CRUSHING ANIMALS AND CRASHING FUNERALS: THE SEMIOTICS OF FREE EXPRESSION

HAROLD ANTHONY LLOYD*

---

* Associate Professor Wake Forest University School of Law. 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, Congress recognized that prosecution of the crime itself is difficult.[4] However, Congress recognized that law enforcement could identify the videos' vendors.[5] In 1999, Congress therefore enacted 18 U.S.C. §48 (hereafter "Section 48") to criminalize certain depictions of unlawful animal cruelty and thereby reduce the demand for both the depictions and the depicted illegal conduct.[6]

As quoted by the Court, Section 48 provided in full:

§ 48. Depiction of animal cruelty

---

1. United States v. Stevens, 559 U.S. __, __, 130 S. Ct. 1577, 1598 (2010) (Alito, J., dissenting) (quoting Brief of Amicus Curiae The Humane Society of the United States in Support of Petitioner at 2, United States v. Stevens, 559 U.S. __, 130 S .Ct. 1577 (2010) (No. 08-769), 2009 WL 1681460, at *2).

2. *Stevens*, 559 U.S. at __, 130 S. Ct at 1583 (majority opinion).

3. *Id.* at __, 130 S. Ct. at 1603 (Alito, J., dissenting).

4. *Id.* at __, 130 S. Ct. at 1598; 145 CONG. REC. S15220 (daily ed. Nov. 19, 1999) (statement of Sen. Robert Smith); 145 CONG. REC. H10267 (daily ed. Oct. 19, 1999) (statement of Rep. Elton Gallegly).

5. 145 CONG. REC. H10267 (daily ed. Oct. 19, 1999) (statement of Rep. Spencer Bachus).

6. *Stevens*, 559 U.S. at __, 130 S. Ct. at 1598 (Alito, J., dissenting).

> (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.[7]

Section 48 apparently worked—the statute's sponsors declared the commercial crush video trade dead by 2007.[8] Unfortunately for the animals, however, after finding that the statute reached beyond depictions of intentional animal cruelty, the Court held Section 48 unconstitutionally overbroad and struck it down.[9] How could the Court

---

7. *Id.* at __, 130 S. Ct. at 1582 n.1 (majority opinion).
8. *Id.* at __, 130 S. Ct. at 1598 (Alito, J., dissenting).
9. *Id.* at __, 130 S. Ct. at 1592 (majority opinion).

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 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 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 facts of the case, the picketers had a First Amendment right to use the

---

10. *Id.* at __, 130 S. Ct. at 1582 n.1. *See infra* Part III.C. for a discussion and critical analysis of the Court's reasoning in *Stevens v. United States*.

11. *See infra* Part III.D. Congress quickly passed substitute legislation, the Animal Crush Video Prohibition Act of 2010, P.L. 111-294, H.R. 5566, which President Obama signed into law on December 9, 2010. *See* Abigail Lauren Perdue, *When Bad Things Happen to Good Laws: The Rise, Fall, and Future of Section 48*, 18 VA. J. SOC. POL'Y & L. 469, 535 (2011). However, the effectiveness and constitutionality of the substitute act remain a matter of debate. *See id.* at 534–48; Andrew A. Beerworth, United States v. Stevens*: A Proposal For Criminalizing Crush Videos Under Current Free Speech Doctrine*, 35 VT. L. REV. 901, 917–24 (2011).

12. Snyder v. Phelps, __ U.S. __, __, 131 S. Ct. 1207, 1216–17 (2011).

13. *Id.* at __, 131 S. Ct. at 1225 (Alito, J., dissenting).

14. *See id*. at __, 131 S. Ct. at 1213–14 (majority opinion).

funeral to garner such added attention regardless of the grievous injury inflicted upon the father.[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.[16]

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:

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.[17] For example, if I have a 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 make about that reference.[18] For example, I may concede that sound indicates either a fly or a bee. The third or disposition level of meaning is a determination or

---

15. *See id.*

16. *See infra* Part IV. 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 a type of expression that such living beings reject. *See infra* Parts III, IV.

17. *See infra* Part II.A.

18. *See infra* Part II.A.

resolution made about the reference as framed.[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, wasp, or hornet." In the legal context, one must always be vigilant in understanding the frame employed, and one should never simply concede a result because the frame demands it when another reasonable frame may generate a different result.[20]

The meaning of a rule, regulation, statute, constitution, or contract is no less triply-complex than the meaning of "bee." Meaning in this context also 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 the words of the statute (or in other words, in light of the reference and the frame). In both such cases, no meaning exists without a reference and a frame, and frames are both fungible and permissive of multiple resolutions (such as the conclusion that the buzz indicates the presence of 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 lead to a more rational, honest, and humane analysis of the crush video case, *U.S. v. Stevens,*[21] and with further semiotic insight, a better analysis of the funeral protest case, *Snyder v. Phelps*[22] as well.

---

19. *See infra* Part II.A.
20. *See* ANTHONY G. AMSTERDAM, MINDING THE LAW 173–76 (2000).
21. *See infra* Part III.
22. *See infra* Part IV.

2. Living Signifiers Have Rights

As discussed in more detail below, living beings can be used as instruments of expression.[23] For example, in discourse, we might use our mayor 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.[24] Thus: (3) ***competent courts must consider and 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)***.[25] 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 also was not addressed.[26] A basic

23. *See infra* Part II.A.

24. As Steven J. Heyman succinctly puts it, "[t]he 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 CONN. 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 could potentially "lead to the protection of every terrorist act." Lee C. Bollinger, *The Tolerant Society: A Response to Critics*, 90 COLUM. L. REV. 979, 982 (1990). *See infra* note 90 for cases supporting the conclusion that the First Amendment does not protect violence. *See infra* Parts II.E, III.D.2.c (discussing the need to balance interests).

25. *See infra* Part II.A.

26. 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 for newspapers), and Pac.

understanding of the types of signifiers assists in this analysis; this includes understanding how types of signifiers such as indices *by definition* use living signifiers in ways that require considering the rights of such living beings.[27]

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. [28] On the surface, this may seem required by some (or all) of the reasons commonly given for protection of speech: protecting democracy and our right to self-governance,[29] permitting "the search for knowledge and 'truth' in the marketplace of ideas,"[30] protecting "individual autonomy, self-expression, or self-fulfillment,"[31] and fostering tolerance.[32] Without delving more deeply beneath the surface, one may 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 this simple. As discussed in more detail below, speech and other expression involve more than message,

---

Gas & Elec. Co. v. Pub. Util. Comm'n of Cal., 475 U.S. 1 (1986) (which invalidated a requirement that utility companies include third party messages in their billings)).

27. *See infra* Part II.C.

28. *See* Heyman, *supra* note 24, at 141–42 (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) (holding that governments may not restrict expression based on message, idea, subject matter or content).

29. *See generally* James Weinstein, *Participatory Democracy as the Central Value of American Free Speech Doctrine*, 97 VA. L. REV. 491 (2011) (arguing that a theory of individual participation in the democratic process explains the First Amendment's structure).

30. *Id.* at 502 (setting forth the rationale and arguing that "a completely unregulated market of ideas will lead to discovery of truth is highly contestable").

31. *Id.* at 502–04; Brian C. Murchison, *Speech and the Self-Realization Value*, 33 HARV. C.R.-C.L. L. REV. 443, 498–503 (1998) ("First Amendment analysis [should] attend more self-consciously to the *speaker's* development through expression.").

