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FOSTA's Mess

DANIELLE KEATS CITRON[†]
QUINTA JURECIC[†]

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[†] Jefferson Scholars Foundation Schenck Distinguished Professor in Law, Chapman & Caddell Professor of Law, LawTech Center Director, University of Virginia School of Law; Vice President, Cyber Civil Rights Initiative; 2019 MacArthur Fellow. Thanks to brilliant research assistants Emily Hockett, Bao Kham Chou, and Rebecca Weitzel. Always grateful for my supportive Dean Risa Goluboff.

[†] Fellow, Brookings Institution; Senior Editor, Lawfare

Abstract

In 2018, Congress rightly highlighted the problem of sex trafficking, which is a moral abomination and vicious scourge. It condemned sites like Backpage.com that helped sex traffickers accomplish their crimes while profiting handsomely. But the legislative outcome of this congressional focus, the Fighting Online Sex Trafficking Act of 2018, has done little to curtail sex trafficking. Indeed, that law has made life more dangerous for sex workers and created difficulties for prosecutors pursuing cases against sex traffickers. Congress wasn't wrong to focus its energies on content platforms enabling harmful illegality. But FOSTA wasn't the right way to incentivize platforms to tackle illegal sex trafficking, let alone other forms of destructive illegality.

INTRODUCTION

Sex trafficking is a moral abomination and contemporary scourge.[1] The damage to victims is incalculable. If victims survive being raped, hit, drugged, starved, and abused, if they manage to escape the clutches of their tormentors, then they are forever traumatized. Far too often, normal is not something they can reclaim.[2]

The number of players involved in sex trafficking has grown exponentially in the digital age. It's not because people are more deviant, cruel, and destructive. No doubt, they are just as deviant, cruel, and destructive as ever before. Digital platforms and tools have made the trafficking easier to accomplish.[3] Criminal rings use content platforms and encrypted messaging apps to connect with buyers (better described as rapists) and to arrange the sexual exploitation of the vulnerable.

In 2018, Congress highlighted the problem of sex trafficking, rightly condemning sites like Backpage.com that helped sex traffickers accomplish their crimes while profiting handsomely. But as part of that effort, the legislature passed a law that has done little to curtail sex trafficking, and which has made life more difficult for prosecutors to pursue cases against sex traffickers and more dangerous for people engaged in consensual sex work. The misguided congressional solution has a name: The Fighting Online Sex Trafficking Act (FOSTA).

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[1] U.S. General Accountability Office, Sex Trafficking: Online Platforms and Federal Prosecutions (June 2021) (defining sex trafficking as the commercial sexual exploitation of adults through fraud, force, or coercion, or of children under the age of 18 with or without fraud, force, or coercion). Under 22 U.S.C. § 7102(12), sex trafficking involves the "recruitment, harboring, transportation, provision, obtaining, patronizing, or soliciting of a person for the purpose of a commercial sex act." Traffickers often target vulnerable people such as runaways, those living in poverty, or those wrestling with drug addictions. *Id.* at 1.

[2] *See, e.g.*, Julie Dahlstrom, *The Elastic Meaning(s) of Human Trafficking*, 108 CALIF. L. REV. 379 (2020).

[3] GAO Report, *supra* note 1, at 1 (noting that online platforms make it easier for traffickers to exploit victims and to find buyers).

Congress wasn't wrong to focus its energies on content platforms enabling harmful illegality.[4] Courts had adopted an expansive interpretation of Section 230 of the Communications Decency Act of 1996. Under judicial doctrine, content platforms were shielded from liability for illegality that they enabled even if they solicited or encouraged the illegality.[5] Section 230's legal shield did not cover federal criminal law, the Electronic Communications Privacy Act, and intellectual property law.[6] Nonetheless, those tools could not (or were not being used to) tackle much of the wrongful activity that content platforms enabled, including sex trafficking.

This short essay lays out why FOSTA was the wrong way to reform Section 230. Indeed, just months after FOSTA's passage, we co-authored a piece warning that FOSTA wasn't the right way to incentivize platforms to tackle illegal sex trafficking, let alone other forms of destructive illegality.[7] This is by no means a victory lap—just a sad, predicable coda to a botched reform effort.

