

## **“Shut Up and Take My Money!”: Revenue Chokepoints, Platform Governance, and Sex Workers’ Financial Exclusion**

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### **Abstract**

Sex work regulation is often debated from the perspective of state control: legalization vs decriminalization, ‘end demand’ vs criminalization. Ultimately, these debates center the State as the most significant arbiter in sex workers’ ability to conduct business. This paper contends that while state legislation has a significant effect on the material lives of sex workers, the terms of service of the US-based, privatized financial industry has a more immediate and widespread affect. Most sex workers make use of online payment applications as well as social media, even though both are highly discriminatory toward sex workers, regardless of the legal status of one’s employment as a sex worker, or even the laws in which the worker conducts their business. Rather than being treated as a luxury or privilege, access to both the worldwide web and the global network of banking are essential rights that enable full participation in contemporary society. Through an analysis of platform governance and revenue chokepoints, this paper argues that payment intermediaries function as an extra-legal regulation of sex work that has a more profound effect on sex workers’ material reality than State legislation, as these intermediaries control how they are able to secure business and be paid for it without having to answer to a voting demographic. Most of the world’s major social media and payment processing applications are based in the United States, which enables it to export the repercussions of the stigmatization and criminalization of sex work even within the boundaries of countries with differing legislation.

### **Keywords**

Sex work; revenue chokepoints; online payment; financial discrimination; platform governance

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## **Introduction**

Large payment intermediaries such as banks, credit card companies, and online payment platforms have systematically targeted both legal and illegal sexual expression for the past two decades. Since PayPal's 2003 announcement that it would no longer process transactions involving proprietors of legal adult content (Cho, 2003), many established businesses transitioned away from using PayPal, but individual workers have reported their money being seized and accounts being closed at banks as well as online payment platforms with no warning, transparency, or legal recourse. The dragnet of exclusion is ever-widening: journalist Violet Blue has documented PayPal freezing accounts and seizing funds from sex toy or even corset sales, memoirs by escorts, and tickets to events centering erotic arts or freedom of expression (Blue, 2015). In 2013, porn star Chanel Preston had her business account with City National bank terminated when she tried to deposit a check (Morris, 2013). In 2014, porn actress and stripper Teagan Presley and her husband had their accounts terminated by Chase bank because she was "high risk" (O'Hara, 2014). Well known porn performer Stoya had her Chase account closed in 2014 as well, with the bank offering no clear answer as to why (Blue, 2015). Porn performer and director Eden Alexander had her crowdfunding campaign for a medical emergency cancelled in 2014 because she retweeted one of her friends offering a deal on porn if they donated to the campaign (Constantine, 2014). In 2017, Visa and Mastercard withdrew their services from the kink-based social media platform FetLife, even though neither company prohibits consensual BDSM in its terms of service (Tusikov, 2021). In December 2020, Visa and Mastercard announced they will cease processing transactions on Pornhub, the world's most popular porn streaming site (Jones, 2020).

Sex workers face financial discrimination across international borders, even in countries that have more progressive sex work legislation. As early as 1999, a joint report by sex worker rights group Scarlet Alliance and the Australian Federation of AIDS Organisations noted widespread banking discrimination of sex workers who applied for credit cards or loans, with no evidence this was due to bad credit or unstable income (Banach, 1999). From 2013-2019, Genevieve LeJeune's LGBTQ+ events business - which included sex parties - banked with HSBC in the UK; in 2019, her account was frozen and she spent the next four years trying to have the £20,000 within it refunded (Makortoff, 2021). In 2020, Santander bank rejected escort Charlotte Edwards' application for the Bounce Back loan offered by the UK government to help small businesses survive the Covid-19 pandemic; the bank reversed its decision after her story caught the attention of both the media and several MPs. However, Santander still released a statement saying, "Our sensitive sectors policy currently states that we will not offer

banking services to businesses operating in a number of different sectors, including the adult entertainment industry” (BBC, 2021, np). A 2021 report from UK-based sex worker advocacy organization National Ugly Mugs confirmed this treatment was not in isolation, describing widespread financial discrimination of sex workers on the part of UK banks, and noting that although foreign banks and online payment platforms were beyond the scope of the report, they nonetheless received ample testimony of discrimination in these sectors as well (Herrmann, 2021). Australian politician David Limbrick has criticized Australia’s banks for discriminating against sex workers, saying their policies “effectively amount to corporate slut shaming” (Simpkins, 2019, np). Although three of Australia’s six states have decriminalized sex work, laws differ by state and territory. New Zealand, on the other hand, does not have states, so sex work has been decriminalized throughout the country since 2003. Even so, brothels, strip clubs, and even individual sex workers have sometimes struggled to obtain a bank account; the owner of one of the largest escort agencies in the country said she was unable to find a New Zealand bank despite having no criminal record and no debt (Doyle, 2018). Bank of New Zealand explicitly names businesses “engaged in prostitution and brothel keeping” (Doyle, 2018, np) as being subject to denial of service, and Kiwibank recently reversed track after widespread backlash for blacklisting brothels and strip clubs (but not individual workers) (Franks, 2020).

Unlike the heterogeneity of laws regulating sex work around the world, the regulatory power over the global financial industry is highly concentrated within the United States, and consequently structured to be accommodating to its interests. Although independent nations have their own banks, almost all connect with US-based credit card companies like Visa, Mastercard, and American Express, obligating them to comply with the “terms of service” of these companies (Iharagbon & Amadi, 2018). Newer payment platforms like PayPal, Square, and Google Pay have further expanded both the reach and interconnectedness of global finance. These private businesses classify even legal sex work as a “high risk” industry, or one whose likelihood of profit is in question due to its instability or dubious legality (Swartz, 2020). As the financial industry’s risk tolerance specifically for sex workers has shifted over the past two decades, sex workers have faced increasing surveillance and discrimination (Tusikov, 2021). The terms of service of these private companies are developed to serve their own interests and apply across international boundaries (Tusikov, 2018). Consequently, one of the reasons sex workers outside the United States face financial sanction even in countries with comparatively progressive sex work legislation is because the banks need to engage globally. The United States’ dominance in the global financial market means it exercises disproportionate influence over what may be bought or sold when a bank, credit card, or online

