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DESECRATION: IS IT PROTECTED SPEECH?

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A prankster sets up a projector near a synagogue, and he shines images of swastikas onto it as worshipers enter. Or, a vandal extinguishes the eternal flame marking the grave of President John F. Kennedy. Or, a computer hacker attacks an online memorial dedicated to a recently deceased teenager by his grieving family, by superimposing pornography all over the website. Each of these descriptions is similar to an event that actually has occurred or has been hypothesized by a Supreme Court Justice.¹

And then, there are behaviors that seem similar but that raise other problems. A group of people who hate the military carries signs containing homophobic slurs near the funeral of a

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¹ Shaare Tefila Congregation v. Cobb, 481 U.S. 615 (1987) (anti-Semitic phrases and symbols created with paint, hypothesized here instead as light projection to avoid confusion with vandalism; desecration claim upheld on other grounds); Texas v. Johnson, 491 U.S. 397, 439 fn* (1980) (dissenting opinion of Justice Stevens) (eternal flame; this Justice would approve a desecration claim); Peggy O’Hare, Cybertrolls Pile on Mourners’ Pain, Hous. Chronicle, Nov. 7, 2010, at 1A col. 3 (desecration of online memorial, said to be a “growing . . . occurrence” that “happens on memorial pages all over the world”).

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soldier killed in combat. A rogue publisher prints a cartoon that pictures a clergyman as having an affair with his mother in an outhouse, and he later testifies that he intended to hurt the target of his tasteless publication. These, too, are situations that actually have occurred, and that the Supreme Court has written about.\textsuperscript{2}

These behaviors are examples of what I call desecration. They include utterances that most people would find of little value, although this characteristic alone does not keep them from qualifying as protected speech. But these situations involve more than tastelessness or offense. They cause actual harm.\textsuperscript{3} Furthermore, the harm sometimes includes suppression of speech initiated by others. The problem remains, however, that in some cases, there is a glimmer of expression on a subject of public interest, and this weak association with protected speech accompanies the harm.\textsuperscript{4} The courts have experienced considerable difficulty in separating protected speech from unprotected desecration.\textsuperscript{5}

Unfortunately, none of the Supreme Court’s opinions provides clear direction for resolving this problem. \textit{Snyder v. Phelps},\textsuperscript{5a} which is the case mentioned above featuring a homophobic demonstration near a soldier’s funeral, is the Court’s most recent pronouncement relevant to this issue, but there, the Court expressly refused to decide whether there is a type of desecration that is unprotected as speech.\textsuperscript{5b} Furthermore, since the Court treated the particular demonstration at issue as protected, the \textit{Snyder} opinion naturally occupies itself with extending

\begin{itemize}
\item \textsuperscript{2} Snyder v. Phelps, 131 S.Ct. 1207 (2011) (homophobic demonstration; claim against demonstrators disapproved); Hustler Magazine v. Falwell, 485 U.S. 46 (1988) (cartoon; claim against publisher disapproved).
\item \textsuperscript{3} Thus, in \textit{Snyder}, 131 S.Ct. at 1220, the Court described the conduct at issue as “certainly hurtful” and agreed that its “contribution to public discourse may be negligible.”
\item \textsuperscript{4} \textit{Id.}, stating that the message at issue “addressed matters of public import.”
\item \textsuperscript{5} Thus, in \textit{Hustler}, 485 U.S. at 878, the Supreme Court reversed the lower court, which had upheld the claim.
\item \textsuperscript{5a} 131 S. Ct. 1207 (2011).
\item \textsuperscript{5b} See infra note 24.
\end{itemize}
the freedom of expression, rather than defining what the First Amendment does not cover. Thus, although the Supreme Court’s decisions, including Snyder, certainly provide clues about the inquiry pursued in this article, they leave the question, equally certainly, unanswered.

One way to approach this lingering problem is through the formula that the Supreme Court generated in Chaplinsky v. New Hampshire.6 There, the Court recognized that there were unprotected categories of utterances, or what might be called speech that is not speech, and it used this concept to allow the prohibition of face-to-face “fighting words.” The two defining characteristics of unprotected utterances, said the Court, are first that they "are of . . . slight social value as a step to truth," and second, that any positive aspect they might have is "clearly outweighed by the social interest in order and morality."7 The Chaplinsky test offers the prospect that severely harmful utterances can be minimized, while protection of speech is maintained. Since Chaplinsky, the Court has used this general approach to define other categories of unprotected utterances, from child pornography to defamation.

