

LEGAL HISTORY
IN THE MAKING

THE (F)LAW OF KARMA:

In Light of Sedlock v. Baird, Would Meditation Classes in Public Schools Survive a First Amendment Establishment Clause Challenge?

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INTRODUCTION

This is a boom time for meditation classes in public schools.¹ The last fifteen years have seen a growing number of schools instructing K–12 students in various kinds of meditation techniques.² Educators in at least ninety-one schools across thirteen states have implemented meditation programs for students.³ Programs include Quiet Time,⁴ Inner Kids Program,⁵ Mindful Schools,⁶ and MindUP.⁷

The benefits of meditation are widely acknowledged in the United States.⁸ A nascent but equally promising body of literature shows that

¹ *Infographic: Meditation in Schools Across America: As a Growing Body of Research Points to Positive Outcomes from Meditation in Schools, Programs are Spreading Across the Country*, EDUTOPIA, <http://www.edutopia.org/stw-student-stress-meditation-schools-infographic> (last visited Nov. 11, 2013) [hereinafter *Infographic*] (noting that at least thirteen states currently implement meditation classes in schools).

² John Meiklejohn et al., *Integrating Mindfulness Training into K–12 Education: Fostering the Resilience of Teachers and Students*, 3 MINDFULNESS 291, 292 (2012).

³ *Infographic*, *supra* note 1.

⁴ *Schools*, DAVID LYNCH FOUND., <http://www.davidlynchfoundation.org/schools.html> (last visited Nov. 11, 2013); David L. Kirp, *Meditation Transforms Roughest San Francisco Schools*, SFGATE (Jan. 12, 2014, 6:37 PM), <http://www.sfgate.com/opinion/openforum/article/Meditation-transforms-roughest-San-Francisco-5136942.php>.

⁵ *Inner Kids*, SUSAN KAISER GREENLAND, <http://www.susankaisergreenland.com/inner-kids.html> (last visited Nov. 11, 2013).

⁶ *What is Mindfulness?*, MINDFUL SCHS., <http://www.mindfulschools.org/about-mindfulness/mindfulness/> (last visited Nov. 11, 2013).

⁷ *MindUP*, HAWN FOUND., <http://thehawnfoundation.org/mindup/> (last visited Oct. 4, 2013), (explaining that MindUP is currently in 1,000 schools across the United States). Mindfulness meditation classes also appear in the burgeoning area of curriculum development called Social and Emotional Learning (“SEL”), which some call the “missing piece” in education. Maurice J. Elias, *The Connection Between Academic and Social-Emotional Learning*, in *THE EDUCATOR’S GUIDE TO EMOTIONAL INTELLIGENCE AND ACADEMIC ACHIEVEMENT* 4, 6 (Maurice J. Elias & Harriett Arnold eds., 2006).

⁸ *Meditation: An Introduction*, NAT’L CTR. FOR COMPLEMENTARY AND ALT. MED. (June 2010), available at <http://nccam.nih.gov/health/meditation/overview.htm>; Richard J. Davidson et al., *Alterations in Brain and Immune Function Produced by Mindfulness Meditation*, PSYCHOSOMATIC MED., 564, 564, 569 (2003) (linking mindfulness meditation to significant positive changes in brain and immune function); Phillip M. Keune & Dora Perczel Forintos, *Mindfulness Meditation: A Preliminary Study on Meditation Practice During Everyday Life Activities and its Association with Well-Being*, 19 PSYCHOL. TOPICS 373, 374 (2010) (documenting the salutary effect of meditation on human health); *Research: Major Research Studies and Findings*, UNIV. OF MASS. MED.

meditation benefits children by reducing test anxiety, increasing attention span, and boosting academic performance.⁹ Other studies show that meditation programs in schools reduce misbehavior and aggression between students.¹⁰ Critics, however, claim that meditation and other allegedly spiritual practices are a modern-day Trojan Horse bringing religion past the schoolhouse gate.¹¹ Given the broad discretion of a school board to select its public school curriculum,¹² what framework should guide educators considering the legality of starting or continuing a state-sponsored meditation program? The timely question now facing public school districts is whether teaching meditation techniques is a violation of the First Amendment Establishment Clause.¹³

“Meditation” is a family of techniques that focus attention on the present moment.¹⁴ This paper will focus on mindfulness meditation (“MM”)¹⁵

SCH., <http://www.umassmed.edu/Content.aspx?id=42426> (last visited Dec. 31, 2013) (discussing the work of Dr. Jon Kabat-Zinn over the past thirty-four years).

⁹ Meiklejohn, *supra* note 2, at 298; Kimberly A. Schonert-Reichl & Molly Stewart Lawlor, *The Effects of a Mindfulness-Based Education Program on Pre- and Early Adolescents’ Well-Being and Social and Emotional Competence*, 1 MINDFULNESS 137–39 (2010); THE QUIET TIME BROCHURE, DAVID LYNCH FOUND. 20–21, available at <http://www.davidlynchfoundation.org/pdf/Quiet-Time-Brochure.pdf> [hereinafter *Brochure*] (collecting research findings on the Transcendental Meditation program in schools).

¹⁰ Vanessa Vega, *Promising Research on Meditation in Schools*, EDUTOPIA (Feb. 22, 2012), <http://www.edutopia.org/stw-student-stress-meditation-schools-research> (collecting research on meditation programs in schools).

¹¹ Charles C. Haynes, *In Public Schools, Religion by Any Other Name is Still Religion*, FIRST AMENDMENT CTR. (Apr. 26, 2009), <http://www.firstamendmentcenter.org/in-public-schools-religion-by-any-other-name-is-still-religion>.

¹² *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968).

¹³ See U.S. CONST. amend. I. This paper does not address meditation in the context of moment-of-silence statutes. By “meditation,” this paper means to address a stand-alone classroom activity apart from the typical moment of silence observed during morning announcements. For a discussion on the latter, see Debbie Kaminer, *Bringing Organized Prayer in Through the Back Door: How Moment-of-Silence Legislation for the Public Schools Violates the Establishment Clause*, 13 STAN. L. & POL’Y REV. 267 (2002).

¹⁴ Keune & Forintos, *supra* note 8, at 374; Betsy L. Wisner et al., *School-based Meditation Practices for Adolescents: A Resource for Strengthening Self-Regulation, Emotional Coping, and Self-Esteem*, 32 CHILD. & SCHS. 150, 152 (2010); Antoine Lutz et al., *Attention Regulation and Monitoring in Meditation*, 12 TRENDS IN COGNITIVE SCI. 163, 163 (2008).

¹⁵ JON KABAT-ZINN, MINDFULNESS FOR BEGINNERS: RECLAIMING THE PRESENT MOMENT — AND YOUR LIFE 135–52 (2012) (describing the basics of mindfulness meditation techniques).

and Transcendental Meditation (“TM”).¹⁶ In MM, the meditator directs her attention to an internal or external object, such as the breath, an emotion, or a bodily sensation.¹⁷ MM cultivates a nonjudgmental awareness of the present moment.¹⁸ The goal of MM is to experience clarity, acceptance, and relaxation.¹⁹ In TM, the practitioner does not focus, concentrate, or otherwise try to control the mind.²⁰ Instead, the meditator allows the mind to naturally settle inward through an effortless and automatic process called “self-transcending.”²¹ The goal of TM is to create an experience of restful alertness.²²

Meditation exists in both religious and secular contexts.²³ Various forms of meditation form the core of Zen, Hinduism, and Buddhism.²⁴

¹⁶ *What is TM: The Technique*, TRANSCENDENTAL MEDITATION, <http://www.tm.org/meditation-techniques> (last visited Nov. 11, 2013). See also HERBERT BENSON, *THE RELAXATION RESPONSE 10* (1975) (discussing mantra-based meditation not requiring a special Sanskrit mantra). See also *How NSR Works*, NAT. STRESS RELIEF/USA, <http://www.nsrusa.org/how-it-works.php> (last visited Oct. 5, 2013) (discussing mantra-based meditation technique similar to Transcendental Meditation).

¹⁷ See *What is Mindfulness?*, ASS’N FOR MINDFULNESS EDUC., <http://www.mindfuleducation.org/what-is-mindfulness/> (last visited Nov. 11, 2013) (describing mindfulness meditation techniques such as watching the breath, emotions, thoughts, physical sensations, and sound).

¹⁸ Lutz, *supra* note 14, at 163; Meiklejohn *supra* note 2, at 293; Wisner, *supra* note 14, at 151.

¹⁹ Meiklejohn *supra* note 2, at 293; Bhante Gunaratana, *Mindfulness Versus Concentration*, VIPASSANA FELLOWSHIP, http://www.vipassana.com/meditation/mindfulness_in_plain_english_16.php (last visited Dec. 31, 2013) (discussing the subtle difference between concentration and mindfulness).

²⁰ *How is Transcendental Meditation Different?*, TRANSCENDENTAL MEDITATION, <http://www.tm.org/tm-is-different> (last visited Jan. 30, 2014).

²¹ See Jonathan Shear, *State-Enlivening and Practice-Makes-Perfect Approaches to Meditation*, 39 *BIOFEEDBACK* 51, 53 (2011); *How is Transcendental Meditation Different?*, *supra* note 20.

²² See Shear, *supra* note 21, at 53.

²³ See Wisner, *supra* note 14, at 152; *Meditation: An Introduction*, *supra* note 8.

²⁴ Wisner, *supra* note 14, at 151; *Hinduism Basics*, HINDU AM. FOUND., http://www.hafsite.org/resources/hinduism_101?q=resources/hinduism_101/hinduism_basics (last visited Nov. 11, 2013). Other religions also have associated meditative practices. ARYEH KAPLAN, *MEDITATION AND KABBALAH* 5–15 (1982) (discussing Kabbalistic meditations); Mark Link, *St. Ignacius’ Call of the King: A Prayerful Meditation*, in *PARTNERS* 22–23 (2011), available at http://bin.jesuits-chgdet.org/wp-content/uploads/2011/03/Partners_SP04_page22-23_IgSpiritlty.pdf (discussing Christian meditations); Kelly

Secular meditation techniques, on the other hand, seem not to contain any spiritual or religious teachings.²⁵ An example is the Mindfulness-based Stress Reduction program (MBSR) at the University of Massachusetts.²⁶ The clinic offers treatment for a wide range of physical and psychiatric diagnoses.²⁷ But is it truly possible to secularize meditation? Is meditation inherently religious? These questions are at the heart of whether or not teaching meditation in public schools is a violation of the First Amendment Establishment Clause.²⁸

Although no court has squarely addressed whether meditation in public schools violates the Establishment Clause, some courts have spoken to the issue tangentially.²⁹ In 1979, the Third Circuit, in *Malnak v. Yogi*, addressed the constitutionality of TM in combination with a course called Science of Creative Intelligence (SCI).³⁰ The court held that SCI/TM, as a unit, violated the Establishment Clause.³¹ Though *Malnak* is instructive, the holding does not reach the constitutionality of the TM technique apart from its association with SCI.³² There is no comparable case for MM, though a recent San Diego County Superior Court decision concerning yoga, *Sedlock v. Baird*, may provide some guidance.³³ The court held that yoga, in general, was religious, but that the yoga as-taught did not violate the Establishment Clause.³⁴ The comparison of MM to yoga is apt for two reasons. First, both have historical roots in Hinduism, Buddhism, and

Cramer, *Sufi Meditation*, PROJECT MEDITATION, http://www.project-meditation.org/a_mtl/sufi_meditation.html (last visited Dec. 31, 2013) (discussing Sufi meditations).

²⁵ Wisner, *supra* note 14, at 152; FAQ, CTR. FOR CONTEMPLATIVE MIND IN SOC'Y, <http://www.contemplativemind.org/about/faq> (last visited Oct. 5, 2013) (disclaiming affiliation with any religion).

²⁶ *Stress Reduction Program*, UNIV. OF MASS. MED. SCH., <http://www.umassmed.edu/cfm/index.aspx> (last visited Dec. 31, 2013) (discussing MBSR).

²⁷ *Id.*

²⁸ See U.S. CONST. amend. I.

²⁹ See, e.g., *Malnak v. Yogi*, 592 F.2d 197, 200 (3d Cir. 1979) (discussing TM in the context of more comprehensive school elective course).

³⁰ *Id.* at 213.

³¹ *Id.* at 197–98.

³² *Id.*

³³ *Sedlock v. Baird*, No. 37201300035910-CU-MC-CTL, 2013 WL 6063439, at *1 (Cal. Super. Ct. C.D. July 1, 2013).

³⁴ Statement of Decision at 27, *Sedlock v. Baird*, No. 37201300035910-CU-MC-CTL (Cal. Super. Ct. C.D. Sep. 23, 2013).

Vedic teachings.³⁵ Second, secular American culture has assimilated both practices to some degree.³⁶

This paper will provide an analytical framework for judges, school district administrators, and other educational stakeholders to examine the constitutionality of meditation programs in public schools. Part I will provide a summary of the relevant legal background of the Establishment Clause.³⁷ Part II will summarize and analyze *Sedlock v. Baird* — not for precedential value, but as an example of how a modern court might deal with a similar question about meditation.³⁸ Part III draws on the background principles of Part I as well as the rationale in *Sedlock v. Baird* to discuss the probable outcome of a First Amendment challenge to meditation classes in public schools.³⁹ This paper argues that schools can offer both MM and TM in a way that does not violate the First Amendment Establishment Clause.⁴⁰

I. BACKGROUND

The Establishment Clause of the First Amendment states, “Congress shall make no law respecting an establishment of religion”⁴¹ The Fourteenth Amendment Due Process clause incorporates the Establishment Clause against the states.⁴² State constitutions contain analogous provisions protecting religious freedom.⁴³

³⁵ *Yoga and Meditation*, SANATAN SOC’Y, http://www.sanatansociety.org/yoga_and_meditation.htm#UIB7_Ra6KsY (last visited Oct. 5, 2013) (discussing the main yogic traditions and their connection to Vedic and Hindu philosophy and religion).

³⁶ Declaration of Mark Singleton at 4, *Sedlock v. Baird*, No. 37201300035910-CU-MC-CTL (Cal. Super. Ct. C.D. May 20, 2013).

³⁷ See discussion *infra* Part I (explaining the relevant Establishment Clause jurisprudence).

³⁸ See discussion *infra* Part II (discussing *Sedlock v. Baird* in detail).

³⁹ See discussion *infra* Part III (applying the legal principles in Parts I and II to determine whether MM and TM classes in public schools would survive an Establishment Clause challenge).

⁴⁰ See discussion *infra* Parts III A.2, B.2.

⁴¹ U.S. CONST. amend. I.

⁴² *Id.*; U.S. CONST. amend. XIV, § 1.

⁴³ *E.g.*, CAL. CONST. art. I, § 4 (“The Legislature shall make no law respecting an establishment of religion.”); N.J. CONST. art. I, ¶ 4 (“There shall be no establishment of one religious sect in preference to another”).

A. DEFINING “RELIGION”

The threshold issue in Establishment Clause violations is whether the challenged governmental activity is “religious.”⁴⁴ The Constitution does not contain a definition of “religion.”⁴⁵ The Supreme Court has assiduously avoided the formulation of a definition of religion.⁴⁶ Some have argued that the very act of defining religion would be unconstitutional because it would limit religious protection for new or unusual belief systems.⁴⁷

Courts have thus approached the notorious question of “what is religion?” with trepidation.⁴⁸ James Madison called religion “the duty which we owe to our Creator and the manner of discharging it.”⁴⁹ This definition of religion in relation to the Creator persisted through the turn of the twentieth century.⁵⁰ Courts routinely recognized religion in the form of formal, mainstream monotheistic belief system such as Christianity, Judaism, or Islam.⁵¹ Courts have struggled, however, to define religion beyond the original theistic understanding of a Supreme Being.⁵²

In 1961, the Supreme Court signaled that the definition of religion was not limited to those solely founded on beliefs of a Supreme Being.⁵³ In dictum, the Court recognized non-theistic religions such as Buddhism, Taoism, Ethical Culture, and Secular Humanism.⁵⁴ In *United States v. Seeger* and *Welsh v. United States*, the Supreme Court upheld a broad interpretation of the definition of religious belief in the context of a provision of the Universal Military Training and Service Act.⁵⁵ The Court examined whether

⁴⁴ *Alvarado v. City of San Jose*, 94 F.3d 1223, 1226–27 (9th Cir. 1996).

⁴⁵ See generally U.S. CONST. (containing no definition of religion).

⁴⁶ *Malnak*, 592 F.2d 197, 200 (3d Cir. 1979).

⁴⁷ Joel Incorvaia, *Teaching Transcendental Meditation in Public Schools: Defining Religion for Establishment Purposes*, 16 SAN DIEGO L. REV. 325, 331 (1979).

⁴⁸ *Alvarado*, 94 F.3d at 1227.

⁴⁹ JAMES MADISON, SELECTED WRITINGS OF JAMES MADISON 22 (Ralph Ketcham ed., 2006).

⁵⁰ *Malnak*, 592 F.2d at 201.

⁵¹ See e.g., *Davis v. Beason*, 133 U.S. 333, 342 (1890).

⁵² See *Malnak*, 592 F.2d at 201.

⁵³ *Torcaso v. Watkins*, 367 U.S. 488, 495 n.11 (1961).

⁵⁴ *Id.* See also *Fellowship of Humanity v. Cnty. of Alameda*, 153 Cal. App. 2d 673, 684 (1st Dist. 1957).

⁵⁵ See *United States v. Seeger*, 380 U.S. 163, 187–88 (1965); *Welsh v. United States* 398 U.S. 333, 341–45 (1970).

a conscientious objector could claim religious belief status.⁵⁶ The test was whether the personal conviction was sincere and meaningful, and had a place in the person's life that paralleled that of traditionally recognized religions.⁵⁷ Some commentators feared this definition of religion would be so broad that certain secular ideals, such as the provision for the general health and welfare of society, would lead to invalidation of government programs.⁵⁸

This expansive view of religion was reined in somewhat in *Wisconsin v. Yoder*, where the Supreme Court held that deep and sincere adherence to a secular way of life, by itself, would qualify merely as a philosophical or personal choice, not a religious one.⁵⁹ By way of example, the Court mentioned that Henry David Thoreau's rejection of modern society at Walden Pond was not religious.⁶⁰ Thoreau's beliefs were personal and meaningful, but not based on religious views.⁶¹ Courts have continued to grapple with how and when to recognize a deeply held set of personal beliefs as religion for the purposes of the Constitution.⁶²

The most influential case addressing whether a set of beliefs is a religion is *Malnak v. Yogi*.⁶³ Judge Adams, in a widely cited concurrence,

⁵⁶ *Seeger*, 380 U.S. at 164–65; *Welsh*, 398 U.S. at 335.

⁵⁷ *Seeger*, 380 U.S. at 165–66; *Welsh*, 398 U.S. at 339–40.

⁵⁸ *Incorvaia*, *supra* note 47, at 331.

⁵⁹ *Wisconsin v. Yoder* 406 U.S. 205, 215–16 (1972). The Court held that the Amish were exempt from the general requirement that children attend public schools. *Id.* The Court focused on how the Amish way of life is inseparable from their religious faith, is practiced in an organized group, and provides prescriptions for daily living found in the Bible that permeate virtually their entire daily life. *Id.*

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *PLANS, Inc. v. Sacramento City Unified Sch. Dist.*, 752 F. Supp. 2d 1136, 1145–46 (E.D. Cal. 2010) (finding that anthroposophy, also known as Waldorf education, is not a religion); *United States v. Meyers*, 95 F.3d 1475, 1485 (10th Cir. 1996) (finding that Church of Marijuana is not a religion); *United States v. DeWitt*, 95 F.3d 1374, 1376 (8th Cir. 1996) (finding that out-of-body travel through use of psychedelic drugs is not a religion); *Wiggins v. Sargent*, 753 F.2d 663, 666 (8th Cir. 1985) (finding that White supremacy group might be a religion); *Africa v. Com. of Pa.* 662 F.2d 1025, 1033–34 (3d Cir. 1981) (finding that raw foods diet is not a religion); *Friedman v. S. Cal. Permanente Med. Grp.*, 102 Cal. App. 4th 39, 70 (2d Dist. 2002) (finding that veganism is not a religion); *Strayhorn v. Ethical Soc. of Austin*, 110 S.W.3d 458 (Tex. App. 2003) (finding that Ethical Culture is a religion).

⁶³ See *Friedman*, 102 Cal. App. 4th at 60–61 (discussing the wide acceptance of the *Malnak* test); *Malnak*, 592 F.2d 197, 207–08 (3d Cir. 1979).

proposed a modern definition of religion later incorporated by the Second, Fifth, Eighth, Ninth, Tenth, and Eleventh Circuits.⁶⁴ The “*Malnak* test” provides three useful indicia courts can use to decide when a belief system is religious.⁶⁵ This next Section addresses the *Malnak* opinions from the trial court and court of appeals in turn.⁶⁶

1. *Malnak* I

In *Malnak I*, the District Court for the District of New Jersey examined whether a novel set of beliefs was a religion, where the defendants themselves denied the religiousness of their beliefs.⁶⁷ The plaintiffs were a group of parents who sued a New Jersey public high school for an alleged violation of the Establishment Clause.⁶⁸ The parents objected to an elective course that combined TM with substantive instruction in a body of knowledge called SCI.⁶⁹ The companion textbook contained 225 pages describing the field of “creative intelligence.”⁷⁰ The textbook defined “creative intelligence” as an omnipresent, omnipotent, unmanifest, eternal, and unseen universal force that spontaneously gives rise to all that is, and forms the basis of all knowledge.⁷¹

⁶⁴ *Watts v. Fla. Int’l Univ.*, 495 F.3d 1289, 1304 (11th Cir. 2007) (adopting *Malnak* test); *Friedman*, 102 Cal. App. 4th at 6061 (collecting cases adopting the *Malnak* test from Third, Eighth, Ninth, and Tenth Circuits); *Strayhorn*, 110 S.W.3d at 469 (adopting the *Malnak* test for the Fifth circuit). The Tenth Circuit slightly reorganized and tweaked the *Malnak* test. *Meyers*, 95 F.3d 1475, at 1482–83 (factors included ultimate ideas, metaphysical beliefs, moral or ethical system, comprehensiveness of beliefs, and accoutrements of religion); *Altman v. Bedford Cent. Sch. Dist.*, 45 F. Supp. 2d 368, 285 (S.D.N.Y. 1999), 245 F.3d 49 (2d Cir. 2001) (using *Malnak* test in the Second Circuit).

⁶⁵ *Malnak*, 592 F.2d at 207–08.

⁶⁶ See discussion Part I.A.1–2.

⁶⁷ *Malnak v. Yogi*, 440 F. Supp. 1284, 1327 (D.N.J. 1977).

⁶⁸ *Id.* at 1287.

⁶⁹ *Id.* at 1289–1306 (discussing the SCI textbook in exacting detail).

⁷⁰ *Id.* at 1290.

⁷¹ *Id.* at 1290, 1294–96. The SCI textbook explained that creative intelligence is the source of everything in the universe. *Id.* at 1291. The textbook stated that during regular practice of meditation, the meditator becomes suffused with the fifty qualities of creative intelligence, such as happiness, kindness, universality, and insight. *Id.* at 1290. The textbook teaches that the purpose of life is to establish contact with this pure and perfect field in order to attain bliss-consciousness. *Id.* at 1296.

The school district defendants argued that the key criterion should be the group's subjective characterization of their own beliefs.⁷² The district court, however, rejected a subjective test because it would not let courts apply a fair and uniform standard.⁷³ The court stated that merely renaming similar beliefs as philosophy or science did not cause the beliefs to shed their religiosity.⁷⁴ The court likened the concept of creative intelligence to Christian, Buddhist, and Hindu conceptions of God.⁷⁵ The district court opted not to offer a new legal definition of religion.⁷⁶ The court instead analogized to existing Supreme Court cases.⁷⁷ Although the SCI teachings "wear novel labels," the court explained, the teachings fall well within the concepts covered in earlier cases.⁷⁸

Besides the textbook, the court examined the instruction ceremony for TM called the "puja."⁷⁹ The puja was a mandatory one-on-one teaching ceremony where upon its completion the student received an individualized TM mantra from the TM teacher.⁸⁰ Attendance at a puja was a requirement to receive a mantra.⁸¹ The teacher performed a ceremony in front of a picture of Guru Dev, the teacher who charged Maharishi Mahesh Yogi with bringing TM to the West.⁸² At the end of a Sanskrit chant,⁸³

⁷² *Id.* at 1310–11, 1316–21.

⁷³ *Id.* at 1318.

⁷⁴ *Id.* at 1322.

⁷⁵ *Id.* at 1321–22.

⁷⁶ *Id.* at 1320.

⁷⁷ *Id.* at 1315 (collecting cases). See also Incorvaia, *supra* note 47, at 331 (noting that courts try to avoid defining religion because it necessarily limits the flexibility of future courts to decide whether a novel set of beliefs constitutes a religion).

⁷⁸ *Malnak*, 440 F. Supp. at 1325.

⁷⁹ *Id.* at 1305–1312.

⁸⁰ *Id.* at 1305, 1323 n.25.

⁸¹ *Id.* at 1305. The TM teacher met the student off-premises on a Sunday. *Id.* The student brought a white handkerchief, flowers and fruit. *Id.*

⁸² *Id.* The student joined the teacher in a small, closed room in front of an eight-by-twelve color picture of Guru Dev, the deceased teacher who had been the preserver and disseminator of TM prior to Maharishi Mahesh Yogi. *Id.* A small table covered with a white cloth held a brass candleholder, a brass incense holder, and three brass dishes, containing water, rice and sandal paste. *Id.*

⁸³ *Id.* at 1306–07.

the teacher imparted the TM mantra to the student.⁸⁴ Teachers told the students that the ceremony was a secular expression of gratitude and not a religious exercise or prayer.⁸⁵

After an in-depth textual analysis of the puja, the district court concluded that the puja was religious.⁸⁶ The court observed that the chant included an invocation to Hindu deities.⁸⁷ The defendants' attempts to compare the chant to the Hippocratic oath were unavailing.⁸⁸ The court reasoned that the gods invoked in the Hippocratic oath (Apollo, Asclepius, Hygeia, and Panacea) belonged to a dead religion.⁸⁹ By comparison, the court noted that present-day believers in Hinduism number in the millions of people.⁹⁰ The defendants appealed the district court's ruling to the Third Circuit.⁹¹

2. Malnak II

On appeal, the Court of Appeals for the Third Circuit affirmed.⁹² The majority, in a per curiam opinion, deferred to the lower court's finding that the SCI/TM course was religious.⁹³ Judge Adams, however, was uncomfortable disposing of the case simply by analogizing the novel set of beliefs to past precedent.⁹⁴ Adams' concurrence sets forth three indicia — not as a definitive test — but as a useful guide in determining whether a set of beliefs is a religion.⁹⁵ The first factor is whether the nature of the ideas concerns fundamental or imponderable issues such as humankind's ultimate place in the world.⁹⁶ The second factor is the degree of comprehensiveness

⁸⁴ *Id.* at 1305. The student observed the teacher singing a Sanskrit chant that offered thanks to Hindu deities. *Id.*

⁸⁵ *Id.* at 1306, 1310–11.

⁸⁶ *Id.* at 1305–12, 1327.

⁸⁷ *Id.* at 1311.

⁸⁸ *Id.*

⁸⁹ *Id.* at 1311–12.

⁹⁰ *Id.*

⁹¹ Malnak, 592 F.2d 197, 200 (3d Cir. 1979).

⁹² *Id.*

⁹³ *Id.* at 197–200.

⁹⁴ *Id.* at 200.

⁹⁵ *Id.* at 207–10.

⁹⁶ *Id.* at 208 (citing PAUL TILLICH, DYNAMICS OF FAITH 1–2 (1958)).

of the belief system.⁹⁷ For example, an isolated teaching is not part of a comprehensive system.⁹⁸ The third factor looks at formal signs or symbols normally associated with organized religions, such as ceremonies, sacred objects, holidays, or an organized clergy.⁹⁹ Adams urged courts to be sensitive and flexible, and to use these guidelines to avoid ad hoc justice.¹⁰⁰

To Adams, SCI/TM met all three factors.¹⁰¹ SCI/TM met the first factor because the nature of the ideas of SCI discussed the basis of life itself.¹⁰² Second, SCI was sufficiently comprehensive because it claimed to chart a way through the world toward ultimate truth.¹⁰³ SCI was more than an isolated teaching, such as the Big Bang theory or a patriotic view.¹⁰⁴ Third, SCI/TM had enough signs of formality to overcome its lack of traditional rites.¹⁰⁵ SCI/TM had trained teachers, an organization that actively sought to expand the teaching, and a formal ceremony in the puja.¹⁰⁶

Notably, Adams put less emphasis on the puja than did the majority.¹⁰⁷ For Adams, the puja, by itself, was not dispositive of SCI/TM's religiousness.¹⁰⁸ In a footnote, he considered the puja to have less force as an indicator of religiousness than did the majority.¹⁰⁹ As opposed to the majority, Adams found reasons that the puja might not be religious.¹¹⁰ The puja was performed only once for each student, without understanding by

⁹⁷ *Id.* at 208–09.

⁹⁸ *Id.*

⁹⁹ *Id.* at 207–10. For more discussion on this factor, see Steven Chananie, *Belief in God and Transcendental Meditation: The Problem of Defining Religion in the First Amendment*, 3 PACE L. REV. 147, 159–60 (1983), and Marjorie Gilman Baker, *Constitutional Law — Establishment Clause — Teaching of Science of Creative Intelligence/Transcendental Meditation in Public Schools Violates Establishment Clause*, 10 SETON HALL L. REV. 614, 627 (1980).

¹⁰⁰ *Malnak*, 592 F.2d at 210.

¹⁰¹ *Id.* at 214.

¹⁰² *Id.* at 213.

¹⁰³ *Id.*

¹⁰⁴ *Id.* at 209, 213.

¹⁰⁵ *Id.* at 214.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* at 203 n.14.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *Id.* at 202–04.

the student or teacher, entirely in Sanskrit, off-premises, not during school hours, on a Sunday, and as an elective.¹¹¹

Courts today continue to rely on the three indicia of the *Malnak* test to determine whether a novel belief system is a religion.¹¹² In a challenge to meditation classes in public schools, a court would likely invoke the *Malnak* test as a preliminary matter to decide the threshold question of whether or not the activity was religious.¹¹³ If the activity is not religious, that is the end of the matter.¹¹⁴ If the activity is religious, courts next address whether the activity violates the Establishment Clause.¹¹⁵

B. LEMON TEST

The Supreme Court has distilled its Establishment Clause jurisprudence in the three-part *Lemon* test.¹¹⁶ To be valid, the challenged governmental practice must have a valid secular purpose, must have a principal or primary effect that does not advance or inhibit religion, and must not foster excessive entanglement by the state in its surveillance, administration, or maintenance of the activity.¹¹⁷ While various courts have criticized and tweaked the *Lemon* test over the years, no court has overruled it.¹¹⁸

In *Lemon*, the Court examined a state statute providing state financial support to private Catholic schoolteachers on the condition that they used only secular class materials, taught secular subjects, and refrained

¹¹¹ *Id.* at 203. Student affidavits stated that the students believed that the chant had no religious meaning. *Id.*

¹¹² See *supra* note 64 and accompanying text (detailing which circuits have adopted the *Malnak* test).

¹¹³ *Malnak*, 592 F.2d at 207–10. See, e.g., *Alvarado v. City of San Jose*, 94 F.3d 1223, 1226–27 (9th Cir. 1996) (using the *Malnak* test to determine if New Age beliefs form a religion).

¹¹⁴ See *Brown v. Woodland Joint Unified Sch. Dist.*, 27 F.3d 1373, 1378 (9th Cir. 1994) (assuming, without deciding, that Wicca is a religion, and then proceeding to the *Lemon* test); *Alvarado*, 94 F.3d at 1226–27 (same).

¹¹⁵ *Lemon v. Kurtzman*, 403 U.S. 602, 612–13 (1971); *Brown*, 27 F.3d at 1378; *Alvarado*, 94 F.3d at 1226–27.

¹¹⁶ *Lemon v. Kurtzman*, 403 U.S. 602, 612–13 (1971).

¹¹⁷ *Id.*

¹¹⁸ See e.g., *Newdow v. Rio Linda Union Sch. Dist.*, 597 F.3d 1007, 1017 (9th Cir. 2010) (reaffirming that the *Lemon* test is the benchmark for Establishment Clause violations); *Freedom from Religion Found. v. Hanover Sch. Dist.*, 626 F.3d 19 n.16 (1st Cir. 2010) (noting that the Supreme Court has never expressly rejected the *Lemon* test).

from teaching religion.¹¹⁹ The *Lemon* court decided it would be impossible to police the arrangement properly because it would require continuing surveillance to make sure that the teachers in private religious schools were not infusing their classes with religion.¹²⁰ The Court acknowledged that despite the best efforts of the nuns, everything about the teaching environment added to the likelihood that there would be some religious instruction.¹²¹ Besides the proximity to nearby churches, and the school buildings containing crucifixes and religious paintings, religious organizations ultimately controlled employment decisions.¹²² The Supreme Court recognized that total separation of church and state is not possible or required.¹²³ The fact that the very purpose of the sectarian school was to commingle religious teachings with other instruction, however, made impossible the assumption that no religious teaching would make its way through.¹²⁴

The first prong of the *Lemon* test assesses government's actual purpose in promulgating the challenged activity.¹²⁵ Usually this prong is easy to meet as long as the stated purpose is not a total sham.¹²⁶ The second prong asks whether a reasonable, objective observer would find that the challenged government activity had the primary effect of endorsing religion.¹²⁷ In the second prong, the government's intent is irrelevant.¹²⁸ The court must ask if the government-sponsored activity actually endorses religion.¹²⁹ For schoolchildren, the proper test is whether a reasonable, objective observer in the position of an elementary school student would think

¹¹⁹ *Lemon*, 403 U.S. at 606–11.

¹²⁰ *Id.* at 619–21.

¹²¹ *Id.* at 618–20.

¹²² *Id.* at 615.

¹²³ *Id.* at 614.

¹²⁴ *Id.* at 636–37.

¹²⁵ *Id.* at 612.

¹²⁶ See *Edwards v. Aguillard*, 482 U.S. 578, 587–88 (1987) (holding that state legislature's pretext of "academic freedom" was a sham, where the Act prohibited the teaching of evolution in public schools).

¹²⁷ *Lemon*, 403 U.S. at 612; *Altman v. Bedford Cent. Sch. Dist.*, 245 F.3d 49, 75 (2d Cir. 2001).

¹²⁸ *Brown v. Woodland Joint Unified Sch. Dist.*, 27 F.3d 1373, 1378 (9th Cir. 1994).

¹²⁹ *Id.*

that the school is approving of or disapproving of religion.¹³⁰ A court will not apply a subjective standard for elementary school children.¹³¹ Although schools cannot inculcate religion, they can teach about it from a historical, literary, or cultural standpoint.¹³² A government does not have to be hostile to religion, merely neutral.¹³³ Lastly, the third prong of the *Lemon* test asks whether there is excessive government entanglement.¹³⁴

C. *ALVARADO v. CITY OF SAN JOSE*

In *Alvarado v. City of San Jose*, the Ninth Circuit used the *Malnak* and *Lemon* tests to address the issue of whether a novel set of beliefs was religious.¹³⁵ The court held that a city-sponsored statue of the “Plumed Serpent” — the ancient Aztec deity, Quetzalcoatl — was not an Establishment Clause violation.¹³⁶ The court’s analysis in *Alvarado* is a model of how a future court might address the question of meditation in public schools.¹³⁷

In relevant part, the court considered whether “New Age” is a religion.¹³⁸ The plaintiff’s evidence was a limited collection of New Age writings that

¹³⁰ *Id.* at 1379. In *Brown*, 27 F.3d at 1384, the Ninth Circuit held that a school district did not violate the establishment clause for teaching elementary school students from a book series that included stories about witchcraft. In *Brown*, parents challenged thirty-two selections (“Selections”) from a book series that contained references to witchcraft, which the parents claimed refers to the religion of Wicca. *Id.* at 1377. The Selections asked students to discuss witchcraft, create spells, or role-play as witches or sorcerers. *Id.* In response to the complaint, the school district appointed a curriculum review committee, which included a Christian minister. *Id.* The review committee concluded it did not have the evidence or expertise to establish a connection between the Selections and Wicca. *Id.* For the purposes of defining “religion,” the *Brown* court assumed, without deciding, that witchcraft (a.k.a. “Wicca”) was a religion. *Id.* at 1378. *But see* *Fleischfresser v. Dir. of Sch. Dist. 200*, 15 F.3d 680, 688 (7th Cir. 1994) (finding no pagan “religion” in elementary school book series which included make-believe and fantasy characters such as wizards and giants).

