

# THE FIRST AMENDMENT AND MANDATORY CONDOM LAWS: RETHINKING THE “PORN EXCEPTION” IN STRICT SCRUTINY, CONTENT NEUTRALITY AND SECONDARY EFFECTS ANALYSIS

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*Public health advocates in California have campaigned for new laws for the last fifteen years requiring the use of condoms in the production of pornography to reduce the spread of HIV and other sexually transmitted infections. This article examines the efficacy and constitutionality of mandatory condom laws and critiques *Vivid Entertainment, LLC v. Fielding*<sup>1</sup>, the Ninth Circuit Court of Appeals decision striking down parts of Los Angeles’ regulatory scheme but upholding the mandatory condom requirement. After exploring jurisprudence related to pornography production—including the conduct/expression dichotomy in First Amendment law, the strict and intermediate scrutiny standards of First Amendment analysis, the contorted secondary effects doctrine, the perplexing nature of the pornography/prostitution distinction by the California Supreme Court decision *People v. Freeman*<sup>2</sup>, and the expressive elements unique to the subgenre of “bareback” pornography—the Article argues for the reassessment of the “pornography exception” to strict scrutiny analysis for content-based regulations.*

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<sup>1</sup> *Vivid Entm’t, LLC v. Fielding*, 965 F. Supp. 2d 1113 (C.D. Cal. 2013), *aff’d*, 774 F.3d 566 (9th Cir. 2014).

<sup>2</sup> *People v. Freeman*, 758 P.2d 1128 (Cal. 1988).

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#### INTRODUCTION

On election day in November 2016, voters in the most populous state in the union cast California's fifty-five electoral college votes to Hillary Clinton over Donald Trump by nearly a two-to-one margin.<sup>3</sup> In addition to other state, county, and local races, voters also made choices on fifteen statewide ballot measures, the most newsworthy of which legalized the recreational use of marijuana.<sup>4</sup> Also on the ballot was a question that struck many as peculiar. Proposition 60, titled the "Condoms in Pornographic Films Initiative," asked whether the state should require the use of condoms and other protective measures during the filming of pornographic films and require that film producers pay for health requirements.<sup>5</sup> California voters rejected Proposition 60 by a vote of 53.7 percent to 46.3 percent.<sup>6</sup> That voters rejected the statewide law came as a surprise to many people, as the measure was seen as the finale of a fifteen-year campaign to codify condoms-in-porn regulations that had been implemented through a patchwork of state, county, and city regulations and policies.<sup>7</sup>

<sup>3</sup> CAL. SEC'Y OF STATE ALEX PADILLA, STATEMENT OF VOTE, NOVEMBER 8, 2016 GENERAL ELECTION 6 (2016), <http://elections.cdn.sos.ca.gov/sov/2016-general/sov/2016-complete-sov.pdf> [<https://perma.cc/R65M-M3S8>] (showing statewide results as Hillary Clinton with 61.7 percent, compared to Donald Trump's 31.6 percent).

<sup>4</sup> Patrick McGreevy, *Voters Legalize Pot in California. Here's What Will Happen Next*, L.A. TIMES (Nov. 8, 2016), <http://www.latimes.com/politics/la-pol-ca-proposition-64-california-legalizes-marijuana-snap-20161108-story.html> [<https://perma.cc/D2AJ-SZJ7>].

<sup>5</sup> Bill Chappell, *Condom Mandate for Porn Industry Falls Short in California*, NPR (Nov. 9, 2016, 10:05 AM), <https://www.npr.org/sections/thetwo-way/2016/11/09/501405749/condom-mandate-for-porn-industry-falls-short-in-california> [<https://perma.cc/5Q9S-CQ92>].

<sup>6</sup> PADILLA, *supra* note 3, at 12.

<sup>7</sup> David Ng, *L.A. County Saw a 95 % Drop in Porn Film Permits. With the Condom Law Defeated, the Industry Looks to Make its Return*, L.A. TIMES (Nov. 15, 2016, 3:00 AM), <http://www.latimes.com/business/hollywood/la-fi-ct-porn-condom-la-20161111-story.html> [<https://perma.cc/HA7Q-RZMY>].

As a result of social, technological, and legal changes, commercially produced pornographic films began to explode in the United States as a form of mass communication in the 1970s.<sup>8</sup> From the earliest days of commercial pornography production, Los Angeles’ San Fernando Valley has been known as the “porn capital” of the world.<sup>9</sup> At its peak—before the Internet radically shifted the economics of pornography production, distribution, and consumption—the trade publication *Adult Video News* placed sales of adult videos and DVDs at nearly \$1 billion annually, much of it originating from the valley.<sup>10</sup> Some studies estimated that 80 percent of all heterosexual commercial pornography was once filmed in the San Fernando Valley, with more than 1,200 performers working for about 200 production companies, typically earning between \$400 and \$1,000 per shoot.<sup>11</sup> Local economists reported the porn

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<sup>8</sup> On the sociological aspects of pornography, *see generally* DONALD ALEXANDER DOWNS, *THE NEW POLITICS OF PORNOGRAPHY* (1989); GORDON HAWKINS & FRANKLIN E. ZIMRING, *PORNOGRAPHY IN A FREE SOCIETY* (1988); CHRISTOPHER NOWLEN, *JUDGING OBSCENITY: A CRITICAL HISTORY OF EXPERT EVIDENCE* (2003); RICHARD S. RANDALL, *FREEDOM AND TABOO: PORNOGRAPHY AND THE POLITICS OF A SELF DIVIDED* (1989); LINDA WILLIAMS, *HARD CORE: POWER, PLEASURE, AND THE “FRENZY OF THE VISIBLE”* (1989). For discussion of evolving legal doctrines regulating pornography and obscenity in the 1970s, *see generally* WALTER BARNETT, *SEXUAL FREEDOM AND THE CONSTITUTION: AN INQUIRY INTO THE CONSTITUTIONALITY OF REPRESSIVE SEX LAWS* (1973); RICHARD F. HIXSON, *PORNOGRAPHY AND THE JUSTICES: THE SUPREME COURT AND THE INTRACTABLE OBSCENITY PROBLEM* (1996); MARC STEIN, *SEXUAL INJUSTICE: SUPREME COURT DECISIONS FROM GRISWOLD TO ROE* (2010); WHITNEY STRUB, *OBSCENITY RULES: ROTH V. UNITED STATES AND THE LONG STRUGGLE OVER SEXUAL EXPRESSION* (2013); LEIGH ANN WHEELER, *HOW SEX BECAME A CIVIL LIBERTY* (2013). For discussion on film censorship, *see generally* MOVIE CENSORSHIP AND AMERICAN CULTURE (Francis G. Couvares ed., 1996); JEREMY GELTZER, *DIRTY WORDS & FILTHY PICTURES: FILM AND THE FIRST AMENDMENT* (2015); JON LEWIS, *HOLLYWOOD V. HARD CORE: HOW THE STRUGGLE OVER CENSORSHIP SAVED THE MODERN FILM INDUSTRY* (2002); LAURA WITTERN-KELLER & RAYMOND J. HABERSKI JR., *THE MIRACLE CASE: FILM CENSORSHIP AND THE SUPREME COURT* (2008); LAURA WITTERN-KELLER, *FREEDOM OF THE SCREEN: LEGAL CHALLENGES TO STATE FILM CENSORSHIP, 1915–1981* (2008).

<sup>9</sup> *See, e.g.*, Susan Abram, *Porn Industry Still at Home in San Fernando Valley Despite Condom Laws, Web, Piracy*, L.A. DAILY NEWS (Jan. 12, 2015, 4:58 PM), <http://www.dailynews.com/social-affairs/20150112/porn-industry-still-at-home-in-san-fernando-valley-despite-condom-laws-web-piracy/> [<https://perma.cc/A6BD-BGZL>]. *See also* Clay Calvert and Robert D. Richards, *Law & 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 (2008).

<sup>10</sup> Corita R. Grudzen & Peter R. Kerndt, *The Adult Film Industry: Time to Regulate?*, 4 PLOS MEDICINE 0993 (June 19, 2007), <http://journals.plos.org/plosmedicine/article?id=10.1371/journal.pmed.0040126> [<https://perma.cc/N69X-Y2E6>]; Mark Kernes, *Analyzing the “Adult Film Industry” Report*, ADULT VIDEO NEWS (Nov. 5, 2007, 5:01 PM), <https://avn.com/business/articles/video/analyzing-the-adult-film-industry-report-23222.html> [<https://perma.cc/DQP6-54VS>].

<sup>11</sup> Grudzen & Kerndt, *supra* note 10, at 0993. Christina Jordan, Note, *The XXX-Files: Cal/OSHA’s Regulatory Response to HIV in the Adult Film Industry*, 12 CARDOZO J.L. & GENDER 421, 423 (2005).

industry in the valley generated a total of 10,000 to 20,000 jobs annually at its peak.<sup>12</sup>

One of the reasons pornography production has flourished in California is because of the law. In California, the business of commercial pornography grew significantly after the 1988 decision in *People v. Freeman*, a landmark First Amendment case in which the Supreme Court of California ruled that the production of pornography could not be prosecuted under traditional prostitution and pandering laws.<sup>13</sup> Prior to the *Freeman* ruling, most pornographers operated underground, and the state periodically launched raids on companies that became too public.<sup>14</sup> In rejecting attempts by the state to shut down commercial pornography production on these grounds, the California high court ruled that the First Amendment protections for pornography possession and distribution necessarily covered some aspects of pornography production.<sup>15</sup> The basic logic behind the *Freeman* ruling was that if viewing and distributing pornography is legal, then there must be some legal rights to producing it. The rationale has also been adopted in other jurisdictions, including by the New Hampshire Supreme Court in the 2008 case of *New Hampshire v. Theriault*.<sup>16</sup> The California Supreme Court decision interpreting the First Amendment to provide protections to the production of pornography was a key factor that allowed California to become home to some of the world's biggest pornography businesses.<sup>17</sup>

For more than fifteen years, the Los Angeles-based AIDS Healthcare Foundation (AHF), led by its controversial CEO Michael Weinstein, has led a campaign by public health advocates to prohibit condom-less sex in commercial pornography production as a way of reducing sexually transmitted diseases.<sup>18</sup> In 2004, in response to a high profile shutdown of porn filming after actors became infected with HIV, AHF sought enforcement actions against condom-less porn production by state regulators.<sup>19</sup> The AHF turned to Los Angeles city

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<sup>12</sup> Richard Verrier, *Porn Production Plummets in Los Angeles*, L.A. TIMES (Aug. 6, 2014, 5:30 AM), <http://www.latimes.com/entertainment/envelope/cotown/la-et-ct-onlocation-la-porn-industry-20140806-story.html> [https://perma.cc/7Y6P-NZUH].

<sup>13</sup> *People v. Freeman*, 758 P.2d 1128, 1132 (Cal. 1988).

<sup>14</sup> Chauntelle Anne Tibbals, *When Law Moves Quicker Than Culture: Key Jurisprudential Regulations Shaping the U.S. Adult Content Production Industry*, 15 SCHOLAR 213, 226–27 (2013).

<sup>15</sup> *Freeman*, 758 P.2d at 1131–33.

<sup>16</sup> See *State v. Theriault*, 960 A.2d 687, 688 (N.H. 2008).

<sup>17</sup> See Philip M. Cohen, *People v. Freeman—No End Runs on the Obscenity Field or You Can't Catch Me from Behind*, 9 LOY. ENT. L.J. 69, 93 (1989) (“The California Supreme Court has taken away a new and potentially powerful weapon from those who seek to halt the spread of pornographic materials, whether in films, books or photographs.”).

<sup>18</sup> Christopher Glazek, *The C.E.O. of H.I.V.*, N.Y. TIMES MAG. (Apr. 26, 2017), <https://www.nytimes.com/2017/04/26/magazine/the-ceo-of-hiv.html> [https://perma.cc/KLF7-EYFR].

<sup>19</sup> Alastair Gee, *Demon or Savior? Aids Activist at War to Make Condoms in Porn the Law*, GUARDIAN (May 23, 2016, 6:30 AM), <https://www.theguardian.com/us-news/2016/may/23/aids-activist-michael-weinstein-condoms-porn-california-law> [https://perma.cc/RFM3-XXV8].

and county officials for more aggressive action, after growing frustrated over several years with what they viewed as weak enforcement by state regulators and lack of support by the California State Legislature. In January 2012, the Los Angeles City Council passed a city ordinance requiring condoms in pornography production.<sup>20</sup> Then, in November 2012, voters in Los Angeles County passed Measure B, a ballot initiative pushed by AHF that created a regulatory framework requiring permitting, training, and mandatory condom use for all pornography filmed in the county.<sup>21</sup> Proposition 60 would have extended those city and county frameworks across the state in one unified law, thereby codifying AHF’s longstanding goal of a statewide law with clear compliance and enforcement protocols.<sup>22</sup> Despite the defeat of Proposition 60, AHF continues to fight for mandatory condom laws.<sup>23</sup>

Mandatory condom laws ban the filming of a legal activity between consenting adults—that of condom-less sexual intercourse.<sup>24</sup> As part of their lobbying against condoms-in-porn laws, adult film executives said that requiring condom use would cripple the industry by unfairly singling out California companies, which would send actors underground where testing is not required and would violate their First Amendment rights.<sup>25</sup> Diane Duke, an official with the Free Speech Coalition, argued that adult film actors should have the same rights as other performers who willingly participate in entertainment with physical risk, such as boxers.<sup>26</sup> “The goal of [boxing] is to knock someone out—pound them in the head until you knock someone out . . . . This is the first step of government overreach into the way we make movies . . . . It’s clearly the

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<sup>20</sup> Rong-Gong Lin II, *L.A. City Council OKs Law Requiring Condom Use by Porn Performers*, L.A. TIMES (Jan. 18, 2012), <http://articles.latimes.com/2012/jan/18/local/la-me-0118-porn-condoms-20120118> [<https://perma.cc/GU7Q-FSF4>].

<sup>21</sup> Anna Gorman & Rong-Gong Lin II, *Condom Requirement for Porn Filming Approved by Voters*, L.A. TIMES (Nov. 7, 2012), <http://latimesblogs.latimes.com/lanow/2012/11/condom-requirement-for-porn-filming-approved-by-voters.html> [<https://perma.cc/NP2R-34MM>]; Samantha Tata, *Citing Public Health Concerns, Measure B Aims to Require Condoms on All L.A. County Porn Shoots*, NBC SOUTHERN CAL. (Nov. 2, 2012, 6:50 PM), <https://www.nbclosangeles.com/news/local/Measure-B-November-Election-Decision-2012-Condoms-in-Porn-175634651.html> [<https://perma.cc/Z9XP-YFUU>].

<sup>22</sup> CAL. SEC’Y OF STATE, ELECTIONS DIV., OFFICIAL VOTER INFORMATION GUIDE, CALIFORNIA GENERAL ELECTION, TUESDAY, NOVEMBER 8, 2016, at 68 (2016).

<sup>23</sup> Matt Baume, *California’s Prop 60 Failed, but Condoms in Porn is Hardly a Dead Issue*, SLATE (Jan. 5, 2017, 1:39 PM), [http://www.slate.com/blogs/outward/2017/01/05/california\\_s\\_prop\\_60\\_condoms\\_in\\_porn\\_bill\\_failed\\_but\\_the\\_fight\\_continues.html](http://www.slate.com/blogs/outward/2017/01/05/california_s_prop_60_condoms_in_porn_bill_failed_but_the_fight_continues.html) [<https://perma.cc/Y5ZK-TRGN>].

<sup>24</sup> Ian Lovett, *Laws on Condoms Threaten Tie Between Sex Films and Their Home*, N.Y. TIMES (Mar. 7, 2012), <https://www.nytimes.com/2012/03/08/us/condom-rule-may-drive-sex-films-from-los-angeles.html> [<https://perma.cc/B5SB-QPTC>].

<sup>25</sup> *Id.*

<sup>26</sup> Rong-Gong Lin II, *Porn Industry May Boogie Out of L.A. Over Condom Law*, L.A. TIMES (Feb. 21, 2012), <http://articles.latimes.com/2012/feb/21/local/la-me-porn-condoms-20120221> [<https://perma.cc/NG4H-KEYA>].

government interfering where it really doesn't belong."<sup>27</sup> Jason E. Squire, a professor of cinematic arts at the University of Southern California, told the *Los Angeles Times*, "It's certainly a fascinating conundrum . . . . You want all performers, whatever they do, to be safe. That transcends content. I don't know what the proper solution is."<sup>28</sup> Legal scholarship on the question has been decidedly mixed.<sup>29</sup>

After the passage of Measure B in 2012, commercial pornographers began deserting Los Angeles, as permits to adult film companies once issued in the hundreds each year dwindled by more 90 percent in the months after the law took effect.<sup>30</sup> "We're not shooting in L.A. anymore," Steven Hirsch, founder and co-chairman of Vivid Entertainment, told the *Los Angeles Times* in 2014.<sup>31</sup> "We'd like to stay here. This is our home, where we've produced for the last [thirty] years. But if we're forced to move, we will."<sup>32</sup> Porn with condoms "just doesn't sell," said Mark Kulkis, president of Kiss Ass Pictures, a Los Angeles porn studio.<sup>33</sup> "You can't argue with the economics of the situation."<sup>34</sup> Vivid Entertainment reported a drop in sales by 10 to 20 percent when it went "condom-only."<sup>35</sup> Between 2012 and 2016, Los Angeles county records show a 95

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<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> Compare Melody Aguilar & Christine R. Mahackian, *Proposition 60: Adult Films. Condoms. Health Requirements*, 2016 CAL. INITIATIVE REV. 1 (2016); Tara M. Allport, Comment, *This is Hardcore: Why the Court Should Have Granted a Writ of Mandamus Compelling Mandatory Condom Use to Decrease Transmission of HIV and STDs in the Adult Film Industry*, 19 VILL. SPORTS & ENT. L.J. 655 (2012); Zachary R. Bergman, Note, *Testing Solutions for Adult Film Performers*, 24 CORNELL J.L. & PUB. POL'Y 183 (2014); Jordan, *supra* note 11; Chris Motyl, *Condom Sense: Regulating and Reforming Performer Health & Safety in the Adult Film Industry*, 32 HOFSTRA LAB. & EMP. L.J. 217 (2014), and Kevin Shaffer, *That's a Wrap: Exploring Los Angeles County's Adult Film Condom Requirement*, 80 BROOK. L. REV. 1579 (2015), with Alexander S. Birkhold, *Poking Holes in L.A.'s New Condom Requirement: Pornography, Barebacking, and Speech*, 90 WASH. U. L. REV. 1819 (2013); Stephan Ferris, *Sex Panic and Videotape*, 28 HASTINGS WOMEN'S L.J. 203 (2017); Bailey J. Langner, Comment, *Unprotected: Condoms, Bareback Porn, and the First Amendment*, 30 BERKELEY J. GENDER L. & JUST. 199 (2015); Christopher A. Ramos, Note, *Wrapped in Ambiguity: Assessing the Expressiveness of Bareback Pornography*, 88 N.Y.U. L. REV. 1839 (2013); Marc J. Randazza, *The Freedom to Film Pornography*, 17 NEV. L.J. 97 (2016); Elizabeth Sbardellati, *Skin Flicks Without the Skin: Why Government Mandated Condom Use in Adult Films is a Violation of the First Amendment*, 9 NW. J.L. & SOC. POL'Y 138 (2013); and Jason Shachner, *Unwrapped: How the Los Angeles County Safer Sex in the Adult Film Industry Act's Condom Mandate Hurts Performers & Violates the First Amendment*, 24 HEALTH MATRIX 345 (2014).

