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High Risk Hustling: Payment Processors Sexual Proxies and Discrimination by Design

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HIGH RISK HUSTLING: PAYMENT PROCESSORS, SEXUAL PROXIES, AND DISCRIMINATION BY DESIGN

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Key words: sex work, financial discrimination, sexual surveillance,
precarious labor, algorithmic profiling

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ABSTRACT

Sex workers are increasingly documenting financial discrimination when accessing banks, payment processors, and financial providers. As hustle economy workers, barriers to digital financial infrastructure impact sex workers' abilities to maintain their livelihoods, resulting in structural marginalization and vulnerability to violence. Internationally, peer-led sex worker organizations have documented payment processors that discriminate, collating public policies and user experiences. They report refusals of merchant services, being unable to open accounts, being denied loans, finance or insurance, higher premiums, and having money frozen, withheld, or forfeited.

In this Article, we examine the policies of banks and payment providers who refuse service to sex workers, sex industry businesses, and other sexual purposes. Drawing from sex worker media from two different regulatory environments, the United States and Australia, we show how sex workers are identified via multiple means, including through algorithmic detection, malicious flagging, unique business names, service descriptions, external links, use of pseudonyms, linking of personal and professional identities, and sex work activism. We argue that the "sexual proxies" that identify sex workers are founded on problematic assumptions of sex as high risk and operate to capture a wide variety of uses, including access to sex education, abortion services, and mutual aid funds.

We position financial discrimination against sex workers as a multi-layered problem, stemming from classist, racist, transphobic, and whorephobic laws and policies, accelerated by automated risk assessments and privatization of financial infrastructure. Financial discrimination is enabled by the criminalization of sex work, and due to the exportation of U.S. policy, continues even in jurisdictions where sex work is decriminalized, buoyed by anti-trafficking policies that conflate sex work with exploitation and identity verification policies driven by anti-terrorism and anti-fraud legislation. As a result, financial discrimination disproportionately impacts sex workers who are undocumented, marginalized, or most at risk of violence. The current challenge facing sex workers is how to survive in this system, including by holding payment processors accountable. We outline a series of potential accountability measures, including an overhaul of law and policy frameworks.

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I. INTRODUCTION

On March 10, 2021, Danielle Blunt received a message that was, sadly, not unfamiliar to them. It read: “Your business has been identified as presenting an elevated level of risk for customer disputes that we will be unable to support.” The message came from the Risk Operations Team at Shopify only a few months after Blunt launched her new consulting business.¹ Although Blunt was permitted to maintain the Shopify

¹ Shopify is a Canadian multinational e-commerce platform that allows businesses to create and customize an online store to sell products and take payments through Stripe. *About Us*, SHOPIFY, <https://perma.cc/T83P-UBZC> (last visited Nov. 20, 2022).

account, losing access to their ability to accept payments through Stripe effectively rendered their new website unusable.²

As a chronically ill, immuno-compromised, in-person sex worker,³ Blunt had slowly transitioned to online sex work during the COVID-19 pandemic and decided to start a new business offering best-practice trainings for tech industry professionals. Having spent weeks building the new website and promoting their new business, Blunt had actively taken multiple security precautions so it would be harder to be traced

² Stripe is an online payment processing and credit card processing platform for businesses that transfers funds into the seller's account. STRIPE, <https://perma.cc/98JG-388C> (last visited Nov. 20, 2022).

³ The term "sex work" was first coined by sex worker, activist, and author Carol Leigh in 1979 or 1980 to describe her own sense of agency in trading sex when confronted by the dehumanizing term "sex use industry" at a feminist conference. See Carol Leigh, *Inventing Sex Work*, in WHORES AND OTHER FEMINISTS 225, 229-230 (Jill Nagle ed., reprinted 2010). In this Article, we use the term "sex work" to describe all forms of trading sexual services, self-created imagery, performance, and other forms of sexual labor for anything of value. This includes, but is not exclusive to, in-person forms of work such as escorting, indoor and outdoor full-service sex work (or what the law derogatorily describes as "prostitution"), stripping, professional bondage/discipline, dominance/submission, sadism/masochism ("BD SM") services, and other sexual labor in which workers meet their customers or clients in real life. We also use the term "sex work" to describe any online or otherwise tech-mediated sexual labor such as webcamming, performance in adult film, or selling nude or explicit photos. While Leigh's use of the term was meant to indicate her own sense of agency in the work, the term has since taken on a more nuanced usage that includes all forms of sexual labor without regard to the individual worker's sense of agency in the work. The authors use the term here with the understanding that people enter the sex trades out of choice, circumstance, and/or coercion; that sex workers and trafficking survivors are not discrete groups; and that work itself, in all industries, is done on a spectrum stretching from coercion to choice. One can be trafficked into sex work in the same way that one can be trafficked into garment work. Sex workers themselves often move in and out of experiences of agency, coercion, and violence throughout their time trading sex. This includes the authors of this Article, at least one of whom identifies as both a sex worker and trafficking survivor. See Lorelei Lee, *The Roots of "Modern Day Slavery": The Page Act and the Mann Act*, 52 COLUM. HUM. RTS. L. REV. 1199, 1206 n.29 (2021). See also Laura LeMoon, *Trafficking Survivors Don't Want SESTA, We Want to Not Be Dying in Poverty*, MEDIUM (Mar. 19, 2018), <https://perma.cc/5KAN-FQP2>; Lorelei Lee, *Cash/Consent: The War on Sex Work*, N+1, Fall 2019, at 39, 39-62, <https://perma.cc/A867-WQKE> (describing the author's own experiences in sex work under varying conditions of choice, coercion, and circumstance, as well as the ways that the sex work/trafficking binary impedes sex workers' ability to describe our own experiences with nuance and in our own words); JUNO MAC & MOLLY SMITH, *REVOLTING PROSTITUTES: THE FIGHT FOR SEX WORKERS' RIGHTS* 40-55 (2018) (providing an in-depth look at the international sex workers' rights movement and situating it within all workers' larger struggles to be free from exploitation and violence at work, regardless of whether that work is "good" or "desirable," and regardless of whether workers like their jobs). See generally SUPRIHMBÉ, *HEAUXTHOTS: ON TERMINOLOGY, AND OTHER [UN]IMPORTANT THINGS* (2019) (discussing the gray areas of consent and work, the utility and racialization of various sex work terms, and sex work as "antiwork").

back to their sex work persona. Despite this caution, Shopify’s risk assessment team shuttered their ability to process payments.

Then, on March 24, Blunt received an email from another payment processor, Venmo, prompting them to “confirm your identity” and “Act by April 10th to keep using your Venmo Balance.” On May 15, they attempted to send funds to unbanked sex workers via a different provider, CashApp, for their recent contributions to a panel series Blunt had helped organize. Blunt was frozen from sending more funds via CashApp until they uploaded a photo of her identification and their social security number. Because the CashApp account was associated with their sex worker pseudonym, “verifying” their identity meant further connecting their legal and sex working identities in a way that would be permanent, traceable and place them at risk. As a result, over the course of three months, they effectively lost access to three different payment processors. This is not an unusual story, given that sex workers experience discrimination across multiple forms of online activity and political participation.⁴

In this Article we examine the policies of banks and digital payment providers who refuse service to sex workers, sex industry businesses, and for other sexual purposes. We approach the umbrella category known as fintech⁵ using sex worker collective Hacking//Hustling’s definition—financial technology that “encompasses technologies and computer programs that either facilitate or disrupt banking and the movement of capital online. . . .Fintech includes crypto-currencies,

⁴ In the 12 months spent writing this Article, Blunt lost access to two further payment processors, both owned by the same parent company: Paypal and Venmo. In the automated notice sent by Venmo, Blunt was told that the account was terminated due to “the nature of your activities” and to “please remove any and all references to Venmo from your website and social media accounts.” E-mail from Venmo to Danielle Blunt (Wednesday, July 6, 2022, 7:04 PM ET) (on file with author). When Blunt requested more information regarding the transactions which violated the User Agreement, Venmo responded, “If you have questions regarding this decision, please note that we do not divulge our decision-making criteria in order to protect the systems that monitor activity on Venmo.” E-mail from Venmo to Danielle Blunt (Thursday, Aug. 18, 2022, 1:32 PM ET) (on file with author).

⁵ Fintech is a portmanteau of “financial” and “technology.” It describes the “products and companies that employ newly developed digital and online technologies in the banking and financial service industries. *Fintech*, MERRIAM-WEBSTER, <https://perma.cc/UCJ6-XG35> (last visited Sept. 28, 2022). In this Article, we use the term fintech as: 1) a noun meaning the technology (apps, websites, software, algorithms, proprietary card readers, cryptocurrencies, etc.) used to exchange, or to disrupt the exchange of, monies between users of that technology; 2) a metonym for the financial technology industry; and 3) an adjective describing individual companies which are part of the financial technology industry or individual apps that enable or block the exchange of monies between users. See DANIELLE BLUNT ET AL., HACKING//HUSTLING, POSTING INTO THE VOID: STUDYING THE IMPACT OF SHADOW BANNING ON SEX WORKERS AND ACTIVISTS 80 (2020), <https://perma.cc/24AE-Y5WZ>.

crowdfunding, budgeting apps, and subscription services.”⁶ This encourages us to think about these providers not only as facilitators for the transfer of money but as active gatekeepers, blockers, and obstacles to the equitable distribution of wealth. In their terms, we find broad definitions, blanket prohibitions, and reference to concepts of obscenity, harm, and legality—all of which are highly contested, geographically distinct and culturally specific. We assess the common justifications given by financial providers (including the policies of credit card companies, legal compliance, and unquantified assessments about risk). We identify the *costs* of financial discrimination for sex workers, including risks to safety, security, livelihood, and health. Finally, we point to a range of potential avenues for holding fintech into account—both legal (in the form of anti-discrimination re-visioning, decriminalization, destigmatization, and decarceration) and cultural (in moving towards public digital infrastructure).

In doing so, we advance an argument for *why* financial discrimination against sex workers is not an aberration, but rather is a specific manifestation of the current social, political, economic, and technological environment—namely the convergence of privatization, platform monopolies, and intermediary power with existing practices of stigma, discrimination, and exploitation. Existing discriminatory practices of assessing risk, creditworthiness, and lending are accelerated by the ubiquity of artificial intelligence. In addition, political pressure and increased legal liability ostensibly intended to pressure tech platforms into addressing criminalized activities including but not limited to fraud, money-laundering, terrorism, human trafficking, and distribution of child sexual abuse material has prompted a renewed push by those platforms towards verification, authentication, and risk detection. As a result, platforms have created policies that conflate sex with harm, illegality, and risk and deputize private actors, platforms, and individual users to do the work of police and the state.⁷

Rather than simply arguing that sex work ought not be conflated with violence and/or harm, we seek to show how fears and panics around race, class, immigration, and sexuality create categories of criminalization and to build infrastructures of policing that in turn facilitate or require financial discrimination. This is not a respectability project to

⁶ See BLUNT ET AL., *supra* note 5, at 80. Hacking//Hustling is a collective of sex workers, survivors, and accomplices working at the intersection of tech and social justice to interrupt violence facilitated by technology. See *About*, HACKING//HUSTLING, <https://perma.cc/9C2Y-2PU3> (last visited Sept. 28, 2022).

⁷ See Kendra Albert et al., *FOSTA in Legal Context*, 52 COLUM. HUM. RTS. L. REV. 1084, 1151 (2021) (describing various forms of discriminatory exclusion that result when private organizations and individuals are given the work of enforcing anti-trafficking laws).

distinguish sex work from other forms of criminalized activity. The legal status of sex work should not be confused with whether the work is consensual or acceptable.⁸ Rather, we seek to problematize the political constructions of illegality and risk themselves. Addressing financial discrimination, therefore, requires not only increased transparency of and accountability for technologies of detection and surveillance, but a wholesale reassessment of the economic, regulatory, and social framework in which risk is understood, discrimination is framed, and the transfer of money is facilitated.

II. SEX WORKER ACCOUNTS OF FINANCIAL DISCRIMINATION

Despite growing media attention, the issue of financial discrimination against sex workers remains woefully underrepresented in academic literature and public dialogue. In one of the only journal articles to specifically address this issue, Natasha Tusikov writes, “[t]his gap in scholarship is notable as big payment actors have systematically denied services for about a decade relating to sexually oriented goods and services.”⁹ While some research examines the practice of paying for sex in a digital age, it focuses largely on clients rather than sex workers.¹⁰ And yet clients’ access to sexual services is not nearly so urgent an issue as limits on sex workers’ access to capital. As Tusikov argues, payment platforms’ censorship of sex is a result of “the distinctive nature of and market concentration within the online payment industry,” and that censorship amounts to “digital redlining,”¹¹ a form of financial discrimina-

⁸ Helen Hester & Zahra Stardust, *Sex Work in a Postwork Imaginary: On Abolitionism, Careerism, and Respectability*, in *THE NEW FEMINIST LITERARY STUDIES* 69, 71-72 (Jennifer Cooke ed., 2020).

⁹ Natasha Tusikov, *Censoring Sex: Payment Platforms’ Regulation of Sexual Expression*, in *MEDIA AND LAW: BETWEEN FREE SPEECH AND CENSORSHIP* 63, 63-69 (Mathieu Deflem & Derek M. D. Silva eds., 2021).

¹⁰ See, e.g., TEELA SANDERS ET AL., *PAYING FOR SEX IN A DIGITAL AGE: US AND UK PERSPECTIVES* (2020).

¹¹ Tusikov, *supra* note 9, at 63, 73-75. “Redlining” describes the decades-long practice by the U.S. Federal Housing Administration (“FHA”) of reifying racial segregation in American cities by refusing to insure mortgages on homes in predominantly Black neighborhoods, claiming that this exclusion was merely an economic issue, despite the FHA’s explicit mission to expand homeownership for middle- and lower-income Americans by “guaranteeing mortgages and amortizing the payments over decades” KEEANGA-YAMAHTTA TAYLOR, *RACE FOR PROFIT; HOW BANKS AND THE REAL ESTATE INDUSTRY UNDERMINED BLACK HOMEOWNERSHIP* 31 (2019). “Officials within the agency contended that African Americans were too poor to be homeowners.” *Id.* at 33. Further, the FHA “relied on ‘experts’ from the housing industry to shape its emergent housing policies . . . [importing] the racial common sense of the real estate industry, including the foregone conclusion that Blacks and other non-whites should be separated from whites to preserve property values.” *Id.* at 34. This practice has been repeated in the construction of digital technology. See Pauline T. Kim, *Ad-*

tion that is the subject of dedicated academic analysis when targeting groups not explicitly identified as sex workers.¹² Bianca Beebe's article on revenue chokepoints is one of the first to analyze digital redlining from a sex worker perspective, arguing that payment processors' "extra-legal regulation of sex work" is so pervasive that it "has a more profound effect on sex workers' material reality than State legislation"¹³

As sex workers and allies involved in organizing and advocacy, we write from a socio-legal perspective, concerned with the effects of law and policy on our communities. We bring together disciplinary backgrounds in law, media studies, public health, and feminist technoscience to enrich the existing literature by contextualizing financial discrimination as part of a larger history of racial capitalism, undervaluing feminized labor, and disrupting the flow of capital to marginalized people. Doing so allows us to move beyond positioning this phenomenon as a tech or censorship issue, to consider how the attempted erasure of cash economies has historically been used as a way to consolidate power,

Addressing Algorithmic Discrimination: Considering the Intersection of Technical Design and Civil Rights When Building and Using Classification Algorithms, COMM'NS ACM, Jan. 2022, at 25, 25-27 (describing the ways that race and gender discrimination are frequently imported into algorithms when they are designed). Both redlining and its extension into the digital realm can be understood as forms of "adaptive discrimination," whereby "racial discrimination adapts to the legal and social environment by mutating to evade prohibitions against intentional discrimination." Elise C. Boddie, *Adaptive Discrimination*, 94 N.C. L. REV. 1235, 1239-40 (2016). Adaptive discrimination refers to both public and private actions, institutional rules, or norms that replicate racial inequality within society across time. *Id.* Thus, it is possible to interpret the anti-sex worker fintech discrimination as wholly a continuation of offline redlining, that is, adaptive discrimination intended to target Black and other nonwhite people through disparate impact, or seemingly neutral policies that in practice disproportionately impact specific groups of people. See *Griggs v. Duke Power Co.*, 401 U.S. 424, 430 (1971) (deciding that under Title VII of the Civil Rights Act of 1964 "practices, procedures, or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to 'freeze' the status quo of prior discriminatory employment practices"). It is the opinion of the authors that anti-sex work stigma contains both racial and other forms of animus, including but not limited to classism, anti-transgender and anti-queer stigmas, anti-drug user stigmas, gender-based stigmas and misogyny, social expectations of familial formation and monogamous sexual partnership, expected delineation between public and private behavior, and anti-sex stigmas generally.

¹² See, e.g., Terri Friedline et al., *Digital Redlining: Poor Rural Communities' Access to Fintech and Implications for Financial Inclusion*, 24 J. POVERTY 517 (2020). As of December 11, 2022, a search of Cornell University Library's digital database, through EBSCO Discovery, of books and academic articles yields 915 results for "digital redlining," but only two results for "'digital redlining' and 'sex work,'" both of which contained only minor references to sex work.

¹³ Bianca Beebe, "Shut Up and Take My Money!": Revenue Chokepoints, Platform Governance, and Sex Workers' Financial Exclusion, 2 INT'L J. GENDER, SEXUALITY & L. 140 (2022).

gatekeep resources, increase the wealth gap, and further marginalize communities.

To do this, we examine financial discrimination in two countries where the authors live and work, which have inverse legal frameworks towards regulating sex work: the United States (U.S.) and Australia.¹⁴ We choose these unique jurisdictions for our case study because financial discrimination remains prevalent in both countries despite their divergent legal frameworks. In the U.S., many forms of sex work remain criminalized, and yet there is a permissive regime whereby pornography production in California is legalized¹⁵ and can be licensed.¹⁶ In Austral-

¹⁴ Generally, sex work is regulated via three models: criminalization, licensing (or regulation), and decriminalization. Criminal regimes involve the criminalization of workers, clients, workplaces, third parties or associates, and harm reduction strategies. They can include a vast array of offences including soliciting, loitering, pandering, procurement, pimping, brothel-keeping, and living off the earning of prostitution. In licensing regimes, governments control who can do sex work, and where, when, and how they can work, often through registration databases, special advertising rules, mandatory medical testing, and onerous conditions for premises. Licensing is sometimes misnamed “legalization,” but, in effect, it creates a two-tier system between those who can afford to comply, and those who remain criminalized, further entrenching inequalities. By comparison, decriminalization involves the removal of criminal laws, licensing laws, and police as regulators, in addition to the introduction of anti-discrimination and vilification protections, expunged historical convictions, and the destruction of criminal records. See SCARLET ALLIANCE, BRIEFING PAPER ON FULL DECRIMINALISATION OF SEX WORK IN AUSTRALIA (2020); SCARLET ALLIANCE, THE PRINCIPLES FOR MODEL SEX INDUSTRY LEGISLATION 6 (2014).

¹⁵ See *People v. Freeman*, 758 P.2d 1128, 1130-31 (Cal. 1988) (deciding that because the “money or other consideration” paid to pornographic actors in exchange for their sexual performances is not paid “for the purpose of sexual arousal or gratification,” pornographic performance does not constitute the “lewd act” required for a conviction under California’s pandering and prostitution laws, and thus the defendant’s conviction for pandering must be overturned) (emphasis omitted).

¹⁶ While some pornographic productions in California are licensed by Los Angeles County, the number of adult film licenses have dropped significantly following the passage of Measure B in 2013, a county-wide mandate for the use of condoms in adult film productions that tied enforcement to licensing. See *Permits for Porn Shoots in LA Drop Sharply Due to Measure B*, KPCC 89.3FM, <https://perma.cc/R9Y9Z-WERK> (last visited Dec. 11, 2022) (“LA county normally issues 500 permits a year to adult film productions, but now, with nearly a third of the year [since the passage of Measure B] behind us, they’ve only handed out two.”). Author Lorelei Lee, who has performed in at least 580 adult films in Los Angeles and elsewhere, see *Lorelei Lee*, IAFD.COM, <https://www.iafd.com/person.rme/perfid=loreleilee/gender=f/lorelei-lee.htm> (last visited Dec. 11, 2022) (on file with the CUNY Law Review), has experienced multiple instances of being told by directors and producers to hide from police, even before Measure B’s passage. Lee has also spoken to several other performers who’ve shared their experiences of being arrested while performing despite filming taking place inside a residence. It is Lee’s interpretation of these experiences that pornography production exists in something of a grey space legally. Despite the decision in *Freeman*, 758 P.2d 1128, the criminalization of other forms of sex work and the onerous regulation of sexual performance give law enforcement license to arrest and/or harass adult film performers, as well as strip club dancers, regardless of whether the police officers in-

ia, three states have undertaken law reform to decriminalize sex work, and yet the production, sale, and screening of pornography remains largely criminalized.¹⁷ Yet, neither the pseudo-legal status of pornography distribution¹⁸ in the U.S. nor the legal status of sex work in Australia has changed the policies of payment processors who issue blanket

volved intend or are permitted by law to press charges. *See, e.g.*, Amir Vera & Laura Ly, *Stormy Daniels Settles for \$450K After Arrest at Columbus, Ohio, Strip Club*, CNN (Sept. 27, 2019, 6:56 PM), <https://perma.cc/D8XV-47KJ>.

¹⁷ *See* Theodore Bennett & Zahra Stardust, *Positive Potential: How Sex Positive Thinking Can Benefit Legal Thinking and Sex Work Regulation in Australia*, 48 *MONASH U. L. REV.*, no. 1, 2022, at 24. *See, e.g.*, Zahra Stardust, *'Fisting Is Not Permitted': Criminal Intimacies, Queer Sexualities and Feminist Porn in the Australian Legal Context*, 1 *PORN STUD.* 242 (2014).

¹⁸ Cornell Law School's Legal Information Institute states that "[i]n the United States, generally people can purchase or access pornographic materials legally," but contains no supporting citation. *Pornography*, LEGAL INFO. INST., <https://perma.cc/3AND-MN2H> (last visited Dec. 11, 2022). U.S. Supreme Court decisions have created a murky legal context. In 1969, the Supreme Court held that even though the distribution of obscene materials was not protected by the First Amendment, the First Amendment freedoms of speech and of press did protect the "right to receive information." *See Stanley v. Georgia*, 394 U.S. 557, 559-60, 564 (1969) (citing *Roth v. United States*, 354 U.S. 476, 485 (1957)). The Court also held that a fundamental right to privacy protects the possession of information in the privacy of one's own home and against government intrusion. *Id.* at 564 (citing *Griswold v. Connecticut*, 381 U.S. 479, 482 (1965)). These decisions may be shaky ground following the 2022 Supreme Court decision in *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228 (2022). In *Dobbs*, the Court reasoned that "Constitutional analysis must begin with 'the language of the instrument'" and that the right to privacy is not explicitly mentioned in the Constitution's text. *Dobbs*, 142 S. Ct. at 2245 (quoting *Gibbons v. Ogden*, 22 (9 Wheat.) 1, 189 (1824)). Thus, the Court reasoned that to allow a secondary right, to decide for one's self whether to have an abortion, as in *Dobbs*, or potentially to decide for one's self whether to receive "obscene materials" as in *Stanley*, to be based in the right to privacy is "loose . . . treatment of the constitutional text." *Id.* at 2245. *But see id.* at 2277-78 (quoting *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 852 (1992) (stating that the *Dobbs* decision does not threaten other rights the Court has previously recognized as encompassed by the Due Process Clause of the Fourteenth Amendment because abortion is "a unique act"). *Stanley*, then, protects against laws criminalizing the possession of "obscene" material, while *Freeman* assumes without deciding that pornographic films can be distinct from "obscene" films. *See Freeman*, 758 P.2d at 1133. But the legal standard for obscenity is a subjective assessment applied after the fact, requiring the application of "community standards" as to what it means for a work to be "patently offensive." *See* David L. Hudson Jr., *Miller Test*, THE FIRST AMEND. ENCYCLOPEDIA (2018), <https://perma.cc/8Y6Y-AD5A>. Because of this, author Lorelei Lee, among other adult film creators, has had the experience of creating a pornographic film while not knowing that it would become the subject of an obscenity charge, much less one applying the community standards of Washington, D.C. to a performance done in Los Angeles. *See United States v. Stagliano*, 729 F. Supp. 2d 222, 223, 223 n.1 (D.D.C. 2010) (describing a seven-count federal indictment against the producer and distributor of adult films who were charged with transporting, selling or transferring, and displaying "obscene" material). Lee performed in two of four allegedly obscene films that were the subject of *Stagliano*, and their performances were purchased and viewed by an FBI agent and later shown in open court.

bans on sex, despite transacting across multiple countries and among users engaged in different types of sex work.¹⁹ We use this discrepancy to highlight the pervasive impact of financial discrimination across borders and the transnational impact of U.S. law, policy, and practice.

A. *Mapping digital exclusion and precarious labor*

Despite the lack of institutional research, sex workers around the world have been increasingly proactive in documenting and compiling mounting evidence of discrimination by banks, payment processors, and financial service providers. Sex workers have trawled through publicly available policies and terms of service, collated media releases, and collected individual accounts from sex workers about their consumer experiences. The U.S. sex worker collective Survivors Against SESTA compiled a substantial list in 2018 documenting providers who discriminate against sex workers. Their database includes over 100 companies, institutions, and products, and includes investment banks such as JP Morgan, credit cards such as Visa and Mastercard, and payment processors such as PayPal, Square, and Stripe.²⁰ Similar lists have been compiled in Australia,²¹ where the policies of U.S.-based companies to exclude sex workers have largely been replicated or applied, despite significantly different regulatory frameworks surrounding sex work. Previous research among pornography performers and producers in Australia has documented refusals of service, disproportionate fees, and administrative blocks to setting up bank accounts, establishing payment processors, and withdrawing funds.²²

Sex workers report common experiences in their engagements with payment processors, typically accompanied by a lack of customer care and inadequate avenues for recourse.²³ In the first instance, where poli-

¹⁹ See, e.g., Miss Tallula Darling, *How to Pay Me (or Not To)- Financial Discrimination Faced by Sex Workers*, MISS TALLULA (Sept. 7, 2021), <https://perma.cc/YJ7P-T7V3> (Australian sex worker Miss Tallula Darling writes “it is important to show the level of financial discrimination that sex workers face in NSW, despite the state having a mostly decriminalized model . . .”).

²⁰ *Platforms Which Discriminate Against Sex Workers*, SURVIVORS AGAINST SESTA, <https://perma.cc/7YBG-AVPL> (last visited Sept. 28, 2022).

²¹ See, e.g., *Fight Banking Discrimination Against Sex Workers*, SEX WORK L. REFORM VICT., <https://perma.cc/2U86-MVV9> (last visited Sept. 28, 2022).

²² See Zahra Stardust, *Alternative Pornographies, Regulatory Fantasies and Resistance Politics* 141-44 (2019) (Ph.D. dissertation, University of New South Wales) (on file with author and the CUNY Law Review).

²³ See, e.g., SPENCER WATSON & KATE D’ADAMO, *SHUT DOWN & SHUT OUT: ACCESS TO FINANCIAL SERVICES AND ONLINE PAYMENTS FOR SEX WORKERS IN THE U.S. 2-5* (2021) (describing the results of an online survey conducted by Sex Workers Outreach Project Sacra-

cies contain blanket bans on commercial sex, sexual services, and sexuality-related activities, they operate to exclude sex workers as potential users or customers. These policies, discussed in Section III, are usually found in terms of service or acceptable use policies, and can have a chilling effect on sex workers' engagement in widely practiced financial activities, acting to deter sex workers from applying for accounts. Then, even where sex workers are eligible for standard accounts, they can be refused access to particular services, such as business accounts, merchant services, personal loans, or insurance.²⁴ Where sex workers are successful in opening accounts, they may be charged higher premiums or fees than other users, effectively taxed for their sex work status.²⁵ If their sex work is later discovered, sex workers may have their funds frozen, withheld, or forfeited (effectively stolen) without notice, warning, or explanation of how or why they were flagged.²⁶ Such suspensions and terminations can result in lost transactions, clients, income, and access to financial infrastructure. Financial discrimination can follow sex workers who move in and out of other labor sectors or who have civil-

mento and Reframe Health among 64 sex workers and adult professionals in the U.S. about their experiences of account closures and denials by financial companies).

²⁴ See, e.g., Violet Blue, *PayPal, Square and Big Banking's War on the Sex Industry*, ENGADGET (Dec. 2, 2015, 3:30 PM), <https://perma.cc/H99N-KWQJ> ("For nearly a decade, PayPal, JPMorgan Chase, Visa/MasterCard, and now Square, have systematically denied or closed accounts of small businesses, artists and independent contractors whose business happens to be about sex.").

²⁵ LaLa B. Holston-Zannell, *How Mastercard's New Policy Violates Sex Workers' Rights*, ACLU (Oct. 15, 2021), <https://perma.cc/58E3-LWDW> ("Many banks and companies single out sex workers by forcing them to pay higher fees and interest rates because they consider them 'high-risk.'"). Indeed, even in our workshoping of this piece, one reader, a tech scholar, suggested that an acceptable response to the issue of financial discrimination against people in the sex trades would be for a payment processor to simply charge us higher fees to make up for the perceived "risk," failing to recognize that people in the sex trades are already disproportionately poor, low-income, and/or living in poverty, and that such fees, alongside stigma and criminalization, merely increase sex workers' marginalization and vulnerability. See Erin Albright & Kate D'Adamo, *Decreasing Human Trafficking Through Sex Work Decriminalization*, 19 AMA J. ETHICS 122, 124 (2017) (discussing how stigma and criminalization increase vulnerability of people in the sex trades).

