Crushing Animals and Crashing Funerals: The Semiotics of Free Expression

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THE SEMIOTICS OF FREE EXPRESSION

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* Associate Professor Wake Forest University School of Law. © Harold Anthony Lloyd 2012. The author would like to thank Michael Kent Curtis, Miles Foy, Ron Wright, and Abigail Perdue for their careful review of this article and for their many helpful suggestions. The author would also like thank his research assistant, Joseph Riegerix, for his helpful comments and assistance including performing most of the work on the illustrative tables. The views expressed in this article and any shortcomings are my own.
I. INTRODUCTION

A. Primal Screams (U.S. v. Stevens)

“[A] kitten, secured to the ground, watches and shrieks in pain as a woman 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 kitten hemorrhages blood, screams blindly in pain, and is ultimately left dead in a moist pile of blood-soaked hair and bone.”¹

This horrific behavior arouses certain people who will buy videos depicting such torture and killing of “helpless animals including cats, dogs, monkeys, mice, and hamsters.”² Although such behavior is typically illegal under state law, the videos rarely disclose the identities of the criminals involved.³ Because of this, members of Congress recognized that prosecution of the crime itself is difficult.⁴ However, Congress recognized that law enforcement could identify the vendors of such videos.⁵ In 1999, Congress therefore enacted 18 U.S.C. §48 to criminalize certain depictions of unlawful animal cruelty and thereby to reduce the demand for both the depictions and the depicted illegal conduct.⁶

As quoted by the Court, the statute (hereafter “Section 48”) provided in full:

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² Stevens, 130 S.Ct at 1583 (majority opinion).
³ Id.; Id. at 1603 (Alito, J., dissenting).
⁵ Id. at 25896 (statement of Rep. Elton Gallegly).
⁶ Stevens, 130 S.Ct at 1598 (Alito, J., dissenting).
§ 48. Depiction of animal cruelty
“(a) CREATION, SALE, OR POSSESSION.-Whoever knowingly creates, sells, or possesses a depiction of animal cruelty with the intention of placing that depiction in interstate or foreign commerce for commercial gain, shall be fined under this title or imprisoned not more than 5 years, or both.
“(b) EXCEPTION.-Subsection (a) does not apply to any depiction that has serious religious, political, scientific, educational, journalistic, historical, or artistic value.
“(c) DEFINITIONS.-In this section-
“(1) the term ‘depiction of animal cruelty’ means any visual or auditory depiction, including any photograph, motion-picture film, video recording, electronic image, or sound recording of conduct in which a living animal is intentionally maimed, mutilated, tortured, wounded, or killed, if such conduct is illegal under Federal law or the law of the State in which the creation, sale, or possession takes place, regardless of whether the maiming, mutilation, torture, wounding, or killing took place in the State; and
“(2) the term ‘State’ means each of the several States, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, American Samoa, the Commonwealth of the Northern Mariana Islands, and any other commonwealth, territory, or possession of the United States.”

Section 48 apparently worked—the statute’s sponsors declared the commercial trade in crush videos dead by 2007. Unfortunately for the animals, however, finding that the statute reached beyond depictions of intentional animal cruelty, the Court held Section 48 unconstitutionally overbroad and struck it down. How could the Court have reached such an awful result? How could the Court have reasonably found that language providing that “any visual or auditory depiction . . . in which a living animal is

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7 Id. at 1582 n.1 (majority opinion).
8 Id. at 1598 (Alito, J., dissenting).
9 Id. (majority opinion).
intentionally maimed, mutilated, tortured, wounded, or killed . . .” could reach beyond depictions of intentional infliction of animal cruelty?10 As we shall see, a better understanding of semiotics (i.e., the philosophy of meaning and signs) including the roles of purpose and framing in statutory interpretation and the various ways living beings might be used as instruments of expression should have led to a more enlightened result in this case.11

B. Primal Decency (Snyder v. Phelps)

“God Hates the USA/Thank God for 9/11,” “America is Doomed,” “Don't Pray for the USA,” “Thank God for IEDs,” “Fag Troops,” “Semper Fi Fags,” “God Hates Fags,” “Maryland Taliban,” “Fags Doom Nations,” “Not Blessed Just Cursed,” “Thank God for Dead Soldiers,” “Pope in Hell,” “Priests Rape Boys,” “You're Going to Hell,” and “God Hates You.”12

The above the placard phrases were among those held up by picketers in conjunction with the funeral of a heterosexual American soldier killed in the line of duty.13 The picketers associated themselves with the funeral to garner added attention for their placards.14 Although a jury thereafter found that the picketers had caused the dead soldier’s father intentional emotional distress, the Court in effect found that, under the

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10 See Section III(C) below.
13 Id at 1225 (Alito, J., dissenting).
14 See id. (entire case)
facts of the case, the picketers had a First Amendment right to use the funeral to garner such added attention regardless of the grievous injury inflicted upon the father.\textsuperscript{15} Again, how could the Court have reached such an awful result? As we shall see, a better understanding of semiotics (including again the various ways living beings might be used as instruments of expression) should have led to a more enlightened result in this case as well.\textsuperscript{16}

\textit{C. Primal Principles}

Proper handling of cases like the ones above requires, among other things, a fundamental understanding of how meaning works, how meaning is found, how living beings can be used as instruments of expression, and how the rights of living beings must be recognized and balanced when such beings are used as instruments of expression. At the outset, this requires understanding and recognizing the following principles:

\textit{1. Interpretation Involves Purpose and Frame As Well As Words}

When interpreting a rule, regulation, statute, constitution or contract, one must of course understand how meaning works before one can attempt to ascribe meaning to the matter at hand. As further discussed below, meaning involves three interrelated levels: reference, frame and disposition. The first or reference level of meaning is the focal point of experience, thought or emotion explored.\textsuperscript{17} For example, if I have particular sound that I wish to analyze, that unanalyzed sensation is a reference. The second or framing level of meaning consists of the possible judgments or determinations one may

\textsuperscript{15} See id. (majority opinion)
\textsuperscript{16} See Section IV below. As we shall see, though Stevens and Phelps employ different kinds of signs in their expression, they are analogous in forcing living beings to participate in expression which they reject. See Sections III and IV below.
\textsuperscript{17} See Section II(A) below.
make about that reference.\textsuperscript{18} For example, I may concede that the sound indicates either a
g fly or a bee. The third or disposition level of meaning is a determination or resolution
made about the reference as framed.\textsuperscript{19} Continuing with the buzzing example, I might
conclude that I am hearing a bee--one of the only two possibilities as framed. Of course,
other possibilities would exist under other frames such as “the sound indicates a bee, fly,
was p, or hornet”. In the legal context, one must always be vigilant in understanding the
frame employed and never simply concede a result simply because the frame demands it
when another reasonable frame may generate a different result.

The meaning of a rule, regulation, statute, constitution or contract is no less triply-
complex than the meaning of such a “bee.” Meaning here as well involves a reference
(often a goal or problem addressed), a frame (often the words of a rule, regulation,
 statute, constitution or contract addressing the goal or problem), and a disposition (often
the determination or resolution of matters involving the reference). For example, the
reference of a statute criminalizing child pornography can be the desired prohibition of
child pornography, the frame can be the words of the statute and the disposition of a
particular case under the statute can be the handling of the case in light of the desired
prohibition and words of the statute, i.e., in light of the reference and the frame.
In such a case, disposition without consideration of the reference would make no more
sense than disposition of the case of the bee without considering the buzz. It would also
make no more sense pretending that the statute must always have one disposition than
would claiming that the buzz was always foreordained a bee. In both cases, no answer

\textsuperscript{18} See Section II(A) below.

\textsuperscript{19} See Section II(A) below.
follows without a frame and frames are both fungible and permissive of multiple resolutions (such as again a bee or fly or, under a different frame, a wasp or hornet).

Thus: (1) competent courts must consider the purposes and goals of any rule, regulation, statute, constitution or contract under interpretation and (2) forthright courts must concede the importance and flexibility of framing. As we shall see, straightforward acknowledgement and understanding of these two points leads to a more rational, honest and humane analysis of the crush video case, U.S. v. Stevens, and, with further semiotic insight, a better analysis as well of the funeral protest case, Snyder v. Phelps.

2. Living Signifiers Have Rights

As discussed in more detail below, living beings can be used as instruments of expression. For example, we might use our mayor in discourse to signify our city. However, one might also try to use him in more pernicious ways. A madman might wish to tar and feather him to signify disgust with city management. Conceding for the sake of argument that the madman has the right to express disgust with city management, surely no reasonable person would hold that the rights of the mayor would not also come into play in such a case of expression. Thus: (3) competent courts must consider and

\[\text{\textsuperscript{20}}\text{ See Section III below.} \]
\[\text{\textsuperscript{21}}\text{ See Section IV below.} \]
\[\text{\textsuperscript{22}}\text{ See Section II(A) below.} \]
\[\text{\textsuperscript{23}}\text{ As Steven J. Heyman succinctly puts it, “The First Amendment should not be interpreted to protect speech that violates the rights of other people, except in situations where the value of the speech outweighs the value of the other rights with which it conflicts.” Steven J. Heyman, To Drink the Cup of Fury: Funeral Picketing, Public Discourse, and the First Amendment, 45 CON L. REV. 101, 108 (2012). As a matter of simple logic, such balancing must of course be allowed since no considerations of harm to others would on its face “lead to the protection of every terrorist act.” Lee C.} \]
weigh the rights of living beings when others would use such living beings as
instruments of expression (or “signifiers” as we shall define the term below). This
obvious moral principle seemed to play little if any role in both the crush video case of
U.S. v. Stevens and the funeral protest case of Snyder v. Phelps. Because this moral
principle was not carefully considered in these cases, the more fundamental question of
when usage of living creatures as signifiers occurs was also not addressed.25 As we shall
see, a basic understanding of the types of signifiers assists in this analysis; this includes
understanding of how types of signifiers such as indices by definition use living signifiers
in ways that require considering the rights of such living beings.26

3. Speech Involves More Than Mere “Expression” or “Ideas”

As in Stevens and Snyder, when focusing on the permissibility of message, idea or
content-based governmental restrictions, much First Amendment analysis downplays or
ignores the harm caused by the regulated expression.27 On the surface, this may seem

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Bollinger, The Tolerant Society: A Response to Critics, 90 COLUM. L. REV. 979, 982
(1990). See also note 74 below to the effect that the First Amendment does not protect
violence. The need to balance interests will be discussed in more detail in Sections II(E)
and III(D)(2)(c) below.

24 See Section II(A) below.

25 Though the Court found no compelled participation in expression in Stevens and
Snyder, it has rejected attempts to compel speech in some cases. See Alan Brownstein &
David Amar, Death, Grief, And Freedom of Speech: Does the First Amendment Permit
the Harassment and Commandeering of Funeral Mourners?, 2010 CARDOZO L. REV. DE
NOVO 368 (2010) (analogizing Snyder to “compelled speech” cases and discussing, inter
alia, Wooley v. Maynard, 430 U.S. 705 (1977) which invalidated a Vermont statute
requiring residents to display “Live Free or Die” on their license plates, Miami Herald
Publ’g Co. v. Tornillo, 418 U.S. 241 (1974) which invalidated equal time requirements
(1986) which invalidated a requirement that utility companies include third party
messages in their billings).

26 See Section II(C) below.

27 See Heyman, supra note 23, at 141-142 (lamenting a trend to this effect over the last
four decades); See also Police Dep’t of Chicago v. Mosley, 408 U.S. 92, 95 (1972).
required by some or all of the reasons commonly given for protection of speech: protecting democracy and our right to self-governance,\textsuperscript{28} permitting “the search for knowledge and ‘truth’ in the marketplace of ideas,”\textsuperscript{29} protecting “individual autonomy, self-expression, or self-fulfillment,”\textsuperscript{30} and fostering tolerance.\textsuperscript{31} Without scratching more deeply beneath the surface, one might of course conclude that regulating the content of one’s speech endangers one’s right to speak on matters of public concern, interferes with the battle of truth in the marketplace of ideas, and circumscribes one’s autonomy, self-expression, and self-fulfillment.

However, matters are not so simple as this. As discussed in more detail below, speech and other expression involve more than message, idea or content\textsuperscript{32} and good First

\footnotesize{(holding that governments may not restrict expression based on message, idea, subject matter or content).}


\textsuperscript{29} Id. at 502 (setting forth the rationale and contending that “a completely unregulated market of ideas will lead to discovery of truth is highly contestable).

\textsuperscript{30} Id. at 502-504; Brian C. Murchison, \textit{Speech and the Self-Realization Value}, HARV. C.R.-CL. L. REV. 443, 498-503 (1998) (“. . . First Amendment analysis [should] attend more self-consciously to the speaker’s development through expression.”)

\textsuperscript{31} Bollinger, \textit{ supra} note 23, at 984-985.

