SNYDER V. PHELPS: APPLYING THE CONSTITUTION'S HISTORIC PROTECTION OF OFFENSIVE EXPRESSION TO RELIGIOUSLY MOTIVATED SPEECH

INTRODUCTION

Just over one year ago, the United States Supreme Court decided in *Snyder v. Phelps* that the First Amendment protects the right of religious minority groups to express unpopular views on controversial public issues in a manner that most Americans would consider harmful, hateful, and offensive.[1] In rare form, eight Justices from diverging ideological backgrounds united together in reaching a nearly unanimous decision in favor of the religious group's freedom of speech,[2] despite the Court majority's express disagreement with the group's message and the means by which it was communicated.[3] Likewise, as the Supreme Court was considering the issue on appeal, a remarkably diverse group of advocates arose in support of the religious group's constitutional right to freely express its fringe viewpoints without being penalized with millions of dollars in state tort damages.[4]

On one side of the historic dispute was Fred Phelps, a self-described "primitive" Baptist preacher,[5] who has gained notoriety in recent years for using military funerals as a platform to share his radical religious

---

[1] 131 S. Ct. 1207, 1220–21 (2011).

[2] Chief Justice Roberts wrote the majority opinion in *Snyder* and was joined by Justices Scalia, Kennedy, Thomas, Ginsburg, Breyer, Sotomayor, and Kagan. *Id.* at 1212. The lone dissenting opinion was authored by Justice Alito, who would have held that given the facts and circumstances of the case, the First Amendment did not shield the church group's protest speech from tort liability. *Id.* at 1228 (Alito, J., dissenting).

[3] Throughout its opinion, the Court described the church's expression as "hurtful," "fall[ing] short of refined social or political commentary," and a negligible contribution to public discourse. *Id.* at 1217, 1220 (majority opinion). The Fourth Circuit Court of Appeals more aptly criticized the speech as "utterly distasteful," "offensive," "rude," and "repugnant." Snyder v. Phelps, 580 F.3d 206, 222–24, 226 (4th Cir. 2009), *aff'd*, 131 S. Ct. 1207 (2011). Like the Supreme Court and the Fourth Circuit, the author of this Comment does not agree with Westboro Baptist Church's ideology or the way the church advances its sincerely held religious views. The author, however, does recognize the serious nature of the constitutional issues implicated in *Snyder* and the important precedent the Court's decision will set for securing the broad right to free expression for religious-minority groups in years to come.

[4] Groups submitting amicus briefs on behalf of Phelps and Westboro Baptist Church included the American Civil Liberties Union, Foundation for Individual Rights in Education, Liberty Counsel, Reporters Committee for Freedom of the Press, Rutherford Institute, Scholars of First Amendment Law, and the Thomas Jefferson Center for the Protection of Free Expression.

[5] Roger Chapman, *Phelps, Fred*, *in* 2 CULTURE WARS: AN ENCYCLOPEDIA OF ISSUES, VIEWPOINTS, AND VOICES 429, 429 (Roger Chapman ed., 2010).

views.[6] Phelps and members of the Westboro Baptist Church argued that the First Amendment guarantees the unqualified right to publicly express their hateful views on America, homosexuality, the Catholic Church, and a host of other topics.[7] On the other side of the case was Albert Snyder, a sympathetic father of a deceased marine who brought multiple state tort claims against Phelps and his church in 2006, alleging physical, mental, and emotional harm caused by the group's demonstration around the time of his son's funeral.[8]

In the year since *Snyder* was decided, surprisingly little scholarship has been written to reflect on the important consequences of the Court's decision and its clear move contrary to the international trend of regulating and even criminalizing so-called "hate speech."[9] This Comment seeks to fulfill this perceived gap in scholarship by analyzing the outcome of the *Snyder* decision within the context of other historic U.S. Supreme Court cases upholding the broad free speech rights of unpopular minority groups under the First Amendment.

Part I provides a brief overview of American free speech jurisprudence, focusing specifically on the Supreme Court's preservation of the broad First Amendment right to free expression for hateful and disfavored minority groups. Part II surveys various laws and regulations that have been implemented domestically and abroad to suppress hate speech at the expense of individual rights to freedom of belief and

---

[6] According to a website maintained by Westboro Baptist Church, the group has conducted more than 400 protest demonstrations at military funerals since 1991. *About Westboro Baptist Church*, GODHATESFAGS, http://www.godhatesfags.com/wbcinfo/aboutwbc.html (last visited Apr. 6, 2012).

[7] *Snyder*, 131 S. Ct. at 1214, 1216–17, 1220.

[8] *Id.* at 1213–14.

[9] In the last year, the majority of published scholarship reflecting on *Snyder* appears critical of the Supreme Court's decision in favor of the religious group's free speech or, at best, views the case as an afterthought of already well-established First Amendment principles. *See, e.g.*, Dan M. Kahan, *Foreword: Neutral Principles, Motivated Cognition, and Some Problems for Constitutional Law*, 125 HARV. L. REV. 1, 42–43 (2011) (referring to the case as "anticlimactic" and "easy"); Alan Brownstein & Vikram David Amar, *Afterthoughts on* Snyder v. Phelps, 2011 CARDOZO L. REV. DE NOVO 43, 43, http://cardozolawreview.com/content/denovo/Brownstein-Amar_2011_43.pdf (stating that the case "added little to the development of free speech doctrine" and questioning the Supreme Court's role in the resolution of the case); Deana Pollard Sacks, Snyder v. Phelps*: A Slice of the Facts and Half an Opinion*, 2011 CARDOZO L. REV. DE NOVO 64, 66, http://cardozolawreview.com/content/denovo/POLLARD-SACKS_2011_64.pdf (arguing that the Supreme Court "may have sent the wrong message to society about the boundaries of malicious civil misconduct perpetrated by speech"); Jeffrey Shulman, *Epic Considerations: The Speech That the Supreme Court Would Not Hear in* Snyder v. Phelps, 2011 CARDOZO L. REV. DE NOVO 35, 35, http://cardozolawreview.com/content/denovo/Shulman_2011_35.pdf (criticizing the Supreme Court's refusal to consider the Internet "epic" in reaching its conclusion in favor of Phelps).

expression. Finally, Part III concludes with a review of the *Snyder* case and the Supreme Court's analysis upholding the constitutional right to communicate unpopular and offensive religiously motivated speech.

I. IN DEFENSE OF FREE SPEECH: HISTORY OF THE AMERICAN APPROACH

A. The Bedrock of Free Speech: "Freedom for the Thought That We Hate"

The Founders of the United States who penned the Declaration of Independence, the Constitution, and the Bill of Rights envisioned a society where citizens had the right to speak their minds freely without government suppression.[10] In fact, the First Amendment to the U.S. Constitution guarantees this right by declaring, "Congress shall make no law . . . abridging the freedom of speech."[11] Over the years, courts have had numerous occasions to interpret the proper scope of the First Amendment's free speech protection.[12] The Ku Klux Klan, Nazis, civil-rights activists, war protesters, and religious leaders all have sought protection from the judiciary to communicate their unpopular, unpatriotic, and sometimes outright "hateful" messages.[13]

In response, the Supreme Court has stayed true to the principle that "debate on public issues should be uninhibited, robust, and wide-open,"[14] consistently granting equal legal protection to all types of expression—popular or unpopular, patriotic or unpatriotic, and endearing or hateful. Through these difficult cases, the Court has developed a strong, principled precedent for freedom of speech and has maintained the democratic vision of America's Founders that all people are created equal with certain fundamental rights, including the freedom of speech, which human government can neither give nor take away.[15]

---

[10] *See* CRAIG R. SMITH & M. JOEL BOLSTEIN, ALL SPEECH IS CREATED EQUAL 2 (1986). Government protection of free speech, however, did not actually originate in the United States. *See* THOMAS L. TEDFORD, FREEDOM OF SPEECH IN THE UNITED STATES 4–5 (1985) (revealing that governments as early as ancient Athens recognized some form of legally protected freedom of speech).

[11] U.S. CONST. amend. I.

[12] WILLIAM W. VAN ALSTYNE, INTERPRETATIONS OF THE FIRST AMENDMENT 21 (1984) ("[T]he free speech clause of the first amendment has been invoked in literally thousands of cases. In the cases handled by the Supreme Court alone, it has been addressed several hundred times. . . . [T]hese adjudicative refinements of the free speech clause present quite an impressive jurisprudence of free speech in America.").

