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## Pornography Isn't the Problem: A Feminist Theoretical Perspective on the War Against Pornhub

Taylor Comerford

*Boston College Law School*, [taylor.comerford@bc.edu](mailto:taylor.comerford@bc.edu)

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# PORNOGRAPHY ISN'T THE PROBLEM: A FEMINIST THEORETICAL PERSPECTIVE ON THE WAR AGAINST PORNHUB

Abstract: Over the last year, Pornhub and its parent company, MindGeek, ignited public outcry against the prevalence of content users posted to their sites featuring sexual violence, nonconsensual pornography, and sex trafficking. Activists, journalists, and legislators allege that Pornhub and similar pornography sites are apathetic toward the victims in these videos and photos while profiting from the ad revenue such content brings to their sites. In December 2021, Senator Josh Hawley proposed the Survivors of Human Trafficking Fight Back Act, proposing to add criminal penalties and a federal cause of action against websites that either post or refuse to remove criminal pornography from their sites. This Note examines the arguments for and against legislation penalizing pornography websites for posting or hosting content of featuring sexual violence through a feminist lens. This style of legislation, which nobly aims to protect survivors of sexual violence, will likely appear again in Congress. This Note argues that Congress should not pass these bills because they subject transactional sex workers and pornography performers to economic and physical harm, making it an ineffective and misguided method to address the core harms of digital sexual exploitation.

## INTRODUCTION

In 2019, twenty-two Jane Doe plaintiffs won a thirteen-million-dollar verdict in California Superior Court against GirlsDoPorn, a pornography production company and Pornhub channel, whose employees coerced them into participating in videos later published on the website.<sup>1</sup> The same year, Florida

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<sup>1</sup> See Samantha Cole, *Girls Do Porn Was a Crime Ring, Not a Porn Site, Industry Experts Say*, VICE (Oct. 16, 2019), <https://www.vice.com/en/article/3kx483/girls-do-porn-sex-trafficking-fbi-indictment> [<https://perma.cc/9626-AKAT>] (describing the cases against GirlsDoPorn that alleged civil theories of misrepresentation, false imprisonment, and fraud and criminal counts of sex trafficking). The owner of the company, Michael Pratt, fled the country after the U.S. Attorney for the Southern District of California charged him and other employees with criminal sex trafficking charges. *See id.* (calling Pratt a fugitive). GirlsDoPorn recruited the plaintiffs with the lie that they were looking for models or by saying that the company sold the videos to Australian private collectors before posting the videos to their Pornhub channel and other pornography sites. *See id.* (characterizing the fraudulent and criminal business model of GirlsDoPorn). Many of the plaintiffs were ostracized by their communities and suffered mental health issues and other serious damage after publication of the videos. *See id.* (noting the harm of several specific survivors without commenting whether these women were parties to the civil lawsuit). The production company and criminal enterprise advertised that its videos featured young women who had never performed in pornography before. *See id.* (explaining the strategy of the company in coercing women to participate in the pornography, which the federal government asserts amounts to sex trafficking in its criminal case).

police found a missing fifteen-year-old girl by using nearly sixty videos of her sexual abuse posted on Pornhub.<sup>2</sup> In both instances, Pornhub ignored or delayed requests from the survivors and their families to take down the videos documenting their abuse, only removing the videos in response to significant public outcry.<sup>3</sup>

By February 2020, Laila Mickelwait published “Traffickinghub,” a Change.org petition alleging widespread misuse of the online pornography website Pornhub to host and distribute sex trafficking and rape videos.<sup>4</sup> Pornhub is one of the most frequented pornography websites in the world, and is successful, in part, because it allows users to post and view content for free.<sup>5</sup> Due to the site’s notoriety, the Traffickinghub petition quickly garnered two

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<sup>2</sup> See Ben Feuerherd, *Suspect Arrested After Missing Teen Girl Was Spotted on Pornhub*, N.Y. POST, <https://nypost.com/2019/10/24/mom-finds-missing-teen-girl-by-spotting-her-on-pornhub/> [<https://perma.cc/9V54-H868>] (Oct. 25, 2019) (detailing the discovery and return of a teenager after her mother identified her in fifty-eight videos posted to Pornhub). Law enforcement found the teenage survivor with her adult abuser, also featured in the videos, whom they charged with sexual battery of a minor. See *id.* (emphasizing that the abuser posted videos of himself engaged in the crime, and implying that Pornhub did not remove these videos of criminal abuse before his arrest).

<sup>3</sup> See Nicholas Kristof, *The Children of Pornhub: Why Does Canada Allow This Company to Profit Off Videos of Exploitation and Assault?*, N.Y. TIMES (Dec. 4, 2020), <https://www.nytimes.com/2020/12/04/opinion/sunday/pornhub-rape-trafficking.html> [<https://perma.cc/8T9M-BZBX>] (revealing that Pornhub has faced no liability for posting the illegal photos and videos). In both cases, the girls featured in the videos were minors at the time of filming, and thus the content was child pornography. See *id.* (discussing that the women were young teenagers when the videos were uploaded). Kristof asserts that by allowing user-submitted content, Pornhub has made the task of confirming that a person in a porn video is an adult a difficult, if not impossible, task. See *id.* (noting that it is difficult to differentiate between a fourteen-year-old and an eighteen-year-old in user-submitted content).

<sup>4</sup> See Laila Mickelwait, *Shut Down Pornhub and Hold Its Executives Accountable for Aiding Trafficking*, CHANGE.ORG, <https://www.change.org/p/shut-down-pornhub-and-hold-its-executives-accountable-for-aiding-trafficking> [<https://perma.cc/95LD-27C8>] (petitioning the Department of Justice (DOJ), the Federal Bureau of Investigation, and foreign and domestic leaders to take action against Pornhub); *Two Million People Sign Petition to Shut Down Pornhub for Sex Trafficking Videos*, PR NEWSWIRE (Sept. 1, 2020), <https://www.prnewswire.com/news-releases/two-million-people-sign-petition-to-shut-down-pornhub-for-sex-trafficking-videos-301122030.html> [<https://perma.cc/K86D-BKWQ>] (stating that Mickelwait published the petition alongside an op-ed condemning Pornhub for the prevalence of videos including sexual violence); see also Kristof, *supra* note 3 (explaining that the Traffickinghub petition documented wrongdoing by Pornhub and demanded that the site be taken down). See generally EXODUS CRY, <https://exoduscry.com/> [<https://perma.cc/7VZ3-ZBG9>] (declaring the mission of the Christian anti-trafficking organization that Mickelwait ran and promoted through Traffickinghub); TRAFFICKINGHUB, <https://traffickinghub.com/> [<https://perma.cc/S8UX-JDU2>]. Exodus Cry is a Christian anti-trafficking organization that believes that all forms of sex work, including transactional sex, pornography, and stripping, should be criminalized. See EXODUS CRY, *supra* (calling the commercial sex industry systemically exploitative and advocating for a criminal justice solution). Traffickinghub, now independent of Change.org, claims it is nonpartisan and not affiliated with religious groups. See TRAFFICKINGHUB, *supra* (alleging that even though Exodus Cry backs the campaign, Traffickinghub is not involved with any political party or religious denomination).

<sup>5</sup> See *2019 Year in Review*, PORNHUB (Dec. 11, 2019), <https://www.pornhub.com/insights/2019-year-in-review> [<https://perma.cc/9939-R7WC>] (detailing the statistics of Pornhub’s growing success in attracting visitors to the website); see also Kristof, *supra* note 3 (emphasizing the grandiosity of Pornhub’s size and impact to advocate for regulation of the site or removal from the internet).

million signatures and prompted global conversation about Pornhub's inability to screen criminal content on the website.<sup>6</sup> Although many dispute the motives behind and solutions proposed by Traffickinghub, the petition and subsequent media attention clearly established a long pattern of complacency by Pornhub on an international scale.<sup>7</sup> Ben Sasse, a U.S. Senator from Nebraska, responded with an open letter calling for then-Attorney General William Barr to open a Department of Justice inquiry into the pornography website and its holding company, MindGeek, for their purported roles in enabling exploitation.<sup>8</sup>

Mobilization around the issue exploded in December 2020, when *New York Times* writer Nicholas Kristof published a self-proclaimed investigative piece detailing Pornhub's prolific dissemination of content featuring sexual

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<sup>6</sup> See TRAFFICKINGHUB, *supra* note 4 (touting that millions of people signed the petition on the Traffickinghub website); see also *Two Million People Sign Petition to Shut Down Pornhub for Sex Trafficking Videos*, *supra* note 4 (reporting that the Traffickinghub campaign reached several million signatures worldwide by September 2020); Kristof, *supra* note 3 (noting 2.1 million people signed the Traffickinghub petition as of early December 2020). The Traffickinghub site is full of testimonials from anti-trafficking organizations and survivors speaking to the role Pornhub plays as a repository of content featuring sexual violence. See TRAFFICKINGHUB, *supra* note 4 (including a large graphic of the MindGeek corporate organizational chart, which includes notable pornography websites such as Pornhub, Brazzers, and Playboy, and a form for survivors to report abuse by any of these sites). Traffickinghub also created a viral outreach video, "Pornhub exposed as #Traffickinghub." See Exodus Cry, *Pornhub Exposed as #Traffickinghub*, YOUTUBE (June 30, 2020), <https://www.youtube.com/watch?v=20x9xEzLODU> [<https://perma.cc/4BQR-YU54>] (explaining Pornhub's poor track record of hosting videos featuring sexual violence); see also TRAFFICKINGHUB, *supra* note 4 (describing the mission of Traffickinghub as a "movement").

<sup>7</sup> See Kristof, *supra* note 3 (detailing the stories of men, women, and children who were featured in videos and photos uploaded to Pornhub without their consent); Mickelwait, *supra* note 4 (calling for signatures on the Change.org petition); Megha Mohan, *I Was Raped at 14, and the Videos Ended Up on a Porn Site*, BBC (Feb. 10, 2020), <https://www.bbc.com/news/stories-51391981> [<https://perma.cc/R7PH-ADBK>] (detailing the story of child rape survivor Rose Kambela, released within days of the Traffickinghub petition); Melissa Gira Grant, *Nick Kristof and the Holy War on Pornhub*, NEW REPUBLIC (Dec. 10, 2020), <https://newrepublic.com/article/160488/nick-kristof-holy-war-pornhub> [<https://perma.cc/9ZU7-F2C5>] (calling Pornhub's failure to adequately moderate or respond to posted videos of sexual violence unethical and abusive towards women); TRAFFICKINGHUB, *supra* note 4 (recounting the stories of many survivors of sex trafficking and violence whose videos and photos were posted to Pornhub).

<sup>8</sup> See Press Release, U.S. Senator from Nebraska Ben Sasse, Sasse Calls on DOJ to Investigate Pornhub (Mar. 10, 2020), <https://www.sasse.senate.gov/public/index.cfm/2020/3/sasse-calls-on-doj-to-investigate-pornhub> [<https://perma.cc/8235-W38Q>] [hereinafter Sasse Press Release] (containing the full text of Sasse's open letter demanding investigation and potentially prosecution of Pornhub under the current law); see also *Two Million People Sign Petition to Shut Down Pornhub for Sex Trafficking Videos*, *supra* note 4 (attributing the inspiration for Senator Sasse's letter to the viral Traffickinghub petition). Senator Sasse, a member of the GOP, quoted from the Pornhub website in his letter to emphasize that in 2019 Pornhub claimed it had over 115 million daily visits to the site, a figure equal to the populations of Australia, Poland, Canada, and the Netherlands combined. See Sasse Press Release, *supra* (quoting the Pornhub website, which proudly displays the striking number of visitors the site receives).

violence.<sup>9</sup> Kristof previously gained notoriety with anti-trafficking and sex work advocates for his crusade against the website Backpage, a site for user-submitted personal advertisements that transactional sex workers and sex traffickers once used to advertise sexual services.<sup>10</sup> The piece led Visa and Mastercard to investigate Pornhub, after which both companies prohibited the use of their credit cards on the website.<sup>11</sup>

Pornhub swiftly responded by modifying its community guidelines.<sup>12</sup> Notably, the website removed users' ability to download content and limited the

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<sup>9</sup> See Kristof, *supra* note 3 (describing a series of stories by survivors of revenge pornography, sexual assault, and sex trafficking, whose abusers uploaded photos and videos of the survivors to Pornhub). Kristof described this piece as investigative journalism, despite the *New York Times*'s publication of the piece as opinion and Kristof's designation as an opinion writer. *Id.* Kristof uses physical and sexual violence in graphic detail in his piece, such as explicit depictions of the sexual assault of minors and the use of weapons to mutilate a trafficking survivor. See *id.* (chronicling the stories told to the author by survivors of violence in graphic detail).

<sup>10</sup> See Nicholas Kristof, *When Backpage.com Peddles Schoolgirls for Sex*, N.Y. TIMES (Jan. 12, 2017), <https://www.nytimes.com/2017/01/12/opinion/when-backpagecom-peddles-schoolgirls-for-sex.html> [<https://perma.cc/CWX3-FNFS>] (calling Backpage an "online brothel"). Kristof reported that in 2017, 75% percent of all child trafficking in the United States occurred on Backpage. See *id.* (noting that among other similar sites, including Google and Craigslist, Backpage featured the most advertising for sex work and sex trafficking). The op-ed is littered with graphic, violent accounts of harm done to women and girls while being trafficked over Backpage. See *id.* (depicting the accounts of abuse of survivors by their traffickers, which included family members and romantic partners).

<sup>11</sup> See Gillian Friedman, *Mastercard and Visa Stop Allowing Their Cards to Be Used on Pornhub*, N.Y. TIMES (Dec. 10, 2020), <https://www.nytimes.com/2020/12/10/business/visa-mastercard-block-pornhub.html> [<https://perma.cc/28X4-VRMP>] (expressing the decisions of both Visa and Mastercard to sever ties with MindGeek and its subsidiaries after investigation substantiated the concerning volume of videos of sexual violence on Pornhub); Nicholas Kristof, *An Uplifting Update, on the Terrible World of Pornhub*, N.Y. TIMES (Dec. 9, 2020), <https://www.nytimes.com/2020/12/09/opinion/pornhub-news-child-abuse.html> [<https://perma.cc/M95C-RFFD>] (noting that Visa and Mastercard publicly responded to Kristof's allegations in his article about Pornhub, pledged to investigate Pornhub, and announced that they would not allow use of their cards on Pornhub); Eshé Nelson, *Visa and Mastercard to Investigate Financial Ties to Pornhub*, N.Y. TIMES (Dec. 7, 2020), <https://www.nytimes.com/2020/12/07/business/visa-mastercard-pornhub.html> [<https://perma.cc/BC6Z-488T>] (reporting the public statements by Visa and Mastercard, pledging to investigate the claims that Pornhub facilitated abuse and criminal violence detailed in Kristof's explosive *New York Times* article); see also Kristof, *supra* note 3 (decrying Pornhub's prolific failure to screen or remove videos featuring and/or furthering sexual violence). Both Visa and Mastercard asserted that if the allegations in Kristof's article proved true, the cards would no longer be accepted as payment on Pornhub, posing potential negative effects on Pornhub's revenue from paid services like Pornhub Premium. See Nelson, *supra* (stressing that Visa and Mastercard could immediately terminate their relationship with Pornhub if their investigation confirmed the allegations of the significant number of criminally violent videos on Pornhub).

<sup>12</sup> See Kristof, *supra* note 11 (attributing Pornhub's changes to its community guidelines to Kristof's article and the insistence of credit card companies); Charlie Porterfield, *New Senate Bill Would Let Sex Trafficking and Revenge Porn Victims Sue Websites Like Pornhub*, FORBES (Dec. 9, 2020), <https://www.forbes.com/sites/charlieporterfield/2020/12/09/new-senate-bill-would-let-sex-trafficking-and-revenge-porn-victims-sue-websites-like-pornhub/> [<https://perma.cc/4WFK-TTKQ>] (listing the series of events, including Traffickinghub's founding, Kristof's article, and media attention surrounding specific survivors, that led Pornhub to modify its guidelines and U.S. Senator from Missouri Josh Hawley to introduce legislation targeting Pornhub). Senator Hawley responded to Pornhub's modified guidelines with a public statement promising that if the site's modifications functioned as described by

ability to upload content to verified users only.<sup>13</sup> That Pornhub once allowed users to download content was contentious because the feature allowed private users to create duplicates of criminal material, such that even if the website removed illegal content through moderation, a user could reupload the offending content.<sup>14</sup> In addition, Pornhub unveiled plans for increased moderation of photos and videos on the site through a partnership with the National Center for Missing and Exploited Children and various other international activist groups to aid the reporting and removal of illicit content.<sup>15</sup>

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Pornhub, the website would not likely face liability under his proposed legislation. See Porterfield, *supra* (quoting a tweet from Senator Hawley that states, “[i]f true, then Pornhub has nothing to fear from my legislation allowing victims of fraud, coercion, and sex abuse to sue them”). Kristof suggested many of the changes made by Pornhub in his original article, including greater restrictions on which users can post content, banning content downloads, and increasing the number of moderators employed by the company to screen illegal content. See Kristof, *supra* note 3 (concluding by suggesting three major changes that Pornhub should make to better protect against criminally violent videos).

<sup>13</sup> See Kristof, *supra* note 3 (suggesting that Pornhub remove the ability to download content to prevent users from reuploading videos they previously downloaded—a measure against piracy and sex trafficking); Porterfield, *supra* note 12 (outlining Pornhub’s new community guidelines); *Our Commitment to Trust and Safety*, PORNHUB, <https://help.pornhub.com/hc/en-us/categories/360002934613> [<https://perma.cc/L4DA-EK2K>] (noting the changes Pornhub recently made to their community guidelines and how each modification better prevents users from posting videos featuring sexual violence on the site). Pornhub now requires verification to upload videos to the site, requiring users to send a photo and legal identification to a third party who attaches the information to the user’s account so authorities can identify the account owner if necessary. See Beck Diaz, *Pornhub Premium Is Here and This Is What It Means for You*, DAILY DOT, <https://www.dailydot.com/nsfw/reviews/pornhub-verified/> [<https://perma.cc/SKH7-C5UL>] (Mar. 26, 2021) (espousing to help Pornhub users adjust to Pornhub’s new verification system, likened to the “blue check” system used by Instagram and Twitter). Pornhub, however, was not initially transparent about what the verification process entails. *Our Commitment to Trust and Safety*, *supra* (describing that Pornhub will carry out user verification, but offering almost no information about who will verify the users or how). Additionally, the company removed the option to download photos and videos from the site except for paid downloads by verified users. See *id.* (explaining that Pornhub will change its download functions to prevent users from reuploading criminal content that Pornhub previously removed).

<sup>14</sup> See Kristof, *supra* note 3 (detailing the dangers of downloads on Pornhub).

<sup>15</sup> See Porterfield, *supra* note 12 (listing the modified measures of Pornhub to combat users who post sexual violence on the website); *Our Commitment to Trust and Safety*, *supra* note 13 (same); see also Kristof, *supra* note 3 (suggesting that Pornhub invest in greater moderation to identify illegal content). Moderators are employees of websites, like Pornhub and Facebook, who review posted content to ensure it meets the standards prescribed by the website and remove offending content. See Kristof, *supra* note 3 (accusing Pornhub of deficient moderation because the site allegedly hires only 15,000 moderators—in contrast to Facebook’s 1.36 million moderators). Moderating pornography sites is an unpopular job because moderators must watch thousands of hours of user-submitted pornography, a significant portion of which is violent or involves children. See *id.* (noting the difficulty of moderation workers for online companies, who describe their work as “soul-destroying”). As part of its amended community guidelines, Pornhub has increased moderation both by hiring additional staff moderators, and by partnering with private organizations worldwide, including the National Center for Missing and Exploited Children, who will also report offending content through the Trusted Flagger Program. See *Our Commitment to Trust and Safety*, *supra* note 13 (outlining the use of private partnerships to increase moderation, although not listing the names of any partner non-governmental organizations).

Days after Pornhub modified its user guidelines, Republican U.S. Senator Josh Hawley of Missouri introduced the Survivors of Human Trafficking Fight Back Act of 2020 (Fight Back Act), aimed at amending existing federal statutes to target sex trafficking, among other sex crimes, in pornography.<sup>16</sup> The bipartisan legislation would have provided criminal penalties and a federal civil cause of action against websites that knowingly distribute or fail to remove posts that feature sexual assault or that a user publishes without the subject's consent.<sup>17</sup> Notably, the Act would have allowed survivors of abuse recorded and uploaded to pornography websites—like Pornhub—to sue the sites for noncompliance with the Act.<sup>18</sup>

This legislation bears strong resemblance to Congress's past efforts to seize Backpage, a Craigslist-like website used primarily for advertising transactional sex work.<sup>19</sup> In 2018, a joint action by the IRS Criminal Investigation

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<sup>16</sup> See Survivors of Human Trafficking Fight Back Act of 2020, S. 4983, 116th Cong. § 2 (2020) (creating civil and criminal penalties for websites that harbor pornography with criminal violence); Kristof, *supra* note 11 (imparting that Josh Hawley introduced the Survivors of Human Trafficking Fight Back Act of 2020); Press Release, Josh Hawley, U.S. Senator for Missouri, Hawley, Colleagues Introduce Bipartisan Bill Empowering Victims of Porn Industry Exploitation to Sue Host Websites (Mar. 10, 2020), <https://www.hawley.senate.gov/hawley-colleagues-introduce-bipartisan-bill-empowering-victims-porn-industry-exploitation-sue-host> [<https://perma.cc/3LJE-BWU7>] [hereinafter Hawley Press Release] (announcing the introduction of the legislation, which aims to combat criminal violence in online pornography by targeting the websites where abusers post pornography, rather than the abusers themselves).

