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Can You Understand this Message? An Examination of Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston's Impact on Spence v. Washington

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CAN YOU UNDERSTAND THIS MESSAGE? AN EXAMINATION OF *HURLEY V. IRISH-AMERICAN GAY, LESBIAN & BISEXUAL GROUP OF BOSTON*'S IMPACT ON *SPENCE V. WASHINGTON*

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INTRODUCTION

A twelve-year-old student went to school wearing a red-, white-, and blue-beaded necklace.[1] According to the child, she wore the necklace to show her support for the soldiers fighting in Iraq, some of whom were people in her family, and to demonstrate her love of the United States.[2] However, upon arriving at school, she was informed that she could no longer wear the necklace because it could be considered "gang related."[3] If she did not comply with this warning, she would be "subjected to discipline."[4]

The schoolgirl brought an action against the school district asserting that its policy and its enforcement violated her First Amendment rights.[5] In analyzing whether this activity was protected as speech under the First Amendment, the Northern District of New York noted that one's support for the soldiers might not express a particularized message.[6] Moreover, the court

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[1] Grzywna *ex rel.* Doe v. Schenectady Cent. Sch. Dist., 489 F. Supp. 2d 139, 142 (N.D.N.Y. 2006).

[2] *Id.*

[3] *Id.* The plaintiff began wearing the necklace in early January 2005, and the school told her to take it off on January 4, 2005. *Id.*

[4] *Id.*

[5] *Id.*

[6] *Id.* at 144. This is the first factor in determining whether the First Amendment protects conduct as symbolic speech under the *Spence* test. *See infra* Part I.B.

stated that people do not automatically associate red, white, and blue with demonstrating support for the troops.[7] Nevertheless, the court held that the claim withstood a motion to dismiss.[8]

Conversely, in another instance, four non-profit organizations engaged in voter-registration activities in politically underrepresented communities.[9] The New Mexico legislature passed legislation that restricted the voter-registration activities of third-party organizations, hindering the organizations' ability to help citizens register to vote.[10] These organizations brought an action alleging that this legislation violateed their right to free speech.[11] The court found that the plaintiffs "pled facts sufficient to support their First-Amendment claims."[12] In deciding that the plaintiffs sufficiently pled First Amendment claims, the court first determined that the plaintiffs intended to convey a particularized message with their conduct.[13] With the voter-registration activities, the non-profit organizations intended to convey a message that "voting is important, that the Plaintiffs believe in civic participation, and that the Plaintiffs are willing to expend the resources to broaden the electorate to include allegedly under-served communities."[14] Moreover, the court believed that people observing the voter-registration efforts would likely understand this message.[15]

Each of the previous two cases highlights the difficulty of identifying whether conduct is protected as symbolic speech under the First Amendment and, specifically, how particularized the message needs to be in order to receive protection. The original test for determining whether conduct could be protected

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[7] *Grzywna*, 489 F. Supp. 2d at 146. This is the second factor in determining whether the First Amendment protects conduct as symbolic speech under the *Spence* test. *See infra* Part I.B.

[8] *Grzywna*, 489 F. Supp. 2d at 146–47. This ruling was on a motion to dismiss, and since the court found that there was "more than a 'plausible contention' that [the plaintiff's] conduct [was] expressive," the claim was not dismissed. *Id.* at 142, 144–45.

[9] Am. Ass'n of People with Disabilities v. Herrera, 690 F. Supp. 2d 1183, 1189 (D.N.M. 2010).

[10] *Id.*

[11] *See id.*

[12] *Id.* at 1214. This decision came on a motion to dismiss, and so the quoted language is the standard used in deciding such a motion. *Id.* at 1188, 1193.

[13] *Id.* at 1215.

[14] *Id.* at 1215–16.

[15] *Id.* at 1216.

as speech was laid out in *Spence v. Washington*.[16] According to the Court, to be engaged in protected speech, the actor needs to have the "intent to convey a particularized message."[17]

Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston[18] potentially altered this test.[19] There, the Court stated that a "narrow, succinctly articulable message is not a condition of constitutional protection, which if confined to expressions conveying a 'particularized message,' would never reach the unquestionably shielded painting of Jackson Pollock."[20] Therefore, the question has arisen whether the intent to convey a particularized message is necessary anymore, and the circuit courts have addressed this precise issue quite differently.[21]

Because the freedom of speech is a fundamental right that has long been protected by the First Amendment,[22] it is very important that the lower courts apply predictable tests when analyzing whether speech is protected. This constitutional safeguard is necessary to assure the uninhibited exchange of ideas, ranging from political to social topics.[23] In fact, "it is a prized American privilege to speak one's mind, although not always with perfect good taste."[24]

This Note analyzes the effect that *Hurley* had on the *Spence* factors and suggests that the particularized requirement has been lowered. This is the best approach to encouraging speech while balancing other important interests. Part I discusses the development of the freedom of speech, from protecting the spoken and written word to protecting expressive conduct. Part II outlines the different approaches taken by the circuit courts in deciding whether conduct is protected as speech and, in particular, what effect *Hurley* had on *Spence*. Part III critically analyzes each of these approaches and concludes that the Eleventh Circuit's approach is the most sound. Finally, Part IV

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[16] 418 U.S. 405, 415 (1974) (per curiam).

[17] *Id.* at 410–11; *see also infra* Part I.B (explaining the second prong of the test).

[18] 515 U.S. 557 (1995).

[19] *Id.* at 569.

[20] *Id.* (citation omitted) (quoting *Spence*, 418 U.S. at 411).

[21] *See infra* Part II.

[22] *See* U.S. CONST. amend. I ("Congress shall make no law . . . abridging the freedom of speech . . . .").

[23] N.Y. Times Co. v. Sullivan, 376 U.S. 254, 269 (1964) (citing Roth v. United States, 354 U.S. 476, 484 (1957)).

[24] Bridges v. California, 314 U.S. 252, 270 (1941).

applies the Second, Third, and Eleventh Circuits' tests to a district court case in order to illustrate the differences between the approaches and the importance of this problem.

I. THE DEVELOPMENT OF SYMBOLIC SPEECH

A. Recognition That Conduct Could Be Protected

The Supreme Court first recognized that speech is not just limited to the spoken or written word in *Stromberg v. California*.[25] In *Stromberg*, the appellant, a member of the Young Communist League, was convicted of displaying a red flag that represented her opposition to the government—an action banned by a state statute.[26] On appeal from the District Court of Appeals of the State of California, the appellant claimed that "the statute was invalid as being 'an unwarranted limitation on the right of free speech.' "[27] The Supreme Court ruled that the statute was unconstitutional.[28] The Court recognized that people could display such flags for peaceful purposes, such as to signal opposition to the political party in power, or opposition to government more generally.[29]

A few years later, symbolic speech was protected again in *West Virginia State Board of Education v. Barnette*.[30] In *Barnette*, the appellees challenged a resolution ordering that saluting the American flag become a regular part of the school day and stating that refusal to salute the flag is insubordination.[31] The Supreme Court held that the flag salute was a form of speech.[32] "Symbolism is a primitive but effective way of communicating ideas. The use of an emblem or flag to symbolize some system, idea, institution, or personality, is a short cut from mind to mind."[33] The Court noted that the flag is a symbol of adherence to the present government, requiring an

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[25] 283 U.S. 359 (1931).

