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## **POKING HOLES IN L.A.'S NEW CONDOM REQUIREMENT: PORNOGRAPHY, BAREBACKING, AND SPEECH**

**ALEXANDER S. BIRKHOLD\***

In November 2012, California voters approved the County of Los Angeles Safer Sex in the Adult Film Industry Act, known as “Measure B”. The law requires producers of erotic adult films to overcome financial hurdles and complete educational training to secure filming permits and also mandates the use of condoms during the production of adult films. If a movie’s producers shoot a scene involving anal or vaginal intercourse without a condom, they will lose their Measure B permits, face fines, and be forbidden from engaging in any future filming for an unspecified period. Although the purpose of the law is laudable—to minimize the spread of sexually transmitted infections resulting from the production of adult films in the County of Los Angeles—the regulation functions as an outright ban on the filming of unprotected, or bareback, sex scenes and is an impermissible infringement on protected speech.

Since Measure B’s strict requirements do not leave open alternative channels of communication, the law will fail constitutional scrutiny under a content-neutral standard. This conclusion, however, may be difficult to reach if the value of barebacking as speech and the alternative means of expression are only evaluated through a traditional heteronormative lens. Queer theory offers a distinctive platform from which to challenge the law, and a careful analysis of bareback sex within the gay community brings the importance of this speech into sharper relief.

Barebacking constitutes a unique identity within the gay community, namely hypermasculinity. Forcing a gay porn star to cover his penis during filming is tantamount to sheathing his sword, blunting his masculinity, power, and speech.

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## BAREBACK SEX IS UNIQUE SPEECH

It is well settled that the First Amendment protects erotic films.<sup>1</sup> Although the government may impose limited time, manner, and place restrictions on speech, it may only regulate the speech as “obscenity” if it lacks serious literary, artistic, political, or scientific value.<sup>2</sup> First Amendment scholars and courts often evaluate sexual speech through a heteronormative lens. This myopic approach, however, threatens a valuable marginal viewpoint. Engaging in and depicting bareback sex is important political and artistic expression, particularly within the gay community. Bareback sex emblemizes sexual freedom and an “outlook on sexual life that, in important ways, has long shaped and animated gay male sexuality as thought and practice.”<sup>3</sup> In short, barebacking is a sexual identity that communicates uniquely significant sexual, personal, and political ideas.<sup>4</sup>

Gay men have organized a sexual identity and subculture around the practice of barebacking. The suggestion that barebacking is a subculture distances it not only from heteronormative society but also from gay society.<sup>5</sup> “As a subculture, barebacking can be represented as both a minority and marginalized sexual form, an underdog among underdogs . . . .”<sup>6</sup> Within the gay community, bareback sex represents masculinity, and words such as “pig play”, “dirty”, and “nasty” play an important role in the construction of identity.<sup>7</sup> The hypermasculinity of barebacking “celebrates slutdom and promiscuity”<sup>8</sup> and this “piggery” represents a unique “construction of male-male sexuality.”<sup>9</sup> Since one function of pornography is “to reflect the experience and the character of

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1. See, e.g., *Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 65 (1981); *City of Renton v. Playtime Theaters*, 475 U.S. 41 (1986).

2. *Miller v. California*, 413 U.S. 15 (1973).

3. Marc Spindelman, *Sexual Freedom's Shadows*, 23 *YALE J.L. & FEMINISM* 179, 183 (2011) (review essay) (citing TIM DEAN, *UNLIMITED INTIMACY: REFLECTIONS ON THE SUBCULTURE OF BAREBACKING* (2009)).

4. See Chris Ashford, *Barebacking and the 'Cult of Violence': Queering the Criminal Law*, 74 *J. CRIM. L.* 339 (2010); see generally J.T. Parsons & D. S. Bimbi, *Intentional Unprotected Anal Intercourse among Sex Who Have Sex with Men: Barebacking—from Behavior to Identity* (2007) 11 *AIDS & BEHAVIOR* 2, 277 (2007).

5. Spindelman, *supra* note 3.

6. *Id.*

7. See Ashford, *supra* note 4 (citing Paul Morris, the founder of Treasure Island Media, who described his approach to sex as “cum-guzzling, double-dick, real mansex.” [http://www.treasureislandmedia.com/TreasureIslandMedia\\_2007/paulsPapers.php?article=StatementOfPurpose](http://www.treasureislandmedia.com/TreasureIslandMedia_2007/paulsPapers.php?article=StatementOfPurpose)).

8. *Id.*

9. Spindelman, *supra* note 3.

the people who watch it,”<sup>10</sup> eliminating the production (and viewership) of bareback pornography jeopardizes a subset of gay speech and identity that deserves as much protection as other speech. The First Amendment should prevent Measure B from unduly infringing on this minority voice.

