

# The Suppression of a *Saggin'* Expression: Exploring the “Saggy Pants” Style Within a First Amendment Context

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## INTRODUCTION

Sunrays dance in his single cubic zirconia earring as he walks toward the local mall’s entrance. The latest hit single is escaping from the seventeen-year-old’s earphones; he sends a mass text message to his friends announcing his arrival at the mall. But the young man will soon have an unplanned expense thrown into his weekly \$25 allowance: as he goes to open the door to enter the mall’s food court, cops sitting atop a parked squad car spot the high-school student and fine him \$100. What was his offense? He was wearing saggy<sup>1</sup> pants.

The fashion police did not fine the high-school student because his plaid boxer shorts were exposed to others due to his oversized jeans. The *real* police fined the high-school student because his plaid boxer shorts were exposed to others due to his oversized jeans—an actual offense in several cities.<sup>2</sup> In fact, this legal fad has made worldwide news.<sup>3</sup> In June 2008, a film crew from a Japanese television program, World Travelog, ventured to Opa-Locka, Florida, to shoot footage regarding the city’s ordinance banning saggy pants.<sup>4</sup> The footage was for a segment on unusual laws in foreign countries.<sup>5</sup> Another Florida anti-saggy-pants law made international headlines when it was spotlighted in *The Weirdest Legal Cases of 2008*.<sup>6</sup> The saggy-pants law of

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1. The “sagging” of pants “involves the wearing of pants below the waistline.” Angelica M. Sinopole, Comment, “No Saggy Pants”: *A Review of the First Amendment Issues Presented by the State’s Regulation of Fashion in Public Streets*, 113 PENN ST. L. REV. 329, 331 (2008).

2. See, e.g., Jasper County, S.C., Ordinance 08-15 (Dec. 15, 2008).

3. See *Opa-Locka: Japanese Take Interest in Saggy Pants Law: A Japanese Television Program Focusing on Unusual Laws in Foreign Countries Takes an Interest in the Ban on Saggy Pants on City Property*, MIAMI HERALD, June 12, 2008, at 5.

4. *Id.*

5. *Id.* The producer of World Travelog, Takayuki “Yuk” Oe, revealed that he chose to investigate Opa-Locka’s “No Saggy Pant Ordinance” because “[i]t is a strange and funny law that we want to tell people about and many of the parents in Japan will think this is a good law because the kids there are also now wearing their pants low from the Hip-Hop culture.” *Id.* Oe was specifically interested in interviewing Opa-Locka City Commissioner Timothy Holmes about his reasons for sponsoring such an “odd” ordinance. *Id.* Holmes stated that the anti-saggy pants campaign came about because he realized “that dress codes are required for restaurants, schools, the opera and most public places.” *Id.* “Thus, he launched his campaign against wearing of apparel below the derriere.” *Id.*

6. Gary Slapper, *The Weirdest Legal Cases of 2008*, TIMES ONLINE (London), Dec. 5, 2008, <http://business.timesonline.co.uk/tol/business/law/article5288066.ece>.

Riviera Beach, Florida, imposed a \$150 fine for the first offense and a \$300 fine for the second offense.<sup>7</sup> A case involving the Riviera Beach law was ranked the fourth weirdest case of 2008.<sup>8</sup>

Laws such as these have become a method for cities across the nation to deal with the “saggy pants” fashion that has become extremely popular among the youth population, especially young men and boys.<sup>9</sup> In 2004, there were efforts to outlaw saggy pants in Virginia and Louisiana; however, the statewide proposals failed after being met with freedom-of-expression claims.<sup>10</sup> But the latest anti-saggy-pants proposals have taken a different approach, drawing on indecency laws, and have successfully become legal standards of dress.<sup>11</sup> City councils across the nation have responded in various ways to the idea of saggy pants laws: some locations have been able to pass the controversial ordinances;<sup>12</sup> other locations are in the drafting stages;<sup>13</sup> and still other locations have rejected the idea of enacting laws to regulate saggy pants.<sup>14</sup> The repercussions of current saggy-pants laws range from simply being asked to leave the premises of a public location,<sup>15</sup> to monetary fines,<sup>16</sup> to jail time.<sup>17</sup> One of the proposed saggy-pants laws would require that offenders not only pay a fine, but also undergo counseling regarding the direction of their lives.<sup>18</sup>

Although cities across the United States have chosen to legally combat what is viewed by some to be no more than a fashion faux pas, organizations, leaders, and scholars have reacted with cries of illegality, racial profiling, and the creation of a

7. *Id.*

8. *Id.* For a discussion of Riviera Beach’s law, see *infra* Part II.A.

9. See generally Robin M. Chandler & Nuri Chandler-Smith, *Flava in Ya Gear: Transgressive Politics and the Influence of Hip-Hop on Contemporary Fashion*, in TWENTIETH-CENTURY AMERICAN FASHION 229 (Linda Welters & Patricia A. Cunningham eds., 2005) (discussing the influence of hip-hop culture on fashion).

10. Niko Koppel, *Are Your Jeans Sagging? Go Directly to Jail.*, N.Y. TIMES, Aug. 30, 2007, at G1.

11. *Id.*

12. See *id.* Delcambre, Louisiana, has been successful in passing a saggy-pants ordinance. *Id.* For an examination of Delcambre’s law, see *infra* Part II.A.

13. See *id.* Trenton, New Jersey, is in the drafting stage of passing a saggy-pants ordinance. *Id.*

14. See Johnny Edwards, *Saggy Pants Law Pulled by Main Backer*, AUGUSTA CHRONICLE (Ga.), Dec. 3, 2008 (“The Augusta Commission killed a proposed saggy pants law . . . with its sponsor calling it unneeded and a possible infringement on free expression.”).

15. *E.g.*, *Opa-Locka*, *supra* note 3. Opa-Locka’s ordinance requires that lawbreakers leave the premises. *Id.*

16. *E.g.*, Marti Convington, *S.C. County Outlaws Saggy Pants*, CHARLOTTEOBSERVER.COM, Dec. 16, 2008, <http://www.charlotteobserver.com/breaking/story/418092.html>. Violators of Jasper County’s saggy-pants law could face monetary fines. *Id.*

17. *E.g.*, Koppel, *supra* note 10. Delcambre’s law allows for jail time as a possible repercussion of wearing saggy pants. *Id.*

18. See Associated Press, *Crackdown! Cities Begin to Belt Wearers of Saggy Pants—But Do Laws Violate Rights?*, MSNBC.COM, Sept. 17, 2007, <http://www.msnbc.msn.com/id/20817735/>; cf. Richard T. Ritenbaugh, *Essay: The Real Solution to Baggy Pants*, C.G.G. WEEKLY (Charlotte, N.C.), Sept. 21, 2007, <http://cgg.org/index.cfm/fuseaction/Library.CGGWeekly/ID/4666/Real-Solution-Saggy-Pants.htm> (proposing that the solution to the saggy pants dilemma is marriage).

cultural wedge due to the increasingly popular saggy-pants laws. The American Civil Liberties Union (ACLU) of Michigan believes that the new saggy-pants law in Flint, Michigan, “gives police authority to conduct unconstitutional searches and seizures, promotes racial profiling, violates due process and interferes with individuals’ freedom to express themselves in their appearance.”<sup>19</sup> Debbie Seagraves, the executive director of the ACLU of Georgia, commented on efforts in Georgia to pass saggy-pants laws: “I don’t see any way that something constitutional could be crafted when the intention is to single out and label one style of dress that originated with the black youth culture, as an unacceptable form of expression.”<sup>20</sup> In an interview with Black Entertainment Television, Chad Dion Lassiter, a sociology professor at the University of Pennsylvania, said that “legislating against the [saggy-pants] fashion ‘pushes the already rebellious youths’ further away.”<sup>21</sup> Interestingly, while saggy-pants laws have been viewed as unfair because they tend to target black youths, “many African Americans support them, believing that such attire is demeaning to the [Black] culture because it is derived from prison.”<sup>22</sup>

Prisoners have been known to wear saggy pants because belts are normally prohibited attire.<sup>23</sup> Belts have been used “to commit suicide by hanging oneself, to hang others, or to use as a weapon in fights” with others in the prison setting.<sup>24</sup> Another reason why prisoners have reportedly been known to wear saggy pants is to convey to other prisoners their homosexuality.<sup>25</sup> As prisoners were released from jail, their saggy pants followed and infiltrated the world of hip-hop and urban culture.<sup>26</sup> Many who wear saggy pants deny the style’s prison roots for their inspiration and state that it was hip-hop culture that supplied them with this fashion trend.<sup>27</sup> As more and more rappers began to display the fad, the youth began to follow their saggy lead.<sup>28</sup> Implementation

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19. Sarah Tompkins, *ACLU to Flint: Lay Off Saggy Pants*, DETROIT FREE PRESS, July 15, 2008, at A1.

20. Koppel, *supra* note 10.

21. *Saggy Pants Serve as Cultural Wedge*, BET.COM, Oct. 23, 2007, [http://www.bet.com/News/NewsArticleSaggyPants.htm?wbc\\_purpose=Basic&WBCMODE=PresentationUnpublished](http://www.bet.com/News/NewsArticleSaggyPants.htm?wbc_purpose=Basic&WBCMODE=PresentationUnpublished).

22. *Id.* Some people also believe the saggy-pants style is degrading because “the trend has a history in slavery, when masters wouldn’t allow males to wear belts as a way to degrade them.” Dan Klepal, *Pair Focuses on Pants Problem: Campaign Seeks to End Sagging Trend*, COURIER-JOURNAL (Louisville, Ky.), Dec. 7, 2008, at B1.

23. *See* Koppel, *supra* note 10; *see also* Klepal, *supra* note 22.

24. Shamontiel L. Vaughn, *Sagging Pants: Hip Hop Trend or Prison Trend?*, ASSOCIATED CONTENT, May 27, 2007, [http://www.associatedcontent.com/article/257484/sagging\\_pants\\_hip\\_hop\\_trend\\_or\\_prison.html?cat=46](http://www.associatedcontent.com/article/257484/sagging_pants_hip_hop_trend_or_prison.html?cat=46); *see also* Klepal, *supra* note 22; Koppel, *supra* note 10; Sinopole, *supra* note 1, at 331 (“Supposedly, prison inmates were denied belts to hold up their loose prison clothing because of the belt’s potential use as a means to commit suicide or as a weapon against others.”).

25. Vaughn, *supra* note 24.

26. *Id.*; *see also* Sinopole, *supra* note 1, at 331 (“In the late 1980s and early 1990s, hip-hop and R&B music artists promoted the [saggy-pants] style through their music videos and CD covers. From there, the fashion spread throughout neighborhoods across the nation . . .”).