32. *See* Bollinger, *supra* note 24, at 984–85.

idea, or content,[33] and good First Amendment analysis must acknowledge this. Speech and other expression involve the use of signs, and signs involve elements other than "content" or "meaning."[34]

Failure to consider these other elements in some cases can have horrific results. Considering the madman example again,[35] how would allowing him to tar and feather the mayor protect autonomy? How would permitting such tarring 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,[36] they have not done so in other cases such as *Stevens* and *Phelps* where living beings have suffered grievous injury.[37] 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.[38] 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***

---

33. *See infra* Part II. 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 criticism. 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.

34. *See infra* Part II.A.

35. 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 supra* note 23, 24. *See also infra* note 90 for a discussion of the First Amendment's non-protection of violence.

36. *See, e.g.*, *infra* Part III.D.2.c.

37. *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.").

38. *See infra* Part III.D.2.c.

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.[39]

II. MEANING, SIGNS, SIGNALS, SIGNIFIERS, AND SEMIOTICS

A. Meaning, Signs and What They Signify

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

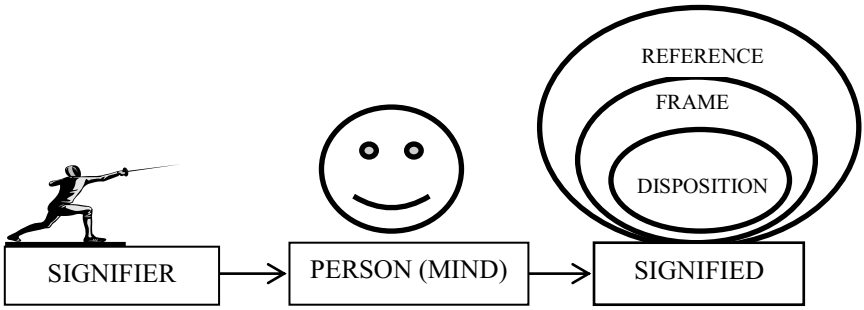
Let us suppose that I erect a statue of John the Fencer to honor the man. In so doing, I am not using that statue as an end in itself but to indicate something beyond itself, i.e., my opinion about the man. Expression in such a case therefore involves something (which I shall call the signifier) which intentionally "stand[s] for something else"[40] (which I shall call the signified) to someone (the speaker or listener or both).[41] 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:

---

39. *See* Heyman, *supra* note 24, at 141–42.

40. 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. *See also infra* note 41. Intention's role here explains "[w]hy 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, *supra* note 24, at 982.

41. See WINFRIED NOTH, HANDBOOK OF SEMIOTICS 79–80 (1995) for a table of various sign terminology, including Saussur'es "signifier" (signfiant) and "signified" (signifié).



I shall use the term "sign" to refer to this intentional usage of a signifier and a signified as diagrammed above.[42] In such a case, again, the words "John the Fencer" are the signifier and the man himself–as understood by the speaker at least[43]—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 speaker or listener or both) and should not be confused with the signifier alone.[44] In this article, I will only use "sign" in the semiotic sense of *both* signifier *and* signified.

---

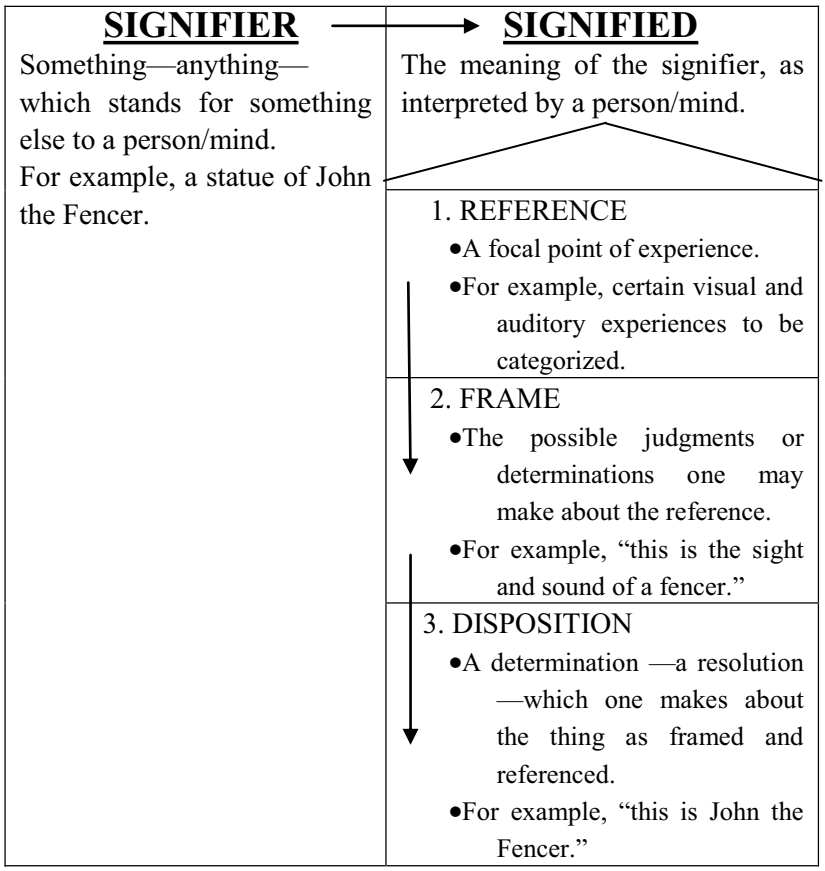
42. According to C.S. Peirce, a founder of pragmatism and one of the founders of modern semiotics, a sign must be "something which stands to somebody for something in some respect or capacity." CHARLES SANDERS PEIRCE, COLLECTED PAPERS §2.228 (Charles Hartshorne & Paul Weiss eds., Belknap Press 1974). *See also* JOSEPH BRENT, CHARLES SANDERS PEIRCE: A LIFE, (1993); CHRISTOPHER HOOKWAY, PEIRCE (1992). Furthermore, according to Peirce, "nothing is a sign unless it is interpreted as a sign." CHARLES SANDERS PEIRCE, COLLECTED PAPERS §2.306 (Charles Hartshorne & Paul Weiss eds., Belknap Press 1974). 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 40, 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 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 in the world." JOHN R. SEARLE, INTENTIONALITY 1 (Cambridge 1983).

43. 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.

44. NOTH, *supra* note 41, at 79–80. 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

Consider a slight modification of our hypothetical: 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:

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 stands 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*,[45] 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."[46] 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 expression in *O'Brien*, burning a Selective Service registration card. This would be consistent with the Court's distinction in the case between "speech" and "nonspeech" elements "combined in the same course of conduct."[47] 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."[48] As we shall see below, limitations on usage of certain signifiers (such as living beings used as signifiers against their will) are indeed appropriate.[49]

B. Contrasting Signs and Signals

Some would also distinguish signals from signs; unlike signs, signals (if they exist) simply provoke instant, unreasoned action.[50] 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).[51] For example, some might contend that the trembling of the earth can provoke an instant, unreasoned run for cover, or a falling box can provoke an instant, unreasoned dash to catch it. If

45. 391 U.S. 367 (1968).

46. *Id*. at 376 (upholding a statute preventing the burning of Selective Service registration cards).

47. *Id.*

48. *Id.*

49. *See infra* Parts II.F, III.D.2.c & IV.B.3.

50. *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 41, 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.").

51. See NOTH, *supra* note 41, at 107–13, for a discussion of the ways others have used the term "signal."

they exist, signals would thus, by definition, be expressionless because they would refer to nothing. Instead, again, signals would consist of signifiers plus such mere unreasoned action.[52]

Assuming that such signals do exist,[53] 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."[54] This emotional engagement with the world has been persuasively studied and described,[55] and the notion that fear or arousal, for example, have no expressive nature is simply incorrect.[56] Signal theory can therefore supply no easy First Amendment solutions for crush video bans even if such videos *merely* provoke some form of emotion such as arousal. This Article shall explore this and related points in more detail in Part III.D.1.

