DESECRATION: IS IT PROTECTED SPEECH?

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A prankster sets up a projector and shines images of swastikas onto the side of a synagogue as worshippers enter. A vandal extinguishes the eternal flame that marks the grave of President John F. Kennedy. A computer hacker attacks an online memorial dedicated by a grieving family to its recently deceased teenage son by superimposing pornography all over the website. Each of these situations is similar to an event that actually has occurred or has been hypothesized by a Supreme Court Justice.[1]

And then there are behaviors that seem similar to the above events, but raise other issues. A group of people who hate the military carries signs displaying homophobic slurs near the funeral of a soldier killed in combat. A rogue publisher prints a cartoon that depicts a clergyman having an affair with his mother in an outhouse, and the publisher later testifies that he intended to hurt the clergyman through his tasteless publication. These, too, are situations that have actually occurred and the Supreme Court has written about.[2]

These are examples of behaviors that I call desecration. Desecration includes utterances that most people would find of little value, although this characteristic alone does not keep them from

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1. Shaare Tefila Congregation v. Cobb, 481 U.S. 615, 616 (1987) (addressing anti-Semitic phrases and symbols created with paint, hypothesized here instead as light projection to avoid confusion with vandalism; desecration claim upheld on other grounds); Texas v. Johnson, 491 U.S. 397, 439 n.* (1989) (Stevens, J., dissenting) (addressing eternal flame facts; this Justice would presumably approve a desecration claim); Peggy O'Hare, *Cybertrolls' Attacks on Web Add to Mourners' Pain*, HOUS. CHRON., Nov. 7, 2010, at 1A (recognizing that desecration of online memorials is a "growing . . . occurrence" that "happens on memorial pages all over the world").

2. Snyder v. Phelps, 131 S. Ct. 1207, 1213 (2011) (addressing a father's tort law claims against picketers of his son's funeral and ultimately finding in favor of the homophobic demonstrators); Hustler Magazine, Inc. v. Falwell, 485 U.S. 46, 48, 56–57 (1988) (addressing the content of a cartoon and finding that clergyman may not prevail on his claim against publisher).

qualifying as protected speech.[3] But the above situations involve more than mere tastelessness or offensiveness. The behaviors in the given examples cause actual harm.[4] Furthermore, that harm sometimes includes suppression of speech initiated by others. The problem remains, however, that in some cases the speech or behavior involves a glimmer of expression on a subject of public interest; a weak association with protected speech accompanies the harm.[5] The courts have experienced considerable difficulty in separating protected speech from unprotected desecration.[6]

Unfortunately, none of the Supreme Court's opinions provide clear direction for resolving this problem. *Snyder v. Phelps*,[7] the case involving a homophobic demonstration near a soldier's funeral, is the Court's most recent pronouncement relevant to this issue. But in *Snyder*, the Court declined to address whether there is a type of speech that is unprotected as desecration, saying only that "there [was] 'no suggestion that the speech at issue fell within one of the categorical exclusions from First Amendment protection.'"[8] Additionally, because the Court treated the particular demonstration at issue as protected, the *Snyder* opinion naturally occupies itself with extending the freedom of expression, rather than with defining the types of speech that are not protected by the First Amendment. Thus, although the Supreme Court's decisions, including *Snyder*, certainly provide clues about the inquiry pursued in this Article, the Court's decisions just as certainly leave the question unanswered.

One way to approach this lingering problem is through the formula that the Supreme Court generated in *Chaplinsky v. New Hampshire*.[9] In *Chaplinsky*, the Court recognized that there are unprotected categories of utterances, or what might be called "speech that is not speech," and the Court used this concept to allow the prohibition of "fighting words."[10] The two defining characteristics of unprotected utterances, said the Court, are first, that they "are [not an] essential part of the exposition of ideas," and second, that they "are of such slight social value as a step to truth" that any positive aspect the utterances might have is "clearly

3. *Snyder*, 131 S. Ct. at 1220; *Hustler*, 485 U.S. at 56.

4. In *Snyder*, the Court described the conduct at issue as "certainly hurtful" and acknowledged that "its contribution to public discourse may be negligible." 131 S. Ct. at 1220.

5. *Id.* (stating that the message at issue "addressed matters of public import").

