

3-1-2011

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Recommended Citation

Carly Strocker, *These Tats Are Made for Talking: Why Tattoos and Tattooing Are Protected Speech Under the First Amendment*, 31 Loy. L.A. Ent. L. Rev. 175 (2011).

Available at: <http://digitalcommons.lmu.edu/elr/vol31/iss2/4>

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THESE TATS ARE MADE FOR TALKING: WHY TATTOOS AND TATTOOING ARE PROTECTED SPEECH UNDER THE FIRST AMENDMENT

“The First Amendment serves not only the needs of the polity but also those of the human spirit—a spirit that demands self-expression.”
- Thurgood Marshall in *Procunier v. Martinez*¹

This Comment examines the current split among the federal circuit courts of appeal on the issue of First Amendment protection of tattoos and argues for the United States Supreme Court to grant certiorari to *Anderson v. City of Hermosa Beach* and adopt the approach taken by the Ninth Circuit Court. Traditionally, courts have viewed a restriction on the process of creating pure speech as a restriction on the speech itself. As a result, the courts vigorously protect the process of creating the speech. Tattooing, a process inexplicably linked to the creation of tattoos, must be protected with the same fervor as the process that creates any other pure speech. Subsequently, zoning laws restricting tattoo establishments would be examined under stricter constitutional standards leading to greater freedom of expression.

I. INTRODUCTION

Tattoos, lifelong commitments to particular expressions, have become pervasive in modern society.² For most, the choice to get a tattoo is not a rash decision but the result of thorough contemplation—the desire to make “permanent that which is fleeting.”³ Tattoos can mark rites of passage, express feelings about others, show religious devotion, or symbolize a collec-

1. *Procunier v. Martinez*, 416 U.S. 396, 427 (1974) (Marshall, J., concurring).

2. See Susan Benson, *Inscriptions of the Self: Reflections on Tattooing and Piercing in Contemporary Euro-America*, in WRITTEN ON THE BODY: THE TATTOO IN EUROPEAN AND AMERICAN HISTORY 234, 240 (Jane Caplan ed., Princeton Univ. Press 2000) (explaining that in recent years the “tattoo community” has become more organized, visible, and numerous); see also *Tattoos Leave Mark on Ads*, L.A. TIMES, Nov. 27, 2007, at C8 (asserting that two out of every five Americans between the ages of 26 and 40 have tattoos, reducing the edginess of tattoos and thus making them less effective marketing tools).

3. Chris Hedges, *Wearing Their Hearts Under Their Sleeves*, N.Y. TIMES, Aug. 21, 1990, at B3 (quoting Dr. Gerald W. Grumet on the psychodynamics of tattoos).

tion of significant moments in one's life.⁴ Whereas tattoos were previously viewed as the "seedy province of old salts, sideshow freaks and biker[s,]" today, tattoos have firmly planted themselves within mainstream society.⁵

In part, the widespread popularity of tattoos is attributed to both technological advances in the field and refined artistic techniques developed by tattoo artists.⁶ New machinery and ink formulations have allowed artists to create detailed tattoos with "thinner lines and more vibrant colors."⁷ Furthermore, many tattoo artists are art school graduates who create "sophisticated, colorful graphic designs," which sometimes take more than thirty-six hours to complete.⁸ Moreover, advancements such as autoclave sterilization and similar tattooing techniques make tattooing safer by preventing the spread of communicable diseases, such as Hepatitis B.⁹ These advances have transformed the industry from that of a dark and unwieldy subculture to a mainstream art form in which the general public desires the creation of a variety of unique images.¹⁰ Despite society's general recognition of tattoos and tattooing as forms of art, most courts deny tattoos' artistic merit, and thus refrain from awarding tattoos and tattooing the full protection afforded other art forms under the First Amendment.¹¹

The issue of First Amendment protection for tattoos and tattooing has recently taken center stage in California's legal arena.¹² California, like all other states within the United States, permits the establishment of tattoo

4. *Anderson v. City of Hermosa Beach*, 621 F.3d 1051, 1061 (9th Cir. 2010); Hedges, *supra* note 3, at B3.

5. See Michael Kimmelman, *Tattoo Moves from Fringes to Fashion. But Is It Art?*, N.Y. TIMES, Sept. 15, 1995, at C1 (asserting that today more middle-class teenagers and adults are getting tattoos).

6. *Id.*

7. Aurora Mackey, *Say It with Skin*, L.A. TIMES, Feb. 13, 1992, at J8.

8. Steve Rhodes, *Their Fans Know the Beauty of Tattoos Not Just Skin-Deep*, CHI. TRIB., Sept. 18, 1993, at N5.

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

10. See Rhodes, *supra* note 8, at N5 (describing Jim Barron's technicolor outdoor scenes); see also Richard Abowitz, *Tattoo Trendiness Has the Strip Awash in Ink*, L.A. TIMES, Oct. 11, 2009, at D10 (stating that for thirty years, tattoo artists have tried to go mainstream and that it has finally happened).

11. See *State v. White*, 560 S.E.2d 420, 423 (S.C. 2002) (responding to the dissent's proposition that tattooing is equivalent to painting, writing, or sculpting, the court asserts that tattooing is "unique in that it involves invasion of human tissue and, therefore, may be subject to state regulation to which other art forms (on non-human mediums) may not be lawfully subjected"); see also Kimmelman, *supra* note 5, at C1 (stating that art galleries have begun to exhibit shows of tattoo designs, such as "Pierced Hearts and True Love: A Century of Drawings for Tattoos").

12. See Marcel Honoré & Colin Atagi, *Ruling May Affect Cities' Policies on Tattoo Parlors*, DESERT SUN, Sept. 10, 2010, at A1 (discussing the impact of the Ninth Circuit's decision in *Anderson v. City of Hermosa Beach*).

parlors.¹³ However, in order to protect its citizens from communicable diseases, each state places different regulations upon the practice of tattooing.¹⁴ In California, tattoo artists must register with the county health department.¹⁵ The County of Los Angeles permits tattooing; however, the City of Hermosa Beach, a city within Los Angeles County, legislated a complete ban on tattooing within its city limits.¹⁶ The City of Hermosa Beach ordinance provides that, “[e]xcept as provided in this title, no . . . building or land [shall] be used for any purpose except as hereinafter specifically provided”¹⁷ The ordinance does not name tattooing in the list of permitted uses.¹⁸ However, upon request, the community development director may grant a similar use permit by finding that the proposed “commercial use not listed in the zoning code . . . ‘is similar to and not more objection[able] than other uses listed.’”¹⁹

In May 2007, Johnny Anderson, a co-owner of a tattoo shop in the City of Los Angeles, attempted to have his plans for a tattoo parlor approved for a similar use permit by the City of Hermosa Beach community development director.²⁰ Anderson’s request was denied, and he was prevented from establishing a tattoo parlor in the City of Hermosa Beach.²¹ Subsequently, Anderson brought a 42 U.S.C. § 1983 action against the City.²² He petitioned that the zoning ordinance was facially unconstitutional under the First and Fourteenth Amendments and sought declaratory and injunctive relief.²³

Anderson’s relief was dependent on whether the court found that tattoos and tattooing fell under the protection of the First Amendment.²⁴ The district court denied this protection because it found that tattooing was not “sufficiently imbued with the elements of communication[.]”²⁵ The court

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

14. *Id.*

15. *Id.* at 1056

16. *Id.* at 1056–57.

17. *Id.* at 1057.

18. *Id.*

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

20. *Id.* at 1055, 1057.

21. *Id.* at 1057.

22. *See id.* at 1057–58 (explaining the procedural history of the case and Anderson’s suit against the City of Hermosa Beach under Civil Action for Deprivation of Rights or 42 U.S.C. § 1983).

23. *Id.* at 1057.

24. *Id.* at 1055.

25. *Anderson*, 621 F.3d at 1058 (quoting *Spence v. Washington*, 418 U.S. 405, 409

opined that since “the customer has ultimate control over which design she wants tattooed on her skin” the tattoo artist is not conveying the artist’s own message or idea to others.²⁶ As a result, the district court applied a rational basis test to the zoning law and upheld the ordinance as a rational means of preventing the alleged health risks of tattooing.²⁷ However, when Anderson appealed, the Ninth Circuit Court of Appeals found that tattoos and the associated process and business of tattooing are purely expressive activities that are fully protected under the First Amendment.²⁸ Under the stricter test applied to zoning laws that infringe upon protected speech, the zoning ordinance was declared unconstitutional.²⁹

This Comment addresses the historic denial of First Amendment protection to tattoos and tattooing that has resulted in a complete ban of tattoo parlors in certain cities. Part II of this Comment addresses how courts have incorrectly interpreted tattoos under the First Amendment. Part III explains that tattoos and tattooing are entitled to full First Amendment protection because: (1) tattoos are pure speech; (2) pure speech is fully protected under the First Amendment; (3) the process of tattooing is inextricably intertwined with the creation of the tattoo and thus must be fully protected as well; and (4) if viewed separately from the tattoo, the process of tattooing is an expressive activity, in and of itself. Part IV of this Comment urges the Supreme Court to grant certiorari to *Anderson v. City of Hermosa Beach* to resolve a circuit conflict and to affirm the Ninth Circuit’s decision. Finally, Part V describes how a grant of First Amendment protection to tattooing would potentially affect anti-tattooing zoning laws.

II. COURTS HAVE PERMITTED MUNICIPALITIES TO CONSTRUCTIVELY BAN TATTOO PARLORS BY HOLDING THAT THE PROCESS OF TATTOOING IS NOT PROTECTED UNDER THE FIRST AMENDMENT

A. Historically Courts Have Upheld Zoning Laws Forbidding or Severely Restricting the Establishment of Tattoo Parlors

Despite the widespread popularity and influence tattoos have garnered in the last few decades,³⁰ some lawmakers still view tattooing as a “bar-

(1974)).

26. *Id.*

27. *Id.*

28. *Id.* at 1060.

29. *See id.* at 1055 (holding that a total ban on tattooing is not a reasonable “time, place, or manner” restriction).

