

Journal of Law & Commerce

Vol. 40, No. 2 (2022) • ISSN: 2164-7984 (online)
DOI 10.5195/jlc.2022.230 • <http://jlc.law.pitt.edu>

NOTES

BETWEEN A LAW AND A PANDEMIC: HOW COVID-19 HAS
EXACERBATED FOSTA-SESTA'S IMPACT ON SEX WORKERS

Gabrielle Wast



This work is licensed under a Creative Commons Attribution-Noncommercial-No Derivative Works 3.0 United States License.



This site is published by the University Library System of the University of Pittsburgh as part of its D-Scribe Digital Publishing Program, and is cosponsored by the University of Pittsburgh Press.

NOTES

BETWEEN A LAW AND A PANDEMIC: HOW COVID-19 HAS EXACERBATED FOSTA-SESTA'S IMPACT ON SEX WORKERS

*Gabrielle Wast**

While the COVID-19 pandemic and subsequent restrictions have felt “unprecedented”¹ to many people in the United States, many people in the country are already familiar with having their lives hyperregulated.² Because this country has historically criminalized most forms of sex work,³ sex workers have had to find alternative methods to continue their work and earn income and access other necessities.⁴ As work on the street became heavily policed and with the proliferation of the internet, sex workers have increasingly turned to the web for work and community.⁵

Classified advertising websites like Craigslist and Backpage.com became places for sex workers to advertise their services and screen clients,⁶

* Gabrielle Wast is a 3L at the University of Pittsburgh School of Law.

¹ See Olivia Eubanks, ‘Unprecedented’ Named People’s Choice 2020 Word of the Year by *Dictionary.com*, ABC NEWS (Dec. 16, 2020, 5:05 AM), <https://abcnews.go.com/Politics/unprecedented-named-peoples-choice-2020-word-year-dictionary/story?id=74735664> (discussing the use of the word “unprecedented” in 2020).

² Danielle Blunt & Ariel Wolf, *Erased: The Impact of FOSTA-SESTA & the Removal of Backpage, HACKING//HUSTLING*, at 1 (2020), https://hackinghustling.org/wp-content/uploads/2020/02/Erased_Updated.pdf.

³ Lura Chamberlain, Note, *FOSTA: A Hostile Law with a Human Cost*, 87 *FORDHAM L. REV.* 2171, 2182 (2019).

⁴ Blunt & Wolf, *supra* note 2, at 4–5.

⁵ *Id.* at 5.

⁶ Aja Romano, *A New Law Intended to Curb Sex Trafficking Threatens the Future of the Internet as We Know It*, *VOX* (July 2, 2018, 1:08 PM), https://www.vox.com/culture/2018/4/13/17172762/fosta-sesta-backpage-230-internet-freedom?__c=1.

making the industry an arguably safer place.⁷ However, in 2017, then-President Donald Trump signed Public Law 115-168 (FOSTA-SESTA),⁸ leading to many websites which hosted sex workers' ads shutting down.⁹ Called the "Stop Enabling Sex Traffickers Act of 2017" (SESTA) in the Senate¹⁰ and the "Allow States and Victims to Fight Online Sex Trafficking Act of 2017" in the House of Representatives,¹¹ the combined legislation was proposed in response to the idea that 47 U.S.C. § 230 ("Section 230")¹² created a safe harbor for websites that "promote[d] and facilitate[d] prostitution" and "allow[ed] the sale of sex trafficking victims" to occur on their pages without repercussions.¹³ However, the law has done little to prevent sex trafficking online¹⁴ and instead has negatively impacted the sex working community.¹⁵

While sex workers themselves have come together and used their resources to examine the detrimental impact FOSTA-SESTA has had on their health and survival, legislators have been mostly silent on the law's adverse effects.¹⁶ The only push by federal lawmakers to cure the impact of the legislation on sex workers was H.R. 5448, introduced at the end of 2019.¹⁷ The proposed bill, called the "FOSTA-SESTA Examination of Secondary Effects for Sex Workers Study Act," or the "SAFE SEX Workers Study Act," directed the Secretary of Health and Human Services to:

⁷ *Why Do Sex Workers Need Online Spaces?*, REFRAME HEALTH & JUST. CONSULTING (2018), https://survivorsagainstsesta.files.wordpress.com/2018/03/onlinespaces_impact-003.pdf; see also Scott Cunningham et al., *Craigslist Reduced Violence Against Women*, J. ECON. LIT. 118, J16, K42, Feb. 2019, at 1, 4; Blunt & Wolf, *supra* note 2, at 4.

⁸ Allow States and Victims to Fight Online Sex Trafficking Act of 2017, Pub. L. No. 115-164 132 Stat. 1253 (2018) (codified as amended at 47 U.S.C. § 230 (2012)) [hereinafter FOSTA-SESTA].

⁹ Blunt & Wolf, *supra* note 2, at 5.

¹⁰ Stop Enabling Sex Traffickers Act of 2017, S.1693, 115th Cong. (2017) [hereinafter SESTA].

¹¹ Allow States and Victims to Fight Online Sex Trafficking Act of 2017, H.R. 1865, 115th Cong. (2017) [hereinafter FOSTA].

¹² 47 U.S.C. § 230 (2012). See also Chamberlain, *supra* note 3.

¹³ FOSTA-SESTA, *supra* note 8.

¹⁴ Glenn Kessler, *Has the Sex-trafficking Law Eliminated 90 Percent of Sex-Trafficking Ads?*, WASH. POST (Aug. 20, 2018), <http://pitt.idm.oclc.org/login?url=https://www-proquest-com.pitt.idm.oclc.org/blogs,-podcasts,-websites/has-sex-trafficking-law-eliminated-90-percent-ads/docview/2090280551/se-2?accountid=14709>.

¹⁵ See Blunt & Wolf, *supra* note 2.