²⁶ See, e.g., Melissa Gira Grant, *Spying, Sex and Finance: What Banks and Payment Processors Are Secretly Watching -- To Avoid "Risk,"* SALON (May 30, 2014, 12:30 PM), <https://perma.cc/T9AP-CCQK> ("Sex workers, particularly those who rely on online payments, have had their PayPal accounts suspended, their Amazon wish lists deleted, their crowd-funding campaigns denied, [and] their payment services canceled."). See also Wendy Stokes, *The Soapbox: How PayPal & WePay Discriminate Against the Adult Industry*, FRISKY (Sept. 23, 2018), <https://perma.cc/C8KJ-D7MH>; Lori DiLetto, *Does Amazon Discriminate Against Adult Entertainers?*, SLIXA: SLIXA BLOG (Dec. 13, 2013), <https://perma.cc/5C8A-CPT3>; Siouxsie Q, *Kicked Out: Crowdsourcing Shows Its Bias*, SF WEEKLY (Apr. 2, 2014), <https://perma.cc/F6LH-QHPA>.

ian²⁷ side hustles in non-sex work related business ventures or pursuits.²⁸ In this sense, these consequences operate similarly to, and/or compound the effects of, criminal records, in that they pose barriers to sex workers seeking other types of employment.²⁹

Access to payment processing plays a foundational part in sex workers' abilities to maintain their livelihoods, security, and autonomy.³⁰ In 2022, a report on *The Impact of Mastercard's Adult Content Policy on Adult Content Creators* by Valerie Webber found that 90% of surveyed sex workers experienced detrimental effects to their livelihood as a result of Mastercard's restrictive policy.³¹ Already, sex workers are

²⁷ Throughout this Article, we use the term "civilian" both as an adjective to denote products and companies targeting or made for non-sex work activities, and as a noun to denote people who do not work in the sex trades. We do so both for convenience and as an assertion of the validity of sex worker languages and cultural practices. The authors who have experience trading sex also have countless experiences being told that we ourselves are too "distracting," "inappropriate," "hyper-visible," or otherwise "don't fit" in the culture of academia. We believe expanding the languages understood to be "appropriate" and/or legible in academic and other professional settings is a small step toward expanding access to those settings.

²⁸ For example, when Blunt's Stripe account was shut down, she faced increased difficulty and barriers running their consulting services. Lorelei Lee has faced account closures or refusals of service even between periods of doing sex work, such as while working as a writer, as an adjunct professor, and while not working due to disability. They have also experienced blocked transactions while engaged in political advocacy. For example, Lee's Square account was shut down while organizing a bus to the Women's March in 2017. When asked to comment on the incident, "a Square Cash representative did not specify whether Square Cash discriminates based on profession, but highlighted three forbidden activities from its terms of service clause: illegal activity or goods, adult entertainment oriented products or services (in any medium, including internet, telephone, or printed material), and escort services." Dame Joan, *What's a Strip Club Without Dollar Bills?*, JEZEBEL (Jan. 1, 2019, 12:02 PM), <https://perma.cc/7B6R-V3YY>. Considering that Lee's attempted usage of Square at the time included none of these forbidden activities, the logical inference is one that Lee is very familiar with, having been explicitly told as much on many other occasions, that their political activities and participation in public life is inherently understood as criminal even when not literally criminalized, and/or that their behavior is always categorized as "adult entertainment" even when there is nothing sexual about that behavior. For more on this phenomenon, see, e.g., Lorelei Lee, *An Open Letter to the New York Times from a Porn Performer*, BUST, <https://perma.cc/4C8Z-RWJ8> (last visited Dec. 12, 2022) (describing discrimination that sex workers face when participating in political processes).

²⁹ See Blue, *supra* note 24 (describing financial barriers faced by sex workers on online platforms). See generally Albright & D'Adamo, *supra* note 25 (describing the consequences sex workers face when sex work is criminalized).

³⁰ See Dame Joan, *supra* note 28 (describing how lack of access to financial accounts for sex workers in Sweden and the United States prevents these workers from holding savings accounts, running fintech-only businesses, having pensions, and obtaining leases and mortgages, and forces sex workers to rely on potentially exploitative third parties for banking).

³¹ Valerie Webber, *The Impact of Mastercard's Adult Content Policy on Adult Content Creators: Survey Results and Analysis 9* (Feb. 2022) (unpublished manuscript) (on file with

precarious laborers operating in “gig” or “hustle” economies that are characterized by temporary, freelance, and casualized work, as well as criminalized economies that are heavily policed.³² Sex workers who work in formal economies, such as in strip clubs, brothels, and some porn sets, are regularly misclassified as contractors rather than employees, and therefore are denied the affordances and protections offered by employment status such as sick leave, maternity leave, or workers compensation.³³ Sex workers have unionized and organized against their workplace conditions, including the racial stratification of scheduling and work opportunities.³⁴ Lacking access to digital financial technology

the CUNY Law Review), https://www.researchgate.net/publication/358441297_The_Impact_of_Mastercard%27s_Adult_Content_Policy_on_Adult_Content_Creators; see also Samantha Cole, *Sex Workers Detail the Financial Damages of Mastercard's Discrimination*, VICE MOTHERBOARD (Feb. 10, 2022, 3:46 PM), <https://perma.cc/XGR9-DT2H>.

³² See generally RAVEN BOWEN, *WORK, MONEY, AND DUALITY: TRADING SEX AS A SIDE HUSTLE* (2021) (describing the stratification of sex industries in the United Kingdom and the exploitation of sex workers in the current labor market).

³³ See *Cybernet Entertainment, LLC*, 20015 WL10058906 (Cal. Occupational Safety & Health App. Bd. Apr. 10, 2015) (deciding that adult film workers were employees, not, as they had been classified by their employers, independent contractors). It is important to note, however, that this decision was not supported by adult film performers at the time. Instead, the decision represented adult film performers in a derogatory manner (for example, the decision characterized performers work as categorically not requiring any particular skills). See *id.* This case was also decided during a time when performers had been alienated from Cal-OSHA generally. See HEATHER BERG, *PORN WORK: SEX, LABOR, AND LATE CAPITALISM* 167-69 (2021) (describing the 2014 through 2016 legislative, administrative, and public battle over adult film regulations that were being pushed by a non-adult industry organization, and quoting performers such as Madeline Marlowe, who stated in regard to OSHA's regulation of the adult film industry: “We're the most important part of this discussion, and yet we're routinely shut out”). It is also important to note that the debate over the classification of adult film performers, who are paid by the day and are not charged to work by their employers, is distinct from the debate taking place over the classification of employees or contractors of strip club dancers, who are routinely charged numerous fees by club owners per shift. See Michael H. Leroy, *Bare Minimum: Stripping Pay for Independent Contractors in the Share Economy*, 23 WM. & MARY L. REV. 249, 251 (2017) (analyzing 75 federal and state misclassification cases brought by strip club dancers). See also Erin Mulvaney & Andrew Wallender, *Strippers Winning Employee Status Challenges Gig Economy's Norms*, BLOOMBERG L. (Oct. 21, 2019), <https://perma.cc/5PPK-TGMZ> (finding 406 wage-and-hour suits brought by dancers and comparing dancers' employment experiences to those of other gig workers). Nonetheless, dancers are not unified on the subject. See Stormy Daniels, *Strippers Need to Be Treated as Freelancers, Not Employees*, L.A. TIMES (Feb. 5, 2019, 1:55 PM), <https://perma.cc/26ZG-67KM> (responding to California Dynamex decision, and outlining reasons dancers like Daniels might prefer to be classified as independent contractors, such as freedom of scheduling and the need for anonymity). See also Reese Piper, *The Stripper's Dilemma*, QUEER MAJORITY, <https://perma.cc/HQ7A-S4C6> (last visited Nov. 30, 2022) (analyzing the complexities and nuances of contractor versus employee classifications for dancers such as the author).

³⁴ See, e.g., Amber Ferguson, *NYC Strippers Strike: Dancers Say Nearly Naked 'Bottle Girls' Are Grabbing Their Cash, Cite Racism*, WASH. POST (Nov. 3, 2017, 4:47 AM),

also compromises many harm reduction techniques used by people in the sex trade. For workers who operate in a cash-based economy, the ability to take digital payments both means sex workers are not required to physically carry large amounts of money, or keep cash in their residences, both of which create a vulnerability to theft. Additionally, not having a financial history bars access to secondary financial transactions such as loans and leases for housing, increasing the need to rely on other people who are able to access these resources.³⁵ Access to digital financial infrastructure therefore plays a significant role in supporting sex workers to work in ways that suit them, especially for sex workers who are in care-giving roles, navigating chronic illness, or undertaking community organizing.³⁶ Because so many sex workers transitioned to online work during the global COVID-19 pandemic,³⁷ including those who were ineligible for government subsidies and assistance, many shifted away from cash-based economies and became increasingly reliant on financial technologies, making this issue even more urgent.

B. Sexual commerce as both technological driver and collateral damage

Sex workers and sex industry businesses have long been pioneers in prompting and supporting new technologies, before those workers and businesses were systematically excluded.³⁸ The distribution of sexual material fiscally supported the development of communications technology throughout the twentieth and twenty-first centuries, from the emergence of photography, to home video, to cable TV.³⁹ The sexual

<https://perma.cc/T6L6-9WBU>; Kate Tasker, *Finding Aid to the Lusty Lady Collection*, ONLINE ARCHIVE OF CAL. (2014), <https://perma.cc/79MC-GB2B>. See generally SIOBHAN BROOKS, UNEQUAL DESIRES: RACE AND EROTIC CAPITAL IN THE STRIPPING INDUSTRY (2010).

³⁵ See Dame Joan, *supra* note 28.

³⁶ See generally *femi babylon*, Madeline Marlowe, Kitty Milford & Lorelei Lee, Sex Work as Work and Sex Work as Anti-Work, Panel at Informal, Criminalized, Precarious: Sex Workers Organizing Against Barriers Conference (Apr. 16, 2021), <https://perma.cc/6FZE-WN3Z> (describing some of the unique challenges faced by sex workers with chronic illnesses).

³⁷ Vaughn Hamilton et al., Risk, Resilience and Reward: Impacts of Shifting to Digital Sex Work (May 5, 2022) (unpublished manuscript) (on file with the CUNY Law Review).

³⁸ See Gabriella Garcia, *The Cybernetic Sex Worker*, DECODING STIGMA (Dec. 16, 2021), <https://perma.cc/R4F8-4TRV>.

³⁹ See *id.*; see also Angela Jones, *Sex Work in a Digital Era*, 9 SOCIO. COMPASS 558, 560 (2015) (“The Internet is an important technological development for sex workers. However, the use of the Internet to schedule appointments, screen clients, and/or market services, etc., is only one new method in a long history of technology used by sex workers.”); Jeff Nagy, *Pink Chat: Networked Sex Work Before the Internet*, 62 TECH. & CULTURE 57, 57 (2021) (describing France’s pre-internet online messaging system financed by sex workers on chat boards); Oishorjyo, *The History of Digital Technology is Entwined with Sex Work*,

revolution of the 1970s coincided with more affordable means of film production and the birth of public-access television.⁴⁰ Money made in the erotic market of 1980s proto-internet bulletin board systems (“BBSs”) paid for the material infrastructure that paved the path toward the world wide web before mainstream consumer adoption could even be taken into consideration.⁴¹ As necessary innovators, sex workers were (and remain) consistent early adopters of new technologies,⁴² designing, coding, building, and using websites and cryptocurrencies to advertise. The fraud and hacking of adult sites played a large role in pushing the development of internet-based payment and transaction systems.⁴³ When CyberCash set up their e-commerce system in 1994, which took commission for facilitating secure “e-cash” and credit transactions online, their intention was to avoid many of the existing hoops facing merchants when interacting with banks and credit card companies. The company was largely built up by pornography (and gambling) consumers who desired anonymity in their transactions.⁴⁴ Ironically, CyberCash was later bought by VeriSign, which was then acquired by PayPal, “one of the financial backbones of the modern commercial Internet,”⁴⁵ which now routinely prohibits any sex-related transactions and/or sex workers from their service.⁴⁶ While adult sites were early adopters of online business

SMASHBOARD (Apr. 16, 2021, 6:17 PM), <https://perma.cc/3QMS-A5FG>; Steve Garlick, *A New Sexual Revolution? Critical Theory, Pornography, and the Internet*, 4 CAN. REV. SOCIO. 221, 223 (2011).

⁴⁰ See PATCHEN BARSS, *THE EROTIC ENGINE: HOW PORNOGRAPHY HAS POWERED MASS COMMUNICATION, FROM GUTENBERG TO GOOGLE* (2010); Jonathan Coopersmith, *Pornography, Technology and Progress*, 4 ICON 94, 101-103 (1998).

⁴¹ See Garlick, *supra* note 39, at 224 (“The online communities which emerged in the 1970s and 1980s around early bulletin board systems (BBSs), and which were important in the development of the Internet, had their origins in the countercultural movements and alternative ways of life emerging out of the sexual revolution.”); see Nagy, *supra* note 39, at 57 (describing France’s pre-internet online messaging system financed by sex workers on chat boards).

⁴² Sinnamon Love, MelissaGira Grant, Tina Horn & Kate D’Adamo, *Digital Stimulation: Sex Invents the Internet*, Panel at *Trains, Texts, and Tits: Sex Work, Technology, and Movement* (May 21, 2021), <https://perma.cc/3UUG-2MNC> (“What we wanted to do is have a dialogue that started 200 years ago, with the idea that sex workers are early adapters. Sex workers go into frontier spaces, to brand new places, to this week, digital spaces, which are being created for the first time and become not only early adopters but to shape that space into someplace welcoming, someplace accessible.”). See generally Livia Folds, *Sex Workers Built the Internet*, PARSONS: ECHOES, <https://perma.cc/8KY2-63UE> (last visited Oct. 23, 2022).

⁴³ Barss, *supra* note 40, at 251-53.

⁴⁴ *Id.* at 254.

⁴⁵ *Id.* at 255.

⁴⁶ LaLa B Holston-Zannell, *Paypal and Venmo are Shutting Out Sex Workers, Putting Lives and Livelihoods at Risk*, ACLU (June 23, 2021), <https://perma.cc/9NKG-UXLH>.

strategies whose success foreshadowed the profitability of digital commerce,⁴⁷ the subsequent policing of pornography at the turn of the twenty-first century and moral panics around “cyberporn” as a public danger led to frameworks for regulating the Internet.⁴⁸

While sex workers continue to build up the commercial bases of platforms, increasing their size and commercial viability, they are regularly excised and treated as collateral damage when those same platforms introduce policies to remove sex entirely.⁴⁹ As analyst and dominatrix Bardot Smith describes, “despite the fact that adult content drives 30% of internet traffic, and the fact that companies are profiting from the traffic, ads, and services involved in the industry, the women who power that capital flow are treated like criminals.”⁵⁰ Essentially, sex workers are caught up in what Jillian York calls big tech’s “war on sex,”⁵¹ a war with a long history driven by colonization and the conservative Christian right, frequently working alongside self-described

⁴⁷ See Folds, *supra* note 42. See generally Samantha Cole, HOW SEX CHANGED THE INTERNET AND THE INTERNET CHANGED SEX 3-14 (2022).

⁴⁸ See WENDY HUI KYONG CHUN, CONTROL AND FREEDOM: POWER AND PARANOIA IN THE AGE OF FIBER OPTICS 77-128 (2006). Chun traces the relationship between cyberporn commerce and regulation (and porn as a regulatory category), including how the framing of digital pornography as a threat led to public debates and consequent policing over free speech, obscenity, and boundaries between public and private space. Prior to the Internet “going public” through privatization, policymakers were not concerned over minors accessing adult sites or BBSs; however popular articles in *Time* and *Newsweek* magazines in the mid-1990s stoked fears of children being exposed to pornographic content. *Id.* Not only did moral panics lead to verification practices in digital commerce around age, but more significantly, the proactive policing of the Internet was justified through leveraging fears of child sexual abuse, pornography, and pedophilia. *Id.* Chun does not argue for child pornography, but rather seeks to “to understand how, through the Internet, pedophilia has been established as the most hypervisible deviant sexuality useful for methods of control.” *Id.* at 97. She highlights how the implementation of police practices to protect children also foreshadows the uses of police methods implemented after 9/11, namely, how perceived intention to commit a crime can lead to arrest and conviction. *Id.*

⁴⁹ See Zahra Zsuzsanna Stardust, *Sexual Subcultures Are Collateral Damage in Tumblr’s Ban on Adult Content*, THE CONVERSATION (Dec. 6, 2018, 1:58 PM), <https://perma.cc/RTC5-Z7MU>; Sarah Manavis, *How the Rich and Famous Stole Only Fans from Sex Workers*, NEW STATESMEN (Apr. 4, 2022, 7:43 PM), <https://www.newstatesman.com/science-tech/2020/09/rich-famous-onlyfans-changing-sex-workers-left-behind-bella-thorne-caroline-calloway-beyonce> (on file with the CUNY Law Review).

⁵⁰ Bardot Smith, *Sex, Money, and the Trillion Dollar Shadow*, MODEL VIEW CULTURE (June 8, 2015), <https://perma.cc/9ELY-XYWC>.

⁵¹ JILLIAN C. YORK, SILICON VALUES: THE FUTURE OF FREE SPEECH UNDER SURVEILLANCE CAPITALISM 145-164 (2021) (describing the evolution of internet platforms and their policies, the passing of laws such as Stop Enabling Sex Traffickers Act (“SESTA”) and Fight Online Sex Trafficking Act (“FOSTA”), and how cultural pushback against sex workers using online platforms worked to push sex workers out of online spaces).

feminists,⁵² involving the policing of sexuality, morality, and class.⁵³ This sustained attack on sex is now coded into both law and tech policy. With the active removal of adult content from social media platforms, routine practices of de-platforming sex workers have come under increased scrutiny.⁵⁴ Tech companies, law enforcement, and personally-appointed vigilantes⁵⁵ continue to non-consensually scrape data from online spaces where sex workers congregate (such as advertising sites, bad date lists, and user-generated adult content platforms) in order to train automated censorship models that can detect and eliminate sex workers from platforms.⁵⁶ While machine learning models are still often

⁵² See Nancy Whittier, *Rethinking Coalitions: Anti-Pornography Feminists, Conservatives, and Relationships Between Collaborative Adversarial Movements*, 61 SOC. PROBS. 175, 176 (2014) (describing the 1980s anti-pornography advocacy of conservatives and feminists as “frenemies” or “collaborative adversarial movements”); see also Melissa Gira Grant, *The Trump Administration Finally Broke the Anti-Trafficking Movement*, NEW REPUBLIC (Feb 18, 2020), <https://perma.cc/RMW4-5UTR> (describing the coalition of conservatives and feminists in the “war on trafficking,” its origins as more invested in “fighting prostitution than human trafficking,” and the war on trafficking’s disruption by the Trump administration); Melissa Gira Grant, *The War on Sex Workers: An Unholy Alliance of Feminists, Cops, and Conservatives Hurts Women in the Name of Defending Their Rights*, 44 REASON, Feb. 2013, at 30, 31 (describing the coalition between conservatives, feminists, and police “who subject sex workers to poverty, violence, and imprisonment—all in the name of defending women’s rights”).

⁵³ See generally POLICING PLEASURE: SEX WORK, POLICY, AND THE STATE IN GLOBAL PERSPECTIVE (Susan Dewey & Patty Kelly eds., 2011) (describing the variety of sex-work related public policy and the often unintended consequences these policies might have); GLOBAL SEX WORKERS: RIGHTS, RESISTANCE, AND REDEFINITION (Kamala Kempadoo & Jo Doezema eds., 1998) (presenting the experiences of sex workers in different countries and their perspectives on regulations and policies regarding sex work); BARBARA SULLIVAN, *THE POLITICS OF SEX: PROSTITUTION AND PORNOGRAPHY IN AUSTRALIA SINCE 1945* (1997) (examining how sex work and pornography are regulated, and examining the political and legal discourse surrounding regulation of sex work); Gayle S. Rubin, *Thinking Sex: Notes for a Radical Theory of the Politics of Sexuality*, in *CULTURE, SOCIETY AND SEXUALITY: A READER* 150 (Richard Parker & Peter Aggleton eds., 2d ed. 2007) (describing the politics surrounding sex and sexuality); PAT CALIFIA, *PUBLIC SEX: THE CULTURE OF RADICAL SEX* (2d ed. 2000); PHILIPPA LEVINE, *PROSTITUTION, RACE & POLITICS: POLICING VENEREAL DISEASE IN THE BRITISH EMPIRE* (2003) (examining the colonial discourse on sex work in the British Empire, and its impact on legal regulation of sex work).

⁵⁴ See generally Danielle Blunt & Zahra Stardust, *Automating Whorephobia: Sex, Technology and the Violence of Deplatforming: An Interview with Hacking//Hustling*, 8 PORN STUD. 350 (2021); Danielle Blunt et al., *Deplatforming Sex: A Roundtable Conversation*, 8 PORN STUD. 420 (2021).

⁵⁵ See e.g., ROB SPECTRE, *CHILDSAFE.AI, Beyond BACKPAGE: BUYING AND SELLING SEX IN THE UNITED STATES ONE YEAR LATER* (2020), <https://perma.cc/39SX-L42N>.

⁵⁶ See, e.g., *Find Kids Faster*, SPOTLIGHT, <https://perma.cc/FX9E-JVR6> (last visited Nov. 12, 2022).

“black boxed,”⁵⁷ the resulting devastation of their use is well documented.⁵⁸ Hacking//Hustling found in research conducted in 2020 that sex workers, activists, organizers, and protesters suffered content moderation tactics and platform exclusions that chilled their speech, disrupted movement work, and inhibited the flow of capital to both individuals and organizations.⁵⁹

As part of this, sex workers report discrimination from a range of different financial providers. Some of the most publicized perpetrators are third-party, or non-bank financial technologies (such as PayPal, Venmo, Stripe, and Square), who process credit card payments from customers, acting as a mediator between the merchant and financial in-

⁵⁷ Black box refers to any system, device, or algorithm which produces information, but the internal workings remain opaque or unknown and can only deduce their logic accordingly. See *Black Box*, MERRIAM-WEBSTER, <https://perma.cc/H9GS-ZLU4> (last visited Dec. 14, 2022).

⁵⁸ See, e.g., SAFIYA UMOJA NOBLE, *ALGORITHMS OF OPPRESSION* (2018) (exploring how negative biases against women of color are embedded in search engine results and algorithms); CATHY O’NEIL, *WEAPONS OF MATH DESTRUCTION* (2016) (exploring how black box algorithms impact all facets of life including education, lending, justice systems, law enforcement, voting, and health); VIRGINIA EUBANKS, *AUTOMATING INEQUALITY* (2018) (investigating the impacts of data mining, policy algorithms, and predictive risk models on poor and working-class people in the U.S.).

⁵⁹ BLUNT ET AL., *supra* note 5 at 30-31. See, e.g., Kashmir Hill, *A Dad Took Photos of His Naked Toddler for the Doctor. Google Flagged Him as a Criminal.*, N.Y. TIMES (Aug. 25, 2022), <https://www.nytimes.com/2022/08/21/technology/google-surveillance-toddler-photo.html> (on file with the CUNY Law Review) (describing several parents’ experiences of being falsely accused of creating child abuse material and losing access to personal electronic accounts such as calendars, email, and family photo archives after Google implemented an automated surveillance system of users’ photos, which could not be undone even by a later human review process); see also Tracy Clark-Flory, *Instagram’s Solicitation Policies Are Exposing Porn Performers to Harassment—and Financial Exploitation*, JEZEBEL (June 6, 2019, 11:00 AM), <https://perma.cc/RZY5-739Q>; Melissa Gira Grant, *QAnon Is Using the Anti-Trafficking Movement’s Conspiracy Playbook*, NEW REPUBLIC (Aug. 19, 2020), <https://perma.cc/T47V-SZE6> (harm caused by automated moderation against non sex working people has been similarly documented); Cynthia Conti-Cook, *Surveilling the Digital Abortion Diary*, 50 U. OF BALT. L. REV. 1 (2020) (describing how internet surveillance-gathered evidence was used in two pre-*Dobbs* criminal claims charging women of color with feticide, child neglect, or murder); Tiffany Diane Tso, *4 Things Sex Workers Can Teach Us About Digital Surveillance*, REWIRE NEWS GRP. (July 20, 2022, 9:05 AM), <https://perma.cc/ZT2F-LJZG> (describing how sex workers’ have responded to experiences of online surveillance and criminalization by developing harm reduction practices); Melissa Gira Grant, *The Pandemic Surveillance State*, NEW REPUBLIC (May 8, 2020), <https://perma.cc/26M6-WU7B> (describing how the pandemic drove an increased use of automated surveillance tools by law enforcement to surveil and contain broad groups of people based on vague estimations of risk); *Social Media Surveillance by Homeland Security Investigations: A Threat to Immigrant Communities and Free Expression*, BRENNAN CTR. FOR JUST. (Nov. 15, 2019), <https://perma.cc/PTM2-KMGD> (describing the harms to immigrant communities caused by Homeland Security’s use of online automated surveillance tools).

stitution.⁶⁰ Crowdfunding platforms such as GoFundMe and patronage platforms such as Patreon also expressly exclude sex workers.⁶¹ This exacerbates harm exponentially because sex workers often turn to crowdfunding and patronage due to existing discriminatory policies from local banks, because they cannot consistently maintain the monetary balance necessary to keep a bank account open (a form of structural discrimination),⁶² or because crowdfunding and patronage offer digital payment services that banks do not.⁶³ In 2019, a spokesperson from the Australian Small Business and Family Enterprise Ombudsman said she was “continuously contacted by sex workers who complained they have been denied banking services.”⁶⁴ In addition, sex workers also experience poor treatment from credit unions, depending on the individual personality of the customer service representative.⁶⁵ Denial of financial infrastructure thus comes from both traditional agents and new players.

C. *Inadequate options and privacy compromises*

In effect, this wide-scale discrimination has served to shut down established payment systems and subsequent workarounds that sex work-

⁶⁰ Samantha Cole, *Sex Workers Detail the Financial Damages of Mastercard’s Discrimination*, VICE (Feb. 10, 2022, 3:46 PM), <https://perma.cc/2BRX-RAH7>.

⁶¹ See, e.g., EJ Dickson, *GoFundMe Cancels Sex Workers’ Legal Fundraising Efforts*, DAILY DOT (May 29, 2021, 8:56 AM), <https://perma.cc/6KLV-U6RA>.

⁶² In 2021, author Lorelei Lee worked with an unbanked sex worker to set up a GoFundMe for her fathers’ funeral expenses. The sex worker was unbanked due to poverty as well as sex work, and thus had difficulty even cashing her disability checks, which had to be done through a check cashing business that took a large fee. A bank account is required to start a GoFundMe, so the worker could not do so by herself. These difficulties were further compounded when the cost of funeral expenses meant that the worker was unable to pay her electric bill, and her electricity was shut off. Without electricity, she was forced to leave her baby overnight with a family member, which made her fear that she would lose her child to that family member or to child services. Due to the urgency of the situation, and the unbanked worker’s inability to access most payment processors, Lorelei had to collect money through their own Venmo account and then pay the electric bill directly. (Text messages are on file with author). See also Lorelei Lee (@MissLoreleiLee), TWITTER (Apr. 13, 2022, 1:53 PM), <https://perma.cc/GE22-E7HX>.

⁶³ For example, in 2020, author Lorelei Lee worked with an unsheltered sex worker who needed to raise enough money to make the substantial payment required to move herself and her children into an apartment, while also needing to take money out of the fundraising account to pay the exorbitant weekly cost of the Airbnb apartment in which she was temporarily housed. This kind of continuous fundraising and account access, exploitative as it is, was necessary for the sex worker’s survival, and would not be possible through traditional banking. (Text messages regarding this fundraiser are on file with the author).

⁶⁴ Sarah Simpkins, *Ombudsman Slams Banks for Adult Industry Discrimination*, INV. DAILY (Sept. 13, 2019), <https://perma.cc/XBS9-BC68>.

⁶⁵ See Taia Handlin, *Financial Services Are Shutting Out Sex Workers*, BTRTODAY (June 7, 2018), <https://archive.ph/jHEnS> (on file with the CUNY Law Review).

ers have innovated and adopted to circumvent stigma and exclusion. When payment apps emerged, they were a convenient substitute for sex workers to transfer funds on mobile devices more easily, to screen clients by asking for deposits in advance of a personal meeting, hold money between transactions, or as a replacement for traditional banking.⁶⁶ However, payment apps rapidly became unsuitable for sex workers, with the risk of funds being seized or accounts being shut down, and new requirements to provide photo identification, phone numbers, and social security numbers (or face spending limits and transfer restrictions). Financial discrimination against sex workers also impacts clients, who experience limited means by which to pay for sex worker services.⁶⁷ “Sex workers report that their clients have been blocked by their banks from subscribing to direct-to-consumer content services such as OnlyFans, even where they were pre-existing subscribers.”⁶⁸

Exclusion from digital infrastructure places sex workers in increasingly precarious positions vis-a-vis their safety, security, and wellbeing. In her book, *New Money: How Payment Became Social Media*, Lana Swartz describes the ways in which access to payment systems is a matter of both belonging and citizenship.⁶⁹ Payment systems not only structure our lives, but they impact our mobility, our safety, our security, and our community.⁷⁰ As Swartz writes, “[t]he consequences of exclusion – losing the “citizenship” of a transactional community – can mean life or death.”⁷¹ In disrupting the flow of money to individual workers, financial discrimination limits sex workers’ access to infrastructure and resources and works as a capitalist control mechanism to sustain the unequal distribution of wealth. As both the U.S. and Australia move

⁶⁶ See Sarabi, *Payment Processors for Online Sex Workers*, ONLINE SEX WORK (2019), <https://perma.cc/535Q-HS8G>.

