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## Tattooist v. Tattoo: Separating the Service from the Constitutionally Protected Message

### I. INTRODUCTION

Tattooing has become a commonplace practice in the United States over the last few decades.<sup>1</sup> Celebrities increasingly sport visible tattoos, and so does the mainstream American public.<sup>2</sup> Moreover, tattooing is gaining recognition across the country as a form of art and is increasingly the subject of museum and art shows.<sup>3</sup> If the tattoo is a piece of artwork, then the process of creating such art could be considered protected First Amendment speech. Indeed, the past few years have seen scholars arguing for constitutional protection of the tattooing process.<sup>4</sup> But unlike other types of art, tattooing can have serious health consequences for the tattoo recipient, including allergic reactions to the ink and serious skin infections.<sup>5</sup>

To address these health risks, states and cities have implemented strict regulations on tattooing. As of 2003, thirty-nine states had tattooing regulations.<sup>6</sup> Other states have no statewide regulations but choose to allow municipal or county ordinances to regulate.<sup>7</sup> These regulations range from mandates concerning the sterilization

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1. Maria Luisa Pérez-Cotapos S. et al., *Tattooing and Scarring: Technique and Complications*, in *DERMATOLOGIC COMPLICATIONS WITH BODY ART* 29, 34–35 (Christa De Cuyper & Maria Luisa Pérez-Cotapos S. eds., 2010).

2. *Id.*

3. CLINTON R. SANDERS, *CUSTOMIZING THE BODY: THE ART AND CULTURE OF TATTOOING* 10 (1st ed. 1989).

4. James M. McGoldrick, Jr., *Symbolic Speech: A Message from Mind to Mind*, 61 *OLKA. L. REV.* 1, 60–61 (2008); Bobby G. Frederick, Note, *Tattoos and the First Amendment—Art Should Be Protected as Art: The South Carolina Supreme Court Upholds the State's Ban on Tattooing*, 55 *S.C. L. REV.* 231 (2003); Anthony Jude Picchione, Note, *Tat-too Bad for Municipalities: Unconstitutional Zoning of Body-Art Establishments*, 84 *B.U. L. REV.* 829 (2004).

5. Pérez-Cotapos S. et al., *supra* note 1, at 34–35.

6. Myrna L. Armstrong, *Tattooing, Body Piercing, and Permanent Cosmetics: A Historical and Current View of State Regulations, with Continuing Concerns*, 67 *J. ENVTL. HEALTH* 38, 40 (2005).

7. *Id.*

procedures to be used by the tattooists<sup>8</sup> to outright bans on tattooing.<sup>9</sup> The harshness of some of these regulations has brought tattooists to the courts to protect their businesses, claiming that tattooing is part of their right to free speech under the First Amendment. Their success in the courts has varied widely.

In reviewing these First Amendment claims, some courts dismiss tattooing altogether, holding that the process of tattooing is not even symbolic conduct, much less pure First Amendment speech.<sup>10</sup> In *Yurkew v. Sinclair*, for example, a federal district court recognized that the speech arising from the tattooing process differed significantly from the speech embodied in the tattoo itself.<sup>11</sup> The tattoo was “clearly more communicative” than the process of tattooing and, furthermore, the average observer would not view the tattooing process itself as communicative.<sup>12</sup> Consequently, the court found that the tattooing process was “not sufficiently communicative in nature” to fall within the realm of symbolic conduct protected by the First Amendment.<sup>13</sup>

Other courts have treated tattoos as a type of art form—entitled to full First Amendment protection—and have given tattooing the same protected status of pure speech.<sup>14</sup> For example, in *Anderson v. City of Hermosa Beach*, the Ninth Circuit held that because all tattoos are forms of pure speech, the process of tattooing necessarily leads to pure speech.<sup>15</sup> Because the tattooing process leads to pure speech, the process should not be separately analyzed as conduct apart from the end result.<sup>16</sup> The court stated that the act of painting is never

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8. *E.g.*, 410 IND. ADMIN. CODE 1-5-1 to 1-5-38 (2010).

9. *E.g.*, Julissa McKinnon, *Hookah Bar, Tattoo Shop Ban Extended*, PRESS-ENTERPRISE (Riverside, CA), Feb. 3, 2010, at A5.

10. *People v. O'Sullivan*, 409 N.Y.S.2d 332, 333 (1978); *Yurkew v. Sinclair*, 495 F. Supp. 1248, 1254 (D. Minn. 1980); *State ex rel Med. Licensing Bd.*, 492 N.E.2d 534, 539 (Ind. Ct. App. 1986); *State v. White*, 560 S.E.2d 420, 423 (S.C. 2002); *Blue Horseshoe Tattoo, V, Ltd. v. City of Norfolk*, 72 Va. Cir. 388, 390 (2007); *Hold Fast Tattoo, LLC v. City of N. Chi.*, 580 F. Supp. 2d 656, 660 (N.D. Ill. 2008).

11. 495 F. Supp. 1248, 1254 (D. Minn. 1980).

12. *Id.*

13. *Id.* at 1253.

14. *Commonwealth v. Meuse*, 10 Mass. L. Rep. 661, 1999 Mass. Super. LEXIS 470, at \*6–8 (Mass. Super. Nov. 29, 1999); *Anderson v. City of Hermosa Beach*, 621 F.3d 1051, 1060 (9th Cir. 2010).

15. *Anderson*, 621 F.3d at 1061.

16. *Id.* at 1062.

separated from the resulting painting and so neither should the process of tattooing be separated from the tattoo.<sup>17</sup> Accordingly, the court held that the process of tattooing was pure speech, similar to a commissioned art.<sup>18</sup>

Thus, whether a court finds tattooing to be protected under the First Amendment seems to rise or fall on one issue: whether the process of tattooing should be analyzed separately from the message conveyed by the tattoo or if the tattooing process and the tattoo are inseparable for First Amendment purposes.<sup>19</sup> Courts that refuse to separate the tattooing process from the tattoo find both to be protected speech.<sup>20</sup> On the other hand, courts that examine the tattooing process independently of the tattoo find that tattooing should not receive any First Amendment protection.<sup>21</sup> Thus, separation plays an important part in the debate because it ultimately can determine what, if any, First Amendment guarantees tattooing receives.

After examining the reasons for and against separation, this Comment argues that because the speech created by the tattooing process belongs to the customer and not to the person who actually injected the ink, separation of the tattooing process from the resulting tattoo is necessary for First Amendment analysis. Unlike a commissioner of art, the tattoo customer determines what message, if any, the tattoo conveys. Part II of this Comment gives background on the Supreme Court's treatment of art and symbolic conduct under the First Amendment and gives a detailed summary of important court decisions on the speech aspects of the tattooing process. Part III shows that because the tattooing process does not always lead to pure speech and substantially differs from commissioned art, separation of the process from the tattoo is necessary. Part IV explores the impact of separation on the constitutional protection for

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17. *Id.*

18. *Id.*

19. *Id.* at 1059–60.

20. *Commonwealth v. Meuse*, 10 Mass. L. Rep. 661, 1999 Mass. Super. LEXIS 470, at \*8–9 (Mass. Super. Nov. 29, 1999); *Anderson*, 621 F.3d at 1060.

21. *People v. O'Sullivan*, 409 N.Y.S.2d 332, 333 (1978); *Yurkew v. Sinclair*, 495 F. Supp. 1248, 1255 (D. Minn. 1980); *State ex rel Medical Licensing Board v. Brady*, 492 N.E.2d 34, 39 (Ind. Ct. App. 1986); *State v. White*, 560 S.E.2d 420, 423 (S.C. 2002); *Blue Horseshoe Tattoo, V. Ltd. v. City of Norfolk*, 72 Va. Cir. 388, 390 (2007); *Hold Fast Tattoo, LLC v. City of North Chicago*, 580 F. Supp. 2d 656, 660 (N.D. Ill. 2008).

the process of tattooing and the consequently permissible regulations, as well as the impact of separation for other collaborative processes that result in communication. Finally, Part V gives a brief conclusion.

## II. BACKGROUND

### *A. First Amendment Protections*

The First Amendment provides that “Congress shall make no law . . . abridging the freedom of speech.”<sup>22</sup> What qualifies as speech is perhaps best defined, first, by what it is not. Incitement to violence, fighting words, libel, obscenity, and child pornography may involve speech, but they do not receive any constitutional protection<sup>23</sup> because they are considered low-value types of speech that do not further First Amendment values.<sup>24</sup> Outside of these categories of unprotected speech, any use of words, oral or written, is protected under the First Amendment.<sup>25</sup>

While words themselves are certainly protected by the First Amendment, “the Constitution looks beyond written or spoken words as mediums of expression.”<sup>26</sup> Artistic mediums that use pictures, music, or movement rather than words to express an idea are also protected by the First Amendment. Justice Souter has declared: “It goes without saying that artistic expression lies within

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22. U.S. CONST. amend. I.

23. *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (holding that the “constitutional guarantees of free speech” do not apply when “advocacy is directed to inciting or producing imminent lawless action”); *R.A.V. v. St. Paul*, 505 U.S. 377, 383 (1992) (stating that obscenity, fighting words, and defamation are not protected by the First Amendment); *New York v. Ferber*, 458 U.S. 747, 764 (1982) (holding that “the category of child pornography . . . is unprotected by the First Amendment”).

24. “[O]ur society, like other free but civilized societies, has permitted restrictions upon the content of speech in a few limited areas, which are ‘of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.’” *R.A.V.*, 505 U.S. at 382–83 (1992) (quoting *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942)). See also Geoffrey R. Stone, *Content Regulation and the First Amendment*, 25 WM. & MARY L. REV. 189, 194 (1983).

25. See *U.S. v. Stevens*, 130 S. Ct. 1577, 1584 (2010) (holding that generally, “the First Amendment means that government has no power to restrict expression because of its message” but that restrictions are permitted in traditionally unprotected areas) (quoting *Ashcroft v. Amer. Civil Liberties Union*, 535 U.S. 564, 573 (2002)).