This article begins by describing the Chaplinsky formula. It then considers an important proposition that is implicit in Chaplinsky: the notion that there are hierarchies of speech, with some types of expression accorded a higher status than others. The article then proceeds to its real work: the adaptation of the Chaplinsky formula to utterances that desecrate the symbolic expression of others. There is a special impediment to this adaptation, since some valuable utterances include ridicule, sarcasm, and devaluation of the speech of others. Here, the article introduces the concept that the unifying factor in the upper hierarchies of speech is its quality of discourse about public issues, or the degree to which it seeks to conduct dialogue on matters of public concern. A type of utterance that does not have this characteristic, which seeks only to

6 315 U.S. 568 (1942).
7 Id. at 572-72.
destroy the expression of others as a matter of personal, invidious pique, is of low speech value, and if it causes serious harm to others’ freedom of expression, my thesis is that it can be subjected to a test that may treat it as unprotected desecration.

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

I. THE CHAPLINSKY FORMULA

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

In Chaplinsky, the defendant addressed a city official as a "racketeer" and a "damned fascist." He was convicted under a city ordinance that made it a crime to direct any "offensive, derisive or annoying word" to another person in a public place.8 The lower court had interpreted the ordinance narrowly, so that it applied only when the words had "a direct tendency to cause acts of violence by the person to whom, individually, the remark is addressed."9 The Supreme Court began by observing that there are "certain well-defined and narrowly limited classes of speech" that are unprotected. The Court went on to provide examples: obscenity, libel, and "insulting or 'fighting words." It was in this context that the Court set out the Chaplinsky formula for recognizing unprotected utterances: "... [S]uch utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality."10

8 Id. at 569.
9 Id. at 573.
10 Id. at 571.
Several characteristics of this reasoning deserve emphasis. First, this approach does not depend on the value of any particular expression. It instead depends upon whether the expression falls into a category of unprotected utterances. The Court quoted the lower court with approval: the categorization of the speech is "not to be defined in terms of what a particular addressee thinks. . . . The test is what [people] of common intelligence would understand" the words to mean.\textsuperscript{11} Second, the categories are "narrowly limited." These two features of the Chaplinsky approach prevent the denial of speech protection from censoring unpopular expression.

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

Since deciding Chaplinsky, the Supreme Court has defined other types of unprotected utterances. The Court has expressed its reasons in differing language and has not relied uniformly upon Chaplinsky, but its analysis usually has depended upon similar kinds of unevenly weighted balancing. For example, in upholding a prohibition upon the promotion of sexual performances by children, the Court characterized the value of the expression as "exceedingly modest, if not \textit{de minimis}," while the interest of the state in preventing harm to children "clearly" outweighed this minimal value.\textsuperscript{12} Likewise, in upholding a prohibition upon dangerous crowds immediately near foreign embassies, the Court observed that the law did not "reach a

\textsuperscript{11} Id. at 572.

substantial amount of constitutionally protected conduct" and emphasized the harm created by mobs that threatened diplomats.\textsuperscript{13} Even when they have protected the expression at issue, the Justices often have used the \textit{Chaplinsky} test as a means of distinguishing it from unprotected utterances.\textsuperscript{14}

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

\textbf{B. The Hierarchy of Speech Values}

It is impossible to reconcile the Supreme Court's decisions without recognizing a hierarchy of speech values. Indeed, perhaps it is impossible to devise a workable system at all, without different levels of speech protection. Political speech, or speech upon issues of public interest, is at the top of the hierarchy. Thus, the protection of government employees when they engage in expression is defined partly by the degree to which their utterances cover "matters of public concern."\textsuperscript{15} Later, the Court borrowed this “matters of public concern” standard in \textit{Snyder}, for use as part of its evaluation of a desecration claim.\textsuperscript{16} There is good reason to value political speech highly, because the definition and protection of all rights, including speech itself, depends upon an electoral system that functions through political expression.

\begin{itemize}
\item \textsuperscript{13} Boos v. Barry, 485 U.S. 312 (1988).
\item \textsuperscript{15} Rankin v. McPherson, 483 U.S. 378, 384 (1987).
\item \textsuperscript{16} Snyder v. Phelps, 131 U.S. 1207, 1216 (2011).
\end{itemize}
Close behind political speech are various types of expression that inform the individual's exercise of the highest speech functions. One cannot understand the Federal Reserve System without knowing something of economics, for example; and at a more general level, one cannot understand society without having experienced some works of literature. The Supreme Court's holdings include protection of informative speech, although sometimes in more limited ways than political speech.17

