14, 2018), <https://polarisproject.org/news/press-releases/national-human-trafficking-hotline-cases-jump-13-2017> (“The overall figures represent an 842 percent increase over the 10 years Polaris has operated the Hotline.”); see also U.S. DEP’T OF STATE, *TRAFFICKING IN PERSONS REPORT 43* (2018) (reporting on increases in prosecutions, convictions, and victims identified from 2011 to 2017).

²⁵ U.N. OFFICE ON DRUGS & CRIME, *GLOBAL REPORT ON TRAFFICKING IN PERSONS 6* (2009). See also DUREN BANKS & TRACEY KYCKELHAHN, BUREAU OF JUSTICE STATISTICS, *CHARACTERISTICS OF SUSPECTED HUMAN TRAFFICKING INCIDENTS, 2008-2010*, at 1 (2011), <http://bjs.ojp.usdoj.gov/content/pub/pdf/cshti0810.pdf> (stating that about eight in ten suspected incidents of human trafficking involve sex trafficking).

²⁶ U.N. OFFICE ON DRUGS & CRIME, *GLOBAL REPORT ON TRAFFICKING IN PERSONS 1* (2016).

were seventeen years old or younger.²⁷ “In fiscal year 2016, [Homeland Security Investigations] initiated 1029 investigations with a nexus to human trafficking and recorded 1952 arrests, 1176 indictments, and 631 convictions.”²⁸

One reason for the continued increase in sex trafficking is the ease with which traffickers can sell sexual access to trafficking victims online with little risk of getting caught by law enforcement.²⁹ In testimony before the House Judiciary Committee in 2015, Yiota Souras from the National Center for Missing and Exploited Children told lawmakers:

Online classified ad sites such as Backpage.com provide traffickers with a quick, easy, user-friendly platform and allows [sic] them to remain anonymous, test out new markets, attempt to evade public or law enforcement detection, and easily locate customers to consummate their sale of children for sex.³⁰

Despite sex traffickers’ burgeoning use of online advertising websites, section 230 of the Communications Decency Act of 1996 granted such websites broad immunity from civil and criminal responsibility for their role in facilitating sex trafficking.³¹

Senator James Exon (D-Neb.) introduced the Communications Decency Act of 1996 out of concern that children had easy access to pornography on

²⁷ OFFICE OF JUVENILE JUSTICE & DELINQUENCY PREVENTION, LITERATURE REVIEW: COMMERCIAL SEXUAL EXPLOITATION OF CHILDREN AND SEX TRAFFICKING 3, <http://www.ojjdp.gov/mpg/litreviews/CSECSexTrafficking.pdf> (last updated Aug. 2014) (citing Bureau of Justice Statistics data).

²⁸ *Human Trafficking*, U.S. IMMIGR. & CUSTOMS ENFORCEMENT, U.S. DEP’T HOMELAND SECURITY, <https://www.ice.gov/features/human-trafficking> (last visited Aug. 10, 2019).

²⁹ *Human Trafficking Investigation: Hearing Before the Permanent Subcomm. on Investigations of the S. Comm. on Homeland Sec. & Gov’t Affairs*, 114th Cong. 7 (2015) (testimony of Yiota G. Souras, Senior Vice President and General Counsel, National Center for Missing and Exploited Children, Subcommittee on Crime, Terrorism, Homeland Security, and Investigations), <https://www.govinfo.gov/content/pkg/CHRG-114shrg98445/pdf/CHRG-114shrg98445.pdf> [hereinafter *Souras Testimony*] (“Technology has fundamentally changed how children are trafficked. Today an adult can shop from their home, office, or hotel room, even on a cell phone, to buy a child for sex.”); see STAFF OF PERMANENT SUBCOMM. ON INVESTIGATIONS, S. COMM. ON HOMELAND SEC. & GOV’T AFFAIRS, 114TH CONG., *supra* note 12, at 5 n.20 and accompanying text (citing MEREDITH DANK ET AL., URBAN INST., ESTIMATING THE SIZE AND STRUCTURE OF THE UNDERGROUND COMMERCIAL SEX ECONOMY IN EIGHT MAJOR U.S. CITIES 234 (2014)).

³⁰ *Souras Testimony*, *supra* note 29, at 39. See also STAFF OF PERMANENT SUBCOMM. ON INVESTIGATIONS, S. COMM. ON HOMELAND SEC. & GOV’T AFFAIRS, 114TH CONG., *supra* note 12, at 5 (“Sex trafficking has thrived on the Internet in part because of the high profitability and relatively low risk associated with advertising trafficking victims’ services online in multiple locations.”).

³¹ STAFF OF PERMANENT SUBCOMM. ON INVESTIGATIONS, S. COMM. ON HOMELAND SEC. & GOV’T AFFAIRS, 114TH CONG., *supra* note 12, at 7.

the internet.³² Senator Exon designed the bill to hold legally responsible those who posted pornography that children might access.³³ Senator Exon did not intend the bill to hold internet service providers and websites legally responsible. Section 230 clarified that “[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.”³⁴

Thomas Dart, the Sheriff of Cook County, Illinois, tested the limits of section 230 in *Dart v. Craigslist*.³⁵ Sheriff Dart brought a public nuisance claim against Craigslist, alleging that Craigslist’s online classified advertising service facilitated prostitution and sex trafficking.³⁶ He alleged that in Craigslist’s “erotic services” category, its most popular destination, users routinely posted advertisements openly promising sex for money.³⁷ He claimed that Craigslist did not simply serve as a publisher, but played a more active role in facilitating prostitution and sex trafficking by creating links to subcategories of erotic services, such as “w4m,” meaning women for men, and by giving users the option of using a word-search function.³⁸ The district court, however, disagreed, finding that Craigslist did not induce anyone to post a particular listing.³⁹ The court held that Craigslist did not lose its section 230(c)(1) immunity because of its alleged “active role” in making it easier for posters to offer sexual access for money.⁴⁰

After a man killed a masseuse he met online through Craigslist in April 2009, Craigslist finally yielded to pressure from law enforcement and the public. It removed its “erotic services” category in May 2009 and replaced it with “adult services” for postings by legal adult service providers.⁴¹ Then, in August 2010, attorneys general from seventeen states signed a letter

³² See Robert Cannon, *The Legislative History of Senator Exon’s Communications Decency Act: Regulating Barbarians on the Information Superhighway*, 49 FED. COMM. L.J. 51, 52–54 (1996) (describing the factual circumstances and motivations involving the introduction of the Communications Decency Act of 1996).

³³ See *id.* at 57 (“The fundamental purpose of the [CDA] is to provide much needed protection for children.’ He proposed to create this protection by amending section 223 of Title 47, United States Code, entitled ‘Obscene or harassing telephone calls in the District of Columbia or in interstate or foreign communications.’” (internal citations omitted)).

³⁴ 47 U.S.C. § 230(c)(1) (2019).

³⁵ See 665 F. Supp. 2d 961, 961–63 (2009) (explaining the factual background of the case).

³⁶ *Id.*

³⁷ *Id.* at 962.

³⁸ *Id.* at 968 (“Sheriff Dart insists, on the other hand, that Craigslist plays a more active role than an intermediary or a traditional publisher. He claims that Craigslist causes or induces its users to post unlawful ads — by having an ‘adult services’ category with subsections like ‘w4m’ and by permitting its users to search through the ads ‘based on their preferences.’”).

³⁹ See *id.* (“But as the Court observed in *Chicago Lawyers*, ‘[n]othing in the service craigslist offers induces anyone to post any particular listing.’” (alteration in original)).

⁴⁰ *Id.* at 967–70.

⁴¹ Geoffrey A. Fowler, *Craigslist Abandons Its Erotic Category*, WALL ST. J. (May 13, 2009), <https://www.wsj.com/articles/SB124222756907515489>.

addressed to Craigslist’s chief executive, Jim Buckmaster, and its founder, Craig Newmark, asking Craigslist to remove the adult services section of its website because the adult advertisements facilitated prostitution and sex trafficking.⁴² Craigslist complied in September 2010.⁴³

By leaving the adult classified advertising market, Craigslist created an opportunity for Backpage, owned by James Larkin, Michael Lacey, and Carl Ferrer.⁴⁴ Although Backpage initially took steps to weed out posts advertising prostitution and sex trafficking, fearing enhanced public scrutiny following Craigslist’s withdrawal from the market,⁴⁵ it soon abandoned that strategy as “bad for business.”⁴⁶ Chief Executive Officer Ferrer wrote that “[w]e are in the process of removing ads and pissing off a lot of users who will migrate elsewhere. I would like to go back to having our moderators remove bad content in a post and then locking the post from being edited.”⁴⁷ By simply removing language suggesting prostitution or sex trafficking, and then publishing the cleaned-up post, “Backpage expanded its marketing footprint in the adult advertising arena.”⁴⁸

By late September 2010, Backpage installed a new filter called “Strip Term From Ad.”⁴⁹ The filter removed terms like “lolita,” “teenage,” “rape,” “young,” “amber alert,” “little girl,” “fresh,” “innocent,” and “school girl.”⁵⁰ Moderators then reviewed the sanitized post and published it.⁵¹ By October 27, 2010, Sales and Marketing Director Dan Hyer boasted that “[w]ith the new changes, we are editing 70 to 80% of ads.”⁵² Of course, the filter did not change the real age of the person sold for sex or the nature of the transaction.⁵³ Backpage knew that its practices masked prostitution and sex trafficking. Andrew Padilla, the head of Backpage’s moderation department, wrote in an October 10, 2010 email to moderators that “it’s the language in ads that is really killing us with the [state] Attorneys General.”⁵⁴ Later in October 2010, Padilla upbraided moderators who failed posts instead of cleaning them: “[Your team] should stop Failing ads and begin Editing . . .

⁴² Claire Cain Miller, *Craigslist Blocks Access to “Adult Services” Pages*, N.Y. TIMES (Sept. 4, 2010), https://www.nytimes.com/2010/09/05/technology/05craigs.html?_r=1&hp.

⁴³ *Id.*

⁴⁴ STAFF OF PERMANENT SUBCOMM. ON INVESTIGATIONS, S. COMM. ON HOMELAND SEC. & GOV’T AFFAIRS, 114TH CONG., *supra* note 12, at 20, 42.

⁴⁵ *Id.* at 20.

⁴⁶ *Id.* at 20–21.

⁴⁷ *Id.* at 21.

⁴⁸ *Doe v. Backpage.com*, 817 F.3d 12, 16 (1st Cir. 2016).

⁴⁹ STAFF OF PERMANENT SUBCOMM. ON INVESTIGATIONS, S. COMM. ON HOMELAND SEC. & GOV’T AFFAIRS, 114TH CONG., *supra* note 12, at 21–22.

⁵⁰ *Id.* at 22–23 (footnotes omitted).

⁵¹ *Id.*

⁵² *Id.* at 25 (alteration in original).

⁵³ *See id.* (noting that while Backpage edited the vast majority of ads in its adult section, it deleted only a *de minimis* share of these ads).

⁵⁴ *Id.* at 25–26 (alteration in original).

As long as your crew is editing and not removing the ad entirely, we shouldn't upset too many users. Your crew has permission to edit out text violations and images and then approve the ad."⁵⁵

By 2012, Ferrer had implemented another practice to help posters keep their ads clean. When a user attempted to post an ad with a banned word, the user received an error message identifying the word, so that the user could change it and continue with the post.⁵⁶ A former Backpage moderator told the Subcommittee that moderators "went through the motions of putting lipstick on a pig, because when it came down to it, it was what the business was about"—moderating ads for prostitution and sex trafficking.⁵⁷

By using the new filter and other business practices designed to make it easier for users offering to sell sexual access to themselves or others, while evading law enforcement, Larkin, Lacey, and Ferrer increased Backpage's revenue from \$11.7 million in 2009, to \$29 million in 2010, \$71.2 million in 2012, and \$135 million in 2014.⁵⁸ Despite knowingly facilitating prostitution and sex trafficking, Backpage received broad immunity from criminal and civil responsibility under the Communications Decency Act of 1996.⁵⁹ By passing FOSTA-SESTA, Congress intended to remove the safeguard that protected online platforms like Backpage from responsibility for their role in facilitating sex trafficking.⁶⁰

II. WHAT HARMS DO SEX TRAFFICKING VICTIMS SUFFER?

Before turning to the burdens FOSTA-SESTA allegedly asks willing sex workers to bear, an analysis of the harms FOSTA-SESTA seeks to avoid is vital. The United States Court of Appeals for the First Circuit stated in *Jane Doe v. Backpage.com, LLC* that the circumstances of sex trafficking victims "evoke outrage."⁶¹ Yet, beyond the initial outrage over victims' circumstances lies a grim catalogue of physical, psychological, and social harms they have suffered already, some of which will linger long into the future. Policy cannot lose sight of the breadth of these harms.

There is little dispute that sex trafficking victims suffer serious harms.⁶² Sex trafficking victims endure repeated rape, sometimes more than a

⁵⁵ *Id.* at 28 (alterations in original).

⁵⁶ *Id.* at 34–35.

⁵⁷ *Id.* at 36–37.

⁵⁸ *Id.* at 43.

⁵⁹ *Doe v. Backpage.com*, 817 F.3d 12, 29 (1st Cir. 2016).

⁶⁰ Allow States and Victims to Fight Online Sex Trafficking Act of 2017, Pub. L. No. 115-164, § 2, 132 Stat. 1253, 1253 (2018).

