Regulating "Sinful" Activity: Tattoo Establishments and Local Governments

by Bradford E. Bullock



Let's begin with a very brief history of tattoo jurisprudence. Tattooing has its origins in prehistoric cultures.[1] In certain religious traditions, the practice is, quite literally, sinful.[2] It should, therefore, come as no surprise that tattooing has, at various times, been banned in various communities across the country on moral grounds, as well as for health and safety reasons. With the growing popularity and acceptance of tattoos, such bans have largely been legislatively repealed.[3] "Ink" is now mainstream.[4]

No longer are tattoos and those who have them consigned to the fringes of society. Look around your office: if you don't have a tattoo yourself, chances are you know someone who has been indelibly marked, for better or worse. And whether that mass produced (and well-hidden) unicorn tattoo was the result of a moment of youthful indiscretion, or is only one of a series of unique designs proudly announcing one's love of mythical creatures, tattoos almost invariably mean something to those who get them. Indeed, the fact that only recently has tattooing become legal in all 50 states suggests that having a tattoo conveys a very pointed message indeed.[5]

Formerly, the prevailing view among the few courts that had considered whether tattoos are entitled to First Amendment protection was a lukewarm "no."[6] For example, in *Blue Horseshoe Tattoo V, Ltd. v. City of Norfolk*,[7] the City had denied the plaintiff both a business license to operate a tattoo studio and a certificate of occupancy, because an ordinance prohibited the act of tattooing and the operation of a "tattoo establishment." Blue Horseshoe argued that the prohibition of tattooing violated its rights to free speech and expression. The court summarily dispensed with this argument based on *Stephenson v. Davenport Community School Dist.*,[8] a case involving a student who ran afoul of a school's no-tattoo policy and testified that her tattoo was merely a form of "self-expression." Relying on *Texas v. Johnson*[9] for the proposition that First Amendment protection is triggered not by mere self-expression, but by the combination of "an intent to convey a particularized message" and a finding that "the likelihood was great that the message would be understood by those who viewed it," the *Blue Horseshoe* court simply accepted as "well-taken" the City of Norfolk's contention that all tattoos must be mere "self-expression," insufficiently communicative to qualify for First Amendment protection.[10]

A later case, *Hold Fast Tattoo, LLC v. City of North Chicago*,[11] held that the act of tattooing failed the first prong of the *Johnson* test because the act itself was "not intended to convey a *particularized* message. The very nature of the tattoo artist is to custom-tailor a *different or unique message* for each customer to wear on the skin."[12] Why the act of tattooing a custom-tailored image on skin cannot convey a particularized message, when the act of painting a custom-tailored image on canvas does, was unexplored by the *Hold Fast* court. Similarly, the court in *Yurkew v. Sinclair* held, for a variety of reasons (without explaining those reasons), that "[w]herever the amorphous line of demarcation exists between protected and unprotected conduct for First Amendment purposes, the Court is convinced that tattooing falls on the unprotected side of the line."[13]

This analysis formed the jurisprudential backdrop for *Anderson v. City of Hermosa Beach*.[14] When Hermosa Beach told tattoo artist and rebel-with-a-cause Johnny Anderson that he couldn't open a tattoo parlor, he fought the law. And this time, the law didn't win.

The Facts

Hermosa Beach banned tattoo parlors within its borders.[15] The City's declarations referred to the health risks of tattooing: the potential transmission of hepatitis, syphilis, tuberculosis, leprosy, and HIV.[16] The State of California, on the other hand, permitted tattooing, but required tattoo artists to register with the health department of the county where the business was conducted,

and required those health departments to inspect registered tattoo parlors.[17] Los Angeles County, where Hermosa Beach is located, had only one tattoo parlor inspector to cover over 300 shops and 850 artists.[18] After the City denied what amounted to a variance request by Anderson to open a tattoo parlor, Anderson brought a 42 U.S.C. § 1983 action against the City, alleging that the City's ban was facially unconstitutional under the First and Fourteenth Amendments, and seeking declaratory and injunctive relief, attorney's fees, and costs.[19]

The district court followed the traditional line of thinking and granted the City's motion for summary judgment, concluding "that the act of tattooing is not protected expression under the First Amendment because, although it is non-verbal conduct expressive of an idea, it is not 'sufficiently imbued with the elements of communication' to receive First Amendment protection."[20] Because tattooing was not protected expression, the prohibition could stand if the City had a rational basis for the ban, which the court concluded the City had (the health and safety concerns).[21] The tattooed rebel brought a timely appeal.