⁶⁷ All the authors of this Article with experience trading sex have been kicked off fintech platforms, have faced increased requirements for verification, transfer restrictions, and have dealt with clients having difficulty sending money due to workers not having access to multiple methods of online payment. All these issues have impacted their ability to make money, to survive, and to do political organizing and mutual aid necessary for sex workers’ survival. See, e.g., Darling, *supra* 19.

⁶⁸ Scarlet Alliance, “*Deemed High Risk*”: *Financial Discrimination Against Sex Workers* (forthcoming 2023) (manuscript at 2) (on file with the CUNY Law Review).

⁶⁹ While conceptions of property ownership have changed over time, ownership itself, and participation in the economic exchanges that shape so much of how we live, have long been understood in the U.S. as symbolic not only of belonging but of responsibility and “good” citizenship. Keeanga-Yamahtta Taylor writes: “Homeownership has long been considered a pathway to political, economic, and cultural citizenship in the United States.” TAYLOR, *supra* note 11, at 30. See also Gregory S. Alexander, *Property and Citizenship*, in PROPERTIES OF PROPERTY 71, 71-78 (Gregory S. Alexander & Hanoch Dagan eds., 2012).

⁷⁰ LANA SWARTZ, *NEW MONEY: HOW PAYMENT BECAME SOCIAL MEDIA* 2-5 (2020).

⁷¹ *Id.* at 2.

towards cashless societies,⁷² the systemic exclusion from digital infrastructure will increasingly impact undocumented folks, lower-income folks, street-based sex workers, and others working in informal or cash-based economies, exacerbating existing inequalities amplified by gender, race, class, and disability.⁷³

Where they can access payment processing, sex workers have unique privacy needs that are not adequately understood or catered to by financial providers.⁷⁴ In Australia, sex workers report facing privacy breaches when using banks, such as where banks have released their legal name to clients making cash deposits into their business account. While some sex workers have requested increased security on their accounts in order to protect their legal names (such as name suppression), or deliberately registered businesses or limited liability companies in order to avoid making their legal name public, these strategies have not always stopped staff from disclosing their name to other customers.⁷⁵ Payment processors that permit transactions for sexual services often require digital verification and personal information, which has an unknown flow between state and private companies. The Paxum Paywallet, for example, one of the means through which content creators can withdraw funds from OnlyFans, requires users to upload photo identification, and sex workers report being coerced into scanning their face using 3D biometric facial recognition software in order to access payouts.⁷⁶ Although the movement towards payment processors has been

⁷² See Dame Joan, *supra* note 28; Nwamaka A. Anaza et al., *DPS 2.0: On the Road to a Cashless Society*, 33 MKTG. LETTERS 693, 694 (2022) (“[Fintech] is feeding consumers’ desertion of cash, checks, and debit cards for easier and faster payments, and has positioned a migration toward cashless economies [T]he average nation’s share of cash transactions will decrease from 29% to only 17% by 2026.”) (citation omitted). See generally Yuk-Tung Tonnie Lam et al., *Australia’s Embrace of a Cashless Society* (Australasian Conference on Information Systems, 2020), <https://perma.cc/JL65-Q7MH>.

⁷³ See, e.g., Michael Kwet, *Digital Colonialism: US Empire and the New Imperialism in the Global South*, 60 RACE & CLASS, Apr.-June 2019, at 3 (describing how the proliferation of digital technology in the Global South is recreating patterns of exclusion established by colonialism); Dipayan Ghosh, *The Commercialization of Bias in Cashless India*, 45 TELECOMMS. POL’Y, Article 102124, 2021, at 1 (discussing how new digital services in India meant to equalize are creating new systems for surveillance and discrimination, and are marginalizing already marginalized and poor citizens).

⁷⁴ Allison McDonald et al., “It’s Stressful Having All These Phones”: Investigating Sex Workers’ Safety Goals, Risks, and Practices Online (30th USENIX Security Symposium, 2021), at 375, 376, 387-388, <https://perma.cc/JM6L-CTWF>.

⁷⁵ See Scarlet Alliance, *supra* note 68, manuscript at 3-4.

⁷⁶ OnlyFans’ Privacy Policy denies collecting Biometric Data, stating: “While we do not collect biometric information, if you choose to authenticate yourself through certain service providers we use, they may collect biometric information subject to their privacy policies, but we are never provided with access to that information.” *Privacy Policy*, OnlyFans (Dec. 2020), <https://perma.cc/GYB5-PU94>. However, many sex workers, including two au-

marketed as a shift to a more “accessible” form of banking, it bears a heavy cost where users may be unknowingly trading their personal data towards the potential construction of risk assessment algorithms that could be used to police and punish them in future. Just as the technology of online financial transactions can both enable and stop the flow of capital, what has been touted as “accessible” banking is inaccessible for those of us who are already the targets of increased surveillance and criminalization.⁷⁷

thors of this paper, have been coerced by the platform to undergo biometric scanning to obtain payouts, a practice that one of the authors of this paper believes falls under the definition of trafficking in federal law. This practice whereby platforms require extra identifying information from people in the sex trades is an experience to all the sex worker authors of this Article and their communities. Furthermore, this practice deters sex workers from seeking other jobs or even interacting with civilians because we don’t know who has that personal information, how it is being shared, and particularly whether it is being sold to law enforcement agencies. Author Lorelei Lee was invited in 2021 to a summit where major tech companies discussed their anti-trafficking policies and practices, sharing that they do not believe privacy for people in the sex trades is at all important. Rather, the tech company reps discussed how to better identify and maintain a shared list of people in the sex trades’ identifying information. This practice creates tremendous risks to people in the sex trades’ safety, including the risk that our traffickers might find us. Trafficking survivor Sabra Boyd and sex worker advocate Savannah Sly tried to explain to the tech representatives that for people in the sex trades, privacy IS safety. Sarah Boyd, *Privacy is Safety: Amazon’s Tech Against Trafficking Summit*, SABRA BOYD: A WORKAHOLIC IN PROGRESS (Oct. 21, 2022), <https://perma.cc/L5N7-XZP5>. After OnlyFans announced and then retracted the decision to stop processing adult payments, Danielle Blunt tweeted: “Very interesting tactic of [OnlyFans] to require models to do a third-party facial-recognition verification 2-months before kicking them off.” Danielle Blunt (@MistressBlunt), TWITTER (Aug. 21, 2021, 1:22 PM), <https://perma.cc/7QQK-9V2B>. Blunt followed up with: “It’s not a coincidence. We know the pattern. It will be years before we understand the full extent of how this info is being used to further discriminate. borders, Airbnb’s, hotels, banking, mortgages . . .” Danielle Blunt (@MistressBlunt), TWITTER (Aug. 21, 2021, 1:46 PM), <https://perma.cc/S78N-XQBA>. Similarly, Paxum’s Pay with Ease policy requires users to upload a proof of identity document. PAXUM INC., USER GUIDE: HOW TO REGISTER & VERIFY YOUR FREE PAXUM PERSONAL ACCOUNT, <https://perma.cc/MLA6-M7L7>.

⁷⁷ This is another example of the mere continuation of offline policing and discrimination tactics into online spaces. While internet technology was once declared a solution to identity-based discrimination, that same technology has actually increased law enforcement and corporate capacity to discriminate on the basis of mutable and immutable traits. For example, the work of surveillance that was once limited by where police could be physically present no longer faces such boundaries. Officers can now profile women like Sarah Marchando in the predominantly Black and Brown neighborhoods of New York City’s outer boroughs. See Melissa Gira Grant, *The NYPD Arrests Women for Who They Are and Where They Go — Now They’re Fighting Back*, VILLAGE VOICE (Nov. 22, 2016), <https://perma.cc/48YK-RXQB>. Officers can also simultaneously use Internet surveillance technology to surveil, profile, and target without the limits of time or geography. See Dave Davies, *Surveillance and Local Police: How Technology Is Evolving Faster Than Regulation*, NPR (Jan. 27, 2021, 12:51 PM), <https://perma.cc/RGJ3-QN5C>. This allows law enforcement to discriminate based on the surveillance reports of unofficially deputized citizens and/or using even

C. Predatory commissions and alternative payment methods

Lack of access to digital payment mechanisms leaves sex workers with few options to get paid. While working in cash can be convenient for some, it can also mean that sex workers become vulnerable to police crack downs on informal economies, a potential target of violence or theft, and subject to increased scrutiny when depositing large sums in the local bank.⁷⁸ Earning in cash can also make it more difficult to prove income for the purposes of obtaining loans, rental properties, and insurance.⁷⁹ Many sex workers take deposits with Amazon gift cards or GiftRocket,⁸⁰ both of which are known to shut down and seize sex

more specific and targeted parameters than would be possible without such technology. *See id.*; Nicol Turner Lee & Caitlin Chin, *Police Surveillance and Facial Recognition: Why Data Privacy Is Imperative for Communities of Color*, THE BROOKINGS INST. (Apr. 12, 2022), <https://perma.cc/P7TC-KRVS> (“Although geolocation tracking is almost ubiquitous among smartphone apps, it also poses unique potential for harm . . . because it allows entities to deduce extraneous details like sexual orientation, religion, health, or personal relationships from their whereabouts.”); *see also* Michael Kwet, *Shadowdragon: Inside the Social Media Surveillance Software That Can Watch Your Every Move*, INTERCEPT (Sept. 21, 2021, 5:03 PM), <https://perma.cc/VN4Z-9UHF>. Fourth amendment jurisprudence has been notoriously slow to adapt to new technology, meaning that Constitutional protection against such surveillance is limited. *See* Ángel Díaz, *When Police Surveillance Meets the ‘Internet of Things,’* BRENNAN CTR. FOR JUST. (Dec. 16, 2020), <https://perma.cc/S5SX-KYCQ> (discussing the evolution of Fourth Amendment jurisprudence as well as statutory privacy protections); *see also* Bennett Cyphers, *How the Federal Government Buys Our Cell Phone Location Data*, ELECTR. FRONTIER FOUND. (June 13, 2022), <https://perma.cc/YQ97-2YGA>; Beryl Lipton, *Police Are Still Abusing Investigative Exemptions to Shield Surveillance Tech, While Others Move Towards Transparency*, ELECTR. FRONTIER FOUND. (July 22, 2022), <https://perma.cc/VKG4-CBQH>.

⁷⁸ *See, e.g.*, JOHN J. CHIN ET AL., *ILLCIT MESSAGE PARLORS IN LOS ANGELES COUNTY AND NEW YORK CITY: STORIES FROM WOMEN WORKERS 21-25* (2019), <https://perma.cc/38VD-UM8A> (providing research on police raids of migrant massage parlor workers, an industry that straddles formal and informal economies and boundaries of constructed terms of legality and illegality); Maya Harris, *Sex Workers Want More Than Just the Right to Work*, SLATE (May 4, 2021), <https://perma.cc/2F72-989N>; Melissa Gira Grant, *The New Orleans Police Raid That Launched a Dancer Resistance*, APPEAL (May 30, 2018), <https://perma.cc/TP4E-RYAJ>; Tracy Clark-Flory & Leigh Cuen, *You’re a Sex Worker – How Do You Pay Your Taxes?*, VOCATIV (Feb. 9, 2016, 2:07 PM), <https://perma.cc/UPK7-856F> (discussing the “hazards” sex workers face when engaging with bank employees and that people who “operate in cash” are automatically considered suspicious).

⁷⁹ *See* Faima Bakar, *How Sex Workers Bank Their Money, Since Mastercard Abandoned Them*, MASHABLE: SE ASIA (Aug. 30, 2022), <https://perma.cc/4VLR-HC3J> (“Financial giants expecting adult performers to jump through hoops doesn’t just cut them off from immediate funds, crucially, financial discrimination means sex workers can’t access other rights, like a credit score, buying property, or insurance.”).

⁸⁰ GiftRocket is a virtually delivered monetary gift that can be redeemed by the recipient for cash or as a gift card for a variety of businesses. *Frequently Asked Questions*, GIFTROCKET, <https://perma.cc/Z4BR-43RL> (last visited Oct. 30, 2022).

worker accounts.⁸¹ This also means that sex workers are limited in how they can use the funds within the parameters of the company issuing the gift card,⁸² and there is less protection when people cancel those gift cards or digital transactions.⁸³

The exclusionary policies of payment platforms further shape the market environment. Where sex workers have a dearth of options for appropriate banking or payment processing, this lays the foundation for potentially exploitative private companies to monopolize the space. This has been the case in terms of platforms distributing adult content. The restrictive legal conditions and lack of adult-friendly billing providers foreclosed many of the avenues that ought to have been available for independent content creators and instead opened up the field to tube⁸⁴ monopolies such as MindGeek, owner of the largest porn aggregator, Pornhub.⁸⁵ Tech platforms behind pornography tube sites and camming sites have annual turnovers in the hundreds of millions of dollars while performers and models working across these sites around the world are producing what is essentially piece work, with high commissions.⁸⁶ Al-

⁸¹ See Lucia Peters, *Amazon Is Shaming Sex Workers*, BUSTLE (May 2, 2014), <https://perma.cc/6TEV-H7P3>; *GiftRocket Allegedly Kicking Off Sexworkers*, WCSU NEWS (2019), <https://perma.cc/J2ZJ-TCCU>; Sonya Aragon, *Whores at the End of the World*, in WE TOO: ESSAYS ON SEX WORK AND SURVIVAL 108 (Natalie West & Tina Horn eds., 2021) (“Prior to COVID, a financial submissive offered to send me money for text humiliation. I instructed him to use GiftRocket but was promptly kicked off the app, receiving the following message: ‘GiftRocket’s Compliance Team identified your account as having sent or received gifts associated with a prohibited use case. . . .’”).

⁸² *GiftRocket Allegedly Kicking Off Sexworkers*, *supra* note 81.

⁸³ Author Danielle Blunt has experience with clients canceling digital purchases and tips after receiving content or time on fan sites such as OnlyFans and AVNStars where the platforms do not protect the performer from chargebacks which come out of the performer’s earnings.

⁸⁴ See Sharif Mowlabocus, *Porn 2.0? Technology, Social Practice, and the New Online Porn Industry*, in PORN.COM: MAKING SENSE OF ONLINE PORNOGRAPHY 69, 69-70 (Feona Attwood, ed., 2010). Tube sites are ad-supported adult video streaming platforms that host user-uploaded content. Tube sites monetize this content by collecting data from their users to customize advertising and marketing in exchange for free access to videos. See Lawrence G. Walters, *Tube Sites*, WALTERS L. GRP., <https://perma.cc/9YD3-2JG6> (last visited Dec. 18, 2022); Simon Regal, *How Tube Sites Took over the Porn Industry*, RED LIGHT NETWORK (Mar. 26, 2018), <https://perma.cc/C8GH-KF4P>; Anna Iovine, *How Pornhub Changed the World*, MASHABLE (May 30, 2022), <https://perma.cc/FY2U-TQP7>.

⁸⁵ See David Auerbach, *Vampire Porn*, SLATE (Oct. 23, 2014, 4:36 PM), <https://perma.cc/6BFY-8BXD>.

⁸⁶ See Zahra Stardust, *Alternative Pornographies, Regulatory Fantasies, Resistance Politics* 197 (2019) (Ph.D. dissertation, University of New South Wales) (citing PORNOCRATIE: LES NOUVELLES MULTINATIONALES DU SEXE (FilmRise 2017)) (on file with author and the CUNY Law Review). For example, the webcamming company Live Jasmin, headquartered in Amsterdam, has an annual turnover of \$305 million. The company considers itself merely a “tech” company, providing a platform where members and models can meet. The site hosts

ready, tube sites use processes of extraction and theft of intellectual property as their business model.⁸⁷ This exacerbates conditions for already marginalized communities, such as Black sex workers, who are repeatedly devalued and faced with suboptimal labor conditions in a racially stratified industry.⁸⁸

Sex workers who run their own subscription websites often face limited options for billing services who include sexual content.⁸⁹ Those that are available can charge high premiums or require high technical knowledge making them inaccessible for many independent (“solo”) producers.⁹⁰ Online performers can become stuck using platforms that take what we call a “predatory commission.”⁹¹ OnlyFans, for example, takes 20% commission from sex workers selling content on their site, while some clip sites charge up to 40%.⁹² In comparison, OnlyFans’ civilian predecessor, Patreon,⁹³ takes between a 5-12% platform fee.⁹⁴ Most civilian payment processors take between a 3-7% cut of transac-

two million models worldwide, mostly from Romania and Colombia, who have an average monthly income of \$1,400. *See id.*

⁸⁷ Annie Lord, *Porn Doesn’t Suffer from a ‘Piracy Problem,’ It Actively Relies Upon It*, VICE (Sept. 3, 2019, 10:03 AM), <https://perma.cc/9QYZ-Y2NN>; Maggie MacDonald, *The Double Exploitation of Deepfake Porn*, WALRUS (Oct. 19, 2021, 2:07 PM), <https://perma.cc/HM78-GCZL> (“Piracy is already a standard practice on porn aggregator sites . . .”).

⁸⁸ *See generally* Mireille Miller-Young, *A TASTE FOR BROWN SUGAR: BLACK WOMEN IN PORNOGRAPHY* (2014) (documenting the barriers facing Black women in the porn industry); Chibundo Egwatu, Zahra Stardust, Mireille Miller-Young & Daisy Ducati, *Curating Desire: The White Supremacist Grammar of Tagging on Pornhub*, in (UN)DESIRING WHITENESS: (UN)DOING SEXUAL RACISM (Denton Callandar et al., eds., forthcoming 2023) (demonstrating how racial tagging practices on Pornhub pose barriers to visibility and economic empowerment for Black performers).

⁸⁹ *See* Tusikov, *supra* note 9, at 69-73.

⁹⁰ *See* Swartz, *supra* note 70, at 84-88.

⁹¹ ANGELA JONES, *CAMMING: MONEY, POWER, AND PLEASURE IN THE SEX WORK INDUSTRY* 61 (2020).

⁹² Gwyn Easterbrook-Smith, *OnlyFans as Gig-economy Work: A Nexus of Precarity and Stigma*, PORN STUD., July 28, 2022, at 1, 8-9.

⁹³ *See* Cara Curtis, *Patreon Continues to Crack Down on NSFW Content Creators*, THE NEXT WEB (June 27, 2019, 9:14 AM), <https://perma.cc/3NYZ-BTGD>.

⁹⁴ *See What Fees Can I Expect as a Creator?*, PATREON, <https://support.patreon.com/hc/en-us/articles/360027674431-What-fees-can-I-expect-as-a-creator-> (last visited Jul 19, 2022) (on file with the CUNY Law Review); *Pricing: We Only Succeed when You Succeed*, PATREON, <https://perma.cc/2RAJ-E9WN> (last visited Oct. 5, 2022) [hereinafter *Patreon Pricing*]. Patreon originally began as a site catering to a variety of content creators, including sex workers, but in 2017 introduced stricter guidelines for adult content and subsequently suspended or banned numerous sex workers, citing pressure from payment processors: “We have been ramping up the proactive review of content on Patreon due to requirements from our payment partners.” Samantha Cole, *Patreon Is Suspending Adult Content Creators Because of Its Payment Partners*, VICE (June 28, 2018, 9:00 PM), <https://perma.cc/XB2J-F4JM>.

tions – Stripe, for example, charges a 2.9% + 30 cents processing fee.⁹⁵ Not all sex workers have the technical skills, time, or desire required to set up their own paywalled site to accept credit card payments, especially as the start-up costs of setting up can be over \$1,000 (and after months of labor it could be taken down at any moment).⁹⁶ Because of the lack of other available affordable options, there is now a market for websites offering services to “high-risk clients” who specialize in “managing risk.”⁹⁷

As sex workers continue to face blanket exclusions from banks and payment processors, many have turned to alternative payment methods. While some accept prepaid cards, gift vouchers, and similar in-kind payments, others are using new technologies such as Bitcoin that allow both workers and clients the privacy to transact without sharing their legal names.⁹⁸ Cryptocurrencies often operate with low fees,⁹⁹ without exorbitant transfer charges, and with low risk of being de-platformed. When OnlyFans announced (and later reversed)¹⁰⁰ their ban on sexually explicit content in 2021,¹⁰¹ sex workers reported turning to adult crypto tokens such as Nafty and CumRocket: media reports that within 24

⁹⁵ See Patreon Pricing, *supra* note 94.

⁹⁶ *Start Your Own Site: Accepting Credit Cards*, PERVOUT, <https://perma.cc/6STT-386V> (last visited July 19, 2022) (describing the steps required to set up your own site accepting credit cards).

⁹⁷ See, e.g., *High Risk Processing*, MOBIUS PAY, <https://perma.cc/T52Q-PX3X> (last visited July 21, 2022) (showing account options for Mobius Pay, an e-commerce merchant account provider that specifically caters to high-risk businesses in the United States). In 2016, porn performer and director Lucy Hart co-created PervOutPay in an attempt to offer a sex worker-led, sex work-friendly payment processor. PervOutPay made radical changes to the billing model, requiring minimal identifying information from users, and charging only a 10% transaction fee. Unfortunately, though, the owners could not keep the service financially viable, and they were closed by 2017. *PervOUT Launches PervOutPay.com Service for Sex Workers*, AVN (Aug. 4, 2016 10:51 AM), <https://perma.cc/84RR-FU42>.

⁹⁸ Cryptocurrencies such as Bitcoin were originally developed to permit pseudonymous transactions that did not link a person’s account address to their real-world identities. However, because transactional data is publicly visible (such as the documentation of transfers and IP addresses), it can be possible to deanonymize data by analyzing transaction patterns and clusters. See, e.g., Richard Chen, *An Overview of Privacy in Cryptocurrencies*, CONTROL (Aug. 9, 2018), <https://perma.cc/97V4-8VMF>; Olive Pometsey, “*OnlyFans Can’t Just Dump Us*”: *Sex Workers Are Finding Freedom in Cryptocurrency*, FACE (Aug. 25, 2021), <https://perma.cc/S2KD-L963>.

⁹⁹ See Karim Ahmad, *12 Cryptocurrencies with Almost Zero Transaction Fees*, MAKE USE OF (Aug. 27, 2022), <https://perma.cc/HY4F-S8XB>.

¹⁰⁰ Brian Fung, *Why Did OnlyFans Ban Sexually Explicit Content? It Says It’s the Credit Card Companies*, CNN BUS. (Aug. 24, 2021, 3:13 PM), <https://perma.cc/3779-4NZL>; Mikelle Street, *OnlyFans Changes Course, Will Allow Adult Content After All*, OUT (Aug. 25 2021, 8:48 AM), <https://perma.cc/SGB3-QF4Y>.

¹⁰¹ Emily van der Nagel, *Competing Platform Imaginaries of NSFW Content Creation on OnlyFans*, 8 PORN STUD. 394, 405 (2021).

hours of the OnlyFans announcement, sign ups to Nafty had increased by 500%.¹⁰²

But, while it is true that sex workers ought to have access to the same tools as their peers and payment mechanisms that meet their privacy needs, the existence of these alternate methods does not undo the impact of discrimination and exclusion from major providers. They are not replacements for banks. Some payment apps do not work on older model mobile phones; some still permit clients to reverse payments; some only offer vouchers; some are only available in limited jurisdictions;¹⁰³ some require digital literacy, energy and time on behalf of clients for up-take.¹⁰⁴ Further, cryptocurrencies are not a solution to the privacy needs of sex workers. Indeed, cryptocurrencies use transaction hash-IDs, meaning that they do not necessarily allow sex workers or clients to transact without identity verification or trace to their legal names. Crypto is not a stable currency, nor one that all sex workers have access to or that all clients are willing to use. For their safety, sex workers need flexibility to use different payment systems according to their needs including equitable access to traditional and new banking and payment methods.

D. *Social impacts of visibility and policing*

Financial discrimination has a broader collective social impact, affecting not only people exchanging sex but also access to sexual health and digital services more broadly. One of the businesses that Stripe prohibited was OMGYes, a sex-education start up that conducts large-scale research centering the advancement of vaginal pleasure in partnership with researchers at Indiana University and the Kinsey Institute.¹⁰⁵

¹⁰² Pomsety, *supra* note 98.

¹⁰³ Devon Delfino, ‘Does Venmo Work Internationally?’: No, You Must Be Physically Located in the US—Here’s What You Need to Know, *BUS. INSIDER* (Nov. 5, 2019, 9:29 AM), <https://perma.cc/R7V4-4WYS>; see, e.g., *Cash App in App Store*, APPLE, <https://perma.cc/M7AD-CV3F> (requiring a device to have iOS 13.0 or later to download Cash App); *Understand the 4 Ways Customers Can Reverse PayPal Transactions*, CLEARSALE BLOG (Apr. 18, 2018), <https://perma.cc/A8L5-4UHE> (describing how users can reverse payments on PayPal); *Who We Are*, PREZZEE, <https://perma.cc/UDQ4-ZVL3> (last visited Dec. 22, 2022) (the Australian app Prezzee can be used to accept payments in the form of eGift cards).

¹⁰⁴ The authors who have sex work experience note that many sex work clients are willing to transact only on impulse, and thus asking a client to do the labor of downloading and learning to use an alternative payment app before engaging in a transaction can be the difference between earning income or not.

¹⁰⁵ Devon J. Hensel et al., “OMG, Yes!”: Feasibility, Acceptability, and Preliminary Efficacy of an Online Intervention for Female Sexual Pleasure, 59 *J. SEX RSCH.* 269, 269 (2022).

OMGYes was widely publicized in media as a sex education resource, but because the website contained explicit tutorials, Stripe reported that it was not considered a supportable business by their financial partners.¹⁰⁶ Despite this video education being backed by medical research,¹⁰⁷ it provides an illustrative example of how—as discussed below—sex is conflated with illegality and sexuality, particularly sexuality that is widely read as feminine, is considered obscene or harmful.

Technologist Naomi “SexyCyborg” Wu attracted similar financial discrimination when her content creator account was demonetized by YouTube for allegedly producing sexually explicit content.¹⁰⁸ The video was flagged by YouTube’s content moderation for featuring a true-to-form 3D-printed model of Wu’s torso, despite the fact that many male YouTube Creators have used similar nude female dress forms in their videos without histories of demonetization.¹⁰⁹ Female gamers who stream live gameplay (a.k.a. “gamer girls” or “e-girls”) on platforms such as Twitch have reported targeted harassment by male gamers who flag their accounts for promoting sexual content with the goal of demonetization.¹¹⁰ These accounts can be removed with little recourse,¹¹¹ further empowering misogynistic gamers to weaponize gendered constructions of sexuality against women who earn income through live-streaming gameplay.¹¹² More and more content creators make both adult content and have successful non-sex working streaming careers, and continue to blur the lines between sex work and influencer both out of

¹⁰⁶ Danika Lyon, *Why Some Businesses Aren’t Allowed*, STRIPE (Aug. 12, 2016), <https://perma.cc/WG4Y-7DPX> (explaining that Stripe must uphold the legal regulations and specific rules that govern their partner financial institutions about which types of businesses they will and will not work with, must uphold the laws of the countries it works in, and need to be careful about the financial risks that different business can pose to customers or to Stripe.)

¹⁰⁷ Debby Herbenick et al., *Women’s Experiences with Genital Touching, Sexual Pleasure, and Orgasm: Results from a U.S. Probability Sample of Women Ages 18 to 94*, 44 J. SEX & MARITAL THERAPY 201, 201 (2018).

¹⁰⁸ Naomi Wu Jīxiè Yāo Jī (机械妖姬) (@RealSexyCyborg), TWITTER (Jan. 26, 2022, 9:30 PM), <https://perma.cc/7UPD-DYHD>.

¹⁰⁹ Naomi ‘SexyCyborg’ Wu, *Why Do I Look . . . Like This? The SexyCyborg Origin Story*, YOUTUBE (Jan 29, 2022), <https://perma.cc/63E2-D95R>.

¹¹⁰ See Andrew Zolides, *Gender Moderation and Moderating Gender: Sexual Content Policies in Twitch’s Community Guidelines*, 23 NEW MEDIA & SOC’Y 2999, 2999-3000 (2021).

¹¹¹ *About Account Enforcements and Chat Bans*, TWITCH, https://help.twitch.tv/s/article/about-account-suspensions-dmca-suspensions-and-chat-bans?language=en_US (last visited Jan. 2023) (on file with the CUNY Law Review) (Twitch user can face temporary or indefinite suspension and have 60 days to appeal).

¹¹² See Bonnie Ruberg et al., *Nothing but a “Titty Streamer”’: Legitimacy, Labor, and the Debate Over Women’s Breasts in Video Game Live Streaming*, 36 CRITICAL STUD. MEDIA COMM’N 466 (2019) (discussing the harassment that some female Twitch users face).

necessity and ingenuity. Presence on mainstream platforms can assist creators in building up audience bases and paid subscribers. However, even where they are not soliciting or sharing sexual content, their sexualization by other users or platforms or their known status as a sex worker can lead to their demonetization. For example, despite not doing sex work on streaming sites like Twitch, creators like Amorphous, one of OnlyFans highest earning creators, continue to face demonetization efforts and have advertising suspended on their non-sex working platforms.¹¹³ Clients also use similar tactics of maliciously reporting sex workers that can result in the demonetization or loss of social media profiles which reduces their ability to earn an income.¹¹⁴

In the U.S., the broader collective social impact by way of algorithmic profiling of sex workers has been further exacerbated by the 2018 passage of the Allow States and Victims to Fight Online Sex Trafficking Act (FOSTA),¹¹⁵ which amended section 230 of the Communications Act of 1934,¹¹⁶ section 112(a)(2) of the Trafficking Victims Protection Act of 2000,¹¹⁷ and the Mann Act (originally titled the White-Slave Traffic Act of 1910)¹¹⁸ creating new criminal and civil liability for anyone who “owns, manages, or operates” a website, app, or other “interactive computer service . . . with the intent to promote or facilitate the prostitution of another person.”¹¹⁹ At the time of FOSTA’s passage, there was no explicit definition of prostitution in federal law,¹²⁰ nor did the terms “facilitate” or “promote” have clear legal meaning in the law’s

¹¹³ Brittany Alva, *Twitch Makes a Shocking Decision About Amorphous*, SVG (May 19, 2021, 8:31AM), <https://perma.cc/VK9T-UX4L>.