¹³¹ *Brown*, 27 F.3d at 1379 (recognizing that following a subjective standard would make each child a roving curriculum review committee).

¹³² *Altman*, 245 F.3d at 76.

¹³³ *Welsh v. United States*, 398 U.S. 333, 372 (1970).

¹³⁴ *Lemon v. Kurtzman*, 403 U.S. 602, 613 (1971); *Agostini v. Felton*, 521 U.S. 203, 233 (1997).

¹³⁵ *Alvarado v. City of San Jose*, 94 F.3d 1223, 1227, 1231 (9th Cir. 1996).

¹³⁶ *Id.* at 1232.

¹³⁷ *See id.* at 1226–32.

¹³⁸ *Id.* at 1229–32.

included general definitions of New Age beliefs.¹³⁹ New Age concepts met the first *Malnak* factor, “ultimate concern,” because New Age beliefs pull liberally from various spiritual and religious traditions that seek to answer the imponderable questions of life.¹⁴⁰ New Age failed the second factor, “comprehensiveness,” because New Age is an unorganized patchwork of beliefs without a central doctrine that purports to answer all of one’s questions.¹⁴¹ To the contrary, it appeared to the court that since “anyone’s in, and ‘anything goes,’” there is no shared belief system among adherents.¹⁴² Similarly, New Age failed the third Adams factor because New Age does not have any comprehensive set of signs or symbols.¹⁴³ New Age has no formal or informal organization, no agreed-upon central text or creed, and no common rituals or objects of worship.¹⁴⁴ Thus, in finding that New Age was not a religion, the *Alvarado* court’s inquiry ended without the need to proceed to the *Lemon* test.¹⁴⁵ If the court had found New Age to be a religion, however, the *Alvarado* court would have used the *Lemon* test in the same way that it did for the other challenged activity in the case.¹⁴⁶

In sum, the *Alvarado* court gives a practical illustration of how a modern court would approach the question of meditation in public schools.¹⁴⁷ The court first asks whether the challenged governmental activity is religious.¹⁴⁸ If the activity is not religious, that is end of the matter.¹⁴⁹ If the activity is religious, the court applies the *Lemon* test.¹⁵⁰ With this framework in mind, Part II examines how a recent San Diego County Superior Court

¹³⁹ *Id.* at 1229–30.

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² *Id.* at 1230.

¹⁴³ *Id.* at 1229–30.

¹⁴⁴ *Id.*

¹⁴⁵ *See id.*

¹⁴⁶ *Id.* at 1232 (using the *Lemon* test to reject the claim that the resemblance of the Plumed Serpent to the Zapatista’s religious symbols had the primary effect of advancing religion).

¹⁴⁷ *See id.*

¹⁴⁸ *Id.* at 1226–27.

¹⁴⁹ *Id.*; *Brown v. Woodland Joint Unified Sch. Dist.*, 27 F.3d 1373, 1378 (9th Cir. 1994).

¹⁵⁰ *Lemon v. Kurtzman*, 403 U.S. 602, 612–13 (1971); *Alvarado*, 94 F.3d at 1226–27; *Brown*, 27 F.3d at 1378.

case addressed whether teaching yoga in public schools violates the Establishment Clause.¹⁵¹

II. *SEDLOCK v. BAIRD*

Since the time of the *Malnak II* decision, no state or federal court has considered the issue of meditation classes in public schools.¹⁵² Without any cases directly on point, it is instructive to consider substantively analogous cases, such as those involving yoga instruction. Yoga is similar to meditation because both practices cultivate awareness and acceptance of the present moment.¹⁵³ Both practices derive from Eastern religion and philosophy.¹⁵⁴ Both practices also enjoy a certain amount of secular integration in our modern American society.¹⁵⁵ *Sedlock v. Baird* is the only case that has squarely addressed the issue of yoga in public schools.¹⁵⁶ In *Sedlock*, the court held that yoga, in general, is religious, but that the school

¹⁵¹ Statement of Decision at 27–28, *Sedlock v. Baird*, No. 37201300035910-CU-MC-CTL (Cal. Super. Ct. C.D. July 1, 2013).

¹⁵² *Malnak*, 592 F.2d 197, 197 (3d Cir. 1979).

¹⁵³ CYNDI LEE, *YOGA BODY, BUDDHA MIND* 11–12 (2004) (discussing the union between yoga and meditation).

¹⁵⁴ CANDY GUNTHER BROWN, *THE HEALING GODS* 47 (2013); Matthew Moriarty et al., *Yoga and the First Amendment: Does Yoga Promote Religion?*, 60 *FED. LAW.* 68, 72–73 (2013).

¹⁵⁵ See Jill Lawson, *Romancing the Om: A Look Into Yoga in America*, *HUFFINGTON POST* (Aug. 30, 2012, 7:30 AM), http://www.huffingtonpost.com/jill-lawson/yoga-america_b_1830809.html; Robert Piper, *10 Reasons Why Meditation Is America's New Push-Up for the Brain*, *HUFFINGTON POST* (May 3, 2013, 8:20 AM), http://www.huffingtonpost.com/robert-piper/mindfulness-meditation-benefits_b_3158080.html.

¹⁵⁶ *Sedlock v. Baird*, No. 37201300035910-CU-MC-CTL, 2013 WL 6063439, at *1 (Cal. Super. Ct. C.D. July 1, 2013).. See also *Altman v. Bedford Cent. Sch. Dist.*, 245 F.3d 49, 60, 65–66, (2d Cir. 2001) (agreeing with district court that yoga exercises instructed by a Sikh minister did not advance religion because no religious concepts or ideas were advanced). In *Altman*, 245 F.3d at 65–66, 74–75, the Second Circuit dismissed the yoga claim on mootness grounds, but did not disturb the district court's finding. Although the district court cited to the *Malnak* and *Lemon* tests in its rule statement, the court did not fully analyze the yoga program under these frameworks. *Id.* at 378, 385. The court simply concluded that the yoga presentation did not advance any religious concepts and that it was just a breathing and relaxation exercise. *Id.* at 385.

district's yoga program did not violate the Establishment Clause.¹⁵⁷ As a mere state trial court decision, *Sedlock* has limited precedential value.¹⁵⁸ On appeal, however, it may develop into a significant case and serve as a bellwether for other yoga and meditation challenges.¹⁵⁹

A. FACTS

The parents of two elementary school students sued the Encinitas Unified School District (EUSD), alleging that the teaching of yoga violated the Establishment Clause.¹⁶⁰ The school had recently received a \$533,000 donation from the Pattabhi Jois Foundation, an Encinitas-based nonprofit¹⁶¹ founded by the late Ashtanga yoga teacher, K.P. Pattabhi Jois.¹⁶² The Jois Foundation's goal was to promote yoga as an alternative to traditional physical education classes.¹⁶³ The Sedlocks argued that the Jois Foundation

¹⁵⁷ Statement of Decision at 14, 28, *Sedlock v. Baird*, No. 37201300035910-CU-MC-CTL (Cal. Super. Ct. C.D. July 1, 2013).

¹⁵⁸ See Sara B. Allman, *Stare Decisis in California State Court: The Decisions that Bind Us*, MARIN LAW., Apr. 2011, at 6, 19, available at http://www.saraballman.com/pdf/Marin_Lawyer_April_2011_-_Stare_Decisis.pdf (explaining that where intermediate appellate court opinions conflict, state trial courts can choose which one to follow).

¹⁵⁹ See Notice of Appeal at 1, *Sedlock v. Baird*, No. 37201300035910-CU-MC-CTL (Cal. Super. Ct. C.D. Oct. 30, 2013); Mark Movsesian, *Yoga in Public Schools, American and Indian*, FIRST THOUGHTS (Dec. 9, 2013, 8:18 AM), <http://www.firstthings.com/blogs/firstthoughts/2013/12/09/yoga-in-public-schools-american-and-indian/>; Paul Brandeis Raushenbush, *Yoga as Religion Debate Reaches India as Court Considers Ancient Discipline in Physical Education*, HUFFINGTON POST (Oct. 29, 2013, 10:52 AM EDT), http://www.huffingtonpost.com/2013/10/29/yoga-religion-_n_4173701.html; Jared Whitlock, *Lawyer Appeals Judge's Ruling over Yoga in Schools*, THE RANCHO SANTA FE NEWS, Nov. 6, 2013, at A1 (noting a comment about the pending India Supreme Court decision made by Dean Broyles, the attorney for the *Sedlock* plaintiffs).

¹⁶⁰ Notice of Appeal, *supra* note 157, at 1–2. The court's analysis of the First Amendment of the United States Constitution was sufficient analysis for the comparable California constitutional provision. See *Barnes-Wallace v. City of San Diego* 704 F.3d 1067, 1082 (9th Cir. 2012).

¹⁶¹ *KP Jois USA Foundation Inc.*, GUIDESTAR, <http://www.guidestar.org/organizations/45-3182571/kp-jois-usa-foundation.aspx> (last visited Oct. 13, 2013).

¹⁶² Statement of Decision, *supra* note 157, at 7.

¹⁶³ *Id.* at 4–10 (describing the yoga program as a part of a comprehensive health and welfare program that included instruction in organic gardening, the culinary arts, and character-building).

had an agenda to advance religion.¹⁶⁴ Plaintiffs cited the following allegedly religious elements: a poster of Ashtanga poses, the phrase, “namaste,” the praying hands position, bowing, the Sun Salutation, the Warrior pose, Sanskrit names of poses, and the Lotus position.¹⁶⁵

The Sedlocks, together with other parents, complained that the yoga program in the school was religious because Ashtanga yoga is closely associated with Hinduism, Buddhism, and Jainism.¹⁶⁶ The plaintiffs’ expert described Ashtanga yoga’s roots in the classic Hindu religious texts: the *Upanishads*, the *Bhagavad Gita*, and Patanjali’s *Yoga Sutra*.¹⁶⁷ To the plaintiffs, even after the district stripped away the Sanskrit names of the yoga postures, the physical postures themselves remained inherently religious.¹⁶⁸

The district asserted that the yoga program was not religious.¹⁶⁹ The defendants’ expert did not dispute that yoga is an important feature of some religions.¹⁷⁰ He also pointed out that yoga as practiced in the United States is a “distinctly American cultural phenomenon.”¹⁷¹ Although defendants’ expert agreed that yoga had ancient roots, he asserted that yoga

¹⁶⁴ *Id.* at 3–4. EUSD and the Jois Foundation were collaborating with the University of Virginia’s Contemplative Sciences Center to provide research on how to integrate yoga into public schools. *Id.* at 4; *Encinitas Ashtanga Yoga Elementary School Curriculum Research*, CONTEMPLATIVE SCI. CTR., UNIV. OF VA., <http://www.uvacontemplation.org/content/encinitas-ashtanga-yoga-elementary-school-curriculum-research> (last visited Oct. 13, 2013).

¹⁶⁵ Verified Petition for Writ of Mandamus; Complaint for Injunctive and Declaratory Relief at 12–13, *Sedlock v. Baird*, No. 37201300035910-CU-MC-CTL (Cal. Super. Ct. C.D. Feb. 20, 2013) 2013 WL 659082. The Sun Salutation is called Surya Namaskar, which plaintiffs claim worships the Hindu solar deity Surya. *Id.* at 12. The Warrior pose (Virabhadrasana) allegedly represents a Hindu god (Shiva) slicing off someone’s head. *Id.* The lotus flower is a religious symbol in Buddhism, Hinduism, and Jainism. *Id.* at 13.

¹⁶⁶ *Id.*

¹⁶⁷ Declaration of Candy Gunther Brown at 6–7, *Sedlock v. Baird*, No. 37201300035910-CU-MC-CTL (Cal. Super. Ct. C.D. Feb. 20, 2013).

¹⁶⁸ See *Complaint*, *supra* note 165, at 15–17. The complaint quotes Jois as saying, “Don’t talk about the philosophy — 99% practice and 1% philosophy that’s what [Jois] meant. You just keep doing it, . . . then slowly it will start opening up inside of you, . . . [to] automatically . . . draw you into the spiritual path.”) *Id.* at 20.

¹⁶⁹ Statement of Decision, *supra* note 157, at 11.

¹⁷⁰ Declaration of Mark Singleton at 2, *Sedlock v. Baird*, No. 37201300035910-CU-MC-CTL (Cal. Super. Ct. C.D. May 13, 2013).

¹⁷¹ *Id.* at 4.

today is a global phenomenon, culturally distinct from Indian traditions.¹⁷²

The district also argued that the kind of yoga actually taught at the time of trial — in the spring of 2013 — was not Ashtanga yoga, but “EUSD yoga.”¹⁷³ The district conceded that an earlier test program during the 2012–13 year had some references to the cultural roots of yoga and some Sanskrit words.¹⁷⁴ The district asserted, however, that the teachers did not refer to the underlying meaning of the words.¹⁷⁵ Furthermore, starting in January 2013, the yoga program eliminated all Sanskrit words, cultural references, chanting, and humming.¹⁷⁶ The district took the position that as of January 2013, the EUSD yoga program was free of any cultural and religious elements.¹⁷⁷

B. IS YOGA RELIGIOUS?

As a threshold question, the court asked if yoga is a religious activity.¹⁷⁸ Interestingly, the court did not apply the *Malnak* test — though the court cited to a number of cases that did use it.¹⁷⁹ The court merely concluded that yoga is religious because of its historic roots in Hinduism and Buddhism.¹⁸⁰ If any conclusion can be drawn from the *Sedlock* court’s sparse analysis, it is that having historic roots in an accepted religion is equivalent to being an activity of an already accepted religion.¹⁸¹ It is not clear from the case law, however, at what point a historical connection becomes so attenuated

¹⁷² *Id.*

¹⁷³ Statement of Decision, *supra* note 157, at 13. The current version of the EUSD yoga at trial was copyrighted. *Id.* at 11.

¹⁷⁴ Statement of Decision, *supra* note 157, at 13.

¹⁷⁵ Trial Brief In Support of Respondents/Defendants at 2, *Sedlock v. Baird*, No. 37201300035910-CU-MC-CTL (Cal. Super. Ct. C.D. May 10, 2013).

¹⁷⁶ *Id.* at 3. The traditional names of the postures were changed to kid-friendly names such as “Mountain,” “Gorilla,” “Surfer,” “Bamboo,” “Cat,” and “Cow.” *Id.*

¹⁷⁷ *Id.*

¹⁷⁸ See Statement of Decision, *supra* note 157, at 13.

¹⁷⁹ See *id.* at 13–14 (citing *Friedman v. S. Cal. Med. Grp.*, 102 Cal. App. 4th 39 (2d Dist. 2002), *Alvarado v. City of San Jose*, 94 F.3d 1223 (9th Cir. 1996), *Brown v. Woodland Joint Unified Sch. Dist.*, 27 F.3d 1373 (9th Cir. 1993), and *Malnak*, F.2d 197 (3d Cir. 1979)).

¹⁸⁰ Statement of Decision, *supra* note 157, at 14.

¹⁸¹ *Id.*

that a set of beliefs defies easy categorization according to prior case law and therefore falls within the ambit of the *Malnak* test.¹⁸²

Although the question appears to be academic — since the issue will normally be disposed of using the *Lemon* test — avoiding a more rigorous analysis of the religiousness of an activity could have a chilling effect on a school district’s curriculum choices.¹⁸³ A risk-averse school administrator might deem a technically “religious” activity too risky despite the fact that it would easily pass the *Lemon* test.¹⁸⁴ While unsatisfying from a doctrinal standpoint, the *Sedlock* court’s conclusory analysis at least harmonizes with the rule that courts ignore a party’s subjective categorizations of the challenged activity’s religiousness.¹⁸⁵ Some courts simply assume, arguendo, that the activity is religious so that the court can dispose of the case on *Lemon* test grounds.¹⁸⁶ It may be that judges generally prefer applying the *Lemon* test as expeditiously as possible without having to get bogged down in the metaphysical morass of defining religion.¹⁸⁷ In this way, judges address the Establishment Clause violation without running the risk that a higher court will reverse the lower court’s decision on Free Exercise grounds.¹⁸⁸

C. DOES YOGA PASS THE LEMON TEST?

The *Sedlock* defendants easily met the *Lemon* test’s first prong because the plaintiffs conceded that the district’s purpose was to promote physical education, health, and wellness.¹⁸⁹ The second prong of the *Lemon* test was the crux of the *Sedlock* case.¹⁹⁰ The *Sedlock* court framed the issue as whether a reasonably informed student in the spring of 2013 would objectively

¹⁸² *Malnak*, 592 F.2d at 207–10.

¹⁸³ *See Lemon v. Kurtzman*, 403 U.S. 602, 612–13 (1971).

¹⁸⁴ *See id.*

¹⁸⁵ *Malnak v. Yogi*, 440 F. Supp 1284, 1318 (D.N.J. 1977).

¹⁸⁶ *See cases cited supra* note 114.

¹⁸⁷ *Incorvaia, supra* note 47, at 353. *See Lemon*, 403 U.S. at 612–13.

¹⁸⁸ *Incorvaia, supra* note 47, at 353 (discussing how a court’s failure to recognize a set of beliefs as religious could qualify as religious discrimination under the Free Exercise Clause).

¹⁸⁹ Statement of Decision at 15, *Sedlock v. Baird*, No. 37201300035910-CU-MC-CTL (Cal. Super. Ct. C.D. July 1, 2013).

¹⁹⁰ *See id.*; *Lemon*, 403 U.S. at 612.

perceive the yoga class at EUSD to advance or inhibit religion.¹⁹¹ The plaintiffs argued that the primary effect of the yoga program was to turn the students toward advanced yoga training and eventually toward conversion to Hinduism.¹⁹² The argument hypothesizes that even if yoga is just stretching and strengthening now, it acts like a “threshold drug.”¹⁹³ Under the primary effect test, however, courts only examine those effects that are direct and immediate.¹⁹⁴ The court thus rejected the plaintiffs’ argument because the possible effect was too distant in the future.¹⁹⁵

The plaintiffs also contended that Hinduism, as opposed to mainstream Western religions, focuses more on practices than beliefs.¹⁹⁶ That is, even when stripped of all religious content, the purely physical “EUSD yoga” promotes Hinduism.¹⁹⁷ The court disagreed, finding EUSD yoga to be a program of just breathing, stretching, and listening to character lessons — all in child-friendly terminology.¹⁹⁸ While the court accepted some quotes of the plaintiffs’ expert, the court found that after a while, her testimony lacked objectivity and credibility.¹⁹⁹ The court concluded that the defendants’ expert was the only person taking the view that the hypothetical student in the EUSD yoga class would think that the school was advancing religion.²⁰⁰ In the court’s opinion, the defendant’s expert was on a personal mission to eliminate yoga from schools.²⁰¹ The court also discounted the declarations of the parents who were against the yoga program.²⁰² The court believed the defendants and found their testimony

¹⁹¹ Statement of Decision, *supra* note 189, at 17.

¹⁹² *Id.* at 21.

¹⁹³ *Id.* (quoting Judge John S. Meyer).

¹⁹⁴ *Brown v. Woodland Joint Unified Sch. Dist.*, 27 F.3d 1373, 1382 (9th Cir. 1994).

¹⁹⁵ Statement of Decision, *supra* note 189, at 17.

¹⁹⁶ Declaration of Candy Gunther Brown at 19, *Sedlock v. Baird*, No. 37201300035910-CU-MC-CTL (Cal. Super. Ct. C.D. Feb. 20, 2013).

¹⁹⁷ Verified Petition for Writ of Mandamus; Complaint for Injunctive and Declaratory Relief at 19-20, *Sedlock v. Baird*, No. 37201300035910-CU-MC-CTL (Cal. Super. Ct. C.D. Feb. 20, 2013) 2013 WL 659082; Statement of Decision, *supra* note 189, at 20.

¹⁹⁸ Statement of Decision, *supra* note 189, at 23.

¹⁹⁹ *Id.* at 20.

²⁰⁰ *Id.* at 23. The court had before it the written curriculum, which also showed no religious component. *Id.* at 22.

²⁰¹ *Id.* at 16.

²⁰² *Id.* at 18-19.

to corroborate the written curriculum.²⁰³ Thus, the defendants met the second *Lemon* test prong.²⁰⁴

Lastly, the court concluded that the defendants met the third *Lemon* test prong.²⁰⁵ The court distinguished EUSD yoga from the Catholic school scenario in *Lemon*.²⁰⁶ First, EUSD was a public school system as opposed to a private religious school.²⁰⁷ Second, there were no nearby houses of worship or religious artifacts creating confusion at EUSD.²⁰⁸ Third, control over the curriculum remained with the district — a public institution — rather than with a religious private school.²⁰⁹ EUSD hired the instructors and retained control over them through a third-party personnel management firm.²¹⁰ The court noted that if any problem arose, the district had the power to deal with it directly, unlike in *Lemon*, where the state would have had to deal with problems through the parochial school and the Catholic Church that supported it.²¹¹ The court also cited *Brown* to support the proposition that a one-time curriculum review by the school administration does not impermissibly entangle the school.²¹² Even if there had been some limited entanglement at the outset of *Sedlock*, there had ceased to be entanglement at the time of trial.²¹³

Regarding the third prong, the *Sedlock* court struggled with the influence of the Jois Foundation.²¹⁴ Evidence indicated that the Jois Foundation had a mission to introduce at least the physical aspects of yoga into schools.²¹⁵ Furthermore, there was some evidence that at least one teacher

²⁰³ *Id.* at 23.

²⁰⁴ *Id.* at 26.

²⁰⁵ *Id.*

²⁰⁶ *Id.* at 26–27.

²⁰⁷ See *Lemon v. Kurtzman*, 403 U.S. 602, 616 (1971); Statement of Decision at 26, *Sedlock v. Baird*, No. 37201300035910-CU-MC-CTL (Cal. Super. Ct. C.D. July 1, 2013).

²⁰⁸ See *Lemon*, 403 U.S. at 615; Statement of Decision, *supra* note 207, at 26.

²⁰⁹ See *Lemon*, 403 U.S. at 615; Statement of Decision, *supra* note 207, at 27.

²¹⁰ See *Lemon*, 403 U.S. at 618; Statement of Decision, *supra* note 207, at 5–6.

²¹¹ See *Lemon*, 403 U.S. at 619–21; Statement of Decision, *supra* note 207, at 27.

²¹² *Brown v. Woodland Joint Unified Sch. Dist.*, 27 F.3d 1373, 1383–84 (9th Cir. 1994); Statement of Decision, *supra* note 207, at 26.

²¹³ Statement of Decision, *supra* note 207, at 26.

²¹⁴ *Id.* at 27.

²¹⁵ *Id.*

worked for the Jois Foundation.²¹⁶ The court concluded, however, that there was no excessive entanglement.²¹⁷ First, notwithstanding the Grant's one-time mention of "Ashtanga Yoga," the district was teaching "EUSD Yoga" by the time of the lawsuit.²¹⁸ Second, the court found that the district witnesses were credible in disclaiming any connection with the Jois Foundation.²¹⁹ Third, the Jois Foundation was not part of the curriculum writing process.²²⁰ Thus, the involvement by the Jois Foundation was minimal and did not excessively entangle the school.²²¹

In sum, despite the threshold determination that yoga was religious, EUSD yoga passed the *Lemon* test.²²² First, the valid secular purpose was to promote health and wellness.²²³ Second, a reasonable, hypothetical child observer would not have thought that the primary effect was to advance religion.²²⁴ Third, there was no excessive entanglement between the EUSD and a religious organization.²²⁵

As of the time of this writing, the *Sedlock* plaintiffs have filed their appeal.²²⁶ Meanwhile, observers will be watching the Supreme Court of India for its upcoming decision on a case that appears to be *Sedlock v. Baird* writ large.²²⁷ At issue in the Indian case is the constitutionality of a petition ordering compulsory yoga classes nationwide.²²⁸ The arguments for and against follow the same contours of the *Sedlock* case.²²⁹ Those in favor

²¹⁶ *Id.*

²¹⁷ *Id.*

²¹⁸ *Id.* at 28.

²¹⁹ *Id.* at 27–28.

²²⁰ *Id.* at 8.

²²¹ *Id.* at 28.

²²² *Lemon v. Kurtzman*, 403 U.S. 602, 612–13 (1971); Statement of Decision, *supra* note 207, at 28.

²²³ *Lemon*, 403 U.S. at 612; Statement of Decision at 15, *Sedlock v. Baird*, No. 37201300035910-CU-MC-CTL (Cal. Super. Ct. C.D. July 1, 2013).

²²⁴ *Lemon*, 403 U.S. at 612; Statement of Decision, *supra* note 223, at 26.

²²⁵ *Lemon*, 403 U.S. at 612–13; Statement of Decision, *supra* note 223, at 27–28.

²²⁶ Notice of Appeal at 1, *Sedlock v. Baird*, No. 37201300035910-CU-MC-CTL (Cal. Super. Ct. C.D. Oct. 30, 2013).

²²⁷ Utkarsh Anand, *Supreme Court to Examine if Yoga Can Be Compulsory in Schools*, INDIAN EXPRESS (Oct. 19, 2013), <http://www.indianexpress.com/news/supreme-court-to-examine-if-yoga-can-be-compulsory-in-schools/1184494/0>.

²²⁸ *Id.*

²²⁹ *See id.*

cite the health benefits, while those against cite the religious roots of yoga.²³⁰ News of the India Supreme Court case came several months after the *Sedlock* trial, so it will be interesting to see on appeal to what use, if any, either party puts the eventual India Supreme Court decision.²³¹

III. MEDITATION CLASSES IN PUBLIC SCHOOLS

Like yoga, meditation is making inroads into the public school curriculum.²³² On one hand, some people understand meditation to be merely a secular technique that calms the mind and releases stress.²³³ On the other hand, critics say meditation is overtly religious.²³⁴ For example, parents in California, Connecticut, and North Carolina have challenged the presence of TM in the classroom.²³⁵ In April 2013, an Ohio parent-

²³⁰ *Id.*

²³¹ See Whitlock, *supra* note 159, at A1 (noting a comment about the pending India Supreme Court decision made by Dean Broyles, the attorney for the *Sedlock* plaintiffs).

²³² See Meiklejohn, *supra* note 2, at 302; Kelly Brewington, *Yoga, Meditation Program Helps City Youths Cope with Stress*, BALT. SUN (Feb. 23, 2011), http://articles.baltimoresun.com/2011-02-23/health/bs-hs-yoga-city-youth-20110223_1_yoga-chronic-stress-researchers; Nick Street, *Take a Breath*, L.A. TIMES (July 25, 2007), <http://articles.latimes.com/2007/jul/25/opinion/oe-street25> (discussing TM in public and charter schools).

²³³ *What Is Mindfulness?*, GREATER GOOD, <http://greatergood.berkeley.edu/topic/mindfulness/definition> (last visited Jan. 2, 2014).

²³⁴ See Carolyn Gregoire, *Warstler Elementary School In Ohio Shuts Down Mindfulness Program Due to Parent Complaints*, HUFFINGTON POST (Apr. 17, 2013, 7:38 PM EDT), http://www.huffingtonpost.com/2013/04/17/warstler-elementary-school-ohio-mindfulness-program_n_3101741.html.

²³⁵ Street, *supra* note 232; Gina Catena, *Letter to San Rafael School Board . . . or . . . How TM Lures the Young and Vulnerable*, TM-Free Blog (Jan. 13, 2007, 12:27 AM) <http://tmfree.blogspot.com/2007/01/letter-to-san-rafael-school-boardor-how.html> (protesting TM in Marin County schools); Marcus Wohlsen, *Affluent California High School Becomes the Site of a Flap over Transcendental Meditation*, ASSOCIATED PRESS ARCHIVE, Oct. 19, 2006, (discussing Quiet Time controversy in San Rafael, California). Compare Robert Varley, *Meditation Program Challenged in Branford; Mom Says Plan to Teach TM Puts Religion into Classroom*, NEW HAVEN REG., June 16, 2006, at A1 (discussing perception that TM brings religion into the classroom), and Christina Breen Bolling, *Board Tells Future School: Remove Religion from Lessons or Lose Charter — Transcendental Meditation, Natural Law Fuel Controversy*, THE CHARLOTTE OBSERVER, Apr. 9, 2004, at 1B (threatening to revoke charter school's charter if TM is

teacher organization forced a shutdown of their elementary school's MM program on the basis that MM is Buddhist.²³⁶ Most recently, in August 2013, parents challenged an MM program in the Albuquerque Public Schools.²³⁷ As further evidence that there are many people concerned about meditation in public schools, the Alabama Administrative Code actually contains an outright prohibition on teaching meditation techniques.²³⁸

Although there will always be close cases, in general, most MM and TM programs should pass constitutional muster.²³⁹ Despite pockets of current controversy and a seeming future headwind, this paper concludes that schools can teach MM and TM in a way that does not violate the Establishment Clause.²⁴⁰ *Sedlock* provides a modern look at how far a school program could push the boundary before crossing the line into an Establishment Clause violation.²⁴¹ Still, innovative meditation programs are at risk due to the combination of aggressive posturing by plaintiffs and a school district's desire to minimize the risk of litigation.²⁴² The analysis of MM and TM below provides a framework for school districts to consider in setting their curriculum.

not removed from curriculum), with *Letter to the Editor: Meditation an Opportunity to Have Happy Life*, NEW HAVEN REG., Aug. 4, 2006, A6 ("I understand the misconceptions and fears of some folks who confuse meditation with prayer. Transcendental [M]editation is not prayer. It is not a religion. It is practiced by individuals of all faiths, as well as those who reject religious ideas and beliefs.").

²³⁶ Gregoire, *supra* note 234.

²³⁷ Laura Thoren, *Mother Upset Over School-wide Meditation Program: McKinley Middle School Has Plans to Offer Program, Created by Goldie Hawn*, KOAT 7 ALBUQUERQUE (Aug. 16, 2013, 8:20 AM MDT), <http://www.koat.com/news/new-mexico/albuquerque/mother-upset-over-schoolwide-meditation-program/-/9153728/21491014/-/6om0xbz/-/index.html#ixzz2iIIPVFMb>.

²³⁸ ALA. ADMIN. CODE r. 290-040-040-.02 (2013) (explicitly banning the teaching of hypnosis, guided imagery, meditation, TM and yoga).

²³⁹ See discussion *infra* Parts III.A–B.

²⁴⁰ See *id.*; *supra* notes 232–238 and accompanying text.

²⁴¹ Statement of Decision at 27–28, *Sedlock v. Baird*, No. 37201300035910-CU-MC-CTL (Cal. Super. Ct. C.D. July 1, 2013).

²⁴² See discussion *infra* Parts III.A–B; *supra* notes 232–238 and accompanying text.

A. WILL MINDFULNESS MEDITATION CLASSES VIOLATE THE ESTABLISHMENT CLAUSE?

1. *Is MM Religious?*

Jon Kabat-Zinn calls MM the “heart” of Buddhist meditation.²⁴³ Mindfulness is the seventh step on the eight-fold path of Buddhism.²⁴⁴ Buddhists use MM as a tool to achieve liberation from suffering and to become enlightened.²⁴⁵ Because courts accept Buddhism as a religion,²⁴⁶ critics could equate the practice of MM to a religious practice such as the recitation of the Lord’s Prayer.²⁴⁷ Thus, if MM were a Buddhist practice, teaching MM in school would violate the Establishment Clause.²⁴⁸

The most vocal resistance to meditation in public schools comes from conservative Christian parents, conservative advocacy groups, and apolitical First Amendment watchdog groups.²⁴⁹ Evangelical Christians are particularly sensitive about meditation because they believe that techniques developing spiritual power invite demonic possession.²⁵⁰ Christians do not seek union with God but rather a proper relationship between God, as

²⁴³ Jon Kabat-Zinn, *Mindfulness-Based Interventions in Context: Past, Present, and Future*, 10 *CLINICAL PSYCHOL.: SCI. & PRAC.* 144, 145 (2003).

²⁴⁴ BROWN, *supra* note 154, at 37.

²⁴⁵ THUBTEN CHODRON, *BUDDHISM FOR BEGINNERS* 14, 24, 42, 76 (2001).

²⁴⁶ *Torcaso v. Watkins*, 367 U.S. 488, 495 n.11 (1961) (recognizing non-theistic religions such as Buddhism, Taoism, Ethical Culture, and Secular Humanism); *Malnak*, 592 F.2d 197, 207–08 (3d Cir. 1979).

²⁴⁷ See *Grove v. Mead Sch. Dist.* No. 354, 753 F.2d 1528, 1534 (9th Cir. 1985).

²⁴⁸ See *id.* (invalidating the recitation of the Lord’s Prayer in public school).

²⁴⁹ News, NAT’L CTR. FOR L. & POL’Y, <http://www.nclplaw.org/news/> (last visited Jan. 2, 2014) (listing NCLP’s recent legal involvements); *Key Issues*, ALLIANCE DEFENDING FREEDOM, <http://www.alliancedefendingfreedom.org/issues/church> (last visited Jan. 2, 2014) (same); *Index of Cults and Religions*, WATCHMAN, <http://www.watchman.org/index-of-cults-and-religions/> (last visited Jan. 2, 2014) (discussing cults and religions); *Religion in Public Schools and Universities*, AMS. UNITED FOR SEPARATION OF CHURCH AND ST., <https://www.au.org/issues/religion-public-schools-and-universities> (last visited Jan. 2, 2014) (listing Americans United’s recent activity with regard to religion and public schools); Archive for the ‘New Age/Occult Practices’ Category, *Who is Congressman Tim Ryan, and Why Is He Pushing New Age/Buddhist “Mindfulness” in Public Schools?*, CHRISTIANS UNITED AGAINST APOSTASY (last revised Nov. 30, 2013), <http://davemosher.wordpress.com/category/new-ageoccult-practices/>; Catena, *supra* note 235.

²⁵⁰ BROWN, *supra* note 154, at 70–76.

Creator, and man, as the created.²⁵¹ For these adherents, the Buddhist goal of trying to merge with God, therefore, is blasphemous.²⁵²

On the other hand, those in favor of MM in schools argue that the technique of MM is severable from its religious roots.²⁵³ Like the defendants in *Malnak*, the proponents of MM could assert their honest and subjective belief that MM is not a religious activity.²⁵⁴ Courts, however, do not give determinative weight to a party's subjective characterization of the challenged activity.²⁵⁵ The United States Supreme Court has noted that a person's earnest declaration that a belief is not religious is relevant to but not determinative of the question of whether the activity is legally "religious."²⁵⁶ Thus, on balance, MM is probably religious, and therefore invokes the *Lemon* test.²⁵⁷

2. Does MM Pass the Lemon Test?

MM meets the first prong, "secular purpose," because the stated goal of boosting performance and health is not a sham.²⁵⁸ The literature documenting the benefits of meditation is vast.²⁵⁹ The second prong, "primary effect," is a more difficult case.²⁶⁰ The main parental complaint about MM

²⁵¹ Reporter's Transcript at 20, *Sedlock v. Baird*, No. 37201300035910-CU-MC-CTL (Cal. Super. Ct. C.D. May 21, 2013) (testimony of Dr. Candy Gunther Brown).

²⁵² *Id.*

²⁵³ See JON KABAT-ZINN, *supra* note 15, at 21 ("Mindfulness is often described as the heart of Buddhist meditation. Nevertheless, cultivating mindfulness is not a Buddhist activity.").

²⁵⁴ *Malnak v. Yogi* 440 F. Supp 1284, 1319 (D.N.J. 1977) (calling defendants' characterizations of their own beliefs unreliable).

²⁵⁵ *Id.*; *Malnak*, 592 F.2d 197, 210 n.45 (3d Cir. 1979) (noting that "the question of the definition of religion for [F]irst [A]mendment purposes is one for the courts, and is not controlled by the subjective perceptions of believers. Supporters of new belief systems may not 'choose' to be non-religious, particularly in the [E]stablishment [C]ause context").

²⁵⁶ *Welsh v. United States*, 398 U.S. 333, 341 (1970) (noting that although a person's subjective belief is highly relevant to question of religion it is an unreliable guide for courts).

²⁵⁷ *Malnak*, 592 F.2d at 207–10; *Lemon v. Kurtzman*, 403 U.S. 602, 612–13 (1971).

²⁵⁸ See *Lemon*, 403 U.S. at 612; *Edwards v. Aguillard*, 482 U.S. 578, 587–88 (1987).