6. One example of courts' difficulty is found in *Hustler*, 485 U.S. at 878, 883, in which the Supreme Court reversed the lower court, which had upheld the clergyman's tort claim against the publisher.

7. 131 S. Ct. 1207.

8. *Id.* at 1215 n.3.

9. 315 U.S. 568 (1942).

10. *Id.* at 571–72.

outweighed by the social interest in order and morality."[11] The *Chaplinsky* test offers the prospect of minimizing severely harmful utterances while maintaining the protection of speech. Since *Chaplinsky,* the Court has used this general approach to define other categories of unprotected utterances, from child pornography to defamation.[12]

This Article begins by describing the *Chaplinsky* formula. It then considers an important proposition that is implicit in *Chaplinsky*: the notion that there are hierarchies of speech, with some types of expression accorded a higher status than others. The Article then proceeds to its real work: the adaptation of the *Chaplinsky* formula to utterances that desecrate the symbolic expression of others. There is a special impediment to this adaptation, since some valuable utterances include ridicule, sarcasm, and devaluation of the speech of others. Here, the Article introduces the concept that the unifying factor in the upper hierarchies of speech is its quality of discourse about public issues, or the degree to which the speech seeks to conduct dialogue on matters of public concern. A type of utterance that does not have this characteristic, and which seeks only to destroy the expression of others as a matter of personal, invidious pique, is of low speech value, and, if it causes serious harm to others' freedom of expression, my thesis is that it can be subjected to a test that may treat it as unprotected desecration.

The Article then seeks to apply this concept to various expressive acts that seem to have speech value and to compare these to messages that might better be treated as unprotected desecration. A final Part sets out my conclusion: that the *Chaplinsky* formula may serve to identify a category of desecration that can be treated as unprotected.

I. THE *CHAPLINSKY* FORMULA

A. Balancing to Create Categories, but Not in Individual Cases

In *Chaplinsky*, the defendant addressed a city official as a "racketeer" and a "damned Fascist."[13] He was convicted under a city ordinance that made it a crime to direct any "offensive, derisive, or annoying word" to another person in a public place.[14] The lower

11. *Id.* at 572.

12. *E.g.*, New York v. Ferber, 458 U.S. 747, 764 (1982) ("There are . . . limits on the category of child pornography which, like obscenity, is unprotected by the First Amendment."); N.Y. Times Co. v. Sullivan, 376 U.S. 254, 279–80 (1964) (determining that liability for defamatory falsehood relating to official conduct requires proof of actual malice or reckless disregard of falsity).

13. *Chaplinsky*, 315 U.S. at 569.

14. *Id.*

court had interpreted the ordinance narrowly, so that it applied only when the words had "a direct tendency to cause acts of violence by the person to whom, individually, the remark is addressed."[15] The Supreme Court began by observing that there are "certain well-defined and narrowly limited classes of speech" that are unprotected.[16] The Court went on to provide examples: obscenity, libel, and "insulting or 'fighting' words."[17] It was in this context that the Court set out the *Chaplinsky* formula for recognizing unprotected utterances: "[S]uch utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality."[18]

Several characteristics of this reasoning deserve emphasis. First, this approach does not depend on the value of any particular expression. It instead depends upon whether the expression falls into a category of unprotected utterances. The Court quoted the lower court with approval: the categorization of the speech is "not to be defined in terms of what a particular addressee thinks. . . . [t]he test is what [people] of common intelligence would understand" the words to mean.[19] Second, the categories are "narrowly limited."[20] These two features of the *Chaplinsky* approach prevent the denial of speech protection from censoring unpopular expression.

Third, the unprotected categories must be "well-defined."[21] This aspect of *Chaplinsky* means that the denial of protection must be readily recognizable, so that speakers will not fear transgressing an amorphous boundary and, perhaps more importantly, so that public authorities will not retain discretion to silence unpopular speech. Fourth, there is a balancing approach behind the definition of unprotected categories,[22] but it is unevenly weighted. Under this approach, protection is denied only when the speech value is "clearly outweighed" by the harm the utterance causes.[23]

Since deciding *Chaplinsky*, the Supreme Court has defined other types of unprotected utterances.[24] The Court has expressed its reasons in differing language and has not relied uniformly upon *Chaplinsky*, but its analysis has usually depended upon unevenly weighted balancing similar to that in *Chaplinsky*. For example, in