[13] *See* discussion *infra* Part I.B.

[14] N.Y. Times Co. v. Sullivan, 376 U.S. 254, 270 (1964).

[15] *See* THE DECLARATION OF INDEPENDENCE paras. 1–2 (U.S. 1776) (speaking of equal rights of the American people under the "Laws of Nature and of Nature's God" and of the British government's "destructive" abuses of these rights).

Formed in the fires of political revolution, America has thrived for more than two centuries as a land where people have the right to freely express their viewpoints in a marketplace of ideas.[16] Just four years after the First Amendment's Free Speech Clause was incorporated against the states,[17] Justice Oliver Wendell Holmes opined in a historic dissent, "[I]f there is any principle of the Constitution that more imperatively calls for attachment than any other it is the principle of free thought—not free thought for those who agree with us but *freedom for the thought that we hate*."[18] This ideal has since become the bedrock of the American legal system's commitment to protect and preserve free speech and free expression.

B. The American Approach: "Uninhibited, Robust, and Wide-Open"

Since the early formation of the American judicial system, courts have been bound by the axiom of the First Amendment that the government must not support any law abridging the freedom of speech.[19] During a few regrettable points in history, the United States has ignored this hallmark of democracy, due in large part to fear or greed for political power.[20] In time, however, the "supreme law of the land" has resolved these controversies properly in favor of a liberal allowance for free speech and free expression under the First Amendment. The Supreme Court in *New York Times Co. v. Sullivan* echoed the resounding protection for free speech in the First Amendment by recognizing that there is a "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open."[21]

Although there have been a significant number of First Amendment disputes before the Supreme Court over the past 200 years,[22] the cases featured below especially highlight the great lengths to which the Court has gone in preserving the right to freedom of speech, even guaranteeing that right to some of the most villainous groups in American history.

---

[16] Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) (describing the "free trade in ideas" as a key principle in American constitutional theory).

[17] Gitlow v. New York, 268 U.S. 652, 666 (1925) (extending the First Amendment guarantee of free speech to the states via the Due Process Clause of the Fourteenth Amendment).

[18] United States v. Schwimmer, 279 U.S. 644, 654–55 (1929) (Holmes, J., dissenting) (emphasis added).

[19] U.S. CONST. amend. I.

[20] *See* TEDFORD, *supra* note 10, at 45–52, 68 (recounting the Alien and Sedition Acts of 1798, the Alien Registration Act of 1940, the Internal Security Act of 1950, and the search for "subversion" by Senator Joseph McCarthy during the late 1940s and early 1950s).

[21] 376 U.S. 254, 270 (1964).

[22] VAN ALSTYNE, *supra* note 12, at 21.

1. Free Speech for the Ku Klux Klan

Despite their ill-famed reputation as radical bigots, the Ku Klux Klan's ongoing fight for free expression has in some respects paved the way in preserving free speech for all Americans.[23] For instance, in the 1969 case of *Brandenburg v. Ohio*, the Supreme Court sided with the Klan in a First Amendment challenge to Ohio's syndicalism statute.[24] The law forbade the advocacy of violence as a means to political reform and prohibited the assembly of groups formed to teach or advocate such violence.[25] A local news station had filmed a private rally in which a Klan leader was featured wearing Klan regalia, burning a cross, and giving a speech full of hateful, racist comments to other Klan members.[26] The leader's words openly advocated the use of violence to foster white supremacy.[27]

Instead of upholding the conviction of the Klan leader under the Ohio law, the Court issued a surprising analysis in favor of the free speech rights of the Klan. Drawing on established precedent from similar cases, the Court reasoned,

> [T]he constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.[28]

To pass constitutional muster, the Court explained that the state's speech restriction must distinguish "mere advocacy" of violence from actual "incitement to imminent lawless action."[29] From a purely pragmatic perspective, the twist of fate in favor of the Klan is probably best explained as a knee-jerk reaction by the Court, fearing the possibility that promulgation of similar laws in the future would eventually severely encroach upon the free speech rights of mainstream America.

To this day, the Klan continues to boast in its radical crusade for free speech.[30] Meanwhile, the strict *Brandenburg* test remains the legal

---

[23] Martin Gruberg, *Ku Klux Klan*, *in* 2 ENCYCLOPEDIA OF THE FIRST AMENDMENT 646, 647–48 (John R. Vile et al. eds., 2009).

[24] 395 U.S. 444, 448–49 (1969) (per curiam).

[25] *Id.* at 444–45.

[26] *Id.* at 445–46.

[27] *Id.* at 446–47.

[28] *Id.* at 447.

[29] *Id.* at 448–49.

[30] *The Ku Klux Klan*, KU KLUX KLAN, LLC, http://kukluxklan.bz/ (last visited Apr. 6, 2012) ("Even today when a Klansman speaks, he is exercising [his rights under] the Constitution, keeping strong and immutable the peoples [sic] right to speak and publish

measuring rod in American courts for many controversies concerning free speech. The lesson to be learned from *Brandenburg* is that violent speech or even speech advocating the overthrow of the government is protected by the First Amendment, until such speech is directed to and is likely to produce imminent lawless action.[31]

2. Free Speech for the Nazis

Less than a decade after *Brandenburg*, the Supreme Court arrived at another significant conclusion protecting the free speech rights of a notorious hate group: the National Socialist Party of America, more commonly known as the "Nazis." In *Collin v. Smith*, the Supreme Court secured the rights of uniformed Nazi activists to march, parade, and disseminate hateful propaganda in the Chicago suburb of Skokie, Illinois by declining to hear an appeal of the decision by the Seventh Circuit Court of Appeals that favored the Nazis' right to free expression.[32] The context of the Court's decision is important because of the nearly 70,000 people residing in the Village of Skokie, a substantial number were Jewish Holocaust survivors.[33]

With the aid of the American Civil Liberties Union ("ACLU"), the Nazi group and its leader brought suit against the Village of Skokie, arguing that the local ordinances were unconstitutional violations of the First Amendment.[34] While a skeptical American public closely monitored the proceedings, the ACLU felt the sting of defending the hate group.[35] Most people in America did not seem to view the case as a matter of freedom of speech, but instead as a hate group's abuse of liberty and a government license to inflict harm on others.[36]

---

their ideas. Whether in the public streets or the halls of Congress as long as our voice can be heard, then every citizen may be heard. Silence the Klansman, and America will be silenced, this can only happen at the hands of despotic rulership. Today rights not exercised are often rights denied, our brave and noble politicians figure a right not used is a right un-needed.").

[31] *Brandenburg*, 395 U.S. at 447.

[32] 578 F.2d 1197, 1201–02 (7th Cir. 1978), *cert. denied*, 439 U.S. 916 (1978).

[33] *Id.* at 1199 n.2; *see also* Geoffrey R. Stone, *Remembering the Nazis in Skokie*, HUFFINGTON POST (Apr. 19, 2009, 3:33 PM), http://www.huffingtonpost.com/geoffrey-r-stone/remembering-the-nazis-in_b_188739.html (estimating that about 40,000 of 70,000 Skokie residents were Jewish and approximately 5,000 were Holocaust survivors).

[34] *Collin*, 578 F.2d at 1201; Lee C. Bollinger, Tolerance and the First Amendment 2–3 (1986).

[35] *See* BOLLINGER, *supra* note 34, at 2–3 (describing how 30,000 members abandoned the ACLU, costing the civil liberties organization an estimated half a million dollars in annual revenue).

