ARTICLES

FRINGES OF FREE EXPRESSION: TESTING THE MEANING OF "SPEECH" AMID SHIFTING CULTURAL MORES & CHANGING TECHNOLOGIES

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I. INTRODUCTION

The United States Supreme Court has been busy in the second decade of the twenty-first century addressing whether new categories of speech should be excluded from First Amendment[1] protection due to their content.[2] The Court has overwhelmingly denied any such exclusions. For

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1. The First Amendment to the United States Constitution provides, in pertinent part, that "Congress shall make no law . . . abridging the freedom of speech, or of the press." U.S. CONST. amend. I. The Free Speech and Free Press Clauses were incorporated to the states nearly ninety years ago through the Fourteenth Amendment's Due Process Clause, which applies such fundamental liberties to state and local government entities and officials. Gitlow v. New York, 268 U.S. 652, 666 (1925).

2. Despite its "no law" language that would seem to provide complete and absolute protection for speech, "[i]t is well accepted . . . that the First Amendment is not absolute." Elizabeth Price Foley, *The Constitutional Implications of Human Cloning*, 42 ARIZ. L. REV. 647, 679 (2000). The Supreme Court has fashioned multiple exceptions from constitutional free-speech protection during the past century. These exceptions sometimes are referred to as "categorical carve-outs." Carey v. Wolnitzek, 614 F.3d 189, 199 (6th Cir. 2010). The Court, for instance, wrote seventy years ago:

> There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or "fighting" words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace.

Chaplinsky v. New Hampshire, 315 U.S. 568, 571–72 (1942). *See also* Ashcroft v. Free Speech Coal., 535 U.S. 234, 245–46 (2002) (providing that "[t]he freedom of speech has its limits; it does not embrace certain categories of speech, including defamation, incitement, obscenity, and pornography produced with real children").

instance, in June 2012, the Supreme Court, in *United States v. Alvarez*, rejected the federal government's call for a novel categorical rule "that false statements receive no First Amendment protection."[3] The previous year, the Court, in *Brown v. Entertainment Merchants Association*, denied California's "wishes to create a wholly new category of content-based regulation that is permissible only for speech directed at children"—namely, violent content in video games.[4] And in 2010, in *United States v. Stevens* the Court refused to embrace a new free-speech exception for depictions of animal cruelty.[5]

While the nation's highest court has repeatedly rebuffed calls for fresh categories of unprotected speech, several lower courts are now grappling with an even more fundamental question in First Amendment jurisprudence: What constitutes "speech" in the first place? This Article analyzes three 2012 court battles over the meaning of speech in three specific contexts: (1) tattoos and tattooing; (2) "Likes" and "Liking" on Facebook; and (3) begging.

These three subjects were selected not only for their current cultural relevance, but also because they forced judges to confront either shifting cultural stereotypes or technological advances. In particular, judges had to reject or embrace arguments that some things were not speech because they were perceived to be—put as bluntly and as provocatively as possible—trashy and low-brow (tattoos),[6] cheap and easy ("Liking" on Facebook), or bothersome and annoying (begging). Thus, this Article draws on scholarly literature from beyond the legal realm to contextualize these skirmishes within broader cultural, social, and technological frameworks. In doing so, the Article endeavors to expose and illustrate latent assumptions about the values, dangers, or difficulties of expression that influence determinations of whether something should constitute speech under the First Amendment.

3. United States v. Alvarez, 132 S. Ct. 2537, 2545 (2012).

4. Brown v. Entm't Merch. Ass'n, 131 S. Ct. 2729, 2735 (2011). The California law at issue in *Brown* prohibited the sale or rental of violent video games to minors and required the labeling of such games. *Id.* at 2732.

5. United States v. Stevens, 130 S. Ct. 1577, 1586 (2010).

6. These stereotypes related to tattoos are addressed in Part II, but for now it suffices to know that tattoos located on the lower back are referred to derisively by some as "tramp stamps," while tattoos on the lower rib cage sometimes are called "the skank flank." Douglas Brown, *Tattoo Fans See Reason to Smile Through Painful Bouts of Rib Ink*, DENV. POST, Oct. 4, 2011, at A-1. Indeed, tattoos in the United States once were "an edgy, fringe-culture practice." Laura Capitano, *Tattoos: Once-Edgy Art Form Has Gone Cutesy*, FLA. TIMES-UNION (Jacksonville), July 26, 2009, at E-1.

Part II of this Article provides a brief overview of judicial decision making regarding the meaning of speech, including recent observations by the Supreme Court in both *Sorrell v. IMS Health Inc.*[7] and in *Brown*.[8] Part III then examines both the legal and cultural issues surrounding tattoos as speech, using the Arizona Supreme Court's recent decision in *Coleman v. City of Mesa*[9] as an analytical springboard. Next, Part IV analyzes the issue of whether Liking a Facebook page amounts to speech under the First Amendment, despite the district court's decision in *Bland v. Roberts* that Liking someone or something is not speech.[10] Part V addresses begging as a form of speech, an issue noted in *Speet v. Schuette*, when a federal judge struck down a Michigan statute that made it a crime to beg in a public place.[11] Finally, Part VI synthesizes these disputes and their cultural contexts, drawing conclusions and principles at both the macro and micro levels about the meaning of speech in the First Amendment.

II. THE MUDDLED MEANING OF SPEECH: A BRIEF PRIMER ON JUDICIAL ANALYSIS

It is, perhaps, the most basic of questions in First Amendment jurisprudence: What constitutes speech? Justice Stevens recently observed in dissent in *Citizens United v. Federal Elections Commission* that, "in

7. Sorrell v. IMS Health Inc., 131 S. Ct. 2653 (2011).

8. Brown v. Entm't Merch. Ass'n, 131 S. Ct. 2729 (2011).

9. Coleman v. City of Mesa, 284 P.3d 863 (Ariz. 2012).

10. Bland v. Roberts, 857 F. Supp. 2d 599 (E.D. Va. 2012). The decision in *Bland*, garnered massive media attention in newspapers across the nation. *See, e.g.*, Tamara Dietrich, *Judge Should Be 'Unfriended,'* DAILY PRESS (Newport News, Va.), May 6, 2012, at A2, *available at* http://articles.dailypress.com/2012-05-06/news/dp-nws-tamara-unlike-0506-20120506_1_facebook-page-free-speech-law-enforcement; Mark Guarino, *Could 'Liking' Something on Facebook Get You Fired?*, CHRISTIAN SCI. MONITOR, Aug. 10, 2012, http://www.csmonitor.com/USA/Justice/2012/0810/Could-liking-something-on-Facebook-get-you-fired; David Hughes, *Judge Says 'Like' Not Expression of Guaranteed Free Speech, Says Columnist*, SALINE COURIER (Benton, Ark.), Aug. 15, 2012, at Opinions 4; Justin Jouvenal, *If You Hit 'Like,' Is That Free Speech?*, WASH. POST, Aug. 9, 2012, at A13, *available at* http://articles.washingtonpost.com/2012-08-08/local/35491626_1_facebook-page-daniel-ray-carter-facebook-friends; William Lewis, *Clicking 'Like' on Facebook Not Protected Speech According to Federal Judge*, FORT LAUDERDALE EXAMINER, May 7, 2012, http://www.examiner.com/article/clicking-like-on-facebook-not-protected-speech-according-to-federal-judge; Ken Paulson, *Is 'Liking' on Facebook a Right?*, USA TODAY, May 30, 2012, at 7A, *available at* http://usatoday30.usatoday.com/news/opinion/forum/story/2012-05-29/facebook-twitter-free-speech-social-media/55269614/1; Brock Vergakis, *Experts 'Unlike' Ruling in Facebook Speech Case*, CHARLESTON GAZETTE (W. Va.), May 6, 2012, at 6E; James Wood, *A 'Like' on Facebook Can Get You Fired, Rules Judge*, PORTLAND EXAMINER (Or.), May 4, 2012, *available at* http://www.examiner.com/article/a-like-on-facebook-can-get-you-fired-rules-judge.

11. Speet v. Schuette, 889 F. Supp. 2d 969 (W.D. Mich. 2012) (striking down MICH. COMP. LAWS § 750.167 (2012)).

normal usage," and since the adoption of the First Amendment in 1791, "the term 'speech' [has] referred to oral communications by individuals."[12] That narrow definition, of course, ends neither the inquiry nor the debate about the meaning of speech, but merely serves as a launching pad for further explication of the term. The Supreme Court, has recognized that speech clearly encompasses words (both spoken and written), pictures, paintings, drawings, and engravings.[13] Whether other items, instances of conduct, or media artifacts fall within the ambit of speech, however, is not always so transparent. As Professor David Anderson observed during a panel discussion at the 2005 National Lawyer's Convention: "[W]e're still evolving what the meaning of speech is."[14]

For example, does doing a burnout on a motorcycle constitute speech?[15] Although this may seem like a silly question, it is a key issue in an ongoing lawsuit filed in 2012 on behalf of a South Carolina biker bar named Suck Bang Blow ("SBB").[16] SBB's lawsuit challenges a Horry County ordinance prohibiting the activity.[17] The lawsuit contends that burnouts are "expressive performances," because the bikers who engage in

12. Citizens United v. FEC, 558 U.S. 310, 428, n.55 (2010) (Stevens, J., dissenting).

13. Kaplan v. California, 413 U.S. 115, 119 (1973) (observing that "[a]s with pictures, films, paintings, drawings, and engravings, both oral utterance and the printed word have First Amendment protection until they collide with the long-settled position of this Court that obscenity is not protected by the Constitution"). *See also* Kaahumanu v. Hawaii, 682 F.3d 789, 798 (9th Cir. 2012) (asserting that the First Amendment "protects more than just the spoken and written word").

14. David Anderson et al., *What is the "Free Press?"*, 11 CHAP. L. REV. 243 (2008).

15. *See* Todd Caveman, *Yet Another Story on How to Ruin Tires*, MOTORCYCLE.COM (Apr. 23, 1998), http://www.motorcycle.com/how-to/yet-another-story-on-how-to-ruin-tires-3363.html (writing, in perhaps semi-sarcastic fashion, that "[b]urnouts are cool. People respect burnout artists for being a bitchin' motorcyclist and a sensitive, caring human being. Chicks will dig you, especially if you're a woman. Heck, even the cops will like you"); *Motorcycle Burnouts*, BREAK.COM, http://www.break.com/topics/motorcycle-burnouts (last visited May 29, 2013) (describing a motorcycle burnout as "among the loudest tricks one can perform on a motorcycle, and is meant to result in an enormous cloud of smoke being emitted from the rider's rear tire," and adding that a burnout constitutes "a spectacle during which an individual attempts to demonstrate how quickly he or she can destroy a motorcycle tire. Motorcycle burnouts are typically performed by chest-thumping males as a way to impress members of the opposite sex").

16. The SBB official website provides the following information about the bar:

> [T]he Original Suck Bang Blow opened its doors in 1996, and quickly gained a reputation for smokin' burnouts, hot girls, great music and, of course, the fact that you could ride through the front doors, right up to the bar, and order a cold one! It was and still is a favorite among rally-goers and locals alike.

About Suck Bang Blow, SUCKBANGBLOW.COM, http://suckbangblow.com/index.php/p/1/about (last visited May 29, 2013).

17. Brian Sullivan, *Manly as They Wanna Be*, A.B.A. J., Oct. 2012, at 71.

them are "expressing their manliness and macho."[18] Horry County, in contrast, contends that burnouts are merely a public nuisance.[19] Although the lawsuit was originally filed in state court, where SBB obtained a temporary restraining order,[20] it was later removed to federal court on federal question jurisdiction involving the First Amendment issue.[21]

The question of whether something constitutes speech is a threshold query. It must be distinguished from secondary issues raised only after something is determined to be speech, such as whether the speech is unprotected because it (1) falls within one of the "well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem"[22]; or (2) is subject to regulation under a traditional standard of judicial review such as strict scrutiny,[23] intermediate scrutiny,[24] or rational basis.[25]

18. David Wren, *Are Biker 'Burnouts' Protected Under First Amendment?*, STATE (Columbia, S.C.), June 11, 2012, at 1.

19. *Id.*

20. Order Granting Temporary Restraining Order, Suck Bang Blow, LLC v. Horry Cnty., No. 2012-CP-26-3699 (Ct. Common Pleas May 9, 2012), *available at* http://ftpcontent.worldnow.com/wmbf/pdf/Order-Granting-TRO.pdf.

21. *Biker Bar Suit Against Horry Co. Headed to Federal Court*, WISTV.com (Columbia, S.C.), June 19, 2012, http://www.wistv.com/story/18269631/biker-bar-takes-out-restraining-order-on-horry-county?clienttype=printable; *Suck Bang Blow v. Horry County*, JUSTIA.COM, http://dockets.justia.com/docket/south-carolina/scdce/4:2012cv01490/190239 (last visited May 29, 2013).

22. *See* United States v. Alvarez, 132 S. Ct. 2537, 2544 (2012) (identifying nine categories of unprotected speech, including: (1) advocacy intended, and likely, to incite imminent lawless action; (2) obscenity; (3) defamation; (4) speech integral to criminal conduct; (5) fighting words; (6) child pornography; (7) fraud; (8) true threats; and (9) speech presenting some grave and imminent threat the government has the power to prevent).

23. Content-based regulations on speech typically are valid only if they pass muster under the strict scrutiny standard of judicial review, which requires the government to prove both that it has a compelling interest in regulating the speech and that the regulation "is narrowly drawn to serve that interest." *Brown*, 131 S. Ct. at 2738. *See* United States v. Playboy Entm't Grp., Inc., 529 U.S. 803, 813 (2000) (noting that a content-based speech restriction "can stand only if it satisfies strict scrutiny," and asserting that "[i]f a statute regulates speech based on its content, it must be narrowly tailored to promote a compelling Government interest"); R. George Wright, *Electoral Lies and the Broader Problems of Strict Scrutiny*, 64 FLA. L. REV. 759, 768 (2012) (observing that each component of strict scrutiny, "as well as the overall test itself, is open to some degree of subjectivity and to conscious or subconscious manipulation," and pointing out that "[t]here are no objective, readily recognized, and readily applicable criteria for determining when merely imperfect tailoring becomes constitutionally insufficiently narrow tailoring" and that "[w]hat should count as a genuinely compelling (rather than a merely substantial) governmental interest is similarly murky").

24. Content-neutral regulations on speech are subject to a standard of judicial review called intermediate scrutiny, and "[a] content-neutral regulation will be sustained under the First Amendment if it advances important governmental interests unrelated to the suppression of free speech and does not burden substantially more speech than necessary to further those interests." Turner Broad. Sys., Inc. v.

