



## **INKED** : First Amendment Protection for Tattoos

by Kelly Frey

*"Congress shall make no law ... abridging the freedom of speech ...."  
The United States Constitution, Amendment 1*

One of the under-appreciated assets Nashville has to offer is the First Amendment Center (the "Center").<sup>1</sup> Associated with Vanderbilt University and adjacent to its campus, the Center provides education and information with respect to the First Amendment to the public, U.S. Constitutional scholars and experts, educators, government policy makers, legal experts, and students. One of the Center's outreach programs is the National First Amendment Moot Court Competition (the "Competition"). Recognized as one of the nation's finest constitutional-law competitions, this annual event (in coordination with Vanderbilt Law School) invites up to 36 two-member teams from fully ABA-accredited law schools to argue a hypothetical based upon a current or trending First Amendment controversy before panels of jurists, legal scholars, and local attorneys.<sup>2</sup>

This year's hypothetical dealt with one of the most fundamental First Amendment questions: "What is speech?" Specifically, the hypothetical addresses whether the process of tattooing is protected under the Free Speech Clause of the First Amendment and the level of judicial review that courts should use in cases related to tattooing.

### **The Hypothetical<sup>3</sup>**

The Free Speech Clause of the First Amendment explicitly covers "speech." But it has been successfully argued that the Clause should be extended to provide protection not only to "pure speech" (the actual oral and/or written communication), but also to certain expressive conduct (such as burning a draft card or a flag).<sup>4</sup> While the U.S. Supreme Court has created a test to determine when conduct is sufficiently communicative to warrant First Amendment protection, the Court has not created a test to determine when the "conduct" can be separated from the "message conveyed" such that the conduct, itself, is protected under the First Amendment.<sup>5</sup>

### *Facts*

The hypothetical for this year's Competition revolves around the "conduct" of tattooing (the process of injecting dye into the human skin). Once the province of counter-culture rebels in the U.S., tattooing has significant anthropological importance and is becoming a more socially acceptable form of expression.<sup>6</sup> That said, many local governments have attempted to regulate the conduct – resulting in tattooers and tattooees raising First Amendment arguments in an attempt to overturn the regulations. In this year's moot court problem, Norman Malone, a tattoo professional with over 30 year's experience and a novel way of creating free-hand tattoos ("Malone"), wanted to open a tattoo parlor in the City of Magnolia Hills (the "City"). However, citing public health issues, the City passed an ordinance classifying the act of tattooing a human being as the "practice of medicine" and allowing only individuals with a valid medical license (or a special permit from the local medical board) to engage in tattooing within the City (the "Ordinance").<sup>7</sup> Malone applied for a special permit under the Ordinance, but was denied.

### *Procedural Status*

Malone filed a complaint in federal district court arguing that (1) the Ordinance created a de facto ban on tattoos, a form of pure speech or expressive conduct, and (2) any infringement on tattooing is a violation of the First Amendment, applicable to states through the Fourteenth Amendment.<sup>8</sup> Upon motion for summary judgment, the district court held that tattooing is conduct, not speech. Citing to precedence, the district court held that for cases



of conduct, judicial review should be based upon whether the City had a rational basis for the Ordinance; finding that there was a rational basis for the Ordinance, the district court dismissed Malone's claims. The appellate court, however, disagreed and held that tattooing was artistic expression, deserving First Amendment protection as pure speech such that the proper standard of judicial review should be "strict scrutiny" and finding that the Ordinance did not have a proper time, place, or manner restriction required under precedence.<sup>9</sup> The minority opinion of the appeals court held, however, that the proper standard for judicial review was not strict scrutiny – rather the Ordinance should be evaluated based upon the four-part test articulated in *United States v. O'Brien*, 391 U.S. 367 (1969): (1) was the Ordinance within the constitutional power of the government; (2) did the Ordinance further an important government interest (a health-interest); (3) was the Ordinance unrelated to suppression of free expression (i.e., "content neutral"); and (4) did the Ordinance only incidentally restrict alleged First Amendment rights.<sup>10</sup>

### The Issues

The U.S. Supreme Court has found that the Free Speech Clause protects not only the spoken and written word, but also certain forms of expressive conduct. In its review of such cases, the Court determines if the conduct in question is (1) purely expressive ("pure speech"), (2) conduct that contains an expressive component, or (3) purely conduct without expressive intent.<sup>11</sup>

Tattooing would seem to involve both conduct and expression. Certainly the act of injecting ink into the skin is "conduct". But the result of the process may be art (one of the highest forms of human expression, clearly worthy of protection within the First Amendment). That said,

courts have separated the finished product of tattooing (the "art") from the process of tattooing (the "conduct" of creating the finished product).<sup>12</sup> In evaluating the process of tattooing some courts have held that we must evaluate the conduct based upon the "intent to convey a particularized message" and "likelihood that the message would be understood by those who viewed it".<sup>13</sup> Other courts have opined that there is no distinction "between the process of creating a form of pure speech (such as writing or painting) and the product of these processes (the essay or artwork) in terms of the First Amendment protection afforded."<sup>14</sup>

The Court will apply different First Amendment standards of review dependent upon whether tattooing involves merely conduct or is expression. If the conduct is pure speech, a strict scrutiny level of review is required – and any regulation restricting the act would be constitutional only if the regulation is reasonable with respect to time, place, and manner.<sup>15</sup> If the conduct is expressive, but not pure speech, then an intermediate level of review is required – if tattooing is expression pursuant to Spence, then any regulation of tattooing would have to pass the four-prong *O'Brien* test and be narrowly tailored to further a substantial governmental interest. If the conduct is without expressive intent, then a rational basis level of review, as expressed in the *Yurkew* case, is required.

In the Competition, the Petitioners (on behalf of the City) argued that tattooing is mere conduct and the Ordinance should be subjected to a rational basis standard of review. The Respondents (on behalf of Malone) argued that tattooing is either pure expression ("pure speech") subject to strict scrutiny or, in the alternative, expressive conduct subject to an intermediate level of scrutiny.

### Conclusion

While tattooing may seem like a trivial or transitory cultural fascination, the protections offered by the First Amendment are neither. First Amendment protections exist to create an open exchange of ideas and expressions critical to participatory democracy. Outlets such as newspapers, TV, and online resources enrich us with the information, and creators in art and performance enrich us with the inspiration, we need as a culture. And thanks to such venues as the First Amendment Center and its annual Moot Court Competition, lawyers who are not typically faced with dilemmas with respect to what role government may play in limiting our public discourse get the chance to actively engage with both present and aspiring Constitutional experts in better understanding critical First Amendment issues that affect us all. ■



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### (Endnotes)

<sup>1</sup> Founded by John Seigenthaler, the First Amendment Center is an operating program of the Freedom Forum and is associated with the Newseum and the Diversity Institute. The center has offices in the John Seigenthaler Center at Vanderbilt University in Nashville, Tenn., and at the Newseum in Washington, D.C. For more information about the Center, see <http://www.firstamendmentcenter.org>.

<sup>2</sup> The competition consists of four preliminary rounds, quarterfinals, semifinals and the championship round. The Center provides a Continuing Legal Education course to the panelist/judges prior to the event, allowing local attorneys to gain a better understanding of the First Amendment and the specific issues and jurisprudence related to the hypothetical that will be argued during the Competition. Additional information about the Competition is available at <http://www.firstamendmentcenter.org/moot-court>.