Hate speech: The Dark Twin of Free Speech

By Sindre Bangstad, social anthropologist, researcher, KIFO, Institute For Church, Religion and Worldview Research, Norway. This item first published on:

http://www.sindrebangstad.com/hate-speech-the-dark-twin-of-free-speech/

On October 20 2014, an unemployed fifty-seven year old white Norwegian man entered a supermarket in an Eastern suburb of the Norwegian capital of Oslo. Walking through the supermarket, he noticed a twenty-seven year old woman of North African background looking for groceries and standing between two supermarket shelves. She was wearing an Islamic headscarf or *hijab*, marking her out as a Muslim. Though they lived in proximity to one another, neither one knew one another. When the middle-aged man passed the woman, he made a negative comment on Muslims which was clearly directed against her. According to court records, the victim thought she had heard the perpetrator assert that "all Muslims ought to be slaughtered." There were no other witnesses to this first incident, and so the Oslo Magistrate's Court in its verdict from March 17 2015 found that there was "reasonable doubt" about the precise terms which the perpetrator might have used. What was not in doubt, however, was that the perpetrator after having moved around a supermarket shelf turned around and returned to the woman, whereupon he proceeded to spit her in her face. The spat hit the victim on her shoulders, but was clearly intended at her. The victim then reacted by screaming, leading two male supermarket employees to run to her assistance. They escorted her to the cashier point in the supermarket, where they confronted the perpetrator. When one of the male supermarket employees asked the perpetrator why he had spat at the woman, he responded that he "hated all Muslims." The perpetrator was then reluctantly escorted

out of the supermarket by the other supermarket employee, loudly registering his disapproval of that course of action by starting a shouting match with the employee outside the supermarket. The case was investigated by the then recently established Hate Crimes Unit of the Oslo Police, and brought to a conclusion by a verdict in Oslo Magistrate's Court on March 17 2015. In its verdict, the court sentenced the defendant to eighteen days' imprisonment and 15 000 Norwegian kroner in fines for violations of Norwegian General Penal Code Paragraph 135 (a) and 390 (a). The first paragraph, which has since its erstwhile introduction in 1970 led to the criminalization of certain forms of hate speech targeting minority individuals on the basis of their skin colour, ethnicity, national origin, religious or other beliefs, sexual orientation, or physical or mental disability, is what can be described as a Norwegian law against hate speech. http://www.idunn.no/ntmr/2012/04/failing_to_protect_minorities_against_racistandor_discrim

In October 2015, the revised and amended Norwegian General Penal Code adopted by the Norwegian Parliament in 2005 was implemented, and Paragraph 135 (a) became Paragraph 185.

The second paragraph brought to bear on the case in questions, was first introduced in 1955. It aims to protect individual citizens against intimidating, harassing or inconsiderate behaviour. By Norwegian standards, this was a relatively lenient sentence: The maximum penalty for crimes under Norwegian General Penal Code Paragraph 135 (a) is three years imprisonment and under 390 (a) two years imprisonment. The Oslo Magistrate's Court found that defendant's expressions were not part of a "free exchange of ideas which is the core value that freedom of expression ought to protect", but that

they were rather aimed at "expressing hatred and contempt for the victim as a Muslim and for Muslims as a group." These expressions, the court argued, could therefore not be considered as protected by freedom of expression as enshrined in the Norwegian Constitution's Paragraph 100.

On June 1, 2015, the US Supreme Court with a majority of 7-2 acquitted Anthony Douglas Elonis for criminal offences under a law making it a federal criminal offense "to transmit communication in which another person is threatened." The background to the case was that Elonis, a US citizen employed by a Pennsylvania amusement park, in the face of his wife of seven years leaving him and taking with her the couples' two young children in May 2010 had started posting Facebook posts with graphically violent language and imagery under an adopted pen name. In his Facebook posts, written under the name 'Tone Dougie' and ostensibly inspired by the violent and woman-hating lyrics of rappers such as Eminem, Elonis targeted not only his ex-wife, but also co-workers at his place of work and a female FBI agent sent to his home after his wife and co-workers alerted police authorities about his activities on Facebook. From the US Supreme Court's verdict in *Elonis v. United States* http://www.supremecourt.gov/opinions/14pdf/13-983_7l48.pdf

it appears that Elonis was well aware of the fact that he might be prosecuted for the content and tenor of his Facebook posts, but reasonably confident that he was not crossing the line of US Supreme Court's increasingly libertarian First Amendment jurisprudence, the precedents for which according to the Harvard legal scholar Cass Sunstein were established in the days of the legendary US Supreme Court Justice Oliver Wendell Holmes (1841-1935) in the 1920s.

