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The New Pornography Wars

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Abstract

The world's largest online pornography conglomerate, MindGeek, has come under fire for the publishing of "rape videos," child pornography, and nonconsensual pornography on its website, Pornhub. In response, as in the "pornography wars" of the 1970s and 1980s, lawyers and activists have turned to civil remedies and filed creative anti-trafficking lawsuits against MindGeek and third parties, like payment processing company, Visa. These lawsuits seek not only to achieve legal accountability for online sex trafficking but also to reframe a broader array of online harms as sex trafficking.

This Article explores what these new trafficking lawsuits mean for the future regulation of the online pornography industry. Redolent of venerable feminist debates, these emerging trafficking cases raise new questions about the scope of the First Amendment, § 230 of the Communications Decency Act—which has shielded online platforms from civil liability for content uploaded by third parties—and direct and third-party liability. They open up new avenues for civil damages against online pornography websites and entities that profit from online harms. However, this Article also posits that trafficking statutes, if mobilized too broadly, can have harmful implications for civil liberties, internet freedom, and sexual expression. Thus, it argues in favor of the judicious application of trafficking frames in these realms.

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INTRODUCTION

"Pornhub became my trafficker."[1]
–Cali

"This is a reckoning."[2]
–Laila Mickelwait, Anti-Trafficking Advocate

On June 17, 2021, thirty-four plaintiffs sued MindGeek,[3] a huge,

1. Nicholas Kristof, *The Children of Pornhub*, N.Y. TIMES (Dec. 4, 2020), https://www.nytimes.com/2020/12/04/opinion/sunday/pornhub-rape-trafficking.html [https://perma.cc/32LL-NZWC].

2. Laila Mickelwait (@LailaMickelwait), TWITTER (Dec. 14, 2020, 2:46 PM), https://twitter.com/vrarda1/status/1338778600682754054 [https://perma.cc/E78B-6ULW]. Laila Mickelwait is the founder of the global #Traffickinghub movement, which claims to be a "decentralized global movement of individuals, survivors, organizations and advocates from across a broad spectrum of political, faith and non-faith, economic, and ideological backgrounds, all uniting together for the single purpose of shutting down Pornhub and holding its executives accountable." *Shut Down Pornhub and Hold Its Executives Accountable for Aiding Trafficking*, TRAFFICKINGHUB https://traffickinghubpetition.com/ [https://perma.cc/5MGW-RGSA] [hereinafter TRAFFICKINGHUB PETITION]; *see also Fight for the Freedom of All Sex Trafficking Victims*, EXODUSCRY https://exoduscry.com/ [https://perma.cc/N7PY-D7FB]. Journalists and activists have criticized Mickelwait, drawing attention to her far-right Christian ties and arguing that she seeks to end the online pornography industry. *See* Tarpley Hitt, *Inside Exodus Cry: The Shady Evangelical Group With Trump Ties Waging War on Pornhub*, DAILY BEAST (Nov. 2, 2020, 10:00 PM), https://www.thedailybeast.com/inside-exodus-cry-the-shady-evangelical-group-with-trump-ties-waging-war-on-pornhub [https://perma.cc/83K6-W37T]. *See infra* Part I.B for more discussion of Mickelwait and her advocacy efforts.

3. MindGeek, a conglomerate headquartered in Luxembourg, owns many popular pornography websites, including Pornhub, RedTube, YouPorn, and Brazzers. *See* Noah Manskar, *This Shadowy Businessman is Reportedly Behind Pornhub Parent MindGeek*, N.Y. POST (Dec. 17, 2020, 2:41 PM), https://nypost.com/2020/12/17/pornhub-parent-owned-by-shadowy-business

global online pornography[4] conglomerate,[5] under federal anti-trafficking statutes.[6] In the civil complaint, plaintiffs did not challenge pornography as such; rather, they accused MindGeek of being "one of the largest human trafficking ventures in the world."[7] They argued that MindGeek should be held liable for knowingly benefiting from images of rape, child pornography,[8] "revenge pornography,"[9] and sex trafficking on its popular

man-bernard-bergemar/ [https://perma.cc/UA46-EPRW]; *see also* Moira Ritter, *Pornhub Sued for Allegedly Serving Nonconsensual Sex Videos*, CNN BUS. (June 18, 2021, 5:36 AM), https://www.cnn.com/2021/06/17/tech/pornhub-lawsuit-filed/index.html [https://perma.cc/D73Y-WHY9] (discussing the lawsuit against MindGeek).

4. The term "pornography," unlike the term "obscenity," has defied simple definition—its meaning evolving over time. *See* WHITNEY STRUB, PERVERSION FOR PROFIT: THE POLITICS OF PORNOGRAPHY AND THE RISE OF THE NEW RIGHT 3–4 (2010) ("Pornography is never *simply* a political battleground but rather a discursive site onto which varied social tensions are mapped out."); *id.* at 4 (noting that Walter Kendrick defines "pornography" as "not a thing but a concept, a thought structure"); Cass R. Sunstein, *Pornography and the First Amendment*, 1986 DUKE L.J. 589, 591 ("Defining pornography is notoriously difficult; indeed, the difficulty of definition is a familiar problem in any attempt to design acceptable regulation."); Amy Adler, *What's Left?: Hate Speech, Pornography, and the Problem for Artistic Expression*, 84 CALIF. L. REV. 1499, 1506 (1996) (taking note of "the impossibility of coherently defining terms such as 'pornography'"). While the author recognizes the inherent difficulties of defining "pornography," this Article adopts the definition found in the Oxford English Dictionary of "printed or visual material" containing "[t]he explicit description or exhibition of sexual subjects or activity in literature, painting, films, etc., in a manner intended to stimulate erotic rather than aesthetic feelings." *Pornography*, OXFORD ENGLISH DICTIONARY (2022), https://www.oed.com/view/Entry/148012?redirectedFrom=pornography#eid [https://perma.cc/C6FP-HS32]. This Article exclusively addresses online pornography, defined as images, videos, and online visual communication posted on the internet.

5. *See* Patricia Nilsson, *The secretive world of MindGeek: the Montreal-based company behind Pornhub and RedTube*, FIN. TIMES (Dec. 18, 2020), https://financialpost.com/financial-times/the-secretive-world-of-mindgeek-the-montreal-based-company-behind-pornhub-and-redtube [https://perma.cc/PZ92-BZG6] ("MindGeek, which with very little scrutiny or accountability has quietly become the dominant porn company."); Manskar, *supra* note 3 ("The world's most powerful internet porn company is owned by a shadowy businessman who barely exists online, a new report says."). *See generally* Complaint at 1, 3, Fleites v. MindGeek S.A.R.L., No. 2:21-cv-04920, 2021 WL 2492964 (C.D. Cal. filed June 17, 2021) (suing MindGeek under federal anti-trafficking statutes for knowingly benefiting from trafficking on their websites).

6. Complaint at 1, 138, 140, *Fleites*, 2021 WL 2492964 (No. 2:21-cv-04920).

7. *Id.* at 3.

8. In this Article, the term "child" refers to a minor under eighteen years of age. The definition of child varies under state and federal law, but this Article uses age eighteen to align with the federal definitions of child pornography and sex trafficking. *Compare* 18 U.S.C. § 1591(a)(2) (referencing the age of eighteen in the context of federal trafficking law), *with* 18 U.S.C. § 2256 (defining a minor as any person under the age of eighteen).

9. Nonconsensual pornography, often referred to as "revenge porn," refers to the "distribution of sexually graphic images of individuals without their consent." *See* Danielle Keats Citron & Mary Anne Franks, *Criminalizing Revenge Porn*, 49 WAKE FOREST L. REV. 345, 346 (2014). This Article uses the term "nonconsensual pornography" in place of "revenge pornography" in recognition that perpetrators' motives often extend beyond revenge. *See, e.g.*,

pornography site, Pornhub.[10] Plaintiffs' attorney, Michael Bowe, called the case "a watershed moment" for the online pornography industry that "simply hasn't been policed enough."[11]

The civil suit came amidst heightened public scrutiny of Pornhub.[12] In December 2020, New York Times journalist, Nicholas Kristof, published an op-ed, *The Children of Pornhub*, highlighting the role of Pornhub and its parent company, MindGeek, in facilitating online harms[13] and evading legal accountability.[14] He conceded that the majority

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Sophie Gallagher, *'Revenge Porn' Is Not the Right Term to Describe Our Experiences, Say Victims*, HUFFINGTON POST (Mar. 8, 2019), https://www.huffingtonpost.co.uk/entry/why-are-we-still-calling-it-revenge-porn-victims-explain-change-in-the-laws-needed_uk_5d3594c2e4b020cd99465a99 [https://perma.cc/CT7F-DTYE] (describing reasons why advocates disfavor the term "revenge pornography"). Also, the term "revenge pornography" often does not accurately capture the nature of conduct, which can include sexual harassment, sexual assault, and other violations. *Id.* The author recognizes that some scholars prefer the term "nonconsensual distribution" of intimate images over "nonconsensual pornography" because it emphasizes that the *distribution* of the images is nonconsensual, rather than the underlying sex act. *See, e.g.*, Jolien Beyens & Eva Lievens, *A Legal Perspective on the Non-consensual Dissemination of Sexual Images: Identifying Strengths and Weaknesses of Legislation in the US, UK and Belgium*, 47 INT'L J. OF L., CRIME, & JUST. 31, 31 (2016) (defining the "[n]on-consensual dissemination of sexual images" as "the act of distributing photos or videos depicting individuals in sexually suggestive or explicit circumstances without consent").

10. *See* Complaint at 116, *Fleites*, 2021 WL 2492964 (No. 2:21-cv-04920). MindGeek representatives have rejected sex trafficking allegations as "utterly absurd, completely reckless and categorically false." *See* Tim Fitzsimons, *Dozens of Women Sue Pornhub, Alleging It Published Nonconsensual Clips*, NBC NEWS (June 17, 2021, 9:14 PM), https://www.nbcnews.com/news/us-news/dozens-women-file-suit-against-pornhub-alleging-it-published-nonconsensual-n1271260 [https://perma .cc/8J9J-RFNU].

11. Ritter, *supra* note 3.

12. *See, e.g.*, Noah Manskar, *Pornhub Cracks Down on Illegal Content Following NY Times Exposé*, N.Y. POST (Dec. 9, 2020, 8:09 AM), https://nypost.com/2020/12/09/pornhub-cracks-down-on-illegal-content-following-ny-times-expose/ [https://perma.cc/MC45-F96Z] ("Pornhub has pledged to crack down on illegal content after an exposé raised concerns about the platform being infested with videos of rape and child sex abuse."); Jeff Parrott, *Public, Corporate Pressures Force Pornhub to Account for Its Content*, DESERET NEWS (Dec. 16, 2020, 12:05 AM), https://www.deseret.com/indepth/2020/12/15/22174770/pornhub-deletes-millions-videos-policy-new-york-times-vice-sex-abuse-trafficking [https://perma.cc/G995-TNW2] (commenting on the public outcry about Pornhub and quoting Senator Josh Hawley of Missouri, who noted that it is "[a]mazing what public pressure will do").

13. This Article uses the term "online harms" to refer to sexually explicit images shared online, including nonconsensual pornography, child sexual abuse material (CSAM), and images of human trafficking, rape, or pornography induced by force, fraud, or coercion. Professor Danielle Keats Citron has written extensively about online harms as a violation of sexual privacy, which she defines as "the social norms (behaviors, expectations, and decisions) that govern access to, and information about, individuals' intimate lives." *See* Danielle Keats Citron, *Sexual Privacy*, 128 YALE L.J. 1870, 1874 (2019); *see also* Danielle Keats Citron & Daniel J. Solove, *Privacy Harms*, 102 B.U. L. REV. 793, 856–60 (2022) (discussing how law is a tool to shape social norms when it comes to sexual privacy). Deep fakes—the use of technology to replace an existing image or likeness with another person's likeness—are outside of the scope of this Article.

14. Kristof, *supra* note 1.

of the 6.8 million videos posted on the site "probably involve consenting adults."[15] However, he accused Pornhub of "monetiz[ing]" an array of troubling content, including "child rapes, revenge pornography, spy cam videos of women showering, racist and misogynist content, and footage of women being asphyxiated in plastic bags."[16]

On the heels of the op-ed, forty plaintiffs filed one of the first civil trafficking suits against MindGeek, seeking over $50 million in damages.[17] Plaintiffs also sued credit card company, Visa, alleging that they "knowingly benefit[ed]" from online harms on Pornhub.[18] Similar lawsuits followed.[19] Laila Mickelwait, a prominent anti-trafficking advocate, explained, "The Trafficking Victims Protection Act makes

15. *Id*.

16. *Id.* Critics have criticized Kristof's portrayals of trafficking as distorted and voyeuristic, failing to represent the complex lived realities of those in the sex trade. *See, e.g.*, 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/H8KY-MXW7] ("When Kristof turns his notebook in the direction of women with stories of trauma, the resulting narratives most often fall somewhere between beneficent voyeurism and journalistic malpractice."); Aziza Ahmed, *The unintended consequences of Nick Kristof's anti-sex trafficking crusade*, GUARDIAN (Mar. 26, 2012, 8:17 AM), https://www.theguardian.com/commentisfree/cifamerica/2012/mar/26/nick-kristof-anti-sex-trafficking-crusade [https://perma.cc/6WDC-795A] ("Kristof has become the pied piper of anti-sex trafficking efforts for many well-meaning people and organizations in North America and beyond. To follow without question is dangerous.").

17. *See* Complaint at 42, Doe v. MG Freesites, Ltd., No. 3:20-cv-02440-W-RBB, 2020 WL 7388723 (S.D. Cal. Dec. 15, 2020); Tracey Shelton, *Pornhub Sued for $52 Million in Damages by 40 Victims of Girlsdoporn Sex-Trafficking Operation*, ABC NEWS (Dec. 16, 2020, 8:52 PM), https://www.abc.net.au/news/2020-12-17/pornhub-sued-by-40-girlsdoporn-sex-trafficking-victims/12992798 [https://perma.cc/SF4U-EZL7].

18. *See* Complaint at 9–10, 145, 162–63, 165–66, *Fleites*, 2021 WL 2492964 (No. 2:21-cv-04920); *see also* Michelle Celarier, *Bill Ackman Sent a Text to the CEO of Mastercard. What Happened Next Is a Parable for ESG*, INST. INV. (June 16, 2021), https://www.institutionalinvestor.com/article/b1s 9f698vwhczr/Bill-Ackman-Sent-a-Text-to-the-CEO-of-Mastercard-What-Happened-Next-Is-a-Parable-for-ESG [https://perma.cc/KT7W-GZWQ] (discussing how a hedge fund manager sought to hold Pornhub's payment processors accountable for benefiting from the site's online harms).

19. *See* Complaint at 1–2, Doe #1 v. MG Freesites Ltd., No. 7:21-cv-00220-LSC, 2022 WL 407147 (N.D. Ala. Feb. 11, 2021); Complaint at 2–3, Doe v. MindGeek USA Inc., 558 F. Supp. 3d 828 (C.D. Cal. Feb. 19, 2021) (No. 8:21-cv-00338-CJC-ADS); Complaint at 1, *Fleites*, 2021 WL 2492964 (No. 2:21-cv-04920) (C.D. Cal. June 17, 2021); *see also* Complaint at 2–3, Doe v. Reddit, Inc., No. 8:21-cv-00768, 2021 WL 5860904, (C.D. Cal. Apr. 22, 2021) (suing Reddit under federal trafficking statutes for CSAM images posted by users online); Doe v. Kik Interactive, Inc., 482 F. Supp. 3d 1242, 1244 (S.D. Fla. 2020) (suing owners of Kik Messenger, a social media service, for trafficking images posted by users online); J.B. v. G6 Hospitality, LLC, No. 19-cv-07848-HSG, 2020 WL 4901196, at *1 (N.D. Cal. Aug. 20, 2020) (suing Craigslist for trafficking images posted by users on its site); Doe v. Twitter, Inc., 555 F. Supp. 3d 889, 894 (N.D. Cal. 2021) (alleging that Twitter bears direct and third-party liability for images of trafficking posted by users on their site).

them liable, because yes, they did know about it but they didn't do anything about it."[20]

The deployment of federal anti-trafficking statutes, combined with public pressure, has already borne fruit for many victims[21] and advocates.[22] Shortly after the plaintiffs filed the anti-trafficking suits, MindGeek took unprecedented action to clean up its sites: It removed over ten million videos, prohibited unverified users from uploading images, and eliminated the "download button"[23] responsible for the easy upload of blocked images.[24] By October 2021, MindGeek settled one federal trafficking suit for an undisclosed amount of money.[25] Public pressure also spurred federal legislative action to rein in nonconsensual pornography in the United States and Canada.[26] As civil lawsuits grew,

20. Celarier, *supra* note 18 (quoting Laila Mickelwait, who called civil litigation "[t]he most effective way to change these corporate facilitators of exploitation").

21. There is considerable scholarly debate about the use of the term "victim" versus "survivor." *See* Rachel Weschler, *Victims as Instruments*, 97 WASH. L. REV. 507, 508, n.4 (2022). However, this Article uses the term "victim" in place of "survivor" because it is a legal term of art that triggers access to important rights and benefits under state and federal law. Also, the term "victim" emphasizes the responsibility of the state to provide rights and remedies to those harmed. *See* Rahila Gupta, '*Victim' vs 'Survivor': feminism and language*, OPEN DEMOCRACY (June 16, 2014), https://www.opendemocracy.net/en/5050/victim-vs-survivor-feminism-and-language/ [https://perma.cc/Q6QG-8GX2] ("[W]hilst 'survivor' is important because it recognises the agency of women, it focuses on individual capacity, but the notion of 'victim' reminds us of the stranglehold of the system."). This Article, however, acknowledges the rise in usage of the term "survivor" in feminist literature in the 1980s and the fact that many feminist scholars are uncomfortable with the term "victim," believing it to convey passivity and define individuals singularly by their experience of victimization. *See* LIZ KELLY, SURVIVING SEXUAL VIOLENCE 159–60 (1988).

22. *See* Parrott, *supra* note 12.

23. Celarier, *supra* note 18 (explaining how Pornhub previously allowed users to download images with a click of a button).

24. *See* Complaint at 56, 58; *Fleites*, 2021 WL 2492964 (No. 2:21-cv-04920); *see also* Samantha Cole, *Pornhub Just Purged All Unverified Content From the Platform*, VICE MOTHERBOARD (Dec. 14, 2020, 7:00 AM), https://www.vice.com/en/article/jgqjjy/pornhub-suspended-all-unverified-videos-content [https://perma.cc/XH7Q-SVT4] (discussing how Pornhub removed all videos uploaded by unverified users); Siladitya Ray, *Pornhub Takes Down All Content Uploaded By Unverified Users*, FORBES (Dec. 14, 2020, 11:19 AM), https://www.forbes.com/sites/siladityaray/2020/12/14/pornhub-takes-down-all-content-uploaded-by-unverified-uploaders/?sh=76516b2d65ed [https://perma.cc/WBM8-AZSR] (discussing Pornhub's efforts to moderate content uploaded onto their site).

25. *See* City News Service, *Settlement Reached in Lawsuit Against Pornhub for SD-Based GirlsDoPorn.com Videos*, TIMES OF SAN DIEGO (Oct. 15, 2021), https://timesofsandiego.com/crime/2021/10/15/settlement-reached-in-lawsuit-against-pornhub-for-sd-based-girlsdoporn-com-videos/ [https://perma.cc/V3X7-WVPF].

