

AROUSAL BY ALGORITHM

Amy Adler[†]

The problem of Big Tech has consumed recent legal scholarship and popular discourse. We are reckoning daily with the threats that digital speech platforms like Facebook, X (formerly known as Twitter), TikTok, and YouTube pose to our personal and political lives. Yet while this conversation is raging in discussions about the impact of technology on democracy, free speech, personal autonomy, and other urgent social issues, there has been no parallel discussion about how technology may be distorting our sexual culture. This Article fills that gap.

Here I make a claim that no one has made in legal scholarship or in popular discourse: that the pornography industry, which has undergone a technological revolution in the last sixteen years, should now be reconceived of as a problem of Big Tech and the power of algorithmic speech platforms to shape our culture. Starting in 2007, pornography shifted to algorithm-driven tech platforms like Pornhub, almost all of which are controlled by one little-known, near-monopoly company called “Aylo” (formerly known as “MindGeek”). I argue that as Facebook, X, and YouTube are to democratic speech, Aylo/MindGeek is to sexual speech. Like these other platforms, the

† Emily Kempin Professor of Law, NYU School of Law. Many thanks to participants in workshops at the University of Chicago, University of North Carolina, Loyola, NYU, and Minnesota, the Yale Free Expression Scholars Conference and the Fordham Law School Symposium on Gender Equality and the First Amendment, where I presented previous iterations of this Article. For helpful conversations, comments at workshops or on previous drafts, I am grateful to Jack Balkin, Katharine Baker, Rachel Barkow, Brian Bix, June Carbone, Mary Anne Case, Emiliano Catan, Danielle Citron, Jane Cohen, Susan Crawford, Peggy Davis, Mary Anne Franks, Barry Friedman, Jeannie Fromer, Deborah Gerhardt, Mike Guttentag, Marty Guggenheim, Aziz Huq, Thomas Kadri, Tal Kastner, Joe Kennedy, Dan Kevles, Kathleen Kim, Kate Klonick, Andy Koppelman, Lewis Kornhauser, Joan Krause, Sylvia Law, William P. Marshall, Richard McAdams, Erin Murphy, Liam Murphy, Leigh Osofsky, Mary-Rose Papandrea, Beth Posner, Rick Pildes, Kal Raustiala, Jennifer Rothman, Darren Rosenblum, Ted Shaw, Ben Sobel, Chris Sprigman, Dick Stewart, Geof Stone, Rick Su, Alexander Tsesis, and Rachel Wechsler. All mistakes are my own. Many thanks to my students at NYU Law School for providing valuable insights along the way. For superb research assistance, I am grateful to Lillian Barany, Elly Brinkley, Julia Leff, Madhulika Murali, Leo Nuovo, Franklin Sussman, Alex Swanson, Sarina Taylor, Jeffrey Waldron, and Emily Yan.

Technology is a moving target. This Article was up to date as of the start of 2024, but there will likely have been changes in the technology landscape by the time it is published.

company's sites use algorithmic search engines and suggestions, rigid categorization of content, and artificial-intelligence-driven search term optimization to constrain and warp what users are exposed to. Pornography now presents the distorting effects that accompany Big Tech speech platforms, such as filter bubbles, feedback loops, and the tendency of algorithmic suggestions to alter individual preferences.

The lack of scholarly attention to this revolution in pornography is surprising given both the extreme scope of the changes and the strong interest scholars are paying to the legal and cultural implications of other Big Tech speech platforms. But it is also striking because the question of whether pornography changes us as individuals and as a society was once hotly debated in legal scholarship. In the 1980s and 90s, these issues consumed First Amendment and feminist legal scholars who debated the feminist critique of pornography of that era. Yet as the debate has moved on, scholars have overlooked the newfound relevance of that scholarship for the Big Tech incarnation of the porn industry. Drawing on that earlier scholarship, and on emerging literature about the power of Big Tech speech platforms, I show that the problems posed by the Big Tech takeover of pornography should be of concern not only to scholars who supported the feminist critique of pornography, but also and for different reasons, to those who opposed it and left it for dead. Anyone who has a stake in sexual autonomy should worry about the threat that the Big Tech transformation of pornography now poses.

| | |
|--|-----|
| INTRODUCTION..... | 789 |
| I. PORNHUB AND THE TRIUMPH OF PORNOGRAPHY..... | 792 |
| A. All Porn All the Time..... | 793 |
| B. Porn Before Pornhub..... | 795 |
| C. Mainstream Penetration | 798 |
| II. RETHINKING PORN AS A PROBLEM OF BIG TECH SPEECH PLATFORMS | 803 |
| A. Down the Rabbit Hole: How Speech Platforms Change What We Want..... | 806 |
| B. Internet Porn and the Construction of Desire..... | 811 |
| 1. <i>Algorithmic Desire</i> | 811 |
| 2. <i>Categorization and Data-Driven Production: Porn Has Begun to Author Itself</i> | 812 |
| III. THE FEMINIST ANTI-PORNOGRAPHY MOVEMENT AND ITS CRITICS..... | 814 |
| A. The Feminist Critique of Pornography in the 1980s and 1990s..... | 816 |

| | | |
|-----|--|-----|
| B. | “Sex-Positive Feminism,” Queer Theory, and Other Responses to MacKinnon | 822 |
| C. | Reassessing Social Construction..... | 827 |
| IV. | THE FIRST AMENDMENT PROTECTION OF PORNOGRAPHY | 829 |
| A. | The Collapse of Obscenity Law..... | 829 |
| B. | Failed Attempts to Regulate Internet Pornography | 833 |
| V. | IS PORNOGRAPHY CHANGING SEXUAL PRACTICES? | 834 |
| A. | Too Much to Measure | 835 |
| B. | Sex That Looks Like Porn | 837 |
| C. | A Normative Assessment | 840 |
| | CONCLUSION..... | 842 |

INTRODUCTION

Our culture is so drenched in pornography that it may be hard to imagine it was once hard to get. I have tried to explain it to my students, but like so many aspects of the pre-digital world, it is not easy to fathom. This is the generation for whom Rule 34 is a tired meme: “If it exists, there is porn of it.” Porn now seems like a natural resource, like the air we breathe: It is everywhere; it is free, and no matter how much we consume, there will always be more than we will ever need. High-quality streaming porn—free, searchable, and categorized to cater to every imaginable fantasy—is always available on our phones.

This is a new state of affairs. Until a technological revolution rocked the industry sixteen years ago, pornography was widely available, but there were still significant barriers to consuming it, and there was far less of it. All that changed in 2007, when a technological disruption of the pornography industry created a new world in terms of distribution, saturation, and content. That year, the pornography industry migrated to streaming, algorithm-driven tech platforms, the most prominent of which is Pornhub. Most of these platforms are controlled by one secretive, data-driven, near-monopoly company known until recently as “MindGeek.” (The company changed its name to “Aylo” in August 2023, but I will refer to it primarily as “MindGeek” in what follows.) Modelled on YouTube, the porn “tube sites” stream user-uploaded content that is available to kids, overwhelmingly free, and in seemingly endless supply. The sheer volume of pornography consumption on MindGeek’s sites is staggering. In 2020, the company’s sites received 4.5 billion visits a month; that is almost double the number of

visitors to Facebook and Google combined.¹ Pornhub alone, just one of MindGeek's sites, garners more visitors per day than Netflix, Yahoo, or Amazon.² As of June 2023, Pornhub was the fourth most-visited website in the United States.³ Its cultural significance is hard to overstate.

This Article makes a claim that no one has made in legal scholarship or in popular discourse: that we should now reconceive pornography as a problem of Big Tech.⁴ In the political realm, legal scholars and cultural critics are reckoning with the power of algorithm-driven, user-generated speech platforms like Facebook, YouTube, TikTok, and X (formerly known as Twitter) to shape and distort both individual choices and public discourse. Algorithmic content optimization, artificial intelligence-driven algorithmic recommendation systems, categorization, filtering, ranking, and presentation can all combine to harden views, push us toward extremes, alter our preferences, and even alter our behavior. Yet while this reckoning with the dangers of Big Tech speech platforms is raging in discussions about their impact on democracy, public discourse, and individual preferences, there has been no parallel discussion about how this same technology, marshaled in the service of the porn industry, is changing and distorting our sexual culture and behavior. Here I fill that gap.

This Article argues that as Facebook, YouTube, TikTok and X are to political speech, MindGeek (now "Aylo") is to sexual

¹ Sheelah Kolhatkar, *The Fight to Hold Pornhub Accountable*, NEW YORKER (June 13, 2022), <https://www.newyorker.com/magazine/2022/06/20/the-fight-to-hold-pornhub-accountable> [<https://perma.cc/HS4C-9QFQ>]. As of 2021, Pornhub received 130 million visitors a day. *The Pornhub Tech Review*, PORNHUB INSIGHTS (Apr. 8, 2021), <https://www.pornhub.com/insights/tech-review> [<https://perma.cc/H9V2-4REM>].

² Nicholas Kristof, *The Children of Pornhub*, N.Y. TIMES (Dec. 4, 2020), <https://www.nytimes.com/2020/12/04/opinion/sunday/pornhub-rape-trafficking.html> [<https://perma.cc/DMU7-JR6P>].

³ *Top 100: The Most Visited Websites in the US*, SEMRUSH BLOG, <https://www.semrush.com/blog/most-visited-websites/> [<https://perma.cc/2UDZ-FUFQ>] (last visited June 2023).

⁴ As will be clear, I use the term "Big Tech" as shorthand to refer to a subset of issues that fall within that umbrella term. My focus is on algorithm-driven, user-generated speech platforms, the ones which Kate Klonick has helpfully labeled "Big Speech." See Stanford Cyber Policy Center, *Big Speech*, YOUTUBE (May 10, 2022), <https://www.youtube.com/watch?v=wr1YQykLrIE> [<https://perma.cc/4NBN-VGES>] (lecture at Stanford Cyber Policy Center). Although these platforms raise any number of concerns, see, e.g., *id.*, my focus here is on how they affect public discourse and individual preferences. Note that I am not referring in this Article to other raging debates about Big Tech, most prominently in the realm of antitrust, which apply to platforms like Amazon and Google. For a fuller explication of the overly capacious nature of the term "Big Tech," see Mark A. Lemley, *The Contradictions of Platform Regulation*, 1 J. FREE SPEECH L. 303 (2021).

speech. The shift of pornography to algorithm-driven speech platforms, most of which are controlled by one corporation, poses a threat to our individual autonomy and our sexual culture in ways that track many of the same concerns scholars have raised about the threat posed by Big Tech to free speech, public discourse, and individual freedom in other realms. MindGeek and its sites share many characteristics of those platforms, including surveillance, data-mining of users, artificial-intelligence-powered algorithms, a social media component, an advertising-supported business model, and near-monopoly market power.⁵ Yet while there is a vibrant body of literature exploring the problems Big Tech poses in the political and public discourse realm, I have found no legal or popular literature exploring how these same problems now exert themselves in the realm of pornography. Just like these other platforms, Pornhub constrains and distorts what users are exposed to. Through algorithmic search engines, suggestions, and search term optimization, MindGeek pushes users into filter bubbles, leads them down rabbit holes, and alters their preferences.

The lack of scholarly attention to the cultural implications of this upheaval in the pornography industry is especially surprising given both the extreme scope of the changes and the strong interest scholars are paying to the legal and cultural implications of other Big Tech speech platforms such as Facebook, YouTube, Tik-Tok, and X. But it is also striking because the question of whether pornography alters us as individuals or as a society was once hotly debated in legal scholarship. In the 1980s and 90s, these issues consumed First Amendment and feminist legal scholars who debated the “feminist critique of pornography” then emerging. From today’s perspective, that critique has mostly failed. Contemporary scholars have largely abandoned it.⁶ Our culture is now so saturated by porn that it makes the pornography environment that was once the subject of debate look quaint. But though the debate has moved on,

⁵ See David Auerbach, *Vampire Porn*, SLATE (Oct. 23, 2014), http://www.slate.com/articles/technology/technology/2014/10/mindgeek_porn_monopoly_its_dominance_is_a_cautionary_tale_for_other_industries.html [<https://perma.cc/8WDQ-95NX>] (asserting that MindGeek is “the porn provider” and has become “the porn monopoly”).

⁶ Cf. *infra* notes 137–140 and accompanying text (describing important contemporary scholarship and activism focusing not on the social construction effects of pornography, but instead on the abuse of participants in the pornography industry, including harms suffered by victims of nonconsensual pornography); see also *infra* note 100 (describing litigation brought against Pornhub alleging that it allows user-uploaded material produced through trafficking and abuse to proliferate on its site).

scholars have yet to realize the implications of the new revolution in the pornography industry for these earlier arguments. Here, I return to those debates to establish their relevance to the contemporary pornography landscape. I show that problems posed by the Big Tech transformation of the pornography industry should be of concern not only to scholars who supported the 1980s feminist critique of pornography, but also and for different reasons to those—like me—who opposed it and left it for dead. Anyone who has a stake in autonomy and sexual freedom should worry about the intrusion that the Big Tech manifestation of pornography now poses to us as individuals and as a culture.

Part I sets forth the tech revolution in the pornography industry and the rise of Pornhub. Here, I show how these technological changes ushered in a new financial model that turbocharged pornography's cultural dominance and ubiquity. Part II reframes pornography as a problem of Big Tech speech platforms. Here, situating the technological upheaval in pornography in the larger literature on algorithms and networked speech platforms, I argue that this shift has given porn greater power to construct and alter sexuality. Part III sets forth the 1980s and 1990s feminist and free-speech debates about pornography and argues that the many different positions that arose during these debates have newfound relevance for our contemporary pornography landscape. Part IV analyzes the First Amendment backdrop that preceded the rise of pornography as Big Tech and explains why free-speech doctrine now forecloses any government attempts to ban or regulate adult pornography because of its potential ill effects on society as a whole. Part V explores recent changes in mainstream pornography and in sexual practice. I evaluate the argument that both porn and mainstream sexual practices have become more "degrading" to women. I then assess the normative and cultural implications of these changes through the framework of both the earlier First Amendment and feminist pornography debates and my new framing of pornography as a manifestation of Big Tech.

I

PORNHUB AND THE TRIUMPH OF PORNOGRAPHY

In this Part, I present the technological shift that revolutionized the pornography industry and dramatically augmented pornography's cultural dominance and ubiquity. As pornography migrated almost completely online to "tube sites," the most

prominent of which is Pornhub, porn has become free, ubiquitous, and normative. It has penetrated mainstream culture in an unprecedented way. It has also become, in effect, sex education for kids.

A. All Porn All the Time

Until a technological revolution disrupted the pornography industry sixteen years ago, porn was of course widely available, even though there were still significant barriers to consuming it, there was far less of it, and it was not available for free as it is today. Historically, to see pornography you had to go to a movie theater, pornography shop, or order it through the mail. Even after the invention of the VCR, you still had to go to a porn store or use mail order to obtain a video. Later, pay-per-view and cable liberalized access, bringing porn directly into the home, but this still required spending money and using a credit card; it risked identification and embarrassment and presented a barrier for kids. All that changed when streaming “tube sites” took over the industry.⁷ Modelled on YouTube, the porn tube sites began to stream user-uploaded content, most of it free, and much of it pirated.

As in other creative industries disrupted by digital changes, the shift to a free and apparently limitless supply of content ushered in an entirely new financial model. Content creators lost,⁸ but it was a huge boon for aggregator platforms, like the tube sites. Like other digital speech platforms (such as Facebook, Instagram, YouTube, and TikTok), these sites make their money from advertising and the data mining that

⁷ Kal Raustiala & Christopher Jon Sprigman, *The Second Digital Disruption: Streaming and the Dawn of Data-Driven Creativity*, 94 N.Y.U. L. REV. 1555, 1572–73 (2019) (discussing the rise of the tube sites and their relevance for intellectual property law).

⁸ Content creators, forced to find new modes of income, have turned to other venues, such as “camming.” Kate Darling, *Internet Pornography Without Intellectual Property: A Study of the Online Adult Entertainment Industry*, CREATIVITY WITHOUT LAW: CHALLENGING THE ASSUMPTIONS OF INTELLECTUAL PROPERTY 201, 212–13 (Kate Darling & Aaron Perzanowski, eds., 2017), “customs,” Jon Ronson, *The Butterfly Effect with Jon Ronson*, AUDIBLE ORIGINALS, [https://www.audible.com/pd/The-Butterfly-Effect-with-Jon-Ronson-Audiobook/B073JS84YF? \[https://perma.cc/U7XS-FGM8\]](https://www.audible.com/pd/The-Butterfly-Effect-with-Jon-Ronson-Audiobook/B073JS84YF? [https://perma.cc/U7XS-FGM8]) (custom-made videos catering to individual desires), or merchandise. See Raustiala & Sprigman, *supra* note 7, at 1580–81. Performers have increasingly turned to OnlyFans, a social media platform that allows users to sell sexual content to subscribers. The New York Times has referred to it as “the paywall of porn.” Jacob Bernstein, *How OnlyFans Changed Sex Work Forever*, N.Y. TIMES (Feb. 9, 2019), [https://www.nytimes.com/2019/02/09/style/onlyfans-porn-stars.html \[https://perma.cc/STH4-CG75\]](https://www.nytimes.com/2019/02/09/style/onlyfans-porn-stars.html [https://perma.cc/STH4-CG75]).

supports it. The porn tube sites also make money from a very small but devoted subset of porn viewers who pay for premium subscriptions.⁹

Pornhub, the biggest of the tube sites, came to dominate this new porn ecosystem.¹⁰ It is owned by MindGeek (rebranded as Aylo in 2023),¹¹ a secretive, privately-held, data-driven tech company, which began buying up the tube sites in 2010 and now occupies a near-monopoly¹² position in the porn industry, which is estimated to generate \$97 billion a year.¹³ In 2012, MindGeek reportedly controlled 80% of the market.¹⁴ As of 2023, the company accounted for 81.6% of the pornography industry revenue in the United States.¹⁵ Although Pornhub is its most important site, MindGeek (now Aylo) owns many others, including RedTube, YouPorn, Tube8, Brazzers, Twistys, and more; many of these also have a social media component. MindGeek's market power and its categorization of porn (which

⁹ One writer indicates that paid subscribers represent one out of every 10,000 users. Gustavo Turner, *My Stepdad's Huge Dataset*, 6 LOGIC MAG. (Jan. 1, 2019), <https://logicmag.io/06-my-stepdads-huge-dataset/> [<https://perma.cc/UZ5V-9BTG>].

¹⁰ *Id.*

¹¹ Still privately held, on March 16, 2023, MindGeek (now Aylo) was acquired by Ethical Capital Partners ("ECP"), a private equity firm that was founded in 2022 and is chaired by the founder of Canada's largest cannabis retailer. Dan Milmo, *Pornhub Owner MindGeek Sold to Private Equity Firm*, THE GUARDIAN (Mar. 17, 2023), <https://www.theguardian.com/business/2023/mar/17/pornhub-owner-mindgeek-sold-to-private-equity-firm> [<https://perma.cc/KL89-DSZL>]. MindGeek appears to be ECP's first and only acquisition.

¹² See Katrina Forrester, *Making Sense of Modern Pornography*, NEW YORKER (Sept. 19, 2016), <https://www.newyorker.com/magazine/2016/09/26/making-sense-of-modern-pornography> [<https://perma.cc/KT6V-AUTP>] ("The majority of the world's tube sites are effectively a monopoly—owned by a company called MindGeek."); see also Joe Pinsker, *The Hidden Economics of Porn*, THE ATLANTIC (Apr. 4, 2016), <https://www.theatlantic.com/business/archive/2016/04/pornography-industry-economics-tarrant/476580/> [<https://perma.cc/R43D-QH4P>] (quoting Shira Tarrant; also stating that porn streaming companies are "monopolizing the industry").

¹³ Raustiala & Sprigman, *supra* note 7. See also *Porn Industry Revenue – Numbers & Stats*, BEDBIBLE.COM (Aug. 23, 2023), <https://bedbible.com/porn-industry-revenuestatistics/> [<https://perma.cc/9YWN-B2V7>] (estimating the industry is worth \$100 billion).

¹⁴ See Sophie Gilbert, *Storytellers Grapple with the Porn Identity*, THE ATLANTIC (Aug. 9, 2017), <https://www.theatlantic.com/entertainment/archive/2017/08/mrs-fletcher-tom-perrotta-the-butterfly-effect-jon-ronson-porn-mainstream-culture/536220/> [<https://perma.cc/J95E-RHKH>] ("By 2012 . . . 80 percent of people watching porn were doing so on [sites owned by MindGeek].").