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[4] One of us has been advocating for reform of Section 230 for more than a decade so that sites enabling crimes would bear duties of care to their users. Danielle Keats Citron, *Cyber Civil Rights*, 89 B.U. L. REV. 61 (2009) (arguing that Section 230's immunity for under-filtering illegality should be conditioned on a "duty of care" negligence standard, which for instance would include the facilitation of traceable anonymity so perpetrators could be caught and sued); Danielle Keats Citron, *Mainstreaming Privacy Torts*, CAL. L REV. (2011); DANIELLE KEATS CITRON, HATE CRIMES IN CYBERSPACE (2014) (proposing a Section 230 carveout for sites that principally host nonconsensual pornography and cyber stalking); Danielle Keats Citron & Benjamin Wittes, *The Internet Will Not Break: Denying Bad Samaritans § 230 Immunity*, 86 FORDHAM L. REV. 401, 406 (2017) (offering statutory language to operationalize a duty of care in a "reasonable steps" approach); Danielle Keats Citron & Mary Anne Franks, *The Internet as Speech Machine and Other Myths Confounding Section 230 Reform*, 2020 U. CHI. LEGAL F. 45, Danielle Keats Citron, *How to Fix Section 230*, B.U. L. REV. (forthcoming 2023) (clarifying, narrowing, and refining reform proposal to exclude sites that purposefully encourage, solicit, or keep up intimate privacy violations, stalking, or harassment and to impose a specific duty of care for sites to take reasonable steps to address intimate privacy violations, stalking, or harassment).

[5] 47 U.S.C. § 230(c) (2018).

[6] *Id.* § 230(e).

[7] Citron & Jurecic, *Platform Justice: Content Moderation at an Inflection Point*, HOOVER INSTITUTE AEGIS SERIES (2018).

I. SECTION 230 AND FOSTA

We have collectively written so much about Section 230 that we hesitate to go over well-trod ground. To get right to the point, the drafters of Section 230 aimed to incentivize private efforts to moderate user-generated content.[8] The legal incentive materialized as a shield from liability for, as the title of Section 230(c) says, "protection for 'Good Samaritan' blocking and screening of offensive material."[9]

Section 230(c) has two key provisions. Section 230(c)(1) addresses the under-removal of content. It says that "no provider or user of an interactive computer service shall be treated as a publisher or speaker of any information provided by another information content provider."[10] Section 230(c)(2), conversely, concerns the over-removal of content.[11] It declares that providers will not be held liable for "any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected."[12] The legal shield has a few exemptions, including violations of federal criminal law, intellectual property claims, and the Electronic Communications Privacy Act (which regulates certain forms of government surveillance).[13]

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[8] *Id.*
[9] 47 U.S.C. § 230(c) (2018).
[10] *Id.* § 230(c)(1).
[11] *Id.* § 230(c)(2).
[12] *Id.* § 230(c)(2). A private party's ability to block or filter offensive, constitutionally protected speech reflects First Amendment tradition—that private parties should be the ones setting norms around speech activity, rather than the government. As Frederick Schauer explains, "individual decisions about speech-preferring some ideas and information to others, placing one's property at the service of some ideologies and not others-are central to the concept of a marketplace of ideas. Ideas fail or succeed according to their ability to win support in free public debate. A private person participates in that debate when he contributes the use of his property to the proponents of certain ideas; that is an act of advocacy as surely as if he were disseminating the ideas himself." Frederick F. Schauer, Hudgens v. NLRB *and the Problem of State Action in First Amendment Adjudication*, 63 MINN. L. REV. 433, 449 (1977).
[13] *Id.* § 230(e).