30. *See* Kyra Kyles, *Body of Art*, CHI. TRIB., Sept. 28, 2006, Redeye, at 6 (referring to the popularity of shows like *Inked* and *Miami Ink*).

baric” activity desired by those of “morbid or abnormal personalit[ies.]”³¹ As a result, some cities have banned the establishment of tattoo parlors within their limits suggesting that the “health, safety and general welfare” of its citizens warrants protection from this grotesque activity.³²

Cities attempt to prevent the establishment of tattoo shops in a variety of ways. Some cities completely prohibit tattoo parlors.³³ For example, three Coachella Valley cities in California enacted outright bans on the operation of tattoo parlors.³⁴ Other places restrict the establishment of tattoo parlors only in certain areas within a municipality.³⁵ Finally, some cities prohibit “tattooing of human beings except by licensed medical doctors for medical purposes. . . .”³⁶ These localities justify the enactment of their respective ordinances by citing the health and safety of their citizens while also alluding to the “unsavory clientele prone to crime” that the localities perceive tattoo shops attract.³⁷

Anti-tattoo zoning laws have garnered support from courts that find complete or area-specific bans on tattooing constitutional.³⁸ Courts reason that tattooing is dangerous because it involves “puncturing the skin” with a needle creating openings in the human skin through which diseases can pass.³⁹ As a result, any regulation restricting a person’s ability to tattoo bears a significant relationship to the state’s police power.⁴⁰ Unfortunately, these courts fail to consider the fact that prohibiting legal tattoo parlors

31. *People v. O’Sullivan*, 409 N.Y.S.2d 332, 333 (N.Y. App. Term 1978) (quoting *Grossman v. Baumgartner*, 254 N.Y.S.2d 335, 338 (N.Y. App. Div. 1964)).

32. *See id.* (holding that the “right to engage in tattooing is not paramount to the public’s right to good health.”).

33. *See, e.g.*, Jake Remaly, *Chatham Weighing Tattoo Parlor Limits*, DAILY REC. (New Jersey), Aug. 12, 2009 (noting that Chatham, New Jersey had a complete ban on tattooing); Gary Nelson, *Mesa Council Ponders Zoning Changes Aimed at Low-End Businesses*, ARIZ. REPUBLIC, Feb. 5, 2010, at 7 (noting that in Mesa, Arizona, tattoo and body piercing shops are required to have a council use permit to establish businesses).

34. *See* Honoré & Atagi, *supra* note 12, at A1 (listing that Desert Hot Springs, Indian Wells, and Rancho Mirage ban tattoo parlors).

35. *See* Amy Picard, *Art-4-Long?*, NEWARK ADVOC. (Ohio), Apr. 24, 2008, at A1 (declaring that tattoo shops were not allowed in a neighborhood business district because the zoning laws only allowed for services that residents would need on a day-to-day basis).

36. *O’Sullivan*, 409 N.Y.S.2d at 333.

37. *See* Honoré & Atagi, *supra* note 12, at A1.

38. *See* *State v. White*, 560 S.E.2d 420, 424 (S.C. 2002) (applying a rational basis test after concluding that tattooing is not constitutionally protected conduct under the First Amendment).

39. *Golden v. McCarty*, 337 So. 2d 388, 390 (Fla. 1976).

40. *Id.*

within city limits pushes tattoo parlors underground.⁴¹ Consequently, the risks associated with tattooing become harder to regulate since there can be no state-funded agency to monitor tattoo shops' compliance with sterile tattooing conditions.⁴²

B. Some Courts Deny First Amendment Protection to Tattooing

Many tattoo artists have attempted to challenge anti-tattooing zoning laws by arguing that these zoning laws are a restriction on their First Amendment rights.⁴³ However, courts have denied the process of tattooing First Amendment protection, thus allowing zoning laws to ban tattoo parlors.⁴⁴ Three basic mistakes support the denial of First Amendment protection to tattooing: (1) tattoos are not pure speech, (2) tattoos and the process of tattooing are viewed as separate expressions, and (3) the process of tattooing is devoid of any expression.⁴⁵

1. Past Courts Have Not Found that Tattoos Are Pure Speech

The First Amendment to the U.S. Constitution prevents the federal government from implementing laws that infringe upon a person's right to free speech.⁴⁶ The Fourteenth Amendment, which applies the protections listed in the Bill of Rights to state government actions, prohibits the states from creating laws that abridge the free expression of ideas.⁴⁷ When devis-

41. See James V. O'Connor, *Tattooing: More Female Clients Enter a Formerly Male Realm*, N.Y. TIMES, Oct. 6, 1996, § 13 (Westchester Wkly.) at 1 (noting that Becky Shaffner got a tattoo from an illegal parlor in Manhattan since tattoo parlors are illegal in New York City).

42. See *State ex rel. Crabtree v. Franklin Cnty. Bd. of Health*, 673 N.E.2d 1281, 1283–84 (Ohio 1997) (supporting the state's assertion that banning tattoo parlors would drive the establishments underground and would thus prevent government regulation of sterile equipment in legal tattoo shops).

43. See 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, 234–36 (2003) (illustrating an overview of certain cases where petitioners sought relief from anti-tattooing zoning laws: *Grossman v. Baumgartner*, 218 N.E.2d 259 (N.Y. 1966), *Yurkew v. Sinclair*, 495 F. Supp. 1248 (D. Minn. 1980), and *State v. Brady*, 492 N.E.2d 34 (Ind. Ct. App. 1986)).

44. See *Blue Horseshoe Tattoo, V, Ltd. v. City of Norfolk*, 2007 WL 6002098, at *2 (Va. Cir. Ct. 2007) (stating that in the city's brief, the city cited numerous federal and state court cases supporting the allegation that tattooing is not constitutionally protected speech).

45. See *id.* (summarizing past laws on tattoos and tattooing and finding that tattoos are not protected expressions under the First Amendment and that tattooing is not sufficiently communicative in nature to be encompassed by the First Amendment).

46. See U.S. CONST. amend. I (prohibiting Congress from making a "law . . . abridging the freedom of speech").

47. Anthony Jude Picchione, Note, *Tat-Too Bad for Municipalities: Unconstitutional Zoning of Body-Art Establishments*, 84 B.U. L. REV. 829, 834 (2004).

ing the Constitution, the Framers sought to ensure that Americans could communicate freely about their country, their government, and its laws.⁴⁸ Laws regulating the free expression of ideas are subjected to strict scrutiny to prevent chilling constitutionally protected speech.⁴⁹

When deciding First Amendment cases, courts are especially careful to protect pure speech.⁵⁰ Pure speech is the term used for ideas expressed verbally or through written words.⁵¹ In order to achieve the status of pure speech, the speech must be “relatively pure[,]” consisting mainly of verbal and written utterances as opposed to conduct.⁵² For example, picketing is not pure speech since it involves conduct that can convey a message absent the spoken or written word.⁵³ On the other hand, a newspaper qualifies as pure speech because it consists of words and images absent any conduct.⁵⁴ The Supreme Court believes the protection of pure speech is of the utmost importance because even though speech “is often provocative and challenging . . . [t]here is no room under our Constitution for a more restrictive view [because] the alternative would lead to the standardization of ideas either by legislatures, courts, or dominant political or community groups.”⁵⁵

Despite the similarities between tattoos and the words and images in newspapers, many courts refuse to acknowledge that tattoos are pure speech entitled to full protection under the First Amendment.⁵⁶ In *Riggs v. City of Fort Worth*, the court held that a tattoo is simply a way for a person to express personal views and beliefs.⁵⁷ The court stated that protected speech must address a legitimate public concern and that the tattoo at issue—a Celtic design of the plaintiff’s heritage—was not of concern to the

48. See ERWIN CHERMERINSKY, CONSTITUTIONAL LAW 1206 (3d ed. 2009) (noting that the First Amendment was intended to protect against common law sedition laws and prevent prosecution for speaking out against the government).

49. See *id.* at 1248 (emphasizing the importance of avoiding vagueness in laws restricting free speech so as to avoid chilling speech).

50. See Picchione, *supra* note 47, at 834 (stating that pure speech is of the highest concern).

51. John P. Collins, Jr., Note, *Speaking in Code*, 106 YALE L.J. 2691, 2694 (1997).

52. *Id.*

53. *Id.*

54. See *City of Lakewood v. Plain Dealer Publ’g Co.*, 486 U.S. 750, 755 (1988) (holding that there is “explicit protection” for speech and the press in the text of the First Amendment).

55. *Cox v. Louisiana*, 379 U.S. 536, 552 (1965) (quoting *Terminiello v. Chicago*, 337 U.S. 1, 4–5 (1949)).

56. *Riggs v. City of Fort Worth*, 229 F. Supp. 2d 572, 580 (N.D. Tex. 2002) (stating that a police officer’s tattoo was not protected under the First Amendment right of free speech).

57. *Id.* at 580 n.11.

public.⁵⁸ Likewise, in *Stephenson v. Davenport Community School District*, the Eighth Circuit declared that the tattoo at issue—a small cross between the thumb and index finger—was “simply ‘a form of self-expression’” not protected by the First Amendment.⁵⁹ In conclusion, some courts refuse to grant tattoos protection under the First Amendment because they view tattoos as self-expression.⁶⁰ To these courts, only expression or conduct that addresses issues of public concern are protected under the First Amendment.⁶¹

2. Courts Analyze the Process of Tattooing Separately from the Tattoo

When determining if the process of tattooing is entitled to First Amendment protection, some courts look at the product separately from the process.⁶² For example, in *Yurkew v. Sinclair*, the court argued “that the issue of whether certain conduct comes within the protection of the First Amendment should not invariably depend on whether the final product of the conduct can by some stretch of the imagination be characterized as art or an art form.”⁶³ Then, the court held that even if a tattoo was an art form entitled to First Amendment protection, such protection did not extend to the process of tattooing.⁶⁴ The court reasoned that a tattoo was clearly more communicative than the process.⁶⁵ Likewise, the court in *Hold Fast Tattoo v. City of North Chicago* found that the process of tattooing is “one step removed” from the expressive tattoo and thus not entitled to First Amendment protection.⁶⁶

58. *Id.*

59. *Stephenson v. Davenport Cmty. Sch. Dist.*, 110 F.3d 1303, 1305, 1307 n.4 (8th Cir. 1997).

60. *Id.* at 1307 n.4.

61. *See id.* (stating that Plaintiff’s tattoo is a mere self-expression and not in the same category as wearing an armband in protest of the Vietnam War); *see also Riggs*, 229 F. Supp. 2d 572 at 581 n.11 (relegating the Plaintiff’s tattoo to simply his own personal views and beliefs and not speech about “legitimate public concern”).

62. *See Yurkew*, 495 F. Supp. at 1254 (arguing that even if a tattoo was entitled to First Amendment protection, the process of creating a tattoo is not).

63. *Id.*

64. *Id.*

65. *Id.*

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

3. Separated from the Product, the Process of Tattooing Is Viewed by the Courts as Not Expressive Enough to Be Entitled to First Amendment Protection

Courts have not limited First Amendment protection to just pure speech but have also provided protection to sufficiently communicative conduct.⁶⁷ In *Spence v. Washington*, the United States Supreme Court held that conduct is “sufficiently imbued with elements of communication” when there is “[a]n intent to convey a particularized message,” and “the likelihood [is] great that the message would be understood by those who view[] it.”⁶⁸ The *Spence* test was created to avoid awarding First Amendment protection to a limitless list of conduct, as doing so would make legislation almost impossible.⁶⁹ For example, a person walking down the street is engaged in conduct, but it is not the type of conduct that needs to be protected by the First Amendment.⁷⁰ *Texas v. Johnson* explained that only conduct performed with the intention of expressing an idea warrants protection under the First Amendment.⁷¹ For instance, a person burning an American flag at a political event needs protection because they are engaged in controversial conduct that is sufficiently imbued with the necessary elements of communication to be afforded First Amendment protection.⁷² Under the *Spence* test, a wide range of conduct that is not pure speech has been determined to be expressive, such as taping a black peace sign to an American flag,⁷³ wearing black arm bands in opposition to the war in Vietnam,⁷⁴ marching peaceably to express grievances against the government, protesting discrimination by engaging in sit-ins, refusing to salute the American flag, and “parad[ing] with or without banners or written messages.”⁷⁵

67. *White*, 560 S.E.2d at 423.