⁶¹ *Doe*, 817 F.3d at 15.

⁶² See Elizabeth Bernstein, *Militarized Humanitarianism Meets Carceral Feminism: The Politics of Sex, Rights, and Freedom in Contemporary Antitrafficking Campaigns*, 36 SIGNS: J. WOMEN CULTURE & SOC'Y 45, 45–46 (2010) (asserting that "no one could plausibly claim to be 'for' sex trafficking").

thousand times.⁶³ A sex trafficking victim does not consent to the commercial sex act, or where the victim is a child, does not have the capacity to consent to it. Yet rape is not the only violence victims face. In Laura J. Lederer's and Christopher A. Wetzel's 2014 study of the health consequences of female domestic sex trafficking victims, the most common forms of violence reported by survivors after rape were: punched (73.8%); beaten (68.9%); kicked (68.0%); forced unprotected sex (68.0%); threatened with weapon (66.0%); strangled (54.4%); and abused by person of authority (50.5%).⁶⁴ Seventy percent of victims reported physical injuries, most commonly to the head or face.⁶⁵ The most frequently reported physical problems were neurological, with victims reporting: memory problems, insomnia, or poor concentration (82.1%); headaches or migraines (53.8%); and dizziness (34.0%).⁶⁶ "More than half of the survivors (54.3%) reported dental problems, with tooth loss the most common problem (42.9%)."⁶⁷ This study mirrors international studies conducted of sex trafficking victims.⁶⁸

Harmful physical impacts also result from the unremitting commercial sex acts that traffickers force upon victims. Lederer's and Wetzel's study revealed that more than two thirds of victims contracted a sexually

⁶³ *Doe*, 817 F.3d at 17; Laura J. Lederer & Christopher A. Wetzel, *The Health Consequences of Sex Trafficking and Their Implications for Identifying Victims in Healthcare Facilities*, 23 ANNALS HEALTH L. 61, 72 (2014) (noting that in a comprehensive study of the health problems of sex trafficking victims, study respondents reported that "[o]n average . . . [they were] used for sex by approximately thirteen buyers per day, with a median response of ten. Some respondents reported typical days of as many as thirty to fifty buyers" (footnote omitted)); see also MODEL PENAL CODE § 213.1 (AM. LAW INST. 1962) (stating, in the Explanatory Note, that "[t]he most serious forms of the offense include cases where the actor compels the victim to submit by force or by certain specified threats, where the actor has impaired the victim's capacity to control or appraise her conduct by administering drugs or other intoxicants, where the victim is unconscious, or where the victim is less than 10 years old").

⁶⁴ Lederer & Wetzel, *supra* note 63, at 75; see also Donna M. Hughes, *Best Practices to Address the Demand Side of Sex Trafficking*, in SELECTED WORKS OF DONNA M. HUGHES 10–12 (2004), https://works.bepress.com/donna_hughes/20/ (reviewing findings of several studies conducted regarding violence in the sex industry from the early 1980s to the early 2000s and reporting that prostitutes face high rates of violence and abuse from men who pay them for sex acts).

⁶⁵ Lederer & Wetzel, *supra* note 63, at 68–69; see also Melissa Farley, "Bad for the Body, Bad for the Heart": Prostitution Harms Women Even if Legalized or Decriminalized, 10 VIOLENCE AGAINST WOMEN 1087, 1098 (2004) [hereinafter Farley, *Bad for the Body*] ("Traumatic brain injury (TBI) occurs in prostitution as a result of being beaten, hit, or kicked in the head, strangled, or having one's head slammed into objects such as car dashboards. . . . Half of a group of 100 Canadian women in prostitution reported violent assaults to their heads that resulted in alteration of consciousness." (citations omitted)).

⁶⁶ Lederer & Wetzel, *supra* note 63, at 68.

⁶⁷ *Id.* at 69.

⁶⁸ See, e.g., Arun Kumar Acharya, *Sexual Violence and Proximate Risks: A Study of Trafficked Women in Mexico City*, 12 GENDER TECH. & DEV. 77, 86 (2008) ("The results show that in one week: 70 percent of the women had been beaten with an object, 100 percent had been abused verbally, 30 percent had been locked in the house without food, 15 percent had been intentionally burned by traffickers or the pimp (the madam), 28 percent had been drugged with cannabis, 38 percent had been threatened with being killed by the madam, 10 percent and 2 percent [of the] women reported that the madam put chili powder in their eyes and vagina respectively.").

transmitted disease or infection.⁶⁹ Not only did survivors report high rates of chlamydia (39.4%), gonorrhea (26.9%), and Hepatitis C (15.4%), but nearly two thirds “reported at least one gynecological symptom other than STDs/STIs, with pain during sex (46.2%), urinary tract infections (43.8%), and vaginal discharge (33.3%) among the most common such symptoms.”⁷⁰ Victims’ next most frequently reported physical problems were dietary, with over 70% of victims reporting one of the following: loss of appetite (46.7%); severe weight loss (42.9%); eating disorders (36.2%); and malnutrition (35.2%).⁷¹ Finally, though not conventionally tied to sexual abuse, victims reported some type of cardiovascular or respiratory difficulty (67.9%) and gastrointestinal symptoms (61.3%) while trafficked.⁷²

Lederer’s and Wetzel’s study confirmed a trend of forced abortions found both in international studies of sex trafficking victims and in another domestic study.⁷³ Of the women who answered whether they had a pregnancy while trafficked, a majority reported that they had (71.2%).⁷⁴ Of those women, about one in five (21.2%) reported having five or more pregnancies.⁷⁵ More than half of the women who reported a pregnancy reported at least one abortion (55.2%), and nearly one third reported multiple abortions (29.9%).⁷⁶ Although only thirty-four women answered whether their abortions were forced upon them, more than half (eighteen) of that group said that one or more of their abortions was at least partly forced upon them.⁷⁷ “Notably, the phenomenon of forced abortion as it occurs in sex trafficking transcends the political boundaries of the abortion debate, violating both the pro-life belief that abortion takes innocent life and the pro-choice ideal of women’s freedom to make their own reproductive choices.”⁷⁸

⁶⁹ Lederer & Wetzel, *supra* note 63, at 71.

⁷⁰ *Id.* at 71–72; *see also* Acharya, *supra* note 68, at 90–92 (“[N]early 57 percent of the trafficked women had a burning sensation, pain or difficulty during urination, whereas, 63 percent said that they had lower abdominal pain or pain in the vagina during intercourse and nearly 62 percent said that during vaginal discharge they had problems of itching or ulcers on both sides of the vagina; 48 percent of the trafficked women had problems of discharging with lower abdominal pain and fever during discharge.”).

⁷¹ Lederer & Wetzel, *supra* note 63, at 68.

⁷² *Id.* at 69.

⁷³ *Id.* at 73 (citing S. Abdulaheem & A.R. Oladipo, *Trafficking in Women and Children: A Hidden Health and Social Problem in Nigeria*, 2 INT’L J. SOC. & ANTHROPOLOGY 34, 37 (2010); Acharya, *supra* note 68, at 90; C. ZIMMERMAN ET AL., THE HEALTH RISKS AND CONSEQUENCES OF TRAFFICKING IN WOMEN AND ADOLESCENTS: FINDINGS FROM A EUROPEAN STUDY 24, 51 (2003), <http://www.oas.org/atip/Global%20Reports/Zimmerman%20TIP%20HEALTH.pdf>; JANICE RAYMOND & DONNA HUGHES, SEX TRAFFICKING OF WOMEN IN THE UNITED STATES: INTERNATIONAL AND DOMESTIC TRENDS 18 (2001), <https://www.ncjrs.gov/pdffiles1/nij/grants/187774.pdf>).

⁷⁴ Lederer & Wetzel, *supra* note 63, at 72.

⁷⁵ *Id.*

⁷⁶ *Id.* at 73.

⁷⁷ *Id.*

⁷⁸ *Id.* at 74.

Not only do sex trafficking victims suffer serious physical health problems, they suffer severe mental and psychological trauma.⁷⁹ Lederer and Wetzel found that nearly all of the women in their study reported at least one psychological issue while trafficked (98.1%), with an average of more than a dozen (12.11).⁸⁰ The most commonly reported problems were: depression (88.7%); feelings of shame or guilt (82.1%); low self-esteem (81.1%); anxiety (76.4%); nightmares (73.6%); and flashbacks (68.0%).⁸¹ Lederer and Wetzel also found that survivors suffered from other psychological disorders, including: acute stress (38.7%); bipolar (30.2%); depersonalization (19.8%); multiple personality (13.2%); and borderline personality (13.2%).⁸² Finally, the extent of mental trauma endured by sex trafficking victims in their study is reflected in the reported rate of attempted suicide (41.5%).⁸³

III. WHAT POPULATIONS MIGHT FOSTA-SESTA IMPACT?

To assess the claim by sex workers and their advocates that FOSTA-SESTA unfairly burdens sex workers, it is helpful to identify distinct populations within the sex trade. In *Getting Screwed: Sex Workers and the Law*, Alison Bass, a West Virginia University journalism professor and former medical and science writer for the *Boston Globe*, writes that people in the sex trade in the United States largely fall into four populations: first, people freely choosing sex work, running what looks like their own small business enterprise; second, sex workers addicted to drugs or alcohol who need money to pay for their addictions, and who often come under the sway of pimps or other facilitators; third, migrants smuggled into the United States voluntarily to sell sex to make a better living than in their origin

⁷⁹ *Id.* at 70; Melissa Farley & Howard Barkan, *Prostitution, Violence, and Posttraumatic Stress Disorder*, 27 *WOMEN & HEALTH* 37, 42 (1998).

⁸⁰ Lederer & Wetzel, *supra* note 63, at 70.

⁸¹ *Id.* (more than half of the women in the study suffered from Post-traumatic Stress Disorder (PTSD)); see also Farley, *Bad for the Body*, *supra* note 65, at 1104–05 (“PTSD is characterized by anxiety, depression, insomnia, irritability, flashbacks, emotional numbing, and hyperalertness. Symptoms are more severe and long lasting when the stressor is of human design. PTSD is normative among prostituted women.”).

⁸² Lederer & Wetzel, *supra* note 63, at 70.

⁸³ *Id.*

country; and fourth, those who entered the sex trade through force, fraud, or coercion, or as children⁸⁴—that is, sex trafficking victims.⁸⁵

The populations Bass identifies do not fully capture the range of backgrounds, circumstances, contexts, and challenges of people in the sex trade.⁸⁶ Indeed, just as circumstances and contexts vary, studies show that people in the sex trade “operate on a continuum of consent,” with fully-informed consent on one end, force, fraud, or coercion on the other, and the vast majority of people falling between those two ends.⁸⁷ Indeed, prostitution abolitionist Melissa Farley argues that in the real world of the sex trade, it is often impossible to distinguish between sex trafficking victims and sex workers.⁸⁸ Nonetheless, to assess the claim that FOSTA-SESTA is misguided, sketching some of the circumstances common to distinct populations of people in the sex trade provides a useful analytical framework. In particular, broadly sketching the outlines of each population’s use of the internet for connecting with buyers, and for screening them, is integral to this inquiry.

For the first population Bass identifies—people who choose sex work, fully aware of the risks of violence and other physical and mental harm—access to the internet reshaped their experience in the sex trade. “For many indoor sex workers, it has become easier to work without third-party

⁸⁴ ALISON BASS, GETTING SCREWED: SEX WORKERS AND THE LAW 96 (2015) [hereinafter BASS, GETTING SCREWED]. Much like statutory rape, which makes having sex with a minor a crime regardless whether the defendant believes his sexual partner was a minor, the TVPA treats a person under the age of eighteen as a trafficking victim, even if the person gives his or her “consent.” 18 U.S.C. § 1591(a) (2012); 22 U.S.C. § 7102 (2012); *see also* Morissette v. United States, 342 U.S. 246, 251 n.8 (1952) (recognizing statutory rape as an example of an offense not requiring proof of criminal intent).

⁸⁵ BASS, GETTING SCREWED, *supra* note 84, at 96 (citing Bass’s interview of Jay Albanese, a criminologist and professor at Virginia Commonwealth University).

⁸⁶ *See, e.g.*, ELIZABETH BERNSTEIN, TEMPORARILY YOURS: INTIMACY, AUTHENTICITY, AND THE COMMERCE OF SEX 169–70 tbl.2 (2007) [hereinafter BERNSTEIN, TEMPORARILY YOURS].

⁸⁷ *See* Martin A. Monto, *Objectivity, Activism, and the Challenge of Research on a Highly Polarized and Somewhat Stigmatized Topic*, in CHALLENGING PERSPECTIVES ON STREET-BASED SEX WORK 218, 222 (Katie Hail-Jares et al. eds., 2017) [hereinafter Monto, *Highly Polarized and Somewhat Stigmatized Topic*] (citing Martin A. Monto, *Female Prostitution, Customers, and Violence*, 10 VIOLENCE AGAINST WOMEN 160 (2004)); Elizabeth M. Donovan, *Same As It Ever Was: In Support of the Rights of Sex Trafficking Victims*, 36 QUINNIPIAC L. REV. 489, 592–612 (2018); Ronald Weitzer, *Human Trafficking and Contemporary Slavery*, 41 ANN. REV. SOC. 223, 232–38 (2015) [hereinafter Weitzer, *Human Trafficking*]; *see also* SALLY ENGLE MERRY, THE SEDUCTIONS OF QUANTIFICATION: MEASURING HUMAN RIGHTS, GENDER VIOLENCE, AND SEX TRAFFICKING 144 (2016) (“[I]t can be difficult to distinguish between voluntary and coerced entrance into commercial sex, since people move into this work under varying degrees of coercion.”).