26. Public outcry against Pornhub sparked an investigation before the Canadian House of Commons ethics committee and U.S. federal legislation to establish a private right of action for nonconsensual pornography. *See* Janice Dickson & Joe Castaldo, *MindGeek executives defend Pornhub's safeguards before Commons ethics committee*, THE GLOBE & MAIL (Feb. 5, 2021),

prominent social media companies, like TikTok and YouTube, banned Pornhub from their sites.[27] Activists and victims celebrated these developments as victories in their fight for legal accountability.

This Article explores what these new trafficking lawsuits mean for the future regulation of online pornography and the broader fight against sex trafficking. In 2005, Professor Catharine MacKinnon posited that sex trafficking laws[28] were "more promising for addressing pornography than has been recognized."[29] Yet, the full "emancipatory" potential of trafficking law would take more than a decade to realize. In 2000, the U.S. Congress passed criminal human trafficking statutes, and three years later, it authorized trafficking civil lawsuits against perpetrators of trafficking.[30] Congress then expanded civil trafficking liability to include companies, like hotels and online platforms, that knowingly benefit from trafficking conduct.[31] Trafficking law has now evolved to become a

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https://www.theglobeandmail.com/politics/article-mindgeek-executives-defend-pornhubs-safe guards-before-commons-ethics/ [https://perma.cc/2C5Y-B5A8]; Violence Against Women Reauthorization Act of 2021, H.R. 1620 § 1413, 117th Cong. (2021) (SHIELD Act of 2021) (as engrossed in House, Mar. 17, 2021).

27. *See* Jon Brown, *TikTok Boots Pornhub From App Amid Child Porn Allegations: 'A Predatory Business*,' FOXBUSINESS (Dec. 15, 2022, 1:54 PM), https://www.foxbusiness.com/technology/tiktok-boots-pornhub-app-child-porn-allegations-predatory-business [https://perma.cc/5YSS-2FAW]; Todd Spangler, *YouTube Removes Pornhub Channel, Citing Multiple Violations of Guidelines*, VARIETY (Dec. 16, 2022, 5:36 PM), https://variety.com/2022/digital/news/youtube-removes-pornhub-1235464049/ [https://perma.cc/DYC8-BCQL].

28. While online pornography can give rise to sex *and* labor trafficking claims, this Article deals exclusively with sex trafficking violations, as defined in 18 U.S.C. § 1591.

29. *See* Catharine A. MacKinnon, Speech, *Pornography as Trafficking*, 26 MICH. J. INT'L L. 993, 993–94 (2005) [hereinafter MacKinnon, *Pornography as Trafficking*] (exploring the conceptual connections between pornography and trafficking). Others have encouraged prosecutors to use trafficking law to address forms of pornography. *See* Allison J. Luzwick, *Human Trafficking and Pornography: Using the Trafficking Victims Protection Act to Prosecute Trafficking for the Production of Internet Pornography*, 111 NW. U. L. REV. 137, 140 (2017) (arguing that federal trafficking law should target pornography producers and distributors with criminal penalties); Hope Watson, Note, *Pornography-Based Sex Trafficking: A Palermo Protocol Fit for the Internet Age*, 54 VAND. J. TRANSNAT'L L. 495, 498, 500–01 (2021) (encouraging the Trafficking Protocol to apply to "pornography-based sex trafficking").

30. *See* Victims of Trafficking and Violence Protection Act of 2000 (TVPA), Pub. L. No. 106-386, § 102(b)(2), 114 Stat. 1464 (2000) (codified at 18 U.S.C. §§ 1581–95 (2018)) [hereinafter TVPA]; Trafficking Victims Protection Reauthorization Act of 2003, Pub. L. No. 108-193, 117 Stat. 2875 (2003) [hereinafter TVPRA of 2003].

31. In 2008, Congress established third-party criminal and civil liability for entities that knowingly benefit from a venture with a perpetrator of trafficking. William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. No. 110-457, 122 Stat. 5044 (2008) [hereinafter TVPRA of 2008]. Then, in 2018, Congress authorized trafficking lawsuits against online platforms, establishing an exception to § 230 of the Communications Decency Act (CDA) for state and federal civil trafficking suits, among other provisions. Fight Online Sex Trafficking Act, Pub. L. No. 115-164, 132 Stat. 1253 (2018) (codified as amended at 18 U.S.C. §§ 1591, 1595, 2421A and 47 U.S.C. § 230) [hereinafter FOSTA]. *See* Part II.C for an overview of federal trafficking statutes.

uniquely potent legal tool and powerful discursive force. As a result, creative litigators have turned to federal trafficking statutes as a remedy to address forms of online pornography.

Legal action aimed at pornography distributors and producers is, of course, not new.[32] In the 1970s and 1980s, anti-pornography activists—an unlikely alliance of feminist activists and evangelical Christians—engaged in activism and legal efforts aimed at pornography producers and distributors.[33] Dominance feminists[34] Professor MacKinnon and

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32. Professor Matthew Lasar argues that the anti-pornography campaigns of the 1970s and 1980s were not a unique moment but rather that "pornography wars" have been present throughout American history. Matthew Lasar, *The Triumph of the Visual: Stages and Cycles in the Pornography Controversy from the McCarthy Era to the Present*, 7 J. OF POL. HIST. 181, 203 (1995) (commenting that "[w]e flatter ourselves to imagine" that key anti-pornography campaigners of the 1950s "are no longer our intellectual neighbors" but rather "[t]hey speak to our hopes, fears, and desires as much now as they did then"). Legal scholars have recognized how the feminist battles of the 1970s and 1980s continue to manifest in modern debates about the regulation of sexual harm. *See, e.g.*, LISA DUGGAN & NAN D. HUNTER, SEX WARS: SEXUAL DISSENT AND POLITICAL CULTURE 6 (1995) (stating that the "consequences [of the pornography wars] . . . are with us still."); BRENDA COSSMAN, THE NEW SEX WARS 15 (2021) (exploring how deep feminist divides continue to animate debates about sexual harm in the "Sex Wars 2.0"). There have also been ample, although largely unsuccessful, legislative and prosecutorial efforts to increase penalties for pornography producers. *See* Marianne Wesson, *Girls Should Bring Lawsuits Everywhere . . . Nothing Will Be Corrupted: Pornography as Speech and Product*, 60 U. CHI. L. REV. 845, 850–51 (1993) (describing efforts to pass legislation, like the Pornography Victims Compensation Act, to carve out new legal claims for purported victims); People v. Freeman, 758 P.2d 1128, 1134–35 (Cal. 1988) (striking down criminal charges against a pornography producer under a California prostitution statute); Marc J. Randazza, *The Freedom to Film Pornography*, 17 NEV. L.J. 97, 103–31 (2016) (examining how prosecutorial efforts to employ state prostitution statutes against pornography producers have largely failed).

33. *See* CAROLYN BRONSTEIN, BATTLING PORNOGRAPHY: THE AMERICAN FEMINIST ANTI-PORNOGRAPHY MOVEMENT, 1976–1986 61–62 (2011) (exploring anti-pornography feminist advocacy efforts in the 1970s and 1980s); Paul Brest & Ann Vandenberg, Essay, *Politics, Feminism, and the Constitution: The Anti-Pornography Movement in Minneapolis*, 39 STAN. L. REV. 607, 607–13 (1987) (providing the local, historical context to anti-pornography activism). *See infra* Part I.A and accompanying text for a greater discussion of the "civil-rights approach." This Article uses the term "anti-pornography advocacy" broadly to refer to activists and scholars who advocate regulation of pornography. Such advocacy encompasses efforts by both sides of the political aisle. *See* BRONSTEIN, *supra*, at 5, 129–34, 145–48 (describing how anti-pornography advocacy included "diverse and overlapping feminist groups who articulated their own set of ideas and goals").

34. "Dominance feminism" refers to a form of feminist theory, also known as "radical feminism," that views gender oppression as a form of domination by men over women, a subordination enshrined in pornography, commercial sex, and trafficking. *See* CATHERINE MACKINNON, FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW 40–43 (1987) (explaining the "dominance approach"). This Article refers to Professor Catharine MacKinnon and Andrea Dworkin throughout this Article as paradigmatic of dominance feminism. Many have critiqued dominance feminism for its overreliance on carceral approaches and failure to recognize the intersecting roles of other identities, including race, class, sexual orientation, gender expression, ability, and other factors in shaping systemic oppression. *See infra* Part I.

Andrea Dworkin pioneered a legal strategy to complement activist efforts, which they called the "civil-rights approach."[35] Together, MacKinnon and Dworkin viewed the civil remedy, rooted in anti-discrimination law,[36] as a pivotal avenue for purported victims of pornography and a means for social change.[37] These measures largely took the form of local ordinances that banned a wide swath of pornography subjugating women.[38]

Anti-pornography advocates, however, met with fierce opposition from civil rights activists, anti-censorship feminists, and queer activists, who argued that pornography bans violated the First Amendment and quelled important sexual expression.[39] Colloquially known as the

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35. *See* Brest & Vandenberg, *supra* note 33, at 615; *see also* Catharine MacKinnon, *The Roar on the Other Side of Silence*, *in* IN HARM'S WAY: THE PORNOGRAPHY CIVIL RIGHTS HEARINGS 4, 15 (Andrea Dworkin & Catharine MacKinnon eds., 1997) [hereinafter DWORKIN & MACKINNON, IN HARM'S WAY] (discussing the civil-rights approach as a way to make pornography actionable as a form of sex discrimination).

36. ANDREA DWORKIN & CATHARINE MACKINNON, PORNOGRAPHY AND CIVIL RIGHTS: A NEW DAY FOR WOMEN'S EQUALITY 29 (1988) [hereinafter PORNOGRAPHY AND CIVIL RIGHTS] ("The law of sex discrimination, aimed at altering the inequality of women to men, at eliminating the subordination of women to men *as a norm*, has been part of this tradition at least to some of us. The civil-rights approach to pornography is an application of this tradition, this analysis, and this determination to the emergency of pornography and the condition of women.").

37. Professor MacKinnon explained that:

> We have learned that this problem is socially invisible until women make it visible. This particular law, this bill that you have before you today, which puts power in women's hands, instead of suppressing the pornography, and with it women's injuries, what it would do in reality is to bring them out in the open, as it has done here today.

DWORKIN & MACKINNON, IN HARM'S WAY, *supra* note 35, at 387–88; *see also* CATHERINE MACKINNON, FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW 203 (1987) (framing the civil remedy as a way to place "enforcement in the hands of the victim"); Catharine MacKinnon, *Speech, Equality, and Harm: The Case Against Pornography*, *in* THE PRICE WE PAY: THE CASE AGAINST RACIST SPEECH, HATE PROPAGANDA, AND PORNOGRAPHY 302, 312–13 (Laura J. Lederer & Richard Delgado eds., 1995) (explaining how civil lawsuits would shift regulation "from law that empowers the state to law that empowers the people . . . and redistribute[s] power to citizens").

38. The ordinance defined "pornography" broadly as the graphic, sexually explicit subordination of women, in pictures or in words. INDIANAPOLIS, IND. CODE § 16-3(v) (1984). The text of the ordinance can be found at PORNOGRAPHY AND CIVIL RIGHTS, *supra* note 36.

39. *See generally* Brief of Feminist Anti-Censorship Taskforce as Amici Curiae, Am. Booksellers Ass'n v. Hudnut, 771 F.2d 323 (7th Cir. 1985) (No. 84-3142), *reprinted in* Nan D. Hunter & Sylvia A. Law, *Brief Amici Curiae of Feminist Anti-Censorship Taskforce, et al.*, *in* American Booksellers Association v. Hudnut, 21 U. MICH. J.L. REFORM 69, 70, 76–136 (1988) (exploring how feminists "who sought sexual self-determination as an essential aspect of full liberation" opposed anti-pornography ordinances); *see, e.g.*, Ellen Willis, *Feminism, Moralism, and Pornography*, 38 N.Y.L. SCH. L. REV. 351, 351–52 (1993) ("By playing games with the

"pornography wars"[40] or "sex wars," these debates made their way into the federal courts, culminating in the U.S. Court of Appeals for the Seventh Circuit's decision in *American Booksellers Association v. Hudnut*[41] in 1985, which struck down the Indianapolis anti-pornography ordinance authored by Professor MacKinnon and Dworkin.[42] Judge Frank Easterbrook reasoned that the ordinance, a content-based restriction on speech, violated the First Amendment and that the government could not "ordain preferred viewpoints in this way."[43]

While much has changed since *Hudnut*, this Article posits that "new pornography wars" have ensued. Anti-trafficking advocates—many of whom are intellectual inheritors of past anti-pornography campaigns—have turned anew to the civil remedy. Like early feminist advocates, they center the civil remedy as a way to make visible certain harms and promote systemic change. Yet, the new pornography wars are different in key respects. Unlike the anti-pornography advocates of the 1970s and 1980s, the civil approach mobilized against Pornhub uses anti-trafficking law, rather than an anti-discrimination frame. Trafficking lawsuits address a narrower range of conduct: coerced or forced pornography;

English language, anti-porn activists are managing to rationalize as feminism a single-issue movement divorced from any larger political context and rooted in conservative moral assumptions that are all the more dangerous for being unacknowledged."); Leo Bersani, *Is the Rectum a Grave?*, 43 OCTOBER 197, 215 (1987) (Professor MacKinnon and Dworkin [in their anti-pornography analysis and activism] "have given us the reasons why pornography must be multiplied and not abandoned, and, more profoundly, the reasons for defending, for cherishing the very sex they find so hateful."). Queer scholars and activists also argued that more regulation would chill nonnormative sexual expression, and many spoke out against the language of sexual "deviance" by feminist activists that had long marginalized LGBTQ+ people. *See* Aya Gruber, *Sex Wars as Proxy Wars*, 6 CRITICAL ANALYSIS OF L. 102, 115 (2019) ("LGBTQ activists pointed out that the dominance feminist activism robustly engaged in the discourse of sexual 'deviance,' something that had long terrorized sexual minorities.").

40. Scholars have called the anti-pornography debates of the 1970s and 1980s the "pornography wars," "sex wars," and "gender wars." *See, e.g.*, CAROLYN BRONSTEIN & WHITNEY STRUB, PORNO CHIC AND THE SEX WARS: AMERICAN SEXUAL REPRESENTATION IN THE 1970S 6 (Carolyn Bronstein & Whitney Strub eds., 2016) (exploring the pornography wars with a focus on the role of "obscenity law, new technologies, feminist activism, citizen discomfort with pornography, marginalized audiences, and the political mobilization of the so-called New Right"); DUGGAN & HUNTER, *supra* note 32, at 1, 5 (tracing the evolution of the pornography wars by centering the perspectives of feminist and activist groups).

41. 771 F.2d 323 (7th Cir. 1985), *aff'd mem.*, 475 U.S. 1001 (1986).

42. *Hudnut*, 771 F.2d at 334; *see also* DUGGAN & HUNTER, *supra* note 32, at 6 (explaining that *Hudnut* was the pinnacle of battles between anti-pornography and anti-censorship feminists).

43. *Hudnut*, 771 F.2d at 325. The decision set up a stark divide in the regulation of adult pornography and other categories of unprotected speech, like obscenity and child pornography, which continues to this day. *See* New York v. Ferber, 458 U.S. 747, 749, 756 (1982); *see also* Amy Adler, *The Shifting Law of Sexual Speech: Rethinking Robert Mapplethorpe*, 2020 U. CHI. LEGAL F. 1, 3, 30–35 (2020) (describing the evolution of obscenity prosecutions and regulation of CSAM).

child pornography or child sexual abuse material (CSAM);[44] and nonconsensual pornography. Moreover, whereas earlier efforts sought to overcome First Amendment challenges, recent trafficking efforts primarily target statutory obstacles to legal accountability, such as § 230 of the Communications Decency Act (CDA), which has shielded online platforms from much civil liability, rather than the First Amendment.[45]

This Article explores what victims and advocates seek to gain from deploying trafficking statutes against online pornography websites and the companies that do business with them. Expanding judicial interpretations of sex trafficking may carve out new, more robust avenues for civil accountability and overcome modern legal challenges, like § 230. Victims also stand to benefit from expansive third-party liability that holds companies accountable that profit from online harms. Moreover, trafficking lawsuits may give victims—no longer dependent on criminal prosecutors for the vindication of their rights—more choice and agency in the legal process.

Even so, this Article also warns that there are dangers inherent in this move. As the civil liability of corporations increases, companies likely will increase surveillance of private online conduct with important implications for sexual expression, privacy, and civil liberties. Additionally, broadening exceptions to § 230 of the CDA has collateral consequences—pushing online harms further abroad and exposing historically marginalized groups to risks of abuse and exploitation. Also, as civil efforts place more control in the hands of victims, they still may lead to "carceral creep": the slow, eventual criminalization of more forms of online pornography.[46] Ultimately, this Article argues that efforts to

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44. This Article largely uses the term "child sexual abuse material" or "CSAM" instead of "child pornography" to refer to the visual depiction of sexual activity involving a minor under eighteen years of age. Advocates and scholars have eschewed the use of the term "pornography" when referring to children, arguing that it does not adequately reflect the nature of harm to minors. *See* Mary Graw Leary, *The Language of Child Sexual Abuse and Exploitation*, *in* REFINING CHILD PORNOGRAPHY LAW: CRIME, LANGUAGE, AND SOCIAL CONSEQUENCES 109 (Carissa B. Hessick ed., 2016) ("For child abuse and exploitation, precise language can help to convey the particular gravity of harms against children and the seriousness with which society addresses such crimes."); *see also* INTERAGENCY WORKING GROUP ON SEXUAL EXPLOITATION OF CHILDREN, TERMINOLOGY GUIDELINES FOR THE PROTECTION OF CHILDREN FROM SEXUAL EXPLOITATION AND SEXUAL ABUSE at v (2016) [hereinafter INTERAGENCY REPORT], https://ecpat.org/wp-content/uploads/2021/05/Terminology-guidelines-396922-EN-1.pdf#page50 [https://perma.cc/2MYF-ADZZ] (commenting that over time "terms like child prostitution and child pornography have been more and more criticized . . . and increasingly replaced by alternative terms, considered less harmful or stigmatizing to the child."). Yet, this Article uses "child pornography" to refer to court decisions, quotations, and the title of sources, as well as the federal crime of child pornography. *See Hudnut*, 771 F.2d at 324; 18 U.S.C. § 2252A(a)(3)(B)(i)–(ii).

45. 47 U.S.C. § 230(c)(2).

46. Mimi E. Kim, *The Carceral Creep: Gender-Based Violence, Race, and the Expansion*

apply trafficking law to other online harms should proceed cautiously and should not replace more transparent, tailored civil efforts to hold platforms accountable.

Part I explores the historic regulation of pornographic images. It looks at early efforts to establish a civil remedy and theoretical connections drawn by feminists between pornography and trafficking. Part II then shows how feminist divides persist and manifest in modern campaigns against online pornography websites. This Part also explores the evolution of trafficking law, which has become a legal tool for victims and advocates. Part II catalogs recent litigation efforts in the online pornography context. It examines arguments by litigators that the definition of sex trafficking includes: (1) adult pornography involving force, fraud, or coercion; (2) CSAM; and (3) nonconsensual pornography. Part III then considers the impact of these litigation efforts. It posits that trafficking claims hold great promise for some victims but also involve collateral costs. This Article then argues in favor of judicious application of trafficking law in these realms.

I. FEMINIST BATTLES

This Part explores the rise and fall of anti-pornography feminist efforts to construct a civil remedy for purported victims of pornography in the 1970s and 1980s. Anti-pornography advocates identified early connections between pornography and sex trafficking, but when it came to legal action, they framed anti-pornography legal claims as sex discrimination, not sex trafficking. Although the Seventh Circuit in *Hudnut* rejected such an expansive attempt to prohibit adult pornography, this Part sheds light on how modern advocates—many of whom are the intellectual inheritors of earlier anti-pornography efforts—have now turned anew to the civil remedy as a tool to address perceived harms of the online pornography industry.