¹⁵ *Mindgeek Llc - Company Profile*, IBISWORLD, <https://www.ibisworld.com/us/company/mindgeek-llc/428371/#:~:text=In%20the%20US%2C%20the%20company.growth%20than%20some%20of%20their> [<https://perma.cc/TZ78-ZTV5>] (last visited 2023).

I explore below) mean that content is now frequently produced to be optimized for the company's searches and algorithms.¹⁶

The sheer volume of consumption of MindGeek's pornography is astonishing. Writing in 2018 about the rising popularity of Pornhub, just one of MindGeek's sites, *Forbes* breathlessly reported:

Every minute sees 63,992 new visitors to the site, watching 207,405 videos through 57,750 searches. That minute sees 12 new videos and two hours of content uploaded. That minute sees 7708 [g]igabytes of data transferred worldwide. That minute sees user statistics of 13,962 profile views, 593 follows, 167 friend requests accepted, 122 messages sent, 271 videos rates, 528 videos added to playlists and 22 new comments left. That's one hell of a minute.¹⁷

Since then, the numbers have grown. As of 2019, Pornhub alone was receiving a total of 115 million visitors a day.¹⁸ By 2021, that number rose to 130 million daily users.¹⁹ In 2020, MindGeek's sites altogether received 4.5 billion visits a month, almost double the traffic of Facebook and Google combined.²⁰ During the pandemic, consumption of pornography increased by at least 22%.²¹ Pornhub alone garners more visitors per day than Netflix, Yahoo, or Amazon.²² In June 2023, it was the fourth most-visited website in the U.S.²³

B. Porn Before Pornhub

Contrast the present pornography environment with earlier eras—the ones that formed the backdrop for most major legal decisions about pornography and most feminist and First

¹⁶ See *infra* Part II.

¹⁷ Curtis Silver, *Pornhub 2018 Year in Review Insights Report Will Satisfy Your Data Fetish*, FORBES (Dec. 11, 2018), <https://www.forbes.com/sites/curtissilver/2018/12/11/pornhub-2018-year-in-review-insights-report/#32fdcaf7369> [<https://perma.cc/J66G-7TU4>]. Note that these statistics, like some but not all of those in the following paragraph, come from MindGeek; as such, they should be taken with a grain of salt, although they are widely repeated in the mainstream press.

¹⁸ *The 2019 Year in Review*, PORNHUB INSIGHTS (Dec. 11, 2019), <https://www.pornhub.com/insights/2019-year-in-review> [<https://perma.cc/8G4L-C28H>].

¹⁹ Kolhatkar, *supra* note 1.

²⁰ *Id.*

²¹ I. India Thusi, *Reality Porn*, 96 N.Y.U. L. REV. 738, 744–45 (2021) (citation omitted).

²² Kristof, *supra* note 2.

²³ *Top 100: The Most Visited Websites in the US*, *supra* note 3.

Amendment debates.²⁴ The Supreme Court decided its last major cases on the subject of “obscenity” during the so-called “Golden Age” of pornography in the 1970s.²⁵ At that time, porn films were feature-length, shot on 35 millimeter, with high-production values and wide theatrical release.²⁶ The sexual revolution was at its height. Major films had mainstream cultural traction, such as *Deep Throat* (1972),²⁷ *Behind the Green Door* (1972), *The Devil in Miss Jones* (1973), *Misty Beethoven* (1976), and *Debbie Does Dallas* (1978).²⁸ Ralph Blumenthal, writing in the *New York Times*, coined the term “porno chic” to describe the era.²⁹ Unlike today, in that earlier period, and up until the turn of this century, pornographic magazines also comprised a significant portion of the pornography business. In 1953, *Playboy* had been the first magazine to introduce pornographic material to mainstream newsstands; by 1978, there were close to 100 of these periodicals.³⁰

By the early ‘80s, the industry changed in response to a major technological shift: the widespread home adoption of the VCR, which offered consumers new ease of access and privacy.³¹ The change in format led to changes in cost and content; lower-budget videos with lower production values supplanted

²⁴ *Infra* Parts III and IV.

²⁵ *Infra* Part IV.A (discussing the major 1973 obscenity cases).

²⁶ See Susanna Paasonen & Laura Saarenmaa, *The Golden Age of Porn: Nostalgia and History in Cinema*, *PORNIFICATION: SEX AND SEXUALITY IN MEDIA CULTURE* 23, 23–24 (Susanna Paasonen, Kaarina Nikunen & Laura Saarenmaa eds., 2007).

²⁷ The film starred Linda Marchiano, who claimed that her performance in it resulted from rape, coercion, and abuse. MacKinnon describes this in her essay *Linda’s Life and Andrea’s Work*. CATHARINE A. MACKINNON, *FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW* 127 (1987) [hereinafter *MACKINNON, FEMINISM UNMODIFIED*].

²⁸ Paasonen & Saarenmaa, *supra* note 26, at 27 (describing the films as “valued in terms of artistry, extraordinariness of atmosphere and story content”).

²⁹ Ralph Blumenthal, “*Hard-Core*” Grows Fashionable—and Very Profitable, *N.Y. TIMES* (Jan. 21, 1973), <https://www.nytimes.com/1973/01/21/archives/pornochic-hardcore-grows-fashionableand-very-profitable.html> [https://perma.cc/66E6-VMBB].

³⁰ See Martha Langelan, *The Political Economy of Pornography*, 32 *AEGIS: MAG. ON ENDING VIOLENCE AGAINST WOMEN* 5, 7 (1981). *Playboy* alone claimed a circulation of 5.5 million and \$65 million in annual advertising revenue in 1981. William Serrin, *Sex Is a Growing Multibillion Business*, *N.Y. TIMES* (Feb. 9, 1981), <https://www.nytimes.com/1981/02/09/nyregion/sex-is-a-growing-multibillion-business-first-of-two-articles.html> [https://perma.cc/V269-MESS].

³¹ See Steven Overly, *The VCR Is Officially Dead. Yes, It Was Still Alive*, *WASH. POST* (Jul. 22, 2016), <https://www.washingtonpost.com/news/innovations/wp/2016/07/22/rip-to-the-vcr/> [https://perma.cc/R4RQ-XTAB] (reporting on the widespread household adoption of VCRs in 1980s and 1990s).

expensive films.³² The industry soared with the change. Video continued to dominate the industry in the 1990s, even as DVDs replaced cassettes, and new distribution methods arose, primarily pay-per-view and cable.³³

The game changed once again with the dawn of the Internet era in the 1990s, when porn could be downloaded on computers. By 1995, Playboy's website was averaging 620,000 daily visits;³⁴ by 1998, Internet pornography revenues were estimated at \$750 million to \$1 billion with 84% of that revenue generated in the United States.³⁵ By 2002, approximately 70 million different individuals were visiting at least one porn site per week—with at least 20 million page views occurring on U.S.-hosted sites.³⁶

But the widespread adoption of broadband Internet in the early 2000s supercharged the pornography industry and offered a huge benefit to consumers. In 2008, over 50% of U.S. households had installed broadband Internet.³⁷ The pre-broadband Internet era was slow and clunky; it required downloading pornography, a relatively time-consuming and burdensome process. Downloading had also created a permanent and potentially embarrassing record. Further liberalizing access

³² See Bryn Pryor, *How the Porn Industry Set the Stage for Micro-Budget Filmmaking*, INDIEWIRE (Feb. 6, 2014), <https://www.indiewire.com/features/craft/how-the-porn-industry-set-the-stage-for-micro-budget-filmmaking-65379/> [https://perma.cc/C96C-9AU5]; Robert Jensen, *Pornography Is What the End of the World Looks Like*, EVERYDAY PORNOGRAPHY 105 (Karen Boyle ed., 2010).

³³ In the early 1990s, the pornographic cassette industry continued to grow. According to one industry estimate, "410 million pornographic videos were rented in 1991 alone." Ronald K. L. Collins & David M. Skover, *The Pornographic State*, 107 HARV. L. REV. 1374, 1382–83 (1994). Between 1991 and 1993, sales and rentals of adult videos at general video stores (not including adult-only video stores) grew 75 percent, reaching \$2.1 billion in revenue (according to Adult Video News, a trade publication). John R. Wilke, *Porn Broker: A Publicly Held Firm Turns X-Rated Videos into a Hot Business*, WALL ST. J., Jul. 11, 1994, at A1.

³⁴ *Playboy Makes Pitch for 'Girls of the Net'*, N.Y. TIMES (Mar. 20 1995), <https://www.nytimes.com/1995/03/20/business/information-technology-playboy-makes-pitch-for-girls-of-the-net.html> [https://perma.cc/S48C-6282].

³⁵ Jonathan C. Coopersmith, *Pornography, Videotape, and the Internet*, 19 IEEE TECH. AND SOC. MAG. 27, 32 (2000).

³⁶ NATIONAL RESEARCH COUNCIL, YOUTH, PORNOGRAPHY, AND THE INTERNET 72 (Dick Thornburgh & Herbert S. Lin eds., 2002).

³⁷ John B. Horrigan, *Home Broadband Adoption 2008*, PEW RSCH. CTR. (Jul. 2, 2008), <https://www.pewresearch.org/internet/2008/07/02/home-broadband-2008/> [https://perma.cc/FR2T-6YVP] (finding that some 55% of adult Americans had broadband Internet connections at home). The term broadband commonly refers to high-speed Internet access that is always switched on and that is faster than traditional dial-up access. See *Getting Broadband Q&A*, FCC, <https://www.fcc.gov/general/types-broadband-connections#bpl> [https://perma.cc/JKE8-9CJH] (last visited Jan. 26, 2023).

and ease of use, free porn became the norm in the broadband era, replacing the subscription-based model of the earlier Internet era.³⁸ In short, the move to streaming tube sites offered consumers a new world of seemingly limitless, free content in which they could access pornography without the friction and pitfalls that accompanied earlier Internet technology.

Prior to the Pornhub era, pornography was still a competitive industry with many different players, rather than what it is today: a business dominated to a significant extent by one firm.³⁹ By 2004, just three years before the debut of the tube sites, noted pornography scholar Linda Williams assessed the extent of the then-thriving porn industry. Writing that “[s]even hundred million porn videos or DVDs are rented each year,” Williams called the number “mind-boggling.”⁴⁰ When viewed from the perspective of a Pornhub world—42 billion visits a year—the number is mind-bogglingly small.

C. Mainstream Penetration

In the 1970s, critics had already begun to worry about porn entering mainstream culture. “Porno chic” was a thing. The sexual revolution was in full swing. In the 70s, the New York Times reported excitedly that some celebrities (e.g., Truman Capote, Johnny Carson, and Jack Nicholson) were rumored to have made the risqué move of going to see *Deep Throat* in Times Square, as had the in-crowd at Elaine’s.⁴¹

These concerns seem quaint by today’s standards. Mainstream culture is now shot through with pornography in a way that would have been unimaginable twenty years ago.⁴² It’s not

³⁸ NATIONAL RESEARCH COUNCIL, *YOUTH, PORNOGRAPHY, AND THE INTERNET* 74 (Dick Thornburgh & Herbert S. Lin eds., 2002) (“Revenue in the online adult entertainment business, as in other businesses both online and offline, results from the sale of products or services (including subscriptions) or advertising. The largest amounts of revenue are obtained from the end-user customer, who typically uses a credit card to subscribe to a site.”).

³⁹ See Martha Langelan, *The Political Economy of Pornography*, 32 AEGIS: MAG. ON ENDING VIOLENCE AGAINST WOMEN 6 (1981) (describing porn as a highly competitive industry); Frank Rich, *Naked Capitalists*, N.Y. TIMES (May 20, 2001), <https://www.nytimes.com/2001/05/20/magazine/naked-capitalists.html> [<https://perma.cc/5ZEV-5EXM>] (describing the variability and breadth of the porn industry in the early 2000s).

⁴⁰ LINDA WILLIAMS, *An Introduction*, PORN STUDIES 1–2 (2004).

⁴¹ Blumenthal, *supra* note 29.

⁴² This discussion is drawn from Amy Adler, *All Porn All the Time*, 31 N.Y.U. REV. L. & SOC. CHANGE 695, 696 (2007) [hereinafter Adler, *All Porn All the Time*]. See also Legacy Russell, *Amy Adler*, BOMB MAG. (Mar. 12, 2013), <https://bomb-magazine.org/articles/amy-adler/> [<https://perma.cc/6GUN-NUJC>].

just that free, hard-core porn is always available. It's also that mainstream culture looks more and more like porn. You can see the influence of porn on Instagram or in music videos;⁴³ the trend is so pervasive that it would be misleading to single out one, but Cardi B's and Megan Thee Stallion's WAP, replete with celebrity cameos, is a recent example of the crossover of porn style and mainstream culture.⁴⁴ Selfie culture shows the marked influence of porn; people now present themselves for the camera in a way that mimics gestures, camera angles, and facial expressions from porn.

Indeed, porn is arguably now at the heart of pop culture. Kim Kardashian became a superstar thanks in large part to a leaked sex tape.⁴⁵ It is still Pornhub's most-viewed video of all time.⁴⁶ Kanye West was "a co-creative lead[]" for Pornhub's 2018 Awards show; he even designed the trophies (described as "monsterish dildos").⁴⁷ And Pornhub continues to brand itself as a mainstream site, buying a billboard in Times Square and touting its charitable donations to organizations like Black Lives Matter.⁴⁸

As a testament to the mainstreaming of pornography, books lamenting the "pornification" of our culture have become a small cottage industry.⁴⁹ So changed are our cultural

⁴³ FEONA ATTWOOD, *MAINSTREAMING SEX: THE SEXUALIZATION OF WESTERN CULTURE* xiv (2009) ("[T]oday the places, products and performances associated with sex for its own sake are becoming more visible.").

⁴⁴ Cardi B, *WAP feat. Megan Thee Stallion [Official Music Video]*, YOUTUBE (Aug. 7, 2020), <https://www.youtube.com/watch?v=hsm4p0TWjMs> [<https://perma.cc/P3LM-HEDP>].

⁴⁵ See Leslie Bruce, *The Kardashian Decade: How a Sex Tape Led to a Billion-Dollar Brand*, HOLLYWOOD REP. (Aug. 16, 2017), <https://www.hollywoodreporter.com/features/kardashian-decade-how-a-sex-tape-led-a-billion-dollar-brand-1029592> [<https://perma.cc/Z4LG-RN87>] (describing Kim Kardashian's sex tape as "world news").

⁴⁶ *The 2019 Year in Review*, *supra* note 18.

⁴⁷ Victoria Clark, *Kanye West Took Over the Pornhub Awards So That's Why You Were Watching Them*, VULTURE, (Sept. 7, 2018), <https://www.vulture.com/2018/09/kanye-west-took-over-the-pornhub-awards.html> [<https://perma.cc/W524-A9LB>].

⁴⁸ See Phil Lord, *Pornhub: Opening the Floodgates?*, 11 HOUS. L. REV.: OFF REC. 54, 54–55 (2021) (citations omitted).

⁴⁹ See, e.g., FEONA ATTWOOD, *MAINSTREAMING SEX: THE SEXUALIZATION OF WESTERN CULTURE* xiv (2009); GAIL DINES, *PORNLAND: HOW PORN HAS HIJACKED OUR SEXUALITY* (2010); ARIEL LEVY, *FEMALE CHAUVINIST PIGS: WOMEN AND THE RISE OF RAUNCH CULTURE* (2005); PAMELA PAUL, *PORNIFIED: HOW PORNOGRAPHY IS DAMAGING OUR LIVES, OUR RELATIONSHIPS, AND OUR FAMILIES* (2005); *PORNIFICATION: SEX AND SEXUALITY IN MEDIA AND CULTURE* (Susanna Paasonen, Kaarina Nikunen & Laura Saarenmaa eds., 2007); CARMINE SARRACINO & KEVIN M. SCOTT, *THE PORNING OF AMERICA: THE RISE OF PORN CULTURE, WHAT IT MEANS, AND WHERE WE GO FROM HERE* (2008). See also NANCY BAUER,

standards governing display that much of what we take for granted on television or in advertisements would have been considered pornographic just two decades ago. This is particularly evident in advertising, which looks a lot like soft-core porn (although with better production values). Recent mainstream-fashion ads have presented themes like gang rape or group sex or upskirting.⁵⁰ It's no wonder that poor Playboy Magazine, increasingly irrelevant, tried for a moment to distinguish itself by *eliminating* nudity as a strategy to make it stand out from everyday culture.⁵¹

The blurred boundaries between mainstream culture and pornography can also be seen in the prevalence of porn on X⁵² and the meteoric rise of OnlyFans during the Covid-19 pandemic.⁵³ More interactive than a tube site and facilitating

HOW TO DO THINGS WITH PORNOGRAPHY 4–6 (2015) (describing the “pornographization of everyday life”).

⁵⁰ For just a few examples of ads that illustrate this tendency, see Dolce and Gabbana’s “gang rape” advertisement, Calvin Klein’s “gang rape” advertisement (banned in Australia), Tom Ford’s fragrance ad from 2007 (showing a woman caressing a perfume bottle between her spread legs), Calvin Klein’s group sex billboard, or basically every American Apparel ad ever. For a collection of some of these images, see Steph Eckardt & Alex Hodor-Lee, *A Brief History of Fashion’s Most NSFW, Controversial Ad Campaigns*, W MAGAZINE (Mar. 31, 2017), <https://www.wmagazine.com/life/most-controversial-fashion-ad-campaigns> [https://perma.cc/3D56-SKZR].

Dominic Green, *15 Recent Ads That Glorify Sexual Violence Against Women*, BUS. INSIDER (May 18, 2013), <https://www.businessinsider.com/sex-violence-against-women-ads-2013-5#calvin-klein-is-another-brand-that-strives-to-be-daring-and-is-often-chastised-for-its-suggestive-ads-this-ad-ran-in-australia-3> [https://perma.cc/WGJ7-UE2P]; and Adele Chapin, *Calvin Klein Upskirt Ad Enrages Instagrammers*, RACKED (May 11, 2016), <https://www.racked.com/2016/5/11/11657760/calvin-klein-ads-underwear-upskirt> [https://perma.cc/SZ9J-NNT3].

⁵¹ Frank Pallotta, *Playboy to Eliminate Nude Photos from the Magazine*, CNN BUS. (Oct. 13, 2015), <https://money.cnn.com/2015/10/12/media/playboy-ending-fully-nude-photos/index.html> [https://perma.cc/UT6C-J7X8].

⁵² X is the only mainstream social media site to allow nudity. See Rob LeDonne, *We’re Living in a Twitter Porn Golden Age*, PAPER (June 16, 2021), <https://www.papermag.com/twitter-porn-2653389836.html> [https://perma.cc/8NQS-AAKE]; Mark Hay, *Twitter and the Porn Apocalypse That Could Reshape the Industry as We Know It*, MASHABLE (Aug. 12, 2020), <https://mashable.com/article/twitter-porn-ban> [https://perma.cc/7CJ7-4E6X].

⁵³ In 2019, the site had 120,000 users. By 2021, there were over 130 million and by 2022, there were 220 million. See, e.g., Jacob Bernstein, *How OnlyFans Has Changed Sex Work Forever*, N.Y. TIMES (Feb. 9, 2019), <https://www.nytimes.com/2019/02/09/style/onlyfans-porn-stars.html> [https://perma.cc/V983-KWKB]; Gillian Friedman, *Jobless, Selling Nudes Online and Still Struggling*, N.Y. TIMES (Jan. 13, 2021), <https://www.nytimes.com/2021/01/13/business/onlyfans-pandemic-users.html> [https://perma.cc/3D2X-7CEB]; *OnlyFans Owner Makes \$500m After Spike in Users*, BBC NEWS, (Sep. 1, 2022), <https://www.bbc.com/news/business-62754943> [https://perma.cc/6Q6K-D9U6]. While my focus

exchanges that have been compared to prostitution but exist only online, OnlyFans has resisted the traditional labels of “pornography” or “sex work.”⁵⁴ The site has been described as “a virtual strip club,”⁵⁵ “a pimp,”⁵⁶ or “reality porn.”⁵⁷ Performers include not just sex workers but also a significant contingent of social-media influencers and celebrities, who move seamlessly between “mainstream culture” and a realm associated with sex work and porn.⁵⁸

in this Article is on MindGeek and its sites, both X, an algorithm-based platform, and OnlyFans likely have similar distorting effects on content. See, e.g., Jessica Sanders, *How to Find People on OnlyFans*, FOLLOWER, <https://follower.co/guides/find-people-on-onlyfans/> [<https://perma.cc/NJ8T-BMKK>] (last visited July 4, 2022) (indicating that most OnlyFans performers advertise their paid content through algorithm-based social media sites).