\textsuperscript{32} See Section II below. Apart from the semiotic concerns addressed in this article, content neutrality analysis must address other questions. For example, if one relies solely on the functional democracy rationale for First Amendment protections, why would content restrictions on purely-private speech run afoul of the First Amendment when there is no general impact on public discourse? A marketplace of ideas approach also faces potential questions. To the extent content neutrality approaches ground themselves in democratic concerns, the purely-private speech points apply. Furthermore, even in the purely-public sphere, fraudulent speech, for example, has no place in a marketplace seeking truth. Tracing and exploring in detail the content-based restrictions permissible under the self-government, marketplace of ideas, individual autonomy, self-expression, self-fulfillment, and tolerance rationales for First Amendment protections is beyond the scope of this article.
Amendment analysis must acknowledge this. Speech and other expression involve the use of signs, and signs involve elements other than “content” or “meaning.”

Failure to consider these other elements in some cases can have horrific results. Taking the madman example again, how would autonomy be protected by allowing him to tar and feather the mayor? How would permitting such tar and feathering further self-governance, aid the discovery of truth or foster tolerance?

As discussed below, although courts have limited speech in certain areas because of damage to others, they have not done so in other cases such as Stevens and Phelps where living beings have suffered grievous injury. This paper will explore one reason for such judicial inconsistency: the judicial failure to address in a consistent manner the relevance of injury to living beings (such as the mayor in the example above) when such living beings are used as signifiers. In other words: (4) analysis of freedom of expression must address where appropriate all of the elements of signs and not just the “meaning” component of signs. This principle should temper any excess focus of First Amendment jurisprudence on content neutrality at the expense of other important values such as preventing actual harm to others.

33 See Section II below.
34 I of course do not mean to suggest that current First Amendment doctrine would allow this practice. I use the example simply to make the logical point. See note 23 above. See also 74 below on the First Amendment’s non-protection of violence.
35 See for e.g. Section III(D)(2)(c) below.
36 See Frederick Schauer, Harm(s) and the First Amendment, 2011 SUP. CT. REV. 81 (2012) (discussing, among other things, Stevens, Snyder and the Court’s general failure to directly address “the issue of speech-created harm” and suggesting that the Court may lack “the conceptual and doctrinal arsenal necessary for grappling with speech-associated harm.”)
37 See Section III(D)(2)(c) below.
38 See again Heyman, supra note 23 at 141-142.
II. MEANING, SIGNS, SIGNALS, SIGNIFIERS, AND SEMIOTICS

A. Meaning, Signs and What They Signify

To serve as further groundwork for a more detailed analysis of the conceptual shortcomings in both Stevens and Snyder, the following examples explore in more detail the three levels of meaning and the use of signs to grasp and convey meaning.

Let us suppose that I erect a statute of John the Fencer to honor the man. In so doing, I am not using that statute as an end in itself but to indicate something beyond itself, i.e., my opinion about the man. Expression in such a case therefore involves something (which I shall call the signifier) which intentionally “stand[s] for something else”\textsuperscript{39} (which I shall call the signified) to someone (the speaker or listener or both). In that case, the signified would be a reference (the man) which I have further refined in discourse with a frame (he is a fencer who is either honorable or dishonorable) and which I have further refined with a disposition (he is an honorable fencer). Such expression can thus be diagrammed as follows:

\textsuperscript{39} ROBERT BENSON, THE INTERPRETATION GAME 75 (2007). Thus, for example, if a tree’s bark grows in a way that creates a cross on its trunk, that cross is not a sign unless someone uses or perceives that mark to convey religious or other meaning. \textit{See also} note 40 below. Intention’s role here explains “. . . why on a Sunday morning, when you awaken at eight o’clock and hear your neighbor mowing his lawn you are agitated and angry . . . . but if you hear thunder and lightning you will return to your covers and sleep. Only those crazed like Ahab will feel the same affront from nature as from a mind—but that is because they see an evil mind behind nature.” Bollinger, \textit{supra} note 23, at 982.
I shall use the term “sign” to refer such intentional usage of a signifier and a signified as diagrammed above.\(^{40}\) In such a case, again, the words “John the Fencer” are the signifier and the man himself—as understood by the speaker at least\(^{41}\)—is the signified.

Where we have such a sign, the sign consists of both the signifier (e.g., the words “John the Fencer”) and the signified (John the Fencer the man as understood by the

\(^{40}\) According to C.S. Peirce, a founder of pragmatism and one of the founders of modern semiotics, a sign must be “. . . something which stands to somebody for something in some capacity.” “CHARLES SANDERS PEIRCE, COLLECTED PAPERS §2.228 (Charles Hartshorne & Paul Weiss eds., Belknap Press 1960). See also JOSEPH BRENT, CHARLES SANDERS PEIRCE A LIFE, (Indiana 1993);CHRISTOPHER HOOKWAY, PEIRCE (Routledge 1992).Furthermore, according to Peirce, “. . . nothing is a sign unless it is interpreted as a sign.” CHARLES SANDERS PEIRCE, COLLECTED PAPERS §2.308 According to Benson, “[t]he something that [one] says has meaning—it may be words or larger units of a text, or sounds, or objects, or feelings, or events in nature, anything that stands for something else—will be called a sign.” Benson, supra note 39, at 78 (emphasis added). Benson understands meaning itself for a given person on a given occasion to be that person’s “. . . experience of [a] series of signs, ending in some mental or other behavioral event.” Id. at 25. The philosopher John R. Searle succinctly describes such necessary “intentionality” as “. . . that property of many mental states and events by which they are directed at or about or of objects and states of affairs of the world.” JOHN R. SEARLE, INTENTIONALITY, 1 (Cambridge 1984).

\(^{41}\) The “man himself” is not a Kantian “thing-in-itself” but a focal point of experience, thought or emotion which is framed for possible categorization and perhaps “dispositively” categorized in the manner discussed in this Section.
speaker or listener or both) and should not be confused with the signifier alone. In this article, I will only use “sign” in the semiotic sense of both signifier and signified.

Thus, to change the example a bit, if everyone agrees that we see John the Fencer, we are referring to a portion of common experience (the reference) that we have framed as a fencer and determined to be John the Fencer. Conversely, we can have other cases where there is actual or potential disagreement at any of these three levels. For example, if I alone speak of my good title to Blackacre, I am referring to a portion (the reference) of experience that I have framed and purportedly determined. I say “purportedly determined” because others may dispute both the frame and the disposition. In the case of my claim about Blackacre, for example, a communist might dispute the private ownership frame that makes such a claim possible while others may concede the frame but deny my good title.

One might therefore diagram the relationship between signifier and signified (i.e., reference, frame, and disposition) as follows:

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42 Winfried Noth, Handbook of Semiotics 79-80 (1995). Confusing these terms is of course easy to do since we also use “sign” in ordinary speech to mean just the signifier itself. One might say, for example, “Turn left at the stop sign down the road,” or “I don’t have any political signs in my yard.” In such usage, “sign” means the physical object used to express traffic rules or political views.
Of course, what constitutes reference, frame and disposition is contextual. For example, “Alexander the Great is either guilty or not guilty of war crimes in Egypt” is a sign because it has both a reference (i.e., the actions he took in Egypt) and a frame of that reference (i.e., he is either guilty or not guilty of war crimes). “Alexander the Great is guilty of war crimes in Egypt” would include the above reference and frame as well as a proposed disposition of the reference within that frame. However, “Alexander the Great is guilty of war crimes in Egypt” would be the reference or focal point where one is debating the meaning of that specific phrase.

Hence, on the face of things, one can intend that anything stand for anything else. Although it may seem silly, there is no reason why, for example, one cannot intend that a tree stand for the moon. However, the Court has sometimes appeared to deny this basic
truth. In United States v. O’Brien, the Court rejected “. . . the view that an apparently limitless variety of conduct can be labeled ‘speech’ whenever the person engaging in the conduct intends thereby to express an idea.” This seems to me, however, to be a confusion of terminology by the Court. Distinguishing between signifier and signified, I believe that the Court actually meant to say that the First Amendment does not protect the usage of every logically-possible signifier (in this case burning a Selective Service registration card) in expression. This would be consistent with the Court’s distinction in the case between “speech” and “nonspeech” elements “combined in the same course of conduct.” If I am correct, a more precise distinction in this latter statement would be between the signified and signifier used “in the same course of conduct.” As we shall see below, limitations on usage of certain signifiers (such as living beings used as signifiers against their will) are indeed appropriate.

B. Contrasting Signs and Signals

For want of a better term, some would also distinguish signals from signs; unlike signs, signals (if they exist) simply provoke instant, unreasoned action. Like signs, such signals would have signifiers; unlike signs, they would lack references and frames and thus dispositions (i.e., handlings of the focus in the context of the frame).

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44 Id.
45 See Sections II(F), III(D)(2)(c) and IV(B)(3) below.
46 See Noth’s discussion of various uses of the term “signal” including the view that “. . . signals have only a sensory-motor function . . .” Noth, supra note 42, at 112. See also Bernard S. Jackson, Semiotics and Legal Theory 18 (1997) (“[a] signal can be a stimulus that does not mean anything but causes or elicits something”).
47 For a discussion of the ways others have used the term “signal,” See Noth, supra note 42, at 107-13.
unreasoned run for cover, or a falling box can provoke an instant, unreasoned dash to catch it. If they exist, signals would thus by definition be expressionless since they refer to nothing. Instead, again, signals would consist of signifiers plus such mere unreasoned action.  

Assuming that such signals do exist, would, for example, the shouting of “boo!” that provokes an instant, unreasoned fear in the addressee be a signal and not expression? Would the adult magazine or crush video that provokes instant, unreasoned arousal in the viewer be a signal and not expression?

One might initially respond that fear and arousal are emotions, not thoughts, and are thus not expression. This analysis would, however, underplay our emotional engagement with the world. The Court itself has noted that “. . .words are often chosen as much for their emotive as their cognitive force. . . .” This emotional engagement with the world has been persuasively studied and described, and the notion that fear or arousal, for example, have no expressive nature is simply incorrect. Signal theory can therefore supply no easy First Amendment solutions for crush video bans even if such

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48 I personally doubt that such signals exist. I believe that any signifier “provoking” an “instant, unreasoned action” would need to do so within the context of a conceptual or emotional framework that turns the “signal” into a sign. I believe that we jump out of the way of a falling box because we have concepts of “box” and “injury” and further believe that we would not jump in the absence of such concepts.

49 Again, I personally doubt that such signals exist. See note 48 supra.


51 See generally ROBERT C. SOLOMON, THE PASSIONS: EMOTIONS AND THE MEANING OF LIFE (Hacket Publ’g Co. 1993) (particularly the “emotional register” on pages 223-308). See also JACKSON, supra note 46, at 24 (discussing views that law “. . . is a collection of symbols capable of evoking ideas and emotions, together with the ideas and emotions so invoked.”) Searle also recognized the expressive nature of emotions: “Undirected anxiety, depression, and elation are not Intentional, the directed cases are Intentional.” Searle, supra note 40, at 2. Searle in fact set out an expansive list of “Intentional states” which includes many emotional ones. Id. at 3.

52 See note 51 supra.
videos “merely” provoke some form of emotion such as arousal. I shall explore this and related points in more detail in Section III(D)(1) below.

C. Signifier Types and Corresponding Signs

Returning to signs, we often think of signifiers as verbal (such as the words “George Washington” signifying the man himself). However, signifiers need not be verbal. A frown, for example, may signify disapproval as well as (if not better than) the phrase “I disapprove.” Any perceptible act or thing may therefore serve as a signifier and any useful basic typology of signifiers will turn on criteria other than merely verbal ones.

<table>
<thead>
<tr>
<th>PEIRCE’S THREE TYPES OF SIGNIFIERS</th>
</tr>
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<tbody>
<tr>
<td>• ICONS – a thing (signifier) that resembles what it signifies.</td>
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<tr>
<td>o A sculpture of John the fencer resembles the John the Fencer, the man.</td>
</tr>
<tr>
<td>• SYMBOLS – A thing (signifier) that bears a relation to what it signifies ONLY because of some arbitrary designation.</td>
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<tr>
<td>o “George the gripper” could elicit thoughts of the same man if John had been named George and if fencing were known as gripping.</td>
</tr>
<tr>
<td>• Indexes – a thing (signifier) that signifies by participating with what it signifies.</td>
</tr>
<tr>
<td>o A weathervane fashioned in the shape of John the Fencer indicates wind direction by participating in the wind flow.</td>
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</tbody>
</table>
In this regard, C. S. Peirce (again, a founder of pragmatism and pioneer in semiotics\(^{53}\)) gives us a useful tripartite typology: signifiers that signify by resembling what they signify (iconic signifiers such as a bust of John the Fencer), signifiers that signify by convention or other arbitrary designation (symbolic signifiers such as the words “John the Fencer”), and signifiers that participate in what they signify (indexical signifiers such as weathervane that indicates the direction of the wind).\(^{54}\) As we shall see, the nature of the indexical signifier sheds particular light on the Court’s error in *Stevens*.\(^{55}\) Taking each in turn, an icon uses an iconic signifier (i.e., a signifier that resembles the signified) to signify a reference, a frame and possibly a disposition. For example, a painting of George Washington crossing the Delaware could be used by its owner as an icon which refers to an historical experience, which frames that experience as a river crossing and which makes that experience a brave river crossing. The painting’s owner could also use the painting in non-iconic and thus expressionless ways such as when, for example, the painting’s owner simply hangs it to cover a hole in a wall.

