October 8, 2014

"God Hates Fags" Isn't the Same as "Fuck the Draft": Introducing the Non-Sexual Obscenity Doctrine

Adam Lamparello

Available at: https://works.bepress.com/adam_lamparello/30/
“GOD HATES FAGS” IS NOT THE SAME AS “FUCK THE DRAFT”: INTRODUCING THE TARGETED, NON-SEXUAL OBSCENITY DOCTRINE

ADAM LAMPARELLO*

“This Court has recognized that the States have a legitimate interest in prohibiting dissemination or exhibition of obscene material when the mode of dissemination carries with it a significant danger of offending the sensibilities of unwilling recipients or of exposure to juveniles.”

In *Miller v. California*, the United States Supreme Court erred by limiting the definition of obscenity to speech appealing to the prurient (sexual) interest. Speech having no relationship to sex can be so vile that it lacks social, literary, or artistic value, contributes nothing to public debate, and causes severe emotional distress. It is called non-sexual obscenity, and it may, but does not always, intimidate others, incite imminent violence, defame, or have a sexual component. In each case, it traumatizes, humiliates, and shocks its audience. Neither the original purpose nor the plain text of the First Amendment shields this speech from restrictions of reasonable time, place, and manner.

Non-sexual obscenity is a narrow class of speech that: (1) consists of low-value speech (and expressive conduct); (2) intentionally targets private and vulnerable individuals; (3) renders these individuals a quasi-captive audience; (4) occurs in places where the speaker’s message can be disseminated in an alternative public forum that provides equivalent, if not greater, benefits than those available in the speaker’s intended forum; and (5) results in severe emotional distress.

---

* Assistant Professor of Law, Indiana Tech Law School.
2 413 U.S. 15.
3 See *Miller*, 413 U.S. at 23.
4 See *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992) (holding that some speech is “of such slight social value as a step to truth that any benefit that may be derived from [it] is clearly outweighed by the social interest in order and morality”) (*quoting Chaplinsky v. New Hampshire*, 315 U.S. 568, 571 (1942)).
7 See, e.g., *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 8-9 (1990) (to be defamatory, speech must be: (1) published to a third party, (2) false; (3) injure one’s reputation; and (4) cause damages).
8 See *Miller*, 413 U.S. at 24.
This definition does not discriminate on the basis of viewpoint because speech cannot be deemed non-sexually obscene simply because it lacks social, literary, or artistic value.\textsuperscript{10} Courts must also consider the context within which this speech is rendered and the effects it has on private individuals. Accordingly, non-sexual obscenity is much narrower than prior and discredited definitions of obscenity that aim to suppress speech likely to “deprave and corrupt those whose minds are open to such immoral influences.”\textsuperscript{11}

Examples of non-sexual obscenity include signs stating “God Hates Fags” and “Thank God for 9/11” on display outside of a private funeral,\textsuperscript{12} photographs of dismembered fetuses confronting women entering an abortion clinic, and a Nazi Swastika flag outside of a synagogue. Limiting obscenity to speech that appeals to the prurient interest (which \textit{is} obscene) ensures that a significant portion of truly “obscene” material will never be restricted. The practical effect, as evident in \textit{Snyder v. Phelps}, is that a father mourning the loss of his gay son in the Iraq war will walk out of a funeral service confronted by signs like the following.


\textsuperscript{11} See \textit{Regina v. Hicklin} (1868) (defining obscenity based on the likelihood that it would deprave and corrupt because of its “immoral influences”).

\textsuperscript{12} \textit{Snyder}, 131 S.Ct. at 1210.
TABLE I

PROTESTORS FROM THE WESTBORO BAPTIST CHURCH OUTSIDE OF A PRIVATE FUNERAL

Does the First Amendment allow this speech in a public forum? Yes. Should it allow protesters who carefully chose a venue to knowingly cause extreme distress to a grieving family to camp outside of a church? No. The posters displayed in this photo intentionally target private citizens at a time of great vulnerability, capitalize on their grief, and cause severe emotional distress. In such cases, states should be permitted to adopt restrictions on the time, place, and manner in which non-sexual obscenity is disseminated and to enact laws providing a civil remedy for emotional distress if these restrictions are violated. This is not to say that non-sexual obscenity constitutes “no part of the expression of ideas,”13 but only that it constitutes “no essential part of any exposition of ideas.”14

Without such restrictions, private citizens, as the following image shows, will continue to be the targets of low-value speech that is intended to shock and traumatize rather than contribute to public debate on matters of political and social importance.

13 R.A.V., 505 U.S. at 385 (quoting Chaplinsky, 315 U.S. at 572).
14 Id. (emphasis in original).
To be sure, “lower federal courts have concluded that exposure to graphic images can cause…psychological harm.” In fact, numerous courts have held that images like these can be banned to protect young children. In the case of an adult making the difficult decision to terminate a pregnancy, anti-abortion protestors should not be banned from displaying these signs in the public square. They should, however, be prohibited from standing mere feet away from the entrance to an abortion clinic, waiting to greet women with such disturbing images. A

16 See Olmer v. City of Lincoln, 192 F.3d 1176, 1180 (8th Cir.1999) (the government has a compelling interest in “protecting very young children from frightening images”); Bering v. SHARE, 721 P.2d 918, 935 (Wash. 1986) (upholding permanent injunction prohibiting anti-abortion signs because the state has “compelling interest in avoiding subjection of children to the physical and psychological abuse inflicted by the picketers’ speech”).
reasonable time, place, and manner restriction on non-sexual obscenity, which includes such images, would not shield “unwitting listeners or viewers…from unwanted expression,” but would protect private citizens from targeted verbal attacks that, as the vast majority of courts have recognized, cause emotional distress. If, as the Supreme Court has held, citizens are protected from words or conduct that intimidate or provoke violence, they should also be protected from speech that causes severe and lasting emotional harm. Of course, states cannot suppress, chill, or discriminate against unpopular or distasteful speech. States cannot intercede simply because people are hurt or offended by this speech. There are differences, however, between discomfort and distress and between the unpopular and the obscene.

For example, the Ku Klux Klan has a constitutional right to march in a public forum, but does the Ku Klux Klan have an unfettered right to march twenty feet outside of the cemetery of a deceased civil rights leader? Should the courts have allowed the 1960s era Black Panther Party to march outside the funeral of a woman whose husband was a lifetime member of the KKK? The answer should be no. Under the Supreme Court’s current jurisprudence, however, this distinction cannot be made because signs stating that “God Hates Fags,” photographs of dismembered fetuses, and demonstrations outside of private funerals do not appeal to the prurient interest, and

---

19 See Snyder, 131 S.Ct. at 1222 (Alito, J., dissenting) (noting that “most if not all jurisdictions” permit recovery in tort for the intentional infliction of emotional distress”) (quoting Hustler Magazine, Inc. v. Falwell, 485 U.S. 46, 53 (1988)).
they do not typically incite violence or defame. This conduct however, is equally if not more harmful than speech that the Court has held is legally obscene, such as a “[p]atently offensive representation or descriptions of masturbation.”20 Furthermore, even speech that conveys a political message and contributes meaningfully to the public debate is not “equally permissible in all places and at all times.”21

Part II discusses the core purposes of the First Amendment and surveys seminal case law on obscenity and other unprotected classes of speech. Part III discusses the Supreme Court’s recent decisions in Snyder v. Phelps,22 and McCullen v. Coakley,23 which underscore the Court’s quasi-absolutist approach to deciding First Amendment cases. Part IV introduces the non-sexual obscenity doctrine, provides standards for distinguishing non-sexual obscenity from unpopular but protected speech, and gives examples of non-sexual speech that can be considered obscene without violating the First Amendment. Ultimately, when it comes to defining obscenity, the Court should recognize, as most citizens do, that it’s not all about sex.24

20 Miller, 413 U.S. at 27.
21 Frisby, 487 U.S. at 479.
22 131 S.Ct. 1207.
24 Although outside the scope of this article, there are some forms of speech that should be categorically prohibited. Animal “crush” videos, for example, are no less gruesome than depictions of child pornography. The lack of a sexual component does not render them more gruesome—or less obscene. Additionally, “revenge porn,” which has a sexual component but is not technically obscene, nonetheless serves no purpose other than to embarrass and degrade. See, e.g., Clay Calvert, Revenge Porn and Freedom of Expression: Legislative Pushback to an Online Weapon of Emotional and Reputational Destruction, 4 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 673 (2014).
PART II
THE HISTORICAL CONTEXT: FROM MILLER TO MCCULLEN

A. BACKGROUND

The First Amendment generally prevents government from proscribing speech.\(^\text{25}\) Thus, “[a]ll ideas having even the slightest redeeming social importance—unorthodox ideas, controversial ideas, even ideas hateful to the prevailing climate of opinion—have the full protection of the (First Amendment) guaranties, unless excludable because they encroach upon the limited area of more important interests.”\(^\text{26}\)

Importantly, however, “[t]he right of free speech is not absolute at all times and under all circumstances,”\(^\text{27}\) and a “limited categorical approach has remained an important part of our First Amendment jurisprudence.”\(^\text{28}\) The Supreme Court “has permitted restrictions upon the content of speech in a few limited areas, which 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.’”\(^\text{29}\) Specifically, the Court has created “well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem.”\(^\text{30}\) This type of speech, which includes “the lewd and obscene, the

\(^{25}\) See, e.g., R.A.V., 505 U.S. at 382 (In R.A.V., the Court invalidated a Virginia statute banning the “display of a symbol which one knows or has reason to know ‘arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender.’” The Court held that the statute impermissibly discriminated on the basis of content because it prohibited specific types of fighting words but left others completely unregulated.

\(^{26}\) Roth v. United States, 354 U.S. 476, 484 (1957) (affirming a conviction for sending pictures of "nude and scantily-clad women" through the mail).

\(^{27}\) Chaplinsky, 315 U.S. at 571 (the statute at issue in Chaplinsky provided, “No person shall address any offensive, derisive or annoying word to any other person who is lawfully in any street or other public place, nor call him by any offensive or derisive name, nor make any noise or exclamation in his presence and hearing with intent to deride, offend, or annoy him, or to prevent him from pursuing his lawful business or occupation.”

\(^{28}\) R.A.V., 505 U.S. at 383.

\(^{29}\) Id. at 382 (quoting Chaplinsky, 315 U.S. at 571).

\(^{30}\) Chaplinsky, 315 U.S. at 571-572.
profane, the libelous, and the insulting,” is not an “essential part of any exposition of ideas … [and] any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.”

Additionally, “nonverbal expressive activity can be banned because of the action it entails, but not because of the ideas it expresses—so that burning a flag in violation of an ordinance against outdoor fires could be punishable, whereas burning a flag in violation of an ordinance against dishonoring the flag is not.” In other words, speech “can be proscribable on the basis of one feature (e.g., obscenity) but not on the basis of another (e.g., opposition to the city government)” and has “found application in many contexts.”