---

52. 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.

53. Again, I personally doubt that such signals exist. *See See infra* Parts II.F, III.D.2.c & IV.B.3.

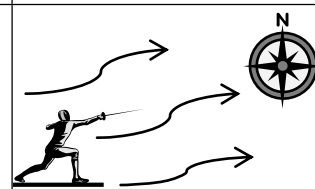
54. Cohen v. California, 403 U.S. 15, 26 (1971).

55. *See generally* ROBERT C. SOLOMON, THE PASSIONS: EMOTIONS AND THE MEANING OF LIFE (Hacket Publ'g Co. 1993) (particularly Chapter 8: The Emotional Register, pages 223-308). *See also* JACKSON, *supra* note 50, at 24 (discussing views that law "is a collection of symbols capable of evoking ideas and emotions, together with the ideas and emotions so evoked."). Searle also recognized the expressive nature of emotions. SEARLE, *supra* note 42, at 2 ("Undirected anxiety, depression, and elation are not Intentional, the directed cases are Intentional."). Searle in fact set out an expansive list of "Intentional states" which includes many emotional ones. *Id.* at 34.

56. *See supra* note 50.

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." An act or thing, therefore, may serve as a signifier. And any useful basic typology of signifiers will turn on criteria other than merely verbal ones.

PEIRCE'S THREE TYPES OF SIGNIFIERS	
ICONS – a thing (signifier) that resembles what it signifies. •A sculpture of John the fencer resembles John the Fencer, the man.	
SYMBOLS – A thing (signifier) that bears a relation to what it signifies ONLY because of some arbitrary designation. •"George the Gripper" could elicit thoughts of the same man if John had been named George and if fencing were known as gripping.	**"John the Fencer"**
Indexes – a thing (signifier) that signifies by participating with what it signifies. •A weathervane fashioned in the shape of John the Fencer indicates wind direction by participating in the wind flow.	

In this regard, C. S. Peirce[57] gives us a useful tripartite typology: (1) signifiers that signify by resembling what they signify (iconic signifiers such as a bust of John the Fencer); (2) signifiers that signify by convention or other arbitrary designation (symbolic signifiers such as the words "John the Fencer"); and (3) signifiers that participate in what they

57. A founder of pragmatism and pioneer in semiotics. *See, e.g.*, BRENT, *supra* note 42; HOOKWAY, *supra* note 42.

signify (indexical signifiers such as weathervane that indicates the direction of the wind).[58] As we shall see, the nature of the indexical signifier sheds particular light on the Court's error in *Stevens*.[59] 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 River[60] 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 has a disposition of a brave river crossing. The painting's owner could also use the painting in non-iconic, and thus expressionless, ways. For example, the painting's owner could simply hang 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 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.[61]

---

58. *See* PEIRCE, *supra* note 42, 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 that follows the more "common sense" belief that resemblance and participation are something more than simply convention.

59. *See infra* Part III.D.2.b.

60. *Cf.* Emanuel Leutze, *Washington Crossing the Delaware,* (1851), *available at* www.ushistory.org/washingtoncrossing/images/washingtoncrossing.jpg.

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

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.[62] 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," the flag can thus be part of quite meaningful symbolic expression.[63] 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.[64]

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.[65] Such indications, which come from the weathervane's interactions with the wind, would therefore serve as dispositions of the references framed.[66]

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

---

62. For example, Gregory Lee Johnson protested the Reagan administration's policies by setting an American flag on fire. Texas v. Johnson, 491 U.S. 397, 399 (1989).

63. *Id.* at 432 (Rehnquist, C.J., dissenting).

64. 4 U.S.C. § 8(k) (2006); *See Johnson*, 491 U.S. at 411 (1989) (stating that "federal law designates burning as the preferred means of disposing of a flag" that is no longer fit for display).

65. *See* PEIRCE, *supra* note 42, at §2.86 (A weathercock is an index of the direction of the wind . . . [because] it really takes the self-same direction as the wind . . . .").

66. 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.

measurer,[67] 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. Of course, 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*.[68]

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.[69] For example, the owner of the George Washington painting might wish to display it proudly as a sign of deep regard for George Washington. Or he may hang the painting to merely plug a hole—not intending for the painting to signify anything. 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 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*,[70] "[a] person gets from a symbol the meaning he puts into

67. *Cf. Air Quality Information*, Environmental Assistance and Protecion: Forsyth County, North Carolina, www.co.forsyth.nc.us/eap/air_quality_info.aspx (last visited Oct. 21, 2013).

68. *See infra* Part III.D.2.b.

69. As the Court has recognized, it is "often true that one man's vulgarity is another's lyric." Cohen v. California, 403 U.S. 15, 25 (1971).

70. 418 U.S. 405 (1974).

it, and what is one man's comfort and inspiration is another's jest and scorn."[71]

Thorough analysis of freedom of expression, therefore, must recognize a distinction between intended expression[72] and perceived expression.[73] Of course, for all practical purposes, the two modes of expression often do coincide.[74] 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 how the author originally intended it to be read.[75] Rather than a coming-of-age fairy tale of good and evil, the author wrote the book as a Populist allegory.[76] 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"[77]; the Cowardly Lion as William Jennings Bryan; and the Wizard as the President who governs by sleight of hand.[78] The author of the *Wizard of Oz*'s original intended meaning are lost on the modern reader.[79]

---

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

72. I.e., the creator's or owner's expression of the potential sign.

73. I.e., anyone else's perceived expression.

74. 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.

75. BENSON, *supra* note 40, at 52–53.

76. *Id.* at 52.

77. Presumably meaning the common people.

78. BENSON, *supra* note 40, at 52.

79. *Id.* at 52–53.

E. When Rights Diverge

In the case of *The Wizard of Oz*, the First Amendment 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.[80]

However,what happens when rights in intended and perceived expression conflict? Consider a hypothetical: John the Fencer owns a rare marble bust of Thomas Jefferson and 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,[81] 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*.[82]

---

80. *See* Griswold v. Conn., 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, [and] *freedom of thought* . . . ." (emphasis added) (citation omitted)); *see also* Weaver v. Jordan, 64 Cal. 2d 235, 242 (1966) (en banc) ("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, 510 (1948))).

81. *See* Warner/Elektra/Atl. 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." (citations omitted)).

82. *See infra* Parts III, IV.

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)[83] ***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,[84] 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 further discussed above,[85] more developed signs will also have disposition levels of meaning.[86] 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.

(7) ***Signs have both intended and perceived meaning, and First Amendment protection should therefore apply to both.***[87] At the same time, addressing intended and perceived meaning 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

83. I continue here the numbering of principles that were started in Part I.C.

84. *See supra* Part II.A.

85. *See supra* Part II.A.

86. I.e., determinations of how to handle the focal points or references within the context of the frames.

87. *See supra* Part II.D.

the signifier is reasonably fungible (as in the Jefferson bust example discussed above).[88]

(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.[89] Similarly, the First Amendment should not protect physically knocking down another person to indicate disgust for that person because of the risk of injury;[90] alternatively, pushing down an image of that person should convey the same message of personal disgust without risking the possible harms.[91]

---

88. *See supra* Part II.E.

89. 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). Today, 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.

90. *See* NAACP v. Claiborne Hardware Co., 458 U.S. 886, 916 (1982) ("The First Amendment does not protect violence."); United States v. Stevens, 559 U.S. __, __, 130 S. Ct. 1577, 1598–99 (2010) (Alito, J., dissenting) ("The First Amendment protects freedom of speech, but it most certainly does not protect violent criminal conduct, even if engaged in for expressive purposes."); United States v. Mullet, 868 F. Supp. 2d 618, 623 (N.D. Ohio 2012) ("The First Amendment has never been construed to protect acts of violence against another individual, regardless of the motivation or belief of the perpetrator.").