A symbol typically uses a conventional or other arbitrary signifier to signify a reference, a frame, and possibly a disposition. For example, one may feel warm, weak and uncomfortable (the reference). One may frame that experience as a disease and

\(^{53}\) *See, again, e.g.*, BRENt and HookWay, *supra* note 40.

\(^{54}\) *See Peirce, supra* note 40, at §1-369 & §1-372. Strictly speaking, iconic and indexical signifiers are in the final analysis actually conventional. What constitutes resemblance and participation is a matter of categorization. Since categories (including those of similarity and participation) can vary from time to time and place to place as convention demands or permits, iconic and indexical signifiers must therefore be conventional as well. One might therefore more precisely distinguish between three kinds of *conventional* signifiers: the iconic, indexical and symbolic. However, from a lawyer’s perspective, this seems perhaps a needless complexity and I have chosen to follow an approach which follows the more “common sense” belief that resemblance and participation are something more than simply convention.

\(^{55}\) *See Section III(D)(2)(b) below.*
conclude that one has a cold (the disposition). In that case, one’s statement that “I have a cold” would be symbolic expression since “I have a cold” gets its meaning purely by the conventional usage of such terms. (If one simply utters those words alone in a random and unconscious state, they would of course not be symbolic expression by the utterer since no meaning was intended or perceived).  

Symbols need not only use words as signifiers. They can employ anything intended or perceived to operate as a signifier. For example, the American flag is an obvious symbol of America and burning that flag can be a symbol for dislike of America or American policy. The flag can thus be part of quite meaningful symbolic expression despite Chief Justice Rehnquist’s claim that “flag burning is the equivalent of an inarticulate grunt or roar that, it seems fair to say, is most likely to be indulged in not to express any particular idea, but to antagonize others. . . .” However, just as words without intended or perceived meaning are not a sign, burning a flag can also be non-symbolic. For example, burning a flag can be a proper means of flag disposal and need express nothing in such a case.

An index uses a signifier that signifies by participating in a reference, a frame and possibly a disposition. For example, a homeowner concerned about the wind (the reference) can frame the wind as something which has direction and can mount a weathervane to indicate that direction. Such indications, which come from the

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56 Others, however, may find meaning in such utterances. I explore the distinction between intended and perceived expression below in Section II(D). Ideally, the intended and perceived expression have identical meaning, and clarity could be defined as the convergence of both forms of expression in a given case.


58 4 U.S.C. §8(k) (2006); See Texas v. Johnson, 491 U.S. 397, 411 (1989) (stating that federal law holds burning to be the preferred means of disposing of a flag which is no longer fit for display).
weathervane’s interactions with the wind, would therefore serve as dispositions of the references framed. (As in the case of icons and symbols, the weathervane is also not a sign if no intended or perceived expression exists. For example, if the homeowner mounts the weathervane simply to cover a hole in the roof, the weathervane would not then serve as an index for the homeowner. Of course, he could later discover a dual purpose in the weathervane and then use it as an index as well.)

In reviewing indexical expression, one should note at the outset that indexical signifiers raise problems not always found with iconic and symbolic signifiers. Since indexical signifiers participate with what they signify, they cannot be analyzed on any “purely-speech” basis which ignores any living signifiers in the indexical relationship. An air quality controller, for example, would engage in indexical expression if he measures air quality throughout the day by how well a person tethered to a stake fares breathing such air. Yet, surely this would present more than just First Amendment issues. As we shall see in more detail below, this inherent difference between indexical and other forms of expression provides strong support for Justice Alito’s dissent in *Stevens*.\(^{59}\)

\(^{59}\) *See Section III(D)(2)(b).*
D. Intended and Perceived Expression

| How do you like my drawing of a box? | What box? I thought you had drawn a “Y.” |

Whether expression is symbolic, indexical or iconic, expression can be intended and perceived in different manners. For example, again, the owner of the George Washington painting might wish to display it proudly as sign of deep regard for George Washington or he may hang the painting not to signify anything but merely to plug a hole. However, regardless of the owner’s intentions, guests in the owner’s home may perceive the painting in ways intended or never intended by the owner. For example, some may see the painting as merely an expression of an old man. Some may see it as an expression of a slave-owning hypocrite. In any such case, the painting can have peculiar meaning for these persons even when the owner hangs it with a different intent or with no expressive purpose at all. As the Court put it in Spence v. Washington, “[a] person gets from a symbol the meaning he puts into it, and what is one man’s comfort and inspiration is another man’s jest and scorn.”

Thorough analysis of freedom of expression must therefore recognize a distinction between intended expression (i.e., expression by the creator or owner of the potential sign) and perceived expression (i.e., expression from the point of view of anyone else). Of course, for all practical purposes, the two modes of expression often do

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60 As the Court has recognized, “. . . one man’s vulgarity is another’s lyric.” Cohen v. California, 403 U.S. 15, 25 (1971).
coincide. However, when they diverge, the divergence can be much more subtle and complex than the examples discussed above.

For example, Robert Benson tells us how modern readers read *The Wizard of Oz* quite differently from the author’s original intent. Rather than a coming-of-age fairy tale of good and evil, the author wrote the book as a Populist allegory. Here are just a few examples of the author’s originally-intended allegories: Dorothy as the average person, the Yellow Brick Road as the gold standard, Dorothy’s silver (not red as in the film) slippers as free silver money, *Oz* as an abbreviation of “ounce” (the measure of gold and silver), the Wicked Witch of the East as “capitalists and bankers,” the Tin Man as the factory worker, the Scarecrow as the farmer, the Munchkins as “the little people,” the Cowardly Lion as William Jennings Bryan, and the Wizard as the President who governs by sleight of hand. These meanings are of course lost on the average modern reader.

*E. When Rights Diverge*

In the case of *The Wizard of Oz*, the First Amendment of protects both the intended expression of the author and the perceived expression of readers; the author has the right to express his allegory and the people have the right to read and take their own message from the book.

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62 I am not naïvely claiming that all persons have exactly the same take on any piece of expression. There will always be some degree of divergence between intended and perceived expression because no one person ever shares the exact same perspective as anyone else. However, as we see every day, for purposes of action and exchange, speaker and listener can for all practical purposes talk about the same thing.

63 BENSON, supra note 39, at 52-53.

64 *Id.* at 52.

65 *Id.*

66 See Griswold v. Connecticut, 381 U.S. 479, 482 (1965) (“The right of freedom of speech and press includes not only the right to utter or to print, but the right to distribute, the right to receive, the right to read . . . and freedom of inquiry, freedom of thought . . .”)
What happens, however, when rights in intended and perceived expression conflict? For example, what if John the Fencer owns a rare marble bust of Thomas Jefferson, John the Fencer keeps a jester’s hat on the bust as an expression of his contempt for Jefferson, the State sees, at most, humorous expression in John the Fencer’s use of the bust, and the State wishes to acquire the bust for hatless display in a museum. The State offers both fair market value for the bust and an exact marble replica. Under these facts, John the Fencer has a First Amendment right to use the bust he owns to express his views about Jefferson. Assuming the State has the Constitutional right to take such property by eminent domain for public use, it would have the right to take such a bust for such museum use. How should we then balance the individual’s and the state’s rights here? Is one more important than the other or is there a possible solution in the distinction we have made between signifier and signified? Should the degree of fungibility of the signifier (i.e., the bust) proportionately reduce the strength of John the Fencer’s claim? Should we say that no real First Amendment question exists here since John the Fencer can continue to make his point by simply putting the jester’s hat on the exact reproduction? As we shall see, these kinds of questions play a critical role in any thorough analysis of both Stevens and Phelps.68

(emphasis added); see also Weaver v. Jordan, 64 Cal.2d 235, 242 (1966) (“Also encompassed are amusement and entertainment as well as the exposition of ideas . . . ‘What is one man’s amusement, teaches another’s doctrine,’”) (quoting Winters v. New York, 333 U.S. 507, 509 (1948)).

67 See Warner Corp. v. Cnty. of DuPage, 991 F.2d 1280, 1285 (7th Cir. 1993) ( “It is rare for American governments to requisition personal property, but sometimes they do so and when they do they have to pay just compensation”).

68 See Sections III and IV below.
F. Several Further Principles and Conclusions

For free speech purposes, several corollaries follow from the discussion and questions raised above. First, of course, free speech or expression issues cannot exist in the absence of signs. (5) At the beginning of any thorough free speech analysis, one should therefore first determine whether a sign exists and, if so, one should clarify its typology (i.e., clarify the type of sign). If the typology of the sign is not clearly understood, the manner in which the sign functions will not be understood and this of course risks a flawed analysis.

(6) Where a sign exists, expression will have two to three levels of meaning regardless of typology (i.e., a reference and frame and possibly a disposition). These levels must be recognized and fully protected to the extent required by law. As discussed above, any signs will at minimum have reference and framing levels of meaning which deal with the reference at hand and with the manner in which the reference is framed. As also discussed above, more developed signs will also have disposition levels of meaning (i.e., determinations of how to handle the focal points or references within the context of the frames). For example, if the First Amendment protects my right to say “We should not have bailed out the banks in the Great Recession,” it is protecting my right to point out the financial problem that occurred, to frame it as a matter subject either to governmental action or inaction and to handle the reference (i.e., the financial problem) by advocating inaction.

69 I continue here the numbering of principles started in Section I(C) above.
70 See Section II(A) above.
71 See Section II(A) above.
(7) Signs have both intended and perceived meaning, and First Amendment protection should therefore apply to both.72 Addressing intended and perceived meaning, however, can present difficulties where the intended and perceived meanings differ and the rights of the speaker and audience to their meanings may therefore conflict. Understanding the difference between signifier and signified, however, might help resolve such conflicts if the conflict turns on the signifier and the signifier is reasonably fungible (as in the Jefferson bust example discussed above).

(8) On its face, no expression is unreasonably limited when we prohibit intentional and unnecessary use of materially-harmful signifiers when reasonably-equivalent, non-harmful signifiers exist. For example, burning an exact copy of a draft card rather than the official card itself conveys the same message to the unwitting viewer without damaging an official document.73 Similarly, the First Amendment should not protect physically knocking down another person to indicate disgust for that person; apart

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72 See Section II(D) above.
73 Discussing this iconic alternative would have bolstered the Court’s decision upholding a draft card mutilation statute in United States v. O’Brien, 391 U.S. 367 (1968). Now it would be easy to make an exact duplicate for burning but even at the time of the case a folded piece of paper or one in an envelope, for example, could perhaps have passed as the real thing before an audience.
from the issues of personal injury, pushing down, for example, an image of that person should convey the same message of personal disgust.

(9) Finally, and perhaps ironically, balancing rights of the parties involved in expression may actually sometimes demand reduced fungibility of signifiers. For example, the right to engage in a war protest should not include the right to carry a real or apparently-real bomb on the street as one’s signifier when an obviously-fake bomb would convey an anti-war message without the actual or perceived danger of a real or seemingly-real bomb.

As we shall see, these principles shed much needed light on the Stevens and Phelps cases discussed below.


75 This is not to say that all signifiers are fungible. An obvious example of lack of fungibility would be use of signifiers that uniquely convey emotional meaning such as the case of Mr. Cohen’s “Fuck the Draft” jacket worn in the corridors of the Los Angeles County Courthouse in 1968. See Cohen v. California, 403 U.S. 15 (1971). In that case, Mr. Cohen chose those specific words to express publicly “... the depth of his feelings against the Vietnam War and the draft....” Id. at 16. In Mr. Cohen’s case, no living being was forced to participate in or view his expressive act—no bystanders were used in any fashion as signifiers and they “... could effectively avoid further bombardment of their sensibilities by simply averting their eyes.” See id. at 21. To give a further more elevated example, Borges notes that Dante’s Beatrice “... is not a sign of the word faith, she is the sign of the valiant virtue and secret illumination indicated by that word. A sign more precise, richer, and more felicitous, than the monosyllabic faith.” JORGE LUIS BORGES, SELECTED NON-FICTIONS 346 (Eliot Weinberger, ed., Esther Allen, trans. Penguin 2000).