payment app is involved. For an exchange to meet the terms of service set by these companies, it must be legal in both countries. This means that to use standard electronic payment processes, customers are obliged to obey sex work law from the United States, even if the commercial sex industry is permitted in their country. Yet, much of the documented evidence of financial discrimination of sex workers relates to sexualized services that are legal in the United States as well, such as pornography. The obvious question then, is why is it happening? It is perhaps not unexpected that a nation founded by colonial puritans would produce sex work legislation averse to evidence and steeped in morality politics (Wagenaar & Altink, 2012). However, private companies' willingness to refuse business from a multi-billion dollar industry - even if it is completely legal - (Naughton, 2018) and proactively spend time and resources surveilling bank accounts and online platforms in order to explicitly exclude even tangential involvement with sex workers is, I argue, uncharacteristically scrupulous. After all, if capitalism is primarily interested in wealth accumulation and sex sells, what exactly is the problem?

This paper proposes a two-part answer to this question, beginning with an analysis of how stigma toward sex workers is quantified as a measure of financial risk, and why payment intermediaries' tolerance for risk has changed with the emergent technology of peer-to-peer online payment platforms. It then turns to an analysis of platform governance, and how the United States' clandestine establishment of "beyond compliance best practices" (Tusikov, 2017, 219) in lieu of legislative mandates have extended the country's extra-territorial and extra-legal realm of influence, as well as incentivized the development of a digital dragnet of surveillance which has an ever-widening scope but almost no democratic oversight (Lingel, 2021). Finally, the focal scope of this paper is expanded to analyze the internet itself as contested space, and propose that the exclusion of sex workers from digital public space is directly analogous to the role "Prostitution Free Zones" have played in the long history of neighborhood gentrification, with sex workers experiencing the same consequences of increased danger and inequity (Edelman, 2011).

### ***Stigma as a Measure of Risk***

The contemporary system of electronic credit cards - issued by financial giants like Visa, Mastercard, and American Express, and tied to banks - is dependent on payment intermediaries (Swartz, 2020). In this system, the merchant (the person or entity being paid) pays an acquiring bank (acquirer) to accept these credit card payments for them. The acquirers pay the credit card company a fee for access to this transaction, which is usually

passed on to the merchants. Acquiring banks are generally only profitable through scale: they deal with large businesses that will bring in a high volume of transactions, but generally don't engage with individuals or small businesses. Instead, smaller businesses will use an independent sales organization (ISO), which is a company that sells the *service* (not the card) of processing credit transactions and is separate from a bank. Although ISOs are useful for merchants who are not large enough to directly deal with an acquiring bank, they are still dependent on scale to be profitable: rather than be a middleman between each merchant and acquiring bank individually, ISOs bundle the services usually provided by an acquirer and then sell them to the merchants. ISOs differ widely in size and cost to the merchant; that cost is dependent on the level of risk the merchant is perceived to pose (Swartz, 2020). Within finance, risk is commonly defined as a situation in which the probability of an outcome can be quantitatively determined (Knight, 1921). Risk analysis is an entire industry in itself but suffice to say that when a payment intermediary is determining the risk a merchant poses, 'risk' is being used as a quantitative relation to a desired outcome (usually profit).

Both an acquiring bank and an ISOs' function is to be a middleman in a transaction: the transfer of money from merchant to purchaser is not instantaneous, so the middleman essentially fronts the money or "holds the risk for the merchant" (Swartz, 2020). A "high risk" customer is one that is more likely to not settle this debt, leaving the acquirer/ISO without payment. Of course, with risk comes the possibility of reward. As a major entity, an acquiring bank is likely to be risk-averse, but some ISOs specialize in "high-risk" payments, for which they can charge merchants higher fees. Assessing financial risk is a multi-factorial question, but is generally determined based on the likelihood of explicit fraud or chargebacks (Hayashi et al., 2016). 'Chargebacks' happen when a purchaser disputes a payment and demands their money back; if that happens, the acquirer is responsible, not the merchant. Refunds due to fraud are easy to understand, but predicting chargebacks is more complicated because their likelihood is, I argue, just as much about stigma as it is legality.

Stigma is a social process by which the physical or social characteristics attributed to a person or group are 'discrediting' within normative opinion, resulting in diminished social power (Goffman, 2014); stigma can be transferred by association when someone interacts with a stigmatized person or group. Things of questionable legality, or legally available only in certain states, or legal but stigmatizing, are all considered a high risk for chargebacks. Unfortunately, sex work (including legal services like porn) meets all three categories, and thus has been marked an inherently "high risk" industry, so only ISOs who specialize in expensive, high-risk merchants would benefit from engaging with it (Swartz, 2020).

Chargebacks in the sex industry are particularly interesting because they demonstrate how both stigma and discriminatory sex work laws *create* the conditions for sex workers' vulnerability. Swartz says a low-risk business will usually have less than 1% of their sales result in chargebacks, whereas "according to some industry estimates, the rate of chargebacks in relation to total transactions for adult-services merchants can be as high as 4%" (Swartz, 2020, 95). It is worth emphasizing that 4% is in relation to *legal* purchases of things like pornography; sex workers who engage in borderline or outright illegal work, such as escorting, are even more vulnerable to a client who wants to take advantage of them through chargebacks, because they cannot seek legal recourse without incriminating themselves (comparative quantitative data on the rate of chargebacks based on sex work policy were unavailable at the time of this writing). Stigma helps create the labor conditions that enhance sex workers' structural vulnerability.

