



Taking the Bait? Lessons from a Hate Speech Prosecution

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Abstract

This article uses one case study to explore the use of criminal hate speech provisions against populist politicians. In a high-profile Finnish case, a populist politician was found guilty of hate speech after a four-year criminal process. Though the prosecution was ultimately successful, the various problems with the case helped boost the political popularity of the accused who was turned into a well-known public figure and member of Parliament. The case might thus be seen to warn against tackling populist politicians by means of criminal law. However, further analysis of the political context and a comparison with the Dutch prosecution against anti-immigration politician Geert Wilders complicate this conclusion. This article examines the consequences of hate speech prosecutions of politicians and sheds light on the conditions under which they can achieve (some of) their aims. The case also has lessons for other jurisdictions about when hate speech prosecutions of politicians are likely to be successful in terms of countering prejudice and disempowering those who spread it for electoral purposes.

Keywords: hate speech, freedom of expression, criminal justice, politics, Finland

Résumé

À l'aide d'une étude de cas, cet article explore l'utilisation des dispositions pénales sur les discours haineux contre les politiciens populistes. Dans une affaire finlandaise très médiatisée, un politicien populiste a été reconnu coupable d'incitation à la haine, suite à un procès criminel d'une durée de quatre ans. Bien que l'accusation ait été couronnée de succès, les divers problèmes liés à cette affaire ont contribué à accroître la popularité de l'accusé et ont fait en sorte de le transformer en un personnage public et un membre du Parlement bien connu. Cette affaire pourrait donc être perçue comme une mise en garde contre le danger d'utiliser le droit pénal contre les politiciens populistes. Cependant, une analyse approfondie du contexte politique ainsi qu'une comparaison avec la poursuite néerlandaise de Geert Wilders, un politicien anti-immigration, remettent en cause cette conclusion. Cet article examine les conséquences des poursuites pénales relatives aux messages haineux contre les politiciens et met en lumière les conditions selon lesquelles elles peuvent atteindre (quelques-uns de) leurs objectifs. Cette affaire offre également des leçons aux autres juridictions relativement aux circonstances selon lesquelles les poursuites de politiciens ont des chances de réussir.

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notamment lorsqu'il s'agit de contrer les préjugés et de retirer l'autorité à ceux qui en font la propagande à des fins électorales.

Mots clés : discours haineux, liberté d'expression, justice pénale, politique, Finlande

Introduction

Hate speech prosecutions are not uncommon in Europe, where many jurisdictions have criminalized the public spreading of hatred towards ethnic, racial, and religious minorities. Hate speech laws and the prosecutions conducted to enforce them are often controversial though usually held to be compatible with freedom of expression as guaranteed under the European Convention on Human Rights (ECHR). Originally designed to ward off xenophobic and anti-Semitic propaganda of the kind associated with the Holocaust, hate speech laws are now justified in Europe and in countries like Canada and New Zealand on the basis that they are needed to protect minorities from the promotion of hatred, to express disapproval of intolerance and to preserve multiculturalism (in contrast to the position in the United States where hate speech laws are largely held to infringe freedom of speech guarantees of the US Constitution).¹ Yet the success of these laws is mixed, especially when they have been mobilized against politicians. Though few systematic analyses have been conducted of the effect of prosecutions and/or convictions on voters' behaviour, examples such as Jean Marie Le Pen and Geert Wilders suggest that populist politicians' popularity can also be enhanced through hate speech prosecutions.