76 See note 55 supra.
III. UNITED STATES v. STEVENS AND THE LIMITS OF INDEXICAL EXPRESSION

A. Section 48 and Dogfighting

[A]bused dogs used in fights endure physical torture and emotional manipulation throughout their lives to predispose them to violence; common tactics include feeding the animals hot peppers and gunpowder, prodding them with sticks, and electrocution. Dogs are conditioned never to give up a fight, even if they will be gravely hurt or killed. As a result, dogfights inflict horrific injuries on the participating animals, including lacerations, ripped ears, puncture wounds and broken bones. Losing dogs are routinely refused treatment, beaten further as ‘punishment’ for the loss, and executed by drowning, hanging, or incineration.77

Dogfights are illegal in every state and in the District of Columbia.78 Like crush videos, some dogfight videos are shot for the sole purpose of selling videos of such illegal activity.79 In addition to sales to those who simply enjoy watching such cruelty, an illegal betting market also apparently exists which is facilitated by such videos.80 Persons who are afraid to attend dogfights in person can still bet on them and then watch

77 United States v. Stevens, 130 S.Ct 1577, 1602 (2010) (Alito, J., dissenting) (quoting Brief of Amicus Curiae the Humane Society of the United States in Support of Petitioner at 5-6, United States v. Stevens, 130 S.Ct. 1577 (2010) (No. 08-769), 2009 WL 1681460, at *5). The Humane Society brief described other dogfighting horrors such as: “An orchestrated fight to the death where tortured dogs and puppies rip the skin and ears off their opponents, and bite through each other’s ears, paws, neck and genitals in a desperate attempt to survive. To avoid impending death, one dog rips out the trachea of another, leaving the dead dog sprawled on the ground covered in blood.” Brief of Amicus Curiae the Humane Society of the United States in Support of Petitioner at 5-6, United States v. Stevens, 130 S.Ct. 1577 (2010) (No. 08-769), 2009 WL 1681460, at *7.
78 Stevens, 130 S.Ct at 1583 (majority opinion).
79 Id. at 1601 (Alito, J., dissenting).
80 Id.
the fights in their homes. Such dogfight videos also apparently encourage additional illegal activity by serving as training materials for other dogfights.

As with crush videos, the locations and criminals involved can be hidden making prosecution difficult if not impossible. As with crush videos, the producers of such videos can achieve such anonymity by use of a “bare-boned, clandestine staff.”

Therefore, Section 48’s goals of addressing both the difficulties of prosecuting videoed animal cruelty and the additional crime created by such videos should apply to dogfight videos. Additionally, Section 48 should apply to such videos by including in its definitions of depictions of animal cruelty videos “…in which a living animal is intentionally maimed, mutilated, tortured, wounded, or killed, if such conduct is illegal under Federal law or the law of the State in which the creation, sale, or possession takes place . . . .”

B. Mr. Stevens’ Videos and the Resulting Conviction and Appeals

Mr. Stevens operated “Dogs of Velvet” and a related website. His enterprise sold videos of pit bulls dogfighting. He also sold videos of dogs attacking other creatures including wild boar and videos depicting a “‘gruesome’ scene of a pit bull attacking a domestic farm pig.”

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81 See id.
82 Id. at 1602.
83 See id. at 1601-02.
84 See id. at 1601 (quoting Brief of Amicus Curiae the Humane Society of the United States in Support of Petitioner at 5-6, United States v. Stevens, 130 S.Ct. 1577 (2010) (No. 08-769), 2009 WL 1681460, at *9).
85 See Stevens, 130 S.Ct. at 1601-02.
87 Stevens, 130 S.Ct. at 1583 (majority opinion).
88 Id.
Because of these videos, Mr. Stevens was indicted under Section 48.89 Mr. Stevens moved to dismiss the charges by claiming that, under the First Amendment, Section 48 is facially invalid.90 The District Court denied the motion, the jury convicted Mr. Stevens under Section 48 as indicted, and Mr. Stevens was sentenced to imprisonment for thirty-seven months with three years of supervised release thereafter.91 However, on Mr. Stevens’ appeal the Third Circuit found Section 48 facially unconstitutional and vacated his conviction.92

The Supreme Court granted certiorari in 200993 and affirmed the Third Circuit in 2010.94 Justice Alito was the lone dissenter.95

C. The Road Taken by the Court

Two roads diverged in a wood, and I—
Took the one less traveled by,
And that made all the difference.96

In Stevens, Chief Justice Roberts, writing for the majority, concluded that Section 48 was overbroad and therefore violated the First Amendment.97 As we shall see, the Court reached this conclusion by taking odd turns at several forks in the roads of analysis. These were turns that the Court need not have taken and were turns that led the Court to reach its unfortunate and avoidable result. For those who would see application of the

89 Id.
90 Id.
91 Id.
92 Id.; United States v. Stevens, 533 F.3d 218 (3d Cir. 2008).
94 Stevens, 130 S.Ct. at 1592.
95 Id. (Alito, J., dissenting).
96 ROBERT FROST, COLLECTED POEMS PROSE AND PLAYS 103 (1995).
97 Stevens, 130 S.Ct. at 1592.
law as merely mechanical, the Court’s opinion in *Stevens* should therefore demonstrate the error of their ways.

The Court acknowledged that a typical facial attack on Section 48 would place the burden of proof on Mr. Stevens to demonstrate that the statute could be valid under “no set of circumstances.” In light of the crush videos the statute was meant to prevent, this would of course likely have been an impossible burden for Mr. Stevens to overcome.

The Court therefore turned to “a second type of facial challenge” that can invalidate a statute as overbroad if “a substantial number of its applications are unconstitutional, judged in relation to the statute’s plainly legitimate sweep.”

In applying this “second type” of facial challenge, The Court found Section 48 to have “alarming breadth.” The Court was particularly concerned that Section 48(c)(1)’s definition of depictions of animal cruelty includes depictions where “a living animal is intentionally maimed, mutilated, tortured, wounded or killed.” As The Court put it, “[M]aimed, mutilated, [and] tortured’ convey cruelty but ‘wounded’ or ‘killed’ do not suggest any such limitation.”

Here the Court arrived at its first fork in the road. It could have easily applied the canon of *noscitur a sociis* (that words are judged by proximate words) to find that “wounded” and “killed” required cruelty since the accompanying words “intentionally

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98 *Id.* at 1587.
99 *Id.* at 1592 (leaving an open door on a narrower crush video statute).
100 *Id.* at 1587 (quoting Wash. State Grange v. Wash. State Repub. Party, 552 U.S. 442, 449 n.6 (2008)).
101 *Id.* at 1588.
102 *Id.*
103 *Id.*
maimed, mutilated, tortured” all involve cruelty. However, the Court rejected this common sense path in favor of a harsher one. As the Court explained the options at this first fork in the road:

The Government contends that the terms [“wounded” and “killed” used in the phrase “intentionally maimed, mutilated, tortured, wounded, or killed” under the heading of “depiction of animal cruelty”] should be read to require the additional element of “accompanying acts of cruelty”. . . . The Government bases this argument on the definiendum, “depiction of animal cruelty,” . . . , and on “the commonsense canon of noscitur a sociis”. . . . As that canon recognizes, an ambiguous term may be “given more precise content by the neighboring words with which it is associated”. . . . Likewise, an unclear definitional phrase may take meaning from the term to be defined. . . .

But the phrase “wounded . . . or killed” at issue here contains little ambiguity. . . . Nothing about that meaning requires cruelty. . . .

Ignoring the other fork in the road, the Court thus chose the ironically crueler route that “wounded . . . or killed” has “little ambiguity” and that these words should therefore be read “according to their ordinary meaning” and “[n]othing about that meaning requires cruelty.” Of course, as the Court itself noted above and as we further discuss below, by virtue of the very placement of the words, the statute can just as well be read to require cruelty where the Court finds it lacking. However, having chosen to construe the words in the manner it did, the Court could of course then review some of

104 See BLACK’S LAW DICTIONARY (9th ed. 2009) available at Westlaw BLACKS; see also S.D. Warren Co. v. Maine Bd. of Evtl. Prot., 547 U.S. 370, 378 (2006) (“The canon, noscitur a sociis, reminds us that ‘a word is known by the company it keeps’, and is invoked when a string of statutory terms raises the implication that the ‘words grouped in a list should be given related meaning.’”) (citations omitted).

105 Id. at 1588.

106 Stevens, 130 S.Ct. at 1588.

107 See Section III(D) below.
the parade of horribles that followed. For example, under the Court’s reading, even a video of the “humane slaughter of a stolen cow” would be covered by Section 48 because no cruelty need be involved\textsuperscript{108} The Court further discussed the popularity of hunting, how state laws vary on how one may hunt, and how Section 48 would therefore, in the Court’s view, potentially create massive confusion across state lines.\textsuperscript{109} It therefore found that, as demand for “hunting depictions” exceeds “by several orders of magnitude” demand for crush or dogfighting depictions, much more legitimate expression than illegitimate expression would be prohibited under Section 48.\textsuperscript{110}

Next, the Court arrived at a second fork in the road. Section 48(b) provides that Section 48(a) “does not apply to any depiction that has serious religious, political, scientific, educational, journalistic, historical, or artistic value.”\textsuperscript{111} The Court found most hunting videos lack obvious instructional value, apparently believing that many have no more than “recreational” value.\textsuperscript{112} Of course, “recreational value” is not one of the categories in Section 48(b) and owners of hunting videos (which depict wounding or killing of animals) would therefore be criminals under Section 48.\textsuperscript{113} However, as we shall see below,\textsuperscript{114} the Court could have just as easily found that found hunting videos indeed fell in one or more of the categories of exceptions if they had the “serious” value required by Section 48(b).\textsuperscript{115}

\textsuperscript{108} Id. The cow must be stolen, of course, because the underlying videoed conduct must be unlawful.
\textsuperscript{109} Id. at 1589.
\textsuperscript{110} See id. at 1589.
\textsuperscript{111} Id. at 1590.
\textsuperscript{112} Id.
\textsuperscript{113} See id. at 1588.
\textsuperscript{114} See Section III(D) below.
On the question of “serious” value, the Court arrived at its third fork in the road and once more chose an avoidable route. Again, Section 48(b) provides that Section 48(a) “does not apply to any depiction that has serious religious, political, scientific, educational, journalistic, historical, or artistic value.”\textsuperscript{116} The Court apparently interpreted “serious” to mean something like “significant and of great import.”\textsuperscript{117} As the Court put it:

The Government's attempt to narrow the statutory ban [of Section 48 by reading “serious” to mean, for example, “not scant”] . . . requires an unrealistically broad reading of the exceptions clause [containing the term “serious”]. As the Government reads the clause, any material with “redeeming societal value,” . . . “at least some minimal value,” . . . or anything more than “scant social value,” . . . is excluded under [the exceptions clause of] § 48(b). But the text says “serious” value, and “serious” should be taken seriously. We decline . . . to regard as “serious” anything that is not “scant.” (Or, as the dissent puts it, “trifling” . . . .)\textsuperscript{118}

The Court’s conclusion here, however, is of course not required by common language usage. As Justice Alito pointed out, “serious” can also mean “not trifling.”\textsuperscript{119} However, the Court chose not to follow Justice Alito’s route and analyzed Section 48 accordingly. Choosing instead to take the route that Section 48(b)’s exceptions applied only to matters which are “significant and of great import,”\textsuperscript{120} the Court of course had little difficulty finding grave problems with Section 48. Since most of what we do, read, etc.

\textsuperscript{116} Stevens, 130 S.Ct at 1590.
\textsuperscript{117} Id. The Court obtained this language from the District Court’s jury instructions which the government defended as “a commonly accepting meaning of the ‘word ‘serious’”. Id.
\textsuperscript{118} Id. at 1590.
\textsuperscript{119} Id. at 1595, 1595 n.4 (Alito, J., dissenting). See also AMERICAN HERITAGE COLLEGE DICTIONARY 1245 (3d ed. 1993).
\textsuperscript{120} Stevens, 130 S.Ct at 1590.
or view is not “of great import,” the Court thus chose a route that eviscerated much of Section 48(b).

Having found Section 48 to apply to woundings and killings lacking cruelty\textsuperscript{121} and having found “serious” to mean something like “significant and of great import,”\textsuperscript{122} it is hard to see how most (if any) hunting videos would fit under any 48(b) exception.\textsuperscript{123} Since the market for hunting videos is much greater than the market for crush videos, the Court then had little difficulty finding the statute overbroad.\textsuperscript{124}

In addition to the language of Section 48 itself, Chief Justice Roberts also expressed external concerns about damaging the work ethic of Congress. As he put it, a different interpretation of Section 48 would “sharply diminish” the incentive of Congress to pass a well-worded statute.\textsuperscript{125}

Of course, the paths taken by the Court here were alternative ones that the Court could have rejected at each of the three forks discussed above.\textsuperscript{126} In fact, not only could the Court have taken different routes, it should have taken different routes. We shall explore in Section D below basic principles the Court violated in taking its turns at the three forks and shall then further explore how semiotics helps to understand how the Court unfortunately harmed free expression analysis, harmed the poor animals involved,

\begin{footnotesize}
\textsuperscript{121} Id. at 1588.
\textsuperscript{122} Id. at 1590.
\textsuperscript{124} Stevens, 130 S.Ct. at 1589, 1592.
\textsuperscript{125} Id. at 1592.
\textsuperscript{126} The Court somewhat imperiously stated, “[o]ur construction of §48 decides the constitutional question.” Id. at 1592. One would wish for a more respectful view of separation of powers that seeks to understand and implement the statute’s clear purpose of addressing videos of true animal cruelty.
\end{footnotesize}
and harmed the public who must suffer the additional criminal activity the animal cruelty videos generate.127

In fact, this reasoning about the language of Section 48 and the work ethic of Congress seems strangely at odds with other statutory interpretation principles elucidated by Chief Justice Roberts. As Chief Justice Roberts wrote in 2012 when upholding the Affordable Care Act128 by finding that its “penalty” meant “tax”:

“The text of a statute can sometimes have more than one possible meaning. To take a familiar example, a law that reads “no vehicles in the park” might, or might not, ban bicycles in the park. And it is well established that if a statute has two possible meanings, one of which violates the Constitution, courts should adopt the meaning that does not do so . . . .

