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Preserving Access to Tattoos: First Amendment Trumps Municipal Ban in *Anderson v. City of Hermosa Beach*

I. INTRODUCTION

In the Ninth Circuit’s recent decision *Anderson v. City of Hermosa Beach*,¹ the court held that a municipal ban on tattoo parlors violates the First Amendment. Particularly, the Ninth Circuit diverged from the rulings of other jurisdictions to conclude that the business, process, and nature of tattooing are purely expressive activities entitled to robust First Amendment protection. After more than thirty years of courts getting it wrong, the Ninth Circuit’s opinion correctly reevaluates the purely expressive nature of tattooing to conclude that tattoos are protected speech. Nevertheless, while the Ninth Circuit’s decision aptly interpreted First Amendment protection and precedent, it went too far when it invalidated the Hermosa Beach ban as an unreasonable time, place, or manner restriction.

Parts II and III of this Note examine relevant First Amendment jurisprudence as well as the history and nature of tattoos generally. Part IV of this Note addresses the Ninth Circuit’s analysis in *Anderson*. Part V analyzes the *Anderson* decision in light of existing case law and Supreme Court precedent, concluding that while the court’s analysis of the tattooing process and business as “purely expressive” speech is correct, it erred in concluding that the Hermosa Beach ban is an unreasonable time, place, or manner restriction. Part VI offers a brief conclusion.

II. FACTS AND PROCEDURAL HISTORY

Plaintiff Johnny Anderson ran Yer Cheat’n Heart tattoo parlor in Redondo Beach, within the City of Los Angeles. He wanted to open another parlor in the City of Hermosa Beach.² Hermosa Beach lies within the County of Los Angeles, and while the City of Los Angeles

1. 621 F.3d 1051 (9th Cir. 2010).

2. *Id.* at 1055.

generally permits tattoo establishments, Hermosa Beach does not.³ Hermosa Beach Municipal Code § 17.06.070 states: “Except as provided in this title, no building shall be erected, reconstructed or structurally altered, nor shall any building or land be used for any purpose except as hereinafter specifically provided”⁴ The Code subsequently permits several kinds of businesses, such as restaurants, bars, and gun shops, but no provision in the zoning code allows tattoo parlors.⁵

In August 2006, Anderson filed an action under 42 U.S.C. § 1983, alleging that § 17.06.070 was unconstitutional under the First and Fourteenth Amendments.⁶ The Central District of California dismissed Anderson’s suit, alleging that it was not ripe for review because he had not yet asked for permission to open a tattoo parlor.⁷ Thereafter, Anderson requested to open a tattoo establishment within Hermosa Beach under the city code’s provision allowing establishments not specifically listed in the statute to operate if the business could be classified as a “similar use.”⁸ Anderson’s request was denied by the city’s Community Development Director, and in 2007 he reinitiated his action in federal court to strike down the city’s ordinance.⁹

A. The District Court’s Ruling

Upon filing the case in district court, both parties moved for summary judgment.¹⁰ The district court granted Hermosa Beach’s motion and denied Anderson’s, holding that “the act of tattooing” is not protected expression under the First Amendment because, although it is non-verbal conduct expressive of an idea, it is not ‘sufficiently imbued with the elements of communication’¹¹ that are required to receive First Amendment protection under *Spence v.*

3. *Id.* at 1056–57.

4. HERMOSA BEACH, CAL., MUNICIPAL CODE § 17.06.070, available at <http://www.hermosabch.org/departments/cityclerk/code/1706.html#070>.

5. *Id.* at § 17.06.030.

6. *Anderson*, 621 F.3d at 1057.

7. *Id.*

8. *Id.* at 1057–58.

9. *Id.*

10. *Id.*

11. *Id.* (quoting *Spence v. Washington*, 418 U.S. 405, 409 (1974)).

Washington.¹² Because the court did not consider tattooing protected speech, mere rational basis review was required in order to uphold Hermosa Beach's ordinance.¹³ As such, in light of the "health risks inherent in operating tattoo parlors,"¹⁴ Hermosa Beach possessed a rational basis for excluding tattoo parlors, and thus the ordinance stood. Anderson appealed the ruling to the Ninth Circuit.¹⁵

III. SIGNIFICANT LEGAL BACKGROUND

A. First Amendment Protected Speech

The First Amendment, as incorporated and applied against the states through the Fourteenth Amendment, prohibits government restrictions on free speech.¹⁶ However, within this broad rule rest several exceptions. Indeed, depending on the type of speech, First Amendment protection may or may not apply. In the broad continuum of speech, "pure" speech involves actual expressive activity, such as writing a book or giving a public oration.¹⁷ Pure speech is afforded the most protection under the Constitution. Additionally, conduct that is not "pure" speech but has a communicative aspect, such as burning a draft card, wearing an armband, or distorting the American flag, generally also receives some First Amendment protection.¹⁸