91. 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 publically "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 simply by 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 illuminations indicated by that word. A sign more precise, richer, and more felicitous, than the monosyllabic *faith.*" JORJE LUIS BORGES, *From Allegories to Novels*, *in* SELECTED NON-FICTIONS 346 (Eliot Weinberger, ed., Esther Allen, trans., Penguin 2000).

(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. [92]

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

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.[93]

---

92. *See infra* Part III.D.2.b.

93. Stevens, 559 U.S. at __, 130 S. Ct. at 1602 (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, 559 U.S. __, 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

Dogfights are illegal in every state and in the District of Columbia.[94] Like crush videos, some dogfight videos are shot for the sole purpose of selling videos of such illegal activity.[95] In addition to sales to those who simply enjoy watching such cruelty, an illegal betting market also exists which is facilitated by such videos.[96] Persons who are afraid to attend dogfights in person can still bet on them and then watch the fights in their homes.[97] Such dogfight videos also encourage additional illegal activity by serving as training materials for other dogfights.[98]

As with crush videos, the locations and criminals involved can be hidden, making prosecution difficult, if not impossible.[99] As with crush videos, the producers of such videos can achieve anonymity by use of a "bare-boned, clandestine staff."[100]

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.[101] 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 . . . ."[102]

> desperate attempt to survive. To avoid impending death, one dog rips out the trachea of the other, 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, 559 U.S. __, 130 S. Ct. 1577 (2010) (No. 08-769), 2009 WL 1681460, at *2.

94. *Stevens*, 559 U.S. at __, 130 S. Ct. at 1583 (majority opinion).
95. *Id.* at __, 130 S. Ct. at 1601 (Alito, J., dissenting).
96. *Id.*
97. *See id.*
98. *Id.* at __, 130 S. Ct. at 1602.
99. *See id.* at __, 130 S. Ct. at 1601–02.
100. *See id.* at __, 130 S. Ct. at 1601 (citation omitted).
101. *See id.*, 559 U.S. at __, 130 S. Ct. at 1601–02.
102. 18 U.S.C. § 48(c)(1) (2006).

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

Mr. Stevens operated "Dogs of Velvet and Steel" and a related website.[103] His enterprise sold videos of pit bulls dogfighting.[104] 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."[105]

Because of these videos, Mr. Stevens was indicted under Section 48.[106] Mr. Stevens moved to dismiss the charges by claiming that, under the First Amendment, Section 48 is facially invalid.[107] The District Court denied the motion, the jury convicted Mr. Stevens under Section 48 as indicted, and Mr. Stevens was thereafter sentenced to imprisonment for thirty-seven months with three years of supervised release.[108] However, on Mr. Stevens' appeal, the Third Circuit found Section 48 facially unconstitutional and vacated his conviction.[109]

The Supreme Court granted certiorari in 2009[110] and affirmed the Third Circuit in 2010.[111] Justice Alito was the lone dissenter.[112]

C. The Road Taken by the Court

> *Two roads diverged in a wood, and I—*
> *I took the one less traveled by,*
> *And that has made all the difference.*[113]

In *Stevens*, Chief Justice Roberts, writing for the majority, concluded that Section 48 was overbroad and, therefore, violated the

---

103. *Stevens*, 559 U.S. at __, 130 S. Ct. at 1583 (majority opinion).
104. *Id.*
105. *Id.*
106. *Id.*
107. *Id.*
108. *Id.*
109. *Id.*; United States v. Stevens, 533 F.3d 218 (3d Cir. 2008).
110. Petition for Writ of Certiorari, United States v. Stevens, 129 S. Ct. 1984 (2009) (No. 08-769).
111. *Stevens*, 559 U.S. at __, 130 S. Ct. at 1592.
112. *Id.* (Alito, J., dissenting).
113. ROBERT FROST, COLLECTED POEMS PROSE AND PLAYS 103 (1995).

First Amendment.[114] 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 led the Court to reach an unfortunate and avoidable result. For those who would see application of the law as merely mechanical, the Court's opinion in *Stevens* should 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."[115] In light of the crush videos the statute was meant to prevent, this would likely have been an impossible burden for Mr. Stevens to overcome.[116] Instead, the Court 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."[117]

In applying this "second type" of facial challenge, the Court found Section 48 to have "alarming breadth."[118] 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."[119] As the Court put it, "'[m]aimed, mutilated, [and] tortured' convey cruelty, but 'wounded' or 'killed' do not suggest any such limitation."[120]

Here, the Court arrived at its first fork in the road. It could have easily applied the canon of *noscitur a sociis* [121] to find that "wounded" and "killed" required cruelty since the accompanying words "intentionally maimed, mutilated, tortured" all involve cruelty.[122]

---

114. *Stevens*, 559 U.S. at __, 130 S. Ct. at 1592.

115. *See id.* at __, 130 S. Ct. at 1587 (citations omitted).

116. *Id.* at __, 130 S. Ct. at 1592 (leaving an open door on a narrower crush video statute).

117. *Id.* at __, 130 S. Ct. at 1587 (quoting Wash. State Grange v. Wash. State Republican Party, 552 U.S. 442, 449 n.6 (2008)).

118. *Id.* at __, 130 S. Ct. at 1588.

119. *Id.*

120. *Id.*

121. That words are judged by proximate words. *See* BLACK'S LAW DICTIONARY (9th ed. 2009).

122. *See* BLACK'S LAW DICTIONARY (9th ed. 2009); *see also* S.D. Warren Co. v. Me. Bd. of Envtl. Prot., 547 U.S. 370, 378 (2006) ("The canon, *noscitur a sociis,*

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 . . . .[123]

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."[124] 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.[125] However, having chosen to construe the words in the manner it did, the Court could then review some of 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

---

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)).

123. *Stevens*, 559 U.S. at __, 130 S. Ct. at 1588. (citations omitted).

124. *Id.*

125. *See infra* Part III.D.

because no cruelty need be involved.[126] The Court further discussed the popularity of hunting, how state laws vary on how one may hunt, and how Section 48 would therefore potentially create massive confusion across state lines.[127] As a result, the Court 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.[128]

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."[129] The Court found most hunting videos lack obvious instructional value, apparently believing that many have no more than "recreational" value.[130] Of course, "recreational value" is not one of the categories in Section 48(b) and owners of hunting videos that depict wounding or killing of animals would therefore be criminals under Section 48.[131] However, as we shall see below,[132] the Court could have just as easily found that hunting videos indeed fell in one or more of the categories of exceptions if they had the "serious" value required by Section 48(b).[133]

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."[134] The Court apparently interpreted "serious"

---

126. *Stevens*, 559 U.S. at __, 130 S. Ct. at 1588. The cow must be stolen, of course, because the underlying videoed conduct must be unlawful.

127. *See id.* at ___, 130 S. Ct. at 1589.

128. *Id.* at ___, 130 S. Ct. at 1589.

129. *Id.* at ___, 130 S. Ct. at 1590 (quoting 18 U.S.C. § 48(b) (2006)).

130. *Id.*

131. *See id.* at ___, 130 S. Ct. at 1588.

132. *See infra* Part III.D.

133. 18 U.S.C. §48(b) (2006).

134. *Stevens*, 559 U.S. at __, 130 S. Ct at 1590 (quoting 18 U.S.C. § 48(b) (2006)).

to mean something like "significant and of great import."[135] 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" . . . .)[136]

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."[137] 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,"[138] the Court of course had little difficulty finding grave problems with Section 48.[139] Since most of what we do, read, or view is not "of great import," the Court thus chose a route that eviscerated much of Section 48(b).[140]

Having found Section 48 to apply to woundings and killings lacking cruelty,[141] and having found "serious" to mean something like "significant and of great import,"[142] it is hard to see how most (if any)

---

135. *Id.* The Court obtained this language from the District Court's jury instructions which the government defended as "a commonly accepted meaning of the word 'serious.'" *Id.*

136. *Id.* at ___, 130 S. Ct. at 1590 (citations omitted).