27. *See* Koppel, *supra* note 10.

28. Posting of Malcolm Venable to HamptonRoads.com, <http://hamptonroads.com/2008/09/what-do-lil-waynes-saggy-pants-mean> (Sept. 10, 2008, 12:05 PM) (“But before we

of saggy-pants laws has been the reaction of local governments across the United States in the fight against the apparently offensive trend of oversized pants.<sup>29</sup>

This Note argues that wearing saggy pants is an unconventional, expressive form of conduct and that many saggy-pants ordinances are unconstitutional because they cannot meet the symbolic-speech standard first used in *United States v. O'Brien*.<sup>30</sup> Part I establishes the wearing of saggy pants as an unconventional, expressive form of conduct. Part II analyzes the constitutionality of three saggy-pants laws: Delcambre, Louisiana; Jasper County, South Carolina; and Riviera Beach, Florida. Part III sets forth alternatives to the implementation of saggy-pants laws. This Note concludes by calling for the repeal of all saggy-pants laws and for local governments to consider alternatives to address the dilemma of saggy pants.

#### I. WEARING SAGGY PANTS IS AN UNCONVENTIONAL, EXPRESSIVE FORM OF CONDUCT

Wearing saggy pants should be viewed as an unconventional, expressive form of conduct that deserves First Amendment protection. Although the style's roots may have begun in prison, it has grown into an expressive form of conduct for young adults who have been influenced by hip-hop culture, especially in the United States.<sup>31</sup> From the jazzy style of zoot suits<sup>32</sup> to the pastel colors of *Miami Vice*-influenced trousers,<sup>33</sup>

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blame rappers, remember that they're entertainers. Like other elements of hip hop culture, this particular facet of expression has been appropriated into real life in a contrast against societal norms. In other words, when Eminem raps about putting someone in a trunk . . . these aren't things most people incorporate into their real lives. Jeans, however, are fairly democratic; they are easy to buy and wear low.").

29. See, e.g., Jasper County, S.C., Ordinance 08-15 (Dec. 15, 2008) ("Jasper County Council believes that at a minimum, the standards of dress set forth [within the ordinance] for all persons within the county send important messages to the people of this area and particularly to the young people of Jasper County that their dress is important to the general welfare, health, peace, order and security of the community.").

30. 391 U.S. 367, 377 (1968) ("[A] government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.").

31. Hip-hop fashions have influenced young adults not only within the United States, but also around the world. See Chandler & Chandler-Smith, *supra* note 9, at 232.

The relevance of hip-hop as a global movement, its nascent cultural principles which seem to instantly syncretize with cultural forms in Turkey, Japan, South Africa, Cuba, Germany and varied cultural sites, points to its resiliency and power as a hypertext of embodiment and empowerment.

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... The hip-hop movement, as a set of aesthetic practices, reverberates with the reinvention of style which has deeply influenced youth cultures around the world, thereby transmitting broader American culture and ideological referents to remote corners of the globe to maximum effect.

*Id.* at 232, 234.

32. See Koppel, *supra* note 10.

33. See Patricia A. Cunningham, Heather Mangine & Andrew Reilly, *Television and Fashion in the 1980s*, in TWENTIETH-CENTURY AMERICAN FASHION, *supra* note 9, at 209, 213.

twentieth-century American fashions have been known to indulge the imaginations of each generation by combining the worlds of popular culture and the fashion industry.<sup>34</sup> “Hip-hop style, as an extension of American ‘black’ fashion, gives form to [this] generation’s fantasies and identities of choice by experimenting and appropriating from preceding systems of American, African and Latino taste to create new mythologies.”<sup>35</sup>

Because the saggy-pants style communicates a message of fashionable disobedience, this Part of the Note establishes that wearing saggy pants is an expressive form of conduct through which the style assures individual self-fulfillment in a democratic society, that saggy pants are a form of communication, and that the saggy-pants style satisfies the expressive-conduct test of *Spence v. Washington*.<sup>36</sup>

*A. Freedom to Wear Saggy Pants Assures Individual Self-Fulfillment and Democratic Self-Government*

Within First Amendment doctrine, several theories have been used to justify the outer limits of freedom of expression. Jurists and First Amendment scholars alike have developed these theories with reference to the underlying values served by the First Amendment.<sup>37</sup> The four major theories of free expression are truth theory, democracy theory, self-fulfillment theory, and tolerance theory.<sup>38</sup> Two theories in particular, the self-fulfillment theory and the democracy theory, are important in assessing the

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34. Chandler & Chandler-Smith, *supra* note 9, at 231.

35. *Id.*

36. 418 U.S. 405 (1974).

37. A description of these First Amendment values was provided by Justice Brandeis in his concurring opinion in *Whitney v. California*, 274 U.S. 357 (1927), which was joined by Justice Holmes:

Those who won our independence believed that the final end of the State was to make men free to develop their faculties . . . . They valued liberty both as an end and as a means. . . . They believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth; that without free speech and assembly discussion would be futile; that with them, discussion affords ordinarily adequate protection against the dissemination of noxious doctrine; that the greatest menace to freedom is an inert people; that public discussion is a political duty . . . . They recognized the risks to which all human institutions are subject. But they knew that order cannot be secured merely through fear of punishment for its infraction; that it is hazardous to discourage thought, hope and imagination; that fear breeds repression; that repression breeds hate; that hate menaces stable government; that the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies; and that the fitting remedy for evil counsels is good ones. Believing in the power of reason as applied through public discussion, they eschewed silence coerced by law—the argument of force in its worst form.

*Id.* at 375 (Brandeis, J., concurring).

38. ERWIN CHERMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES § 11.1.2, at 924–30 (3d ed. 2006). Justice Brandeis’s *Whitney* concurrence explains the rationales underlying each of these theories. See *Whitney*, 274 U.S. at 375; CHERMERINSKY, *supra* § 11.1.2, at 926.

constitutionality of wearing saggy pants because the theories provide a framework for the legal discussion of regulating dress in a public sphere.<sup>39</sup>

“The right of the individual to freedom of expression has deep roots in our history.”<sup>40</sup> The function of free expression has evolved since its birth during the social movement of the Renaissance and has grown into several categories, including the assurance of individual self-fulfillment.<sup>41</sup>

First, the right to freedom of expression can be justified “as the right of an individual purely in his capacity as an individual. It derives from the widely accepted

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39. Although truth theory and tolerance theory *may* have some relevance for assessing the constitutionality of saggy-pants laws, neither theory is as persuasive as self-fulfillment theory or democracy theory in this context.

Truth theory is based on the premise that the best way to find truth and expand human knowledge is to allow for the free exchange of ideas. *See* *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) (“[T]he best test of truth is the power of the thought to get itself accepted in the competition of the market.”). The foremost proponent of truth theory, John Stuart Mill, argued that “[i]f all mankind minus one, were of one opinion, and only one person were of the contrary opinion, mankind would be no more justified in silencing that one person, than he, if he had the power, would be justified in silencing mankind.” JOHN STUART MILL, *ON LIBERTY* 14 (Dover Publ’ns, Inc. 2002) (1859). Silencing this one person’s opinion is not merely a personal injury to the speaker; it is an assault on humanity because we can never be truly assured that the opinion we are trying to suppress is false. *Id.* Even if we were sure of the opinion’s falsity, silencing it would still constitute an evil on mankind because its presence invites the world to discuss it and prove it unfounded. *Id.* at 14–18. Truth theory, best described as the “marketplace of ideas” theory, has become a bedrock principle in the Supreme Court’s First Amendment jurisprudence. *See, e.g.,* *New York Times Co. v. Sullivan*, 376 U.S. 254, 272 n.13 (1964) (quoting John Stuart Mill); *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942) (stating that “such utterances [(fighting words)] are no essential part of any *exposition of ideas*, and are of such slight social value *as a step to truth*” (emphasis added)); *see also* Susan H. Williams, *Content Discrimination and the First Amendment*, 139 U. PA. L. REV. 615, 677 (1991) (“The truth theory is perhaps the best established theory explaining why free speech should receive special protection. . . . Moreover, this theory has enjoyed some real acceptance in the courts.”). Truth theory is not particularly applicable in the context of saggy-pants laws because people generally do not wear saggy pants to contribute to a marketplace of ideas concerning the correct or truthful way to wear pants.

Tolerance theory, developed by Lee Bollinger, argues that tolerance is a generally desirable goal for society and free speech carves out a special exception where tolerance can be fostered. LEE BOLLINGER, *THE TOLERANT SOCIETY: FREEDOM OF SPEECH AND EXTREMIST SPEECH IN AMERICA* 120 (1986). Protecting distasteful speech is itself an act of tolerance, and thus, free speech serves as a model for fostering tolerance in society at large. *Id.* The difficulty in using tolerance theory for assessing the constitutionality of saggy-pants laws is that there are certain things in society that should not be tolerated, such as genocide or murder—intolerance is a social necessity. Moreover, the debate around saggy-pants laws is whether saggy pants should be tolerated, so a tolerance theory argument would amount to arguing that saggy pants should be tolerated because tolerance is good. Additionally, the novelty of this theory suggests it has not reached the importance in the Court’s First Amendment jurisprudence as the other three free expression theories have.

40. Thomas I. Emerson, *Toward a General Theory of the First Amendment*, 72 *YALE L.J.* 877, 878 (1963).

41. *Id.*

premise of Western thought that the proper end of man is the realization of his character and potentialities as a human being.”<sup>42</sup> Man is capable of thinking in abstract terms, using language, and creating culture; this places Man in a separate category from all other animals.<sup>43</sup> “From this it follows that every man—in the development of his own personality—has the right to form his own beliefs and opinions. And, it also follows, that he has the right to express these beliefs and opinions. Otherwise they are of little account.”<sup>44</sup> Therefore, “the suppression of belief, opinion and expression is an affront to the dignity of man.”<sup>45</sup>

Second, the right to freedom of expression can be justified by “basic Western notions of the role of the individual in his capacity as a member of society.”<sup>46</sup> Man is a social animal and joins his fellow men to create a common culture.<sup>47</sup> As a member of his community, man has the right to express his beliefs and opinions because the purpose of society is to promote the welfare of the individual and every individual is entitled to the opportunity to share in decisions that affect him.<sup>48</sup> To fully participate as a member of his community, man has the responsibility to participate in formulating the aims and achievements of his community, but that responsibility carries with it the right to free expression.<sup>49</sup>

Within the system of freedom of expression, there is a group of rights afforded to individuals within society; this cluster of rights “includes the right to form and hold beliefs and opinions on any subject, and to communicate ideas, opinions, and information through *any medium*— in speech, writing, music, art, or in other ways.”<sup>50</sup>

In addition to the self-fulfillment theory, democracy theory may be used as a tool in evaluating the constitutionality of wearing saggy pants. Democracy theory stems from a general premise that each person has two functions in a democracy—as a public citizen and as a private individual—and the First Amendment applies only to a person’s role as a public citizen who votes.<sup>51</sup> There are at least two variations of the democracy theory: when narrowly interpreted the theory only encompasses “political

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42. *Id.* at 879.