<sup>17</sup> See Survivors of Human Trafficking Fight Back Act of 2020, S. 4983 § 2 (proposing a federal cause of action for survivors of violence posted to pornography websites and criminal penalties against the owners of such websites); Kristof, *supra* note 11 (lauding the introduction of the Survivors of Human Trafficking Fight Back Act of 2020 as a major win against Pornhub); Hawley Press Release, *supra* note 16 (announcing other co-sponsors of the Survivors of Human Trafficking Fight Back Act of 2020 in the Senate, including Democrat Maggie Hassan of New Hampshire, Republican Thom Tillis of North Carolina, and Republican Joni Ernst of Iowa).

<sup>18</sup> See Survivors of Human Trafficking Fight Back Act of 2020, S. 4983 § 2; Kristof, *supra* note 11 (implying that Kristof's original op-ed spurred the introduction of the Survivors of Human Trafficking Fight Back Act); Hawley Press Release, *supra* note 16 (announcing the major criminal penalties and civil fines this legislation could issue against websites that post or host content featuring sexual violence, sex trafficking, or nonconsensual pornography).

<sup>19</sup> See Allow States and Victims to Fight Online Sex Trafficking Act, Pub. L. No. 115-164, 132 Stat. 1253 (2018) (codified as amended in scattered sections of 18 U.S.C. and 47 U.S.C.); Elizabeth Nolan Brown, *The Senate Accused Them of Selling Kids for Sex. The FBI Raided Their Homes. Backpage.com's Founders Speak for the First Time.*, REASON (Aug. 21, 2018), <https://reason.com/2018/08/21/backpage-founders-larkin-and-lacey-speak/> [<https://perma.cc/6MJA-76SC>] (describing the rise of Backpage business model and the government campaign to destroy the website); Sarah N. Lynch & Lisa Lambert, *Sex Ads Website Backpage Shut Down By U.S. Authorities*, REUTERS (Apr. 6, 2018), <https://www.reuters.com/article/us-usa-backpage-justice/sex-ads-website-backpage-shut-down-by-u-s-authorities-idUSKCN1HD2QP> [<https://perma.cc/J7QB-XX5S>] (chronicling the passage of FOSTA-SESTA and the government seizure of Backpage.com following accusations of trafficking on the site). The U.S. Postal Service helped investigate Backpage with other federal agencies, and pursued traffickers who used Backpage for money laundering through the postal system. See Press Release, U.S. Dep't of Just., Justice Department Leads Effort to Seize Backpage.Com, the Internet's Leading Forum for Prostitution Ads, and Obtains 93-Count Federal Indictment, (Apr. 9, 2018), <https://www.justice>

Division, the FBI, and the U.S. Postal Service seized the website for its ties to sex trafficking.<sup>20</sup> Subsequently, the U.S. Attorney for the District of Arizona charged the executives of Backpage, including founders James Larkin and Michael Lacey, for the knowing publication of sex services ads.<sup>21</sup>

Despite the public support for legal action against pornography websites, transactional sex workers, pornography performers, and their supporters argue strongly against such measures.<sup>22</sup> Sex work advocates argue that Mickelwait and Kristof's crusade against trafficking and portrayals of the pornography industry demonize sex work, not sexual violence.<sup>23</sup> These individuals assert that Kristof is not a credible narrator and often motivated by money and publicity, pointing to his long history of questionable journalism regarding survivors of sexual violence and promotion of a fraudulent anti-sex trafficking organization.<sup>24</sup> Critics also point to Mickelwait's membership to dominionistic,

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gov/opa/pr/justice-department-leads-effort-seize-backpagecom-internet-s-leading-forum-prostitution-ads [https://perma.cc/V2VJ-T6B9] (announcing the official seizure of Backpage by federal authorities). The Fight Online Sex Trafficking Act and Stop Enabling Sex Traffickers Act of 2018 (FOSTA-SESTA) also used enhanced criminal and civil liability to target websites hosting personal sexual advertisements. *See* Allow States and Victims to Fight Online Sex Trafficking Act § 2, 132 Stat. at 1253 (targeting internet pornography websites explicitly in the language of the bill).

<sup>20</sup> *See* Brown, *supra* note 19 (describing the success of Backpage, followed by the congressional and law enforcement campaign against the website); Lynch & Lambert, *supra* note 19 (relaying that federal agencies shuttered Backpage and arrested Backpage executives and founders for the prevalence of sex trafficking on the site).

<sup>21</sup> *See* Brown, *supra* note 19 (expounding upon Backpage's initial success, only to be brought down by legislation from Congress); Lynch & Lambert, *supra* note 19 (observing that Larkin and Lacey are still awaiting trial). James Larkin and Michael Lacey are currently awaiting trial, and believe the government is stalling the proceedings to force them to plead guilty. *See* Brown, *supra* note 19 (illustrating the case against Larkin and Lacey for facilitation of sex trafficking and prostitution, among other counts).

<sup>22</sup> *See* Grant, *supra* note 7 (presenting the arguments against Kristof's *New York Times* article and the Survivors of Human Trafficking Fight Back Act of 2020 and asserting that both sources mischaracterize the issue for self-aggrandizement).

<sup>23</sup> *See id.* (criticizing Kristof's and Mickelwait's crusade against Pornhub for failing to distinguish that sex work is not innately sexual violence, and claiming that this failure actually exposes more people—namely sex workers—to violence).

<sup>24</sup> *See id.* (rejecting the controversial narrative spun by Kristof against Pornhub considering Kristof's past indiscretions). Kristof's critics know him for his gratuitous use of violence and identifying detail in his decades-long coverage of human trafficking and sex work. *See* Kristof, *supra* note 3 (describing a trafficker's use of a potato peeler to mutilate a survivor of sex trafficking); Grant, *supra* note 7 (describing Kristof's use of graphic detail in reporting as "voyeurism," and stating his work verges on exposing anonymous trafficking and rape survivors to their abusers and society at large). Further, Kristof heavily promoted the Somaly Mam Foundation, run by a Cambodian activist and writer of the same name who gained international acclaim by running shelters for trafficking survivors in Southeast Asia. *See* Melissa Gira Grant, *The Price of a Sex-Slave Rescue Fantasy*, N.Y. TIMES (May 29, 2014), <https://www.nytimes.com/2014/05/30/opinion/the-price-of-a-sex-slave-rescue-fantasy.html> [https://perma.cc/76RT-U6YH] (detailing the downfall of the Somaly Mam Foundation). Kristof wrote multiple articles bolstering Somaly Mam's work before Simon Marks, in a *Newsweek* exposé, revealed that Somaly Mam invented her backstory of sex slavery, captured and physically imprisoned the sex workers she claimed to save and forced them to solicit money for her foundation. *See* Simon

radical Christian groups like the International House of Prayer Kansas City to question her motives.<sup>25</sup> Opponents argue that Mickelwait uses sex trafficking as a talking point to peddle a religious message of sexual morality, and that Kristof uses the narrative of sex trafficking to garner notoriety for his writing and charitable work.<sup>26</sup>

Despite this controversy, Pornhub's footprint on our society undeniable.<sup>27</sup> SimilarWeb, a website traffic analytics company, ranks Pornhub as the tenth most frequented website in the world,<sup>28</sup> amassing around 3.5 billion monthly

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Marks, *Somaly Mam: The Holy Saint (and Sinner) of Sex Trafficking*, NEWSWEEK (May 21, 2014), <https://www.newsweek.com/2014/05/30/somaly-mam-holy-saint-and-sinner-sex-trafficking-251642.html> [https://perma.cc/K3J5-SCYF] (reporting that Somaly Mam lied for years about her experiences as a trafficking survivor and mischaracterized her work with trafficking survivors); see also Grant, *supra* note 7 (criticizing Kristof's support of Somaly Mam); Grant, *supra* (noting that celebrities like Susan Sarandon and journalists like Kristof enabled Somaly Mam by promoting the foundation without ever confirming its legitimacy, allowing the foundation to fraudulently solicit donations based on a false narrative of sex trafficking).

<sup>25</sup> See Grant, *supra* note 7 (stressing Mickelwait's membership in radical evangelical groups). Dominionism is a Christian theology that asserts the United States should be governed under biblical law. See Elizabeth Flock, *Dominionism: A 'Dangerous' Christian Movement Influencing Michelle Bachmann and Rick Perry?*, (Aug. 15, 2011), WASH. POST, [https://www.washingtonpost.com/blogs/blogpost/post/dominionism-a-dangerous-christian-movement-with-an-influence-on-michelle-bachmann-and-rick-perry/2011/08/15/glQAYdn5GJ\\_blog.html](https://www.washingtonpost.com/blogs/blogpost/post/dominionism-a-dangerous-christian-movement-with-an-influence-on-michelle-bachmann-and-rick-perry/2011/08/15/glQAYdn5GJ_blog.html) [https://perma.cc/673J-MJQU] (noting the relationships between prominent political figures and organizations that believe "Christians have an obligation, a mandate, a commission, a holy responsibility to reclaim the land for Jesus Christ—to have dominion [over] incivil [sic] structures"). The International House of Prayer Kansas City (IHOPKC) is an evangelical Christian group known both for its 24-hour streams of ministry and its hateful speech towards marginalized groups, including statements that God supported Adolf Hitler's genocide against the Jewish community. See Grant, *supra* note 7 (detailing the extensive criticism of IHOPKC). Further, IHOPKC's leader, Mike Bickle, preaches "that homosexuality 'opens the door to the demonic realm.'" *Id.* Mickelwait also works for Exodus Cry, an anti-sex work organization that is a partner of IHOPKC, and was herself a missionary at IHOPKC. See *id.* (explaining that Exodus Cry reports back to IHOPKC and cohosts events with the hate group). IHOPKC has publicly praised Exodus Cry for adding human trafficking to its campaign against abortion, causing activists to criticize the organization's use of human trafficking as a Trojan horse for an anti-abortion narrative. See *id.* (criticizing Mickelwait's connection to IHOPKC and Exodus Cry).

<sup>26</sup> See Grant, *supra* note 7 (explaining that fundamentalist Christian groups often co-opt sex trafficking to peddle a narrative of sexual purity, rather than a genuine critique of gender-based violence); Grant, *supra* note 24 (detailing how Kristof's support of a fraudulent sex trafficking organization gave its leader the credibility and notoriety necessary to steal money and spread misinformation about sex trafficking); Marks, *supra* note 25 (reporting how Somaly Mam abused the individuals she claimed to rescue).

<sup>27</sup> See *The Tech Companies That Have Had the Biggest Impact on Society in the 21st Century*, DIGGITY, <https://diggitymarketing.com/most-influential-tech-companies-2020/> [https://perma.cc/8U85-PDL4] (noting that Pornhub is one of the most distinguished websites of the last century); see also Kristof, *supra* note 3 (claiming that Pornhub's massive size makes it as condemnable as Jeffery Epstein and Harvey Weinstein by implying Pornhub has caused comparable harm to survivors of sexual abuse).

<sup>28</sup> See Kristof, *supra* note 3 (implying that Pornhub, because of its immense size, has done as much harm to individuals as some of the most notorious sexual predators of the last decades); *Top Websites Ranking*, SIMILARWEB, <https://www.similarweb.com/top-websites/> [https://perma.cc/L667-7RC8] (crowning Pornhub as one of the most visited sites in the world). It is worth noting that in the

visits.<sup>29</sup> Pornhub hosts over an additional six million videos annually,<sup>30</sup> generating three billion new views to the ads on Pornhub daily.<sup>31</sup> As a result, Diggity Marketing declared Pornhub to be the third-most “socially impactful” technology firm of the century.<sup>32</sup> The demonstrated inadequacy of Pornhub’s content screening, paired with its monolithic reign over the pornography industry, begs the question: are new criminal and civil causes of action against Pornhub an effective way to regulate this issue?<sup>33</sup>

This Note argues no, asserting that a criminal legal approach to the regulation of pornography conflates sex work and sex trafficking, further marginalizing all sex workers.<sup>34</sup> Part I of this Note discusses the history and theory surrounding the internet and different forms of sex work, including established and rising feminist discourses, modern business models for internet-based sex work, and related legislation.<sup>35</sup> Part II presents a deeper look at how anti-sex work advocates and opposing narratives shape legislative approaches to regulating sex work broadly, and internet pornography specifically.<sup>36</sup> Finally, Part III argues that the carceral approach of the Fight Back Act, supported by Kristof and Mickelwait, is an ineffective and misguided method of addressing sex trafficking and protecting the survivors of sexual violence.<sup>37</sup>

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duration of writing this Note, Pornhub’s rank has fallen within the list of the world’s most visited websites. *See Top Websites Ranking, supra*.

<sup>29</sup> *See 2019 Year in Review, supra* note 5 (reporting Pornhub’s growing success in attracting visitors to the website); *see also* Kristof, *supra* note 3 (distinguishing the grandiosity of Pornhub’s size and impact from other, less lewd businesses and websites).

<sup>30</sup> *See 2019 Year in Review, supra* note 5 (noting that Pornhub hosted 6.83 million new videos in 2019); *see also* Kristof, *supra* note 3 (emphasizing Pornhub’s large size and impact to contextualize the gravity of harm Pornhub may be causing).

<sup>31</sup> *See Traffic Statistics*, TRAFFICJUNKY, <https://www.trafficjunky.com/online-advertising/traffic-statistics> [<https://perma.cc/9AVE-QJNA>] (recording and marketing Pornhub’s daily advertisement impressions to potential advertisers); *see also* Kristof, *supra* note 3 (reporting the number of times individuals view an advertisement on Pornhub per day).

<sup>32</sup> *See The Tech Companies That Have Had the Biggest Impact on Society in the 21st Century, supra* note 27 (calling Pornhub one of the most impactful websites of the century); *see also* Kristof, *supra* note 3 (noting statistics about Pornhub’s size and impact to argue, in part, that the American and Canadian governments must take action against the company). Diggity Marketing ranked companies by their influence on society, “including [factors like] communication, data security, sustainability, knowledge sharing, charitable giving and overall contribution to society.” *The Tech Companies That Have Had the Biggest Impact on Society in the 21st Century, supra* note 27.

<sup>33</sup> *See* Kristof, *supra* note 3 (asserting that Pornhub’s size and the unchecked proliferation of criminal content on the site require either legislative intervention or drastic company-wide change).

<sup>34</sup> *See infra* notes 235–288 and accompanying text.

<sup>35</sup> *See infra* notes 38–162 and accompanying text.

<sup>36</sup> *See infra* notes 163–234 and accompanying text.

<sup>37</sup> *See infra* notes 235–288 and accompanying text.

## I. AN EXPLORATION OF FEMINIST THEORY, THE RISE OF INTERNET PORNOGRAPHY, AND MODERN LEGAL RESPONSES TO THE MORAL PANIC SURROUNDING SEX WORK

The public's understanding of the role of women in society influences the discourse on sex work, including the current moral outrage and reactive federal legislation surrounding the topic.<sup>38</sup> This Part traces the origins of modern strategies against sexual violence in the sex industry to their theoretical roots.<sup>39</sup> Section A of this Part outlines the various waves of feminist thought and their positions on transactional sex work, pornography, and sexual violence.<sup>40</sup> Section B provides an overview of sex work in the United States generally.<sup>41</sup> Section C examines the history of the internet as a platform for sex work, discussing Pornhub and Backpage as modern adaptations of age-old markets.<sup>42</sup> Section D concludes by surveying several legal approaches to regulate and curtail these businesses, particularly those used to shutter Backpage and criminally charge its owners.<sup>43</sup>

### *A. The Conflicting Feminist Legal Perspectives of Sex Work*

Scholars organize the generational ebb and flow of feminist thought in activism and academia through the metaphor of “waves.”<sup>44</sup> Each wave, defined temporally and by core substantive principles, imparts a different understanding of sexuality, social hierarchy, and culture.<sup>45</sup> The following subsections pro-

<sup>38</sup> See *infra* notes 39–162 and accompanying text. See generally Hokulani K. Aikau, Karla A. Erickson & Jennifer L. Pierce, *Introduction: Feminist Waves, Feminist Generations*, in *FEMINIST WAVES, FEMINIST GENERATIONS: LIFE STORIES FROM THE ACADEMY 1* (Hokulani K. Aikau, Karla A. Erickson & Jennifer L. Pierce eds., 2007) (discussing how the evolution of feminist thought has influenced the goals of each wave of feminism).

<sup>39</sup> See *infra* notes 40–162 and accompanying text.

<sup>40</sup> See *infra* notes 44–77 and accompanying text.

<sup>41</sup> See *infra* notes 78–103 and accompanying text.

<sup>42</sup> See *infra* notes 104–127 and accompanying text.

<sup>43</sup> See *infra* notes 128–162 and accompanying text.

<sup>44</sup> See Aikau et al., *supra* note 38, at 3–11 (conceptualizing feminist thought in waves). Feminist scholars Hokulani Aikau, Karla Erickson, and Jennifer Pierce note that despite the “wave” analogy’s usefulness, it can be misleading to rigidly define the natural evolution of discourse into disconnected segments. See *id.* (clarifying both the utility and confusion around the waves of feminism).

<sup>45</sup> See *id.* at 3–4 (explaining the connection between the contextual experience of feminist scholars and their work, who were greatly influenced by the contemporary access to work and struggles with sexism). Feminist scholars argue that the different waves of feminism reached regions of the United States at slightly different times and impacted them at different levels, making the study of feminist waves imprecise. See *id.* at 4 (illustrating that the lived experience of women, which deeply shapes feminist thought, is constantly in evolution). This is particularly true of the third feminist wave, which critics often said was difficult to distinguish from the second wave. See *id.* (noting that every generation of feminism does not cleanly break from the previous, and many attributes of one feminist wave carry over to the next).

vide a limited overview of the second, third, and fourth waves of feminist thought regarding sexuality and sex work, and their historical contexts.<sup>46</sup>

### 1. Second-Wave Feminism and the Post-Civil Rights Era

The second wave of Western feminism arose between 1960 and 1970 and reflected the period's culture of activism.<sup>47</sup> The Civil Rights and Black Power Movements deeply influenced the Women's Liberation Movement, focusing on the intersection of political and civil rights and calling for legal and cultural equality.<sup>48</sup> Scholars characterize this wave by the rise of women in the workplace and academia, marked also by strong reactive misogyny in those spaces.<sup>49</sup>

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<sup>46</sup> See *infra* notes 47–77 and accompanying text. For the sake of brevity, this Note will not include an anthology of the first feminist wave. See, e.g., Sally Ann Drucker, *Betty Friedan: The Three Waves of Feminism*, OHIO HUMANITIES (Apr. 27, 2018), <http://www.ohiohumanities.org/betty-friedan-the-three-waves-of-feminism/> [<https://web.archive.org/web/20210630170648/http://www.ohiohumanities.org/betty-friedan-the-three-waves-of-feminism/>] (describing generally the first feminist wave). This Note excludes the first feminist wave because its primary focus was the achievement of civil and political rights, and scholars primarily associate it with the suffragette movement in the nineteenth and twentieth centuries through which women gained enfranchisement. See *id.* (recounting the major historical events that were central to the first feminist wave). The first wave, however, did not engage with sex work or female sexuality as a core component of its mission. See *id.* (including no mention of sex work or sexuality when discussing the first wave, but deeply considering female sexuality and sexual orientation when discussing the second and third waves).

<sup>47</sup> See Aikau et al., *supra* note 44, at 5 (illustrating that second-wave feminism arose out of a period of counterculture and civil rights movements). Some scholars identify a brief interim period between the second and third waves in the 1980s defined by characteristics such as the creation of gender studies departments across American universities and achieving parity in the numbers of women and men in doctoral programs. See *id.* at 14–16 (distinguishing the “2.5 wave” of feminism in the 1980s).

<sup>48</sup> See Drucker, *supra* note 44 (discussing the political consciousness of the second wave in relation to other civil rights movements).

<sup>49</sup> See Aikau et al., *supra* note 44, at 11 (noting that during this period women were frequently excluded from faculty leadership, tenure, and other important facets of social life and prestige in the university setting). The first American university “Women’s Center” opened in 1960 at the University of Minnesota to improve the experiences of women at the university, initially attempting to retain married women who typically left college before earning a degree. See *id.* (describing the rise of women’s studies programs in the United States). Soon after, Shymala Rajender, a University of Minnesota assistant professor, settled an employment discrimination suit with the University resulting in a consent decree that required the University to hire additional female faculty. See *id.* (revealing the University of Minnesota’s role in the increased presence of women faculty nationwide because of its historic consent decree to combat gender discrimination in faculty hiring). Following the suit, universities across the United States began hiring, promoting, and retaining women in record numbers. See *id.* (analyzing how Rajender’s suit acted as a catalyst for the increased presence of women in academia, as universities hired more women to avoid similar anti-discrimination lawsuits). The resulting change in faculty demographics at universities in the United States created an intense disparity between the triumph of growing female representation in higher education and the vilification those women faced as lone female scholars in male-dominated communities. See *id.* at 16 (explaining the animosity women faculty experienced both inside and outside the university setting). At the time, the National Association of Scholars, among other organizations, publicly criticized sexual harassment prevention training as a violation of the First Amendment. See *id.* (describing the outrage from male

This focus on women in academia and professional settings shaped the scholarship and thought of the second-wave era, which today is aptly criticized for centering middle-class, white, and heterosexual experiences to the exclusion of other narratives.<sup>50</sup> Unsurprisingly, the increased role of women in the workplace prompted women's movements to target workplace issues such as equality in pay, advancement, and harassment.<sup>51</sup> In part, the movements of the period centered around the concept of "male chauvinism," the antagonistic and even violent role men play in the subordination of women.<sup>52</sup>

Thus, it is not shocking that second-wave feminism characterized sex work as inherently exploitative.<sup>53</sup> At the time, feminists viewed transactional

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faculty, administrators, and scholars following the increased inclusion of women in leadership on college campuses).

