Failing to Protect Minorities Against Racist and/or Discriminatory Speech?

The Case of Norway and § 135(a) of The Norwegian General Penal Code

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Abstract: On a recent visit to Norway, the legal philosopher Professor Ronald Dworkin, a known prominent advocate of what I will refer here to as 'free speech absolutism' or the idea that there should – on the basis of an attempt to universalise US First Amendment understandings which Dworkin can be associated with – be minimal legal regulations of freedom of expression. He argued that the so-called ‘racism paragraph’ of the Norwegian General Penal Code (§ 135(a), introduced in 1970, last amended in 2005) was “unconstitutional” in light of the guarantees of freedom of expression provided by the new § 100 of the Norwegian Constitution. A new and amended § 100 was introduced in the aftermath of the 1999 report (in 2004) of the Norwegian Commission of Freedom of Expression (1996–1999). In this article, I will explore the recent application of § 135(a) by higher Norwegian courts, along with the shifting historical understandings of freedom of expression and its limits. I shall argue that these shifting understandings have played a role in the manner in which higher Norwegian courts have applied this paragraph. I shall also demonstrate why Dworkin’s claim regarding the relationship between the General Penal Code’s §135(a) and the Constitution’s § 100 is not only factually incorrect, but also grossly exaggerated.

Keywords: §135 (a); Freedom of Expression; Racist and Discriminatory Speech; Right-wing Extremism; Free Speech Absolutism.

I. Introduction

In Norway, at a recent conference organised by the *Fritt Ord Foundation* in partnership with the New York Review of Books entitled ‘Challenges to Multiculturalism: A Conference on Migration, Citizenship and Free Speech’, the prominent US legal philosopher Ronald Dworkin argued that the so-called “racism paragraph” of the Norwegian General Penal Code (§ 135(a)), introduced in 1970 and last amended in 2005 was “unconstitutional” in light of the guarantees of freedom of expression in the new § 100 of the Norwegian Constitution (introduced in 2004). Professor Dworkin is one of the main exponents of what I – in line with a number of other academic scholars – will refer to as a “free speech absolutism”, which seeks to universalise the understandings of freedom of expression and its limits enshrined in the First Amendment jurisprudence of the US Supreme Court in recent decades. It amounts to a call for European nation-states to abandon the protections against racist and discriminatory speech introduced as a result of international human rights conventions from the 1950s to the 1970s. Through a detailed exploration of the legal history and application of Norway’s § 135(a), in this article, I will demonstrate why Professor Dworkin’s claims about the relationship between § 135(a) and § 100 of the Norwegian Constitution can be classed as both factually incorrect and grossly exaggerated. I shall also (with reference to the recent work of Professor Jeremy Waldron amongst others) demonstrate that, far from being a threat against core liberal values and democratic legitimacy, Norwegian legislation against racist and discriminatory expressions — in theory and also practice — seek to protect individual rights to dignity and formal rights to equal citizenship, which are core liberal values.


II. The Introduction of the “Racism Paragraph” 135 (a) in 1970

The paragraph of the Norwegian General Penal Code, since commonly known as the “racism paragraph”, § 135(a), was first introduced in 1970. In actual fact, the term “racism paragraph” is something of a misnomer, since the remit of the paragraph (as we shall see) also covers public expressions of discriminatory attitudes which cannot strictly speaking be qualified as “racist”. It is also noteworthy that the paragraph, both in its original and present formulation, does not define the concept of “racism”. In an era in which the markers of racism have shifted from “biology” to “culture” and/or “religion”, this arguably also means that expressions of classical biological racism are most likely to be prosecuted in the Norwegian context. In its current formulation, “public” and “pre-meditated”, or “grossly negligent” articulation of a discriminatory or hateful expression, are thereby prohibited. Transgressions of this statute are punishable by fines or up to three years imprisonment.

According to the statute, an expression qualifies as “public” when it is expressed in such a manner that it may reach a ‘greater number of people’ [større antall personer]. Significantly, symbols (of a racist and discriminatory nature) are also included in the remit of the statute, and contribution [medvirkning] to acts whereby racist and discriminatory expressions are made are also liable to punishment. The statute defines a discriminatory or hateful expression as one which threatens or harasses another person, or which advocates hatred, persecution or contempt [ringeakt] against persons on account of their:
1) skin colour, or national or ethnic origin;
2) religion or view of life [livssyn], or
3) homosexual inclination, lifestyle or orientation.

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4 See Marianne Gullestad, Plausible Prejudice: Everyday Experiences and Social Images of Nation, Culture and Race (Universitetsforlaget 2006) for extensive discussions of this shift in the Norwegian context.

5 This provision has, as far as the author has been able to ascertain, never been applied in any cases relating to § 135 (a) after its introduction in an amendment dated 2005. Given that it was introduced in response to criticisms against Norway for violations of the International Convention on the Elimination of All Forms of Racial Discrimination (adopted 7 March 1966, entered into force 4 January 1969) 660 UNTS 195 (ICERD) articles 4 and 6 by the CERD Commission in 2005, it is fair to assume that Nazi swastikas would be among the symbols targeted in the amended version of the legal statute.
Paragraph 135 (a) has been amended on three occasions: in 1981, 2003 and 2005. By virtue of the amendment of 1981, homosexuals were protected under the law; the 2003 amendment expanded the remit of the law to incorporate symbols; and the 2005 amendment revised the definition of “public” so that the law would also cover expressions made in private, but which reached a wider public, and were either intentionally [overlagt] or grossly negligently [grovt uaktsomt] racist and/or discriminatory. It also increased the maximum penalty for criminal offences under the law from two to three years. Furthermore, under existing Norwegian legislation, as well as legal practice, racist motivation for other crimes may constitute an aggravating circumstance. Hence, in Norway’s most well-known racist murder in modern times — the so-called “Hermansen murder” in 2001 — the fact that the three defendants were motivated by racism was deemed an aggravating circumstance by the Court of Appeals [Borgarting Lagmannsrett].

The legal statute, § 135(a), which prohibited incitement [opphidselse] to ‘racial hatred’ was introduced in 1961. It had both a limited remit and applicability and arose in response to a wave of anti-Semitic attacks and demonstrations in several countries in western Europe in early 1960. However, when § 135(a) of the Norwegian General Penal Code was revised and amended in 1970, this was as a direct result of Norway ratifying the 1965 United Nations’ International Convention on All Forms of Racial Discrimination (ICERD). ICERD article 4 calls upon state parties to declare it an offence to disseminate ‘ideas based on racial superiority and hatred, incitement to racial discrimination, as well as acts of violence or incitement to such acts’. While ICERD article 6 calls upon state parties to ensure that everyone, within their jurisdictions, have effective protection and remedies against acts of racial discrimination through courts of law and state institutions.

In the words of Erik Bleich, the general trend towards restrictions on racist and discriminatory speech that emerged in a number of western European states in the 1960s ‘dovetailed with developments at the international level’. The exception being the USA, and which did not ratify ICERD under 1994 entered a reservation concerning article 4 of ICERD ‘precluding any effect on speech more restrictive than that of the US Constitution’. This resulted in the CERD Com-

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6 Borgarting Lagmannsrett 02-00850M/01 4 December 2002.
Failing to Protect Minorities Against Racist and/or Discriminatory Speech?

