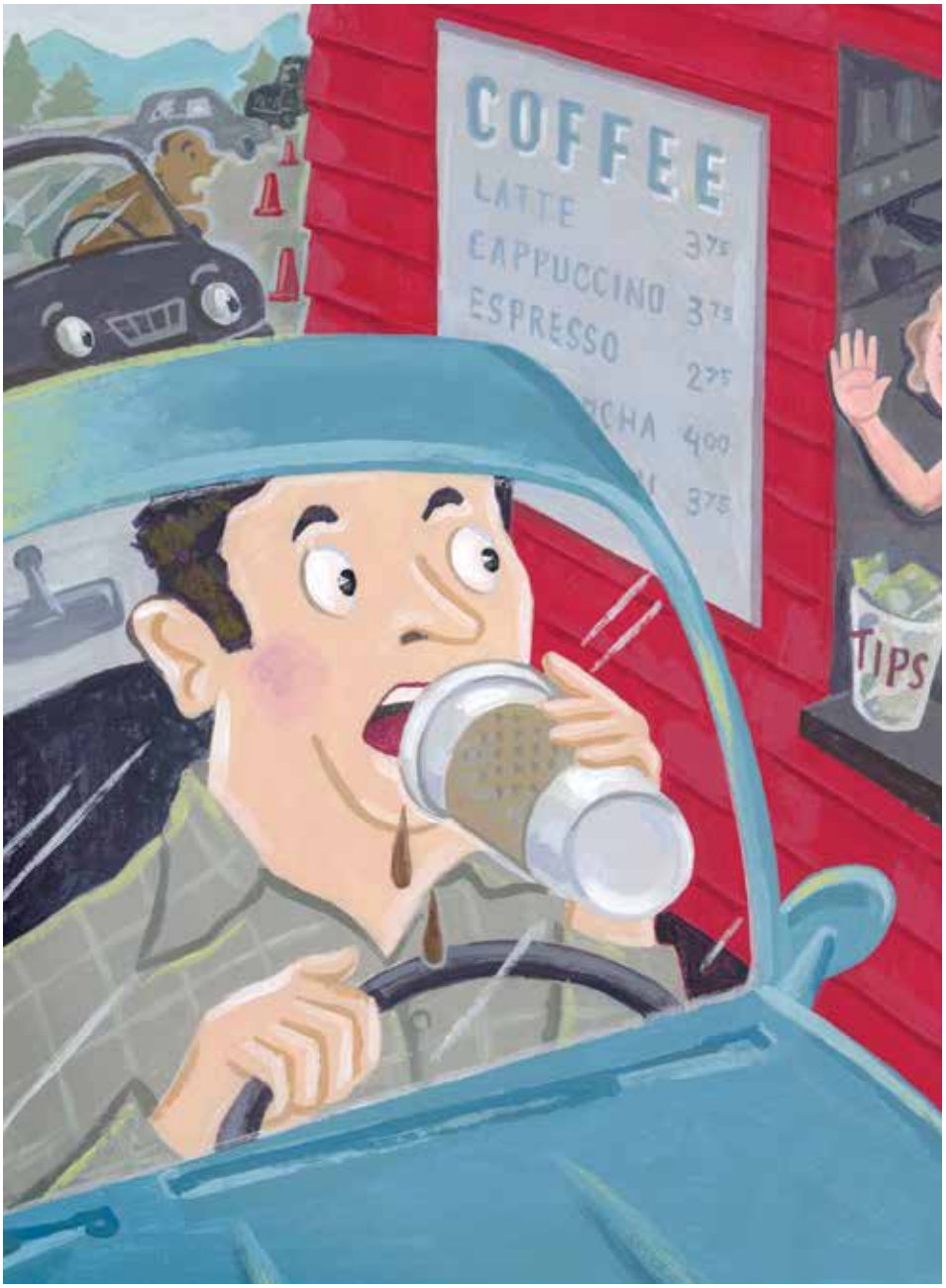
HEADNOTES



FREEDOM OF EXPRESSION

What Does Your Body Say About You? Not Enough, the Ninth Circuit Says

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Self-expression has never been more vibrant. Many of us each day fill the blogosphere with self-revelatory musings on every aspect of our lives. We display on our cars and our clothes images of rainbows, animals, tools, office equipment, really bad hair plugs, infants, guns, religious icons—all to show our association with movements, attitudes, or social issues. For an increasing number, or so it seems, even our bodies have become billboards, adorned with tattoos and piercings that furnish insight into how we think and feel.

Of course, throughout civilization's history, our fashion choices also have communicated much about who we are. Purple robes for Roman royalty. Red-coat or blue-coat uniforms for the Loyalists or the Revolutionaries. Rolex watches for the financially successful. Jaunty *chapeaux* for the French and the Francophiles.

