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Bailey J. Langner

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Commentary

Unprotected: Condoms, Bareback Porn, and the First Amendment

Bailey J. Langner†

ABSTRACT

In November 2012, Los Angeles County voters passed Measure B, or the Safer Sex in the Adult Film Industry Act. Measure B mandated condom use by all porn performers in adult films produced within county borders and created a complex regulatory process for adult film producers that included permitting, mandatory public health trainings, and warrantless administrative searches. Shortly after its passage, Vivid Entertainment filed a lawsuit to enjoin the enforcement of Measure B, arguing that the Measure violated their First Amendment right to portray condomless sex in porn. In December 2014, the Ninth Circuit upheld the district court’s decision upholding the constitutionality of Measure B.

Notably, the mainstream discourse surrounding the Measure B campaign, as well as the legal arguments put forth in the lawsuit, focused exclusively on straight pornography while purporting to represent all porn. As a result, an entire genre of condomless pornography went unrepresented in the discussion: bareback porn, which portrays intentional unprotected anal sex between men. Excluding bareback porn from the lawsuit represented a missed opportunity for Vivid in its challenge of Measure B. There are several political messages underlying bareback porn unique to that genre that might have resulted in the

† The author received a law degree from the University of California, Berkeley, School of Law (Boalt Hall) in 2015. As a law student, the author worked as a Teaching Assistant in the First Year Legal Writing Program and served as a Senior Board Member of the Boalt Hall Women’s Association. The author also co-founded the Health Law Initiative, a student organization that partners with the East Bay Community Law Center and Bay Area hospitals to serve low-income populations related to their health, housing, and public benefit needs. She is grateful to Professor Melissa Murray, whose Regulating Sex & Sexuality course provided the impetus for this Comment. She would also like to thank Courtney Fraser for excellent editorial assistance.
Ninth Circuit applying strict scrutiny instead of intermediate scrutiny, and might have ultimately helped Vivid successfully defeat the Measure. Now, if the condom mandate is extended statewide, as the Aids Healthcare Foundation hopes it will, producers of bareback may unfortunately be without recourse—it seems unlikely that a court would extend First Amendment protection to bareback pornography after declining to extend protection to straight condomless pornography.

INTRODUCTION

In November 2012, Los Angeles County voters passed Measure B, also called the Safer Sex in the Adult Film Industry Act, which mandated condom use by all porn performers in adult films produced within county borders. The law went into effect on December 14, 2012, and already, two years later, the impact on the industry is evident. In 2012, FilmL.A., the nonprofit responsible for film permitting within the county, issued 485 permits to producers of adult films; in 2013, after the condom requirement went into effect, FilmL.A. issued a scant 40 permits. It is unknown at this time how many porn producers relocated their

shooting to neighboring counties or states, and how many filmmakers stopped paying for permits and continued production underground.

Supporters of Measure B heralded its passage as an important public health initiative to curb the spread of sexually transmitted infections (STIs) within the porn industry, as well as within the community at large. The porn industry, on the other hand, decried the measure as an invasion of personal liberties and a violation of First Amendment rights. Vivid Entertainment, a L.A.-based porn studio described as dominating the American porn industry, paired up with Califa Productions and two high-profile porn performers to challenge the constitutionality of the law.

Notably, the mainstream discourse related to the Measure B campaign and the lawsuit focused exclusively on issues as they pertained to straight porn while claiming to talk about all porn generally. Statements, materials, and legal arguments from both the Measure B supporters and opponents failed to consider whether the arguments they made were applicable to gay porn. The discussion surrounding safer-sex practices provides a pertinent example. In the “Argument in Favor” statement attached to the proposed Measure B ballot language, proponents declared, “Condoms are rarely used in the making of most adult films.” Opponents countered that claim in their rebuttal, claiming that “[e]very single actor is tested at least monthly.” Remarkably, neither of these two statements remotely captured the safer-sex practices in the gay male porn industry, where condom usage is prevalent, and where the number of actors who get tested for HIV and/or STIs is miniscule. Similarly, the mainstream media

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3. It is evident that at least some producers moved porn shoots out of Los Angeles County. One politician in nearby Ventura County even reported complaints from residents about the “moans and groans” coming from adult film sets that relocated to the area. Kurt Streeter, Porn Film Permits Sharply Decline in L.A. County, L.A. TIMES (Apr. 17, 2013), http://articles.latimes.com/2013/apr/17/local/la-me-04–18-porn-20130418.

4. See, e.g., Condoms for Porn Actors, supra note 2.


7. The terms “gay porn” and “straight porn” used throughout this comment describe the way in which pornography is commonly marketed and perceived. The use of this terminology is not intended to ignore the fact that many people who do not identify within the gay-straight binary still star in and/or consume porn labeled using this binary framework.


9. Tit. 11 ch. 11.39 note (2012) (Text of the Proposed Measure) (Rebuttal to Argument in Favor of Measure B).

coverage frequently focused on the “porn industry’s” reliance on a voluntary testing and monitoring scheme to curb the spread of HIV and STIs, though in reality, only straight porn producers opt into the regime.

Although the majority of male performers in gay porn wear condoms, within the gay male community and the gay porn industry there exists a subculture of “barebacking,” a term that refers to the intentional act of engaging in unprotected anal sex. The mainstream Measure B discourse notably lacked any mention of gay bareback porn. Although the focus on straight porn in this discussion was not surprising based on the respective locations of producers—straight porn dominates the Los Angeles area, whereas gay porn is split between San Francisco, Los Angeles, San Diego, and New York—there are negative


13. See, e.g., Brandon Andrew Robinson, The Queer Potentiality of Barebacking: Charging, Whoring, and Breeding as Utopian Practices, in UTOPIA: A CRITICAL INQUIRY INTO QUEER UTOPIAS 101, 101, 121 (Angela Jones ed., 2013). Although technically “barebacking” can refer to any kind of unprotected sex, the term originated in the gay community. See Barry D. Adam, Emergence of a Poz Sexual Culture: Accounting for “Barebacking” Among Gay Men, in THE STORY OF SEXUAL IDENTITY: NARRATIVE PERSPECTIVES ON THE GAY AND LESBIAN LIFE COURSE 207 (Phillip L. Hammack & Bertram J. Cohler eds., 2009). Although some authors use the term interchangeably to talk about gay and straight unprotected sex, see Christopher A. Ramos, Wrapped in Ambiguity: Assessing the Expressiveness of Bareback Pornography, 88 N.Y.U. L. REV. 1839, 1840 n.6 (2013), this Comment will use “bareback” exclusively to refer to intentional unprotected anal sex between gay men. Moreover, barebacking as a behavior is not necessarily synonymous with barebacking as an identity, see Perry N. Halkitis, Forward to MICHAEL SHERNOFF, WITHOUT CONDOMS: UNPROTECTED SEX, GAY MEN & BAREBACKING xiii, xv-xvi (2006), and this Comment will mostly consider arguments relevant to men who identify as members of the barebacking subculture. Finally, this Comment focuses on intentional unprotected sex, but there are many other reasons why gay men might not use condoms. In Emergence of a Poz Sexual Culture, author Barry D. Adam explores some of these reasons, including difficulty in maintaining an erection with condom use, Adam, supra note 13, at 211–12, depression and life stressors, id. at 212–13, alcohol and drug use, id. at 213, and the desire to communicate trust to a potential new partner, id. at 214. Adam also discusses the somewhat troubling “unspoken rule” that has emerged in bareback culture—that is, “many HIV-positive men read the willingness of their partners to engage in unprotected sex as evidence that the partners are already HIV-positive.” Id. at 216–17. Given the variety of factors that account for condom usage and non-usage, the “unspoken rule” may lead to additional unintentional high-risk sexual encounters. Id. at 217.