Nevertheless, even if speech is considered purely expressive in itself, as opposed to conduct that communicates, such a finding does not give the person a free pass to "speak" in all circumstances. For instance, a city or jurisdiction may be able to regulate the time, place, or manner of the speech, provided such a regulation is (1) content-neutral, (2) in furtherance of a significant government interest, (3) narrowly tailored, and (4) leaves open alternative channels of communication of the information.¹⁹ Expressive conduct

12. 418 U.S. 405, 409 (1974).

13. *Anderson*, 621 F.3d at 1058.

14. *Id.*

15. *Id.*

16. *See* U.S. CONST. amend. I.

17. Beth Waldock Houck, Comment, *Spinning the Wheel After Roulette: How (and Why) to Overturn a Sidewalk Sitting Ban*, 32 ARIZ. ST. L.J. 1451, 1469 (2000).

18. *Id.*

19. *See, e.g.*, *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989); *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 298 (1984).

may also be regulated under the test promulgated in *United States v. O'Brien*,²⁰ which permits narrowly tailored regulation in light of an “important or substantial government interest” that is unrelated to the suppression of speech.²¹

While both pure speech and expressive conduct are considered sacred under the First Amendment,²² and are at least presumptively protected subject to the various tests listed above, other forms of speech are not afforded similar protection. For instance, conduct that is not “sufficiently imbued with elements of communication,”²³ or in other words, conduct that does not obviously communicate an idea, is not similarly exempted. Likewise, conduct that may have certain harmful effects may be regulated even if the conduct is obviously communicative in nature. For example, adult movie theaters²⁴ and nude dancing²⁵ are considered “communicative” in nature but can still be constitutionally regulated and banned in a number of areas.

B. The Tattoo: A Profession and an Art?

A tattoo is an image or word engrafted onto a person’s body. Often termed “body art,” tattoos were first used as early as 5000 years ago.²⁶ Later, tattoos became associated with two societal groups: prisoners and members of the armed forces.²⁷ Now, tattoos have gained significant popularity with teenagers, celebrities, and other broad groups within society. Indeed, in 1982 the Governor’s Office of California issued a proclamation stating that “a tattoo is primal parent of the visual arts It has reemerged as a fine art attracting highly skilled and trained practitioners. Current creative

20. 391 U.S. 367 (1968).

21. *Id.* at 377; *see also* Anderson v. City of Hemosa Beach, 621 F.3d 1051, 1059 n.3 (9th Cir. 2010).

22. As a corollary, there are of course certain types of “pure” speech which are given no protection under the Constitution. These include perjury, libel, slander, infringing on copyrights, and other forms of “fighting words.” *See* Spence v. Washington, 418 U.S. 405, 417 (1974) (Rehnquist, J., dissenting) (per curiam). However, since this presumptively unprotected speech is not at issue with the creation of a tattoo, such a discussion does not warrant much attention.

23. *Spence*, 418 U.S. at 409.

24. *See* Young v. Am. Mini Theatres, Inc., 427 U.S. 50, 70 (1976).

25. *Erie v. Pap’s A.M.*, 529 U.S. 277, 285 (2000).

26. Enid Schildkrout, *Inscribing the Body*, 33 ANN. REV. ANTHROPOLOGY 319, 325 (2004).

27. David Morton, *Tattooing*, INVENTION & TECH., Winter 2002, at 36, 40.

approaches . . . [infuse] this traditional discipline with new vigor and meaning.”²⁸ Most courts today recognize that a tattoo itself is considered to be “pure” First Amendment speech.²⁹

A tattoo is created through a surgical process by which dye is injected “into the recipient’s skin by the use of needles or machines.”³⁰ Generally, an electronic tattoo machine is used to create the tattoo, which commands a needle to puncture the skin.³¹ Ink is injected into the second layer of skin, and the result is “essentially an open wound.”³² Because the process involves puncturing skin and interaction with blood, there is a risk of transmission of disease.³³ As such, certain risks include infection, tuberculosis, hepatitis B and C, and HIV.³⁴ To guard against the spread of disease, many states and cities have passed regulations to monitor tattoo parlors and ensure that proper instruments and cleaning measures are being employed.³⁵

Of course, behind the tattoo is the tattoo artist. Tattoo artists learn the trade through apprenticeships that allow them to learn the art and work the machines. Tattoo artists typically work either in a “tattoo parlor” or a “tattoo art studio.”³⁶ A tattoo is ultimately created through collaboration between the recipient and the tattoo artist.³⁷ Tattoo artists have been compared to painters, sculptors, and other artists who are commissioned to produce a piece of art in exchange for money.³⁸

28. Hoag Levins, *The Changing Cultural Status of the Tattoo Arts in America*, TATTOO ARTS IN AM., <http://www.tattooartist.com/history.html> (last visited Mar. 9, 2011).