The purpose of the First Amendment is to protect unpopular, distasteful, and undesirable speech. It is intended to give speakers of all viewpoints a voice in public debate and to prohibit the government from discriminating on the basis of content. Indeed, the First Amendment facilitates spirited public discussion about political and social issues, creates a marketplace of ideas in which diverse perspectives can be expressed without fear of reprisal, and promotes democratic and political equality. The interest in fostering open and deliberative debate on matters of public concern is not vindicated by giving bigoted, racist, and homophobic individuals

31 Id.
32 Id. (brackets added)
33 R.A.V., 505 U.S. at 385.
34 Id.
35 Id.
36 See Ann Tucker, Flawed Assumptions: A Corporate Law Analysis of Free Speech and Corporate Personhood in Citizens United, 61 CASE W. RES. L. REV. 497, 510 (2010). The Court has relied on principles of democracy when upholding the First Amendment rights of corporations:

[T]here is practically universal agreement that a major purpose of [the First] Amendment was to protect the free discussion of governmental affairs.” If the speakers here were not corporations, no one would suggest that the State could silence their proposed speech. It is the type of speech indispensable to decision making in a democracy, and this is no less true because the speech comes from a corporation rather than an individual. The inherent worth of the speech in terms of its capacity for informing the public does not depend upon the identity of its source, whether corporation, association, union, or individual. Id. (quoting First National Bank of Boston v. Bellotti, 435 U.S. 765, 776 (1978)).
the right to spew hatred and vitriol at private citizens. None of these interests are advanced when
groups or individuals hurl vicious personal insults at vulnerable individuals mourning the death
of a child, display pictures of dead fetuses in the faces of women entering an abortion clinic, or
burn crosses on a public street outside the residence or private business of an African-American
family. Of course, not all speech must have intrinsic value. However, when the primary effect of
low-value speech is to cause substantial and legally cognizable harm, the state has a compelling
interest in protecting the victims of that speech.

Currently, there are several categories of speech that engender no First Amendment
protection. Non-sexual obscenity does not fall within any of these categories.

B. THE CATEGORIES OF UNPROTECTED SPEECH

1. DEFAMATION

The First Amendment does not protect defamatory statements.37 Such statements, which
are uttered to third parties, typically include verbal or oral communications that are verifiably
false, cause reputational harm, are not privileged, are made with negligence or actual malice, and
result in damages.38 The Court has been careful to define defamation narrowly, holding that
“[t]he First Amendment requires that we protect some falsehood in order to protect speech that
matters.”39 Statements reflecting the speaker’s opinion, therefore, are protected by the First
Amendment.40 Whether a statement constitutes actionable fact or protected opinion depends on

Pornography Prevention Act of 1996 because they suppressed speech that that had “serious literary, artistic,
political, or scientific value,” including the visual depiction of teenagers engaged in sexual activity, which is a "fact
of modern society and has been a theme in art and literature throughout the ages”).
323, 341 (1974)).
40 See, Milkovich, 497 U.S. at 8-9.
(1) “the specific language used;” (2) “whether the statement is verifiable;” (3) “the general context of the statement;” and (4) “the broader context in which the statement appeared.”

Additionally, “to provide ‘breathing space’ for true speech on matters of public concern, the Court has been willing to insulate even demonstrably false speech from liability and has imposed additional requirements of fault upon the plaintiff in a suit for defamation.” Public figures, for example, must show not only that the statement was false, but that the speaker acted with knowledge of its falsity or recklessly disregarded evidence of falsity.

In the vast majority of cases, non-sexual obscenity cannot be categorized as defamatory because statements such as “God Hates Fags” and “Thank God for 9/11” reflect the speaker’s point of view and thus constitute non-actionable opinion. In the same way, expressive conduct, such as the flying of a Nazi flag outside of a synagogue or signs depicting dead fetuses are based on political beliefs or opinions, not verifiably false facts about specific individuals.

2. **Fighting Words**

The First Amendment does not protect “fighting words,” which are defined as “those which by their very utterance inflict injury or tend to incite an immediate breach of the peace.” Thus, “epithets or personal abuse [are] not in any proper sense communication of information or opinion safeguarded by the Constitution, and [their] punishment as… criminal act[s] would raise no question under that instrument.” This encompasses speech that “when addressed to the ordinary citizen [is] inherently likely to provoke violent reaction.”

---

41 Id. at 9 (quoting Scott v. News–Herald, 496 N.E.2d 699, 709 (1986)).
44 Chaplinsky, 315 U.S. at 572.
46 Virginia v. Black, 538 U.S. at 359 (quoting Cohen, 403 U.S. at 20 (1971)); see also Chaplinsky, 315 U.S. at 572.
In addition, “advocacy of the use of force or of law”\textsuperscript{47} may be prohibited “where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.”\textsuperscript{48} Likewise, states are not prohibited from banning a “true threat,”\textsuperscript{49} which includes “those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals.”\textsuperscript{50} A prohibition on true threats “protect[s] individuals from the fear of violence”\textsuperscript{51} and “from the disruption that fear engenders”\textsuperscript{52} while protecting people “from the possibility that the threatened violence will occur.”\textsuperscript{53} The Court has rejected the proposition that fighting words “have at most a ‘\textit{de minimis}’ expressive content, or that their content is in \textit{all respects} ‘worthless and undeserving of constitutional protection…sometimes they are quite expressive indeed.’”\textsuperscript{54} That fact alone, however, does not insulate this speech from reasonable time, place, and manner restrictions.

There are several problems with classifying non-sexual obscenity as fighting words. First, a substantial portion of non-sexual obscenity may but will not necessarily provoke violence, although it can certainly cause severe emotional distress. For example, statements such as “God Hates Fags” and “Priests Rape Boys” are offensive ways of expressing controversial views about homosexuality and the Catholic Church’s molestation scandal,\textsuperscript{55} but they do not directly threaten or personally attack specific individuals. Despite the crudeness of these statements, they embrace

\begin{footnotesize}
\textsuperscript{47} Brandenburg, 395 U.S. at 447
\textsuperscript{48} Id.
\textsuperscript{49} Virginia, 538 U.S. at 359 (quoting Watts v. United States, 394 U.S. 705, 708 (1969)) (per curiam) (internal quotation marks omitted); see also R.A.V., 505 U.S. at 388 (“[T]hreats of violence are outside the First Amendment”).
\textsuperscript{50} Virginia, 538 U.S. at 359.
\textsuperscript{51} Id. (quoting R.A.V., 505 U.S. at 388).
\textsuperscript{52} Id.
\textsuperscript{53} Id.
\textsuperscript{54} R.A.V., 505 U.S. at 384-385 (emphasis in original) (quoting Ferber, 458 U.S. at 775).
\end{footnotesize}
a point of view shared by a certain segment of the population. In fact, speech that certainly would cause emotional distress, such as “White son of a bitch, I’ll kill you” and “You son of a bitch, I’ll choke you to death” has been protected under the First Amendment, demonstrating that a significant amount of non-sexual obscenity would be unregulated if placed in the fighting words category. Statements such as “God hates Fags” are less likely to incite violence and be classified as fighting words than, for example, racial slurs against African Americans, or calling a police officer a “white, racist motherfucker” and wishing the officer’s mother would die.\footnote{\textit{State v. Clay}, No. CX-99-343, 1999 WL 711038 (Minn. Ct. App. Sept. 14, 1999).}

In \textit{Snyder}, however, similar statements on signs proclaiming “Thank God for IIED’s” and “Maryland Taliban,” can—and did—cause severe emotional distress.\footnote{See, e.g., \textit{Snyder} 131 S.Ct. at 1222 (Alito, J., dissenting) (noting that the protestors “approached as closely as they could without trespassing, and launched a malevolent verbal attack on Matthew and his family at a time of acute emotional vulnerability. As a result, Albert Snyder suffered severe and lasting emotional injury”).} Stated simply, speech that does not provoke violence nonetheless can be “so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community.”\footnote{\textit{Harris v. Jones}, 380 A.2d 611, 616 (1977) (discussing the standard for the intentional infliction of emotional distress).}

3. \textbf{Obscenity}

Obscene speech warrants no First Amendment protection. In \textit{Miller}, the Court stated “[t]his much has been categorically settled by the Court, that obscene material is unprotected by the First Amendment.”\footnote{\textit{Miller}, 413 U.S. at 23 (citing \textit{Kois v. Wisconsin}, 408 U.S. 229 (1972)).} In fact, “implicit in the history of the First Amendment is the rejection of obscenity as utterly without redeeming social importance.”\footnote{\textit{Roth}, 354 U.S. at 484.}

In \textit{Miller}, the Court created a three-part test governing whether speech was obscene:

The basic guidelines for the trier of fact must be: (a) whether ‘the average person, applying contemporary community standards’ would find that the work, taken as a
whole, appeals to the prurient interest … (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.  

In so holding, the Court overruled its ruling in *Memoirs v. Massachusetts*, which required the government to demonstrate that allegedly obscene material was “utterly without redeeming social value.”

Of course, the Court recognized the conceptual difficulties that lower courts would face in applying this standard. Nonetheless, it held that “no amount of ‘fatigue’ should lead us to adopt a convenient ‘institutional’ rationale—an absolutist, ‘anything goes’ view of the First Amendment.” Critically, in *Miller*, the Court’s definition of obscenity included a requirement that the speech at issue have a sexual component: “[u]nder the holdings announced today, no one will be subject to prosecution for the sale or exposure of obscene materials unless these materials depict or describe patently offensive ‘hard core’ sexual conduct specifically defined by the regulating state law, as written or construed.” Consequently, “[s]ex and nudity may not be

---

61 *Miller*, 413 U.S. at 24 *(quoting Kois, 408 U.S. at 230 (in turn quoting Roth, 354 U.S. at 489)).
62 *Miller*, 413 U.S. at 24 *(citing Memoirs v. Massachusetts, 383 U.S. 413, 419 (1966)).* In *Miller*, the Court rejected the *Memoir* Court’s interpretation of *Roth*, which held that Congress could ban material that is “utterly without redeeming social importance”:

Nine years later, [in *Memoirs*] the Court veered sharply away from the Roth concept and, with only three Justices in the plurality opinion, articulated a new test of obscenity. The plurality held that under the Roth definition ‘as elaborated in subsequent cases, three elements must coalesce: it must be established that (a) the dominant theme of the material taken as a whole appeals to a prurient interest in sex; (b) the material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters; and (c) the material is utterly without redeeming social value. … While Roth presumed ‘obscenity’ to be ‘utterly without redeeming social importance,’ *Memoirs* required that to prove obscenity it must be affirmatively established that the material is ‘utterly without redeeming social value.’ Thus, even as they repeated the words of Roth, the Memoirs plurality produced a drastically altered test that called on the prosecution to prove a negative, i.e., that the material was ‘utterly without redeeming social value’—a burden virtually impossible to discharge under our criminal standards of proof. *Miller*, 413 U.S. at 21 *(quoting Memoirs, 383 U.S. at 418 ) (brackets added).

64 *Miller*, 413 U.S. at 27. The majority stated:
exploited without limit by films or pictures exhibited or sold in places of public accommodation any more than live sex and nudity can be exhibited or sold without limit in such public places.”

The problem is that speech can be obscene without having a sexual component. In practice, such a narrow definition limits the regulation of speech that is equally, if not more, obscene. Why is a poster saying “Kill All Homosexuals” considered protected speech? Must the bearer of such a sign also include images depicting a man and child engaging in oral sex before this speech considered obscene? Likewise, if the sole distinction between obscenity and protected speech is the presence of sexual content, are photographs of a black man with a noose tied around his neck and accompanied by “Segregation Now, Segregation Tomorrow, and Segregation Forever” still protected even if displayed outside the funeral of a slain civil rights leader? The answer should be no. The lack of a sexual component does not make the speech any less obscene, but it does result in emotional harm by virtue of the direct targeting of private citizens. Stated simply, the regulation of low-value speech is not based on its content, but on the intent of the speaker—and the timing of the speech.

“We emphasize that it is not our function to propose regulatory schemes for the States. That must await their concrete legislative efforts. It is possible, however, to give a few plain examples of what a state statute could define for regulation under part (b) of the standard announced in this opinion:

(a) Patently offensive representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated
(b) Patently offensive representation or descriptions of masturbation, excretory functions, and lewd exhibition of the genitals.” Id.