26. *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557, 569 (1995).

this First Amendment protection.”<sup>27</sup> Elsewhere, the Court has called paintings and music “unquestionably shielded.”<sup>28</sup> Indeed, music, live performances, and paintings have received protection in several Supreme Court cases.<sup>29</sup> But the Court has failed to offer a detailed explanation for its protection of art or how art fits within the First Amendment.<sup>30</sup> The exact level of art’s protection is also uncertain as the Court has left open the exact test for the protection of artwork.<sup>31</sup> But, while the Court has not offered any definitive opinion about what types of art are protected, clues can be found within the Court’s previous decisions.

In affording First Amendment guarantees to art, the Court seems to emphasize the communicative nature of art.<sup>32</sup> For example, the Court has reasoned that films are included in the First Amendment because they “are a significant medium for the communication of ideas” that can espouse a particular agenda or subtly mold a viewer’s thoughts.<sup>33</sup> In defending art as speech, Justice Souter has stated that the constitutional protection of art does not rest on any political significance but rather on the piece’s “expressive character.”<sup>34</sup> But although art may generally receive protection for its communicative possibilities, no “narrow, succinctly articulable message” is required

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27. *Nat’l Endowment for the Arts v. Finley*, 524 U.S. 569, 602 (Souter, J., dissenting). The majority did not question whether the live, dramatic performances in question were speech under the First Amendment. *See id.* at 580.

28. *Hurley*, 515 U.S. at 569.

29. *Ward v. Rock Against Racism*, 491 U.S. 781, 790 (1989) (“Music . . . is protected under the First Amendment”); *Schad v. Mount Ephraim*, 452 U.S. 61, 65 (1981) (“[M]otion pictures, programs broadcast by radio and television, and live entertainment, such as musical and dramatic works, fall within the First Amendment guarantee.”); *Kaplan v. California*, 413 U.S. 115, 119–20 (1973) (“As with pictures, films, paintings, drawings, and engravings, both oral utterance and the printed word have First Amendment protection.”).

30. Marci A. Hamilton, *Art Speech*, 49 VAND. L. REV. 73, 104–05 (1996) (“Although the Supreme Court has recognized, since at least 1952, that art should receive some first amendment protection, it has yet to provide a theory to undergird the assertion, or to make clear how much protection art ought to receive.”); Christen Martosella, Note, *Refusing to Draw the Line: A Speech-Protective Rule for Art Vending Cases*, 13 N.Y.U. J. LEGIS. & PUB. POL’Y 603, 608 (“[T]he Court has never offered a definition for art for First Amendment purposes, nor has it fleshed out exactly why art merits First Amendment protection.”).

31. Hamilton, *supra* note 30, at 104–05.

32. *See id.* (“Mirroring the commentators’ approach, the Court tends to protect art only to the extent that it is a vehicle for ideas, especially political ideas.”).

33. *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 501 (1952).

34. *Nat’l Endowment for the Arts v. Finley*, 524 U.S. 569, 602 (Souter, J., dissenting).

of an artwork for it to be protected by the First Amendment.<sup>35</sup> Therefore, the First Amendment covers even abstract artwork that arguably lacks a distinct message.<sup>36</sup>

Lower courts have also emphasized the artist's intent to communicate when analyzing the protection of art under the First Amendment.<sup>37</sup> For example, in *White v. City of Sparks*, the Ninth Circuit protected a painting "so long as it is an artist's self-expression . . . because it expresses the artist's perspective."<sup>38</sup> Also in *White*, the Ninth Circuit reserved the question of whether "paintings that are copies of another artist's work or paintings done in an art factory setting where the works are mass-produced by the artist" would receive any First Amendment protection.<sup>39</sup> The court's reservation of this question indicates that it was comfortable in affording constitutional protection to artwork only when there were no questions concerning authorship or the author's communicative input into each artwork.

The Supreme Court has also recognized that beyond words and artistic mediums, conduct may be sufficiently communicative to qualify as speech. The Court has noted that "[s]ymbolism is a primitive but effective way of communicating ideas."<sup>40</sup> Given this communicative value, the Court has protected some conduct as symbolic speech.<sup>41</sup> But the Court has refused to extend First Amendment protection to the "apparently limitless variety of conduct" that could be claimed as speech "whenever the person engaging in the conduct intends thereby to express an idea."<sup>42</sup> Thus, in *Spence v. Washington*, the Court protected the government's interest in regulating a course of conduct by limiting protection to conduct where "[a]n intent to convey a particularized message was

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35. *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557, 569 (1995).

36. *Id.*; see also David Greene, *Why Protect Political Art as "Political Speech"?*, 27 HASTINGS COMM. & ENT. L.J. 359, 366 (2004) ("However, the Supreme Court has also made clear that art is 'speech' protected by the First Amendment even if it is not so 'imbued' with communicative elements.").

37. Martosella, *supra* note 30, at 619–25.

38. 500 F.3d 953, 956 (9th Cir. 2007).

39. *Id.* at 956 n.4.

40. *West Virginia Bd. of Ed. v. Barnette*, 319 U.S. 624, 632 (1943).

41. *E.g.*, *Virginia v. Black*, 538 U.S. 343, 358 (2003).

42. *United States v. O'Brien*, 391 U.S. 367, 376 (1968).

present, and in the surrounding circumstances the likelihood was great that the message would be understood by those who viewed it.”<sup>43</sup> Instances of protected symbolic conduct include wearing black armbands to protest the Vietnam War,<sup>44</sup> taping a peace sign on an inverted American flag,<sup>45</sup> burning an American flag,<sup>46</sup> and marching in an organized parade.<sup>47</sup>

Even if speech falls within the protection of the First Amendment, however, regulation may be permissible. The protection of the First Amendment is not absolute.<sup>48</sup> Some government regulation may be constitutional even though it regulates protected speech.<sup>49</sup> In determining what types of regulation are permissible, the Supreme Court has typically divided regulations of protected speech into two categories: content-based regulations and content-neutral regulations.<sup>50</sup> Content-based regulations aim at the content of a message and thereby attempt to shut down certain messages or viewpoints.<sup>51</sup> Content-neutral regulations, on the other hand, “limit communication without regard to the message conveyed.”<sup>52</sup> These regulations are often referred to as time, place, and manner restrictions because they aim

at regulating the circumstances surrounding the speech and not the actual message.<sup>53</sup>

43. 418 U.S. 405, 410–11 (1974).

44. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 505–06 (1969).

45. *Spence v. Washington*, 418 U.S. 405, 415–16 (1974).

46. *O’Brien*, 391 U.S. at 372.

47. *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557, 569 (1995).

48. *Virginia v. Black*, 538 U.S. 343, 358 (2003).

49. *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 (1984) (“Expression . . . is subject to reasonable time, place, or manner restrictions.”).

50. Geoffrey R. Stone, *Content-Neutral Regulations*, 54 U. CHI. L. REV. 46, 54–55 (1987).

51. Examples of content-based regulations include laws prohibiting criminals from profiting from books written about their crimes, *Simon & Schuster, Inc. v. Members of New York State Crime Victims Board*, 502 U.S. 105 (1991), and statutes preventing judicial candidates from announcing their personal views on legal or political issues, *Republican Party of Minnesota v. White*, 536 U.S. 765 (2002).

52. Stone, *Content Regulation*, *supra* note 24, at 189.

53. A few examples of content-neutral regulations include bans on signs on public property, *Members of City Council v. Taxpayers for Vincent*, 466 U.S. 789 (1984), regulations on



Because content-based and content-neutral regulations present differing First Amendment concerns,<sup>54</sup> the Court uses different tests to determine the constitutionality of each. “Content-based restrictions are more likely than content-neutral restrictions to distort public debate, to be tainted by improper motivation, and to be defended with constitutionally disfavored justifications.”<sup>55</sup> For these reasons, content-based regulations are subject to strict scrutiny.<sup>56</sup> That is, the government interest at hand must be compelling, and the regulation must be narrowly tailored to meet this government interest.<sup>57</sup> Content-neutral regulations can similarly undermine First Amendment principles by limiting the “availability of particular means of communication.”<sup>58</sup> But because content-neutral regulations do not distort debate or favor a certain viewpoint, they are subject to a lower level of scrutiny.<sup>59</sup> Thus, a content-neutral regulation must be “narrowly tailored to serve a significant governmental interest” and must “leave open ample alternative channels for communication of the information.”<sup>60</sup>

Regulation of symbolic conduct, however, is not subject to these same standards. Symbolic conduct is not “pure speech”; it necessarily combines both speech and nonspeech elements. As a threshold matter, a regulation of symbolic conduct must not aim directly at the regulated conduct’s expressive elements but rather may impose only an incidental limitation on the First Amendment.<sup>61</sup> Otherwise, the

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the acceptable times and or place to use a loud speaker, *Kovacs v. Cooper*, 336 U.S. 77 (1949), and requirement of a permit for demonstrations on public property, *Thomas v. Chicago Park Dist.*, 534 U.S. 316 (2002).

54. Stone, *Content-Neutral Regulations*, *supra* note 50, at 72 (“Content-based and content-neutral restrictions both threaten basic first amendment values, although they do so in different ways.”).

55. *Id.*

56. *Boos v. Barry*, 485 U.S. 312, 321 (1988) (noting that “a content-based restriction on political speech in a public forum . . . must be subjected to the most exacting scrutiny”).

57. *Id.* (citing *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 45 (1983)).

58. Stone, *Content-Neutral Regulations*, *supra* note 50, at 57; Stone, *Content Regulation*, *supra* note 24, at 193.

59. Stone, *Content-Neutral Regulations*, *supra* note 50, at 54.

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

61. *United States v. O’Brien*, 391 U.S. 367, 376 (1968); Michael C. Dorf, *Incidental Burdens on Fundamental Rights*, 109 HARV. L. REV. 1175, 1205 (1996) (explaining that an incidental restriction is subject to heightened scrutiny if it “appl[ies] to speech so disproportionately as to suggest that the government is targeting speech” or if the “law

regulation is content-based discrimination subject to strict scrutiny.<sup>62</sup> An incidental regulation of symbolic conduct is “sufficiently justified . . . if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.”<sup>63</sup> In this way, the regulation is similar to a time, place, or manner restriction in that it is not seeking to limit the message but rather the way that the message is conveyed.<sup>64</sup>

### *B. Treatment of Tattooing by Courts*

While several cases have examined whether a tattoo by itself is speech under the First Amendment,<sup>65</sup> less than ten cases have actually analyzed the speech qualities of the tattooing process to determine whether it is entitled to First Amendment protection. These cases have come down on both sides of the issue. A majority of courts have held that the tattooing process, analyzed apart from the tattoo itself, was not protected speech or symbolic conduct.<sup>66</sup> In contrast, by refusing to separate the process of tattooing from the tattoo, other courts have held that the tattooing process is protected

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penalizes expressive activity”).

