RE-THINK YOUR INK: TATTOOS AND TATTOOING AS A SUBSTANTIVE DUE PROCESS ISSUE

It's a scene that is all too familiar: Stu, the straight-laced dentist in *The Hangover: Part II*, wakes up—unsurprisingly—hungover in a dirty bathtub in Thailand.[1] Rolling over, he gives the camera a glimpse of his freshly inked facial tattoo, an identical replica of boxer Mike Tyson's very own tattoo design.[2] Horrified, Stu takes stock of the ink and does what any nice guy dentist might do: he asks himself, *Oh my god, what happened?*[3]

I. "THINK BEFORE YOU INK:" MASQUERADING AS A HEALTH BILL

Perhaps this scene was playing out in Washington, D.C. politicians' minds when they drafted the "Think Before You Ink Bill" in September 2013, a 66-page package of health-related regulations on D.C.'s tattoo and body-piercing industry.[4] Among the bill's most controversial provisions were the proposals under "Pre-Operating Procedures."[5] The bill required "[t]he licensee or operator of a body art establishment shall ensure that no tattoo artist applies any tattoo to a customer until after twenty-four (24) hours have passed since the customer first requested the tattoo."[6] Perhaps paying homage to the slapstick scene in *The Hangover*, department spokeswoman Najma Roberts remarked: "We're making sure when that decision [to get a tattoo] is made that you're in the right frame of mind . . .

1. THE HANGOVER (Warner Brothers 2009).

2. *Id.*

3. *Id.*

4. Body Art Establishment Regulations, 60 D.C. Reg. 12675 (proposed Sept. 6, 2013) (to be codified at D.C. Mun. Regs. tit. 25 §§ 100-9901); *see* Scott Simon, *D.C. Wants to Make Sure You Truly Want that Tattoo*, NPR (Sept. 14, 2013, 7:47 AM), http://www.npr.org/2013/09/14/222125825/d-c-wants-to-make-sure-you-truly-want-that-tattoo.

5. Body Art Establishment Regulations, 60 D.C. Reg. at 12682–88.

6. *Id.* at 12685.

and you don't wake up in the morning saying, 'Oh my God, what happened?'"[7]

"Incensed" would be a mere euphemism to describe how tattoo artists initially felt about the provision.[8] Fatty, the owner of Fatty's Custom Tattooz in D.C., claimed that walk-in services have been the "cornerstone" of the body art industry, and the proposed bill would effectively be a "job killer."[9] Fatty's co-worker, Gilda Acosta, echoed a similar sentiment.[10] Acosta explained that her income would take a nosedive if she could no longer tattoo consumers seeking a spontaneous, same-day design.[11]

Many worried that the D.C. Department of Health was overzealously attempting to wedge a waiting period into the tattoo industry.[12] Were the nation's capital to effectuate such a law, the concern arose that other city governments would quickly follow suit. Perhaps as a response to this public outcry, D.C. officials promulgated a second rulemaking in which they removed the 24-hour waiting period.[13] D.C. tattoo artists and owners alike breathed a collective sigh of relief.

But D.C. is hardly the first city government to contemplate a 24-hour tattoo or body art waiting period.[14] When pressed for an explanation, the political actors have resoundingly cited public health reasons.[15] A politician

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7. Eliana Dockterman, *D.C. Wants a 24-Hour Waiting Period on Tattoos*, TIME (Sept. 18, 2013), http://newsfeed.time.com/2013/09/18/d-c-wants-a-24-hour-waiting-period-on-tattoos/.

8. *Body Artists Infuriated over Proposed D.C. Tattoo Law: It Would Be a "Job Killer,"* FOX NEWS INSIDER (Sept. 15, 2013, 9:30 AM), http://foxnewsinsider.com/2013/09/15/body-artists-infuriated-over-proposed-dc-tattoo-law-it-would-be-job-killer.

9. *Id.*

10. Mike DeBonis & Victoria St. Martin, *24-Hour Waiting Period Proposed for D.C. Tattoos, Piercings Proposed in District*, WASH. POST (Sept. 6, 2013), http://articles.washingtonpost.com/2013-09-06/local/41830505_1_tattoo-parlor-piercings-body-art.

11. *Id.*

12. *Id.* ("The body art rules are the latest product of a city government that has occasionally struggled to reconcile its socially liberal sensibilities with a zeal for regulation.").

13. Body Art Establishment Regulations, 60 D.C. Reg. 12675 (proposed Sept. 6, 2013) (to be codified at D.C. Mun. Regs. tit. 25 §§ 100-9901).

14. VILLAGE OF HALES CORNERS, WIS., TATTOO & BODY PIERCING CODE §14.22(15), *available at* http://www.halescorners.org/vertical/sites/%7B13E374A3-DCA7-4815-B7CA-3C313FFDC47C%7D/uploads/%7B64071584-82FE-4556-A468-DB0732C1B825%7D.PDF ("Due to the permanent nature of tattoos and body piercing, no tattooist, tattoo establishment, body piercer, or body piercing establishment may apply a tattoo or perform body piercing to a patron until 24 hours have passed since the patron first requested the tattoo or body piercing."); ARK. CODE ANN., §§ 20-27-1501, -1513 (2005 & Supp. 2013) (limiting body modifications to "traditional" piercings and tattoos, and even banned scarification procedures and dermal implants).

15. *See* ARK. CODE ANN., tit. 20 (body art regulations are contained in Title 20, "Public Health and Welfare," Subtitle 2, "Health and Safety," under Chapter 15, "Disease and Disease Prevention Generally").

in Marblehead, Massachusetts denied that the aesthetics of the tattoos themselves are relevant to the ordinance, but rather cited public health issues as the driving rationale.[16] Similarly, the D.C. bill is ostensibly geared to protect public health and safety in body art procedures.[17] Moreover, mandatory waiting periods have cropped up in the abortion[18], gun registration,[19] and insurance contexts.[20]

It remains to be seen how tightly municipal governments can circumscribe the ability of its individual citizens to do as they please to their bodies. And in the event that tattoo parlors and artists begin to litigate against such a waiting-period, it is unclear how courts and attorneys will navigate the constitutional issues that come into play. Many proponents of a mandatory waiting period will undoubtedly highlight how the "right" to get an immediate tattoo falls low in the pecking order of decisions an individual can make about his or her body (whether through an abortion, physician-assisted suicide, or medical decisions).[21] Accordingly, a careful examination of both sides' arguments—for and against bills like "Think Before You Ink,"—as well as a review of the current tattoo jurisprudence is necessary to unpack the legal ramifications of 24-hour waiting periods on tattoos.

Part II of this Comment will explore the growingly diverse history of tattoos. Part III will discuss First Amendment tattoo jurisprudence. The Comment will then turn to the limitations of a First Amendment analysis when applied to proposed clauses like "Think Before You Ink's" 24-hour waiting period.