14. That is not to say, however, that alternative and/or queer publications ignored the connection between Measure B and the gay pornography genre. See, e.g., Nick Mattos, Los Angeles Measure B Brings Condom Controversy to Straight Adult Film Industry, PQ MONTHLY (Nov. 13, 2012), http://www.pqmonthly.com/los-angeles-measure-b-brings-condom-controversy-to-straight-adult-film-industry-9455 (discussing how Measure B “forced” the straight porn industry “to deal with a controversy that the gay adult film industry has engaged with for decades); Alex Garner, The Numbers Don’t Add Up on Measure B, HUFFINGTON POST (Nov. 5, 2012), http://www.huffingtonpost.com/alex-garner/the-numbers-dont-add-up-on-measure-b-b_2074065.html (discussing how lawmakers should turn their attention away from mandating condom use in the porn industry and focus instead on reducing new HIV transmissions between gay men and in communities of color).

15. Jay Barmann, Kink.com Begins Shooting in Las Vegas Ahead of Possible Condom Law, SFIST (July 15, 2014),
repercussions for the gay porn industry related to Measure B as well.

On December 15, 2014, the Ninth Circuit issued its ruling in the Vivid Entertainment appeal, holding that Measure B did not impinge on the First Amendment rights of producers or the performers.16 Because the lawsuit only focused on the straight porn industry, but the precedent relates to the expressive content of pornography in general, First Amendment arguments specific to the gay community and the barebacking subculture may never be seriously considered. Thus, if future efforts to expand the condom mandate statewide are successful, either through legislative action or the voter-initiated proposition system, producers and performers of bareback porn may effectively be without legal recourse.

Part I of this Comment will review the specific rules set forth in Measure B, and then discuss the arguments made by Measure B supporters and opponents during the campaign. Part II will examine Vivid Entertainment’s lawsuit challenging Measure B, including the Ninth Circuit appeal. Part III will briefly review the recent attempt to require condom use by porn actors statewide. Next, Part IV will explore a variety of issues and arguments related to condom use in gay porn that did not appear in the campaign materials, lawsuit, or mainstream media coverage. Finally, Part V will discuss the First Amendment argument specific to the barebacking genre of gay porn, which courts may never seriously consider now that Vivid’s First Amendment challenge failed.

I. MEASURE B

Measure B, or the Safer Sex in the Adult Film Industry Act, mandated condom use by performers in adult films17 in L.A. County, as well as created a complex regulatory process for adult film producers that included permitting, mandatory public health trainings, and warrantless administrative searches.18 The Measure passed by fifty-six percent.19

Under Measure B, a porn producer20 must submit an application, pay a fee, and complete a blood borne pathogen training course in order to receive a

16. See Vivid Entm’t, LLC v. Fielding, 774 F.3d 566, 582 (9th Cir. 2014).
17. Although the language of Measure B defined “adult film” more broadly, the Ninth Circuit upheld the District Court’s decision to narrow the definition such that “[a]n ‘adult film’ is defined as any film, video, multimedia, or other representation of sexual intercourse in which performers actually engage in vaginal, or anal penetration, by a penis.” See id. at 575.
20. Measure B defines “producer of adult film” as “any person or entity that produces, finances, or directs, adult films for commercial purposes,” meaning that Los Angeles County officials are unable to enforce the condom mandate with respect to amateur porn on the Internet. See L.A. CNTY., CAL., CODE tit. 11, ch. 11.39.075 (2012).
Permits are subject to suspension and revocation, and producers are subject to fines and/or jail time, if producers do not “require performers to use condoms during any acts of vaginal or anal sexual intercourse.” Moreover, producers must post clearly visible signs on production sites, notifying performers of the condom mandate. Measure B also granted L.A. County public health officials the right to inspect any porn production location, including locations where the Department suspects filming is taking place. Furthermore, Measure B permitted public health officials to immediately suspend an adult film production if the Department finds or reasonably suspects “any immediate danger to the public health or safety.”

Measure B proved to be contentious during the campaign leading up to the November 2012 election, and continues to be divisive even after its passage. Much of the initial debate surrounding Measure B focused on a public health versus individual liberties framework—and focused entirely, though not expressly, on the straight porn industry.

A. Measure B Supporters

Measure B was the brainchild of the AIDS Healthcare Foundation (“AHF”) and AHF’s founder and president, Michael Weinstein. AHF is a Los Angeles-based nonprofit focused on providing HIV prevention services and testing, as well as health care and advocacy for HIV/AIDS patients. Accordingly, the stated purpose of Measure B in the campaign literature was 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.” The campaign literature noted that most porn films do not utilize condoms—a statement true only of the straight porn industry—and focused on performers’ increased risk of contracting preventable sexually transmitted infections like chlamydia, gonorrhea, herpes, hepatitis, syphilis, and HIV.

21. Tit. 11, ch. 11.39.080.A.1. If a business entity, rather than an individual, applies for a permit, “all principals and management-level employees . . . including, but not limited to, all film directors” are required to complete the blood borne pathogen training course in order to satisfy permitting requirements. Id.
22. Tit. 11, ch. 11.39.110.A.
23. Tit. 11, ch. 11.39.120.C-D.
24. Tit. 11, ch. 11.39.090.B.
25. Tit. 11, ch. 11.39.130.
26. Tit. 11, ch. 11.39.110.E.
To be certain, AHF’s public health message contained many valid points. The California Medical Association reported that, between 2004 and 2008, health care workers in Los Angeles County diagnosed nearly 2,850 cases of sexually transmitted infections in approximately 2,000 adult film performers. Of those 2,000 performers with infections, seventy percent were women, and a quarter of the women suffered multiple infections. Moreover, during that same period, adult performers experienced rates of chlamydia and gonorrhea that were thirty-four to sixty-four times higher, respectively, than rates in the general public in Los Angeles. Though researchers concede that the increased rate may be due in part to more frequent STI screening by members of the adult film industry, porn performers are likely at an increased risk of contracting STIs.

In addition to focusing on the health of adult film performers, the supporters of Measure B argued that the health of the entire Los Angeles County would improve if porn actors were required to wear condoms on set. The campaign literature asserts that “[i]nfections acquired within the industry are spread to the larger community,” presumably alluding to unprotected sexual relations that porn performers have with non-performers in their personal lives, and giving voters a more tangible connection to the then-proposed law.

In sum, Measure B supporters almost universally focused on the public health implications at stake, specifically the implications for straight porn performers. According to AHF, the condom mandate would decrease adult film performers’ risk of contracting various STIs and HIV—and would protect the greater public from contracting STIs as well.