[26] *Id.* at 360, 362. The pertinent statute read: "Any person who displays a red flag . . . in any public place or in any meeting place or public assembly, or from or on ahy [sic] house, building or window as a sign, symbol or emblem of opposition to organized government . . . is guilty of a felony." *Id.* at 361.

[27] *Id.* at 364.

[28] *Id.* at 369–70.

[29] *Id.* at 369.

[30] 319 U.S. 624 (1943).

[31] *Id.* at 627, 629.

[32] *Id.* at 632.

[33] *Id.*

individual to communicate and accept the flag's ideas.[34] Therefore, the mandatory flag salute contravened the First Amendment.[35]

B. The Spence *Test*

Once the Supreme Court decided to protect conduct under the First Amendment, it was faced with the question of *when* conduct should be protected. In other words, was all conduct to be protected as speech, or did protection have to be restricted in some way? That answer came in 1974 with *Spence v. Washington*.[36] In *Spence*, a college student hung an American flag from his window upside down, with a peace symbol made of tape attached to the front and back of the flag.[37] Following his arrest for violating a statute banning such behavior,[38] the student testified that he affixed the peace symbol on the flag and displayed it as a way to protest the recent American invasion of Cambodia and the killings at Kent State University, and to demonstrate that he thought America stood for peace.[39] A jury ultimately convicted the student for violating the statute.[40]

The student challenged his conviction on the ground that the statute violated his First Amendment rights.[41] In deciding whether the First Amendment protected these actions, the Supreme Court explained that it is "necessary to determine whether [this] activity was sufficiently imbued with elements of communication to fall within the scope of the First . . . Amendment[]."[42] The Court looked at the circumstances surrounding the conduct: The student's actions coincided with the American invasion of Cambodia and the killings at Kent State, which were highly publicized.[43] Therefore, the Court concluded that "[a]n intent to convey a particularized message

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[34] *Id.* at 633.

[35] *Id.* at 642.

[36] 418 U.S. 405 (1974) (per curiam).

[37] *Id.* at 406.

[38] *Id.* at 405–07. The statute read: "No person shall, in any manner, for exhibition or display: (1) Place or cause to be placed any . . . mark . . . of any nature upon any flag . . . of the United States . . . ." *Id.* at 407 (internal quotation marks omitted).

[39] *Id.* at 408.

[40] *Id.*

[41] *Id.* at 406.

[42] *Id.* at 409.

[43] *Id.* at 410.

was present, and in the surrounding circumstances the likelihood was great that the message would be understood by those who viewed it."[44] Thus, the First Amendment protected the student's conduct as symbolic speech.[45] This two-part inquiry to determine whether conduct is protected speech became known as the *Spence* test.[46]

C. Hurley*'s Statement*

Difficulty and confusion ensued following the Court's later decision in *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*.[47] In *Hurley*, parade organizers refused to allow an openly gay, lesbian, and bisexual group to march in a parade.[48] In response to a First Amendment challenge by the parade organizers, the state court ruled that the parade had no common theme other than involving participants.[49] The organizers were not selective in choosing participants, and they failed to circumscribe participants' messages.[50] Therefore, the parade lacked the expressive purpose necessary to fall under the First Amendment.[51]

On appeal, the Supreme Court reversed and held that the parade was a form of expressive speech.[52] The Court asserted that "a narrow, succinctly articulable message is not a condition of constitutional protection, which if confined to expressions conveying a 'particularized message,' would never reach the unquestionably shielded painting of Jackson Pollock."[53] Therefore, the Supreme Court held that a private speaker's action does not lose First Amendment protection just because it

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[44] *Id.* at 410–11.

[45] *Id.* at 415.

[46] James M. McGoldrick, Jr., *Symbolic Speech: A Message from Mind to Mind*, 61 OKLA. L. REV. 1, 5 (2008). Often, the test is called the *Spence-Johnson* test because these factors were affirmed in *Texas v. Johnson*, 491 U.S. 397, 404 (1989). *See* Cressman v. Thompson, 719 F.3d 1139, 1149 (10th Cir. 2013) (calling the test the "*Spence-Johnson* factors"). However, this Note refers to the test as the *Spence* test.

[47] 515 U.S. 557 (1995).

[48] *Id.* at 561.

[49] *Id.* at 562–63.

[50] *Id.* at 563.

[51] *Id.*

[52] *Id.* at 566.

[53] *Id.* at 569 (citation omitted) (quoting Spence v. Washington, 418 U.S. 405, 411 (1974) (per curiam)).

contains "multifarious voices" or fails to have an isolated, "exact message as the exclusive subject matter of the speech."[54] This statement has given rise to the split among the circuits regarding *Hurley*'s effect on the *Spence* factors.

II. *HURLEY*'S EFFECT ON THE *SPENCE* FACTORS: THE CIRCUIT SPLIT

A. *The Sixth and Ninth Circuits: Applying* Spence *and* Hurley *Together*

The Sixth and the Ninth Circuits seem to apply the *Spence* factors together with *Hurley*'s statement that a "narrow, succinctly articulable message is not a condition of constitutional protection."[55] The Sixth Circuit took this approach in *Blau v. Fort Thomas Public School District*.[56] In *Blau*, the court held that wearing one's choice of clothing was not a form of protected speech.[57] There, a school had instituted a dress code, which was challenged by a student as infringing her freedom of speech.[58] The student said she wished to wear clothes that looked nice on her, that she felt good in, and that expressed her individuality.[59]

In analyzing whether the plaintiff could have a free speech claim, the Sixth Circuit indicated that claimants have to show that their conduct conveys a particularized message, and that the likelihood is great that those who view it would understand the message.[60] According to the court, "The threshold is not a difficult one, as 'a narrow, succinctly articulable message is not a condition of constitutional protection.' "[61]

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[54] *Id.* at 569–70.

[55] *Id.* at 569.

[56] 401 F.3d 381, 388 (6th Cir. 2005).

[57] *Id.* at 389.

[58] *Id.* at 385–86. Among some of the things the new dress code banned were revealing clothing and baggy clothing; visible body piercings, other than ear piercings; clothes with holes in them; and tops with writing on them. *Id.*

[59] *Id.* at 386. In fact, the student specifically said that there was no "particular message" that she wanted to convey through her clothing. *Id.* (internal quotation marks omitted).