Part IV of the Comment will argue that tattooing—like other private, autonomous decisions about one's body—should be deemed a fundamental right subject to a strict scrutiny analysis. The idea of tattoos and tattooing as a "fundamental right" will be argued through a three-step approach challenging "fundamental rights" as the touchstone of a strict scrutiny

16. Shannon Larratt, *A 48 Hour Waiting Period for Tattoos?*, BME NEWS, (Oct. 7, 2003) http://news.bme.com/2003/10/07/a-48-hour-waiting-period-for-tattoos-the-publishers-ring/ (citing surgical risks and sanitary tattoo parlors as the city's interest in promoting the ordinance).

17. Body Art Establishment Regulations, 60 D.C. Reg. 12675.

18. Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833, 844 (1992) (imposing a 24-hour waiting period on a woman seeking an abortion).

19. MD. CODE ANN, PUB. SAFETY § 5-123 (2011) (requiring a licensed firearm dealer to wait seven days following a customer's completion of the application process before selling, renting or transferring a regulated firearm).

20. 42 U.S.C. § 423(c)(2) (2012) (requiring a five-moth waiting period for access to disability insurance benefits under the Social Security Act); *see also* Robbins v. Schweiker, 708 F.2d 340 (8th Cir. 1983).

21. *See* ERWIN CHEMERINSKY, CONSTITUTIONAL LAW 933 (4th ed. 2013).

analysis. First, the hypocrisies in our socio-cultural conceptualization of tattoos will be addressed. Second, a paradigm shift from law as a mechanistic process to a more fluid process will pave a theoretical and philosophical path for tattoos to enter the fundamental rights discussion. Third, comparisons between an individual's fundamental right to make decisions over one's body[22]—explained in abortion, sexual intercourse, and other highly sensitive jurisprudence—will show that tattooing can be construed as a bodily integrity issue. The last section of Part IV will briefly sketch out a strict scrutiny analysis of the "Think Before You Ink" bill and similar bills that states and municipalities may contemplate, ultimately showing that such waiting periods should be struck from the proposed bills.

II. TATTOOS: OUR BODIES, OUR SELVES

Whether through words, abstract images, or symbols, tattoos can be a projection of an individual's identity, status, occupation, or ownership. Long before the days of butterfly shoulder-tattoos, or improperly translated Chinese symbols, tattoos emerged in the tradition of indigenous peoples.[23] Moreover, religious, social, and political purposes have—and continue to be—the motivation behind tattoos.[24] Even in today's society, where an individual can opt to get a tattoo of the McDonald's arches[25] or the apt phrase, Y.O.L.O. (You Only Live Once),[26] individuals still, at their core, choose to get a tattoo for "symbolization of an interpersonal relationship, participation in a group, representation of key interests and activities, self-identification, and making a decorative or aesthetic statement."[27]

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22. Lawrence v. Texas, 539 U.S. 558, 564 (2003) ("[This] case should be resolved by determining whether the petitioners were free as adults to engage in the private conduct in the exercise of their liberty under the Due Process Clause of the Fourteenth Amendment to the Constitution.").

23. CHARLES DARWIN, THE DESCENT OF MAN 339 (1871) ("Not one great country can be named, from the polar regions in the north to New Zealand in the South, in which the aborigines do not tattoo themselves."); WRITTEN ON THE BODY: THE TATTOO IN EUROPEAN AND AMERICAN HISTORY 17 (Jane Caplan ed., Reaktion Books Ltd 2000).

24. *One in Five U.S. Adults Now Has a Tattoo*, HARRIS INTERACTIVE (Feb. 23, 2012), http://www.harrisinteractive.com/NewsRoom/HarrisPolls/tabid/447/mid/1508/articleId/970/ctl/ReadCustom%20Default/Default.aspx [hereinafter HARRIS INTERACTIVE].

25. Jessica Misener, *47 Cringeworthy Tattoos Being Regretted As We Speak*, BUZZFEED (Apr. 30, 2012, 1:54 PM), http://www.buzzfeed.com/jessicamisener/47-tattoos-being-regretted-as-we-speak.

26. *16 Tattoos That are the Worst of the Worst*, BUZZFEED (Oct. 30, 2013, 10:22 PM), http://www.buzzfeed.com/bigbadsyd/16-tattoos-that-are-the-worst-of-the-worst-g4xr.

27. Clinton R. Sanders, *Drill and Frill: Client Choice, Client Typologies, and Interactional Control in Commercial Tattooing Settings*, *in* MARKS OF CIVILIZATION 222-23 (Arnold Rubin ed., 1988).

What was once the hallmark of sailors, gang members, or other "outsiders"[28] quickly became mainstream and the choice du jour of everyone from college students to liberated parents to hipsters.[29] Beginning in the 1960s, artists with formal training began the momentum towards using the human body as a canvas for artwork.[30] Now, one in five adults has a tattoo[31] and the attitudes towards getting a tattoo vary across the spectrum.[32] And the stereotypical view of tattoos as rebellious or subversive has certainly waned.[33] Above all else, the biggest trend in tattooing is how diverse the group of recipients has become.[34]

Not only have the tattoo recipients themselves evolved, but so too have the tattoo artists.[35] Much like any other profession, tattoo artists dedicate themselves to understanding both the aesthetic and legal aspects of their trade.[36] Whether through professional training manuals, trade associations, or websites, artists dedicate themselves to the techniques of tattooing and how to best serve their clients.[37] As tattooing finds its footing in the mainstream, the nature of the profession has also evolved.[38]

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28. Priscilla Frank, *The Gorgeous History of Tattoos, from 1900 to Present*, HUFFINGTON POST (Mar. 17, 2014, 8:26 AM), http://www.huffingtonpost.com/2014/03/17/tattoohistory_n_4957215.html?ncid=fcbklnkushpmg00000063 (depicting glossy black and white photos of tattooed individuals at the turn of the 20th century, from tribes in Maori to British housewives); HANK SCHIFFMACHER, 1000 TATTOOS (1998).

29. Brief Amicus Curiae of Enid Schildkrout Chair and Curator, Division of Anthropology the American Museum of Natural History in Support of Petitioner at 2, White v. South Carolina, 537 U.S. 825 (2002) (No. 01-1859) [hereinafter Schildkrout Brief].

30. *Id.* at 1.