This article uses one case from Finland to explore the conditions under which mobilizing criminal law against politicians accused of publicly vilifying minorities can hope to reach at least some of the progressive aims of such prosecutions. In 2012, the Finnish Supreme Court found Jussi Halla-aho, a blogger and aspiring politician, guilty of disturbing religious peace and incitement to hatred against a racial group. The offenses were committed by writing and publishing a gratuitously offensive blog entry "as bait," that is, to test the limits of freedom of expression regarding what could be written about racial and religious minorities. The prosecutor general eventually took the bait, but in the four years the case took to work its way through the courts, the accused was transformed, largely thanks to the publicity around the case, from a small-time blogger to a prominent "immigration critic" and an outspoken member of Parliament. Moreover, the controversy raised the profile of the political party with whom he was and remains associated. The True Finns Party (Perussuomalaiset, hereafter the TF) is now an established part of the political landscape in Finland, driving, among other things, a populist anti-immigration and criminal justice agenda (and the revision of the hate speech law).

¹ About the similarities between the European and Canadian approach, see S. Sottiaux, "Bad Tendencies' in the ECtHR's 'Hate Speech' Jurisprudence," *European Constitutional Law Review* 7, no. 1 (2011): 40.

The rights and wrongs of criminalizing hate speech have been much discussed and this article does not revisit this well-trodden ground as such.² More pragmatically, the article accepts that many countries have such laws and that though they cannot eliminate bigotry, prosecutions can be thought of as one element in an antiracist strategy,³ aiming to reject dangerously exclusive ideologies and publicly affirm the inclusion of and tolerance towards minorities.⁴ The use of hate speech law evokes general debates about the benefits and drawbacks of legal mobilization as a progressive strategy. Trying to achieve social change through the courts has been debated especially in the US context, where some have argued that social reform litigation is ineffective or even counterproductive,⁵ while others are more optimistic about using the courts as a strategic resource, taking an approach that is less top-down and stressing aspects such as raised legal consciousness and transformation of public discourse.⁶ Recognizing the complexity of making assessments about indirect and long-term effects of court cases, Keck has noted, in the context of the US same-sex marriage litigations, that “the effectiveness of legal mobilization is quite variable, depending on a variety of contextual factors.”⁷ This article is concerned with such contextual factors and seeks to identify when mobilizing hate speech prosecutions against politicians can (or cannot) reach the prosecutions’ progressive aims.

Hate speech prosecutions of politicians, especially ones deliberately provoking the authorities to enhance their public profile, have a legal and a political context, both of which need to be evaluated to appreciate their consequences. The case against Halla-aho is interesting as the unfolding hate speech prosecution coincided with not just his personal electoral success but the transformation of Finland into a country where populist anti-immigration sentiment is cutting a swathe through politics. The case thus offers an ideal context for analysing the effects of the mobilization in terms of both the legal and the political results. The legal context is one in which prosecutorial action against hate speech is new, driven by slowly emerging recognition of the vulnerability of minorities. The aims and the eventual outcome of the prosecution were progressive — yet the case raised some

² For a sample of arguments for and against hate speech legislation, see I. Cram, *Contested Words: Legal Restrictions on Freedom of Speech in Liberal Democracies* (Aldershot: Ashgate, 2006), ch. 5; E. Heinze, “Viewpoint Absolutism and Hate Speech,” *Modern Law Review* 69, no. 4 (2006): 543; I. Hare, “Extreme Speech under International and Regional Human Rights Standards,” in *Extreme Speech and Democracy*, ed. I. Hare and J. Weinstein (New York: Oxford University Press, 2009), 62–80; M. Herz and P. Molnar (eds.), *The Content and Context of Hate Speech: Rethinking Regulation and Responses* (Cambridge: Cambridge University Press, 2012); J. Waldron, *The Harm in Hate Speech* (Cambridge, Mass.: Harvard University Press, 2012).

³ S. Fish, “Boutique Multiculturalism, or Why Liberals Are Incapable of Thinking about Hate Speech,” *Critical Inquiry* 23, no. 2 (1997): 393–4.

⁴ See, e.g., Waldron, *The Harm in Hate Speech*.

⁵ G. Rosenberg, *The Hollow Hope: Can Courts Bring About Social Change?* (Chicago, Ill.: University of Chicago Press, 2008).