The nature of payments, and with them intermediaries' risk tolerance, fundamentally changed with the introduction of the internet and peer-to-peer (P2P) payments. A P2P payment is an electronic transfer from the bank account of one user to another through a payment service provider (PSP). PSPs circumvent the acquiring system entirely by setting themselves up as the nexus of as many transactions as possible: users can purchase items, pay each other, and keep their money in their platform account. This way, the PSP can charge the individual user without having to pay a middleman. They are still dependent on government infrastructure, particularly the automated clearinghouse (ACH), a nonprofit network set up by the Federal Reserve for bank-to-bank transfers (Tusikov, 2021). PSPs emerged in the 1990s as an alternative to the ISO-model with the introduction of PayPal (Trautman, 2013) in 1998. P2P transactions became increasingly common when eBay purchased PayPal in 2002; the company received its initial public offering, and began to grow exponentially (Kaminski, 2003).

PSPs are how the platform economy runs: a platform is a digital space where software programs are executed; the platform economy refers to the financial transactions that occur on digital platforms (Kenney & Zysman, 2020). The transition from ISOs to PSPs to enable online payment platforms is a large contributor to the banking discrimination faced by sex workers because it changed who is working for whom. Under the ISO model, the credit card has obligations to the people it has signed up as members, and acquiring banks represent the merchants they take on as clients. Conversely, "the true client of the PSP is the platform, not the parties on either end of the transaction" (Swartz, 2020, 91). The PSPs circumvent an ISO to negotiate with an acquirer on behalf of the platform; in order to guarantee a low rate, the

“PSPs must guarantee that all the transactions they conduct will be low risk for chargebacks” (Swartz, 2020, 93). The elimination of ISOs meant the elimination of the possibility of reward for risk: it is in a PSP’s economic interest to refuse service to anyone deemed a likely risk, which includes anyone in the sex industry. PayPal confirmed this rationale in 2003 - less than a year after being acquired by eBay and going public - when it announced it would no longer process transactions that involved adult-themed content, including legal products and services. PayPal insisted this decision was not based in moralism but money, claiming there was simply too much fraud associated with adult-themed content to continue processing transactions for such merchants (Cho, 2003).

It is important to remember the goal of risk elimination only makes sense for PSPs; ISOs can still profit handsomely from high-risk businesses because they can charge a premium for it. The accounts of the independent sex workers, educators, and boutique sex toy shops mentioned in the introduction of this article are frequently frozen, and their users permanently banned from the platform in use, because they were (often without knowing it) using a PSP through their chosen payment platform (Swartz, 2020). The terms of service of these platforms explicitly forbid any sexualized material in order to guarantee they have a low risk pool, and allow for termination of accounts without warning (Watson & D’Adamo, 2021). Individuals or small companies usually do not have access to high-risk ISOs, and even if they did, they would likely be prohibitively expensive (Swartz, 2020). By contrast, large porn production companies or brothels can offer the volume and afford the fees to make them an attractive client to the right ISO. This is another way that stigma and sex work legislation create the conditions of vulnerability for sex workers: the current system of platform governance means small, independent workers or businesses cannot legally participate in the transactional community because, regardless of their actual transactional history, they are classified as high risk and consequently undesirable to the payment platform’s PSP. Since high-risk ISOs are generally inaccessible to independent workers, they instead need to be contractors or employees through a larger entity which has an ISO. This essentially gives third-party actors in sex work - porn production companies, large escort agencies, etc - significant influence over the people who are actually performing the labor, which is another way that stigma and discriminatory legislation create the structural vulnerability sex workers face while performing their labor.

This dynamic is exemplified by Visa and Mastercard’s decision to cease processing transactions on Pornhub in December 2020, as a result of accusations that the online porn site shared videos of both adult and child sexual abuse (Associated Press, 2020). Pornhub is

one of many subsidiaries of the company MindGeek, which controls most of the internet's popular porn streaming sites (including Pornhub, RedTube, YouPorn, and many more) (Auerbach, 2014). Pornhub is the largest free porn streaming service in the world, and has frequently been a point of controversy within the porn industry due to the proliferation of stolen content on the site, despite Pornhub's piracy prohibitions (Nilsson, 2020). Accusations of Pornhub's apathy toward victims of sexual assault also have merit: many victims of assault have spent years trying to get videos of themselves permanently removed to no avail, and lawyer Carrie Goldberg has written extensively about representing victims of revenge porn that were uploaded to Pornhub (Goldberg & Amber, 2019). After a long campaign from Exodus Cry - a non-profit that seeks to abolish the sex industry entirely, and has focused much of their attention on Pornhub - and a *New York Times* op-ed by Nicholas Kristof (Gira Grant, 2020), Visa and Mastercard announced they were terminating their relationship with Pornhub.

There is no evidence this decision has had any impact on the amount of child pornography available online, and substantial evidence that it has harmed independent sex workers by removing their livelihood and further concentrating power within large porn production companies (Jones, 2021). As adult star and writer Cherie DeVille, and multiple NYT reports have reiterated, Facebook distributes more child porn than any other platform in the world, accounting for up to 90% of imagery reported (DeVille, 2021). As Angela Jones points out, 84 million cases of videos depicting sexual abuse have been flagged on Facebook within the past 3 years, whereas Internet Watchdog Foundation has found only 118 on Pornhub, meaning "0.0008 percent of videos on Pornhub featured sexual abuse. As a result, Pornhub elected to purge over 10 million videos and users whose accounts had already been verified" (Jones, 2020, np). DeVille further notes, "Exodus Cry's tax filings revealed that the company had amended their mission statement to include 'abolishing sex trafficking and the commercial sex industry'" (DeVille, 2021, np); Pornhub is just a convenient proxy to attack sex work, not child pornography.

Although losing a partnership with Visa and Mastercard negatively impacts Pornhub, they quickly switched to cryptocurrencies (Tusikov, 2021) and have enough capital to negotiate with an ISO specialising in high-risk clients. By contrast, Visa, Mastercard, and PayPal's termination severely impacted Pornhub's Model Program, in which individual performers can upload their own content and earn revenue independently of Pornhub itself (Jones, 2020). In the middle of a pandemic, where sex workers had already been systematically denied access to government assistance (LaGrone, 2020), up to 250,000 performers lost thousands of dollars of income per month due to credit card companies'



spurious claims that they were halting these payments in order to prevent child porn or establish consent of performers (Jones, 2021). As Angela Jones also points out, “the only monetized content on Pornhub was already verified, so the policy’s only impact was on legal work” (Jones, 2021, np). Once again, the options and independence of the actual workers have been greatly restricted, enhancing the dominance of large, third-party platforms.