<sup>50</sup> See Rosalyn Baxandall & Linda Gordon, *Second-Wave Feminism, in A COMPANION TO AMERICAN WOMEN'S HISTORY* 414, 417 (Nancy A. Hewitt ed., 2005) (clarifying that Black women, despite inspiring and aiding the women's rights movement of the 1960s and 1970s, were excluded from the movement's goals and membership). Perhaps the most dramatic shift in feminist theory is the move towards "globalism," demonstrated by the role of women in supranational organizations like the United Nations and the International Criminal Court. *See id.* at 425 (characterizing how Western, second-wave feminism played an integral role in international governing bodies). With the scope of feminist consciousness expanded, the goals of mainstream Western feminism took a "neocolonialist" perspective—though which internationally powerful nations use cultural, political, and political power to dominate other nations—toward international issues like poverty, war, and environmental destruction that disproportionately affect women and children. *See id.* at 426 (observing the irony of early second-wave feminism's anti-colonial roots compared to its primarily imperial narrative). Nevertheless, feminists of the era painted non-Western nations as primitive and anti-women while failing to discuss the prevalence of these same issues in the United States. *See id.* (asserting that although issues like infant mortality and poverty plagued the United States during this period, international feminism did not focus on the Global West).

<sup>51</sup> *See id.* at 414 (reporting that under the Kennedy administration, Eleanor Roosevelt chaired the Presidential Commission on the Status of Women). The Presidential Commission on the Status of Women issued a 1963 report calling for pay equality, paid maternity leave, and childcare among other goals aimed at improving the condition and status of women in the workplace. *See id.* (tracing the goals of the Presidential Commission on the Status of Women to the workplace and educational equality platforms of the second wave). Scholars believe that President Kennedy created the group to appease female constituents without any intention of supporting the organization sufficiently to make an impact, although the findings of the commission later led Congress to pass the Equal Pay Act. *See id.* (defining President Kennedy's begrudging role in appointing the Presidential Commission on the Status of Women to emphasize that political figures of both parties were at best facially committed to women's issues).

<sup>52</sup> *See id.* (relaying that people frequently used the word "chauvinism" in feminist discourse at the time). Chauvinism describes an attitude of arrogance or superiority towards another group, and is an age-old phrase used to describe how patriarchy manifests in casual interactions between people. *See Chauvinism*, ENCYC. BRITANNICA <https://www.britannica.com/topic/chauvinism> [<https://perma.cc/M4QV-BFVZ>] (defining chauvinism and its socio-historical roots).

<sup>53</sup> *See* Baxandall & Gordon, *supra* note 50, at 421 (explaining the often sex-negative—or a view of sex as repressive or shameful—approach of early second-wave feminism); Catharine A. MacKinnon, *Trafficking, Prostitution, and Inequality*, 46 HARV. C.R.-C.L. L. REV. 271, 273 (2011) (characterizing sex work, like sex trafficking, as innately exploitive, because both are interactions in which men always benefitted to the detriment of women).

sex work and pornography as the violent exploitation of women by men.<sup>54</sup> Specifically, women mobilized against the newly booming pornography market by advocating for zoning and censorship legislation to limit the spread of pornography theaters and retailers.<sup>55</sup> This view of sex and sex work created cognitive dissonance within the movement, as many second-wave feminists claimed that transactional sex work and pornography contributed to patriarchal sexual domination while simultaneously painting sex workers and pornography performers as victims of exploitation.<sup>56</sup>

## 2. Third-Wave Feminism and the Birth of Sex Positivity

As the second wave receded, the third wave of feminism rose in the 1990s, marked by a boom in the number women of color and white women at universities as faculty and students.<sup>57</sup> More women visibly filled positions of power, including Janet Reno as the first female Attorney General, Madeleine Albright as the first female Secretary of State, and Carly Fiorina as the first female CEO of a Fortune 500 Company.<sup>58</sup> The U.S. Supreme Court reaffirmed

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<sup>54</sup> See Baxandall & Gordon, *supra* note 50, at 421 (noting the aggressively anti-pornography rhetoric and activism of feminist groups of the period, which eventually formed an odd partnership with evangelicals due to their mutual opposition to pornography). During the period, some feminist groups viewed nonviolent pornography as equally harmful as violent pornography. See *id.* (describing the stance of feminist groups like Women Against Pornography (WAP) and Women Against Violence Against Women (WAVAW), who opposed even non-violent, consensual pornography). WAVAW also initiated demonstrations against The Rolling Stones for publishing an album cover and billboard picturing an excited woman who is bruised and bound with the slogan “I’m Black and Blue from the Rolling Stones and I Like It.” See *id.* (depicting the offending Rolling Stones album cover as glamorizing and inciting violence against women).

<sup>55</sup> See *id.* (setting forth the fervor against pornography characteristic of the second-wave period, which included outcry from a diverse political coalition of radical feminists, evangelical Christians, and traditional Republicans). The Feminists Against Censorship Taskforce was an organization that actively opposed the anti-pornography campaign by WAP, other feminist organizations, and anti-feminist conservative groups. See *id.* (describing the schism within the feminist community between radical feminists and early sex-positive feminist). This battle was so profound that the media colloquially labeled it the “porn wars.” See *id.* (labeling the conflict over pornography in the 1980s).

<sup>56</sup> See R. Claire Snyder-Hall, *Third-Wave Feminism and the Defense of “Choice”*, 8 PERSPS. ON POL. 255, 257 (2010) (quoting CATHARINE A. MACKINNON, *Desire and Power, in FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW* 46, 54 (1987)) (highlighting that although feminists of the period labeled sex workers and pornography performers as victims of the men with whom they transacted, they also villainized these same women for contributing to the objectification of all women). Modern feminists heavily criticize this victim-villain dichotomy, because it simultaneously blames sex workers for violence enacted by men against women and paints them as powerless in their own lives. See *id.* at 258–59 (noting that the third wave of feminism expressly abandoned the second wave’s exclusion and disparagement of sex workers).

<sup>57</sup> See Aikau et al., *supra* note 44, at 14 (emphasizing that for the first time in history, women made up nearly half of all medical, legal, and graduate students in the country, and the proportion of students of color in the same programs rose to 18%).

<sup>58</sup> See Allison Yarrow, *How the ‘90s Tricked Women into Thinking They’d Gained Gender Equality*, TIME (June 13, 2018), <https://time.com/5310256/90s-gender-equality-progress/> [<https://perma.cc/>

abortion as a constitutional right in the 1992 decision in *Planned Parenthood v. Casey*.<sup>59</sup> With the rise of LGBTQ+ representation in academic spaces in the late 1990s, increased diversity led to more inclusive feminist thought and the origins of intersectional feminism.<sup>60</sup> Although still whitewashed, mainstream feminism became more queer and more Black as white feminists integrated issues faced by queer and Black women into the feminist discourse.<sup>61</sup>

Often defined in opposition to the perceived rigidity and judgment of second-wave feminists, scholars describe the third wave as “choice feminism”, which values the freedom of female autonomy over rejecting specific behaviors or identities—particularly about sexuality.<sup>62</sup> As a result, the third wave does not have a centralized platform or common cause, opting instead for a cultural feminism through which tag lines like “Girl Power” became part of

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BY6L-QPVJ] (interpreting the rise in notable female figures in business and government as a sign of greater equity in the workplace and society).

<sup>59</sup> See *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 845–46 (1992) (affirming the right to choose to have an abortion, first articulated in the Supreme Court’s 1973 decision in *Roe v. Wade*, under the doctrine of *stare decisis*); *Roe v. Wade*, 410 U.S. 113, 113 (1973) (declaring criminal laws limiting access to abortion unconstitutional). In 1992, the U.S. Supreme Court in *Planned Parenthood v. Casey* clarified how courts should review statutes regulating access to abortions, holding that the Constitution bars regulations that impose undue burden or pose a “substantial obstacle” to obtaining an abortion “before the fetus attains viability.” See *Casey*, 505 U.S. at 877–78.

<sup>60</sup> See Aikau et al., *supra* note 44, at 19 (noting that several of the first university centers for LGBTQ+ studies appeared in the 1990s). “Whitewashing” refers to the domination of certain spaces by white people to the exclusion of people of color, including the erasure of people of color from history or art. See Andrea Merodeadora, *Whats and Whys of Whitewashing*, MEDIUM (June 14, 2017), <https://puentera.medium.com/whats-and-whys-of-whitewashing-611e7f8a17ca> [<https://perma.cc/LZ2Z-HZRQ>] (explaining that whitewashing is commonly referenced in movies, where white actors play characters of color). Although queer scholarship was a part of feminist discourse before the third wave, the growth of third-wave feminism towards intersectionality amplified the role of queer scholars and activists within the feminist movement. Aikau et al., *supra* note 44, at 14 (describing the role that *Poisoned Ivy: Lesbians and Gay Academics Confronting Homophobia* and other novel works played in opening academia and academic spaces to queer studies and scholars). Intersectionality is a term originating in feminist scholarship referring to the impact of overlapping marginalized identities. *What is Intersectionality?*, ENCYC. BRITANNICA, <https://www.britannica.com/story/what-is-intersectionality> [<https://perma.cc/Q8NQ-Y7L5>]. For example, intersectionality could examine the lives of Black women as the intersecting identities of race and gender to create a socio-political experience of inequality unique from being only Black or only a woman. See *id.* (remarking that scholars often discuss intersectionality in terms of race and gender).

<sup>61</sup> See Snyder-Hall, *supra* note 56, at 258–59 (recounting the growth of intersectionality and intersectional goals within the feminist movement in the late twentieth and early twenty-first century); Aikau et al., *supra* note 44, at 19 (describing the diversification of feminist advocates in academic institutions, including in gender and queer studies programs).

<sup>62</sup> See Snyder-Hall, *supra* note 56, at 258–59 (explaining that scholars often describe third-wave feminism as more accepting of people of color and queer people and less doctrinal than second-wave feminism). Many scholars critique third-wave feminism for its similarity to the second wave, but lack of major social and political accomplishments. See *id.* at 255 (taking note of the conflict between second-wave and third-wave feminists, who co-exist in the same academic and activist spaces).

popular culture.<sup>63</sup> This period hosted a rise in hypersexuality and the consensus that sexualization and feminism are compatible.<sup>64</sup>

Thus, the concept of “sex positivity,” or the belief that any form of consensual, adult sex can be healthy and even empowering, emerged.<sup>65</sup> On one hand, feminists rallied behind sexual liberation and sex workers, often venerating and even fetishizing strippers and pornography actresses for their perceived liberation.<sup>66</sup> On the other, the third wave’s support of sex workers was largely superficial, as activist groups did little to advocate for legal or social change that benefitted sex workers.<sup>67</sup>

### 3. Fourth-Wave Feminism, Anti-Carceral Feminism, and Sex Work

The fourth wave is the result of countless factors, most dramatically, the role of the internet.<sup>68</sup> Emerging in the mid-2000s and reaching its peak around 2016, the fourth wave emerged after the election of President Donald Trump and the subsequent public trials of serial sexual predators like Harvey Weinstein and Bill Cosby.<sup>69</sup> The fourth wave is loud, aggressive, and impolite feminism that takes on a narrative of justice framed by protest.<sup>70</sup>

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<sup>63</sup> See Yarrow, *supra* note 58 (explaining the cultural and historical context of third-wave feminism, particularly in relation to the growing importance of pornography to modern society).

<sup>64</sup> See Snyder-Hall, *supra* note 56, at 258 (distinguishing third-wave feminists by their rejection of the sex-negative perception of sex by second-wave feminists, who characterized female heterosexuality as tied to the patriarchy).

<sup>65</sup> See Snyder-Hall, *supra* note 56, at 259 (recounting the growing acceptance and mobilization behind sexuality in the third wave of feminism). “Sex positivity” refers to an individual’s or group’s comfort with sexual activity and sexual identities of themselves and others. *What Does “Sex Positive” Mean?*, INT’L SOC’Y FOR SEXUAL MED., <https://www.issm.info/sexual-health-qa/what-does-sex-positive-mean/> [<https://perma.cc/X7Y7-BAX3>].

<sup>66</sup> See Nina K. Martin, *Porn Empowerment: Negotiating Sex Work and Third Wave Feminism*, ATLANTIS, Sept. 2007, at 31–32 (noting that at the peak of the third wave during the early 2000s, feminists radically shifted their views towards sex work, although did not always rally behind the social and legal issues sex workers identified). Scholars identify this period by the shifting aesthetics of feminists, who wear makeup and dress provocatively. See *id.* (explaining how women’s fashion trends relate to feminist ideologies). Sex workers, particularly strippers, became fashion influencers, setting trends like exposed thongs and bras, brightly colored clothing, bleached hair, and long nails. See *id.* (criticizing that fashion trends of the era taken from sex workers of color without proper credit). Interestingly, the fetishization of sex workers in this period led to the rise of pole dancing as a popular exercise class. See *id.* (noting the veneration of sex workers in pop culture).

<sup>67</sup> See, e.g., *id.* (describing the rise of sex workers in pop culture and the technical acceptance of sex workers as feminist, but not identifying any tangible socio-political action by feminists to improve the lives of sex workers).

<sup>68</sup> See Miglena Sternadori, *Situating the Fourth Wave of Feminism in Popular Media Discourses*, in MISOGYNY AND MEDIA IN THE AGE OF TRUMP 31, 32 (Maria B. Marron ed., 2020) (describing the role of the internet as a creator of culture and platform for ideas as deeply intertwined with modern feminism).

<sup>69</sup> See *id.* at 33 (asserting that a campaign against sexual violence with a social justice spin is at the center of early fourth-wave feminism, in relation to publicized cases of prolific sexual abuse by celebrities and politicians). Famed producer Harvey Weinstein and comedian Bill Cosby were both

In part due to the prolific #MeToo movement created by activist Tarana Burke, the current wave of feminism focuses on reducing sexual violence, emphasizing experiences shared by women, and increasing transparency.<sup>71</sup> The fourth wave is deeply intersectional, and emphasizes the experiences of women of color, trans women, and sex workers.<sup>72</sup> The overlap of the movement with the rise of social media contributed to the phenomena of “cancel culture,” in which individuals hold content and people accountable for misogyny, racism, or other offensive effects.<sup>73</sup> Additionally, scholars identify the fourth wave by its inclusion of male feminists and its attention to the issue of toxic masculinity as it harms both women and men.<sup>74</sup>

Scholars also describe fourth-wave feminism in part as “choice feminism,” a reference to the wave’s emphasis on the empowerment of women’s

criminally tried for a series of violent rapes perpetrated against women over the course of several decades. *Id.*

<sup>70</sup> *See id.* at 32 (emphasizing that fourth-wave feminism is outspoken and rejects the social norms of pleasantness often imposed upon women). A controversial example of this is supermodel Cara Delevingne’s vest at the 2021 Met Gala, designed by Christian Dior, emblazoned with the phrase “Peg the Patriarchy.” *See* Samantha Riedel, *Cara Delevingne’s “Peg the Patriarchy” Outfit Sparks Controversy*, THEM (Sept. 16, 2021), <https://www.them.us/story/cara-delevingne-peg-the-patriarchy-outfit-sparks-controversy> [<https://perma.cc/59TW-GR5Y>] (explaining that the phrase refers to the sexual practice in heterosexual relationships by which women penetrate male partners).

<sup>71</sup> *See id.* (stressing the prolific impact of the #MeeToo movement in building the culture of fourth-wave feminism and creating recognition for it in the media and scholarship). Legal feminist scholars, notably Kimberlé Crenshaw, argue that the lack of intersectionality in anti-discrimination law fails to capture the plight of women of color who face discrimination at the intersection of multiple marginalized identities. *See* Jamillah Bowman Williams, *Maximizing #MeToo: Intersectionality & the Movement*, 62 B.C. L. REV. 1797, 1798–99 (2021) (discussing Crenshaw’s seminal work coining the term “intersectionality” in legal feminist theory and arguing that her thesis still rings true today, as women of color experience severe marginalization); *see also* note 60 *supra* and accompanying text (defining intersectionality and its effect on third-wave feminism, which Crenshaw initially critiqued as ignoring the myriad of social, political, and economic harms to Black women in American society). These scholars, although optimistic about the impact of fourth-wave and #MeToo feminism on the legal rights of Black women, assert that women’s rights movements exclude race from their initiatives. *See* Williams, *supra*, at 1801–02 (arguing, as an example, that feminist initiatives promoting anti-sexual harassment legislation often ignore that people harass women of color both because they are women and because they are not white).

<sup>72</sup> *See* Sternadori, *supra* note 68, at 33–34, 40–41 (observing that feminist thought outside the typical white, middle class, cishet, female gaze is central in the discourse of the newest wave of the movement).

<sup>73</sup> *See id.* at 31 (illustrating the role of social media and the internet in the fourth-wave feminist trend of policing offensive language).

<sup>74</sup> *See id.* at 40 (discussing the perceived increasing prevalence of male feminists as a distinctly fourth-wave phenomenon). Toxic masculinity often identifies male “machismo,” or extreme masculinity, as negative to women and men alike, and attributes these characteristics to the socialization of men to promote misogyny, violence, and suppressed emotions. Maya Salam, *What Is Toxic Masculinity?*, N.Y. TIMES (Jan. 22, 2019), <https://www.nytimes.com/2019/01/22/us/toxic-masculinity.html> [<https://perma.cc/4QND-6HEL>].

choices, particularly in the context of sex.<sup>75</sup> As a result, most fourth-wave feminists are explicitly pro-sex worker, and many support the decriminalization of transactional sex.<sup>76</sup> The power of these beliefs led anti-sex work scholar Julie Bindel to note that young feminists are more offended by the idea of abolishing transactional sex work than by transactional sex.<sup>77</sup>

### B. Sex Work in the United States

Sex work, as advocates and scholars refer to it in modernity, encompasses the many ways adults exchange consensual sexual services or performances for money or other goods.<sup>78</sup> The term “sex worker” includes people engaged in transactional sex work,<sup>79</sup> stripping, and pornography.<sup>80</sup> Although American

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<sup>75</sup> Compare Snyder-Hall, *supra* note 56, at 255 (defining and explaining choice feminism in the context of the third feminist wave), with Jessica Abrahams, *Everything You Wanted to Know About Fourth Wave Feminism—But Were Afraid to Ask*, PROSPECT (Aug. 14, 2017), <https://www.prospectmagazine.co.uk/magazine/everything-wanted-know-fourth-wave-feminism> [<https://perma.cc/234V-4Z9X>] (“For many feminists, the endgame is choice. Women should be free to do whatever they want, without judgment and without facing additional obstacles to men . . .”).

<sup>76</sup> See Sternadori, *supra* note 68, at 41 (noting that feminism is increasingly pro-sex worker since the initiation of the fourth feminist wave).

<sup>77</sup> See JULIA BINDEL, *THE PIMPING OF PROSTITUTION: ABOLISHING THE SEX WORK MYTH*, at vii (2017) (expressing anger and exasperation at the support of young feminists for sex work, while arguing for the abolition of sex work as a whole).

<sup>78</sup> See *Understanding Sex Work in an Open Society*, OPEN SOC’Y FOUND., <https://www.opensocietyfoundations.org/explainers/understanding-sex-work-open-society> [<https://perma.cc/9JXX-ZVE8>] (Apr. 2019).

<sup>79</sup> See *id.* (advocating for the use of “sex worker” and “sex work” in lieu of derogative terms like “prostitute” or “prostitution”). Although sex work encompasses the same economic structure as prostitution, sex workers and activists prefer to use the terms “transactional sex work” or “sex worker.” See *id.* (explaining that “sex worker” is a preferred term to prostitute. “Prostitute” is historically pejorative because it implies criminality and moral depravity, such that many persons who work in the sex industry prefer the term “sex worker” as a less stigmatizing label. See *id.* (emphasizing that the stigma around the term “prostitute” makes it difficult for sex workers to access social services, legal aid, and healthcare).

<sup>80</sup> See *id.* (listing classic professions within the sex industry). In the last decade and, increasingly since the onset of the COVID-19 pandemic, sex work has migrated to online platforms. Alex J. Nelson, Yeon Jung Yu & Bronwyn McBride, *Sex Work During the COVID-19 Pandemic*, SOC’Y FOR THE ANTHROPOLOGY OF WORK (Nov. 2, 2020), <https://saw.americananthro.org/pub/sex-work-during-the-covid-19-pandemic/release/1> [<https://perma.cc/2TYU-4KCV>]. A prolific example of this online transition is rise of webcam and erotic models on sites like OnlyFans, on which individuals create profiles and sell subscriptions for access to sexual content. See *id.* (explaining the role of cam sites and online modeling during the pandemic, during which in-person sex work has lessened due to social distancing). See generally Jacob Bernstein, *How OnlyFans Changed Sex Work Forever*, N.Y. TIMES (Feb. 9, 2019), <https://www.nytimes.com/2019/02/09/style/onlyfans-porn-stars.html> [<https://perma.cc/KA8G-W84W>] (commenting that OnlyFans not only revolutionized the sex industry, but also gave sex workers greater control over their labor compared to the traditional pornography industry, because they essentially own and run their own businesses).

attitudes toward sex work and the legal approaches to sex work fluctuate, the marginalization of sex workers has remained constant throughout history.<sup>81</sup>

Before the founding of the United States, transactional sex work was not only legal, but an essential component of society for European colonizers in the Americas.<sup>82</sup> In a society with very few women, men viewed transactional sex workers as a necessity to fulfil the sexual needs of the early colonial settlers.<sup>83</sup> As women and children began to migrate to the Americas, transactional sex work continued to flourish as a source of economic mobility for impoverished women, particularly indentured servants and immigrants.<sup>84</sup>

Entering the eighteenth century, most colonists viewed transactional sex work as a nuisance, associating the practice with disruption, drinking, and gambling.<sup>85</sup> Vigilantes took some of first formal action against transactional sex work, exemplified by the Whorehouse Riots in which residents attacked and destroyed brothels in lower-class neighborhoods.<sup>86</sup>

Throughout the eighteenth and nineteenth centuries, city ordinances became the principal source of legal action against prostitution.<sup>87</sup> Such laws took what would be considered today a progressive approach to sex work, regulating the industry through the lens of public health, often by requiring transac-

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<sup>81</sup> See April Lynn Jackson, *The History of Prostitution Reform in the United States 1* (May 6, 2004) (undergraduate honors thesis, University of Tennessee) (on file with University of Tennessee), [https://trace.tennessee.edu/utk\\_chanhonoproj/754](https://trace.tennessee.edu/utk_chanhonoproj/754) [<https://perma.cc/AW7E-2AUK>] (outlining the socio-legal transformation of sex work in the United States, and noting the consistent physical, economic, socio-cultural, and legal harm experienced by sex workers).