⁶ M. McCann, “Reform Litigation on Trial,” *Law and Social Inquiry* 17, no. 4 (1992): 715; M. McCann, *Rights at Work: Pay Equity Reform and the Politics of Legal Mobilization* (Chicago, Ill.: University of Chicago Press, 1994); M. McCann, “Causal versus Constitutive Explanations (or, On the Difficulty of Being so Positive . . .),” *Law and Social Inquiry* 21, no. 2 (1996): 457.

⁷ T. M. Keck, “Beyond Backlash: Assessing the Impact of Judicial Decisions on LGBT Rights,” *Law and Society Review* 43, no. 1 (2009): 151.

legitimate concerns that could be used for countermobilization to undermine the intended message. As to the political context, until very recently, Finland had neither a sizeable immigrant community nor widespread anti-immigration sentiment and no political party making waves about immigrants and crime. The ways in which the transformation of the political landscape is connected to Halla-aho's prosecution can be investigated through comparisons with other hate speech prosecutions of politicians. In particular, the parallels with the case against Geert Wilders in the Netherlands shed light on the political ramifications of the case.

This article proceeds as follows. After a brief description of the blog entry of our protagonist, Mr Halla-aho, the article outlines the prosecution process and the Supreme Court's judgment that condemns Halla-aho's statements. The article then moves on to examine what the legal and political aspects of the case reveal about the conditions under which legal tools such as hate speech prosecutions can be successfully mobilized to reach their progressive objectives.

The Case against Halla-aho

The Baits

The case arose from a post published by Jussi Halla-aho on 3 June 2008 in his blog where, since 2003, he has routinely criticized (and still does criticize) Finnish immigration, refugee, and penal policies.⁸ At the time, Halla-aho was an aspiring politician, running as a candidate for Helsinki city council and having run — unsuccessfully — for Parliament in 2007. According to him, the piece in question was prompted by the conviction in the District Court of Tampere of the extreme right-wing activist Seppo Lehto on numerous charges, including libel, incitement to racial hatred, and disturbing religious worship. The blog entry was entitled “A few baits for Mika Illman” (“Muutama täky Illmanin Mikalle”) and contained as “bait” provocative remarks aimed at the prosecutor who had successfully prosecuted the case against Lehto. The baits were allegedly motivated by the desire to challenge the practice through which prosecutors were disproportionately targeting “immigration critics” (anti-immigration activists) for censorship. According to Halla-aho, ethnic minorities enjoyed a higher level of protection from criticism than the so-called majority population who could be verbally attacked with impunity. Prosecutors, especially Mika Illman, were thus allegedly upholding a double standard regarding freedom of expression.

The first bait was related directly to Lehto's conviction. In *Lehto*, the District Court of Tampere had stated, as part of its reasoning, that it was unlawful to insult the prophet Mohammed as he was “holy for Muslims.” Halla-aho wrote in response that surely Jesus and God are also holy as far as Christians are concerned, but that did not stop anyone from insulting them without criminal punishment. Allegedly to test his hypothesis, he made a generalized statement

⁸ J. Halla-aho, “Scripta. Kirjoituksia uppoavasta lännestä” (blog) (2003–14), <http://www.halla-aho.com/scripta/>. Accessed 22 July 2014. In 2008, the blog's followers created a new website (Hommaforum) that has become a popular anti-immigration forum. K. Horsti and K. Nikunen, “The Ethics of Hospitality in Changing Journalism: A Response to the Rise of the Anti-immigrant Movement in Finnish Media Publicity,” *European Journal of Cultural Studies* 16, no. 4 (2013): 489.

concerning Muhammad's life (related to his marriage to an underage girl) that associated Islam, as a religion, with paedophilia. The second bait was a sarcastic response to a Finnish columnist who had previously written in an editorial piece on alcohol use and violence published in a Finnish newspaper (*Kaleva*) that drinking excessively and killing while drunk were perhaps "national and possibly genetic characteristics" of Finns. These comments had not been deemed worthy of action by the Council for Mass Media (the body tasked with investigating complaints about journalists and to whom a complaint had been made). Halla-aho's response was to write in turn that the Somali minority in Finland was also characterized by a "national or genetic trait," namely, "robbing passersby and living as parasites at taxpayers' expense."