Thus, while today's motion pictures constitute speech within the meaning of the First Amendment, they are not safeguarded by the Constitution if deemed obscene under the Supreme Court's ruling in *Miller v. California*.[26] Similarly, while spoken words are a form of speech within the meaning of the First Amendment, some words will not be protected if they are strung together in such a way as to amount to a true threat of violence,[27] an incitement to violence,[28] or fighting words.[29] Likewise,

FCC, 520 U.S. 180, 189 (1997); Free Speech Coal., Inc. v. Att'y Gen. of United States, 677 F.3d 519, 535 (3rd Cir. 2012) (determining that "we apply intermediate scrutiny to content-neutral regulations challenged on First Amendment grounds," and adding that "[a] statute satisfies intermediate scrutiny where it: (1) advances a 'substantial' governmental interest; (2) does not 'burden substantially more speech than is necessary' (i.e., the statute must be narrowly tailored); and (3) leaves open 'ample alternative channels for communication'" (quoting Ward v. Rock Against Racism, 491 U.S. 781, 791, 798–800 (1989))). *See also* Ashutosh Bhagwat, *The Test That Ate Everything: Intermediate Scrutiny in First Amendment Jurisprudence*, 2007 U. ILL. L. REV. 783, 831 (2007) (providing a comprehensive overview of the intermediate scrutiny standard of review, and concluding that since the mid-1990s, it "is fast becoming, in Justice Scalia's words, a 'default standard' applicable to essentially all free speech cases where strict scrutiny is not, for some reason, appropriate. Its importance is thus very substantial").

25. A regulation subjected to rational basis review results in "near-automatic approval." *Alvarez*, 132 S. Ct. at 2552 (Breyer, J., concurring). Regulations imposed on the speech rights of inmates, for example, are subject to a form of rational basis review. *See* Thornburgh v. Abbott, 490 U.S. 401, 409 (1989) (referring to the standard of review in inmate cases as a "reasonableness standard"); Matthew D. Rose, *Prisoners and Public Employees: Bridges to a New Future in Prisoners' Free Speech Retaliation Claims*, 5 SEVENTH CIRCUIT REV. 159, 167–68 (2009) (observing that the U.S. Supreme Court considers "the validity of contested prison regulations on prisoners' asserted First Amendment right[s] under a very deferential, rational basis standard of review").

26. *See* Miller v. California, 413 U.S. 15 (1973). The Court in *Miller* adopted a three-pronged test to be applied by courts to determine if the speech at issue is obscene and thus outside of First Amendment protection. The approach from *Miller* asks: (1) whether an average person, applying contemporary community standards would find that the work, taken as a whole, appeals to the prurient interest; (2) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (3) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value. *Id.* at 24.

27. *See* Virginia v. Black, 538 U.S. 343, 359–60 (2003) (asserting that "'[t]rue threats' encompass those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals," and adding that "[i]ntimidation in the constitutionally proscribable sense of the word is a type of true threat, where a speaker directs a threat to a person or group of persons with the intent of placing the victim in fear of bodily harm or death").

28. *See* Brandenburg v. Ohio, 395 U.S. 444, 447 (1969) (holding that the First Amendment does "not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action").

29. In *Chaplinsky*, the Court defined fighting words as "those which by their very utterance inflict injury or tend to incite an immediate breach of the peace." Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942). In *Cohen v. California*, 403 U.S. 15 (1971), the Court described fighting words as "those personally abusive epithets which, when addressed to the ordinary citizen, are, as a matter of common knowledge, inherently likely to provoke violent reaction." *Id.* at 20.

perjurious statements constitute speech, but they do not warrant constitutional protection due to their content.[30] These examples illustrate what Professor Frederick Schauer refers to as "the distinction between the *coverage* and the *protection* of the First Amendment."[31] Schauer adds that "[q]uestions about the boundaries of the First Amendment are not questions of strength—the degree of protection that the First Amendment offers—but rather are questions of scope—whether the First Amendment applies at all."[32] As this Part will illustrate, "[t]he First Amendment's coverage questions are difficult."[33]

What follows is a primer on the meaning of speech as recognized and articulated by various judicial bodies, rather than as embodied in normative theories or philosophies of free expression such as the marketplace of ideas,[34] democratic self-governance,[35] and human liberty.[36] After all, as

30. As Professor Eugene Volokh explains:

> Perjury is no less speech, and no more action, than was speech in violation of the Sedition Act, which sought to punish another form of falsehood. Perjury is speech in a particular context, such as in court or on an official form, but it is still communication that is punished because of what it communicates. Perjury and threats should be punishable, but only because they fall within an exception to free speech protection and not because they are somehow not speech.

Eugene Volokh, *Speech as Conduct: Generally Applicable Laws, Illegal Courses of Conduct, "Situation-Altering Utterances," and the Uncharted Zones*, 90 CORNELL L. REV. 1277, 1316 (2005).

31. Frederick Schauer, *The Boundaries of the First Amendment: A Preliminary Exploration of Constitutional Salience*, 117 HARV. L. REV. 1765, 1769 (2004) (emphasis added).

32. *Id.* at 1771.

33. *Id.* at 1772.

34. Under this theory, the "justification for free speech is that it contributes to the promotion of truth." Daniel J. Solove, *The Virtues of Knowing Less: Justifying Privacy Protections Against Disclosure*, 53 DUKE L.J. 967, 998 (2003). *See infra* note 91 (providing further background about the marketplace theory).

35. This theory "stresses the particular relationship between free expression and democratic government" and "rests on a powerful argument for free speech: Speech related to political issues cannot be suppressed because it is necessary to our democratic government." DANIEL A. FARBER, THE FIRST AMENDMENT 5–6 (2d ed. 2003). It embraces "the widely shared view that the First Amendment is particularly concerned with speech that is relevant to the processes of self-governance." Cynthia L. Estlund, *Speech on Matters of Public Concern: The Perils of an Emerging First Amendment Category*, 59 GEO. WASH. L. REV. 1, 30 (1990). *See also* MATTHEW D. BUNKER, CRITIQUING FREE SPEECH 8–10 (2001) (providing a brief overview and analysis of this theory as articulated by its leading proponent, Alexander Meiklejohn); Lyrissa Barnett Lidsky, *Nobody's Fools: The Rational Audience as First Amendment Ideal*, 2010 U. ILL. L. REV. 799, 839 (2010) (writing that "[i]t is generally agreed that a core purpose of the First Amendment is to foster the ideal of democratic self-governance").

36. Under the liberty theory, as dubbed by C. Edwin Baker, "[s]peech or other self-expressive conduct is protected not as a means to achieve a collective good but because of its value to the individual," and First Amendment protection of speech exists to foster "individuals' self-realization and self-determination." C. EDWIN BAKER, HUMAN LIBERTY AND FREEDOM OF SPEECH 5 (1989). Other variations and versions of this theory state:

Professor Peter Meijes Tiersma writes, "[r]egardless of one's philosophy of the First Amendment, all theories must address the constitutional protection of 'speech.' Whichever of these competing theories one prefers, the meaning of the word 'speech' must function as a point of departure."[37]

This Part examines speech in three parts: (1) expressive conduct and symbolic expression, (2) media artifacts and money, and (3) pure speech. Because there is substantial crossover among these parts due to the constantly evolving nature of speech, these parts serve as rough divisions rather than bright-line demarcations of speech.

A. EXPRESSIVE CONDUCT AND SYMBOLIC EXPRESSION

The United States Supreme Court has held that some forms of conduct, such as nude dancing[38] and flag burning,[39] may rise to the level of speech, provided that certain conditions are satisfied.[40] Notably, as Justice O'Connor observed in recognizing cross burning as speech, "the First Amendment protects symbolic conduct as well as pure speech."[41] First

> [T]he right to remain unmanipulated and the right to speak freely intertwine and are necessary to self-fulfillment, self-realization, and the free development of people's humanity. Autonomy is what is meant by being left unmanipulated to pursue "our own good in our own way," and it is a precondition for treating the individual as an end and not as a means.

O. Lee Reed, *A Free Speech Metavalue for the Next Millennium: Autonomy of Consciousness in First Amendment Theory and Practice*, 35 AM. BUS. L.J. 1, 11 (1997).

37. Peter Meijes Tiersma, *Nonverbal Communication and the Freedom of "Speech"*, 1993 WIS. L. REV. 1525, 1543 (1993).

38. City of Erie v. Pap's A.M., 529 U.S. 277, 285, 289 (2000) (observing that nude dancing "is expressive conduct that is entitled to some quantum of protection under the First Amendment," and adding that it "falls only within the outer ambit of the First Amendment's protection"). In an interesting twist on nudity and speech, an Oregon circuit court judge, in July 2012, held that a man who stripped nude near TSA body scanners at Portland International Airport to protest what he saw as invasive security measures was engaging in protected speech, and thus could not be found guilty of indecent exposure. Nigel Duara, *Man Who Stripped at Airport Is Cleared*, SAN JOSE MERCURY NEWS, July 19, 2012, at 6B.

39. Texas v. Johnson, 491 U.S. 397, 406 (1989) (concluding that Gregory Lee Johnson's public burning of an American flag as a means of political protest outside of the 1984 Republican National Convention in Dallas was sufficiently imbued with communicative elements so as "to implicate the First Amendment").

40. ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 1098 (4th ed. 2011) (asserting that under the current approach adopted by the U.S. Supreme Court, "conduct is analyzed as speech under the First Amendment if, first, there is an intent to convey a specific message and, second, there is a substantial likelihood that the message would be understood by those receiving it").

41. Virginia v. Black, 538 U.S. 343, 360, n.2 (2003). The Court has used this distinction between so-called pure speech and expressive conduct in other contexts, as described in Part II, Section C.

Amendment scholar Rodney Smolla refers to this as "the symbolism principle."[42]

But the Court has made clear that not all conduct is symbolic. As Chief Justice Roberts explained for a unanimous Court in *Rumsfeld v. Forum for Academic and Institutional Rights, Inc*., "we have extended First Amendment protection only to conduct that is *inherently expressive*."[43] The Court has stated, for example, that "[b]eing 'in a state of nudity' is not an inherently expressive condition,"[44] and that it has "not automatically concluded . . . that any action taken with respect to our flag is expressive."[45]

Indeed, "[c]onduct cannot be labeled 'speech' whenever a person intends to express an idea."[46] There must, instead, be both a particularized message intended by the actor, as well as a great likelihood that the message will be understood as intended by those who view it in the surrounding circumstances.[47] This, as Professor Robert Post writes, is "known as the *Spence* test,"[48] after the case from which it arose, *Spence v. Washington*. Post criticizes the *Spence* test in part because "it locates the essence of constitutionally protected speech exclusively in an abstract triadic relationship among a speaker's intent, a specific message, and an audience's potential reception of that message."[49] More recently, and in stark contrast, Professor Randall Bezanson lauds *Spence* as "a useful linear model of communication,"[50] under which "free speech presumes a speaker intending to send a message to an audience that reasonably understands the message."[51]

42. RODNEY A. SMOLLA, FREE SPEECH IN AN OPEN SOCIETY 48 (1992).

43. Rumsfeld v. Forum for Academic & Inst. Rights, Inc., 547 U.S. 47, 66 (2006) (emphasis added).

44. City of Erie v. Pap's A.M., 529 U.S. 277, 289 (2000). *See also* Naturist Soc'y, Inc. v. Fillyaw, 736 F. Supp. 1103, 1111 (S.D. Fla. 1990) (opining that "nudity has no First Amendment protection").

45. Texas v. Johnson, 491 U.S. 397, 405 (1989).

46. Baribeau v. City of Minneapolis, 596 F.3d 465, 475 (8th Cir. 2010). *See* United States v. O'Brien, 391 U.S. 367, 376 (1968) (holding that "[w]e cannot accept the view that an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea").

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

48. Robert Post, *Recuperating First Amendment Doctrine*, 47 STAN. L. REV. 1249, 1251 (1995).

49. *Id.* at 1252.

50. Randall P. Bezanson, *The Manner of Government Speech*, 87 DENV. U. L. REV. 809, 814 (2010).

51. *Id.* at 814–15.

The *Spence* test requires that a particularized message be intended.[52] Thus, while wearing certain clothing may constitute speech under the First Amendment in some circumstances,[53] a generalized and vague desire to express one's individuality or cultural values through clothing choice does not.[54] On the other hand, wedding ceremonies are speech under the First Amendment because, as the Ninth Circuit observed, they "convey important messages about the couple, their beliefs, and their relationship to each other and to their community."[55]

Honking a car horn makes a sound, but is it speech for purposes of the First Amendment? In *Washington v. Immelt*, the Supreme Court of Washington considered whether an ordinance that banned honking a horn as a public disturbance—that is, "for purposes other than public safety"—on the rationale that it "impermissibly burden[ed] protected expression."[56] Citing the Supreme Court's decision in the flag-burning case of *Texas v. Johnson*, Washington's high court found that "[c]onduct such as horn honking may rise to the level of speech when the actor intends to communicate a message and the message can be understood in context."[57] Applying this standard, the court reasoned that there were:

> numerous occasions in which a person honking a vehicle horn will be engaging in speech intended to communicate a message that will be understood in context. Examples might include: a driver of a carpool

52. *Spence*, 418 U.S. at 410–11.

53. Canady v. Bossier Parish Sch. Bd., 240 F.3d 437, 441, n.3 (5th Cir. 2001) (observing that "certain choices of clothing may have sufficient communicative content to qualify as First Amendment activity"). *See also* Gowri Ramachandran, *Freedom of Dress: State and Private Regulation of Clothing, Hairstyle, Jewelry, Makeup, Tattoos, and Piercing*, 66 MD. L. REV. 11, 45 (2006) (asserting that "[o]ne theory of why dress is important is that it is a kind of speech," and explaining that "[u]nder this theory, we can address claims concerning freedom of dress by simply assessing whether the dress communicates a sufficiently 'particularized' message, understandable by observers, to count as speech in a given instance, using well-established First Amendment doctrine for the protection of expressive acts as opposed to 'pure speech'").

54. Blau v. Fort Thomas Pub. Sch. Dist., 401 F.3d 381, 389 (6th Cir. 2005). The appellate court in *Blau* added that "the First Amendment does not protect such vague and attenuated notions of expression—namely, self-expression through any and all clothing that a 12-year old may wish to wear on a given day." *Id.* at 390. *See also* Littlefield v. Forney Indep. Sch. Dist., 268 F.3d 275, 284, n.11 (5th Cir. 2001) (observing that "individuality, almost by definition, is not sufficiently particularized to be protected by the First Amendment"); Zalewska v. Cnty. of Sullivan, 316 F.3d 314, 320 (2d Cir. 2003) (rejecting the notion that a woman's clothing choice to express cultural values constitutes speech, and reasoning that "a woman today wearing a dress or a skirt on the job does not automatically signal any particularized message about her culture or beliefs").

55. Kaahumanu v. Hawaii, 682 F.3d 789, 799 (9th Cir. 2012).

56. Washington v. Immelt, 267 P.3d 305, 306, 308 (Wash. 2011).

57. *Id.*

> vehicle who toots a horn to let a coworker know it is time to go, a driver who enthusiastically responds to a sign that says "honk if you support our troops," wedding guests who celebrate nuptials by sounding their horns, and a motorist who honks a horn in support of an individual picketing on a street corner.[58]

As the next section illustrates, questions involving the meaning of speech stretch far beyond the expressive conduct scenarios addressed here.

