

Hate Speech, Dignity, and the Westboro Baptist Church

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## **ABSTRACT**

### Hate Speech, Dignity, and the Westboro Baptist Church

This thesis analyzes America's approach to free speech and hate speech in comparison to international law. Focusing on 2011 Supreme Court case *Snyder v. Phelps*, I will discuss how the court's approach to expression fails to comply with standard human rights norms. I will compare domestic and international approaches to hate speech, as well the harms of such expression to dignity. Additionally, I will trace the history of the Westboro Baptist Church, American definitions of hate speech, and the development of international law approaches to expression.

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## Introduction

The United States of America’s approach to contemporary free speech has long stood as an outlier among freedom of expression norms, one regarded as often radical in comparison to other Western nations. With other advanced democracies in possession of strong, functional hate speech law paradigms—with Canada, Australia, the United Kingdom and other European nations at the helm—America’s stance remains acutely rooted within the limitations of the First Amendment. On several notable occasions, this position has clashed with preexisting human rights contexts and laws, with free speech trumping the right to dignity.<sup>1</sup> I intend to argue that rights based free speech laws would be better suited in determining and defining hate speech, as well as protecting individuals from emotional harm. This rights-based structure would entail the consideration of international law, with the main objective being to fulfill human rights as stipulated by the UDHR.<sup>2</sup> Such a structure would incorporate human rights norms from relevant charters emphasizing dignity for all. The US government, as duty bearers of multiple human rights charters, have an obligation to fulfill their responsibilities to right bearers. Perhaps the most fundamental human right is the right to dignity. The United States’ incitement-based approach—based in the marketplace of ideas theory-- overrules dignity in favor of expression. Over the last century, Supreme Court decisions such as *Smith v. Collin* (1977), *R.A.V. vs. City of St. Paul* (1994), and most recently *Snyder v. Phelps* (2011) have affirmed the United States’ opposition to content-based hate speech prohibitions.<sup>3</sup> Instead of disallowing speech on the

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<sup>1</sup> Waldon, Jeremy, “Hate Speech and Democracy”, *Criminal Justice Ethics* 23, No. 1: (2013): 78

<sup>2</sup> UN General Assembly, *Universal Declaration of Human Rights*, (Paris, 1948), General Assembly Resolution 217A, <http://www.un.org/en/universal-declaration-human-rights/> (accessed 11/12/17)

<sup>3</sup> *Snyder v. Phelps*, 562 U.S. 443 (2011); see also *R. A. V. v. City of St. Paul* (90-7675), 505 U.S. 377 (1992); *Smith v. Collin*, 439 U.S. 916 (1978)

grounds of discriminatory speech, America bases its definition of hate speech on incurred threats—namely, determined by if the speaker intended to provoke physical violence against a person or group. The American understanding of hate speech is therefore based upon the category of incitement, safeguarding most forms of expression. Thus, with incitement as the basis, speech acts are “more generally protected because the law does not capture the actual content of the speech act, only the ‘inciting’ manner in which it was expressed,” with the focus on HOW the content was said as opposed to WHAT was said.<sup>4</sup> But paradoxically, often the medium—no matter how offensive—is legally tolerated due to the speaker’s right to convey their idea. American hate groups have often managed to work within the realms of content based free speech legislation to convey their message. Groups such as the Westboro Baptist Church can continue to violate others’ right to dignity and propagate hate speech—insofar that they stay within the bounds of American defined incitement.

The 2011 Supreme Court Case *Snyder v. Phelps* is demonstrative of the U. S’s flawed judicial approach to hate speech legislation. By reversing the decision of the United State District Court for the District of Maryland, the Supreme Court ruled in favor of Fred Phelps—the patriarch of the Westboro Baptist Church—citing protection of his First Amendment rights.<sup>5</sup> Through this ruling, the United States Supreme Court clarified a definition of free speech that runs afoul of ratified and widely accepted international human rights norms-- namely, the UDHR as well as Article 20(2) of the ICCPR.<sup>6</sup> I shall argue that America's iteration of hate speech fails

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<sup>4</sup> Sorial, Sarah, “Hate Speech and Distorted Communication: Rethinking the Limits of Incitement” *Law and Philosophy* 34 (2015): 299

<sup>5</sup> *Snyder v. Phelps*, 562 U.S. 443 (2011)

<sup>6</sup> UN General Assembly, *International Covenant on Civil and Political Rights*, (16 December 1966) with resolution 2200A (XXI), 20(2) <http://www.refworld.org/docid/3ae6b3aa0.html> (accessed 1/13/18)

to comply with human rights freedom of expression soft laws, with the American “all speech is equal” principle problematic. I will begin with a background of the WBC, and then go through why indictment is not sufficient for determining hate speech. Additionally, I will examine contrasting international law approaches to free speech, as well as relevant conceptions of human dignity as they pertain to the *Snyder v. Phelps* case.

### **Westboro Baptist Church Background**

In order to understand the legal route taken by the Supreme Court in *Snyder v. Phelps*, the Westboro Baptist Church’s (WBC) background and objectives must be explored. It is also crucial to note their how their tactics work to inflict major emotional damage upon their targets, sidestepping legal ramifications. Designated a hate group by the Southern Poverty Law Center, the WBC is an American based cult of personality centered around late family patriarch, Fred W. Phelps Sr. The senior Phelps stood out as a fire and brimstone public nuisance as early as his college years, with his family—later his church—growing in notoriety as one of America’s most well-known hate groups. Founded in 1955 in Kansas, the group currently consists of 70 to 80 members of Phelps’s immediate and extended family. Unlike other churches, they do not attempt save individuals from damnation. They do not engage in any type of recruitment, refusing outside donations. The group views most outsiders to their sect as corrupted by the influences of the secular world and thus ineligible for admission. The WBC are family based and insular without any outside affiliations; any new members have since married into the group. The church communicates via an old school, Southern gospel preaching style, utilizing press releases,

sermons and social media.<sup>7</sup> Their internet usage is extensive, spreading their message through parodies of popular songs (such as Pharrell's "Happy") with the lyrics replaced to reflect WBC's homophobic ideology. They are also extremely active on Twitter and Instagram. Most notoriously, the WBC communicates their beliefs via street picketing protests. The group considers it their utmost duty to be the mouthpiece of God, denoting themselves as "WMPs" or "Weapons of Mass Publication". Their extremely public demonstrations of inflammatory, yet legally sanctioned, protests have included picket signs with slurs ("God Hates Fags"), flag burning, statements that casualties of 9/11 and other national tragedies would burn in hell, funeral protesting, and a wide range of assertions about God's hatred for America. Westboro is highly mobile and motivated; according to the group's website, they have conducted over 60,614 protests to date.<sup>8</sup> In line with being God's mouthpiece, the WBC actively seeks out media attention and are extremely receptive to reporters. Westboro currently pickets on a near-daily basis.

The theodicy of the WBC is crucial to their protests. Akin to Calvinism, Westboro believes in an omnipotent God possessing absolute power. Their God is not a forgiving one. The WBC believes that only a select few have been selected for forgiveness (with the church members among them) with the rest of humanity doomed to an eternity in hell. In several interviews with the group, members describe God as a "Jealous Man of War" in reference to a

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<sup>7</sup> Powell-Williams, Todd, and Powell-Williams, Melissa, "'God Hates Your Feelings': Neutralizing Emotional Deviance within the Westboro Baptist Church", *Deviant Behavior* (2016): 2

<sup>8</sup> Westboro Baptist Church, "Homepage" [godhatesfags.com](http://www.godhatesfags.com).  
<http://www.godhatesfags.com/index.html> (accessed 11/13/17)



passage of the Book of Isaiah, 42:13.<sup>9</sup> WBC members view God as a supreme being in active engagement with the earthly world. In this theology, God is responsible for causing the world's ills in a direct response to mankind's sexual wickedness. Every unfortunate event which befalls man—from terrorist attacks to natural disasters—is demonstrative of God conveying his fury. God particularly despises the United States for its growing acceptance of homosexuality; a vehement stance not unusual in the context of conservative hate groups ranging across the politico-religious gamut. However, Westboro takes their position to an extreme. The WBC directly links homosexual behavior with events such as the Sandy Hook Elementary School shootings and 9/11. Their website states plainly, "WBC engages in daily peaceful sidewalk demonstrations opposing the homosexual lifestyle of soul-damning, nation-destroying filth. We display large, colorful signs containing Bible words and sentiments, including: GOD HATES FAGS, FAGS HATE GOD, AIDS CURES FAGS, THANK GOD FOR AIDS, FAGS BURN IN HELL, GOD IS NOT MOCKED, FAGS ARE NATURE FREAKS, GOD GAVE FAGS UP, NO SPECIAL LAWS FOR FAGS, FAGS DOOM NATIONS, THANK GOD FOR DEAD SOLDIERS, FAG TROOPS, GOD BLEW UP THE TROOPS, GOD HATES AMERICA, AMERICA IS DOOMED, THE WORLD IS DOOMED, etc."<sup>10</sup> These signs and slurs are crucial to the shock value of Westboro's protests, attracting media attention and propagating their notoriety. With their placards serving as calling cards, the WBC have established a sort of instantly recognizable brand name within the American media landscape.

