

2012

## Preventing Sparks in Smoldering Ashes: Using Sweden's Internet Law to Combat Incendiary Speech in the Scandinavian Online Community

Hanna Li Robinson

Follow this and additional works at: <https://brooklynworks.brooklaw.edu/bjil>

---

### Recommended Citation

Hanna L. Robinson, *Preventing Sparks in Smoldering Ashes: Using Sweden's Internet Law to Combat Incendiary Speech in the Scandinavian Online Community*, 37 Brook. J. Int'l L. (2012).

Available at: <https://brooklynworks.brooklaw.edu/bjil/vol37/iss3/11>

This Note is brought to you for free and open access by the Law Journals at BrooklynWorks. It has been accepted for inclusion in Brooklyn Journal of International Law by an authorized editor of BrooklynWorks.

# PREVENTING SPARKS IN SMOLDERING ASHES: USING SWEDEN'S INTERNET LAW TO COMBAT INCENDIARY SPEECH IN THE SCANDINAVIAN ONLINE COMMUNITY

And the people under the sky were also very much the same—everywhere, all over the world, hundreds or thousands of millions of people just like this, people ignorant of one another's existence, held apart by walls of hatred and lies, and yet almost exactly the same—people who had never learned to think but were storing up in their hearts and bellies and muscles the power that would one day overturn the world.<sup>1</sup>

## INTRODUCTION

On July 22, 2011, Anders Behring Breivik, a thirty-two-year-old Norwegian man, confessed to carrying out a violent rampage that left seventy-seven of his countrymen dead.<sup>2</sup> Before surrendering to police, Breivik detonated a bomb in central Oslo, and then traveled to a political youth camp on the island of Utøya, where he, dressed as a police officer, used a machine gun to shoot sixty-nine campers, many of them young members of Norway's Labor Party.<sup>3</sup> Within hours, a portrait of the killer emerged: “[T]he man behind the worst attack on Norway since the second world war . . . [was] a Christian fundamentalist with a deep hatred of multiculturalism, of the left and of Muslims, who had written disparagingly of prominent Norwegian politicians.”<sup>4</sup>

In the wake of Breivik's attacks, Norwegian Prime Minister Jens Stoltenberg urged his countrymen to reflect on “what we have thought, said and written,” and that, “We all have something to learn from the trag-

---

1. GEORGE ORWELL, 1984, at 181 (1949).

2. Malin Rising & Bjoern H. Amland, *Anders Behring Breivik, Norway Killer, Remains in Detention*, HUFFINGTON POST (Sept. 19, 2011), [http://www.huffingtonpost.com/2011/09/19/anders-behring-breivik-detention\\_n\\_969900.html](http://www.huffingtonpost.com/2011/09/19/anders-behring-breivik-detention_n_969900.html).

3. *Id.*; see also *Terrorofrene på Utøya og i Oslo [The Terrorist Attacks on Utøya Island and Oslo]*, VG NETT, <http://www.vg.no/nyheter/innenriks/oslobomben/ofre/> (last visited Feb. 2, 2012).

4. Peter Beaumont, *Anders Behring Breivik: Profile of a Mass Murderer*, GUARDIAN (July 23, 2011), <http://www.guardian.co.uk/world/2011/jul/23/anders-behring-breivik-norway-attacks>.

edy.”<sup>5</sup> Meanwhile, Erik Hellsborn, a member of the anti-immigrant Sweden Democrats party, blogged, “In a Norwegian Norway this tragedy would never have happened . . . This was caused by multiculturalism.”<sup>6</sup> In fact, Breivik left behind a 1500-page manifesto, in which he calls for an end to “the multiculturalist regime of Norway.”<sup>7</sup> Moreover, a week before his attacks, Breivik registered a Twitter account and sent off a single tweet: “One person with a belief is equal to the force of 100,000 who have only interests.”<sup>8</sup>

With the proliferation of right-wing, anti-immigrant political parties in Scandinavia<sup>9</sup>—specifically the Sweden Democrats,<sup>10</sup> Norway’s Progress Party,<sup>11</sup> and the Danish People’s Party<sup>12</sup>—the personal statements by

5. Tony Paterson & Charlotte Sundberg, *Norway’s Premier Urges a New Tone in Public Debate*, INDEP. (Aug. 2, 2011), <http://www.independent.co.uk/news/world/europe/norways-premier-urges-a-new-tone-in-public-debate-2330216.html>.

6. Mark Townsend & Ian Traynor, *In Focus: How the far right’s web of influence created a killer*, OBSERVER (July 31, 2011), <http://www.guardian.co.uk/world/2011/jul/30/norway-attacks-anders-behring-breivik>.

7. *Norway shooting: quotes from Anders Behring Breivik’s online manifesto*, TELEGRAPH (Aug. 19, 2011), <http://www.telegraph.co.uk/news/worldnews/europe/norway/8657727/Norway-shooting-quotes-from-Anders-Behring-Breiviks-online-manifesto.html>. In his manifesto, Breivik takes on the pseudonym of Andrew Berwick, and claims the title of “Justiciar Knight Commander for Knights Templar Europe and one of several leaders of the National and pan-European Patriotic Resistance Movement.” *Id.*

8. Beaumont, *supra* note 4.

9. While some colloquially refer to Scandinavia as including Iceland and Finland, traditionally Scandinavia includes only Norway, Sweden, and Denmark. *Scandinavia*, BRITANNICA ONLINE ENCYCLOPÆDIA (Nov. 3, 2011), <http://www.britannica.com/EBchecked/topic/526461/Scandinavia>. For the purposes of this Note, I will refer to Scandinavia as only including Norway, Sweden, and Denmark.

10. The Sweden Democrats Party was formed in 1988, as an offspring of the Sweden Party and the Keep Sweden Swedish party. *Vårt parti [Our Party]*, SVERIGEDEMOKRATERNA.SE, <http://sverigedemokraterna.se/vart-parti/> (last visited June 8, 2012); *see infra* text accompanying note 44.

11. Norway’s Progress Party was formed in 1973 in response to increased social welfare programs. Tor Bjørklund & Jørgen Goul Andersen, *Anti-Immigration Parties in Denmark and Norway*, in SHADOWS OVER EUROPE 107, 108 (Martin Schain, Aristide Zolberg & Patrick Hossay eds., 2002). Coinciding with a spike in asylum-seekers in the 1980s, the Progress Party shifted from its anti-tax platform to immigration reform. *Id.* at 113; ELIZABETH CARTER, THE EXTREME RIGHT IN WESTERN EUROPE 31–32 (2005) (“Immigration has also become the most important policy area for the Danish and Norwegian right-wing extremist parties in more recent years.”).

12. The Danish People’s Party was formed in 1995 as faction of the Danish Progress Party and eventually as its successor when the Progress Party collapsed in 1998. Bjørklund & Andersen, *supra* note 11, at 107. With its initial anti-tax platform, the Danish

party members have been characterized by the media and civic society groups as fostering extremism and, in some cases, inciting violence and hatred.<sup>13</sup> Officially these political parties focus on issues stemming from mass immigration and asylum grants, including increased drugs and crime rates, welfare costs, and cultural clashes such as female genital mutilation, forced marriage, and radicalization.<sup>14</sup> However, a significant anti-multicultural blogosphere is growing, in which hate and violence are celebrated and encouraged.<sup>15</sup>

This Note argues that the Swedish legislature should enforce their hate speech legislation against illegal online activity. In particular, the Swedish government should require Internet Service Providers (“ISPs”) to filter content that constitutes hate speech, including all content traveling through their telecommunications systems infrastructure. In the wake of these tragic events, all the Scandinavian countries need to confront the threat of hate speech with open eyes. Given its geographic location and the technological infrastructure of the surrounding countries, the Swedish government is in a key position to address the threat of incendiary speech. Because hate speech is particularly pernicious, increased regulation is necessary in order to uphold the cultural values of Scandinavian society.

This Note explores the limits of freedom of speech in the online community and the extent of the law in controlling these forums, in reference to the outpouring of radical right-wing bloggers in Scandinavia and the anti-immigration platforms they promulgate. Part I of this Note provides background information on the current political climate in Scandinavia, paying particular attention to Norway and Sweden, and discusses existing instruments of international law. Part II illustrates the shortcomings of current legislation in Scandinavia, using Breivik’s manifesto as a lens through which to examine the proliferation of hate speech in Scandinavia. Part III proposes a multilateral approach to bridge the gap in the law between hate speech legislation and online enforcement, and provides the rationale for curbing freedom of expression in certain online forums.

---

Progress Party inspired the formation of the Norwegian Progress Party and witnessed a similar shift in platform in response to increased immigration in the mid-1980s. *Id.* at 113. Political scientists have characterized both the Danish People’s Party and the Norwegian Progress Party as right-wing extremist parties whose racist platforms are “of the cultist kind.” CARTER, *supra* note 11, at 39 (citing Andreas Widfeldt, *Scandinavia: Mixed Success for the Populist Right*, 53 PARLIAMENTARY AFF. 486, 491 (2000)).

13. Nicholas Kulish, *Norway Attacks Put Spotlight on Rise of Right-Wing Sentiment in Europe*, N.Y. TIMES (July 24, 2011), <http://www.nytimes.com/2011/07/24/world/europe/24europe.html?pagewanted=all>.