B. MEDIUMS OF EXPRESSION, MEDIA ARTIFACTS, AND MONEY

Beyond the realm of symbolic speech and expressive conduct, debates exist and notions shift as to whether particular media artifacts constitute speech. This is correlated to the Supreme Court's declaration that "the Constitution looks beyond written or spoken words as mediums of expression."[59] For instance, motion pictures once were not considered speech,[60] but today are categorically recognized as such.[61] Further, although only three decades ago "[c]ourts almost unanimously held that video games lacked the expressive element necessary to trigger the First Amendment,"[62] in 2011, the Supreme Court definitively declared that "video games qualify for First Amendment protection."[63] Yet, while that may be the case for video games, "games, in general, are not protected speech."[64]

58. *Id.*

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

60. Mut. Film Corp. v. Indus. Comm'n of Ohio, 236 U.S. 230, 244 (1915) (opining that "[i]t cannot be put out of view that the exhibition of moving pictures is a business pure and simple, originated and conducted for profit, like other spectacles, not to be regarded, nor intended to be regarded by the Ohio constitution, we think, as part of the press of the country or as organs of public opinion"). *See also* Alexandra Gil, *Great Expectations: Content Regulation in Film, Radio, and Television*, 6 U. DENV. SPORTS & ENT. L.J. 31, 43 (2009) (noting that the Court in *Mutual Film Corp.* "gave legitimacy to the censorship of film" and made it clear that movies "could be regulated under the police power without concern for freedom of expression"); Paul E. Salamanca, *Video Games as a Protected Form of Expression*, 40 GA. L. REV. 153, 160 (2005) (asserting that the Court in *Mutual Film Corp.* based its decision not to provide First Amendment protection for motion pictures on four characteristics "of films: (1) they are not necessarily dependent upon the printed or spoken word; (2) they are derivative of existing media and therefore in some sense superfluous; (3) they do not so much explain events as depict them; and (4) they are capable of tremendous emotional impact").

61. Burstyn v. Wilson, 343 U.S. 495, 502 (1952) (concluding that "expression by means of motion pictures is included within the free speech and free press guaranty of the First and Fourteenth Amendments").

62. Interactive Digital Software Ass'n v. St. Louis Cnty., 200 F. Supp. 2d 1126, 1133 (E.D. Mo. 2002), *rev'd*, 329 F.3d 954 (8th Cir. 2003).

63. Brown v. Entm't Merch. Ass'n, 131 S. Ct. 2729, 2733 (2011).

64. Lamle v. City of Santa Monica, No. 04-6355-GHK, 2010 WL 3734868, at *7 (C.D. Cal. July 23, 2010).

What about money as a medium of expression? Spending money can constitute—or at least enable—speech,[65] but money itself is not speech.[66] As Professor Frederick Schauer wryly observed nearly two decades ago, "[m]oney is money, speech is speech, and most competent speakers of English take the words 'money' and 'speech' to be largely extensionally divergent, such that few instances of money are properly called 'speech,' and few instances of speech are properly called 'money.'"[67]

In 2011, in *Brown v. Entertainment Merchants Association*, the Court concluded that video games constitute speech. Speaking for the majority, Justice Scalia wrote that "[t]he Free Speech Clause exists principally to protect discourse on public matters, but we have long recognized that it is difficult to distinguish politics from entertainment, and dangerous to try."[68] Justice Scalia added:

> Like the protected books, plays, and movies that preceded them, video games communicate ideas—and even social messages—through many familiar literary devices (such as characters, dialogue, plot, and music) and through features distinctive to the medium (such as the player's interaction with the virtual world). That suffices to confer First Amendment protection.[69]

65. *See* Minn. Citizens Concerned for Life, Inc. v. Swanson, 692 F.3d 864, 870 (8th Cir. 2012) (observing that "independent expenditures are indisputably political speech").

66. Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377, 400 (2000) (Breyer, J., concurring) (opining that "a decision to contribute money to a campaign is a matter of First Amendment concern—not because money is speech (it is not); but because it enables speech"); Buckley v. Valeo, 424 U.S. 1, 263 (1976) (White, J., concurring in part, dissenting in part) (opining that "money is not always equivalent to or used for speech, even in the context of political campaigns").

Professor Leslie Gielow Jacobs asserts that "when the Court equates money with speech something other than the impact of the government action on the complaining individual's ability to speak freely is its reason. While speech is always speech, whether money is speech for First Amendment purposes depends upon the context." Leslie Gielow Jacobs, *The Link Between Student Activity Fees and Campaign Finance Regulations*, 33 IND. L. REV. 435, 455 (2000).

67. Frederick Schauer, *Judicial Review of the Devices of Democracy*, 94 COLUM. L. REV. 1326, 1331–32 (1994).

68. *Brown*, 131 S. Ct. at 2733. Justice Scalia's thoughts are not original. The Supreme Court wrote more than sixty years before *Brown* that:

> The line between the informing and the entertaining is too elusive for the protection of that basic right. Everyone is familiar with instances of propaganda through fiction. What is one man's amusement, teaches another's doctrine. Though we can see nothing of any possible value to society in these magazines, they are as much entitled to the protection of free speech as the best of literature.

Winters v. New York, 333 U.S. 507, 510 (1948).

69. *Brown*, 131 S. Ct. at 2733.

This language, as addressed in further detail in the next section, carries implications for the meaning of speech beyond the realm of video games.

Additionally in *Brown*, Justice Scalia obliterated any vestige of an argument that value judgments regarding the sophistication of content—or the personal edification sought from it—affect whether something is considered speech. He wrote that "cultural and intellectual differences are not constitutional ones,"[70] and that "[c]rudely violent video games, tawdry TV shows, and cheap novels and magazines are no less forms of speech than *The Divine Comedy*."[71]

C. PURE SPEECH

In *Virginia v. Black*, the Supreme Court recognized a distinction between varying types of expressive conduct and what it sometimes calls "pure speech."[72] The difference is not always easy to detect,[73] and a few examples help to illustrate this roughly hewn dichotomy.

For instance, while the wearing of clothes sometimes can constitute expressive conduct, "[w]ords printed on clothing qualify as pure speech."[74] Thus, in the eyes of the majority of the Supreme Court in *Cohen v. California*,[75] wearing of an article of clothing with the message "Fuck the Draft," raises First Amendment interests based solely upon speech.[76] Yet *Cohen* illustrates the elusiveness of a clean distinction between expressive

70. *Id.* at 2737, n.4.

71. *Id.*

72. Virginia v. Black, 538 U.S. 343, 360, n.2 (2003). *See also* Cox v. Louisiana, 379 U.S. 536, 555 (1965) (asserting that "[w]e emphatically reject the notion urged by appellant that the First and Fourteenth Amendments afford the same kind of freedom to those who would communicate ideas by conduct such as patrolling, marching, and picketing on streets and highways, as these amendments afford to those who communicate ideas by pure speech").

73. *See* James M. McGoldrick, Jr., *Symbolic Speech: A Message from Mind to Mind*, 61 OKLA. L. REV. 1, 3, n.10 (2008) (writing that Professor Harry Kalven "used to say that there was no such thing as pure speech, that instead all speech was speech plus, speech plus litter or speech plus noise").

74. Canady v. Bossier Parish Sch. Bd., 240 F.3d 437, 440 (5th Cir. 2001).

75. Cohen v. California, 403 U.S. 15 (1971).

76. *Id.* at 18. Justice Harlan II explained for the *Cohen* majority:

> The conviction quite clearly rests upon the asserted offensiveness of the words Cohen used to convey his message to the public. The only "conduct" which the State sought to punish is the fact of communication. Thus, we deal here with a conviction resting solely upon "speech," not upon any separately identifiable conduct which allegedly was intended by Cohen to be perceived by others as expressive of particular views but which, on its face, does not necessarily convey any message and hence arguably could be regulated without effectively repressing Cohen's ability to express himself.

Id. (internal citation omitted).

conduct and pure speech; as Justice Blackmun said in dissent, the case involved "mainly conduct and little speech."[77]

What else constitutes pure speech? The Supreme Court has held that the wearing of black armbands affixed with peace symbols but lacking words is "closely akin to 'pure speech,'"[78] and that regulations prohibiting the disclosure of cell phone conversations target "pure speech."[79] In addition, the same year in which *Brown* was decided, the Court provided additional guidance on the meaning of "speech" in *Sorrell v. IMS Health, Inc.*[80] In *Sorrell*, the Court struck down a Vermont law that restricted healthcare agencies from selling prescriber-identifying information to so-called data miners.[81] In rejecting Vermont's argument that the law was "a mere commercial regulation"[82] that did not regulate speech but "simply access to information,"[83] Justice Kennedy observed that "the creation and dissemination of information are speech within the meaning of the First Amendment."[84]

D. SUMMARY OF SPEECH

So what is speech? Viewed collectively, the language from both *Brown* and *Sorrell* provides very broad and expansive precepts for determining when something constitutes speech. In particular, neither the nature of the medium (books, plays, movies, or video games) nor the substantive importance of the message (political, entertaining, or social) controls the resolution of whether "speech" is involved. As Professor R. George Wright asserts, Justice Scalia, in *Brown*, "seems to be saying that distinctions between entertainment and political speech will typically be subjective or riskily unclear and, in that sense, arbitrary and not reasonably justified."[85] Similarly, one might argue that the determination by Justice Kennedy, in *Sorrell*, that information alone constitutes speech signals a

77. *Id.* at 27 (Blackmun, J., dissenting).

78. Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 505 (1969).

79. Bartnicki v. Vopper, 532 U.S. 514, 526 (2001).

80. Sorrell v. IMS Health, Inc., 131 S. Ct. 2653 (2011).

81. *Id.* at 2672 ("The State has burdened a form of protected expression that it found too persuasive. At the same time, the State has left unburdened those speakers whose messages are in accord with its own views. This the State cannot do.").

82. *Id.* at 2664.

83. *Id.* at 2665. Vermont contended "that heightened judicial scrutiny is unwarranted in this case because sales, transfer, and use of prescriber-identifying information are conduct, not speech." *Id.* at 2666 (emphasis added).

84. *Id.* at 2667.

85. R. George Wright, *Judicial Line-Drawing and the Broader Culture: The Case of Politics and Entertainment*, 49 SAN DIEGO L. REV. 341, 344 (2012).

lessening, if not the outright negation, of the importance placed on medium when determining whether "speech" is implicated.[86] If, as Kennedy observed, "[f]acts . . . are the beginning point for much of the speech that is most essential to advance human knowledge and to conduct human affairs,"[87] then what role, if any, does the mode of the information imparted play in the determination of what constitutes speech?

If neither the medium nor the subject matter is determinative in resolving the threshold question of whether something constitutes speech, then the two critical guiding concepts from this pair of 2011 cases appear to be "ideas"—as used in *Brown* in the phrase "communicate ideas"[88]—and "information"—as used in *Sorrell* in the phrase "creation and dissemination of information."[89] The notion that speech, for First Amendment purposes, is defined as the communication or expression of ideas comports with previous observations by the Supreme Court.[90] This focus on information and ideas is also in accord with the "marketplace of ideas"—a venerable theory of free speech that underlies so much of First Amendment jurisprudence and that centers on the notion of ideas, namely the marketplace of ideas.[91] For example, the Court tends to defend speech from

86. Further evidence of the declining role the mode of delivery plays in the determination of what constitutes "speech" can be seen in the prior Supreme Court cases *Rubin v. Coors Brewing Co*., 514 U.S. 476, 481 (1995) (holding that "information on beer labels" is free speech) and *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 759 (1985) (plurality opinion) (holding that a credit report constitutes "speech").

87. *Sorrell*, 131 S. Ct. at 2667.

88. Brown v. Entm't Merch. Ass'n, 131 S. Ct. 2729, 2733 (2011).

89. *Sorrell*, 131 S. Ct. at 2667.

90. *See* Ashcroft v. Free Speech Coal., 535 U.S. 234, 253 (2002) (observing that "the Court's First Amendment cases draw vital distinctions between words and deeds, between ideas and conduct"); Harper & Row Publishers, Inc. v. Nation Enters., 471 U.S. 539, 559 (1985) (observing that the "essential thrust of the First Amendment is to prohibit improper restraints on the voluntary public expression of ideas").

91. For instance, in *United States v. Alvarez*, Justice Kennedy, writing for the plurality, stated that "[t]he theory of our Constitution is 'that the best test of truth is the power of the thought to get itself accepted in the competition of the market.'" United States v. Alvarez, 132 S. Ct. 2537, 2550 (2007) (quoting Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting)). The internally quoted language from Justice Holmes' dissent in *Abrams* represents what First Amendment scholar Rodney Smolla labels as Holmes's "elegant defense of the marketplace of ideas." Rodney A. Smolla, *Content and Context: The Contributions of William Van Alstyne to First Amendment Interpretation*, 54 DUKE L.J. 1623, 1637 (2005). In *Abrams*, "Holmes immediately realized that if speech could be suppressed merely because it tended to produce prohibited action, the marketplace of ideas could easily be savaged by state regulation." Robert Post, *Reconciling Theory and Doctrine in First Amendment Jurisprudence*, 88 CALIF. L. REV. 2353, 2361 (2000). *See also* Stanley Ingber, *The Marketplace of Ideas: A Legitimizing Myth*, 1984 DUKE L.J. 1, 3 (1984) (asserting that Holmes first introduced the marketplace of ideas "concept into American jurisprudence in his 1919 dissent to *Abrams v. United States*"). Other recent cases have invoked the marketplace-of-ideas theory. For example, when

government censorship by reference to the ideas being conveyed, as in *Texas v. Johnson*, where it proclaimed that "[i]f there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable."[92] Thus, under long-standing Supreme Court doctrine and First Amendment principle, speech, broadly defined, involves ideas and their communication.

Yet additional analysis may be required to determine whether specific categories of idea communication constitute speech. For example, Justice Scalia's reference in *Brown* to "literary devices"[93] intimates that, in the media-artifact context, speech must somehow tell a story or possess certain elements of storytelling. However, it seems logical that the presence of such devices is merely a sufficient (rather than necessary) condition for finding an instance of speech, given what Justice Kennedy described in *United States v. Alvarez* as the "vast realm of free speech."[94] And with respect to the expressive-conduct variety of speech, although the Supreme Court has never provided a clear definition for "speech," in *Spence*, it adopted a test for determining whether expressive conduct constitutes speech.[95]

overruling *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652 (1990), Justice Kennedy wrote in *Citizens United v. FEC*, that "*Austin* interferes with the 'open marketplace' of ideas protected by the First Amendment." Citizens United v. FEC, 558 U.S. 310, 314 (2010).

92. Texas v. Johnson, 491 U.S. 397, 414 (1989).

93. *Brown*, 131 S. Ct. at 2733.

94. *Alvarez*, 132 S. Ct. at 2544. That vast realm of speech includes, "motion pictures, programs broadcast by radio and television, and live entertainment, such as musical and dramatic works." Schad v. Borough of Mount Ephraim, 452 U.S. 61, 65 (1981).