⁵⁴ See, e.g., Thusi, *supra* note 21, at 751 (noting that OnlyFans “frustrates the legal distinction between prostitution and pornography”). The OnlyFans platform allows individuals to sell and buy monthly subscriptions to direct message creators, and to tip them. Jacob Bernstein, *OnlyFans Reverses Its Decision to Ban Explicit Content*, N.Y. TIMES (Aug. 25, 2021), <https://www.nytimes.com/2021/08/25/style/onlyfans-ban-reversed.html?smid=url-share> [<https://perma.cc/29TF-WLV8>]. Whether OnlyFans has made sex work safer or more exploitative has been hotly debated. See, e.g., *Behind the OnlyFans Ban of Sexually Explicit Content*, NPR: ALL THINGS CONSIDERED (Aug. 21, 2021), <https://www.npr.org/2021/08/21/1030023077/behind-the-onlyfans-ban-of-sexually-explicit-content> [<https://perma.cc/JVR2-L5JZ>] (arguing that OnlyFans makes sex work “safer because [creators] don’t need an intermediary . . . who might be exploiting [creators], drugging them, physically abusing them”); Kyle Chayka, *What the “Creator Economy” Promises—and What It Actually Does*, NEW YORKER, (July 17, 2021) <https://www.newyorker.com/culture/infinite-scroll/what-the-creator-economy-promises-and-what-it-actually-does> [<https://perma.cc/U96P-ZJJR>] (arguing that OnlyFans creators are in a “precarious” situation, “responsible for her own marketing, health care, and tax contributions”); Catharine A. MacKinnon, *OnlyFans Is Not a Safe Platform for ‘Sex Work.’ It’s a Pimp*, N.Y. TIMES (Sept. 6, 2021), <https://www.nytimes.com/2021/09/06/opinion/onlyfans-sex-work-safety.html?smid=url-share> [<https://perma.cc/5CC9-CTJD>] (arguing that OnlyFans is a “gateway” to prostitution).

⁵⁵ Charlotte Shane, *OnlyFans Isn’t Just Porn ;*, N.Y. TIMES MAG. (May 18, 2021), <https://www.nytimes.com/2021/05/18/magazine/onlyfans-porn.html?smid=url-share> [<https://perma.cc/3MD8-WFVE>].

⁵⁶ MacKinnon, *supra* note 54 (“OnlyFans takes 20 percent of any pay, its pimp’s cut.”).

⁵⁷ Thusi, *supra* note 21, at 741 (arguing that OnlyFans constitutes “reality porn” which is defined as “sexual experiences that fit within the legal definition of prostitution in most states because they involve sexual conduct in exchange for a fee—but that are expressive in nature”).

⁵⁸ See Jason Parham, *When Influencers Switch Platforms—and Bare It All*, WIRED, (Aug. 19, 2019), <https://www.wired.com/story/culture-fan-tastic-planet-influencer-porn/> [<https://perma.cc/4N7S-G3NE>]; Claire Downs, *OnlyFans, Influencers, and the Politics of Selling Nudes During a Pandemic*, ELLE (May 14, 2020), <https://www.elle.com/culture/a32459935/onlyfans-sex-work-influencers/> [<https://perma.cc/7JJ8-VZ2Q>] (“Where else can influencers, former reality contestants, and D-listers turn to but OnlyFans?”).

Many have argued that porn's newfound dominance and saturation has rendered it increasingly normative for women.⁵⁹ For example, philosopher Nancy Bauer laments that our move to a world she calls "pornutopia" has created "a new standard both of beauty and sexual fulfillment."⁶⁰ Feminist Rebecca Traister, who explicitly rejects earlier feminist critiques of pornography,⁶¹ still sees pornography's normative and heteronormative power: Women, she writes, are "expected to look and fuck like porn stars — plucked, smooth, their pleasure performed persuasively."⁶² Time Magazine reports that "[t]een girls increasingly report that guys are expecting them to behave like porn starlets, encumbered by neither body hair nor sexual needs of their own."⁶³ Meanwhile, pornography's normative power is strengthened by the concomitant decline in sex education. The New York Times reports that as sex education has declined in schools, porn is now the de facto sex educator for American youth.⁶⁴ It helps that Pornhub is completely accessible to kids.⁶⁵ It has no age screens, no credit card

⁵⁹ For a critique of this line of argument as exhibiting tendencies toward sex-panic, see REBECCA SULLIVAN & ALAN MCKEE, *PORNOGRAPHY* (2015).

⁶⁰ NANCY BAUER, *HOW TO DO THINGS WITH PORNOGRAPHY* 4–6 (2015).

⁶¹ Traister embraced the work of feminist Andrea Dworkin, who was an intellectual partner with Catharine MacKinnon in their feminist critique of pornography. Like many contemporary feminists, Traister has enthusiasm for Dworkin's work in general, but rejects the MacKinnon-Dworkin view of pornography. Rebecca Traister, *The Books That Inspired Rebecca Traister's Good and Mad*, CUT (Oct. 2, 2018) <https://www.thecut.com/2018/10/six-books-that-inspired-rebecca-traisters-good-and-mad.html> [<https://perma.cc/EGN9-KRNW>] (citing the influence on her work of ANDREA DWORKIN, *INTERCOURSE* (1987), which Traister described as "prescient, terrifying in its acuity, raucous and daring and very much of this moment," but rejecting Dworkin's views on pornography). See also Elaine Blair, *Fighting for Her Life*, N.Y. REV. BOOKS, (June 27, 2019) <https://www.nybooks.com/articles/2019/06/27/andrea-dworkin-fighting-for-her-life/> [<https://perma.cc/2YEF-K2AP>] ("[I]n a body of work that seems newly relevant, [Dworkin's] writing about pornography stands out for having been unredeemed").

⁶² Traister, *supra* note 61.

⁶³ Belinda Luscombe, *Porn and the Threat to Virility*, TIME MAG. (Mar. 31, 2016), <https://time.com/4277510/porn-and-the-threat-to-virility/> [<https://perma.cc/5X5J-4RB9>].

⁶⁴ Maggie Jones, *What Teenagers Are Learning from Online Porn*, N.Y. TIMES MAG. (Feb. 7, 2018), <https://www.nytimes.com/2018/02/07/magazine/teenagers-learning-online-porn-literacy-sex-education.html> [<https://perma.cc/AE43-D5MG>].

⁶⁵ The average age of first exposure to pornography is twelve. Cecilia Kang, *Three-Quarters of Teenagers Have Seen Online Pornography by Age 17*, N.Y. TIMES, (Jan. 10, 2023) <https://www.nytimes.com/2023/01/10/technology/porn-teens-online-report.html> [<https://perma.cc/U4HK-PA8N>]. Most research investigating children's exposure to pornography was published more than five years ago, with the bulk of that work occurring between 2000 and 2010. This relatively recent

requirements, and the user interface (though not the content) is familiar and kid-friendly—like YouTube but with porn.⁶⁶

II

RETHINKING PORN AS A PROBLEM OF BIG TECH SPEECH PLATFORMS

In this Part, I reframe Pornhub’s power over sexuality as part of the larger problem of Big Tech speech platforms and “algorithmic society.” I situate my analysis of Pornhub in a larger and exploding body of scholarship about the power of digital speech platforms to shape and distort both individual choices and public discourse more generally. In the political realm, we are reckoning with the capacity of digital speech platforms like Facebook, YouTube, and X to warp democratic deliberation. Algorithmic content optimization, artificial intelligence driven categorization, filtering, presentation, ranking, and recommendation systems all combine to harden views and push us toward extremes. Here I argue that as Facebook, YouTube, and X are to democratic deliberation and political speech, MindGeek is to sexual speech.

In the early digital era, scholarship and popular discourse around technology tended to view the Internet as a tool of

research may already be obsolete because of the dramatic technological shift in the pornography industry. A 2007 study published in *Pediatrics* focusing on American children found, “[f]orty-two percent of youth Internet users 10 to 17 years of age saw online pornography in the past year, and two thirds of those reported only unwanted exposure.” Presumably the data was gathered before the advent of tube sites. Janis Wolak, Kimberly Mitchell & David Finkelhor, *Unwanted and Wanted Exposure to Online Pornography in a National Sample of Youth Internet Users*, 119 *PEDIATRICS* 247, 254 (2007).

⁶⁶ In 2023, a number of states, beginning with Louisiana, passed age verification laws. Jacob Kastrenakes, *Pornhub Blocks Access in Mississippi and Virginia over Age Verification Laws*, *VERGE* (July 3, 2023), <https://www.theverge.com/2023/7/3/23782776/pornhub-blocks-mississippi-virginia-age-verification-laws> [<https://perma.cc/5G28-NV6V>] (noting age verification laws in Louisiana, Utah, Mississippi, Virginia, Texas, Montana, and Arkansas). In response, Pornhub decided to continue with no age verification and instead to take sites offline and ban IP addresses from these states altogether. *Id.*; Kaitlin Lewis, *Utah Searches for VPN Spike After Pornhub Blocks Access to State*, *NEWSWEEK* (May 3, 2023), <https://www.newsweek.com/utah-searches-vpn-spike-after-pornhub-blocks-access-state-1797964> [<https://perma.cc/4FCV-5VXU>] (describing Pornhub response to Utah age verification law). A number of parties—including the Free Speech Coalition, a prominent adult entertainment advocacy group—are challenging these laws as unconstitutional. Sarah Kline & Kevin McGill, *Adult Entertainment Group Sues Louisiana over Age-Verification Law for Porn*, *AP NEWS* (June 22, 2023), <https://apnews.com/article/porn-lawsuit-age-verification-louisiana-65c5ff6c6e15c8c95f73e81e3dc0a65e> [<https://perma.cc/882H-SWDG>]; see, e.g., Complaint for Declaratory and Injunctive Relief, Free Speech Coal., Inc. v. LeBlanc, No. 2:23-cv-02123, (E.D. La. Jun. 20, 2023) (pending case initiated by Free Speech Coalition).

liberation and democratization. In 1998, Kathleen Sullivan called the Internet “First Amendment manna from heaven.”⁶⁷ A year earlier, the Supreme Court had marveled at the Internet’s utopian potential, observing that it enabled “tens of millions of people to communicate with one another and to access vast amounts of information from around the world.”⁶⁸ As recently as 2017, the Court in its First Amendment jurisprudence still spoke of the “vast democratic forums of the Internet” and identified “social media in particular” as one of “the most important places . . . for the exchange of views.”⁶⁹

Many academic discussions of Internet pornography followed (and still follow) a parallel course of utopianism. Commentators share a similar enthusiasm about the liberating and democratizing possibilities that Internet pornography has created for sexuality. On this view, Internet pornography has given voice and representation to every possible desire, including formerly marginalized ones. In other words, the Internet has liberated and democratized porn—and sexuality more generally.⁷⁰

We are now undergoing a societal “techlash.” Scholars and critics explore how digital speech platforms like Facebook and YouTube, rather than a democratizing force as once imagined, instead pose a threat to our personal and political lives. Public and academic criticism of the harms of technology has been rising for some time, but it reached a crescendo in the fall of 2021 when the “Facebook Files” were published, and Frances Haugen, a former Facebook employee who had leaked the documents, testified before Congress.⁷¹ In Haugen’s view and

⁶⁷ Kathleen M. Sullivan, *First Amendment Intermediaries in the Age of Cyberspace*, 45 UCLA L. REV. 1653, 1669 (1998).

⁶⁸ *Reno v. ACLU*, 521 U.S. 844, 850 (1997).

⁶⁹ *Packingham v. North Carolina*, 582 U.S. 98, 104 (2017) (citation omitted).

⁷⁰ See, e.g., THE FEMINIST PORN BOOK: THE POLITICS OF PRODUCING PLEASURE (Tristan Taormino, Celine Parreñas Shimizu, Constance Penley & Mireille Miller-Young eds., 2013) (exploring multiple liberating genres in porn including, for example, queer porn, trans porn, and others); Courtenay W. Daum, *Feminism and Pornography in the Twenty-First Century: The Internet’s Impact on the Feminist Pornography Debate*, 30 WOMEN’S RTS. L. REP. 543, 548 (2009) (“[O]ne of the Internet’s defining features—the democratic nature of the medium—appears to change the terms of the feminist pornography debate”); Consuelo M. Concepcion, *On Pornography, Representation and Sexual Agency*, 14 HYPATIA 97 (1999) (“Pornography dislodges our ignorance and hatred of various sexualities and openly challenges sexual prohibitions.”).

⁷¹ See Bill Chappell, *The Facebook Papers: What You Need to Know About the Trove of Insider Documents*, NPR (Oct. 25, 2021) <https://www.npr.org/2021/10/25/1049015366/the-facebook-papers-what-you-need-to-know>

the view of many critics, Facebook fosters hate and extremism, promotes violence at home and abroad, and is “tearing our societies apart.”⁷² There is evidence that Facebook and Instagram also harm individuals’ mental and physical health. For example, Instagram’s own research found that the company knew its platform contributed to eating disorders in girls. An internal memo stated flatly: “We make body image issues worse for one in three teen girls.”⁷³

Yet while this reckoning with the dangers of technology platforms and algorithms is raging in discussions about technology’s impact on democracy, world politics, public discourse, mental and physical health, and other urgent issues, there has been no parallel discussion about how technology may be affecting our sexual culture.⁷⁴ Here, I argue that this shift of pornography to algorithm-driven, tech platforms (almost all of which are controlled by MindGeek, a near-monopoly) poses a threat to our individual sexualities and our sexual culture in ways that track many of the same concerns scholars have raised about the threat posed by Big Tech speech platforms to

[<https://perma.cc/LGP3-986X>] (describing press coverage and findings based on thousands of leaked internal Facebook documents); *see also* Marcy Gordon & Barbara Ortutay, *Ex-Facebook Manager Criticizes Company, Urges More Oversight*, AP (Oct. 5, 2021) <https://apnews.com/article/facebook-haugen-congress-testimony-1daac7a76ca7bf0b0802cc46e732b51b> [<https://perma.cc/5WAQ-LPGN>] (describing former Facebook employee turned whistleblower Frances Haugen’s “wide-ranging condemnation” of the company during her congressional testimony); *see also* Tim De Chant, *2021 Was the Year the World Finally Turned on Facebook*, ARS TECHNICA (Dec. 23, 2021), <https://arstechnica.com/features/2021/12/facebook-and-the-terrible-horrible-no-good-very-bad-year/> [<https://perma.cc/QTU5-HX66>] (noting that with each of Haugen’s public appearances “politicians’ calls for regulations grew louder”). Facing this controversy and a string of other scandals the company ultimately rebranded as “Meta.” James Purtill, *Facebook’s Terrible 2021: Will a Year of Scandal Be the Catalyst For Regulation?*, ABC SCIENCE (Dec. 20, 2021), https://www.abc.net.au/news/science/2021-12-21/facebook-year-in-review-2021-annus-horribilis-laws-regulation/100683410?utm_campaign=abc_news_web&utm_content=link&utm_medium=content_shared&utm_source=abc_news_web [<https://perma.cc/XJ3Z-PKL6>] (chronicling the backlash Facebook received in 2021).

⁷² Tim De Chant, *Facebook “Is Tearing Our Societies Apart,” Whistleblower Says in Interview*, ARS TECHNICA (Dec. 4, 2021), <https://arstechnica.com/tech-policy/2021/10/facebook-is-tearing-our-societies-apart-whistleblower-says-in-interview/> [<https://perma.cc/7254-QRJ8>].

⁷³ Georgia Wells, Jeff Horwitz & Deepa Seetharaman, *Facebook Knows Instagram Is Toxic for Teen Girls, Company Documents Show*, WALL ST. J. (Sept. 24, 2021), <https://www.wsj.com/articles/facebook-knows-instagram-is-toxic-for-teen-girls-company-documents-show-11631620739> [<https://perma.cc/7SUP-NQJZ>].

⁷⁴ Pornhub has been the target of widespread backlash in response to revelations about the horrifying problem of child and adult exploitation discussed above. *See supra* note 66 (discussing the problem). Nonetheless the site enjoys mainstream prominence and widespread use.

public democratic discourse and individual freedom in other realms. Below I sketch several of the major arguments that inform this critique of technology speech platforms. I then explore how these arguments apply to Pornhub and MindGeek.

A. Down the Rabbit Hole: How Speech Platforms Change What We Want

By now most of us are familiar with the general lines of argument about the threat that Big Tech speech platforms like Facebook, X, YouTube, and TikTok pose to individual freedom, public discourse, and democracy. Tim Wu has famously argued that we now live in an attention economy, a business model premised on the resale of human attention.⁷⁵ The distorting effects of the attention economy on public discourse are evident. For example, Wu describes the now-familiar problem of filter bubbles that leads platforms to promote “content that maximizes ‘engagement,’ which is information tailored to the interests of each user. While this sounds relatively innocuous (giving users what they want), it has the secondary effect of exercising strong control over what the listener is exposed to, and blocking content that is unlikely to engage.”⁷⁶

Many scholars explore the corrosive effects of these filter bubbles: for example, Kate Klonick calls them “antidemocratic” spaces which foster “non-deliberative polarization.”⁷⁷

⁷⁵ Tim Wu, *Is the First Amendment Obsolete?*, KNIGHT FIRST AMENDMENT INST., (Sept. 1, 2017), <https://knightcolumbia.org/content/tim-wu-first-amendment-obsolete> [<https://perma.cc/HX2Y-TPQW>].

⁷⁶ *Id.*

⁷⁷ Kate Klonick, *The New Governors: The People, Rules, and Processes Governing Online Speech*, 131 HARV. L. REV. 1598, 1666–67 (2018). See generally Cass R. Sunstein, *Polarization*, in #REPUBLIC: DIVIDED DEMOCRACY IN THE AGE OF SOCIAL MEDIA (2018). See also Ana Lucia Schmidt et al., *Anatomy of News Consumption on Facebook*, 114 PROC. NAT'L ACAD. SCI. U.S. 3035 (2017) (showing how news consumed on Facebook tends to be more partisan: “the more active a user is, the more the user tends to focus on a small number of news sources”); Orowa Sikder, Robert E. Smith, Pierpaolo Vivo & Giacomo Livan, *A Minimalistic Model of Bias, Polarization and Misinformation in Social Networks*, 10 SCI. REP. 1 (2020) (analyzing how people react to new information on social networks, and finding that even a small amount of confirmation bias can have far-reaching results). In a related body of work, Jack Balkin writes about the way in which algorithms on digital platforms now govern our behavior; in his view, we now live in an “algorithmic society,” in which “multinational social media platforms that sit between traditional nation states and ordinary individuals [use] algorithms and artificial intelligence agents to govern populations.” Jack M. Balkin, *Free Speech in the Algorithmic Society: Big Data, Private Governance, and New School Speech Regulation*, 51 U.C. DAVIS L. REV. 1149, 1151 (2018); see also Jack M. Balkin, *Free Speech Is a Triangle*, 118 COLUM. L. REV. 2011 (2018); see also Jack M. Balkin & Jonathan Zittrain, A

The problem is not just that these bubbles silo us into echo chambers in which we are shielded from opposing views. The problem is also that within these siloed filter bubbles, we are exposed to increasingly extreme content, which not only reinforces our pre-existing views, but also changes them.⁷⁸ The attention economy depends on capturing our valuable attention; as Tim Wu observes, business “success and user addiction are the same thing.”⁷⁹ But it turns out that what captures our precious attention, even addicts us, is extreme content.⁸⁰ It therefore makes eminent business sense for these platforms’ algorithms to recommend incrementally more extreme content to users, leading us down a rabbit hole we may not have chosen on our own.⁸¹ And this fall down the rabbit hole can change our views and behavior. For example, a Facebook internal

Grand Bargain to Make Tech Companies Trustworthy, THE ATLANTIC (Oct. 3, 2016), <https://www.theatlantic.com/technology/archive/2016/10/information-fiduciary/502346> [https://perma.cc/3PL4-3SQT]. Although I do not address it here, there is also a growing literature on a related problem: the power of platforms to influence political debate directly by blocking content and certain viewpoints. For just one example, see, e.g., Eugene Volokh, *Treating Social Media Platforms Like Common Carriers?*, 1 J. FREE SPEECH L. 377, 461 (2021) (assessing the need to regulate platforms, considering their enormous power to “block certain viewpoints as a means of influencing public debates throughout the nation”).

⁷⁸ See, e.g., Shira Ovide, *How to Fix Facebook*, N.Y. TIMES (Oct. 6, 2021), <https://www.nytimes.com/2021/10/06/technology/facebook-fixes.html> [https://perma.cc/VQ4B-RKK9] (describing the Congressional testimony of Frances Haugen, former Facebook employee turned whistleblower, including how algorithms using “engagement-based ranking[s] . . . tend to fan the most salacious or extreme views, and subtly nudge people to post more of the same”).