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<sup>9</sup> Baker, Joseph O., Bader, Christopher D., Hirsch, Kristen, "Desecration, Moral Boundaries, and the Movement of Law: The Case of the Westboro Baptist Church", *Deviant Behavior* 36, Iss. 1 (2015): 44

<sup>10</sup> Westboro Baptist Church, "About WBC", [godhatesfags.com](http://www.godhatesfags.com), <http://www.godhatesfags.com/wbcinfo/aboutwbc.html>, (accessed 11/20/17)

The differentiating factor distinguishing the WBC from other hate groups is not their homophobic belief system, but instead their clever use of legal tactics while working within the confines of law.<sup>11</sup> With Phelps once a well-known Civil Rights lawyer, and several of his children well-versed in First Amendment Law, the WBC collectively possess an unusual mastery of the workings of the American judicial system. Despite being disbarred at the state level in 1979 for berating a witness (*Phelps v. Supreme Court*) Phelps continued to employ his knowledge of the law in his workings and protests, even going as far to run for public office. Westboro's protests all remain within the bounds of legality. The group carefully coordinates pickets with local police departments and respects all protest established limitations. During their protests, they neither yell or verbally express profanity, and make a point to never step within the realms of what could be considered incitement to violence. Even when physically harassed by onlookers, the church's protestors refuse to retaliate. Thus, by respecting local laws and federal incitement-based hate speech laws, the WBC are continually allowed to invoke their freedom of expression. Another crucial differentiation between the WBC and other fundamentalist groups is their advanced use of media manipulation. Even though technically the group doesn't engage in any violent incitement, their extremely provocative language and choice of protest locations oft-attract a swarm of media attention—with the WBC reveling in their status as one of America's well-known hate groups. Unlike other fundamentalist religious groups who might keep a low profile as not to draw negative attention, the WBC utilize the media and embrace their self-proclaimed roles as God's messengers. The media coverage of their exploits accomplishes a twofold task: fulfilling what they consider to be their earthly duties, all while conflating the

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<sup>11</sup> Baker, Joseph O., Bader, Christopher D., Hirsch, Kristen, *Desecration, Moral Boundaries, and the Movement of Law*, 43

public and the private sphere. This further exemplifies the ability of the WBC to offend and emotionally disturb on a mass scale.

Westboro has a preoccupation with the rule of law, both on divine and domestic measures.<sup>12</sup> With the law a “multivalent repository of a ruling group’s values, along with the formalized (and state sanctioned) methods of social control used to discourage or punish behavior,” the legal system largely determines the moral, political and social limitations of society. WBC believes that the law of the land should fall into line with the law of God, and when the two diverge, God becomes furious. Therefore, laws benefiting homosexuals directly rouse God’s vengeance. Referring to the 2003 Supreme Court case *Lawrence v. Texas*, the WBC states “America crossed the line on June 26 2003, when the Supreme Court (the conscience of the nation) ruled we must respect sodomy,” with the *Lawrence* case standing at the pinnacle of the group’s outrage.<sup>13</sup> Many of the church members are practicing lawyers, providing the group with an unusually well-versed understanding of First Amendment legal protections. As previously stated, Westboro’s picketing takes extra precaution in remaining within the bounds of legality. Despite laws passed in response to their protests (such as the Respect for America’s Fallen Heroes Act), Westboro have used their legal savvy to win several court cases—most significantly, *Snyder v. Phelps*.

The WBC’s political tactics pose a legislative challenge in terms of free speech regulation, with the church’s provocative approach warranting an outcry from the general public and politicians eager to check them accordingly. Through violating the space of the sacred (i.e.

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<sup>12</sup> Baker, Joseph O., Bader, Christopher D., Hirsch, Kristen, *Desecration, Moral Boundaries, and the Movement of Law*, 57

<sup>13</sup> Westboro Baptist Church, “About WBC”, godhatesfags.com, <http://www.godhatesfags.com/wbcinfo/aboutwbc.html> (accessed 11/20/17)

funerals, flag desecrations, etc.) Westboro pushes the boundaries of traditional American moral order. Their protests thus “extend beyond simply disrespecting” into “rhetorically violat(ing) the sanctity of funerary rites in efforts to defile the deepest signifiers of civil religion—soldiers’ dead bodies.”<sup>14</sup> Additionally, their invocation of God as a force of hatred, one specifically targeting the homosexual community, raises particular ire over their usage and claims of God’s will. Westboro initially targeted the burials of those who had died from AIDS, claiming that they were decrying the deceased’s sexual immorality and lauding their subsequent punishment by God. They also protested pro-LGBTQ events such as pride festivals. Following in the same homophobic vein, the WBC garnered significant media attention following the picketing of Matthew Shephard’s funeral in 1998. However, the group gained more mainstream notoriety and coverage following their 2005 protest of an American soldier’s funeral. The WBC’s purpose for picketing military funerals doesn’t stem from specific anti-U.S. military stance, but rather serves as an extension for their anti-homosexual agenda. The group fervently believes that each troop’s death results from America’s growing acceptance of the LGBTQ community. Concerning their military protests, Westboro’s website states “Perceiving the modern militant homosexual movement to pose a clear and present danger to the survival of America, exposing our nation to the wrath of God as in 1898 B.C. at Sodom and Gomorrah, WBC has conducted **60,752** such demonstrations since June, 1991, at homosexual parades and other events, including funerals of impenitent sodomites (like Matthew Shepard) and over 400 military funerals of troops whom God has killed in Iraq/Afghanistan in righteous judgment against an evil nation.”<sup>15</sup> Thus, their

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<sup>14</sup> Baker, Joseph O., Bader, Christopher D., Hirsch, Kristen, *Desecration, Moral Boundaries, and the Movement of Law*, 46

<sup>15</sup> Westboro Baptist Church, “About WBC”, godhatesfags.com, <http://www.godhatesfags.com/wbcinfo/aboutwbc.html> (accessed 11/20/17)

military protests are directly linked to their fundamentalist, homophobic belief system. The group is also vehemently anti-Catholic, making Matthew Snyder—Catholic, American, and a Marine—an ideal target.

### **Snyder v. Phelps**

*Snyder v. Phelps* originated with the death of twenty-year-old Marine Lance Cpl. Matthew A. Snyder, killed in an accident while serving in Iraq.<sup>16</sup> On the date of the burial, March 10<sup>th</sup>, 2006, Rev. Phelps and seven other WBC family members travelled to Westminster, Maryland to protest the funeral. Coordinating and cooperating fully with the police, the local department escorted Westboro to the picket site—a 10 x 25-foot plot of land surrounded by orange fences, located about 1,000 feet away from the church entrance.<sup>17</sup> Westboro remained within their designated protest site, displaying their signs and singing hymns. No profanity was verbally articulated; however, their placards included statements such as “God Hates the USA”, “Fag Troops”, “America is doomed”, and “Pope in Hell”. Signs more specifically targeting the deceased Cpl. Snyder included “You’re going to hell”, “God Hates You”, “Semper fi fags”, and “Thank God for Dead Soldiers”.<sup>18</sup> The homophobic slurs mischaracterized the heterosexual Matthew Snyder—however, the accuracy of their statements was irrelevant to the overarching purpose of Westboro’s protest. While the Snyder family later stated that they could not see the full content of the signs from their church vantage point, father Al Snyder said he was able to glimpse the tops of the signs. He wasn’t aware that the protest was directed towards his son.

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<sup>16</sup> *Snyder v. Phelps*, 562 U.S. 443 (2011)

<sup>17</sup> Russomanno, Joseph, “‘Freedom for the Thought That We Hate’: Why Westboro Had to Win”, *Communication Law and Policy*, (2012): 2

<sup>18</sup> *Ibid.*, 3

Snyder later discovered the full extent of the signs' content that night while watching the local news. He also discovered a blogpost on the WBC website specifically addressing his son's funeral—a so-called “Epic” entitled “The Burden of Marine Lance Cpl. Matthew Snyder”. Excerpts from the “Epic” include passages directly focused on Matthew Snyder and his family, referring to them by name:

*“Twenty years ago, little Matthew Snyder came into the world...God created him and loaned/entrusted him to Albert and Julie Snyder,” with the “Epic” continuing to state that Cpl. Snyder’s parents “had a DUTY to prepare that child to serve the LORD his GOD—PERIOD! You did JUST THE OPPOSITE—you raised him for the devil. You taught him that God was a liar.”<sup>19</sup>*

Three months later, in June of 2006, Al Snyder filed a suit against the adult members in attendance at his son's funeral protest and against the church itself. Snyder cited four state law tort claims: defamation, publicity given to private life, intentional infliction of emotional distress, and conspiracy.<sup>20</sup> Snyder's claims originated from his position as a private citizen; his claims were therefore “grounded in an implicit theory of the private sphere....that a human being's private suffering and grief should not be used in a mercenary fashion as a public platform for religious or political grandstanding by another party.”<sup>21</sup> The WBC had violated both his and his son's right to privacy. Additionally, they had defamed his son and caused intentional emotional distress. During the trial, Snyder presented evidence of physical and mental distress as caused by

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<sup>19</sup> *Snyder v. Phelps*, 562 U.S. 443 (2011)

<sup>20</sup> Rossamunno, *Freedom for the Thought That We Hate*, 3

<sup>21</sup> Bruner, M. Lane, Balter-Reitz, Susan “*Snyder v. Phelps*: The Supreme Court's Spectacular Erasure of the Tragic Spectacle” *Rhetoric & Public Affairs* 4, Vol. 16, Winter 2013): 660

the WBC’s protest—including a serious worsening of his diabetes and a deepening depression. The post-trial opinion, assessing Snyder, states:

*“He described the severity of his emotional injury, stating that is often tearful and angry, and that he becomes so sick to his stomach that he actually physically vomits. He testified that the Defendants placed a “bug in his head, such that he is unable to separate thoughts of his son from the [Defendants’] actions.”*

In response, Phelps and his family cited protection from tort liability under the First Amendment, specifically the intentional infliction of emotional distress tort (IIED). The WBC claimed that Matthew Snyder’s funeral was a public event due to its announcement in a local paper—and thus, Matthew and his father should be treated as public figures. Phelps argued that the importance of the WBC’s contribution to public debate dwarfed the Snyder’ right to privacy.