31. HARRIS INTERACTIVE, *supra* note 24.

32. Among those with a tattoo, most have never regretted getting a tattoo (86%) and three in ten say it makes them feel more sexy (30%). One-quarter say having a tattoo makes them feel rebellious (25%), 21% say both it makes them feel attractive or strong, 16% say it makes them feel spiritual and fewer say it makes them feel more healthy (9%), intelligent (8%) or athletic (5%). *Id.*

33. *Id.*

34. Schildkrout Brief, *supra* note 29, at 2 (Explaining that "women of all ages, athletes, fashion figures, musicians, firefighters and police, stockbrokers, lawyers, and academics" get tattoos. "Recently, firefighters and police in New York have been getting memorial tattoos relating to the bombing of the World Trade Center affirming not only their loss but also their common identity as a community.").

35. *Id.* at 8.

36. *Id.* at 8-9.

37. *Id.* at 14.

38. Sanders, *supra* note 27, at 235 ("This pattern appears to be accompanied, however, by increased stability, professionalism, and the use of media for self-promotion. Artists are regularly approached for large-scale projects by persons with few or no previous tattoos and who return for additional work. Major demographic shifts have brought in a greater number of females and generally older, better educated, more affluent, and more artistically sophisticated clients.").

Perhaps even more diverse than the individuals receiving tattoos are the *reasons* individuals decide to get them. Many people use tattoos to represent their ethnic or religious identities, while others use a tattoo "as a way of 'gaining control' of their own bodies."[39] Even the typical view of tattoos as a rebellious act still carries its own nuances: some use tattoos to eschew traditional conventions of beauty or aesthetics.[40] Others are merely concerned with the interaction between the tattoo artist and the process itself.[41] Because of these changes, categorizing the experience of getting a tattoo as a *Hangover*-esque exercise in drunken debauchery is a myopic view of a growingly diverse trade.

III. TATTOOING AND FIRST AMENDMENT JURISPRUDENCE: A FAILURE TO COMMUNICATE

A. First Amendment Rumblings in White, Coleman, *and* Hold Fast

With tattoos becoming increasingly mainstream, it was inevitable that the legal world and tattoo world would collide. In 2003, Ronald White was arrested after a clip of him tattooing another person in his home aired on WBTW news in South Carolina.[42] Although White conceded that he violated the applicable code, he challenged the code's constitutionality on First Amendment grounds.[43] The court declined to reach the First Amendment question, concluding that tattooing is not sufficiently imbued with communication to make it "speech" worthy of First Amendment protection.[44] The court went on to distinguish tattoos from flag burning because burning of a flag conveys an obvious political message, whereas the process of tattoos is not "communicative enough to automatically fall within First Amendment protection."[45] Relying heavily on the *O'Brien* court's test, the court said that the First Amendment should protect conduct that intends to express an idea.[46] The result: the act of injecting ink into someone's skin—unlike flag burning or burning a draft card—is not sufficiently communicative to "outweigh the risks to public safety."[47]

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39. Schildkrout Brief, *supra* note 29, at 14.

40. HARRIS INTERACTIVE, *supra* note 24.

41. *Id.*

42. State v. White, 560 S.E.2d 420, 421 (S.C. 2002).

43. *Id.* at 422.

44. *Id.* at 422-23.

45. *Id.* at 423-24 ("Appellant has not met his burden to show that tattooing, an invasive procedure, with inherent health risks, would fall within the First Amendment.").

46. *Id.* at 423.

47. *Id.*

But in 2012, an Arizona court laid down an entirely different precedent.[48] In *Coleman*, the court acknowledged the tension between tattoo artists' right to free speech and the authority of municipal governments to regulate tattoo parlors' locations.[49] The court first defined tattoos as:

> mark[ing] the skin with any indelible design, letter, scroll, figure, symbol or any other mark that is placed by the aid of needles or other instruments upon or under the skin with any substance that will leave color under the skin and that cannot be removed, repaired or reconstructed without a surgical procedure.[50]

Next, the Court then described the split between various jurisdictions as to tattoos and the First Amendment.[51] On one end of the spectrum, the court explained that tattooing has been categorized as "purely expressive activity"[52] entitled to First Amendment protection only through reasonable time, manner, and place restrictions. But in other jurisdictions, a tattoo will receive First Amendment protection only if it is imbued with (1) elements of communication; (2) there is an intent to convey a particularized message; and (3) the likelihood is great that the message will be understood by viewers.[53] In the courts declining to afford tattoos First Amendment protection, many find that tattoos lack the necessary "expressive conduct"[54] because the tattoo itself is expressive enough for First Amendment protection but the process of *tattooing* is not.

The court laid out a more nuanced approach to address this problematic dichotomy. The approach would allow First Amendment protection for artists if the act of tattooing had a predominantly expressive purpose.[55] This would require a case-by-case, fact intensive inquiry as to whether the artist's activity was expressive. Many further qualify this approach by arguing that the creation of the expression ought not to be separated from

48. Coleman v. City of Mesa, 284 P.3d 863, 866 (Ariz. 2012).

49. *Id.*

50. *Id.* at 867.

51. *Id.* at 869.

52. Alicen Pittman, *Tattoos and Tattooing: Now Fully Protected as "Speech" Under the First Amendment*, 38 W. ST. U. L. REV. 193, 194 (2011).

53. *Coleman*, 284 P.3d at 869 (citing Spence v. State of Wash., 418 U.S. 405, 409-11 (1974)).

54. *Id.*; Hold Fast Tattoo, LLC v. City of North Chicago, 580 F. Supp. 2d 656, 660 (N.D. Ill. 2008) (finding that "[the] act of tattooing is one step removed from actual expressive conduct"); Yurkew v. Sinclair, 495 F. Supp. 1248, 1253–55 (D. Minn. 1980) (finding process of tattooing is not protected speech); State *ex rel.* Med. Licensing Bd. of Ind. v. Brady, 492 N.E.2d 34 (Ind. Ct. App. 1986) (rejecting tattoos as protected by the First Amendment).

55. Ryan J. Walsh, *Painting on a Canvas of Skin: Tattooing and the First Amendment*, 78 U. CHI. L. REV. 1063 (2011).

the final product itself.[56] In other words, the act of tattooing also becomes the protected activity.[57]

The court in *Coleman* seemed to agree with the more flexible approach.[58] Explaining that the "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," the process of tattooing could be considered expressive activity under the First Amendment.[59]

The court also took the opportunity to distinguish themselves from cases that rejected First Amendment protection.[60] Explaining that the *Spence* test should not apply to tattoos, but rather only to non-expressive content, the court also declined to apply the case-by-case approach.[61] Stating that the case-by-case approach does not work with "paintings, photographs, prints" or other mediums that communicate an idea or concept to those who view it, the court explained that tattoos are more akin to paintings and photographs in this type of inquiry.[62] Furthermore, the court dismissed the case-by-case inquiry as administratively unmanageable and too subjective because "whether a particular artist could engage in tattooing might turn in the first instance on a licensing official's assessment of whether the proposed work is "predominantly expressive" and ultimately on whether courts agreed with that assessment."[63]

In its conclusion, the court effectively rewarded tattooing First Amendment protection.[64] They decisively said that the "business of tattooing" can be constitutionally protected, albeit not entirely shielded from government regulation.[65] But above all else, the court noted that just because the purportedly "free expression" of tattooing is a commodity, rather than freely exchanged, it should not necessarily be stripped of First Amendment protection.[66]

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56. *Id.* at 1065.