The question is not whether that is the most natural interpretation . . . , but only whether it is a “fairly possible” one. . . . As we have explained, “every reasonable construction must be resorted to, in order to save a statute from unconstitutionality” . . . . 129

The Chief Justice further chastised the dissent in the Affordable Care Act case for in effect contending that “. . . the law must be struck down because Congress used the wrong labels.”130

In light of Chief Justice Roberts’ views in the Affordable Care Act, how does one account for Chief Justice Roberts’ apparent failure to practice in Stevens what he preached in 2012? Perhaps the words from 2012 mark an evolution in Chief Justice Roberts’ thinking. If so, perhaps he would now agree with the alternative analysis that

127 See Stevens, 130 S.Ct. at 1601-02 (Alito, J., dissenting).
130 Id. at 2597 (discussing the terms “tax” and “penalty”).
follows, an analysis driven by a better understanding of semiotics that should have led to
a more enlightened outcome in Stevens.

D. The Road Not Taken

I. Signals or Signs Along the Road?

Before addressing the semiotics of statutory construction in this case, a proper
analysis should first determine whether animal cruelty videos could be construed as
signals or signs. For if they function as signals, they express nothing and are thus subject
to no First Amendment protection.131

One might argue, for example, that crush videos bought solely for arousal express
nothing. Instead, one might argue, they merely provoke instant, unreasoned acts of
arousal. As such, they would signify nothing (since they would have no reference, frame,
or disposition) and would thus express nothing. Since they express nothing, crush videos
on their face would have no First Amendment protection and the matter would need no
further discussion.

This argument, however, has fatal problems. First, even if true signals could
exist, even if the producers of crush videos intended them to be merely signals, and even
if they were always perceived only as something arousing, arousal is more than mere
physical reaction. As we have seen, emotions involve their own forms of expression and
interaction with the world,132 and even under this scenario crush videos would be more
than mere signals. Second, the fact that Congress and animal rights activists wished to
ban crush videos because of the animal cruelty involved shows that they at least
perceived the videos as depictions of animal cruelty and thus as more than mere signals.

131 See Section II(B) above and the discussion of the unlikely existence of such signals.
132 See Section II(B) and note 35 supra.
One would also imagine that an ordinary person accidentally buying and watching such a video would also see expressions of animal cruelty. Perceived expression is no less expression than intended expression\textsuperscript{133} and crush videos therefore involve more than mere expressionless signals. No simple First Amendment solutions therefore exist along these lines.

2. \textit{The Semiotics of Statutory Construction}

\hspace{1em} \textit{a. The Vacuum of Plain Meaning}

As the review of the nature of signs indicated in Section II(A) above, statutory expression involves three levels of meaning: reference meaning, frame meaning, and disposition meaning.\textsuperscript{134} A thorough analysis of any statutory expression should review all three levels of meaning. As these levels of meaning are all interrelated, it of course makes no sense to review one level of meaning apart from the other two.\textsuperscript{135} In other words, we must do more than merely parse the words of Section 48 to find its meaning. A proper review of Section 48 must include an intertwined review of the purpose of the statute (in this context the reference level of meaning), the language of the statute (in this

\textsuperscript{133} See Section II(D) above.


\textsuperscript{135} See Section II(A) above.
context the frame of that reference), and the handling of the reference or parts thereof\textsuperscript{136} in ways permitted by the frame (in this context the disposition level of meaning).\textsuperscript{137}

As to the purpose of the statute, there can be little doubt that the statute seeks to prohibit depictions of live animal cruelty except in the cases enumerated in Section 48(b). As the Court itself recognizes, Section 48 is titled “Depiction of animal cruelty.”\textsuperscript{138} From the title alone, there is therefore little room for doubt that the purpose of the statute is to address depictions of animal cruelty. Thus, the Court stated at the outset of its opinion that Congress enacted Section 48 “to criminalize the commercial creation, sale, or possession of certain depictions of animal cruelty.”\textsuperscript{139} As legislative history accords with this,\textsuperscript{140} it should be indisputable at this point that Section 48 addresses cruelty and not, for example, the humane slaughter of a cow.\textsuperscript{141}

Moving next to the frame level of meaning (i.e., the text of the statute itself) in light of the statute’s purposes, it is puzzling that the Court took the three roads discussed above, all three of which should have been roads “less travelled by” if courts are to

\textsuperscript{136} In the case of statutory application, disposition of the reference as permitted by the frame often includes disposition of parts rather than the whole of the reference. For example, if the focus of the statute is upon all animal cruelty videos, a case involving only crush videos can still involve a disposition of that subset of animal cruelty videos.

\textsuperscript{137} As noted in Section II(A) above, meaning is contextual, and our analysis here presupposes a prior question: “How does one determine the meaning of Section 48?” In the context of that question, the language of the statute is the reference, the frame recognizes the three levels of meaning, and the disposition provides that the statutory language, viewed in light of the focus or purpose of the statute, determines the statute’s meaning.


\textsuperscript{139} Id. at 1582.

\textsuperscript{140} See id. at 1598 (Alito, J., dissenting) (providing Justice Alito’s overview of such legislative history).

\textsuperscript{141} See Stevens, 130 S.Ct. at 1588 (majority opinion).
engage in meaningful statutory interpretation. First, Section 48(c)(1)’s caption “depiction of animal cruelty,” leaves little if any reasonable doubt that the words “wounded” or “killed” require the cruelty lacking in such things as the humane slaughter of a stolen cow. The Court itself has conceded that Section 48 is about depictions of cruelty. Second, since the words “wounding” and “killing” cannot be viewed apart from the stated purpose of the statute, it is clear that the Court erred in not applying noscitur a sociis to read the words as “cruel wounding” and “cruel killing” or the like. The Court simply chose the wrong road at this first fork.

The Court also chose the wrong road at its second fork when it found no clear exception category in Section 48(b) for hunting videos. Remembering that meaning includes both intended and perceived meaning, hunting videos can easily be intended or perceived to fall in every exception category. Those who believe in gun and hunting

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142 Frost, supra note 96, at 103.
143 See Stevens, 130 S.Ct. at 1588, 1588 n.4.
144 See id. at 1587-88.
145 Construction canons are often much maligned. See Huhn, The Five Types of Legal Argument 22-25, 101-102 (2d ed. 2008). This example shows how such attacks are misplaced. A canon of construction is properly used where it reconciles issue and frame meaning. Canons should not be applied when they do not reconcile such meanings. Had the purpose of Section 48 been to include depictions of humane killings and woundings as well, then noscitur a sociis would be inappropriate. It is thus a specious to attack canons on that grounds that for each canon there is an opposite canon. See id. at 102.
146 Not only would members of Congress presumably want their statute to achieve its purpose, they can also always revise the statute should the Court improperly resolve an ambiguity. See Huhn, supra note 145, at 128. Requiring Congressional remedial action is surely less draconian than striking down the entire statute and breathing life back into the crush video market. See Stevens, 130 S.Ct. at 1598 (Alito, J., dissenting) (“Now, after the Third Circuit’s decision [facially invalidating the statute], crush videos are already back online.”) (quoting Brief of Amicus Curiae The Humane Society of the United States in Support of Petitioner at 2, United States v. Stevens, 130 S.Ct. 1577 (2010) (No. 08-769), 2009 WL 1681460, at *5).
147 Stevens, 130 S.Ct. at 1590.
148 See Section II(D) above.
rights could see hunting videos as valuable political statements. Those who study hunting methods or enjoy hunting could see hunting videos as having scientific and educational value.\textsuperscript{149} Those who report on hunting or hunting videos could find them to have journalistic value. Those who study filming methods could see artistic value in hunting videos. Those who have religious objections to hunting might find films have religious value in their ability to convert others to such a religious view. Finally, since some hunting videos could be filmed to record the history of a special hunt, hunting videos can also have historical value.\textsuperscript{150} It is therefore hard to imagine anyone interested in hunting videos not falling into one or more of these categories in these or other ways.

In fact, if any drafting problems occur with the statute here, they might seem to run in the opposite direction of swallowing up the statute. Fortunately for the animals, however, the exceptions also include the requirement of “value.” Among the various definitions of “value” is “merit.”\textsuperscript{151} Given the ethical dimensions of the term “merit,”\textsuperscript{152} understanding “value” in such a way would make sense in a statute passed to reduce animal cruelty. Thus, since moral justification would be lacking under this reasonable interpretation of “value,” mere animal cruelty should not fall under any exception of Section 48(b).

\textsuperscript{149} Stevens, 130 S.Ct. at 1595 (Alito, J., dissenting) (adding educational and scientific categories as well).
\textsuperscript{150} To play the dictionary game as well, “historical” can simply mean “based on or concerned with events in history.” American Heritage College Dictionary 644 (3d ed.1993). To continue the game, Congress did not use the term “historic” which implies importance in history. Id. Instead, they used “historical” which “refers to whatever existed in the past, whether regarded as important or not.” Id.
\textsuperscript{151} Id. at 1490.
\textsuperscript{152} Among the various definitions of “merit” are “a quality deserving praise or approval” and “virtue.” Id. at 853. These definitions are inconsistent with mere animal cruelty.
Continuing on in its confused journey, the Court also chose the wrong road at the third fork discussed above. Rejecting claims that “serious” in Section 48(b) means “not trifling,” the Court appeared to settle on a meaning in the range of “significant and of great import.”¹⁵³ The Court even seemed to find humor in its choice of roads, stating: “. . .the text says ‘serious’ and ‘serious’ should be taken seriously.”¹⁵⁴ Of course, on its face this understanding of “serious” cannot be right in light of the purpose of the Section 48. Again, most of what we do is not “significant and of great import.” This is equally true of the ordinary the videos that we often watch. It is also hard to imagine how many hunting videos would be “significant and of great import.”¹⁵⁵ This, however, does not bring the statute down. It brings down the inappropriate definition of “serious” chosen by the Court. The other course not taken, the course of defining “serious” as meaning “not trifling,” (which is a perfectly-acceptable definition of “serious”¹⁵⁶) would allow Section 48(b)’s exceptions to be both meaningful and constitutional. Since frame and reference levels of meaning are intertwined¹⁵⁷ and since the purpose of a statute seeking to reduce animal cruelty would not be served by an avoidable reading that invalidates the statute, the Court’s histrionic definition of “serious” is simply not reasonable. Instead, Justice Alito’s understanding of “serious” as meaning “not trifling”¹⁵⁸ reasonably accords with the purposes of Section 48 while allowing the statute to pass constitutional muster.

¹⁵³ Stevens, 130 S.Ct. at 1590 (majority opinion). This is apparently a “gotcha” definition arising from the District Court’s jury instructions to which the Government apparently consented. Id.
¹⁵⁴ Id. at 1590.
¹⁵⁵ See id. at 1590.
¹⁵⁷ See Section II(A) above.
¹⁵⁸ Stevens, 130 S.Ct. at 1595 (Alito, J., dissenting).
In analyzing these roads not taken, we can also see a further principle of interpretation that flows from the intertwined nature of frame and reference. Since the words and focuses of statutes are intertwined, since statutes frame their reference or focus, it makes no sense to read statutes in avoidable ways that bring statutes down. Such avoidable readings run counter to the way focus, frame, and disposition should work together rather than in opposition. Where legislation may be construed in multiple ways, courts should therefore construe statutes to be both constitutional and well drafted to the extent possible in light of the purpose and words of the statutes. In this case, the Court’s proclamation that it would not “rewrite” Section 48 to make it constitutional therefore makes no sense. Instead, looking at all three levels of the statute’s meaning, the Court effectively “rewrote” Section 48 to make it unconstitutional.

A correct reading of Section 48 in light of its stated purpose provides a conservative (and perhaps too conservative) statute that only bans depictions of animal cruelty that lack even trifling religious, political, scientific, educational, journalistic, historical or artistic value. On this reading, it is hard to imagine how the relation of invalid applications of Section 48 to valid applications of Section 48 could be substantial and thus support a facial challenge that the statute is overbroad.

b. The Unique Case of Indexicals

Were this not problem enough for the Court, a good grasp of semiotics also shows a further unique problem with videos of this type. Because photography and videotaping

159 Justice Alito was thus correct where he asserted, in this case at least, that the Court has a duty to construe the statute “so as to avoid serious constitutional concerns.” Id. at 1597. See also id. at 1595.
160 Id. at 1592 (majority opinion).
161 Id. at 1587.
involve the interaction of the subject with the recording medium, they are straightforward examples of indexical expression.\textsuperscript{162}

Child pornography, crush videos, and cockfighting and dogfighting videos are all members of the same subset of indexical expression. All three involve:

1. Usage of the children, dogs and other animals as a part of the very creation of the indexicals; and
2. Material, unjustified harm to those so used.

