



Juridicum

A right to hate

A comparative study on the approach to hate speech in the United States and Sweden

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VT 2014

RV4460 Rättsvetenskap C, Tillämpade studier (C-uppsats), 15 hp

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Abstract

Free speech, today is considered as a fundamental right in any democratic society. In order to live a fulfilling life, people need to express their thoughts and opinions. However, not all expressions are made in a positive spirit. There are those who use the right to free speech to hate, shock and offend. In the area of international law, few attempts of defining hate speech have been made.

This paper examines the legal approaches of two countries-The United States and Sweden-when dealing with 'hate speech'. Attempts to ban hate speech in the United States are seen through the prism of 'regulation of content'. That generates a strict scrutiny by the courts to check for if certain speech, by its content can be considered as hateful. As a result of this, only a few forms of speech can amount to be considered as hateful, and they generally include incitement to violence, a clear and present danger or if they are so called fighting words. By contrast, the Swedish approach on hate speech is far more open to the idea of restricting free speech. The Swedish regulation consists of a detailed constitution, with four documents all concerning free speech, and a specific law regulating hate speech in particular. Sweden is also bound to both the European Convention on Human Rights (hereinafter ECHR) and the European Union (hereinafter EU), which further adds to the complexity of dealing with hate speech.

The conclusion of this paper is that the United States do not even define hate speech in its constitution while Sweden have a specific law regulating the matter. Although, this is only the tip of the iceberg, it should give an indication on how each country approaches hate speech.

Keywords: *Freedom of Speech, Hate Speech, First Amendment, Restrictions, Westboro Baptist Church, Åke Green.*

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1. Introduction

1.1 Background

Two cases, two forms of speech, two similar agendas, two Supreme Courts, yet one different way of dealing with hate speech.

In June of 2004, Swedish pastor Åke Green was sentenced for preaching hate speech at a sermon.¹ Even though his sentence was a mere one month in prison, the case stirred an intense debate in Sweden. A year before his sentence, Green held a sermon entitled *Man and Women – Gods order of creation*. Green preached before the congregation about sexual abnormalities. According to the pastor these abnormalities, especially homosexuality, were considered a sin. The pastor even went to the extreme, and called these abnormalities as a “cancer on the entire societal body”.² Green continued his hate speech against homosexuality by comparing it to pedophilia, and stating that both are an human deviation.³

Green was prosecuted for hate speech in accordance with Swedish legislation on hate for his offensive and outrageous treatment of homosexuals. The first instance court, came to the conclusion that Green had shown a deliberate contempt towards homosexuals, and could therefore be charged for hate speech. The case was appealed and brought before the Supreme Court in Sweden. Even though, the Supreme Court acknowledged the fact that Greens sermon could be classified as hate speech, they did not find him guilty. The Supreme Court referred to the European Convention on Human Rights (hereinafter ECHR), stating that a sentencing of Green would be a breach of article 9 and 10 of the Convention.⁴

In the same period as the Åke Green case was being unfolded in Sweden, another religious group of people spread an equally hateful message throughout the United States.

Westboro Baptist Church (hereinafter WBC) are today known for their spiteful behaviour, which includes both gay and funeral picketing.⁵ Protesting at funerals, affects not only the mourning family’s, but it also creates media attention around the church. Every natural disaster, school shooting or even soldier falling in combat, is according to the Westboro

1 New Judicial Archive, *Nytt Juridiskt Arkiv* (hereinafter NJA) 2005 s.805.

2 Ibid.

3 Ibid.

4 Ibid.

5 Scott Swenson, 'Snyder v. Phelps: In the Court of Public Opinion, Snyder Wins' (2011)

<http://www.huffingtonpost.com/scott-swenson/snyder-v-phelps-in-the-co_b_831069.html> accessed 23 May 2014.

Baptist Church, Gods way of punishing those who do not obey him. In March of 2006, the congregations leader, pastor Fred Phelps, was prosecuted by a family member of a fallen soldier. The church had been protesting during the soldiers funeral, and according to the family member causing him emotional distress.⁶ In August of 2011, the Supreme Court of the United States came to the conclusion that, according the First Amendment of the Constitution, Westboro Baptist Church have the right to both freedom of religion and expression⁷. Even though their actions might be considered as outrageous, they have the right to express them. This paper will explore how each country respectively approaches hate speech, through the lens of these two cases. Since both cases share several similarities, they will represent each countries way of reasoning on hate speech.

Discussing hate speech from a broader perspective has already been done, and it would not contribute anything to legal science. Instead the paper aims to bring a different nuance to the subject by comparing two fundamentally different legals systems, and how they deal with hate speech. The comparative study will include both a discussion on constitutional protection, as well as how the Supreme Court in each country has dealt with hate speech.

1.2 Aim of Study

The purpose with this is paper is to study and analyse how hate speech is manifested in both the Swedish and American legislation. The focus of this study will be on examining the constitutional protection for hate speech, in each respective country. This includes a more refined examination on the similarities and differences between the legal system's, and if there are any fundamental differences in their approach to hate speech. The paper also seeks to describe how other legal authorities can impact a nation's way of regulating free speech. Sweden is today bound both by the EU and the ECHR, which makes its regulation on free speech much more extensive than the American.

With this purpose, the paper will answer one key question: How do both countries deal with hate speech? Answering this question will be the main objective of this paper. However, out of this extensive area of law, several other questions will arise. How strong is the constitutional protection on free speech in each respective country? How does each

⁶ 131 S. Ct. 1207 (2011).

⁷ First Amendment to the United States Constitution[1787]: adopted 1791 to the Bill of Rights.

respective country restrict free speech? What impact has the EU and ECHR, on Sweden's legislation on hate speech?

1.3 Method and material

In order to answer the mentioned questions, the paper will use a comparative method. This method relies on examining two different legal subjects. Since the purpose of this study is to examine how the constitutional protection in both countries regulate hate speech, the comparative method will allow for such a analysis. It will also give a reliable indication on which of the two countries has the strongest protection.

The comparative method will be used mostly primarily in chapter 7. There the paper will strive to highlight both the similarities and difference in the way each respective country deals with hate speech.

Apart from the comparative method the paper will also use a legal dogmatic method. It consists of examining already existing law on the matter, this involves a deeper analysis of both the American and Swedish legislation on hate speech. Since the paper deals with two very different legal systems, how much this method will be applied depends on which country is being examined. Because lack of legislation on free speech in the United States, the main legal source will instead be case law, and the legal doctrine developed by the courts. The only legislative document which will be discussed in depth, is the First Amendment. It is the primary legal source on free speech in the United States, and will therefore acquire a deeper examination.

The Swedish legislation on free speech is constructed of four constitutional documents. Three of these concern free speech, and will be examined further. However, unlike the United State, Sweden also has an actual law prohibiting hate speech. Aside from the constitution Sweden is also bound to EU-treaties and the ECHR, which all have its own regulations on free speech.

When discussing Sweden's approach to hate speech one needs to go beyond the legislative context. Another source of material which will be used is the preparatory work to the constitution and the law against hate speech. It will not only give a more detailed view of the actual law itself, but also how the legislators reasoned when making the law.

A type of legal source which will be used in the comparative method is a academic discussions. Since hate speech is a very controversial subject, it has caused for a number of people to raise their voices on the matter. The academic discussion of this paper will focus on commentaries to legislation, in order to understand its true meaning, as well as in legal journals and literature. The paper will shed some light on how discussion involving hate speech has been before this paper, and what impact it has had on how hate speech is perceived today.

In conclusion, there will be two different methods applied in this paper, the primary one being a comparative method. Depending on which method is being used will determine what material is relevant. When discussing the American view on hate speech, case law will be the primary source of material. It is worth noting that case law from the Supreme Court will be used primary. In the section on Sweden, legislation combined with case law serve the majority of the content. The legal doctrine, and article will be used when exemplifying a point, or highlighting a important legal discussion.

The legal citation system that has been used throughout this paper is the Oxford Standard for the Citation of Legal Authorities (OSCOLA). This is a style most commonly used in the United Kingdom.