<sup>30</sup> Verrier, *supra* note 12.

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> Patrick Range McDonald, *Rubbers Revolutionary: AIDS Healthcare Foundation's Michael Weinstein*, L.A. WKLY. (Jan. 28, 2010, 4:30 AM), <http://www.laweekly.com/news/rubbers-revolutionary-aids-healthcare-foundations-michael-weinstein-2163506> [<https://perma.cc/5YQW-B5P4>].

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

percent decline in on-location permits for pornography companies.<sup>36</sup> In late 2016, after the defeat of Proposition 60, commercial pornographers began coming back to California. Hirsch stated, “The industry is moving back to L.A.— unquestionably . . . . The business has changed and has downsized. But you’ll see the vast percentage coming back to L.A.”<sup>37</sup> A spokesman for FilmL.A., a nonprofit group that oversees film permits in the city and county, said, “Voters’ rejection of Proposition 60 leaves local policies intact, but may keep California in competition for the adult film business generally.”<sup>38</sup>

This Article examines the new politics of condom-less sex in the fifteen-year public health campaign in California, and discusses First Amendment issues raised by mandatory condom regulations in film production, examining developments in administrative codes, legislation, and the courts. The research also explores whether the government can effectively ban the commercial depiction of a legal activity between consenting adults and whether such laws are likely to survive First Amendment scrutiny based on legal precedents. Part I explores the impetus for regulatory action in more detail, and then assesses the alleged harms of non-condom sex in adult film production as well as the perceived social benefits of regulation. Part II explores the theoretical and doctrinal frameworks for understanding legal regulations of sexual expression and evaluates the First Amendment distinction between conduct and expression that belies much of the constitutional jurisprudence in this area. Part III critiques the Ninth Circuit Court of Appeals decision in *Vivid Entertainment, LLC v. Fielding*<sup>39</sup>, and discusses how regulations mandating condom use in adult films are suspect under the First Amendment.

## I. PUBLIC HEALTH CAMPAIGNS FOR MANDATORY CONDOM LAWS

### A. Government Interests

The primary government interest articulated in the push for condoms-in-porn laws has been the protection from HIV and other sexually transmitted infections for actors and performers.<sup>40</sup> Over the fifteen years of AHF’s campaign, public support for mandatory condom laws was propelled in part by media coverage of HIV infections by adult film performers that public health advocates argued was evidence of the failures of voluntary, industry run HIV testing.<sup>41</sup>

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<sup>36</sup> Ng, *supra* note 7.

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> *Vivid Entm’t, LLC v. Fielding*, 965 F. Supp. 2d 1113 (C.D. Cal 2013), *aff’d*, 774 F.3d 566 (9th Cir. 2014).

<sup>40</sup> For an official summary of arguments in support of and opposition to Proposition 60, see CAL. SEC’Y OF STATE, ELECTIONS DIV., *supra* note 22, at 70.

<sup>41</sup> Mark Kernes, *Adult Industry Leaders Say Condom-Only Laws Won’t Work*, ADULT VIDEO NEWS (June 15, 2009, 5:47 PM), <https://avn.com/business/articles/legal/adult-industry-leader-s-say-condom-only-laws-won-t-work-345802.html> [<https://perma.cc/34UM-86ND>].

After the adult film industry's screening process detected a positive HIV test for a female actress in June 2009, records released to the *Los Angeles Times* showed that sixteen previously "unpublicized" adult movie performers tested positive for HIV between 2004 and 2009.<sup>42</sup> While most of those with positive tests acquired HIV outside of their work in pornography,<sup>43</sup> public health advocates used the 2009 case to question the efficacy of the industry's self-testing operation. They held a public protest outside the Hustler Hollywood retail store to "call for the introduction of landmark California legislation that would require the use of condoms by actors performing in porn videos produced by California's multi-billion dollar adult entertainment industry—a mainstay of the San Fernando Valley economy."<sup>44</sup> Three high profile cases of HIV infections among adult film performers in 2004, 2009, and 2013 sparked their own campaigns for greater support for mandatory condom laws.<sup>45</sup>

Advocates have also used data that shows higher rates of other sexually transmitted infections among adult performers as evidence of the public health problems associated with unsafe sex. "The average American male has seven female sexual partners in a lifetime. But it's possible for a male to have seven sexual partners in a single day on [a] porn movie set . . . . Because this is a network that's kind of inbred, the spread of disease could be exponential," said AHF President Michael Weinstein.<sup>46</sup>

The pornography industry has opposed mandatory condom rules, arguing that their own HIV testing policies are superior to mandatory condom rules in preventing disease.<sup>47</sup> The industry established the Adult Industry Medical (AIM) Healthcare Foundation in 1997 to conduct HIV and other STD tests and provide results to production companies and actors.<sup>48</sup> In 2011, the industry transitioned to Adult Production Health & Safety Services (APHSS), created in part by the Free Speech Coalition, which is the adult entertainment industry's trade association.<sup>49</sup> The self-regulation scheme has required testing and disclo-

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<sup>42</sup> Matt Siegel, *Business Before Pleasure?*, ADVOC. (Aug. 12, 2009, 12:00 AM), <https://www.advocate.com/health/2009/08/12/business-pleasure> [<https://perma.cc/HG8U-RBA3>].

<sup>43</sup> *Id.*

<sup>44</sup> Kernes, *supra* note 41.

<sup>45</sup> See, e.g., Jordan, *supra* note 11, at 424–25; Michelle Castillo, *Fourth Porn Actor Reportedly Latest to Contract HIV*, CBS NEWS (Sept. 10, 2013, 5:43 PM), <https://www.cbsnews.com/news/fourth-porn-actor-reportedly-latest-to-contract-hiv/> [<https://perma.cc/9WB9-DPG7>]; Kernes, *supra* note 41.

<sup>46</sup> Katie Moisse, *HIV-Positive Performer Shuts Down L.A. Porn Industry*, ABC NEWS (Aug. 30, 2011), <http://abcnews.go.com/Health/Wellness/hiv-positive-performer-shuts-la-porn-industry/story?id=14412090> [<https://perma.cc/KBM7-67SV>].

<sup>47</sup> See, e.g., Alexandre Padilla, *Self-Regulation in the Adult Film Industry: Why Are HIV Outbreaks the Exception and Not the Norm?* 24 (Oct. 15, 2008) (unpublished manuscript), <https://ssrn.com/abstract=1285283> [<https://perma.cc/5SV2-G6NH>].

<sup>48</sup> Jordan, *supra* note 11, at 439–40.

<sup>49</sup> Barbie Davenport, *New Porn Healthcare Service Program, HIV/STD Database Planned for Adult Industry*, L.A. WKLY. (May 26, 2011, 11:23 AM), <http://www.laweekly.com/news/>

sure as a way of protecting actors and minimizing harm, and moratoriums on filming have occasionally occurred after an actor has tested positive.<sup>50</sup> The adult film industry has argued that its self-regulation has resulted in dramatically lower HIV infection rates among its performers than the general population.<sup>51</sup> Until 2011, an industry-funded organization called the Adult Industry Medial Healthcare Foundation (AIM) conducted mandatory HIV and other STD testing every thirty days for performers.<sup>52</sup> According to testimony provided at a Division of Occupational Safety and Health (Cal/OSHA) public hearing in March 2010, a review of AIM's data shows a lower prevalence of all sexually transmitted diseases in the Los Angeles adult film industry than the general population.<sup>53</sup>

Others have suggested that condom-less pornography encourages unsafe sex practices by pornography viewers, another reason to police its unsafe practices. One study of the prevalence of condoms in both heterosexual and homosexual pornography suggested that depictions of condoms in pornography could reduce unsafe practices among viewers.<sup>54</sup> "It is known that the media affects health attitudes and risk behaviors; thus the consistent presence of condoms in heterosexual adult films might increase their use off screen," researchers wrote.<sup>55</sup> Other researchers studying the link between unsafe sex practices and pornography viewing habits among gay men have found a correlation between the two. In a study focused on unprotected anal intercourse (UAI) among men who have sex with men, researchers found that "viewing pornography depicting UAI was significantly associated with engaging in UAI."<sup>56</sup> The study did not present evidence that pornography viewing caused unsafe sex practices; however the researchers speculated that "the viewing of pornography depicting UAI may affect sexual practices and attitudes, or reduce the perceived likelihood of adverse consequences associated with engaging in UAI."<sup>57</sup> The researchers cautioned against using their findings to support additional pornography regulations but said that "the findings of this research suggest that reduced viewing of certain types of pornography may facilitate adherence to safer sex guidelines for some [men who have sex with men]."<sup>58</sup> Another study found

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new-porn-healthcare-service-program-hiv-std-database-planned-for-adult-industry-2529540 [https://perma.cc/3TR7-MCKH].

<sup>50</sup> Bergman, *supra* note 29, at 193.

<sup>51</sup> Shachner, *supra* note 29, at 349.

<sup>52</sup> Bergman, *supra* note 29, at 193.

<sup>53</sup> Kernes, *supra* note 41.

<sup>54</sup> Corita R. Grudzen et al., *Condom Use and High-Risk Sexual Acts in Adult Films: A Comparison of Heterosexual and Homosexual Films*, 99 AM. J. PUB. HEALTH S152, S155 (2009).

<sup>55</sup> *Id.*

<sup>56</sup> Dylan Stein et al., *Viewing Pornography Depicting Unprotected Anal Intercourse: Are There Implications for HIV Prevention Among Men Who Have Sex with Men?*, 41 ARCHIVES SEXUAL BEHAV. 411, 415 (2012).

<sup>57</sup> *Id.* at 416.

<sup>58</sup> *Id.* at 417.

that people who watched pornography with condoms used condoms more often in sexual encounters.<sup>59</sup> AHF said the study “offers a compelling argument for condom use in porn films that stretches beyond worker safety, suggesting that viewing safe sex practices in porn could yield a broader public health benefit.”<sup>60</sup> AHF’s Weinstein said, “People emulate actions, behaviors, clothing, hairstyles and other things they see in mainstream movies all the time—why wouldn’t it be any different with porn?”<sup>61</sup>

### B. California Workplace Safety Regulations

California’s state agency charged with policing workplace safety is the California Occupational Safety and Health Standards Board of Cal/OSHA. California’s Labor Code states that the Standards Board “shall be the only agency in the state authorized to adopt occupational safety and health standards.”<sup>62</sup> The agency has had a rule since 1993 requiring workplaces to use barrier protection from blood borne pathogens, which a spokeswoman said, “in the case of the adult film industry, means condoms . . . .”<sup>63</sup> However, over the years, the messages from Cal/OSHA have been “confusing and seemingly contradictory.”<sup>64</sup> While state regulatory agencies can institute and enforce rules to monitor employee safety, they do not have the authority to regulate agreements between employers and independent contractors.<sup>65</sup> A majority of adult film actors are hired as independent contractors, although some have exclusive contracts with production companies that treat them as employees for tax purposes.<sup>66</sup>

Based on California law, Cal/OSHA’s regulatory authority to mandate condom use for all adult production companies remains specious. Some scholars have argued it is tenuous to conclude that all adult film actors are considered employees under even the most deferential interpretations of labor law statutes, tax codes, and common law.<sup>67</sup> However, Cal/OSHA has argued that, using common law tests, such performers could be classified as employees.<sup>68</sup> In California, two legal tests, known as the Common Law Test and the Economic

<sup>59</sup> Eric W. Schrimshaw et al., *Viewing of Internet-Based Sexually Explicit Media as a Risk Factor for Condomless Anal Sex Among Men Who Have Sex with Men in Four U.S. Cities*, PLOS ONE, Apr. 27, 2016 at 1, <https://journals.plos.org/plosone/article/file?id=10.1371/journal.pone.0154439&type=printable> [<https://perma.cc/53KK-DXLY>].

<sup>60</sup> *AHF on Porn/Condom Study: “Porn Is Not Just a Fantasy. Performers Are Having Actual Sex; Contracting STDs—and the Audience Knows It.”*, AIDS HEALTHCARE FOUND. (Apr. 29, 2016), <https://www.aidshealth.org/ahf-porncondom-study-porn-not-just-fantasy-performers-actual-sex-contracting-stds-audience-knows/> [<https://perma.cc/K5UZ-YVTY>].

<sup>61</sup> *Id.*

<sup>62</sup> CAL. LAB. CODE § 142.3(a)(1) (West 2018).

<sup>63</sup> Ng, *supra* note 7.

<sup>64</sup> *Id.*

<sup>65</sup> Jordan, *supra* note 11, at 427.

<sup>66</sup> *Id.* at 429.

<sup>67</sup> *Id.* at 431–40.

<sup>68</sup> Allport, *supra* note 29, at 672–73.

Realities Test, present different factors to consider when it is unclear if an employer-employee relationship exists.<sup>69</sup> These common law tests center on “the nature of the work being performed, the degree of control the employer has over how that work is being done, how the work was directed, and whether the principal or the workers supplied the instruments, tools or location where the business was being conducted.”<sup>70</sup>

Cal/OSHA’s first newsworthy action regulating condoms in commercial pornography came in 2004.<sup>71</sup> Publicity over the HIV infections of two adult film actors shut down thirty San Fernando Valley production companies for sixty days,<sup>72</sup> and pressured Cal/OSHA to investigate the use of condoms in pornography production.<sup>73</sup> The HIV infections were traced to one male actor’s work on a Brazil porn set, in between testing periods in the United States.<sup>74</sup> He apparently tested negative immediately after his return, and worked in several movies before testing positive for HIV.<sup>75</sup> Between the point of infection and the positive test result, the actor had infected at least four additional performers.<sup>76</sup>

The case sparked several government interventions. The Los Angeles County Department of Health requested that Cal/OSHA investigate the safety conditions of the adult film industry, and a state assemblyman held a legislative hearing into the outbreak.<sup>77</sup>

In issuing fines to two production companies involved in the 2004 HIV infections, Cal/OSHA found an employer-employee relationship, but was careful to state that the determination was made on a “case-by-case” basis, and that not all adult film performers would be considered “employees” under the law.<sup>78</sup> While Cal/OSHA noted that its investigation would be limited to companies that employ adult actors, and that independent contractors were unlikely to be considered employees entitled to Cal/OSHA protections, it concluded that adult film performers could indeed be considered employees under labor laws governing workplace safety.<sup>79</sup> The agency issued fines to two adult film companies for violating blood-borne pathogen standards.<sup>80</sup>

Another crackdown by Cal/OSHA came in 2010, when Cal/OSHA created a committee to study a mandatory condom rule after AHF drew attention to an-

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<sup>69</sup> *Id.* at 671.

<sup>70</sup> Jordan, *supra* note 11, at 431.

<sup>71</sup> *Id.* at 424.

<sup>72</sup> *Id.* at 424–25.

<sup>73</sup> *Id.*

<sup>74</sup> *Id.*

<sup>75</sup> *Id.*

<sup>76</sup> *Id.* at 425.

<sup>77</sup> *Id.* at 425–26.

<sup>78</sup> *Id.* at 431.

<sup>79</sup> *Id.* at 425.

<sup>80</sup> *Id.* at 426.

other case involving a female adult actress contracting HIV in June 2009.<sup>81</sup> It appears the 2009 case was contained to “Patient Zero,” who did not infect anyone else in the industry.<sup>82</sup> In 2011, based on a complaint by AHF, Cal/OSHA fined Hustler Video \$14,175 and Forsaken Pictures \$12,150 for failing to require condom use.<sup>83</sup>

However, attempts to push Cal/OSHA into more aggressive policing have often backfired or failed. As recently as February 2016, Cal/OSHA’s Standards Board rejected a twenty-one-page proposal that would have explicitly required the use of condoms in pornography production, and other measures to protect against blood-borne pathogens, on a three-to-two vote.<sup>84</sup>

### C. California State Legislature

Attempts to pass legislation mandating condom use have failed to gain traction in the California State Legislature. After the 2004 outbreak that prompted the first Cal/OSHA interventions, bills were introduced to require HIV and STD testing and prohibiting anyone from working in adult films who tested positive.<sup>85</sup> Other legislators said they would introduce mandatory condom laws if pornography companies did not voluntarily require them.<sup>86</sup>

The state Assembly’s Committee on Labor and Employment issued a report in 2004 titled “Worker Health and Safety in the Adult Film Industry” that summarized the core issues, including whether state and local agencies have authority to regulate in this area; whether performers are considered employees or independent contractors; the viability and legality of mandatory testing and reporting; and the viability and legality of mandatory condom use.<sup>87</sup> The report summarized testimony from various experts with different perspectives, and presented a summary of recommendations varying from no government in-

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<sup>81</sup> Shaya Tayefe Mohajer, *Calif. Board to Study Requiring Condoms in Porn*, SAN DIEGO UNION-TRIB. (Mar. 18, 2010), <http://www.sandiegouniontribune.com/sdut-calif-board-to-study-requiring-condoms-in-porn-2010mar18-story.html> [https://perma.cc/6RLX-DCD6].