<sup>82</sup> See *id.* (recounting the importance of sex work to early colonial American society). In the earliest periods of European settlement in the Americas, most women in colonized regions were sex workers. See *id.* (noting the lack of women during the period as men initially created the first colonial settlements). Sex workers of the era experienced greater social and legal freedom in comparison to the more rigid social structures for women in Europe at the time. See *id.* (commenting that despite the consistent stigma around sex work, women often selected into the profession to find space outside of stereotypical gender roles in which women had no control over their work or sexuality).

<sup>83</sup> See *id.* (emphasizing that the sexual desires of men were treated as a necessity in colonial America, and that sex workers played an important role in those societies because wives were not available as an outlet for those desires).

<sup>84</sup> See *id.* at 1–2 (describing that as early American society became more stable and families joined the communities of men, sex work continued to be a demanded profession). As religious institutions appeared in colonist communities, however, the stigma against sex workers became more pronounced, and the first signs of public condemnation against sex work took place. See *id.* (connecting the rise of religiosity in Boston to the first ban on brothels in region).

<sup>85</sup> See *id.* at 2 (explaining that sex work occurred most commonly in lower-class immigrant neighborhoods, and a lesser amount of sex work took place in wealthy neighborhoods).

<sup>86</sup> See *id.* (portraying the scope and devastating aftermath of the Whorehouse Riots, which burned down blocks of East Coast and Mid-Western cities). These demonstrations took place across the mid-to late-1700s in Boston, New York, St. Louis, Chicago, and Detroit in reaction to perceived complacency by law enforcement against brothels. See *id.* (listing the most well-known riots against brothels).

<sup>87</sup> See *id.* at 3 (distinguishing the Victorian attitudes about sex work and the ordinance regulation model of the period from the previous non-addressal of sex work by the law).

tional sex workers to be tested for sexually transmitted infections in exchange for freedom to work without disruption by law enforcement.<sup>88</sup> Transactional sex work became confined to specific geographic areas in urban cities known as “red light districts.”<sup>89</sup>

At the same time, Victorian American culture began to look at transactional sex work in terms of morality.<sup>90</sup> In an era focused on the sexual purity of women, women’s activist groups blamed men for seducing and trapping women in transactional sex work.<sup>91</sup> These female activist organizations identified poverty, alcoholism, and immigrant status as core causes of transactional sex work, turning the campaign against sex work into a charitable exercise.<sup>92</sup> Notably, some sex workers of the era chose transactional sex work because it was preferable to

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<sup>88</sup> *See id.* at 6 (recounting that the Minnesota cities of Minneapolis and St. Paul were two pioneers of this progressive style of city regulation of sex work). City officials often required sex workers to undergo a licensure process, through which medical exams were prescribed. *See id.* (portraying the ordinance model of regulating sex work, indicating that at least some legislators viewed sex work as a public health concern and not a crime). Other cities without formal ordinances used raids and arrests of sex workers to effectively regulate sex work in the same manner, and to foster public sentiment that law enforcement was tackling sex work. *See id.* (explaining the de facto control model of sex work enforcement). The role of law enforcement in regulating the industry also exposed sex workers to rampant abuse and extortion. *See id.* (discussing the negative impact of regulation on sex workers in the era, because police officers would threaten criminal punishment to rape, steal from, and otherwise physically harm sex workers).

<sup>89</sup> *See id.* (explaining that by confining sex work to specific areas, law enforcement could create the perception that sex work was less prevalent and quell public outrage by city inhabitants).

<sup>90</sup> *See id.* at 4–5 (chronicling the role of morality and religion in the increasingly carceral responses to sex work, as society began to view the male purchasers of sex as tainting and violating women). Men and women adopted very different stances against sex work, with the male view influencing the laws criminalizing sex work and the female role focusing on charity and outreach for sex workers. *See id.* (noting the dichotomy between views of sex work by men and women during a period in which men and women existed in nearly separate communities). Men often adopted an attitude that sex work was a matter of necessity and viewed sex work as immoral but vital to meeting male sexual needs. *See id.* (discussing that because men viewed sex work as a necessity, society allowed the industry to thrive legally without significant regulation).

<sup>91</sup> *See id.* (detailing the female perspective and advocacy of the Victorian era against sex work as vilifying the men that purchased sex, rather than sex workers, in contrast to later views on sex work). Women often pushed the narrative that male corruptors and abusers were responsible for the growth of sex work in the period, targeting at-risk women through women’s homes and other organizations to provide alternatives to sex work. *See id.* (recounting the rise of “Magdalen societies” and other charitable entities designed to combat sex work).

<sup>92</sup> *See id.* at 5 (discussing female mobilization in the Victorian era around sex work and related issues through charitable causes, as women had little political or legal power at the time); Marie Conn, *Magdalen Society*, ENCYC. OF GREATER PHILA., <https://philadelphiaencyclopedia.org/archive/magdalen-society/> [<https://perma.cc/C4G7-NBAR>] (recounting the history of the Magdalen Society of Philadelphia). Although these charitable organizations did not often influence public policy, they did have a prominent role socially and culturally. *See Conn, supra* (identifying the impact of women’s organizations in the Victorian age). Anti-sex work societies had newspapers, hospitals, women’s homes, and other charitable structures devoted to rescuing and rehabilitating women from sex work. Jackson, *supra* note 81, at 5 (remarking upon the prominence of Magdalen Societies in metropolitan communities as prestigious charitable work).

the horrific working conditions in industrial America, in which factories injured workers, paid them low wages, and forced them to work brutal hours.<sup>93</sup>

In the early twentieth century, women influenced the narrative surrounding transactional sex work to focus on the men purchasing sex, and many legislatures enacted criminal legislation targeting male seducers who trapped women in transactional sex work.<sup>94</sup> By the 1960s, however, the rise of “germ theory” and the modern understanding of sexually transmitted infections contributed to the demonization of transactional sex workers as unclean or disease-carrying.<sup>95</sup> Propaganda from the First and Second World Wars depicted soldiers sleeping with foreign sex workers as a dereliction of duty, and portrayed transactional sex work as synonymous with disease.<sup>96</sup>

Pornography emerged on a mass scale in the nineteenth and twentieth centuries, despite powerful criminalization under obscenity legislation.<sup>97</sup> Obscenity laws at both the state and federal level targeted erotic or sexually lewd material.<sup>98</sup> In 1973, in *Miller v. California*, the U.S. Supreme Court held that depictions of sex in pornography are not intrinsically obscene, and protected in

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<sup>93</sup> See Jackson, *supra* note 81, at 6 (emphasizing that for otherwise marginalized women, sex work was a less dangerous occupation than others available in the industrial United States). Women working in factory settings often made less money, were more harshly supervised, and at greater risk of physical harm from the crude machinery used at the time. See *id.* (discussing how the introduction of women into the workplace generally during the Industrial Revolution often led women to sex work).

<sup>94</sup> See *id.* at 8 (noting the widespread myths that pimps and traffickers put together elaborate rouses, such as fake weddings, to trick women and force them into sex work). An example of legislation based on this misconception is the federal Mann Act of 1910, harnessing the power of the Commerce Clause to prohibit the interstate conveyance of women for “immoral” objectives. See *id.* (discussing the Mann Act to demonstrate the influence of rescue myths on legislation); White-Slave Traffic (Mann) Act, Pub. L. No. 61-277, 36 Stat. 825 (1910) (codified as amended at 18 U.S.C. §§ 2421–2424).

<sup>95</sup> See Jackson, *supra* note 81, at 8 (remarking that as the modern concept of hygiene emerged, a new layer of stigma against sex workers came with it). Following the rise of public concern about germs and health, people viewed sex workers as immoral and physically dirty, although the stigma did not extend to the men purchasing sex. See *id.* (discussing the beginnings of a health-based stigma against sex workers in the then-primarily male professions of military service and medicine).

<sup>96</sup> See *id.* at 8–9 (explaining that because sexually transmitted infections were rampant among American soldiers, the federal government used propaganda in videos and print advertising to vilify foreign sex workers as the source of high rates of infection). The American military associated sex workers with enemy forces and portrayed the women as unhealthy and unclean. See *id.* (commenting that the U.S. Army even hired Disney to create a film about venereal diseases to help stop the spread of STIs in the military).

<sup>97</sup> See, e.g., *Miller v. California*, 413 U.S. 15, 23–24 (1973) (holding that the First Amendment categorically excludes protections for obscene content, but clarifying that pornography is not always obscene); Elizabeth Harmer Dionne, *Pornography, Morality, and Harm: Why Miller Should Survive* Lawrence, 15 GEO. MASON L. REV. 611, 618 (2008) (noting that following *Miller*, consensual adult pornography, which the First Amendment protects, is often defined in opposition to obscenity, which the First Amendment does not protect).

<sup>98</sup> See *Miller*, 413 U.S. at 24 (illustrating the breadth of obscenity legislation at all levels of government, capturing behaviors that the First Amendment clearly protects).

most cases by the First Amendment.<sup>99</sup> This decision invalidated laws restricting the production and distribution of pornography and opened the door for the expansion of the modern pornography industry.<sup>100</sup>

Currently, purchasing or soliciting transactional sex is illegal in all U.S. states except Nevada.<sup>101</sup> Nevada regulates transactional sex at the county level, where it is legal in ten counties and illegal in seven.<sup>102</sup> Other forms of sex work, including pornography and stripping, are legal throughout the United States.<sup>103</sup>

### C. A Brief History of the Internet, Pornography, and Sex Work

With the rise of the internet, the sex industry adapted to the new technology as a new frontier to provide and advertise sexual goods and services.<sup>104</sup> Backpage and Pornhub are representative of the migration of the sex industry at large to the internet.<sup>105</sup> The two following subsections describe how Backpage and Pornhub's websites revolutionized different aspects of the sex industry, the dynamism of their business model, and the relevant controversy over their platforms.<sup>106</sup>

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<sup>99</sup> See *id.* (holding that pornography is not inherently obscene, and there must be a greater showing of societal harm to criminalize sexual material). In 1973, the U.S. Supreme Court set forth a specific test for obscenity in *Miller v. California*. For content to be deemed obscene, the *Miller* test requires the state to demonstrate that the content (1) attracted "prurient interest," (2) was offensive to community norms, and (3) lacked value to the sciences, writing, politics, or the arts. See *id.* (holding that most obscenity legislation violated the First Amendment by capturing pornography, which is protected speech); see also Carmen M. Cusack, *Busting Patriarchal Booby Traps: Why Feminists Fear Minor Distinctions in Child Porn Cases*, 39 S.U. L. REV. 43, 45 (2011) (stating that modern courts still rely on the *Miller* factors in analyzing the legitimacy of obscenity prosecution). "Prurient" refers to having inappropriate, often excessive, preoccupation with sex. *Prurient*, BLACK'S LAW DICTIONARY (11th ed. 2019).

<sup>100</sup> See *United States v. Mecham*, 950 F.3d 257, 260 (5th Cir. 2020) (explaining that the *Miller* test effectively barred most legislation against adult pornography, creating the need for specific statutes criminalizing child pornography), *cert. denied*, 141 S. Ct. 139 (2020).

<sup>101</sup> See *US Federal and State Prostitution Laws and Related Punishments*, PROCON.ORG, <https://prostitution.procon.org/us-federal-and-state-prostitution-laws-and-related-punishments/> [<https://perma.cc/U3MS-VLLN>] (May 4, 2018) (giving a fifty-state survey of prostitution laws).

<sup>102</sup> See *id.* (breaking down the criminalization of prostitution in Nevada by country). One of the seven countries in which transactional sex is illegal is Clark County, containing the City of Las Vegas. *Id.*

<sup>103</sup> See *Miller*, 413 U.S. at 24 (noting that pornography is not inherently obscene and is protected by the First Amendment).

<sup>104</sup> See generally Brown, *supra* note 19 (detailing the success of Backpage as an online classified advertiser prolifically used by transactional sex workers); Benjamin Wallace, *The Geek-Kings of Smut*, N.Y. MAG. (Jan. 28, 2011), <https://nymag.com/news/features/70985/> [<https://perma.cc/D7HQ-YYC5>] (illustrating the explosive impact of online pornography on the pornography industry).

<sup>105</sup> See generally Brown, *supra* note 19 (outlining the rise of Backpage following the decline of print media and attributing the success of the website to the fact that it filled the void left by classified ads in newspapers); Wallace, *supra* note 104 (describing the rise of Pornhub and its creators as a foil to the decline of the Hollywood-esque pornography industry).

<sup>106</sup> See *infra* notes 107–127 and accompanying text.

## 1. Backpage: Classified Ads with a Virtual Twist

Backpage founders James Larkin and Michael Lacey forged the website from years of experience in print media.<sup>107</sup> The pair rose to prominence in the 1970s with the publication of the *Phoenix New Times*, an anti-war, anti-“Big Media” newspaper.<sup>108</sup> Although the duo initially found success from the Pulitzer Prize-winning stories in their seventeen accumulated newspapers, they retained success by adopting audiotext technology that allowed readers to call in responses to personal ads in their newspapers.<sup>109</sup>

With the fall of print media, Lacey and Larkin founded Backpage in 2004 as a natural extension of their classified ads in the *Phoenix New Times*.<sup>110</sup> Declining newspaper and magazine readership created a void for personal ads; Backpage filled that void by providing a space online where individuals could advertise for everything from babysitting to used furniture.<sup>111</sup> The website’s business model mirrored that of Craigslist and newspapers.<sup>112</sup> Individuals could post on the site for free, but paid to advertise and promote their listings on the site.<sup>113</sup>

This business model made Backpage a hotspot for transactional sex work advertising, which was prevalent in newspapers before the explosion of the

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<sup>107</sup> See Brown, *supra* note 19 (chronicling Lark and Lacey’s rise to notoriety running newspapers that often published content too risqué for larger media conglomerates).

<sup>108</sup> See *id.* (describing several high-profile controversies and ensuing legal battles from the contents of *Phoenix New Times* reporting). The *Phoenix New Times* is best known for exposing Cindy McCain’s opioid addiction, prescription forgeries, and theft from her children’s charity to supply her addiction. See *id.* (noting that this style of exposé reporting made the founders of Backpage longtime enemies of the McCains as early as the 1970s). The newspaper also wrote explicitly pro-choice and pro-LGBTQ+ articles when abortion and the queer community were taboo topics. See *id.* (recounting several articles published by the *Phoenix New Times* which instructed readers on how to travel from Arizona to California to get an abortion).

<sup>109</sup> See *id.* (explaining that when the newspaper’s avant-garde writing no longer paid for the cost of publication, Lacey and Larkin became some of the first newspaper owners to use audiotext). Lacey and Larkin won a Pulitzer Prize for the work of food critic Jonathan Gold in 2007 in *LA Weekly*. See *id.* (highlighting the success of the small media empire the Backpage founders accumulated). Audiotext was a program that allowed readers to dial 1-900 phone numbers which linked to a voicemail box, allowing them to respond to advertisements over the phone. See *id.* (explaining that audiotext improved upon the original classifieds structure by allowing customers to use voicemail instead of written mail).

<sup>110</sup> See *id.* (tracing the natural continuation of audiotext and personal advertising into online classified advertising websites, which improved an existing method of business with new technology).

<sup>111</sup> See *id.* (attributing the success of Backpage and Craigslist in part to the decline in newspapers and magazines, where such advertisements were originally published).

<sup>112</sup> See *id.* (tracing the similarity between Craigslist and Backpage and the age-old use of print newspapers to place advertisements). Craigslist is a website resembling the classifieds section in newspapers, allowing users to post personal advertisements and receive responses. See *id.* (detailing the modern adaptation of classified ads online through services like Craigslist and Backpage).

<sup>113</sup> See *id.* (outlining how the generally free nature of Backpage generated revenue).

internet.<sup>114</sup> Backpage’s community guidelines, however, barred transactional sex advertisements and other criminal behavior.<sup>115</sup> Additionally, the website structured all transactions around credit cards, which allowed Backpage to work with credit card companies to identify and report suspected traffickers among the classified ads.<sup>116</sup> Despite these efforts, by 2018 the company allegedly housed approximately eighty percent of transactional sex work advertising in the United States.<sup>117</sup>

## 2. Pornhub: Bringing the “Tubist” Model to Pornography

The structure of online pornography before MindGeek typically resembled a pay-per-view model, in which the company owning the website produced its own content and charged users to view it.<sup>118</sup> In 2007, young Montreal developers Stephane Manos and Ouissan Youssef created Pornhub, a revolutionary pornography website offering free access to users.<sup>119</sup> The duo sold the company to Fabian Thylmann, who incorporated it into the larger company Manwin, which owned many of the world’s most popular pornography websites.<sup>120</sup> Manwin eventually changed its name to MindGeek, and the company as whole amassed hundreds of pornography websites and production companies.<sup>121</sup>

Pornhub and other MindGeek affiliates run on a “Tubist” model website, which allows users to post and watch content for free, generating high profit

<sup>114</sup> See *id.* (underscoring that Backpage worked with law enforcement to combat sex trafficking on its website until law enforcement eventually stopped contacting the site); Danielle Keats Citron & Benjamin Wittes, *The Problem Isn’t Just Backpage: Revisiting Section 230 Immunity*, 2 GEO. L. TECH. REV. 453, 453 (2018) (emphasizing the prevalence of sex trafficking on Backpage before its seizure, as some commenters claimed most sex trafficking advertising occurred on Backpage).

<sup>115</sup> See Brown, *supra* note 19 (noting the community guidelines Backpage used to regulate sex trafficking and ban, at least in theory, content promoting sex trafficking from the site).

<sup>116</sup> See *id.* (emphasizing that for a long period Backpage had a great working relationship with federal and state law enforcement, who commended Backpage’s transparency with data).

<sup>117</sup> Citron & Wittes, *supra* note 114, at 453; see also *Doe v. Backpage.com*, 817 F.3d 12, 25 (1st Cir. 2016) (emphasizing that the petitioners successfully demonstrated that Backpage dominates the market for sex trafficking advertising online).

<sup>118</sup> See Citron & Wittes, *supra* note 114, at 453 (defining MindGeek’s business model in opposition to the traditional pay-per-view model that was most common in the period); Wallace, *supra* note 105 (affirming that YouTube-style pornography sites destroyed the market for pay-per-view sites because users could watch content, often pirated from other websites, for free).

<sup>119</sup> See Wallace, *supra* note 114 (elaborating that the founders of Pornhub met after recently graduating from Concordia University in Canada). Manos and Youssef met playing competitive Foosball and became friends while traveling to the United States to play in a Foosball tournament. *Id.* The pair also founded the competitor website, Brazzers, in 2004. See *id.* (calling the founders of Pornhub and Brazzers brilliant, irreverent “geeks”).

<sup>120</sup> See *id.* (featuring a flow chart explaining how MindGeek, owned by Thylmann, acquired most of the pornography industry, including Brazzers, XTube, and Spankwire).

<sup>121</sup> See David Auerbach, *Vampire Porn*, SLATE, <https://slate.com/technology/2014/10/mindgeek-porn-monopoly-its-dominance-is-a-cautionary-tale-for-other-industries.html> [<https://perma.cc/SDQ9-H5XF>] (June 22, 2016) (detailing the transition from Manwin to MindGeek).

margins by selling advertising space.<sup>122</sup> The innovative business model also incentivizes incredible amounts of piracy, as users frequently post content stolen from other production companies.<sup>123</sup> As a result, the success of Pornhub was the death of the traditional pornography production industry, which could no longer generate profit in a market flooded with pirated content available for free on Pornhub.<sup>124</sup>

Over time, MindGeek acquired nearly all the major pornography producers and websites to create an overwhelming monopoly in the porn industry.<sup>125</sup> Described as a “vampiric ecosystem,” MindGeek’s production companies create films for Pornhub and other free pornography sites, yielding less profit for those businesses, and thus performers.<sup>126</sup> Following Pornhub’s takeover, performers in the industry lost significant control over their work, pay, and ability to speak about problems in the industry for fear of the giant’s blacklisting policy.<sup>127</sup>

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<sup>122</sup> See *id.* (describing MindGeek’s business model as so unbelievably successful that it quickly became a monopoly in the market for pornography); Wallace, *supra* note 114 (blaming Pornhub and related sites for choking out the market for paid pornographic videos and sites). Tubist sites, which take their name from YouTube, allow users to submit their own content for the viewing of others for free, and generate profit by selling advertising space on their sites to other businesses. Wallace, *supra* note 114.