⁸⁸ *See* Melissa Farley, Kenneth Franzblau & M. Alexis Kennedy, *Online Prostitution and Trafficking*, 77 ALB. L. REV. 1039, 1055–56 (2013) (“There are no boundaries in the sex trafficking industry that distinguish physically coerced from psychologically coerced victims. Confusion reigns regarding techniques of mental control used by pimps and traffickers whereby victims appear to collude happily in their own victimization. There is also a failure by many—the public, law enforcement, NGOs, health care personnel—to recognize the coercive force of a history of abuse, neglect, racism, sexism, and poverty in channeling women into prostitution.” (citations omitted)).

management, to conduct one's business with minimal interference from the criminal justice system, and to reap greater profits by honing one's sales pitch to a more elite and more specialized audience."⁸⁹ This population includes women with college educations and feminist leanings.⁹⁰ Many sex workers in this population turn down clients they deem unsafe, often running client phone numbers through online "bad-client" databases they share with other sex workers.⁹¹ Studies show that this population does not typically face the same degree of hardship, stigma, and violence that street-based sex workers face.⁹²

Bass includes other so-called "indoor" sex workers in this first population, even though their experiences sometimes contrast sharply with the paradigmatic small business owner Bass portrays as representing this population.⁹³ These other indoor sex workers work for, or sometimes with, third-party management, connecting with buyers in bars, strip clubs, gentlemen's clubs, residential brothels, massage parlors, and hotels, even if they or third-party facilitators advertise their sexual services on the internet.⁹⁴ Bass concedes that "[w]hile some adult sex workers are definitely being exploited by pimps, for others, the men in their lives whom law enforcement would label as pimps are actually lovers, bodyguards, or drivers who share in their earnings."⁹⁵ Many of these sex workers do not consider themselves to have freely chosen sex work, viewing it instead as the only way to make a living wage.⁹⁶ It appears these less independent indoor sex workers represent another distinct population. They fall along the continuum that begins just after the sex worker who runs her or his own business without third-party management and stretches until just before the sex trafficking victim. They or their management commonly use the internet to

⁸⁹ BERNSTEIN, *TEMPORARILY YOURS*, *supra* note 86, at 93.

⁹⁰ Monto, *Highly Polarized and Somewhat Stigmatized Topic*, *supra* note 87, at 222.

⁹¹ BASS, *GETTING SCREWED*, *supra* note 84, at 81–82.

⁹² Sharon S. Oselin & Jennifer E. Cobbina, *Holding Their Own: Female Sex Workers' Perceptions of Safety Strategies*, in *CHALLENGING PERSPECTIVES ON STREET-BASED SEX WORK* 78, 81 (Katie Hail-Jares et al. eds., 2017) [hereinafter *Perceptions of Safety Strategies*].

⁹³ BASS, *GETTING SCREWED*, *supra* note 84, at 96.

⁹⁴ *Id.* at 96 (some of this population works "for brothels, escort agencies, or private clubs"); Farley et al., *supra* note 88, at 1041–44 ("The Internet has facilitated prostitution's shift from the street to indoor locations: to massage parlors, residential brothels, hotels, call girl or escort prostitution (more accurately described as cell phone prostitution), and strip club or gentlemen's club prostitution." (internal citation omitted)).

⁹⁵ BASS, *GETTING SCREWED*, *supra* note 84, at 96.

⁹⁶ *Id.* ("The majority (67 percent) of the indoor workers [in a 2005 study] (who worked independently or for brothels, escort agencies, or private clubs) said they got involved with sex work because they were unable to find other work that provided a living wage."); Farley et al., *supra* note 88, at 1041–42 ("According to estimates from eighteen sources including research studies, government reports, and nongovernmental agencies, on average 84% of women in prostitution are under third-party control or pimped or trafficked.").

market their sexual services.⁹⁷ It is unclear whether they use the internet to screen buyers, although it seems unlikely that many buyers in these venues would provide the information sought for such screenings.⁹⁸

The second population Bass identifies—sex workers addicted to drugs or alcohol⁹⁹—is primarily street-based.¹⁰⁰ Sex workers and children¹⁰¹ in this population rely on pimps, other facilitators, other sex workers, or friends, and real-time cautionary measures for safety, rather than internet databases and sophisticated online screening measures, like confirming telephone numbers before meeting.¹⁰² People in this population face a greater risk of violence from buyers, pimps, and other facilitators than do willing, indoor, internet-based sex workers.¹⁰³ Although buyers find a small percentage of this population using the internet, through advertisements posted by pimps or traffickers, or sometimes by sex workers and children selling sexual

⁹⁷ Farley et al., *supra* note 88, at 1043 (“Eighty-eight percent of sex buyers in a 2011 research study had bought women and children for sexual use indoors via Internet-advertised escort agencies, strip clubs, gentlemen’s clubs, brothels, and massage parlors.”).

⁹⁸ Amelia McDonnell-Parry, *Ashley Judd Confronted at Women’s Event for Anti-Prostitution Beliefs*, ROLLING STONE (Dec. 10, 2018, 5:57 PM), <https://www.rollingstone.com/culture/culture-news/ashley-judd-anti-prostitution-767269/> (“[M]any sex workers are careful to screen clients before they meet with them, asking for detailed information about who they are and where they work. . . . [L]aws criminalizing buyers would make such screening much more difficult — what buyer is going to readily divulge such culpable information — and thus jeopardize their ability to work safely.” (second alteration in original) (quoting Alison Bass, *Why Laws That Criminalize Buyers of Sex Only Make Sex Work More Dangerous*, HUFFPOST, https://www.huffpost.com/entry/why-laws-that-criminalize_b_9820562 (last updated May 3, 2017))). It is worth noting that every state in the United States makes prostitution illegal, except Nevada, which licenses prostitution in certain brothels. Daria Snadowsky, Note, *The Best Little Whorehouse Is Not in Texas: How Nevada’s Prostitution Laws Serve Public Policy, and How Those Laws May Be Improved*, 6 NEV. L.J. 217, 217 (2005).

⁹⁹ BASS, GETTING SCREWED, *supra* note 84, at 96; *see also* Lederer & Wetzel, *supra* note 63, at 68 (quoting a former sex worker: “I am telling you that you have to not be in your sober mind to run these tricks—you just can’t do it straight so everyone on the street is hooked on some drug”).

¹⁰⁰ Linda Muraresku, “Just to Be There”: A Probation Officer’s Reflection on Project Dawn Court, in CHALLENGING PERSPECTIVES ON STREET-BASED SEX WORK 40, 49 (Katie Hail-Jares et al. eds., 2017) (“[T]he street-based population in Philadelphia is drug driven. Heroin—it’s just crazy.”); *see also* BASS, GETTING SCREWED, *supra* note 84, at 67 (“In many cases, drug use preceded their involvement in commercial sex. For these streetwalkers, prostitution is a means of securing the funds needed to feed an already established drug addiction.”).

¹⁰¹ Traffickers often seek to lure troubled youth into the sex trade. COVENANT HOUSE, HOMELESSNESS, SURVIVAL SEX AND HUMAN TRAFFICKING: AS EXPERIENCED BY THE YOUTH OF COVENANT HOUSE NEW YORK 6, 14–15 (2013), <https://humantraffickinghotline.org/sites/default/files/Homelessness%2C%20Survival%20Sex%2C%20and%20Human%20Trafficking%20-%20Covenant%20House%20NY.pdf>.

¹⁰² Oselin & Cobbina, *supra* note 92, at 91–93 (female street sex workers screen clients by: choosing clients selectively, rejecting ones that seem risky, such as those high on drugs; having a friend, relative, or business partner along or nearby in a car or on the phone, and making the buyer aware of this; using repeat customers; and not going to a buyer’s house).

¹⁰³ *See* BASS, GETTING SCREWED, *supra* note 84, at 67 (citing Ronald Weitzer, *New Directions in Research on Prostitution*, 43 CRIME L. & SOC. CHANGE 211, 216 (2005)); *see also* Martin A. Monto, *Female Prostitution, Customers, and Violence*, 10 VIOLENCE AGAINST WOMEN 160, 161 (2004) (citing studies showing that street-based prostitutes suffer more violence than indoor-based prostitutes).

access to their own bodies,¹⁰⁴ buyers find a significant percentage of this population on the street.¹⁰⁵ There is little evidence to suggest that pimps and facilitators who use the internet to solicit buyers do so to protect the safety of the people sold.¹⁰⁶ Moreover, even where people in this population sell online, they do not appear to do so to increase their safety.¹⁰⁷

Similarly, there is little evidence to suggest that the third group Bass identifies—sex workers voluntarily smuggled¹⁰⁸ into the United States to sell sex to make a better living than in their origin country¹⁰⁹—is safer because their pimps, facilitators, or smugglers use the internet to screen buyers and reject those deemed unsafe.¹¹⁰ Moreover, language barriers often isolate these migrant sex workers, making it difficult for them to access basic information on their rights and health, let alone to use the internet to screen

¹⁰⁴ Without having his or her own credit card to pay for an online advertisement or to book a hotel room, a younger drug or alcohol-addicted person often cannot avail himself or herself of these tools.

¹⁰⁵ RIC CURTIS ET AL., CTR. FOR COURT INNOVATION, THE COMMERCIAL SEXUAL EXPLOITATION OF CHILDREN IN NEW YORK CITY 55–56 (2008), <https://www.ncjrs.gov/pdffiles1/nij/grants/225083.pdf> (“For those who recently entered the market, allowing the customer to approach and proposition them (49%) appeared to be the most common route, followed by youth approaching the customer (23%) . . . [S]ome teens (23%) said that the internet was an increasingly popular option to meet customers, and 11% of the teens used the popular website, Craigslist, to meet prospective ‘dates.’”).

¹⁰⁶ See Ronald Weitzer, *New Directions in Research on Prostitution*, 43 CRIME L. & SOC. CHANGE 211, 227 (2005) (“Pimps rarely provide protection for their workers, because they are only intermittently on the street monitoring their workers. Only one-fifth of the 72 prostitutes interviewed in one study said their pimp provided them with protection and, surprisingly only a minority of the 38 pimps interviewed (43%) believed that pimps provide their workers with protection.” (citation omitted)).

¹⁰⁷ Farley et al., *supra* note 88, at 1090–91 (“Because online sex businesses are less visible to the public, victims of sexual exploitation in prostitution are isolated and can be in greater danger from sex buyers. A survivor of prostitution opined that street prostitution was actually safer than online prostitution since friends watched out for her on the street. ‘They don’t know what they are doing,’ she said about women who are sold via online websites, ‘they’re alone.’” (citing Jennifer Quinn & Robert Cribb, *Inside the World of Human Trafficking*, TORONTO STAR (Oct. 5, 2013), http://www.thestar.com/news/gta/2013/10/05/inside_the_world_of_human_sex_trafficking.html)).

¹⁰⁸ Smuggling is a distinct crime from sex trafficking. Smuggling centers on transporting people into the United States to evade immigration laws, whereas sex trafficking centers on exploiting people, through force, fraud, or coercion to induce a person into performing a sex act. *Human Trafficking and Smuggling*, U.S. IMMIGR. & CUSTOMS ENFORCEMENT (Jan. 16, 2013), <https://www.ice.gov/factsheets/human-trafficking> [hereinafter *ICE Fact Sheet*].

¹⁰⁹ To the extent women in this population start their own business without third-party management, they are included in the first group Bass identifies. See BASS, GETTING SCREWED, *supra* note 84, at 89, 96–97.

¹¹⁰ Weitzer, *Human Trafficking*, *supra* note 87, at 233; see also Meredith Dank & Matthew Johnson, *The Hustle: Economics of the Underground Commercial Sex Industry*, URB. INST. (2014), <http://apps.urban.org/features/theHustle/index.html> (finding that, in a study of commercial sex economies, only 6% of pimps cited sex worker safety concerns as a reason to shift marketing strategies from the street to the internet).

clients for themselves.¹¹¹ There is little question, however, that many pimps and facilitators use the internet to advertise these sex workers.¹¹²

The final population Bass identifies is the population Congress designed FOSTA-SESTA to protect—sex trafficking victims—people who entered the sex trade through force, fraud, or coercion, or as children.¹¹³ The U.S. Department of State reports that the United States is a destination country for thousands of men, women, and children trafficked from all over the world.¹¹⁴ Yet, traffickers need not transport a victim across a U.S. border to break U.S. law.¹¹⁵ Trafficking is not about transporting people. Rather, the TVPA looks at whether traffickers induced a person to perform a commercial sex act using force, fraud, or coercion, which is defined as:

- (A) threats of serious harm to or physical restraint against any person;
- (B) any scheme, plan, or pattern intended to cause a person to believe that failure to perform an act would result in serious harm to or physical restraint against any person; or
- (C) the abuse or threatened abuse of the legal process.¹¹⁶

The TVPRA clarifies that a threat of “serious harm” is not solely a threat of physical harm:

- (4) The term “serious harm” means any harm, whether physical or nonphysical, including psychological, financial, or reputational harm, that is sufficiently serious, under all the surrounding circumstances, to compel a reasonable person of the same background and in the same circumstances to

¹¹¹ GLOB. NETWORK OF SEX WORK PROJECTS, BRIEFING PAPER: MIGRANT SEX WORKERS 9 (2017), https://www.nswp.org/sites/nswp.org/files/briefing_paper_migrant_sex_workers_nswp_-_2017.pdf (“Language barriers isolate migrant sex workers and make it difficult for them to access services and information on their rights and health.”).

