

WRAPPED IN AMBIGUITY: ASSESSING THE EXPRESSIVENESS OF BAREBACK PORNOGRAPHY

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Contrary to popular belief, pornography has not won the culture war. Far from enjoying the spoils of victory, pornography instead faces legislative ire up to the point of absolute prohibition. On November 6, 2012, close to fifty-six percent of voters approved the County of Los Angeles Safer Sex in the Adult Film Industry Act (“Measure B”), completely prohibiting “bareback”—or condom-free—pornography production. An intuitive response to such an imposition is to raise a First Amendment claim. However, bareback pornography has yet to receive explicit protection by any legislature or court. This Note takes a step toward assessing bareback pornography’s First Amendment status by first arguing that bareback pornography is sufficiently expressive to merit First Amendment protection under traditional theoretical justifications, doctrine, and emerging arguments for an expanded interpretation of First Amendment protection. This Note then argues that Measure B is a content-based restriction on protected expression and, therefore, should receive the Court’s most demanding scrutiny. Under such a test, Measure B should be deemed unconstitutional.

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INTRODUCTION

Professor Amy Adler has concisely concluded that in “the escalating war against pornography, pornography has already won.”¹ Adler partially supports this assertion with the sheer ubiquity of pornography in contemporary society.² However, this “observation of the quantitative scale of pornography as a cultural presence tells only part of the story.”³ Last year, Los Angeles voters wrote the latest chapter when they approved the County of Los Angeles Safer Sex in the Adult Film Industry Act (“Measure B”)⁴ by ballot initiative.⁵ The measure eliminates the performance and production of condom-free (“bareback”)⁶ pornography by requiring that “producers of adult films obtain a permit . . . to ensure that producers comply with preexisting law requiring, among other things, that performers are protected from sexually transmitted infections by condoms.”⁷ Far from enjoying the spoils of its supposed victory, pornography is under legislative attack,⁸ and Measure B provides only the most recent example of legislative and popular ire. And it appears that the battle continues: On Valentine’s Day, just three months after Measure B’s passage, a California lawmaker introduced a statewide version of the law.⁹ The

¹ Amy Adler, *All Porn All the Time*, 31 N.Y.U. REV. L. & SOC. CHANGE 695, 695 (2007).

² See *id.* (“[P]ornography is now ubiquitous in our society in a way that would have been unimaginable twenty years ago.”).

³ Simon Hardy, *The Pornography of Reality*, 11 SEXUALITIES 60, 60 (2008).

⁴ County of Los Angeles Safer Sex in the Adult Film Industry Act (2012) (to be codified at L.A. CNTY., CAL., CODE tit. 11, ch. 11.39) [hereinafter Measure B].

⁵ Dennis Romero, *Measure B Election Results: Porn’s Mandatory Condom Initiative Wins; Industry Vows Challenge*, L.A. WEEKLY (Nov. 7, 2012, 12:47 PM), http://blogs.laweekly.com/informer/2012/11/measure_b_election_results_porn_condoms_los_angeles.php.

⁶ My use of the term “bareback” is fully intentional and decided with the utmost care. Colloquially, gay men use the term bareback with equal intention and care, to describe the act of unprotected anal sex. Because throughout this piece I draw on queer theory and the experiences of gay and bisexual men, it is with humble homage to this community that I borrow “bareback” to refer to all unprotected sex, gay or straight.

⁷ Measure B § 3.

⁸ Cf. Clay Calvert & Robert D. Richards, *Law and Economics of the Adult Entertainment Industry Today: An Inside View from the Industry’s Leading Trade Publisher*, 4 U. DENV. SPORTS & ENT. L.J. 2, 6 (2008) (noting that pornography as an industry “never strays far from the scornful sight of law enforcement authorities”).

⁹ See Patrick McGreevy, *Lawmaker Proposes Requiring Condoms for Porn Actors in California*, L.A. TIMES (Feb. 13, 2013), <http://www.latimes.com/news/local/political/la-me-pc-condom-law-20130213,0,2406468.story> (reporting in part on Measure B).

press conference came complete with oversized, heart-shaped balloons adorned with the word “love” in large print.¹⁰

Pornography—and sexual expression generally—has long been considered only marginally cognizable under the First Amendment,¹¹ if at all.¹² Bareback pornography in particular has never received the attention of the Court. Moreover, because it has rarely been the focus of government regulation, its constitutional status is “opaque.”¹³

This Note takes an initial step toward assessing bareback pornography’s right to First Amendment protection by arguing, first, that bareback pornography deserves First Amendment protection and, second, that Measure B must pass strict scrutiny review in order to be found constitutional because it is content-based regulation of protected speech. In doing so, this Note argues that bareback pornography satisfies the three most popular theoretical rationales motivating First Amendment protection—political expression critical to self-government, a robust marketplace of ideas, and individual and communal fulfillment—as well as the Court’s own doctrinal test to determine when conduct is sufficiently expressive to receive First Amendment protection—the *Spence* test. This Note then argues that Measure B is content-based regulation of bareback pornography and, therefore, triggers strict scrutiny review.

Before proceeding, some background information on bareback pornography is necessary. Pornography has no single legal definition.¹⁴ This Note’s use of the term borrows from Measure B itself to include any representation of sex in which performers actually engage

¹⁰ *Id.*

¹¹ See *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 566 (1991) (plurality opinion) (discussing sexual expression’s diminished position in the First Amendment hierarchy).

¹² See *infra* note 22 (discussing obscenity law). *But see* *United States v. Playboy Entm’t Grp., Inc.*, 529 U.S. 803, 811 (2000) (accepting the government’s concession that Playboy’s premium television programming deserved First Amendment protection); *Am. Booksellers Ass’n, Inc. v. Hudnut*, 771 F.2d 323, 327 (7th Cir. 1985), *aff’d mem.*, 475 U.S. 1001 (1986) (affirming without opinion the Seventh Circuit’s holding that the City of Indianapolis’s anti-pornography ban violated the First Amendment). In both cases, the Court reached what this Note believes to be the proper constitutional conclusions; but because the Court failed to discuss why or how pornography might deserve First Amendment protection, the decisions do little to clarify pornography’s constitutional position.

¹³ See David S. Han, *Autobiographical Lies and The First Amendment’s Protection of Self-Defining Speech*, 87 N.Y.U. L. REV. 70, 112 n.198 (2012) (“The constitutional status of a particular category of speech often remains opaque until the government attempts to regulate that speech for the first time.”).

¹⁴ See *Miller v. California*, 413 U.S. 15, 18 n.2 (1973) (explaining that the Court’s understanding of obscenity and pornography does not match common usage).

in oral, vaginal, or anal penetration.¹⁵ Measure B itself only regulates producers of adult films.¹⁶ Producers, financiers, and directors, then, have the most immediate legal interest in Measure B's constitutionality. However, the sphere of affected individuals is much larger. Actors and consumers both have germane First Amendment concerns: actors, in their ability and right to create bareback pornography, and consumers, in their ability and right to view, purchase, and share the product.

Measure B is reflective of a larger phenomenon, which is that "the power to regulate pornography has been conspicuously abused."¹⁷ Nonetheless, the protection of pornography on First Amendment grounds has received insufficient attention from scholars and less from the courts, with even less attention paid to bareback pornography. Related scholarship on sexual expression provides little guidance, generating diverse academic arguments such as removing obscenity from categorical exclusion under the First Amendment,¹⁸ recognizing the act of sex as expressive in and of itself,¹⁹ demanding that all areas of the law recognize sex-positivity,²⁰ and encouraging expanded constitutional protections for all adult consensual sex.²¹ The absence of legal scholarship on bareback pornography is especially concerning given Measure B's recent passage and its recently introduced statewide counterpart.

The remainder of this Note helps to fill this gap by first providing theoretical and doctrinal justifications for viewing bareback pornography as protected speech and then examining a specific regulation of

¹⁵ See Measure B ch. 11.39.010 ("An 'adult film' is . . . any film . . . in which performers actually engage in oral, anal, or vaginal penetration . . .").

¹⁶ Measure B defines producers as "any person or entity that produces, finances, or directs, adult films for commercial purposes." *Id.* ch. 11.39.075.

¹⁷ Andrew Koppelman, *Problems of Censorship in a New Technological Age: Free Speech and Pornography: A Response to James Weinstein*, 31 N.Y.U. REV. L. & SOC. CHANGE 899, 907 (2007).

¹⁸ See Mark Huppín & Neil Malamuth, *The Obscenity Conundrum, Contingent Harms, and Constitutional Consistency*, 23 STAN. L. & POL'Y REV. 31 (2012) (arguing that obscenity law is unprincipled and incoherent).

¹⁹ See James Allon Garland, *Sex as a Form of Gender and Expression After Lawrence v. Texas*, 15 COLUM. J. GENDER & L. 297, 300–06 (2006) (arguing that sex itself is expression sufficient to support expressive conduct and expressive association claims).

²⁰ See Margo Kaplan, *Sex-Positive Law*, 89 N.Y.U. L. REV. (forthcoming 2013) (manuscript at 6) (on file with the *New York University Law Review*) (understanding sexual pleasure as physical and psychological enjoyment interpreted as sexual or erotic by the individual who experiences it).

²¹ See generally Laura A. Rosenbury & Jennifer E. Rothman, *Sex in and out of Intimacy*, 59 EMORY L.J. 809, 859–68 (2010) (grounding the sex-based constitutional claim in the liberty interest of the Due Process Clause rather than the First Amendment's freedom of expression).

bareback pornography—Measure B. Part I.A argues that bareback pornography satisfies three of the most prominent justifications for the First Amendment: political speech as crucial to self-government, the marketplace of ideas, and expression as individual and communal fulfillment. Part I.A.1 shows that bareback pornography is a politically charged genre, so its creation and proliferation becomes salient to larger self-government decision-making processes. Part I.A.2 conceptualizes bareback pornography as vital to the marketplace of ideas, shedding light on a variety of “truths” from the sexual practices of gay men to the underlying influences of power and knowledge in our society. Part I.A.3 then examines how bareback pornography aids in the self-fulfillment and self-realization of the actors, subculture members, and even casual consumers. Part I.B shifts focus away from canonized theory to an emerging theory and existing doctrine. Part I.B.1 discusses bareback pornography’s relationship to scholarly calls for a more expansive understanding of the First Amendment, and Part I.B.2 examines the Court’s existing expressive conduct doctrine to argue that the underlying act—condom-free sex—is expressive, and even more so when filmed and distributed. With bareback pornography firmly understood as protected speech, Part II identifies Measure B as a restriction of that protected expression and concludes that the measure should be evaluated as a content-based restriction subject to the Court’s most demanding scrutiny.

I

“WHERE IN THE CONSTITUTION DOES IT SAY *THAT*?” BAREBACK PORNOGRAPHY’S ABILITY TO INVOKE FIRST AMENDMENT PROTECTIONS

Assuming for the purposes of this Note that pornography is not categorically excluded from First Amendment protection as obscenity²² and is sufficiently communicative,²³ the threshold inquiry

²² Obscenity law is an obvious hurdle. *See* United States v. Alvarez, 132 S. Ct. 2537, 2544 (2012) (recognizing obscenity as a “historical and traditional” category of speech regulable based on content (internal quotation marks omitted)). Same-sex bareback pornography may be especially vulnerable. *See* WILLIAM N. ESKRIDGE, *GAYLAW: CHALLENGING THE APARTHEID OF THE CLOSET* 203 (2002) (acknowledging that obscenity law has been used to target same-sex pornography especially). While obscenity is an obstinate doctrine in First Amendment jurisprudence, it remains dormant and, more importantly, irrelevant to the goals of this Note. As such, it will be mostly ignored, and this Note will proceed with an understanding of protected bareback pornography to be nonobscene bareback pornography.