The preliminary district trial court held Westboro liable for all but one of Snyder’s tort claims, with the expectation of his defamation claim. Snyder was initially awarded over \$10 million in total, which was later lowered by the district judge to \$5 million through remission of punitive damages.<sup>22</sup> But upon Phelps appeal, the Fourth Circuit reversed the verdict on the basis of Fred Phelps’s free speech claims, holding that his claims “failed as a matter of First Amendment law” due to how “the defendants were expressing views on matters of public concern and did not seriously assert anything provably false about Snyder or his son.”<sup>23</sup> Despite the court’s statements that Westboro’s words were “distasteful and repugnant”, the Fourth

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<sup>22</sup> United States Courts, “Facts and Case Summary: Snyder v. Phelps”, [www.uscourts.gov](http://www.uscourts.gov/educational-resources/educational-activities/facts-and-case-summary-snyder-v-phelps), <http://www.uscourts.gov/educational-resources/educational-activities/facts-and-case-summary-snyder-v-phelps>, accessed 11/25/17

<sup>23</sup> Zipursky, Benjamin C., “Snyder v. Phelps, Outrageousness, and the Open Texture of Tort Law”, *DePaul Law* 60, Issue 2 (Winter 2011): 474

Circuit held they were “constrained to conclude that Defendants’ signs and Epic are constitutionally protected.”<sup>24</sup> Hence, Westboro’s words didn’t fall under the category of hate speech, and the Snyder family was not protected under the IIED tort. The court based its 8 to 1 decision on the basis of public concern, determining that Westboro’s speech involved public issues—and was therefore constitutionally protected. With most of the court’s decision stemming from scrutiny of the Epic and the picket signs, it was based on the conjecture of so-called “reasonable people. This assumption held that observers of the protest could reasonably infer that Westboro’s statements were rhetorical and weren’t directed toward Matthew Shepherd as an individual. Since the protest took place in on a public street, the court drew that it was exempt from IIED liability. Accordingly, the Snyder family’s emotional damage was just an unfortunate footnote in a religious organization’s legitimate practice of free speech. With the Fourth Circuit noting that rhetorical hyperbole (such as WBC’s “God Hates Fags”) is “entitled to First Amendment protections” in order “to ensure that public debate will not suffer to lack of imagination”,<sup>25</sup> the court inferred that public debate takes priority over individual’s potential emotional harm. By being deemed a public figure subject to public debate, Albert’s Snyder’s emotional distress at Westboro’s protest—as well as his family’s dignity-- fell second to Fred Phelps’s Constitutional right to free speech.

### **Dissenting Opinion**

Justice Alito stood as the only dissenting judge in an 8 to 1 decision. Much of his dissent concerned Westboro’s misuse of their freedom of expression at the expense of the Snyder’s

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<sup>24</sup> *Snyder v. Phelps*, 562 U.S. 443 (2011)

<sup>25</sup> Bruner, M. Lane, Balter-Reitz, Susan, citing *Snyder v. Phelps*, 562 U.S. 443 (2011): 665



dignity. In his closing statement, Alito states that “our profound national commitment to free and open debate is not a license for the vicious verbal assault that occurred in (the *Snyder v. Phelps*) case,” due largely to his belief that Albert Snyder’s possessed the status of private figure, not a public one.<sup>26</sup> Snyder was performing the ordinary rites of burial and attempting to bury his son, an essentially private act. He did not possess status of celebrity nor was he a public figurehead. And despite the WBC’s protection under the First Amendment allowing them to convey their viewpoint, Alito argues that they were restricted in making attacks which lacked contribution to public debate. Citing the tort law permitting recovery for intentional emotional distress (with *Hustler Magazine, Inc. v. Falwell* as standing) precedent, Alito claims that WBC’s attacks met the standards for a IIED claim. Their attacks on Snyder and his family were of a specific and intimate nature. So, despite the rigidity of the tort’s limitations, the WBC’s personal attacks on the deceased Snyder—done with the intent to cause serious and lasting harm—warrants the Snyders’ protection under the tort. He positions that the WBC’s overall aim was not to contribute to public debate, but to personally attack the deceased Cpl. Snyder and his family. Alito invoked both the WBC’s picket signs and online rant as evidence. Although the court found that “reasonable people” would find Westboro’s statements and protest to be rhetorical, Alito stated that since the WBC “chose to stage their protest at Matthew Snyder’s funeral and not at any of the other countless available venues” a so-called “reasonable person would have “assumed there was a connection between the message on the placards and the deceased.”<sup>27</sup> With the placards designating God’s judgement of the deceased and homosexuality, a “reasonable bystander seeing those signs would have likely concluded that they were meant to suggest the deceased was a

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<sup>26</sup> Concurring and Dissenting Opinions: *Snyder v. Phelps*, 562 U.S. 443 (2011) (Alito, J., dissenting) <https://www.law.cornell.edu/supct/html/09-751.ZD.html>, accessed 1/10/18

<sup>27</sup> Alito, J, dissenting

homosexual”, albeit a homosexual burning in hell.<sup>28</sup> Thus, the WBC’s presence nearby the funeral—even though legally sanctioned—in conjunction with their placard’s contents warrants a personal attack on Matthew Snyder. Furthermore, the church’s online “epic” further clarified their hateful position on homosexuality, the United States military, and specifically Matthew Snyder’s personhood. Alito maintains that the WBC’s attacks on Snyder’s personhood, on the basis of his Catholic religion and military service, is not a matter of public debate. Rather, it was a targeted and intentional effort to cause individuals severe emotional pain. In regard to the WBC’s protection under the First Amendment, Alito states that it “allows recovery for defamatory statements that are interspersed with nondefamatory statements on matters of public concern, and there is no good reason why respondents’ attack on Matthew Snyder and his family should be treated differently.”<sup>29</sup> So even if a portion of WBC’s speech involved public debate, it doesn’t hold that the rest of their speech shouldn’t be subject to IIED prosecution. Alito concludes with acknowledging the conduct of the WBC was outrageous, causing Snyder great personal harms—and by siding with Phelps’s claims, the Supreme Court only deepened the family’s injuries.

### **The American Approach to Free Speech**

Understanding the Fourth Circuit’s decision in *Snyder v. Phelps* requires a consideration of the uniquely American approach to freedom of expression. The American legal system places particular emphasis on the importance of free speech, with the First Amendment oft-prioritized before all other rights. With the First Amendment to the U.S. Constitution stating that “Congress

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<sup>28</sup> Alito, J, dissenting

<sup>29</sup> Alito, J, dissenting

shall make no laws... abridging the freedom of speech”, the First Amendment has emerged as the most crucial aspect of American governance. Foreshadowing some aspects of the UDHR’s philosophy, the American Constitution draws heavily from John Locke’s theory of natural rights, as well as 17<sup>th</sup> and 18<sup>th</sup> century social contract theories. The natural rights theory, also prevalent in the Bill of Rights, grants that each individual is born with inherent rights, and such rights ought to be protected and fostered by the state. The individual, through living in the state, enters into a contract with the government—exchanging certain freedoms for certain securities. The individual prepossesses natural rights when they enter the contract, while the rights granted by the contract (in this case, the Constitution) are deemed to be contractual rights. Both act in tandem to provide a conception of liberty and to protect the aforementioned rights granted.

However, certain American judicial evolutions and precedents have seemingly come to value some rights—mainly the right to expression—over others, such as the right to dignity. In accordance with Justice Oliver Wendell Holmes, who called for “freedom for the thought we hate”, the Supreme Court has established a radical acceptance of free speech as determined by the supreme law of the land. And as demonstrated by the decision of the Fourth District in *Snyder v. Phelps*, American jurisdiction prioritizes the right to expression above all other freedoms.<sup>30</sup>

America’s approach to freedom of speech is a complex one, changing with each court based precedent set by the judicial system. It serves to protect nonpolitical expression as well as protect art and music. All expressed ideals possessing any degree of social relevance—no matter how controversial—is safeguarded under the First Amendment. There has historically been a strong judicial resistance to any sort of content regulation, with the basis being that no idea

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<sup>30</sup> *Snyder v. Phelps*, 562 U.S. 443 (2011)

should be ascribed more value over another.<sup>31</sup> Perspectives which differ from each other, no matter how radically so, each possess the same intrinsic value (and thus, protection) under the law. This also applies to cases of symbolic speech i.e. destroying draft cards, flag burning or wearing swastikas. However, this protection does not extend to cases deemed as obscenity, fighting words, defamation, and incitement. An example of the former is the 1957 Supreme Court case *Roth v. United States*. Samuel Roth was convicted of the publication and distribution of obscene materials in his bookstore. Some of his store's stock contained pornographic images, with his print advertising for the products stating as such. In its conclusion of the case, the court stated that:

*“All ideas having even the slightest redeeming social importance—unorthodox ideas, controversial ideas, even ideas hateful to the prevailing climate of opinion—have the full protection of the (constitutional) guaranties, unless excludable because they encroach upon the limited area of more important interests; but implicit in the history of the First Amendment is the rejection of obscenity as utterly without redeeming social interest.”<sup>32</sup>*

Thus, obscene speech is not a constitutionally protected form of expression. Nonetheless, the dividing line between obscenity and acceptable speech remains a fuzzy one. In the Roth case, the court stated that obscenity must be “taken as a whole” with accountability for the “dominant theme of the material.”<sup>33</sup> This allows for a rather broad and liberal definition of the term. If

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<sup>31</sup> Greenawalt, Kent, “Free Speech in the United States and Canada”, *Law and Contemporary Problems*, (Winter 1992):10

<sup>32</sup> *Roth v. United States*, 354 U.S. 476 (1957) 3c.

<sup>33</sup> *Roth v. United States*, 354 U.S. 476 (1957) 4c

obscenity is judged on the basis of the whole material, then no singular part can be a total indicator. Therefore, no one image or passage can jump the line into obscenity—the work must be tried based on the entirety of the text.

But even though there are aspects of expression that aren't protected under the First Amendment, regulations of problematic speech may still not be permissible. In the case of *R.A.V. vs. City of St. Paul*, the Supreme Court struck down the state's ordinance against hate speech. The case concerned a cross burning on an African-American family's lawn, with petitioner, R.A.V. charged under St. Paul's Bias-Motivated Crime Ordinance. The ordinance stated "whoever place on public or private property a symbol, object, appellation, character or graffiti, including, but not limited to, a burning cross or Nazi swastika, which one knows or has reasonable grounds to arouse anger, alarm, or resentment in others on the basis of race, color, creed, religion or gender commits disorderly conduct and shall be guilty of a misdemeanor."<sup>34</sup> While the trial court granted R.A.V. that the ordinance was too far reaching and content based, the Minnesota Supreme Court reversed the decision. Citing prior Minnesotan cases, the court deemed that the actions of R.A.V. amounted to fighting words as per conduct which "arouse(s) anger, alarm or resentment," which cross burning on private property entails. The Minnesotan court in turn argued that the ordinance only applied to speech beyond First Amendment protections. Upon review by the Supreme Court, the ordinance was found to be facially unconstitutional—the reason being that "it prohibits otherwise permitted speech solely on the basis of the subjects the speech addresses."<sup>35</sup> Following as such, the St. Paul ordinance was overturned on the grounds of inappropriate content regulation.