65 Id. at 25-26.
66 See, e.g., Cohen, 403 U.S. at 20. (“Whatever else may be necessary to give rise to the States’ broader power to prohibit obscene expression, such expression must be, in some significant way, erotic”).
In fact, the requirement that obscene speech have a sexual component is inconsistent with the principle reason that the *Miller* Court held obscenity to be unprotected under the First Amendment:

All ideas having even the slightest redeeming social importance—unorthodox ideas, controversial ideas, even ideas hateful to the prevailing climate of opinion—have the full protection of the (First Amendment) guaranties, unless excludable because they encroach upon the limited area of more important interests. But implicit in the history of the First Amendment is the rejection of *obscenity as utterly without redeeming social importance.*

Thus, while speech appealing to the prurient interest lacks social value and *is* obscene, it should be an example of, not a necessary condition for, deeming a particular form of speech obscene. The Court’s focus on low-value speech underscores that “sex and obscenity are not synonymous.”

Ironically, sexual conduct that appeals to the prurient interest *is* similar to non-sexually obscene speech because both lack social value, and the latter causes “severe and lasting emotional injury.” However, under current law, “patently offensive representation or descriptions of masturbation” are proscribable, but signs displayed outside of a private funeral stating that “God Hates Fags” and causing severe distress to grieving family members are protected.

---


69 *Roth*, 354 U.S. at 487.

70 *Snyder*, 131 S.Ct. at 1222 (Alito, J., dissenting).

71 *Miller*, 413 U.S. at 27.
C. REGULATING PROTECTED SPEECH—TIME, PLACE, AND MANNER AND CONTENT-NEUTRALITY

1. THE TIME, PLACE, AND MANNER RESTRICTION

It is widely accepted that “[e]ven protected speech is not equally permissible in all places and at all times.”\(^72\) Thus, political speech “is not beyond the Government's regulatory reach—it is ‘subject to reasonable time, place, or manner restrictions.’”\(^73\)

To pass constitutional muster, time, place, and manner restrictions must not discriminate on the basis of content.\(^74\) Indeed, “[t]he principal inquiry in determining content neutrality, in speech cases generally and in time, place, or manner cases in particular, is whether the government has adopted a regulation of speech because of disagreement with the message it conveys.”\(^75\) As such, “the government's purpose is the controlling consideration,”\(^76\) and a “regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others.”\(^77\) Specifically, “[g]overnment regulation of expressive activity is content neutral so long as it is ‘justified without reference to the content of the regulated speech.’”\(^78\) Non-sexual obscenity does precisely that—it regulates speech because of its harmful effects on private citizens.

\(^72\) Frisby, 487 U.S. at 479.
\(^73\) Snyder, 131 S.Ct. at 1218; see also R. George Wright, Content-Based and Content Neutral Restriction of Speech: The Limitations of a Common Distinction, 60 U. MIAMI L. REV. 333 (2006) (discussing the distinction between content-based and content-neutral regulations).
\(^75\) Id.
\(^77\) Id. (citing Renton v. Playtime Theatres, Inc., 475 U.S. 41, 48, (1986)) (upholding as a valid time, place, and manner restriction a law prohibiting adult theaters from operating in certain areas of the city).
2. **The General Prohibition Against Content and Viewpoint-Based Restrictions**

Of course, even where speech can be restricted, “[t]he government may not regulate use based on hostility—or favoritism—towards the underlying message expressed.” 79 Importantly, however, “even the prohibition against content discrimination … is not absolute.” 80 Although content discrimination “‘raises the specter that the Government may effectively drive certain ideas or viewpoints from the marketplace,’” 81 it applies “differently in the context of proscribable speech than in the area of fully protected speech.” 82

Thus, the Court has acknowledged the tension between expressive conduct that constitutes core political speech but falls within a broader class of proscribable speech, such as fighting words. In fact, restrictions on speech that might otherwise be protected can at times be permissible. “[W]hen the basis for the content discrimination consists entirely of the very reason the entire class of speech at issue is proscribable, no significant danger of idea or viewpoint discrimination exists.” 83 Put differently, “having been adjudged neutral enough to support exclusion of the entire class of speech from First Amendment protection is also neutral enough to form the basis of distinction within the class.” 84 For example, “the government may proscribe libel; but it may not make the further content discrimination of proscribing only libel critical of the government.” 85

Likewise, “[a] State might choose to prohibit only that obscenity which is the most patently offensive *in its prurience*—i.e., that which involves the most lascivious displays of

---

80 *R.A.V.*, 505 U.S. at 387.
81 *Id.* (quoting *Simon and Shuster v. Crime Victims Bd.*, 502 U.S. 105, 116 (1991)).
82 *R.A.V.*, 505 U.S. at 387.
83 *Id.* at 388.
84 *Id.*
85 *Id.* at 384.
sexual activity,” but it may not prohibit “only that obscenity which includes offensive political messages.” Stated simply, some areas of speech “can be regulated because of their constitutionally proscribable content (obscenity, defamation, etc.) … [but cannot] be made the vehicles for content discrimination unrelated to their distinctively proscribable content.”

Thus, “just as the power to proscribe particular speech on the basis of a noncontent element (e.g., noise) does not entail the power to proscribe the same speech on the basis of a content element, so also the power to proscribe it on the basis of one content element (e.g., obscenity) does not entail the power to proscribe it on the basis of other content elements.” Otherwise, “a city council could enact an ordinance prohibiting only those legally obscene works that contain criticism of the city government or, indeed, that do not include endorsement of the city government.”

In Virginia v. Black, where the Court held that a Virginia statute banning cross burning “with intent to intimidate” did not violate the First Amendment, the Court discussed the distinction between permissibly restricting speech within a proscribable class and impermissibly banning political speech that may fall within that class. The Court explained that it did not “single out for opprobrium only that speech directed toward ‘one of the specified disfavored topics,’” but instead applied the ban to all acts of cross-burning regardless of the “victim’s race, gender, or religion, or because of the victim’s ‘political affiliation, union membership, or

---

86 Id.
88 R.A.V., 505 U.S. at 383-84 (emphasis in original) (brackets added).
89 Id. at 386.
90 Id.
91 Virginia, 538 U.S. at 362.
homosexuality.””92 Furthermore, “as a factual matter it is not true that cross burners direct their intimidating conduct solely to racial or religious minorities.”93

At the same time, the Court invalidated a provision in the Virginia statute deeming *any* act of cross-burning to be prima facie evidence of an intent to intimidate.94 The Court recognized that “the act of burning a cross may mean that a person is engaging in constitutionally proscribable intimidation,”95 but may also mean that “the person is engaged in core political speech.”96 As such, the statute’s constitutionality depended on the *additional* requirement of intent to intimidate, which then brought the speech within a proscribable class.97 Thus, the presumption that cross-burning was prima facie evidence of an intent to discriminate "blur[red] the line between these two meanings of a burning cross."98 Consequently, this provision “chills constitutionally protected political speech because of the possibility that the Commonwealth will prosecute—and potentially convict—somebody engaging only in lawful political speech at the core of what the First Amendment is designed to protect.”99 This would lead to “‘an unacceptable risk of the suppression of ideas.’”100 In other words, there must be something more—unrelated to the speech’s content—that justifies a particular regulation. If, as the Court recognized, the intent to intimidate is enough to regulate speech, the intent to target and injure should be more than enough.

92 Id. at 362 *(quoting R.A.V., 505 U.S. at 391).*
93 Virginia, 538 U.S. at 362.
94 Id. at 365.
95 Id.
96 Id.
97 Id.
98 Id. at 365 (brackets added).
99 Id.
Accordingly, where the prohibited conduct falls within a class of speech that the First Amendment does not protect, “some types of content discrimination [do] not violate the First Amendment.”\(^{101}\) In \textit{Virginia}, the Court stated:

The First Amendment permits Virginia to outlaw cross burnings done with the intent to intimidate because burning a cross is a \textit{particularly virulent form of intimidation}. Instead of prohibiting all intimidating messages, Virginia may choose to regulate this subset of intimidating messages in light of cross burning’s long and pernicious history as a signal of impending violence. Thus, just as a State may regulate only that obscenity which is the most obscene due to its prurient content, so too may a State choose to prohibit only those forms of intimidation that are most likely to inspire fear of bodily harm.\(^{102}\)

In the same manner, “the Federal Government can criminalize only those threats of violence that are directed against the President…since the reasons why threats of violence are outside the First Amendment (protecting individuals from the fear of violence, from the disruption that fear engenders, and from the possibility that the threatened violence will occur) have special force when applied to the person of the President.”\(^{103}\) Additionally, content discrimination within a subclass of prohibited speech is permitted where the “subclass happens to be associated with particular ‘secondary effects’ of the speech, so that the regulation is ‘\textit{justified} without reference to the content of the … speech.’”\(^{104}\)

3. \textbf{The Distinction Between Matters of Public and Private Concern}

The First Amendment affords less protection to speech that concerns private matters. The Supreme Court has recognized that matters of private concern do not implicate the same concerns that exist when government tries to regulate speech on issues of public importance:

\(^{101}\) \textit{Virginia}, 538 U.S. at 365.
\(^{102}\) Id. (emphasis added).
\(^{103}\) \textit{R.A.V.}, 505 U.S. at 388 (citing \textit{Watts v. United States}, 394 U.S. 705, 707 (1969)).
[N]ot all speech is of equal First Amendment importance… and where matters of purely private significance are at issue, First Amendment protections are often less rigorous. That is because restricting speech on purely private matters does not implicate the same constitutional concerns as limiting speech on matters of public interest: “[T]here is no threat to the free and robust debate of public issues; there is no potential interference with a meaningful dialogue of ideas;” and the “threat of liability” does not pose the risk of “a reaction of self-censorship” on matters of public import. 105

Speech constitutes a matter of public concern when it can “be fairly considered as relating to any matter of political, social, or other concern to the community,” or when it “is a subject of legitimate news interest; that is, a subject of general interest and of value and concern to the public.”106 Moreover, “[t]he arguably ‘inappropriate or controversial character of a statement is irrelevant to the question whether it deals with a matter of public concern.”107 In discussing the distinction between matters of public and private concern, the Court stated:

Deciding whether speech is of public or private concern requires us to examine the “‘content, form, and context’” of that speech “as revealed by the whole record.” As in other First Amendment cases, the court is obligated to “make an independent examination of the whole record” in order to make sure that “the judgment does not constitute a forbidden intrusion on the field of free expression.” 108 In considering content, form, and context, no factor is dispositive, and it is necessary to evaluate all the circumstances of the speech, including what was said, where it was said, and how it was said.

This distinction is critical, because “speech concerning public affairs is more than self-expression; it is the essence of self-government.”109

107 Snyder, 131 S.Ct. at 1216 (quoting Rankin v. McPherson, 483 U.S. 378, 387 (1987)).
109 Snyder, 131 S.Ct. at 1215 (Garrison v. Louisiana, 379 U.S. 64, 74–75, 85 S.Ct. 209, 13 L.Ed.2d 125 (1964)).
III.

THE SUPREME COURT’S SHIFT TOWARD ABSOLUTISM

A. SNYDER V. PHELPS

1. THE MAJORITY OPINION

In Snyder v. Phelps, a father sued the Westboro Baptist Church after protestors held an anti-homosexual demonstration outside his son’s funeral. The demonstration, which was held approximately 1000 feet outside of the church, featured signs bearing messages such as “Thank God for Dead Soldiers,” “Fags Doom Nations,” “America is Doomed,” “Priests Rape Boys,” and “You're Going to Hell.” Matthew Snyder’s father filed suit, alleging the intentional infliction of emotional distress, intrusion upon seclusion, and civil conspiracy. The jury found in favor of the plaintiff, but the Fourth Circuit reversed the decision, holding that the speech related to a matter of public concern and was defamatory, thus engendering First Amendment protection.