A. *The Pornography Wars of the 1970s and 1980s*

Anti-pornography feminists long viewed the civil remedy as a key component of the fight for gender equality.[47] Early organizing efforts, led by dominance feminists, such as Dworkin, Professor MacKinnon, and Professor Kathleen Barry, sought to raise awareness of the harms of

of the Punitive State, 1973-1983, 67 SOC. PROBS. 251, 251 (2020). Mimi Kim coined this term to refer to "the incremental and often imperceptible advance of carceral forces" that culminated in the 1970s and 1980s in the predominant use of a crime control lens "within a feminist social movement field that was once almost devoid of its presence." *Id.*

47. *See* BRONSTEIN, *supra* note 33, at 323–26.

pornography, writ large.[48] They framed pornography that "subordinated women" as harmful to women's equality.[49] Indeed, they viewed pornography as a literal representation of patriarchy and a form of subordination of women.[50] Anti-pornography advocates engaged in activism and organizing efforts to raise public consciousness about the harms of pornography, and Professor MacKinnon and Dworkin pioneered a legal strategy—called the "civil-rights approach"[51]—which centered the civil remedy as a pivotal avenue for monetary compensation, legal accountability, and social change.[52]

While this approach employed the lens of sex discrimination, Professor MacKinnon and Dworkin were eager to point out connections between pornography and sex trafficking.[53] Professor MacKinnon, for example, viewed pornography as intrinsically connected to other forms of violence, including trafficking, arguing that it promoted and normalized the subjugation of women.[54] She also maintained that the industries of pornography and sex trafficking had similar features, both involving "an organized crime industry built on force, some physical, some not."[55] In addition, pornography and sex trafficking involved "acts, not viewpoints or ideas," that, according to Professor MacKinnon and Dworkin, should be condemned and regulated.[56]

By the late 1970s, Professor MacKinnon and Dworkin faced considerable pushback from civil rights activists, anti-censorship or

48. *See* KATHLEEN BARRY, FEMALE SEXUAL SLAVERY 174 (1979); ANDREA DWORKIN, PORNOGRAPHY: MEN POSSESSING WOMEN 199–202 (1981); CATHARINE A. MACKINNON, TOWARDS A FEMINIST THEORY OF THE STATE 195–96 (1989); *see also* ANDREA DWORKIN & CATHARINE MACKINNON, PORNOGRAPHY AND CIVIL RIGHTS: A NEW DAY FOR WOMEN'S EQUALITY 26 (1988) (explaining that the law refrains from "recognizing the personal injuries and systemic harms of pornography").

49. *See, e.g.*, DWORKIN & MACKINNON, *supra* note 48, at 29 (explaining how legal efforts to regulate pornography aimed to address "systematic social inequality" of women); DONALD A. DOWNS, THE NEW POLITICS OF PORNOGRAPHY at xi–xii (1989) (exploring Dworkin's stance on pornography as the literal expression of male dominance).

50. DOWNS, *supra* note 49, at xi.

51. *See* Brest & Vandenberg, *supra* note 33, at 616–17.

52. *Id.* at 619–20, 635.

53. A full exploration of the theoretical underpinnings of the "pornography wars" are beyond the scope of this Article.

54. *See, e.g.*, Catharine A. MacKinnon, Commentary, *Pornography, Civil Rights and Speech*, 20 HARV. C.R.-C.L. L. REV. 1, 17 (1985) ("Pornography sexualizes rape, battery, sexual harassment, prostitution, and child sexual abuse; it thereby celebrates, promotes, authorizes, and legitimizes them.").

55. MacKinnon, *Pornography as Trafficking*, *supra* note 29, at 995.

56. DWORKIN & MACKINNON, *supra* note 48, at 58 ("Coercion is not a fantasy. Force is not a symbol. Assault is not a representation.").

"choice" feminists,[57] and queer activists, who rejected their framing of pornography as harmful.[58] To the extent that there were parallels between pornography and commercial sex, choice feminists often viewed both through the lens of sex positivity, pointing to the potential of consensual sex to promote a fuller exploration of sexual identity and agency.[59] Indeed, for many feminists, pornography and sex work, if consensual, had liberatory potential.[60] Many also rejected efforts by dominance feminists to criminalize or regulate pornography and commercial sex,[61] arguing that they marginalized and stigmatized historically oppressed groups.[62]

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57. Linda Hirshman coined the term "choice" feminism to refer to women's greater autonomy to choose, without judgment. *See* Linda Hirshman, *Homeward Bound*, AM. PROSPECT, Dec. 2005, at 24 (opining that "[a] woman could work, stay home, have [ten] children or one, marry or stay single" and "[i]t all counted as 'feminist' as long as she *chose* it"); *see also* R. Claire Snyder-Hall, *Third-Wave Feminism and the Defense of "Choice"*, 8 PERSPS. ON POL. 255, 256 (2010) (examining "choice feminism" as "entail[ing] a commitment to three important principles essential to feminism—pluralism, self-determination, and nonjudgmentalness"); LESLIE L. HEYWOOD, THE WOMEN'S MOVEMENT TODAY: AN ENCYCLOPEDIA OF THIRD WAVE FEMINISM 260 (2006) (describing how third wave feminism "defends pornography, sex work, sadomasochism, and butch/femme roles, but it also recuperates heterosexuality, intercourse, marriage and sex toys from separatist feminist dismissals").

58. *See* Gruber, *supra* note 39, at 115.

59. *See* Snyder-Hall, *supra* note 57, at 255–59.

60. *See, e.g.*, CARMEN M. CUSACK, PORNOGRAPHY AND THE CRIMINAL JUSTICE SYSTEM 5 (2014) (examining feminist views of pornography as a way to promote sexual empowerment); Snyder-Hall, *supra* note 57, at 258 (describing, as an example, a third wave feminist, who defends the "choice to be a stripper" as "personally empowering"); Rebecca Walker, *Being Real: An Introduction*, *in* TO BE REAL: TELLING THE TRUTH AND CHANGING THE FACE OF FEMINISM at xxxiv (Rebecca Walker ed., 1995) ("As [women] struggle to formulate a feminism they can call their own, they debunk the stereotype that there is one lifestyle or manifestation of feminist empowerment, and instead offer self-possession, self-determination, and an endless array of non-dichotomous possibilities."). Queer theorists particularly opposed further regulation of pornography, arguing that state intervention has historically harmed LGBTQ+ communities by targeting nonnormative sexual expression. *See, e.g.*, GAYLE S. RUBIN, THINKING SEX: NOTES FOR A RADICAL THEORY OF THE POLITICS OF SEXUALITY (1984), *reprinted in* DEVIATIONS: A GAYLE RUBIN READER 170 (2011) (describing the anti-pornography laws as attempts to "reduce violence by banning so-called violent porn," but concluding that "[i]t is dubious that such a sexual witch hunt would make any appreciable contribution toward reducing violence against women"); Ellen Willis, *Feminism, Morality, and Pornography*, 38 N.Y.L. SCH. L. REV. 351, 357 (1993) ("The basic purpose of obscenity laws is and always has been to reinforce cultural taboos on sexuality and suppress feminism, homosexuality, and other forms of sexual dissidence.").

61. *See* Willis, *supra* note 60, at 356–57.

62. *Id.* at 357. Critical race and LatCrit scholars have critiqued dominance feminism for its overemphasis on sex, arguing that other identities, such as race, class, gender, sexual orientation, ability, and gender expression, also shape how individuals experience the law. *See, e.g.*, Cheryl Nelson Butler, *A Critical Race Feminist Perspective on Prostitution & Sex Trafficking in America*, 27 YALE J.L. & FEMINISM 95, 105–06 (2015) (arguing that legal responses to gender-based violence—even those purported to provide protection to victims—have historically subordinated

In the 1970s, criminal statutes were the primary tools to address pornography in the United States.[63] Human trafficking law did not yet exist.[64] Law enforcement, instead, addressed the commercial sex industry separately from pornography, under a mix of state misdemeanor prostitution[65] statutes and the federal Mann Act.[66] Most regulation of pornography centered around obscenity and nuisance statutes.[67] While the First Amendment prohibited laws that "abridg[e] . . . the freedom of speech, or of the press," legislation emerged in the late nineteenth century

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people of color); Berta E. Hernández-Truyol, Essay, *Borders (En)gendered: Normativities, Latinas, and a LatCrit Paradigm*, 72 N.Y.U. L. REV. 882, 924 (1997) (addressing the heterogeneity of the Latinx community, which impacts how law is experienced); Berta E. Hernández-Truyol, *Latina Multidimentionality and LatCrit Possibilities: Culture, Gender, and Sex*, 53 U. MIA. L. REV. 811, 812 (1999) ("LatCrit's interrogation of the black/white paradigm, dating to the movement's beginnings, has invited us to contest other sites of normativity such as the socially constructed categories of foreignness, proper sex/gender roles, and sexuality—both within the majority culture and our *cultura Latina*.").

63. Miller v. California, 413 U.S. 15, 16, 18 (1973). Obscenity refers "to works which, taken as a whole, appeal to the prurient interest in sex, which portray sexual conduct in a patently offensive way, and which, taken as a whole, do not have serious literary, artistic, political, or scientific value." *Id*. at 24. Early obscenity laws were both civil and criminal, but civil claims were relatively rare. *See, e.g.*, WHITNEY STRUB, OBSCENITY RULES: *ROTH V. UNITED STATES* AND THE LONG STRUGGLE OVER SEXUAL EXPRESSION 7 (2013) (examining the evolution of obscenity law before the holding in *Roth v. United State*s).

64. Federal trafficking law emerged in 2000 with the passage of the Trafficking Victims Protection Act (TVPA), and thus, there was no avenue for civil liability and imperfect criminal responses to trafficking until the twenty-first century. *See infra* Part II.

65. Scholars and activists have critiqued the terms, "prostitution" and "prostitute," as pejorative, degrading, and stigmatizing. *See, e.g.*, Sylvia A. Law, *Commercial Sex: Beyond Decriminalization*, 73 S. CAL. L. REV. 523, 525 (2000) (critiquing the use of "prostitute" or "prostitution"); Vanessa E. Munro & Marina Della Giusta, *The Regulation of Prostitution: Contemporary Contexts and Comparative Perspectives*, *in* DEMANDING SEX: CRITICAL REFLECTIONS ON THE REGULATION OF PROSTITUTION 1, 6 (Vanessa E. Munro & Marina Della Giusta eds., 2008) ("[T]he language of 'prostitute' and 'prostitution' have been closely aligned with abolitionist perspectives that see the sale of sex as entailing women's exploitation and objectification . . . ."). As a result, this Article uses the term "commercial sex," except when using quotations or referencing the name of criminal prostitution statutes.

66. White-Slave Traffic (Mann) Act, Pub. L. No. 61-227, 36 Stat. 825 (1910) (codified as amended at 18 U.S.C. §§ 2421–2424). Prosecutions for commercial sex often took place under the guise of state misdemeanor prostitution statutes, with enforcement through local vice units. *See* Rep. Ann Wagner & Rachel Wagley McCann, Policy Essay, *Prostitutes or Prey? The Evolution of Congressional Intent in Combatting Sex Trafficking*, 54 HARV. J. ON LEGIS. 17, 95 (2017). Meanwhile, federal prosecutions under the Mann Act focused on individuals brought across state lines for the purpose of commercial sexual activity. *Id*. at 42–43.

67. *See* Sunstein, *supra* note 4, at 592, 595 (advocating for regulation of pornography but seeking "a departure from current law, which is directed at 'obscenity'"); Doug Rendleman, *Civilizing Pornography, The Case for an Exclusive Obscenity Nuisance Statute*, 44 UNIV. CHI. L. REV. 509, 521–22 (1977) (noting prevalence of nuisance statutes to address sexually explicit materials).

that targeted the circulation of sexually explicit materials.[68] In 1873, Congress passed the Comstock Act[69] to prohibit "obscene," "lewd," or "lascivious" material.[70] Thereafter, criminal obscenity prosecutions proliferated, and courts struggled mightily to differentiate obscenity from classical art or literature.[71]

It was many decades before the United States Supreme Court, in 1957, first weighed into the pornography debate, holding that obscenity was beyond First Amendment protection.[72] In *Roth v. United States*, the Court found that the government must balance its interest in proscribing sexually explicit images with protection of works with enduring artistic or cultural value.[73] Later, in 1973, the Court elaborated on its definition of obscenity in *Miller v. California*.[74] *Miller* mandated a complex, three-part balancing test.[75] Sexually explicit materials were obscene only if the work, taken as a whole and according to contemporary community standards: (1) "appeals to the prurient interest"; (2) "depicts [sexual conduct] in a patently offensive way"; and (3) "lacks serious literary, artistic, political, or scientific value."[76]

The *Miller* test, while adding a veneer (and perhaps a degree) of clarity, also provoked opposition. Professor MacKinnon and Dworkin strenuously rejected the approach, viewing it as unduly focused on "contemporary standards" without consideration of harm to victims.[77] Instead, they viewed the private civil right of action as a means to make visible the important harms of pornography, and they set about to draft ordinances to prohibit forms of pornography.[78] The ordinances focused on pornography broadly, defined as "the sexually explicit subordination

68. U.S. CONST. amend. I.

69. Mar. 3, 1873, ch. 258, 17 Stat. 598 (codified as amended at 18 U.S.C. § 1461).

70. Anthony Comstock fought to strengthen obscenity prohibitions after the Civil War, resulting in the Comstock Act of 1873, which prohibited the mailing of obscene materials. *See* FREDERICK F. SCHAUER, THE LAW OF OBSCENITY 14 (1976).

71. *See* Roth v. United States, 354 U.S. 476, 486–87 (1957) (discussing state courts' holdings concerning obscenity law before *Roth*); Adler, *supra* note 43, at 12; *see also* STRUB, *supra* note 63, at 75–77.

72. *Roth*, 354 U.S. at 481 ("[T]his is the first time the question has been squarely presented to this Court.").

73. *Id.* at 487–88.

74. *Miller*, 413 U.S. at 15.

75. *Id* at 24.

76. *Id.*

77. *See, e.g.*, Catherine A. MacKinnon, Commentary, *Not a Moral Issue*, 2 YALE L. & POL'Y REV. 321, 322–24 (1984) (parsing "the male morality of liberalism and obscenity law from the feminist political critique of pornography"); DWORKIN, *supra* note 48, at 9 ("Obscenity is not a synonym for pornography.").

78. *See, e.g.*, PORNOGRAPHY AND CIVIL RIGHTS, *supra* note 36, at 15–16 (arguing that law could be a vehicle to change the view of women as second-class citizens to men).

of women, graphically depicted, whether in pictures or words."[79] And, their aim was to recognize pornography subjugating women as a violation of civil rights.[80]

While the Minneapolis mayor initially vetoed the first anti-pornography ordinance the Indianapolis City Counsel encouraged Dworkin and Professor MacKinnon to draft a similar ordinance, which Mayor William Hudnut eventually signed into law.[81] The Indianapolis ordinance, however, met with strong opposition. Feminist activists and scholars famously authored a brief opposing the Indianapolis ordinance on behalf of the Feminist Anti-Censorship Taskforce (FACT), co-signed by the Women's Legal Defense Fund and eighty feminist advocates who identified as academics, professionals, and individuals in the arts.[82] Known as the "quintessential and definitive statement of liberal feminists on pornography," the brief argued that the civil remedy constituted harmful censorship that would lead society down the slippery slope of banning all pornography.[83]

Ultimately, the Indianapolis ordinance was short-lived. In 1985, Judge Easterbrook, sitting on the Seventh Circuit, in *American Booksellers v. Hudnut*, struck down the Indianapolis ordinance, finding it violated the First Amendment.[84] Judge Easterbrook concluded that the ordinance constituted impermissible viewpoint discrimination of protected speech.[85] While he acknowledged some of the harms associated with pornography,[86] he held that the civil remedy, by regulating only images

79. INDIANAPOLIS, IND. CODE § 16-3(v); DWORKIN & MACKINNON, *supra* note 48, at 113.

80. DWORKIN & MACKINNON, *supra* note 48, at 11 (defining trafficking in pornography as "[t]he formation of private clubs or associations for purposes of trafficking in pornography," and explaining that such an act "is illegal and shall be considered a conspiracy to violate the civil rights of women").

81. Geoffrey R. Stone, Essay, American Booksellers Association v. Hudnut*: "The Government Must Leave to the People the Evaluation of Ideas"*, 77 U. CHI. L. REV. 1219, 1221 (2010).

82. *See, e.g.*, Hunter & Law, *supra* note 39, at 70, 99 (exploring how feminists "who sought sexual self-determination as an essential aspect of full liberation" opposed anti-pornography ordinances). *But see* Lila Lee, *Fact's Fantasies and Feminism's Future: An Analysis of the Fact Brief's Treatment of Pornography Victims*, 75 CHI.-KENT L. REV. 785, 785–86 (2000) (critiquing the FACT brief, filed by anti-censorship feminists, who argued that the local ordinances were unconstitutional).

83. Lee, *supra* note 82, at 785, 788.

84. *Hudnut*, 771 F.2d. at 324–25. The court's approach in *Hudnut* was strikingly different than that adopted by the Canadian Supreme Court in *R v. Butler*, which found that the state had a strong interest in preventing harms that might arise from obscenity. 1 S.C.R. 452, 456 (1992) ("Explicit sex with violence will generally constitute undue exploitation of sex, and explicit sex that is degrading or dehumanizing will be undue if it creates a substantial risk of harm.").

85. *Hudnut*, 771 F.2d at 325.

86. *Id.* at 328–29 (noting that those individuals "who see women depicted as subordinate are more likely to treat them so," and that portrayals of "subordination tend to perpetuate

subordinating women, amounted to a content-based restriction on speech and was, therefore, subject to strict scrutiny.[87] He acknowledged that some harms contemplated by the ordinance, like coerced pornography, "might be constitutional," but found that suppression of such a broad category of sexual expression amounted to impermissible "thought control."[88] Ultimately, the government could not suppress a viewpoint "unless the danger [was] not only grave *but also imminent*,"[89] a threshold not met by the City.[90] The U.S. Supreme Court then affirmed the *Hudnut* decision without comment, effectively putting an end to anti-pornography ordinances.[91]

Hudnut stood in stark contrast to the then-recent Supreme Court decision in *New York v. Ferber* regarding child pornography.[92] In *Ferber*, the Court upheld the regulation of sexually explicit images of children as "conduct" beyond the scope of First Amendment coverage.[93] In contrast to *Hudnut*, the Court in *Ferber* pointed to the significant harms posed to children by child pornography, harms that were "evident beyond the need for elaboration."[94] The Court, thus, found that child pornography, like obscenity, was outside of First Amendment protection.[95] The decision set up a stark divide between the regulation of non-obscene adult pornography and child pornography that continues until today.

B. *The New Pornography Wars*

This Part argues that in the aftermath of *Hudnut*, a new pornography war has ensued—one in which litigators, activists, and scholars have resurrected the civil remedy to promote legal accountability against online pornography distributors, producers, and other companies. As Professor Matthew Lasar has observed, the "pornography wars" were not isolated to the 1970s and 1980s.[96] Rather, pornography presents a

subordination," leading to "affront and lower pay at work, insult and injury at home, battery and rape on the streets").

87. *Id.*

88. *Id.* at 332, 328.

89. *Id.* at 329 (emphasis added).

90. *Id.*

91. *Id.*

92. 458 U.S. 747 (1982); *see* James Weinstein, *The Context and Content of* New York v. Ferber, *in* REFINING CHILD PORNOGRAPHY LAW: CRIME, LANGUAGE, AND SOCIAL CONSEQUENCES 22–23 (Carissa B. Hessick ed., 2016) (describing how First Amendment jurisprudence leading up to the Supreme Court's decision in *Ferber* limited obscenity to "hard core" pornography and how "the Court in *Ferber* bucked this trend").