[36] *Id.*

Aryeh Neier was Executive Director of ACLU at the time of the Skokie controversy.[37] In his book entitled *Defending My Enemy*, Neier detailed ACLU's paradoxical position in the Skokie litigation.[38] When asked how Neier, a Jew, could defend Nazi freedom,[39] Neier explained that the ACLU's protection of free speech for the Nazis was in reality their best strategy to overcome the Nazis' agenda of hate and oppression.[40] According to Neier, "Defending [our] enemy [was] the only way to protect a free society against the enemies of freedom."[41]

Meanwhile, the Village of Skokie argued that the display of the Nazi slogans promoted hatred against persons of Jewish faith or ancestry and that the Constitution does not protect speech that promotes racial or religious hatred.[42] The Village further complained that the marches were meant to intentionally inflict psychic trauma and emotional distress on Jews and Holocaust survivors.[43]

The case was eventually appealed to the Supreme Court; however, the Court refused to disturb the Seventh Circuit's holding that the Skokie ordinances restraining the hate group were unconstitutional.[44] Recognizing that "First Amendment rights are truly precious and fundamental to our national life,"[45] the Seventh Circuit had set aside its natural inclination to sympathize with the Holocaust victims and reluctantly reasoned that the Nazi demonstrations were "within the ambit of the First Amendment."[46]

As it turned out, the Nazis never marched in the Village of Skokie as they had originally planned.[47] Instead, Jewish Defamation League members showed up to express their own views on the Nazi hate regime, with approximately 2,000 spectators there to observe.[48] In hindsight, the outcome of the Skokie controversy represents a fundamental tenet of American free speech jurisprudence: Even the most hateful and unpopular speech should be granted the same legal protection as popular

---

37 ARYEH NEIER, DEFENDING MY ENEMY 1 (1979).

38 *Id.* at 1–4.

39 *Id.* at 4.

40 *Id.* at 1–2.

41 *Id.* at 2.

42 Collin v. Smith, 578 F.2d 1197, 1204–05 (7th Cir. 1978).

43 *Id.* at 1205.

44 *Id.* at 1207, *cert. denied*, 439 U.S. 916 (1978).

45 *Id.* at 1201.

46 *Id.* at 1201–02 (reasoning that the Nazi slogans were not obscenities, fighting words, or libel—three forms of expression which may constitutionally be restricted).

47 NEIER, *supra* note 37, at 51.

48 *Id.*

opinions from society's majority groups.[49] In our free society, hateful and offensive forms of expression should be combated by society's moral voices, not cut off by government-mandated silence.

3. Free Speech for the Unpatriotic

The companion cases of *Texas v. Johnson*[50] and *United States v. Eichman*[51] established that the First Amendment guarantee of freedom of speech extends even to extremely unpatriotic forms of expression, or "hate speech" against the United States.[52]

In *Texas v. Johnson*, the Supreme Court held that burning the American flag during a protest rally was constitutionally protected expression.[53] Near the end of a political protest outside the 1984 Republican National Convention, a protester set fire to an American flag in front of Dallas City Hall while his fellow protesters chanted, "America, the red, white, and blue, we spit on you."[54] While no one was physically injured or threatened with injury, several witnesses testified that the flag burning "seriously offended" them.[55]

The Supreme Court's reasoning in protecting the protester's unpatriotic expression was driven by a "bedrock principle underlying the First Amendment . . . that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable."[56] Ignoring the dissent's view that the American flag's unique position as the symbol of the Nation justifies a government prohibition against flag burning,[57] the majority instead

---

[49] *Collin*, 578 F.2d at 1210 ("The result we have reached is dictated by the fundamental proposition that if these civil rights are to remain vital for all, they must protect not only those society deems acceptable, but also those whose ideas it quite justifiably rejects and despises."); *see also* Stone, *supra* note 33 ("The outcome of the Skokie controversy was one of the truly great victories for the First Amendment in American history. It proved that the rule of law must and can prevail. Because of our profound commitment to the principle of free expression even in the excruciatingly painful circumstances of Skokie more than thirty years ago, we remain today the international symbol of free speech.").

[50] 491 U.S. 397 (1989).

[51] 496 U.S. 310 (1990).

[52] *Id.* at 319; *Johnson*, 491 U.S. at 420.

[53] 491 U.S. at 399.

[54] *Id.* (internal quotation marks omitted).

[55] *Id.*

[56] *Id.* at 414.

[57] *Id.* at 422 (Rehnquist, J., dissenting).

emphasized that education and more speech would be the proper tools in combating the evil of flag burning.[58]

Congress responded to the Supreme Court's holding in *Johnson* by passing the 1989 Flag Protection Act.[59] One year later, the Court in *United States v. Eichman* was once again faced with the question of whether burning the American flag was a protected form of expression under the First Amendment.[60] The Court rejected the government's argument that flag burning was outside the scope of the First Amendment.[61] Finding instead that the government's interest in defending the Flag Protection Act was "related to the suppression of free expression,"[62] the Court struck down the Flag Protection Act as unconstitutional.[63]

Notably, in both *Johnson* and *Eichman*, the Supreme Court recognized that while unpatriotic speech may be offensive or hurtful to most people in society, the speech is nevertheless entitled to protection from government suppression under the Constitution.[64]

4. Free Speech for Racists

In 1992, the Supreme Court heard yet another difficult case involving the proper scope of the constitutional right to free speech and free expression. In *R.A.V. v. City of St. Paul*, a unanimous Court upheld

---

[58] *Id.* at 419 (majority opinion) ("'If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence.'" (quoting *Whitney v. California*, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring))).

[59] Flag Protection Act of 1989, Pub. L. No. 101-131, 103 Stat. 777 (codified at 18 U.S.C. § 700 (2006)) (prohibiting the conduct of anyone who "knowingly mutilates, defaces, physically defiles, burns, maintains on the floor or ground, or tramples upon any flag of the United States").

[60] 496 U.S. 310, 312 (1990) ("[W]e consider whether appellees' prosecution for burning a United States flag in violation of the Flag Protection Act of 1989 is consistent with the First Amendment.").

[61] *Id.* at 318.

[62] *Id.* at 314 (internal quotation marks omitted).

[63] *Id.* at 312 (affirming the district court's holding that the Flag Protection Act was unconstitutional).

[64] *See id.* at 318 ("We are aware that desecration of the flag is deeply offensive to many."); Texas v. Johnson, 491 U.S. 397, 399, 420 (1990) (noting that several witnesses were "seriously offended" by the flag burning, yet holding that the expression itself was constitutional).

the free speech rights of racist bigots,[65] further solidifying the "uninhibited, robust, and wide-open"[66] American approach to free speech.

The City of St. Paul had enacted the Bias-Motivated Crime Ordinance, making it a misdemeanor to display a symbol on public or private property, "which one knows or has reasonable grounds to know arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender."[67] A young man was charged under the St. Paul ordinance for burning a cross inside the fenced yard of a neighboring African-American family's lawn.[68]

The Minnesota Supreme Court upheld the defendant's conviction, reasoning that the ordinance was limited to prohibiting "fighting words" and was therefore a valid constitutional regulation of expression.[69] The court further concluded that "the ordinance was not impermissibly content based" because it was "a narrowly tailored means toward accomplishing the compelling governmental interest in protecting the community against bias-motivated threats to public safety and order."[70]

The U.S. Supreme Court reversed the Minnesota Supreme Court's decision on appeal, holding the St. Paul ordinance was facially invalid under the First Amendment.[71] The Court reasoned that the ordinance was unconstitutional because it imposed special prohibitions on speakers who express views on disfavored subjects, such as "race, color, creed, religion or gender."[72] In other words, the ordinance unconstitutionally advanced actual viewpoint discrimination.[73] The Court rejected the argument that the ordinance's content discrimination was justified as a narrowly tailored means to serve a compelling state interest in protecting the basic human rights of groups historically discriminated against, and instead, the Court maintained that other adequate, content-neutral alternatives could have been used.[74]

---

[65] 505 U.S. 377, 381 (1992) ("[W]e nonetheless conclude that the ordinance is facially unconstitutional in that it prohibits otherwise permitted speech solely on the basis of the subjects the speech addresses.").

[66] N.Y. Times Co. v. Sullivan, 376 U.S. 254, 270 (1964).

[67] *R.A.V.*, 505 U.S. at 380.

[68] *Id.* at 379–80.

[69] *Id.* at 380–81.

[70] *Id.* at 381 (internal quotation marks omitted).

[71] *Id.* at 391.

[72] *Id.*

[73] *Id.* at 391 ("In its practical operation, moreover, the ordinance goes even beyond mere content discrimination, to actual viewpoint discrimination.").

[74] *Id.* at 395–96 ("St. Paul has sufficient means at its disposal to prevent such behavior without adding the First Amendment to the fire.").