In an 8-1 decision, the Supreme Court affirmed the decision, primarily because the speech related to a matter of public concern. The Court held that the Westboro Baptist Church’s protest “plainly relates to broad issues of interest to society at large, rather than matters of ‘purely private concern.’” Specifically, “while these messages may fall short of refined social or political commentary, the issues they highlight—the political and moral conduct of the United States and its citizens, the fate of our Nation, homosexuality in the military, and scandals

110 Snyder, 131 S.Ct. 1207 (2014).
111 Id. at 1210.
112 Id.
113 Id. As the Court noted, “[t]o succeed on a claim for intentional infliction of emotional distress in Maryland, a plaintiff must demonstrate that the defendant intentionally or recklessly engaged in extreme and outrageous conduct that caused the plaintiff to suffer severe emotional distress.” Id. at 1215 (citing Harris v 380 A.2d at 616).
114 Snyder, 131 S.Ct. at 1214.
115 Id. at 1219.
116 Id. at 1216.
involving the Catholic clergy—are matters of public import.” 117 This differed from historically private matters, such as “information about a particular individual's credit report,” 118 and “videos of an employee engaging in sexually explicit acts.” 119 Even if some of the signs “related to Matthew Snyder or the Snyders specifically, that would not change the fact that the overall thrust and dominant theme of Westboro's demonstration spoke to broader public issues.” 120 Additionally, the protest occurred on a public street, which enjoys a “special position in terms of First Amendment protection.” 121 Indeed, the Court’s precedent had “repeatedly referred to public streets as the archetype of a traditional public forum,” 122 which have been used “for public assembly and debate.” 123

Thus, because Westboro's speech “was at a public place on a matter of public concern, that speech is entitled to 'special protection' under the First Amendment.” 124 The government could not restrict the speech “simply because it is upsetting or arouses contempt,” 125 or “prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.” 126 After all, “the point of all speech protection...is to shield just those choices of content that in someone's eyes are misguided, or even hurtful.” 127 In addition, holding Westboro liable for the intentional infliction of emotional distress depended upon a finding of outrageousness, “a highly malleable standard with 'an inherent subjectiveness [sic] about it which would allow a jury to impose liability on the basis of the jurors' tastes or views, or perhaps

117 Id. at 1217.
118 Id. at 1216.
119 Id.
120 Id. at 1217.
121 Snyder, 131 S.Ct. at 1218 (quoting United States v. Grace, 461 U.S. 171, 180 (1983)).
122 Snyder, 131 S.Ct. at 1218.
123 Id. (quoting Frisby, 487 U.S. at 480).
124 Snyder, 131 S.Ct. at 1215 (quoting Connick, 461 U.S. at 145).
125 Snyder, 131 S.Ct. at 1219.
127 Snyder, 131 S.Ct. at 1219 (quoting Hurley v. Irish–American Gay, Lesbian and Bisexual Group of Boston, Inc., 515 U.S. 557, 574 (1995)).
on the basis of their dislike of a particular expression.”

In addition, “any distress occasioned by Westboro's picketing turned on the content and viewpoint of the message conveyed, rather than any interference with the funeral itself.”

2. **Justice Alito’s Dissent**

In his dissent, Justice Alito stated that “our profound national commitment to free and open debate is not a license for the vicious verbal assault that occurred in this case.”

The signs of the Westboro protestors were so “offensive and shocking as to not be entitled to First Amendment protection.”

Justice Alito relied on several factors to advocate for a narrow time, place, and manner exception to the otherwise-protected speech.

a. **The Intent of the Speaker**

Justice Alito recognized that this case rested in part on the speakers’ intention to exploit “a funeral for the purpose of attracting public attention [and] ‘intrud[ing] upon [the mourners]…grief.’”

In fact, the Church’s history of protesting at funerals, which included nearly 600 military funerals, “was central to respondents' well-practiced strategy for attracting public attention.”

Before the funeral, the Westboro Baptist Church issued a press release stating that they would picket the funeral of Matthew Snyder because “God Almighty killed Lance Cpl. Snyder…“to ensure that their protests [would] attract public attention.”

Justice Alito stated:

---

128 *Snyder*, 131 S.Ct. at 1219 (*quoting Hustler*, 485 U.S. at 55).

129 *Snyder*, 131 S.Ct. at 1219 The Court also rejected the Petitioner’s argument that the protest essentially made the mourners a captive audience, holding that “we have applied the captive audience doctrine only sparingly to protect unwilling listeners from protected speech.” Because Westboro’s church members stayed approximately 1,000 feet away from the service, those at the funeral were not rendered captive by the speech. *Id.* at 1220.

130 *Id.* at 1222 (Alito, J., dissenting).

131 *Id.* at 1225 (*quoting Snyder v. Phelps*, 580 F.3d 206, 221 (4th Cir. 2009)).


133 *Snyder*, 131 S.Ct. at 1223.

134 *Id.* at 1224-25 (*citing Supp. App. in No. 08–1026(CA4), p. 158a)).
In this case, respondents implemented the Westboro Baptist Church’s publicity-seeking strategy. Their press release stated that they were going “to picket the funeral of Lance Cpl. Matthew A. Snyder” because “God Almighty killed Lance Cpl. Snyder. He died in shame, not honor—for a fag nation cursed by God…Now in Hell—sine die”…This announcement guaranteed that Matthew’s funeral would be transformed into a raucous media event and began the wounding process. It is well known that anticipation may heighten the effect of a painful event.  

Indeed, “the media is irresistibly drawn to the sight of persons who are visibly in grief,” and “the more outrageous the funeral protest, the more publicity the Westboro Baptist Church is able to obtain.” Indeed, “this is the strategy that they [Westboro Baptist Church] have routinely employed—and that they will now continue to employ—inflicting severe and lasting emotional injury on an ever growing list of innocent victims.”

b. **The Speech Did Not Relate to a Matter of Public Concern**

Justice Alito recognized that, although the issue of homosexuality and military service is a matter of public concern, the Westboro Baptist Church’s conduct involved a personal attack on a private figure:  

[I]t is abundantly clear that respondents, going far beyond commentary on matters of public concern, specifically attacked Matthew Snyder because (1) he was a Catholic and (2) he was a member of the United States military. Both Matthew and petitioner were private figures, and this attack was not speech on a matter of public concern. While commentary on the Catholic Church or the United States military constitutes speech on matters of public concern, speech regarding Matthew Snyder’s purely private conduct does not.

---

135 *Id.*
136 *Snyder*, 131 S.Ct. at 1224.
137 *Id.*
138 *Id.* at 1226.
139 *Id.*
140 *Id.* Furthermore, the respondents’ desire “to increase publicity for its views” did not transform their conduct into a matter of public concern.
In addition, Mr. Snyder was “simply a parent whose son, Marine Lance Corporal Matthew Snyder, was killed in Iraq.”\footnote{141} Thus, although the First Amendment protects this speech, speakers may not “intentionally inflict severe emotional injury on private persons at a time of intense emotional sensitivity by launching vicious verbal attacks that make no contribution to public debate.”\footnote{142} Put differently, “[a]llowing family members to have a few hours of peace without harassment,” rather than permitting speech that “may permanently stain their memories of the final moments before a loved one is laid to rest…does not undermine public debate.”\footnote{143} And “the First Amendment permits a private figure to recover from the intentional infliction of emotional distress caused by speech on matter of private concern,”\footnote{144} even if the “respondents' protest occurred on a public street.”\footnote{145}

This distinction was critical, because “it is speech on ‘matters of public concern’…at the heart of the First Amendment's protection,”\footnote{146} which is to “‘to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people.’”\footnote{147} Thus, the Court has held that “speech on public issues occupies the ‘highest rung of the hierarchy of First Amendment values’ and is entitled to special protection.”\footnote{148} Conversely, a matter of purely private concern engenders “less First Amendment concern.”\footnote{149} In such instances, “[t]here is no threat to the free and robust debate of public issues; there is no potential interference with a meaningful dialogue of ideas concerning self-government; and there is no threat of liability

\footnote{141}Id.
\footnote{142}Id. (quoting \textit{New York Times}, 376 U.S. at 270).
\footnote{143}Snyder, 131 S.Ct. at 1225.
\footnote{144}Id. at 1228.
\footnote{145}Id. at 1227.
\footnote{146}Dun & Bradstreet, Inc., 472 U.S. at 758-759 (quoting \textit{First National Bank}, 435 U.S. at 776).
\footnote{149}Dun & Bradstreet, Inc., 472 U.S. at 759.
causing a reaction of self-censorship by the press.” 150 Thus, “[w]hile such speech is not totally unprotected by the First Amendment, its protections are less stringent.” 151

c. THE TARGETS OF THE SPEECH WERE VULNERABLE PRIVATE CITIZENS

Justice Alito argued that the Westboro Baptist Church’s conduct targeted innocent and unsuspecting civilians during a time of grief:

Mr. Snyder wanted what is surely the right of any parent who experiences such an incalculable loss: to bury his son in peace. But respondents, members of the Westboro Baptist Church, deprived him of that elementary right. They first issued a press release and thus turned Matthew’s funeral into a tumultuous media event. They then appeared at the church, approached as closely as they could without trespassing, and launched a malevolent verbal attack on Matthew and his family at a time of acute emotional vulnerability. As a result, Albert Snyder suffered severe and lasting emotional injury. 152

As Justice Alito noted, “personal abuse is not in any proper sense communication of information or opinion safeguarded by the Constitution.” 153

d. THE RESPONDENTS COULD HAVE DISSEMINATED THEIR MESSAGE IN OTHER PUBLIC FORUMS

Justice Alito acknowledged that Westboro Baptist Church had a First Amendment right to express its views, but asserted that it did not have the unfettered right to express those views in every public forum, particularly where they would cause severe emotional harm:

On the morning of Matthew Snyder’s funeral, respondents could have chosen to stage their protest at countless locations. They could have picketed the United States Capitol, the White House, the Supreme Court, the Pentagon, or any of the more than 5,600 military recruiting stations in this country. They could have returned to the Maryland State House or the United States Naval Academy, where they had been the day before. They could have selected any public road where

150 Id. at 759-760.
151 Id. at 760.
152 Snyder, 131 S.Ct. at 1228 (emphasis added).
153 Id. (quoting Cantwell, 310 U.S. at 310).
pedestrians are allowed. (There are more than 4,000,000 miles of public roads in the United States.) They could have staged their protest in a public park. (There are more than 20,000 public parks in this country.) They could have chosen any Catholic church where no funeral was taking place. (There are nearly 19,000 Catholic churches in the United States.).