²⁵⁹ See *Brochure*, *supra* note 9, at 20–21; *Promising Research on Meditation in Schools*, *supra* note 10.

²⁶⁰ *Lemon*, 403 U.S. at 612.

is that it looks like a Buddhist practice and therefore has the primary effect of advancing a religion — similar to the complaint in *Sedlock*.²⁶¹ A practice's mere consistency with or coincidental resemblance to a religious practice, however, does not have the primary effect of advancing religion.²⁶² For example, it is no matter that the Ten Commandments' prohibition of theft, adultery, and murder harmonize with state regulation of the same.²⁶³ Thus, concerned parents cannot invalidate MM in schools merely because MM also happens to be a Buddhist practice.²⁶⁴

Furthermore, the second prong of the *Lemon* test requires that a hypothetical school-age observer perceive the government activity as actually endorsing religion.²⁶⁵ *Sedlock* teaches that opponents of MM would have to show an ongoing use of Buddhist phrases, objects, and teachings in the classroom.²⁶⁶ The *Sedlock* court approved of how the district changed the allegedly religious name of "Lotus position" to "criss-cross applesauce."²⁶⁷ Thus, proponents of MM would do well to preempt Establishment Clause challenges by keeping the MM program content-free and terminology-neutral.²⁶⁸

Even in such a case, however, opponents of MM could still argue — as did the plaintiffs in *Sedlock* with respect to yoga — that the very practice of MM itself advances religion through "camouflage."²⁶⁹ Under this view, MM would set a child on a path of greater and greater dependency, which would eventually lead to a desire to convert to Buddhism.²⁷⁰ As *Brown* and *Sedlock* illustrate, however, speculation as to what children might do when they grow up is an effect too far into the future to count as having

²⁶¹ See Statement of Decision at 16–18, *Sedlock v. Baird*, No. 37201300035910-CU-MC-CTL (Cal. Super. Ct. C.D. Feb. 20, 2013); Gregoire, *supra* note 234.

²⁶² *Alvarado v. City of San Jose*, 94 F.3d 1223, 1232 (9th Cir. 1996).

²⁶³ *Brown v. Woodland Joint Unified Sch. Dist.*, 27 F.3d 1373, 1380–81 (9th Cir. 1994).

²⁶⁴ See *Alvarado*, 94 F.3d at 1232.

²⁶⁵ *Brown*, 27 F.3d at 1380–81.

²⁶⁶ See Statement of Decision, *supra* note 261 at 5–9.

²⁶⁷ *Id.* at 9.

²⁶⁸ See *id.* at 28.

²⁶⁹ *Id.* at 21.

²⁷⁰ *Id.*

the “primary effect” of advancing religion.²⁷¹ Thus, MM would meet the second prong of the *Lemon* test.²⁷²

Most public school MM programs would also satisfy the third prong of *Lemon*.²⁷³ School districts can proactively avoid a finding of entanglement by using regular classroom teachers instead of religiously affiliated ones, keeping the MM programs on campus, and supervising teachers regularly.²⁷⁴ Excessive entanglement could arise where an allegedly religious organization had an impermissible level of control over hiring, firing, and curriculum development.²⁷⁵ In *Sedlock*, for example, EUSD pushed against these limits by agreeing to hire Jois-certified teachers and giving several Jois-related people some access to the curriculum development.²⁷⁶ EUSD mitigated what could otherwise have been excessive entanglement both by maintaining control of employment decisions and by utilizing an independent curriculum specialist.²⁷⁷ Thus, most MM programs would likely meet the third prong of the *Lemon* test.²⁷⁸

In sum, MM is probably religious, but it will not violate the Establishment Clause where schools take care to avoid using religious phrases, objects, or teaching materials as part of the MM program.²⁷⁹ Despite MM’s historical roots, the reasonable, hypothetical schoolchild would not understand an MM program to have the primary, immediate, and direct effect of advancing religion.²⁸⁰ Districts must also remain independent in terms of curriculum development and employment decisions regarding MM program personnel.²⁸¹

²⁷¹ *Brown v. Woodland Joint Unified Sch. Dist.*, 27 F.3d 1373, 1382 (9th Cir. 1994) (dismissing parental claim that neurolinguistic programming would cause schoolchild to seek out occult groups after coming of age); *Sedlock v. Baird*, No. 37201300035910-CU-MC-CTL, 2013 WL 6063439, at *1 (Cal. Super. Ct. C.D. July 1, 2013).

²⁷² *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971).

²⁷³ *Id.* at 613.

²⁷⁴ *Id.* at 618 (recognizing that it will always be extremely difficult for religiously affiliated teachers to remain religiously neutral).

²⁷⁵ Statement of Decision, *supra* note 261 at 5-26-28.

²⁷⁶ *Id.* at 7.

²⁷⁷ *Id.* at 8, 27.

²⁷⁸ See *Lemon v. Kurtzman*, 403 U.S. 602, 612–13 (1971).

²⁷⁹ See Part III.A.1, and *supra* note 266 and accompanying text.

²⁸⁰ See *supra* Part III.A.2.

²⁸¹ See *supra* notes 275–277 and accompanying text (discussing how EUSD avoided excessive entanglement).

B. WILL TRANSCENDENTAL MEDITATION CLASSES VIOLATE THE ESTABLISHMENT CLAUSE?

1. *Is TM in Quiet Time Religious?*

Malnak I and *II* examined the religiousness of TM in conjunction with SCI, but no court has decided whether TM, by itself, is a religion.²⁸² It is, therefore, an open question as to whether TM alone could survive an Establishment Clause challenge.²⁸³ In his *Malnak II* concurrence, Judge Adams alluded to the possibility that TM, by itself, might be able to pass constitutional muster.²⁸⁴ He noted that the degree to which TM answered matters of “ultimate concern” — the first prong of the *Malnak* test — might vary from course to course.²⁸⁵

In some ways, TM in the public school setting today is much different from the TM of thirty-five years ago.²⁸⁶ Importantly, TM is no longer packaged with SCI.²⁸⁷ TM is packaged in a program called Quiet Time.²⁸⁸ To avoid confusion with the *Malnak*-era version of TM, the author will refer to TM — as taught in Quiet Time — as “TM in Quiet Time.”²⁸⁹ Quiet Time is a fifteen-minute period of unpressured and peaceful rest at the beginning and end of each school day.²⁹⁰ The purpose of Quiet Time is to

²⁸² *Malnak*, 592 F.2d 197, 213, 213 n.54 (3d Cir. 1979).

²⁸³ *Id.* at 213 n.54.

²⁸⁴ *Id.* at 213 (noting that “[a]lthough [TM] by itself might be defended . . . as primarily a relaxation or concentration technique with no ‘ultimate’ significance, the . . . course at issue here was not a course in TM alone, but a course in [SCI].”).

²⁸⁵ *Id.* at 213 n.54.

²⁸⁶ Compare *Malnak v. Yogi*, 440 F. Supp. 1284, 1288–1312 (D.N.J. 1977) (describing TM in depth), with *Brochure*, *supra* note 9, at 7, and QUIET TIME PRIMER, EDUTOPIA 1–2 [hereinafter *Primer*], available at <http://www.edutopia.org/pdfs/stw/edutopia-stw-reducingstudentstress-visalvey-primer.pdf>.

²⁸⁷ See generally *Brochure*, *supra* note 9, at 2–7 (detailing the teaching of TM through the Quiet Time program).

²⁸⁸ *Id.*

²⁸⁹ The author’s reference to “TM in Quiet Time” is not to be confused with “TM/ Quiet Time,” the name of an earlier version of Quiet Time. See *Featured Past Events*, DAVID LYNCH FOUND., <http://www.davidlynchfoundation.org/featured-past-events.html> (last visited Jan. 2, 2014). Since Quiet Time comprises a set of meditation and non-meditation related activities, the use of the term, “TM in Quiet Time” refers specifically TM component of Quiet Time.

²⁹⁰ *Brochure*, *supra* note 9, at 7.

increase health and readiness-to-learn.²⁹¹ During Quiet Time, students are free to choose between meditation, sustained silent reading, or free painting or drawing.²⁹² Students who have learned TM are free to practice the technique during this time.²⁹³ Students who do not wish to learn TM can also practice other less structured forms of meditation such as quiet sitting or mindfulness.²⁹⁴ During Quiet Time, students are not discouraged from napping or praying.²⁹⁵

TM in Quiet Time is not a religion under the *Malnak* test.²⁹⁶ TM in Quiet Time does not meet the first *Malnak* test factor because Quiet Time does not answer any imponderable questions and does not address matters of ultimate concern.²⁹⁷ Quiet Time is devoid of any teaching about religion, metaphysics, or transcendent reality.²⁹⁸ Quiet Time does not teach about “creative intelligence.”²⁹⁹ The only content in the instructional process, aside from the training in the mechanical meditation technique itself, involves the biology and psychology of stress reduction.³⁰⁰ In one school, for example, a cardiologist and neurologist taught students how meditation affects the heart and brain.³⁰¹ Critics could point to the possibility of students’ Googling TM and making a connection to SCI, which does still exist as a stand-alone course.³⁰² This argument fails, however, because

²⁹¹ *Primer*, *supra* note 286, at 1.

²⁹² *Id.*

²⁹³ *Brochure*, *supra* note 9, at 7.

²⁹⁴ Telephone Interview with Laurent Valosek, Exec. Dir., Ctr. for Wellness and Achievement in Educ. (Nov. 6, 2013) (notes on file with author) [hereinafter *Telephone Interview*].

²⁹⁵ Eve Conant, *Can Meditation Help At-Risk Kids?*, NEWSWEEK (May 29, 2008, 8:00 PM), <http://www.newsweek.com/can-meditation-help-risk-kids-90387>. The Free Exercise Clause protects students’ freedom to pray in school. U.S. CONST. amend I. This paper does not discuss Free Exercise Clause challenges.

²⁹⁶ *Malnak*, 592 F.2d 197, 207–10 (3d Cir. 1979).

²⁹⁷ *Id.* at 208.

²⁹⁸ See generally *Brochure*, *supra* note 9 (not discussing religion); *Primer*, *supra* note 286 (same).

²⁹⁹ See generally *Brochure*, *supra* note 9 (discussing the scope of Quiet Time); *Primer*, *supra* note 286 (same).

³⁰⁰ *Telephone Interview*, *supra* note 294.

³⁰¹ *Id.*

³⁰² *The Science of Creative Intelligence Course*, MAHARISHI, <http://www.maharishi.org/sci/sci.html> (last visited Jan. 5, 2014) (calling TM the practical aspect of SCI).

such independent Internet research would only serve to distinguish the practical technique of TM as taught in Quiet Time from the separate metaphysical teaching of SCI.³⁰³

TM in Quiet Time does not meet the second *Malnak* test factor — comprehensiveness.³⁰⁴ In TM in Quiet Time, students learn only a mental technique, not an all-inclusive belief system.³⁰⁵ TM in Quiet Time is an isolated scientific method of reducing stress and increasing relaxation.³⁰⁶ Although it is true that courts sometimes recognize a science as a religion — as in Scientology — Quiet Time is completely devoid of religious content.³⁰⁷ Furthermore, even if an isolated teaching gives answers to ultimate questions, the teaching will not be broad enough to rise to the level of being religious.³⁰⁸

TM in Quiet Time probably does not meet the third *Malnak* test factor — extrinsic formal signs or symbols.³⁰⁹ There are no sacred objects, holy books, or formal clergy.³¹⁰ After the initial lesson, students meet with certified TM teachers only once or twice a semester for short, follow-up refresher classes.³¹¹ The rest of the time, regular classroom teachers oversee the twice-daily Quiet Time classes.³¹² Quiet Time does not use any SCI textbook.³¹³ And although there are TM centers around the world,³¹⁴ Quiet

³⁰³ See *Malnak*, 440 F. Supp. 1284, 1288–1312 (D.N.J. 1977) (detailing TM in depth); *The Science of Creative Intelligence Course*, *supra* note 302.

³⁰⁴ *Malnak*, 592 F.2d 197, 208–09 (3d Cir. 1979). See *Brochure*, *supra* note 9, at 3–7 (discussing scope of Quiet Time program).

³⁰⁵ See *generally Brochure*, *supra* note 9 (discussing the scope of the Quiet Time program).

³⁰⁶ *Brochure*, *supra* note 9, at 20–25.

³⁰⁷ *Founding Church of Scientology of Wash., D.C. v. United States*, 409 F.2d 1146, 1160 (D.C. Cir. 1969); *Brochure*, *supra* note 9 (discussing the scope of Quiet Time); *Primer*, *supra* note 286 (same).

³⁰⁸ *Malnak*, 592 F.2d at 208–09.

³⁰⁹ *Id.* at 209–10.

³¹⁰ *Id.* at 209; *Brochure*, *supra* note 9; *Primer*, *supra* note 286.

³¹¹ Email from Laurent Valosek, Exec. Dir., Ctr. for Wellness & Achievement in Educ., to author (Dec. 26, 2013, 6:40 PM PST) [hereinafter *Email*].

³¹² See *Primer*, *supra* note 286.

³¹³ *Id.*; *Brochure*, *supra* note 9.

³¹⁴ *Alphabetical Listing of Resource Websites Around the World*, GLOBAL COUNTRY OF WORLD PEACE, <http://www.globalcountry.org/wp/full-width/links/> (last visited Jan. 5, 2014).

Time teachers do not discuss them.³¹⁵ Furthermore, TM in Quiet Time lacks the rigid requirements of formal religious observances,³¹⁶ learning TM as part of Quiet Time is optional.³¹⁷ And even if a student does choose to learn TM, practicing the technique in the Quiet Time class period remains voluntary.³¹⁸

It is a closer case as to whether the instruction ceremony in TM in Quiet Time is a formal sign of religion.³¹⁹ Critics will point out that the *Malnak II* majority cited the puja as one of the factors determining the religiousness of SCI/TM.³²⁰ The highly influential Judge Adams concurrence, however, left more room for debate as to how much determinative weight to afford the puja.³²¹ For Adams, the textual analysis of the chant was far less important than was the purpose and context of the chant.³²² As was true in the *Malnak* era, the purpose of the puja in Quiet Time is still to ensure that the teacher imparts the technique correctly, by reminding the teacher to instruct in a precise manner without superimposing any changes to the standard instructional process.³²³ In addition, the context of the puja in Quiet Time includes many of the same mitigating features noted by Adams: the puja is performed only once, in Sanskrit, without translation, and without the students' knowledge of the meaning of the words.³²⁴ Also, students no longer bring the white handkerchief, fruit, and flowers to the ceremony — these objects are already present in the room.³²⁵

³¹⁵ *Telephone Interview*, *supra* note 294.

³¹⁶ *Malnak*, 592 F.2d 197, 209–10 (1979).

³¹⁷ Mariko Nobori, *How to Start a Meditation Program in Your School*, EDUTOPIA (Feb. 22, 2012), <http://www.edutopia.org/stw-student-stress-meditation-school-tips>.

³¹⁸ *See Primer*, *supra* note 286, at 1.

³¹⁹ *Malnak*, 592 F.2d at 209–10.

³²⁰ *Id.* at 199.

³²¹ *See id.* at 209 n.14 (discussing how the puja's ceremonial aspects are not determinative of the course's religiousness); *Friedman v. S. Cal. Permanente Med. Grp.*, 102 Cal. App. 4th 39, 60–62 (2d Dist. 2002) (collecting cases relying on the *Malnak* test, and noting that the Adams concurrence has been far more influential than the majority opinion in guiding contemporary jurisprudence on the question of religion).

³²² *Malnak*, 592 F.2d at 202 n.7.

³²³ *Telephone Interview*, *supra* note 294.

³²⁴ *Malnak*, 592 F.2d at 203; *Telephone Interview*, *supra* note 294.

³²⁵ *Telephone Interview*, *supra* note 294.

Lastly, anecdotal evidence suggests that out of the 5,000 students in Northern California who have learned TM in Quiet Time, no student who has chosen to learn TM has ever asked not to participate in the puja.³²⁶ Given the overall context of the puja within the Quiet Time program, therefore, a contemporary court would probably find that the third *Malnak* prong fails.³²⁷ In sum, TM in Quiet Time is probably not religious.³²⁸

2. Does TM in Quiet Time Pass the Lemon Test?

Even if a court did find TM in Quiet Time to be religious, TM in Quiet Time would still pass the *Lemon* test.³²⁹ TM in Quiet Time meets the first prong of *Lemon* because it has a valid secular purpose.³³⁰ The purpose of Quiet Time is to reduce stress, promote relaxation, improve health, reduce violence, and improve academic performance.³³¹ Over three hundred published studies show benefits, including recovery from PTSD, prevention of heart attacks, and decreased blood pressure.³³² Critics could argue, as did the plaintiffs in *Sedlock*, that Quiet Time is merely camouflage for a religious mission to embed TM in schools.³³³ Considering the well-documented benefits of TM in the peer-reviewed academic literature, however, there is a logical basis to conclude that the stated governmental purpose is not a sham.³³⁴

TM in Quiet Time meets the second prong of *Lemon* because its principal or primary effect neither advances nor inhibits religion.³³⁵ Because the TM technique as taught in Quiet Time lacks any religious content, a reasonable, hypothetical school-aged child would not think that TM is also

³²⁶ *Id.*

³²⁷ *Malnak*, 592 F.2d 197, 209 (3d Cir. 1979); *See supra* notes 309–326 and accompanying text (analyzing the TM in Quiet Time under the third prong of the *Malnak* test).

³²⁸ *See supra* Part III.B.1.

³²⁹ *Lemon v. Kurtzman*, 403 U.S. 602, 612–13 (1971); *See infra* Part III.B.2.

³³⁰ *Lemon*, 403 U.S. at 612. *See infra* Part III.B.2.

³³¹ *Brochure*, *supra* note 9, at 3, 5.

³³² *Id.* at 20–25 (collecting 112 research findings).

³³³ *See* Statement of Decision at 21, *Sedlock v. Baird*, No. 37201300035910-CU-MC-CTL (Cal. Super. Ct. C.D. July 1, 2013).

³³⁴ *See* *Edwards v. Aguillard*, 482 U.S. 578, 587–88 (1987) (holding that state legislature’s pretext of “academic freedom” was a sham, where the Act prohibited the teaching of evolution in public schools); *Brochure*, *supra* note 9, at 20–25 (collecting research).

³³⁵ *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971).

endorsing SCI.³³⁶ Even if a child searched the websites promoting Quiet Time, they would not find any suggestion of religion.³³⁷ The tm.org website does briefly mention the Vedic origins of meditation, but only in a historical way.³³⁸ At the initial TM introductory lecture, the teacher mentions Maharishi only in passing in order to acknowledge him as the founder of TM.³³⁹ Additionally, the students do not understand the Sanskrit chant.³⁴⁰

Considering the overall time spent in Quiet Time throughout the school year, the one-time, three- to four-minute ceremony constitutes a minute part of a student's overall Quiet Time experience.³⁴¹ Understood in this light, the puja seems more akin to a one-time cultural enrichment program, such as an American Indian dance presentation that might tangentially present some religious elements.³⁴² Furthermore, the instructor explicitly informs the student that the purpose of the puja is a giving of thanks to the tradition of teachers and a reminder for the teacher to impart the technique correctly.³⁴³ Thus, the puja is a practical quality control measure that does not have the primary effect of advancing or inhibiting religion.³⁴⁴

Equally unavailing is the argument that exposure to TM advances religion because of its future effect.³⁴⁵ Although it is true that TM is the first

³³⁶ *Brown v. Woodland Joint Unified Sch. Dist.*, 27 F.3d 1373, 1378–79 (9th Cir. 1994). See *Brochure*, *supra* note 9 (describing the content of Quiet Time).

³³⁷ See *Programs: Quiet Time Program*, CTR. FOR WELLNESS AND ACHIEVEMENT IN EDUC., http://cwae.org/quiet_time_program.php (last visited Jan. 5, 2014) (describing the scope and content of Quiet Time); *Schools*, *supra* note 4 (same).

³³⁸ *What Is TM?: The Technique*, *supra* note 16 (discussing the basis of TM in the ancient Vedic tradition of enlightenment in India).

³³⁹ *Telephone Interview*, *supra* note 294.

³⁴⁰ *Id.*

³⁴¹ See *Brown v. Woodland Joint Unified Sch. Dist.*, 27 F.3d 1373, 1381 (9th Cir. 1994) (finding that a reasonable child observer would not find that the stories on witchcraft were religious, in part because they constituted a minute part of an otherwise clearly nonreligious set of teaching materials); *Malnak v. Yogi*, 440 F. Supp. 1284, 1305 (D.N.J. 1977).

³⁴² Barbara A. Hughes, *American Indian Dance: Steps to Cultural Preservation*, 21 *HIGH PLAINS APPLIED ANTHROPOLOGIST* 176, 176–77 (2001).

³⁴³ *Malnak*, 440 F. Supp. at 1309.

³⁴⁴ See *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971); *Telephone Interview*, *supra* note 294.

³⁴⁵ *Brown*, 27 F.3d at 1382.

step in advanced SCI courses such as the TM Siddhi program,³⁴⁶ *Brown v. Woodland Joint Unified School District* teaches that the challenged activity must have a direct or immediate effect of advancing religion.³⁴⁷ A similar argument failed in *Sedlock*.³⁴⁸ No evidence suggests that any Quiet Time students have changed their religion as a result of practicing TM.³⁴⁹ Over the last seven years, approximately 5,000 students learned TM in Northern California.³⁵⁰ Anecdotal evidence suggests that Quiet Time actually strengthens these students' commitments to their existing faiths.³⁵¹ Some student meditators say they have a more profound appreciation of their own religious heritage due to the physical and psychological benefits of practicing TM.³⁵²

Critics also argue that TM advances religion because the TM mantras themselves allegedly derive from Hindu and Tantric Buddhist "bija" mantras.³⁵³ However, academic authorities differ on whether the TM mantras refer to Hindu gods.³⁵⁴ TM proponents uniformly maintain that the mantras have no meaning.³⁵⁵ Notably, neither *Malnak I* nor *Malnak II* determined

³⁴⁶ *The TM-Sidhi Program*, PERMANENT PEACE, <http://www.permanentpeace.org/technology/sidhi.html> (last visited Jan. 7, 2014) (stating that the practitioners can continue to advanced programs after starting with TM).

³⁴⁷ 27 F.3d at 1382.

³⁴⁸ Statement of Decision at 27, *Sedlock v. Baird*, No. 37201300035910-CU-MC-CTL (Cal. Super. Ct. C.D. July 1, 2013).

³⁴⁹ *Email*, *supra* note 311.

³⁵⁰ *Id.*

³⁵¹ *Id.*

³⁵² *Id.*

³⁵³ *TranceNet: What's Your Mantra Mean?: Or When Is a Meaningless Sound Not Mean[ingless]? When It's a Tantric Name of a Hindu God*, MINET, <http://minet.org/www.trancenet.net/secrets/mantras.shtml> (last visited Jan. 5, 2014).

³⁵⁴ CAROL A. WILSON, HEALING POWER BEYOND MEDICINE 178 (2011) (noting that some advanced *bija* mantras used in TM invoke Hindu deities); Note, *Transcendental Meditation and The Meaning of Religion Under the Establishment Clause*, 62 MINN. L. REV. 887, 918–19, n.122 (1978) (noting that Hindu and Buddhist mantras customarily have meaning). *But see* SIR JOHN WOODROFFE, THE GARLAND OF LETTERS 261 (1998) (stating that *bija* mantras have no meaning).

³⁵⁵ *Aff. of Charles Berlitz at 2–3*, *Malnak v. Yogi*, No. 76–341 (D.N.J. Oct. 20, 1977) (finding no religious meanings in the TM mantras); *Aff. of K.L. Seshagiri Rao at 2–3*, *Malnak v. Yogi*, No. 76–341 (D.N.J. Oct. 20, 1977) (stating that TM mantras are not the names of Hindu gods); *Email from William Goldstein, Dean of Global Dev. & Gen. Counsel, Maharishi Univ. of Mgmt.*, to author (Oct. 10, 2013, 9:46 AM PST) (stating

that the mantra was religious.³⁵⁶ In both opinions, the court merely referred to the mantra as a “sound aid.”³⁵⁷ Even if a mantra did have religious significance, the Adams concurrence suggests that no one consideration is dispositive of the third factor.³⁵⁸ Furthermore, some recent Pledge of Allegiance cases suggest that the religiousness of a phrase has less force where the school activity is a non-religious exercise.³⁵⁹ Thus, even if the mantra were religious, the overall non-religiousness of Quiet Time mitigates any advancement of religion.³⁶⁰

TM in Quiet Time does not foster an excessive government entanglement with religion.³⁶¹ As with MM, Quiet Time is curriculum-based and therefore easy to monitor.³⁶² District administrators can supervise Quiet Time directly without leaving the school grounds.³⁶³ Furthermore, the Quiet Time teachers are regular classroom teachers, as opposed to the overtly religious Catholic school nuns in *Lemon*.³⁶⁴ And any entanglement on the part of the school district with regard to the intermittent training provided by outside TM teachers would be minimal or non-existent.³⁶⁵ Certified TM

that TM students are told that the mantras have no meaning) (on file with author); Evan Finkelstein, *On TM Mantras: The Mantras Used in TM Are Some of the Most Fundamental Vibrations of Natural Law*, TRUTH ABOUT TM (last visited Jan. 13, 2014), <http://www.truthabouttm.org/truth/IndividualEffects/IsTMaReligion/TMMantras/index.cfm> (stating that TM mantras have no meaning).

³⁵⁶ See *Malnak v. Yogi*, 440 F. Supp 1284, 1289 n.3 (D.N.J. 1977); *Malnak*, 592 F.2d 197, 198 (3d Cir. 1979).

³⁵⁷ *Malnak*, 440 F. Supp at 1289 n.3; *Malnak*, 592 F.2d at 198.

³⁵⁸ See *Malnak*, 592 F.2d at 203 n.14.

³⁵⁹ See *Newdow v. Rio Linda Union Sch. Dist.*, 597 F.3d 1007, 1037 (9th Cir. 2010) (holding that the phrase “under God” in the Pledge of Allegiance did not violate the Establishment Clause); *Freedom from Relig. Found. v. Hanover Sch. Dist.*, 626 F.3d 1, 13 (1st Cir. 2010), *cert. denied*, 131 S.Ct. 2992 (2011) (finding that couching of religious phrase, “under God,” in the non-religious text of the Pledge of Allegiance, while not dispositive, is significant in mitigating an Establishment Clause violation).

³⁶⁰ See *Newdow*, *supra* note 359, at 1037.

³⁶¹ *Lemon v. Kurtzman*, 403 U.S. 602, 613 (1971).

³⁶² See *Primer*, *supra* note 286, at 1–2 (detailing classroom implementation of Quiet Time); *supra* text and accompanying notes 274–277.

³⁶³ See *Primer*, *supra* note 286, at 1.

³⁶⁴ *Id.*; *Lemon v. Kurtzman*, 403 U.S. 602, 615–16 (1971).

³⁶⁵ See *Lemon*, 403 U.S. at 615–16; *Primer*, *supra* note 286, at 1. Although not dispositive of the legal issue, it is telling that the United States government finds no excessive entanglement in sponsoring TM studies for cardiovascular disease and post-traumatic

instructors, though often present in the school during the day, have contact with students on an individual basis just once or twice a semester.³⁶⁶ Thus, TM in Quiet Time would meet the third prong of *Lemon*.³⁶⁷

In sum, TM in Quiet Time probably does not violate the Establishment Clause.³⁶⁸ If a court found that TM in Quiet Time was not religious, that would be the end of the matter.³⁶⁹ If a court found that the program was religious, TM in Quiet Time would probably pass the *Lemon* test.³⁷⁰ The valid secular purpose is to create relaxation, boost performance, and decrease violence.³⁷¹ Given the purpose and context of TM in Quiet Time, a reasonable, hypothetical schoolchild would not understand TM in Quiet Time to have the primary, immediate, and direct effect of advancing religion.³⁷² Quiet Time presents TM as a standalone, scientifically proven technique to increase health and well-being.³⁷³ Lastly, like in MM, there would be no excessive entanglement as long as the school took care to maintain its independence in monitoring the teachers and in developing the curriculum.³⁷⁴ At first glance, *Malnak v. Yogi* seems to cast a long shadow over any implementation of TM in schools.³⁷⁵ The above analysis illustrates, however, that

stress disorder (PTSD). For example, the National Institutes of Health has provided \$26 million in grants for TM cardiovascular health studies. *TM Research: NIH-funded Research on Transcendental Meditation*, DAVID LYNCH FOUND., <http://www.davidlynch-foundation.org/national-institutes-of-health.html> (last visited Jan. 5, 2014). Similarly, the Department of Defense recently awarded a multi-million dollar grant for TM training and research for veterans with PTSD. *Operation Warrior Wellness: Building Resilience and Healing the : Hidden Wounds of War*, DAVID LYNCH FOUND., <http://www.davidlynch-foundation.org/military.html> (last visited Jan. 5, 2014).

³⁶⁶ Telephone Interview, *supra* note 294.

³⁶⁷ See *Lemon*, 403 U.S. at 613.

³⁶⁸ See Part III.A.1, B.2.

³⁶⁹ See cases cited *supra* note 114.

³⁷⁰ See *Lemon*, 403 U.S. at 615–23; Part III.A.1, B.2.

³⁷¹ See *supra* notes 330–334 and accompanying text (discussing the secular benefits of Quiet Time).

³⁷² *Brown v. Woodland Joint Unified Sch. Dist.*, 27 F.3d 1373, 1378–79 (9th Cir. 1994). See *supra* notes 335–340 and accompanying text (analyzing Quiet Time under the second prong of the *Lemon* test).

³⁷³ *Brochure*, *supra* note 9, at 20–25.

³⁷⁴ See *supra* notes 361–367 and accompanying text (applying the excessive entanglement prong of the *Lemon* test to Quiet Time).

³⁷⁵ 592 F.2d 197, 199 (3d Cir. 1979).

TM in Quiet Time presents a fact pattern much different from that of the *Malnak*-era SCI/TM.³⁷⁶

IV. CONCLUSION

There will always be activities in the ever-subtle twilight between church and state. Especially in the sensitive area of public education, courts must tread lightly, carefully, and correctly when addressing constitutional issues. The purpose of this paper is to bring into sharper focus both the definition of religion and the requirements for an Establishment Clause violation with respect to meditation classes. Despite the firm legal footing for yoga and meditation in public schools, some school districts may shy away from implementing such programs in order to avoid the distraction and expense of defending legal challenges. This uncertainty may have a chilling effect on experimentation with novel health and wellness programs. Even beyond what happens in the *Sedlock* case on appeal, the question of the constitutionality of meditation classes in public schools will still remain unanswered.³⁷⁷ Whether a school meditation program currently exists or is in the planning phase, it is the intent of this paper to provide a possible framework for how schools can offer meditation programs within the bounds of the law.

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³⁷⁶ *Malnak*, 440 F. Supp 1284, 1288–1312 (D.N.J. 1977); *Malnak*, 592 F.2d at 199–200. See Part III.B.2.

³⁷⁷ Notice of Appeal at 1, *Sedlock v. Baird*, No. 37201300035910-CU-MC-CTL (Cal. Super. Ct. C.D. Oct. 30, 2013).

CALIFORNIA'S ANTI-REVENGE PORN LEGISLATION:

Good Intentions, Unconstitutional Result

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INTRODUCTION

“In a perfect world there would be no bullying and there would be no people like me and there would be no sites like mine . . . [b]ut we don’t live in a perfect world.”

— Revenge porn website owner, Hunter Moore¹

“R evenge porn”² is a practice in which vengeful ex-lovers post photos shared in confidence during their relationships with the public via the Internet.³ Websites such as Moore’s are dedicated solely to hosting this type of content and have multiplied over the past few years.⁴ They provide platforms for users to reveal photos as well as other personal information about their former partners to the public.⁵ In fact, users often include with the photos information such as the subject’s full name, city and state, and links to their social media profiles, ensuring the photos appear high in Google search results.⁶ Some go so far as to include contact information of subjects’ family members or coworkers.⁷

Holly Jacobs⁸ experience demonstrates the devastating effects revenge porn postings have on one’s life, both personally and profes-

¹ Jessica Roy, *The Battle Over Revenge Porn: Can Hunter Moore, the Web’s Vilest Entrepreneur, Be Stopped?*, BETABEAT (Dec. 4, 2012, 7:46 PM), <http://betabeat.com/2012/12/the-battle-over-revenge-porn-can-hunter-moore-the-webs-vilest-entrepreneur-be-stopped/>.

² “Revenge porn” may also be referred to as “cyber revenge,” “cyberrape,” or “involuntary pornography.” See, e.g., *id.*; Heather Kelly, *New California ‘revenge porn’ law may miss some victims*, CNN (Oct. 3, 2013, 6:32 AM), <http://www.cnn.com/2013/10/03/tech/web/revenge-porn-law-california/>; Lorelei Laird, *Victims are taking on ‘revenge porn’ websites for posting photos they didn’t consent to*, ABA JOURNAL (Nov. 1, 2013 4:30 AM), http://www.abajournal.com/magazine/article/victims_are_taking_on_revenge_porn_websites_for_posting_photos_they_didnt_c/?utm_source=maestro&utm_medium=email&utm_campaign=tech_monthly/.

³ Laird, *supra* note 2.

⁴ *Id.*

⁵ Roy, *supra* note 1; *id.*

⁶ Laird, *supra* note 2.

⁷ *Id.*

⁸ Holly Jacobs was previously Holli Thometz and has also used the pseudonym “Sarah.” See Holly Jacobs, *A Message From Our Founder, Dr. Holly Jacobs*, END REVENGE PORN (Sept. 8, 2013), <http://www.endrevengeporn.org/?p=422/>; Roy, *supra* note 1; Jessica Roy, *A Victim Speaks: Standing Up to a Revenge Porn Tormentor*, BETABEAT

sionally.⁹ Jacobs shared nude photos with her then-boyfriend during a long-distance portion of their relationship.¹⁰ After they broke up, he posted the photos on hundreds of revenge porn websites and emailed them to all of her coworkers.¹¹ He also included personal information about Jacobs including her full name, email address, where she worked, and information about the Ph.D. program she was enrolled in.¹² She was horrified.¹³ For months, she received harassing emails from people who had seen her photos online.¹⁴ She began to worry she would be physically stalked.¹⁵ In response, she left her job, changed her name, and began carrying a stun gun with her.¹⁶

She looked to the law for relief. She hired a lawyer, begged three different police stations to file charges against her ex-boyfriend, went to the FBI, and hired an Internet specialist to take the material down.¹⁷ Unable to fund a civil suit, she filed several Digital Millennium Copyright Act takedown requests claiming copyright infringement.¹⁸ However, these attempts proved fruitless.¹⁹ To shed light on her plight and the plights of others similarly situated, Jacobs founded EndRevengePorn.org to support

(May 1, 2013, 1:04 PM), <http://betabeat.com/2013/05/revenge-porn-holli-thometz-criminal-case/>.

⁹ Roy, *supra* note 1. Professor of law Eric Goldman has described the effects of these types of postings as “life-altering” because “there are a lot of people who will feel like someone who is depicted naked or is recorded having sex . . . has done something wrong.” See *Revenge Porn*, YOUR WEEKLY CONSTITUTIONAL (Nov. 22, 2013) http://ywc.podomatic.com/entry/2013-11-22T13_24_26-08_00 [hereinafter *Podcast*]. Victims report being fired from their jobs or expelled from their schools, being shunned by friends, receiving sexual propositions by strangers who have seen their photos online, being subjected to physical stalking and harassment, changing their names, and some victims have even committed suicide. *Id.*

¹⁰ Roy, *supra* note 1.

¹¹ *Id.*

¹² Jacobs, *supra* note 8.

¹³ Roy, *supra* note 1.

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*; Roy, *supra* notes 8–10.

¹⁷ Jacobs, *supra* note 8.

¹⁸ Roy, *supra* note 1.

¹⁹ *Id.*; Jacobs, *supra* note 8.

the End Revenge Porn campaign organized by the Cyber Civil Rights Initiative (CCRI).²⁰

While Moore may be correct that the world — let alone the United States legal system — is not perfect, must it be that victims and potential victims of revenge porn enjoy little to no legal redress? Many state and federal lawmakers do not believe so.²¹ For example, California recognized the gravity of the problem and became the second state after New Jersey to pass legislation targeting the activity when it passed California Penal Code section 647(4) in October 2013.²² Moreover, legislatures in several states are currently considering laws to combat revenge porn and United States senators have contacted CCRI regarding possible federal legislation.²³

However, lawmakers interested in combatting revenge porn must tread lightly, as regulations on speech evoke First Amendment freedom of speech concerns.²⁴ California's legislation has come under fire for possibly regulating constitutionally protected speech and missing many of its

²⁰ End Revenge Porn, <http://www.endrevengeporn.org> (last visited October 30, 2013) (follow “About” hyperlink; then follow “Who We Are” hyperlink).