95. *See supra* note 47 and accompanying text. This may not be so surprising given that the Court has similarly failed to articulate a clear and meaningful definition of certain speech subsets, such as commercial speech. Multiple First Amendment scholars have opined about the Court's troubles in explicating commercial speech. *See, e.g.*, Robert Post, *The Constitutional Status of Commercial Speech*, 48 UCLA L. REV. 1, 5 (2000) (observing that "sometimes advertising is deemed to be public discourse rather than commercial speech, and sometimes expression that would not ordinarily be regarded as advertising is included within the category of commercial speech. The boundaries of the category are thus quite blurred"); Martin H. Redish, *Commercial Speech, First Amendment Intuitionism and the Twilight Zone of Viewpoint Discrimination*, 41 LOY. L.A. L. REV. 67, 74 (2007) (writing that "the Supreme Court has cryptically offered a number of different—and not always consistent—definitions of commercial speech"); Samuel A. Terilli, Nike v. Kasky *and the Running-But-Going-Nowhere Commercial Speech Debate*, 10 COMM. L. & POL'Y 383, 386 (2005) (arguing that there is an "absence of any meaningful consensus regarding what is or is not commercial speech or how it ought to be treated" and asserting that "the commercial speech doctrine has become a linguistic quagmire for speakers with commercial interests and for speech that may or may not be deemed commercial").

Thus, at the end of the legal day, as Professor Schauer wrote three decades ago, speech is "a term of art in the phrase 'freedom of speech,'" and it essentially "is not possible to offer any simple definition of 'speech' in terms of equivalent words or of concrete things to which it refers."[96]

It was into this milieu of definitional imprecision that, as described in the next three parts of this Article, lower courts found themselves grappling with the question of whether certain products and processes constitute speech. Part III of this Article begins to explore these controversies by addressing intersections of law and culture surrounding the question of whether tattoos and tattooing are speech as that term is used in the First Amendment.

III. TATTOOS, TATTOOING, AND SPEECH: SHIFTING LEGAL AND CULTURAL ACCEPTANCE?

Part III features two sections, the first of which examines the legal perspective on whether tattoos and tattooing constitute speech under the First Amendment. The second section then analyzes the cultural values and issues surrounding tattoos as a form of expression that may, however subtly, influence judicial decision making on resolving the is-it-speech question.

A. THE LEGAL PERSPECTIVE

In September 2012, the Supreme Court of Arizona, in *Coleman v. City of Mesa*, faced the issue of whether tattoos and the process of tattooing count as speech under the First Amendment.[97] The Arizona Supreme Court had to "determine whether tattooing is constitutionally protected expression."[98] The case revolved around a zoning and permitting dispute for a tattoo parlor that Ryan and Laetitia Coleman sought to operate in the City of Mesa.[99]

After noting splits of authority on the tattoos-as-speech issue,[100] as well as the dichotomy between expressive conduct and pure speech discussed above,[101] the Arizona high court deemed it "incontrovertible"[102] that tattoos are a form of pure speech. Citing and agreeing with the Ninth

96. FREDERICK SCHAUER, FREE SPEECH: A PHILOSOPHICAL ENQUIRY 91 (1982).
97. Coleman v. City of Mesa, 284 P.3d 863 (Ariz. 2012).
98. *Id.* at 868.
99. *Id.* at 866.
100. *See id.* at 868.
101. *Id.* at 868–69.
102. *Id.* at 870.

Circuit's 2010 decision in *Anderson v. City of Hermosa, Beach*,[103] the Arizona Supreme Court noted that "the [United States] Supreme Court has recognized that the First Amendment protects a range of expressive activity including parades, music, paintings, and topless dancing."[104] In reaching its pro-speech conclusion, the Arizona Supreme Court became the first state supreme court in the nation to afford First Amendment protection to tattoo parlors.[105]

When it comes to tattoos, the Arizona Supreme Court made three important observations, each of which militates in favor of its pure-speech conclusion. First, the court noted that symbolism is speech, and held that tattoos are "generally composed of words, realistic or abstract symbols, or some combination of these items."[106] Second, the court identified multiple speech rights that were at stake, namely that tattoos involve "expressive elements beyond those present in 'a pen-and-ink' drawing, inasmuch as a tattoo reflects not only the work of the tattoo artist but also the self-expression of the person displaying the tattoo's relatively permanent image."[107] Third, the court held that the originality or creativity of the speech is not determinative as to whether it receives First Amendment protection, stating that "[t]he fact that a tattoo artist may use a standard design or message, such as iconic images of the Virgen de Guadalupe or the words 'Don't tread on me' beside a coiled rattlesnake, does not make the resulting tattoo any less expressive."[108]

The first of these three observations is important because it recognizes that symbols, as well as words, constitute speech. Put differently, words are not a necessary for tattoos to constitute speech, because the symbols that often comprise tattoos communicate messages. Symbols, as Professor Schauer writes, "convey a message that could be expressed linguistically, but the exact words of the linguistic equivalent are less."[109] For example, Schauer cites the peace symbol and black armbands as examples of items

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

104. *Coleman*, 284 P.3d at 870.

105. *See* Howard Fischer, *Skin Etchings a Form of Expression; Parlors Must Get Leeway, Court Says*, ARIZ. DAILY STAR (Tucson), Sept. 10, 2012, at A10 (reporting "Attorney Clint Bolick of the Goldwater Institute, who brought the lawsuit on behalf of the owners of Angel Tattoo in Mesa, said the ruling is historic. He said no other state supreme court anywhere in the country has extended First Amendment protections to tattoo shops").

106. *Coleman*, 284 P.3d at 870.

107. *Id.*

108. *Id.* at 871.

109. SCHAUER, *supra* note 96, at 96–97.

that have "no exact linguistic analogue."[110] Furthermore, certain images can possess one-to-one—or bijective referential correspondence—to certain words, as well as to the larger ideas those words represent. As Professor Mark Tushnet recently observed: "Think of the donkey and elephant as symbols of the Democratic and Republican parties. The images have no intrinsic meanings and can also be depicted in apolitical ways. However, deployed in political cartoons, the images have propositional content."[111]

The Arizona Supreme Court's second observation—that multiple speech rights are at stake—is important because it represents two distinct sets of speech interests associated with tattoos: (1) the artist's interest, and (2) the tattoo-recipient's interest. In a very real sense, both the artist and the recipient speak through the medium of the tattoo. Specifically, the tattoo artist creates a piece of art, leaving behind his or her own inspired and often inventive expressive legacy and sometimes gaining fame and fortune in the process, like a renowned painter; the recipient displays it; and, in turn, those who see the tattoo on the recipient receive the speech. In displaying the art, the tattoo-recipient engages in self-expression, a "fundamental concern of the First Amendment,"[112] and exercises "the value of 'individual self-realization.'"[113]

Finally, the third observation by the Arizona Supreme Court—that the standardized nature of the tattoo design or message does not decrease or detract from its expressive quality—is important because it suggests that a certain threshold of originality, creativity, or imagination need not be surmounted before something, in this case a tattoo, constitutes speech. This implies that any dichotomy between effortful and effortless speech is a false one.[114]

The Arizona Supreme Court ultimately concurred with the Ninth Circuit's *Anderson* decision and recognized tattoos as speech. However, the *Anderson* court made two significant, additional statements. First, the court in *Anderson* emphasized that the medium is not determinative as to the form of speech.[115] Writing for the majority, Judge Jay Bybee wrote:

110. *Id.* at 97. The Supreme Court recognized and protected the "silent symbol of armbands" in *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503, 510 (1969).

111. Mark Tushnet, *Art and the First Amendment*, 35 COLUM. J.L. & ARTS 169, 196 (2012).

112. Citizens United v. FEC, 558 U.S. 310,466 (2010) (Stevens, J., dissenting).

113. *Id.* (quoting Martin Redish, *The Value of Free Speech*, 130 U. PA. L. REV. 591, 594 (1982)).

114. The significance of this distinction will be discussed further below in the discussion of Liking something on Facebook. *See infra* Part IV.

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

> The principal difference between a tattoo and, for example, a pen-and-ink drawing, is that a tattoo is engrafted onto a person's skin rather than drawn on paper. This distinction has no significance in terms of the constitutional protection afforded the tattoo; a form of speech does not lose First Amendment protection based on the kind of surface it is applied to.[116]

This conclusion squarely comports with the Supreme Court's statement that "the Constitution looks beyond written or spoken words as mediums of expression."[117] Skin is a medium, and the expression placed on it in the form of a tattoo is inextricably and uniquely connected to an individual.

Second, the Ninth Circuit attempted to eliminate what it saw as a false dichotomy between the product of speech and the process of speech creation in First Amendment jurisprudence.[118] More specifically, the distinction between a tattoo, on the one hand, and the process of tattooing, on the other, was irrelevant for the Ninth Circuit. In dispelling this artificial distinction Judge Bybee wrote:

> Neither the Supreme Court nor our court has ever drawn a 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 the artwork) in terms of the First Amendment protection afforded. Although writing and painting can be reduced to their constituent acts, and thus described as conduct, we have not attempted to disconnect the end product from the act of creation. Thus, we have not drawn a hard line between the essays John Peter Zenger published and the act of setting the type.[119]

The decision reached by the court in *Anderson* is not necessarily obvious, though, and several courts have come out the other way on the matter. Just two years prior to *Anderson*, a district court in the Northern District of Illinois reached the opposite conclusion in *Hold Fast Tattoo, LLC v. City of North Chicago*.[120] Applying the *Spence* test, Judge James B. Moran wrote that the process of tattooing "fails the first prong of the test"

116. *Id.* at 1061.
117. Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., 515 U.S. 557, 569 (1995).
118. *Anderson*, 621 F.3d at 1061–62.
119. *Id.*
120. *Hold Fast Tattoo, LLC v. City of North Chicago*, 580 F. Supp. 2d 656 (N.D. Ill. 2008).

and "there is no 'message' to be understood by viewers."[121] Therefore, he concluded that "the act of tattooing is not an act protected by the First Amendment."[122]

Among the cases relied on by Judge Moran was *South Carolina v. White*,[123] perhaps the most important state high court decision prior to *Coleman*. In *White*, the South Carolina Supreme Court upheld a state law making it unlawful for a person to tattoo any part of the body of another person unless the tattoo artist meets the requirements of a licensed physician administering a tattoo for cosmetic or reconstructive purposes.[124] The court in *White* applied the *Spence* test and reasoned that Ronald White, who was arrested after a South Carolina television station aired a video clip of him administering a tattoo,[125] failed to make "any showing that the process of tattooing is communicative enough to automatically fall within First Amendment protection."[126] The court observed that, while flag burning was protected "because it conveyed an obvious political message . . . the process of injecting dye to create the tattoo is not sufficiently communicative."[127] In October 2002 the United States Supreme Court declined to hear Ronald White's case.[128]

The tattoo cases illustrate a split of authority regarding whether a process-versus-product dichotomy is relevant for purposes of determining whether an act constitutes speech. To the extent that courts embrace such a distinction, it carries important ramifications in areas beyond the tattoo-versus-tattooing division. For instance, as discussed in Part IV, the distinction would require courts to examine separately the physical act, Liking someone or something on Facebook, from the resultant product of the physical action, a "Like" that appears next to online content. Furthermore, such a distinction would have game-changing ramifications in the free-speech discussion of *Brown*. If the U.S. Supreme Court had recognized a distinction between the process of creating a video game and

121. *Id.* at 660.

122. *Id.*

123. *South Carolina v. White*, 560 S.E.2d 420 (S.C. 2002).

124. S.C. CODE ANN. § 16-17-700 (2011). John Knotts, a South Carolina lawmaker who supported the law and made the tattooing ban "his signature issue," proclaimed the same year that "if the Lord wanted you to have a tattoo, he would have put it on you." Josh Earl, *An Activist Devoted to His Artistry—South Carolina Man Fights to End a Ban on Tattooing*, WASH. TIMES, Oct. 30, 2002, at A2.

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

126. *Id.* at 423.

127. *Id.*

128. White v. South Carolina, 537 U.S. 825 (2002).

the final product of that creative process, the game itself, states may have been able to find a creative, backdoor way of restricting minors' access to violent video games. States would be able to use their general police powers to prohibit the games' creation and production in the name of public health, safety, and welfare.[129] Additionally, if the First Amendment did not apply to the process of creating a video game because no "speech" is involved, then there would seem to be no additional constitutional hurdle for a state like California to clear.

In *White*, the South Carolina Supreme Court also determined that the nature of the medium makes a key difference and that skin, in particular, is a unique medium. The *White* court wrote that "tattooing, as opposed to painting, writing, or sculpting, 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."[130]

The bottom line is that while splits of authority exist on the process-versus-product and role-of-the-medium issues relating to tattoos, the most recent two opinions on the subject—one from the highest appellate court in Arizona, and the other from the largest federal circuit—suggest at least a modest trend toward fully recognizing the inseparability of tattoos and tattooing as speech. This trend's impact or reflection on larger cultural developments regarding tattooing is analyzed in the next section.

B. TATTOOS IN MODERN AMERICAN CULTURE

Tattoos, as Professor Rachel Carmen and her colleagues recently asserted, were "once reserved for specific subgroups within our culture," such as for example, sailors, punks, and bikers.[131] Professors Benjamin Martin and Chris Dula observes that negative stereotypes about those with tattoos include "being unsuccessful in school, coming from broken homes, having an unhappy childhood, rarely attending church, having poor decision-making skills, usually obtaining body modifications while

129. *See* Gonzales v. Raich, 545 U.S. 1, 42 (2005) (O'Connor, J., dissenting) ("The States' core police powers have always included authority to define criminal law and to protect the health, safety, and welfare of their citizens.").

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

131. Rachael A. Carmen, Amanda E. Guitar & Haley M. Dillon, *Ultimate Answers to Proximate Questions: The Evolutionary Motivations Behind Tattoos and Body Piercings in Popular Culture*, 16 REV. GEN. PSYCHOL. 134, 134 (2012).

inebriated, and being easy victim to peer pressure."[132] In fact, as Professor Mark Burgess points out, early academic work on tattoos, dating back more than a century to the 1890s, "emphasized that criminals sometimes consciously used tattoos as a meaningful semiotic tool that provided a pictorial means of cataloguing deviant activities. For example, a renowned recidivist had his entire autobiography of killings and assaults etched on his body, including a lone helmet to represent a murdered policeman."[133] The bottom line is that tattoos have been "long considered a hallmark of American deviance."[134]

In light of such cultural condescension, when judges fail to recognize tattoos as speech within the meaning of the First Amendment, they arguably engage in the legal reinforcement of the stigmatized identities of the tattooed.[135] In contrast, recognizing tattoos as "speech" within the meaning of the First Amendment forces judges to set aside such negative cultural baggage and to focus instead simply on whether tattoos convey messages and ideas—high-brow, low-brow, or otherwise. When the load of such cultural baggage is lightened by changing mores, judicial decision making in treating tattoos and tattooing as speech becomes seemingly less difficult.