1.4 Delimitation

Since the purpose of this study is to examine the approach on hate speech between the United States and Sweden, there will be a few delimitations that needs to be explained. Firstly, it is important to separate hate speech from other areas, such as discrimination. The purpose of this paper is not examine the legislation on discrimination, nor will it include any discussion regarding discrimination in this study.

Secondly, there has been a conscious delimitation to not single religion as one possible target for hate speech. Even though, both of the above mentioned cases are connected to religious motives they are primary used to exemplify hate speech in general. One could have written a paper only focusing on hate speech that arrives from religion: What happens when God makes you hate?, but that is not the aim of this study.

A third and final delimitation is that when the paper examines the European Union's role on

the Swedish legislation, it will not describe how laws are implemented in a member states. This means that it will not focus on the legislative process that occurs when an EU directive transposes into a domestic legal system. This paper will only focus on the result of the EU directives and how they have influenced Sweden's approach to hate speech.

1.5 Structure

The outline of this paper begins under **Section II** with a general definition on what is hate speech. In order to further progress this study the paper requires a common definition on hate speech, which then will be used throughout. Both the International Covenant on Civil and Political Rights (hereinafter ICCPR) and the International Convention on the Elimination of All Forms of Racial Discrimination (hereinafter ICERD) will be analysed to seek out variations on the definition of hate speech.

In **Section III** the American view on hate speech will be developed. This includes a thorough examination of the United States Constitution, and the protection it gives to free speech. This section will start with a description of the First Amendment and its importance in the American legal history. It then moves to discuss what kind of speech is not constitutionally protect, and what form of restrictions can be made. To further exemplify how the Supreme Courts has reasoned in cases concerning hate speech, this section will describe how the Westboro Baptist Church (hereinafter WBC) have impacted the discussion hate speech in the United States. It will explain how their controversial agenda has been percied by the courts, and why their speech was protected under the First Amendment. Finally, a short distinction between hate speech and hate crime will also be allowed space in this paper. The paper is constructed in a way that every important principle is explained by case law.

Section IV focuses on the other state in this comparative analysis, Sweden. It begins with a a brief explanation on the different constitutional instruments that regulate free speech, and how they are perceived by the government. It then focuses on other legal authorities that influence the Swedish legislation on free speech. Both the European Union (hereinafter EU) and the ECHR will be explored. This section will also focus on describing what the general restrictions on free speech are, and what the criteria is for them to be fulfilled. The final part of this section will primary focus on the specific regulation on hate speech which is found in

the Swedish criminal code. What does the law actually entail and how has the Supreme Court ruled on the matter, for example in the case concerning Åke Green.

Section V will be an analytical section where the true comparative study, expresses itself. Firstly, a short presentation of the results will be presented. Then the section will focus on comparing the different elements of hate speech between the two countries. Perception, legislation, Supreme Court's approach, and also why the Supreme Court reasoned differently in our two main cases. The objective with this paper is to compare hate speech in both countries. This will hopefully lead to an answer on which country has the strongest protection on free speech, and which is more open to restrictions.

Section VI will consist of a concluding discussion.

2. What is hate speech?

Since the main objective of this paper is to examine how hate speech is regulated in two very different legal systems, it is important to begin with an explanation of what it means to speak hatefully. For without a clear understanding of what the concept entails a comparative study would be meaningless. This section of the paper will attempt to define what hate speech actually means. It will focus on three different legal aspects, all of which give their own interpretation on what the term entails.

2.1 ICCPR

Finding a balance between freedom of expression and hate speech is often a very difficult task.⁸ On one hand there is a growing need to protect the freedom of expression; on the other hand there is also an equal need to prevent those who use it in order to provoke violence. One legal framework which regulates hate speech, or any other form of discriminative acts is the International Covenant on Civil and Political Rights [1976] (hereinafter ICCPR).⁹ Granted, the ICCPR states that “[e]veryone has the right to hold opinions without interference”¹⁰, it does not mean that there are no limitations on what is considered to be free speech. On the contrary, the covenant gives a detailed description on what kind of speech is prohibited, and does not enjoy the protection of the covenant stating that: “Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law”.¹¹ Although the ICCPR does not define hate speech in its text, a common interpretation is that the prohibition entails certain forms of speech which because of its content are hateful. Not only does the ICCPR prohibit advocacy of this kind, but the final sentence in the clause also states that this kind of behaviour “shall be prohibited by law”.¹² Accordingly, the ICCPR does not simply permit member states to prohibit hate speech, but even has it as a requirement.

8 D Moeckli, S Shah, S Sivakumaran, *International Human Rights Law* (Oxford University Press 2010) 270.

9 *ibid*

10 art 19.1 CCPR

11 art 20 ICCPR

12 *ibid*

2.2 ICERD

The International Convention on the Elimination of All Forms of Racial Discrimination (hereinafter ICERD) also regulate hate speech. It condemns “all propaganda and all organizations which are based on ideas or theories of superiority of one race or group of persons of one colour or ethnic origin, or which attempt to justify or promote racial hatred and discrimination in any form”¹³. The purpose of this convention is to promote understanding between races, and to ensure that all state parties work together in condemning any form of racial discrimination. It defines racial discrimination as “any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin”.¹⁴

What differentiates ICERD from the ICCPR is that it is more strict in restricting free speech. It goes further than the provision in the ICCPR when it states that the Convention “Shall declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin”.¹⁵ While the ICCPR requires that the speech incites to discrimination for it to be restricted, the ICERD does not require that.¹⁶

While the term hate speech is not worded in the Convention, it does not prevent the Committee on the Elimination of Racial Discrimination from identifying hate speech, and exploring the relationship between it and the standards of the Convention.¹⁷ The Committee's own interpretation on hate speech is that it has to be based on racial superiority.¹⁸

A final note on ICERD is that Article 4 is not self-executing. This means that the Convention is dependent on the state parties to adopt the legislation.¹⁹ This has caused some controversy, especially in the case of the United States. Although, they are a party to the Convention, the United States “does not accept any obligation under this Convention, in

13 art 4 ICERD

14 art 1 ICERD

15 art 4 (a) ICERD

16 <<http://www.article19.org/pages/en/hate-speech-more.html>>

17 Committee on the Elimination of Racial Discrimination General recommendation No. 35

18 ibid

19 ibid

particular under articles 4 and 7, 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”²⁰

2.3 Council of Europe

According to the Council of Europe (hereinafter CoE) there exists not universally accepted definition of the term “hate speech”.²¹ The only definition on hate speech has come from the Council of Europe's Committee of Ministers. It was first brought to light during the case *Günduz v. Turkey*.²² The case concerned a religious leader, who during a televised debate had criticised both democracy, and any other religion that was not obeying Sharia law. The European Court of Human Rights (hereinafter ECtHR) had to decide whether the speech was considered as hateful, or if it enjoyed the protection under article 10 of the ECHR. In its reasoning the court referred to under Recommendation No. R (97) 20 on “hate speech”, adopted by the Committee of Ministers of the Council of Europe. There hate speech is understood as “covering all forms of expression which spread, incite, promote or justify racial hatred, xenophobia, anti-Semitism or other forms of hatred based on intolerance.” This includes intolerance “expressed by aggressive nationalism and ethnocentrism, discrimination and hostility against minorities, migrants and people of immigrant origin.”

In the above mentioned case, the court itself defined hate speech, by stating that “all forms of expression which spread, incite, promote or justify hatred based on intolerance (including religious intolerance)”²³ are not protected by the Convention, and are to be considered as hate speech. The court in this case further stressed that “there can be no doubt that concrete expressions constituting “hate speech”, which may be insulting to particular individuals or groups, are not protected by Article 10 of the Convention.”²⁴

20 <https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-2&chapter=4&lang=en#EndDec>

21 Anne Weber, *Manual on hate speech*, (Council of Europe Publishing 2009) 3

22 Application no 35071/97

23 *ibid* para. 40

24 *Ibid* para. 41

3. Free speech in the U.S.

“Restriction of free thought and free speech is the most dangerous of all subversions. It is the one un-American act that could most easily defeat us”²⁵ - William O. Douglas

The previous section discussed that hate speech is generally defined both according to law, and those who practise it, as advocacy rooted in hatred that constitutes incitement to discrimination, hostility and violence²⁶. This section will advance this definition of hate speech even further in order to investigate if, and how the Constitution of the United States regulates it. The first part of this section will focus on the legal aspect of hate speech in the U.S., and primarily on the first amendment. The latter part of this section will explore if and how free speech can be restricted. The final part will consist of a more deeper examination on a few landmark cases in the U.S. where hate speech, or freedom of expression has been discussed by the courts. *Snyder v Phelps*, will serve as a starting point in that section, since it's judgement is still fairly new.