There is also the far more nebulous question of what happens to the funds when payment platforms close an account due to a supposed violation of their terms of service. Although peer-reviewed, quantitative data is so far unavailable on how often payment platforms simply keep the remaining balance on an account they have closed, anecdotal evidence on social media sites like Twitter indicate this is a common practice. On the 21<sup>st</sup> February 2021, popular writer and Twitter user Imani Gandy DeBarge tweeted “I was today years old when I found out @CashApp will just close your account for no reason and keep your money,” (DeBarge, 2021), along with an accompanying screenshot showing an email from CashApp (owned by Square) confirming that she had violated their terms of service, they are exercising their discretion to block her funds, and for security reasons will not provide further details. DeBarge tweeted her ongoing debate with CashApp to her 260,000 followers as she attempted to recover what she said was nearly \$1,000 from an account that was closed with no warning or explanation. She started the hashtag #CashAppStealsMoney in order to apply public pressure and awareness; although DeBarge says her funds were later returned, dozens of other Twitter users without the power of a very large social media audience used #CashAppStealsMoney to share their stories of their accounts being closed with no warning or recourse, and no return of the balance that had been in the account; many of the tweets shared were from sex worker accounts.

This dynamic is by no means restricted to CashApp, with sex workers often reporting that various payment platforms closed their accounts without warning and refused to refund the existing balance. In 2015, Violet Blue wrote, “For over ten years PayPal, the world’s most ubiquitous payment processor, has emerged as the king of denying service, seizing accounts and freezing funds for anyone discovered to be associated with sexual content online” (Blue, 2015, np). Some light may soon be shed on how frequently PayPal engages in this practice as they come under increasing legal scrutiny. In May 2021, former poker champion Chris MoneyMaker announced his intent to sue PayPal for seizing \$12,000 in his account (Pill, 2021), and, as of January 2022, PayPal faces a class-action lawsuit accusing them of violating racketeering laws by freezing users’ funds with no explanation. The three plaintiffs claim PayPal has stolen a combined sum of nearly \$250,000 from them (De Chant, 2022).

Although PayPal announced it would no longer host merchants who sell adult content in 2003 and was known within the sex industry as being increasingly stringent in its exclusion (Blue, 2015), the number of reports of sex workers being banned from various online platforms - even when they had never used that platform for any kind of sexualized transaction - increased sharply in 2014 (Horn, 2014). Although it was unknown at the time, this period of enhanced surveillance and de-platforming (removing a user's access to an online platform) was part of an initiative of the United States government to utilize the market concentration of payment intermediaries to "systematically harness extra-legal pressure to achieve results beyond what law would provide or even permit" (Benkler, 2011, 154).

### ***From Platform Economy to Platform Governance***

Regulation is often presented as anathema to capitalism: US political discourse frequently centers 'red tape' bureaucracy as a catch-all bogeyman for any state-imposed limits on the continual accumulation and expansion of private capital (Reyman, 2009). Yet, as David Levi-Faur (2017) has noted, presenting regulation as an inherently de-commodifying or 'socialist' influence is misleadingly simplistic: for all the popular political discourse on the use of environmental, safety, and social regulations to stymie profit, capitalism is dependent on a network of regulations—both State and industry led—to enable it. Capitalism depends on the State's "power and capacity to nurture the process of commodification, nowadays mainly by active promotion of competition and 'competitiveness'" (Levi-Faur, 2017, 292). This system's longevity is dependent upon its ability to outlast both election cycles and political trends, so although regulatory authority is certainly legitimized through the State, it is not wholly dependent upon it. Regulatory capitalism, then, is a system in which the perpetuation of a capitalist economy is *dependent* on regulations which are increasingly developed by private industry and absent democratic input, and then implemented outside a legislative or judicial process. It is within the context of regulatory capitalism that platform governance becomes both possible and necessary for its own continuation.

Regulatory capitalism is the relationship between State and non-State actors to both implement and enforce laws and non-legislative regulations for the mutually beneficial aims of global influence and capital accumulation; platform governance is how regulatory capitalism is enacted. It is important to remember that although platform governance refers to the specific use of these non-State actors as regulators, this does not imply their relationship to the State is inherently antagonistic *or* friendly; it is better to describe the relationship as mutually constitutive (Levi-Faur, 2017), in that both derive power and legitimacy through the other. As

will be argued, the US government has been consistently involved in the development and enforcement of platform governance; it is only the transparency of this relationship that has varied.

Although banking institutions have long cooperated with governments and law enforcement in disrupting criminal activity, the extra-legal use of payment processors to disrupt online exchange (whether or not the exchange is actually illegal) has newer origins. As Tusikov describes, the domination of Visa, Mastercard, and PayPal in the online payment industry means that if they withdraw their services, “they can effectively establish chokepoints that starve the targeted entities of revenue and cut them off from the global marketplace” (Tusikov, 2017, 214). Unlike blocking a domain name or banning someone from a social media platform, payment processing services are difficult to replace because they are so concentrated and interconnected: even though online payment platforms have expanded beyond PayPal (with the addition of platforms like Apple Pay, Google Pay, Stripe, Square, and WePay), they still need to connect into the architecture of physical banks, which are then connected to Visa, Mastercard, and American Express via credit and checking accounts. Revenue chokepoints give payment intermediaries significant regulatory power that is not constrained by legislative process or geographic boundaries.