[60] *Id.* at 388 (citing Spence v. Washington, 418 U.S. 405, 411 (1974) (per curiam)).

[61] *Id.* (quoting Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., 515 U.S. 557, 569 (1995)).

However, even with a lower threshold, the court still found that the student was not engaging in a form of protected speech.[62] Instead, the student had only a "generalized and vague desire to express her . . . individuality," something the First Amendment does not protect.[63] Indeed, to rule for the student would eliminate the requirement that the conduct have an identifiable message and would also depreciate the First Amendment in cases where a particularized message is present.[64]

The Ninth Circuit similarly applied the *Spence* factors together with *Hurley*'s statement in *Kaahumanu v. Hawaii*.[65] In *Kaahumanu*, the Ninth Circuit held that a wedding was protected as symbolic speech.[66] The Hawaii Department of Land and Resources required couples to obtain permits and satisfy other terms and conditions in order to have beach weddings.[67] A pastor and an association that provided commercial weddings challenged the new requirements, claiming that the requirements unduly burdened their right to organize and participate in weddings, violating the First Amendment.[68]

In determining whether the plaintiffs stated a First Amendment violation, the Ninth Circuit articulated that the amendment protects expressive conduct "so long as that conduct 'convey[s] a particularized message' and is likely to be understood in the surrounding circumstances."[69] "A 'narrow, succinctly articulable message' is not required."[70] Using this standard, the court concluded that a wedding ceremony was a form of symbolic speech.[71] According to the court, the particularized message was one about the couple, their beliefs, and their relationship to each other and to the community, as well as a celebration of marriage and uniting two people in a long-term relationship.[72] First

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[62] *Id.* at 389.

[63] *Id.* at 389–90.

[64] *Id.* at 390.

[65] 682 F.3d 789, 798 (9th Cir. 2012).

[66] *Id.* at 799.

[67] *Id.* at 794–95. The terms and conditions included a ban on alcohol, chairs, and tables, and a two-hour maximum to perform the wedding. *Id.*

[68] *Id.* at 793, 795.

[69] *Id.* at 798 (citing Spence v. Washington, 418 U.S. 405, 409–11 (1974) (per curiam)).

[70] *Id.* (citing Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., 515 U.S. 557, 569 (1995)).

[71] *Id.* at 799.

[72] *Id.*

Amendment protection for this activity could not be ignored just because actors combined "multifarious voices" or failed "to edit their themes to isolate an exact message as the exclusive subject matter of the speech."[73]

B. The Eleventh Circuit: The Liberalized Test

Similarly, the Eleventh Circuit sees *Hurley* as having relaxed or "liberalized" the *Spence* test.[74] The Eleventh Circuit took this approach in *Holloman ex rel. Holloman v. Harland*[75] when it held that raising a fist during the Pledge of Allegiance was expressive conduct.[76] In *Holloman*, a child was punished for refusing to recite the Pledge of Allegiance.[77] A day later, the plaintiff, a student at the same school, did not say the Pledge of Allegiance and raised his fist in the air during the pledge instead.[78] When summoned to the principal's office, the plaintiff explained that he raised his fist to protest what happened to the child the previous day, and the plaintiff was subsequently punished for his actions.[79]

The plaintiff brought an action in which he alleged that the defendants' actions infringed his First Amendment rights.[80] In order to determine whether this action was speech, the Eleventh Circuit opined that *Hurley* "liberalized" the *Spence* test.[81] The issue for the court was "whether the reasonable person would interpret [the conduct] as *some* sort of message, not whether an observer would necessarily infer a *specific* message."[82] Using this new test, the court concluded that at least some students would have recognized the raising of the fist as a protest over the punishment of the boy the day before.[83] Even if students were not aware of this specific message, the raised fist expressed a "generalized message of disagreement or protest" toward either

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[73] *Id.* (quoting *Hurley*, 515 U.S. at 569–70) (internal quotation marks omitted).

[74] *See infra* note 81 and accompanying text.

[75] 370 F.3d 1252 (11th Cir. 2004).

[76] *Id.* at 1261, 1270.

[77] *Id.* at 1260.

[78] *Id.* at 1261.

[79] *Id.* The punishment normally would have been three days of detention and the postponement of receiving a diploma until detention ended, but the plaintiff chose instead to get a paddling in order to receive his diploma. *See id.*

[80] *Id.* at 1259.

[81] *Id.* at 1270.

[82] *Id.*

[83] *Id.*

the school or the United States.[84] Although not specifically stated by the court, the other part of the test would seem to be whether the actor intended to convey some sort of message.[85] This also fits within the court's observation that *Hurley* "liberalized" the *Spence* test.

C. The Third Circuit: Spence *Factors as Signposts and Eliminating the Particularized Requirement*

Some courts have concluded that *Hurley* eliminated the "particularized" aspect of the *Spence* test so that now the factors are "signposts," rather than requirements; this is the approach the Third Circuit took in *Tenafly Eruv Ass'n v. Borough of Tenafly*.[86] In *Tenafly*, the Third Circuit held that Orthodox Jews' act of attaching religious items known as *lechis* to utility poles was not protected speech.[87] In reaching this conclusion, the Third Circuit stated that there was no language in *Spence* suggesting that (1) an intent to convey a particularized message that (2) would be understood by those who viewed it were necessary factors.[88] According to the court, conduct would be expressive if, "considering 'the nature of [the] activity, combined with the factual context and environment in which it was undertaken,' . . . the 'activity was sufficiently imbued with elements of communication.' "[89] The court focused on two questions: (1) whether the actor intended subjectively for his conduct to communicate with people whom he expected to observe the conduct, and (2) whether observers would understand the message that the actor intended his conduct to convey.[90]

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[84] *Id.* The court also hinted that the raised fist could constitute pure speech, meaning that the raised fist "does not contain any of the substantive 'non-speech' elements that are necessary to remove something from the realm of 'pure speech' into the realm of expressive conduct." *Id.* Yet, the court concluded that the raised fist is still protected by the First Amendment, whether it is symbolic speech or pure speech. *Id.*

[85] *See id.* (concluding that the raised fist expressed a generalized message of protest or disagreement).

[86] 309 F.3d 144, 160 (3d Cir. 2002) (citing Troster v. Pa. State Dep't of Corr., 65 F.3d 1086, 1090 & n.1 (3d Cir. 1995)).

[87] *Id.* at 155, 161. *Lechis* are thin black strips made of plastic. *Id.* at 152; *see infra* note 92 (explaining the purpose of *lechis*).

[88] *Id.* at 160 (citing *Troster*, 65 F.3d at 1090 n.1).

[89] *Id.* (alteration in original) (quoting *Troster*, 65 F.3d at 1090).

[90] *Id.* at 161 (citing *Troster*, 65 F.3d at 1091–92).