Like other historic cases where the Supreme Court chose to uphold the free speech rights of minority hate groups, *R.A.V.* recognizes that although the act of cross burning may be perceived as harmful and offensive by society, hate groups are nevertheless equally entitled to express their views under the broad free speech protection of the First Amendment.[75]

C. Narrowly Tailored Exceptions

After an overview of the landmark cases featuring the "uninhibited, robust, and wide-open" American approach to free speech, one may be under the impression that the United States lacks any legal restrictions on speech. This is certainly not the case. Courts have excluded various forms of speech from First Amendment protection when they 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."[76] Even if speech is of adequate social value, reasonable time, place, and manner restrictions on speech are appropriate,[77] as long as the restrictions are content-neutral, "narrowly tailored" to serve a compelling governmental interest, and "leave open ample alternative channels for communication."[78] The government must, however, avoid limiting speech based solely on its content or the viewpoint of the speaker.[79]

The following discussion outlines the historic cases that have birthed the narrowly tailored exceptions to the otherwise broad free speech protection of the First Amendment.

1. Fighting Words

In *Chaplinsky v. New Hampshire*, the Supreme Court upheld the conviction of a Jehovah's Witness who had been charged with breaching the peace in violation of the following public law:

> No person shall address any offensive, derisive or annoying word to any other person who is lawfully in any street or other public place, nor call him by any offensive or derisive name, nor make any noise or

---

[75] *Id.* at 396 (labeling the cross burning "reprehensible" yet entitled to protection under the First Amendment).

[76] Chaplinsky v. New Hampshire, 315 U.S. 568, 571–72 (1942).

[77] Ward v. Rock Against Racism, 491 U.S. 781, 803 (1989) (clarifying the legal standard applicable to time, place, and manner restrictions on speech).

[78] *Id.* at 791 (quoting *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 (1984)) (internal quotation marks omitted).

[79] *R.A.V.*, 505 U.S. at 391.

> exclamation in his presence and hearing *with intent to deride, offend or annoy him* . . . .[80]

The appellant, a Jehovah's Witness, was convicted for causing a street riot after distributing unwelcome religious literature on a Saturday afternoon on a busy city street.[81] In the Court's opinion, the Appellant's use of threatening "fighting words" directed to law enforcement justified his conviction, given the context.[82] In its analysis, the Court was careful to qualify the meaning of the term "offensive" in the statute as "[s]uch words, as ordinary men know, are likely to cause a fight."[83] The precise meaning of the term supported the ultimate purpose of the statute, which was to prevent breaching the peace[84]—not to prevent hurting people's feelings.

Fifty years later, in *R.A.V. v. City of St. Paul*, the Supreme Court qualified its holding in *Chaplinsky*: "[T]he reason why fighting words are categorically excluded from the protection of the First Amendment is not that their content communicates any particular idea, but that their content embodies a particularly intolerable (and socially unnecessary) *mode* of expressing *whatever* idea the speaker wishes to convey."[85]

Thus, in cases implicating the "fighting words" doctrine, the focus of the analysis is not on whether the particular *content* is emotionally harmful or offensive, but rather on whether the *mode* of communicating the particular idea creates an impermissible safety concern to the public.

2. Defamatory Falsehoods

Defamatory falsehoods are another common exception to the broad free speech protection of the First Amendment. In *New York Times Co. v. Sullivan*, perhaps the most famous free speech case in U.S. history, the Supreme Court held that constitutional protections for speech and press require

> a federal rule that prohibits [an offended] public official from recovering damages for a defamatory falsehood relating to his official conduct unless [the public official] proves that the statement was made with "actual malice"—that is, with knowledge that [the

---

[80] 315 U.S. at 569 (emphasis added).

[81] *Id.* at 569–70.

[82] *Id.* at 574 ("Nor can we say that [the statute] . . . substantially or unreasonably impinges upon the privilege of free speech. . . . [T]he appellations . . . are epithets likely to provoke the average person to retaliation, and thereby cause a breach of the peace.").

[83] *Id.* at 573 (internal quotation marks omitted).

[84] *Id.* ("Derisive and annoying words can be taken as coming within the purview of the statute as heretofore interpreted only when they have this characteristic of plainly tending to excite the addressee to a breach of the peace." (internal quotation marks omitted)).

[85] 505 U.S. 377, 393 (1992).

> statement] was false or with reckless disregard of whether it was false or not.[86]

In *Sullivan*, the New York Times had carried a full-page advertisement soliciting funds to support the legal defense of Martin Luther King, Jr.[87] The sponsors of the ad later stipulated that some of the ad's assertions were inaccurate portrayals of the police's activities in Montgomery, Alabama.[88] Sullivan, one of the elected police commissioners in Montgomery, was awarded $500,000 at trial after suing the New York Times and the ad's sponsors under Alabama defamation law.[89] Recognizing the "importance of the constitutional issues involved,"[90] the Supreme Court heard the *Sullivan* case to resolve questions regarding the proper balance between the protection of free expression under the First Amendment and legitimate claims for reputational injury caused by false and defamatory statements.[91]

The *Sullivan* Court imposed the strict, "actual malice" standard because of the weighty constitutional "safeguards for freedom of speech and of the press."[92] The *Sullivan* decision emphasizes that any exception to the "uninhibited, robust, and wide-open" First Amendment protection for free speech must be strict and narrowly tailored.

3. Obscenities

Legally obscene speech has long been excluded from First Amendment protection.[93] In *Miller v. California*, the Supreme Court issued a three-prong analysis to determine whether a particular form of expression qualifies as legally obscene.[94] Under the Court's narrow, three-part test, legally obscene expression must (1) appeal to the average person's prurient (shameful, morbid) interest in sex; (2) depict sexual conduct in a "patently offensive way" as defined by community standards; and (3) "taken as a whole, lack[] serious literary, artistic, political, or scientific value."[95]

---

[86] 376 U.S. 254, 279–80 (1964).

[87] *Id.* at 256–57.

[88] *Id.* at 258 ("It is uncontroverted that some of the statements contained in the two paragraphs were not accurate descriptions of events which occurred in Montgomery.").

[89] *Id.* at 256.

[90] *Id.* at 264.

[91] *Id.* at 264–65.

[92] *Id.* at 264, 283.

[93] *See*, *e.g.*, Roth v. United States, 354 U.S. 476, 483 (1957). *See generally* Rosen v. United States, 161 U.S. 29 (1896).

[94] 413 U.S. 15, 24 (1973) (modifying the Supreme Court's previous obscenity test set forth in *Roth*).

[95] *Id.*

Remarkably, *Miller* teaches that even when evaluating certain low-utility forms of expression such as pornography,[96] the Supreme Court has refused to grant the federal government a great deal of power in regulating speech.[97] On the contrary, the *Miller* Court praised the historic value of the First Amendment's broad free speech protection[98] and therefore granted states the power to control legally obscene speech at the local level.[99]

II. THREATS TO FREE SPEECH: CAMPUS SPEECH CODES AND THE INTERNATIONAL HUMAN RIGHTS MOVEMENT

In its unwavering commitment to free speech, the United States has distinguished itself from nearly every other government in the world, including some of America's closest political allies.[100] Western democracies such as Australia, Canada, South Africa, and the United Kingdom all have enacted legislation or signed international conventions forbidding so-called "hate speech."[101] Likewise, global human rights declarations have limited individual freedom of expression by regulating speech that may be deemed harmful or offensive to others.[102] Indeed, one global human rights organization has reported, "The United States stands virtually alone in having no valid statutes penalizing expression that is offensive or insulting on such grounds as race, religion or ethnicity."[103] Before analyzing these international speech-regulating trends, however, this Comment takes pause to consider an emerging threat to free speech within America's own borders: speech codes at public colleges and universities.

---

[96] *Id.* at 34–35 (explaining that the "commercial exploitation of obscene material" lacks the "serious literary, artistic, political, or scientific ideas" to equate with expression that facilitates the "free and robust exchange of ideas and political debate").

[97] *Id.* at 30.

[98] *Id.* at 20 (citing *Roth*, 354 U.S. 476 (1957)).

[99] *Id.* at 25.

[100] Adam Liptak, *Outside U.S., Hate Speech Can Be Costly: Rejecting the Sweep of the First Amendment*, N.Y. TIMES, June 12, 2008, at A1 ("The First Amendment really does distinguish the U.S. . . . from the rest of the Western world." (internal quotation marks omitted)).