14. Townsend & Traynor, *supra* note 6.

15. *Id.*

## I. BACKGROUND

*A. The Changing Makeup of the Land*

Immigration has effectively addressed two problems facing the European labor market: a smaller workforce caused by a lower birthrate and an aging population across Europe, and a need to fill jobs that Europeans are not willing to perform at the going rate.<sup>16</sup> As a result of generous asylum laws and an even more generous welfare system,<sup>17</sup> Sweden's foreign-born population rate reached 13.4% in 2007.<sup>18</sup> Similarly, Norway's foreign-born population has reached 10%.<sup>19</sup> Because many of these immigrants are willing to work at a lower wage than native Europeans, they represent a stabilizing force in the labor economy.<sup>20</sup>

However, their presence does not come without controversy. In fact, current sentiment across Europe is that there are simultaneously too many and too few people, or as one scholar put it, Europe is plagued with "demographic bulimia."<sup>21</sup> Many native Europeans protest the lowered wages and increased unemployment within the native population that

---

16. CHRISTOPHER CALDWELL, REFLECTIONS ON THE REVOLUTION IN EUROPE 34, 39 (2009). As Christopher Caldwell writes, "Today Europe's population is aging, its support ratio is shrinking and due to falling birthrates, there is no sufficiently large 'next generation' of workers to restore it to balance." *Id.* at 39. In fact, according to a study by the United Nations, Europe needs an annual net immigration of 1.4 million people per year in order to meet its labor requirements. Herbert Brücker, Joachim R. Frick & Gert G. Wagner, *Economic Consequences of Immigration in Europe*, in IMMIGRATION AND THE TRANSFORMATION OF EUROPE 111, 136 (Craig A. Parson & Timothy M. Smeeding eds., 2006) [hereinafter IMMIGRATION]. For example, in Sweden, the fertility rate between 2000 and 2005 was 1.64 births per 1,000 people, and in 2003, the natural population growth was 0.7%. *Id.* at 12 tbl.1.4 (citing data from United Nations). To put this figure in perspective, the United States had a total fertility rate of 2.04. *Id.* at 3 tbl.1.1 (citing data from Eurostat).

17. Georg Menz, "Useful" Gastarbeiter, burdensome asylum seekers, and the second wave of welfare retrenchment: Exploring the nexus between migration and the welfare state, in IMMIGRATION, *supra* note 16, at 407–10.

18. *Country Statistical Profile: Sweden 2010*, OECD iLIBRARY, [http://www.oecd-ilibrary.org/economics/country-statistical-profile-sweden-2010\\_20752288-2010-table-swe;jsessionid=mqsh595d1ixh.delta](http://www.oecd-ilibrary.org/economics/country-statistical-profile-sweden-2010_20752288-2010-table-swe;jsessionid=mqsh595d1ixh.delta) (last updated May 27, 2010).

19. *Norway—Breivik Attacks*, N.Y. TIMES, [http://topics.nytimes.com/topics/reference/timestopics/people/b/anders\\_behring\\_breivik/index.html](http://topics.nytimes.com/topics/reference/timestopics/people/b/anders_behring_breivik/index.html) (last updated Mar. 7, 2012) ("Immigration has skyrocketed by a factor of five since the early 1970s—more than 10 percent of Norway's population is of foreign origin. In recent years, the biggest groups of asylum seekers have come from Afghanistan, Iraq, Somalia and Eritrea.")

20. Brücker, Frick & Wagner, *supra* note 16, at 112.

21. CALDWELL, *supra* note 16, at 39–41 (quoting HANS MAGNUS ENZENBERGER, DIE GROBE WANDERUNG 31 (1992)).

accompany increases in immigration.<sup>22</sup> Given the strong welfare programs in the Scandinavian countries, immigrants are also characterized as a “welfare drain.”<sup>23</sup> Moreover, just because a country is diverse does not mean its society is integrated. In fact, Sweden has been called “the country with the most intractable segregation.”<sup>24</sup>

But cultural differences and economics are not the only factors that fuel anti-immigration sentiment. Remarkably, in 2003, 69% of all Europeans surveyed believed that “immigrants make crime ‘worse.’”<sup>25</sup> However, this belief has been characterized as inaccurate,<sup>26</sup> and in 2011, the

22. Brücker, Frick & Wagner, *supra* note 16, at 112. “Unemployment has also frequently been linked to hostility against immigrants. It has been suggested that marginalized groups, not least the unemployed, are particularly inclined to blame immigrants themselves for their problems.” Björklund & Andersen, *supra* note 11, at 116–17.

23. In part, economic concerns over the “welfare drain” are not unfounded: there is a noticeable difference in employment rates between Swedish and non-Swedish citizens, with 78% of Swedish males and 74.2% of females working versus only 63.1% and 60.3% of their non-Swedish counterparts, respectively. Menz, *supra* note 16, at 407–10. This difference is even starker when you isolate the non-European migrants in Sweden, who have an overall employment rate of only 55%. *Id.* In a country whose generous welfare system is based on a social contract that involves labor contribution, these differences do not go unnoticed. *Id.* This said, the fact that the majority of immigrants coming to Norway and Sweden are asylum seekers—many of whom are coming from countries with civil unrest—can also provide clarity in the discrepancies in employment rates. Amanda Billner, *Regeringen vill jämna ut jobbklyfta*, DAGENS NYHETER (May 30, 2011, 6:38 PM), <http://www.dn.se/nyheter/politik/regeringen-vill-jamna-ut-jobbklyfta>.

24. CALDWELL, *supra* note 16, at 246. Cultural differences have become intensified by the current segregation. *Id.* According to the Pew Forum on Religion & Public Life, the estimated Muslim population in Sweden in 2010 is 451,000, or 4.9% of the country’s population of 9.4 million. *The Future of the Global Muslim Population*, PEW FORUM ON RELIGION & PUB. LIFE (Jan. 2011), [http://pewforum.org/future-of-the-global-muslim-population-regional-europe.aspx#ftn39\\_rtn](http://pewforum.org/future-of-the-global-muslim-population-regional-europe.aspx#ftn39_rtn); see also SWEDEN.SE, [www.sweden.se](http://www.sweden.se) (last visited Apr. 24, 2012). Similarly, Norway’s Muslim population is 144,000, or 3.0% of their population of 4.9 million, and 12.2% of their population is foreign-born. *Id.* Steven Erlanger & Michael Schwartz, *In Norway, Consensus Cuts 2 Ways*, N.Y. TIMES (July 29, 2011), <http://www.nytimes.com/2011/07/29/world/europe/29norway.html?pagewanted=all>; *Norway After Terrorism: Flowers for Freedom*, ECON. (July 30, 2011), <http://www.economist.com/node/21524852>.

25. Jack Citrin & John Sides, *European Immigration in the People’s Court*, in IMMIGRATION, *supra* note 16, at 327, 334 (citing 2002–2003 European Social Survey).

26. *Hur många av dem som begår brott är invandrare? [How Many of Those Who Commit Crime Are Immigrants?]*, BROTTSFÖREBYGGANDE RÅDET (Feb. 8, 2006), [http://www.bra.se/extra/pod/?action=pod\\_show&id=85&module\\_instance=15](http://www.bra.se/extra/pod/?action=pod_show&id=85&module_instance=15); see also MICHELLE HALE WILLIAMS, *THE IMPACT OF RADICAL RIGHT-WING PARTIES IN WEST EUROPEAN DEMOCRACIES* 63 (2006) (“The lack of a direct correlation on the socioeconomic variables supports the argument that backing for radical right-wing parties has less to do with real conditions in European societies and more to do with perceived circumstances.”).

Swedish government published an article rebuffing common “myths” about immigration.<sup>27</sup>

### *B. Proliferation of Political Parties Opposing Immigration*

As this “demographic bulimia” becomes epidemic, Europe has experienced a wave of public opinion opposing immigration and multiculturalism.<sup>28</sup> In particular, prominent political parties have embraced these sentiments, imbued them into their platforms, and now wield significant force in the Scandinavian political arena.<sup>29</sup> The Sweden Democrats, Norway’s Progress Party, and the Danish People’s Party all hold seats in their respective parliamentary bodies.<sup>30</sup> In fact, at the time of Breivik’s attacks, the Progress Party was the second-largest party in Norway.<sup>31</sup> Similarly, the Sweden Democrats currently hold twenty seats out of a total of 349 in the parliamentary body, the Riksdag,<sup>32</sup> and the People’s

27. *Vanliga nätmyter om invandrare och minoriteter* [Common Myths about Immigrants and Minorities], REGERINGSKANSLIET (Nov. 30, 2011), <http://www.regeringen.se/sb/d/2279/a/181576>.

28. Ross Douthat, *A Right-Wing Monster*, N.Y. TIMES (July 25, 2011), <http://www.nytimes.com/2011/07/25/opinion/25douthat.html>. “Mass immigration really has left the Continent more divided than enriched, Islam and liberal democracy have not yet proven natural bedfellows and the dream of a postnational, postpatriotic European Union governed by a benevolent ruling elite looks more like a folly every day.” *Id.*

29. Bjørklund & Andersen, *supra* note 11, at 112.

30. *See infra* notes 31–33.

31. Erlanger & Schwirtz, *supra* note 24. In the election held just seven weeks after Breivik’s attacks, the Progress Party was displaced by the Conservative Party for the second seat. *Norway: Losses for the Right Wing*, ASSOCIATED PRESS (Sept. 14, 2011), <http://www.nytimes.com/2011/09/14/world/europe/norway-losses-for-the-right-wing.html>. With the Labor Party winning 33.2% of the vote, the Progress Party decreased from 18.5% of the vote in 2007, to 11.8% of the vote on September 14, 2011. *Id.* The Norwegian government has a 165-member legislative body called the *Storting*, whose members are elected through a direct proportional vote. Patrick Hossay, *Country Profiles*, in SHADOWS OVER EUROPE, *supra* note 11, at 322.

32. *Election 2010*, RIKSDAG, [http://www.riksdagen.se/templates/R\\_Page\\_\\_\\_775.aspx](http://www.riksdagen.se/templates/R_Page___775.aspx) (last updated Sept. 20, 2010). The Swedish government is comprised of a unicameral legislature, called the Riksdag, whose members are directly elected by the people through a proportional representation system. Hossay, *supra* note 31, at 339–40. The elections are held among Sweden’s twenty-nine regional electoral constituencies, and in order to gain seats in the Riksdag, a political party must surpass the four percent threshold of the national vote, or obtain 12% of the vote in any regional constituency. *Id.*; SWEDISH INST., FACTS ABOUT SWEDEN: GOVERNMENT 2 (Apr. 2011), *available at* [http://www.sweden.se/upload/Sweden\\_se/english/factsheets/SI/SI\\_FS55z\\_The\\_Swedish\\_System\\_of\\_Government/FS21-The-Swedish-system-of-government-low-resolution.pdf](http://www.sweden.se/upload/Sweden_se/english/factsheets/SI/SI_FS55z_The_Swedish_System_of_Government/FS21-The-Swedish-system-of-government-low-resolution.pdf); *see also* CARTER, *supra* note 11, at 149, 150 tbl.5.1.