93. *Ferber*, 458 U.S. at 765; *see also* Joan Colen, Note, *Child Pornography: Ban the Speech and Spare the Child?* — New York v. Ferber, 32 DEPAUL L. REV. 685, 685 (1983) (discussing the state of First Amendment law in the years before *Hudnut*).

94. *Ferber*, 458 U.S. at 756–57.

95. *Id.* at 754, 756, 764.

96. CATHARINE A. MACKINNON, ONLY WORDS 93 (1993).

"running controversy" throughout American history that involves a reexamination of the harms inherent in pornography and the dangers of government censorship.[97] Advocates and victims' recent efforts to invoke trafficking statutes in the pornography context seek to revisit many of these fundamental questions and to expand regulation of forms of pornography.[98]

1. The Rise of a New Pornographer

In 2020, victims and advocates launched a major public campaign to shutter Pornhub, the leading global online pornography website, and draw attention to the companies that profit from online harms.[99] Pornhub, owned by parent company MindGeek, rose to prominence in the twenty-first century as "one of the most powerful players in the online content delivery field."[100] In 2010, German technology entrepreneur Fabian Thylmann, the owner of the internet pornography conglomerate Manwin, bought up a handful of struggling pornography sites, including Pornhub, YouPorn, and RedTube.[101] Thylmann revamped the sites, implementing an entrepreneurial business model that promoted free online pornography, and sold the company for millions in 2013.[102] Now called MindGeek, the conglomerate owns over 100 pornography websites[103] and boasts over 100 million visitors daily—more than Amazon, Disney+, and Netflix.[104]

MindGeek's rise was deeply tied to the advent of free online pornography, which sent reverberations through the pornography industry in the early 2000s.[105] Since *Hudnut*, the production of

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97. *Id.*

98. *Id.*

99. Hitt, *supra* note 2.

100. Zak Nye, *MindGeek: The Not-So-Secret Tech Giant of Montréal*, BULL & BEAR (Nov. 17, 2019), https://bullandbearmcgill.com/mindgeek-the-not-so-secret-tech-giant-of-montreal/ [https://perma.cc/729V-4FU4].

101. Nick Whigham, *Meet the Man Who Changed the World of Porn Forever*, N.Y. POST (Aug. 11, 2017, 12:16 PM), https://nypost.com/2017/08/11/meet-the-man-who-changed-the-world-of-porn-forever/ [https://perma.cc/7TUA-CSST].

102. *Id.*

103. Saumya Dixit, *What is Bernard Bergemar's Net Worth? PornHub's Majority Owner Saw Wealth Grow with Backers like JP Morgan Chase*, MEAWW.COM (May 24, 2021, 5:21 PM), https://meaww.com/bernard-bergemars-net-worth-porn-hub-majority-owner-mind-geek-million-views-2-billion-usd [https://perma.cc/TDH2-FZQR].

104. *Id.*

105. Several podcasts have explored the impact of free online pornography on the pornography industry. *See, e.g.*, *The Butterfly Effect*, AUDIBLE (July 27, 2017), https://www.audible.com/pd/The-Butterfly-Effect-with-Jon-Ronson-Audiobook/B073JS84YF [https://perma.cc/W3AR-CZ7M]; *Hot Money: Who Rules Porn?*, PUSHKIN INDUS. (June 6, 2022), https://podcasts.apple.com/gb/podcast/hot-money-who-rules-porn/id1621757273 [https://perma.cc/9UT3-XKMC].

pornography had become largely decentralized.[106] In the late 1980s, "Do-it-yourself" pornography rose to prominence with the advent of cellular phones and new technology.[107] "Tube sites," which are pornography websites resembling YouTube, allowed users to access, upload, and stream pornography more easily.[108] Thylmann capitalized on these advances, creating a business model built on free pornography and incentivizing users to create and upload content.[109]

These collective developments gave rise to a new type of pornographer.[110] While the pornographers of the twentieth century focused on content production,[111] the new pornographers had a direct relationship with consumers.[112] They were experts in web design and content distribution.[113] They were skilled at monetizing online content and maximizing search optimization.[114] In the case of MindGeek, executives perfected a business model based on free online

106. Jonathan Coopersmith, *Pornography, Technology, and Progress*, 4 ICON 94, 96 (1998) (describing efforts to democratize pornography and blur distinctions between producers, distributors, and consumers).

107. *Id.* at 106 (emphasizing that the move to create one's own pornography "was one of the most significant changes in the history of pornography and communications technologies"). Peer-to-peer file-sharing technology, like BitTorrent, transformed the industry, making file transfer faster and more anonymous, all while decentralizing the file sharing process. Matthew Kelley, *Pornography, Piracy, and Privacy: How Adult Entertainment Companies' Mass Copyright Infringement Litigation Threatens Sexual Privacy, and What Courts Should Do About It*, 2012 VA. STATE BAR at 2, 7–9, https://www.vsb.org/docs/sections/intellect/Matthew_E_Kelley_VA_Bar_IP_competition_entry.pdf [https://perma.cc/HF5P-KVX9]; *see also* Scott Faynor, *Down the Tubes: How Free Streaming Video Threatens the Pornography Industry*, MIT TECH. REV. (Aug. 25, 2010), https://www.technologyreview.com/2010/08/25/200986/down-the-tubes/ [https://perma.cc/JLM7-WFCU] (explaining how BitTorrent began the movement in providing quick streaming content on tube sites).

108. *See Porn-o-nomics: Drawing Back the Curtain on the Online Porn Industry*, CBC RADIO (Feb. 3, 2017, 11:08 PM), https://www.cbc.ca/radio/day6/episode-323-quebec-s-far-right-super-bowl-prop-bets-pornonomics-steve-bannon-s-political-power-and-more-1.3960621/porn-o-nomics-drawing-back-the-curtain-on-the-online-porn-industry-1.3960747 [https://perma.cc/E5N6-P7MZ] ("Tube sites are the most-visited adult entertainment sites on the web. They're sprawling, they're free and they get hundreds of millions of clicks every day.").

109. Nilsson, *supra* note 5.

110. *See The Butterfly Effect*, *supra* note 105 (exploring how free online pornography led to declining performer salaries, a rise in amateur pornography, and a new type of pornographer); Coopersmith, *supra* note 106, at 108–09 ("Far more than DIY video, computer networks have destroyed the differences as between production, distribution and consumption, while also greatly reducing barriers to the creation and support of geographically disparate communities . . . .").

111. *See* Sarah Mann, *Pornographers and Pirates: Intellectual Property and Netporn*, 5 DIGIT. STUD. (2014), https://www.digitalstudies.org/article/id/7250/ [https://perma.cc/XR5D-W7NN] (describing how the "networked distribution infrastructure" allowed pornography distributors to profit and removed other intermediaries); Blaise Cronin & Elisabeth Davenport, *E-Rogenous Zones: Positioning Pornography in the Digital Economy*, 17 INFO. SOC'Y 33, 39 (2001).

112. *See* Mann, *supra* note 111.

113. *Id.*

114. *Id.*

pornography.[115] They established free pornography websites where they could profit from advertising and paid premium content.[116] Meanwhile, MindGeek executives used data from the site to optimize user experiences and tailor content to individuals' desires.[117] This model allowed MindGeek to profit tremendously and corner the online pornography market.

Yet, there was a dark side of MindGeek's rise. Due to its dependence on free, user-generated content, MindGeek's business model relied heavily on amassing a large library of content, including CSAM, nonconsensual pornography, and images of violence.[118] According to advocates, MindGeek executives incentivized the easy upload of such images, bypassing existing requirements to confirm consent and age.[119] Executives created a "download" button on Pornhub, making it easy to download and re-upload banned content.[120] In response to such measures, victims argued that MindGeek had become "likely the largest non-regulatory repository of child pornography in North America" and "one of the largest human trafficking ventures in the world."[121] Moreover, they accused MindGeek of intentionally "creat[ing] a bustling marketplace for child pornography, rape videos, trafficked videos, and every other form of non-consensual content."[122]

2. The Fight to #DismantlePornhub

In light of these developments, advocates and victims—many of whom are associated with far-right Christian causes and prior anti-pornography campaigns—have mounted a public campaign against Pornhub. In 2020, Laila Mickelwait, one of Pornhub's most prominent critics and founder of Traffickinghub, a "decentralized global movement" created for the unitary purpose of "shutting down Pornhub and holding its executives accountable," authored an op-ed, entitled "Time to shut

115. Nilsson, *supra* note 5 ("MindGeek, which with very little scrutiny or accountability, has quietly become the dominant porn company."); *The Butterfly Effect*, *supra* note 105.

116. Nilsson, *supra* note 5.

117. *See* Aisha Hassan, *Porn Sites Collect More User Data Than Netflix or Hulu. This is What They Do With It.*, QUARTZ (Dec. 13, 2018), https://qz.com/1407235/porn-sites-collect-more-user-data-than-netflix-or-hulu-this-is-what-they-do-with-it [https://perma.cc/AA92-XCWT]; Complaint at 19, *Fleites*, 2021 WL 2492964 (No. 2:21-cv-04920).

118. Nilsson, *supra* note 5.

119. *See* 18 U.S.C. §§ 2257, 2257A (establishing age verification and recordkeeping requirements for pornography producers), *invalidated by* Free Speech Coal., Inc. v. Attorney Gen. United States, 825 F.3d 149 (3d Cir. 2016); Complaint at 3, 58, *Fleites*, 2021 WL 2492964 (No. 2:21-cv-04920).

120. Complaint at 3, 58, *Fleites*, 2021 WL 2492964 (No. 2:21-cv-04920).

121. *Id.* at 1.

122. *Id.* at 3.

Pornhub down."[123] In the piece, she pointed out "shocking cases of sex trafficking and child rape films" and called on the public to "shut down super-predator site Pornhub and hold the executive megapimps behind it accountable."[124] Traffickinghub and Mickelwait were joined in their campaign by other anti-trafficking organizations—notably the National Center on Exploitation (NCOSE), formerly Morality in the Media,[125] which had played a pivotal role in the anti-pornography efforts of the 1970s and 1980s.[126]

In December 2020, Mickelwait's advocacy efforts gained a national spotlight in the opinion piece, *The Children of Pornhub*, by *New York Times* journalist, Nicholas Kristof.[127] The op-ed told compelling stories of the children whose images were posted on Pornhub and highlighted the work of Traffickinghub in calling to shut down Pornhub.[128] Kristof featured the story of one young girl, Serena Fleites, whose ex-boyfriend posted sexually explicit images of her on Pornhub, leading to her descent into depression and attempted suicide.[129] The piece sparked a public outcry and buoyed Traffickinghub's public campaign.[130]

Following the op-ed, Traffickinghub collected over two million signatures on their petition to shut down Pornhub and gathered endorsements from over 300 anti-trafficking, child advocacy, and women's rights organizations.[131] Also, in what the *Institutional Investor* called a "parable for ESG,"[132] investors and stakeholders rallied to their

123. Laila Mickelwait, *Time to shut Pornhub down*, WASH. EXAM'R (Feb. 9, 2020, 6:00 AM), https://www.washingtonexaminer.com/opinion/time-to-shut-pornhub-down [https://perma.cc/77VT-JLVP] (describing how Pornhub was home to "hundreds, if not thousands, of videos of underage sex trafficking victims" and "complicit in the trafficking of these women and minors and probably thousands more like them").

124. *Id*.

125. Sheelah Kolhatkar, *The Fight to Hold Pornhub Accountable*, NEW YORKER (June 13, 2022), https://www.newyorker.com/magazine/2022/06/20/the-fight-to-hold-pornhub-accountable [https://perma.cc/7UTA-95TN].

126. *See* Daniel Villarreal, *Before Its Sex Content Ban, Anti-Porn Group Asked DOJ To Probe OnlyFans*, NEWSWEEK (Aug. 20, 2021, 12:23 AM), https://www.newsweek.com/before-its-sex-content-ban-anti-porn-group-asked-doj-probe-onlyfans-1621315#:~:text=The%20NCOSE%20is%20an%20anti,and%20Madonna's%201992%20book%20Sex [https://perma.cc/8DCH-NMYZ]. NCOSE's president, Patrick Trueman, has been called a "porn war veteran." *Id.*

127. *See* Kristof, *supra* note 1.

128. *Id.*

129. *Id.*

130. *Id.*; Celarier, *supra* note 18; TRAFFICKINGHUB PETITION, *supra* note 2.

131. TRAFFICKINGHUB PETITION, *supra* note 2; Exodus Cry, *One Million People Sign Petition to Shut Down Pornhub for Alleged Sex Trafficking Videos*, PR NEWSWIRE (June 9, 2020, 9:20 ET), https://www.prnewswire.com/news-releases/one-million-people-sign-petition-to-shut-down-pornhub-for-alleged-sex-trafficking-videos-301072809.html [https://perma.cc/9FLE-B6PB].

132. ESG—or "environmental, social, and governance" criteria—rose to prominence in recent years and refers to criteria that guides the decision-making of socially conscious investors.

cause.[133] Billionaire hedge fund manager, Bill Ackman, publicly called out credit card companies for allowing Pornhub to use their payment processing systems, and advocates pressured credit card companies to cut ties with Pornhub.[134] These efforts were quick to yield results.[135] Almost immediately, Mastercard and Visa quickly moved to temporarily suspend payment processing.[136] And, within days, Pornhub purged its site of over ten million sexually explicit images.[137]

These outcomes were also deeply tied to a legal campaign to hold Pornhub and other companies accountable.[138] Activists seeking to shutter Pornhub developed a legal approach, primarily using human trafficking law as a way to promote legal accountability and social change. The civil remedy, according to Mickelwait, was a means to "make the risk of exploitation [for corporations doing business with Pornhub] outweigh the rewards that they [are] getting from not addressing it."[139] Lina Nealon from NCOSE similarly explained that "by and large [Pornhub and companies that do business with them] have been held unaccountable, so these lawsuits, we hope, will . . . really hold them accountable."[140] Overall, advocates saw civil lawsuits as a means for victims to "stand up to these corporations, [and] shine a light on their exploitive and tortious conduct" and have a powerful avenue for monetary damages.[141]

Trafficking civil lawsuits also offered a promising legal avenue for civil damages. Attorney Michael Bowe, who led civil litigation efforts against MindGeek at the law firm Brown Rudnick, called federal trafficking legislation "the most plaintiffs-friendly statute we have

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Quinn Curtis et al., *Do ESG Mutual Funds Deliver on Their Promises?*, 120 MICH. L. REV. 393, 395 (2021) ("ESG investing—that is, investing informed by environmental, social, and governance criteria or considerations—is growing explosively.").

133. Celarier, *supra* note 18.

134. *Id.* For example, Ackman texted Mastercard CEO, saying that "Amex, VISA and MasterCard should immediately withhold payments or withdraw until this is fixed. PayPal has already done so." *Id*.

135. *Id.*

136. *Id.*

137. *Id.*

138. *See* NCOSE, *The Class Action Lawsuit Against Pornhub and MindGeek, Explained*, NAT'L CTR. ON SEXUAL EXPLOITATION (Mar. 11, 2021), https://endsexualexploitation.org/articles/the-class-action-lawsuit-against-pornhub-and-mindgeek-explained-2/ [https://perma.cc/C2JR-EE8U] (noting that NCOSE brought a civil lawsuit against MindGeek as part of their efforts to shut down Pornhub); Celarier, *supra* note 18 (describing how the founder of the Traffickinghub movement identified civil litigation as a tool for legal accountability).

139. Celarier, *supra* note 18 (quoting Laila Mickelwait).

140. Conversations with Consequences, *EP. 173 Montse Alvarado on Biden's Transgender Mandate & Lina Nealon Talks Pornhub*, CATHOLIC ASS'N, at 34:14 (Aug. 12, 2022), https://thecatholicassociation.org/podcast/ep-173-montse-alvarado-on-bidens-transgender-mandate-lina-nealon-talks-pornhub/ [https://perma.cc/C5U9-M8WC].

141. NCOSE, *supra* note 138.

and . . . one of the most under-utilized statutes we have."[142] As Bowe observed, federal trafficking law provided plaintiffs with access to treble damages and attorney's fees.[143] Indeed, Bowe saw such cases as "a model" for how large firms could take on systemic injustice.[144]

Thus, armed with trafficking law, plaintiffs moved into action. The same day that Kristof's *New York Times* op-ed featured Traffickinghub, attorneys at Brown Rudnick sent an evidence preservation letter to credit card companies doing business with Pornhub, giving them notice of potential trafficking liability.[145] Six months later, attorneys represented Serena Fleites, a victim featured in the *Times* op-ed, to file a novel trafficking lawsuit against MindGeek and payment processing company Visa.[146] The pleadings alleged that MindGeek was liable for sex trafficking on its sites, and third parties, including Visa, knowingly profited from sex trafficking online.[147] It was quickly followed by other similar lawsuits against MindGeek and other social media platforms.[148]

These legal efforts were not uniformly applauded. In fact, many feminists criticized efforts to close Pornhub. They argued that trafficking rhetoric was nothing more than a smokescreen to engage in morality policing.[149] Many also pointed to Mickelwait's far-right Christian ties, including past connections to Exodus Cry and the International House of Prayer Kansas City, a Christian dominionist ministry with extreme views, as evidence that such advocacy was motivated by a moral panic about pornography.[150] They argued that advocates, like Mickelwait, overstated the pervasiveness of sexual violence on Pornhub, and sought to mobilize trafficking rhetoric to end pornography writ large.[151] Mike Stabile of the Free Speech Coalition reasoned, "This isn't a Pornhub-specific problem

142. Ross Todd, *Meet the Brown Rudnick Duo Pursuing Human Trafficking Claims Against Pornhub*, AM. LAW. (June 21, 2021), https://brownrudnick.com/wp-content/uploads/2021/06/AMLAW07132021498528BROWN.pdf [https://perma.cc/FJK8-LWDY].

143. *Id.*

144. *Id.*

145. Kristof, *supra* note 1 (discussing Kristof's article instigating ESG activism from hedge fund manager); *see also* Celarier, *supra* note 18.

146. Complaint at 1, 9–10, 134, Fleites v. MindGeek S.A.R.L., No. 2:21-cv-04920, 2021 WL 2492964 (C.D. Cal. June 17, 2021).

147. *Id.* at 3, 138–41, 144–45, 148.

148. For information about similar federal lawsuits, see *supra* note 19.

149. Grant, *supra* note 16. For example, some journalists have highlighted how Mickelwait was connected to Exodus Cry and the International House of Prayer Kansas City (IHOPKC), a Christian dominionist ministry with extreme views against LGBTQ+ rights and abortion access. *See id*. Traffickinghub was associated with Exodus Cry, an organization for whom Mickelwait worked, which was founded by Benjamin Nolot when he was a member of IHOPKC. *Id.* Nolot has since distanced himself from some of IHOPKC's more controversial views on LGBTQ+ rights. Kolhatkar, *supra* note 125.