The committee expressing ‘particular concerns’ over the US reservations in 2001.10 The 1948 UN Declaration of Human Rights (UNDHR) in article 19 declares freedom of expression to be a fundamental human right, although one which must be balanced against other fundamental human rights.11 Of particular interest here is article 7, which forbids discrimination or incitement to discrimination. The 1950 European Convention of Human Rights (ECHR) declares in article 10(1) that:

Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.12

Yet it is clear from article 10(2) that freedom of expression is also seen (by the drafters of the ECHR) as requiring a balancing with other fundamental human rights:

The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or the rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

The ECHR was incorporated into Norwegian law by the Human Rights Act [Menneskerettighetsloven] no. 30 of 1999.13 According to § 2 and § 3 of this law, the ECHR is accorded precedence over Norwegian law in cases of conflict. Furthermore, the 1966 UN International Covenant on Civil and Political Rights (ICCPR), ratified by Norway in 1972, holds, in article 20(2), that, ‘any advocacy

10 See Eric Heinze, ‘Wild-West Cowboys versus Cheese-Eating Surrender Monkeys: Some Problems in Comparative Approaches to Hate Speech’, in Ivan Hare and James Weinstein (eds), Extreme Speech and Democracy (Oxford University Press 2009) 186.
13 See Menneskerettighetsloven nr. 30 (1999) <http://www.lovdata.no/all/hl-19990521-030.html>
of national, racial and religious hatred that constitutes incitement to discrimination, hostility and violence shall be prohibited by law’.14

One would perhaps have thought that, in the face of the genocide against Jews, Roma and homosexuals in Europe during World War II, in the aftermath of the war, European states would have rushed to enact legislation against racist and discriminatory speech.15 This was not the case, however, as this process took decades to develop. It is not particularly surprising that West Germany, in the face of resurgent Nazi activity, was at the forefront of these developments at a nation-state level. Indeed, the post-World War II 1949 Basic Law for the Federal Republic of Germany [Grundgesetz für die Bundesrepublik Deutschlands] already included strong anti-discriminatory provisions. In 1960, the West German Parliament [Die Bundestag] — through an amendment of the German Criminal Code article 130 — made it illegal to ‘incite hatred’ or to ‘insult parts of the population’ in a way that might disturb societal peace.16

In Eric Heinze’s words, ‘the 1960s witnessed worldwide acceptance of hate speech bans as set forth in international human rights treaties’.17 The introduction of legislation against racist and discriminatory speech in Germany was followed by the introduction of similar legislation in the United Kingdom (the Race Relations Act of 1965), which made it illegal to intentionally use threatening, abusive, or insulting language likely to stir up hatred against sections of the public on the grounds of ‘colour, race, or ethnic or national origins’. In France, Law no. 72-546 of 1972 banned racist speech that provoked discrimination, hatred or violence based on ethnicity, nationality, race or religion.18 In Denmark, a paragraph against racist and/or discriminatory speech first introduced in the Danish General Penal Code in 1939 was amended in 1971 as a result of ICERD. According to the new § 266(b) of the Danish General Penal Code, it was forbidden to engage in hateful speech based on ‘race’. In 1970, Sweden introduced a law against ‘hatred of ethnic groups’ [Hets mot folkgrupp].

15 Readers will note that I for the purposes of this paper prefer the term “racist and/or discriminatory speech” to the term “hate speech”. The latter is arguably ‘too broad a designation to be usefully analysed as a single category’. See Caleb Young, ‘Does Freedom of Speech Include Hate Speech?’ (2011) 17 Res Publica 385.
16 See Bleich (n 8) 159.
17 See Heinze ‘Wild West Cowboys’ (n 10) 184. The exception was the USA, which only ratified the ICCPR in 1992, and ICERD in 1994, and in both cases with reservations which pertained to the Conventions’ restrictions on freedom of expression.
18 See Bleich (n 8).
Jeremy Waldron argues in *The Harm of Hate Speech* that ‘most countries’ – including ‘the Scandinavian countries’ – that have enacted legislation in order to protect ethnic and racial groups from ‘threatening, abusive, or insulting publications likely to excite hostility against them or to bring them into public contempt’ have done so ‘pursuant to their obligations under Article 20(2) of the International Covenant on Civil and Political Rights’. In other words, it seems as if Waldron considers the enactment of such legislation in various Scandinavian countries to be a direct and causal consequence of ICCPR. In the case of both Norway and Denmark, strictly speaking this may not be entirely correct: in as much as the ratification of the 1965 ICERD Convention seems to have been much more important than the 1966 ICCPR (which only entered into effect at an international level in 1976) as an explanatory factor for the timing of the introduction of new and revised paragraphs in the national criminal codes against racist and discriminatory speech.

III. The Problem of “Public” and “Private”

The distinction between “private” and “public” speech is central to the definition of legally punishable racist and/or discriminatory speech under § 135(a). In order to be punishable under § 135(a), expressions of this nature have to be spread to a wider ‘general public’ [almennheten]. In its proposals for revising and amending the paragraph in 2002, the Holgersen Commission noted that, according to the legal statutes, it was unclear what would constitute a “general public” in legal terms. It pointed to a variety of interpretations in Norwegian courts regarding what this meant exactly. In one Supreme Court case (leading to a conviction under the paragraph in 1980), the presence of fifteen to twenty individuals was deemed sufficient for the expressions to have been made in “public”; while in another case, from 1995, the presence of six individuals was deemed insufficient for it to be so. These problems were made starkly apparent in the so-called Arve Beheim Karlsen case in Sogn in 2001. The Beheim Karlsen case was based on a criminal incident

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in the village of Naustdal in the province of Sogn and Fjordane (in western Norway) in 1999: a (then) seventeen year-old boy, originally adopted from India by an “ethnic Norwegian” couple, following a long period of racist abuse and harassment on account of his skin colour, was chased into a local river, where he then drowned. Witnesses testified in court that Beheim Karlsen had, in the presence of some of his closest friends, been referred to as a “the fucking negro” [“den jævla negeren”], “the damned darkie” [“den helvetes svartingen”], “nigger” [“nigger”] and so on by the defendants. The two defendants were originally charged with murder, but the prosecuting authorities eventually only reduced the charges against the two to violence and threats against Beheim Karlsen.

The racist murder of fifteen year-old Benjamin Hermansen at Holmlia in Oslo, perpetrated by three Norwegian neo-Nazis aligned with Boot Boys on 26 January 2001, was followed by a written instruction by the Director General of Public Prosecutions to all of Norway’s state attorneys inducing them to take a closer look at cases relating to racism in the country. This instruction would have direct repercussions for the Beheim Karlsen case. In addition to the original charges, the local state attorney decided to charge the two defendants with breaches of § 135(a). In its verdict, on 12 June 2001, the Indre Sogn Heradsrett [District Court] sentenced one of the defendants to three years, and the other to 18 months imprisonment for violence and threats against Beheim Karlsen, but acquitted them for breaches of the racism paragraph.23 The court’s argument was that the racist statements against Beheim Karlsen by the two defendants had been made in the presence of a limited number of people, and hence did not qualify as “public”. Both parties to the trial appealed the verdict, but the Gulating Lagmannsrett refused to hear the case on formal grounds.

The government-appointed Holgersen Commission, in its report on discrimination and equality in Norway from 2002, duly noted the problems of legally defining the term ‘public’ under the existing provisions of § 135(a). Accordingly, it proposed revisions making racist and/or discriminatory expressions that were not necessarily made in public or distributed to a (wider) public subject to criminalisation. These proposals were not endorsed by the Norwegian Parliament, who instead chose to retain the existing formulations whereby ‘public’ was, for legal purposes, defined as requiring the presence of “a greater number of persons” [større antall personer]. The definition of “public” under § 135(a) preceded the introduction of a revised and amended paragraph in 2005 subject to the defini-

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22 Indre Sogn Heradsrett 00-00160-M (2001).
23 Ibid.
tion of ‘public’ under the provisions of Norwegian General Penal Code § 7(2), introduced in 1902. Under § 7(2), an act could only be considered to have been committed in public if the act was committed [forøvet] through the publication of ‘printed matter’ [trykt skrift] or in the presence of ‘a greater number of persons’ [større antall personer]. The definition of ‘printed matter’ under § 7(2) was provided by § 10 of the Norwegian General Penal Code, by virtue of which it had to be ‘made available’ [mangfoldiggjøres] through printing, or another chemical or mechanical mode of reproduction in order to qualify as “printed matter”. The Odelsting Proposition, in which revisions and amendments to § 135(a) were proposed from 2004–2005, makes it clear that the ‘public’ under the new § 135 of 2005 includes expressions on various internet platforms, regardless of whether or not these are brought to public attention.24

IV. Laws against Racist and Discriminatory Speech: Illiberal and Illegitimate?

In using the term ‘free speech absolutism’, I draw upon the work of Professor Cass Sunstein, who has argued that such absolutism, in the case of the US and modern debates over the interpretations of the First Amendment provisions on freedom of expression of the US Constitution, is reflected in five defining claims:25

1) Any effort to regulate speech, by the nation or the states, threatens the principle of free expression;
2) All speech stands on the same footing [i.e. what is known in the literature as “viewpoint absolutism”];26
3) Free expression is not limited to “political speech”;
4) Any restrictions on speech, once permitted, have a sinister and nearly inevitable tendency to expand, and;
5) “Balancing” of competing interests ought so far as possible to play no role in free speech law.