Using this test, the court found that affixing the religious items to the poles was not expressive activity that would be protected.[91] The Third Circuit found that the intended audience was not the general public, but rather other Orthodox Jews because it was for their benefit.[92] Moreover, the items were not expressing a message that would be understood by anyone but instead were used for a purely functional purpose.[93] Thus, because there was no message behind the hanging of these religious items that could be understood by the intended audience, the conduct was not protected as symbolic speech.

D. The Second Circuit: Spence *Factors as "Intact"*

Conversely, the Second Circuit believes that the *Spence* factors remain "intact" after *Hurley*.[94] In *Church of American Knights of the Ku Klux Klan v. Kerik*,[95] the Second Circuit took this approach and held that wearing masks was not symbolic speech.[96] In *Kerik*, members of the American Knights, a group that identifies with the Ku Klux Klan ("KKK"), applied for a permit to demonstrate while wearing masks.[97] However, the New York City Police Department denied the application on the ground that wearing the masks would violate a New York statute.[98] The members sought an injunction against the police department to allow the group to wear its masks while demonstrating.[99] While the decision denying the injunction was stayed, the group conducted its protest with robes and hoods but without masks.[100]

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[91] *Id.*

[92] *Id.* at 162. This is because the religious item was used to demarcate the boundaries within which Orthodox Jews could travel during a religious holiday. *See id.* at 152.

[93] *Id.* at 162.

[94] *See infra* notes 101 and 103 and accompanying text.

[95] 356 F.3d 197 (2d Cir. 2004).

[96] *Id.* at 205 & n.6, 208 (citing Zalewska v. Cnty. of Sullivan, 316 F.3d 314, 319 (2d Cir. 2003)).

[97] *Id.* at 199–200.

[98] *Id.* at 200–01. The statute provided that a person is guilty of loitering when such person "[b]eing masked . . . loiters, remains or congregates in a public place with other persons so masked or disguised, or knowingly permits or aids persons so masked or disguised to congregate in a public place." *Id.* at 201.

[99] *Id.*

[100] *Id.*

When the case reached the Second Circuit, the court stated that it had "interpreted *Hurley* to leave intact the Supreme Court's test for expressive conduct in [*Spence*]."[101] The Second Circuit reached this conclusion by citing *Zalewska v. County of Sullivan*.[102] According to *Zalewska*:

> To be sufficiently imbued with communicative elements, an activity need not necessarily embody a narrow, succinctly articulable message, but the reviewing court must find, at the very least, an intent to convey a particularized message along with a great likelihood that the message will be understood by those viewing it.[103]

Applying this standard, the court in *Kerik* found that the wearing of the masks was not protected speech because the mask itself did not convey a message independently of the robe and hood.[104] In other words, the audience would conclude that the members of the American Knights were associated with the KKK just by looking at the robe and hood; the mask did nothing to add to that impression.[105]

III. RESOLUTION OF THE CIRCUIT SPLIT: WHY THE ELEVENTH CIRCUIT IS CORRECT

A. The Sixth, Ninth, and Eleventh Circuits: Correct Both Textually and Policy-Wise

The Sixth and Ninth Circuit's approach[106] is textually sound. By first stating that the intent to convey a particularized message needs to be present, but then stating a "narrow, succinctly articulable message" is not required,[107] these circuits have essentially lowered the particularized requirement, rather

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[101] *Id.* at 205 n.6.

[102] 316 F.3d 314, 319 (2d Cir. 2003).

[103] *Id.* (citations omitted) (internal quotation marks omitted); *see also infra* Part III.C (pointing out the similarity of this statement to the Sixth and Ninth Circuit's approach, but explaining why the Second Circuit's test is different).

[104] 356 F.3d at 206.

[105] *Id.*

[106] *See supra* notes 60–61, 69–70 and accompanying text.

[107] Kaahumanu v. Hawaii, 682 F.3d 789, 798 (9th Cir. 2012) (citing Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., 515 U.S. 557, 569 (1995)); Blau v. Fort Thomas Pub. Sch. Dist., 401 F.3d 381, 388 (6th Cir. 2005) (citing *Hurley*, 515 U.S. at 569).

than just clarifying it.[108] In fact, the factual scenario in *Kaahumanu* closely mirrors the factual scenario in *Hurley* because, like a parade, a wedding combines multifarious messages, such as messages about the couple and their beliefs, as well as their relationship to the community and to each other.[109] Just as the point of a parade is to express a message,[110] the core message of a wedding is a celebration of marriage and uniting two people in a lifelong relationship.[111] Because the facts of *Kaahumanu* closely parallel the facts of *Hurley*, the Ninth and Sixth Circuits have correctly stated that *Hurley* lowered the threshold of the first *Spence* factor.

The Sixth and Ninth Circuit's approach was best phrased by the Eleventh Circuit, which explicitly stated that *Hurley* "liberalized" the *Spence* test by lowering the particularized requirement.[112] In the Eleventh Circuit, the new test would be whether a reasonable person would understand some sort of message, not whether an observer would necessarily infer a specific message.[113]

One of the benefits of the Eleventh Circuit's test is that it is pragmatic. An audience might not be able to understand the specific message the actor intended to convey, but the audience might be able to understand a different message.[114] Yet, the conduct would still be protected as symbolic speech.[115] This

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[108] *See infra* Part III.C (distinguishing the Sixth and Ninth Circuit's test from the Second Circuit's test, which uses very similar language).

[109] *Kaahumanu*, 682 F.3d at 799 (citing *Hurley*, 515 U.S. at 569–70).

[110] *Hurley*, 515 U.S. at 568.

[111] *Kaahumanu*, 682 F.3d at 799.

[112] Holloman *ex rel.* Holloman v. Harland, 370 F.3d 1252, 1270 (11th Cir. 2004) (citing *Hurley*, 515 U.S. at 569).

[113] *Id.*

[114] *Compare* Doe *ex rel.* Doe v. Yunits, No. 001060A, 2000 WL 33162199, at *4 (Mass. Super. Ct. Oct. 11, 2000) (finding that a student had particularized the message of expressing her gender identity by wearing feminine clothing, and that the audience would understand that exact message), *aff'd sub nom.* Doe v. Brockton Sch. Comm., No. 2000-J-638, 2000 WL 33342399 (Mass. App. Ct. Nov. 30, 2000), *with Holloman*, 370 F.3d at 1270 ("Even if students were not aware of the specific message Holloman was attempting to convey, his fist clearly expressed a generalized message of disagreement or protest directed toward . . . the school, or the country in general."), *and* Zalewska v. Cnty. of Sullivan, 316 F.3d 314, 320 (2d Cir. 2003) ("[I]t is difficult to see how Zalewska's broad message would be readily understood by those viewing her since no particularized communication can be divined simply from a woman wearing a skirt.").