²¹ See *infra* note 23. In Florida, an anti-revenge porn bill was approved unanimously by both the Criminal Justice Committee and the Senate Judiciary Committee, but ultimately died in the appropriations process. Kristina Ramer, *California becomes second state to ban revenge porn, but still legal in Florida*, THE INDEPENDENT FLORIDA ALLIGATOR (Oct. 7, 2013, 1:43 AM) http://www.alligator.org/news/local/article_7560a468-2f13-11e3-ac8a-001a4bcf887a.html. State Senator David Simmons believes Florida may still pass such a law. Kelly, *supra* note 2. First Amendment concerns played a part in the ultimate death of Florida's revenge porn law. *Id.*

²² See Kelly, *supra* note 2. New Jersey's law was not passed in response to revenge porn, but in part criminalizes such activity. *Podcast, supra* note 9; see also N.J. Stat. § 2C:14-9 (West 2012).

²³ The Senate Judiciary Committee of Pennsylvania voted unanimously on a bill proposed by Pennsylvania Senator Judy Schwank that would outlaw revenge porn postings. Associated Press, *Pennsylvania lawmakers advance bill to punish ‘revenge porn’*, FOX NEWS (January 15, 2014) <http://www.foxnews.com/politics/2014/01/15/pennsylvania-lawmakers-advance-bill-to-punish-revenge-porn/>. The legislatures of Maryland, Wisconsin, New York, and Texas, are also currently considering similar legislation. Tal Kopan, *States criminalize ‘revenge porn’*, POLITICO (Oct. 30, 2013, 11:10 AM) <http://www.politico.com/story/2013/10/states-criminalize-revenge-porn-99082.html>. Further, lawmakers in Delaware, Kansas and Alabama have contacted CCRI regarding co-drafting legislation for their states. *Id.*

²⁴ “Congress shall make no law . . . abridging the freedom of speech.” U.S. Const. amend. I.

targeted victims.²⁵ Lee Rowland, a staff attorney with the American Civil Liberties Union (“ACLU”), stated that overly broad bills could bar normal Internet activities or speech that is worth protecting and that “trying to find a cure by creating a new criminal law that threatens free speech could be worse than the disease.”²⁶ She also opined, “without much evidence that such criminal bills actually protect victims, it’s unclear whether it’s worth wading into the tricky constitutional waters.”²⁷

This paper discusses the First Amendment implications of California’s recent legislation targeting revenge porn, California Penal Code section 647. Although California’s law is a step in the right direction, the law likely fails both practically and constitutionally in several ways. As a content-based regulation on constitutionally protected speech, the law faces exacting constitutional scrutiny.²⁸ Its narrow construction fails to protect a large portion of its targeted victims, possibly rendering it underinclusive and not narrowly tailored to prevent the harm it aims to prevent. Further, it may be overinclusive for vagueness.

Part I of this paper demonstrates the importance of passing constitutionally-sound legislation targeting revenge porn by demonstrating its harms and highlighting the inadequacy of existing laws in redressing and preventing the practice. Part II discusses relevant First Amendment jurisprudence. Part III takes a closer look at California’s anti-revenge porn legislation and the legislative purpose behind it. Part IV analyzes the constitutionality of California’s legislation under First Amendment jurisprudence and concludes that California’s legislation is likely unconstitutional under the First Amendment. Finally, Part V proposes alternate ways to prevent revenge porn and provide redress to victims within constitutional bounds.

²⁵ See, e.g., Cathy Reisenwitz, *Revenge Porn Is Awful, But The Law Against It Is Worse*, TALKING POINTS MEMO (Oct. 16, 2013 9:35 AM) <http://talkingpointsmemo.com/cafe/revenge-porn-is-awful-but-the-law-against-it-is-worse/>; Kopan, *supra* note 23; Jessica Roy, *California’s New Anti-Revenge Porn Bill Won’t Protect Most Victims*, TIME (Oct. 3, 2013) <http://nation.time.com/2013/10/03/californias-new-anti-revenge-porn-bill-wont-protect-most-victims/>.

²⁶ Kopan, *supra* note 23.

²⁷ *Id.*

²⁸ See *infra* Parts A, IV.A.

I. WHY LEGISLATIVE ACTION TARGETING REVENGE PORN IS NECESSARY

Constitutionally-sound legislation is necessary to target revenge porn because of the destructive effects of the practice and the inadequacy of current laws to address the issue.²⁹ This section highlights the limited effect of existing civil and criminal laws on curtailing the rising pandemic in revenge porn postings.³⁰ It further details the practice's pervasive and harmful effects, which warrant the creation of more effective legislation.

A. THE INADEQUACY OF EXISTING LAWS

The existing legal avenues for both preventing and redressing revenge porn are scant and unsatisfactory.³¹ No federal statute explicitly prohibits the non-consensual disclosure of sexually graphic images and only two states, California and New Jersey, have state criminal laws prohibiting such conduct.³² Civil suits under existing torts such as intentional infliction of emotional distress or publication of private facts are problematic for victims.³³ For example, plaintiffs may not be able to find attorneys willing to take on their cases because the defendant often does not have any material assets to make the suit worthwhile.³⁴ Also, litigating the suit would bring further publicity to the media the victim wants to get rid of.³⁵

Further, civil suits against website owners or Internet service providers may prove futile because the federal Communications Decency Act (CDA), grants immunity to Internet service providers (ISP) for content posted by

²⁹ See *supra* note 9 and accompanying text.

³⁰ See *Podcast, supra* note 9 (referring to the trend as a pandemic).

³¹ Ariel Ronneburger, Comment, *Sex, Privacy, And Webpages: Creating a Legal Remedy for Victims of Porn 2.0*, 21 SYRACUSE SCI. & TECH. L. REP. 1, 11 (2009).

³² Mary Anne Franks, *Combating Non-Consensual Pornography: A Working Paper* (Dec. 5, 2013) (unpublished working paper) (*available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2336537); see also Cal. Penal Code § 647 (West 2013); N.J. Stat. § 2C:14-9 (West 2012).

³³ See *Podcast, supra* note 9.

³⁴ See *Podcast, supra* note 9.

³⁵ See *Podcast, supra* note 9. Also, "once [revenge porn] pictures are out there, it's really difficult to get them taken down even if [a plaintiff] win[s] on a civil suit." *Id.*

third-party users.³⁶ The CDA states, “No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.”³⁷ Accordingly, section 230 likely bars suits by revenge porn victims against website owners for content uploaded by third-party users, unless the court deems them Internet content providers (ICPs).³⁸ Courts have construed section 230 immunity quite liberally in the past.³⁹ For example, in *Carafano v. Metroplash.com, Inc.*, Christianne Carafano sued Metroplash.com for an allegedly defamatory and fake profile a third party user posted on the defendant’s site, Matchmaker.com.⁴⁰ The site provided content in drop-down menus for users to choose from in creating their profiles.⁴¹ Still, the Ninth Circuit held that Metroplash.com was immune under section 230 because it constituted an Internet service provider.⁴² However, courts are

³⁶ Ronneburger, *supra* note 31, at 3; *see also* Communications Decency Act, 47 U.S.C. § 230 (1998). Internet service providers (ISPs) “provide[] or enable[] computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet and such systems operated or services offered by libraries or educational institutions.” Communications Decency Act, 47 U.S.C. § 230(f) (1998). Internet content provider (ICP) “means any person or entity that is responsible, in whole or in part, for the creation or development of information provided through the Internet or any other interactive computer service.” *Id.*

³⁷ Communications Decency Act, 47 U.S.C. § 230 (1998).

³⁸ Ronneburger, *supra* note 31, at 3. The CDA distinguishes between ISPs and ICPs, generally granting complete immunity to ISPs, but not to ICPs. *See* Ashley Ingber, Comment, *Cyber Crime Control: Will Websites Ever Be Held Accountable For The Legal Activities They Profit From?*, 18 CARDOZO J.L. & GENDER 423, 429–34 (2012). Congress’ purpose in making this distinction was “not to deter harmful online speech through the separate route of imposing tort liability on companies that serve as intermediaries for other parties’ potentially injurious messages.” *Carafano v. Metroplash.com, Inc.*, 339 F.3d 1119, 1123 (9th Cir. 2003). Congress recognized that imposing such liability would force ISPs to police a staggering amount of online communication, thereby leaving them no choice but to restrict the amount and type of posts allowed. *Id.* at 1124.

³⁹ *See* Ingber, *supra* note 38, at 434.

⁴⁰ 339 F.3d 1119, 1122 (9th Cir. 2003).

⁴¹ *Id.* at 1121.

⁴² *Id.* at 1120, 1125. The court stated that even if it were to find Matchmaker.com an Internet content provider, § 230 “would still bar Carafano’s claims unless Matchmaker created or developed *the particular information at issue.*” *Id.* at 1125 (emphasis added); *see also* Barnes v. Yahoo! Inc., No. Civ. 05-926-AA, 2005 WL 3005602, at *1 (D. Or. Nov. 8, 2005) (holding Yahoo! fell “under the *broad* immunity provided Internet servers by § 230.”) (emphasis added).

gradually moving toward a narrower interpretation of section 230 immunity, which “indicates that courts may be willing, or even intending, to find that Section 230 does not provide protections to ISPs or ICPs in the realm of criminal suits.”⁴³ However, only two states criminalize revenge porn thus far.⁴⁴ Accordingly, it is unclear whether a court would grant immunity to a revenge porn site such as Moore’s, and it is necessary for states to enact constitutionally sound criminal legislation to redress the problem of revenge porn.⁴⁵

Copyright law may be a better avenue, but is likewise inadequate.⁴⁶ The CDA does not immunize website owners from copyright claims.⁴⁷ Furthermore, it is inexpensive for victims to notify website owners of their copyright infringement.⁴⁸ However, it is not guaranteed the website owners will remove the content; “website operators overseas or those who believe they’re judgment-proof can and do ignore the notices.”⁴⁹ It is likewise uncertain whether someone has saved the photos and will repost them on the same site or elsewhere.⁵⁰ Moreover, only copyright owners — those who took the photos or videos themselves — may file claims for copyright infringement against websites hosting the copyrighted

⁴³ See Ingber, *supra* note 38, at 434.

⁴⁴ Franks, *supra* note 32.

⁴⁵ See also *Carafano v. Metrosplash.com, Inc.*, 339 F.3d 1119 (9th Cir. 2003). It is possible a court could construe a revenge porn website to be an ICP where it actively seeks out and promotes the posting of revenge porn. See *Podcast*, *supra* note 9. However, courts are not in agreement as to how to differentiate between ISPs and ICPs. Compare *F.T.C. v. Accusearch Inc.*, 570 F.3d 1187, 1199 (10th Cir. 2009) (finding Accusearch an ICP because it “encourage[d] development of what is offensive about the content” by soliciting requests for legally confidential information and publishing it) with *Chicago Lawyers’ Committee for Civil Rights Under Law v. Craigslist, Inc.*, 519 F.3d 666, 671–72 (7th Cir. 2008) (holding Craigslist not an ICP because it does not induce users to post specific content or types of content).

⁴⁶ See *Podcast*, *supra* note 9.

⁴⁷ Franks, *supra* note 32.

⁴⁸ Laird, *supra* note 2.

⁴⁹ *Id.*

⁵⁰ See *Podcast*, *supra* note 9. Professor Goldman has stated that “once content is released to the internet it’s almost impossible to put that digital data back into the bottle In theory [victims] could go and try and stamp out each and every instance on the internet, but that’s not very feasible.” *Id.*; see also Laird, *supra* note 2.

content.⁵¹ Those who did not create the contested media do not have copy-right claims.⁵²

Further, current criminal laws are insufficient to address revenge porn.⁵³ State and federal laws regulating child pornography, stalking, harassment, voyeurism, and computer hacking are limited.⁵⁴ State anti-voyeurism laws and the federal Video Voyeurism Prevention Act of 2004 are inadequate because they only protect those whose images were taken without their consent or knowledge.⁵⁵ Likewise, federal and state child pornography laws only regulate the age of those depicted in pornographic media, and not whether they consented to the distribution of the images.⁵⁶ Laws targeting stalking and harassment only apply if the prosecutor can show that the posting of revenge porn is part of a larger pattern of conduct intended to distress or harm the victim, which may not apply in many revenge porn cases.⁵⁷ For example, many revenge porn site operators claim intent only to “obtain notoriety, fulfill some sexual desire, or increase traffic for their websites.”⁵⁸ Further, some posters are only motivated by financial gain or bragging rights.⁵⁹ Thus, the prosecutor may have a hard time proving the intent-to-harm element in prosecutions of such defendants.

Even where a state criminal law does address an individual’s predicament, police are reluctant to investigate or file charges.⁶⁰ Attorney Erica Johnstone has represented clients in revenge porn cases, and she states that police are accustomed to typical crime scenes and may not think to apply pertinent laws on stalking, voyeurism, or hacking to online revenge porn cases.⁶¹ It is “common for police to say no law was broken unless the

⁵¹ Laird, *supra* note 2.

⁵² Franks, *supra* note 32. According to a recent study by CCRI, up to 80 percent of revenge porn victims were victimized using photos they took themselves; the remaining 20 percent of victims are unprotected under copyright law. *Id.*

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ Laird, *supra* note 2.

⁵⁷ Franks, *supra* note 32.

⁵⁸ *Id.*

⁵⁹ See Kelly, *supra* note 21.

⁶⁰ Laird, *supra* note 2.

⁶¹ *Id.*

picture is child porn.”⁶² Jody Westby, a consultant on online privacy and security, says that law enforcement officers are not aware of how existing criminal laws apply to revenge porn cases and are “loath to get involved in domestic problems.”⁶³

B. THE HARM

Online dissemination of sexually explicit photos without the depicted person’s consent causes tremendous harm to that person. As illustrated by Jacobs’ story, publication of these types of photos negatively affects many aspects of one’s life.⁶⁴ Many others have been the subject of revenge porn postings.⁶⁵ Mary Anne Franks, board member of CCRI and University of Miami associate law professor, has stated that revenge porn victims are coming out of the woodwork to tell their stories or seek help, especially since Jacobs braved the public eye to tell her story.⁶⁶

According to Franks, these new accounts demonstrate that revenge porn is of serious concern, both in terms of the magnitude of the problem and the degree of harm caused to victims.⁶⁷ Once photos have been disseminated via the Internet, women suffer stalking and harassment, they often must leave their jobs, are expelled from their schools, have problems in their relationships, and change their names.⁶⁸ In some cases, victims have committed suicide.⁶⁹

The potential for future victims is high as well. It is estimated that one third of young adults have sent or posted nude or semi-nude photos

⁶² *Id.* In fact, police are not always keen on taking up child pornography cases either. *Id.* Las Vegas attorney Marc Randazza’s underage client “couldn’t get the police or FBI interested in her case.” *Id.*

⁶³ *Id.* Westby states she had to convince police to take up a case in which her client was being cyberstalked. *Id.*

⁶⁴ See *supra* Introduction.

⁶⁵ Cases of revenge porn are “becoming increasingly common.” See *Podcast, supra* note 9.

⁶⁶ Kopan, *supra* note 23.

⁶⁷ *Id.*

⁶⁸ “[S]ome . . . victims have had to change their names because, as you can imagine, when you put a person’s name into a search engine, if the first 10, 20, 30 hits are going to be these pornographic websites, it can become very difficult to retain any kind of credibility over [one’s] own name.” See *Podcast, supra* note 9.

⁶⁹ Kopan, *supra* note 23; see also *Podcast, supra* note 9.

of themselves.⁷⁰ The vast majority of those who have sent or posted these types of photos have done so to their boyfriends or girlfriends.⁷¹ To deter future posts, constitutionally-sound legislation that directly addresses revenge porn is necessary, because current laws have not prevented revenge porn from becoming “pandemic.”⁷²

II. CALIFORNIA’S ANTI-REVENGE PORN LEGISLATION

California’s anti-revenge porn legislation went into effect on October 1, 2013.⁷³ The legislation is an amendment to the California Penal Code section 647 prohibiting disorderly conduct.⁷⁴ The amendment states that any person who commits any of the following is guilty of disorderly conduct, a misdemeanor:

(4)(A) Any person who photographs or records by any means the image of the intimate body part or parts of another identifiable person, under circumstances where the parties agree or understand that the image shall remain private, and the person subsequently distributes the image taken, with the intent to cause serious emotional distress, and the depicted person suffers serious emotional distress. (B) As used in this paragraph, intimate body part means any portion of the genitals, and in the case of a female, also includes any portion of the breasts below the top of the areola, that is either uncovered or visible through less than fully opaque clothing.⁷⁵

The law makes the above conduct punishable by up to six months in county jail and/or a fine of up to \$1,000.⁷⁶ Canella states that there is a need for this law because “[c]urrent law is silent as to the illegality of this

⁷⁰ *Sex and Tech: Results from a Survey of Teens and Young Adults*, THE NATIONAL CAMPAIGN, http://www.thenationalcampaign.org/sextech/PDF/SexTech_Summary.pdf [hereinafter *Sex and Tech*] (last visited Dec. 29, 2013).

⁷¹ *Id.*

⁷² *See Podcast*, *supra* note 9.

⁷³ Cal. Penal Code § 647 (West 2013). California state senator Anthony Canella proposed the bill on June 3, 2013 with an urgency clause. S. B. 255, Reg. Sess. (Cal. 2013).

⁷⁴ Cal. Penal Code § 647 (West 2013).

⁷⁵ *Id.*

⁷⁶ S. B. 255, Reg. Sess. (Cal. 2013).

disturbing practice.”⁷⁷ As the justification for the bill, Canella states that “[v]ictims of this cruel act are often so humiliated that they pose a threat to harming themselves, as evidenced by numerous examples of cyber revenge victims who have taken their own lives.”⁷⁸ According to the bill’s legislative history, one specific incident prompted the bill.⁷⁹ The incident involved a fifteen-year-old named Audrie in Saratoga, California:

Audrie became very intoxicated to the point of unconsciousness at a party. Three boys — Audrie’s high school classmates — took off some or much of her clothing, sexually assaulted her, wrote crude and demeaning phrases on her body and took at least one cell-phone photo of an intimate part of her body. She awoke in the morning to find her shorts pulled down and the crude drawings or words on her body. When the photo was shown to other students at school, Audrie became very distraught. About a week later, Audrie hung herself.⁸⁰

Media reports indicate that the photos were widely distributed at school and uploaded to social media.⁸¹ The government has filed sexual battery and distribution of child pornography charges against her perpetrators.⁸²

Several entities expressed their support for the bill, including the California Partnership to End Domestic Violence, the California Sheriffs’ Association, Crime Victims Action Alliance, and Crime Victims United of California.⁸³ On the other hand, the ACLU opposed the bill, stating, “the posting of otherwise lawful speech or images even if offensive or emotionally distressing is constitutionally protected.”⁸⁴ Despite ACLU’s

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Id.* The legislative history gives other examples of incidents of revenge porn in the United States and California. *Id.* The proposal also mentions the highly publicized 2012 rape case from Steubenville, Ohio and a case in Tulare County where a man named Michael Rosa posted false ads online containing nude photos of his ex-wife. *Id.*

⁸³ *Id.*

⁸⁴ *Id.* The ACLU states that, in order to criminalize speech, the prohibited speech “must constitute a true threat or violate another otherwise lawful criminal law” and

opposition, the bill was signed into law.⁸⁵ It has not been challenged on constitutional grounds as of yet.

III. FIRST AMENDMENT JURISPRUDENCE

Legislators must walk on eggshells when drafting legislation regulating speech.⁸⁶ The First Amendment protects the right to freely disseminate and receive ideas and unequivocally prohibits Congress from making laws “abridging the freedom of speech.”⁸⁷ The judiciary has long considered the right to free speech essential to a democracy.⁸⁸ As Justice Thurgood Marshall stated, “[the] right to receive information and ideas, regardless of their social worth, is fundamental to our free society.”⁸⁹ This Section introduces First Amendment jurisprudence relevant to the constitutional implications of California Penal Code section 647(4). It discusses the standards of review courts use in analyzing the constitutionality of statutes that regulate speech, such as section 647(4), and the high burden proponents of legislation carry when courts subject their laws to strict scrutiny.⁹⁰

that California’s bill does not meet this standard. *Id.* (citing *United States v. Cassidy*, 814 F. Supp. 2d 574 (D. Md. 2011)).

⁸⁵ See Cal. Penal Code § 647 (West 2013).

⁸⁶ U.S. Const. amend. I.

⁸⁷ *Id.* Pursuant to the Fourteenth Amendment, First Amendment freedom of expression is guaranteed by the states as well. *Cohen v. Cowles Media Co.*, 501 U.S. 663, 663 (1964) (stating enforcement of an unconstitutional state law constitutes state action). Accordingly, state laws may be invalidated for unconstitutionally infringing on freedom of speech. *Id.*

⁸⁸ *Stanley v. Georgia*, 394 U.S. 557, 564 (1969). While the First Amendment only explicitly protects “speech,” the Supreme Court has “long recognized that its protection does not end at the spoken or written word.” *Texas v. Johnson*, 491 U.S. 397, 404 (1989). Conduct may be considered protected speech where there exists an “intent to convey a particularized message” and “the likelihood [is] great that the message [will] be understood by those who view[] it.” See *id.* (quoting *Spence v. Washington*, 418 U.S. 405, 410–411 (1974)). Photography, film, and audio recording may be constitutionally protected expression in some circumstances. Cf. *Glik v. Cunniffe*, 655 F. 3d 78, 82 (1st Cir. 2011) (finding videotaping in public to be protected speech); *Anderson v. City of Hermosa Beach*, 621 F. 3d 1051, 1061–62 (9th Cir. 2010) (stating compositions of “words, realistic or abstract images, symbols, or a combination of these . . . are forms of pure expression”).

⁸⁹ *Stanley*, 394 U.S. at 564.

⁹⁰ See *infra* Part III.A.

It also introduces the doctrines of low-level speech,⁹¹ secondary effects,⁹² obscenity,⁹³ indecency,⁹⁴ and online speech.⁹⁵ Within these categories, the law is uncertain. Internet and indecency jurisprudence is particularly uncertain, making it difficult to predict how the Supreme Court will rule on the constitutionality of a statute regulating indecent expression and online communication.⁹⁶

A. JUDICIAL STANDARDS OF REVIEW OF REGULATIONS ON SPEECH

At the heart of the First Amendment is the idea that the government shall not proscribe speech “simply because society finds the idea itself offensive or disagreeable.”⁹⁷ As a baseline rule, the government may not regulate speech based on “its message, its ideas, its subject matter, or its content.”⁹⁸ In other words, the government may not censor expression of any thought and “the essence of this forbidden censorship is content control.”⁹⁹ Consequently, regulations that proscribe speech based on its content are subject to heightened judicial examination compared with those that do not.¹⁰⁰ Content-based restrictions are presumed invalid.¹⁰¹ Content-based statutes that go one step further and discriminate based on particular views commit “viewpoint

⁹¹ See *infra* Part III.B.

⁹² See *infra* Part III.C.

⁹³ See *infra* Part III.D.

⁹⁴ See *infra* Part III.D.

⁹⁵ See *infra* Part III.E.

⁹⁶ See *infra* Parts III.D and III.E.

⁹⁷ *Texas v. Johnson*, 491 U.S. 397, 414 (1989).

⁹⁸ See *Police Dep’t of Chicago v. Mosley*, 408 U.S. 92, 94 (1972).

⁹⁹ *Id.* at 95–96.

¹⁰⁰ Kevin Francis O’Neill, *A First Amendment Compass: Navigating The Speech Clause With A Five-Step Analytical Framework*, 29 Sw. U. L. REV. 223, 226–27 (2000). Regulations restricting speech based on its content are generally referred to as “content-based” and such statutes are subject to what courts and legal scholars have coined “strict scrutiny.” *Id.*

¹⁰¹ *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964); *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992). As the Supreme Court has emphasized repeatedly, content-based regulations on speech are contrary to “the principle that debate on public issues should be uninhibited, robust, and wide-open.” *Sullivan*, 376 U.S. at 270.

discrimination.”¹⁰² The Supreme Court considers viewpoint discrimination to be even more blatantly violative of the First Amendment because it “raises the specter that the Government may effectively drive certain ideas or viewpoints from the marketplace.”¹⁰³ On the other hand, the government may regulate the time, place, and manner of speech more freely; such laws are considered “content-neutral.”¹⁰⁴ Courts examine content-neutral statutes less rigorously under what is often referred to as “intermediate scrutiny.”¹⁰⁵

1. *Determining the Applicable Level of Scrutiny*

To determine what level of scrutiny to apply, courts must first determine whether a statute is content-based or content-neutral.¹⁰⁶ Content neutrality depends on “whether the government has adopted [the] regulation of speech because of disagreement with the message it conveys.”¹⁰⁷ The main inquiry is into the government’s purpose or intent in passing the legislation.¹⁰⁸ A speech regulation is content-neutral so long as it is “justified without reference to the content of the regulated speech”¹⁰⁹ and “even if it has an incidental effect on some speakers or messages but not others.”¹¹⁰

¹⁰² DAVID L. HUDSON, JR., *LEGAL ALMANAC: THE FIRST AMENDMENT: FREEDOM OF SPEECH* § 2:2 (2012); *see also* R.A.V., 505 U.S. at 387–91.

¹⁰³ *See* R.A.V., 505 U.S. at 387–91 (quoting *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 116 (1991)). In R.A.V., the Supreme Court struck down a city ordinance that criminalized “‘fighting words’ that insult, or provoke violence, ‘on the basis of race, color, creed, religion or gender.’” *Id.* at 391. The Court stated that St. Paul could not prohibit speakers from speaking on “disfavored subjects” nor “license one side of a debate to fight freestyle, while requiring the other to follow Marquis of Queensberry rules.” *Id.* at 391–92. It held that this amounted to unconstitutional viewpoint discrimination. *Id.*

¹⁰⁴ *See e.g.*, *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 642 (1994); *Ward v. Rock Against Racism*, 491 U.S. 781, 789 (1989); *see also* O’Neill, *supra* note 100, at 227.

¹⁰⁵ O’Neill, *supra* note 100, at 227. There is less of a presumption of invalidity with regard to these types of statutes because they merely regulate the when, where, and how of expression rather than the subject matter of speech. HUDSON, *supra* note 102, § 2:3. However, because content neutral statutes are nevertheless restrictions on speech, courts must still analyze their constitutionality, albeit using a milder test. *Id.*

¹⁰⁶ HUDSON, *supra* note 102, § 2:3.

¹⁰⁷ *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989).

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* (quoting *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 (1984)).

¹¹⁰ *Id.*

On the other hand, a content-based regulation “discriminates between lawful and unlawful conduct based upon the content of the [speaker’s] communication.”¹¹¹ For example, the Supreme Court in *United States v. Playboy Entertainment Group, Inc.* held a law to be content-based where it only regulated sexually explicit speech.¹¹² The justification for the law was the subject matter’s effect on young viewers.¹¹³ The Court concluded that the law was content-based because its justification “focus[ed] *only* on the content of the speech and the direct impact that speech has on its listeners.”¹¹⁴

2. *Strict Scrutiny vs. Intermediate Scrutiny*

Once the court determines whether the statute is content-based or content-neutral, it must apply the corresponding level of constitutional scrutiny.¹¹⁵ Courts frequently invalidate content-based statutes upon strict judicial examination.¹¹⁶ To survive strict scrutiny, a regulation must be (1) necessary to serve a compelling state interest, (2) narrowly drawn to achieve that end, and (3) the least restrictive means of doing so.¹¹⁷ On the other hand, intermediate scrutiny is “a far cry from strict scrutiny.”¹¹⁸ To survive intermediate scrutiny, content-neutral regulations must be (1) “justified without reference to the content of the regulated speech,” (2) “narrowly tailored to serve a significant governmental interest,” and (3) “leave open

¹¹¹ *Carey v. Brown*, 447 U.S. 455, 460 (1980); *see also* *Consolidated Edison Co. v. Pub. Serv. Comm’n*, 447 U.S. 530, 536 (1980).

¹¹² *United States v. Playboy Ent. Group, Inc.*, 529 U.S. 803, 811 (2000) (analyzing a regulation applying to “sexually explicit adult programming or other programming that is indecent”); *see also* *Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 410 (1993). In *Cincinnati v. Discovery Network, Inc.*, the Supreme Court analyzed the constitutionality of a city ordinance banning news racks containing “commercial handbills.” *See* 507 U.S. at 410. The Court held the ordinance was content-based because it was not justifiable as a time, place, or manner restriction without reference to the content — the commercial nature — of the material on the news racks. *Id.* at 428–31.

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ HUDSON, *supra* note 102, § 2:2.

¹¹⁶ “Strict scrutiny leaves few survivors.” *City of Los Angeles v. Alameda Books*, 535 U.S. 425, 455 (2002) (Souter, J., dissenting).

¹¹⁷ *See e.g.*, *Burson v. Freeman*, 504 U.S. 191, 197 (1992); *Thornburgh v. Abbott*, 490 U.S. 401, 408 (1989).

¹¹⁸ *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 434 (1993).

ample alternative channels for communication of the information.”¹¹⁹ Notably, content-neutral regulations need not be justified by a compelling government interest, as content-based statutes must, but rather a significant government interest. Further, content-neutral time, place, and manner restrictions need not be the least restrictive or least intrusive means of achieving the government’s purpose.¹²⁰

B. UNPROTECTED AND “LOW-LEVEL” SPEECH

While heightened judicial scrutiny — both strict and intermediate — of speech regulations serves to protect First Amendment interests, not all speech is equally deserving of protection.¹²¹ Accordingly, the judicial standards of review described in Part II.A do not apply in all First Amendment cases.¹²² On one end, political speech and speech on matters of public concern garner the highest protection.¹²³ On the other end, some categories of speech are considered “low-level” or “low-value” speech deserving less protection, and some categories are entirely outside of constitutional protection due to their harm or lack of social value.¹²⁴ The following are low-value, unprotected

¹¹⁹ *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 642 (1994); *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 (1984).

¹²⁰ *Ward v. Rock Against Racism*, 491 U.S. 781, 798 (1989). The Supreme Court has stated, “the requirement of narrow tailoring is satisfied ‘so long as the . . . regulation promotes a substantial government interest that would be achieved less effectively absent the regulation.’” *Id.* (quoting *United States v. Albertini*, 472 U.S. 675, 689 (1985)).

¹²¹ Jeffrey M. Shaman, *The Theory of Low-Value Speech*, 48 S.M.U. L. REV. 297, 298 (1995). “Some speech might not sufficiently further the values and purposes of the First Amendment to warrant such extraordinary immunity from regulation,” i.e., application of strict scrutiny. Geoffrey R. Stone, *Free Speech in the Twenty-First Century: Ten Lessons from the Twentieth Century*, 36 PEPP. L. REV. 273, 283 (2009).

¹²² Shaman, *supra* note 121, at 298.

¹²³ *Id.* at 302; see also *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 758–59 (1985) (“It is speech on ‘matters of public concern’ that is ‘at the heart of the First Amendment’s protection.’”) (quoting *First Nat’l Bank of Boston v. Bellotti*, 435 U.S. 765, 776 (1978)).

¹²⁴ Shaman, *supra* note 121, at 298–99, 331. In *Chaplinsky v. New Hampshire*, the Supreme Court first acknowledged the idea that some speech is less deserving of protection and stated, “there are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem.” 315 U.S. 568, 571–72. It stated that these categories “are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that

categories of speech: incitement to imminent lawless action, fighting words, true threats, obscenity, child pornography, and speech integral to criminal conduct.¹²⁵ In these areas, the government has considerable leeway in regulating speech.¹²⁶ Some types of speech that are considered low-value, but are not entirely unprotected, are commercial speech, indecent expression, and false statements of fact.¹²⁷ The government has more leeway to regulate low-value speech than high-value speech.¹²⁸ Where the proscribed speech is of high-value, the Supreme Court requires a sufficiently compelling state interest as justification for its law.¹²⁹ The Court “requires much less to sustain the regulation of low-value speech.”¹³⁰

The Supreme Court uses definitional balancing¹³¹ for low-value speech.¹³² Definitional balancing “focuses upon a category or class of speech, such as libel, and inquires whether the category of speech causes a sufficiently serious harm to justify restricting the speech.”¹³³ If the Court is convinced that the speech causes sufficient harm, it will uphold a regulation on such speech.¹³⁴ However, the Court has been “quite reluctant to recognize new ‘low value’

any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.” *Id.*

¹²⁵ HUDSON, *supra* note 102, § 2:2; *see also* Stone, *supra* note 121, at 298.

¹²⁶ However, the government does not have absolute power to regulate speech within unprotected speech categories. *See* R.A.V. v. City of St. Paul, 505 U.S. 377 (1992). In *R.A.V. v. City of St. Paul*, the Supreme Court held that where the government makes content-based distinctions between types of speech *within* an unprotected speech category, the government’s regulation is subject to “greater scrutiny” than strict scrutiny. 505 U.S. at 431.

¹²⁷ O’Neill, *supra* note 100, at 252; Stone, *supra* note 121, at 285.

¹²⁸ Shaman, *supra* note 121, at 329.

¹²⁹ *Id.*

¹³⁰ *Id.* “The essential difference between the Supreme Court’s treatment of high- and low-value speech concerns what the Court will accept as justification for regulating speech.” *Id.*

¹³¹ *Id.* at 331. Definitional balancing has also been called “categorical balancing.” *Id.*; *see also* Stone, *supra* note 121, at 285.

¹³² Stone, *supra* note 121, at 285; *see also* Melville B. Nimmer, *The Right to Speak from Times to Time: First Amendment Theory Applied to Libel and Misapplied to Privacy*, 56 CAL. L. REV. 935, 942–43 (1968).

¹³³ Shaman, *supra* note 121, at 331.

¹³⁴ *Id.* However, in established unprotected speech categories, the Supreme Court does not use balancing tests because it has historically considered such categories of little to no value. *Id.* at 331–32.

categories that have not been well established over time.”¹³⁵ There has been much debate in the past few years over the value of “violent expression, hate speech,¹³⁶ pornography,¹³⁷ and non-newsworthy invasions of privacy,” but the Supreme Court has not yet declared these areas unprotected.¹³⁸ These types of expression, which may overlap with revenge porn, fall into a regulatory gray area, making it difficult for legislators to predict how courts will view laws that regulate in these areas.

C. SECONDARY EFFECTS

Under the secondary effects doctrine, where the government justifies a facially content-based law without reference to the communicative impact of the regulated speech, courts will treat the law as content-neutral, and subject it to intermediate scrutiny.¹³⁹ The government frequently uses the secondary effects doctrine to defend legislation, arguing that laws “are not aimed at the content of the disfavored expression, but at certain indirect or side effects of the speech that are unrelated to the message of the speech.”¹⁴⁰ The secondary effects doctrine arose out of adult entertainment zoning regulation cases, as city officials sought to regulate the locations of adult businesses, such as clubs with nude dancing, adult movie theaters, and adult bookstores.¹⁴¹

¹³⁵ Stone, *supra* note 121, at 284. University of Chicago Law School Professor Geoffrey R. Stone suggests a four-prong definition for the Supreme Court to use in determining whether speech is of low value. *Id.* “Low value speech does not ‘primarily advance political discourse,’ is not defined in terms of ‘disfavored ideas or political viewpoints,’ usually has ‘a strong noncognitive’ aspect, and has ‘long been regulated without undue harm to the overall system of free expression.’” *Id.*

¹³⁶ Hate speech is generally defined as “highly offensive speech that vilifies, insults, or stigmatizes an individual on the basis of race, ethnicity, national origin, religion, gender, age, handicap, or sexual orientation.” Shaman, *supra* note 121, at 324.

¹³⁷ Webster’s Dictionary defines “pornography” as “writings, pictures, etc. intended primarily to arouse sexual desire.” HUDSON, *supra* note 102, § 4:1.

¹³⁸ Stone, *supra* note 121, at 284; Shaman, *supra* note 121, at 319–325 (commentators petition the Supreme Court to deem non-obscene pornography and racist “hate speech” to be low-value, unprotected speech categories).

¹³⁹ O’Neill, *supra* note 100, at 245.