¹⁶ *Id.*

¹⁷ SESTA/FOSTA Examination of Secondary Effects for Sex Workers Study Act, H.R. 5448, 116th Cong. (2019) [hereinafter SAFE SEX Workers Study Act].

study the impacts on the health and safety of people engaged in transactional sex resulting from the loss of access to interactive computer services (as defined in section 230(f) of the Communications Act of 1934 (47 U.S.C. 230(f))) in connection with the closure of websites (including Backpage.com) that host information related to consensual sexual exchange, on or after February 27, 2018, in anticipation of, or in response to, the enactment of the Allow States and Victims to Fight Online Sex Trafficking Act of 2017 (Public Law 115-164).¹⁸

The people who introduced the SAFE SEX Workers Study Act and its supporters touted their interest in protecting people in the U.S. who engage in transactional sex work.¹⁹ But research done by grassroots organizations showed that such a study would do nothing to protect sex workers who were being and had already been impacted by the effects of FOSTA-SESTA.²⁰ The only suggested solution that could combat the immediate harms of FOSTA-SESTA was to repeal the statute completely.²¹

Beyond the passage of FOSTA-SESTA, the COVID-19 pandemic makes sex work even more dangerous.²² Unlike the non-criminalized workforce in the United States, sex workers typically do not have access to expected employment benefits like protection from discrimination, sick days, or health insurance.²³ Additionally, sex workers are often from marginalized communities and may be unhoused or unable to maintain social distancing from essential workers.²⁴ More significant is the new working-from-home phenomenon: Studies of people in non-criminalized employment settings found that over 42% could work from home to lessen the spread of COVID-

¹⁸ *Id.*

¹⁹ *Id.* at § 2. See also Ella Ceron, *Sex Workers Warned Everyone About FOSTA-SESTA—Now Lawmakers Are Beginning to Listen*, MTV NEWS (Dec. 17, 2019), <http://www.mtv.com/news/3149442/safe-sex-work-study-act-fosta-sesta-ro-khanna/>.

²⁰ See Blunt & Wolf, *supra* note 2.

²¹ Chamberlain, *supra* note 3, at 2209. Repealing FOSTA-SESTA completely would still fail to adequately compensate sex workers for the lost income and increased danger within the industry since the bill became law in 2018.

²² See Lucy Platt et al., Comment, *Sex Workers Must Not Be Forgotten in the COVID-19 Response*, 396 LANCET 9 (2020), [https://www.thelancet.com/journals/lancet/article/PIIS0140-6736\(20\)31033-3/fulltext](https://www.thelancet.com/journals/lancet/article/PIIS0140-6736(20)31033-3/fulltext).

²³ See Blunt & Wolf, *supra* note 2; *Sex Work & COVID-19: Guidelines for Sex Workers, Clients, Third Parties, and Allies*, BUTTERFLY ASIAN & MIGRANT SEX WORKERS SUPPORT NETWORK & MAGGIE'S TORONTO SEX WORKERS ACTION PROJECT (Jan. 1, 2020), <https://www.drugpolicy.ca/wp-content/uploads/2020/03/03.19.20-Sex-Work-and-COVID-19-2.pdf> [hereinafter COVID-19 Guide].

²⁴ See COVID-19 Guide, *supra* note 23, at 4.

19.²⁵ While that significant portion of the U.S. workforce has been able to work from home, many sex workers must leave the house and risk exposure to COVID-19.²⁶

The disproportionate effects of the COVID-19 pandemic, compounded by the already apparent harms of FOSTA-SESTA on sex workers, reveal the need for change. While Congress has attempted to create some semblance of a response to protect this population,²⁷ the SAFE SEX Workers Study Act does not even begin to undo the harms that the sex working community has faced as a result of FOSTA-SESTA. Additionally, the legislation did not contemplate a global pandemic. Thus, a bureaucratic research approach will further fail to protect sex workers. The quickest and least expensive solution will be to repeal FOSTA-SESTA. More drastic measures must be considered, but simply starting by considering the needs and wants of sex workers would begin to eliminate some of the harms the legislation has caused.

This Note considers the harms of FOSTA-SESTA on sex workers in light of the COVID-19 pandemic. I argue that past solutions or compromises, like the SAFE SEX Workers Act, are insufficient responses and far too slow. Further, I propose that the best solution for the immediate future is to repeal FOSTA-SESTA, and I discuss some alternative or further actions that should be considered. Additionally, I consider the social and structural barriers that may inhibit change and suggest steps forward.²⁸

Part I of this Note details a brief legislative history and the context of FOSTA-SESTA. Part II provides a detailed analysis of different studies of the impact of the legislation on sex workers before the COVID-19 pandemic. Part III outlines the ongoing effects of the COVID-19 pandemic that

²⁵ May Wong, *Stanford Research Provides a Snapshot of a New Working from Home Economy*, STAN. NEWS (June 29, 2020), <https://news.stanford.edu/2020/06/29/snapshot-new-working-home-economy/>.

²⁶ COVID-19 Guide, *supra* note 23, at 4.

²⁷ See SAFE SEX Workers Study Act, *supra* note 17.

²⁸ If you are in a position to and would like to support the organizations working to support sex workers in the U.S. and around the world mentioned in this note, you can donate to the groups here: Hacking/Hustling at <https://hackinghustling.org/store/>; Butterfly Asian and Migrant Sex Workers Support Network at <https://www.butterflysw.org/donate>; Maggie's Toronto Sex Workers Action Project at <https://www.maggiesto.org/donate>; Red Umbrella Fund at <https://www.redumbrellafund.org/how-to-donate-to-red-umbrella-fund/>; Slix's suggested organizations at <https://www.slix.com/blog/covid-19/covid19-financial-resources-sex-workers/>; various sex worker mutual aid funds at <https://docs.google.com/document/d/1FKve5gAEQo4hJECRiTOYUzDqiBZTESvoKHC0lbr7smY/edit>.

exacerbated the harms sex workers were already facing after the passing of FOSTA-SESTA. Part IV discusses solutions and calls for action to protect sex workers.