29. *Anderson v. City of Hermosa Beach*, 621 F.3d 1051, 1060 n.3 (9th Cir. 2010) (“There appears to be little dispute that the tattoo itself is pure First Amendment ‘speech.’”).

30. *Yurkew v. Sinclair*, 495 F. Supp. 1248, 1252 (D. Minn. 1980).

31. *Anderson*, 621 F.3d at 1055–56 (citing the city’s declaration).

32. *Id.*

33. See *Body Art: Tattoos and Piercings*, CTRS. FOR DISEASE CONTROL & PREVENTION, <http://www.cdc.gov/features/bodyart/> (last updated Jan. 21, 2008).

34. *Id.*

35. See, e.g., COUNCIL BLUFFS, IOWA, MUNICIPAL CODE ch. 4.05 (2010), available at <http://library.municode.com/index.aspx?clientId=16299&stateId=15&stateName=Iowa>.

36. See Levins, *supra* note 28.

37. See *Anderson*, 621 F.3d at 1057 (citing declaration submitted by Anderson describing his own approach to tattooing).

38. Thomas F. Cotter & Angela M. Mirabole, *Written on the Body: Intellectual Property Rights in Tattoos, Makeup, and Other Body Art*, 10 UCLA ENT. L. REV. 97, 104 (2003).

C. Tattoo Jurisprudence: Yurkew and Hold Fast Tattoo

Anderson is not the first case to raise the issue of tattoo parlors and First Amendment jurisprudence. In fact, several courts have already encountered the issue, in most cases finding that tattoo parlors are generally not protected forms of speech under the First Amendment.

Thirty years ago, in the seminal case of *Yurkew v. Sinclair*,³⁹ a Minnesota court considered whether the Minnesota State Fair Board of Managers could refuse to rent space to a tattooist.⁴⁰ The board denied the rental space because of health and safety concerns implicated in the tattooing process.⁴¹ The tattooist sued the Minnesota State Fair, arguing that tattooing is protected First Amendment speech and that the restriction was a prior restraint.⁴² The Minnesota court initially concluded that the process of tattooing was expressive conduct rather than pure speech, and thus the main question to decide was “whether the actual process of tattooing, as opposed to the image conveyed by the tattoo itself, is sufficiently imbued with elements of communication” as required under the *Spence* test.⁴³ The court ultimately found that the tattooing process is not communicative in nature and thus does not implicate the First Amendment.⁴⁴

In so holding, the *Yurkew* court stated that the tattooist made “no showing that the normal observer or even the recipient would regard the process of injecting dye into a person’s skin through the use of needles as communicative.”⁴⁵ Under the *Spence* test, communicative activity requires “[a]n intent to convey a particularized message,”⁴⁶ and that the circumstances surrounding the conduct would likely provide “that the message would be understood by those who viewed it.”⁴⁷ Because the surgical process does not, in itself, communicate a message that the average observer

39. 495 F. Supp. 1248 (D. Minn. 1980).

40. *Id.* at 1249–50.

41. *Id.* at 1249.

42. *Id.*

43. *Id.* at 1253 (internal quotation marks omitted) (quoting *Spence v. Washington*, 418 U.S. 405, 409–10 (1974)).

44. *Id.*

45. *Id.* at 1254.

46. *Spence*, 418 U.S. at 410–11.

47. *Id.* at 411.

could interpret, the Minnesota district court rejected the tattooist's argument.⁴⁸

More recently, in 2008, a U.S. district court in Illinois encountered a similar question concerning a city's denial of a tattoo shop's request for a special use permit. In *Hold Fast Tattoo, LLC v. City of North Chicago*⁴⁹ a tattoo shop claimed that the denial of the permit violated the First Amendment.⁵⁰ Taking a page from *Yurkew*, the court presumed that the process of tattooing was expressive conduct, as opposed to pure speech, because "the act itself is not intended to convey a particularized message."⁵¹ Specifically, the court compared the tattoo artist to a sound truck vehicle, in which the vehicle allows a person to convey a message, but the truck itself is not expressive.⁵² In sum, the court found that tattooing is not protected speech under the First Amendment.⁵³

