

published by:

Public Discourse: Ethics, Law and the Common Good

<http://www.thepublicdiscourse.com>

[view article in original form](#)

Swastikas, Burning Crosses, and "God Hates Fags"

by [Hadley Arkes](#)

October 13, 2010

It's time for conservatives and liberals alike to remember that certain words by their very utterance inflict injury.

In a legendary case of the late 1970s, a small band of self-styled "Nazis" sought to march through Skokie, Illinois, a suburban town with many Jews who had survived the Holocaust. David Hamlin of the ACLU declared at the time that the First Amendment protected all kinds of speech regardless of whether it was "popular or despised." The translation was unmistakable: What was "despised" was that which was unpopular or hated. What was ruled out was that certain things were despised because they were in point of principle "despicable."

Now we are finding the same translation provided again even by conservative writers and jurists. The case at hand involves the antics of the Rev. Fred Phelps and a contingent from the Westboro Baptist Church in Topeka, Kansas. In 2006 they were alerted to the funeral of young Matthew Snyder, 20, a Marine lance corporal who had died in Iraq. Phelps and his crew, ever ready to broadcast their message, made it a point to show up at St. John's Catholic Church in Westminster, Maryland, the site of the funeral. They came with signs saying "Semper fi fags," "Thank God for dead soldiers," and decrying the "pedophile machine" of the "Roman Catholic monstrosity." The editors of the *Wall Street Journal* pronounced Phelps and his band "scoundrels," their message "despicable." And yet the translation was made again: The editors seem inclined to think Phelps nevertheless had a "right" to engage in despicable performative acts because there are no grounds on which the law can really discriminate between the "despicable" and the "unlikable."

But the law was not always thought to be so wanting in the standards of judgment, and the judges expounding the law were not compelled to absorb, ever more deeply with each case, the premises of moral relativism. Until the 1970s the cases on speech, and the harms inflicted through speech, were governed by the classic case of *Chaplinsky v. New Hampshire* (1942). Justice Frank Murphy observed in that case that certain well-defined and narrowly focused classes of speech have never been given protection under the Constitution. As he wrote in a famous passage:

These [classes of speech] include the lewd and obscene, the profane, the libelous, and the insulting or "fighting" words — those which *by their very utterance inflict injury* or tend to incite an immediate breach of the peace. [Italics added]

But in the early 1970s this understanding was truncated and largely displaced in favor of a view the judges regarded as far more sophisticated and in tune with the times. The signature line came with Mr. Justice Harlan in *Cohen v. California*. The case involved a young man, in the courthouse of Los Angeles, wearing a jacket with the inscription, "F*** the Draft." Harlan gave us the line that would echo through the coming years: "One man's vulgarity is another's lyric." Heated words, the words of political argument, were emotive; they were too subjective to bear any fixed meaning. And so there was "no readily ascertainable general principle" by which to distinguish the words on Cohen's jacket from other words. Harlan's grand innovation in this case was to discover the teaching of "logical positivism," quite heady in his days as an undergraduate—but long abandoned now in the schools of philosophy.

But with Harlan's opinion in *Cohen*, the law on speech would turn in a new direction, governed by Harlan's relativism. The judges, even conservative jurists, would talk themselves into the notion that the law could not make judgments on the content of speech. But in that way they glided past the deep incoherence of Harlan's new doctrine and forgot the truer understanding of language that was contained in the old *Chaplinsky* case. Harlan had insisted on protecting Cohen's jacket as a species of political speech. And yet, if the meaning of words was "subjective," how did he profess to know that the speech was "political"? Perhaps "F*** the Draft" meant "make love to the wind." But Harlan understood that Cohen was *condemning* the Draft. Still, how would he have known that without knowing that certain terms and symbols were established in the language as terms of condemnation, disapproval, insult? Back to *Chaplinsky*.