Although scholarship, the adult entertainment industry, and broader society continue to debate the precise meaning of bareback sex, the discourse suggests that the act and its depiction are meaningful and not purely obscene. Several scholars propose that bareback sex represents an erotic risk among gay men that has become organized and deliberate.<sup>11</sup> Others posit that engaging in unprotected sex represents the “bad queer” and the proliferation of bareback pornography “is the public revelation of the ‘dirty secret’ of sex lives, and the growing visibility of the ‘bad queer.’”<sup>12</sup> For certain gay men, engaging in unprotected sex is even a category of “political action.”<sup>13</sup>

Speech is inextricably tied to self-realization, personal liberty, and autonomy; it is central to personhood. What we say is not only reflective of who we are, but it is formative. Speech is a powerful element of our sense of self. For many gay men, bareback sex constructs, defines, and realizes a sense of self. Any regulation, no matter how well-meaning, that impinges on this vital category of speech must be closely examined.

#### CONTENT-NEUTRALITY

In cases concerning the freedom of speech, courts distinguish between content-based and content-neutral regulations to determine whether strict or intermediate scrutiny governs their analysis. The content distinction stems from *Police Department v. Mosely*, which overturned a Chicago ordinance that prohibited certain types of picketing by particular groups of people while exempting others.<sup>14</sup> The First Amendment prohibits the government from regulating expression based on the message, idea, content, or subject matter of speech. Accordingly, content-based laws are analyzed against strict scrutiny.

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10. Paul Morris, *No Limits: Necessary Danger in Porn*, paper presented at the 1998 World Pornography Conference, LA and the UCSF InSite Discussion on Barebacking, SF, available at [http://www.treasureislandmedia.com/TreasureIslandMedia\\_2007/paulsPapers.php?article=noLimits](http://www.treasureislandmedia.com/TreasureIslandMedia_2007/paulsPapers.php?article=noLimits).

11. Spindelman, *supra* note 3.

12. Ashford, *supra* note 4.

13. D.K. Gauthier & C.J. Forsyth, *Bareback Sex, Bug Chasers, and the Gift of Death*, 20 DEVIANT BEHAVIORS 1, 85 (1999).

14. *See Police Dept. of Chi. v. Mosley*, 408 U.S. 92, 94 (1972) (finding Chicago ordinance unconstitutional because, despite its legitimate aim to prevent school disruption, it impermissibly distinguished between peaceful labor picketing and other peaceful picketing).

However, when a law regulates all speech irrespective of its expression, the act is considered content neutral and is afforded an intermediate standard of scrutiny.<sup>15</sup> *United States v. O'Brien* provided the first version of the intermediate balancing test applied in First Amendment cases.<sup>16</sup> To satisfy the test, the government directive: (1) must be “within the constitutional power of the Government”; (2) must further “an important or substantial governmental interest”; (3) must be “unrelated to the suppression of free expression”; and (4) must not create an incidental restriction on First Amendment freedoms “greater than essential to the furtherance of that interest.”<sup>17</sup>

The Court further refined its content-neutral analysis in *Ward v. Rock Against Racism*.<sup>18</sup> The case concerned a content-neutral time, place, and manner regulation and ultimately changed the Court’s approach to intermediate scrutiny. The government may impress “reasonable restrictions on the time, place, or manner of protected speech, provided the restrictions ‘are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information.’”<sup>19</sup> The test from *Rock Against Racism* modified the *O'Brien* approach to content-neutral laws with respect to the narrow tailoring component, no longer requiring the regulation to be the least restrictive means of accomplishing the state’s interest.<sup>20</sup> Nevertheless, the Court emphasized that this standard does not permit regulations to infringe upon substantially more speech than is necessary to advance the government’s justifiable interests.<sup>21</sup>

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15. *See, e.g.*, *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) (finding a guideline mandating the use of city-provided sound equipment and technicians content neutral); *Members of the City Council v. Taxpayers for Vincent*, 466 U.S. 789, 817 (1984) (holding that a ban on the posting of signs on public property was content neutral); *United States v. O'Brien*, 391 U.S. 367, 385–86 (1968) (concluding that a ban on draft card burning was content neutral); *see also Rock Against Racism*, 491 U.S. at 791 (applying intermediate scrutiny to analyze a content-neutral guideline).

16. 391 U.S. 367 (1968).

17. *Id.* at 377.

18. 491 U.S. 781 (1989).

19. *Id.* at 791 (quoting *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 (1984)).

20. *Id.* at 789.

21. *See id.* at 799 (asserting that the government may not implement a restriction on expression unless the restriction substantially advances the measure’s stated goals).

MEASURE B WILL FAIL A FACIAL CHALLENGE UNDER INTERMEDIATE  
SCRUTINY

Measure B will not pass constitutional muster when facially challenged under a traditional First Amendment intermediate scrutiny standard. The regulation significantly burdens a large amount of permissible speech and does not allow for ample alternative modes of communication.