150. Grant, *supra* note 16.

151. *See* Grant, *supra* note 16; Kolhatkar, *supra* note 125.

or an issue where Pornhub is particularly negligent."[152] He added, "If you look at the vast majority of child-sex-abuse material being shared, it is not on porn sites, it's on sites like Snapchat and Facebook. This is about stopping pornography."[153]

II. PORNOGRAPHY AS TRAFFICKING

Human trafficking law provided an attractive remedy to advocates fighting Pornhub.[154] In the last decade, civil trafficking lawsuits have intensified against perpetrators as well as third parties, including online platforms, social media companies, and banks.[155] Well-trained attorneys have entered the fray, filing increasingly novel anti-trafficking claims.[156] Judges, in response, have begun to interpret federal trafficking statutes expansively to apply to new actors and a wider array of conduct.[157] As a result, trafficking law has become a powerful and dynamic mechanism for victims and advocates.[158]

A. *Human Trafficking Law and Theory*

Scholars and activists have historically considered human trafficking and pornography to be distinct phenomena. Human trafficking typically involves forced labor or coerced commercial sex. Pornography, in contrast, refers to sexually explicit images. While the conduct may overlap, the legal categories have typically remained distinct. Yet, over

152. Kolhatkar, *supra* note 125.

153. *Id.*

154. *See, e.g.*, Kyleigh Feehs & Alyssa Currier Wheeler, *2020 Federal Human Trafficking Report*, HUM. TRAFFICKING INST. 25 (Lindsey Roberson ed., 2021), https://traffickinginstitute.org/wp-content/uploads/2022/01/2020-Federal-Human-Trafficking-Report-Low-Res.pdf [https://perma.cc/9CLQ-ZHTL].

155. *See* Julie Dahlstrom, *The Elastic Meaning(s) of Human Trafficking*, 108 CALIF. L. REV. 379, 383–84 (2020) (examining the application of U.S. federal anti-trafficking law to new actors and conduct); *Epstein Accusers Sue Banks That Allegedly Benefited from Sex Trafficking Operation*, CBC NEWS (Nov. 25, 2022, 3:44 PM), https://www.cbsnews.com/dfw/news/epstein-accusers-sue-banks-that-allegedly-benefited-from-sex-trafficking-operation/ [https://perma.cc/7L5W-HR8N] (describing unfolding federal civil lawsuits filed against JPMorgan for knowingly benefiting from the sex-trafficking of young women and girls by Jeffrey Epstein).

156. *See, e.g.*, THE HUM. TRAFFICKING LEGAL CTR., FEDERAL HUMAN TRAFFICKING CIVIL LITIGATION: 2020 DATA UPDATE 7 (2020), https://htlegalcenter.org/wp-content/uploads/Federal-Human-Trafficking-Civil-Litigation-Data-Update-2020_FINAL.pdf [https://perma.cc/HY4M-3FDA] ("The number of federal civil trafficking cases rose steadily between 2003 and 2020, with more than [14] times as many cases filed in 2019 (88) as in 2004 (6)."); Julie Dahlstrom, *Trafficking to the Rescue?*, 54 U.C. DAVIS L. REV. 1, 28 (2020) [hereinafter "Dahlstrom, *Rescue?*"] (positing that "creative litigators have sought to push federal trafficking law in new, and perhaps unexpected, directions").

157. *See generally* Dahlstrom, *supra* note 155 (describing the deployment of trafficking statutes to address buyers of sex, hotels, online platforms, and other conduct).

158. See *infra* Section III, *supra* Section I.B.3, and *infra* note 312 for more information about human trafficking law.

time, the definition of trafficking has grown more capacious, beginning to subsume aspects of pornography.[159]

These developments are due, in large part, to ambiguity in the definitional framework of trafficking, resulting from early feminist battles. In the 1970s and 1980s, dominance feminists, including Professor MacKinnon, united with conservative evangelical activists to support an expansive conception of sex trafficking.[160] Professor MacKinnon viewed all commercial sex as inherently harmful—the embodiment of subordination of women.[161] She acknowledged that historically subordinated groups often faced limited choices, due to their economic or social position, and reasoned that these systemic factors rendered women often inherently coerced into commercial sex.[162] In this context, state intervention was a key tool to stem the market for exploitation.[163] As a result, dominance feminists embraced tools that targeted both the *demand* for commercial sex by criminalizing buyers of sex and the *supply* of commercial sex by penalizing third parties who engaged in trafficking

159. *See, e.g.*, Janie A. Chuang, *Rescuing Trafficking from Ideological Capture: Prostitution Reform and Anti-Trafficking Law and Policy*, 158 U. PA. L. REV. 1655, 1656 (2010) ("Despite shared moral outrage over the plight of trafficked persons, debates over whether trafficking encompasses voluntary prostitution continue to rend the anti-trafficking advocacy community—and are as intractable as debates over abortion and other similarly contentious social issues."); Lara Gerassi, *A Heated Debate: Theoretical Perspectives of Sexual Exploitation and Sex Work*, 42 J. SOCIO. & SOC. WELFARE 79, 81 (2015) (describing competing feminist theories, including radical feminism and pro-sex work perspectives).

160. Chuang, *supra* note 159, at 1664–65; Elizabeth Bernstein, *The Sexual Politics of the "New Abolitionism"*, 18 DIFFERENCES 128, 130–31 (2007) (examining the role of evangelical advocacy in anti-trafficking efforts).

161. *See, e.g.*, Catharine A. MacKinnon, *Trafficking, Prostitution, and Inequality*, 46 HARV. C.R.-C.L. L. REV. 271, 285–86 (2011) [hereinafter MacKinnon, *Prostitution and Inequality*] (noting the inherent harms present in commercial sex and rejecting harm reduction arguments because "[t]he imperative is to fix the harms so prostitution can stay").

162. *See, e.g.*, Catharine A. MacKinnon, *Rape Redefined*, 10 HARV. L. & POL'Y REV. 431, 448 (2016) ("[W]omen are disproportionately bought and sold in prostitution by men as a cornerstone of combined economic, racial, age-based, and gendered inequality, in which money functions as a form of force in sex because the women are not permitted to survive any other way."); Melissa Farley, *Prostitution, Trafficking, and Cultural Amnesia: What We Must Not Know in Order to Keep the Business of Sexual Exploitation Running Smoothly*, 18 YALE J.L. & FEMINISM 109, 111 (2006) ("Prostitution/trafficking/pornography thus systematically discriminate[s] against women, against the young, against the poor and against ethnically subordinated groups. . . . When prostitution is defined as labor, the predatory, pedophiliac purchase of a human being by a john becomes a banal business transaction.").

163. Elizabeth Bernstein, *Militarized Humanitarianism Meets Carceral Feminism: The Politics of Sex, Rights, and Freedom in Contemporary Antitrafficking Campaigns*, 36 SIGNS 45, 47 (2010) (positing that abolitionists and evangelicals have a "commitment to carceral paradigms of social justice and to militarized humanitarianism as the preeminent mode of engagement by the state").

crimes, while decriminalizing those providing commercial sex.[164] This model, now known as the Swedish or Nordic model, aimed to shrink the market for commercial sex and end what, according to such feminists, was an exploitative practice.[165]

Intersectional or choice feminists, in contrast, rejected such broad formulations of trafficking.[166] They argued that consensual sex work could be separated from that involving force, fraud, or coercion.[167] Many anti-carceral feminists also pointed to the harms of the criminal legal interventions and argued that they often punished those most marginalized.[168] As a result, sex work proponents advocated models that

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164. *See, e.g.*, Farley, *supra* note 162, at 141–42 (2006) ("Since prostitution creates the demand for trafficking, the sex industry in its totality must be confronted."); Michelle Maden Dempsey, *Sex Trafficking and Criminalization: In Defense of Feminist Abolitionism*, U. PA. L. REV. 1729, 1752–53 (2010) (describing the main premises of the abolitionist position to combat demand for sex trafficking through interventions aimed at buyers of sex). For an exploration of the different models for decriminalization of commercial sex, see Janet Halley et al., *From the International to the Local in Feminist Legal Responses to Rape, Prostitution/Sex Work, and Sex Trafficking: Four Studies in Contemporary Governance Feminism*, 29 HARV. J.L. & GENDER 335, 338–39 (2006), or Chuang, *supra* note 159, at 1666–68.

165. Dominance feminists support the Swedish model, known also as the Nordic Model, based on Sweden's Sex Purchase Act of 1999 that punishes buyers of commercial sex, provides exit services to those involved in commercial sex, and criminalizes perpetrators of trafficking. *See* Benjamin Conery, *Prostitution: The Role of Trafficking and the Swedish Model*, 1 CORNELL INT'L L.J. ONLINE 5, 5–6 (2013).

166. *See* Aziza Ahmed, *Feminism, Power, and Sex Work in the Context of HIV/AIDS: Consequences for Women's Health*, 34 HARV. J.L. & GENDER 225, 229–31 (2011); M. Ditmore and P. Saunders, *Sex Work and Sex Trafficking*, SEXUAL HEALTH EDUC. 1, 15 (1998); Halley et al., *supra* note 164, at 351.

167. Sex work proponents vary in how they conceptualize commercial sex. *See* Chuang, *supra* note 159, at 1670. While most reject the neo-abolitionist framing, some approach it from a lens of sex positivity, arguing that sex work itself was liberatory. *See* Halley et al., *supra* note 164, at 351. Others believe it to be one "constrained option among many." Chuang, *supra* note 159, at 1670; *see also* Gerassi, *supra* note 159, at 81–82 (explaining the pro-sex work perspective and its critiques).

168. *See, e.g.*, Bernstein, *supra* note 160, at 143 (coining the term "carceral feminism" to refer to feminist dedication to "a law and order agenda and . . . a drift from the welfare state to the carceral state as the enforcement apparatus for feminist goals"); Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581, 588 (1990) (critiquing feminist approaches that essentialize women, rooting a "notion that there is a monolithic 'women's experience' that can be described independent of other facets of experience like race, class, and sexual orientation"); Joan Williams, *Implementing Antiessentialism: How Gender Wars Turn into Race and Class Conflict*, 15 HARV. BLACKLETTER L.J. 41, 41 (1999) ("The traditional feminist assumption is that gender binds women together. In fact, gender divides them."); Aya Gruber, *Rape, Feminism, and the War on Crime*, 84 WASH. L. REV. 581, 582 (2009) ("Some feminist scholars have begun to express grave concern that 'a punitive, retribution-driven agenda' now constitutes 'the most publicly accessible face of the women's movement.'") (quoting Dianne L. Martin, *Retribution Revisited: A Reconsideration of Feminist Criminal Law Reform Strategies*, 36 OSGOODE HALL L.J. 151, 158 (1998)). Also, feminist and critical race scholars have pointed to

either decriminalized or legalized commercial sex.[169] These approaches are frequently aimed at harm reduction—addressing the stigma and violence within the market—rather than the elimination of the commercial sex industry altogether.[170]

B. *The International Trafficking Frame*

In 2000, the international community sought to reconcile these competing feminist approaches by adopting a uniform definition of human trafficking. States Parties enacted the United Nations Convention Against Transnational Organized Crime and the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (Trafficking Protocol).[171] The Trafficking Protocol attempted to reconcile prior international efforts aimed at "white slavery" and trafficking in persons.[172] Article 3(a) of the Trafficking Protocol defined "trafficking in persons" as:

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how carceral approaches center the experience of cisgender white women and ignore how race, gender, ability, and other factors shape experiences of the criminal legal system. *See* Dorothy E. Roberts, *The Social and Moral Cost of Mass Incarceration in African American Communities*, 56 STAN. L. REV. 1271, 1287 (2004) ("Given the history of police brutality against [B]lacks, many [B]lack women are reluctant to enlist law enforcement to protect them."); Miriam H. Ruttenberg, Note, *A Feminist Critique of Mandatory Arrest: An Analysis of Race and Gender in Domestic Violence Policy*, 2 AM. U. J. GENDER SOC. POL'Y & L. 171, 172 (1994) ("In spite of the best intentions of many domestic violence activists, who are mostly white women, the interests of many Black women are not served by asking the state for protection such as mandatory arrest laws.").

169. *See Keeping Sex Workers Safe*, 386 LANCET 504, 504 (Aug. 8, 2015), http://thelancet.com/journals/lancet/article/PIIS0140-6736(15)61460-X/fulltext [https://perma.cc/N389-3ENN]; Halley et al., *supra* note 164, at 338–39 (articulating different models of decriminalization and legalization).

170. *See* Linda Cusick, *Widening the Harm Reduction Agenda: From Drug Use to Sex Work*, 17 INT'L J. DRUG POL'Y 3, 3 (2006) (arguing for harm reduction as the model to address commercial sex); CHERYL OVERS & PAULO LONGO, MAKING SEX WORK SAFE (2003), https://www.aspasie.ch/files/MakingSexWorkSafe.pdf [https://perma.cc/JQN5-CDAN]; Gordon Roe, *Harm Reduction as Paradigm: Is Better Than Bad Good Enough? The Origins of Harm Reduction*, 15 CRITICAL PUB. HEALTH 243 (2005) (explaining the increasing support for harm reduction).

171. United Nations Convention Against Transnational Organized Crime, Nov. 15, 2000, 2225 U.N.T.S. 209, S. Treaty Doc. No. 108-16 (enacting the United Nations Convention Against Transnational Organized Crime); Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention Against Transnational Organized Crime, G.A. Res. 55/25 (Nov. 15, 2000) [hereinafter Trafficking Protocol] (supplementing the United Nations Convention Against Transnational Organized Crime with "Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children").

172. *See* ANNE T. GALLAGHER, THE INTERNATIONAL LAW OF HUMAN TRAFFICKING 55 (2012) (explaining the emergence of the concept of "white slavery").

> [T]he recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation.[173]

The Trafficking Protocol was groundbreaking in building a shared definitional framework. Yet, consensus was born through ambiguity.[174] The Trafficking Protocol defined "trafficking in persons" broadly as a form of exploitation, encompassing sex and labor trafficking.[175] Nonetheless, it left "exploitation" undefined, only clarifying the floor of exploitative practices.[176] Drafters also failed to define other terms, like "the abuse of power or a position of vulnerability."[177] Additionally, while the Protocol failed to mention pornography, it was not explicitly excluded.[178] As a result, the Protocol, by including vague terms capable

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173. Trafficking Protocol, *supra* note 171, at art. 3(a).

174. Anne T. Gallagher, *Trafficking in Transnational Criminal Law*, *in* ROUTLEDGE HANDBOOK OF HUMAN TRAFFICKING 34 (2017) (observing that "consensus was only achieved through the adoption of an unwieldy formulation that included a number of vague and undefined terms").

175. U.N. Secretariat, Conference of the Parties to the United Nations Convention against Transnational Organized Crime, *Forms of Exploitation Not Specifically Mentioned in the Protocol*, ¶ 6, U.N. Doc. CTOC/COP/WG.4/2013/4 (Aug. 23, 2013).

176. Trafficking Protocol, *supra* note 171, at art. 3(a) ("Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs."); *see also* Interpretative Notes for the Official Records (travaux préparatoires) of the Negotiation of the United Nations Convention against Transnational Organized Crime and the Protocols Thereto, Rep. of the Ad Hoc Comm. on the Elaboration of a Convention Against Transnational Organized Crime on the Work of its First to Eleventh Sessions, at 12, A/55/383/Add. (Nov. 3, 2000) ("The terms 'exploitation of the prostitution of others' or 'other forms of sexual exploitation' are not defined in the protocol.").

177. Trafficking Protocol, *supra* note 171, at art. 3(a).

178. Pornography was not mentioned in the Trafficking Protocol but addressed in other international instruments at the time. The Convention of the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography, enacted in 2000, called on States Parties to "prohibit the sale of children, child prostitution and child pornography." Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography, G.A. Res. 54/263, Annex II, U.N. Doc. A/54/49, Vol. III, art. 1 (entered into force Jan. 18, 2002). The Convention Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labor of 1999 also defined the "worst forms of child labour" to include "[t]he use, procuring or offering of a child for prostitution, for the production of pornography or for pornographic performances." Art. 3, *opened for signature* June 17, 1999, 2133 U.N.T.S. 161 (entered into force Nov. 19, 2000).

of multiple definitions, effectively left it to States Parties to clarify the scope of the concept.[179]

Since 2000, States Parties have responded by defining trafficking, at the outer edges, to include a wide range of practices, including unethical adoptions, begging, and pornography.[180] Professor Janie Chuang termed this phenomenon "exploitation creep," the use of "previously narrow legal categories . . . in a strategic bid to subject a broader range of practices to a greater amount of public opprobrium."[181] She has argued that this trend has harmed anti-trafficking efforts, strengthening carceral approaches and diminishing the strength of the concept.[182] Similarly, Professor Anne Gallagher has opined that "exploitation creep" can attune public attention to problems often overlooked, but it also gives rise to attendant harms, like dilution of the trafficking concept and doctrinal confusion, which should be "acknowledged and actively managed."[183]

C. *The Domestic Trafficking Frame*

The same year that the States Parties enacted the Trafficking Protocol, Congress passed the Trafficking Victims Protection Act (TVPA), comprehensive legislation focused on the three "Ps"—prosecution of perpetrators, protection of victims, and prevention of trafficking.[184] The TVPA articulated new federal human trafficking crimes, including the federal crime of sex trafficking of children by force, fraud, or coercion under 18 U.S.C. § 1591.[185] Congress also defined the crime of forced labor to criminalize work induced through psychological coercion.[186] Alongside criminal penalties, Congress articulated new protections for

179. *See* Chuang, *supra* note 159, at 613 ("The hastily drafted protocol defined trafficking to include vague elements that are chronically undefined under international law and subject to vast differences in interpretation.").

180. *Id.* (commenting on the application of trafficking law to "practices as diverse as illegal, unethical adoptions; commercial surrogacy; begging; [and] prostitution/pornography").

181. *Id.* at 611 (arguing against the broadening of "trafficking" or "modern day slavery" to include a wider array of harms).

182. *Id*.

183. Gallagher, *supra* note 174, at 35.

184. *See* Jennifer A.L. Sheldon-Sherman, *The Missing "P": Prosecution, Prevention, Protection, and Partnership in the Trafficking Victims Protection Act*, 117 PA. ST. L. REV. 443, 445 (2012).

185. Mohamed Y. Mattar, *Interpreting Judicial Interpretations of the Criminal Statutes of the Trafficking Victims Protection Act: Ten Years Later*, 19 AM. U. J. GENDER, SOC. POL'Y & L. 1247, 1250 (2011).

186. *See id.*; Kathleen Kim, *Psychological Coercion in the Context of Modern-Day Involuntary Labor: Revisiting* United States v. Kozminski *and Understanding Human Trafficking*, 38 U. TOL. L. REV. 941, 944 (2007) (describing how the passage of the TVPA reversed precedent in *U.S. v. Kozminski*, limiting involuntary servitude to not reach psychological coercion).

survivors of trafficking, including specialized immigration benefits to provide protection against deportation.[187]

While narrower than the Trafficking Protocol, the definition of sex and labor trafficking was susceptible to broad interpretation. For example, Congress defined a perpetrator of sex trafficking under 18 U.S.C. § 1591 as:

> (a) Whoever knowingly— (1) in or affecting interstate or foreign commerce . . . recruits, entices, harbors, transports, provides, obtains, advertises, maintains, patronizes, or solicits by any means a person; (2) knowing, or, . . . in reckless disregard of the fact, that means of force, threats of force, fraud, coercion described in subsection (e)(2), or any combination of such means will be used to cause the person to engage in a commercial sex act.[188]

The definition focused on a *prohibited act*, such as obtaining, maintaining, harboring, or transporting, but left these terms undefined.[189] Moreover, Congress defined a "commercial sex act," broadly to include "any sex act on account of which anything of value is given to or received by any person."[190] Like in international law, pornography also was not explicitly excluded. Thus, Congress left it to federal courts to interpret the sex trafficking statute and further define its scope.

Since then, U.S. trafficking law has become an attractive avenue for plaintiffs. In 2003, Congress passed the Trafficking Victims Protection Reauthorization Act (TVPRA), establishing a federal private right of action for trafficking victims to enforce TVPA violations—notably, forced labor under 18 U.S.C. § 1589; trafficking into involuntary servitude under 18 U.S.C. § 1590; and sex trafficking of children by force, fraud, or coercion under 18 U.S.C. § 1591.[191] As a result, victims

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187. *See* Jennifer Chacón, *Tensions and Trade-Offs: Protecting Trafficking Victims in the Era of Immigration Enforcement*, 159 U. PA. L. REV. 1609, 1613 (2010) (illuminating how the TVPA and subsequent congressional reauthorizations "not only targeted traffickers for unique punishment . . . but also created a legal space for unauthorized migrant victims to come forward").