¹¹⁴ See Samantha Cole, *People Are Threatening to Report Sex Workers to the IRS in #ThotAudit*, VICE (Nov. 26, 2018, 6:45 PM), <https://perma.cc/B258-XDHC>; Emma Grey Ellis, *Social Media Is Reshaping Sex Work—but Also Threatening It*, WIRED (Mar. 10, 2018 7:00 AM), <https://perma.cc/S9C8-JK2H>.

¹¹⁵ Allow States and Victims to Fight Online Sex Trafficking Act of 2017, H.R. 1865, 115th Cong. (2018). See generally Albert et al., *supra* note 7.

¹¹⁶ Communications Act of 1934, S. 3285, 73d Cong. (1934).

¹¹⁷ Trafficking Victims Protection Act of 2000, H.R. 3244, 106th Cong. (2000).

¹¹⁸ See Lee, *supra* note 3, at 1234-35 (describing the drafting and passing of the White-Slave Traffic Act of 1910).

¹¹⁹ Allow States and Victims to Fight Online Sex Trafficking Act of 2017, H.R. 1865, § 3(a), 115th Cong. (2018).

¹²⁰ See Albert et al., *supra* note 7, at 1132. FOSTA clearly distinguishes between “trafficking” and “prostitution” by creating separate crimes for each. Compare 18 U.S.C. § 2421A(a) (creating the federal crime of owning, managing, or operating a website or other internet computer service with the intent to promote or facilitate prostitution of another person), with 18 U.S.C. § 2421A(b)(2) (creating the aggravated version of the federal crime § 2421A(a) with an added element of reckless disregard for sex trafficking). But, to confuse matters more, where “commercial sex act” is defined in the TVPA, all commercial sex is categorized as “sex trafficking.” See Victims of Trafficking and Violence Protection Act of 2000, H.R. 3244, 106th Cong. § 103(9) (2000).

context.¹²¹ Further, the new or expanded civil claims in 18 U.S.C. § 2421A and 18 U.S.C. § 1591 were vaguely and ungrammatically worded such that the breadth of liability they created was unclear to platforms and sex workers alike¹²² (and later, to the judiciary).¹²³ In response, digital platforms seemed to assume the greatest potential interpretation of the law's breadth, and began banning a wider range of adult content, pre-emptively introducing restrictive community standards and proactively detecting and removing sexual content.¹²⁴ To this end, automated content moderation has resulted in the disabling of certain social media accounts due to the eroticization and hypervisibility of bodies outside of the white, androcentric, heteronormative status quo.¹²⁵ Sex-positive digital media platform *Salty*¹²⁶ reported that a run of advertisements “featuring fully clothed BIPOC, disabled, plus-sized and trans women were rejected by Instagram for ‘promoting escorting services,’” confirming suspicions that “certain bodies and perspectives are being policed, and . . . targeted for censorship more than others.”¹²⁷

This was, and continues to be, a digital extension of centuries of settler-colonialist hyper-sexualization of Black, queer, and immigrant bodies, thus making those bodies hyper-visible to carceral surveillance.¹²⁸ Offline, this has looked like “slave codes” and American legal decisions like *State of Missouri v. Celia*, a case that cast enslaved Black women as people in that they could be held legally culpable for killing

¹²¹ See Albert et al., *supra* note 7, at 1143-47.

¹²² See Albert et al., *supra* note 7, at 1143-47; Kendra Albert, *Five Reflections from Four Years of FOSTA/SESTA*, CARDOZO ARTS & ENT. L. J. (forthcoming) (manuscript at 11).

¹²³ See Albert et al., *supra* note 7, at 1132 n. 227, 1136-37. *Compare* Woodhull Freedom Found. v. United States, 334 F. Supp. 3d 185 (D.D.C. 2018) (holding that plaintiffs lacked standing to challenge FOSTA and were not at risk of prosecution), *with* Woodhull Freedom Found. v. United States, 948 F.3d 363 (D.C. Cir. 2020) (finding that plaintiffs did have standing to challenge FOSTA and that their conduct did put them at risk of prosecution).

¹²⁴ See YORK, *supra* note 51, at 145-64.

¹²⁵ See Ysabel Gerrard & Helen Thornham, *Content Moderation: Social Media's Sexist Assemblages*, 22 NEW MEDIA & SOC'Y 1266 (2020).

¹²⁶ SALTLY, <https://perma.cc/EVN5-VKLT> (last visited Oct. 4, 2022).

¹²⁷ See *Exclusive: An Investigation into Algorithmic Bias in Content Policing on Instagram*, SALTLY (last visited Oct. 4, 2022), <https://perma.cc/L7DE-BCPF>.

¹²⁸ See Cheryl Nelson Butler, *A Critical Race Feminist Perspective on Prostitution & Sex Trafficking in America*, 27 YALE J.L. & FEMINISM 95, 97 (2015); Emily Yost, Comment, *Queering the Landscape: Decriminalizing Consent and Remapping the Permissible Geographies of Intimacy*, 19 U. MD. L.J. OF RACE, RELIGION, GENDER & CLASS 201, 203; SIMONE BROWN, DARK MATTERS (2015) (showing how contemporary surveillance technologies and practices are informed by the long history of racial formation and by the methods of policing black life under slavery). See also NAYAN SHAH, STRANGER INTIMACY: CONTESTING RACE, SEXUALITY, AND THE LAW IN THE NORTH AMERICAN WEST (2011) (discussing the policing of South Asian migrant men and criminalization of sexual acts and perceived male prostitution in the early twentieth century).

the enslaver who raped them, but property in that they had no legal protections against rape or other forms of violence.¹²⁹ It has also looked like New York's "walking while trans" and "condoms as evidence" laws, which allowed subjective and indiscriminate policing of Black cis and trans women,¹³⁰ who, for years, were surveilled, targeted, and arrested for "loitering for the purposes of prostitution" based on where they lived, who they spoke with in public, what they were wearing,¹³¹ and how much cash and/or how many condoms were in their possession.¹³² Later, these laws were repealed but that by no means indicates that these racist and transphobic policing tactics have ended.¹³³ At the same time, Black women are consistently misidentified by algorithms, such as artificial intelligence repeatedly misinterpreting and misgendering images of iconic Black women.¹³⁴ This is not to say that "correct" identification of such communities is the answer, but rather to problematize their physical and algorithmic policing and highlight their underlying racist and transphobic ideologies.

¹²⁹ See Saidiya Hartman, *Seduction and the Ruses of Power*, 19 CALLALOO 537, 540 (1996) ("As *Missouri v. Celia* demonstrated, the enslaved could neither give nor refuse consent, nor offer reasonable resistance, yet they were criminally responsible and liable."); DeNeen L. Brown, *Missouri v. Celia, a Slave: She Killed the White Master Raping Her, Then Claimed Self-Defense*, WASH. POST. (Oct. 19, 2017, 4:00 AM EDT), <https://perma.cc/K6HP-H9LN>, and Douglas O. Linder, *Celia, a Slave, Trial (1855): An Account*, FAMOUS TRIALS, <https://perma.cc/5TF5-ZLJJ> (last visited Dec. 18, 2022). See also SAIDIYA HARTMAN, SCENES OF SUBJECTION 80 (1997) ("[T]he law's selective recognition of slave humanity nullified the captive's ability to give consent or act as agent, and at the same time, acknowledged the intentionality and agency of the slave but only as it assumed a form of criminality."). See also MARK TUSHNET, SLAVE LAW IN THE AMERICAN SOUTH at 20-37 (2003) (in *State v. Mann* the North Carolina Supreme Court ruled that masters could not be prosecuted for assaulting their slaves).

¹³⁰ See Grant, *supra* 77; Amanda Arnold, *A Guide to the 'Walking While Trans' Ban*, THE CUT (July 22, 2020), <https://perma.cc/BA9Z-BW54>. Black trans women face the doubled hyper-sexualization cast on them by both anti-Black and anti-trans stigmas. See generally HARTMAN, *supra* note 129; Annalisa Anzani et al., "Being Talked to like I Was a Sex Toy, like Being Transgender Was Simply for the Enjoyment of Someone Else": *Fetishization and Sexualization of Transgender and Nonbinary Individuals*, 50 ARCHIVES OF SEXUAL BEHAV. 897 (2021).

¹³¹ On sworn depositions, police officers described "tight black leggings," "pink + blue sweater hoodie," "mini dress, bra strap showing," and "tight jeans and tight tank showing cleavage [sic]" as evidence in loitering for the purposes of prostitution arrests. Grant, *supra* 77 (alteration in original).

¹³² See Grant, *supra* 77; Arnold, *supra* 130.

¹³³ See Jaclyn Diaz, *New York Repeals 'Walking While Trans' Law*, NPR (Feb. 3, 2021, 2:45 AM), <https://perma.cc/C35M-HSN8>.

¹³⁴ See ALGORITHMIC JUST. LEAGUE, <https://perma.cc/38ZL-HDXS> (last visited Dec. 18, 2022); Joy Buolamwini, *AI, Ain't I a Woman?*, YOUTUBE (June 28, 2018), <https://perma.cc/L26D-54W5>.

Unfettered financial discrimination further jeopardizes the work of sexual and reproductive health organizations who provide direct community services. Since Texas introduced its anti-abortion legislation in 2021,¹³⁵ which banned abortions after six weeks, activists cited serious concerns that payment apps and financial data could be used to criminalize people seeking abortion services.¹³⁶ In Hacking//Hustling’s survey, they consistently found that people who identified as both a sex worker and an activist, organizer, or protester experienced platform policing more intensely and frequently, with 51.28% reporting they had been shadow-banned.¹³⁷ While the collateral damage of financial discrimination extends beyond sex workers, it has a more serious legacy of reinforcing sex work stigma. It does this by incentivizing all sex tech, sex education, and sex-related businesses to frame themselves through a lens of repudiation: we are education *not* porn, we are health promotion *not* solicitation, we are companions *not* sex workers, we are influencers *not* whores. By distancing themselves from the red herring of sex work, sex tech, sex education, and sex-related businesses create loopholes to survive the system but reconsolidate sex work stigma.

III. UNDERSTANDING POLICIES AND TERMS OF USE

While financial discrimination manifests in both automated decision-making and human customer service interactions, it stems largely from policy. As demonstrated below, many banks, payment processors, and financial providers feature broad “acceptable use” policies that prohibit certain businesses, transactions, activities, or use of their services for a range of purposes relating to sex, sexual content, and sexual communication. Although some of their common justifications, such as legal compliance and risk assessment, are discussed below, many of these policies, as one Australian Member of Parliament described them, “effectively amount to corporate slut shaming.”¹³⁸ In this section, we analyze the policies of payment processors that have been accused of discrimination by sex workers and unpack the key grounds on which they

¹³⁵ S.B. 8, 87th Leg., Reg. Sess. (Tex. 2021).

¹³⁶ See Ron Lieber & Tara Siegel Bernard, *Payment Data Could Become Evidence of Abortion, Now Illegal in Some States*, N.Y. TIMES (June 29, 2022), <https://www.nytimes.com/2022/06/29/business/payment-data-abortion-evidence.html> (on file with the CUNY Law Review). See also Kathryn Joyce, *High-Tech Surveillance in Post-Roe America: Chilling New Report Outlines Possible Future*, SALON (May 24, 2022, 5:30 AM), <https://perma.cc/T4U8-ER9N>.

¹³⁷ BLUNT ET AL., *supra* note 5, at 30.

¹³⁸ Sarah Simpkins, *NAB Charged With ‘Slut-Shaming’ Sex Workers*, INVESTORDAILY (Sept. 12, 2019) [hereinafter *NAB Charged with ‘Slut-Shaming’*], <https://perma.cc/D365-C3D8>.

prohibit sex, sex workers, sexual services, sex businesses, and sexual products.

A. *Defining obscene, objectionable, and “sexually suggestive”*

The first problem for sex workers and other platform users is that platforms’ prohibited activities are often vaguely defined, affording broad discretion to payment processors to decide what uses are permissible and even to change their assessments on a day-to-day basis.¹³⁹ This leaves users with little information on how to comply. PayPal, for example, prohibits use of the service for activities that relate to “*certain* sexually oriented materials or services” (our emphasis), although it does not define or clarify which sexually oriented materials or services are prohibited.¹⁴⁰ Other services use contested terms that rely upon high de-

¹³⁹ This is, however, not unlike U.S. laws, which use words like “reasonable” or “excessive,” allowing their application to vary based on context, their parameters to vary, and their valid applications to change as culture and social norms change. The U.S. Constitution is one such legal origin point, containing phrases like “due process,” under which entire fields of jurisprudence have developed, and hugely divisive debates taken place. U.S. CONST. amend. XIV, § 1; *see, e.g.*, *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2243–2332 (2022). The debate over Constitutional law and textual interpretation is demonstrated through legal arguments between the *Dobbs* majority opinion and the dissent, which dispute not only the meaning of “due process,” but also the meanings of “liberty,” “rational,” “equal,” and even “personhood.” Such debates are at the heart of the American legal system, and various legal theories have evolved around them, which may or may not be aligned with party politics of the time. For example, Justice Alito’s reference to the legal theory of so-called “originalism” where he quotes Justice Story’s opinion in *Gibbons v. Ogden*, written in 1824, for the premise that “‘the language of the [Constitution]’ . . . offers a ‘fixed standard. . . .’” *Id.* at 2244–45 (citation omitted). However, even if legal texts did not contain words with meanings that are widely understood to be subjective (like “due,” “reasonable,” or “liberty”), there is variance of interpretation in most words, “[s]ince words do not apply themselves, since it is we who apply them to cases, of course we may need further rules for their application, and of course we will eventually run out of analytic meaning-rules before a precise application is determined [S]ooner or later, one simply makes a judgment.” Jeremy Waldron, *Vagueness in Law and Language: Some Philosophical Issues*, 82 CAL. L. REV. 509, 511 (1994). But most of the time in American Law, there is a level of transparency in legal interpretation and decision making (for example, judicial interpretations of law are published as opinions that can often be appealed), and the vagueness doctrine in criminal law allows entire laws to be repealed if their text does not make clear what it is that the law prohibits. *Vagueness Doctrine*, LEGAL INFO. INST., <https://perma.cc/BY8C-7G3B> (last visited Oct. 11, 2022). By contrast, as explained in further detail above, the decisions of private actors such as the corporate employees who run fintech platforms are opaque. Algorithms may apply rules using a machine logic that is incompatible with human logic, and human reviewers likely each hold a universe of contexts in their own interpretations of words like “sex” and “sexual” that they themselves have not even reflected on, much less made transparent to users.

¹⁴⁰ *Acceptable Use Policy*, PAYPAL (Oct. 29, 2022), <https://www.paypal.com/us/legalhub/acceptableuse-full> (on file with the CUNY Law Review).

gresses of subjectivity and discretion. The prohibition by Braintree on “pornographic products” is arguably unclear,¹⁴¹ because pornography is a historically and politically contested term,¹⁴² and what is considered pornographic could extend from artworks to advertising to clothing to slash fiction to best-selling books. Google Wallet prohibits not simply pornography but also “sexually suggestive materials,” which could be broad enough to potentially include eggplant, taco, peach, or splash emojis (indeed, Facebook introduced software to detect and suppress the use of such emojis in 2019 in an attempt to crack down on sexual solicitation).¹⁴³ These definitions may be so vague as to potentially render the clauses void or unenforceable. Google Wallet also prohibits “anything related to sex trafficking”¹⁴⁴ which is particularly expansive considering that the meaning of sex trafficking is disputed by service providers and law enforcement,¹⁴⁵ and could be broad enough to encompass fundraisers for migrant sex workers, or the development and sharing of harm reduction materials.¹⁴⁶ As discussed in section V. B below, the definition of human trafficking in some jurisdictions is now so broad that it need not even involve movement, third parties, or exploitation.

¹⁴¹ *Acceptable Use Policy*, BRAINTREE (Nov. 8, 2017), <https://perma.cc/SQ2X-E4KP>.

¹⁴² See KELLY DENNIS, ART/PORN: A HISTORY OF SEEING AND TOUCHING 1-3 (2009) (tracing back the history of the term “pornography” to historical debates about sight, touch, proximity, and the status of art).

¹⁴³ *Google Payments User Policies*, GOOGLE PAY, <https://perma.cc/9F7P-PGVR> (last visited Oct. 6, 2022). See Elliot Harmon, *Facebook’s Sexual Solicitation Policy Is a Honey-pot for Trolls*, ELEC. FRONTIER FOUND. (Dec. 7, 2018), <https://perma.cc/MG73-NCTP>. Taco, eggplant, peach, and splash emojis are often used as innuendo. Amanda Mull, *Free the Eggplant*, ATLANTIC (Nov. 7, 2019), <https://perma.cc/ULK7-ZP5R>.

¹⁴⁴ GOOGLE PAY, *supra* note 143.

¹⁴⁵ See discussion in note 120. Sex trafficking is variably defined by nonprofits. See, e.g., *Human Trafficking*, POLARIS, <https://perma.cc/6K6C-G433> (last visited Oct. 17, 2022) (defining human trafficking as “the business of stealing freedom for profit”); *The Fight Against Child Trafficking*, SAVE THE CHILDREN, <https://perma.cc/52Q5-C4HP> (last visited Oct. 17, 2022) (defining child trafficking as “the exploitation of girls and boys, . . . for . . . sexual exploitation”); Miranda Stith, *‘A Hidden Issue:’ Nonprofit Organizations Address Human Trafficking Rates in Arkansas*, ARK. TRAVELER (Feb. 14, 2020), <https://perma.cc/2PEQ-F7UN> (defining sex trafficking as “any interaction wherein a sexual act is exchanged for anything of value, whether it be money, food or a place to sleep under force, fraud or coercion”); *Human Trafficking*, A21, <https://perma.cc/7ELP-M6UZ> (last visited on Oct. 17, 2022) (comparing human trafficking to “slavery”); *FAQ: Understanding Trafficking in Persons*, GLOB. ALL. AGAINST TRAFFIC IN WOMEN, <https://perma.cc/TA2X-FSF9> (last visited Oct. 17, 2022) (noting that the three core elements of trafficking in persons are: “1. the movement of a person (inside a country or across borders) 2. with deception or coercion 3. into a situation of forced labour, servitude or slavery-like practices”).

¹⁴⁶ Reuters Fact Check, *Fact Check-Berlin Sex Worker Group Not ‘Recruiting’ Ukrainian Refugees*, REUTERS (Mar. 30, 2022), <https://perma.cc/7QZ6-TBKX>.

For some financial technologies, the connection to sex work, sexual services, sexual communications, or sexual imagery need only be very loose. Terms of Use prohibit the use of the service “*in connection with*” (Square),¹⁴⁷ or “for activities that . . . *relate to* transactions involving . . . “ (PayPal)¹⁴⁸ such activities, which could effectively prohibit users and businesses with only very tenuous connections to sex. Such broad scope inevitably results in over-capture of businesses and users whose work may only be tangentially connected to sexual content or material. However, as demonstrated in Blunt’s case study in the introduction, payment processors generally lack the accountability mechanisms for users who have had their accounts unjustifiably blocked or wrongly terminated and have inadequate mechanisms for appeal.

Prohibition of transactions which “involve pornography, obscene material or otherwise objectionable content,” as Venmo does, are also open to dispute.¹⁴⁹ The legal test for obscenity requires a jury to decide, first, what constitutes “prurient interest” by contemporary community standards, second, whether the material is patently offensive, and, third, whether it has serious literary, artistic, political or scientific value.¹⁵⁰ The U.S. federal legal obscenity standard is always assessed after the act of censorship and takes into account numerous undefined contextual variables, which are specific to the situation and cannot be replicated across situations. Thus, under the law, *nothing* is obscene until a jury has determined it to be, leaving content creators to guess what kind of material may be subject to indictment. Reinforcing this ambiguity, the question of whether material is obscene under federal law is tested against local “community standards.”¹⁵¹ While lower courts have taken up the issue of what “community standards” might mean with respect to a medium through which publishers are unable to control the geographic limits of distribution,¹⁵² the Supreme Court has not responded to that specific issue, choosing to decide internet obscenity cases on other

¹⁴⁷ *Prohibited Goods and Services with Square Point of Sale*, SQUARE SUPPORT, <https://perma.cc/XCS2-CAME> (last visited Oct. 6, 2022).

¹⁴⁸ PAYPAL *supra* note 140.

¹⁴⁹ *Helpful Information*, VENMO, <https://perma.cc/Z3GG-PPNT> (last visited on Oct. 7, 2022).

¹⁵⁰ *Miller v. California*, 413 U.S. 15, 24 (1973).

¹⁵¹ While *Miller* argued for a national standard, “the [Miller] majority disagreed, famously writing that ‘[i]t is neither realistic nor constitutionally sound to read the First Amendment as requiring that the people of Maine or Mississippi accept public depiction of conduct found tolerable in Las Vegas, or New York City.’” David L. Hudson Jr., *Miller Test*, THE FIRST AMEND. ENCYCLOPEDIA (second alteration in original), <https://perma.cc/P56W-YAQA> (last visited Oct. 7, 2022).

¹⁵² *ACLU v. Reno*, 217 F.3d 162, 166, 176-77 (3d Cir. 2000).

grounds.¹⁵³ Thus there is an outstanding question as to whose standards should be applied in determining whether online content might be “obscene.” It is almost impossible for individual users of Venmo to determine whether an “item” would be considered obscene by a judge or jury, much less by Venmo’s standards,¹⁵⁴ which are, again, likely to be ambiguously and variably applied depending on how algorithms and human reviewers interpret “obscene” and “pornographic.” Similar problems occur when “objectionable” use is prohibited and/or perceived as criminal. Where users have their accounts suspended because they have violated such a term, they are rarely able to appeal or contest these decisions, and payment processors, unlike some social media companies, do not consistently publish transparency reports documenting their decisions regarding violations and terminations of accounts. As private companies, they are under no obligation to provide reasons for their decisions in this context. Nor are sex workers considered a “discrete and insular minority” whose liberty infringements would receive heightened scrutiny under these amendments, despite such infringements likely having a disparate impact on groups who *are* discrete and insular minorities or otherwise protected by U.S. anti-discrimination laws, such as women, people of color, disabled people, and, most recently, LGBT people.¹⁵⁵

B. *Conflating sex, harm, and illegality*

When one examines where these policies sit within the broader terms of service, it sheds light on how companies more broadly conceptualize and situate sex and sexuality, especially by conflating sex with harm. PayPal’s policy, for example, positions sexually oriented activities within a range of other prohibited activities, including controlled substances, drug paraphernalia, cigarettes, items that instruct others to engage in illegal activities, stolen goods, promotion of hate and racial

¹⁵³ See generally *Ashcroft v. ACLU*, 542 U.S. 656, 666 (2004).

¹⁵⁴ Like many other arguments made in this Article, this has only become more relevant in the wake of *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228 (2022). The histories of anti-obscenity and anti-abortion laws are intertwined. With the passage of the Comstock Law in 1873, obscenity was explicitly defined by Congress as including “any drug or medicine, or any article whatever, for the prevention of conception, or for causing unlawful abortion . . .” Comstock Act, ch. 258, 42 Cong., Pub. L. 42-258, 17 Stat. 598 (1873). Despite the Supreme Court’s decisions protecting access to birth control in *Griswold v. Connecticut*, 381 U.S. 479 (1965), and abortion in *Roe v. Wade*, 410 U.S. 113 (1973), in 1996 the Comstock Law was still on the books. 142 CONG. REC. 10769 (1996) (statement of Rep. Patricia S. Schroeder). A bill introduced that year to repeal the law was never passed. H.R. 3057, 104th Cong. (1995-1996).

¹⁵⁵ See *Bostock v. Clayton County*, 140 S. Ct. 1731, 1754 (2020) (holding that discrimination against LGBTQ people is sex discrimination within the meaning of the Civil Rights Act of 1964).

intolerance, ammunition, firearms, and certain weapons or knives.¹⁵⁶ This framing implies that sex is equivalent or analogous to activities that can cause harm, have deleterious health implications, are dangerous, or promote illegality. While some sex is criminalized, it is not all unlawful sexual activity that is prohibited here. PayPal does not list harmful sexual behavior such as sexual assault or sexual harassment. Rather, they prohibit the broader (and unclear) category of certain “sexually oriented” materials or services, which may include the sale of reproductive health products or printed community health promotion materials and does not refer to sexual violence or victimization. Other payment processors conflate sex with non-consent. WePay list “adult sites” in the same category as “child pornography” and “bestiality.”¹⁵⁷ “Adult sites,” which could include anything from queer and feminist sex toy stores to sex therapist websites to information on LGBTQIA+ and TGNC identities or reproductive healthcare,¹⁵⁸ are lumped in in a way that positions them as equivalent to unlawful, non-consensual activities of public concern.

In addition to conflating sex with harm, some processors conflate sex and illegality or use them interchangeably. Stripe’s prohibition on “adult content and services,” for example, is listed alongside prohibited businesses such as “illegal products and services,” “products and services that are unfair, predatory, or deceptive,” and “firearms, explosive and dangerous materials.”¹⁵⁹ Similarly, the AmEx international regulations prohibit users from “a person or business providing sexual services in return for payment.”¹⁶⁰ It is one thing to prohibit the sale of unlawful personal services, but this framing also prohibits *all* personal services that are simply “sexual in nature,” regardless of whether or not they are unlawful. Other processors prohibit sexual activities that are completely lawful. Intuit QuickBooks Payments, for example, prohibits “lingerie or

¹⁵⁶ PAYPAL, *supra* note 140.

¹⁵⁷ *WePay Terms of Service - United States*, WEPAY (Nov. 1, 2020), <https://go.wepay.com/terms-of-service-us/> (on file with the CUNY Law Review) (WePay’s terms of service were last updated on April 1, 2022).

¹⁵⁸ This has become even more of a concern since the Supreme Court’s decision in *Dobbs* that neither people’s decisions regarding abortion nor their access to abortion services are protected by the right to privacy that has been understood to be part of the Fourteenth Amendment’s Due Process Clause. *See Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2248 (2022).

¹⁵⁹ *Prohibited and Restricted Businesses*, STRIPE (Sept. 2022), <https://perma.cc/JZC2-FMT2>.

¹⁶⁰ *MERCHANT REGULATIONS: INTERNATIONAL*, AM. EXPRESS 22 (2020), <https://perma.cc/WB7B-NBE2>.

passion parties” as well as “adult novelties” and “dating/match-making services” without any explicit justification.¹⁶¹

In some instances, these decisions likely reflect moral concerns held by corporate owners and/or boards, and in other instances they almost certainly reflect attempts by corporations to avoid liability while doing business in jurisdictions with conflicting legal rules. These conflicts of law have dramatically increased even in the time between when we began writing this paper and the time when it was accepted for publication. Our initial analysis pointed to the fact that some adult novelties are prohibited for sale in only some parts of the U.S., such as Alabama, which prohibits not only the sale of “any device designed or marketed as useful primarily for the stimulation of human genital organs,” but also “commercial exploitation of erotica” if it is sold “solely for . . . prurient appeal,”¹⁶² language that demonstrates the subjective and difficult-to-apply nature of such laws. Further, for groups without legal protections, corporations typically are not incentivized to determine what constitutes “erotica” or “prurient appeal” with anything near the level of specificity that legal actors use.¹⁶³ The Alabama law highlights the problem with international and digital corporations defaulting to a blanket policy which serves the most conservative jurisdiction they operate in. In an era where digital space is integral for the full realization of rights, health, and safety, the most violative policies, crafted in our most extreme jurisdictions, should not set international standards.

C. *Universal bans across different jurisdictions*

As we discuss further below, one of the problems with the justification that payment processors and banks are simply complying with their legal obligations is that legal frameworks differ markedly across jurisdictions. Blanket bans on sex work cannot be understood to constitute reasonable compliance in jurisdictions where sex work is decriminalized. Australian sex worker Madison Ashton told *Fintech Business* that she had taken out seven applications for merchant facilities with established Australian Banks, including Australia New Zealand (“ANZ”),

¹⁶¹ *Intuit Payments Acceptable Use Policy*, INTUIT QUICKBOOKS (May 1, 2020), <https://perma.cc/H6Q3-BTQX>.

¹⁶² Ala. Code § 13A-12-200.2 (2022).

¹⁶³ See *Prager Univ. v. Google LLC*, No. 17-CV-06064-LHK, 2018 WL 1471939, at *5 (N.D. Cal. Mar. 26, 2018); see also Note, *Developments in the Law: State Action and the Public/Private Distinction*, 123 HARV. L. REV. 1248, 1303-13 (2010) (discussing the limited circumstances in which corporations are liable for First Amendment infringements); *Knight First Amend. Inst. at Columbia Univ. v. Trump*, 928 F.3d 226 (2d Cir. 2019), *cert. granted, judgment vacated sub nom. Biden v. Knight First Amend. Inst. at Columbia Univ.*, 141 S. Ct. 1220 (2021) (discussing how private entities can create a public forum).