57. *Id.*

58. *See Coleman*, 284 P.3d at 870.

59. *Id.*

60. *Id.* at 870-71 (In *Hold Fast Tattoo*, the court said that tattooing did not meet the *Spence* test of being "sufficiently imbued" with expressive content to warrant protection).

61. *Id*. at 870.

62. *Id.* at 871.

63. *Id.*

64. *Id.*

65. *Id.*

66. *Id.* (quoting Plain Dealer Publ'g Co. v. City of Lakewood, 486 U.S. 750, 756 n.5 (1988)); *see also* Riley v. Nat'l Fed'n of the Blind of N.C., Inc., 487 U.S. 781, 801 (1988) (noting that "a speaker's rights are not lost merely because compensation is received; a speaker is no less a speaker because he or she is paid to speak.").

B. Anderson*: A Coherent Approach That Still Presents Problems*

The reasoning from *Coleman* closely mirrors *Anderson v. City of Hermosa Beach*, perhaps what is the most liberal interpretation of tattooing and the First Amendment. In an issue of first impression for the Ninth Circuit, the court considered whether a ban in the City of Hermosa Beach on tattoo parlors violated the First Amendment.[67] Johnny Anderson sought to challenge a municipal code that prohibited tattoo parlors in Hermosa Beach city limits, although tattoo parlors were permitted throughout the rest of Los Angeles County.[68]

Anderson first argued that tattooing is his "creative work" that should be protected by the Free Speech Clause of the First Amendment.[69] In his brief, he advocated for a broad interpretation of tattoos, saying that it is no less communicative than painting, motion pictures, music, or other forms that receive full First Amendment protection.[70] Emphasizing that the only difference between tattooing and a painting was that the human body was the "canvas," Anderson argued that tattooing is visual and verbal expression fully embraced by the First Amendment.[71]

Further drawing an analogy to First Amendment protected painting, Anderson gathered an arsenal of case law to suggest that tattooing—like painting—can express everything from a "social position"[72] to "public attitudes,"[73] through an electric needle gun and pigments rather than a paintbrush.[74] Anderson brought himself in line with artwork by saying that his images were "expressive and emotionally evocative in precisely the same way as music and painting."[75]

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

68. *Id.* at 1057 ("No provision of the zoning code, however, permits tattoo parlors, and as a result, these facilities are banned from Hermosa Beach under section 17.060.070.") (citing HERMOSA BEACH, CAL., MUNICIPAL CODE, § 17.06.070 (1996)).

69. Opening Brief of Appellant Johnny Anderson at 7, *Anderson*, 621 F.3d 1051 (No. 08-56914) [hereinafter Anderson Brief].

70. *Id.* at 13, 17, 29.

71. *Id.* at 13.

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

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

74. *Id.* at 26 n.6; White v. City of Sparks, 500 F.3d 953, 956 (9th Cir. 2007); Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, 515 U.S. 557, 569 (1995) ("[T]he Constitution looks beyond written or spoken words as mediums of expression."); Ward v. Rock Against Racism, 491 U.S. 781, 790 (1989) ("Music, as a form of expression and communication, is protected under the First Amendment."); Doran v. Salem Inn, Inc., 422 U.S. 922 (1975) ("customary 'barroom' type of nude dancing" entitled to First Amendment protection).

75. Anderson Brief, *supra* note 69, at 17.

Anderson's arguments also rejected a complete ban on tattoo parlors, as opposed to careful regulations.[76] Anderson explained that, unlike a ban, regulation could be narrowly tailored to address health and sanitation concerns.[77] Moreover, he explained, if the City's concern was the expense of regulation fees for tattoo parlors, it would only need to sign on to an existing system of regulation and saddle tattoo proprietors with the expense of registration fees.[78]

In its brief, however, the City summarily rejected tattoos as "expressive conduct."[79] Engaging in a debate about the artistic merits of tattooing, the City explained that tattooing had never been amounted to more than a "trendy fashion statement," and therefore could not be associated with more highbrow mediums of expression.[80] But the City in its opposition did not attempt to explain this loaded term, instead cursorily noting that tattooing's "unseemly" association with slavery and the Holocaust removed it from the realm of "significant medium."[81]

Next, the City turned to tattooing's invasion of human tissue, as opposed to a canvas, film, or MP3.[82] Characterizing tattoos as an invasive procedure with inherent health risks, the City deemed it appropriate for state regulation.[83] Drawing support from the line of cases rejecting tattooing, the City said that even if the court found the tattoo to be expressive conduct, Anderson could opt for more traditional mediums—like a T-Shirt or canvas—to reflect his designs.[84]

Addressing both parties' arguments, the court ultimately held that the municipal ban was facially unconstitutional.[85] First, the court explained that the *tattoo* itself merited First Amendment protection because the fact that the tattoo is placed on skin rather than a canvas has no bearing on its constitutional protection.[86] Holding that the act of tattooing itself also merited constitutional protection, the court explained, "[t]attooing is a

76. *Id.* at 18, 20.

77. *Id.* at 22-23.

78. *Id.* at 22-24.

79. Answering Brief of Appellee City of Hermosa Beach at 52-53, Anderson v. City of Hermosa Beach, 621 F.3d 1051 (9th Cir. 2010) (No. 08-56914).

80. *Id.* at 38-39.

81. *Id.* (Citing Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 501 (1952) (in which the Supreme Court held that "motion pictures are a significant medium for the communication of ideas.")).

82. *Id.* at 41-42.

83. *Id.*

84. *Id.*

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

86. *Id.* at 1061.

process like writing words down or drawing a picture except that it is performed on a person's skin."[87] Effectively, the court's reasoning established a pattern in which the abstract, creative elements of a work like tattooing could emerge from the process itself or by analogy to other commonly protected mediums of "speech".[88]

With respect to Hermosa Beach's regulation on the tattoo *business*, the court also adopted a liberal approach;[89] explaining that a business-transaction activity like erecting a tattoo parlor, similar to an artist selling his/her work, still merited First Amendment protection.[90] Moreover, the court refused to distinguish between the process of creating pure speech and the final product of the processes.[91] The court also drew a comparison to instances in which courts found First Amendment protection under weaker circumstances.[92] For example, in *Hurley*, the Court found a parade process to be protected by the First Amendment.[93] Holding that the tattooing process, in addition to the tattoo itself, should receive First Amendment protection, the Ninth Circuit ushered in a decidedly tattoo-friendly result.[94]

Although *Anderson* signified a tentative step towards a liberalizing view of tattoos and the First Amendment, the remaining tattoo jurisprudence still found ways to twist its rhetoric in favor of tattoo regulations.[95] Moreover, since *Anderson*, relatively few circuit courts have been confronted with the thorny issues Think Before You Ink presents. Stuck in the junction between bodily issues, business regulation, and self-expression, a holding period on tattooing does not clearly lend itself to the First Amendment analysis that *Anderson* and *Coleman* engaged in.[96]

87. *Id.* at 1062.