¹¹² Dank & Johnson, *supra* note 110 (“Forty-nine percent of pimps reported using Internet ads to attract business. Online classifieds, social media vehicles, discussion boards, chat rooms, dating websites, and custom web pages are commonly used to attract and book new business.”).

¹¹³ BASS, GETTING SCREWED, *supra* note 84, at 96; *see also* Trafficking Victims Protection Act, Pub. L. No. 106-386, § 103(8)–(9), 114 Stat. 1469, 1470 (2000) (codified at 22 U.S.C. § 7102) (defining “sex trafficking” and “severe forms of trafficking in persons”).

¹¹⁴ *ICE Fact Sheet*, *supra* note 108.

¹¹⁵ *See* 18 U.S.C. § 1591(a) (2018) (making sex trafficking by force, fraud, or coercion, or of children, a federal crime); *see also* Catharine A. MacKinnon, *Trafficking, Prostitution, and Inequality*, 46 HARV. C.R.-C.L. L. REV. 271, 299–300 (2011) (“The sine qua non of trafficking is . . . neither border crossing nor severe violence. It is third-party involvement.”).

¹¹⁶ Trafficking Victims Protection Act of 2000, Pub. L. No. 106-386, § 103(2), 114 Stat. 1469, 1470 (2000) (codified at 22 U.S.C. § 7102(3)).

perform or to continue performing commercial sexual activity in order to avoid incurring that harm.¹¹⁷

Sex trafficking without force, fraud, or coercion is not criminal under the TVPA, unless it involves children.¹¹⁸ As alleged in case after case, sex traffickers use the internet to sell sexual access to their victims.¹¹⁹

In sum, it appears that using the internet to advertise the sale of sexual access is rife throughout much of the sex trade, with street-based sex workers the least likely population to rely on it to find buyers. Differences arise between populations with respect to using the internet to screen clients for security reasons, such as running background checks to try to manage safety risk or checking credit cards to manage financial risk. Indoor sex workers who manage their own small businesses tend to rely on the internet to manage all types of security risk. The less independent an indoor sex worker is, including a migrant sex worker smuggled into the United States to make a better living than in her or his country of origin, the less likely it is that the sex worker or third-party management uses the internet to limit safety risk. Street-based sex workers appear unlikely, for the most part, to use the internet to limit safety risk, largely because of the demands of substance dependency and addiction, which is rampant in this population. Of course, sex trafficking victims have no practical ability to use the internet to keep themselves safe, and traffickers show little regard for their personal safety in any event.

IV. THE DIFFICULTY OF QUANTIFICATION

Knowing the relative sizes of populations allegedly burdened and potentially benefitted by FOSTA-SESTA would aid in the analytical task of weighing those burdens and benefits. Yet, measuring the size of populations of self-identified willing sex workers and sex trafficking victims is

¹¹⁷ William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. No. 110-457, § 222, 122 Stat. 5044, 5070 (codified at 18 U.S.C. § 1591(e)(4)).

¹¹⁸ Traffickers often target children because children depend on adults for essential needs. Traffickers use victims' vulnerability to attract and trap them. *See, e.g.*, *United States v. Brooks*, 610 F.3d 1186, 1199 (9th Cir. 2010) (noting how traffickers look for children with "no money, no job and . . . nowhere to live").

¹¹⁹ Complaint for Damages at 2–4, *M.A. v. Vill. Voice Media Holdings, L.L.C.*, No. 4:10-cv-01740 (E.D. Mo. Sept. 16, 2010) (suing Backpage for its role in sex trafficking a 14-year-old girl); Plaintiff's Original Petition at 31–47, *Jane Doe #1 v. Backpage.com*, No. 2018-04501/Court: 270 (Harris Cty. Dist. Ct. Jan. 23, 2018) (suing Backpage and its owners for their role in sex trafficking a minor); Complaint at Law at 1–9, *Ambrose v. Backpage.com, L.L.C.*, No. 2017L004979 (Cook Cty. Cir. Ct. May 17, 2017) (suing Backpage and its owners for their role in sex trafficking a 16-year-old girl murdered by a buyer); Original Petition and Request for Disclosures at 2, *Plaintiff XXXXXXXX v. Medalist Holdings, L.L.C.*, No. DC-17-00951 (Dallas Cty. Dist. Ct. Jan. 25, 2017) (suing Backpage, its owners, and a sex trafficker for their roles in sex trafficking a 15- to 16-year-old girl); Complaint at 2–5, *K.R. v. Backpage.com, L.L.C.*, No. 38-CV-2017-900041.00 (Hous. Cty. Cir. Ct. Jan. 25, 2017) (suing Backpage and its owners for their role in sex trafficking a minor).

notoriously difficult,¹²⁰ in part because sex work is almost entirely illegal in the United States¹²¹ and sex trafficking using force, fraud, or coercion, or of a child, is a felony under the TVPA.¹²² Hence, sex workers, pimps, facilitators, other investors, traffickers, and buyers all share an interest in anonymity. Moreover, sex traffickers surely maintain a strong interest in keeping the identity and number of victims unknown.

Sex workers resist providing data about themselves out of fear that data collectors will not treat such data with proper confidentiality and that law enforcement, government health agencies, or child protective services might use the data against them. The Global Network of Sex Work Projects, an organization advocating for sex worker rights,¹²³ cautions sex workers against providing data about themselves:

Geographical mapping and population size estimates can be useful for organisations to monitor the changes in their communities and with the people that they serve, as well as for effective programme planning. In the right context, they can provide valuable information that lead to better services. However, their increased use by governments and multilateral agencies to establish national population size estimates is extremely worrying. The potential harms to sex workers' safety, confidentiality and health should not be underestimated or ignored. The use of these methodologies is increasingly seen as essential to develop national strategic plans, and

¹²⁰ BASS, GETTING SCREWED, *supra* note 84, at 90–91 (“There is no good count. A worthy estimate is based on an underlying actual count and there has been no such count done for human trafficking.” (quoting Virginia Commonwealth University criminology professor Jay Albanese)); ENGLE MERRY, *supra* note 87, at 124 (“Yet victims are hard to find and count: trafficking is illegal and hidden, the victims are often afraid to speak up, and their situations and experiences are very diverse. Estimates are based on differing theoretical frameworks and describe different categories of people.”); Weitzer, *Human Trafficking*, *supra* note 87, at 227 (“It is impossible to satisfactorily count the number of persons involved or the magnitude of profits in an illicit, underground economy internationally or nationally This means that . . . the worldwide magnitude of victims of trafficking and slavery is unknown.”); Maggie McNeill, *Lies, Damned Lies and Sex Work Statistics*, WASH. POST (Mar. 27, 2014), <https://www.washingtonpost.com/news/the-watch/wp/2014/03/27/lies-damned-lies-and-sex-work-statistics/> (“[W]hen all sex work is illegal, consensual, of-age sex workers are far more reluctant to report coercion, abusive pimps, and underage prostitutes for fear of being arrested themselves. This makes actual sex trafficking more difficult to discover.”).

¹²¹ Every state makes both the sale and the purchase of sexual services criminal, except Nevada, which licenses a number of brothels. *See* Snadowsky, *supra* note 98, at 217.

¹²² 18 U.S.C. § 1591 (2018).

¹²³ In 2015, the Vice President of the Global Network of Sex Work Projects, Gil Cuervo, was convicted of sex trafficking women in Mexico City and sentenced to fifteen years in prison. Jody Raphael, *Decriminalization of Prostitution: The Soros Effect*, 3 DIGNITY 1, 13 (2018); Kat Banyard, *Why Is a Pimp Helping to Shape Amnesty's Sex Trade Policy?*, GUARDIAN (Oct. 22, 2015), <https://www.theguardian.com/commentisfree/2015/oct/22/pimp-amnesty-prostitution-policy-sex-trade-decriminalise-brothel-keepers>.

concept notes for The Global Fund and other international donors, however, they present serious risks to the safety and well-being of sex workers.¹²⁴

Some researchers and sex worker rights advocates question the accuracy of studies showing large numbers of sex trafficking victims.¹²⁵ Macro level studies conducted on a national or international level draw the harshest censure because of their alleged reliance on nonstandard sources, suspect data extrapolation techniques, lack of transparency, and reporting bias.¹²⁶ As anthropologist Sally Engle Merry observes, those tasked with counting face “ambiguity about who has actually been trafficked. How does the enumerator know when a person has been coerced into sex work? If a woman who has been rescued from a brothel escapes from protective custody and returns to sex work, does this mean she consented to sex trafficking?”¹²⁷ Recognizing the difficulty in producing an accurate estimate

¹²⁴ GLOB. NETWORK OF SEX WORK PROJECTS, MAPPING AND POPULATION SIZE ESTIMATES OF SEX WORKERS: PROCEED WITH EXTREME CAUTION 15, https://www.nswp.org/sites/nswp.org/files/Mapping&Population%20Size%20Estimates%20Policy%20Brief,%20NSWP%20-%20November%202015_0.pdf (accessed Feb. 2, 2019); see also Sex Workers Outreach Project – Chicago, *Sex Work and Harm Reduction: Tips for Working with Individuals in the Sex Trade* (Sept. 13, 2016), <https://www.heartlandalliance.org/mhri/wp-content/uploads/sites/20/2016/10/9.13.16-Harm-Reduction-presentation-Best-Practices-for-Sex-Workers.pdf> (listing “[f]ear of negative consequences (arrest, losing children, [and] mandatory treatment/testing)” as barriers to accessing services).

¹²⁵ ENGLE MERRY, *supra* note 87, at 139 (“[E]stimates of victims are widely divergent and the social practices of trafficking are varied. Yet numbers offer the illusion of knowledge, even if it is a false specificity. This is a seductive form of knowledge.”); Wendy Chapkis, *Soft Glove, Punishing Fist: The Trafficking Victims Protection Act of 2000*, in REGULATING SEX: THE POLITICS OF INTIMACY AND IDENTITY 51, 54 (Elizabeth Bernstein & Laurie Schaffner eds., 2005) (“The figure of 50,000 victims of sex slavery [cited by Representative Christopher Smith in support of the need for the TVPA] is inaccurately based on data from a 1999 CIA briefing on ‘global trafficking’ in which it was estimated that between 45,000 and 50,000 women and children are trafficked into the United States for sweatshop labor, domestic servitude, agricultural work, and prostitution each year.”); Sheldon X. Zhang, *Beyond the ‘Natasha’ Story—A Review and Critique of Current Research on Sex Trafficking*, 10 GLOBAL CRIME 178, 179 (2009) (“[R]ecently a few researchers began to question the empirical premises of many articles on sex trafficking, pointing out major gaps in the findings and claims. Among the most critical is perhaps Professor Weitzer Weitzer is not alone. In a recent effort to build a comprehensive bibliography on sex trafficking literature, Gozdziaik and Bump found that few published journal articles were empirically based.” (citing ELZBIETA GOZDZIAK & MICAH N. BUMP, DATA AND RESEARCH ON HUMAN TRAFFICKING: BIBLIOGRAPHY OF RESEARCH-BASED LITERATURE (2008)).

¹²⁶ Weitzer, *Human Trafficking*, *supra* note 87, at 229–30 (citing Monti Narayan Datta & Kevin Bales, *Slavery in Europe: Part 1, Estimating the Dark Figure*, 35 HUM. RTS. Q. 817, 823–29 (2013)) (criticizing the Walk Free Foundation’s Global Slavery Index 2013, found at <https://www.walkfreefoundation.org/news/resource/the-global-slavery-index-2013/>). *Id.* at 230–31 (criticizing studies that rely on data from the United Nation’s Office on Drugs and Crime and national level studies for methodological flaws); see also ENGLE MERRY, *supra* note 87, at 107 (“Clearly, this massive effort to quantify violence against women has brought greater visibility to a problem that has long remained hidden and unspoken But this comparison shows that even the apparently simple question of what to count is a fundamental dimension of the power of quantification to shape public knowledge.”).

¹²⁷ ENGLE MERRY, *supra* note 87, at 112.

of the number of human trafficking victims in the United States, the Department of State no longer produces an official estimate of the number of victims in the United States in its annual Trafficking in Persons Report.¹²⁸

Sociologist and sex worker rights supporter Ronald Weitzer recommends studying sex worker populations using micro level studies—that is, studies of a town, city, region, or special, delimited population.¹²⁹ He asserts that such studies may produce: more reliable data on victims (“in a universe smaller than nationwide”); more useful data on “structural catalysts of migration, smuggling, trafficking, and slavery”; and deeper insights into the lives of sex workers.¹³⁰ Yet, sex worker rights advocates often pan micro studies of sex worker populations for allegedly not obtaining representative samples, but instead relying on methodologies that tend to target persons in crisis, and ignoring those not in crisis or just not interested in participating.¹³¹ Where researchers fail to access the full range of persons in the sex trade, their findings suffer, according to these critics.¹³² Weitzer himself finds flaw after flaw with micro studies cited by prostitution abolitionists, whose policies he decries, even though such studies were conducted of smaller groups in the United States and contain both quantitative and qualitative data.¹³³ The micro level studies of which Weitzer approves include studies

¹²⁸ Compare U.S. DEP’T OF STATE, 2004 TRAFFICKING IN PERSONS REPORT 23 (2004), <https://www.state.gov/documents/organization/34158.pdf> (estimating 14,500 to 17,500 victims of human trafficking in the United States, but not citing a source), with U.S. DEP’T OF STATE, 2018 TRAFFICKING IN PERSONS REPORT (2018), <https://www.state.gov/documents/organization/282798.pdf> (no estimate included).