http://books.simonandschuster.com/Democracy-and-the-Problem-of-Free-Speech/Cass-R-Sunstein/9780028740003

In one Facebook post cited by the court, Elonis rather ingeniously refers to his posts as "art" and declares his readiness "to go to jail for my Constitutional rights." Elonis' Facebook lyrics certainly seemed threatening to those who knew him: His wife obtained a three-year protection order against him, and a lower court ordered him to cease his Facebook activities on the basis of texts like these:

"There's one way to love you but a thousand ways to kill you. I'm not going to rest until your body is a mess, soaked in blood and dying from all the little cuts. Hurry up and die, bitch, so I can put this nut all over your corpse from a top your shallow grave."

Elonis furthermore posted texts in which he fantasized about initiating "the most heinous school shooting ever imagined" and putting his ex-wife's "head on a stick." After the visit at his house by a female FBI Agent and her partner, he posted fantasies about "pull[ing] my knife, flick[ing] my wrist and slitt[ing] her throat" on Facebook.

In the majority opinion of the US Supreme Court written by the US Supreme Chief Justice, the Republican appointee John G. Roberts http://www.newyorker.com/news/news-desk/the-chief-justice, the US Supreme Court chose not to deliberate on legal issues relating to the First Amendment of the US Constitution: "Given our disposition, it is not necessary to consider any First Amendment issues," the majority argued. Instead the court focused on whether the federal prosecutors in the case and the lower courts' who convicted Elonis for threats on the basis of how his posts "would be understood by a reasonable person" had met the legal threshold for convicting Elonis for transmitting a communication containing a threat under US federal law (18 USC Paragraph 875 c.) The

US Supreme Court's majority concluded that a lower court which had convicted Elonis to forty-four months in prison had not conclusively proved that Elonis had intentionally issued what in US jurisprudence is characterized as "true threats." http://www.nytimes.com/2015/06/02/us/supreme-court-rules-in-anthony-elonis-online-threats-case.html?_r=0

Prominent legal commentators in the US found the US Supreme Court majority's outright refusal to engage First Amendment issues in the Elonis cases to be something of a disappointment. http://www.theatlantic.com/politics/archive/2015/06/does-a-true-threat-require-a-guilty-mind/394643/ In a partial dissent, Justice Samuel Alito noted that Elonis had made sure that his ex-wife saw his posts, and that she had testified that they made her "extremely afraid." "Threats of violence and intimidation are among the most favored weapons of domestic abusers, and the rise of social media has only made these tactics more commonplace." Alito also decried the fact that his fellow judges refused to provide lower courts with more precise guidelines on the issue of negligence or recklessness in speech. In its commentary on the Elonis case, *The Economist* concluded that "as long as they have no intention of hurting anybody, people should now feel safe posting even the vilest content on social media." http://www.economist.com/news/united-states/21653658-justices-toss-out-mans-conviction-writing-violent-facebook-posts-speak-some-evil

That is, however, a misreading. For on matters relating to freedom of expression, the US is by virtue of scholarly consensus something of an outlier in global terms. http://papers.ssrn.com/sol3/papers.cfm?abstract_id=668543

This outlier status follows directly and logically from US Supreme Court jurisprudence under the First Amendment dating back to the 1920s, which in the words of University of Queensland professor Katharine Gelber "precludes the statutory prohibition of hate speech." http://onlinelibrary.wiley.com/doi/10.1111/lasr.12152/abstract

This basically means that what is considered permissible under US laws and legal practice would in many other countries, and not the least in Western Europe, be subject to legal sanctions. The Economist's reading also fails to register that private and corporate regulation of speech – for example in the form of so-called 'campus speech codes' at US colleges and universities or speech restrictions at large multinational corporations in the US – are as pointed out in an essay by Arthur Jacobson and Bernhard Schlink in 2012http://www.cambridge.org/no/academic/subjects/law/socio-legal-studies/content-and-context-hate-speech-rethinking-regulation-and-responses -

in many cases much more stringent than elsewhere in the world. By way of an example tenured academics in Norway who engage in racist and/or discriminatory speech (and there has in fact been some in recent years http://www.dagbladet.no/2012/09/16/kultur/debatt/norskpakistanere/nils_rune_langeland/punjab/23432369/) cannot under existing Norwegian laws and legal practice not be fired, but they most certainly can under US laws and legal practice.