For the purposes of this article I have dubbed Ronald Dworkin as an exponent of free speech absolutism, not only due to the fact that Dworkin is closely aligned with the present views of the US Supreme Court regarding how the First Amendment of the US Constitution should be interpreted, but also because he defended a free speech absolutism even in the context of the genocide in the Balkans in the 1990s: an attempted genocide preceded by years of racist and discriminatory speech targeting the Muslims of Bosnia in particular.27 Nor am I alone in contending that Dworkin is a prominent exponent of free speech absolutism, in our time.28

One argument often made by free speech absolutists is that laws criminalising racist and discriminatory speech are, by their very nature, bound to be “illiberal”, in that they infringe on personal autonomy29 and/or undermine democratic legitimacy.30 Furthermore, it is often argued by scholars skeptical of whether the legal apparatuses of states are the right instances for regulating such speech that European bans against racist and/or discriminatory speech are intrinsically suspicious in as much as they reflect the ‘hegemonic interests’ of European elites.31 Concerns over democratic legitimacy, in a time of ongoing crises of democratic sovereignty, cannot be ignored.32 Yet as a matter of fact, ‘virtually all law today’ happens to be ‘the products of elites’, and that applies for US as well as European laws.33 Laws against racist and/or discriminatory speech and their enforcement vary a great

28 See Holmes (n 27) 346, who also argues that Dworkin is a “free speech absolutist”.
29 The argument against restrictions on freedom of expression from “personal autonomy” is articulated by the late C Edwin Baker in ‘Autonomy and Hate Speech’ in Ivan Hare and James Weinstein (eds) Extreme Speech and Democracy (Oxford University Press 2009). For a critique, see Waldron (n 19) ch 6.
30 The argument against restrictions on freedom of expression from “democratic legitimacy” is expressed by Ronald Dworkin, ‘Foreword’ in Ian Hare and James Weinstein (eds) Extreme Speech and Democracy (Oxford University Press 2009). It is refuted in Waldron (n 19) ch 7.
31 See Robert Post, ‘Hate Speech’, in Ivan Hare and James Weinstein (eds), Extreme Speech and Democracy (Oxford University Press 2009).
33 See Heinze ‘Wild West Cowboys’ (n 10) 189.
deal between various nation-state contexts. This is not indicative of a conceptual flaw. For we accept that historical, political and social context matter in the formulation of other forms of legislation. Proponents of free speech absolutism tend to ignore the fact that the aim and function of much racist and discriminatory speech is precisely to undermine a central aspect of liberal democracies, namely the formally equal rights to citizenship, peace and dignity regardless of race, ethnicity, religion or sexual orientation.

Much racist and/or discriminatory speech sets out to undermine these equal rights to citizenship, peace and dignity, and to create an environment in which it becomes more difficult for the state to uphold these horizontal rights (ie rights that individuals holds vis-à-vis the state) by means of vertical (ie between individuals) attacks on the very legal and societal foundations of these rights. Social, political and historical contexts do matter, even in, and between, stable liberal democracies, in as much as histories of vilification, discrimination and persecution perpetrated by private citizens and/or the state against particular minorities can differ greatly. In the words of Dieter Grimm, ‘there can be no doubt that, despite its importance, freedom of speech is not an absolute right since speech can harm other liberties or protected interests’. Furthermore, ‘if one accepts that freedom of speech has a double basis in democracy as well as in dignity it seems difficult to privilege the democratic aspect and submit the individual dignity aspects to exigencies of democracy’. This is because ‘equality and dignity of human beings regardless of their gender, race, religion and similar classifications are themselves democratic values’. Erik Bleich similarly argues that, ‘striking a careful balance in legislation and enforcement is possible’. The Committee on the Elimination of Racial Discrimination (CERD) has repeatedly made it clear that it considers a balancing of rights and protections in this field to be both necessary, as well as required by the ICERD. In its Recommendation XV, from 1993,

34 See Bleich (n 8) 8.
36 See Bleich (n 8) 154.
37 See Grimm (n 35) 12.
40 See Bleich (n 8) 9.
it expresses the following view concerning how article 4 of the Convention is to be interpreted:

In the opinion of the Committee, the prohibition of all ideas based upon racial superiority or hatred is compatible with the right to freedom of opinion and expression…The citizen’s exercise of right [to freedom of opinion and expression under Article 4, my comments] carries special rights and responsibilities…of which the obligation not to disseminate racist ideas is of particular importance.41

In the conclusion to its report on Denmark in 1996, the committee expresses the view that ‘[the] due regard clause of article 4 of the convention requires due balancing of the right to protection from racial discrimination against the right to freedom of expression’.42

Furthermore, in the Committee’s report on the USA from 2001, it expressed the view that, ‘the prohibition of dissemination of all ideas based upon racial superiority or hatred is compatible with the right to freedom of expression, given that a citizen’s exercise of this right carries special duties and responsibilities, among which is the obligation not to disseminate racist ideas’.43 The public and media debate on freedom of expression and its limits in the wake of the terrorist attacks in Norway on 22 July 2011 suggests that the fact there is an individual legal obligation not to express or disseminate racist ideas which follows from various international conventions that Norway is a signatory to is poorly, if at all understood even among Norwegian political and academic elites.44 In the context of Norway, in calling for stronger governmental action on racist and/or discriminatory speech and more prosecutions for such speech after 22 July 2011, the Norwegian Equality and Anti-Discrimination Ombud [Likstillings- og diskrimineringsombudet] has also underlined the need to balance freedom of expression

42 Stortingsmelding nr 26,68–69.
43 Heinze ‘Wild West Cowboys’ (n 10) 186.
against the rights to protection against racist and discriminatory speech. In most countries – with the exception of the USA, where the US Supreme Court has moved ‘strongly towards a civil libertarian position’ in the course of the 20th century – then, a need to balance different rights defines the parameters of freedom of expression and its legal limitations.

Despite the fact that the US Supreme Court’s interpretations of the First Amendment of the US Constitution is firmly anchored in First Amendment principles, it is a mistake to assume that the legal parameters of freedom of expression and its limitations in the US are mere reflections of the First Amendment, and thus more or less constant. The text of the First Amendment is ‘ambiguous’ and ‘not absolute’. As Cass Sunstein has demonstrated, before the 20th century, there were few free speech cases in the federal courts, and government censorship of “harmful speech” was not held to violate the free speech principles of the First Amendment. Central to modern US legal interpretations of freedom of expression and its limitations is the prohibition of “viewpoint discrimination” by the state through the law and the courts. Put in other words, ‘the First Amendment should be understood as embodying a commitment to a strong conception of neutrality’, whereby ‘all speech stands on the same footing’. Accordingly, “hate speech” is not, and cannot, be prohibited under the First Amendment merely because it is deemed to constitute “hate speech”. There appears to be substantial cross-political support in the US for the principle that the response to “hate speech” or what I herein have referred to as racist or discriminatory speech is ‘more speech’. This is not to say that the US approach to freedom of expression is one which endorses absolutism: private and non-criminal regulation of

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45 See Sunniva Ørstavik, ‘Hatefulle ytringer må få konsekvenser’ ['Hateful expressions must have consequences'] (Aftenposten 7 August 2012).
46 For a good comparative analysis of European and US approaches, see Heinze ‘Wild West Cowboys’ (n 10) 182–203.
47 See Cass Sunstein, Democracy and the Problem of Free Speech (The Free Press 1993), xiv
48 Ibid 4.
49 Ibid 5.
speech through speech codes on college and university campuses, standards and practices in the broadcast and cable media and workplace harassment codes\textsuperscript{52} demonstrate that limitations of freedom of expression in the private sector may in fact be more widespread in the USA than it is in western Europe.