B. Measure B Opponents

Unlike proponents, opponents of Measure B vocalized several different rationales in their opposition efforts. Anti-Measure B campaign materials

32. Id.
34. Id.
35. However, the fact that there have been so few HIV transmissions within the porn industry is remarkable, and is something the supporters of Measure B seemed to ignore. In 2012, “[t]he industry’s medical consultants [said] that about 350,000 sex scenes ha[d] been shot without condoms since 2004, and H.I.V. ha[d] not been transmitted on a set once.” Donald G. McNeil Jr., Unlikely Model in H.I.V. Efforts: Sex Film Industry, N.Y. TIMES, Nov. 5, 2012, at D1. There have been a number of HIV transmissions connected to the porn industry in LA—however, each HIV transmission was later determined to have occurred off-set, or retesting determined an initial false positive. See, e.g., Michelle Castillo, Fourth Porn Actor Reportedly Latest to Contract HIV, CBS NEWS (Sept. 10, 2013), http://www.cbsnews.com/news/fourth-porn-actor-reportedly-latest-to-contract-hiv/. Regardless, industry HIV incidence rates remain significantly below non-industry incidence rates.
focused on arguments rooted in autonomy and liberty, Libertarian anti-big government ideals, consumer preference, and the economic impact of mandating condoms.37

Campaign materials distributed by Measure B opponents conceded that safe-sex practices could be beneficial, but forcefully asserted that these practices “shouldn’t be forced on adult film actors.”38 The Free Speech Coalition, the trade association for the adult film industry, opposed Measure B, stating that performers should have the right to control their bodies, and sex between consenting adults should not be restricted.39 Moreover, many individual adult film entertainers echoed this sentiment through social media, interviews, and personal blogs.40 Stoya, a porn actor who uses condoms in her personal life, remarked, “It’s my body. I decide what goes in and on it.”41 Another adult film performer, Amber Lynn, stated, “The idea of allowing a government employee to come examine our genitalia while we’re on set is atrocious.”42

Opponents also invoked anti-big government messages in their materials. Specifically, opponents analogized the condom requirement to New York Mayor Bloomberg’s “nanny state,” which restricted sugary sodas to small cups.43 Their rebuttal argument, distributed with the proposed ballot language, asked voters, “Do you like the idea of busybodies forcing people to do what is healthful for them?” and “Do we really want our tax dollars paying for government agents to go to movie sets and look at how sex acts are being performed?”44 Opponents also warned voters that “[the government] may regulate your business or your sex life the next time around.”45

Finally, in response to the public health concerns, campaign materials and porn industry representatives repeatedly cited to the alleged adequacy of the porn

38. Id.
42. Castillo, supra note 18.
44. Id.
45. Id.
industry’s self-imposed HIV/STI testing regime. Adult film actors working in the straight porn industry are required to submit to monthly testing, though some producers require tests every two weeks. The industry maintains a database of test results, and performers that test positive for HIV or STIs are not cleared to work. When an actor in the straight porn industry tests positive for HIV, “there is simply no work for them.” Though, ballot language touted the fact that “[i]n 8 years, not one [performer] has contracted HIV on a set anywhere in the U.S.”

Although many of these arguments implicitly pertain to both the gay and straight porn industries, mainstream opponents of Measure B failed to raise any arguments specific to the gay porn industry. Both gay and straight porn performers alike, for example, may share concerns about bodily autonomy and government interference by a “nanny state.” Opponents’ reliance on the effectiveness of the voluntary testing regime is inapplicable to the gay porn industry, however, as only straight porn performers face professional consequences for failing to test clean or failing to test at all. Likewise, condom use and non-use may have special connotations in the context of gay porn that are absent from the straight porn context, but these particular concerns were not addressed by Measure B opponents in the mainstream materials. Part II will discuss how the lawsuit challenging Measure B similarly elided concerns specific to gay porn while treating straight porn as if it represented the whole of the porn industry.

II. THE LAWSUIT

In January 2013, Vivid Entertainment; Califa Productions, a production and design company that produces adult films exclusively for Vivid; and Kayden Kross and Logan Pierce, two adult film performers, initiated a lawsuit to enjoin the enforcement of Measure B. Like the campaign materials and arguments, the lawsuit initiated by these straight porn producers and actors focused entirely on issues germane to the straight porn industry, specifically to the exclusion of issues in gay porn. Although the Measure B supporters retained their public health arguments, the parties challenging the measure switched their focus to a new issue: the First Amendment. As Vivid’s attorney Paul Cambria noted,

46. See, e.g., Tit. 11, ch. 11.39 note (2012) (Text of the Proposed Measure) (Rebuttal to Argument in Favor of Measure B); Campaign to Defeat Measure B Requiring Condoms on Adult Film Sets Launched by Broad Coalition, FREE SPEECH COALITION (Sept. 6, 2012), http://freespeechcoalition.com/campaign-to-defeat-measure-b-requiring-condoms-on-adult-film-sets-launched-by-broad-coalition/.
47. See, e.g., McNeil, supra note 35.
48. See, e.g., id.
50. Tit. 11, ch. 11.39 note (2012) (Text of the Proposed Measure) (Rebuttal to Argument in Favor of Measure B).
51. See infra Part V.
52. Complaint, supra note 6.
“[Measure B] dictates the content of a movie,” and “doesn’t allow a producer to portray conduct that is lawful.”  

A. The District Court Decision

At the district court level, the court upheld Measure B’s condom mandate. The court found that the government had a legitimate interest in reducing the spread of sexually transmitted infections, and that the actual harms caused by disease transmission in the adult film industry would likely trump Vivid’s First Amendment claims. In reaching its decision, the court cited to evidence submitted by the Los Angeles Department of Public Health documenting thousands of cases of STIs among porn performers, which the court found put both performers and the greater Los Angeles area at risk. However, the court ultimately blocked Los Angeles County health officials from entering suspected adult film production locations as the provision was too vague. Instead, the court required the county officials to obtain a warrant if they suspected porn was being illegally produced.

B. The Appeal

After the District Court denied Vivid’s request for an injunction, the production company appealed the constitutionality of the condom mandate to the Ninth Circuit. On December 15, 2014, the Ninth Circuit held that the District Court “did not abuse its discretion in declining to enjoin the enforcement of the condom mandate.” Although “[t]he Supreme Court has recognized that nearly all regulation of the adult entertainment industry is content based,” and “[c]ontent-based regulation of speech generally receives strict scrutiny,” the Ninth Circuit concluded that “Measure B regulates sexual speech in order to prevent the secondary effects of sexually transmitted infections.” Thus, the court found that Measure B’s condom mandate came within the Alameda Books exception, triggering intermediate scrutiny instead.

55. Id.; see also Shackford, supra note 18.
56. Vivid Entm’t, 965 F. Supp. 2d at 1135.
57. Id. at 1138.
59. Vivid Entm’t, LLC v. Fielding, 774 F.3d 566, 578 (9th Cir. 2014).
60. Id. (citing City of Los Angeles v. Alameda Books, Inc., 535 U.S. 425, 448 (2002)).
61. Id. (emphasis in original).
62. “Content-based regulation of speech generally receives strict scrutiny, but we have fashioned an exception, grounded in Alameda Books, that applies intermediate scrutiny if two
Despite the *Alameda Books* exception, Vivid argued that strict scrutiny should still apply because the condom requirement amounted to a total ban on its protected expression of portraying condomless sex. The court credited Vivid’s statements “that condomless sex differs from sex generally because condoms remind the audience about real-world concerns such as pregnancy and disease,” as well as Vivid’s argument that “films depicting condomless sex convey a particular message about sex in a world without those risks.” However, the court concluded that it was “unlikely that viewers of adult films would understand that message.” Accordingly, the court evaluated Vivid’s expression not as the portrayal of condomless sex specifically, but instead as the general erotic message of pornography.