68. *Spence v. Washington*, 418 U.S. 405, 410–11 (1974).

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

70. *City of Dallas v. Stanglin*, 490 U.S. 19, 25 (1989).

71. *Texas v. Johnson*, 491 U.S. 397, 403 n.3 (1989).

72. *See White*, 560 S.E.2d at 423 (explaining the Court’s holding in *Johnson*, 491 U.S. at 403 n.3).

73. *See Spence*, 418 U.S. at 408–10 (holding that taping a black peace sign to an American flag was an expression of anguish about the government’s foreign and domestic policy).

74. *See generally Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969) (holding that the state cannot forbid students from wearing black arm bands in protest of the Vietnam War).

75. *Bery v. City of New York*, 97 F.3d 689, 694 (2d Cir. 1996).

Even though some courts are willing to acknowledge that the tattoo itself might be sufficiently imbued with communication, most courts are not willing to extend that protection to the actual process of creating tattoos.⁷⁶ Courts that separate the process from the product believe that tattooing is non-communicative conduct; to them, engrafting a tattoo on the skin does not suggest political or social thought to the normal observer, nor does it affect public attitudes and behavior.⁷⁷ Other courts claim that the process of creating a tattoo is not an effort to create a particularized message, but rather, an attempt to create the expression of the person who is paying for the tattoo.⁷⁸ These courts conclude that tattooing is not speech, symbolic speech, or conduct sufficiently communicative to warrant protection by the First Amendment.⁷⁹

III. LIKE OTHER ART FORMS AND THEIR PROCESSES, TATTOOS AND TATTOOING ARE PURE SPEECH ENTITLED TO FULL PROTECTION UNDER THE FIRST AMENDMENT

Historically, courts that apply the *Spence* test have offered inconsistent holdings as to whether tattoos and the associated process and business of tattooing should be protected by the First Amendment.⁸⁰ Some courts, like the Eighth Circuit, applied the test and found that tattoos—and thus tattooing—are not sufficiently imbued with communicative elements.⁸¹ Other courts applied the *Spence* test and found that even though the tattoo might encompass communicative elements, the process of tattooing is pure *conduct* without any expressive elements.⁸² Finally, other courts using the *Spence* test have held that tattooing is expressive conduct entitled to First Amendment protection.⁸³ However, the courts need not apply the *Spence* test to tattoos and tattooing because tattoos are pure speech, not expressive

76. *Yurkew*, 495 F. Supp. at 1253.

77. *Id.* at 1254–55.

78. *Hold Fast Tattoo, LLC*, 580 F. Supp. 2d at 660.

79. *See White*, 560 S.E.2d at 423 (holding that tattooing is not sufficiently communicative to be protected by the First Amendment); *see also O'Sullivan*, 409 N.Y.S.2d at 333 (holding that tattooing is not speech or symbolic speech).

80. *See, e.g., Blue Horseshoe Tattoo, V, Ltd. v. City of Norfolk*, 2007 WL 6002098 (Va. Cir. Ct. 2007) (reviewing the various court decisions in tattooing cases).

81. *Stephenson v. Davenport Cmty. Sch. Dist.*, 110 F.3d 1303, 1307 n.4 (8th Cir. 1997).

82. *See Yurkew v. Sinclair*, 495 F. Supp. 1248, 1254 (D. Minn. 1980) (providing a list of reasons why tattooing is not “sufficiently communicative”).

83. *See MacNeil v. Bd. of Appeal*, No. 02-CV-01225, 2004 Mass. Super. LEXIS 282, at *2 (Mass. Super. Aug. 9, 2004) (stating that tattooing was found to be expressive conduct in *Commonwealth v. Meuse*, No. 9877 CR 2644, 1999 Mass. Super. LEXIS 470, at *3 (Mass. Super. Nov. 29, 1999) and *Lanphear v. Commonwealth*, Mem. Decision and Ord., Docket No. 99-1896-B (Mass. Super. Oct. 20, 2000)).

conduct, fully protected under the First Amendment.⁸⁴ As a result, the process that creates the pure speech is protected as well.⁸⁵

A. Tattoos Are Pure Speech

1. Tattoos Are an Ancient Art Form Older than the United States Itself

The history of tattoos precedes the founding of the United States.⁸⁶ In early America, tattoos were viewed as “degraded art”, art for the lower classes, and were ridiculed for being “coarse” and “poorly executed” depictions.⁸⁷ Mostly military men wore tattoos as a symbol of their patriotism.⁸⁸ However, by the late 1800’s, tattoo artists began establishing their trade in various cities in the United States.⁸⁹ Famous tattoo artists emerged, such as Gus Wagner,⁹⁰ and advertisements noted that “[t]attooing is quite a fad and many ladies as well as gentlemen have adopted it and their persons bear everlasting symbols of the art.”⁹¹ The acceptance of tattoos in mainstream society led to advances in the tattoo industry, such as the invention of the first electric tattoo machine in New York City in the 1880s.⁹² As a result, tattoos became more ornate and were less painful to complete.⁹³

However, the pervasive acceptance of tattooing did not last.⁹⁴ Conservative Americans began to view tattoos as immoral, vile, and appropriate only for the lower class.⁹⁵ By World War I, the military began to regu-

84. See *Anderson v. City of Hermosa Beach*, 621 F.3d 1051, 1060 (9th Cir. 2010) (holding that a tattoo is pure speech).

85. See *id.* at 1059 (holding that the *Spence* test is used when a process does not produce a pure expression).

86. See Arnold Rubin, *General Introduction* to MARKS OF CIVILIZATION 13, 14 (Arnold Rubin ed., Regents of the Univ. of Cal. 1988) (noting that body art was practiced by people of Africa, Asia, and the Americans during the Age of Exploration); see also Picchione, *supra* note 47, at 832 (noting that tattoos were found on soldiers in the Continental Army).

87. Alan Govenar, *The Changing Image of Tattooing in American Culture, 1846–1966*, in WRITTEN ON THE BODY: THE TATTOO IN EUROPEAN AND AMERICAN HISTORY, *supra* note 2, at 212–13.

88. Picchione, *supra* note 47, at 832; see also Govenar, *supra* note 87, at 213–14 (noting that tattoos were so pervasive in the military that by the late nineteenth hundreds “95 per cent of the 26th US infantry and 90 per cent of the sailors serving on American men-of-war were tattooed.”).

89. Govenar, *supra* note 87, at 214.

90. *Id.* at 215 (memorializing Gus Wagner, who traveled around the world studying other tattoo artists’ techniques and was known for his great work and skill).

91. *Id.*

92. Frederick, *supra* note 43 at 233; Hedges, *supra* note 3, at B3.

93. Frederick, *supra* note 43 at 233; Hedges, *supra* note 3, at B3.

94. See Govenar, *supra* note 87, at 226 (describing the attempt to regulate tattooing).

95. Picchione, *supra* note 47, at 832.

late the more sexually suggestive content of tattoos.⁹⁶ Concurrently, the government began inspecting tattoo shops to ensure compliance with health codes.⁹⁷ By the 1950s, journalists lamented that “[t]he venerable art dedicated to skin deep beauty is, unlike its indelible triumphs, fading away.”⁹⁸ The post-war society emphasized conformity, and thus tattoos became a symbol of adolescent rebellion.⁹⁹ Once again, tattoos were viewed as an art form of the lower class.¹⁰⁰

In the 1960s, an outbreak of Hepatitis in New York was attributed to an unsanitary tattoo shop.¹⁰¹ Through the media, word spread that diseases could be transmitted through tattooing, and many states and cities reacted by banning tattooing completely.¹⁰² During the Vietnam War, tattoos moved further away from the mainstream when they became a venue for anti-war and anti-government expression in the counterculture.¹⁰³ While many older tattoo artists refused to tattoo anti-military images, younger artists quickly embraced the designs of the counterculture and created “[p]eace signs, marijuana leaves, mushrooms, swastikas and motorcycle emblems”¹⁰⁴

During the 1970s, traditionally trained fine artists began applying their skills to tattooing and created a new genre of tattoos with more sophisticated imagery and techniques.¹⁰⁵ Contemporary artists such as Bruce Nauman, Dennis Oppenheim, and Chris Burden focused their attention on creating “body pieces” that “explored ways in which the artist could become both the subject and object” of the artwork.¹⁰⁶ Concurrently, younger tattoo artists such as Ed Hardy, a student at the San Francisco Art Institute, began to establish uniform ethical and hygienic standards in hopes of overturning laws that restricted tattooing.¹⁰⁷ The self-regulation of tattoo artists,

96. See Govenar, *supra* note 87, at 214 (suggesting that this restriction might be a result of the more suggestive images of nude women depicted in tattoos during the early twentieth century); see also Picchione, *supra* note 47, at 832 (describing the sexually suggestive tattoos that emerged during the early 1900s).

97. See Govenar, *supra* note 87, at 229 (discussing military regulations of tattoos and government inspection of tattoo shops).

98. *Id.* at 230.

99. *Id.*

100. *Id.* (noting that tattoos were associated with “blue-collar workers, drunks, hot rods, motorcycle clubs and street gangs”).

101. Frederick, *supra* note 43, at 233.

102. *Id.*

103. Picchione, *supra* note 47, at 833.

104. Govenar, *supra* note 87, at 233.

105. *Meuse*, No. 9877 CR 2644, at *2.

106. Govenar, *supra* note 87, at 233.

107. *Id.*

combined with the changing attitudes toward body art, created a platform in the 1970s and 1980s that established tattooing as a legitimate art form.¹⁰⁸

By the 1980s, tattoos reached rock star status.¹⁰⁹ Musicians and their supermodel girlfriends openly displayed their tattoos, and consumer demand for this art form skyrocketed.¹¹⁰ As tattooing again became more acceptable within mainstream society, states lifted their bans against the process of tattooing.¹¹¹ Today, tattooing has become a leading art form, a desirable profession,¹¹² a profitable sector of the national economy,¹¹³ and the subject of museum exhibits throughout the United States.¹¹⁴ Today, tattoo artists are known for their “large-scale, unified, custom designs,” and some have even sought copyrights for their finished pieces.¹¹⁵ Currently, most tattoo artists are graduates of college art programs who seek the “intrinsic appeal of the medium” and desire to break free from the “limitations, distortions and irrelevance of conventional elitist modes of art production.”¹¹⁶ Tattoos are pervasive; they are found on everyone from athletes to movie stars to public figures who shape American culture.¹¹⁷

2. Tattoos, Like All Other Visual Arts, Deserve Protection as Pure Speech

Although the Supreme Court has never heard a case concerning First Amendment protection for visual art, it has held that forms of expression—such as art, music, and entertainment—are protected under the First

108. *Id.*

109. *See generally Tattoos Leave Mark on Ads*, *supra* note 2, at C8 (describing how tattoos have garnered popularity especially among rock stars and movie stars).