I. A BRIEF HISTORY OF FOSTA-SESTA

The history of FOSTA-SESTA begins with the passage of the Communications Decency Act (CDA) of 1996, which sought to protect minors from obscene material online with the internet's invention.²⁹ The statute regulated internet speech, and the American Civil Liberties Union (ACLU) quickly challenged it.³⁰ The U.S. Supreme Court struck down most of the CDA but left behind 47 U.S.C. § 230 ("Section 230").³¹ Section 230 protected websites from civil liability from content created and posted by third parties on their platforms.³²

As the internet grew, so did illicit online markets.³³ Craigslist, perhaps known best as a website to purchase a neighbor's unwanted belongings, created its "erotic services" section.³⁴ Then other sites driven by sex work began popping up, most notably Backpage.com.³⁵ As the popularity of these websites grew, ads for the sale of sex trafficking victims became more prevalent.³⁶ In an attempt to quell sex trafficking through online spaces, the United States House of Representatives and Senate passed FOSTA and SESTA, respectively.³⁷

Both FOSTA and SESTA intended to clarify the language of Section 230 to ensure that it would not allow protections to websites that hosted third-

²⁹ Communications Decency Act of 1996 (CDA) 5, 47 U.S.C. § 230(c)(1) (2012) (amended 2018) (originally enacted as Communications Act of June 19, 1934, ch. 652, § 201, 48 Stat. 1070) ("No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider."); *see* Chamberlain, *supra* note 3.

³⁰ *Reno v. ACLU*, 521 U.S. 844 (1997).

³¹ Chamberlain, *supra* note 3, at 2182.

³² *Id.*

³³ Liz Tung, *FOSTA-SESTA Was Supposed to Thwart Sex Trafficking. Instead, It Sparked a Movement*, WHY: THE PULSE (July 10, 2020), <https://why.org/segments/fosta-sesta-was-supposed-to-thwart-sex-trafficking-instead-its-sparked-a-movement/>.

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.*; SESTA, *supra* note 10; FOSTA, *supra* note 11.

party sex trafficking content.³⁸ The language that resulted in the version signed by then President Trump stated: “Whoever . . . owns, manages, or operates an interactive computer service . . . or conspires or attempts to do so, with the intent to promote or facilitate the *prostitution* of another person shall be fined under this title, imprisoned for not more than ten years, or both.”³⁹ Note that while the bill was passed to target involuntary sex trafficking, the language of the final bill also targeted websites that have any content related to voluntary sex work.⁴⁰

While many legal battles led the public to begin questioning Section 230,⁴¹ the outcry for a bill like FOSTA-SESTA became particularly loud after a case in 2016 where a California Superior Court judge dismissed criminal charges against Backpage.com executives from then-state Attorney General Kamala Harris.⁴² Judge Michael Bowman specifically cited Section 230 as the reason for the dismissal of the suit.⁴³ The decision resulted in a Senate investigation,⁴⁴ and the rest of the national concern over sex trafficking through websites like Backpage.com is history.

II. FOSTA-SESTA’S ADVERSE EFFECTS ON SEX WORKERS

Both in the lead up to the passing of FOSTA-SESTA and after the bill became law, platforms across the internet that used to host sex workers’ content disappeared.⁴⁵ The legislation also affected some dating apps and sites, like Craigslist Personals.⁴⁶ As a result, studies showed a rise in the

³⁸ SESTA, *supra* note 10; FOSTA, *supra* note 11.

³⁹ FOSTA-SESTA, *supra* note 8 (emphasis added).

⁴⁰ *Id.*; *see also* Romano, *supra* note 6.

⁴¹ *See* Reno v. ACLU, 521 U.S. 844 (1997); M.A. v. Village Voice Media, 809 F. Supp. 2d 1041 (E.D. Miss. 2011); Dart v. Craigslist, 665 F. Supp. 2d 961 (N.D. Ill. 2009); Doe v. SexSearch.com, 502 F. Supp. 2d 719 (N.D. Oh. 2007); Jane Doe v. AOL, 718 So. 2d 385 (Fl. 2001).

⁴² *See* Max Kutner, *After Backpage.com Case Dismissed, Anti-Trafficking Advocates Look to Next Battles*, NEWSWEEK (Dec. 12, 2016, 4:46 PM), <https://www.newsweek.com/backpage-sex-trafficking-case-ferrer-harris-531187>; *see also* People v. Ferrer, No. 16FE019224, 2016 WL 7237305 (Cal. Super. Ct. Dec. 9, 2016) [hereinafter Ferrer Opinion].

⁴³ Ferrer Opinion, *supra* note 42.

⁴⁴ STAFF OF S. COMM. ON HOMELAND SEC. & GOV’T AFFS., 11TH CONG., REP. ON BACKPAGE.COM’S KNOWING FACILITATION OF ONLINE SEX TRAFFICKING (Comm. Print. 2017), <https://www.hsgac.senate.gov/imo/media/doc/Backpage%20Report%202017.01.10%20FINAL.pdf>.

⁴⁵ Tung, *supra* note 33.

⁴⁶ *Id.*

number of sex workers who were missing or dead.⁴⁷ Without any help or guidance from society at large, organizations that support sex workers took it upon themselves to study the outcomes of FOSTA-SESTA.⁴⁸

For example, Hacking//Hustling, “a collective of sex workers working at the intersection of technology and social justice,” released a community report on the effects of removing Backpage.com and the passage of FOSTA-SESTA.⁴⁹ The report studied two groups of sex workers, online sex workers and primarily street-based sex workers.⁵⁰ Using both an online survey and verbal interviews, Hacking//Hustling gained insight into the effects of SESTA/FOSTA on 139 people.⁵¹ In their own words, sex workers described what they believed the new legislation did.⁵² Generally, those surveyed expressed feelings that the bill removed “key safety measures used by sex workers,” created “moral panic and perpetuate[d] whorephobia,”⁵³ and did not prevent sex trafficking (the bill’s stated aim).⁵⁴ About 70% of survey respondents noted that FOSTA-SESTA had decreased their ability to access the sex worker community, which they relied on for safety and as a way to financially support one another.⁵⁵ In addition to physical security, about 72% of those surveyed said they faced financial insecurity since FOSTA-SESTA became law.⁵⁶

Within a month of the bill’s passage, thirteen sex workers went missing and two died from suicide.⁵⁷ Those numbers, of course, do not include those sex workers whose disappearances or deaths have not been reported. Nor does it include the sex workers who have been assaulted, lost their housing, or access to necessities.⁵⁸ Even more astonishing is the fact that, even with

⁴⁷ *Id.*

⁴⁸ *Id.*; Blunt & Wolf, *supra* note 2, at i.

⁴⁹ Blunt & Wolf, *supra* note 2, at i–ii.

⁵⁰ *Id.*

⁵¹ *Id.* at 6–8.

⁵² *Id.* at 9–12.