¹²⁹ Weitzer, *Human Trafficking*, *supra* note 87, at 232.

¹³⁰ *Id.*

¹³¹ Frances M. Shaver, *Sex Work Research: Methodological and Ethical Challenges*, 20 J. INTERPERSONAL VIOLENCE 296, 296 (2005).

¹³² See *id.* (positing micro studies’ failure to obtain representative samples as a challenge to analyzing the sexual service industry).

¹³³ See Ronald Weitzer, *Flawed Theory and Method in Studies of Prostitution*, 11 VIOLENCE AGAINST WOMEN 934, 941 (2005) [hereinafter Weitzer, *Flawed Theory*] (taking issue with the methods used in several studies of sex trafficking victims and prostitutes and concluding that “we can have no confidence in the results” because of such methodological flaws); *id.* at 938 (dismissing a study of 200 street prostitutes in San Francisco conducted by Mimi H. Silbert and Ayala M. Pines because: it relies on an unrepresentative sample of prostitutes—street prostitutes; interviewers were former prostitutes who had suffered assaults; and the prostitutes interviewed came from a single city (citing Mimi H. Silbert & Ayala M. Pines, *Victimization of Street Prostitutes*, 7 VICTIMOLOGY 122 (1982))); *id.* at 941 (deriding a study conducted by Melissa Farley and Howard Barkan of 130 prostitutes working in San Francisco because “[n]o indication is given of the breadth or diversity of their sample, or the method of approaching people on the street” (citing Melissa Farley & Howard Barkan, *Prostitution, Violence Against Women and Posttraumatic Stress Disorder*, 27 WOMEN & HEALTH 37 (1998))); *id.* at 939 (condemning a 2000 study of 222 current or former Chicago-area prostitutes conducted by Jody Raphael and Deborah L. Shapiro because “no attempt was made to sample the broadest range of workers possible; the sample was heavily skewed by the fact that the interviewers were prostitution ‘survivors’ and by the fact that interviewers and respondents were prior associates who may have been like-minded” (citing Jody Raphael & Deborah L. Shapiro, *Violence in Indoor and Outdoor Prostitution Venues*, 10 VIOLENCE AGAINST WOMEN 126 (2004))).

of: Filipinas working in Japanese hostess clubs; Bangladeshi sex workers returning home after working illegally abroad; and Nigerians, Albanians, and Romanians doing sex work in Italy.¹³⁴ Regrettably, these scattered international studies of smaller populations, though Weitzer appears to consider them trustworthy and helpful within their bounded “universe,” offer little to estimating the number of sex trafficking victims and willing sex workers in the United States.

This analysis accepts that sex workers who wish to continue earning income in sex commerce have voiced well-founded concerns about the conditions and circumstances of their industry before and after FOSTA-SESTA. Yet, given that many researchers, sex workers, and sex worker rights advocates reject national-level estimates of sex trafficking victims and different populations of sex workers, often because of perceived bias on the part of those doing the estimating, identifying studies that these critics trust is useful to assessing their claim that FOSTA-SESTA is unfair to them. Accordingly, this analysis turns next to assaying studies designed by sex workers, sex worker rights advocates, and researchers sympathetic to their desire to continue earning income as sex workers, but with safer working conditions. Although these studies do not produce national-level estimates, they shed light on the sex worker experience in the populations studied.

V. TWO MICRO STUDIES YIELD DATA ON NEW YORK CITY SEX WORKERS

Finding research studies which sex worker rights advocates accept, whether macro level or micro level, is challenging. Engle Merry recommends an analytical approach that draws on both quantitative and qualitative data to reach a more accurate and comprehensive analysis.¹³⁵ Two studies conducted for the Sex Workers Project at the Urban Justice Center appear to meet criteria established by sex workers and their advocates: *Behind Closed Doors: An Analysis of Indoor Sex Work in New*

¹³⁴ Weitzer, *Human Trafficking*, *supra* note 87, at 232–33.

¹³⁵ ENGLE MERRY, *supra* note 87, at 217 (“While quantitative data clearly benefit from linkages with qualitative information, qualitative data used alone are also problematic. Absence of quantitative data risks relying on simple narratives taken out of context that do not represent wider patterns. Although there is division within the social sciences concerning the relative emphasis on these two forms of knowledge, it is clear that both are important and that working together, they provide more accurate and comprehensive analyses.”). Quantitative data results from counting—for example, surveying a population of sex workers to determine the percentage who have suffered a broken bone through violence by buyers—whereas qualitative data results from interviews and observations that attempt to capture the lived experience of the population. See Vijayendra Rao & Michael Woolcock, *Integrating Qualitative and Quantitative Approaches in Program Evaluation*, in *THE IMPACT OF ECONOMIC POLICIES ON POVERTY AND INCOME DISTRIBUTION: EVALUATION TECHNIQUES AND TOOLS* 168 (François Bourguignon & Luiz A. Pereira da Silva eds., 2003) (differentiating quantitative data as “numbers” and qualitative data as “text” but suggesting strategies to combine the uses of such polarized types of data).

York City;¹³⁶ and *Revolving Door: An Analysis of Street-Based Prostitution in New York City*.¹³⁷ The Sex Workers Project is a sex worker advocacy organization that “offer[s] legal advocacy and therapeutic support to survivors of human trafficking and people who engage in sex work, regardless of whether they do so by choice, circumstance, or coercion.”¹³⁸ Both studies gather quantitative and qualitative data. In *Behind Closed Doors*, researchers used a variety of qualitative methods, including “participant observation, interviews, and focus groups with indoor sex workers, service providers, advocates [from non-governmental organizations], law enforcement and City officials[.]”¹³⁹ Similarly, researchers in *Revolving Door* conducted interviews of prostitutes, service providers, advocates, and City agency or administration officials.¹⁴⁰ Researchers in both studies gathered arrest and criminal justice statistics to provide background and context to the interviews.¹⁴¹ Although both studies caution that the sex worker sample “is not representative of all sex workers,” both also: describe the sample as “extremely varied” and “highly varied”; report “experiences described” by sex workers as “extremely similar”; and claim that the data may reflect “systemic phenomena and [are] not merely anecdotal.”¹⁴² Both reports seek “to record problems faced by sex workers, in their own words, since theirs is a voice almost always left out of policy debates.”¹⁴³

¹³⁶ JUHU THUKRAL ET AL., BEHIND CLOSED DOORS: AN ANALYSIS OF INDOOR SEX WORK IN NEW YORK CITY (2005), <http://sexworkersproject.org/downloads/BehindClosedDoors.pdf> [hereinafter THUKRAL ET AL., BEHIND CLOSED DOORS].

¹³⁷ JUHU THUKRAL & MELISSA DITMORE, REVOLVING DOOR: AN ANALYSIS OF STREET-BASED PROSTITUTION IN NEW YORK CITY (2003), <http://sexworkersproject.org/downloads/RevolvingDoor.pdf> [hereinafter THUKRAL & DITMORE, REVOLVING DOOR].

¹³⁸ *Sex Workers Project: About Us*, URB. JUST. CTR., <https://swp.urbanjustice.org/swp-mission> (last visited Jan. 9, 2020).

¹³⁹ THUKRAL ET AL., BEHIND CLOSED DOORS, *supra* note 136, at 28.

¹⁴⁰ THUKRAL & DITMORE, REVOLVING DOOR, *supra* note 137, at 24.

¹⁴¹ THUKRAL ET AL., BEHIND CLOSED DOORS, *supra* note 136, at 28; THUKRAL & DITMORE, REVOLVING DOOR, *supra* note 137, at 24.

¹⁴² THUKRAL ET AL., BEHIND CLOSED DOORS, *supra* note 136, at 28; THUKRAL & DITMORE, REVOLVING DOOR, *supra* note 137, at 24.

¹⁴³ THUKRAL ET AL., BEHIND CLOSED DOORS, *supra* note 136, at 17; *see also* THUKRAL & DITMORE, REVOLVING DOOR, *supra* note 137, at 5 (“This [report] is a special effort to give voice to the problems faced by street-based sex workers, using their own words, since this is a voice that is almost always left out of policy debates.”).

As sex worker rights advocates,¹⁴⁴ with the input of sex workers,¹⁴⁵ designed these two studies to capture the realities and challenges New York City sex workers face, the findings should generally reflect how these sex workers perceive those realities and challenges. Further, as Weitzer suggests in praising micro level studies, the findings may help to understand the number of those victimized (at least in New York City) and may also help in understanding their “lived experiences.”¹⁴⁶ The studies shed light on the number of those victimized by showing, for the population studied, the percentages, for example, that sustain certain types of injuries or violence or threats of violence. Though the studies do not reveal the total number of sex workers in New York City, or the total number that suffer certain harms, they do provide evidence of what a member of the populations is likely or unlikely to expect—that is, what the lived experience actually looks like.

Although the percentage of sex workers who work indoors is considered unknown, some estimate that 80% to 85% of sex commerce occurs indoors.¹⁴⁷ Juhu Thukral and Melissa Ditmore, who authored both studies

¹⁴⁴ Thukral and Ditmore consider themselves committed to sex worker rights. See JUHU THUKRAL, <http://juhuthukral.com/> (last visited Nov. 7, 2019) (Thukral describing herself on her personal website as: “a human rights lawyer; communications and narrative strategist; founder of numerous ventures focused on the rights of women, girls, and LGBTQI people. She works in the global context, addressing the many dimensions of sexual health and rights, gender-based violence, and women’s leadership”). On her website, she lists the Sex Workers Project at the Urban Justice Center as one of several “social impact enterprises” of which she has served as a founder and in senior leadership. *Id.*; see also Melissa Ditmore, *Anti-Trafficking Bill Would Create More Problems Than It Would Solve*, REWIRE.NEWS (Mar. 13, 2018), <https://rewire.news/article/2018/03/13/anti-trafficking-bill-create-problems-solve/> (arguing against the passage of FOSTA-SESTA); *Curriculum Vitae*, MELISSA DITMORE, <https://melissaditmore.com/curriculum-vitae/> (last visited Apr. 2, 2020) (Ditmore’s personal website, describing her “ten years” of “experience and advocacy on gender, sexuality, and development,” shows she is a member of the Board of Directors of the Red Umbrella Project, a leading sex worker rights advocacy group); *Red Umbrella Project*, RESIST. (2017), <https://resist.org/grantees/red-umbrella-project> (describing the Red Umbrella Project as follows: “The Red Umbrella Project (RedUP) is a small peer-led organization based in Brooklyn, New York, which does community organizing and advocacy to make policy and systemic change to support the rights of sex workers. We utilize media, storytelling, peer support, and direct action strategies to amplify the voices and power of sex workers to take greater control of our lives and livelihoods. Our programming supports the development of skills, confidence, and political analysis among our members so that we can better navigate systems of oppression and fight for our rights. We also promote health and safety, make referrals to health and social services, and provide in-house peer counseling, job assistance, and leadership opportunities to our members”).

¹⁴⁵ See ENGLE MERRY, *supra* note 87, at 217 (“Doing qualitative research within the populations that are to be measured to determine more accurate category construction and encoding would provide better guidance about what can be measured and how it should be categorized.”).

¹⁴⁶ See Weitzer, *Human Trafficking*, *supra* note 87, at 232 (arguing that “[m]icro-level studies have the potential to [] produce more reliable numbers on victimization [and] . . . generate richer insights regarding actors’ lived experiences”).

¹⁴⁷ THUKRAL ET AL., *BEHIND CLOSED DOORS*, *supra* note 136, at 19 (citing PATRICIA WHELEHAN, AN ANTHROPOLOGICAL PERSPECTIVE ON PROSTITUTION: THE WORLD’S OLDEST PROFESSION 36–37 (2001)) (stating that street prostitution comprises 15% of all prostitution in the United States); Ricardo Ciacci & Maria Micaela Sviatschi, *The Effect of Indoor Prostitution on Sex Crimes: Evidence from New York City*, CATO INST. RES. BRIEFS ECON. POL’Y, Feb. 2017, at 2,

for the Sex Workers Project, define indoor sex work to include “prostitutes who work in brothels (official or makeshift), independently in their own homes, and as escorts; strippers and bar patrons who connect with prospective clients in these venues and make dates for later meetings; and dominatrices whose services may potentially be defined as ‘sexual conduct.’”¹⁴⁸ Researchers interviewed forty-eight indoor sex workers and representatives of four sex trafficking victims.¹⁴⁹ The sample included thirty-eight women, six transgender women, and eight men.¹⁵⁰ For their earlier study of street-based sex workers, Thukral and Ditmore interviewed twenty-five women, three transgender women, and two men.¹⁵¹

Perhaps the most striking differences between the experiences of indoor sex workers¹⁵² and street-based sex workers stem from the profound substance dependency of street-based sex workers. Substance dependency, including dependency on crack cocaine and heroin, affected 83% of the street-based sex workers.¹⁵³ Although all of the street-based sex workers reported performing sex work for financial reasons, 73% named substance dependency as the reason they continued to work on the street.¹⁵⁴ Moreover, although 57% reported that they would prefer indoor sex work, substance dependency stood in the way, as indoor sex work venues often refuse to employ drug dependent sex workers because they struggle to maintain regular hours.¹⁵⁵ Substance dependency also played a role in a housing crisis among this population, as 87% reported unstable housing.¹⁵⁶ “Respondents who lived in [single room occupancy hotels] indicated that this was a chaotic environment not conducive to discontinuing drug use.”¹⁵⁷ Pervasive drug use in shelters was also reported.¹⁵⁸

<https://object.cato.org/sites/cato.org/files/pubs/pdf/research-brief-70.pdf> (estimating 85%); Ronald Weitzer, *Prostitution: Facts and Fictions*, 6 CONTEXTS 28, 29 (2007) [hereinafter Weitzer, *Facts and Fictions*] (“An estimated 20 percent of all prostitutes work on the streets in the United States [indicating that an estimated 80% work indoors]. Although this number is hard to substantiate at the national level, some city-level studies support it. Regardless of the exact numbers, indoor sex work clearly accounts for a large share of the market.”).