<sup>82</sup> Donald G. McNeil Jr., *Unlikely Model in H.I.V. Efforts: Sex Film Industry*, N.Y. TIMES (Nov. 5, 2012), <https://www.nytimes.com/2012/11/06/health/unlikely-model-for-hiv-prevention-porn-industry.html> [https://perma.cc/98YP-9RPN].

<sup>83</sup> *Cal-OSHA Fines Hustler Video \$14K for Not Using Condoms*, ADULT VIDEO NEWS (Mar. 30, 2011 7:07 PM), <http://business.avn.com/articles/video/Cal-OSHA-Fines-Hustler-Video-14K-for-Not-Using-Condoms-430764.html> [https://perma.cc/7WLK-GKZT].

<sup>84</sup> *California Safety Board Rejects Condom Requirement for Porn Films*, L.A. TIMES (Feb. 18, 2016), <http://www.latimes.com/local/lanow/la-me-ln-porn-actors-condoms-20160218-story.html> [https://perma.cc/P24B-M6B5].

<sup>85</sup> Padilla *supra* note 47, at 2.

<sup>86</sup> *Id.* at 2–3.

<sup>87</sup> CAL. STATE ASSEMBLY COMM. ON LABOR & EMP’T, “WORKER HEALTH AND SAFETY IN THE ADULT FILM INDUSTRY” POST-HEARING REPORT, 2003–04 Sess., at 1 (2004), <http://www.nswp.org/sites/nswp.org/files/CAL-ADULTFILM.pdf> [https://perma.cc/H6ZE-WT6V].

volvement at all, to mandatory condom laws for all high risk sexual encounters, including oral sex.<sup>88</sup>

Mandatory condom laws have been introduced regularly in the state legislature but failed to gain traction—most recently in 2014 with Assembly Bill 1576.<sup>89</sup> But largely, the state legislature has left it to state agencies and localities as it failed to advance any statewide condoms-in-porn bill.

#### *D. Los Angeles City Council Ordinance*

Public health advocates have had better luck pushing legislation at the local level, albeit after much effort. In late 2011, AHF announced they had collected enough signatures to pursue a mandatory condom law on a citywide ballot measure in Los Angeles.<sup>90</sup> City Attorney Carmen Trutanich filed a lawsuit to block the ballot measure, saying that state law preempted local authorities from regulating condoms in pornography.<sup>91</sup> In response, Cal/OSHA’s staff counsel issued a letter to the city council indicating he did not think state law preempted the proposed action, as it was in the form of a conditional use permit as part of the city’s zoning regulation authority.<sup>92</sup> In January 2012, likely to head off an expensive special election for a ballot measure on the issue, the Los Angeles City Council voted nine-to-one to approve a city ordinance requiring actors to wear condoms while having sex in film productions.<sup>93</sup> The mayor, Antonio Villaraigosa, signaled his support as a public health issue.<sup>94</sup> The *Los Angeles Times* said the vote “marks a significant victory for the L.A.-based AIDS Healthcare Foundation, which has been rallying for years to protect the health of porn actors by asking agencies in California to mandate condom use during film shoots.”<sup>95</sup>

The ordinance was titled the “City of Los Angeles Safer Sex in the Adult Film Industry Act.”<sup>96</sup> It stated that the “HIV/AIDS crisis, and the ongoing epidemic of sexually transmitted infections as a result of the making of adult films, has caused a negative impact on public health and the quality of life of citizens

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<sup>88</sup> *Id.*

<sup>89</sup> A.B. 1576, 2013–14 Sess. (Cal. 2014).

<sup>90</sup> Kate Linthicum, *L.A. City Council Votes to Require Condoms in Porn Filming*, L.A. TIMES (Jan. 10, 2012 3:53 PM), <http://latimesblogs.latimes.com/lanow/2012/01/condom-porn-ordinance-los-angeles.html> [<https://perma.cc/8A95-RZJ4>].

<sup>91</sup> Dakota Smith, *Trutanich Objects to City Ballot Measure Requiring Condoms for Porn Actors*, DAILY BREEZE (Dec. 14, 2011 12:00 AM), <https://www.dailybreeze.com/2011/12/14/trutanich-objects-to-city-ballot-measure-requiring-condoms-for-porn-actors/> [<https://perma.cc/PU8N-267X>].

<sup>92</sup> Letter from James D. Clark, Staff Counsel to Cal/OSHA, to Los Angeles City Council (July 20, 2011), available at <http://documents.latimes.com/calosha-condom-porn/> [<https://perma.cc/572W-GEUT>].

<sup>93</sup> Lin, *supra* note 20.

<sup>94</sup> *Id.*

<sup>95</sup> *Id.*

<sup>96</sup> L.A., Cal., Ordinance 181,989 (Jan. 17, 2012).

living in Los Angeles.”<sup>97</sup> Further, it required that producers of adult films use “barrier protection, including condoms, to protect employees during the production of adult films.”<sup>98</sup> It did not spell out details of demonstrating compliance or enforcement.

*E. Los Angeles County Measure B*

While the city ordinance covered film permits within the city of Los Angeles, the county of Los Angeles comprises a much larger area. Los Angeles County is the most populous county in the United States, with a population of nearly ten million residents and nearly 27 percent of California’s population.<sup>99</sup> Because the county’s Department of Public Health also had more explicit authority and capacity under state law to regulate workplace health conditions, it too was a target of AHF’s public health campaigns, ultimately resulting in the passage of Measure B, or the “Safer Sex in the Adult Film Industry Act.”<sup>100</sup>

Prior to Measure B’s passage, AHF filed a lawsuit in 2011 in Los Angeles County Superior Court, *AIDS Healthcare Foundation v. Los Angeles County Department of Public Health*, seeking a writ of mandamus to compel the Los Angeles County Department of Public Health to require mandatory condom use in adult films and vaccinate actors for Hepatitis B.<sup>101</sup> A judge ruled that the Department of Public Health had not abused its discretion by failing to require condoms be used in pornography production, and dismissed the case.<sup>102</sup> The decision was upheld on appeal.<sup>103</sup>

AHF moved forward on a ballot measure in Los Angeles County, and in November 2012, voters approved Measure B.<sup>104</sup> As codified in county code, the new law required porn producers to pay a fee and obtain a permit from the County Department of Public Health; required all principals and management-level employees, including directors, to complete blood borne pathogen training; allowed for immediate and potentially permanent permit revocation without prior notice; allowed for warrantless searches of filming premises; required an exposure control plan; and required the posting of signs of regulations, among other things.<sup>105</sup> The ballot measure passed with 56 percent of the

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<sup>97</sup> *Id.*

<sup>98</sup> *Id.*

<sup>99</sup> *About LA County*, COUNTY OF L.A., <http://www.lacounty.gov/government/about-la-county> [<https://perma.cc/MV8Q-MPUX>] (last visited Sep. 23, 2018).

<sup>100</sup> L.A. COUNTY, CAL. CODE tit. 11 ch. 11.39 (2018).

<sup>101</sup> Allport, *supra* note 29, at 679.

<sup>102</sup> *Id.*

<sup>103</sup> For a critique of the decision see *id.* at 682–95.

<sup>104</sup> Gorman & Lin, *supra* note 21.

<sup>105</sup> L.A. COUNTY, CAL. CODE tit. 11 ch. 11.39 (2018).

vote.<sup>106</sup> A number of pornography production companies and adult film actors filed suit to block enforcement.<sup>107</sup>

*F. California State Proposition 60*

Using the momentum from the passage of Measure B, AHF and other supporters mobilized for a statewide ballot measure, collecting signatures and certifying them in 2015.<sup>108</sup> Proposition 60—a measure that, if passed, would have resulted in statewide enactment of the Condoms in Pornographic Films Initiative—was on the November 2016 ballot.<sup>109</sup> This initiative would have required the use of condoms and other protective measures in pornographic film production and mandated producers to pay for certain health requirements and programs.<sup>110</sup> The measure’s requirements, in addition to the mandatory condom rule, included a licensing system run by Cal/OSHA, and would allow individuals to enforce violations through lawsuits against producers, distributors, performers, and agents.<sup>111</sup>

In the fall of 2016, state voter guides carried official written arguments by both sides.<sup>112</sup> Proponents argued that thousands of adult film actors were exposed to serious and life-threatening injuries.<sup>113</sup> Further, proponents argued that with the estimated lifetime costs of treating people with HIV at a half a million dollars per person, the porn industry “has cost California taxpayers an estimated \$10 million in HIV treatment expenses alone.”<sup>114</sup> Thus, supporters asserted that Proposition 60 was necessary “to hold pornographers accountable for worker safety and health.”<sup>115</sup> Proponents wrote:

When pornographers ignore the law, they expose their workers to HIV, syphilis, chlamydia, gonorrhea, herpes, hepatitis, and human papillomavirus (HPV). Scientific studies show adult film performers are far more likely to get sexually transmitted diseases than the general population. Thousands of cases of diseases—which can spread to the larger community—have been documented within the adult film industry in recent years.<sup>116</sup>

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<sup>106</sup> Gorman & Lin, *supra* note 21.

<sup>107</sup> See *infra* Part III.

<sup>108</sup> *Activists Submit Signatures for California Condoms-in-Porn Vote*, REUTERS (Sept. 14, 2015 11:45 AM), <https://www.reuters.com/article/us-usa-condoms-california/activists-submit-signatures-for-california-condoms-in-porn-vote-idUSKCN0RE22420150914> [<https://perma.cc/8CX4-PH4F>].

<sup>109</sup> CAL. SEC’Y OF STATE, ELECTIONS DIV., *supra* note 22, at 68.

<sup>110</sup> *Id.*

<sup>111</sup> *Id.* at 68–69.

<sup>112</sup> *Id.* at 70–71.

<sup>113</sup> *Id.* at 70.

<sup>114</sup> *Id.*

<sup>115</sup> *Id.*

<sup>116</sup> *Id.*

Opponents claimed Proposition 60 was poorly drafted, invited rampant lawsuits, and would cost millions to implement.<sup>117</sup> California State Senator Mark Leno made the official argument against Proposition 60 in the statewide voter guide, writing, “This is what happens when one special interest group has access to millions of dollars to fund a political campaign.”<sup>118</sup> He also wrote, “The proponent wants you to believe this is about worker safety. But this disguises the real impact of the measure: the creation of an unprecedented LAWSUIT BONANZA that will cost taxpayers ‘millions of dollars’ and threatens the safety of performers.”<sup>119</sup> Opponents said Proposition 60 would violate performers’ privacy by requiring them to disclose private information to the state, create a state employee whose job would be “review” adult films, and could allow “[m]arried couples who distribute films produced in their own homes” to be sued.<sup>120</sup> The California Democratic Party and the California Republican Party both opposed Proposition 60.<sup>121</sup>

Despite AHF spending more than \$5 million in support, compared to about \$560,000 by opponents, the measure failed to pass, earning just 46 percent of voter support.<sup>122</sup> The vote was a surprise to many.<sup>123</sup> What was expected to be the final victory in AHF’s fifteen-year public health campaign actually resulted in confusion; all that remained was a patchwork of rules and regulations, rather than one law providing statewide uniformity.<sup>124</sup>

## II. THE FIRST AMENDMENT AND PORNOGRAPHY: RELEVANT ISSUES

Scholars identify various normative theories of the First Amendment, including the contribution to democratic self-governance, the search for truth, the checking value on authorities of power, a safety valve for citizen anger, a tool for individual autonomy and self-fulfillment, among others.<sup>125</sup> As a theoretical matter, it is difficult to argue that pornography advances First Amendment ideals related to democratic self-governance or the search for truth, but many scholars have rooted its First Amendment grounding in individual autonomy

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<sup>117</sup> *Id.* at 71.

<sup>118</sup> *Id.*

<sup>119</sup> *Id.*

<sup>120</sup> *Id.*

<sup>121</sup> *Id.*

<sup>122</sup> PADILLA, *supra* note 3, at 73.

<sup>123</sup> *See* Baume, *supra* note 23.

<sup>124</sup> *Id.*

<sup>125</sup> *See generally* C. EDWIN BAKER, HUMAN LIBERTY AND FREEDOM OF SPEECH (1989); LEE C. BOLLINGER, THE TOLERANT SOCIETY (1986); STEVEN J. HEYMAN, FREE SPEECH AND HUMAN DIGNITY (2008); MARTIN H. REDISH, FREEDOM OF EXPRESSION: A CRITICAL ANALYSIS (1984); FREDERICK SCHAUER, FREE SPEECH: A PHILOSOPHICAL ENQUIRY (1982); CASS R. SUNSTEIN, DEMOCRACY AND THE PROBLEM OF FREE SPEECH (1993); Thomas I. Emerson, *Toward a General Theory of the First Amendment*, 72 Yale L.J. 877 (1963).

and self-fulfillment theories.<sup>126</sup> The regulation of pornography production is mired with difficult theoretical and doctrinal questions. In this section, I will discuss the frameworks informing constitutional limits to the regulation of pornography, including the evolution of the obscenity doctrine; the virtues and harms of pornography as articulated through legal arguments; scrutiny analysis and content neutrality; conduct/expression distinctions; the secondary effects doctrine; and the prostitution/pornography distinction. These frameworks will inform analysis of appropriate standards to adjudicate the efficacy and constitutionality of mandatory condom laws in adult film production.

### A. *Obscenity Standards*

As a result of litigation beginning in the mid-twentieth century, US law has generally settled on a liberal, anti-censorial view of sexual expression.<sup>127</sup> This *laissez faire* attitude toward sexual speech has not always been the case, and sexual expression has been the subject of regulation for as long as mass communication has existed.<sup>128</sup> The First Amendment's coverage of sexually explicit content expanded in part from precedents in cases testing censorship of the mails over offensive books, pamphlets, and magazines that flourished in the Comstock Era of the late nineteenth and early twentieth centuries.<sup>129</sup> Until the 1930s, US courts generally upheld legal sanctions against sexually explicit and other offensive publications based on standards from *Regina v. Hicklin*, an 1868 case from England.<sup>130</sup> The "Hicklin test" allowed for censorship of materials if "the tendency of the matter . . . is to deprave and corrupt [the morals of] those whose minds are open to such immoral influences, and into whose hands a publication of this sort may fall."<sup>131</sup>

After new technologies of film and moving images became mass produced, they were initially carved out of First Amendment coverage by the Supreme Court until the 1952 decision in *Joseph Burstyn, Inc. v. Wilson*.<sup>132</sup> The Supreme

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<sup>126</sup> See books cited *supra* note 125. See also OBSCENITY AND THE LIMITS OF LIBERALISM (Loren Glass & Charles Francis Williams eds., 2011); David A. J. Richards, *Free Speech and Obscenity Law: Toward a Moral Theory of the First Amendment*, 123 U. PA. L. REV. 45 (1974); Jeffrey M. Shaman, *The Theory of Low-Value Speech*, 48 SMU L. REV. 297 (1995).

<sup>127</sup> See books cited *supra* note 8.

<sup>128</sup> See books cited *supra* note 8.

<sup>129</sup> See, e.g., PAUL S. BOYER, PURITY IN PRINT: BOOK CENSORSHIP IN AMERICA FROM THE GILDED AGE TO THE COMPUTER AGE (2002); MORRIS L. ERNST & ALAN U. SCHWARTZ, CENSORSHIP: THE SEARCH FOR THE OBSCENE (1964); FELICE FLANERY LEWIS, LITERATURE, OBSCENITY & LAW (1976); JAMES C. N. PAUL & MURRAY L. SCHWARTZ, FEDERAL CENSORSHIP: OBSCENITY IN THE MAIL (1961).

<sup>130</sup> *Regina v. Hicklin* [1868] L.R. 3 Q.B. 360; William Crawford Green, *Hicklin Test*, in FIRST AMENDMENT ENCYCLOPEDIA, <https://mtsu.edu/first-amendment/article/969/hicklin-test> [<https://perma.cc/24Y6-TSSQ>] (last visited Sep. 23, 2018).

<sup>131</sup> *Hicklin*, L.R. 3 Q.B. at 371; see, e.g., STRUB, *supra* note 8 (discussing the Hicklin test and its application).

<sup>132</sup> *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 506 (1952).

Court began to adopt a more critical eye toward censorship of sexual themes in the 1950s. Central to the sexual revolution were business ventures, such as the commercial pornography industry, that “helped to create a public space . . . where it was permissible not only to discuss patterns of sexual behavior but also to portray sexuality honestly and bluntly in fiction, on the stage, and in movies.”<sup>133</sup> In the 1950s and 1960s, the Supreme Court established different lines to draw between obscenity and pornography, ruling that the former was not deserving of First Amendment protection while the latter deserved full legal protections.<sup>134</sup> As one scholar of pornography noted, “the sexual revolution of the sixties and seventies would never have taken place without a series of extended legal and political battles over obscenity and pornography.”<sup>135</sup>

The modern obscenity doctrine was spawned by the 1957 case of *Roth v. United States*, in which the Supreme Court upheld the conviction of Samuel Roth for sending erotic materials and nude images through the mail.<sup>136</sup> The Court defined obscenity as material that “to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to the prurient interest.”<sup>137</sup>

Over the next fifteen years, the *Roth* holding was applied erratically in a series of cases that showed the difficulty in creating objective standards for defining pornography.<sup>138</sup> The *Roth* holding raised more problems than it solved, including disparate ideas about how to define community standards, and whether positive values of the underlying work mitigated appeals to the prurient interest.<sup>139</sup> In *Redrup v. New York*, the Supreme Court in 1967 rejected an obscenity conviction of the seller of sexually explicit paperback “pulp fiction” books.<sup>140</sup> The judgment was per curiam, although the judges could not agree on a common approach.<sup>141</sup> For the next several years, the Court overturned many obscenity decisions, but with justices split on different reasons.<sup>142</sup> Perhaps the most absolutist of these decisions was *Stanley v. Georgia*, in which the Su-

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<sup>133</sup> Jeffrey Escoffier, *The Sexual Revolution, 1960–1980*, GLBTQ ENCYCLOPEDIA PROJECT, [http://www.glbtqarchive.com/ssh/sexual\\_revolution\\_S.pdf](http://www.glbtqarchive.com/ssh/sexual_revolution_S.pdf) [https://perma.cc/W4A7-WF3G] (last visited Sep. 23, 2018).