[115] *See Holloman*, 370 F.3d at 1270 ("Even if students were not aware of the specific message Holloman was attempting to convey, his fist clearly expressed a

strikes the right balance between protecting an individual's right to free speech and the Supreme Court's admonition that not everything can be considered speech.[116] For example, the conduct of wearing a skirt to express cultural values in *Zalewska* would still probably not be protected under the Eleventh Circuit's test because no one would understand that message, or any other message, from wearing a skirt.[117] That could be contrasted with a situation like *Holloman ex rel. Holloman v. Harland*, in which the raising of a fist to protest another student's punishment, which has some particularization, was protected because students could infer multiple messages, although not a particular one.[118] Protecting speech where the audience does not understand the exact same message the actor intends to convey is beneficial: An actor like the student in *Holloman* clearly intended to express a message, and protection should not hinge on the audience's ability to perceive that same message, as long as it could understand some message from the conduct. This is especially true if conduct could convey multiple messages, yet the actor intended to convey only one message.[119]

One could argue that allowing an audience to understand a different message from the one the actor intended to convey does not serve the conception of the First Amendment as maintaining the "marketplace of ideas."[120] According to this theory, there is a seller with an idea, and there is a buyer looking for an idea.[121] All ideas should enter into the marketplace of ideas so that individual buyers can pick and choose which ideas to accept from sellers.[122] Therefore, if an audience-buyer understands a different message from the one the actors-sellers intended their

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generalized message of disagreement or protest directed toward . . . the school, or the country in general."). In fact, there is even a suggestion that *Spence* itself only required that the audience understand some message, not the particular message the actor intended the conduct to convey. Laurie Magid, Note, *First Amendment Protection of Ambiguous Conduct*, 84 COLUM. L. REV. 467, 486 (1984).

[116] *See infra* note 138 and accompanying text; *see also infra* Part III.B–C (arguing that the Third Circuit protects too much conduct, while the Second Circuit protects too little conduct).

[117] 316 F.3d at 320.

[118] 370 F.3d at 1270.

[119] *See* Magid, *supra* note 115, at 478.

[120] *See* Robert A. Sedler, *The "Law of the First Amendment" Revisited*, 58 WAYNE L. REV. 1003, 1017 (2013).

[121] *See* Lamont v. Postmaster Gen., 381 U.S. 301, 308 (1965) (Brennan, J., concurring).

[122] *See* Sedler, *supra* note 120.

conduct to convey, the marketplace of ideas is altered so that the roles of actors and sellers are not as important: They do not have to put as much effort into communicating their exact message. Therefore, maybe the particularization of the conduct is important to this theory insofar as it helps an audience understand the exact message the actor intended to communicate.

Yet, courts should not protect the marketplace of ideas at the expense of an individual's autonomy. The First Amendment's primary and most important purpose is to "protect *all* forms of peaceful expression in all of its myriad manifestations."[123] "While not all cases provide a clear answer to [whether something is symbolic speech], courts should err on the side of protecting expression."[124] The courts have emphasized this on multiple occasions because they have recognized the importance of protecting an individual's freedom, as compared to other goals.[125] In fact, to have a marketplace of ideas, individual autonomy needs to be protected: Individuals must be willing to come forward with a message they would like to express in a marketplace.

The Eleventh Circuit's test protects individual autonomy as a primary goal in two ways. First, actors' freedom in expressing themselves through their conduct is protected by lowering the particularized requirement. If there is a chance that their conduct will not be protected as speech just because it is not particularized enough, people may be deterred from engaging in such conduct.[126]

Second, allowing the audience to understand a different message from the one the actor intended to convey protects individuals' freedom in self-expression. If an audience understands a different message from the one the actor intended

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[123] Bery v. City of New York, 97 F.3d 689, 694 (2d Cir. 1996) (emphasis added) (citing Abood v. Detroit Bd. of Educ., 431 U.S. 209, 231 (1977)).

[124] James M. Gottry, Note, *Just Shoot Me: Public Accommodation Anti-Discrimination Laws Take Aim at First Amendment Freedom of Speech*, 64 VAND. L. REV. 961, 1000 (2011).

[125] *See* C. Edwin Baker, *Autonomy and Free Speech*, 27 CONST. COMMENT. 251, 270–80 (2011) (highlighting cases where the Supreme Court recognized the need to protect autonomy).

[126] *See* LEE C. BOLLINGER, THE TOLERANT SOCIETY 78–79 (1988) ("The very likely prospect of [failing to protect the liberty of speech] would itself have an inhibiting effect on expression, for . . . many people will choose not to exercise their liberty for fear they would be the victims of those systemic failures . . . .").

to convey, and the First Amendment would protect that conduct, people are more likely to express themselves. This security, then, is important for protecting a person's autonomy in self-expression.

Because of this greater degree of autonomy, a larger, more diverse group of people can communicate with a wider variety of messages.[127] This is particularly true because many people may not be able to express their intent in a particularized way, yet they may still have a message they want to convey. It is especially true because conduct with a wide variety of messages will still be protected, so long as the audience can understand some message from it, even if that message is different from the one the actor intended to convey.[128]

One may question how the court in *Holloman* arrived at the reasonable person standard, because *Spence v. Washington* requires that "those who viewed it" understand the message.[129] However, this was ambiguous in *Spence*, because the case itself suggested two different approaches.[130] On the one hand, it could mean actual viewers, but the Supreme Court probably did not intend to limit the audience to this circumscribed class because it explicitly stated that nobody saw Spence's flag before the police arrived to take it down.[131] Also, the Court did not even consider the policemen who came to take the flag down as the audience.[132]

On the other hand, "those who viewed it" could mean reasonable observers. This standard is a practical approach, for two reasons. First, it would be difficult to locate and interview actual observers about what they understood the conduct to mean.[133] Second, if only one actual observer in an audience does not understand the message the actor intended to convey, would that mean the actor loses constitutional protection? Surely, an actor should not lose First Amendment protection just because one audience member cannot perceive or understand that actor's conduct. This would especially be true if the message were not as

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[127] Magid, *supra* note 115, at 467.

[128] *See supra* Part II.B.

[129] 418 U.S. 405, 411 (1974) (per curiam). This also mirrors the criticism of the Third Circuit's statement that there was no language in *Spence* indicating that the two factors were necessary factors. *See infra* Part III.B.

[130] Magid, *supra* note 115, at 485.

[131] *Id.*

[132] *Id.*

[133] *Id.* at 485–86.

particularized as *Spence* required before *Hurley*. The Eleventh Circuit approach handles this problem by focusing on the reasonable observer.