62. *Texas v. Johnson*, 491 U.S. 397, 403 (1989) (holding that if the State’s interest was related to expression, “then we are outside of *O’Brien’s* test,” and the regulation is subject to “a more demanding standard”).

63. *O’Brien*, 391 U.S. at 377.

64. *Cnty. for Creative Non-Violence*, 468 U.S. at 298 (“[T]he Park Service regulation is sustainable under the four-factor standard of *United States v. O’Brien*, 391 U.S. 367 (1968), for validating a regulation of expressive conduct, which, in the last analysis is little, if any, different from the standard applied to time, place, or manner restrictions.”).

65. *See, e.g.*, *Roberts v. Ward*, 468 F.3d 963 (6th Cir. 2006) (holding that a government employee’s tattoo was “not a clearly established right” under the First Amendment for “qualified immunity purposes”); *Riggs v. City of Fort Worth*, 229 F. Supp. 2d 572 (N.D. Tex. 2002) (holding that tattoos are not protected First Amendment speech); *Stephenson v. Davenport Cmty. Sch. Dist.*, 110 F.3d 1303 (8th Cir. 1997) (holding that a tattoo that is only self-expression is not protected by the First Amendment).

66. *People v. O’Sullivan*, 409 N.Y.S.2d 332, 332 (1978); *Yurkew v. Sinclair*, 495 F. Supp. 1248, 1254 (D. Minn. 1980); *State ex rel. Med. Licensing Bd. v. Brady*, 492 N.E.2d 34, 39 (Ind. Ct. App. 1986); *State v. White*, 560 S.E.2d 420, 423 (S.C. 2002); *Blue Horseshoe Tattoo, V. Ltd. v. City of Norfolk*, 72 Va. Cir. 388, 390 (2007); *Hold Fast Tattoo, LLC v. City of N. Chi.*, 580 F. Supp. 2d 656, 660 (N.D. Ill. 2008).

as First Amendment speech.<sup>67</sup>

*1. Cases that separate the tattooing process from the tattoo*

Although all the cases that separate the tattooing process from the tattoo conclude that tattooing is not symbolic conduct, their mode of analysis falls into two general camps. Some cases simply declare, with little analysis, that the tattooing process is not symbolic conduct. The other cases find that tattooing is not symbolic conduct because, unlike the tattoo itself, tattooing is not communicative. But both groups of cases fail to provide a detailed justification for the separation of the tattoo and the process of tattooing.

Of the cases that separate the tattoo from the tattooing process, some hold that tattooing is not speech or symbolic conduct but fail to provide support for the holding.<sup>68</sup> The court in *People v. O'Sullivan* simply declared that “[w]hether tattooing be an art form . . . or a ‘barbaric survival, often associated with a morbid or abnormal personality,’ . . . we do not deem it speech or even symbolic speech”<sup>69</sup> and provided no additional analysis of the speech qualities of tattooing. To the court, even if the tattooing process were speech or symbolic conduct, the regulation would still be constitutional due to the health risks of tattooing.<sup>70</sup> Likewise, the court in *State ex rel Medical Licensing Board v. Brady* held that the process of tattooing was not protected speech, even after admitting that the First Amendment protects a “wide range of expression.”<sup>71</sup> To support this holding, the court simply cited previous cases holding that tattooing was not speech.<sup>72</sup> Beyond finding these cases “persuasive,” the court did not discuss the issue further.<sup>73</sup> The court in *State v. White* continued this trend by proceeding straight to the *Spence* test

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67. *Commonwealth v. Meuse*, 10 Mass. L. Rep. 661, 1999 Mass. Super. LEXIS 470, at \*6–8 (Nov. 29, 1999); *Anderson v. City of Hermosa Beach*, 621 F.3d 1051, 1061 (9th Cir. 2010).

68. See Picchione, *supra* note 4, at 843–44 (“In none of the cases the Commonwealth cited did the courts inquire into the communicative aspects of tattooing; rather, the cited cases—indeed the entire corpus of decisions on the issue—were based merely on the conclusory assertion that tattoos are not speech or symbolic speech.”).

69. 409 N.Y.S.2d 332, 333 (App. Div. 1978) (quoting *Grossman v. Baumgartner*, 254 N.Y.S.2d 335, 338 (App. Div. 1964)).

70. *Id.*

71. 492 N.E.2d 34, 39 (Ind. Ct. App. 1986).

72. *Id.*

73. *Id.*

without mentioning the speech qualities of the tattoo.<sup>74</sup> In applying the *Spence* test, the court found that the tattooing process was “not sufficiently communicative to warrant protections”<sup>75</sup> and yet provided no analysis for this assertion.

On the other hand, courts that do provide meaningful analysis on this issue mostly find that tattooing is not symbolic conduct because it is only the tattoo itself that communicates. For example, *Yurkew v. Sinclair* held that tattooing was “undeniably conduct” that did not “rise to the level of displaying the actual image” and simply was not as communicative as the tattoo itself.<sup>76</sup> The court found no showing that the average observer “would regard the process of injecting dye into a person’s skin through the use of needles as communicative.”<sup>77</sup> Thus, the court held that the process of tattooing was not symbolic conduct.<sup>78</sup> Because no First Amendment rights were implicated, refusal to rent a booth for tattooing at the state fair survived under rational-basis review.<sup>79</sup> Similarly, in *Hold Fast Tattoo v. City of North Chicago* a federal district court held that tattooing failed the *Spence* test. To the court, the process of tattooing was “one step removed from actual expressive conduct.”<sup>80</sup> The court felt that tattooing was a mechanism for speech and not speech itself.<sup>81</sup> To support this assertion, the court likened the process of tattooing to a sound truck, in that both are used to convey a message but do not by themselves receive First Amendment protection.<sup>82</sup>

Significantly, none of the cases that separate the process of tattooing from the tattoo discuss the reason for this separation. Even the courts that found tattoos to be communicative did not find that the tattoo’s speech properties prevented separating the tattoo from the tattooing process.<sup>83</sup> Nor do these cases even discuss this

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74. 560 S.E.2d 420, 423 (S.C. 2002).

75. *Id.*

76. 495 F. Supp. 1248, 1253, 1254 (D. Minn. 1980).

77. *Id.* at 1254.

78. *Id.*

79. *Id.* at 1256.

80. 580 F. Supp. 2d 656, 660 (N.D. Ill. 2008).

81. *Id.*

82. *Id.*

83. *Yurkew v. Sinclair*, 495 F. Supp. 1248, 1254 (D. Minn. 1980).; *Hold Fast Tattoo*, 580 F. Supp. 2d at 660.

possibility. But the cases that do not separate the process from the tattoo do spend time examining how the tattoo's speech qualities factor into the decision to whether to separate the two.

*2. Cases that refuse to separate the process of tattooing from the tattoo*

Of the few cases that do not employ a separate analysis for the process and for the tattoo, all found that the process of tattooing was pure speech. These courts have emphasized the artistic nature of tattoos, leading to the conclusion that tattooing is art created by the tattooist, and, therefore, pure expression. In *Commonwealth v. Meuse*, for example, the court focused on the current social view of tattoos as acceptable and even artistic.<sup>84</sup> Considering the social acceptance of tattooing, the court held that "[t]attooing cannot be said to be other than one of the many kinds of expression so steadfastly protected by our Federal and State Constitutions."<sup>85</sup> This ruling was later reaffirmed by the same court in 2007.<sup>86</sup>

In a similar vein, the Ninth Circuit in *Anderson v. City of Hermosa Beach* has held that tattoos are pure artistic expression; unlike other cases, *Anderson* used this finding to give a detailed explanation as to why the process behind the tattoo should not be subject to a separate analysis.<sup>87</sup> The court reasoned that tattoos themselves are combinations of forms of pure expression, regardless of the choice of medium.<sup>88</sup> The *Spence* test is applicable only when a process results in conduct that does not always convey a message rather than a process that always results in pure speech.<sup>89</sup> Because tattoos are pure speech, the court reasoned, the process of tattooing should not be separated from the resulting tattoo and subjected to the *Spence* test.<sup>90</sup> Otherwise, the court suggested, the act of painting could be analyzed as conduct separate from the painting itself.<sup>91</sup> As with other collaborative processes, such as commissioned art or a news

84. 10 Mass. L. Rep. 661, 1999 Mass. Super. LEXIS 470, at \*6-8 (Mass. Super. Ct. Nov. 29, 1999).

85. *Id.* at \*8-9.

86. Voigt v. City of Medford, 22 Mass. L. Rep. 122 (Mass. Super. Ct. 2007).

87. Anderson v. City of Hermosa Beach, 621 F.3d 1051, 1060-61 (9th Cir. 2010).

88. *Id.* at 1061.

89. *Id.*

90. *Id.* at 1061-62.