Following the US Supreme Court verdict in \textit{Schenk v United States} in 1919, ‘fighting words’ that constitute a ‘clear and present danger’ of unleashing violence are in fact liable to criminal punishment.\textsuperscript{53} The argument that freedom of expression stops at incitement to violence can be traced back to John Stuart Mill’s “harm principle”, as set out in Mill’s \textit{On Liberty} (1839) according to which: ‘…the only purpose for which power can be rightfully exercised over any other member of a civilized community, against his will, is to prevent harm to others’.\textsuperscript{54} However, terms such as “incitement to violence” can of course also raise a whole range of semantic issues, when they are to be applied by the courts with reference to existing laws in real-life contexts, as ‘the point at which a strongly voiced opinion shades into incitement to harm is rarely obvious’.\textsuperscript{55}

A minority of the Norwegian Supreme Court acknowledged a need for balancing in 2002, in the so-called \textit{Sjølie} case,\textsuperscript{56} when it argued that the reason why international law acknowledges the need for legal interventions in cases of racist and discriminatory expressions is that such interventions are aimed at protecting the fundamental human rights of other people, or in other words to protect people targeted by such expressions.

The argument that legislation against “hate speech” has no demonstrable empirical effect on incidences of hate speech in any given societal context is one that is often made by free speech absolutists. During his lecture at the Fritt Ord / New York Review of Books Conference in Oslo on 26 June 2012, Ronald Dworkin asserted that the incidence of hate crimes in the USA had fallen in recent decades, and that it had generally done so in western European countries without legislation against “hate speech”. He suggested that the best remedy against the hate crimes would be for any state to abandon all legal protections against “hate speech”.\textsuperscript{57}

\textsuperscript{52} See Jacobson and Schlink (n 50) 217–241.
\textsuperscript{55} Warburton (n 53) 31.
\textsuperscript{56} Høyesterett HR- 2001-01428 – Rt-2002-1618, (Saks nr. 361-2002) 17 December 2002 (The \textit{Sjølie} Case)
\textsuperscript{57} Dworkin, ‘Speech’ (n 3).
There are a number of problems with such assertions. Firstly, in most countries, we do not have anything like a reliable historical statistical baseline for diachronic comparisons of hate crimes. In the US, it was not until the passing of the 1990 Hate Crime Statistics Act that Congress managed to mandate federal collection of local data on such crimes.58 In Norway, police authorities have only registered and published data on such crimes since late 2006; after gay rights groups brought public attention to the phenomenon of hate crimes.59 Oslo Police in its last report on hate crimes in the Norwegian capital issued in 2010 openly admitted that due to lack of knowledge about the very existence of this category of crime, it is likely that a number of such crimes are not registered by police as hate crimes, and furthermore, that such crimes may therefore be under-reported.60 Secondly, a problem with using statistics on the incidence of hate crimes as a basis for comparisons within, as well as between, nation-state jurisdictions is, of course, the variation and inconsistency in not only that which is categorised as a “hate crime”, but also actual police registration of hate crimes. Moreover, the propensity for victimised individuals to report hate crimes varies a great deal between and within different national contexts, rendering cross-country comparisons virtually impossible.61 Of the 27 member states of the European Union, it is only Finland, Great Britain and Sweden, which collects and publishes data on levels of hate crimes motivated by racism in any systematic fashion.62 Furthermore, due to the unreliability of reporting and available statistics at federal level in the USA on this issue, it cannot be established with any degree of certainty that hate crimes have actually been decreasing there.

Moreover, Waldron’s argument in favour of European (and other countries’) restrictions on racist and discriminatory expressions is also linked to an argument anchored in liberal conceptions of citizenship, which Waldron holds must be defended more forcefully against encroachments from advocates of racism and discrimination than that which free speech absolutists happen to countenance. It does not rest on demonstrating an effect on the incidence of hate crimes in countries that happen to have legislation against “hate speech”. Importantly, Waldron points out that it is not arbitrary feelings of ‘offense’ that legal restrictions against

58 See Bleich (n 8) 116.
59 See Gisle Bruknapp, ‘Hatkriminalitet’ [Hate Criminality](MA thesis, University of Oslo 2009).
60 See https://www.politi.no/vedlegg/lokale_vedlegg/politidirektoratet/Vedlegg_1022.pdf
61 I wish to thank Anders Ravik Jupskås at the Department of Political Science at the University of Oslo, Norway for sharing his reflections on this with me.
62 Anders Ravik Jupskås, Ekstreme Europa (Cappelen Damm 2012) 221.
racist and/or discriminatory speech seeks to protect against, the central issue is, rather, substantive notions of individual ‘dignity’. By dignity, Waldron means to refer to ‘the sense of a person’s basic entitlement to be regarded as a member of society in good standing, as someone whose membership of a minority group does not disqualify him or her from ordinary social interaction’. He goes on to say, ‘...[t]he whole tendency of the hate speech laws that exist in the world is – and ought to be – to protect individuals, not groups as such’. The approach to ‘hate speech’ that Waldron defends is therefore one that is clearly distinct from attempts in recent years by various Muslim international organisations (most notably, the 57-member strong Organization of the Islamic Conference, OIC) to have various forms of “critique of religion” criminalised in and through UN Conventions, by reference to the purported “offense” that so-called “defamation of religion” constitutes.

The Norwegian law against blasphemy, § 142 of the Norwegian General Penal Code, makes it a criminal act to ‘by word or deed publicly’ ‘insult’ or ‘show contempt for any creed whose practice in the realm is permitted’ is still formally on the statute books, but has not been used since the 1930s, when the atheist author Arnulf Øverland was prosecuted for referring to Christianity as the ‘tenth plague of the country’ in a highly publicised lecture. Although it has been invoked by evangelical Christians in Norway in the context of the Monty Python comic film Life of Brian (1979), and by Muslims with respect to Salman Rushdie’s, Satanic Verses (1988), the Norwegian blasphemy paragraph is, to all practical purposes, a dead legal letter.

On the part of some Norwegian media editors and academics aligned with free speech absolutist views, there have in recent years been attempts to conflate legal

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63 For an excellent discussion of dignity discourses in philosophy, history and international law, see Michael Rosen, Dignity: Its History and Meaning (Harvard University Press 2012).
64 Waldron (n 19) 105.
65 Ibid 123.
66 For a critique, see Kwame Anthony Appiah, ‘What’s Wrong With Defamation of Religion?’, in Michael Herz and Peter Molnar (eds), The Content and Context of Hate Speech: Rethinking Regulation and Responses (Cambridge University Press 2012).
prohibitions against racist and discriminatory speech and blasphemy provisions, as if these pertained to the same legal and conceptual domains, and as if upholding the former would automatically lead to a “slippery slope” towards a re-introduction of blasphemy provisions in the form of applying legislation against racist and discriminatory speech to cases of alleged blasphemous acts. Their argument rests on spurious grounds. Upon closer inspection of the Norwegian Supreme Court’s practice with regard to the application of § 135(a), it is quite clear that the Court has long made and upheld the distinction between defamatory speech against ‘religion’ and racist and discriminatory speech against individuals. In the case against Vivi Krogh in 1981, who had distributed thousands of racist leaflets targeting Pakistani immigrants to Norway, the court found Krogh guilty of breaches of § 135(a) in that the statements in her leaflets were directed against Muslims. However, the majority of the court noted that it considered the leaflet’s statements concerning Islam and Norwegian immigration policy – regardless of its offensiveness – as speech protected under the Constitution’s § 100.

Although reference to “the legacy of the Enlightenment” is often made by contemporary “free speech absolutists” when arguing for diminished legal restrictions on freedom of expression, this largely expresses a popular myth rather than takes the relevant literature seriously to argue that the European Enlightenment philosophers advocated freedom of expression without restrictions. The liberal tradition in which Waldron stands in contemporary political philosophy arguably finds its clearest articulation in the work of the Canadian philosopher, Charles Taylor. A central argument for these philosophers in the philosophical tradition following Jean-Jacques Rosseau and Georg Wilhelm Friedrich Hegel is that we achieve ‘real’ freedom as individual human beings, in fact, through certain restrictions on freedom, and that certain limits on our own freedoms are legitimate.