43. *Id.*

44. *Id.*

45. *Id.*

46. *Id.* at 880.

47. *Id.*

48. *Id.*

49. *Id.*

50. THOMAS I. EMERSON, *THE SYSTEM OF FREEDOM OF EXPRESSION* 1 (1971) (emphasis added). *But see* LARRY ALEXANDER, *IS THERE A RIGHT OF FREEDOM OF EXPRESSION* 131–32 (2005) (concluding that autonomy theories cannot justify the special treatment of expression) (“If autonomy is important, why is autonomy regarding expression more important than autonomy regarding conduct? It cannot be because expression is harmless and conduct is potentially harmful. Expression can cause all sorts of harms, as we have seen, many of which themselves reduce autonomy.”).

51. *See* ALEXANDER MEIKLEJOHN, *POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE* 107 (1960) (“[W]ith respect to political belief, political discussion, political advocacy, [and] political planning, our citizens are sovereign, and the Congress is their subordinate agent.”).

speech,”<sup>52</sup> and when broadly interpreted the theory posits that free speech furthers the decision making necessary for self-government.<sup>53</sup>

The narrower approach, articulated by Robert Bork, would limit First Amendment protection to “explicitly and predominantly political speech”; specifically, “protected speech should consist of speech concerned with governmental behavior, policy or personnel.”<sup>54</sup> Bork’s theory would not extend First Amendment protection to the arts, literature, science, or any other related field that helps shape our ability to govern.<sup>55</sup>

The broader democratic approach articulated by Meiklejohn would not only afford protection to scientific and academic expression, but also to art, literature, science, and philosophy because these forms of expression shape our ability to participate in democratic decision making.<sup>56</sup> This approach has been expanded upon to include “individual self-realization,” which can either be interpreted as protecting the development of the individual’s powers and abilities or as protecting the individual’s control over his or her own destiny through life-affecting decision making.<sup>57</sup>

Of these two democracy theories, the Supreme Court’s First Amendment jurisprudence seems to adopt the broader approach for two reasons. First, the obscenity standard articulated by the Court in *Miller v. California*<sup>58</sup> recognizes constitutional protection for prurient sexual materials that, “taken as a whole,” have “serious literary, artistic, political, or scientific value.”<sup>59</sup> Whereas prurient sexual materials that do not possess such attributes are not constitutionally protected speech.<sup>60</sup> The Court has thus incorporated the broader principles of democracy theory into its jurisprudence by protecting speech that has “literary, artistic, political, or scientific value.” Second, Bork’s argument starts with the premise that the majority opinions in *Gitlow v. New York*<sup>61</sup> and *Whitney v. California*<sup>62</sup> were correct.<sup>63</sup> But the Court in *Brandenburg v. Ohio*<sup>64</sup> expressly rejected the reasoning and holding of *Whitney* (which relied on *Gitlow*).<sup>65</sup> Thus, the narrower democracy theory has previously been rejected by the Court.

Under the self-fulfillment theory, those who wish to express themselves by wearing saggy pants should be allowed to do so because there is a message in the wearing of saggy pants: *fashionable disobedience*.<sup>66</sup> When commenting on anti-saggy-pants laws,

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52. See, e.g., Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1 (1971).

53. See MEIKLEJOHN, *supra* note 51 at 109.

54. Bork, *supra* note 52, at 27–28.

55. *Id.* at 28.

56. See *id.* at 115–24.

57. Martin H. Redish, *The Value of Free Speech*, 130 U. PA. L. REV. 591, 593 (1982).

58. 413 U.S. 15 (1973).

59. *Id.* at 24.

60. *Id.*

61. 268 U.S. 652 (1925).

62. 274 U.S. 357 (1927).

63. Bork, *supra* note 52, at 31.

64. 395 U.S. 444 (1969).

65. *Id.* at 449 (“The contrary teaching of *Whitney v. California* cannot be supported, and that decision is therefore overruled.”).

66. See *infra* Part I.C.1 (describing the intentional, particularized message conveyed by wearing saggy pants).

Dr. Benjamin Chavis, the former executive director of the National Association for the Advancement of Colored People, proclaimed:

[C]riminaliz[ing] how a person wears their clothing is more offensive than what the remedy is trying to do. . . . The focus should be on cleaning up the social conditions that the [style] comes out of. . . . [Sagging pants are a] statement of the reality that [saggy pants-wearers are] struggling with [daily].<sup>67</sup>

The popularization of saggy pants has become a generation's way of rebelliously freeing themselves from the expectations laid upon them by society. Saggy-pants wearers essentially convey the message: "If y'all don't like us or the way we talk or the way we act, we don't really care."<sup>68</sup> Thus, under the theory of self-fulfillment, the voice of saggy-pants wearers must be heard so as to not marginalize their status within society, by devaluing their personhood and turning saggy-pants wearers into second-class citizens<sup>69</sup> simply because of their *fashionable disobedience*. When the government allows others to express themselves through fashion, but outlaws the wearing of saggy pants, the government is essentially saying it respects the right of expression for some, but not others.<sup>70</sup> Such disrespect to the social position of saggy-pants wearers is unfortunate because the style conveys an intentional and particularized message of *fashionable disobedience*.

While wearing saggy pants would not be protected under Bork's narrow view of democracy theory because the style would not be considered traditional "political speech," under a broader theory of democratic self-government, an individual's decision to wear saggy pants should be afforded First Amendment protection. For example, a saggy-pants wearer could be wearing saggy pants as a form of art and that individual's decision to wear saggy pants would be protected under Meiklejohn's framework. The viewpoint of saggy-pants wearers could help to inform the democratic process and generate solutions<sup>71</sup> without creating inequality among groups in the democratic society. Under Redish's "individual self-realization" theory, the fashion of saggy pants would also be protected because the style is an expression of a group's way of expressing their *fashionable disobedience* of cultural expectations. Therefore, as long as the wearing of saggy pants is a form of expression that furthers the value of the self-realization for the individual, then the style is afforded full constitutional protection. Overall, the theoretical underpinnings of self-fulfillment and democratic self-governance should extend First Amendment protection to the wearing of saggy pants in public—thus strengthening the position that anti-saggy-pants laws should be deemed unconstitutional.

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67. Koppel, *supra* note 10. Dr. Chavis is chairman of the Hip-Hop Summit Action Network, a coalition he cofounded with music mogul Russell Simmons, and has said that the coalition will challenge the ordinances in court. *Id.*

68. DANIEL GRASSIAN, *WRITING THE FUTURE OF BLACK AMERICA: LITERATURE OF THE HIP HOP GENERATION* 11 (2009) (quoting KEVIN POWELL, *KEEPIN' IT REAL: POST-MTV REFLECTIONS ON RACE, SEX, AND POLITICS* 210 (1997)).

69. *See* Williams, *supra* note 39, at 684 (arguing that a broad concept of content discrimination is both appropriate and useful).

70. *See id.*

71. *See infra* Part III.

*B. Dress as a Form of Communication*

Wearing saggy pants is a form of communication because dress generally can be seen as a form of communication.<sup>72</sup> “[D]ress communicates a sufficiently ‘particularized’ message, understandable by observers, to count as speech in a given instance . . . .”<sup>73</sup> Fashion has been described as a language, code, or system because choices about dress can communicate ideas and statements just as words can.<sup>74</sup> The “difference between verbal language and the language of dress is one of form.”<sup>75</sup> Statements made in the language of dress are more subjective and personal than statements made using words.<sup>76</sup> Clothes are like “statements that always have the word ‘I’ in them,” conveying not only, for instance, that “[t]he war is wrong,” but also that “I think the war is wrong.”<sup>77</sup> The right to manipulate one’s image through dress and call attention to one’s personal beliefs allows one to make a particularly strong statement.<sup>78</sup> “Dress expressions are explicitly personal and subjective in form, whether artistic or not, and putting something on or altering one’s own body is a unique form of expression that communicates affiliation, commitment, and self-definition . . . .”<sup>79</sup>

Wearing saggy pants is a personal, deliberate choice.<sup>80</sup> For example, when a popular rapper performed shirtless and in saggy pants during the 2008 MTV Video Music Awards (VMAs), his attire was purposely chosen.<sup>81</sup> “Certainly [the rapper] knew what he was going to wear onstage at the VMAs, right?”<sup>82</sup> As illustrated through the rapper’s VMA performance wardrobe, this generation has decided to purposely communicate their personal views through the wearing of saggy pants. Just as the

72. See Gowri Ramachandran, *Freedom of Dress: State and Private Regulation of Clothing, Hairstyle, Jewelry, Makeup, Tattoos, and Piercing*, 66 MD. L. REV 11, 45–53 (2006) (proposing a legal right to free dress).

73. *Id.* at 45.

74. *Id.* at 46.

75. *Id.* at 48.

76. *Id.*

77. *Id.*

78. *Id.* at 48, 49.

79. *Id.* at 49.

80. See Posting of Malcolm Venable, *supra* note 28.

81. *Id.*

82. *Id.* Blog author Malcolm Venable argues that the rapper’s sagging pants purposely convey sex. The rapper’s dress choice follows in the footsteps of other black musicians:

Despicable as some might find Lil Wayne’s choice of clothing, it fits into a larger canon of black male musicians for whom clothing and sexuality were intertwined. Think about James Brown, and his jumpsuits with the chest exposed. Think about Isaac Hayes, who took to the stage shirtless, in chains, and revealing tights. Think about Fela Kuti, who often appeared onstage in his underwear. Take Prince, whose sexual clothing ran the gamut from bikinis to androgyny to, as it happens, also exposing his bum . . . at the VMAs. Talk about honoring the legends!

*Id.* (ellipsis in original).

sneaker has become a staple of hip-hop culture, saggy jeans<sup>83</sup> have become a staple item as well.<sup>84</sup>

Becoming popular in the 1970s, jeans grew to provide “a liberating outlet for casual male dressing as much as they allowed young women to liberate themselves from the conventional ‘dress’ codes of femininity.”<sup>85</sup> Young hip-hoppers have personalized the wearing of jeans, making the wearing of jeans “hip-hop.”<sup>86</sup> This sentiment of making clothing “hip-hop” has permeated into the wearing of pants, thus creating the style of saggy pants. So wearing saggy pants is not only illustrating one’s choice not to wear a belt, but saggy pants also represent the “fantasies and identities”<sup>87</sup> of a generation and a conscious effort to express a disobedient attitude against expected conformity.