91. *Id.* at 1061.

article overseen by multiple editors, the fact that several people contribute to the end result does not revoke First Amendment protection.<sup>92</sup>

After determining that all aspects of the tattooing process, including its business side, are protected speech,<sup>93</sup> the court found, under a strict scrutiny analysis, that a total ban on tattooing was not sufficiently tailored to the significant health interests at issue nor did it leave open adequate alternative channels of communication.<sup>94</sup> Having the same symbol on a shirt or other medium is not the same message as a tattoo because the essence of the tattoo's message is wrapped up in its permanence and its painful placement directly onto the body.<sup>95</sup> Thus, the tattoo is not only a more effective medium of communication, as a sound truck is more effective than simple oral communication, but it also communicates a unique message that no other medium can entirely capture.<sup>96</sup> For these reasons, the Ninth Circuit struck down the city-wide ban on tattooing as facially unconstitutional.<sup>97</sup>

### III. WHY SEPARATION IS NECESSARY

As established in Part II, courts are divided on whether the process of tattooing and the tattoo should be treated as one for First Amendment analysis or whether the two should be treated as distinct forms of speech. Although the courts that have separated the two have not provided much analysis or support, the choice to separate is the correct one. Careful examination into the tattoo itself and the tattooing process exposes cracks in the foundation of the cases that refuse to separate the tattooing process from the tattoo. First, because many tattoos lack a communicative function, not all tattoos are pure speech. Second, the courts' comparison of the tattooing process to commissioned art is improper given the tattooist's low level of input into the tattoo's message and into the

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92. *Id.* at 1062.

93. *Id.* at 1063.

94. *Id.* at 1065–66.

95. *Id.* at 1067 (“[A] permanent tattoo ‘often carries a message quite distinct’ from displaying the same words or picture through some other medium . . .”(quoting *City of Ladue v. Gilleo*, 512 U.S. 43, 56 (1994))).

96. *Id.* at 1067.

97. *Id.* at 1068.

aspects of the tattoo itself. For these reasons, courts should separately analyze the tattooing process and tattoos when determining their protected status under the First Amendment.

*A. Tattooing Does Not Always Lead to Pure Speech*

For the courts that choose not to separate the tattoo from the tattooing process, the argument is simple. A process that creates pure speech, such as writing or painting, is never separated from the resulting speech.<sup>98</sup> Tattoos are considered art<sup>99</sup> or forms of pure speech.<sup>100</sup> Therefore, tattooing should not be distinguished from the tattoo for First Amendment analysis because tattooing is a process that leads to pure speech.<sup>101</sup> But there is a problem with the underlying premise that all tattoos are artistic and thus forms of pure speech. Many tattoos are not meant to be communicative and are not treated as such by the courts. As a result, the logic of *Anderson* and *Meuse* falls apart, leaving the correct approach: the separation of the tattooing process and the tattoo according to the *Spence* test.

*1. Tattoos that lack a communicative raison d'être*

While many tattoos are expressive in nature, others simply are not. Some tattooees have no communicative motive for receiving a tattoo. Perhaps the best example of a nonexpressive tattoo is the cosmetic tattoo, otherwise known as permanent makeup. Cosmetic tattooing is done around the eyes or lips and gives an appearance of eyeliner, fuller eyebrows, or lip liner.<sup>102</sup> The common reasons for getting a cosmetic tattoo have nothing to do with expression. Many recipients of cosmetic tattoos merely “desire to improve their appearance” and to “look their best at all times.”<sup>103</sup> Besides hoping for an aesthetic improvement, cosmetic tattooees choose to be

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98. *Id.* at 1061.

99. *Commonwealth v. Meuse*, 10 Mass. L. Rep. 661, 1999 Mass. Super. LEXIS 470, at \*6–8 (Mass. Super. Ct. Nov. 29, 1999).

100. *Anderson*, 621 F.3d at 1061.

101. *Id.*

102. Jana C. Saunders & Myrna L. Armstrong, *Experiences and Influences of Women with Cosmetic Tattooing*, 17 DERMATOLOGY NURSING 23, 24 (2005).

103. *Id.* at 26.

tattooed in order to “decrease the amount of time they spen[d] in applying makeup.”<sup>104</sup> The desire to look better and to spend less time applying makeup has no communicative value. These tattooees are not trying to speak with their permanent makeup; they are simply trying to look their best. While other types of tattoos can be used for a wide range of potential communicative purposes, such as proclaiming membership with a group, registering important personal events, memorializing loved ones, or even expressing passions or hobbies,<sup>105</sup> cosmetic tattoos present none of these communicative purposes.

In a similar vein, when asked what the experience has done for them, cosmetic tattooees most commonly answer that the cosmetic tattoo has boosted their self-confidence.<sup>106</sup> Notice that this answer does not reaffirm any type of message; rather, it is tied to a perceived improvement in appearance. This sharply contrasts the answers of recipients of body tattoos when asked what effect the tattoo has had on their life. One interviewee described how “[t]hings that were . . . a big part of my life[] are now on my body.”<sup>107</sup> Another noted that her tattoos connect her to others with tattoos and also separate her from the non-tattooed population.<sup>108</sup> “[T]attooees consistently conceive of the tattoo as having impact on their definition of self and as demonstrating to others information about their unique interests and social connections.”<sup>109</sup> Thus, recipients of body tattoos tend to believe that their tattoos change their own views and the views of others while cosmetic tattooees find changes only in personal appearance and self-confidence.

Nor are cosmetic tattoos the only type of tattoos received for nonexpressive purposes; they are merely one example. Any tattoo may be nonexpressive if the tattooee had no communicative purpose in mind. As tattoos have gained in popularity, tattoos could be chosen merely as a type of fashion statement that does not merit First

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104. *Id.*

105. SANDERS, *supra* note 3, at 46–47.

106. Saunders & Armstrong, *supra* note 102, at 27.

107. Janet S. Fedorenko et al., *A Body of Work: A Case Study of Tattoo Culture*, 25 VISUAL ARTS RES. 105, 110 (1999).

108. *Id.* at 110–11.

109. SANDERS, *supra* note 3, at 51.



Amendment protection as speech. This seems more possible given the tattoo's rise in popularity.

Further, tattoos are no longer viewed by society as "an act of rebellion or deviance, associated with sailors, carnival performers, criminals, and other marginal groups in society."<sup>110</sup> In recent years, tattooing has become quite popular among the mainstream public.<sup>111</sup> The data on the subject is quite revealing. "Of Americans age eighteen to twenty-four . . . only twenty-nine percent describe tattoos as 'freakish,' and fifty-three percent find tattoos 'artistic.'"<sup>112</sup> Middle-class, suburban women are "the single fastest growing demographic group seeking tattoo[s]."<sup>113</sup> The Pew Research Center found in 2007 that thirty-six percent of young adults age eighteen to twenty-five have a tattoo and that forty percent of adults age twenty-six to forty have a tattoo.<sup>114</sup>

As tattoos become fashionable, the fashion-forward may choose a tattoo for the same reasons they pick an outfit.<sup>115</sup> Case studies examining the reasons for getting a tattoo find "they look good" to be a common reason.<sup>116</sup> In one study, almost a third of tattooees surveyed "described their tattoos as decorative with no symbolic meanings" attached to them.<sup>117</sup> Another study found that while the majority of tattooees surveyed chose to get the tattoo as a means of

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110. Marika Tiggemann & Fleur Golder, *Tattooing: An Expression of Uniqueness in the Appearance Domain*, 3 BODY IMAGE 309, 309 (2006) (citation omitted).

111. *Id.*; Pérez-Cotapos S. et al., *supra* note 1, at 29 ("Permanent modifications such as piercing and tattooing are old forms of body art that have gained popularity in the last decades as a fashion statement, promoted by celebrities."); *see also* Frederick, *supra* note 4, at 250 ("[T]attooing . . . is believed to be the most commonly purchased form of original artwork in the United States." (quoting Memorandum of Decision and Order for Judgment on Cross-motions for Summary Judgment, *Lanphear v. Massachusetts*, No. 99-1896-B (Mass. Super. Ct. Oct. 20, 2000) (internal quotation marks omitted))).

112. Picchione, *supra* note 4, at 833-34 (citing David Whelan, *Ink Me, Stud*, AM. DEMOGRAPHICS, Dec. 2001, at 1).

113. *Id.* (quoting Hoag Lewis, *The Changing Cultural Status of Tattoo Art*, <http://www.tattooartist.com/history.html>) (internal quotation marks omitted).

114. THE PEW RESEARCH CTR. FOR THE PEOPLE & THE PRESS, HOW YOUNG PEOPLE VIEW THEIR LIVES, FUTURES AND POLITICS: A PORTRAIT OF "GENERATION NEXT" 21 (2007), *available at* <http://people-press.org/files/legacy-pdf/300.pdf>.

115. Pérez-Cotapos S. et al., *supra* note 1, at 31 ("Ornamental tattoos represent the largest group and are nowadays accepted as a fashion statement in all the social classes.") (emphasis omitted).

116. Tiggemann & Golder, *supra* note 110, at 314.

117. Fedorenko et al., *supra* note 107, at 111.

individual expression, others chose it merely as a fashion statement.<sup>118</sup> As one tattooist laments, “Tattooing’s become fashion now, it’s become trendy. . . . [W]hether it’s a tattoo or a pair of shoes or something, they treat it as the same thing. It’s a fashion statement.”<sup>119</sup> This idea is reinforced by one tattooee who described her neck tattoo as “just very decorative, like a permanent necklace.”<sup>120</sup>

Perhaps it could be argued that the permanence of a tattoo distinguishes it from other fashion choices and makes the tattoo naturally expressive, regardless of communicative intent. Fashion choices such as an outfit or hairstyle are transitory, easily changed at any time. Tattoos, on the other hand, reflect a greater, more permanent commitment to the image. But the image is not absolutely permanent; it can be removed by costly and painful surgery.<sup>121</sup> Furthermore, other fashion statements can be worn day in and day out—almost to the same level of permanence. The wearing of a certain necklace everyday does not necessarily raise it from fashion choice to expressive statement.

## 2. *Fashion, self-expression, and the courts*

Fashion choices with speech elements have not been considered pure speech but have been examined under the *Spence* test as symbolic conduct.<sup>122</sup> Of course, clothes can, at times, communicate a

118. Vaughn S. Millner & Bernard H. Eichold, II, *Body Piercing and Tattooing Perspectives*, 10 CLINICAL NURSING RES. 424, 433 (2001).