Bendigo Bank and the National Australia Bank (“NAB”), all of which were rejected.¹⁶⁴ Ashton then stated that she was unable to access a number of payment vendors such as Square, even though she was working in states such as New South Wales where the type of sex work she was doing was decriminalized.¹⁶⁵ Where payment processors take U.S. criminalization of sex work as if it is universal, they erase cultural and geographical nuances.¹⁶⁶ As Ashton put it, “[t]hey won’t respect our local laws, they won’t respect our culture.”¹⁶⁷

Some processors do this in a more nuanced way than instituting a blanket ban on an entire industry. For example, PayPal has a category of Activities Requiring Approval, which permits different uses of the service with pre-approval. These uses range from “selling alcoholic beverages, non-cigarette tobacco products, e-cigarettes or prescription drugs/devices” to “selling stocks, bonds, securities, options, futures (forex) or an investment interest in any entity or property.”¹⁶⁸ This category even allows for PayPal to be used for gambling, sports betting and lottery “if the operator and customers are located exclusively in jurisdictions where such activities are permitted by law.”¹⁶⁹ If PayPal can make exceptions for their services to be used for gambling in jurisdictions where it is lawful, there is nothing stopping them from permitting their services from being used for sex work in jurisdictions and ways that are lawful, which would be a relatively straight-forward drafting exercise. While pre-approval would be inappropriate for sex workers (who are likely to face stigma if required to send their contact information, busi-

¹⁶⁴ Sarah Simpkins, *Sex Worker Blasts Fintechs for Discrimination*, FINTECH BUS. (Nov. 18, 2019) [hereinafter *Sex Worker Blasts Fintechs*], <https://perma.cc/KK5E-D7NJ>.

¹⁶⁵ *Id.*

¹⁶⁶ U.S.-based payment processors may be influenced in this regard by the U.S. government’s use of foreign aid as a lever to control sex-related speech and policy in other countries. For example, each year the U.S. publishes the Trafficking in Persons (TIP) report, which is then used by Congress in determining distribution of nonhumanitarian and nontrade foreign assistance. Request for Information for the 2022 Trafficking in Persons Report, 86 Fed. Reg. 70562 (Dec. 10, 2021). Similarly, since 1984 the U.S. has prohibited NGOs in other countries from providing “legal abortion services or referrals” while receiving U.S. aid. *What Is the Global Gag Rule?*, OPEN SOC’Y FOUNDS. (Apr. 2019), <https://perma.cc/GJ4Q-TYUH>. A gag rule using those same parameters is also in place requiring that foreign NGOs take what is colloquially called the “prostitution pledge” agreeing that they will oppose prostitution or risk losing U.S. aid, regardless of the legal status of prostitution in the jurisdiction where they provide services. Kellie Moss & Jennifer Kates, *PEPFAR Reauthorization: Side-by-Side of Legislation over Time*, KFF (Aug. 18, 2022), <https://perma.cc/9XGD-WAAZ>.

¹⁶⁷ *Sex Worker Blasts Fintechs*, *supra* note 164.

¹⁶⁸ *Acceptable Use Policy*, PAYPAL (Mar. 19, 2020), <https://perma.cc/H9T6-QU9H> (PayPal’s Acceptable Use Policy was last updated on Oct. 29, 2022).

¹⁶⁹ *Id.*

ness website URL and business summary for approval), financial providers ought to permit sex work that is lawful in the jurisdiction in which it occurs.

D. Lack of differentiation in “adult services”

Similar to their lack of nuance across jurisdictions, financial companies demonstrate low literacy about the variety and types of adult services available and often prohibit vastly disparate types of activities under the same umbrella. For example, under “adult content and services,” Stripe prohibits pornography and obscene materials alongside sites offering any sexually-related “adult services including prostitution, escorts, pay-per view, sexual massages, and adult live chat features.”¹⁷⁰ These activities, such as full service sex work and pornography distribution, fall under very different regulatory frameworks both within the United States and abroad.¹⁷¹ Square similarly lumps together different communication media, clarifying that they will not accept payments in connection with “adult entertainment oriented products or services (in any medium, including Internet, telephone or printed material” as well as specifically excluding “escort services.”¹⁷² WePay has a specific prohibition on “cam girls.”¹⁷³ Apple Pay prohibits the incorporation of Apple Pay into websites that “primarily offers” sexually-oriented items or

¹⁷⁰ *Prohibited and Restricted Businesses*, STRIPE (Aug. 22, 2022), <https://perma.cc/DYX3-2K6W>.

¹⁷¹ Internationally, there are distinct forms of regulation for commercial or transactional sex. *See supra* note 14. *See* Hester & Stardust, *supra* note 8 at 74-76. The most stringent form of regulation, full criminalization of everyone and every space involved, is used in the United States. *See* MAC & SMITH, *supra* note 3, at 15-39 (2018). Legalization, where high-barrier regulations govern how and where sex is exchanged, is practiced through much of Europe, such as Amsterdam. *See id.* at 176-89. The Nordic Model, End Demand, or Asymmetrical Criminalization criminalizes the purchasers and organizers of sexual services, and technical (though not necessarily in practice) removal of criminal penalties for the selling of these services has been enacted in countries such as France and Canada. *See id.* at 140-75. Decriminalization, where the sex trade faces no criminal penalties and is regulated in line with other industries, exists in the Northern Territory, Australia. While Aotearoa is often described as the model for decriminalization, it continues to prohibit sex work for migrant sex workers, including anyone on a temporary visa. *See* Nada DeCat & Zahra Stardust, *Against Inclusion: Sex Work Research, Racial Capitalism, and the Knowledge Industrial Complex*, in HANDBOOK OF SOCIAL INCLUSION (Pranee Liamputtong, ed., 2021). Some jurisdictions such as Victoria and New South Wales, Australia, have made significant steps towards decriminalization but retain offences for street-based sex work. *See* Bennett & Stardust, *supra* note 17, at 26-27.

¹⁷² SQUARE SUPPORT, *supra* note 147.

¹⁷³ *What Is WePay’s Policy Regarding Adult Content?*, WEPAY (July 3, 2014, 3:46 PM), <https://support.wepay.com/hc/en-us/articles/203609043-What-is-WePay-s-policy-regarding-adult-content-> (on file with the CUNY Law Review).

services.¹⁷⁴ These policies generally lack any delineation between different types of adult content, business and activities and instead take a punitive approach and apply it universally across mediums. U.S. laws incentivize these very conservative and broad prohibitions, first, by failing to provide clarity in federal legal frameworks governing obscenity, trafficking, and federal regulation of prostitution,¹⁷⁵ and second, by failing to provide clarity on which of numerous and varied state and municipal regulations on sex-related transactions govern online spaces.¹⁷⁶

E. Prohibiting users on the basis of status rather than activity

Lastly, a significant area of concern is where these exclusions are based upon a person's sex worker status or assumed status rather than their behavior, activity, or use of the service. While some policies restrict certain activities or businesses, others restrict certain *users*, even where their use is not in violation of the policy. In particular, crowdfunding platforms have experienced media scrutiny for cancelling community fundraising efforts by sex workers. GoFundMe, for example, cancelled the legal fundraising efforts of The Erotic Service Providers Legal, Education and Research Project ("ESPLERP") who were raising funds towards legal fees for a constitutional challenge to California's sex work laws.¹⁷⁷ GoFundMe contacted the group to say they had changed their terms of use, canceled the campaign and deleted their account, but ESPLERP reports receiving no information on what had changed or how they had violated the terms of service. As discussed below, such scenarios reveal the limits of existing anti-discrimination

¹⁷⁴ *Acceptable Use Guidelines for Apple Pay on the Web*, APPLE PAY, <https://perma.cc/QC28-G2AS>.

¹⁷⁵ See generally Albert et al., *supra* note 7.

¹⁷⁶ In the United States, legal definitions of "prostitution" differ both by state and by municipality, and the term remains undefined in federal law. See Albert et al., *supra* note 7 at 1103-09. Additionally, sex-related materials that may be legally sold or distributed in some states and municipalities are prohibited in others. See, e.g., *Webber v. State*, 21 S.W.3d 726 (Tex. App. 2000) (upholding Texas conviction for "intentionally promoting an obscene device" through sale of a dildo). This dissonance between regional laws has been a source of concern for national sex worker advocates in recent years, as it has become apparent that a single state or municipality can influence the policies of internet platforms throughout the U.S.

¹⁷⁷ Maxine, *GoFundMe Canceled Our Fundraising Campaign but You Can Still Support the Legal Action*, ESPLER PROJECT INC. (Mar. 6, 2015), <https://perma.cc/P8FS-RR3>. See generally Tara Burns, *A New Lawsuit Aims to Decriminalize Prostitution in California*, VICE (Mar. 4, 2015, 5:00 PM), <https://perma.cc/G4SS-XZMY>.

law,¹⁷⁸ because users are being discriminated against not on the basis of any trait or attribute, but on the basis of their algorithmic profile.

IV. ALGORITHMIC PROFILING AND THE CONSTRUCTION OF RISK

One of the key unanswered questions for sex workers facing financial discrimination is “how was I flagged?” Because so many of the policies and practices that lead sex workers to be identified remain internal or proprietary, the processes of screening and detection are rarely transparent to either the individual or the public. When they experience financial discrimination, sex workers are often offered inadequate explanations regarding how or why their accounts have been flagged. For example, sex workers report their funds being frozen for supposedly suspicious activity despite paying taxes and reporting making regular earnings over multiple concurrent years.¹⁷⁹ Scarlet Alliance, Australian Sex Workers Association reports that sex workers experience poor customer service when making such inquiries, including “lack of follow up,” “disengagement,” being told that the financial providers simply “do not have an appetite for that industry” or citing “internal policies.”¹⁸⁰ These experiences leave sex workers with little clarity or information over exactly how or why they have been identified. But more importantly, the grossly unequal power dynamic between financial service providers and users leaves sex workers without information, documentation, or evidence to properly analyze or take informed action to address the discrimination. Thus, sex workers are left in economic circumstances that make them more vulnerable to labor exploitation.

In this section, we break down different indicators of risk associated with sex work, through sex workers’ own reporting and financial policy guidelines. We show that financial discrimination does not represent a glitch in the system. These instances are not simply the result of an ill-configured algorithm or unintended over-capture that can be easily tweaked for accuracy. Rather, financial discrimination against sex workers, like criminalization, is part of a matrix of a carefully curated, deliberately designed regulatory systems, which include very selective conceptualizations of risk. Risk profiling disproportionately affects marginalized communities and has a long history in sustaining racial capitalism, now accelerated and exacerbated due to the rapid uptake in the use of automation, algorithms, and machine learning among plat-

¹⁷⁸ See *infra* Section V(D) (discussing the limitations of anti-discrimination law in the U.S., where sex work is not a protected category, and in Australia where varying levels of protection exist).

¹⁷⁹ Handlin, *supra* note 65.

¹⁸⁰ Scarlet Alliance, *supra* note 68.

forms.¹⁸¹ While financial discrimination against sex workers is hardly new, and systems of gatekeeping, labor exploitation, and sexual stigma have long intersected, the convergence of these aspects combined with privatization, gentrification, and digital control has laid the foundation for discriminatory practices to proliferate on an international scale.

A. Identification, verification, and flagging

By listening to sex-worker experiences, we can start to patch together common patterns in flagging and identification. Sex workers expect that they are identified via multiple means, both algorithmic and human. Sex workers are already subject to malicious flagging across social media platforms and disgruntled clients and members of the public also report sex workers' payment apps¹⁸² or report them to the IRS.¹⁸³ All of these forms impact how automated systems (and staff) are taught to code for red flags, risk typologies, and suspicious activity. Sometimes, a sex worker may be flagged because they use an unusual or unique business (or legal) name, username, or email address, and a curious staff member searches their name online. They may be outed because a description for the service uses language that is explicit (for example, a client refers to sexual activities rather than simply a booking). Where a sex worker's email address or bank account is linked to their payment processor account (for example they use the same email they have used to place an escorting ad), linking their work and legal identities, they may be flagged for using a pseudonym, having multiple identities or not being able to verify their name with legal documentation. Part of the problem may lie in the use of keywords to screen for various uses that may breach policy. But this is also a problem of human oversight and unconscious bias. Due to the uneven distribution of power and information between the service and user alongside the opaque nature of black box technologies, sex workers who lose accounts are often left trying to figure out what flagged the system so that when they open a new account it is less likely to be taken down.

¹⁸¹ See generally JUSTIN JOQUE, *REVOLUTIONARY MATHEMATICS: ARTIFICIAL INTELLIGENCE, STATISTICS AND THE LOGIC OF CAPITALISM* (2022).

¹⁸² Zahra Stardust et al., *What Can Tech Learn from Sex Workers?*, BERKMAN KLEIN CTR. COLLECTION (Dec. 15, 2020), <https://perma.cc/8G9D-VMV5>.

¹⁸³ In 2018, misogynistic online trolls campaigned to deputize men into maliciously reporting sex workers to the IRS using the hashtag #THOTAudit despite lack of any evidence of unpaid taxes. The campaign was largely fear mongering but resulted in fear in sex worker communities and sex workers locking down their accounts. See Emily Shugerman, *Men Behind #ThotAudit Have Nothing Better to Do Than Report Sex Workers to IRS*, DAILY BEAST (Mar. 20, 2019, 2:50 PM), <https://perma.cc/X2QH-8X4K>.

Payment processors have already admitted to monitoring users' social media presence for evidence of a person's sex work. In her chapter, "Transactional Politics: Getting Paid and Not Getting Paid," Lana Swartz documents the 2014 case of Eden Alexander, whose friends set up a crowdfunding campaign to raise money for her medical costs after she had a severe reaction to medication.¹⁸⁴ However, shortly thereafter Alexander was notified by the platform, GiveForward, that the campaign would be cancelled and donations refunded, because it violated the terms of service of WePay, their service provider, which could not be used "in connection with" pornographic services.¹⁸⁵ Although the campaign made no mention of Alexander's work as an adult performer, Alexander had retweeted other supporters on Twitter who had offered adult material in exchange for donations, including a studio and website who gave out free clips, pictures, and membership to people who donated. The way in which this fundraiser was flagged indicates that payment processors are actively monitoring and surveilling users' social media accounts. Bill Clerico, the Chief Executive Officer of WePay, tweeted following the incident to say that WePay uses a combination of software and manual review in accordance with bank contracts and card network policy: "we monitor what we can. It's not a perfect science."¹⁸⁶

There are a number of outstanding questions relating to the identification and flagging of sex workers. How much of this process is automated versus how much is done via human decision-making? What kind of detection software is being used for compliance and how is it being designed, developed and trained? How are machines and humans being taught to differentiate between sex work, criminal activity and labor exploitation, given the services often operate across vastly different legal contexts? What consequences are there for erroneous decision-making? A follow-up set of questions then emerges about whether this data is being used for subsequent profiling and how might it impact sex workers' access to other services. These questions matter exponentially in jurisdictions where sex work is criminalized, where workers are undocumented and risk detention, incarceration or deportation, and where there is information sharing between law enforcement, immigration agencies, and private institutions.

¹⁸⁴ SWARTZ, *supra* note 70, at 76-108.

¹⁸⁵ SWARTZ, *supra* note 70, at 76.

¹⁸⁶ Melissa Gira Grant, *The Scarlet RT: How WePay Denies Service to Sex Workers & Surveils Everyone*, MELISSA GIRA GRANT (May 18, 2014), <https://perma.cc/FT84-ANSB>.

B. Assessing (and projecting) risk in sexual transactions

Payment processors commonly justify the exclusion of sex workers from their services under the rationale that adult businesses are seen as high risk. For example, as the Commonwealth Bank of Australia describes, “[W]e may form a view that we no longer wish to continue a banking relationship with a customer based on risk factors.”¹⁸⁷ In identifying risk, platforms often cite the monetary risks of credit card fraud or charge backs, or their own legal risks for facilitating unlawful activities. Yet there is a lack of evidence to support whether these assessments of risk are accurate or qualified. For financial institutions that specialize in managing risk as a core part of their business, banks and payment processors appear unwilling to conduct any tailored assessment of risk in relation to sex workers, sexual businesses, or sexuality products. This is despite regulators such as Australian Transaction Reports and Analysis Centre (“AUSTRAC”), in recognizing the problem of de-banking, expecting that banks take a case-by-case approach to assessing risk.¹⁸⁸ In their report on financial discrimination against adult-only businesses, Australia’s Eros Association found that 66% (16 out of 24) of adult retailers and wholesalers reported a recent incident of discrimination by one of the “Big Four” banks, including having merchant facilities withdrawn with little to no warning.¹⁸⁹ Eros concluded that financial providers treat adult-only businesses “unfavorably on the basis of broad internal policies against the ‘adult industry’ rather than tailored assessments of financial risk.”¹⁹⁰

It is not necessarily the case that all sex work or sex-industry businesses are at high risk of fraud, chargebacks, child-sex exploitation, money laundering, or human trafficking. It would be inaccurate to say that risk attaches consistently and universally across the sex industry. Risk applies disproportionately to different actors, different contexts, and different legal and political environments. In fact, research repeatedly demonstrates that it is policing, criminalization, and stigma that *creates* risk factors associated with sex work.¹⁹¹ It would be difficult for fi-

¹⁸⁷ Sarah Simpkins, *Ombudsman Slams Banks for Adult Industry Discrimination*, INV. DAILY (Sept. 13, 2019), <https://perma.cc/RRZ5-KBAD>.

¹⁸⁸ *AUSTRAC Statement 2021: De-Banking*, AUSTRALIAN GOV’T (AUSTRAC) (Oct. 29, 2022), <https://www.austrac.gov.au/news-and-media/media-release/austrac-statement-2021-de-banking> (on file with the CUNY Law Review).

¹⁸⁹ JARRYD BARTLE, *EROS ASS’N, FINANCIAL DISCRIMINATION AGAINST ADULTS-ONLY BUSINESS 6* (2017), <https://perma.cc/PQF5-ZAF6>.

¹⁹⁰ *See id.* at 4.

¹⁹¹ *See generally* ELISE WHITE ET AL., *CTR. FOR CT. INNOVATION, NAVIGATING FORCE AND CHOICE: EXPERIENCES IN THE NEW YORK CITY SEX TRADE AND THE CRIMINAL JUSTICE SYSTEM’S RESPONSE*, (2017), <https://perma.cc/2SM7-YME6>.

nancial providers to illustrate how individual sex workers, sole traders, and cooperatives pose risk. It is possible to take a more case-by-case basis to assessing risk: indeed, the *Australian Financial Review* reported the National Australia Bank (“NAB”)’s decision not to provide banking services to legal brothels and escort agencies as being out of step with its Big Four bank peers who say they review business customers in the sex industry on a case-by-case basis.¹⁹² Instead, payment processors project risk back onto sex workers. As Tamara K. Nopper describes, financial technologies code individuals as “high risk” as a matter of course.¹⁹³ This process simultaneously relies on and produces a “digital character” that is “assessed to make inferences regarding character in terms of credibility, reliability, industriousness, responsibility, morality, and relationship choices.”¹⁹⁴

Furthermore, chargebacks are a pertinent example of how sex work stigma affects perceptions of risk. Based on the authors’ experiences, chargebacks occur when users dispute transactions from their accounts because they are either dissatisfied with the service or product, because the transaction was fraudulent, or because they are nervous or ashamed about the charge showing up on their credit card statement. Chargebacks cost money because the liability for the chargeback moves along a chain from the issuer, consumer, and merchant, and there are strict time limits and restrictions on processing chargebacks.¹⁹⁵ However, chargebacks are a symptom of stigma—clients chargeback because they do not wish the service to appear on their bank records, because they feel entitled to access free or discounted services/content, or simply because they know that, as a stigmatized group, sex workers have little recourse.¹⁹⁶ Instead of challenging this stigma, banks use chargebacks as justification to refuse services to sex-industry businesses, and payment processors use it as an excuse to charge higher premiums.¹⁹⁷ This perpetuates a cycle of

¹⁹² James Frost, *NAB’s Sex Industry Woes*, AUSTRALIAN FIN. REV. (Oct. 15, 2020, 3:55 PM), <https://perma.cc/QN2Q-PEKX>.

¹⁹³ Tamara K. Nopper, *Digital Character in “The Scored Society”*: FICO, Social Networks, and Competing Measurements of Creditworthiness, in CAPTIVATING TECHNOLOGY: RACE, CARCERAL TECHNOSCIENCE, AND LIBERATORY IMAGINATION IN EVERYDAY LIFE 170, 170-187, (Ruha Benajmin ed., 2019).

¹⁹⁴ See *id.* at 170.

¹⁹⁵ *Visa Chargeback Time Limits: Understanding the Dates & Deadlines*, CHARGEBACKS 911 (Oct. 26, 2021), <https://perma.cc/Y8SW-DZZG>.

¹⁹⁶ Lydia Veljanovski, *OnlyFans Creators Forced to Give Refunds to Scammers Who Stole Naked Images*, NEWSWEEK (July 14, 2021, 7:36 AM), <https://perma.cc/TM64-Q5N7> (providing an illustrative example of the ways in which sex workers bear the financial burden of chargebacks).

¹⁹⁷ Lux Alptraum, *Is Porn Really So ‘High Risk’ That Porn Stars Shouldn’t Have Bank Accounts?*, GUARDIAN (Apr. 29, 2014, 10:35 AM), <https://perma.cc/DX6U-LSBY>.

client defaulting, financial providers perceiving sex work as high risk, discrimination in service provision, predatory lending, and expectations of impunity—on behalf of both clients and payment providers. In this manner, human biases and sexual stigmas become embedded into risk typologies.

While there is a lack of reliable data to suggest that sex work is indeed “high risk” within the meaning of that phrase as used by fintech companies, there is a wealth of evidence pointing to the ways in which moral panics have contributed to the conflation of sex with risk, resulting in policies that put multiply marginalized individuals at actual risk.¹⁹⁸ By their nature, moral panics construct social problems that ostensibly need to be solved. The racist and xenophobic discourse on trafficking and terror has been repeatedly shown to harm migrant sex workers,¹⁹⁹ particularly Muslim and Arab communities, and Black men, and yet, trafficking and terror has been used to justify and wield enormous state power to enhance carceral surveillance systems while doing very little to improve their rights or material concerns.²⁰⁰ When financial institutions reproduce these moral panics through their risk assessment algorithms, they work to categorize individuals and communities as “high risk” and, as a result, operate to police people rather than behaviors. In turn, the construction of high-risk communities creates a feedback loop in which communities are excluded from access to financial resources, thereby increasing their risk of vulnerability and violence. In this manner, these constructions of risk operate to police informal economies, restrict the flow of capital to feminized workforces, and distract from system accountability and root causes of harm—sex work stigma, inequitable distribution of wealth, lack of access to resources, lack of safe migration pathways, and the criminalization of survival.

¹⁹⁸ PARDIS MAHDAVI, FROM TRAFFICKING TO TERROR: CONSTRUCTING A GLOBAL SOCIAL PROBLEM 1-23 (2014).

¹⁹⁹ See ELENE LAM, BUTTERFLY (ASIAN & MIGRANT SEX WORKERS SUPPORT NETWORK), BEHIND THE RESCUE: HOW ANTI-TRAFFICKING INVESTIGATIONS AND POLICIES HARM MIGRANT SEX WORKERS 2-5 (2018), <https://perma.cc/686D-QDPG>. See generally GLOB. ALL. AGAINST TRAFFICKING IN WOMEN, COLLATERAL DAMAGE: THE IMPACT OF ANTI-TRAFFICKING MEASURES ON HUMAN RIGHTS AROUND THE WORLD (2007), <https://perma.cc/BYZ7-W5MM>; Elena Shih, *Duplicious Freedom: Moral and Material Care Work in Anti-Trafficking Rescue and Rehabilitation*, 44 CRITICAL SOCIOLOGY 1007 (2018).

²⁰⁰ See *id.*; Fatema Ahmad, *Why “Countering Violent Extremism” Programs Won’t Stop White Supremacists*, MUSLIM JUST. LEAGUE (Jan. 10, 2019, 12:24 PM), <https://perma.cc/V5J6-BSF9>.

C. Evaluating indicators of suspicious activity

Industry policy documents and public statements can be a useful indication of how financial providers operationalize their compliance obligations, how they are conceptualizing and identifying risk, and what they deem suspicious matter and suspicious activity on an internal day-to-day basis. There are legal requirements that compel some entities to publish this information publicly—at least at a high level. For example, in Australia, the federal Modern Slavery Act 2018 requires entities based or operating in Australia, which have an annual consolidated revenue of more than \$100 million, to report annually on and address the risks of modern slavery in their operations and supply chains.²⁰¹ The reports are kept in a public repository, which can be accessed freely online by the public.²⁰² In their compliance report for the Modern Slavery Statements Register, Westpac Group report that in the 2019-20 financial year they “undertook a range of initiatives to enhance our approach to transaction monitoring, and specifically child sexual exploitation (CSE), human trafficking and people smuggling, to enhance our suite of risk indicators and detection scenarios.”²⁰³ It is not specified what kind of detection scenarios were used, but Westpac indicate that they were “drawn from a range of external papers and analysis of risk indicators for human trafficking and modern slavery.”²⁰⁴

Similarly, as part of their due diligence, Australia and New Zealand Bank (“ANZ”) report that they screen their suppliers for “modern slavery risks” via a third-party database, which screens for a company’s risk exposure to 28 social, governance, and environmental issues mapped to international standards on human rights and forced labor.²⁰⁵ Bendigo Bank notes among actions they have taken to reduce risk of “sex trafficking” that they have completed annual compliance surveys to capture business risk assessments, adapted group-wide reporting tools “to enable staff to confidentially document unusual activity that may indicate modern slavery facilitating further investigation” and enhanced their commercial credit policy to address the risks of modern slavery.²⁰⁶ Again,

²⁰¹ Modern Slavery Act of 2018 (Cth) s 3 (Austl.).

²⁰² *Online Register for Modern Slavery Statements*, AUSTRALIAN BORDER POLICE, <https://modernslaveryregister.gov.au/> (last visited Dec. 21, 2022).

²⁰³ WESTPAC GROUP, MODERN SLAVERY STATEMENT 2020, at 14 (2020), <https://modernslaveryregister.gov.au/statements/1809/> (on file with the CUNY Law Review).

²⁰⁴ *Id.*

²⁰⁵ ANZ BANKING GRP., 2020 MODERN SLAVERY STATEMENT 5 (2020), <https://perma.cc/54TP-ZEQW>.

²⁰⁶ BENDIGO AND ADELAIDE BANK, MODERN SLAVERY STATEMENT 2 (2020), <https://modernslaveryregister.gov.au/statements/503/> (on file with the CUNY Law Review).

their report does not include the particulars of how they have assessed risk or what kind of activity is understood as unusual. It is likely that, as suspicious activity or suspicious matter reports are often undertaken through manual review, staff bring unconscious bias into their understanding of sex, harm, and legality.

There are obvious challenges to this kind of work, notably how to differentiate sex work from human trafficking and sexual servitude. A 2022 report by the AUSTRAC and the Fintel Alliance provide guidance for businesses to identify indicators of sexual servitude.²⁰⁷ The Guide states that “[f]inancial analysis alone can make it difficult to differentiate between legal sex work and illegal sex work, and therefore needs to be used in conjunction with other indicators and information to define and detect the activity.”²⁰⁸ Some of the financial indicators they cite for coordinators of sexual servitude include activities that may be common practices for many sex workers: cash withdrawals, lack of business-related expenses and transactions, payments to online merchants or classified sites, regular payments to hotel or short-term accommodation providers, frequent third-party ATM deposits, and domestic transfers predominantly from third-party males.²⁰⁹ Payment patterns “that indicate the running of an illegal sex work business” include: “luxury spending habits,” “purchases that are inconsistent with the customer profile, such as clothing, make-up, beauty products, and lingerie,” “frequent payments for pre-paid mobile phone top-ups,” and “high volumes of payments to rideshare companies.”²¹⁰ AUSTRAC financial crime guides are highly influential for banks’ internal financial crime teams and their risk indicators are then incorporated into the bank’s red flags, impacting which transactions are picked up. If these are the kinds of indicators banks and payment processors are screening for, it is unsurprising that sex workers are so frequently flagged. Further, these reactions are based on the assumption that the proper response to identifying a possible situation of exploitation and abuse is simply to cut off access to technology, with no consideration of how that could exacerbate desperation, cut off opportunities to save money and leave a situation of exploitation, or otherwise bring additional harm to a potential victim of violence.

Via such risk detection systems, payment processors are effectively producing an imaginary “sex worker” category, comprised of imputed

²⁰⁷ AUSTRALIAN GOV’T (AUSTRAC) & FINTEL ALL., DETECTING AND STOPPING FORCED SEXUAL SERVITUDE IN AUSTRALIA: FINANCIAL CRIME GUIDE (Feb. 2022), https://www.austrac.gov.au/sites/default/files/2022-02/AUSTRAC_FCG_DetectingAndStoppingForcedSexualServitude_web.pdf (on file with the CUNY Law Review).

²⁰⁸ *Id.* at 6.

²⁰⁹ *Id.* at 11.

²¹⁰ *Id.*

attributes. We call these “sexual proxies,” signifiers that represent potential sexual behavior, activity, use, or status. These proxies operate in a similar way to social media policy enforcement, whereby Blunt argues that “[w]hen hashtags like #woman, #curvy, #Goddess, and #breastfeeding have been banned ‘woman’ becomes proxy for whore.”²¹¹ They further resemble proxies used to police sex work in offline environments. Street-based sex workers, for example, are often targeted through their activities (seen as “loitering for the purposes of prostitution”), their dress (seen as manifesting prostitution) or their connection to a particular area, regardless of what they are doing there.²¹² This kind of targeted policing often relies upon racist, transphobic, and fatphobic stereotypes about appearance and location that stand in for the status of the sex worker.²¹³ As sex workers become algorithmically coded and digitally monitored, these proxies work to alert payment processors of a person’s potential sex work status. In some respects, this is emblematic of the biopolitical project of fintech, a form of governance that actively produces new marginal identities that can be better known, and therefore better governed.