The cultural mores regarding tattoos are shifting or, at the very least, are in a state of flux. Although some in American society still view tattoos as "socially and criminally deviant,"[136] and "scholars have found that many tattooees continue to face negative repercussions in response to their tattoos,"[137] the sweepingly negative views and generalizations about tattoos and those who sport them are no longer universal in the United States. As Derek John Roberts writes, "tattoos are in limbo—neither fully damned nor fully lauded."[138] Such a transitory state of cultural fermentation on tattooing mirrors the current splits of authority on tattoos-as-speech described in Section A. And yet, in accord with the most recent judicial

132. Benjamin A. Martin & Chris S. Dula, *More than Skin Deep: Perceptions of, and Stigmas Against, Tattoos*, 44 C. STUDENT J. 200, 201 (2010).

133. Mark Burgess & Louise Clark, *Do the "Savage Origins" of Tattoos Cast a Prejudicial Shadow on Contemporary Tattooed Individuals?*, 40 J. APPLIED SOC. PSYCHOL. 746, 746 (2010).

134. Derek John Roberts, *Secret Ink: Tattoo's Place in Contemporary American Culture*, 35 J. AM. POPULAR CULTURE 153, 153 (2012).

135. *Cf.* Lisa C. Bower, *Queer Acts and the Politics of "Direct Address": Rethinking Law, Culture, and Community*, 28 LAW & SOC'Y REV. 1009, 1010 (1994) (describing the "legal reinforcement of 'stigmatized' identities like homosexuality" and the effects of such stigmatization).

136. Roberts, *supra* note 134, at 155.

137. *Id.*

138. *Id.* at 163.

opinions on the subject—*Coleman* and *Anderson*—the cultural tide seems to be shifting to growing acceptance of tattoos and, in particular, their value as speech.

Professor Carmen and her colleagues contend, for instance, that "[t]he practice of tattooing and piercing the body is found in almost every subsection of Western popular culture."[139] The fact that tattoos are indeed firmly entrenched in modern American culture as artistic creations is perhaps best exemplified—at least, from a legal perspective—by the copyright infringement lawsuit of *Whitmill v. Warner Bros. Entertainment Inc*,[140] spawned by the 2011 movie *The Hangover II*. Plaintiff S. Victor Whitmill describes himself as an "award-winning visual artist who works in various mediums, including the creation, design, and application of tattoo art to bodies."[141] The tattoo that Whitmill claimed was pirated by the movie studio was, according to his complaint, "an original design he created on the upper left side of former world heavyweight champion boxer Mike Tyson's face."[142] Whitmill alleged that Warner Bros. copied the Tyson tattoo design without Whitmill's permission and put a nearly identical image on the face of an actor in *The Hangover II*.[143] Whitmill asserted that the pirated tattoo was "prominently featured in the marketing and promotional materials for the movie."[144]

Although a federal judge denied Whitmill's request for an injunction stopping the release of the movie, Warner Bros. settled the case for an undisclosed sum.[145] Warner Bros.'s willingness to settle the case rather than risk going to trial may be based on Judge Catherine D. Perry's statements in a hearing that Whitmill "has a strong likelihood of success" and that most of the defendant's arguments were "just silly."[146] Judge Perry remarked during the hearing that "[o]f course tattoos can be copyrighted. I

139. Carmen, Guitar & Dillon, *supra* note 131, at 134.

140. Verified Complaint for Injunctive and Other Relief, Whitmill v. Warner Bros. Entm't Inc. (E.D. Mo. Apr. 25, 2011) (No. 4:11-cv-752) 2011 WL 2038147.

141. *Id.* ¶ 4.

142. *Id.* ¶ 5.

143. *Id.* ¶ 13.

144. *Id.* ¶ 16.

145. *Tattoo Artist Settles Suit*, ST. LOUIS POST-DISPATCH, June 21, 2011, at A8. A joint statement issued by Whitmill and Warner Bros. stated simply that "WB and Mr. Whitmill have amicably resolved their dispute. No other information will be provided." Ted Johnson, *Warner Settles Tattoo Tussle on 'Hangover*,' DAILY VARIETY, June 21, 2011, at 12.

146. Ted Johnson & Dave McNary, *"Hangover II" Not Hung Up by Suit*, DAILY VARIETY, May 25, 2011, at 6.

don't think there is any reasonable dispute about that."[147] The latter assertion itself is a tacit acknowledgment that tattoos are speech because copyright law protects original works of authorship fixed in tangible mediums of expression, including pictorial and graphic works.[148]

The reality today is that, as Professor Mary Kosut notes, "[n]ew generations of American children are growing up in a cultural landscape that is more tattoo-friendly and tattoo-flooded than at any other time in history."[149] Further, "[t]he community of new tattooees transcends age, class, and ethnic boundaries, and includes a heterogeneous population of teenagers and young adults, women, African Americans, Latin Americans, urbanites, suburbanites, white-collar professionals, and the college-educated."[150] Tattooing as an art form now is celebrated on television. A reality show called *Ink Master* Spike TV features musician-turned-host Dave Navarro paying "respect for the art and culture of tattooing"[151] as "16 of the country's most skilled tattoo artists compete for $100K and the title of *Ink Master*."[152] The show is incredibly popular, as its first season was the highest rated Spike original series, and over 2.3 million viewers watched its season finale in March 2012.[153]

Significantly, the expressive or speech component of tattoos[154] is increasingly recognized in popular culture beyond television shows such as *Ink Master*. Professor Kosut observes that mass-media discourses today often link tattoos to art and "art worlds."[155] She notes that "[t]attoo artists with art school training have clearly influenced the development of new tattoo styles, yet mainstream articles focusing on these changes have also

147. *Id.*

148. 17 U.S.C. § 102 (2006).

149. Mary Kosut, *An Ironic Fad: The Commodification and Consumption of Tattoos*, 39 J. POPULAR CULTURE, 1035, 1036 (2006).

150. *Id. See also* Joe Queenan, *No More Needling People About Tattoos*, WALL ST. J., Nov. 17–18, 2012, at C19 (asserting that "[t]attoos are now part of the fabric of society" while once they "were adornments used to make scary people look even scarier").

151. *Ink Master Bios: Dave Navarro*, SPIKE.COM, http://www.spike.com/shows/ink-master/bios/dave-navarro (last visited May 29, 2013).

152. *Ink Master*, SPIKE.COM, http://www.spike.com/shows/ink-master (last visited May 29, 2013).

153. Gina Salamone, *Dead-On Debut—'Ink' Host Offers Stiff Test in Morgue*, N.Y. DAILY NEWS, Oct. 9, 2012, at Television 4.

154. As Professor Carmen and her colleagues encapsulate the speech component of tattoos and body piercings, "[s]ymbolic thought drove our need to come up with increasingly novel ways to express ourselves, ultimately ending in the human species using our own skin as a means to represent our innermost thoughts and desires." Carmen, Guitar & Dillon *supra* note 131, at 142.

155. Kosut, *supra* note 149, at 1045.

crystallized the connection between tattoos and art in the public's imagination."[156] This linkage arguably elevates the cultural status of tattoos.

Growing acceptance of tattoos in American popular culture[157] as a form of speech[158] arguably paves the way for the legal system's growing recognition of tattoos as speech within the meaning of the First Amendment, evidenced by the *Coleman* and *Anderson* cases described in Section A. This, of course, comports with social theories of the law that focus on culture as a social force influencing the law,[159] as well as with aspects of legal realism theory, under which law is "embedded in (and the product of) societal realities."[160] Legal realists perceive the law as "responsive to changing social norms and realities."[161] It still may be accurate that many judges, as Judge Richard Posner once put it, "tend to be snooty about popular culture"[162] and are selected by processes that, as Professor Jack Balkin observes, are "skewed toward the values of the elites,"[163] who one might expect to frown upon tattoos and tattooing. Yet other First Amendment scholars, such as Ronald K. L. Collins and David M. Skover, emphasize that the key "referent point of the free speech guarantee is the unremarkable talk of popular culture rather than the remarkable discourse envisioned by constitutionalists."[164]

Tattoos, in this light, may be viewed as part of the "unremarkable talk" of popular culture today, and the judges that now are recognizing

156. *Id.*

157. Professor Lawrence Friedman, who has focused a significant part of his scholarship on the nexus between law and culture, defines popular culture as "the norms and values held by ordinary people, or at any rate, by non-intellectuals, as opposed to high culture, the culture of intellectuals and the intelligentsia." Lawrence M. Friedman, *Law, Lawyers, and Popular Culture*, 98 YALE L.J. 1579, 1579 (1989).

158. *See* Roberts, *supra* note 134, at 163 (observing that "more and more people choose to express themselves through ink").

159. Friedman, *supra* note 157, at 1581 (noting that social theories "may isolate some particular 'social force,' and assign it the lion's share of responsibility for law and legal institutions; or they may credit some mixture of factors in the outside world. They may focus on politics, on economic organization, or on tradition or culture").

160. Adam Benforado, *The Body of the Mind: Embodied Cognition, Law, and Justice*, 54 ST. LOUIS U. L.J. 1185, 1216 (2010).

161. Terry A. Maroney, *The Persistent Cultural Script of Judicial Dispassion*, 99 CALIF. L. REV. 629, 653 (2011).

162. Miller v. Civil City of South Bend, 904 F.2d 1081, 1100 (7th Cir. 1990) (Posner, J., concurring).

163. Jack M. Balkin, *The Roots of the Living Constitution*, 92 B.U. L. REV. 1129, 1145 (2012).

164. Ronald K.L. Collins & David M. Skover, Book Review, *Pissing in the Snow: A Cultural Approach to the First Amendment*, 45 STAN. L. REV. 783, 784 (1993).

tattoos and tattooing as speech are part of that culture. While tattoos may not be fully embraced in all quarters as part of high-brow culture, it is important to recall and draw parallels between Justice Scalia's twin observations from *Brown* that (1) "cultural and intellectual differences are not constitutional ones,"[165] and (2) "[c]rudely violent video games, tawdry TV shows, and cheap novels and magazines are no less forms of speech than *The Divine Comedy*."[166] Ultimately, regardless of whether one views culture as the independent variable influencing the law or, alternatively, the law as the independent variable influencing culture,[167] the legal and cultural trajectories of growing acceptance of tattoos and tattooing are paralleling each other.

IV. LIKES AND LIKING ON FACEBOOK: WHAT'S NOT TO LIKE ABOUT TRUNCATED SPEECH?

In October 2012, Facebook founder Mark Zuckerberg announced that the Facebook social network had acquired more than one billion users.[168] One way that Facebook users bond is via the "Like" button, which provides users a way to "[g]ive positive feedback or to connect with things you care about on Facebook."[169] Facebook adds on its website that "[c]licking Like under something you or a friend posts on Facebook is an easy way to let someone know that you enjoy it, without leaving a comment. Just like a comment though, the fact that you [L]iked it is noted beneath the item."[170]

In April 2012, however, U.S. District Judge Raymond A. Jackson concluded that "[s]imply [L]iking a Facebook page is insufficient" to constitute speech for purposes of the First Amendment.[171] The first section of Part IV explores Judge Jackson's opinion in *Bland v. Roberts*, as well as the outpouring of criticism against his ruling. The second section examines online expression as a cultural phenomenon.

165. Brown v. Entm't Merch. Ass'n, 131 S. Ct. 2729, 2737, n.4 (2011).

166. *Id.*

167. *See* Abigail C. Saguy & Forrest Stuart, *Culture and Law: Beyond a Paradigm of Cause and Effect*, 619 ANNALS AM. ACAD. POL. & SOC. SCI. 149, 151–53 (Sept. 2008) (observing that one category of sociolegal research "takes law and legal practices as the object of interest, to be explained by cultural factors. Here, scholars use culture—often understood as deep-seated concerns, categories, or assumptions about how the world operates—as an independent variable to explain differences in legal practices," while another category "positions law as an independent variable with culture as a dependent outcome").

168. Jessica Guynn, *Facebook Tops 1 Billion Users, But Growth Slows*, L.A. TIMES, Oct. 5, 2012, at B2.

169. *Like*, FACEBOOK.COM, http://www.facebook.com/help/like (last visited May 29, 2013).

170. *Id.*

171. Bland v. Roberts, 857 F. Supp. 2d 599, 604 (E.D. Va. 2012).

A. REJECTING "LIKE" AS SPEECH: REASONING AND BACKLASH

Bland centered on claims for retaliatory discharge[172] filed by several former employees of the sheriff's office in Hampton, Virginia. The former employees alleged their jobs were terminated by Sheriff B.J. Roberts after they exercised their free speech rights by supporting Jim Adams, one of Roberts's opponents, in an election.[173] One way in which plaintiff Daniel Ray Carter, Jr. expressed his support for candidate Adams was by Liking Adams' Facebook page.[174]

Judge Jackson, however, rejected the premise that Liking a Facebook page constitutes speech within the meaning of the First Amendment. He reasoned that "merely '[L]iking' a Facebook page is insufficient speech to merit constitutional protection. In cases where courts have found that constitutional speech protections extended to Facebook posts, actual statements existed within the record."[175] Jackson adamantly added that Liking a Facebook page "is not the kind of substantive statement that has previously warranted constitutional protection. The Court will not attempt to infer the actual content of Carter's posts from one click of a button on Adams's Facebook page."[176]

As these portions of Judge Jackson's statements suggest, speech must involve a statement and, in particular, a substantive one, possessing actual content in order to be protected. Judge Jackson did not define the terms "substantive statement" or "actual content," but he did cite cases in which complete sentences posted on Facebook pages were held by other courts to constitute speech.[177] Judge Jackson's analysis is important because it raises at least three disturbing possibilities for ferreting out what is or is not speech. The first possibility is that brevity matters; Judge Jackson's opinion can be read as holding that truncated forms of online and digital expression

172. Verified Complaint for Injunctive and Other Relief at 8, Bland v. Roberts, 859 F. Supp. 2d 599 (E.D. Va. Mar. 4, 2011) (No. 4:11-cv-00045-RAJ-TEM), 2011 WL 79402020 ¶ 26 (asserting that Sheriff B.J. Roberts "fired the Plaintiffs in retaliation for refusing to support his campaign for Sheriff, for supporting his opponent and for exercising their rights to free speech and free political association on matters of public concern").

173. *Bland*, 857 F. Supp. 2d at 602 (stating that the "[p]laintiffs first allege that the Sheriff failed to reappoint them in retaliation for their exercise of their right to freedom of speech when they choose to support the Sheriff's opponent in the election").

174. *Id.* at 603.

175. *Id.*

176. *Id.* at 604.

177. *Id.* at 603–04 (citing Gresham v. City of Atlanta, No. 1:10-CV-1301-RWS-ECS, 2011 WL 4601022 (N.D. Ga. Aug. 29, 2011) (suggesting that a Facebook posting be treated as protected speech); Mattingly v. Milligan, No. 4:11CV00215, 2011 WL 5184283 (E.D. Ark. Nov. 1, 2011) (same)).

such as Likes, emoticons, and other symbols do not constitute speech. The second possibility is that effort matters; *Bland* could support the argument that speech requires some amount of physical effort or exertion—so simply clicking a single Internet-based button does not qualify. Finally, a third possibility is that substance matters; courts should be involved in the business of measuring the "substance" of communication to determine if it constitutes speech.