137. *Id.* at ___ n.4, 130 S. Ct. at 1595 n.4 (Alito, J., dissenting). *See also* AMERICAN HERITAGE COLLEGE DICTIONARY 1245 (3d ed. 1993).

138. *Stevens*, 559 U.S. at __, 130 S. Ct. at 1590.

139. *Id.* at ___, 130 S. Ct. at 1590–92.

140. *Id.* at ___, 130 S. Ct. at 1590.

141. *Id.* at ___, 130 S. Ct. at 1588.

142. *Id.* at ___, 130 S. Ct. at 1590.

hunting videos would fit under any 48(b) exception.[143] 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.[144]

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.[145]

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.[146] In fact, not only could the Court have taken different routes, it should have taken different routes. In Section D, we shall explore the basic principles the Court violated in taking its turns at the three forks. We shall then further explore how semiotics helps to explain how the Court unfortunately harmed free expression analysis, harmed the poor animals involved, and harmed the public who must suffer the additional criminal activity the animal cruelty videos generate.[147]

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 Act[148] 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,

---

143. 18 U.S.C. §48(b) (2006).

144. *Stevens*, 559 U.S. at ___, ___, 130 S. Ct. at 1589, 1592.

145. *Id.* at ___, 130 S. Ct. at 1592.

146. The Court somewhat imperiously stated, "Our construction of § 48 decides the constitutional question." *Id.* at ___, 130 S. Ct. 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*.

147. *See id.* at ___, 130 S. Ct. at 1601–02 (Alito, J., dissenting).

148. Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010) (codified in scattered volumes and sections of U.S.C.).

> 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."[149]

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."[150]

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 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

1. 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.[151]

One might argue, for example, that crush videos bought solely for arousal express nothing. Rather, one might argue that crush videos merely provoke instant, unreasoned acts of arousal. Either way, since crush videos only foster an incoherent, emotional response, they would

---

149. Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. ___, ___, 132 S. Ct. 2566, 2593–94 (2012) (internal citations omitted).

150. *Id.* at ___, 132 S. Ct. at 2597 (discussing the terms "tax" and "penalty").

151. *See supra* Part II.B, and the discussion of the unlikely existence of such signals.

signify nothing because they would have no reference, frame, or disposition—and would thus express nothing. Since crush videos express nothing, they would have no First Amendment protection, making subsequent analysis irrelevant.

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,[152] 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. 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,[153] and crush videos, therefore, involve more than mere expressionless signals. As such, no simple First Amendment solutions exist along these lines.

2. The Semiotics of Statutory Construction

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.[154] 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

---

152. *See supra* Part II.B.

153. *See supra* Part II.D.

154. *See* Harold Anthony Lloyd, *"Original" Means Old, "Original" Means New: An Original Look at What "Originalists" Do*, 67 NAT'L LAW. GUILD REV. 135 (2010) (discussing the need to review all three levels of meaning in construction).

two.[155] 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 context the frame of that reference), and the handling of the reference or parts thereof[156] in ways permitted by the frame (in this context the disposition level of meaning).[157]

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 "[d]epiction of animal cruelty."[158] From the title alone, there is 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."[159] As legislative history accords with this,[160] it should be indisputable at this point that Section 48 addresses cruelty and not, for example, the humane slaughter of a cow.[161]

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 engage in meaningful

---

155. *See supra* Part II.A.

156. 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.

157. As noted in Part II.A, 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.

158. United States v. Stevens, 559 U.S. __, ___ n.1, 130 S. Ct. 1577, 1582 n.1 (2010) (majority opinion) (quoting 18 U.S.C. § 48).

159. *Id.* at ___, 130 S. Ct. at 1582.

160. *See id.* at ___, 130 S. Ct. at 1598 (Alito, J., dissenting) (providing Justice Alito's overview of such legislative history).

161. *See id.* at ___, 130 S. Ct. at 1588 (majority opinion).

statutory interpretation.[162] 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.[163] The Court itself has conceded that Section 48 is about depictions of cruelty.[164] 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*[165] to read the words as "cruel wounding" and "cruel killing" or the like.[166] The Court simply chose the wrong road at this first fork.[167]

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.[168] Remembering that meaning includes both intended and perceived meaning,[169] hunting videos can easily be intended or perceived to fall in every exception category. Those who believe in gun and hunting rights could see hunting videos as valuable political statements. Those who

---

162. FROST, *supra* note 113, at 103.

163. *See Stevens*, 559 U.S. at ___, ___ n.4, 130 S. Ct. at 1588, 1588 n.4 (citing 18 U.S.C. § 48(c)(1)).

164. *See id.* at ___, 130 S. Ct. at 1587–88.

165. *See supra* note 121.

166. Construction canons are often much maligned. *See* HUHN, THE FIVE TYPES OF LEGAL ARGUMENT 22–25, 101–02 (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 specious to attack canons on the grounds that for each canon there is an opposite canon. *See id.* at 102.

167. 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 id.* 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*, 559 U.S. at ___, 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, 559 U.S. __, 130 S. Ct. 1577 (2010) (No. 08-769), 2009 WL 1681460, at *5)).

168. *Stevens*, 559 U.S. at ___, 130 S. Ct. at 1590.

169. *See supra* Part II.D.

study hunting methods or enjoy hunting could see hunting videos as having scientific and educational value.[170] 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.[171] 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."[172] Among the various definitions of "value" is "merit."[173] Given the ethical dimensions of the term "merit,"[174] 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).

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

---

170. *Stevens*, 559 U.S. at ___, 130 S. Ct. at 1595 (Alito, J., dissenting) (adding educational and scientific categories as well).

171. 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.*

172. 18 U.S.C. § 48(b) (2006) (requiring items to have "serious religious, political, scientific, educational, journalistic, historical, or artistic value" in order to qualify for exception from the law).

173. AMERICAN HERITAGE COLLEGE DICTIONARY 853 (3d ed. 1993).

174. 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.

settle on a meaning in the range of "significant and of great import."[175] The Court even seemed to find humor in its choice of roads, stating: "the text says 'serious' and 'serious' should be taken seriously."[176] Of course, on its face this understanding of "serious" cannot be right in light of the purpose of Section 48. Again, most of what we do is not "significant and of great import."[177] This is equally true of the ordinary videos that we often watch. It is also hard to imagine how many hunting videos would be "significant and of great import."[178] 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,"[179] would allow Section 48(b)'s exceptions to be both meaningful and constitutional. Since frame and reference levels of meaning are intertwined,[180] 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"[181] reasonably accords with the purposes of Section 48 while allowing the statute to pass constitutional muster.

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, and since statutes frame their reference or focus, it is illogical 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

---

175. *Stevens*, 559 U.S. at ___, 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.*

176. *Id.*

177. *Id.* at ___, 130 S. Ct. at 1590.

178. *See id.*

179. Which is a perfectly acceptable definition of "serious." *See* AMERICAN HERITAGE COLLEGE DICTIONARY 1245 (3d ed. 1993).

180. *See supra* Part II.A.