What the UK legal scholar Eric Heinze has referred to as a principle of 'viewpoint absolutism' http://onlinelibrary.wiley.com/doi/10.1111/j.1468-2230.2006.00599.x/full

under US Supreme Court First Amendment jurisprudence since the 1920s also in effect means that US courts generally must refrain from paying any attention at all to the *impact*

of hate speech on individuals targeted by it. In the case of *Snyder v. Phelps* (2011) https://supreme.justia.com/cases/federal/us/562/09-751/

found 8-1 that the Christian fundamentalist *Westboro Baptist Church's* picketing of the funeral service of a US Lance Corporal by the name of Matthew Snyder, who had been killed on duty in Iraq, with posters bearing the inscription 'God hates fags' constituted protected political speech under the US Constitution's First Amendment. The vile homophobic hate campaign in which the Westboro Baptist Church of Topeka, Kansas under the leadership of its self-appointed pastor, the late Fred Phelps (1929-2014) http://www.theguardian.com/commentisfree/2014/mar/24/pastor-fred-phelps-westboro-baptist-church-louis-theroux

targeted Lance Corporal Snyder's bereaved family on- and offline, drove Snyder's father to the verge of suicide. The late Lance Corporal Snyder had in actual fact not been gay, but Phelps and his church saw his and other marines' death as a form of divine punishment visited upon the USA for the country's increasingly accepting societal attitudes towards LGBT people.

In September 2011, the Equality Court in the province of Gauteng in South Africa decided on a case brought by the Afrikaaner organisations *Afri-Forum* and *Transvaal Agricultural Union* against one Julius Sello Malema. Malema (1981 -), the uncouth undereducated son of domestic worker and single mother from Polokwane, was then a rising star on the political firmament of post-apartheid South Africa. He was at the time the firebrand leader of the ruling party the ANC's Youth League (ANCYL), and traded in a revolutionary and African nationalist rhetoric which the ANC had by and large left behind after coming to power in South Africa's first democratic elections in 1994, but which held

great appeal to the masses of young black South Africans whose lived realities after the fall of apartheid continued to consist in grinding poverty and lack of opportunities in life. The background to the case was that Malema had on four separate public occasions in March 2010 – one at a rally at Human Rights Day Celebration in Mafikeng sung the anti-apartheid struggle song *Dubul'ibhunu* (*Shoot The Boer*) in front of large crowds of people. Malema's singing of the song had been accompanied by bodily movements in which he imitated the holding of a firearm. On at least one occasion, Malema had added the words: "Shoot the Boer. Shoot the Boer. Shoot to kill" to the end of the song. https://www.youtube.com/watch?v=OIsO78kkJP0

Malema's performances of the song were widely reported in the South African press, and brought much and heated public attention to Malema. Malema's use of the song placed him in the tradition of the first ANCYL president after the un-banning of the ANC in 1990, namely Peter Mokaba (1959-2002), who like Malema also hailed from Polokwane, and died from AIDS-related illnesses as an AIDS-denialist in 2002. http://mg.co.za/article/2002-01-01-hambe-kahle-peter-mokaba For Mokaba's trademark appearances at ANCYL rallies whilst ANCYL president from 1990 to 1994 had also included his singing of the same song. Malema is likely to know that he was pushing the legal limits inasmuch as it was well known that the *South African Human Rights Commission* – a state oversight body – had already in 2003 declared the song to constitute hate speech. The *South African Constitution of 1996* in Section 16 (2) limits freedom of expression in cases of (a) propaganda for war, (b) incitement of imminent violence and (c) advocacy of hatred based on race, ethnicity, gender or religion, and which constitutes incitement to cause harm. Furthermore, the *Promotion of Equality and Unfair Discrimination Act 4 of 2000* – which is also known in South Africa as *The Equality Act* in Section 10 prohibits the