[101] *Id.* ("Canada, England, France, Germany, the Netherlands, South Africa, Australia and India all have laws or have signed international conventions banning hate speech. Israel and France forbid the sale of Nazi items like swastikas and flags. It is a crime to deny the Holocaust in Canada, Germany and France.").

[102] *See* discussion *infra* Part II.B.1.

[103] SAMUEL WALKER, HATE SPEECH: THE HISTORY OF AN AMERICAN CONTROVERSY 4 (1994) (quoting *"Hate Speech" and Freedom of Expression: A Human Rights Watch Policy Paper* (Human Rights Watch/The Fund for Free Expression, New York, N.Y.), Mar. 1992, at 7) (internal quotation marks omitted).

A. Campus Hate Speech Codes

Speech codes at public colleges and universities have presented the most visible attack on the free speech rights of Americans in recent decades. Not long after the enormous legal victory for free speech in *Collin* in 1978,[104] campus speech codes regulating discriminatory hate speech began cropping up throughout the United States.[105] According to one estimate, as many as sixty percent of all colleges and universities by 1990 had adopted some school-wide prohibition of hate speech and another eleven percent were considering similar measures.[106]

Generally, speech codes were argued as justifiable on three grounds: "educational purposes, the limited protection provided certain kinds of speech, and the rights of the victim."[107] Proponents of outlawing hate speech in public schools offered a novel civil rights argument for courts to consider: Is First Amendment protection of free speech outweighed by the "equal protection" provision of the Fourteenth Amendment?[108] Pitting the Constitution against itself (the First Amendment versus the Fourteenth Amendment) was quite a clever strategy because the Supreme Court's reasoning in past speech cases had emphasized the weight to be given to the Constitution over inferior laws.

Notwithstanding these arguments, campus hate speech codes have not fared well in the federal courts.[109] The courts' refusal to validate campus speech codes reaffirms—at least for now—America's national commitment to generally unrestricted free speech.[110]

B. The International Human Rights Movement

The greatest opposition to the "uninhibited, robust, and wide-open" American approach to free speech has not come from within. While America has upheld the broad free speech rights of its citizens (even in

---

[104] *See* discussion *supra* Part I.B.2.

[105] WALKER, *supra* note 103, at 127.

[106] *Id.* Although not every university discrimination code that was reported contained a hate speech provision, many did. *Id.*

[107] Alex Aichinger, *Campus Speech Codes*, *in* 1 ENCYCLOPEDIA OF THE FIRST AMENDMENT, *supra* note 23, at 237, 237.

[108] *See* WALKER, *supra* note 103, at 128.

[109] *See, e.g.*, Dambrot v. Cent. Mich. Univ., 55 F.3d 1177, 1185 (6th Cir. 1995) (holding university discrimination-harassment policy was unconstitutionally vague and overbroad and not a valid prohibition of fighting words); UWM Post, Inc. v. Bd. of Regents of Univ. of Wis. Sys., 774 F. Supp. 1163, 1181 (E.D. Wis. 1991) (holding university system's rule was overbroad and unduly vague and did not meet requirements of "fighting words" doctrine); Doe v. Univ. of Mich., 721 F. Supp. 852, 867 (E.D. Mich. 1989) (holding university policy was overbroad and "so vague that its enforcement would violate the due process clause"); *see also* WALKER, *supra* note 103, at 128–29.

[110] WALKER, *supra* note 103, at 129.

cases of unpopular and hateful forms of expression, as described above), the international community, including many Western democracies, has taken opposite measures to criminalize the expression of ideas that may be deemed harmful or offensive to others.

Commentators have speculated as to the various reasons why America and the international community have diverged on this issue. Some say that the U.S. approach to free speech is based on an "individualistic view of the world."[111] Others have argued that Americans generally fear "allowing the government to decide what speech is acceptable."[112] History also offers a potential explanation. Countries like Israel, Austria, Germany, and South Africa with histories of horrible oppression may feel that the best way to remedy human rights violations is to limit the ability of citizens to harm one another by legally restricting free expression.[113] Inspired by these regulations that were intended to promote human rights, some scholars in the United States have argued that America should likewise follow the apparent international trend of outlawing hate speech.[114] As discussed in detail in Part III of this Comment, an overwhelming majority of the Supreme Court rejected this approach outright in the recent case of *Snyder v. Phelps*.[115]

The following examples illustrate a number of these international laws proscribing hate speech akin to what the Supreme Court recently declared as protected forms of First Amendment expression.

1. United Nations

The United Nations ("UN") is an international organization of nearly 200 member states that are expressly dedicated to the preservation of human rights.[116] The Universal Declaration of Human Rights ("UDHR")[117] and the International Covenant on Civil and

---

[111] Liptak, *supra* note 100.

[112] *Id.*

[113] *Id.*

[114] *See, e.g.*, Jeremy Waldron, *Dignity and Defamation: The Visibility of Hate*, 123 HARV. L. REV. 1596, 1599–1600 (2010); Thomas J. Webb, *Verbal Poison—Criminalizing Hate Speech: A Comparative Analysis and a Proposal for the American System*, 50 WASHBURN L.J. 445, 446 (2011).

[115] *See* discussion *infra* Part III.

[116] U.N. Charter pmbl.; Press Release, Dep't of Pub. Info., U.N. Member States, U.N. Press Release ORG/1469 (July 3, 2006).

[117] Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948).

Political Rights ("ICCPR")[118] are two of the UN's most historic codifications of these efforts.[119]

Although the UDHR and the ICCPR laudably defend certain civil rights of mankind, both restrict the rights of those who wish to freely express themselves through "offensive" expression. While Article 19 of the UDHR declares that "[e]veryone has the right to freedom of opinion and expression,"[120] Article 29 of the same declaration warns that these rights may be limited at the government's discretion on the basis of "morality, public order and the general welfare in a democratic society."[121]

The ICCPR similarly flounders in unequivocally guaranteeing free expression. Articles 18 and 19 of the ICCPR praise freedom of thought and expression,[122] but Article 20 is quick to qualify this right: "Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law."[123] A UN committee has since interpreted Article 20 to be a mandate on signatory states to adopt hate speech legislation.[124] Several UN member states, including the United States, have placed reservations on Article 20 of the ICCPR.[125] When the United States ratified the ICCPR in 1992, it refused to be bound by any international provision that violated the U.S. Constitution's First Amendment guarantee of free expression.[126]

So, although the international community may argue that these conventions are sufficient safeguards of individual freedom, the First Amendment to the U.S. Constitution guarantees without reservation something much greater: "Congress shall make *no* law . . . abridging the freedom of speech."[127]

---

[118] International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), U.N. GAOR, 21st Sess., Supp. No. 16, U.N. Doc. A/6316 (Dec. 19, 1966).

[119] *See generally* WALKER, *supra* note 103, at 87 (noting that between World War II and the 1980s, the UN was responsible for producing twenty-one documents geared toward protecting human rights).

[120] Universal Declaration of Human Rights, *supra* note 117, art. 19.

[121] *Id.* art. 29.

[122] International Covenant on Civil and Political Rights, *supra* note 118, arts. 18, 19.

[123] *Id.* art. 20.

[124] WALKER, *supra* note 103, at 89.

[125] *Id.*

[126] *Id.*

[127] U.S. CONST. amend. I (emphasis added).

2. United Kingdom

In Great Britain, hate speech is a criminal offense under the country's 1986 Public Order Act.[128] The Act makes it illegal to stir up racial hatred by using "threatening, abusive or insulting words or behaviour" or by "display[ing] any written material which is threatening, abusive or insulting."[129] In addition to race, the Act was amended to prohibit offensive expression based on religion[130] and sexual orientation.[131]

The potential dangerous effects of this law were illustrated in April 2010 when a forty-two-year-old street preacher in the U.K. was charged for violating Section 5 of the Public Order Act after talking with shoppers on a public street about why he believed homosexuality was a sin based on Scripture.[132] According to a BBC news report, the preacher was confronted by a community support officer of the government who was admittedly offended by the preacher's expression due to the officer's own sexual orientation:

> "He told me he was homosexual," Mr[.] Mcalpine said.
>
> "I said 'the Bible says homosexuality is a sin'. He said 'I'm offended by that and I'm also the LGBT liaison officer within the police'.
>
> "I said 'it is still a sin'."
>
> He said three uniformed police officers then appeared and accused him of using homophobic language.
>
> "I'm not homophobic, I don't hate gays," Mr[.] Mcalpine said. "Then they said it is against the law to say homosexuality is a sin. I was arrested. It's crazy isn't it?"[133]

Within weeks, charges against the preacher were dropped after public outcry at the events.[134] A spokesman for the Christian Institute that supported the preacher's legal defense commented on the arrest: "Dale is an ordinary, everyday Christian with traditional views about sexual ethics. Some people will agree with him, others will disagree. But

---

[128] Public Order Act, 1986, c. 64 (Gr. Brit.). One can infer from the title of the Public Order Act that the British approach to limiting free expression resembles the UN's position in the ICCPR that governments may restrict speech when deemed necessary to preserve the "public order."