181. *Stevens*, 559 U.S. at ___, 130 S. Ct. at 1595 (Alito, J., dissenting).

the purpose and words of the statutes.[182] In this case, the Court's proclamation that it would not "rewrite" Section 48 to make it constitutional therefore makes no sense.[183] 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.[184]

b. The Unique Case of Indexicals

Were this not problematic enough for the Court, a good grasp of semiotics also shows a further unique problem with videos of this type. Because photography and videotaping involve the interaction of the subject with the recording medium, they are straightforward examples of indexical expression.[185]

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 *New York v. Ferber* recognized this point in the case of child pornography.[186] Reaffirming *Ferber*, the Court

182. 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 ___, 130 S. Ct. at 1597 (Alito, J., dissenting).. *See also id.* at ___, 130 S. Ct. at 1595 ("When a federal court is dealing with a federal statute challenged as overbroad, it should, of course, construe the statute to avoid constitutional problems . . . ." (quoting New York v. Ferber, 458 U.S. 747, 769 n.24 (1982))).

183. *Id.* at ___, 130 S. Ct. at 1592 (majority opinion).

184. *Id.* at ___, 130 S. Ct. at 1587.

185. *See supra* Part II.C.

186. New York v. Ferber, 458 U.S. 747, 759 (1982).

subsequently stated in *Ashcroft v. Free Speech Coalition*[187] that "[w]here the images are themselves the product of child sexual abuse, *Ferber* recognized that the State had an interest in stamping it out without regard to any judgment about its content."[188]

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 *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.[189] Both a secret voyeuristic video 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.[190]

Precisely put, the indexical question in *Stevens* is whether the scope of protected indexical signifiers should include animals as well as

187. 535 U.S. 234 (2002).

188. Ashcroft v. Free Speech Coal., 535 U.S. 234, 249 (2002).

189. Although there is doubt whether any of these "snuff" films actually exist, (*see* Barbara Mikkelson, *A Pinch of Snuff*, SNOPES.COM (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 "[t]he First Amendment does not protect violence." NAACP v. Claiborne Hardware Co., 458 U.S. 886, 916 (1982).

190. *See* CONN. GEN. STAT. ANN. §§ 53a-189aa–189b (West 2012) (criminalizing both voyeurism and the dissemination of voyeuristic material as Class D felonies). In March 2012, Dharun Ravi was convicted of fifteen 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 NEWS (May 21, 2012), http://abcnews.go.com/US/rutgers-trial-dharun-ravi-sentenced-30-days-jail/story?id=16394014; Verdict Sheet, State v. Ravi, No. 1100400596, 2011 WL 7562705 (N.J. Super. Ct. Law Div. 2011). 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. *See* Ian Parker, *The Story of a Suicide*, NEW YORKER, Feb. 6, 2012, at 39, *available at* http://www.newyorker.com/reporting /2012/02/06/120206fa_fact_parker. On one occasion, Ravi used his Twitter account to solicit others to view a feed of the webcam. *See* i*d.*

humans (children and adults). It should. Animals also clearly feel pain,[191] and unjustified pain on its face is undesirable.[192] Good government, by definition, seeks to minimize unjustified pain within its jurisdiction,[193] which means that the underlying rule of *Ferber* applies to more than underage human beings alone.[194]

In fact, understanding how signs work also helps demonstrate the potential speech neutrality of this more precise statement of the rule underlying *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).[195] 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.[196] Other iconic (i.e., resemblance)

---

191. That animals felt pain was recognized by many at least as early as the Eighteenth Century. *See* KEITH THOMAS, MAN AND THE NATURAL WORLD 175–78 (Pantheon Books 1983). 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 inner sensation." *Id.* at 33.

192. Pain is "[a]n unpleasant sensation varying in severity, resulting from injury, disease, or emotional disorder." THE AMERICAN HERITAGE COLLEGE DICTIONARY 999 (4th ed. 2007).

193. *See, e.g.*, U.S. CONST. pmbl. (including "promote the general Welfare").

194. For a detailed analysis of the compelling governmental interest in preventing animal cruelty, see Perdue, *supra* note 11, at 494–501.

195. 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." United States v. Stevens, 559 U.S. ___, ___, 130 S. Ct. 1577, 1586. (citing New York v. Ferber, 458 U.S. 747, 756–57, 762 (1982)). Justice Alito further addressed the very point that symbolic and iconic avenues remained open, stating that "the statute does not apply to verbal descriptions or to simulations." *Id.* at ___, 130 S. Ct. 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.

196. Ashcroft v. Free Speech Coal., 535 U.S. 234, 250–51 (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

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 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[197] uses[198] a living[199] human or other animal as an

---

'intrinsically related' to the sexual abuse of children," and further noting that "*Ferber's* judgment about child pornography was based upon how it was made, not on what it communicated").

197. 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, 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 when 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, 1023–24 (2011) (quoting *Chaplinsky*, 315 U.S. at 572). For a general discussion of the need to understand the relationship between harm and the First Amendment, see Schauer, *supra* note 37. *See also infra* Part IV.B.3.

198. 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, 443 (N.Y. Sup. Ct. 2010) ("[T]he law does not permit a person to consent to his own murder. That consent does not transform an active killing of another into a suicide."); People v. Gray, 224 Cal. App. 2d 76, 79–80 (1964) ("[I]t is no defense to assert that the victim consented to an assault upon her by force likely

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.[200] 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 is conducting and is videotaping as well (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.[201] 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

---

to produce great bodily harm."); *see also* W.E. Shipley, Annotation, *Consent as 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." (footnotes omitted)). Where human consent is permissible, such consent can be considered under justification as can the application of any force.

199. Using dead humans or other animals is beyond the scope of this article and will not be addressed.

200. 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.

201. 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, 142 N.W.2d 798 (Wis. 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).

harmful expression could, for example, be replaced by other harmless indexical expression or by iconic or symbolic expression.

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 to the living signifier.[202] 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.[203] This necessarily involves a balancing of rights, and there is no reason the speaker's right should always prevail 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.[204] 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.[205]

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,[206] can evolve over time.[207] For example, the justification

---

202. See *supra* note 90 to the effect that the First Amendment does not protect violence.

203. *Id.*

204. *Id.*

205. Or they should not, as Heyman puts it, "short-circuit this inquiry by invoking the content neutrality doctrine." Heyman, *supra* note 24, at 142. Instead, they "should engage in a careful consideration of the values on both sides." *Id.*

206. See *supra* note 197 on the scope of the justification element. *See also* Trop v. Dulles, 356 U.S. 86, 100–01 (1958) (noting that the words of the Eighth Amendment are neither precise nor standard in scope. Thus, "[t]he 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 sixteen or seventeen years of age does not offend the Eighth Amendment's prohibition on cruel and unusual punishment), *with* Roper v. Simmons, 543 U.S. 551 (2005) (holding that the Eighth and Fourteenth Amendments forbid the imposition of the death penalty on persons who were under the age of eighteen when they committed a crime).

207. 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 191, at 22. "Of bear-baiting and cock-fighting they could say:

element addresses such concerns as the hunting videos with which the Court in *Stevens* expressed such angst.[208] 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, such as, for example, the greater latitude that should apply to distribution of videotapes of public figures.[209]

In any case, the indexical-harm exception formulated here is fully consistent with *United States v. O'Brien*.[210] Addressing First Amendment issues where "speech" and "nonspeech" elements were combined "in the same course of conduct," the *O'Brien Court* held:

> [A] sufficiently important interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms . . . . [A] government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.[211]

The Court in *Stevens* did not question the power of the states to regulate animal cruelty.[212] Additionally, the Court in *Stevens* did not

---

'Christianity gives us a placard to use these sports.'" *Id.* The very passage of Section 48 shows how far common wisdom has moved from such earlier notions.

208. *See* United States v. Stevens, 559 U.S. ___, ___, 130 S. Ct. 1577, 1590 (2010).

209. As demonstrated in Part IV.B.3, *infra*, 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.

210. 391 U.S. 367 (1968).

211. *Id.* at 376–77.

