HATE SPEECH IN PUBLIC SPACE: A VIEW FROM THE NORTH AMERICAN DOCTRINE OF CLEAR AND PRESENT DANGER*

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Abstract: This study addresses the debate about the constitutionality of legislation outlawing so-called hate crimes starting from an analysis of some of the most significant decisions in United States Supreme Court case-law, rulings which follow a famously different doctrinal model than the European guidelines and case-law in this area (which is that currently followed by the Spanish Criminal Code). The study also identifies the possibilities and difficulties of application that exist within US case-law around the use of the doctrine of Clear and Present Danger in this matter. It is an analysis that shows us a theory which, on the constitutionality of such expressive behaviours, can, with seemingly impossible duality, work as an (inadequate) applied instrument of the doctrine of hate speech, and at the same time, function as a construction with the opposite theoretical approach. This is a paradox that can only be resolved by identifying and differentiating the various models within the theory of Clear and Present Danger, which is frequently and erroneously conceived of and explained as a single model.

Key Words: Fundamental Rights, Freedom of speech, Public space, Hate speech, First Amendment, Clear and Present Danger Test

1.- Introduction.

Dealing with what is known as hate speech means dealing with what is undoubtedly a topical issue in Spanish constitutional law, and even

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more so in Spanish society. This is true in two senses. Firstly, because there have been many sentences handed down by criminal courts in recent years indicative of the "oscillating" doctrine [Aba Catoira (2015) p.202] related to the type of offences currently covered by article 510 of the Criminal Code (hereafter, CC). Secondly, insofar as the underlying socio-legal problem that these legal decisions aim to address -conceptually bound together with the, on occasion, imprecisely constructed category or *nomen iuris* of *hate speech*- has moved from the strictly technical arena of the science of Constitutional Law and has placed itself in the middle of an intense social debate, in which it is impossible to disregard the content and the limits of the fundamental right to free speech in a democratic state. Something which is demonstrated by, as a mere illustration, the social uproar in February 2017 in Spain around the so-called "hate-bus". This was the bus driven around Madrid, before being provisionally prohibited by the courts, which the Hazteoir.org association chartered in response to a campaign that the Chrysalis Association of Families of Transsexual Minors launched in January 2017 with the slogan "There are girls with a penis and boys with a vulva". The bus carried the provocative message "Boys have a penis. Girls have a vulva. Don't be fooled. If you're a man, you're a man. If you're a woman, you will continue to be a woman". For some it was a mere exercise of freedom of speech, for others a hate crime, because of its offensive nature and incitement to violence towards transsexual children. [For more on this case see Presno Linera (2017)].

The aim in the following pages is to contribute to this constitutional debate, looking to consider the issue from a famously different perspective: that built on the case-law of the United States Supreme Court, whose rulings run completely counter to the community directives shaping the types of hate crimes and offences, and in fact the

case-law of the European Court of Human Rights (and the recent case of Karaahmed v. Bulgaria is a splendid example) on this subject. In particular, the US Supreme Court continues to maintain the general abstract premise that the criminalisation of these offences which fall under the category of hate speech does not consider, to the appropriate extent, the true constitutional dimension of the problem, and more specifically that it, on some occasions, ignores the fundamental right to free speech of those who resort to unconventional means or turns of phrase which could fall within these types of offences. In other words, the criminal regulation of hate crimes does not respect in any way the core principle that the US Supreme Court outlined in its well known landmark ruling in New York Times v. Sullivan (1964): that the fundamental right to freedom of speech not only covers the possibility of expressing objectively valuable, useful ideas for public debate, but also caustic, corrosive and forceful speech.

The analysis of case-law in this study will confirm that in the field of comparative constitutional law there are other options, not only the European model of hate speech (which our current legislation and legal system ascribe to). In particular it will show how in the North American approach, the question which in Europe is an indisputable legal axiom is, paradoxically, a true constitutional red line. Examining this North-American model more closely, it will outline some ideas on real possibilities which would allow the reclamation of the theory or doctrine of Clear and Present Danger as a procedural tool that would, once the specific model of this doctrine to be used is defined, permit a novel constitutional treatment of the underlying problem.

2.- Approaching a concept of hate speech and its current regulation in the Spanish legal system.

Naturally, any study must begin with clarification of the object of study. This conceptual precision is even more fundamental in the case of hate speech, especially if we address the fuzzy edges of this category, which is defined with little certainty and a lack of clarity in different international lega texts, and which covers such varied behaviours as the Ku Klux Klan burning crosses, denial of the Jewish holocaust in world war II, and the justification of the genocide of the Tutsis in Rwanda in 1994) [Diaz Soto, (2015), p. 77-79].

To that end, in this study we compare the concept of hate speech with the legal-criminal regulation effected by the varied set of offences principally in article 510 of our CC. This is a provision which currently gathers criminal definitions independent of each other but bound together around the common idea of criminally punishing certain behaviours which, aimed at certain minority groups from a racial, religious, or ethnic point of view (the criminal code opted for an open list or *numerus apertus),* could potentially provoke violent reactions, discrimination, humiliation, or prejudice to members of such groups. In short, and in the terms of the Recommendation 20 (1997) from the Committee of Ministers of the Council of Europe on 30 October: "all forms of expression which spread, incite, promote or justify racial hatred, xenophobia, anti-Semitism or other forms of hatred based on intolerance, including: intolerance expressed by aggressive nationalism and ethnocentrism, discrimination and hostility against minorities, migrants and people of immigrant origin."

In other words we will take an instrumental, in terms of *lege data,* and largely criminal law approach to this notion of hate speech, while being aware that it is not a perfect, gap-free concept, and that the end result could be refined through a distinction between, hate speech on the one hand, and hate crimes on the other, characterising the latter as one type of the former. So although hate crimes cover the more serious or

objectionable forms of hate speech, this concept will also be used to describe other, related social behaviours which are less serious and therefore not liable to criminal prosecution [Rey Martínez, (2015), p.55-56].