²³ *See* Jed Rubenfeld, *The First Amendment’s Purpose*, 53 STAN. L. REV. 767, 772 (2001) (noting that nonverbal conduct must be sufficiently “‘communicative’ to trigger First Amendment scrutiny”). In attacking its communicativeness, social conservatives and anti-pornography feminists “categorize pornography as a sex aid, or as a form of sex

under First Amendment analysis is whether bareback pornography contains some threshold level of expressive elements sufficient to merit constitutional protection.²⁴

The Court's jurisprudence on sexual expression (of which pornography is a subset) has received mixed interpretations. Some see existing sexual expression protection as severely limited.²⁵ Others understand the Court's protection of sexual expression as rather "robust."²⁶ These antithetical positions are to be expected given the "vacillation and uncertainty"²⁷ reflected in the Court's opinions and its tendency to "proceed by assertion rather than by logical reasoning."²⁸ This doctrinal instability reflects, perhaps, a deeper conceptual problem in First Amendment jurisprudence. When Professor Thomas Emerson attempted to articulate a general theory of the First Amendment fifty years ago, the need for such a theory was precipitated by the conflict between courts and the legal profession, public confusion, and the impending disintegration of the First Amendment itself.²⁹

Borrowing from Professor Emerson and others, this Part uses traditional First Amendment theoretical justifications to show that bareback pornography is sufficiently expressive to deserve First

discrimination, but dismiss the notion that pornographic expression transmits ideas." Stephen G. Gey, *The Apologetics of Suppression: The Regulation of Pornography as Act and Idea*, 86 MICH. L. REV. 1564, 1564 (1988). This line of thinking is by no means limited to theorists. Joanna Angel, an adult film director herself, expressed a narrow understanding of the genre: "[P]orn is still being made with the intent that some guy will buy it and (masturbate) to it. If you can't succeed in that you've failed." "Shortbus": *Porn, Art or a Bit of Both?*, TODAY.COM (Oct. 4, 2006), <http://www.today.com/id/15129045#UVxOBo6hBSW>.

²⁴ See *Dallas v. Stanglin*, 490 U.S. 19, 25 (1989) (noting that a mere "kernel [of expression] is not sufficient to bring [an] activity within the protection of the First Amendment").

²⁵ See David Cole, *Playing by Pornography's Rules: The Regulation of Sexual Expression*, 143 U. PA. L. REV. 111, 113 (1994) ("When it comes to sexual expression, however, the state is not obliged to offer a compelling rationale . . .").

²⁶ As Kim Buchanan has noted, "the Supreme Court has afforded robust constitutional protection to . . . [sexual] practices and materials." Kim Shayo Buchanan, *Lawrence v. Geduldig: Regulating Women's Sexuality*, 56 EMORY L.J. 1235, 1246 (2007).

²⁷ Jerrold J. Kippen, Note, *Sexually Explicit Speech*, 28 HASTINGS CONST. L.Q. 799, 802 (2001) (suggesting that the Court's deference to morality and offense with respect to sexual expression has created a damaged and inconsistent First Amendment doctrine); see also Jeffrey M. Shaman, *The Theory of Low-Value Speech*, 48 S.M.U. L. REV. 297, 298 (1995) (suggesting, more broadly, that the Court's identification of all lower-value speech has been inconsistent).

²⁸ Cole, *supra* note 25, at 113.

²⁹ Thomas I. Emerson, *Toward a General Theory of the First Amendment*, 72 YALE L.J. 877, 877 (1963) ("Not only are courts and the legal profession in sharp conflict but the public is seriously confused and the [F]irst [A]mendment is threatened with disintegration. Under the circumstances, one further attempt to state an acceptable theory may perhaps be pardoned.").

Amendment protection. Although I identify three primary theoretical justifications—buttressing of the political process, the marketplace of ideas or the search for truth, and individual and communal self-fulfillment³⁰—no particular theory is dispositive in First Amendment jurisprudence.³¹ By using recognized rationales, this Note hopes to bring clarity to bareback pornography’s First Amendment position. This Note does not seek to elevate a particular theory over others.³² Rather, the following application of three prominent theories supports the view that “[f]reedom of speech should be valued for many reasons.”³³ Courts have built a body of First Amendment jurisprudence recognizing that principle.³⁴ From this holistic perspective, this Part shows that bareback pornography fits neatly into existing justifications for the freedom of expression.

A. Three Canonized Theories

1. Political Expression Facilitating Self-Government

The first traditional justification for protecting free speech is founded in a fundamental First Amendment maxim: the absolute need to protect political speech crucial to the democratic process.³⁵ Professor Thomas Emerson sees this political-expression justification

³⁰ These three rationales are commonly understood as the most prominent explanations and justifications for the freedoms protected by the First Amendment. See Han, *supra* note 13, at 89–90 (“[T]hree general rationales are most commonly advanced as bases for the First Amendment’s protection of free speech: the pursuit of truth, the promotion of democratic self-government, and the preservation of individual autonomy and self-realization.”).

³¹ See Robert Post, *Reconciling Theory and Doctrine in First Amendment Jurisprudence*, 88 CAL. L. REV. 2353, 2372 (2000) (“First Amendment jurisprudence contains several operational and legitimate theories of freedom of speech, so that it is quite implausible to aspire to clarify First Amendment doctrine by abandoning all but one of these theories.”).

³² See Brian C. Murchison, *Speech and the Self-Realization Value*, 33 HARV. C.R.-C.L. L. REV. 443, 445 (1998) (identifying these tactics as favorites among scholars seeking to promote certain political or moral values underlying the First Amendment).

³³ Steven Shiffrin, *Dissent, Democratic Participation, and First Amendment Methodology*, 97 VA. L. REV. 559, 559 (2011) (articulating a variety of values that the First Amendment protects including self-realization, truth, and democracy).

³⁴ See Han, *supra* note 13, at 89 (“[C]ourts have recognized a patchwork of different interests underlying the protection of speech.”).

³⁵ See *First Nat’l Bank of Bos. v. Bellotti*, 435 U.S. 765, 776 (1978) (reiterating the need for public discussion that is a core justification for the First Amendment); *Mills v. Alabama*, 384 U.S. 214, 218–19 (1966) (“Whatever differences may exist about interpretations of the First Amendment, there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs. This of course includes . . . all such matters relating to the political process.”); *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964) (“Debate on public issues should be uninhibited, robust, and wide-open.”). The sacrosanctity of this justification is due in large part to the work of Alexander Meiklejohn. See ALEXANDER MEIKLEJOHN, *FREE SPEECH AND ITS RELATION*

as the First Amendment's guarantee of "participation in decision-making through a process of open discussion."³⁶ Once we accept the premise that a democratic government's power stems from the consent of the governed, it follows that the people must have freedom of expression.³⁷ This expression is critical to both the development of individual judgments and "in forming the common judgment" on social and political issues.³⁸ Since the 1960s the Court has aggressively protected speech it understood to be political.³⁹

The Court, however, has yet to recognize the political dimension of sexual expression.⁴⁰ Nonetheless, sexuality and its expression have direct salience in today's political environment.⁴¹ Indeed, given how politically salient sexual expression generally has become, maintaining any division between sexual speech and political speech is an increasingly difficult, if not impossible, task.⁴² The recognition of sexual speech's political dimension has ramifications for bareback pornography's constitutional protection.⁴³ Admittedly, bareback

TO SELF-GOVERNMENT 93–94 (1948) (identifying participation in the political process as the purpose of freedom of speech).

³⁶ Emerson, *supra* note 29, at 882. Although Professor Emerson's notion of the "decision-making" process is expansive, including social decisions, he understands that the justification is "especially true of political decisions." *Id.* at 883.

³⁷ *Id.*

³⁸ *Id.* at 883. Meiklejohn also recognized that many forms of expression provide the voter with the "knowledge, intelligence, [and] sensitivity to human values" important in casting a ballot. See Alexander Meiklejohn, *The First Amendment Is an Absolute*, 1961 SUP. CT. REV. 245, 256 (1961).

³⁹ See *Texas v. Johnson*, 491 U.S. 397, 406 (1989) (protecting flag burning despite mass public offense to the act); *Brandenburg v. Ohio*, 395 U.S. 444, 448–49 (1969) (protecting speech that advocates for the use of force and violation of law so long as there is no direct incitement to imminent lawless action or a likelihood to produce such action); *Sullivan*, 376 U.S. at 285 (protecting criticism of public officials).

⁴⁰ See *Young v. Am. Mini Theatres, Inc.*, 427 U.S. 50, 70 (1976) ("Whether political oratory or philosophical discussion moves us to applaud or to despise . . . our duty to defend the right to speak remains the same. But few of us would march our sons and daughters off to war to preserve the citizen's right to see 'Specified Sexual Activities[.]'").

⁴¹ See Cole, *supra* note 25, at 122–23 (arguing that sexuality is present in political arenas "from local school board disputes over sex education, to state anti-gay legislative efforts, to . . . attacks on artists who use sexual themes in their work, to debates over 'family values' in national presidential campaigns").

⁴² See *id.* at 123 (discussing the "collapse of a descriptively persuasive distinction between political and sexual speech"); Shaman, *supra* note 27, at 344 ("Throughout history, political ideas often have been expressed in sexual, scatological, profane, or offensive images.").

⁴³ The Court seems to operate under an assumption that sexual expression and political speech are mutually exclusive and respectively identifiable. See *e.g.*, *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 566 (1991) (plurality opinion) (discussing the greater magnitude of protection due to political speech); see also Brief for the United States at 29, *Roth v. United States*, 354 U.S. 476 (1957) (No. 582) (presenting the following hierarchy of speech: "political speech, religious, economic, scientific, general news and information,

pornography's direct role in political decision making may not be readily apparent;⁴⁴ however, bareback pornography does, in fact, contribute to myriad political and social issues in the public discourse, such as same-sex marriage, healthy sex practices among vulnerable populations, and the value of sex itself. As such, bareback pornography can be seen as a form of political speech, especially when the underlying discussion is politically charged or its production has political consequences.

The highly controversial and politically charged issue of marriage equality is a particularly salient example. It is a prevalent myth that gay people are hyper promiscuous. For example, a recent release by the Family Research Council declared, "Fact: Both because of high-risk behavior patterns, such as sexual promiscuity, and because of the harm to the body from specific sexual acts, homosexuals are at greater risk than heterosexuals for sexually transmitted diseases and other forms of illness and injury."⁴⁵ However, marriage activists—for example, in the recent 2012 pro-marriage equality ballot initiatives in Maryland and Maine—have been successful in part by framing same-sex marriage as a desire for "love, commitment, [and] family."⁴⁶ In light of this tone of discourse, a highly visible same-sex bareback pornography industry could easily have served as political fodder for marriage equality opponents. "Facts" about hyper promiscuous homosexuals coupled with actual images of homosexual bareback pornography could work together to undermine the image of the same-sex family in a manner intended to alter the political discourse on the highly charged topic of marriage equality.

Apart from the marriage equality debate, criticism of bareback pornography that leads to shame and judgment is, itself, a political act. This is especially true of intra community silencing.⁴⁷ As one

social and historical commentary, literature, art, entertainment, music, humor, commercial advertisements, gossip, comic books, epithets, libel, obscenity, profanity, commercial pornography"). The blurring of the lines between the political and sexual should encourage a questioning of such categorization.

⁴⁴ It is the rare pornographic film that overtly speaks to the political realm, as, for example, flag-burning may. Cf. *Johnson*, 491 U.S. at 406 (understanding the flag-burning at issue to be overtly political given its role in a demonstration protesting the Republican Party National Convention).

⁴⁵ Peter Sprigg, *The Top Ten Myths About Homosexuality*, FAMILY RESEARCH COUNCIL 26 (2010), available at <http://downloads.frc.org/EF/EF10F01.pdf>.

⁴⁶ Nathaniel Frank, *How Gay Marriage Finally Won at the Polls*, SLATE (Nov. 7, 2012 2:00 AM), http://www.slate.com/articles/news_and_politics/politics/2012/11/gay_marriage_in_maryland_and_maine_the_inside_strategy.html (internal quotation marks omitted) (discussing the family-values based strategy of the LGBT rights group Freedom to Marry).