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<sup>34</sup> St. Paul Bias Motivated Crime Ordinance, St. Paul, Minn. Legis. Code § 292.02 (1990)

<sup>35</sup> *R. A. V. v. City of St. Paul* (90-7675), 505 U.S. 377 (1992)

As demonstrated, even areas of speech which are not explicitly covered by the First Amendment enjoy a certain degree of protection from content prohibition. In the words of the court, “the exclusion of ‘fighting words’ from the scope of the First Amendments simply means that, for purposes of that Amendment, the unprotected features of the words are, despite their verbal character, essentially a ‘nonspeech’ element of communication.”<sup>36</sup> With the Supreme Court claiming that fighting words are analogous to a “noisy truck,” the focus shifts from the medium of communication to the actual message. While the medium may be irritating, disruptive, or even offensive, the message nonetheless continues to carry relevance in terms of freedom of expression. The landmark decision reached in *R.A.V. vs. St. Paul* reflected this, with the St. Paul ordinance deemed unconstitutional on the basis of viewpoint discrimination. Even in cases of obscenity, defamation and fighting words, the government is not allowed to regulate such speech based upon either hostility or favoritism.<sup>37</sup> However, defining such terms—as well as separating the message from the medium—isn’t always cut and dry.

This reluctance to engage in content regulation can clearly be seen in *Snyder v. Phelps*. Even though Westboro’s protest could be deemed obscene (with homophobic slurs in a public setting) or defamatory (false and offensive attacks on a potential private citizen), the Court found that the First Amendment protected the WBC’s right to convey their viewpoint.<sup>38</sup> Although the medium of them picketing a funeral was blatantly controversial and offensive, the content of their speech still deserved acknowledgement. Such speech could not be constitutionally denied. This withstanding, the WBC intentionally chooses places and targets that will gander the most outraged reactions. More outrage from the pubic attracts more media coverage. Consequently,

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<sup>36</sup> *R. A. V. v. City of St. Paul* (90-7675), 505 U.S. 377 (1992)

<sup>37</sup> *R. A. V. v. City of St. Paul* (90-7675), 505 U.S. 377 (1992)

<sup>38</sup> *Snyder v. Phelps*, 562 U.S. 443 (2011)

more attention furthers the WBC's goal of serving as God's mouthpiece. This methodology raises questions concerning valuing the message over the medium—particularly in the context of funeral rites and intense media exposure. Although dissenting Justice Alito argued that the Snyders were private, not public citizens, Westboro's protest was via a public medium. This publicity factored into the court's decision to eliminate the Snyders from protection under the IIED tort law, since it was deemed to be public debate. The open medium of Westboro's attack further contributed to the harm inflicted upon the Snyders, as noted by Albert Snyder in his court statement. The public decimation of their recently deceased son by the WBC—as covered by the news media and further elaborated upon in the online rant—infringed on both privacy and reputation. Furthermore, the aggressive nature of the speech made heavily negative and false implications regarding Matthew Snyder's sexual life, as well as status in the afterlife. WBC's false implications became open for public consumption. Moreover, the medium of the message included profoundly offensive slurs against homosexuals. Signs such as “God Hates Fags”, “Thank God for Dead Soldiers” and “Semper Fi Fags” target specific at-risk demographics. Displayed in a public forum, the placards are extremely discriminatory against both LGBTQ peoples and members of the military. As the LGBTQ community is already subject to major discrimination in much of American society, these public attacks intensify preexisting negative societal hierarchies. The WBC's methods of conveyance drive their campaign to gain media exposure, with the medium further amplifying the group's message. Despite being legally protected, such speech mediums serve to deepen the harm caused by the WBC's attacks. This loophole in speech laws demonstrates one of the flaws in America's lack of content regulating prohibitions. Though the lack of regulations, Westboro is legally allowed to spread misinformation and inflict lasting emotional harm.

## America's Hate Speech and Harms

America's approach to hate speech is a complex one, differing from international law standards. As demonstrated by both the *R.A.V. vs. St. Paul* and the *Snyder v. Phelps* outcomes, the American definition of "hate speech" isn't—as European counterparts are—content based. Its basis in indictment allows for hate groups to prosper without negative legal implications. The US's understanding of hate speech sanctions a multitude of loopholes, in which the judicial definition of the term is dangerously flexible.

According to Sarah Sorial, hate speech is:

*“a broad term used to describe speech which attacks others on the grounds of their race, nationality, religious identity, gender, sexual orientation or other group memberships, where this group membership is a morally arbitrary distinguishing feature.”*<sup>39</sup>

Through expressing notions of another's inferiority based on them belonging to a certain social order or class, such verbal expressions engage in an emblematic, prejudicial attacks. Under Sorial's definition, hate speech includes slurs, defamation, and verbal harassment. Hate speech can also include broad, all-encompassing statements such as “All Muslims are Terrorists” or displays of well-known symbols of hate, such as swastikas.<sup>40</sup> It might seem that the WBC, with their placards proclaiming that “God Hates Fags” among other homophobic sentiments, routinely

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<sup>39</sup> Sorial, Sarah, “Hate Speech and Distorted Communication: Rethinking the Limits of Incitement,” *Law and Philosophy* 54, (2015): 300

<sup>40</sup> Simpson, Robert Mark, “Dignity, Harm, and Hate Speech”, *Law and Philosophy* 32, (2013): 702



engages in hate speech. However, the American legal boundaries of present a much more convoluted picture—one which oft-runs contrary to the human rights-based laws valuing human dignity for all right bearers.

Hate speech involves the othering of another group or individual, an attempt to reduce one's inclusivity within a broader social context. It is a form of speech that goes beyond insult, sending a message that “members of a particular minority or peripheral group should not get too comfortable because many other(s) would gladly mistreat them or cast them out.”<sup>41</sup> Instances of hate speech diminish one's status as a fellow human being. Since in a functioning democracy all beings are entitled to equal protections under the law, hate speech—and acceptance of hate speech on a federal or judicial level—violates such notions of state sanctioned equality. Harmful speech reduces the equal status of one's fellow citizens, as well as raises the potential for direct acts of violence. Even when not directly advocating for harm, it creates a toxic environment prime for cultivating festering resentments.

In order to combat hate speech, there must be a suitable definition of the term. In this regard, America is lacking. As free speech is crucial for a functioning democracy, First Amendment protections are especially legally robust when it comes to defining hate speech—as demonstrated by cases such as *National Socialist Party of America v. Skokie* (1977), *Hustler Magazine v. Falwell* (1988) and the aforementioned *R.A.V. vs. St. Paul*.<sup>42</sup> In each of these cases, the Supreme Court ruled to protect the free speech of the defendants. As to maximize protection of freedom of speech, legal categorization of hate speech rests primarily upon determination of

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<sup>41</sup> Feldman, Stephen M., “Hate Speech and Democracy”, *Criminal Justice Ethics* 23, No. 1, (2013): 79

<sup>42</sup> *National Socialist Party of America v. Village of Skokie*, 432 U.S. 43 (1977); *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46 (1988); *R. A. V. v. City of St. Paul* (90-7675), 505 U.S. 377 (1992)

incitement. If speech is thought to have been expressed in order to stir up lawless violence against a person, group, or creed, then it can be legally defined as hate speech—with the term “incitement” serving as an umbrella to protect more general forms of speech. Defining hate speech as incitement therefore “ensures speech is more generally protected because the law does not capture the actual content of the speech, only the ‘inciting matter’ in which it is expressed.”<sup>43</sup> Such a categorization grants the ability to dodge any content-based prohibitions on speech. Instead, focus is granted to the medium in which the message was conveyed instead of the message itself. Therefore, the HOW of what was spoken takes precedence over WHAT was spoken. However, as mentioned prior, the medium can do lasting harm to targets alongside the message.

The limitations of incitement, as demonstrated by *Snyder v. Phelps*, are extremely variable. Prior free speech cases demonstrate the Supreme Court’s approach. One legal course for determination is referred to as the Brandenburg Test, named after *Brandenbrug v. Ohio* (1969). The test sets a certain—although not comprehensive-- precedent for determining the bounds of inflammatory speech. The Supreme Court case involved a KKK leader who, during a private rally and in front of reporters, spoke at length using racial slurs.<sup>44</sup> Addressing his fellow KKK members, he stated: “it’s possible that there might have to be some revengeance (sic) taken” against minority groups.<sup>45</sup> Upon the video’s surfacing, the Klan leader was convicted under Ohio state law. Upon appeal, the Supreme Court overturned the conviction and ruled in favor of the Klansman’s right to free speech. Expression may be prohibited on two counts—

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<sup>43</sup> Sorial, *Hate Speech and Distorted Communication*, 300

<sup>44</sup> *Brandenburg v. Ohio*, 395 U.S. 444 (1969)

<sup>45</sup> Legal Information Institute, “Brandenbrug test”, [www.law.cornell.edu](http://www.law.cornell.edu), [https://www.law.cornell.edu/wex/brandenburg\\_test](https://www.law.cornell.edu/wex/brandenburg_test) (accessed 12/7/17)

firstly, if the speech is “directed to inciting or producing violence”, or secondly if the speech is “likely to incite or produce such action.”<sup>46</sup> Since the KKK leader was practicing “mere advocacy” of violence instead of straight “incitement to imminent lawless action,” the Court concluded that his speech was protected.<sup>47</sup> The Brandenburg Test became further specified in 1973 Supreme Court case *Hess v. Indiana*. The Court concluded that incitement is determined by the likeliness to produce impending violence. Their ruling concerning the reversal of Hess’s conviction stated, “since there was no evidence, or rational inference from the import of language, that [the speaker’s] words were intended to produce, and likely to produce, imminent disorder, these words could not be punished by the State on the ground that they had a ‘tendency to lead to violence.’”<sup>48</sup> In order for speech to count as incitement, it must be determined that the words were intended to provoke violence—in accordance to the notion of time in relation to the incurred threat. Therefore, with the great value placed on the First Amendment by America’s judicial system, the Brandenburg Test allows for some—however vague—determination of the nature of harmful speech. Brandenburg Test withstanding, incitement-based standards do not do enough to properly account for speakers well-versed in law. The test provides too wide of a net for what doesn’t constitute incitement as opposed to what does. Additionally, it only accounts for immediate violence. While Westboro may not be calling for physical attacks on their targets, their relentless protesting tactics work to create an abiding hostile atmosphere. This also applies to other active hate groups. Later Supreme Court cases ruled in favor of unsavory characters such as Nazis (*Collins v. Smith*) and other racists (*R.A.V. vs. City of St. Paul*).