The Flawed "Process" Distinction

As we've seen, First Amendment jurisprudence makes a distinction between purely expressive activity, and conduct containing an expressive component. A regulation of purely expressive activity (e.g., the spoken word) is only constitutional if it is a reasonable "time, place, or manner" restriction.[22] This determination "requires an inquiry into whether the restriction: (1) is 'justified without reference to the content of the regulated speech'; (2) is 'narrowly tailored to serve a significant governmental interest'; and (3) 'leave[s] open ample alternative channels for communication of the information.'"[23] By contrast, expressive conduct is protected only if it is "sufficiently imbued with elements of communication to fall within the scope of the First and Fourteenth Amendments."[24] If the conduct meets this threshold, any regulation's constitutionality is governed by the four-part test established in *U. S. v. O'Brien*.[25] If the conduct is not sufficiently communicative, then a regulation is constitutional if it is rationally related to a legitimate governmental interest.[26]

Prior to *Anderson*, the prevailing view among courts was that tattooing was non-communicative conduct—simply the process of injecting dye into a person's skin through the use of needles.[27] When considered in a vacuum, this is correct in the same way that making a sculpture is simply the process of placing a chisel against a block of stone and hitting it with a mallet. The problem with separating the process from the product is that it can easily become a convenient pretext for banning unpopular speech: *Sculpting is not banned in our town; the creation of noise or dust is.*[28]

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Long before it created the complex analytical framework under which First Amendment cases are decided today, the U.S. Supreme Court understood that regulations aimed "only" at banning the process of disseminating ideas were an invidious form of content-based regulation.[29] Apart from the medium used, there is little that separates the act of creating a tattoo from the act of creating a painting. Obviously, the fact that a living person is the "canvas" on which a tattoo is placed implicates legitimate health and safety concerns, but people "huff" paint fumes to get high, and an improperly used power tool can cause serious injury. Yet these items (and others) are regularly used to create art, and it's unlikely that a local government is going to ban them anytime soon. Accordingly, the traditional "process" distinction, with its weak intellectual underpinnings and its selective application to tattoos, begs the question—is there more to these bans than public health concerns? Are they an expression of distaste for, or discomfort with, the tattooed? In other words, are they simply invidious content-based regulations because tattoos, and those who get them, are "sinful?"

The *Anderson* Rationale

On appeal, the U.S. Court of Appeals for the Ninth Circuit held that, "[t]he tattoo itself, the process of tattooing, and even the business of tattooing are not expressive conduct but purely expressive activity fully protected by the First Amendment."[30] *Anderson v. City of Hermosa Beach* represents a radical departure from the earlier analyses of other courts, and the first time that tattooing was legally recognized as expressive activity. In coming to this conclusion, *Anderson* started out with the obvious—that in form and substance, a tattoo was no different than any other visual depiction of art.[31] The fact that it was permanently affixed to skin was "relevant to the governmental interest *potentially justifying* a restriction on protected speech [but] not to whether the speech is constitutionally protected."[32]

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Likewise, *Anderson* dispensed with the notion that the end result (the tattoo) should be separated from the constituent act of its creation, since the Supreme Court had never before recognized this distinction.[33] "[A]s with writing or painting, the tattooing process is inextricably intertwined with the purely expressive product (the tattoo), and is itself entitled to full First Amendment protection."[34] The fact that the ban related to tattooing businesses, rather than the tattooing process, did not create any meaningful distinction for the purpose of determining whether the activity regulated was protected or not.[35]

Having determined that tattoos and the tattooing process were entitled to full First Amendment protection, *Anderson* examined whether the City's ban was a reasonable "time, place, and manner" restriction. Anderson only challenged the ban on the basis of the narrowly tailored and "alternate avenues of communication" prongs of this test.[36]

A narrowly-tailored restriction "need not be the least restrictive or least intrusive means" of achieving the government objective, provided that "the means chosen are not substantially broader than necessary to achieve the government's interest."[37] Anderson argued that the ban was overly broad because the City's health and safety concerns could be met by enacting regulations relating to sanitation, rather than using an outright ban.[38] The City replied that a ban was necessary because Los Angeles County had insufficient resources to monitor tattoo parlors (only one inspector).[39] The court concluded that the City had presented no evidence that tattoo parlors could not be adequately regulated and inspected: it had simply asserted that there were presently inadequate resources in place to do so.[40] Inadequacy of regulatory resources, however, was an insufficient justification for banning an entire medium of expression.[41]

Dealing with the last issue, the ample alternative channels for communication of the information, the City argued that its ban met this prong because tattoo artists could create temporary tattoos with paint or henna paste, or the desired image could be made on a canvas or a t-shirt. There was nothing "inherently expressive or distinctive" about rendering the tattoo designs on skin.[42] The court disagreed that these options constituted "alternative channels" by noting the obvious—ink embedded in the dermis often carried a message that was "distinct" from displaying the same image using some other medium,[43] and also indicated that the bearer was "highly committed" to the permanent message he or she was displaying.[44]

Anderson should also serve as a reminder to the local government practitioner to carefully review outright bans of any kind, especially those that could have First Amendment implications.