B. *Criticisms of the Third Circuit: Potentially Correct Textually, but Not Policy-Wise*

While the Third Circuit's test[134] could be correct textually, it would not produce the wisest policy. Textually, it could be true that *Hurley* eliminated the "particularized" requirement of the *Spence* test by stating that a narrow, succinctly articulable message is not a necessary condition. Even if a "narrow, succinctly articulable message" is not equivalent to being "particularized,"[135] that confusion was eliminated in *Hurley*, in which the Supreme Court stated that "a narrow, succinctly articulable message is not a condition of constitutional protection, *which if confined to expressions conveying a 'particularized message,' would never reach the unquestionably shielded painting of Jackson Pollock*."[136] Thus, the Supreme Court may have indicated that a message no longer needs to be particularized in order to receive constitutional protection.

There is room for debate whether eliminating the "particularized" aspect of the *Spence* test is a sound approach for adjudicating symbolic speech cases. On the one hand, there is an argument that the First Amendment would protect more speech this way, without regard to how particularized the actors intended their conduct to be.[137] On the other hand, it is just not feasible for the First Amendment to protect conduct whenever a person intends to express any idea at all. The Supreme Court acknowledged this by stating that it "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."[138] If one were to take a literal reading of the

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[134] *See supra* notes 89–90 and accompanying text.

[135] *See supra* note 103 and accompanying text.

[136] Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., 515 U.S. 557, 569 (1995) (emphasis added) (citation omitted) (quoting Spence v. Washington, 418 U.S. 405, 411 (1974) (per curiam)).

[137] Of course, the less particularized a message is, the less likely it is that the speech will be protected because it would fail the second prong of the *Spence* test: If a message is not too particularized, there is a lower likelihood that those who view it will understand it. *See supra* note 114 and accompanying text.

[138] United States v. O'Brien, 391 U.S. 367, 376 (1968).

first prong of the test and ignore pragmatic thinking, there could be no limit on what could be protected as speech under that prong if the actor did not intend to convey a particularized message.

Thus, there could be a danger that protecting more conduct, and so safeguarding people's autonomy, sacrifices other values that society deems more important than an individual's right to self-expression. A group could block a police station because it thinks that looking at a police station is important; a couple could walk hand-in-hand in the middle of Fifth Avenue because it believes publicly displaying affection is healthy for the relationship. Yet, in each of these instances, there are overriding public interests, such as the ability to respond to an emergency and the need for traffic to move, respectively. In such instances, these actions cannot be recognized as speech.

A degree of particularization is the best tool for determining whether conduct should be protected, since it would guard against pretextual claims like the ones above while ensuring that other interests are protected as well. An advocate of the Third Circuit's approach might argue that such interests could also be served by a balancing test, eliminating the need for a particularization requirement. For example, in *United States v. O'Brien*,[139] the Court held, in part, that regulation of expressive conduct is permissible if the regulation furthers an important or substantial government interest.[140] Similarly here, an advocate of the Third Circuit's approach might argue that conduct could be protected as speech unless there is an important or substantial governmental interest that weighs against the individual interest of the speaker. This approach is problematic for two reasons. First, a balancing test allows for even more discretion and uncertainty than an inquiry into particularization.[141] Second, precisely because every individual has the ability to act and to come up with any message at all for the conduct, courts cannot afford to presume that all conduct is speech. In short, some level of particularization is necessary to recognize conduct as speech, which is one of the benefits of the Eleventh Circuit's test.

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[139] 391 U.S. 367 (1968).

[140] *Id.* at 376–77.

[141] *See* San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 98–99 (1973) (Marshall, J., dissenting) ("A principled reading of what this Court has done reveals that it has applied a spectrum of standards . . . .").

By eliminating the particularized requirement, the Third Circuit shifts the burden of determining whether conduct is protected as speech to the second prong of the test, which is audience understanding. However, in the Third Circuit's case, that prong is ill-equipped for that purpose. Asking whether the actors intended for their conduct to communicate a message to people whom they expected would observe the conduct is confusing because it could blend actual and potential observers, which are two separate groups. In other words, do the people who the actors expected to observe the conduct include actual viewers, potential viewers, or both? For instance, by hanging the flag with a peace symbol from his window, the plaintiff in *Spence* presumably expected his neighbors to observe his conduct. Some neighbors may have actually observed the flag, but maybe others did not, making the latter group only potential viewers.

Blending actual and potential observers is an untenable position. Asking whether the actors intended their conduct to communicate to actual observers might yield a different response than asking whether the actors intended their conduct to communicate to potential observers.[142] The answer to this question could also differ from case to case, which leads to inconsistency in applying the test. This is a problem unique to the Third Circuit, since other courts usually state which audience they are examining.[143] Even in those cases in which courts do not specifically state whether they are looking at actual or potential observers, they at least identify a group as the audience.[144]

Perhaps the Third Circuit would be able to use a few tools to make its determination, such as imputing an actual audience's understanding onto a potential audience rather than surmising what the latter would understand. Although this would be easy to apply, it does not seem fair because a potential audience could understand a completely different message from the actual

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[142] *See* Magid, *supra* note 115, at 485 (stating that two different approaches are the actual observer standard and the potential observer standard).

[143] *See* Zalewska v. Cnty. of Sullivan, 316 F.3d 314, 320 (2d Cir. 2003) (focusing on the "ordinary viewer"); Doe *ex rel.* Doe v. Yunits, No. 001060A, 2000 WL 33162199, at *4 (Mass. Super. Ct. Oct. 11, 2000) (focusing on faculty and students by looking at their reactions to the plaintiff's way of dressing), *aff'd sub nom.* Doe v. Brockton Sch. Comm., No. 2000-J-638, 2000 WL 33342399 (Mass. App. Ct. Nov. 30, 2000).

[144] *See, e.g.*, Holloman *ex rel.* Holloman v. Harland, 370 F.3d 1252, 1270 (11th Cir. 2004) (looking at "students").

audience; this goes against the Third Circuit's requirement that the audience understand the same message as the one the actor intended to convey.

The only room for debate with the Third Circuit's test could be whether *Spence* originally required that the audience understand the same message the actor intended to convey or whether the audience could glean a different message from the conduct.[145] There is support for the suggestion that the audience would have to understand the same message the actor intended to convey.[146] But again, this aspect of the Third Circuit's test falls short for two reasons. First, like the Eleventh Circuit provides, the protection of conduct should not depend on the audience's ability to perceive the exact same message that the actor intended to convey, so long as it could understand some message. This is especially true if the conduct could convey multiple messages, yet the actor intended to convey only one message.[147] In that case, what are the chances that the audience would perceive the exact same message? For example, if someone is wearing a red, white, and blue necklace and intends to convey a message about support for the troops, an audience could understand a message about support for the United States, not necessarily support for the troops. It is more likely that someone would understand a message about the former rather than the latter. Therefore, although this requirement would maintain the traditional marketplace of ideas because the actor's role in expressing a message is more necessary, it would not maintain the actor's autonomy, which should not be denied.[148]

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[145] *Compare* Magid, *supra* note 115, at 486–87 ("*Spence* requires only that the observer recognize that the conduct expresses some message, not that he understand the particular meaning the actor intends."), *with Yunits*, 2000 WL 33162199, at *4 (finding that the student's message of gender identity expression by wearing feminine clothing was understood by the audience).