<sup>123</sup> See Auerbach, *supra* note 121 (maintaining that the old pornography industry model could not survive the Tubist revolution because it did not have the resources to challenge all the instances of piracy on Pornhub and other Tubist sites); Wallace, *supra* note 114 (narrating the resentment against Tubist sites and Pornhub by porn stars at the 2011 Adult Video Awards); see also Grant, *supra* note 7 (asserting that although Pornhub deserves criticism for its monopolistic and exploitive business structure, the backlash against Pornhub as a cause of sex trafficking ignores Pornhub’s abuses as an employer). The pornography production community was so threatened by the rise of Tubist sites that during the 2011 Adult Video Awards multiple award winners opined in their speeches that the audience needs to pay for their pornography, rather than using free sites. See Wallace, *supra* note 114 (portraying the animosity towards Pornhub during its rise to domination, which led the 2011 Adult Video Awards to feature the tagline “Buy the [f\*\*\*ing] movies.”).

<sup>124</sup> See Auerbach, *supra* note 121 (lamenting that the San Fernando Valley is no longer the Hollywood-like capital of pornography production, because Pornhub destabilized the pornography industry through piracy); Wallace, *supra* note 114 (reflecting that in 2011, nearly all pornography production companies went out of business due to the popularity of Pornhub); see also Grant, *supra* note 7 (asserting that although Pornhub is inarguably a morally bad company, the narrative Kristof pushes about sex work and criminal violence ignores the porn giant’s labor abuses).

<sup>125</sup> See Auerbach, *supra* note 121 (noting that MindGeek owns Pornhub, YouPorn, Redtube, and hundreds of other popular pornography websites); Grant, *supra* note 7 (calling Pornhub and its parent company, MindGeek, an exploitive monopoly and suggesting that the best approach to Pornhub may be to limit its power through anti-trust legislation).

<sup>126</sup> See Auerbach, *supra* note 121 (referring to MindGeek as a “vampire,” describing the predatory manner by which the company rose to prominence and acquired the existing pornography industry); Grant, *supra* note 7 (criticizing MindGeek’s overwhelming dominance of the pornography industry and the effect on pornography performers).

<sup>127</sup> See Auerbach, *supra* note 121 (denouncing MindGeek for its practice of blacklisting performers who publicly criticize the company, effectively banishing the workers from the pornography industry); Grant, *supra* note 7 (explaining that performers essentially must work for MindGeek or not at all because it owns such a significant stake of the pornography industry).

### D. The Modern Use of Law to Address Transactional Sex Work, Pornography, and Sex Trafficking Online

The foundational legislation regulating sexual content on the internet is the Communications Decency Act (CDA), limited by the grants of immunity for websites under § 230.<sup>128</sup> As the sex industry has adapted to the internet and expanded in novel ways, Congress struggles to amend and supplement the CDA to regulate criminal sexual content online.<sup>129</sup> Subsection 1 outlines the history of the CDA.<sup>130</sup> Subsection 2 details Congress's amendment of § 230 and enactment of FOSTA-SESTA to target Backpage.<sup>131</sup> Subsection 3 provides a summary of the reaction to FOSTA-SESTA's enactment.<sup>132</sup> Subsection 4 explains the proposed Fight Back Act of 2020.<sup>133</sup>

#### 1. The Communications Decency Act and § 230 Immunity

Congress created the CDA in part to prevent children from accessing sexual content online and to incentivize websites and online businesses to develop new technology to block explicit content from minors.<sup>134</sup> In 1995, in *Stratton*

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<sup>128</sup> See Communications Decency Act of 1996, Pub. L. No. 104-104, §§ 501–509, 551–552, 561, 110 Stat. 56, 133–43 (1996) (codified as amended in scattered sections of 47 U.S.C.). The Communication Decency Act's (CDA) immunity provisions offer a safe harbor for websites where users generate content and post independently, like social media platforms and Tubist video streaming websites. See *id.*; Charles Matula, *Any Safe Harbor in a Storm: SESTA-FOSTA and the Future of § 230 of the Communications Decency Act*, 18 DUKE L. & TECH. REV. 353, 354 (2020) (noting that § 230 protects public forum websites allowing user-posted content or media from liability). Under the CDA, websites have immunity from criminal and civil penalties if they take steps to remove offensive content and either over-police permissible content or miss offending content. See Communications Decency Act of 1996, §§ 501–509, 551–552, 561, 110 Stat. at 133–43; Matula, *supra*, at 354.

<sup>129</sup> 47 U.S.C. § 230; see Communications Decency Act of 1996, §§ 501–509, 551–552, 561, 110 Stat. at 133–43 (amending the Communications Decency Act of 1996 to include immunity for internet service providers); Matula, *supra* note 128, at 354 (explaining how the codification of § 230 qualified the liability imposed by the Communications Decency Act).

<sup>130</sup> See *infra* notes 134–139 and accompanying text.

<sup>131</sup> See *infra* notes 140–149 and accompanying text.

<sup>132</sup> See *infra* notes 150–159 and accompanying text.

<sup>133</sup> See *infra* notes 160–162 and accompanying text.

<sup>134</sup> 47 U.S.C. § 230; see Communications Decency Act of 1996, §§ 501–509, 551–552, 561, 110 Stat. at 133–43 (amending the Telecommunications Act of 1996); Citron & Wittes, *supra* note 114, at 456 (observing that the CDA actively targeted child access to internet pornography and other offensive content, including graphic violence). Although a complete history of the CDA and its interpretation in the courts is beyond the scope of this Note, it is worth mentioning that the Supreme Court struck some of the language of the CDA for constitutional vagueness. *Reno v. ACLU*, 521 U.S. 844, 859–60 (1997) (striking portions of the CDA referring to indecent communications with minors for unconstitutional vagueness); see 47 U.S.C. § 223(a), (d) (prohibiting messages to minors that include obscene content or communication). In 1997, in *Reno v. ACLU*, Justice Paul Stevens held for the U.S. Supreme Court that the construction of the filtering requirements of the CDA could impermissibly limit adult access to indecent material, and that Congress could not limit expression or access to material based only on what content is suitable for children. See 521 U.S. at 859–60 (holding that the CDA

*Oakmont v. Prodigy Services*, the New York Supreme Court held an internet service provider liable for defamatory material posted to a third party's website because the provider's filters did not identify and block the material.<sup>135</sup> Congress quickly responded by amending the CDA with § 230, aimed at protecting websites from liability if they cannot successfully block or filter indecent material, particularly sexual or violent content.<sup>136</sup> Congress feared that without the exception, websites would be incentivized not to screen content for fear of CDA liability if their screening was inadequate.<sup>137</sup>

Following the § 230 amendments, websites implementing screening measures cannot be held liable if they: (1) miss offensive content despite their best efforts; or (2) screen too much content.<sup>138</sup> Thus, in practice under § 230 of

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was unconstitutionally vague for impinging on adult access to internet expression); see also Citron & Wittes, *supra* note 114, at 457 (emphasizing *Reno*'s role in striking key portions of the CDA).

<sup>135</sup> See *Stratton Oakmont v. Prodigy Servs. Co.*, 1995 WL 323710, at \*5 (N.Y. Sup. Ct. May 24, 1995) (holding Prodigy Services liable for hosting defamatory content on its website); Citron & Wittes, *supra* note 114, at 457–58 (explaining the role of *Stratton Oakmont v. Prodigy Services* in influencing the introduction of § 230 to amend the CDA). The court decided *Stratton Oakmont* before the codification of the CDA, which was still pending legislation at the time. See *Stratton Oakmont*, 1995 WL 323710, at \*5 (stating that the ruling of the court may be preempted by the CDA if Congress passes the legislation).

<sup>136</sup> See 47 U.S.C. § 230; Communications Decency Act of 1996, §§ 501–509, 551–552, 561, 110 Stat. at 133–43; Citron & Wittes, *supra* note 114, at 456 (noting that Congress introduced § 230 in part to modify the CDA following *Stratton Oakmont* because Congress did not want internet service providers to face liability for taking beneficial steps to moderate content on their websites). Websites that miss content despite their best efforts can neither be civilly sued nor criminally prosecuted for their efforts. See Citron & Wittes, *supra* note 114, at 456 (distinguishing the facets of § 230 immunity). Essentially, the CDA's immunity incentivizes websites to proactively remove content by negating the risk that these companies will be sued if they imperfectly moderate. See *id.* (illustrating that Congress also introduced § 230 to garner the efforts of businesses in removing offensive conduct and remove liability that may cause websites not to act proactively).

<sup>137</sup> See 47 U.S.C. § 230; Communications Decency Act of 1996, §§ 501–509, 551–552, 561, 110 Stat. at 133–43; Citron & Wittes, *supra* note 114, at 457 (emphasizing how § 230 describes immunity in its text).

<sup>138</sup> 47 U.S.C. § 230 (c)(1)–(2); see Citron & Wittes, *supra* note 114, at 458 (emphasizing that the legislative intent motivating § 230 was consistent with the intent of the CDA to limit child access to pornography and other offensive or indecent content). Subsection (c) of § 230 outlines the immunities for websites that try to moderate content on their sites, even if they do so imperfectly. 47 U.S.C. § 230(c); see Citron & Wittes, *supra* note 114, at 458 (characterizing § 230's "Good Samaritan" provisions). Subsection (c)(1) of the exemption states that providers of online services are, legally speaking, neither publishers nor speakers regarding content posted to their sites by third parties. 47 U.S.C. § 230 (c)(1); Citron & Wittes, *supra* note 114, at 458. Subsection (c)(2) prohibits civil liability for websites who, in restricting or screening such content, violate other statutes or the Constitution. 47 U.S.C. § 230 (c)(2). Currently, § 230 is the subject of controversy because of an executive order issued by former President Donald Trump requesting that regulators interpret § 230 narrowly in order to target social media sites like Twitter that Trump alleged were engaged in censorship by removing conservative-leaning posts. See Casey Newton, *Everything You Need to Know About Section 230*, VERGE, <https://www.theverge.com/21273768/section-230-explained-internet-speech-law-definition-guide-free-moderation> [<https://perma.cc/DY8S-SC9E>] (Dec. 29, 2020) (describing Donald Trump's controversial action against § 230, which many accuse of being self-serving). President Joe Biden also spoke out against the legislation and proposed striking § 230 entirely to hold social media platforms

the CDA, social media websites like Twitter are not liable for offensive content posted by users or for erroneously removing user content if the website takes efforts to screen offensive content.<sup>139</sup>

## 2. The Rise of FOSTA-SESTA

Starting in the mid-2000s law enforcement,<sup>140</sup> anti-trafficking activists,<sup>141</sup> and academics began to criticize Backpage for its lax attitude toward sex trafficking and transactional sex work advertisements on the site.<sup>142</sup> In 2016, in *Doe v. Backpage.com*, the U.S. Court of Appeals for the First Circuit held that Backpage was immune to liability in civil suits by survivors of sex trafficking under § 230 of the CDA.<sup>143</sup> Despite its holding, the court acknowledged there was credible evidence that the website removed posts advertising anti-trafficking advocacy groups and disclaiming sex trafficking as a crime, and did not collect email addresses or data from photos to allow law enforcement to trace the users who posted them.<sup>144</sup> Public outcry following the decision led

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accountable for propagating disinformation and misinformation. *See id.* (discussing whether the Biden administration will seek to repeal § 230 of the CDA).

<sup>139</sup> *See* 47 U.S.C. § 230 (c)(1)–(2); Citron & Wittes, *supra* note 114, at 470 (noting that websites that take efforts to screen content cannot be held liable for hosting or removing user posts).

<sup>140</sup> *See* Matula, *supra* note 128, at 357 (remarking that the DOJ issued public letters urging Congress not to pass or to more narrowly tailor the legislation codified later as FOSTA-SESTA); Letter from Stephen E. Boyd, Assistant Att’y Gen., Dep’t of Just., to Rep. Bob Goodlatte, Chair, House Comm. on the Jud. 2 (Feb. 27, 2018) [hereinafter Letter from Stephen E. Boyd] (urging Congress to reconsider FOSTA-SESTA, noting its likely impact on both consensual sex workers and law enforcement targeting traffickers). Both the DOJ and Assistant Attorney General Steve Boyd expressed that the bill was too broad and that there was little state interest to justify the legislation. Letter from Stephen E. Boyd, *supra*. The letter noted the harm FOSTA-SESTA was likely to have on sex workers facilitating consensual transactional sex. *See id.* (warning against FOSTA-SESTA as further criminalizing members of the sex industry, which falls outside the bill’s stated purpose).

<sup>141</sup> *See* Matula, *supra* note 128, at 357 (expounding on the arguments made by sex workers and pro-sex worker advocates against FOSTA-SESTA, who claim the law makes their work more dangerous and destroys the online methods sex workers developed to protect themselves); Samantha Cole, *Trump Just Signed SESTA/FOSTA, a Law Sex Workers Say Will Literally Kill Them*, VICE (Apr. 11, 2018), <https://www.vice.com/en/article/qvxe9q/trump-signed-fosta-sesta-into-law-sex-work> [<https://perma.cc/MDA2-5WXE>] (describing the fear sex workers and activists had about the pending impact of FOSTA-SESTA).

<sup>142</sup> *See* Matula, *supra* note 128, at 359 (explaining arguments against FOSTA-SESTA, including complaints that the legislation harms sex workers and is not necessary for law enforcement agencies to combat sex trafficking).

<sup>143</sup> *See* 817 F.3d 12, 19 (1st Cir. 2016) (explaining that several anonymous survivors of sex trafficking, whose traffickers used Backpage, attempted to sue Backpage for allegedly facilitating their abuse).

<sup>144</sup> *See id.* (holding that Backpage had immunity from liability for its role in the trafficking of the plaintiff under § 230); Citron & Wittes, *supra* note 114, at 460–61 (emphasizing that the *Backpage.com* case sparked widespread public outrage and criticism of § 230 as overly broad).

federal legislators to move to amend § 230 immunity to allow such websites to face criminal and civil penalties.<sup>145</sup>

In 2018, Congress combined bills from the House and Senate and passed the Fight Online Sex Trafficking Act and Stop Enabling Sex Traffickers Act (FOSTA-SESTA).<sup>146</sup> The House of Representatives proposed FOSTA, and the Senate proposed SESTA.<sup>147</sup> Together, FOSTA-SESTA modifies § 230 of the CDA such that websites that either: (1) do not take down content that could knowingly facilitate sex trafficking; or (2) allow site users to promote transactional sex work face civil and criminal liability.<sup>148</sup> Further, the law creates a new cause of action for the use or operation of websites (and other means or facilities of interstate commerce) “with the intent to promote or facilitate prostitution.”<sup>149</sup>

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<sup>145</sup> See *Backpage.com*, 817 F.3d at 23 (holding that under § 230, the court could not hold Backpage liable for its role in the sex trafficking of a survivor); Citron & Wittes, *supra* note 114, at 456 (noting that *Backpage.com* incited public frustration with § 230 as too broad and as permitting websites to ignore the use of their platforms to facilitate crime). During Vice President Kamala Harris’s term as the Attorney General of California, she brought money laundering and trafficking charges against the founders of Backpage and its executives. See Elizabeth Nolan Brown, *Backpage Executives Escape Pimping Charges Kamala Harris Brought (Twice) Against Them*, REASON (Aug. 31, 2017), <https://reason.com/2017/08/31/california-drops-kamala-harris-pimping/> [https://perma.cc/U56A-VC8L] (describing how Kamala Harris pursued criminal charges against Backpage executives and founders before FOSTA-SESTA’s enactment and did not succeed because of § 230).

<sup>146</sup> See Allow States and Victims to Fight Online Sex Trafficking Act, Pub. L. No. 115-164, 132 Stat. 1253 (2018) (codified as amended in scattered sections of 18 U.S.C. and 47 U.S.C.); see also Matula, *supra* note 128, at 357 (flagging how FOSTA-SESTA affected the CDA, limiting the broad immunity under § 230 by allowing the government to pursue criminal charges and survivors to pursue civil suits against websites that allow users to facilitate sex work).

<sup>147</sup> Matula, *supra* note 128, at 356 (observing that FOSTA originated in the House and SESTA in the Senate, both in reaction to the public outcry against Backpage and the U.S. Court of Appeals for the First Circuit’s decision in *Backpage.com*); see Allow States and Victims to Fight Online Sex Trafficking Act § 4, 132 Stat. at 1254–55 (proposing to amend § 230 of the CDA to allow law enforcement to charge sites and give a cause of action to survivors of sex crimes to sue websites that harbored pornography featuring sex crimes).

<sup>148</sup> Allow States and Victims to Fight Online Sex Trafficking Act § 4, 132 Stat. at 1254–55; see 47 U.S.C. § 230; Matula, *supra* note 128, at 357 (recounting how FOSTA-SESTA affected the CDA, limiting the broad immunity under § 230 for websites that hosted content facilitating any illegal sex work). Despite FOSTA-SESTA’s purpose of targeting websites that aid sex trafficking, Assistant Attorney General Stephen Boyd and the DOJ asserted the law could create massive penalties for women soliciting or coordinating sex work using online resources, an inappropriate use of the law. See Allow States and Victims to Fight Online Sex Trafficking Act § 4, 132 Stat. at 1254–55 (creating liability for internet service providers that host pornography by limiting the original protections under CDA § 230); 47 U.S.C. § 230; Matula, *supra* note 128, at 357 (explaining public critique of FOSTA-SESTA by law enforcement).

<sup>149</sup> See Allow States and Victims to Fight Online Sex Trafficking Act § 4, 132 Stat. at 1254–55 (limiting protections and safe harbors under § 230 for internet service providers that host pornography); Matula, *supra* note 128, at 354, 357 (considering how FOSTA-SESTA created civil and criminal liability for websites like Backpage and Craigslist by removing the immunity provided under § 230 of the CDA if they hosted content that facilitated sex trafficking).

### 3. Reactions to FOSTA-SESTA

On one hand, champions of FOSTA-SESTA assert that the statute is a crucial tool for combatting sex trafficking online by creating accountability for websites that allow users to advertise sex trafficking.<sup>150</sup> On the other hand, critics of statute, including the U.S. Department of Justice under Deputy Assistant Attorney General Stephen Boyd, warn that the law is overexpansive and may be unconstitutional because of the vast amount of behavior it targets in the absence of a strong government interest to add another layer of penalties for sex trafficking.<sup>151</sup> In Boyd's open letter to Congress, he stated that FOSTA-SESTA could be used to target transactional sex between adults arranged by phone, which is already regulated under existing federal criminal law.<sup>152</sup> Boyd also argued that SESTA-FOSTA raises the level of intent prosecutors must prove at trial, which could thwart efforts of the legislature to target sex trafficking.<sup>153</sup> For example, several state attorneys general charged Backpage and its executives with facilitating sex trafficking<sup>154</sup> and a joint federal taskforce shuttered Backpage without using FOSTA-SESTA, indicating the reluctance of law enforcement to utilize the statute.<sup>155</sup>

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<sup>150</sup> See Allow States and Victims to Fight Online Sex Trafficking Act § 4, 132 Stat. at 1254–55 (removing § 230 liability and creating criminal penalties for websites that “facilitate prostitution”); Matula, *supra* note 128, at 358 (exposing the sharp difference in opinion from interests groups in reaction to FOSTA-SESTA and noting that Congress members championed the passage of the legislation as a victory for anti-sex trafficking efforts).

<sup>151</sup> See Allow States and Victims to Fight Online Sex Trafficking Act § 4, 132 Stat. at 1254–55; Matula, *supra* note 128, at 357 (communicating that despite the frenzy over FOSTA-SESTA in Congress, the DOJ did not want or need the law in its long-term Backpage prosecution); Letter from Stephen E. Boyd, *supra* note 140, at 2 (criticizing SESTA-FOSTA as potentially unconstitutionally overbroad). Assistant Attorney General Boyd argued that the law is vague about whether it targets sex traffickers or sex workers and what devices the law prohibits from use in promoting sex work: just computers, or other devices more broadly. Letter from Stephen E. Boyd, *supra* note 140, at 2. A court could permissibly interpret the law to apply to a sex worker, rather than a trafficker, using a phone, rather than a computer, which is far broader than Congress presumably intended. *Id.*

<sup>152</sup> See Letter from Stephen E. Boyd, *supra* note 140, at 2 (calling the SESTA-FOSTA unnecessary and unwisely overexpansive); see also Matula, *supra* note 128, at 357 (identifying the potential impact of FOSTA-SESTA on consensual, transactional sex as potentially unconstitutional). Boyd argued that because the language of the bill stating that CDA immunity will be stripped for “conduct [allegedly occurring] . . . before, on, or after such date of enactment,” violates the Ex Post Facto Clause of the Constitution. Letter from Stephen E. Boyd, *supra* note 140, at 2 (first citing *Cummings v. Missouri*, 71 U.S. (4 Wall.) 277, 325–26 (1867); then citing *Bezell v. Ohio*, 269 U.S. 167, 169–70 (1925); and then citing U.S. CONST. art. I, § 9, cl. 3).

<sup>153</sup> See Letter from Stephen E. Boyd, *supra* note 140, at 2 (observing that FOSTA-SESTA changed the intent requirement from “knowing[]” to reckless disregard).

<sup>154</sup> See Brown, *supra* note 19 (recording that the executives and founders of Backpage were arrested on criminal charges in 2018); Matula, *supra* note 128, at 358 (describing the office raid by federal agencies on Backpage).