Having defined Vivid’s expressive content as merely the general erotic message common to all pornographic films, the court analogized the condom mandate to the requirement, upheld in *City of Erie v. Pap’s A.M.*, that erotic dancers wear pasties and G-strings. The court concluded that “[t]he requirement that actors in adult films wear condoms while engaging in sexual intercourse might have ‘some minimal effect’ on a film’s erotic message, but that effect is certainly no greater than the effect of pasties and G-strings on the erotic message of nude dancing.” Because the condom mandate imposed a de minimis restriction instead of banning the relevant expression completely, the court applied intermediate scrutiny.

Accordingly, the Ninth Circuit held that the District Court did not abuse its discretion in concluding that Measure B’s condom requirement would likely survive intermediate scrutiny. First, Vivid did not contest that the government had a substantial interest in reducing sexually transmitted infections among adult film performers, as well as stymieing the spread of STIs to the general public. Second, rejecting Vivid’s assertions that the condom requirement was

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63. *Id.*
64. *Id.*
65. *Id.* at 579.
66. *Id.* (“To determine whether conduct is protected by the First Amendment, we ask not only whether someone intended to convey a particular message through that conduct, but also whether there is a ‘great’ likelihood ‘that the message would be understood by those who viewed it.’” *Id.* (citing *Spence v. Washington*, 418 U.S. 405, 410–11 (1974) (per curiam)).
67. *Id.*
68. *Id.;* see *City of Erie v. Pap’s A.M.*, 529 U.S. 277 (2000).
69. *Vivid Entm’t.*, 774 F.3d. at 580.
70. *Id.* In dicta, the court also noted that it might still be able to apply intermediate scrutiny even if the relevant expression were the depiction of condomless sex because Measure B “does not prohibit the depiction of condomless sex, but rather limits only the way the film is produced.” *Id.* at 579 n.6.
71. *Id.* at 580.
duplicative of the voluntary HIV testing and monitoring scheme in place in the industry, the court held that the condom requirement was narrowly tailored. Specifically, the court credited the district court’s finding that the testing scheme was ineffective given the high incidence of STIs within the adult film industry. Finally, the court found that Measure B’s condom requirement did not unconstitutionally foreclose alternate channels of communication because “Measure B is a minimal restriction on Plaintiffs’ expression that ‘leaves ample capacity to convey [Plaintiffs’] erotic message.’”

III. THE STATE-WIDE INITIATIVE

While the lawsuit and the appeal made their way through the courts, California state lawmakers sought to expand the L.A. County-based condom mandate statewide. Assemblyman Isadore Hall of Los Angeles introduced AB 1576 on January 30, 2014. The bill would have made condom use mandatory for vaginal and anal intercourse, as well as require regular STI and HIV testing, for working adult performers across the state of California. In November 2014, AB 1576 hit a budgetary ceiling, triggering an automatic suspension of the bill. Lawmakers could have amended the bill, but did not address the budgetary issues nor vote the bill out of committee, “essentially killing [the legislation], at least for [the current] legislative session.”

Despite the bill’s legislative defeat in 2014, the fight for a statewide condom mandate is not likely over. Michael Weinstein, the AIDS Healthcare Foundation founder and CEO who sponsored and campaigned for Measure B, was quoted after the bill’s defeat: “Regardless of whether AB 1576 became law this year, condom use already is—and has been—the law in California under existing Cal/OSHA authority.” Although it is unclear at this point whether the state assembly will pursue another bill of this type next session, and there is

72. Notably, very few gay porn producers rely on the voluntary testing system. Accordingly, this is another indicia of the lawsuit only focusing on the practices and issues relevant to the straight porn industry. See Testing and Condoms, supra note 10.
73. Vivid Entm’t, 774 F.3d at 581–82.
74. Id. at 581.
75. Id. at 582 (quoting City of Erie v. Pap’s A.M., 529 U.S. 277, 301 (2000)).
78. Id.
80. Id. A prominent argument throughout the debate stems from the idea that existing Cal/OSHA authority already requires the use of condoms in pornography. See, e.g., Klausner & Katz, supra note 33, at 649. The debate turns on whether porn performers are “employees” or “independent contractors.” Id. at 650. This Comment does not address this Cal/OSHA argument.
some evidence of waning interest, Weinstein made clear after the Ninth Circuit ruling came down that he is still committed to a statewide condom mandate in pornography. According to Weinstein, AHF “is going forward with a petition drive to put the issues before voters if the Legislature doesn’t act.” In fact, AHF filed a final draft of the proposed ballot measure with the State of California on February 17, 2015. AHF must collect 365,880 signatures by September in order to get the proposed measure on the November 2016 ballot.

Moreover, a single HIV diagnosis in the adult film industry in Las Vegas, Nevada, in the fall of 2014 could be pivotal in AHF’s push to expand the condom mandate statewide in California, according to some commentators.

Porn production studios in California threatened to move their business to Las Vegas both during the Measure B campaign and during legislative efforts to expand the mandate statewide. Nevada officials, however, announced their intention to apply brothel rules to the porn industry—including regular HIV/STI testing, health exams, and condom use—which would rule out Las Vegas as a viable alternative production location. California producers would then have few other options, and the threat of picking up and moving to another state would ring hollow, making the proposed statewide condom mandate a real possibility.

IV. GAY BAREBACK PORN

As discussed, the Measure B discourse entirely excluded First Amendment concerns specific to the gay bareback genre of pornography. This Part will first briefly describe the bareback porn industry, and then discuss the expressive arguments that Measure B opponents could have raised, including that barebacking has the potential to liberate the gay community from both the politics of respectability and the stigma of HIV/AIDS.

81. Although the Los Angeles Times supported an L.A. city ordinance that would have mandated condom use, for example, the news outlet came out against Measure B and the statewide initiative, claiming that “there’s no evidence that the law has had its intended effect,” and that the “government is ill-equipped to mandate and enforce the use of condoms on adult film sets.” Condoms for Porn Actors, supra note 2.
82. Rogers, supra note 2.
84. Id.
86. Id. Producers at Kink.com even embarked on an “exploratory mission” in Las Vegas—producers rented out an office in Las Vegas and did two porn shoots—in July 2014 while the statewide legislation was pending. Barmann, supra note 15.
87. Elias, supra note 85.
88. See Michael McNamara, Cumming to Terms: Bareback Pornography, Homonormativity, and Queer Survival in the Time of HIV/AIDS, in THE MORAL PANICS OF SEXUALITY 226, 239
A. Background

Unlike the straight porn industry—where HIV and STI testing are paramount—testing in the gay porn industry is much less common. Instead, performers in approximately 80 percent of anal sex scenes in gay pornography use condoms. Interestingly, most gay porn producers do not even ask performers about their HIV status. Producer Kent Taylor of Raging Stallion Studios noted, for example: “We don’t currently ask [about HIV status]. We assume everyone is [HIV-positive], and if they say they are not, we assume they are lying.” It is estimated that somewhere between thirty and fifty percent of gay porn performers are actually HIV-positive. Though, unlike the straight porn industry, HIV status in the gay porn community is “treated as a closely guarded secret.” Quite simply, the gay porn industry would not survive if it shut out HIV-positive performers, whereas there is no work in straight porn for HIV-positive performers, with or without condoms.

Although bareback porn accounts for approximately thirty percent of all gay porn produced, its popularity far exceeds that percentage. Videos depicting bareback sex on MaleDVD.net, the “Netflix” of the gay porn industry, generally equate to half of the top twenty video rentals. By other accounts, “bareback videos now outperform scenes of condom usage on every site that carries them—and most of them now do.” Accordingly, bareback films are at least as popular, if not more so, than gay porn depicting sex with condoms.