Much of the litigation concerning Section 230 has focused on the under-filtering provision: Section 230(c)(1). Courts have interpreted that provision in a broad—to be precise, overbroad—fashion. Judges have extended the immunity to sites that aren't being sued for publishing someone else's speech, as the language of the statute discusses.[14] They have extended the legal shield to sites being sued for enabling civil rights violations, designing defective products, or encouraging or soliciting users to engage in illegality, such as nonconsensual pornography.[15]

The situation leading up to FOSTA's enactment was stark. State and local prosecutors could not prosecute sites under state criminal laws for aiding and abetting sex trafficking. State attorneys general could not seek civil penalties from sites that engaged in unfair practice of enabling sex trafficking. Victims could not sue sites for tortiously enabling their sexual exploitation. They could not seek redress from the parties in the best position to minimize their harm; platforms could continue to profit from their enablement of illegality.

Congress turned its attention to the issue following a Senate investigation into the classified advertising site Backpage.com, which had successfully relied on Section 230's protections to shield itself from liability. Backpage, the Senate Permanent Subcommittee on Investigations found, had helped sex traffickers get around prohibitions on sex ads posted by sellers under 18, which had resulted in the rape of women and children.[16] At the time, the site was the largest and most profitable outlet for posting sex ads in the United States. Adults selling sex consensually often relied on the site to safely find clients. But the site also hosted countless ads at the behest of sex traffickers. Senate investigators found that Backpage assisted sex traffickers by regularly editing ads to remove keywords that would signal illegality such as "teenage" or "little girl."[17]

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[14] Citron, *Hate Crimes in Cyberspace*, *supra* note; Citron, *Cyber Civil Rights*, *supra* note.
[15] Citron & Wittes, *supra* note.
[16] Jurecic, *The Politics of Section 230 reform: Learning from FOSTA's mistakes*, BROOKINGS REPORT (2022).
[17] *Id.*

With the Senate investigation fresh in their minds, members of Congress set out to tackle the problem of online sex trafficking and the role of platforms in enabling sexual exploitation. They did so despite the new information uncovered by Senate investigators showing that Backpage's operators were involved with writing sex trafficking ads themselves, which would have jeopardized the site's ability to use Section 230 as a shield in the future.[18] Senators and representatives from both sides of the aisle got involved. Legislative negotiations became messy. One of us (Citron) worked with Republican and Democratic Senators on the effort.[19] At every stage, advisers to staff sought to ensure that FOSTA would tackle the problem in a narrow and effective way. Yet at every stage, the bill became more bloated and confusing. The result was a disappointment, to say the least.

As one of us (Jurecic) explains in a report for the Brookings Institution, FOSTA is a "hodgepodge . . . with a number of moving pieces—few of which are clearly defined."[20] FOSTA has four main parts. First, it created a new crime, 18 U.S.C. § 2421A, of "own[ing], manag[ing], or operat[ing]" a platform "with the internet to promote or facilitate prostitution." Under that provision, harsher penalties are available if the defendant promotes prostitution of five or more people in "reckless disregard of the fact that such conduct contributed to sex trafficking."[21] Second, FOSTA expanded existing federal sex trafficking law, 18 U.S.C. §1591 (Section 1591), to criminalize "knowingly assisting, supporting, or facilitating sex trafficking." Third, it created a new exception in Section 230 for federal civil claims under 18 U.S.C. 1595, which established a civil remedy for violations of Section 1591. It also excluded from Section 230 state criminal prosecutions if conduct would violate Section 1591, as well as for conduct that violated Section 2421A. In other words, the legal shield no longer stands in the way of state prosecutors bringing criminal charges under coextensive state criminal law. Lastly, FOSTA allowed state attorneys general to bring federal

[18] *Id.*
[19] Citron advised Senator Robert Portman's staff and worked closely with then-Senator Kamala Harris's tech adviser, Jonathan Mayer, offering lawmakers various different approaches—none were adopted.
[20] Jurecic, *supra* note.
[21] 18 U.S.C. § 2421A.

civil claims under Section 1595 on behalf of state residents harmed by conduct violating Section 1591.

Taking this altogether, FOSTA was an attempt to increase the number of enforcers involved (state prosecutors, state attorneys general, and plaintiffs) and the potential avenues of criminal and civil liability (with the addition of new exemptions to Section 230). More potential litigants and prosecutors, more potential avenues for criminal and civil liability: what could go wrong? Unfortunately, quite a bit.