15. *Id.* at 573.
16. *Id.* at 571–72.
17. *Id.* at 572.
18. *Id.*
19. *Id.* at 573.
20. *Id.* at 571.
21. *Id.*
22. *See id.* at 572.
23. *Id.*
24. *See* Rodney A. Smolla, *Words "Which By Their Very Utterance Inflict Injury": The Evolving Treatment of Inherently Dangerous Speech in Free Speech Law and Theory*, 36 PEPP. L. REV. 317, 319–20 (2009).

upholding a prohibition on the promotion of sexual performances by children, the Court characterized the value of the expression as "exceedingly modest, if not de minimis," and recognized that the interest of the state in preventing harm to children "clearly" outweighed this minimal value.[25] Likewise, in upholding a prohibition on dangerous crowds immediately near embassies, the Court observed that the "congregation clause" did not "reach a substantial amount of constitutionally protected conduct" and emphasized the special national interest in protecting diplomats.[26] Even when they have protected the expression at issue, the Justices have often used the *Chaplinsky* test as a means of distinguishing the expression from unprotected utterances.[27]

Is it possible that the *Chaplinsky* approach can distinguish offensive expression that has a measure of speech value from a defined category of unprotected desecration? The test would need to be well defined and narrowly limited, as was the Court's approach in *Chaplinsky*. In addition, it would have to provide an unevenly weighted balancing scale and depend upon a categorical definition unrelated to any particular utterance.

B. The Hierarchy of Speech Values

It is impossible to reconcile the Supreme Court's decisions without recognizing a hierarchy of speech values. Indeed, perhaps it is impossible to devise a workable system at all without providing different levels of speech protection. Political speech, or speech upon issues of public interest, is at the top of the hierarchy. For example, the protection of government employees when they engage in expression is defined partly by the degree to which their utterances cover "matters of public concern."[28] More recently, the Court borrowed this "matters of public concern" standard to use in *Snyder*, as part of its evaluation of the tort claims against the homophobic picketers—what I would call desecration claims.[29] There is good reason to value political speech highly, because the definition and protection of all rights, including speech itself, depend upon an electoral system that functions through political expression.

Close behind political speech in the hierarchy are various types of expression that inform the individual's exercise of the highest speech functions. One cannot understand the Federal Reserve System without knowing something of economics, for example; and

25. New York v. Ferber, 458 U.S. 747, 747–48 (1982).

26. Boos v. Barry, 485 U.S. 312, 313, 323–24 (1988).

27. *See, e.g.*, R.A.V. v. City of St. Paul, 505 U.S. 377, 399 (1992) (White, J., concurring) (citing *Chaplinsky*, 315 U.S. at 571–72); Cohen v. California, 403 U.S. 15, 20 (1971) (citing *Chaplinsky*, 315 U.S. at 573).

28. Rankin v. McPherson, 483 U.S. 378, 384 (1987) (quoting Pickering v. Bd. of Educ., 391 U.S. 563, 568 (1968)).

29. *See* Snyder v. Phelps, 131 S. Ct. 1207, 1216 (2011).

at a more general level, one cannot understand society without having experienced some works of literature. The Supreme Court's holdings include protection of informative speech, although sometimes in more limited ways than political speech.[30]

The Court has been explicit in affording lesser protection to some other speech categories. Commercial speech, for example, can be circumscribed in ways that never would be tolerated with political speech.[31] The same is true of indecent speech.[32] Probably the lowest level of speech is that which is engaged in solely for the enjoyment or self-indulgence of the speaker or listener.[33] Thus, the expression at issue in *Chaplinsky*, like the expression in the child-sexual-performance case, received only the lowest level of protection.[34] Still, there is protection of expression even for some kinds of self-indulgent activities. The courts have protected violent video games, for example, even though the video games do not serve to advance any debate (except, perhaps, debate about whether their distribution should be limited).[35]

If some types of desecration are to be unprotected, then, they must be confined to expression that contains only "exceedingly modest" contributions to information or debate on public issues.[36] Speech is discourse; this is the key to the Supreme Court's hierarchy of speech values.[37] If an identifiable category of utterance forms "no essential part of any exposition of ideas, and [is] of . . . slight social value as a step to truth,"[38] it may fall outside the spectrum of

30. For example, in *FCC v. Pacifica Foundation*, the Court upheld the FCC's determination that a certain comedic monologue was offensive enough to be prohibited as "indecency" under the Communications Act, even though the monologue was informative about the use of (dirty) language. 438 U.S. 726, 739 (1978). In *Cohen v. California*, however, the Court treated an offensive political message as protected speech. 403 U.S. at 26.

31. Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557, 597–98 (1980) (Rehnquist, J., dissenting).

32. *R.A.V.*, 505 U.S. at 427.

33. *See* Bose Corp. v. Consumers Union of U.S., Inc., 466 U.S. 485, 504 (1984) (citing Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942)).

34. The speech in question was "no essential part of any exposition of ideas," said the Court, and therefore one can infer that if it had any value, the value was confined to self-indulgent expression. *Chaplinsky*, 315 U.S. at 572.

35. *E.g.*, Entm't Software Ass'n v. Swanson, 519 F.3d 768, 772 (8th Cir. 2008) (striking down prohibition of violent video games without finding in them any value on matters of public concern).

36. *See* Ashcroft v. Free Speech Coal., 535 U.S. 234, 250–51 (2002) (quoting New York v. Ferber, 458 U.S. 747, 762 (1982) and reasoning that the *Ferber* Court held that child pornography was not protected under the First Amendment because of how the pornography was made, not because of the content of the speech).

37. *See, e.g.*, Snyder v. Phelps, 131 S. Ct. 1207, 1215–16 (2011) (suggesting that higher forms of First Amendment protection are centered on "meaningful dialogue" and discourse).

38. *Chaplinsky*, 315 U.S. at 572.

protectable discourse. If, like "[r]esort to epithets or personal abuse,"[39] the utterance does not "in any proper sense [communicate] information or opinion,"[40] the *Chaplinsky* formula suggests that the expression can be examined to determine whether its value is "clearly outweighed"[41] by the harm it causes. Some forms of desecration, arguably, are crude attempts at discourse and must be protected, even if they are also offensive.

On the other hand, perhaps there are types of desecration that fit a narrowly defined category of unprotected utterances. In fact, the Supreme Court stated in *Snyder v. Phelps* that "not all speech is of equal First Amendment importance."[42] The Court suggested that utterances of a private character, not touching upon "matter[s] of public interest," could properly be subjected to suits for liability and damages.[43] The Court added, however, that there was "no suggestion that the speech at issue [in *Snyder*] falls within one of the categorical exclusions from First Amendment protection, such as those for obscenity or 'fighting words.'"[44] This reservation of the issue is why the question raised by this Article remains unresolved.

C. The Contrary Position of the Absolutists

The argument that there must be levels of speech value is opposed by the claim that speech protection should be absolute. The most prominent exponent of the absolutist position is probably Justice Hugo Black. In his opinion in *Brandenburg v. Ohio*,[45] for example, he rejects the balancing approach contained in the clear and present danger test. Justice Black consistently refused to assess the value of any particular utterance.[46] Instead, he compared speech, which he saw as absolutely protected, with conduct, which he believed was not.[47]

39. *Id.* (quoting Cantwell v. Connecticut, 310 U.S. 296, 309–10 (1940)).

40. *Id.*

41. *Id.*

42. *Snyder*, 131 S. Ct. at 1215 (quoting Hustler Magazine, Inc. v. Falwell, 485 U.S. 46, 50–51 (1988)) (internal quotation marks omitted).

43. *Id.* at 1215–16.

44. *Id.* at 1215 n.3.

45. Brandenburg v. Ohio, 395 U.S. 444, 449–50 (1969) (Black, J., concurring).

46. *See, e.g.*, Rosenbloom v. Metromedia, Inc., 403 U.S. 29, 57 (1971) (Black, J., concurring) ("*First Amendment* protection extends to 'all discussion and communication involving matters of public or general concern.'" (emphasis added) (citation omitted)); N.Y. Times Co. v. Sullivan, 376 U.S. 254, 293–97 (1964) (Black, J., concurring) (explaining that "at the very least" the First Amendment means that a State cannot impose civil libel laws to punish discussion of public affairs or critiques of public officials).