The use of payment processors as revenue chokepoints became increasingly standardized in internet governance after the dramatic and controversial failure of two important pieces of US online intellectual property regulation in 2010 and 2011: the Stop Online Piracy Act (SOPA), and the Protect Intellectual Property Act (PIPA) (Tusikov, 2018). The original language of both bills allowed the Department of Justice (DOJ) to seek a court order that would require internet service providers (ISPs) to block access to websites the DOJ accused of copyright infringement, as well as provisions which established payment processors (Visa, Mastercard, American Express, Discover, and PayPal) as having responsibility for their third-party transactions. Both would directly challenge Section 230 of the *Communications Decency Act*, the foundational internet law that protects third-parties from most liability from the content posted on their platforms; the majority of internet governance experts said it would substantially change the way communication happened online (Goodman, 2012). Mobilization against SOPA and PIPA was passionate and widespread, coming from activists and academics as well as globally dominant companies such as Google, Facebook, and eBay; the opposition of these internet giants helped the word spread quickly, and petitions against the bills attracted tens of millions of signatures (Goodman, 2012). By 2012 both bills were dead.

Unknown to almost anyone not actively involved, the US Intellectual Property Coordinator (IPEC) had been negotiating 'voluntary best-practice guidelines' with the cooperation of the major payment processors protesting SOPA/PIPA. The document in question, the Best Practices to Address Copyright Infringement and the Sale of Counterfeit Products on the Internet, is dated May 16, 2011 - five months before SOPA was even introduced into the House of Representatives - and lists Visa, Mastercard, American Express, Discover, and PayPal as participants (Bridy, 2015). IPEC's 2010, 2011, and 2012 Joint Strategic Plans (JSPs) all include rhetoric concerning the voluntary nature of private-sector cooperation in preventing online copyright infringement and counterfeiting by agreeing to 'quarantine' websites the US government accuses of counterfeiting or piracy (Tusikov, 2018).

IPEC characterizes these private-sector best practice agreements as voluntary and non-regulatory, which is partially true in its most literal sense: legally binding legislation did not result from these negotiations. Yet as Bridy points out, classifying agreements on best private-sector practices made with a government, in order to enforce legislation either enacted or supported by that very government as voluntary or non-regulatory is at best a great oversimplification (Bridy, 2015). Bridy connects this to Julia Black's work on how courts draw their boundaries between private and public law when reviewing decisions on self-regulatory associations, differentiating between voluntary self-regulation as a situation "where there is no active state involvement, direct or indirect, in promoting or mandating self," and coerced self-regulation, "in which the industry itself formulates and imposes regulation but in response to threats by the government that if it does not the government will impose statutory regulation" (Black, 1996, 27). This connection is further supported by the fact that IPEC makes legislative recommendations in its annual JSPs. Further in this paper, evidence of what Black calls mandated self-regulation, when private industry "is required or designated by the government to formulate and enforce norms within a framework defined by the government, usually in broad terms" (Black, 1996, 27), is evident. Criticizing the government's attempts to characterize these best practice agreements as voluntary, Tusikov says they should instead be understood as a form of "state-enforced hybrid governance" (Tusikov, 2018, 1) because the goal is to push these large companies into exceeding their legal obligations without having to go through the process of enacting additional legislation. She notes that "advocates of this approach, such as the European Commission, approvingly refer to it as 'beyond compliance' regulation" (Tusikov, 2018, 1).

Particularly in the wake of the fallout of SOPA/PIPA, this kind of ubiquitous, soft power is appealing to governments for several reasons. This hybrid governance model allows the

government to regulate by proxy, thereby obfuscating their involvement with controversial legislation and shifting public attention (and accountability) onto the private sector. The lack of legislative process also means the private sector can be both immediately reactive and highly flexible in its implementation or enforcement of regulations. And most importantly, regulating through payment processors in particular allows the US government to export its own priorities across international boundaries, sometimes even in contradiction of another nation's (or indeed, its own) laws. IPEC itself explicitly noted that this style of influence allows governments to impact "websites that are beyond the reach of US law enforcement agencies" (Tusikov, 2018, 13).

Of course, an integral aspect of the US government's force of persuasion is the looming possibility of legislative action. SOPA/PIPA were fiercely opposed by the very companies which entered into voluntary best practice agreements with IPEC; it is consequently reasonable to assume these private sector actors view such agreements as defensive measures against more intrusive, legally binding regulations. These threats are not always hypothetical: while negotiating voluntary agreements with IPEC, Google faced criminal charges for hosting ads from unauthorized online pharmacies, eventually forfeiting \$500 million in 2011 (Tusikov, 2018). The Department of Justice explicitly acknowledged they used this forfeiture to "get Google's attention" (Dept of Justice, 2011, np).

Regardless of the rhetoric around the supposedly voluntary, cooperative best practices involved in platform governance, this architecture undeniably laid the foundation for what would become increasingly State-led, legislative action. This paper contends that the very purpose of presenting State-led best practice agreements as voluntary self-regulation is to allow the State to impose regulations that are likely to be politically unpopular, acclimating both industry and individuals to these standards until the imposition of explicit mandatory self-regulation is more likely to be palatable to a voting populace.

### ***From Voluntary Mandates to Legislative Action***

Beginning in 2013, the Department of Justice and Federal Deposit Insurance Corporation (FDIC) engaged in a campaign of investigating and combating businesses suspected of engaging in consumer fraud by using banks and payment processors as revenue chokepoints, literally nicknamed "Operation Choke Point" (Issa, 2014). The primary targets of Operation Choke Point were predatory payday lending companies - which offer small, short-term loans at very high interest rates - and online and phone telemarketers who sell products and services

on which they never intend to deliver (Zywicki, 2015). Unlike the voluntary best practice regulations developed by the government and private industry, Operation Choke Point was explicitly presented as a consumer protectionist regulation, rather than one intended to promote profit through copyright (Hughes & Middlebrook, 2014). The legality of this operation came under heavy scrutiny because the scope of investigation was very wide: payday lenders, marketers, firearms and ammunitions sales, and (of course) adult entertainment were all subject to secret, non-judicial assessment by the DOJ, and many legal businesses found their sources of revenue choked off as their access to online and physical banking was denied and their assets seized, often with little or no warning (O'Hara, 2014). When it began, Operation Choke Point was more rumor than confirmed policy, meaning the sex workers mentioned in the beginning of this paper who lost their banking access initially had no way of knowing why their legal employment resulted in financial discrimination, but the sharp increase in payment platforms banning users with even tangential relation to sexualized content from 2014 is correlated with the introduction of Operation Choke Point.