Party holds twenty-four seats of a total 179 in the Danish Folketing.<sup>33</sup> In order to garner more widespread support and political legitimacy, radical right-wing parties purify their rhetoric to conform to the limits of mainstream politics.<sup>34</sup> The official platforms of these parties are often limited to carefully constructed discourse emphasizing the impact of immigration.<sup>35</sup> Funneling issues such as unemployment, education disparity, crime, and diminishing social values into a single platform, these parties argue that an end to immigration will solve many of the country's socio-economic concerns.<sup>36</sup>

However, the members—and in many cases, even the leaders—of these political parties have expressed individual opinions that do not disguise their anti-Muslim and anti-immigration, and often racist and xenophobic, thoughts.<sup>37</sup> They have crossed the line of acceptable political

33. *Who's who in the Folketing and the government*, FOLKETINGET (Mar. 14, 2011), <http://www.thedanishparliament.dk/Publications/Who%20is%20who%20in%20the%20Folketing%20and%20the%20government.aspx>. The Danish government is comprised of a unicameral legislature, called the Folketing, whose members are elected through a complicated proportional representation system. Hossay, *supra* note 31, at 332, 340. In order to gain seats in the Folketing, a political party must cross a threshold of two percent of the national vote. *Id.*

34. Martin Schain, Aristide Zolberg & Patrick Hossay, *Democracy in Peril?*, in *SHADOWS OVER EUROPE*, *supra* note 11, at 301, 312 [hereinafter Schain et al., *Democracy in Peril?*]. This can be a methodical process:

As the extreme right cleans up its image to gain electoral credibility and support, it is likely to (1) moderate its rhetoric and program toward a populist but less atavistic alternative; (2) be a more appealing partner to the center right; and (3) inspire additional efforts by more centrist politicians to usurp the populist-nationalist mantle.

*Id.* at 312.

35. *SHADOWS OVER EUROPE*, *supra* note 11, at 60.

The genius or madness of the radical right wing appears to be their innovation at creating a climate of fear upon which their omnibus issue, immigration feeds . . . . Skillfully, they spin the issue to show how governments refuse to address it, placing themselves in the vacuum holding solutions: the radical right wing to the rescue.

*Id.*

36. WILLIAMS, *supra* note 26, at 60.

37. Furthermore, xenophobic speech has so permeated political discourse that it is now accepted as part of the anti-immigration platform. Bjørklund & Andersen, *supra* note 11, at 112. For instance, in 1997, Thomas Behnke, a member of the Danish Progress Party, suggested that Somalian refugees be repatriated “by parachute.” *Id.* at 114. The Danish People's Party is even more extreme in its view of nationalism, specifically that welfare should be limited to Danish citizens and that multiethnicity is “a threat to national culture.” *Id.* While these sentiments are not examples of hate speech that must be limited



speech in their public appearances or in writing on their personal blogs. “The climate of fear surrounding immigration appears to have come about as a result of radical right-wing posturing. Fears have been inflated beyond what the realities of conditions ought to produce.”<sup>38</sup> Pia Kjaersgaard, the leader of the Danish People’s Party, described the arrival of “thousands of persons who apparently civilisationally [sic], culturally and spiritually live in the year 1005 instead of 2005.”<sup>39</sup> In 2009, Siv Jensen, the leader of the Progress Party, used the phrase “stealth Islamization” to refer to efforts at multiculturalism,<sup>40</sup> and stated “we must put a stop to that.”<sup>41</sup> Moreover, in May 2011, Christian Tybring-Gjedde, the head of the Oslo branch of the Progress Party, characterized Muslims as by nature more aggressive than Norwegians.<sup>42</sup> Tybring-Gjedde has likened Muslim parents dressing their children in a hijab to dressing them in a Ku Klux Klan robe.<sup>43</sup>

In the context of the proliferation of hate speech by right-wing extremist parties, the historical background of these groups is relevant to the study. While native Scandinavians might be reluctant to admit it, xenophobic sentiment is not a new phenomenon stemming from increased immigration and multiculturalism in their region.<sup>44</sup> Scrutiny reveals that

---

by the law, they are indicative of the direction that politics are moving and are noteworthy.

38. WILLIAMS, *supra* note 26, at 61.

39. *The Growth of Islamophobia: Can Careless Talk Cost Lives?*, ECON. (July 30, 2011), <http://www.economist.com/node/21524862>.

40. Erlanger & Schwirtz, *supra* note 24.

41. Shoaib Sultan, *The Muslims of Norway*, FOREIGN AFF. (July 26, 2011), <http://www.foreignaffairs.com/articles/67995/shoaib-sultan/the-muslims-of-norway>.

42. Erlanger & Schwirtz, *supra* note 24.

43. *Frp-politiker sammenligner hijab med Ku Klux Klan [Progress Party Politician Likens Hijab with KKK]*, VG NETT (Mar. 3, 2011, 7:31 AM), <http://www.vg.no/nyheter/innenriks/norsk-politikk/artikkel.php?artid=593810>. Significantly, the incendiary speech that Breivik cited was not just limited to one side of the Atlantic. Breivik also quoted the American blogger Pamela Geller, who has written on her blog *Atlas Shrugs* that, “The Muslims have taken to rampaging, destroying and setting alight the streets of France.” Tim Lister, *Suspect Admired Bloggers Who Believe Europe is Drowning in Muslims*, CNN WIRE (July 27, 2011), [http://articles.cnn.com/2011-07-27/world/norway.terror.web\\_1\\_islamic-muslims-atlas-shrugs?\\_s=PM:WORLD](http://articles.cnn.com/2011-07-27/world/norway.terror.web_1_islamic-muslims-atlas-shrugs?_s=PM:WORLD). Following the attacks, Geller dismissed any responsibility: “If anyone incited him to violence, it was Islamic supremacists. If anything incited him to violence, it was the Euro-Med policy.” *Id.* Jeffrey Goldberg criticized Geller’s dismissal: “Free speech means free speech. But she should be aware now that violent people look to her for guidance, and she should write with that in mind.” *Id.*

44. Townsend & Traynor, *supra* note 6. In fact, the Sweden Democrats party has their roots in a fascist party and had connections with neo-Nazi party members. *Id.*; *see also* Kulish, *supra* note 13. Moreover, the Sweden Democrats have until recently used the

the proliferation of these parties is simply a reshaping of old xenophobic sentiment that became socially unacceptable after World War II.<sup>45</sup>

The universal delegitimation of right wing ideology brought on by the identification of World War II as a war against fascism . . . as well as the prohibition against blatantly xenophobic rhetoric that emerged as the reality of the Holocaust became public, ensured that right-wing extremists would have a very hard reception in public opinion. This “time in the catacombs,” as the Belgian extreme right refers to the three decades following the war, did not mark the end of an ideology; but it did mark its exclusion from polite, public conversation and thus its exclusion from the political scene.<sup>46</sup>

Others might say the proliferation is a response to the perceived threats to deeply-rooted nationalism.<sup>47</sup> For example, one cultural anthropologist characterizes Norwegians as having a “quiet nationalism.”<sup>48</sup> This said, “[T]here are some unexamined ugly features of Norwegian nationalism that have to do with ethnic nationalism, a feeling of specialness, an element of racism. Non-ethnic Norwegians are visible and seen as out of place.”<sup>49</sup>

Breivik’s attacks were not isolated incidents of violence stemming from xenophobic sentiment in Scandinavia. In 1995, the fatal stabbing of a refugee from the Ivory Coast by a sixteen-year-old Swedish neo-Nazi brought racially-motivated violence to the nation’s forefront.<sup>50</sup> In a 2002 study by the Expo Foundation,<sup>51</sup> a Swedish Security Police analyst re-

---

tagline “Keep Sweden Swedish.” Øyvind Strømme, *Violent “Counter-Jihadism,”* FOREIGN AFF. (July 27, 2011), <http://www.foreignaffairs.com/articles/67999/oyvind-strommen/violent-counter-jihadism>. Similarly, the Norwegian Progress Party was founded by Anders Lange, an anti-communist who supported the South African apartheid regime. *Id.*

45. Martin Schain, Aristide Zolberg & Patrick Hossay, *The Development of Radical Right Parties in Western Europe*, in SHADOWS OVER EUROPE, *supra* note 11, at 3 (“Indeed, parties supporting ideologies that had been relegated to the lunatic fringe in the postwar period have now established a significant and enduring presence in most Western European states.”).

46. Schain et al., *Democracy in Peril?*, *supra* note 34, at 304.

47. Erlanger & Schwirtz, *supra* note 24.

48. *Id.* (quoting Thomas Hylland Eriksen, a cultural anthropologist at the University of Oslo who studies efforts at multiculturalism).

49. *Id.* (quoting Thomas Hylland Eriksen).

50. Per-Ola Ohlsson, *Kand nazist tog sitt liv [Famous Nazi Took His Own Life]*, AFTONBLADET (May 2, 2001), <http://www.aftonbladet.se/nyheter/article10208972.ab>.

51. Stieg Larsson, *A Study on Racially Motivated Crime and Violence*, EXPO (Sept. 2002), [http://expo.se/www/download/final\\_sweden\\_racialviolence\\_raxen3.pdf](http://expo.se/www/download/final_sweden_racialviolence_raxen3.pdf). Before he became the internationally acclaimed author of the Millennium trilogy, Larsson was a well-known journalist and the founder of the Expo Foundation. *Stieg Larsson, 1954-2004*,

ported a considerable increase in hate crime and racial violence in Sweden from 1997 to 2001.<sup>52</sup> In 2009, the Swedish Security Police released an additional study, finding violent extremists to pose a significant threat to national security.<sup>53</sup> Similarly, in February 2011, the Norwegian Police Security Force published a risk analysis study concluding that right-wing extremists posed “no serious threat,” but that “a higher level of activity of some anti-Islamic groups” exists, with a greater concentration on social media websites.<sup>54</sup> In the wake of the murder of a young boy of Ghanaian descent by a neo-Nazi gang, the Norwegian government actively engaged in an anti-Nazi campaign.<sup>55</sup> However, while this campaign has resulted in the significant crumbling of neo-Nazi groups in Norway, it has not dissipated the widespread xenophobic opinion in the online world.<sup>56</sup>

### C. Instruments of International Law

Sweden, Denmark, and Norway are all members of the United Nations<sup>57</sup> and founding members of the Council of Europe.<sup>58</sup> Sweden and Denmark are both member states of the European Union (“EU”), and thus subject to EU treaties, conventions, and directives.<sup>59</sup> While not an

---

EXPO, [http://expo.se/2010/stieg-larsson-1954-2004\\_3515.html](http://expo.se/2010/stieg-larsson-1954-2004_3515.html) (last visited Feb. 2, 2012). The Expo Foundation was founded to “counteract the growth of the extreme right and the white power-culture in schools and among young people.” *Id.*

52. MIKAEL JOHANSSON, BROTTSLIGHET KOPPLAD TILL RIKETS INRE SAKERHET 2001: RAPPORT FRÅN SAKERHETSPOLISEN [CRIME LINKED TO NATIONAL SECURITY 2001: SAKERHETSPOLISEN REPORT] (2001), *available at* <http://www.sakerhetspolisen.se/download/18.7671d7bb110e3dcb1fd80009984/pmv2001.pdf>. The report noted that reported crimes increased from 1,752 in 1997 to 2,670 in 2001. *Id.* at 21.