¹⁴⁸ THUKRAL ET AL., BEHIND CLOSED DOORS, *supra* note 136, at 17.

¹⁴⁹ *Id.* at 28. Researchers chose not to interview the sex trafficking victims to spare them further trauma. *Id.*

¹⁵⁰ *Id.* at 10.

¹⁵¹ THUKRAL & DITMORE, REVOLVING DOOR, *supra* note 137, at 6.

¹⁵² *Behind Closed Doors* includes the four sex trafficking victims when compiling data for indoor sex workers, e.g., when compiling data with respect to “Race/Ethnicity,” but assures that “[s]pecific populations, such as trafficked sex workers, were separated out for their unique experiences where appropriate.” THUKRAL ET AL., BEHIND CLOSED DOORS, *supra* note 136, at 28–30.

¹⁵³ THUKRAL & DITMORE, REVOLVING DOOR, *supra* note 137, at 31.

¹⁵⁴ *Id.* at 54.

¹⁵⁵ *Id.* at 49.

¹⁵⁶ *Id.* at 30.

¹⁵⁷ *Id.* at 31.

¹⁵⁸ *Id.*

Unlike street-based sex workers, substance dependency affected indoor sex workers to a far lower degree.¹⁵⁹ Although the indoor sex workers also faced a housing crisis, the 43% who reported unstable housing is less than half of the 87% of street-based sex workers who reported unstable housing.¹⁶⁰ Perhaps this difference also related to substance dependency, as 73% of street-based sex workers said the first thing they did with money earned was to buy drugs, not make a rent or mortgage payment.¹⁶¹ The education level of indoor sex workers is somewhat consistent with national averages for all adults aged twenty-five and older, with 40% reporting having graduated college (compared to 33% of all adults), another 22% having some college (compared to 26% of all adults), and yet another 19% having graduated high school (compared to 30% of all adults).¹⁶²

The percentage of sex workers who experienced violence is perhaps different for each of the two populations, although a direct comparison is challenging because researchers measured violence in different ways in each study. Nonetheless, both populations encounter high levels of violence. Street-based sex workers considered violence the worst part of their work: “[r]espondents most frequently cited violence and danger, including difficulties with the police, when asked what most makes sex work difficult.”¹⁶³ Exactly 60% of street-based sex workers reported that they had suffered violence from male customers, or that customers had “tried to force them to do things they did not want to do.”¹⁶⁴ Such violence included rape, assault, and robbery.¹⁶⁵ When asked whether they suffered from violence “and/or threats of violence,” 80% reported they had.¹⁶⁶ Indoor sex workers likewise reported high rates of violence: “the majority of indoor sex workers in this study live surprisingly precarious lives, and encounter a high level of exactly the same problems faced by street-based sex workers, including violence, constant fear of police interference, and a lack of substantive support services.”¹⁶⁷ Of the fifty-two respondents, 46% reported that a buyer

¹⁵⁹ THUKRAL ET AL., BEHIND CLOSED DOORS, *supra* note 136, at 39 (showing in figure 21 that only three of fifty-two indoor sex workers, 6%, reported that the first thing they bought with money from sex work was drugs); *cf.* THUKRAL & DITMORE, REVOLVING DOOR, *supra* note 137, at 31 (reporting that twenty-two of thirty street-based sex workers, 73%, reported that the first thing they bought with money from prostitution was drugs).

¹⁶⁰ THUKRAL ET AL., BEHIND CLOSED DOORS, *supra* note 136, at 37; THUKRAL & DITMORE, REVOLVING DOOR, *supra* note 137, at 30.

¹⁶¹ THUKRAL & DITMORE, REVOLVING DOOR, *supra* note 137, at 31.

¹⁶² THUKRAL ET AL., BEHIND CLOSED DOORS, *supra* note 136, at 31; CAMILLE L. RYAN & KURT BAUMAN, EDUCATIONAL ATTAINMENT IN THE UNITED STATES: 2015, at 2, tbl.1 (2016), <https://www.census.gov/content/dam/Census/library/publications/2016/demo/p20-578.pdf>.

¹⁶³ THUKRAL & DITMORE, REVOLVING DOOR, *supra* note 137, at 44.

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

¹⁶⁷ THUKRAL ET AL., BEHIND CLOSED DOORS, *supra* note 136, at 17.

forced the respondent to do something he or she did not want to do; 42% reported that a buyer threatened or beat the respondent “for being a sex worker”; and 31% reported that a client robbed the respondent.¹⁶⁸ As for the four sex trafficking victims, they voiced greater concern for violence from traffickers than from buyers.¹⁶⁹ They reported that traffickers threatened, beat, and raped them, and withheld their earnings “as a means of keeping them in line.”¹⁷⁰

To protect themselves against violence, the two populations used many of the same safety precautions, with both groups listing: gut feeling and instinct; selling to regular buyers; self-defense tactics, including carrying a weapon; making sure someone, such as another sex worker or friend, knows where the encounter will occur; and fleeing.¹⁷¹ One crucial safety precaution identified by indoor sex workers, but understandably not cited by street-based sex workers, is pre-encounter screening—that is, screening other than by gut feeling and instinct.¹⁷² Such screening involves trying to verify the identity of the buyer, calling work numbers, checking credit cards, and conducting background checks.¹⁷³ One indoor sex worker described her “very rigorous phone screening” as follows:

She requires the “full name, home address, home phone, business name, position at work, company telephone number (not a direct line but a secretary), or a business web page, and 411 information for accuracy. If these are not correct, I need more, including a reference from another girl if I know her, or if she’s a real obvious and well-known person.”¹⁷⁴

Although sex workers and their advocates contend that FOSTA-SESTA curtails their ability to conduct such pre-encounter screening, their other primary complaint is that FOSTA-SESTA infringes their marketing efforts. In *Behind Closed Doors*, indoor sex workers listed eight means of soliciting clients (some respondents listed more than one means): internet/print advertisements (twenty-five); bars/clubs (sixteen); word of mouth (fifteen); regulars (six); brothel/parlor (five); street (four); escort service (three); and dungeon (three).¹⁷⁵ Although indoor sex workers used a variety of means to solicit clients, nearly half used internet or print advertisements, a number which likely grew in the years following the study.¹⁷⁶

¹⁶⁸ *Id.* at 50.

¹⁶⁹ *Id.* at 52.

¹⁷⁰ *Id.*

¹⁷¹ *Id.* at 52–53; THUKRAL & DITMORE, *REVOLVING DOOR*, *supra* note 137, at 46–47.

¹⁷² THUKRAL ET AL., *BEHIND CLOSED DOORS*, *supra* note 136, at 53.

¹⁷³ *Id.*

¹⁷⁴ *Id.*

¹⁷⁵ *Id.* at 32.

¹⁷⁶ *Id.*

In sum, the estimated number of willing sex workers, sex trafficking victims, and people in the sex trade who do not fit neatly into either of those two categories is unknown. Indeed, virtually any estimate of the number of people in any one of those three populations is met with skepticism. Even more discouraging, the ratio of the numbers in each category as compared to another is largely unknown, though some sex worker rights advocates estimate between 80% and 85% work indoors, instead of on the street.¹⁷⁷ What the two studies of New York City sex workers reveal, however, is useful. First, because sex workers participated in the studies' designs, not only by providing evidence of their lived experience, but by helping researchers decide what to count, the studies reflect the challenges and realities faced by sex workers, as they perceive them. Indeed, the Sex Worker Project's website continues to link to these studies.¹⁷⁸ Second, the studies reveal the strategies sex workers use to confront the hurdles placed in front of them. Third, the studies show that sex workers within the two groups studied should expect to encounter certain risks, and should develop strategies to manage those known risks.

VI. WEIGHING FOSTA-SESTA'S BURDENS AGAINST ITS BENEFITS

Before FOSTA-SESTA, traffickers frequently sold sexual access to trafficking victims on websites like www.backpage.com¹⁷⁹ and www.craigslist.com,¹⁸⁰ in violation of the TVPA.¹⁸¹ Section 230 of the Communications Decency Act of 1996 protected the owners of those websites and others like them from civil and criminal liability,¹⁸² even though evidence continued to mount over time that they knew that the websites were platforms for illegal sales of sex. Willing sex workers also used these websites to solicit buyers, which is also illegal under the laws of nearly every state.¹⁸³ Congress passed FOSTA-SESTA to remove legal

¹⁷⁷ See Ciacci & Sviatschi, *supra* note 147, at 2 (providing a figure at 85%); Weitzer, *Facts and Fictions*, *supra* note 147, at 29 (providing a figure at 80%).

¹⁷⁸ See *Publications*, SEX WORKERS PROJECT, <http://sexworkersproject.org/publications/> (last visited Aug. 5, 2019) (providing links to publications, including *Behind Closed Doors* and *Revolving Door*).

¹⁷⁹ *Souras Testimony*, *supra* note 29, at 2.

¹⁸⁰ Fowler, *supra* note 41 (stating Craigslist had a section of its site dedicated to "erotic services"); Cynthia Rodriguez, *Craigslist and Backpage: The Websites Used for Sex Trafficking*, ST. MARY'S U. HIST. MEDIA (Nov. 3, 2018), <https://stmhistorymedia.org/craigslist-and-backpage-sex-trafficking-at-your-fingertips/>.

¹⁸¹ See 18 U.S.C. § 1591(a) (2012) (making sex trafficking by force, fraud, or coercion, or of children, a federal crime).

¹⁸² STAFF OF PERMANENT SUBCOMM. ON INVESTIGATIONS, S. COMM. ON HOMELAND SEC. & GOV'T AFFAIRS, 114TH CONG., *supra* note 12, at 7.

¹⁸³ Siouxie Q, *Anti-Sex-Trafficking Advocates Say New Law Cripples Efforts to Save Victims*, ROLLING STONE (May 25, 2018, 7:01 PM), <https://www.rollingstone.com/culture/culture-features/anti-sex-trafficking-advocates-say-new-law-cripples-efforts-to-save-victims-629081/> (last visited Aug. 5,

protection from websites like www.backpage.com and www.craigslist.com so that both law enforcement and sex trafficking victims can hold them responsible, and consequently, to make it more difficult for traffickers to sell trafficking victims on the internet.¹⁸⁴ Sex workers, who also used these online platforms to solicit buyers, immediately protested, claiming that FOSTA-SESTA makes it harder for them to find buyers, causing them to lose income and take chances they would not otherwise take to replace their lost income.¹⁸⁵

The arguments advanced by sex workers and their advocates in attacking FOSTA-SESTA rely on the same conclusions about the impact of FOSTA-SESTA that Congress reached. Congress concluded that by removing the defense of the Communications Decency Act of 1996, it would allow law enforcement and sex trafficking victims to hold online platforms like www.backpage.com and www.craigslist.com responsible for facilitating the sale of sexual services, consequently discouraging online platforms from hosting these sales, and thereby placing a burden on the market for both sex workers and sex trafficking victims.¹⁸⁶ Sex workers and their advocates reach the same conclusion when they argue that, by passing FOSTA-SESTA, Congress made it more difficult for sex workers to solicit buyers, causing them to lose income.¹⁸⁷ Sex workers and Congress seemingly agree that the markets for willing sex workers and sex trafficking victims will both likely contract because of FOSTA-SESTA.¹⁸⁸ Sellers will

2019); Thompson, *supra* note 18; Liz Velek et al., *Impact of FOSTA/SESTA on Sex Work and Sex Trafficking*, at 21, <https://static1.squarespace.com/static/58ea94e61b10e3a416f9f014/t/5bb7a2a4e2c483998e80f4d3/1538761382218/The+Impact+of+FOSTA+%26+SESTA+on+Sex+Work+and+Trafficking+.pdf> (last visited Aug. 5, 2019) (sex workers’ “[m]ost significant worries relate to income loss [and] greater risks of interpersonal violence [because of FOSTA/SESTA]”); Zimmerman, *Sex Workers Fear for Their Future*, *supra* note 17.

¹⁸⁴ Allow States and Victims to Fight Online Sex Trafficking Act of 2017, Pub. L. No. 115-164, § 2, 132 Stat. 1253 (2018).

¹⁸⁵ Zimmerman, *Sex Workers Fear for Their Future*, *supra* note 17.

¹⁸⁶ Allow States and Victims to Fight Online Sex Trafficking Act of 2017 § 2 (indicating that Congress clarified and amended section 230 of the Communications Decency Act of 1996 to ensure that it does not “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”).