⁷⁹ Tim Wu, Opinion, *Subtle and Insidious, Technology Is Designed to Addict Us*, WASH. POST (Mar. 2, 2017), https://www.washingtonpost.com/opinions/subtle-and-insidious-technology-is-designed-to-addict-us/2017/03/02/5b983ef4-fcee-11e6-99b4-9e613afeb09f_story.html [https://perma.cc/78ND-N8SD]; see also TIM WU, THE ATTENTION MERCHANTS: THE EPIC SCRAMBLE TO GET INSIDE OUR HEADS 289–302 (2016) (describing how media companies aim to addict users to resell user attention to advertisers).

⁸⁰ See, e.g., James Grimmelmann, *The Platform Is the Message*, 2 GEO. L. TECH. REV. 217, 227 (2018) (observing that platforms “tend to promote content that already has the characteristics that promote virality . . . and extremism”).

⁸¹ In a recent case, the Supreme Court described the recommendation algorithms of Facebook, Twitter, and YouTube as mechanisms “that match content, advertisements, and users based on information about the use, advertisement, and content being viewed.” *Twitter, Inc. v. Taamneh*, 598 U.S. 471 (2023) (holding, *inter alia*, in a civil aiding-and-abetting suit under the Justice Against Sponsors of Terrorism Act, that plaintiffs failed to sufficiently allege that operators of social media platforms consciously and culpably participated in a terrorist attack); cf. *Gonzalez v. Google LLC*, 598 U.S. 617, 622 (2023) (declining to address the application of § 230 of the Communications Decency Act to a complaint that appears to state little, if any, plausible claim for relief under the holding of *Taamneh*).

presentation from 2018 put it bluntly: The Facebook algorithm feeds users “more and more divisive content in an effort to gain user attention & increase time on the platform.”⁸² In short, the presentation stated: “Our algorithms exploit the human brain’s attraction to divisiveness.”⁸³ Facebook reportedly shelved this internal research.⁸⁴

Many critics have focused on YouTube’s recommendation algorithm, which drives 70% of time spent on the platform.⁸⁵ These critics charge that YouTube’s algorithm operates as an engine for radicalization, as the platform incrementally exposes users to increasingly extreme political positions.⁸⁶ Indeed, YouTube has been called “one of the most powerful radicalizing instruments of the 21st century.”⁸⁷ Psychologists have

⁸² Jeff Horwitz & Deepa Seetharaman, *Facebook Executives Shut Down Efforts to Make the Site Less Divisive*, WALL ST. J. (May 26, 2020), <https://www.wsj.com/articles/facebook-knows-it-encourages-division-top-executives-nixed-solutions-11590507499> [<https://perma.cc/DTG4-UAX2>].

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ Kevin Roose, *The Making of a YouTube Radical*, N.Y. TIMES, (June 8, 2019), <https://www.nytimes.com/interactive/2019/06/08/technology/youtube-radical.html> [<https://perma.cc/HGT5-M9HY>]. Roose describes one man’s descent into the alt-right universe on YouTube. Looking back, the man states, “I was brainwashed.” *Id.*

⁸⁶ Rebecca Lewis, *Alternative Influence: Broadcasting the Reactionary Right on YouTube*, DATA & SOC’Y (Sept. 18, 2018), https://datasociety.net/wp-content/uploads/2018/09/DS_Alternative_Influence.pdf [<https://perma.cc/RPM8-WA83>]; Sam Levin, *James Damore, Google, and the YouTube Radicalization of Angry White Men*, THE GUARDIAN (Aug. 13, 2017), <https://www.theguardian.com/technology/2017/aug/13/james-damore-google-memo-youtube-white-men-radicalization> [<https://perma.cc/7K7M-8H8G>] (arguing that YouTube algorithms that redirect viewers to increasingly extreme content, some of it terroristic in nature, are responsible for radicalization); Mathew Ingram, *YouTube’s Secret Life as an Engine for Right-Wing Radicalization*, COLUM. JOURNALISM REV. (Sept. 19, 2018), https://www.cjr.org/the_media_today/youtube-conspiracy-radicalization.php [<https://perma.cc/D7UK-UVBG>]; Kyle Langvardt, *Regulating Habit-Forming Technology*, 88 FORDHAM L. REV. 129, 149 (2019); (“Many recommendation algorithms . . . have been shown repeatedly to send users along a ‘radicalizing path.’”); Connor J. Suozzo, *Red Lion Broadcasting Co. v. FCC and the Rise of Speech-Enhancing Regulations of Social Media Platforms*, 4 GEO. L. TECH. REV. 215, 228 (2019) (arguing that YouTube radicalization and polarization pose threats to free speech principles); see generally Emily B. Tate, Note, “*Maybe Someone Dies*”: *The Dilemma of Domestic Terrorism and Internet Edge Provider Liability*, 60 B.C. L. REV. 1731 (2019); Zeynep Tufekci, Opinion, *YouTube, the Great Radicalizer*, N.Y. TIMES (Mar. 10, 2018), <https://www.nytimes.com/2018/03/10/opinion/sunday/youtube-politics-radical.html> [<https://perma.cc/QF89-9A8K>].

⁸⁷ Kevin Roose, *YouTube’s Product Chief on Online Radicalization and Algorithmic Rabbit Holes*, N.Y. TIMES, (Mar. 29, 2019), <https://www.nytimes.com/2019/03/29/technology/youtube-online-extremism.html> [<https://perma.cc/R6KD-YVXQ>].

described how incremental exposure to increasingly extreme content can “normalize” what it depicts.⁸⁸ The danger of alt-right propaganda is a particular focus for critics, but the push toward extreme content happens in every area, not just politics. For example, accusations arose that YouTube’s algorithm promoted the normalization of pedophilia.⁸⁹ A recent study found users have little power to keep content they explicitly do not want, including hate speech, violent material, and misinformation, out of their algorithmically produced recommendations; the likely reason is that YouTube’s algorithm prioritizes watch time over user choices.⁹⁰

Ultimately platforms do not merely reflect what users want but also construct the very desires that they seem to reflect. As they fulfill our preferences, platforms also shape and create them.⁹¹ Consider TikTok and its extraordinary power to

⁸⁸ Max Fisher & Amanda Taub, *On YouTube’s Digital Playground, an Open Gate for Pedophiles*, N.Y. TIMES (June 3, 2019), <https://www.nytimes.com/2019/06/03/world/americas/youtube-pedophiles.html> [<https://perma.cc/67WP-ES2X>] (quoting Marcus Rogers, a psychologist at Purdue University).

⁸⁹ *Id.*

⁹⁰ Becca Ricks and Jesse McCrosky, *Does This Button Work? Investigating YouTube’s Ineffective User Controls*, MOZILLA, <https://assets.mofoprod.net/network/documents/Mozilla-Report-YouTube-User-Controls.pdf> [<https://perma.cc/2MVL-MG67>]; see also Hana Kiros, *Hated That Video? Youtube’s Algorithm Might Push You Another Just Like It*, MIT TECH. REV. (Sep. 20, 2022) <https://www.technologyreview.com/2022/09/20/1059709/youtube-algorithm-recommendations/> [<https://perma.cc/ZJ8V-HPU4>].

⁹¹ Shoshana Zuboff, *Big Other: Surveillance Capitalism and the Prospects of an Informal Civilization*, 30 J. INFO. TECH. 75, 84 (2015) (describing how big data surveillance leads to “analysis, prediction, and modification of actual behavior”). See also Jack M. Balkin, *Free Speech Is a Triangle*, 118 COLUM. L. REV. 2011, 2047 (2018) (arguing that “the danger of widespread digital participation is widespread digital manipulation” because digital surveillance also involves digital curation that uses “knowledge about end users to control, shape, and govern their behavior”); Julie E. Cohen, *What Privacy Is for*, 126 HARV. L. REV. 1904, 1925 (2013) (asserting that “the techniques of Big Data subject individuals to predictive judgments about their preferences, and the process of modulation also shapes and produces those preferences”); Michal S. Gal, *Algorithmic Challenges to Autonomous Choice*, 25 MICH. TECH. L. REV. 59, 103 (stating that “algorithmic assistants may systematically reduce the ability of users to create preferences on their own”); Langvardt, *supra* note 86, at 150 (platforms “crowd out the individual’s role in cultivating a set of interests and values”); Perra Nicola & Luis E. C. Rocha, *Modelling Opinion Dynamics in the Age of Algorithmic Personalisation*, 9 SCI. REP. 1, 1 (2019) (finding that the “algorithmic gatekeeping” used in social networks has the capacity to shape opinions); JAMES G. WEBSTER, *THE MARKETPLACE OF ATTENTION: HOW AUDIENCES TAKE SHAPE IN A DIGITAL AGE* 135–36 (2014) (asserting that platforms “exploit and manipulate our social identities” through which our “‘endogenous’ preferences are produced”); David Z. Morris, Opinion, *The Algorithmic Life Is Not Worth Living*, COINDESK (Jan. 27, 2022), <https://www.coindesk.com/layer2/privacyweek/2022/01/27/the-algorithmic-life-is-not-worth-living/> [<https://perma.cc/2MVL-MG67>].

capture the attention of, well, seemingly every teenager. The app seems to know what teenagers want (which it does, of course, through surveillance and data mining). But in the process of discovering teenage desires, it also creates and alters them. Jia Tolentino in the *New Yorker* describes the process through which algorithmically constructed desires can crowd out our own. She writes,

TikTok favors whatever will hold people's eyeballs The platform then adjusts its predilections based on the closed loop of data that it has created. This pattern seems relatively trivial when the underlying material concerns shaving cream and Crocs, but it could determine much of our cultural future. The algorithm gives us whatever pleases us, and we, in turn, give the algorithm whatever pleases it. As the circle tightens, we become less and less able to separate algorithmic interests from our own.⁹²

Observing the effect of algorithms on culture more broadly, Kyle Chayka writes that “the entire ecosystem of content that we interact with online has been engineered to influence us in ways that we can’t quite parse, and that have only a distant relationship to our own authentic preferences.”⁹³

Tech scholars have warned that Big Tech modifies not only our preferences, but also our “actual behavior.”⁹⁴ As Silicon Valley pioneer Jaron Lanier says of Big Tech, the goal of these companies is not simply to capture your attention and sell it as a product to advertisers. Instead, the product sold by Big Tech to advertisers, the way Big Tech makes money, is even more precise—and more chilling. As Lanier puts it, “it is the gradual, slight, imperceptible change in your own behavior and perception that is the product. That’s the only thing there is for them

cc/8TPV-P3AD] (“The algorithmic loop, in short, doesn’t just predict our tastes, attitudes and beliefs, it creates them.”).

⁹² Jia Tolentino, *How TikTok Holds Our Attention*, *NEW YORKER* (Sept. 30, 2019), https://www.newyorker.com/magazine/2019/09/30/how-tiktok-holds-our-attention?te=1&nl=the-interpreter&emc=edit_int_20191004?campaign_id=30&instance_id=12850&segment_id=17598&user_id=2e4617f7f854e088c0c42d57fd892c54®i_id=78726748 [https://perma.cc/Q5HW-U3SB].

⁹³ Kyle Chayka, *The Age of Algorithmic Anxiety*, *NEW YORKER* (Jul. 25, 2022), <https://www.newyorker.com/culture/infinite-scroll/the-age-of-algorithmic-anxiety> [https://perma.cc/GXA9-8S8K].

⁹⁴ See, e.g., Zuboff, *supra* note 91, at 84 (describing how big data surveillance leads to “analysis, prediction, and modification of actual behavior”); Balkin, *Free Speech Is a Triangle*, *supra* note 91, at 2047 (stating that “[d]igital curation is not simply the selection of content for end users; it also involves using knowledge about end users to control, shape, and govern their behavior”).

to make money from. Changing what you do, how you think, who you are."⁹⁵

B. Internet Porn and the Construction of Desire

1. *Algorithmic Desire*

I believe that these concerns apply not only to platforms like Facebook, YouTube, TikTok, and X, but to MindGeek and its sites, which share many characteristics of those platforms, including surveillance, data-mining of users, artificial intelligence-powered algorithms, a social media component, an advertising-supported business model, and enormous market power.⁹⁶ Yet while there is a vibrant body of literature exploring the problems technology platforms pose in the political speech and public discourse realm, I have found no legal literature and no feminist literature exploring how these same problems may exert themselves in the realm of pornography. Just like these other platforms, MindGeek and its sites constrain and distort what users are exposed to. Through algorithmic recommendations and rankings, rigid categorization of pornography genres, and search term optimization, MindGeek pushes users into filter bubbles and leads them down rabbit holes.

Consider, for example, how something as simple as the keywording of search terms can shape consumer preferences in a way that is both profound and completely invisible. In an interview, porn industry scholar Shira Tarrant explains the keywording process:

[P]orn gets keyworded in very stereotyped, often sexist, often racist ways and also just with a narrow-minded view of sexuality. If you are interested in something like double oral, and you put that into a browser, you're going to get two women giving one guy a blowjob. . . [not] two men or two people giving a woman oral sex. That's just not how it's keyworded. That then feeds into what the industry decides to make more of.⁹⁷

⁹⁵ Mirel Zaman, *The People Who Created Facebook & YouTube Are Sorry*, REFINERY29 (Sept. 2, 2020), <https://www.refinery29.com/en-us/2020/09/10002175/social-media-effects-the-social-dilemma-netflix-documentary> [<https://perma.cc/J63R-739X>] (quoting Jarod Lanier, tech futurist and a founder of the field of virtual reality).

⁹⁶ See Auerbach, *supra* note 5. *But cf.* Raustiala & Sprigman, *supra* note 7, at 1572 (recognizing the market power of MindGeek, but questioning whether it had a monopoly).

⁹⁷ Pinsker, *supra* note 12 (quoting professor Shira Tarrant); see also SHIRA TARRANT, *THE PORNOGRAPHY INDUSTRY: WHAT EVERYONE NEEDS TO KNOW* 44 (2016) (observing

Indeed, MindGeek uses its algorithms not merely to invisibly spoon feed content to viewers; as I explore in the next Section, MindGeek also determines to a large extent what content gets *created* in the first place, in a way that exacerbates many of the feedback loop issues that plague other platforms. In fact, MindGeek uses its data to create its own content, perfectly tailored to the algorithmic desire it has helped to form in its users.

Ultimately, this suggests that the utopian view of Internet pornography as a free realm in which every possible sexual desire can be expressed and explored underestimates the power of digital platforms to shape desire. Instead of freeing users (or perhaps in addition to freeing us), the move to streaming digital porn, dominated by one company, has freed a corporation to shape sexuality on a massive scale.

2. *Categorization and Data-Driven Production: Porn Has Begun to Author Itself*

MindGeek influences not just what viewers “choose” to see, but also what porn gets produced in the first place. Given the company’s extraordinary market power, it is a matter of survival for porn producers to create content that will maximize views on Pornhub (and to a lesser extent on MindGeek’s other sites). Thus, these producers create content designed to fit Pornhub’s system of categorizing porn and its keywords, tags, and search terms. Yet this strong incentive for producers to conform to Pornhub’s categories alters and rigidifies available content. For example, in terms of mainstream porn categories on Pornhub, there are essentially two kinds of female performers: MILFs, the “old” category, meaning women aged 29 and above (!), and teens.⁹⁸ This categorization so controls what gets produced that women between the ages of 22 and 29 now find it near-impossible to get work in the pornography industry because they fail to fit in to a Pornhub category.⁹⁹ As Pornhub’s categories (informed by user data) dictate porn production, porn entrenches itself more deeply into what Pornhub

that the Pornhub business model “spoon-feeds a limited range of content to unsuspecting online porn users who do not realize their online-porn use patterns are largely molded by a large corporation”). For important work exploring how search engine keywording and algorithms reinforce racial biases, see SAFIYA UMOJA NOBLE, *ALGORITHMS OF OPPRESSION: HOW SEARCH ENGINES REINFORCE RACISM* (2018).

⁹⁸ Gilbert, *supra* note 14.

⁹⁹ *Id.*

“knows” we want. The categories organize consumer preferences. In a class action brought against MindGeek, which survived a motion to dismiss in 2022, the plaintiffs alleged that MindGeek permits user-uploaded illegal material on its sites. Plaintiffs claimed that MindGeek exerts extraordinary control over user-uploaded content by “creating and editing titles, tags, keywords, storylines, themes, and scenes. . . . [W]hen a user uploads a new video, Defendants require the user to choose a minimum number of tags to describe the content from provided options, and when users choose certain tags, Defendants suggest related tags to increase traffic.”¹⁰⁰

In an article about intellectual property law, Chris Sprigman and Kal Raustiala discuss Pornhub as part of a larger rise of what they call “data-driven creativity” across numerous fields.¹⁰¹ They show that by mining its enormous trove of data about what viewers like, MindGeek used “algorithms, artificial intelligence, and machine learning [to create] content without, or with little, human intervention.”¹⁰² While Sprigman and Raustiala discuss the implications of this shift in authorship for intellectual property law, I wish to consider the implications this shift has for the intensification of content. As porn has begun to author itself, feeding our desire back to us in an A.I.-driven feedback loop, porn gains the capacity to crystalize, amplify, and distort desire itself.

MindGeek leverages its extraordinary trove of user data to script pornography (often using A/B testing), giving data-driven specific requirements to porn producers to fulfill. The company creates detailed scripts for the porn it commissions, specifying “movements of the actors, the exact positions, and the details of the prescribed sex acts” all tailored to the what the data have

¹⁰⁰ Doe #1 v. MG Freesites, LTD, No. 7:21-CV-00220-LSC, 2022 WL 407147, at *1, *17 (N.D. Ala. Feb. 9, 2022) (finding that the Trafficking Victims Protection Reauthorization Act abrogated MindGeek immunity under Section 230 of the Communications Decency Act when a complaint alleged MindGeek profited off of child pornography materials); cf. Doe v. Mindgeek USA Inc., 558 F. Supp. 3d 828, 831 (C.D. Cal.) (allowing a putative class action alleging that MindGeek encourages, capitalizes, and profits from child sexual abuse material to proceed), *reh'g denied*, 574 F. Supp. 3d 760 (C.D. Cal. 2021); see also Fleites v. MindGeek S.A.R.L., 617 F. Supp. 3d 1146, 1166 (C.D. Cal. 2022) (in lawsuit by trafficking victims against Visa, finding that plaintiff adequately pled that Visa violated 18 U.S.C. § 1594(c) by continuing to process financial transactions for MindGeek); Julie Dahlstrom, *The New Pornography Wars*, 75 FLA. L. REV. 117 (2023) (analyzing trafficking lawsuits against MindGeek and payment processing company, Visa).

¹⁰¹ Raustiala & Sprigman, *supra* note 7, at 1583.

¹⁰² *Id.*, at 1584.

indicated are preferred features within the category.¹⁰³ For example, one MindGeek script dictated details that the company's data indicated were most popular in a category called "CFNM" (Clothed Female, Naked Male). The script, in which "Girl1 and Girl2 make Guy3 their sex toy," required that "Girl1 and Girl2's clothes remain ON during sex, while Guy3 is completely naked."¹⁰⁴ The script also dictates specifics about scenes, including directions, for example, that "Girl2 'lies on her stomach and looks over her shoulder at the camera.'" She "stretches, flips over, and then 'struts' toward the camera."¹⁰⁵ Other MindGeek scripts, again based on data mined from users, required the use of certain furniture, carpet styles, etc.¹⁰⁶ In short, the trove of data gained through surveillance of user streaming habits is now redeployed to author new content, exquisitely calibrated to conform to mainstream viewing habits. Porn has begun to author itself.

If we think about MindGeek as a subset of the problem of Big Tech, then we can begin to see the present porn landscape in a new light. As algorithms now change what we "want" and as mainstream porn increasingly conforms to a rigid set of self-replicating categories, porn has gained the capacity to shape and construct our individual desires and our sexual culture. In this light, we can recast Internet porn as a force that paradoxically diminishes our sexual autonomy while seeming to expand it. Ultimately this suggests that Internet pornography may not be the liberating, democratizing force that many hoped (and still hope) for.

III

THE FEMINIST ANTI-PORNOGRAPHY MOVEMENT AND ITS CRITICS

Reconceptualizing pornography as Big Tech does not only reveal a critical gap in recent technology scholarship. This shift also calls for a reexamination of a debate that once consumed First Amendment and feminist legal scholars in the 1980s and early 1990s: the feminist critique of pornography, launched almost fifty years ago. As we will see, scholars of that period fought bitterly about surprisingly similar issues to the ones I argued are relevant now: They debated whether and how pornography socially constructed sexuality, gender, and culture more broadly.