188. 18 U.S.C. § 1591.

189. *See* 18 U.S.C. § 1591(a)(1). While "force, threats of force, fraud, [or] coercion" was required for adults who were eighteen years of age and older, the government need not show that a prohibited means was used for children under 18. *See id.*

190. 18 U.S.C. § 1591(e)(3); *see also* 22 U.S.C. § 7102(4) (providing the same definition for "commercial sex act").

191. TVPRA of 2003, *supra* note 30, § 4(a). The TVPRA explains that:

> An individual who is a victim of a violation of [§] 1589 [forced labor], 1590 [trafficking with respect to peonage, slavery, involuntary servitude, or forced labor], or 1591 [sex trafficking of children or by force, fraud, or coercion] of this chapter may bring a civil action against the perpetrator in an appropriate district

could bring a federal civil action directly against the perpetrator in federal court under 18 U.S.C. § 1595(a) and receive civil damages.[192]

While this provision attracted relatively little legislative attention at the time,[193] Professor Kathleen Kim and attorney Kusia Hreshchyshyn recognized the federal civil remedy as a seismic shift in the anti-trafficking landscape.[194] The right to sue perpetrators allowed victims to bypass the lengthy, often unpredictable criminal restitution process.[195] It also provided a lower standard of proof—a preponderance of the evidence—and shifted control from prosecutors to victims, making perpetrators "directly accountable to their victims."[196] These developments allowed victims to "significantly influence interpretation of the original TVPA" and "claim . . . membership in the political community through enforc[ing] [their] individual civil rights."[197]

Congress further expanded these rights in 2008 by authorizing civil trafficking cases against third parties.[198] In particular, Congress modified § 1595(a) to permit civil actions against parties who "knowingly benefit[], financially or by receiving anything of value from participation in a venture in which that person knew or should have known has engaged in an act in violation of this chapter."[199] In terms of the *mens rea* requirement, § 1595(a) required only constructive knowledge, not an overt act or even actual knowledge, a significantly lower standard.[200]

> court of the United States and may recover damages and reasonable attorneys fees.

Id.

192. *Id.*

193. Briana Beltran, *The Hidden 'Benefits' of the Trafficking Victim Protection Act's Expanded Provisions for Temporary Foreign Workers*, 41 BERKELEY J. EMP. & LAB. L. 229, 248 (2020) ("The legislative history contains but one reference to the private right of action, amidst a continued overwhelming focus on sex trafficking and victims who are women and children.").

194. Kathleen Kim & Kusia Hreshchyshyn, *Human Trafficking Private Right of Action: Civil Rights for Trafficked Persons in the United States*, 16 HASTINGS WOMEN'S L.J. 1, 16 (2004) ("A civil suit provides unique methods by which trafficked persons can recover damages from traffickers while globally deterring trafficking by disabling traffickers financially, thereby reducing the mercurial incentives of the industry.").

195. *Id.*

196. *Id.* at 16–17.

197. *Id.* at 5, 34.

198. TVPRA of 2008, *supra* note 31.

199. *Id.* at § 221; 18 U.S.C. § 1595(a).

200. *See also* J.C. v. Choice Hotels Int'l, Inc., No. 20-CV-00155-WHO, 2020 WL 3035794, at *1, n.1 (N.D. Cal. June 5, 2020) (reasoning that applying the "participation in a venture" to require an overt act, as in the criminal section, "would void the 'should have known' language in the civil remedy" and "[t]his violates the 'cardinal principle of statutory construction that a statute ought, upon the whole, to be construed so that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant'"). *Compare* United States v. Afyare, 632 F. App'x.

Thus, Congress significantly expanded potential civil liability for companies who knowingly benefit from trafficking.

Not surprisingly, civil trafficking claims against third parties have proliferated in the last decade or so.[201] In 2019 and 2020, plaintiffs filed 406 federal civil anti-trafficking suits against entities, in contrast to 91 from 2015 to 2018.[202] This significant increase in civil lawsuits sent reverberations across entire industries, hotels being a prime example. In 2015, Lisa Ricchio, a survivor of sex trafficking, brought a first-of-its-kind lawsuit against motel owners at the Shangri-La Motel, in Seekonk, Massachusetts.[203] In a watershed decision, the U.S. Court of Appeals for the First Circuit validated Ricchio's theory,[204] finding that the district court erred in dismissing the trafficking claims and in allowing the claims to proceed.[205] An explosion of trafficking lawsuits against hotels followed, resulting in many hotel chains implementing employee training on trafficking in an effort to avoid liability.[206]

As litigation ramped up against companies, one industry remained relatively untouched: online platforms. Until 2018, § 230 of the CDA

272, 283–86 (6th Cir. 2016) (finding that an overt act is required in the criminal trafficking context when establishing entity liability), *with* B.M. v. Wyndham Hotels & Resorts, Inc., No. 20-CV-00656-BLF, 2020 WL 4368214, at *3 (N.D. Cal. July 30, 2020) ("As a threshold matter, the Court addresses the parties' dispute as to whether the 'participation in a venture' definition from the criminal liability section of the TVPRA, [§] 1591(e)(4), applies to the civil liability [§] 1595 and concludes that it does not.").

201. Max Mitchell, *Sex Trafficking Awareness Is Increasing and So Are Civil Claims*, LEGAL INTELLIGENCER (July 22, 2019, 2:11 PM), https://www.law.com/thelegalintelligencer/2019/07/22/sex-trafficking-awareness-is-increasing-and-so-are-civil-claims/ [https://perma.cc/9XQL-BW4T] ("[L]awsuits are now being lodged against a range of entities, including hotels, motels, taxis, massage parlors, truck stops and, in one case outlined in the Human Trafficking Legal Center's report, a doctor who prescribed drugs to a trafficker who then used those drugs to control a trafficking victim."); Todd Soloway & Bryan Mohler, *The Proliferation of Human Trafficking Lawsuits in the Hotel Industry*, N.Y. L.J. (Nov. 17, 2021, 2:00 PM), https://pryorcashman.gjassets.com/content/uploads/2021/11/NYLJ_TheProliferationofHumanTraffickingLawsuitintheHotelIndustry.pdf [https://perma.cc/DU3C-QTFS] ("Relying upon this civil remedy mechanism, in recent years a flurry of human trafficking lawsuits against hotel entities were filed in courts around the country.").

202. Feehs & Wheeler, *supra* note 154, at 55.

203. Todd Bookman, *Human Trafficking Survivor Settles Lawsuit Against Motel Where She Was Held Captive*, NPR (Feb. 20, 2022, 5:00 AM), https://npr.org/2020/02/20/807506786/human-trafficking-survivor-settles-lawsuit-against-motel-where-she-was-held-capt [https://perma.cc/3SHP-TZQU]. Ricchio claimed that the motel owners benefitted financially from trafficking by turning a blind eye to sex trafficking at their motel. *See* Ricchio v. McLean, 853 F.3d 553, 556 (1st Cir. 2017).

204. *Ricchio*, 853 F.3d at 557–58.

205. *Id.*

206. *See* Feehs & Wheeler, *supra* note 154, at 55; Bookman, *supra* note 203; *see also* Bernadette Giacomazzo, *The Sex-Trafficking Lawsuits Plaguing Major Hotel Chains*, TRAVEL NOIRE (Oct. 22, 2021), https://travelnoire.com/sex-trafficking-lawsuit [https://perma.cc/3ZCF-3M5Y] (detailing the responses of hotel defendants of trafficking lawsuits).

barred civil trafficking lawsuits against online platforms, effectively immunizing websites from civil liability for content posted online by third parties.[207] Congress passed the CDA, part of the Telecommunications Act of 1996, with dual purposes of promoting the development of the then-nascent Internet and encouraging private efforts to eradicate "offensive" conduct.[208] Over time, however, courts interpreted the CDA to provide blanket immunity to online platforms, even those that actively facilitated sex trafficking.[209]

A public outcry eventually sparked a flurry of federal legislative action to curtail the reach of § 230.[210] Anti-trafficking advocates argued that new measures were needed to stem sex trafficking and address bad actors, like Backpage—the then-leading website for commercial sex ads—that profited from sex trafficking.[211] Yet, opponents warned that amending § 230 would lead to a slippery slope, eroding internet freedom and opening up new exceptions to § 230.[212] They also argued that shuttering online platforms would make those in the sex trade more vulnerable to abuse and exploitation.[213]

Despite these concerns, Congress took the monumental—and controversial—step of passing the Fight Online Sex Trafficking Act

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207. 47 U.S.C. § 230 (2018) ("[N]o provider or user of an interactive computer service shall be held liable on any action voluntarily taken in good faith to restrict access to 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.").

208. As Professor Citron and Benjamin Wittes observed, legislators sought to "devis[e] a limited safe harbor from liability for online providers engaged in self-regulation." Danielle Keats Citron & Benjamin Wittes, *The Internet Will Not Break: Denying Bad Samaritans § 230 Immunity*, 86 FORDHAM L. REV. 401, 403–04 (2017).

209. *See, e.g.*, Doe No. 1 v. Backpage.com, LLC, 817 F.3d 12, 20–21 (1st Cir. 2016) (finding that § 230 of the CDA bars trafficking claims against Backpage). In *Doe v. Backpage*, the First Circuit, while sympathetic to the plaintiff's claims, ultimately upheld the dismissal of the trafficking lawsuit against Backpage, the then-leading website for commercial sex ads, while it opined that, "[t]his is a hard case . . . hard in the sense that the law requires that we, like the court below, deny relief to plaintiffs whose circumstances evoke outrage." *Id.* at 15.

210. Kendra Albert et al., *FOSTA in Legal Context*, 52 COLUM. HUM. RTS. L. REV. 1084, 1100 (2021).

211. *See, e.g.*, Aja Romano, *A New Law Intended to Curb Sex Trafficking Threatens the Future of the Internet as We Know It*, VOX (July 2, 2018, 1:08 PM), https://www.vox.com/culture/2018/4/13/17172762/fosta-sesta-backpage-230-internet-freedom [https://perma.cc/HVC5-DBEH] ("The bill's supporters have framed FOSTA and SESTA as vital tools that will allow officials to police websites and allow sex trafficking survivors to sue those websites for facilitating their victimization.").

212. *See id.* (quoting law Professor Eric Goldman, commenting that "[t]he bill would expose Internet entrepreneurs to additional unclear criminal risk, and that would chill socially beneficial entrepreneurship well outside the bill's target zone").

213. *See, e.g.*, Albert et al., *supra* note 210, at 1089 ("The result is that people in the sex trades, who work in legal, semilegal, and criminalized industries, have been forced into dangerous and potentially life-threatening scenarios.").

(FOSTA) of 2018. Among other provisions, FOSTA amended § 230 to allow direct and intermediary civil trafficking claims to proceed against online platforms "if the conduct underlying the claim constitutes a violation of [§] 1591 of that title"—the criminal sex trafficking statute.[214] By referencing Chapter 1591, the criminal sex trafficking standard, FOSTA also left open whether courts should apply the criminal or civil knowledge standard in claims against online platforms. FOSTA also defined "venture" broadly to include entities that "knowingly assist[], support[], or facilitat[e]" a violation of federal sex trafficking law.[215] These changes were significant, opening the door to civil lawsuits against online platforms, while also injecting uncertainty, especially in terms of whether the knowledge standard would trigger liability.[216]

D. *Using Trafficking Law to Confront Online Harms*

Over the last few years, victims, prosecutors, and litigators have now mobilized trafficking law in the online pornography context. Parties ask courts to interpret "sex trafficking" broadly to include new conduct, including (1) the production of pornography involving force, fraud, or coercion; (2) CSAM; and (3) nonconsensual pornography. While federal litigation is still in its early stages, district courts have begun to signal acceptance of some of these arguments—especially related to CSAM and pornography induced by force, fraud, or coercion. If sustained, these developments may have significant reverberations across the online pornography industry.

1. Pornography Involving Force, Fraud, and Coercion

Dominance feminists have long argued that force, fraud, and coercion are key features of the pornography industry.[217] Indeed, anti-pornography

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214. 47 U.S.C. § 230(e)(5)(A). FOSTA updated § 230 to have "[n]o effect on sex trafficking law," and provided that it cannot "be construed to impair or limit . . . any claim in a civil action brought under [§] 1595 of title 18, if the conduct underlying the claim constitutes a violation of [§] 1591 of that title." *Id.* § 230(e)(5); 18 U.S.C. § 1591.

215. 18 U.S.C.§ 1591(e)(4).

216. *See* United States v. Afyare, 632 F. App'x 272, 286 (6th Cir. 2016). Prior to FOSTA, the U.S. Court of Appeals for the Sixth Circuit, in *United States v. Afyare*, found that "mere negative acquiescence" was insufficient to qualify as a "venture" in the criminal context because such an interpretation would create "a vehicle to ensnare conduct that the statute never contemplated." *Id.* But no courts had weighed in in the civil context. Doe #1 v. Backpage.com, LLC, 817 F.3d 12, 21 (1st Cir. 2016), *cert. denied*, 137 S. Ct. 622 (2017) (confirming that "'participation in a sex trafficking venture' [was] a phrase that no published opinion has yet interpreted").

217. *See, e.g.*, PORNOGRAPHY AND CIVIL RIGHTS, *supra* note 36, at 41 ("Often, individuals are coerced through violence into sexually explicit and subordinating performances, but the coercion itself is not shown in the film."). In public hearings regarding the anti-pornography

ordinances drafted by Professor MacKinnon and Dworkin included provisions aimed at coerced pornography, and in *Hudnut*, Judge Easterbrook opined that they "might be constitutional."[218] However, few legal cases have emerged as test cases.[219]

Beginning in 2020, plaintiffs have mobilized civil trafficking law to test the waters, arguing that pornography induced by force, fraud, or coercion amounts to sex trafficking.[220] One such case, *Doe v. Steele*, was hailed by NCOSE as the "first ever" trafficking case against pornography producers.[221] The pleadings alleged that the defendant, Cissy Steele, used force, fraud, and coercion to induce the plaintiff to engage in sex acts for money—namely, sex acts filmed and posted online.[222] The plaintiffs also claimed that the production companies knowingly profited from the illegal venture with Steele in violation of federal trafficking law.[223] In an initial ruling, U.S. District Judge Michael Anello denied the pornography

ordinance, women spoke of "pornography being forced on them in ways that gave them no choice about seeing the pornography or later performing the sex." *Id.* at 34. Indeed, Linda Boreman, the actress who starred in *Deep Throat*—the first mainstream pornographic film to be released in theaters—later became an advocate for anti-pornography ordinances. *See* BRONSTEIN, BATTLING PORNOGRAPHY, *supra* note 33, at 127. Boreman claimed that her husband, Chuck Traynor, coerced her into participating in the film. Simon Hattenstone, *After 33 Years, Deep Throat, the Film That Shocked the US, Gets Its First British Showing*, GUARDIAN (June 10, 2005), https://www.theguardian.com/uk/2005/jun/11/film.filmnews [https://perma.cc/5MV9-GAYU].

218. *See, e.g.*, *Hudnut*, 771 F.2d at 324–25 ("Without question a state may prohibit fraud, trickery, or the use of force to induce people to perform—in pornographic films or in any other films.").

219. Obscenity prosecutions declined in the twenty-first century, and while prosecutors have occasionally brought state prostitution criminal cases against pornography producers, these efforts largely failed on appeal. *See, e.g.*, People v. Freeman, 758 P.2d 1128, 1129 (Cal. 1988) (striking down the prosecution of California pornography producer under prostitution charges); *see also* Randazza, *supra* note 32, at 100 (describing state prosecutorial efforts to charge pornography producers with prostitution or pandering crimes, which courts largely struck down).

220. *See* Complaint for Damages Pursuant to 18 U.S.C. § 1595 at 8–12, Doe v. MG Freesites, Ltd., No. 3:20-cv-02440, 2020 WL 7388723 (S.D. Cal. Dec. 15, 2020) (filing civil federal trafficking suit against MindGeek and other defendants in a claim alleging that MindGeek knowingly benefited from a venture with GDP). *See generally* Complaint for Violation of: Title 18, Section 1591(a), United States v. Pratt et al., No. 3:19-cr-04488 (S.D. Cal. Oct. 10, 2019) (charging GDP executive with sex trafficking and related federal criminal charges for use of fraud and coercion to induce a commercial sex act).

221. Complaint at 1, Doe v. Steele, No. 3:20-CV-01818-MMA-MSB, 2020 U.S. Dist. LEXIS 213854 (S.D. Ca. Nov. 16, 2020); NCOSE, *NCOSE Law Center Files First Ever Anti-Trafficking Lawsuit Against Pornography Producers on Behalf of Survivor*, NCOSE (Sept. 25, 2020), https://endsexualexploitation.org/articles/ncose-law-files-first-ever-federal-lawsuit-against-pornography-producers-on-behalf-of-survivor/ [https://perma.cc/CZK4-L7CY].

222. Complaint at 1–6, *Steele*, 2020 U.S. Dist. LEXIS 213854 (describing how the defendant, Cissy Steele, recruited the plaintiff, identified only as Jane Doe in pleadings, by disguising herself as a talent agent from Royal Loyalty Management and making false promises of modeling and acting opportunities).

223. *Id.* at 14 (arguing that "[t]he Adult Film Companies knowingly benefited financially and/or personally from Steele's sex-trafficking venture and the exploitation of Jane Doe").

studio's motion to compel arbitration, allowing the lawsuit to move forward.[224] Then, in July 2022, the parties entered into a confidential settlement agreement, allowing the court to dismiss the claims.[225] While the litigation failed to establish legal precedent, it broke new ground in promoting a novel legal theory.

Since the filing of the *Steele* litigation, plaintiffs have filed civil trafficking litigation under similar legal theories against MindGeek.[226] These cases center around the conduct of GirlsDoPorn (GDP) owners and employees,[227] who reportedly used fraud and coercion to induce young women to film pornographic videos.[228] Victims of GDP filed a civil suit against GDP executives for fraud in state court.[229] The civil claim sparked the attention of federal prosecutors, who, in a relatively novel criminal case, brought sex trafficking charges against GDP representatives in 2020, which have already resulted in guilty pleas.[230] However, litigation

224. Order Denying Motion to Compel Arbitration at 1, *Steele*, 2020 U.S. Dist. LEXIS 213854.

225. Joint Motion Re: Date for Filing Joint Motion for Dismissal with Prejudice at *3, *Steele*, 2020 U.S. Dist. LEXIS 213854.

226. *See, e.g.*, Complaint for Damages Pursuant to 18 U.S.C. § 1595 at 9, *MG Freesites*, 2020 WL 7388723 (filing a civil trafficking suit against MindGeek alleging that MindGeek with GirlsDoPorn published victims' sex videos without their consent).

227. The owners and employees were associated with two websites, GirlsDoPorn.com and GirlsDoToys.com. *Id.* at 9, 13. For simplicity, this Article refers to the company as GirlsDoPorn or "GDP."