Hip-hop culture not only has an aesthetic nature that is expressed through music, clothing, language, and art, but also an experiential component.<sup>88</sup> Hip-hop culture places an emphasis on the “struggle to ‘make it out’ of the trappings of urban ghettos.”<sup>89</sup> While not all people who identify with the hip-hop culture live in urban ghettos, many identify with feeling “deprived or marginalized for an almost infinite number of reasons from getting poor grades to romantic failings to family problems.”<sup>90</sup> Hip-hop culture allows those who identify with the culture to express the following: “If y’all don’t like us or the way we talk or the way we act, we don’t really care.”<sup>91</sup> In this expression, “y’all” is anyone who sees saggy pants as being distasteful or disrespectful and “us” is anyone that identifies with hip-hop culture (not exclusively African-Americans) by choosing to express their identification by wearing saggy pants. Thus, for those who choose to express their disdain with conformity through the avenues of hip-hop culture, saggy pants have become a popular vehicle for expression.

### C. Expressive Conduct Analysis

To be a form of protected expressive conduct, the wearing of saggy pants needs to satisfy the two-prong test used in *Spence v. Washington*.<sup>92</sup> In *Spence*, a college student hung a United States flag from the window of his apartment in Seattle, Washington, on May 10, 1970.<sup>93</sup> The student attached a peace symbol made of removable black tape to the flag and hung the flag upside down in the window.<sup>94</sup> Three Seattle police officers

83. Jeans are popularly worn as “saggy,” although sweat pants and shorts can also be worn as “saggy.”

84. See Chandler & Chandler-Smith, *supra* note 9, at 234.

85. *Id.* at 234–35.

86. *Id.* at 235.

87. *Id.* at 231.

88. GRASSIAN, *supra* note 68, at 9. The author refers to the “hip-hop generation” as African Americans only. See *id.* However, for the purposes of this Note, hip-hop culture applies to anyone that is in the United States and identifies with hip-hop culture, regardless of ethnicity.

89. *Id.* (quoting SHAWN A. GINWRIGHT, BLACK IN SCHOOL: AFROCENTRIC REFORM, URBAN YOUTH AND THE PROMISE OF HIP-HOP CULTURE 32 (2004)).

90. *Id.*

91. *Id.* at 11 (quoting KEVIN POWELL, KEEPIN’ IT REAL: POST-MTV REFLECTIONS ON RACE, SEX, AND POLITICS 210 (1997)).

92. 418 U.S. 405, 410–11 (1974).

93. *Id.* at 406.

94. *Id.*

saw the flag in the student's window and entered the apartment, seized the flag, and arrested the student.<sup>95</sup> The student was not charged under Washington's flag-desecration statute, but under Washington's "improper use" statute.<sup>96</sup>

The Supreme Court looked at several factors when analyzing the student's case.<sup>97</sup> These factors included the fact that the flag was privately owned by the student and the flag was displayed on the student's private property.<sup>98</sup> The State and the Washington Supreme Court conceded that the student was engaged in a form of communication.<sup>99</sup> The U.S. Supreme Court had to determine "whether [the student's] activity was sufficiently imbued with elements of communication to fall within the scope of the First and Fourteenth Amendments."<sup>100</sup> The Court also evaluated the State's interests to support the conviction of the student. First, the Court discarded the State's breach-of-the-peace concern because there was nothing to support the claim in the record.<sup>101</sup> Second, the concern of the State to protect the sensibilities of passersby was rejected because the student did not evoke his ideas on a captive audience, nor could the student be punished for failing to show respect for a national emblem.<sup>102</sup> Lastly, the State's interest in preserving the national flag as a symbol of our country was also rejected by the majority because the flag can hold different meanings to different people.<sup>103</sup> "A person gets from a symbol the meaning he puts into it, and what is one man's comfort and inspiration is another's jest and scorn."<sup>104</sup>

The Court concluded that the student's activity, combined with the factual context and environment in which the activity had taken place, was a form of protected expression.<sup>105</sup> "On this record there can be little doubt that [the student] communicated

95. *Id.*

96. *Id.* at 406–07. The Washington statute provided:

No person shall, in any manner, for exhibition or display:

- (1) Place or cause to be placed any word, figure, mark, picture, design, drawing or advertisement of any nature upon any flag, standard, color, ensign or shield of the United States or of this state . . . or
- (2) Expose to public view any such flag, standard, color, ensign or shield upon which shall have been printed, painted or otherwise produced, or to which shall have been attached, appended, affixed or annexed any such word, figure, mark, picture, design, drawing or advertisement . . . .

*Id.* at 407 (quoting WASH. REV. CODE § 9.86.020).

97. *See id.* at 408–15.

98. *Id.* at 408–09.

99. *Id.* at 409. The student stated that he "wanted people to know that [he] thought America stood for peace." *Id.*

100. *Id.* "[W]e cannot accept the view that an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea." *Id.* (quoting *United States v. O'Brien*, 391 U.S. 367, 376 (1968)).

101. *Id.* at 412.

102. *See id.*

103. *Id.* at 412–15. Justice Rehnquist's dissenting opinion adopted essentially the same approach proposed by the state court about preserving the flag's meaning in our country. *Id.* at 420–22 (Rehnquist, J., dissenting).

104. *Id.* at 413 (quoting *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 632–33 (1943)).

105. *Id.* at 409–10. The Court went on to state that that it had recognized the communicative

through the use of symbols. The symbolism included not only the flag but also the superimposed peace symbol.<sup>106</sup> In addition to the use of symbols, the context in which a symbol is used for purposes of expression is also important because the context may give meaning to the symbol.<sup>107</sup> The student's activity was "roughly simultaneous with and concededly triggered by the Cambodian incursion and the Kent State tragedy, . . . issues of great public moment."<sup>108</sup> The Court reasoned that a flag with a peace symbol being displayed upside-down by a student today might be interpreted as nothing more than bizarre behavior, but it would have been difficult for a great majority of Americans to miss the point of the student's message at the time he made it.<sup>109</sup>

So the student's display was not just "an act of mindless nihilism"; it was a purposeful act of expression about the then-current governmental affairs of the United States.<sup>110</sup> "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."<sup>111</sup> Although the State's interest in upholding the conviction of the student was not a deciding factor in the case, the Court determined that the "improper-use" statute was nonetheless unconstitutional as applied to the student's activity<sup>112</sup> and the student's conviction was invalidated.<sup>113</sup>

Thus, to satisfy the *Spence* test and establish the presence of expressive conduct, one must show (1) an intent to convey a particularized message and (2) a likelihood that, in the surrounding circumstances, the message will be understood by those who view it.<sup>114</sup> In the case of saggy pants, the communicative nature of the style should satisfy the *Spence* test.

#### 1. Fashionable Disobedience: The Intentional, Particularized Message of Saggy Pants

When one wears saggy pants, there is generally an intent to convey a particularized message. As illustrated by the rapper's wardrobe selection for his international television performance during the MTV Music Awards,<sup>115</sup> one normally *elects* to wear saggy pants; the style is usually not a product of happenstance. Saggy pants have

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uses of flags on several occasions. "In many of their uses flags are a form of symbolism comprising a 'primitive but effective way of communicating ideas . . .,' and 'a short cut from mind to mind.'" *Id.* at 410 (quoting *W. Va. Bd. of Educ. v. Barnette*, 319 U.S. 624, 632 (1943)).

106. *Id.* at 410.

107. *Id.*; see also *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969) (holding that students wearing black armbands in protest of the Vietnam War at school was permitted because wearing an armband is a symbolic act worthy of First Amendment protection).

108. *Spence*, 418 U.S. at 410.

109. *Id.*

110. *Id.*

111. *Id.* at 410–11 (emphasis added).

112. See *id.* at 413–14.

113. *Id.* at 415.

114. See *id.* at 410–11.

115. See Posting of Malcolm Venable, *supra* note 28; *supra* notes 57–61 and accompanying text.

“symbolic importance” in hip-hop<sup>116</sup> because the style helps construct social meaning for hip-hop culture.<sup>117</sup> The particularized message that saggy pants convey is one of *fashionable disobedience* of cultural expectations through rebellion and identity.<sup>118</sup> “Hip hop replicates and reimagines the experiences of urban life and symbolically appropriates urban space through sampling, attitude, dance, style, and sound effects.”<sup>119</sup> Hip-hop “attempts to negotiate new economic and technological conditions as well as new patterns in race, class, and gender oppression in urban America,” partly by appropriating style.<sup>120</sup> Saggy pants fashionably communicate the message: “If y’all don’t like us or the way we talk or the way we act, we don’t really care.”<sup>121</sup>

Proponents of saggy-pants laws may argue that the “cultural” reasons advanced for wearing saggy pants, such as identifying with the hip-hop culture or rebellion against conformity, are not protected under the First Amendment as expressive conduct.<sup>122</sup> However, the cases used to support this assertion can be distinguished from any possible saggy-pants case that could occur within the public sphere. All expression, whether oral or written or symbolic, is subject to reasonable time, place, and manner restrictions.<sup>123</sup> However, the Court has often noted that time, place, and manner restrictions “are valid provided that they are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information.”<sup>124</sup> The First Amendment restrictions that apply to public employees at work and public school students at school (or doing school-related activities), simply do not apply to individuals in traditional, public forums such as sidewalks and streets. In the area of public employees at work, courts have applied *O’Brien’s* suppression of expression test to workplace dress codes and employers are often victorious under the framework.<sup>125</sup> In the area of school dress requirements, “the Supreme Court has created a student-speech framework that allows schools to restrict certain types of speech that the First Amendment would otherwise protect.”<sup>126</sup>

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116. Chandler & Chandler-Smith, *supra* note 9, at 238–39.

117. *See id.*

118. *See* Associated Press, *Baggy Pants Crackdown Goes National*, CNN.COM, Sept. 17, 2007, available at <http://www.trews.org/node/697> (“For young people, it’s a form of rebellion and identity,” [said] Adrian ‘Easy A.D.’ Harris, 43, a founding member of the Bronx’s legendary rap group Cold Crush Brothers. ‘The young people think it’s fashionable. They don’t think it’s negative.’”).

119. TRICIA ROSE, *BLACK NOISE: RAP MUSIC AND BLACK CULTURE IN CONTEMPORARY AMERICA* 22 (George Lipsitz, Susan McClary & Robert Walser eds., 1994).

120. *Id.*

121. GRASSIAN, *supra* note 68 (quoting KEVIN POWELL, *KEEPIN’ IT REAL: POST-MTV REFLECTIONS ON RACE, SEX, AND POLITICS* 210 (1997)).