110. *See generally id.* (describing the commercial impact of tattoos on advertising).

111. *See Frederick*, *supra* note 43, at 236 (noting that between 1960 and 2003, statewide tattoo bans had been repealed in all states except South Carolina and Oklahoma); *see also* Janice Francis-Smith, *OK Governor Henry Signs Tattoo Legalization into Law*, J. REC. (Okla. City), May 11, 2006 (declaring that Oklahoma was the last state to repeal its ban in 2006, making tattooing legal in all fifty states).

112. *Meuse*, No. 9877 CR 2644, at *3.

113. *See id.* (stating that tattooing “is the sixth-fastest growing retail business in the United States [and] [t]he single fastest growing demographic group seeking tattoo services is . . . middle-class suburban women.”).

114. *See id.* (noting that the American Museum of Natural History in New York City had a current exhibit titled, “Body Art: Marks of Identity” which was attended by many high-profile Manhattanites dressed in formal attire and tattoos).

115. Arnold Rubin, *The Tattoo Renaissance*, in MARKS OF CIVILIZATION, *supra* note 86, at 235.

116. *Id.*

117. *Meuse*, No. 9877 CR 2644, at *3.

Amendment.¹¹⁸ In *Ward v. Rock Against Racism*, the Supreme Court held that the First Amendment protected the music at a concert where there was also political speech.¹¹⁹ The Court distinguished the speaker's political remarks from the music to emphasize that the music itself received full First Amendment protection "as a form of expression and communication."¹²⁰ The court reasoned that music needs First Amendment protection because it is "one of the oldest forms of human expression" that has a long history of censorship.¹²¹ Likewise, tattooing is one of the oldest forms of human expression subjected to censorship by governments in the past, and thus is in need of First Amendment protection.¹²²

Similarly, in *Burstyn, Inc. v. Wilson*, the Supreme Court ruled that motion pictures fall within the "ambit of protection which the First Amendment, through the Fourteenth, secures to any form of 'speech' or 'the press.'"¹²³ The First Amendment shelters motion pictures because they are a "significant medium for the communication of ideas."¹²⁴ The Court added that movies are deserving of protection because they have the power to affect public attitudes and behavior, from the "espousal of a political or social doctrine to the subtle shaping of thought which characterizes all artistic expression."¹²⁵ Similarly, tattoos have the power to shape public attitudes and behavior.¹²⁶ Tattoos are often used as "cultural icon[s]" in advertisements and promotions to attract younger consumers.¹²⁷ For example, Goodyear Tire & Rubber Company has offered a set of free tires to anyone who will tattoo the company's logo onto his or her body.¹²⁸ Furthermore, the website *leaseyourbody.com* allows advertisers to find people willing to

118. See *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 502 (1952) (holding that motion pictures are protected under the First Amendment as a form of "speech"); see also *Ward v. Rock Against Racism*, 491 U.S. 781, 790 (1989) (holding that music is protected under the First Amendment).

119. *Ward*, 491 U.S. at 790.

120. *Id.*

121. See *id.* (noting that music has been censored since the time of Plato).

122. See Jane Caplan, *Introduction* to WRITTEN ON THE BODY: THE TATTOO IN EUROPEAN AND AMERICAN HISTORY, *supra* note 2, at xi–xii (discussing the goal of modern literature on the history of tattooing to establish tattooing as a legitimate art form as opposed to the "dishonorable and penal reputation" it has in Western culture); see also Govenar, *supra* note 87, at 229 (discussing the censorship of tattoos in the military during the second half of the 20th century).

123. *Joseph Burstyn, Inc.*, 343 U.S. at 501.

124. *Id.*

125. *Id.*

126. See *Tattoos Leave Mark on Ads*, *supra* note 2, at C8 (arguing that the pervasive use of tattoos in advertising has made them less effective marketing tools).

127. *Id.*

128. *Id.*

be paid for wearing tattoo advertisements.¹²⁹ In a more serious context, other tattoos express pro-war or anti-war sentiments, such as the soldiers during the Vietnam War who tattooed “Sat Cong” (Kill the Communists) on themselves before entering combat, or the anti-war protestors who tattooed peace signs on their bodies to oppose the war.¹³⁰

Some who oppose granting blanket First Amendment protection to tattoos believe that only tattoos making political statements might warrant protection.¹³¹ For example, in *Riggs v. City of Fort Worth*, the United States District Court for the Northern District of Texas stated that a plaintiff’s tattoo of a Celtic tribal design was an “artistic expression” as opposed to a “political message.”¹³² As a result, the tattoo did not receive First Amendment protection because the tattoo was a way to express a personal view and not a matter of “legitimate public concern”.¹³³ However, the Supreme Court has held that First Amendment protection is granted not only to the discussion of political ideas but also to “philosophical, social, artistic, economic, literary [and] ethical matters.”¹³⁴ Thus, the First Amendment provides broader protection than that afforded by the Texas District Court, and thus, tattoos do not need to be political statements to be protected by the First Amendment.

Furthermore, appellate courts have afforded more traditional visual arts pure speech status under the First Amendment.¹³⁵ In *White v. City of Sparks*, the Ninth Circuit Court of Appeals concluded that an artist’s painting ought to be protected as pure speech under the First Amendment because it created thoughtful reflection and discussion and because the Supreme Court has held that “a narrow, succinctly articulable message is not a condition of constitutional protection.”¹³⁶ Tattoos, like paintings, provoke thoughtful reflection and discussion by those who view them.¹³⁷ Paintings

129. *Id.*

130. Govenar, *supra* note 87, at 233.

131. *See Riggs v. City of Fort Worth*, 229 F. Supp. 2d 572, 581 n.11 (N.D. Tex. 2002) (hinting that courts might protect tattoos which “state” political messages).

132. *Id.* at 580 n.11.

133. *Id.*

134. *Abod v. Detroit Bd. of Educ.*, 431 U.S. 209, 231 (1977).

135. *See White v. City of Sparks*, 500 F.3d 953, 955 (9th Cir. 2007) (holding that arts and entertainment are protected forms of expression, and visual art is included in that category).

136. *See id.* at 956 (illustrating that paintings may express a social position, condemnation of foreign policy, demonstrate an artist’s vision of movement and color, or shape public opinion) (quoting *Hurley v. Irish-Am. Gay, Lesbian, & Bisexual Grp. of Bos.*, 515 U.S. 557, 569 (1995)).

137. *See Clinton R. Sanders, Drill and Frill: Client Choice, Client Typologies, and Interactional Control in Commercial Tattooing Settings*, in *MARKS OF CIVILIZATION*, *supra* note 86,

can express a political position, depict a scene in nature, or show deep understanding of movement and color.¹³⁸ Nonetheless, courts have found that all types of paintings elicit thoughtful reflection and discussion.¹³⁹ Likewise, tattoos can express those same reflections,¹⁴⁰ and often become conversation pieces when people inquire about the significance of a person's tattoo.¹⁴¹

Opponents of this view argue that a tattoo is unlike a painting or sculpture because a painted canvas or sculpture can be displayed for all to see, but a tattoo cannot.¹⁴² However, tattoos are constantly viewed by the public.¹⁴³ In fact, tattoos probably receive more viewership than a piece of art located in a museum.¹⁴⁴ Tattoos are an "intimate art form" that people carry on their bodies, thus enabling all people, not just those who pay admittance to an art museum, to see and understand them.¹⁴⁵ Furthermore, determining whether protection should be afforded based on visibility to the public would result in absurd inconsistencies. For example, under this rule, if a person had the exact same tattoo on the thumb and on the back, the visible thumb tattoo would be protected while the other would not. Similarly, a painting produced by Jackson Pollock that was hidden in his attic would not be protected, but a Pollock painting displayed in a museum would receive full First Amendment protection.¹⁴⁶ Thus, the amount of visibility a piece of artwork receives cannot be determinative of its ability to be protected under the First Amendment.

Others oppose giving First Amendment protection to tattoos because tattoos do not convey particularized messages easily understood by their viewers.¹⁴⁷ For example, the Eighth Circuit declared that a tattoo of a small

at 219, 223 (describing why men and women get tattoos in different locations based on others' interpretation of the tattoo).

138. *White*, 500 F.3d at 956.

139. *Id.*

140. *See* Rubin, *supra* note 115, at 238 (showing a picture of a back tattoo called the "Warrior").

141. *See* Sanders, *supra* note 137, at 222–23 (describing five reasons why people get tattoos and then transcribing a conversation between a tattoo artist and a customer concerning why that customer chose a specific tattoo).

142. Brief for Appellee at 3, *Anderson v. City of Hermosa Beach*, 621 F.3d 1051 (2009) (No. 08-56914) [hereinafter Brief for Hermosa].

143. *See* *Tattoos Leave Mark on Ads*, *supra* note 2, at C8 (noting that Angelina Jolie, Josef Stalin, and Thomas Edison all have/had viewable tattoos).

144. Sanders, *supra* note 137, at 223 (quoting one tattoo artist as saying "nobody ever sees [museum art]").

145. *Id.*

146. *See* *White*, 500 F.3d at 956 (holding that Jackson Pollock's paintings are protected under the First Amendment).

147. *See* *Stephenson*, 110 F.3d at 1307 n.4 (noting that Stephenson's tattoo does not con-

cross located between the thumb and index finger did not convey the requisite particularized message and was instead simply “self-expression.”¹⁴⁸ However, later, the court acknowledged that the opposing party viewed the cross as a gang symbol and “a significant portion of the world’s population” viewed it as a symbol of devotion to the Christian religion.¹⁴⁹ The Eighth Circuit might not have found that the tattoo conveyed the same message to everyone, but it definitely did convey a message.¹⁵⁰

The Supreme Court has held that if First Amendment protection relied on the delivery of a particularized message, protection would never have been afforded to “unquestionably shielded [speech such as the] painting of Jackson Pollock, music of Arnold Schoenberg, or Jabberwocky verse of Lewis Carroll.”¹⁵¹ As with the subjective message conveyed by a cross tattoo, two different people might find different messages in Pollock’s Number 1 located at the Museum of Contemporary Art.¹⁵² People may even believe that there is no message and that the painting is just a self-expression.¹⁵³ However, regardless of the meaning others read into his work, the work is fully protected by the First Amendment.¹⁵⁴ Similarly, tattoos convey messages, and although the message a particular tattoo conveys may not be consistent or easily understood by all who view it, that is not a valid reason to deny the tattoo First Amendment protection.¹⁵⁵

Finally, in *Bery v. City of New York*, the Second Circuit Court of Appeals protected visual art as pure speech because it is as “wide ranging in its depiction of ideas, concepts and emotions as any book, treatise, pamphlet or other writing”¹⁵⁶ In fact, visual art has the power to convey messages to more people since these expressions can transcend language barriers and reach those who are illiterate.¹⁵⁷ The court concluded that

vey a particularized message).