<sup>134</sup> See, e.g., *Stanley v. Georgia*, 394 U.S. 557, 567–68 (1969); *Ginsberg v. New York*, 390 U.S. 629, 643 (1968); *Redrup v. New York*, 386 U.S. 767, 770–71 (1967) (per curiam); *A Book Named “John Cleland’s Memoirs of a Woman of Pleasure” v. Att’y Gen. of Mass.*, 383 U.S. 413, 431–32 (1966); *Jacobellis v. Ohio*, 378 U.S. 184, 201 (1964); *Roth v. United States*, 354 U.S. 476, 490 (1957).

<sup>135</sup> JEFFREY ESCOFFIER, *BIGGER THAN LIFE: THE HISTORY OF GAY PORN CINEMA FROM BEEFCAKE TO HARDCORE 2* (2009).

<sup>136</sup> *Roth*, 354 U.S. at 492–93.

<sup>137</sup> *Id.* at 489.

<sup>138</sup> See, e.g., *Redrup*, 386 U.S. at 770–71; *Memoirs*, 383 U.S. at 418. For book-length treatment of the case, see STRUB, *supra* note 8.

<sup>139</sup> *Roth*, 354 U.S. at 490.

<sup>140</sup> *Redrup*, 386 U.S. at 770–71.

<sup>141</sup> *Id.* at 768.

<sup>142</sup> See generally HIXSON, *supra* note 8, at 112.

preme Court in effect said that individuals have a right to possess sexually explicit material in the privacy of their home, even if the material was deemed obscene.<sup>143</sup>

Whatever may be the justifications for other statutes regulating obscenity, we do not think they reach into the privacy of one's own home. If the First Amendment means anything, it means that a State has no business telling a man, sitting alone in his own house, what books he may read or what films he may watch.<sup>144</sup>

The possession distinction did not follow to cases in which individuals were accused of transporting or distributing obscenity.<sup>145</sup>

Perhaps recognizing the problems with the "I-know-it-when-I-see-it" approach, the Supreme Court ended the "reverse-on-Redrup" era with *Miller v. California*.<sup>146</sup> In 1973, a Supreme Court with a conservative majority used a case involving a California man's distribution of sexually explicit catalogs in the mail to issue a new obscenity test, which remains the starting point for constitutional analysis today. In *Miller v. California*, the Supreme Court, by a five-to-four vote, determined that sexually explicit material could be adjudicated "obscene" if:

(a) . . . '[an] average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest; (b) . . . the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) . . . the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.<sup>147</sup>

While seen as a conservative decision upholding the prosecution of a pornographer, the result of the *Miller* test has generally been a decline in obscenity convictions and the flourishing of sexually explicit materials.<sup>148</sup> Still, the *Miller* test hardly provides individuals with clarity about what speech is prohibited, leaving the application of the subjective *Miller* standards up to individual juries.<sup>149</sup> As a former executive director of the Free Speech Coalition, an adult entertainment advocacy group said:

Obscenity law is like an unposted speed limit—you're going down the road, you're passing some people and some people are passing you. There's no posted speed limit. You don't know what's okay and what's not okay, so you make a

<sup>143</sup> *Stanley v. Georgia*, 394 U.S. 557, 568 (1969).

<sup>144</sup> *Id.* at 565.

<sup>145</sup> *See, e.g., United States v. 12 200-Ft. Reels of Super 8mm. Film*, 413 U.S. 123, 125 (1973); *United States v. Reidel*, 402 U.S. 351, 354–55 (1971); *United States v. Thirty-Seven Photographs*, 402 U.S. 363, 376–77 (1971).

<sup>146</sup> *Miller v. California*, 413 U.S. 15 (1973). Justice Potter Stewart wrote that in defining "hard core pornography," "I shall not today attempt further to define the kinds of material I understand to be embraced . . . . But I know it when I see it." *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).

<sup>147</sup> *Miller*, 413 U.S. at 24 (citations omitted) (quoting *Kois v. Wisconsin*, 408 U.S. 229, 230 (1972)).

<sup>148</sup> *See generally* HAWKINS & ZIMRING, *supra* note 8.

<sup>149</sup> *Id.* at 132–34.

decision and you decide. But then, as you're going down the road and you get pulled over, the cop says "you're going too fast," but it's not posted anywhere so how do you know?<sup>150</sup>

After the *Miller* decision, the Supreme Court's obsession with obscenity cases diminished, and commercial pornography flourished despite occasional legal crackdowns that cast a subtle pall over the industry.<sup>151</sup> During the presidency of George W. Bush, the federal government ramped up its obscenity prosecutions in several high-profile cases of *extreme* pornography.<sup>152</sup> Several jury convictions of commercial pornographers were upheld upon appeal, signaling that obscenity prosecutions continued to be a threat to explicit sexual speech.<sup>153</sup> The Bush administration's crackdown of Los Angeles-based film producers were largely conducted in conservative regions of Florida, Pennsylvania, and Texas.<sup>154</sup> The convictions signaled another challenge for the adult film industry, as local juries were allowed to use local community standards to prosecute pornography that was made available over the Internet.<sup>155</sup> In effect, the holdings suggest that all pornographers are vulnerable to prosecutions in the most conservative regions of the country because of the new distribution model presented by the Internet.<sup>156</sup>

Even without an obscenity finding, pornography can still be subjected to a variety of regulations without violating the First Amendment. The courts have given municipalities several mechanisms to shut down adult-oriented businesses by declaring them "public nuisances,"<sup>157</sup> and municipalities can restrict the operation of adult-oriented businesses to certain parts of town through zoning laws.<sup>158</sup> A divided Supreme Court also ruled that nude dancing in strip clubs can be prohibited without violating the First Amendment rights of the perform-

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<sup>150</sup> Clay Calvert & Robert D. Richards, *Stopping the Obscenity Madness 50 Years After Roth v. United States*, 9 TEX. REV. ENT. & SPORTS L. 1, 19 (2007).

<sup>151</sup> *Id.*; see also Robert D. Richards & Clay Calvert, *Obscenity Prosecutions and the Bush Administration: The Inside Perspective of the Adult Entertainment Industry & Defense Attorney Louis Sirkin*, 14 VILL. SPORTS & ENT. L.J. 233 (2007) [hereinafter Richards & Calvert, *Obscenity Prosecutions*]; Robert D. Richards & Clay Calvert, *The 2008 Federal Obscenity Conviction of Paul Little and What It Reveals About Obscenity Law and Prosecutions*, 11 VAND. J. ENT. & TECH. L. 543 (2009) [hereinafter Richards & Calvert, *Obscenity Law and Prosecutions*]; Robert D. Richards & Clay Calvert, *Prosecuting Obscenity Cases: An Interview with Mary Beth Buchanan*, 9 FIRST AMEND. L. REV. 56 (2010) [hereinafter Richards & Calvert, *Prosecuting Obscenity Cases*].

<sup>152</sup> Richards & Calvert, *Prosecuting Obscenity Cases*, *supra* note 151, at 72.

<sup>153</sup> Richards & Calvert, *Obscenity Law and Prosecutions*, *supra* note 151, at 588.

<sup>154</sup> Richards & Calvert, *Prosecuting Obscenity Cases*, *supra* note 151, at 65–66.

<sup>155</sup> Calvert & Richards, *supra* note 150, at 16; Richards & Calvert, *Obscenity Prosecutions*, *supra* note 151, at 280; Richards & Calvert, *Obscenity Law and Prosecutions*, *supra* note 151, at 572; Richards & Calvert, *Prosecuting Obscenity Cases*, *supra* note 151, at 64–65.

<sup>156</sup> Richards & Calvert, *Prosecuting Obscenity Cases*, *supra* note 151, at 64–65.

<sup>157</sup> See *Alexander v. United States*, 509 U.S. 544, 552–53 (1993); *Vance v. Universal Amusement Co.*, 445 U.S. 308, 309 (1980).

<sup>158</sup> See *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 43 (1986); *Young v. Am. Mini Theatres, Inc.*, 427 U.S. 50, 84 (1976).

ers,<sup>159</sup> and Congress can require public libraries to install filtering software that blocks sexually explicit content for users.<sup>160</sup>

*B. Pornography: Virtues and Harms*

Is pornography a harmless expression of the sexual desires in all humans, or a dangerous vice of our darkest desires? The answer to this question has long informed debates over the social interests in regulating pornography. It also underscores how answers to such questions have informed attempts to regulate pornography and limit censorship.

A libertarian view of pornography might insist that claimed positive values of pornography are irrelevant in determining First Amendment protections if the First Amendment right to create, disseminate, and view sexually explicit expression is rooted in “autonomy” and “self-fulfillment” theories of the First Amendment.<sup>161</sup> As such, pornography is expression; and based on autonomy, self-fulfillment, and anti-paternalism theories of speech protection, pornography is *de facto* protected by the First Amendment, regardless of its effects or uses.<sup>162</sup> However, one may advance a positivist argument that non-condom pornography fulfills a particular fantasy for consumers, and perhaps allows for a sexual release through fantasy akin to the First Amendment’s “safety valve” function, and therefore has a value to the metaphorical marketplace of ideas.<sup>163</sup> Using this framework, mandatory condom laws limit the right of citizens to produce otherwise lawful, sexual expression and limit an individual’s ability to receive otherwise lawful, sexual expression.

To be sure, the public utility of pornography is hardly universally accepted among First Amendment scholars. Provocatively, Frederick Schauer has advocated that some pornography, including “hardcore” pornography, isn’t speech at all because it merely serves to spark sexual arousal. Analogizing hardcore pornography to a sex aid such as a vibrator, Schauer said that “[d]irect sexual excitement can hardly be said to contribute to the marketplace of ideas.”<sup>164</sup>

There are several rebuttals to Schauer’s argument.<sup>165</sup> One is to attack the argument on its merits. Pornography that produces a sexual response does so through mediated communication that contains both a message and a process of

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<sup>159</sup> *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 570–71 (1991).

<sup>160</sup> *United States v. Am. Library Ass’n Inc.*, 539 U.S. 194 (2003).

<sup>161</sup> See generally *BAKER*, *supra* note 125; Martin H. Redish, *The Value of Free Speech*, 150 U. PA. L. REV. 591, 591 (1982).

<sup>162</sup> Redish, *supra* note 161, at 593.

<sup>163</sup> *Id.* at 594.

<sup>164</sup> Frederick Schauer, *Response: Pornography and the First Amendment*, 40 U. PITT. L. REV. 605, 608 n.14 (1979); see also Frederick Schauer, *Speech and “Speech”—Obscenity and “Obscenity”: An Exercise in the Interpretation of Constitutional Language*, 67 GEO. L.J. 899, 900 n.3 (1979).

<sup>165</sup> See David Cole, *Playing by Pornography’s Rules: The Regulation of Sexual Expression*, 143 U. PA. L. REV. 111, 125 (1994).

response that sparks emotion, traditions, instincts, learned behavior, and desire. As Jeffrey Weeks has noted, “Sexuality is as much about words, images, ritual and fantasy as it is about the body: the way we think about sex fashions the way we live it.”<sup>166</sup> A second problem with Schauer’s argument is that it fails to address a variety of other expression that receives First Amendment protection, but can hardly be viewed as being “intellectual.”<sup>167</sup> The Supreme Court’s decisions largely, but not entirely, rejected arguments that sexual expression is qualitatively different, and more harmful, than other forms of protected speech, or that it is not “speech” at all, but rather conduct that serves primarily as a sex aid that does not appeal to intellect.<sup>168</sup> Protecting the “morality” of society is generally not a sufficient reason to prohibit sexual expression.<sup>169</sup>

Other attempts to punish or prohibit pornography not deemed to be obscene have generally failed. Perhaps the most notable was the movement to deem pornography as a civil rights violation to women. Scholars Catherine MacKinnon, Andrea Dworkin, and Richard Delgado, among others, have advocated for pornography prohibitions not because of its lack of intellectual ideas, but *because* of them.<sup>170</sup> In *Only Words*, MacKinnon asserted “[e]mpirically, all pornography is made under conditions of inequality based on sex, overwhelmingly by poor, desperate, homeless, pimped women who were sexually abused as children.”<sup>171</sup> She identified the harms of both pornography as “including stereotyping, objectification, deprivation of human dignity, targeting for violence, and terrorization of target groups.”<sup>172</sup> She said that even though women consent to participating in the making of pornography, they are not truly able to consent, given the nature of male dominance in society.<sup>173</sup>

MacKinnon and Dworkin were activist scholars who turned their advocacy into legal proposals, which were adopted by some jurisdictions.<sup>174</sup> The City of Indianapolis, for example, adopted a version of MacKinnon and Dworkin’s model statute that deemed pornography to be a civil rights violation against women.<sup>175</sup> The Seventh Circuit Court of Appeals flatly rejected MacKinnon and Dworkin’s pornography proposal as a clear violation of numerous First

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<sup>166</sup> JEFFREY WEEKS, *SEXUALITY AND ITS DISCONTENTS: MEANINGS, MYTHS & MODERN SEXUALITIES* 3 (1985).

<sup>167</sup> See generally MARK V. TUSHNET ET AL., *FREE SPEECH BEYOND WORDS: THE SURPRISING REACH OF THE FIRST AMENDMENT* (2017).

<sup>168</sup> See generally RANDALL, *supra* note 8.

<sup>169</sup> *Id.*

<sup>170</sup> THE PRICE WE PAY: THE CASE AGAINST RACIST SPEECH, HATE PROPAGANDA, AND PORNOGRAPHY (Laura Lederer & Richard Delgado eds., 1995).

<sup>171</sup> CATHARINE A. MACKINNON, *ONLY WORDS* 20 (1993).

<sup>172</sup> Catharine MacKinnon, *Speech, Equality, and Harm: The Case Against Pornography*, in THE PRICE WE PAY: THE CASE AGAINST RACIST SPEECH, HATE PROPAGANDA AND PORNOGRAPHY 301, 301 (Laura Lederer & Richard Delgado eds., 1995).

<sup>173</sup> MACKINNON, *supra* note 171, at 20.

<sup>174</sup> See, e.g., DOWNS, *supra* note 8, at xi.

<sup>175</sup> *Id.* at 95–143.

Amendment principles and called such approach "thought control."<sup>176</sup> "The Constitution forbids the state to declare one perspective right and silence opponents," wrote Judge Easterbrook in *American Booksellers Association Inc. v. Hudnut*.<sup>177</sup> Easterbrook also recognized the power of speech to "condition" people in certain ways, sometimes in undesirable ways, but to rule otherwise would mean "the end of freedom of speech."<sup>178</sup> He wrote that the description of sexual dominance is "not real dominance."<sup>179</sup>

MacKinnon's proposal to regulate pornography swept so broadly as to reveal fundamental problems with such approaches. She essentially argued that all pornography depicts a world in which women are objectified and subordinated; that this is a serious harm to all women; and therefore, such pornography can be justifiably regulated.<sup>180</sup> Her argument seemed to provide two deeply contradictory propositions: that pornography as such conveys deeply disturbing ideas about gender and based on the offensiveness of this idea it should be regulated; and that pornography conveys no ideas at all and therefore isn't speech.<sup>181</sup> This exposes the profound conundrum of pornography and its regulation. On the one hand, as Andrea Dworkin stated, "[i]n pornography, everything means something."<sup>182</sup> And what it means is that women are second-class citizens, even objects, to be used at the whim of men's sexual fancy.<sup>183</sup> In this respect, the argument is that pornography deserves regulation because of the message it conveys; a message that is morally repugnant to a nation that embraces gender equality.

Other reviews of scientific inquiry have not supported MacKinnon's broad attack on pornography. The President's Commission on Obscenity and Pornography in 1970, for example, found "no evidence" that exposure to explicit sexual materials plays a role in the causation of criminal behavior. However, the Meese Commission in 1986 said "evidence strongly supports the hypothesis that substantial exposure to sexually violent materials . . . bears a causal relationship to antisocial sets of sexual violence."<sup>184</sup> In summarizing the findings of these and a third national study, Gordon Hawkins and Franklin E. Zimring said "we have found no more striking example of the drawing of contrary conclusions from the evidence provided by social science research in any area of modern policy debate."<sup>185</sup> In another review of academic studies of the effects

<sup>176</sup> *Am. Booksellers Ass'n, Inc., v. Hudnut*, 771 F.2d 323, 328 (7th Cir. 1985).

<sup>177</sup> *Id.* at 325.

<sup>178</sup> *Id.* at 330.

<sup>179</sup> *Id.*

<sup>180</sup> MacKinnon, *supra* note 172, at 304.

<sup>181</sup> *Id.* at 304–05.

<sup>182</sup> Andrea Dworkin, *Pornography Happens to Women*, in *THE PRICE WE PAY: THE CASE AGAINST RACIST SPEECH, HATE PROPAGANDA AND PORNOGRAPHY* 181, 183 (Laura Lederer & Richard Delgado eds., 1995).

<sup>183</sup> *Id.*

<sup>184</sup> HAWKINS & ZIMRING, *supra* note 8, at 77, 79.