69 See for example Frank Rossavik ‘Ett steg videre’ [‘One Step Further’], Op-ed commentary (Bergens Tidende newspaper 22 September 2012) for a case in point <http://blogg.bt.no/preik/2012/09/22/ett-steg-videre/>. For a pointed response, see Rune B. Steen ‘Tom kritikk av rasismeparagrafen’ [‘Empty critique of the racism paragraph’] (Bergens Tidende newspaper 27 September 2012). See also Alexandra Irene Larsen ‘Muhammedstriden: Ytringsfrihet under press [‘The Muhammed Conflict: Freedom of Expression under Pressure’], Samtiden 4 2012, 115, fn. 15 for a Norwegian academic who without any reference whatsoever to actual court cases in Norway or elsewhere in Europe engages in such spurious conflation.

70 See the Høyesterett Rt. 1981 – 1305 (the Vivi Krogh Case).

71 For another account of the legacy of the Enlightenment that questions this facile and popular view, see Tzvetan Todorov, In Defence of the Enlightenment (translated by Gila Walker, Atlantic Books 2009) 109–127.

72 See Heinze ‘Wild West Cowboys’ (n 10) 196.
means by which the freedoms of others may be enhanced.\textsuperscript{73} According to this view, social inclusion and formally equal rights to citizenship and individual dignity are ‘public goods’ in any liberal and democratic society.\textsuperscript{74} If one accepts the basic premise of philosophers in this liberal tradition, it seems reasonable to argue that the negative freedom to denigrate other human beings by engaging in racist and discriminatory speech is a freedom of lesser significance in its purposes, and that this freedom may be restricted by law in order to thereby enhance the positive freedoms of others.

V. The Application of the Norwegian “Racism Paragraph”

The legal record from Norway suggests that § 135(a) has, since its introduction in 1970, rarely been applied. Between 1977 and 2001, only seven people were prosecuted under § 135(a), and only six convicted of offences under the legal statute.\textsuperscript{75} Enforcement of legal provisions is of course a matter of both the police’s priorities in terms of allocation of investigative resources to various criminal offences, and the courts’ propensity to apply the law in specific cases brought to its attention. The record on this in the Norwegian case indicates that enforcement of the provisions of §135(a) has not been high on the list of priorities for the Norwegian police or the Norwegian courts. An examination of 130 cases brought under § 135(a) by the Norwegian Director General of Public Prosecutions in 2002, found that in half of the examined cases, police investigations had not been adequately carried out.\textsuperscript{76} A full record will not be presented in this article, instead I intend to focus on the record from the past fifteen years (1997 to 2012), as this is the period in which a notable shift in the conceptualisations of freedom of expression and its limits, and hence the willingness to apply § 135(a) seems to have occurred, at least in higher Norwegian courts. These shifts also illustrate that the manner in which § 135(a) is applied is historically contingent, and thus subject to shifts underpinned by developments in society at large. This illustrates a more general analytical point about the role and function of law in

\textsuperscript{73} Ibid 197.
\textsuperscript{74} Waldron (n 19) 95.
\textsuperscript{75} See John Are Moen and John Hultgren, ‘Bare seks dømt for rasehets på 24 år’ ['Only six convicted for racial harassment in 24 years'] (\textit{Aftenposten} newspaper 31 January 2001).
\textsuperscript{76} See European Commission against Racism and Intolerance (ECRI), ‘Third Report on Norway (Strasbourg 27 June 2003) 27 <http://www.unhcr.org/refworld/publisher,COECRI,COUNTRYSREP,NOR,46efa2e52d,0.html>
various societal contexts – a point central to what has become known as the field of legal anthropology – namely that the legal world is not in any societal context a world completely of its own. The period in question is also of particular interest and concern in this context, in as much as it was in this very period that the decisions of Norwegian higher courts, as well as the reluctance by the Norwegian police to prosecute cases of racist and discriminatory speech which resulted from some of these decisions, generated strong criticisms against Norwegian authorities from the CERD as well as the European Council’s European Commission Against Racism and Intolerance (ECRI). These criticisms, and the Norwegian government and parliamentarians’ reactions to them, appear to have been part of the impetus for the amendment of § 135(a) in 2005. In these amendments, in an attempt by Norwegian authorities to strengthen legislation against racist and discriminatory speech, most of the recommendations of the 2002 Holgersen Commission on Anti-Discrimination for revisions of §135(a) were then adopted.

VI. The Sjølie Case: The background

It was arguably with the acquittal of the Norwegian neo-Nazi leader Terje Sjølie for criminal offences under § 135(a) in 2002 that the Norwegian Supreme Court took the hitherto farthest step towards ascribing freedom of expression the status of a “trump” overriding any other rights. The Sjølie acquittal generated serious criticism of Norway by international monitoring bodies. The amendments and revisions of § 135(a), as well as the Norwegian Supreme Court’s own decisions in the limited number of cases relating to § 135(a), and its application since then, suggest that the Sjølie acquittal has not generated the legal precedent that many detractors feared it would – among them the Director General of Public Prosecutions.78 Instead, starting with the decision by the Appeal Council [Kjæremålsutvalget] of the Norwegian Supreme Court to refuse to hear the appeal against the conviction in the Tvedt case from Borgarting Lagmansrett in 2007,79

77 See Sally Falk Moore, Law and Anthropology: A Reader (Wiley-Blackwell 2005) for an introduction to the key texts of modern legal anthropology.
78 See for example, the comments of the Director General of Public Prosecutions, Mr Tor-Aksel Busch, in the aftermath of the Sjølie verdict, in which he personally appeared for the Prosecution in the Norwegian Supreme Court, in Eline Lønna, ‘Krever ny lovendring’ [‘Demands new legislation’] (Klassekampen newspaper 18 January 2002).
79 Borgarting Lagmannsrett 06-174077AST-BORG/02 14 May 2007 (The Tvedt Case).
and ending with the conviction in the most recent case in the Norwegian Supreme Court in March 2012, a gradual reversal of the legal trend epitomised by the *Sjølie* acquittal has been evident, along with a development towards a more careful balancing between the right to freedom of expression and the right to freedom from racist and discriminatory speech. In order to understand the outcome of the *Sjølie* case, it is, however, necessary to briefly refer to two significant developments in the legal and political field that preceded it.

On 28 November 1997, the Norwegian Supreme Court upheld a conviction against the lawyer and politician Jack Erik Kjuus in the Oslo City Court [*Byretten i Oslo*] from earlier that year. Kjuus had been sentenced by the Oslo City Court for offences against § 135(a). As leader of the miniscule extreme right-wing party White Electoral Alliance [*Hvit Valgallianse*], Kjuus had been charged, upon the initiative of the Director General of Public Prosecutions in Norway, for having distributed the political programme of his party. The party programme called for the forced sterilisation of children adopted to Norway; the forced sterilisation of “foreigners” in a relationship with a Norwegian partner, as well as any children born to such couples unless they divorced or left the country; and the abortion of any children conceived in such relationships. A majority of twelve Supreme Court judges reached the conclusion that Kjuus’ statements clearly referred to people of dark skin colour, that Kjuus’ had in fact called for ethnic cleansing, and that the statements could not be considered as protected political speech. A minority of five Supreme Court judges argued that, in as much as the statements were central to the political platform of Kjuus’ party, they were political, and thereby an example of particularly protected speech. This minority argued that to punish these statements would be equivalent to prohibiting Kjuus’ party and would thereby violate the constitutional protection for any party to operate freely, regardless of the views it espoused. It made specific reference to the Norwegian Constitution’s § 100, which the lower instance court had (according to the minority of the Supreme Court), not taken into due consideration. Previously, cases relating to § 135(a) had generated limited interest in Norwegian media and academic elites; the *Kjuus* case, however, would see significant mobilisation on

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80 Høyesterett HR 2012-00689-A (2012/143) 30 March 2012. The defendant in this case was not a public figure, and has not been named by any Norwegian media.
82 Ibid; Developments after the verdict would at least provide partial support for this contention: Kjuus’ party was eventually dissolved.
the part of Norwegian media editors and senior academics in favour of Kjuus’ right to freedom of expression. The secretary-general of the Norwegian Editors’ Association, Nils E. Øy, characterised the Supreme Court verdict as a ‘loss for free speech and free debate’. Kjuus appealed the verdict to the European Court of Human Rights (ECtHR). The court declared the case ‘manifestly ill-founded’ and refused to hear it in a decision in 2000.