Consistent with *Yurkew* and *Hold Fast Tattoo*, several other courts have also found that tattooing is not protected under the First Amendment. In *Kennedy v. Hughes*,⁵⁴ the Delaware district court concluded that operating a tattoo parlor does not involve a "fundamental" right.⁵⁵ In *People v. O'Sullivan*,⁵⁶ the Supreme Court of New York perfunctorily held that even if tattooing constituted pure speech or symbolic speech, it may be subject to "reasonable regulation in the public interest and [the] right to engage in tattooing is not paramount to the public's right to good health."⁵⁷ These decisions set the backdrop for the Ninth Circuit's encounter with Anderson and his tattoo parlor request.

48. *Yurkew*, 495 F. Supp. at 1254.

49. 580 F. Supp. 2d 656 (N.D. Ill. 2008).

50. *Id.* at 659.

51. *Id.* at 660 (refusing to engage in a dialogue about conduct versus pure speech and stating that the "act of tattooing fails the first prong of this test because the act itself is not intended to convey a particularized message").

52. *Id.* (citing *R.A.V. v. City of St. Paul*, 505 U.S. 377, 386 (1992)) (describing a loud sound truck as unprotected First Amendment speech).

53. *Id.*

54. 596 F. Supp. 1487 (D. Del. 1984).

55. *Id.* at 1493.

56. 409 N.Y.S.2d 332 (App. Div. 1978).

57. *Id.* at 333 (citations omitted).

IV. THE NINTH CIRCUIT'S DECISION

In *Anderson v. City of Hermosa Beach*, the Ninth Circuit found the provision banning tattoo parlors within the city in Hermosa Beach's Municipal Code § 17.06.070 facially unconstitutional.⁵⁸ Significantly, the court concluded that because tattooing is purely expressive activity, not expressive conduct, there is no need to determine whether tattooing is "sufficiently imbued" with communicative aspects as required under the *Spence* test.⁵⁹ Furthermore, the Ninth Circuit determined that an absolute ban on tattoo parlors is not a reasonable time, place, or manner restriction.⁶⁰

A. Discarding the "Sufficiently Imbued" Test: Tattooing as Pure Speech

The Ninth Circuit's analysis proceeded by rejecting the underlying premise that had previously propelled the long line of tattoo decisions. The court found that, as opposed to symbolic conduct, such as burning a draft card, "tattooing is more akin to traditional modes of expression (like writing)."⁶¹ Therefore, the "sufficiently imbued" test is inapplicable because tattooing is purely expressive speech.

The Ninth Circuit engaged in a three-step approach to determine that the tattooing process is protected pure speech. The reasoning went as follows: (1) tattoos are expressive, protected speech; (2) speech includes the process of creating that speech; and therefore, (3) the process of tattooing is necessarily protected speech.

First, the Ninth Circuit found that there is "little dispute" that tattoos are considered expressive speech.⁶² The United States Supreme Court has found various forms of entertainment to be expressive activities, including dance, parades, movies, and music.⁶³ Because tattoos consist of images, symbols, and words,⁶⁴ there is little difference between a tattoo and a painting.⁶⁵ The Ninth Circuit further explained that there is no difference between injecting dye

58. 621 F.3d 1051, 1059 (9th Cir. 2010).

59. *Id.*

60. *Id.*

61. *Id.* at 1062.

62. *Id.* at 1060.

63. *Id.*

64. *Id.* at 1061.

65. *Id.*

onto a piece of paper as opposed to in a person's skin.⁶⁶ Therefore, because paintings and other forms of communication are protected, tattoos should be protected as well.⁶⁷

Second, when speech is protected, the medium of the speech is likewise protected. Because "the process of expression through a medium has never been thought so distinct from the expression itself,"⁶⁸ it would be contradictory to separate the process of creating the expression, such as a printing press or artist brushes, from the expression. Therefore, because the process of tattooing as performed in a tattoo parlor constitutes the medium of expression, it is protected under the broad umbrella of protected speech that accompanies a tattoo.