D. Creditworthiness as a function of racial capitalism

We ought to understand these risk typologies as the manifestation of deeply embedded systems of racial capitalism (a system of extracting value from racialized differentiation), the deep entrenchment of racism, classism and misogyny (such as in anti-miscegenation and anti-immigration laws), and the undervaluing of feminized labor.²¹⁴ In both the U.S. and Australia, existing economic structures have been built upon the colonization of Indigenous land, extraction of labor and value from Black communities through slavery, wage theft, mass incarceration, labor exploitation, and citizen taxonomization. These systems have facilitated the perpetual accumulation of capital and power by the State and corporations. During the 1970s, the International Wages for House-

²¹¹ @MistressBlunt, TWITTER (Oct. 17, 2019, 11:13 PM), <https://perma.cc/3EBT-4U6D>.

²¹² NINA LUO, DECRIMINALIZING SURVIVAL: POLICY PLATFORM AND POLLING THE DISCRIMINATION OF SEX WORK 6-7 (2020), <https://perma.cc/75VT-MZ5H>; Ricardo Cortés, *An Arresting Gaze: How One New York Law Turns Women into Suspects*, VANITY FAIR (Aug. 3, 2017), <https://perma.cc/5BS2-48HC>.

²¹³ See STOP LAPD SPYING COAL., DISMANTLING PREDICTIVE POLICING IN LOS ANGELES (2018) <https://perma.cc/4EYD-QTZ5>; LUO, *supra* note 212. For example, policing that uses “cleavage” as evidence of prostitution relies on fatphobic stereotypes. See e.g., Grant, *supra* note 77.

²¹⁴ See generally CEDRIC J. ROBINSON, BLACK MARXISM: THE MAKING OF THE BLACK RADICAL TRADITION (3d ed., 2020) (discussing racial capitalism); SILVIA FEDERICI, WAGES AGAINST HOUSEWORK (1st ed., 1975).

work campaign called for the recognition of undervalued, invisibilized, feminized, and unwaged care work—inside and outside the home—as labor deserving of payment.²¹⁵ The movement brought to the fore the ways in which the transition from feudalism to capitalism had been dependent on the undervaluing and exploitation of women’s labor and limiting their access to resources and accumulation of capital.²¹⁶ The continued call for compensating feminized labor such as carework, sex work, and emotional labor was reflected in 2016 with the viral hashtag #GiveYourMoneyToWomen.²¹⁷ In the U.S., women were often unable to open their own bank account without a male co-signer until the 1960s.²¹⁸ Even then, it wasn’t until the 1974 passage of the Equal Credit Opportunity Act that women were protected from sustained practices of gender-based discrimination that had emerged in credit lending.²¹⁹

Contemporary sex worker experiences of financial discrimination can therefore be understood against a wider backdrop of discrimination against “vulnerable consumers.”²²⁰ There are well-documented practices of discrimination in financial services, including discriminatory lending practices based upon race, ethnicity, gender, sexuality, nationality, migration status, and HIV status.²²¹ Research has demonstrated discrimination in mortgage lending against Latinx and African American people

²¹⁵ SILVIA FEDERICI, *REVOLUTION AT POINT ZERO: HOUSEWORK, REPRODUCTION, AND FEMINIST STRUGGLE* 15-22 (2012). *See generally* FEDERICI, *supra* note 214.

²¹⁶ *See generally* SILVIA FEDERICI, *CALIBAN AND THE WITCH: WOMEN, THE BODY AND PRIMITIVE ACCUMULATION* (2004) (discussing how the subjugation of gendered bodies is necessary for capitalist accumulation).

²¹⁷ Lauren Chief Elk-Young Bear et al., *Give Your Money to Women: The End Game of Capitalism*, MODEL VIEW CULTURE (Aug. 10, 2015), <https://perma.cc/CAR3-GKL7>.

²¹⁸ *See* Pham, LeBach, *When Could Women Have a Bank Account? A Short History of Financial Gender Equality and the Financial Road Ahead*, SPIRAL (Apr. 22, 2021), <https://perma.cc/G8YZ-A494>.

²¹⁹ Equal Credit Opportunity Act, Pub. L. No. 93-495, § 501-03, 88 Stat. 1521 (1974) (codified as amended at 15 U.S.C. § 1691).

²²⁰ *See generally* DISCRIMINATION, VULNERABLE CONSUMERS AND FINANCIAL INCLUSION: FAIR ACCESS TO FINANCIAL SERVICES AND THE LAW 9-13 (Cătălin-Gabriel Stănescu & Asress Adimi Gikay eds., 2021) (defining and discussing the term “vulnerable consumers”).

²²¹ *See* SARAH SCHULMAN, *CONFLICT IS NOT ABUSE: OVERSTATING HARM, COMMUNITY RESPONSIBILITY, AND THE DUTY OF REPAIR* 113-35 (4th prtg., 2017) (discussing discrimination and criminalization based on race, ethnicity, gender, sexuality, nationality, migration status, and HIV status); *see also* Cyrus Mostaghim, Comment, *Constructing the Yellow Brick Road: Preventing Discrimination in Financial Services Against the LGBTQ+ Community*, 11 MICH. BUS. & ENTREPRENEURIAL L. REV. 63, 68-71 (2021) (discussing financial discrimination based on sex, gender, and sexuality); Winnie F. Taylor, *Fintech and Race-Based Inequality in the Home Mortgage and Auto Financing Markets*, 33 LOY. CONSUMER L. REV. 366 (2021) (discussing race based financial discrimination).

compared to white Americans,²²² and against same-sex applicants compared to heterosexual applicants.²²³ As we move into a new economic order of surveillance capitalism²²⁴ and increased dependence on financial technologies, the exclusion of marginalized communities from the infrastructure to accumulate capital remains. Sociologist Tamara Nopper demonstrates how, in an algorithmically scored network society, humans are assessed via competing measurements of creditworthiness.²²⁵ While good credit scores operate as “a gatekeeper to wealth, career opportunities and housing,” biased data used to develop risk assessment tools²²⁶ can perpetuate racial injustice.²²⁷ While the advent of the peer-to-peer economy held promises to level the playing field, the investment of venture capital into new forms of payment processing has further tipped the balance of who controls financial infrastructure and who can access it.

In understanding risk profiling and flagging, we ought to remember that financial discrimination is by no means a new phenomenon. As technology and infrastructure develop, so does our misplaced faith that these systems will be more just than previous systems, as well as the infrastructure to deploy discrimination at a greater scale. Critical race and technology scholar Ruha Benjamin refers to this process as the “the New Jim Code” and describes it as “the employment of new technologies that reflect and reproduce existing inequities but that are promoted and perceived as more objective or progressive than the discriminatory systems of a previous era.”²²⁸ The technology and infrastructure used to aid in continuing financial inequities may be new, but the process of gatekeeping wealth is anything but.

²²² Robert Bartlett et al., *Consumer-Lending Discrimination in the FinTech Era*, 143 J. FIN. ECON. 30-56 (2022).

²²³ Hua Sun & Lei Gao, *Lending Practices to Same-Sex Borrowers*, 116 PROC. NAT'L ACAD. SCI. U.S. 9293 (2019).

²²⁴ See generally SHOSHANA ZUBOFF, *THE AGE OF SURVEILLANCE CAPITALISM: THE FIGHT FOR A HUMAN FUTURE AT THE FRONTIER OF POWER* (2019) (describing surveillance capitalism).

²²⁵ See Nopper, *supra* note 193, at 174-177.

²²⁶ Natalie Campisi, *From Inherent Racial Bias to Incorrect Data—The Problems with Current Credit Scoring Models*, FORBES: ADVISOR (Feb. 26, 2021, 9:00 AM), <https://perma.cc/UR3P-LV2D>.

²²⁷ Sarah Ludwig, *Credit Scores in America Perpetuate Racial Injustice. Here's How*, GUARDIAN (Oct. 13, 2015, 10:14), <https://perma.cc/Q6GB-ZGM3>.

²²⁸ RUHA BENJAMIN, *RACE AFTER TECHNOLOGY: ABOLITIONIST TOOLS FOR THE NEW JIM CODE 1*, 5-6 (Ruha Benjamin ed., 2019) (emphasis omitted); see also Ruha Benjamin, *Introduction: Discriminatory Design, Liberating Imagination*, in *CAPTIVATING TECHNOLOGY: RACE, CARCERAL TECHNOSCIENCE, AND LIBERATORY IMAGINATION IN EVERYDAY LIFE 1*, 3-4 (Ruha Benjamin ed., 2019).

E. Digital control and gentrification

Notably, risk assessments are being conducted in a new financial ecosystem marked by the international privatization of payment platforms. This privatization has involved covert decision-making, increased data collection from users, and the exporting of U.S. legal and policy frameworks to jurisdictions around the world.²²⁹ The fallout from this is especially apparent in the experiences of sex workers. Where U.S. ideologies and frameworks (such as the criminalization and stigmatization of sex work) are embedded into the policies of payment platforms, those hegemonic policies are applied to other jurisdictions (such as Australia), despite completely different regulatory environments. As tech platforms control the sites of digital labor and fintech companies control access to payment processors (and the state puts pressure on both), there is little accountability for how policies on risk are developed or deployed.

Poor sex work policy in the U.S. has been internationally exported to facilitate digital control—the importation of digital technology and communication equipment for political, economic and social domination and subjugation of another.²³⁰ Presently, U.S. tech companies dominate the financial industry through their “centralized ownership and control of the three core pillars of the digital ecosystem: software, hardware, and network connectivity.”²³¹ In effect, what Jillian York describes as their “Silicon Values”²³²—of which whorephobia²³³ is central—are ce-

²²⁹ Multinational technology companies can extend different forms of domination and control, often in collaboration with state interests. For example, practices of policy exportation and data extraction have been discussed via various frameworks, including digital colonialism and data colonialism. *See, e.g.,* Nick Couldry & Ulises A. Mejias, *Data Colonialism: Rethinking Big Data's Relation to the Contemporary Subject*, 20 TELEVISION & NEW MEDIA 336 (2019); *see also* Kwet, *supra* note 73, at 3 (drawing connections between U.S. empire, technology, and corporate interests in extending apparatuses of surveillance to govern different aspects of social and political life). In this Article, we focus upon corporate control and the exportation of U.S. law and policy. While contemporary forms of technological governance and control extend ongoing systems of imperialism and colonialism, this analysis bears closer attention and detail. For discussions of the connections between imperialism, capitalism, and the governance and control of sexuality, *see* ANNE MCCLINTOCK, *IMPERIAL LEATHER: RACE, GENDER, AND SEXUALITY IN THE COLONIAL CONTEST* (1995) and ANJALI ARONDEKAR FOR THE RECORD: *ON SEXUALITY AND THE COLONIAL ARCHIVE IN INDIA* (2009).

²³⁰ Herbert I. Schiller, *Communication and Cultural Domination*, INT'L J. POL., Winter 1975/1976 at 1, 45, 81.

²³¹ *See* Kwet, *supra* note 73, at 13-14.

²³² YORK, *supra* note 51, at 145-63.

²³³ We use The Support Ho(s)e Collective's definition of whorephobia, “[a]s the name implies, this term refers to the fear and hatred of those involved in the sex trades, as well as what they represent as challenges to hetero/homonormative conceptions of amative relation-

mented into the prevailing international ecosystem of the internet. In this context, the architecture of software (including that of payment processors) becomes even more significant as a regulatory force, as it has the ability to shift policy via what legal scholars have called *Lex Informatica*.²³⁴ Through this process, digital infrastructure becomes a parallel regulatory regime, in which technology developers create rules that “[exert] a powerful influence on the behavior, policies and freedoms of people using digital technology”²³⁵—including sex workers.

The discriminatory policies of payment processors are even more acute because of the limited options for sex workers in accessing viable payment infrastructure. This is largely the result of what feminist media studies scholar Jessa Lingel calls the “gentrification of the internet,” where online spaces are “increasingly dictated by corporations instead of being driven by communities.”²³⁶ Just as in urban gentrification, the internet’s gentrification “exaggerates inequality and normalizes certain social values while excluding others”²³⁷ through a displacement of communities that do not benefit the corporate interests. The predominant architectural development of digital gentrification is called the “walled garden,” or a privately owned digital space acting as public commons.²³⁸ In this way, the extractive nature of surveillance capitalism can be hidden behind the social veneer of payment processors. Walled gardens coincide with the corporatization of the “open” internet toward ad-enhanced platforms which sociologist Zeynep Tufekci states are “incentivizing the platforms to use their massive troves of data with the power of computational inference to become better spy machines, geared toward ad delivery.”²³⁹

Platforms therefore access more revenue by attracting more users—the more individuals interact through any given platform, the bigger the dataset to train machine learning algorithms that platforms can use “to make the ads more effective for the advertisers, while also controlling the experience of the users to keep the platform advertising-friendly, and to keep the user from leaving the platform.”²⁴⁰ As Jennifer Cobbe ex-

ships and Sexualities.” SUPPORT HO(S)E, SEX WORK CENTERED GUIDE FOR ACADEMICS 24 (2021), <https://perma.cc/GW9U-MQ54>.

²³⁴ Joel R. Reidenberg, *Lex Informatica: The Formulation of Information Policy Rules Through Technology*, 76 TEX. L. REV. 553, 553-55 (1998).

²³⁵ Kwet, *supra* note 73, at 8.

²³⁶ JESSA LINGEL, THE GENTRIFICATION OF THE INTERNET: HOW TO RECLAIM OUR DIGITAL FREEDOM 2 (2021).

²³⁷ *Id.* at 9-10.

²³⁸ Zeynep Tufekci, *As the Pirates Become CEOs: The Closing of the Open Internet*, 145 DÆDALUS, J. AM. ACAD. ARTS & SCIS. 65, 67-74 (2016).

²³⁹ *Id.* at 72.

²⁴⁰ *Id.* at 74.

plains, platforms “seek to appeal to a wide mainstream audience” as a result of their commercial priorities of growth, market dominance, and profit.²⁴¹ This has motivated discrimination against non-mainstream groups and communities through content suppression, “effectively excluding sex workers and marginalizing women and LGBT people,”²⁴² despite building their commercial viability on content created by those populations. Platforms have turned toward automated moderation technology to detect “low-quality” content in order to keep undesirables out of their walled gardens.²⁴³ Training these algorithmic models has required dragnets of data collection then parsed and categorized, aided by already-existing metadata sets that help identify potentially “risky” users based on their movements online, so that they could be deployed toward digital gentrification.²⁴⁴

In the past decade, the finance industry has adopted walled-garden design toward capitalizing on transactional data, by privatizing the role of a vital public utility (payment) and transforming it into a surveillance commodity. As Lana Swartz writes, “the goal of most new payment systems is to create a new set of sieves for collecting data,”²⁴⁵ requiring the mass adoption of new payment platforms in order to fulfill this objective. By situating payment as the communication and media of money, Swartz documents how the logics of social media are applied to financial activity, creating “a new genre of personal data to add to companies’ existing portfolios of user surveillance”²⁴⁶ collected across the myriad connected media systems that turn digital “ephemera” into extractable metadata “to be aggregated, analyzed, packaged, and sold.”²⁴⁷ As Bardot Smith described in 2015, “[t]echnology is enveloping finance, becoming the medium and the mode of money itself.”²⁴⁸ It is therefore no surprise that the deployment of the logics of social media on financial activity leads to discrimination against certain “algorithmic

²⁴¹ Jennifer Cobbe, *Algorithmic Censorship by Social Platforms: Power and Resistance*, 34, PHIL. & TECH. 739, 754 (2020).

²⁴² *Id.* at 754.

²⁴³ See generally Rosalie Gillett et al., *Safety for Whom? Investigating How Platforms Frame and Perform Safety and Harm Interventions*, SOCIAL MEDIA & SOC’Y, Oct.-Dec. 2022, Dec. 15, 2022, at 1, 7-8.

²⁴⁴ See generally Shahriar Akter, et al., *Algorithmic Bias in Data-Driven Innovation in the Age of AI*, INT’L J. INFO. MGMT., Oct. 2021, Article 102387, at 1; Robert Gorwa, et al., *Algorithmic Content Moderation: Technical and Political Challenges in the Automation of Platform Governance*, BIG DATA & SOC’Y, Jan.-June 2020, Feb. 28, 2020, at 1.

²⁴⁵ SWARTZ, *supra* note 70, at 124.

²⁴⁶ SWARTZ, *supra* note 70, at 125.

²⁴⁷ SWARTZ, *supra* note 70, at 125.

²⁴⁸ Smith, *supra* note 50.

identities” that have been produced by deciphering metadata through preexisting social categories such as gender, race, and class.²⁴⁹

V. REGULATORY INCENTIVES AND POLITICAL PRESSURES

Aside from the capitalistic motives discussed above, what drives and perpetuates financial discrimination? In this section we outline the regulatory and political environments that are influential upon payment processors. Financial service providers cite consistent justifications for their anti-sex work policies, the most common of which are their compliance obligations and the heavy penalties for breach. Banks often cite the need to meet legal obligations to prevent criminal activity such as fraud, money-laundering, trafficking, terrorism, or child sexual abuse/exploitation material (“CSAM/CSEM”). For example, the National Australia Bank, who claim they still serve independent sex workers but who decided in 2019 to stop servicing brothels and escort agencies, claim that this decision was made to meet requirements under the Anti-Money Laundering and Counter-Terrorism Financing Act.²⁵⁰ By comparison, payment processors often defer responsibility to the conditions of the credit card companies. Intuit, for example, prohibits users who use the service in a way that causes Intuit to be non-compliant with “relevant laws, sponsor bank requirements, and card or payment association (e.g. VISA, MasterCard, American Express, NACHA) rules and policies.”²⁵¹ WePay stated that they had to follow “rules set by banks, Visa & Mastercard” and claimed that their practice of monitoring customer websites and social media was a matter of obligation and compliance rather than choice.²⁵² Below we discuss how different pressures set up a regulatory environment that incentivize financial providers to discriminate against sex workers.

A. *Regulatory oversight and intermediary power*

Banks, payment processors, and cryptocurrencies each have different regulatory bodies and processes that allow for varying levels of discretion and consumer protection. In the U.S., banks, depending on how they are chartered, are regulated on both the state and federal level by multiple institutions, including the Federal Reserve, Federal Deposit Insurance Corporation (“FDIC”), Office of the Comptroller of the Curren-

²⁴⁹ See SWARTZ, *supra* note 70, at 128.

²⁵⁰ Frost, *supra* note 192; *NAB Charged with ‘Slut-Shaming,’* *supra* note 138.

²⁵¹ INTUIT QUICKBOOKS, *supra* note 161.

²⁵² SWARTZ, *supra* note 70, at 78-79.

cy (“OCC”), the Office of Thrift Supervision (“OTS”)²⁵³ and the Securities and Exchange Commission (“SEC”).²⁵⁴ Banks also have additional consumer protections, such as deposit insurance. By contrast, payment processors can range in terms of how and where they operate, the services offered, and the form of business they conduct, so there is not an easy answer to how they are regulated and by whom.²⁵⁵ The rise of third-party intermediaries, and the increasing reliance upon them for increasingly diverse business models, has often created legal and regulatory confusion. Cryptocurrencies are currently somewhat federally regulated and some states have passed regulations; debate has begun in both the U.S. Congress and Administration to develop a framework that can more fully regulate the cryptocurrency industry.²⁵⁶

As such, intermediaries have unprecedented power over who can engage in online transactions and hold extraordinary political and financial power to set standards. As legal scholar Annemarie Bridy writes, “payment intermediaries are uniquely positioned to police online activity because approximately eighty percent of online transactions use a credit or debit card as a method of payment, and most of those transactions go through one of two payment systems: Mastercard or Visa.”²⁵⁷ The rise of intermediary power has been the concern of legal and internet scholars because of their status as private organizations with the ability to control flows of both information and capital.²⁵⁸ Payment intermediaries hold great power to shut down organizations and hinder social and political movements based not on court orders but on “a series of business decisions by corporate executives and their risk managers.”²⁵⁹

The lack of consumer protection is compounded by an inequitable distribution of funding. While groups like the Financial Crimes Enforcement Network (“FinCen”), which is a criminal-prosecution focused

²⁵³ *Supervision and Regulation*, THE FED. RESRV., <https://perma.cc/T5PE-HV48> (last visited Sept. 28, 2022).

²⁵⁴ Michael Schmidt, *Financial Regulators: Who They Are and What They Do*, INVESTODEPIA (Dec. 6, 2021), <https://perma.cc/EKK8-CPGP>.

²⁵⁵ See generally JOHANNES EHRENTAUD ET AL., FIN. STABILITY INST., BANK FOR INT’L SETTLEMENTS, FINTECH AND PAYMENTS: REGULATING DIGITAL PAYMENT SERVICES AND E-MONEY (2021).

²⁵⁶ See Conor Donovan & Patrick Jarenwattananon, *There’s a New Plan to Regulate Cryptocurrencies. Here’s What You Need to Know*, NPR (June 14, 2020, 5:00 AM), <https://perma.cc/XS24-NNM5>.

²⁵⁷ Annemarie Bridy, *Internet Payment Blockades*, 67 FLA. L. REV. 1523, 1525-1526 (2016).

²⁵⁸ NICOLAS P. SUZOR, LAWLESS: THE SECRET RULES THAT GOVERN OUR DIGITAL LIVES 90-92 (2019).

²⁵⁹ See, e.g., Bridy, *supra* note 257.

unit situated in the U.S. Department of the Treasury, are receiving increasing attention and funding,²⁶⁰ regulatory bodies meant for protection of consumers are frequently embattled. In 2018, the Trump administration requested a \$0 budget for the Consumer Financial Protections Bureau,²⁶¹ a body meant to address regulatory abuse by financial institutions. Under the new administration, this period of defunding has ripple effects that last far longer, including years of lowered or non-enforcement.²⁶² This creates an additional power imbalance that leans towards inappropriate levels of discretion to the detriment of consumers, in service to the limitations of legal and financial liability for institutions. Much like the rest of U.S. systems, American financial institutions are set up to serve the needs of policing over the needs of people.

Federally, compliance by financial institutions' compliance is governed by a number of laws and guidance from administrative institutions. Several relevant pieces of legislation, including the Bank Secrecy Act and the Right to Financial Privacy Act, passed in the 1970s and shaped much of the financial regulation we see today. These two pieces of legislation first developed a system of record keeping that was required on consumers' financial transactions²⁶³ as well as created a process through which the government would have to go to access information about consumers.²⁶⁴ The idea was to balance oversight with personal privacy from government intrusions, setting up banks as the ones engaged in surveilling consumers, while protecting them from government invasion. Throughout the '80s and '90s, the rise of mergers and acquisitions consolidated the financial industry.²⁶⁵ The growth of technology and the removal of regulations around state-to-state banking allowed for the consolidation of actors in the financial system,²⁶⁶ meaning that companies were larger and therefore held more power over the financial system, and were less likely to have the intimate relationships

²⁶⁰ Izabella Babchinetskaya, *U.S. House Increases FinCEN's Funding by Over 30%*, BALLARD SPAHR LLP: MONEY LAUNDERING WATCH (July 28, 2022), <https://perma.cc/8D5F-GBE4>.

²⁶¹ Donna Borak, *Trump Consumer Protection Chief Requests \$0 in Funding*, CNN BUS. (Jan. 18, 2018, 4:05 PM), <https://perma.cc/US8R-L7GF>.

²⁶² Press Release, Consumer Fed'n of Am., CFPB Law Enforcement Plummet Under Trump Administration, (Mar. 11, 2019), <https://perma.cc/VN7V-72AX>.

²⁶³ *Bank Secrecy Act (BSA)*, OFF. OF THE COMPTROLLER OF THE CURRENCY, <https://perma.cc/9RZ6-Y5JH> (last visited Nov. 4, 2022).

²⁶⁴ *Right to Financial Privacy Act*, in FDIC CONSUMER COMPLIANCE EXAMINATION MANUAL VIII-3.1 (2006), <https://perma.cc/H93Z-XRAH>.

²⁶⁵ See FED. RES. BANK OF CLEVELAND, *Bank Mergers and Acquisitions*, ECON. TRENDS, May 1996 at 17-18, <https://perma.cc/MQ2J-YYHQ>.

²⁶⁶ See Alexei V. Ovtchinnikov, *Merger Waves Following Industry Deregulation*, J. CORP. FIN., 51, 51-53 (2013).

with consumers that were relied upon in envisioning the 1970s approach.²⁶⁷ During the financial market and housing collapse of 2008, government bailouts focused on larger banks for capital investment, meaning even greater consolidation over the last 20 years, further centralizing power in a few national banks.²⁶⁸ The Federal Reserve Bank of Cleveland reported that “[d]uring the 2000s, the number of institutions declined by 725, or 11.5%; however, during the 2010s, the number of institutions dropped sharply by 1,616, or 28.9%.”²⁶⁹ Currently, four banks control 50% of all U.S. banking assets: JPMorgan Chase, Wells Fargo, Citibank, and Bank of America.²⁷⁰

Pay apps such as Venmo and PayPal are responding to an antiquated system of oversight and liability which was developed while the financial industry was significantly more diverse, and physically and locally bound. But payment apps are, by nature, digital instead of physical, lacking in any significant relationship to an individual customer and thriving on accessibility to people who are more likely to be excluded from traditional banking. However, pay apps have no assumption of consumer relationships or accountability similar to what was originally envisioned for banks. As we have increasingly moved online and into digital spaces, regulations on both types of financial institutions, criminalization and internet surveillance have not kept pace with the way that we are living, and atrophied ideas are still the main mechanisms of regulation. Meanwhile, financial institutions are, like other markets,²⁷¹ incentivized to monetize their legal liability and oversight to offset the cost of potential legal ramifications such as litigation costs or fines for lax oversight, which is not mitigated by an open market. This leads to predatory fees for marginalized communities who lack options, including sex workers. The same forces are at work among fast-lending institutions which target low-income earners and people experiencing poverty, wire

²⁶⁷ See Laura K. Donohue, *Anti-Terrorist Finance in the United Kingdom and United States*, 27 MICH. J. INT’L L. 303, 356-57 (2006).

²⁶⁸ See generally Tommy Andres, *Divided Decade: How the Financial Crisis Changed Banking*, MARKETPLACE (Dec. 21, 2018), <https://perma.cc/69ZN-AT8D>.

²⁶⁹ Kyle Fee & Erik Tiersten-Nyman, *Has Bank Consolidation Changed People’s Access to a Full-Service Bank Branch?* 2 (Fed. Rsv. Bank Cleveland, Cmty. Dev. Reps., Working Paper No. 20211006, 2022).

²⁷⁰ Alicia Phaneuf, *Top 10 Biggest US Banks by Assets in 2022*, INSIDER INTEL. (Jan. 2, 2022), <https://perma.cc/TG8E-G3CK>; see also *How 37 Banks in 1990s became 4 Banks in 2009; Mega Consolidation in the US*, PROVE (June 2, 2021), <https://perma.cc/UQ9Z-UBZ6>.

²⁷¹ See Claire Andre & Manuel Velasquez, *Who Should Pay? The Product Liability Debate*, MARKKULAH CTR. FOR APPLIED ETHICS AT SANTA CLARA U. (Nov. 20, 2015), <https://perma.cc/E975-ZSFT> (describing how markets are incentivized to monetize their legal liability).

transfer services which target migrant workers sending remittances,²⁷² or those sending money to people in custody.²⁷³

B. The wars on trafficking and terrorism

As outlined above, financial discrimination is tied to perceptions and suspicions of criminalization along lines of race, gender, immigration status, and class. Financial discrimination has been incentivized by heavily politicized, high-profile campaigns against money laundering, fraud, counterfeiting, terrorism, human trafficking, and organized crime as categories of illicit and criminal activity. Here we focus on trafficking and terrorism (or the figures of trafficker/trafficked and terrorist) as particular criminal categories that justify the expansion of carceral control.²⁷⁴ Since the 1970s, consolidation and deregulation has led to a financial system with unchecked power and almost no oversight, with liability-based requirements to engage in policing and surveillance of consumers. The international agenda to eliminate forced labor and labor exploitation through the framework of combatting “modern slavery” and human trafficking has primarily focused on adding criminal provisions and increasing punishment.²⁷⁵ Trafficking is internationally defined as the exploitation of a person through force, fraud, or coercion.²⁷⁶ We are

²⁷² See, e.g., Drake Bennett & Lauren Etter, *Give Us Your Tired, Your Poor, Your Huddled Masses Yearning to Send Cash*, BLOOMBERG: BUSINESSWEEK (June 16, 2017, 5:00 AM), <https://perma.cc/9JLX-3THV> (“For years the company has been tracing the movements of ‘double belongs’ and the remittances they send home. These émigrés, expatriates, immigrants, and refugees—the uprooted—are Western Union’s people, and right now we’re living in Western Union’s world.”).

²⁷³ See generally Tommaso Bardelli et al., *How Corporations Turned Prison Tablets into a Predatory Scheme*, DISSENT (Mar. 7, 2022), <https://perma.cc/JKS7-XTST>.

²⁷⁴ See CHUN, *supra* note 48, at 96 (describing how the figures of the child abuser and pedophile are used to stoke public outrage and legislation on police control and regulation of the Internet).

²⁷⁵ In the U.S., The Trafficking Victims Protection Act (“TVPA”) of 2000 establishes trafficking as a federal crime and establishes offices for monitoring as a means of prevention. Stopping forced labor is under the auspices of the Department of Homeland Security, the most heavily armed federal agency that was created in the wake of 9/11 to combat terrorism through anti-immigration measures. Trafficking Victims Protection Act of 2000, 22 U.S.C. §§ 7101-7114; see also *Human Trafficking*, U.S. DEP’T OF HOMELAND SEC. (Nov. 3, 2022), <https://perma.cc/F5MA-L7XW>.