<sup>155</sup> See Allow States and Victims to Fight Online Sex Trafficking Act § 4, 132 Stat. at 1254–55 (theoretically providing the authority to pursue charges against Backpage); Matula, *supra* note 128, at 358 (highlighting that although FOSTA-SESTA was available to prosecutors following the Backpage

Sex workers and activists also argue that the statute is physically and economically dangerous for sex workers because it fails to distinguish between transactional sex work and sex trafficking.<sup>156</sup> For example, FOSTA-SESTA's restrictions prohibit online databases created by transactional sex workers to track health information and dangerous clients, crucial protection resources against physical violence and illness.<sup>157</sup> By criminalizing online sex advertising, the statute removes sex workers' alternatives to soliciting clients in person, raising the risk of physical assault and creating a growing role for pimps and traffickers.<sup>158</sup> Further, removing the internet as a tool for the advertising and facilitating transactional sex work exposes transactional sex workers to a greater risk of poverty.<sup>159</sup>

#### 4. The Fight Back Act of 2020 Lays the Foundation for the Crusade Against Pornhub

The Fight Back Act is an echo of FOSTA-SESTA, but this time specifically targeting Tubist pornography sites like Pornhub.<sup>160</sup> The proposed legisla-

raid, federal law enforcement chose not to use it because of their belief that it is overbroad and potentially unconstitutional).

<sup>156</sup> See Matula, *supra* note 128, at 359 (explaining that many sex workers are outspoken critics of SESTA-FOSTA and the crusade against Backpage).

<sup>157</sup> See Allow States and Victims to Fight Online Sex Trafficking Act § 4, 132 Stat. at 1254–55 (barring websites and other “facility or means of interstate or foreign commerce” to “facilitate” sex work); Matula, *supra* note 128, at 357, 359 (describing a Nevada sex worker who criticized SESTA-FOSTA both for robbing her of an economic tool and for criminalizing many of the methods sex workers use to protect each other from physical harm). Since the passage of SESTA-FOSTA, Senator Elizabeth Warren of Massachusetts sponsored the SESTA/FOSTA Examination of the Secondary Effects for Sex Workers Study Act to direct the Department of Health and Human Services to study the impact of SESTA-FOSTA on sex workers. SESTA/FOSTA Examination of the Secondary Effects for Sex Workers Study Act of 2020, S. 3165, 116th Cong. (2020). The legislation died in the Senate in January 2021. See S. 3165 (116th): SESTA/FOSTA Examination of the Secondary Effects for Sex Workers Study Act, GOVTRACK, <https://www.govtrack.us/congress/bills/116/s3165> [<https://perma.cc/ZR6F-8XQ5>] (tracking the course of the bill through the Senate until its death).

<sup>158</sup> See Allow States and Victims to Fight Online Sex Trafficking Act § 4, 132 Stat. at 1254–55; Matula, *supra* note 128, at 358 (quoting a community organizer who said that after the passage of SESTA-FOSTA pimps gained power over the sex workers in her community).

<sup>159</sup> See Matula, *supra* note 128, at 359 (noting that Backpage allowed sex workers to find clients, schedule services, and advertise their work effectively, and without these mechanisms sex workers cannot engage in the same amount of safe business).

<sup>160</sup> See Survivors of Human Trafficking Fight Back Act of 2020, S. 4983, 116th Cong. § 2 (2020); Allow States and Victims to Fight Online Sex Trafficking Act § 4, 132 Stat. at 1254–55; Hawley Press Release, *supra* note 16 (explicitly stating that Pornhub was a target of the legislation); see also Brown, *supra* note 19 (describing the law enforcement and Congressional attack on Backpage); Grant, *supra* note 7 (highlighting that Kristof's journalism previously led to legislation against and the shutdown of Backpage); Lynch & Lambert, *supra* note 19 (recounting Congress's passage of FOSTA-SESTA and the government seizure of Backpage.com). Nick Kristof also wrote an op-ed criticizing Backpage.com, which critics credit with the subsequent legislation against Backpage and the prosecution of its executives and founders. Grant, *supra* note 7; see Kristof, *supra* note 10 (alleging Backpage played a major role in sex trafficking in the United States).

tion targets user-posted photos and videos that depict child pornography, sexual assault victims, sex trafficking victims, and nonconsensual pornography.<sup>161</sup> The bill requires websites to report such content and creates criminal and civil causes of action for sites housing or posting it, threatening websites pornography performers use to make a living—much like FOSTA-SESTA destroyed online resources for transactional sex workers.<sup>162</sup>

## II. FEMINIST LENSES AND APPROACHES TO SEXUAL VIOLENCE, TRANSACTIONAL SEX, AND PORNOGRAPHY

The feminist controversy over sex work is nearly as ancient as the world's oldest profession itself.<sup>163</sup> Although pornography is a relatively new development in the long history of the sex industry, feminist views on transactional sex influence societal views on pornography, and thus the law surrounding it.<sup>164</sup> Section A of this Part discusses carceral feminist approaches that utilize the criminal justice system as the solution to sexual violence and a means to regulate transactional sex and pornography.<sup>165</sup> Section B examines sex-positive feminism, which finds liberation in the free sexual expression of women, including through transactional sex work and pornography.<sup>166</sup>

### A. Carceral Feminism and the Inherent Exploitation of Transactional Sex Work and Pornography

Carceral feminism advocates for the use of the criminal legal system to address sexual violence through the redefinition of sex crimes in the law, and enhanced prison sentences for sexual offenders.<sup>167</sup> Carceral feminists often

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<sup>161</sup> See Survivors of Human Trafficking Fight Back Act of 2020, S. 4983 § 2 (criminalizing the “facilitation” of trafficking through a computer); Porterfield, *supra* note 12 (describing the potential impact of the Survivors of Human Trafficking Fight Back Act of 2020 on Pornhub, which could be shut down or fined so significantly as to destroy the business); Hawley Press Release, *supra* note 16 (explaining how Senator Josh Hawley intends the Survivors of Human Trafficking Fight Back Act of 2020 to affect websites like Pornhub, either by deterring poor moderation of pornography featuring sex crimes or by using criminal or civil punishment as retribution).

<sup>162</sup> See Survivors of Human Trafficking Fight Back Act of 2020, S. 4983 § 2 (eliminating § 230 immunity so that survivors of violence can sue pornography websites, and creating criminal liability for any website that does not report and remove offending content or posts offending content); Porterfield, *supra* note 12 (asserting that the Survivors of Human Trafficking Fight Back Act of 2020 may shut down Pornhub, effectively destroying the business infrastructure that employs the majority of pornography performers); Hawley Press Release, *supra* note 16 (reiterating that the Survivors of Human Trafficking Fight Back Act of 2020 targets online pornography websites, specifically Pornhub).

<sup>163</sup> See *supra* notes 78–103 and accompanying text.

<sup>164</sup> See *infra* notes 165–234 and accompanying text.

<sup>165</sup> See *infra* notes 167–200 and accompanying text.

<sup>166</sup> See *infra* notes 201–234 and accompanying text.

<sup>167</sup> See Victoria Law, *Against Carceral Feminism*, JACOBIN (Oct. 17, 2014), <https://www.jacobinmag.com/2014/10/against-carceral-feminism/> [<https://perma.cc/Q6NU-JF8U>] (defining carceral femi-

view all forms of sex work, including transactional sex and pornography, as inherently violent.<sup>168</sup> The philosophy emerged from the context of second-wave feminist thought, which was particularly hostile towards sex workers.<sup>169</sup> This feminist lens is often conflated with feminist legal theory as a whole, as during this period the first legal feminist scholars attained notoriety.<sup>170</sup>

Subsection 1 outlines the carceral feminist approach to sexual violence, including the proposed legal solution of the affirmative consent model in rape law.<sup>171</sup> Subsection 2 discusses the carceral feminist understanding of transactional sex as a form of sexual violence, and the Nordic or neo-abolitionist model of decriminalized transactional sex.<sup>172</sup> Finally, Subsection 3 explores the carceral feminist understanding of pornography as a form of digital “prostitution” and as creating demand for physical “prostitution.”<sup>173</sup>

## 1. Sexual Violence and Affirmative Consent

Carceral feminists view rape not only as violence, but as indicative of social structures shaped by gender.<sup>174</sup> For carceral scholars, such as the prominent legal feminist Catherine MacKinnon,<sup>175</sup> it is an open question whether

nism in a broader argument against the use of carceral policies in the sexual violence space). Some scholars argue against carceral feminism, claiming that it amplifies the inequities of systemic racism in the criminal justice system by giving law enforcement increased contact with communities that already experience disproportionate police violence. *See id.* (arguing that carceral solutions to sexual violence augment the criminal justice system’s harm to Black communities because law enforcement disproportionately enforces those solutions against Black men, including innocent people). Feminist theorists use the term “carceral feminism” to critique other feminists, but most activists and scholars with “carceral” viewpoints would not describe themselves as such. *See, e.g., id.* (heavily criticizing some feminists’ reliance on the criminal justice system to police sexism, and terming these individuals “carceral feminists”).

<sup>168</sup> *See* CATHERINE A. MACKINNON, *Linda’s Life and Andrea’s Work*, in FEMINISM UNMODIFIED, *supra* note 56, at 127, 128–133 (discussing the inherent violence of pornography). *But see* Janet Halley, *The Move to Affirmative Consent*, 42 SIGNS 257, 258 (2016) (criticizing feminists allied with the American political right in adopting deeply carceral policies).

<sup>169</sup> *See* Aikau et al., *supra* note 44, at 14 (noting that for the first time in history women made up nearly half of all medical, legal, and graduate program enrollment in the country, and the proportion of students of color in the same programs rose to 18%).

<sup>170</sup> *See* Martha Minow, *Foreword* to FEMINIST LEGAL THEORY: A PRIMER, at ix, ix (Nancy Levit & Robert R.M. Verchick eds., 2d ed. 2016) (discussing the history and tradition of feminist legal theory in the early 1970s and 1980s).

<sup>171</sup> *See infra* notes 174–182 and accompanying text.

<sup>172</sup> *See infra* notes 183–190 and accompanying text.

<sup>173</sup> *See infra* notes 191–200 and accompanying text.

<sup>174</sup> *See* Catharine A. MacKinnon, *Feminism, Marxism, Method, and the State: Toward Feminist Jurisprudence*, 8 SIGNS 635, 635–36 (1983) (commenting that the male viewpoint forces itself upon society as a greater whole, such that it is hegemonic).

<sup>175</sup> *See id.* at 636. The Author of this Note is deeply critical of MacKinnon’s scholarship, particularly because of its lack of intersectionality or consideration of gender-diverse experiences both in MacKinnon’s view of gender as a whole and of sex work. *See* Halley, *supra* note 168, at 258 (criticizing carceral scholars, like MacKinnon, in the context of affirmative consent laws).

women can truly consent to sexual contact because of the violence and coercion inherent in our deeply misogynist society.<sup>176</sup> Feminists like MacKinnon also critique the socio-legal understanding of rape as deeply painted by the male experience.<sup>177</sup> Currently, most legislatures define “rape” as the physical act of penetration, and carceral feminists argue that society characterizes rape as a form of sex rather than a form of violence.<sup>178</sup>

Carceral feminists aim to reform American criminal laws regarding rape to reflect the female sexual experience as they understand it.<sup>179</sup> The “affirmative consent” model of rape law embodies this philosophy by substituting the historic force element of rape with a requirement that the defendant prove explicit consent by the accuser.<sup>180</sup> Instead of requiring alleged victims to prove force, the affirmative model shifts the burden to perpetrators to show that the victim actively and enthusiastically agreed to sex.<sup>181</sup> Carceral feminists believe that the affirmative consent model will make it easier to convict rapists and bring justice to victims.<sup>182</sup>

## 2. Transactional Sex as Rape and Neo-abolitionist Decriminalization

Carceral feminists tightly tie their views on transactional sex to their views on sexual violence.<sup>183</sup> Because carceral feminists argue that rape is a

<sup>176</sup> See Halley, *supra* note 168, at 259, 264 (noting that some feminists believe the omnipotence of male power in our society coerces women to some extent into sex whenever sex takes place). Interestingly, Halley asserts that although those coercive elements may be present in sexual situations, that influence is insufficient to constitute criminal punishment under our current understanding of civil and procedural rights. See *id.* at 267, 270 (explaining how the social pressure leading to a drunk sexual encounter at a college party may make it so a woman is practically unable to consent in our social understanding of the concept, but this is likely not enough to demonstrate sexual assault in the criminal law).

<sup>177</sup> See MacKinnon, *supra* note 174, at 636 n.4 (arguing the entirety of human society is constructed around the needs and preferences of men).

<sup>178</sup> See MACKINNON, *supra* note 168, at 87 (arguing that feminist legal theorists, in essence, argue for the law to reflect the female experience of gender-based violence rather than the classically male perspective that the legislature currently imagines in rape law).

<sup>179</sup> See *id.* (arguing that rape law looks at rape as sex rather than as an act of violence or assertion of power).

<sup>180</sup> See Halley, *supra* note 168, at 261, 265 (defining affirmative consent and presenting modern examples in California’s rape law and Harvard’s student code). Affirmative consent remains a minority approach across states, but many university student codes have adopted the affirmative consent model. See *id.* (noting the prevalence of the affirmative consent model at universities).

<sup>181</sup> See *id.* at 264 (explaining that it is extremely difficult for defendants to prove that their accuser enthusiastically consented). Some scholars point out that in practice it is nearly impossible to differentiate genuine consent from feigned or coerced consent. See *id.* (discussing the practical difficulties of applying affirmative consent).

<sup>182</sup> *Id.* at 259; see Law, *supra* note 167 (admonishing the carceral feminist goal of utilizing the criminal justice system effectively for women by making it easier to convict accused rapists, even if at the cost of punishing some innocent defendants).

<sup>183</sup> See MacKinnon, *supra* note 53, at 273 (linking the violence of rape to the experience of sex work).

form of societal violence against women, many carceral feminists conclude that transactional sex is a form of sexual violence to which women cannot meaningfully consent.<sup>184</sup> Carceral feminists assert that poverty, substance abuse, and other marginalizing experiences compel people to sell sex because they are not free to choose other types of work.<sup>185</sup> Thus, transactional sex is repeated rape and a form of sexual slavery indistinguishable from other forms of sexual violence.<sup>186</sup>

Carceral feminists look at transactional sex workers as victims of violence and typically mobilize behind the “neo-abolitionist” model of sex work decriminalization.<sup>187</sup> The neo-abolitionist or “Nordic” model, pioneered in the Nordic countries, criminalizes the “Johns” who purchase sex rather than the people who sell the sex work.<sup>188</sup> Essentially, Nordic criminal law ignores transactional sex workers and the act of selling or advertising sex is not illegal.<sup>189</sup> By punishing the people who buy sex, carceral feminists and neo-abolitionists believe they can release transactional sex workers from the societal conditions that prevent them from pursuing other forms of work without incarcerating vulnerable sex workers.<sup>190</sup>

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<sup>184</sup> See *id.* at 274 (referring to sex work as repeated, paid rape); MacKinnon, *supra* note 174, at 636 (referring to rape as a vestige of the overwhelming patriarchal structure in modern society).

<sup>185</sup> See MacKinnon, *supra* note 53, at 274 (stating that although sex workers are often depicted as agents of their own lives, sex workers are actually victims of an age-old cycle of exploitation created by misogyny).

<sup>186</sup> See Catherine A. MacKinnon, *Prostitution and Civil Rights*, 1 MICH. J. GENDER & L. 13, 23 (1993) (referring to “white slavery,” a term coined in the early twentieth century to describe position and sex trafficking). It is worth noting that beyond the racist undertones of the term “white slavery,” it is also inaccurate to the extent that women of color are most frequently the victims of human trafficking and sexual violence. See *Rape & Sexual Assault in the U.S.*, NAT’L ORG. FOR WOMEN N.Y. CITY, <https://nownyc.org/issues/get-the-facts-take-rape-seriously/> [<https://perma.cc/X6R7-WT25>] (presenting statistics indicating that Black women experience sexual assault at the highest rate of any race).

<sup>187</sup> See *What Is the Nordic Model?*, NORDIC MODEL NOW!, <https://nordicmodelnow.org/what-is-the-nordic-model/> [<https://perma.cc/3NB2-PLPJ>] (describing the Nordic Model of sex work abolition); see also MacKinnon, *supra* note 53, at 282–83 (noting that despite the oppressive presence of sex buyers and pimps, the female sex worker is often the target of law enforcement action).

<sup>188</sup> See MacKinnon, *supra* note 53, at 276 (emphasizing that law enforcement targets sex workers more often than pimps or clients when enforcing laws against transactional sex).

<sup>189</sup> See *What Is the Nordic Model?*, *supra* note 187 (explaining that the Nordic model aims to correct the imbalance in the criminalization of sex work by lowering the demand for sex work without actively harming the women participating in sex work).

<sup>190</sup> See *id.* (contending that the neo-abolitionist model targets what supporters believe is the key criminal actor in transactional sex—the purchaser); MacKinnon, *supra* note 53, at 274 (arguing that despite how some sex workers view themselves and their livelihoods, they are innately subjected to exploitation and violence).

### 3. Pornography as “Prostitution” and Pornography Abolitionism

Carceral feminists look at pornography as a form of legalized “paid rape” and argue that it should be illegal.<sup>191</sup> Similar to transactional sex work, carceral feminists do not believe that performers freely choose to work in the pornography industry, but are coerced by a lack of other options, trafficking, or other oppressive conditions.<sup>192</sup> In that light, the money used to pay performers to engage in pornography acts as a form of coercion motivating the sexual contact.<sup>193</sup> Carceral feminist scholars refer to the differentiation between pornography and transactional sex work as a meaningless distinction separating the mind from the body.<sup>194</sup> According to carceral feminists, transactional sex is an act of physical violence, and viewing and creating pornography simulates abuse.<sup>195</sup>

Further, carceral feminists argue that pornography creates demand for transactional sex, and with it sexual violence and abuse.<sup>196</sup> MacKinnon calls pornography “salt water,” in that it looks like something that would be thirst-quenching, but instead makes the desire stronger.<sup>197</sup> Carceral feminists posit that pornography normalizes violence against and subjugation of women, stating that porn drives men to mirror such behavior with partners and to seek out transactional sex workers to fill these needs.<sup>198</sup> Further, carceral feminists believe that that porn indoctrinates women to accept objectification and degrading, porn-style sex as normal.<sup>199</sup> For this reason, carceral feminists believe all

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<sup>191</sup> See MACKINNON, *supra* note 168, at 130 (calling for the abolition of pornography as a form of violence against women).

<sup>192</sup> See *id.* (terming the role of money in transactional sex “coercive,” such that it destroys free consent to the sex act).

<sup>193</sup> See MacKinnon, *supra* note 186, at 26 (calling sex work a systematic deprivation of civil rights otherwise guaranteed by national and international law).

<sup>194</sup> See Catharine A. MacKinnon, *Pornography as Trafficking*, 26 MICH. J. INT’L LAW 993, 1000 (2005) (describing the difference between the people who consume pornography and prostitution as those who believe they can commit the abuse without repercussions and those who would purchase sex but for the fear of legal liability).

<sup>195</sup> See *id.* (calling the male fantasy inspiring violent pornography dangerous and criminal).

<sup>196</sup> See *id.* at 1001 (calling pornography supply-driven, such that without the existence of pornography there would not be a demand for it). Carceral feminist scholars assert that pornography is something men desire only after exposure to it, and that with time pornography desensitizes viewers to the abuse inherent in the work. See *id.* (arguing that pornography actually leads men to commit sexual violence).

<sup>197</sup> *Id.*

<sup>198</sup> See *id.* at 999 (explaining that after watching the abuse and degradation of women in pornography, men find the degradation attractive, and believe it to be a normal part of intimacy).

<sup>199</sup> See *id.* at 1008 (asserting that porn usually portrays women as sex objects, rather than people, and violent pornography normalizes the belief that violence should be part of sex).

forms of pornography should be criminalized as sexual violence and censored from public consumption.<sup>200</sup>

### *B. Sex Positive Feminism and the Importance of Choice*

Simply put, “sex-positive” feminism, or pro-sex feminism, argues that all sex between consenting adults is good.<sup>201</sup> This feminist perspective gained traction in the third and fourth waves, during which feminist thought became more intersectional and open to different sexual identities and interests.<sup>202</sup> Sex positivity differs from carceral, second-wave feminism in that it envisions women both as marginalized *and* as having control over their sexual experiences.<sup>203</sup> Where carceral feminism believes to some extent that consent can never be meaningful, sex positivity posits that free sexual choice empowers women to direct their sex lives.<sup>204</sup> Thus, sex-positive feminism is often unequivocally pro-sex worker.<sup>205</sup>

This Section analyzes sex-positive arguments against carceral feminist approaches.<sup>206</sup> Subsection 1 discusses the fourth-wave perception of sexual violence and provides the sex-positive arguments against the affirmative consent model of rape law.<sup>207</sup> Subsection 2 addresses the rejection of the Nordic model for transactional sex work in favor of complete legalization.<sup>208</sup> Finally, Subsection 3 discusses the empowerment of pornography as empowering for performers and rejection of abolitionism.<sup>209</sup>

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<sup>200</sup> See *id.* at 1012 (attesting that pornography, like any other form of sexual violence, should be addressed with criminal law and censorship).

<sup>201</sup> See *Sex Positivity*, COLO. UNIV. WOMEN & GENDER ADVOC. CTR., <https://wgac.colostate.edu/education/bodyimage/sex-positivity/> [<https://web.archive.org/web/20210119155511/https://wgac.colostate.edu/education/bodyimage/sex-positivity/>] (defining sex positivity as a broad ideology that encompasses both unconventional sex and those who simply believe that people should not be ostracized for having consensual, adult sex outside of the norm).