3.1 The First Amendment

When the “father of the American Constitution”,²⁷ James Madison, first drafted the Bill of Rights, he sought out to include an amendment where peoples right to speak, write and publish their statements would be protected.²⁸ Madison asserted that it was of great importance to secure people these fundamental rights, and protect them from any governmental actions.²⁹ He created what is today known as the First Amendment, the United States primary regulation on free speech. The First Amendment is worded as follows:

“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances”³⁰

25 W O. Douglas, *The one un-American act*, Speech to the Author's Guild Council in New York 1952

26 art 20 ICCPR

27 E G Hudson, W O. Douglas, *Freedom of speech and press in America*, (Literary Licensing LLC 2012) 6

28 *ibid*

29 *ibid*

30 The First Amendment to the United States Constitution adopted december 15 1791

Reading this fairly short paragraph does not give one a simple answer on what speech is protected, and what can be considered as hate speech. On the contrary, only a few of the words in the First Amendment actually concerns free speech. Congress shall not make any laws that abridge individuals right to free speech. Accordingly, the First Amendment is not worded as a positive duty on the government to ensure people these rights. Instead, it serves more as a prohibition against government interference.³¹

Even though the First Amendment is the primary regulation regarding free speech in USA, it leaves a few questions to be answered. How, when and who is protected by the law is not described, nor does it entail if there are any restrictions to the law. As a matter of fact, the First Amendment only protects individuals from the government, not from other individuals.³² In short, this means that only the government or a governmental body can be charged for breaching the First Amendment. Unlike other countries (including Sweden) where laws on free speech are more restricted, the First Amendment has been given a broad legal protection.³³ As a result, court's have been given room for interpretation when assessing cases that rely upon the First Amendment. To offer a more comprehensible context, the following two cases will illustrate how court's balance different rights, and how the First Amendment trumps over other legislation.

One of the earlier cases which dealt with the issue of balancing the individuals freedom, and the states power was *Thomas v Collins*³⁴. A union worker lacked the proper documentation for soliciting members, which according to a Texas Statue was a requirement. Despite not having the documentation needed in Texas the union worker spoke before a assemblage of workers, and urged them to become part of a union. The union worker was brought before a court for not obeying the Statue and sentenced to a fine and imprisonment for contempt. He appealed the case before the Supreme Court who had the task of deciding whether his right to free speech according to the First Amendment had been infringed or if the Statue could be considered a necessary restriction. The Supreme Court reasoned that deciding where an individuals rights ends and State's power begin is a very delicate task³⁵. However, in this

31 M Hertz, P Molnar, *The content and context of Hate Speech*, (Cambridge Unitersty Press 2012) 247

32 K Gelber, *Speaking Back. The Free Speech versus hate speech debate*. (Johri Benjamins Publishing Company 2002) 99

33 M Hertz, P Molnar, *The content and context of Hate Speech*, (Cambridge Unitersty Press 2012) 42

34 323 U.S. 516 (1945)

35 Page 323 U.S. 529 (1945)

case, the restraint of free speech is not to be considered a insignificant restraint³⁶. Instead when the First Amendment is challenged by a unclear sanction it shall always prevail. Despite that there was a Statue requiring union workers to obtain certain documentation it would be considered disproportional to restrict their freedom of speech for those reasons. Therefore, the First Amendment shall be interpreted broadly and the appellant shall not be sentenced³⁷.

A more recent case, was *United States v. Stevens*.³⁸ A film producer was sentenced to 37 months in prison for compiling and selling tapes of dogfights. Federal statue Pub. L. 106-152 prohibited so called “crush-videos” (videos where people crushed smaller animals as a sexual fetish). It also prohibited both the creation and possession of depictions that contained animal cruelty. Even though the film producer himself did not participate in the animal cruelty, the court found him guilty because it was he who narrated the movies, as well as him distributing them. The defendant appealed the case, stating that his First Amendment right to free speech had been violated, and the case went up to the Supreme Court. United States urged the court to apply a balancing test before rendering their decision. The test required the court to weigh in the value of the speech against it's social cost. This would mean that the type of free speech which the defendant used was not worth torturing innocent animals. The Supreme Court held that statue Pub. L. 106-152 was unconstitutional, thereby limiting the defendants right to free speech. It further reasoned, that the benefits of the First Amendment on the government outweigh the costs.

3.2. Restrictions on hate speech

As discussed in the previous section, the First Amendment is considered to be the strongest protection of free speech in the United States, and is therefore often interpreted broadly by the court's. Does this mean that the law is absolute? The absence of a general prohibition on hate speech does not make the First Amendment absolute. Although it is broadly written, it would be impossible for the court's to accept all forms of speech.³⁹ Allowing hate speech, or any other offensive language would go against everything that the Constitution stands for.⁴⁰

36 Page 323 U.S. 543 (1945)

37 ibid

38 559 U.S. 460 (2010)

39 M Hertz, P Molnar, *The content and context of Hate Speech*, (Cambridge University Press 2012) 123

40 E G Hudson, W O. Douglas, *Freedom of speech and press in America*, (Literary Licensing LLC 2012) 8

Therefore, the Supreme Court has over time, and through a number of cases encountered situations where certain speech is not protected under the First Amendment. These restrictions will further on be exemplified, by relevant case law.

3.2.1 Content-based restrictions

3.2.2 Clear and present danger

If the First Amendment gives you the right to speak, it can also take the same right away from you.⁴¹ The U.S Supreme Court has by examining case law, arrived to the conclusion that, free speech does not equal the right to speak whatever you want. Therefore, one restriction that can be made is based on the content of the speech.⁴² One form of content-based speech which is excluded from the protection of the First Amendment, is speech that incites unlawful behaviour. One of the first cases which dealt with this issue was *Schenck v. United States*.⁴³ This case was about a group of people handing out leaflets which urged people to “assert their rights”. However, it was not the facts in this case which were of importance, but instead how the court reasoned. The Supreme Court used the example of a man shouting “fire” in a crowded theatre, which then caused panic to erupt. The same result would amount from the leaflets. Their purpose was to cause panic amongst the population. Justice Holmes wrote a famous opinion on the matter. “The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic. The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger”⁴⁴.

3.2.3 Inciting to violence

This criteria was later replaced in *Brandenburg v. Ohio*⁴⁵. A leader of the Ku Klux Klan (a white supremacy organisation) made during a televised rally, several derogatory statements, against minorities in the United States. Without threatening, or inciting to violence the leader urged the minorities to return to their homeland. The case was brought before the Supreme Court who reasoned that, even though the leader had advocated violence, he did

41 E G Hudson, W O. Douglas, *Freedom of speech and press in America*, (Literary Licensing LLC 2012) 21

42 M Hertz, P Molnar, *The content and context of Hate Speech*, (Cambridge University Press 2012) 257

43 249 U.S. 47 (1919)

44 249 U.S. 47, 52 (1919)

45 343 U.S. 250 (1952)

not incite to it. If the criteria before was that there needed to a “clear and present danger” it was now also needed to be incited, advocating was simply not enough. The constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action.

3.2.4 Fighting Words

Another form of speech which the court has restricted are so called fighting words. Those are words which by their very nature incite to hatred or violence.⁴⁶ In the case *Chaplinsky v. New Hampshire*⁴⁷, a member of the Jehovah's Witness attacked a police officer verbally for not allowing him to pass out pamphlets. The member called the officer for “a damned Fascist”, and other atrocities. The court held that words “which by their very utterance inflict injury or tend to incite an immediate breach of peace” are not constitutionally protected.⁴⁸

This limitation has however been challenged in a more recent case, *R.A.V. v. Saint Paul*.⁴⁹ The Supreme Court highlighted that when restricting speech based on its content, the court must ensure highest scrutiny. The case concerned a group of white extremists, burning a cross, in the yard of a black family. The group was convicted under a local criminal ordinance, which prohibited any display of racial symbols on private property.⁵⁰ According to the ordinance: “Whoever places on public or private property, a symbol, object, appellation, characterization or graffiti, including, but not limited to, a burning cross or Nazi swastika, which one knows or has reasonable grounds to know arouses anger, alarm or resentment in others on the basis of race, colour, creed, religion or gender commits disorderly conduct and shall be guilty of a misdemeanor”.⁵¹ The Supreme Court overturned the decision, and found the ordinance unconstitutional. Firstly, because it targeted speech that would not amount to an incitement to violence. Secondly, even if burning a cross was considered as “fighting words”, prohibiting certain acts but not other would make the ordinance based on impermissible viewpoint discrimination.