119. MARGO DEMELLO, *BODIES OF INSCRIPTION: A CULTURAL HISTORY OF THE MODERN TATTOO COMMUNITY* 191 (2000).

120. Guy Trebay, *Even More Visible Ink*, N.Y. TIMES, Sept. 25, 2008, at G1 (internal quotation marks omitted).

121. Joe Holleman, “*Bad News*” of *Tattoo Removal Fails to Sway Most Unhappily Decorated People*, ST. LOUIS POST-DISPATCH, Dec. 23, 2002, at E1 (“Basically, a professionally drawn tattoo will take about 18 months to two years to remove, will cost about \$3,000 and will require the use of numbing cream and over-the-counter painkillers . . .”).

122. See, e.g., *Jacobs v. Clark Cnty. Sch. Dist.*, 526 F.3d 419 (9th Cir. 2008) (finding that a dress code met the intermediate scrutiny test for regulations of symbolic conduct); *Blau v. Fort Thomas Pub. Sch. Dist.*, 401 F.3d 381 (6th Cir. 2005) (finding that clothing choice is not inherently expressive conduct); *Zalewska v. Cnty. of Sullivan*, 316 F.3d 314 (2d Cir. 2003) (examining whether the choice to wear a skirt is protected expressive conduct); *Long v. Bd. of Educ.*, 121 F. Supp. 2d 621 (W.D. Ky. 2000) (finding that clothing choice is expressive conduct protected by the First Amendment), *aff’d*, 21 F. App’x 252 (6th Cir. 2001).

particular message.<sup>123</sup> But the Supreme Court has not treated all fashion choices as protected speech. Instead, the Court employs an individualized test. In *Tinker v. Des Moines*, students wore black armbands to show contempt for the Vietnam War.<sup>124</sup> The Supreme Court found that in this context, the wearing of the armbands was “akin to ‘pure speech.’”<sup>125</sup> But the Court did not rule that wearing a black armband always receives First Amendment protection.<sup>126</sup> Rather, the Court recognized that this specific fashion choice, coupled with its underlying intended message, was indeed symbolic communication.<sup>127</sup> The *Anderson* Court noted that the *Spence* test was used precisely because wearing armbands is a type of conduct that “can be done for reasons having nothing to do with any expression.”<sup>128</sup> Thus, if wearing an armband for fashion purposes places all wearing of armbands outside of pure speech and into the symbolic conduct realm, then the process of tattooing should also be considered symbolic conduct.

Courts have also found that tattoos that solely communicate a self expression of individuality do not receive full First Amendment protection. In *Stephenson v. Davenport Community School District*, a student was asked to remove or alter her tattoo of a cross as part of a school dress-code regulation.<sup>129</sup> In determining whether the tattoo raised First Amendment concerns, the Eighth Circuit found that the tattoo, by the student’s admission, “was simply ‘a form of self-expression.’”<sup>130</sup> In other words, because the tattoo was not meant as a message to others, the court placed it outside of First Amendment

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123. “People strive to discover who they really are, and to express their real selves in various ways, including the expression of self through the selection of fashion.” Gowri Ramachandran, *Freedom of Dress: State and Private Regulation of Clothing, Hairstyle, Jewelry, Makeup, Tattoos, and Piercing*, 66 MD. L. REV. 11, 40 (2006) (internal quotation marks omitted). See also SANDERS, *supra* note 3, at 4 (“Fashion, like all other mechanisms of appearance alteration, is used symbolically to proclaim group membership and to signal voluntary exclusion from disvalued social categories.”).

124. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969).

125. *Id.* at 505, 508.

126. See *id.* at 514 (stating that the “circumstances of the present case” were a violation of the students’ constitutional rights).

127. *Id.* at 505.

128. *Anderson v. City of Hermosa Beach*, 621 F.3d 1051, 1061 (9th Cir. 2010).

129. *Stephenson v. Davenport Cmty. Sch. Dist.*, 110 F.3d 1303, 1305 (8th Cir. 1997).

130. *Id.* at 1307 n.4.

protections.<sup>131</sup> In a similar context, another court determined that an earring that went against the school dress code did not receive any First Amendment protection.<sup>132</sup> In looking to the *Spence* test, the court found that the only message conveyed by the earring was one of the wearer's individuality.<sup>133</sup> This message was "not within the protected scope of the First Amendment."<sup>134</sup>

The Supreme Court's treatment of fashion and other forms of self-expression under the First Amendment reinforces the idea that not all tattoos are pure protected speech. If self-expressive tattoos are not protected speech, then a potentially large percentage of tattoos would not receive any First Amendment protections.<sup>135</sup> Furthermore, the entire subset of cosmetic tattoos should not be covered by the First Amendment due to the lack of a communicative intent by the tattooee. Because not all tattoos would receive First Amendment protection, separation of the tattoo and the tattooing process makes sense and follows the Supreme Court's treatment of processes that do not lead to pure speech.

*B. Tattooing Requires No Creative Input or Communication from the Tattooist*

The lack of creative input or expression from the tattooist into the tattoo provides another reason for separately analyzing the tattoo and the tattooing process for First Amendment purposes. One major premise of the Ninth Circuit's decision in *Anderson* is that the process of tattooing should not be separated from the tattoo because "both the tattooist and the person receiving the tattoo are engaged in expressive activity."<sup>136</sup> The court likened tattooing to a piece of commissioned art.<sup>137</sup> Even though Michelangelo did not choose the subject of his painting on the ceiling of the Sistine Chapel, it is still his masterpiece and, therefore, his speech.<sup>138</sup> The same is said for a

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131. *Id.*

132. *Olesen v. Bd. of Educ.*, 676 F. Supp. 820, 822 (N.D. Ill. 1987).

133. *Id.*

134. *Id.*

135. One study found that forty percent of tattooees chose their tattoo as a means of self expression. Millner & Eichold, *supra* note 118, at 433.

136. *Anderson v. City of Hermosa Beach*, 621 F.3d 1051, 1062 (9th Cir. 2010).

137. *Id.*

138. *Id.*

newspaper writer who receives assignments and feedback from his or her editor.<sup>139</sup> As applied to tattooing, the court stated that the tattoo artist was still rendering art, the tattoo, regardless of whether the paying customer had the final say in the design chosen.<sup>140</sup> If the tattooist and the tattooee were indeed both speaking, this would provide a compelling reason to analytically fuse tattooing and tattoos. But the amount of creative input and the singularity of the speech conveyed by the tattoo distinguish tattooing from commissioned art in such a way that invalidates a comparison of the two. Unlike a commissioned painting, society views the tattoo as almost entirely the speech of the customer.

*1. Amount of artistic contribution*

The cases that refuse to separate the tattoo from the tattooing process observe that tattooing has become an art. True, tattooing has of late gained recognition as an art form.<sup>141</sup> *Anderson* noted the “skill, artistry and care that modern tattooists have demonstrated.”<sup>142</sup> Tattooing is increasingly the subject of museum and gallery exhibitions and is discussed by academics and critics of the art world.<sup>143</sup> But while the tattoo may be artistic, a tattooist has much lower level of creative input into a tattoo than a traditional commissioned artist. Indeed, the amount of the tattooist’s input varies greatly depending on whether the tattooist performs custom work or highly standardized “flash” tattooing.

In custom tattooing, each tattoo is a unique creation. Input from both the tattooist and the customer is expected, and both work together to create the exact design for the tattoo.<sup>144</sup> But this is not the only type of tattooing practiced. In fact, custom-only shops are

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139. *Id.*

140. *Id.*

141. See, e.g., DEMELLO, *supra* note 119, at 126; Frederick, *supra* note 4, at 239 (2003) (arguing that “[l]ike filmmaking, tattooing is an art form in its own right”); Picchione, *supra* note 4, at 833–34 (discussing that fifty-three percent of Americans age eighteen to twenty-four find tattoos artistic).

142. *Anderson*, 621 F.3d at 1061.

143. SANDERS, *supra* note 3, at 10.

144. Fedorenko et al., *supra* note 107, at 107 (describing how one tattooist’s “customers are encouraged to help her create original designs”).

the minority of tattoo shops.<sup>145</sup>

Flash tattooing lies on the other side of the spectrum from custom tattooing. Flash tattoos are generated from “highly standardized tattoo designs,” usually found on large sheets on the walls of the establishment.<sup>146</sup> These designs may be created by the tattooist or can even be purchased from other tattooists or “mail-order tattoo design companies.”<sup>147</sup> Indeed, most of the flash sheets in contemporary tattoo shops originated in the 1970s or 1980s.<sup>148</sup> The tattooist traces the tattoo outline from the design onto the skin and then proceeds to fill in the outlines with color.<sup>149</sup> Due to their standardized nature, these types of tattoos seem more like a rendered service than artwork.

Comparing flash tattoos to either commissioned art or to a news article presents serious problems because tattooists can tattoo without any creative input, unlike a commissioned artist. Typically, an artist working by commission is given a subject or theme with which to work. The artist’s work may even be subject to correction if specific aspects do not match the customer’s expectations. But the commissioner of a painting would not provide the outline of the image and engage an artist merely to paint by numbers. Likewise, while an editor may dictate the subject, tone, length, and viewpoint of a news article, the editor certainly wouldn’t provide the entire outline of an article for the writer to simply fill in with a few sentences and quotations. Nor would an artist buy the outline of another artist’s work to recreate the work on another canvas.

Yet this is what a flash tattooist does. A flash tattooist technically would never have to create any original design but could just fill in the outlines provided by other tattooists. No original, creative input from the tattooist is needed. The tattooist usually does not make any creative decision regarding the tattoo’s size, location, coloring, or even the design itself. Thus, because these choices are left to the customer, little creative outlet remains for the flash tattooist to render his or her own expression.

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145. See SANDERS, *supra* note 3, at 26 (noting that a majority of tattooists describe their career as “commercial, rather than creative”).

146. DEMELLO, *supra* note 119, at 8 n.4.

147. Fedorenko et al., *supra* note 107, at 107; see also DEMELLO, *supra* note 119, at 8 n.4.

148. DEMELLO, *supra* note 119, at 8 n.4.

149. Fedorenko et al., *supra* note 107, at 109.

If a tattooist purchases his or her designs from a tattoo design company and the company has a copyright on those designs, then this would seem to raise questions about the true authorship of the tattoo. The Ninth Circuit in *White v. City of Sparks* explicitly chose not to decide whether paintings that were copies of another artist's work would receive any First Amendment protection.<sup>150</sup> A flash tattoo can be an exact copy of another artist's work onto a customer's skin. Accordingly, the tattooist's lack of creative authorship for the tattoo raises basic concerns over whether the tattoo should be even considered the tattooist's art, much less whether the tattooist should be protected by the First Amendment.