⁵³ *Id.* at 10 (“Whorephobia is the fear or hatred of sex workers that often leads to discrimination, stigma and violence. It is a term that was coined by sex worker rights activists.”).

⁵⁴ *Id.* at 10–11.

⁵⁵ *Id.* at 25–26.

⁵⁶ *Id.* at 22.

⁵⁷ Chamberlain, *supra* note 3, at 2174. According to Chamberlain, “[t]hese egregious acts of violence . . . are directly attributable to FOSTA’s enactment.” *Id.*

⁵⁸ *Id.* at 2174; Emily McCombs, ‘This Bill is Killing Us’: 9 Sex Workers on Their Lives in the Wake of FOSTA, HUFF. POST (May 17, 2018), https://www.huffpost.com/entry/sex-workers-sesta-fosta_n_

harm against “unintended targets,” the bill has done little to protect trafficking victims as it purported to do.⁵⁹ Some law enforcement professionals have found it more challenging to investigate sex-trafficking cases because they cannot follow leads on the internet with the shutdown of websites like Backpage.com.⁶⁰

In 2019, a study correlated the use of Craigslist’s erotic services (ERS) section for sex work advertisements to a reduced rate of female homicide in the United States by 10–17%.⁶¹ The study, titled “Craigslist Reduced Violence against Women,” found that “ERS created an overwhelmingly safe environment for female sex workers—perhaps the safest in history.”⁶² Such an effect could have been from efficiency,⁶³ composition,⁶⁴ better ability to screen clients,⁶⁵ or some combination of the three. The study concluded that the shutting down of ERS through legislation like FOSTA would have devastating effects, like moving offline and working with pimps or traffickers and increasing the risk of death and physical violence.⁶⁶

In a different investigation, the *Washington Post* found that shortly after the passage of FOSTA-SESTA, sex-trafficking ad numbers were close to where they started before Backpage.com shut down.⁶⁷ Representative Ann Wagner (R-MO), who introduced FOSTA in the House, appeared in a video released by the House Judiciary Committee only three months after the bill was signed, estimating that some 90% of “sex-trafficking business and ads”

5ad0d7d0e4b0edca2cb964d9?guccounter=1&guce_referrer=aHR0cHM6Ly93d3cuZ29vZ2xlLmNvbS8&guce_referrer_sig=AQAAAHvkW06FyJfFRnY5kwDDM0YISsLvtXc0i8RsdBSFYgNFIS7snn_XAa mkY2T43ftgmYdmW4htce2UW-TNtSd1TFE9lmGUGISEnbUgly-oVmxDtp9II4F4sKNm_uOKo9Uk JRDtR8IRHXRh9rSoOV8ns3SX2E9MV4E_WMKFDJPUYst#:~:text=HUFFPOST%20PERSONAL- ,‘This%20Bill%20Is%20Killing%20Us’%3A%209%20Sex%20Workers%20On,In%20The%20Wake% 20Of%20FOSTA&text=On%20April%2011%2C%20the%20Allow.prostitution%2C%20was%20signe d%20into%20law.

⁵⁹ Chamberlain, *supra* note 3, at 2174; Ryan Tarinelli, *Online Sex Ads Rebound, Months After Shutdown of Backpage*, PHYS.ORG (Nov. 28, 2018), <https://phys.org/news/2018-11-online-sex-ads-rebound-months.html>.

⁶⁰ Chamberlain, *supra* note 3, at 2174.

⁶¹ Cunningham et al., *supra* note 7.

⁶² *Id.* at 17.

⁶³ *See id.* at 21 (discussing efficiency as repeating customers after non-violent interactions).

⁶⁴ *See id.* at 21–23.

⁶⁵ *See id.* at 24.

⁶⁶ *Id.* at 28–29.

⁶⁷ Kessler, *supra* note 14.

had been shut down thanks to FOSTA-SESTA.⁶⁸ But the report found that a month after the video was posted, the rate of advertising related to sex-trafficking rose back by about 75%.⁶⁹ While any decrease in the amount of sex-trafficking would be commendable, the *Washington Post* noted that the metrics used by Rep. Wagner included ads for sex work as well as trafficking.⁷⁰ So, FOSTA-SESTA was signed to slow the rate of sex-trafficking transactions on the internet, but also lessened the number of ads for voluntary sex workers. Limiting the presence of voluntary sex workers online harmed sex workers, rather than slowing sex-trafficking, as predicted in the “Craigslisr Reduced Violence Against Women” and Hacking//Hustling reports.⁷¹

The harmful effects of FOSTA-SESTA are not just felt by sex workers in the United States but abroad as well.⁷² Sex workers used Backpage.com in countries all over the globe, including New Zealand.⁷³ Even though New Zealand decriminalized all sex work in 2003,⁷⁴ sex workers in the country moved their advertising online like workers in the United States to communicate with their community and improve safety.⁷⁵ A study of twenty-four sex workers in Auckland, New Zealand, published in 2020, found that the passage of FOSTA-SESTA and shutting down of Backpage.com pushed sex workers back to the streets where they “accepted clients they might otherwise avoid,” or entered “unsafe situations” to make ends meet.⁷⁶ Unlike in the United States, sex workers in New Zealand had other online platforms

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *Id.* In other words, while FOSTA-SESTA impacted the number of advertisements for voluntary sex workers online, “the actual impact on sex-trafficking [was] unknown.” *Id.* (internal quotations omitted).

⁷¹ Blunt & Wolf, *supra* note 2, at i (“The results of our online survey . . . indicate that the removal of Backpage and FOSTA-SESTA have had detrimental effects on online workers’ financial stability, safety, access to community, and health outcomes.”); *see generally* Cunningham et al., *supra* note 7.

⁷² *See, e.g.*, Erin Tichenor, ‘I’ve Never Been So Exploited’: *The Consequences of FOSTA-SESTA in Aotearoa New Zealand*, 14 ANTI-TRAFFICKING REV. (SPECIAL ISSUE—TECHNOLOGY, ANTI-TRAFFICKING, AND SPECULATIVE FUTURES) 99 (2020), <https://www.antitraffickingreview.org/index.php/atjournal/article/view/447/361>.

⁷³ *Id.* at 99–101.

⁷⁴ Prostitution Reform Act, Pub. Act 2003 No. 28, § 3 (N.Z. 2003), <https://www.legislation.govt.nz/act/public/2003/0028/latest/DLM197815.html>.