122. *See* Sinopole, *supra* note 1, at 344 (“Wearing clothing which expresses vague cultural values is not protected under the First Amendment as expressive conduct.”).

123. *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 (1984).

124. *Id.*

125. *See, e.g.*, James M. McGoldrick, Jr., *United States v. O’Brien Revisited: Of Burning Things, Waving Things, and G-Strings*, 36 U. MEM. L. REV. 903, 925 (2006) (advancing that the time, place, and manner framework is more appropriate to analyze expressive conduct that the *O’Brien* test).

126. Emily Gold Waldman, *Regulating Student Speech: Suppression Versus Punishment*, 85

Two of the cases referred to by proponents of saggy-pants laws, *Zalewska v. County of Sullivan*<sup>127</sup> and *Blau v. Fort Thomas Public School District*,<sup>128</sup> deal with workplace dress requirements and school dress requirements, respectively; however, neither of the cases occurred within traditional public forums.

In *Zalewska*, the appellant was employed by the Sullivan County Transportation Department as a van driver when the county instituted a dress code requiring pants to be worn, rather than skirts.<sup>129</sup> Pants were required because the county believed “pants are safer than skirts for the operators of vans, particularly vans with chair lifts, as the operator must assist customers on and off the vehicle.”<sup>130</sup> *Zalewska* spoke to her supervisor about the new policy, conveying her concerns about wearing pants because as a matter of familial and cultural custom, *Zalewska* was permitted to wear only skirts.<sup>131</sup> The supervisor informed her that she had to wear pants, and *Zalewska* was later suspended for not following the new dress code.<sup>132</sup> *Zalewska* was transferred to a new post where she was permitted to wear a skirt while receiving the same pay.<sup>133</sup> *Zalewska* decided to file suit alleging that the County of Sullivan deprived her of her rights to due process and equal protection under the Fourteenth Amendment, and of her right to free expression under the First and Fourteenth Amendments.<sup>134</sup> The Second Circuit found that *Zalewska*'s wish to only wear skirts did not constitute the expressive conduct that would invoke First Amendment protection because a woman wearing a skirt is only vaguely expressive and would not be readily understood by those viewing her.<sup>135</sup>

Wearing a skirt at work can be distinguished from a person wearing saggy pants on the street. *Zalewska* was at work; dress codes at work should be separated from dress codes within the public sphere. The court understandably concluded that her familial and culture values could not be understood because “a woman today wearing a dress or a skirt on the job does not automatically signal any particularized message about her culture or beliefs.”<sup>136</sup> However, when a person wears saggy pants, the message disrespectfully communicates: “If y'all don't like us or the way we talk or the way we act, we don't really care.”<sup>137</sup> Thus, *Zalewska* choosing to express herself by wearing a skirt to work when she was permitted to wear only pants is vastly different from someone walking down a public street wearing saggy pants.

Those attempting to weaken the argument that wearing saggy pants is a form of protected expression also refer to the *Blau* case to support their position.<sup>138</sup> There,

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IND. L.J. 1115 (2010) (hypothesizing that the Supreme Court's student speech framework currently lacks heightened protection against student punishment; advocating that student punishments should be based on adequate prior notice and be substantively reasonable).

127. 316 F.3d 314 (2d Cir. 2003).

128. 401 F.3d 381 (6th Cir. 2005).

129. *Zalewska*, 316 F.3d at 317.

130. *Id.*

131. *Id.* at 317–18.

132. *Id.* at 318.

133. *Id.*

134. *Id.*

135. *See id.* at 319–20.

136. *Id.* at 320.

137. GRASSIAN, *supra* note 68, at 11 (quoting KEVIN POWELL, KEEPIN' IT REAL: POST-MTV REFLECTIONS ON RACE, SEX, AND POLITICS 210 (1997)).

138. *Blau v. Fort Thomas Pub. Sch. Dist.*, 401 F.3d 381 (6th Cir. 2005).

sixth-grader Amanda Blau and her father challenged the constitutionality of a school dress code, claiming that the dress code violated Amanda's First Amendment right to freedom of expression, her substantive due process right to wear clothes of her choosing, and her father's substantive due process rights to dress his child.<sup>139</sup> The Sixth Circuit held that the Blaus did not meet their burden of showing that the First Amendment protected Amanda's conduct, which amounted to "nothing more than a generalized and vague desire to express her middle-school individuality."<sup>140</sup> Amanda stated in her deposition that she was not trying to convey a particularized message, but that she only wanted to wear clothes that she looked nice in and made her feel good.<sup>141</sup>

Amanda Blau is distinguishable from a person wearing saggy pants on a public street. *Blau* took place in the public school realm, an area where the Supreme Court has allowed school administrators and teachers to have great authority over individual student liberty concerns.<sup>142</sup> School dress codes should be viewed differently than dress codes for the public arena. Amanda wanting to wear clothes that make her "feel good"<sup>143</sup> in school is not legally synonymous to someone wanting to wear saggy pants in public. As a student in a school setting, there are free expression restrictions that can be placed on Amanda that may not be applicable to an individual in a public area.<sup>144</sup> Thus, while wearing saggy pants may make someone "feel good," the disrespectful message of wearing saggy pants is clear and should be constitutionally protected: "If y'all don't like us or the way we talk or the way we act, we don't really care."<sup>145</sup>

## 2. Likelihood of Message Being Understood

In the surrounding circumstances of today's society, it is likely that the viewers of saggy pants will understand the style's fashionably disobedient message. In the world of hip-hop, clothing is often regarded as "a way to make the most powerful statement"

139. *Id.* at 385. Among the prohibitions, the dress code restricted clothing that is too tight, revealing, or baggy; visible body piercing (other than the ears); flip-flop sandals; and high-platform shoes. *Id.* at 385–86.

140. *Id.* at 389.

141. *Id.*

142. See Alison G. Myhra, *No Shoes, No Shirt, No Education: Dress Codes and Freedom of Expression Behind the Postmodern Schoolhouse Gates*, 9 SETON HALL CONST. L.J. 337, 348 (1999) (summarizing how courts have addressed school appearance codes, and examining the tension between student autonomy and the trend of schools teaching societal norms).

143. *Blau*, 401 F.3d at 386. The student opposed the dress code because she wanted to be able to wear clothes that "look[ed] nice on her," that she "[felt] good in," and that expressed her individuality. *Id.*

144. For example, school officials have authority over school-sponsored publications and other expressive activities that students, parents, or members of the public might reasonably construe to be representative of the school. See *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260 (1988) (holding that school officials did not violate the First Amendment by exercising editorial control over the content of a high school newspaper as long as the officials' actions were reasonably related to legitimate pedagogical concerns). Many school officials have interpreted the language from the *Hazelwood* opinion to apply to other areas of student expression such as dress and hair length. See Myhra, *supra* note 142, at 346.

145. GRASSIAN, *supra* note 68.

. . . . Attire visually conveys the message, image, and style of a [hip-hop] artist."<sup>146</sup> For example, one famous rapper is known for wearing a large clock strung around his neck "to signify that it is time for black advancement."<sup>147</sup> West coast rappers appropriated the "Chicano cholo" style of wearing colored bandanas (showing affiliation to different groups) and wearing the tails of their shirts outside of their oversized jeans.<sup>148</sup> A teenage duo popularized saggy pants worn backwards during the early 1990s.<sup>149</sup> While the popularization of saggy pants may seem to complicate the fashionable—"[i]f y'all don't like us or the way we talk or the way we act, we don't really care"<sup>150</sup>—message, the message is still intact enough to be greatly understood by viewers as a type of disobedience. Saggy pants is a fashionable method of rebelling against and disobeying societal expectations; thus, saggy pants are fashion's version of a burning flag.

A popular reason that community leaders pursue saggy-pants ordinances relates to decency issues.<sup>151</sup> However, the Court in *Spence* reiterated that protecting the sensibilities of passersby is not enough to prohibit expressive conduct because "[i]t is firmly settled that under our Constitution the public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers."<sup>152</sup> Many members of society may not want to see the underwear of disobedient youth; but, under the auspices of *Spence*, the saggy pants style should be considered an unconventional form of expressive conduct because the style conveys a particularized message of fashionable disobedience. In the surrounding circumstances of today's society and the internationalization of American hip-hop culture,<sup>153</sup> there is a great likelihood that the disobedient message will be understood by those who view the style.

In *Bivens ex rel. Green v. Albuquerque Public Schools*,<sup>154</sup> the issue of wearing saggy pants in a public school was before the court. Bivens was suspended on several occasions for breaking his public high school's dress code by wearing saggy pants. The student asserted that he wore saggy pants "as a statement of his identity as a black youth" and as a way to identify with black culture.<sup>155</sup> The court ruled that Bivens met the first prong of the *Spence* test in that there is a particularized message in wearing saggy pants; however, Bivens did not meet the second prong of the test because saggy

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146. CHERYL L. KEYES, *RAP MUSIC AND STREET CONSCIOUSNESS* 151 (2004) (quoting THOMAS KOCHMAN, *BLACK AND WHITE STYLES IN CONFLICT* 132 (1981)).

147. *Id.* (discussing Flavor Flav of the rap group Public Enemy).

148. *Id.* at 152.

149. *See id.*

150. GRASSIAN, *supra* note 68.

151. *See, e.g., Opa-Locka, supra* note 3. Opa-Locka city commissioner, Timothy Holmes, sponsored the city's "No Saggy Pant Ordinance" to enforce decency. *Id.*

152. *Spence v. Washington*, 418 U.S. 405, 412 (1974) (quoting *Street v. New York*, 394 U.S. 576, 592 (1969)).

153. *See* NELSON GEORGE, *HIP HOP AMERICA* 201–03 (1998). In Chapter 15 of the book, entitled *Funk the World*, the author describes a night in a hip-hop club overseas: "It is 1995 and I am in a big barn of a nightclub in Zurich, Switzerland. The place is jammed with teenagers and young adults in drooping pants . . ." *Id.* at 201.

154. 899 F. Supp. 556 (D.N.M. 1995).