'publishing, propagation, advocacy or communication of words on prohibited grounds which could reasonably be construed to demonstrate a clear intention to be hurtful, to incite harm or to promote or propagate hatred. Among the 'prohibited grounds' according to Section 10 are 'race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language, birth or any other ground of discrimination.' In comparison with the grounds listed in most laws relating to hate speech, South African laws are extremely comprehensive and therefore also arguably slippery. The Afrikaaner organisations which had brought the case against Malema were concerned about ongoing criminal attacks on white farms and farmers in South Africa since the fall of apartheid, http://www.hrw.org/reports/2001/safrica2/

and the effect that hate speech directed at white farmers in South Africa might have in this context. It is clear from the public record since the 1990s that these organizations, wedded as they were to the notion that so-called 'farm attacks' and the resulting number of violent deaths of white Afrikaaner farmers did not receive adequate attention from the ruling ANC. They argued that Malema's singing of the song in question represented a form of hate speech which 'caused and perpetuated systematic disadvantage to Afrikaners and Afrikaans farmers' and 'undermined the human dignity of those [thereby] targeted'. Appearing in defense of Malema's right to sing the song in public, representatives of the governing ANC argued, however, that the song was part of South Africa's historical 'heritage' and that the right to sing it should therefore be retained in the interests of the preservation of a complete record of South Africa's troubled history. In court, there was no argument over the fact that the lyrics of the song as used in the course of the struggle against apartheid in the 1980s had referred to the bringing down

of the apartheid regime by means of violent action. In its verdict, the Equality Court of Gauteng found that Malema's singing of the song did indeed constitute hate speech. Though the South African press reported that Malema had been 'convicted' of hate speech by the court, under the Equality Act, the Equality Court was set up first and foremost to promote the aims of reconciliation, and to do so by 'setting the moral standards to which members of society must adhere'. In the Malema case, the proceedings of which were by permission of the court itself broadcasted live throughout South Africa by the private television channel ETV, that meant that the court prohibited Malema and any other person from singing the song in public in the future, and that Malema was ordered to pay the costs of the case. By way of setting a precedent, it is more doubtful that the case had much of an impact. The constitutional expert Pierre de Vos at the University of Cape Town declared in his blog *Constitutionally Speaking* that the definition of hate speech in the Equality Act was "extremely broad" and cautioned that Judge Lamont's ruling in the Malema case might usher in a "radical limitation on the right to freedom of expression." http://constitutionallyspeaking.co.za/malema-judgment-a-re-think-on-hate-speech-needed/

According to De Vos the overly broad hate speech definition in the Equality Act might even be "unconstitutional" in light of the much more narrow definition in Section 16 of the 1996 Constitution. As the South African legal scholar Joel M. Modiri of the University of Witwatersrand notes in a 2013 article on the Malema case, Judge Lamont's verdict in the case entailed a "sweeping ban on the song" applicable to all South Africans, even though the complainants had only requested that Mr Malema be barred from singing the words they found to be hateful.

http://reference.sabinet.co.za/sa_epublication_article/ju_salj_v130_n2_a5

At the press conference held after the verdict, Malema indicated his intention to appeal. On October 30 2012, however, the parties reached a mediated settlement in terms of which the ANC and Malema consented to withdrawing their appeal, which effectively brought the legal case to an end.

In the aftermath of the case, South African President Jacob G. Zuma performed the song at a public rally at ANC's Centenary Celebrations in Bloemfontein as late as in December 2012. https://www.youtube.com/watch?v=4NVkRmBTB7k

On September 21 2014, a chief spokesman for the salafi-jihadist terrorist group ISIS, Abu Muhammad al-Adnani according to Jessica Stern and J. M. Berger in *ISIS: The State of Terror* "called for supporters around the world to rise up and respond to Western-led airstrikes" by carrying out indiscriminate attacks "against any citizen of a country that belonged to ISIS." According to their translation, al-Adnani stark threats called for "*kill[ing] a disbelieving American or European – especially the spiteful and filthy French – or an Australian, or a Canadian, or any other disbeliever from the disbelievers waging war… […]… in any manner or way… […]… whether civilian or military*." Al-Adnani asserted that doing so did not in any way require the soliciting of any legal opinion or advice – in the form of – say - *fatwas* -, and also provided tips to would-be-salafi-jihadist assassins on the instruments of killing, ranging from 'rocks, knives, cars, choking or poisoning.' In the event that this should fail, al-Adnani called for the agrarian-inclined to 'destroy their crops' and for the meekly-inclined to 'spit in their face.'
http://www.harpercollins.com.au/9780008120931/isis-the-state-of-terror

It goes without saying that a salafi-jihadist terrorist movement premised on hatred and intolerance of all Muslims and non-Muslims in the world who disapprove of its particular

creed and operating in the badlands of current Iraq and Syria will not exactly enact laws against hate speech – except to the extent to which it is able to re-define hate speech as 'blasphemy' or 'apostasy.' In general, limited attention in the troubled contemporary Middle East seem to be paid to various forms of hate speech directed against minorities of various kinds, whether this be state-sanctioned speech or the speech of private citizens.