[146] Spence v. Washington, 418 U.S. 405, 410–11 (1974) (per curiam) ("An intent to convey a particularized message was present, and in the surrounding circumstances the likelihood was great that *the* message would be understood by those who viewed it." (emphasis added)).

[147] *See supra* Part III.A.

[148] *See supra* Part III.A (discussing how requiring the audience to understand the same message as the one the actor intended to convey maintains the marketplace of ideas, allows the audience to understand a different message, and helps protect autonomy).

Second, requiring the audience to understand the same message as the one the actor intended the conduct to convey demonstrates an inherent contradiction in the Third Circuit's approach. On the one hand, the Third Circuit eliminates the particularized requirement, which would protect more conduct at the expense of other interests.[149] On the other hand, the requirement that the audience understand the same message the actor intended the conduct to convey would recognize less conduct, because it is probable, more often than not, that the audience gleans a different message than what was intended. Therefore, the Third Circuit essentially seeks to recognize more conduct while recognizing less conduct at the same time, which is a contradiction unique to that circuit.[150]

Additionally, for the proposition that there are other criteria to use to determine if the First Amendment will protect conduct, the court in *Tenafly* cited only one Third Circuit case, *Troster v. Pennsylvania State Department of Corrections*.[151] According to *Troster*, there was no language in *Spence* that (1) an intent to convey a particularized message (2) that would then be understood by those who viewed it were necessary factors.[152] Although this is true, it still ignores the fact that those factors were relied on in *Texas v. Johnson*[153] and *Clark v. Community for Creative Non-Violence*,[154] as well as countless lower court decisions.[155] Citing *Troster* is problematic because the Third Circuit's new test could lead to many different, unanticipated problems, since it may not have been used much. Even though the *Spence* factors are still "signposts,"[156] the court did not make

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[149] *See supra* Part III.B.

[150] The Eleventh Circuit (1) lowers the particularized requirement and (2) allows the audience to understand a different message from the one the actor intended to convey, both protecting more speech. *See supra* Part III.A. Conversely, the Second Circuit (1) keeps a higher particularized requirement and (2) requires the audience to understand the same message the actor intended to convey, both limiting what speech is protected. *See infra* Part III.C.

[151] 65 F.3d 1086 (3d Cir. 1995).

[152] *Id.* at 1090 n.1.

[153] 491 U.S. 397, 404 (1989).

[154] 468 U.S. 288, 305 (1984).

[155] *See, e.g.*, Church of Am. Knights of the Ku Klux Klan v. Kerik, 356 F.3d 197, 205 (2d Cir. 2004); Zalewska v. Cnty. of Sullivan, 316 F.3d 314, 319 (2d Cir. 2003).

[156] Tenafly Eruv Ass'n v. Borough of Tenafly, 309 F.3d 144, 160 (3d Cir. 2002).

it clear how the factors would be used as signposts. Conversely, at least the *Spence* factors have been tested on numerous occasions.

C. Criticisms of the Second Circuit: Wrong Textually and Policy-Wise

If the Third Circuit's test may have been correct textually, but not the best test in terms of protecting an individual's right to free speech, the Second Circuit's test[157] is wrong textually and does not sufficiently protect an individual. By stating that a particularized requirement is intact after *Hurley*'s statement that "a narrow, succinctly articulable message is not a condition of constitutional protection, which if confined to expressions conveying a 'particularized message,' would never reach the unquestionably shielded painting of Jackson Pollock,"[158] the Second Circuit at first glance seems to be applying the same test as the Sixth and Ninth Circuits, which lowered the particularized threshold.[159] However, by specifically stating that the *Spence* factors are intact, the Second Circuit is not lowering the threshold; instead, it may have provided an understanding of what particularized means.[160] Maybe the Second Circuit believes that just a coherent message is needed.

However, there are two problems with this thought. First, *Hurley* did not simply clarify what "particularized" means; instead, *Hurley* lowered the threshold. In fact, if the particularized requirement were merely clarified, *Hurley* would not have been decided the way it was because the parade in *Hurley* did not have a coherent message.[161] Second, by keeping a higher level of particularization than the Eleventh Circuit, the Second Circuit maintains discretion for judges to decide whether conduct is protected. Judges have to somehow decide whether

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[157] *See supra* notes 102–03 and accompanying text.

[158] Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., 515 U.S. 557, 569 (1995) (citation omitted) (quoting Spence v. Washington, 418 U.S. 405, 411 (1974) (per curiam)).

[159] *See supra* notes 60–61, 69–70 and accompanying text.

[160] *See Kerik*, 356 F.3d at 205 n.6 ("[W]e are mindful of *Hurley*'s caution against demanding a narrow and specific message . . . .").

[161] *Hurley*, 515 U.S. at 569–70 ("[A] private speaker does not forfeit constitutional protection simply by combining multifarious voices, or by failing to edit their themes to isolate an exact message as the exclusive subject matter of the speech.").

something is particularized highly enough, which leads to inconsistency. For instance, while expressing cultural values by wearing a skirt was not particularized enough,[162] neither was the even vaguer message of needing money while panhandling.[163] Yet, a message about training and technique, and beauty and creativity through fighting, was considered particularized.[164] If individuals are not sure whether their intent is particularized enough, they may not act at all, leading to a chilling effect on speech.[165] At least with a lower particularized requirement, there is less discretion in deciding whether conduct is minimally particularized.

The Second Circuit, however, does address one of the problems of the Third Circuit's test: Eliminating the particularized requirement will protect too much conduct.[166] If conduct will only be protected where the actor intends to convey a particularized message, then conduct where the actor intends to convey a generalized and vague idea will not receive First Amendment protection.[167] Since an audience is more likely to understand the actual message the actor intended to convey if the message is more particularized,[168] the Second Circuit helps maintain the traditional conception of the marketplace of ideas, where the actor plays a more important role in expressing a message.[169]

But, in the name of preserving the marketplace of ideas, the Second Circuit's test stifles autonomy in two ways: (1) by not lowering the particularized requirement, and (2) by requiring that the audience understand the same message as the one the actor intended to convey. On the contrary, if the actor's intent in

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[162] Zalewska v. Cnty. of Sullivan, 316 F.3d 314, 319–20 (2d Cir. 2003).

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

[164] Jones v. Schneiderman, 974 F. Supp. 2d 322, 333–34 (S.D.N.Y. 2013).

[165] *See* BOLLINGER, *supra* note 126.

[166] *See supra* Part III.B; *see also* City of Dall. v. Stanglin, 490 U.S. 19, 25 (1989) ("It is possible to find some kernel of expression in almost every activity a person undertakes . . . but such a kernel is not sufficient to bring the activity within the protection of the First Amendment.").