Conclusion

Anderson raises numerous important issues for municipalities. The first is why it took so long for such an ancient art form to be recognized as such, and given First Amendment protection. It is possible that longstanding religious prohibitions on tattooing could have contributed to the dismissive attitude earlier courts took towards tattoos as a legitimate art form, one deserving of protection. The answer to that question, however, goes well beyond the scope of this article.

Another issue is the extent to which *Anderson* can serve as the paradigm for extending First Amendment protection to other body-modification procedures (permanent or temporary) and the extent to which municipalities can attempt to regulate them.[45] Regulating tongue-splitting, flesh-stapling,[46] or venues that feature consensual mutilation may not be at the top of anyone's "to do" list, but reviewing tattoo parlor prohibitions wasn't necessarily on anyone's radar ten years ago, either. *Anderson* should also serve as a reminder to the local government practitioner to carefully review outright bans of any kind, especially those that could have First Amendment implications. A ban is almost always the most convenient regulation to create—just ask any parent of a four-year-old.[47] But if there is a less restrictive way to address legitimate regulatory concerns where expressive speech (or conduct, to be on the safe side) is concerned, those alternatives should be considered.

Notes

1. Otzi the Iceman, who is thought to have lived around 3,300 B.C., bears evidence of carbon tattoos. Spindler, Konrad (1995), *The man in the ice*, Phoenix, pp. 178–184, ISBN 0 75381 260 6.
2. A prohibition on tattooing is found in the Torah (Old Testament): "You shall not make gashes in your flesh for the dead, or incise any marks on yourselves: I am the Lord" (Leviticus 19:28). *See* http://www.myjewishlearning.com/practices/Ethics/Our_Bodies/Adorning_the_Body/Tattoos.shtml.
3. Oklahoma, the last state to outlaw tattooing, lifted its 40-year-old total ban in 2006 when it repealed 21 Ok. St. T. § 842. 1; *see* 2006 Okla. Sess. Laws, c. 141.
4. In the interest of providing citations in support of factual assertions, I direct your attention to the cable station TLC and its popular "L.A. Ink" series, starring heavily-tattooed Kat Von D, who is now engaged to the similarly heavily-tattooed reality-television star Jesse James, who recently divorced the non-heavily-tattooed actress, Sandra Bullock (alas, no relation to me) after he admitted to cheating on Sandra with heavily-tattooed model Michelle "Bombshell" McGee—not that I pay attention to this sort of thing.
5. If the author does have a tattoo or five, the first time his mother saw his first one, she might have said, "Oh, son. Now nobody will want to hire you."
6. *See, e.g.,* Hold Fast Tattoo, LLC v. City of North Chicago, 580 F.Supp.2d 656, 659-61 (N.D. Ill. 2008); Yurkew v. Sinclair, 495 F.Supp. 1248, 1253-55 (D. Minn.1980); State v. Brady, 492 N.E.2d