228. Affidavit in Support of Complaint at *1–2, United States v. Pratt et al., No. 3:19-cr-04488 (S.D. Cal. Nov. 6, 2019). GDP operatives reportedly used bait-and-switch advertisements, offering large sums of money to girls with little to no modeling experience and promising that the videos would remain off the internet—never seen in North America. Complaint at *20–22, MG *Freesites*, 2020 WL 7388723 (S.D. Cal. Dec. 15, 2020). Despite these promises, GDP operatives then uploaded videos to its subscription website and other high traffic websites, including Pornhub. *Id.* at 23. To drive up views and revenue, GDP also circulated videos to the victims' social networks, including classmates and teachers, until they went "viral." *See* Scott Graham, *In GirlsDoPorn Trial, Jane Doe Law Grad Emerges as Central Figure*, LAW.COM (Aug. 21, 2019, 2:00 PM), https://www.law.com/therecorder/2019/08/21/in-girlsdoporn-trial-jane-doe-law-grad-emerges-as-central-figure/ [https://perma.cc/WM52-2FUV]. As a result, the plaintiffs suffered social stigma, harassment, and humiliation; some attempted suicide. *Id.*

229. Jane Doe No. 17 et al. v. Girlsdoporn.com et al., No. 37-2017-00043712-CU-FR-CTL (S.D. Sup. Ct. Nov. 8, 2017); Michael Levenson, *Judge Awards Nearly $13 Million to Women Who Say They Were Exploited by Porn Producers*, N.Y. TIMES (Jan. 2, 2020), https://www.nytimes.com/2020/01/02/us/girls-do-porn-lawsuit-award.html [https://perma.cc/SCN2-F3GX].

230. Docket, USA v. Pratt, No. 3:19-cr-04488 (S.D. Cal. Nov 6, 2019); Brittany Shammas, *The men behind GirlsDoPorn lured young women with modeling jobs, then tricked them into porn, FBI says*, WASH. POST (Oct. 16, 2019, 7:00 AM EDT), https://www.washingtonpost.com/business/2019/10/16/men-behind-girlsdoporn-lured-young-women-with-modeling-jobs-then-tricked-them-into-porn-fbi-says/ [https://perma.cc/V2DJ-P8M6].

efforts have not stopped there.[231] Borrowing from the prosecution's theory, fifty plaintiffs then filed a class action lawsuit under federal trafficking statutes against MindGeek, alleging that the conglomerate violated federal trafficking law by profiting from GDP images on Pornhub.[232] On October 21, 2021, MindGeek settled the federal trafficking suit, and the terms of the settlement remain confidential.[233]

These cases, while they settled in the initial stages, signal that federal courts may yet be receptive to broader interpretations of "sex trafficking" in the pornography context. Few federal prosecutions or civil cases have been brought against pornography producers, but they were not expressly prohibited by Congress.[234] Moreover, federal courts have found that trafficking law includes statutory terms that "do[] not lend themselves to . . . restrictive interpretation[s]."[235] Indeed, courts have often interpreted trafficking law expansively in line with the remedial purpose of "enhancing . . . protections of trafficking victims"[236] to reach other harms, including "casting couch" sexual abuse or the abuse of Olympic athletes.[237] Therefore, courts may continue to uphold the application of federal sex trafficking law to pornography induced by force, fraud, or coercion.[238]

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231. As of this writing, the criminal prosecution has already resulted in four guilty pleas. Docket, United States v. Pratt et. al., No. 3:19-cr-04488 (S.D. Cal. Nov. 6, 2019); Brittany Shammas, *The Men Behind GirlsDoPorn Lured Young Women with Modeling Jobs, Then Tricked Them into Porn, FBI Says*, WASH. POST (Oct. 16, 2019, 7:00 AM), https://www.washingtonpost.com/business/2019/10/16/men-behind-girlsdoporn-lured-young-women-with-modeling-jobs-then-tricked-them-into-porn-fbi-says/ [https://perma.cc/V2DJ-P8 M6].

232. Complaint at *9, *MG Freesites*, 2020 WL 7388723 (arguing that GDP "sex-trafficked hundreds of high school and college-aged women using fraud, coercion, and intimidation").

233. *50 Women Settle Lawsuit with Pornhub Over San Diego-Based GirlsDoPorn Conten*t, CITY NEWS SERV. (Oct. 15, 2021, 9:08 PM), https://www.nbcsandiego.com/news/local/50-women-settle-lawsuit-with-pornhub-over-san-diego-based-girlsdoporn-content/2746542/ [https://perma.cc/VU7U-58AS6XTQ-Z754].

234. Only a handful of federal trafficking criminal cases have emerged that relate to pornography production. *See, e.g.*, United States v. Flanders, 752 F.3d 1317, 1330 (11th Cir. 2014) (involving the recruitment of women through fraud and subsequent drugging and filming of sex acts sold to pornography businesses); United States v. Tollefson, 367 F. Supp. 3d 865, 878–80 (E.D. Wis. 2019) (sentencing the defendant to child sex trafficking charges for soliciting a thirteen-year-old to send images of sex acts online).

235. Noble v. Weinstein, 335 F. Supp. 3d 504, 516 (S.D.N.Y. 2018) (citing United States v. Jungers, 702 F.3d 1066, 1070 (8th Cir. 2013)).

236. *Id.* at 515.

237. *Id.* at 511–12, 515, 521 n.8 (finding federal trafficking law applies to the promises of job advancement or movie roles in exchange of sex); Gilbert v. U.S. Olympic Comm., 423 F. Supp. 3d 1112, 1126–27, 1130 (D. Colo. 2019) (holding that federal forced labor statutes can apply to the forced work of Olympic athletes).

238. 18 U.S.C. § 1591.

2. CSAM

Plaintiffs have also asked federal district courts to interpret "sex trafficking" to include the posting of CSAM online.[239] To make out a claim for civil trafficking liability, plaintiffs need only show that the defendant induced a commercial sex act with a child under eighteen;[240] force, fraud, or coercion need not be present.[241] Thus, plaintiffs have argued that uploading CSAM amounts to a commercial sex act because monetizing the sexual image online is an exchange of something of value.[242] If sustained, these interpretations would considerably expand civil liability for online platforms that host CSAM images, allowing plaintiffs to overcome § 230 of the CDA. Also, it would increase civil liability for companies that do business with a range of websites where users may upload and share CSAM.

At least three district courts have already interpreted the uploading of CSAM to be a commercial sex act under federal trafficking law.[243] In *Doe v. Twitter*, in January 2021, plaintiffs, represented by NCOSE and partner firms, filed civil trafficking claims against Twitter in the U.S. District Court for the Northern District of California and argued that the social media platform profited from CSAM images on their platform.[244] On August 19, 2021, Chief Magistrate Judge Joseph C. Spero allowed third-party trafficking claims to move forward against Twitter.[245] Notably, the court found that posting child pornography on Twitter was a commercial

239. Doe v. MindGeek USA Inc., 558 F. Supp. 3d 828, 837–38, 840 (C.D. Cal. 2021) (citing *Twitter*, 555 F. Supp. 3d at 925) (finding that "posting child pornography is a commercial sex act").

240. 18 U.S.C. § 1591(a)(1).

241. *Id.*

242. *MindGeek*, 558 F. Supp. 3d at 833–34, 840; Doe #1 v. MG Freesites, Ltd., No. 7:21-cv-00220-LSC, 2022 WL 407147, at *17–20 (N.D. Ala. Feb. 9, 2022); *Twitter*, 555 F. Supp. 3d at 905, 925.

243. *Twitter*, 555 F. Supp. 3d at 925; *MindGeek*, 558 F. Supp. 3d at 840; *MG Freesites*, 2022 WL 407147, at *19–20.

244. *Twitter*, 555 F. Supp. 3d at 893–94. According to the complaint, when plaintiffs were thirteen years old, their sex videos were uploaded to Snapchat, and later posted and retweeted on Twitter. *Id.* When the plaintiffs learned of the videos on Twitter, they contacted law enforcement who asked Twitter to remove them, but Twitter took nine days to remove the images, allowing the posts to accrue 167,000 views and 2,223 retweets. *Id.* at 894.

245. *Id.* at 889, 925, 932. The court did not allow direct sex trafficking liability claims to move forward because the plaintiffs failed to plead that Twitter "solicited" a commercial sex act, but the judge hinted that if the plaintiffs properly plead, he might consider such an argument. *Id.* at 915 (noting that "[§] 1591(a)(1) expressly allows for criminal liability where a defendant 'solicits by any means a person' and the conduct at issue in that case falls comfortably within that language" but that plaintiffs failed to allege that Twitter engaged in solicitation).

sex act under federal sex trafficking law.[246] Indeed, the court pointed to conduct by Twitter that "the Videos were being retweeted on a massive scale while they remained on the Twitter platform" to find that the facts pleaded "raise[d] a plausible inference that Twitter's failure to remove the Videos would result in *future* commercial sex trafficking."[247] Twitter appealed the decision to the U.S. Court of Appeals for the Ninth Circuit, and as of this writing, the litigation remains ongoing.[248]

At least two other district courts have issued similar rulings, endorsing the reasoning in *Doe v. Twitter*, interpreting CSAM to amount to child sex trafficking.[249] In one such case, in February 2021, plaintiffs brought a putative class action in the U.S. District Court for the Central District of California related to CSAM images posted on MindGeek's websites.[250] The lead plaintiff, Jane Doe, alleged that her ex-boyfriend filmed their sexual intercourse when she was sixteen years old without her consent and posted videos on MindGeek websites.[251] The plaintiffs argued that MindGeek, by profiting from CSAM on their website, was directly liable as a perpetrator of trafficking because their monetizing the images amounted to a commercial sex act.[252] Additionally, the plaintiff asserted that MindGeek bore third-party liability because it knowingly benefited from a venture with the perpetrator.[253] On September 3, 2021, U.S. District Judge Cormac J. Carney allowed the federal trafficking claims to move forward in substantial part against MindGeek, rejecting most of the defendant's arguments.[254] Of note, Judge Carney held that "posting child pornography is a commercial sex act," endorsing the decision in *Twitter*.[255]

246. *Id.* at 925. According to Judge Spero, the plaintiffs need not show a causal connection between the sex act and the exchange of anything of value, but rather must plausibly allege the "receipt of a benefit." *Id.* at 924–25.

247. *Id.* at 923, n.6.

248. *See* David McAfee, *Twitter Appeals to Ninth Circuit in Child Sex Trafficking Case*, BLOOMBERG L. (Nov. 8, 2021, 6:58 PM), https://news.bloomberglaw.com/white-collar-and-criminal-law/twitter-appeals-to-ninth-circuit-in-child-sex-trafficking-case [https://perma.cc/C9HN-9HEU]; Docket, Doe v. Twitter, No. 3:21-cv-00485 (N.D. Cal. Jan. 20, 2021).

249. Doe v. MindGeek USA Inc., 558 F. Supp. 3d 828, 840 (C.D. Cal. 2021); Doe v. MG Freesites, Ltd., No. 7:21-cv-00220-LSC, 2022 WL 407147, at *17–20 (N.D. Ala. Feb. 9, 2022). The parties in *Doe v. MG Freesites* notified the district court on September 7, 2022, of their attempt to resolve the matter through mediation. Docket, Doe v. MG Freesites, Ltd., No. 7:21-cv-00220-LSC, 2022 WL 407147 (N.D. Ala. Feb. 9, 2022).

250. *MindGeek*, 558 F. Supp. 3d at 831–32.

251. *Id*. at 833.

252. *Id.* at 839–40.

253. *Id.* at 839.

254. *Id.* at 839–45.

255. *Id.* at 840.

While the litigation is still ongoing,[256] this case has significant implications for MindGeek and other platforms, like Instagram, Twitter, and Facebook. It signals that, at least in some jurisdictions, online platforms may be subject to third-party civil trafficking liability for CSAM on their sites. It also highlights a number of questions that courts have yet to resolve. In particular, courts remain split about the knowledge standard that triggers an exception to § 230 of the CDA under FOSTA. At issue is whether a higher criminal knowledge standard should apply. This question relates to the statutory language in FOSTA, which provides that § 230 shall not limit "any claim in a civil action under [§] 1595 of Title 18, *if the conduct underlying the claim* constitutes a violation of [§] 1591 of that title"—the criminal sex trafficking statute.[257] Plaintiffs have argued that, under FOSTA, "the exacting standard[s] of 'actual knowledge' and 'overt act' employed in a criminal prosecution . . . are replaced by [a] 'constructive knowledge' standard when a civil recovery is sought under the TVPA."[258]

However, courts have disagreed. In *Twitter*, described above, the court allowed claims of third-party liability to proceed against MindGeek, finding the lower standard of "constructive knowledge" applied to civil trafficking claims against online platforms.[259] In particular, the court found it significant that MindGeek representatives reviewed, approved, and uploaded at least one CSAM video.[260] The court also drew attention that the term "teen" was tagged, MindGeek representatives failed to identify and remove the content,[261] and MindGeek took more than a month to remove images after receiving notification.[262]

In October 2022, the Ninth Circuit in *Does v. Reddit* interpreted FOSTA to require that plaintiffs satisfy the higher criminal intent standard to sustain a civil trafficking claim against an online platform.[263]

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256. Judge Carney granted the Defendants' Motion for a Stay of Proceedings on December 28, 2021, during the pendency of criminal proceedings against plaintiff's alleged trafficker, who was arrested on possession and distribution of child pornography charges, and the civil case remains pending. Order Denying Plaintiff's Motion to File Third Amended Complaint Without Prejudice and Granting Defendants' Motion for a Stay of Proceedings Pursuant to 18 U.S.C. § 1595(B) at 2, 8, Jane Doe v. MindGeek USA Inc., No. 8:21-cv-00338 (C.D. Cal. Feb. 19, 2021).

257. 47 U.S.C. § 230(e)(5)(A) (emphasis added).

258. *Kik Interactive*, 482 F. Supp. 3d at 1250.

259. *Id.* at 836.

260. *Id.* at 837–38.

261. *Id.* at 838.

262. *Id.*

263. 51 F.4th 1137, 1141–45 (9th Cir. 2022) (finding that "for a plaintiff to invoke FOSTA's immunity exception, she must plausibly allege that the website's own conduct violated [§] 1591" by "directly sex trafficking or, with actual knowledge, 'assisting, supporting, or facilitating' trafficking"); *see* Isaiah Poritz, *Reddit Win Previews Looming Sex Trafficking, Section 230 Battles*, BLOOMBERG L. (Nov. 4, 2022, 5:20 AM), https://www.bloomberglaw.com/

The ruling means that plaintiffs would have to meet the high standard of demonstrating that the defendants "actively participated" in the sex trafficking venture, not merely that they "turned a blind eye."[264] The plaintiffs in *Reddit* have filed a writ of certiorari with the Supreme Court,[265] and several other cases remain on appeal.[266] Thus, future cases will shed important light on the intent standard for third-party liability.

3. Nonconsensual Pornography

Litigators have also argued that adult nonconsensual pornography amounts to sex trafficking.[267] Although courts have yet to weigh in, plaintiffs contend that nonconsensual distribution of adult sexual images satisfies the elements of sex trafficking when the images are monetized online and the underlying sex act involves force, fraud, or coercion.[268] Nonconsensual pornography has posed mounting concerns on online platforms.[269] Often referred to as "revenge porn," the term refers to the nonconsensual distribution of sexually explicit images.[270] Frequently, nonconsensual pornography is also accompanied by other forms of cyber harassment, like cyber stalking or doxing, which results in making the victim's identity known, exposing them to shame, stigma, and even violence.[271] Entire websites have now emerged to encourage

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bloomberglawnews/tech-and-telecom-law/XB294U50000000?bwid=00000184-342f-d76d-abdf-f57fbefc0001&cti=LSCH&emc=bblnw_nl%3A1&et=NEWSLETTER&isAlert=false&item=body-link&qid=7377229&region=text-section&source=newsletter&uc=1320016571&udvType=Alert&usertype=External [https://perma.cc/J3Z9-RXRP].

264. Poritz, *supra* note 263.

265. See Petition for a Writ of Certiorari, Jane Does No. 1–6 v. Reddit, Inc., No. 22-695 (U.S. Jan. 25, 2023).

266. The Ninth Circuit is scheduled to hear a similar case in *Twitter*, which plaintiffs argue is factually distinct from the *Reddit* case. John Doe #1, et al. v. Twitter, Inc., No. 22-15103 (9th Cir. filed Jan. 21, 2022); *see* Poritz, *supra* note 263. The U.S. Court of Appeals for the Eleventh Circuit will also hear a case involving a lawsuit against the website Omegle, which allegedly matched an eleven-year-old girl with a perpetrator of sexual abuse. M.H., et al. v. Omegle.com LLC, No. 22-10338 (11th Cir. filed Jan. 31, 2022). In the Seventh Circuit, plaintiffs have appealed a lawsuit involving allegations that Salesforce, a provider of customer relationship management software, assisted Backpage, the once prominent commercial sex advertisement website, to traffic a thirteen-year-old victim. G.G., et al. v. Salesforce.com, Inc., No. 22-02621 (7th Cir. filed Sept. 15, 2022).

267. *See* Complaint at 43, Fleites v. MindGeek S.A.R.L., No. CV 21-04920-CJC(ADSx), 2021 WL 2766886 (C.D. Cal. June 28, 2021).

268. *Id.* at 140–41.

269. *See* Comments of the Cyber Civil Rights Initiative, Inc. and Without My Consent, Inc. to the Federal Trade Commission, FTC File No. 132 3120 (Feb. 23, 2015), at 3 [hereinafter CCRI Comment] ("Nonconsensual pornography is not a new phenomenon, but its prevalence, reach and impact have increased in recent years.").

270. *See* Citron & Franks, *supra* note 9, at 346.

271. Chance Carter, *An Update on the Legal Landscape of Revenge Porn*, NAT'L ASSOC. OF

nonconsensual distribution and profit from it, and despite the emergence of criminal statutes in most states, victims argue that there are insufficient legal remedies for civil damages or to take down images.[272]

In June 2021, thirty-three victims, some of whom were victims of adult nonconsensual pornography, filed a federal class action in *Fleites*, described above, which alleged that MindGeek and Visa knowingly benefited from trafficking conduct on MindGeek's websites.[273] MindGeek contested the plaintiffs' assertions, arguing that "[t]he production of pornography—legal or not—for private use is not a commercial sex act"[274] and that nonconsensual image distribution is not sex trafficking. It asserted that force, fraud, or coercion is required and that many plaintiffs failed to meet this showing.[275] MindGeek also asked the court to interpret a commercial sex act to require a quid pro quo or causal relationship between the exchange of something of value and the sex act.[276]

However, the court failed to weigh in, instead ruling to sever cases "given the sheer number of claims and issues presented" in the litigation.[277] While at least one child victim refiled her claims, no victims of adult nonconsensual pornography have yet re-filed their claims, although their filing may be imminent.[278] As a result, courts have yet to weigh in definitively as to whether adult nonconsensual pornography

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ATT'YS GEN. (Nov. 16, 2021), https://www.naag.org/attorney-general-journal/an-update-on-the-legal-landscape-of-revenge-porn/ [https://perma.cc/T6R8-K4MF] ("[N]onconsensual porn victimization is frequently connected to or compounded by a wide range of other crimes or harassment such as sextortion, troll attacks, doxing, hacking, and physical and sexual abuse of both minors and adults.").

272. *Id.* The Digital Millennium Copyright Act (DMCA) provides legal remedies but has safe harbor provisions and limited third-party liability that makes recovery challenging. *See* 17 U.S.C. § 512(c)(1) (2006) (providing an exception for service providers from "liab[ility] for monetary relief" based on infringement due to user content); *see also* § 512(a) (no monetary liability for infringement if engaged in automated routing and transmitting content on user request); § 512(b)(1) (no monetary liability for infringement due to caching); § 512(d) (no monetary liability for infringement due to linking).

273. *See* Complaint at 3, Fleites v. MindGeek S.A.R.L., No. CV 21-04920-CJC (ADSx), 2021 WL 2766886 (C.D. Cal. June 28, 2021). While many plaintiffs had images posted online when they were children, the plaintiffs include adult victims of nonconsensual pornography. *Id.* at 139.