(Breanne Fahs et al. eds., 2013) (“The queer movement generally relies upon what some have come to call a politics of respectability that relies upon the presentation of specific queer subjects seeking assimilation and inclusion into the contemporary state apparatus.”).

90. Id.; Gavin, supra note 10.
91. Grudzen et al., supra note 29, at S154. Researchers in the study analyzed randomly selected adult films from Adult DVD Empire, which they identified as the “rental site with both the greatest number of DVDs and the largest variety of production companies for both heterosexual and homosexual adult films.” Id. at S153. The fifty heterosexual films the researchers analyzed came from forty different production companies of varying sizes, while the fifty homosexual films analyzed came from thirty-one companies. Id. at S154. According to the same study, condoms were used for penile-vaginal intercourse in three percent of heterosexual scenes and ten percent in heterosexual penile-anal intercourse scenes. Id.
93. Id.; Gavin, supra note 10.
95. Gavin, supra note 10.
98. Id.
B. Arguments Missed by the Straight-Focused First Amendment Framework

Despite the growing prevalence of bareback pornography, there was surprisingly no mention of gay sex and/or gay pornography in the discourse surrounding Measure B, except to note that condom use in gay porn was the norm. This section will explore two arguments specific to the gay community that help explain the significance of unprotected sex within the barebacking porn genre, as well as in the barebacking subculture. Both the argument that the bareback subculture liberates the gay community from the politics of respectability, and the argument that the bareback subculture helps distance the gay community from the stigma and shame associated with HIV/AIDS, represent missed opportunities related to political messaging and legal arguments in the fight against Measure B’s condom mandate.

1. Liberating the gay community from the politics of respectability

The gay community has succeeded in gaining many new civil rights in recent years, and much of the community’s success rests on assimilationist practices that say that LGBT people are just like their straight counterparts. While this approach has been incredibly successful in ensuring new rights for LGBT individuals, it has caused a schism within the gay community between those who see assimilationist practices as a means to further equality and those who wish to preserve the transgressive nature of the gay community. This Section will explore that divide and discuss the ways in which the bareback community consciously engages in unsafe sexual practices to distance itself from

100. The legalization of same-sex marriage is, perhaps, the biggest example of a newly acquired right by LGBT individuals in the United States. See Obergefell v. Hodges, No. 14-556, 2015 WL 2473451 (U.S. June 26, 2015).


102. See, e.g., A ‘Queer’ Argument Against Marriage, NPR (June 10, 2010), http://www.npr.org/templates/story/story.php?storyId=127740436 (rejecting the idea that LGBT individuals should “conform to th[e] narrow notion of a long-term monogamous partnership sanctioned by the state,” and arguing that the same-sex marriage movement “limits people’s options rather than increasing them”). The Transgender Law Center’s “More than Marriage” campaign also provides an example of gay, transgender, and queer individuals rejecting the idea to assimilate for the sake of marriage in an effort to raise awareness of other—arguably more basic—needs within the LGBT community. See Dana Beyer, Waiting for the Supremes: There is “More than Marriage” on the Equality Agenda, HUFFINGTON POST (June 13, 2013), http://www.huffingtonpost.com/dana-beyer/waiting-for-the-supremes-_b_3430813.html.
The politics of respectability that now permeate the “gay agenda.”

The gay community has fought long and hard for equality under the law, as well as in society. The gay community first sought basic safety and antidiscrimination statutes, for example. As professor and author Tim Dean describes, “For decades we have battled stereotypes of queers as homicidal or suicidal... We have argued that homosexuals are not doomed, not unproductive, not sick, not serial killers, and no more violent than heterosexuals.” 103 Although those fights are not yet completely won, more recently came the movement to legalize gay marriage, serve openly in the military, and adopt children. Cultivating and presenting a model “good gay citizenry” 104 deserving of those basic rights ultimately became crucial to the fight. Accordingly, one approach to the gay rights movement relies upon the outward presentation of specific, “respectable” gay subjects who “seek[... assimilation and inclusion] into contemporary societal practices.” 105 Tipping his hat to the plaintiffs carefully selected in the high-profile same-sex marriage lawsuits, McNamara describes the role model of the gay rights movement as a “well-dressed, prosperous, white professional.” 106 Regardless of which rights the LGBT community has fought for, much of it relied on playing up the respectability of gay citizens in this manner. 107

Conversely, one rationale underlying the barebacking subculture is the transgressive, “outlaw” nature of the practice, which drives many individuals to participate in and identify as members of the barebacking community. 108 The


104. See STEVEN SEIDMAN, BEYOND THE CLOSET: THE TRANSFORMATION OF GAY AND LESBIAN LIFE 15–16 (2002) (discussing how the “rights-oriented assimilationist... agenda” seeks to “bring[... gyps into the circle of good sexual citizens.”).

105. McNamara, supra note 88, at 239. Issues of race and class, among other axes of oppression, relate directly to this assimilationist approach. Specifically, when it comes to the relationship between sex and respectability, middle-class, white, monogamous, heterosexual couples receive the most legal and social protections. See Gayle Rubin, Thinking Sex: Notes for a Radical Theory of the Politics of Sexuality, in PLEASURE AND DANGER: EXPLORING FEMALE SEXUALITY (Carole S. Vance ed., 1992). As one loses more markers of respectability and moves further away from what Rubin calls the “charmed circle,” it gets noticeably more difficult to assimilate into mainstream, “respectable” society. Id. Accordingly, it makes sense why the LGBT assimilationist model focuses on white, middle-class, monogamous gay couples. See id.


107. Notably, the tendency to use “respectable” gay subjects to advance the rights of LGBT people does not just come from within the LGBT community. In striking down Texas’ sodomy laws, the Court in Lawrence v. Texas, for example, supposed that the defendants were in a long-term, monogamous, and committed relationship, see Lawrence v. Texas, 539 U.S. 558, 567 (2003), when in fact, the defendants were not in a relationship at all, see DALE CARPENTER, FLAGRANT CONDUCT: THE STORY OF LAWRENCE V. TEXAS: HOW A BEDROOM ARREST DECRIMINALIZED GAY AMERICANS 90–91, (2012).

108. See DEAN, supra note 103, at 9; Robinson, supra note 13, at 104; MICHAEL SHERNOFF, WITHOUT CONDOMS: UNPROTECTED SEX, GAY MEN & BAREBACKING 92 (2006).
bareback subculture, therefore, stands in direct opposition to “the politics of respectability” in the gay community—and the subculture perhaps even arose in response to the idealized respectable gay citizen. As Michael Shernoff describes, “the goals of organizations fighting for gay rights have shifted away from gay men radically transforming American society to now assimilating into it in conservative and heteronormative ways.”109 The rise of the barebacking identity, and its consciously unsafe sex practices, operates in many ways as a response to this assimilationist shift that occurred within the gay community.

Many within the barebacking community have spoken about the need to remain transgressive in an increasingly normalized gay community. To Paul Morris, the owner of barebacking studio Treasure Island Media, “sex and homosexuality are meaningful only if they’re transgressive, unreined, risky.”110 Morris “calls HIV-negativity ‘the new virginity.’”111 The following statement from Morris further explains his desire to operate a bareback porn studio:

I want to make porn that comes from a place even I don’t understand. Porn from a place that’s wild, forbidden, that’s absolutely secret. That to me is gay. Not filtered through what the government says you should do. Not according to what the industry says you should or should not do.112

Similarly, to former porn performer Will Clark, barebacking “reflects our need to be edgy and defiant in a world were being gay used to be edgy and defiant and every day has become more and more commonplace.”113 These statements by Morris and Clark provide an important contextual understanding about what drives both the barebacking community and the porn genre.

