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 RUSSELL & RODRIGUEZ, L.L.P. 1633 Williams Drive • Building 2, Suite 200
 Georgetown, TX 78628 • Phone (512) 932-1317 Fax (866) 929-1641


“SINFUL ACTIVITIES” REGULATION AND THE FIRST AMENDMENT

Bradford E. Bullock
 Partner
 Russell & Rodriguez, LLP
 Longhorn Crossing
 1633 Williams Drive, Building 2, Suite 200
 Georgetown, Texas 78628
 512-930-1317
 866-929-1641(fax)
bbullock@rxadminlaw.com

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 “Ex Mori Veritas”

The First Amendment

- Just in case you forgot ...
- Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.



Tension exists between “sins” and the Constitution.

- When most people think of “sins” that have Constitutional considerations, they think of –
 - **Abortion** – The constitutional/political debate rages on.
 - **Drunkenness** – The Constitution was amended twice over it.
 - **Sins of the flesh** – Federal Courts still routinely hear challenges to SOB regulations.
 - **Homosexuality** – The Fifth Circuit, sitting en banc, just ruled in April of this year that Louisiana did not violate the Constitution by refusing to issue a new birth certificate to a child adopted by a gay couple in New York. (Adar v. Smith)

Don't worry – this isn't a speech about those.

- Today, we'll concentrate on sins that I can joke about and [hopefully] not get banned by the TCAA board...
 - Like tattooing and fortune telling.



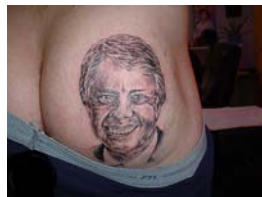
First Amendment Primer

- REMEMBER –
- A regulation of purely expressive activity (e.g. the spoken/written word) is **only** constitutional if it is a reasonable time, place, manner restriction.
 - Ward v. Rock Against Racism



Pure Speech Regulation

- A regulation of "pure speech" is a reasonable time, place manner restriction if:
 - It is justified without reference to the content of the message;
 - It is narrowly tailored to serve a significant governmental interest; and
 - It leaves open ample alternative channels for communication of information.
 - Ward v. Rock Against Racism
- Remember even bad (I mean really, really bad) content is entitled to First Amendment protection...



Pure Speech vs. Symbolic Speech

- The U.S. Supreme Court case *Texas v. Johnson* sets out the test for determining whether symbolic speech – that is, conduct with expressive elements – is entitled to First Amendment Protection.
- Expressive conduct is only entitled to First Amendment protection if -
 - The actor intends to convey a particularized message ; and
 - There exists a great likelihood that the message would be understood by those who viewed it.

Expressive Conduct Regulation

- A regulation of expressive conduct is justified if –
 - The regulation is within the constitutional power of the government;
 - It furthers an important or substantial government interest;
 - The interest is unrelated to the suppression of free expression; and
 - Any incidental restriction on alleged First Amendment freedoms is no greater than necessary to further the important interest.
 - *U.S. v. O'Brien*



The Sin - Tattooing, Lev. 19:28

- You may not make cuts in your flesh in respect for the dead, or have marks printed on your bodies: I am the Lord.
 - Bible in Basic English

- This guy didn't get the memo ...



The Regulation – Tattoo Parlors Banned

- City of Hermosa Beach Code §17.06.070
 - Thou shalt not operate tattoo parlors within the City of Hermosa Beach (or words to that effect)



Pre-Hermosa Beach Tattoo Jurisprudence

- Let's just say they weren't the most scholarly opinions –
 - **Blue Horseshoe Tattoo v. City of Norfolk**
 - The court accepted as "well-taken" the City's contention that all tattoos are mere "self-expression," (which fails the first prong of the *Johnson* test) because in *Stephenson v. Davenport Community Sch. Dist.*, a student whose tattoo violated the school's tattoo policy testified that her tattoo was just "her form of self-expression."



- More like guilty of being awesome...

Pre-Hermosa Beach Tattoo Jurisprudence Cont.

- **Hold Fast Tattoo v. City of North Chicago –**
 - Held that act of tattooing fails first prong of *Johnson* test (particularized message) because –
 - The very nature of a tattooing is to custom-tailor a "different or unique" message for each customer.