274. Memorandum of Points and Authorities in Support of MindGeek's Motion to Dismiss the Complaint for Lack of Personal Jurisdiction and Failure to State a Claim at 27, *Fleites*, 2021 WL 2492964 (No. 2:21-cv-04920).

275. *Id.* at 26–27.

276. *Id.* at 26–27, 27 n.7.

277. Ross Todd, *Brown Rudnick Sex Trafficking Suit Against Pornhub, Visa Clears Major Hurdle*, LAW.COM (Aug. 2, 2022, 7:30 AM), https://www.law.com/litigationdaily/2022/08/02/brown-rudnick-sex-trafficking-suit-against-pornhub-visa-clears-major-hurdle/?slreturn=20220704165908 [https://perma.cc/MZ4Q-UTXU] [hereinafter Todd, *Brown Rudnick*].

278. *Id.*

amounts to sex trafficking, and the outcome of future cases will likely be heavily fact specific, dependent on whether the plaintiffs can show that the uploaded sex act was induced by force, fraud, or coercion.

III. IMPLICATIONS OF THE TRAFFICKING FRAME

This Part argues that invoking trafficking law in the pornography context has value for certain advocates and victims. The trafficking frame, thus far, has been relatively effective for victims and advocates in sparking moral outrage and compelling public action aimed at Pornhub. Unifying diverse online harms under the umbrella of trafficking allows activists to communicate succinctly the harms of "trafficking" and compel action. As Professor MacKinnon has aptly noted, "No one defends trafficking. There is no pro-sex-trafficking position any more than there is a public pro-slavery position for labor."[279] Accordingly, trafficking claims have powerful expressive value, signaling culpability for those who facilitate online harms and providing victims with a powerful legal tool—one with a long statute of limitations, generous civil damages, and expansive third-party liability. Moreover, it signals that the pornography industry, like other industries, must curtail violent and coercive conduct in its midst.

Nevertheless, the deployment of civil trafficking law in the online pornography context is not without risk. If mobilized too broadly, trafficking law may chill valuable sexual expression. It also can give rise to "carceral creep," the slow criminalization of more online harms. It may provide corporations with incentives to engage in overbroad surveillance efforts. Additionally, as with other regulatory efforts, the invocation of trafficking may push conduct further underground (or abroad) in ways that endanger vulnerable communities. As a result, trafficking law is not a cure-all or a replacement for more nuanced, tailored interventions to address online harms.

A. *The Value of Trafficking*

Trafficking claims against online pornography sites clearly address a persistent legal barrier to civil accountability for certain victims: § 230 of the CDA. As courts interpret online harms—including CSAM and pornography involving force, fraud, or coercion—to be "sex trafficking," plaintiffs may overcome § 230, which had immunized online platforms from civil liability for conduct uploaded by third parties. When Congress passed FOSTA in 2018, critics argued that it would open the door to a "slippery slope" of new exceptions to § 230.[280] In some respects, these

279. MacKinnon, *Prostitution and Inequality*, *supra* note 161, at 271.

280. *See* Romano, *supra* note 211.

fears have rung true. Plaintiffs, by urging broader interpretations of trafficking law, successfully widen the scope of exceptions to § 230.

Take *Doe v. Twitter* as an example. Plaintiffs argued that Twitter was liable under trafficking law for profiting from CSAM images; Twitter claimed that these claims were barred by § 230.[281] The court, however, rejected Twitter's argument and brought CSAM within the ambit of trafficking law, finding that § 230 did not apply.[282] This reasoning removes a significant legal barrier for plaintiffs seeking to hold websites accountable for CSAM.

Yet, many legal questions remain, especially about the reach of civil liability under FOSTA. In particular, courts are split about the knowledge standard.[283] The Ninth Circuit in *Reddit* interpreted FOSTA to permit civil trafficking claims only against platforms that knowingly facilitate trafficking,[284] but other district courts have disagreed.[285] Appeals remain pending, and their resolution will be pivotal to determining the scope of civil liability for online platforms and the reach of § 230.[286]

As courts sort out what will give rise to platform liability, early evidence signals that corporations may be subject to increased civil liability under trafficking statutes for doing business with online platforms, like Pornhub. In *Fleites v. MindGeek S.A.R.L*, the U.S. District Court for the Central District of California permitted trafficking civil claims to move forward against the payment processing company Visa.[287] According to U.S. District Judge Cormac J. Carney, "Visa lent to MindGeek a much-needed tool—its payment network—with the alleged knowledge that there was a wealth of monetized child porn on

281. Doe v. Twitter, Inc., 555 F. Supp. 3d 889, 931 (N.D. Cal. 2021).

282. *Id.* at 909 ("Section 230 does not apply to that claim."). The court also refused to apply a criminal intent requirement—which would have limited the impact of the ruling—and instead applied a constructive knowledge requirement, requiring that Twitter "knew or should have known" that it participated in a venture with traffickers. *Id.* at 898, 922 ("[T]he Court concludes that Plaintiffs' [§] 1595 claim against Twitter based on alleged violation of [§] 1591(a)(2) is not subject to the more stringent requirements that apply to criminal violations of that provision.").

283. *See also* Doe v. Kik Interactive, Inc., 482 F. Supp. 3d 1242, 1251 (S.D. Fla. 2020) ("FOSTA permits civil liability for websites only 'if the conduct underlying the claim constitutes a violation of [§] 1591.' And [§] 1591 requires knowing and active participation in sex trafficking by the defendants."). *Compare, e.g.*, J.B. v. G6 Hosp., LLC, No. 19-CV-07848, 2020 WL 4901196, at *12 (N.D. Cal. Aug. 20, 2020) (granting motion to dismiss filed by Craigslist and finding that FOSTA requires that plaintiffs show that the defendant engaged in an overt act under § 1591 to overcome § 230 of the CDA), *with* Doe v. MindGeek USA Inc., No. 21-cv-00338 (C.D. Cal. Feb. 19, 2021) (denying motion to dismiss by MindGeek and finding that an online platform is not immune from liability under § 230 of the CDA if it had constructive knowledge of the conduct, as required by § 1595(a)).

284. Does 1-6 v. Reddit, Inc., 51 F.4th 1137, 1141–45 (9th Cir. 2022).

285. For more information about pending appeals, see *supra* note 263.

286. For more information about pending appeals, see *supra* note 263.

287. Fleites v. MindGeek S.A.R.L., No. CV 21-04920-CJC, 2022 WL 4456077, at *1, *10 (C.D. Cal. July 29, 2022).

MindGeek's websites."[288] While Visa lamented that it had no control over Pornhub, the court remained unpersuaded.[289]

The *Fleites* decision has seismic implications, signaling broad third-party liability for companies that do business with online pornography websites that host harmful content.[290] While the litigation is still ongoing, the decision has already prompted swift action from corporations to distance themselves from Pornhub. Visa has taken unprecedented action to cut ties to suspend payments from Pornhub's advertising arm to curtail potential liability.[291] Other credit cards, like Mastercard, recently implemented wide-reaching steps to monitor and oversee websites with which it does business.[292] Additionally, TikTok and YouTube have banned Pornhub from their social media platforms.[293] Many advocates have heralded these actions as key to reducing online harms and promoting corporate responsibility.

If properly calibrated to reach parties who facilitate online harms, civil liability likely will have value—encouraging greater content moderation and establishing viable legal avenues to civil damages. However, if overbroad, it could significantly interfere with commerce, lawful sexual expression, and valuable speech. In other areas of law, like trademark law, courts and scholars have recognized how principles, like non-interference, culpability, and reasonableness in operation, should govern the scope of third-party liability.[294] Non-interference principles also require that liability balances interest in addressing harm against any

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288. *Id.* at *5.

289. *Id.*; Emily Mason, *Visa Suspends PornHub Parent Company's Advertising Arm From Payments Network Amidst Child Pornography Lawsuit*, FORBES (Aug. 4, 2022, 3:47 PM), https://www.forbes.com/sites/emilymason/2022/08/04/visa-suspends-pornhub-parent-companys-advertising-arm-from-payments-network-amidst-child-pornography-lawsuit/?sh=1dde6c042275 [https://perma.cc/HP3B-6WSX].

290. Todd, *Brown Rudnick*, *supra* note 277.

291. Mason, *supra* note 289 (quoting Visa Chairman and CEO Alfred F. Kelly Jr., who noted that "[d]uring this suspension, Visa cards will not be able to be used to purchase advertising on any sites including Pornhub or other MindGeek affiliated sites").

292. *See, e.g.*, *Plastic Policemen*, ECONOMIST (Oct. 12, 2021), https://www.economist.com/finance-and-economics/credit-card-firms-are-becoming-reluctant-regulators-of-the-web/21805450 [https://perma.cc/ED4E-Z2K2] (describing new Mastercard regulations requiring that "[f]rom October 15th adult websites worldwide will have to verify the age and identity of anyone featured in a picture or video, as well as the ID of the person uploading it," in addition to "operat[ing] a fast complaints process, and . . . review[ing] all content before publication").

293. Brown, *supra* note 27; Spangler, *supra* note 27.

294. *See, e.g.*, Stacey Dogan, *Principled Standards vs. Boundless Discretion: A Tale of Two Approaches to Intermediary Trademark Liability Online*, 37 COLUM. J.L. & ARTS 503, 504–06 (2014) [hereinafter Dogan, *Principled Standards*] (examining how "broad secondary liability comes with costs," looking particularly at indirect liability in the trademark infringement context); Stacey L. Dogan, *Trademark Remedies and Online Intermediaries*, 14 LEWIS & CLARK L. REV. 467, 469 (2010) (examining the "appropriate scope of relief in trademark suits against intermediaries").

interference in legitimate commerce.[295] Moreover, principles of reasonableness call for the liability to target the parties that are "best positioned to accomplish each task."[296] These principles will be important in the trafficking context to ensure that liability attaches to actors who bear culpability for harm, not innocent actors.[297]

B. *The Harm of Trafficking*

While some victims and advocates may clearly benefit from trafficking lawsuits, there are also clear dangers inherent in this move. Civil remedies offer greater agency and control for victims over the legal process. They respond to the emerging critique of anti-carceral scholars and advocates, who point to the harms of the criminal legal system—especially for survivors of gender-based violence.[298]

The success of civil remedies, however, depends in part on de-linking them from the criminal legal system, which is particularly challenging in the context of federal trafficking law.[299] Indeed, criminal trafficking law is deeply intertwined with civil remedies. The federal civil remedy explicitly references the criminal definitions of trafficking.[300] Thus, as district courts interpret sex trafficking, they inform the application of civil *and* criminal trafficking law. As a result, interpretations by courts will likely trickle down into the criminal law and contribute to the slow, eventual criminalization of online harms. For this reason, trafficking civil litigation efforts involve a significant risk of "carceral creep," the expansion of the carceral state. With the risk of greater criminalization also comes concerns about targeting marginalized communities with arrest and incarceration.[301]

These new trafficking cases, like the anti-pornography ordinances, also may give rise to First Amendment challenges. In the pornography wars of the 1970s and 1980s, opponents to the Indianapolis anti-

295. *See* Dogan, *Principled Standards*, *supra* note 294, at 505.

296. *Id.* at 509.

297. *Id.* at 508.

298. *See generally* LEIGH GOODMARK, DECRIMINALIZING DOMESTIC VIOLENCE (Oct. 2018) (exposing how the criminal legal system often fails to believe victims, especially from racially marginalized or LGBTQ+ communities, and disproportionally subjects them to arrest and prosecution). Professor Leigh Goodmark points to how criminal legal interventions aimed at gender-based violence often exacerbate violence and vulnerability instead of making survivors safer. *Id.* at 1–5.

299. Some scholars have called for civil avenues as a "reparative" measure to address harm but emphasize that such efforts should be separated from criminal legal enforcement efforts. *See* COSSMAN, *supra* note 32, at 12.

300. TVPRA of 2003, *supra* note 30.

301. Kim, *supra* note 46. Dr. Mimi E. Kim explored how anti-domestic violence social movements in the 1970s established collaborative relationships with carceral actors, such as law enforcement and prosecutors, which resulted in a rise of carceral responses to domestic violence and gender-based violence. *Id.* at 254.

pornography ordinance argued that it had a "breathtaking" sweep and was "sufficiently elastic to encompass almost any sexually explicit image that someone might find offensive."[302] Similarly, trafficking statutes, while aimed at egregious conduct, permit expansive interpretation to apply to subtle forms of sexual expression. And, as courts are faced with a broader array of conduct, the application of trafficking statutes may risk overburdening protected speech.

Since *Hudnut*, courts have generally preserved the line between speech and conduct, permitting governmental regulation of conduct, while striking down that of speech. For example, courts upheld the regulation of CSAM in *Ferber* as illegal conduct[303] but then struck down bans on non-obscene adult pornography in *Hudnut*, finding it to be protected "speech" subject to strict scrutiny.[304] Litigators, by advocating expansive interpretations of sex trafficking, seek to transform new forms of sexual expression into illicit conduct, beyond the reach of the First Amendment. While much is already unprotected conduct, including CSAM and images of rape, the statute may also reach more nuanced harms—like a sex act uploaded online where one partner deceives the other. Thus, while litigation is in the early stages now, more First Amendment challenges will likely emerge and their resolution will likely turn on the strength of the governmental interest in trafficking and whether the application of the statute is narrowly tailored—not just an "end run" around important First Amendment values.[305]

Even if lawsuits ultimately survive First Amendment scrutiny, these measures may have a strong chilling effect on sexual expression. As civil liability expands, especially if triggered by constructive knowledge, companies may distance themselves from the pornography industry, fearful of being caught in the crosshairs of civil trafficking lawsuits. Moreover, some pornography websites will shutter, unwilling or unable to bear the additional costs of content moderation and potential civil liability. The impact of these developments is likely to fall on marginalized communities, including performers and websites that promote nonnormative sexual expression. Overall, they risk limiting the scope and nature of lawful sexual expression online.

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302. Hunter & Law, *supra* note 39, at 101.

303. New York v. Ferber, 458 U.S. 747, 764 (1982) (upholding the government's power to regulate "child pornography").

304. KATHLEEN ANN RUANE, CONG. RSCH. SERV. 95-815, FREEDOM OF SPEECH AND PRESS: EXCEPTIONS TO THE FIRST AMENDMENT (2014), https://sgp.fas.org/crs/misc/95-815.pdf [https://perma.cc/94AE-EEG2].

305. California v. Freeman, 488 U.S. 1311, 1314 (1989) (O'Connor, J., in chambers) (calling the government's decision to charge pornography producers with prostitution offenses "a somewhat transparent attempt at an 'end run' around the First Amendment and the state obscenity laws").

Corporate surveillance of online behavior also is likely to increase in the name of human trafficking with significant risks to free expression and privacy.[306] In an early example, Apple announced in 2021 that it would scan individuals' phones, tablets, and computers for images of CSAM and sex trafficking.[307] While some advocates applauded these efforts, others argued that they invade privacy in troubling ways with broad implications for terrorism, national security, and civil liberties.[308] Amidst these concerns, Apple decided to hold off on the implementation of the program, but similar measures are likely on the horizon.

There are also lessons to learn from past efforts to increase platform liability. When civil liability increased after FOSTA, researchers found that companies overregulated to avoid liability, resulting in overbroad suppression of speech and legitimate sexual expression.[309] One report documented how social media companies used bans and "shadow bans" to constrict the messaging of those who posted sexually explicit images or mentioned commercial sex, regardless of whether the posting involved sex trafficking or violence.[310] Even more troubling, the report found that these measures often targeted "marginalized and radicalized communities" engaged in the sex trade and "movement work,"[311] which constricted their expression and the scope of their impact.[312] Thus, as online platforms become subject to heightened civil liability, surveillance and censorship by private actors may intensify with dangerous implications for privacy and speech.

Heightened trafficking liability also risks pushing online harms deeper underground and abroad, further from the public eye. As Professor

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306. *See* Justin Scheck, Newley Purnell & Jeff Horwitz, *Facebook Employees Flag Drug Cartels and Human Traffickers. The Company's Response Is Weak, Documents Show*, WALL ST. J. (Sept. 16, 2021, 11:24 PM), https://www.wsj.com/articles/facebook-drug-cartels-human-traffickers-response-is-weak-documents-11631812953 [https://perma.cc/WKV7-8868].

307. *See* Stephen Nellis & Joseph Menn, *Apple Says Photos in iCloud Will be Checked by Child Abuse Detection System*, REUTERS (Aug. 9, 2021, 5:26 PM), https://www.reuters.com/technology/apple-says-photos-icloud-will-be-checked-by-child-abuse-detection-system-2021-08-09/ [https://perma.cc/4JH5-SJWR].

308. *Id.*

309. *See* Danielle Blunt et al., *Posting Into the Void*, HACKING//HUSTLING 14 (2020), https://hackinghustling.org/wp-content/uploads/2020/09/Posting-Into-the-Void.pdf [https://perma.cc/B5QE-QUK6].

310. *Id.* at 15 (defining a "shadowban" as when "a user can continue posting as normal, but their posts will be hidden from the rest of the community"). The report documented, for example, how Twitter content "deem[ed] inappropriate, high-risk, or low value speech" was made "invisible to other users." *Id.*

311. *Id.* at 7, 15–16 ("These are forms of structural violence that predominantly impact populations already vulnerable to state and platform policing's access to resources, community, and harm reduction materials.").

312. These efforts not only cause direct censorship, but they may cause individuals to self-censor to remain on platforms. *Id.* at 70–71.

Thomas Arthur has argued, regulatory efforts can cause hidden "speakeasies on the dark web [to] spring up to meet this demand."[313] Many of these risks were born out in FOSTA. As online platforms shuttered rather than engaged in greater content moderation efforts, content migrated to other sites abroad and onto the dark web, where it was more hidden from public view.[314] For this reason, advocates argued that FOSTA made it more dangerous for individuals to engage in commercial sex or seek help if subject to abuse or exploitation.[315] Thus, while efforts to broaden civil liability may be effective at holding platforms like Pornhub legally accountable, they may also move marginalized groups out of the reach of regulators and prosecutors, increasing vulnerability to violence and abuse.

Ultimately, as online harms persist on pornography sites, the question becomes how to effectively regulate online pornography platforms to prevent bad actors, such as Pornhub, from encouraging and profiting from online harms. Trafficking law is a powerful tool, especially as it reaches online platforms and exposes them to expansive civil damages. In many ways, trafficking claims appear both democratizing and powerful—a way for victims to fight powerful corporations and industries. However, the very power of trafficking law—its attendant moral condemnation and harsh penalties—also makes it a particularly blunt and ill-equipped instrument to engage in nuanced reform. Thus, while trafficking law may provide important avenues for some, it also entails considerable risks. Thus, it should be invoked, if at all, judiciously and with a clear-eyed view of the dangers that may come.

CONCLUSION

In the new pornography wars, activists and victims have embraced federal trafficking law as a means to achieve legal accountability against pornography producers, online platforms, and other third parties. These civil suits may accomplish what early anti-pornography activists could not: establishing a narrower "civil-rights approach" for victims of harms in the pornography industry. This trend sends a message to entities and individuals that knowingly profit from online harms. It provides victims with much-needed legal accountability, including an avenue for injunctive relief and civil damages. Yet, as trafficking statutes reach further online in a digital age, they also raise new questions about civil liberties, protected speech, and internet freedom that should not be left unaddressed.

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313. Thomas C. Arthur, *The Problems with Pornography Regulation: Lessons from History*, 68 EMORY L.J. 867, 907 (2019).

314. *See* David McCabe & Kate Conger, *Stamping Out Online Sex Trafficking May Have Pushed It Underground*, N.Y. TIMES (Dec. 17, 2019, 10:23 PM), https://www.nytimes.com/2019/12/17/technology/fosta-sex-trafficking-law.html [https://perma.cc/C6UB-TSZE].

315. *See id.*