The Kjuus case appears to have formed a significant background to the Freedom of Expression Commission’s arguments concerning the relationship between freedom of expression and racist and discriminatory speech. The Commission, which had been appointed by the Norwegian Ministry of Justice in 1996, was tasked with proposing a new and revised § 100 of the Norwegian Constitution. The Freedom of Expression Commission in its proposals regarding § 135 (a) in light of § 100 did not propose changing § 135 (a) substantially, proving more radical than Norwegian legislators in Parliament were prepared to accept. This fact makes the assertion on Professor Dworkin’s part regarding the alleged “unconstitutionality” of § 135 (a) in light of the new § 100 of the Constitution, which entered into force in 2004, seem even more absurd. In its report from 1999 the Commission did not at all advocate the abolishment of the Norwegian General Penal Code § 135(a) in light of the new formulation of § 100 of Norwegian Constitution it proposed. Nor is there any empirical evidence to suggest that Norwegian legislators or Norwegian courts have, at any point since the adoption of the new §100 by Parliament in 2004, considered § 135(a) to be problematic, in light of the formulations of the former paragraph. It is on these grounds that one may well characterise Ronald Dworkin’s view that the new § 100 of the Norwegian Constitution makes the racism paragraph § 135(a) “unconstitutional” as grossly exaggerated.

What the Freedom of Expression Commission did do, however, was to call for restricting the applicability of § 135(a) to extreme cases and to revise it so that individuals targeted by racism and discriminatory speech under the paragraph

83 On the list of witnesses for the defense in the Kjuus case figured Hans Erik Matre of the Norwegian Editors Forum [Norsk Redaktørforening]; University of Oslo Professors, Sigurd Skirbekk and Hans Fredrik Dahl; as well as the senior Conservative Party politician, Georg Apenes.
87 Dworkin, ‘Speech’ (n 3).
could only invoke legal protection against speech relating to innate biological characteristics and culturally inherited socio-cultural characteristics. Arguing that an individual's religious or other faith is a matter of choice, it sought to abolish the reference to 'religious faith' \([\text{trosbekjennelse}]\) in § 135(a). Significantly, however, neither the Ministry of Justice, nor the Holgersen Commission of 2002, whose proposals (rather than those of the Freedom of Expression Commission) provided the baseline for the revisions of § 135(a) adopted by Parliament in 2004 and entering into force in 2005, accepted the argument that faith was merely a matter of individual “choice”. In the final amendment, the term “religious faith” was replaced by the more inclusive “religion and view of life” \([\text{religion-og livssyn}]\), designed also to include non-religious life-stances. The Norwegian Ministry of Justice appears to have successfully argued that Norway would risk violating the prohibition of ‘religious hatred’ in ICCPR article 20(2), should the Commission’s proposals be endorsed. With regard to the impact of the new §100 in cases relating to freedom of expression that have come before the Norwegian Supreme Court after the paragraph entered into force in 2004, Kierulf has documented that the Norwegian Supreme Court makes rather limited reference to it as a source of law in its decisions.

On 17 December 2002, the Norwegian Supreme Court acquitted Boot Boys leader Terje Sjølie (1974–) of the charges brought against him under § 135(a) of the Norwegian General Penal Code. The Boot Boys were a group of neo-Nazi skinheads that had emerged in the eastern suburbs of the Norwegian capital of Oslo (particularly in Bøler), in the course of the late 1990s. Academic sources on the emergence of neo-Nazism among white Norwegian youth in the 1990s include Tore Bjørgo, “Racist and right-wing violence in Scandinavia: Patterns, perpetrators and responses” (TANO Aschehoug 1997); Katrine Fangen, \textit{En bok om nynazister} [A Book About neo-Nazis] (Universitetsforlaget 2001).
Failing to Protect Minorities Against Racist and/or Discriminatory Speech?

A march organised by the Boot Boys in the small town of Askim in eastern Norway on 19 August 2000. The march had been organised in commemoration of the German Nazi leader Rudolf Hess (1894–1987). Hess had served as deputy to Adolf Hitler [Stellvertreter des Führers] from 1933 to 1941 and came to be seen as the successor of Hitler after the latter’s death by suicide in Berlin, on 30 April 1945. At the Nuremberg trials in 1948, Hess was sentenced to life imprisonment, and spent the rest of his life incarcerated in Spandau Prison in West Berlin. The date the Boot Boys had chosen for its neo-Nazi march in Askim was the anniversary of Hess’ date of death in 1987. The Boot Boys had originally applied to hold the demonstration in Oslo. In response to Boot Boy's stated intent to hold a commemorative march for Rudolf Hess in the capital, some 134 organisations initiated a demonstration against neo-Nazis in Oslo. Local police authorities in Oslo had thrice turned down Boot Boys’ application to demonstrate; the counter-demonstration by Norwegian anti-racist organisations brought an estimated 15,000 people to Youngstorget, a square in Oslo at which the headquarters of the Labour Party as well as the national trade union alliance (LO) is located, on 19 August 2000.95 No permission to march in Askim had been granted by the local police authorities, so the march there was illegal. Subsequent to the march, local police arrested nine Boot Boys’ members close to the nearby town of Moss, for travelling in a stolen car with a false registration plate.96 An estimated 38 people took part in the Askim march, which lasted approximately fifteen to twenty minutes, and passed through Askim’s town center. According to media reports and footage, the Boot Boys’ members attending the march were dressed in semi-military attire and some participants shielded parts of their faces with scarves. Upon reaching the town square, Sjølie made a short speech in which he said the following words:

We are gathered here to honour our great hero, Rudolf Hess, for his brave attempt to save Germany and Europe from Bolshevism and Jewry during the Second World War. While we stand here, over 15,000 Communists and Jew-lovers are gathered at Youngstorvet in a demonstration against freedom of speech and the white race. Every day immigrants rob, rape and kill Nor-


wegians, every day our people and country are being plundered and destroyed by the Jews, who suck our country empty [dry] of wealth, and replace it with immoral and un-Norwegian thoughts. We were prohibited from marching in Oslo three times, whilst the Communists did not even need to ask. Is this freedom of speech? Is this democracy? Our dear Führer Adolf Hitler and Rudolf Hess sat [served] in prison for what they believed in. We shall not depart from their principles and heroic efforts. On the contrary, we shall follow in their footsteps and fight for what we believe in, namely a Norway built on National Socialism.97

After the speech, Sjølie asked for one minute's silence in honour of Rudolf Hess. This was followed by the crowd, led by Sjølie, who repeatedly made the right-wing Nazi salute and shouted the Nazi greeting 'Sieg Heil!' Sjølie, who had first been acquitted for criminal offences under § 135 (a) by Halden Byrett,98 and then been found guilty and sentenced to two years and eight months imprisonment for the same offences in Borgarting Lagmannsrett,99 had succeeded in his appeal to freedom of expression as overriding concerns for the rights of minorities in Norway. However, the Supreme Court was sharply divided in the Sjølie case. The majority of eleven Supreme Court judges, led by Mrs Ingse Stabel,100 argued that the rights to freedom of expression guaranteed by the Norwegian Constitution’s § 100 – as revised in 2000 – in this case were more important than the rights to protection from racism guaranteed by the Norwegian General Penal Code’s § 135(a). Also, a minority of six Supreme Court judges, represented by Mr Hans Flock,101 argued that the majority of the Supreme Court emphasised freedom of expression too strongly. Referring to the ICERD and the ICCPR, Flock pointed to Norwegian obligations under international law to protect the fundamental rights of individuals by acting against racist and discriminatory expressions.