<sup>185</sup> *Id.* at 77.

of violent pornography, Professor Donald Downs suggested that the evidence of a causal relationship between pornography and social harms is far from conclusive, and even if it were more so, he questioned the strength of the findings in First Amendment analysis.<sup>186</sup> And Professor Steven G. Gey pointed to the fundamental dilemma with MacKinnon's proposal: In advocating for pornography regulation based on a generalized harm to a group of people (i.e., women), she fails to address the fact that "no one has been able to demonstrate that identifiable, physical harms result directly from pornography."<sup>187</sup>

### C. First Amendment Scrutiny and Content Neutrality

When it comes to assessing the First Amendment implications of mandatory condom laws, several basic jurisprudential frameworks are invoked. One of the most elementary questions is whether the law is regulating conduct or expression. The expressive conduct doctrine emanates from decisions of the Supreme Court finding that the First Amendment provides some protection to conduct intertwined with expression in cases involving compulsory flag salutes,<sup>188</sup> wearing black armbands to protest war,<sup>189</sup> displaying a flag,<sup>190</sup> nude dancing,<sup>191</sup> flag burning,<sup>192</sup> and cross burning.<sup>193</sup> Conduct intertwined with expression can be protected by the First Amendment under the Court's expressive conduct doctrine, which essentially applies the intermediate scrutiny.<sup>194</sup> After determining that a law is regulating the expressive elements of conduct, another threshold question is whether the law or regulation is content-based or content-neutral. Does the law or regulation apply to all expression equally, or does it single out only some kinds of expression for regulation? Generally, if a law is content-based, courts will apply the "strict scrutiny" test, a stringent standard that makes it difficult for the law to be upheld.<sup>195</sup> Laws that are content-neutral are generally constitutional if they meet the standards of intermediate scrutiny.<sup>196</sup>

A number of Supreme Court decisions have wrestled with what communicative messages were conveyed through different activities. In *Spence v. Wash-*

<sup>186</sup> DOWNS, *supra* note 8, at 165–75.

<sup>187</sup> Steven G. Gey, *The Apologetics of Suppression: The Regulation of Pornography as Act and Idea*, 86 MICH. L. REV. 1564, 1600 (1988).

<sup>188</sup> *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 632 (1943).

<sup>189</sup> *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 505–06 (1969).

<sup>190</sup> *Spence v. Washington*, 418 U.S. 405, 406 (1974) (per curiam).

<sup>191</sup> *Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 63 (1981). *But see City of Erie v. Pap's A.M.*, 529 U.S. 277, 278 (2000); *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 562–63 (1991).

<sup>192</sup> *Texas v. Johnson*, 491 U.S. 397, 399 (1989).

<sup>193</sup> *R.A.V. v. City of St. Paul*, 505 U.S. 377, 381 (1992). *But see Virginia v. Black*, 538 U.S. 343, 347–48 (2003).

<sup>194</sup> *See generally United States v. O'Brien*, 391 U.S. 367, 370–72 (1968).

<sup>195</sup> *See generally Williams-Yulee v. Fla. Bar*, 135 S. Ct. 1656 (2015).

<sup>196</sup> *See generally Ward v. Rock Against Racism*, 491 U.S. 781, 782 (1989).

*ington*,<sup>197</sup> the Supreme Court ruled that in evaluating expressive conduct claims, the intent of the communicator was relevant, but so too was whether there was a "great" likelihood "that the message would be understood by those who viewed it."<sup>198</sup> The case involved the arrest of a man who hung an American flag with a peace sign affixed to it from his apartment window, in violation of a state statute that prohibited the exhibition of a U.S. flag with superimposed symbols on it.<sup>199</sup> Sometimes, it may be difficult to determine the extent of the expressive element present. There are other forms of communication that while not immediately conveying obvious messages, still warrant First Amendment consideration. All sorts of communications raise difficult questions about First Amendment coverage and protection, including instrumental music, nonrepresentational art, and "nonsense."<sup>200</sup> Even when the communication may be unclear, scholars have argued that the cognitive reactions to unconventional expression, such as instrumental music, warrant the communication coverage under the First Amendment.<sup>201</sup> Instrumental music, for example, provokes cognitive responses among listeners, enhances other communicative messages, expresses specific cultural, religious and social values, and expresses emotion.<sup>202</sup> While not all laws regulating expressive conduct are found to be in violation of the First Amendment, those that single out expressive conduct because of the expression it conveys are usually deemed to be conduct-based laws subject to strict scrutiny.<sup>203</sup>

The principle that content-based laws are constitutionally suspect, and are therefore subject to the most rigorous form of judicial scrutiny, comes from the belief that the "government may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views."<sup>204</sup> A foundational case establishing the content neutrality principle in speech regulations was the 1972 decision in *Police Department of the City of Chicago v. Mosley*.<sup>205</sup> After the City of Chicago passed an ordinance prohibiting protests outside of schools, a citizen who regularly peacefully protested against racial discrimination sought declaratory and injunctive relief, in part alleging that because the ordinance had an exemption for labor protests, the ordinance denied him equal protection of the law in violation of the First and Fourteenth Amendments.<sup>206</sup> The Court said:

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<sup>197</sup> *Spence v. Washington*, 418 U.S. 405 (1974).

<sup>198</sup> *Id.* at 410–11.

<sup>199</sup> *Id.*

<sup>200</sup> TUSHNET ET AL., *supra* note 167, at 119.

<sup>201</sup> *Id.* at 65.

<sup>202</sup> *Id.* at 46–65.

<sup>203</sup> *Id.* at 5.

<sup>204</sup> *Police Dep't of Chi. v. Mosley*, 408 U.S. 92, 96 (1972).

<sup>205</sup> *Id.* at 102.

<sup>206</sup> *Id.* at 93–94.

The central problem with Chicago's ordinance is that it describes permissible picketing in terms of its subject matter. Peaceful picketing on the subject of a school's labor-management dispute is permitted, but all other peaceful picketing is prohibited. The operative distinction is the message on a picket sign. But, above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.<sup>207</sup>

For a content-based law to survive strict scrutiny, the government must demonstrate the law "is necessary to serve a compelling state interest and is narrowly drawn to achieve that end."<sup>208</sup> While the Court has noted, it is the "rare case[] in which a speech restriction withstands strict scrutiny,"<sup>209</sup> the Court does occasionally uphold speech restrictions subject to strict scrutiny. Most recently, in *Holder v. Humanitarian Law Project*, the Court upheld a law prohibiting individuals and organizations from providing material support to groups identified as terrorist organizations, after applying the strict scrutiny test.<sup>210</sup>

Content-neutral laws and regulations that affect expression are reviewed under an "intermediate scrutiny" test.<sup>211</sup> Content-neutral laws, including so-called "time, place, or manner" regulations, are permissible so long as they "are justified without reference to the content of the regulated speech," and are generally upheld if "they are narrowly tailored to serve a significant government interest, and . . . leave open ample alternative channels for communication of the information."<sup>212</sup> As Justice Kennedy articulated in *Ward v. Rock Against Racism*, a case involving New York City regulations on the use of sound amplification equipment in Central Park, "[t]he principal inquiry in determining content neutrality, in speech cases generally and in time, place, or manner cases in particular, is whether the government has adopted a regulation of speech because of disagreement with the message it conveys."<sup>213</sup> In that case, the Court upheld regulations of sound equipment use as having legitimate government interests in protecting the quality of life for neighbors and park users unrelated to the suppression of the expression of anyone using the sound system.<sup>214</sup>

In other cases, in which intertwined expression and conduct are being regulated, the Court has applied a form of intermediate scrutiny when the aim of the law is unrelated to the suppression of expression. In *U.S. v. O'Brien*, the Court ruled that a law prohibiting the destruction of a draft card was sufficiently important to outweigh any incidental speech restrictions.<sup>215</sup> The Court asked whether the law furthered an important or substantial government interest, un-

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<sup>207</sup> *Id.* at 95.

<sup>208</sup> *Ark. Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 231 (1987).

<sup>209</sup> *Williams-Yulee v. Fla. Bar*, 135 S. Ct. 1656, 1666 (2015).

<sup>210</sup> *See generally* *Holder v. Humanitarian Law Project*, 561 U.S. 1 (2010).

<sup>211</sup> *Id.* at 2723.

<sup>212</sup> *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 (1984).

<sup>213</sup> *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989).

<sup>214</sup> *Id.* at 803.

<sup>215</sup> *See generally* *United States v. O'Brien*, 391 U.S. 367 (1968).

related to the suppression of expression.<sup>216</sup> It answered in the affirmative, ruling that the smooth functioning of the draft process was a sufficient reason to require everyone to have a draft card and was not intended to stifle protests of the war efforts.<sup>217</sup> The *O'Brien* intermediate scrutiny test requires that a regulation impinging on First Amendment values (1) be within the constitutional power of the government to enact; (2) further an important or substantial government interest; (3) that interest must be unrelated to the suppression of speech; and (4) prohibit no more speech than is essential to further that interest.<sup>218</sup> In two cases involving the constitutionality of FCC regulations of cable television services, *Turner I*<sup>219</sup> and *Turner II*<sup>220</sup>, the Supreme Court articulated the thresholds for some elements of intermediate scrutiny, including the standards for defining substantial government interest, narrow tailoring, and alternative means of communication. *Turner I* required that the substantial government interest be "real, not merely conjectural, and that the regulation will in fact alleviate [those] harms in a direct and material way."<sup>221</sup> And while a law is "not invalid simply because there is some imaginable alternative that might be less burdensome,"<sup>222</sup> the law must not "burden substantially more speech than is necessary to further the government's legitimate interests."<sup>223</sup>

The categorical approach regarding the threshold question of whether a law is content-based or content-neutral is not as clear cut as it might appear. After scholar Dan Kozlowski reviewed divided Court decisions hinging on the content neutrality question in three controversial areas of First Amendment law,<sup>224</sup> he concluded that "the Court's malleable definitions and inconsistent applications leave the content and viewpoint concepts especially ripe for manipulation."<sup>225</sup>

A 2015 Supreme Court decision underscored the malleability of the content neutrality distinctions, and some scholars have suggested the precedent may have important implications to traditional doctrines, including the pornography doctrine. In *Reed v. Town of Gilbert*, the Supreme Court struck down lower courts' determinations that an outdoor signage law was content-neutral, and instead found it was a content-based law that could not survive strict scrutiny.<sup>226</sup>

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<sup>216</sup> *Id.* at 377.

<sup>217</sup> *Id.* at 381.

<sup>218</sup> *Id.* at 377.

<sup>219</sup> *Turner Broad. Sys., Inc. v. FCC (Turner I)*, 512 U.S. 622 (1994).

<sup>220</sup> *Turner Broad. Sys., Inc. v. FCC (Turner II)*, 520 U.S. 180 (1997).

<sup>221</sup> *Turner I*, 512 U.S. at 664.

<sup>222</sup> *Turner II*, 520 U.S. at 217 (internal quotation marks omitted).

<sup>223</sup> *Turner I*, 512 U.S. at 665 (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 799 (1989)).

<sup>224</sup> Dan V. Kozlowski, *Content and Viewpoint Discrimination: Malleable Terms Beget Malleable Doctrine*, 13 COMM. L. POL'Y 131, 134 (2008) (Reviewing precedents in cases involving abortion protests, adult businesses, and religious expression).

<sup>225</sup> *Id.*

<sup>226</sup> *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2224 (2015).

The law in question in Gilbert, Arizona, imposed limits on the size and location of various outdoor signs, including temporary directional signs to events, ideological signs, and political signs.<sup>227</sup> A church that posted between fifteen to twenty temporary signs in public right-of-ways each weekend challenged the law after it was twice cited for violating the sign ordinance by leaving the signs up too long and not including the date of the events on the signs.<sup>228</sup>

Justice Thomas, writing for the majority, adopted a bright-line rule to distinguish between content-based and content-neutral regulations that drew criticism from his colleagues. Reviewing the Gilbert ordinance, Justice Thomas said the law was a content-based law on its face.<sup>229</sup> A law is content-based, Justice Thomas wrote, if it “applies to particular speech because of the topic discussed or the idea or message expressed.”<sup>230</sup> Justice Thomas said that “[s]ome facial distinctions based on a message are obvious, defining regulated speech by particular subject matter, and others are more subtle, defining regulated speech by its function or purpose. Both are distinctions drawn based on the message a speaker conveys, and, therefore, are subject to strict scrutiny.”<sup>231</sup> He said that because the sign ordinance treats signs differently based on their content—signs that are designed to influence an election are treated differently than signs directing people to a church event—the ordinance is a content-based law subject to strict scrutiny.<sup>232</sup> “The restrictions in the Sign Code that apply to any given sign thus depend entirely on the communicative content of the sign,” Justice Thomas wrote.<sup>233</sup> “On its face, the Sign Code is a content-based regulation of speech. We thus have no need to consider the government’s justifications or purposes for enacting the Code to determine whether it is subject to strict scrutiny.”<sup>234</sup> Additionally, government motives have no place in the analysis of content-based or content-neutral determinations, Justice Thomas said.<sup>235</sup> “Innocent motives do not eliminate the danger of censorship presented by a facially content-based statute, as future government officials may one day wield such statutes to suppress disfavored speech,” he wrote.<sup>236</sup> Justice Thomas concluded,

This type of ordinance may seem like a perfectly rational way to regulate signs, but a clear and firm rule governing content neutrality is an essential means of

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<sup>227</sup> *Id.* at 2224–25.

<sup>228</sup> *Id.*

<sup>229</sup> *Id.* at 2227.

<sup>230</sup> *Id.*

<sup>231</sup> *Id.*

<sup>232</sup> *Id.*

<sup>233</sup> *Id.*

<sup>234</sup> *Id.*

<sup>235</sup> *Id.* at 2229.

<sup>236</sup> *Id.*

protecting the freedom of speech, even if laws that might seem ‘entirely reasonable’ will sometimes be ‘struck down because of their content-based nature.’<sup>237</sup>

It would seem that Justice Thomas’s “clear and firm rule” may implicate other precedents in which the Court seemingly interpreted regulations more generously when it came to distinctions based on content—namely, sexually explicit speech. In concurrence, Justices Breyer and Kagan critiqued Justice Thomas’s bright line approach.<sup>238</sup> Justice Breyer noted that government regulations often involve content in some way, and “content discrimination, while helping courts to identify unconstitutional suppression of expression, cannot and should not *always* trigger strict scrutiny.”<sup>239</sup> He cited examples including regulations of securities, energy conservation labeling practices, prescription drugs, doctor-patient confidentiality, income tax statements, commercial airplane briefings, and signs at petting zoos.<sup>240</sup> “[T]o hold that such content discrimination triggers strict scrutiny is to write a recipe for judicial management of ordinary government regulatory activity,” Justice Breyer wrote.<sup>241</sup> Justice Kagan, joined by Justice Breyer and Ginsburg, concurred in judgment but not the rationale.<sup>242</sup> Justice Kagan traced the rationale for the strict scrutiny standard in the Court’s precedents, finding that the two primary reasons for subjecting content-based restrictions to strict scrutiny are “to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail” and “to ensure that the government has not regulated speech ‘based on hostility—or favoritism—towards the underlying message expressed.’”<sup>243</sup> When the risks of impinging on truth seeking and discriminating against viewpoint are small, the courts have used a less rigid standard to evaluate the constitutionality of a law—including cases involving sign ordinances, and the Court’s secondary effects analysis in regulating adult businesses, Justice Kagan said.<sup>244</sup>

Whether *Reed* will be used to reconsider other areas of First Amendment law hinging on the distinction between content-based and content-neutral determinations, including pornography regulations justified by the secondary effects doctrine, discussed below, remains to be seen.

#### D. Secondary Effects Analysis

While it is true that non-obscene pornography maintains constitutional protections, the protections are nuanced, subject to political considerations, vulner-

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<sup>237</sup> *Id.* at 2231 (quoting *City of Ladue v. Gilleo*, 512 U.S. 43, 60 (1994) (O’Connor, J., concurring)).

<sup>238</sup> *Id.* at 2236–39 (Kagan, J., concurring).

<sup>239</sup> *Id.* at 2234 (Breyer, J., concurring).

<sup>240</sup> *Id.* at 2235.

<sup>241</sup> *Id.* at 2234.

<sup>242</sup> *Id.* at 2236 (Kagan, J., concurring).

<sup>243</sup> *Id.* at 2237 (Kagan, J., concurring) (quoting *McCullen v. Coakley*, 134 S. Ct. 2518, 2529 (2014), and *R.A.V. v. City of St. Paul*, 505 U.S. 377, 386 (1992)).

<sup>244</sup> *Id.* at 2238.

able to political and social whims, and highly contextualized. One major exception to general First Amendment protections is the secondary effects doctrine, by which the Supreme Court has carved out an exception to its general First Amendment framework that allows for greater government regulation than is allowed for non-pornographic speech.<sup>245</sup> While the Court has generally required laws that regulate speech because of its content to be analyzed under a framework of strict scrutiny, the Court has applied a weaker standard for pornography regulations when the laws are aimed at “secondary effects” of the content.<sup>246</sup>

The Supreme Court created the secondary effects doctrine in the 1976 case *Young v. American Mini Theatres, Inc.*, in which a five-to-four split court upheld a Detroit zoning regulation that prohibited adult movie theaters from residential areas.<sup>247</sup> The majority acknowledged that the law was aimed not at the content of the adult films but at the “deleterious effect upon the adjacent areas” surrounding an adult business, which “tends to attract an undesirable quantity and quality of transients, adversely affects property values, causes an increase in crime, especially prostitution, and encourages residents and businesses to move elsewhere.”<sup>248</sup> The majority determined that because the law was not aimed at the total suppression of the content of speech but at the secondary effects of the content, it was therefore more akin to a time, place, manner regulation subject to intermediate scrutiny.<sup>249</sup> As scholars have noted, this was a departure from several First Amendment standards, including the distinction between content-based and content-neutral laws, and several precedents, including *Miller v. California*<sup>250</sup> and *Erznoznik v. City of Jacksonville*,<sup>251</sup> in which the Court struck down as unconstitutional an ordinance requiring drive-in movie theaters to shield films with nudity from public view.<sup>252</sup> But the

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<sup>245</sup> For extensive discussion of the secondary effects doctrine, see Leslie Gielow Jacobs, *Making Sense of Secondary Effects Analysis After Reed v. Town of Gilbert*, 57 SANTA CLARA L. REV. 385 (2017). See also Clay Calvert & Robert D. Richards, *Stripping Away First Amendment Rights: The Legislative Assault on Sexually Oriented Businesses*, 7 N.Y.U. J. LEGIS. & PUB. POL’Y 287, 325–26 (2004); John Fee, *The Pornographic Secondary Effects Doctrine*, 60 ALA. L. REV. 291 (2009); David L. Hudson, Jr., *The Secondary-Effects Doctrine: Stripping Away First Amendment Freedoms*, 23 STAN. L. & POL’Y REV. 19, 29 (2012); Minch Minchin, *A Doctrine at Risk: Content Neutrality in a Post-Reed Landscape*, 22 COMM. L. & POL’Y 123, 145 (2017) (suggesting that the Court “minimize[], if not eradicate[]” secondary effects doctrine in light of *Reed*); Mark Rienzi & Stuart Buck, *Neutral No More: Secondary Effects Analysis and the Quiet Demise of the Content-Neutrality Test*, 82 FORDHAM L. REV. 1187, 1200–01 (2013).