Critics of the operation claimed it was a vast government overreach, as it did not simply target businesses that were engaged in questionably illegal behavior, but rather those deemed "high risk," with conservative lawmakers, bankers, and private industry representatives alleging that "high risk" businesses were really just ones the Obama administration objected to, with payday lenders being the most explicitly targeted (Keating, 2014). As was seen in negotiations between industry and IPEC from 2010-2012, sometimes the mere suggestion that a bank or payment platform would come under scrutiny was enough to encourage them to act proactively and discontinue financial transactions with any businesses that could bring the bank into disrepute (Guida, 2017). This tactic was explicitly acknowledged by then Deputy-Assistant Attorney General Maame Ewusi-Mensah Frimpong in an internal memo saying, "[i]n several cases, after receiving a subpoena, banks and processors have self-disclosed potentially problematic relationships and have informed us that they have taken corrective action" (Zibel & Johnson, 2014, np).

The FDIC was sued - and settled - several times by various banks and payday lenders in response to Operation Choke Point. A condition of the 2019 settlement in *Advance America, Cash Advance Centers, Inc. v. FDIC* (FDIC, 2019) was the FDIC publicly releasing several letters clarifying their internal protocol and confirming many of the accusations levied against them. Operation Choke Point pressured banks to stop engaging in commerce with what the DOJ considered "high risk" ventures, which forced the closure of businesses that were operating legally, with little to no transparency in the process (Guida, 2017). Operation Choke

Point consequently incentivized banks and payment platforms to employ an ever-expanding surveillance system with very broad and conservative parameters in establishing acceptable use in their terms of service. Even though Operation Choke Point has been discontinued, the use of chokepoints and the framework of mass surveillance that it encouraged endures (Tusikov, 2017).

In the absence of binding legislation or specific judicial guidance, payment intermediaries become de-facto policymakers and enforcers whose primary motivation is avoiding further regulatory scrutiny; their compliance with State interests comes “not in the shadow of existing law, but in the shadow of potential law” (Mann & Belzley, 2005, 260). In practice, ‘beyond compliance’ self-regulation justifies “state-corporate interests in the massive accumulation and mining of personal data to influence and predict human behavior” (Tusikov, 2017, 224).

Surveillance is not just a matter of recording data as value-neutral information, but also one of classifying and assessing the accumulated data. As surveillance becomes increasingly automated and payment platforms’ assessment of risk relies more on probabilistic modelling and monitoring rather than clearly defined or even negotiable industry standards (Swartz, 2020), payment intermediaries are incentivized to classify an ever-expanding list of content deemed even tangentially sexual to be a violation of their terms of service to ensure their compliance with State-led regulatory suggestions, and therefore avoid more legal intervention. In practice, this has led to the further institutionalization of whorephobia - a fear and hatred of sex workers derived from negative stereotypes about them (Tempest, 2019) - which worsens inequities for the most vulnerable sex workers.

One of the most egregious examples of this process can be seen in a 2017 report from the UK on the role of financial institutions in disrupting human trafficking (Keatinge & Barry, 2017). The report praises an unnamed bank’s list of activities which could indicate possible sex trafficking, which includes: receiving multiple cash transfers of less than £10,000; making repeated payments to websites that advertise adult services; making multiple airline bookings to Eastern Europe; payments to high-end restaurants and diners on the same day; and even regular payments of £10–20 to pharmacies under the presumption contraceptives might have been purchased frequently (Keatinge & Barry, 2017). Although many of the activities related to sex work are not legal in the UK, the actual act of consenting adults exchanging sex for remuneration is: receiving multiple cash transfers, dining out, buying a plane ticket, and purchasing condoms describes a normal, average work week for many escorts, particularly in

Europe, where intra-European travel via airline is both cheap and common. The conflation of normal sex working expenditures with accusations as serious as trafficking pressures financial institutions to continually discriminate against sex workers in order to avoid being either stigmatized or criminalized by association—even if all exchanges were legal. The inclusion of “regular (daily) payments of £10–20 to pharmacies that could be for contraceptives” (Keatinge & Barry, 2017, 28) as an indication of trafficking is exceptionally dangerous because it has been continually documented that using the possession of condoms as evidence of trafficking or prostitution disincentivizes sex workers from carrying them in order to avoid arrest, which increases the likelihood they will engage in unprotected sex, thereby increasing their likelihood of unwanted pregnancy and/or STI transmission (Carcioppolo et al., 2021; Dumey, 2009; Jahnsen, 2017; Newcomer, 2013; Wurth et al., 2013). The very fact that daily purchases of as little as £10–20 are being analyzed as possible evidence of trafficking speaks to the breadth of surveillance that has become standard.

This paper does not argue that none of the industries targeted in Operation Choke Point are undeserving of greater scrutiny, or that content monitoring on platforms is wholly unnecessary; protecting vulnerable people from predation by unscrupulous for-profit industries should be one of the basic functions of government (Tempkin & Maloney, 2019). But oversight free of public knowledge or accountability is a poor precedent to set in an ostensibly democratic system, and greatly increases the likelihood that vulnerable people will be negatively affected, either intentionally or explicitly. Although the FDIC did not focus its efforts on sex workers, it is clear that the online architecture of revenue chokepoints developed between industry and IPEC from 2010 on, and the very broad language used to describe “risk” during Operation Choke Point, had a detrimental effect on many sex workers all over the world and laid the foundations for what would later become FOSTA/SESTA (Monea, 2022).

Initially introduced as HR 1865 (FOSTA) and SB 1693 (SESTA) and then combined into Public Law No: 115-164, the passing of FOSTA-SESTA in 2018 represents the culmination of the process of platform governance in regulating sex work, wherein the State designs and implements legislation (rather than best practice regulations) that it then legally obliges platforms to enforce. Rather than relying only on the coercive control of revenue chokepoints, legislative platform governance utilizes explicitly carceral punishments to solicit cooperation from private industry.