Such indexical expression thus involves more than issues of pure expression. The Court in \textit{New York v. Ferber} recognized this point in the case of child pornography.\textsuperscript{163} Reaffirming \textit{Ferber}, the Court subsequently stated in \textit{Ascroft v. Free Speech Coalition} that “[w]here the images are themselves the product of child sexual abuse, \textit{Ferber} recognized that the State had an interest in stamping it out without regard to any judgment about its content.”\textsuperscript{164}

c. The Indexical Harm Exception

Understanding that the child pornography exception turns on the indexical nature of such expression, a more precise statement of the underlying principle in \textit{Ferber} does not require children as subjects. Instead, it turns upon the harm inflicted on more than just children. For example, adult pornography involving the murder of adults (“snuff videos”) would also fall outside the First Amendment.\textsuperscript{165} A secret voyeuristic video

\textsuperscript{162} See section II(C), supra.
\textsuperscript{165} Although there is doubt whether any of these “snuff” films actually exist (see Barbara Mikkelson, \textit{A Pinch of Snuff}, SNOPES (Oct. 31, 2006), http://www.snopes.com/horrors/madmen/snuff.asp), any such films would be outside the scope of First Amendment protection since the Court has plainly stated that “The First
filmed and distributed without the subject’s consent and a secret sex video of a gay college student filmed and distributed without his consent and leading to his suicide should therefore also fall outside the First Amendment.\footnote{See Conn. Gen. Stat. Ann. § 53a-189a, 53a-189b (West 2012) (criminalizing both voyeurism and the dissemination of voyeuristic material as class D felonies). In March, 2012, Dharun Ravi was convicted of 15 crimes including invasion of privacy and bias intimidation and sentenced to thirty days in jail for secretly videotaping and distributing intimate scenes of his gay roommate. Michael Koenigs et al., Rutgers Trial: Dharun Ravi Sentenced to 30 Days in jail, ABC (May 20, 2012) http://abcnews.go.com/US/rutgers-trial-dharun-ravi-sentenced-30-days-jail/story?id=16394014; Verdict Sheet, State v. Ravi, 2011 WL 7562705 (N.J.Super. Ct. 2011) (No. 1100400596). On at least two occasions Ravi used a webcam to spy on his male roommate during his roommate’s private romantic encounter with another male. On one occasion, Ravi used his Twitter account to solicit others to view a feed of the webcam. See Ian Parker, The Story of a Suicide, New Yorker (Feb. 6, 2012), http://www.newyorker.com/reporting/2012/02/06/120206fa_fact_parker.}

Precisely put, the indexical question in \textit{Stevens} is therefore whether the scope of protected indexical signifiers should include animals as well as humans (children and adults). It should. Animals also clearly feel pain\footnote{That animals felt pain was recognized by many at least as early as the Eighteenth Century. \textit{See} Keith Thomas, \textit{Man and the Natural World} 175-178 (Penguin Books 1984). This was a welcome contrast to the earlier Seventeenth Century views of at least some Cartesians. These Cartesians believed that animals were mere automata and that “the cry of a beaten dog was no more evidence of the brute’s suffering than was the sound of an organ proof that the instrument felt pain when struck. Animal howls and writhings were merely external reflexes, unconnected with any internal sensation.” \textit{Id.} at 33.} and unjustified pain on its face is undesirable.\footnote{Pain is “[a]n unpleasant sensation varying in severity, resulting from injury, disease, or emotional disorder.” \textit{American Heritage College Dictionary} 981 (3d ed. 1993).} Good government by definition seeks to minimize unjustified pain within
its jurisdiction\textsuperscript{169} which means that the underlying rule of \textit{Ferber} applies to more than merely underage human beings.\textsuperscript{170}

In fact, understanding how signs work also helps demonstrate the potential speech neutrality of this more precise statement of the rule underlying \textit{Ferber}. Portrayals of both animal torture and child pornography need not be indexical. The same kind of expression can be conveyed iconically (i.e., by imitation) and symbolically (i.e., by words).\textsuperscript{171} Computer-generated videos of animal torture, dogfights and child pornography can express such things by fictional imitation and resemblance without causing any pain to an animal or child. The Court has in fact expressly upheld the right to produce non-obscene virtual child pornography for this very reason.\textsuperscript{172} Other iconic (i.e., resemblance) substitutions for real animals could of course include usage of realistic imitations of the animals along with the necessary fake blood and imitation screams.

The fungibility of either the virtual or imitation approaches here is heightened by the extremely-fungible nature of arousal expression itself. For example, pornography requires images of certain attributes that arouse the particular viewer, and this does not

\textsuperscript{169} See, e.g., U.S. \textsc{Const.} pmbl. (including “promote the general Welfare”).
\textsuperscript{170} For a detailed analysis of the compelling governmental interest in preventing animal cruelty, see Perdue, supra note 11, at 494-501.
\textsuperscript{171} The Court recognized the possibility of iconic substitution in the case of child pornography, recognizing that: . . . the value of using children in these works (as opposed to simulated conduct or adult actors) was de minimus.” \textit{Stevens}, 130 S.Ct. at 1586. Justice Alito took the point further to address the very point that symbolic and iconic avenues remained open, stating that “the statute does not apply to verbal descriptions or simulations.” \textit{Id.} at 1600 (Alito, J., dissenting). Animal torture, dogfights and child pornography can be expressed iconically and also symbolically through written depictions of fictional subjects that suffer no injury at all.
\textsuperscript{172} Ashcroft v. Free Speech Coal., 535 U.S. 234, 250 (2002) (finding unconstitutional a statute which “. . .prohibits speech that records no crime and creates no victims by its production,” noting that “[v]irtual child pornography is not ‘intrinsically related’ to the sexual abuse of children . . . .” and further noting that “\textit{Ferber’s} judgment about child pornography was based upon how it was made, not on what it communicated.”)
necessarily require images of specific and only those specific persons with the desired attributes. This point would apply even more in the case of crush videos since the viewer knows nothing about the particular animal involved in the video.

A more precise statement of the injury principle (or at least one of the principles) involved in *Ferber* would therefore seem to be: “The First Amendment does not protect indexical expression (1) where the speaker unjustifiably\(^{173}\) uses\(^{174}\) a living\(^{175}\) human or

\(^{173}\) Justification in this context requires a discussion well beyond the limits of this article. However, to give a couple of examples, justification under this first part of the exception could include filming a murder to provide evidence to police and studying a murder video as a part of forensics instruction. In an attempt to build a more general justification formula, one might return to 1942 and build in part on a previous formula of the Court and ask whether “any benefit that may be derived from [the expression] is clearly outweighed by the social interest in order and morality.” Chaplinsky v. New Hampshire, 11 315 U.S. 568, 572 (1942). As the breadth of “order and morality” may cause concern, a better formulation of this principle might be: “protection is denied only the speech value is ‘clearly outweighed’ by the harm the utterance causes.” David Crump, *Desecration: Is It Protected Speech?*, 46 WAKE FOREST L. REV. 1021, 1024 (2011). For a general discussion of the need to understand the relationship between harm and the First Amendment, see again, Schauer, *supra* note 36. See also Section IV(B)(3) below.

\(^{174}\) Like meaning, use can be intentional (e.g., the maker of a crush video) or perceived (e.g., the distributor or purchaser who uses or distributes a video as a crush video). Furthermore, use of force should not be a necessary component of “use” because non-human animals cannot consent and there are certain activities (such as murder) to which human victims cannot consent. See, e.g., People v. Minor, 898 N.Y.S.2d 440 (Sup. Ct. 2010) (“. . . the law does not permit a person to consent to his own murder. That consent does not transform an active killing into a suicide,”); People v. Gray, 224 Cal. App. 2d 76, 79-80 (“However, it is no defense to assert that the victim consented to an assault upon her by force likely to produce great bodily harm,”); see also W.E. Shipley, Annotation, *Consent as a Defense to Criminal Assault and Battery*, 58 A.L.R.3d 662, §2[a] (1974) (“Although the cases are replete with broad general statements that consent is a defense in a prosecution for assault, most of these statements are drawn from cases involving sexual assaults of one kind or another, and in the few cases which have involved an actual battery, without sexual overtones, the courts have usually taken the view that since the offense in question involved a breach of the public peace as well as an invasion of the victim's physical security, the victim's consent would not be recognized as a defense, at least where the battery is a severe one”). Where human consent is permissible, such consent can be considered under justification as can the application of any force.
other animal as an indexical signifier, and (2) where the living human or other animal suffers unjustified, material harm as a result of such use.”

The “use” in the first element covers not only those who originally filmed the indexical expressions but also those who otherwise use the film or other videos of the underlying action. The latter category would include, for example, those who copy or distribute crush videos as well as opportunists who also directly use the indexical victims. Thus, if B videotapes an animal crushing that A has set up and is videotaping (with or without knowledge of B’s activity), the first element would apply to the videos of both A and B.

The phrasing of the second element narrows the sweep of the exception. If the harm is not material or is justified, the exception should not apply. For example, if one traps a bird briefly to photograph its beauty and does not harm the bird, this expression should be protected. If, however, the bird is materially harmed in making the video and there is no acceptable justification for such harm, both the video and its inseparable underlying act should be subject to state response since such harmful expression could, for example, be replaced by other harmless indexical expression or by iconic or symbolic expression.

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175 Using dead humans or other animals is beyond the scope of this article and will not be addressed.
176 This wide net captures all who intentionally participate in the production, distribution and “enjoyment” of such videos; the issue of justification is then addressed separately.
177 This is not to say, of course, that briefly “trapping” a child for such purpose would be harmless even if the child suffers no physical or mental injury. As a potential tort of false imprisonment, such an action in itself could be a material harm. See, e.g., Drabek v. Sabley, 31 Wis.2d 184 (1966) (holding that defendant’s conduct was unreasonable as a matter of law where defendant put a boy into his automobile, while only a few yards from the boy’s home, and drove the boy to a police station)
This is not to say, however, that justification would automatically exist in the absence of easy or reasonable fungibility. First, the very concept of reasonable fungibility must take into account the harm caused the living signifier.\textsuperscript{178} This must broaden the universe of the acceptable since it might well be very reasonable to accept some imperfect fungibility to avoid severe harm to the living signifier.\textsuperscript{179} This necessarily involves a balancing of rights and there is no reason the speaker’s right should always trump regardless of the injury to the living signifier. Second, even if no reasonable fungible alternative exists on this analysis, justification must still weigh the rights of the speaker against the rights of the living signifier not to suffer serious injury.\textsuperscript{180} Again, there is no reason why the speaker’s right should always trump in such a case and courts should not hide behind the cover of “content neutrality” to avoid doing their job.\textsuperscript{181}

Of course, the elements of harm, materiality and justification in the indexical exception formulated here can often be controversial and, much like the concept of “cruel and unusual” under the Eighth Amendment,\textsuperscript{182} can evolve over time.\textsuperscript{183} For example, the

\textsuperscript{178} See note 74 supra to the effect that the First Amendment does not protect violence.
\textsuperscript{179} See again note 74 supra to the effect that the First Amendment does not protect violence.
\textsuperscript{180} See again note 74 supra to the effect that the First Amendment does not protect violence.
\textsuperscript{181} Or they should not, as Heyman puts it, “short-circuit this inquiry by invoking the neutrality doctrine. . . .” Heyman, supra note 23, at 142. Instead, they “should engage in a careful consideration of the values on both sides.” Id.
\textsuperscript{182} See note 173 above on the scope of the justification element. See Trop v. Dulles, 356 U.S. 86, 100-01 (noting that the words of the Eighth Amendment are neither precise nor standard in scope. Thus, “The Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.”). Compare, e.g., Stanford v. Kentucky, 492 U.S. 361 (1989) (holding that the imposition of the death penalty on persons 16 or 17 years of age does not offend the Eighth Amendment’s prohibition on cruel and unusual punishment) and Roper v. Simmons, 543 U.S. 551
justification element addresses such concerns as the hunting videos with which the Court in *Stevens* expressed such angst.\(^{184}\) As long as hunting is permissible, the justification element will generally protect hunting videos. If hunting itself or certain hunting practices become impermissible, then the justification element will no longer protect videos of such activities. This, however, would not prohibit expression since iconic replacement videos can take their place as can symbolic descriptions of the activities. The justification element would similarly address such other issues as, for example, the greater latitude that should apply to distribution of videotapes of public figures.\(^{185}\)

In any case, the indexical-harm exception formulated here is fully consistent with *United States v. O'Brien* which, again, addressing First Amendment issues where “speech” and “nonspeech” elements were combined “in the same course of conduct” held:

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\ldots \text{[A] sufficiently important interest in regulating the nonspeech element can justify incidental limitations on 1st Amendment freedoms} \ldots \text{[A] government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression and if the}
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\(^{183}\) For example, in the 1640s, those who wished to kill animals merely for pleasure could cite the Bible and “man’s charter of dominion over the creatures.” THOMAS, supra note 167, at 22. “Of bear-baiting and fighting they could say: ‘Christianity gives us placard to use these sports.’” *Id.* The very passage of Section 48 shows how far common wisdom has moved from such earlier notions.

\(^{184}\) See *Stevens*, 130 S.Ct. at 1590.