⁴⁷ See, e.g., TIM DEAN, UNLIMITED INTIMACY: REFLECTIONS ON THE SUBCULTURE OF BAREBACKING ix (2009) ("Gay people don't need this kind of publicity . . ."); see also, LYNN THIESMEYER, DISCOURSE AND SILENCING: REPRESENTATION AND THE LANGUAGE

journalist noted, “[g]ay men, whether porn-performer, producer, or consumer” have long debated the utility of bareback pornography itself, with some men urging the outlawing of the genre while others “revel in it.”⁴⁸

The political consequences of the bareback pornography debate also extend to the subtle and perhaps nebulous ideas of norm shaping and paradigm-building. For people of color, discussions prompted by bareback pornography can be intensely political given the disproportionately large presence of HIV in particular communities.⁴⁹ Bareback pornography’s emanations become political because the genre serves as a public reminder of the wide disparities in mortality, education, and access to treatment, as well as on-going discrimination against Black and Latino/a individuals.⁵⁰ Given the discouraging interaction between race and ethnicity and HIV, many may be legitimately concerned that bareback pornography influences risky sexual behavior by advocating for bareback sex itself, a very controversial position. For example, the Young Gay Black Men’s Leadership Initiative recently posed this question to its social media followers: “Does the ubiquity of bareback porn have an impact on the sexual lives of young Black [men who have sex with men]? What’re your thoughts?”⁵¹ It is irrelevant whether bareback pornography actually influences behavior; instead, what matters is the possibility that it does. Indeed, Measure B, itself, illustrates this concern as its scope is not limited just to porn actors but also includes the “public health and quality of life of

OF DISPLACEMENT 2 (2003) (“The action of silencing is accompanied by social and political judgments of what is acceptable and unacceptable.”).

⁴⁸ Conner Habib, *By the Time You’ve Seen It, It’s Too Late*, THE RUMPUS (January 31, 2013), <http://therumpus.net/2012/01/by-the-time-you%E2%80%99ve-seen-it-it%E2%80%99s-too-late>.

⁴⁹ See, e.g., *HIV Among African Americans*, CTR. FOR DISEASE CONTROL & INFECTION (May 2013), <http://www.cdc.gov/hiv/topics/aa/> (“African Americans account for a higher proportion of HIV infections at all stages of disease—from new infections to deaths.”); Miriam Pérez, *Race-Based Health Disparities and the Politics of Difference: What Rates of HIV Among Latinos Tell Us*, RH REALITY CHECK (Oct. 19, 2012, 8:24 AM), <http://rhrealitycheck.org/article/2012/10/19/race-based-health-disparities-and-politics-difference/> (showing the disproportionately high rates of HIV infection among Latinos in the United States).

⁵⁰ See Monte Morin, *Race, Education Linked to Differences in HIV Mortality Rates*, L.A. TIMES (Oct. 8, 2012), <http://articles.latimes.com/2012/oct/09/news/la-heb-hiv-race-disparity-20121008> (describing correlation between HIV and race and education); see also Michael Closen, Robert Gamrath & Dem Hopkins, *Mandatory Premarital HIV Testing: Political Exploitation of the AIDs Epidemic*, 69 TUL. L. REV. 71, 110 (1994) (“[M]any individuals with HIV possess a deep and continuing fear of discrimination because of their disease. Indeed, the unfortunate historical truth has been that such fears, even for people merely perceived as having HIV-AIDS, have been well founded.”).

⁵¹ Young Gay Black Men’s Leadership Initiative, FACEBOOK (Mar. 14, 2013), <https://www.facebook.com/YBGLI>.

citizens living in Los Angeles.”⁵² Although Measure B does not focus on the racial dynamics of sexual public health, it can be understood as indirectly ameliorating the scars of a community traditionally plagued by health disparities due to social and political exclusion from valuable resources.⁵³

Aside from influencing sexual behavior, Professor Tim Dean argues that bareback pornography encourages “a mode of thinking about bodily limits, about intimacy, about power, and of course about sex.”⁵⁴ For example, bareback sex helps illuminate differences in how we view gay versus straight sex: As Mark S. King colorfully concludes, “[s]omehow, we have come to the homophobic conclusion that when gay men engage in the romantic, emotional, spiritual act of intercourse without a barrier we label it psychotic barebacking, but when straight people do it we call it sex.”⁵⁵ Dean and King’s recognition of the ability of visual depictions of bareback sex to influence our conceptions of sex invokes the Meiklejohnian belief that “knowledge, intelligence, [and] sensitivity to human values” are also of political importance because these concepts influence decision making within the democratic process.⁵⁶

Although not always directly political, bareback pornography has tangible ramifications for live political issues such as marriage equality, private sexual behavior, and communal norms around sex itself. As such, bareback pornography should be recognized for its political import and relevance to contemporary self-government.

2. Marketplace of Ideas

The marketplace of ideas, also known as the “[a]ttainment of [t]ruth”⁵⁷ rationale for First Amendment protection, understands the

⁵² See Measure B § 3.

⁵³ See Simon Szreter & Michael Woolcock, *Health by Association? Social Capital, Social Theory, and the Political Economy of Public Health*, 33 INT’L J. EPIDEMIOLOGY 650, 650 (2004) (discussing a political economy theory of public health and social capital allocation). The government’s public health decisions, especially given the racialization of STDs, are inherently political because “inequalities in health are always fundamentally rooted in differences of access to material resources (including housing and relevant neighbourhood amenities), which are, in turn, ultimately the product of political and ideological decisions.” *Id.* at 652.

⁵⁴ DEAN, *supra* note 47, at 105.

⁵⁵ Mark S. King, *Your Mother Liked It Bareback*, MY FABULOUS DISEASE (Jan. 28, 2013), <http://marksking.com/my-fabulous-disease/your-mother-liked-it-bareback/>.

⁵⁶ See Meiklejohn, *supra* note 38, at 256 (explaining that political expression extends beyond the purely political to include human values).

⁵⁷ Emerson, *supra* note 29, at 881; see also *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) (“[T]he best test of truth is the power of the thought to get itself accepted in the competition of the market . . .”).

value and need of speech protections to be connected with ideas and truth, “so that we can better understand the world in which we live.”⁵⁸ As Professor Emerson argues, however, our judgment of the world in which we live suffers from a “lack of information, insight, or inadequate thinking.”⁵⁹ To account for this deficit, society must consider “all facts and arguments which can be put forth in behalf of or against any proposition.”⁶⁰ As discussed in the previous Subpart, bareback pornography can contribute to myriad political and social discussions about same-sex marriage, sex practices among vulnerable populations, and social norms concerning sex. Beyond these topics with tangible tethers to the political realm, queer and feminist theorists have long recognized the role pornography can play in elucidating the ways in which sex can teach us about pleasure and thought⁶¹—that is to say, ideas and truth removed from any forced political interpretation.

Theorist Michael Foucault believes that we incessantly speak about sex.⁶² To Foucault, the preoccupation is not with sex itself but with knowledge.⁶³ Pornography, along with law, medicine, and psychoanalysis, uses sex and serves to transfer knowledge around power and pleasure.⁶⁴ Individuals then use pornography as a prism through which we can see how knowledge and power “structure our experience of ourselves and of the world.”⁶⁵ Feminist film scholar Linda Williams uses Foucauldian concepts to describe pornography as a

⁵⁸ Post, *supra* note 31, at 2363; *see also* William P. Marshall, *In Defense of the Search for Truth as a First Amendment Justification*, 30 GA. L. REV. 1, 1 (1995) (“[T]he oft-repeated metaphor that the First Amendment fosters a marketplace of ideas that allows truth to ultimately prevail over falsity has been virtually canonized.”).

⁵⁹ Emerson, *supra* note 29, at 881.

⁶⁰ *Id.*

⁶¹ The Court has discussed the power of film in much the same way. *See* Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 501 (1952) (“It cannot be doubted that motion pictures are a significant medium for the communication of ideas.”).

⁶² *See* MICHAEL FOUCAULT, *THE HISTORY OF SEXUALITY* 77 (1978) (describing how we are all “under the spell of an immense curiosity about sex . . . with an insatiable desire to hear it speak and be spoken about”).

⁶³ *See id.* at 77 (explaining that sex is a point of knowledge, and it is this knowledge that attracts people to discussions about sex).

⁶⁴ *Id.* at 40–48. In this context, the goal of the marketplace-of-ideas rationale is not to reach an objective political truth but to help individuals learn about other values fundamental to understanding the world and ourselves. *See* Marshall, *supra* note 58, at 38–39; *see also* Post, *supra* note 31, at 2363 (noting that Justice Holmes’s articulation of the marketplace-of-ideas theory “ought to be concerned with all communication conveying ideas relevant to our understanding the world, whether or not these ideas are political in nature”).

⁶⁵ Amy Allen, *The Impurity of Practical Reason: Power and Autonomy in Foucault, in THE POLITICS OF OUR SELVES: POWER, AUTONOMY, AND GENDER IN CONTEMPORARY CRITICAL THEORY* 40, 67 (Amy Allen ed., 2008).

form of “knowledge-pleasure.”⁶⁶ While admitting that pornography may be a byproduct of a “dominant male economy,”⁶⁷ Williams also explores the extent to which pornography can be subjected to a feminist revision that is in tension with truths of “power, pleasure, and discourse.”⁶⁸ The visual depiction of a bareback female sexuality can be an “inversion of the shame” historically cast upon female bodies.⁶⁹ For gay and bisexual men, bareback pornography can serve a similar revisionism with “emancipatory implications for those whose sexuality is denied public expression.”⁷⁰

A concrete example may be useful. William Marshall argues that the search for truth imbues the individual with values such as open-mindedness, empathy, and humility.⁷¹ Marshall proposes this process-oriented understanding of the search for truth against popular criticism of an “objective truth.”⁷² This framing of the First Amendment justification parallels Professor Tim Dean’s understanding of bareback pornography. Contemporary discussions about sexually transmitted diseases (“STDs”) leave many, gay men in particular, “disproportionately terrified of risk in all forms.”⁷³ Moreover, the “rhetoric of safety” makes us terrified of contact with strangers and others to the

⁶⁶ See LINDA WILLIAMS, *HARD CORE: POWER, PLEASURE, AND THE “FRENZY OF THE VISIBLE”* 3 (1989) (“This book considers hard-core film and video pornography as one of the many forms of the ‘knowledge-pleasure’ of sexuality.”).

⁶⁷ *Id.* at 4.

⁶⁸ *Id.* at 5–6. One such truth is the fact that pornography is one of the few industries in which females are paid more than their male counterparts. See DEAN, *supra* note 47, at 101 (“Pornography is one line of work in which women consistently get paid more than men to perform—often ten times as much per scene.”). Bareback pornography provides an opportunity for women to capitalize further on this premium. See *id.* at 102 (noting that Brazilian women earn double their usual fee to perform a condom-free scene). Although crass, this market premium for female bareback sex should not diminish the potential feminist revisionism of bareback pornography. See *infra* note 96 and accompanying text (noting that commercialism does not diminish the potential female empowerment in pornographic performance).

⁶⁹ See Lauren Langman, *Punk, Porn and Resistance: Carnivalization and the Body in Popular Culture*, 56 CURRENT SOC. 657, 670 (2008) (suggesting that depictions of female genitalia could even be celebrated as public art).

⁷⁰ See Lois McNay, *Subject, Psyche and Agency: The Work of Judith Butler*, 16 THEORY CULTURE & SOC’Y, no. 2, 1999, at 175, 180.

⁷¹ See Marshall, *supra* note 58, at 29–31 (discussing the positive traits associated with the process of searching for truth).

⁷² Such an interpretation of the search of truth resonates with feminist and queer theorists. Foucault’s and Williams’s writings on sex and pornography serve as tangible points of learning and knowledge building from which individuals can find what is “usable and ignore or discard the rest.” See Jana Sawicki, *Queering Foucault and the Subject of Feminism*, in THE CAMBRIDGE COMPANION TO FOUCAULT 379, 379 (Gary Gutting ed., 2003) (discussing the value of the use-and-discard tactic in analyzing Foucault’s own work). It follows that such a process-oriented search for truth can be applied directly to pornography itself.