The Court has been explicit in affording lesser protection to some other speech categories. Commercial speech, for example, can be circumscribed in ways that never would be tolerated with political speech.18 The same is true of indecent speech.19 Probably the lowest level of speech is that which is engaged in solely for the enjoyment or self-indulgence of the speaker or listener. Thus, the expression at issue in Chaplinsky, like the expression in the child sexual performance case, received only the lowest kind of evaluation.20 Still, there is protected expression even in some kinds of self-indulgent activities. The courts have protected violent video games, for example, even though they do not serve to advance any debate (except, perhaps, debate about whether their distribution should be limited).21

If some types of desecration are to be unprotected, then, they must be confined to expression that contains only "exceedingly modest" contributions to information or debate on public issues. Speech is discourse; this is the key to the Supreme Court's hierarchy of speech

17 For example, in FCC v. Pacifica Foundation, 438 U.S. 726 (1978), the Court upheld the FCC’s determination that a certain comedic monologue was offensive enough to be prohibited as “indecency” under the Communications Act, even though the monologue was informative about the use of (dirty) language. In Cohen v. California, 403 U.S. 15 (1971), however, the Court treated an offensive political message as protected speech.


19 See supra note 17.

20 The speech in question was “no essential part of any exposition of ideas,” said the Court, and therefore one can infer that if it had any value, the value was confined to self-indulgent expression.

21 E.g., Entertainment Software Ass’n v. Swanson, 519 F.3d 768 (8th Cir. 2008) (striking down prohibition upon violent videos without finding in them any value on matters of public concern).
values.\textsuperscript{22} If an identifiable category of utterance forms "no essential part of any exposition of ideas, and [is] of . . . slight social value as a search for truth," it may be outside any channel of discourse. If, like "[r]esort to epithets or personal abuse," it does not "in any proper sense convey information or opinion," the Chaplinsky formula suggests that it can be examined to determine whether its value in the speech hierarchy is "clearly outweighed" by the harm it causes. Some forms of desecration, arguably, are crude attempts at discourse and must be protected, even if they also are offensive.

On the other hand, perhaps there are types of desecration that fit a narrowly defined category of unprotected utterances. In fact, the Supreme Court stated in Snyder v. Phelps, a desecration case in which the Court actually upheld the First Amendment defense at issue, that “[N]ot all speech is of equal First Amendment importance.” The Court suggested, there, that utterances of a private character, not touching upon “matter[s] of public interest,” could properly be subjected to suits for liability and damages.\textsuperscript{23} The Court added, however, that there was “no suggestion that the speech at issue [in Snyder] falls within one of the categorical exclusions from First Amendment protection, such as those for obscenity or fighting words.”\textsuperscript{24} This reservation of the issue is why the question raised by this article remains unresolved.

\textbf{C. The Contrary Position of the Absolutists}

The argument that there must be levels of speech value is opposed by the claim that speech protection is absolute. The most prominent exponent of the absolutist position is probably

\textsuperscript{22} E.g., Snyder v. Phelps, 131 S.Ct. 1207, 1216, 1221 (2011) (suggesting that higher forms of First Amendment protection are centered on “meaningful dialogue” and “discourse.”

\textsuperscript{23} Id. at 1216-17.

\textsuperscript{24} Id. at 1215 fn.3.
Justice Hugo Black. His opinion in *Brandenburg v. Ohio*,\(^{25}\) for example, rejects the balancing approach contained in the clear and present danger test. Justice Black consistently refused to assess the value of any particular utterance. Instead, he compared speech, which he saw as absolutely protected, with conduct, which he believed was not.\(^{26}\)

But Justice Black was not really an absolutist. He balanced, even though he did it in an indirect way, by characterizing as "conduct" the utterances he considered unprotected. In *Cohen v. California*, for example, he joined an opinion that would have treated certain offensive expression as unprotected because it "was mainly conduct and little speech."\(^{27}\) This kind of balancing is dubious, because it compares speech with something that has little to do with its potential for discourse or with its resulting harm.