148. *Id.* at 1307 n.4.

149. *Id.* at 1308.

150. *See id.* (noting that the meaning of Stephenson’s tattoo is contested).

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

152. *See Jackson Pollock “Number 1,”* THE MUSEUM OF CONTEMPORARY ART, http://www.moca.org/audio/postwar/audio_popup_pollock.html (last visited Nov. 13, 2010) (explaining the significance of Pollock’s painting).

153. *See id.*

154. *See Hurley*, 515 U.S. at 569 (stating that the First Amendment “unquestionably” protects Jackson Pollock paintings).

155. *See Sanders, supra* note 137, at 222-23 (describing five reasons why people get tattoos).

156. *Bery v. City of New York*, 97 F.3d 689, 695 (2d Cir. 1996).

157. *Id.*

“words may form part of a work of art, and images may convey messages and stories,” but both forms of expression are protected as pure speech.¹⁵⁸ Similarly, tattoos have the power to convey a wide range of ideas, concepts, and emotions.¹⁵⁹ For example, a tattoo of someone’s name can symbolize a close interpersonal relationship, members of a biking group might chose to tattoo their club’s insignia on their body, or a person who has recently experienced a traumatic experience might tattoo an image conveying the emotions stemming from that experience.¹⁶⁰

B. The Product of Tattoos and the Process of Tattooing Are Inextricably Linked and Thus Protected Under the First Amendment as Pure Speech

1. Tattoos Cannot Be Created Without the Process of Tattooing

The Supreme Court does not treat the process of creating pure speech and the product of that process differently when determining whether the product and the process should be afforded First Amendment protection.¹⁶¹ This is because the Court sees the process and the product as inextricably intertwined.¹⁶² Therefore, any restriction on the process would be an obstacle to the production of the protected expression, thus chilling the free expression of ideas.¹⁶³ For example, in *Minneapolis Star & Tribune Co. v. Minnesota Commissioner of Revenue*, the Court cautioned against unfairly burdening the ink and paper used to create a newspaper for fear that it would effectively censor the production of the newspaper.¹⁶⁴ Much like a newspaper that cannot exist without the ink and paper used to create it, a tattoo cannot be created without the process of tattooing.¹⁶⁵ For instance, if a rural town located 500 miles from a tattoo parlor bans the art of tattooing, but not the actual wearing of a tattoo, the town is still effectively banning tattoos, because it leaves no legal place within the town for willing citizens to produce them.¹⁶⁶

158. *Id.*

159. Sanders, *supra* note 137, at 222.

160. *See id.* (explaining the various reasons for getting a tattoo).

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

162. *See id.* at 1062 (comparing tattooing to writing where the entire purpose of the process is to create the final product).

163. *See generally Minneapolis Star & Tribune Co. v. Minn. Comm’r of Revenue*, 460 U.S. 575, 585 (1983) (holding that a tax on the production of a newspaper can threaten its operation and in essence censor the press).

164. *Id.*

165. *Anderson*, 621 F.3d at 1062.

166. *Contra* Brief for Hermosa, *supra* note 142, at 47 (arguing that a city that bans tattooing does not ban tattoos).

Even though opponents acknowledge that a ban on the physical act of writing would be the functional equivalent of a restriction on books or on written expression in general, they argue that if an author were no longer able to write in graphite, that author would instead pick up a pen.¹⁶⁷ However, the same cannot be true of tattooing. If a tattoo artist were banned from using a needle and ink to create a tattoo, the artist would be unable to resort to another method to obtain the same result.¹⁶⁸ In fact, it is the process of puncturing the skin with ink-filled needles that creates the most critical aspect of the tattoo: its permanence.¹⁶⁹ Everything involved with that permanence is what makes the tattoo—the “pain, the scarification, the exhibitionism,”¹⁷⁰ the “evocation of the private depths of the self upon the surfaces of the body”¹⁷¹ If tattoo artists are banned from using needles and ink, they no longer have a method for producing the tattoo, a permanent marking upon one’s skin.¹⁷²

2. The Only Reason to Undergo the Process of Tattooing Is to Receive a Tattoo

Unlike tattooing, processes that are viewed as not inextricably intertwined contain conduct that can be performed without creating the desired expression.¹⁷³ Such symbolic conduct may consist of wearing a black armband or walking in a parade.¹⁷⁴ These activities can be done for reasons that have no connection to any expression.¹⁷⁵ For example, a person might wear an armband to prevent sweat from dripping down his or her arm. In this sense, wearing an armband is pure conduct, devoid of any expressive meaning.¹⁷⁶ However, a person undergoes the process of obtaining a tattoo

167. *Id.* at 30.

168. *See Yurkew*, 495 F. Supp. at 1252 (noting that tattoos require injecting dye into the person’s skin through the use of a needle).

169. Benson, *supra* note 2, at 251.

170. Kimmelman, *supra* note 5, at C1.

171. Benson, *supra* note 2, at 251.

172. Kimmelman, *supra* note 5, at C1 (stating that the uniqueness of tattoos stems from their permanence and the control over permanently marking one’s body).

173. *See State v. White*, 560 S.E.2d 420, 423 (S.C. 2002) (explaining when the *Spence* test is used).

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

175. *Id.*

176. *Contra Spence v. Washington*, 418 U.S. 405, 410 (1974) (noting that sometimes the context surrounding an action gives that action a symbolic meaning; for example, wearing an armband within the context of the Vietnam War conveyed an unmistakable message about an issue of intense public concern).

in order to permanently express an idea, belief, or feeling on his or her body.¹⁷⁷ There is never a time when a person is tattooed for any other reason.¹⁷⁸ Even the least expressive form of permanent tattooing, cosmetic tattooing, is still a process sought to leave a permanent mark upon the skin of a customer.¹⁷⁹ These women commission a tattoo artist to create for them what they believe is beauty in the most lasting form.¹⁸⁰

Tattooing is not conduct that contains speech; rather, it is more akin to the writing process.¹⁸¹ The tattooing process is the only way to create the tattoo, just like the writing process is the only way to create the book.¹⁸² For both writing and tattooing, only after hours of planning, thought, and work is the final product created in the vision planned by the author and editor.¹⁸³ Just as a book and its author would be protected under the First Amendment, so should the tattoo and its artist.¹⁸⁴

C. The Process of Tattooing, Viewed Separately from the Tattoo, Is Expressive Activity

Under the *Spence* test, some courts professed that the process of creating a tattoo is not an effort to create a particularized message, but rather an attempt to create the expression of the person who is paying for the tattoo.¹⁸⁵ However, the Supreme Court has held that First Amendment protection does not “require [the creator] to generate, as an original matter, each item featured in the communication” in order to receive First Amendment protection.¹⁸⁶ If First Amendment protection was only given to work that was uninfluenced by another’s creative direction, a mural created by Diego Rivera as a result of a government grant would not be protected because the government was the communicator and not the artist

177. See Sanders, *supra* note 137, at 222–23 (presenting five reasons why a person would get a tattoo).

178. See Kimmelman, *supra* note 5, at C1 (reporting that tattooing has to do with taking liberty over one’s own body).

179. See KP Permanent Make-Up, Inc. v. Lasting Impression I, Inc., 328 F.3d 1061, 1065 (9th Cir. 2003) (describing the types of permanent make-up customers seek).

180. See Govenar, *supra* note 87, at 217 (noting that since the early 1900s, women sought permanent make-up to meet the idea of beauty).

181. *Anderson*, 621 F.3d at 1062.

182. *Id.*

183. See Sanders, *supra* note 137, at 221 (detailing the process of tattooing as a time consuming, planned activity).

184. See *Bery*, 97 F.3d at 695 (stating that visual artwork is an embodiment of the artist’s expression just like a book is the embodiment of the author’s expression).

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

186. *Hurley*, 515 U.S. at 569–71.

himself.¹⁸⁷ Likewise, a newspaper would not be protected speech because individual reporters and editors dictate and edit the content of news stories.¹⁸⁸ Tattooing is similar to a government-sponsored mural or a news story written for the Los Angeles Times because, in creating a tattoo, both the tattoo artist and the customer contribute their artistic vision to the final product.¹⁸⁹ The customer enters the tattoo parlor with an idea, but it is the artist and his artistic talent that creates the image.¹⁹⁰

Much like a person seeking a commissioned painting, people who desire tattoos seek out certain tattoo artists.¹⁹¹ For example, Ed Hardy, who would himself become a famous tattoo artist, sought out Phil Sparrow's studio for his first tattoo, after hearing about his work through Milt Zeis.¹⁹² Later, Hardy flew to Japan to work with and be tattooed by Horihide, a distinguished Japanese tattoo artist.¹⁹³ Moreover, like many other art forms, the cost of tattoos depends on the time invested to create the work and the fame of the artist.¹⁹⁴

In the past, courts have opined that since the tattoo artist has "no control over the tattoo once its [sic] engrafted on the skin of someone else[,]" it becomes the expression of the paying customer, not the artist.¹⁹⁵ However, the Supreme Court has held that just because a product is produced for profit, the creator's right to protection is not terminated.¹⁹⁶ In fact, without payment for the final product, most people would not be able to create the protected expression.¹⁹⁷ For example, although Picasso no longer has control over "Guernica", the painting still remains entitled to First Amendment

187. See *Anderson*, 621 F.3d at 1062 (explaining that even commissioned artwork is entitled to protection).

188. *Id.*

189. *Id.* (stating that tattooing is a collaborative creative process where both the customer and the tattoo artist engage in expressive activity).

190. See generally *Sanders*, *supra* note 137, at 220 (describing the relationship that develops between that tattoo and the tattoo artist who has the "skill and . . . consequent right to control the interaction").

191. See *Abowitz*, *supra* note 10, at D10 (referencing a tattoo artist who has a two-year waiting list for clients who pay a minimum charge of \$10,000 for his work).

192. *Rubin*, *supra* note 115, at 242.

193. *Id.* at 245.

194. See *Abowitz*, *supra* note 10, at D10 (reporting that Mario Barth has a two-year waiting list of clients willing to pay \$10,000 for a piece of artwork); see also *O'Connor*, *supra* note 41, at 1 (stating that a tattoo can cost between \$75 and \$70,000).