155. *Id.* at 558.

pants can be interpreted differently by others.<sup>156</sup> The *Bivens* court reasoned that saggy pants are understood by some to be a sign of gang activity or affiliation.<sup>157</sup>

While *Bivens* was about saggy pants, the case can be differentiated from the style in the public sphere. In the *Bivens* case, the court mentions that Bivens failed to provide support for the assertion that others will understand the saggy-pants style; this is part of the reason why Bivens failed to satisfy the second prong of *Spence*.<sup>158</sup> Another reason Bivens failed to show that others would understand his particularized message is that his public school was having gang-activity issues and the school's dress code was a reasonable response to the gang activity. Thus, as in the case of Amanda Blau, the aftermath of several Supreme Court cases<sup>159</sup> have provided educators with the legal framework to interpretatively regulate dress. In fact, a recent Supreme Court case<sup>160</sup> may have laid the groundwork to give educators unprecedented control over student speech—a legal phenomenon that has not similarly occurred in traditional public forums.<sup>161</sup>

Therefore, the court's conclusion in *Bivens* is not unreasonable. School administrators should be able to control gang violence, or other disturbances to the learning environment, through dress codes. However, *Bivens* still does not reflect the constitutionality of an anti-sagging dress code in the public sphere. Additionally, the court was correct when it concluded that wearing saggy pants is not necessarily associated with one racial or cultural group.<sup>162</sup> As previously mentioned, hip-hop style may be rooted in Black-American culture, but the style has invaded communities of different ethnicities, colors, and creeds around the world.<sup>163</sup> Because of hip-hop's roots and history, one of the cornerstones of hip-hop's culture—the saggy-pants style—has come to convey a message of “[i]f y’all don’t like us or the way we talk or the way we act, we don’t really care.”<sup>164</sup> Society as a whole should accept that it understands this message, even if “y’all” do not agree with the style.

## II. CONSTITUTIONAL ANALYSIS OF SAGGY PANTS ORDINANCES

When community leaders regulate against the saggy-pants style, their interest in prohibiting the conduct is related to the suppression of expression through the saggy

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156. *See id.* at 560–61.

157. *Id.* at 561.

158. *See id.* (“Plaintiff merely argues that ‘there is a great likelihood that those who observe this expressive conduct will understand the message.’”).

159. *See, e.g., Hazelwood v. Kuhlmeier*, 484 U.S. 260 (1988); *Bethel Sch. Dist. v. Fraser*, 478 U.S. 675 (1986) (holding that public school students could be suspended for using sexual innuendos in a speech before the student body at a student assembly).

160. *Morse v. Frederick*, 551 U.S. 393, 397 (2007) (holding that “schools may take steps to safeguard those entrusted to their care from speech that can reasonably be regarded as encouraging illegal drug use”).

161. *See* Francisco M. Negron, Jr., *A Foot in the Door? The Unwitting Move Towards a “New” Student Welfare Standard in Student Speech After Morse v. Frederick*, 58 AM. U. L. REV. 1221 (2009) (discussing the use of the word “safeguard” in the *Morse* opinion and how the case may be the basis for the development of the “student welfare” standard).

162. *See id.*

163. *See* Chandler & Chandler-Smith, *supra* note 9, at 232.

164. GRASSIAN, *supra* note 68.

pants. Currently, there are at least twelve saggy-pants ordinances in effect throughout the United States,<sup>165</sup> including Atlanta, Baltimore, Dallas, and Charlotte, with at least ten other cities nationwide considering the implementation of pants ordinances to quell the popularity of the style.<sup>166</sup> However, most, if not all, of these ordinances are unconstitutional because the local government's interest in regulating the conduct is related to the suppression of expression through saggy pants. This Part will first examine three saggy-pants ordinances and then evaluate saggy-pants ordinances under the analysis of *Texas v. Johnson*.<sup>167</sup>

#### A. Three Saggy-Pants Ordinances

The following three saggy-pants ordinances were chosen because these ordinances accurately represent the current state of saggy-pants laws and the lengths communities are willing to go to in order to eliminate the fashion.

Delcambre, Louisiana, was the first community to successfully pass its ordinance<sup>168</sup> to outlaw saggy pants in June 2007.<sup>169</sup> Delcambre's ordinance also carries one of the more severe fines for daring to wear the saggy pants fashion—up to six months in jail and a hefty \$500 fine.<sup>170</sup> The law applies to the “exposure of the buttocks, genitals and undergarments of both men and women.”<sup>171</sup>

Jasper County, South Carolina, is one of the latest communities to pass an ordinance outlawing saggy pants. On December 15, 2008, the Jasper County Council passed an ordinance<sup>172</sup> prohibiting anyone from wearing pants more than three inches below the

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165. See *Has Saggin' Gone Too Far? The Baggy Pants Debate*, ASSOCIATED CONTENT, Feb. 11, 2008, [http://www.associatedcontent.com/article/577913/has\\_saggin\\_gone\\_too\\_far\\_the\\_baggy\\_pants.html](http://www.associatedcontent.com/article/577913/has_saggin_gone_too_far_the_baggy_pants.html).

166. See *Saggy-Pants Laws No Longer Butt of Jokes*, RICHMOND TIMES DISPATCH (Va.), Sept. 12, 2008, at A4.

167. 491 U.S. 397 (1989).

168. The ordinance in Delcambre, Louisiana, reads:

It shall be unlawful for any person in any public place or in view of the public to be found in a state of nudity, or partial nudity, or in dress not becoming to his or her sex, or in any indecent exposure of his or her person or undergarments, or be guilty of any indecent or lewd behavior.

Jeff Moore, *Sagging Bagged by Town*, DAILY IBERIAN (New Iberia, La.), June 12, 2007, <http://iberianet.com/articles/2007/06/12/news/news/news56.txt>.

169. Johnny Edwards, *Official Proposes Saggy Pants Law*, AUGUSTA CHRON., Nov. 25, 2008, at B1.

170. *Legally Saggin'*, CURRENT EVENTS, Oct. 6, 2008, at 6.

171. Editorial, *La. Town's 'Saggy Pants Law' Is Unfair*, DAILY REVEILLE (Baton Rouge, La.), June 14, 2007, <http://www.lsureveille.com/opinion/1.1176735>.

172. Ordinance 08-15 in Jasper County, South Carolina, specifies the following:

3. PROHIBITION OF CERTAIN ATTIRE; DUTIES OF PARENTS AND GUARDIANS.

A. It shall be prohibited for any person to appear in a public place wearing his or her pants more than three (3) inches below his or her hips (crest of the ilium) and thereby exposing his or her skin or intimate clothing.

hips, exposing skin or undergarments.<sup>173</sup> The ordinance also prohibits parents and guardians from allowing minor children to don the now-outlawed style.<sup>174</sup> The new law carries with it a fine between \$25 and \$500.<sup>175</sup> “The law will be enforced by the Jasper County Sheriff’s Office, municipal police officers and the Jasper County administrator.”<sup>176</sup> The saggy-pants ordinance that was passed was a revised version of the originally proposed law, which included a maximum penalty of thirty days in jail.<sup>177</sup>

Riviera Beach, Florida’s saggy-pants law<sup>178</sup> has gained national fame for being deemed unconstitutional by a Florida judge.<sup>179</sup> On March 11, 2008, Mayor Thomas Masters’s saggy-pants law won 72% of the voters’ approval.<sup>180</sup> The area was the first large city to pass a saggy-pants law through an election, and Mayor Masters celebrated the acceptance of the law by saying, “I am thankful to the people who came out and voted their conscience and defined what is indecent in our city.”<sup>181</sup> Riviera Beach’s saggy-pants lawbreakers faced a \$150 fine or community service for their first offense,

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B. It shall be prohibited for any custodial parent or guardian to willfully allow their minor to appear in a public place wearing his or her pants more than three (3) inches below his or her hips (crest of the ilium) and thereby exposing his or her skin or intimate clothing.

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#### 5. VIOLATIONS AND PENALTIES.

A. A person who violates a provision of Section 3 of this ordinance shall be guilty of an infraction, punishable by a fine of not less than twenty-five (\$25.00) dollars, nor more than five hundred (\$500.00) dollars.

B. Violation of this ordinance is hereby declared to be a public nuisance, which may be abated by the County by restraining order, preliminary and permanent injunction, or other means provided for by law and the County may take action to recover the cost of the nuisance abatement.

C. Each day of a continuing violation of this ordinance shall be considered a separate and distinct infraction.

Jasper County, S.C., Ordinance 08-15 (Dec. 15, 2008).

173. Covington, *supra* note 16.

174. *Id.*

175. *Id.*

176. *Id.*

177. *Id.*

178. Riviera Beach, Fla., Ordinance 3043 (Mar. 11, 2008). The ordinance, entitled “Wearing of Pants Below the Waist in Public,” specifies:

(a) It shall be unlawful for any person to appear in public or in view of the public, wearing pants below the waist which expose the skin or undergarments.

(b) Any person convicted of violating the provisions of this section shall be punished by a fine of \$150.00 or shall be given community service to perform.

(c) Any person convicted of a second or subsequent offense of violating the provisions of this section shall be punished by a fine of \$300.00.

(d) Any person who fails to pay a fine or complete community service as set forth herein may be imprisoned for a term not exceeding sixty (60) days.

*Id.*

179. Eliot Kleinberg, *Judge Releases Teen, Criticizes Riviera Beach’s Saggy Pants Law*, PALM BEACH POST, Sept. 16, 2008, at 1B.

180. William Cooper, Jr., *Saggy Pants Will Cost the Wearer a \$150 Fine*, PALM BEACH POST, Mar. 12, 2008, at 5B.

181. *Id.*

while a second offense earned a \$300 fine or more community service; habitual violators could face up to sixty days in jail.<sup>182</sup>

However, in September 2008, Circuit Judge Paul Moyle declared Riviera Beach's saggy-pants law unconstitutional in the case of seventeen-year-old Julius Hart.<sup>183</sup> Hart was charged with breaking the saggy-pants law when an officer spotted Hart riding his bicycle with four to five inches of blue and black boxer shorts sticking out of his black trousers.<sup>184</sup> A charge against Hart for wearing saggy pants meant a violation of his probation on a marijuana possession charge, so he was taken to jail.<sup>185</sup> When given Hart's case, Judge Moyle ridiculed the law, saying:

We're not talking about exposure of buttocks. No! We're talking about someone who has on pants whose underwear are apparently visible to a police officer who then makes an arrest and the basis is he's then held overnight, no bond. No bond! . . . You can have Speedo underwear, which is way less than boxer shorts, and that is perfectly legal, but boxer shorts, with pants over them, is not?<sup>186</sup>

"Moyle ruled the law unconstitutional 'based on the limited facts of [the] case,'" and "[i]nstead of issuing bail . . . released Hart on his own recognizance."<sup>187</sup> In April 2009, Riviera Beach's saggy-pants ordinance was before the court again and was deemed unconstitutional on its face by County Judge Laura Johnson.<sup>188</sup> Johnson found that there was no legitimate governmental interest and declared that no matter how "tacky or distasteful" the saggy-pants style is perceived to be, the Fourteenth Amendment's freedom of choice and liberties requirements must prevail.<sup>189</sup>

Delcambre's law illustrates the severe penalties that communities are willing to impose on saggy pants-wearers. Jasper's law shows the continuing trend of looking to law to alleviate the woes caused by the saggy pants dilemma. The Riviera Beach law conveys that saggy pants ordinances can create grounds for confusion and mockery. Ordinances about saggy pants appear to be the main ingredient in a recipe of unconstitutional, legal disaster.