In no known society is freedom of expression absolute. Through these examples, I have indicated that hate speech and the challenges posed by it are global phenomena in our time. Anyone familiar with the international legal framework on freedom of expression after World War II – will know that under international laws freedom of expression is seen as one of several core human rights, but as a right which must be balanced against other human rights. Yet in spite of the ongoing standardization and harmonization of international and national laws and legal instruments in many parts of the world, not only definitions and registration, but also legislation and legal practice with regard to hate speech vary enormously between contexts. Hate speech may be characterized as the 'dark twin' of free speech. "Under what conditions does freedom of speech become freedom of hate?" asked Judith Butler in 2011. http://politics-of-religious-freedom.berkeley.edu/files/2011/05/Is-Critique-Secular-Blasphemy-Injury-and-Free-Speech.pdf

In Norway, it was the worst terrorist attacks in modern Norwegian history, perpetrated by the white right-wing extremist and racist Anders Behring Breivik on July 22 2011 which brought a heightened awareness on the part of Norwegian authorities, police and the general public about hate speech. For Breivik had in the years preceding

his massacres of seventy-seven individuals, most of them teenagers attending a summer youth camp for the then governing social-democratic Labour Party's Youth Association AUF at Utøya outside of Oslo, http://zedbooks.co.uk/paperback/anders-breivik-and-the-rise-of-islamophobia virtually drenched himself in the online netherworld of far right conspiracy theories - known as the 'Eurabia'-genre http://www.tandfonline.com/doi/full/10.1080/09596410.2013.783969#.VbjCg_4w-Uk - about Islam and Muslims in Europe. Through the Council of Europe, the Norwegian government supported a European-wide *No Hate Speech Campaign*, and a number of civil society initiatives in various European countries designed to counter hate speech. The Oslo Police, which had only in 2007 begun registering hate crimes, set up a specialized Hate Crimes Unit in Oslo East. Still, even the most cursory survey of social media on any given day of the year in Norway as elsewhere in Europe reveals an ubiquity of online hate speech. To such an extent that the *European Commission Against Racism and Intolerance* (ECRI) in its latest annual report for 2014 highlights the challenge to liberal and democratic societies posed by hate speech. http://www.coe.int/t/dghl/monitoring/ecri/Library/PressReleases/197-09_07_2015_AnnualReport2014_en.asp

At the European Court of Human Rights (ECHtR) in Strasbourg, which wields a significant influence on European signatory states' interpretation of the ECHTR (1952) and the limitations on freedom of expression which it sanctions, the need for a balancing between the human right to freedom of expression and other human rights is clear from its verdict in a recent case from Bulgaria (*Karaahmed v Bulgaria* 2015), in which the Grand Chamber of the ECHtR found that Bulgarian police and authorities in failing to provide a Bulgarian Muslim hate speech victim with effective legal remedies against members of

the far-right nationalist Ataka party demonstrating against a mosque issuing the call to prayer in the capital of Sofia, Bulgarian authorities had in fact violated Article 9 of the ECHTR, guaranteeing the right to freedom of religion and belief. http://hudoc.echr.coe.int/eng?i=001-152382#{"itemid":["001-152382"]} Article 9 was in this specific case found to override Article 10 of the ECHR on freedom of expression. Middlebury Professor Erik Bleich in reviewing a number of hate speech prosecutions in France and the UK for his 2011 monograph entitled *The Freedom to be Racist? How the United States and Europe Struggle To Preserve Freedom and Combat Racism* *http://www.oxfordscholarship.com/view/10.1093/acprof:oso/9780199739684.001.0001/acprof-9780199739684* found little support for the widespread popular contention that liberal and secular European states have compromised basic civil liberties and freedom of expression in pursuing the application of its hate speech laws.