47. *See, e.g.*, Cox v. Louisiana, 379 U.S. 559, 577–81 (1965) (Black, J., concurring in No. 24 and dissenting in No. 49) (distinguishing speech, which is never constitutionally regulated, from marching and patrolling, which can be regulated as long as the State's interest in suppressing the conduct outweighs

But Justice Black was not really an absolutist. He balanced, even though he did it in an indirect way, by characterizing as "conduct" the utterances he considered unprotected. In *Cohen v. California*, for example, he joined an opinion that would have treated an offensive expression as unprotected because it "was mainly conduct and little speech."[48] This kind of balancing is dubious because it compares speech with something that has little to do with its potential for discourse or with its resulting harm.

In any event, some kind of balancing is necessary. Otherwise, the First Amendment would license solicitations of murder, bomb threats, and fraudulent advertising. Thus, there may be a category of desecration that has negligible speech value.

D. "Anti-Speech": Utterances That Not Only Are Not Speech, but That Actually Impair the Freedom of Expression

The thesis of this Article, then, is that a narrow category of utterances that includes desecration is unprotected by the First Amendment, partly because the category is, in a way of speaking, "anti-speech." The issue was not analyzed in *Snyder v. Phelps*, apparently because the Court credited the lower court's finding that there was "no suggestion that the speech . . . falls within one of the categorical exclusions from First Amendment protection."[49] The category would not have applied in *Snyder* anyway, because the Court pronounced the speech there protected by the First Amendment.[50]

But, some types of desecration consist not only of matters that implicate little in the way of First Amendment values, but also, those that do the opposite. They actually impair First Amendment values. The phenomenon of utterances that impair the freedom of speech is not unfamiliar, but it is also not much noticed. If an airwaves pirate broadcasts a blank signal over a licensed radio frequency, for example, the resulting interference not only does not advance discourse, it, in fact, cancels it. Pranksters who shout down a speaker likewise do not advance discourse very much, but they may succeed in preventing people who wish to receive information from getting it. In these situations, the utterances in question not only are not speech, but they cause actual harm. This harm is not just to people's sensibilities, but to the freedom of speech itself. Sometimes there is a message lurking behind the interference with

the individual's interest in engaging in the conduct); NLRB v. Fruit & Vegetable Packers & Warehousemen, 377 U.S. 58, 76–80 (1964) (Black, J., concurring) (distinguishing permissible restriction of the "patrolling" aspect of picketing from the impermissible restriction of the "speech" involved in picketing).

48. Cohen v. California, 403 U.S. 15, 27 (1971) (Blackmun, J., dissenting).

49. *Snyder*, 131 S. Ct. at 1215 n.3.

50. *Id.* at 1219–20.

speech, in the form of an implied statement that "I disagree with the speaker," but other times there is no such message.

Real-world situations show that desecration sometimes impairs freedom of speech. Recall the example of pornographic desecration of online memorials, which is said to be a "growing" problem.[51] A bereaved survivor might think that the most effective way to communicate with a large group of friends or relatives would be through a website dedicated to her lost loved one, but, apparently, the survivor runs the risk that a cybertroll will desecrate her site.[52] The result is an impairment of her freedom of expression. Her memorial may even implicate matters of public concern if, for example, the decedent fought a terminal disease, contributed to society in a notable way, died in combat, or lived a life that would inform public debate in any of countless ways. Pornography pasted over the site disrupts all of these messages, and potential readers are unable to receive her message, because, even if the words and images of the original post are visible, readers are overwhelmed by the pasted images, and it becomes difficult for any viewer to absorb the original message of the site.

In conclusion, the concern for freedom of speech is wasted, and indeed it is backward, if it allows this kind of desecration to censor discourse. The same conclusion follows, with greater or lesser completeness, in the cases of the prankster who puts out the eternal flame and the bigot who projects anti-Semitic messages on a temple. The tricky aspect of this proposition, however, is that harm to sensibilities, even if obvious and serious, does not overcome the freedom of speech of those who send out unpleasant messages that actually are a part of discourse. And the Supreme Court's decisions protect even those messages that are clumsily or offensively delivered.