⁷⁵ Tichenor, *supra* note 72, at 101.

⁷⁶ *Id.* at 109.

to turn to, but those options were far too expensive for them to sell their services as they had before.⁷⁷ This rise in pricing allowed sex work managers in Auckland to exploit workers who they knew were desperate for work they had lost from the shutdown of Backpage.com.⁷⁸ The study concluded that, even though sex work in New Zealand has been decriminalized, FOSTA-SESTA and the resulting shutdown of Backpage.com negatively impacted sex workers in New Zealand by increasing their vulnerability to exploitation and pushing them back onto the streets.⁷⁹

III. COVID-19'S DISPARATE IMPACT ON SEX WORKERS

On March 11, 2021, newly elected President Joe Biden signed the American Rescue Plan of 2021.⁸⁰ While CNN called the bill “historic,”⁸¹ there remains a notable similarity between this bill and the two signed by former President Donald Trump:⁸² The newest bill does not provide specific relief for the sex working community. Calls to ensure sex workers have “equal access to social protection schemes” have once again been ignored by the U.S. government.⁸³

While the government has failed to support sex workers throughout this pandemic, COVID-19 has exacerbated the health risks and social problems sex workers already faced.⁸⁴ Because of their profession's illicit nature, sex workers often do not have access to the same employment protections that other workers do.⁸⁵ In addition to not having access to unemployment

⁷⁷ *Id.* at 108.

⁷⁸ *Id.* at 109.

⁷⁹ *Id.* at 113.

⁸⁰ American Rescue Plan Act of 2021, Pub. L. No. 117-2.

⁸¹ Katie Sullivan, *Biden Signs Historic \$1.9 Trillion Covid-19 Relief Law*, CNN (Mar. 11, 2021, 2:51 PM), <https://www.cnn.com/2021/03/11/politics/biden-sign-covid-bill/index.html>.

⁸² CARES Act of 2020, Pub. L. No. 116-136 (134 Stat. 281); Consolidated Appropriations Act, 2021, Pub. L. No. 116-260.

⁸³ Platt et al., *supra* note 22. For an international take on the same topic see Miriam Berger, *Sex Workers Are Falling Through the Cracks in Coronavirus Assistance Programs Around the World*, WASH. POST (Apr. 28, 2020), <https://www.washingtonpost.com/world/2020/04/28/sex-workers-are-falling-through-cracks-coronavirus-assistance-programs-around-world/#:~:text=World-,Sex%20workers%20are%20falling%20through%20the%20cracks,assistance%20programs%20around%20the%20world&text=To%20receive%20benefits%2C%20she%20would,have%20implications%20for%20her%20future.>

⁸⁴ *Id.*

⁸⁵ COVID-19 Guide, *supra* note 23, at 3.

compensation like many people in the United States, demand for services has decreased due to social distancing.⁸⁶ However, not all sex workers can adhere to the state and national guidelines if the result would mean a loss of necessary income to afford basic needs.⁸⁷ And while some sex workers were able to move their services online, not everyone had that luxury.⁸⁸

In response, sex worker organizations and health care experts have proposed and innovated solutions to the problem.⁸⁹ For example, public health scholars published a comment in May of 2020 suggesting tangible steps governments worldwide could take in collaboration with sex-worker-led organizations to mitigate the harms of COVID-19 against the community.⁹⁰ The article recommends “structural interventions” that governments can implement to support sex workers during the pandemic through financial protection including ceasing prosecutions for sex work or minor drug offenses and increasing access to emergency housing.⁹¹ Additionally, the authors suggest specific health services that could limit the spread of COVID-19 throughout the sex-working community, like the distribution of personal protective equipment (PPE), the extension of healthcare services, and COVID-19 testing and contact tracing throughout the industry.⁹² The professionals propose that following these procedures would allow “sex workers to protect their health during this pandemic as equal citizens” to others receiving support during this time.⁹³

Without any particularized guidance from the government, sex-worker-led organizations have taken the initiative and created a set of COVID-19 suggestive guidelines for sex workers, clients, third parties, and allies.⁹⁴ Sex workers are urged to decline symptomatic clients, consider alternative

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Id.* at 4; Fancy Feast, *5 Sex Workers Talk About Doing Their Jobs During COVID-19*, BUZZFEED (July 8, 2020, 3:25 PM), <https://www.buzzfeednews.com/article/fancyfeast/sex-work-from-home-stripping-bdsm-pandemic> (“Now, because of the pandemic, some sex workers are back online or going online for the first time, while others haven’t been able to make this transition.”).

⁸⁹ See Fancy Feast, *supra* note 88 (discussing individual sex workers’ COVID-19 survival methods). See, e.g., COVID-19 Guide, *supra* note 23.

⁹⁰ Platt et al., *supra* note 22.

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Id.*

⁹⁴ COVID-19 Guide, *supra* note 23.

services that minimize face-to-face contact, wash their hands or use hand sanitizer when available and appropriate.⁹⁵ Suggested practices for sex work clients include seeking alternative services (like online or phone sessions) and, most importantly, urging them not to be predatory by offering more money for riskier services during the pandemic.⁹⁶ The guidance also suggests that third parties to sex work, like strip clubs, do not force workers to show up if they call in sick and waive any cancellation fees they typically enforce.⁹⁷ All of these guidelines work together to protect sex workers' physical health during the COVID-19 pandemic. Still, they were not created to remedy the disproportionate impact COVID-19 has had on sex workers as the government fails to include them in national relief.

In response to this system failure, sex workers themselves created emergency aid funds and community resources to support one other during this time.⁹⁸ The Red Umbrella Fund, an organization guided by sex workers to support their human rights,⁹⁹ created a list of resources by continent and for the United States by state.¹⁰⁰ Some resources offer monetary support through funds raised by donation, while others provide information and discussions on harm reduction practices for the community and allies.¹⁰¹

Sex workers have also innovated ways to continue working while practicing social distancing.¹⁰² For example, strippers at the Lucky Devil Lounge in Portland, Oregon, started offering a delivery service to take food to customer's doors.¹⁰³ Clubs have also created drive-thru experiences so customers can still support the workers while maintaining social

⁹⁵ *Id.* at 15–16.