46 M Hertz, P Molnar, *The content and context of Hate Speech*, (Cambridge University Press 2012) 253

47 315 U.S. 568 (1942)

48 315 U.S. 568, 572 (1942)

49 505 U.S. 377 (1992)

50 St.Paul Bias-Motivated Crime Ordinance (1990)

51 *ibid* at §292.02

3.3. Non-content-based restrictions

3.3.1 Time, place and manner

The second restriction on free speech concerns factors such as time, place, or manner. When assessing if a certain speech is protected by the First Amendment the court has to take all these factors in consideration.⁵² In *Ward v. Rock Against Racism*⁵³ the city of New York, on behalf of complaining citizens, demanded that their own sound systems and technicians would be in charge during a rock concert. Members of a rock group, felt that New York's involvement in their performance interfered with their First Amendment right to free speech. The group appealed, and the case was later brought before the Supreme Court. However, the Supreme Court upheld the ordinance made by New York City. The court concluded, that it was appropriate by New York to take the necessary actions to maintain order. Justice Kennedy stated that “the means chosen are not substantially broader than necessary to achieve the government's interest”⁵⁴ The court further stressed that the restrictions based on time, place, or manner can only be invoked if they are: content neutral, narrowly tailored, have a significant governmental interest, leave other channels for communication open.⁵⁵

Another restriction on time place and manner was implemented as a result of our main case *Snyder v. Phelps*⁵⁶. This case will be examined more in depth in the next section, however, in november of 2012, President Barack Obama signed on to the Honoring America's Veterans and Caring for Camp Lejeune Families Act P.L.112-154. This act further emphasises the need of restrictions based on time, place, and manner when exercising free speech. It mainly focuses on regulating conditions when demonstrating at military funerals.⁵⁷ For example, the act bans any form of demonstration, or picketing, within 300 feet from where the funeral occurs.⁵⁸

3.4 Westboro Baptist Church

So far we have discussed the protection of free speech under the First Amendment, and concluded that even though there are some limitations concerning hate speech, the

52 M Hertz, P Molnar, *The content and context of Hate Speech*, (Cambridge University Press 2012) 77

53 491 U.S. 781 (1989)

54 491 U.S. 781,783 (1989)

55 491 U.S 781, 784 (1989)

56 131 S. Ct. 1207 (2011).

57 Section 601 P.L. 112-154

58 *ibid*

protection is generally considered strong. Although, this paper has already presented a number of cases concerning hate speech, few have caught the medias attention as Westboro Baptist Church (hereinafter WBC). This section of the paper will describe how their actions have impacted the American view on hate speech.

3.4.1 The agenda

Describing WBC simply as a congregation with a controversial message, would only be scratching the surface. WBC consider themselves more as a community, with only one purpose, serving God.⁵⁹ The congregation is located, and works out of Topeka, Kansas. It was until march of 2014, lead by pastor Fred Phelps.⁶⁰ Phelps was the head of the community, and also the one who branched out of regular baptism to create a more primitive school of learning.⁶¹

The church has through their infamous picketing (a form of protest) gained publicity, world wide. Perhaps it's not the faces of WBC that have caught the publics eye, rather than the signature picket signs. The signs contain derogatory statements, and remarks against those who WBC consider to be sinners.⁶² Their primary agenda is that, according to the Bible, homosexuality should be abolished. The church refer to Lev 18:22 “You shall not lie with a male as with a woman; it is an abomination” quoting it as a direct message from God, banning homosexuality. WBC often carry out their picketing at places where gay people live, or funerals of homosexual people.⁶³

However, WBC do not only have an anti-gay agenda. In recent years, the church has attended several military funerals, with the message that “God hates America”, or “Thank God for dead soldiers”. Their belief is that dead soldiers are God's way of punishing America for allowing people to live in sin.⁶⁴ Even though, WBC had already made a name for themselves, it was not until they attended the funeral of corporal Matthew A Snyder, that

59 <<http://www.godhatesfags.com/wbcinfo/aboutwbc.html>>

60 Daniel Burke, 'Westboro church founder Fred Phelps dies' (2014) <<http://edition.cnn.com/2014/03/20/us/westboro-church-founder-dead/>> accessed 23 May 2014

61 <http://www.godhatesfags.com/wbcinfo/aboutwbc.html>

62 M Hertz, P Molnar, *The content and context of Hate Speech*, (Cambridge University Press 2012) xix

63 Mollie Relily, 'Sioux City Activists Counter Westboro's Anti-Gay Hate With Peace Rall' (2013) <http://www.huffingtonpost.com/2013/08/27/sioux-city-westboro_n_3823512.html> accessed May 25

64 M Hertz, P Molnar, *The content and context of Hate Speech*, (Cambridge University Press 2012) xix

the media circus started around them.⁶⁵

3.4.2 Snyder v. Phelps

As mentioned in the introduction *Snyder v. Phelps*⁶⁶ concerned a picketing by WBC at the funeral of a soldier who had died in combat. During the service, members of the church, waved sign that were anything but appropriate.⁶⁷ The father of the deceased, Mr. Snyder, brought a law suit against WBC, claiming he had suffered emotional distress during their picketing. He asked “since when did any of our military die so that a group of people could target their families and harass them?”⁶⁸ He felt that the mere presence of WBC had turned the funeral turn into a media circus, unworthy of his son.⁶⁹ WBC argued that they had not violated any local laws or statues, they had obeyed the police in staying more than thousand feet away from funeral, and most importantly they had the right according to the First Amendment to inform people about their message.

The jury of the United States District Court for the District of Maryland did not agree with WBC. The court stated that even the First Amendment has certain limits, especially when the speech is as offensive as it was in this case. The court referred to *Chaplinsky v. New Hampshire*⁷⁰, where the court in that case stated that if words “by their very utterance inflict injury”, they are not protected by the First Amendment. For these reasons the jury found that, even though the First Amendment shall be interpreted broadly, it does not include this type of outrageous behaviour. The jury held WBC liable for compensatory damages of 11 million dollars.⁷¹

WBC appealed the case to the United States Supreme Court. The court had a few issues to address, one being whether “emotional distress” is considered to fall under the limitations of the First Amendment. Another question was to sort out the context of the speech, and if it fell under the “captive audience doctrine” (prohibiting someone from making intrusive

65 Ibid

66 131 S. Ct. 1207 (2011).