¹⁴⁰ David L. Hudson, Jr., *The Secondary Effects Doctrine: “The Evisceration Of First Amendment Freedoms,”* 37 WASHBURN L.J. 55, 60 (1997).

¹⁴¹ HUDSON, *supra* note 102, § 2:4; Hudson, *supra* note 140, at 61–62.

The doctrine first came about in *Young v. American Mini Theatres, Inc.*¹⁴² There, the Supreme Court upheld Detroit's "Anti-Skid Row Ordinance" which limited the locations for adult businesses.¹⁴³ The government justified its law by arguing that a concentration of such businesses in certain areas has negative secondary effects on the surrounding areas, such as decreased property values and increased crime rate.¹⁴⁴ It supported this argument with corroborating opinions of urban planners and real estate experts.¹⁴⁵ The Court accepted the government's secondary effects justification.¹⁴⁶ Justice Stevens reasoned that the interest in protecting this type of speech "is of a wholly different, and lesser, magnitude than the interest in untrammelled political debate."¹⁴⁷ Thus, the Court seems to rest its decision on both the secondary effects doctrine and the idea that adult entertainment is of "lesser" social value.

In *City of Renton v. Playtime Theatres, Inc.*, two adult theaters challenged an ordinance prohibiting adult movie theaters within 1,000 feet of any residential zone, single- or multiple-family dwelling, church, park, or school.¹⁴⁸ The government of the city of Renton supported their secondary effects justification with studies from the nearby city of Seattle and other cities, but not from Renton.¹⁴⁹ The Supreme Court relied heavily on *American Mini Theatres* in concluding the ordinance was facially content-discriminatory, but content-neutral in its justification based on the negative secondary effects of

¹⁴² *Young v. Am. Mini Theatres, Inc.*, 427 U.S. 50 (1976).

¹⁴³ Hudson, *supra* note 140, at 61.

¹⁴⁴ *Am. Mini Theatres*, 427 U.S. at 54.

¹⁴⁵ *Id.* at 55. After *American Mini Theatres*, courts required that the government support their secondary effects arguments with some factual basis. See *Avalon Cinema Corp. v. Thompson*, 667 F.2d 659, 661 (1981) (striking down a law similar to that in *American Mini Theatres* because it was "not based on any studies by social scientists, or on a demonstrated past history of 'adult' theatres causing neighborhood deterioration.").

¹⁴⁶ *Am. Mini Theatres*, 427 U.S. at 71 n.34 (1976) ("The Common Council's determination was that a concentration of 'adult' movie theaters causes the area to deteriorate and become a focus of crime It is this secondary effect which these zoning ordinances attempt to avoid, not the dissemination of 'offensive' speech.").

¹⁴⁷ *Am. Mini Theatres*, 427 U.S. at 70.

¹⁴⁸ *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 41 (1986).

¹⁴⁹ *Id.* at 44.

adult theaters.¹⁵⁰ The Court upheld the ordinance.¹⁵¹ While *Renton* arguably expanded the application of the secondary effects doctrine by indicating that governments need not supply supporting data from the locale the law applies to, the majority opinion has received much criticism.¹⁵²

First, the decision was not unanimous.¹⁵³ The dissent, written by Justice Brennan and joined by Justice Marshall, argued the ordinance was content-based.¹⁵⁴ Justice Brennan contended the majority mixes up the secondary effects doctrine with the requirement under strict scrutiny that the government have a compelling interest justifying its law.¹⁵⁵ The dissent also pointed out that only *after* the lawsuit was filed challenging the ordinance did the city amend the ordinance to add a provision claiming its purpose was to prevent negative effects.¹⁵⁶ Second, legal scholars also denounced the decision.¹⁵⁷ For example, Professor Laurence Tribe opined that, “[c]arried to its logical conclusion, such a doctrine could gravely erode the first amendment’s protections” and allow government regulation of “most, if not all, speech.”¹⁵⁸ Despite this criticism, courts have continued to apply the secondary effects doctrine in adult business zoning cases, albeit inconsistently.¹⁵⁹

Further, in *Boos v. Barry*, the Supreme Court opened the door for the expansion of the secondary effects doctrine to cases besides those involving

¹⁵⁰ *Id.* at 47.

¹⁵¹ *Id.* at 54.

¹⁵² Hudson, *supra* note 140, at 64–67.

¹⁵³ *Playtime Theatres*, 475 U.S. at 55.

¹⁵⁴ *Id.* at 56.

¹⁵⁵ *Id.* Justice Brennan stated that the idea that the targeted speech has negative secondary effects may be support for a compelling government interest, but it does not turn a content-based law into a content-neutral one. *Id.*

¹⁵⁶ *Id.*

¹⁵⁷ Hudson, *supra* note 140, at 65. Marc Rohr called the *Renton* decision “a wholly unprecedented approach to the understanding of content-neutrality.” *Id.* at 66.

¹⁵⁸ *Id.* Tribe is a professor of constitutional law at Harvard Law School. Laurence H. Tribe, HARVARD LAW SCHOOL, <http://www.law.harvard.edu/faculty/directory/10899/Tribe> (last visited January 15, 2014).

¹⁵⁹ Hudson, *supra* note 140, at 67–71. Some courts apply the secondary effects doctrine even where the legislature claims such a purpose after the litigation has commenced or where there is evidence of a content discriminatory purpose. *Id.* Other courts are reluctant to apply the secondary effects doctrine and require the government “show some evidence or probability that adult businesses will create harmful effects.” *Id.*

adult businesses.¹⁶⁰ In *Boos*, the Court invalidated a law banning the “display [of] any sign that tends to bring [a] foreign government into ‘public odium’ or ‘public disrepute’” within 500 feet of that foreign country’s embassy.¹⁶¹ However, Justice O’Connor opened the door for application of the secondary effects doctrine to political speech by stating, “Respondents and the United States do not point to the ‘secondary effects’ They do not point to congestion, to interference with ingress or egress, to visual clutter, or to the need to protect the security of embassies.”¹⁶² This suggests that these secondary effects justifications may have been sufficient to uphold a content-based statute regulating political speech.¹⁶³ Since *Boos*, courts have applied the secondary effects doctrine in cases of regulation of several different types of speech such as, “indecent speech, commercial speech, and even political speech.”¹⁶⁴ The secondary effects jurisprudence illustrates one route legislators may take in combating revenge porn. *Boos* indicates that courts may accept a secondary effects justification even where the regulated speech is of high value, while *American Mini Theatres* demonstrates that courts may be more likely to accept a secondary effects argument where the regulated speech is of low value. However, the *Renton* decision and the criticism it garnered illustrate the existence of diverging views in this area.

D. OBSCENITY, INDECENCY, AND PORNOGRAPHY

“All ideas having even the slightest redeeming social importance — unorthodox ideas, controversial ideas, even ideas hateful to the prevailing climate of opinion — have the full [First Amendment] protection.”¹⁶⁵ However, this principle is not absolute.¹⁶⁶ As discussed above, the Supreme Court

¹⁶⁰ *Id.* at 74–76; see also *Boos v. Barry*, 485 U.S. 312 (1988).

¹⁶¹ *Boos*, 485 U.S. at 312.

¹⁶² *Id.* at 321.

¹⁶³ Hudson, *supra* note 140, at 75–76.

¹⁶⁴ *Id.* at 76–77 (citing *Reno v. ACLU*, 117 S. Ct. 2329, 2346 (1997) (applying the secondary effects doctrine to obscenity); *Maryland II Ent., Inc. v. City of Dallas*, 28 F.3d 492 (5th Cir. 1994) (applying the secondary effects doctrine to commercial speech); *Johnson v. Bax*, 63 F.3d 154 (2d Cir. 1995) (applying the secondary effects doctrine to political speech)).

¹⁶⁵ *Roth v. United States*, 354 U.S. 476, 484 (1957).

¹⁶⁶ Shaman, *supra* note 121, at 298.

considers some categories of speech of such low value or high harm as to be considered unprotected, and has upheld regulations on adult entertainment under the secondary effects doctrine.¹⁶⁷ The Supreme Court clearly considers some speech less worthy of protection and more susceptible to regulation than other speech.¹⁶⁸

Obscenity is one such type. Obscenity has been called one of the most “controversial and confounding areas of First Amendment jurisprudence.”¹⁶⁹ In *Roth v. United States*, the Supreme Court held that “obscenity is not within the area of constitutionally protected speech or press.”¹⁷⁰ The Court stated that “implicit in the history of the First Amendment is the rejection of obscenity as utterly without redeeming social importance.”¹⁷¹ To determine what constitutes obscene material, the Court laid out the test: “whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to the prurient interest.”¹⁷² It defined “prurient” interest as “material having a tendency to excite lustful thoughts” and “having morbid or lascivious longings.”¹⁷³ It further clarified that “sex and obscenity are not synonymous.”¹⁷⁴

Post-*Roth*, the Supreme Court continued to struggle to define obscenity.¹⁷⁵ In his concurring opinion in *Jacobellis v. Ohio*, Justice Stewart attempted clarification by stating that “criminal laws in this area are constitutionally limited to hard-core pornography.”¹⁷⁶ Years after the Supreme

¹⁶⁷ See *supra* Parts III.B and III.C.

¹⁶⁸ Shaman, *supra* note 121, at 298.

¹⁶⁹ HUDSON, *supra* note 102, § 4:2. In *Jacobellis v. Ohio*, the Supreme Court was faced with the task of determining whether a film was obscene. 378 U.S. 184, 186–87 (1964). Justice Stewart stated he felt the Court was “faced with the task of trying to define what may be indefinable. *Id.* at 197 (Stewart, J., concurring).

¹⁷⁰ Roth, 354 U.S. at 485.

¹⁷¹ *Id.* at 484.

¹⁷² *Id.* at 489.

¹⁷³ *Id.* at 488 n.20.

¹⁷⁴ *Id.* at 487.

¹⁷⁵ HUDSON, *supra* note 102, § 4:2.

¹⁷⁶ *Jacobellis v. Ohio*, 378 U.S. 184, 197 (Stewart, J., concurring). Beyond that, however, Justice Stewart could not further define obscene material, except to state “I know it when I see it.” *Id.*

Court heard *Jacobellis* and *Roth*, it adjusted the obscenity test in *Miller v. California*.¹⁷⁷ The *Miller* test instructs consideration of

(1) whether the average person, applying contemporary community standards, would find that the work, taken as a whole, appeals to the prurient interest; (2) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; (3) whether the work, taken as a whole, lacks serious literary, artistic, political or scientific value.¹⁷⁸

The Court left it up to the states to regulate obscene speech according to their community standards, but gave the following two examples of “what a state statute could define for regulation”: “(a) [p]atently offensive representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated”; and “(b) [p]atently offensive representation or descriptions of masturbation, excretory functions, and lewd exhibition of the genitals.”¹⁷⁹ Today, the *Miller* test is still used to determine what is obscene.¹⁸⁰ It is clear today that states may regulate within the unprotected realm of obscenity.¹⁸¹

However, there is a plethora of sexual speech that does not fall within the category of obscenity.¹⁸² Pornography is not a legal term.¹⁸³ Pornography and sex are not synonymous with obscenity, but overlap with obscenity.¹⁸⁴ Some pornography is legally obscene, but much is protected because it does not meet the *Miller* requirements.¹⁸⁵ States have an interest in regulating “indecent” sexual expression that does not amount to obscenity, but the

¹⁷⁷ HUDSON, *supra* note 102, § 4:2.

¹⁷⁸ *Id.*; see also *Miller v. California*, 413 U.S. 15, 24 (1973).

¹⁷⁹ *Miller*, 413 U.S. at 25.

¹⁸⁰ HUDSON, *supra* note 102, § 4:2.

¹⁸¹ Shaman, *supra* note 121, at 306–07; see also HUDSON, *supra* note 102, § 4:2.

¹⁸² HUDSON, *supra* note 102, § 4:5.

¹⁸³ *Id.* at § 4:1. However, one type of pornography, child pornography, is an unprotected speech category under the First Amendment. *Id.*

¹⁸⁴ See *id.*; *Roth v. United States*, 354 U.S. 476, 487 (1957).

¹⁸⁵ HUDSON, *supra* note 102, § 4:1. The Supreme Court in *Jacobellis v. Ohio* stated that only hard-core pornography is legally obscene. 378 U.S. 184, 197 (Stewart, J., concurring). Courts struggle to determine the line between protected and unprotected pornography. David L. Hudson, Jr., *Pornography & obscenity*, FIRST AMENDMENT CENTER (Sept. 13, 2002) <http://www.firstamendmentcenter.org/pornography-obscenity>.

Supreme Court has not declared indecent speech an unprotected speech category.¹⁸⁶

In *FCC v. Pacifica*, the Supreme Court held that the Federal Communications Commission (FCC) could regulate indecent speech on broadcast radio in some situations.¹⁸⁷ In *Pacifica*, the FCC granted a complaint it received against Pacifica, a radio station that had broadcast a comedian's monologue entitled "Filthy Words," which contained repeated curse words, during the day.¹⁸⁸ Pacifica challenged the FCC's order on First Amendment grounds.¹⁸⁹ The Court found the content of the broadcast to be "vulgar, offensive, and shocking" and stated that, while some "patently offensive references to excretory and sexual organs and activities" may be protected, "they surely lie at the periphery of First Amendment concern."¹⁹⁰ However, the Court declined to declare indecency an unprotected category of speech.¹⁹¹ Rather, it stated that whether indecent expression is protected varies with the context; "[i]t is a characteristic of speech such as this that both its capacity to offend and its 'social value' . . . vary with the circumstances."¹⁹² Later, in *Sable*, the Supreme Court definitively stated that "[s]exual expression which is indecent but not obscene is protected by the First Amendment," but the government may regulate such speech so long as the regulation passes strict scrutiny.¹⁹³

¹⁸⁶ HUDSON, *supra* note 102, § 4:5.

¹⁸⁷ *FCC v. Pacifica*, 438 U.S. 726 (1978).

¹⁸⁸ *Id.* at 730. The FCC's order stated that Pacifica "could have been the subject of administrative sanctions," and that the FCC has the power to regulate the use of "any obscene, indecent, or profane language by means of radio communications." *Id.*

¹⁸⁹ *Id.* at 734.

¹⁹⁰ *Id.* at 743, 747 (internal quotations omitted). The Court compared indecency with the unprotected category of low-value speech, obscenity; it stated, "These words offend for the same reasons that obscenity offends." *Id.* at 746.

¹⁹¹ *Id.* at 747.

¹⁹² *Id.* at 747. In this case, the Court made clear that the 'circumstances' of this broadcast, i.e., that the monologue was disseminated via broadcast radio during the day when children would be listening, were of tantamount importance. *Id.*

¹⁹³ *Sable Commc'ns of California, Inc. v. FCC*, 492 U.S. 115, 126 (1989); see also C. Richard Martin, *Censorship in Cyberspace*, 34 HOUS. LAW. 45, 47 (1996) ("[T]he government cannot regulate 'indecent' speech unless the restriction promotes a compelling interest, and the government uses the least restrictive means to further that interest.").

Following *Pacifica*, the FCC was reluctant to end licenses with broadcast stations based on indecency complaints, stating its “inten[tion] strictly to observe the narrowness of the *Pacifica* holding.”¹⁹⁴ However, in 2003, the FCC began to “crack down” on licensees.¹⁹⁵ That year, in response to a complaint regarding a singer’s isolated use of the word “fuck” on the Golden Globe awards, the FCC ruled that the word is inherently indecent.¹⁹⁶ In a subsequent order, the FCC also deemed “shit” to be per se indecent.¹⁹⁷ Unlike the “Filthy Words” monologue, these were cases of isolated instances of profanity, so-called “fleeting expletives.”¹⁹⁸ In its orders, the FCC made clear that it considered fleeting expletives to be indecent, regardless of context or usage.¹⁹⁹ These orders marked a striking change in policy.²⁰⁰

Several television networks challenged the FCC’s Golden Globes order.²⁰¹ The Supreme Court heard the case twice.²⁰² In *Fox I*, the Court avoided the First Amendment issue entirely.²⁰³ In *Fox II*, the Court held that the FCC failed to give the television networks adequate notice of their new policy before the broadcasts.²⁰⁴ The Court again sidestepped the constitutional issue.²⁰⁵ Accordingly, First Amendment indecency jurisprudence is plagued with uncertainty. It is unclear at which point the Supreme Court would consider speech that crosses the line into indecent expression

¹⁹⁴ FCC v. Fox Television Stations (*Fox I*), 556 U.S. 502, 507 (2009).

¹⁹⁵ GEORGE B. DELTA & JEFFREY H. MATSUURA, LAW OF THE INTERNET §12.01 (Supp. 2014-1), available at 2013 Westlaw 3924202.

¹⁹⁶ *Id.*

¹⁹⁷ *Id.*

¹⁹⁸ *Fox I*, 556 U.S. at 502; see also DELTA & MATSUURA, *supra* note 195, § 12.01.

¹⁹⁹ DELTA & MATSUURA, *supra* note 195, § 12.01.

²⁰⁰ *Fox I*, 556 U.S. at 502, 508–09; DELTA & MATSUURA, *supra* note 195, § 12.01.

²⁰¹ See *Fox I*, 556 U.S. at 502.

²⁰² See *id.*; FCC v. Fox Television Stations, Inc. (*Fox II*), 132 S. Ct. 2307 (2012).

²⁰³ See *Fox I*, 556 U.S. at 502, 529. *Fox I* consisted entirely of discussion on whether an administrative agency need give an explanation when drastically changing its policy. *Id.* The Court remanded the case to the Second Circuit for consideration of the First Amendment issues. *Id.* On remand, the Second Circuit held the FCC’s policy was unconstitutionally vague and the FCC appealed. *Fox Television Stations, Inc. v. FCC*, 613 F.3d 317 (2d Cir. 2010) (vacated and remanded by *Fox II*, 132 S. Ct. 2307 (2012)).

²⁰⁴ *Fox II*, 132 S. Ct. at 2320.

²⁰⁵ *Id.* (“[I]t is unnecessary for the Court to address the constitutionality of the current indecency policy.”).

is “at the periphery of First Amendment concern.”²⁰⁶ It is thereby unclear the extent to which indecent material may be regulated within the bounds of the Constitution. What we do know, however, is that the Supreme Court has not yet declared indecency to be unworthy of First Amendment protection and *Sable* is still good law.²⁰⁷

E. THE INTERSECTION OF THE FIRST AMENDMENT AND THE INTERNET

The Supreme Court has afforded different types of media varying levels of protection under the First Amendment.²⁰⁸ The Internet is no different. The nature of the Internet creates unique First Amendment challenges.²⁰⁹ Its creation sparked debate among legislators, parents, and politicians regarding how to protect children from adult material online.²¹⁰ In 1996 Congress passed the Communications Decency Act (CDA), which in part, sought to address these issues.²¹¹ In particular, two provisions sparked controversy.²¹² One provision criminalized the online transmission of “obscene” or “indecent” material to a person the sender knows to be under eighteen years of age.²¹³ The prohibition of indecent communication sparked criticism because the Supreme Court had distinguished indecency

²⁰⁶ *FCC v. Pacifica*, 438 U.S. 726, 743, 747 (1978) (internal quotations omitted). The spectrum of uncertainty ranges from Carlin’s clearly indecent monologue to fleeting expletives in arguably innocuous contexts.

²⁰⁷ See *Sable Commc’ns of California, Inc. v. FCC*, 492 U.S. 115, 126 (1989).

²⁰⁸ See, e.g., *Se. Promotions, Ltd. v. Conrad*, 420 U.S. 546, 557 (1975) (“Each medium of expression . . . may present its own problems.”); *Sable Commc’ns of California, Inc. v. FCC*, 492 U.S. 115 (1989) (discussing a regulation on telephonic communications); *FCC v. Pacifica*, 438 U.S. 726 (1978) (considering a regulation on broadcast media).

²⁰⁹ Kim L. Rappaport, Comment, *In The Wake Of Reno v. ACLU: The Continued Struggle In Western Constitutional Democracies With Internet Censorship And Freedom Of Speech Online*, 13 AM. U. INT’L L. REV. 765, 773 (1998). “[The Internet] allows any of the literally tens of millions of people with access to the Internet to exchange information . . . almost instantaneously . . . either to specific individuals, to a broader group of people interested in a particular subject, or to the world as a whole.” *ACLU v. Reno*, 929 F. Supp. 824, 831 (E.D. Pa. 1996).

²¹⁰ See Martin, *supra* note 193, at 47; see also Rappaport, *supra* note 209, at 766.

²¹¹ Rappaport, *supra* note 209, at 766.

²¹² Martin, *supra* note 193, at 47.

²¹³ Rappaport, *supra* note 209, at 775–76; see also Communications Decency Act, 47 U.S.C. § 223(a) (Supp. II 1994).

from obscenity as a protected category of speech.²¹⁴ The other provision criminalized the transmission or display of “patently offensive” material “in a manner available to a person under 18 years of age.”²¹⁵

Although the CDA included affirmative defenses for content providers and ISPs, its opponents requested an injunction on the two provisions on First Amendment grounds in *ACLU v. Reno*.²¹⁶ The district court granted the injunction and the government appealed.²¹⁷ In *Reno v. ACLU*, the Supreme Court affirmed the district court’s decision.²¹⁸ Nearly two decades prior, the Supreme Court stated that it grants broadcast media the most limited First Amendment protection of all expressive media because it is a “uniquely pervasive presence in the lives of all Americans” and “uniquely accessible to children.”²¹⁹

In *Reno*, the Court differentiated broadcast media from the Internet; it stated that unlike the Internet, broadcast media has a “history of extensive Government regulation,” a frequency-scarcity element, and is uniquely “invasive.”²²⁰ The Court emphasized that the Internet is not as invasive as radio or television and that “odds are slim that a user would come across a sexually explicit sight by accident.”²²¹ As for the regulation itself, the Court found the CDA to be a content-based regulation, applied strict scrutiny,

²¹⁴ See *supra* Part III.D; see also Martin, *supra* note 193, at 47.

²¹⁵ Rappaport, *supra* note 209, at 777; see also Communications Decency Act, 47 U.S.C. § 223(d) (Supp. II 1994).

²¹⁶ *Id.* at 777–78.

²¹⁷ *ACLU v. Reno*, 929 F. Supp. 824, 851–83 (E.D. Pa. 1996).

²¹⁸ *Reno v. ACLU*, 521 U.S. 844, 844 (1997).

²¹⁹ *FCC v. Pacifica*, 438 U.S. 726, 748 (1978). In other words, the government has more freedom to regulate broadcast media than other types of media. *Id.*

²²⁰ *Reno*, 521 U.S. at 867. Spectrum scarcity refers to the idea that available broadcast frequencies are finite. *FRC v. Nelson Bros. Bond & Mortgage Co.*, 289 U.S. 266, 279 (1933). It allowed Congress to delegate power to the FCC to regulate licensing of frequencies. *Id.* The Supreme Court has cited spectrum scarcity as one of the reasons broadcast media may be regulated more strictly than other types of media. See, e.g., *Turner Broad. System, Inc. v. FCC*, 512 U.S. 622, 622 (1994); *NBC v. United States*, 319 U.S. 190, 213 (1943); *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 388 (1969) (stating the broadcast medium is “of considerable and growing importance whose scarcity impelled its regulation by an agency authorized by Congress.”).

²²¹ *Reno*, 521 U.S. at 869 (internal quotations omitted).

and held it unconstitutionally vague and overbroad.²²² The Court invalidated the provisions despite its recognition that it had “repeatedly recognized the governmental interest in protecting children from harmful materials.”²²³ This decision demonstrates the constitutional hurdles legislators face in attempting to regulate online communications. The Court explicitly granted the Internet the utmost First Amendment protection, even where it is pitted against an interest the Supreme Court has previously found compelling.²²⁴

The inception of the Internet has also created a difficulty in the realm of obscenity jurisprudence. In *Miller*, the Court stated that courts and juries must apply “contemporary community standards” in deciding what “appeals to the prurient interest.”²²⁵ However, as the district court found in *ACLU v. Reno*, the Internet is a “*global medium* of communications that links people, institutions, corporations, and governments *around the world*.”²²⁶ The Internet knows no geographic boundaries. The community standards measure as applied to Internet communications has thus received harsh criticism.²²⁷ Content creators risk being penalized for content

²²² *Id.* at 868, 871, 878. The Court found the CDA to be vague because one of the provisions uses “indecent” to describe the prohibited expression, while the other defines the prohibited expression as material that “in context, depicts or describes, in terms patently offensive as measured by contemporary community standards, sexual or excretory activities or organs.” See *id.* at 871; see also Communications Decency Act, 47 U.S.C. § 223(a), (d) (Supp. II 1994). With two differing descriptions and absent a definition of “indecent,” it was unclear what speech was prohibited. *Reno*, 521 U.S. at 873. Moreover, the second provision uses some of the language from the *Miller* test for obscenity, but omits important narrowing aspects, as well as the limiting social value prong, rendering it overbroad. *Id.*

²²³ See *Reno*, 521 U.S. 875 (“[T]he Government may not ‘reduc[e] the adult population . . . to . . . only what is fit for children.’”) (quoting *Denver Area Ed. Telecomm. Consortium, Inc. v. FCC*, 518 U.S. 727, 759 (1996)).

²²⁴ See, e.g., *Sable Commc’ns of California, Inc. v. FCC*, 492 U.S. 115, 126 (1989) (“We have recognized that there is a compelling interest in protecting the physical and psychological well-being of minors.”); see also *FCC v. Pacifica*, 438 U.S. 726, 749–750 (1978) (upholding a regulation justified in part by an interest in protecting children from indecent programming); see also *Ginsberg v. New York*, 390 U.S. 629, 640 (1968) (“The State also has an independent interest in the well-being of its youth.”).

²²⁵ *Miller v. California*, 413 U.S. 15, 32 (1973).

²²⁶ *ACLU v. Reno*, 929 F. Supp. 824, 831 (E.D. Pa. 1996) (emphasis added).

²²⁷ See, e.g., Noah Hertz-Bunzl, Note, *A Nation of One? Community Standards in the Internet Era*, 22 *FORDHAM INTELL. PROP. MEDIA & ENT. L.J.* 145 (2011); Matthew

that is constitutionally protected in one community, but considered obscene in a less liberal community.²²⁸

In *Ashcroft v. ACLU*, the Supreme Court addressed whether the Child Online Protection Act's (COPA) reliance on community standards to identify material harmful to minors renders it overbroad under the First Amendment.²²⁹ The Supreme Court, in a plurality opinion, held that "any variance caused by the statute's reliance on community standards is not substantial enough to violate the First Amendment."²³⁰ It upheld the statute as constitutional.²³¹ Notably, only three justices stated they believed the community standards measure is constitutional in online obscenity cases.²³² The other four justices questioned the constitutionality of local community standards as applied to Internet communications, and two explicitly supported a move to a national standard.²³³ In the realm of Internet communication, First Amendment jurisprudence is still developing. *Ashcroft* indicates that the Supreme Court may prefer objective national standards over subjective standards that vary with geographic location when it comes to Internet regulations.

IV. THE CONSTITUTIONALITY OF CALIFORNIA PENAL CODE SECTION 647(4)

California Penal Code section 647(4) raises several First Amendment issues. First, the law is likely a content-based regulation warranting the application of strict scrutiny.²³⁴ Second, the secondary effects doctrine likely does not apply, as the California Legislature intended to prevent the

Dawson, Comment, *The Intractable Obscenity Problem 2.0: The Emerging Circuit Split Over the Constitutionality of "Local Community Standards" Online*, 60 CATH. U. L. REV. 719 (2011).

²²⁸ Dawson, *supra* note 227, at 721–22.

²²⁹ *Ashcroft v. ACLU*, 535 U.S. 564, 585 (2002).

²³⁰ *Id.* at 584–85.

²³¹ *Id.*

²³² *Id.* at 583.

²³³ *Id.* at 587, 589–90. Justice O'Connor stated a national standard is necessary in cases of online speech and Justice Breyer stated, "A nationally uniform adult-based standard . . . significantly alleviates any special need for First Amendment protection." *Id.*

²³⁴ See *infra* Part IV.A.

direct effect the speech has on its listeners, as opposed to any indirect effects.²³⁵ Third, much of the targeted speech undoubtedly falls outside of the unprotected category of obscenity.²³⁶ Lastly, revenge porn may fall within the low-value speech category of indecency, but indecency jurisprudence is not well defined and indecent speech is not unprotected.²³⁷ Section 647(4) is likely unconstitutional as written, but California and other states can and should work toward passing constitutional laws to deter the destructive trend of posting revenge porn. Part V discusses possible alterations to California's law that could strengthen it against attacks on its constitutionality and render it more effective in combating revenge porn.²³⁸

A. APPLYING STRICT SCRUTINY

Strict scrutiny is the applicable standard of review because section 647(4) is a content-based statute. Section 647(4) is not a time, place, or manner restriction on speech because it is not “*justified* without reference to the content of the regulated speech.”²³⁹ It prohibits the dissemination of media based on the content of the images or videos.²⁴⁰ In other words, in order for one to determine whether an individual who has posted an image online has violated section 647(4), one must know the content of the image posted. As in *United States v. Playboy Entertainment*

²³⁵ See *infra* Part III.B; see also *Boos v. Barry*, 485 U.S. 312, 321 (1988).

²³⁶ See *infra* Part III.C.

²³⁷ *Id.*

²³⁸ No one has attacked the constitutionality of California's law yet, but it may not be long. California Attorney General Kamala Harris is prosecuting an alleged revenge porn website operator and extortionist as of December 10, 2013. Fran Berkman, *Alleged Operator of Revenge Porn Site Pleads Not Guilty in California*, MASHABLE (Jan. 17, 2014) <http://mashable.com/2014/01/17/revenge-porn-not-guilty/>. Kevin Christopher Bollaert operated two websites, *ugotposted.com*, which hosted revenge porn, and *changemyreputation.com*, which charged money to remove the content from *ugotposted.com*. *Id.* However, Attorney General Harris did not charge Bollaert under the new revenge porn legislation. *Id.* The case indicates that California prosecutors are serious about prosecuting these types of cases and it is only a matter of time before someone is charged under the new law, giving defendants the opportunity to attack its constitutionality.

²³⁹ *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) (quoting *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 (1984)).

²⁴⁰ See *supra* Part III.A.i. Section 647(4) regulates images “of the intimate body part or parts of another identifiable person.” Cal. Penal Code § 647 (West 2013).

Group, Inc., where the Supreme Court held a law applying only to sexually explicit speech to be content-based,²⁴¹ section 647(4) only applies to images depicting intimate body parts.²⁴² Content neutrality further depends on whether the government has passed the legislation because of its “disagreement with the message it conveys.”²⁴³ The government in this case passed section 647(4) because it considers the prohibited speech “disturbing.”²⁴⁴ California’s intent and the law’s construction render it content-based.

As a content-based statute, section 647(4) faces a constitutional uphill battle. Content-based statutes must survive strict scrutiny, a test that “leaves few survivors.”²⁴⁵ To survive strict scrutiny, the law must be necessary to serve a compelling state interest, narrowly drawn, and the least restrictive means of achieving the interest.²⁴⁶ According to the bill’s legislative history, California’s interest is in preventing its citizens from the humiliation, emotional distress, and other repercussions caused by the dissemination of revenge porn.²⁴⁷ In his proposal, Canella cites the “numerous examples of cyber revenge victims who have taken their own lives.”²⁴⁸ Thus, it is likely that a court would find California has at least a substantial interest in criminalizing the cause of these suicides.²⁴⁹

However, the Supreme Court has invalidated content-based statutes for violating the First Amendment even in cases where government interests

²⁴¹ See *supra* notes 112–14 and accompanying text.

²⁴² See Cal. Penal Code § 647 (West 2013).

²⁴³ *Rock Against Racism*, 491 U.S. at 791.

²⁴⁴ S. B. 255, Reg. Sess. (Cal. 2013); see also *supra* Part II.

²⁴⁵ *City of Los Angeles v. Alameda Books*, 535 U.S. 425, 455 (2002) (Souter, J., dissenting).

²⁴⁶ See *supra* Part III.A.

²⁴⁷ S. B. 255, Reg. Sess. (Cal. 2013); see also *supra* Part II.

²⁴⁸ S. B. 255, Reg. Sess. (Cal. 2013); see also *supra* Part II.

²⁴⁹ The legislative history indicates California’s interest is partially in the well-being of its children. See *supra* Part II. The Supreme Court may be more likely to find “compelling” an interest in children than an interest in only adults. See, e.g., *Sable Commc’ns of California, Inc. v. FCC*, 492 U.S. 115, 126 (1989) (“We have recognized that there is a compelling interest in protecting the physical and psychological well-being of minors.”); but see *Reno v. ACLU*, 521 U.S. 844, 875 (1997) (rejecting an interest in protecting children from offensive material online to justify a content-based regulation).

seem to be of the highest order.²⁵⁰ For example, in *The Florida Star v. B.J.F.*, the Supreme Court invalidated a Florida statute that made it “unlawful to print, publish, or broadcast . . . in any instrument of mass communication the name of the victim of a sexual offense.”²⁵¹ The government cited as its interests the privacy of victims of sexual offenses, their physical safety against retaliation by their assailants, and its interest in encouraging victims of sexual offenses to report the crimes without fearing exposure.²⁵² Despite the convincing nature of the government’s interests, the Court struck down the statute under strict scrutiny.²⁵³ *Florida Star* demonstrates the importance of narrow tailoring in regulations on speech.²⁵⁴

Here, section 647(4) runs into similar problems. Assuming the government has a compelling interest, California’s anti-revenge porn legislation may not be narrowly tailored nor the least restrictive means of achieving its interest. One aspect of the law that has produced criticism is its failure to cover photos taken by the victims themselves, so-called “self-shots.”²⁵⁵ According to a recent study by CCRI, up to 80 percent of revenge porn victims were victimized using photos they took themselves.²⁵⁶

Absent justification for such an exclusion, section 647(4)’s exclusion of self-shots is constitutionally problematic for two reasons. First, one could infer from the exclusion impermissible viewpoint discrimination on the government’s part. Viewpoint discrimination is considered even more constitutionally untenable than content discrimination.²⁵⁷ The government has not supplied any reason to distinguish between images that are taken by an individual’s partner versus those taken by the individual, and there is no obvious justification. The harm caused by the online dissemination of intimate images of an individual presumably does not depend

²⁵⁰ See e.g., *Sable*, 492 U.S. at 126; *Reno*, 521 U.S. at 875.

²⁵¹ *The Florida Star v. B.J.F.*, 491 U.S. 524, 524 (1989) (quotations omitted).

²⁵² *Id.* at 537.

²⁵³ *Id.* at 538–41. It held that the statute was not narrowly tailored nor the least restrictive means. *Id.*

²⁵⁴ *Id.*

²⁵⁵ Franks, *supra* note 32. California’s law only applies to “[a]ny person who photographs or records by any means the image of the intimate body part or parts of another identifiable person.” Cal. Penal Code § 647 (West 2013) (emphasis added).

²⁵⁶ *Id.*

²⁵⁷ See *supra* notes 102–03 and accompanying text.

on the photographer; regardless of the photographer, the victim's photos have been publicized without their consent. The exclusion may amount to viewpoint discrimination because it indicates a government belief that those who took the photos of themselves are less deserving of protection than those who did not. Franks, in discussing California's exclusion of self-shots stated, "I think we are really looking at a 'blame the victim' mentality here," meaning a government mentality that those who take photos of themselves are "asking for it."²⁵⁸

A tenuous justification for California's exclusion may be that the government felt that self-shots are sufficiently covered by copyright law.²⁵⁹ However, the fact that another law may apply to some conduct does not mean that legislators are precluded from addressing overlapping conduct in another statute. It is unlikely that this was the government's logic because the statute does not likewise exclude minors even though child pornography laws apply to the dissemination of their photos.²⁶⁰ Thus, the government's exclusion is suspect.

Second, the exclusion of self-shots indicates the law is not narrowly drawn to achieve its stated end. Under the "narrow tailoring" prong of strict scrutiny, courts may invalidate statutes for being underinclusive, overinclusive, or both.²⁶¹ Here, the exclusion of self-shots renders the statute underinclusive. There is no apparent justification for such a distinction. If the government's purpose in passing the statute is to protect individuals from the harm caused by having photos of intimate areas of their bodies splashed across the Internet, then the statute effectively misses a large portion of its targeted victims. As in Holly Jacobs' case and as the CCRI study indicates, the vast majority of revenge porn victims took the photos themselves.²⁶² Where a content-based statute misses its target, First Amendment

²⁵⁸ See Kelly, *supra* note 2.