Because the barebacking subculture risks sullying the “respectability” of gay individuals—that is, visibly identifying gay men that contradict the carefully controlled, respectable model of gay identity—there is significant pressure from within the gay community to condemn barebacking. McNamara describes:

[T]he bareback porn panic effectively singles out particular gay men and their practices to disable a radical critique of an assimilationist neoliberal gay and lesbian political agenda modeled on a politics of respectability. Rather than opening up a . . . dialogue about sexual freedom and the limits of sexual citizenship, [several] moralizing examples . . . demonstrate how the demonization of particular members of an already marginalized community serve to bolster the normative political agenda of their more respectable constituents as they fight for neoliberal inclusion in the normative national

109. SHERNOFF, supra note 108, at 93.
111. Id.
112. Id.
113. Id.
body.  

One of the “moralizing examples” to which McNamara refers is ex-barebacking porn star Brent Corrigan, who later came out against barebacking and joined an STI prevention group founded by Dr. Terry Gerace.  

In an interview, Dr. Gerace depicted Corrigan’s disavowal of bareback porn “as a narrative of redemption that posits bareback sex (and by extension bareback porn) as infantile, immature, and immoral.”  

Dr. Gerace recounted Corrigan’s change of heart, noting that Corrigan “has very publicly apologized for his past appearances in films depicting unsafe sexual practice.”  

By narrating the story in this manner, Dr. Gerace portrayed unsafe sexual practices “as so inappropriate and harmful that they necessarily must elicit a public apology.”  

Accordingly, the interview operates to pathologize and infantilize gay male desire.

Because the mainstream gay community positions barebacking as antithetical to the push for gay rights, the barebacking community is further marginalized. Dean describes the sentiment rampant in the gay community: “[g]ay people don’t need this kind of publicity,” because it “jeopardizes public acceptance of homosexuality.”  

Excluding barebacking and bareback pornography from the “citizenship machinery” of the gay rights movement “add[s] a new layer of political shame” to gay men’s sexuality in that barebakers’ identities as transgressive people threaten the entire gay community’s chance of inclusion.

Posing this “threat” might, in fact, be precisely the point of barebacking. Rebelling against the assimilationism and homonormativity of the mainstream LGBT agenda is one rationale for the existence of the barebacking subculture. By engaging in unprotected sex, many gay men hope to restore some of the non-
normative, risky, and transgressive associations that once imbued gay culture. 123
In that way, barebacking and depicting bareback sex in porn both serve a political purpose.

2. Liberating the gay community from the stigma of HIV

Not surprisingly, gay bareback sex and pornography are typically subject to greater stigma and societal judgment compared to straight condomless sex and pornography. This Section will explore the burden placed on gay men related to safe sex practices—both from society in general and members of the gay community—and discuss how the bareback subculture consciously pushes against the increased stigma of HIV associated with the gay community by engaging in unprotected anal sex, regardless of the risk of HIV transmission.

Since HIV/AIDS emerged in the United States, the disease has been closely associated with the gay community. 124 Despite a visible and monumental shift toward safer sex practices within the gay community, gay men continue to experience increased stigmatization as carriers of the disease, and are subject to a double standard when it comes to safe sex practices. As gay advocate Mark S. King remarked:

There was an unspoken agreement that gay men made amongst ourselves during the AIDS crisis of the 1980’s. We accepted that we would use condoms—at the time it was the only “safer sex” option that existed—until whatever time the crisis abated. But none of us could have fathomed that, thirty years later, we would still be held to these strict and oppressive guidelines. 125

Despite decades of safer sex campaigns within the gay community, a declining incidence rate of HIV in the United States, and new medications that control HIV, unprotected gay sex is still seen as more morally depraved than condomless straight sex. 126


124. In fact, AIDS was first referred to as Gay Related Immune Deficiency, or GRID. SHERNOFF, supra note 108, at 42.

125. King, supra note 123.

The double standard related to safe sex practices is evident from self-imposed standards within the porn industry. Corbin Fisher, for example, a porn studio located in Las Vegas, requires performers in gay sex scenes to wear condoms, whereas condom usage is not required of performers in straight scenes on Corbin Fisher’s sister sites. Similarly, San Francisco-based Kink.com “has long maintained a condom-only policy for gay shoots, and condom-optional for all other shoots.” Of course, Measure B does not discriminate against the gay porn industry, and requires that straight pornographers mandate the use of condoms in all films made in L.A. County, but historically, the porn industry required only gay men to wear condoms.

Because we now understand the grave risks of HIV/AIDS, unprotected sex by gay men and bareback porn are inconceivable to many. From one point of view, “after all the deaths from AIDS complications and the struggle to curb HIV . . . [bareback] films seemed to betray everyone who had fought the fight.” Moreover, there is concern that bareback sex depicted in porn serves to “break down community norms supporting condom use,” and that it has the potential to promote sexual behaviors that lead to HIV transmission.

In addition to eliciting feelings of betrayal and concern, many commentators view bareback sex and pornography as an act of violence and/or death. Gay Journalist Charles Kaiser stated that “[a] person who is HIV-positive has no more right to unprotected intercourse than he has the right to put a bullet through another person’s head.” In a similar vein, playwright Larry Kramer asked, “Has it never, ever occurred to you that not using a condom is tantamount to murder?” In fact, deliberately transmitting HIV to another person is a felony in the majority of states. Relatedly, others have remarked that the bareback subculture amounts to “gay men creating death camps for

Id. Whether the one-year ban reflects continued discrimination or is based on sound science remains hotly contested, see id., but the fact that the lifetime ban stayed in place until 2014 speaks volumes about our views of HIV and its relationship to men who have sex with men.


130. SHERNOFF, supra note 108, at 61.

131. See Conner Habib, By the Time You’ve Seen It, It’s Too Late, RUMPUS MAG. (Jan. 31, 2012), http://therumpus.net/2012/01/by-the-time-you’ve-seen-it-it’s-too-late/.

132. DEAN, supra note 103, at 2.

133. Id. at 2–3. Although HIV has historically been viewed as a death sentence, as demonstrated by the statements of Kaiser and Kramer, the successful treatment of HIV/AIDS with antiretroviral therapy (ART), as well as the preventative use of antiviral Truvada, has started to change this perception. See Saundra Young, HIV No Longer Considered Death Sentence, CNN (Dec. 1, 2013), http://www.cnn.com/2013/12/01/health/hiv-today/; Peter Staley & Matthew Rose, Antivirals Like Truvada Made it Possible for Gay Men to Love Without a Sense of Dread, GUARDIAN (Feb. 16, 2015, 8:20 AM), http://www.theguardian.com/commentisfree/2015/feb/16/truvada-medicine-hiv-aids-gay-men.

134. See DEAN, supra note 103, at 6 n.10.
themselves.” And, bareback porn has been equated with the making of child pornography and snuff films due to producers allegedly taking advantage of naïve participants.