67 M Hertz, P Molnar, *The content and context of Hate Speech*, (Cambridge University Press 2012) xix

68 ibid

69 Andy Marso, 'Supreme Court Upholds Anti-Gay Church's Protest Rights in Md. Case' (2011)

<<http://www.newsline.umd.edu/justice/westboro-supreme-court-030211.htm>> accessed 23 May 2014

70 315 U. S. 568, 572 (1942)

71 Civil Action No. 1:06-cv-1389-RDB

speech).⁷² The Supreme court held in a 8-1 decision that the rights of the First Amendment shall be upheld, thereby ruling in favour of WBC.⁷³

The court reasoned that the context of the speech served a social and political purpose. The speech was held at a public place on a issue of public concern.⁷⁴ Restricting speech only because it is upsetting is not a limitation to the First Amendment.⁷⁵ Signs that said “America is doomed”, or “God hates America” have a social purpose, and were not directed towards Matthew Snyder, or his family.⁷⁶

Therefore the argument of “emotional distress” was dismissed. The court did not find that the “captive audience doctrine” to be applicable, because WBC picketing was more than 1000 feet from the funeral, at the most the tips of their sign could have been seen.⁷⁷

Judge Ailito was alone with a dissenting opinion. He stated that “Our profound national commitment to free and open debate is not a license for the vicious verbal assault that occurred in this case”.⁷⁸

3.4.3 Conclusion

There are few interesting aspects of the outcome. Firstly, the Supreme Courts ruling will not only strengthen WBC and their cause, but also any other group that speaks outrageous. Secondly, the case shows indirectly the conservative approach of American legislation on hate speech. It is hard to imagine anything more disgraceful than speaking hatefully during a funeral, yet the Supreme Court considers it as free speech. The decision to give free speech such a broad interpretation puts the United States at one extreme in the international spectrum of protecting hate speech.⁷⁹

Thirdly, the Supreme Court made with it's decision a clear distinction between hate speech and hate crime. In this case hate speech was not prohibited because of the First Amendment. It is interesting to imagine if the outcome would have been differently if the signs said “Kill all homosexuals”, or “100 dollars to anyone who kills a gay. Probably. At least then the

72 *Sabelko v. City of Phoenix*, 846 F. Supp.810, 825 (District of Arizona. 1994)

73 *Snyder v Phelps*, 131 S. Ct. at 1215

74 *ibid* at 1217-18

75 *ibid* at. 1219

76 *ibid*

77 *Ibid* at. 1220

78 *ibid*

79 M Hertz, P Molnar, *The content and context of Hate Speech*, (Cambridge University Press 2012) xxi

content would have been different, as well as the purpose.

3.5 Hate speech vs Hate crime

Previous section discussed that the United States treasure their free speech, and therefore often relies on the First Amendment as a pillar upholding it. Despite this, not all speech is protected under the First Amendment. Some is forbidden because of its content, others because of surrounding circumstances. One very easy conclusion would be to say that any speech that does not enjoy the protection of the First Amendment is considered to be hate speech. However, that would be misleading. Playing loud music at a rock concert is hardly hate speech, yet it was prohibited in *Ward v. Rock Against Racism*.

This part of the paper will briefly compare hate speech to hate crimes. The reason why this digression is needed, is because it will show how two fairly similar areas of law are approached differently.

In some cases, state laws or statutes have been proven to uphold their validity even when questioning federal law. When discussing hate speech, one of the first cases where the Supreme Court upheld a statute, even though it was considered to be biased, was *Wisconsin v Mitchell*.⁸⁰ A young black man instigated, and participated in the assault of a white teenager. The motivation for the crime was clearly based on race, and the perpetrator was sentenced to prison. However, his sentence was increased, because according to Wisconsin law the actions that took place went beyond regular assault, due to the fact that it was a racial crime. The case was brought before the Supreme Court where the defendant argued that his First Amendment right had been violated. The Court found that the Wisconsin statute fell well within the means of the First Amendment. In the light of *R.A.V. v. Saint Paul*, the court reasoned that the provision enhances the maximum penalty for an offence whenever the defendant "[i]ntentionally selects the person against whom the crime . . . is committed . . . because of the race, religion, color, disability, sexual orientation, national origin or ancestry of that person".⁸¹ It further held, that the statute did not punish the defendant for his beliefs, rather than for the ramifications of his crime. Because the statute banned the conduct of the act, not the expression, federal law could not trump state law.

80 508 U.S. 476 (1993)

81 508 U.S. 476, 481 (1993)

The reason why this is considered to be a landmark case, is because it take a clear standpoint between hate speech and hate crime. Even though it was not expressed in any greater detail by the Supreme Court, one conclusion which can be made is that, speech which ultimately causes people physical harm is not protected by the First Amendment.

3.5.1 Matthew Shepard and James Byrd Jr.

If the previous section argued that state and federal laws sometimes collide, this part will focus on what happens when neither level is sufficient? Both Matthew Shepard and James Byrd Jr were victims of hate related crimes. In October 1998, Matthew Shepard was beaten, tortured and left to die, only because he was gay.⁸² The same year James Byrd Jr, was attacked by three white supremacists. He was tied to their truck and dragged behind it until he lost consciousness, and later died.⁸³ In both cases the perpetrators where captured, brought before a court and convicted of murder. However, none of them was convicted of committing hate crime. In the case of Matthew Shepard neither federal, nor state law considered sexual orientation as criteria for hate crime. While the state of Texas, where Byrd Jr was killed, had no hate crime legislation at all. The aftermath of these cases caused a serious gap in the legislation, and also made the relationship between state and federal law even more vulnerable when it cate to hate crimes.

More than ten years after these horrific events, President Obama signed the Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act PL 111-84, making it into law. The act expands all existing hate crime legislation to include gender, sexual orientation, gender identity or disability.⁸⁴

82 Ed Pilkington, 'Fifteen years after Matthew Shepard's murder, Wyoming remains anti-gay' (2013) <<http://www.theguardian.com/world/2013/oct/10/matthew-shepard-wyoming-gay-rights-laws>> accessed 23 May 2014

83 Allan Turner, 'Hate crime killer executed' (2011) <<http://www.chron.com/news/houston-texas/article/Hate-crime-killer-executed-2182684.php>> accessed 2 May 2014

84 PL 111-84 Section 4704

4. Free speech in Sweden

The previous chapter discussed that, hate speech in the United States is not as well-regulated as is in other countries. While a country, such as Sweden, have installed instruments that prohibits hate speech, the First Amendment is still interpreted by court's conservatively, giving free speech a strong protection in the United States.

This section of the paper will concern the other part of this comparative study, Sweden. Similar to the previous section it will focus around three questions. What is the regulation on hate speech? How is it restricted?, and how has the Supreme Court ruled in cases concerning hate speech? In addition, two more deciding factors will be discussed. Since Sweden is a part of the European Union, and also has ratified the European Convention on Human Rights, it will be very interesting to discuss how these factors affect Sweden's approach on hate speech.

4.1 Constitutional protection

Unlike the American legislation on free speech, Sweden has a more unusual constitutional regulation. The Swedish Constitution consists of four constitutional documents.⁸⁵

Of these four fundamental documents, three of them concern free speech, or more importantly what is considered as free speech. These three documents generally interact with each other, meaning that if one them is lacking legislation on a subject, any of the other two should erase any grey areas.⁸⁶

The first protection on free speech in Sweden, is found in *Regeringsformen 1974:152* (The Instrument of Government). The provision constitutes that everyone has the right to express themselves, whether it be by speech, writing or in picture⁸⁷ It further holds that both imparting and acquiring information shall be protected under this law.⁸⁸ Simply by reading the law, one can easily draw the comparison to article 10 of the ECHR.⁸⁹ The Instrument of

85 Thomas Bull, *Freedom of Expression in Sweden* in *Freedom of Speech Abdringed?*, Anine Kierulf & Helge Ronning, (Nordicom 2009) 80

86 *ibid*

87 *Regeringsformen* 2kap 1§

88 *ibid*

89 Thomas Bull, *Freedom of Expression in Sweden* in *Freedom of Speech Abdringed?*, Anine Kierulf & Helge Ronning, (Nordicom 2009) 80

Government is considered to be the primary constitutional protection on expressions between individuals, or expressions that are non-media.⁹⁰

In the recent *Manga case*⁹¹, a man was convicted at a lower instance for possession of child pornography. On his computer, police found 51 manga pictures illustrating young children. The man who works as a translator of manga comics, and a specialist on Japanese culture, appealed the case to the Supreme Court in Sweden. The court argued that a conviction would breach the man's right to free speech, since expression in picture also is protected under the Instrument of Government. The court further held, that a restriction of this kind would be disproportional to its purpose.⁹²

The second regulation on free speech is *Yttrandefrihetsgrundlagen 1991:1469* (The Freedom of Expression Act), which is also constitutionally protected. The core of the Freedom of Expression Act is that every citizen has the right to express his or her opinions, emotions and thoughts.⁹³

What The Freedom of Expression Act actually regulates is the mass medial communication.⁹⁴ The communication can occur either by transmission⁹⁵, recording⁹⁶, or database.⁹⁷ However, it is important to bare in mind that The Freedom of Expression Act does not regulate speech between two individuals.