²⁵⁹ See *supra* notes 46–52 and accompanying text.

²⁶⁰ See *supra* notes 53–56 and accompanying text.

²⁶¹ See, e.g., *The Florida Star v. B.J.F.*, 491 U.S. 524, 540 (1989); *Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653, 2658 (2011). An underinclusive statute regulates less speech than necessary to achieve the government's purpose in enacting the statute. *Id.* An overinclusive or overbroad statute prohibits mores speech than necessary to meet the government's stated end. See *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 227–29 (1987).

²⁶² See *supra* notes 8–20, 257 and accompanying text.

jurisprudence tells us the government's true purpose becomes particularly suspect and the statute is more likely than not unconstitutional.²⁶³

Moreover, section 647(4) may be underinclusive for another reason. The law requires proof of the poster's intent to cause the depicted person serious emotional distress.²⁶⁴ There is indication that some revenge porn disseminators post the material solely for financial gain or for bragging rights.²⁶⁵ In such cases, California would be hard-pressed to prove intent to harm the victim, rendering the law inadequate, similar to laws targeting stalking and harassment.²⁶⁶ Regardless of the poster's intent, the harm to the victim is arguably the same. The victim did not consent to publication of the photo, yet their ex disseminated it to the public. Thus, section 647(4) may not address some types of the harmful conduct it aims to prevent.

Lastly, the statute may be effectively overinclusive due to vagueness.²⁶⁷ One aspect of the statute in particular raises vagueness issues. As Franks has stated, the requirement of "'circumstances where the parties agree or understand that the image shall remain private' uses a subjective rather than objective standard" and "[s]uch standards are inherently ambiguous and less likely to withstand constitutional scrutiny."²⁶⁸ Where a statute is vague, it deters more speech than is necessary because people do not understand what expression the law prohibits and are overly deterred from speaking.²⁶⁹ Consequently, section 647(4) is not likely to withstand strict scrutiny because it is not narrowly tailored nor the least restrictive means to achieving the government's goal.²⁷⁰

²⁶³ See *R.A.V. v. City of St. Paul*, 505 U.S. 377, 387–91 (1992).

²⁶⁴ Cal. Penal Code § 647 (West 2013) (requiring the poster have "the intent to cause serious emotional distress" to the person depicted).

²⁶⁵ See, e.g., Franks, *supra* note 32; Ronneburger, *supra* note 31, at 29 ("The blog 'Ex Girlfriend Pictures' allows users to submit photos of ex-girlfriends for 'revenge or bragging rights.'"); see also *supra* Part I.A.

²⁶⁶ See *supra* notes 57–59 and accompanying text.

²⁶⁷ See *supra* note 222 and accompanying text.

²⁶⁸ Cal. Penal Code § 647 (West 2013); Franks, *supra* note 32.

²⁶⁹ See, e.g., *Reno v. ACLU*, 521 U.S. 844, 871 (1997) (stating that, where a statute lacks definitions of key terms, the statute leads to uncertainty and has an "obvious chilling effect on free speech").

²⁷⁰ See *id.* at 873.

B. SECONDARY EFFECTS

Courts may deem a content-based statute content-neutral for constitutional purposes where the government's purpose is not based on the direct impact of the targeted speech on its listeners, but on some secondary effects of the speech.²⁷¹ The secondary effects doctrine is unlikely to apply to section 647(4). The Legislature has stated its purpose as preventing the humiliation of victims of the prohibited speech.²⁷² The government's target is to prevent the harmful, direct communicative impact of the speech on its listeners. Furthermore, the secondary effects doctrine has typically been applied in zoning regulation cases involving adult businesses.

However, *Boos* opened the door for expansion of the doctrine to cases involving different types of speech.²⁷³ Furthermore, some courts have applied the doctrine even where the legislature claims such a purpose after the litigation has commenced or where there is evidence of a content discriminatory purpose.²⁷⁴ Accordingly, although the government has not cited a secondary effects justification yet, it is not out of the realm of possibility that a court would accept one. One possible secondary effect is the promotion of extortion. In some instances, when victims of revenge porn have requested website operators to take down their photos, the owners have agreed, but only for a fee.²⁷⁵ One website "claims to hold an 'independent' partnership with another site that charges a \$250 fee for the removal of photos."²⁷⁶ The proliferation of revenge porn creates an avenue not only for humiliation of its subjects, but also for their extortion. The government may have a legitimate argument for secondary effects, but it is by no means

²⁷¹ See *supra* Part III.C.

²⁷² As in *ACLU v. Reno*, a court would likely find that California's interest is in the "primary effects of 'indecent' and 'patently offensive' speech, rather than any "secondary" effect of such speech." 521 U.S. at 868.

²⁷³ *Boos v. Barry*, 485 U.S. 312, 321 (1988); see also *supra* notes 160–64 and accompanying text.

²⁷⁴ *Hudson*, *supra* note 140, at 76–77 (citing *Phillips v. Borough of Keyport*, 107 F.3d 164, 168–69 (3d Cir. 1997)).

²⁷⁵ See *Laird*, *supra* note 2.

²⁷⁶ Jessica Roy, *Victims of Revenge Porn Speak Out Against Craig Brittain, Founder of Is Anybody Down*, BETABEAT (Feb. 4, 2013 2:40 PM), <http://betabeat.com/2013/02/victims-of-revenge-porn-speak-out-against-craig-brittain-and-is-anybody-down/#ixzz2ljSYqAxA>.

certain a court would be persuaded by it.²⁷⁷ And even if a court did buy such an argument, the statute would still be subject to intermediate scrutiny, which requires narrow tailoring.²⁷⁸ As discussed above, the statute likely fails this prong and thus, likely fails intermediate scrutiny as well.²⁷⁹

C. OBSCENITY, INDECENCY, AND PORNOGRAPHY

The Supreme Court would likely consider speech that constitutes “revenge porn” to be low-value, indecent expression.²⁸⁰ But, indecency is not a currently established unprotected category of speech.²⁸¹ Revenge porn is of low social value because it is not likely that its protection is essential to a free marketplace of ideas.²⁸² However, a baseline rule of First Amendment jurisprudence is that the government may not prohibit speech based on its offensiveness to society. While obscenity has been deemed to be so worthless as to fall outside of First Amendment protection, indecency is still considered protected expression. Here, because pornography is not synonymous with obscenity, the government may not regulate revenge porn without limit and will face several problems in attempting to regulate it as either obscene or indecent.²⁸³

²⁷⁷ Even were a court to apply the secondary effects doctrine, it would still subject the statute to intermediate scrutiny, which requires a significant government interest. See Part III.A. A court may not find as significant an interest in preventing extortion than an interest in protecting against the repercussions of revenge porn as discussed *supra* in Part I.B.

²⁷⁸ See *supra* Part IV.A.

²⁷⁹ *Id.*

²⁸⁰ See *supra* notes 190–192 and accompanying text.

²⁸¹ See *FCC v. Pacifica*, 438 U.S. 726, 747 (1978).

²⁸² Danielle Keats Citron & Mary Anne Franks, *Criminalizing Revenge Porn*, Wakeforest L. Rev. (forthcoming 2014). “The publication of revenge porn does not produce better democratic citizens It does not promote civic character or educate us about cultural, religious, or political issues.” *Id.* However, the argument can and has been made that sexual material may convey information or have artistic value. See Shaman, *supra* note 121, at 305–06. Moreover, Eric Goldman has argued that there may be social value in the dissemination of indecent photos that are of public concern. See *infra* notes 289–91 and accompanying text. However, the existence of a narrow exception for material of public concern or of high artistic value would safeguard against such concerns. *Id.*

²⁸³ See *supra* Part III.D.

First, revenge porn media does not necessarily fall within obscenity.²⁸⁴ To constitute obscenity, an image would have to “appeal to the prurient interest,” be “patently offensive,” and depict “sexual conduct.”²⁸⁵ As California’s legislation does not require the image depict “sexual conduct,” but rather only “intimate body parts,” much of what the law covers would fall outside of obscenity jurisprudence.²⁸⁶

Second, because indecency is a protected speech category, laws regulating such speech are subject to the traditional standards of review. It is safe to say that nearly all, if not all, material falling within California’s statute is indecent.²⁸⁷ However, such material and the mode of expressing it inherently conveys an idea — specifically, that of revenge. The First Amendment stands to prohibit the government from prohibiting speech based on its disagreeability.²⁸⁸ Michael Perry has stated, “That the ideas conveyed by obscene materials may be hateful does not make them any less ideational,” and that “even reprehensible ideas such as Nazi ideology are nonetheless ideas.”²⁸⁹ Accordingly, it is likely that a court would apply the strict scrutiny analysis detailed in Part IV.A and conclude that section 647(4) is likely unconstitutional.

Furthermore, indecency jurisprudence revolves primarily around when the government may regulate speech to shield minors from viewing offensive content online. California’s justification for its revenge porn legislation does not purport to protect children from encountering offensive content online.²⁹⁰ It is unclear what amount of regulation of indecent

²⁸⁴ See *Roth v. United States*, 354 U.S. 476, 487 (1957).

²⁸⁵ *Miller v. California*, 413 U.S. 15, 25 (1973).

²⁸⁶ See Cal. Penal Code § 647 (West 2013).

²⁸⁷ To fall under section 647(4), media must depict “any portion of the genitals, and in the case of a female, also includes any portion of the breasts below the top of the areola, that is either uncovered or visible through less than fully opaque clothing.” Cal. Penal Code § 647 (West 2013).

²⁸⁸ *Texas v. Johnson*, 491 U.S. 397, 414 (1989).

²⁸⁹ Shaman, *supra* note 121, at 305.

²⁹⁰ See *supra* Part II. The legislative history cites the case of Audrie, a fifteen-year-old whose nude photos were posted without her consent online. *Id.* The law does not aim to protect children from viewing offensive content online, but rather aims to protect both children and adults from having their depictions posted online without their consent. *Id.*

online communication courts will tolerate as constitutional.²⁹¹ However, these cases also indicate that, as a low-value speech category, indecent speech may be regulated to some extent. For example, if the Supreme Court had felt strongly about the FCC's harsh definition of and policy on indecency, it presumably would not have sidestepped the constitutional issues in *Fox Television II*.²⁹² Accordingly, the only certainty is that California may regulate indecent material without violating the First Amendment, so long as its regulation passes the applicable standard of review.

V. LOOKING FORWARD: RECONCILING COMPETING GOALS TO ACHIEVE CONSTITUTIONALLY-SOUND LEGISLATION

The problem of revenge porn proves to be a constitutionally tricky one. California's legislation is a step in the right direction, but needs modification to be effective and withstand constitutional scrutiny. Other states should learn from section 647(4)'s shortcomings in drafting their own anti-revenge porn legislation. As a start, in order to narrowly tailor legislation to achieve California's purpose, legislators ought to include self-shots.²⁹³ Many past victims took the photos themselves and the exclusion of such victims renders the law inadequate.²⁹⁴

Second, legislators should consider including an exception that excludes material with serious literary, artistic, political, or scientific value, as does the *Miller* test.²⁹⁵ Franks cites as a constitutional weakness of the California law its lack of "clear exceptions for commercial images, reporting, investigation, and prosecution of unlawful conduct, or images relating to the public interest."²⁹⁶ Exceptions such as these would keep the law from chilling constitutionally valuable speech. Professor of law Eric Goldman

²⁹¹ See *supra* notes 205–07 and accompanying text.

²⁹² *Id.* However, it is important to note that the FCC acts in a special capacity. See *supra* note 220. Congress delegated power to the FCC to regulate broadcast media, authorization that states do not enjoy. *Id.*

²⁹³ *Podcast, supra* note 9.

²⁹⁴ See *supra* note 256 and accompanying text; see also *supra* Part IV.A.

²⁹⁵ See *supra* note 178 and accompanying text.

²⁹⁶ Franks, *supra* note 32.

gave the example of Anthony Weiner's infamous nude self-shots.²⁹⁷ As a person of legitimate public interest, Anthony Weiner's actions are of public concern.²⁹⁸ Goldman stated that a recipient of such photos "might want to divulge [them] to prove his or her story as part of their ability to engage in this important social discourse."²⁹⁹ An exception for media of public concern would allow people to participate in such dialogue. Further, the exception for serious literary, artistic, political, or scientific value should be an objective, national standard because in *Ashcroft v. ACLU* some Supreme Court justices have voiced their beliefs that subjective standards that vary with geographic location are unconstitutional as applied to the Internet.³⁰⁰

Third, anti-revenge porn statutes should be entirely based on objective standards, rather than subjective.³⁰¹ For example, Franks has suggested that a statute could prohibit dissemination of photos where the subject has a "reasonable expectation of privacy or confidentiality" in the photo.³⁰² Section 647(4)'s requirement of "circumstances where the parties agree or understand that the image shall remain private" is a subjective standard.³⁰³

Fourth, criminal laws targeting revenge porn are preferable to civil laws.³⁰⁴ Civil litigation is expensive and further publicizes the embarrassing material.³⁰⁵ Further, courts are tending to interpret section 230 immunity more narrowly and decline to grant immunity to sites that induce users to engage in criminal activity.³⁰⁶ Where a state criminalizes revenge porn, victims may also have a remedy under the CDA.³⁰⁷

Lastly, the New Jersey statute serves as a more comprehensive and constitutionally sound statute. The pertinent part of the statute states:

²⁹⁷ *Podcast, supra* note 9.

²⁹⁸ *See id.*

²⁹⁹ *Id.* In such a case, Goldman states that the recipient "has no credibility in the media" and "the proof is in the photos." *Id.*

³⁰⁰ *See* 535 U.S. 564, 589–90 (2002); *see also supra* notes 229–33 and accompanying text.

³⁰¹ *See supra* note 268 and accompanying text.

³⁰² Franks, *supra* note 32; *see also id.*

³⁰³ *See supra* note 268 and accompanying text.

³⁰⁴ *See supra* notes 33–43 and accompanying text.

³⁰⁵ *Id.*

³⁰⁶ *See supra* notes 43–45 and accompanying text.

³⁰⁷ *Id.*

An actor commits a crime of the third degree if, knowing that he is not licensed or privileged to do so, he discloses any photograph, film, videotape, recording or any other reproduction of the image of another person whose intimate parts are exposed or who is engaged in an act of sexual penetration or sexual contact, unless that person has consented to such disclosure.³⁰⁸

New Jersey's law is commendable because it does not exclude self-shots and it deems revenge porn an invasion of privacy.³⁰⁹ The statute has proved successful in prosecuting revenge porn cases already and has not yet been challenged on constitutional grounds.³¹⁰ Further, Franks believes that "California's categorization of revenge porn as a misdemeanor sends a weak message to would-be perpetrators and will be a less effective deterrent than a law like New Jersey's."³¹¹ New Jersey's law makes it a third-degree crime and carries a prison sentence of three to five years.³¹² California's law threatens only a six-month jail sentence.³¹³

Looking forward, California, as well as other states contemplating passing anti-revenge porn legislation should study First Amendment jurisprudence carefully to determine how to achieve constitutionally-sound legislation. The problem of revenge porn is real, and victims and potential victims deserve legal redress, which they lack in the vast majority of jurisdictions today.

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³⁰⁸ Franks, *supra* note 32; *see also* N.J. Stat. § 2C:14-9 (West 2012).

³⁰⁹ *Podcast*, *supra* note 9.

³¹⁰ *Id.*

³¹¹ Keats & Franks, *supra* note 282.

³¹² N.J. Stat. § 2C:14-9 (West 2012).

³¹³ S. B. 255, Reg. Sess. (Cal. 2013).

VIRTUAL CLONING: TRANSFORMATION OR IMITATION?

Reforming the Saderup Court's Transformative Use Test for Rights of Publicity

SHANNON FLYNN SMITH*

INTRODUCTION

Tupac Shakur, dead nearly sixteen years, rose up slowly from beneath the stage at the 2012 Coachella Valley Music & Arts Festival in Indio, California to rouse the crowd and perform his songs *2 of Amerikaz Most Wanted* and *Hail Mary* alongside rap artists Snoop Dogg and Dr. Dre.¹ Celine Dion and Elvis Presley belted *If I Can Dream* together in a duet on the hit performance show *American Idol* in 2007,² thirty years after Presley's

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¹ Claire Suddath, *How Tupac Became a Hologram (Is Elvis Next?)*, BUSINESSWEEK (Apr. 16, 2012), <http://www.businessweek.com/articles/2012-04-16/how-tupac-became-a-hologram-plus-is-elvis-next>; *Tupac Hologram Snoop Dogg and Dr. Dre Perform Coachella Live 2012*, YOUTUBE (Apr. 17, 2012), <http://www.youtube.com/watch?v=TGbrFmPBV0Y> [hereinafter *Tupac Live Hologram*].

² *American Idol Elvis & Celine Dion "If I Can Dream,"* YOUTUBE (Jan. 8, 2010), <http://www.youtube.com/watch?v=plHtPG6eMio>.

death.³ In 2011, Mariah Carey performed live across five European countries — Germany, Croatia, Macedonia, Montenegro, and Poland — simultaneously.⁴ Pop artist Beyoncé performed at the Billboard Music awards in 2011; in fact several of her did: Beyoncé performed, at one point, with over forty replicas of herself.⁵ Hologram technology made all of these, and many similar performances, possible and has since transformed the entertainment industry.

The excitement of this new technology has not come without concern, however, and the legal issues it raises are many: right of publicity infringement, copyright infringement, and trademark infringement, to name a few.⁶ Not all celebrities, or their families, are thrilled with the technology. Some estates, like Marilyn Monroe's, have sought to stop digital re-creators from creating holograms of their deceased celebrities under these different legal theories.⁷ Tupac Shakur's mother consented to the use of her son's likeness in the Coachella concert, but even when a license is granted, re-creators may exceed the scope of that license, raising right-of-publicity issues.⁸

One main concern this hologram, or virtual cloning, technology presents is right-of-publicity infringement. Rights of publicity, as creatures of state law, provide a cause of action to celebrities (and sometimes their

³ Molly Ivins, *Elvis Presley Dies; Rock Singer Was 42*, N.Y. TIMES, Aug. 16, 1977, at A1, available at <https://www.nytimes.com/learning/general/onthisday/big/0816.html>.

⁴ *Mariah Carey Hologram Performs Simultaneously in Five Cities for Deutsche Telekom Campaign*, THE DRUM (Nov. 18, 2011, 12:14 PM), <http://www.thedrum.com/news/2011/11/18/mariah-carey-hologram-performs-simultaneously-five-cities-deutsche-telekom-campaign> [hereinafter *Mariah Carey Hologram*].

⁵ *Tupac's Coachella Performance and More Hologram Wins and Fails (VIDEO)*, THE DAILY BEAST (Apr. 8, 2012), <http://www.thedailybeast.com/articles/2012/04/18/tupac-s-coachella-performance-and-more-hologram-wins-fails-video.html>.

⁶ See generally Joseph J. Beard, *Clones, Bones and Twilight Zones: Protecting the Digital Persona of the Quick, the Dead and the Imaginary*, 16 BERKELEY TECH. L.J. 1165 (2001) (describing virtual cloning techniques and dangers).

⁷ Eriq Gardner, *Marilyn Monroe Estate Threatens Legal Action over Hologram (Exclusive)*, HOLLYWOOD REP. (June 11, 2012, 12:40 PM), <http://www.hollywoodreporter.com/thr-esq/marilyn-monroe-estate-hologram-legal-334817> (displaying a cease-and-desist letter from Monroe's estate to Digicon requesting Digicon stop a concert featuring Monroe's hologram).

⁸ See *No Doubt v. Activision Publ'g, Inc.*, 122 Cal. Rptr. 3d 397, 411 (Cal. Ct. App. 2011) (providing an example of a right-of-publicity claim for exceeding the scope of a license to use a likeness).

estates)⁹ when the celebrities' likenesses are used without permission.¹⁰ Where the celebrity is alive and able to consent to the performance, as with Mariah Carey's concert, these issues can easily be resolved through licensing.¹¹ Where a celebrity has not consented and is either alive or was domiciled at death in a state that recognizes postmortem rights of publicity, the celebrity or estate may bring a right-of-publicity infringement claim. A First Amendment defense may still defeat that claim, however, depending on the facts of the case and the jurisdiction.

States have an amalgam of different protections for rights of publicity, and as such, several different First Amendment defense tests have developed across jurisdictions to protect legitimate uses of a celebrity's likeness.¹² California, the hotbed of celebrities and celebrity right-of-publicity claims, has adopted the transformative use test to determine whether the use of a likeness is protected by the First Amendment or whether a celebrity's rights of publicity will prevail. This new virtual cloning technology and its recent right-of-publicity challenges will pose new questions when balancing First Amendment interests under the transformative use test, particularly because California and others who have adopted the test have provided several different iterations of what may constitute a transformative use, and those iterations may lead to conflicting results. As such, courts should abandon these several iterations and instead adopt a single iteration of the transformative use test to better direct courts and parties alike.

This article focuses on the transformative use test applied by California and other United States courts when analyzing the First Amendment defense to right-of-publicity infringement claims in the context of newly developing virtual-cloning technology.¹³ Part I examines this virtual-cloning

⁹ See J. THOMAS MCCARTHY, *THE RIGHTS OF PUBLICITY AND PRIVACY* § 9:18 (2013) (stating that twenty states have recognized postmortem rights of publicity, six by common law and fourteen by statute).

¹⁰ RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 46 (2012).

¹¹ See *Mariah Carey Hologram*, *supra* note 4.

¹² See generally Andreas N. Andrews, Note, *Stop Copying Me: Rethinking Rights of Publicity Verses the First Amendment*, 32 *TEMP. J. SCI. TECH. & ENVTL. L.* 127 (2013).

¹³ This work is intended to extend the discussion from my previous work, which considered the implications of virtual cloning and postmortem right-of-publicity choice-of-law complications that arise under current state right-of-publicity laws. See Shannon Flynn Smith, *If It Looks like Tupac, Walks like Tupac, and Raps like Tupac, It's*

technology and the Tupac Shakur concert. Part II sets out the current state of First Amendment defenses by examining the Supreme Court precedent on the issue and the cases where courts have applied the transformative use test. Part III then applies the transformative use test to the Tupac Shakur virtual clone concert to demonstrate that the different iterations of the transformative use test can lead to conflicting results using the same set of facts. Part IV concludes, based on this analysis using the Tupac virtual clone, that because the current iterations of the transformative use test are unclear and lead to contradictory results, courts should adopt the Mere Celebrity Likeness Test as the single iteration of the transformative use test.

I. VIRTUAL CLONING TECHNOLOGY & THE TUPAC SHAKUR VIRTUAL CLONE CONCERT

The Tupac Shakur virtual clone that performed at the Coachella music festival and other virtual clones like it present a unique question in applying First Amendment defenses to this new technology. At the concert, the Tupac Shakur virtual clone performed the song *Hail Mary* for a live audience, but Tupac had never actually performed this song live during his life; re-creators enabled the virtual clone to sing this song in front of an audience for the very first time.¹⁴ The re-creators' performance enabled the Tupac virtual clone to dance and rap alongside two other rappers, Dr. Dre and Snoop Dogg.¹⁵ The re-creators also added language never before spoken by the living Tupac Shakur: "What the fuck is up, Coachella!"¹⁶ The Coachella music festival in fact did not even exist until three years after Tupac's death.¹⁷ Finally, the re-creators took out the first lines of the

Probably Tupac: Virtual Cloning and Postmortem Right-of-Publicity Implications, 2013 MICH. ST. L. REV. 1719.

¹⁴ Ewan Palmer, *Tupac Shakur Hologram 'Performs' at Coachella 2012 [Video]*, INTERNATIONAL BUSINESS TIMES (Apr. 16, 2012, 11:32 AM), <http://www.ibtimes.co.uk/tupac-shakur-2pac-performs-coachella-hologram-dr-328517>.

¹⁵ *Id.*

¹⁶ Jason Lipshutz, *Opinion: The Problem with the Tupac Hologram*, BILLBOARD (Apr. 16, 2012, 7:25 PM), <http://www.billboard.com/articles/columns/the-juice/494288/opinion-the-problem-with-the-tupac-hologram>.

¹⁷ Suddath, *supra* note 1.

recorded *Hail Mary* song, “Killuminati all through your body, the blow’s like a twelve gauge shotty.”¹⁸

Other than these small changes, the virtual clone was so nearly identical to the deceased Tupac that some fans did not realize that the virtual clone was not the real Tupac. One fan at the concert was quoted as saying, “Wow, it was a hologram? . . . It was ridiculously realistic. Unbelievable.”¹⁹ After all, the clone danced like Tupac; rapped like Tupac; dressed like Tupac, wearing no shirt, baggy pants sagging below the waist, Timberland boots, and even Tupac’s characteristic gold-chain necklace; and donned the same “Thug Life” tattoo across its chest as the deceased Tupac sported.²⁰ As such, the re-creators added their own touches by creating a completely new visual performance — *Hail Mary* — but the idea of the performance was to make the clone resemble the true Tupac to the fullest extent possible.²¹

The Tupac virtual clone, while appearing to be a three-dimensional replica of the artist, was actually a flat optical illusion created by reflecting the image off of an angled piece of glass outside of the view of the audience;²² this distinction, however, would not likely change any First Amendment

¹⁸ Compare *Tupac Live Hologram*, *supra* note 1, with TUPAC SHAKUR, *Hail Mary*, on THE DON KILLUMINATI: THE 7 DAY THEORY (Koch Records 1996).

¹⁹ Jacob E. Osterhout, *It’s Tupac, Live 3-D Hologram Resurrects Rapper for Performance at Festival*, N.Y. DAILY NEWS, Apr. 17, 2012, at 38. Another fan later said, “The hologram was so real that I kept looking over at Snoop to catch his reaction at having his buddy back on stage with him after all of this time . . . He seemed happy.” *Id.*

²⁰ Cyrus Farivar, *Tupac “Hologram” Merely Pretty Cool Optical Illusion*, ARSTECHNICA (Apr. 16, 2012, 9:45 PM), <http://arstechnica.com/science/2012/04/tupac-hologram-merely-pretty-cool-optical-illusion/>; Osterhout, *supra* note 19, at 38.

²¹ Anthony McCartney, *Holograms Present Celebs with New Afterlife Issues*, MPRNEWS (Aug. 21, 2012), <http://minnesota.publicradio.org/display/web/2012/08/21/arts/holograms-present-celebs-with-new-afterlife-issues/> (quoting a Tupac re-creator as saying, “I also hope that the people who do follow us do it with the same care and the same sense of dedication because I would hate to see a bad version of Marilyn Monroe, a bad version of Elvis up there”).

²² Hayley Tsukayama, *How the Tupac ‘Hologram’ Works*, WASH. POST (Apr. 18, 2012), http://www.washingtonpost.com/business/technology/how-the-tupac-hologram-works/2012/04/18/gIQA1ZVyQT_story.html. For a diagram of the technology used to project this hologram, see Reggie Ugwu, *Everything You Ever Wanted to Know About the Tupac Hologram*, COMPLEX (Apr. 18, 2012, 5:53 PM), <http://www.complex.com/tech/2012/04/everything-you-ever-wanted-to-know-about-the-tupac-hologram>.

defense's success.²³ Whether the digital re-creation is used on-screen in a movie or off-screen in a virtual clone concert like Tupac's, two approaches are typically used to create virtual clones: the direct approach and the indirect approach.²⁴ Under one version of the direct approach, called motion capture, the re-creator uses an actor or the artist himself by attaching sensors to the artist and then recording the light refractions in front of a blue or green screen.²⁵ The re-creator can then manipulate this "human blueprint" in a computer program to do anything the re-creator would like.²⁶

Under the indirect approach, the artist is not present. In the indirect-approach method, re-creators use film, photos, and other media of the artist taken during the artist's life and then incorporate the person's image, voice, and even mannerisms from this material to create a completely new digital version of the artist.²⁷ The re-creators of the Tupac virtual clone would not reveal their exact strategy for creating the clone, but as Tupac was not available, some version of the indirect approach was used.²⁸ One method re-creators use in the indirect approach, called photogrammetry, is to feed images of the artist into computer software that establishes a three-dimensional coordinate point of the artist's face in a given photo and then repeats this process to establish all of the points of the face to create the clone.²⁹

Re-creators also use voice techniques to add new language to a performance. Digital voice compilation software allows a re-creator to input the voice of an artist from soundtracks, movies, and other audio recordings

²³ Cf. *Comedy III Prods., Inc. v. Gary Saderup, Inc.*, 21 P.3d 797, 811 (Cal. 2001) (stating that regardless of the skill employed to create the depiction of an artist, the work may still lack transformative elements).

²⁴ Beard, *supra* note 8, at 1172.

²⁵ *Id.* at 1172–73.

²⁶ Joel Anderson, Comment, *What's Wrong with This Picture? Dead or Alive: Protecting Actors in the Age of Virtual Reanimation*, 25 LOY. L.A. ENT. L. REV. 155, 171 (2005) (quoting Kenneth Turan, *A Bumpy, Noisy Ride: Robert Zemeckis' Visually Striking 'Polar Express' Pumps up a Classic Children's Book*, L.A. TIMES, Nov. 10, 2004, at E1).

²⁷ Beard, *supra* note 6, at 1188–89. This method is called photogrammetry. *Id.* at 1188. Other possible indirect-approach methods include creating a bust from a life mask, creating a bust by referencing photos, or scanning a look-alike. *Id.* at 1186.

²⁸ See Suddath, *supra* note 1.

²⁹ Joseph J. Beard, *Casting Call at Forest Lawn: The Digital Resurrection of Deceased Entertainers — A 21st Century Challenge for Intellectual Property Law*, 8 HIGH TECH. L.J. 101, 111–12 (1993).

that can then be broken down into its base components and reconstructed.³⁰ This will then allow the re-creator to make a virtual clone speak new words never spoken in life. Re-creators may also simply use impersonators as an alternative where this voice technology is not available or is too expensive.³¹ This nearly exact replication of a dead individual raises the question of whether the estate would have to consent to this re-creation or whether by creating a completely new product using the indirect approach — the virtual clone — the re-creators would have a successful First Amendment defense to any possible right-of-publicity infringement claim.

II. RIGHTS OF PUBLICITY & THE FIRST AMENDMENT

Rights of privacy predated, and ultimately led to the establishment of, rights of publicity but were not a consideration for the courts until nearly 1900.³² It was not until the 1960s that rights of privacy began to develop as a concept of torts. In a law review article, Dean William Prosser identified four specific causes of action encompassing the rights of privacy: (1) intrusion,³³ (2) disclosure,³⁴ (3) false light,³⁵ and (4) appropriation.³⁶ The fourth tort, invasion of privacy by appropriation, then led to the courts' recognizing a commercial property right in one's likeness — rights of publicity.³⁷ Since this development of rights of publicity, individual states have

³⁰ Beard, *supra* note 6, at 1192.

³¹ Anderson, *supra* note 26, at 172–73.

³² Justice Louis Brandeis and Samuel Warren were two of the earliest scholars and jurists to consider rights of privacy, and they voiced their concerns in an 1890 Harvard Law Review article, *The Right to Privacy*. Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 195–96 (1890), available at http://www.californialawreview.org/assets/pdfs/misc/prosser_privacy.pdf.

³³ William L. Prosser, *Privacy*, 48 CALIF. L. REV. 383, 389 (1960) (“[i]ntrusion upon plaintiff’s seclusion or seclusion or solitude, or into his private affairs”).

³⁴ *Id.* (“[p]ublic disclosure of embarrassing private facts about the plaintiff”).

³⁵ *Id.* (“[p]ublicity which places the plaintiff in a false light in the public eye”).

³⁶ *Id.* (“[a]ppropriation, for the defendant’s advantage, of the plaintiff’s name or likeness”).

³⁷ See *Haelan Labs., Inc. v. Topps Chewing Gum, Inc.*, 202 F.2d 866, 868 (2d Cir. 1953) (coining the phrase “right of publicity” to describe these property-like rights in one’s own likeness).

addressed this tort in very different ways. Most states, however, require the following prima facie elements for a right-of-publicity infringement action: “(1) defendant, *without permission*, has used some *aspect of identity or persona* in such a way that plaintiff is *identifiable* from the defendant’s use; and (2) defendant’s use is likely to *cause damage to the commercial value* of that persona.”³⁸

Other than these prima facie elements, however, states’ right-of-publicity protections vary greatly. For example, Indiana, the state known for providing the most protection for rights of publicity,³⁹ protects an artist’s “name, voice, signature, photograph, image, likeness, distinctive appearance, gestures, [and] mannerisms” but makes exemptions for literary works, television programs, works of art, and anything that has “political or newsworthy value.”⁴⁰ It further protects these rights for one hundred years after the death of the artist.⁴¹ New York, on the other hand, does not recognize postmortem rights of publicity at all,⁴² and its protection extends only to “the name, portrait or picture of any living person.”⁴³ Therefore, the celebrity may only bring a cause of action for right-of-publicity infringement for the unconsented use of these narrow aspects of a persona, and an estate has no claim after the celebrity’s death.

California, the state examined in this article to determine the legitimacy of a First Amendment defense in the Tupac virtual clone concert,⁴⁴

³⁸ Thomas Phillip Boggess V, *Cause of Action for an Infringement of the Right of Publicity*, in 31 CAUSES OF ACTION § 5 (Clark Kimball & Mark Pickering eds., 2d ed. 2013) (emphasis added) (citing RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 46 (2012)).

³⁹ See 1 MCCARTHY, *supra* note 9, § 6:59.

⁴⁰ IND. CODE § 32-36-1-1 (2013).

⁴¹ *Id.* § 32-36-1-8.

⁴² Without postmortem rights protection, the likeness of the celebrity becomes a part of the public domain upon the celebrity’s death, and anyone may use it. See ‘Rights of Publicity’ Extended Beyond the Grave, NPR (Sept. 4, 2012, 1:00 PM), <http://www.npr.org/2012/09/04/160551338/rights-of-publicity-extended-beyond-the-grave>.

⁴³ N.Y. CIV. RIGHTS LAW §§ 50–51 (McKinney 2013).

⁴⁴ California law would be applicable to this use of Tupac’s likeness had Tupac’s mother not consented to the performance or had the use of the likeness exceeded the scope of the license. See Jana M. Moser, *Tupac Lives! What Hologram Authors Should Know About Intellectual Property Law*, BUS. L. TODAY, Sept. 2012, at 3, available at <http://apps.americanbar.org/buslaw/blt/content/2012/09/all.pdf> (stating that Tupac’s mother, who holds Tupac’s postmortem rights of publicity, granted permission to Dr. Dre to use

provides right-of-publicity protection both statutorily and by common law.⁴⁵ California provides statutory protection for a deceased celebrity's "name, voice, signature, photograph, or likeness, in any manner, on or in products, merchandise, or goods, or for purposes of advertising or selling, or soliciting purchases of, products, merchandise, goods, or services"⁴⁶ for seventy years following the artist's death.⁴⁷ That same statute also delineates that the following will not be considered a product, article of merchandise, good, or service for application of the statute: "a play, book, magazine, newspaper, musical composition, audiovisual work, radio or television program, single and original work of art, work of political or newsworthy value, or an advertisement . . . for any of these works . . . if it is fictional or nonfictional entertainment, or a dramatic, literary, or musical work."⁴⁸ This legislative remedy is meant to "complement, not supplant"

the likeness in the clone); see, e.g., *No Doubt v. Activision Publ'g, Inc.*, 122 Cal. Rptr. 3d 397, 411 (Cal. Ct. App. 2011) (providing an example of a right-of-publicity claim for exceeding the scope of a license to use a likeness). Under the domicile-at-death rule, the law of the artist's domicile at death governs questions of the availability of postmortem right-of-publicity protections. 2 McCARTHY, *supra* note 9, § 11:15. Therefore, California law, including the transformative use test adopted in *Comedy III Productions, Inc. v. Gary Saderup, Inc.*, 21 P.3d 797, 808 (Cal. 2001), would be applicable to any case brought regarding this hologram concert because California was Tupac's domicile at death, Jon Pareles, *Tupac Shakur, 25, Rap Performer Who Personified Violence, Dies*, N.Y. TIMES, Sept. 14, 1996, at 1.

⁴⁵ *Kirby v. Sega of Am., Inc.*, 60 Cal. Rptr. 3d 607, 612 (Cal. Ct. App. 2006).