### B. Suppression of Expression Analysis

In *Texas v. Johnson*,<sup>190</sup> the Supreme Court applied the suppression of expression analysis, first used by the Supreme Court in *United States v. O'Brien*,<sup>191</sup> to hold that a

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182. *Id.*

183. Kleinberg, *supra* note 179.

184. *Id.*

185. *Id.*

186. *Id.*

187. *Id.*

188. Susan Spencer-Wendel, *Let 'em Sag, Judge Says*, PALM BEACH POST, Apr. 23, 2009, at 1A.

189. *Id.*

190. 491 U.S. 397 (1989).

191. 391 U.S. 367, 376 (1968) (stating that "when 'speech' and 'nonspeech' elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment

state may not make it a criminal offense to burn the American flag.<sup>192</sup> During the 1984 Republican National Convention in Dallas, Texas, Johnson participated in a protest against the policies of the Reagan Administration and of certain Dallas-based corporations.<sup>193</sup> During the demonstration, Johnson took out an American flag, poured kerosene on it, and set it on fire.<sup>194</sup> While the flag burned the protestors chanted, “America, the red, white, and blue, we spit on you.”<sup>195</sup> No one was hurt in the fire, but several witnesses testified that they were “seriously offended by the flag burning.”<sup>196</sup>

The Court of Appeals for the Fifth District of Texas affirmed Johnson’s conviction, but the Texas Court of Criminal Appeals reversed the lower court’s ruling, “holding that the State could not, consistent with the First Amendment, punish Johnson for burning the flag in these circumstances.”<sup>197</sup> The Supreme Court affirmed the decision of the Texas Court of Criminal Appeals.<sup>198</sup> To come to its conclusion, the Supreme Court had to “first determine whether Johnson’s burning of the flag constituted expressive conduct,” allowing him to evoke First Amendment protection under *Spence v. Washington*’s expressive conduct test.<sup>199</sup> After the flag burning was established to be expressive conduct, the Court used the suppression of expression test from *United States v. O’Brien* to determine whether the State’s regulation was related to the suppression of free speech.<sup>200</sup> Under *O’Brien*’s test, if the State’s regulation is not related to expression, then a less stringent standard must be met for regulation of noncommunicative conduct controls.<sup>201</sup>

The Court did not automatically conclude that any action taken with respect to the American flag is expressive.<sup>202</sup> However, the demonstrative and overtly political nature of Johnson’s act indicated that it was expressive conduct and layered with elements of communication.<sup>203</sup> At his trial, Johnson explained, “[t]he American Flag was burned as Ronald Reagan was being renominated as President. And a more powerful statement of symbolic speech, whether you agree with it or not, couldn’t have been made at that time. It’s quite a just position [juxtaposition]. We had new patriotism and no patriotism.”<sup>204</sup> While the government generally has more freedom to restrict expressive

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freedoms”). The *O’Brien* framework includes four prongs:

[W]e think it clear that a government regulation is sufficiently justified [1] if it is within the constitutional power of the Government; [2] if it furthers an important or substantial governmental interest; [3] if the governmental interest is unrelated to the suppression of free expression; and [4] if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.

*Id.* at 377.

192. *Johnson*, 491 U.S. at 399–420.

193. *Id.* at 399.

194. *Id.*

195. *Id.*

196. *Id.*

197. *Id.* at 400.

198. *Id.* at 402.

199. *Id.* at 403; see *supra* Part I for discussion of *Spence*.

200. *United States v. O’Brien*, 391 U.S. 367, 369–87 (1968).

201. *Johnson*, 491 U.S. at 403–04.

202. *Id.* at 405.

203. *Id.* at 406.

204. *Id.*

conduct than it has in restricting written or spoken words, “[i]t may not, however, proscribe particular conduct *because* it has expressive elements. . . . It is, in short, not simply the verbal or nonverbal nature of the expression, but the governmental interest at stake, that helps to determine whether a restriction on that expression is valid.”<sup>205</sup>

The government’s interests in question have to be unconnected to expression in order to fall under *O’Brien*’s less demanding rule.<sup>206</sup> Thus, in order to determine whether the less demanding rule applied to Johnson’s case, the Supreme Court had to decide whether Texas had asserted an interest unrelated to the suppression of expression.<sup>207</sup> The Court decided that the State’s interest in preventing breaches of peace was not implicated on the record and that the State’s interest in preserving the status of the flag as a symbol of nationhood and unity was related to the suppression of expression.<sup>208</sup>

The only evidence offered in support of the State’s breach of the peace interest was the testimony of witnesses who had been seriously offended by Johnson’s act.<sup>209</sup> The Court responded to this State interest by concluding that “[t]he State’s position, therefore, amounts to a claim that an audience that takes serious offense at particular expression is necessarily likely to disturb the peace and that the expression may be prohibited on this basis. Our precedents do not countenance such a presumption.”<sup>210</sup>

The State’s second interest in preserving the status of the flag directly related to Johnson’s expression. The Court decided that the State’s concern for the flag “blossom[s] only when a person’s treatment of the flag communicates some message, and thus [is] related ‘to the suppression of free expression’ within the meaning of *O’Brien*. We are thus outside of *O’Brien*’s test altogether.”<sup>211</sup> The State’s interest in preserving the symbolic nature of the American flag requires the State to meet “the most exacting scrutiny”<sup>212</sup> because the interest was based on the content<sup>213</sup> of Johnson’s expression.<sup>214</sup> The Court concluded by affirming the decision of the court of appeals, asserting, “[w]e do not consecrate the flag by punishing its desecration, for in doing so we dilute the freedom that this cherished emblem represents.”<sup>215</sup>

Many saggy-pants ordinances would be unconstitutional under *O’Brien*’s test. To decide whether *O’Brien*’s test applies, courts should examine the interest the community asserts in support of the conviction of the saggy-pants wearer to see if the interest is unrelated to expression. If the interest asserted by the community is not implicated by the facts, then the *O’Brien* test would not apply. In the case of saggy-

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205. *Id.* at 406–07 (emphasis in original).

206. *Id.* at 407.

207. *Id.*

208. *Id.*

209. *Id.* at 408.

210. *Id.*

211. *Id.* at 410.

212. *Id.* at 412 (quoting *Boos v. Barry*, 485 U.S. 312, 321 (1988) (holding that the secondary effects analysis was not applicable to laws banning displays near foreign embassies that tend to bring the foreign government into disrepute)).

213. See *Williams*, *supra* 39, at 645 n.128 (discussing how a broader concept of content discrimination could apply to recent and controversial flag cases, including *Johnson*).

214. *Johnson*, 491 U.S. at 412.

215. *Id.* at 420.

pants ordinances, the interest is often decency.<sup>216</sup> However, as seen in the case of Julius Hart in Riviera Beach, can the showing of underwear really be considered indecent? How can saggy pants be indecent when people are free to walk around in miniskirts, short shorts, and other revealing clothing items without being fined or sent to jail?

Even when indecency is not the asserted interest, communities will have a difficult time showing that saggy-pants laws are constitutional because the laws may not be narrowly tailored enough to meet the needs of the asserted interest for a time, place, or manner (TPM) restriction.<sup>217</sup> While more recent Supreme Court cases have confirmed the weakening of the TPM restriction,<sup>218</sup> some First Amendment scholars, such as Susan H. Williams, have argued that the content-neutral/content-based distinction made by the Court has not been applied broadly enough.<sup>219</sup> Williams proposes that the First Amendment should consider laws to be content-based if the laws are intentionally discriminatory or if the laws distort public debate, whether the impact of the law is intentional or not.<sup>220</sup> Williams suggests that a governmental regulation that suppresses speech because of its communicative nature disrespects the speaker and the listener; a regulation that the speaker perceives to silence his viewpoint, lowers the speaker's participation, and thus, the speaker's level of citizenship; a regulation that silences a point of view from the audience's perspective robs society of information and ideas.<sup>221</sup> Thus, saggy-pants ordinances should be analyzed for content discrimination in a variety of contexts to prevent a systematic elimination of views. For example, "Jonathan Sumner, city manager in Hahira, [Georgia], said his city bans sagging pants as a public safety measure—officials say someone can more easily hide weapons when their pants sag."<sup>222</sup> While a court may find saggy pants to be a public-safety concern, the banning of saggy pants altogether may not be narrowly tailored enough under Williams' multifaceted content-discrimination analysis to receive less than strict scrutiny.<sup>223</sup> Also, the ordinance may not be narrowly tailored enough to encompass

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216. *E.g.*, *Opa-Locka*, *supra* note 3. Opa-Locka City Commissioner Timothy Holmes sponsored the city's "No Saggy Pant Ordinance" to enforce decency. *Id.*

217. *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 (1984) ("We have often noted that restrictions of this kind are valid provided that they are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information.").

218. *See, e.g.*, *Ward v. Rock Against Racism*, 491 U.S. 781 (1989). The Court held that the "narrow tailoring" requirement is not defeated simply because there is an imaginable, less burdensome alternative to the restriction that was selected. *Id.* at 797. Thus, the Court held that "a regulation of the time, place, or manner of protected speech must be narrowly tailored to serve the government's legitimate, content-neutral interests but that it need not be the least restrictive or least intrusive means of doing so." *Id.* at 798.

219. Williams, *supra* note 39, at 729.

220. *Id.* at 672.

221. *Id.*

222. Klepal, *supra* note 22.

223. Williams, *supra* note 39, at 719–22. Williams uses the *Clark v. CCNV* case as an example of how a broader application of content discrimination would work. In *Clark*, the Court held that the denial of CCNV's request to sleep on the National Mall to conduct a demonstration to call attention to the homeless's plight did not violate the First Amendment due to TPM restrictions. *Clark*, 468 U.S., at 293, 295–96. Williams argues that the *Clark* Court does not use

only those saggy-pants wearers who carry weapons. The Supreme Court in *Johnson* said the State's goal of preventing breaches was not "[narrow] enough to encompass only those flag burnings that were likely to result in a serious disturbance of the peace."<sup>224</sup> The same rationale could likely be applied to a governmental regulation that dictates how people may wear their pants in the public sphere.