¹⁰³ *Id.*, at 1591–92.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

The argument that pornography socially constructs society, most closely associated with feminist legal scholar Catharine MacKinnon, has been largely abandoned by contemporary feminists; young feminists have called it a “fiasco.”¹⁰⁷ The bitter “sex wars” fought over it are over. We live in a culture so drenched in porn that it makes the pornography environment that preoccupied feminist and First Amendment scholars in that era look quaint. The 80s argument that pornography has the power to socially construct sexuality has fallen “dramatically out of fashion,” even as other aspects of that period in feminism are having a renaissance in the #MeToo era.¹⁰⁸ But as the debate has moved on, scholars have overlooked the new-found relevance of these arguments to the revolution that has occurred in the porn industry since the “sex wars” were fought. As I argued above, the transformation of the pornography industry into an instance of Big Tech means that the industry has gained enormous power to shape and socially construct our sexual culture.

In this Part, I outline the major theoretical framework for attacking pornography in the 1980s, focusing on the work of Catharine MacKinnon, who was the most prominent legal voice

¹⁰⁷ See, e.g., Michelle Goldberg, *Not the Fun Kind of Feminist: How Trump Made Andrea Dworkin Relevant Again*, N.Y. TIMES (Feb. 22, 2019), <https://www.nytimes.com/2019/02/22/opinion/sunday/trump-feminism-andrea-dworkin.html> (calling it a “fiasco”) [<https://perma.cc/X4U8-APWJ>]. See also *supra* note 61 (detailing other contemporary feminists who endorse the work of 1980s feminists but reject their anti-pornography position).

¹⁰⁸ Moira Donegan, *Sex During Wartime: The Return of Andrea Dworkin's Radical Vision*, BOOKFORUM, Feb.-Mar. 2019, <https://www.bookforum.com/print/2505/-20623> [<https://perma.cc/M7GQ-42JC>]; Jennifer Szalai, *Andrea Dworkin, a Startling and Ruthless Feminist Whose Work Is Back in the Spotlight*, N.Y. TIMES (Mar. 12, 2019), <https://www.nytimes.com/2019/03/12/books/review-last-days-at-hot-slit-andrea-dworkin.html#:~:text=of%20The%20Times-.Andrea%20Dworkin%2C%20a%20Startling%20and%20Ruthless%20Feminist%20Whose,Is%20Back%20in%20the%20Spotlight&text=In%20Owrtime%2C%20no%20strategy%20is,patriarchy%20had%20foisted%20on%20her> [<https://perma.cc/3CLV-3AY6>]; see also Janet Halley, *The Move to Affirmative Consent*, 42 SIGNS: J. WOMEN CULTURE & SOC. 257 (2015). While Halley claims that dominance feminism, the school associated with MacKinnon, “remains the driving ideology behind advocacy for affirmative consent requirements,” as well as for “many related carceral projects,” she argues that its modern-day iteration has become a conservative force unmoored from the liberal agenda of the original dominance project. *Id.* at 264. Halley distinguishes between Early and Late MacKinnon based on MacKinnon’s turn to the state. See, e.g., *id.* at 258. For disagreement with Halley’s characterization of the contemporary ties to MacKinnon, see, e.g., Lama Abu-Odeh, *Janet Halley and the Art of Status Quo Maintenance*, 2 SOC. JUST. & EQUITY L.J. 5, 44 (2019) (arguing that Halley is wrong to claim that radical feminism is at the root of this contemporary movement).

in these debates.¹⁰⁹ I then sketch the extraordinary range of criticism that this theory generated as well as its rejection as a matter of First Amendment doctrine. In the end, I assess the relevance of both sides of this debate to my framing of pornography as part of a more general problem of Big Tech speech platforms.

A. The Feminist Critique of Pornography in the 1980s and 1990s

Beginning in the early 1980s, Catharine MacKinnon, the leading voice of the feminist anti-pornography movement at the time, argued that pornography was a central cause of women's inequality. Her attack on porn was two-pronged, focusing both on the production of pornography and on its social construction effects.

First, MacKinnon described terrible harms that she believed the production of pornography caused to the women who appear in it. In this way her work both anticipated and tracked the Supreme Court's child pornography jurisprudence, which was emerging at exactly the same time, and which justified banning child pornography images based on the grievous abuse done to the children used to produce them.¹¹⁰ MacKinnon applied the same logic to adult pornography, arguing that it too depended on the abuse of those who appeared in

¹⁰⁹ Because MacKinnon was the most prominent feminist voice in these debates as well as the most prominent legal scholar engaged in them, I focus on her work and her co-authored work with Dworkin. See *infra* text accompanying notes 118–19. Note that feminists outside of law had begun the critique of pornography in the 70s, when Robin Morgan famously published her article *Theory and Practice: Pornography and Rape*, which argued that “pornography is the theory and rape is the practice.” ROBIN MORGAN, *THE WORD OF A WOMAN: FEMINIST DISPATCHES, 1968-1992*, 88 (1992). Susan Brownmiller published *Against Our Will: Men, Women, and Rape* in 1975 which also set out an anti-pornography position. SUSAN BROWNMILLER, *AGAINST OUR WILL: MEN, WOMEN, AND RAPE* (1975). I leave aside the cultural feminist analysis of pornography, which arose roughly concurrently with MacKinnon's.

¹¹⁰ See Amy Adler, *Inverting the First Amendment*, 149 U. PA. L. REV. 921, 981–83 (2001) [hereinafter Adler, *Inverting the First Amendment*]. In terms of which came first, it appears that MacKinnon makes this argument as early as April 2, 1982 (if not earlier) in her speech at Stanford called *Linda's Life and Andrea's Work* (although the text was published later). See FEMINISM UNMODIFIED, *supra* note 27, at 129. *Ferber* was decided a few days later, on April 27, 1982. See *infra* note 180. In any event, MacKinnon later cited *Ferber* and its progeny approvingly. Andrea Dworkin's important anti-pornography book, *PORNOGRAPHY: MEN POSSESSING WOMEN*, was published in 1981.

it.¹¹¹ In her view, porn documented a “traffic in female sexual slavery.”¹¹² She recounted violent acts of abuse that went into the production of pornography: “[W]omen are gang raped so they can be filmed. . . . [W]omen are hurt and penetrated, tied and gagged . . . so sex pictures can be made.”¹¹³ But in her view the harm done to women who appear in porn went beyond pictures produced through violence or even coercion (in its conventional sense).¹¹⁴ Instead, she argued that *all* pornography violated the women who appeared in it, even if the women gave their “consent” and even if the images were soft-core.¹¹⁵ Consent was an illusion. Women could never voluntarily consent to making pornography because, as MacKinnon wrote, “All pornography is made under conditions of inequality based on sex.”¹¹⁶ Consent is simply an artifact of false consciousness, created by pornography in the first place.

Second, and deeply related, MacKinnon made an even more sweeping attack, the one which I will focus on here. She argued that pornographic images, already the product of violence, harm not only the women used to produce them, but *all* women, by socially constructing what sexuality and thus gender mean.¹¹⁷ Note that this argument goes well beyond the claim that pornography consumption leads some men to acts of sexual violence against some women. MacKinnon believes

¹¹¹ See *infra* Part III.B. for the discussion of the critique of MacKinnon’s vision of female autonomy.

¹¹² CATHARINE A. MACKINNON & ANDREA DWORKIN, IN HARM’S WAY: THE PORNOGRAPHY CIVIL RIGHTS HEARINGS 46 (1998).

¹¹³ CATHARINE A. MACKINNON, ONLY WORDS 15 (1993).

¹¹⁴ MacKinnon would view coercion as inherent in a world of male domination.

¹¹⁵ See, e.g., the discussion of *Playboy* in FEMINISM UNMODIFIED, *supra* note 27, at 136 (describing as an illusion the idea “that people, even people who as a group are poor and powerless, do what they do voluntarily, so that women who pose for Playboy are there by their own free will”).

¹¹⁶ *Id.* at 20.

¹¹⁷ The production harm and the social construction harm are connected in two ways. First the production harm replicates itself. MACKINNON, ONLY WORDS, *supra* note 113, at 25 (“Pornography brings its conditions of production to the consumer: sexual dominance.”). I have written previously about the curious way in which MacKinnon invests pornographic imagery with talismanic power, as if the force that goes into its production remains present in the image and reproduces itself when the image is shown to others. Amy Adler, *The First Amendment and the Second Commandment*, 57 N.Y.L. SCH. L. REV. 41, 50 (2013) [hereinafter Adler, *Second Commandment*] (connecting MacKinnon’s theory to a long strain of anxiety about the power of images in the history of idolatry and iconoclasm). Second, MacKinnon views the social construction harm as creating the inequality and ultimately false consciousness that vitiates the consent of women who claim to pose voluntarily for pornography.

that is true of course, but her claim is far more sweeping, going to the root of what it means to be a man or a woman: In her view “pornography . . . institutionalizes the sexuality of male supremacy which fuses the eroticization of dominance and submission with the social construction of male and female.”¹¹⁸ (As explained below, MacKinnon, located sexuality front and center in feminist theory, arguing that sexuality precedes and produces gender).¹¹⁹ As a result, pornography creates a “sub-human, victimized, second-class status for women.”¹²⁰ Thus, social inequality itself “is substantially created and enforced—that is, done—through words and images.”¹²¹

In an extraordinary passage written in 1984, MacKinnon described how she came to discover the central role pornography played in producing the subjugation of women. She recounts how she struggled to unlock the puzzle of women’s pervasive societal inequality until she realized that pornography provided the master key. She writes:

I couldn’t explain it [women’s inequality] until I started studying a lot of pornography. In pornography, there it is, in one place, all of the abuses that women had to struggle so long even to begin to articulate, all the *unspeakable* abuse: the rape, the battery, the sexual harassment, the prostitution, and the sexual abuse of children. Only in pornography is it called something else: sex, sex, sex, sex, and sex, respectively. Pornography sexualizes rape, battery, sexual harassment, prostitution, and child sexual abuse; it thereby celebrates, promotes, authorizes, and legitimizes them. More generally, it eroticizes the dominance and submission that is the dynamic common to them all. It makes hierarchy sexy and calls that “the truth about sex” or just a mirror of reality. Through this process pornography constructs what a woman is . . . ¹²²

Note two important steps in the logic of this paragraph.¹²³ First, the mechanism by which pornography causes such

¹¹⁸ CATHARINE A. MACKINNON, *TOWARD A FEMINIST THEORY OF THE STATE* 197 (1989).

¹¹⁹ Catharine A. MacKinnon, *Feminism, Marxism, Method, and the State: Toward Feminist Jurisprudence*, 8 *SIGNS: J. WOMEN CULTURE & SOC.* 635, 653 n.1 (1983) (“[S]exuality is fundamental to gender and fundamentally social.”); see also MACKINNON, *FEMINISM UNMODIFIED*, *supra* note 27, at 161 (arguing that “pornography constructs women and sex, defines what ‘woman’ is and what sexuality means”) (emphasis in original).

¹²⁰ MACKINNON & DWORKIN, *supra* note 112, at 46.

¹²¹ MACKINNON, *ONLY WORDS*, *supra* note 113, at 13.

¹²² *Id.* at 171.

¹²³ See *infra* Part III.B. for arguments (including my own) criticizing the logic of MacKinnon’s theory.

sweeping harm is erotic pleasure itself; the pleasure is the danger.¹²⁴ She writes elsewhere, for example, that “pornography conditions male orgasm to female subordination,”¹²⁵ or that it “condition[s] orgasm to sex inequality.”¹²⁶ A second assumption in her argument is that our erotic lives bear extraordinary potency in shaping who we are. She writes: “[P]ornography constructs *what a woman is*.”¹²⁷ Thus we see the primacy of sexuality (erotic pleasure itself) to MacKinnon’s notion of gender: porn produces sexuality which in turn produces male and female. Sexuality (as constructed by pornography) is the root of inequality. Gender is nothing more than an artifact of eroticized domination.

MacKinnon did more than merely theorize about pornography. Joining forces with scholar and activist Andrea Dworkin, who had written her own important work against pornography,¹²⁸ they drafted a model ordinance that framed pornography as a civil rights violation.¹²⁹ Two cities passed versions of their

¹²⁴ With apologies to Carole Vance’s *PLEASURE AND DANGER: EXPLORING FEMALE SEXUALITY* (1984).

¹²⁵ MACKINNON, *FEMINISM UNMODIFIED*, *supra* note 27, at 190. Note that this view of pleasure extends to women. Thus, MacKinnon dismisses views of women who claim to enjoy pornography or sexual submission. MACKINNON, *TOWARD A FEMINIST THEORY OF THE STATE*, *supra* note 118, at 125; *see also* Ti-Grace Atkinson, *Why I’m Against S/M Liberation*, in *AGAINST SADOMASOCHISM: A RADICAL FEMINIST ANALYSIS* 90, 91 (Robin Ruth Linden, Darlene R. Pagano, Diana E. H. Russell & Susan Leigh Star eds., 1982). *See generally* Amy Adler, *What’s Left?: Hate Speech, Pornography, and the Problem for Artistic Expression*, 84 CALIF. L. REV. 1499 (1996) [hereinafter Adler, *What’s Left?*].

¹²⁶ ANDREA DWORKIN & CATHARINE A. MACKINNON, *PORNOGRAPHY AND CIVIL RIGHTS: A NEW DAY FOR WOMEN’S EQUALITY* 46 (1988).

¹²⁷ Catharine A. MacKinnon, *Pornography, Civil Rights, and Speech*, 20 HARV. C.R.-C.L. L. REV. 1, 16–17 (1985) (emphasis added).

¹²⁸ ANDREA DWORKIN, *PORNOGRAPHY: MEN POSSESSING WOMEN* (1981). For discussion of newfound feminist interest in Dworkin’s work, but the continued rejection of her anti-pornography stance, *see* Traister, *supra* note 61 (citing Dworkin’s influence on her work but rejecting Dworkin’s views on pornography).

¹²⁹ This ordinance defined pornography as:

[T]he graphic sexually explicit subordination of women through pictures and/or words that also includes one or more of the following: (i) women are presented dehumanized as sexual objects, things, or commodities; or (ii) women are presented as sexual objects who enjoy pain or humiliation; or (iii) women are presented as sexual objects who experience sexual pleasure in being raped; or (iv) women are presented as sexual objects tied up or cut up or mutilated or bruised or physically hurt; or (v) women are presented in postures or positions of sexual submission, servility, or display; or (vi) women’s body parts—including but not limited to vaginas, breasts, or buttocks—are exhibited such that women are reduced to those parts; or (vii) women are presented as whores by nature; or (viii) women are presented being penetrated by objects or animals; or (ix) women are presented in

legislation.¹³⁰ Minneapolis passed a version, but the mayor vetoed it.¹³¹ Indianapolis passed a version into law in 1984, but it was famously struck down as viewpoint discrimination under the First Amendment by the Seventh Circuit in 1985.¹³² Judge Easterbrook termed the ordinance “thought control.”¹³³

Indeed, the ordinance was wildly unconstitutional. But that may have been part of the point. MacKinnon rejects central First Amendment tenets, deriding traditional notions of value and harm. And she rejects what is arguably the central premise of free speech law: that there is a distinction between words and action. Thus, she and her intellectual partner Andrea Dworkin wrote that “[p]ornography is . . . the subordination of women.”¹³⁴ Pornography does not *represent* the subordination of women, it does not (merely) *cause* it, it is it. MacKinnon writes, “Representation is reality.”¹³⁵ Indeed,

scenarios of degradation, injury, torture, shown as filthy or inferior, bleeding, bruised, or hurt in a context that makes these conditions sexual.

DWORKIN & MACKINNON, *supra* note 126, at 36. Operating only through civil remedies, the model ordinance provides five possible causes of action to individuals claiming to have been harmed by pornography. *Id.* at 41–52. The statute also defines as pornography “[t]he use of men, children, or transsexuals in the place of women.” *Id.* at 36. For a discussion of how MacKinnon viewed gay and lesbian sex as reproducing gender assumptions about men and women, see Adler, *What’s Left?*, *supra* note 125, at 1539–40. MacKinnon and Dworkin wrote, for example: “Gay men are often used literally in the same ways women are in pornography; their status being lowered to that of a woman is part of the sex.” DWORKIN & MACKINNON, *supra* note 126, at 49.

¹³⁰ This turn to the state was a characteristic of what Janet Halley called “Late MacKinnon” and a significant departure from her early work in which she targeted the state itself as an institution of male domination. Halley, *infra* note 145.

¹³¹ See *The Minneapolis Civil Rights Ordinance, with Proposed Feminist Pornography Amendments*, 2 CONST. COMMENT. 181, 183–84 (1985) (reprinting proposed amendments to Minneapolis, Minn., Code of Ordinances, tit. 7, chs. 139 & 141).

¹³² The Indianapolis City Council passed a modified version of this definition into law, eliminating subsections (i), (v), (vi), and (vii), and substituting instead as (vi) “[w]omen are presented as sexual objects for domination, conquest, violation, exploitation, possession, or use, or through postures or positions of servility or submission or display.” INDIANAPOLIS, IND., CODE § 16-3(q) (1984), *reprinted in* Am. Booksellers Ass’n v. Hudnut, 771 F. 2d 323, 324 (7th Cir. 1985), *aff’d mem.*, 475 U.S. 1001 (1986). The Indianapolis City Council further modified the MacKinnon-Dworkin model ordinance by restricting the reach of the trafficking provisions.

¹³³ *Am. Booksellers Ass’n*, 771 F. 2d at 328. Note MacKinnon’s success in changing Canadian obscenity law to reflect her goals, and note the anti-feminist, anti-LGBTQ consequences of that change. BRENDA COSSMAN, *BAD ATTITUDE/S ON TRIAL: PORNOGRAPHY, FEMINISM, AND THE BUTLER DECISION* (1997).

¹³⁴ DWORKIN & MACKINNON, *supra* note 126 (emphasis added).

¹³⁵ *Cf.* Rae Langton, *Speech Acts and Unspeakable Acts*, 22 PHIL. & PUB. AFFS. 293 (1993) (using speech act theory from linguistics to argue that pornography does not merely cause harm but also constitutes harm).

MacKinnon expresses bewilderment with critics who do not understand that she literally means that pornography is “an act against women;” she protests that critics misread her claim “as metaphorical or magical, rhetorical or unreal, a literary hyperbole or propaganda device.”¹³⁶

Contemporary feminist scholars have for the most part not followed MacKinnon’s social construction critique of pornography.¹³⁷ While an important group of contemporary legal scholars have introduced a powerful new critique of “revenge porn” or “nonconsensual porn,”¹³⁸ their focus bears little in common with MacKinnon’s. By addressing the harm done to victims of nonconsensual porn, or more generally to participants in the porn industry, these scholars combat what I would describe as modern-day iterations of the first type of harm MacKinnon identified—the harm to individual women victimized by porn.¹³⁹

¹³⁶ MACKINNON, ONLY WORDS, *supra* note 113, at 11.

¹³⁷ See Andrew Koppelman, *Revenge Pornography and First Amendment Exceptions*, 65 EMORY L.J. 661, 685 (2016) (describing legal literature on MacKinnon’s pornography work by saying that these “arguments have not been persuasive, and while they are still made, they are less prominent than they once were.”); see also Kathryn Abrams, *Sex Wars Redux: Agency and Coercion in Feminist Legal Theory*, 95 COLUM. L. REV. 304 (1995) (exploring “sex radical” critique of early 1980s and arguing that it failed to sustain influence on feminist or other legal theory). There are, of course, exceptions; a few legal scholars still pursue claims that seem rooted in MacKinnon’s work. See, e.g., Lynne Tirrell, *Toxic Misogyny and the Limits of Counterspeech*, 87 FORDHAM L. REV. 2433 (2019).