⁷³ DEAN, *supra* note 47, at 190.

point of reinforcing class hierarchies, racial segregation, and overall xenophobia.⁷⁴ Bareback pornography, thus, may serve as a psychological intervention of sorts, allowing us to reimagine the “pleasures and ethics of encountering the unfamiliar.”⁷⁵

The point is not to indoctrinate participants and consumers into promoting any one form of sexual expression. There is no right answer here as bareback sex does expose an individual to communicable diseases. But bareback pornography also encourages the viewer to engage in a process of rethinking.⁷⁶ Each viewer may come to a different conclusion, but the process makes the individual a more empathetic, humble, and open thinker.⁷⁷ Applying Marshall’s process-oriented understanding of the search for truth, bareback pornography’s role in the marketplace promotes a beneficial process of self-improvement for both speakers and viewers.

3. *Individual and Communal Fulfillment*

The third fundamental justification for First Amendment protections of speech and expression, as articulated by Professor Thomas Emerson, is the right of an individual to express herself purely.⁷⁸ It is through our “powers of imagination, insight and feeling” that we find self-fulfillment and self-realization in the world.⁷⁹ It follows that we have the right to express our “beliefs and opinions” and that the “suppression of belief, opinion and expression is an affront to the dignity of man.”⁸⁰ The Court has often expressed support for this First Amendment justification.⁸¹

⁷⁴ *Id.*

⁷⁵ *Id.* at 191.

⁷⁶ The fact that the message may be offensive to a great many, gay and straight alike, is constitutionally irrelevant. *See Am. Booksellers Ass’n, Inc. v. Hudnut*, 771 F.2d 323, 327 (7th Cir. 1985), *aff’d mem.*, 475 U.S. 1001 (1986) (“Under the First Amendment the government must leave to the people the evaluation of ideas.”).

⁷⁷ *See* Marshall, *supra* note 58, at 30–31 (“[T]he search for truth reflects understanding and empathy rather than self-righteousness.”).

⁷⁸ *See* Emerson, *supra* note 29, at 879 (identifying individual self-fulfillment as a primary purpose of the right to freedom of expression); Martin H. Redish, *The Value of Free Speech*, 130 U. PA. L. REV. 591, 593 (1982) (identifying self-expression as the “true value” of the First Amendment).

⁷⁹ Emerson, *supra* note 29, at 879; *see also* Murchison, *supra* note 32, at 448–49 (exploring the self-realization value of free speech through Supreme Court opinions, philosophy, and literature).

⁸⁰ Emerson, *supra* note 29, at 879.

⁸¹ *See, e.g.,* *Police Dep’t v. Mosley*, 408 U.S. 92, 95–96 (1972) (“To permit the continued building of our politics and culture, and to assure self-fulfillment for each individual, our people are guaranteed the right to express any thought, free from government censorship.” (emphasis added)); *see also* *First Nat’l Bank of Bos. v. Bellotti*, 435 U.S. 765, 777 n.12 (1978) (“[S]elf-expression is a concern of the First Amendment separate from the concern for open and informed discussion”); *Procunier v. Martinez*, 416 U.S. 396, 427 (1974)

Bareback pornography advances values of individual self-fulfillment in several ways. Individually, bareback pornography can be a “pro-sex” opportunity for feminists to reclaim bodily autonomy, and a “pro-bareback” chance for a subculture of gay men to find self-acceptance. Beyond the individual, bareback pornography also serves an important function in shaping our cultural imaginations and documenting subcultures.

We define ourselves through “a history of relationships and affiliations.”⁸² Our intimate relationships and affiliations can be particularly defining.⁸³ Professor Karst notes that the defining power of intimate relationships holds true for even casual and fleeting sexual encounters.⁸⁴ Recently, scholars have taken Karst’s thesis further to declare that sex without emotional “intimacy” carries the same defining power.⁸⁵ This Subpart advances Karst’s thesis to argue that bareback pornography—filmed bareback sex with or without

(Marshall, J., concurring) (“To suppress expression is to reject the basic human desire for recognition and affront the individual’s worth and dignity.”), *overruled in part by Thornburgh v. Abbott*, 490 U.S. 401 (1989).

⁸² MORRIS B. KAPLAN, *SEXUAL JUSTICE: DEMOCRATIC CITIZENSHIP AND THE POLITICS OF DESIRE* 222–23 (1997) (discussing how Justice Blackmun’s dissent in *Bowers v. Hardwick*, 478 U.S. 186 (1986), supports a constitutional right to intimate association because these relationships aid in the construction of “intersubjectively-constituted personal identities”).

⁸³ Before the Court explicitly articulated the liberty-based right to intimate associations, Professor Kenneth Karst discussed the importance of such relations in the creation and maintenance of our own individuality. *See generally* Kenneth L. Karst, *The Freedom of Intimate Association*, 89 *YALE L.J.* 624, 626–27 (1980). The freedom of intimate association and the First Amendment right to political association are constitutional cousins. *See id.* at 627 (“[L]ike the First Amendment, which is one of its doctrinal underpinnings, [the freedom of intimate association] rejects as illegitimate any asserted justification for repression of expressive conduct based on the risk that a competing moral view will come to be accepted.”).

⁸⁴ *Id.* at 633 (“[A]ny effective legal shelter for this value must offer some protection to casual associations as well as lasting ones.”). However, granting protection to casual encounters is not without controversy. *See* Rosenbury & Rothman, *supra* note 21, at 813–14 (identifying the tendency to demean casual sex within legal scholarship). If the right to intimate association transcends marital bounds to apply to the casual noncommercial encounter, it becomes difficult to see why or how the power of intimate association dissipates for individuals just because they are monetarily compensated. After all, intimacy “is valued for itself, for the emotions it generates immediately.” Karst, *supra* note 83, at 635.

⁸⁵ *See* Rosenbury & Rothman, *supra* note 21, at 836–38 (discussing the value of sex out of intimacy to identity development).

intimacy—builds self-realization and self-fulfillment.⁸⁶ Feminist and queer theories help support this assertion.⁸⁷

From a feminist perspective, pornography can be “a critique of patriarchal codes of morality and adornment in which the body becomes a basis of empowerment and authenticity.”⁸⁸ This idea is familiar to “pro-sex” feminists who argue that there is a personal power and importance in a woman’s claim to consensual sex.⁸⁹ The pornographic performance becomes both a personal expression of empowerment and a rejection of traditionally patriarchal conceptions of femininity. Performing sex on camera without a condom is but one example of this claim.⁹⁰

The “pro-sex” feminist has a clear ally in the “pro-bareback” homosexual. Bareback sex among gay and bisexual men becomes more than a physical act, transcending to the level of personal identity.⁹¹ One scholar characterizes the act of admitting to engaging in bareback sex as a form of “coming out.”⁹² Of course, “[t]he ritual of ‘coming out’ finds its historical roots in gay culture and activism.”⁹³ The bareback sex performance on film serves as a visual dismantling

⁸⁶ This proposition is a reassertion that “[w]e also speak in order to define, develop, and express ourselves as individuals. It recognizes people’s fundamental interest in controlling the contours of their public personas and the fashion in which these personas are constructed.” Han, *supra* note 13, at 97–98 (citations omitted).

⁸⁷ See *infra* notes 88–109 (applying specific theorists’ works to support the argument that bareback pornography helps create and maintain self-realization and self-fulfillment).

⁸⁸ Langman, *supra* note 69, at 657; see also *id.* at 668–70 (discussing the feminist revision of pornography into a positive and empowering genre). *But see* Catharine A. MacKinnon, *Pornography, Civil Rights, and Speech*, 20 HARV. C.R.-C.L. L. REV. 1, 16–17 (1985) (criticizing pornography as an expression of sexual violence and male dominance).

⁸⁹ See Ann Ferguson, *Pleasure, Power and the Porn Wars*, 3 WOMEN’S REV. BOOKS 11, 11 (1986) (“Libertarian or ‘pro-sex’ feminists stress the importance of women’s claiming the right to consensual pleasure in sexual activity . . .”).

⁹⁰ The regulation of pornography then interferes with a “means by which we present our identities to the world, and having the freedom to determine how we approach this project is an integral aspect of individual autonomy.” Han, *supra* note 13, at 98.

⁹¹ See Chris Ashford, *(Homo)normative Legal Discourse and the Queer Challenge*, 23 DURHAM L. REV. 1, 10 (2011), available at [http://durhamlawreview.co.uk/attachments/article/23/\(Homo\)normative%20Legal%20Discourses%20and%20the%20Queer%20Challenge.pdf](http://durhamlawreview.co.uk/attachments/article/23/(Homo)normative%20Legal%20Discourses%20and%20the%20Queer%20Challenge.pdf) (positioning coming out as a “barebacker” alongside coming out as gay). Such an understanding of bareback pornography as a vehicle of self-definition resonates with Lawrence Tribe’s recognition of speech’s power to project identity. See LAWRENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 887–88 (1978) (noting that aspects of the self are expressed “through seeking to project one identity rather than another upon the public world”).

⁹² Ashford, *supra* note 91, at 10.

⁹³ Natasha Rivera-Silber, “*Coming Out Undocumented*” in *the Age of Perry*, 37 N.Y.U. REV. L. & SOC. CHANGE 71, 72 (2013) (comparing the coming out process of LGBT people to undocumented immigrants).

of yet another “closet.”⁹⁴ In this way, the act and the image are two parts of an indivisible whole. Attaching bareback pornography to a traditional gay coming-out narrative underscores the genre’s importance to self-acceptance.⁹⁵ Additionally, bareback pornography’s wide distribution can amplify its usefulness as a tool for self-acceptance. The power and importance are not diminished simply because this visual claim of sexuality is bought and sold.⁹⁶ In fact, the sale and wide dissemination of the message through film suggests recognition of pornography’s import and relevance.⁹⁷

Beyond personal identity development, bareback pornography helps shape imaginations. Queer theorists have recognized the power of the visual or “aesthetic.”⁹⁸ Adopting Professor José Muñoz’s framework, one would say that “there is a performance of futurity embedded in the aesthetic”⁹⁹ of bareback pornography. “Futurity,” according to Muñoz, “is a modality of critique that speaks to quotidian gestures as laden with potentiality.”¹⁰⁰ The futurity within bareback pornography is a public mandate that “[w]e must dream and enact . . . other ways of being in the world, and ultimately new worlds.”¹⁰¹ Distilling Muñoz’s language, futurity is an additional dimension of understanding beyond the immediate sex act. Consider HIV for example. Today’s bareback pornography is acutely aware of

⁹⁴ Indeed, it is the public nature of the display of identity and action that bothers some. See Toni M. Massaro, *Gay Rights, Thick and Thin*, 49 STAN. L. REV. 45, 62–63 (1996) (arguing that First Amendment claims around homosexual conduct transform the lives of gay and lesbian people into spectacles and should therefore be avoided).

⁹⁵ See James Allon Garland, *Breaking the Enigma Code: Why the Law Has Failed to Recognize Sex as Expressive Conduct Under the First Amendment, and Why Sex Between Men Proves That It Should*, 12 LAW & SEXUALITY REV. LESBIAN GAY BISEXUAL & LEGAL ISSUES 159, 170 (2003) (“[V]erbalizing sexual identity has become a focal point for many advocates for lesbian, gay, and bisexual people both as a step toward self-acceptance and as an identity . . .”).

⁹⁶ See Ferguson, *supra* note 89, at 11 (“Any feminist sexual morality that attempts to draw the line at certain sorts of consensual sexual acts engaged in for pleasure is, [for pro-sex feminists], reactionary, perpetuating the Victorian stereotype of women as sexual or prudish about sexual pleasure.”).

⁹⁷ Cf. *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 501 (1952) (“It cannot be doubted that motion pictures are a significant medium for the communication of ideas. They may affect public attitudes and behavior in a variety of ways, ranging from direct espousal of a political or social doctrine to the subtle shaping of thought which characterizes all artistic expression.”).

⁹⁸ See José Esteban Muñoz, *Cruising the Toilet: LeRoi Jones/Amiri Baraka, Radical Black Traditions, and Queer Futurity*, 13 GLQ: J. LESBIAN & GAY STUD. 353, 357 (2007) (exploring the topic of queer temporality).

⁹⁹ *Id.*

¹⁰⁰ *Id.* at 360.

¹⁰¹ JOSÉ ESTEBAN MUÑOZ, *CRUISING UTOPIA: THE THEN AND THERE OF QUEER FUTURITY* 1 (2009).