II. TOO MANY COSTS, TOO FEW BENEFITS

After FOSTA's passage, we teamed up to write about our concerns. In a report for the Hoover Institution, we underscored our concerns about the law's confusing language. We argued that FOSTA's "unclear 'knowingly facilitating' language could perversely push platforms" to either engage in no moderation at all or, on the flip side, "engage in over-the-top moderation to prove their anti-sex-trafficking bona fides and to strengthen their argument that they did not knowingly facilitate such activity in any given case."[22] As we said then, "[o]verly aggressive moderation would likely involve shutting down hubs devoted to sex advertising or even websites that are known to host such advertising, even if the majority of users turn to the platform for other purposes."[23] We raised the specter of the removal of sexual expression online—no matter if there were no connection to sex trafficking.[24] Sites might use algorithmic filtering to solve the problem, which would result in the blocking or removal of "*anything* related to sex, including activities that have nothing to do with illegal sex trafficking."[25] Our concern was that "aggressive over-removal [of sexual expression] seem[ed] the most likely danger."

Some of the over-reaction might be have been related to the shuttering of Backpage, which had nothing to do with FOSTA except for the timing of its demise. Shortly after FOSTA's

[22] Citron & Jurecic, *supra* note, at 7.
[23] *Id.*
[24] *Id.*
[25] *Id.*

passage, the DOJ indicted five Backpage executives and employees and the site's two cofounders for charges including money laundering and "facilitating prostitution." Backpage CEO Carl Ferrer separately pleaded guilty to conspiracy charges, which were unrelated to FOSTA.[26] Even though FOSTA had nothing to do with the law enforcement actions against Backpage, members of Congress pointed to their new law as the reason for its shuttering. Then-Senator John McCain attributed the seizure of "malicious sex marketplace Backpage.com" to the "historic effort in Congress to reform the law [Section 230] that for too long has protected websites like Backpage from being held liable for enabling the sale of young women and children."[27]

In short order, pointing to FOSTA, websites hosted in the United States began shuttering classified ads sections. Craigslist, for instance, explained that the "legal risk was too great for it to maintain that corner of Craigslist, on which users often posted solicitations for sex: 'Any tool of service can be misused. We can't take such a risk without jeopardizing all our other services, so we have regretfully taken craigslist personals offline.'"[28]

Sex workers found themselves shut out of online spaces. Sites removed sexual content that might bear any relationship to sex work, including consensual sex work. As Kendra Albert and their coauthors have explained, social media companies have "categorically exclud[ed] people in the sex trades and people profiled in being in the sex trades."[29] A qualitative study conducted in 2019 found that male sex workers faced significant psychological and financial damage. Several male escorting sites shut down or sharply limited access after FOSTA's passage. One sex worker said that he lost the personal website and email that he used for advertising and communicating with clients after his web hosting provider pulled its service with no explanation.[30]

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[26] Jurecic, *supra* note.
[27] *Id.*
[28] *Id.*
[29] Albert et al., *FOSTA in Legal Context*, 52 COLUM. HUMAN RIGHTS L. REV. 1084, 1085 (2021).
[30] Eichert, "It Ruined My Life': FOSTA, Male Escorts, and the Construction of Sexual Victimhood in American Politics," 26 Virginia Journal of Social Policy & the Law 201, available at https://web.archive.org/web/20220412174909/http://vjspl.org/wp-content/uploads/2020/03/12.2-FOSTA.pdf. (2019)

Cloudflare, a web infrastructure company, pulled its services from the social network Switter, which in the wake of FOSTA had been serving as an online refuge for sex workers whose content had been removed from other parts of the web. Cloudflare's general counsel Douglas Kramer explained that the termination of its service to Switter was "related to our attempts to understand FOSTA, which is a very bad law and a very dangerous precedent."[31]

Crucially, sex workers lost access to sites that helped them crowdsource safety tips and information about dangerous clients who should be avoided. In June 2018, two months after FOSTA's passage, a sex worker was assaulted in her home by a client after she had been unable to check his identity against bad date lists and other screening mechanisms. Sex workers and scholars voiced alarm about this possibility because, as Jennifer Lynne Musto and Danah Boyd have underscored, anti-trafficking efforts often "blur the boundaries between sex trafficking and sex work."