88. *Id.* at 1061-62.

89. *Id.* at 1063.

90. *Id.*

91. *Id.* at 1062 ("The process of expression through a medium has never been thought so distinct from the expression itself that we could disaggregate Picasso from his brushes and canvas, or that we could value Beethoven without the benefit of strings and woodwinds.").

92. *Id.*

93. *Id.*

94. *Id.* at 1068.

95. *See* Gowri Ramachandran, *Freedom of Dress: State and Private Regulation of Clothing, Hairstyle, Jewelry, Makeup, Tattoos, and Piercing*, 66 MD. L. REV. 11 (2006).

96. *Id.*

C. The First Amendment Framework Will Not Hold Up for a Waiting Period

Why, exactly, is the First Amendment not the most apt mode of analysis for tattoo artists and aficionados alike to challenge the 24-hour waiting period? Were a court to confront the "time, place, manner" rule, it would first have to edge open the door to First Amendment jurisprudence by embracing tattoos as "expressive conduct" or speech. And from the above discussion, courts seem to treat tattoos as the redheaded stepchild or crazy uncle in the attic of First Amendment jurisprudence—if they don't acknowledge it as "expressive conduct," then it will simply go away. Because freedom of speech is considered a "fundamental right,"[97] yet courts will not deem tattoos a fundamental right in the First Amendment context, this Comment seeks to find an entry in the constitutional backdoor by arguing that tattoos are a fundamental right in the Due Process context.

Given how inconsistently and shakily courts have accepted the tattoo itself as worthy of First Amendment protection, and how *Anderson* is one of the few federal courts to clearly articulate that the tattooing process—in addition to the tattoo itself—can receive such protection, one can envision that the waiting period on *receiving* a tattoo will receive similar treatment in the courts. And before a court can even discuss First Amendment issues, it needs to employ the logic used by the *Anderson* court—that tattoos and tattooing are on equal footing with respect to the First Amendment.[98] As *Hold Fast* and other tattoo-wary jurisdictions have demonstrated, even a seemingly flexible amendment like the First Amendment can be molded into an analysis that ties tattoo artists' hands from conducting their business.[99]

Courts are currently at a crossroads with tattoos: they can either continue to deny them First Amendment protection, or re-assess the substantive due process landscape. Because tattoos inescapably deal with bodily choices, courts should orient themselves towards the latter option.

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97. CHEMERINSKY, *supra* note 21, at 1199-1200.

98. Carly Strocker, *These Tats are Made for Talking: Why Tattoos and Tattooing are Protected Under the First Amendment*, 31 LOY L.A. ENT. L. REV. 175, 184 (2011) ("[C]ourts that separate the process from the product believe that tattooing is non-communicative conduct; to them, engrafting a tattoo on the skin does not suggest political or social thought to the normal observer, nor does it affect public attitudes and behavior.").

99. *E.g.*, Hold Fast Tattoo LLC v. City of North Chi., 580 F. Supp. 2d 656 (2008).

IV. SUBSTANTIVE DUE PROCESS IN ACTION: DISMANTLING THE "THINK BEFORE YOU INK" BILL

A. Fundamental Rights: An "Uphill Battle"

The biggest hurdle towards framing tattooing as a substantive due process issue is certainly the issue of "fundamental rights." Traditionally, a fundamental right is a liberty so imperative that the government cannot infringe it.[100] As they work through substantive due process in their constitutional law classes, many law students will learn that such liberties are confined to "relatively few claims of rights," including family autonomy, procreation, sexual activity, sexual orientation, and medical care decision-making.[101]

In an already amorphous legal area—constitutional law—the concept of fundamental rights has proved to be an amorphous concept and a battleground between constitutional originalists and those who advocate for a more flexible constitutional interpretation.[102] This flexible and amorphous definition allows competing views of constitutional interpretation to directly spar. On the one side of the aisle, originalists will argue that courts have run afoul of the meaning of fundamental rights in substantive due process, transforming it into any right du jour that citizens are trying to protect, rather than sticking to the framers' intent.[103] But on the other side of the debate, courts are asking for a definition of fundamental rights that encompasses the social and socioeconomic concerns of the day.[104]

Understandably, the only meaningful way to broaden fundamental rights to include the tattooing at issue in Think Before You Ink is to take a nonoriginalist approach[105] and look for fundamental rights not enumerated in the Constitution. A cursory glance at fundamental rights cases reveals that—save for a few vocal Supreme Court justices[106]—the majority of the

100. CHEMERINSKY, *supra* note 21, at 933.

101. *Id.*

102. *Id.* at 936-37.

103. James A. Crook, *Exposing the Contradiction: An Originalist's Approach to Understanding Why Substantive Due Process is a Constitutional Misinterpretation*, 10 NEV. L.J. 1 (2009).

104. Lawrence v. Texas, 539 U.S. 558, 603 (2003).

105. CHEMERINSKY, *supra* note 21, at 937 (Chemerinsky describes nonoriginalism as "the view that it is permissible for the Court to protect fundamental rights that are not enumerated in the Constitution or intended by its drafters.").

106. Randy E. Barnett, *Scalia's Infidelity: A Critique of "Faint-Hearted" Originalism*, 75 U. CIN. L. REV 7, 15 (2006) (acknowledging that Scalia is bookmarked as an originalist, Randy

Supreme Court, and lower courts for that matter, look to "history and tradition" when trying to protect fundamental rights not found in the Constitution's text.[107] This makes sense, given that the drafters of the Fourteenth Amendment certainly did not conceive of bodily choices—like getting a tattoo—as a fundamental right.[108] Accordingly, courts have used this test: "[fundamental rights are] those liberties that are deeply rooted in this Nation's history and tradition."[109]

This phrase inherently raises another problem: how litigators and judges alike will convincingly import the right to tattoo one's body as something deeply rooted in our nation's history and tradition. Many have criticized this idea of 'history and tradition' as unworkable,[110] particularly when each justice's—let alone each American's—concept of tradition and history vastly differs.[111]

The next section will outline how courts can win the "fundamental rights" battle in order to fit tattoos as a due process right. There are several steps to help rationalize the "tattoos as a due process issue" theory. The first step towards conceptualizing tattoos as worthy of a due-process analysis is to understand how socio-cultural values have muted our understanding of tattoos as a bodily choice, but rather as a sneer-inducing lifestyle choice. Next, it is worth considering that the concept of fundamental rights is a constantly evolving process, rather than a rut of legal discourse we can't extract ourselves from. And finally, we should

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Barnett notes that "if any current justice can fairly be described as a committed originalist, it is Justice Thomas.").