<sup>202</sup> See Elisa Glick, *Sex Positive: Feminism, Queer Theory, and the Politics of Transgression*, FEMINIST REV., Apr. 2000, at 19, 22 (noting the rise of sex-positive feminism within queer feminist groups practicing sadomasochistic sex, in which classically violent behavior occurs as a consensual sexual practice).

<sup>203</sup> See *id.* (imparting that sex-positive feminists often see free sexual expression as the most immediate liberation of women from socially impressed gender roles).

<sup>204</sup> See *generally id.* (highlighting that the incorporation of sex workers into the pro-sex feminist discourse was a major revolution of the third wave).

<sup>205</sup> See *id.* (discussing the role of sex work and sex workers in sex-positive feminist discourse).

<sup>206</sup> See *infra* notes 210–234 and accompanying text.

<sup>207</sup> See *infra* notes 210–215 and accompanying text.

<sup>208</sup> See *infra* notes 216–224 and accompanying text.

<sup>209</sup> See *infra* notes 225–234 and accompanying text.

## 1. Sexual Violence and the Rejection of Affirmative Consent

Like carceral feminists, sex-positive feminists understand sexual violence as a form of both interpersonal and societal violence, created by the structural inequality of patriarchy.<sup>210</sup> Where pro-sex feminists and carceral feminists disagree is that pro-sex feminists believe women can reject paternalistic and sexist views about female sexuality by exercising control over when, how, and with whom to have sex.<sup>211</sup> Carceral feminists look to the criminal justice system as creating norms for permissible behavior; in contrast, sex-positive feminists encourage women to contradict social norms by embracing female sexuality to affect change.<sup>212</sup>

Because sex-positive feminists focus on society and culture—rather than the criminal legal system—to change stigmas, norms, and violent behaviors, they reject the expansive role of criminal law and affirmative consent constructions in rape statutes.<sup>213</sup> On a theoretical level, they argue that affirmative consent paints women in a passive, disempowered state, limiting their ability to take charge of their sexuality and ignores sexual violence outside of the gender binary.<sup>214</sup> From a civil rights perspective, sex-positive and fourth-wave feminists assert that affirmative consent erodes core procedural rights for defendants necessary for the function of our criminal justice system.<sup>215</sup>

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<sup>210</sup> See generally Halley, *supra* note 168 (acknowledging that, in theory, affirmative consent is logical, because the organization and power of society often compel women to engage in sex acts); Glick, *supra* note 202, at 21 (accentuating the role that male dominance often plays in sexual violence, namely that the power imbalance between men and women in a patriarchal society allows men to coerce women into sex).

<sup>211</sup> See Glick, *supra* note 202, at 21 (affirming that sex-positive feminists believe sexual liberation combats the sexist concept that women cannot or should not be overtly sexual).

<sup>212</sup> See Halley, *supra* note 168, at 259 (criticizing carceral feminism's reliance on the criminal justice system as the solution to sexual and gender-based violence and arguing that social or cultural changes could change the core causes of this violence).

<sup>213</sup> See *id.* at 258 (arguing against the affirmative consent model as excessively carceral and eroding civil rights in the criminal legal process); Law, *supra* note 167 (arguing that carceral responses harm marginalized women, and providing the example of a Black domestic violence victim who was beaten by the police when she called them to report her abuser).

<sup>214</sup> See Halley, *supra* note 168, at 259 (noting that a core issue with the carceral feminist approach is that it imagines sexual violence between heterosexual partners, ignoring sexual violence that occurs between individuals of the same gender or who are gender-diverse by focusing on male dominance over female partners).

<sup>215</sup> See *id.* (asserting that procedural and civil rights must be protected above efforts to make it more likely that a prosecutor can convict a defendant of rape). Halley asserts that affirmative consent is a slippery slope for the due process rights of defendants because it creates a framework where prosecutors do not have to prove that the defendant did anything besides have sex or demonstrate that the defendant knew the person they had sex with did not want to have sex. *Id.* The Author of this Note does not advocate for Halley's perspective on affirmative consent, but rather believes it is a helpful example of how sex-positive feminists view carceral measures against sexual violence. See *id.*

## 2. Transactional Sex and Legalization

Because sex-positive feminists believe that women should have the power to direct their sex lives how they see fit, they also support transactional sex workers.<sup>216</sup> They assert that individuals who exchange sexual services for money do so as a legitimate source of work, and for a variety of reasons including their own sexual empowerment.<sup>217</sup>

As a result, sex-positive feminists reject any form of criminalization of transactional sex work, including the neo-abolitionist model that only criminalizes buyers, third-party managers, and pimps.<sup>218</sup> Sex-positive feminists contend that any form of criminalization has a tangible, harmful effect on transactional sex workers.<sup>219</sup> At the most basic level, criminalizing any part of transactional sex labels transactional sex workers as criminals or morally corrupt, making it more difficult from them to access help from law enforcement.<sup>220</sup> By criminalizing the purchase of sex and lowering the demand for transactional sex, transactional sex workers are less able to negotiate the terms of their services with buyers, or work in groups with other transactional sex workers to protect themselves from physical violence.<sup>221</sup> Under the Nordic model, transactional sex workers remain outcasts, which impedes their access to social services, housing, and healthcare.<sup>222</sup>

<sup>216</sup> See Glick, *supra* note 202, at 22 (implying that sex-positive feminists see individual sexual liberation as a revolutionary feminist act, including through sex work).

<sup>217</sup> See *Understanding Sex Work in an Open Society*, *supra* note 78 (explaining that people engage in sex work for a variety of legitimate and logical reasons, like those that underlie any other profession—such as flexible hours and economic need).

<sup>218</sup> See *id.* (asserting that the Nordic model of abolition maintains the stigma against sex workers and prevents sex workers from accessing services without having a demonstrable impact on the amount of sex work in the states who implemented it). Two years after France implemented the Nordic model of abolition, researchers found that sex workers faced greater rates of physical violence and worse living conditions. See *id.*

<sup>219</sup> See *id.* (contending that criminalizing sex work in any form forces sex workers underground and into riskier methods of work, such as not using condoms with clients, by weakening bargaining power).

<sup>220</sup> See *id.* (stressing that the criminalization of any component of sex work forces sex workers to do their work more dangerously). See generally Danielle Blunt & Ariel Wolf, *Erased: The Impact of FOSTA-SESTA and the Removal of Backpage on Sex Workers*, ANTI-TRAFFICKING REV., Apr. 2020, at 117 (explaining the harms of criminal intervention in online sex work advertising, and the impact of stigma on sex workers seeking social services or law enforcement intervention).

<sup>221</sup> See *Why Sex Work Should Be Decriminalized*, HUM. RTS. WATCH (Aug. 7, 2019), <https://www.hrw.org/news/2019/08/07/why-sex-work-should-be-decriminalized> [<https://perma.cc/UDM8-NR3L>] (revealing that by labeling sex work as criminal activity, the criminal justice system exposes sex workers to abuse by law enforcement, who take advantage of the “criminal” nature of the profession to keep sex workers quiet); see also *Understanding Sex Work in an Open Society*, *supra* note 78 (detailing the harms to sex workers from the illegality of the profession, because as “criminals” they cannot access many social services and report crimes perpetrated against them—like rape—to the police).

<sup>222</sup> See *Understanding Sex Work in an Open Society*, *supra* note 78 (claiming that the Nordic model of abolition preserves the stigma against sex workers and prevents sex workers from accessing

Pro-sex feminists advocate for the legalization of transactional sex, and the replacement of criminal penalties with regulation under labor and employment law.<sup>223</sup> By treating transactional sex as a legitimate form of work, society can take the necessary steps towards guaranteeing transactional sex workers other basic human rights.<sup>224</sup>

### 3. Pornography as Legitimate Sex Work

Many sex-positive feminist arguments in favor of legalizing transactional sex also support keeping pornography legal.<sup>225</sup> Through this lens, creating pornography is a legitimate form of labor that should be treated and regulated like other forms of work.<sup>226</sup> Sex-positive feminism holds that pornography performers are autonomous individuals with the freedom to choose this kind of work for any reason.<sup>227</sup>

In fact, sex-positive feminists embrace pornography as a form of sexual liberation not only for the people who perform in it, but also for the people who watch it.<sup>228</sup> In recent years, “feminist pornography” became a growing genre, in which pornographic content is shot in a way that appeals to women.<sup>229</sup> Although sex-positive feminists sometimes criticize mainstream porno-

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services because those agencies view them as criminals, without a demonstrable impact on the amount of sex work in the states which implement it); *Why Sex Work Should Be Decriminalized*, *supra* note 221 (clarifying that stigma exposes sex workers to violence from those who believe that law enforcement is unwilling to protect sex workers, and bars access to social services because the law regards them as criminals).

<sup>223</sup> See *Understanding Sex Work in an Open Society*, *supra* note 78 (advocating, as a nongovernmental organization supporting sex workers, for the decriminalization of sex work and its regulation under labor law like all other legal industries of work).

<sup>224</sup> See *id.* (calling the decriminalization of sex work critical to build human rights for sex workers). *Contra* MacKinnon, *supra* note 186, at 13 (calling sex work a systematic deprivation of civil rights otherwise guaranteed by national and international law). The term “human rights,” as used in this Note, refers both to the basic right of human dignity, civil and political rights to be free of oppressive government intervention, and economic and social rights to social services and labor.

<sup>225</sup> See *Understanding Sex Work in an Open Society*, *supra* note 78 (advocating for the decriminalization of all sex work, including currently legal industries like pornography).

<sup>226</sup> See generally Glick, *supra* note 202 (noting that sex-positive feminists support the right of sex workers to engage in pornography and transactional sex work, which came about particularly as queer feminists were incorporated into broader third-wave feminism).

<sup>227</sup> See *Understanding Sex Work in an Open Society*, *supra* note 78 (explaining that sex workers chose their professions for legitimate reasons, including their own sexual empowerment).

<sup>228</sup> See Roisin Agnew, *Feminist Porn: Putting Female Desire in the Picture?*, IRISH TIMES, <https://www.irishtimes.com/life-and-style/people/feminist-porn-putting-female-desire-in-the-picture-1.2250349> [<https://perma.cc/64PQ-D7KE>] (June 18, 2015) (describing the rise in feminist pornography, which is often shot and produced by women in contrast to the male-dominated mainstream pornography industry, where women often only find roles as performers).

<sup>229</sup> See *id.* (noting that major brands like *Cosmopolitan* and *New York Magazine* promoted and reviewed feminist pornography sites as a growing trend, describing the kind of pornography each site makes and recommending them to women based on the kind of pornography they find most appealing).

raphy as catering to male enjoyment, they support the rights of female performers to engage in this work.<sup>230</sup>

Sex-positive feminists, however, critique the pornography industry, especially the monopoly of Pornhub, for inadequate labor and employment practices.<sup>231</sup> For this reason, the fourth-wave feminist community supports OnlyFans, a website where individual performers charge for subscriptions to their content and can receive tips from users.<sup>232</sup> In contrast to Pornhub, performers on OnlyFans have sole control over their business, deciding everything from what they post to what they charge.<sup>233</sup>

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<sup>230</sup> See *id.* (distinguishing that although anti-porn feminists think all iterations of pornography objectify and demean women, sex-positive feminists use feminist porn to carve out a space for women in a male-dominated industry).

<sup>231</sup> See, e.g., Bernstein, *supra* note 80 (criticizing Pornhub for its monopoly on the pornography industry, which forces performers to work on projects they would not have otherwise because of the scarcity of other work, and noting that OnlyFans is a beneficial development for performers who desire more autonomy over their labor).

<sup>232</sup> See *id.* (describing OnlyFans as revolutionizing the pornography industry because it shifts power, and revenue potential, to individual performers). For example, Pornhub uses its dominance over the pornography industry to blacklist performers who speak critically about the company. See Auerbach, *supra* note 121 (detailing Pornhub's authoritarian-style of leadership in the pornography industry, which forces performers to work substandard, undesirable conditions for hours, wages, and protective health measures). Pornhub is such a notorious source of pirated copyrighted pornography that it is practically impossible to stay in business as an independent pornography production company. See *id.* (commenting that most performers associated with MindGeek and Pornhub refuse to publicly comment on piracy allegations due to fear of blacklisting). As a result of Pornhub's strangulation of the pornography industry, many performers must engage in transactional sex work to meet their economic needs because Pornhub pays performers significantly less than traditional porn production. See *id.* (quoting a performer who criticized Pornhub, noting that most porn performers working for MindGeek also work transactional sex work, which used to be a rarity before Pornhub's rise to prominence).

<sup>233</sup> See *id.* (explaining that performers on OnlyFans set their own subscription and tip rates and can choose the kind of content they post, from more risqué content to simple workout photos). In August 2021, OnlyFans announced they would ban "adult," or pornographic, content from their website. Todd Spangler, *OnlyFans Drops Planned Porn Ban, Will Continue to Allow Sexually Explicit Content*, VARIETY (Aug. 25, 2021), <https://variety.com/2021/digital/news/onlyfans-drops-porn-ban-sexually-explicit-policy-1235048705/> [<https://perma.cc/43VT-PN8N>]. The website explained they initiated the ban to respect the desires of "banking partners" and payout providers, likely credit card companies. *Id.* This is potentially a reaction to the more aggressive stance of credit card companies against online pornography sites, notably Visa and Mastercard's refusal to work with Pornhub. See *supra* note 11 and accompanying text (detailing that Mastercard and Visa investigated and then cut ties with Pornhub after Kristof's article criticizing the prevalence of criminal sexual content on the site). Days later, however, OnlyFans retracted the policy, announcing its intent to continue to allow pornography on its site. See Spangler, *supra* (announcing that OnlyFans suspended its planned ban on pornography, which would have removed adult content starting in October 2021). OnlyFans attributed this changed position to the outcry from content creators on the site, primarily sex workers, who rely on the website for financial and physical security. *Id.*

These vastly different viewpoints on pornography and sexuality help explain the ongoing conflict regarding legislation to regulate sex work and sex crime online.<sup>234</sup>

### III. EVALUATING THE CRIMINAL LEGAL APPROACH TO PORNHUB THROUGH THE CARCERAL AND FOURTH-WAVE, SEX-POSITIVE LENSES

Because solutions to sexual violence are linked to implicit understandings of gender, sexuality, and power, it is important to trace the criminal and civil approach to Pornhub to theoretical roots.<sup>235</sup> The Fight Back Act and advocates like Mickelwait and Kristof argue that pornography websites where users post criminally violent content should face civil and criminal liability for failing to take down such illegal content.<sup>236</sup> This Note endorses the sex-positive perspective that formal legal punishment is not only ineffective at reducing sexual violence, but also harms transactional sex workers and pornography performers.<sup>237</sup> Any successful approach to combating sexual violence in the sex industry must include and acknowledge transactional sex workers and pornography performers as rights-bearing parties to the issue.<sup>238</sup>

Section A of this Part asserts that Kristof, Traffickinghub, and the failed Fight Back Act take on a classically carceral approach to sexual violence, and deeply mirror the poorly constructed efforts in FOSTA-SESTA.<sup>239</sup> Section B argues that using the legal system to address this issue is disastrously harmful to transactional sex workers and performers and ineffective at combatting sex trafficking and abuse in the sex industry.<sup>240</sup>

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<sup>234</sup> Compare Halley, *supra* 168, at 258 (advocating against carceral feminist approaches, such as the affirmative consent model, that use criminal punishment to tackle sexual violence without regard the consequences for women, people of color, and other groups), with MacKinnon, *supra* note 194, at 1001 (calling sex work, including pornography, essentially sex trafficking and arguing that all forms of sex work should be criminalized).

<sup>235</sup> See *supra* notes 43–77, 163–234 and accompanying text.

<sup>236</sup> See Survivors of Human Trafficking Fight Back Act of 2020, S. 4983, 116th Cong. § 2 (2020) (proposing a repeal of CDA § 230 immunity and creation of criminal and civil penalties for pornography websites for illegal content posted to the site); Kristof, *supra* note 3 (arguing that the Canadian and United States governments should act against Pornhub); TRAFFICKINGHUB, *supra* note 4.

<sup>237</sup> See Halley, *supra* note 168, at 258 (arguing against the affirmative consent model as excessively carceral and eroding civil rights in the criminal legal process for defendants); Law, *supra* note 167 (asserting that carceral responses harm marginalized women by labeling them as criminals and subjecting them to criminal punishment); see also Glick, *supra* note 202, at 21 (describing that sex-positive feminists see sexual liberation as a central facet of feminism, which includes sex work).

<sup>238</sup> See generally *Understanding Sex Work in an Open Society*, *supra* note 78 (advocating for the inclusion of sex workers in the conversation about sexual violence and abuse in the sex industry).

<sup>239</sup> See *infra* notes 241–266 and accompanying text.

<sup>240</sup> See *infra* notes 267–288 and accompanying text.

### A. *Traffickinghub and the Fight Back Act as Carceral Approaches to Sexual Violence*

Advocates like Senator Hawley, Traffickinghub, and Nick Kristof take an explicitly carceral approach to regulating Pornhub that is present in the Fight Back Act.<sup>241</sup> Carceral philosophy permeates not only the legislation's proposed remedies, but also the views of its supporters on transactional sex, pornography, female sexuality, and the failure to address the concerns of sex workers.<sup>242</sup> This viewpoint in the Fight Back Act is emblematic of the largely unsuccessful FOSTA-SESTA approach to combatting sex trafficking.<sup>243</sup>

The most obvious carceral facet of these laws is that they utilize the criminal justice system as the source of social change, and formal punishment as the manner of effecting that change.<sup>244</sup> Just as FOSTA-SESTA removed § 230 immunity for websites that host advertising for transactional sex work, these groups and the proposed Fight Back Act would remove CDA immunity for pornography sites upon demonstration that the sites hosted or posted criminally violent content.<sup>245</sup> Under both pieces of legislation, the solution to digital sexual violence is civil liability and criminal punishment—exposing officers in those businesses to prison terms or fines, while doing nothing to target the underlying criminal behavior by abusers and traffickers who post the videos.<sup>246</sup>

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<sup>241</sup> See Survivors of Human Trafficking Fight Back Act of 2020, S. 4983 § 2 (proposing the repeal of § 230 to enable use of the civil and criminal legal systems to punish pornography sites, like Pornhub, that do not block or effectively moderate content featuring sex crimes); Kristof, *supra* note 3 (pushing Canadian and American governments to take legal action against Pornhub and to create new legislation to regulate pornography websites); TRAFFICKINGHUB, *supra* note 4.

<sup>242</sup> See Survivors of Human Trafficking Fight Back Act of 2020, S. 4983 § 2 (proposing criminal and civil punishment as a solution to the use of Pornhub and other pornography websites to share videos of sexual violence); Kristof, *supra* note 3 (advocating for criminal prosecution and new legislation against pornography websites where abusers post videos of sex crimes). TRAFFICKINGHUB, *supra* note 4.

<sup>243</sup> See Allow States and Victims to Fight Online Sex Trafficking Act, Pub. L. No. 115-164, § 4, 132 Stat. 1253, 1254–55 (2018) (removing CDA § 230 immunity for websites that host and post videos featuring sex trafficking and other sex crimes); see also Halley, *supra* note 168, at 258 (denouncing carceral feminist ideology for over-reliance on the criminal justice system to solve gender-based violence).

<sup>244</sup> See Halley, *supra* note 168, at 258 (criticizing carceral feminists for focusing its solutions to sexual and gender-based violence on the criminal justice system).

<sup>245</sup> See Survivors of Human Trafficking Fight Back Act of 2020, S. 4983, 116th Cong. § 2 (2020) (proposing to strike CDA § 230 immunity and to create criminal and civil penalties for pornography websites); Allow States and Victims to Fight Online Sex Trafficking Act § 4, 132 Stat. at 1254–55 (removing CDA § 230 immunity for websites that host content that facilitates sex trafficking).

<sup>246</sup> Survivors of Human Trafficking Fight Back Act of 2020, S. 4983 § 2; Allow States and Victims to Fight Online Sex Trafficking Act § 4, 132 Stat. at 1254–55. Targeting pornography websites instead of the actual abusers does not cause abusers to stop engaging in illegal sexual conduct, rather abusers respond by simply using another website or means to facilitate their criminal behavior. See Karol Markowicz, *Congress' Awful Anti-Sex Trafficking Law Puts Sex Workers in Danger and Wasted Tax-Payer Money*, INSIDER (July 14, 2019), <https://www.businessinsider.com/fosta-sesta-anti-sex-trafficking-law-has-been-failure-opinion-2019-7> [<https://perma.cc/Y9MN-ZRAH>] (noting that after

Advocates of the proposed bill and statute believe that by punishing the individuals running the host websites, they will incentivize similar websites to monitor and remove content featuring sexually violent or illegal behavior.<sup>247</sup> The theory that formal legal punishment is the start of major social change is a deeply carceral perspective.<sup>248</sup>

The Fight Back Act is carceral because it fails to meaningfully distinguish between pornography performers or transactional sex workers and survivors of sexual violence on pornography websites.<sup>249</sup> The Fight Back Act does not even attempt to exempt performers in consensual pornography as targets of the legislation.<sup>250</sup> This infantilizes performers, casting them as unable to choose to work in pornography, and assumes performers have the same legislative interests as non-sex worker survivors of violence.<sup>251</sup>

The motivations behind the Fight Back Act paint the bill as carceral, particularly because the bill was a reaction to the rhetoric of activists like Mickelwait and Kristof, who both push deeply carceral messages.<sup>252</sup> Traffickinghub, for example, is powered by Exodus Cry, which has an abolitionist agenda and labels all women in pornography as victims.<sup>253</sup> Similarly, Kristof uses one line of his lengthy op-ed to acknowledge that he does not oppose the pornography industry as a whole, yet implies that if Pornhub cannot regulate content to his liking, the entity as a whole should be shut down.<sup>254</sup> Under carceralism, porn

FOSTA-SESTA passed and Backpage.com closed, federal law enforcement reported a brief dip in sex trafficking, followed by an enormous rebound, in part due to copycat websites like “Bedpage”).