195. Brief for *Hermosa*, *supra* note 142, at 4.

196. See *Riley v. Nat'l Fed'n of the Blind of N.C. Inc.*, 487 U.S. 781, 801 (1988) (holding that a speaker's rights are not terminated because the speaker is paid to speak).

197. *Bery*, 97 F.3d at 696.

protection.¹⁹⁸ Similarly, newspapers are protected even after a customer purchases them.¹⁹⁹ There would be little speech value in newspapers if they were never circulated.²⁰⁰

Furthermore, tattoo artists, like other fine artists or news reporters, must be attuned to their customers' needs.²⁰¹ They must employ certain strategies to instill confidence in their customers to show that their shop has the desired level of skill and professionalism.²⁰² Tattoo artists see themselves in a customer-oriented business where meeting their clients' needs can result in a profitable business.²⁰³ However, they are not willing to sacrifice their personal beliefs for a paycheck.²⁰⁴ For example, Big Joe Kaplan, a tattoo artist in New York, refuses to tattoo swastikas or a person's face.²⁰⁵ Like other artists, tattoo artists remain true to their art, creating pieces that they are proud of and that have the potential to be worth over \$10,000.²⁰⁶ However, it is important to note that even though tattoo artists share many characteristics with other visual artists, First Amendment protection is not dependent on the price of the art or the values it portrays.²⁰⁷

IV. THE UNITED STATES SUPREME COURT SHOULD ESTABLISH FULL FIRST AMENDMENT PROTECTION FOR TATTOOS AND TATTOOING

The Supreme Court has never ruled on whether tattoos or the process of tattooing is protected under the First Amendment.²⁰⁸ As a result, different courts have found different levels of protection for tattoos and the asso-

198. See *Anderson*, 621 F.3d at 1062 (arguing that Michelangelo's paintings in the Sistine Chapel are no longer in his possession but are still protected).

199. See *City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 768 (1988) (holding that the activity of circulating newspapers is protected); see also *See Joseph Burstyn, Inc.*, 343 U.S. at 501 (holding that the fact that movies are produced, distributed and exhibited as part of a large-scale, for-profit business does not affect their First Amendment protection).

200. *Plain Dealer Publ'g Co.*, 486 U.S. at 768 (citing *Ex parte Jackson*, 96 U.S. 727, 733 (1878) and *Lovell v. Griffin*, 303 U.S. 444, 452 (1938)).

201. See *Sanders*, *supra* note 137, at 221 (describing how to interact with an incoming customer).

202. See *id.* (describing how to interact with an incoming customer).

203. See *id.* at 222 (describing how tattoo artists see themselves).

204. O'Connor, *supra* note 41, at 1.

205. See *id.* (explaining how tattoo artists can choose to refrain from tattooing certain tattoos).

206. See *Abowitz*, *supra* note 10, at D10 (stating that there is a two-year waiting list to be tattooed by Barth at a minimum charge of \$10,000).

207. See *Anderson*, 621 F.3d at 1062 (arguing that the First Amendment protects a commissioned painting completed by Michelangelo which was completed for money and conveyed the commissioner's values).

208. *Hold Fast Tattoo, LLC v. City of North Chicago*, 580 F. Supp. 2d 656, 659 (N.D. Ill. 2008).

ciated process.²⁰⁹ The Supreme Court will review a U.S. Circuit Court of Appeal's decision if its ruling conflicts with the ruling of another Court of Appeal.²¹⁰ Here, the Ninth Circuit's ruling not only conflicts with the Eighth Circuit's prior ruling, but it completely departs from the test the Eighth Circuit used to render its decision.²¹¹ Thus, the Ninth Circuit's decision in *Anderson* creates a conflict that will only generate further uncertainty in the law.

A. The Supreme Court Should Grant Certiorari to Anderson v. Hermosa Beach to Resolve the Conflict that Exists Between Different Circuits Within the United States

The Ninth Circuit, which held that tattoos, the process of tattooing, and the business of tattooing were protected by the First Amendment, did not rely upon the *Spence* Test to reach its decision.²¹² The essential element to the Ninth Circuit's decision is its belief that tattoos are pure speech to be fully protected under the First Amendment to the same extent as a piece of artwork or a novel.²¹³ Once tattoos are viewed as pure speech and not expressive conduct, the next logical conclusion is that tattooing is so intertwined with the creation of the tattoo that it must be afforded full First Amendment protection as well.²¹⁴ Protecting the product without the process would make the creation of the product impossible, as most people do not have the artistic ability or the pain threshold required to stick a needle into their own skin numerous times to create a beautiful image.²¹⁵

On the other hand, the Eighth Circuit, in a footnote, decided that tattoos should not be a protected expression.²¹⁶ The Eighth Circuit applied the *Spence* test to the tattoo itself, not to the process of tattooing.²¹⁷ However, the court did this without providing an adequate explanation as to

209. *See supra*, Part III.

210. SUP. CT. R. 10a.

211. *Compare* Stephenson v. Davenport Cmty. Sch. Dist., 110 F.3d 1303, 1307 n.4 (8th Cir. 1997) (using the *Spence* test to determine if Stephenson's conduct is protected by the First Amendment), *with* Anderson v. City of Hermosa Beach, 621 F.3d 1051, 1059 (9th Cir. 2010) (holding that tattooing is a purely expressive activity and entitled to full First Amendment protection without applying the *Spence* test).

212. *Anderson*, 621 F.3d at 1059.

213. *Id.* at 1061.

214. *Id.* at 1062.

215. *See id.* (stating that the purpose of tattooing is to produce the tattoos, which cannot be created without the tattooing process).

216. *Stephenson*, 110 F.3d at 1307 n.4.

217. *Id.*

why it applied a test that has only been used to determine whether expressive conduct is entitled to First Amendment protection, rather than applying the test for pure speech.²¹⁸ The *Spence* test is the appropriate test to apply when there is an issue as to whether conduct, like burning a flag or marching in a parade, is sufficiently imbued with communicative elements.²¹⁹ However, the test does not apply to situations when speech exists without associated conduct.²²⁰

The unexplained footnote was then used in subsequent tattooing cases to explain why the process of tattooing was not sufficient to pass the *Spence* test for expressive conduct.²²¹ For example, in *Blue Horseshoe Tattoo, V, Ltd. v. City of Norfolk*, the court not only denied First Amendment protection to a tattoo itself,²²² but also to the process of tattooing.²²³ However, courts have not yet explained why the *Spence* test applies to tattoos or the process of the tattooing.

B. Although Tattooing Previously Conjured Many Negative Associations, These Concerns Are No Longer Realistic

Tattoos and tattooing have received different treatment than other forms of visual art.²²⁴ The Court has never been questioned that “the processes of writing words down on paper, painting a picture, and playing an instrument are purely expressive activities entitled to full First Amendment protection.”²²⁵ However, in cases involving tattoos and First Amendment rights, most courts have consistently applied the *Spence* test.²²⁶ This decision might stem from the courts view of tattoos and tattooing as attracting criminal elements, spreading diseases and being created upon an objectionable medium.²²⁷ However, First Amendment protection is meant to protect

218. *Id.*

219. *See State v. White*, 560 S.E.2d 420, 423 (S.C. 2002) (noting that the First Amendment protects conduct if it is sufficiently imbued with communicative elements according to the *Spence* test).

220. *See id.* (noting that the *Spence* test is applied to conduct when that conduct is at issue).

221. *See Blue Horseshoe Tattoo, V, Ltd. v. City of Norfolk*, 2007 WL 6002098, at *2 (Va. Cir. Ct. 2007) (reviewing various court decisions in tattooing cases).

222. *Id.* at *2 (discussing *Riggs v. City of Fort Worth*, 229 F. Supp. 2d 572 (N.D. Tex. 2002) and *Stephenson*, 110 F.3d 1303).

223. *Id.*

224. *Anderson*, 621 F.3d at 1061 (noting that the courts typically do not draw “a distinction between the process of creating . . . pure speech . . . and the product of these processes.”).

225. *Id.* at 1062.

226. *See Blue Horseshoe Tattoo, V*, 2007 WL 6002098, at *1; *see also Hold Fast Tattoo*, 580 F. Supp. 2d at 659.

227. *See People v. O’Sullivan*, 409 N.Y.S.2d 332, 333 (N.Y. App. Term 1978) (noting that

expressions subject to “prejudices and preconceptions [that] . . . have profound unsettling effects as it presses for acceptance”²²⁸ Without the protection of the First Amendment, the tattoo would be eliminated by “legislatures, courts, or dominant political or community groups” under the guise of the government’s police power.²²⁹ Furthermore, the concerns of crime and health are no longer applicable in light of the changes in tattooing that have evolved in recent years.²³⁰

Tattoos, like a Rembrandt or Picasso, consist of words, images, symbols, or any combination of these to express various messages.²³¹ The only difference between a painting and a tattoo is that the tattoo is created on a human’s skin instead of on a canvas.²³² However, a form of speech cannot lose its First Amendment protection solely because of the surface upon which it exists.²³³ It is irrelevant whether a drawing “is engrafted onto a person’s skin” or impresses ink upon a canvas; the drawing is still protected.²³⁴ The First Amendment equally protects Henri Matisse’s “The First Dance” created with oil paints and canvas, his “The Snail” created with gouache on paper, and his “The Back Series” etched out of bronze.²³⁵ However, according to the Eighth Circuit and other district courts, if Matisse had created any of these works of art by tattooing the human skin, they would completely lose all protection solely because of his choice of medium.²³⁶

four Justices of the Appellate Division found tattooing to be “associated with a morbid or abnormal personality”) (quoting *Grossman v. Baumgartner*, 254 N.Y.S.2d 335, 338 (N.Y. Sup. Ct. 1964)); *see also* *Golden v. McCarty*, 337 So. 2d 388, 390 (Fla. 1976) (noting that because tattooing punctures the skin numerous times, it creates an “opening . . . for infection and health impairment.”).

228. *Cox v. Louisiana*, 379 U.S. 536, 552 (1965) (quoting *Terminiello v. Chicago*, 337 U.S. 1, 4–5 (1949)).

229. *Id.*

230. *See* *Honoré & Atagi*, *supra* note 12, at A1 (describing the court’s opinion in *Anderson v. City of Hermosa* that complete bans on tattoo parlors in municipalities are an “unconstitutional overreaction to health concerns that can be addressed through regulations to ensure sanitation”); *see also* *Body Art: Tattoos and Piercings*, CENTER FOR DISEASE CONTROL AND PREVENTION, <http://www.cdc.gov/Features/BodyArt/> (last visited Jan. 3, 2011) [hereinafter *Body Art*] (listing safety procedures for tattoo shops).