Judge Jackson arguably left the abovementioned areas unsettled, and each is a possible explanation for his decision. Professor Paul Secunda criticized the holes in Judge Jackson's opinion, stating that "[t]he analysis is just dead wrong. Pressing Like on Facebook is the cyberequivalent of making a gesture at someone. We know that giving someone the finger or clapping for someone are considered forms of protected expression."[178] If simple physical gestures in the real world constitute speech because they have meanings and communicate ideas, then so too should online digital gestures, such as the thumbs-up Like symbol on Facebook.

I have also previously criticized Judge Jackson's decision, observing that "[w]e live in a world of abbreviated forms of communication, from text-speak on smartphones to thumbs-up and thumbs-down movie reviews to stars for restaurant reviews."[179] I added that "[a] [L]ike on Facebook reasonably and plausibly can be interpreted as a truncated form of political endorsement, especially given the fact [in *Bland*] that the individual who was liked was running for election."[180] The notion that a Like constitutes speech because it reasonably and plausibly can be interpreted as communicating a specific idea or meaning draws at least some support from Supreme Court cases in which the justices have analyzed ambiguous messages.[181] If a necessary condition for constituting speech is the

178. David L. Hudson, Jr., *'Like' Is Unliked*, A.B.A. J., Sept. 2012, at 23, *available at* http://www.abajournal.com/magazine/article/like_is_unliked_clicking_on_a_facebook_item_is_not_free_speech_judge_rules. Indeed, physical gestures—even very minor ones—have been held to be speech. A federal district court in Maine held that the raised middle-finger gesture—in this instance, given by a student to a teacher while off campus—constitutes speech. Klein v. Smith, 635 F. Supp. 1440 (D. Me. 1986). The judge in *Klien* observed that the "only purpose the [student] could have had in making the gesture to [the teacher] Mr. Clark was to communicate or express in a very low manner his disrespect for Mr. Clark. The record displays that Mr. Clark so understood the gesture and that he was immediately offended by it." *Id.* at 1441, n.2.

179. Hudson, *supra* note 178, at 24.

180. *Id.*

181. For instance, in the student-speech case of *Morse v. Frederick*, 551 U.S. 393 (2007), the Court had to determine the meaning of a banner with the words "Bong Hits 4 Jesus." *Id.* at 397. In *Morse*, the content of the speech was at issue, as the banner's student-creator was asserting that the message was nonsense, while his principal was claiming it conveyed a pro-drug message. *Id.* at 401. In

communication of an idea or meaning,[182] then a reasonable-and-plausible standard would seem to be a low one for Facebook Liking to clear.

Furthermore, Judge Jackson seemed to be adopting a distinction between the process of creating speech and the finished product—a distinction over which, as described in Part III, a judicial split of authority now exists with respect to tattooing. Attorney Arthur Bright wrote for the Digital Media Law Project:

> I suspect that Judge Jackson is getting lost in the formalities of the act of "[L]iking," rather than the substance thereof; after all, he writes that he won't try to infer "from one click of a button." I take that to mean that the judge isn't willing to hang constitutional protections from a single, atomic (in the classic, indivisible sense) action.[183]

Judge Jackson's decision now is under review by the U.S. Court of Appeals for the Fourth Circuit,[184] and several amicus briefs were filed in support of plaintiff-appellant Daniel Carter and his colleagues. Perhaps most notably, Facebook filed an amicus brief in August 2012, asserting that "Liking a Facebook Page (or other website) is core speech: it is a statement that will be viewed by a small group of Facebook Friends or by a vast community of online users."[185] The brief elaborates that "[w]hen a Facebook User clicks the Like button, she is expressing an idea, both via her Profile and via her Friends' News Feeds. She is telling other Users something about who she is and what she likes."[186] This argument taps into the Supreme Court reasoning that speech is defined by the communication of ideas,[187] as well as the free-speech theory of self-realization.[188]

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accepting Principal Deborah Morse's interpretation, Chief Justice Roberts wrote for the majority that Morse's "interpretation plainly is a reasonable one." *Id.* In Justice Alito's concurring opinion in *Morse*, he embraced a plausibility standard on the meaning issue, writing that student "speech that can plausibly be interpreted as commenting on any political or social issue" merits protection. *Id.* at 422 (Alito, J., concurring).

182. *Supra* note 90 and accompanying text.

183. Arthur Bright, *Is Liking on Facebook Protected Speech?*, DIGITAL MEDIA LAW PROJECT (Apr. 30, 2012), http://www.citmedialaw.org/blog/2012/liking-facebook-protected-speech.

184. Notice of Appeal, Bland v. Roberts, No. 4:11-cv-00045-RAJ-TEM (E.D. Va. May 22, 2012).

185. Brief of Facebook, Inc. as Amicus Curiae in Support of Plaintiff-Appellant Daniel Ray Carter, Jr. and in Support of Vacatur at 2, Bland v. Roberts, No. 12-1671 (4th Cir. Aug. 6, 2012), 2012 WL 3191379 at *2 [hereinafter Brief of Facebook].

186. *Id.* at 7.

187. *Supra* note 90 and accompanying text.

188. *Supra* note 113 and accompanying text.

Further, Facebook analogized Liking the page of a candidate running for office to a time-honored, low-tech vehicle for communication, arguing that Liking the page of a candidate was "the 21st-century equivalent of a front-yard campaign sign."[189] This argument relied on the Supreme Court's opinion in *City of Ladue v. Gilleo*,[190] which struck down a municipality's ban on certain residential yard signs, dubbing them "a venerable means of communication that is both unique and important."[191] Justice Stevens added, for a unanimous court, that "[r]esidential signs are an unusually cheap and convenient form of communication. Especially for persons of modest means or limited mobility, a yard or window sign may have no practical substitute."[192] Facebook continued its analogy by stating that Carter's Liking of Adams' Facebook page "demonstrated [his] support in a manner directly attributable to Carter himself," and that the "ease with which Carter was able to generate statements of support for the Adams campaign makes this form of speech, like the residential signs in *City of Ladue*, especially valuable and worthy of protection.[193]

The American Civil Liberties Union ("ACLU") and its Virginia chapter also filed an amicus brief in support of the plaintiffs-appellants in *Bland*.[194] The ACLU brief characterized a Facebook Like as both pure speech[195] and symbolic expression,[196] asserting that:

> [a]lthough it requires only a click of a computer mouse, a Facebook "Like" publishes text that literally states that the user likes something. "Liking" something also distributes the universally understood "thumbs up" symbol. A Facebook "Like" is, thus, a means of expressing support—whether for an individual, an organization, an event, a sports team, a restaurant, or a cause.[197]

189. Brief of Facebook, *supra* note 185, at 2 ("When Carter clicked the Like button on the Facebook Page entitled "Jim Adams for Hampton Sheriff," the words "Jim Adams for Hampton Sheriff" and a photo of Adams appeared on Carter's Facebook Profile in a list of Pages Carter had Liked—the 21st-century equivalent of a front-yard campaign sign.") (internal citation omitted).

190. City of Ladue v. Gilleo, 512 U.S. 43 (1994).

191. *Id.* at 54.

192. *Id.* at 57.

193. Brief of Facebook, *supra* note 185, at 11–12.

194. Brief of Amici Curiae American Civil Liberties Union and ACLU of Virginia in Support of Plaintiffs-Appellants' Appeal Seeking Reversal, Bland v. Roberts, No. 12-1671 (4th Cir. Aug. 6, 2012), 2012 WL 3191380 [hereinafter Brief Amici Curiae ACLU].

195. *See supra* Part II.C (addressing pure speech).

196. *See supra* Part II.A (addressing symbolic expression).

197. Brief Amici Curiae ACLU, *supra* note 194, at 5–6.

The brief added that "[c]ontrary to the district court's assertion, no 'content' need be inferred to understand the meaning of plaintiffs' use of the 'Like' button; the meaning is apparent without any additional information."[198] Zeroing in on the symbolic speech argument under the *Spence* test, the ACLU's made two key arguments. First, the ACLU argued that "by 'Liking' the Sheriff's political opponent, plaintiffs revealed their view of his candidacy and expressed an opinion." [199] Through this simple action, the plaintiffs' "clear intent was to convey the 'particularized message' of political support for the opponent."[200] Second, the ACLU argued that the act of Liking Adams' Facebook page was one that the general public was "likely to understand the message, as it represents the digital version of a phrase used prolifically in the real world."[201]

Furthermore, although it may be physically easy to press the Like feature, its impact is long-lasting because other Facebook users can view a Like for years to come on a user's page.

Ultimately, and for all or some of the aforementioned reasons, Judge Jackson's ruling in *Bland* will likely be reversed by the Fourth Circuit. As Ken Paulson, president and chief executive officer of the First Amendment Center at Vanderbilt University, writes, "[i]n the end, this federal court's decision will be a footnote in a history of communications that will grow ever more innovative and intuitive. Over time, courts will recognize the remarkable range of ways in which Americans have a right to express themselves, interactively and in real time."[202]

What *Bland* illustrates, however, is the unsettled nature of speech itself and, in particular, how evolving technologies test notions of what constitutes speech and force judges and scholars alike to consider the criteria used when making speech determinations. Judge Jackson suggests that effort and substantive content are important variables in the speech-determination equation. Liking on Facebook, in contrast, uses the effortless action of clicking an online button to express a person's adoration and respect for someone or something. Thus, ease and brevity are hallmark characteristics of Liking. Digital media also often depends on shortened

198. *Id.* at 6.

199. *Id.* at 9.

200. *Id.*

201. *Id.* The ACLU further noted that the act of Liking was so well understood that there are over 300,000 Likes on Facebook every minute. *Id.*

202. Ken Paulson, *Is 'Liking' on Facebook a First Amendment Right?*, FIRST AMENDMENT CTR. (May 31, 2012), http://www.firstamendmentcenter.org/is-liking-on-facebook-a-first-amendment-right.

forms of expression, whether it be emoticons or the type of abbreviated words used in text messages. Similarly, such truncated messages on platforms like Twitter can be fired off quickly, yet still pack powerful meaning in fewer than 140 characters.[203] Thus, as these and other new modes of expression permeate, courts will be forced to reconsider what constitutes speech under the First Amendment.

B. THE TRUNCATED NATURE OF SPEECH ON DIGITAL TECHNOLOGIES

What does Liking something on Facebook really mean? A 2011 study conducted by the marketing firm ExactTarget concluded that "there is no universal understanding of 'Like,' because it depends entirely on the individual user and the context in which the 'Like' button is used."[204] The study adds that a Like is "deceptively simple and infinitely complex, with subtle variations in meaning that are highly dependent on context and the individual user."[205] Although the meaning of, and motives for Liking may vary, the act of Liking is common, with 93 percent of Facebook users engaging in "some form of "Like" behavior at least monthly."[206]

A separate report published in February 2012 by the Pew Internet & American Life Project found that "Use of the '[L]ike' button is among the most popular activities on Facebook. A third of our sample (33%) used the [L]ike button at least once per week during this month, and 37% had content they contributed liked by a friend at least once per week."[207]

While the meaning of Liking may not always be clear, its sheer popularity as a form of truncated speech that occurs with the mere click of a button reflects a growing overall trend toward the acceptance and

203. Twitter messages have recently been the subject of high-profile defamation actions. *See, e.g.*, Jon Epstein, *Think Before You Tweet*, NEWSOK, Apr. 20, 2012, http://newsok.com/think-before-you-tweet/article/3560145 ("As Twitter's popularity increases, we are seeing cases in which people are being sued for allegedly defamatory tweets."). The destructive power and force of a Twitter message was also demonstrated in 2012 when "[a] tweet forced an elderly couple to flee their home and move into a hotel room after director Spike Lee incorrectly circulated to his 250,000 followers that their address was that of Trayvon Martin's shooter, George Zimmerman." Natalie DiBlasio, *Spike Lee Apologizes for #tweetfail in Trayvon Martin Case*, USA TODAY, Mar. 29, 2012, http://usatoday30.usatoday.com/news/nation/story/2012-03-28/spike-lee-reckless-tweeting-trayvon/53841132/1.

204. EXACTTARGET, THE MEANING OF LIKE 4 (2011), *available at* http://www.exacttarget.com/resources/SFF10_highres.pdf.

205. *Id.* at 19.

206. *Id.* at 4. The study also reported that "The most common of these are related to posts by friends, followed by clicking the "Like" button on sites outside of Facebook, while the use of "Like" is less frequent with regard to company pages or posts made by companies." *Id.*

207. KEITH N. HAMPTON, ET AL., WHY MOST FACEBOOK USERS GET MORE THAN THEY GIVE 13–14 (2012), *available at* http://pewinternet.org/Reports/2012/Facebook-users.aspx.

legitimacy of abridged modes of expression that challenge rules of standard English, exhibited in numerous digital spheres today.[208] For instance, when texting, both teens and adults often use abbreviations for words and acronyms for entire phrases,[209] such as the ubiquitous LOL for "laugh out loud"[210] and the somewhat more obscure ROFLMAO for "rolling over on the floor laughing my ass off."[211] Text speak ("textism") is replete with "acronyms and symbols as well as rebus abbreviations and other phonetically based variants."[212] In reference to text speak, one scholar stated:

> Textspeak is characterized by its distinctive graphology. Its chief feature is rebus abbreviation. Words are formed in which letters represent syllables, as seen in 'b', 'b4', 'NE', 'r', 'Tspoons', 'u', 'ur', 'xcept'. Use is made of logograms, such as numerals and symbols, as seen in '&', '@', '2', 'abbrevi8', 'b4', 'face2face', and 'sum1'.[213]

Furthermore, the use of emoticons—a portmanteau melding "emotions" and "icons"—such as the smiley face ("☺"), "often accompany textual computer-mediated communication."[214] The emoticon concept was invented in 1982 by Carnegie Mellon Professor Scott E. Fahlman, who

208. *See* Natalie I. Berger & Donna Coch, *Do U Txt? Event-Related Potentials to Semantic Anomalies in Standard and Texted English*, 113 BRAIN & LANGUAGE 135, 135 (2010) (observing that "[i]ntegral to the technological phenomena of instant and text messaging is an abridged form of standard English").

209. Graham M. Jones & Bambi B. Schieffelin, *Talking Text and Talking Back: "My BFF Jill" from Boob Tube to YouTube*, 14 J. COMPUTER-MEDIATED COMMC'N 1050, 1051 (2009) (noting that texting is "typified by multiple strategies of abbreviation").

210. *See* Chandra M. Hayslett, *No LOL Matter: Cyber Lingo Shows Up in Academia*, SEATTLE TIMES, Nov. 26, 2006, *available at* http://seattletimes.com/html/nationworld/2003448269_student26.html (explaining that LOL stands for "laugh out loud" and suggesting that this particular abbreviation might be around in society's lexicon "several decades from now").