²⁷⁶ Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention Against Transnational Organized Crime, art. III, § 1, *opened for signature* Dec. 12, 2000, 2237 U.N.T.S. 319 (entered into force Dec. 25, 2003) (defining trafficking as the recruitment, transportation, transfer, harbor, or receipt of persons by threat or use of force, coercion, abduction, fraud, deception, abuse of power, manipulation of vulnerability, giving or receiving payments or benefits to achieve consent of a person having control over another, for the purpose of exploitation, in-

not condoning practices of forced labor, but rather how approaches to address these issues facilitate mechanisms of control and governance and justify state violence. These structures and systems for policing and criminalization individualize acts of violence instead of recognizing the structural inequities that created the circumstances in which these situations happened.²⁷⁷ Further, the anti-trafficking movement has had a sensationalist and disproportionate focus on trafficking into commercial sex compared to other areas of labor (such as in hospitality or agriculture), or other forms of human trafficking (such as child soldiers or organ trafficking), with a wealth of resources diverted towards policing the sex industry.²⁷⁸ Indeed, in 2011 the former United Nations Rapporteur on Trafficking reported the need to desexualize the discourse on trafficking, noting that it was often conflated with sex work.²⁷⁹ In the U.S., prosecutions of trafficking in 2020 by the Department of Justice were 93% for trafficking into commercial sex, while the remaining 7% were in all other areas of labor combined.²⁸⁰

Modern discourse on trafficking is rooted in the myth of “white slavery,” a narrative created in the mid-1800s by advocates who sought to utilize language and fervor around anti-slavery advocacy but focus on white women as the central victim to also advance agendas around anti-miscegenation.²⁸¹ In the U.S., additional discourse on “modern slavery” is founded in the Page Act of 1875 and the White Slave Traffic Act of 1910 (also known as the Mann Act, which made it a crime to transport women across state lines “for the purpose of prostitution or debauchery, or for any other immoral purpose”).²⁸² These Acts imposed “restrictive,

cluding exploitation of the prostitution of others, other forms of sexual exploitation, forced labor or services, slavery, servitude, or organ removal).

²⁷⁷ See, e.g., KAY WITHLOCK & MICHAEL BRONSKI, *CONSIDERING HATE* 71-99 (2016) (discussing hate crime legislation’s role in furthering criminal categories and also individualizing acts of harm).

²⁷⁸ See, e.g., Prabha Kotiswaran, *The Sexual Politics of Anti-Trafficking Discourse*, 29 *FEMINIST LEGAL STUD.* 43, 52-53 (2021).

²⁷⁹ Press Release, Office of the High Commissioner of Human Rights, Australia / Trafficking: UN Expert Calls for Greater Focus on the Rights and Needs of Victims, (Dec. 1, 2011), <https://perma.cc/485J-EUQQ>.

²⁸⁰ KYLEIGH FEEHS & ALYSSA CURRIER WHEELER, *HUM. TRAFFICKING INST., 2020 FEDERAL HUMAN TRAFFICKING REPORT 2* (2021).

²⁸¹ Alexandra Levy, *The Virtues of Unvirtuous Spaces*, 50 *WAKE FOREST L. REV.* 403, 430 (2017) (citing Jo Doezema, *Loose Women or Lost Women? The Re-emergence of the Myth of White Slavery in Contemporary Discourses of Trafficking in Women*, 18 *GENDER ISSUES* 23 (2000).) (“[T]he ‘white slaver’ was an invented villain, a metaphor for people’s fears about dramatic social changes and a fiction meant to spook women back into their homes.”).

²⁸² Eric Weiner, *The Long, Colorful History of the Mann Act*, NPR (Mar. 11, 2008, 2:00PM), <https://perma.cc/V9XG-A3WE>; see also 18 U.S.C. § 2421(a) (“Whoever know-

racialized immigration laws and racialized federal policing of domestic movement.”²⁸³ The 2000 International Protocol to Suppress, Prevent and Punish Trafficking in Persons, Especially Women and Children (known as “the Palermo Protocol”) was highly contested at the time of its drafting, with sex workers concerned about how it would be used to police individual sex workers.²⁸⁴ The protocol drew from previous international anti-trafficking instruments that conflated sex work with coercion and exploitation, including the 1979 Convention on the Elimination of Discrimination Against Women (“CEDAW”), which has been critiqued by sex workers for its clause requiring state parties, in Article 6, to “suppress all forms of traffic in women and exploitation of prostitution of women.”²⁸⁵ What made the Palermo Protocol a sea change, though, was that it squarely moved the anti-trafficking efforts from international bodies into a criminal justice framework. Whereas previously, international conventions had loosely asked countries to address the issue, Palermo intentionally turned trafficking into “a problem of transnational crime requiring a coordinated response and that imposed specific obligations of criminalization and cross-border collaboration,” instead of a rights-focused or survivor-informed framework.²⁸⁶

As such, the legislative approaches implemented by nation states have taken a decisively carceral approach to combat human trafficking, rather than say, approaches that examine root causes of displacement and forced migration or labor protections. This has involved raids and policing of migrant, Asian, and racialized sex workers and their workplaces.²⁸⁷ Interventions have largely focused on detection and prosecution rather than prevention or support – in Australia, for example, victim support has previously been reserved for those who agree to assist in po-

ingly transports any individual in interstate or foreign commerce, . . . with intent that such individual engage in prostitution, or in any sexual activity for which any person can be charged with a criminal offense, or attempts to do so, shall be fined . . . or imprisoned . . . or both . . .”).

²⁸³ Lee, *supra* note 3, at 1199.

²⁸⁴ Jo Doezema, *Now You See Her, Now You Don't: Sex Workers at the UN Trafficking Protocol Negotiation*, 14 SOC. & LEGAL STUD. 61, 62 (2005).

²⁸⁵ Dec. 18, 1979, 1249 U.N.T.S. 13. For sex worker critiques of Article 6, *see, e.g.*, INTERNATIONAL WOMEN'S RIGHTS ACTION WATCH ASIA PACIFIC, FRAMEWORK ON RIGHTS OF SEX WORKERS & CEDAW 14-15 (2013), and GLOBAL NETWORK OF SEX WORK PROJECTS, CEDAW: THE SMART SEX WORKER'S GUIDE TO THE CONVENTION ON THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN 7-9 (2018).

²⁸⁶ Anne T Gallagher, *Two Cheers for the Trafficking Protocol*, ANTI-TRAFFICKING REV., Apr. 2015 at 19 (2015).

²⁸⁷ *See generally* RED CANARY SONG ET AL., UN-LICENSED: ASIAN MIGRANT MESSAGE LICENSURE AND THE RACIALIZED POLICING OF POVERTY (2022).

lice investigations.²⁸⁸ Again, these interventions are largely tied to the stigmatization of sex work. For example, in the U.S., the Trafficking Victims Protection Act of 2000 (“TVPA”), which offers support in the form of access to T-visas and/or non-prosecution of prostitution charges to victims who work with law enforcement toward increased prosecution and punishment of their traffickers, was passed in part through coordinated advocacy work by both the Christian right and mainstream feminists, such as Gloria Steinem and the head of Planned Parenthood Gloria Feldt.²⁸⁹ As part of their advocacy, this coalition petitioned the Clinton administration to expand domestic definitions of trafficking to include any woman transported for the purposes of commercial sexual exploitation, with or without consent.²⁹⁰ Additionally, the anti-

²⁸⁸ See Marie Segrave & Sanja Milivojević, *Auditing the Australian Response to Trafficking*, 22 CURRENT ISSUES CRIM. JUST. 63, 68-69 (2010) (explaining that until June 2009, the victim support program was conditional on the progression of cases through the criminal justice system, which operates to effectively offer support only for victims who assist the State with a criminal case).

²⁸⁹ See Stephen Lemons, *Trafficking in Human Flesh*, SALON (Oct. 16, 2000, 7:30 PM), <https://perma.cc/CUJ2-DLLR> (explaining the broad support of the Trafficking Victims Protection Act from “both Jewish and evangelical groups,” and “a broad coalition of people including Bill Bennett, Gloria Steinem, Rabbi David Sapperstein, Ann Jordan and [Prison Fellowship Ministries founder] Chuck Colson”); Leah Platt, *Regulating the Global Brothel*, AM. PROSPECT (Dec. 19, 2001), <https://perma.cc/7JDV-MUX7>; Tony Carnes, *‘Odd Couple’ Politics*, CHRISTIANITY TODAY (Mar. 6, 2000) <https://perma.cc/7XKJ-J7YK>.

²⁹⁰ See William J. Bennett & Charles W. Colson, *The Clintons Shrug at Sex Trafficking*, WALL STREET J. (Jan. 10, 2000, 12:01 AM), <https://perma.cc/2DJH-ZJ77>; see also Hanna Roisin & Steven Mufson, *Bitter Issue in Crime Treaty Debate: What Is Prostitution?*, WASH. POST (Jan. 15, 2000), <https://perma.cc/7MD4-S5Y2>. The expansion of the definition of trafficking has bled into other areas of advocacy and academic work. For example, Janice Raymond, known for her trans-exclusionary feminism, received a Ford Foundation grant to study trafficking, arguing that legitimizing sex work will subject women to sexual exploitation. Press Release, U. of Mass. Amherst, Professor from UMass Amherst Receives Two Major Grants to Study Sex Trafficking (Apr. 12, 1999), <https://perma.cc/2APK-SKFR>; Jael Holzman, *The Unlikely Political Alliance Against Trans Care*, POLITICO (Mar. 8, 2022, 4:04 PM), <https://perma.cc/D8JM-J7AL>. In 2022, Gloria Steinem wrote a letter to New York Governor Kathy Hochul and New York City Mayor Eric Adams suggesting that following the long-awaited closure of New York City’s notoriously inhumane prison facility on Rikers Island, the Lincoln Correctional Facility in Harlem should be re-opened to house a “Women’s Center for Justice” in which to incarcerate not only women, but also gender-expansive people. *Gloria Steinem Endorses the #BEYONDrosies Campaign*, WOMEN’S COMMUNITY JUST. ASS’N (June 15, 2022), <https://perma.cc/7RLG-QHPA>. Steinem describes the imagined facility as “gender responsive, trauma-informed,” and perhaps most outrageously, as “set[ing] a precedent for decarceration.” *Id.* Formerly incarcerated activists opposing the new jail in Harlem point out that “a ‘trauma-informed’ jail is oxymoronic.” Ella Fassler, *Design Firm Wants to Build ‘Feminist’ Jails and Prisons. Abolitionists Say ‘No.’*, TRUTHOUT (Aug. 21, 2022) <https://perma.cc/S5G4-ULS9> (citations omitted). Abolitionist activists opposed the plan, explaining that building new jails only increases incarceration and that “[n]o

trafficking movement has funded what Laura Agustín refers to as a “rescue industry” that has funded “saviors” and helping professions that do not necessarily serve the needs of sex workers.²⁹¹ In many countries, domestic anti-trafficking legislation has become increasingly broad. Some acts to address trafficking no longer consider whether a person consented to the work or travel,²⁹² removing all agency from the individual. Some country definitions of trafficking do not even require the presence of a third party.²⁹³

The force of the anti-trafficking movement has been instrumental to financial discrimination because banks and payment processors are now required to comply with new swathes of new legislation. In 2018, the U.S. Fight Online Sex Trafficking Act / Stop Enabling Sexual Exploitation Act provided a legal incentive for payment processors to discriminate, making it illegal for any interactive computer service to facilitate or promote prostitution.²⁹⁴ Migrant sex workers, advocating for “rights not rescue,” have long critiqued the criminal justice approach to trafficking.²⁹⁵ When the Modern Slavery Act 2018 was introduced in Australia, it received serious criticism from sex worker organizations. In their public submission, Scarlet Alliance, Australian Sex Workers Association, argued that instead of introducing this legislation, migrant sex workers need access to safer migration pathways, access to a federal compensation scheme, access to victim protection regardless of whether they assist with police investigations, the removal of police as regulators of the sex industry, and evidence-based awareness campaigns.²⁹⁶ They argued

matter what, a jail will only be a space of harm. . . . [y]ou will never find healing when you are isolated from the people that help you feel and be cared for.” *Id.*

²⁹¹ See LAURA MARIA AGUSTÍN, *SEX AT THE MARGINS: MIGRATION, LABOR MARKETS AND THE RESCUE INDUSTRY* 4, 39 (2007). See also LAM, *supra* note 199, at 2.

²⁹² U.N. Office on Drugs and Crime, Issue Paper, *The Role of ‘Consent’ in the Trafficking in Persons Protocol*, at 5, (2014), <https://perma.cc/NKA2-QKND>.

²⁹³ This is true, for example of the United States, which added “patronizes” and “solicits” to the TVPA in 2015, allowing the prosecution of sex work clients regardless of whether a third party is responsible for the required “force, fraud, or coercion” or whether one of those elements could be attributed to the client themselves. See *Key Legislation*, U.S. DEP’T. OF JUST. (Sept. 28, 2022), <https://perma.cc/XA98-M2MC>; see also *Fact Sheet: Human Trafficking*, OFF. ON TRAFFICKING IN PERSONS, U.S. DEP’T OF HEALTH & HUM. SERVS., <https://perma.cc/Q8XN-JK6N> (last visited Dec. 23, 2022) (explaining how the Department of Justice defines force, fraud, and coercion).

²⁹⁴ See Albert et al., *supra* note 7, at 1088-91.

²⁹⁵ See Chi Adanna Mgbako, *The Mainstreaming of Sex Workers’ Rights as Human Rights*, 43 HARV. J.L. & GENDER 91, 106-10 (2020); Luca Stevenson, *Rights Note Rescue for Migrant Sex Workers*, OPENDEMOCRACY (May 14, 2019, 7:00 AM), <https://perma.cc/T6CU-KN83>.

²⁹⁶ Submission from Scarlet Alliance to the Joint Standing Committee on Foreign Affairs, Defence and Trade’s inquiry into establishing a Modern Slavery Act in Australia

that if Australia was truly concerned with the experiences of migrant workers at risk of trafficking, they ought to ratify the 1990 International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families.²⁹⁷ Their submission notes the underlying problems with the Palermo Protocol and other instruments such as the Convention of Elimination of all forms of Discrimination Against Women, which position sex work as exploitation rather than work and therefore fail to recognize or address poor labor conditions where they are present in sex work.²⁹⁸ Further, they point to the ways in which anti-trafficking policy has served an anti-migration agenda, and the lack of training, markers, and consistency in identifying and supporting victims and survivors of exploitation.²⁹⁹ These definitions are significant because—as we discuss below—they influence how banks and payment processors go on to identify and mitigate indicators of risk.

The war on trafficking has also been inextricably linked to the war on terror. In 2000, when the TVPA was signed into law in the U.S., the Act used the framework offered by the Palermo Protocol for its approach to trafficking: prioritizing criminal policing and surveillance and offering almost no protections to policed communities or services to victims.³⁰⁰ A year later, on September 11, 2001, the World Trade Center was attacked by international, funded but non-state actors with ties which crossed borders. From that moment, both trafficking and terrorism fell under the umbrella of transnational, organized crime, and whatever mechanisms were available to fight one issue could serve both ends, forever tying the anti-trafficking and anti-terrorism campaigns as conceived of by the United States.³⁰¹ By putting anti-trafficking efforts under the purview of DHS, trafficking became a problem of national security.³⁰² As an entity, Homeland Security tethers together anti-immigration and counterterrorism concerned with policing unwanted people within national borders.³⁰³ Counter-terrorism measures continue

(April 28, 2017), <https://perma.cc/EJX4-V92L> (on file with the CUNY Law Review) [hereinafter Scarlet Alliance Submission].

²⁹⁷ *Id.* at 7-8.

²⁹⁸ *Id.* at 13; *see also* INTERNATIONAL WOMEN'S RIGHTS ACTION WATCH ASIA PACIFIC, *supra* note 285; GLOBAL NETWORK OF SEX WORK PROJECTS, *supra* note 285.

²⁹⁹ *See* Scarlet Alliance Submission, *supra* note 296, at 3, 18.

³⁰⁰ Gallagher, *supra* note 286, at 16-19.

³⁰¹ *See* Request for Information for the 2022 Trafficking in Persons Report, *supra* note 166 (showing how the United States' government imposes restrictions on nations not meeting their dictated "minimum standards" for the elimination of human trafficking).

³⁰² U.S. DEP'T OF HOMELAND SEC., *supra* note 275.

³⁰³ On critiques of national security culture and the War on Terror, *see generally* CHANDAN REDDY, FREEDOM WITH VIOLENCE: RACE, SEXUALITY, AND THE US STATE (2011); ARUN KUNDNANI, THE MUSLIMS ARE COMING!: ISLAMOPHOBIA, EXTREMISM AND THE

to be used in both the U.S. and Australia to justify increased surveillance and state power.³⁰⁴

The wars on trafficking and terror inevitably impact sex workers, especially those experiencing multiple forms of structural marginalization. Behaviors which are ultimately reflective of economic survival in the face of structural oppression may be deemed high-risk by institutions. For example, a sex worker who is sending money to another country to support family members is engaging in a cash economy which leaves little paper trail, has irregular hours of work, requires frequent cash deposits,³⁰⁵ and is also utilizing international wire transfers where the sender and receiver may have non-white sounding names. This behavior, while common among migrant workers in black and gray markets and/or being exploited in numerous labor industries,³⁰⁶ is flagged by financial institutions³⁰⁷ under both anti-trafficking regulations and in attempts to give the widest possible berth to encounters with the equally-imprecise statutes on material support of a designated foreign terrorist organization.³⁰⁸ These behaviors profiled as high-risk have in common

DOMESTIC WAR ON TERROR (2014); Amber Michel, *Countering Violent Extremism: Islamophobia, the Department of Justice and American Islamic Organizations*, 3 ISLAMOPHOBIA STUD. J. 1, 127 (2015); MOUSTAFA BAYOUMI, THIS MUSLIM AMERICAN LIFE: DISPATCHES FROM THE WAR ON TERROR (2015). On DHS and digital categories of criminalization, see Rachel Kuo, *A Platform for Safety Beyond Security*, in MOVEMENT MEDIA: RACIAL SOLIDARITIES ACROSS PLATFORMS (forthcoming) (on file with the CUNY Law Review).

³⁰⁴ See Atiya Husain, *Terror and Abolition*, BOS. REV. (June 11, 2022), <https://perma.cc/72G7-5ZLG>.

³⁰⁵ *FinCEN Supplemental Advisory Outlines New Human Trafficking Typologies, Red Flags*, VERA FIN (Jan. 14, 2021), <https://perma.cc/FPV3-8NAW>.

³⁰⁶ See, e.g., Pardis Mahdavi & Christine Sargent, *Questioning the Discursive Construction of Trafficking and Forced Labor in the United Arab Emirates*, J. MIDDLE E. SEXUALITIES, Fall 2021, at 6, 6-8 (2011).

³⁰⁷ See, e.g., *How Much Money Can I Transfer Without Being Flagged*, CASHERO (Apr. 6, 2022), <https://perma.cc/86PX-7DXM> (“It’s not a great idea to split up a transaction into smaller chunks since that looks a lot more suspicious than a considerable one-off value or regular payment!”). PayPal’s denial of service to Palestinians given interpretations of anti-terrorism statutes and sanctions that block access to entire geographic regions is an example of how payment processors and financial institutions perpetuate global Islamophobia. See UBAI ALABOUDI, PALESTINE & PAYPAL: TOWARDS FINANCIAL EQUALITY (2018), <https://perma.cc/G354-QJP5>; Jillian C. York, *Why Is PayPal Denying Service to Palestinians?* ELEC. FRONTIER FOUND. (Oct. 12, 2021), <https://perma.cc/3LPC-FZ35>.

³⁰⁸ By “imprecise” here, we mean imprecise in their ostensible design to target behavior that constitutes support for “terrorism,” a term that we argue is widely understood, just as is the term “trafficking,” to include violence as a core part of its definition. In both their anti-terrorism and anti-trafficking actions, however, the U.S. has repeatedly sought to punish behavior (like all forms of sex work) so that it reads as sufficiently adjacent to the thing it claims it is trying to deter. See, e.g., *Holder v. Humanitarian L. Project*, 561 U.S. 1 (2010) (deciding that training members of an organization designated a Foreign Terrorist Organization (“FTO”) by the U.S. government in international human rights laws and humanitarian

the fact that they are disproportionately likely to be flagged when financial account holders are migrants or have histories of incarceration, and these red flags can accumulate to make someone increasingly likely to be penalized by financial institutions, and thus increasingly precarious. The implied underlying principle of this approach is that all criminalized behavior is worth targeting for sanction and punishment; that crimes against people such as terrorism, and crimes against the state, such as tax evasion, are collapsible into the single category of *crime* and require the same reaction—isolation from financial mechanisms. In reality, people often engage in the same behaviors when avoiding criminalization, regardless of the motives towards violence or harm.

On the one hand, automated processes flag certain behaviors as high-risk or illicit, such as sending mutual aid to certain regions. However, state constructions of terrorism as anything threatening its legitimacy (e.g. the construction of the Black liberation movements as terrorizing the state or resistance by groups such as Palestinians and Puerto Ricans to state occupation) *create* the problem of terrorism as something to secure and solve through mechanisms of state control.³⁰⁹ The bigger picture is how the political, legal, and social construction of trafficking and terrorism as criminal activities to be solved and enforced by police and military facilitate carceral apparatuses that in turn creep into policing other domains of life such as financial transactions.

C. *Preventing money-laundering and child sexual abuse material*

Banks and other financial institutions and mechanisms are incentivized to require financial customers to verify consumers and tightly surveil transactions, while deep learning is being pitched as a promising so-

processes such as nonviolent mediation is prohibited by the statute 18 U.S.C. § 2339B, which prohibits knowingly providing material support to FTOs, regardless of whether there was an intent to further that FTO's terrorist activities, or, as in this case, the opposite intent). For further analysis of these material support statutes' imprecision, see Opening Brief for Humanitarian Law Project, *Holder v. Humanitarian L. Project*, 561 U.S. 1 (2010) (Nos. 08-1498, 09-89); Reply Brief for Humanitarian Law Project, *Holder v. Humanitarian L. Project*, 561 U.S. 1 (2010) (Nos. 08-1498, 09-89); Abdulrahman Alwattar, *The Material Support Statutes and Their Tenuous Relationship with the Constitution*, 20 U. PA. J. CONST. L. 473 (2017). On the uses of "terrorism" and the messiness of its interpretations, see Diala Shamas (@dialash), TWITTER (Jan. 7, 2021, 1:11 PM), <https://perma.cc/F2NF-MR5V>; CTR. FOR CONST. RIGHTS ET AL., *UNCONSTITUTIONAL AND UNJUST: DISMANTLING 20 YEARS OF DISCRIMINATORY 'NATIONAL SECURITY' POLICY* (2021), <https://perma.cc/3Q9H-D63A>; Amna Akbar, *Policing "Radicalization,"* 3 U.C. IRVINE L. REV. 809 (2013).

³⁰⁹ Husain, *supra* note 304.

lution to fraud detection in digital payment systems.³¹⁰ The 1970 Bank Secrecy Act (“BSA”) is the primary anti-money laundering law in the U.S. and includes certain provisions of Title III of the U.S. Patriot Act to detect, deter and disrupt terrorist financing networks.³¹¹ Banks, insurers, and creditors were required to engage in a practice of “know your customer” processes as part of their due diligence requirements.³¹² Financial institutions were required not to simply increase surveillance, but file “Suspicious Activity Reports” (“SARs”) on customers with specific behaviors in order to reduce their institutional liability—a tactic of using private actors for policing that would continue and expand.³¹³ Failure to file timely SARs or have a system of monitoring and reporting could result in “[c]riminal penalties, civil fines, and administrative sanctions.”³¹⁴ The thought was to engage in surveillance to cut off access to financial institutions for people engaged in criminal activity, while also protecting the privacy of consumers generally. This logic offered incredible, unchecked power to financial systems to decide who was allowed to participate in the financial system, and who was too risky. With this system already in place, it becomes infinitely easier to simply expand what behaviors are to be surveilled and reported on, or who does the reporting as legislation or internal policy would simply be incrementally expanding existing procedures and could do so through administrative regulatory changes which rarely receive attention.

This type of consumer surveillance has also proven an important mechanism in policing sex work. For example, Craigslist ads were originally free to post, meaning that the broadest marketplace for people to advertise sexual services had technological barriers, but no economic barriers for use.³¹⁵ Under pressure from a coalition of states’ Attorneys’ General, led by now Senator Blumenthal, Craigslist began taking nominal payments and more information from people specifically for adult services ads.³¹⁶ As then AG Blumenthal claimed, “requiring phone

³¹⁰ A. Roy et al., *Deep Learning Detecting Fraud in Credit Card Transactions* (2018 Systems and Information Engineering Design Symposium (SIEDS), 2018) 129, <https://perma.cc/4XVN-4X3S>.

³¹¹ *See Bank Secrecy Act (BSA) & Related Regulations*, OFF. OF THE COMPTROLLER OF THE CURRENCY, <https://perma.cc/D35N-4LSX> (last visited Oct. 3, 2022); *Bank Secrecy Act*, INTERNAL REVENUE SERV., <https://perma.cc/55EU-HBBQ> (Apr. 05, 2022).

³¹² Laura K. Donohue, *Anti-Terrorist Finance in the United Kingdom and United States*, 27 MICH. J. INT’L L. 303, 356-57 (2006).

³¹³ *See What Is a Suspicious Activity Report?*, THOMSON REUTERS, <https://perma.cc/JDS7-AE2B> (last visited Oct. 3, 2022).

³¹⁴ Donohue, *supra* note 312, at 357.

³¹⁵ Benjamin Popper, *In Defense of Craigslist*, ATLANTIC (Sept. 8, 2010), <https://perma.cc/SJ5K-U5LR>.

³¹⁶ *Id.*

numbers, credit cards and identifying details will provide a roadmap to prostitutes and sex traffickers—so we can track them down and lock them up. Information is a powerful disincentive and disinfectant to purveyors of illegal sex.”³¹⁷ While requiring financial institutions to file reports under the Bank Secrecy Act of 1970 was intended to protect the customer privacy, and even though this requirement does not violate the Fourth Amendment,³¹⁸ Senator Blumenthal was using it specifically to engage in surveillance and create a trail of policing to monitor, track, and prosecute people engaged in trading sex.

In Australia, the Anti-Money Laundering and Counter-Terrorism Financing Act 2006 provides measures to detect, deter, and disrupt money laundering and the financing of terrorism. It requires financial institutions to carry out procedures to verify customers’ identity and engage in ongoing due diligence, including monitoring the customer’s identity to mitigate and manage risk.³¹⁹ In 2020, Westpac paid \$1.3bn to AUSTRAC for failing to properly flag suspicious transactions linked to child exploitation in Asia.³²⁰ In 2021, the Australian Federal Police and AUSTRAC investigated subscription site OnlyFans for potential links to financial crime, prompted by academics concerned with “whether the company was doing enough to verify ages or check where money was going.”³²¹

In addition to the public imperative to curb trafficking and terrorism, payment processors are under pressure to reduce the spread and virality of child sexual abuse and exploitation material (“CSAM/CSEM”) as well as non-consensual intimate imagery (“NCII”) and image-based abuse, which have had disproportionate impacts upon the availability of surveillance and economic precarity of adult sex workers. In 2015, Visa and Mastercard pulled their services from the adult section of Backpage³²² and in 2021, following an article published in the *New York Times*,³²³ the companies prohibited the use of their cards for payments

³¹⁷ *Id.*

³¹⁸ See Donohue, *supra* note 312, at 357-58.

³¹⁹ Anti-Money Laundering and Counter-Terrorism Financing Act 2006 (Cth) pt 2 div 6 (Austl.).

³²⁰ Gerard Cockburn, *Australian Authorities Investigate OnlyFans for Possible Links to Financial Crime*, AUSTRALIAN (May 25, 2021, 12:00 AM), <https://perma.cc/B564-S846>.

³²¹ *Id.*

³²² Aamer Madhani, *Visa Follows Mastercard, Cuts Off Business with Backpage.com*, USA TODAY (July 1, 2015, 6:59 PM), <https://perma.cc/CY2B-2MN6>.

³²³ Nicholas Kristoff, Opinion, *The Children of Pornhub*, N.Y. TIMES (Dec. 4, 2020), <https://www.nytimes.com/2020/12/04/opinion/sunday/pornhub-rape-trafficking.html> (on file with the CUNY Law Review).

on one of the largest video aggregators, PornHub.³²⁴ In 2021, Mastercard updated their policy to place further restrictions on adult content. In a statement titled, “Protecting our network, protecting you: Preventing illegal adult content on our network,” Mastercard announced they were “taking an even more active stance against the potential for unauthorized and illegal adult content.”³²⁵ They introduced a number of new steps aimed at “enhancing requirements for adult content [and] preventing anonymous content,” said to be in line with their partnerships with groups such as Interpol, Europol and others to fight sexual exploitation.³²⁶ The steps include requiring banks “to certify that sellers of adult content have effective controls in place to monitor, block, and take down all illegal content;” requiring “documented age and identity verification for all people depicted and those uploading the content;” and requiring “content review process prior to publication.”³²⁷ The implication for small-scale adult businesses, such as individuals, partnerships and cooperatives, is that such blanket requirements may make selling content unviable.³²⁸ Some payment processors and banks may interpret Mastercard’s policies so broadly that they prohibit any adult business on their site altogether.

D. *Limitations of anti-discrimination law*

The rampancy of financial discrimination remains, in part, because of the lack of legal avenues for redress, including the lack of anti-discrimination protections that recognize this phenomenon. In the U.S., sex work is not a category protected under anti-discrimination law, and sex work is not specially protected in anti-discrimination employment law. Although anti-discrimination legislation usually lists attributes such as race or sex, and sometimes gender identity,³²⁹ it rarely recognizes

³²⁴ Gillian Friedman, *Mastercard and Visa Stop Allowing Their Cards to Be Used on Pornhub.*, N.Y. TIMES (Dec. 10, 2020), <https://www.nytimes.com/2020/12/10/business/visa-mastercard-block-pornhub.html> (on file with the CUNY Law Review).