[129] *Id.* § 18.

[130] Racial and Religious Hatred Act, 2006, c. 1 (Eng. & Wales).

[131] Criminal Justice and Immigration Act, 2008, c. 4, § 74, sch. 16 (Gr. Brit.).

[132] *Charge Against 'Gay Sin' Preacher Dropped*, BBC (May 17, 2010, 15:49 UK), http://news.bbc.co.uk/2/hi/uk_news/england/cumbria/8687395.stm; *see also Christian Preacher on Hooligan Charge After Saying He Believes That Homosexuality Is a Sin*, DAILY MAIL (May 1, 2010, 11:59 PM), http://www.dailymail.co.uk/news/article-1270364/Christian-preacher-hooligan-charge-saying-believes-homosexuality-sin.html.

[133] *Charge Against 'Gay Sin' Preacher Dropped*, *supra* note 132.

[134] *Id.*

it's not for the police to arrest someone just because others may disagree with what is said."[135]

Even a veteran gay-rights campaigner in the U.K. criticized the government's actions and urged the police to adopt new regulations for similar encounters in the future: "Although I disagree with Dale Mcalpine and support protests against his homophobic views, he should not have been arrested and charged. Criminalisation is a step too far."[136] Months later, British police admitted in an out-of-court settlement that the preacher's detention was a wrongful arrest, unlawful imprisonment, and breach of human rights.[137] Nevertheless, the Christian Institute is active in petitioning the U.K. government for an amendment to the Public Order Act to prevent similar instances in the future.[138]

3. Canada

Canada's divergence from the U.S. approach of preserving broad free speech and free expression rights began as early as the 1960s when legislation was adopted in Canada at the federal and provincial levels outlawing hate speech.[139] The national bans are now promulgated by the Canadian Constitution,[140] the Criminal Code of Canada,[141] and the Canadian Human Rights Act.[142] These staunch prohibitions of hate speech have consistently withstood legal challenges before the Canadian Supreme Court, which has justified such laws as necessary measures to protect human rights.[143]

In this purported attempt to protect human rights, Canadian hate speech laws have actually weakened revered political freedoms, such as

---

[135] *Christian Preacher on Hooligan Charge After Saying He Believes That Homosexuality is a Sin*, *supra* note 132 (internal quotation marks omitted).

[136] *Charge Against 'Gay Sin' Preacher Dropped*, *supra* note 132 (internal quotation marks omitted).

[137] Brian Hutt, Second 'Homosexuality is a Sin' Preacher Awarded Damages for Wrongful Arrest, CHRISTIAN POST (Dec. 20, 2010, 11:13 AM), http://www.christianpost.com/news/second-homosexuality-is-a-sin-preacher-awarded-damages-for-wrongful-arrest-48137/.

[138] *Id.*

[139] See Kathleen Mahoney, *Hate Speech, Equality, and the State of Canadian Law*, 44 WAKE FOREST L. REV. 321, 326 (2009).

[140] Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act, 1982, c. 11 (U.K.). The fundamental freedoms of Article 2 are restrained by Article 1's "reasonable limits prescribed by law."

[141] Criminal Code, R.S.C. 1985, c. C-46, §§ 318–320 (Can.) (outlawing "hate propaganda").

[142] Canadian Human Rights Act, R.S.C. 1985, c. H-6, § 13 (proscribing "hate messages").

[143] Mahoney, *supra* note 139, at 328.

freedom of speech, press, and religion. For instance, in 2010, the University of Ottawa made headlines when it sent a threatening letter to political pundit, Ann Coulter, who had been invited to speak at the Canadian university by a conservative student group.[144] The letter urged Ms. Coulter to avoid engaging in political discussion that could be viewed as "[p]romoting hatred against any identifiable group."[145] The letter warned, "[Such speech] would not only be considered inappropriate, but could in fact lead to criminal charges."[146]

Unfortunately, Ms. Coulter is not the only one to fall prey to Canada's restrictive speech regulations. Other recent victims include a youth pastor who claimed homosexuality is unbiblical[147] and a journalist who republished a cartoon depicting the prophet Mohammad.[148]

These examples illustrate that Canada's pride in "protecting" human rights through speech legislation is unfounded. The true byproduct of such laws is the suppression of minority viewpoints.

4. Sweden

One final illustration of this apparent international trend can be seen in Sweden's treatment of a Christian pastor who was jailed in 2004 for preaching a sermon from his church pulpit regarding a biblical perspective on homosexuality.[149] Pastor Åke Green was charged under a law enacted by the Swedish Parliament that made it a criminal offense to threaten or use words of "disrespect" against people identifying as homosexual.[150] Under the law, one could be imprisoned up to two years for ordinary violations of the statute and up to four years for aggravated violations (those deemed "especially offensive").[151]

---

144 Protest Forces Coulter to Skip College Speech, NEWSDAY, Mar. 25, 2010, at A13.

145 *Id.*

146 *Id.*

147 Michael Brendan Dougherty, *Canada's Speech Impediment: Our Northern Neighbors Learn the Limits of Free Expression*, AM. CONSERVATIVE, June 30, 2008, at 16, 16.

148 *Id.* at 17.

149 Dale Hurd, *Swedish Pastor Sentenced for 'Hate Speech*,*'* CBN (Sept. 10, 2004), http://www.akegreen.org/Links/L14/L14.html.

150 Nytt Juridiskt Arkiv [NJA] [Supreme Court] 2005-11-29 p. 805 B1050-05 (Swed.).

151 BROTTSBALKEN [BrB] [CRIMINAL CODE] 16:8 (Swed.), *available at* http://www.sweden.gov.se/content/1/c6/02/77/77/cb79a8a3.pdf. In January of 2003, the Swedish Parliament passed an amendment to the country's hate speech law to include incitement against homosexuals as a group as a criminal offense and to provide harsher punishments for aggravated violations. Proposition [Prop.] 2001/2002:59 Hets mot folkgrupp, m.m. [government bill] (Swed.). As the amendment was being considered by the legislature, an article was published in *Christianity Today* predicting what would one day be the reality of the Åke Green case. *See* Tomas Dixon, *'Hate Speech' Law Could Chill*

Pastor Green was convicted of the offense at the trial court and appealed his case all the way to the Swedish Supreme Court.[152] There, Pastor Green was finally acquitted of the charge after the court reasoned that, while Pastor Green's preaching constituted criminal hate speech under Swedish law, in all likelihood, the European Court of Human Rights would eventually overturn the conviction.[153] As of the time of this writing, although Pastor Green's conviction for preaching his sermon on homosexuality was overturned, the same law that Pastor Green was charged under still remains in effect.

III. *SNYDER V. PHELPS*: THE LATEST AMERICAN FREE SPEECH SHOWDOWN

In *Snyder v. Phelps*, the U.S. Supreme Court recently held that a radical preacher and his followers had the constitutional right to express anti-American, anti-Catholic, and anti-homosexual "hate speech" near the funeral of a deceased marine.[154] Similar to historic Supreme Court cases ruling in favor of the constitutional rights of the Ku Klux Klan, the Nazis, and other notorious hate groups, the Supreme Court reasoned in *Snyder* that the religious group's offensive expression was fully protected by the First Amendment[155]—contrary to the apparent global trend of regulating or silencing such unpopular forms of expression.[156]

This Part begins with a summary of the relevant facts in the *Snyder* case, followed by the Supreme Court's legal analysis favoring the constitutional right of religious minority groups to communicate unpopular and offensive "hate speech."