HIV, unlike “pre-condom” pornography of the 1970s and 1980s.¹⁰² Contemporary bareback pornography can then be understood as a chance to play with and create new realities where AIDS, homophobia, and oppression do not exist or, at least, do not imbue our lives with such omnipresent fear.¹⁰³ Notably, this exercise in futurity is not limited to the performers and producers: Given pornography’s production and distribution, third party consumers receive the product and share in its “utopian kernel.”¹⁰⁴

The role of the consumer reminds us that the self-fulfillment rationale also takes a communal form. Professor Emerson’s conception of self-fulfillment emphasizes that the right to freedom of expression stems from “notions of the role of the individual in his capacity as a member of society.”¹⁰⁵ Bareback pornography, as a species of pornography, expresses and transmits a subculture.¹⁰⁶ This is sometimes an explicit intention of some bareback pornography,¹⁰⁷ although by no means its only intention. The documentation, sale, and transmission of same-sex bareback sex are necessary to the maintenance of that subculture.¹⁰⁸ This inter-personal or communal understanding of

¹⁰² See DEAN, *supra* note 47, at 105 (“Bareback porn, in other words, is no more simply a case of ‘denial’ than bareback sex is simply a case of irresponsibility.”).

¹⁰³ See MICHAEL SHERNOFF, WITHOUT CONDOMS: UNPROTECTED SEX, GAY MEN & BAREBACKING 205 (2006) (“For all gay men who seek a committed relationship or who are already in one, love, the desire to love and be loved, sex, and the specter of HIV infection are inextricably bound together and most likely will be for the foreseeable future.”). This Note is not the first academic work to recognize the appropriateness of Muñoz’s framework in assessing the value of bareback sex. See Michael O’Rourke, *The Afterlives of Queer Theory*, CONTINENT (July 2, 2013, 1:08 AM), <http://www.continentcontinent.com/index.php/continent/article/view/32> (“[B]arebacking occupies the queer time and space of the not-yet-here . . . and potentializes the thinking of new relational modes or forms-of-life . . .”). But it is the first to specifically identify bareback pornography as an expressive vehicle imbued with the power to document and transmit a bareback “futurity,” or in more familiar First Amendment parlance, a bareback “idea.”

¹⁰⁴ Muñoz, *supra* note 98, at 361.

¹⁰⁵ Emerson, *supra* note 29, at 880.

¹⁰⁶ See Paul Morris, No Limits: Necessary Danger in Male Porn, Address at World Pornography Conference (Aug. 8, 1998), <http://www.managingdesire.org/nolimits.html> (discussing the importance of the speech element of same-sex bareback pornography in its power to support a subculture); see also JOHN R. BURGER, ONE-HANDED HISTORIES: THE EROTO-POLITICS OF GAY MALE VIDEO PORNOGRAPHY 21 (1995) (“[B]y documenting the sexual and erotic trends and practices of gay men, pornography serves as a form of historiography.”).

¹⁰⁷ See DEAN, *supra* note 47, at 104 (“No longer a closet activity, unprotected gay sex has given rise to a subculture that graphically represents itself and aspires to create a visual archive of its actions.”).

¹⁰⁸ See *id.* at 52 (“Pornographic representation is central to bareback subculture because it offers a form of witnessing . . .”); Morris, *supra* note 106 (“At the heart of every culture is a set of experiences which members hold not only to be worth practicing, but also necessary to maintain and transmit to those who follow.”).

bareback pornography directly aligns with Professor Karst's belief in the power of intimate association beyond the personal.¹⁰⁹

The self-fulfillment of third-party consumers adds another layer to the pro-bareback pornography position. Support for this proposition can be found in *Stanley v. Georgia*, where the Court protected the possession of obscene materials.¹¹⁰ In so doing, the Court emphasized the importance of the "right to receive information and ideas, regardless of their social worth."¹¹¹ According to the Court, the possessor of the obscene material was asserting "the right to satisfy his intellectual and emotional needs."¹¹² This argument likewise applies to participants and non-filmed members of the bareback subculture, and bareback pornography deserves similar constitutional recognition for its impact on consumers.¹¹³

B. Two Additional Justifications

The preceding Subpart argued that bareback pornography deserves First Amendment protection under three popular theoretical justifications for protecting the freedom of expression. First, bareback pornography is a politically charged genre, and its creation and proliferation are salient to the democratic decision-making process. Second, bareback pornography contributes to the marketplace of ideas and sheds light on a wide range of "truths," from the sexual practices of gay men to the underlying influences of power and knowledge in our society. Finally, bareback pornography promotes the self-fulfillment and self-realization of actors, subculture members, and casual consumers.

The above analysis provides a basis for giving bareback pornography First Amendment protection under canonized justifications. This analysis is critical because First Amendment jurisprudence is often vague and based on assumptions, especially where sexual expression is concerned.¹¹⁴ The following Subparts expand this basis by exploring two additional rationales for granting First Amendment protection to bareback pornography: first, the call for a more

¹⁰⁹ See Karst, *supra* note 83, at 636 ("An intimate association may influence a person's self-definition not only by what it says to him but also by what it says (or what he thinks it says) to others.").

¹¹⁰ 394 U.S. 557, 565 (1969).

¹¹¹ *Id.* at 564.

¹¹² *Id.* at 565.

¹¹³ See Redish, *supra* note 78, at 620–21 (arguing that the right of free speech also belongs to the listeners because the listener's self-realization depends on freely receiving information).

¹¹⁴ See Cole, *supra* note 25, at 112–13 (noting that this is especially true where sexual expression is concerned).

expansive First Amendment; and second, the Court's test for First Amendment protection of expressive conduct developed in the context of symbolic speech.

1. *A More Expansive First Amendment*

There is a growing call for an expansive First Amendment doctrine that protects expression and feeling not directly tethered to the political arena, the marketplace of ideas, or the journey of self-fulfillment. This section explores such a conception of the First Amendment and argues that bareback pornography would fit more comfortably in this proposed theory.

At first blush it may seem difficult to fit bareback pornography into a traditional First Amendment framework developed to protect speech for its "rational," "particularized," and "direct" qualities.¹¹⁵ In opposition to traditional understandings of the First Amendment, however, Professor Amy Adler encourages us to rethink our reliance on key terms in First Amendment jurisprudence—terms such as "idea," "rationality," and "reason."¹¹⁶ Adler criticizes these assumptions of First Amendment doctrine in the context of art, but much of her argument can apply to pornography as well.¹¹⁷ Like art, bareback pornography is visual, making the value of such work difficult to articulate in relation to works purely in text form.¹¹⁸

Arguably, the Court has already begun this process and has opened an avenue for constitutional recognition of bareback pornography's expression that may not otherwise fit into traditional theories and doctrine.¹¹⁹ The Court remarked in *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston, Inc.* that the abstract expressionism of Jackson Pollock was "unquestionably shielded" by the First Amendment.¹²⁰ The casual acceptance of the fact that the First Amendment protects Pollock's art is notable given that such art is generally understood as capturing "action" rather than any articulable

¹¹⁵ See Amy Adler, *The Thirty-Ninth Annual Edward G. Donley Memorial Lectures: The Art of Censorship*, 103 W. VA. L. REV. 205, 209 (2000) (describing the assumptions underlying the marketplace-of-ideas model of the First Amendment).

¹¹⁶ See *id.* at 217, n.80.

¹¹⁷ See *id.* ("[O]nce we value speech for its rationally comprehensible ideas, as the marketplace model does, then it becomes hard to accommodate protection for art.").

¹¹⁸ See *id.* at 210 (noting this "peculiar preference"). Adler states that obscenity prosecutions against pornography have exclusively focused on visual representations. *Id.* Even academic anti-pornography work has focused on the genre's visual form. *Id.*

¹¹⁹ Cf. Mark Tushnet, *Art and the First Amendment*, 35 COLUM. J.L. & ARTS 169, 170 (2012) (discussing the difficulty of understanding nonrepresentational art under common First Amendment explanations).

¹²⁰ 515 U.S. 557, 569 (1995).

“idea.”¹²¹ Moreover, in *Pleasant Grove City v. Summum*, the Court described the “message” of a monument by stating that “text-based monuments are almost certain to evoke different thoughts and sentiments in the minds of different observers, and the effect of monuments that do not contain text is likely to be even more variable.”¹²² *Hurley* and *Pleasant Grove* offer two examples of the Court’s willingness to relinquish dependence on rigid frameworks around what type of speech is valuable and thus protected under the First Amendment. The two cases show a flirtation with the recognition that visual speech need not have a clear, express message to be protected.

Adler’s suggestion to rethink the First Amendment’s dependence on express political messages also encourages the Court to recognize the “great and mysterious”¹²³ elements of sex’s visual depiction. Expanding the “great and mysterious” to include public reaction to visual depictions should follow. For example, the vocal disapproval of bareback pornography can actually add to the genre’s value and purpose. There is eroticism in the forbidden.¹²⁴ Like the public monument at issue in *Summum*, bareback pornography contains multiple meanings, perceived differently by different observers, and is a phenomenon that should be celebrated and protected.

Bareback pornography also possesses the power to express profound emotions such as love and trust.¹²⁵ Indeed, a recent survey found that men who bareback understand that particular form of sex as an “expression of love.”¹²⁶ This practice and belief is not limited to men who have sex with men; many heterosexual and female same-sex

¹²¹ See Amy M. Adler, *Against Moral Rights*, 97 CALIF. L. REV. 263, 296 (2009) (describing Pollock’s paintings as encompassing “a record of his transcendent struggle”).

¹²² 555 U.S. 460, 475 (2009) (finding the display of a public monument to be expressive conduct by the city).

¹²³ *Roth v. United States*, 354 U.S. 476, 487 (1957). *Roth* is the Court’s foundational obscenity case. Even in 1957, the Court understood that particularized and rational concepts could not fully capture the “great and mysterious” act of sex. Since then, the Court has indicated its understanding of the complex world in which sexual expression exists. See *R.A.V. v. City of St. Paul*, 505 U.S. 337, 426 (1992) (Stevens, J., concurring) (noting that “the complex reality of expression” defeats the ability to categorize speech as protected or unprotected and pointing to the Court’s obscenity jurisprudence as exemplifying these “fuzzy boundaries”).

¹²⁴ See Bernard E. Harcourt, *Foreword: “You Are Entering a Gay and Lesbian Free Zone”: On the Radical Dissents of Justice Scalia and Other (Post-) Queers. [Raising Questions About Lawrence, Sex Wars, and the Criminal Law]*, 94 J. CRIM. L. & CRIMINOLOGY 503, 530 (2004) (describing an earlier time in which lesbians had to hide their identities, engendering an alluring taboo).

¹²⁵ See *id.* (noting that behavior considered sadomasochistic by some can also be understood as an expression of “loving”).

¹²⁶ See Garland, *supra* note 95, at 185 (“[C]lear majorities of men surveyed for this Article said they considered the act of sex without a condom an expression of love.”).

couples understand unprotected sex as an unparalleled expression of intimacy.¹²⁷ While these dimensions of pornography appear nebulous, they unquestionably have value.¹²⁸ Under the expansive understanding of the First Amendment, bareback pornography's abstract values would justify protecting the genre even absent any tethering to the canonized doctrines discussed in Part I.A.

2. *The Expressive Conduct Captured in Bareback Pornography*

Bareback pornography may also warrant protection under the Supreme Court's test for when the First Amendment protects expressive conduct—action consisting of both “speech” and “nonspeech” elements—with two caveats in order: First, the continued vitality of the following test is questionable;¹²⁹ second, the test is highly fact-specific. Additionally, although bareback pornography should not be conceptualized as “pure action,”¹³⁰ it is worthwhile to explore the doctrine of expressive conduct because it is the only area of First Amendment jurisprudence where the Court has expressly articulated a test for determining when “nonverbal conduct will be recognized as sufficiently ‘communicative’ to trigger First Amendment scrutiny.”¹³¹

In *United States v. O'Brien*, the Court recognized expressive conduct or symbolic speech but refused to “accept the view that an apparently limitless variety of conduct can be labeled ‘speech’ whenever the person engaging in the conduct intends thereby to express an idea.”¹³² Six years later, in *Spence v. Washington*, the Court attempted to establish parameters for the expressive conduct doctrine by articulating a two-pronged test: First, the conduct must “inten[d] to convey a particularized message”; second, “the likelihood [must be] great that the message would be understood by those who viewed it.”¹³³

¹²⁷ See Amanda B. Diekman, Mary McDonald & Wendi L. Gardner, *Love Means Never Having to Be Careful: The Relationship Between Reading Romance Novels and Safe Sex Behavior*, 24 PSYCHOL. WOMEN Q. 179, 179 (2000) (noting this common belief and associating it with romance novel reading).