⁹⁶ *Id.* at 18.

⁹⁷ *Id.*

⁹⁸ See Red Umbrella Fund, *Sex-Workers' Resilience to the COVID Crisis: a List of Initiatives* (Mar. 31, 2021), <https://www.redumbrellafund.org/covid-initiatives/> (providing a list of sex worker support initiatives by continent); *Sex Work Mutual Aid Funds*, <https://docs.google.com/document/d/1FKve5gAEQo4hJECriTOYUzDqiBZTESvoKHCOlbr7smY/edit> (sex worker created working Google Doc listing resources by continent).

⁹⁹ Red Umbrella Fund, *About Us* (last visited Mar. 18, 2021), <https://www.redumbrellafund.org/about-us/>.

¹⁰⁰ Red Umbrella Fund, *supra* note 98.

¹⁰¹ *Id.*

¹⁰² See, e.g., Fancy Feast, *supra* note 88 (highlighting individual sex workers' approaches to working during the COVID-19 pandemic).

¹⁰³ *Id.*

distancing.¹⁰⁴ Other sex workers are relying more on phone sex work or creating OnlyFans accounts to keep some money coming in while COVID-19 restrictions remain in place.¹⁰⁵ But even the more successful sex workers using websites like OnlyFans during the pandemic may be unable to survive on that income alone.¹⁰⁶

Sex workers, who are disproportionately harmed by the COVID-19 pandemic, should be eligible for governmental support, just like workers outside the industry accessed throughout the pandemic.¹⁰⁷ As previously discussed, there are concrete steps that the government can take to reduce harm to this population of workers.¹⁰⁸ As an example, New Zealand's solutions prove that supporting sex workers during the COVID-19 pandemic is possible.¹⁰⁹ The country provided sex workers access to the country's emergency wage subsidy almost immediately.¹¹⁰ New Zealand also defined guidelines for sex workers to safely work after stay-at-home orders ended, similar to the guidelines published by the sex working community in the United States¹¹¹ and connected sex workers with other social support programs, as the public health experts suggested.¹¹²

IV. A WAY FORWARD: ALTERNATIVES TO THE CURRENT TREATMENT OF SEX WORKERS

The United States government's treatment of sex workers must change to diminish and, hopefully one day, eliminate the inhumane impact that criminalization and lack of support cause them. The last four years have been

¹⁰⁴ *Id.*

¹⁰⁵ Fancy Feast, *supra* note 88.

¹⁰⁶ *Id.* (discussing one sex worker's experience of making only \$300 per month on OnlyFans while falling in the top 27% of content creators).

¹⁰⁷ Platt et al., *supra* note 22.

¹⁰⁸ See *supra* notes 85–99 and accompanying text.

¹⁰⁹ See *infra* notes 110–12. It is important to note that New Zealand decriminalized sex work in 2003 under the Prostitution Reform Act (PRA). Prostitution Reform Act, 2003 No. 28 (N.Z.). Most sex work in the United States remains criminalized, but New Zealand's actions still serve as an example of how simple it could be to protect sex workers during the pandemic.

¹¹⁰ Stacey-Leigh Manuel, *The Multiplying Threats Facing Sex Workers Today*, OPEN SOCIETY FOUNDATIONS (Sept. 1, 2020), <https://www.opensocietyfoundations.org/voices/the-multiplying-threats-facing-sex-workers-today>.

¹¹¹ *Id.*; see COVID-19 Guide, *supra* note 23 (set of guidelines created by organizations in Canada).

¹¹² Manuel, *supra* note 110; Platt et al., *supra* note 22.

particularly harmful to sex workers, with the passage of FOSTA-SESTA, which pushed sex workers away from online platforms.¹¹³ The government's exclusion of sex workers from the supports provided throughout the COVID-19 pandemic and failure to implement programs to specifically protect them, has made the problem worse.¹¹⁴ The U.S. government's criminalization of sex work must end, and other methods must be implemented. This section will discuss such alternatives.

A. *SAFE SEX Workers Study Act*

At the end of 2019, in response to the passage of FOSTA-SESTA, Representative Ro Khanna (D-CA) introduced the SAFE SEX Workers Study Act.¹¹⁵ The bill sought to grant the National Institute of Health (NIH) the ability “to study how FOSTA-SESTA has impacted sex workers’ safety, health, and proximity to violence”¹¹⁶ At the FOSTA hearings, Rep. Khanna voiced his concerns that Congress had not considered the devastating impact the legislation would have on sex workers.¹¹⁷ As a result, he introduced the SAFE SEX Workers Act study, in hoping to provide data that would sway otherwise undeviating members of Congress to consider repeal.¹¹⁸ But Rep. Khanna specifically noted that the ultimate purpose of such a study would be “[to] help galvanize a movement to repeal FOSTA-SESTA.”¹¹⁹

But activists who had been working on getting Congress's attention for years on the treatment of sex workers in the United States (even before the passage of FOSTA-SESTA) often understand their progress as intertwined with decarceration, prison abolition, and LGBTQ rights movements.¹²⁰ As a result, the SAFE SEX Workers Study Act may not be radical enough to

¹¹³ FOSTA-SESTA, *supra* note 8; Romano, *supra* note 6.

¹¹⁴ See, e.g., Fancy Feast, *supra* note 88.

¹¹⁵ SAFE SEX Workers Study Act, *supra* note 17.

¹¹⁶ Ceron, *supra* note 19.

¹¹⁷ *Id.* (“It’s not even like we had a debate in Congress and said, ‘OK, [FOSTA] is going to drive sex workers out onto the streets and increase violence, but the benefits outweigh the risks,’ . . . ‘There wasn’t even a consideration of the impact.’”).

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ *Id.*

overcome these systemic harms.¹²¹ However, activist Katie D’Adamo discussed in an interview shortly after introducing the SAFE SEX Workers Act, how, if more radical legislation failed, more damage would result against the movement generally.¹²²

Unfortunately, with the COVID-19 pandemic creating further public health concerns for sex workers, legislation like the SAFE SEX Workers Act is too little, too late. The legislation was introduced in December of 2019,¹²³ without gaining any movement in Washington.¹²⁴ Shortly after the bill’s introduction, COVID-19 spread across the globe and further harmed sex workers.¹²⁵ Congress continues to sit on this issue and even excludes a population of people who the pandemic has disproportionately impacted from their numerous relief packages.¹²⁶ While the proposed legislation did not plan for a pandemic, in the end, the resulting study would miss the mark, as COVID-19 and the government’s simultaneous failure to protect sex workers has already made its impact.