A. Factual Summary of Snyder v. Phelps

Fred Phelps, the named defendant in *Snyder v. Phelps*, is the founding pastor of Westboro Baptist Church in Topeka, Kansas.[157] Phelps and his small, radical congregation have gained notoriety over

---

Sermons, CHRISTIANITY TODAY (Aug. 5, 2002, 12:00 AM), http://www.christianitytoday.com/ct/2002/august5/15.22.html.

[152] *Swedish Anti-Gay Pastor Acquitted*, BBC (Nov. 29, 2005, 9:49 GMT), http://news.bbc.co.uk/2/hi/europe/4477502.stm.

[153] Nytt Juridiskt Arkiv [NJA] [Supreme Court] 2005-11-29 p.805 B1050-05 (Swed.) ("Under these circumstances, it is likely that the European Court, in a determination of the restriction of Åke Green's right to preach his Biblically-based opinion that a judgment of conviction would constitute, would find that this restriction is not proportionate, and would therefore be a violation of the European Convention on Human Rights."); *see also Sweden Overturns Hate-Speech Conviction*, UPI.COM (Feb. 12, 2005, 7:54 AM), http://www.upi.com/Top_News/2005/02/12/Sweden-overturns-hate-speech-conviction/UPI-19621108212841/.

[154] 131 S. Ct. 1207, 1217, 1219, 1220 (2011).

[155] *Id.* at 1220.

[156] *See* discussion *supra* Part II.B.

[157] *Snyder*, 131 S. Ct. at 1213.

the last fifty years for their views espousing God's hatred and punishment of the United States for its tolerant stance toward homosexuality.[158] Most recently, Phelps and his Westboro congregation have taken to traveling across the United States to picket memorial services of American soldiers who have lost their lives serving in Iraq and Afghanistan.[159] In addition to these frequent national protests, Westboro also maintains several Internet web pages designed to publicly broadcast their protest activities and to educate the public regarding their views on corruption in the United States and abroad.[160]

In early 2006, Phelps and several of his family members who attend Westboro Baptist Church arrived in Westminster, Maryland to picket the funeral of deceased marine, Matthew Snyder, who died in the line of duty serving in Iraq.[161] The group's purpose in picketing the funeral was to spread their sincere religious belief that "God hates and punishes the United States for its tolerance of homosexuality, particularly in America's military."[162] Both parties stipulated that during the group's protest outside of the church where Snyder's funeral was held, Phelps and his fellow church members were supervised by local police at all times, stayed approximately 1,000 feet from the church building, and complied with all other relevant local ordinances.[163]

Despite the lawful nature of their protest, the religious group showed no discretion in expressing their hateful views toward America, homosexuality, and the Catholic Church. They displayed signs with generalized messages like "God Hates the USA," "Pope in Hell," and "God Hates Fags," as well as several signs arguably more closely directed toward the deceased marine such as "You're Going to Hell," "God Hates You," and even "Thank God for Dead Soldiers."[164]

---

158 *Id.*

159 *Id.*

160 *See, e.g.*, GODHATESFAGS, http://www.godhatesfags.com (last visited Apr. 6, 2012); GODHATESTHEWORLD, http://www.godhatestheworld.com (last visited Apr. 6, 2012); JEWSKILLEDJESUS, http://www.jewskilledjesus.com (last visited Apr. 6, 2012); PRIESTSRAPEBOYS, http://www.priestsrapeboys.com (last visited Apr. 6, 2012); SIGNMOVIES, http://www.signmovies.net (last visited Apr. 6, 2012); THEBEASTOBAMA, http://www.beastobama.com (last visited Apr. 6, 2012); WBC BLOGS, http://blogs.sparenot.com/index.php?blog=1 (last visited Apr. 6, 2012).

161 *Snyder*, 131 S. Ct. at 1213.

162 *Id.*

163 *Id.*; Snyder v. Phelps, 533 F. Supp. 2d 567, 572 (D. Md. 2008).

164 *Snyder*, 131 S. Ct. at 1213. After the funeral, when the Westboro group returned home to Kansas, one of the church members wrote and published on the church's infamous website a self-styled written "epic," which recounted the story of the group's protest at Snyder's funeral, interspersed among lengthy Bible quotations. *Id.* at 1214 n.1. Although the epic was at issue at the trial court and the Fourth Circuit, Snyder did not present

Albert Snyder, the father of deceased marine Matthew Snyder, sued Phelps and Westboro Baptist Church under several Maryland state tort theories, including invasion of privacy by intrusion upon seclusion, intentional infliction of emotional distress, and civil conspiracy.[165] Although Mr. Snyder did not physically see Westboro's picket signs at his son's funeral, he claimed that viewing the protest covered on the news later that evening caused him severe and permanent physical and emotional injury.[166] Mr. Snyder, who appeared visibly shaken and distressed throughout trial, testified that he had "one chance to bury [his] son" and that Westboro's protest at the funeral "took the dignity away from it."[167] Describing the emotional injury allegedly resulting from the church's protest, Mr. Snyder stated, "[S]omebody 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."[168]

A jury initially awarded Mr. Snyder a total of $10.9 million in compensatory and punitive damages on the three tort claims.[169] In its post-trial opinion, the district court remitted the total damages to $5 million but upheld the jury's verdict on the grounds that Maryland's interest in protecting its citizens from tortious conduct outweighed Westboro Baptist Church's First Amendment rights to freedom of religion and freedom of speech.[170]

Phelps and his church appealed the trial court's ruling to the Fourth Circuit, arguing that their picket signs at the funeral and Internet "epic" posted on the church's website were forms of speech fully protected by the First Amendment.[171] The Fourth Circuit reversed the decision of the district court in holding that the funeral demonstration and Internet

---

arguments before the Supreme Court regarding the epic, so it was not a factor in the Court's ultimate analysis of the case. *Id.*

[165] *Id.* at 1214. Albert Snyder's original suit also included tort claims for defamation and publicity given to private life. The district court awarded Phelps and his church summary judgment on the defamation claim because their speech was "essentially . . . religious opinion" and "would not realistically tend to expose Snyder to public hatred or scorn." *Snyder*, 533 F. Supp. 2d at 572–73. The "publicity given to private life" claim was also dismissed because the defendants had not made public any private information. *Id.*

[166] *Snyder*, 131 S. Ct. at 1213–14. Expert witnesses for Mr. Snyder testified at trial that, among other things, Mr. Snyder's injuries included the worsening of his diabetes and severe depression, which prevented him from undergoing a normal grieving process. *Id.* at 1214.

[167] *Snyder*, 533 F. Supp. 2d at 589.

[168] *Id.*

[169] *Snyder*, 131 S. Ct. at 1214.

[170] *Snyder*, 533 F. Supp. 2d at 581, 593–95, 597.

[171] *Snyder*, 131 S. Ct. at 1214.

"epic" were immune from tort liability under the First Amendment because the group's expression related to their views on matters of public concern.[172] The Supreme Court granted certiorari to resolve the dispute and ultimately upheld the Fourth Circuit's decision to relieve Phelps and his church of all liability arising from the tort claims.[173]

B. The Supreme Court's Analysis in Favor of Phelps's Free Speech

When considering the constitutional issues on appeal from the Fourth Circuit, the Supreme Court held that Phelps and Westboro Baptist Church indeed were immune from tort liability for their protest speech around the time of Matthew Snyder's funeral.[174] In its well-reasoned opinion, the Court rejected the district court's balancing of the church's First Amendment right to free speech and free expression with Snyder's right to privacy and his right to be free from intentional, reckless, or extreme and outrageous conduct.[175]

The majority's analysis in *Snyder* resembles the Court's aggressive efforts over the years to safeguard unpopular, offensive, and even hateful forms of expression under the auspices of a broad First Amendment right to free expression.[176] Unlike many other controversial cases before the Court in times past, however, the decision in *Snyder* was nearly unanimous across ideological lines, with eight Justices boldly securing the church's constitutional right to communicate religiously motivated "hate speech" and only one Justice authoring a lone dissenting opinion in favor of the offended plaintiff.[177]

1. Intentional Infliction of Emotional Distress

The Supreme Court began its analysis of the case with the intentional infliction of emotional distress claim brought by Snyder. Citing *Hustler Magazine, Inc. v. Falwell*,[178] the Court recognized that the First Amendment's guarantee that "Congress shall make no law . . . abridging the freedom of speech" can serve as an absolute defense in state tort suits.[179] In determining whether the First Amendment would immunize Phelps and his church from tort liability, the Court first considered whether the church's speech was primarily

