PART III

Governance × Feminism

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The Rise, Fall, and Rise of Civil Libertarianism

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In 2012, I spent the summer working as a legal intern at the Electronic Frontier Foundation (EFF). Then headquartered in a dim and cavernous former pornography studio in San Francisco's Mission District, the organization was in the process of finalizing its move to an erstwhile Planned Parenthood clinic that it had recently acquired near the Tenderloin. One day EFF staffers took me and my fellow interns to the new building, where we appreciatively gushed over the square footage and rifled around the metal storage cabinets that had been left behind in examination rooms that had been abandoned but not yet cleared out.

A decade later, the occupation of a former women's health clinic by a technology advocacy organization seems a fitting metaphor for Silicon Valley's social and political ambitions. Nearly every contemporary social and political conflict touches, or is touched by, networked technologies in some way. Protests against police brutality are organized online and surveilled by law enforcement using social media monitoring. Amid a global pandemic that has killed over 6 million people to date, networked technologies enable contact tracing and permit public health disinformation to flourish. And the criminalization of pregnancy wrought by the Supreme Court's decision in *Dobbs* has brought to fruition both a new era of social mobilization and a new era of surveillance, as Elizabeth Joh's contribution to this volume shows.

At the time, EFF's move to its new building seemed like a harbinger of a promising future in which the organization could move from the fringes of the legal community to a position nearer to its center, while maintaining some of its iconoclasm. Though perhaps a little too on-the-nose, EFF's move is also an apt symbol of cyberlaw's maturation. From the outset, cyberlaw was characterized by a moral

panic over sexual speech, pornography, and the protection of children familiar to First Amendment scholars. Important civil libertarian victories recognized that sexual speech and pornography were constitutionally protected from state intervention. The civil libertarian approach advanced by EFF, the ACLU, and others cautioned against government efforts to expand surveillance and weaken encryption. The civil libertarian paradigm saw government regulation as the primary threat to free speech online, the marketplace as the more appropriate mechanism for regulating expression, and courts as the rightful arbiters of these disputes.

But while civil libertarians successfully rolled back much regulatory intervention to enforce moral codes online, their successes came at a price: the legitimation of private power over speech. Though the civil libertarian tradition would theoretically protect sexual speech, it has in practice shifted the locus of power over speech from public to private hands.[1] Today, private speech enforcement is far broader than what the state could accomplish through direct regulation.

Using sexual speech as its focal point, this chapter explores the ambiguous legacy of cyber civil liberties and the ascent of alternative paradigms for digital freedom. Civil libertarians won important initial cyberlaw victories against early efforts by states to sanitize the Web and to surveil its users. These victories, coupled with an expansive interpretation of free speech in the courts, have resulted in a growing industry of private speech enforcement and control. The result is a form of "market" ordering that is nominally private but that, in fact, reflects the entrenched power and influence of conservative cultural politics. In turn, this burgeoning private authority has prompted both political and cultural realignments (the "techlash") and a broader turning away from the civil libertarian approach to speech. But in a moment of challenge to sexual freedom and equality, cyber civil libertarianism might yet find another foothold.

CYBER CIVIL LIBERTIES

In many respects, cyberlaw inherited the First Amendment civil libertarian tradition and its anti-regulatory stance. At the core of the civil libertarian tradition is the metaphor of the marketplace of ideas. Initially articulated by thinkers including John Milton and John Stuart Mill, the "marketplace" denotes "the metaphorical space in civil society in which ideas are espoused, debated, and refined."[2] In his famous dissent in *Abrams v. United States*, Justice Oliver Wendell Holmes rearticulated the marketplace concept, calling for "free trade in ideas" and making the market a permanent fixture in First Amendment jurisprudence.[3]

Notwithstanding the rhetoric of *laissez faire*, the notion of a free marketplace for ideas was almost immediately challenged by the conviction that some kinds of ideas were not worth trading in. For example, obscenity was seen as lacking any First Amendment value or protection.[4] Excluding obscenity from the marketplace of ideas aptly illustrates a basic legal realist insight: no market is truly "free"

from regulation.[5] The apparent simplicity of obscenity's categorical exclusion from constitutional protection also belied a more complicated struggle to articulate a workable test for identifying "obscene" material. Even as the test for obscenity was narrowed and refined, the Court continued to permit states to regulate sexual expression—pornography, nude dancing, and adult businesses, to name a few—in ways that they could not regulate nonsexual speech.[6]