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<sup>46</sup> *Brandenburg v. Ohio* 395 U.S. 444 (1969)

<sup>47</sup> Martin, J. Michael, “Snyder v. Phelps: Applying the Constitution’s Historic Protection of Offensive Expression to Religiously Motivated Speech”, *Regent University Law Review* 24, Issue 2 (2011-2012): 491

<sup>48</sup> *Hess v. Indiana*, 414 U.S. 105 (1973)

## Limitations of Hate Speech Definitions

Two issues arise from such a categorization of hate speech and incitement as based upon the merits of the speech's medium. The first comes from potential misemployment of punishment, as directed by lack of education or other needed abilities for expression.<sup>49</sup> Since hate speech laws targeting the "how" of what is conveyed via speech, those possessing a better understanding of the law are able to skirt around limitations. Whereas people who engage in "histrionic or hyperbolic ranting" can be more easily called out, speakers who are able to "couch their claims in ways that seems acceptable" avoid legal ramifications and are permitted to spread their message.<sup>50</sup> In cases of this sort, indictment laws unfairly target those lacking in education, or speakers with other expressional limitations. Secondly and conversely, the same indictment laws do not do enough in terms of limiting speakers with deeper understandings of legislative limitations. The Westboro Baptist Church stands as a leading example of such speakers. With a team of lawyers at the helm of the organization, the WBC is meticulous in staying within legal good graces. Savvy hate groups possessing a knowledge of the law are able to amend their language, avoiding being ensnared by legislation. As long as their language falls within the realm of the civil—as to avoid obscenities or fighting words charges—hate groups are able to sidestep technically being classified as such. This also applies to the protest tactics of the WBC. The church takes care to cover all their legal bases, both in terms of their conduct and cooperating with local law enforcement. For other less obvious hate groups, the subtler conveyance of their message (alongside the lack of prohibitory legislation) makes their dispatches more palpable for

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<sup>49</sup> Soral, *Hate Speech and Distorted Information*, 300

<sup>50</sup> Soral, *Hate Speech and Distorted Information*, 301

larger audiences.<sup>51</sup> By avoiding more obvious, openly aggressive uses of slurs and instead opting for use of more widely accepted language, hate groups (such as alt-right organizations) can gain better access into the mainstream. Although the Westboro Baptist Church routinely engages in slurs (prominently of the homophobic variety), their deep reservoir of legal knowledge sanctions the group's protection under the First Amendment. Their awareness of the ins and outs of free speech legislation, as well as protest laws, allows for the group to survive and even thrive under media attention.

Relying primarily on incitement of violence as a definition of hate speech allows for incorrect categorizations of the term. Despite its vitriol, the Fourth District classified Westboro's speech as public debate. Although it caused the Snyder family mental and physical distress, the WBC's protest was deemed to contribute to the democratic marketplace of ideas—even though their protest was intended to promote unjust and unequal ideas of hate. The WBC's legal capabilities allowed them to misuse the American approach to freedom of expression to their own advantage, resulting in what Soral refers to as “distorted communication.” Westboro exploited their speech protections in order to “argue for an undemocratic social and political organization, which would exclude others from equal recognition and participation.”<sup>52</sup> Their engagement of demeaning speech towards both individuals (Matthew Snyder and his family) and groups (homosexuals, Catholics, etc.) “exclude(s) others from equal participation in various subtle and overt ways, including by making others feel threatened and cultivating an environment that is degrading, hostile, or uncomfortable for the hearer.”<sup>53</sup> With their relentless cross country touring schedule and relationship with the media, the WBC have become an

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<sup>51</sup> Ibid.

<sup>52</sup> Ibid., 301

<sup>53</sup> Ibid.

infamous part of the American lexicon. Their prominence, however derided by the general public, contributes to a creating a toxic social atmosphere of discrimination. Through distorted communication, Westboro manipulates the boundaries of legal definitions of free speech and hate speech. As such, incitement as a legal basis doesn't cover all the necessary bases.

### **Hateful Public Debate in the Marketplace of Ideas**

One of the main justifications for radical American free speech is the so-called “marketplace of ideas” theory. The WBC’s personal attacks on Cpl. Snyder, as well as its use of slurs, occurred in a public forum. The Court concluded that to limit their speech would to limit public debate. This view had its basis in the concept of the marketplace of ideas—that in order to have robust public debate, all ideas must be considered.<sup>54</sup> Theoretically, the best ideas in the public realm would rise to prominence, as dictated by the marketplace. This had judicial precedence in *Abrams v. United States*, with Supreme Court Judge Oliver Wendell Holmes stating that “the best truth of truth is the power of the thought to get itself accepted by the competition of the market.”<sup>55</sup> However, individual’s and groups’ confirmation bias must be taken into account. People often base their decisions and judgements in ways serving prior existing beliefs. Accordingly, individuals and groups are more likely to buy into those ideas which further their own interests, as opposed to what may truly be the best idea.<sup>56</sup> What rises to the top in the marketplace of ideas may—especially in a less than perfect democracy—serve to better a party at the expense of another party. In terms of hate speech, if the majority decides on a course of

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<sup>54</sup> Ingber, Stanley. "The Marketplace of Ideas: A Legitimizing Myth." *Duke Law Journal*, no. 1 (1984): 6 doi:10.2307/1372344, accessed 2/9/18

<sup>55</sup> *Abrams v. United States*, 250, U.S. 626, 630 (1919)

<sup>56</sup> Heyman, Steven J. “Hate Speech, Public Discourse, and the First Amendment”, *Extreme Speech and Democracy*, Oxford Univ. Press (2008): 14

action which violates a minority's rights, it wouldn't be the so-called "best idea". It would merely be the idea which best served to further the interests of a particular party. Confirmation bias also drives people to seek out ideas which confirm their own preexisting belief system. In the case of *Snyder v. Phelps*, their contribution to the "marketplace of ideas" is heavily steeped in homophobia. If one subscribes to a homophobic ideology, they're more likely to buy into the WBC's protests—and thus feel justified in their own homophobic sentiments. However, the United States' lack of content restriction legislation makes it near-impossible to regulate the marketplace of ideas. While democracy relies on the free flow of communication, communication denying another's personhood undermines the democratic process. The natural rights-based democracy theory is based in recognizing the humanity within others. When an idea is based in discriminatory ideology, reliance on "the marketplace of ideas" weakens the ability of all parties to equally participate. Consequently, the theory ultimately runs against international law's stipulations of free speech.

### **International Law and Expression**

While recognizing freedom of speech as fundamental to the human condition, international law provides a more comprehensive approach to hate speech. Whereas other western nations—such as South Africa, Canada, Australia, the United Kingdom and other EU countries—have all signed and ratified international human rights covenants concerning hate speech, the United States has dodged any such commitments to soft or hard law. Even in regard to major treaties such as the ICCPR

There is no other country that has made more reservations, understandings, and declarations ("RUDs") in their agreement than the United States. The international model of

speech seeks to, as in a rights-based paradigm, preserve freedom of speech while not infringing on other rights. In contrast to the United States, some international law treaties go as far as to require states to ban speech that is deemed to incite hatred or promote inequality. Within abiding states, hate groups have less recourse for infringing on others' dignity. In its effort to preserve Constitutionally based free speech, the United States fails to uphold the standards of the international community. The development of international law's stance on free speech reflects the its growing emphasis on rights being interdependently linked to the concept of human value. Instead of there being one right valued over all, i.e. American speech, international law holds dignity as an objective. Human rights treaties theoretically work to ensure that no being or group is discriminated against. Since hate speech violates dignity, it is a form of discrimination. There are several key articles providing a baseline for the determination of hate speech, providing a contrast to the United States' solely incitement-based approach.

International laws counterbalancing freedom of expression with limiting hate speech stem from the United Nations, an international organization consisting of over 200 nation-states. The UN's purpose is to primarily promote and protect human rights worldwide, with its Universal Declaration of Human Rights (UDHR) majorly influencing the international community's approach to human rights. Drawn up in the aftermath of WWII, the declaration was the first collation of efforts to establish a rights-based basis for international law. The UDHR, alongside the International Covenant on Civil and Political Rights (ICCPR), lays the much of the groundwork for modern rights paradigms. While Article 19 of the UDHR states that "everyone has the right to freedom of opinion and expression...includ(ing) the freedom to hold opinions without interference and to seek, receive, and impart information and ideas through any media



and regardless of frontiers”, this is not an absolute right.<sup>57</sup> Even though there’s no explicit mention of hate speech prohibitions, Article 7 provides a counterbalance to Article 19, stating that “all are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.”<sup>58</sup> Additionally, Article 29 of the UDHR set limitations on granted rights, stating in 29(2) that “everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.”<sup>59</sup> This is further elaborated on in the 1965 International Convention on the Elimination of all Forms of Racial Discrimination (CERD), which became the first UN treaty to deal with hate speech. Article of the CERD urges all state parties to “condemn all propaganda and all organizations which are based on ideas or theories of superiority of one race or group of persons of one color or ethnic origin, or which attempt to justify or promote racial hatred or discrimination in any form.”<sup>60</sup> The convention continues to declare that states are obligated to “undertake to adopt immediate and positive measures designed to eradicate all incitement to, or acts of, such discrimination,” with parties required to punish by law all dissemination of ideas related to racial discrimination. This also covers acts deemed to be incitement.<sup>61</sup>

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<sup>57</sup> UN General Assembly, *Universal Declaration of Human Rights*, (Paris, 1948), General Assembly Resolution 217A, <http://www.un.org/en/universal-declaration-human-rights/> (accessed 11/12/17)

<sup>58</sup> UDHR, article 7

<sup>59</sup> UDHR, article 29

<sup>60</sup> UN General Assembly, *International Convention on the Elimination of All Forms of Racial Discrimination*, (21 December 1965) 2106 XX,