B. Absolute Ban as a Time, Place or Manner Restriction

Next, the court found that an absolute ban on tattoo parlors in a city is not a reasonable time, place, or manner restriction.⁶⁹ Even if speech is protected, cities may limit the speech in their own legitimate interests.⁷⁰ However, the restriction must: (1) be content-neutral, (2) be narrowly tailored, and (3) leave open alternative channels of communication.⁷¹

Here, the Ninth Circuit found that an absolute ban of all tattoo parlors in Hermosa Beach was not narrowly tailored and did not leave open alternative channels of communication.⁷² While the city argued that the absolute ban was narrowly tailored—as Los Angeles County lacks the resources to monitor the hundreds of tattooists working there—the court rejected this reasoning by stating that the city cannot use its own refusal to allocate resources as a means to create a broad-based prohibition.⁷³ Similarly, the court found that alternative channels of communication are not available if tattoo establishments are prohibited because a tattoo is a unique form of communication that "often carries a message quite distinct from displaying the same words or picture through some other

66. *Id.*

67. *Id.*

68. *Id.* at 1061–62.

69. *Id.* at 1068.

70. *Id.* at 1064.

71. *Id.* at 1064–66.

72. *Id.* at 1068.

73. *Id.* at 1065.

medium.”⁷⁴ The court focused on the increasing popularity of tattoos, citing a 2006 survey stating that 36% of people from ages eighteen to twenty-five have tattoos, and 40% of people from ages twenty-six to forty have tattoos.⁷⁵ These numbers suggest that tattoos are becoming an increasingly important and distinct form of communication.⁷⁶ For these reasons, the court found that the ban on Hermosa Beach tattoo parlors was not a reasonable restriction.⁷⁷

V. ANALYSIS

In light of prior decisions on the issue of tattoos and free speech, the Ninth Circuit’s decision in *Anderson* raises some interesting questions. Jesse Choper, an expert on the First Amendment and a law professor at the University of California, Berkeley, commented that the Ninth Circuit’s opinion in *Anderson* constituted a “clear, uncontroversial application of the First Amendment.”⁷⁸ However, while Choper believes that *Anderson* was a “pretty straightforward case,”⁷⁹ it is hard to comprehend how, if he is correct, nearly every other court confronting the issue in the past thirty years got it wrong.⁸⁰ Indeed, this warrants further analysis into the Ninth Circuit’s underlying premise and its inquiry into the art of tattooing and free speech generally. Under this analysis, the *Anderson* court correctly decided that tattooing should be considered purely expressive First Amendment activity but erred in concluding that the ban was not a reasonable time, place, or manner restriction.

74. *Id.* at 1067 (citation omitted).

75. *Id.* at 1066 (citing PEW RESEARCH CTR. FOR THE PEOPLE & THE PRESS, HOW YOUNG PEOPLE VIEW THEIR LIVES, FUTURES AND POLITICS: A PORTRAIT OF “GENERATION NEXT” 21 (2007), <http://people-press.org/reports/pdf/300.pdf>).

76. *Id.*

77. *Id.* at 1064.

78. Paul Elias, *Appeals Court Ends Tattoo Parlor Ban in Calif City*, ABC NEWS (U.S.) (Sept. 9, 2010), <http://abcnews.go.com/US/wireStory?id=11595461>.

79. *Id.*

80. *See, e.g.*, *Hold Fast Tattoo, LLC v. City of N. Chi.*, 580 F. Supp. 2d 656 (N.D. Ill. 2008); *Yurkew v. Sinclair*, 495 F. Supp. 1248 (D. Minn. 1980); *State v. Brady*, 492 N.E.2d 34 (Ind. Ct. App. 1986); *People v. O’Sullivan*, 409 N.Y.S.2d 332 (App. Div. 1978); *State v. White*, 560 S.E.2d 420 (S.C. 2002); *Blue Horseshoe Tattoo, V, Ltd. v. City of Norfolk*, 72 Va. Cir. 388 (2007).

A. Tattoos as a “Venerable Means of Communication”

After more than thirty years of conflicting decisions, the Ninth Circuit finally turned the tide of tattoo jurisprudence by holding that tattoos constitute a protected form of pure speech. Surprisingly, just two years ago, a U.S. district court in Illinois concluded that tattoos are not protected speech.⁸¹ This departure is significant, raising the intriguing question: What has changed?

The answer: not much. The Ninth Circuit simply questioned the underlying premise that several courts merely assumed was true—that the tattooing process is distinct from the tattoo. Certainly this distinction makes little sense. Courts have not separated the act of painting from the finished product, or a printing press from the newspaper product. The Supreme Court, in *Minneapolis Star & Tribune Co. v. Minnesota Commissioner of Revenue*,⁸² declined to make such a distinction when it held that a tax on newspaper ink may improperly burden the dissemination of the newspaper.⁸³ However, the previous tattoo-ban cases have deliberately segregated the act of tattooing from the tattoo itself.