"Cyberspace," like the "marketplace," was similarly envisioned as both a quasi-physical space and a philosophical metaphor. In the heady early days of the commercial internet, its enthusiasts imagined cyberspace as a unique new "place" distinct from any "territorially based sovereign."[7] In one of the earliest and most influential formulations, *A Declaration of the Independence of Cyberspace*, John Perry Barlow, one of EFF's cofounders, articulated the utopian, libertarian ideal of the internet as a self-governing community in which "anyone, anywhere may express his or her beliefs, no matter how singular, without fear of being coerced into silence or conformity."[8]

The bar was set unattainably high. Like the "marketplace of ideas," the romantic vision of "cyberspace" as a world open to equal participation by all and governed from the bottom up has not lived up to its idealized formulation. From the start, the terrain of cyberspace was shaped by legal, political, and cultural currents that sought to confront a perceived flood of pornography, sanitize online speech, and push sexual speech to the margins. These efforts to sanitize the Web were nothing new; indeed, fights over online pornography reprised decades-old debates about free speech, feminism, and the protection of children.

In the 1980s, Catharine MacKinnon and Andrea Dworkin argued that pornography subordinates women and constitutes legally cognizable sex discrimination.[9] MacKinnon and Dworkin advanced an anti-pornography civil rights ordinance that defined "the graphic sexually explicit subordination of women through pictures or words" as sex discrimination.[10] The effort to bar pornography through civil rights law ultimately failed: the versions of the statute adopted in Indianapolis and Bellingham were struck down as viewpoint-based distinctions in violation of the First Amendment.[11]

The failure of the anti-pornography civil rights ordinance was not the end of the battle against pornography. Over the decades, lawmakers and regulators have repeatedly based attempts to regulate sexual speech on the grounds that it is harmful to minors. In 1968, the Supreme Court upheld a New York statute that barred the sale of nonobscene nude pictures to minors even though they were constitutionally protected for adults.[12] The Court deferred to the state's determination that exposure to sexual speech could "impair the ethical and moral development of our youth."[13] Similar assertions about sexual speech's adverse effects on children repeatedly resurfaced in other contexts. Cities used the "harmful to minors" argument to justify using zoning laws to limit where adult businesses could operate.[14] In one case, the city of Jacksonville, Florida, attempted to prohibit drive-in movie

theaters from showing films with nudity by arguing (unsuccessfully) that the ordinance was necessary to protect children.[15] The FCC's authority to sanction a radio station for airing George Carlin's "seven dirty words" monologue rested in large part on the finding that it was broadcast at a time when children could hear it.[16]

Compared to the anti-subordination argument, the notion that porn was "harmful to minors" was less objectionable on First Amendment grounds. In *American Booksellers Association v. Hudnut*, the Seventh Circuit had rejected the anti-pornography civil rights ordinance because it singled out for regulation "speech that subordinates women," whereas "speech that portrays women in positions of equality is lawful, no matter how graphic the sexual content."[17] Writing for the court, Judge Easterbrook brushed aside the argument that pornography silenced women, infamously castigating the ordinance as impermissible "thought control."[18] In contrast, courts had always considered whether sexual speech was "harmful to minors," or whether it caused any of an array of antisocial effects, as a content- and viewpoint-neutral inquiry.

The "harmful to minors" argument thus proved a more potent justification for restrictions on sexual speech than the subordination of women. As Robin West notes, however, the feminist anti-pornography movement gave rise to political realignments: liberals and "anti-censorship feminists," on the one hand, who argued that pornography constituted protected speech with some social value, and conservatives and "anti-pornography feminists," on the other, who argued that pornography could be highly regulated or even banned, consistent with constitutional principles.[19] Those political realignments gave the anti-pornography movement an established position in domestic politics.

The introduction and commercialization of the Web made debates over sexual speech salient once again. Regulatory efforts to limit sexual speech reflected the "political pressure produced by the dramatic and rapid mainstreaming of pornography in our culture."[20] As Amy Adler illustrates, changing technological and cultural mores yielded innumerable attempts to control the flow of sexual content, typically oriented around the protection of children.

For example, the "cyberporn panic of 1996" gave rise to the Communications Decency Act (CDA), which made it a crime to knowingly send "obscene or indecent" messages to people under 18.[21] The CDA also made it a crime to display any message that "depicts or describes, in terms patently offensive as measured by contemporary community standards, sexual or excretory activities or organs."[22] The CDA provided an affirmative defense to websites that took steps to restrict access to minors or that employed age verification techniques.

So it is no surprise that the CDA's drafters cited sexual speech's potential harmful effects on minors as a reason to control the rapidly commercializing World Wide Web. The Supreme Court struck the CDA down in *Reno v. American Civil Liberties Union*, rejecting the argument that the imperative of protecting children justified broad, vague, content-based penalties for online speech.