<http://www.ohchr.org/EN/ProfessionalInterest/Pages/CERD.aspx>, accessed 1/12/18

<sup>61</sup> CERD, Article 4

CERD provided the groundwork for the 1966 International Covenant on Civil and Political Rights (ICCPR)—the covenant perhaps exerting the most influence on contemporary international law’s approach to hate speech.<sup>62</sup> As its name implies, the ICCPR guarantees a broad spectrum of second generation civil and political rights. The covenant is “rooted in basic democratic values and freedoms, to all individuals within the territory to under the jurisdiction of the States party without distinction of any kind, such as race, gender, ethnicity, et cetera” with parties obligated to respect and ensure these rights, to adopt legislative or other necessary measures to give effect to these rights, and to provide an effective remedy to those whose rights are violated.”<sup>63</sup> The ICCPR grants negative and positive rights, including the right to self-determination and freedom of opinion. It also grants freedom from advocacy of national, racial or religious hatred. In this regard, the two relevant ICCPR articles are Articles 19 and 20. Article 19(2) guarantees the right to freedom of expression, including the rights to “seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.”<sup>64</sup> However, these rights are not absolute. Article 19(3) provides a caveat to the prior paragraph, stating that the “exercise of rights (provided in 19(2)) ... carries with it special duties and responsibilities.”<sup>65</sup> As follows, Article 19(2) of the ICCPR “may therefore be subject to certain restrictions” but only when judicially sanctioned and necessary.<sup>66</sup> Even with this caveat, the following covenant article, Article 20, becomes a potential source of tension in regard to free speech. Article 20(1) declares

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<sup>62</sup> UN General Assembly, *International Covenant on Civil and Political Rights*, (16 December 1966) with resolution 2200A (XXI), <http://www.refworld.org/docid/3ae6b3aa0.html> (accessed 1/13/18)

<sup>63</sup> ICCPR, Purpose (I)

<sup>64</sup> ICCPR, Article 19(2)

<sup>65</sup> ICCPR, Article 19(3)

<sup>66</sup> ICCPR, Article 19(3)

that any propaganda advocating war shall be prohibited by law, with 20(2) stating that “any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility, or violence shall be prohibited by law.”<sup>67</sup> Even though Article 20(2) serves to restrict certain forms of speech, it was written as to be compatible with the prior article. If a state’s law wishes to invoke the boundaries of 20(2), it must also be in accordance with Article 19(3). This is also applicable vice versa, with states wanting to invoke Article 19(3) having to stay within the scope of 20(2). However, it is theoretically possible for Article 19(3) to work to restrict hate speech beyond 20(2)’s requirements, as “what States are required to ban to ensure equality is not necessarily the same as what they are permitted to ban to serve this goal without breaching the right to freedom of expression.”<sup>68</sup> In other words, States can still, hypothetically, respect Article 19(3) while working to limit certain forms of incitement.

Even though the United States ratified the ICCPR in 1992 -- twenty-six years after its adoption by the United Nation’s General Assembly --the state proposed a huge number of RUDs. They included provisions to prohibition of capital punishment, war propaganda, cruel, and inhuman or degrading treatment, and equal protection.<sup>69</sup> The United States’ reservation to Article 20 is the most significant in regard to the state’s stance on freedom of speech preservation. With concerns the Article would infringe on First Amendment protections, the Senate issued a reservation that “Article 20 does not...restrict the right of free speech and association protected by the Constitution and laws of the United States.”<sup>70</sup> Citing Constitutional freedoms, the US

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<sup>67</sup> ICCPR, Article 20(2)

<sup>68</sup> Mendel, Toby “Hate Speech Rules Under International Law,” *Centre for Law and Democracy*, (Feb. 2010): 4 <http://www.law-democracy.org/wp-content/uploads/2010/07/10.02.hate-speech.Macedonia-book.pdf>, accessed 1/18/18

<sup>69</sup> Ash, Kristina, “U.S. Reservations to the International Covenant on Civil and Political Rights: Creditability Maximization and Global Influence”, *Nw. J. Int’l Hum. Rts.* 1, 3 (2005): 6

<sup>70</sup> Ash, *U.S. Reservations*, 8, citing 138 CONG. REC. at S4783

made an additional reservation to ICCPR's Article 19-- specifically, 19(3a) and 3(b). Both articles call for restrictions on exercising freedom of expression "for the respect of the rights or reputations of others" or "for the protection of national security or of public order, or of public health or morals."<sup>71</sup> The United States avowed that they would not accept these limitations, and rather continue to pursue their Constitutional approach. Stating their reservations, the Senate only consented to the ICCPR on the basis that "the constitution and laws of the United States contain extensive protections of its individual freedom of speech, expression and association," and as such "the United States does not accept an obligation under this Convention...to restrict those rights, through the adoption of legislation or any other measures, to the extent that they are protected by the Constitution and laws of the United States."<sup>72</sup> Although RUDs to international covenants are far from uncommon, the US avoided any obligation to speech restrictions of any kind. No other nation state made more reservations to the treaty, particularly in regard to freedom of expression. Consequently, the US is not obligated to halt hate speech under any human rights treaty. This demonstrates the United States' radical departure from human rights norms, often—in the case of the Snyder family—at the expense of state's right bearers.

In international law, there are two main foundations regarding what constitutes hate speech—namely, incitement, and proscribed results (such as hatred against a group). Within the context of hate speech, incitement is defined as a desire to promote violence, racism, discrimination or hatred. This is opposed to the US's definition under the Brandenburg Test. As mentioned prior, although the UDHR does not mention regulations on speech, regulating intent

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<sup>71</sup> ICCPR, Article 19(3), a and b

<sup>72</sup> U.S. reservations, declarations, and understandings, *International Convention on the Elimination of All Forms of Racial Discrimination*, 140 Cong. Rec. S7634-02 (daily ed., June 24, 1994). <http://hrlibrary.umn.edu/usdocs/racialres.html>, accessed 1/10/18

is explicitly mentioned in Article 20(2) of the ICCPR. And even though international law lacks a concrete definition of the term, there are a number of factors which help dictate a general understanding. While it generally follows that causation is not the same as incitement, the causation can serve as an indicator of provocation. The impact of the speech—on both the targets and the overall environment—should be taken into account. In Canadian Supreme Court case *Malcolm Ross v. Canada*, a New Brunswick remedial reading teacher (Ross) stood accused of propagating anti-Semitic views. The Canadian Supreme court concluded that the “evidence that a ‘poisoned environment’ had been created within the relevant school board and held that ‘it is possible to reasonably anticipate’ the causal relationship between that environment and the author’s publications.”<sup>73</sup> When the case came before the Human Rights Committee, the HRC held that this counted as incitement—and therefore did not violate Ross’s right to freedom of expression. Thus, the risk of potential harm, as well as the creation of the “poisoned environment” within the school constituted hate speech.

Context is a crucial factor in the human rights appraisal of incitement. In the *Ross* case, Ross’s standing as a teacher heavily influenced the HRC’s upholding of the Canadian Supreme Court’s decision. As mentioned in the Committee’s briefing of the case, “in the circumstances, the Committee recalls that the exercise of the right to freedom of expression carries with it special duties and responsibilities... (which) are of particular relevance within the school system, especially in regard to the teaching of young students.”<sup>74</sup> Since Ross was in a position of relative power, he was regarded by the HRC to have more influence in spreading (mis)information. As

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<sup>73</sup> Mendel, *Hate Speech Rules Under International Law*, 6, quoting *Ross v. New Brunswick School District No. 15* (1996), 1 S.C.R. 825, 101

<sup>74</sup> *Malcolm Ross v. Canada*, CCPR/C/70/D/736/1997, UN Human Rights Committee (HRC), (26 October 2000) <http://www.refworld.org/cases,HRC,3f588efc0.html>, accessed 1/12/17

thus, his role as teacher was an important factor in determining context and therefore setting the stage for incitement. Taking context into account serves to measure the likelihood of a sort of environmental combustion, especially when it leads to negative proscribed results. Article 4(a) of the CERD and ICCPR's Article 20(2) reach past covering merely incitement to violence. Both articles call for prohibitions on incitement to hatred and discrimination, with CERD's Article 4(a) additional "declar(ing) an offence punishing by law all dissemination of ideas based on racial superiority."<sup>75</sup> While incitement to violence is deemed to be hate speech even by American standards, prohibitions on incitement to hatred constitutes another approach. Rather than calling for a specific act, incitement to hatred is a creation of a state of mind.<sup>76</sup> Hatred is a viewpoint and thus covered under international law's freedom of expression norms—but yet, most states (with a few notable exceptions, most prominently the United States) accept the banning of incitement to hatred. The justification of the ban draws upon the probable physical manifestation of hatred, from thought to action. Since hatred is a powerful, driving state of mind, some form of it will eventually develop into tangible being. Thus, the ban works to protect groups before they need to seek protection from acts of hatred. The HRC's definition of hatred relies on the potential discrimination to a group (i.e. racism), or the risk of harm to established rights. In terms of Westboro, it can be argued that the group engaged in incitement to hatred—though invoking God as justification for discrimination.

Primarily, the difference between international definitions of hate speech and merely offensive speech lies in the target. If the expression's target is an idea, then it is covered by

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<sup>75</sup> UN General Assembly, *International Convention on the Elimination of All Forms of Racial Discrimination*, (21 December 1965) 2106 XX, <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CERD.aspx>, accessed 1/12/18, Article 4(a)

<sup>76</sup> Mendel, *Hate Speech Rules Under International Law*, 9

freedom of expression protections. However, if the target is a human being, the expression may not be covered by protections. In *Snyder v. Phelps*, the target of Westboro's protest was clearly an individual. Their online "epic" directly mentioned Matthew Snyder by name, with the location of their protest indicative of their target. As demonstrated by the case's outcome, international law's approach differs greatly from the United States. It is extremely difficult to legally prove cases of hate speech due to restrictions on content discrimination. As opposed to a country such as Germany, which forbids any speech denying the Holocaust, America errs on the side of freedom of expression

While there's no definitive answer to the why the two spheres have diverged, the US's position could potentially stem from its cultural emphasis on individualism. Such individualism is reflected in the previously mentioned "marketplace of ideas", where in theory each individual idea possesses intrinsic value. Moreover, the US culturally has a historical mistrust of placing too much power in the hands of the state. There is also a certain national amnesia regarding prior treatment of minorities. J. Michael Martin postulates that "countries like Israel, Austria, Germany, and South Africa with histories of horrible oppression may feel that the best way to remedy human rights violation is to limit the ability of citizens to harm one another by legally restricting free expression",<sup>77</sup> drawing a clear distinction between the United States and other countries with repressive histories. This seems an overlook of the US's past of blatant discriminatory practices—including the genocide of the Native Americans, the enslavement of black people, Jim Crow laws, and Japanese internment camps. All of these were federally sanctioned. So, while America's amnesia allows it to engage in degrees of exceptionalism, the

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<sup>77</sup> Martin, J. Michael, "Snyder v. Phelps: Applying the Constitution's Historic Protection of Offensive Expression to Religiously Motivated Speech", *Regent University Law Review* 24, Issue 2 (2011-2012): 502

nation's history tells a story of severe violations of human dignity. Perhaps, in that light, stronger hate speech laws should be considered as to avoid repeats of past atrocities and work to respect individuals' rights to dignity.