Therefore, the complete lack of artistic contribution by the tattooist in some types of tattooing is a major difference between tattooing and commissioned arts. The First Amendment should not be stretched to protect a tattooist who had no creative input in the formation of the tattoo and only supplied a service. Even the tattooists who do create the tattoos themselves lack substantial input into the decisions concerning the ultimate message behind the tattoo.

## *2. Contribution to the tattoo's message*

Just as the creative input of the tattooist differs from the input of traditional commissioned artists, so does the tattooist's input into the message of the artwork differ from that of a typical commissioned artist. The entire message behind the artwork in question, the tattoo, derives from the customer. A claim that the tattooist is the speaker cuts against the intensely personal symbol of tattoos, especially given the tattoo's placement upon the tattooee.

It is the customer that imbues the tattoo with meaning and not the tattooist. The customer comes to the tattooist to affix a message to his or her body. There are innumerable reasons for a customer to choose a particular tattoo. Some tattoos communicate a connection between the tattooee and another. Alternatively, tattoos can be a means of identifying with a gang or other group.<sup>151</sup> "The tattoo is a

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150. *White v. City of Sparks*, 500 F.3d 953, 956 n.4 (9th Cir. 2007).

151. Susan Benson, *Inscription of the Self: Reflections on Tattooing and Piercing in Contemporary Euro-America*, in *WRITTEN ON THE BODY* 234, 245 (Jane Caplan ed., 2000).

powerful symbol of affiliation and identity.”<sup>152</sup> Tattoos can also act as a registration of significant, personal events or a “private diary.”<sup>153</sup> A vow tattoo expresses “love and commitment” to a significant other.<sup>154</sup> But tattoos are not received only to show connection to others; tattoos are also a means of self-expression, a way to describe who the individual is.<sup>155</sup> Due to the placement of the symbol onto the skin itself, many tattoos convey a message about the tattooee’s own body.<sup>156</sup> For example, those who have received tattoos have described the tattoo as a way of reclaiming the body for oneself or even as a “statement of ownership over the flesh.”<sup>157</sup>

While these are only a few of the possible motivations behind getting a tattoo, they all focus on the tattooee, not the tattooist. It is the tattooee who is part of the group. It is tattooee who shows dominance over his or her body. The tattooee proclaims love for another or records the tattooee’s experiences. The tattoo is displayed on the tattooee. The tattooist simply has no automatic part in determining the meaning of the tattoo’s message. In commissioned arts, even when the artist has not chosen the subject, the end product is still regarded as the artist’s message, the artist’s speech. This is seen by the court’s treatment of artwork, where art is protected speech when it represents the artist’s own expression.<sup>158</sup>

Furthermore, tattooists have little-to-no say concerning the aspects of the tattoo. The customer is the one to make all of the significant decisions concerning the tattoo. The customer may seek the tattooist’s advice on such matters, but the ultimate control over the design, location, and size of the tattoo is in the hands of the customer. These aspects of the design can play into the message behind the tattoo. For example, one tattooee had a grenade tattooed on his chest “like armour, protecting me from those who’ll break my

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152. DEMELLO, *supra* note 119, at 12.

153. Benson, *supra* note 151, at 246.

154. SANDERS, *supra* note 3, at 46.

155. Benson, *supra* note 151, at 245.

156. *See id.* at 251 (“What is distinctive in contemporary tattoo practices is the linking of such assertions of permanence to ideas of the body as property and possession . . . indeed as the *only* possession of the self in a world characterized by accelerating commodification and unpredictability.”).

157. *Id.* at 249–50.

158. *White v. City of Sparks*, 500 F.3d 953, 956 (9th Cir. 2007).



heart.”<sup>159</sup> In this case, the placement of the tattoo was very significant to the tattoo’s overall meaning. By controlling the other decisions concerning the tattoo, the tattooee controls more than just where it is or how big it is: the tattooee actually controls the message behind the tattoo.

It is true, as declared in *Anderson*, that the choice of medium does not factor into whether speech occurred.<sup>160</sup> But the choice of medium emphasizes the speech of the tattooee over that of the tattooist because placing the tattoo upon the skin communicates messages about the tattooee’s body. For a tattooist, the medium chosen is not dead, unfeeling canvas or wood, but living human tissue. Because the medium is the customer, the message must belong solely to the customer.

Part of the message inherent in the tattoo is that the body of the recipient is something capable of being controlled.<sup>161</sup> Obviously, the tattooist does not communicate control over his or her body—the tattooee does. Placement of a design upon one’s own body indicates a much higher level of personal speech and commitment to the message than commissioning a painting. Furthermore, “central to a lot of contemporary tattoo and piercing talk is the idea of *individuation*, of the tattoo . . . as ‘a declaration of me-ness.’”<sup>162</sup> Thus, the unique medium emphasizes that this is the speech of the recipient and not the distributor.

Because the design, size, and even message are chosen by the tattooee, the execution of the design is the only possible element of speech left for the tattooist. But this is not as communicative as the tattoo itself. As the court in *Yurkew* stated: “Here, even assuming that tattooing constitutes an art form, [the] plaintiff’s interest in engaging in conduct involving tattooing does not rise to the level of displaying the actual image conveyed by the tattoo, as the tattoo itself is clearly more communicative.”<sup>163</sup> Execution of a design should not receive First Amendment protection. Consider, for example, a cake decorator who executes a design upon a cake chosen by his or her customer.

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159. Benson, *supra* note 151, at 246.

160. *Anderson v. City of Hermosa Beach*, 621 F.3d 1051, 1061 (9th Cir. 2010).

161. Benson, *supra* note 151, at 250–51 (describing a tattoo as a “statement of ownership over the flesh”).

162. *Id.* at 245.

163. *Yurkew v. Sinclair*, 495 F. Supp. 1248, 1254 (D. Minn. 1980).

One would not typically conceive of this work as constitutionally protected speech. Cake decorating lacks a communicative purpose and, therefore, does not appear to be speech. Likewise, a tattooist must have a communicative intent behind the execution of the design in order for the act of tattooing to count as protected speech. Since the tattoo does not represent the tattooist's communication, execution of the tattoo design should not be protected speech.

#### IV. THE SIGNIFICANCE OF THE SEPARATION

Separating the tattooing process from the resulting tattoo may lead the process to receive less constitutional protection and, consequently, subject tattooing regulations to a more deferential standard of scrutiny. Also, a choice to not separate the tattoo from tattooing could have significant ramifications for other types of collaborative processes.

##### *A. Speech Content of the Tattoo and of the Tattooing Process*

Separating the tattoo from the tattooing process requires that each be analyzed for their speech content under the First Amendment. Because some subsets of tattoos are not forms of pure expression, tattoos as a whole cannot be labeled pure speech. Otherwise, drawing a line between what does or does not constitute speech becomes impossible. If all tattoos were considered pure speech, then every fashion choice would necessarily also be considered pure speech, leading to untenable results. For example, wearing a certain color or a shirt with sleeves would become constitutionally protected speech. Refusing to label all tattoos as pure speech preserves the distinction between fashion choices meant to communicate an intelligible message from those that do not. Thus, for tattoos, a more individualistic analysis under the *Spence* test must take place,<sup>164</sup> and just as the wearing of a black armband must be examined to see if the intent behind the action was communicative, so must the tattoo be examined for a communicative purpose. But even though the tattoo itself should be considered potential symbolic conduct, the tattooing process is not symbolic conduct but instead should be considered as a medium for others to

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164. See *Anderson*, 621 F.3d at 1061.

speak.

All of the courts that have separated the process of tattooing from the tattoo have held that the process itself did not meet the standards for symbolic conduct.<sup>165</sup> Most courts have found that the process of tattooing failed both prongs: no intent to convey a communicable message existed nor would a message be understood by an audience.<sup>166</sup> Although these courts may not have provided much analysis to support their holdings,<sup>167</sup> their ultimate conclusion was correct. The tattooist is not trying to impart his or her own message through tattooing, nor would an audience view the tattooing process as the tattooist's message.

*1. Tattooing does not communicate the tattooist's message*

First, the tattooing process fails to meet the first standard for symbolic conduct because the tattooist does not intend to convey his or her own personal message through the tattoo or through the act of tattooing. The tattooist also does not communicate through the act of tattooing itself. Neither can the tattooist try to claim the tattoo as his or her speech. The tattoo is the expression of the tattooee and not the tattooist. Additionally, the tattoo's permanent placement on the skin means that no subsequent owners can attach a different meaning to the tattoo.

The act or process of tattooing is not a communication by the tattooist. It is difficult to imagine what the injection of ink into the skin of another would convey. Likely because of this difficulty, tattooists do not claim that the injecting of ink into the skin conveys any type of message by itself but instead tend to claim that they convey a message through the tattoo. For example, in his brief to the Ninth Circuit, tattooist Johnny Anderson argued that "his images are expressive and emotionally evocative."<sup>168</sup>

But this claim is misguided because it is the customer who

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165. See *supra* Part II.B.1.

166. *Yurkew v. Sinclair*, 495 F. Supp. 1248, 1253–54 (D. Minn. 1980); *State ex rel Med. Licensing Bd. v. Brady*, 492 N.E.2d 34, 39 (Ind. Ct. App. 1986); *State v. White*, 560 S.E.2d 420, 423 (S.C. 2002); *Blue Horseshoe Tattoo, V, Ltd. v. City of Norfolk*, 72 Va. Cir. 388, 390 (2007); *Hold Fast Tattoo, LLC v. City of North Chicago*, 580 F. Supp. 2d 656, 660 (N.D. Ill. 2008).

167. *Picchione*, *supra* note 4, at 843–44.