Furthermore, the protesters could have employed any number of methods to disseminate their message:

The First Amendment ensures that they have almost limitless opportunities to express their views. They may write and distribute books, articles, and other texts; they may create and disseminate video and audio recordings; they may circulate petitions; they may speak to individuals and groups in public forums and in any private venue that wishes to accommodate them; they may picket peacefully in countless locations; they may appear on television and speak on the radio; they may post messages on the Internet and send out e-mails.\textsuperscript{154}

Thus, the Westboro Baptist Church members had an unfettered right to express their views in terms that were “uninhibited,” “vehement,” and “caustic.”\textsuperscript{155} Justice Alito recognized, however, that “[w]hen grave injury is intentionally inflicted by means of an attack like the one at issue here, the First Amendment should not interfere with recovery.”\textsuperscript{156}

\textsuperscript{154} Snyder, 131 S.Ct. at 1222 (Alito, J., dissenting).
\textsuperscript{155} Id. (quoting New York Times, 376 U.S. at 270).
\textsuperscript{156} Snyder, 131 S.Ct. at 1223. Justice Alito distinguished the Court’s prior rulings in Hustler Magazine, 485 U.S. 46, and Milkovich, 497 U.S. 1, as follows:.Unlike the respondent in Hustler, petitioner’s father was not a public figure. Milkovich involved defamation, requiring that defamatory facts be verifiably false and not merely opinion. Nothing in Milkovich suggested that this requirement applied to claims for the intentional infliction of emotional distress. Snyder, 131 S.Ct. at 1228.
B. McCullen v. Coakley

In *McCullen*, the Supreme Court invalidated a Massachusetts law that made it a crime to “knowingly stand on a public way or sidewalk within 35 feet of an entrance or driveway to any place, other than a hospital, where abortions are performed.”¹⁵⁷

When initially enacted in 2000, the statute established an eighteen-foot radius around the clinic entrance to allow patients to enter.¹⁵⁸ No one could come within six feet of another person “for the purpose of passing a leaflet or handbill to, displaying a sign to, or engaging in oral protest, education, or counseling with such other person.”¹⁵⁹ The law sought to prevent confrontations between abortion protestors and those employed at or seeking services from abortion clinics.¹⁶⁰ The statute also “subjected to criminal punishment anyone who ‘knowingly obstructs, detains, hinders, impedes, or blocks another person’s entry to or exit from a reproductive health care facility.’”¹⁶¹ After reports surfaced that the law had been repeatedly violated, the Massachusetts legislature amended the statute to create a thirty-five foot buffer zone within which no one could enter.¹⁶²

The petitioners, who offered counseling and information outside of a Planned Parenthood Clinic, brought suit, arguing that the law violated the First Amendment.¹⁶³ In a unanimous decision, the Supreme Court agreed that the law regulates access to “public way[s]” and “sidewalk[s],” which is considered “traditional public fora”…held in trust for the use of the

---

¹⁵⁷ *McCullen*, 134 S.Ct. 2518, 2525 (2014) (*quoting* MASS. GEN. LAWS, ch. 266, § 120E½ (West 2000)).
¹⁵⁸ *McCullen*, 134 S.Ct. at 1225.
¹⁵⁹ *Id.*
¹⁶⁰ *Id.*
¹⁶¹ *Id.*; see also *Hill v. Colorado*, 530 U.S. 703 (2000) (upholding a similar statute).
¹⁶² *McCullen*, 134 S.Ct. at 2626.
¹⁶³ *Id.*
public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions.’”\textsuperscript{164} The Court explained:

It is no accident that public streets and sidewalks have developed as venues for the exchange of ideas. Even today, they remain one of the few places where a speaker can be confident that he is not simply preaching to the choir. With respect to other means of communication, an individual confronted with an uncomfortable message can always turn the page, change the channel, or leave the Web site. Not so on public streets and sidewalks. There, a listener often encounters speech he might otherwise tune out. In light of the First Amendment’s purpose “to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail,” this aspect of traditional public fora is a virtue, not a vice.\textsuperscript{165}

Consequently, “even though the Act says nothing about speech on its face, there is no doubt—and respondents do not dispute—that it restricts access to traditional public fora and is therefore subject to First Amendment scrutiny.”\textsuperscript{166}

Noting that “the government's ability to restrict speech in such locations is ‘very limited,’” the Court reiterated its “guiding First Amendment principle that the ‘government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.’”\textsuperscript{167} On the other hand, the Court has “afforded the government somewhat wider leeway to regulate features of speech unrelated to its content.”\textsuperscript{168} Thus, “even in a public forum, the government may impose reasonable restrictions on the time, place, or manner of protected speech, provided the restrictions ‘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.’”\textsuperscript{169}

\textsuperscript{164} Id. at 2528-2529 (quoting Pleasant Grove City v. Summum, 555 U.S. 460, 469 (2009)) (quoting Perry Educ. Ass’n. v. Perry Local Educators’ Ass’n., 460 U.S. 37, 45 (1983)).

\textsuperscript{165} McCullen, 134 S.Ct. at 2529 (quoting FCC v. League of Women Voters of Cal., 468 U.S. 364, 377 (1984)).

\textsuperscript{166} McCullen, 134 S.Ct. at 2529.

\textsuperscript{167} Id. (quoting Grace, 461 U.S. at 197; Police Dep’t of Chicago v. Mosley, 408 U.S. 92, 95 (1972)).

\textsuperscript{168} McCullen, 134 S.Ct. at 2529.

\textsuperscript{169} Id. (quoting Ward, 491 U.S. at 791 (in turn quoting Clark, 468 U.S. at 293).
Applying this standard, the Court found that the law was neutral on its face, though “by
limiting the buffer zones to abortion clinics, the Act has the ‘inevitable effect’ of restricting
abortion-related speech more than speech on other subjects.” 170 Indeed, a facially neutral law
does not “become content based simply because it may disproportionately affect speech on
certain topics,” 171 and where it “serves purposes unrelated to the content of expression [despite
the] incidental effect on some speakers or messages but not others.” 172 Rather, a law becomes
content-based “if it require[s] ‘enforcement authorities’ to ‘examine the content of the message
that is conveyed to determine whether’ a violation has occurred.” 173 The dispositive question,
therefore, asks whether the law is ‘justified without reference to the content of the regulated
speech.’” 174

Answering in the affirmative, the Court held that the stated purpose is to “increase
forthwith public safety at reproductive health care facilities.” 175 As such, “[w]hether petitioners
violate the Act ‘depends’ not ‘on what they say’… but simply on where they say it,” 176 such that
a person “can violate the Act merely by standing in a buffer zone, without displaying a sign or
uttering a word.” 177 As the Court recognized, “[o]bstructed access and congested sidewalks are
problems no matter what caused them,” 178 and “individuals can obstruct clinic access and clog
sidewalks just as much when they loiter as when they protest abortion or counsel patients.” 179

The Court stated:

170 McCullen, 134 S.Ct. at 2531 (quoting Brief for Petitioners, at 24) (quoting United States v. O'Brien, 391 U.S. 367, 384 (1968)).
171 Id., 134 S.Ct. at 2531.
172 Id. (quoting Ward, 491 U.S. at 791).
173 McCullen, 134 S.Ct. at 2531 (quoting League of Women Voters of California, 468 U.S. at 383).
174 McCullen, 134 S.Ct. at 2531 (quoting Renton, 475 U.S. at 48).
175McCullen, 134 S.Ct. at 2531 (quoting 2007 MASS. ACTS, p. 660).
176 McCullen, 134 S.Ct. at 2531 (quoting Holder v. Humanitarian Law Project, 561 U.S. 1, 27 (2010)).
177 Id.
178 Id.
179 Id.
To be clear, the law would not be content neutral if it were concerned with undesirable effects that arise from “the direct impact of speech on its audience” or “[l]isteners' reactions to speech.” If, for example, the speech outside Massachusetts abortion clinics caused offense or made listeners uncomfortable, such offense or discomfort would not give the Commonwealth a content-neutral justification to restrict the speech. All of the problems identified by the Commonwealth here, however, arise irrespective of any listener's reactions. Whether or not a single person reacts to abortion protestors' chants or petitioners’ counseling, large crowds outside abortion clinics can still compromise public safety, impede access, and obstruct sidewalks.\(^{180}\)

Additionally, the Court rejected the Petitioner’s arguments that the statute was content-based because the legislature chose “to pursue these interests only at abortion clinics,”\(^{181}\) and thus operated to “burden a narrower category of disfavored speech.”\(^{182}\) States can “adopt laws to address the problems that confront them”\(^{183}\) “in response to a problem … limited to abortion clinics.”\(^{184}\) Of course, “the Act would not be content-neutral if it were concerned with undesirable effects that arise from ‘the direct impact of speech on its audience’ or ‘[l]isteners' reactions to speech.’”\(^{185}\) However, that was not the intent underlying the statute. The reasons for enacting the statute “arise irrespective of any listener's reactions,”\(^{186}\) because even a single protester can block access to an abortion clinic and compromise public safety.\(^{187}\) Although the statute did not discriminate on the basis of content, however, the Court held that it was not narrowly tailored to achieve the Government’s stated interests. The Court noted that although the restriction “need not be the least restrictive or least intrusive means of ‘serving the government’s interests,’”\(^{188}\) the government may not “regulate expression in such a manner that a substantial

\(^{180}\) Id. (quoting Boos v. Barry, 485 U.S. 312, 321 (1988)).
\(^{181}\) McCullen, 134 S.Ct. at 2532.
\(^{182}\) Id.
\(^{183}\) Id. (quoting Burson, 504 U.S. at 207).
\(^{184}\) McCullen, 134 S.Ct. at 2532.
\(^{185}\) Id. at 2531-2532 (quoting Boos, 485 U.S. at 321).
\(^{186}\) McCullen, 134 S.Ct. at 2532.
\(^{187}\) Id.
\(^{188}\) Id. at 2535 (quoting Ward, 491 U.S. at 799).
portion of the burden on speech does not serve to advance its goals.” The Court held that the thirty-five foot buffer zone imposed “serious burdens on Petitioner’s speech”\(^{189}\) by restricting access to “a significant portion of the adjacent public sidewalks, pushing petitioners well back from the clinics’ entrances and driveways.”\(^{190}\)

In doing so, “[t]he zones…compromise petitioners' ability to initiate the close, personal conversations that they view as essential to ‘sidewalk counseling.’”\(^{191}\) For example, the Petitioner “cannot distinguish patients from passersby outside the Boston clinic in time to initiate a conversation before [entering] the buffer zone.”\(^{192}\) Indeed, because of these zones, a petitioner must often raise “her voice at patients from outside the zone—a mode of communication sharply at odds with the compassionate message she wishes to convey.”\(^{193}\) Although one of the Petitioners had “persuaded about 80 women not to terminate their pregnancies since the 2007 amendment,”\(^{194}\) that number was much lower than the number persuaded prior to the amendment. Additionally, the “buffer zones have also made it substantially more difficult for petitioners to distribute literature to arriving patients”\(^{195}\) because they have been pushed “so far back from the clinics' driveways that they can no longer even attempt to offer literature as drivers turn into the parking lots.”\(^{196}\) Basically, the law “operates to deprive petitioners of their two primary methods of communicating with patients.”\(^{197}\) This was particularly troublesome because “while the First Amendment does not guarantee a speaker the right to any particular form of expression, some forms—such as normal conversation and leafleting on a public sidewalk—have

---

\(^{189}\)McCullen, 134 S.Ct. at 2535.

\(^{190}\)Id.

\(^{191}\)Id.

\(^{192}\)Id.

\(^{193}\)Id.

\(^{194}\)Id. (quoting Appendix, at 137).

\(^{195}\)McCullen, 134 S.Ct. at 2535.

\(^{196}\)Id.

\(^{197}\)Id.
historically been more closely associated with the transmission of ideas than others.” For example, “in the context of petition campaigns,” the Court held that “one-on-one communication” is “the most effective, fundamental, and perhaps economical avenue of political discourse.” Massachusetts law, therefore, “is responsible for that restriction on their ability to convey their message.”

For these reasons, the Court held that the “buffer zones burden substantially more speech than necessary to achieve the Commonwealth's asserted interests.” Furthermore, less intrusive options were available to achieve Massachusetts' stated goal:

If Massachusetts determines that broader prohibitions along the same lines are necessary, it could enact legislation similar to the federal Freedom of Access to Clinic Entrances Act of 1994 … which subjects to both criminal and civil penalties anyone who “by force or threat of force or by physical obstruction, intentionally injures, intimidates, or interferes with or attempts to injure, intimidate, or interfere with any person because that person is or has been… obtaining or providing reproductive health services.” Some dozen other States have done so … If the Commonwealth is particularly concerned about harassment, it could also consider an ordinance such as the one adopted in New York City that not only prohibits obstructing access to a clinic, but also makes it a crime “to follow and harass another person within 15 feet of the premises of a reproductive health care facility.”