The third regulation on free speech is *Tryckfrihetsförordning 1949:105* (The Freedom of Press Act). It grants every citizen the right to express their thoughts and opinions in writing.⁹⁸ The purpose of this act is to create a social climate where people are not afraid to share thoughts and ideas.⁹⁹

Together these three constitutional documents cover most of what falls under the term “free speech”. Since in Sweden constitutional regulation has precedence over any other law or legal document, it also makes them more “powerful”, in the sense that they seldom get

90 W-W Nerep, *En orientering I Tryckfrihet & Yttrandefrihet*, (Jure Förlag AB 2005) 16

91 NJA 2012 s 400

92 NJA 2012 s.400, 411

93 Yttrandefrihetsgrundlag 1kap 1§

94 W-W Nerep, *En orientering I Tryckfrihet & Yttrandefrihet*, (Jure Förlag AB 2005) 125

95 Yttrandefrihetsgrundlag 1kap 6§

96 Yttrandefrihetsgrundlag 1kap 10§

97 Yttrandefrihetsgrundlag 1kap 9§

98 Tryckfrihetsförordning 1 kap 1§

99 W-W Nerep, *En orientering I Tryckfrihet & Yttrandefrihet*, (Jure Förlag AB 2005) 16

challenged before a court.¹⁰⁰ Further on, expressions that are only protected by the The Instrument of Government enjoy less protection than if they were protected by any of the two other constitutional documents. The reason for this is that both the Freedom of Expression Act and the Freedom of Press Act, can only be restricted if a constitutional amendment is adopted.¹⁰¹

Lastly, I have on purpose not discussed one from of expression, that being hate speech. The reason for that is, neither of the three constitutional documents gives a definition on what constitutes hate speech. In the preparatory work to the Freedom of Press Act, it is stated that expressions which are “criminal, other than those which go beyond the borders of free speech, are not constitutionally protected”.¹⁰² The next section of the paper will further explore the regulation on hate speech, and how it is restricted.

4.2 Other legal authorities

In addition to the already the discussed legislative instruments, Sweden is also bound to two other legal authorities. Since it's membership to the European Union (hereinafter EU) in 1995, Sweden has been under the supervision of the EU. Another legal authority which Sweden is bound by is the ECHR. Both these legislative powers are incorporated in the Swedish legislation, and are equal to any domestic legislation. This section will focus on how they affect Sweden's approach in dealing with hate speech.

4.2.1 EU

Sweden entered the membership knowing that it would affect the national legislation, but how does EU actually affect regulation on human rights, such as freedom of speech? Aside from the ECHR, which will be discussed later, the most significant contribution has been the legal doctrine of the Court of Justice of the EU (ECJ).¹⁰³ The protection EU offers to human rights comes from the court's extensive case law, and is often referred as “judge made law”¹⁰⁴ However, this form of regulation is somewhat fragile. Court's tend to change

100 Thomas Bull, *Freedom of Expression in Sweden* in *Freedom of Speech Abdringed?*, Anine Kierulf & Helge Ronning, (Nordicom 2009) 80

101 Joakim Nergelius, *Svensk Statsrätt*, (Studentlitteratur AB 2010) 138

102 SOU 1947:60 s.115

103 Karl-Göran Algotsson, *Grundläggande fri -och rättigheter* in *Svensk författningsspolitik* by I Mattson and O Petersson (SNS Förlag 2011) 46

104 *ibid*

their legal doctrine when it's outdated, or replaced by other legislation.¹⁰⁵ There has been discussion to implement a general act, that is directly implemented in each country. The problem with such an act would be, that member states would have to fully rely that the act regulates every aspect of human rights since their national legislation would be of no use.¹⁰⁶

The EU and its governmental bodies have adopted several treaties to combat hate speech and racism. Article 4 of the Proposed Council Framework Decision on Combating Racism and Xenophobia [2007] prohibits any behaviour that “incites to violence or hatred for a racist or xenophobic purpose or to any other racist or xenophobic behaviour which may cause substantial damage to individuals or groups concerned”¹⁰⁷ Resolution on Freedom of Expression and Respect for Religious Beliefs [2006] argues that although freedom of expression is a fundamental right in a democratic society, it must exercise responsibility to other human rights, such as religion. “Hate speech against any religious group is not compatible with the fundamental rights and freedoms guaranteed by the Convention and the case law of the Court.”¹⁰⁸

4.2.2 ECHR

Sweden’s membership in EU has also led to the ECHR being incorporated into Swedish law.¹⁰⁹ This is noticeable in two ways. Firstly, the Swedish parliament has passed an Act making ECHR into a Swedish law. Secondly, the government has added a provision in the Instrument of Government, where it prohibits the passing of laws that are contrary to the ECHR¹¹⁰ Although the ECHR does not enjoy a constitutional status in Sweden, courts tend to regard it very highly when dealing with a case.¹¹¹ The ECHR with its protocols tend to cover more legislation than the Instrument of Government.

Article 10 of the ECHR ensures everyone the right to free speech. It includes both to hold and share opinions. In *Handyside v UK*¹¹² the ECtHR concluded that “Freedom of expression constitutes one of the essential foundations of such a society, one of the basic

105 ibid

106 ibid

107 art 4. (a)

108 Para. 12

109 Thomas Bull, *Freedom of Expression in Sweden* in *Freedom of Speech Abridged?*, Anine Kierulf & Helge Ronning, (Nordicom 2009) 80

110 ibid

111 ibid

112 Application No. 5493/72

conditions for its progress and for the development of every man”. The court also added that Article 10 should not only apply to ideas that are favourably received, “but also to those that offend, shock or disturb the State or any sector of the population”.

The second paragraph of Article 10 confirms that there are restrictions to free speech. Because free speech carries with it both duties and responsibilities, it can be restricted on several grounds. Prevention of disorder or crime, protection of health or morals, national security, protection of the reputation or rights of others are all possible limitation.¹¹³

When the court's deal with hate speech, they have to distinguish what the intention of the speech was. Did the speech serve a public interest, or was it's purpose only to offend and shock. In *Jerslid v. Denmark*¹¹⁴, the court distinguished between the speech of the “Greenjackets, who offended people by racist remarks, and the defendant who broadcasted these remarks, as a public service.¹¹⁵ The court concluded that “Taken as a whole, the feature could not objectively have appeared to have as it's (its) purpose the propagation of racist views and ideas”.¹¹⁶ When deciding if it is hate speech, one must look to the intention.¹¹⁷

4.3 General restrictions on free speech

Similar to the American approach on free speech, Sweden does not consider the right as absolute. The general rule is that a limitation on free speech can only be made if there is another law restricting it.¹¹⁸ Rules on limiting free speech are found in the Instrument of Government. One can sort out three provision which allow for a limitation on free speech.

4.3.1 Acceptable in a democratic society

Firstly, freedom of speech can only be limited if the means are acceptable in a democratic society.¹¹⁹ However, this rule must be applied with strict scrutiny. One way of determining if a limitation is acceptable is to apply the principle of proportionality. The principle entails, that a limitation must never go beyond what is necessary for it's purpose. The principle of proportionality also prohibits any limitation that might interfere with peoples freedom to

113 art 10.2 ECHR

114 Application No. 15890/89

115 *ibid* para 33.

116 *ibid*

117 *ibid*

118 Joakim Nergelius, *Svensk Statsrätt*, (Studentlitteratur AB 2010) 160

119 Regeringsformen 2kap 21§

form an opinion.¹²⁰ In the mentioned *Manga case*, the Supreme Court acknowledged that a limitation would not go beyond the means in democratic society, however, it would have been disproportional.

4.3.2 National security, public order, individual's reputation etc.

Secondly, freedom of speech can always be limited with respect to national security, public order and security, individual's reputation, privacy or the prevention and prosecution of crime.¹²¹ In a case concerning the dismantling of a nuclear facility, the court found that such a decision by the government could be appropriate, even without the consent of the nuclear company, since it concerned national security.¹²² The same rule that limits freedom of speech on the above mentioned grounds, also highlights the importance to never restrict freedom of speech on the basis of political, religious or other cultural beliefs.¹²³

4.3.3 Particularly important reasons

The third and final limitation is rather vague one. Freedom of speech can be restricted because of “particularly important reasons”.¹²⁴ The reason why this is considered to be a vague limitation, is because it opens the possibility of broad interpretations on what kind of speech can be limited.¹²⁵ The legislator has failed to define what a “particularly important reason” is. What makes this limitation even more confusing is that, in the preparatory work to the Instrument of Government, the legislator was careful to highlight the importance of free speech, stating that “free speech can with confidence be regarded as one of the most important human rights”¹²⁶ Why then create a such broad imitation to a supposedly fundamental right?