### **What is Dignity?**

The concept of “human dignity” is an intentionally complex one, enshrined in the first paragraph of the Universal Declaration of Human Rights. “Dignity” is a broad moral notion, one which is inherent to every human through virtue of being human. In theory, all human beings are accorded an equal amount of dignity, and though dignity, rights. The concept is a fundamental aspect of modern day human rights and underscores the entirety of international law. In the UDHR, dignity is connected to our possession of reason and consciousness, with the intro to the declaration stating that we are “born...equal in dignity and rights.”<sup>78</sup> Going off the natural rights tradition shaped by Locke and Kant, possessing rights is an inalienable part of the human condition. As in a human rights schema all rights are interlocked and interdependent, dignity serves as the underscoring factor. While dignity is considered to be inalienable, it can also be destroyed or damaged. The concept has played a crucial role in shaping not only the UDHR, but also the United Nations Charter, the ICCPR, and the International Covenant on Economic, Social and Cultural Rights (ICESR). Stretching beyond just a general human rights construct, dignity has become a core underpinning of legislation across nations. It has also served as a rallying cry for various causes throughout the world—ranging from the American abolition of slavery to the United Kingdom Labor movement.

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<sup>78</sup> UDHR, preamble



While the evolution of the concept of dignity is a long and varied one, modern day conceptions mainly took shape post-Holocaust. The horrors of World War Two inspired a resurgence of international interest in a “never again” approach to preserving human dignity, as well as better defining it. Perhaps most significantly in the UDHR, dignity is linked to the nature of being born in freedom and naturally “endowed with reason and conscience.”<sup>79</sup> Due to all beings being born into a state of inherent equality and possessing logic, as per Article 1, they therefore should “act towards one another in a spirit of brotherhood” and work to validate each other’s worth. Dignity is also explicitly mentioned in Articles 22 and 23, with Article 23(3) concerning the right to work stating “everyone who works has the right to just and favorable remuneration ensuring for himself and his family an existence worthy of human dignity, and supplemented, if necessary, by other means of social protection.”<sup>80</sup> In the UDHR, dignity is both a shorthand for a general theory of human rights—one acceptable to members of varying ideological, cultural, and national groups—and applicable to any person, anywhere. A being does not have to be in possession of any particular attribute or belong to any group to possess it. Thus, its use in the UDHR is based in a sort of humanistic non-ideology. The insertion of dignity into the declaration allows for a “linguistic-symbol that can represent different outlooks, thereby justifying a concrete political agreement on a seemingly shared ground.”<sup>81</sup> This is not to say that the broadness of the term diminishes its contextual importance in any way. Rather, the linguistic flexibility allows for dignity to possess meanings varying across socio-political contexts.<sup>82</sup> As

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<sup>79</sup> UDHR, Article 1

<sup>80</sup> UDHR, Article 23(3)

<sup>81</sup> Shultziner, Doron, “Human Dignity: Functions and Meanings”, *Perspectives on Human Dignity: A Conversation*. Springer, Dordrecht (2007): 5

<sup>82</sup> McCrudden, Christopher, “Human Dignity and Judicial Interpretation of Human Rights”, *European Journal of International Law*, Volume 19, Issue 4, 1 September (2008): 677

such, the concept can be understood in a wide variety of ways—but at its basis, either correlating with human rights or serves as the foundation for them. At a minimum, dignity consists of a being’s intrinsic worth that ought to be recognized and respected. It also stands that certain behaviors towards other beings constitute a violation of their dignity. As Jack Donnelly states, “human rights are rooted in ‘structure’ rather than ‘culture’”, with dignity serving as a structural base.<sup>83</sup>

Since dignity is a given part of rights, its invocation figures heavily into the international law sphere. The United Nations relies heavily on the term, with its charter’s preamble seeking to “reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and woman of nations large and small.”<sup>84</sup> Beyond dignity as an overarching guide post for rights, the UN has come to adopt dignity to particular areas of human rights. The 1993 Vienna World Conference saw the implementation of the term to such issues like torture, indigenous people’s rights, the abolition of poverty, gender-based violence, and biomedical issues.<sup>85</sup> Outside the general reach of the UDHR and human right texts preambles, the concept of dignity has been adopted into declarations targeting key issues—with specific articles invoking dignity as justification for specific rights. Examples include Article 25(d) of the Convention of the Rights of Persons with Disabilities (CRPD), which requires “health professionals to provide care of the same quality to persons with disabilities as to others, including...raising awareness of the human rights, dignity, autonomy and needs of persons of disabilities through training and the

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<sup>83</sup> Donnelly, Jack, “Human Dignity and Human Rights”, *Protecting Dignity: An Agenda for Human Rights*, (June 2009): 72

<sup>84</sup> United Nations, *Charter of the United Nations*, (24 Oct 1945) Preamble, <http://www.un.org/en/sections/un-charter/preamble/index.html>, accessed 1/16/18

<sup>85</sup> McCrudden, *Human Dignity and Judicial Interpretation* 670

promulgation of ethical standards for public and private health care.”<sup>86</sup> Another invocation of dignity in a specific article can be found in Article 39 of the Convention of the Rights of the Child, providing “recovery and reintegration . . . which fosters the health, self-respect and dignity of the child.”<sup>87</sup> Mentions of dignity in particular articles of human rights text provide the term with a stronger contextual conception, and further justifications for its importance. The International Court of Justice judges frequently invoke dignity in their individual decisions, with domestic legislation across nations including mention of the concept. Thus, dignity serves to provide a background for human rights, while human rights work to ensure dignity for all.

With international law holding dignity at its crux, its application requires a counterbalance between hate speech and freedom of expression. While international law treats dignity as a nexus, American legal structure disregards it in lieu of expression. In the case of *Snyder v. Phelps*, this can best be understood via the lens of personhood. As Alito said in his dissenting statement, the Snyder’s rights to personhood were violated by Westboro’s actions. Dignity underpins the right to personhood, relating back to Snyder’s initial claims of defamation, publicity given to private life, and intentional infliction of emotional distress. Though disregarding such violations, the Fourth District Court’s conclusion regarding WBC’s use of hate speech violated the Snyders’ right to personhood. It also threatened the personhoods of marginalized groups, infringing upon their dignity and ability to fully perform as democratic citizens.

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<sup>86</sup> United Nations General Assembly, *Convention of the Rights of Persons with Disabilities*, (3 May 2006) A/RES/61/106, <https://www.un.org/development/desa/disabilities/convention-on-the-rights-of-persons-with-disabilities/article-25-health.html>, accessed 1/15/18

<sup>87</sup> United Nations General Assembly, *Convention of the Rights of the Child*, (2 September 1990) 44/25, <http://www.ohchr.org/en/professionalinterest/pages/crc.aspx>, accessed 1/15/18, Article 39

## Personhood and Hate Speech

In order to be granted rights, one must possess the status of personhood—a status which runs the metaphysical gamut (Is a fetus afforded human rights? A brain-dead individual? A forest? etc.) In the context of international human rights law, personhood can be understood as stemming from theories of natural rights. This is understood in modernity best via the philosophy of Hegel, who understood people as completely independent individuals who each view themselves as possessing intrinsic supreme value.<sup>88</sup> When encountering another individual, each finds the others sense of internal value threatens their own. Thus, the struggle for recognition between the individuals comes into play, which can only be resolved through reaching mutual recognition of the others value. This mutual recognition makes up not only the basis of human rights, but statehood and citizenship. Without mutual recognition—of both the civic and the individual—society cannot functionally operate. And with recognition of the other as the basis, respect for one’s fellow beings provides the basis for human rights. Article 6 of the UDHR states that “Everyone has the right to recognition everywhere as a person before the law,” with Article 16 of the ICCPR asserting a nearly identical statement. Beyond the judicial, hate speech undermines a person’s right to recognition. Through the lens of respecting personhood, hate speech can be understood as “reflecting the stage of consciousness in which individuals find themselves deeply threatened by the selfhood of others and respond by trying to dominate or destroy them.”<sup>89</sup> The WBC’s dehumanization of Matthew Snyder dismantled his and his family’s personhood, as well as engaged in homophobia. Though the invocation of the hatred of a supreme being, it reduced the targeted parties to subhuman and deserving of suffering.

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<sup>88</sup> Heyman, Steven J. “Hate Speech, Public Discourse, and the First Amendment”, *Extreme Speech and Democracy*, Oxford Univ. Press (2008): 13

<sup>89</sup> Ibid. 13

The harms of hate speech to personhood, particularly when protected by freedom of expression, are numerous. Article 3 of the UDHR grants the right to personal security, guaranteeing “life, liberty, and security of person.”<sup>90</sup> Additionally, Article 9 of the International Covenant on Civil and Political Rights states that “everyone has the right to liberty and security of person.”<sup>91</sup> Beyond just freedom from unlawful imprisonment, possessing security entails positive protection by the state to prevent threats to individual’s liberty. In terms of the Westboro Baptist Church, their aggressive vernacular and use of slurs—on a massive publicized scale—contribute to the erosion of both its target’s personal security, and the overall environment. Through the WBC’s aggressive picketing, the targets of their attacks suffer losses to elements of their personal safety. Even though the WBC do not engage in any physical altercations, Snyder cited suffering worsening health as a result of their verbal assaults against his son, specifically citing his diabetes. The WBC additionally violated his, and his dead son’s, personality rights. Such rights, even though they aren’t explicitly mentioned in international law, are inherently linked to natural rights and human dignity. Personality rights entail the right to exist in the public sphere and still retain control over their image, as well as the right to privacy. Even though the Fourth District Court of Appeals deemed Snyder a public figure, the WBC’s targeting of Cpl. Snyder post-mortem—notably, the online epic directly calling him by name—appears a violation of the subject’s personality rights, and thus a violation of dignity. And despite Snyder’s judicially deemed status as a public figure, “individuals do not cease to be persons when they participate in the public life of the community, and they should not be required to wholly sacrifice their

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<sup>90</sup> UDHR, Article 3

<sup>91</sup> ICCPR, Article 9

personality rights to do so.”<sup>92</sup> Public figures are still people, afforded the same right to dignity as private figures possess.