\(^{185}\) As demonstrated in Section IV(B)(3) below, restrictions on using humans and other live animals as signifiers does not typically create, among other things, public forum, religious discrimination, freedom of association, or satire issues.
incidental restriction on alleged 1st Amendment freedoms is no greater than is essential to the furtherance of that interest.\textsuperscript{186}

The Court in \textit{Stevens} did not question the power of the states to regulate animal cruelty.\textsuperscript{187} Additionally, the Court in \textit{Stevens} did not question the important governmental interests involved including reduction of crime generated by such cruelty.\textsuperscript{188} Furthermore, prohibiting usage of live animals in filming is not based upon expression but based upon cruelty to the animals and the resulting criminal activity generated.\textsuperscript{189} Finally, prohibiting animal cruelty by prohibiting use of live animals is no broader than necessary to achieve that goal. Thus, none of these \textit{O’Brien} factors weighed in favor of invalidating Section 48. Instead, \textit{O’Brien} together with a basic understanding of semiotics would uphold Section 48 through proper statutory construction and recognition of the indexical harm exception that the statute tacitly used.

\section*{IV. Snyder v. Phelps and the Limits of Shanghaied Symbols}

\subsection*{A. Humans and Other Animals as Symbolic Signifiers}

In addition to serving as indexical signifiers, humans and animals can also serve as symbolic signifiers.\textsuperscript{190} Such symbols can be conventional (such as using George Washington as a symbol of America) or non-conventional (such as using George Washington as a brand of cherries).

\begin{footnotesize}
\begin{enumerate}
\item[188] \textit{See id.} at 1601.
\item[189] \textit{See id.} at 1598-1601.
\item[190] They can of course also serve as iconic signifiers. For example, a person who looks like George Washington can be used to signify George Washington.
\end{enumerate}
\end{footnotesize}
Thus, a person might shoot a cow to express his disgust for milk. Or another might kidnap and hold a board of directors to express his disapproval of capitalism. Much like indexical usage, the living beings here also serve as signifiers in such expression. Given the harm to living beings and the potential existence of other harmless signifiers for such expression, the same rule that applied to harmful indexical signifiers should also apply to humans and other animals used as symbolic signifiers in a way that violates their rights as living beings.

In a manner similar to the indexical expression exception, one can therefore formulate the following exception for symbolic signifier use: “The First Amendment does not protect symbolic expression (1) where the speaker unjustifiably uses a living human or other animal as a symbolic signifier, and (2) where the living human or other animal suffers unjustified, material harm as a result of such use.”

The above rule for live symbolic signifiers presents the same issues as living indexical signifiers in the areas of defining harm, materiality, and justification discussed above. However, what counts as “use” of live symbolic signifiers is not always as straightforward as what counts as use of live indexical signifiers. In the case of indexical signifiers, use is required by the very nature of the signifiers and no gray areas exist where, for example, one videotapes a dogfight. Again, the dogfight itself is required for the very existence of the tape. Yet, in the absence of such a necessary relationship in the case of symbolic signifiers, what kind of relationship must exist between a speaker and

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191 Again, force should not be a necessary component here because non-human animals cannot consent and there are certain activities (such as murder) to which human victims cannot consent. See, e.g., People v. Minor, 898 N.Y.S.2d 440 (Sup. Ct. 2010). Where human consent is permissible, such consent can fall under the justification element. However, where force is used the exception should apply all the more.

192 See III(D)(2)(b).
another living human to constitute improper usage of that human as a symbolic signifier? *Phelps* helps us both understand this question and sheds further light on the questions of harm, materiality and justification.

**B. The Snyders as Symbolic Signifiers**

1. Matthew Snyder’s Funeral

Again, in *Phelps* picketers associated themselves with a dead heterosexual soldier’s funeral to garner added attention for their placards.\(^{193}\) Prior to their protest, they had issued a press release designed to turn the funeral “into a tumultuous media event.”\(^{194}\) The press release stated that the picketers were coming “to picket the funeral of Lance Cpl. Matthew A. Snyder.”\(^{195}\) The press release further stated that “God Almighty killed Lance Cpl. Snyder. He died in shame, not honor—for a fag nation cursed by God . . . . Now in Hell—sine die.”\(^{196}\)

On the day of Matthew Snyder’s funeral, the picketers carried placards expressing their belief that “God hates and punishes the United States for its tolerance of homosexuality, particularly in America’s military.”\(^{197}\) For about one half hour before the funeral, they picketed on public land 1000 feet from the church holding the funeral service.\(^{198}\) The picketers obeyed all police instructions.\(^{199}\) The funeral procession came

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\(^{194}\) *Id.* at 1222 (Alito, J., dissenting).
\(^{195}\) *Id.* at 1225.
\(^{196}\) *Id.*
\(^{197}\) *Id.* at 1213.
\(^{198}\) *Id.*
\(^{199}\) *Id.*
within 200 to 300 feet of the picketers and Matthew Snyder’s father could see the tops of their signs but not their content.\textsuperscript{200}

However, while watching a newscast later that evening Matthew Snyder’s father learned of the signs’ content.\textsuperscript{201} This content included the following:

“God Hates the USA/Thank God for 9/11,” “America is Doomed,” “Don't Pray for the USA,” “Thank God for IEDs,” “Thank God for Dead Soldiers,” “Pope in Hell,” “Priests Rape Boys,” “God Hates Fags,” “God Hates You,” and “You’re Going to Hell.”\textsuperscript{202}

The signs also included purely iconic expression such as a depiction of “two men engaging in anal intercourse.”\textsuperscript{203}

Claiming emotional distress, Matthew Snyder’s father filed five Maryland state law claims in federal district court including claims for intrusion upon seclusion, intentional infliction of emotional distress and civil conspiracy.\textsuperscript{204} Matthew Snyder’s father explained at trial how the picketers’ actions harmed him both mentally and physically including exacerbating his diabetes.\textsuperscript{205} Among other things, he stated: “I look at this as an assault on me. Somebody could have stabbed me in the arm or in the back

\begin{itemize}
\item \textsuperscript{200} Id.
\item \textsuperscript{201} Id. at 1213-1214.
\item \textsuperscript{202} Id. at 1213. I do not of course claim that these placards on their own have no First Amendment protection. Instead, I argue that problems arise when the protestors use Mr. Snyder’s father in the symbolic fashion discussed in this article. See Sections IV(B)(2) and (3) below.
\item \textsuperscript{203} Id. at 1225 (Alito, J., dissenting). Again, I do not claim that this placard on its own has no First Amendment protection. Instead, I argue that problems arise when the protestors use Mr. Snyder’s father in the symbolic fashion discussed in this article. See Sections IV(B)(2) and (3) below.
\item \textsuperscript{204} Id. at 1213 (majority opinion).
\item \textsuperscript{205} Brief for Petitioner at 6, Snyder v. Phelps, 131 S.Ct. 1207 (2011) (No. 09-751), 2010 WL 2145497, at *6.
\end{itemize}
and the wound would have healed. But I don’t think this will heal.”²⁰⁶ Matthew Snyder’s father subsequently prevailed on the intrusion upon seclusion, intentional infliction of emotional distress, and civil conspiracy claims and was awarded substantial compensatory and punitive damages.²⁰⁷

On First Amendment grounds, the Court of Appeals reversed the judgment because it found the picketers’ statements “. . . were on matters of public concern, were not provably false, and were expressed solely through hyperbolic rhetoric.”²⁰⁸

The Court granted certiorari and agreed with the Court of Appeals that the picketers engaged in public not private speech even though they “. . . spoke in connection with a funeral.”²⁰⁹ Finding such public expression exercised on public land entitled to special First Amendment protection, the Court agreed that the intentional infliction of emotional harm judgment should be set aside.²¹⁰ Rejecting the claim that Matthew Snyder’s father was a member of a captive audience,²¹¹ the Court similarly concluded that Matthew Snyder’s father could not recover on the claim for intrusion upon seclusion.²¹² Because the third claim of civil conspiracy was based on these two torts, the Court concluded that Matthew Snyder’s father could not recover on that claim as well.²¹³ As in Stevens, Justice Alito was the lone dissenter.²¹⁴

²⁰⁶ Id.
²⁰⁷ Phelps, 131 S.Ct. at 1214.
²⁰⁸ Id.
²⁰⁹ Id. at 1217.
²¹⁰ Id. at 1219.
²¹¹ See Section IV(B)(2) below for a further discussion of the captive audience doctrine.
²¹² Phelps, 131 S.Ct. at 1220.
²¹³ Id. at 1220.
²¹⁴ Id. (Alito, J., dissenting).
2. The Question of Use

For the two-part living symbolic signifier use exception discussed above to apply in *Phelps*, there must first be use of a human being as a symbolic signifier.\(^\text{215}\) There can be no reasonable denial that this necessary element exists. As noted above, the picketers’ press release expressly stated that they were picketing Matthew Snyder’s funeral because “[h]e died in shame, not honor—for a fag nation cursed by God . . . .”\(^\text{216}\) The Court thus acknowledged that “[t]here is no doubt that [the picketers] chose to stage [their] picketing at . . . Matthew Snyder’s funeral to increase publicity for [their] views . . . .”\(^\text{217}\) As the Court further put it, the picketers “. . . exploited the funeral as a platform to bring their message to a broader audience.”\(^\text{218}\)

Although use of the deceased Matthew Snyder cannot meet any living use element, use of his funeral surely can. A funeral is a gathering of living people and it is just this gathering—especially Matthew Snyder’s family—that the picketers wished to use symbolically. The picketers in fact posted a message online in which they specifically used Matthew Snyder’s parents in their message:

Albert and Julie RIPPED that body apart and taught Matthew to defy his Creator, to divorce, and to commit adultery. They taught him how to support the largest pedophile machine in the history of the entire world, the Roman Catholic monstrosity. . . . They also, in supporting satanic Catholicism, taught Matthew to be an idolater.

. . . .

Then after all that they sent him to fight for the United States of Sodom, a filthy country that is in lock step with his evil, wicked, and sinful manner of life, putting

\(^{215}\) See Section III(D)(2)(c) above.
\(^{216}\) *Phelps*, 131 S.Ct.at 1225 (Alito, J., dissenting).
\(^{217}\) *Id.* at 1217 (majority opinion).
\(^{218}\) *Id.*
him in the cross hairs of a God that is so mad He has smoke coming from his nostrils and fire from his mouth! How dumb was that?\textsuperscript{219}

On these facts, therefore, did the picketers improperly use Matthew Snyder’s father as a living symbolic signifier? The only reasonable answer is of course that they did.\textsuperscript{220}

The fact that the picketers were approximately 1000 feet from the funeral,\textsuperscript{221} the fact that they were on public land,\textsuperscript{222} the fact that they obeyed the police,\textsuperscript{223} and the fact that Matthew Snyder’s father could not initially read the picket signs\textsuperscript{224} are all irrelevant to the question of symbolic use. One can from any distance use another as a symbol and can do so even if that person never knows of such use and even if such use does not violate any police instructions. I can, for example, use the Queen to symbolize propriety even though we are oceans apart. Such usage on its face does not require that either of us be in any certain place. Such usage can occur even if she never knows about it and can occur regardless of whether it violates any police instructions. Similarly though in a

\textsuperscript{219} \textit{Id.} at 1226 (Alito, J., dissenting).
\textsuperscript{220} With their words and placards as signifiers, they of course also used Mr. Snyder and the other mourners as an unwilling private audience. See generally Jeffrey Shulman, \textit{Epic Considerations: The Speech That the Supreme Court Would Not Hear in Snyder v. Phelps}, 2011 CARDOZO REV. DE NOVO 35 (2011) (discussing internet postings by Phelps members that the Court majority refused to consider in Snyder); See also Heyman, \textit{supra} note 23, at 107 (“the real issue in cases like Snyder is whether there is a First Amendment right to address speech of this sort to mourners at a funeral and thereby cause them profound emotional distress”); Schauer, \textit{supra} note 36, at 100-103; and Clay Calvert, \textit{Too Narrow of a Holding? How—And Perhaps Why—Chief Justice John Roberts Turned Snyder v. Phelps into an Easy Case}, 64 OKLA. L. REV. 111 (2012) (discussing how the Court narrowly framed the case to eliminate considerations of the Snyders as a private audience).
\textsuperscript{221} \textit{Id.}
\textsuperscript{222} \textit{Id.}
\textsuperscript{223} \textit{Id.}
\textsuperscript{224} \textit{Id.}
much less tasteful fashion, the picketers used Matthew Snyder’s father to signify a part of their message.

Thus, the Court’s discussion of the “captive audience doctrine” (i.e., that Matthew Snyder’s father did not have to view or hear the picketers’ actions) misses the point. Conceding for the sake of argument that Matthew Snyder’s father was not a captive audience, he was of course a “captive speaker.” He was forced to help the picketers convey their hateful message about him and about his dead son, and forcing Mr. Snyder to participate in such speech of course raises first amendment issues of its own.

3. The Questions of Harm, Materiality, and Justification

Having answered the question of use in the affirmative, we must next examine whether the picketers used Matthew Snyder’s father in a way that caused him unjustified, material harm.