As one of us (Jurecic) has underscored, the dangers for sex workers have "added up." Sex workers have been forced to find clients on the streets because they no longer could access online hubs. According to a survey of sex workers conducted by Hacking//Hustling, a collective of sex workers and advocates, many sex workers' social media accounts were shut down or shadow banned, which prevent their content from being readily seen or accessed at all.[32] The group concluded that without a centralized hub on which to advertise online, sex workers experienced economic and housing instability and faced uncertainty and violence.[33] Another study echoed these findings, underscoring the fact that sex workers were forced to find clients on the streets, which entailed a significant risk of harm and financial hardship.[34] As a deputy director of a San Francisco health clinic remarked several months after FOSTA became law, "without being able to advertise online, a huge number of sex

[31] *Id.*
[32] *Id.* (citing Blunt, Danielle, and Ariel Wolf. Erased: The Impact of FOSTASESTA and the Removal of Backpage. Hacking//Hustling https://hackinghustling.org/erased-the-impact-of-fosta-sesta-2020/) (2020).
[33] *Id.*
[34] Musto et al., *Anti-Trafficking in the Time of FOSTA/SESTA: Networked Moral Gentrification and Sexual Humanitarian Creep*, 10 SOC. SCI. 7 (2021), https://www.mdpi.com/2076-0760/10/2/58/htm.

workers were forced to go outside, and many have reported that former pimps came out of the woodwork offering to 'manage' their business again. . . . The very bill that was supposed to stop trafficking has quite literally given formerly irrelevant traffickers new life."[35]

What about the sites hosted in the United States that knowingly facilitated sex trafficking? Have they faced criminal prosecution? Since FOSTA's passage, there have been no state prosecutions. Perhaps the reason could be FOSTA's confusing language. In 2018, when FOSTA first became law, we wondered if the law's confusing language might discourage state and local prosecutors from expending scarce resources on enforcement actions. Likewise, as far as we could find, state attorneys general have also not brought claims on behalf of their residents seeking civil penalties.[36]

FOSTA doesn't appear to have proved any more useful at the federal level. At the time of FOSTA's passage, even the Justice Department voiced concerns about the law's lack of clarity.[37] And a June 2021 review conducted by the GAO reported that federal prosecutors have found little use for the new criminal statute created by FOSTA, Section 2421A. As of the report's publication, the Justice Department had brought only two cases under Section 2421A; in one case, the defendant successfully moved for an acquittal on that count.[38] Federal prosecutors may not need the additional criminal law, the GAO explained. Rather, they have had success using existing racketeering and money laundering charges against online platforms, as the Backpage.com case illustrated.

Might the absence of prosecutions indicate that online sex trafficking has been appreciably deterred under FOSTA? Likely not. The GAO report contained no data suggesting that rates of online trafficking, or sales in consensual sex, have fallen. Instead, it "described an online sex trade that hasn't shrunken since April 2018, but instead fragmented across a number of platforms and

[35] Jurecic, *supra* note.
[36] Albert et al., *supra* note.
[37] Citron & Jurecic, *supra* note.
[38] Jurecic, *supra* note.

apps, some of which moved overseas."[39] In some cases, sites moved to countries where prostitution is legal on the notion that they would be unlikely to face prosecution.[40] As soon as U.S. law enforcement shut down Backpage, replacement websites like OneBackpage.com and Backpage.ly appeared, hosted in Poland, and bearing the disclaimer, "FOSTA-SESTA—No Operator of this site reviews content or otherwise screens the content of this site."[41] To be sure, as Nicholas Nugent explains in his important work, moving overseas means that sites may not load as quickly or work well.[42] That may be worth the trade-off for some sites because it puts them outside the reach of state or federal prosecutors. According to the GAO, the FBI has had difficulty finding sex trafficking victims and traffickers because overseas platforms have refused to cooperate with federal agents.[43]