¹⁸⁷ Melanie Ehrenkranz, *Sex Workers Fight Back Against a Dangerous Law by Stepping into the Spotlight*, GIZMODO (June 4, 2018), <https://gizmodo.com/sex-workers-fight-back-against-a-dangerous-law-by-stepp-1826540734>.

¹⁸⁸ The work of economists Scott Cunningham and Todd D. Kendall lends support to this conclusion. In *Prostitution 2.0: The Changing Face of Sex Work*, they show that the arrival of online sales of sexual services led to an increase in both supply and demand. Scott Cunningham & Todd D. Kendall, *Prostitution 2.0: The Changing Face of Sex Work*, 69 J. URB. ECON. 273, 276, 286 (2011). “In fact, it appears that overall, online solicitation represents an augmentation of the prostitution market, with large displacement effects only among some age groups of sex workers. This conclusion is not inconsistent with available survey evidence from the General Social Survey, in which the share of individuals who admit to having paid for, or received pay for, sex during the past year increased from

likely either raise prices to account for fewer buyers, driving some buyers out of the market, or open themselves to a greater risk of law enforcement noticing them, driving some sellers from the market.¹⁸⁹ Sex workers view this as a burden. Yet, surely fewer sex trafficking victims is a benefit.¹⁹⁰ FOSTA-SESTA means fewer sex trafficking victims raped and forced to endure severe and lasting physical and psychological abuse.¹⁹¹ In short, sex workers, sex worker advocates, and Congress appear to agree—FOSTA-SESTA makes it harder to sell sex.

This analysis considers arguments made against FOSTA-SESTA in a light that favors sex workers and their defenders, accepting claims that FOSTA-SESTA burdens sex workers just as they allege. Yet, sex workers face a challenging undertaking when they seek to stack their burdens against the harms FOSTA-SESTA avoids by making it harder to sell sex trafficking victims. How many fewer sex trafficking victims does it take to outweigh the market burdens placed on people who want to sell sexual access? Sex workers identify two burdens that result from FOSTA-SESTA making it harder to sell sex. First, sex workers who want to sell sexual access claim that they will or have lost income, because the online platforms they used to find buyers deserted them after FOSTA-SESTA removed the defense those platforms used to protect against civil and criminal responsibility for

0.54% in 1998 to 0.79% in 2008.” *Id.* at 286. Accordingly, with a decrease in online sales because of FOSTA-SESTA, a decrease in both supply and demand appears likely.

¹⁸⁹ Cf. Paul J. Gertler & Manisha Shah, *Sex Work and Infection: What’s Law Enforcement Got to Do with It?*, 54 J.L. & ECON. 811, 813 (2011) (“We argue that enforcement theoretically changes market returns in two ways. First, increased enforcement raises the fixed costs of working on the street or in a brothel without a license relative to working in the less risky setting of a brothel and complying with the licensure regulation [of Ecuador]. Second, increased enforcement causes sex workers to raise their prices for both protected and unprotected sex, and it thereby reduces the number of both types of sexual transactions and, hence, the risk of infection. We find strong empirical evidence that both pathways are operative in Ecuador.”).

¹⁹⁰ Although some sex worker rights defenders argue that FOSTA-SESTA makes it more challenging to identify and help trafficking victims now that websites like www.backpage.com have shut down, *see, e.g.*, Siouxsie Q, *supra* note 183, what is certain is that Backpage went to great lengths to avoid reporting sex trafficking to law enforcement and the National Center for Missing and Exploited Children. STAFF OF PERMANENT SUBCOMM. ON INVESTIGATIONS, S. COMM. ON HOMELAND SEC. & GOV’T AFFAIRS, 114TH CONG., *supra* note 12, at 40 (“The record . . . contains substantial evidence that, as a matter of policy, Backpage often chose to err against reporting potential child exploitation . . . [I]n June 2012 Backpage instructed its outsourced third-party moderators only to delete suspected child-sex advertisements ‘IF YOU [ARE] REALLY VERY SURE THE PERSON IS UNDERAGE.’ In a similar email, a Backpage supervisor instructed internal moderation staff: ‘Young ads do not get deleted unless they are clearly a child.’” (emphasis and footnotes omitted)). Backpage management upbraided a moderator for reporting an ad to the National Center for Missing and Exploited Children even though the moderator found that the person in the ad “look[ed] young” and “looked drugged and has bruises.” *Id.* Backpage executives refused to take at face value reports that an advertised person was a minor, even from a minor asking Backpage to take down an ad for the minor herself. *Id.* at 40–41.

¹⁹¹ Lederer & Wetzel, *supra* note 63, at 68–76.

facilitating the sale of sex. Second, sex workers claim that they must take on riskier sex work to replace their lost income.

With respect to the first burden alleged, there is scarce debate on the economic question whether sex workers with fewer buyers might simply raise prices to replace their alleged lost income.¹⁹² With fewer buyers because of FOSTA-SESTA, but higher prices, sex workers might not have to “work”¹⁹³ as often to make the same income, which might also have the concomitant benefit of increased safety.¹⁹⁴ Regardless whether higher prices could ease this first alleged burden, not all people in the sex trade bear it anyway. Sex trafficking victims comprise some percentage of people in the sex trade, and income is not their concern, it is the concern of their traffickers. Victims’ concern is that they find themselves in the sex trade through force, fraud, or coercion, or as children. Nor do street-based sex workers¹⁹⁵ generally bear the burden of reduced income from FOSTA-SESTA, because most do not use the internet to solicit buyers.¹⁹⁶ This population is remarkably substance dependent and unlikely to use the

¹⁹² See Gertler & Shah, *supra* note 189, at 813, 835–38 (showing that in Ecuador, where indoor prostitution is legal with a license, increasing law enforcement in the street sector pushes some sex workers into the licensed and unlicensed brothel sectors, resulting in higher prices in the street sector, and fewer buyers: “Street sector prices do significantly increase with enforcement and reduce the number of clients. Specifically, an increase in enforcement of 1 SD [standard deviation] leads to a 12 percent increase in prices and a 23 percent reduction in the number of clients on the street”); cf. Brad Tuttle, *Sex Keeps Getting Cheaper Around the Globe*, MONEY (Aug. 12, 2014), <http://money.com/money/3103806/sex-prices-prostitutes-cheap/> (quoting J.D., *Why the Price of Commercial Sex Is Falling*, ECONOMIST (Aug. 12, 2014), <https://www.economist.com/the-economist-explains/2014/08/11/why-the-price-of-commercial-sex-is-falling>) (“The increase in people selling sex online—where it is easier to be anonymous—has probably boosted local supply. Increased supply means increased competition, and lower prices in order to win customers’ business.”).

¹⁹³ Although this Article appraises sex workers’ arguments in their best light, and accepts that sex work is “work” because it involves physical, mental, and emotional labor, it is certainly not work like any other. As the micro studies of New York City sex workers and sex trafficking victims reveal, sex workers face physical, mental, and emotional risks from their work wherever they fall along the spectrum between internet-based small business operators and sex trafficking victims. In short, sex workers face serious risks. The Occupational Safety and Health Administration publishes volumes of regulations regarding the conditions under which employers may employ workers. Philosopher Jeffrey A. Gauthier notes that the purpose of those regulations “is not primarily to prevent a party from making a choice that is harmful to that party individually, but rather to prevent her from undermining the interests of the class of which she is a part.” Jeffrey A. Gauthier, *Prostitution Law and Paternalism*, in DIMENSIONS OF MORAL AGENCY 194, 198 (David Boersema ed., 2014). If some workers agree to work under unsafe conditions, other workers have less bargaining power to avoid such work. Although this is yet another reason to burden the market for selling sex, it is beyond the scope of this analysis.

¹⁹⁴ See THUKRAL ET AL., BEHIND CLOSED DOORS, *supra* note 136, at 17 (“[T]he majority of indoor sex workers in this study live surprisingly precarious lives, and encounter a high level of exactly the same problems faced by street-based sex workers, including violence, constant fear of police interference, and a lack of substantive support services.”).

¹⁹⁵ See Ciacci & Sviatschi, *supra* note 147, at 2 (estimating the percentage of street-based prostitutes at 15% to 20% of persons in the sex trade).

¹⁹⁶ CURTIS ET AL., *supra* note 105, at 55–60; Cunningham & Kendall, *supra* note 188, at 276 (“Internet technology is rarely employed by streetwalkers.”).

internet either to advertise or for safety.¹⁹⁷ Moreover, not all indoor sex workers use the internet to solicit buyers, as some solicit buyers in bars, strip clubs, gentlemen's clubs, residential brothels, massage parlors, hotels, and dungeons, and some rely on word of mouth, regular customers, and escort services.¹⁹⁸ Where indoor sex workers solicit buyers using these other methods, FOSTA-SESTA does not appear to impact their income. Indeed, their income may increase as potential buyers who find that FOSTA-SESTA has impinged their ability to find willing sellers using the internet search for other means of finding them. The sex workers most impacted financially are those who have freely chosen sex work and who rely on the internet to manage their own small businesses, without third-party management. This may include some willing sex workers smuggled into the United States. It is unclear what percentage of people in sex commerce bear this financial burden, but it is the percentage that is left after deducting percentages for: sex trafficking victims; street-based prostitutes; and indoor sex workers who rely on myriad other means besides the internet for soliciting buyers.

The second burden alleged by sex workers is an increased safety risk that results from FOSTA-SESTA forcing them to take on riskier sex work to replace lost income.¹⁹⁹ Although it is unclear what percentage of sex workers use the internet to make their sex work less dangerous, those that do report using a variety of tools to screen buyers before deciding whether to go forward with an in-person encounter. They can attempt to verify the identity of the buyer by using a 411 service,²⁰⁰ or by calling work numbers or references.²⁰¹ They can pay a service fee to have a credit card number verified or a background check conducted.²⁰² They can run a phone number through a so-called "bad date list," which alerts sex workers to persons who have acted violently or aggressively or who have refused to pay.²⁰³ Sex

¹⁹⁷ BASS, GETTING SCREWED, *supra* note 84, at 67 ("In many cases, drug use preceded their involvement in commercial sex. For these streetwalkers, prostitution is a means of securing the funds needed to feed an already established drug addiction."); Lederer & Wetzel, *supra* note 63, at 68 (quoting a former sex worker: "I am telling you that you have to not be in your sober mind to run these tricks—you just can't do it straight so everyone on the street is hooked on some drug"); Muraresku, *supra* note 100, at 49 ("[T]he street-based population in Philadelphia is drug driven. Heroin—it's just crazy.").

¹⁹⁸ THUKRAL ET AL., BEHIND CLOSED DOORS, *supra* note 136, at 32; Farley et al., *supra* note 88, at 1044.

¹⁹⁹ Siouxsie Q, *supra* note 183.

²⁰⁰ A 411 service allows a user to obtain an address and phone numbers of an individual or businesses entered in a phone directory. *411 Search FAQs*, VERIZON, <https://www.verizonwireless.com/support/411-connect-faqs/> (last visited Sept. 2, 2019).

²⁰¹ See THUKRAL ET AL., BEHIND CLOSED DOORS, *supra* note 136, at 53 (describing phone screening procedures to ensure safety).

²⁰² *Id.*

²⁰³ Ian S. Thompson, *Congress Proposes to Fight Online Trafficking by Harming Sex Workers*, ACLU (Mar. 16, 2018, 4:15 PM), <https://www.aclu.org/blog/criminal-law-reform/congress-proposes-fight-online-trafficking-harming-sex-workers>; see, e.g., *Bad Date List*, ST. JAMES INFIRMARY, https://stjamesinfirmary.org/wordpress/?page_id=3767 (explaining that the San Francisco Bay Bad Date

workers using these tools claim that doing so allows them to operate without third-party management, which allows them to retain a greater share of their earnings and makes them safer by eliminating the risk of violence from pimps, investors, and other facilitators.²⁰⁴ They also maintain that it reduces their risk of encounters with street-based people who view sex workers as easy targets and reduces their risk of encountering law enforcement, helping them to avoid the criminal justice system, as well as police misconduct.²⁰⁵

Accordingly, it appears that the sex workers most impacted by online platforms leaving the erotic services classified advertising market are those with the most autonomy, wherewithal, education, and technological savvy. Many of these people have college educations, or at least some college.²⁰⁶ Some sex workers hold feminist leanings.²⁰⁷ Unlike street-based sex workers, most do not suffer from substance dependency.²⁰⁸ Indeed, of all sex workers, those most burdened by FOSTA-SESTA appear to be those best equipped to take on other income producing endeavors that do not entail the same high risks of violence and physical and mental harms. These sex workers have other valued skills that might help them to secure safer work outside the sex trade to replace any lost income.²⁰⁹ In no other line of work would workers accept the rate of violence sex workers encounter.²¹⁰ Even in the best circumstances, the risk of violence from sex work is high.²¹¹ Yet, despite all of this, it appears that the sex worker and sex worker advocate community uncritically accepts that the logical response to reduced income is to take on riskier sex work.

List “is a community-based violence intervention tool utilized by sex workers to share information regarding ‘bad dates.’ A Bad Date may be any person who threatens, behaves violently towards, robs, extorts, or engages in any behavior that violates the agreed upon terms and boundaries of the exchange”).

²⁰⁴ BERNSTEIN, TEMPORARILY YOURS, *supra* note 86, at 93.

²⁰⁵ See BASS, GETTING SCREWED, *supra* note 84, at 114–15 (discussing anecdotal evidence and studies of police misconduct regarding women in the sex trade); BERNSTEIN, TEMPORARILY YOURS, *supra* note 86, at 93 (discussing how “the Internet has . . . reshaped predominant patterns of sexual commerce in ways that some sex workers have been able to benefit from”).