Mrs Stabel, in turn, argued that Sjølie’s 2000 statements concerning Jews expressed 'a general endorsement of National Socialistic ideology', but that such

97 My translation of the speech is cited verbatim from The Jewish Community of Oslo v Norway (n 93).
98 Halden Byrett 00-000823 M 16 March 2001.
100 Stabel’s views were supported by Supreme Court judges Gjølstad, Lund, Gussgard, Coward, Stang Lund, Rieber-Mohn, Bruzelius, Utgård, Støle and Mitsem.
101 Flock’s dissent was supported by Supreme Court judges Flock, Aasland, Dolva, Matningsdal, Skoghøy and Schei.
endorsement could not necessarily be presumed to include endorsement of mass extermination or other systematic acts of violence against Jews or other groups.\textsuperscript{102} Sjølie’s 2000 statements concerning immigrants, she argued, ‘were intended to give expression to a fact’. Furthermore, she argued, ‘the fact is wrong, but is in its essence not dissimilar to what is often expressed in polarised expressions of opinion in debates on immigration or criminal justice’.\textsuperscript{103} Mrs Stabel also claimed – the extensive media coverage of the neo-Nazi march in Askim in 2000 and the very contents of Sjølie’s speech notwithstanding – that Sjølie’s statements constituted ‘a singular \textit{enkeltstående} appeal with limited \textit{begrenset} distribution’.\textsuperscript{104} Mr Flock, on the other hand, argued that in interpreting Sjølie’s statements, one had to take into account how these statements would be interpreted by those present. Bearing this in mind, Sjølie’s:

\textit{\ldots verbal expressions appeared to be much more than an offensive statement directed at Jews concerning economic exploitation and immorality. What was expressed had, judged in its entirety, to be seen as an acceptance of, and an endorsement of, the massive atrocities which Jews were exposed to in our recent historical past.}\textsuperscript{105}

Flock also argued that the Court would have to assume that Sjølie’s audience – or at least a section thereof – were in possession of ‘elementary knowledge both of Hitler’s and of the Nazis’\textsuperscript{106} views on Jews, and of the persecution and later extermination [of Jews, my insertion] which took place before and during World War II.’ It is significant in this context that neither the Supreme Court’s majority, nor the minority, found the statements Sjølie had made about immigrants to be in breach of § 135(a) of the Norwegian General Penal Code. The division of the Supreme Court in this case related specifically to Sjølie’s statements concerning Jews.

In arguing the case for the Norwegian State, the Director General of Public Prosecutions, Tor-Aksel Busch, had argued that the Norwegian Supreme Court had every opportunity to take the ‘context in which the statements were made’ into account. ‘Freedom of expression cannot be absolute’, Busch asserted, and

\begin{flushright}
\textsuperscript{103} Ibíd 1629.
\textsuperscript{104} Ibíd 1630.
\textsuperscript{105} Ibíd 1635.
\textsuperscript{106} Ibíd.
\end{flushright}
‘Boot Boys cannot be considered actors in political debate, as they are not a political party with a coherent program, and do not engage in open dialogue with others’. After the verdict, Busch made it clear in statements to the media that he would not propose the introduction of any new legislation in this field, and that he feared that the verdict would set a precedent in the Norwegian context, and have serious implications for the legal protection of the rights of minorities in Norway against racism.

It is an understatement to simply contend that the Norwegian Supreme Court majority’s arguments in favour of acquittal of Sjølie for offences against § 135(a) for his racist and discriminatory statements against Jews were problematic. Regarding the de-linking of endorsement of Nazi ideology from endorsement of Nazi atrocities that the Norwegian Supreme Court’s majority engaged in, the Sjølie case comes close to historical revisionism. It is hard not to conclude that Sjølie’s speech indicated that the defendant was well aware of the fact of the Nazi genocide against the Jews during World War II.

Furthermore, the Norwegian Supreme Court’s denial of an intimate linkage between endorsement of Nazi or neo-Nazi ideology and Nazi or neo-Nazi violent persecution of minorities is belied by the fact that, among those present at the Askim march and during Sjølie’s speech, was Ole Nicolai Kvisler (aged 22). Little more than six months after Sjølie’s Askim speech, Kvisler was the ring-leader of a group of three young Boot Boys members from Bøler who bludgeoned Benjamin Hermansen to death in 2001. The three neo-Nazis involved in the murder of Hermansen, Joe Erling Jahr (aged 20), Veronica Andreassen (aged 18) and Ole Nicolai Kvisler were sentenced to eighteen, three, and seventeen years respectively in prison by Borgarting Lagmannsrett. The three had set out from an apartment at Bøler on the day of the murder, armed with knives and planning to “attack immigrants”. Hermansen was a random victim, selected by the murderers on account of the colour of his skin. The Court found that the murder of Hermansen had been motivated by racism, and declared this to be an aggravating circumstance. In the first round of the trial at Oslo’s Magistrate’s Court [Oslo Tingrett], Jahr assumed all responsibility for the Hermansen murder. However, forensic evidence, along with testimonies from witnesses, suggested that two knives had been used in Hermansen’s murder. In the second round of the trial, Jahr testified to the effect that he had been in contact with Sjølie in the days after the

107 Ibid 1621–1622.
108 Borgarting Lagmannsrett 02-00850 M/01, 4 December 2002.
murder.\textsuperscript{109} In this context, Jahr, who had had an extremely troubled childhood and appeared the most impressionable of the three defendants, had consented to assuming full and sole responsibility for the Hermansen murder.

In the context of the media reception of the acquittal in the \textit{Sjølie}-case, it is noteworthy that newspaper editors, spanning from the left to the right of the political spectrum, welcomed the Norwegian Supreme Courts’ decision as a signal victory for freedom of expression in Norway. The acquittal of Sjølie for racism did seem to tie in with a nascent dogma concerning the sanctity of freedom of expression in Norwegian legal, political and media elites. It is not surprising, therefore, that, among the limited number of people who are still prepared to defend the acquittal of Sjølie in public in Norway, one finds both liberal media editors and academics.\textsuperscript{110}

\section*{VII. The Appeal of the Sjølie Acquittal to CERD}

The acquittal of Sjølie for criminal offences under §135(a) of the Norwegian General Penal Code by the Norwegian Supreme Court in 2002 would, over time, generate serious criticisms from various international bodies. In its third report on Norway in 2003, the European Commission Against Racism and Intolerance (ECRI) — a monitoring body set up by the European Council under its Vienna Declaration in 1993 — devoted a substantial amount of time on the Sjølie acquittal. It noted that:

\begin{quote}
ECRI considers that the Norwegian legislation, as it currently stands and is interpreted, does not provide individuals with adequate protection against racist expression. In ECRI’s opinion, this has become particularly apparent following the Supreme Court’s judgement of 17 December 2002 [the Sjølie case, my comment], which overturned a Court of Appeals decision to con-
\end{quote}

\textsuperscript{109} Jahr was the only one of the murderers who managed to flee the country in the hours after Hermansen’s murder. He was eventually arrested in neighbouring Denmark, from where he was extradited a few weeks after the murder.

demn the defendant for breach of Article [Paragraph, my comment] 135(a)…

ECRI deeply regrets that statements such as those [of Sjølie, my comment] in the circumstances and in the case in question may go unpunished.111

Representatives of the Jewish communities of Oslo and Trondheim and the Norwegian Centre Against Racism [Antirasistisk Senter, ARS], represented by legal counsel Frode Elgesem, lodged a formal complaint to the CERD. This body is tasked with supervising the interpretation and implementation of the ICERD,112 of which Norway is a signatory. CERD’s decisions are, however, non-binding for signatory states.113 The complainants claimed that Norway – through the Norwegian Supreme Courts acquittal in the Sjølie case – had violated articles 4 and 6 of ICERD. They noted that ICERD is concerned not only with ‘racist ideas as such’ but also the effects thereof. Furthermore, they claimed that, in light of the Norwegian Supreme Court’s decision in the Sjølie case, domestic remedies had effectively been exhausted and that ‘any legal proceedings taken by them in Norway would [therefore] have no prospect of success’.114 In its sixty-seventh session, from 2 to 19 August 2005, CERD considered the complaint, and found that the Norwegian Supreme Court’s decision were in violation of articles 4 and 6 of ICERD, as alleged by the complainants. CERD recommended that the Norwegian state ‘take measures to ensure that statements such as those made by Mr. Sjølie in the course of his speech are not protected by the right to freedom of speech under Norwegian law’.115 CERD gave Norway until 22 February 2006 to report on the measures undertaken to remedy the situation arising from the acquittal of Sjølie.

VIII. Norwegian Authorities’ Remedial Actions

Norwegian authorities, represented by the then-Minister of Justice, Odd-Einar Dørum (serving from 2001–2005) of the Social Liberal Party Venstre, which was in government at that time, promised to comply with the recommendations of

111 See ECRI (n 76) 27–28.
112 See Heinze, ‘Viewpoint Absolutism’ (n 26) 557.
113 The author wishes to thank Professor Michael Banton for clarifications on this point in personal correspondence from 2011.
115 Ibid 23.
the CERD Commission in regard to racist and discriminatory expressions. In the following years, Norwegian authorities would claim to international monitoring bodies that efforts to remedy the precedent set by the Norwegian Supreme Court in 2002 in the Sjølie case had been put in place.