Simply stated, Massachusetts sought to remedy safety and overcrowding problems at abortion clinics “by the extreme step of closing a substantial portion of a traditional public forum to all speakers,” and “has done so without seriously addressing the problem through alternatives

---

198 Id.
199 Id.
200 Id. (quoting Meyer v. Grant, 486 U.S. 414, 424 (1988)); see also McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 347 (1995) (“handing out leaflets in the advocacy of a politically controversial viewpoint ... is the essence of First Amendment expression”; “[n]o form of speech is entitled to greater constitutional protection”) (as cited in McCullen, 134 S. Ct. at 2535).
201 McCullen, 134 S. Ct. at 2537.
202 Id.
that leave the forum open for its time-honored purposes.”

As a result, the law violated the First Amendment.

C. UNITED STATES v. STEVENS—AND JUSTICE ALITO’S DISSENT

In United States v. Stevens, the U.S. Supreme Court—affirming the Third Circuit Court of Appeals—held that 18 U.S.C. § 48, which criminalized the production and trafficking of videos depicting conduct “in which a living animal is intentionally maimed, mutilated, tortured, wounded, or killed,” violated the First Amendment’s free speech protections. Through passage of 18 U.S.C. § 48, Congress intended, among other things, to eliminate “crush videos,” which depict “a small animal, a kitten or hamster, constrained to the floor of a room.” The animal is tortured by a woman who “thrusts her high-heeled shoe into its body, slams her heel into the kitten’s eye socket and mouth loudly fracturing its skull, and stomps repeatedly on the animal’s head.”

The Court held that 18 U.S.C. § 48 was unconstitutionally overbroad because the “ban on a ‘depiction of animal cruelty’ nowhere requires that the depicted conduct be cruel.” In the Court’s view, while “‘[m]aimed, mutilated, [and] tortured’ convey cruelty,” the words ‘wounded’ or ‘killed’ do not suggest any such limitation.

Although 18 U.S.C. § 48 required that the depicted conduct be illegal, it failed to distinguish between laws aimed at preventing animal cruelty and those seeking, for example, to

204 McCullen, 135 S.Ct. at 2541.
206 Id. at 465.
207 Id. at 482.
208 Id. at 465-66.
209 Id. at 465.
210 Id. at 491 (Alito, J., dissenting).
211 Id. at 474.
212 Id. (quoting 18 U.S.C. § 48(c)(1)).
213 Stevens, 559 U.S. at 474.
preserve endangered species.\textsuperscript{214} Thus, because 18 U.S.C. § 48 made “no distinction based on the reason the intentional killing of an animal is made illegal,”\textsuperscript{215} it prohibited conduct such as “the humane slaughter of a stolen cow.”\textsuperscript{216} As a result, the Court held that 18 U.S.C. § 48 infringed on the defendants’ First Amendment freedoms.\textsuperscript{217} While the Court’s overly broad analysis was arguably correct, it should have recognized that “crush videos” demean animal life in a manner warranting heightened legal protection.

Justice Alito dissented. He stated that the Court could have held that “crush videos”—like child pornography—do not constitute protected speech because they are “intrinsically related”\textsuperscript{218} to the criminal conduct of animal cruelty. Although the production of crush videos is not illegal, they record “the actual commission of a criminal act that inflicts severe physical injury . . . and ultimately results in death.”\textsuperscript{219} While the State certainly has a compelling interest in protecting children from exploitation and abuse, it also has a compelling interest in preventing depictions of “living creatures that experience excruciating pain.”\textsuperscript{220} Furthermore, just as the value of child pornography “is exceedingly modest, if not de minimis,”\textsuperscript{221} the “actual recording of acts of animal torture”\textsuperscript{222} has no conceivable value whatsoever. Consequently, instead of avoiding the issue of “whether a statute limited to crush videos or other depictions of extreme animal cruelty would be constitutional,”\textsuperscript{223} the Court should have held that, if carefully drafted, laws banning crush videos are constitutional. As Justice Alito explained, “the animals used in crush videos are living

\begin{footnotes}
\item[214] Id. at 475.
\item[215] Id.
\item[216] Id.
\item[217] Id. at 482.
\item[218] Id. at 493-94 (Alito, J., dissenting).
\item[219] Id. at 494.
\item[220] Id. at 496.
\item[221] Id. at 494 (quoting Ferber, 458 U.S. at 762-63).
\item[222] Stevens, 559 U.S. at 495.
\item[223] Id. at 482.
\end{footnotes}
creatures that experience excruciating pain." This speech has one characteristic that distinguishes it from hateful signs and disturbing photographs: it should be banned outright.

IV.

TARGETED, NON-SEXUAL OBSCENITY

A. NON-SEXUAL OBSCENITY CAN BE SUBJECT TO TIME, PLACE, AND MANNER RESTRICTIONS

The Court’s First Amendment jurisprudence gives insufficient weight to the extreme distress that occurs when inflammatory speech of minimal social value is used to traumatize, degrade, and humiliate. Neither the interest in fostering open debate on issues of public concern nor the need to protect unpopular speech from censorship or viewpoint discrimination should compel the Court to shield non-sexual obscenity from reasonable time, place, and manner restrictions.

The problem was created when the Court confined obscenity to matters appealing to prurient, or sexual, interests. Although the Miller Court’s definition identified speech that is obscene, such as child pornography or photographs depicting excretory functions, it excluded from this definition non-sexual speech that, in certain contexts, is also obscene. This has created a doctrinal void in First Amendment law that allows speakers to target vulnerable individuals with abhorrent messages, like those in Snyder, that have no social value and cause incalculable harm.

Although the Court in Snyder and McCullen relied on principles of liberty, self-expression, and open public debate, the speech did not implicate these principles, just as tort liability for harm caused by the speech would not have weakened First Amendment freedoms. Of course, few would dispute that the entire purpose of the First Amendment is to protect

---

224 Id. at 496 (Alito, J., dissenting).
225 Miller, 413 U.S. at 27.
unpopular points of view and offensive, even vulgar, speech from suppression or viewpoint discrimination.\footnote{Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 828 (1995) (“government offends the First Amendment when it imposes financial burdens on certain speakers based on the content of their expression”).} Admittedly, expressive conduct that directly or indirectly relates to a public issue warrants the highest levels of First Amendment protection, regardless of whether passersby find the speech distasteful, irritating, or unpleasant. Hurt feelings and heightened sensitivities are no reason to silence those who hate the United States or who believe in segregation. In a free society, the more speech we allow, the better. As citizens are exposed to different viewpoints, particularly those that are antithetical to their values, the quality of public debate is enhanced, the value of social discourse is heightened, and the liberty of all citizens, particularly those who are in the minority or hold dissenting views, is strengthened. Stated simply, protecting undesirable speech is vital to ensuring equality and a functioning democracy. Thus, citizens can burn the American Flag. They can wear shirts that say “Fuck the Draft.” The Ku Klux Klan can hold rallies in the public square championing white supremacy.\footnote{Black, 538 U.S. at 366 (“[i]t may be true that a cross burning, even at a political rally, arouses a sense of anger or hatred among the vast majority of citizens who see a burning cross. But this sense of anger or hatred is not sufficient to ban all cross burnings”).}

The benefits of totally unfettered speech notwithstanding, the Court has recognized that “protected speech is not equally permissible in all places and at all times,”\footnote{Frisby, 487 U.S. at 479.} including instances where the speech transcends the “uninhibited,” “vehement,” and “caustic”\footnote{New York Times, 376 U.S. at 270.} into the profane and disturbing. The basis for imposing civil liability in Snyder and for establishing the buffer zone in \textit{McCullen} was not to suppress or discriminate against unpopular or distasteful speech or to shield “unwitting listeners or viewers … from unwanted expression.”\footnote{Miller, 413 U.S. at 21 (emphasis added).} Rather, imposing liability protected private citizens from the trauma resulting from vicious personal attacks against a
deceased family member or protestors displaying bloody photographs of dismembered infants outside entrances to abortion clinics. This speech does not merely annoy, insult, or offend. It causes tangible—and lasting—harm.

In Snyder and McCullen, the Court relied heavily on the forum where the speech was rendered, rather than the context, impact, and value of the speech, and the intentions of the speaker. In Snyder, for example, the Court emphasized that Westboro Baptist Church’s speech related to a matter of public concern and occurred in a traditionally public forum. The speakers at Matthew Snyder’s funeral, however, displayed signs with statements such as “Thank God for Dead Soldiers,” “Fags Doom Nations,” “Fag Troops,” and “God Hates You,” not to express an unpopular or offensive opinion, educate an unsuspecting audience, or provoke a spirited debate. They sought to traumatize a grieving family and draw unwanted attention to a private funeral. That is precisely what happened. Matthew Snyder’s father suffered “‘wounds that are truly severe and incapable of healing themselves.’”231 The speech was intentional, targeted, and extremely harmful. It may not have involved depictions or descriptions of sex, but that did not make it any less obscene.

Non-sexual obscenity encompasses a narrow category of speech that consists of degrading verbal attacks aimed at private, vulnerable citizens who cannot avoid this speech and are targeted by speakers whose primary intent is to traumatize or humiliate. These attacks occur in places where the speaker’s message can be disseminated in an alternative public forum. This test strikes the proper balance between protecting low-value speech and safeguarding individuals

---

231 Snyder, 131 S.Ct. at 1223 (Alito, J., dissenting) (quoting Figueiredo–Torres v. Nickel, 584 A.2d 69, 75 (Md. 1991)).
from speech and expressive conduct that is equally, if not more, obscene than “[p]atently offensive representation or descriptions of masturbation.”

1. **DEGRADING VERBAL ATTACKS AND GRAPHIC, DISTURBING IMAGES**

Although the speech in *Snyder* and *McCullen* related to matters of public concern and occurred in public forums, the state had a cognizable interest in regulating the time, place, and manner of its dissemination. Degrading verbal attacks may have political aspects and communicate about matters of public concern. In *Snyder* and *Coakley*, the Court relied heavily on the fact that homosexuality and abortion are public issues that should be afforded the highest level of protection when rendered in a traditionally public forum.

Not every utterance that directly or indirectly relates to a public issue, however, contributes to open public deliberation or the “marketplace of ideas.” For example, signs such as “Kill All Fags” and “Segregate All Black People” can be said, on some level, to relate to public issues (same-sex marriage and race relations) and thus be characterized as core political speech. However, as the Court recognized in *Snyder*, courts must focus on the “content, form, and context,” of the speech “as revealed by the whole record” when assessing the constitutionality of restrictions on its dissemination.

The record in *Snyder* revealed that members of the Westboro Baptist picketed with signs that attacked and degraded homosexuals:

- God Hates the USA/Thank God for 9/11
- America is Doomed
- Don't Pray for the USA
- Thank God for IEDs
- Fag Troops
- God Hates Fags

---

232 See Miller, 413 U.S. at 27 (providing an example of sexual obscenity).
234 *Dun & Bradstreet, Inc.*, 472 U.S. at 761.
235 *Id.*
Maryland Taliban
Fags Doom Nations
Thank God for Dead Soldiers
Priests Rape Boys
God Hates You

Such speech does not constitute fighting words because its “very utterance [will not] inflict injury or tend to incite an immediate breach of the peace.” While many people may find this speech offensive, if not disturbing, it will not necessarily provoke listeners to violence or unlawful conduct. Even without considering its social value, however, these signs promote intolerance, hatred, and homophobia. They do not contribute meaningfully, if at all, to the public discourse on any matter of public concern. Thus, when a speaker’s objective is to target private citizens during vulnerable moments with the intent to cause severe emotional distress, the law should provide a remedy for the harm inflicted. Likewise, states should be permitted to adopt restrictions on the time, place, and manner in which this speech is disseminated because they would not discriminate based on the content of the speech (or expressive conduct), but on the targeting of and resulting harm to private citizens.