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

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

The thesis of this article, then, is that a narrow category of utterances that include desecration is unprotected by the First Amendment, partly because it is, in a way of speaking, "anti-speech." The issue was not analyzed in *Snyder v. Phelps*, apparently because it was not "suggested" by anyone in the lower courts.\(^{28}\) The category would not have applied in *Snyder* anyway, because the Court pronounced the speech there protected by the First Amendment. But some types of desecration consist not only of matters that implicate little in the way of First


\(^{26}\) See infra note 27 and accompanying text.

\(^{27}\) 403 U.S. 15, 27 (1971).

\(^{28}\) See supra note 24 and authority therein cited.
Amendment values, but also, they do the opposite. They actually impair First Amendment values.

The phenomenon of utterances that impair the freedom of speech is not unfamiliar, but it is not much noticed. If an airwaves pirate broadcasts a blank signal over a licensed radio frequency, for example, the resulting interference does not advance discourse and in fact cancels it. Pranksters who shout down a speaker likewise do not advance discourse very much, but they may succeed in preventing people who wish to receive information from getting it. In these situations, the utterances in question not only are not speech, but they cause actual harm, and the harm is caused not just to people's sensibilities but to the freedom of speech itself. Sometimes there is a message lurking behind the interference with speech, in the form of an implied statement that "I disagree with the speaker," but sometimes not.

Real-world situations show that desecration sometimes impairs the freedom of speech. The example of pornographic desecration of online memorials is said to be a "growing" problem.29 If a bereaved survivor tries to communicate with a large group of friends or relatives, she might think that she can do it most effectively by a website, but apparently, she runs the risk that a cybertroll will desecrate her site. The result is an impairment of her freedom of expression. Her memorial may even carry messages on matters of public concern if, for example, the decedent fought a terminal disease, contributed to society in a notable way, died in combat, or lived a life that would inform public debate in any of countless ways. Pornography pasted over the site cancels out all of these messages, and people who otherwise would receive them are unable to, because even if the words and images of the original post are visible, they are overwhelmed by the pasted images, and it becomes difficult for any viewer to absorb them.

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29 See supra note 1.
In conclusion, the concern for freedom of speech is wasted, and indeed it is backward, if it allows this kind of desecration to censor discourse. The same conclusion follows, with greater or lesser completeness, in the cases of the prankster who puts out the eternal flame and the bigot who projects anti-Semitic messages on a temple. The tricky aspect of this proposition, however, is that harm to sensibilities, even if obvious and serious, does not overcome the freedom of speech of those who send out unpleasant messages that actually are a part of discourse. And the Supreme Court's decisions protect even those messages that are clumsily or offensively delivered.

II. ADAPTING THE CHAPLINSKY FORMULA TO ANALYZE DESECRATION

A. The Simplistic Application

A simplistic approach would characterize acts of desecration as generally unprotected. That is, if the utterance is highly offensive and causes significant harm in the form of pain inflicted on another person as a response to that person's speech, the unsophisticated approach would allow it to be prohibited. This approach would inadequately protect the freedom of expression. As the Supreme Court has put it, speech "may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger."30

Some courts have followed the simplistic approach. Hustler Magazine v. Falwell,31 for example, involved a tasteless, offensive political cartoon and fictional story. The publication fantasized that a well-known clergyman had engaged in incestuous acts in an improbable and disgusting setting. But the Supreme Court pointed out that the cartoon was parody, and

it implicitly editorialized against the moral views of the clergyman.\textsuperscript{32} The intermediate court nevertheless had affirmed a judgment for intentional infliction of emotional distress by stressing the pain inflicted upon the clergyman and by pointing out that the harm was intentional.\textsuperscript{33} The Supreme Court reversed and linked the expression to political cartoons generally, which are often exaggerated. Although the Court recognized that this particular effort was far inferior to most political cartoons – a "poor relation," as the Court put it – it held that the category of utterances to which it belonged was protected.\textsuperscript{34}

At the same time, the Court in \textit{Hustler Magazine} recognized that infliction of emotional distress could properly create liability in "most if not all jurisdictions."\textsuperscript{35} The Court's approval of this kind of liability must have depended upon the relative absence of speech value in utterances triggering the liability. This reasoning reinforces the conclusion that some kinds of desecration may be unprotected as well.

\textbf{B. Speech as Discourse: A Method for Making the Distinction}

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

\textsuperscript{32} \textit{Id.} at 48, 54-55.