B. Sex Worker Created Solutions

In response to the signing of FOSTA-SESTA and the COVID-19 pandemic, sex workers and sex worker-led organizations have conducted their own studies¹²⁷ and shared resources to combat increased health and safety concerns.¹²⁸ These resources have been primarily disseminated online and provide a range of information: results highlighting how FOSTA-SESTA

¹²¹ See *id.* (activist stating that shifting away from radical change and towards a study is a “very, very hard decision”).

¹²² *Id.*

¹²³ SAFE SEX Workers Study Act, *supra* note 17.

¹²⁴ See *id.* (introduced in the House of Representative on December 17, 2019, without any further action).

¹²⁵ See *supra* Part III.

¹²⁶ See American Rescue Plan Act of 2021, *supra* note 80 and accompanying text; CARES Act of 2020, *supra* note 82 and accompanying text.

¹²⁷ E.g., Blunt & Wolf, *supra* note 2.

¹²⁸ See Katie D’Adamo, *Special Edition: Resources and Tips for Getting What’s Yours and Staying Safe*, SLIXA BLOG (Apr. 7, 2020), <https://www.slix.com/blog/covid-19/financial-resources-assistance-sex-workers/>; *Keep Calm and Hustle On(line): How to Stay Safe as a Provider in the Time of COVID-19*, SLIXA BLOG (Apr. 3, 2020), <https://www.slix.com/blog/guides/keep-calm-and-hustle-on-how-to-stay-safe-as-a-provider-in-the-time-of-covid-19/> [hereinafter *How to Stay Safe*]; Vital Strategies, *Sex Work, COVID-19, and Harm Reduction* (2020), https://www.vitalstrategies.org/wp-content/uploads/Vital_Strategies_OverdosePrevention_SexWorkersandCOVID.pdf [hereinafter Vital Strategies].

has harmed sex workers, COVID-19 relief funds and resources, access to legal help, how to move sex work online, and other harm reduction techniques.¹²⁹ Not only do these reports and aids highlight the resilience of the sex working community, but they also reveal that simple solutions exist to quell some of FOSTA-SESTA's problems.¹³⁰

Before the COVID-19 pandemic, Hacking//Hustling released its report discussing the impact of FOSTA-SESTA and the removal of Backpage.com on sex workers.¹³¹ While the report came from a small sample of sex workers, it essentially did what the proposed SAFE SEX Workers Act set out to do: research the immediate effects of FOSTA-SESTA on sex workers.¹³² However, Hacking//Hustling did the research with only a three-year turnaround from the time FOSTA-SESTA was signed to the report's publication.¹³³ While a report like this may have been challenging to create, its final production proves that the study proposed in the SAFE SEX Workers Act could be done. And not only is it possible, but it could have started as soon as FOSTA-SESTA came into effect, rather than holding off as a global pandemic continues to ravage an already vulnerable community.

In addition to sex workers' quick research efforts to determine the effects of FOSTA-SESTA on their community, various community groups promptly responded with various resources to combat the COVID-19 pandemic.¹³⁴ Numerous aids were created and released in the first months of stay-at-home orders, including sharing COVID-19 guidelines for sex workers and clients alike, identifying best practices for online work, and providing information on where to find economic resources.¹³⁵ Similar to the Erased report, these resources display how alternatives to the current treatment of sex workers during the pandemic (no particularized resources or government assistance) are not the only option.

¹²⁹ *E.g.*, *supra* note 128; Blunt & Wolf, *supra* note 2.

¹³⁰ *See* Vital Strategies, *supra* note 128.

¹³¹ *See supra* notes 49–56.

¹³² Blunt & Wolf, *supra* note 2; SAFE SEX Workers Study Act, *supra* note 17.

¹³³ Blunt & Wolf, *supra* note 2; FOSTA-SESTA, *supra* note 8.

¹³⁴ *E.g.*, Vital Strategies, *supra* note 128; *Sex Work Mutual Aid Funds*, *supra* note 98; COVID-19 Guide, *supra* note 23.

¹³⁵ *See Sex Work Mutual Aid Funds*, *supra* note 98; Vital Strategies, *supra* note 128.

Some examples of those resources include Maggie's COVID-19 guidelines,¹³⁶ Vital Strategies' Harm Reduction Report,¹³⁷ and Slixa's blog posts on staying safe and working online.¹³⁸ The resource created by Vital Strategies, a global public health organization, compiled sex worker created resources and offered both financial and health-related advice to sex workers and clients during the pandemic.¹³⁹ The document also listed sex-worker-specific COVID-19 guides and other resources for sex workers.¹⁴⁰ One of those additional resources was an article titled "Resources and Tips for Getting What's Yours and Staying Safe."¹⁴¹ That article was published about a month into the COVID-19 pandemic in the United States and helped guide sex workers through COVID-related financial relief options, immediate assistance with bills, imprisonment, and direct harm reduction resources.¹⁴² A few days before that article was published, another piece was published to help sex workers navigate the online space (for those who can access it) during the COVID-19 pandemic.¹⁴³ Within just a few weeks of the first stay-at-home orders in the United States, sex workers and their collectives had created guides and resources for one another.¹⁴⁴ So, what prevented the U.S. government from implementing sex-worker-specific relief?¹⁴⁵

¹³⁶ COVID-19 Guide, *supra* note 23.

¹³⁷ Vital Strategies, *supra* note 128 (suggesting to harm reduction service providers that "it's not that simple or easy for sex workers to 'just go online' the way they're often advised to, especially in a post-SESTA/FOSTA landscape—particularly for populations without much access to tech, tech and privacy protection skills, and without considerable resources to invest in overhead and branding costs").

¹³⁸ D'Adamo, *supra* note 128; *How to Stay Safe*, *supra* note 128.

¹³⁹ Vital Strategies, *supra* note 128; Vital Strategies, *About Us* (last visited Mar. 18, 2021), <https://www.vitalstrategies.org/about-us/> [hereinafter Vital Strategies, *About Us*].