¹²⁸ Cf. *Am. Booksellers Ass'n, Inc. v. Hudnut*, 771 F.2d 323, 329 (1985), *aff'd mem.*, 475 U.S. 1001 (1986) (“Pornography affects how people see the world, their fellows, and social relations.”).

¹²⁹ See Rubinfeld, *supra* note 23, at 773 (noting that the court selectively exercises the *Spence* test).

¹³⁰ See Melville B. Nimmer, *The Meaning of Symbolic Speech Under the First Amendment*, 21 UCLA L. REV. 29, 31–32 (1973) (“The distinction often made is between ‘pure speech’ which is entitled to the full panoply of [F]irst [A]mendment protection, and symbolic speech or speech plus, which is to receive some ill-defined lesser degree of protection.”).

¹³¹ Rubinfeld, *supra* note 23, at 772.

¹³² 391 U.S. 367, 376, 381–82 (1968).

¹³³ 418 U.S. 405, 410–11 (1974).

In *Lawrence v. Texas*, the Court itself recognized sex as a valuable form of “expression.”¹³⁴ Although “[t]he reference is brief and unexplained, [it] has greater constitutional resonance” than its fleeting mention might otherwise suggest “when compared to the Court’s prior” treatment of sex.¹³⁵ Scholars have already argued that sex itself is expressive enough to merit constitutional protection.¹³⁶ It follows then that as a type of sex, barebacking entails the same expression and deserves the same protection. Any act of bareback sex can convey distinct and particular messages ranging from love, to power, to rage.¹³⁷ Ironically, a popular argument against pornography—that it amounts to nothing more than a sexual aid¹³⁸—can buttress the genre’s expressiveness. Even if just expressing emotive ecstasy, bareback sex would seem to satisfy the first prong of the *Spence* test—intending to convey a particular message—since the Court has made it clear that emotion itself, which would appear to include sexual pleasure, can constitute a message.¹³⁹ Still, it may be difficult to extrapolate a particularized message from the run-of-the-mill pornographic film. The Court has since modified the *Spence* test in a manner that impacts the treatment of these films, holding in 1995 that “a narrow, succinctly articulable message is not a condition of constitutional protection.”¹⁴⁰ This modification allows some breathing room in *Spence*’s first prong, making it more likely that bareback pornography can fit within the test’s definition of protected conduct.

Even if we recognize that in itself *sex* is expressive and valuable, some may still consider *pornography* to be the ultimate exposition of

¹³⁴ 539 U.S. 558, 562, 567 (2003).

¹³⁵ Garland, *supra* note 19, at 297.

¹³⁶ See generally *id.* (discussing the import of *Lawrence* and examining what *Lawrence* means for future First Amendment claims regarding sex); Rosenbury & Rothman, *supra* note 21, at 810–11 (arguing that sex should be a constitutionally protected action in general and not “only when potentially in the service of emotional intimacy”).

¹³⁷ See David Cole & William N. Eskridge, Jr., *From Hand-Holding to Sodomy: First Amendment Protection of Homosexual (Expressive) Conduct*, 29 HARV. C.R.-C.L. L. REV. 319, 326 (1994) (explaining that “sex is intrinsically communicative and may express a wide range of emotions—love, desire, power, dependency, even rage or hatred”).

¹³⁸ See *infra* note 143 and accompanying text (discussing the argument that pornography lacks any expressive value and serves solely as a tool to complete masturbation).

¹³⁹ See Nimmer, *supra* note 130, at 34 (“The emotive content of expression can be fully as important as the intellectual, or cognitive, content in the competition of ideas for acceptance in the marketplace.”); *id.* at 35 (“But even if a communication is substantially devoid of all cognitive content, its emotive content is surely protectable.”).

¹⁴⁰ *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Group of Bos., Inc.*, 515 U.S. 557, 569 (1995). This more nuanced and capacious understanding of the expressive message supports the argument that bareback pornography, which can operate on multiple levels of meaning simultaneously, falls within the ambit of the First Amendment. However, this broadening of the *Spence* test still falls short of the more expansive First Amendment conception discussed in Part II.A.

sex devoid of any incidental expressive value—merely a commercial masturbatory aid. This position is often based on two arguments. The first argument is that pornography does not merit First Amendment protection because of its commercial nature. However, while pornography is a wildly and widely successful commercial product, it is not *exclusively* a commercial product.¹⁴¹ More fundamentally, the Court has held that the mere presence of a form of expression in the commercial market does not diminish the expression's First Amendment protection.¹⁴²

The second argument against pornography as deserving First Amendment protection is that “[m]any forms of pornography are not an appeal to the exchange of ideas, political or otherwise; they operate as masturbatory aids and do not qualify for top-tier First Amendment protection under the prevailing theories.”¹⁴³ This argument, however, is based on the high-low dichotomy of “whether the expression in question appeals to the ‘intellectual’ aspect of the human mind or the ‘passionate’ aspect,”¹⁴⁴ and has been challenged in several ways. First, the idea that any pornography can produce a *purely* physical effect is highly questionable. As David Cole explains, “pornography ‘works’ only because (and to the extent that) it plays upon fantasies and narratives which the reader, viewer, or listener finds arousing. Sexual expression, like human sexuality itself cannot be ‘purely physical.’”¹⁴⁵ Moreover, even assuming that some pornography might be purely physical, the promotion of the physical effect—pleasure—might itself be a political endeavor.¹⁴⁶

The above arguments also ignore the fact that all pornography is an instance of sexual expression and therefore reflects “the

¹⁴¹ See Calvert & Richards, *supra* note 8, at 4–5 (noting “the proliferation of free amateur sites like YouPorn.com—the so-called ‘YouTube of Porn’” (citations omitted)).

¹⁴² See *City of Lakewood v. Plain Dealer Publ’g Co.*, 486 U.S. 750, 756 n.5 (1988) (“[T]he degree of First Amendment protection is not diminished merely because the . . . speech is sold rather than given away.” (citing *Pittsburgh Press Co. v. Pittsburgh Comm’n on Human Relations*, 413 U.S. 376, 385 (1973))).

¹⁴³ Cass R. Sunstein, *Words, Conduct, Caste*, 60 U. CHI. L. REV. 795, 807–08 (1993).

¹⁴⁴ Gey, *supra* note 23, at 1587.

¹⁴⁵ Cole, *supra* note 25, at 126–27; see also Andrew Koppelman, Essay, *Is Pornography “Speech”?*, 14 LEGAL THEORY 71, 77 (2008) (explaining that pornography, despite its clear physical component, also has a mental component: “Human sexuality, it appears, is always mediated by thought.”).

¹⁴⁶ See MICHELANGELO SIGNORILE, *LIFE OUTSIDE: THE SIGNORILE REPORT ON GAY MEN: SEX, DRUGS, MUSCLES, AND THE PASSAGES OF LIFE* 47–62, 208–18 (1997) (describing how some gay men have championed pleasure itself and how this has coincided with various stages of the more political strands of the gay liberation movement).

multiplicity of meanings that sexual expression can convey.”¹⁴⁷ Finally, pornography, as a depiction of sex, conveys the communicative and expressive values of the underlying sexual act.¹⁴⁸

Thus, the position that pornography lacks expressive value is shortsighted. The power and value of pornography’s expression emerge from its exposition.¹⁴⁹ Therefore, the second prong of *Spence*—a high likelihood that the message will be understood by those who view the expression—is arguably satisfied by bareback pornography because the various messages within any particular depiction of bareback pornography are likely understood by those who purchase and view it.¹⁵⁰

The communicative nature of bareback pornography includes both the act of sex and its concurrent filming; the two coalesce to result in protected expression. Ironically, pornography may also serve as a successful limiting principle appeasing the *O’Brien* Court’s worry that potentially all action could be characterized as expressive.¹⁵¹ The filming of bareback sex provides a vehicle for discerning the message of the act, captures the conduct in a recognized medium of speech, and identifies an audience. Although *Spence* may be a “profoundly unsatisfactory test,”¹⁵² it remains good doctrine, and bareback pornography is sufficiently expressive under the *Spence* test to trigger First Amendment protection.

At this point a disclaimer is necessary. In the above exposition of existing and emerging justifications for the freedom of speech and the argument that bareback pornography satisfies each, I do not mean to suggest moral approval or social approbation of barebacking. Although I believe bareback pornography advances the interests of

¹⁴⁷ Cole, *supra* note 25, at 130 (explaining why arguments that sexual expression is of low value or is not speech at all fail by cramming sexual speech into a distinct category of communication).

¹⁴⁸ See *supra* note 137 and accompanying text.

¹⁴⁹ See *supra* notes 88–98 and accompanying text (discussing the positive consequences of pornography’s ubiquity, including self-acceptance and cultural documentation); *cf.* Garland, *supra* note 19, at 298 (explaining that, while the court has been willing “to characterize sex as a possible form of expression,” many may find it difficult to identify the expressive nature of sex when the act is performed without a public audience).

¹⁵⁰ See DEAN, *supra* note 47, at 104 (“No longer a closet activity, unprotected gay sex has given rise to a subculture that graphically represents itself and aspires to create a visual archive of its actions.”); Violet Blue, *Surprising Facts About Porn for Women*, O, THE OPRAH MAG. (July 2007), <http://www.oprah.com/relationships/What-Kind-of-Woman-Watches-Porn-Researchers-Find-Answers> (discussing porn consumption and production by women).

¹⁵¹ See *United States v. O’Brien*, 391 U.S. 367, 376 (1968) (refusing to expand First Amendment protection to all action).

¹⁵² Rubinfeld, *supra* note 23, at 773 (noting *Spence*’s awkward application to contemporary art).

the First Amendment, I do not believe that it is without danger or that it is impenetrable to state regulation. The next Part of this Note addresses Los Angeles County's recent effort at regulating the production of bareback pornography and suggests how the County may regulate the harm targeted by Measure B while staying within the sphere of the constitutionally permissible.

II

THE PROBLEM WITH MEASURE B: A CONTENT-BASED RESTRICTION ON PROTECTED SPEECH WARRANTING THE MOST EXACTING SCRUTINY

Part I argued that bareback pornography is sufficiently expressive to merit First Amendment protection. This assertion is crucial because much of the Court's sexual expression jurisprudence and the diminished protection provided to sexual speech rests on the assumption that such expression is of a "less vital interest" to the First Amendment.¹⁵³ The Court's suggestion that pornography is of less interest to the First Amendment serves a specific end, for the "essential difference between the Supreme Court's treatment of high- and low-value speech concerns what the Court will accept as justification for regulating speech."¹⁵⁴ It has followed that "[w]hen it comes to sexual expression, . . . the state is not obliged to offer a compelling rationale, and the Court's decisions proceed by assertion rather than by logical reasoning."¹⁵⁵

The application of theory and doctrine to bareback pornography in Part I stands in direct tension with the exile of bareback pornography to the "outer ambit"¹⁵⁶ of the First Amendment. Bareback pornography cannot be characterized as low-value so as to allow uncontested regulation or censorship. This Part argues that Measure B is a content-based restriction on protected speech and, therefore, is subject to strict scrutiny review.

¹⁵³ *Young v. Am. Mini Theatres, Inc.*, 427 U.S. 50, 61 (1976) (explaining that the interest is "less vital" in the "exhibition of material that is on the borderline between pornography and artistic expression than in the free dissemination of ideas of social and political significance").

¹⁵⁴ *Shaman*, *supra* note 27, at 329.

¹⁵⁵ *Cole*, *supra* note 25, at 113 (elaborating on the "peculiar relationship" between the Court, the law, the community, and sexual speech).