<sup>246</sup> See, e.g., Fee, *supra* note 245, at 323–25.

<sup>247</sup> See generally *Young v. Am. Mini Theatres, Inc.*, 427 U.S. 50 (1976).

<sup>248</sup> *Id.* at 54 n.6, 55.

<sup>249</sup> See *id.* at 64–71.

<sup>250</sup> See generally *Miller v. California*, 413 U.S. 15 (1973).

<sup>251</sup> See generally *Erznoznik v. City of Jacksonville*, 422 U.S. 205 (1975).

<sup>252</sup> Jacobs, *supra* note 245, at 393.

*Young* precedent would be expanded to uphold restrictions on sexually explicit expression in various contexts.<sup>253</sup>

The secondary effects doctrine, first articulated in *Young*, was subsequently adopted and applied in the 1986 case *City of Renton v. Playtime Theatres, Inc.*<sup>254</sup> The case involved a city zoning ordinance in Renton, Washington, that prohibited adult theaters from operating within one thousand feet of residential homes, churches, parks, or schools.<sup>255</sup> The law was upheld by a district court but overturned as an unconstitutional violation of the First Amendment by the Ninth Circuit Court of Appeals, which had ruled that based on the *O'Brien* test, the government had not established the existence of a substantial government interest nor had it demonstrated the law was unrelated to the suppression of expression.<sup>256</sup> The Supreme Court reversed on a seven-to-two vote.<sup>257</sup> The majority found that the ordinance was indeed a content-neutral, time, place and manner regulation aimed at combating secondary effects.<sup>258</sup>

In a decision written by Justice William Rehnquist, the majority analyzed three factors related to First Amendment scrutiny.<sup>259</sup> First, was the law content-based or content-neutral?<sup>260</sup> The Court acknowledged that the ordinance "does not appear to fit neatly into either the 'content-based' or the 'content-neutral' category."<sup>261</sup> Indeed, the Court admitted, the ordinance treated theaters showing adult films differently than other theaters.<sup>262</sup> However, the intent of the ordinance, as determined by the district court, was "aimed not at the *content* of the films shown at 'adult motion picture theatres,' but rather at the *secondary effects* of such theaters on the surrounding community."<sup>263</sup> Those secondary effects include the ordinance's stated purpose "to prevent crime, protect the city's retail trade, maintain property values, and generally 'protect and preserve the quality of [the city's] neighborhoods, commercial districts, and the quality of urban life,' not to suppress the expression of unpopular views," the Court said.<sup>264</sup> The Court dismissed concerns that the ordinance was an end-run around content-based restrictions, noting that the law did not aim to close theaters altogether or restrict their numbers, but rather restrict their location for legitimate reasons of secondary effects.<sup>265</sup>

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<sup>253</sup> *Id.* at 392–404.

<sup>254</sup> See generally *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986).

<sup>255</sup> *Id.* at 43.

<sup>256</sup> *Id.* at 45–46.

<sup>257</sup> *Id.* at 42.

<sup>258</sup> *Id.* at 48.

<sup>259</sup> *Id.* at 42.

<sup>260</sup> *Id.* at 48.

<sup>261</sup> *Id.* at 47.

<sup>262</sup> *Id.*

<sup>263</sup> *Id.*

<sup>264</sup> *Id.* at 48 (alteration in original).

<sup>265</sup> *Id.* at 48.

Second, was the law aimed at a substantial government interest?<sup>266</sup> The Court was highly deferential to the city's judgment that the "quality of urban life is one that must be accorded high respect," and criticized the appellate court's apparent more stringent burden of proof.<sup>267</sup>

The First Amendment does not require a city, before enacting such an ordinance, to conduct new studies or produce evidence independent of that already generated by other cities, so long as whatever evidence the city relies upon is reasonably believed to be relevant to the problem that the city addresses,<sup>268</sup>

the Court wrote.

And third, did the law unreasonably limit alternative avenues of communication?<sup>269</sup> The Court said evidence showed the ordinance's boundaries would limit the available area for adult businesses to only about 5 percent of the city, in which the respondents claimed there were no viable commercial sites for potential relocation.<sup>270</sup> The appellate court used this evidence to determine the law did not leave ample means of available communication, but the Supreme Court disagreed.<sup>271</sup>

[A]lthough we have cautioned against the enactment of zoning regulations that have 'the effect of suppressing, or greatly restricting access to, lawful speech,' we have never suggested that the First Amendment compels the Government to ensure that adult theaters, or any other kinds of speech-related businesses for that matter, will be able to obtain sites at bargain prices,<sup>272</sup>

the majority wrote. "In our view, the First Amendment requires only that Renton refrain from effectively denying respondents a reasonable opportunity to open and operate an adult theater within the city, and the ordinance before us easily meets this requirement."<sup>273</sup>

In a lengthy dissent, Justice Brennan, joined by Justice Marshall, said the law's focus on the content of the movie theater makes it a content-based law and therefore subject to strict scrutiny.<sup>274</sup> However, even if intermediate scrutiny standards apply, Justice Brennan said the ordinance was still "plainly unconstitutional."<sup>275</sup> He said that the law singles out adult film theaters while not addressing other businesses that may have similar negative secondary effects. "In this case, the city has not justified treating adult movie theaters differently from other adult entertainment businesses. The ordinance's underinclusiveness is co-

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<sup>266</sup> *Id.* at 50.

<sup>267</sup> *Id.* (citing *Young v. Am. Mini Theatres, Inc.*, 427 U.S. 50, 71 (1976)).

<sup>268</sup> *Id.* at 51–52.

<sup>269</sup> *Id.* at 54.

<sup>270</sup> *Id.*

<sup>271</sup> *Id.* at 54.

<sup>272</sup> *Id.* (citing *Young*, 427 U.S. at 71 n.35, 78).

<sup>273</sup> *Id.*

<sup>274</sup> *Id.* at 55 (Brennan, J., dissenting).

<sup>275</sup> *Id.*

gent evidence that it was aimed at the *content* of the films shown in adult movie theaters," Justice Brennan wrote.<sup>276</sup>

The Court extended the secondary effects analysis to ordinances regulating erotic dancing, upholding, in two separate cases, bans on nude dancing. In 1991, the Court in *Barnes v. Glen Theatre, Inc.*, overturned a Seventh Circuit Court of Appeals decision that found unconstitutional Indiana's application of its public indecency law to prevent totally nude dancing at strip clubs.<sup>277</sup> While nude dancing is expressive conduct "within the outer perimeters of the First Amendment," a divided court found a plurality that said the law met the four standards of the *O'Brien* test and was therefore constitutional: the law was within the state's constitutional power; it was aimed at protecting social order and morality, a legitimate substantial government interest; it was unrelated to the suppression of free expression since public nudity in general was the aim, not the erotic messages from nude dancing; and was sufficiently narrowly tailored.<sup>278</sup> However, in dissent, Justice White, joined by Justices Marshall, Blackmun, and Stevens, criticized the application of the *O'Brien* standards and said the plurality did not do enough to apply and justify them.<sup>279</sup> "[W]hen the State enacts a law which draws a line between expressive conduct which is regulated and nonexpressive conduct of the same type which is not regulated, *O'Brien* places the burden on the State to justify the distinctions it has made," Justice White wrote.<sup>280</sup> General prohibitions against public nudity are aimed at preventing offense in public places, while viewers who pay money to watch nude performances inside establishments are not encountering the nudity without knowledge and consent.<sup>281</sup> Also, the dissenters stressed the significance of full nudity, as compared to performances with required G-Strings and pasties, as conveying different messages.<sup>282</sup> "[T]he nudity of the dancer is an integral part of the emotions and thoughts that a nude dancing performance evokes," the dissenters wrote.<sup>283</sup> The dissenters added:

The sight of a fully clothed, or even partially clothed, dancer generally will have a far different impact on a spectator than that of a nude dancer, even if the same dance is performed. The nudity is itself an expressive component of the dance, not merely incidental "conduct." We have previously pointed out that "'[n]udity alone' does not place otherwise protected material outside the mantle of the First Amendment."<sup>284</sup>

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<sup>276</sup> *Id.* at 58.

<sup>277</sup> See generally *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560 (1991) (plurality opinion).

<sup>278</sup> *Id.* at 566–70.

<sup>279</sup> *Id.* at 589–90 (White, J., dissenting).

<sup>280</sup> *Id.* at 590.

<sup>281</sup> *Id.* at 589.

<sup>282</sup> *Id.* at 591–92.

<sup>283</sup> *Id.* at 592.

<sup>284</sup> *Id.* (alteration in original) (quoting *Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 66 (1981)).

In 2000, in *City of Erie v. Pap's A.M.*, the Supreme Court overturned a Pennsylvania Supreme Court decision striking down a nude dancing ban based on the state court's determination that it was a content-based law subject to strict scrutiny.<sup>285</sup> The Supreme Court—while still fragmented, but less so than the *Barnes* court—in a decision written by Justice O'Connor, found the ban on nude dancing to be a content-neutral law that survived intermediate scrutiny, based on the *Barnes* precedent.<sup>286</sup> Six justices agreed with the judgment overturning the Pennsylvania court decision and finding that the nude dancing ban did not violate the First Amendment, although Justices Scalia and Thomas declined to recognize any First Amendment issue at all, saying the law simply regulates conduct and not expression.<sup>287</sup> In dissent, Justice Stevens, joined by Justice Ginsburg, criticized what he said was conflation of government interests between secondary effects and primary effects.<sup>288</sup> Justice Stevens said the Court was moving its secondary effects analysis too far from its original intent and that laws banning nudity within a business are more about the effects on the direct audience, and therefore not about secondary effects as originally defined.<sup>289</sup> “A secondary effect on the neighborhood that ‘happen[s] to be associated with’ a form of speech is, of course, critically different from ‘the direct impact of speech on its audience,’” Justice Stevens wrote.<sup>290</sup> He said the law resulted in a “total suppression of protected speech” motivated by its antipathy toward nude dancing itself and the erotic message it conveyed to the audience.<sup>291</sup>

In 2002, in *City of Los Angeles v. Alameda Books Inc.*, a five-to-four divided Supreme Court reiterated the secondary effects analysis as appropriate for speech that is sexual or pornographic in nature and where the asserted motivation is not the suppression of content but the associated secondary effects.<sup>292</sup> The Court overturned the lower courts' decisions that had ruled against the City of Los Angeles' use of its zoning ordinances to prohibit two adult book stores and video arcades from operating in the same building.<sup>293</sup> The district court found the law to be a content-based law subject to strict scrutiny, while the Ninth Circuit Court of Appeals found that even if the law was content-neutral, the city failed to show it served a substantial government interest.<sup>294</sup> Justice O'Connor, writing for the majority, said the appellate court set too high of a bar for the city to prove the effectiveness of its government interest and remanded

<sup>285</sup> See generally *City of Erie v. Pap's A.M.*, 529 U.S. 277 (2000).

<sup>286</sup> See *id.* at 301–02.

<sup>287</sup> *Id.* at 302–04 (Scalia, J., concurring).

<sup>288</sup> *Id.* at 319–23 (Stevens, J., dissenting).

<sup>289</sup> *Id.* at 323–24.

<sup>290</sup> *Id.* at 323 n.6 (alteration in original) (quoting *Boos v. Berry*, 485 U.S. 312, 320–21 (1988)).

<sup>291</sup> *Id.* at 318.

<sup>292</sup> See generally *City of Los Angeles v. Alameda Books, Inc.* 535 U.S. 425 (2002).

<sup>293</sup> *Id.*

<sup>294</sup> *Id.* at 432–33.

the case for further proceedings.<sup>295</sup> In dissent, Justice Souter, joined by Justices Stevens, Ginsburg, and Breyer (in part), discussed the contorted steps courts have taken to classify adult business regulations as content-neutral, despite applying to only sexually themed content.<sup>296</sup> Justice Souter wrote,

While spoken of as content neutral, these regulations are not uniformly distinct from the content-based regulations calling for scrutiny that is strict, and zoning of businesses based on their sales of expressive adult material receives mid-level scrutiny, even though it raises a risk of content-based restriction. It is worth being clear, then, on how close to a content basis adult business zoning can get, and why the application of a middle-tier standard to zoning regulation of adult bookstores calls for particular care.<sup>297</sup>

Justice Souter was pointing out that the analytical framework that has evolved in Supreme Court precedents has created several tensions.<sup>298</sup> Those tensions include: What is the difference between a content-based or content-neutral law in the realm of sexual expression regulations?<sup>299</sup> How does one assess whether the government's interest in regulations is truly aimed at the secondary effects or primary effects?<sup>300</sup> What burdens does the government have to meet to show that law's purpose is unrelated to the suppression of expression and that ample alternative modes of communication exist?<sup>301</sup>

One scholar has argued that while *Reed v. Town of Gilbert* will likely not end the secondary effects framework, it may prompt lower courts to apply more rigorous analysis and require a more explicit grounding in constitutional principles.<sup>302</sup> Concluding her review of the history and analytical frameworks of secondary effects analysis, Professor Leslie Gielow Jacobs noted, "[T]he Justices' abstract comments about secondary effects being 'unrelated to the impact of speech on the audience' do not help regulators to write rules or lower courts to decide real cases."<sup>303</sup>

Indeed, it seems that the secondary effects doctrine has subsumed traditional strict scrutiny analysis for content-based laws in the realm of sexual expression, and Justice Thomas' decision in *Gilbert* may provide impetus for new limitations to the secondary effects doctrine. The California Supreme Court's precedent in *People v. Freeman*, discussed below, provides additional context for the conduct/expression dichotomy in the realm of regulating the production of sexual expression.<sup>304</sup>

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<sup>295</sup> *Id.* at 438–39.

<sup>296</sup> *See id.* at 454 (Souter, J., dissenting).

<sup>297</sup> *Id.* at 455.

<sup>298</sup> *Id.* at 456–57.

<sup>299</sup> *Id.* at 457.

<sup>300</sup> *Id.*

<sup>301</sup> *Id.*

<sup>302</sup> Jacobs, *supra* note 245, at 450.

<sup>303</sup> *Id.* (quoting *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425, 444 (2002) (Kennedy, J., concurring)).

<sup>304</sup> *See generally* *People v. Freeman*, 758 P.2d 1128 (Cal. 1988).

*E. People v. Freeman: Prostitution vs. Pornography*

One of the more perplexing problems in the regulation of pornography production is the somewhat circular theoretical debate about whether making pornography is conduct or speech.<sup>305</sup> Some scholars have advocated that pornography should be prosecuted as prostitution, based on the rather logical premise that prostitution involves the transfer of money for the purposes of sex, and pornography usually involves the transfer of money for people to engage in sex on film.<sup>306</sup>

The California Supreme Court rejected the pornography-as-prostitution argument in *People v. Freeman*.<sup>307</sup> The Court ruled that the production of pornography could not be prosecuted as prostitution or pandering.<sup>308</sup> The case involved the 1983 arrest of Harold Freeman, the president of Hollywood Video Production Company, for paying actors and actresses to perform in *Caught from Behind II*.<sup>309</sup> Freeman “was charged with five counts of pandering based on” his payment to five actresses who engaged in “various sexually explicit acts, including sexual intercourse, oral copulation and sodomy.”<sup>310</sup> A jury convicted Freeman on all counts, and he was sentenced to five years’ probation and ninety days in jail, and was ordered to pay \$10,000 in restitution.<sup>311</sup> An appellate court upheld the conviction.<sup>312</sup>

In a landmark decision for the commercial pornography industry, the California Supreme Court overturned the conviction, ruling that the First Amendment prohibits the prosecution of a film maker on prostitution and pandering charges when he pays wages to adult performers engaging in consensual sexual acts.<sup>313</sup> The court said the prosecution was “a somewhat transparent attempt at an ‘end run’ around the First Amendment and the state obscenity laws. Landmark decisions of this court and the United States Supreme Court compel us to reject such an effort.”<sup>314</sup> The court emphasized the legality of the underlying

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<sup>305</sup> See, e.g., Sherry F. Colb, *The Legal Line Between Porn and Prostitution*, CNN (Aug. 12, 2005, 2:20 PM), <http://www.cnn.com/2005/LAW/08/12/colb.pornography/index.html> [https://perma.cc/PMQ6-EW9R]; Michelle Tsai, *Porn v. Prostitution: Why Is it Legal to Pay Someone for Sex on Camera?*, SLATE (Mar. 14, 2008, 5:13 PM), [http://www.slate.com/articles/news\\_and\\_politics/explainer/2008/03/porn\\_vs\\_prostitution.html](http://www.slate.com/articles/news_and_politics/explainer/2008/03/porn_vs_prostitution.html) [https://perma.cc/8YVG-3DR9].

<sup>306</sup> See, e.g., Sarah H. Garb, *Sex for Money is Sex for Money: The Illegality of Pornographic Film as Prostitution*, 13 LAW & INEQ. 281 (1995); Tonya R. Noldon, Note, *Challenging First Amendment Protection of Adult Films with the Use of Prostitution Statutes*, 3 VA. SPORTS & ENT. L.J. 310 (2004).

<sup>307</sup> *Freeman*, 758 P.2d at 1135.

<sup>308</sup> *Id.*

<sup>309</sup> *Id.* at 1129.

<sup>310</sup> *Id.* (internal citation omitted).