What about civil suits? This aspect of FOSTA might seem appealing as a way of forcing sites that knowingly enable sex trafficking to internalize the costs that they have externalized onto victims. But this, too, has not been the case. As of 2022, there were fewer than 15 reported cases where plaintiffs have brought claims seeking civil penalties against sites that enabled their sex trafficking.[44] Again, the statute's poor drafting has left courts confused over a number of issues, "from what specific conduct prohibited by federal sex trafficking law is included in FOSTA's Section 230 carve-out; to whether FOSTA also permits state civil claims concerning sex trafficking; to what exactly constitutes

[39] *Id.*
[40] GAO Report, *supra* note, at 14.
[41] Jurecic, *supra* note.
[42] Nugent, Nicholas, The Five Internet Rights (December 2, 2022). Washington Law Review, Forthcoming, https://ssrn.com/abstract=4292196
[43] *Id.*
[44] Our research assistant Bao Chao helped us ascertain that number.

'participation in a venture.'"[45] Courts are split on whether FOSTA implicitly exempted state civil claims from Section 230's legal shield.[46] They are also split on whether plaintiffs must show the required elements of a criminal claim under Section 1591 to trigger the exemption from Section 230's legal shield.[47] As long as the ambiguities remain, platforms will remain cautious, erring on the side of removing sexual expression. Kendra Albert and co-authors rightly argue that "Though the exact legal applicability of FOSTA is speculative . . . even the threat of an expansive reading of these amendments has had a chilling effect on free speech."[48]

To sum up, FOSTA hasn't been an effective tool of redress and deterrence against sex trafficking, as the drafters hoped. Instead, as Kate D'Adamo—a sex worker advocate and partner at the organization Reframe Health and Justice—explained in a

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[45] See, e.g., Doe v. Kik Interactive, Inc., 482 F. Supp. 3d 1242 (S.D. Fla. 2020) (construing that FOSTA, in light of its legislative history, requires Plaintiffs to plead that Defendant knowingly participated in the sex trafficking venture); Doe v. Reddit, Inc., 2021 U.S. Dist. LEXIS 129876 (C.D. Cal. July 12, 2021); J.B. v. G6 Hosp., LLC, 2021 U.S. Dist. LEXIS 170338 (N.D. Cal. Sep. 8, 2021); Day v. TikTok, Inc., N2022 U.S. Dist. LEXIS 34380 (N.D. Ill. Feb. 28, 2022); M. L. v. craigslist Inc., No. C19-6153 BHS-TLF, 2020 U.S. Dist. LEXIS 166334 (W.D. Wash. Sep. 11, 2020); Doe v. Twitter, Inc., 2021 U.S. Dist. LEXIS 157158 (N.D. Cal. Aug. 19, 2021) (holding that the "known or should have known" language of Section 1595 rather than the actual knowledge standard of Section 1591 applies); In re Facebook, Inc., 625 S.W.3d 80 (Tex. 2021); Doe v. MindGeek USA Inc., 2021 U.S. Dist. LEXIS 236874 (C.D. Cal. Dec. 2, 2021); Jane Doe #1 v. MG Freesites, Ltd., 2022 U.S. Dist. LEXIS 23199 (N.D. Ala. Feb. 9, 2022); DeLima v. YouTube, LLC, 2018 U.S. Dist. LEXIS 160145 (D.N.H. Aug. 30, 2018); Green v. YouTube, LLC, 2019 U.S. Dist. LEXIS 55577 (D.N.H. Mar. 13, 2019).

[46] *Compare* Doe v. Reddit, Inc., 2021 U.S. Dist. LEXIS 129876 (C.D. Cal. July 12, 2021) (dismissing state law claims) *with* In re Facebook, Inc., 625 S.W.3d 80 (Tex. 2021) (allowing state law claims to proceed because they were functionally equivalent to Section 1595).