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

232. *Id.*

233. *Id.*

234. *Id.*

235. *See* *Piarowski v. Ill. Cmty. Coll. Dist.*, 759 F.2d 625, 628–32 (7th Cir. 1985) (declaring that art for art’s sake is protected under the First Amendment).

236. *See* *Golden*, 337 So. 2d at 391 (stating that the method used for tattooing is sufficient to deny tattooing First Amendment protection).

Furthermore, courts state that they can draw the line between art upon canvas and art tattooed on the human skin because of the associated health hazards.²³⁷ They believe that “injecting dye” into human skin is so repulsive that it must “be subject to state regulation to which other art forms (or non-human mediums) may not be lawfully subjected.”²³⁸ The process is not subjected to a different constitutional standard because it is less communicative, but because of the associated health hazards of invading human tissue.²³⁹ However, even if these health hazards had once been sufficient to outweigh the full First Amendment protection of the tattoos’ expression, they are no longer categorically so.²⁴⁰

Tattoo parlors have become a profitable business and thus benefit from ensuring customer safety.²⁴¹ Like all other businesses, tattoo parlors are dependent on attracting customers and in order to do so, they must convey to their customers that their methods are safe.²⁴² For this reason, tattoo artists will self-regulate by using sterile conditions in order to attract and maintain customers.²⁴³ Furthermore, as early as 1963, courts have held that tattooing can be carried out in a safe and sanitary manner.²⁴⁴ Moreover, medical experts believe that safe tattooing procedures can be conducted by artists who are required to pass examinations that demonstrate an understanding of the principles of bacteriology, sterilization, and asepsis.²⁴⁵ Finally, sterilized machines and sanitary surroundings can ensure that tattooing is conducted in a safe manner.²⁴⁶ However, despite acknowledging that tattooing can be performed in a safe and sanitary manner, courts still deny the same protection afforded to other artwork based upon the use of a process that requires “injecting dye into a person’s skin through the use of needles.”²⁴⁷ Tattooing cannot be both safe and unsafe. Furthermore, even if tattooing does involve some health risks,²⁴⁸ there are hazards in other First Amendment activities which allow governments to regulate but not ban the

237. *Id.*

238. *White*, 560 S.E.2d at 423.

239. *Id.*

240. *See Body Art*, *supra* note 230 (listing safety procedures for tattoo shops).

241. *See Abowitz*, *supra* note 10, at D10 (relaying that “tattoo shops make a lot of money” and have “incredible profit margins”).

242. *See id.* (stating that the owner of a tattoo parlor has created an atmosphere in his shop that allows people to know it is safe).

243. *See Govenar*, *supra* note 87, at 233 (noting Ed Hardy’s desire to establish health guidelines for tattoo shops).

244. *Grossman v. Baumgartner*, 242 N.Y.S.2d 910, 916 (N.Y. Sup. Ct. 1963).

245. *Id.*

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

247. *Id.* at 1254.

248. *Body Art*, *supra* note 230.

activity.²⁴⁹ For example, paint fumes can be noxious and theatrical performances often involve flammable lighting and other electrical equipment; however, these activities cannot be completely suppressed.²⁵⁰

Crime also seems to be a motivation for denying First Amendment protection to tattooing.²⁵¹ Tattoos have a troubled history; they have been associated with criminal activity and delinquent behavior.²⁵² However, these accounts no longer accurately describe the demographics of tattoo seekers.²⁵³ Instead of “servicemen, ex-convicts and members of motorcycle gangs[,]” a growing number of customers at tattoo shops are “teachers, nurses [sic] and grandmothers.”²⁵⁴ In fact, tattoos are becoming luxury items sought by the country’s elite.²⁵⁵ The changing cultural status of tattoos from “that of an anti-social activity in the 1960s to that of a trendy fashion statement” calls for a re-evaluation of tattooing because the majority of decisions regarding tattoos relied on decisions made in an “era when tattooing was regarded as something of an anti-social sentiment.”²⁵⁶

V. FULL FIRST AMENDMENT PROTECTION FOR TATTOOS AND THE PROCESS OF TATTOOING WILL PROHIBIT MUNICIPALITIES FROM EFFECTIVELY BANNING TATTOO PARLORS

If the Supreme Court affirms the Ninth Circuit’s decision, the product, process, and business of tattooing will be entitled to full First Amendment protection.²⁵⁷ Whether a business is protected under the First

249. *See* *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) (holding that governments can impose reasonable restrictions on activities fully protected under the First Amendment).

250. *See* *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 502–04 (1952) (noting that First Amendment protection is not absolute but that there cannot not be a prior restraint on protected expression unless there exists extraordinary circumstances).

251. *See* *Kennedy v. Hughes*, 596 F. Supp. 1487, 1494 (D. Del. 1984) (quoting the mayor’s statement that “tattooing was inconsistent with the ‘nice family type town’ image of Rehoboth Beach”).

252. *See* Clare Anderson, *Godna: Inscribing Indian Convicts in the Nineteenth Century*, in *WRITTEN ON THE BODY: THE TATTOO IN EUROPEAN AND AMERICAN HISTORY*, *supra* note 2, at 102, 106 (tracing the history of the tattoo to ancient cultures that used the tattoo for punitive purposes, to mark delinquent slaves and criminals).

253. *See* O’Connor, *supra* note 41, at 1 (noting the changing demographics of tattoo customers).

254. *Id.*

255. *See* Abowitz, *supra* note 10, at D10 (describing Mario Barth’s shop at Mandalay Bay in Las Vegas).

256. *White*, 560 S.E.2d at 425 (Waller, J., dissenting).

257. *Anderson v. City of Hermosa Beach*, 621 F.3d 1051, 1055 (9th Cir. 2010).

Amendment substantially affects municipal zoning laws since zoning ordinances must conform to the Constitution.²⁵⁸ Like other content-based laws that restrict protected expression,²⁵⁹ a zoning law that infringes upon free expression is examined under a strict scrutiny, and not a rational basis, test.²⁶⁰ On the other hand, laws that are content-neutral are valid regulations of speech only if they are a reasonable “time, place, or manner” restriction.²⁶¹ Currently, courts that deny First Amendment protection to tattoo parlors apply a rational basis test, where any legitimate purpose for the challenged laws render the restriction constitutional.²⁶²

A. If Not Protected, Tattooing Bans Will Remain Constitutional

Under the rational basis test, courts have found zoning regulations that entirely forbid the act of tattooing within a city or regulations that only permit tattooing by or under the direction of a licensed doctor or dentist to be constitutional.²⁶³ Even ordinances that further limit the process of tattooing by requiring that tattoos only be performed by doctors for cosmetic or reconstructive purposes are upheld.²⁶⁴ Under the rational basis test, these ordinances have been upheld as a legitimate use of the states’ police powers to protect the health, safety, and welfare of would-be tattoo customers.²⁶⁵

The rational basis test is a very deferential test, where a law is presumed valid unless the ordinance is clearly arbitrary and unreasonable.²⁶⁶ Courts have found that legislatures intended to protect customers from the “very real risk of infection or transmission of communicable diseases,” especially serum hepatitis, by passing laws that severely restrict tattooing.²⁶⁷

258. *Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 68 (1981).

259. *See Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 641–42 (1994) (defining content-based laws as those that “stifle” speech based on its message or a requirement that a particular message be uttered and thus requiring a rigorous scrutiny).

260. *See United States v. Playboy Entm’t Grp., Inc.*, 529 U.S. 803, 813 (2000) (holding that content-based regulations must withstand strict scrutiny) (citing *Sable Comm’n of Cal., Inc. v. FCC*, 492 U.S. 115, 126 (1989); *see also* CHEMERINSKY, *supra* note 48, at 1214 (acknowledging that the distinction between neutral and content-based restrictions affects the outcome of a decision)).

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

262. *Kennedy v. Hughes*, 596 F. Supp. 1487, 1494 (D. Del. 1984).

263. *See, e.g., State v. White*, 560 S.E.2d 420, 424 (S.C. 2002); *Piperato v. Zuelch*, 395 So. 2d 1231, 1232 (Fla. Dist. Ct. App. 1981).

264. *White*, 560 S.E.2d at 421.

265. *Id.* at 424.

266. *Hold Fast Tattoo, LLC v. City of North Chicago*, 580 F. Supp. 2d 656, 662 (N.D. Ill. 2008) (citing *Clark v. County of Winnebago*, 817 F.2d 407, 408 (7th Cir. 1987)).

267. *State ex rel. Med. Licensing Bd. v. Brady*, 492 N.E.2d 34, 39 (Ind. Ct. App. 1986).

Although courts have found this purpose to be legitimate,²⁶⁸ this restriction on tattooing does not appear to be logical. In fact, courts have upheld bans on tattoo parlors for the safety of the public even when they found that a tattoo shop employed “extensive sterilization procedures” and would not create a risk of infection.²⁶⁹

Furthermore, courts such as the Supreme Court of New York have conceded that legislatures have failed to offer a reasonable purpose for complete bans on tattooing, stating that banning tattooing “bear[s] no reasonable relation to the protection of the public health against the contagion of serum hepatitis.”²⁷⁰ Unfortunately, the denial of First Amendment protection to tattoos sacrifices the tattoo artists’ “right to engage in tattooing” in order to allegedly protect “the public’s right to good health.”²⁷¹

B. If Full Protection Is Awarded to Tattoos and Tattooing, Most Zoning Laws Banning Tattoo Parlors Will Be Declared Unconstitutional

1. Content-Based Anti-Tattoo Parlor Laws Must Withstand Strict Scrutiny

Although zoning laws banning tattoo parlors appear neutral on their face, those that ban tattooing by anyone other than a doctor or dentist can be effectively categorized as content-based restrictions on free speech.²⁷² Doctors and dentists are not artists and thus cannot create the works of art for which people seek tattoo artists.²⁷³ Instead, the only tattoos permitted would be those for cosmetic or reconstructive surgery.²⁷⁴ For example, a dermatologist would be able create permanent markings of lipstick, eyeliner, and eyebrows for his patients.²⁷⁵ However, this would result in a complete ban of all tattoos done for artistic or communicative purposes.²⁷⁶ These ordinances would not allow a tattoo artist, even one who completed the rigorous coursework to become a doctor, to be able to practice his expressive art.²⁷⁷ He would only be allowed to tattoo for cosmetic or recon-

268. *Kennedy*, 596 F. Supp. at 1494.

269. *Brady*, 492 N.E.2d at 39.

270. *Grossman v. Baumgartner*, 242 N.Y.S.2d 910, 913 (N.Y. Sup. Ct. 1963).

271. *People v. O’Sullivan*, 409 N.Y.S.2d 332, 333 (N.Y. App. Term 1978).

272. *See Kennedy*, 596 F. Supp. at 1495 (holding that a plaintiff who followed sanitary procedures could still be denied the ability to operate a tattoo parlor).