There can be no reasonable doubt that the picketers caused Matthew Snyder’s father material harm. To recover on a claim of intentional infliction of emotional

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225 Id. at 1219-20.
226 See id. at 1222-25 (Alito, J., dissenting).
227 See Hurley v. Irish-Am. Gay, Lesbian & Bisexual Group of Boston, 515 U.S. 557, 573-74 (1995) (describing how freedom of speech involves the choice of what to say and what not to say); see also Miller v. Mitchell, 598 F.3d 139 (3d Cir. 2010) (holding that a district attorney violated a woman’s First Amendment right to be free from compelled speech where the district attorney threatened charges against the woman for sending sexually suggestive text messages unless she attended an education program. The education program amounted to compelled speech because there was no evidence that the woman possessed or distributed sexually suggestive photographs of herself and the education program would require the woman to write an essay explaining how her actions were wrong).
228 On the issue of harmfully using others as signifiers, Justice Alito raises the interesting hypothetical of the culpability of “... a cold and calculated strategy to slash a stranger as
distress under applicable state law, Matthew Snyder’s father had to prove “. . . that the conduct at issue caused harm that was truly severe.”\textsuperscript{229} In fact, the injury must be “so severe that no reasonable man could be expected to endure it.”\textsuperscript{230} The elements of this tort claim are thus difficult to meet and the jury’s unchallenged \textit{factual} finding of the severity of harm therefore more than satisfied the material harm requirement.\textsuperscript{231}

Consistent with this, the Court pointed out that there would have been no liability had the picketers instead held signs stating “God Bless America” and “God Loves You.”\textsuperscript{232} This of course is true because Matthew Snyder’s father would not have been used as a signifier in way that harmed him. Unfortunately, the Court drew the wrong conclusion that “[i]t was what [the picketers] said that exposed [them] to damage.”\textsuperscript{233} It was not what they said but how they said it, i.e., using Matthew Snyder’s father as a signifier in a way that caused him harm.

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\textsuperscript{229} Id. at 1222 (Alito, J., dissenting) (referring to \textit{Figueiredo-Torres v. Nickel}, 321 Md. 642, 653, 584 A.2d 69, 75 (1991)).
\textsuperscript{230} Id. (quoting \textit{Harris v. Jones}, 281 Md. 560, 571, 380 A.2d 611, 616 (1977)).
\textsuperscript{231} As Justice Alito noted in his dissent, the picketers “abandoned any effort” to show error in these severity of harm findings, maintaining instead “. . . that the First Amendment gave them a license to engage in such conduct.” \textit{Id.} at 1223.
\textsuperscript{232} \textit{Id.} at 1219 (majority opinion).
\textsuperscript{233} \textit{Id.}
Whether this case falls outside First Amendment protection should therefore turn on the final issue of justification. Was the infliction of such severe harm upon Matthew Snyder’s father justified under the facts of this case?

The answer of course is no. Just as the signifiers in the animal crushing and dogfighting cases are fungible, Matthew Snyder’s father was not a necessary signifier for the message the picketers wished to convey. As Justice Alito pointed out, there were effectively an infinite number of other ways to convey the substance of their message.

Nor were there other facts in this case that could reasonably justify using Matthew Snyder’s father as a signifier. First, even if no reasonable fungible signifier alternative existed, justification must still weigh the rights of the picketers against the right of Mr. Snyder’s father not to suffer the serious injury he suffered. It is difficult for me, at least, to see how Mr. Snyder’s father’s right to avoid such serious injury would not trump any right of the picketers to use him as a part of their message. Additionally, Matthew Snyder’s father was not a public figure, and no reasonable argument can therefore exist that he was somehow entitled to reduced protection on those grounds. Nor were the picketers’ actions protected by the strict limitations imposed on regulation of offensive

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234 See IV(A) above.
235 See Phelps, 131 S.Ct. at 1222, 1223-24. Again, the very concept of “reasonable” in this context must take into the account the harm caused Mr. Snyder. This would of course broaden the universe of the reasonable.
236 In equity at least, any justification analysis should also consider the picketers’ tactics as part of a broader approach that has allowed them “to bargain” for free airtime in exchange for their forbearance. For example, the picketers accepted free radio airtime in exchange for not picketing the funeral of a nine-year old girl their announcements had proclaimed “better off dead.” Id. at 1224-25.
237 See New York Times v. Sullivan, 376 U.S. 254 (1964); Time, Inc. v. Firestone, 424 U.S. 448 (1976). Even if he had been a public figure, that would not change the fact that he was not a required signifier for the picketers’ expression.
expression—they were entitled to their offensive expression but were not entitled to use Matthew Snyder’s father as a signifier of such expression. Nor were restrictions on the picketers’ use of Matthew Snyder’s father as signifier subject to strict scrutiny—it was not the expression but the harm involved in “shanghaiing” Matthew Snyder’s father as signifier that is the issue in this case. Nor were public forum issues involved since the picketers could have expressed their anti-gay and anti-Catholic message on the same grounds with signifiers that did not involve the Snyder family. Nor were religious discrimination issues in play since the picketers could have used signifiers other than Matthew Snyder’s father to advocate their message. Nor were any freedom of association issues in play since, again, the picketers were free to march together so long as they did not use Matthew Snyder’s father as a signifier of their message. Finally, though the picketers’ actions may have been “hyperbolic,” their actions were certainly not satire and somehow thus protected on such grounds.

In fact, one could make the claim that speech is better served by taking the Snyders out of the equation. If the picketers truly intended only to claim

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238 See Cohen v. California, 403 U.S. 15, 16-17 (1971)
239 See note 74 supra (on the First Amendment not protecting violence) and Section IV(B)(1) above on the mental and physical injuries suffered by Matthew Snyder’s father.
240 See United States v. O’Brien, 391 U.S. 367, (1968) (addressing draft card burning as symbolic speech and upholding regulations on such acts where the government has regulation powers in the field, where important or substantial governmental interests are advanced by such regulation, this interest is not related to the expression, and the regulatory burden is no greater than necessary to advance this interest).
242 See Good News Club v. Milford Cent. Sch., 533 U.S. 98 (2001) (holding that a school could not discriminate against religious viewpoint in limited public forum it had created).
243 See NAACP v. Alabama, 357 U.S. 449 (1958) (recognizing such a right).
244 See Snyder v. Phelps, 131 S.Ct. 1207, 1210, 1215 (2011) (majority opinion).
homosexuality is evil and that God punishes the United States for its tolerance of homosexuality\textsuperscript{246} and if their attacks on the Snyders\textsuperscript{247} were truly intended to express this more general point, then use of other signifiers than the Snyders would have expressed their message more clearly. Their tactic basically assured that the intended and perceived meaning of their expression would diverge.\textsuperscript{248} Even if others could have seen through the clamor and grasped the more limited message about the claimed dire effects of the tolerance of homosexuality, they would almost certainly have perceived additional unintended meanings such as the homosexuality of the heterosexual Matthew Snyder\textsuperscript{249} and the exceptional nature of Matthew Snyder’s case since the picketers chose to protest his specific funeral. This same point holds even if one does not accept the claim that the intended message was so limited. Even if the picketers also meant to single out fallen soldiers and their families for specific derision and attack regardless of their sexuality, others would still have been likely to perceive a claim that Matthew Snyder was homosexual.\textsuperscript{250} Additionally, many would have also likely perceived Matthew Snyder’s situation as allegedly more egregious than the other cases since, again, his funeral was the funeral the picketers chose to protest.\textsuperscript{251} The perceived meaning would thus diverge from any intended meaning in any such case. Hence, Matthew Snyder’s father should have been compensated for his serious injury.\textsuperscript{252}

\textsuperscript{246} See Phelps, 131 S.Ct. at 1225-26 (Alito, J., dissenting).
\textsuperscript{247} See id.
\textsuperscript{248} See Section II(D) above
\textsuperscript{249} See Phelps, 131 S.Ct. at 1225.
\textsuperscript{250} See id.
\textsuperscript{251} See id.
\textsuperscript{252} See id. at 1222-23 (describing the elements for an Intentional Infliction of Emotional Distress claim, how speech can satisfy these elements and how the respondents did not challenge the sufficiency of the petitioner’s evidence to state such a claim,). In addition
This is not to say, however, that all injurious symbolic usage of living beings lies outside the scope of First Amendment protection. For example, where a person used as a signifier consents to such usage and no criminal or public policy issues demand otherwise (such as, for example, the case of murder films where the victim’s consent would be no defense\textsuperscript{253}), consent should justify usage in some cases even where the human signifier suffers substantial harm. For example, a person with an incurable, sexually-transmitted disease might (out of a desire to help others) consent to be a symbol of the result of unsafe sexual practices. No one could reasonably maintain that such expression would not enjoy full First Amendment protection even though the infected person might suffer substantial reputational or financial harm as a result of such public exposure. In such a case, the consensual harm to the living person would not violate criminal law or public policy and would in fact advance sound public policy of risk education in the area of that disease.

Even where the living human used as signifier does not consent and suffers substantial harm, there can still be cases where such expression enjoys full First Amendment protection. Certain cases involving public figures would be obvious examples.\textsuperscript{254} For instance, if a Congressman has and continues to take multiple bribes, he should be fair game as a symbol of Congressional corruption even if such usage causes

to emotional distress, the Snyder family’s privacy was invaded, their personal dignity was attacked, and their religious freedom to bury their son in the manner required by their faith also fell under seige. See Heyman, supra note 23, at 154-157.

\textsuperscript{253} See, e.g., People v. Minor, 898 N.Y.S.2d 440 (Sup. Ct. 2010).

him the substantial harms of loss of his seat; his accepting a position of public trust\textsuperscript{255}
coupled with the fact that any signifier change would materially change the meaning of
the expression by leaving out this Congressman’s example\textsuperscript{256} would justify such a result.

Even in cases of non-public figures, First Amendment protection can apply as well. For example, if a contractor has repeatedly criminally swindled clients, there
should be full First Amendment protection for using him as a symbol of such corruption.
He is involved in such corruption, he has put himself within the scope of public criminal
process, and any signifier change would change the meaning of the expression by leaving
out this contractor’s example.\textsuperscript{257}

Admittedly, justification can be reasonably debated in endlessly-imaginable cases
and its full treatment is well beyond the scope of this article. However, justification
cannot reasonably be claimed in the crooked Congressman’s or crooked contractor’s
cases. Nor, for all the reasons given above, can justification be reasonably claimed for
the symbolic signifier usage of Matthew Snyder’s father.\textsuperscript{258}

\textsuperscript{256} The signifier’s fungibility thus differs here from that in \textit{Phelps}. If the message in
\textit{Phelps} is about God’s hatred, homosexuality, and the American military, Matthew
Snyder’s father is no inherent part of that message.
\textsuperscript{257} Again, therefore, such a signifier is not fungible in the way of Matthew Snyder’s
father.
\textsuperscript{258} On August 6, 2012, President Obama signed legislation criminalizing protests at
military funerals within three hundred to five hundred feet of such funerals both two
hours before and two hours after such funerals. Honoring America’s Veterans and Caring
1195 (2012) (to be codified as amended at 18 USCA § 1388). This statute was enacted
after a number of state statutes were enacted on the same subject. \textit{See Phelps}, 131 S.Ct. at
1218 (majority opinion). Presumably this statute does not preclude further civil
restrictions and further state criminal restrictions on such protests. \textit{See Wyeth v. Levine},
555 U.S. 555, 565 (2009) (describing pre-emption jurisprudence, noting that Congress’
purpose is the ultimate touchstone in pre-emption cases and noting that it is to be
V. CONCLUSION

These sad decisions in *Stevens* and *Phelps* (and the unnecessary suffering they continue to permit) demand correction. They demand correction of flawed expression analysis that lacks necessary semiotic depth. They demand correction of mechanical notions of law that conceal judicial choice at forks in the road. They demand correction of claims that dictionaries settle constitutional or statutory interpretation issues without regard to applicable reference or focus. They demand correction of claims that canons such as *noscitur a sociis* impermissibly rewrite law. They demand *much* better of the Court. As noted above, perhaps the construction principles set forth by Chief Justice Roberts in *National Federation of Independent Business v. Sebelius* provide hope that the Court will do better in future cases.\(^{259}\) If so, any such optimism is of course tempered by Justice Alito’s joining the dissent in *Sebelius*.\(^{260}\) In such dissent Justice Alito, the lone voice of reason in *Stevens*\(^ {261}\) and in *Phelps*, voted to strike down the Affordable Care Act because (again in the words of Chief Justice Roberts) “. . . Congress used the wrong labels.”\(^ {262}\)

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\(^{259}\) See Section I(A) above.


\(^{261}\) In *Stevens*, Justice Alito adamantly maintained that the Court had “. . . a duty to interpret §48 so as to avoid serious constitutional concerns, and §48 may reasonably be construed not reach almost all, if not all, of the depictions that the Court finds constitutionally protected.” United States v. Stevens, 130 S.Ct. 1577, 1597 (2010) (Alito, J., dissenting).

\(^{262}\) *Sebelius*, 132 S.Ct. at 2597 (majority opinion).