[47] *Compare* Doe v. Kik Interactive, 482 F. Supp. 3d 1242 (S.D. Fla. 2020) (dismissing plaintiff's claim against message service for facilitating sex trafficking because private right of action for violations of Section 1591 are only allowed upon allegation that defendant subjectively knew that it had participated in a sex trafficking venture) and J.B. v. G6 Hosp. LLC, 2021 WL 4079207 (N.D. Cal. Sept. 8, 2021) (same) *with* Doe v. Twitter, 2021 WL 3675207 (N.D. Cal. Aug. 19, 2021) (refusing to dismiss plaintiffs' claims against Twitter on the grounds that it was sufficient to allege that Twitter knew or should have known that plaintiffs were victims of sex trafficking and did not need to allege heightened knowledge).

[48] Albert et al., *supra* note.

Brookings webcast, the internet was once a crucial space for sex workers to find safety, clients, and support. Now, with FOSTA, sex workers have been denied online outlets that made their lives better.

CONCLUSION

Four years after FOSTA became law, Section 230 has taken up a place of astonishing prominence in American political discourse. Each of the last three presidents have now weighed in: President Trump discussed it numerous times on the campaign trail in 2020. President Biden, while campaigning in the spring of 2020, advocated repealing the law entirely in an interview with the New York Times. And President Obama proposed carveouts for paid advertising in an April 2022 speech. Meanwhile, in the 117th Congress, legislators introduced a slew of bills to remove or reform the liability shield.

As debate continues over the future of Section 230, the failures of FOSTA must be kept in mind. The law demonstrates that vague, poorly defined carveouts to Section 230 can spur platforms to over-moderate, with potentially disastrous effects for vulnerable people. As one of us (Jurecic) has written, Section 230 turns out to be "a sensitive dial: Small adjustments can have wide-reaching, and unanticipated, effects."[49] Policymakers considering changes to the statute must keep in mind the risk of inadvertently pushing platforms to shut down whole swaths of online speech.

FOSTA's passage represented a sea change in the legal landscape around Section 230: for the first time since it became law in 1996, the liability shield had been substantively revised. Yet FOSTA also predated the surge of attention that Section 230 would soon receive. Looking back from 2022, the legislative record around FOSTA is strikingly clean of the broader anxieties over content moderation practices that have now become common on both the political left and right.[50]

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[49] Jurecic, The Politics of Section 230 Reform: Learning from FOSTA's mistakes https://www.brookings.edu/research/the-politics-of-section-230-reform-learning-from-fostas-mistakes/. (2022).
[50] Jurecic, *supra* note.

The increased political attention to Section 230 that made reform newly possible has also, ironically, made reform difficult—certainly the careful revisions necessary to adjust the statute without creating damage along the lines of FOSTA. While there is high-level support in Washington, D.C. for some type of change to Section 230, the political parties are pulling in very different directions. Democrats tend to voice concerns that major platforms allow too much abusive content to remain up, and advocate for reforms that—they argue—would encourage platforms to moderate more assertively.[51] Republicans, meanwhile, complain that large social media websites are overly aggressive in taking content down, and seek changes to Section 230 that—in theory, if not necessarily in practice—would push companies to take a more hands-off approach.[52] With such a divergence of interests, the politics suggest that hashing out a compromise may be difficult.

Often when policymakers propose revising the statute, the actual focus is less on the mechanics of intermediary liability and more on making a symbolic point concerning political and cultural anxieties around the modern internet. This doesn't mean that all is well online—far from it. But to avoid disaster along the lines of FOSTA, reforms to Section 230 must be crafted with specific, concrete goals in mind. This, too, adds to the difficulty of reaching consensus on any change to the statute. The political ruckus distracts from the careful, technical work required to make good policy.

Regardless, advocates and academics alike will keep working on reform for the good of civil rights and liberties. Revisions that minimize uncertainty and clarify industry obligations will be the key to any successful effort.[53]

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[51] Citron & Franks, *supra* note.
[52] *Id.*
[53] Citron, *How to Reform Section 230*, *supra* note.