Hate speech is arguably an imprecise term – but like many other modern terms of US provenance - and has only recently come into usage at a European political and legal level. According to Katharine Gelber's 2011 *Speech Matters: Getting Free Speech Right*, it may be defined as "speech or expression capable of instilling or inciting hatred of, or prejudice against, a person or a group of persons on a specified ground." https://www.penguin.com.au/products/9780702238734/speech-matters-getting-free-speech-right

If there can be said to exist an identifiable 'European approach' to hate speech, the case for it has in recent years been most succinctly formulated by Prof Jeremy Waldron of New York University in his 2012 *The Harm in Hate Speech*. http://www.hup.harvard.edu/catalog.php?isbn=9780674065895

For Waldron, hate speech undermines not only formally equal rights to citizenship in liberal and democratic societies, but also equal rights to *human dignity* as a *public good*. Waldron locates his work within a liberal framework inspired by the influential liberal philosopher John Rawls' ideas about what a 'well-ordered' society looks like, though Waldron's claim to present a liberal position on this is far from uncontested. http://journals.cambridge.org/action/displayAbstract?fromPage=online&aid=9118204&fileId=S1744552313000311

Waldron is clear about the fact that hate speech bans should protect individuals, not groups, and their individual claims to equal humanity and citizenship rather than their faiths or beliefs. In this, he clearly distances himself from the dubious attempts by the Organization for Islamic Co-operation (IOC) and a number of Muslim states to advance the case for international legislation against so-called 'defamation of religions' through international for in recent years.

But a problem in Waldron's strand of thinking on this issues stems from the perennial problems of defining what exactly human dignity might be, and what precisely is required to uphold it. Prof Michael Rosen's 2012 book *Dignity: Its History and Meaning* *http://www.hup.harvard.edu/catalog.php?isbn=9780674064430*

offers some striking illustrations of this in referring to the famous case of a French dwarf who was prevented by French courts as well as the European Court of Human Rights (ECHtR) in Strasbourg from making a living from public dwarf-tossing competitions. The courts decided, against the protestations of the French dwarf, that making a living in this manner infringed on his inherent human dignity.

A fundamental weakness in much existing scholarly research and writing on free speech is the lack of reference to empirical data. And so we have scholarly treatises aplenty about the philosophical, legal and historical foundations of freedom of expression in various societal and political contexts - but relatively few works on what it's dark twin, hate speech, feels and looks like, and what their wider ramifications for individuals targeted by hate speech might be. Anecdotal evidence from numerous countries around the world seem to suggest that in countries with hate speech provisions on their statute books, the extent to which various minorities are actually protected both by law and court practice can vary significantly. This is after all what one would suspect given that law-making and application are the products of social processes in any given societal context, and as such also reflective of the highly differentiated and often selective awareness of racism and discrimination. In Norway, though Norwegian hate speech laws extend protection against all religious minorities in the country, a case can definitely be made for these laws having extended a greater level of protection against anti-Semitic speech than against anti-Muslim speech by virtue of Norwegian prosecutorial services and Norwegian courts' actual practice. Unequal protection under the law – whether it be a matter of reality or perception - obviously presents a long-term challenge for the legitimacy of laws, in that some minorities may then be left with the impression that the laws do not protect them equally http://blogs.ssrc.org/tif/2015/08/05/the-public-voice-of-muslim-women/.

A likely consequence of such a lack of confidence in the law's universality and equal protection is that minority individuals simply opt out of reporting hate speech and hate crimes to the police – recently alleged to be the case among Muslims in Norway.

http://www.aftenposten.no/nyheter/iriks/--Muslimer-anmelder-ikke-hatkriminalitet-De-har-null-tillit-til-at-politiet-tar-det-alvorlig-8112354.html