American social doctrine teaches us that self-expression is a natural right. The law, for the most part, recognizes this. That's why the Supreme Court upheld Mary Beth Tinker's right to wear a black armband to elementary school to express her family's disagreement with the Vietnam War. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969). Paul Cohen upped the silent-expression game, and the justices enabled scores of other caustic protestors who came

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after Cohen, by wearing into a courthouse a jacket with the words "Fuck the Draft" on the back. *Cohen v. California*, 403 U.S. 15 (1971). In more recent years, students at a Pennsylvania middle school convinced the Third Circuit that donning bracelets proclaiming "I ♥ boobies! (KEEP A BREAST)" for cancer awareness could not be banned by the school district because the bracelets commented on a social issue. *B.H. ex rel. Hawk v. Easton Area Sch. Dist.*, 725 F.3d 293 (3d Cir. 2013).

Even the lack of clothing, in the right circumstances, will move the Court's First Amendment needle to a finding of "expressive conduct"—the First Amendment doctrine that protects expressions that have no words. The Supreme Court has held that nude go-go dancing at a bar or lounge is, in fact, expressive conduct that falls within the "outer perimeters" of First Amendment protection. *Barnes v. Glen Theatre*, 501 U.S. 560, 566 (1991). Similarly, after *AAK, Inc. v. City of Woonsocket*, 830 F. Supp. 99 (D.R.I. 1993), cabaret dancers could undulate with relief—the court there found that an entertainment license ordinance charging a higher fee for an "adult cabaret" license than for other entertainment licenses violated the plaintiff's freedom of expression because even *semi*-nude dancing was entitled to the First Amendment protections.

At least in the Ninth Circuit, however, when it comes to fashion, expressive conduct seems to be an all-or-nothing concept.

Folks living in the city of Everett, Washington, looking for that 8:30 a.m. cappuccino fix, get much more than a jolt of caffeine from baristas—or perhaps we should say, bare-istas—at the drive-through coffee stand "Hillbilly Hotties." Rather than the ubiquitous green apron with a Starbucks logo, the young women working at the popular Everett establishment wear little of anything—typically, a bikini top and half of what you would normally consider a bikini bottom.

Some in Everett saw these costumes as tasteless and immoral. About 40 of them complained, prompting a police investigation that, according to the record in the litigation that followed, concluded the bikinis beckoned criminal activity, including sexual exploitation and sexual violence.

Writing into local law colorful terms like "the bottom one-half of the anal cleft" and "any portion of the areola or nipple of the female breast," the city expanded the definition of a "lewd" act under municipal ordinance to prevent the baristas from coming to work half- or less- dressed. Everett, Wash., Mun. Code § 10.24.010(A)(1)–(2). The city also enacted a "Dress Code Ordinance" for the employees, owners, and operators of coffee stands, fast-food restaurants, and all other drive-through restaurants. These businesses must comply with a "dress requirement" to cover "minimum body areas," defined as "the upper and lower body (breast/pectorals, stomach, back below the shoulder blades, buttocks, top three inches of legs below the buttocks, pubic area and genitals)." *Id.* § 5.132.020(A)–(C).

The owner of Hillbilly Hotties, along with several baristas, challenged the new dress code ordinance as a violation of their First Amendment right to freedom of expression. *Edge v. City of Everett*, 291 F. Supp. 3d 1201, 1204 (W.D. Wash. 2017). The baristas, according to their argument, were in bikinis to express empowerment and to encourage people to promote body positivity in their place of employment. "By confidently revealing tattoos, scars, and personal attributes" in the bikinis they selected, the baristas argued, they intended to "convey their fearless body acceptance and freedom from judgment," "express personal viewpoints," and invite "customers to ask questions and open dialogue." The baristas argued these messages were understood by customers and prompted conversations about "body image and self-confidence" as a result.

The federal district court sided with the baristas. Judge Marsha J. Pechman said she got the baristas' message completely:

> While some customers view the bikinis as "sexualized," to others, they convey particularized values, beliefs, ideas, and opinions; namely, body confidence and freedom of choice. Moreover, in certain scenarios, bikinis can convey the very type of political speech that lies at the core of the First Amendment. For instance, Plaintiffs might wear bikinis constructed of the bright pink "pussyhats" worn by protesters during the Women's March or the black armbands worn by students during the Vietnam War, or emblazoned with the logos and colors of their favorite sports teams. Accordingly, the Court finds that Plaintiffs' choice of clothing is sufficiently communicative.

But the Ninth Circuit did not appreciate this argument for the right to bare arms (and most other body parts). The court held that a lack of clothing alone did not implicate speech rights.

Unlike the nude dancers in precedent who had established the expressive nature of their wardrobe in the context of their work, the Everett baristas vehemently denied that they were exotic dancers. The Ninth Circuit therefore drew a sharp distinction between the employment contexts, finding that the baristas' uniforms did not warrant the First Amendment protection as an expression because "[t]he baristas' act of wearing pasties and g-strings in close proximity to paying customers creates a high likelihood that the message sent by the baristas' nearly nonexistent outfits vastly diverges from those described in plaintiffs' declarations." *Edge v. City of Everett*, 929 F.3d 657 (9th Cir. 2019). Interestingly, the court found that because the baristas were conducting commercial transactions and collected tips, they were not at the same time expressing body positivity.

Maybe the "Hillbilly Hotties" should start wearing bikini tops labeled "I ♥ boobies!"? ■