Marketed as a necessary tool for law enforcement to intervene and prosecute cases of sex trafficking in which victims are advertised and/or money is exchanged online, FOSTA



represents the largest expansion of US federal anti-sex [work] laws (Blunt & Wolf, 2020a) by making online platforms (whether they host ads, message boards, or allow money transfers) both criminally and civilly responsible for third-party content that “unlawfully promote[s] and facilitate[s] prostitution and websites that facilitate traffickers in advertising the sale of unlawful sex acts with sex trafficking victims” (Allow States and Victims to Fight Online Sex Trafficking Act of 2017, 2018, 1). FOSTA was introduced explicitly as serving to amend Section 230, which as previously discussed, is a critical aspect of internet governance that protects platforms from liability for what individual users of the sites post. Sex workers were immediately and universally critical of SESTA and FOSTA, saying this legislation would likely *increase* both sex trafficking and the level of violence faced by consensual sex workers because it would severely limit workers’ ability to find and assess clients as well as share safety information among themselves (Tichenor, 2020; Van Ness, 2019). Contrary to the narrative that FOSTA is necessary to combat sex trafficking, a 2021 report by the Government Accountability Office (GAO) concluded that three years after its passage “Criminal restitution has not been sought and damages have not been awarded under section 3 of FOSTA” (GAO, 2021, 1).

There is no evidence that FOSTA has reduced the likelihood of sex trafficking or made incidents of it easier to prosecute. Instead, FOSTA sits within the ecosystem of platform governance that has been developing between private industry and the US government since the early 2000s, de-platforming and using revenue chokepoints to target expressions of sexuality, including sex work (Blunt & Stardust, 2021). Sex worker rights advocates overwhelmingly agree that FOSTA has made sex work more dangerous for workers, with a community report saying, “This dismantling of an online-based sex work environment has played a role in the increased economic instability for 72.45% of the online participants of this survey, with 33.8% reporting an increase of violence from clients” (Blunt & Wolf, 2020b, 18). The consequences of FOSTA have been felt globally, expanding the influence of the United States’ anti-sex work priorities far beyond its geographic boundaries, disrupting the abilities of sex workers even in countries with decriminalized or legalized contexts to advertise, exchange safety information, and be paid for their labor. A qualitative study from New Zealand in *Anti-Trafficking Review* claimed FOSTA has “undermined the positive impacts of decriminalisation, while exacerbating socioeconomic, racial, gender, and legal inequalities in Auckland’s sex industry” (Tichenor, 2020, 1). Additionally, a report from the Network of Sex Work Projects on the 22<sup>nd</sup> International AIDS Conference confirmed that the closure of US-based websites that were used by international workers impacted their ability to advertise and do background checks on clients (NSWP, 2018).

Similarly to Operation Choke Point, FOSTA has executed considerably more discursive power than litigious impact. Operation Choke Point labelled “adult entertainment” a high-risk industry based both on quantitative assessment relating to the frequency of chargebacks and on longstanding stigma toward sex workers that would make suspicion seem natural; Choke Point’s lasting impact is one of using State power and authority to legitimize this stigma, which is why sexualized content is continually and explicitly excluded from platforms long after the FDIC admitted wrongdoing and apologized for Choke Point’s impact (FDIC, 2019). FOSTA operates the same way: even though neither criminal convictions nor civil penalties have actually occurred as a result of FOSTA, it indelibly changed the landscape of the entire internet by codifying what *could* happen by explicitly correlating sex work with sex trafficking. In each instance, the stigma toward sex work has been so successful because State power has rhetorically tied it to other acts of criminal deviance: for Operation Choke Point, it was fraud; for FOSTA, it is sexual violence.

### ***The Internet as Contested Space***

The regulation of commercial sexual exchange has long been marked not only by moralism in what people should be able to do in private, but more especially the extent to which these private interactions affect, and are affected by, the public sphere. This tension is a result of the recognition that individuals have a reciprocal relationship with the society in which they live: no ring in an ecological framework exists in a vacuum as all affect and are affected by the others. This concern is reflected throughout the breadth of academic study on sex work: although street-based sex work accounts for only a small percentage of the commercial sex trade, it has received a large portion of academic attention because the question of street-based sex work is ultimately just a focal point in the wider debate about contested public space (Wagenaar & Altink, 2009). A public space is ‘contested’ if multiple demographics have use for it, yet a dominant group (with greater power due to their socioeconomic, racial, immigration, and/or landowning status) is able to exclude minority participation in the space, either through legal sanction or social pressure. Who is considered to be part of the community that has a legitimate claim over a public space has a reciprocal effect of shaping the space itself (Abel, 2020). This creates a ‘moral geography,’ in which the mere presence of sex work (particularly work that is highly visible) has a polluting effect, transforming an urban space into “streets of shame,” (Hubbard & Sanders, 2003) in which stigma is attributed by association. This process is literalized by the implementation of a “Prostitution Free Zone” (PFZ).

Although the concept of preventing sex workers from engaging in business in certain areas has existed for centuries, the contemporary development of a PFZ describes either a formal or informal neighborhood radius that is determined to be off-limits to the business of sex-work related activities (Edelman, 2011). In some cases, this includes anyone who has ever been charged with the crime of prostitution, regardless of their current sex working status (Morehead, 2017). PFZs are associated with increased harassment of gender non-conforming people and/or racial minorities, and their legality in an official capacity has often been disputed (Saunders & Kirby, 2010). Yet even cities notoriously tolerant of sexual commerce, such as Amsterdam, have increasingly sought to limit the boundaries in which sex work can either be advertised or occur as part of a larger project of urban development and gentrification (Aalbers & Deinema, 2012). Gentrification is the process by which property developers purchase land or housing that is cheap due to structural underinvestment and then sell it at a profit to new residents who are wealthier (and usually whiter) than the previous demographic, leading to the displacement of the former community (Lingel, 2021).