In addition to the government's asserted interest, if *Johnson* could protest Reagan's administration by burning the American flag, surely today's youth can protest their social conditions through fashion. While proponents of saggy-pants laws may not agree with the style, "[i]f there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable."<sup>225</sup> Michaela Angela Davis, a social critic and editor-at-large of Honey.com in New York, believes that the saggy-pants style is expressive of today's cultural environment: "Youth culture has always let us know what's going on in the belly of America . . . . This is the era of fatherlessness, the era of war, and this is what it looks like: children lost in their clothes . . . ." <sup>226</sup> Thus, the saggy-pants fashion should be analyzed in the same manner as other expressive forms of conduct are: using *O'Brien's* framework.<sup>227</sup> If saggy-pants laws were to be analyzed under *O'Brien's* framework, many of these laws would require "the most exacting scrutiny"<sup>228</sup> to regulate how people are allowed to wear their pants in public.<sup>229</sup>

The idea behind criminalizing behavior to protect the dignity of the American flag is synonymous with the sentiments behind saggy-pants laws that want to "protect" the eyes of others or the reputation of a "respectable" way to wear pants. "To conclude that the government may permit designated symbols to be used to communicate only a limited set of messages would be to enter territory having no discernible or defensible boundaries."<sup>230</sup> Limiting the way people can wear their pants in public would enter into territory "having no discernible or defensible boundaries."

### III. ALTERNATIVE SOLUTIONS

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strict scrutiny to analyze the sleeping restriction in the park because the Court "failed to recognize the content discrimination in the impact on the speaker, and because it had already destroyed the independence of the symbolic speech doctrine that was designed to deal with that discrimination." *Id.* at 721. If the Court had used strict scrutiny to analyze the TPM regulation of sleeping in the park, the regulation would not have survived strict scrutiny. *Id.*

224. *Johnson*, 491 U.S. at 401.

225. *Id.* at 414.

226. Patrik Jonsson, *In Louisiana Town, Wearing Low-Rider Pants May Cost You*, CHRISTIAN SCI. MONITOR, June 18, 2007, at 1. Davis also noted that "[b]lues reflected how people felt about the Jim Crow laws, while R&B music can be traced back to the civil rights movement." *Id.*

227. *See, e.g., City of Erie v. Pap's A.M.*, 529 U.S. 277 (2000) (holding that a city ordinance that prohibited nude appearances in public, requiring the use of G-strings and pasties in nude dancing establishments, did not violate the First Amendment and was a content-neutral regulation that was valid under *O'Brien*).

228. *Johnson*, 491 U.S. at 412 (quoting *Boos v. Barry*, 485 U.S. 312, 321 (1988)).

229. In *Julius Hart's* case, Riviera Beach's interest in passing the saggy-pants law was deemed unconstitutional "based on the limited facts of this case." Kleinberg, *supra* note 179.

230. *Johnson*, 491 U.S. at 417.

While community leaders have turned to laws to cure the wearing of saggy pants, making laws specifically about pants is not necessary. President Barack Obama summed this sentiment up during a November 2, 2008, MTV interview.<sup>231</sup> When asked whether people should be penalized for wearing saggy pants, Mr. Obama responded:

Here is my attitude: I think people passing a law against people wearing sagging pants is a waste of time. We should be focused on creating jobs, improving our schools, health care, dealing with the war in Iraq, and anybody, any public official, that is worrying about sagging pants probably needs to spend some time focusing on real problems out there. Having said that, brothers should pull up their pants. You are walking by your mother, your grandmother, your underwear is showing. What's wrong with that? Come on. There are some issues that we face, that you don't have to pass a law, but that doesn't mean folks can't have some sense and some respect for other people and, you know, some people might not want to see your underwear—I'm one of them.<sup>232</sup>

In essence, and without exploring the obvious avenue of parental control and influence, there are several alternative solutions that can be used to control the wearing of oversized pants that include the growth of hip-hop culture, community programs, and already established legal remedies.

First, hip-hop culture popularized saggy pants, so hip-hop culture can make saggy pants unpopular as well. "Hip-hop has long been synonymous with jeans big enough to upholster a sofa, with throwback sports jerseys draped to the knees, with outrageously priced, limited-edition sneakers and with the diamond-barnacled hardware that has entered the vernacular as bling-bling."<sup>233</sup> But the members of hip-hop that originally popularized the uniform of saggy pants are now approaching thirty-five years old.<sup>234</sup> As the culture matures, so has the dress of its members. Urban designers, such as Ecko and Sean John, have begun to feature blazers and suits as part of their clothing lines.<sup>235</sup>

The culture has become more "Wall Street"<sup>236</sup> as it has blossomed into a multi-million-dollar-a-year industry; "[t]he whole bling-bling thing has left."<sup>237</sup> When rapper Jay-Z released *The Black Album* in November 2003, he proudly proclaimed in one of his rhymes: "And I don't wear jerseys, I'm 30-plus. . . . Give me a crisp pair of jeans. . . . Button up."<sup>238</sup> As the fashion of the headliners of hip-hop changes, so will the fashion of those who associate with the culture. "Musicians set the trends . . . [and they are] now migrating away from the hip-hop lifestyle . . . . At the same time, they're bringing the lessons of casual hip-hop dressing forward so they wear the suit in a way that says they're willing to be part of the establishment but not necessarily . . .

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231. *Barack Obama Answers Your Questions*, MTV.COM, Nov. 2, 2008, <http://www.mtv.com/news/articles/1598409/20081102/story.jhtml>.

232. *Id.*

233. Guy Trebay, *Maturing Rappers Try a New Uniform: Yo, a Suit!*, N.Y. TIMES, Feb. 6, 2004, at A1.

234. *Id.*

235. *Id.*

236. *Id.*

237. *Id.*

238. *Id.*; JAY-Z, *What More Can I Say*, on THE BLACK ALBUM (Roc-A-Fella Records 2003).

conform.”<sup>239</sup> Thus, since hip-hop culture created the saggy pants style, hip-hop culture can also be the catalyst to change the style as well.

Secondly, saggy-pants laws are not needed because community members have designed creative methods to deal with the saggy-pants style. For example, MeShorn Daniels and Peter Hayes, a couple in Louisville, Kentucky, have launched a “Pull Up Your Pants” education campaign.<sup>240</sup> The couple does not want a saggy-pants ordinance for Louisville, but they want “‘to open up the discussion and use a little positive peer pressure’ to persuade young people to change.”<sup>241</sup> Another nonlegal remedy promoted by a Jacksonville, Florida, preacher involves giving away belts.<sup>242</sup> Pastor Diane Robinson said she is personally offended every time she sees young men not wearing belts, so she began the “Pull Up Your Pants!” campaign.<sup>243</sup> The campaign collects belts and gives them to young men at local high schools who need them.<sup>244</sup> The campaign is mostly symbolic and has a deeper meaning for the campaign organizers than just having young men pull up their saggy pants: “We’re trying to get these guys to pull up their pants and act like young men. You don’t have to curse. The rap music [and] killing everybody and selling drugs, that’s not life . . .”<sup>245</sup> Thus, community members have taken the saggy-pants dilemma into their own hands and have found nonlegal remedies to reach out to saggy-pants wearers.

Lastly, if legal remedies must be used to combat the saggy-pants style, there are usually existing laws that can be amended to prohibit the fashion. Most communities already have indecent exposure and disorderly conduct ordinances.<sup>246</sup> “These laws are usually vague enough to be used to deal with most situations of nudity or partial nudity and the public reaction to it. They just need to be enforced.”<sup>247</sup> In fact, “Atlanta is currently considering an amendment to its indecency exposure ordinance that would ban sagging pants that show ‘undergarments in a public setting.’”<sup>248</sup> However, if communities venture down this road of regulation, what about other bodily exposure such as cleavage? On a *Dr. Phil* episode exploring the saggy-pants dilemma, Reverend Al Sharpton made a good point about the slippery slope of regulating against clothes in the public sphere: “I think that baggy pants and saggin’ pants disturb me, but so do low-cut women’s [tops], showing too much cleavage. Are we going to make laws about that?”<sup>249</sup> To regulate against saggy pants could mean the regulation of other clothing

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239. Trebay, *supra* note 233.

240. Klepal, *supra* note 22.

241. *Id.*

242. *Florida Preacher Starts “Pull Up Your Pants” Campaign*, WFTV.COM, Apr. 6, 2007, <http://www.wftv.com/irresistible/11551511/detail.html>.

243. *Id.*

244. *Id.*

245. *Id.*

246. Ritenbaugh, *supra* note 18.

247. *Id.*

248. Klepal, *supra* note 22.

249. *Dr. Phil: The Baggy Pants Debate* (Harpo Productions television broadcast Jan. 28, 2008), available at <http://www.drphil.com/slideshows/slideshow/4255/?id=4255&slide=2>. On this same episode, a Dallas-based group called the Hip-Hop Government reported that they did not support the saggy-pants laws, but wanted saggy-pants-wearers to pull up their pants because “police could end up shooting a kid with [s]aggy pants thinking they have a weapon in their pockets when they’re only pulling up their pants.” *Id.*, available at

and forms of expression as well. While the desire to see the undergarments of others may be extremely low, the fruition of laws regulating clothing in the public sphere is unnecessary and unconstitutional because of their suppression on expression.

#### CONCLUSION

The topic of saggy-pants laws may seem trivial, but the effects upon freedom of expression are not. Regulating how one is allowed to wear pants in public is unnecessary and degrading. All saggy-pants ordinances within the public sphere should be repealed, and alternative methods should be used to deal with the saggy-pants dilemma. While many may not appreciate the sight of others' undergarments, legislating about how to wear one's pants in the public sphere is a slippery slope that should not be ventured down.

This Note has attempted to establish the saggy-pants style as a form of unconventional, expressive conduct that should receive First Amendment protection. Some may believe that our country's Founding Fathers did not intend for the First Amendment to protect a fashion statement such as saggy pants. This idea may be true, but "like most revolutionaries, the Framers could not foresee the specific issues which would arise as their 'novel idea' exercised its domination over the governing activities of a rapidly developing nation in a rapidly and fundamentally changing world. In that sense, the Framers did not know what they were doing."<sup>250</sup> After grappling with the Framers' words for over two centuries, we still do not know what they were trying to do, and now we do not know what we are doing.<sup>251</sup> We have to be open to applying the First Amendment to new societal developments. Saggy pants are a small piece of "a [large] collage of experimentation, appropriation, innovation, [and] resistance."<sup>252</sup> Therefore, the suppression of this *saggin'* expression is not only unacceptable, it is unconstitutional.

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<http://www.drphil.com/slideshows/slideshow/4256>. While this is a real concern, regulating against the style would be overbroad because it would have an effect on other freedoms of expression. Educating the youth about criminal procedure would likely be more beneficial to our society than regulating against the style.

250. Alexander Meiklejohn, *The First Amendment Is an Absolute*, in FREEDOM OF EXPRESSION: A COLLECTION OF BEST WRITINGS 65, 84 (Kent Middleton & Roy M. Mersky eds., 1981).

251. *Id.*

252. Chandler & Chandler-Smith, *supra* note 9, at 252.