⁴⁶ CAL. CIV. CODE § 3344.1(a)(1) (West 2013). It is arguable that the Coachella concert used Tupac Shakur's likeness in a service, as the concert was not a tangible good. Further, any copies of the concert that the re-creators sold would arguably fall within this statute as goods using Tupac's likeness. Beard, *supra* note 29, at 159 (asserting that the showing of a film or theatrical exhibition may not fall within the goods category but that the sale of the film on a videocassette would be considered the sale of a good). If the concert did fall within the statute on the first instance, a court would still need to consider whether it falls within a statutory exception.

⁴⁷ § 3344.1(g).

⁴⁸ *Id.* § 3344.1(a)(2). This statutory exception, meant to protect works where an artist's life is depicted, such as books or movies about the artist, may also apply to the Tupac virtual clone. See Beard, *supra* note 29, at 161. A re-creator of the Tupac virtual clone may assert that this concert falls within the "audiovisual work . . . if it is fictional or nonfictional entertainment" category of protection and as such is a statutory exception to any right-of-publicity claim Tupac's rights-holder could bring. *Id.* at 164. This statutory defense is outside the scope of this article, however.

common law rights of publicity, in which the plaintiff must prove that there was unauthorized use of the plaintiff's likeness that results in injury, regardless of whether the purpose is commercial.⁴⁹

A. SUPREME COURT PRECEDENT: *ZACCHINI V. SCRIPPS-HOWARD BROADCASTING CO.*

Due in part to the distinct nature of these state laws,⁵⁰ the United States Supreme Court has only addressed state rights of publicity once.⁵¹ In *Zacchini v. Scripps-Howard Broadcasting Co.*, the Supreme Court heard a case arising from the Ohio statutory right of publicity.⁵² In *Zacchini*, plaintiff Hugo Zacchini brought suit after a local news station rebroadcast Zacchini's fifteen-second human cannonball routine in its entirety.⁵³ Zacchini asserted that this violated his Ohio rights of publicity because the television station rebroadcast the entire act and did not compensate him.⁵⁴ The television station asserted a First Amendment defense, and the Ohio Supreme Court found for the television station in holding that the station was protected by the First Amendment and could broadcast matters of public interest.⁵⁵ The U.S. Supreme Court granted certiorari and considered the issue of whether the First and Fourteenth Amendments could shield the television station from damages arising from a state right-of-publicity infringement claim when the performance had been rebroadcast in its entirety.⁵⁶

In balancing the state interests in compensating publicity rights holders and providing public access to information, the Court found that

⁴⁹ *Kirby*, 60 Cal. Rptr. 3d at 612.

⁵⁰ *Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562, 566 (1977) (stating that if the judgment rested on independent state grounds, certiorari should be denied).

⁵¹ MCCARTHY, *supra* note 9, §1:33.

⁵² 433 U.S. at 565.

⁵³ *Id.* at 563-64.

⁵⁴ *Id.* at 564.

⁵⁵ The Ohio Supreme Court, in its syllabus wrote:

"A TV station has a privilege to report in its newscasts matters of legitimate public interest which would otherwise be protected by an individual's right of publicity, unless the actual intent of the TV station was to appropriate the benefit of the publicity for some non-privileged private use, or unless the actual intent was to injure the individual."

Id. at 566 (quoting 47 Ohio St. 2d 224 (1976)).

⁵⁶ *Id.* at 565.

“[w]herever the line in particular situations is to be drawn between media reports that are protected and those that are not, we are quite sure that the First and Fourteenth Amendments do not immunize the media when they broadcast a performer’s entire act without his consent.”⁵⁷ The Court reasoned that broadcasting the act in its entirety threatened the economic value of Zacchini’s performance, which lay in his right to control the publicity of the act.⁵⁸

The Court stated that “unlike the unauthorized use of another’s name for purposes of trade or the incidental use of a name or picture by the press, [this] goes to the heart of petitioner’s ability to earn a living as an entertainer.”⁵⁹ Recognizing that this may be the strongest case for a right-of-publicity claim, the Court decided that this was “not the appropriation of an entertainer’s reputation to enhance the attractiveness of a commercial product, but the appropriation of the very activity by which the entertainer acquired his reputation in the first place.”⁶⁰ The Court found important that Zacchini was seeking compensation rather than an injunction, and it held that the First Amendment did not require that the press have the right to rebroadcast Zacchini’s performance where Ohio chose to enact right of publicity legislation.⁶¹

B. THE TRANSFORMATIVE USE TEST

Without more guidance on the appropriate balance between rights of publicity and the First Amendment, states have struggled to hone First Amendment tests to determine when there is “a privilege to report matters of legitimate public interest even though such reports might intrude” on other rights, such as rights of publicity.⁶² For example, to weigh these interests, courts have created several different tests. Courts have used a “Predominant Purpose Test” and asked whether the predominant purpose of the use or portrayal is to serve a social function valued by free speech or

⁵⁷ *Id.* at 574–75.

⁵⁸ *Id.* at 575.

⁵⁹ *Id.* at 576.

⁶⁰ *Id.*

⁶¹ *Id.* at 578.

⁶² *Id.* at 567 (internal quotation marks omitted).

to commercially exploit the likeness in the same way the celebrity would.⁶³ The Second Circuit established the *Rogers Test*, which asks whether the challenged work is wholly unrelated to the underlying work and whether the plaintiff's name is used for its advertisement and commercial value.⁶⁴ California has also used a "Public Interest Test" of sorts to ask whether the events are ones of public interest that the public has a right to know and the press has a right to tell.⁶⁵ The California Supreme Court considered these tests and others in *Comedy III Productions, Inc. v. Gary Saderup, Inc.* and instead adopted the transformative use test.⁶⁶

1. *The Origin of the Transformative Use Test: Copyright & Fair Use Analyses*

Taking from established copyright fair use analyses, the California Supreme Court was the first to import the copyright transformative use concept to weigh the First Amendment in right-of-publicity cases in.⁶⁷ Under copyright law, traditional fair use factors include: "(1) the purpose and

⁶³ Andrews, *supra* note 12, at 133; see *Presley's Estate v. Russen*, 513 F. Supp. 1339, 1356 (D.N.J. 1981). The court in this case held that THE BIG EL SHOW could not sustain its First Amendment defense against right-of-publicity infringement claims by the Elvis Presley estate because the predominant purpose behind the imitation show was for the defendant's own economic interest, and it did not have significant social value as a mere imitation without more. *Id.* at 1359.

⁶⁴ See *Rogers v. Grimaldi*, 875 F.2d 994, 1004 (2d Cir. 1989). In this case, the Second Circuit found for the defendant, MGM, who had produced the film "Fred and Ginger," which imitated Fred Astaire and Ginger Rogers's cabaret performances. *Id.* at 1004–05. The court found that the film's title both related to the product, the movie, and was not an advertisement in disguise. *Id.*

⁶⁵ Andrews, *supra* note 12, at 134; see *Montana v. San Jose Mercury News, Inc.*, 34 Cal. App. 4th 790, 793 (1995). In this case, the California Court of Appeal for the Sixth District held that a news story relating to past Superbowls and NFL player Joe Montana was a matter of public interest and protected by the First Amendment. *Id.* at 797.

⁶⁶ *Comedy III Prods., Inc. v. Gary Saderup, Inc.*, 21 P.3d 797, 806–09 (Cal. 2001).

⁶⁷ Matthew D. Bunker, *Free Speech Meets the Publicity Tort: Transformative Use Analysis in Right of Publicity Law*, 13 COMM. L. & POL'Y 301, 305 (2008). A second defense recognized in California is the public interest defense. *Arenas v. Shed Media U.S. Inc.*, 881 F. Supp. 2d 1181, 1190 (C.D. Cal. 2011). Under the public interest defense, "no cause of action will lie for the publication of matters in the public interest, which rests on the right of the public to know and the freedom of the press to tell it." *Id.* at 1191. This defense is beyond the scope of this article, however, because the concert was created by re-creators and would not otherwise be newsworthy, as it would not exist.

character of the use . . . ; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential market for the copyrighted work.”⁶⁸

In 1994, in *Campbell v. Acuff-Rose Music, Inc.*, the United States Supreme Court endorsed the idea of asking whether a use was transformative in considering the purpose and character of the use prong of the fair use test.⁶⁹ In *Campbell*, the Court considered whether the rap group 2 Live Crew’s song “Pretty Woman” could survive a copyright infringement claim brought by Ray Orbison, who wrote the original song “Oh, Pretty Woman,” by asserting a fair use defense.⁷⁰ To determine whether 2 Live Crew’s song constituted a fair use of Orbison’s song, the United States Supreme Court adopted the transformative use test, stating that it is a proper inquiry in a copyright fair use analysis to ask “whether the new work merely ‘supersede[s] the objects’ of the original creation, or instead adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message; it asks, in other words, whether and to what extent the new work is ‘transformative.’”⁷¹

The Court further stated that finding transformation was sufficient but not necessary to determine whether a new work could be considered a fair use.⁷² The Court reasoned that the goals of copyright — to “promote the Progress of Science and useful Arts”⁷³ — are furthered when transformative works are created; as such, the transformative use inquiry was appropriate to protect those original works that deserved protection when the second work in question did not add its own expression.⁷⁴ Further

⁶⁸ 17 U.S.C. § 107 (2006).

⁶⁹ 510 U.S. 569, 578 (1994) (“The central purpose of this investigation is to see, in Justice Story’s words, whether the new work merely ‘supersede[s] the objects’ of the original creation, or instead adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message; it asks, in other words, whether and to what extent the new work is ‘transformative.’” (quoting *Folsom v. Marsh*, 9 F. Cas. 342, 348 (C.C.D. Mass. 1841) (internal citations omitted))).

⁷⁰ *Id.* at 571–72.

⁷¹ *Id.* at 579 (internal citations omitted).

⁷² *Id.*

⁷³ U.S. CONST. art I, § 8, cl. 8.

⁷⁴ *Campbell*, 510 U.S. at 579.

justifying the transformative use test, the Court reasoned that the more transformative a secondary work was, “the less will be the significance of other factors, like commercialism, that may weigh against a finding of fair use.”⁷⁵ The Court stated that 2 Live Crew’s song was a parody and “has an obvious claim to transformative value”⁷⁶ deserving of fair use protection under the four-prong fair use test.⁷⁷

2. *Applying the Transformative Use Test to Rights of Publicity*

In drawing upon this Supreme Court precedent in *Comedy III Productions, Inc. v. Gary Saderup, Inc.*, the California Supreme Court also adopted the transformative use test as the applicable First Amendment defense test to be applied in right-of-publicity claims.⁷⁸ In *Saderup*, plaintiff Comedy III Productions owned the rights to the images of the Three Stooges.⁷⁹ The defendant, Gary Saderup, made charcoal-type drawings that he then silkscreened onto various products and sold.⁸⁰ Saderup made a charcoal drawing of the Three Stooges and then sold this likeness on shirts without obtaining permission from Comedy III Productions.⁸¹ Saderup made approximately \$75,000 in profits from these shirts.⁸² When Comedy III Productions brought suit against Saderup for violating California’s postmortem-right-of-publicity statute, the district court enjoined Saderup from violating the statute by using the likeness of the Three Stooges.⁸³ On appeal, Saderup claimed that his conduct was protected by the First Amendment, and the California appellate court struck the injunction but affirmed the judgment of damages and attorneys’ fees.⁸⁴

The California Supreme Court, hearing the case on appeal, adopted the transformative use test to determine the essential balance between

⁷⁵ *Id.* at 578.

⁷⁶ *Id.*

⁷⁷ *Id.* at 594.

⁷⁸ *Comedy III Prods., Inc. v. Gary Saderup, Inc.*, 21 P.3d 797, 808 (Cal. 2001) (quoting *Campbell*, 510 U.S. at 579).

⁷⁹ *Id.* at 800.

⁸⁰ *Id.*

⁸¹ *Id.* at 800–01.

⁸² *Id.* at 801.

⁸³ *Id.*

⁸⁴ *Id.*

publicity rights and the First Amendment.⁸⁵ The Court recognized that rights of publicity and the First Amendment are in tension and that rights of publicity have the potential to frustrate the purposes of the First Amendment.⁸⁶ As such, the Court concluded that the “inquiry into whether a work is ‘transformative’ appears to us to be necessarily at the heart of any judicial attempt to square the right of publicity with the First Amendment.”⁸⁷ The Court recognized that the two also shared common goals: both rights of publicity and the First Amendment seek to encourage “free expression and creativity.”⁸⁸ Where a likeness is used without significant transformative elements, the Court stated that “protecting the fruits of artistic labor outweighs the expressive interests of the imitative artist.”⁸⁹ Similar to the transformative use justification in *Campbell*, the *Saderup* Court also suggested that where a work contains significant transformative elements, it is more deserving of First Amendment protection and is also not as likely to interfere with the original artist’s economic interest in his or her likeness.⁹⁰ As such, when a secondary work is transformative, First Amendment interests should prevail.⁹¹

In adopting the transformative use test though, the Court explicitly rejected applying the entire copyright fair use test to right-of-publicity claims.⁹² The Court was willing to adopt the first prong of the copyright fair use test — the purpose and character of the work — but was unwilling to apply the entire test because at least two prongs — the nature of the copyrighted work and the amount and substantiality of the portion used — were particularly designed to apply to “the partial copying of works of authorship ‘fixed in [a] tangible medium of expression.’”⁹³

⁸⁵ *Id.* at 808.

⁸⁶ *Id.* at 803.

⁸⁷ *Id.* at 808.

⁸⁸ *Id.* (“Both the First Amendment and copyright law have a common goal of encouragement of free expression and creativity, the former by protecting such expression from government interference, the latter by protecting the creative fruits of intellectual and artistic labor.”).

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.* at 809.

⁹² *Id.* at 807–08.

⁹³ *Id.* (quoting 17 U.S.C. § 102) (“[I]t is difficult to understand why these factors would be especially useful for determining whether the depiction of a celebrity likeness

Then looking to *Saderup*'s work, the Court recognized that the portraits were expressive works, for the purpose of entertaining, and done for financial gain, but this did not void the constitutional protection they should receive.⁹⁴ The Court found that the appropriate inquiry was whether the work in question "adds something new, with a further purpose or different character, altering the first new expression, meaning, or message," quoting the U.S. Supreme Court in *Campbell*.⁹⁵ The Court did not stop at this New Meaning Test,⁹⁶ however, and instead provided several other iterations of what else may constitute a transformative use. The Court expressed that where a work is transformative and "adds significant creative elements so as to be transformed into something more than a mere celebrity likeness or imitation" (the Mere Celebrity Likeness Test), it should be protected under the First Amendment.⁹⁷

The Court continued on, also iterating the Raw Materials Test: "Another way of stating the inquiry is whether the celebrity likeness is one of the 'raw materials' from which an original work is synthesized, or whether the depiction or imitation of the celebrity is the very sum and substance of the work in question."⁹⁸ The Court also phrased the test in a fourth way to ask "[w]hether a product containing a celebrity likeness is so transformed that it has become primarily the defendant's own expression rather than the celebrity's likeness," with expression meaning something other than the celebrity's likeness — the Defendant's Own Expression Test.⁹⁹ Addressing what may constitute a transformative use, the Court listed parody, factual reporting, "heavy-handed lampooning," and social criticism.¹⁰⁰ The Court further

is protected by the First Amendment.").

⁹⁴ *Id.* at 802, 804.

⁹⁵ *Id.* at 808 (quoting *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 578 (1994)).

⁹⁶ The names for these three tests were not used by the Court but have been added by the author to demonstrate the different questions truly involved in the *Saderup* transformative use test.

⁹⁷ *Saderup*, 21 P.3d at 799. The court reasons that this type of depiction is also not likely to interfere with the economic interests that the artist has in his or her own likeness, as it will have its own value and not act as a good substitute for the original likeness itself. *Id.* at 808.

⁹⁸ *Id.* at 809.

⁹⁹ *Id.*

¹⁰⁰ *Id.*

reasoned that literal depictions may be protected in some circumstances,¹⁰¹ but where a work is simply a literal depiction of the celebrity (lacking other expressive elements), the interests of rights of publicity prevail over First Amendment interests.¹⁰²

In answering all of these questions (or tests), the Court found that Saderup's portraits had no such transformative elements.¹⁰³ Even if it took great skill to draw the portraits, the Court stated, the use of a likeness is still subject to challenge if the imitative elements of the portraits predominated and the economic value of the portraits derived mainly from the fame of the celebrity.¹⁰⁴ In this case, despite the fact that Rush used his artistic talents to create the charcoal drawings, the Court found no significant transformation and found that Saderup's skill was subordinated to his purpose to capitalize on the Three Stooges' fame through literal depictions.¹⁰⁵ Saderup's portraits using the Three Stooges' likenesses could not sustain a First Amendment defense claim.¹⁰⁶

3. *The Development of the Right-of-Publicity Transformative Use Test*

Since the adoption of the transformative use test by the California Supreme Court in *Saderup*, California courts and federal circuit courts alike have asked whether the likeness of a celebrity was transformed to balance celebrities' and artists' interests.

a. *ETW Corp. v. Jireh Publishing, Inc.*

The Sixth Circuit in *ETW Corp. v. Jireh Publishing, Inc.*, in one of the highest profile right-of-publicity cases to use the transformative use test,¹⁰⁷

¹⁰¹ See *id.* at 811. The Court discusses Andy Warhol's reproduction of celebrity portraits and demonstrates that by manipulating the likeness, Warhol conveys a message that "went beyond the commercial exploitation of celebrity images and became a form of ironic social comment on the dehumanization of celebrity itself" and which may be deserving of First Amendment protection. *Id.*

¹⁰² *Id.* at 808.

¹⁰³ *Id.* at 811.

¹⁰⁴ *Id.* at 810. The Court held that even though these were reproductions of the likeness, this does not remove the significant creative elements that entitled the portraits to protection under the First Amendment as expressive works of art. *Id.*

¹⁰⁵ *Id.* at 811.

¹⁰⁶ *Id.*

¹⁰⁷ Bunker, *supra* note 67, at 315.

settled the issue of whether a painter's use of Tiger Woods's likeness was protected under the First Amendment.¹⁰⁸ In *ETW*, painter Rick Rush created a work of art depicting Tiger Woods famously winning the 1997 Masters Tournament in Augusta, Georgia.¹⁰⁹ Rush created the painting, *The Masters of Augusta*, depicting Woods completing a swing and lining up to observe a putt with one of his caddies on either side of him.¹¹⁰ In a blue sky-like background, Rush painted the Augusta National Clubhouse; the Masters leaderboard; and past famous golfers Arnold Palmer, Sam Snead, Ben Hogan, Walter Hagen, Bobby Jones, and Jack Nicklaus.¹¹¹

ETW, the exclusive holder of Woods's rights of publicity, brought suit claiming, among other claims, an infringement on Woods's rights of publicity under Ohio common law.¹¹² Ultimately, in a short transformative use analysis, the court set out tests similar to those of *Saderup*, asking whether Rush had added a significant creative component.¹¹³ The court also focused on the economic impact that the work would have on Woods's own economic interests in his likeness.¹¹⁴ Ultimately, the court concluded that Rush's work was a transformative use that consisted of more than the mere use of Woods's likeness.¹¹⁵ The court found the added elements of the clubhouse, leaderboard, caddies, and legendary golfers significant and creative, stating that they "in themselves are sufficient to bring Rush's work within the protection of the First Amendment" by adding the message that Woods would one day become one of these golf greats.¹¹⁶ The court also

¹⁰⁸ 332 F.3d 915, 919 (6th Cir. 2003).

¹⁰⁹ *Id.* at 918.

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² *Id.* at 918–19.

¹¹³ *Id.* at 938.

¹¹⁴ *Id.*

¹¹⁵ *Id.* at 936.

¹¹⁶ *Id.* The court in its analysis considered other right-of-publicity cases decided on First Amendment grounds: *White v. Samsung Electronics America, Inc.*, where the Ninth Circuit found that a robot wearing a gown and wig intended to look like Vanna White did not qualify under a parody defense against White's right-of-publicity claims, *id.* at 932 (citing 989 F.2d 1512 (9th Cir. 1993)); *Cardtoons, L.C. v. Major League Baseball Players Ass'n*, where the Tenth Circuit found that trading cards with humorous commentary about baseball players constituted a parody and added a creative component to make an entirely new product, *id.* at 932–33 (citing 95 F.3d 959 (10th Cir. 1996));

found persuasive that the painting included a collage of images to describe a historic sporting event.¹¹⁷ Finally the court found that Rush's painting was not capitalizing solely on Wood's literal depiction and would not interfere with Woods's ability to profit from the use of his likeness.¹¹⁸ Therefore, Rush's First Amendment interests outweighed any right-of-publicity interest that Woods maintained.

b. Winter v. DC Comics

Another instance where the California Supreme Court found a clear transformative use was the case of *Winter v. DC Comics*. In *Winter*, the defendant created a series of comics that featured singers Edgar and Johnny Winter as half-worm, half-human characters.¹¹⁹ The Winter brothers' likenesses appeared in a volume titled *Autumns of our Discontent*, and the half-worm characters were aptly named Edgar and Johnny Autumn.¹²⁰ In determining whether DC Comics' use of the Winters's likeness infringed the Winters's rights of publicity, the Court used the transformative use test to balance DC Comics' First Amendment rights.¹²¹ In setting out the test, the Court reaffirmed the use of *Saderup*'s Raw Materials Test and Defendant's Own Expression Test.¹²² The California Supreme Court went further than in *Saderup* though, expressing that even if the market and economic value of a work derive from the celebrity's fame, the secondary work may still be transformative.¹²³ The Court then iterated that a "work is protected by the First Amendment inasmuch as it contains significant transformative elements or that the value of the work does not derive primarily from the celebrity's fame."¹²⁴

The Court also stated that rights of publicity may not be used to censor portrayals of the celebrity that the celebrity dislikes, but rather are intended

Hoffmann v. Capital Cities/ABC, Inc., where the Ninth Circuit found that an altered image of Dustin Hoffman wearing a spring 1997 line of women's clothing was not commercial speech and was entitled to full First Amendment protection, *id.* at 933–34 (citing 255 F.3d 1180 (9th Cir. 2001)); and *Saderup, id.* at 934–36 (citing 21 P.3d 797 (Cal. 2001)).

¹¹⁷ *ETW*, F.3d at 938.

¹¹⁸ *Id.*

¹¹⁹ *Winter v. DC Comics*, 69 P.3d 473, 476 (Cal. 2003).

¹²⁰ *Id.*

¹²¹ *Id.* at 477.

¹²² *Id.* at 477–78.

¹²³ *Id.* at 478.

¹²⁴ *Id.* at 478–79.

to prevent the misappropriation of a likeness for economic value.¹²⁵ As such, the Court found that “this case is not difficult” and that the comic books did not contain literal depictions of the Winters brothers, but rather they added significant expressive content.¹²⁶ The Court concluded that the plaintiffs were “merely part of the raw materials from which the comic books were synthesized.”¹²⁷ As such, the Court found the incorporation of these likenesses into the comic books to be one of the clearest examples of a transformative use and protected the use of the likenesses under the First Amendment.

c. The Use of Athletes’ Likenesses in Video Games

Another common area where right-of-publicity infringement claims have arisen has been the use of celebrity likenesses in video games, in which sports video game creators’ First Amendment defenses have largely been unsuccessful.¹²⁸ Recently, in *Hart v. Electronic Arts, Inc.*, the Third Circuit found for Rutgers University football quarterback Ryan Hart where the video game creator, Electronic Arts, Inc., incorporated Hart’s likeness into its *NCAA Football 2004, 2005, and 2006* games.¹²⁹ The video game incorporated aspects of Hart’s identity to make up the Rutgers quarterback in its game.¹³⁰ The quarterbacks both played for Rutgers; wore number thirteen; were 6’2” tall and 197 pounds; came from the same hometown, team, and class year; and looked alike.¹³¹ Any game user could alter the digital avatar resembling Hart to change statistics like height, weight, and throwing distance, but could not change the hometown and class year.¹³²

In applying the transformative use test to determine the validity of Electronic Arts’ First Amendment defense, the Third Circuit listed both

¹²⁵ *Id.* at 478.

¹²⁶ *Id.* at 479.

¹²⁷ *Id.*

¹²⁸ In *In re NCAA Student-Athlete Name & Likeness Litigation*, 724 F.3d 1268 (9th Cir. 2013), the Ninth Circuit heard a class-action claim by student athletes against video game developer Electronic Arts. The court found that the First Amendment did not protect the use of college athletes’ likenesses in football video games against the athletes’ right-of-publicity infringement claims because the use was not transformative where the athletes’ likenesses were used to play football in the game as they did in life. *Id.*

¹²⁹ 717 F.3d 141,170 (3d Cir. 2013).

¹³⁰ *Id.* at 146.

¹³¹ *Id.*

¹³² *Id.*

the Raw Materials Test and the Defendant's Own Expression Test as the appropriate inquiries.¹³³ The Court then found that the digital avatar closely resembled Hart and that the context of the video game was not transformative: "The digital Ryan Hart does what the actual Ryan Hart did while at Rutgers: he plays college football . . ." ¹³⁴ The Court further found that the video game player's ability to change the avatar was not sufficient to constitute a transformative use and rather fell into the "'mere trivial' variation"¹³⁵ category, in which rights of publicity surmount First Amendment protections.¹³⁶ Other creative elements of the game that did not affect Hart's digital avatar were not applicable to the question of whether Hart's likeness had been transformed,¹³⁷ and the Court found this use violated Hart's rights of publicity.¹³⁸

d. The Use of Musicians' Likenesses in Video Games

College athletes have not been the only ones seeking to recover from the video game industry for the use of their likenesses to sell video games. Musicians have also brought right-of-publicity infringement claims against video game creators for including their likenesses and music in video games.

i. Kirby v. Sega of America

In *Kirby v. Sega of America*, for example, '90s singer Keirin Kirby brought suit against video game distributor Sega for allegedly incorporating her likeness into the video game *Space Channel 5*.¹³⁹ Kirby alleged that the main character of *Space Channel 5*, Ulala, was a depiction of Kirby.¹⁴⁰ Kirby claimed that she had a specific "funky diva-like" character and that she typically wore "platform shoes, knee-socks, brightly colored form-fitting clothes and unitards, short pleated or cheerleader-type skirts, bare

¹³³ *Id.* at 160.

¹³⁴ *Id.* at 166.

¹³⁵ *Id.* at 168 (quoting *Winter v. DC Comics*, 69 P.3d 473, 478 (Cal. 2003)).

¹³⁶ *Id.* at 167.

¹³⁷ *Id.* at 169 ("Decisions applying the Transformative Use Test invariably look to how the *celebrity's identity* is used in or is altered by other aspects of a work.")

¹³⁸ *Id.* at 170.

¹³⁹ 60 Cal. Rptr. 3d 607, 609 (Cal. Ct. App. 2006).

¹⁴⁰ *Id.*

midriff, . . . a blue backpack, and red/pink hair.”¹⁴¹ She also claimed that her signature lyrical expression was “ooh la la,” phonetically similar to the name of the Ulala character.¹⁴² Sega released *Space Channel 5* in 1999, and the game featured Ulala as a news reporter working in outer space in the twenty-fifth century.¹⁴³ In the game, Ulala primarily wore an orange outfit with a bare midriff, a miniskirt, elbow-length gloves, platform boots, hot pink hair, and a blue jetpack.¹⁴⁴ Considering the similarities and differences between Ulala and Kirby, the California Court of Appeals for the Second District found that there was a factual issue as to whether Sega infringed, but the court ultimately concluded that any use of Kirby’s likeness was protected by the First Amendment.¹⁴⁵

The court applied the transformative use test to the game and listed the Raw Materials Test, the Defendant’s Own Expression Test, and the New Meaning Test as applicable inquiries.¹⁴⁶ The court reasoned that Ulala was more than a literal depiction in part because of differences in physical appearance but also because of the context in which Ulala appeared, as a futuristic space reporter, not a 1990s singer.¹⁴⁷ The fact that Ulala and Kirby also did not have similar dance moves demonstrated that Ulala was transformative and as such protected under the First Amendment. Finally, the court rejected Kirby’s argument that Ulala and the game must have some type of social commentary or meaning, stating, “Whether the Ulala character conveys any expressive meaning is irrelevant to a First Amendment defense. All that is necessary is that respondents’ work add ‘something new . . . altering the first with new expression, meaning, or message.’”¹⁴⁸ The court found that Ulala was not simply “an imitative character contrived of ‘minor digital enhancements or manipulations,’” and as such was protected by the First Amendment against Kirby’s claims.¹⁴⁹

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ *Id.* at 610.

¹⁴⁴ *Id.*

¹⁴⁵ *Id.* at 616.

¹⁴⁶ *Id.* at 615.

¹⁴⁷ *Id.* at 616.

¹⁴⁸ *Id.* at 617 (quoting *Comedy III Prods., Inc. v. Gary Saderup, Inc.*, 21 P.3d 797, 808 (Cal. 2001)).

¹⁴⁹ *Id.* at 616.

ii. *No Doubt v. Activision Publishing, Inc.*

In another case involving musicians' likenesses appearing in a video game, however, the California Court of Appeal for the Second District applied the transformative use test and found that the First Amendment did not supersede the band No Doubt's rights of publicity.¹⁵⁰ In *No Doubt v. Activision Publishing, Inc.*, the band No Doubt had contracted with Activision to appear in Activision's game *Band Hero*, which allowed players to perform various popular songs in a rock band with other digital members of the band.¹⁵¹ Players would choose an avatar character and then play with either digital versions of real-life rock stars or other fictional avatars.¹⁵² No Doubt agreed to appear in the video game and granted Activision a nonexclusive license to use their likenesses in the game, subject to the band's prior approval.¹⁵³

To facilitate the game creation, No Doubt participated in a motion-capture photography¹⁵⁴ session to make the digital representations closely look like the real band members.¹⁵⁵ No Doubt later became aware that an unlocking feature of the game (when the player reached a certain level) would allow the player to choose No Doubt avatars to perform other songs in the game that "No Doubt maintains it never would have performed."¹⁵⁶ Players could also manipulate the No Doubt band member Gwen Stefani to sing in a male voice and male band members to sing in female voices or manipulate band members to perform solo without the rest of the band.¹⁵⁷ No Doubt demanded that Activision stop these additional functions, but Activision refused.¹⁵⁸ No Doubt then brought suit alleging that Activision had violated the band's rights of publicity by exceeding the scope of its

¹⁵⁰ *No Doubt v. Activision Publ'g, Inc.*, 122 Cal. Rptr. 3d 397, 411 (Cal. Ct. App. 2011).

¹⁵¹ *Id.* at 401.

¹⁵² *Id.*

¹⁵³ *Id.* at 401–02.

¹⁵⁴ See *supra* note 25 and accompanying text.

¹⁵⁵ *No Doubt*, 122 Cal. Rptr. 3d at 402.

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

¹⁵⁸ *Id.* Activision admitted that because No Doubt had not performed these new songs during its motion capture photography session, Activision had simply used impersonators to create the likenesses that would perform songs other than those licensed by No Doubt.

license, which indicated that the likenesses would only appear performing No Doubt songs.¹⁵⁹ Activision asserted that even if it did exceed the scope of its license, the First Amendment provided a complete defense to the complaint.¹⁶⁰

In applying the transformative use test, the court listed all four of the *Saderup* test iterations: the New Meaning, Defendant's Own Expression, Mere Celebrity Likeness, and Raw Materials tests.¹⁶¹ The court then considered that the digital representations were nearly an exact replication because of the motion-capture photography.¹⁶² It then looked to the context of the likenesses within the game.¹⁶³ The court found compelling that "no matter what else occurs in the game during the depiction of the No Doubt avatars, the avatars perform rock songs, the same activity by which the band achieved and maintains its fame. Moreover, the avatars perform those songs as literal recreations of the band members."¹⁶⁴ The court recognized that the band members could be manipulated to play in different venues, including outer space, but found that these other creative elements did not transform the avatars into doing anything other than what the band members would normally do — play songs.¹⁶⁵ The fact that Activision used the depictions to increase interest in its game by enticing the band's fan base to purchase the game also ultimately led the court to conclude that the use of the band's likenesses was not transformative.¹⁶⁶

III. THE TRANSFORMATIVE USE TEST & THE TUPAC VIRTUAL CLONE: TRANSFORMATION OR INFRINGEMENT?

To determine whether the Tupac virtual clone could be protected under the First Amendment, the virtual clone must first be protected speech. The United States Supreme Court has stated that video games can constitute

¹⁵⁹ *Id.*

¹⁶⁰ *Id.* at 406.

¹⁶¹ *Id.* at 407.

¹⁶² *Id.* at 409.

¹⁶³ *Id.* at 410.

¹⁶⁴ *Id.* at 410–11.

¹⁶⁵ *Id.* at 411.

¹⁶⁶ *Id.*

protected speech,¹⁶⁷ a proposition that lower courts have followed when weighing right-of-publicity interests against First Amendment interests.¹⁶⁸ The video game *Band Hero*, which the court found was protected speech,¹⁶⁹ closely resembles the Tupac concert. For example, *Band Hero* used motion-capture technology to incorporate the likeness of the band No Doubt into a video game to perform its own songs.¹⁷⁰ To achieve the Tupac performance, re-creators used an indirect approach to virtual cloning that allowed a two-dimensional Tupac to appear rapping in a live concert.¹⁷¹ Because similar virtual cloning technology was used to create both the band and Tupac, and both were created to perform their own music for an audience, this virtual performance is likely also protected speech. Because of this, the re-creators may attempt to claim a First Amendment defense to any common law right-of-publicity claim.¹⁷²

A. ARGUMENTS AGAINST TUPAC'S VIRTUAL CLONE AS A TRANSFORMATIVE USE UNDER *SADERUP*'S TEST ITERATIONS

It is not the case that the First Amendment “automatically trumps” rights of publicity,¹⁷³ and to balance these interests, the *Saderup* transformative use test requires that the work in question (1) “adds something new, with a further purpose or different character, altering the first with *new expression, meaning, or message*”;¹⁷⁴ (2) “adds significant creative elements so as

¹⁶⁷ See *Brown v. Entm't Merch. Ass'n*, 131 S. Ct. 2729, 2738 (2011) (analyzing a restriction on video games under a strict scrutiny standard because it “impose[d] a restriction on the content of protected speech”).

¹⁶⁸ See *Kirby v. Sega of Am., Inc.*, 50 Cal. Rptr. 3d 607, 618 (Cal. Ct. App. 2006) (“Because Kirby’s claims are subject to a First Amendment defense, and the video game is protected speech, Kirby’s state common law and statutory claims fail.”).

¹⁶⁹ See *No Doubt v. Activision Publ'g, Inc.*, 122 Cal. Rptr. 3d 397, 405 (Cal. Ct. App. 2011).

¹⁷⁰ *Id.* at 402.

¹⁷¹ See *supra* notes 22–31 and accompany text (describing the possible creation technique that re-creators used to create the concert performance).

¹⁷² To sustain a common law right of publicity, the plaintiff must prove that there was unauthorized use of the plaintiff’s likeness that results in injury, regardless of whether the purpose is commercial. *Kirby*, 50 Cal. Rptr. 3d at 612.

¹⁷³ *Comedy III Prods., Inc. v. Gary Saderup, Inc.*, 21 P.3d 797, 806 (Cal. 2001).

¹⁷⁴ *Id.* at 808 (emphasis added).

to be transformed into something more than a *mere celebrity likeness* or imitation”;¹⁷⁵ (3) “is so transformed that it has become primarily the *defendant’s own expression* rather than the celebrity’s likeness,” with expression meaning something other than the celebrity’s likeness;¹⁷⁶ or (4) uses the celebrity likeness as one of the ‘*raw materials*’ from which an original work is synthesized, or whether the depiction or imitation of the celebrity is the very sum and substance of the work in question.”¹⁷⁷ In considering whether a likeness has been transformed, the court first considers the likeness itself and then the context in which the likeness appears¹⁷⁸ to determine whether the new work is transformative.

1. *Likeness Similarities*

The Tupac virtual clone, like the No Doubt motion-capture use, was intended to resemble the deceased Tupac as closely as possible. Using either a direct or an indirect approach to virtual cloning in and of itself demonstrates that the re-creators are attempting to replicate the likeness. The Tupac virtual clone donned Tupac’s tattoos, gold-chain necklace, Timberland boots, and even sagging baggy pants exactly the way the true Tupac had in life.¹⁷⁹ Arguably, under the Mere Celebrity Likeness Test, by making the virtual clone physically identical to the true Tupac, the re-creators did not add “significant creative elements” to transform the Tupac virtual clone “into something more than a mere celebrity . . . imitation.”¹⁸⁰ Rather, replicating the likeness down to the tattoos on Tupac’s chest was “painstakingly designed to mimic [his] likeness,” exactly like the No Doubt video game avatars that did not meet the court’s requirements for transformative use.¹⁸¹

¹⁷⁵ *Id.* at 799 (emphasis added).