²⁰⁶ THUKRAL ET AL., BEHIND CLOSED DOORS, *supra* note 136, at 31 (reporting that 40% of survey respondents were college graduates); Monto, *Highly Polarized and Somewhat Stigmatized Topic*, *supra* note 87, at 222; Cunningham & Kendall, *supra* note 188, at 284 (reporting that 41% of online sex workers were college graduates).

²⁰⁷ Monto, *Highly Polarized and Somewhat Stigmatized Topic*, *supra* note 87, at 222.

²⁰⁸ THUKRAL ET AL., BEHIND CLOSED DOORS, *supra* note 136, at 39; Cunningham & Kendall, *supra* note 188, at 284.

²⁰⁹ *But see* BASS, GETTING SCREWED, *supra* note 84, at 156 (“Once they’ve been arrested for prostitution, women have tremendous difficulty getting a job outside the sex industry. They also face discrimination in housing and child custody cases, according to advocates who work with the homeless.”).

²¹⁰ See Farley, *Bad for the Body*, *supra* note 65, at 1100 (“Most of us would not consider any predictable and systematic violence acceptable in our jobs.”).

²¹¹ See, e.g., THUKRAL ET AL., BEHIND CLOSED DOORS, *supra* note 136, at 17 (“Sex workers live under the daily threat of arrest, deportation, and violence. These dangers are compounded by the stigma, isolation, and invisibility associated with their work.”).

Even if that position is accepted—that is, that sex workers’ next best option after FOSTA-SESTA is to take on more dangerous sex work—this population of sex workers is also the best equipped population of sex workers to devise alternative business models that allow them to continue to sell sexual access without resorting to street-based solicitation or third-party management. For example, after Congress passed FOSTA-SESTA, some sex workers turned to www.switter.at²¹² to replace sex worker social networking, including sharing safety tips, maintaining “bad date lists,” and advertising.²¹³ The Australian company that launched www.switter.at, Assembly Four,²¹⁴ also launched www.tryst.link,²¹⁵ a platform for paid advertisements, similar to www.backpage.com,²¹⁶ but based in Australia, where prostitution is legal.²¹⁷ Assembly Four describes itself as “a collective of sex workers and technologists.”²¹⁸ Its founders created a community on Mastodon, a free open-source decentralized social network.²¹⁹ Other sex workers maintain their own personal websites, although some web development platforms have begun to take down the sites of sex workers due to “Terms of Use” violations.²²⁰

²¹² SWITTER, <https://www.switter.at/about> (last visited July 28, 2019) (“[A] sex work-friendly social space.”).

²¹³ Sandra Song, *Inside Switter, the Sex Worker Social Network*, PAPER MAG. (Dec. 13, 2018), <http://www.papermag.com/switter-sex-worker-social-network-2623333073.html?rebelltitem=1#rebelltitem1> (“[C]lose to 200,000 people sign[ed] up for the platform since its launch eight months ago.”).

²¹⁴ ASSEMBLY FOUR, <https://assemblyfour.com/> (last visited July 28, 2019) (“Empowering sex workers through intelligent tech. Our mission is to build products and services to empower sex workers.”).

²¹⁵ TRYSTLINK, <https://www.tryst.link> (last visited July 28, 2019) (“Search by location, gender, age, height, ethnicity, body type, and more!”).

²¹⁶ 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> (last visited Aug. 28, 2019) (noting www.backpage.com as a platform “repeatedly accused of enabling prostitution”).

²¹⁷ Cale Guthrie Weissman, *What Is Switter? What You Need to Know about the Growing Sex Workers Network*, COMPASS (Apr. 11, 2018), <https://www.fastcompany.com/40557654/what-is-switter-what-you-need-to-know-about-the-growing-sex-workers-network>.

²¹⁸ ASSEMBLY FOUR, *supra* note 214.

²¹⁹ *Id.*; see also Megan Farokhmanesh, *A Beginner’s Guide to Mastodon, the Hot New Open-Source Twitter Clone*, VERGE (Apr. 7, 2017), <https://www.theverge.com/2017/4/7/15183128/mastodon-open-source-twitter-clone-how-to-use> (“Mastodon is a fast-growing Twitter-like social network that seeks to re-create the service’s best parts while eliminating its whale-sized problems. The distributed, open-source platform offers better tools for privacy and fighting harassment than Twitter does, but it also comes with a learning curve.”).

²²⁰ Ana Valens, *Sex Workers Say Wix Is Shutting Down Their Websites*, DAILY DOT (May 3, 2018), <https://www.dailydot.com/irl/sex-workers-wix-websites/> (“In the past few years, web development platform Wix, which lets users build and host their own sites, has become particularly popular with sex workers for its accessibility and customizable options. But recently, models and escorts have said their pages are being taken down by Wix amid SESTA-FOSTA, the controversial anti-‘sex trafficking’ law signed last month by President Donald Trump.”).

The burden at issue is the risk to personal safety. Without the ability to screen buyers on the internet before meeting, sex workers claim that they must put themselves in danger. Yet, FOSTA-SESTA does not prevent sex workers from using a 411 service, calling work numbers or references, or paying a service fee to have a credit card number verified or a background check conducted. Sex workers who wish to continue using the internet to solicit buyers can seek other live platforms because, as many sex workers and advocates predicted, convincing www.craigslist.com to remove the “erotic services” and “adults services” sections of its website, and shutting down www.backpage.com, did not end the internet-based sale of sex. Both established²²¹ and new²²² platforms rushed to take their place.²²³ Whether www.tryst.link and the scores of other platforms continuing to facilitate sex sales may stay ahead of law enforcement over the long term is in doubt, but these platforms allow sex workers to screen buyers in the meantime. The problem for sex workers using these platforms relates back to their first burden, however—each of these platforms has far fewer users than www.backpage.com had,²²⁴ currently resulting in fewer buyers for the sex workers who use them.²²⁵ Yet, these platforms also offer fewer opportunities for sex traffickers to sell victims.

When weighing the burden FOSTA-SESTA foists on some unverified number of independent sex workers who choose to sell sex without third-party management against the benefit of reducing an unverified

²²¹ See [EROS.COM](http://www.eros.com), <https://www.eros.com> (last visited July 28, 2019); see also Jonah Kaplan, *I-Team: New Indictment Reveals Possible Triangle Ties in “Escort Scheme,” Money Laundering*, ABC11 (July 26, 2018), <https://abc11.com/new-indictment-reveals-possible-triangle-ties-in-escort-scheme-money-laundering/3829242/> (“Eros.com, which is still up and running, does include a disclaimer on its website reading ‘We are not an escort agency nor can we make referrals.’”); Katy Simon, *The Eros Raid Means None of Us Are Safe*, TITS & SASS (Nov. 10, 2017), <http://titsandsass.com/the-eros-raid-means-none-of-us-are-safe/> (“When Backpage caved to government pressure and shut down its adult ads earlier this year, some middle and upper class escorts felt immune. They felt that the higher prices they were charged for ads on Eros and Slixa meant they were paying for security.”).

²²² See, e.g., TRYSTLINK, *supra* note 215 (“Escorts available now.”).

²²³ *Best Backpage Replacements for 2019: The Voting Results Are In!*, SPICED UP AFFAIRS, <https://www.spicedupaffairs.com/backpage-alternatives/> (last visited Sept. 1, 2019) (ranking the fifty best platforms for buying sex on the internet).

²²⁴ Cunningham & Kendall, *supra* note 188, at 275 (“Because clients value the existence of a range of choices, there may be increasing returns to scale in market size, and so prostitutes have an incentive to congregate spatially where clients can find them, while clients in turn have an incentive to move to locations where prostitutes are This may explain the existence of ‘strolls’ in most cities, where many prostitutes and clients congregate. ‘Spatial’ agglomeration at key sites on the Internet may operate through similar mechanisms, with Craigslist and other sites serving a purpose similar to ‘strolls’ in street prostitution.”).

²²⁵ The same problem is true for another solution proposed for sex workers—using the dark web to avoid law enforcement. The dark web requires the use of the Tor browser, and the currency of choice is Bitcoin, adding even more layers of difficulty for sex workers seeking buyers. See Ellen Coyne, *Men Who Pay for Sex Turn to the Dark Web*, TIMES (May 1, 2017), <https://www.thetimes.co.uk/article/men-who-pay-for-sex-turn-to-the-dark-web-zxwpm3pnm>.

number of people compelled into the sex trade by force, fraud, coercion, or as children, it is clear where the balance tilts. Even if sex trafficking victims represent a relatively small percentage of all those in the sex trade—assume 8%, as reflected in the *Beyond Closed Doors* study²²⁶—is that not enough to ask sex workers savvy enough to convince potential buyers to reveal their work telephone numbers, and to run credit card and background checks on them, to take on some share of the burden of reducing the number of sex trafficking victims? Those who fall victim to sex traffickers suffer the gravest of harms.²²⁷ Trafficking victims do not consent to sex with buyers. Each sale is rape.²²⁸ Even so, sex trafficking victims fear violence from traffickers more than from buyers.²²⁹ More than two thirds of sex trafficking victims in Lederer’s and Wetzel’s study of the health consequences of sex trafficking were: punched; beaten; kicked; forced to have unprotected sex; and threatened with a weapon.²³⁰ They also suffer a host of psychological problems. The most commonly reported by more than two thirds of all victims, were: depression; feelings of shame or guilt; low self-esteem; anxiety; nightmares; and flashbacks.²³¹ Victims attempt suicide at a rate of 41%.²³² In short, the harms avoided by FOSTA-SESTA easily outweigh the market burdens placed on sex workers.

CONCLUSION

Faced with mounting court decisions holding that sex trafficking victims had no recourse against online platforms that played active roles in facilitating violent crimes against them, Congress chose to act. Congress passed FOSTA-SESTA, pulling down the protection provided to those platforms from civil and criminal liability for their role in facilitating sex trafficking and prostitution. With their protection gone, many online platforms fled the classified advertising market for sexual services. Sex workers who used the same platforms to solicit buyers instantly protested. FOSTA-SESTA has made it harder for all sellers of sexual access to reach buyers. This includes sex traffickers and sex workers who use the internet to find buyers.

Sex workers claim that FOSTA-SESTA unfairly burdens them because it prevents them from making as much money selling sex as they did before

²²⁶ THUKRAL ET AL., *BEHIND CLOSED DOORS*, *supra* note 136, at 28.

²²⁷ Lederer & Wetzel, *supra* note 63, at 68–76.

²²⁸ MODEL PENAL CODE § 213.1 note on Rape and Related Offenses (AM. LAW INST. 1962).

²²⁹ THUKRAL ET AL., *BEHIND CLOSED DOORS*, *supra* note 136, at 52.

²³⁰ Lederer & Wetzel, *supra* note 63, at 75.

²³¹ *Id.* at 70 (more than half of the women in the study suffered from Post-traumatic Stress Disorder (PTSD)); *see also* Farley, *Bad for the Body*, *supra* note 65, at 1104–05 (“PTSD is characterized by anxiety, depression, insomnia, irritability, flashbacks, emotional numbing, and hyperaltness. Symptoms are more severe and long lasting when the stressor is of human design. PTSD is normative among prostituted women.”).

²³² Lederer & Wetzel, *supra* note 63, at 70.

Congress acted. They also claim that FOSTA-SESTA makes them less safe, because it prevents them from taking pre-encounter screening measures like confirming a potential buyer's identity, checking his credit card, cross-checking his name against "bad date" lists, and calling references. To replace their lost income, they contend that they must take on riskier sex work, such as soliciting in the street or turning to third-party facilitators.

The sex worker populations most impacted financially by FOSTA-SESTA are those that rely primarily on classified advertising on the internet to reach clients. Many sex workers in this group use a variety of somewhat sophisticated techniques to screen potential buyers, revealing that they possess an array of skills that would hold value for nonprofit and for-profit endeavors alike. As these populations include educated people with the wherewithal to run their own businesses, and do not generally include substance dependent people, it seems fair to assume they can pursue other means of earning income besides dangerous sex work.

It certainly appears that those most burdened by FOSTA-SESTA need not solicit buyers in the street or rely on a pimp to deliver buyers. Although the actual number of people impacted—or even the percentage of all people in the sex trade—is unknown, this population does not include: sex trafficking victims; most street-based sex workers; and indoor sex workers who mainly solicit clients in bars, strip clubs, gentlemen's clubs, residential brothels, massage parlors, hotels, or dungeons, or those who rely chiefly on word of mouth and regular customers. Further, to the extent members of the population most burdened by FOSTA-SESTA insist that sex work is the best income producing venture available to them, other online platforms provide a means for pursuing such ventures, at least until law enforcement catches up.

Finally, granting that FOSTA-SESTA burdens an unknown number of sex workers, and that, for some, sex work is perceived as not only their preferred means of earning income, but as the means that offers them their best chance at financial independence, is it nonetheless fair to ask them to bear those burdens to reduce the number of people sex trafficked? By arguing that FOSTA-SESTA has made it more difficult for them to sell sex, sex workers and their advocates seemingly concede that FOSTA-SESTA will make it more difficult for traffickers to sell sex trafficked people. The potential benefit won by sex workers bearing the burdens they allege is fewer people raped, suffering from violent attacks, and sustaining a host of other physical and psychological damage. This benefit justifies the burdens asked of sex workers by FOSTA-SESTA.