<sup>247</sup> See Hawley Press Release, *supra* note 16 (explaining that the legislation aims to force pornography sites to take a more active role in monitoring the content users post to their sites in light of Pornhub’s exposed failure to moderate pornography featuring sex crimes).

<sup>248</sup> See Halley, *supra* note 168, at 258 (criticizing carceral feminists for the view that the criminal justice system provides the only solution for systemic gender-based violence).

<sup>249</sup> See Survivors of Human Trafficking Fight Back Act of 2020, S. 4983 § 2 (proposing to punish pornography sites with civil and criminal liability if the sites or their users post videos of sexual violence); MacKinnon, *supra* note 194, at 1001 (refusing to acknowledge the differences between rape, human trafficking, and consensually-produced pornography).

<sup>250</sup> See Survivors of Human Trafficking Fight Back Act of 2020, S. 4983 § 2 (proposing to repeal CDA § 230 immunity and to create criminal and civil penalties for pornography websites).

<sup>251</sup> See Grant, *supra* note 7 (arguing that the rhetorical approach taken in Congress and by advocates like Kristof, which reduces pornography itself to violence, completely ignores the needs of pornography performers for autonomy to work in pornography); see also Survivors of Human Trafficking Fight Back Act of 2020, S. 4983 § 2 (offering civil and criminal penalties that target online pornography websites that host or post videos of criminal sexual violence).

<sup>252</sup> See Survivors of Human Trafficking Fight Back Act of 2020, S. 4983 § 2 (levying criminal and civil penalties against pornography sites that host or post content featuring sexual violence); Grant, *supra* note 7 (noting that Senator Hawley introduced the bill at the peak of the media frenzy and public outrage following the Traffickinghub petition and Kristof’s op-ed); TRAFFICKINGHUB, *supra* note 4; Kristof, *supra* note 3 (ignoring the difference in experience and interests of pornography performers and survivors of sexual violence).

<sup>253</sup> See TRAFFICKINGHUB, *supra* note 4.

<sup>254</sup> See Kristof, *supra* note 3 (emphasizing the number of violent pornography videos on Pornhub and calling on governments to shutter the website if it cannot comply). Kristof’s voyeuristic account

performers are inaccurately categorized as victims, ignoring their choice to engage in legal and legitimate work.<sup>255</sup>

The same was true of FOSTA-SESTA and Backpage, as the media and legislative narrative around the statute discussed shutting down a marketplace for transactional sex work for the benefit of women, without acknowledging that a large number of transactional sex workers would be negatively impacted by the legislation.<sup>256</sup> In the case of Pornhub, the government has an even less compelling interest in intervention, because the industry targeted by the Fight Back Act—pornography—is legal.<sup>257</sup> By consolidating women into one interest group, rather than distinguishing that transactional sex workers and pornography performers have incredibly different experiences and goals in regulation than survivors of sexual violence, legislators and activists essentialize the female experience in the sex industry to abuse.<sup>258</sup> In this narrative, women are always harmed by pornography or transactional sex work, and can never find empowerment or legitimacy in sex work.<sup>259</sup>

More subtly, the gratuitous use of violence in the anecdotes provided by activists and legislators furthers the narrative that performers must be “rescued” from porn.<sup>260</sup> Explaining the details of physical violence experienced by

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of Pornhub’s content and the appropriation of survivors’ stories build an image of pornography as violent and abusive because he excludes the important narratives of performers who enjoy their jobs. See Grant, *supra* note 7 (criticizing Kristof’s prolific journalism about sex work and sexual violence).

<sup>255</sup> See Kristof, *supra* note 10 (ignoring the impact of shuttering Backpage on the sex workers who relied on the website to run their businesses); see also Brown, *supra* note 19 (describing the shuttering of Backpage following significant public and congressional outcry); Grant, *supra* note 7 (drawing similarities between Backpage and Pornhub in Kristof’s journalism, and noting the harm to sex workers after FOSTA-SESTA’s passage).

<sup>256</sup> See Brown, *supra* note 19 (describing how Congress targeted Backpage specifically through legislation); Lynch & Lambert, *supra* note 19 (detailing the role of federal agencies in shuttering Backpage); *Understanding Sex Work in an Open Society*, *supra* note 78 (asserting that labeling sex workers as victims marginalizes and stigmatizes them); see also Kristof, *supra* note 10 (failing to acknowledge that the shuttering of Backpage demonstrably and negatively impacted workers engaged in transactional sex); Grant, *supra* note 7 (explaining that Kristof took the same questionable journalistic slant in his articles about Pornhub and Backpage).

<sup>257</sup> Compare Survivors of Human Trafficking Fight Back Act of 2020, S. 4983 § 2 (addressing pornography websites), with Allow States and Victims to Fight Online Sex Trafficking Act, Pub. L. No. 115-164, § 4, 132 Stat. 1253, 1254–55 (2018) (targeting websites that cater to advertising for illegal transactional sex work or sex trafficking).

<sup>258</sup> See, e.g., *Understanding Sex Work in an Open Society*, *supra* note 78 (maintaining that if legislators and activists treat autonomous sex workers as victims, sex workers cannot advocate for solutions to sexual violence that will not expose them to violence, poverty, and marginalization).

<sup>259</sup> See, e.g., MacKinnon, *supra* note 194, at 996 (referring to the differences between sex work and sex trafficking as meaningless distinctions because sex work—including pornography— inherently fuels the demand for sex trafficking).

<sup>260</sup> See Grant, *supra* note 7 (rejecting the controversial narrative spun by Kristof against Pornhub and considering Kristof’s past harmful narratives about sex trafficking, which anti-trafficking organizations reject); see also Kristof, *supra* note 3 (describing a trafficker’s use of a potato peeler to mutilate a survivor of sex trafficking); Kristof, *supra* note 10 (describing graphic accounts of violence against women and children trafficked through advertising posted on Backpage).

trafficking and rape victims does not logically aid the assertion that Pornhub should better regulate its content because the specificities of the violence have nothing to do with Pornhub.<sup>261</sup> Rather, it implicitly serves to foster the belief that sex work, including transactional sex and pornography, necessarily involves dehumanization and violence.<sup>262</sup> Kristof's article about Backpage, and the discourse around FOSTA-SESTA used the same strategy.<sup>263</sup> When the focus is on the details of violence, it becomes less likely that individuals and legislators will include the voices of pornography performers whose positive experiences in the sex industry should be included in discussions of regulation.<sup>264</sup>

Not only do the Fight Back Act and its supporters embrace carceral justice as the only solution to sexual violence, but they also accept that the experience of pornography is the same as abuse.<sup>265</sup> This distils to the core belief that the only experience of the sex industry is abuse, and that transactional sex workers and pornography performers must be victims of violence.<sup>266</sup>

### *B. The Active Harm of Carceral Feminism in the Pornography Industry and on Transactional Sex Workers*

The carceral views inherent to FOSTA-SESTA, the Fight Back Act, and supporting activist narratives are problematic.<sup>267</sup> These policies ignore the in-

<sup>261</sup> See Grant, *supra* note 7 (describing Kristof's writing as a type of "voyeurism" for his gratuitous use of violent detail); see also Kristof, *supra* note 3 (describing horrific specificities of human trafficking and rape posted on Pornhub); Kristof, *supra* note 10 (describing graphic accounts of violence against women and children trafficked through advertising posted on Backpage).

<sup>262</sup> See Grant, *supra* note 7 (criticizing Kristof's writing as very voyeuristic in its excessive use of violent detail); Kristof, *supra* note 10 (describing graphic accounts of violence against women and children trafficked through advertising posted on Backpage).

<sup>263</sup> See generally Grant, *supra* note 7 (characterizing Kristof's gratuitous use of violent, anecdotal detail as a distraction from the vast number of counterarguments against shuttering websites used by sex workers); Kristof, *supra* note 10 (describing graphic accounts of violence against women and children trafficked through advertising posted on Backpage).

<sup>264</sup> See *Understanding Sex Work in an Open Society*, *supra* note 78 (criticizing the characterization of all sex workers as victims, claiming this description increases their marginalization and stigmatization as, simultaneously, criminals and powerless objects of abuse). See generally Grant, *supra* note 7 (disclaiming Kristof's use of gratuitous violence in his reporting on sex trafficking); Kristof, *supra* note 10 (describing graphic accounts of violence against women and children trafficked through advertising posted on Backpage, without noting that sex workers relied on the website for their livelihoods).

<sup>265</sup> See Survivors of Human Trafficking Fight Back Act of 2020, S. 4983, 116th Cong. § 2 (2020) (proposing to amend CDA § 230 immunity in order to introduce criminal and civil penalties for pornography websites); Kristof, *supra* note 3 (arguing that the Canadian and United States governments should act against Pornhub); TRAFFICKINGHUB, *supra* note 4.

<sup>266</sup> See Glick, *supra* note 202, at 22 (noting that sex workers are a crucial part of modern sex-positive feminist discourse); *Understanding Sex Work in an Open Society*, *supra* note 78 (asserting the victim narrative forced on all sex workers fosters marginalization and stigma).

<sup>267</sup> See *Why Sex Work Should Be Decriminalized*, *supra* note 221 (explaining why carceral views of sex work are harmful to sex workers). *Contra* Survivors of Human Trafficking Fight Back Act of 2020, S. 4983, 116th Cong. § 2 (2020) (proposing to strike CDA § 230 immunity and create criminal

terests of transactional sex workers and pornography performers, and implement regulations that expose both groups to greater physical violence, restrict their ability to negotiate their work, and increase the stigma against them.<sup>268</sup> Because the carceral approach often explicitly refuses to listen to transactional sex workers and pornography performers when drafting legal solutions, it does not reduce the harms of sexual violence, but shifts the burden of bearing those harms to transactional sex workers and performers.<sup>269</sup>

Carceral narratives ignore the needs and interests of transactional sex workers and performers, including the concern that a criminal response to Pornhub will expose them to physical and financial harm.<sup>270</sup> At the most basic level, when the government attacks businesses that provide a platform for sex work and performance, the workers face economic insecurity and the demand for their labor decreases.<sup>271</sup> Studies on the impacts of FOSTA-SESTA and the Backpage shutdown on transactional sex workers show that more than 70% of surveyed transactional sex workers experienced greater economic peril—namely income insecurity—than before the legislation’s enactment.<sup>272</sup> If legislation similarly targeted and shuttered Pornhub, thousands of performers would be without stable work.<sup>273</sup> Rather than effectively tackling sexual violence per-

and civil penalties for pornography websites); Kristof, *supra* note 3 (arguing that the Canadian and United States governments should act against Pornhub); TRAFFICKINGHUB, *supra* note 4.

<sup>268</sup> See *Why Sex Work Should Be Decriminalized*, *supra* note 221 (arguing that the criminalization of sex work globally bars sex workers from accessing law enforcement remedies, healthcare, and other services considered to be human rights).

<sup>269</sup> See *Understanding Sex Work in an Open Society*, *supra* note 78 (asserting that Nordic model and similar approaches to sex work are unsuccessful because they do not solicit input from sex workers, a crucial interest group, when drafting solutions). The Nordic Model does not curtail sex work and sex trafficking in the countries where legislators implemented it. See *id.* (explaining that the Nordic Model is a failure because it cannot curtail the supply or demand for sex work, while also exposing sex workers to greater violence).

<sup>270</sup> See Blunt & Wolf, *supra* note 220, at 119 (explaining that criminal intervention in online sex work negatively impacts advertising and entrenches the stigma against sex workers, who often cannot receive social services or law enforcement intervention because society views them as criminals); *Why Sex Work Should Be Decriminalized*, *supra* note 221 (remarking that the criminalization of sex work not only exposes sex workers to violence from law enforcement, as well as pimps, clients, and others who desire to harm sex workers).

<sup>271</sup> See Blunt & Wolf, *supra* note 220, at 119 (noting that more sex workers faced financial insecurity and job instability after the implementation of FOSTA-SESTA, which not only shut down Backpage, but also criminalized strategies sex workers use to keep themselves safe, such as databases on violent clients).

<sup>272</sup> See *id.* (finding that following the implementation of FOSTA-SESTA and the shutdown of Backpage, nearly three quarters of the sex workers surveyed reported economic instability, with almost a quarter “[not knowing] where their next income was coming from”).

<sup>273</sup> See Auerbach, *supra* note 121 (demonstrating that MindGeek’s near monopoly on the pornography industry forces most performers to work for or affiliate with Pornhub and its affiliates); see also Blunt & Wolf, *supra* note 220, at 119 (finding that the shuttering Backpage had massive economic effects on the sex workers surveyed). Pornhub employs over one hundred thousand performers. EJ Dickson, *Pornhub Upended the Porn Industry. Now New Changes Could Destroy Sex Workers’ Livelihoods*,

petrated through pornography websites, this could displace harm onto performers.<sup>274</sup>

Lack of economic security and mobility also forces sex workers, including pornography performers, into riskier and less-regulated forms of sex work.<sup>275</sup> In the case of FOSTA-SESTA, the legislation forced transactional sex workers who previously advertised their services online to solicit customers outside.<sup>276</sup> Academics, activists, and legislators agree that transactional sex workers working outdoors are more vulnerable to severe physical and sexual violence than almost any other group of people.<sup>277</sup> Serial predators target transactional sex workers outdoors because the workers are easily ambushed and the crime is not as likely to be observed by people who could report it.<sup>278</sup> This is not a testament to the inherent abuses of transactional sex work, but to the lack of fair or safe working conditions for laborers in unregulated or illegal industries.<sup>279</sup> If activists and the legislature target pornography and work becomes scarce as a result, performers may be forced to take on riskier and unregulated forms of sex work, including transactional sex, that will expose them to violence.<sup>280</sup> Rather than reducing sexual violence, a carceral approach actu-

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ROLLING STONE (Dec. 11, 2020), <https://www.rollingstone.com/culture/culture-news/pornhub-visa-mastercard-nicholas-kristof-sex-work-1102150/> [<https://perma.cc/FWW3-VK42>].

<sup>274</sup> See Blunt & Wolf, *supra* note 220, at 121 (asserting that the shuttering of Backpage did not impact the rates of sex trafficking in the United States but did demonstrably harm transactional sex workers economically and physically).

<sup>275</sup> See *id.* (concluding that outdoor sex work exposes sex workers to greater rates of violence than pornography or sex work solicited online); Matula, *supra* note 128, at 358 (providing the example of a community organizer who found that after the passage of SESTA-FOSTA, sex workers began to return to pimps for protection, as they were forced to solicit work outside).

<sup>276</sup> See Blunt & Wolf, *supra* note 220, at 121 (emphasizing that when transactional sex workers solicit customers outside, they are more likely to be victims of violent crime); Matula, *supra* note 128, at 358 (quoting a community organizer who asserted sex workers who once used Backpage to advertise their services moved outdoors to obtain sufficient work, and that nearly half of sex workers surveyed could no longer afford to advertise services online).

<sup>277</sup> See Blunt & Wolf, *supra* note 220, at 121 (noting that following FOSTA-SESTA, sex workers not only struggled to advertise online, but lost access to databases about violent clients and verification services to confirm the identity of clients); Matula, *supra* note 128, at 358 (illustrating potential threats of violence toward sex workers who work outdoors from pimps, clients, and police); *Why Sex Work Should Be Decriminalized*, *supra* note 221 (analyzing how the criminalization of sex work facilitates violence from law enforcement who use the status of criminality to coerce and abuse sex workers, most egregiously by raping sex workers).

<sup>278</sup> See *Why Sex Work Should Be Decriminalized*, *supra* note 221 (explaining that by criminalizing transactional sex work, transactional sex workers become more vulnerable to violence from law enforcement and other individuals).

<sup>279</sup> See *Understanding Sex Work in an Open Society*, *supra* note 78 (arguing that violence in sex work should be addressed as a labor law issue and asserting that although violence exists in the sex work industry, decriminalization and regulation as legitimate work is a better solution to violence than criminalization).

<sup>280</sup> See *id.* (emphasizing that any form of criminalization in the sex industry makes sex workers, including pornography performers, more vulnerable to economic and physical abuse); see also Auer-

ally exposes performers and transactional sex workers to sexual violence in their work.<sup>281</sup>

Similarly, work scarcity limits the ability of laborers to negotiate the terms of their work.<sup>282</sup> Because of the intimate nature of their work, transactional sex workers and pornography performers need the freedom to meaningfully choose the projects they work on, set boundaries on those projects, and demand safety measures to protect their health.<sup>283</sup> For example, in a work-scarce pornography market, a performer may not have the bargaining power to demand that other performers wear condoms while filming, exposing them to sexually transmitted infections or unwanted pregnancy.<sup>284</sup> Following FOSTA-SESTA, transactional sex workers complained they are less able to meaningfully decide what kinds of sex acts they engage in, whether their clients wear condoms, and the location at which they provide services.<sup>285</sup> Thus, carceral approaches to sex work actually expose transactional sex workers and pornography performers to worse working conditions and greater harm by impeding their bargaining power, rather than effectively reducing sexual violence.<sup>286</sup>

The harm to transactional sex workers and pornography performers by carceral policies is unavoidable because carceral advocates like Kristof, Traffickinghub, and the supporters of the Fight Back Act do not seek out or involve the opinions of sex workers.<sup>287</sup> By ignoring these harms, activists reveal that they value the rights of non-sex workers over the safety of sex workers.<sup>288</sup>

bach, *supra* note 121 (detailing that Pornhub's rise created work scarcity, such that performers now commonly have to take part in transactional sex work as well to support themselves).

<sup>281</sup> See Blunt & Wolf, *supra* note 220, at 121 (noting that rates of sexual violence against transactional sex workers rise when these workers must solicit clients outdoors).

<sup>282</sup> See Muqing M. Zhang, *If Pornhub Wants to Support a Cause, Start with Sex Worker Rights*, FUTURE (June 20, 2019), <https://theoutline.com/post/7582/pornhub-latches-on-to-causes-support-sex-workers> [<https://perma.cc/F5S4-Z9TD>] (outlining the dire situation of independent pornography creators and performers, and reporting that Pornhub's "monopoly has become so restrictive that some adult performers are being forced to work for MindGeek regardless of its poor practices").

<sup>283</sup> See, e.g., *id.* (illustrating how MindGeek blacklists most performers who publicly denounce the company, effectively banishing them from work in the pornography industry); Auerbach, *supra* note 121 (same); Grant, *supra* note 7 (same).

<sup>284</sup> See, e.g., Auerbach, *supra* note 121 (arguing that by decreasing the bargaining power of performers working with MindGeek, the company essentially gatekeeps the entire pornography industry); Grant, *supra* note 7 (same); Zhang, *supra* note 282 (same).

<sup>285</sup> See Blunt & Wolf, *supra* note 220, at 119 (emphasizing the increased pressure on sex workers to take on riskier clients and forms of work following the implementation of FOSTA-SESTA); Matula, *supra* note 128, at 358 (arguing that following Backpage and decreased access to a consistent flow of work, sex workers felt compelled to take on riskier forms of work to make ends meet).

<sup>286</sup> See *Understanding Sex Work in an Open Society*, *supra* note 78 ("Criminalization makes it harder for sex workers to negotiate terms with clients, work together with other sex workers for safety, and carry condoms without fear that they will be used as evidence of prostitution."); *Why Sex Work Should Be Decriminalized*, *supra* note 221 (noting the harms to health stemming from stigma, violence, and lack of regulation in the sex industry due to current criminalization).

<sup>287</sup> See Survivors of Human Trafficking Fight Back Act of 2020, S. 4983, 116th Cong. § 2 (2020) (proposing to strike CDA § 230 immunity and create criminal and civil penalties for pornography

## CONCLUSION

As demonstrated in the social and legislative movements against Backpage and Pornhub, the socio-political culture of the United States is moving towards a carceral approach to sexual violence online. Public figures like Nicholas Kristof and Laila Mickelwait capitalized on moral outrage against trafficking and rape to push for reforms that fail to meaningfully distinguish between consensual sex work, pornography, and sexual violence. The failure of FOSTA-SESTA foreshadowed the flaws of the proposed Fight Back Act, which aimed to harness civil and criminal punishment to deter lax moderation of sexual content by websites and shutter websites unwilling or unable to comply. On one hand, carceral feminists believe that these acts are an important first step towards pornography abolition as a necessary facet of ensuring political and civil rights for women. On the other, sex-positive feminists see this as a step back from decriminalizing sex work, and in the fight against the marginalization, criminalization, and stigmatization that tangibly harms sex workers.

Going forward, legislators and advocates must push for sex-positive policies surrounding sex work and sexual violence and oppose carceral remedies that will inevitably arise in the federal legislature. Although the goal of eradicating sexual violence is noble, approaches that further criminalize sex work expose sex workers to violence, economic uncertainty, and marginalization are unworkable. Any approach to sexual violence that reciprocally harms sex workers is not a solution, but an augmentation of the existing issues.

TAYLOR COMERFORD

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websites); Kristof, *supra* note 3 (arguing that the Canadian and United States governments should act against Pornhub); TRAFFICKINGHUB, *supra* note 4.

<sup>288</sup> See *Understanding Sex Work in an Open Society*, *supra* note 78 (arguing that sex workers need to be active participants in the discussion around regulating sex work).