168. Opening Brief of Appellant at 17, *Anderson v. City of Hermosa Beach*, 621 F.3d 1051 (9th Cir. 2010) (No. 08-56914), 2009 WL 4921598.

speaks through the tattoo. The tattooist has no input into the message of the tattoo; this is entirely generated by the customer, the owner of the tattoo. As previously discussed,<sup>169</sup> the customer alone determines what the tattoo represents. Since the tattooist cannot choose any aspect of the tattoo or the tattoo's message, the tattoo cannot be the tattooist's speech.

Additionally, a tattoo differs from a design on other mediums because a tattoo permanently resides with the original owner. While paintings are frequently sold and traded, tattoos cannot be sold, traded, or moved. Once a tattoo is commissioned, it forever resides with the purchaser unless the purchaser takes steps to remove or cover it with another tattoo. Because the tattoo forever stays with the original customer, there is no possibility that a later owner can affix a different interpretation or message to the tattoo. The tattoo can never have significance beyond what the original owner gives it. Thus, the tattooist cannot claim that he or she communicates through tattooing since the actual process of tattooing is not communicative and any message that the tattoo might carry belongs only to the original purchaser of the tattoo.

## *2. Audiences and tattooing*

Furthermore, an audience would not view the injection of dye into the skin as the tattooist communicating a message, as required by the *Spence* test. Audiences may recognize that tattoos have meaning,<sup>170</sup> but they would not think of the tattooist as communicating by injecting ink into someone else's skin. Because tattoos are considered the tattooee's speech, an observer would not recognize the process of tattooing as a communication of the tattooist. The tattooist is not the one declaring "I love Mom" or a passion for dolphins. It would seem odd to ask a tattooee what the tattooist meant by creating such a design. Questions about the meaning of a tattoo are posed to the tattooee, not the tattooist.<sup>171</sup>

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169. See *supra* Part III.B.

170. See Picchione, *supra* note 4, at 833–34 (finding that fifty-three percent of Americans age eighteen to twenty-four find tattoos artistic).

171. For example, studies involving tattoos often involve asking the tattoo recipient about the meaning behind his or her tattoo or why he or she chose a specific design. See, e.g., Fedorenko et al., *supra* note 107, at 111–13; Millner & Eichold, *supra* note 118, at 433; Tiggemann & Golder, *supra* note 110, at 312.

The focus is on the meaning of the tattooee's choices, not what message the tattooist intended. Simply put, the tattooee's speech overwhelms any of that by the tattooist. The observer would not view a tattooist inking another as the tattooist speaking. Because a tattoo's message focuses on the wearer rather than the tattooist, the tattooing process is not symbolic conduct and hence does not receive First Amendment protection as such.

*3. Protection for conduct that is not speech but is closely related to speech*

Even if the tattooing process is not speech, it might receive some First Amendment protection because it is closely related to speech. Some courts that have separated the tattoo from the process have compared the process of tattooing to a sound truck that "enables each customer to express a particularized message, but the sound truck vehicle itself is not expressive."<sup>172</sup> But this analogy is flawed because a sound truck is just one method to express oneself vocally. The sound truck is not necessary for the actual expression itself because the message could still be delivered, although in a different manner, without the truck. In contrast, tattooing is the only means for a customer to express himself symbolically through a permanent tattoo. If a city banned the use of sound trucks, individuals could still proclaim their messages vocally. If tattooing is banned, no one can express herself by receiving a tattoo. Thus, comparing a tattooist to a sound truck presents problems rather than solutions.

Rather than comparing a tattooist to a commissioned artist or a sound truck, a tattooist is more aptly likened to a publishing house. A publishing house provides a mechanism for those who desire to speak to get their message to the public. Yet a publishing house does not create its own message. It is a conduit for others' speech. Publishing, whether by a formal publishing house or at home, is the only way to create a printed message available to the public. Similarly, tattooing is also a method that makes a certain type of speech possible. It brings that speech into the public arena. But the tattooist, just like the publishing house, is not advocating his or her own message but is merely providing a way for others to speak. It

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172. *Hold Fast Tattoo, LLC v. City of N. Chi.*, 580 F. Supp. 2d 656, 660 (N.D. Ill. 2008).

follows that the process of tattooing should thus receive the same amount of First Amendment protection as does a publishing house.

Publishing houses do not create protected speech, but they could receive protection from the First Amendment as a conduit for an entire type of speech. In *Lakewood v. Plain Dealer Publishing Co.*, the Supreme Court applied the First Amendment to a regulation of newspaper racks.<sup>173</sup> The Court noted that the licensing scheme at issue concerning the placement of newspaper racks on public lands was directed at “conduct commonly associated with expression.”<sup>174</sup> The Court found that this scheme was still subject to First Amendment guarantees because of the potential for censorship of expression.<sup>175</sup> Likewise, in *Minneapolis Star & Tribune Co. v. Minnesota Commissioner of Revenue*, the Supreme Court held that the First Amendment protected newspaper publications from a special use tax on ink and paper.<sup>176</sup> Therefore, the tax burdened the printing of speech rather than the actual speech. Even though the tax did not actually regulate protected speech, the Court found that the tax placed “a burden on the interests protected by the First Amendment.”<sup>177</sup>

Thus, even if the activity at issue isn’t speech itself, an activity that usually accompanies expression could receive some First Amendment protection. These activities receive protection when the action serves to promote or protect “free access of the public to the expression.”<sup>178</sup> Although the analogy between newspaper racks and tattooists is not perfect, tattooists also conduct activity that is usually associated with speech but is not speech itself. A tattooist most definitely promotes public access to a type of speech because the tattooist serves as the way for the public to speak through the medium of permanent tattoos. Thus, even though tattooists do not speak themselves when tattooing, the practice could still receive some First Amendment protection.

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173. *Lakewood v. Plain Dealer Publ’g Co.*, 486 U.S. 750 (1988).

174. *Id.* at 760.

175. *Id.*

176. *Minneapolis Star & Tribune Co. v. Minn. Comm’r of Revenue*, 460 U.S. 575, 585 (1983).

177. *Id.*

178. *Young v. Am. Mini Theatres, Inc.*, 427 U.S. 50, 77 (1976) (Powell, J., concurring).

*B. Constitutionally Permissible Regulations*

One of the most significant implications of separating the tattoo from the process is that tattoos and the tattooing process could constitutionally be subject to different types of regulations. The tattoo and the process are considered together only if the tattoo is pure speech. As a result of analyzing them as one, tattooing would then also be pure speech. But when separated from the tattoo, the process of tattooing is not pure speech or symbolic conduct and deserves protection only as a medium used to convey speech.

If the debate centered on whether the tattooing process is pure speech or symbolic conduct, the answer actually would not have much significance as to permissible regulations. If the act of tattooing is pure speech and a city attempts to enact a content-neutral regulation, such as a requirement of certain safety procedures, the test used would be the time, place, and manner test. The regulation would have to be tailored to meet a significant government interest while leaving open alternative avenues for communication.<sup>179</sup> If the act of tattooing is symbolic conduct, then any regulation would have to pass the *O'Brien* four-factor test, which requires that an “incidental limitation[] on First Amendment freedoms” further “an important or substantial government interest” that is “unrelated to the suppression of free expression” and is “no greater than is essential to the furtherance of that interest.”<sup>180</sup> While the two tests may employ different words, the two amount to approximately the same level of scrutiny.<sup>181</sup>

Even if the city attempted to regulate the process of tattooing for content reasons, any difference between defining tattooing as pure speech versus symbolic conduct would be negligible. Regulating tattooing for content would mean that the regulation would fail the *O'Brien* test, since *O'Brien* requires that the regulation be an incidental limitation on the First Amendment.<sup>182</sup> A content-based regulation is a quintessentially nonincidental restriction on speech.<sup>183</sup> If the *O'Brien* test is thus not applicable, the regulation

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179. See *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 (1984).

180. *United States v. O'Brien*, 391 U.S. 367, 376–77 (1968).

181. *Clark*, 468 U.S. at 298.

182. *O'Brien*, 391 U.S. at 377.

183. *Texas v. Johnson*, 491 U.S. 397, 403 (1989).

would be subject to strict scrutiny.<sup>184</sup> This is the same standard for a content-based regulation of pure speech. Therefore, a choice between labeling the tattooing process as pure speech or symbolic conduct has few ramifications.

But if the tattooing process is not speech or symbolic conduct, then a very different standard is applied. A lack of First Amendment protection for tattooing would mean that any regulations of the process of tattooing would only have to pass rational-basis review.<sup>185</sup> Because rational basis only requires a legitimate government interest that is reasonably related to the statute,<sup>186</sup> almost any statute would pass this standard given the health risks of tattooing.

Generally, tattooing is safe if performed under sterilized conditions.<sup>187</sup> But tattooing can present serious health risks not inherent in other types of art. If unsterile tattooing occurs, the recipient is at risk for several infectious diseases, including HIV, syphilis, hepatitis B virus, hepatitis D virus, and hepatitis C.<sup>188</sup> Bacterial infections are also a possible hazard.<sup>189</sup> Skin reactions to the pigments can also occur, ranging from photosensitivity to the different pigments to allergic reactions and metal toxicity.<sup>190</sup>

Because of these serious health risks, a legislature considering regulation of the practice of tattooing could constitutionally pass almost any measure if the regulations are only subjected to rational-basis scrutiny. Indeed, all of the courts that separated the tattooing process from the tattoo found that the regulation passed constitutional muster.<sup>191</sup> Even in *White*, the court found that a total ban on tattooing within the state was still constitutional.<sup>192</sup>

But the courts that have subjected tattooing solely to rational-

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184. *Id.*

185. *Anderson v. City of Hermosa Beach*, 621 F.3d 1051, 1059 (9th Cir. 2010).

186. *Id.*

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

188. *Millner & Eichold*, *supra* note 118, at 426; *Pérez-Cotapos S. et al.*, *supra* note 1, at 35.

189. *Pérez-Cotapos S. et al.*, *supra* note 1, at 34.

190. *Id.* at 35; *Millner & Eichold*, *supra* note 118, at 427.