The reform of the Criminal Code in Spain in 2015 included a significant modification in the wording of article 510 of the CC, which meant that various offences were combined or incorporated in article 510 CC, which had previously been covered by said article and article 607.2 CC. The reform criminalised the denial or justification of genocide, the compatibility of which with our constitutional text was the subject of a ruling from the Constitutional Court in its controversial, and for one sector of legal scholarship "inconsistent", ruling STC 235/2007, in the well known case of the Librería Europa (the Europa bookshop). [Torres (2007)]. It is a reform which strictly and fully follows the directives from the European Community, and in particular Framework Decision 2008/913/JHA of 28 November 2008 on combating certain forms and expressions of racism and xenophobia by means of criminal law. This is confirmation of the tendency, in general terms and in relation to the crimes that we will examine in this study in particular, of the doctrine of criminalisation of hate speech, making it common for the Spanish legislature, when transposing international legal instruments to Spanish legislation, to opt for legislation, from the different options available, which ignores or fails to make use of the possible adaptations or modifications that the international texts themselves contain, which would allow -without preventing compliance with international agreements entered into by the State- a narrower criminal law. [In this regard see, Aluastey Dobón (2016) p. 4 or Landa Gorostiza (2012) pp. 321-324].

It is not, however, the aim of this work to produce a complete exegesis of this provision, but rather an instrumental jurisprudential analysis that we intend to present demonstrating its more general guidance. In this sense, the mix of crimes currently described in article 510 CC fall into three basic types [Gascón Cuenca (2015)]. Focusing on those basic types, and teasing out the essence of the offences described in this provision we find that a wide range of expressions are considered criminal offences liable to prison sentences of 1 to 4 years, according to their content, and for which there are three common requirements. Firstly, that the aim of the criminalised behaviour has to be to, publicly, promote, foment, or directly (and, it must be emphasised, indirectly) incite hatred, hostility, discrimination, or violence. Secondly, the injured parties, or those these messages are aimed at, are specified groups, from such groups, or individuals who belong to these groups. The third requirement is connected in some way with the fundamental ideology of the message which must, according to the law, in an open list in terms of *numerus apertus*, be characterised by "racist or antisemitic motives or other references to ideology, religion or beliefs, family situation, belonging to an ethnic group, race or nation, national origin, sex, sexual orientation or identity, gender, illness or disability". Aggravating circumstances, which carry longer sentences for the crime, include choosing a means or channel of distribution to communicate the message to a large number of people, and acts which threaten public order or create serious feelings of insecurity or fear in members of the targeted group.

There are many essential aspects which, in relation to the perspective and aim this work pursues, may be inferred from this outline of the core provision which in Spain is currently legislated as so-called hate crimes. The first is, essentially, the classification as criminally liable of behaviours which are not covered by general offences in criminal law

such as threats, coercion, defamation etc. If that were not the case, then this legislation of hate crimes would either not exist or be famously redundant. The second is that here we find ourselves faced with a combination of criminal offences which prosecute or are aimed at criminalising the content of certain messages or speech. The restriction or limitation to potential freedom of speech which this implies is not based on contextual, behavioural or formal reasons, but rather on the blank or *prima facie* incompatibility of these messages with the dignity, specified as a legal asset, of the members of such groups. With that, and for the inseparable and practically intrinsic relationship that exists between ideas and their expression, this law indirectly ends up almost completely excluding, and in practice potentially excluding certain ideas from public debate. The third aspect, and this will highlight an essential legal difference with the North-American jurisprudential test of Clear and Present Danger which we will present and examine in this study, is that it is not an essential condition or requirement for the speech to harm public order for it to be a crime (and thus the restriction of a fundamental right) but rather a mere aggravating factor. Moreover, this aggravating circumstance does not require real or effective danger, only the inference of its potential in the accused speech.

This may raise the question of whether, with a law such as that in article 510 CC, a militant democratic style instrument is not being incorporated into the Spanish legal system, undermining the procedural nature that defines the Spanish democratic system, as the Constitutional Court has declared on many occasions (e.g. STS 48/2003, 12 March). It is true that in the scholarship on this question we find analysis which has dismissed this approach, saying that the models of militant democracy and procedural democracy should not be thought of in traditional terms as completely opposite paradigms but rather that nowadays the differences

between them are diminishing [Revenga (2015) p. 29-32]. The question, however, is not so clear or distinct if we look at it from the perspective taken in North-American constitutional law; from a more orthodox, less eclectic view of a deliberative democratic model.

3.- Some general directives on the constitutional treatment of hate speech in the USA.

3.1- Case-law application of the doctrine of hate speech by the the US Supreme Court.

In this study we use the North-American legal system as an paradigmatic example of a constitutional model which, in general, rejects the classification of "hate crimes" as criminal offences as it considers such legislation to be in violation of the fundamental right to freedom of speech. Indeed, it is an objective fact that there are significant differences and mismatches between case-law in the European Court of Human Rights and the US Supreme Court in this area. [Kiska (2013)]. Nonetheless, such a claim should not be made without at least some clarifications and qualifications. The first is the acknowledgement of the substantial difference between the USA and Europe in what the definition and characterisation of the fundamental principles of the Constitutional State refer to. Some differences are set into the constitutional requirements of the European welfare constitutional democracy which are downplayed in the more liberal North-American constitutional democracy. Such differences might lead to different understandings and theories about the place of freedom of speech in a democratic state, although in this study it is not possible to go into more detail on this question. The second qualification is related to the relative, rather than absolute, sense of the

contrast between the USA and Europe in this matter. The fact that the criminalisation of hate speech is much debated nowadays in the North-American legal system should not necessarily lead to the inference that it is unfamiliar or completely alien to them, as in US Supreme Court case-law we can, paradoxically, find pioneering applications of the doctrine of hate speech.

One example of this, and a leading case in the creation of US case-law on this matter, is the case of Beauharnais v. Illinois (1952). The case examined the conviction of a citizen for distributing leaflets in Chicago streets which were racist in content, blaming negroes for many social problems (delinquency, drug use, violence…) and concluding with a call for white people to unite to keep the black population under control. The criminal conviction was imposed by Illinois state courts based on a state law which had been passed with the aim of preventing conflicts between different religious and racial groups and which -following parameters similar to the current laws on hate speech in, among others, article 510 of the Spanish Criminal Code- made it an offence to publish or publicly exhibit materials portraying the "depravity, criminality, unchastity, or lack of virtue of a class of citizens of any race, color, creed or religion" in such a way that might incite violence on the part of, or towards such ethnic or religious groups.