In response to the stigma placed on the gay community associated with HIV/AIDS, the community again seeks to self-regulate with respect to safer sex practices. In addition to the raced, classed, and gendered “good gay citizen” discussed above, McNamara argues that the model gay citizen is also sexualized: “The respectable queer of the gay and lesbian movement also adheres to the mature, responsible, and healthy sexuality defined by the safer-sex campaign.” Specifically, the public health model equates safe sex and rationality, thus positioning people with HIV as irrational actors and creating stigma around HIV-positive status because no rational person would seek death. Thus, although “[s]afe-sex porn says that on the one hand you should cut loose and fuck however you want . . . you shouldn’t dare do it without treating your partner like he has a lethal disease.” Accordingly, the sexual health framework around safe sex “promotes the subordination of sexual instincts and desires to reason.”

Much like the barebacking community pushed back against the model gay citizen discussed above, barebacking rejects the stigma associated with HIV. As Tim Dean described, “[b]areback subculture reclaims gay sex as sexuality by relegating epidemiological concerns to secondary status.” Notably, sex without condoms in the gay community never stopped, not even during the height of the AIDS crisis; the difference now is that this subgroup is publically owning their sexual desires and practices without shame. Members of the subgroup and those associated with bareback porn production repeatedly emphasize that barebackers are not in denial about the realities of HIV/AIDS, nor is the barebacking community naively attempting to return to a pre-AIDS version of gay sex. Instead, members of the barebacking subgroup refuse to be intimidated by HIV or let fear of the disease control their sex lives. Barebackers can even buy shirts depicting the biohazard symbol associated with barebacking, allowing members to “proudly market [their] bod[ies] as a biological weapon, embracing the fears that many HIV-negative people harbor about those who are HIV-positive.”

135. Id. at 3.
136. King, supra note 99.
137. McNamara, supra note 88, at 239.
138. Robinson, supra note 13, at 102, 110.
139. Villarreal, supra note 127.
140. Robinson, supra note 13, at 102.
141. DEAN, supra note 103, at 11; see also Robinson, supra note 13, at 104 (“Barebacking reclaims gay sex as sexuality and relegates HIV concerns to secondary status.”).
142. SHERNOFF, supra note 108, at 4, 12.
143. See, e.g., DEAN, supra note 103, at 5.
144. Id. at 21.
Bareback porn thus “caters to the powerful and very real desire to have sex without fear.” Commentators often cite to Dawson’s 20 Load Weekend, one of the first bareback gangbang porn films produced after the emergence of HIV/AIDS, as one of the most influential pornographies of all time. As gay rights advocate Mark S. King noted, “This was not a film that was made in the absence of HIV, but was created because of HIV. You can practically hear a disembodied voice whispering, ‘Watch closely. This is how gay men have sex now. That is where semen belongs. Fuck AIDS.’” Similar commentary has been made about bareback films in general: “Many of these films fetishize semen so graphically that the message is unmistakable: a loud ‘fuck you’ to the plague that once terrified us all.” In declining to let fear of HIV control their sex lives, members of the barebacking subculture reclaim their sexuality without letting shame, anxiety, or fear of death influence their every sexual encounter.

Although there are many pressures on gay men to practice safe sex by using condoms, including both pressures from a society that sees gay men as carriers of HIV/AIDS and pressures from within the larger gay community to eradicate their association with HIV/AIDS, the truth is that a growing percentage of gay men are now engaging in bareback sex and/or are identifying as members of the barebacking subculture. Instead of letting HIV control their sex lives and sexuality, these men are actively working to reclaim their sexuality by engaging in unprotected sex. Bareback porn captures and disseminates this powerful message.

V. GAY BAREBACK PORN & MEASURE B

In light of these issues relevant to bareback sex and pornography that never surfaced in the discussion surrounding Measure B, this Part will discuss how Vivid’s First Amendment challenge to Measure B may effectively preclude a similar challenge by bareback porn producers if the condom mandate were to extend statewide. Under a First Amendment analysis, although bareback pornography arguably contains different expressive content than straight condomless pornography, it seems unlikely that a court would afford constitutional protection to the depiction of unprotected gay sex after the Ninth Circuit refused to do so for straight condomless porn.

As discussed above, the discourse surrounding Measure B, as well as the

145. Villarreal, supra note 127.
146. King, supra note 99.
147. Id.
148. Gavin, supra note 10 (internal quotation marks added).
149. In a 2012 study of gay and bisexual men who use apps like Grindr, for example, researchers found that nearly half of the respondents engaged in unprotected sex, even though eighty percent admitted they were knowledgeable about how HIV is transmitted. Gay Men Using Grindr, Other Apps To Meet Men On Barebacking: CHN ‘Zero Feet Away’ Poll, HUFFINGTON POST (Jan. 22, 2013), http://www.huffingtonpost.com/2013/01/22/gay-men-grindr-barebacking-frequency-poll-_n_2527856.html.
Ninth Circuit’s analysis in *Vivid Entertainment, LLC v. Fielding*, focused exclusively, though not expressly, on the straight porn industry. This was evident given that all of the plaintiffs in the case participated solely in the straight porn industry. Moreover, the manner in which the parties and the court discussed the “porn industry”—often as if the discussion included gay, straight, and other genres of pornography—revealed that they actually only spoke of straight porn. Notable examples include discussions of HIV transmission rates being almost nonexistent, as well as discussions surrounding the opt-in HIV/STI testing and monitoring regime.\(^{150}\) The parties spoke as if these facts were true of the porn industry as a whole, when in reality, these facts only describe the straight porn industry.

If a bareback producer challenged a condom mandate, however, a court could arguably reach a different conclusion if it took into consideration the rationales underlying bareback sex and pornography. First, unlike Vivid’s claim, a challenge by a gay bareback porn producer could reasonably be subject to strict scrutiny analysis instead of intermediate scrutiny. In response to Vivid’s argument that strict scrutiny should apply because Measure B amounted to a complete ban on protected expression, the Ninth Circuit noted that Vivid’s “argument presupposes that their relevant expression for First Amendment purposes is the depiction of condomless sex.”\(^{151}\) Though the court seemingly accepted Vivid’s argument that condomless porn conveys a message about sex in a world without risks of pregnancy and disease, the court concluded that viewers of adult films were unlikely to understand that message.\(^{152}\) Accordingly, the court determined that Vivid’s expressive content amounted to the general erotic message inherent in adult films.\(^{153}\)

In the context of gay bareback porn, however, viewers of the videos would be more likely to understand the messages behind the condomless sex scenes. As discussed above, bareback porn visually depicts the subculture’s resistance to the politics of respectability related to the gay rights movement, as well as the attempt to free the subculture from the stigma surrounding HIV. At the most basic level, viewers of bareback porn are arguably aware of the history of HIV within the gay community and understand that bareback sex depicted in porn is a transgressive act.\(^{154}\) Accordingly, a court could more readily find the expressive

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150. See, e.g., *Vivid Entm’r*, 774 F.3d at 581.
151. Id. at 578.
152. Id. at 579–80.
153. Id. at 579.
154. Some commentators argue that members of the LGBT community and other consumers of gay porn, particularly young gay men removed from the horrors of HIV/AIDS in the 1980s, do not fully appreciate the significance of depicting barebacking in adult films. Moreover, the advent of Truvada has likely increased the disconnect between bareback sex and HIV transmission for many more people. See, e.g., Tim Murphy, *Sex Without Fear*, N.Y. MAG. (July 13, 2014), http://nymag.com/news/features/truvada-hiv-2014–7/. At a minimum, though, a viewer of gay bareback porn is significantly more likely to understand the transgressive and risky nature of the unprotected sex depicted in the film as compared to a
content of bareback pornography to be the depiction of condomless sex specifically. By defining bareback producers’ expression as the depiction of condomless sex, strict scrutiny would then be appropriate because a condom mandate would ban bareback producers’ relevant expression completely—and a condom mandate affecting the gay barebacking genre of pornography would be much more likely to fail under strict scrutiny analysis.