---

[172] *Id.*
[173] *Id.* at 1220–21.
[174] *Id.* at 1220.
[175] *See id.* at 1219.
[176] *See* discussion *supra* Part I.B.
[177] *Snyder*, 131 S. Ct. at 1212.
[178] 485 U.S. 46 (1988).
[179] *Snyder*, 131 S. Ct. at 1215.

directed to a matter of public or private concern based on all the relevant circumstances of the case.[180] Drawing on a series of precedents, the Court noted that speech on matters of public concern is afforded greater constitutional protection than speech on purely private matters due to the "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open."[181] In deciding whether speech is of public or private concern, the Court recognized that it must examine the "content, form, and context" of the speech "as revealed by the whole record."[182]

Applying these rules to the facts of the *Snyder* case, the Court concluded that given the content and context of the messages surrounding Matthew Snyder's funeral, Phelps and his congregation were clearly speaking on matters of public concern: "While these messages may fall short of refined social or political commentary, the issues they highlight—the political and moral conduct of the United States and its citizens, the fate of our Nation, homosexuality in the military, and scandals involving the Catholic clergy—are matters of public import."[183] And although a few of the church's picket signs could be interpreted as speaking directly to Matthew Snyder and his family, "the overall thrust and dominant theme of Westboro's demonstration spoke to broader public issues."[184] The Court recognized that although the church's speech could be considered hurtful and offensive to many, "Westboro conducted its picketing peacefully on matters of *public* concern at a *public* place adjacent to a *public* street" and because of the elevated constitutional protection available to speech on important public matters under the First Amendment, Phelps and his church were consequently shielded from civil liability in the case.[185]

The Court was careful to recognize what was likely the true issue underlying Mr. Snyder's suit—his disagreement with the viewpoint expressed by Phelps and his church during the protest.[186] In fact, at the

---

[180] *Id.*

[181] *Id.* (quoting N.Y. Times Co. v. Sullivan, 376 U.S. 254, 270 (1964)) (internal quotation marks omitted).

[182] *Id.* at 1216 (quoting Dun & Bradstreet v. Greenmoss Builders, Inc., 472 U.S. 749, 761 (1985)) (internal quotation marks omitted).

[183] *Id.* at 1217.

[184] *Id.*

[185] *Id.* at 1218–19 (emphasis added). The Court recognized, though, that states wishing to give military families like the Snyders the opportunity to respectfully bury their loved ones may enact reasonable time, place, and manner restrictions on funeral protests. *Id.* at 1218.

[186] *Id.* at 1219 ("The record confirms that any distress occasioned by Westboro's picketing turned on the content and viewpoint of the message conveyed, rather than any interference with the funeral itself.").

same time the church was picketing before Matthew Snyder's memorial service, an even greater number of individuals and groups turned out in support of the deceased marine and to combat the Westboro demonstration. Church parishioners, school children, and a group of "Patriot Riders" displayed signs that read "God Bless America" and "God Loves You" even closer to the church than Westboro.[187] Notably, of course, Mr. Snyder did not bring suit against those supporters for disturbing the funeral or causing him emotional distress in the course of expressing their views at the memorial service.

In the end, the Supreme Court arrived at the principled conclusion that Mr. Snyder could not justifiably bring a claim against Phelps and his church for intentional infliction of emotional distress due to contempt for Westboro's views and its disagreeable message. Instead, the Court rightfully chose to reinforce its historic position that speech on public issues in the United States cannot be restricted simply because it is upsetting to, or arouses contempt in, the listener.

2. Intrusion upon Seclusion and Civil Conspiracy

In addition to the tort claim for intentional infliction of emotional distress, Mr. Snyder also argued that Phelps and Westboro Baptist Church should be liable for violating Maryland tort law concerning intrusion upon seclusion and civil conspiracy.[188] The Court likewise rejected this invitation because the church's actions in protest of Matthew Snyder's funeral did not rise to the level necessary to meet the Court's strict standard for granting relief on these claims in times past.[189] Essentially, Mr. Snyder asserted that even if the church's speech was generally entitled to First Amendment protection, the church should nevertheless be held liable in tort for intrusion upon seclusion since Mr. Snyder was allegedly a "member of a captive audience" at his son's funeral.[190] Citing precedent, the Court rightfully disagreed:

> In most circumstances, "the Constitution does not permit the government to decide which types of otherwise protected speech are sufficiently offensive to require protection for the unwilling listener or viewer. Rather, . . . the burden normally falls upon the viewer to avoid further bombardment of [his] sensibilities simply by averting [his] eyes."[191]

---

[187] *Id.*; Brief for Respondents at 6, *Snyder*, 131 S. Ct. 1207 (No. 09-751).

[188] *Snyder*, 131 S. Ct. at 1219.

[189] *Id.* at 1219–20.

[190] *Id.*

[191] *Id.* at 1220 (alteration in original) (quoting Erznoznik v. Jacksonville, 422 U.S. 205, 210–11 (1975)).

In rejecting Mr. Snyder's captive-audience argument, the Court noted its history of applying that theory "only sparingly" in past cases to protect unwilling listeners from protected speech.[192] Moreover, the majority emphasized the fact that the church remained a respectable distance away from the memorial service and that Mr. Snyder could only see the tops of the church's picket signs, at most, as he was driving to the funeral.[193] On these facts, there was no reasonable argument that the church's demonstration in any way interfered with the service itself or that Mr. Snyder was a member of a captive audience for purposes of the tort claim.[194]

Having found that the First Amendment prevented Mr. Snyder from recovering on the intentional infliction of emotional distress and intrusion upon seclusion claims, the Court in turn refrained from finding Phelps and his church liable for civil conspiracy on the same torts.[195]

CONCLUSION

In *Snyder v. Phelps*, an eight-Justice majority of the Supreme Court concluded its opinion with an important caution regarding the value of free speech in the United States, which undoubtedly led to its resounding decision in favor of the First Amendment rights of the fringe, religious minority group:

> Westboro believes that America is morally flawed; many Americans might feel the same about Westboro. Westboro's funeral picketing is certainly hurtful and its contribution to public discourse may be negligible. But Westboro addressed matters of public import on public property, in a peaceful manner, in full compliance with the guidance of local officials. . . .
>
> Speech is powerful. It can stir people to action, move them to tears of both joy and sorrow, and—as it did here—inflict great pain. *On the facts before us, we cannot react to that pain by punishing the speaker*. As a Nation we have chosen a different course—to protect even hurtful speech on public issues to ensure that we do not stifle public debate. That choice requires that we shield Westboro from tort liability for its picketing in this case.[196]

The *Snyder* controversy resembles divides in times past concerning the proper bounds of the constitutional guarantee of free speech and free

---

[192] *Id.*

[193] *Id.*

[194] *Id.*

[195] *Id.* ("Because we find that the First Amendment bars Snyder from recovery for intentional infliction of emotional distress or intrusion upon seclusion—the alleged unlawful activity Westboro conspired to accomplish—we must likewise hold that Snyder cannot recover for civil conspiracy based on those torts.").

[196] *Id.* (emphasis added).

expression. Westboro Baptist Church's demonstration around the time of Matthew Snyder's funeral was repulsive, like the Klan's demonstration in *Brandenburg*;[197] anti-religious, like the Nazis's demonstration in *Collin*;[198] unpatriotic, like the protesters' demonstration in *Johnson* and *Eichman*;[199] and appalling, like the racists' demonstration in *R.A.V.*[200] Yet, the Supreme Court's decision to relieve Phelps and his church of liability for their words was not a foreign concept—literally. The Court rightly reasoned that the church's speech was within the purview of the "uninhibited, robust, and wide-open" speech protection of the First Amendment because the speech, although offensive, was intimately connected with the church's sincerely held religious views on matters of public concern.

Unlike the international community, which has begun imposing greater restrictions on speech that is perceived as harmful or offensive to society in a failed attempt to promote human rights, the U.S. Supreme Court's principled position in *Snyder* aligns with the traditional American solution to resolving disputes on controversial public issues—more speech, not less.

J. Michael Martin

---

197 *See* discussion *supra* Part I.B.1.

198 *See* discussion *supra* Part I.B.2.

199 *See* discussion *supra* Part I.B.3.

200 *See* discussion *supra* Part I.B.4.