The increasing ubiquity of digital sexual expression - for pay and for play - has dragged to the forefront the question of the internet as both public space and essential utility. Increasing academic and media attention is being paid as to whether, and under what conditions, sex workers are allowed to exist in the digital commons (Blunt & Stardust, 2021; Gillespie, 2018; Grant, 2021). The 20-year process of increasingly intrusive platform governance as a means of eventual exclusion is analogous to sex workers' removal from physical public space due to gentrification. Sex work researchers have consistently demonstrated that the privatization and gentrification of public space - which consistently regard the removal of sex workers from public view as essential to community development and improvement (van Liempt & Chimienti, 2017) - increases the likelihood that sex workers will face greater economic hardship and threats of violence (Hubbard et al., 2007; Neville & Sanders-McDonagh, 2018; Wagenaar & Altink, 2009).

Similarly, there is no evidence to demonstrate the exclusion of sex workers from the platform economy or implementation of FOSTA resulted in a decrease of either sex work or sex trafficking; it just made advertising, the exchange of money electronically, and background safety checks more inaccessible (Blunt & Wolf, 2020b). Similar to how Prostitution Free Zones and police or civilian led anti-sex work "street sweeps" do not result in a decrease in sex work but simply the removal of a highly stigmatized population from public view (Aalbers & Deinema, 2012; Edelman, 2011), the exclusion of sex workers from the digital commons enhances the already disparate racial and wealth inequities between different demographics

of sex workers (Are, 2020; Jindal-Talib, 2021). Instead of cheap, easily accessible sites like Craigslist or Backpage<sup>2</sup>, 45% of sex workers report not being able to afford to place an ad after the passage of FOSTA, and 72% report increased economic instability (Blunt & Wolf, 2020a). As has frequently been reiterated in this paper, stigma and discriminatory laws create the labor conditions that lead to sex workers' vulnerability: 33% of sex working respondents said they have experienced an increase in violence from clients after FOSTA, and 99% reported the law did not make them feel safer (Blunt & Wolf, 2020a). Rather than increase safety, FOSTA privatized it: arguably one of the more secure ways to advertise sexual services is to have a personal website that is hosted on a server outside the USA, along with encrypted communication channels (McDonald et al., 2021). While technologically sound, these suggestions require the kind of start-up costs that are simply impossible for lower income workers, so just as gentrification pushes people who have fewer resources out of public view and into more dangerous spaces, so too has platform governance pushed sex workers from the digital commons and into situations of greater financial and physical precarity.

Relatedly, cryptocurrencies are often suggested as a solution to sex workers' financial exclusion, as though smartphones, reliable internet, and a client base willing to pay in such a manner were standard fare among the sex working population. Such a suggestion reveals not only a lack of awareness of the massive income disparity among sex workers (that is highly predicated on race, gender identity, and disability), but also a curious level of trust in both the ability and willingness for crypto payments to offer protection. Since Coinbase, one of the most popular crypto exchange platforms, just confirmed another deal with Immigration and Customs Enforcement (ICE) (Parashar, 2021), it is past time we as a society stop expecting sex workers to continually innovate ways to circumvent discrimination and instead address the root causes that incentivize their exclusion in the first place.

## **Conclusion**

This paper has argued the United States' near-ubiquitous influence on global finance and internet law has allowed it to export its stigma toward sex workers far beyond its own territorial boundaries. This influence has incentivized technological and regulatory practices that worsen sex workers' labor conditions, enhance vulnerabilities, and exacerbate inequities. Using payment platforms as a focal point, this paper has criticized both the intentions and outcomes

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<sup>2</sup> Craigslist and Backpage are US-based websites where users can post classified ads under various categories. Their 'personals' sections were frequently used by sex workers to advertise their services as both sites had very high internet traffic and low advertising costs (Blunt & Wolf, 2020b). Craigslist still exists but has closed its 'personals' section, whereas Backpage was closed and seized by the US federal government in April 2018 - right before the passage of FOSTA/SESTA (Gira Grant, 2018).

of platform governance, but it does not mean to suggest that the solution is to simply end either online content monitoring or regulation. As communications scholar Tarleton Gillespie notes, “The fantasy of a truly ‘open’ platform is powerful, resonating with deep, utopian notions of community and democracy—but it is just that, a fantasy” (Gillespie, 2018, 5). The solution to the discrimination of marginalized communities in physical or digital public space is not to create a power vacuum whereby bad actors could continue to do harm to vulnerable people, but rather to dismantle the system that has enforced the interests of private capital over communities’ lived experiences. To begin addressing these inequities, this paper recommends:

- Worldwide decriminalization of the sale, purchase, and third-party facilitation of all consensual, adult commercial services. As has been acknowledged by Amnesty International (Amnesty International, 2016), Human Rights Watch (Human Rights Watch, 2019), the American Civil Liberties Union (ACLU, 2021), the Global Alliance Against Traffic in Women (GAATW, 2013), established leaders in public health (The Lancet, 2015), academic reviews of countries that have decriminalized (Abel, 2014), and the global movement led by sex workers themselves, decriminalization is an essential component of sex workers’ labor rights. This paper has argued that the terms of service of payment intermediaries have a more significant impact on the material lives of sex workers in large part because the United States’ stigmatization and criminalization of sex work incentivizes private industry’s discrimination; a change in US priorities and perspective would have worldwide, systemic impacts.
- Engage both physical and digital public spaces in a process of de-gentrification (Lingel, 2021), by which capital and private industry’s monopoly on public space and essential utilities - including the internet and banking - is dismantled and reconstructed to serve the democratically determined needs of the community.

Ultimately, this paper argues that the privatization of the physical and digital commons makes the terms of service of commercial industry more significant to sex workers’ material reality than the actual sex work legislation of their specific geographic area, and allows the United States to export its own sexual and financial hegemony across the globe. It calls for a radical restructure of who has the power to regulate the internet to accommodate their interests, emphasizing the need to center marginalized communities in a changing landscape.

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