In this matter, the Supreme Court concluded the applicable law in this case to be entirely constitutional as it was aimed at punishing a class of expressions, libel or defamatory to a group, which did not fall under freedom of speech, and it expressly established that based on this definition, it was not necessary to rule on whether the limits set by the Clear and Present Danger test were in operation, affirming that "Libellous utterances not being within the area of constitutionally protected speech, it

is unnecessary, either for us or for the State courts, to consider the issues behind the phrase 'clear and present danger.'"

Something which bears at least structural similarity to the doctrine of hate speech, and in this way another example of categorical limitations on freedom of speech, is, within US Supreme Court case-law, the doctrine of fighting words [Greenawalt (1996)]. This doctrine -rather unpopular in a wide swathe of North-American constitutional literature, even characterised as "nothing more than a quaint remnant of an earlier morality that has no place in a democratic society dedicated to the principle of free speech". [Gard (1980), p. 536]- is formulated in the central case of Chaplinski v. New Hampshire (1942). The case was on the prosecution of the behaviour of a Jehovah's Witness (Chaplinski), who in a public argument said that organised religion was a "racket", and when being detained for the commotion his strident denunciations of Christian morality and doctrine was causing, ended up insulting the police officers (specifically calling them racists).

The Supreme Court found, in this case, that Chaplinski's ideological argument against the Catholic church was not protected by the First Amendment, and based that conclusion on the reasoning that "the right of free speech is not absolute at all times and under all circumstances. There are certain well defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libellous, and the insulting or "fighting" words -- those which, by their very utterance, inflict injury or tend to incite an immediate breach of the peace. It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived

from them is clearly outweighed by the social interest in order and morality."

Although this ruling is still considered to be a valid precedent by the Supreme Court, and it has not been formally overruled in its later case-law, nowadays it is effectively insignificant. Furthermore, although the literal reasoning of the Supreme Court seems to include provocative speech which might lead to an immediate breach of the peace in actions to which it would apply the fighting-words doctrine, in reality, the Supreme Court's rulings subsequent to Chaplinski in similar occurrences [Street v. New York (1969); Cohen v, California (1971); Gooding v. Wilson (1972); Rosenfeld v. New Jersey (1972); City of Houston v. Hill (1987); Texas v. Johnson (1989)…] have clarified the principle and limited the doctrine's scope of application principally to "the use of insulting and provocative epithets that describe a particular individual and are addressed specifically to that individual in a face-to-face-encounter". [Stone & Seidman & Sunstein &, Tushnet (1991), p. 1100]. In other words, those insults which violate the right to honour do not come under freedom of speech, in the same way that expressions which can, in and of themselves, constitute threats, intimidation or in short, other criminal offences in the legal system do not fall within fundamental rights. However, the idea that expressions that provoke violence or that are offensive or derogatory towards a certain group would be outside the protection of free speech that the First Amendment of the US Constitution guarantees- as the cases of Chaplinski and Beauharnais assert- is nowadays a little-used notion in North-American case-law.

3.2- Rejection of the fighting words and hate speech doctrines in US case-law.

Despite those attempts to define it via a priori categorisation, hate speech is not the approach currently used by North-American courts, or the Supreme Court in particular, in the analysis of constitutionality of behaviours which are prejudicial to a group's rights, notwithstanding scholarly remarks to the contrary, such as J. Waldron (2012), who continues the line marked by previous work such as that of M. Matsuda (1993), or R. Delgado & J. Stefancic (2004). An examination of the Supreme Court's principal decisions in this area in recent decades endorses this conclusion, as we will see in more detail below, and as such indirectly endorses the jurisprudential approaches which advocate deregulation of hate speech, for example that proposed by R. Post (2009).

A good example of the US Supreme Court's current thinking around the meaning and content of the fundamental right to free speech and the rejection of hate speech as a limiting category of that is provided by the ruling in the case of R.A.V. v St Paul (1992). This was a case involving the prosecution of a group of adolescents (minors) who, in behaviour typical of members and sympathisers of the Ku Klux Klan, burnt a cross on the lawn of an African-American family in the State of Minnesota, with all the connotations of hate, humiliation and racial distain that such a symbolic behaviour implies for historical reasons. The law used to prosecute this case (a Minnesota city municipal ordinance) is, in fact, structurally very similar to the language defining so-called hate crimes in current European legislation, and thereby not very different from those offences in article 510 of the Spanish Criminal Code. This ordinance, copying a very similar provision in the Minnesota State Criminal Code establishes that "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, color, creed, religion or gender commits disorderly conduct and shall be guilty of a misdemeanor". However, the Court concluded by a majority -in a way that is very different to the way this type of legislation is interpreted by European courts- that a law worded in such a way restricts the constitutional right to free speech and therefore must be declared unconstitutional.

In this ruling, the Supreme Court distanced itself significantly from the fighting words doctrine previously established in the Chaplinski case, which was precisely the precedent invoked by the Minnesota State Supreme Court to uphold the idea that the Ordinance being applied in the prosecution of the accused in this case was entirely in conformance with the US Constitution. The Court built its argument on two principal premises. The first was that in the legal system there are instruments which, without being specifically aimed at excluding certain categories of speech from the content of freedom of speech, were available to prosecute expressive conduct such as that in this case: unlawful intrusion or coercive or threatening behaviour for example. The second, and more important in terms of constitutional theory, was the announcement of the important principle that restrictions of free speech based on content of expressive conduct must be presumed (and this is not an easily removable presumption) unconstitutional. For the Supreme Court, on the basis of this principle, there were various reasons why the St Paul Ordinance used to prosecute the accused should be ruled unconstitutional. Firstly because it was worded in terms which were, ultimately, discriminatory as they protect members of certain groups based on factors such as race, creed, and gender but fail to give the same protection to members of other groups or minorities (such as addressing sexual orientation of group members). Additionally, because it introduced the risk of state censorship of the

expression of certain ideas and because, with a law of this nature the State abandons its essential value-neutral stance and takes sides in the marketplace of ideas, to the detriment of some ideas. In addition (and in terms of the principle of proportionality), ultimately because there were other means and legal instruments that could have been used to achieve the same ends as the St Paul City Ordinance without the need to restrict freedom of speech.