<sup>311</sup> *Id.* at 1129–30.

<sup>312</sup> *Id.* at 1135.

<sup>313</sup> *Id.* at 1131.

<sup>314</sup> *Id.* at 1130.

sexual activities, and the legality of the film itself, based on the US Supreme Court's obscenity doctrine.<sup>315</sup>

The California Supreme Court based its decision on two distinct rationales. First, the court ruled that the film maker lacked the requisite conduct and *mens rea* to be guilty of the prostitution and pandering statutes.<sup>316</sup> The Court said there was no evidence that paying actors to engage in sexual activity was "for the purpose of sexual arousal or gratification," as required by prostitution definitions.<sup>317</sup> Second, the Court ruled that even if the prostitution statute was applicable, it was a violation of the First Amendment as applied, because such prosecution would impinge on a filmmaker's free speech rights.<sup>318</sup> In the first instance, the court emphasized that the definition of prostitution included a requirement of a "lewd act," that prior courts had defined to be based on "the purpose of sexual arousal [or] gratification."<sup>319</sup> An additional court ruling narrowed the definition of prostitution further:

[F]or a 'lewd' or 'dissolute' act to constitute 'prostitution,' the genitals, buttocks, or female breast, of either the prostitute or the customer must come in contact with some part of the body of the other for the purpose of sexual arousal or gratification of the customer or of the prostitute.<sup>320</sup>

Using these definitions, the court ruled that Freeman's payment to the actors did not constitute prostitution or pandering because there was no evidence that the payment was for the sexual arousal or gratification of him or the actors.<sup>321</sup> "Defendant, the payor, thus did not engage in either the requisite conduct nor did he have the requisite mens rea or purpose to establish procurement for purposes of prostitution."<sup>322</sup>

However, the court wrote, even if Freeman's actions could be construed to fall under a strict reading of the prostitution statute, they would still be protected under the First Amendment because "the application of the pandering statute to the hiring of actors to perform in the production of a nonobscene motion picture would impinge unconstitutionally upon First Amendment values."<sup>323</sup> The court said that the state's emphasis on the distinction between "speech" (the film) and the "conduct" (the making of the film) was "untenable."<sup>324</sup> Applying the US Supreme Court's expressive conduct test outlined in *United States v. O'Brien*,<sup>325</sup> the court ruled that the government interest was not unrelated to

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<sup>315</sup> *Id.*

<sup>316</sup> *Id.* at 1131.

<sup>317</sup> *Id.*

<sup>318</sup> *Id.*

<sup>319</sup> *Id.* at 1130.

<sup>320</sup> *Id.* (quoting *People v. Hill*, 163 Cal. Rptr. 99 (1980)) (emphasis omitted).

<sup>321</sup> *Id.* at 1131.

<sup>322</sup> *Id.*

<sup>323</sup> *Id.*

<sup>324</sup> *Id.* at 1132.

<sup>325</sup> *United States v. O'Brien*, 391 U.S. 367 (1968).

suppression of free expression.<sup>326</sup> The government had asserted two interests: the prevention of profiteering from prostitution, and the prevention of the spread of sexually transmitted diseases.<sup>327</sup>

The *Freeman* decision explicitly overturned three prior California court rulings and was contrary to other rulings that upheld prosecution of pornographers under prostitution statutes.<sup>328</sup> The US Supreme Court declined to review the decision after Justice Sandra Day O'Connor denied the state's request for a stay, finding that its ruling was founded on an independent and adequate basis of state law.<sup>329</sup> As a result of the *Freeman* ruling, the state dropped several other pending cases against pornographers.<sup>330</sup>

In 2008, the New Hampshire Supreme Court in *State v. Theriault* embraced the *Freeman* logic in a case involving the prosecution of a man who offered money to a couple in exchange for their permission to allow him to record them having sex.<sup>331</sup> The New Hampshire high court wrote:

The [US Supreme] Court has never held that for First Amendment purposes, there is a distinction between production and dissemination in regulating pornography. Moreover, this distinction is illogical. It would mean that sale, distribution and viewing of a non-obscene movie is constitutionally protected while production of the same movie is not.<sup>332</sup>

The Court found that the evidence suggested that the intent of the defendant was to produce pornography, not for his own sexual gratification, and he was therefore protected by the First Amendment and state free speech and press protections.<sup>333</sup>

The *Freeman* and *Theriault* holdings clearly indicate that some aspects of activity plainly considered as conduct in some contexts raise First Amendment issues when intertwined with the production of pornography.<sup>334</sup> The distinction is even more important in the consideration of mandatory condom use, in part because non-condom sex is perfectly legal conduct in and of itself.

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<sup>326</sup> *Id.* at 376.

<sup>327</sup> *Freeman*, 758 P.2d at 1132.

<sup>328</sup> *Id.* at 1133 n.6 (“To the extent that *People v. Fixler*, *People ex rel. Van de Kamp v. American Art Enters., Inc.*, and *People v. Zeilm* hold that the payment of wages to an actor or model who performs a sexual act in filming or photographing for publication constitutes prostitution regardless of the obscenity of the film or publication so as to support a prosecution for pandering under section 266i, they are disapproved.”) (internal citations omitted).

<sup>329</sup> See generally *California v. Freeman*, 488 U.S. 1311 (1989).

<sup>330</sup> See, e.g., *Charges Against Sex Film Maker Dropped*, L.A. TIMES (Oct. 20, 1988), [http://articles.latimes.com/1988-10-20/local/me-5288\\_1\\_hollywood-film-maker](http://articles.latimes.com/1988-10-20/local/me-5288_1_hollywood-film-maker) [<https://perma.cc/T7ZQ-TECC>].

<sup>331</sup> *State v. Theriault*, 960 A.2d 687, 691–93 (N.H. 2008).

<sup>332</sup> *Id.* at 691.

<sup>333</sup> *Id.* at 692.

<sup>334</sup> See generally *Randazza*, *supra* note 29.

## III. FIRST AMENDMENT ISSUES WITH MANDATORY CONDOM LAWS

Challenges to mandatory condom laws may be an example of “First Amendment expansionism”—the phenomenon of novel legal issues pushing the boundaries of the First Amendment into ever more areas of law.<sup>335</sup> It should be clear by now that mandatory condom laws do in fact raise significant First Amendment questions, even though facially they may appear to be laws that target conduct and not expression. First, the conduct prohibition proposed for adult films raises the same problems that prostitution prosecutions did in the *Freeman* case. While ostensibly only regulating conduct, a mandatory condom law necessarily limits the expressive rights of adult film makers under the *Freeman* logic. By prohibiting non-condom sex in the production of adult films, the state would be limiting the expression found in adult films. The *expression* of non-condom sex is what audiences want, pay more for, and have a First Amendment right to view. The underlying conduct is perfectly legal in a non-expressive context. Singling out one particular group of content producers recording consensual, legal sexual activity—those of the organized, commercial adult film industry based in California—but not by others, also raises First Amendment problems. These were some of the arguments presented in *Vivid Entertainment, LLC v. Fielding*, a federal lawsuit brought by Vivid Entertainment, LLC, and Califa Productions, Inc.—two adult film companies—and Kayden Kross and Logan Pierce—two adult film performers—challenging the constitutionality of Measure B, the Los Angeles County ballot measure passed in 2012.<sup>336</sup>

A. *Vivid v. Fielding*

The lawsuit, filed in the US District Court for the Central District of California, sought declaratory and injunctive relief to block Measure B.<sup>337</sup> Citing *Roth v. U.S.*, the plaintiffs said their work in erotic films, protected by the First Amendment, “explore the ‘great and mysterious motive force in human life . . . [which] has indisputably been a subject of absorbing interest to mankind through the ages.’”<sup>338</sup> They argued that proponents of Measure B used misleading and incorrect information in their political campaign.<sup>339</sup> They further argued that the permitting and licensing scheme, coupled with broad investigation and enforcement powers and the mandatory condom rule, unconstitutionally intruded on the expressive elements of actors and film makers, and granted the government “broad, vague, and unlimited” enforcement

<sup>335</sup> See Leslie Kendrick, *First Amendment Expansionism*, 56 WM. & MARY L. REV. 1199 (2015).

<sup>336</sup> Complaint for Declaratory and Injunctive Relief at 1–2, *Vivid Entm’t, LLC v. Fielding*, 965 F. Supp. 2d 1113 (C.D. Cal. 2013) (No. CV-13-00190 DDP).

<sup>337</sup> *Id.*

<sup>338</sup> *Id.* at 1. (alteration in original) (quoting *Roth v. U.S.* 354 U.S. 476, 487 (1957)).

<sup>339</sup> *Id.* at 2.

powers.<sup>340</sup> The lawsuit claimed the law also singles out Los Angeles-based performers, claiming that of the estimated 1,500 active adult film performers nationwide, about 300 live full time in Los Angeles.<sup>341</sup> Los Angeles adult film companies employ an estimated 10,000 individuals in Southern California, the lawsuit claimed, estimating a \$1 billion contribution to the local economy.<sup>342</sup> In addition to the First Amendment problems, “by stifling or otherwise adversely affecting the exercise of First Amendment rights to engage in sexually expressive speech,” the lawsuit contended that Measure B “puts these expenditures and this employment at risk.”<sup>343</sup>

The industry’s lawyers made seven core arguments in their lawsuit. First, the plaintiffs alleged that Measure B allowed the curtailing of protected freedom of expression by a ballot initiative that lacked a legislative record to measure whether the government’s burden had been met to enact such restrictions, citing Supreme Court case law indicating that “voters may no more violate the United States Constitution by enacting a ballot issue than the general assembly may by enacting legislation.”<sup>344</sup> Second, the plaintiffs alleged that Measure B was effectively a prior restraint on protected expression by prohibiting the creation and dissemination of protected expression, absent compliance with permitting and training requirements, and gave the county “unlimited, standardless discretion to undertake” suspensions and revocations for violations.<sup>345</sup> Third, the plaintiffs argued that the fees imposed—initially set at \$2,000 to \$2,500 per year—were established “without analysis, findings or factual basis,” and because they were required to be paid prior to filming, the fees acted as a “prior restraint on protected speech.”<sup>346</sup> Fourth, the plaintiffs alleged that Measure B was unconstitutionally vague, leaving unknown many elements of the mandates.<sup>347</sup> Examples cited included language that allowed the county to suspend production, initiate criminal proceedings, or impose “any” fine if they find or reasonably suspect “any immediate danger to the public health or safety.”<sup>348</sup> Fifth, the plaintiffs argued the law was both over-inclusive and under-inclusive regarding the applicability of government interests in First Amendment analysis.<sup>349</sup> It is over-inclusive because the industry already takes extensive actions to protect performers from being infected with or transmitting sexually transmitted diseases.<sup>350</sup> And it is under-inclusive because it targets for harm reduc-

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<sup>340</sup> *Id.* at 8–9.

<sup>341</sup> *Id.* at 11.

<sup>342</sup> *Id.*

<sup>343</sup> *Id.*

<sup>344</sup> *Buckley v. Am. Constitutional Law Found., Inc.*, 525 U.S. 182, 194 (1999).

<sup>345</sup> Complaint, *supra* note 336, at 13.

<sup>346</sup> *Id.* at 14.

<sup>347</sup> *Id.* at 17.

<sup>348</sup> *Id.* at 16 (emphasis omitted).

<sup>349</sup> *Id.* at 18.

<sup>350</sup> *Id.*

tion only a small population of adult film performers working for commercial companies.<sup>351</sup> “Measure B is not tailored as is constitutionally required because it is a content-based regulation of protected speech that must be the least restrictive means of achieving its stated purposes, and at minimum must not burden substantially more speech than is necessary to achieve that purpose,” the plaintiffs argued.<sup>352</sup> “Measure B is not the least restrictive means of minimizing the spread of sexually transmitted infections resulting from production of adult films, and burdens substantially more speech than necessary.”<sup>353</sup> Sixth, the plaintiffs argued that the law violated the Due Process Clause of the Fourteenth Amendment by limiting their liberty and property interests and subjecting them to unreasonable search and seizures.<sup>354</sup> Seventh, and finally, the plaintiffs argued that Measure B was specifically preempted by state law that places jurisdiction for workplace safety rules with Cal/OSHA.<sup>355</sup>

### 1. District Court Decision

The first decision made by the district court judge was to allow AHF to defend the law.<sup>356</sup> The County of Los Angeles would not defend Measure B in court and declined to file a response to Vivid’s lawsuit.<sup>357</sup> As a result, the AIDS Healthcare Foundation and the Campaign Committee Yes on B filed a motion to intervene in order to defend the law.<sup>358</sup> District Court Judge Dean D. Pregerson ruled in support of the intervenors, finding they had satisfied the requirements under Rule 24(a)(2) of the Federal Rule of Civil Procedure, establishing they had a significant interest in the action; the disposition may impair their ability to protect the interest; the application is timely; and the existing parties may not adequately represent the interests.<sup>359</sup> The judge also cited California case law that allowed proponents of Proposition 8, the ballot measure that banned gay marriage, to defend the law after state officials declined.<sup>360</sup>

On the First Amendment question presented by the case, Judge Pregerson framed the issue as follows: “Presently at issue is whether engaging in sexual intercourse for the purpose of making a commercial adult film receives First Amendment protections. The Court is aware of no case that has analyzed this issue.”<sup>361</sup> The judge concluded that indeed the First Amendment was implicat-

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<sup>351</sup> *Id.*

<sup>352</sup> *Id.*

<sup>353</sup> *Id.*

<sup>354</sup> *Id.* at 19–20.

<sup>355</sup> *Id.* at 20–21.

<sup>356</sup> Order Granting Motion to Intervene, *Vivid Entm’t, LLC v. Fielding*, 965 F. Supp. 2d 1113 (C.D. Cal. 2013) (No. CV-13-00190 DDP), 2013 WL 1628704, at \*1.

<sup>357</sup> *Id.* at \*5.

<sup>358</sup> *Id.* at \*1.

<sup>359</sup> *Id.* at \*5.

<sup>360</sup> *Id.* at \*2.

<sup>361</sup> *Vivid Entm’t, LLC*, 965 F. Supp. 2d at 1124.

ed by Measure B.<sup>362</sup> “[T]his Court concludes that sexual intercourse engaged in for the purpose of creating commercial adult films is expressive conduct, is therefore speech, and therefore any restriction on this expressive conduct requires First Amendment scrutiny.”<sup>363</sup>

The district court determined that the law was aimed at the secondary effects of adult films, and therefore the intermediate scrutiny framework was the appropriate standard, not strict scrutiny as the plaintiffs argued.<sup>364</sup> “Measure B’s stated purpose ‘is to minimize the spread of sexually transmitted infections resulting from the production of adult films in Los Angeles,’” the district judge wrote.<sup>365</sup> “Because this purpose focuses on the secondary effects of unprotected speech, rather than the message the speech conveys, it will be reviewed under intermediate scrutiny.”<sup>366</sup> The judge denied the intervenor’s motion to dismiss the First Amendment claims.

In light of the alleged effective, frequent, and universal testing in the adult film industry, Plaintiffs allege sufficient facts, which for purposes of this motion must be assumed true and construed in the light most favored to Plaintiffs, to show that Measure B’s condom requirement does not alleviate the spread of STIs in a “direct and material way.”<sup>367</sup>

The judge also ruled that Measure B was a classic prior restraint.<sup>368</sup> Prior restraints, the court said, are defined as “administrative and judicial orders forbidding certain communications when issued in advance of the time that such communications are to occur.”<sup>369</sup> A prior restraint “bears a heavy presumption against its constitutionality,”<sup>370</sup> and courts have found laws requiring permits for nude dancing establishments to be a prior restraint.<sup>371</sup> The interveners argued that Measure B was not a prior restraint because it did not require a permit to show adult films, it only required a permit to film certain kinds of films.<sup>372</sup> However, the district court found the intervenors’ distinction “unhelpful,” noting that because prior restraints chill speech from occurring, they are more dangerous than statutes that punish speech after the fact, and that policy concern “would be upended” if the law recognized differences in prior restraints for permitting schemes for production but not viewing.<sup>373</sup> The district court ruled,

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<sup>362</sup> *Id.*

<sup>363</sup> *Id.* at 1125.

<sup>364</sup> *Id.*

<sup>365</sup> *Id.*

<sup>366</sup> *Id.*

<sup>367</sup> *Id.* at 1126 (citing *Turner I*, 512 U.S. 622, 644–65 (1994)).

<sup>368</sup> *Id.* at 1128.

<sup>369</sup> *Id.* at 1127 (quoting *Alexander v. United States*, 509 U.S. 544 (1993)).

<sup>370</sup> *Id.* (quoting *Berger v. City of Seattle*, 569 F.3d 1029, 1037 (9th Cir. 2009)).

<sup>371</sup> *See Santa Fe Springs Realty Corp. v. City of Westminster*, 906 F. Supp. 1341 (C.D. Cal. 1995); *Dease v. City of Anaheim*, 826 F. Supp. 336 (C.D. Cal. 1993).

<sup>372</sup> *Vivid Entm’t, LLC*, 965 F. Supp. 2d at 1127–28.

<sup>373</sup> *Id.* at 1128.