¹⁴⁰ Vital Strategies, *supra* note 128.

¹⁴¹ *Id.*

¹⁴² D'Adamo, *supra* note 128.

¹⁴³ *How to Stay Safe*, *supra* note 128.

¹⁴⁴ See generally *supra* note 128 and accompanying text.

¹⁴⁵ Note that some sex workers *did* have access to unemployment compensation and other COVID-relief. See Bubbles, *Sex Workers: You Can and Should Request Pandemic Relief*, TITS AND SASS (Apr. 14, 2020), <http://titsandsass.com/sex-workers-you-can-and-should-request-pandemic-relief/> (guiding eligible sex workers through the process of getting stimulus checks and unemployment). However, the federal government did not implement specific programs to protect already marginalized groups who would face the most harm as a result of the pandemic. *But see* NYC Health Department, *Safer Sex and COVID-19* (June 8, 2020), <https://www1.nyc.gov/assets/doh/downloads/pdf/imm/covid-sex-guidance.pdf> (New York did not implement specific support for sex workers but did release a guide acknowledging sex workers in the pandemic response).

C. Alternatives Solutions for Protecting Sex Workers in the United States

The author hypothesizes that the continued stigma from the criminalization of sex work is what has prevented the protection of sex workers during the COVID-19 crisis. In fact, since the passage of FOSTA-SESTA, national rhetoric regarding sex trafficking has increased, prompting the legislature to suggest stricter regulation and policing of sex work.¹⁴⁶ A conflict between transactional sex workers and victims of sex trafficking also exists,¹⁴⁷ making it difficult to create appropriate legislation for either group. But to prevent further systemic harms against sex workers, the United States must move away from criminalization toward a new legal framework.

To protect sex workers, the United States could adopt one of many traditional approaches that would extend benefits and protections to sex workers and improve their lived experiences. For instance, the United States could adopt a neo-abolitionist approach, criminalizing activity that profits off the exploitation of sex workers.¹⁴⁸ More radically, and what may be sex workers' preferred way forward,¹⁴⁹ the country could decriminalize sex work altogether.¹⁵⁰ To supplement decriminalization, some countries have legalized sex work, implementing legislation that allows the state to regulate sex work.¹⁵¹ These methods have benefits and costs for sex workers, but it is undeniable that any alternative method to the current approach in the United States would change the country's sex workers' current conditions.

¹⁴⁶ See Senator Lindsey Graham's EARN IT Act of 2020, S.3398, 116th Cong. (2020) (proposing the creation of a commission to further police online spaces for child sex trafficking while limiting protections for online service providers, similarly to FOSTA-SESTA); but see also National Health Care for the Homeless Council, *American Rescue Act: Summary of Key Provisions for the HCH Community*, <https://nhchc.org/wp-content/uploads/2021/02/Final-Summary-of-Provisions-in-American-Rescue-Act.pdf> (Mar. 12, 2021) (highlighting the "\$30 M to support community-based overdose prevention programs, syringe services programs, and other harm reduction services," which signals a shift in the federal government's long held animus toward harm reduction services that could benefit the sex working community).

¹⁴⁷ Tung, *supra* note 33.

¹⁴⁸ Hila Shamir, *Feminist Approaches to the Regulation of Sex Work: Patterns in Transnational Governance Feminist Law Making*, 52 CORNELL INT'L L.J. 177, 179–80 (2019); Library of Parliament, *Prostitution: A Review of Legislation in Selected Countries*, Pub. No. 2011-115-E, at 12–14 (Nov. 3, 2011).

¹⁴⁹ Blunt & Wolf, *supra* note 2.

¹⁵⁰ See Shamir, *supra* note 148, at 181–82 (discussing decriminalization); Library of Parliament, *supra* note 148, at 6–9 (discussing the approach in New Zealand).

¹⁵¹ See Library of Parliament, *supra* note 148, at 2–4, 9–12 & 19–21 (discussing the legalization approaches in Australia, the Netherlands, Nevada).

Rather than asking what the most practical method forward is, allies to sex workers, particularly those with the power to change laws, must not debate the answer but instead look to the actions sex workers have *already* taken to understand where to go from here. While there is no retrospective way to prevent the harms that sex workers have faced due to the pandemic, it is apparent that there are immediate ways to support sex workers rather than researching their harms under the SAFE SEX Workers Act.

Of course, like the proposed research in the SAFE SEX Workers Act, the adoption of such frameworks would not happen overnight, and as a result, sex workers would continue to be disproportionately impacted by COVID-19. But movement toward a society in which sex workers are treated equally is the best way forward. But to lessen the impact as quickly as possible, Congress should consider decriminalizing sex work and repealing FOSTA-SESTA. Then, to immediately alleviate some of the harms caused to the community from through the COVID-19 pandemic, the government should implement support programs and spread resources, in the same manner that sex workers already have. Finally, the government must recognize sex workers as equal human beings and include them in conversations about legislation that will affect their livelihoods.¹⁵² Recognizing sex workers as working members of society, allowing them to guide decisions about their own lives, and bringing them into the public discourse will better the lived experience of sex workers in the United States.

V. CONCLUSION

Sex workers have been marginalized as long as the United States has existed. After the signing of FOSTA-SESTA, many sex workers were forced offline and pushed deeper into the shadows.¹⁵³ Then, in 2020, the COVID-19 pandemic and the government's lack of care for sex workers further worsened the health and well-being of sex workers.¹⁵⁴ While some legislators proposed studies to determine the adverse outcomes of FOSTA-SESTA, any

¹⁵² See Ceron, *supra* note 19 (Rep. Khanna stated, “[U]ltimately [sex workers] need to be invited to committee hearings. Their stories are the ones that need to be heard. Their advocacy is making the difference.”). Because the COVID-19 pandemic has increased use of video conferencing, Congressional hearings may be more accessible to sex workers and their allies across the country, making it easier for Congress to hear firsthand what the community needs.

¹⁵³ Blunt & Wolf, *supra* note 2.

¹⁵⁴ See *supra* Part III.

such research could hardly overcome the damage done to sex workers as a result of the COVID-19 pandemic. As such, the United States must move toward decriminalization, immediately implement resources to support the sex working community through the COVID-19 pandemic and begin to bring sex workers into the conversation.