273. *Golden v. McCarty*, 337 So. 2d 388, 391 (Fla. 1976) (Sundberg, J., dissenting).

274. *White*, 560 S.E.2d at 426 (Waller, J., dissenting).

275. Gina Piccalo, *Botox, This Is Your Big Week*, L.A. TIMES, Mar. 18, 2003, at E1.

276. *Golden*, 337 So. 2d at 391 (Sundberg, J., dissenting).

277. *White*, 560 S.E.2d at 426 (Waller, J., dissenting).

structive purposes.²⁷⁸ Thus, these statutes ban tattoos that express messages and ideas that were typically associated with an underclass, but not tattoos that people obtain in order to compete within a society that values a certain idea of beauty.²⁷⁹

Laws which are content-based would “require[] the government to prove that the restriction ‘furthers a compelling interest and is narrowly tailored to achieve that interest.’”²⁸⁰ Although a court would likely find the protection of the general public from communicable diseases a compelling interest,²⁸¹ the same court would likely hold that the means to achieve that interest are not narrowly tailored. Tattoo artists can be trained to use safety precautions and prevent the transmission of diseases.²⁸² The narrowest means to achieve the compelling interest would be to either require tattoo artists to attend medical training where they could learn how to prevent the transmission of communicable diseases or to require government monitoring of tattoo parlors’ health and safety techniques.²⁸³ In conclusion, ordinances permitting only medical practitioners to tattoo would be declared unconstitutional as a “complete ban on the right of free speech.”²⁸⁴

2. Content-Neutral Zoning Laws Banning Tattoo Parlors Must Meet the Time, Place, and Manner Test for Regulations of Protected First Amendment Speech

Laws that completely ban tattooing are content-neutral since they seek to eliminate all types of tattooing within their municipalities.²⁸⁵ Laws that restrict a means of expression, not the content, are constitutional only if they are reasonable “time, place, [and] manner” restrictions.²⁸⁶ A reasonable time, place, and manner restriction is one that is “justified without reference to the content of the regulated speech, [narrowly tailored to

278. *Id.*

279. See *Turner Broad. Sys., Inc.*, 512 U.S. at 641 (holding that content-based laws are those that the government passes because it agrees or disagrees with the message being communicated); see also Piccalo, *supra* note 275, at E1.

280. *Citizens United v. FEC*, 130 S. Ct. 876, 898 (2010) (quoting *FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449, 464 (2007)).

281. *Brady*, 492 N.E.2d at 39.

282. See *Golden*, 337 So. 2d at 391 (Sundberg, J., dissenting) (observing that there is “no reasonable relation between health hazards associated with tattooing and the limitation of its performance to those licensed to practice medicine . . .”).

283. *Kennedy*, 596 F. Supp. at 1495.

284. *White*, 560 S.E.2d at 426 (Waller, J., dissenting).

285. See *Turner Broad. Sys., Inc.*, 512 U.S. at 643 (stating that “laws that confer benefits or impose burdens on speech without reference to the ideas or views expressed are in most instances content neutral”).

286. *Anderson*, 621 F.3d at 1064.

serve a significant governmental interest, and []leaves open ample alternative channels for communication of the information.”²⁸⁷

Total bans on tattooing would survive the first element of this test because the bans restrict all tattooing regardless of the content; however, the second element might not be met. On one hand, states could argue that complete bans are narrowly tailored to serve a significant government interest. The state could argue that the injection of ink-filled needles into a person’s skin for any reason brings about too great a risk to the public that it must be completely eradicated from a city, regardless of the operator of the needle.²⁸⁸ On the other hand, these ordinances might not be narrowly tailored since they are broader than necessary to achieve the government interest.²⁸⁹ Studies show that complete bans on tattoo parlors push tattooing underground where the tattoo artist is not held to any state-mandated health or safety standards.²⁹⁰ A total ban on tattooing would result in a law that prohibits not just “unsanitary and unsterile tattooing,” but all types of tattoo shops no matter how safe and sterile those establishments may be.²⁹¹ Surely, there are better methods to control the public health hazards involved in tattooing other than a complete ban.²⁹² For example, regulations requiring tattooing to be performed in a sanitary manner would accomplish the states’ purpose without eliminating the practice altogether.²⁹³

Finally, these restrictions would not leave open an alternative form of similar communication.²⁹⁴ As discussed above, the tattoo is a unique expression because it is an “intimate art form” that can be carried on a person’s body for life.²⁹⁵ In fact, part of the appeal of expressing oneself through a tattoo instead of a painting or sculpture is that paintings and sculptures are commodities that can be bought and sold, whereas tattoos permanently belong to their owner and can never be removed by a bank reclaiming debt or a government foreclosure.²⁹⁶ Since there is no other way

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

288. *See Golden*, 337 So. 2d at 391 (Sundberg, J., dissenting) (contemplating that an absolute prohibition on tattooing might be what the public health hazards require).

289. *See Anderson*, 621 F.3d at 1065 (noting Anderson’s argument that the city’s regulation on tattooing is substantially broader than it needs to be).

290. *See O’Connor*, *supra* note 41, at 1 (reporting that certain customers go to illegal parlors in Manhattan).

291. *Grossman*, 242 N.Y.S.2d at 916.

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

293. *Id.*

294. *Id.* at 1065–66.

295. *Sanders*, *supra* note 137, at 223.

296. *See Benson*, *supra* note 2, at 251 (commenting on the permanence of tattoos until

to permanently mark oneself, these laws would not stand the reasonable time, place, and manner restriction.

However, ordinances that allowed tattoo shops in business districts but not in residential districts would most likely be upheld as constitutional because they would satisfy the time, place, and manner analysis.²⁹⁷ Like total bans, partial bans would apply to all tattoos regardless of the content. They would also be narrowly tailored to serve a significant government interest. For example, the government interest might be to prevent high traffic flow in a residential area.²⁹⁸ Thus, preventing the establishment of tattoo shops on smaller residential streets would satisfy that government goal. Furthermore, unlike total bans, partial bans would leave open alternative channels for communication because tattooing would be allowed in business and retail areas.

Furthermore, ordinances like the one in *Anderson v. City of Hermosa Beach* would also be declared unconstitutional. These ordinances would constitute a prior restraint on protected speech and would be subject to even stricter constitutional review than the time, place, and manner analysis.²⁹⁹ The prior restraint analysis holds that “licensing or permitting scheme[s] which place[] unbridled discretion in the hands of government official[s] or agenc[ies] . . . [or] that are impermissibly vague and that fail to provide ‘narrow, definite and objective’ standards” are facially unconstitutional.³⁰⁰ Under this analysis, a zoning ordinance that required that a conditional use permit for a tattoo parlor be granted only if the specific site was “‘an appropriate location for such [a] use’ and . . . [the use] will ‘not adversely affect the neighborhood[]’” would be considered too subjective.³⁰¹ It would leave the decision to grant or deny the permit to the city officials.³⁰² Furthermore, ordinances that give city officials the discretion to determine if a tattoo shop in an area will be in the “best interests of the community” or for the “public welfare, peace, safety, health, decency, good order, morals, or conscience” are also unconstitutionally vague and thus not

one’s death); *see also* Kimmelman, *supra* note 5, at C1.

297. *See Anderson*, 621 F.3d at 1064 (explaining that only laws that are reasonable time, place, and manner restrictions are constitutional).

298. *See Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525 (2001) (recognizing that state interests in traffic safety may justify zoning regulations).

299. *MacNeil v. Bd. of Appeal*, No. 02-CV-01225, 2004 Mass. Super. LEXIS 282, at *16 (Mass. Super. Aug. 9, 2004).

300. *Voigt v. City of Medford*, No. 2005-00163F, 2007 Mass. Super. LEXIS 38, at *7–8 (Mass. Super. Jan. 30, 2007) (quoting *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 150–51 (1969)).

301. *MacNeil*, 2004 Mass. Super. LEXIS 282, at *19.

302. *Id.*

permitted under the prior restraint analysis.³⁰³

VI. CONCLUSION

First Amendment jurisprudence is an ever-expanding category. Courts have granted First Amendment protection to the most unlikely types of speech, such as soundless and wordless parade marching.³⁰⁴ This is because our nation is committed to protecting speech regardless of the message conveyed.³⁰⁵ However, up until the Ninth Circuit Court of Appeal's decision in *Anderson v. City of Hermosa Beach*, courts, for the most part, have failed to protect an ancient form of speech: tattoos and tattooing.³⁰⁶ As a result, legislative zoning ordinances that restrict tattooing only to doctors or complete legislative bans have been held constitutional by district and appellate courts.³⁰⁷

However, these courts have erred in their application of First Amendment principles to the issue of tattoos and tattooing. "The Constitution looks beyond written or spoken words as mediums of expression."³⁰⁸ In fact, the Constitution protects, as pure speech, all forms of artistic expression.³⁰⁹ Tattoos are an art form and are thereby entitled to full First Amendment protection.³¹⁰ Furthermore, tattoos and tattooing are inextricably linked, such that any restriction of the process will effectively chill the protected expression.³¹¹ With full protection for tattoos and tattooing, legislatures will no longer be able to eliminate this valuable mode of communication from their municipalities. Once tattoos and tattooing are fully

303. *Id.* at *19–20.

304. *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557, 569 (1995).

305. *Id.* at 581.

306. *See Rubin, supra* note 86, at 14 (noting that people of Africa, Asia and the Americans practiced body art during the Age of Exploration); *see also Picchione, supra* note 47, at 832 (noting that tattoos were found on soldiers in the Continental Army).

307. *See State v. White*, 560 S.E.2d 420, 426 (S.C. 2002) (upholding a statute that limited tattooing to only licensed physicians and only for cosmetic or reconstructive purposes); *see also Piperato v. Zuelch*, 395 So. 2d 1231 (Fla. Dist. Ct. App. 1981) (upholding a statute that allowed tattooing only when performed under the supervision of a doctor or a dentist).

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

309. *See Piarowski v. Ill. Cmty. Coll. Dist.*, 759 F.2d 625, 628–32 (7th Cir. 1985) (declaring that art for art's sake is protected under the First Amendment).

310. *Anderson v. City of Hermosa Beach*, 621 F.3d 1051, 1055 (9th Cir. 2010).

311. *See Spence v. Washington*, 418 U.S. 405, 408–10 (1974) (separating conduct from speech when the expression at issue was mainly conduct); *see also Minneapolis Star & Tribune Co. v. Minn. Comm'r of Revenue*, 460 U.S. 575, 585 (1983) (holding that a restriction on the process is a restriction on the product when the product is pure speech).

protected, laws restricting or banning tattoo parlors will be examined with stricter scrutiny.³¹² As a result, state legislatures will not be able to chill this tool of permanent self-expression.³¹³

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312. CHEMERINSKY, *supra* note 48, at 1214.

313. Kimmelman, *supra* note 5, at C1.

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