¹³⁸ See Danielle Keats Citron, *Sexual Privacy*, 128 YALE L.J. 1870, 1917–28 (2019) (analyzing nonconsensual pornography (“revenge porn”) and deep fakes); DANIELLE KEATS CITRON, HATE CRIMES IN CYBERSPACE (2014); Bobby Chesney & Danielle Citron, *Deep Fakes: A Looming Challenge for Privacy, Democracy, and National Security*, 107 CALIF. L. REV. 1753 (2019); Danielle Keats Citron, *Why Sexual Privacy Matters for Trust*, 96 WASH. U. L. REV. 1189 (2019); Danielle Keats Citron & Mary Anne Franks, *Criminalizing Revenge Porn*, 49 WAKE FOREST L. REV. 345 (2014); Mary Anne Franks, *“Revenge Porn” Reform: A View from the Front Lines*, 69 FLA. L. REV. 1251 (2017) (describing Frank’s role at the forefront of the burgeoning movement to criminalize revenge porn); Mary Anne Franks, *Democratic Surveillance*, 30 HARV. J. L. & TECH. 425 (2017); Koppelman, *supra* note 137, at 690 (analyzing the constitutionality of restrictions on revenge porn under the First Amendment). Mary Anne Franks’s work as a producer on *Hot Girls Wanted* (Netflix 2015) offers a searing portrait of young girls who enter the porn industry. (Once again, her focus departs from MacKinnon’s for reasons I have described above.) Forty-eight states and the District of Columbia have now enacted laws prohibiting nonconsensual distribution of pornography. See *Nonconsensual Distribution of Intimate Images*, CYBER C.R. INITIATIVE, <https://cybercivilrights.org/nonconsensual-distribution-of-intimate-images/> [<https://perma.cc/D9XM-5R6D>] (collecting state laws against nonconsensual distribution of intimate images); see also Mary Anne Franks, *CCRI Model State Law*, CYBER C.R. INITIATIVE, <https://www.cybercivilrights.org/model-state-law> [<https://perma.cc/6P5C-CNKA>] (model nonconsensual pornography law).

¹³⁹ I should note that I am utterly convinced as a matter of policy by this scholarship on revenge porn, and nothing I say here should be read to contradict

Nonetheless, this generation of scholars departs from MacKinnon by emphasizing the critical role of consent, drawing pivotal distinctions between women who appear in porn consensually and those who appear non-consensually. This is a distinction MacKinnon explicitly rejected. And these contemporary scholars most critical of pornography have decidedly not pursued MacKinnon's most sweeping, signature argument and the one I evaluate here: that porn should be restricted because of its power to construct society and sexuality itself.¹⁴⁰

Here I focus on MacKinnon's more radical claim about social construction, the one largely abandoned by legal scholars, major media critics, and younger feminists. This latter claim was vigorously contested by many feminists over the years. I should know because I was one of them.¹⁴¹ But has this social construction claim become more compelling given the Big Tech porn environment in which we now live?

B. "Sex-Positive Feminism," Queer Theory, and Other Responses to MacKinnon

While many scholars endorsed MacKinnon,¹⁴² it is hard to overstate how much scholarship—including my own—has

that. It is also important to note here the ongoing litigation against Pornhub for trafficking sex victims. See *supra* note 100. Once again, these cases seek redress for harm to victims used in pornography; they do not allege that pornography causes any social-construction harms.

¹⁴⁰ Jeremy Waldron's theory of hate speech also evidences an interest in the harm of social construction in general and engages with MacKinnon's work. See JEREMY WALDRON, *THE HARM IN HATE SPEECH* 38, 58, 73–74, 89–96 (2012).

¹⁴¹ Adler, *What's Left?*, *supra* note 125; Adler, *Inverting the First Amendment*, *supra* note 110, at 979; Amy Adler, *Girls! Girls! Girls!: The Supreme Court Confronts the G-String*, 80 N.Y.U. L. REV. 1108 (2005); Amy Adler, *Performance Anxiety: Medusa, Sex and the First Amendment*, 21 YALE J.L. & HUMAN. 227 (2009); Amy Adler, *To Catch a Predator*, 21 COLUM. J. GENDER & L. 130 (2012); Adler, *Second Commandment*, *supra* note 117. I was also involved in activism; fresh out of law school I joined the legal steering committee of "Feminists for Free Expression," an anti-censorship pro-sex feminist group which had been founded in 1992. *FFE Board*, FEMINISTS FOR FREE EXPRESSION, <https://web.archive.org/web/20060427013857/http://www.ffeusa.org/html/board/index.html> [<https://perma.cc/MLK3-Q2UK>].

¹⁴² For example, Cass Sunstein wrote against pornography in a way that aligned his scholarship with hers. See, e.g., Cass R. Sunstein, *Pornography and the First Amendment*, 1986 DUKE L.J. 589, 591 (1986) (evaluating MacKinnon's anti-pornography legislation and arguing that "pornography is 'low-value' speech, entitled to less protection from government control than most forms of speech"). In philosophy Rae Langton, Susan Brison, and Rebecca Whishnant continue to pursue anti-pornography claims. See, e.g., Susan Brison, *"The Price We Pay"?* *Pornography and Harm*, in CONTEMPORARY DEBATES IN APPLIED ETHICS 236, 242 (Andrew I. Cohen, ed., 2005) (arguing that there is a connection between what she

been devoted to attacking her work. In a genealogy of feminist jurisprudence, the reaction against MacKinnon's anti-pornography work was extraordinarily generative: It gave birth to the feminist "sex wars"¹⁴³ of the 1980s and the ascendance of the "sex-positive" or "pro-sex" feminist movement that eventually won those wars.¹⁴⁴ We can also trace the origins of queer legal theory—in part—to a reaction against MacKinnon.¹⁴⁵ Indeed so many arguments were launched against MacKinnon (and continue to be) that I cannot begin to offer a comprehensive account of them here. Instead, what follows is a quick sketch of some of the most salient arguments in this very rich vein.

A particularly influential set of arguments against MacKinnon's anti-pornography work, first raised in the 1980s by "sex-positive" feminists, charged that MacKinnon failed to see the

views as "the dehumanization of girls and women in pornography" and "their brutalization in rape, battering, forced prostitution, and sexual murder").

¹⁴³ As Carole Vance wrote, "[T]o speak only of sexual violence and oppression ignores women's experience with sexual agency and choice and unwittingly increases the sexual terror and despair in which women live." CAROLE S. VANCE, *PLEASURE AND DANGER: EXPLORING FEMALE SEXUALITY* 1 (1984). The conference "Towards a Politics of Sexuality," was held in April 1982, and organized by Carol Vance, Ellen Willis, and Gayle Rubin (among others). Anti-porn feminists picketed the conference, wearing shirts saying, "Against S/M" and "For a Feminist Sexuality." SULLIVAN & MCKEE, *supra* note 59, at 86–87. This was the start of what became known as the feminist sex wars. See also *id.* at 88–89 (stating that the "sex positive" feminists won the Porn Wars"); Abrams, *supra* note 137 (analyzing the "sex radical" critique of the early 1980s); LISA DUGGAN & NAN D. HUNTER, *SEX WARS: SEXUAL DISSENT AND POLITICAL CULTURE* 1, 30–78 (1995); Elizabeth Wilson, *The Context of 'Between Pleasure and Danger': The Barnard Conference on Sexuality*, 13 *FEMINIST REV.* 35 (1983).

¹⁴⁴ For some foundational texts of sex-positive feminism, see ELLEN WILLIS, *Lust Horizons: Is the Women's Movement Pro-Sex?*, in *NO MORE NICE GIRLS: COUNTERCULTURAL ESSAYS* 3 (1992); *CAUGHT LOOKING: FEMINISM, PORNOGRAPHY AND CENSORSHIP* (Kate Ellis, Nan D. Hunter, Barbara O'Dair & Abby Tallmer eds., 1992); CAROLE VANCE, *PLEASURE AND DANGER: EXPLORING FEMALE SEXUALITY* (1984); Ann Barr Snitow, *Mass Market Romance: Pornography for Women is Different*, in *POWERS OF DESIRE: THE POLITICS OF SEXUALITY* 245 (Ann Snitow, Christine Stansell & Sharon Thompson eds., 1983) (arguing that pornography can serve a liberating feminist role). See also NADINE STROSSEN, *DEFENDING PORNOGRAPHY* (1995); Nadine Strossen, *A Feminist Critique of "The" Feminist Critique of Pornography*, 79 *VA. L. REV.* 1099 (1993). For an analysis of the history of pornography and its frequent links to political subversion, see *THE INVENTION OF PORNOGRAPHY* (Lynn Hunt ed., 1993). See also Gertrud Koch, *The Body's Shadow Realm*, *OCTOBER*, Fall 1989, at 3. For two evaluations of sex-positivity in law more generally, see Margo Kaplan, *Sex-Positive Law*, 89 *N.Y.U. L. REV.* 89, 92 (2014) and Ummni Khan, *Let's Get It On: Some Reflections on Sex-Positive Feminism*, 38 *WOMEN'S RTS. L. REP.* 346, 352 (2017); cf. Laura A. Rosenbury & Jennifer E. Rothman, *Sex in and Out of Intimacy*, 59 *EMORY L.J.* 809, 815 (2010) (exploring what they describe as our "sex-negative legal regime").

¹⁴⁵ See, e.g., Ian Halley, *Queer Theory by Men*, 11 *DUKE J. GENDER L. & POL'Y* 7 (2004). Note that other prominent influences included postmodern theories of sexuality, as well as a reaction to AIDS-panic and the homophobia that informed it.

value of pornography for women.¹⁴⁶ What about women who enjoy pornography or find in it a tool for sexual freedom, power, and liberation? What about women (or others) who enjoy the kind of sex that MacKinnon condemned as subordinating and degrading?¹⁴⁷ MacKinnon viewed this argument as a testament to the totalizing power of male dominance and female subordination; these women were so fully victimized that they had been deluded into viewing their victimization as a form of empowerment.¹⁴⁸ A related set of arguments, also originating in part in sex-positive feminism, charged that MacKinnon's view must be rejected because it denies the possibility of female agency and autonomy, and that her project reifies a notion of women as victims.¹⁴⁹

Coinciding with the sex-positive movement was an emergent tendency within the LGBTQ community to embrace pornography as a site of political activism as well as pleasure; MacKinnon's unwavering condemnation of all pornography threatened this development.¹⁵⁰ Even worse, MacKinnon's critique of pornography crested at the time of AIDS, when gay men were dying in droves and when censorship was most prominently

¹⁴⁶ See *supra* note 143 (collecting some of the major texts of pro-sex feminism).

¹⁴⁷ This argument arising in sex-positive feminism also found traction in queer legal theory, where theorists explored and embraced the darkness of pornography and sexuality. See, e.g., Leo Bersani, *Is the Rectum a Grave?*, 43 OCTOBER 197, 215 (1987) (criticizing MacKinnon by embracing the "anticommunal, antiegalitarian, antinurturing, antiloving" aspects of pornography her work exposed). For an elaboration of this argument, see Halley, *Queer Theory by Men*, *supra* note 145.

¹⁴⁸ See MacKinnon, *TOWARD A FEMINIST THEORY OF THE STATE*, *supra* note 148, at 125.

¹⁴⁹ Furthermore, censorship has been used to restrict women's rights and sexual freedom. A salient example comes from the history of obscenity law, when those laws were used to prosecute Margaret Sanger for distributing birth control information to women. See GEOFFREY STONE, *SEX AND THE CONSTITUTION* (2017). The threat MacKinnon's work posed to contemporary feminist as well as lesbian materials became clear in Canada, where under the nation's obscenity law, crafted in 1992 by the Supreme Court of Canada with the support of MacKinnon, some of the first seizures were of lesbian, feminist, and, in fact, anti-pornography materials. See Adler, *What's Left?*, *supra* note 125, at 1530. Even Andrea Dworkin's publications were confiscated on suspicion of obscenity. See Jeffrey Toobin, *X-Rated*, *NEW YORKER*, Oct. 3, 1994, at 70, 74 (reporting that in 1993, under the new, purportedly feminist anti-pornography law in Canada, Canadian officials seized two books by Dworkin).

¹⁵⁰ See generally Adler, *What's Left?*, *supra* note 125 (offering an extended analysis explaining this embrace of pornography and how these practices were threatened by MacKinnon's theories). Lesbian magazines such as *On Our Backs* and *Bad Attitude*, featuring centerfolds, and sexual photo spreads, often with an emphasis on sadomasochism, became a prominent site of both activism and pleasure. *Id.* at 1524–25. At the same time, gay men were embracing pornography as a form of activism, pleasure, and AIDS education. *Id.* at 1531–38.

associated with religious conservatives who wielded it as a tool to pursue their homophobic, AIDS-phobic agenda.¹⁵¹

Further critiques of MacKinnon arose, informed by (and informing) queer theory and postmodern theories of sexuality: What about people who did not identify with MacKinnon's binary model of male and female?¹⁵² Were all "women" somehow the same, produced by pornography? These theorists rejected MacKinnon's monolithic theory in which sex, gender, and sexuality all follow one another in lockstep. Instead, these theorists insisted on a split between gender and erotic desire, exploring how sex, gender, and sexuality all float free of one another.¹⁵³ (While I have endorsed these queer critiques, I nonetheless limit my focus in this Article to heterosexual pornography, both because it was the focus of MacKinnon's work and because it represents the overwhelming majority of contemporary "mainstream" pornography.)¹⁵⁴ Later, as feminist theory moved into an intersectional phase, scholars engaged with MacKinnon's work from the perspective of critical race theory, anti-essentialism, intersectionality, and anti-colonialism.¹⁵⁵

¹⁵¹ A central example comes from the signal event of the culture wars during the same period, the national campaign against Robert Mapplethorpe, in which anti-gay conservatives explicitly linked pornography with AIDS and homosexuality. See Amy Adler, *The Shifting Law of Sexual Speech: Rethinking Robert Mapplethorpe*, 2020 U. CHI. LEGAL F. 1 (2020).

¹⁵² See Halley, *Queer Theory by Men*, *supra* note 145, at 7 (claiming that queer theory owes its origins in part to a reaction against MacKinnon). For some of the early, central texts of queer theory, see JUDITH BUTLER, *GENDER TROUBLE: FEMINISM AND THE SUBVERSION OF IDENTITY* (1990); EVE KOSOFSKY SEDGWICK, *EPISTEMOLOGY OF THE CLOSET* (1990); Gayle Rubin, *Thinking Sex: Notes for a Radical Theory of the Politics of Sexuality*, in *PLEASURE AND DANGER: EXPLORING FEMALE SEXUALITY* 267 (Carol S. Vance ed., 1984).

¹⁵³ The foundational text is Rubin, *Thinking Sex: Notes for a Radical Theory of the Politics of Sexuality*, *supra* note 152.

¹⁵⁴ See, e.g., Adler, *What's Left?*, *supra* note 125; Adler, *The Shifting Law of Sexual Speech: Rethinking Robert Mapplethorpe*, *supra* note 152.

¹⁵⁵ For two important works in this regard, both of which have engendered an extraordinary body of scholarship, see 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) and Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581 (1990). For MacKinnon's work in this vein, see Catharine A. MacKinnon, *From Practice to Theory, or What Is a White Woman Anyway?*, 4 YALE J.L. & FEMINISM 13 (1991). See also Kimberlé W. Crenshaw, *Close Encounters of Three Kinds: On Teaching Dominance Feminism and Intersectionality*, 46 TULSA L. REV. 151 (2010) (favorable discussion of MacKinnon and intersectionality). For a sustained and nuanced analysis of the relationship between anti-essentialism, intersectionality, and dominance theory, see Devon W. Carbado & Cheryl I. Harris, *Intersectionality at 30: Mapping the Margins of Anti-Essentialism, Intersectionality, and Dominance Theory*, 132 HARV. L. REV. 2193 (2019).

A key set of attacks on MacKinnon rejected the literalism of her work and its assumptions about causation and interpretation. (I will admit a particular interest in these issues; I have made several of these arguments in my previous scholarship.)¹⁵⁶ How could MacKinnon assume that a pornographic text means only one thing, or produces only one effect in each person who views it? Doesn't pornography—like all texts—produce multiple readings and multiple effects? Can't a viewer exposed to pornography emerge with an anti-pornography sentiment (as MacKinnon and Dworkin in fact did), just as a viewer exposed to an anti-pornography work could find it erotic? (Dworkin's work, for example, in its unrelenting explicitness, can read like porn.) Furthermore, does pornography really *construct* us or does it also *reflect* our desires? And to the extent pornography does construct us, doesn't it do so in multiple and unpredictable ways and in concert with many different forces? Don't we have enough agency to push back against pornography, to bring our own readings to bear on it? In short, these attacks on MacKinnon's work argued that she was wrong to assume a simple and direct relationship between a text, its meanings, and the way a viewer might behave in the world. Not only feminists

Many scholars have explored the troublingly racialized character of much pornography. See, e.g., PATRICIA HILLS COLLINS, *BLACK FEMINIST THOUGHT* (1990); Amanda Wong, Note, *Broken, Brutal, Bloody: The Harms of Violent Racial Pornography and the Need for Legal Accountability*, 8 *GEO. J. L. & MOD. CRIT. RACE PERSP.* 225 (2016); Sunny Woan, *White Sexual Imperialism: A Theory of Asian Feminist Jurisprudence*, 14 *WASH. & LEE J. CIVIL RIGHTS & SOC. JUST.* 275 (2008). These scholars address how pornography reproduces patriarchy, colonialism, and whiteness through depictions of sex featuring people of color, especially Black and Asian women. See also Zethu Matebeni, *Queer(ing) Porn - A Conversation*, 26 *AGENDA* 61 (2012); Jewel Amoah, *Back on the Auction Block: A Discussion of Black Women and Pornography*, 14 *NAT'L BLACK L.J.* 204 (1997). For a "race-positive" approach to the intersection of race and pornography, see Celine Parreñas Shimizu, *Queens of Anal, Double, Triple, and the Gang Bang: Producing Asian/American Feminism in Pornography*, 18 *YALE J.L. & FEMINISM* 235, 241 (2006) ("Race-positive sexuality connects gender and sexuality in pornography to slavery and colonial history, while keeping open pornography's anti-racist and sex-positive potentialities").

The legal scholars pioneering the legal discourse on nonconsensual or revenge porn and privacy harms associated with it frequently highlight the troubling racial dimensions of that practice. See, e.g., Danielle Keats Citron, *Sexual Privacy*, 128 *YALE L.J.* 1870, 1890 (2019) (arguing that the "relationship between sexual privacy and gender, racial, sexual, and economic equality is undeniable"); Mary Anne Franks, *Democratic Surveillance*, 30 *HARV. J.L. & TECH.* 425, 464 (2017) ("Attentiveness to race, class, and gender is vital to understanding the true scope of the surveillance threat.")

¹⁵⁶ For my previous arguments in this vein, see *supra* note 141 (listing articles).

but also literary scholars and First Amendment lawyers and judges have been exploring related questions for years.¹⁵⁷

Meanwhile, in popular (non-academic) discourse and in pop culture, feminism morphed for a time from the initial sex-positive response to MacKinnon's defeat to a more market-friendly phase of "empowerment feminism" in the mid-2000s. Some have argued that in popular practice, empowerment feminism made sex-positivity mandatory, as if to be a feminist meant "giving blow jobs like it's missionary work."¹⁵⁸ Jill Lepore calls empowerment feminism "a cynical sham."¹⁵⁹ Moira Donegan argues that "third-wave sex positivity became as strident and incurious in its promotion of all aspects of sexual culture as the anti-porn feminists were in their condemnation of sexual practices under patriarchy."¹⁶⁰ This development in popular versions of feminism, while by no means representative of all feminist theory, nonetheless assured that a significant feminist cohort had backed off a critique of pornography in the mid-2000s—just the time when the pornography industry went through the massive technological shift I have described—and when the First Amendment avenues to restrict porn had vanished, as I show below.

C. Reassessing Social Construction

The many arguments levied against MacKinnon's pornography work, sketched above, are weighty ones. Indeed, in my view, most of them remain largely persuasive in the face of what I explore in this Article. For now, however, we can see that by reframing the present pornography environment as a problem of networked technology speech platforms, I have

¹⁵⁷ Hints of these lines of attack even appeared in the Seventh Circuit's opinion striking down the MacKinnon-Dworkin ordinance under the First Amendment. *Am. Booksellers Ass'n, Inc. v. Hudnut*, 771 F.2d 323, 325 (7th Cir. 1985), *aff'd*, 475 U.S. 1001 (1986). For a historical example of this conflict in obscenity law, see the debate between Justices Douglas and Clark in *Memoirs v. Massachusetts*, 383 U.S. 413 (1966).

¹⁵⁸ Jessa Crispin, *WHY I AM NOT A FEMINIST: A FEMINIST MANIFESTO X* (2017); see also Rebecca Traister, *Why Sex That's Consensual Can Still Be Bad*. *And Why We're Not Talking About It*, *THE CUT* (Oct. 20, 2015), <https://www.thecut.com/2015/10/why-consensual-sex-can-still-be-bad.html> [<https://perma.cc/T7CA-XHM9>] (describing one recent version of sex-positive feminism as viewing sex as compulsory).

¹⁵⁹ Jill Lepore, *When Barbie Went to War with Bratz*, *NEW YORKER* (Jan. 15, 2018), <https://www.newyorker.com/magazine/2018/01/22/when-barbie-went-to-war-with-bratz> [<https://perma.cc/PKH3-2QPT>].