Measure B, which requires producers to obtain a permit before shooting “any film, video, multimedia or other representation of sexual intercourse” is a prior restraint. Plaintiffs argue that Measure B does not provide sufficient procedural safeguards, does not have narrowly tailored requirements, and gives the County unbridled discretion. The Court generally agrees.<sup>374</sup>

As a result of this determination, the district court issued a preliminary injunction striking several provisions of Measure B as likely unconstitutional violations of prior restraint doctrine.<sup>375</sup> The judge ruled there were not sufficient procedural safeguards to assure prompt judicial review of license suspensions and revocations by the county, and allowed “unbridled discretion” over the denial of permits by “unnamed, undescribed ‘standards affecting public health.’”<sup>376</sup> The law also potentially allowed permanent license suspensions, and required permits for all adult films defined as follows:

[A]ny film, video, multimedia or other representation of sexual intercourse in which performers actually engage in oral, vaginal, or anal penetration, including, but not limited to, penetration by a penis, finger, or inanimate object; oral contact with the anus or genitals of another performer; and/or other sexual activity that may result in the transmission of blood and/or any other potentially infectious materials.<sup>377</sup>

This much broader definition of an adult film covered by Measure B’s condom requirement provides support for plaintiff’s claim that the permitting requirement was not narrowly tailored, the district court ruled.<sup>378</sup>

The judge determined that there was sufficient evidence for the plaintiffs to survive motions to dismiss on other elements, including the fees system and a Fourth Amendment claim on the warrantless search provisions.<sup>379</sup> For these reasons, the judge issued a preliminary injunction.<sup>380</sup> On the merits of the other claims, the district court dismissed claims that the county impermissibly allowed ballot measures on First Amendment issues without legislative findings, and that it was preempted by state law.<sup>381</sup>

However, the district court declined to issue a preliminary injunction on the First Amendment claim regarding the condom requirement, finding that it would be unlikely to succeed on the merits.<sup>382</sup> In determining this, the judge said that under the intermediate scrutiny framework, the courts would need to determine whether the harms that Measure B targets “are real, not merely conjectural, and that [Measure B] will in fact alleviate those harms in a direct and

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<sup>374</sup> *Id.*

<sup>375</sup> *Id.* at 1134.

<sup>376</sup> *Id.* at 1129.

<sup>377</sup> *Id.* at 1130–31.

<sup>378</sup> *Id.* at 1131.

<sup>379</sup> *Id.* at 1136.

<sup>380</sup> *Id.* at 1134.

<sup>381</sup> *Id.* at 1124, 1127.

<sup>382</sup> *Id.* at 1134.

material way.”<sup>383</sup> Citing data provided by Jonathan Fielding, the county’s director of public health, the court noted that incidences of STDs among adult film actors surpassed that of the general public, and thus appeared to be a workable way to reduce STDs among adult film performers, despite the plaintiffs’ argument that its testing regimen is sufficient.<sup>384</sup>

## 2. Ninth Circuit Court of Appeals

On appeal, a three-judge panel of the Ninth Circuit Court of Appeals upheld the district court’s decision.<sup>385</sup> In its independent review of the facts, the Ninth Circuit ruled that Measure B was indeed a content-based law that limits expression, and thus warranted First Amendment scrutiny.<sup>386</sup> However, the Court rejected the plaintiff’s argument that strict scrutiny should apply, and instead agreed with the district court that intermediate scrutiny was the appropriate standard.<sup>387</sup> The Court’s analysis supported the district court’s decision, ruling the law survived intermediate scrutiny by having only a *de minimis* effect on expression, was narrowly tailored to achieve a substantial government interest, and left open adequate alternative means of expression.<sup>388</sup>

First, the Court rejected claims by the plaintiffs that the district court erred in severing elements of the ordinance it viewed as unconstitutional while allowing other elements, including the mandatory condom rule, to remain.<sup>389</sup> After discussing the precedents involving severability, including the tension between not wanting federal courts to become judicial legislators but wanting them to respect separation of powers principles by not nullifying an entire statute when only portions of it are unconstitutional, the Court ruled that the district court had not erred in severing four parts of the ordinance.<sup>390</sup> Additionally, the appellate court noted that Measure B’s severability clause specifically allowed for the ordinance to remain in force if specific parts of it were struck down by the courts.<sup>391</sup>

Next, the appellate court turned to the appropriate standard of review. The Court said it assumed without deciding that the law’s condom mandate is a content-based regulation.<sup>392</sup> While First Amendment precedent generally calls for the strict scrutiny standard of review to be applied to content-based laws,

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<sup>383</sup> *Id.* at 1135 (alteration in original) (quoting *Turner I*, 512 U.S. 622, 644–65 (1994)).

<sup>384</sup> *Id.*

<sup>385</sup> *See generally* *Vivid Entm’t, LLC v. Fielding*, 774 F.3d 566 (9th Cir. 2014).

<sup>386</sup> *Id.* at 578.

<sup>387</sup> *Id.*

<sup>388</sup> *Id.* at 580.

<sup>389</sup> *Id.* at 577.

<sup>390</sup> *Id.* at 573, 577.

<sup>391</sup> *Id.* at 574. (“If any provision of this Act, or part thereof, is for any reason held to be invalid or unconstitutional, the remaining provisions shall not be affected, but shall remain in full force and effect, and to this end the provisions of the Act are severable.”).

<sup>392</sup> *Id.* at 578.

the Court traced a long line of Supreme Court and Ninth Circuit precedents, involving regulations of sexual expression and pornography, to justify its decision that intermediate scrutiny was the correct standard.<sup>393</sup> The courts have carved out a "pornography exception" to the general rule that content-based regulations of expression require strict scrutiny, the Court noted.<sup>394</sup> When laws are aimed at preventing "secondary effects" of pornography and not at the expression itself, courts have used the more deferential intermediate scrutiny standard.<sup>395</sup>

In rejecting the strict scrutiny standard, a key analytical issue was whether condom-less pornography conveyed ideas that were different from pornography requiring condoms. The plaintiffs argued that in fact it did; that "condomless sex differs from sex generally because condoms remind the audience about real-world concerns such as pregnancy and disease."<sup>396</sup> The Court rejected this argument, writing that viewers were unlikely to make that inference, concluding that the general idea is the erotic message, not particularized ideas or attitudes expressed from condom-less pornography.<sup>397</sup> "So condomless sex is not the relevant expression for First Amendment purposes; instead, the relevant expression is more generally the adult films' erotic message."<sup>398</sup>

In a footnote, the Court also questioned whether Measure B was in fact a ban on expression at all; seemingly undermining its assumption that Measure B was a content-based regulation of expression.<sup>399</sup> "On its face, Measure B does not ban expression; it does not prohibit the *depiction* of condomless sex, but rather limits only the way film is *produced*."<sup>400</sup> The Court said Measure B was similar to the Ninth Circuit's decision in *Gammoh* requiring a two-foot distance between dancers and patrons, which did not ban a dance's particular form or content.<sup>401</sup> The Court ruled the law "does not ban the *relevant* expression completely."<sup>402</sup> The Court wrote: "[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," the Court wrote.<sup>403</sup> Because the law only imposes a de minimis restriction on expression, the Court ruled strict scrutiny was an inappropriate standard.<sup>404</sup>

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<sup>393</sup> *Id.*

<sup>394</sup> *Id.*

<sup>395</sup> *Id.*

<sup>396</sup> *Id.* at 579.

<sup>397</sup> *Id.*

<sup>398</sup> *Id.* (footnote omitted).

<sup>399</sup> *Id.*

<sup>400</sup> *Id.* at 579 n.6.

<sup>401</sup> *Id.* at 578.

<sup>402</sup> *Id.* at 579.

<sup>403</sup> *Id.* at 580.

<sup>404</sup> *Id.* at 578.

Next, the Court assessed the law's constitutionality in the context of intermediate scrutiny standards of substantial government interest, narrow tailoring, and ample alternative avenues of communication. The appellate court concluded a substantial government interest by reviewing the stated purpose of Measure B as being twofold: (1) the decrease of sexually transmitted infections among adult film performers; and (2) the decrease of sexually transmitted infections "to the general population among whom the performers dwell."<sup>405</sup> The Court rejected the plaintiffs' argument that the law was not narrowly tailored.<sup>406</sup> The Court summarized this prong as follows: "[i]n order to be narrowly tailored for purposes of intermediate scrutiny, the regulation "'need not be the least restrictive or the least intrusive means" available to achieve the government's legitimate interests,'" but will survive "so long as the regulation promotes a substantial government interest that would be achieved less effectively absent the regulation."<sup>407</sup> The plaintiffs argued that its own testing and reporting system was effective, although the Courts cited the 2009 letter from the county's health department citing higher rates of STI infection among adult film performers as evidence to the contrary.<sup>408</sup> The 2009 letter was "especially compelling," the court noted.<sup>409</sup> Additionally, the plaintiffs argued that because the law would prompt adult film companies to move filming outside of the County of Los Angeles, the law was ineffective in stopping the underlying conduct of unsafe sex practices.<sup>410</sup> The Court suggested that this was unpersuasive, citing contradictory evidence that film permits dropped but the "regular" film infrastructure in Los Angeles made it difficult for the adult industry to move.<sup>411</sup> Finally, the appellate court noted that ample alternative means of communication are left intact for adult filmmakers to convey erotic messages through films; therefore the law meets the requirements of the third prong of intermediate scrutiny analysis.<sup>412</sup>

### B. *Implications and Analysis*

Future attempts to pass or expand mandatory condom laws will need to use the framework of the *Vivid v. Fielding* analysis in order to survive First Amendment challenges; while plaintiffs will need to use the framework in order to challenge existing laws or attempts to create new ones. Several factors stand out for additional analysis and critique.

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<sup>405</sup> *Id.* at 580.

<sup>406</sup> *Id.* at 578.

<sup>407</sup> *Id.* at 580 (quoting *Berger v. City of Seattle*, 569 F.3d 1029, 1041 (9th Cir. 2009) and *Colacurcio v. City of Kent*, 163 F.3d 545, 553 (9th Cir. 1998)).

<sup>408</sup> *Id.* at 581.

<sup>409</sup> *Id.* at 582.

<sup>410</sup> *Id.*

<sup>411</sup> *Id.*

<sup>412</sup> *Id.*

First, mandatory condom laws are sufficiently intertwined with the expressive elements of pornography production to warrant coverage under the First Amendment. While perhaps not immediately evident, a review of First Amendment theories and doctrines, as well as case law including *People v. Freeman*, provide ample evidence to support the conclusion that the expression in pornography is limited by mandatory condom laws.

To be sure, the basis for First Amendment protection of conduct associated with the production of speech is a perplexing problem. Ashutosh Bhagwat has argued that First Amendment history and doctrines provides a foundation for protections of conduct associated with expression, including the role of licensing rules for printers during the Revolutionary Era, and more recent precedents such as *Citizens United v. FEC*, finding that spending money to amplify speech messages is a form of speech itself.<sup>413</sup> After reviewing cases involving the regulation of conduct that burdens free expression in different ways, including taxing ink and paper, recording public officials, tattooing, "ag-gag" laws, photography, and the right to gather information, Bhagwat concludes "it seems clear that the First Amendment protects not only literal acts of communication but also penumbral conduct associated with the distribution and production of speech."<sup>414</sup> In defending the applicability of the First Amendment to acts of speech production, Professor Bhagwat says that history and doctrine support protections but also provide deference to government regulations for laws of general applicability when the government "can make a strong, plausible case that the harm it is combatting is unrelated to the message or communicative impact."<sup>415</sup> Professor Bhagwat suggests a need for scrutiny analysis to focus on assessing the government's interest in regulation as being unrelated to the communicative impact of the suppressed speech.<sup>416</sup> Regarding Measure B and mandatory condom laws, he hedges.<sup>417</sup> "The question of whether Measure B is truly necessary to achieve the government's regulatory goals is thus open to dispute," he writes.<sup>418</sup> Professor Bhagwat concludes:

Measure B thus poses a genuinely difficult problem. It is supported by strong government interests and is well tailored, both weighing in favor of its validity. On the other hand, its necessity is subject to dispute and its impact on a particular category of speech production is significant. On the whole, however, I am inclined to think that because of the strength of the government's interest in controlling STDs, and because the industry retains the option of creating digital bareback pornography, Measure B should be upheld.<sup>419</sup>

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<sup>413</sup> Ashutosh Bhagwat, *Producing Speech*, 56 WM. & MARY L. REV. 1029, 1055 (2015) (citing *Citizens United v. FEC*, 558 U.S. 310 (2010)).

<sup>414</sup> *Id.* at 1058.

<sup>415</sup> *Id.* at 1063.

<sup>416</sup> *Id.*

<sup>417</sup> *Id.* at 1070–72.

<sup>418</sup> *Id.* at 1071.

<sup>419</sup> *Id.* at 1072.

Second, strict scrutiny should be the appropriate standard for reviewing mandatory condom laws under First Amendment analysis. Because mandatory condom laws in adult film making do in fact impinge upon expressive elements on content creators, we need to determine what level of scrutiny such laws would have to survive in constitutional analysis. By singling out non-condom intercourse for prohibition, in commercially produced pornography only, the law is targeting a particular kind of content, and thus the courts should apply a strict scrutiny analysis, which is the most exacting scrutiny for a law to pass. While the courts in *Vivid v. Fielding* used the secondary effects doctrine as an end-run around strict scrutiny, they generally acknowledge that the mandatory condom laws are content-based laws.<sup>420</sup> This distorted reasoning used to apply intermediate scrutiny should be abandoned and the courts should apply the appropriate test based on the nature of the regulation—that is, strict scrutiny to a content-based law. Recent Supreme Court precedents suggest broader considerations for analyzing when laws are content-based, lending support to arguments that strict scrutiny is the appropriate standard for mandatory condom laws.<sup>421</sup>

Third, the expressive elements of condom-less pornography are varied and nuanced, but it is clear that condom-less pornography conveys different meanings from producers to viewers. This was dealt with only cursorily in *Vivid v. Fielding*.<sup>422</sup> A segment of homosexual pornography known as “bareback” porn defiantly does not use condoms, and one scholar who has studied this movement as a subculture argues that barebacking as pornography is filled with unique political overtones and intellectual and aesthetic elements.<sup>423</sup> Additionally, some industry leaders have accused public-health advocates of distorting their real goal: to decrease the amount of condom-less sex in pornography, which would in fact be an effort to suppress speech. “[I]t has much more to do with their view that pornography incorrectly models what they would like to see as universal sexual social behavior, and that their real concerns here are political,” Ernest Greene, a former member of the board of directors of the adult industry’s self-testing unit, said.<sup>424</sup> Some studies of pornography viewing habits in gay men have suggested a relationship between interest in condom-less pornography and unsafe sex practices.<sup>425</sup> Especially as it relates to the genre of gay bareback pornography and the pornography and sex practices of gay men, non-condom pornography can also be viewed as “political” in the sense that its

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<sup>420</sup> *Vivid Entm’t, LLC v. Fielding*, 774 F.3d 566, 578 (9th Cir. 2014).

<sup>421</sup> See *supra* notes 226–44 and accompanying text for discussion of the *Reed v. Town of Gilbert*, 135 S. Ct. 2218 (2015) decision.

<sup>422</sup> *Vivid Entm’t, LLC*, 774 F.3d at 578–79.

<sup>423</sup> See, e.g., TIM DEAN, UNLIMITED INTIMACY: REFLECTIONS ON THE SUBCULTURE OF BAREBACKING (2009).

<sup>424</sup> Kernes, *supra* note 41.

<sup>425</sup> Stein et al., *supra* note 56, at 412.

message is targeted based on its social and cultural content.<sup>426</sup> The First Amendment is sensitive to tolerance for the expression of sexual minorities and deviants.<sup>427</sup>

Fourth, it is far from unclear that policing sex between consenting adults in cases such as this is a compelling government interest. Policing safe sex among consenting adults has been a longstanding problem in the regulation of human behavior.<sup>428</sup> Requiring condom use among consensual adults might not even pass the first threshold of the *O'Brien*<sup>429</sup> test, as the government lacks the authority to mandate condom use among consenting adults in the general population. The contractual relationships between pornography production companies and performers further complicate the government's authority to regulate the behaviors of actors under California employment law. Because performers are generally considered to be independent contractors,<sup>430</sup> they are freer to negotiate the terms of their work, and if they want to participate in lawful, non-condom sex for the purposes of a film, they may have a liberty right to freely do so because of the legality of the underlying conduct in a non-expressive setting.

Fifth, it is also unclear that mandatory condom laws are effective means of achieving a compelling government interest. While on its face a mandatory condom laws would appear to increase the safety of performers in the adult industry, such a claim becomes questionable after analyzing the extent to which the industry already polices itself. Thus, and upon closer scrutiny, such regulations would likely fail the *O'Brien*<sup>431</sup> test's second prong. The available data shows that the industry's testing process effectively screens performers regularly, with advanced rapid tests, and monitors closely the results.<sup>432</sup> Therefore, given the successful history of the industry's self-regulation, a mandatory condom law may not further an important government interest. The analysis is further complicated by the third prong of the *O'Brien* analysis requiring the regulation be unrelated to the suppression of expression.<sup>433</sup> Ostensibly, a mandatory condom law is aimed at the health of performers and not at suppressing speech. But the prostitution/pornography distinction raised in *People v. Freeman* becomes important here, because similarly the suppression of the conduct necessarily suppresses the expression.<sup>434</sup>

Finally, this Article reveals that the secondary effects doctrine is a mess, both theoretically and as a predictive analytical tool. This supports the findings

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<sup>426</sup> See Birkhold, *supra* note 29, at 1819–21.

<sup>427</sup> See generally WHEELER *supra* note 8.

<sup>428</sup> *Id.*

<sup>429</sup> *United States v. O'Brien*, 391 U.S. 367 (1968).

<sup>430</sup> See Jordan, *supra* note 11, at 422.

<sup>431</sup> *O'Brien*, 391 U.S. at 377.

<sup>432</sup> See generally Padilla, *supra* note 47.

<sup>433</sup> *O'Brien*, 391 U.S. at 377.

<sup>434</sup> *People v. Freeman*, 758 P.2d 1128 (Cal. 1988).

of other scholars that have criticized the contorted evolution of this doctrine well beyond its original intent.<sup>435</sup>

#### CONCLUSION

Laws requiring condom use in commercial pornography present a complex problem in the evolution of First Amendment doctrine. The expansion of First Amendment protection to sexual speech is the primary reason why the adult film industry has been allowed to exist, and flourish, over the past fifty years. Outlawing bareback sexual intercourse in the production of adult movies restricts expressive activity that is both lawful when considered strictly as conduct and the depiction of which, separate from the conduct itself, is fully protected by the First Amendment. The California Supreme Court has held that the “conduct” of pornography production cannot be punished without consideration of the First Amendment values that are impugned. The US Supreme Court’s First Amendment jurisprudence sets a high bar for such efforts to punish. It is a bar that mandatory condom laws will not likely meet.

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<sup>435</sup> See Jacobs, *supra* note 245.