4.4 Restrictions on hate speech

The previous section only discussed general restrictions on free speech. However, it did not describe if and how hate speech is restricted. The regulation on hate speech is instead found in the *Brottsbalk 1962:700* (Swedish Criminal Code).

120 Joakim Nergelius, *Svensk Statsrätt*, (Studentlitteratur AB 2010) 160

121 Regeringsformen 2kap 23§

122 RÅ 1999 ref. 76

123 Regeringsformen 2kap 23§ 2st

124 Regeringsformen 2kap 23§

125 Joakim Nergelius, *Svensk Statsrätt*, (Studentlitteratur AB 2010) 161

126 Prop 1975/76:209 s. 77

4.4.1 Expression of contempt

“Anyone who makes statements that, threatens or expresses contempt for a group of people, based on their skin colour, nationality, ethnicity, religious belief or sexual orientation, is convicted of hate speech”¹²⁷

That is how the rule on hate speech is worded. Although it does not directly define hate speech, one interpretation that is easy to make, is that any speech which expresses contempt based on the mentioned characteristics is hate speech. Another criteria which is not worded in the law, but in the preparatory work, is that in order for it to be considered hate speech the expression needs to have a spreading.¹²⁸ Speech that is confined to a smaller audience, or within the private sphere is not considered to be hate speech.¹²⁹ The list regarding what groups can be victims of hate speech is exhaustive, leaving the court's a small room for interpretation. One example is that, although sexual orientation is one of the concerned criteria's, sexual preferences is not. This leaves a group such as transsexuals outside of the protection.

In the highly controversial *Söderhamn case*¹³⁰, a group of teenagers were convicted of hate speech by the Supreme Court. The teenagers had spread a leaflet, with derogatory statements about homosexuals in their school. The message on the leaflets was that homosexuality was cause the of HIV and AIDS. It also compared homosexuality to pedophilia. The Supreme Court reasoned that because the teenagers spread their leaflets in school, they had access to a broad audience. The court also reviewed article 10 of the ECHR and previous rulings. The conclusion was that the court needs to weigh in both the content and of the message as well as the context it is used. Then the court needs to decide whether a limitation on free speech is proportional. In this case the court reasoned that the content was highly inappropriate to be spread in a school. When deciding if it was proportional, the court argued it was proportionate to the legitimate aims pursued, which was to fight anti-gay propaganda.

In another case, a man was convicted of hate speech for putting up a sign at a camp. The sign said “Gypsy’s not allowed”. Although the sign itself didn't say anything derogatory

127 Brottsbalk 16 kap 8§

128 Prop 2001/02:59 kap 5

129 ibid

130 NJA 2006 s. 467

about gypsy's, it applied that they as a ethnic group were not to be trusted, and was therefore indirect derogatory. The court reasoned, that because the sign was put visible for the public, the man had deliberately expressed contempt towards gypsy's.¹³¹

4.5 Åke Green

This paper has discussed, that free speech in Sweden, even though it enjoys a constitutional protection, is far more open for limitation than under the First Amendment in the United States. One reason for this is that free speech in Sweden is regulated by a number of instruments which all have their own restrictions, while the American regulation consists of one amendment. Another important as is the fact that the Swedish legislation is dependant on other legal authorities than it's own constitution. In this section I will discuss the parallel case to *Snyder v Phelps*.

4.5.1 Hateful sermon

Similar to WBC, Åke Green had controversial opinions on homosexuality. During a sermon he repeatedly referred homosexuality as a sexual abnormality. He even called it a “cancer on the entire societal body”.¹³² He then went on comparing it to pedophilia and other sexual deviations.¹³³ Proceedings were brought against Green, and his case was heard at the first instance court in Sweden (*Tingsrätten*). The court argued in it's reasoning, that the law on hate speech in Sweden requires that someone has shown contempt towards a specific group. From 2003, sexual orientation is considered to be one of the concerned groups. As we have discussed in previous sections, the court discussed that in order to be convicted on hate speech, the expressions need to have been spread to a larger audience. The sermon was at large facility and it was later published on the internet. When assessing if a restriction on free speech is proportional the court turned again to the preparatory work.

There it is stated that “for speech to be punishable by law, the expressions have to exceed the boundaries of a objective and reasonable discussion about the concerned group”.¹³⁴

The court found that, Greens sermon was a deliberate act of contempt towards homosexuals, and Green was sentenced to one month in prison. The reason why this case is fascinating to

131 NJA 1982 s.128

132 NJA 2005 s805

133 ibid

134 Prop. 2001/02:59 s. 41 f.

compare with *Snyder v. Phelps* is that, the facts of the cases are practicably the same. However, the court's interpretation on what is hate speech is significantly different. In conclusion, Sweden's approach on restricting free speech is far less as conservative as the American.

The case was later brought before the Supreme Court in Sweden. Although the Supreme Court acknowledged that the ECtHR prohibits speech which advocates hatred or violence, it came to the conclusion after a overall assessment that it was not the case with Green. Instead, the Supreme Court reasoned that “The ECtHR would at a examination of the merits find that Greens right to preach the bible was founded in a perception where a limitation would only be disproportional and thereby constitute a violation of the convention”.¹³⁵ This sentence is probably the clearest evidence on what impact the ECHR has on Swedish legislation. The Supreme Court, did not want to run the risk of the case being brought before the ECtHR, and therefore justified their overturning of the decision, by referring to the ECHR.

4.5.2 The Supreme Courts Approach

The Supreme Court has the sometimes precarious duty to balance national legislation with the ECHR. If we take the above mentioned case as an example, if the Supreme court interpreted the restrictions on free speech to broadly, it would have run the risk of breaching the ECHR. On the other hand, if the court's go with the American approach of not allowing to many limitations on free speech, it runs the risk of creating a social conflict between groups in society.¹³⁶

The number of cases actually being brought before the Supreme Court, are far less in comparison to the United States. Another problem is that, if a lower instance has made a constitutional ruling, it is forbidden for a higher court to overturn that ruling.¹³⁷ The few cases were the Supreme Court has been involved are often those were there is a conflict between two regulations. In the *Bible temple case*¹³⁸, the creator of the christian website was convicted at a lower instance of hate speech, for writing derogatory statements about homosexuals, and then leaving them on a internet forum. The defendant appealed the case to the Supreme Court, which had to weigh in if the rule on hate speech was applicable. The court came to a similar conclusion as in the Åke Green case, that it would be

135 NJA 2005 s805

136 Thomas Bull, *Freedom of Expression in Sweden* in *Freedom of Speech Abdringed?*, Anine Kierulf & Helge Ronning, (Nordicom 2009) 83

137 *ibid* 84

138 NJA 2007 s805

disproportional to restrict the defendants free speech, only because he had forgot to erase the comments from the internet.

5. Comparative Analysis

The paper has up to this point discussed how hate speech is generally defined, and how it is regulated in two different legal systems. A first step in this comparative analysis is to highlight the fact that the paper deals with two countries, that at its core are fundamentally different. The primary difference is that the American legal system is based on common law tradition, while Sweden base its legal system on a civil law model.¹³⁹ This becomes evident when discussing freedom of expression. The American legislation regarding this subject, is significantly more limited than the most other Western countries. One reason for Americans unwillingness to regulate free speech, is because it is not only considered to be one of the most cherished constitutional rights, but also a cultural symbol of liberty and prosperity.¹⁴⁰ Sweden does not share the same historical background as the United States, and therefore is not as emotionally tied to free speech. This allows for a more open minded approach when restricting it.