211. Franklin B. Krohn, *A Generational Approach to Using Emoticons as Nonverbal Communication*, 34 J. TECH. WRITING & COMMC'N 321, 323 (2004).

212. Beverly Plester, Clare Wood & Victoria Bell, *Txt Msg n School Literacy: Does Texting and Knowledge of Text Abbreviations Adversely Affect Children's Literacy Attainment?*, 42 LITERACY 137, 137 (2008).

213. David Crystal, *Texting*, 62 ELT J. 77, 80 (2008). *See also* RANDALL C. MANNING, TEXTING DICTIONARY OF ACRONYMS 1 (2d ed. 2011) (asserting that "[t]he newest language being formed is the language of texting. Sentences and phrases are now being compressed into acronym and symbol forms").

214. Eli Dresner & Susan C. Herring, *Functions in the Nonverbal in CMC: Emoticons and Illocutionary Force*, 20 COMMC'N THEORY 249, 249–50 (2010) (explaining that emoticons typically "are construed as indicators of affective states, the purpose of which is to convey nonlinguistic information that in face-to-face communication is conveyed through facial expression and other bodily indicators").

proposed ":-)" as an attempt to compensate for the absence of paralinguistic cues in standard written English.[215] Put differently, emoticons "can be considered a creative and visually salient way to add expression to an otherwise strictly text-based form."[216] Today, "hundreds if not thousands of similar signs have developed, many of which have been catalogued in dictionaries."[217] The "Like" feature itself, with its thumbs-up symbol, arguably is somewhat akin to an emoticon for expressing positive emotions toward someone or something.

The disconnect between Liking as an accepted mode of truncated and abbreviated speech in computer-mediated communication[218] and Judge Jackson's opinion may simply represent a case of one judge, over sixty years of age,[219] not conversant in new modes of digital speech. In other words, a generational gap may be the reason for a lack a familiarity that is responsible for the law's failure to accept modern styles of speech. Following Judge Jackson's opinion in *Bland*, the legal system—in particular, the Fourth Circuit Court of Appeals where *Bland v. Roberts* now waits for review—must play judicial catch-up. "U.S. law is infamous for its tendency to lag behind technology at a seemingly embarrassing pace."[220] Thus, just as movies and videogames previously tested the judiciary's understanding of speech under the First Amendment,[221] now new technological communications challenge judges to push notions of speech forward. The social reality is that truncated forms of expression are

215. Anthony Garrison et al., *Conventional Faces: Emoticons in Instant Messaging Discourse*, 28 COMPUTERS & COMPOSITION 112, 114 (2011).

216. Tainyi (Ted) Luor et al., *The Effect of Emoticons in Simplex and Complex Task-Oriented Communication: An Empirical Study of Instant Messaging*, 26 COMPUTERS IN HUM. BEHAV. 889, 890 (2010).

217. Dresner & Herring, *supra* note 214, at 249.

218. Importantly, such linguistic tendencies from computer-mediated communication technologies are now seeping into writing in other forms of traditional media. *See* Marissa Harshman, *OMG! Text Lingo Appearing in Schoolwork*, SEATTLE TIMES, Mar. 6, 2011, *available at* http://seattletimes.com/html/localnews/2014421357_texting07m.html (reporting that "[w]hile it's become typical to see 'LOL' and 'JK' pop up in text messages and Internet chat sessions, teachers are also finding text slang seeping into their students' written work.").

219. Judge Raymond A. Jackson was born in 1949. Biographical Directory of Federal Judges, *1789–present*, USCOURTS.GOV, http://www.uscourts.gov/JudgesAndJudgeships/BiographicalDirectoryOfJudges.aspx (last visited May 29, 2013).

220. Lawrence G. Walters, *Shooting the Messenger: An Analysis of Theories of Criminal Liability Used Against Adult-Themed Online Service Providers*, 23 STAN. L. & POL'Y REV. 171, 171 (2012). *See also* Courtney M. Bowman, *Privacy Law: A Way Forward After* Warshak*: Fourth Amendment Protections for E-mail*, 27 BERKELEY TECH. L.J. 809, 835 (2012) (stating that "[t]he law often lags behind technology").

221. *See supra* notes 60–63 and accompanying text.

regularly used to convey important messages,[222] and Liking simply falls within this larger paradigm shift in how humans communicate using digital technologies. The law, in turn, must alter its notion of speech to comport with this social and communicative reality.

V. BEGGING AS SPEECH: SHIFTING SOCIETAL VIEWS TOWARD THOSE WHO BEG

Begging challenges conceptions of speech from the perspectives of both the speaker and audience—just as Liking on Facebook may constitute a form of cheap, easy, exceedingly brief, and sometimes ambiguous speech for the online masses, and tattooing may still be perceived as tacky, trashy speech reserved primarily for the lower classes. Those likely to engage in begging are the powerless, while those likely to encounter begging may find the speech annoying, bothersome, and sometimes even threatening.[223] However, as Section A of this part indicates, begging clearly constitutes speech within the province of the First Amendment, either as a form of pure speech or expressive conduct. Section B, in turn, suggests that growing cultural acceptance of individuals who are homeless facilitates legal acceptance of begging as speech.

A. BEGGING AS SPEECH

In August 2012, U.S. District Judge Robert J. Jonker, in *Speet v. Schuette*,[224] held that a Michigan statute classifying "begging in a public place"[225] as a crime violated the First Amendment.[226] The case was filed by the ACLU of Michigan, on behalf of two homeless men, against the city of Grand Rapids. Grand Rapids had reportedly "enforced the state law 399 times between Jan[uary] 1, 2008, and May 24, 2011."[227]

222. *See* Rich Ling & Naomi S. Baron, *Text Messaging and IM: Linguistic Comparison of American College Data*, 26 J. LANGUAGE & SOC. PSYCHOL. 291, 292 (2007) (noting that stylistic features of texting "are abbreviations, acronyms, emoticons, misspellings, and omission of vowels, subject pronouns, and punctuation").

223. *See* Charles Mitchell, Note, *Aggressive Panhandling Legislation and Free Speech Claims: Begging for Trouble*, 39 N.Y.L. SCH. L. REV. 697, 708 (1994) (asserting that "[a]lthough the most common activity utilized in solicitation is begging or panhandling, these methods have become increasingly more aggressive. Appeals for handouts can escalate into repeated demands, threatening body contact, slinging obscenities, and other intimidating behavior").

224. Speet v. Schuette, 889 F. Supp. 2d 969, 973 (W.D. Mich. 2012).

225. MICH. COMP. LAWS § 750.167(1)(h) (2012).

226. *Speet*, 889 F. Supp. 2d at 979.

227. John Agar, *Peaceful Begging Is Protected Speech, Federal Judge in Grand Rapids Rules*, MLIVE.COM (Sept. 19, 2012), http://www.mlive.com/news/grand-rapids/index.ssf/2012/08/peaceful_begging_is_protected.html.

The decision was not surprising, as Judge Jonker observed that "virtually every court considering the constitutionality of blanket restrictions on begging has reached the same conclusion."[228] Furthermore, Judge Jonker had little trouble finding that begging is speech, reasoning that:

> Begging plainly conveys a message: it communicates, whether verbally or non-verbally, a request for financial or material assistance. A beggar's message is analogous to other charitable solicitation[s]: in both situations, the speaker is soliciting financial assistance, the beggar for him or herself, and the charitable fundraiser for a third party.[229]

As this rationale illustrates, speech may be defined simply as message conveyance. Judge Jonker added that begging may not only constitute pure speech, but also symbolic expression, noting that "when a beggar wordlessly extends a container for donations, for example, the conduct expresses the message of indigence and request for assistance."[230] He thus concluded that "[r]egardless of whether begging is characterized as speech, expressive conduct, or a combination of the two, it is entitled to protection under the First Amendment."[231]

Several broad principles are important when it comes to analyzing the larger issue of what constitutes speech. First, neither the status of the speaker (in the case of begging, usually a down-and-out homeless individual, sometimes with mental problems), nor the possible perturbance of the audience (passersby) affects whether something is speech within the meaning of the First Amendment. While speaker status may affect the amount of protection the speech receives, that is a different issue from whether speech itself is involved. [232] Although begging certainly "pits the

228. *Speet*, 889 F. Supp. 2d at 980. *See also* Steve Pardo, *Asking for Money Could Bring Jail Time*, DETROIT NEWS, Aug. 21, 2012, at A1 (quoting Dan Korobkin, a staff attorney for the ACLU of Michigan, for the proposition that "[a]ll over the country, courts have recognized that begging in a public place is generally protected by the First Amendment because it's a form of solicitation for charity").

229. *Speet*, 889 F. Supp. 2d at 974.

230. *Id.* at 975.

231. *Id.*

232. For instance, both students and inmates are second-class First Amendment citizens when it comes to the scope of protection their speech receives. Clay Calvert & Kara Carnley Murrhee, *Big Censorship in the Big House—A Quarter-Century After* Turner v. Safley*: Muting Movies, Music & Books Behind Bars*, 7 NW. J.L. & SOC. POL'Y 257, 264 (asserting that "both minors on campus and adults behind bars are treated as second-class citizens" under the nearly identical tests fashioned by the U.S. Supreme Court for determining the constitutional validity of restrictions imposed on student

economic 'haves' against the economic 'have-nots,'"[233] the threshold question of whether something is speech is not affected by the financial status or power of either party in the communication interaction.

Second, the potential negative side effects from what many might consider to be the low-value speech of a homeless person do not affect the threshold question of whether begging is speech. In particular, aggressive begging by the homeless might have a deleterious impact on tourism, conventions, safety, and property values.[234] For instance, in 2011, when *Condé Nast Traveler* magazine dropped formerly top-ranked San Francisco down to second place on its list of favorite North American destinations, the decline was attributed to "the reported rise in homelessness in the city and increased complaints from visitors about aggressive panhandlers."[235] Aggressive begging may also cause people to be fearful of bodily injury or being robbed.[236] However, because begging constitutes a recognized type of speech, laws that restrict it in the name of ameliorating such problems face First Amendment challenges.

Third, judicial acknowledgment of begging as speech means that the mere desire of a potential message recipient to avoid the speech—to be left alone, as it were, due to privacy concerns—does not influence the threshold question of whether something is speech. This comports, of course, with the Supreme Court's observation that "[m]uch that we encounter offends our esthetic, if not our political and moral, sensibilities. Nevertheless, the

speech in *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260 (1988), and on inmate speech in *Turner v. Safley*, 482 U.S. 78 (1987)).

233. Greg Lisby & Ginger Rudeseal Carter, *Determining the Legal Limits of the Right to Beg: A Spatial Communication Argument*, 19 J. COMMC'N INQUIRY 88, 89 (1995).

234. *See, e.g.*, Jeremiah McWilliams, *Panhandling Rule; Curb on Pushy Begging in Limbo*, ATLANTA J. CONST., Aug. 28, 2012, at 1B (noting that "Atlanta has been trying to push back against panhandling for years, partly to appease downtown residents and partly to protect the city's lucrative tourism and convention industry, which brings in hundreds of thousands of visitors and millions in spending and taxes"); Luis Perez, *Beggars Banned, yet Many Still Have Hands Out*, ST. PETERSBURG TIMES (Fla.), Oct. 8, 2008, at Neighborhood Times 1 (describing the efforts of St. Petersburg, Fla., to deal with begging, and reporting that "[i]t was with business and tourism in mind that the city created the panhandling-free zone," and that "[b]usiness owners say they are frustrated that, zone or no zone, they and their customers are pestered by begging").

235. Phillip Matier & Andrew Ross, *Spare Change? S.F. Slips a Notch in Tourism*, S.F. CHRON., Oct. 24, 2011, at C1.

236. William L. Mitchell, II, Comment, *"Secondary Effects" Analysis: A Balanced Approach to the Problem of Prohibitions on Aggressive Panhandling*, 24 U. BALT. L. REV. 291, 295 (1995) (asserting that "[a]ggressive panhandling strikes fear into the hearts of individual citizens who have to deal with it on a daily basis," and contending that such "fear is often the product of the more coercive and intimidating conduct of panhandlers who aggressively solicit donations").

Constitution does not permit the government to decide which types of otherwise protected speech are sufficiently offensive to require protection for the unwilling listener or viewer."[237] This is especially relevant in public places where beggars often ply their trade, and the duty is on the offended person to walk on by.[238]

It was not, however, always this way when it comes to treating begging as speech, as "[c]ourts historically enforced statutory proscriptions of begging without challenge."[239] For instance, in 1976, a California appellate court reasoned that "[b]egging and soliciting for alms do not necessarily involve the communication of information or opinion; therefore, approaching individuals for that purpose is not protected by the First Amendment."[240] In addition, the Court of Appeals for the Second Circuit, in 1990, expressed "grave doubt as to whether begging and panhandling in the subway are sufficiently imbued with a communicative character to justify constitutional protection,"[241] and determined that "[t]he real issue here is whether begging constitutes the kind of 'expressive conduct' protected to some extent by the First Amendment."[242] The appellate court held that under *Spence*:

> Even where an individual intends to communicate some particularized message through an act of begging, we wonder whether the conduct is not divested of any expressive element as a result of the special surrounding circumstances involved in this case. In the subway, it is the conduct of begging and panhandling, totally independent of any particularized message, that passengers experience as threatening, harassing and intimidating.[243]

237. Erznoznik v. City of Jacksonville, 422 U.S. 205, 210 (1975).

238. As the Supreme Court wrote more than forty years ago in protecting the right of a man to wear a jacket emblazoned with the message "Fuck the Draft" in a Los Angeles courthouse:

> Those in the Los Angeles courthouse could effectively avoid further bombardment of their sensibilities simply by averting their eyes. And, while it may be that one has a more substantial claim to a recognizable privacy interest when walking through a courthouse corridor than, for example, strolling through Central Park, surely it is nothing like the interest in being free from unwanted expression in the confines of one's own home.

Cohen v. California, 403 U.S. 15, 21–22 (1971).

239. Charles Feeney Knapp, Comment, *Statutory Restriction of Panhandling in Light of* Young v. New York City Transit*: Are States Begging Out of First Amendment Proscriptions?*, 76 IOWA L. REV. 405, 408 (1991).

240. Ulmer v. Mun. Court, 127 Cal. Rptr. 445, 447 (Cal. Ct. App. 1976).

241. Young v. N.Y.C. Transit Auth., 903 F.2d 146, 153 (2d Cir. 1990).

242. *Id.*

243. *Id.* at 154.