¹⁶⁰ Donegan, *supra* note 108.

given new force to *one* aspect of MacKinnon's argument, her argument that pornography constructs sexuality. As we saw, tech scholars, while never addressing pornography, warned that Big Tech in other realms modifies our preferences, and "our actual behavior."¹⁶¹ To return to tech pioneer and critic, Jaron Lanier, Big Tech changes "what you do, how you think, who you are."¹⁶²

Note that my argument that porn has now gained the social construction power that attends other Big Tech speech platforms does *not* mean that its power to socially construct us works in the same way that MacKinnon predicted. In my view, her argument is still riven with the problems that gave rise to the critique of her work from many different positions.¹⁶³ We are still worlds away from the totalizing, monolithic vision MacKinnon presents of pornography's power. But by seeing Pornhub through the lens of the literature on Big Tech, we can see that while pornography has always had *some* power (albeit complex and incomplete) to socially construct our sexuality, that power has now been turbocharged by technology and the financial models it enabled.

At a minimum, anyone interested in sexual freedom, pro-sex or anti-porn, feminist or otherwise, should consider the ways in which Internet pornography, viewed by so many as a route to sexual freedom and democratization, constrains our sexualities even as it offers us seemingly endless "choice." What we discover in our confrontation with porn may be less the freedom to find pleasure and agency, and more the rigidification of pleasure and the replacement of agency with algorithmic desire. I believe that even sex-positive feminists—those who fought against censorship of pornography and who would still reject MacKinnon's arguments for many of the reasons recounted above—should worry about this new intrusion on our sexual autonomy.

Nevertheless, significant, deeply complex questions remain unanswered: Even if pornography changes our desires, so what? Even if our new pleasure is now corporate produced, isn't that still pleasure? Furthermore, do changes in pleasure dictate changes in behavior, or further still, in what it means to act in the world in terms of gender or otherwise? And what

¹⁶¹ *E.g.* Zuboff, *supra* note 91 (big data surveillance leads to "analysis, prediction, and modification of actual behavior").

¹⁶² Zaman, *The People Who Created Facebook & YouTube Are Sorry*, *supra* note 95 (quoting Jaron Lanier, tech futurist and a founder of the field of virtual reality).

¹⁶³ *Supra* Part III.B..

does any of this have to do with female subordination, in sex or in life? What (if any) are the normative implications of sexual pleasure? I turn to some of these questions in Part V, after first discussing the First Amendment issues surrounding these questions below.

IV

THE FIRST AMENDMENT PROTECTION OF PORNOGRAPHY

The triumph of pornography was not inevitable. The major driver for this triumph was technology and its relentlessness,¹⁶⁴ (not to mention the relentlessness of sexual desire itself). But as I briefly show here, First Amendment law paved the way.

There were at least two avenues in First Amendment law that plausibly could have prevented the growth of online pornography, but as I show here, both had been foreclosed by the time Pornhub came on the scene. First, I consider the collapse of obscenity law. Then I explore the Supreme Court's repeated rejections of Congress's attempt to regulate online pornography under the rubric of "indecenty." These two legal developments, fought and settled against the backdrop of a dramatically different pornography ecosystem, cleared the way for Pornhub.

A. The Collapse of Obscenity Law

If you were to open Pornhub in your browser right now, you would see on the homepage thumbnails of a dizzying array of hard-core sex videos to click on. Today as I write, Pornhub offers me the following choices under the rubric of "Most Viewed Videos in the United States": "Double Alpha Homemade Gangbang," "Step Siblings Caught - Hot Stepsister ****," and . . . well, you get the point.

You may be asking yourself, isn't this stuff obscene? The answer is that a lot of what's on Pornhub would have been considered obscene in an earlier era. But beginning in the early 1990s, for several reasons, obscenity law fell into relative disuse. Since that time, the decline in obscenity prosecutions—and the explosion of porn it both responded to and

¹⁶⁴ See Adler, *All Porn All the Time*, *supra* note 42, at 696 (identifying technological innovation as the major factor driving pornography's newfound cultural dominance, but also exploring other significant factors such as sweeping changes in social norms governing sexuality, and the saturation of mass media, advertising, and communications with photographic images as we move to an image culture). See generally TARRANT, *supra* note 97 (analyzing the economics of the pornography industry and discussing the changes introduced by new technology).

facilitated—have made it almost impossible to reverse course and to put the pornography genie back in the bottle.

While the Supreme Court's obscenity doctrine has remained steady since the early 70s, as a practical matter, obscenity law was all but abandoned in the 1990s for several reasons I have written about elsewhere.¹⁶⁵ One major driver was the exploding crisis around child pornography.¹⁶⁶ Under the Clinton administration, the Child Exploitation and Obscenity Unit of the Department of Justice, which prosecutes both obscenity and child pornography cases, decided to focus its resources on child pornography, which was emerging as an urgent and growing problem, and which I discuss below.¹⁶⁷ The statistics are clear. In the period from 1992 to 2000, federal prosecutions of child pornography increased more than fivefold, from 104 to 563 per year. In contrast, federal prosecutions of obscenity fell by more than half in the same period, from 44 cases in 1992 to 20 in 2000.¹⁶⁸ Another statistic reveals that the number of federal convictions for child pornography more than tripled from 1997 to 2004.¹⁶⁹ The conservative anti-pornography group Morality in Media charged that "[d]uring the first six years of the Clinton administration, federal obscenity law enforcement declined by over eighty percent."¹⁷⁰

But as obscenity law declined, and adult pornography rushed in to fill the void, it had the consequence of slowly rendering obscenity law impotent. In our porn-soaked contemporary

¹⁶⁵ See, e.g., Adler, *All Porn All the Time*, *supra* note 42 (discussing doctrinal and other embarrassments that I believe led to the decline in obscenity law).

¹⁶⁶ Adler, *The Shifting Law of Sexual Speech*, *supra* note 151 (considering the relationship between obscenity law and child pornography law and investigating multiple reasons for the decline of obscenity law).

¹⁶⁷ The Clinton administration policy, though not explicitly announced, was clear in the pattern of prosecutions. It was widely maligned by conservative anti-pornography groups and legislators. See *House Subcommittee Criticizes DOJ for Not Prosecuting Internet Obscenity*, *TECH L.J.* (May 24, 2000), <http://www.techlawjournal.com/crime/20000524.htm> [<https://perma.cc/3A8F-72QP>].

¹⁶⁸ U.S. DEP'T OF JUSTICE, REP. NO. I-2001-02, REVIEW OF CHILD PORNOGRAPHY AND OBSCENITY CASES (2001).

¹⁶⁹ *United States Senate Concerning Protecting Children on the Internet: Hearing before the Comm. on Commerce, Sci., and Transp.*, 109 Cong. 12 (2006) (statement of Laura H. Parsky, Deputy Assistant Att'y Gen., Criminal Division).

¹⁷⁰ Robert Peters, *Clinton's Hardcore Porn Legacy*, *MORALITY IN MEDIA* (Aug. 14, 2000), <http://www.freerepublic.com/focus/news/710891/posts> [<https://perma.cc/QPE5-8AGH>]. See also, Patrick McGrath, *Enforcement of Federal Obscenity Laws Dropped 86% Under Clinton Administration*, *NAT'L CTR. SEXUAL EXPLOITATION* (Oct. 19, 1998), <https://endsexualexploitation.org/articles/enforcement-of-federal-obscenity-laws-dropped-86-under-clinton-administration/> [<https://perma.cc/US8H-CG2N>].

culture, a pornographer's defense is built into obscenity law's reliance on community standards: the government in an obscenity case must prove that the material exceeds contemporary community standards.¹⁷¹ Given the sea of pornography in which we live (a condition facilitated in part by the decline of obscenity law), it is now much harder for a prosecutor to prove that material on trial deviates in its prurience and patent offensiveness from the kind of stuff everyone else in the community has been looking at right before they came to court. Pornhub now is the community standard. In a pre-Pornhub era, the Bush Department of Justice briefly revived obscenity law in the early 2000s;¹⁷² it tended to target extremely hardcore pornography on the scatological fringes of the industry, material that might seem to a jury to be unlike the usual pornographic fare they or their neighbors had grown accustomed to.¹⁷³ In any event, the Bush revival of obscenity law did not last long.¹⁷⁴ It is still possible that a future administration will once again reverse course.¹⁷⁵ Indeed, Donald Trump, in his 2016 campaign, pledged to reinvigorate obscenity prosecutions if elected,¹⁷⁶ but he never fulfilled his promise, as conservative critics lamented.¹⁷⁷ And, as I have documented, obscenity law

¹⁷¹ See *Miller v. California*, 413 U.S. 15, 24 (1973).

¹⁷² Barton Gellman, *Recruits Sought for Porn Squad*, WASH. POST (Sept. 20, 2005), <https://www.washingtonpost.com/archive/politics/2005/09/20/recruits-sought-for-porn-squad/4efa6c1b-7be2-4a3a-a003-c1a3a2f5579a/> [https://perma.cc/FGF2-ZWEB]; see also Alberto R. Gonzales, *Prepared Remarks of Att'y Gen. Alberto R. Gonzales at the U.S. Attorney's Conference* (Apr. 21, 2005), <https://www.justice.gov/archive/ag/speeches/2005/042105usatorneysconference.htm> [https://perma.cc/5Z5S-2HZ9] ("I've made it clear that I intend to aggressively combat the purveyors of obscene materials.").

¹⁷³ Adler, *All Porn All the Time*, *supra* note 42, at 705–06.

¹⁷⁴ Josh Gerstein, *Holder Accused of Neglecting Porn*, POLITICO (Apr. 16, 2011), <http://www.politico.com/story/2011/04/holder-accused-of-neglecting-porn-053314#ixzz4GrYnOHA1> [https://perma.cc/3ZDT-LXDK]; see also Jamshid Ghazi Askar, *Prosecute Pornography? Why Mitt Romney and President Obama Can't Agree*, DESERET NEWS (Sep. 13, 2012), <http://www.deseretnews.com/article/865562332/Prosecute-pornography-Why-Mitt-Romney-and-President-Obama-cant-agree.html?pg=all> [https://perma.cc/CD8H-8HFG].

¹⁷⁵ Tal Kopan, *GOP Platform Draft Declares Pornography 'Public Health Crisis'*, CNN (July 11, 2016), <http://www.cnn.com/2016/07/11/politics/gop-platform-republican-convention-internet-pornography/> [https://perma.cc/9WJH-Q7ZA]; see also Adler, *The Shifting Law of Sexual Speech*, *supra* note 151 (discussing the special threat obscenity has posed in past to unpopular speakers and sexual minorities).

¹⁷⁶ *Donald Trump Pledges to Protect Children from Sexual Exploitation Online: Vows Aggressive Enforcement of Existing Federal Laws*, ENOUGH IS ENOUGH, (Aug. 1, 2016), <https://enough.org/news/75EL28EXME> [https://perma.cc/5QHB-CJV9].

¹⁷⁷ Jeff Mordock, *Pornography crackdown vowed by Donald Trump still never materialized*, WASH. TIMES, (Dec. 25, 2019), <https://www.washingtontimes.com/>

is still invoked sometimes to fill the gaps for other doctrinal areas.¹⁷⁸ Nonetheless, the pornographic culture in which we now live presents a monumental hurdle for prosecutors pursuing obscenity convictions.¹⁷⁹

In contrast to obscenity law's increasing irrelevance, child pornography law represents a growing and urgent body of law that targets one segment of pornographic materials: those produced through the sexual abuse of children. (The tragic proliferation of illegal images of child sexual abuse online continues nonetheless.) But because child pornography law has no application to adult pornography, it is limited in reach.¹⁸⁰ Furthermore, the Supreme Court has insisted that any consideration of widespread societal harms caused by such images—what we could call “social construction” harms—have no place in child pornography law, which focuses on banning images

news/2019/dec/25/pornography-crackdown-vowed-trump-still-never-mate/
[https://perma.cc/Q4M6-RLN8].

¹⁷⁸ For example, Congress has resorted to obscenity law to achieve legislative agendas that have met with initial Supreme Court defeat. For instance, the “Protect Act” (Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today Act of 2003), Pub. L. No. 108-21, § 504, 117 Stat. 650, 678 (2003) explicitly invoked the rubric of obscenity law in response to the Supreme Court's invalidation of Congress's attempt to ban virtual child pornography. See Pub. L. No. 104-208, § 121, invalidated by *Ashcroft v. Free Speech Coal.*, 535 U.S. 234 (2002). Similarly, after the Supreme Court invalidated Congress's attempt to criminalize depictions of animal cruelty in *United States v. Stevens*, 559 U.S. 460 (2010), Congress used obscenity law to rewrite the legislation in a way that would pass constitutional muster. See *Animal Crush Video Prohibition Act of 2010*, 18 U.S.C. 48 (2010); see also *United States v. Richards*, 755 F.3d 269 (5th Cir. 2014) (upholding the revised law which uses obscenity law to ban “crush” videos).

¹⁷⁹ A striking illustration of the mainstreaming of pornography and the challenge that this phenomenon might pose to prosecutors seeking obscenity convictions comes from the Supreme Court's decision in *United States v. Playboy Entertainment Group*, 529 U.S. 803, 826 (2000). In *Playboy*, the Court considered a telecommunications case involving restrictions on cable television channels that were “primarily dedicated to sexually-oriented programming.” *Id.* at 806 (invalidating under the First Amendment Section 505 of the Telecommunications Act of 1996). In spite of the sexually explicit nature of the material, a majority of the Supreme Court accepted without question the litigants' agreement that the material at issue was not obscene. In dissent, Justice Scalia termed the assumption that this material was not obscene “highly fanciful” and proceeded to describe the content of some of the programming, such as “female masturbation/external,” “girl/girl sex,” and “oral sex.” *Id.* at 831, 834 (Scalia, J., dissenting) (terming the agreement that the material was not obscene a “highly fanciful assumption”). The other Justices' easy acceptance of the agreement that such material was not obscene suggests the difficulty that prosecutors now face. It seems that a great deal of pornography would not strike the Justices themselves as legally obscene.

¹⁸⁰ *New York v. Ferber*, 458 U.S. 747 (1982) (excluding from First Amendment protection any material produced through the abuse of children).

only if they were produced through the abuse of a child. This has always been the basis of child pornography law, but the Court made this abundantly clear in 2002 when it declared that computer-generated images that looked like child pornography but were not produced using actual children did not constitute child pornography for First Amendment purposes, even though these images could potentially cause grievous harms such as sexualizing children in our culture.¹⁸¹ As the Court explained, if the harm the government seeks to avert flows “from the content of the images, not from the means of their production, then speech must be protected.”¹⁸² Thus the Court has explicitly rejected the possibility of banning speech based on the possibility of its social construction effects, even in the horrific realm of child sexual abuse.

B. Failed Attempts to Regulate Internet Pornography

There was a moment early in digital life when Congress attempted to regulate Internet pornography because of concerns about its effects on children as a group. The Supreme Court repeatedly thwarted Congress’s attempts. In three separate First Amendment decisions between 1997 and 2004, the Court voiced concern about the threat that such regulation poses to adults who wished to view or disseminate pornography. In 1996, Congress passed the Communications Decency Act, which criminalized indecent and patently offensive online communications; the Court struck down these major provisions on constitutional grounds in 1997.¹⁸³ In response to the defeat, Congress in 1998 passed The Child Online Protection Act (“COPA”).¹⁸⁴ COPA was premised on the notion that some speech, even if it is constitutionally acceptable for adults to

¹⁸¹ *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002) (invalidating Congress’s attempt to ban virtual child pornography).

¹⁸² *Id.* at 242. Note that class action lawsuits recently brought against Pornhub alleged, *inter alia*, that the site allows the proliferation of child pornography. See *supra* note 100.

¹⁸³ Communications Decency Act of 1996, 47 U.S.C. § 223 (1994 ed., Supp. II, vol. 4). The Act, *inter alia*, prohibited the knowing transmission of obscene or indecent messages to any recipient under 18 years of age. The Court held the CDA unconstitutional because it was not narrowly tailored to serve a compelling governmental interest and because less restrictive alternatives were available. *Reno v. ACLU*, 521 U.S. 844 (1997).

¹⁸⁴ 47 U.S.C. § 231 (2000).

view, may be regulated because it is “harmful to minors.”¹⁸⁵ The Supreme Court evaluated COPA twice. In *Ashcroft v. ACLU I*,¹⁸⁶ the Court issued a narrow ruling; although it rejected the Third Circuit’s holding that COPA was overbroad because of its reliance on “contemporary community standards” in evaluating speech, the Court nonetheless remanded the case for further assessment of COPA’s First Amendment validity. In *Ashcroft v. ACLU II*, its second case considering COPA, the Court found that private filtering technology might more effectively protect minors than Congress’s proposed regulatory scheme would, with less threat to free speech.¹⁸⁷ The district court, on remand, applied the Court’s standard to issue a permanent injunction against COPA in 2007, the year that marked the shift to the tube sites.¹⁸⁸

V

IS PORNOGRAPHY CHANGING SEXUAL PRACTICES?

In reconceptualizing the porn industry as an instance of Big Tech, I argued that the move toward algorithmically-driven Internet pornography has turbocharged pornography’s power

¹⁸⁵ COPA defines Material that is “harmful to minors” as: “[A]ny communication, picture, image, graphic image file, article, recording, writing, or other matter of any kind that is obscene or that— (A) the average person, applying contemporary community standards, would find, taking the material as a whole and with respect to minors, is designed to appeal to, or is designed to pander to, the prurient interest; (B) depicts, describes, or represents, in a manner patently offensive with respect to minors, an actual or simulated sexual act or sexual contact, an actual or simulated normal or perverted sexual act, or a lewd exhibition of the genitals or post-pubescent female breast; and (C) taken as a whole, lacks serious literary, artistic, political, or scientific value for minors.” 47 U.S.C. § 231(e)(6) (2000).

¹⁸⁶ *Ashcroft v. ACLU I*, 535 U.S. 564, 585-586 (2002) (finding that COPA’s use of community standards to identify material that is “harmful to minors” does not render statute facially overbroad; remanding for further analysis of other overbreadth and vagueness issues).

¹⁸⁷ *Ashcroft v. ACLU II*, 542 U.S. 656, 667-668 (2004) (upholding preliminary injunction against enforcement of COPA and remanding case).

¹⁸⁸ *ACLU v. Gonzales*, 478 F. Supp. 2d 775, 809-821 (E.D. Pa. 2007). In contrast to the CDA and COPA, Congress has had success using the “harmful to minors” rationale to impose filters on public libraries’ Internet access. In 2003, the Supreme Court upheld the Children’s Internet Protection Act (“CIPA”), Pub. L. 106-554 § 1711-41, 114 Stat. 2763A-335 to -352 (2000), codified as amended at scattered sections of 20 and 47 U.S.C. (2000), which forbids public libraries to receive federal assistance for Internet access unless they install software to block obscene or pornographic images and to prevent minors from accessing material harmful to minors. *United States v. Am. Library Ass’n., Inc.*, 539 U.S. 194 (2003).

to shape sexual desire, not in the uniform, all-encompassing way that MacKinnon insisted on, but to a greater degree than current discourse has recognized. The recent explosion of pornography has therefore paradoxically limited sexual freedom. Its vast social construction power has normative ramifications for everyone, feminist or not, who has a stake in sexual autonomy.

In this Part, I look more specifically at whether Pornhub has begun to construct sexuality in ways that bear any resemblance to the MacKinnon social construction critique. Has mainstream porn (whatever that is) arguably become more sexist, or more “degrading” for “women” as a category?¹⁸⁹ And has it further changed sexual practices to reflect this? How should we evaluate such changes from a normative perspective? These are incredibly thorny issues.

A. Too Much to Measure

Pornography and its effects are notoriously hard to measure.¹⁹⁰ In the First Amendment context, Professor Geoffrey Stone observed that “there is no consensus with the scientific community about the actual consequences of even sustained exposure to sexually-explicit material.”¹⁹¹ Wading into the research,

¹⁸⁹ Note that to ask this question, as MacKinnon did, grouping women as a category is already a controversial move in light of queer theory’s interrogation of that categorization.

¹⁹⁰ See, e.g., Irene Nemes, *The Relationship Between Pornography and Sex Crimes*, 20 J. PSYCHIATRY & L. 459, 475-76 (1992) (noting the methodological difficulties inherent in analyzing the relationship between pornography and its effects in the context of violent pornography’s causal relationship with sex crimes).