In response to this majority ruling of the Supreme Court (delivered by Justice Scalia), Judges White, Blackmun, O'Connor, and Stevens wrote concurring opinions in which, although they also concluded that the law under scrutiny in this case was unconstitutional because it was over-broad, they did not share the majority opinion about the presumption of unconstitutionality applicable to any law restricting free speech based on content. The problem with the St Paul City Ordinance lay, for these judges, in the way in which it articulates the limit of free speech, and specifically in the mere fact that the expressive conduct may antagonise or distress those it is aimed at would be sufficient basis for limiting this fundamental right. In terms of the theory of Clear and Present Danger which we will address in a later section, it is as though for those judges, the drafters of the City of St Paul ordinance had exceeded their bounds in the expression of the nature and scope of the danger, of such threatening evil produced by that speech. In these concurrent opinions, then, they attempt to modulate the forcefulness of the doctrine expressed by the Court about the impossibility of setting restrictions on free speech based on any type of value judgement of the content of the expressive conduct or messages. However, at the same time, and this is something we will also encounter in later Supreme Court rulings, no substantial or qualitatively alternative models are proposed. In the Supreme Court we do not find, even in dissenting opinions, stances which are favourable to the doctrine

of hate speech. Ultimately there may be a certain jurisprudential debate on the need to introduce a certain modulation in the more classical and orthodox North-American concept of free speech, but such tweaks will not detach from or break the mould of a shared model. The dissenting and concurring opinions present, therefore, mere variants of the same doctrine, rather than anything different.

Later Supreme Court rulings add some nuance to the jurisprudence established in this case of R.A.V. v. St Paul, but more significantly, confirm the essential direction of this case-law. In the case of Virginia v. Black (2003) again two different cases of cross-burning were considered together under procedural accumulation. The US Supreme Court, thus, returned to the decision of whether, in this case, the expressive conduct intrinsically symbolically linked to the practices and ideology of racial hatred for the Ku Klux Klan is protected by the First Amendment to the Constitution. One of the instances of cross burning happened in the garden belonging to a person of colour, its perpetrator was a teenage neighbour of the message's recipient, who had in fact not acted out of racial hatred nor had provable connections with the Ku Klux Klan, but rather acted out of neighbourhood issues which had no racial element at all. The other cross burning, on the other hand, was related to an event organised by a local chapter of the Klan in Carroll County which 20 or 30 people attended. The meeting in which the cross was burnt was held in another place and was a ritual that was not aimed at intimidating any specific person. So the one case, therefore, combined two factual events which differed considerably from each other but which were subject to the same law: a Virginia statute which outlawed cross burning with the intention to intimidate a person or group, on private property, highways or in other public spaces. The statute affirmed, in addition, that the behaviour of cross burning itself would be

considered sufficient proof of the intimidatory intent towards a group or person.

It is precisely this presumption *juris et de jure,* introduced in the criminal definition that any behaviour of cross burning would be an offence, sufficient evidence on its own, and without the possibility of contradictory evidence, of the legally required malicious intent to intimidate a person or group, which led the Supreme Court to decide that this legislation must be ruled unconstitutional. In doing so, the Court reacted to the danger that a law so written could produce a chilling effect of ideas in public debate, and that, paraphrasing the Supreme Court's expressive turn of phrase, when a citizen burns a cross it may well be a matter of threatening others (which would not have constitutional protection) but it may also just be an expression of a political point of view. The fact that the law does not allow differentiation of these possibilities is the essential factor in it being unconstitutional.

However, *sensu contrario,* one may infer that the majority opinion of the Supreme Court in this ruling would not have found the law unconstitutional if it had outlawed cross burning with two essential additional requirements being stipulated in the law. Firstly, the law would establish one essential element of the behaviour for it to be a crime if it could be shown to have been, rather than presumed to have been, carried out with a real intent of intimidating a person or group. Secondly, if the concept of causing intimidation were limited or redefined in a strict, rather than broad manner. The manner of this strict interpretation is clarified in argument and conceptual back and forth in the ruling and equates causing intimidation with threat, that is, causing a person or group to fear that their life or personal safety may be in danger, and not, therefore, less significant or intense fear or inconvenience.

The dissenting opinions in this matter show us the debate within the Supreme Court around this problem. However, as in the previous case of R.A.V. v. St Paul we must appreciate that it is not a debate on different conceptual models of freedom of speech. Justice Souter's dissenting opinion asserts that the case be resolved following nothing more than the doctrine established by the Supreme Court in the previous case of R.A.V. v. St Paul. Thus, from the core, inalienable principal that any restriction to free speech based on content of the expressive behaviour is absolutely contrary to the First Amendment of the Constitution, which only permits the restriction of this constitutional right on formal, contextual and procedural bases. From this perspective, Souter reaches an even more drastic conclusion than that in the ruling's majority opinion: even if the law had not contained the *juris et de jure* presumption that burning a cross must necessarily demonstrate the perpetrator's intent to intimidate a person or group, it would still be unconstitutional. On the other hand, and from a completely opposite point of view, Clarence Thomas disputed the true legal character ascribed to the human behaviour of burning a cross, arguing that it belonged not in the field of expressions but rather in that of actions. This postulate allowed Justice Thomas, in contrast to Justice Souter, to conclude that even despite the *juris et de jure* presumption, the Virginia statue was constitutional.

Beyond this debate, the truly significant part of the Virginia v. Black ruling is found in the fact that although it adds flexibility and introduces some exceptions to the doctrine previously established in R.A.V. v St Paul, that is not to say in any way that the Supreme Court opened the door to the incorporation of the theory of hate speech into its jurisprudence. In the characteristic traits of this doctrine, in the criminal definition of hate crimes, it is not uncommon to infer the subjective intent to produce a criminal result from the objective elements, in other words,

from the character of the speech itself. This is an inference which brings us to the theory of constructive intent, a characteristic of the Bad Tendency Test, which was mainly used by North-American courts in the interpretation and application of the 1917 Espionage Act and the 1918 Sedition Act, which the Wilson administration used for the political persecution of those who opposed US participation in World War I.