Betty White and Estelle Getty getting cozy on your inner thigh IS different...

Pre-Hermosa Tattoo Jurisprudence Cont.

- **Yurkew v. Sinclair** –
 - Held “for a variety of reasons” (without explaining said reasons) that “wherever the amorphous line of demarcation exists between protected and unprotected conduct for First Amendment purposes, the Court is convinced that tattooing falls on the unprotected side of the line.”



- Somehow I have a feeling this guy is pretty good at “protection”

Hermosa Beach Rethinks the Expressive Conduct Assumption

- If expressive conduct is not sufficiently communicative, then a regulation is constitutional if it is “rationally related to a legitimate governmental interest.”
- Every significant reported case prior to *Hermosa Beach* held that tattooing was not sufficiently communicative conduct; therefore, bans simply had to pass the “rational relationship” test to survive scrutiny.
- *Hermosa Beach* dispensed with the “expressive conduct” rubric, noting that in form and substance, a tattoo is no different than any other visual art depiction – but for one notable difference...

Charlie Sheen has Tiger Blood!!



No wait ... it is affixed to skin.

- The fact that tattoos are permanently affixed to skin is “relevant to the governmental interest *potentially justifying* a restriction on protected speech [but] not to whether the speech is constitutionally protected.”
- You are potentially justified in being horrified, but not in banning protected speech...



City tries to justify the ban...

- City argued that ban was necessary because the county had insufficient resources to monitor tattoo parlors.
- One inspector for all of Los Angeles County
- Just hire this guy...



Bans are rarely reasonable time, place, manner restrictions

- Court rejected this argument – inadequacy of regulatory resources is an insufficient justification to ban [awesome] protected speech.



Ample Alternative Channels?

- City also argued that the ban should stand because tattoo artists had ample alternative channels – they could create temporary tattoos or put their work onto canvass.

- Tell that to this girl...



Think before you ink...

- Court disagreed with the city noting that the tattoo bearer is “highly committed” to the permanent message being displayed.

- He may have been high, and perhaps he should be committed for getting it, but are you gonna tell this guy no?



The Sin – Fortune Telling - Deut. 4:19

- And when your eyes are lifted up to heaven, and you see the sun and the moon and the stars, all the army of heaven, do not let yourselves be moved to give them worship, or become the servants of what the Lord has given equally to all peoples under heaven.



- Bible in Basic English

We don't need no stinkin' fortune tellers.

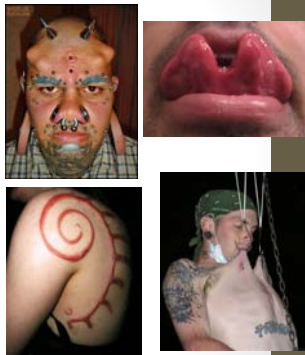
- **April 6, 2011** – Against the advice of its city attorney (shocker), Meridian, Mississippi refuses to lift its ban on fortune telling.
- Litigation backed by the ACLU is almost certainly forthcoming.

Fortune telling bans have consistently been overturned by courts

- *Argello v. City of Lincoln*, 143 F.3d 1152 (8th Cir. 1998).
- *Rushman v. City of Milwaukee*, 959 F. Supp. 1040 (E.D. Wis. 1997).
- *Trimble v. City of New Iberia*, 73 F. Supp. 2d 659 (W.D. La. 1999).
- *Marks v. City Council of City of Chesapeake, Va.*, 723 F. Supp. 1155 (E.D. Va. 1988) aff'd sub nom. *Marks v. City of Chesapeake, Va.*, 883 F.2d 308 (4th Cir. 1989).

Things to think about – if you dare...

- For those city attorneys with a little extra time on your hands, ponder how the *Hermosa Beach* case could apply to other types of body modification –
- Flesh-implants
- Tongue-splitting
- Scarification
- Performance art consisting of consensual mutilation
- Other things you don't want me to name...



So, the moral of this story ...

- Sometimes it is really hard NOT to regulate on the basis of content...



And while it may be hard to accept that this is protected "art" ...



Remember -

- You just can't regulate on the basis of content...
- Even if you can never "unsee" something – no matter how much you wish you could.