[167] *See Zalewska*, 316 F.3d at 319. There, the plaintiff wore a skirt to express her cultural values. *Id.* The Second Circuit ruled that this is too broad of a message to convey, and so would not receive constitutional protection. *Id.* at 319–20.

[168] *See supra* note 114 and accompanying text.

[169] *See supra* Part III.A (discussing how requiring the audience to understand the same message as the one the actor intended to convey protects the marketplace of ideas).

conveying a message no longer needs to be so particularized, and if an audience understands a different message from the one the actor intended to convey, which are the two requirements according to the Eleventh Circuit, people are more likely to express themselves because there is less fear that their conduct will not be recognized as speech.[170]

IV. WHY THE DIFFERENCES MATTER: APPLICATION OF THE TESTS

The Second, Third, and Eleventh Circuits have all addressed the question of whether conduct is protected as symbolic speech quite differently.[171] These interpretations differ in very important respects, from how particularized the message needs to be to whether the audience needs to understand the same message the actor intended the conduct to convey. This has important policy implications, for it could either deter or encourage speech. The following case illustrates the different tests and the importance of these differences.

A. Teenagers and Online Pictures

The case examined under the three different tests is *T.V. ex rel. B.V. v. Smith-Green Community School Corp.*[172] In *T.V.*, teenage girls took pictures of themselves in sexually suggestive positions and subsequently posted them on the Internet.[173] Because of these photographs, the girls were suspended from extracurricular activities.[174] The girls brought an action, claiming that their suspension violated their rights to free speech.[175] The teenagers said they posted the photographs because they thought the photographs were funny, and the teenagers wanted to share that.[176] The court held that the First Amendment protected the girls' conduct because "the images . . . had a particularized message of crude humor likely to be understood by those they expected to view the conduct."[177] The court found a particularized message of crude humor

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[170] *See supra* Part III.A.
[171] *See supra* Part II.
[172] 807 F. Supp. 2d 767 (N.D. Ind. 2011).
[173] *Id.* at 772.
[174] *Id.* at 773.
[175] *Id.* at 771.
[176] *Id.* at 772.
[177] *Id.* at 776.

because the photographs themselves were silly and inflammatory, which could be at the heart of humor for many teenagers, and because they were staged.[178]

B. Application of the Different Tests

1. The Third Circuit

Applying the different tests to *T.V.* would each yield a different outcome. Under the Third Circuit's test, the conduct of staging sexually suggestive poses and posting them on the Internet would be protected because it is sufficiently imbued with elements of communication. There was the intent to convey a message of crude humor to teenagers whom the girls expected would observe the images. There was a great likelihood that the audience would understand that same message because, according to the court, the poses were funny and provocative for teenagers.[179]

2. The Second Circuit

On the contrary, under the Second Circuit's test, this activity may not be protected as speech because the teenage girls' conduct does not have a particularized message. Instead, the message about crude humor seems rather broad. Just as in *Zalewska v. County of Sullivan*,[180] a message about cultural values was too broad,[181] and in *Young v. New York City Transit Authority*,[182] a message that a beggar on a subway needs money was too generic,[183] here, a message of crude humor also seems too broad. Yet, because of the wide degree of discretion this test affords judges, perhaps being funny could be considered particularized enough for a judge.[184] This is a problem because if individuals do not know if their conduct will be considered speech, they may choose not to act at all.[185]

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[178] *Id.* at 775–76.
[179] *Id.* at 776.
[180] 316 F.3d 314 (2d Cir. 2003).
[181] *Id.* at 319.
[182] 903 F.2d 146 (2d Cir. 1990).
[183] *Id.* at 153.
[184] *See supra* Part III.C.
[185] *See supra* Part III.C.

3. The Eleventh Circuit

Unlike the Second Circuit, the Eleventh Circuit's test would protect this activity, and rightly so. The girls' conduct would be recognized as symbolic speech because a reasonable observer is likely to understand *some* message from the plaintiffs' conduct. As stated by the court, an audience is likely to understand the humor behind the girls' conduct because it is consistent with the audience's idea of humor at that age.[186] Perhaps a reasonable observer could have understood a different message from the one the plaintiffs intended to convey. For instance, the teenagers may have intended to convey a message of humor, but a reasonable observer could have understood the girls' conduct to convey that they are promiscuous. Yet, the conduct would still be protected.

The distinction between these tests is very important for the individual. The message behind posing in sexually suggestive positions could contribute an idea about the sexuality of teenage girls to the marketplace of ideas. But, if teenagers interpreted a different message from the pictures, the traditional conception of the marketplace of ideas is altered, since the teenage girls' role is lessened. The Eleventh Circuit's approach overcomes this potential shortcoming by protecting people's autonomy in expressing themselves, such as the teenage girls in *T.V.* "The fact that . . . 'offensive' speech here may not address 'important' topics [such as] 'ideas of social and political significance,' . . . does not mean that it is less worthy of constitutional protection."[187]

CONCLUSION

In the seminal case of *Spence v. Washington*, the Supreme Court laid out a two-factor test to determine if conduct would be protected as symbolic speech under the First Amendment: (1) there was an intent to convey a particularized message, and (2) in the surrounding circumstances, the likelihood was great that the message would be understood by those who viewed it.[188] Years later, in *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*, the Supreme Court stated that "a narrow,

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[186] *See* T.V. *ex rel.* B.V. v. Smith-Green Cmty. Sch. Corp., 807 F. Supp. 2d 767, 775–76 (N.D. Ind. 2011).

[187] Young v. Am. Mini Theatres, Inc., 427 U.S. 50, 87 (1976) (Stewart, J., dissenting).

[188] 418 U.S. 405, 410–11 (1974) (per curiam).

succinctly articulable message is not a condition of constitutional protection, which if confined to expressions conveying a 'particularized message,' would never reach the unquestionably shielded painting of Jackson Pollock."[189] Since then, lower courts have interpreted *Hurley*'s impact on the *Spence* factors differently. While some circuits have concluded that the *Spence* factors are intact and perhaps just clarified, others have interpreted *Hurley* to completely eliminate the "particularized" requirement, while others have assessed *Hurley* to lower the "particularized" threshold. However, *Hurley* clearly lowers the threshold so that only some sort of message is required; *Hurley* would not have been decided the way it was if the test were otherwise. Because the "particularized" threshold is lowered, an observer should be able to understand a different message from the one the actor intended to convey. The Eleventh Circuit captures this new standard best, which helps protect an actor's autonomy. However, until the Supreme Court clarifies *Hurley*'s impact on *Spence*, the confusion will continue.

[189] 515 U.S. 557, 569 (1995) (citation omitted) (quoting *Spence*, 418 U.S. at 411).