Shortly after *Reno v. ACLU*, Congress tried again with the Child Online Protection Act (COPA). COPA restricted the posting of material "harmful to minors" for "commercial purposes," unless the poster used some means to verify that viewers were above legal age. Again, the Court struck the statute down on First Amendment grounds. Because COPA affected at least some protected speech, and because it employed means that were broader than necessary, the Court held that it was unconstitutional.[23]

THE RISE OF PRIVATE CENSORSHIP

What is slightly more surprising, however, is that a widespread crackdown on sexual speech occurred *even in spite of* the victories in *Reno v. ACLU* and *Ashcroft v. ACLU*. Pressure to suppress pornography migrated from the halls of Congress to the conference rooms of Silicon Valley, where it was embedded into content policies, community standards, and automated enforcement techniques.

First, *Reno v. ACLU* left intact intermediary immunity rules that shielded platforms from liability for user-generated content and allowed companies to make and enforce their own rules and standards to limit the kinds of content that they would host.[24] Section 230I(1) infamously immunizes online websites from liability for information posted by third parties. Section 230I(2), the "Good Samaritan" provision, protects online providers from liability when they take action "in good faith" to block or filter "obscene, lewd, lascivious, filthy, excessively violent, harassing or otherwise objectionable" material from their services.[25]

Section 230's survival meant that the internet did not become a "digital cesspool," as some had feared.[26] Instead, the internet was preserved as a domain for private ordering rather than public regulation. And the incentive to moderate online content set by Section 230's Good Samaritan provision aligned directly with conservative attacks on pornography and "indecency." As a result, even when attempts to regulate were not directly successful, what Alice Marwick calls "technopanics" often led private entities to voluntarily constrain speech in ways that reflected the dominant cultural and political milieu.[27]

So while platforms were not required to screen out pornography, nudity, or sexual content from their services, many—particularly the major social media platforms—have promised to do so. In short, as Ari Waldman has argued, online platforms have adopted the same kind of "moralistic discourse" about sexual speech and the need to protect children that lawmakers advanced around the CDA.[28] For example, YouTube bars all explicit content that is "meant to be sexually gratifying."[29] Facebook likewise bars nudity and "sexual activity," citing concerns about users who might be "sensitive."[30] The desire to maximize advertising revenue provides further justification for suppressing what platforms define as sexual speech. Indeed, YouTube explicitly defines "adult content" as "not advertiser-friendly."[31]

As platforms grew and commercialized, they also developed technological methods to moderate online content, including for adult content and nudity. Technology firms began to use hash-matching tools to monitor content for unlawful child sexual abuse imagery and terrorist content.[32] Using machine learning and artificial intelligence, platforms broadened their efforts to make content-related decisions rapidly and at scale.[33] Automated techniques remain a vital mechanism for platforms to be able to detect violations of their community standards. But despite a popular veneer of objectivity and perfect enforcement, they are frequently wrong. When the blogging site Tumblr announced that it would no longer host adult content, it rolled out an AI system to moderate posts that immediately began to flag "vases, witches, fishes, and everything in between" as impermissible sexual content.[34]

Intolerance of sexual speech has only grown more pronounced during the four years since the passage of the Allow States and Victims to Fight Online Sex Trafficking Act (FOSTA). FOSTA expanded federal criminal liability for sex trafficking and for intentionally promoting or facilitating prostitution through interactive computer services.[35] As Kendra Albert documents, although FOSTA has had little real-world impact on criminal and civil liability, it has incentivized large "general purpose" platforms to crack down on sexual content. Small platforms were "deterred by the possibility of federal criminal investigation;" many "niche, free, and queer" websites shut down.[36] FOSTA has had a particularly dramatic effect on sex workers, who have been harmed by the law's effort to eliminate sites that facilitate sex work and simultaneously "deplatformed" by the major platforms.[37]

As Waldman points out, the mainstream online platforms' sexual content policies disproportionately affect queer content and reinforce social media as a "straight space."[38] FOSTA doubled down on these policies, as Albert notes, both because "fear of queerness and non-normative sexuality is intimately tied to whorephobia, and because a huge number of transgender people, primarily transgender women of color and transfeminine people of color, trade sex."[39]