After months of deliberation and much public debate, the office of the prosecutor general took the bait(s) (though Illman himself was not officially involved in the case). Halla-aho was charged with disturbing religious worship and peace (Criminal Code, chapter 17, section 10; hereafter s.17:10)⁹ for the first bait. The second one resulted in a charge of inciting ethnic/racial hatred (Criminal Code, chapter 11, section 10; hereafter s.11:10).¹⁰ Of the two, inciting ethnic/racial hatred is the far more serious charge (liable to imprisonment for a term not exceeding two years as opposed to six months for disturbing religious peace). The charge was initially introduced in 1970 to comply with the United Nations International Convention on the Elimination of All Forms of Racial Discrimination.¹¹ In contrast, disturbing religious peace is a public order offense based on the old blasphemy offense and last modernized in 1998 to cover both blasphemy regarding the Christian God as well as public denigration of what any registered religious community considers "holy."¹² While the provision against inciting hatred is generally considered necessary, the retention of blasphemy in the guise of disturbing religious peace is more contentious in a largely secularized country (see below).

The Background of the Prosecution

The increasing mobilization of hate speech legislation and the decision to prosecute Halla-aho should be understood in Finland's immigration context. Unlike the other Nordic countries, Finland has become a country of immigration only since the end of the Cold War and overall numbers remain low.¹³ The vast majority of the population is white, Finnish-speaking, and Lutheran (or with no religious affiliation). Though immigration is recognised as an economic necessity, the discourse around immigration and especially refugees has often been negative. Refugees from Somalia, who started to arrive after the collapse of the Somali government in 1991 (coinciding with an economic recession in Finland),

⁹ "Uskonrauhan rikkominen," RL 17:10§.

¹⁰ "Kiihottaminen kansanryhmää vastaan," RL 11:10§.

¹¹ R. Neuvonen, *Sananvapauden sääntely Suomessa* (Helsinki: Lakimiesliiton Kustannus, 2012). The provision was expanded in 2011 to cover not only race, ethnic background, nationality, and religion but also sexual orientation, disability, or other comparable ground.

¹² *Ibid.*

¹³ OECD, "International Migration Outlook 2012" (2012), http://dx.doi.org/10.1787/migr_outlook-2012-en. Accessed 22 July 2014.

have been portrayed as particularly problematic.¹⁴ The Somali minority (now numbering about 13,000, by far the largest Muslim group in Finland and largely residing in urban areas) is both racially and religiously markedly different from the majority population. Despite Finland's generally progressive social welfare policies, Somali immigration has caused "integration issues," though proper analysis of the reasons is just beginning.¹⁵ What is clear is that Muslims from Somalia are also one of the most vulnerable minorities in Finland in terms of victimization through violence and discrimination.¹⁶ Issues around refugees have become increasingly politicized after the cartoon row in nearby Denmark (2006) and some much-publicized incidents of criminal activity by second-generation Somali youth in 2008. Much racist speech about the Somali community is published online, often anonymously.