The case of Snyder v. Phelps (2011) also confirms this tendency of case-law, the general directions of which can be traced in previous cases commented on above. It shows how far, nowadays, the US Supreme Court is from what is being created in Europe, both legislatively and through case-law, about hate speech. It is true that this matter is not, unlike the previous cases, raised from a criminal perspective but rather a civil or Private Law, the controversy not being about whether certain expressive conduct constituted a specific criminal behaviour, included in those generally known as hate crimes, but rather whether such expressive behaviour had caused damage for which compensation was due, and therefore it is a matter of civil liability compensation (for damages of a moral nature). This, nonetheless, does not prevent the jurisprudence in this case from being of great interest to the matter at hand in this study. That interest is in the way in which the Supreme Court dismissed the appeal for civil liability not for questions of procedural application of the private legal action, but rather for a prior question and strictly constitutional principle. The Supreme Court dismissed the claim for damages on the central theses that the expressive conduct at issue was constitutionally protected by the fundamental right to free speech, and that consequently, such constitutional protection shielded it against the illegality which is the *conditio sine qua non* that it may cause harm to third parties to which the legal system attaches the obligation of compensation and, *a fortiori*, following this argument, the possibility of being outlawed by legislators.

The conduct likely to cause compensable harm in this case of Snyder v. Phelps is that of a citizen (Fred Phelps) who founded the small Westboro Baptist Church and encouraged the members of this religious community to demonstrate and protest in various US cities at the funerals of members of the US military who had died in service. The aim of this was to express the idea, held by this community, that such deaths were a punishment from God because of US tolerance of homosexuality. The claim for compensation was raised by the father of a fallen marine (Albert Snyder) claiming compensation for moral and psychological injury he had suffered due to protests during his son's funeral in which placards had been displayed, albeit 300 meters away from where the funeral took place, on which messages were displayed such as "God hates fags", "Thank God for dead soldiers", "You're going to hell", and "God hates you".

The Supreme Court based its reasoning in this case on two principal arguments and one initial logical premise, which is nothing more than the reaffirmation of the classical North-American concept of the First Amendment: the special protection that must be granted to free speech in a democratic state; the preferential position -in the terms demonstrated in the historic ruling of Palko v. Connecticut (1937)- that this fundamental right occupies within the fundamental rights guaranteed by the Constitution. From this initial theoretical position, the first argument of the Supreme Court is that expressive conduct of the demonstrators at the dead marine's funeral was not a merely private behaviour, in which case there would be a lower level of constitutional protection, but rather an behaviour of public interest and relevance. The right to free discussion or debate on matters of public interest, as the Supreme Court had affirmed in previous cases "is more than self-expression; it is the essence of self-government" [Garrison v Louisiana (1964)], and "occupies the 'highest rung of the hierarchy of First Amendment values,'" [Connick v. Myers (1983)]. The

second argument -complementing and supporting the previous one- was that the prosecuted expressions were not only concerning an issue of public interest, but had also been expressed in a public space, specifically a public highway, which is categorised by the Court -in a very traditional, basic manner- as the archetypal public forum. On this basis the Supreme Court could not have concluded its reasoning in this ruling in a more eloquent manner: "Speech is powerful. It can stir people to action, move them to tears of both joy and sorrow, and—as it did here—inflict great pain. On the facts before us, we cannot react to that pain by punishing the speaker. As a Nation we have chosen a different course—to protect even hurtful speech on public issues to ensure that we do not stifle public debate. That choice requires that we shield Westboro from tort liability for its picketing in this case".

Only one of the nine Supreme Court Justices (Alito) wrote a dissenting opinion to this reasoning. His thinking can be summed up in his central statement that "In order to have a society in which public issues can be openly and vigorously debated, it is not necessary to allow the brutalization of innocent victims". However, and this is important, despite dissenting from the majority opinion it does not seem that this dissenting opinion affirms or upholds the theory or doctrine of hate speech. Justice Alito, in this opinion, draws on the presumption that debating ideas of public interest in public spaces would not be restricted by preventing offensive speech such as that of Fred Phelps as those same ideas may be introduced into public debate by other alternative means of expression which do not require the invasion of such an intimate and painful occasion as the funeral of someone's child. The Constitution guarantees the expression of any kind of idea, including those of the Westboro Baptist Church. What the Constitution does not protect is the expression of those ideas in all possible ways, all possible forms, or at any given time. It is

not, in any case, prohibiting the free expression in and of itself, of certain ideas, but rather restricting certain methods or unacceptable forms of expression. It does not suggest restricting freedom of speech based -and this seems to be key in this dissenting opinion- on the content of the expressive conduct itself (which is the change of perspective, the Copernican shift, which the doctrine of hate speech and hate crimes ultimately poses). The restrictions -Justice Alito's dissenting opinion does not abandon the essential presumptions of the North-American concept of freedom of speech- must be of manner, referring only to the external form of expression, but not its content.

4.- The approach of the Clear and Present Danger doctrine in relation to expressions which fall under the criminal classification of hate speech.

4.1. - Preliminary conceptual clarifications.

With the fighting words or hate speech doctrine, briefly presented previously, one can establish, as may be deduced from what has already been presented in this study, some categories of speech, characterised by a series of requirements, both subjective and objective, which do not, *per se*, enjoy constitutional protection, and so, would be excluded in all cases and not only in certain circumstances, from the idea of freedom of speech. This approach to the issue is not, of course, without problems. As with all categories, fighting words or hate speech are categories whose edges are difficult to narrow down in the fuzziness inherent in most cases in the real world. For that reason, when the courts are faced with the difficult task of determining in specific cases, the nature of the contested expressions there is always the underlying risk that the categories, by being applied more

broadly than initially planned, function as a true filter of ideas that should, regardless of their truth or target, form part of the deliberative process, and in doing so, undermine that process. We have seen how that risk, the fear that the doctrine of hate speech leads to censorship and undermines the procedural understanding of constitutional democracy, motivates the North-American courts to completely discount that theory nowadays based on the understanding and confirmation of the prominent position of freedom of speech in the system of constitutional guarantees. The question is, what might the alternative dogma to hate speech be?