191. *Hold Fast Tattoo, LLC v. City of N. Chi.*, 580 F. Supp. 2d 656, 661 (N.D. Ill. 2008); *Yurkew v. Sinclair*, 495 F. Supp. 1248, 1255–56 (D. Minn. 1980); *State ex rel Med. Licensing Bd. v. Brady*, 492 N.E.2d 34, 39 (Ind. Ct. App. 1986); *People v. O’Sullivan*, 409 N.Y.S.2d 332, 333 (1978); *State v. White*, 560 S.E.2d 420, 424 (S.C. 2002).

192. *White*, 560 S.E.2d at 424.



basis review have failed to consider the fact that tattooing is a medium for speech. As such, not all regulations may be permitted. Because the goal of the First Amendment is to preserve the free flow of expression,<sup>193</sup> regulations that tend to completely shut off mediums for speech or distort the marketplace of ideas have been found unconstitutional. Hence, in *Lakewood*, the Supreme Court struck down the licensing scheme because of the potential for censorship.<sup>194</sup> Because no objective standards existed for the granting or refusal of a license, the licensor could potentially grant licenses exclusively to messages that he or she agreed with.<sup>195</sup> This would lead to a distortion of the expression at issue. A licensing scheme for tattooing that lacked objective standards unrelated to the message of the tattoo would likely be unconstitutional in light of *Lakewood*.

Likewise, a total ban on tattooing would foreclose an entire area of speech and possibly violate the Constitution. Without someone to perform the tattooing, potential speakers wouldn't be able to share their message through a tattoo. Shutting off a legitimate form of expression is usually an unconstitutional time, place, or manner restriction.<sup>196</sup> Even so, some bans of an entire medium have been upheld by the Supreme Court. In *Kovacs v. Cooper*, the Court upheld a citywide ban on sound trucks as a protection of others from the "distracting noises" of the sound trucks.<sup>197</sup> The Court noted that this legislation did not act as a "restriction upon the communication of ideas" through mediums other than sounds trucks.<sup>198</sup> This case implies that where the medium is one of many available to convey a message, a ban may be permissible. But this case would not be applicable to tattooing since tattooing is the only means to acquire a

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193. *Associated Press v. United States*, 326 U.S. 1, 20 (1945) (The First Amendment "rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public" and is a "command that the government itself shall not impede the free flow of ideas.").

194. *Lakewood v. Plain Dealer Pub. Co.*, 486 U.S. 750, 760 (1988).

195. *Id.*

196. *See, e.g., Martin v. City of Struthers*, 319 U.S. 141, 145-49 (1943) (holding a ban on door-to-door distribution of literature unconstitutional); *Lovell v. City of Griffin*, 303 U.S. 444, 451-52 (1938) (holding a ban on distribution of pamphlets within the municipality unconstitutional).

197. *Kovacs v. Cooper*, 336 U.S. 77, 89 (1949).

198. *Id.*

tattoo.

Neither does any other medium convey the same message as the tattoo. A temporary tattoo, such as a henna tattoo, cannot communicate in the same manner as a permanent tattoo because permanence of the tattoo generally plays a large role in the tattoo's overall message.<sup>199</sup> Neither would displaying the same design on a t-shirt or other item of clothing speak in the same manner as a tattoo would. As mentioned, part of the tattoo's meaning is derived from its placement on human skin, and so placing that design on inanimate clothing simply is not the same. Since tattooing is the only medium to convey the message of a tattoo, a ban on the act of tattooing would almost certainly be unconstitutional.

Along these same lines, states or cities that permitted tattooing only when performed by a licensed physician would likely also be unconstitutional. While the regulation certainly furthers the government's interest in public health, a doctors-only provision would severely limit the availability of tattoos and greatly increase their cost. It seems unlikely that a tattooist would attend medical school to pursue his or her vocation. Nor is it likely that already licensed physicians would start specializing in tattooing or even take on tattooing as a part-time job. Thus, requiring that only licensed physicians perform the act of tattooing would essentially shut down an entire medium of expression and would be unconstitutional under the First Amendment.

In contrast, regulations that do not effectively bar all tattooing or discriminate based on viewpoint would likely pass constitutional muster. Regulations of this type might include statutes that require a physician or other health professional to supervise the tattooing or strict health regulations of the business and practice of tattooing. It is debatable whether requiring health professionals to supervise would effectively shut down all tattooing in the way that requiring tattooing to be performed by a licensed physician would. Tattoo parlors likely would not be able to hire a physician to supervise the work full time; but if the physician did not have to be present for the entire process or only had to ensure that the tattooist was properly using sterilized

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199. Benson, *supra* note 151, at 250. ("[I]n tattoo-talk the focus is rather on the body as . . . a site for self-realization. And in this, of course the idea of the permanence of the tattoo is critical.").

equipment in a safe manner, then it is plausible that tattooing would still occur legally. Strict regulations, such as requiring a license or mandating the use of certain sterilization procedures and chemicals, would not tend to shut down all tattooing or distort the marketplace. Thus, these types of regulations would be constitutionally permissible due to the important safety issues involved in tattooing.

*C. Implications for Other Collaborative Processes*

It may seem unjust to some that the tattooist's role is downplayed to a service rather than elevated to that of artist, but it is consistent with the way we view many other collaborative processes. The *Anderson* court reasoned that "[a]s with all collaborative creative processes, both the tattooist and the person receiving the tattoo are engaged in expressive activity."<sup>200</sup> This statement is flawed, however. Usually collaborative creative processes are not treated as if everyone involved was expressing something. A few examples help to illustrate this point.

If all involved in a collaborative process that results in speech are "engaged in expression," some strange (even absurd) results can occur. For example, if a person went to a barber to have a phrase or name shaved into his head, under this rule, both the barber and the customer would be communicating. This seems ridiculous as clearly it is the customer's speech and not the barber's. The barber may have to use his or her creative touch to make the words look nice but he is not speaking in the usual sense of the word. He may help another put his message out there, but the barber is not the speaker. Furthermore, if anyone engaged to help another speak is also speaking, then the friend who applies face paint proclaiming support for a sports team on another is also speaking. The same goes for the person who applies a rub-on tattoo for a friend. These examples may seem silly, but they are all logical outgrowths of the *Anderson* rationale.

In *Anderson*, the court decries the separation of tattoos and tattooing, saying that doing so would provide no protection for the process of writing news articles assigned by editors.<sup>201</sup> But not separating the tattoo from the process raises a potential problem

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200. *Anderson v. City of Hermosa Beach*, 621 F.3d 1051, 1062 (9th Cir. 2010).

201. *Id.*

about the ownership of the speech. If both the writer and the editor are speaking, then do both have claim to the finished article as their speech? The *Anderson* court would likely be hesitant to say so. If the article was the editor's speech as well, then any editor who contributed to the article by correcting grammatical errors could possibly lay claim to the article as his or her speech. This result is avoided by separately analyzing the tattoo and the process of tattooing.

Finally, choosing this separation has implications for another area brought into court recently—body piercing as First Amendment speech. In recent years, both individuals owning piercing shops and those with piercings have claimed First Amendment privileges for their right to wear or insert a piercing.<sup>202</sup> Just like tattooists, piercers claim that body piercing is an art and communicates ideas of body ownership.<sup>203</sup> If piercings are First Amendment speech, as one jurisdiction has found,<sup>204</sup> then the *Anderson* holding would dictate that both the customer and the piercer are speaking through the resultant piercing. This stretches the First Amendment beyond its

rightful bounds because many piercers are simply performing a service rather than communicating themselves.

In all of these situations, one person communicates and another helps that person to communicate. But the giving of aid does not necessarily render the helper a speaker for First Amendment purposes. Truly, a state could not completely prohibit the hairdresser or the face painter from rendering their services if it would prevent others from speaking, but it does not mean that they should be viewed as speakers themselves. Courts should remember who is actually putting forth the message when providing First Amendment

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202. *Bar-Navon v. Sch. Bd.*, 2007 U.S. Dist. LEXIS 82044, at \*9–10 (M.D. Fla. Nov. 5, 2007), *aff'd*, 2008 U.S. App. LEXIS 17562 (11th Cir. Fla., Aug. 15, 2008) (student claiming that body piercings were protected expressive conduct); *Olesen v. Bd. of Educ.*, 676 F. Supp. 820, 821 (N.D. Ill. 1987) (student claiming that school regulation prohibiting male from wearing earrings violates his right to free speech); *Difeo v. Town of Plaistow*, No. 00-E-0218, 2002 N.H. Super. LEXIS 20, at \*5 (Sup. Ct. Mar. 7, 2002) (owner of piercing shop claiming First Amendment protection for the act of body piercing); *City of Albuquerque v. Sachs*, 92 P.3d 24, 29 (N.M. Ct. App. 2004) (owner of piercing establishment claiming that piercing was First Amendment speech).

203. *Sachs*, 92 P.3d at 29; *Difeo*, 2002 N.H. Super. LEXIS 20, at \*5.

204. *Difeo*, 2002 N.H. Super. LEXIS 20, at \*6.

protection. When courts separate the tattoo from the process of tattooing, they acknowledge that the wearer of the tattoo is the one communicating and thus the one in need of constitutional protection, not the tattooist. If the courts do not emphasize the main speaker at hand, many others could claim a message as their own even if they have not input anything into the actual message at hand.

#### V. CONCLUSION

Tattooing can be a means for a tattooee to communicate a message to the general public. Despite court efforts to afford wide protection to the tattooing process, the simple truth is that some tattoos, such as cosmetic tattoos or self-expression tattoos, are not communicative. Thus, tattoos generally cannot categorically be labeled pure speech. Because the act of tattooing does not always result in pure speech and because it requires little to no creative input from the tattooist, the process of tattooing can be treated differently from other commissioned arts and can be separated from the tattoo for First Amendment purposes.

Once the tattooing process is separated from the tattoo, it becomes obvious that the process cannot qualify as either pure speech or symbolic conduct. The tattooist does not convey his or her own message through the tattoo, nor would an audience view the tattoo as the tattooist's communication. Tattooing may still receive some First Amendment protection as the only means to speak through a tattoo, but this protection may allow more rigorous regulation than if the process of tattooing was protected speech itself. In light of other collaborative processes, this separation

becomes necessary to protect the truly dominant speaker and not the one who provided the mechanism for speech.

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