Perhaps one explanation for the shortcomings of other courts is the emphasis on the health and safety concerns of tattooing. While tattooing involves the transmission of blood, and possibly disease, no such risk exists for a pen-and-ink drawing. However, as observed by the Ninth Circuit judges during oral arguments in *Anderson*, a painter may very well use lead ink in making a portrait, which could cause lead poisoning, but the act of painting, as well as the painting itself, is still protected speech.⁸⁴

Similarly, the negative, transgressive qualities of tattoos may have played a part in other courts’ refusals to accept the process of tattooing as protected activity. Previously, tattoos were believed to be a degraded art left to the “lower class.”⁸⁵ Notably, however, the Ninth Circuit went to great lengths to demonstrate tattoos’ increasing acceptance in traditional social circles and also explained

81. *See supra* notes 49–53 and accompanying text.

82. 460 U.S. 575 (1983).

83. *Id.* at 592–93.

84. Oral Argument at 22:13, *Anderson v. City of Hermosa Beach*, 621 F.3d 1051 (9th Cir. 2010) (No. 08-56914), *available at* http://www.ca9.uscourts.gov/media/view_subpage.php?pk_id=0000005493.

85. *See* Randolph I. Geare, *Tattooing*, SCI. AM., Sept. 12, 1903, at 189.

how tattoos have “increased in prevalence and sophistication.”⁸⁶ More significantly, the increasing social acceptance of tattoos signifies that, as compared with thirty years ago, tattoos are now perceived as “communicative” in nature. While in the past, body art was generally understood as a barbaric practice received with repugnance by mainstream culture, the Ninth Circuit entered into a detailed description of how a tattoo makes a statement of “autonomy and self-fashioning.”⁸⁷ Therefore, while the First Amendment jurisprudence on this issue seems to have remained relatively unaltered in recent years, the perception surrounding tattoos as speech seems to have changed.

Furthermore, the Ninth Circuit’s inquiry into the history and communicative nature of tattooing reflects the U.S. Supreme Court’s approach to First Amendment issues. Indeed, unlike the other courts that have confronted tattoo parlor bans, the Ninth Circuit engaged in an extensive discussion about the “decorative; religious; magical; punitive”⁸⁸ nature of tattoos. This analysis mirrors the Supreme Court’s historical account in *United States v. Stevens*,⁸⁹ in which the Court engaged in an extensive discussion of the history of animal cruelty to find that depictions of maiming and mutilation are not likely protected under the First Amendment.⁹⁰ While historical evidence is not necessary for First Amendment protection, the Court noted that the Constitution is not a document “prescribing limits, and declaring that those limits may be passed at pleasure.”⁹¹

Moreover, perhaps what occurred in *Anderson* that was absent from the prior tattoo-parlor ban cases was that the court recognized an amorphous line between pure speech and symbolic conduct. Where a tattoo transforms from serving as merely a symbol of an idea to become the very representation of the idea itself is a line that courts should not have to draw. After all, such a determination

86. *Anderson*, 621 F.3d at 1066.

87. *Id.* at 1067 (citing Susan Benson, *Inscriptions of the Self: Reflections on Tattooing and Piercing in Contemporary Euro-America*, in WRITTEN ON THE BODY: THE TATTOO IN EUROPEAN AND AMERICAN HISTORY 251–52 (Jane Caplan ed., 2000)).

88. *Id.* at 1061 (citing Mark Gustafson, *The Tattoo in the Later Roman Empire and Beyond*, in WRITTEN ON THE BODY, *supra* note 87, at 17).

89. 130 S. Ct. 1577 (2010).

90. *Id.* at 1585–86.

91. *Id.* at 1585 (quoting *Marbury v. Madison*, 5 U.S. 137 (1 Cranch), 178 (1803)). Note, however, that the statute in *Stevens* was ultimately held to be unconstitutional as it was impermissibly overbroad. *Id.* at 1592.

would change with each tattoo and every person who receives a tattoo. For some, a navy anchor tattoo may represent service in the military, but for others, the navy anchor may merely serve as a decorative design, symbolizing nothing more than the anchor itself. Thus, the Ninth Circuit recognized that for First Amendment cases it is better to err on the side of permission than prohibition.⁹²

B. Hermosa Beach's Ban Is Reasonable in Los Angeles County

Nevertheless, the Ninth Circuit fell short in its analysis of Hermosa Beach's ban as an unreasonable time, place, or manner restriction. After accepting tattooing as expressive activity, the court proceeded to invalidate the ordinance on two grounds: that the ban was not narrowly tailored, and that it did not leave open alternative channels of communication.⁹³ Specifically, the court focused on the fact that as a general proposition, absolute bans are disfavored in First Amendment case law.⁹⁴ While this may be true, this broad proposition should not apply to the 1.5 square miles comprising Hermosa Beach.