³²⁵ John Verdeschi, *Protecting Our Network, Protecting You: Preventing Illegal Adult Content on Our Network*, MASTERCARD NEWSROOM (Apr. 14, 2021), <https://perma.cc/WAQ9-7HFQ>.

³²⁶ *Id.*

³²⁷ *Id.*

³²⁸ Samantha Riedel, *These Adult Sites Are the Latest to Close Down Because of Big Banks*, THEM (Dec. 2, 2021), <https://perma.cc/QAB7-YVJE>; Oliver Haug, *New Mastercard Policy Will Hurt Sex Workers*, THEM (Oct. 20, 2021), <https://perma.cc/M6S4-YJHC>.

³²⁹ See e.g., Civil Right Act of 1964, 28 U.S.C. § 1447, 42 U.S.C. §§ 2000a et seq., 52 U.S.C. § 10101; *State Maps*, HUM. RTS. CAMPAIGN (Jan. 19, 2022), <https://perma.cc/7783-HJ43>.

“sex worker” or work status as a protected attribute or trait.³³⁰ As a result, even in the most obvious cases of direct discrimination, sex workers may struggle to achieve redress under anti-discrimination law which doesn’t protect against stigmatization of types of work. However, some forms of protection do exist to prevent discrimination in credit lending. The Equal Credit Opportunity Act,³³¹ for example, prohibits discrimination on the grounds of race, color, religion, national origin, and sex. Indeed, it was introduced to address discrimination on the basis of sex and marital status, and the Congressional Statement of Purpose states that their intention was to ensure that “various financial institutions and other firms engaged in the extensions of credit exercise their responsibility to make credit available with fairness, impartiality, and without discrimination”³³² Irrespective of whether sex workers, as a class, are covered by equal opportunity legislation, there remain barriers in utilizing these narrow protections. Many payment processors are set up in such a way that they are not creditors, as they do not extend credit but simply move existing money from one account to another, and would therefore have no obligations under the Equal Credit Opportunity Act, which covers discrimination.³³³ While there are already strategies to address proxies in financial discrimination law (such as prohibition on redlining on the basis of zip code to prevent racial discrimination),³³⁴ there are no similar protections to prevent sex workers being targeted from the kinds of proxies we have identified.

³³⁰ In the U.S., there are few jurisdictions in which anti-discrimination law prevents discrimination on the basis of “lawful source of income.” In New York, such a law was passed to prevent housing discrimination against potential tenants who plan to pay their rent using government distributed vouchers. *Source of Income Discrimination*, N.Y.C. HUM. RTS., <https://perma.cc/5NKV-KC24> (last visited Oct. 7, 2022). It is possible that such a law could be extended to protect sex workers in legalized industries, but the law has not been tested in that regard. In 2015, the U.S. government stated to the U.N. Commissioner for Human Rights: “We agree that no one should face violence or discrimination in access to public services based on sexual orientation or their status as a person in prostitution, as these recommendations suggest. We have recently taken concrete steps to address discrimination on the basis of sexual orientation and gender identity, and are engaged in further efforts.” CYNTHIA BURACK, *BECAUSE WE ARE HUMAN: CONTESTING US SUPPORT FOR GENDER AND SEXUALITY HUMAN RIGHTS ABROAD* 56 (2018). At the time of this writing, however, we are unaware of any such efforts by the U.S. government to protect sex workers from such discrimination.

³³¹ 15 U.S.C. § 1691.

³³² Equal Credit Opportunity Act, 15 U.S.C. §§ 1691 to 1691f.

³³³ *See 12 CFR Part 1002 - Equal Credit Opportunity Act (Regulation B)*, CONSUMER FIN. PROT. BUREAU (Jan. 1, 2018), <https://perma.cc/5XC6-WH9W> (providing the scope of the Equal Credit Opportunity Act).

³³⁴ *See generally* Anya E.R. Prince & Daniel Schwarcz, *Proxy Discrimination in the Age of Artificial Intelligence and Big Data*, 105 IOWA L. REV. 1257 (2020).

In some instances, the kinds of discrimination reported by sex workers would amount to “direct discrimination,” whereby an individual is treated unfavorably on the basis that they are, or are presumed to be, a sex worker. In other instances, some of these outcomes may amount to what is known in Australia as “indirect discrimination” and in the United States as “disparate impact,” where sex workers have been subject to a condition, requirement, or practice that applies to all people using the service but has a disproportionate impact upon or disadvantages sex workers, and where that condition is unreasonable. While indirect discrimination provisions emerged as a tool to address systemic discrimination rather than simply formal equality, Natalie Sheard notes that, although it has potential “to achieve radical outcomes: a redistribution of wealth and opportunities from privileged groups to those who have been historically disadvantaged,” instead, “the operation of indirect discrimination provisions in Australia is fraught with uncertainty” and it can be difficult to prove.³³⁵ This can be explained in part by how challenging it is to establish the disadvantage, disproportionate impact, or unreasonableness of the practice, given the lack of a unified or consistent threshold for measurement.³³⁶ For example, all users of payment processors may be subject to identification verification, however the policy to verify all customers vis a vis their government identification may disproportionately affect sex workers. To achieve this, sex workers may need to establish that they were at more disadvantage than other users who also could not verify their identity,³³⁷ which could be difficult given that the verification requirement could impact a number of groups, including undocumented people, people exiting detention or people sleeping rough. Whether or not a practice or condition is reasonable in the circumstances depends on a range of considerations and “lies somewhere between the more onerous test of business necessity which applies in the U.S. and that of convenience.”³³⁸

In Australia, some anti-discrimination protections exist that may make discrimination claims against financial providers easier to action than in the U.S. For example, the states of Queensland, Victoria, and

³³⁵ Natalie Sheard, *Employment Discrimination by Algorithm: Can Anyone Be Held Accountable?*, 45 U. N.S.W. L. J. 617, 641-42 (2022) (discussing the operation of indirect discrimination provisions in Australia).

³³⁶ *Id.* at 641 (explaining how discrimination provisions differ in each Australian jurisdiction, that these were drafted at different times without considering existing law, that the High Court of Australia has only considered four cases of indirect discrimination and the emerging jurisprudence lacks consistency and clarity, and that the High Court and lower have differing interpretations of legislation).

³³⁷ *Id.* at 617.

³³⁸ *Id.* at 643.

Tasmania each have anti-discrimination protections on the basis of “lawful sexual activity,” and the Australian Capital Territory and Victoria now have protections on the basis of “occupation, trade or calling.”³³⁹ A third model has recently been introduced in the Northern Territory, which provides explicit protections against discrimination for people who have or are engaged or been employed in sexual services.³⁴⁰ Under a proposed bill in New South Wales, discrimination will be prohibited against past and present sex workers as well as discrimination on the grounds of characteristics that appertain generally to or are generally imputed to sex workers.³⁴¹ The protections apply to discrimination in goods and services, which would include the provision of financial services.³⁴² The obvious problem in the first of these models, which protects on the basis of “lawful sexual activity,” is that some forms of sex work remain unlawful in those states, and therefore unprotected. Although sex worker organizations continue to advocate for decriminalization, both Queensland and Australian Capital Territory still have licensing models, whereby only certain forms of government-sanctioned sex work are lawful.³⁴³ Where sex workers are conducting work online and across borders, it may be difficult to establish the legality of their work due to a complex mix of broadcasting, classification, content regulation and criminal laws that govern the distribution of sexual content in each jurisdiction. While the model of “lawful sexual activity” is too limited to be useful to the majority of sex workers,³⁴⁴ the general “occupation” model first relies upon the arbitrator to recognize sex work as work.³⁴⁵

³³⁹ *Equal Opportunity Act 2010* (Vic) ss 6(la), (g) (Austral.); *Anti-Discrimination Act 1991* (Qld) s 7(l) (Austral.); *Anti-Discrimination Act 1998* (Tas) s 16(d) (Austral.); *Discrimination Act 1991* (ACT) (Austral.).

³⁴⁰ A new law has been passed in the Northern Territory which protects sex work and sex workers under anti-discrimination laws. See Sarah Spina-Matthews, *With Anti-Discrimination Changes, Northern Territory Has Some of the World's Most Progressive Sex Work Laws. It Wasn't Always That Way*, ABC News (Nov. 2, 2022), <https://perma.cc/4XMU-YMTW>. See *Anti-Discrimination Amendment Bill 2022* (NT) s10 (3) (Austral.). Similar reforms have also been proposed in New South Wales. See *Proposed Anti-Discrimination Amendment to Sex Workers Bill 2020* (NSW) s 50AB (Austral.).

³⁴¹ *Proposed Anti-Discrimination Amendment to Sex Workers Bill 2020* (NSW) s 50AB (Austral.).

³⁴² *Proposed Anti-Discrimination Amendment to Sex Workers Bill 2020* (NSW) s 50AL (Austral.).

³⁴³ See Bennett & Stardust, *supra* note 17, at 23-27.

³⁴⁴ See *id.*, manuscript at 30.

³⁴⁵ See, e.g., *J v Federal Capital Press of Austl Ltd* (1999) ACTDT 2 (Austral.), <https://perma.cc/FST3-EVEY>. The Australian Capital Territory Discrimination Tribunal (“ACTDT”) found that sex work did constitute an “occupation,” stating: “[T]his Tribunal is satisfied that, given the frequency with which she advertised and engaged in the activity, and her financial dependence on it over a period of time, there is enough evidence to support a

Financial discrimination against sex workers further raises significant questions for anti-discrimination law in terms of how it ought to address discrimination on the basis of algorithmic profiling. The danger here is that discrimination is occurring not necessarily on the basis of recognized (and protected) attributes or traits but on an algorithmically-produced prediction of risk.³⁴⁶ As Sheard notes, the use of proxies can be difficult to “predict or detect” where they “are not based on stereotypical assumptions or generalizations but rather statistical correlation.”³⁴⁷ For example, a user (who may or may not be a sex worker) is flagged and blocked by a payment processor because of a combination of factors, such as: they cannot verify their legal name, they use an explicit keyword in their transactions, their social network includes sex educators, sex workers, or queer businesses, or their social media features a link to an activist fundraiser. Boyd et al. point out (in relation to discrimination in employment) that one of the risks of predictive analysis systems is that they make imputations about users, including who they are like, based on behavior, practices, and preferences.³⁴⁸ Existing discrimination laws may not be adequate to prevent discrimination on the basis of, for example, personal network. Because of this, they argue, “[w]e must rethink our models of discrimination and our mechanisms of accountability. No longer can we just concern ourselves with immutable characteristics of individuals; we must also attend to the algorithmically produced position of an individual, which, if not acknowledged, will be used to reify contemporary inequities.”³⁴⁹ Lack of identification, the use of cash deposits, and the presence of multiple pseudonyms may not necessarily be immutable characteristics of sex workers, but the requirement for verification—to take one example—clearly operates to nega-

description of her occupation, trade or profession as ‘sex worker’ or ‘prostitute’ or ‘adult service provider.’”

³⁴⁶ See generally Sandra Wachter et al., *Why Fairness Cannot Be Automated: Bridging the Gap Between EU Non-Discrimination Law and AI*, *COMPUTER L. & SEC. REV.*, July 2021, Article 105567, at 1, 2 (2021) (“Compared to traditional forms of discrimination, automated discrimination is more abstract and unintuitive, subtle, intangible, and difficult to detect”); Thao Phan & Scott Wark, *Racial Formations as Data Formations*, *BIG DATA & SOC’Y*, July-Dec. 2021, Sept. 30, 2021, at 1, 2-3 (2021) (discussing the challenges that emerge when “modes of classification that operate through proxies and abstractions . . . figure racialized bodies not as single, coherent subjects, but as shifting clusters of data . . .,” and asking “how are we supposed to think, to identify and to confront race and racialization when they vanish into algorithmic systems that are beyond our perception?”).

³⁴⁷ Sheard, *supra* note 335, at 639.

³⁴⁸ Danah Boyd et al., *The Networked Nature of Algorithmic Discrimination*, in *DATA AND DISCRIMINATION: COLLECTED ESSAYS* 53, 54 (Seeta Peña Gangadharan et al. eds., 2014), <https://perma.cc/4LYY-UDUT>.

³⁴⁹ *Id.* at 56.

tively impact sex workers and the use of such proxies are adversely impacting this population.

The prevalence of financial discrimination against sex workers calls for a new approach to anti-discrimination law. Monique Mann and Tobias Matzner argue that anti-discrimination law ought to recognize what they call “emergent discrimination.”³⁵⁰ They note that anti-discrimination law has long been limited in its ability to adequately recognize intersectional forms of discrimination,³⁵¹ and that the prevalence of algorithmic profiling and use of proxies to discriminate necessitates a new approach.³⁵² If it is the case that sex workers are being discriminated against *en masse* on the basis of predictive analyses based on flawed risk assessment tools, we must re-think how law ought to adapt and evolve to address these insidious forms of discrimination. Just as fintech companies have used proxy variables (such as ZIP Code) to discriminate in credit lending, one must be attentive to the kinds of “sexual proxies” that may be used to impact sex workers applying to access financial services.

E. Necessary legal, social, cultural, and political change

This backdrop leaves us with the question of what policy and operational changes are necessary to end systemic financial discrimination against sex workers. It is likely that blanket prohibitions on sex are often unnecessary in order for payment processors to be compliant with their legal obligations, especially where sex work is decriminalized. For example, the fact that AUSTRAC in Australia differentiates between sex work and sexual servitude in their Financial Crime Guide suggests that financial providers ought to be making more nuanced distinctions in their risk assessments rather than prohibiting anything broadly associated with sex.³⁵³ The requirement to report on risks in supply chains under Australia’s Modern Slavery Act 2018 should arguably not be construed so broadly as to prohibit all uses of financial services for any sexual transaction; this is not a requirement of the legislation.³⁵⁴ While payment processors may be required to prevent use of their services for criminal

³⁵⁰ Monique Mann & Tobias Matzner, *Challenging Algorithmic Profiling: The Limits of Data Protection and Anti-Discrimination in Responding to Emergent Discrimination*, BIG DATA & SOC’Y, July-Dec. 2019, Dec. 16, 2019, at 1, 4.

³⁵¹ See generally Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139 (1989) (arguing for the use of an intersectional approach to include the experiences of Black women in feminist and anti-racist movements).

³⁵² See, e.g., Mann & Matzner, *supra* note 350.

³⁵³ AUSTRAC & FINTEL ALLIANCE, *supra* note 207.

³⁵⁴ See *Modern Slavery Act 2018* (Cth) pt 2 ss 11-16 (Austl.).

activity, the legal status of different types of sex work differs dramatically around the world—and even within states and districts within the U.S. It would therefore be possible for financial providers—in at least some circumstances—to allow transactions for what is considered “lawful” sexual purposes while still complying with platforms’ legal obligations to prevent what is considered “criminal” activity, such as fraud, money-laundering, terrorism, and human trafficking. This is possible simply by recognizing that sex workers use payment processors in multiple contexts and jurisdictions in which their activities are lawful and by re-evaluating the ways in which financial providers understand and assess risk. However, more broadly, we should push against the deputization of platforms into doing police and law enforcement work, such as determining what is legal or not, as well as challenge the construction of legal versus illegal activity.³⁵⁵

It does not follow that the criminalization of sex work is just or necessary. Part of unpacking financial discrimination involves challenging what constitutes not only risk but criminal activity and advocating instead for decriminalization. Where they prohibit sex workers under the rationale of preventing illegal activity, payment processors presume the universal criminalization of sex work, and rely upon restrictive domestic laws as justification rather than looking to jurisdictions that have progressive laws on sex work. But the legality of sex work ought not to be conflated with whether the work is legitimate, valid or “low-risk.” While it is true that many states continue to criminalize various forms of sexual commerce, this approach is out of line with human rights and public health approaches. The decriminalization of sex work is publicly supported by numerous international health, labor, and human rights organizations including Amnesty International,³⁵⁶ the World Health Organization,³⁵⁷ Human Rights Watch,³⁵⁸ the United Nations Population Fund,³⁵⁹ United Nations Development Program, and UNAIDS.³⁶⁰ Decriminaliza-

³⁵⁵ See generally MAE M. NGAI, IMPOSSIBLE SUBJECTS: ILLEGAL ALIENS AND THE MAKING OF MODERN AMERICA (2004).

³⁵⁶ AMNESTY INT’L, AMNESTY INTERNATIONAL POLICY ON STATE OBLIGATIONS TO RESPECT, PROTECT AND FULFIL THE HUMAN RIGHTS OF SEX WORKERS (2016), <https://perma.cc/WSU2-6RLA>.

³⁵⁷ *Global HIV, Hepatitis and STIs Programmes*, WORLD HEALTH ORG., <https://perma.cc/3K9V-HG88> (last visited Nov. 27, 2022).

³⁵⁸ *Why Sex Work Should Be Decriminalized: Questions and Answers*, HUM. RTS. WATCH (Aug. 7, 2019, 3:31AM), <https://perma.cc/5KWH-VPN7>.

³⁵⁹ WORLD HEALTH ORG. ET AL., IMPLEMENTING COMPREHENSIVE HIV/STI PROGRAMMES WITH SEX WORKERS: PRACTICAL APPROACHES FROM COLLABORATIVE INTERVENTIONS (2013), <https://perma.cc/96Z4-B9XD>.

³⁶⁰ JOHN GODWIN, SEX WORK AND THE LAW IN ASIA AND THE PACIFIC: LAWS, HIV AND HUMAN RIGHTS IN THE CONTEXT OF SEX WORK 6 (2012), <https://perma.cc/C4K2-DTUC>;

tion is understood as the best regulatory model to protect sex worker access to human rights, health, safety, and justice because it reduces stigma, policing and barriers to accessing services.³⁶¹ In 2015, a study in a special issue of *The Lancet* found that decriminalization of sex work would have “the greatest effect on the course of the HIV epidemics across all settings, averting 33-46% of HIV infections in the next decade.”³⁶²

Preventing financial discrimination then is not simply about adjusting the ways in which algorithms code for sex or the ways in which machines learn about risk, or merely about creating more accurate detection tools to allow fintech to comply with the existing legal framework. It is not apparent that verification or surveillance are useful solutions in addressing the underlying structural problems that these pieces of legislation are trying to address. Verification is not a solution to poverty. Surveillance is not a solution to the global unequal distribution of wealth. Rather, these practices work in tandem with criminalization to further marginalize groups already subject to multiple forms of violence and oppression. Where sex work is criminalized, access to payment processors becomes even more crucial for safety. For those who do not have access to banks or credit cards, such as sex workers without stable housing, payment processors may be one of their only access points to monetary resources besides cash. By only permitting services to those working legally, financial providers perpetuate a two-tiered industry, whereby those who work illegally (in order to protect their safety or privacy) are disadvantaged. Further, the regulatory framework negatively impacts a wide variety of social justice actors. The complex web of anti-fraud, anti-trafficking and anti-terrorism laws target particular communities and prohibit legitimate forms of mutual aid, community building, and activism, such as supporting migrant sex workers experiencing labor exploitation or donating to support the liberation of occupied territo-

UNAIDS Welcomes the Decision by the Northern Territory of Australia to Decriminalize Sex Work, UNAIDS (Dec. 2, 2019), <https://perma.cc/A324-6CVH>. We cite these examples to present evidence of broader support for decriminalization; however, we also note the ways in which human rights discourses have further justified state interventions through militarism, sanctions, and criminalization, such as in the human trafficking discourse. See Elizabeth Bernstein, *Militarized Humanitarianism Meets Carceral Feminism: The Politics of Sex, Rights, and Freedom in Contemporary Antitrafficking Campaigns*, 36 SIGNS: J. WOMEN CULTURE & SOC'Y 45 (2010).

³⁶¹ See generally SARAH SAKHA ET AL., IS SEX WORK DECRIMINALIZATION THE ANSWER? (2020), <https://perma.cc/AW2N-C78S>.

³⁶² Kate Shannon et al., *Global Epidemiology of HIV Among Female Sex Workers: Influence of Structural Determinants*, LANCET, Jan. 3, 2015, at 55.

ries.³⁶³ Anti-trafficking laws proliferate despite their demonstrable harms for the people they purport to protect, and disproportionately affect migrant sex workers.³⁶⁴ Anti-terrorism laws—which have accumulated dramatically in the last two decades as part of the war on terror—have been used to target, vilify, detain and effectively terrorize Muslim communities.³⁶⁵ The current legal frameworks in effect bolster both state and privatized surveillance systems but are a distraction from the real changes needed to end trafficking, wealth inequality, and labor exploitation.

Addressing financial discrimination, therefore, will require many non-reformist projects³⁶⁶ that seek to end ongoing systems of racism, sexism, xenophobia, whorephobia, and incarceration, not limited to the decriminalization of sex work. It also involves destigmatization at social and cultural levels, anti-discrimination protections that do not take carceral approaches, resisting the creep of sexual and gender surveillance, policies to materially support migrant workers and marginalized communities (including through health care and housing), and the abolition of policing and prisons. On an infrastructural level, it requires an end to monopolies (such as Visa and Mastercard’s control over payment processors), and a practice of what Afsaneh Rigot calls “design from the margins,” where systems are designed to protect the people most impacted.³⁶⁷ Further, addressing financial discrimination requires dismantling the structures that intentionally obfuscate information and penalize whistle-blowers working within financial and technology companies.³⁶⁸

³⁶³ For example, people sending mutual aid to Palestine have been perceived as engaging in terrorist activity. See *PayPal Partners with ADL to Fight Extremism and Protect Marginalized Communities*, ADL (July 26, 2021) <https://perma.cc/2PK6-FMLB>; Massarah Mikati, *Paypal Is Blocking Payments for Queer Cinema for Palestine Film Festival*, PHILA. INQUIRER (Nov. 16, 2022), <https://perma.cc/VCL6-3VXZ>; Tyler Sonnemaker, *US Payment Platform Blocking Some Payments Mentioning Palestinian Relief Funds*, BUS. INSIDER S. AFR. (May 18, 2021), <https://perma.cc/PGC2-MJTY>; Nora Barrows-Friedman, *Israel Lobby Group ADL Teams Up with PayPal*, ELEC. INTIFADA, (Aug. 2, 2021), <https://perma.cc/T43A-8EJ2>.

³⁶⁴ GLOB. NETWORK OF SEX WORK PROJECTS, *THE IMPACT OF ANTI-TRAFFICKING LEGISLATION AND INITIATIVES ON SEX WORKERS* 10 (2018), <https://perma.cc/F7EP-KJ7T>.

³⁶⁵ See generally MAHDAVI, *supra* note 198.

³⁶⁶ See generally Dan Berger, Mariame Kaba & David Stein, *What Abolitionists Do*, JACOBIN (Aug. 24, 2017) <https://perma.cc/ZQ6G-TPBX>.

³⁶⁷ AFSANEH RIGOT, *DESIGN FROM THE MARGINS: CENTERING THE MOST MARGINALIZED AND IMPACTED IN DESIGN PROCESSES - FROM IDEATION TO PRODUCTION* 1 (2022).

³⁶⁸ See, e.g., Annie Brown, *The AI-Bias Problem and How Fintechs Should Be Fighting It: A Deep-Dive With Sam Farao*, FORBES, (Sept. 29, 2021, 8:45 PM), <https://www.forbes.com/sites/anniebrown/2021/09/29/the-ai-bias-problem-and-how-fintechs-should-be-fighting-it-a-deep-dive-with-sam-farao/?sh=225917162129> (on file with the CUNY Law Review); Ballard CFS Group, *CFPB Looking for Whistleblowers to Report Potential Discrimination Arising from the Use of Artificial Intelligence*, BALLARD SPAR LLP: CONSUMER FIN.

Proprietary systems and non-disclosure agreements exist to prevent employees from sharing information about how algorithms function. In 2020, Timnit Gebru, former co-lead of Google's AI Ethics team, was fired for refusing to withdraw an unpublished paper on the dangers of large learning models.³⁶⁹ In speaking out, Gebru experienced backlash not only from Google but from online trolls who created bots to harass her.³⁷⁰ In response, Gebru founded the Distributed Artificial Intelligence Research Institute, which documents the impacts of AI on marginalized groups, particularly African immigrants in the U.S.³⁷¹ Despite this and the growing number of institutes studying AI (such as Data and Society and the Algorithmic Justice League), there are few AI research institutes that include sex work as an axis of marginalization in their analysis—and perhaps also crucially, a lack of funding for research outside of the AI realm geared at non-technical solutions to social issues that have been exacerbated by technologies.

VI. CONCLUSION

Despite the lack of academic consideration on this topic, financial discrimination against sex workers is of growing international media attention. As we have shown, the account closures, refusals of service, and seizing of funds should not be understood simply as glitches or aberrations in an otherwise fair system, one which could be incrementally improved through tweaks to various algorithms. Rather, they are part of a broader web of discrimination by design—a concept that has been used to explain how discriminatory decision-making impacts a range of social decisions, from the architecture of public space to the processes of machine learning. Financial discrimination stems from whorephobic laws, anti-sex policies, moral panic, and anti-migration agendas, which coalesce to form a regulatory agenda that criminalizes, stigmatizes, and disadvantages people who exchange sexual services for money or trade. It thrives due to the tandem impacts of discriminatory human decision-making and its companion, algorithmic bias. When sex workers, and attributes imputed to them, are classified as “high risk,” whore stigma be-

MONITOR (Dec. 21, 2021), <https://perma.cc/835P-FJXR>; *How Employers Use NDAs to Scare Whistleblowers*, FISCHER LEGAL GRP. (May 1, 2019), <https://perma.cc/G4WQ-YFWW>.

³⁶⁹ Nitasha Tiku, *Google Hired Timnit Gebru to Be an Outspoken Critic of Unethical AI. Then She Was Fired for It.*, WASH. POST (Dec. 23, 2020, 2:15 PM), <https://perma.cc/6NGU-RNQ4>.

³⁷⁰ Zoe Schiffer, *Timnit Gebru Was Fired from Google—Then the Harassers Arrived*, VERGE (Mar. 5, 2021, 11:30 AM), <https://perma.cc/QR85-A495>.

³⁷¹ Nitasha Tiku, *Google Fired Its Star AI Researcher One Year Ago. Now She's Launching Her Own Institute.*, WASH. POST (Dec. 2, 2021, 8:00AM), <https://perma.cc/PA8Q-JA2P>.

comes encoded into automated decision-making tools, with poor or complicit human oversight. Such risk assessment software is driven by a regulatory environment that incentivises overcompliance and deputizes private actors to police its users whether or not the activity is criminalized. In effect, the denial of financial infrastructure increases vulnerability to exploitation and keeps sex workers constantly hustling to survive economic precarity and lack of formal protections. New sexual proxies operate to identify and algorithmically profile broad groups of people, including queer folk, activists, sex educators, sex tech businesses, and health promotion agencies. In this sense, financial discrimination is part of a larger, more comprehensive carceral system that maintains a gendered, classed, and racialized social order in which the labor of sex workers is undervalued and sex worker lives are treated as expendable.

As we see an increase in gendered criminalization (such as through the US Supreme Court's 2022 overturning of *Roe v. Wade*³⁷²), we are likely to see an increase of financial discrimination for those seeking access to reproductive health, abortion, and trans health care. While we have offered user accounts and experiences of financial discrimination to identify gaps in knowledge around how sex workers are being flagged, there is much more to be done. There is a need for further research into what internal decisions are made by platforms about how to detect risk, legality, or harm, and on what basis; what systems they use to identify sex workers and sex industry businesses, or to detect the sale of "adult" novelties; what kind of sexual proxies they are using to pick up these users and transactions; how their algorithms are being trained, monitored and evaluated; and how this information is shared with state agencies or other third parties. At minimum, financial providers ought to make their algorithms and detection software publicly available so both researchers and sex workers can understand when, how, and why individuals have been flagged. They should release publicly available enforcement data on their patterns of refusals, forfeitures, and shutdowns so that the public can understand and evaluate how they are interpreting risk and actioning their policies. This includes data that compares the risks of each of these activities (chargebacks, fraud, trafficking) with other industries so that the public can determine whether sex workers are being treated exceptionally, disproportionately, or unfavorably, and so that financial providers can re-conceptualize risk and compliance.

This data transparency is necessary as one baseline strategy to hold fintech into account for both its automated and human decision-making, as well as to better understand how anti-discrimination law should address and respond to both algorithmic profiling and unconscious bias.

³⁷² *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2242 (2022).

Such data will be essential in unpacking *how* payment processors understand and operationalize their legal and policy compliance, which would assist policy and advocacy organizations in identifying problematic legal frameworks and lobbying for reform. It could also assist payment processors and banks in identifying how they can comply with the regulatory frameworks while still providing services to sex workers. Finally, more resources ought to be invested in supporting sex workers to challenge discriminatory laws and hold payment processors accountable. While there is promising movement in this space, attempts at accountability are restricted by both the lack of formal anti-discrimination protections for sex workers and the limitations of current anti-discrimination law in addressing algorithmic discrimination (and issues of exclusion more broadly). As such, these phenomena demand new ways of thinking about legality, risk, and discrimination that does not look to policing as a means of guaranteeing safety and inclusion. Finally, a key driver of this phenomenon is how sex work stigma has been baked into law and policy frameworks. Laws expanding categories of criminalization dually incentivize financial discrimination against sex workers and encourage discrimination-by-design under the guise of compliance. A core step in addressing financial discrimination and mitigating the harm must be the abolition of carceral systems of policing and punishment, which includes the decriminalization *and* destigmatization of all sex work and survival.