II. ADAPTING THE *CHAPLINSKY* FORMULA TO ANALYZE DESECRATION

A. The Simplistic Application

A simplistic approach would characterize acts of desecration as generally unprotected. That is, if the utterance is highly offensive and causes significant harm in the form of pain inflicted on another person as a response to that person's speech, the unsophisticated approach would allow the harmful speech to be prohibited. This approach would inadequately protect the freedom of expression. As the Supreme Court has put it, speech "may indeed best serve its high purpose when it induces a condition of unrest, creates

51. O'Hare, *supra* note 1.
52. *See generally id.*

dissatisfaction with conditions as they are, or even stirs people to anger."[53]

Some courts have followed the simplistic approach. *Hustler Magazine, Inc. v. Falwell*,[54] for example, involved a tasteless, offensive political cartoon and fictional story. The publication fantasized that a well-known clergyman had engaged in incestuous acts in an improbable and disgusting setting.[55] But the Supreme Court pointed out that the cartoon was parody, and it implicitly editorialized against the moral views of the clergyman.[56] The intermediate court nevertheless had affirmed a judgment for intentional infliction of emotional distress by stressing the pain inflicted upon the clergyman and by pointing out that the harm was intentional.[57] The Supreme Court reversed and linked the expression to political cartoons generally, which are often exaggerated.[58] Although the Court recognized that this particular effort was inferior to most political cartoons—a "poor relation," as the Court put it—it held that the category of utterances to which it belonged was protected.[59]

At the same time, the Court in *Hustler Magazine* recognized that infliction of emotional distress could properly create liability in "most if not all jurisdictions."[60] The Court's approval of this kind of liability must have depended upon the relative absence of speech value in utterances triggering the liability. This reasoning reinforces the conclusion that some kinds of desecration may be unprotected as well.

B. Speech as Discourse: A Method for Making the Distinction

One key factor in proper application of the claim for intentional infliction of emotional distress, then, is the absence of a potential for discourse. For example, "continuous, deliberate, degrading treatment of another" in a private setting, even if characterized as a series of "pranks," does not invite meaningful discourse, and this is the prototype of the intentional infliction claim.[61] Similarly, some of

53. Terminiello v. City of Chicago, 337 U.S. 1, 4 (1949).
54. 485 U.S. 46, 48 (1988).
55. *Id.*
56. *Id.* at 48, 54–55.
57. The Fourth Circuit's opinion quoted a series of answers by Larry Flynt, a principal in *Hustler Magazine*, confirming his intention to hurt Reverend Falwell and, indeed, to "assassinate" his reputation. Falwell v. Flynt, 797 F.2d 1270, 1273 (4th Cir. 1986). It also quotes the Reverend Falwell's testimony about the "deep hurt" he understandably experienced. *Id.* at 1276.
58. *Hustler Magazine*, 485 U.S. at 53.
59. *Id.* at 54–57.
60. *Id.* at 53.
61. *See* Pollard v. E.I. DuPont de Nemours Co., 213 F.3d 933, 947 (6th Cir. 2000) (analyzing a series of actions that met this description and finding that

the examples given at the beginning of this Article are devoid of any meaningful potential for discourse: extinguishing the flame at President Kennedy's grave, pasting pornography over a memorial, or broadcasting swastikas onto a place of worship.

On the other hand, a potential for discourse in the category of expression at issue distinguishes the utterances at the beginning of this Article that involve protected speech even if they cause pain to others. The Supreme Court points out that a political cartoon is a part of discourse, even if it is exaggerated and fictional, and it is for this reason that even a crude effort such as that in *Hustler Magazine* can qualify as protected speech.[62] Similarly, a demonstration that denounces the military invites discourse, and the Court held in *Snyder v. Phelps* that this category includes even crude, offensive messages.[63]

III. APPLYING THE ADAPTED *CHAPLINSKY* FORMULA TO ACTS OF DESECRATION

With this background, one can hypothesize a test for analyzing acts of desecration to determine whether they should be protected or unprotected. The effort begins with the *Chaplinsky* formula and its use in other cases that have recognized categories of unprotected utterances. An utterance of desecration, it might be asserted, may be unprotected if it fits into a category characterized by exceedingly modest or de minimis value as speech and if it predictably causes significant harm, including interference with the protected expression of others.

But this formulation is too general. Its application would depend too much on case-by-case evaluation of particular utterances, and, therefore, the formula would be vulnerable to misuse. It might deny protection to unpopular expression. Instead, a viable test would depend upon factors of more neutral application.

Again, the idea of public discourse is useful. The test might instead be phrased as depending upon whether the utterance has an element that is a part of discourse on a matter of public concern. The "public concern" feature is borrowed from *Snyder v. Phelps*[64] (which borrowed it from prior cases of different categories), and it expresses the possibility that expression centered on public issues is

plaintiffs could proceed to trial with their claims of intentional infliction of emotional distress).