1. Narrowly tailored

In order for a time, place, or manner restriction to be upheld on free speech grounds, it must be narrowly tailored to serve a significant government interest.⁹⁵ Anderson did not dispute that the health and safety concerns of tattooing serve a government interest. Rather, Anderson claimed, and the court agreed, that tattooing can be conducted safely, and that the failure of the city to appropriate the proper number of health inspectors cannot be a means to restrict free speech.⁹⁶

The problem with the Ninth Circuit's analysis is that while tattooing may be conducted safely in some circumstances, tattooing presents other risk factors that can lead to crime and drug use. For instance, tattooing presents specific risk factors for adolescents and

92. See *Fed. Election Comm'n v. Wis. Right to Life, Inc.*, 551 U.S. 449, 474 (2007) ("Where the First Amendment is implicated, the tie goes to the speaker, not the censor.").

93. *Anderson*, 621 F.3d at 1068.

94. *Id.* at 1064.

95. See *Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 68 (1981) ("[A]s is true of other ordinances, when a zoning law infringes upon a protected liberty, it must be narrowly drawn and must further a sufficiently substantial government interest.").

96. *Anderson*, 621 F.3d at 1065.

teens, for whom tattoos have generally been found to accompany “low self-esteem, delinquency, [and] drug abuse.”⁹⁷ Moreover, while health regulations often address the use of sterile equipment, diseases may be transferred through the ink or the string that is used to transmit the ink.⁹⁸ Furthermore, what distinguishes tattooing from other potentially infection-creating trades, such as nail salons and barber shops, is that tattooing is closely associated with the drug culture and transmission of HIV and hepatitis.⁹⁹ In other forms of problematic speech, like live entertainment and hand billing, the government is concerned about litter, parking, and neighborhood deterioration.¹⁰⁰ Risks associated with tattooing are certainly more immediate and hazardous than those of littering and parking.

Similarly, while the Ninth Circuit alleged that health and safety regulations are a narrowly tailored means to confront the risks of tattooing as opposed to an outright ban, there is no information suggesting that such regulations improve the problem areas of tattooing. For instance, unreported or unlicensed tattoo artists operating in basements and homes are unlikely to be affected by health regulations. Indeed, in a Minnesota study on the relationship between government regulation and tattooists’ response to such regulation, artists who self-reported responded favorably to government regulation, but problem areas still existed with artists who did not report.¹⁰¹ In fact, “tattooists most in need of improvement [from government regulation] may be hardest to reach due to their opposition to the government.”¹⁰² This difficulty is in keeping with the culture of the tattoo industry, which has often been resistant to government involvement.¹⁰³

97. Ronald L. Braithwaite et al., *Risks Associated with Tattooing and Body Piercing*, 20 J. PUB. HEALTH POL’Y 459, 459 (1999).

98. *Id.* at 461.

99. *Id.*

100. *See, e.g., Schad*, 452 U.S. at 73 (relating that the ban on live entertainment is arguably based on issues related to “parking, trash, police protection, and medical facilities”).

101. Monica J. Raymond, Linda L. Halcón & Phyllis L. Pirie, *Regulation of Tattooing in Minneapolis and St. Paul, Minnesota: Tattooists’ Attitudes and Relationship Between Regulation and Practice*, 188 PUB. HEALTH REP. 154, 160 (2003).

102. *Id.*

103. *See id.* at 159 tbl.3 (detailing widely varying opinions among tattooists as to proper extent of government regulation, including restrictions on purchasing tattooing equipment, giving tattoos to minors, and involvement of persons with bloodborne illnesses).

2. *Alternative channels of communication*

The court proceeded to conclude that an absolute ban on tattoo parlors would not leave open alternative channels of communication to those who desired a tattoo. The Ninth Circuit focused on the Supreme Court's general disfavor of broad prophylactic prohibitions on speech. Citing cases such as *City of Ladue v. Gilleo*¹⁰⁴ and *Schad v. Borough of Mount Ephraim*,¹⁰⁵ the court concluded that as a rule, absolute bans are rejected.¹⁰⁶ However, the court's analysis was flawed: the regulations in *Ladue* and *Schad* were not struck down because they were blanket prohibitions per se, but because the nature of the speech conformed to the surrounding area¹⁰⁷ and the government interest did not outweigh the First Amendment rights.¹⁰⁸ Indeed, in *Schad*, the Supreme Court invalidated a municipal ordinance that prohibited all nude dancing in the city, but the Court held that the "[t]he situation would be quite different if the ordinance had the effect of suppressing, or greatly restricting access to, lawful speech."¹⁰⁹ The *Schad* Court observed that there was no evidence in the record that the kind of dancing that was prohibited by the ordinance was available in close-by areas outside of the city.¹¹⁰