These factors, together with the fact that Halla-aho had for some time been a vocal detractor of Muslim immigration, help explain why the prosecutor general's office took the bait. Despite increasing mobilization of criminal laws to deal with intolerant expression, neither inciting hatred nor disturbing religious peace is prosecuted frequently.¹⁷ This is notwithstanding the fact that unlike in some jurisdictions, Finnish public prosecutors are under a general duty to prosecute identified offenses, though action may be waived on the grounds of nonseriousness or, unless important public interest requires it, equity.¹⁸ In this case, media coverage quickly grew to the point where it became clear that for the prosecutor general's office not to take the bait, so publicly offered and in such taunting terms, would have risked more damage from allowing the statements to go without official reaction even though the blog entry was (deliberately) "borderline." As put by the ombudsman for minorities, a prominent advocate for mobilizing hate speech laws, the harms of such bigoted statements reside in their ability to offend those targeted, deepen prejudice, and, at worst, incite hatred.¹⁹ The blog post did not incite or endorse any course of action against Somalis, and no Somalis complained about the post (as it was published in Finnish and in an anti-immigration blog, they were unlikely to read it). The perception of harm was thus based on the blog entry's public nature and its potential to inspire further ill will towards the Somali minority.

The prosecution was thus pursued to send a signal that minorities are not fair game even in communications that are sarcastically represented as a critique of the

¹⁴ S. Aden, "Ikuisesti pakolaisina? Maahanmuuttokeskustelu Suomen somalialaisten näkökulmasta," in *En ole rasisti, mutta... Maahanmuutosta, monikulttuurisuudesta ja kritiikistä*, ed. S. Keskinen, A. Rastas, and S. Tuori (Tampere: Vastapaino, 2009), 47–64.

¹⁵ See A. Väänänen, *Maahanmuuttajien integroituminen suomalaiseen yhteiskuntaan* (Helsinki: Sektoritutkimuksen neuvottelukunta, 2009).

¹⁶ J. Niemi and I. Sahramäki, *Poliisin tietoon tullut viharikollisuus Suomessa 2011* (Tampere: Poliisiammattikorkeakoulu, 2012); Oikeuspoliittinen tutkimuslaitos, *Rikollisuustilanne 2011* (Helsinki: Oikeuspoliittinen tutkimuslaitos, 2012).

¹⁷ Oikeuspoliittinen tutkimuslaitos, *Rikollisuustilanne*. Similar patterns of sparing prosecution can also be seen, e.g., in Canada, Australia, and many European countries.

¹⁸ In contrast, for instance, in Canada hate speech prosecutions under section 319(2) of the Criminal Code require the consent of the attorney general. See J. Walker, "Canadian Anti-hate Laws and Freedom of Expression," Library of Parliament Background Paper, 2010-31-E (2013).

¹⁹ Vähemmistövaltuutettu, "Rasistiset ilmaiset," (2013), http://www.vahemmistovaltuutettu.fi/fi/etninen_syrjinta/rasismi. Accessed 22 July 2014.

authorities. This increasing use of hate speech prosecutions is in line with the Finnish tradition of employing the nation's traditionally moderate criminal justice system to send messages of public disapproval intended to operate as general prevention.²⁰ More interestingly, hate speech prosecutions also reflect the increasing trend, evident in other jurisdictions, to seek to utilize legal tools to protect the values of equality and dignity, often in line with existing international human rights obligations.²¹ Legal mobilization to protect minorities from intolerant expression is a relatively recent trend in Finland and Halla-aho became the first high-profile case, but similar mobilizations have occurred elsewhere. Halla-aho's comments about Islam and paedophilia were very similar to those made by Austrian far-right politician Susanne Winter; she was convicted for her statements in Austria in 2008.²² Moreover, Halla-aho's comments also evoke shades of the famous Danish cartoon controversy.²³ Halla-aho's remarks about Somali refugees, their criminal activity and living at taxpayers' expense, were also comparable to comments made in other countries by other "immigration critics," such as Jean Marie Le Pen and Geert Wilders, both of whom have been prosecuted for such remarks (if not always successfully, see below). In a way Halla-aho's prosecution brings Finland in line with the rest of Europe, which has been seeking to tackle hate speech for some time.