62. *See Hustler Magazine*, 485 U.S. at 53–55.

63. *See* Snyder v. Phelps, 131 S. Ct. 1207, 1220 (2011).

64. *Id.* at 1215–16 (citing cases involving defamation and statements by public employees, and allowing particular utterances to be afforded less protection as speech if not made about "matter[s] of public concern," but only about private matters). *Snyder*, however, did not recognize the nonspeech category proposed here for desecration, and hence it supports the thesis of this Article only indirectly.

more likely to have real speech value, even if the utterance is crude, than private expressions of spite would have.[65] The other ingredient is a finding that the utterance has potential for harm, including suppression of protected expression by others, that "clearly outweigh[s]" any value the utterance might have as a part of public discourse.[66] If desecration is to include an unprotected category, it should be defined so as to require proof of impairment of the exercise of the freedom of speech by another, since this is the core harm caused by desecration. By putting the elements together, one can hypothesize that there may be a category of unprotected expression that consists of desecration, defined as interference with the sacred or highly valued expression of another, limited so that it covers utterances with only de minimis value as a part of discourse on any matter of public concern, and also with potential for harm to others, including the freedom of speech of others, that clearly outweighs any slight value it may be asserted as having.

One potential problem with this proposal is the allegation that "the boundaries of the public concern test are not well defined."[67] One can find evidence to support this allegation in such cases as *Rankin v. McPherson*,[68] where the Court split five to four in deciding whether the utterance at issue was protected speech. On the other hand, the public concern distinction was meaningful enough for the Court to approve it in *Snyder*.[69] Moreover, it is used in other areas to distinguish protected speech, including areas that generate many court opinions, which should help to define the concept.[70] Still, a court probably should err on the side of caution in declaring that an utterance does not implicate a matter of public concern.

CONCLUSION

The suggested formula would deny protection to genuinely valueless acts of desecration. It can be applied successfully, for example, to the act of pasting pornographic images on an Internet memorial. This conduct interferes with sacred or highly valued speech of others. But what is perhaps more important, the conduct meets the other criteria hypothesized here. That type of desecration communicates little that is part of discourse on a matter of public concern; in fact, it communicates nothing in and of itself. It does not tell a viewer whether it is motivated by a dislike of online

65. *Id.* at 1215.

66. *See id.* at 1223 (quoting Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942)).

67. *Id.* at 1216 (quoting City of San Diego v. Roe, 543 U.S. 77, 83 (2004)).

68. 483 U.S. 378, 379–80, 386–87 (1987).

69. *Snyder*, 131 S. Ct. at 1217–18.

70. *See, e.g.*, Hustler Magazine, Inc. v. Falwell, 485 U.S. 46 (1988) (using the public concern test in the area of political speech to find speech was protected).

memorials, or by hatred toward the deceased individual, or by a desire to distribute pornography, or by a wish simply for amusement derived from a cruel prank. This kind of desecration also would carry a high potential for harm—including not only serious psychological harm to those who might appreciate the memorial but also suppression of the speech in which they are engaged.

The same test would deny speech protection to desecration in the forms of extinguishment of the eternal flame and swastikas projected onto the synagogue. And yet, the proposed test can differentiate the kinds of utterances that the Supreme Court has held are protected. It extends the protection of the First Amendment to expressions such as the cartoon and story in *Hustler Magazine* and the demonstration in *Snyder* against the military near a soldier's funeral. Although these utterances are crude and unlikely to persuade others, the Supreme Court would say that they are not in a category that is unrelated to discourse on matters of public concern.

The dividing line depends on context, and it also depends upon the meaning of the words used. It is not fail-safe. But, then, neither are other definitions of unprotected utterances. For example, fighting words of the kind deemed unprotected by *Chaplinsky* can be identified only by context and meaning. One can easily imagine situations raising complex fact issues. Were the parties sufficiently face-to-face and in close proximity, and were the words really directed at a particular individual? Did the meaning of the particular expression amount, in fact, to fighting words? The distinction suggested here between speech and unprotected desecration is no more vulnerable to misuse than the approach in *Chaplinsky*. Perhaps it can provide a means of protecting speech while minimizing the harm caused by acts of desecration.