¹⁹¹ GEOFFREY STONE, *SEX AND THE CONSTITUTION*, *supra* note 149 at 343; see also Andrew Koppelman, *Does Obscenity Cause Moral Harm?*, 105 COLUM. L. REV. 1635, 1664 (2005) (reviewing empirical evidence and concluding that “it is reasonable to infer that pornography is causally connected with some sexual violence, though the effect is relatively small”; also concluding that the relationship between any particular text and moral harm is “too uncertain . . . to justify legal intervention.”). Cf. Megan S. C. Lim, Elise R. Carrotte & Margaret E. Hellard, *The Impact of Pornography on Gender-based Violence, Sexual Health and Well-being: What Do We Know?*, 70 J. EPIDEMIOLOGY & COMM. HEALTH 3, 3 (2016) (“Despite copious research into the phenomenon over many decades, the direct evidence for how viewing violent pornography impacts on gender-based violence is inconclusive.”); Gert Martin Hald, Neil M. Malamuth & Carline Yuen, *Pornography and Attitudes Supporting Violence Against Women: Revisiting the Relationship in Nonexperimental Studies*, 36 AGGRESSIVE BEHAV. 14, 18 (2010) (arguing that viewing porn is correlated with increased attitudes approving of sexual violence); Melinda Wenner Moyer, *The Sunny Side of Smut*, 22 SCI. AM. MIND 14 (2011) (discussing studies that purport to show that increased pornography use leads to less sexual violence). For a study suggesting broadband Internet access (and thus increased access to pornography) correlated with increased sex crimes, see Manudeep Bhuller, Tarjei

it's hard to avoid a sinking feeling that there are few neutral statistics. Most people who write about pornography seem to have picked a side. As Professor Katrina Forrester recently wrote:

Abolitionists say there is overwhelming proof that [porn] provokes violence and is bad for our health. Pro-porn campaigners say there are no reliable data either way . . . They're not wrong: each side commissions its own surveys, has its own journals, and cites selectively. There are studies for everything—to show that pornography consumption correlates with aggressive behavior, that performers are victims of sexual abuse, and that such findings are premised on ill-founded stereotypes and stigmas.¹⁹²

Pornography is far from monolithic. As I argued above, many, many theorists and porn producers insist that the modern proliferation of pornography has democratized pleasure.¹⁹³ These writers emphasize the liberating potential that pornography now offers to sexual minorities; many stress the remarkable and growing presence of feminist porn, LGBTQIA+ porn, porn produced by and for underrepresented minorities, and “ethical porn.”¹⁹⁴ And yet, despite the endless range of potential desires represented in pornography, there is still a mainstream that predominates online: a recent study of two online sites showed that the top 5% of popular tags covered more than

Havens, Edwin Leuven & Magne Mogstad, *Broadband Internet: An Information Superhighway to Sex Crime?*, 80 REV. ECON. STUD. 1237 (2013) <https://www.jstor.org/stable/43551558> [<https://perma.cc/UW23-66Z5>] (finding that the introduction of broadband Internet in Norway led to an increase in sex crimes and discussing the role of pornography in that increase).

Does empirical work show that mainstream heterosexual pornography is sexist, degrading, or violent toward women? Several confounding factors make accurate comparisons of studies difficult. In particular, normative judgements about sex acts can affect the coding of data. See Meagan Tyler, “Now, That’s Pornography!”, in *EVERYDAY PORNOGRAPHY* 50, 51 (Karen Boyle ed., 2010) (explaining that some researchers code BDSM as violence, whereas others do not because of the assumption of mutual sexual arousal for the participants). Furthermore, a sex act may be deemed “degrading” in one study but “violent” in another. For example, “gagging” discussed below, is alternately treated as violence or as a demeaning act. Compare Elizabeth Gorman, Elizabeth Monk-Turner & Jennifer N. Fish, *Free Adult Internet Web Sites: How Prevalent Are Degrading Acts?*, *GENDER ISSUES*, Nov. 2010, at 131, 137 (“[A] majority of the free Internet videos in our sample may generally be described as degrading pornography . . .”), with Eran Shor & Kimberly Seida, “Harder and Harder”? *Is Mainstream Pornography Becoming Increasingly Violent and Do Viewers Prefer Violent Content?*, 56 J. SEX RES. 16, 20-21 (2019) (coding certain sexual acts as acts of aggression).

¹⁹² Forrester, *supra* note 12.

¹⁹³ See *supra* note 70 and accompanying text.

¹⁹⁴ For a compendium of writing about feminist porn, see *THE FEMINIST PORN BOOK*, *supra* note 70.

90% of the porn available.¹⁹⁵ Furthermore, even theorists who emphasize pornography's diversity and its liberating potential for sexual minorities still acknowledge that this mainstream has "disturbing" components.¹⁹⁶ Rebecca Sullivan and Alan McKee, for example, who explore the extraordinary diversity of porn and its liberating possibilities, still acknowledge that the dominant and "hegemonic" mainstream of porn has "troubling representations of gendered power dynamics."¹⁹⁷ They note in particular that "the normalization of coercive language and a lack of explicit consent in much mainstream pornography is a major concern."¹⁹⁸ Prof. Forrester is more to the point: "Most porn remains conservative, brutal, and anonymous."¹⁹⁹

B. Sex That Looks Like Porn

But even if this is an accurate description of pornography, which is so plentiful that it is hard to characterize, other questions remain: Is mainstream pornography, to the extent it is "troubling," changing sex? And is it doing so in ways that make sex more "degrading" or "subordinating" for women, as feminist anti-pornography scholars once insisted? These are incredibly thorny questions. Does porn merely reflect desire, produce it, or both?

In my earlier work, I argued that the answer is both: sex and pornography construct each other—in both directions and in complex, indirect ways. I disagreed with MacKinnon's view that pornography is a one-way ratchet that drives desire; I disagreed with her view of pornographic texts as directly implanting desire in the hapless, helpless viewer, who has no power to resist indoctrination from what they see.²⁰⁰

¹⁹⁵ Antoine Mazieres, Mathieu Trachman, Jean-Philippe Cointet, Baptiste Coulmont, & Christophe Prieur, *Deep Tags: Toward a Quantitative Analysis of Online Pornography*, 1 PORN STUDIES 80, 84-85 (2014).

¹⁹⁶ See also *supra* note 155 (exploring articles which consider the important issue of the racialized character of much pornography).

¹⁹⁷ SULLIVAN & MCKEE, *supra* note 59, at 70.

¹⁹⁸ *Id.* at 72.

¹⁹⁹ Forrester, *supra* note 12. Similarly, Debby Herbenick, a sex researcher who works with the Kinsey Institute, writes that in the past, "[P]orn stars looked like real people and the sex looked, well, relatively ordinary. Debby Herbenick, *Five Things Porn Tricks Us Into Thinking Everyone Does*, VICE (Aug. 2, 2017), https://www.vice.com/en_au/article/evngym/five-things-porn-tricks-us-into-thinking-everyone-does [<https://perma.cc/5LZ5-S3J3>]. But today's porn is a much different beast: It's way more aggressive, for one thing, and tends to be pretty far removed from reality" *Id.*

²⁰⁰ Adler, *Second Commandment*, *supra* note 117. This view of the power of images to change reality has age-old roots. See also WALTER KENDRICK, *THE SECRET MUSEUM: PORNOGRAPHY IN MODERN CULTURE* 226 (1996).

Yet if sex and pornography evolve together in a complex, interwoven dynamic, what happens when porn suddenly gets the awesome power of Big Tech on its side? As porn's power intensifies in the digital landscape, it seems plausible that its ability to socially construct sexuality grows as well, even if that construction does not work in the uniform and literal way that MacKinnon insisted.

Consider recent evidence suggesting the possibility that pornography is changing sexual practices in ways that arguably make sex more “degrading” for women. Certain acts have become newly conventional in mainstream porn in recent years: “facials,”²⁰¹ anal sex,²⁰² gagging²⁰³ and choking.²⁰⁴ (The

²⁰¹ “Facials” (ejaculating on a woman’s face) are extremely common and arguably normative in heterosexual porn. They are also apparently becoming more common in sexual practice. See Herbenick, *supra* note 199 (describing “today’s porn” and stating that “[e]jaculating somewhere other than the vagina or anus may seem almost banal these days to a lot of guys”); see also Anna North, *Are Facials (Yes, THOSE Facials) Really On The Rise?*, BUZZFEED (Sept. 24, 2012), <https://www.buzzfeed.com/annanorth/are-facials-yes-those-facials-really-on-the-ris>, [<https://perma.cc/4UZD-2ZUC>]; see generally Jones, *supra* note 64 (describing the mainstream prevalence of facials as a sexual practice for teens and also describing teens’ significant exposure to this practice in pornography). Anti-porn activist Gail Dines seizes on the rise in facials in life and in porn as evidence of porn’s destructive power. DINES, *supra* note 49 at Chapter 5.

As for whether these practices are inherently degrading (and whether that’s a bad thing), there are a range of views. Sex columnist Dan Savage writes, “Facials are degrading—and that’s why they’re so hot.” Dan Savage, *Savage Love*, PITTSBURGH CITY PAPER (Apr. 9, 2009), <https://www.pghcitypaper.com/columns/savage-love-1341746> [<https://perma.cc/B7X4-DWSX>]. Sex-positive feminist columnist Clarisse Thorne writes, “As a sex-crazy nympho dreamgirl, I am supposed to love all facials all the time, to which I say: Bah. I’m occasionally into degradation scenes, and facials feel really degrading to me, so there are circumstances in which a guy can come on my face and it’ll be hot—but those circumstances are rare.” Clarisse Thorn, *The Myth of the Sex-Crazy Nympho Dreamgirl*, GOOD MEN PROJECT (May 20, 2011), <https://goodmenproject.com/sex-relationships/myth-sex-crazy-nympho-dream-girl/> [<https://perma.cc/6MDL-U6PJ>].

²⁰² Anal sex was the sixth most viewed category on Pornhub in 2019 and has remained a top category. PORNHUB INSIGHTS, *supra* note 18. It is also unquestionably an extremely popular practice in heterosexual sex. Debby Herbenick et al., *Sexual Behavior in the United States: Results from a National Probability Sample of Men and Women Ages 14–94*, 7 J. SEXUAL MED. SUPPLEMENT 5, 255 (2010) (finding increased incidence of anal sex as a sexual practice). Teen Vogue recently ran its own reader’s guide to anal sex. Gigi Engle, *Anal Sex: Safety, How Tos, Tips, and More*, TEEN VOGUE (Nov. 12, 2019), <https://www.teenvogue.com/story/anal-sex-what-you-need-to-know> [<https://perma.cc/G8S3-63FB>].

²⁰³ SARRACINO & SCOTT, *supra* note 49, at 202 (describing the practice of “rough oral sex” in which “the erect member is forced down the female’s throat, causing her to gag.”).

²⁰⁴ See generally Olga Khazan, *The Startling Rise of Choking During Sex*, THE ATLANTIC (June 24, 2019), <https://www.theatlantic.com/health/archive/2019/06/how-porn-affecting-choking-during-sex/592375/> [<https://perma.cc/L4ZV-FSP8>];

details are in the footnotes). In a recent study of teenagers ages thirteen to seventeen, more than half surveyed said they had viewed pornography including “choking or someone in pain.”²⁰⁵

These acts are reportedly also on the rise in heterosexual practices.²⁰⁶ “Facials,” for example, are so common that Dr. Ruth has weighed in, tweeting, “Explaining to teens that ‘facials’ are not the norm is as important as telling them how babies are born.”²⁰⁷ Buzzfeed dubs this sexual era the “Age of the Facial.”²⁰⁸

These practices are on the rise in porn and in life, but for now we can see only a statistically significant correlation between them (as a 2020 study found), not the causation MacKinnon would insist on.²⁰⁹ Furthermore, even if porn were causing these changes in sexual behavior, we cannot assume that changes in sexual practice affect behavior outside of the bedroom, even though this was a key assumption in MacKinnon’s work. MacKinnon wrote in 1993 in *Only Words*:

As society becomes saturated with pornography, what makes for sexual arousal, and the nature of sex itself in terms of the

Gail Dines, *Choking Women Is All the Rage. It’s Branded as Fun, Sexy ‘Breath Play’*, THE GUARDIAN (May 13, 2018), <https://www.theguardian.com/commentisfree/2018/may/13/choking-women-me-too-breath-play> [<https://perma.cc/6NA7-H7GF>].

²⁰⁵ Kang, *supra* note 65.

²⁰⁶ For the moment I limit my inquiry to heterosexual sex because it was MacKinnon’s focus, but I should note that MacKinnon’s narrow focus and her assumptions in her work from the 80s and 90s about a monolithic connection between sex and gender are problematic, as other scholars have observed and as I have written. See *supra* Part III.B., describing the critiques of MacKinnon as heteronormative.

²⁰⁷ @AskDrRuth, X.com (formerly known as TWITTER) (Aug. 11, 2011, 9:20 A.M.), <https://twitter.com/askdruth/status/101644208833695744> [<https://perma.cc/7WJA-4D5A>].

²⁰⁸ North, *supra* note 201 (“We appear to have entered the Age of the Facial.”).

²⁰⁹ See, e.g., Debby Herbenick et al., *Diverse Sexual Behaviors and Pornography Use: Findings from a Nationally Representative Probability Survey of Americans Aged 18 to 60 Years*, 17 J. SEXUAL MED. 623, 628 (2020) (finding a statistically significant association between pornography use and certain “dominant” behaviors including anal-sex without prior consent, “face-fucking,” and choking). Women were consistently more likely to report being on the receiving end of these behaviors. *Id.* at 627. While the authors are confident that these practices are on the rise in sexual behavior, they do not have the data to show it. Emily Vogels & Lucia O’Sullivan, *The Relationship Among Online Sexually Explicit Material Exposure to, Desire for, and Participation in Rough Sex*, 48 ARCHIVES SEXUAL BEHAV. 653, 662–63 (2019) (finding correlation between engaging in activities labeled “rough sex,” defined to include spanking, scratching, biting, bondage, among others, and exposure to such material in pornography; not finding evidence of directionality or causation).

place of speech in it, change. What was words and pictures becomes, through masturbation, sex itself. As the industry expands, this becomes more and more the generic experience of sex, the woman in pornography becoming more and more the lived archetype for women's sexuality in men's, hence women's, experience.²¹⁰

Below I consider the question of whether these acts are inherently degrading, as many have charged. Then I consider the relevance of the changes in pornography I document not only for MacKinnon's work, but also for sex-positive feminists, and for culture more broadly.

C. A Normative Assessment

Let's assume—for the sake of argument—that porn really is changing sex, that digital culture is spreading these sexual practices like it spreads memes or the craze for eating Tidepods. We still must ask: if these acts, such as facials, are becoming widespread and conventional in mainstream, heterosexual sex, how should we evaluate them from a normative perspective? Are these acts inherently “degrading” and therefore anti-feminist? Many feminists believe they are.²¹¹

The sex-positive feminist in me resists labeling any practice as inherently degrading, especially one in which many women claim to take pleasure.²¹² The runaway success of *Fifty*

²¹⁰ MACKINNON, *supra* note 113, at 25–26.

²¹¹ See *supra* note 192 (describing assessment of these practices as degrading).

²¹² For the foundational work on the relationship between degradation and desire, see SIGMUND FREUD, *The Most Prevalent Form of Degradation in Everyday Life* (1912), reprinted in 4 COLLECTED PAPERS 203, 212 (Joan Riviere trans., 1959); SIGMUND FREUD, *A Child is Being Beaten: A Contribution to the Study of the Origin of Sexual Perversions* (1922), reprinted in THE STANDARD EDITION OF THE COMPLETE PSYCHOLOGICAL WORKS OF SIGMUND FREUD 175 (James Strachey trans., James Strachey et al. eds., 1955). It is worth noting that the latter is one of the few Freud texts to focus on female patients as a model for development. See Ethel Spector Person, Int'l Psychoanalytical Ass'n, ON FREUD'S "A CHILD IS BEING BEATEN" at xvi (Ethel Spector Person ed., 1997). Freud's theories of masochism evolved, and there are significant contradictions between Freud's account of masochism in this Article and in his later 1924 paper *The Economic Problem of Masochism*, which posited a primary masochism. See Jack Novick & Kerry Kelly Novick, *Not for Barbarians: An Appreciation of Freud's A Child Is Being Beaten*, in ON FREUD'S "A CHILD IS BEING BEATEN", *supra*, at 31, 36–42 (elaborating differences between Freud's varying theories of masochism).

For my own essays on masochism and mass culture, see Amy Adler, *To Catch A Predator*, 21 COLUM. J. GENDER & L. 130 (2012); Amy Adler, *The Pleasures of Punishment: Complicity, Spectatorship, and Abu Ghraib*, in PUNISHMENT IN POPULAR CULTURE 236 (Charles J. Ogletree & Austin Sarat, eds., 2015). For a foundational modern psychoanalytic work on female masochism, see JESSICA BENJAMIN, *THE*

Shades of Grey among women was hardly the first time that the mainstream taste for female subjugation revealed itself. Should we tell women, as MacKinnon once did, that their desire is wrong? The sex wars were fought over this very point. What to do with that desire, the pleasure in power and submission? And yet what to do with MacKinnon's argument, that female pleasure may be nothing more than a symptom of subordination, a product of false consciousness?²¹³ Furthermore, the postmodern and queer-influenced scholar in me resists the restrictive, heteronormative, male/female binary premises of the question, just as I resist the idea that these sexual scenes work in one way only, that there is no possibility for cross-identification, subversion, and empowerment in scenes of apparent degradation.²¹⁴

And yet. Porn by algorithm. Porn scripted by artificial intelligence and A/B testing. Porn created by a near-monopoly Big Tech corporation, fed to us in an invisible feedback loop. Porn as sex education. Porn as normative. Is a world of efficient orgasms and algorithmically designed categories of pleasure a sexually progressive world? Is porn both the enemy and friend of sexual freedom?

I still cannot endorse MacKinnon's totalizing theory for the reasons I have stated here and elsewhere. But as a sex-positive feminist in a Big Tech porn world, I think it is also time to be open to reevaluating the costs of our current porn landscape. The transformation of porn into Big Tech should be of concern not only to scholars who supported the earlier feminist critique of pornography, but also, and for different reasons, to those (like me) who opposed it and left it for dead. Anyone, feminist or otherwise, who has a stake in sexual freedom and autonomy should worry about the intrusion that Big Tech porn poses to our individual sexual autonomy and to our culture.

BONDS OF LOVE (1988). For analyses of masochism and degradation from a queer perspective, see generally Eve Kosofsky Sedgwick, *A Poem is Being Written*, in *TENDENCIES* (1993) (exploring connections between masochism and subversive, queer possibilities); Bersani, *supra* note 147, at 215; Halley, *supra* note 145, at 14–48. For just a few examples of legal scholarship on the complexity of masochistic desire, see generally Anne C. Dailey, *The Psychodynamics of Sexual Choice*, 57 *ARIZ. L. REV.* 343, 371–81 (2015); Darren Rosenblum, *Rethinking International Women's Human Rights Through Eve Sedgwick*, 33 *HARV. J. L. & GENDER* 349 (2010); Susan R. Schmeiser, *Forces of Consent*, 32 *STUD. IN LAW, POL. & SOC'Y* 3 (2004); Margo Kaplan, *Sex-Positive Law*, 89 *N.Y.U. L. REV.* 89, 115–39 (2014).

²¹³ As she writes, “[F]emale masochism [is] the ultimate success of male supremacy.” *MACKINNON, supra* note 148, at 125.

²¹⁴ See Judith Butler, *The Force of Fantasy: Feminism, Mapplethorpe, and Discursive Excess*, 2 *DIFFERENCES: J. FEMINIST CULTURAL STUD.* 105, 114 (1990).

CONCLUSION

Scholars of democracy and free speech once heralded the Internet as a utopian force for freedom. Many academic discussions of Internet pornography followed (and still follow) a parallel course of utopianism, extolling the liberating and democratizing value of Internet pornography, especially for formerly marginalized voices. We are now, however, undergoing a societal “techlash,” as scholars and critics confront how digital speech platforms, rather than a democratizing force as once imagined, instead pose a threat to our personal and political lives. Yet while this techlash is raging in discussions about the impact of technology on democracy, free speech, and other urgent social issues, there has been no parallel discussion about how technology may be distorting our sexual culture.

This Article fills that gap, making a novel claim in legal scholarship and in popular discourse: the pornography industry, which has undergone a tech revolution, should now be reconceived of as a problem of Big Tech. As I have shown, this reframing of porn as Big Tech also calls for revisiting feminist and First Amendment scholarship from the 1980s and 90s, when questions of whether and how pornography changes us as individuals or as a society were once hotly debated. By drawing on the multiple arguments that emerged in that earlier scholarship, and on the growing literature in Big Tech, I offer a new assessment of contemporary pornography. Instead of creating a utopia that offers users unprecedented freedom, the move to algorithmically driven online porn platforms, dominated by one company, has freed a corporation to shape sexuality on a massive scale.