¹⁷⁶ *Id.* at 809 (emphasis added).

¹⁷⁷ *Id.* (emphasis added).

¹⁷⁸ See *No Doubt v. Activision Publ’g, Inc.*, 122 Cal. Rptr. 3d 397, 409–10 (Cal. Ct. App. 2011).

¹⁷⁹ *Coachella’s ‘Astonishing’ Tupac Shakur Hologram: How They Did It*, THE WEEK (Apr. 17, 2012), <http://theweek.com/article/index/226859/coachellas-astonishing-tupac-shakur-hologram-how-they-did-it> (“No detail was glossed over, with the late rapper’s signature tattoos, jewelry, and body movements all incorporated into the hologram.”).

¹⁸⁰ *Saderup*, 21 P.3d at 799.

¹⁸¹ *No Doubt*, 122 Cal. Rptr. 3d at 409.

The fact that the likeness was a literal depiction of the former Tupac Shakur weighs against a finding of transformative use where the virtual clone is more or less a “fungible” image of Tupac Shakur, which he and his estate have the right to monopolize.¹⁸² Further, the songs performed also incorporated Tupac Shakur’s voice exactly as he had sung those songs when he was alive.¹⁸³ As such, it was not just Tupac’s physical identity that the re-creators took, but rather it was his physical identity, paired with his own voice, making the virtual clone simply a full-blown substitute for, or imitation of, the former Tupac Shakur. Rather than using Tupac’s likeness as a raw material to create a new work, the new work itself was just a carbon copy of which the imitation of Tupac is “the very sum and substance.”¹⁸⁴ Therefore, this exact replication would weigh against transformation under both the Raw Materials and Mere Celebrity Likeness tests.

The virtual clone likely took much skill and significant resources to create.¹⁸⁵ Using the indirect approach, the re-creators needed to incorporate many different performances, photos, etc. to be able to create the virtual clone with sufficient detail. The software is also likely very complex and not operable by a lay user, as evidenced by the fact that Dr. Dre teamed up with two different audio-visual companies to create the virtual clone.¹⁸⁶ The complexity and skill required, however, do not transform the virtual clone performance itself into something new or something other than a mere imitation of Tupac’s likeness. The Court in *Saderup* recognized that while *Saderup*’s charcoal drawings took the skill of an artist to create, this alone did not make the depiction of the Three Stooges transformative because the “marketability and economic value . . . derived primarily from the fame of the celebrity depicted” rather than the “creativity, skill, and reputation” of the re-creator — thus failing the Defendant’s Own Expression Test.¹⁸⁷

¹⁸² *Id.* at 407.

¹⁸³ *Compare Tupac Live Hologram, supra* note 1, with *2-Pac-Hail Mary (Official Music Video)* (1996), YouTube (Nov. 8, 2010), <https://www.youtube.com/watch?v=3SQVBsJG9Rs>.

¹⁸⁴ *Winter v. DC Comics*, 69 P.3d 473, 477 (Cal. 2003).

¹⁸⁵ The re-creators stated that the Tupac hologram cost between \$100,000 and \$400,000. Gil Kaufman, *Exclusive: Tupac Coachella Hologram Source Explains How Rapper Resurrected*, MTV.com (Apr. 16, 2012, 12:49 PM), <http://www.mtv.com/news/articles/1683173/tupac-hologram-coachella.jhtml>.

¹⁸⁶ *Id.*

¹⁸⁷ *Comedy III Prods., Inc. v. Gary Saderup, Inc.*, 21 P.3d 797, 810 (Cal. 2001).

The media aftermath of the concert demonstrates that the focus of the audience was on seeing Tupac perform again, not on the mastery of AV Concepts and Digital Domain. The fans and media were ecstatic to see Tupac resurrected and performing next to his friends again, not to see the AV Concept's *version* of Tupac.¹⁸⁸ This was not a case of Andy Warhol recreating Marilyn Monroe's face to make it Andy Warhol's version of Marilyn Monroe; rather it was simply AV Concepts creating a replica of Tupac to be Tupac.¹⁸⁹ As such, there are strong arguments that the virtual clone would not pass the Defendant's Own Expression Test, further weighing against a finding of transformative use.

2. Likeness Differences Insignificant

The re-creators did change elements of the performance, namely creating a live performance for the song *Hail Mary*, which Tupac had never actually performed for a live audience; adding new language into Tupac's vernacular, "Coachella"; and opening and closing the performance with awe-inspiring visual effects, raising Tupac from beneath the ground and then vanishing him into a cloud of gold specks.¹⁹⁰ Transformative use precedent is not clear, however, on whether these minor changes constitute transformative use where the overall effect is still to physically replicate the virtual clone Tupac to perform as Tupac performed in life. The ability to change quarterback Ryan Hart's avatar to reflect different bodily physique and skill was insufficient to make Hart's likeness in the football video game transformative.¹⁹¹ Arguably, this precedent could apply to any minor changes (intended or unintended) made to Tupac's physical appearance and would weigh toward a finding that the virtual clone is not a transformative use under the Mere Celebrity Likeness Test.

In *No Doubt*, the court also considered the fact that the game player could manipulate the band's voices and make men sound like women and

¹⁸⁸ See Osterhout, *supra* note 19, at 38 (quoting a concert-goer as saying, "The hologram was so real that I kept looking over at Snoop to catch his reaction at having his buddy back on stage with him after all of this time . . . [h]e seemed happy").

¹⁸⁹ See *Saderup*, 21 P.3d at 811 (describing a celebrity depiction that would be deserving of First Amendment defense protection under the transformative use test).

¹⁹⁰ Suddath, *supra* note 1.

¹⁹¹ *Hart v. Electronic Arts, Inc.*, 717 F.3d 141, 168 (3d Cir. 2013).

vice versa.¹⁹² The court's finding that this element did not transform the likeness into something new is also telling for the Tupac performance where only one truly new word was added to Tupac's vernacular. As such, this minor addition may be rather insignificant when considering whether the virtual clone as a whole deserves First Amendment protections over Tupac's rights of publicity. In *No Doubt*, the avatars could perform with or without the band, and the avatars sang new songs by other artists that the band had not sung before.¹⁹³ Tupac similarly performed with other rappers during the concert, Dr. Dre and Snoop Dogg. The fact that the *No Doubt* court put little weight behind the argument that the separation of the band was transformative could also indicate that simply including new rappers into the virtual clone performance will not constitute a transformative use, particularly where the artist had in fact performed with those rappers in life.¹⁹⁴

Finally, the fact that the Tupac virtual clone performed a song that Tupac had not performed in life is arguably also not transformative. The *No Doubt* avatars were forced to sing the songs of other artists in *Band Hero*, and the court found that this made the video game no more transformative.¹⁹⁵ As such, forcing Tupac's virtual clone to sing a Tupac song, albeit not one performed in life, is arguably directly in line with this *No Doubt* precedent and will not transform this use of Tupac's likeness under the Defendant's Own Expression or Raw Materials tests also employed in *No Doubt*.¹⁹⁶ Therefore, these minor changes to the Tupac virtual clone are similar to that which Activision undertook in *No Doubt* and which the court found unconvincing and un-transformative.¹⁹⁷ Considering the similarity of the likeness alone however cannot dictate whether a use is transformative.¹⁹⁸

¹⁹² *No Doubt v. Activision Publ'g, Inc.*, 122 Cal. Rptr. 3d 397, 402, 406 (Cal. Ct. App. 2011).

¹⁹³ *Id.*

¹⁹⁴ See *2Pac-2 of Amerikaz Most Wanted*, YouTube (Feb. 12, 2006), <https://www.youtube.com/watch?v=Qb4V4jfHOO8&feature=kp> (showing a music video of Tupac performing with rapper Snoop Dogg); *2Pac-California Love*, YouTube (Feb. 12, 2006), <https://www.youtube.com/watch?v=FWOsbGP5Ox4&feature=kp> (showing a music video of Tupac performing with rapper Dr. Dre).

¹⁹⁵ *No Doubt*, 122 Cal. Rptr. 3d at 407.

¹⁹⁶ *Id.* at 410.

¹⁹⁷ *Id.* at 411.

¹⁹⁸ *Id.* at 415; *Hart v. Electronic Arts, Inc.*, 717 F.3d 141, 166 (3d Cir. 2013).

3. Context

Courts have also looked to the context in which the celebrity's likeness appears to determine whether the re-creator added significant creative elements, thus making it transformative and worthy of protection.¹⁹⁹ The Tupac virtual clone performed two Tupac songs alongside Dr. Dre and Snoop Dogg, two performers that he had performed with during life.²⁰⁰ Because the only songs the trio sang were songs that Tupac had written and sung during his life, arguably the message of both songs in the context of a new concert was the same message conveyed when Tupac was alive, rather than any new message that the re-creators were attempting to impart. The estate could then assert that the performance should fail the New Meaning Test for transformativeness.

Further, courts have been reluctant to provide protection to re-creations that depict the celebrity doing exactly “the same activity by which the [celebrity] achieved and maintains [his or her] fame.”²⁰¹ Rapping made Tupac famous and continued to make him famous throughout both his life and his death.²⁰² In the virtual clone concert, re-creators capitalized on what made Tupac famous — his rap lyrics and style. The Tupac virtual clone even performed Tupac's own songs, which contributed to his fame. This use of Tupac's likeness to perform the same activity that made him famous is much like the use of Zacchini's entire cannonball act, which was also how Zacchini achieved his reputation.²⁰³ It may similarly be what the United States Supreme Court termed one of the “strongest case[s] for a ‘right of publicity’ involving, not the appropriation of an entertainer's reputation to enhance the attractiveness of a commercial product, but the appropriation of the very activity by which the entertainer acquired his reputation in the first place.”²⁰⁴ Ryan Hart played college football for Rutgers. Ryan Hart's avatar played college football for Rutgers. No Doubt

¹⁹⁹ See *No Doubt*, 122 Cal. Rptr. 3d at 409–10.

²⁰⁰ See *supra* note 194.

²⁰¹ *No Doubt*, 122 Cal. Rptr. 3d at 411.

²⁰² Derek Iwamoto, *Tupac Shakur: Understanding the Identity Formation of Hyper-Masculinity of a Popular Hip-Hop Artist*, *THE BLACK SCHOLAR*, Summer 2003, at 44, available at <http://www.jstor.org/stable/41069025?seq=2>. (“In the mid-1990s [Tupac] was one of the most popular rap stars. Even today he is considered a legend in the hip-hop world, and has sold over 22 million records, posthumously.”)

²⁰³ *Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562, 576 (1977).

²⁰⁴ *Id.*

performed songs. No Doubt's avatars in the *Band Hero* video game performed songs. No matter what else changed on the football field or in the concert arena in these video games, the celebrities were depicted doing the exact activities that made them famous.²⁰⁵ And as such, these depictions were arguably not transformative under any of the *Saderup* tests.²⁰⁶

The added creative elements of the concert, such as Tupac's entrance and exit and the fact that Tupac performed as one part of an entire music festival, are also arguably insufficient to make the use transformative. The court in *Hart* rejected an argument that the other elements of the video game (not affecting Hart's likeness) elevated the entire game as a transformative use.²⁰⁷ Instead, the court stated that the transformative use test looks only at the way in which the celebrity's identity is used or changed, not other extraneous creative parts of the game (or concert in this case).²⁰⁸ Therefore, other elements of the concert outside of the Tupac performance do not bear on the transformative use inquiry.²⁰⁹ These other elements may be relevant though when considering whether the performance interferes with the Tupac estate's economic interest in his likeness.

4. Possible Interference with Economic Interest

In considering whether a use is transformative, courts have also taken into account the extent to which the new use of the artist's likeness will affect the economic interest of the artist, asserting that the more transformative the work, the less it will interfere with the celebrity's economic interest.²¹⁰ The Coachella concert organizers sold tickets to the show, as any concert

²⁰⁵ *Hart v. Electronic Arts, Inc.*, 717 F.3d 141, 166 (3d Cir. 2013); *No Doubt*, 122 Cal. Rptr. 3d at 411 ("Moreover, Activision's use of life-like depictions of No Doubt performing songs is motivated by the commercial interest in using the band's fame to market *Band Hero*, because it encourages the band's sizeable fan base to purchase the game so as to perform as, or alongside, the members of No Doubt.").

²⁰⁶ *Hart*, 717 F.3d at 166; *No Doubt*, 122 Cal. Rptr. 3d at 411.

²⁰⁷ *Hart*, 717 F.3d at 166.

²⁰⁸ *Id.* 169.

²⁰⁹ *Id.*

²¹⁰ See *Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562, 575 (1977); *Comedy III Prods., Inc. v. Gary Saderup, Inc.*, 21 P.3d 797, 808 (Cal. 2001) ("On the other hand, when a work contains significant transformative elements, it is not only especially worthy of First Amendment protection, but it is also less likely to interfere with the economic interest protected by the right of publicity.").

presenter would. These ticket sales alone are not likely detracting from any economic interest Tupac's estate has unless the estate itself would like to capitalize on a Tupac virtual clone performance of its own. If this were the case, the Coachella concert would be in direct competition with the estate's economic interest in the use of the likeness.

Following the concert though, Tupac Shakur's *Greatest Hits* album returned to the Billboard top 200 for the first time since 2000, falling into spot 129, with 4,000 copies sold.²¹¹ The concert thus boosted record sales more than a 570% increase from the previous week.²¹² This alone would not likely interfere with the estate's economic interest but would rather do the opposite and enhance the estate's economic interest in Tupac's music. However, if the fans turned to purchasing recorded versions of the concert to view the performance rather than buying "The Don Killuminati: The 7 Day Theory" album that simply contains the song *Hail Mary*, this could interfere with the estate's interest in Tupac's likeness. This is still a very narrow substitute, however, and the likelihood is greater that the estate's economic interest would be enhanced following the concert rather than impeded based on the post-concert record sales.

These elements, the identical depiction of Tupac doing exactly what Tupac did to obtain and maintain his fame, tend to weigh against a finding that Dr. Dre and his audio-visual counterparts added "significant creative elements so as to . . . transform[] [the Tupac virtual clone] into something more than a mere celebrity likeness or imitation."²¹³ Rather this concert, meant to astonish fans by resurrecting an iconic deceased rapper using an indirect virtual cloning approach, is likely more akin to "when an artist's skill and talent is manifestly subordinated to the overall goal of creating a conventional portrait of a celebrity so as to commercially exploit his or her fame" that then subordinates a re-creator's First Amendment defenses to the celebrity's rights of publicity under the Mere Celebrity Likeness Test.²¹⁴ Where there is arguably no or little economic interference, however, critics

²¹¹ Keith Caulfield, *Tupac's Virtual Coachella Appearance Spurs Huge Sales Bump*, BILLBOARD (Apr. 26, 2012, 9:30 PM), <http://www.billboard.com/news/tupac-s-virtual-coachella-appearance-spurs-1006896752.story>.

²¹² *Id.*

²¹³ *Saderup*, 21 P.3d at 799.

²¹⁴ *Id.* at 810.

of rights of publicity are not without hope, as this lack of interference would tend to show transformation. Several other elements of the concert also weigh toward a finding of transformative use.

B. ARGUMENTS FOR TRANSFORMATIVE USE OF TUPAC'S LIKENESS USING *SADERUP*'S TEST ITERATIONS

Tupac's re-creators would undoubtedly assert that they created something of their own that contributes more to Tupac's performance and his legacy than any "trivial variation" could.²¹⁵ The re-creators added aspects both to the likeness and to the context of the performance that arguably add a new message, that of the re-creator rather than Tupac himself, thus passing the New Meaning, Defendant's Own Expression, and Raw Materials tests.

1. Likeness & Context Additions Under the Defendant's Own Expression & Raw Materials Tests

While the virtual clone is a literal depiction meant to look like the deceased Tupac Shakur, courts applying the transformative use test have not damned artistic expressions merely for being a literal reproduction. The courts in *No Doubt* and *Saderup* both recognized that the First Amendment can protect literal reproductions where there are added elements making the depiction recognizable as the work of the artist rather than the celebrity.²¹⁶ While not as distinct as Andy Warhol's famous additions to Marilyn Monroe's likeness, the re-creators reproduced Tupac but did so by creating an entirely new performance to accompany the song *Hail Mary*. The re-creators had to either find old dance moves in past performances or create the new dance moves digitally themselves because Tupac had not ever actually shown the world how he would dance to and perform this song live. The re-creators thus added their own creative elements to the performance. Even the music video for the song *Hail Mary* does not show Tupac dancing, so the virtual clone's moves, while undoubtedly Tupac-esque, are something that the re-creators memorialized and constructed to fit the lyrics and rhythm of the

²¹⁵ *Id.*

²¹⁶ *Id.* at 811; *No Doubt v. Activision Publ'g, Inc.*, 122 Cal. Rptr. 3d 397, 402, 408 (Cal. Ct. App. 2011).

song themselves.²¹⁷ In adding words that Tupac had never spoken and deleting the beginning portion of the recorded song *Hail Mary* from the live performance, the re-creators arguably also made artistic changes to the performance to make the performance as a whole more coherent and forceful, thus likely passing the Defendant's Own Expression Test.

These changes to a literal reproduction to represent real-life events with artistic additions are similar to the changes that transformed Tiger Woods's likeness in *ETW*. In *ETW*, Rick Rush created a painting of Tiger Woods, intended to look like Tiger Woods, and depicting Woods as he appeared in real life — winning the Masters Tournament.²¹⁸ These facts made Rush's work no less transformative or deserving of First Amendment protection. Rush added elements to a historical event by including Woods's caddies, the Master's Leader Board, and famous golf greats in the background looking down on Woods.²¹⁹ The Tupac re-creators added rap greats Dr. Dre and Snoop Dogg to the concert and included both a mesmerizing resurrection from below the ground to open the performance and a shocking burst of light to represent Tupac's exit from the stage — but not the music industry. Under this theory, taking the exact replication of Tupac's likeness was just one of the raw materials used to create this larger performance that then added significant creative elements, thus passing the Raw Materials Test.

While this performance was not a historic event, like the youngest golfer ever to win the Masters,²²⁰ these added elements are arguably deserving of First Amendment protection where the re-creators transformed Tupac's live performances into a new performance all their own. AV Concepts also created other virtual clone performances for artists like Madonna, the Gorillaz, Celine Dion, and the Black Eyed Peas,²²¹ so AV could assert that, like Rush, it is creating literal reproductions with added elements that make the performances “recognizably [AV's] own” expression.²²²

²¹⁷ See *2-Pac-Hail Mary (Official Music Video) (1996)*, *supra* note 183.

²¹⁸ *ETW Corp. v. Jireh Publ'g, Inc.*, 332 F.3d 915, 918 (6th Cir. 2003).

²¹⁹ *Id.* at 936.

²²⁰ *Id.* at 918.

²²¹ Tom Eames, *Tupac Shakur Hologram Took Several Months, Says Creator*, DIGITAL SPY (Apr. 16, 2012, 5:02PM), <http://www.digitalspy.com/music/news/a376774/tupac-shakur-hologram-took-several-months-says-creator.html#~oAGyIsmhbhVPuz>.

²²² *Comedy III Prods., Inc. v. Gary Saderup, Inc.*, 21 P.3d 797, 810 (Cal. 2001).

2. *The Re-Creators' Added Message: The New Meaning Test*

The re-creators, in re-creating and resurrecting a performer who died too young and whom the public has idolized to the extent of questioning his death,²²³ arguably “added something new, with a further purpose or different character, altering the first [Tupac] with new expression, meaning, or message.”²²⁴ This concert may well have added new meaning to the Tupac performances than existed before. In life, his performances carried the message that thug life was difficult and that racial oppression was occurring right in front of society’s face, but nothing was changing.²²⁵ In death, however, the re-creators created the virtual clone from the memories and vision of Dr. Dre²²⁶ with the purpose of adding new meaning to the *posthumous* Tupac’s performance — the world has not forgotten you. This concert arguably elevated Tupac to an iconic status as a rapper that, even in death, the world will not let die.²²⁷ The concert could have been making a comment that unlike Tupac himself, Tupac’s music will live on forever.

However, while this new message is persuasive to a finding that the use was transformative, whether or not the concert actually made this comment about Tupac is not required under the transformative use test.²²⁸ All that the re-creators needed to do is add new meaning that the likeness did not otherwise provide,²²⁹ which the resurrection, new performance,

²²³ Chris Whitworth, *Tupac Shakur: Top 5 Conspiracy Theories*, 3 NEWS (June 17, 2011, 3:00 PM), <http://www.3news.co.nz/Tupac-Shakur-Top-5-conspiracy-theories/tabid/418/articleID/215479/Default.aspx> (listing Tupac’s posthumous albums and lyrics pointing to his death as reasons supporting conspiracy theories that Tupac Shakur is still alive).

²²⁴ *Saderup*, 21 P.3d at 808.

²²⁵ Iwamoto, *supra* note 202, at 44.

²²⁶ “[Q]uite honestly, it was Dre and Snoop who had to guide us. He is their friend and they know him,” said the chief creator at Digital Domain. Suddath, *supra* note 1; see also Nadeska Alexis, *Dr. Dre Hopes Jimi Hendrix, Marvin Gaye Follow ‘Pac as Holograms*, MTV.COM (Apr. 19, 2012, 12:36 PM), <http://www.mtv.com/news/articles/1683463/tupac-hologram-dr-dre.jhtml> (stating that the creation of the hologram was Dr. Dre’s idea, and his vision was what was used to bring Tupac back).

²²⁷ Re-creator Dylan Brown, a filmmaker who worked on the Tupac virtual clone, stated, “even if you die we’ll bring you back.” McCartney, *supra* note 21.

²²⁸ See *Kirby v. Sega of Am., Inc.*, 60 Cal. Rptr. 3d 607, 617 (Cal. Ct. App. 2006) (“The law does not require Ulala to ‘say something — whether factual or critical or comedic’ about Kirby the public figure in order to receive First Amendment protection. This argument has been soundly rejected by the Supreme Court.”).

²²⁹ *Id.*

and vanishing may indeed all do. The slow resurrection from beneath the stage adds meaning to the likeness — Tupac’s music and messages cannot be killed. Singing the song *Hail Mary*, of all the songs in Tupac’s discography,²³⁰ also added meaning to the concert because the song includes lyrics like “[w]hen they turn out the lights, I’ll be down in the dark [t]huggin eternal through my heart,” and “[d]ealing with fate, hoping God don’t close the gate.”²³¹ This song and its title — the name of a Catholic prayer calling for the intercession of the Virgin Mary²³² — further exemplify the “eternal” nature of Tupac’s music, and the virtual clone’s performance to this song that had never been performed further conveys the message that, to the audience and friends, Tupac will never truly die. This new message, that of an eternal Tupac Shakur, is new meaning that Tupac’s likeness did not maintain during Tupac’s life, and as such, the use of the likeness passes the transformative use test under the New Meaning and Raw Materials subtests and is deserving of First Amendment protection.

IV. THE MANY TESTS OF *SADERUP*

Because the *Saderup* test iterations seemingly lead to contrary results in situations like the Tupac virtual clone concert, one may question whether the transformative use test is really the most appropriate inquiry when balancing right-of-publicity and First Amendment interests. The California Supreme Court in *Saderup*, however, took the approach most directly imparted by the United States Supreme Court in adopting the transformative use test, rather than the tests adopted by other circuits and jurisdictions.²³³ The U.S. Supreme Court in *Zacchini* stated that Ohio’s goals in providing right-of-publicity protection were “closely analogous” to the goals of both copyright and patent protection by “focusing on the right

²³⁰ See *2Pac Discography*, MTV, <http://www.mtv.com/artists/2pac/discography/> (last visited Mar. 26, 2014) (listing fourteen Tupac albums released).

²³¹ *Hail Mary*, AZ LYRICS, <http://www.azlyrics.com/lyrics/2pac/hailmary.html> (last visited Mar. 26, 2014).

²³² *Hail Mary*, MERRIAM WEBSTER, <http://www.merriam-webster.com/dictionary/hail%20mary> (last visited Mar. 26, 2014).

²³³ See *supra* notes 62–66 and accompanying text (outlining the First Amendment tests applied in right-of-publicity infringement cases).

of the individual to reap the reward for his endeavors”²³⁴ and providing an economic incentive to create.²³⁵ The Court again compared rights of publicity and copyrights in declaring that the Constitution would no more prevent a state from requiring the news station to compensate Zacchini than it would allow a defendant to broadcast a copyrighted dramatic work without compensating the copyright holder.²³⁶

Because the U.S. Supreme Court had already recognized the connection between copyrights and rights of publicity in a case balancing First Amendment protections against rights of publicity, the California Supreme Court’s decision to take a similar approach — using an aspect of the established copyright fair use test based on these common goals — is warranted under *stare decisis* principles.²³⁷ Further, because *Zacchini* is the only U.S. Supreme Court case to address rights of publicity generally, much less rights of publicity as weighed against the First Amendment, adopting a similar copyright transformative use test would be most consistent with the only binding precedent of all of the possible right-of-publicity tests employed.

In adopting the transformative use test over other possible First Amendment defense tests, the Third Circuit in *Hart* rejected the *Rogers* test²³⁸ because it did not maintain a single focus on whether the work in question sufficiently transformed the celebrity’s likeness in simply requiring that the new work be unrelated and not use the celebrity’s name for its commercial value.²³⁹ The court said that this inquiry overlooked the possibility that misappropriation can occur in the celebrity’s market as well.²⁴⁰

²³⁴ *Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562, 573 (1977).

²³⁵ *Id.* at 576.

²³⁶ *Id.* at 575.

²³⁷ See *Comedy III Prods., Inc. v. Gary Saderup, Inc.*, 21 P.3d 797, 808 (Cal. 2001) (“The right of publicity, at least theoretically, shares this goal with copyright law. . . . When artistic expression takes the form of a literal depiction or imitation of a celebrity for commercial gain, directly trespassing on the right of publicity without adding significant expression beyond that trespass, the state law interest in protecting the fruits of artistic labor outweighs the expressive interests of the imitative artist.”).

²³⁸ The *Rogers Test* asks whether the challenged work is wholly unrelated to the underlying work and whether the plaintiff’s name is used for its advertisement and commercial value. See *Rogers v. Grimaldi*, 875 F.2d 994, 1004 (2d Cir. 1989).

²³⁹ *Hart v. Electronic Arts, Inc.*, 717 F.3d 141, 163 (3d Cir. 2013).

²⁴⁰ *Id.*

The court also rejected the Predominant Purpose Test,²⁴¹ stating that the court's inquiry should not start and stop with commercial purpose or value but that it must look at whether the work is the creator's own expression.²⁴² This analysis, coupled with the U.S. Supreme Court dicta in *Zacchini*, further demonstrates that the transformative use test is the most appropriate test for balancing rights of publicity against the First Amendment.

The *Saderup* Court in presenting several different iterations of the transformative use test, however, derailed the analysis slightly by not adopting a single iteration of the test to narrow the scope of the inquiry to strictly consider the use of the celebrity's likeness. The California Supreme Court should address these four iterations of the transformative use test that it laid out in *Saderup* and instead adopt just one, the Mere Celebrity Likeness Test. This more narrow iteration of the test can provide predictability without losing the spirit of the larger goals found in both copyright and rights of publicity.

As the Tupac virtual clone shows, the transformative use test itself now has subparts, each of which can weigh toward contrary results using the same set of facts. The Tupac re-creators, even though creating a literal reproduction, added new elements to the performance — new language, dance moves, and interactions — and may well have added new meaning to the performance in addition to any meaning that the *Hail Mary* and *2 of Amerikaz Most Wanted* songs or performances held before. The re-creators made artistic changes and inserted the message that “Tupac's music will live forever” into the minds of fans and the media. This additional meaning or message would weigh in favor of the defendant re-creators under the *Saderup* transformative use New Meaning Test. The fact that the re-creators had similarly created other concert performances using virtual cloning technology, in addition to the added message in the Tupac concert, also tends to show that the virtual clone was really the re-creators' own expression. This would again weigh in favor of the re-creators' First Amendment interests under the *Saderup* Defendant's Own Expression Test.

²⁴¹ The Predominant Purpose Test asks whether the predominant purpose of the use or portrayal is to serve a social function valued by free speech or to commercially exploit the likeness in the same way the celebrity would. See *Presley's Estate v. Russen*, 513 F. Supp. 1339, 1356 (D.N.J. 1981).

²⁴² *Hart*, 717 F.3d 163 & n.29.

On the other hand, the re-creators made an exact replica of Tupac Shakur and profited from the activity that made and kept him famous, rapping, which courts have weighed heavily against a finding of transformative use.²⁴³ Therefore, this would also weigh heavily against a finding that the re-creators' use of both Tupac's likeness and his voice would be a transformative use under the *Saderup* Mere Celebrity Likeness and Raw Materials tests. It is also unclear how the Court should weigh the possible interference with the artist's economic interest under the transformative use test and its current subtests adopted in *Saderup*,²⁴⁴ reaffirmed in *Winter*,²⁴⁵ and subsequently used by the Third, Sixth, and Ninth Circuits.²⁴⁶ Under the current set of tests, cases similar to this one involving virtual-cloning technology will present new issues for the Court, which will have a difficult time parsing the convoluted test-setting precedent and the strong case law on each side of the debate.

To avoid this outcome, first the California Supreme Court should clarify the New Meaning Test in terms of right-of-publicity issues and reject the blanket New Meaning Test used in *Campbell* — a copyright test.²⁴⁷ Merely taking the test in its entirety confuses the issue in right-of-publicity claims; that is, whether the likeness has been transformed into something more. The depictions themselves must “contain[] significant expressive content beyond the [celebrity's] likeness.”²⁴⁸ Simply asking whether “a work . . . adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message” misses the mark and is too broad.²⁴⁹ While copyright and rights of publicity have similar goals in respect to applying the First Amendment,²⁵⁰ they are still two different areas of law comparing two different things.

²⁴³ See *supra* notes 204–205 and accompanying text.

²⁴⁴ See *supra* notes 95–99 and accompanying text.

²⁴⁵ See *Winter v. DC Comics*, 69 P.3d 473, 477–78 (Cal. 2003).

²⁴⁶ See *Hart*, 717 F.3d at 160; *ETW Corp. v. Jireh Publ'g, Inc.*, 332 F.3d 915, 938 (6th Cir. 2003); *In re NCAA Student-Athlete Name & Likeness Litigation*, 724 F.3d 1268, 1275–76 (9th Cir. 2013).

²⁴⁷ *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994).

²⁴⁸ *Kirby v. Sega of Am.*, 60 Cal. Rptr. 3d 607, 615 (Cal. Ct. App. 2006).

²⁴⁹ *Comedy III Prods., Inc. v. Gary Saderup, Inc.*, 21 P.3d 797, 808 (Cal. 2001).

²⁵⁰ See *Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562, 573, 575–76 (1977).

In copyright infringement claims, the United States Supreme Court has said that a transformative use is sufficient but not necessary to find a fair use.²⁵¹ In right-of-publicity analyses using the transformative use test, however, a finding of transformativeness is imperative to the decision of whether the use of the likeness is legitimate because it is the only question at issue. Therefore, employing the exact same iteration of the New Meaning Test to rights of publicity and copyright infringement is inappropriate because of these distinct legal standards. Copyright transformative use compares two works to determine whether the second is deserving of First Amendment protection because it is itself a new creation with added creative elements.²⁵² Right-of-publicity First Amendment analyses, however, compare a secondary work not with an original work, but with an actual likeness (a property right the celebrity has a right to compensation for).²⁵³ While both are similar negative rights, comparing a human being and a work is a different analysis than comparing a work against another work. As such, even when employing a similar test derived from copyright law — the New Meaning Test — the question when dealing with rights of publicity must be posed in terms of the likeness that triggers the cause of action — did the new likeness add expressive content *to the old likeness*?²⁵⁴

The *Saderup* Court rejected importing the entire copyright fair use analysis because in its entirety it would be inapplicable to right-of-publicity questions.²⁵⁵ However, in continuing to use the copyright New Meaning Test as an iteration of what constitutes a right-of-publicity transformative use, the Court is implicitly introducing the broad copyright transformative use test rather than focusing on whether the work has been transformed to do something more than just exploit the likeness for its monetary gain. As such, this broad definition of the test should be abandoned for a more focused inquiry.

²⁵¹ *Campbell*, 510 U.S. at 579.

²⁵² *Id.*

²⁵³ *Winter v. DC Comics*, 69 P.3d 473, 478 (Cal. 2003) (“What the right of publicity holder possesses is not a right of censorship, but a right to prevent others from misappropriating the economic value generated by the celebrity’s fame . . .”).

²⁵⁴ *Hart v. Electronic Arts, Inc.*, 717 F.3d 141,169 (3d Cir. 2013) (“Decisions applying the Transformative Use Test invariably look to how the *celebrity’s identity* is used in or is altered by other aspects of a work. Wholly unrelated elements do not bear on this inquiry.”).

²⁵⁵ *Saderup*, 21 P.3d at 807–08.

Because of this breadth of the transformative use test and the possibility of confusing the real issue — appropriation of one’s likeness — the Court should clarify and narrow the transformative use by adopting the Mere Celebrity Likeness Test as the single iteration for the transformative use test in right-of-publicity cases. The Court should instead simply ask “whether the work in question adds significant creative elements so as to be transformed into something more than a mere celebrity likeness or imitation.”²⁵⁶ This maintains the spirit of both the *Campbell* and *Saderup* rules, including the New Meaning, Defendant’s Own Expression, and Raw Materials tests, but narrows the scope of the inquiry to focus specifically on whether the celebrity or the defendant should profit from the use of the likeness.

The Mere Celebrity Likeness Test language is also clearer and arguably more predictable than the very similar Raw Materials Test that similarly asks “whether the celebrity likeness is one of the ‘raw materials’ from which an original work is synthesized, or whether the depiction or imitation of the celebrity is the very sum and substance of the work in question.”²⁵⁷ By asking whether significant creative elements have been added, the Court is similarly asking whether there is a larger work encompassing that likeness. By also asking whether the work has been made into something more than an imitation of the likeness, the Court is similarly determining whether the likeness is actually serving as the “sum and substance” of the new work. If the work is imitative and does not have significant creative elements, the Court can conclude, as it would under the Raw Materials Test, that the likeness is not a raw material synthesized into a larger work but rather that the imitation serves as the sum and substance of the new work. This single iteration would not change the conclusion under the Raw Materials test but would offer clarity to future courts in providing only one test iteration for the court to follow rather than unnecessarily employing several similar tests.

Further, if the defendant has transformed the likeness so that the work has become the defendant’s own expression (of something other than the celebrity’s likeness), the Mere Celebrity Likeness Test acknowledges this contribution as well but without requiring that the Court point to exactly what that expression is. So long as the work adds creative elements to be

²⁵⁶ *Id.* at 799.

²⁵⁷ *Id.* at 809.

something more than a mere celebrity likeness or imitation, the Court need not find anything else, and the First Amendment interests prevail. By maintaining this one consistent iteration of the transformative use test, rather than four, the Court can give better direction both to re-creators who want to fairly use a likeness and to the courts that will hear the cases, which now have strong precedent on both sides of the issue.

CONCLUSION

Virtual-cloning technology has advanced to the point where live concerts featuring both the living and the dead are possible. Rights of publicity, meant to protect an artist's economic interest in his or her likeness, conflict with First Amendment free expression principles, and courts have struggled to balance the two. The transformative use test has emerged as one of the predominant tests to determine whether the use of a celebrity's likeness is legitimate, but courts have come to different conclusions depending on the facts of each case due to the four different *Saderup* iterations of the right-of-publicity transformative use test. The Tupac virtual clone concert, which incorporated Tupac's exact physical appearance and voice, also depicted Tupac doing what made him famous in life: rapping. While the Tupac re-creators also added new elements to this performance — a stunning entrance, exit, and entirely new live performance never before done by Tupac — this may be insufficient to transform the performance into anything more than a mere imitation of the artist to profit from the likeness itself.

Precedent on transformative use is available and currently strengthens both sides of the debate based on the four different subtests created in *Saderup*. Because these four different test iterations can lead to contrary results based on the same set of facts, the California Supreme Court, as the pioneer of the right-of-publicity transformative use test, and other courts using the transformative use test should adopt the Mere Celebrity Likeness Test as the sole iteration of the transformative use test in right-of-publicity First Amendment defense claims. This will maintain the spirit of the original iterations but also provide for more consistency and predictability for cases, including virtual-cloning cases, still to come.