5.1 Constitutional differences

The first comparison that acquires attention, is between the countries constitutional protection on free speech. As mentioned before, all legislation on free speech in the United States is compressed to the First Amendment of the United States Constitution. In short, this means that those fifty words, which the First Amendment consists of, cover everything concerning free speech in the United States. One might think that having such a narrowly tailored regulation, on such a large area of law, would lead to a number of grey areas. Although this is not entirely untrue, the interpretation on free speech is generally applied broadly by the courts. In other words, because of its limited regulation, the courts in the United States, have given itself the power to interpret the First Amendment according to their own judgement. When assessing if certain speech is protected by the First Amendment, courts tend to look into previous cases for guidance instead of the actual words in the First Amendment.

¹³⁹ Peter De Cruz, *Comparative law in a changing world*, (Routledge-Cavendish 2008) 108

¹⁴⁰ M Hertz, P Molnar, *The content and context of Hate Speech*, (Cambridge University Press 2012) 257

It is important to also bare in mind that the First Amendment is not worded as a positive duty on the government, but instead as a prohibition against government interference.

Author Michel Rosenfelds theory on the American perception of free speech is that “Americans have a deep-seated belief in free speech as a virtually unlimited good and strong fear that an active government in the area of speech will much more likely result in harm than good”.¹⁴¹ He argues that the reason why free speech in the United States is seldom restricted, is because that would give the government additional influence over its people. I would agree with his assessment, and might ad that, the trust in government is also the difference between having a strong free speech, and one which can more easily be restricted.

Unlike the United States, and much like other European countries, Sweden treat freedom of expression as a constitutional right, like any other. It does not consider it to be a paramount right that stands above the rest. While the United States have one law which protects free speech, Sweden has four constitutional documents which address the matter. What becomes evident is that, if the First Amendment strives to be clear and concise with its regulation, the Swedish constitution is on the other side of that spectrum. In many ways Sweden's regulation on free speech resembles the German Civil Code (*Bürgerliches Gesetzbuch*), with its extensive legal work, that attempts to capture all areas of free speech. A part from the four constitutional documents, Sweden is also bound by EU-treaties, as well as the ECHR. Unlike the American legal environment, where judges are left with the power of shaping the law, Swedish courts play a minor role in this part. Instead the legislative power is either dealt to the government or to the European Union. This would lead to believe that one of the reasons why free speech is not as strongly protected in Sweden as in the United States is because, when you ad more than one legal authority to the constitution, the chances are that free speech is interpreted differently.

5.2 Hate Speech

The previous section concluded that one major difference between the countries lies in the wording of each countries constitution. Despite being a few sentences short, the First

¹⁴¹ ibid 248

Amendment is considered to be a first among equals. Sweden however, does not give freedom of speech the same constitutional status. The next area which will be compared is the actual regulation on hate speech between the countries. This also includes each countries approach on restricting free speech.

A first remark is that, so far the United States Constitution does not define hate speech, nor is it worded as a restriction on free speech. The United States are extremely cautious, on the border to conservative, when free speech is discussed. One example of this, is the fact that they adopted the ICERD with a clause that guaranteed them self-determination in questions regarding free speech.

Sweden on the contrary, have a specific rule on hate speech in its criminal code. The law prohibits statements which threatens or expresses contempt for a group of people based on their sexual orientation, ethnicity, religious belief etc. While the First Amendment only gives one the right to free speech, the Swedish legislation does not only give you an equal right, but also prohibits you from violating it. The rule on hate speech in Sweden has despite its clear wording, often lead to confusion for the courts. The reason for that is, despite it prohibiting certain speech it has also to take into consideration other legal principles. One of these being the captive-audience doctrine. This means that, when courts reason if there has been a violation of hate speech, they have to take into account the distribution of the speech. How many people have heard the speech? In the mentioned *Söderhamn case* the court reasoned a school of more than 500 students, definitely fall under the captive-audience doctrine. Although, same principle has been used in the United States, *Sabelko v. City of Phoenix*, American courts are still reluctantly considering the distribution as criteria for restriction speech.

This paper has shown that the main difference between these two countries, in regard to hate speech, is the different views on restricting it. While the United States interpret their rule on free speech broadly, not allowing for any massive restrictions, Sweden is on the other side of that spectrum. Apart from the common denominator, that any restrictions made have to be acceptable in a democratic society, the countries are far from similar when discussing restrictions. One example of how their views differ is that free speech in Sweden can be restricted because of “particularly important reasons”. An American court would not only

find this restriction extremely unclear, but also hard to interpret. It would certainly also see it as an easy way for the government to prohibit people from their speech. Therefore such restrictions are discarded by the Americans.

5.3 Green v. WBC

This paper started with the following sentence: Two cases, two forms of speech, two similar agendas, two Supreme Courts, yet one different way of dealing with hate speech. The reason why these cases have been singled out, is because they give a general reflection on the different approach to hate speech, in each country. Although, the outcome in the end was fairly the same, both Green and WBC were entailed to free speech, respective Supreme Courts reasoning was anything but similar. WBC free speech was protected by the First Amendment since their message served a public purpose, and was not directed towards the victim specifically. The members of the church also stayed well away from the funeral and the captive-audience doctrine could not be applicable. Green was on the other hand first sentenced by a court in Sweden for hate speech, and the judgement would have likely have been upheld by the Supreme Court had it not been for the ECHR. The Supreme Court in Sweden reasoned that, it could not with certainty conclude that Greens sermon was not in fact a form of hate speech. However, because of the rule in article 10 of the ECHR, a sentencing would probably have been overturned, had the case been brought before the ECtHR.

5.4 Similarities

Even though, both countries are fundamentally different in their approach to hate speech, there are a few similarities. Firstly, when it comes to different levels of regulation, one can easily sort out that it is not that different between the countries. While Sweden operates under the ECHR and the EU, they are not forbidden to create own legislation as long as it is not in complies with their standard. The same can be said about the relationship between state and federal regulation in the United States. Even though, the First Amendment is part of the constitution and therefore a supreme law in every state, it does not federal laws from giving states the power to create their own legislation as long as it is not in conflict with the First Amendment.

Another noticeable similarity is that, when the Supreme Court in both countries are dealing with restricting free speech, it always looks into the purpose of the speech, as well as if a restriction would be proportional. That alone, gives an indication that restricting speech is the final solution.

6. Conclusion

The starting point of this study were two cases, which by a mere glance looked fairly similar. Both the WBC and Åke Green had used their right to free speech, to spread a religiously based message. In both cases the message was an anti-gay propaganda. Both were sued of committing hate speech and were sentenced by a first instance court. The similarities stops there. Although, some might argue that another similarity is that, both were later acquitted by each respective countries Supreme Court, the reasoning behind their acquittal was far similar.

The American approach to hate speech is very different than the Swedish. Firstly, there is only legislative instrument regulation free speech, the First Amendment. Although the First Amendment protects people from the government, it is also a double-edged sword. The same law that gives you the right to hold an opinion, also gives the WBC the right to spread their somewhat hateful message. Secondly, there is a completely different historical background between the countries. Free speech in the United States is more than a right, it is a symbol of a time when people did not have the opportunity to make their voices heard. For these reasons it is not hard to understand the United States conservative approach in restricting it. As discussed, speech can only be restricted in the United States based on its content if it either is a clear and present danger (although this criteria was revised in *Brandenburg v. Ohio*), incitement to violence or so called fighting words. Even with these restrictions the court has to apply strict scrutiny in their way of dealing with them. The courts have also concluded that a restriction against hate speech, is a restriction on free speech itself.

Sweden on the other hand have a more liberal approach to hate speech. While the United States Supreme Court held convincingly that, in the case of WBC, their right to speech should not be restricted based on its content, the Swedish Supreme Court was not as confident in the Åke Green case. The Swedish Constitution has three documents regulating a free speech and a specific law prohibiting hate speech. The Supreme Court in Sweden reasoned that it could not with certainty conclude that Greens speech was not hate speech. However, because Sweden is member state of the ECHR it has adopt it as national legislation. The Swedish Supreme Court reasoned that a sentencing of Greens would be in

breach of article 10 of the Convention and chose there for to overturn previous ruling.

In conclusion, the paper started with a very interesting observation. How could two similar cases, in two countries, still be reasoned differently by the courts. The answer is that, there are far less restrictions on hate speech in the American legal system than in the Swedish. The United States has not even defined hate speech in its legislation. The First Amendment is still considered to be a paramount right which stand above all other legislation on the matter.

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