53. SAKERHETSPOLISEN & BROTTSFÖREBYGGANDE RÅDET, RAPPORT 2009: 15: VÅLDSAM POLITISK EXTREMISM [REPORT 2009: VIOLENT POLITICAL EXTREMISM] 42 (2009), *available at* <http://www.sakerhetspolisen.se/download/18.5bf42a901201f330faf80002541/valdsampolitiskextremism.pdf>.

54. Strømmen, *supra* note 44.

55. *Id.*

56. *Id.* In the 2009 election, only 362 votes were cast in favor of the two remaining neo-Nazi parties in Norway. *Id.*

57. *Member States of the United Nations*, UNITED NATIONS (July 3, 2006), <http://www.un.org/en/members/index.shtml>.

58. *Council of Europe in Brief: 47 Countries, One Europe*, COUNCIL OF EUROPE, <http://www.coe.int/aboutcoe/index.asp?page=47pays1europe&l=en> (last visited Feb. 2, 2012).

59. *Countries*, EUROPA, [http://europa.eu/about-eu/countries/index\\_en.htm](http://europa.eu/about-eu/countries/index_en.htm) (last visited Feb. 2, 2012).

EU member state, Norway is part of Europe and cooperates closely with the EU, electing to participate in many EU initiatives.<sup>60</sup> The relevant international instruments controlling hate speech in Scandinavia include the European Convention on Human Rights,<sup>61</sup> the International Covenant on Civil and Political Rights,<sup>62</sup> the International Convention on the Elimination of All Forms of Racial Discrimination,<sup>63</sup> and the Additional Protocol to the Convention on Cybercrime Concerning the Criminalisation of Acts of a Racist and Xenophobic Nature Committed Through Computer Systems.<sup>64</sup> Sweden, Norway, and Denmark are signatories to each of these instruments.<sup>65</sup>

---

60. *About Norway: The European Union (EU)*, NORWAY, <http://www.norway.org/aboutnorway/government-and-policy/europe/policy/> (last visited Feb. 2, 2012). Norway is a member of the European Economic Area (“EEA”), in the context of being a member of European Free Trade Association (“EFTA”), or the EU internal market member. *Id.* Norway is also a member of Europol. *Id.*

61. Promulgated by the Council of Europe, the European Convention on Human Rights and Fundamental Freedom was enacted in 1950, in consideration of the 1948 Universal Declaration of Human Rights. Ivan Hare, *Extreme Speech Under International and Regional Human Rights Standards*, in *EXTREME SPEECH AND DEMOCRACY* 62, 65–66 (Ivan Hare & James Weinstein eds., 2009) [hereinafter *EXTREME SPEECH*].

62. Adopted by the United Nations in 1966 and ratified in 1976, the International Covenant on Civil and Political Rights requires state parties to protect a set of civil and political rights, and establishes a forum, the Human Rights Committee, to hear alleged violations of these rights. International Covenant on Civil and Political Rights, Dec. 19, 1966, 999 U.N.T.S. 171 [hereinafter *ICCPR*]; see also Hare, *supra* note 61, at 63–64.

63. Adopted by the United Nations in 1965 and ratified in 1969, the International Convention on the Elimination of All Forms of Racial Discrimination seeks to “prevent and combat racist doctrines and practices in order to promote understanding between races and to build an international community free from all forms of racial segregation and racial discrimination.” International Convention on the Elimination of All Forms of Racial Discrimination, Jan. 4, 1969, 660 U.N.T.S. 195.

64. Adopted in 2003 and entered into force in 2006, the Additional Protocol to the Convention on Cybercrime, Concerning the Criminalisation of Acts of Racist and Xenophobic Nature Through Computer Systems seeks to “harmonise substantive law provisions concerning the fight against racist and xenophobic propaganda” and acknowledges that “computer systems offer an unprecedented means of facilitating freedom of expression and communication around the globe.” Additional Protocol to the Convention on Cybercrime Concerning the Criminalization of Acts of a Racist and Xenophobic Nature Committed through Computer Systems, Jan. 28, 2003, E.T.S. No. 189 [hereinafter *Additional Protocol to the Convention on Cybercrime*], available at <http://conventions.coe.int/Treaty/en/Treaties/html/189.htm>.

65. *Status of Treaties: ECHR*, COUNCIL OF EUROPE TREATY OFF., <http://conventions.coe.int/Treaty/Commun/ListeTableauCourt.asp?MA=3&CM=16&CL=ENG> (last visited May 22, 2012); *Status of Treaties: ICERD*, U.N. TREATY COLLECTION, [http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-2&chapter=4&lang=en](http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-2&chapter=4&lang=en) (last visited Mar. 29, 2012); *Status of Treaties: ICCPR*, U.N. TREATY COLLECTION,

The European Convention on Human Rights (“ECHR”) protects freedom of expression, but also recognizes the government’s power to interfere with this right.<sup>66</sup> Article 10 of the ECHR provides that, “Everyone has the right to freedom of expression.”<sup>67</sup> However, this right may be limited:

in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.<sup>68</sup>

Hate speech regulation is considered a means of preventing disorder or crime.<sup>69</sup>

According to the ECHR jurisprudence, the enforcement of hate speech regulations often turns on whether the regulation is necessary in a democratic society.<sup>70</sup> The European Court of Human Rights (“ECtHR”) applies a proportionality interest test, and the protection granted varies with the type of speech sought to be limited.<sup>71</sup> In *Jersild v. Denmark*, a

---

[http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-4&chapter=4&lang=en](http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&lang=en) (last visited Mar. 29, 2012).

66. Hare, *supra* note 61, at 65–68.

67. European Convention for the Protection of Human Rights and Fundamental Freedoms [ECHR] art. 10, § 1, Nov. 4, 1950, 213 U.N.T.S. 222. The goals of freedom of expression include promoting access to the exchange of information and ideas, allowing individuals to express themselves and participate in a public forum, granting the public the ability to monitor authorities through the “public watchdog” function, and promoting social progress in general. DRAGOS CUCEREANU, ASPECTS OF REGULATING FREEDOM OF EXPRESSION ON THE INTERNET 9 (2008).

68. ECHR, *supra* note 67, art. 10, § 2.

69. CUCEREANU, *supra* note 67, at 9, 13, 16, 20, 31. According to Article 10 § 2 of the Convention, limitations to freedom of expression must be prescribed by law, pursue one of the enumerated aims, and necessary for maintaining a democratic society. *Id.* First, the interference must be prescribed by law, which means that there must be some national law or international instrument that forms the basis for the limitation. *Id.* Second, the enumerated aims that are legitimate include protection of national security, territorial integrity or public safety, prevention of disorder or crime, protection of health or morals, protection of reputation or rights of others, preventing disclosure of information received in confidence, and maintaining the authority and impartiality of the judiciary. *Id.* Finally, in determining whether a limitation is necessary for maintaining a democratic society, three interests are balanced: the pressing social need of the limitation, the relevant and sufficient reasons for the limitation, and the proportionality of a measure. *Id.* Proportionality involves considering suitability, whether there is a less restrictive alternative, a balancing of means and ends, and balancing the interests involved. *Id.*

70. *Id.*

71. Thomas Bull, *Freedom of Expression in Sweden: The Rule of Formalism*, in FREEDOM OF SPEECH ABRIDGED? 79, 81 (Anine Kierulf & Helge Rønning eds., 2009).

television journalist appealed a conviction of aiding and abetting the dissemination of hate speech to the ECtHR.<sup>72</sup> Jersild was charged after he produced a news report for the Danish Broadcasting Corporation on a gang of young racists who called themselves Greenjackets.<sup>73</sup> In the report, which was broadcast over a Sunday-night television program, members of the gang made derogatory and offensive remarks about immigrants and ethnic minorities in Denmark.<sup>74</sup> The ECtHR found that the Danish Supreme Court had violated Jersild's freedom of expression under the ECHR.<sup>75</sup> While the ECtHR found that the government's actions were "prescribed by law" and did pursue "a legitimate aim," the intrusion on Jersild's Article 10 rights was not "necessary in a democratic society."<sup>76</sup> In dicta, the ECtHR noted that prosecuting the speech of the Greenjackets would not violate Article 10.<sup>77</sup> Thus, "[h]ate speech would be protected if it were part of a 'serious' discussion of societal issues, but not if it were the product of right-wing intolerance."<sup>78</sup>

In *Prosecutor General v. Åke Ingemar Teodor Green*, in which a pastor was charged with hate speech made during a sermon, the outcome again turned on whether the prosecution of a pastor's speech is necessary

---

According to Thomas Bull, "Political speech is at the core of the protected area, as it is of great public interest, while obscene and defamatory expressions are at the outer edge." *Id.*

72. *Jersild v. Denmark*, 298 Eur. Ct. H.R. (ser A) ¶ 12 (1995).

73. *Id.* ¶¶ 12–14.

74. *Id.* ¶ 11. These comments characterized blacks as an inferior race, applauded the Ku Klux Klan in America and advocated for a return to slavery. *Id.* On the local level, the Danish Supreme Court had held that in contacting the members and arranging their interviews, Jersild knew the members would make racist assertions, and in fact, encouraged them to. *Id.* ¶18. Thus, Jersild, in effect, caused the racist assertions to be made. *Id.* The court noted that their judgment did not prevent the reporting of extremist views, but that this reporting must be balanced and comprehensive. *Id.* Thus, freedom of expression would not override the interests of the hate speech legislation, when four to five hours of interview tape was cut down to only a few minutes of the most crude comments made by extreme racists. *Id.*

75. *Id.* ¶ 11. Emphasizing the media's important role as a "public watchdog," the Court found that the journalist did not intend to disseminate racism, but rather to bring a serious issue to the public's attention. *Id.* ¶¶ 35–36.