The Supreme Court's Judgment

At first instance, Helsinki District Court found Halla-aho guilty of the first but not the second (more serious) charge — that one was held to have been made within the bounds of lawful exaggeration and provocation. He was fined 30 day-fine units (EUR 330) and ordered to remove parts of his blog entry.²⁴ These findings were upheld on appeal.²⁵ On 8 June 2012, in a long-awaited judgment (four years after the publication of the comments), the Supreme Court found Halla-aho guilty of both disturbing religious peace and inciting ethnic/racial hatred.²⁶ The fine was increased to 50 day-fine units (EUR 400). In deciding on Halla-aho's criminal liability, the Finnish Supreme Court had to enter uncharted territory. Though there had been considerable public and academic debate over the definition of hate speech ("*vihapuhe*"),²⁷ this was the first time the Supreme Court was faced with

²⁰ T. Lappi-Seppälä, "Penal Policy in Scandinavia," *Crime and Justice: An Annual Review of Research* 36, no. 1 (2007): 217.

²¹ Canada has often been cited as one of the leading examples; Cram, *Contested Words*, 112. About Finland, S. Melander, *Kriminalisointiteoria: Rangaistavaksi säättämisen oikeudelliset rajoitukset* (Helsinki: Suomalainen Lakimiesyhdistys, 2008).

²² Winter, of the far-right Freedom Party, was fined EUR 24,000 and given a three-month suspended prison term.

²³ See K. Boyle, "Column: The Danish Cartoons," *Netherlands Quarterly of Human Rights* 24, no. 2 (2006): 185; R. Post, "Religion and Freedom of Speech: Portraits of Muhammad," *Constellations* 14, no. 1 (2007): 72; T. Modood, R. Hansen, E. Bleich, B. O'Leary, and J. H. Carens, "The Danish Cartoon Affair: Free Speech, Racism, Islamism, and Integration," *International Migration* 44, no. 5 (2006): 3; E. Bleich, *The Freedom to Be Racist: How the United States and Europe Struggle to Preserve Freedom and Combat Racism* (Oxford: Oxford University Press, 2011); P. Jones, "Religious Belief and Freedom of Expression: Is Offensiveness Really the Issue?" *Res Publica* 17, no. 1 (2011): 75.

²⁴ Helsinki District Court, 8 September 2009.

²⁵ Helsinki Court of Appeal, 29 October 2010. Both parties appealed.

²⁶ KKO:2012:58, 8 June 2012 (hereinafter "*Halla-aho*").

²⁷ For a study on s.11:10, see M. Illman, *Hets mot folkgrupp* (Helsinki: Suomalainen Lakimiesyhdistys, 2005).

interpreting what “inciting hate” means. In interpreting the limits of both offenses the Supreme Court explicitly relied on the Finnish Constitution, especially section 11, which guarantees freedom of thought and conscience and section 12, which provides everyone’s right to freedom of expression, as well as Finland’s international human rights obligations (most notably the ECHR).

The court accepted that the mental element of disturbing religious peace, section 17:10, has a high threshold: it requires an intention to denigrate what a religious community holds to be “holy.”²⁸ The court’s take in *Halla-aho* was that generally the line between legitimate criticism and denigration is crossed if it is clear from the context that the author seeks to vilify a religion rather than make reasoned comments. It is permissible to criticize, even sharply, religious doctrines without denigrating the religion²⁹ (it would be acceptable, for instance, to point out and criticize concrete instances of Muslim leaders using religiously inspired excuses to try and justify sexual abuse of young girls). The court thought it important that Halla-aho used highly derogatory language that is not normally used in critical and reasonable discourse: he generalized his statement about Mohammed to cover an entire religion, and his statements were expressed in strongly denigrating terms.³⁰ The court found from this use of polemical language that Halla-aho’s intention went beyond reasonable commentary and demonstrated an intention to offend — despite his protestations, his aim was not to start discussion about the problems related to Islam’s presence in Finland but to strengthen intolerance.³¹