Second, even if a court declined to apply strict scrutiny, a First Amendment claim by bareback porn producers could defeat the condom mandate on the third prong of intermediate scrutiny analysis, specifically that the law “does not unreasonably limit alternative avenues of communication.”155 Prior to the Ninth Circuit’s decision, one author predicted that Measure B would fail under the third prong because of bareback porn,156 though as demonstrated, the Ninth Circuit did not consider bareback porn in its analysis. Birkhold supposed that Measure B would fail the third prong of intermediate scrutiny because the measure “bans the production of all bareback scenes, leaving no alternative modes of communication.”157 According to Birkhold:

Engaging in and depicting bareback sex is important political and artistic expression, particularly within the gay community. Bareback sex emblemizes sexual freedom and an ‘outlook of sexual life that, in important ways, has long shaped an animated gay male sexuality as thought and practice. In short, barebacking is a sexual identity that communicates uniquely significant sexual, personal, and political ideas.158

These social and political meanings behind bareback expression only exist in gay porn.159 Further, because there is no other means to communicate the “hypermasculinity represented in [gay] barebacking—namely, piggery and nasty dangerous play”—Birkhold predicted that the law would fail constitutional scrutiny.160 Notably, Birkhold’s analysis mirrors the discussion above about the politics of respectability and the stigma associated with HIV.

A statewide mandate subjecting all bareback studios to the condom mandate would seriously impair the genre’s ability to present alternative political

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155. *Vivid Entm’t*, 774 F.3d at 580 (quoting Gammoh v. City of La Habra, 395 F.3d 1114, 1125–26, amended on denial of reh’g, 402 F.3d 875 (9th Cir. 2005)). In determining whether a restriction of speech survives intermediate scrutiny, courts look to see if the restriction on speech (1) furthers a substantial governmental interest, (2) is narrowly tailored, and (3) does not unreasonably foreclose alternate channels of communication. *Id.*


157. *Id.* at 1823. Though, Measure B only applies to commercial porn studios, so non-commercial producers of pornography will remain free to post bareback films on the Internet. See *supra* note 21.

158. Birkhold, *supra* note 156, at 1820 (internal citations omitted).

159. See *id.* at 1823–24.

160. *Id.*
messaging. Bareback studios could no longer depict the transgressive act of condomless anal sex in an attempt to counteract the proliferation of the “good” or “respectable” gay citizen in mainstream society. Similarly, bareback producers would be unable to actively disassociate gay sex from the stigma of HIV/AIDS with the message that, just like straight couples who regularly have unprotected sex without shame, sex and intimacy between gay men is not wrong or depraved. If bareback studios were required to force their actors to wear condoms under a mandate, the presence of condoms in gay sex scenes might reinforce the connection between gay men and HIV, as well as the idea that in order for gay men to be respectable, they must practice safe sex.

Ultimately, bareback pornography’s depiction of unprotected anal sex conveys political messages and social commentary in a way that condomless straight porn does not. Bareback sex conveys messages about the transgressive nature of the gay community, the subculture’s rejection of HIV/AIDS as factors controlling their sexuality, and the liberation of gay men from the politics of respectability that now controls the mainstream LGBT assimilationist strategy. Although there are significant differences between the straight porn industry contemplated by the Ninth Circuit and the porn depicting gay bareback sex, it seems unlikely that a court would exclude only gay bareback sex from a less-than-hypothetical statewide condom mandate while keeping straight porn under the purview of the mandate.

CONCLUSION

The discourse surrounding Measure B, the lawsuit challenging the condom requirement, and the attempt to mandate condoms statewide only focused on the straight porn industry; but a condom mandate also impinges on the expressive rights of gay bareback porn producers. The Ninth Circuit’s December 2014 decision found that the depiction of condomless sex was not protected expression, though the court effectively only contemplated straight pornography. Although bareback porn conveys political and social messages absent in straight condomless porn, and should be subject to a distinct constitutional analysis, it is unlikely that a court would now recognize and protect the depiction of gay bareback sex as expressive content under First Amendment when it declined to do so for straight porn.

Ironically, had Vivid teamed up with producers and/or performers in bareback pornography—or at least contemplated how Measure B might affect bareback porn—in its challenge of the condom mandate, and made the compelling First Amendment arguments related to the political messaging present in bareback porn, the lawsuit might have succeeded. Of course, it is possible that the Ninth Circuit would have still declined to extend First Amendment protection, but Vivid’s legal argument would have been stronger because bareback porn expresses the transgressive nature of unprotected gay sex in a way that straight porn does not.
It is unclear what kept bareback producers out of the lawsuit, as well as what kept the topic of bareback porn out of the discussion generally. There are possible benign rationales for the focus on the straight porn industry. First, Measure B originated in Los Angeles County—the hub of the straight porn industry—so it is possible that the Measure was simply designed with straight porn in mind, and that the affected producers and performers in the county were primarily engaged in straight porn. Second, condoms are used in a full eighty percent of sex scenes involving anal sex between men—a percentage already so high that Measure B could have been seen as considerably less relevant to a segment of the industry where voluntary condom use is so prevalent. Yet, one is left to wonder whether these facts fully explain why bareback porn never made it into the mainstream Measure B discourse.

The exclusion of bareback porn from the lawsuit and the campaign could have stemmed from the fact that the LGBT community has yet to attain real legal and social equality in the United States. This inequality, which often results in the oppression of the gay community and renders LGBT issues invisible to mainstream society, could have resulted in the unintended exclusion of bareback porn from the Measure B discussion. Perhaps nobody in the mainstream discussion thought about the impact Measure B could have on bareback. Perhaps nobody in the mainstream understood bareback’s unique political and expressive messaging. Or perhaps nobody in the mainstream was even aware of the distinct genre of bareback porn.

Alternatively, the exclusion could have been purposeful. Leaders in the Measure B opposition may have intentionally excluded bareback from the discussion because they thought that defeating the condom mandate would be easier without the social baggage accompanying the gay community. Returning to Rubin’s “Charmed Circle,” if gay sex is further from the core of social acceptability than heterosexual sex, a fight that implicates another disfavored sexual category—pornography—would stand a better chance by focusing on the more “charmed” straight members of the affected community. In addition, because barebackers do not fit within the homonormative, respectability-focused agenda of the mainstream gay rights movement, the LGBT community itself may have discouraged their participation in the Measure B discussion or lawsuit as an unwise political move. Thus, the purposefully risky and transgressive sexual practices by members of the bareback community may have effectively rendered barebackers unsuitable as representatives of both the porn industry and the gay community, thereby doubly barring bareback porn from the mainstream discussion.

Regardless of whether the exclusion of bareback porn from the fight against Measure B was intentional or unintentional, malicious or benign, it is important to consider the consequences of Measure B on bareback porn. Future attempts to mandate condoms in porn throughout the state of California will threaten bareback porn as well as condomless straight porn. Despite the apparent neutrality of such a rule, this Comment demonstrates that bareback porn
arguably has more to lose because of the unique expressive and political messages embodied in depictions of condomless sex between gay men. Nevertheless, barebackers were effectively denied an opportunity to challenge any future condom mandate because bareback was excluded from the Measure B challenge, which was purportedly made on behalf of all porn.