\textsuperscript{33} The court of appeals opinion quotes a series of answers by Larry Flynt, a principal in Hustler Magazine, confirming his intention to hurt Reverend Falwell and, indeed, to "assassinate" his reputation. Falwell v. Flynt, 797 F.2d 1270 (7th Cir. 1986). It also quotes the Reverend Falwell’s testimony about the "deep hurt" he understandably experienced.

\textsuperscript{34} 485 U.S. at 54-57.

\textsuperscript{35} \textit{Id.} at 53.
claim.\textsuperscript{36} Similarly, some of the examples given at the beginning of this article are devoid of any meaningful potential for discourse: extinguishing the flame at President Kennedy's grave, pasting pornography over a memorial, or broadcasting swastikas onto a place of worship.

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

\textbf{III. APPLYING THE ADAPTED \textit{CHAPLINSKY} FORMULA TO ACTS OF DESECRATION}

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

But this formulation is too general. Its application would depend too much on case-by-case evaluation of particular utterances, and therefore, it would be vulnerable to misuse. It might

\textsuperscript{36} \textit{See} Pollard v. E. I. Dupont de Nemours Co., 213 F.3d 933, 947 (6th Cir. 2000) (analyzing a series of actions that met this description).
deny protection to unpopular expression. Instead, a viable test would depend upon factors of more neutral application.

Again, the idea of public discourse is useful. The test might instead be phrased as depending upon whether the utterance has an element that is a part of discourse on a matter of public concern. The "public concern" feature is borrowed from *Snyder v. Phelps*, 37 which borrowed it from prior cases of different categories, and it expresses the possibility that public issues are more likely to have real speech value, even if the utterance is crude, than private expressions of spite would have. The other ingredient is a finding that the utterance has potential for harm, including suppression of protected expression by others, that "clearly outweighs" any value the utterance might have as a part of public discourse. If desecration is to include an unprotected category, it should be defined so as to require proof of impairment of the exercise of the freedom of speech by another, since this is the core harm caused by desecration. By putting the elements together, one can hypothesize that there may be a category of unprotected expression that consists of desecration – defined as interference with the sacred or highly valued expression of another – limited so that it covers utterances with only *de minimis* value as a part of discourse on any matter of public concern, and also, with potential for harm to others, including the freedom of speech of others, that clearly outweighs any slight value it may be asserted as having.

One potential problem with this proposal is the allegation that “the boundaries of the public concern test are not well defined.” 38 One can find evidence to support this allegation in

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37 131 S.Ct. 1207, 1216-17 (citing cases involving defamation and statements by public employees and allowing particular utterances to be afforded less protection as speech if not made about “matter[s] of public concern,” but only about private matters). *Snyder*, however, did not recognize the nonspeech category proposed here for desecration, and hence it supports the thesis of this article only indirectly.

38 *Snyder*, 131 S.Ct. at 1216.
such cases as *Rankin v. McPherson*,\(^{39}\) where the Court split by five to four Justices in deciding whether the utterance at issue was protected speech. On the other hand, the public concern distinction was meaningful enough for the Court to approve it in *Snyder*. Moreover, it is used in other areas to distinguish protected speech, including areas that generate many court opinions, which should help to define the concept.\(^{40}\) Still, a court probably should err on the side of caution in pronouncing that an utterance does not implicate a matter of public concern.

**CONCLUSION**

The suggested formula would deny protection to genuine, valueless acts of desecration. It can be applied successfully, for example, to the act of pasting pornographic images on an internet memorial. This conduct interferes with sacred or highly valued speech of others. But what is more important, it meets the other criteria hypothesized here. It communicates little that is part of discourse on a matter of public concern; in fact, it communicates nothing in and of itself. It does not tell a viewer whether it is motivated by a dislike of online memorials, or by hatred toward the deceased individual, or by a desire to distribute pornography, or by a wish simply for amusement derived from a cruel prank. This kind of desecration also would carry a high potential for harm: not only serious psychological harm to those who might appreciate the memorial, but also suppression of the speech in which they are engaged.

The same test would deny speech protection to desecration in the forms of extinguishment of the eternal flame and swastikas projected onto the synagogue. And yet, the proposed test can differentiate the kinds of utterances that the Supreme Court has held are protected. It extends the protection of the First Amendment to expressions such as the cartoon


\(^{40}\) See supra note 37.
and story in *Hustler Magazine* and the demonstration in *Snyder* against the military near a soldier's funeral. Although these utterances are crude and unlikely to persuade others, the Supreme Court would say that they are not in a category that is unrelated to discourse on matters of public concern.

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