Measure B ostensibly regulates the manner of speech rather than the specific subject matter or message conveyed by the speech. Accordingly, by qualifying as content-neutral, the ban on filming unprotected sex scenes will be subject to intermediate scrutiny. To meet this standard, the regulation must: (1) further a significant government interest; (2) be narrowly tailored to serve that interest; and (3) leave open ample alternative modes of communication.<sup>22</sup> Measure B fails the third prong of intermediate scrutiny because the law bans the production of *all* bareback sex scenes, leaving no alternative modes of communication.

Proponents of Measure B will easily satisfy the first prong of intermediate scrutiny. The government has an interest in the occupational health and safety in workplaces, including the sets of adult entertainment films. Protecting adult actors from sexually transmitted infections certainly qualifies as a significant interest.

The narrow tailoring requirement will be satisfied if the regulation promotes a substantial governmental interest that would be achieved less effectively absent the law, and the means chosen are not substantially broader than necessary to achieve that interest.<sup>23</sup> If this standard can be met, the courts generally defer to the government's reasonable determination. Los Angeles County's interest in protecting adult entertainment performers from contracting sexually transmitted infections is directly and efficaciously served by Measure B's education and condom requirements. Despite existing procedures for testing adult actors, the County's interest would arguably be less well served absent Measure B's requirements. Consequently, Measure B will meet the second prong of content-neutrality.

Although Measure B is likely to survive the first two prongs of the content neutrality test, the law does not leave ample alternative modes of communication and will thus fail constitutional scrutiny. The kind of hypermasculinity represented in barebacking—namely, piggery and nasty,

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22. *Rock Against Racism*, 491 U.S. at 791 (quoting *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. at 293).

23. *Id.* at 783.

dangerous play—cannot be expressed in any other way. The expression, and the social and political meaning behind it, does not exist in straight pornography in the same manner. Since the message is different between gay and straight representations of bareback sex, the available alternative channels are different as well. Accordingly, examining alternative channels through a heteronormative lens threatens the gay expression since it might appear that channels exist for communicating the (straight) message when they are not truly adequate for the gay speech. Proponents of Measure B have suggested that if filming unprotected sex scenes is important, the movies can be digitally altered to eliminate the condom from sight. This fix, however, has two major flaws.

First, the cost of digitally altering films is significant and in many cases prohibitively expensive. Although some production companies might have the economic means to remove condoms post-production, smaller producers and independent adult actors and videographers are unlikely to have the finances to comply with Measure B. Without the budget or sophisticated editing capabilities, many adult actors will not be able to depict bareback sex in their productions.

More problematically, a scene digitally altered to eliminate a condom fundamentally changes the expression of the film. Bareback sex represents hypermasculinity, risk, and sexual freedom and constitutes a unique sexual identity. If a performer or viewer knows a scene or video has been shot while performers were wearing condoms, the thrill, danger, and very meaning of bareback sex have been blunted. Digitally altering a scene to remove a condom intrinsically changes the entire meaning of the speech. Measure B's condom requirement leaves no other means of communicating the expressive elements of genuine bareback sex.

#### CONCLUSION

The recent Complaint<sup>24</sup> filed against Measure B advances important arguments against the provision and shows that there are already policies and procedures in place to protect adult actors against the transmission of sexually transmitted infections. The Adult Protection Health and Safety Services helps erotic film producers and performers to ensure safe work environments for all participants and provides for testing and treatment. Pre-production testing for infections arguably obviates the need for

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24. Rong-Gong Lin II, *Porn Producer Sues to Overturn L.A. County Condom Requirement for Actors*, L.A. TIMES, Jan. 11, 2013, available at <http://latimesblogs.latimes.com/lanow/2013/01/porn-producer-sues-to-overturn-la-county-condom-requirement-for-actors.html>.

condoms without infringing on protected speech. However, the importance of the speech itself should not be overlooked.

A heteronormative valuation of sexual speech, particularly within the barebacking context, is dangerous. Even the most outspoken critics and steadfast defenders of sex as speech often fail to consider the worth of sexual expression that is unique to the gay community. What may be acceptable alternative means of communicating speech within the larger world may not be adequate for the gay community. Speech is central to identity, and barebacking represents more than a health risk to those who engage with it as participant or viewer.

Even though Measure B promotes a significant governmental interest and the regulation is narrowly tailored, Measure B fails to satisfy intermediate scrutiny because no alternative channels of communication are available under the law. Digital alteration of protected sex may pose an insurmountable financial burden on the speech and prevent amateur and low-budget producers and actors from speaking. More importantly, editing the condom from sight necessarily edits the speech. The expression of bareback sex would be transformed, and no amount of post-production manipulation could restore the intent of the message.