107. CHEMERINSKY, *supra* note 21, at 937.

108. *Skin Stories: The Art and Culture of Polynesian Tattoo*, PBS, http://www.pbs.org/skinstories/history/beyond.html (last visited Aug. 29, 2014) (one of the first instances of tattoos in America took place when Martin Hildebrandt "set up a permanent tattoo shop in New York City in 1846 and began a tradition by tattooing sailors and military servicemen from both sides of the Civil War," but earlier instances of tattoos permeating the affluent world of the Framers seems almost comical).

109. CHEMERINSKY, *supra* note 21, at 937.

110. In his article, *Fundamentally Flawed: Tradition and Fundamental Rights*, Adam B. Wolf criticizes the "test" for six reasons: (1) the United State's tradition has been one of subjugation; (2) adhering to tradition contravenes the purposes of the Fourteenth Amendment; (3) traditional renders the fundamental rights doctrine irrelevant; (4) tradition is not objective; (5) malleability of tradition allows for abuse in fundamental rights traditions; (6) blind adherence to history and tradition is dangerous. Adam B. Wolf, *Fundamentally Flawed: Tradition and Fundamental Rights*, 57 U. MIAMI L. REV. 101 (2002).

111. Ely's slew of rhetorical questions reveals just how difficult defining "tradition and history" in the fundamental rights context can be: "Whose traditions? America's only? Why not the entire world's? (Justice Frankfurter liked to refer to the traditions of the "English-speaking peoples.") And what is the relevant time frame? All of history? Anteconstitutional?" John Hart Ely, *Foreward: On Discovering Fundamental Values*, 92 HARV. L. REV. 5, 39 (1978).

borrow the wisdom of bodily integrity in abortion and medical cases to recalibrate how we can view tattoos as part of one's bodily autonomy.

B. Step One: Understanding Tattoos as a "Touch Sense"

The first step towards understanding how tattooing it not a neatly categorized piece of Copyright Law or First Amendment jurisprudence, but rather guiding it into the concept of bodily integrity, is to understand that tattooing and other forms of body alteration are connected to one of our five senses: touch.[112] Describing tattooing as one of three[113] *elective* body-altering touches, Lois Bibbings explains that body-altering touch dispenses with the notion that the human body cannot be reshaped or rebuilt, and should be left as it was at inception.[114]

Although all five senses are part of one's body, not surprisingly, American legal discourse has overwhelmingly deferred to the visual.[115] In a way, this makes touch-based activities like tattooing more vulnerable in the legal world to socio-cultural attitudes, depending on how we visually perceive the particular alteration.[116] Interestingly, the socio-cultural response to body alteration is as variant as the tattoos themselves: it all depends on the level of pain or potential hazard the procedure entails, the context, and/or the resultant visual effect.[117] The result? Plastic surgery to fix a cleft-lip is viewed more positively than a tattoo on one's inner lip because the former is more of an aspirational, correctional surgery, while the latter is considered a perversion of the human body.[118] Yet cosmetic

112. Lois S. Bibbings, *Touch: Socio-Cultural Attitudes and Legal Responses to Body Alteration*, *in* LAW AND THE SENSES: SENSATIONAL JURISPRUDENCE 176, 176 (Lionel Bently & Leo Flynn eds., 1996).

113. *Id.* at 177 (piercing and cosmetic surgery are also considered elective body-altering touches).

114. *Id.* (quoting ANTHONY SYNNOTT, THE BODY SOCIAL: SYMBOLISM, SELF AND SOCIETY (1993)).

115. Bernard J. Hibbits, *Senses of Difference: A Sociology of Metaphors in American Legal Discourse*, *in* LAW AND THE SENSES: SENSATIONAL JURISPRUDENCE, *supra* note 112, at 97, 97-98 (Hibbits points out that visually-oriented phrases like "observing" the law, "in the eye of the law," as well as the dominance in American culture of exclusively visual media has characterized how we perceive the law as it applies to the body).

116. Bibbings, *supra* note 112, at 178.

117. *Id.*

118. *Id.* at 183-84 ("Plastic surgery is generally viewed as being positive because of its potential to improve the lives of those with congenital 'deformities' and those damaged by disease or accidents." Even though cosmetic surgery may be considered the hallmark of "scalpel slave[s]" or "polysurgical addicts" it is a "consumer choice [and] attitudes towards it within capitalist societies may alter.").

surgery has the capacity to be more dangerous than tattooing or piercing.[119] If this is the case, then it seems peculiar that the Think Before You Ink Bill brands itself as an attempt to curb health dangers from tattooing.

Although we consider tattoos through a visual-centric analysis, the legal responses to tattooing have remained touch-centric, focusing on how bodily touches are "facilitate[ed], regulat[ed], or proscrib[ed]."[120] In the legal context, the idea that the human body is not "makeable" or alterable permeates above all else.[121] If we are to view tattoos as a part of one's fundamental right to bodily integrity and autonomy, we must start to see how projecting visual-centric ideas—like "that looks like it hurts a lot" or "that tattoo visually offends me"—onto the legal discourse has created the notion that regulating tattoos is exclusively First Amendment territory.[122] The focus instead should be on the concept of touch, which is inherently wrapped up in bodily choice and integrity.

C. Step Two: Getting out of the Fundamental Rights Rut

After borrowing the idea that tattooing is a touch-based activity closely related to one's body, the next step towards conceptualizing tattoos as part of one's bodily autonomy would be to get out of what I deem the "fundamental rights rut." As explained above, courts are reluctant to expand the concept of fundamental rights, lest it become a catchall term for a trendy cultural issue or hot topic of the day.[123] The idea that only a limited list of categories merit fundamental rights treatment[124] ignores the reality that concepts that were once taboo—like interracial marriage—are now the norm and outgrow legal restraint.[125] Ideally, the law would always accommodate increasingly mainstream processes like tattooing, but the reality remains that litigators and lawmakers alike will have to guide tattooing into the category of bodily integrity.

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119. *Id.* at 178.

120. *Id.* at 179.

121. *Id.* at 180.

122. *Id.* at 179.

123. Lawrence v. Texas, 539 U.S. 558, 603 (2003) (Scalia, J., dissenting) ("What Texas has chosen to do is well within the range of traditional democratic action, and its hand should not be stayed through the invention of a brand-new 'constitutional right' by a Court that is impatient of democratic change.").