¹⁵⁶ *City of Erie v. Pap's A.M.*, 529 U.S. 277, 289 (2000) (plurality opinion) (explaining that "nude dancing . . . is expressive conduct, although . . . it falls only within the outer ambit of the First Amendment's protection" (citing *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 565-66 (1991))).

A. Measure B as an Expressive Restriction

This Subpart revisits the rationales underlying the fundamental First Amendment protections discussed above in Part I.A and examines the ways in which Measure B—a “one-of-a-kind law”¹⁵⁷—limits or eliminates bareback pornography’s expression in Los Angeles. It argues that Measure B prohibits bareback pornography’s contribution to the political process and to the marketplace of ideas, while simultaneously hindering the genre’s important role in advancing individual and communal fulfillment.

Recall the question posed by the Young Gay Black Men’s Leadership Initiative: “Does the ubiquity of bareback porn have an impact on the sexual lives of young Black [men who have sex with men]? What’re your thoughts?”¹⁵⁸ This question has clear political relevancy—raising the question of whether legal bans on the production of bareback pornography are tolerable—but it also raises intimate questions of sincere personal salience for gay men of color. The question itself may be leading, hinting at the underlying fear that “[b]areback porn . . . viewers are at risk of corruption and harm.”¹⁵⁹ Some bareback pornographers may in fact mean to persuade viewers to mimic the depicted behavior.¹⁶⁰ Others may seek only to document a subculture. Whatever the motivations, Measure B makes it all moot. By prohibiting the production of bareback pornography, Measure B removes the depiction of bareback sex from the “unfettered interchange of ideas for the bringing about of political and social changes.”¹⁶¹ This overt censoring is political.

¹⁵⁷ See Susan Abram, *Measure B: Porn Advocates to Fight Condom Rule; Looking for Film Sites Outside San Fernando Valley, State*, L.A. DAILY NEWS (Nov. 11, 2012), http://www.dailynews.com/ci_21949679/measure-b-porn-advocates-fight-condom-rule-looking (quoting David Sommers, spokesman for the Los Angeles county chief executive office).

¹⁵⁸ See *supra* note 51 and accompanying text (introducing the quote).

¹⁵⁹ DEAN, *supra* note 47, at 116.

¹⁶⁰ This is likely the position of the County of Los Angeles given that it understands the harm of bareback pornography to extend beyond the performers themselves. See *supra* note 52 and accompanying text (discussing this idea in light of the specific text of Measure B).

¹⁶¹ *Roth v. United States*, 354 U.S. 476, 484 (1957) (explaining that the First Amendment protection granted to speech protects this free exchange of ideas). Representatives of the pornography industry have vowed that they will look into other locations where they can continue filming bareback sex. Abram, *supra* note 157 (discussing reaction of industry). In that sense, there is a likelihood that bareback pornography would not be completely eliminated from the marketplace. In fact, one generous director and actress offered producers her home (outside of Los Angeles) to continue shooting: “Hey porn peeps—Pasadena isn’t covered by Measure B . . . want to rent my house?” Lily Cade, TWITTER (Nov. 6, 2012 8:40 PM), https://twitter.com/lily_cade/status/266037266344984576. However, the generosity and ingenuity of a single porn star does not diminish the severity and extent of the expression regulated by Measure B.

Beyond its function as a political speech restriction, Measure B is especially deleterious to bareback pornography's ability to aid self-fulfillment and self-realization. As discussed above, bareback pornography allows for the transmission of critical ideas around bodily autonomy, self-acceptance, and subculture visibility.¹⁶² Measure B eliminates the genre's ability to engage in these processes of self-fulfillment and self-realization. One may argue that Measure B only regulates the actual workplace conduct of porn actors, allowing digital removal of the condom in post-production, thereby maintaining the genre's expression.¹⁶³ At first blush, this seems to be an acceptable compromise; however, it fails to recognize the extent of Measure B's restriction on expression. For example, if we accept bareback pornography's expressive value in documenting a subculture involving participants and consumers, the digital post-production removal of the condom ameliorates little. Measure B denies individuals the ability to perform, record, and disseminate a fundamental aspect of their lives—indeed, their identities.¹⁶⁴ Similarly, Measure B denies consumers the ability to enjoy actual depictions of a vibrant subculture.¹⁶⁵ Even if the consumer continues to purchase digitally altered pornography, she arguably still knows or suspects that the act of bareback sex itself has not taken place. She suspects that this is not an actual representation of the subculture. Whatever enjoyment one may continue to receive from the pornography is tinged by the question of what it is not.¹⁶⁶

¹⁶² See *supra* Part I.A.3 (discussing bareback pornography's relationship to individual and communal fulfillment).

¹⁶³ In response to reports of a First Amendment challenge to Measure B, supporters of the law, such as Michael Weinstein, president of the AIDS Healthcare Foundation, have pointed to digital removal of the condom as a sufficient solution to any expression issue. Weinstein has explained: "If they want to digitally remove a condom from the final cut of a film, there's no issue." Jackie Chazan, *Free Speech Trumps Condom Law According to Porn Producer*, EXAMINER.COM (Jan. 13, 2013), <http://www.examiner.com/article/free-speech-trumps-condom-law-according-to-porn-producer> (quoting Michael Weinstein).

¹⁶⁴ See *supra* note 91 and accompanying text (discussing the tether between identity and sexual activity).

¹⁶⁵ The expansive scope of Measure B is quite evident when we turn our attention to its prevention of the documentation of a real subculture. Within Measure B's scope would fall any individual bareback performer wishing to record his sexual life and present it to the public on a social website, while earning a slight profit. See Calvert & Richards, *supra* note 8, at 4 (noting "the proliferation of free amateur sites like YouPorn.com—the so-called 'YouTube of Porn'").

¹⁶⁶ This effect may be felt especially strongly by gay and bisexual men because they interact with pornography more than their heterosexual peers. See Dylan J. Stein et al., *Viewing Pornography Depicting Unprotected Anal Intercourse: Are There Implications for HIV Prevention Among Men Who Have Sex with Men?*, 41 ARCHIVE SEXUAL BEHAV. 411, 412 (2012) ("Viewing of pornography is common among MSM, and more frequent than among their heterosexual peers."). Furthermore, bareback pornography is marketed to gay and bisexual men and widely accessible in digital and film formats, for free or for pay. *Id.*

The ways in which Measure B circumscribes the expressiveness of bareback pornography are evident. Still, AIDS Healthcare Foundation executive director Michael Weinstein, Measure B's benefactor, denies that the law causes any First Amendment harm: "This is not a First Amendment issue It's a public health issue. We're not telling them what to film but that certain precautions should . . . be taken. You don't have a First Amendment right to spread diseases."¹⁶⁷ A less aggressive stance would argue that any incidental restriction on expression by Measure B is nothing more than a consequence of the law's focus on workplace safety.¹⁶⁸ This second position—a position not taken by the AIDS Health Care Foundation—at least recognizes that bareback sex, when filmed and sold, is indeed expressive and worthy of First Amendment protection.¹⁶⁹ This view recognizes that there is at least *some* protected speech at issue, which then may be regulated for reasons such as public health if the government can satisfy demanding tests protecting expression. Merely recognizing the expressiveness of bareback pornography—without also providing the utmost protection—is not enough.

By prohibiting the underlying act, Measure B both eliminates the expressive elements of bareback sex and the additional—and crucial—expression provided by its filming and popular dissemination. Measure B is properly understood as doubly restrictive: It regulates both the underlying expressive conduct and the filming of that conduct. That said, STDs are a very real risk. The next Subpart discusses how Measure B—despite its worthwhile goal of monitoring and preventing the spread of STDs in the Los Angeles porn industry—is only constitutional if it satisfies strict scrutiny.

¹⁶⁷ Abram, *supra* note 157 (internal quotation marks omitted). This Note does not argue that there is a First Amendment right to spread disease, and recognizing the protected expression within bareback pornography does not mean that the genre is beyond the regulatory grasp of the state. Cf. Kaplan, *supra* note 20 (manuscript at 51) (reiterating that legal recognition of sexual pleasure does not mean that some harms that come from sex cannot be regulated). Nonetheless, the risk of STDs inherent in bareback pornography is, itself, a form of expression that this Note argues is protected under the First Amendment.

¹⁶⁸ See Abram, *supra* note 157 ("Advocates, primarily the AIDS Healthcare Foundation, which spent more than \$2 million to support the measure, said the new law promotes public health and the safety of actors.").

¹⁶⁹ Understanding Measure B as a workplace safety law with incidental restrictions on expressive conduct would lead the Court to apply the *O'Brien* test. See *supra* note 132 and accompanying text (discussing the *O'Brien* test). The application of *O'Brien* is laudable in the context of bareback pornography because it requires the Court to respect the genre's expressiveness and First Amendment value. However, *O'Brien* is inapplicable with respect to Measure B because the law does not seek to control bareback sex generally but only bareback sex when recorded and sold as an adult film.

B. Measure B as a Content-Based Restriction on Protected Speech

This Note has thus far argued that bareback pornography is sufficiently expressive to merit First Amendment protection and that Measure B targets this protected expression. As such, Measure B will be unconstitutional if it “abridge[s]” the freedom of expression.¹⁷⁰ This Part turns to this inquiry and argues that Measure B is a content-based restriction and therefore its constitutionality must be considered under strict scrutiny review.

Deciding whether a law unconstitutionally abridges freedom of expression is no simple task. Although the process involves familiar levels of scrutiny, identifying when a particular level of scrutiny applies is difficult to discern, especially in the arena of sexual expression.¹⁷¹ Of uniform importance is the following maxim: The “government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.”¹⁷² The disapproval of content-based or viewpoint-based regulation is, in the Court’s words, the “most basic” First Amendment principle.¹⁷³ A content-based restriction on protected speech will pass constitutional muster only if it is “necessary to serve a compelling state interest and . . . narrowly drawn to achieve that end.”¹⁷⁴

However, even a content-based regulation may, at times, trigger less demanding review. With respect to sexual expression, the Court has developed the *Renton* doctrine of “secondary effects” which allows a content-based law, if targeting harmful “secondary effects,” to be scrutinized as if it were neutral.¹⁷⁵ Although a colorable

¹⁷⁰ U.S. CONST. amend. I.

¹⁷¹ See *supra* note 25–26 and accompanying text (discussing how the Court plays by unclear rules in the realm of sexual expression).

¹⁷² *Police Dep’t v. Mosley*, 408 U.S. 92, 95 (1972); see also *Rubinfeld*, *supra* note 23, at 777 (“[A] content-based regulation makes communication itself an element of the prohibited act.”).

¹⁷³ *Brown v. Entm’t Merchs. Ass’n.*, 131 S. Ct. 2729, 2733 (2011). The Court’s animus for content-based restrictions is so strong that Justice Scalia recognized that even within unprotected categories of speech, content-based laws would fail a constitutional challenge. See *R.A.V. v. City of St. Paul*, 505 U.S. 377, 384 (1992) (“[T]he government may proscribe libel; but it may not make the further content discrimination of proscribing *only* libel critical of the government.”).

¹⁷⁴ *Boos v. Barry*, 485 U.S. 312, 321 (1988) (internal quotation marks omitted). *But see* John Fee, *The Pornographic Secondary Effects Doctrine*, 60 ALA. L. REV. 291, 325 (2009) (arguing that because of pornography’s potential to cause blight and crime and invade the privacy of the home, pornography, in fact, triggers a “distinctive” level of scrutiny under which the “government may not ban it altogether, [but] content-based regulations of pornography do not always require strict scrutiny”).

¹⁷⁵ See *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 50 (1986) (finding that a content-based law targeting content-neutral secondary effects need only satisfy a less demanding test than strict scrutiny); see also *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 586 (1991)

argument exists that Measure B targets secondary effects, the *Renton* doctrine is inappropriate.¹⁷⁶ Like the doctrine of secondary effects, in the area of expressive conduct or symbolic speech, the Court has developed the *O'Brien* test to address regulations that burden, but do not target, speech.¹⁷⁷ Like the *Renton* test, the *O'Brien* test is not appropriate in this instance.¹⁷⁸ Finally, even if a law targets protected

(Souter, J., concurring) (same); *Young v. Am. Mini Theatres, Inc.*, 427 U.S. 50, 71 & n.34 (1976) (plurality opinion) (same); *id.* at 80–82 (Powell, J., concurring) (same).