For these reasons, in Snyder, the Court should have upheld the lower court’s award of damages for emotional distress. Although the Westboro Baptist Church’s speech related to a matter of public concern (gays in the military and homosexuality generally) and was expressed in a public forum, it was “so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community.” As the Court held in Miller, we may know “know it [obscenity] when we see it,” but we also know obscenity where we see it. There comes a point when political speech,

236 Chaplinsky, 315 U.S. at 572 (brackets added).
237 Snyder, 131 S.Ct. at 1223 (Alito, J., dissenting) (quoting Harris, 380 A.2d at 616.
238 Jacobellis, 378 U.S. at 197 (Stewart, J., concurring) (brackets added).
even if conveyed in a public forum, becomes so abhorrent, invasive, and injurious that it lacks any social, literary, or artistic value. It is obscene in every sense of the word.

2. **AIMED AT PRIVATE CITIZENS—WHY ‘FUCK THE DRAFT’ IS DIFFERENT**

In *Cohen v. California*, the Court overturned a conviction against an individual who walked into a public courthouse wearing a shirt that said “Fuck the Draft.”

The Court correctly held that “[n]o individual actually or likely to be present could reasonably have regarded the words on appellant's jacket as a direct personal insult.” Specifically, although “the four-letter word displayed by Cohen in relation to the draft is not uncommonly employed in a personally provocative fashion, in this instance it was clearly not ‘directed to the person of the hearer.’” Thus, “absent a showing of an intent to incite disobedience to or disruption of the draft, Cohen could not, consistently with the First and Fourteenth Amendments, be punished for asserting the evident position on the inutility or immorality of the draft his jacket reflected.”

The Court relied heavily on the principle that the First Amendment protects unpopular speech. Indeed, “that the air may at times seem filled with verbal cacophony is, in this sense, not a sign of weakness but of strength,” and we must remember that even in these instances of tactless abuse of the freedom of speech, “these fundamental societal [open public debate] values are truly implicated.” To be sure, “while the particular four-letter word being litigated [was] perhaps more distasteful than most others of its genre, it is nevertheless often true that one man's
vulgarity is another's lyric." 246 As such, “the State has no right to cleanse public debate to the point where it is grammatically palatable to the most squeamish among us.” 247

Significantly, however, the Court recognized that the “First and Fourteenth Amendments have never been thought to give absolute protection to every individual to speak whenever or wherever he pleases or to use any form of address in any circumstances that he chooses.” 248 States can enact laws “as a valid regulation of the manner in which … that freedom [is exercised], [but] not as a permissible prohibition on the substantive message it conveys.” 249 They can also regulate speech based on “separately identifiable conduct which allegedly was intended by Cohen to be perceived by others as expressive of particular views but which, on its face, does not necessarily convey any message and hence arguably could be regulated without effectively repressing Cohen's ability to express himself.” 250

Although speech restrictions cannot be justified based on “the mere presumed presence of unwitting listeners or viewers,” 251 some speech can be subject to time, place, and manner restrictions to protect an individual’s privacy:

While this Court has recognized that government may properly act in many situations to prohibit intrusion into the privacy of the home of unwelcome views and ideas which cannot be totally banned from the public dialogue … we have at the same time consistently stressed that “we are often ‘captives' outside the sanctuary of the home and subject to objectionable speech” … The ability of government, consonant with the Constitution, to shut off discourse solely to protect others from hearing it is, in other words, dependent upon a showing that substantial privacy interests are being invaded in an essentially intolerable manner.” 252

246 Id.
247 Id.
248 Id. at 19.
249 Id. (emphasis added) (brackets added).
250 Id. at 18 (emphasis added).
251 Id. at 21 (emphasis added).
Additionally, the Court held that “while it may be that one has a more substantial claim to a recognizable privacy interest when walking through a courthouse corridor than, for example, strolling through Central Park, surely it is nothing like the interest in being free from unwanted expression in the confines of one's own home.”

Consequently, if the conviction were upheld, “governments might soon seize upon the censorship of particular words as a convenient guise for banning the expression of unpopular views.”

The speech at issue in Snyder, which consisted of signs saying “God Hates Fags,” “Thank God for Dead Soldiers,” and “Thank God for 9/11,” and the graphic signs often displayed mere feet away from entrances to abortion clinics, are entirely different in form and context from a “Fuck the Draft” t-shirt. The previous statements reflected hatred for and prejudice toward an entire class of citizens and targeted a private family outside a funeral where they mourned the loss of a child. In his dissent, Justice Alito recognized that the speech personally attached the Snyder family:

They posted an online account entitled “The Burden of Marine Lance Cpl. Matthew A. Snyder. The Visit of Westboro Baptist Church to Help the Inhabitants of Maryland Connect the Dots!” Belying any suggestion that they had simply made general comments about homosexuality, the Catholic Church, and the United States military, the “epic” addressed the Snyder family directly:

“God blessed you, Mr. and Mrs. Snyder, with a resource and his name was Matthew. He was an arrow in your quiver! In thanks to God for the comfort the child could bring you, you had a DUTY to prepare that child to serve the LORD his GOD—PERIOD! You did JUST THE OPPOSITE—you raised him for the devil.”

---

253 Cohen, 403 U.S. at 22.
254 Id. at 26.
255 Snyder, 131 S.Ct. at 1225-26 (Alito, J., dissenting).
Surely, these words constitute a “direct personal insult” and the type of “epithets or personal abuse [that] [are] not in any proper sense communication of information or opinion safeguarded by the Constitution.” In fact, the Westboro Baptist Church’s decision to stand as close to the church as possible underscored their desire to capitalize on a private family’s grief and attract public attention. To say that such speech cannot be subject to reasonable time, place, and manner restrictions unless it incites violence, intimidates, is defamatory, or appeals to the prurient interest (all of which require a subjective inquiry into the content of speech), leaves a narrow yet abhorrent class of speech entirely unregulated. As evident in Snyder, scores of private citizens remain vulnerable to targeted verbal assaults that cause severe, if not irreparable, emotional distress. Accordingly, targeting specific people with signs such as “God Hates Fags,” is precisely the “separately identifiable conduct” that justifies limited restrictions on its dissemination. It is also why the speech in Snyder and the expressive conduct that often occurs outside abortion clinics are distinguishable from a shirt that says “Fuck the Draft.”

Ironically, the Court has upheld laws that, unlike the non-sexual obscenity doctrine, discriminate based on content. In Virginia v. Black, for example, the Court upheld a time, place, and manner restriction prohibiting cross-burning in front of a private residence if it was done with the intent to intimidate. The non-sexual obscenity doctrine applies the same reasoning. It regulates abusive speech that is accompanied by a purposeful intent to target and results in actual injury. Indeed, “[n]either classic ‘fighting words’ nor defamatory statements are immunized when they occur in a public place, and there is no good reason to treat a verbal

256 Cohen, 403 U.S. at 20.
257 Id. (quoting Cantwell, 310 U.S. at 309-10) (emphasis added).
258 Cohen, 403 U.S. at 18.
259 538 U.S. at 363 (Virginia may choose to regulate this subset of intimidating messages in light of cross burning’s long and pernicious history as a signal of impending violence).
assault based on the conduct or character of a private figure like Matthew Snyder any differently.”

In other words, time, place, and manner restrictions on non-sexual obscenity focus on the likely effects, not the content, of hateful, abusive, and degrading speech; they do not rest solely on subjective assessments about the value of particular speech. In fact, to the extent that the value of non-sexually obscene speech is analyzed, it is done to ensure that unpopular but not harmful speech is excluded. Thus, to avoid protecting hyper-sensitive individuals or “unwitting listeners or viewers … from unwanted expression,” courts would have to make a threshold determination about whether the speech itself was sufficiently abhorrent. Importantly, this finding is not sufficient to restrict speech unless it targets private individuals and results in severe emotional distress. Ultimately, not all speech, simply because it relates to a public issue in a public forum, should be freely expressed without regard to the severe trauma it may inflict on private citizens. There is a place in the public forum for “God Hates Fags,” “Thank God for Dead Soldiers,” bloody, dismembered fetuses, and even burning crosses, but it should not be outside of a funeral home, at the entrance to an abortion clinic, or at a civil rights ceremony remembering Martin Luther King, Jr.

3. INABILITY TO AVOID THE SPEECH

In Snyder, the Court rejected the argument that the Snyder family was a captive audience, noting that it “applied the captive audience doctrine only sparingly to protect unwilling listeners from protected speech.” For example, the Court had previously “upheld a statute allowing a

---

260 Snyder, 131 S.Ct. at 1227 (Alito, J., dissenting).
261 Cohen, 403 U.S. at 21 (emphasis added).
262 See Snyder, 131 S.Ct. at 1222 (Alito, J., dissenting) (“[t]his is a very narrow tort with requirements that “are rigorous, and difficult to satisfy”) (quoting W. Keeton, D. Dobbs, R. Keeton, & D. Owen, PROSSER AND KEETON ON LAW OF TORTS § 12, p. 61 (5th ed.1984)).
263 Snyder, 131 S.Ct. at 1220.
homeowner to restrict the delivery of offensive mail to his home.” In Snyder, however, “Westboro stayed well away from the memorial service [approximately 1000 feet] … Snyder could see no more than the tops of the signs when driving to the funeral … [a]nd there is no indication that the picketing in any way interfered with the funeral service itself.”

Admittedly, the signs were not displayed outside the church entrance or shoved in the faces of those attending the funeral. However, the Court failed to consider the captive audience doctrine in context and gave insufficient weight to the effect of the speech on funeral attendees. Even though the signs did not physically interfere with the funeral ceremony, the family members had no ability to avoid the speech or the knowledge that protestors had “approached as closely as they could without trespassing” to personally attack the deceased with disturbing and hateful messages. Furthermore, as the protest attracted greater public attention, it “turned Matthew's funeral into a tumultuous media event.”

The Court has allowed restrictions on speech where “the ‘captive’ audience cannot avoid objectionable speech.” In many ways, this is far worse than a private individual receiving offensive mail, which he or she can simply toss in the trash. In Snyder, a grieving family could not avoid “a malevolent verbal attack on Matthew and his family at a time of acute emotional vulnerability.” Thus, while the recipients of “objectionable mailings … may ‘effectively avoid further bombardment of their sensibilities simply by averting their eyes’” the Snyder family could not avoid—and continues to suffer—the emotional trauma that this conduct caused.