124. Chemerinsky and several casebook editors maintain that marital, procreative, and reproductive rights are the few and fortunate to generally receive status as a fundamental right, and accordingly, strict scrutiny. *See* CHEMERINSKY, *supra* note 21.

125. Loving v. Virginia, 388 U.S. 1 (1967) (striking a law effectively criminalizing interracial marriage, and carving out the right to make marital decisions as an unequivocal fundamental right.).

The concept that law is process can help guide the seemingly novel idea that tattooing occupies space in substantive due process jurisprudence.[126] While many in the legal community might at first balk at the idea of moving towards a wholly context-based approach that takes into account "continually shifting institutional forms and structures,"[127] it is troubling to remain in a realm where categories of order and hierarchic, mechanistic applications are prioritized.[128] Instead, the concept of fundamental values should be viewed more fluidly, incorporating broad concepts of bodily integrity, autonomy and tattooing.

D. Step Three: Analogizing to 'Bodily Integrity' in Assisted Suicide and Abortions to Categorize Tattooing as a Fundamental Right to Bodily Choices

With such uncertainty in this corner of the tattoo jurisprudence, it is helpful to compare situations in which individuals are free—or not free—to do as they please with their bodies. The more controversial example that comes to mind is suicide.[129] In some jurisdictions, suicide is considered a felony, as it was at the common-law.[130] But in others—including California, Florida, and Iowa[131]—suicide is not considered a criminal activity. Penal and psychology theory lend support to this idea.[132]

However, some of the literature on suicide and assisted suicide has approached this concept that the "right" to take one's life should be a "fundamental right" of due process.[133] A Washington district court somewhat fleetingly—before being reversed by the Ninth Circuit—likened themselves to *Planned Parenthood v. Casey*.[134] The court also emphasized the connection between autonomy and bodily integrity.[135]

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126. JAMES MACLEAN, RETHINKING LAW AS PROCESS: CREATIVITY, NOVELTY, CHALLENGE (2012).

127. *Id.* at 78.

128. *Id.* at 89.

129. In some jurisdictions (such as Mississippi, North Carolina, and Virginia), suicide is considered a felony, as it was at common-law. 83 C.J.S. *Suicide* § 5 (2014).

130. *Id.* ("[A]t common-law, suicide was a felony").

131. *Id.*

132. *Id.* ("[A]ll modern research points to one conclusion about the problem of suicide—the irrelevance of the criminal law to its solution.").

133. Willard C. Shih, *Assisted Suicide, The Due Process Clause and "Fidelity in Transition,"* 63 FORDHAM L. REV. 1245 (1995); Compassion in Dying v. Washington, 49 F.3d 586 (9th Cir. 1995).

134. Compassion in Dying v. Washington, 850 F.Supp 1454, 1459 (W.D. Wash. 1994), *rev'd*, 49 F.3d 586 (9th Cir. 1995) (explaining that the Fourteenth Amendment includes "liberty"

The controversial decision in *Compassion in Dying* borrowed its own constitutional interpretation from *Planned Parenthood v. Casey*, a seminal case about bodily integrity, autonomy, and the Fourteenth Amendment. The *Casey* court explained that concept of liberty in the Fourteenth Amendment protection to personal decisions like procreation, family relationships, and contraception.[136] Perhaps foreshadowing the problem with categorically analyzing tattoos through the types of "liberties" found in the First Amendment, the Court explained that individual "liberties" operate on a continuum and do not just include obvious examples like property, free speech, and religion.[137] With the viewpoint that due process is not reduced to a "formula," but rather can be a vehicle for protecting individual liberties, the Court ultimately held that—among other provisions of an abortion statute—a woman had the right to terminate her pregnancy.[138] Interestingly, the Court found that the waiting period did not impose an undue burden on the abortion right although it did increase costs and delay the abortion.[139] In spite of this, the *Casey* court continued a tradition of permitting individuals to make decisions about their bodily integrity through the vehicle of the Fourteenth Amendment.[140]

E. Bodily Integrity and the "Fundamental Right" to Make Decisions About One's Body

With this in mind, substantive due process is an increasingly viable mode of analysis for legal issues that deal with one's body.[141] In particular, courts have increasingly incorporated the concept of "bodily integrity" as a liberty guaranteed by due process.[142] And, as explained above, because many cases dealing with tattoos spend more time debating the semantics of

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interests to "make choices according to one's individual conscience" encompassed the decision to refuse medical treatment and opt instead to die.).

135. *Id.* at 1461 ("[Decisions about one's body] are essential to personal autonomy and human dignity. . . . From a constitutional perspective, the court does not believe that a distinction can be drawn between refusing life-sustaining medical treatment and physician-assisted suicide by an un-coerced, mentally competent, terminally ill adult.").

136. Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833, 848-52 (1992).

137. *Id.* at 848.

138. *Id.* at 849-50.

139. *Id.* at 885-86.

140. *Id.* at 849.

141. Ramachandran, *supra* note 95, at 29.

142. Washington v. Glucksberg, 521 U.S. 702, 716-21, 776-79 (1997); *see also* Vacco v. Quill, 521 U.S. 793, 807 (1997) (articulating the right to refuse medical treatment as part of one's bodily integrity).

the tattoo vs. tattoo*ing*,[143] it makes sense to return to the ultimate canvas of the tattoo: the human body. Just as an individual may opt to undergo plastic surgery, pierce one's body, donate one's organs, or tattoo one's upper lip,[144] so too should one be able to receive a tattoo immediately.

While in theory it is arguable that one's bodily decisions should not receive a waiting period, this may prove more difficult in practice. As demonstrated by *Casey*, a court will find a waiting period to not be unreasonable because it allows for a period of reflection before a decision and does not create a noticeable health risk.[145] But the *Casey* waiting period can be distinguished from a tattoo-waiting period because the stakes—both bodily and with respect to one's life—are much higher in the context of an abortion.[146] In this sense, the reasoning employed by the *Casey* court doesn't serve as strong a hypothetical justification for the tattoo-waiting period.[147]

Once the primary arguments for a 24-hour waiting period have been jettisoned, the experience of getting a tattoo on one's body can be framed as a choice of "bodily integrity." The doctrine of bodily integrity, at times vague and malleable, can be basically described as security from governmental violation.[148] But what about when the government is not per se violating one's body, but instead preventing an individual from "violating"—in the eyes of the anti-tattoo populace—his or her own body? An analogy to this situation could be drawn from cases in which courts have held that refusing medicine is a form of "self-determination" wrapped up in one's choice of bodily integrity.[149] Although the courts are not willing to recognize suicide as a form of bodily self-determination because it is a self-infliction of deadly harm, here, tattooing generally does not cause deadly harm.[150]

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143. *See supra* Part III.A.