To understand the stakes, compare these two examples. Over the years, Facebook has repeatedly taken down photographs of women breastfeeding their children as violative of the firm's policy against nudity.[40] When asked, Facebook asserted that breastfeeding photos were permitted and that most of these takedown decisions were erroneous. The company's public position was that breastfeeding was "natural and beautiful" and so photographs of breastfeeding were permitted.[41] In contrast, Facebook's Oversight Board recently announced that it will consider an appeal from a decision to remove two pictures of a transgender, nonbinary couple with captions explaining that one member was planning to undergo top surgery and that the couple was raising funds to support their surgery and recovery. Facebook took the photos down because they violated the company's policy on sexual solicitation, and refused to reinstate them even after the couple appealed.[42]

The convergence of formally "private" incentives with public policy provides a powerful new avenue for suppression of sexual speech. In theory, platforms' decisions about adult content are entirely private. In fact, however, the "private" rules of content moderation operate within a political context in which government is a powerful stakeholder. This political context renders platforms vulnerable to government pressure, despite formal independence.[43] With governments unable to enforce anti-pornography laws directly, platforms became particularly apt at policing undesirable speech.

Sexual speech thus presents a rejoinder to the idealized image of openness and democratic participation in the "marketplace of ideas" and in its virtual instantiation, "cyberspace." Indeed, at the core of the internet's democratic promise is the idea that it lowers the barriers to participation in public discourse. With widely distributed communicative technology, as the Court in *Reno v. ACLU* put it, "any person with a phone line can become a town crier with a voice that resonates farther than it could from any soapbox."[44] Even, in theory, a sex worker.

But the emergence of large online platforms blunted these possibilities. Instead, as online platforms emerged and commercialized, the preference for what Barlow applauded as "natural anarchy" and social ordering collapsed into a preference for private or market ordering.[45] Online communities developed rules and enforcement methods.[46] The growth of commercial platforms meant that the individual speech that was at the core of the libertarian tradition grew increasingly reliant on technological infrastructure in private hands.[47] As those private entities grew increasingly powerful, it became clear that their preferences for online speech aligned in significant part with those of cultural conservatives who opposed sexual content and, in particular, the flourishing of sexual minorities. The approach to content regulation jettisoned in *Reno v. ACLU* came back, this time originating in Silicon Valley.

CONFRONTING ONLINE HARMS AND PLATFORM POWER

For nearly thirty years, the dominant mode of thinking about online speech has been libertarian in outlook. But faced with the seemingly innumerable challenges of digital culture and politics today—disinformation, misinformation, weaponized harassment, extractive surveillance capitalism, to name just a few—the cyber civil libertarianism that EFF espouses and, in many ways, pioneered, is on the decline.[48]

First, a growing consensus holds that much online speech causes significant harms, and that the internet industry has largely failed to address those harms. Perhaps the sharpest critique of cyber civil libertarianism comes from Danielle Citron, who offers an alternative paradigm in her germinal work on cyber civil rights. Citron paints a disturbing picture of a flood of online mobs, harassment, and abuse. She argues that civil rights law is an appropriate response to patterns

of behavior that can "extinguish the self-expression of another" while evading accountability for harmful speech.[49] Citron contends that online attacks and abuse rarely implicate the kinds of interests that free speech doctrine is meant to protect. In particular, she rejects the notion that online threats, doxing, and harassment contribute to the "marketplace of ideas."[50] In fact, as she shows, online attacks frequently have the effect of silencing women and people of color.[51]

In her book *Algorithms of Oppression*, Safiya Umoja Noble offers a distinct, but parallel critique of search engines' "corporate control over personal information."[52] In a chapter on the right to be forgotten, Noble describes how Google has resisted legal obligations to erase information about individuals, even when it causes significant harm. Under the First Amendment's protections for publishing truthful information, Google has the better of these arguments.[53] But they come at a high cost. Noble focuses on several anecdotes about women who were fired, bullied, and harassed after past work in the porn industry was discovered online.[54] As Noble describes it, the interest in concealing one's past is in tension with Google's position that its search engine preserves "the cultural record of humanity."[55] Noble aptly describes how Google's dominance has wrested control over reputation, history, and information away from institutions and individuals.

Firms' invocation of robust expressive freedom to shield themselves from regulation has also invited scrutiny.[56] As Julie Cohen puts it, "a campaign has been underway to insulate all forms of commercial information processing from regulatory oversight by invoking the First Amendment's protection for freedom of speech."[57] The result is that the countercultural origins of cyber civil libertarianism have faded while the modern libertarian approach benefits behemoths such as Verizon and Google. To put it another way, the "winners" of First Amendment cases are "more likely to be corporations and other economically and politically powerful actors" than individuals, movement groups, or activists.[58] Tech giants promise to use their First Amendment rights to fight for their users, but whether they do so is ultimately left to their discretion.