76. Jean-Marie Kamatali, *The U.S. First Amendment Versus Freedom of Expression in Other Liberal Democracies and How Each Influenced the Development of International Law on Hate Speech*, 36 OHIO N.U. L. REV. 721, 727 (2010) (discussing the court's holding in relation to international hate crime legislation). Specifically, the Court found that the means of the interference was not proportionate to the interest. *Jersild*, 298 Eur. Ct. H.R. (ser A) ¶ 15.

77. *Jersild*, 298 Eur. Ct. H.R. (ser A) ¶ 31. The conviction of the Greenjackets had not been appealed to the European Court, and thus their ruling was limited to the television producer of the television program. *Id.* ¶¶ 31, 37.

78. Bull, *supra* note 71, at 81.

in a democratic society.<sup>79</sup> The Supreme Court of Sweden (“the Swedish Court”) noted that while religious sermons presented in a church will be afforded protection, there is “a duty to avoid, to the extent possible, statements that are unjustifiably insulting to others and constitute attacks on their rights. These statements therefore do not contribute to any form of public discourse that will lead to progress in relations among people.”<sup>80</sup> Ultimately, the Swedish Court found that in context of a pastor preaching to a congregation, speech would be protected under Articles 9 and 10 of the ECHR.<sup>81</sup> However, the Swedish Court emphasized the religious context in which the statements were made,<sup>82</sup> which is a distinction that can also be drawn between the protected realm of religious ser-

---

79. Prosecutor General v. Åke Ingemar Teodor Green, Nytt Juridiskt Arkiv [NJA] [Supreme Court] 2005-11-29 B1050-05 (Swed.), available at [http://domstol.se/domstolar/hogstadomstolen/avgoranden/2005/dom\\_pa\\_engelska\\_B\\_1050-05.pdf](http://domstol.se/domstolar/hogstadomstolen/avgoranden/2005/dom_pa_engelska_B_1050-05.pdf). Åke Ingemar Teodor Green was charged with agitation against a group on the basis of sexual orientation. *Id.* In Sweden, the law places a limit on the extent of free speech, in that racist speech can be prosecuted under criminal law. *Id.* Under Sweden’s Criminal Code, enraging conduct is also a crime. Bull, *supra* note 71, at 87 (citing BROTTSBALKEN [BRB] [CRIMINAL CODE] 16:16 (Swed.)). Enraging conduct is defined as “a person who is noisy in a public place or who otherwise publicly behaves in a manner apt to arouse public indignation.” BRB 16:16 (Swed.). In 2006, a Svea Court of Appeals upheld the criminal conviction of the parent of an ice hockey player, who during a youth game yelled the Swedish equivalent of, “Take that [racial expletive] off the ice.” Bull, *supra* note 71, at 81 n.34 (citing NJA, Svea Hovrätt [HovR] [Court of Appeal of Svea] 2006-07-04 B8117-05 (Swed.)). In its opinion, the court focused on the effect of the speech on the young hockey players. NJA, HovR, 2006-07-04 B8117-05, at 3 (Swed.). In the opinion, freedom of expression was not considered to be a defense. *Id.* Additionally, Sweden’s Penal Code also prohibits inciting rebellion, “[a] person who orally, before a crowd or congregation of people, or in a publication distributed or issued for distribution, or in other message to the public, urges or otherwise attempts to entice people to commit a criminal act.” BRB 16:5 (Swed.).

80. *Åke Ingemar Teodor Green*, NJA 2005-11-29 B1050-05, at 13 (Swed.).

81. *Id.* The Court held:

This even applies to his most extreme statement, in which he describes sexual abnormalities at a cancerous growth, as that statement, viewed in light of what he said in connection with this in his sermon, is not something that can be deemed to encourage or justify hatred of homosexuals. The way he expressed himself perhaps cannot be deemed that much more derogatory than the wording of the Bible verses in question, but must be viewed as extreme also when considering what he was preaching to his audience. He made his statements in a sermon to his congregation regarding a theme found in the Bible.

*Id.* at 35–36. Moreover, the Swedish Court held that the use of “contempt” in the Swedish law needed to be read narrowly in order to comply with the European jurisprudence. *Id.* at 16.

82. *Id.*

mons and the unprotected online hate speech. Thus, in order to comply with the ECHR when regulating online hate speech, the government must not interfere with the right to discuss serious social issues or religious freedom.

Under Article 20 of the International Covenant on Civil and Political Rights (“ICCPR”), “Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.”<sup>83</sup> In *J.R.T. and W.G. Party v. Canada*, the Human Rights Commission upheld the decision of the Canadian Human Rights Commission to curtail J.R.T.’s telephone facilities.<sup>84</sup> J.R.T. provided a telephone service in which members of his party could call and listen to a prerecorded message, which warned “of the dangers of international finance and international Jewry leading the world into wars, unemployment and inflation and the collapse of world values and principles.”<sup>85</sup> The Human Rights Committee dismissed J.R.T.’s application, holding that “the opinions which Mr. T. seeks to disseminate through the telephone system clearly constitute the advocacy of racial or religious hatred which Canada has an obligation under article 20 (2) of the Covenant to prohibit.”<sup>86</sup>

Under Article 4 of the International Convention on the Elimination of All Forms of Religious Discrimination (“CERD”), “State parties condemn all propaganda and all organizations . . . which attempt to justify or promote racial hatred and discrimination in any form.”<sup>87</sup> In *Jewish Community of Oslo et al. v. Norway*,<sup>88</sup> the Committee on the Elimination of Racial Discrimination (“the CERD Committee”) considered a claim brought by a local Norwegian Jewish organization against Norway for violating Article 4 of the CERD.<sup>89</sup> Norway’s highest court had dismissed a claim of hate speech against Terje Sjølie, the leader of a march held in

---

83. ICCPR, *supra* note 62, art. 20.

84. *J.R.T. & W.G. Party v. Canada*, Judgment, U.N. Human Rights Comm’n, Comm’n No. 104/1981, U.N. Doc. CCPR/C/OP/2, at 25 (1984).

85. *Id.*

86. *Id.* at 231.

87. International Convention on the Elimination of all Forms of Racial Discrimination [CERD] art. 4, Dec. 21, 1966, 660 U.N.T.S. 195.

88. In cases brought before the Committee on the Elimination of Racial Discrimination, a citizen or organization can bring a claim against his country for not complying with Article 4 of the CERD. *Id.* Thus in this case, the local Norwegian Jewish organization brought a claim against Norway for failing to uphold Article 4 of the CERD.

89. *Jewish Cmty. of Oslo v. Norway*, Comm. on the Elimination of Racial Discrimination, Comm’n No. 30/2003, ¶¶ 2.1, 2.7, U.N. Doc. CERD/C/67/D/30/2003 (2005).



honor of Rudolf Hess.<sup>90</sup> At the march, in which participants wore military-like uniforms and made the Nazi salute, Sjølie made a speech applauding Hitler and Hess for “their principles and heroic efforts.”<sup>91</sup> In holding that Norway violated Article 4, the CERD Committee found that, “the intent of article 4 is to fight racism at its roots; there is a causal link between hate speech of the type made by Mr. Sjølie, and serious violent racist acts.”<sup>92</sup> The CERD Committee continued:

Thus, to give the right to freedom of speech a more limited role in the context of article 4 does not deprive the due regard clause of significant meaning, all the more so since all international instruments that guarantee freedom of expression provide for the possibility, under certain circumstances, of limiting the exercise of this right.<sup>93</sup>

This strikes at the heart of the issue: the tension between freedom of speech and incendiary speech. The Scandinavian legal systems pride themselves on a liberal approach to freedom of speech.<sup>94</sup> In fact, the Norwegian Constitution lists freedom of speech as an affirmative duty of the government.<sup>95</sup> However, there is a distinction between open and honest dialogue and speech that lends itself to hate, violence, and crime. The instruments of international law, to which the Scandinavian countries are signatories, uphold this distinction, allowing for freedom of expression to

---

90. *Id.* The Jewish Community of Oslo had appealed to the CERD Committee on the basis that in dismissing the charges against Sjølie, the Norwegian court’s decision, “contributed to an atmosphere in which acts of racism, including acts of violence, are more likely to occur.” *Id.* ¶ 7.3. In response, Norway argued that Article 135(a) of the Norwegian penal code, which bans racist propaganda, had to be considered “with due regard to the right of freedom of expression.” *Id.* ¶ 8.1.

91. *Id.* ¶ 2.1. In his speech, Sjølie stated, “Every day immigrants rob, rape and kill Norwegians, every day our people and country are being plundered and destroyed by the Jews, who suck our country empty of wealth and replace it with immoral and un-Norwegian thoughts.” *Id.*

92. *Id.* ¶ 5.4.

93. *Id.* ¶ 10.5.

94. Bjørklund & Andersen, *supra* note 11, at 109 (citing Jørgen Würtz Sørensen, *Der kom fremmede: Migration, Højkonjunktur, Kultursammenstød. Fremmedarbejderne i Danmark frem til 1970* [The foreigners arrived: migration, cultural clashes. Guest workers in Denmark up to 1970] (Åarhus Univ., Working Paper for the Ctr. for Kulturforskning, 1988) (Den.) (“Official ideology has been one of tolerance and humanism even though earlier waves of small-scale immigration has often generated some unrest among ordinary people.”).