144. Mark J. Cherry, *Embracing the Commodification of Human Organs: Transplantation and the Freedom to Sell Body Parts*, 2 ST. LOUIS HEALTH L. & POL'Y 359, 372-73 (2009).

145. *Casey*, 505 U.S. at 885.

146. *Id.* at 881-88.

147. Moreover, the 24-hour waiting period has also been framed as an informed consent requirement found in tort law, further demonstrating that the legal arguments made for a 24-hour abortion waiting period may not stick in the context of a tattoo, which is not as invasive a bodily procedure. Brief for Petitioners Robert P. Casey et al., *Casey*, 505 U.S. 833 (No. 91-744).

148. Christyne L. Neff, *Woman, Womb, and Bodily Integrity*, 3 YALE J.L. & FEMINISM 327, 328 (1991).

149. Vacco v. Quill, 521 U.S. 793, 803-05 (1997).

150. Mayo Clinic Staff, *Tattoos: Understand risks and precautions*, MAYO CLINIC (Mar. 20, 2012), http://www.mayoclinic.org/tattoos-and-piercings/ART-20045067 (beyond the normal allergy, infection, and skin-related health risks, tattoos are becoming increasingly safe as parlors comply with local and state health ordinances).

In the final push towards tattooing as a fundamental right, *Lawrence* is instructive.[151] The landmark case provides a mode of analysis that many courts should look to in order to defend one's right to get a tattoo without waiting 24 hours.[152] Tackling Texas's criminalization of sexual conduct between two consenting homosexual adults head on, the Court borrowed Justice Kennedy's wisdom when discussing fundamental rights: "history and tradition are the starting point but not in all cases the ending point of the substantive due process inquiry."[153] While this dicta set off a chain of cases[154] in which one's sexual activity was deemed a fundamental right, its sentiment rings true in the tattoo context. While the challenged Texas law at its instatement may have reflected conservative attitudes towards sexual behavior and homosexuality, the Court was able to recognize that the constitutional protection of marriage, procreation, family relationships, child rearing, and education should necessarily be expanded to include the liberty interests of two males who engaged in consensual sodomy in the privacy of their own home.[155]

Borrowing this logic, one could argue that the liberty interest of "bodily integrity" should necessarily encompass changing societal values.[156] With an increasing section of the population seeking tattoos, the concept of bodily integrity should not just be limited to freedom from unwanted touching, sexual assault, or more traditional concepts of bodily integrity. And although the counterargument could be raised that tattooing does not inhere the same right to privacy as does a choice about one's sexual activity—because one takes place in a bedroom and the other in a tattoo parlor[157]—the concepts of fundamental rights do not necessarily turn on the *location* of the activity, but rather the *right* at stake.

Courts could also liken the decision to get a tattoo to certain decisions one makes in the privacy of a doctor's office.[158] Like the physician, the tattoo artist may inform the patient of the inherent risks in a procedure. In the tattoo parlor as well, the 'patient' undergoes a procedure, not entirely unlike a routine surgery like having a mole removed or even laser hair removal.

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151. Lawrence v. Texas, 539 U.S. 558 (2003).

152. *Id.*

153. *Id.* at 572 (quoting County of Sacramento v. Lewis, 523 U.S. 833, 857 (1998)).

154. United States v. Windsor, 133 S. Ct. 2675 (2013) (striking DOMA); Perry v. Schwarzenegger, 704 F. Supp. 2d 921 (N.D. Cal. 2010) (finding a state constitutional amendment limiting marriage to a man and a woman unconstitutional).

155. *Lawrence*, 539 U.S. at 574.

156. *Id.*

157. *Id.* at 564-65.

158. Does v. Munoz, 507 F.3d 961, 964 (6th Cir. 2007).

Once the right has been deemed "fundamental," the Think Before You Ink Bill is subject to strict scrutiny, which—unlike rational basis review[159]—permits the law to be presumably unconstitutional.[160] The analysis would flow quite easily after the fundamental rights hurdle is surmounted. Here, the right to bodily integrity has patently been infringed by requiring individuals to wait 24-hours to make a bodily choice.

While courts have advanced very narrow justifications to infringe such a right,[161] generally the "compelling government interest[s]"[162] offered are struck down and the law is marked a violation of substantive due process. Unlike rational basis review, where justifications for the health, safety, welfare, and morals will often uphold a statute,[163] the suspicion towards a statute under strict scrutiny review makes it highly difficult that the law will pass constitutional muster. Here, the state's interest in preventing individuals from making a drunken mistake (although the State would most likely articulate the interest as one of public health and safety) would not be enough to survive a strict scrutiny analysis. Moreover, a court would likely find that the 24-hour waiting period is not "narrowly tailored"[164] to serve these interests: one could imagine registration fees,[165] a standard consent form, or even a type of pre-operating informative orientation that would assuage lawmakers' worst fears.

V. CONCLUSION

One might reach the end of this paper and think, *this Comment has run afoul of fundamental rights*. And they would not be entirely incorrect. From *Loving* to *Lawrence*, courts have become increasingly willing to stand the concept of fundamental rights on its head and protect different ideas of autonomy—whether familial or reproductive.[166] Why, then has tattooing—a clear expression of bodily autonomy—been swept to the side?

By questioning the overall reluctance towards accepting tattoos into First Amendment jurisprudence and refining the fundamental rights definition, this Comment's purpose has been to show that decisions about

159. CHEMERINSKY, *supra* note 21 at 6 (rational basis review presumes the law to be constitutional).

160. *Id.* at 117-118.

161. *Id.* (winning war, protecting children).

162. *Id.* at 717.

163. *Id.* at 717-18 (explaining that rational basis review only requires that the statute be rationally related to a legitimate state interest).

164. *Id.*

165. *See supra* Part III.B.

166. *See supra* Part III.B.

one's body—whether relating to an abortion, medical assistance, or a seemingly frivolous tattoo of Homer Simpson[167]—should be categorized generally as bodily autonomy and integrity, regardless of where it falls in the "hierarchy" of bodily choices. And in the absence of an immediate physical harm or danger, tattoo artists and their clients should be able to regulate such decisions privately.

This is not to say that every single time a court faces a tattooing issue that it should find in favor of the tattoo artist or client simply because of their fundamental rights. Rather, the gravity of fundamental rights jurisprudence should center on special protections for the human body. And even if the method of tattooing still seems unorthodox, the canvas—the human body—remains universal. This is what strikes at the heart of many recent due process decisions.

*Danielle S. Krauthamer**

167. Sam Greenspan, *11 Extraordinarily Clever Simpsons Tattoos*, 11 POINTS (Apr. 19, 2010 11:00 AM), http://www.11points.com/TV/11_Extraordinarily_Clever_Simpsons_Tattoos.

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