In a forthcoming paper, Syracuse University professor Thomas Moylan Keck argues that European states would in order to be consistent either have to extend the coverage of hate speech law provisions to Muslims and LGBT people, or abandon hate speech provisions altogether. This concern over lack of consistency in both the formulation of laws and its application in legal practice is not unmerited. For if we hold with Brown University Professor Corey Brettschneider in *When The State Speaks, What Should It Say?* *http://press.princeton.edu/titles/9733.html*

that a liberal, secular and democratic state committed to the liberal principles of equal rights and dignity for all citizens is obliged to refrain from endorsing, supporting or funding people and organizations who engage in racist and/or discriminatory speech, then the rise of populist right-wing formations who themselves routinely engage in, support and fund such speech should be of the utmost concern. In Norway, hardly a week has passed by since the populist right-wing Progress Party came into power in October 2013 http://bostonreview.net/world/sindre-bangstad-norway-populist-right

without some of its local politicians affiliated with the party being caught expressing racist and/or discriminatory views in social media, with no ensuing sanction whatsoever from the party's central leadership. Progress Party MPs and city councillors at Oslo City Council have also seen to a lavish state and municipal funding of the civil society organization *Human Rights Service* (HRS), which in Norway has a long and sustained record of engaging in racist and/or discriminatory speech and far-right 'Eurabia'- fantasies targeting all and sundry among ordinary Norwegian Muslims. In a shadow report to the

UN International Committee On the Elimination Of All Forms of Racial Discrimination (ICERD) on the occasion of Norwegian authorities' regular reporting on the Norwegian state's compliance with the UN ICERD Convention from 1965, whose article 4 requires signatory states to act against hate speech, 22 Norwegian NGOs have in documenting the HRS' record on hate speech for the second time publicly questioned Norwegian state and municipal authorities' funding of the HRS.
http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=INT%2fCERD%2fNGO%2fNOR%2f21041&Lang=en

It is only very recently that scholars have started to explore the effects of hate speech laws from an empirically-based social science perspective. Among the more important contributions so far is that of Katharine Gelber and her colleague Luke McNamara, who in a recent article published in the *Law & Society Review* this year in the case of Australia finds civil hate speech laws in Australia do reduce the public expression of hate in mediated outlets, but not on the streets.
http://onlinelibrary.wiley.com/doi/10.1111/lasr.12152/abstract

This study - contrary to much intuitive thinking in this field - also suggest that there is no discernable evidence of the 'chilling effects' so feared by free speech proponents and little evidence of the creation of 'free speech martyrs' from the application of hate speech laws. It should be noted, though, that Gelber and MacNamara's study is not necessarily applicable to other legal and societal contexts. But there are more aspects of this in need of further investigations. Firstly, we know little about to what extent hate speech succeeds in excluding those targeted by from participation in the processes of public deliberation which are among the foundations of a liberal and secular democracy.

Nor do we know much about when and how hate speech actually manages to silence the speech of those targeted by it. And secondly, though we know from scholarly literature that large scale human atrocities such as ethnic cleansing and genocide are usually preceded by sustained exposure to and a *routinization* of hate speech – as first documented in the case of Nazi Germany by the German philologist Viktor Klemperer (1881-1960) in his seminal LTTI – The Language of the Third Reich (1947) http://www.bloomsbury.com/uk/language-of-the-third-reich-9781472507211/ - the exact nature of the relationship between *hate speech* and *hate crimes* is in fact also poorly understood. If indeed it is knowable at all. The precise point at which hate speech turns into a direct incitement to violence is for analytical purposes often notoriously hard to define. In the USA, what is known as the 'Brandenburger test', referring back to the US Supreme Court verdict in *Brandenburg v. Ohio* (1969), establishes that the unlawful action must be both 'immanent' and 'likely' in order for speech inciting such action to be in violation of the law. In *Hess v. Indiana* (1973), the US Supreme Court even held that incitement to illegal action in some 'indefinite future' was legally permissible. Yet we know that hate speech and its often attendant incitement to violence feature as commonly used instruments by various extremists in the contemporary world – whether salafi-jihadist or right-wing extremists – to accomplish both individual 'radicalization' and a wider societal polarization. What Cass Sunstein has insightfully referred to as *polarization entrepreneurs* https://global.oup.com/academic/product/going-to-extremes-9780195378016?cc=no&lang=en&

have in recent years become very adept at availing themselves of the opportunities provided by the largely unedited online social media and what John Suler defined as the

online disinhibition effects

http://www.academia.edu/3658367/The_online_disinhibition_effect

which are here often on display. Though there is every reason to think that hate speech is a phenomenon which has existed in perpetuity, the new modes of sociality enabled by the various so-called 'new' social media may be a central contributing factor to the growth and ubiquity of hate speech in the public sphere in many parts of the world. Scholars in various disciplines and in different corners of the world are only starting to explore what this might all entail for our common future.