95. GRUNNLOVA [CONSTITUTION], § E, art. 100 (Nor.). Under Article 100, “It is the responsibility of the authorities of the State to create conditions that facilitate open and enlightened public discourse.” *Id.*

be “afforded a lower level of protection in cases of racist and hate speech.”<sup>96</sup>

The Council of Europe’s Convention on Cybercrime makes hate speech illegal, and thus ISPs must filter or block offending content.<sup>97</sup> Hate speech includes “racist, xenophobic, anti-Semitic, anti-Muslim and generally intolerant speech.”<sup>98</sup> Many European countries, including Norway, Sweden, Denmark, and Finland, have already implemented filtering systems to restrict illegal content.<sup>99</sup> However, at present, these systems are mostly tailored to preventing the production and distribution of child pornography.<sup>100</sup> More importantly, the systems are not advanced enough to filter out all hate speech, and thus they do not do enough to combat the proliferation of incendiary speech.<sup>101</sup>

## II. THE GAP BETWEEN THE INTERNET AS A GLOBAL MEDIUM AND THE REGULATION OF ILLEGAL ONLINE ACTIVITY

### *A. Breivik’s Manifesto as an Example of the Gap between Internet as a Medium and the Failure of Regulation*

Breivik’s manifesto provides the link between the growing blogosphere of hate speech and his acts of terrorism. In his 1500-page manifesto,

---

96. Jewish Cmty. of Oslo v. Norway, Comm. on the Elimination of Racial Discrimination, Commc’n No. 30/2003, ¶ 10.5, U.N. Doc. CERD/C/67/D/30/2003 (2005).

97. Dawn C. Nunziato, *How (Not) to Censor: Procedural First Amendment Values and Internet Censorship Worldwide*, 42 GEO. J. INT’L L. 1123, 1126 (2011) (providing an overview of global internet censorship).

98. CUCERANU, *supra* note 67, at 34. The Council of Europe has defined racist and xenophobic materials as:

any written material, any image or any other representation of ideas or theories, which advocates, promotes or incites hatred, discrimination or violence, against any individual or group of individuals, based on race, colour, descent or national or ethnic origin, as well as religion if used as a pretext for any of these factors.

Additional Protocol to the Convention on Cybercrime, *supra* note 64, art. 1.

99. Nunziato, *supra* note 97, at 1127.

100. *Nordic Countries, OPENNET INITIATIVE*, [http://opennet.net/sites/opennet.net/files/ONI\\_NordicCountries\\_2010.pdf](http://opennet.net/sites/opennet.net/files/ONI_NordicCountries_2010.pdf) (last visited Feb. 2, 2012).

101. Additionally, few bloggers who are inciting violence and promoting extremism are being charged for hate speech crimes, and when they are being charged, they are rarely convicted. Townsend & Traynor, *supra* note 6. For example, the leader of the Dutch Freedom Party, Geert Wilders, who—while not Scandinavian—advocated for the rewriting of the Dutch constitution to outlaw the “fascist” Qur’an in the Netherlands, has been tried and acquitted on hate speech charges. *Id.*

Breivik fears the effects of “cultural Marxism,” a movement he attributes to the spread of political correctness and multiculturalism.<sup>102</sup> Breivik writes:

Political Correctness is not at all about “being nice,” unless one thinks gulags are nice places. Political Correctness is Marxism, with all that implies: loss of freedom of expression, thought control, inversion of the traditional social order, and, ultimately, a totalitarian state.<sup>103</sup>

While many of the activists cited in the manifesto have sought to distance themselves from the attacks,<sup>104</sup> the extent to which their words fueled Breivik cannot be understated. Marc Sageman, a former CIA officer, described the anti-Muslim and anti-Jihad blogosphere as “the infrastructure from which Breivik emerged.”<sup>105</sup> As two prominent Norwegian writers put it: “The racism and bigotry that have simmered for years on anti-Islamic and anti-immigration Web sites in Norway and other European countries and in the United States made it possible for him to believe he was acting on behalf of a community that would thank him.”<sup>106</sup> Or as one of Breivik’s acquaintances recently stated in a radio interview:

He [Breivik] felt a sort of desperation, resignation, and panic for the future . . . He saw that there was a big conflict coming, and he didn’t want Europe to erupt in flames—or however you call these struggles. And he understood that something was about to go wrong, and obviously, it is going wrong.<sup>107</sup>

While many have drawn parallels between Breivik and Ted Kaczynski,<sup>108</sup> Breivik does not fit neatly into the mold of the “lone wolf” theory

102. ANDREW BERWICK, 2083: A EUROPEAN DECLARATION OF INDEPENDENCE 18 (2011), available at <http://www.scribd.com/doc/60739170/2083-a-European-Declaration-of-Independence>.

103. *Id.*

104. Scott Shane, *Killings Spotlight Anti-Muslim Thought in U.S.*, N.Y. TIMES (July 25, 2011), <http://www.nytimes.com/2011/07/25/us/25debate.html?pagewanted=all>. Pamela Geller, a vociferous critic of Islam, wrote on her blog, “If anyone incited him to violence, it was Islamic supremacists.” *Id.*

105. Strømmen, *supra* note 44.

106. Kulish, *supra* note 13 (quoting Hajo Funke) (“This may be the act of a lone, mad, paranoid individual, but the far-right milieu creates an atmosphere that can lead such people down that path of violence.”).

107. *Verlikgheten i P3: “Han gjorde i alla fall något,”* SVERIGESRADIO (Oct. 11, 2011), <http://sverigesradio.se/sida/artikel.aspx?programid=3052&artikel=4742251> (interview by Magnus Arvidson with Erik Walfridsson) (translated by the author).

108. Shane, *supra* note 104. In fact, Breivik’s manifesto included passages taken directly from Kaczynski’s 1995 manifesto, only making minor alterations including substituting terms like “leftists” with his own “multiculturalists” or “cultural Marxists.” *Id.*

of terrorism.<sup>109</sup> Anders Behring Breivik was not merely a deranged person whose political views had taken an extreme turn,<sup>110</sup> but rather he was the product of the blogosphere of hate from which he recognized—and answered—a call to arms.<sup>111</sup> As a prominent Norwegian writer stated, “Indeed, like many of the violent jihadists he so feared—though, notably, did not directly target—Breivik seems to have been radicalized via the Internet.”<sup>112</sup> Even though Kaczynski quoted heavily from other scholars who criticized technological advances, including Adolphus Huxley’s *Brave New World*, Kaczynski’s work appears a reflection of his own troubled mind and his conscious decision to sequester himself from society.<sup>113</sup> Breivik, on the other hand, remained quite social,<sup>114</sup> and it is this continued engagement in the online world that distinguishes him from the lone wolf theory. In fact, “the hatred and contempt from which he drew his deranged determination were shared with many others through the international right-wing blogosphere.”<sup>115</sup>

Through online forums and discussion boards, Breivik frequently interacted with other individuals sharing his xenophobic and racist beliefs.<sup>116</sup> Lars Buehler, a Norwegian terrorist expert who had debated with

---

While Breivik essentially lifted passages from Kaczynski’s writing, only replacing terms to make the passages fit his topic, he did not acknowledge Kaczynski in his work. *Id.*

109. The lone wolves of terrorism have been described as “deranged individuals who were sympathetic to a larger cause—from Oklahoma City bomber Timothy McVeigh to the Washington area sniper John Allen Muhammad.” Alexandra Marks, “*Lone Wolves*” *Pose Explosive Terror Threat*, CHRISTIAN SCI. MONITOR (May 27, 2003), <http://www.csmonitor.com/2003/0527/p02s02-usju.html>.

110. While court-appointed psychiatrists found Breivik to be insane in their initial assessment, the court has not yet ruled whether he is fit to stand trial. Bjoern H. Amland & Karl Ritter, *Anders Behring Breivik, Norway Killer, Was Insane During July Attacks*, HUFFINGTON POST (Nov. 29, 2011), [http://www.huffingtonpost.com/2011/11/29/anders-behring-breivik-legally-insane\\_n\\_1118194.html](http://www.huffingtonpost.com/2011/11/29/anders-behring-breivik-legally-insane_n_1118194.html). Moreover, the insanity diagnosis has been criticized by psychologists and psychiatrists in the media. *Id.* In fact, Dr. Tarjei Rygnestad, the head of the panel of the Norwegian Board of Forensic Medicine who will review the assessment, had previously stated, “If you have voices in your head telling you to do this and that, it will disturb everything, and driving a car is very complex.” Ian McDougal, *Anders Behring Breivik Insanity Ruling Not Likely In Norway*, HUFFINGTON POST (Aug. 1, 2011), [http://www.huffingtonpost.com/2011/07/31/anders-behring-breivik-norway-shooting\\_n\\_914309.html](http://www.huffingtonpost.com/2011/07/31/anders-behring-breivik-norway-shooting_n_914309.html).

111. Townsend & Traynor, *supra* note 6.

112. Strømmen, *supra* note 44.

113. Shane, *supra* note 104.

114. *Id.*

115. Jostein Gaarder & Thomas Hylland Eriksen, *A Blogosphere of Bigots*, N.Y. TIMES (July 29, 2011), <http://www.nytimes.com/2011/07/29/opinion/Gaarder-Eriksen.html>.

116. *Profile: Anders Behring Breivik*, BBC NEWS (Nov. 30, 2011, 7:59 PM), <http://www.bbc.co.uk/news/world-europe-14259989>.

Breivik on one such forum, stated, "I was the single opposing voice, arguing against the xenophobic, Islamophobic postings and comments that were the norm on this page, and Breivik did not stand out with a particularly aggressive or violent rhetoric. He was quite mainstream."<sup>117</sup> Breivik also reportedly warned others of the coming war against Muslims in Europe and was a member and participant in Nordisk, an online forum for neo-Nazis in the Nordic countries.<sup>118</sup>

In his manifesto, Breivik cited heavily to a Norwegian blogger who operated under the pseudonym Fjordman.<sup>119</sup> In one entry, Fjordman equated the spread of multiculturalism with a foreign invasion, and stated that "aiding and abetting a foreign invasion in any way constitutes Treason."<sup>120</sup> Fjordman continued, "If non-Europeans have the right to resist colonisation and desire self-determination then Europeans have that right, too. And we intend to exercise it."<sup>121</sup> In another cited section, Fjordman blames the "feminisation" of Europe for the current state of affairs:

Didn't feminists always claim that the world would be a better place with women in the driver's seat, because they wouldn't sacrifice their own children? Well, isn't that exactly what they are doing now? Smiling and voting for parties that keep the doors open to Muslim immigration, the same Muslims who will be attacking their children tomorrow?<sup>122</sup>

---

117. *Id.*

118. Sultan, *supra* note 41; Townsend & Traynor, *supra* note 6.

119. Lister, *supra* note 43. In the wake of the attacks and after extensive questioning by the Norwegian police force, PST, Fjordman has stated that he may never take up blogging again. Jonas Skybakmoen, *Fjordman avviser nye blogg-rykter* [*Fjordman Rejects New Blog Rumors*], ADRESSEAVISEN (Aug. 8, 2011), <http://www.adressa.no/nyheter/terrorangrepet/article1676738.ece>. However, this sentiment was short-lived and on October 25, 2011, Fjordman wrote an editorial claiming he had been censored by the media. *Fjordman Lives On Despite Media Censorship*, RIGHT SIDE NEWS (Oct. 25, 2011), <http://www.rightsidenews.com/2011102514793/editorial/rsn-pick-of-the-day/fjordman-lives-on-despite-media-censorship.html>.