212. *See* United States v. Stevens, 559 U.S. ___, ___, 130 S. Ct. 1577, 1595 (2010) (Alito, J., dissenting).

question the important governmental interests involved, including reduction of crime generated by such cruelty.[213] Furthermore, prohibiting usage of live animals in filming is not based upon expression; the prohibition is based upon cruelty to the animals and the resulting criminal activity generated.[214] Finally, prohibiting animal cruelty by prohibiting use of live animals is no broader than necessary to achieve that goal.[215] Thus, none of these *O'Brien* factors weighed in favor of invalidating Section 48.[216] Instead, *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.

IV. *SNYDER V. PHELPS* AND THE LIMITS OF SHANGHAIED SYMBOLS

A. Humans and Other Animals as Symbolic Signifiers

In addition to serving as indexical signifiers, humans and animals can also serve as symbolic signifiers.[217] 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).

Thus, a person might shoot a cow to express his disgust for milk. Or another might kidnap and hold hostage 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.

---

213. *See id.* at ___, 130 S. Ct. at 1601.

214. *See id.* at ___, 130 S. Ct. at 1601–02.

215. See id. at ___, 130 S. Ct. at 1602.

216. See 391 U.S. at 376–77.

217. 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.

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[218] 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.[219] 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 another living human to constitute improper usage of that human as a symbolic signifer? *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.[220] Prior to their protest, they had issued a press release designed to turn the funeral "into a tumultuous media event."[221] The press release

---

218. 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 (N.Y. 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.

219. *See supra* Part III.D.2.b.

220. Snyder v. Phelps, 562 U.S. ___, ___, 131 S. Ct. 1207, 1217 (2011).

221. *Id.* at ___, 131 S. Ct. at 1222 (Alito, J., dissenting).

stated that the picketers were coming "to picket the funeral of Lance Cpl. Matthew A. Snyder."[222] 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."[223]

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."[224] For about one half hour before the funeral, they picketed on public land 1,000 feet from the church holding the funeral service.[225] The picketers obeyed all police instructions.[226] The funeral procession came within 200 to 300 feet of the picketers and Matthew Snyder's father could see the tops of their signs but not their content.[227]

However, while watching a newscast later that evening Matthew Snyder's father learned of the signs' content.[228] 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."[229] The signs also included purely iconic expression such as a depiction of "two men engaging in anal intercourse."[230]

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.[231] Matthew Snyder's father explained at trial how the

---

222. *Id.* at ___, 131 S. Ct. at 1225.

223. *Id.*

224. *Id.* at ___, 131 S. Ct. at 1213.

225. *Id.*

226. *Id.*

227. *Id.*

228. *Id.* at ___, 131 S. Ct. at 1213–14.

229. *Id.* at ___, 131 S. Ct. 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 infra* Part IV.B.2–3.

230. *Id.* at ___, 131 S. Ct. 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 infra* Part IV.B.2–3.

231. *Phelps*, 562 U.S. at ___, 131 S. Ct. at 1214 (majority opinion).

picketers' actions harmed him both mentally and physically, including exacerbating his diabetes.[232] 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 and the wound would have healed. But I don't think this will heal."[233] 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.[234]

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."[235]

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."[236] 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.[237] Rejecting the claim that Matthew Snyder's father was a member of a captive audience,[238] the Court similarly concluded that Snyder's father could not recover on the claim for intrusion upon seclusion.[239] Because the third claim of civil conspiracy was based on these two torts, the Court concluded that Snyder's father could not recover on that claim either.[240] As in *Stevens*, Justice Alito was the lone dissenter.[241]

---

232. Brief for Petitioner at 6, Snyder v. Phelps, 562 U.S. ___, 131 S. Ct. 1207 (2011) (No. 09-751), 2010 WL 2145497, at *6.

233. *Id.* at *8.

234. *Phelps*, 562 U.S. at ___, 131 S. Ct. at 1214.

235. *Id.*

236. *Id.* at ___, 131 S. Ct. at 1217.

237. *Id.* at __, 131 S. Ct. at 1219.

238. See *infra* Part IV.B.2 for a further discussion of the captive audience doctrine.

239. *Phelps*, 562 U.S. at ___, 131 S. Ct. at 1220.

240. *Id.*

241. *See id.* at ___, 131 S. Ct. at 1212 (Alito, J., dissenting); U.S. v. Stevens, 559 U.S. ___, ___, 130 S. Ct. 1577, 1582 (2010).

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.[242] 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."[243] 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."[244] As the Court further put it, the picketers "exploited the funeral 'as a platform to bring their message to a broader audience.'"[245]

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 him in the cross hairs of a God that

242. *See supra* Part III.D.2.c.
243. *Phelps*, 562 U.S. at ___, 131 S. Ct. at 1225 (Alito, J., dissenting).
244. *Id.* at ___, 131 S. Ct. at 1217 (majority opinion).
245. *Id.*

> is so mad He has smoke coming from his nostrils
> and fire from his mouth! How dumb was that?[246]

On these facts, therefore, did the picketers improperly use Matthew Snyder's father as a living symbolic signifier? The only reasonable answer is that they did.[247]

The fact that the picketers were approximately 1,000 feet from the funeral,[248] the fact that they were on public land,[249] the fact that they obeyed the police,[250] and the fact that Matthew Snyder's father could not initially read the picket signs[251] are all irrelevant to the question of symbolic use. From any distance, one can 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 much less tasteful fashion, the picketers used Snyder's father to signify a part of their message.

---

246. *Id.* at ___, 131 S. Ct. at 1226 (Alito, J., dissenting).

247. With their words and placards as signifiers, they of course also used Mr. Snyder and the other mourners as an unwilling private audience. *See* Heyman, *supra* note 24, at 107 ("The real issue in cases like *Snyder* is whether there is a First Amendment right to address speech of this sort to the mourners at a funeral and thereby cause them profound emotional distress."); Schauer, *supra* note 37, at 100–03; Clay Calvert, *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). *See generally* Jeffrey Shulman, *Epic Considerations: The Speech That the Supreme Court Would Not Hear in Snyder v. Phelps*, 2011 CARDOZO L. REV. DE NOVO 35 (2011), *available at* http://scholarship.law.georgetown.edu/facpub/622 (discussing internet postings by Phelps members that the Court majority refused to consider in *Snyder*).

248. Calvert, *supra* note 247, at 118.

249. *Id.*

250. *Id.*

251. *Id.*

Thus, the Court's discussion of the "captive audience doctrine"[252] misses the point.[253] 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,[254] and forcing Mr. Snyder to participate in such speech of course raises First Amendment issues of its own.[255]

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 Snyder's father material harm.[256] To recover on a claim of intentional infliction of emotional

252. That Matthew Snyder's father did not have to view or hear the picketers' actions. Snyder v. Phelps, 562 U.S. ___, ___, 131 S. Ct. 1207, 1220 (majority opinion).

253. Phelps, 562 U.S. at ___, ___, 131 S. Ct. at 1219–20 (majority opinion).

254. *See id.* at ___, 131 S. Ct. at 1222–25 (Alito, J., dissenting).

255. *See* Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. 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, 151–52 (3d Cir. 2010) (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.).