264 Id. (citing Rowan, 397 U.S. at 736–738).
265 Snyder, 131 S.Ct. at 1220 (Alito, J., dissenting).
266 Id. at 1222.
267 Id.
269 Snyder, 131 U.S. at 1220 (Alito, J., dissenting).
270 Bolger, 463 U.S. at 72 (quoting Cohen, 403 U.S. at 21).
4. **INTENTIONALLY OR RECKLESSLY CAUSING EMOTIONAL HARM**

In *Snyder*, through pre-funeral press releases, interviews, and online postings, the protest was carefully orchestrated and intended to cause precisely the injury that ultimately resulted: lasting emotional trauma.\(^{271}\) In his dissent, Justice Alito stated:

> In this case, respondents implemented the Westboro Baptist Church’s publicity-seeking strategy. Their press release stated that they were going “to picket the funeral of Lance Cpl. Matthew A. Snyder” because “God Almighty killed Lance Cpl. Snyder. He died in shame, not honor—for a fag nation cursed by God .... Now in Hell—sine die.”\(^{272}\)

The Church also posted a message directly to the Snyder family before the funeral, stating “you had a DUTY to prepare that child to serve the LORD his GOD—PERIOD! You did JUST THE OPPOSITE—you raised him for the devil.”\(^{273}\)

Indeed, the announcement “began the wounding process,”\(^{274}\) as it is “well known that anticipation may heighten the effect of a painful event.”\(^{275}\) Inferring that the Westboro Baptist Church members intended—and did—cause harm is evident from their behavior:

> Funerals are unique events at which special protection against emotional assaults is in order. At funerals, the emotional well-being of bereaved relatives is particularly vulnerable. Exploitation of a funeral for the purpose of attracting public attention “intrud[es] upon their ... grief” and may permanently stain their memories of the final moments before a loved one is laid to rest. Allowing family members to have a few hours of peace without harassment does not undermine public debate.\(^{276}\)

Indeed, the church members’ intent to cause emotional harm or, at the very least, deliberate indifference to the harm that would result from messages like “Fag Troops” and

\(^{271}\) *Snyder*, 131 S.Ct. at 1224-1225 (Alito, J., dissenting).
\(^{272}\) *Id.* at 1225 (quoting Supp. App. in No. 08–1026(CA4), at 158a).
\(^{273}\) *Snyder*, 131 S.Ct. at 1225-1226.
\(^{274}\) *Id.* at 1225.
\(^{275}\) *Id.*
\(^{276}\) *Id.* at 1228-29 (internal citation omitted).
“Thank God for Dead Soldiers,” demonstrates why the context and the effect of degrading forms of speech are relevant to whether that speech can be regulated.

5. **Alternative Public Forums are Available**

Prohibiting the Westboro Baptist Church’s speech outside of Matthew Snyder’s funeral, like restricting a speaker’s ability to display graphic images outside of an abortion clinic, would be problematic if no equivalent alternative public forums existed where this speech could be disseminated. This would be the equivalent of suppressing the protesters’ speech, which would impermissibly infringe on their First Amendment rights. In Snyder, however, the protesters could have chosen a myriad of public forums to disseminate their message, both locally and nationally:

They could have picketed the United States Capitol, the White House, the Supreme Court, the Pentagon, or any of the more than 5,600 military recruiting stations in this country … [they] may write and distribute books, articles, and other texts; they may create and disseminate video and audio recordings; they may circulate petitions; they may speak to individuals and groups in public forums and in any private venue that wishes to accommodate them … They could have chosen any Catholic church where no funeral was taking place. (There are nearly 19,000 Catholic churches in the United States.) … they may picket peacefully in countless locations; they may appear on television and speak on the radio; they may post messages on the Internet and send out e-mails.  

Likewise, abortion protestors and other individuals with similar graphic images or hate-fueled speech can speak in a variety of public forums and through many channels to effectively disseminate their message. As the Court has recognized, “even protected speech is not equally permissible in all places and at all times.” One of those times is when speech, rather than commenting on a public issue, targets the individual.

277 *Id.* at 1222.
278 *Frisby*, 487 U.S. at 479.
B. **DISTINGUISHING NON-SEXUAL OBSCENITY FROM UNPOPULAR BUT PROTECTED SPEECH**

The critical question is where the line should be drawn between speech that is unpopular, distasteful, and offensive, and targeted (non-sexual) obscenity, which can be subject to time, place, and manner restrictions. Below is a discussion of the types of speech that would constitute non-sexual obscenity and a model statute designed to restrict non-sexual obscenity while burdening no more speech than necessary to protect citizens from severe emotional harm.

1. **VAGUENESS AND OVERBREADTH**

A time, place, and manner restriction regulating non-sexual obscenity would be challenged on the grounds that it is unconstitutionally vague and overbroad and sweeps within its ambit constitutionally protected speech.\(^{279}\) In addition, such a statute would face claims that it discriminated on the basis of content, either on its face or as applied, chilled otherwise protected speech, and burdened more speech than necessary to achieve the state’s asserted interests.\(^{280}\) The following table provides examples of protected and non-sexually obscene speech.

### TABLE III

**PERMISSIBLE SPEECH VERSUS NON-SEXUALLY OBSCENE SPEECH**

<table>
<thead>
<tr>
<th>PERMISSIBLE SPEECH</th>
<th>TARGETED, NON-SEXUAL OBSCENITY SUBJECT</th>
</tr>
</thead>
<tbody>
<tr>
<td>“FUCK THE DRAFT”</td>
<td>“GOD HATES FAGS” OUTSIDE A PRIVATE FUNERAL</td>
</tr>
<tr>
<td>ABORTION PICKETING (AND GRAPHIC IMAGES) AT A PUBLIC RALLY</td>
<td>ABORTION PICKETING (AND GRAPHIC IMAGES) OUTSIDE THE GATES OF AN ABORTION CLINIC</td>
</tr>
<tr>
<td>CRUDE HUMOR OR SATIRE (<em>HUSTLER</em> MAGAZINE—STATEMENTS THAT JERRY FALWELL HAD INTERCOURSE IN AN OUTHOUSE WITH HIS MOTHER)</td>
<td>PERSONAL ATTACKS TARGETED AT INDIVIDUALS OUTSIDE THEIR HOMES</td>
</tr>
</tbody>
</table>

\(^{279}\) *See, e.g.*, Stevens, 559 U.S. at 473-74; *see also* David H. Gans, *Strategic Facial Challenges*, 85 B.U. L. Rev. 1333, 1342-44 (2005) (discussing the vagueness and overbreadth doctrines).

\(^{280}\) *See, e.g.*, Ward, 491 U.S. at 799.
As illustrated in this table, non-sexual obscenity does not apply to unpopular speech or public figures. It includes, among other things, tasteless parodies of various public and private figures, insults hurled at private citizens by online bloggers, burning of the American Flag, frequently offensive words uttered by talk show hosts and radio personalities, or acts of cross-burning that, in rare instances, convey a political message. This speech may offend many individuals, but, at least to an extent, it comments on an issue of public concern. Currently, speech that would qualify as non-sexually obscene, such as a “God Hates Fags” sign outside of a private citizen’s funeral, cannot be regulated because it does not appeal to a prurient (sexual) interest, provoke imminent violence, or constitute defamation. That should change—now. Non-sexual obscenity should be subject to reasonable time, place, and manner restrictions.

The original purpose of the First Amendment was to protect unpopular and dissenting speech from suppression or viewpoint discrimination, not to protect speech of marginal value that intentionally or recklessly causes severe distress to targeted private citizens:

Ultimately, the question must focus on [the] original purpose of the First Amendment. “The lesson I have drawn from my childhood in Nazi Germany and my happier adult life in this country is the need to walk the sometimes difficult path of denouncing the bigot's hateful ideas with all my power, yet at the same time challenging any community's attempt to suppress hateful ideas by force of law.” The prima facie evidence provision in this case ignores all of the contextual

281 See Johnson, 491 U.S. 397.
283 See Miller, 413 U.S. at 23.
factors that are necessary to decide whether a particular cross burning is intended to intimidate.\textsuperscript{284}

The factors distinguishing non-sexual obscenity from other types of offensive speech (or expressive conduct) have nothing to do with the content of the speech itself, but with the speaker’s intentions, such as whether a private citizen was targeted, and the context within which the speech was rendered. Of course, the speech must lack social, literary, or artistic value, but that alone will not justify time, place, and manner restrictions because the risk of content discrimination is too high.

2. **A HYPOTHETICAL STATUTE**

The following is a hypothetical statute regulating the time, place, and manner of non-sexual obscenity.

****

**NON-SEXUAL OBSCENITY**

I. **GENERAL PROVISION**

Non-sexual obscenity is speech that lacks literary, artistic, or social value, is intended to or recklessly targets private and vulnerable individuals, is uttered in public places where citizens have a reasonable expectation of privacy and where alternative public forums are available to accommodate the speech, is disseminated in a manner that prevents individuals from avoiding such speech, and causes severe emotional harm.

A. “Target” requires a deliberate and premeditated intention to direct speech at private individuals in areas where they enjoy a reasonable expectation of privacy.

\textsuperscript{284} *Black*, 538 U.S. at 366-367 (*quoting* Gerhard Casper, 55 STAN. L. REV. 647, 649 (2002)).
B. “Private individuals” refers to individuals who have not achieved pervasive fame or notoriety in the community or voluntarily thrust themselves into a public event or controversy.

C. “Vulnerable” refers to and includes, but is not limited to, instances where private individuals are at private events or gatherings involving matters of heightened emotional sensitivity, such as mourning loss of a family member, undergoing life-saving medical treatment, or making decisions affecting the health or safety of the individual or family members.

D. “Reasonable expectation of privacy” is defined as a place that is inaccessible to the general public, where private individuals have both a subjective and objective expectation that their affairs will be protected from governmental or personal intrusion.

E. “Alternative Public Forum” refers to traditionally open public forums that are located in close proximity to the originally intended location of the speech and provide the speaker(s) with an equivalent opportunity to disseminate the speech.

F. “Avoid speech” refers to instances where private individuals are confronted with speech that lacks literary, artistic, or social value, in areas where such individuals have a reasonable expectation of privacy and are forced to directly observe the contents of such speech during a time of vulnerability.

G. “Severe emotional harm” is defined as speech “so outrageous in character, and so extreme in degree as to go beyond all possible bounds of decency and to be regarded as atrocious and utterly intolerable in a civilized community.”
II. PROVISIONS

Non-sexual obscenity requires a finding, by a preponderance of the evidence, of the following:

A. The speech has minimal literary, social, or artistic value;
B. The speaker(s) intentionally or recklessly targeted private individuals;
C. The targets were unable to avoid the speech;
D. The speech occurred in an area where the claimant had an expectation of privacy;
E. There were alternative and equivalent public forums within the vicinity within which the speaker could disseminate the message; and
F. The claimant suffered severe emotional distress as defined in Section (A).

III. EXEMPTIONS

Speech that satisfied the above criteria shall be exempt from this section in the following instances:

A. Where the target of the speech is a public figure;
B. Where the speech is combined with speech or expressive conduct of substantial political, literary, or artistic value that outweighs the non-sexually obscene characteristics speech;
C. Where the aggrieved party previously consented to the speaker’s presence; and
D. Where the aggrieved party had readily available and accessible means of avoiding the speech but, with prior knowledge that the speech would occur, chose to remain in the targeted area(s).

IV. PENALTIES

Persons who violate this section shall be subject to civil liability for damages resulting directly and proximately from the harm caused for the sole purpose of compensating a claimant for severe emotional harm that is traceable to and the foreseeable result of such violation.
CONCLUSION

The First Amendment promotes democratic participation in political decision-making, self-expression or self-realization, and advancement of knowledge and the search for truth.”

Indeed, a society that values liberty and equality requires a “profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open.”

To that end, the First Amendment facilitates the “unfettered interchange of ideas for the bringing about of political and social changes desired by the people.”

Non-sexual obscenity vindicates none of these principles. It adds no value to public discourse and taints the marketplace of ideas with words and conduct that traumatize, degrade, and humiliate.

Certainly, if the purpose of the First Amendment is to ensure that “truth emerges in a free market of ideas,” states should be allowed to adopt restrictions or provide civil remedies that prevent truth from being buried under the shadow of non-sexual obscenity. While “free speech is valuable both as an end and as a means,” when the First Amendment is interpreted to protect non-sexual obscenity, it ceases to be a shield against government suppression, and becomes a sword to directly attack and injure vulnerable people.

287 Gray, supra note 286, at 8 (quoting Roth, 354 U.S. at 484).
288 Gray, supra note 286
289 Gray, supra note 286, at 8.