To a progressive, then, it looks increasingly like platforms' First Amendment freedoms are running headlong into the expressive, dignitary, and reputational interests of their users. But cultural conservatives are also, once again, seeking to regulate the internet, making arguments (often in bad faith) about social media "censorship" that they argue disproportionately silences conservative viewpoints.

Contemporary confrontations with platform power directly challenge the libertarian tradition in surprising and internally contradictory ways. As evelyn douek and Genevieve Lakier have put it, political conservatives are raising "concern about the threat that private corporate power poses to freedom of speech," while liberals are defending private governance.[59] Meanwhile, progressives see the role of private firms in what Jack Balkin calls the "Second Gilded Age" as a roadblock to democracy.[60] To some extent, these reconfigured political alignments echo the shifts that took place during the feminist anti-pornography movement,

when political conservatives and anti-porn feminists joined forces in support of censorship.

Today, however, even the "anti-censorship" coalition is anti-sexual speech. Conservative majorities in Texas and Florida have enacted "must-carry" legislation that prohibit "censorship" by social media firms. At the time of writing, courts have struck down both statutes as unconstitutional. Anti-censorship groups have pointed out that these laws are so broad that they would prohibit online platforms from removing pornography. For example, the Texas statute prohibits any censorship on the basis of viewpoint. When pressed in litigation, however, the state argued that platforms could still exclude pornography as a "content category," as if doing so raises no problem for free expression.[61] The Florida law does not permit platforms to "censor, deplatform, or shadow ban" a "journalistic enterprise" unless that enterprise posts content that meets the legal standard of obscenity. As the Eleventh Circuit pointed out, "The provision is so broad that it would prohibit a child-friendly platform like YouTube Kids from removing—or even adding an age gate to—soft-core pornography posted by PornHub."[62]

Could civil libertarianism be revived? I think so, with caveats. The first wave of cyber civil libertarianism pitted the interests of the state against the interests of the users of a nascent World Wide Web, a classic First Amendment clash between state and speaker. With the reversal of *Roe v. Wade* and the widespread criminalization of abortion, the same kind of danger arises once again: criminalizing and obstructing information about effectuating what was, until late June 2022, a constitutional right.

Indeed, "anti-censorship" conservatism is increasingly difficult to square with a political and cultural agenda that seeks to reverse hard-won gains for sexual freedom and equality. Shortly after *Dobbs*, South Carolina introduced the "Equal Protection at Conception—No Exceptions—Act," which would ban almost all abortions in the state. In addition, the statute has a provision making it unlawful to "aid or abet" a violation of the abortion ban. In particular, the law criminalizes "providing information . . . regarding self-administered abortions" and "providing access to a website . . . purposefully directed to a pregnant woman who is a resident of this State that provides information on how to obtain an abortion" if the provider knows that the information will be or is reasonably likely to be used to procure an abortion.[63]

For civil libertarians, laws like South Carolina's are a classic example of government overreach: direct state meddling with free expression. Like the anti-porn efforts rejected in *Reno v. ACLU* and *Ashcroft v. ACLU*, the "Equal Protection at Conception—No Exceptions—Act" pits law enforcement's interests against those of internet platforms, and their users: old wine in new bottles.

Amid attacks on women's health, privacy, equality, and autonomy, it is tempting to look to online platforms as guardians of these values and defenders of First Amendment traditions. But as legal theorists have long understood, this is not

the exclusive way to imagine free speech. For over a century, it has been apparent that even *laissez faire* ordering is "in reality permeated with coercive restrictions of individual freedom."[64] To put it another way, "Market ordering is only neutral if one takes power off the table."[65] In 2022, after the Supreme Court opinion in *Dobbs*, Facebook and Instagram began to delete social media posts offering to send mifepristone through the mail. The posts, the platform said, violated their rules against "regulated goods."[66] Sexual expression has been effectively marginalized through both law and private action; will abortion-related speech suffer the same fate?

Putting porn at cyberlaw's center illustrates how the libertarian battles to ensure that the state could not censor sexual speech set the stage for the rise of platform power. Once the prime exemplar of free speech battles, today sexual speech is so off limits that even advocates of must-carry legislation believe that pornography need not find a home online. Abortion, now the subject of widespread criminalization and crackdown, may become even more difficult to discuss. In our cultural, political, and legal imagination, private platforms are bulwarks against censorship. But this vision was naïve from the start. If one lesson of the current political moment is that the Supreme Court won't save us, surely a second is that neither will Silicon Valley.[67]

NOTES

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