A similar approach was adopted concerning inciting hatred, which requires a lesser degree of mental culpability. Section 11:10 criminalizes spreading among the public threatening, defaming, or insulting statements or other information against a group with knowledge of the statements’ nature.³² The Supreme Court held that Halla-aho’s claim about Somalis was defamatory and insulting. It accepted that Halla-aho’s motivation may have been, in part, to criticize the media and authorities (in the blog he specifically denied that he was generalizing or treating what he was writing “as a fact”; he was also careful not to incite any action typical of anti-immigration rhetoric). This, however, did not entitle him to defame and gratuitously insult Somalis as a group (again, it would have been possible to present his critique, even in sarcastic form, without defamation). The court argued that it was possible for some readers to consider that the claims were intended to be “taken seriously.”³³ It was also clear that Halla-aho had understood the defamatory and insulting nature of his claim (as evidenced by him calling it “a bait”). His statements were of the kind that could rouse “intolerance, loathing and possibly even hate” against the target group.³⁴

²⁸ Neuvonen, *Sananvapauden sääntely*, 421.

²⁹ *Halla-aho*, para 20.

³⁰ *Halla-aho*, para 21.

³¹ *Halla-aho*, para 22.

³² Neuvonen, *Sananvapauden sääntely*. The mental element is broad compared to other jurisdictions where intention is required; about similar issues around the British criminalization of incitement to religious hatred in 2006, see K. Goodall, “Incitement to Religious Hatred: All Talk and No Substance?” *Modern Law Review* 70, no. 1 (2007): 89.

³³ *Halla-aho*, para 38.

³⁴ *Halla-aho*, para 39.

Where hate speech laws exist, judges are required to make “difficult decisions as to what is acceptable, robust (maybe even offensive or hurtful) debate on controversial matters, and what crosses the line into creating hate of a kind that may lead to violence or other forms of harm.”³⁵ This is a demanding (and, some would argue, impossible) undertaking. In deciding that Halla-aho had crossed the line with regard to both charges, the court effectively chose not to believe Halla-aho’s account of his intention — that he wanted to satirically criticize authorities and promote political debate — but sided with the prosecutor general’s version by accepting that Halla-aho was simply out to attack a marginalized minority. The Supreme Court did not hesitate to take a wide view of the kind of expression that may generate hatred, regardless of whether the expression is linked to any incitement to discriminate or commit acts of violence. Though not particularly well argued, especially as the argument relies heavily on the gratuitous offensiveness of the blog entry,³⁶ the Supreme Court’s verdict harnesses the law to punish expressions of intolerance. The judgment, phrased in the language of human rights, sends a message about the potential dangers and unacceptability of intolerant speech — and indeed it was widely reported and welcomed by many commentators who considered that Halla-aho, having baited the authorities, deserved the consequences.³⁷

Halla-aho has recently taken his case to the European Court of Human Rights (ECtHR),³⁸ which will give its assessment in due course. Despite its shortcomings, the judgment is likely to be compatible with the case law of the ECtHR. There is no single approach to regulating hate speech — for instance, some countries also use complaints to human rights bodies in addition to prosecutions — but criminalizations have been held to be permissible under Article 10 ECHR, which allows freedom of expression to be restricted where necessary, for instance, “for the protection of the reputation and rights of others” (Art. 10(2)). The ECtHR gives states a wide margin of appreciation for deciding where to draw the line,³⁹ and the Supreme Court made many references to case law of the ECtHR. Regarding disturbing religious peace, *Otto Preminger Institute*⁴⁰ and *I.A.*⁴¹ give wide discretion to states in protecting the religious feelings of citizens.⁴² As to inciting racial/ethnic hatred, the Supreme Court quoted *Féret*,⁴³ which indeed is very similar, except that *Féret*

³⁵ C. Evans, “Religion and Freedom of Expression,” in *Religion and Human Rights*, ed. J. Witte Jr. and M. C. Green (Oxford: Oxford University Press, 2012), 193.

³⁶ About “gratuitous offense” as a problematic basis for criminalization, see I. Cram, “The Danish Cartoons, Offensive Expression, and Democratic Legitimacy,” in *Extreme Speech and Democracy*, 311–30; Jones, “Religious Belief.”