Here, what the court failed to mention, and what was incorrectly stated in the oral arguments by Anderson's counsel, is that Los Angeles County, of which Hermosa Beach is only a small part, generally allows tattoo parlors subject to licensing requirements.¹¹¹ Indeed, Anderson's other tattoo parlor is located in the town of Gardena,¹¹² only eight miles away from Hermosa Beach.¹¹³ While the

104. 512 U.S. 43 (1994).

105. 452 U.S. 61 (1981).

106. *Anderson v. City of Hermosa Beach*, 621 F.3d 1051, 1064 (9th Cir. 2010).

107. *Schad*, 452 U.S. at 76.

108. *Id.* at 72; *Ladue*, 512 U.S. at 54.

109. *Schad*, 452 U.S. at 76 (quoting *Young v. Am. Mini Theaters, Inc.*, 427 U.S. 50, 71 n.35 (1976)).

110. *Id.*

111. *See* LOS ANGELES CNTY. CODE § 7.94.020(A) (2010), available at <http://search.municode.com/html/16274/index.htm> ("No person shall own or operate a body art establishment or permit the conduct of body art activity at any location unless and until a body art establishment license has been procured . . .").

112. *See* *Elias*, *supra* note 78.

113. Driving Directions from Hermosa Beach, CA to Yer Cheat'n Heart Tattoo, Gardena, CA, GOOGLE MAPS, <http://maps.google.com> (follow "Get Directions" hyperlink;

court may have been correct in determining that a large-scale time, place, or manner restriction in all of Los Angeles County may be overly broad, certainly this is not the case in the present action. The Hermosa Beach ban merely restricted access to tattoos in Hermosa Beach, not *all* access; as residents would only need to travel five minutes, or walk ten blocks, to a neighboring city to find a tattoo artist.¹¹⁴

Unfortunately, the court was so committed to invalidating the tattoo parlor ban that it failed to consider the city's location and its place in the larger community of Los Angeles. Contrary to the Ninth Circuit's characterization, a prohibition in Hermosa Beach would not foreclose all opportunities for obtaining a tattoo in tattoo parlors in Los Angeles County.

Finally, the court engaged in a discussion of how tattoos are a "distinct" method of communication carrying a unique message.¹¹⁵ This analysis misses the mark. The Hermosa Beach time, place, or manner restriction bans tattoo parlors, not tattoos. Determining the validity of a time, place, or manner restriction is an inquiry apart from the pure speech versus conduct dichotomy discussed earlier.¹¹⁶ In the latter, the tattoo and the tattoo process are necessarily intertwined. But for the former, regulations restricting the manner of expression are not the same as restricting the expression itself. The court engages in an analysis assuming that regulation of the tattooing process is the same as limiting tattoos entirely. As mentioned earlier, this is not the case. Hermosa Beach does not ban tattoos, merely tattoo parlors. Certainly a ban in a city with limited space and neighboring cities that permit tattoo parlors is not unreasonable.

VI. CONCLUSION

Anderson v. City of Hermosa Beach is a landmark decision in several respects. Finally, after more than thirty years, tattoo parlors are recognized as a protected medium of pure speech, not conduct.

then search "A" for "Hermosa Beach, CA" and search "B" for "Yer Cheat'n Heart Tattoo, Gardena, CA"; then follow "Get Directions" hyperlink).

114. See Tattoo Parlors in Redondo Beach, CA, GOOGLE MAPS, <http://maps.google.com> (search for "tattoo parlors"; then zoom in on Redondo Beach, CA) (showing two tattoo parlors in Torrance and one in Gardena).

115. *Anderson v. City of Hermosa Beach*, 621 F.3d 1051, 1067 (9th Cir. 2010).

116. See *supra* Part IV.A.

The Ninth Circuit's articulation of tattooing as a protected form of communication effectively closed the door to years of dispute. However, the Ninth Circuit failed to consider Hermosa Beach's specific circumstances in concluding that the restriction was an invalid time, place, or manner restriction. Indeed, it appeared that the court was so concerned with making a statement about the impropriety of such tattoo prohibitions that it failed to analyze the realities of Hermosa Beach. While tattoo parlors should be protected under the First Amendment, they should still be capable of being regulated under proper time, place, or manner restrictions.

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