120. Strømme, *supra* note 44.

121. *Id.*

122. BERWICK, *supra* note 102, at 345 (quoting Fjordman). In another section quoted in the manifesto, Fjordman writes,

While Chinese, Indian, Korean and other Asian Universities are graduating millions of motivated engineers and scientists every year, Western Universities have been reduced to little hippie factories, teaching about the wickedness of the West and the blessings of barbarism . . . Far worse than failing to compete with non-Muslim Asians is failing to identify the threat from Islamic nations who want to subdue us and wipe out our entire civilisation. That is a failure we

By characterizing Muslim immigrants as having the potential of attacking Norwegian children and instilling fear in his readers, Fjordman's words appear as a call to arms to his countrymen. On July 22, 2011, Anders Behring Breivik answered that call. Because Breivik believed an attack on Norwegians was imminent and his countrymen could no longer be trusted to protect the country, he carried out a massacre leaving seventy-seven dead. If the proper measures were in place regulating hate speech on the Internet, Breivik would not have been engulfed in such a whirlwind of insidious ideas, and the attacks might have been prevented. The lack of content filtering has led to a plethora of misinformation and dangerous rhetoric, which, combined with a society already on edge, poses a serious threat to democracy.

### *B. The Internet as a Global Medium*

Inherent to the discussion of the proliferation of hate speech online is the difference between the speed of information across the Internet and previous means of distributing political speech of decades past. Given the speed with which the Internet allows users to acquire and distribute data, information costs have greatly decreased, "to nearly zero."<sup>123</sup> In the context of online hate speech, information costs refer to the ease with which a user can create, acquire, or distribute illegal materials through the Internet.<sup>124</sup> According to the Council of Europe, "the emergence of international communication networks like the Internet provide certain persons with modern and powerful means to support racism and xenophobia and enables them to disseminate easily and widely expressions containing such ideas."<sup>125</sup>

Because certain media, like television, provide the user with a heightened sensory experience, that particular medium should be considered in determining the effect of hate speech.<sup>126</sup> This view comports with inter-

---

quite simply cannot live with. And we probably won't, unless we manage to deal with it.

*Id.* at 59.

123. Derek E. Bambauer, *Consider the Censor*, 1 WAKE FOREST J.L. & POL'Y 31 (2011) (citing Derek E. Bambauer, *Conundrum*, 96 MINN. L. REV. 584 (2011)).

124. *Id.*

125. Additional Protocol to the Convention on Cybercrime, *supra* note 64.

126. Bull, *supra* note 71, at 81. "Thus the need for restrictions may be greater in a medium that is very efficient in reaching a wide audience, and the Court has accepted national restrictions on expression in such circumstances that otherwise would perhaps not have been accepted." *Id.* In *Jersild v. Denmark*, the European Court considered the medium with which the speech was distributed. 298 Eur. Ct. H.R. (ser A) ¶ 31 (1995). The Court noted that, "it is commonly acknowledged that the audiovisual media have

national hate speech jurisprudence, which considers the types of harm in context.<sup>127</sup> According to the Canadian Supreme Court, “The courts must determine as best they can what the community would tolerate others being exposed to on the basis of the degree of harm that may flow from such exposure.”<sup>128</sup> While this statement was made in reference to a case involving pornography coming into the hands of minors, the notion that harmful content should be evaluated in its context is especially relevant to online hate speech.<sup>129</sup>

Given the speed of technology and Internet as a global medium, harmful online content similarly must be considered in context.<sup>130</sup> Because modern computer technology offers a way to connect quickly, cheaply, and anonymously over the Internet, users enjoy a greater sense of freedom of expression.<sup>131</sup> “The Internet is regarded as the key platform for the dissemination and mediation of the culture of violent extremism.”<sup>132</sup> Thus, it is important to consider the Internet as a medium in that, “[a]nonymous forums on the Internet have allowed anti-Muslim bigots to connect and reinforce each other’s worldview.”<sup>133</sup>

### III. SWEDEN’S LAW BANNING HATE SPEECH SHOULD BE ENFORCED AGAINST PERPETRATORS IN THE ONLINE COMMUNITY AND EXTENDED TO ALL CONTENT TRAVELING ALONG SWEDEN’S INTERNET INFRASTRUCTURE.

In order to prevent further violence, the Swedish government should enforce its current law regarding hate speech to all online acts committed using Swedish ISPs. Sweden’s telecommunications infrastructure, and geographic location in the center of Scandinavia, provides a unique and extraordinary opportunity for Sweden to assume a leading role in hate speech filtering. Almost all international electronic communications traf-

---

often a much more immediate and powerful effect than the print media and reports . . . . The audiovisual media have means of conveying through images meanings which the print media are not able to impart.” *Id.* Ultimately, the Court found that the news program was geared towards a serious, well informed audience, and that the material was presented with appropriate care and attention to the sensitivity of the subject, and thus, the medium was used appropriately. *Id.* ¶¶ 9, 34.

127. CUCEREANU, *supra* note 67, at 32.

128. *Id.* at 33 (quoting *R. v. Butler*, [1992] 1 S.C.R. 452 (Can.)).

129. CUCEREANU, *supra* note 67, at 34.

130. *Id.* at 7.

131. *Id.* at 139.

132. Tufyal Choudhury, *The Terrorism Act 2006: Discouraging Terrorism, in EXTREME SPEECH*, *supra* note 61, at 463, 477–78 (citing GABRIEL WEIMANN, *TERROR ON THE INTERNET: THE NEW ARENA, THE NEW CHALLENGES* (2006)).

133. Sultan, *supra* note 41.

fic both into and out of Norway and Finland cross through Sweden.<sup>134</sup> Additionally, a great deal of Norwegian domestic communications travels through the Swedish telecommunications infrastructure.<sup>135</sup> Following the rationale provided for the Försvarets radioanstalt (“FRA Law”),<sup>136</sup> the Swedish legislature could extend their hate speech laws to restrict the dissemination of all hate speech, which passes over their borders and which is controlled using their Internet infrastructure.<sup>137</sup> By following a similar approach to the filtering of child pornography, terrorism, and racism in France,<sup>138</sup> the proposed measure would establish a quasi-autonomous nongovernmental organization that would monitor offensive content online.<sup>139</sup>

---

134. *Nordic Countries*, *supra* note 100.

135. *Norwegian Group Joins Case Against Sweden’s Wiretapping Law*, LOCAL (Feb. 13, 2009), <http://www.thelocal.se/17578/20090213/>.

136. In 2008, the Swedish Parliament enacted the FRA Act, which will “monitor cross-border cable traffic . . . [including] Internet, e-mail, chat, mobile telephony and SMS communication.” Joakim Hammerlin, *Anti-Terror Surveillance and Freedom of Expression*, in FREEDOM OF SPEECH ABRIDGED?, *supra* note 71, at 98. The passage of this act came with a great deal of criticism, both domestically and internationally, including by those who claimed the act posed a great threat to civil liberties. *Surveillance Sweep*, ECON. (July 22, 2008), <http://www.economist.com/node/11778941>; *Sweden Passes Eavesdropping Law*, N.Y. TIMES (June 19, 2008), <http://www.nytimes.com/2008/06/19/technology/19iht-sweden.4.13838203.html>. While part of the Act was repealed and a court order is required for monitoring, a good portion of the act is still in place, and information collected from this monitoring system will be stored for 18 months. Hammerlin, *supra*, at 98; Press Release, Statsrådsberedningen [Prime Minister’s Office], Alliansen enig om stärkt integritet, tydligare reglering och förbättrad kontroll i kompletteringar till signalspaningslage [Compromise reached for enhanced privacy, better regulation and improved control of additions to the FRA Act] (Sept. 25, 2008) (Swed.), *available at* <http://www.regeringen.se/sb/d/10911/a/112332>.

137. While the FRA Act was unpopular in that it provided government surveillance without a court order, this act would be carefully tailored to prevent speech, which is already unlawful in the country from being disseminated using Swedish controlled infrastructure. *Sweden Passes Eavesdropping Law*, *supra* note 136.

138. *France Blocks Online Child Porn, Terrorism, Racism*, USA TODAY (June 10, 2008), [http://www.usatoday.com/tech/products/2008-06-10-1132847073\\_x.htm](http://www.usatoday.com/tech/products/2008-06-10-1132847073_x.htm).

139. This organization could be modeled after the Swedish nongovernmental organization called ECPAT Sweden. *Nordic Countries*, *supra* note 100. As a participant in the International Association of Internet Hotlines project, ECPAT compiles lists of suspicious links to websites that may traffic in child pornography. *Id.* A majority of Swedish ISPs participate in the program, which requires blocking the reported commercial child pornography websites. World Congress Against Commercial Sexual Exploitation of Children, Stockholm, Swed., Aug. 27–31, 1996, ECPAT Sweden, *End Child Prostitution, Child Pornography and Trafficking in Children for Sexual Purposes* (Oct. 11, 1996), *available at* <http://www.ecpat.se/images/filer/Organisation/engoct11presentation.pdf>.



The organization's role would be two-fold: it would maintain an online forum in which other users could report offensive content, and once identified, the organization would notify Internet ISPs to block access to the flagged content. For instance, a user could flag a posting in which supporters of multiculturalists were called "traitors to their country." Once reported, the organization would make a record of the comment so that prosecutors might identify and hold liable for hate speech the writer or poster of the comment. More importantly, however, the ISPs would filter out or block the content on the page to prevent the further distribution of this illegal content. In order to ensure that users do not abuse the system and report non-offensive materials in an attempt to have it filtered, the organization would have some oversight to ensure that material qualifies as illegal hate speech.