¹⁷⁶ The argument is that Measure B targets the secondary effects of bareback pornography—the possibility of STD and HIV transmission—and is therefore justified without reference to the content of pornography. The secondary effects doctrine, however, has been strongly criticized. *See, e.g.*, Amy Adler, *Girls! Girls! Girls!: The Supreme Court Confronts the G-String*, 80 N.Y.U. L. REV. 1108, 1120 (2005) (calling the Court's use of the secondary effects doctrine in *Renton* to find the regulation content-neutral “an impressively bold act of logic”); Richard A. Posner, Comment, *Pragmatism Versus Purposivism in First Amendment Analysis*, 54 STAN. L. REV. 737, 742 (2002) (stating that the “ostensible justification” for the secondary effects doctrine “cannot be taken seriously”); *see also* *City of L.A. v. Alameda Books, Inc.*, 535 U.S. 425, 448 (2002) (Kennedy, J., concurring) (calling the doctrinal sleight of hand a “fiction”).

Even if we accept the doctrine, it is not applicable to Measure B. Unlike in *Renton*, where the “secondary effects” had nothing to do with the content of the speech, the harm that Measure B seeks to mitigate and the “speech” that it restricts are inextricably connected. Thus, the harm targeted by Measure B is a “primary effect” of the “speech” of bareback pornography, removing Measure B from the realm of the content-neutral. *See, e.g.*, *Boos v. Barry*, 485 U.S. 312, 320 (1988) (“So long as the justifications for regulation have nothing to do with content, *i.e.*, the desire to suppress crime has nothing to do with the actual films being shown inside adult movie theatres, we concluded that the regulation was properly analyzed as content-neutral.”); *see also* Fee, *supra* note 174, at 306 (explaining that there is no clear distinction between primary and secondary effects, but that one way to define secondary effect is by considering “remote or downstream causation,” meaning that “the first consequence in the chain [of events] is a primary effect while the second and more remote consequences are deemed to be secondary”). The actors engaged in the sexual expression are at once being both censored and protected by Measure B. Here any safety risk occurs in the actual moment of sexual expression. Given such an immediate and direct connection, Measure B cannot fall under a *Renton* secondary-effects analysis.

¹⁷⁷ *United States v. O'Brien*, 391 U.S. 367, 376 (1968) (finding that when “speech” and “nonspeech” elements are combined in a single act, a version of intermediate scrutiny, rather than strict scrutiny, is applicable). *O'Brien* and *Renton* secondary effects are justified in similar manners. Ofer Raban explains that, in similar manners, both tests properly define the judicial analysis of “regulations that burden speech, but are not aimed at burdening it.” Ofer Raban, *Content-Based, Secondary Effects, and Expressive Conduct: What in the World Do They Mean (and What Do They Mean to the United States Supreme Court)*, 30 SETON HALL L. REV. 551, 552–53 (2000).

¹⁷⁸ *O'Brien* was developed to recognize communicative “elements” of expressive conduct, 391 U.S. at 376, and only applies to content-neutral laws that *incidentally* restrict speech. *Id.* at 375–77. Measure B is not content-neutral, nor can it fairly be said to only incidentally restrict speech; unlike the draft card-burner in *O'Brien*, Measure B attempts to extinguish an entire subclass of an accepted mode of communication (film). *See* *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 501 (1952) (“It cannot be doubted that motion pictures are a significant medium for the communication of ideas.”). As a result, *O'Brien* intermediate scrutiny is inapplicable.

speech, the government may regulate such speech within reasonable time, place, and manner parameters.¹⁷⁹ However, Measure B is not a valid time, place, or manner restriction because it works as a total ban on protected speech by eliminating *all* bareback pornography production from Los Angeles County.¹⁸⁰

As opposed to a ban on all pornography,¹⁸¹ Measure B solely and exclusively targets adult films that portray actual bareback sex.¹⁸² Because the alternative tests apply less demanding levels of scrutiny, it is not necessary to determine whether Measure B would be valid under them.¹⁸³ Therefore, as a content-based restriction on protected speech, the State must show that Measure B “is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end.”¹⁸⁴

Measure B clearly serves a compelling interest. The interest motivating Measure B, as articulated to voters, is to “minimize the spread of sexually transmitted infections resulting from the production of adult films in the County of Los Angeles, which have caused a negative impact on public health and the quality of life of citizens living in Los Angeles.”¹⁸⁵ Measure B’s concern is more than hypothetical since California’s pornography industry has experienced HIV outbreaks in the past.¹⁸⁶ Although we “must tolerate insulting, and even

¹⁷⁹ *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) (noting that the “government may impose reasonable restrictions on the time, place, or manner of protected speech” within certain limitations).

¹⁸⁰ As the the dissenting opinion explained in *City of Erie v. Pap’s A.M.*, a total ban on protected speech necessarily fails any tailoring requirements. 529 U.S. 277, 321 (2000) (“Because time, place, and manner regulations must leave open ample alternative channels for communication of the information, a total ban would necessarily fail that test.” (Stevens J., dissenting) (citation omitted) (internal quotation marks omitted)).

¹⁸¹ Such a law would be in clear violation of the California Constitution as interpreted by that state’s highest court. *People v. Freeman*, 758 P.2d 1128, 1131 (Cal. 1988) (protecting the employment of actors in nonobscene, sexually explicit films).

¹⁸² See Measure B § 3 (“This Act will require the producers of adult films to obtain a permit from the Los Angeles County Department of Public Health to ensure that . . . performers are protected from sexually transmitted infections by condoms.”). In this way, Los Angeles’s Measure B parallels Jacksonville’s unconstitutional ban on public displays of films containing nudity. See *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 208 (1975) (explaining that the problem was the statute’s lack of tailoring because the Jacksonville ordinance did “not protect citizens from all movies that might offend; rather it single[d] out films containing nudity”).

¹⁸³ See *supra* notes 176–84 and accompanying text (discussing alternative tests).

¹⁸⁴ *Boos v. Barry*, 485 U.S. 312, 323 (1988) (citations omitted) (internal quotation marks omitted).

¹⁸⁵ Measure B § 3.

¹⁸⁶ The most recent HIV contraction on set occurred in 2004. See Maria de Cesare, Note, *R_{XXX}: Resolving the Problem of Performer Health and Safety in the Adult Film Industry*, 79 S. CAL. L. REV. 667, 667–70 (2006) (noting the 2004 “spate of HIV infections among performers” and examining the potential for state-level regulation of adult per-

outrageous, speech,”¹⁸⁷ this Note does not propose that we must tolerate untrammelled infectious-disease exposure in the name of free speech.

Still, any effort to address the aforementioned compelling interest must be narrowly drawn.¹⁸⁸ Measure B makes no effort at all to restrict its scope. Instead, the law completely prohibits the production of bareback pornography. Measure B ignores the fact that California’s adult film industry already self-regulates through a screening and test-confirmation regime.¹⁸⁹ The industry currently requires all performers to be tested every 30 days for STDs and HIV.¹⁹⁰ The system has proven successful but not infallible. Between 2004 and 2011 there were over seventeen thousand new HIV transmissions in Los Angeles County,¹⁹¹ but only two among adult performers.¹⁹² Measure B thus ignores the industry’s current testing regime. Instead, the law proposes a more draconian solution: complete prohibition.

Beyond the formal pornography industry, Measure B burdens substantially more speech than necessary. For example, imagine a

formers (footnote omitted)); *see also No on Government Waste Committee Denounces Last Minute STD Study by Yes on B Campaign as “Desperation Tactics,”* FREE SPEECH COAL. (Nov. 1, 2012), <http://www.freespeechcoalition.com> (explaining that, at the time, there had been no documented cases of HIV transmission on a pornographic film set). However, the Free Speech Coalition announced on August 22, 2013 that an actress, under the screen name Cameron Bay, tested positive for HIV. Abbey Sewell, *Porn Coalition Seeks Moratorium After Actress Tests Positive for HIV*, L.A. TIMES, Aug. 24, 2013, <http://www.latimes.com/local/la-me-hiv-actress-20130823,0,4183739.story>. Since this most recent HIV-contraction, two more performers, and a potential third, have tested positive for HIV. *See* Chris Morris, *Mounting HIV Cases Have Porn Industry Questioning Its Own Trade Group*, CNBC.COM, Sept. 12, 2013, <http://www.cnbc.com/id/101029395> (discussing the unconfirmed report of a fourth performer testing positive for HIV). At the time of this writing, it is unknown whether the performers contracted HIV while on set, and the Free Speech Coalition, a leading adult entertainment industry organization, established a self-imposed moratorium to prevent further spread of the virus. *See id.* (noting that the initial moratorium was lifted and reset after the third performer’s status became known).

¹⁸⁷ *Boos*, 485 U.S. at 322.

¹⁸⁸ *See supra*, note 184 and accompanying text (describing the level of scrutiny).

¹⁸⁹ *See* Dashiell Bennett, *Why L.A.’s Condom Law Won’t Help Porn Stars Stay Safe*, THE ATLANTIC WIRE (Jan. 18, 2012), <http://www.theatlanticwire.com/national/2012/01/why-ls-condom-law-wont-help-porn-stars/47533/> (discussing the industry’s robust self-regulation of STDs).

¹⁹⁰ *See* Tristan Taormino, *Measure B Does Not Protect Performers: Vote No*, HUFFINGTON POST (Oct. 31, 2012, 4:10 PM), http://www.huffingtonpost.com/tristan-taormino/los-angeles-measure-b_b_2026027.html (explaining the existing testing regime and noting its effectiveness).

¹⁹¹ CNTY. OF L.A. PUB. HEALTH DEP’T, 2011 ANNUAL HIV SURVEILLANCE REPORT 5 tbl. 1 (2012), available at http://publichealth.lacounty.gov/wwwfiles/ph/hae/hiv/2011_Annual%20HIV%20Surveillance%20Report.pdf.

¹⁹² *See* Nick Madigan, *H.I.V. Cases Shut Down Pornography Film Industry*, N.Y. TIMES, Apr. 17, 2004, at A11 (noting the two HIV infections experienced by performers and explaining the impact these relatively rare infections were having on the industry).

monogamous, STD-free couple.¹⁹³ One day they decide to have sex, film it, and upload the video to a website.¹⁹⁴ Before a viewer can watch the entire video, she must pay a nominal fee.¹⁹⁵ This couple falls within the scope of Measure B but poses absolutely no risk to one another or the public, generally, with respect to STDs.

Thus, given the expansive nature of the regulation and the presence of an existing and successful self-regulation regime, it appears that Measure B fails strict scrutiny. As such, the law is unconstitutional.

CONCLUSION

This Note's principal contribution is the elevation of bareback pornography as a recognized form of expression for purposes of First Amendment law. This, of course, is not the end of the First Amendment inquiry—nor should it be. Once we recognize the expressiveness of bareback pornography, a court cannot so easily disregard the genre's First Amendment protection. From this “sex-positive” position, legislators and scholars must be more honest in “what we choose to regulate, what we fail to regulate, and our justifications for these choices.”¹⁹⁶ In that vein, this Note concludes with an appraisal of Measure B as a content-based restriction on protected speech requiring the application of strict scrutiny. Such a position does not demean or ignore the very real threat that HIV and other diseases pose to porn performers or to society generally. Instead, this Note argues that bareback pornography should be recognized for its full expressive value and, as a result, should be afforded robust, but not impregnable, constitutional protection.

¹⁹³ See SHERNOFF, *supra* note 103, at 207–44 (elaborating on the health risks of monogamous same-sex barebacking). Of course, some may argue that even one HIV infection is too many. Such a position is only supported by the most recent spate of performers testing positive.

¹⁹⁴ This is not a far-fetched hypothetical. See Calvert & Richards, *supra* note 8, at 4–5 (noting the popularity of websites containing user-generated home videos).

¹⁹⁵ This payment would likely make the home video “commercial,” thereby within Measure B's scope. Measure B defines a producer of an adult film as “any person or entity that produces, finances, or directs, adult films for commercial purposes.” See Measure B ch. 11.39.075.

¹⁹⁶ Kaplan, *supra* note 20 (manuscript at 3).