From this position, the intention of this section is to make some notes on the possibilities of reformulating the approach to the criminal classification of hate speech and its potential interference with the constitutional right to freedom of speech from a significantly different point of view; the perspective of the doctrine of Clear and Present Danger. This is a classic of North-American constitutional tests, initially formulated by Justices Holmes and Brandeis at the beginning of the 20th century which, interpreting the wording of the First Amendment to the United States Constitution in apparently absolutist, unlimited terms, set a limit on the exercise of the constitutional right to freedom of speech and the press linked, not to the content of the speech in and of itself, but rather to the consequences or effects that speech may have on the continued existence of the democratic system. It states that it is only constitutionally possible to restrict certain speech when there is a clear, imminent danger of bringing about substantive evils that the State, in exercise of its duties and responsibilities, must prevent.

Nonetheless, in order for a general presentation of the essential core of the theory raised in these pages to be considered an alternative that is less restrictive of the fundamental right to free speech than the current criminal categorisation in various European states, it must be the object of

a significant initial qualification in order to not end up manifestly incomplete or imprecise. This doctrine (examined in depth in my doctoral thesis, currently in publication, *Clear and Present Danger Test: Freedom of speech at the limits of democracy*) must not be thought of or explained in linear terms, as a single theoretical model which has been distilled and perfected through a process of technical refinement via successive application and the efforts of generations of Supreme Court Justices who share common ideological premises and aims. On the contrary, in the historical, legal unfolding of this theory, one may identify different, even contradictory, models. Thus, rather than talking of the Clear and Present Danger test in the singular, we should refer to it in the plural. Consequently, it is not enough to propose an abstract application of the Clear and Present Danger test, but rather it is necessary to examine this theory deeply and identify which of the different models might provide a valid alternative form a legal-constitutional perspective. It is precisely this question that the ideas in the following section will address.

4.2.- The treatment of speech which potentially falls into the legal category of hate speech from the position of the original and broad models of the doctrine of Clear and Present Danger.

In this section we examine -and demonstrate on the one hand, the potential application of the doctrine of Clear and Present Danger in the area under examination in this study, and at the same time, its difficulties and technical contradictions (especially if one fails to identify the different models in the theory)- a series of three historic cases, judged by the US Supreme Court in the 1940s in which the Clear and Present Danger test was applied concerning speech whose ultimate effect was to make its target, on feeling provoked or offended by the speaker's message, feel

provoked to react violently, constituting a breach of the peace. It should be noted that the concept of peace, or public order is used here in an eminently conventional, intuitive sense which associates order with the absence of violence, disturbances or violent altercations. Using this concept of the idea of public order is justified because, as will be seen later, the notion used in North-American jurisprudence in these decisions, although not necessarily a definition from the strict European legal-constitutional view of public order (which prioritises the material element and the infringement of certain values that the legal system values in and of themselves) is fully in line with this concept.

The question then -structurally and constitutionally analogous to that concerning so-called hate speech- is this; to what extent does constitutional protection of freedom of speech cover those expressions which offend the sensibility of the hearer, whether an lone individual or, more squarely in the area of the problem of hate speech, a group of people, and which (adding an additional, powerful element in the definition -one which is required for the outlawing of these acts in Spain) may themselves trigger a violent reaction.

The first of these three cases, Cantwell v. Connecticut (1940) concerns the case of three Jehovah's witnesses who were proselytising on the streets of New Haven. Each of the three had with them leaflets, books, a phonograph, and a selection of records containing descriptions of the books. Their mode of operation was always the same and consisted of asking passers-by if they would like to hear one of the records. If the passer-by agreed, then they would ask if they would be interested in buying the book described in the record, if not, they would offer one of their leaflets on certain religious topics in exchange for donation the passer-by thought fair. One of these Jehovah's Witnesses, Jesse Cantwell, was accused of violating city ordinances which prohibited "inciting

breaches of the peace", following an incident that occurred one day as a consequence of their habitual activities described above. According to the proven facts in the case, the accused, after receiving permission from two citizens, played a phonograph record which described the contents of a book called *Enemies* which levelled serious accusations and attacks against the catholic church. The two citizens felt deeply offended by the content of the record and there was a minor altercation, although Cantwell's attitude was completely calm. It is important to remember that the street where the Jehovah's witnesses were expressing their opinions was *Cassius Street*, a New Haven neighbourhood with a population that was practically 90% catholic.

In the judgement in this case the Court, unanimously, introduced the doctrine of Clear and Present Danger, in hypothetical and conjectural terms, as a parameter of constitutionality for these types of speech, stating that "When clear and present danger of riot, disorder, interference with traffic upon the public streets, or other immediate threat to public safety, peace, or order, appears, the power of the state to prevent or punish is obvious". The question was to evaluate the constitutionality of these types of speech that we could call "offensive" or "provocative" to their potential hearers, without regard to their content, but rather using the standard of the Clear and Present Danger test, which would only consider the speech's effects; keeping the requirement, in this new area of application for this doctrine, of imminent danger, and reducing -in comparison to its original arrangement- the element of the severity of evil which would be associated with the danger of riot, disorder, interference with traffic on public street, and other threats to public safety, peace and order. Public order, which is characterised in this ruling as a category which "embraces a great variety of conduct destroying or menacing public order and

tranquility. It includes not only violent acts but acts and words likely to produce violence in others."

This novel specification of the need for a substantive or serious evil in the test, *a priori* and because of the absolute failure to be met in this case, would not seem to add essential variations to either the traditional premises of the test or its case-law compared to its original formulation by Justices Holmes and Brandeis in the dissenting opinions these judges wrote in the case of Abrams v. U.S. (1919) and Whitney v. California (1927). However, from a more abstract approach, it introduced a real distortion or breach in the historic, original sense of the idea; one that allows us to identify a different (broader) model of the doctrine.