From a fourth monitoring report on Norway by ECRI published in 2009, we learn that, due to alterations of § 100 of the Norwegian Constitution in 2004, and amendments to § 135(a) of the Norwegian Penal Code in 2003 and 2005, ‘statements such as those that were examined by the Supreme Court in December 2002 would be found to be in breach of Norwegian legislation’. With regard to § 135(a), the maximum penalty in case of violation was increased from two to three years imprisonment; gross negligence is sufficient for racist statements to be liable to prosecution; and it is no longer necessary for such statements to have been made in public or otherwise disseminated to the public. Norwegian state authorities consequently argued that subsequent alterations and amendments to Norwegian laws meant Norwegian authorities had signaled that racist expressions could be punished to a greater extent than they could before.

IX. The Norwegian Supreme Court and § 135(a) in the Wake of the Sjølie Acquittal

In the wake of the Norwegian Supreme Court’s acquittal of Sjølie in 2002, a period in which both the Norwegian police authorities and the lower courts interpreted these shifts as implying that racist and discriminatory speech ought to be prosecuted and sanctioned to a lesser extent than they had prior to 2002 apparently ensued. This was to be evident in the so-called Tvedt case. In 2003, the leader of the minuscule neo-Nazi organisation, Vigrid, Tore Tvedt, stated in an interview with the Norwegian tabloid newspaper VG that his organisation

118 On my reading of the relevant paragraph in its amended version, which entered into force in 2006, it is doubtful that the third interpretation of ECRI 2009 (concerning publicness no longer being a necessary requirement for prosecution) holds true.
119 See ECRI, 'Report on Norway (Fourth Monitoring Cycle)' (n 117) 12.
regarded ‘the Jews’ as their ‘main enemy’ and that Jews were ‘parasites that are to be cleansed from [the country]’. He furthermore claimed that members of his organisation received weapons-training, and wanted to take power in society, in order to be able to ‘wipe out the Jews’.\textsuperscript{120} Once again, it was the Jewish congregation in Oslo [\textit{Mosaisk Trossamfunn}] along with the Norwegian Centre Against Racism [\textit{Antirasistisk Senter}] which reported Tvedt to the police with reference to possible violations of the legal provisions of § 135(a). According to sources within these organisations consulted for this article, it took considerable time and effort in order to get Oslo Police Authorities to prioritise the case.\textsuperscript{121} Upon having considered the case for two years, the Oslo Police refused to prosecute Tvedt. An appeal to the state attorney at Borgarting led to another dismissal.

The case was only prosecuted after the Director General of Public Prosecutions decided to overturn the decision by the state attorney at Borgarting.\textsuperscript{122} Tvedt was first acquitted by Borgarting Lagmannsrett;\textsuperscript{123} although, on 21 December 2007, the Norwegian Supreme Court overturned the lower court’s acquittal of Sjølie, and found him guilty of offenses under § 135(a).\textsuperscript{124} Yet again, there was – as with the precedent set by the \textit{Kjuus} and the \textit{Sjølie} cases – support for Tvedt’s freedom of racist and discriminatory expression displayed by Norwegian media editors: the assistant secretary general of the Norwegian Editors’ Association, Arne Jensen, characterised it as ‘primitive’ to want to prohibit statements such as those which Tvedt had been charged for.\textsuperscript{125} Tvedt’s neo-Nazi organisation Vigrid, which never had much of a popular following, eventually dissolved in 2012.

In the latest verdict in cases relating to § 135(a), the Norwegian Supreme Court, on 30 March 2012, found an unnamed person guilty of violating § 135(a), and upheld the verdict of the lower courts.\textsuperscript{126} The individual in question had, in an intoxicated state, been refused entry into a bar by a doorman, in

\begin{itemize}
\item \textsuperscript{120} For the full original interview with Tvedt, see Marius Tøtli and Erik Veum (2003) ‘Her blir Kjersti (19) nynazist’ [‘This is where Kjersti (19) becomes a Neo-Nazi’], (VG 14 July 2003).
\item \textsuperscript{121} Private communication with Mrs Anne Sender of Mosaisk Trossamfunn, Oslo, 2011.
\item \textsuperscript{122} See -----’Riksadvokaten: Omgjør henleggelser av rasheits’ [The Director General of Public Prosecutions: Overturns dismissal of racial harassment’] (\textit{Monitor} 9 December 2005).
\item \textsuperscript{123} For the acquittal of Tvedt, see Borgarting Lagmannsrett 06-174077AST-BORG/02 14 May 2007. For a comment, see See Mona Levin ‘\textit{Jøder har svakt vern}’ [Jews have weak protections’], Op-ed., (\textit{Aftenposten} October 2007).
\item \textsuperscript{125} See Alexander Fredriksen, ‘\textit{Jødehets behandles av Høyesterett}’ [‘Harassment of Jews to be considered by the Supreme Court’] (NRK.no 13 December 2007).
\item \textsuperscript{126} See Høyesteret HR-2012-00689-A (Saks nr. 2012/143) 30 March 2012 <http://www.lovdata.no/hr/hr-2012-00689-a.html>
Failing to Protect Minorities Against Racist and/or Discriminatory Speech?

the city of Stavanger (on Norway’s West Coast) and reacted offensively. The doorman was of African origin, and on the date in question (in July 2010), in the presence of a significant number of people, the individual referred to the doorman as a “fucking Negro” [“jævla neger”] and a “fucking darkie” [“jævla svart-ing”]. A work colleague of the African doorman called to the scene was referred to as a “niggerlover”, and asked why “Negroes are permitted to work in Norway.” Compared with the verdicts in the Sjølie and the Tvedt cases before the Norwegian Supreme Court, this latest verdict, is however not necessarily directly comparable in terms of circumstances — nevertheless it could still indicate a lowering of the bar for convictions for racist and discriminatory speech under § 135(a).

X. Conclusions

Absolute freedom of expression does not exist anywhere in the world, and there are, as I have indicated in this article, valid legal, philosophical and societal reasons for this state of affairs.127 In line with international conventions, to which Norway is a signatory, such as ICERD and the ICCPR, I have in this article argued that a balancing between freedom of expression and an individual’s right to protection from racist and discriminatory speech in public is both necessary and appropriate. Based on Jeremy Waldron’s arguments in The Harm in Hate Speech, I have furthermore argued that it is individual dignity, and not feelings of offense, that the laws against racist and discriminatory speech seek to protect. In light of the available evidence, and on the basis of the Norwegian government and the Norwegian Supreme Court’s reversal of the highly problematic interpretation of freedom of expression and its limits under international law in the Sjølie case, I would argue that the Norwegian Supreme Court has managed to strike a balance in this field. For free speech absolutists such as Ronald Dworkin there seems to be no need for such balancing in the first place. With respect to this view, current legal developments, as expressed by the Norwegian Supreme Court’s verdict in cases relating to § 135(a) after the Sjølie case, would therefore seem to bring Norway in the wrong direction. Legal and political opinion is likely to continue to vary on these matters in the future and in an increasingly multicultural Norway. As we have seen in this article, in recent times, Norwegian media editors

127 Stanley E. Fish, There’s No Such Thing as Free Speech, And It’s A Good Thing Too (Oxford University Press 1994).
in particular have seemed particularly committed to positions of free speech absolutism, readily and repeatedly casting the Norwegian legal systems’ attempts to uphold prohibitions against racist and discriminatory expressions under § 135 (a) of the Norwegian General Penal Code, as well as Norway’s commitments to such prohibitions under international law, including ICERD and ICCPR, as instantiations of “assaults on free speech”. Disagreement is at the heart of a liberal democracy. But so are legal protections of the rights to formally equal citizenship and to dignity for all citizens. As I have argued here, the existence and application of Norway’s General Penal Code § 135(a) does not render Norway, or Norwegian law, illiberal or undemocratic, as the caricatures of free speech absolutists would have it.