256. 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 a means of attracting public attention." *Phelps,* 562 U.S. at ___, 131 S. Ct. at 1227 (Alito, J., dissenting). Justice Breyer in his concurrence notes that Justice Alito's dissent requires the Court "to ask whether our holding unreasonably limits liability for intentional infliction of emotional distress—to the point where A (in order to draw attention to his views on a public matter) might launch a verbal assault upon B, a private person, publicly revealing the most intimate details of B's private life, while knowing that the revelation will cause B severe emotional harm. Does our decision leave the State powerless to protect the individual against invasions of, *e.g.,* personal privacy, even in the most horrendous of such circumstances?" *Id.* at ___, 131 S. Ct. at 1221 (Breyer, J., concurring). Justice

distress under applicable state law, Matthew Snyder's father had to prove "that the conduct at issue caused harm that was truly severe."[257] In fact, the injury must be "so severe that no reasonable man could be expected to endure it."[258] Thus, the elements of this tort claim are difficult to meet, and the jury's unchallenged *factual* finding of the severity of harm therefore more than satisfied the material harm requirement.[259]

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."[260] This is true because Matthew Snyder's father would not have been used as a signifier in a way that harmed him. Unfortunately, the Court drew the wrong conclusion that "[i]t was what [the picketers] said that exposed [them] to . . . damage[]."[261] It was not what they said but how they said it—using Matthew Snyder's father as a signifier in a way that caused him harm.

Whether this case falls outside First Amendment protection should therefore turn on the final issue of justification.[262] 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.[263]

Breyer believed the Court's decision does not leave the State so powerless. *Id.* at ___, 131 S. Ct. at 1221–22.

257. *Id.* at ___, 131 S. Ct. at 1222 (Alito, J., dissenting) (citing Figueiredo-Torres v. Nickel, 584 A.2d 69, 75 (1991)).

258. *Id.* (quoting Harris v. Jones, 380 A.2d 611, 616 (1977)).

259. 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." *Id.* at ___, 131 S. Ct. at 1223.

260. *Id.* at ___, 131 S. Ct. at 1219 (majority opinion).

261. *Id.*

262. *See supra* Part IV.A.

263. *See Phelps*, 562 U.S. at ___, 131 S. Ct. at 1222, 1223–24. (Alito, J., dissenting). 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.

Nor were there other facts in this case that could reasonably justify using Matthew Snyder's father as a signifier.[264] First, even if no reasonable fungible signifier alternative existed, justification must still weigh the rights of the picketers against the right of Snyder's father not to suffer the serious injury he suffered. It is difficult to see how 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, Snyder's father was not a public figure, and thus, no reasonable argument can exist that he was somehow entitled to reduced protection on those grounds.[265] Nor were the picketers' actions protected by the strict limitations imposed on regulation of offensive expression[266]—they were entitled to their offensive expression but were not entitled to use Matthew Snyder's father as a signifier of such expression.[267] Nor were restrictions on the picketers' use of Snyder's father as signifier subject to strict scrutiny—it was not the expression but the harm involved in "shanghaiing" Snyder's father as signifier that is the issue in this case.[268] 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

---

264. 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 ___, 131 S. Ct. at 1224–25.

265. *See* N.Y. 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, it would not change the fact that he was not a required signifier for the picketers' expression.

266. *See* Cohen v. California, 403 U.S. 15, 16–17 (1971).

267. *See supra* note 90 and accompanying text (on the First Amendment not protecting violence); *see also supra* Part IV.B.1 (regarding the mental and physical injuries suffered by Matthew Snyder's father).

268. *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).

family.[269] Nor were religious discrimination issues in play since the picketers could have used signifiers other than Matthew Snyder's father to advocate their message.[270] Nor were any freedom of association issues in play[271] 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,"[272] their actions were certainly not satire and somehow thus protected on such grounds.[273]

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 that homosexuality is evil and that God punishes the United States for its tolerance of homosexuality,[274] and if their attacks on the Snyders[275] 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. [276] Even if others could have seen through the clamor and grasped the intended 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,[277] 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 malign fallen soldiers and their families regardless of their sexuality, independent observers would still

---

269. *See* Frisby v. Schultz*,* 487 U.S. 474 (1988) (upholding a ban on picketing one household rather than picketing in general).

270. *See* Good News Club v. Milford Cent. Sch., 533 U.S. 98 (2001) (holding that a school could not discriminate against religious viewpoint in a limited public forum it had created).

271. *See* NAACP v. Alabama, 357 U.S. 449 (1958) (recognizing such a right).

272. *See* Snyder v. Phelps, 562 U.S. ___, ___, ___, 131 S. Ct. 1207, 1210, 1214 (2011) (majority opinion).

273. *See* Hustler Magazine v. Falwell*,* 485 U.S. 46 (1988).

274. *See Phelps*, 562 U.S. at ___, 131 S. Ct. at 1225–26 (Alito, J., dissenting).

275. *See id.*

276. *See supra* Part II.D.

277. *See Phelps*, 562 U.S. at ___, 131 S. Ct. at 1225 (Alito, J., dissenting).

have been likely to perceive a claim that Matthew Snyder was homosexual.[278]

Additionally, many would have also likely perceived Matthew Snyder's situation as allegedly more egregious than the other cases since his funeral was the funeral the picketers chose to protest.[279] 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.[280]

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,[281] 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 the message 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.[282] For instance, if a

---

278. *See id.*

279. *See id.*

280. *See id.* at ___, 131 S. Ct. 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 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 siege. *See* Heyman, *supra* note 24, at 154–57.

281. For example, the case of murder films where the victim's consent would be no defense *See, e.g.*, People v. Minor, 898 N.Y.S.2d 440 (N.Y. Sup. Ct. 2010).

282. *See, e.g.,* N.Y. Times v. Sullivan, 376 U.S. 254 (1964); Time, Inc. v. Firestone, 424 U.S. 448 (1976).

congressman persistently accepts bribes, he should be fair game as a symbol of congressional corruption even if such usage results in the loss of his seat. Using the corrupt congressman as a signifier is permissible because he accepted a position of public trust[283]—meaning he is publicly accountable for his actions—and because excluding the congressman as a signifier would materially alter the message's idea.[284]

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.[285]

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.[286]

---

283. *See, e.g., Sullivan*, 376 U.S. 254; *Firestone*, 424 U.S. 448.

284. The signifier's fungibility thus differs here from that in *Phelps.* If the message in *Phelps* is about God's hatred, homosexuality, and the American military, then Matthew Snyder's father is no inherent part of that message.

285. Again, therefore, such a signifier is not fungible in the way of Matthew Snyder's father.

286. 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 for Camp Lejeune Families Act of 2012, Pub. L. No. 112-154, § 601, 126 Stat. 1165, 1195 (2012) (codified as amended at 18 U.S.C. § 1388 (2012)). This statute was enacted after a number of state statutes were enacted on the same subject. *See* Snyder v. Phelps, 562 U.S. ___, ___, 131 S. Ct. 1207, 1218 (2011) (majority opinion). Presumably this statute does not preclude further civil restrictions and further state criminal restrictions on such protests. *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 assumed, especially when Congress legislates in a field which the States traditionally occupy, that state police powers are not to be superseded by federal law unless that is Congress' clear and manifest purpose); *see also Phelps*, 562 U.S. at___, 131 S. Ct. at 1227 (Alito, J., dissenting) ("[T]here is absolutely nothing to suggest that Congress and the state legislatures, in enacting these laws [including an

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.[287] If so, any such optimism is of course tempered by Justice Alito's joining the dissent in *Sebelius*.[288] In such dissent, Justice Alito, the lone voice of reason in *Stevens*[289] 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." [290]

---

earlier 2006 version of 18 USC § 1388], intended them to displace the protection provided by the well-established IIED tort.").

287. *See supra* notes 148–50 and accompanying text.

288. Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. ___, 132 S. Ct. 2566 (2012) (dissenting opinion).

289. 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 to reach almost all, if not all, of the depictions that the Court finds constitutionally protected." U.S. v. Stevens, 562 U.S. ___, ___, 130 S. Ct. 1577, 1597 (2010) (Alito, J., dissenting).

290. *Sebelius*, 567 U.S. at ___, 132 S. Ct. at 2597 (majority opinion).