As one prominent Internet Law scholar stated, "Restricting Internet information is a policy question about choosing among multiple regulatory endpoints that are both possible and legitimate."<sup>140</sup> By making it more difficult to post and maintain content without being filtered, the Swedish government can increase these information costs, and in the process, inhibit the proliferation of hate speech over the Internet.<sup>141</sup> Delegated enforcement already plays a major role in hate speech regulation throughout Europe. Google filters its search results to comply with French and German law, particularly in the realm of filtering out Nazi-related speech.<sup>142</sup> Moreover, governmental pressure on the ISPs to comply with filtering, as well as public support for the program, would likely be important factors in the program's success. In 2006, British ISPs agreed to block child pornography on a "voluntary" basis, after Parliament threatened to pass unfavorable legislation if they did not comply.<sup>143</sup> Similarly, many major Swedish newspapers have reacted favorably to media pressure to moderate online commentary. For example, *Aftonbladet*, a major Swedish newspaper, will no longer allow anonymous comments on their website.<sup>144</sup> While this may be in part due to pending enforcement of

---

140. Derek E. Bambauer, *Cybersieves*, 59 DUKE L.J. 377, 386 (2009) (citing Peter Hammer).

141. As Derek Bambauer notes, "This point mirrors a lesson drawn from studies of Internet censorship: even imperfect limits can raise costs sufficiently to affect the average user's information consumption." Bambauer, *Consider the Censor*, *supra* note 123, at 40 (citing Bambauer, *Conundrum*, *supra* note 123).

142. CUCEREANU, *supra* note 67, at 3.

143. *United Kingdom: Country Profile*, OPEN NET INITIATIVE (2010), [http://opennet.net/research/profiles/united-kingdom#footnote37\\_hprcd2g](http://opennet.net/research/profiles/united-kingdom#footnote37_hprcd2g).

144. Jon Helin, *Nu slopar vi anonyma kommentarer på nätet [We Will Now Put a Stop to Anonymous Online Comments]*, AFTONBLADET (Aug. 31, 2011), <http://www.aftonbladet.se/debatt/debattamnen/medier/article13544314.ab>.

Sweden's Act on Responsibility for Electronic Bulletin Boards, in which media forums have an obligation to erase certain messages,<sup>145</sup> it does foreshadow a favorable outcome to political pressure on online forums.

Moreover, a government's requirement of filtering by ISPs forces private enforcement in some cases. For instance, in 2000, a French court ordered Yahoo, "to take all necessary measures to dissuade and render impossible any access via Yahoo.com to the Nazi artifact auction service and to any other site or service that may be construed as constituting an apology for Nazism or a contesting of Nazi crimes."<sup>146</sup> While the judgment is still valid in France, enforcement of the judgment in the United States became moot after Yahoo abruptly stopped trafficking in Nazi memorabilia.<sup>147</sup> However, the reach of adjudicative jurisdiction did have an effect on the development of technology and the use of greater filtering devices for other international commercial sellers.<sup>148</sup>

#### CONCLUSION

Anders Behring Breivik's 1,518-page manifesto reflects the perfect storm that was brewing for years in Scandinavia: a whirlwind of hatred and fear, coupled with minimal technological barriers and a high-speed Internet connection. To borrow from George Orwell, "walls of hatred and lies" separate the user from the truth.<sup>149</sup> With the ever-expanding capability of the search engine and the limitless volume of user-generated content, preconceived notions are no longer refuted, but further solidified. Researching political viewpoints can be guided by one's own tailored search terms, and virtually any viewpoint can find traction

---

145. LAG (1998:112) OM ANSVAR FÖR ELEKTRONISKA ANSLAGSTAVLOR [ACT ON RESPONSIBILITY FOR ELECTRONIC BULLETIN BOARDS] (Svensk författningssamling [SFS] 1998:112, § 5) (Swed.).

146. Tribunal de grande instance [T.G.I.] [ordinary court of original jurisdiction] Paris, May 22, 2000, *Union des Etudiants Juifs de France & Ligue Contre le Racisme et L'Antisemitisme v. Yahoo! Inc. & Yahoo France (Fr.)*, translated at <http://www.lapres.net/yahen.html>, reproduced in *Yahoo Inc. v. La Ligue Contre Le Racisme et L'Antisemitisme*, 169 F. Supp. 2d 1181 (N.D. Cal. 2001).

147. JACK GOLDSMITH & TIM WU, WHO CONTROLS THE INTERNET? 8 (2008) (citing Troy Wolverton & Jeff Pelline, *Yahoo to Charge Auction Fees, Ban Hate Material*, CNETNEWS.COM (June 27, 2001), <http://news.com/2100-1017-250452.html?legacy=cnet>).

148. CUCEREANU, *supra* note 67, at 3 (citing T.G.I. Paris, Nov. 20, 2000, *Yahoo! Inc.* (interim court order) (Fr.)). After a French court ordered Yahoo to filter Nazi memorabilia from being accessed by French users, a California district court prevented enforcement of the order in the U.S., but then the decision was reversed by the Ninth Circuit. GOLDSMITH & WU, *supra* note 147, at 8.

149. See Orwell, *supra* note 1, at 14.

by someone, somewhere in the blogosphere. Given the speed of the Internet, the nature of trans-border communications has changed.<sup>150</sup> “The internet has become a fertile ground for hate groups, setting up websites to promote prejudice against a wide variety of groups.”<sup>151</sup> Especially in Norway and Sweden, these hate groups are increasingly volatile, vociferous, and gaining in numbers. These blogs and forums are not only contributing to the breakdown of barriers between speech and action, but they are inciting violence.

While some may argue that protecting extreme speech curbs intolerance,<sup>152</sup> hate speech regulation is necessary to maintain democratic society in Scandinavia. A society cannot survive if it loses its basis as a “community of ideas,”<sup>153</sup> or a conglomerate of agreed-upon social norms.<sup>154</sup> The law must uphold these social norms:

---

150. David Fraser, “*On the Internet, Nobody Knows You’re a Nazi*”: *Some Comparative Legal Aspects of Holocaust Denial on the WWW*, in *EXTREME SPEECH*, *supra* note 61, at 511, 513.

151. Helen Ginger Berrigan, “*Speaking Out*” *About Hate Speech*, 48 *LOY. L. REV.* 1, 13 (2002) (advocating a balance between European hate speech laws and the United States Constitution).

152. Stephen Gottlieb & David Schultz, *The Empirical Basis of First Amendment Principles*, 19 *J.L. & POL.* 145, 154 (2003) (citing *LEE C. BOLLINGER, THE TOLERANT SOCIETY* 107, 119–20 (1986)) (discussing Lee Bollinger’s model for protection of freedom of expression in America).

153. The “community of ideas” theory must be distinguished from the American “marketplace of ideas” theory, which advocates for freedom of expression as a rationale against censorship. Robert C. Post, *Hate Speech*, in *EXTREME SPEECH*, *supra* note 61, at 123, 133. The notion of a “marketplace of ideas” is often attributed to Justice Oliver Wendell Holmes Jr.’s dissenting opinion in *Abrams v. United States*. 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) (“[t]hat the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out.”). In relationship to the Scandinavian countries, the United States is a very large, very diverse country. Whereas the “marketplace of ideas” theory of freedom of expression may work in the United States, in which there is enough diversity of opinion that the truth will emerge, the same theory cannot be applied to freedom of expression in Europe.

154. Post, *supra* note 153, at 130 (quoting *PATRICK DEVLIN, THE ENFORCEMENT OF MORALS* 10 (1965)). Devlin writes:

[S]ociety means a community of ideas; without shared ideas on politics, morals and ethics, no society can exist . . . If men and women try to create a society in which there is no fundamental agreement about good and evil they will fail; if, having based it on common agreement, the agreement goes, the society will disintegrate.

*Id.*

That society means a “community of ideas”; without shared ideas on politics, morals, and ethics no society can exist . . . . For society is not something that is kept together physically; it is held by invisible bonds of common thought . . . . A common morality is part of the bondage. The bondage is part of the price of society; and mankind, which needs society, must pay its price.<sup>155</sup>

Hate speech regulation serves an important role in upholding these social norms.<sup>156</sup> When individuals promote hatred against other races, religions, or ethnic groups, they are violating social norms and threatening society. “To the extent that hate speech contributes its ugly perspective, it does double damage. It reinforces those stereotypical and historic prejudices and arguably silences all but the more stalwart of the minority members.”<sup>157</sup>

To address the threat of future violence, the Swedish government should establish a filtering program to eliminate illegal content through a quasi-autonomous nongovernmental organization. Because hate speech is especially pernicious, the Swedish government should also require ISPs to filter all online hate speech traffic on its servers. The lesson to be gleaned from Breivik’s July 22nd attacks is clear: while the freedom of an open society is valuable, we must not be reticent of the risk of unfettered, extreme speech. In a world with greater information costs, potential terrorists would not come across and collect incendiary materials with the same ease and gusto that Breivik did.

*Hanna Li Robinson*\*

---

155. DEVLIN, *supra* note 154, at 10.

156. Post, *supra* note 153, at 123, 132 (citing Robert C. Post, *Democratic Constitutionalism and Cultural Heterogeneity*, 25 AUSTL. J. LEGAL PHIL. 185 (2000) & Robert C. Post, *Cultural Heterogeneity and Law: Pornography, Blasphemy, and the First Amendment*, 76 CAL. L. REV. 297 (1988)) (“[H]ate speech regulation must necessarily enforce social norms that represent the well-socialized intuitions of the hegemonic class that controls the content of the law.”). Post departs from Devlin’s more static interpretation of a “community of ideas.” *Id.* at 130. (“Once we understand, however, that norms enforced by law . . . are constantly evolving, we can also see that law must continuously choose which kind of community it will sustain.”).

157. Berrigan, *supra* note 151, at 9.

\* B.A., Macaulay Honors College at Hunter College (2007); J.D., Brooklyn Law School (expected 2013); Managing Editor of the *Brooklyn Journal of International Law* (2012–2013). Thank you to my family, especially my parents, John and Eva Robinson, for their support and encouragement. Thank you to Professors Derek E. Bambauer and Richard N. Winfield for their insightful comments during the writing process. Thank you also to Max Robinson. I am especially grateful to the entire *Brooklyn Journal of International Law* staff for their assistance in the preparation of this Note. All errors and omissions are my own.