34, 39 (Ind. Ct. App. 1986); People v. O'Sullivan, 96 Misc.2d 52, 409 N.Y.S.2d 332,333 (N.Y. App. Div. 1978); State v. White, 560 S.E.2d 420, 423-24 (S.C. 2002).
7. 72 Va. Cir. 388, 2007 WL 6002098 (Va. Cir. Ct. Jan. 17, 2007).
8. 110 F.3d 1303, 1307 (8th Cir. 1997).
9. 491 U.S. 397, 404 (1989).
10. 2007 WL 6002098 at *2. Remarkably, though, the court noted that the *Stephenson* opinion left open the possibility that "a particular tattoo might constitute protected speech." *Id.*, citing *Stephenson*, 110 F.3d at 1307. That this "possibility" accurately describes a content-based speech regulation, which is subject to strict scrutiny, is ignored in both opinions.
11. 580 F. Supp.2d 656, 659-61 (N.D. Ill. 2008).
12. *Id.* (emphasis added). Compare "Particular, adj."…"of or pertaining to a single or specific person, thing, group, class, occasion, etc., rather than to others or all; special rather than general, with "Unique, adj."…" existing as the only one or as the sole example; single; solitary in type or characteristics: a unique copy of an ancient manuscript." *See* http://dictionary.reference.com/browse/unique.
13. 495 F. Supp. 1248, 1253 (D. Minn. 1980).
14. 621 F.3d 1051 (9th Cir. 2010).
15. Hermosa Beach, Ca., Code § 17.06.070.
16. *Anderson*, 621 F.3d at 1056.
17. Cal. Health & Safety Code §119303(a), § 119304 (West 2011).
18. *Anderson*, 621 F.3d at 1056.
19. *Id.* at 1057.
20. *Id.* at 1058.
21. *Id.*
22. *See* Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989) (municipal noise regulation designed to ensure that musical performances in public band-shell did not disturb surrounding residents was valid under the First Amendment as a reasonable regulation of the place and manner of protected speech).
23. *Id.* (citing *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 (1984)).
24. *Anderson*, 621 F.3d at 1058 (citing *Spence v. Washington*, 418 U.S. 405, 409-11 (1974) (per curiam)).
25. "[W]e think it clear that a government regulation is sufficiently justified if it is (1) within the constitutional power of the Government; (2) if it furthers an important or substantial governmental interest; (3) if the governmental interest is unrelated to the suppression of free expression; and (4) if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest." U. S. v. O'Brien, 391 U.S. 367, 377 (1968).
26. *Anderson*, 621 F.3d at 1059 (citing *Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 68 (1981)).
27. *See, e.g.,* Hold Fast Tattoo, LLC v. City of North Chicago, 580 F.Supp.2d 656, 660 (N.D. Ill. 2008) ("[t]he act of tattooing is one step removed from the actual expressive conduct"); Yurkew v. Sinclair, 495 F.Supp. 1248, 1253-54 (D. Minn. 1980) ("there has been no showing that the normal observer … would regard the process of injecting dye into a person's skin through the use of needles as communicative").
28. Bearing in mind that regulations of protected speech must be no more than content-neutral time, place, and manner restrictions, the Supreme Court has accepted only one total ban of an entire medium of communication on the basis of protection of the public tranquility – sound trucks. The Court reasoned that, "[i]n [their] home or on the street [the public] is practically helpless to escape this interference with [their] privacy by loud speakers except through the protection of the municipality." *See* Kovacs v. Cooper, 336 U.S. 77, 78 (1949). In other words, freedom is not "beyond all control." *Id.*
29. *See* Multimedia Pub. Co. of S. Carolina, Inc. v. Greenville-Spartanburg Airport Dist., 991 F.2d 154, 158 (4th Cir. 1993) (overturning ban on airport newsracks, citing *Ex parte Jackson*, 96 U.S. 727, 733 (1878): "Liberty of circulating is as essential to [freedom of expression] as liberty of publishing; indeed, without the circulation, the publication would be of little value.").
30. *Anderson*, 621 F.3d at 1060 (emphasis added).
31. *Id.* at 1061.
32. *Id.* (emphasis in original).
33. *Id.* at 1062 ("Tattooing is a process like writing words down or drawing a picture except that it is performed on a person's skin. As with putting a pen to paper, the process of tattooing is not intended to 'symbolize' anything. Rather, the entire purpose of tattooing is to produce the tattoo, and the tattoo cannot be created without the tattooing process any more than the Declaration of Independence could have been created without a goose quill, foolscap, and ink.").
34. *Id.*
35. *Id.* at 1062-63 (citing *City of Lakewood v. Plain Dealer Publ'g. Co.*, 486 U.S. 750, 756 n. 5 (1988): "[T]he degree of First Amendment protection is not diminished merely because the [protected expression] is sold rather than given away."); *see also*, Riley v. Nat'l Fed'n of the Blind of N.C., Inc., 487 U.S. 781, 801 (1988) ("It is well settled that a speaker's rights are not lost merely because compensation is received; a speaker is no less a speaker because he or she is paid to speak").
36. 621 F.3d at 1063. Anderson had conceded that the total ban operated without regard to the content of any particular tattoo.
37. Ward v. Rock Against Racism, 491 U.S. 781, 798, 800 (1989).
38. *Anderson*, 621 F.3d at 1065.
39. *Id.*
40. *Id.*
41. *Id.*
42. *Id.* at 1066.
43. *Id.* at 1067.
44. *Id.*
45. *See, e.g.,* Thomas Schramme, *Should We Prevent Non-Therapeutic Mutilation and Extreme Body Modification?* 22 Bioethics 8-15 (Jan. 2008).
46. According to Wikipedia, a "flesh staple is a type of piercing jewellery or implant in which the middle, rather than the end of the jewellery is exposed when worn. The jewellery resembles a staple, the ends of which pierce the skin and hold the item in place. A flesh plate works on the same principle, but has a different shape, resembling a flat plate rather than a staple…" For these and other body-modification innovations, see http://en.wikipedia.org/wiki/Implant_(body_modification).
47. Although I don't have national statistics handy, I've probably said "no" to my four-year-old at least ten times while writing this article.