### **Harm-prevention paradigms**

Limiting violations to dignity, especially in a Constitutional free speech state, is no easy task. In order to make the argument that there should be legislative restrictions on hate speech, there must be appropriate legal, civic, and morale rationales. As suggested by Robert Mark Simpson, such a rationale can be found in the harm-prevention paradigm. It is not enough to say that hate speech is merely offensive—that it is wrong or hurtful, or that such speakers of speech deserve to be punished. Rationales that could be “overridden by considerations that countervail against legal restrictions on *any* conduct (e.g. costliness, risk of inefficacy, risk of sinister misuse)” or any other free speech concerns must be justified via an establishment of real harm.<sup>93</sup> Going beyond just hurt feelings, invoking real emotional harm as a potential byproduct of hate speech infuses cases with more merit. But to do so, it must be proven that there is harm perpetuated by speakers of hate speech towards their targets. The targets must be negatively impacted as a result. In order to better establish a precedent for determining hate speech, the harm-prevention framework must distinguish between types of harms—namely, direct and indirect harm.<sup>94</sup> It is obviously possible for an individual to be on the receiving end of a racial slur, and to suffer emotional distress as a result. This would be a case of direct harm towards an individual. However, the consequences of hate speech ripple beyond just the individual target.

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<sup>92</sup> Heyman, *Hate Speech, Public Discourse*, 11

<sup>93</sup> Simpson, Robert Mark, “Dignity, Harm, and Hate Speech”, *Law and Philosophy* 32, (2013): 705

<sup>94</sup> *Ibid.*, 706

Though the use of hate speech, harmful social hierarchies can be built or further established, resulting in a toxic and unequal societal environment. Such an environment works to erode individuals' basic human dignity. Simpson likens such occurrences to that of pollution—in which “even when there are no specifiable victims, all acts of pollution have a degrading impact on environmental systems whose degradation beyond a certain point does inflict harms on individuals.”<sup>95</sup> In an indirect matter, hate speech aids in creating to a toxic socio-political environment ranging past any one targeted individual or group. This creates major problems for a healthy and functioning democratic state, as individuals become dissuaded and unsure of status within the structure.

If the uttering of a racial slur creates a poisoned environment, then the WBC's protest tactics seem to be especially offensive. Through their mastery of media manipulation, Westboro's platform extends beyond just their legally sanctioned protest sites. The group has reached levels of infamy in America as one of the country's most disdained, and well known, hate groups. Despite the WBC being widely scorned by wider American society, they're still attract no small amount of attention to their causes via their shock tactics and offensive language. With their extensive coverage by the media, Westboro's hate speech has infiltrated the American lexicon. The statement “God Hates Fags” is an instantly identifiable one as tied to the WBC. As previously mentioned, the WBC's use of distorted communication aids in contributing to an unequal society, making their targets feel unheard and unwelcome. The current digital age also calls into question limitations of speech and harm, with WBC's online epic targeting Matthew Snyder made accessible to anyone. Within the harm prevention paradigm, the WBC's speech and actions result in both direct and indirect harms.

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<sup>95</sup> Simpson, *Dignity, Harm, and Hate Speech*, 707

A potential solution to the tension between free speech and hate speech requires recognition of interdependence between rights. Stephen Heyman proposes a four-pronged approach to recognizing the importance of freedom of expression while still limiting its harms. The four parts include consideration of “(1) the external world; (2) the internal realm of thought and feeling; (3) the social and political domain; (4) the sphere of intellect and spirit.”<sup>96</sup> Freedom is fundamentally linked to autonomy in the external world, independence without outside intrusion. Heyman states that while freedom of speech is a “form of outward liberty...or the ability to act as one likes,” misuse of the freedom violates others’ “right to personal security” as well as the collective’s right to freedom from violence.<sup>97</sup> The second rationale involves the natural right to self-realization. When speech is prohibited excessively, the individual’s capacity for internal growth and recognition of own desires and being is stunted. However, one’s other internal rights—such as the rights to dignity, security, and privacy—are threatened by hate speech. Such violations are protected by the tort doctrine that affords a remedy for intentional and unjustified infliction of severe emotional distress.”<sup>98</sup> But as demonstrated in *Snyder v. Phelps*, this tort doctrine is often overshadowed by the judicial emphasis on preserving freedom of expression.<sup>99</sup> Heyman’s third point concerns the right of citizens to participate in their governmental processes. While freedom of speech is crucial for a functioning democracy, the freedom requires cooperation with one’s fellow citizens. Accordingly, this right is a social one, requiring the honoring of other’s internal and external rights. Hate speech limits the abilities of the deemed “other” to fully participate in the democracy. With this in mind, when partaking in

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<sup>96</sup> Heyman, Steven J. “Hate Speech, Public Discourse, and the First Amendment”, *Extreme Speech and Democracy*, Oxford Univ. Press (2008): 6

<sup>97</sup> *Ibid.*

<sup>98</sup> *Ibid.*, 7

<sup>99</sup> *Snyder v. Phelps*, 562 U.S. 443 (2011)



the democratic process, the collective's corresponding rights must be taken into account.<sup>100</sup> Finally, the right to intellectual and spiritual freedom also requires social cooperation. Truth seeking is "a relational right, which should be exercised with due regard to others."<sup>101</sup> An example of the right to intellectual freedom violating others' internal rights includes Holocaust denial--often presented under the guise of legitimate research-- in academia. So even though freedom of expression is a crucial for proper execution of the Constitutional process, other rights are of equal importance and must be taken into account. Thus, Heyman's rights-based outline provides a broader context for considering freedom of speech in relation to other rights. The natural rights structure is also prevalent in the UDHR and ICCPR, with the UDHR's preamble stating, "all members of the human family" possess "inherent dignity....and equal and inalienable rights," with Article I specifically noting that "all human beings are born free and equal in dignity and rights."<sup>102</sup>

## **Conclusion**

While freedom of expression is undoubtedly a hallmark of a free and functioning society, hate speech is a corrosive element to human dignity. As dignity is an integral part of human rights and vice versa, the United States' reliance on solely indictment-based measures allows major violations to rights to personhood. The valuing of freedom of expression over dignity allows groups like the Westboro Baptist Church to target innocent victims on macro and micro scales. Individuals like the Snyders suffer extreme emotional duress, while the WBC's hate speech works towards their aims of polluting the social atmosphere. There are no effective laws

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<sup>100</sup> Ibid.

<sup>101</sup> Ibid..

<sup>102</sup> UDHR, Preamble

to limit their legally savvy speech tactics. Even though America's legal system possesses certain torts which, in theory, allow individuals to challenge on the basis of emotional distress, such torts are perpetually secondary to freedom of expression. The most effective tool for combating hate speech is legal regulation. The law is a theoretical extension of wants of society, serving as an "expressive function in signaling to affected groups that the institutions of the society do not endorse or in any way validate the views (of the hate group) that are being expressed."<sup>103</sup>

Through a nation's possession of prohibitory laws against hate speech, it motions to both hate groups and victims of hate speech that such actions are not condoned by the wider politico-culture. Laws signal that the vast majority of a populace--although it may not always come about in practice—stand either against or for a particular set of ideals. Such laws attempt to establish a more just society, one without hatred directed against a person's creed, religion, or race. To allow room for judicially sanctioned hate speech is to legally sanction the violation of an individual's rights—be it to security, privacy, or dignity.

Simpson's harm reduction paradigm and Heyman's rights-based context offer potential approaches to better determine the range of hate speech. In order to respect beings' rights to dignity—and allow them the abilities to reach their full personhood—America ought to implant stronger hate speech legal clauses in accordance with human rights norms. While no easy task, the diversity of American culture requires a consideration of inclusivity. The so called American melting pot should possess laws ensuring that all are respected under the law. Furthermore, there ought to be an acknowledgement—especially accounting for America's storied past—of vulnerable groups. Minorities historically subjected to discrimination deserve to feel secure that

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<sup>103</sup> Sorial, Sarah, "Hate Speech and Distorted Communication: Rethinking the Limits of Incitement," *Law and Philosophy* 54, (2015): 320

they are a part of America's social fabric, just as much as anyone else. The American collective and the American individual are intrinsically parallel, "represent(ing) different descriptions of the same phenomenon: the experience of a society in which all citizens are political and legal equals, and all citizens experience that sense of equality."<sup>104</sup> Hate speech serves to smear an individual for belonging to a group and the group itself. Without effective tools to address these smears, the dignity of the democratic collective suffers. The failure of America to label obvious instances of hate speech as such—and thereby prosecute—is a failure at protecting human dignity as defined by human rights norms.

This is not to diminish the importance of freedom of expression. Free speech is a crucial aspect of human rights, and accordingly hate speech laws should not be impulsive and reactionary. But yet, as Judge Alito stated, speech like the Westboro Baptist Church's does nothing to contribute to public debate. As shown by numerous flaws in the marketplace of ideas construct, not all ideas deserve equal consideration. Ideologies which rely on constructs of discrimination do nothing to better a functioning democracy. It only harms the dignity of its targets, in both a direct and indirect manners. By America adopting a rights-based approach to hate speech, one grounded in the principles of preserving and furthering dignity, the state can ensure that its civilians do not suffer exclusion or harm. The basis of the American Constitution stemmed from Locke's natural rights-based approach, one which valued the inherent dignity of beings and sought to safeguard it. Accordingly, there ought to be stronger domestic judicial processes aiming to negate the impact of hate speech—and thus better protect the dignity of Americans.

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<sup>104</sup>Feldman, Stephen M., "Hate Speech and Democracy", *Criminal Justice Ethics* 23, No. 1, (2013): 91

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