These decisions illustrate that only within the past twenty-five years have courts elucidated that begging constitutes speech within a First Amendment framework. From a theoretical perspective, there are multiple reasons why such a changed perspective is correct. For instance, in response to the Second Circuit's opinion in *Young*, ACLU attorneys Helen Hershkoff and Adam S. Cohen suggest that begging conveys ideas at both the macro and micro levels:

> The beggar may describe in her plea why she has been forced to beg, and the begging may lead to a discussion of larger issues. But even if the beggar conveys nothing more than that she wants the listener to give her money, this information contributes to the collective search for truth. Moreover, views about the way in which society should be ordered are implicit in the beggar's request for money. Her plea is a direct challenge to prevailing assumptions about the social responsibilities that members of a community owe to each other.[244]

Hershkoff and Cohen add that "[b]egging, by alerting listeners to the conditions and existence of poverty and deprivation, is speech that helps society's decisionmakers" by "provid[ing] facts about those who believe that they cannot obtain subsistence through the existing social structure."[245] Thus, if critical variables in determining what constitutes speech are, in accord with the Supreme Court's recent opinions in *Brown* and *Sorrell*, the communication of ideas and the creation and dissemination of information,[246] then begging is speech because it conveys multiple ideas and information on both the individual and societal levels.

B. CULTURAL VIEWS ON THE HOMELESS AND BEGGING

There is an important correlation between begging and homelessness. For instance, in a 2008 survey the Homeless Alliance in Oklahoma City[247] determined that 20 percent of panhandlers in that metropolis were actually homeless.[248] Emphasizing the connection between begging and

244. Helen Hershkoff & Adam S. Cohen, *Begging to Differ: The First Amendment and the Right to Beg*, 104 HARV. L. REV. 896, 899 (1991).

245. *Id.* at 901.

246. *Supra* notes 88–89 and accompanying text.

247. The organization describes itself as "a not-for-profit organization dedicated to rallying our community to end homelessness in Oklahoma City through collaboration with service providers, city government, and local businesses." *About Us*, THE HOMELESS ALLIANCE, http://www.homelessalliance.org/?page_id=33 (last visited May 29, 2013).

248. Leighanne Manwarren, *Panhandlers Live 'Life Day-To-Day' on Corners*, DAILY OKLAHOMAN (Okla. City), Oct. 1, 2012, at 1A.

homelessness, Professors Barrett Lee and Chad Farrell wrote that, "[f]or many Americans, panhandling represents the most tangible expression of contemporary homelessness. Visitors to the downtown areas of major U.S. cities often find it difficult to avoid apparently homeless persons who are soliciting money or food."[249] Homelessness and, by extension, begging are vast problems in the United States. According to the Coalition for the Homeless, New York City alone had an all-time record high number of 46,400 homeless individuals in August 2012.[250] Although the problem of homelessness is far from new in the United States,[251] the amount of homeless people in the United States significantly grew during the 1980s.[252]

Negative attitudes about the homeless remain today but, as with cultural views in the United States about tattoos and those who have them, there is no longer a monolithic sentiment or viewpoint regarding the homeless. On the off-putting side, a study published in 1997 concluded that "identifying a person as being homeless, rather than eliciting compassion or reducing blame, engenders a degree of stigma over and above that attached to poverty."[253] The authors of the study elaborate that "by making a more precise comparison of attitudes toward homeless and housed poor people than had been possible in previous studies, we confirmed the conventional sociological wisdom . . . that homeless people would suffer greater, not less, stigma than domiciled poor people."[254] Although readily acknowledging the limitations of their research, the authors ultimately found "no indication that that the homelessness of the 1980s represents a

249. Barrett A. Lee & Chad R. Farrell, *Buddy, Can You Spare a Dime? Homelessness, Panhandling and the Public*, 38 URB. AFF. REV. 299, 299 (2003).

250. COALITION FOR THE HOMELESS, NEW YORK CITY HOMELESSNESS: THE BASIC FACTS (Oct. 2012), http://coalhome.3cdn.net/5034318617580186d6_8zm6bhd8v.pdf.

251. For instance, a scholarly article published nearly one-hundred years ago vividly asserted that "[e]verything in the lives of homeless men and women drives them in the direction of chronic dependency and parasitism. Many fight on against odds, day after day, to retain their precarious foothold upon the social ladder; others go down in the struggle, their spirits unbroken to the end." Stuart A. Rice, *The Homeless*, 77 ANNALS AM. ACAD. POL. & SOC. SCI. 140, 142 (1918). *See also* John Minnery & Emma Greenhalgh, *Approaches to Homelessness Policy in Europe, the United States, and Australia*, 63 J. SOC. ISSUES 641, 643 (2007) (writing that "[h]omelessness itself is not new. What is more recent is an understanding of the extent of the phenomenon and its visibility").

252. Jo Phelan et al., *The Stigma of Homelessness: The Impact of the Label "Homeless" on Attitudes Toward Poor Persons*, 60 SOC. PSYCH. Q. 323, 324 n.3 (1997).

253. *Id.* at 332.

254. *Id.*

form of poverty that can restrain or reverse the customary practice of stigmatizing the poor."[255]

In a 1988 article, Professors Leland Axelson and Paula Dail explain that "[t]he residue of a strong tradition of self-reliance endures and complicates our thinking" about the homeless.[256] They trace such beliefs back to notions of a Protestant work ethic and Social Darwinism.[257] Other scholars, such as Professors Lee and Farrell, concur, noting that "panhandlers breed resentment by violating a core tenet of the work ethic: that gainful employment is the acceptable way to earn a living, especially among men."[258] Much like social stigmas have long existed against those with tattoos,[259] negative stereotypes and stigmas face the homeless and, by extension, those who beg for food or cash for their survival. Addressing the stigma of begging, ethnographic researcher Stephen Lankenau asserts that:

> [P]anhandlers are ignored or harassed by some people and befriended by others. Such responses from passersby often lead to feelings of rejection or humiliation since panhandling typically involves a homeless person publicly asking a nonhomeless person for money and, thereby, advertising his or her stigma to a broad, often unsympathetic audience.[260]

On the other hand, signs of sympathy for the homeless in American culture exist. For instance, one study found that during the 1980s "a dramatic shift in labeling occurred in the yearly newspaper indexes. The primary subject keywords 'vagrant' and 'vagrancy' began to be replaced by the less pejorative terms 'homeless' and 'homelessness,' a change that was virtually complete by the late 1980s."[261] Another 2006 article concluded that "[t]he public appears to hold increasingly complex views of the homeless population and factors contributing to homelessness. Advocates may take heart that the general public is moving away from old stereotypes about homeless people and may be increasingly willing to support new

255. *Id.* at 335.

256. Leland J. Axelson & Paula W. Dail, *The Changing Character of Homelessness in the United States*, 37 FAM. REL. 463, 466 (1988).

257. *Id.* at 464.

258. Lee & Farrell, *supra* note 249, at 300.

259. *See supra* Part III.B.

260. Stephen E. Lankenau, *Stronger Than Dirt: Public Humiliation and Status Enhancement Among Panhandlers*, 28 J. CONTEMP. ETHNOGRAPHY 288, 289 (1999).

261. Phillip O. Buck, Paul A. Toro & Melanie A. Ramos, *Media and Professional Interest in Homelessness Over Thirty Years (1974–2003)*, 4 ANALYSES OF SOC. ISSUES & PUB. POL'Y 151, 164 (2004).

policy initiatives."[262] More recently, a law review article succinctly captures the evolving relationship between changing societal views on the homeless, those who beg, and how the legal system responds to them:

> [T]he public will often associate panhandling with homelessness or being poor. Therefore, society's perception of and attitude towards the homeless or poor affects its view of street panhandlers. That view of street panhandlers will influence how society conceives and deals with the poor and homeless. That view also influences the types of laws, punitive or lenient, the legislature adopts.[263]

The manner in which courts address begging carries with it the possibility of either legally reinforcing or rejecting the still stigmatized identities of beggars and the homeless. While "[h]omelessness continues to be a major social problem,"[264] opinions like that by Judge Jonker in *Speet* provide that the portion of the homeless population that must beg for its very survival can do so with a quite literal and lawful voice that society cannot ignore.

VI. CONCLUSION

> "*Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea*."[265]

This sentiment was expressed more than sixty years ago by the United States Supreme Court in a case challenging the constitutionality of a law allowing for the criminal conviction of a person "if his speech stirred people to anger, invited public dispute, or brought about a condition of unrest."[266] Its relevance holds true today in cases that test judicial notions of the meaning of speech under the First Amendment. Society, for instance, still holds "prejudices and preconceptions" about both those with tattoos and those who engage in begging. Encountering a person who is begging can "have profound unsettling effects" on a passersby that go beyond mere annoyance to approach fear and safety concerns. Such negative sentiments

262. Carolyn J. Tompsett et al., *Homelessness in the United States: Assessing Changes in Prevalence and Public Opinion, 1993–2001*, 37 AM. J. CMTY. PSYCHOL. 47, 60 (2006).

263. Ruth A. Szanto, "*Excuse Me! Can You Spare Some Change . . . in This Economy?" A Socio-Economic History of Anti-Panhandling Laws*, 4 PHX. L. REV. 519, 520 (2010).

264. Daniel Farrell, *Understanding the Psychodynamics of Chronic Homelessness from a Self Psychological Perspective*, 40 CLINICAL SOC. WORK J. 337, 337 (2012).

265. Terminiello v. City of Chicago, 337 U.S. 1, 4 (1949).

266. *Id.* at 5.

arguably can affect judicial decisionmaking as to whether the activities of tattooing and asking for money constitute speech.

Outsiders, however, have always tested the boundaries of freedom of speech under the First Amendment. Kathleen Sullivan, former dean of the Stanford Law School, writes that First Amendment battles in the early part of the twentieth century were waged mostly by "communists, anarchists, socialists, syndicalists, pacifists and assorted other 'reds.'"[267] Furthermore, religious minorities like the Jehovah's Witnesses[268] and even the far smaller and culturally ostracized Westboro Baptist Church[269] have shaped much of the current constitutional free-speech terrain.

Into this mix now fall the tattooed and the beggars, groups of individuals against whom social stigmas long have existed and, in some quarters, still survive. Although Facebook users clearly are no minority or fringe group, their modes of communication—Liking, in particular—challenge older norms about acceptable styles of speech. Complete or grammatically correct sentences are no longer the norm for communication among a younger generation of Americans weaned on texting and instant messaging. Just as the Supreme Court observed more than forty years ago that the government "has no right to cleanse public debate to the point where it is grammatically palatable to the most squeamish among us,"[270] so too should judges not eradicate from the otherwise "vast realm of free speech"[271] icons and symbols such as "Likes" on Facebook because they require no physical effort or because they do not provide a detailed elaboration on their meaning.

Then what legal lessons on the meaning of speech might be gleaned from the trio of types of cases analyzed in this Article? Perhaps the

267. Kathleen M. Sullivan, *Discrimination, Distribution and Free Speech*, 37 ARIZ. L. REV. 439, 439 (1995).

268. *See* William Shepard McAninch, *A Catalyst for the Evolution of Constitutional Law: Jehovah's Witnesses in the Supreme Court*, 55 U. CIN. L. REV. 997, 1077 (1987) (asserting that "[t]he Jehovah's Witnesses have had a profound impact on the evolution of constitutional law, particularly by expanding the parameters of the protection for speech and religion," and adding that "[t]hey expanded the right to speak and established the right to refrain from speech").

269. *See* Snyder v. Phelps, 131 S. Ct. 1207, 1220 (2011) (ruling in favor of the members of Westboro Baptist Church and their ability to picket approximately 1000 feet away from a funeral held for a soldier killed in Iraq, and prompting Chief Justice Roberts to write for the majority that, in the United States, we have chosen "to protect even hurtful speech on public issues to ensure that we do not stifle public debate. That choice requires that we shield Westboro from tort liability for its picketing in this case").

270. Cohen v. California, 403 U.S. 15, 25 (1971).

271. United States v. Alvarez, 132 S. Ct. 2537, 2544 (2012).

overarching lesson at the macro level is that as social and cultural norms evolve over time and, in particular, when they enter periods of tumult when meanings are contested and what is or is not socially acceptable is in a state of flux, the legal system has an opportunity to influence the debate in profound ways. We have examined the legal shift today on viewing tattoos and tattooing as speech, when once that was not the case; the same holds true for the current recognition of begging as speech, be it pure speech or symbolic expression. In acknowledging both tattoos and begging as speech, the law validates, even if just in some small way, the identity and existence of those who engage in such expression. Their socially stigmatized identities are undermined by legal recognition of the speech.

Similarly, by rejecting the notion that Liking on Facebook is speech, Judge Jackson can be perceived as holding on to the past at a time when modes of acceptable speech on digital technologies are themselves changing. Notably, differences in thinking exist between generations—like the way perception of tattoos has changed across generations, generational differences also affect communication. Today's technologically savvy users who use abridged and truncated modes of communication in digital spheres are intermixed with those who are not conversant with them.

At the micro level, several lessons or principles about what constitutes speech can be derived. From the tattoo cases, possible principles are: (1) symbols and art constitute speech, not simply words; (2) skin is a medium on which speech can be both produced and reside permanently; (3) originality and creativity are not determinative of whether something constitutes speech (off-the-rack tattoos are speech just as much as original, copyrighted designs such as those created by Victor Whitmill on former boxer Mike Tyson's face); (4) the process of creating speech (tattooing) should not be separated from the speech product (tattoos), with the former being treated as speech just as much as the latter; and (5) the vestiges of social stigmas that attach to those who sport tattoos should not affect whether the tattoos themselves are treated as speech.

Although the Facebook case, *Bland v. Roberts*, has yet to be resolved at the appellate level, several potential principles might be rendered: (1) the minimal physical effort involved in creating a Like on a Facebook should not affect whether a Like is speech; (2) truncated and abridged forms of expression should fall within the scope of the word "speech" in the First Amendment, such that their brevity makes no difference; (3) expression that does not comport with traditional, grammatical rules of standard written English should not affect whether something constitutes speech

where the U.S. Constitution is concerned; (4) the law must constantly play catch-up with new styles and manners of speech, just as it has over the years when playing catch-up with new technologies like movies and videogames; and (5) courts should not be involved in the slippery business of measuring the "substance" of communication to determine if it constitutes speech.

Finally, when it comes to begging, principles that might be derived include: (1) the financial status of an individual—a homeless or penniless person—seeking to communicate should not affect whether something constitutes speech; (2) pure speech (orally asking for money) and symbolic conduct (extending a cup for money) are equally as valuable to an individual and, in turn, should be treated equally as speech under the law; (3) audience annoyance with, and even fear of, an individual must not be determinative of whether that individual is engaging in speech within the meaning of the First Amendment; and (4) negative economic consequences at the community level from an activity like begging should not affect whether that activity is treated as speech.

Whether it is tattoos, Liking, begging, wedding ceremonies, horn honking, or biker burnouts, questions regarding whether something constitutes "speech" will continue to plague courts in the foreseeable future. Ultimately, none of the cases or controversies mentioned in this Article provide the legal system with a clear and concise definition of "speech" within the First Amendment. Broad principles like those described in Part II and articulated by the Supreme Court in recent opinions, such as *Brown* and *Sorrell*—that speech communicates ideas and includes the creation and dissemination of information—may initially seem unsatisfactory for those seeking precision and analytical rigor. However, it is possible that this very flexibility will allows courts to adapt and update First Amendment to protect changing social mores and new technologies and, in doing so, will render it a meaningful and relevant provision for those seeking constitutional validation of their expression.