This situation is highlighted in the later case of Terminiello v. Chicago (1949). Terminiello was an unorthodox catholic priest who had been suspended by the bishop of the diocese. Under the auspices of an organisation called "Christian Veterans of America" which defended supposed "anticommunists" and "antisemites", Terminiello organised a rally which raised enormous expectations in Chicago. On the day of the rally, the auditorium, with an 800 seat capacity, overflowed with people and was surrounded by a large crowd that had gathered in the surroundings to protest the rally. The tension was such that the police who were there to maintain order were unable to prevent some altercations between protesters and Terminiello's followers. During his speech Terminiello not only failed to attempt to "calm" tempers but instead directed his comments against the crowds jeering him outside, against police officials and against various social and ethnic groups. For this, Terminiello was charged with violating a municipal order outlawing breaches of the peace.

In this case, the Court once again, as in the previous case of Cantwell v. Connecticut, turned to the theory of Clear and Present Danger

to indicate the principal constitutional limits that may be placed on this *offensive* and *provocative speech*, concerning certain groups, although there are some subtle, but important differences compared to the previous ruling on this matter. The ruling in the Terminiello case was not unanimous as in Cantwell v. Connecticut, and the discrepancy, which is significant, between the Justices did not turn solely on the particular result of a single concept of the test applied to the facts in the case, that is, based on the applied result of a construction about whose premises there is a consensus among members of the Court. On the contrary, in this case, and in the dissenting opinions concerning the same evidence -and here we see in detail the utility of identifying different models within the theory of Clear and Present Danger- there are two different notions of the test each having their own impact on case-law. One concept -that of the majority- which, returning to the essence of Holmes and Brandeis' construction, aims to remove the *broad turn* taken on the requirement for serious harm in the case of Cantwell v. Connecticut. The other keeps this *broad turn* and in the background, advocates the change to the jurisprudential model that would trigger.

On one hand, Justices Murphy, Douglas, Black and Rutledge, in the majority opinion in this case, add a significant refinement to the general criteria established, principally by themselves in the Cantwell case. This refinement is in reality a redefinition of the requirement of substantive evil to uncouple it from the danger of riot, disorder and other public disturbances previously set out in the Cantwell case. With that, these Justices dismiss the previously established idea of substantive evil and - returning to the premises of the original model (formulated by Holmes and Brandeis) of the theory of Clear and Present Danger - assert that the "evils" produced by the accused speech in this specific case, which they refer to as "public inconvenience, annoyance, or unrest", were

not severe enough to warrant the speech not having constitutional protection in the application of the Clear and Present Danger test. The central paragraph quoted here advises of their position: "…freedom of speech, though not absolute… is nevertheless protected against censorship or punishment, unless shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest. There is no room under our Constitution for a more restrictive view. For the alternative would lead to standardization of ideas either by legislatures, courts, or dominant political or community groups."

On the other hand, the dissenting opinion given by judge Jackson in this matter also turns to the Clear and Present Danger test, although upholding the interpretation used by the Supreme Court in the previous case of Cantwell v. Connecticut, and as such, from a premise that the danger of public disorder and disturbances constitute a sufficiently substantive evil to justify a restriction on free speech. In his opinion "No one ventures to contend that the State on the basis of this test (referring to the Clear and Present Danger test),… was not justified in punishing Terminiello. In this case the evidence proves beyond dispute that danger of rioting and violence in response to the speech was clear, present and immediate", and -in clear conceptual agreement with the parameters established in Cantwell v. Connecticut- that "rioting is a substantive evil, which I take it no one will deny that the State and the City have the right and the duty to prevent and punish. Where an offense is induced by speech, the Court has laid down and often reiterated a test of the power of the authorities to deal with the speaking as also an offense."

This divergence within the Court between the alternative notions of the test concerning the interpretation of the requirement for substantive evil continued in later cases. And with that, we arrive at the third of our cases [Feiner v. New York (1951)], the explanation of which will allow us

in this work to contextualise the possibilities- and the difficulties- of using the doctrine of Clear and Present Danger as an alternative to the current characterisation in Europe of hate speech as categories of expression excluded per se from constitutional right to freedom of speech.

Irving Feiner had been convicted under article 722 of the New York Penal Code for inciting a breach of the peace. The events leading to that conviction occurred in the spring of 1949 when Feiner was giving a speech in the street to a crowd of 75 or 80 people, both black and white. During his speech on various occasions he suggested that black people should fight (even by violent means) for equal rights with whites. These ideas divided his audience, some supported them, others were opposed. His opponents asked the police, who had been sent to the event to prevent possible disturbances, to stop him from speaking, threatening to do it themselves if the authorities did not take action. Faced with the increasing tension, the police intervened, asking Feiner on multiple occasions to stop speaking, and on his refusal, proceeded to arrest him.

Despite the facts in the case being strikingly similar to those in the Terminiello case, ruled on two years previously, the majority of the Court found, basing its reasoning on the Clear and Present Danger test, that there had been a clear, imminent danger of disturbances and disorder and that, therefore, the conditions were there to limit the constitutional rights of the accused. In this case, then, the Court's majority opinion followed the direction indicated by judge Jackson in his dissenting opinion mentioned above, applying once again, the criteria set out in Cantwell, which was cited by the Supreme Court as the valid precedent, about the way in which the requirement for substantive evil should be understood in this kind of case, and discarding, as a correction, the direction set by the majority in the Terminiello case, which was not even cited as a precedent by the Court in their reasoning in this case and whose defenders were, this time, in the

minority in the Supreme Court. In fact, judges Black, Douglas and Minton, in their dissenting opinions against the Court majority, maintained the idea that the police should not only not have arrested the speaker, but that they should have detained the members of the crowd who threatened violence. In reality, although in these dissenting opinions there is no systematic critique of the application the majority of the Court made of the Clear and Present Danger doctrine in this case, one may discern that those opinions uphold the Supreme Court majority opinion in the Terminiello, and with that, the original model of the theory of Clear and Present Danger against the broader model.