Chaplinsky rested on the understanding that we could not have a private language. I cannot go into town and order a corned beef sandwich and then later explain that I mean one of those things with ice cream and chocolate sauce. With "ordinary language" we are compelled to be guided by the way in which words are commonly understood. We are constituted as moral beings, given to praising and blaming, applauding and deriding, commending and condemning. We can refer to things we merely "dislike" but we move to another level when we complain about mistreatment or when we condemn genocide in Darfur. The moral functions of commending and condemning are built into our nature, and the words that carry those functions must be understandable at any given time. Words of course may alter over time in the way they are shaded and understood. But at any given moment, ordinary people must be able to know the words that are established in the language as the moral terms of commending and condemning, praising and assaulting. Truck drivers and construction workers can show a remarkably keen sensitivity to words and gestures that are insulting or even subtly patronizing.

Chaplinsky was simply based on that common sense about language, and with that sense of things we were able to give juries of

ordinary working men and women these instructions: Convict only when people used gestures and words clearly understood as terms of assault. In case of doubt—if the words are less clear or at the borderline of derision, just hold back from convicting. I've found in my own experience that people never suffer doubt in applying that rule to a list containing words of this kind: Kike, bastard, nigger, faggot, meter maid, urologist, hero. People in Washington may stop for a while at "meter maid," but they have no trouble in recognizing the terms clearly established as terms of insult.

The *Chaplinsky* case also had the advantage of building on a tradition of understanding in the law that "assaults" did not strictly require the laying on of hands. One could shoot and deliberately miss. One could hold an unloaded gun near the head of a victim and click the trigger. There was not that much discrimination between an act of that kind and threatening calls in the night, or letters of extortion—or a cross burned outside the home of a black family. People who knew the conventions in their own language would have no trouble telling the difference, say, between a burning cross and a burning shoe box. With this understanding, swastikas and burning crosses and blazing epithets could be understood as "assaults" as fully as rocks thrown at victims.

With Justice Harlan's turn in the *Cohen* case, the judges would essentially remove from the notion of "fighting words" those words "which by their very utterance inflict injury." The wrong would be narrowed to those words that were spoken in a face-to-face encounter, in a distinctly personal attack, and likely to trigger a violent reaction. That formula has proved inapt at every level. Not the least of which is that the cases have been brought in actions for personal damages. And so in the case of *Snyder v. Phelps*, Phelps and his band were compelled by the local authorities to stand a good distance from the church, so that their presence would not impinge on the funeral. Nevertheless, this outpouring of venom drew the local news. Mr. Snyder, the father of the young marine, would later see the footage in images that would be hard to erase from his mind. He claimed to suffer, as a result, a deepening depression that would not quit and a worsening of his diabetes.

In the past, these spectacles of verbal assaults would be handled with an arrest, along with a fine of about \$200—just enough for the law to make its point and put a stop to the spectacle at hand. But with the Court now virtually foreclosing that path, Mr. Snyder sued under the laws of Maryland for the infliction of emotional distress. He was awarded both personal and punitive damages, which the district court scaled back to an award of \$2.1 million. And that became the subject of the case that was argued on appeal to the Supreme Court just this past week: Could Phelps invoke the First Amendment now to invalidate an action in personal damages for emotional distress?

The concern of the *Wall Street Journal* and other publications is that these kinds of action for personal damages could lead to knockout damage awards that could put newspapers and journals out of business. But the editors seemed to have forgotten that this state of affairs is one that came about when the Court turned to relativism and confined the meaning of "assaulting words" to words directed to personal targets, threatening injuries distinctly personal.

As the judges sought to untangle the problem during the oral argument, Justice Scalia and his colleagues began to back into the reasoning contained in *Chaplinsky*, the reasoning that many had forgotten. Scalia reminded the counsel for Phelps that the doctrine of fighting words did not actually require the evidence of violence breaking out. After all, the victim could be outnumbered—or be a Quaker, as he put it, a pacifist. When a menacing crowd gathered in front of the house of a black family or burned a cross, it was implausible that the family in the house would try striking out at the crowd. It was also the case that a burning cross would never contain the particular names of the members of the family who formed the target. The burning cross was a symbol of hostility to blacks, and its bearing on the family at hand would be unmistakable. If fighting words were confined to words directed at persons in a face-to-face encounter, the burning crosses could never be decoded as an assault.