An examination of these three cases together (Cantwell, Terminiello, and Feiner) allows us to infer some ideas on the root problem we are looking at, and more specifically about the potential application of the theory of Clear and Present Danger in expressions that fall under the category of hate speech. The first, and main idea rooted in the acknowledgement that this theory has an inherent conceptual variability. In fact, the doctrine of Clear and Present Danger is not an unambiguous doctrine and within it we can find variations (or models) that are completely incompatible with the postulates of the theory of hate speech (original model) as well as others which could be converted into valid legal instruments for such a theoretical model (broad model). Depending on how we define the substantive evil of the test, we can conclude, like the Supreme Court in the ruling in the Cantwell case, that speech which is likely to cause a clear, imminent danger to injure the sensitivity of certain groups (realised in a breach of the peace) is excluded from the constitutional protection of the First Amendment of the Constitution. Or, in contrast, as the Supreme Court concluded in the Terminiello case, that the substantive evil that would make it possible to limit free speech would have to be more objectively serious that mere public inconvenience,

annoyance or unrest that certain speech may provoke in their potential or actual audience. In that way, therefore, under this conceptual direction, the laws outlawing hate crimes may be found unconstitutional for violating constitutionally protected free speech.

In fact, the applicative solution provided by using Clear and Present Danger as a legal instrument linked to the idea of hate speech is manifestly unsatisfactory and ends up producing specific results that border on the absurd. The principal incongruence can be seen when the danger of public disorder is considered a sufficient evil to apply the Clear and Present Danger test -following the broad position established in Cantwell v. Connecticut- what Harry Kalven Jr. called the Heckler's Veto. According to him the fundamental problem is that, if the police can make a speaker stop, then the law grants a power of veto to disgruntled spectators who, if they show themselves to be sufficiently hostile, can prevent the expression of anything they disagree with. [Kalven Jr. (1965) p. 140].

Ultimately, it incentivises the violent answer to ideas that are uncomfortable or upset their audience, rather than answering with other ideas. That is a fundamental change (and flagrantly contradictory) to the legal premises of a democratic system such as in North America and in Spain. So in a public debate where someone responds to ideas that they don't like with confrontation and violence rather than better arguments, the system should not reward such a response with granting the role of referee to that person, despite any provocation they may feel.

Paradoxically, this role of referee is what is conceded in the end to those who respond to ideas with violence (which, although they may be abhorrent, are ultimately just ideas) when the theory of Clear and Present Danger is applied following the guidelines set by the Supreme Court in the cases of Cantwell and Feiner and in Justice Jackson's dissenting opinion in

Terminiello, it is like a legal instrument from a conception of free speech that is very close to the doctrine of hate speech. The least disposition of the audience to respond to speech with violence ends up being the ultimate parameter which determines whether that speech may or may not be expressed. So it is when there is a serious and imminent danger that the recipient of the message may funnel their upset through violent means, that is the precise moment when the speech loses its constitutional protection. So it is the debaters themselves, not heteronomous will, who decide which ideas may be debated and which may not, which means the deliberative nature of the system loses its objective and judicial character, and is "*de-institutionalised*", to the point where it becomes something purely moral or ethical, the content and limit of which are subject to the whim of some (the most violent) of its participants. A process subject to these rules and these constraints is not, of course, a process which is truly compatible with the requirements and theoretical premises of a procedural concept of democracy. So curiously, the application of Clear and Present Danger as constitutional canon on provocative speech ends up changing the conception of democracy itself towards a substantial compression in which the limit on free speech is not linked to safeguarding the process, but rather to the participants not responding violently to debates that provoke them to do so.

5.- In conclusion.

Europe and the United States take substantially different approaches to the constitutional challenge posed by hate speech. We are faced with two very different models. The North-American model, in which the "keystone of the system is free speech", and the European

model, where it is "the dignity of the person" [Alcacer Guirao (2015) p. 51]. This work has attempted to infer, from various US Supreme Court rulings in recent decades, some key features on what is characterised as the North-American model in which restrictions on free speech may not be based on the content of the speech but rather on other, contextual, formal factors, in order to not violate the neutrality of the State in public debate. Within this model it is worth considering the role that may be played by the classic legal arrangement of the Clear and Present Danger test, both in North-American case-law, and other legal systems, such as in Spain for example.

From this point of view, the applicational labyrinth that previous sections of this work have shown can be produced by the use of the Clear and Present Danger test when its is redefined to be a conceptual doctrine characteristic of hate speech, is not the essential element of this analysis. The truly important thing is to understand that the theory of Clear and Present Danger, depending on how we define it and specify it, offers us distinctly different solutions for the same base problem, and the ambiguity which means that it can be an instrument which is compatible (although not useful in application) with the doctrine of hate speech, and at the same time an absolutely contradictory (and negating) construction of the same, and which offers an alternative qualitatively different, jurisprudential approach to the problem of the constitutionality of such speech. It is this second aspect which must be emphasised now. Following the previous fundamental divergence between the different models, the big question seems to be what can Holmes and Brandeis age-old construction (as those Justices originally conceived it) bring to the current European constitutional debate about hate speech.

That question must logically be answered starting from the previous clarification of the relationship established between the original

model of the Clear and Present Danger test and the jurisprudential postulates of hate speech. A relationship which, given what we have demonstrated, can be nothing other than negation or reciprocal incompatibility. If we affirm the former, we discount the latter. If, however, we establish that so-called hate crimes constitute a possible constitutional limitation on free speech, the original doctrine of Clear and Present Danger (and, therefore, the conception of this fundamental right that doctrine upholds) will end up refuted and abandoned. In this manner, the original doctrine of Clear and Present Danger is not a legal instrument to apply to the doctrine of hate speech, nor is it valid for introducing limits or controls to the same. Its role is different, substantially different in fact. The Clear and Present Danger test -as formulated by Holmes and Brandeis- must be necessarily linked to the classically posed concept in the USA of free speech, which is evidenced by the jurisprudence of the Supreme Court in decisions such as R.A.V. v. St Paul, Virginia v. Black, and Snyder v. Phelps, examined in this work. From this relationship, it gives us theoretical support to critically question (and maybe reassess) the premises of a new (and different) notion around the fundamental right to freedom of speech (and its content and limits) which is being constructed in European legal systems (and Spain is no exception) on the matter of the theory of hate speech.

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