But then even further: the wrong of the assault did not have to entail any material injury, for the same reason that assaults did not require bodily touching. In one notable case in Long Island, a cross was burned outside the home of a black family who had been away. By the time they had returned, the cross and the debris had been cleared from the scene. The family had never witnessed the spectacle and experienced any fright. Yet, the people in the community were deeply embarrassed, for they had the sense that an act of bigotry and assault had taken place in their midst. And were they not emphatically right?

Justice Murphy had remarked quite aptly in the *Chaplinsky* case that these gestures of assault are "no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality." In one notable case, Mr. Rosenfeld, speaking at a PTA meeting in New Jersey had one adjective: "motherf***ng." It was thought that Rosenfeld could be asked, properly, to avoid such language out of a sense of propriety in a public place; and yet nothing in that restriction would impair in any degree his freedom to mount the most vigorous, substantive critique of the school board and its policies.

But that part of *Chaplinsky* has been forgotten, along with the recognition that the words themselves may constitute an assault. Mr. Snyder was appealing from the decision of the appellate court below that had overturned a judgment in his favor and protected Phelps for engaging in "political speech." The court of appeals in the Fourth Circuit argued that "speech concerning homosexuality [is] a matter of public concern" and a legitimate subject of public argument. So it is, and therefore it should not be banned in colleges and churches and public places. But as the law used to teach us, public argument may continue to flourish, even while we ban the gross gestures and antics that constitute an "assault." In fact, serious argument may flourish even more because the law can in fact recognize the difference between "argument" and the words and symbols that function unmistakably as terms of assault.

During the oral argument in the *Snyder* case the judges were pondering for a while that there might be a distinction between signs that were critical of the war in Iraq and signs that directed epithets at Matthew Snyder and his family. But Justice Alito offered the hypothetical of a grandmother visiting the grave of a grandson who died during the war in Iraq. If she were accosted by protestors condemning the war, could that assault on her be protected by the First Amendment because the assailants mentioned only the political issue of the war? Curiously, the division between liberals and conservatives on the Court did not seem so vividly present as the argument unfolded in this case. Justice Kennedy pointed out that we all have memberships in various groups, religious, ethnic, political, and "any one of those things ...could turn into a public issue and follow a particular person around, making that person the target of ... comments." And so the distinction between political speech and speech targeted to a person would not supply a ground for excusing "outrageous conduct" and protecting it with the First Amendment.

The Court seemed to be veering toward this kind of judgment: that *in the absence of a more personal attack*, denunciations of the war in Iraq or the homosexual life would be regarded rather clearly as political speech, well within the protections of the First Amendment. But the mere publication of an obituary was not enough to convert Matthew Snyder into a "public figure." And even if the local laws marked off restrictions for "time and place," Phelps and his followers did not have a license to turn a family's private grief into a circus of venomous attacks. The Court may be acting then within the grooves of the law that supplanted the *Chaplinsky* case, the law that narrows the wrong to assaulting words directed to particular persons. But in getting there, the Court has had to rediscover many parts of *Chaplinsky* that had fled from its collective memory over the years. The main thing that remains to be rediscovered are those words "which by their very utterance inflict injury." Scalia, who had come so far, still found himself saying that the terms for identifying assaulting speech are "subjective." But it may be only a matter of time until this accomplished student of languages recalls again things he had known long ago: that the words and symbols are not randomly chosen; that we cannot invent a private language; and that the standards that stamp swastikas and burning crosses as symbols of assault are anything but subjective.

Hadley Arkes is the Ney Professor of Jurisprudence at Amherst College. His most recent book is [Constitutional Illusions & Anchoring Truths: The Touchstone of the Natural Law](#) (Cambridge).

Copyright 2010 the [Witherspoon Institute](#). All rights reserved.