³⁷ J. Virolainen, “KKO 2012:58. Jussi Halla-ahon tuomio; sitä saa mitä tilaa,” *Virolainen* (blog), (8 June 2012), <http://jyrkivirolainen.blogspot.com/2012/06/607.html>. Accessed 22 July 2014.

³⁸ Yleisradio, “Päivän kansanedustajana Jussi Halla-aho (PS),” *Politiikkaradio* (29 January 2013), http://yle.fi/puhe/ohjelmat/politiikkaradio/jussi_halla-aho_5319.html. Accessed 25 May 2014.

³⁹ E.g., Cram, “Danish Cartoons”; Hare, “Extreme Speech”; Sottiaux, “Bad Tendencies.”

⁴⁰ *Otto Preminger Institute v Austria* (No. 13470/87), judgment 20 September, 1994.

⁴¹ *I.A. v Turkey* (No. 42571/98), judgment 13 September, 2005.

⁴² The ECtHR’s approach has sometimes come close to recognizing a right to have one’s religion exempted from criticism: J. Temperman, “Blasphemy, Defamation of Religions, and Human Rights Law,” *Netherlands Quarterly of Human Rights* 26, no. 4 (2008): 517. Though this is problematic (e.g., I. Leigh, “Damned if They Do, Damned if They Don’t: The European Court of Human Rights and the Protection of Religion from Attack,” *Res Publica* 17, no. 1 (2011): 55), cases like *Wingrove v UK* (No. 17419/90, judgment 25 November, 1996) affirm states’ wide discretion.

⁴³ *Féret v Belgium* (No. 15615/07), judgment 16 July, 2009.

(a Belgian politician), in addition to representing immigrants as both criminal-minded and welfare scroungers, endorsed taking action through expressions such as “Send non-European job-seekers home.”⁴⁴ Nevertheless, the underlying context of Halla-aho’s comments is very similar, especially in light of the rest of his blog.

A Counterproductive Legal Victory?

In some ways, prosecuting Halla-aho fulfilled the progressive aims of mobilizing hate speech laws: his eventual conviction by the Supreme Court was a sign that his inflammatory discourse was officially rejected and public tolerance towards minorities was affirmed. However, this was achieved at a high cost. The case against Halla-aho took nearly four years to work its way through the legal system. In that short time Finland was transformed from a country where “the issue of immigration has been able to generate few of the fears and frustrations that populist political organizations have been able to exploit in Norway and other European countries”⁴⁵ to one where anti-immigration has considerable political traction. This change started with the 2008 municipal election, in which Halla-aho’s writings became a focal point, also raising the profile of the TF, whose xenophobic faction Halla-aho heads.⁴⁶ As a result, immigration dominated the political landscape of 2008.⁴⁷ The TF made great electoral gains, and Halla-aho, who had built himself a following through his blog, secured a place on the city council of Helsinki. These gains were reinforced in the 2011 parliamentary elections, which gave the TF nearly 20 per cent of the vote, compared to 4.1 per cent in 2007, making it the third largest party in Parliament.⁴⁸ Halla-aho himself received the sixth highest share of the votes in the entire country and became a member of Parliament.⁴⁹ Halla-aho’s electoral popularity was last confirmed in the October 2012 municipal elections where he received the third largest number of votes in the entire country, doubling his popularity compared to the 2008 election — despite the recent judgment of the Supreme Court.⁵⁰

⁴⁴ The ECtHR, accepted *Féret* (sentenced to 250 hours of community service and barred from running for political office for 10 years) had made comments clearly liable to “arouse feelings of distrust, rejection or even hatred towards foreigners, especially among less knowledgeable members of the public.” Similarly, in the admissibility decision *Le Pen v France* (no. 18788/09, decision 20 April, 2010) the ECtHR said that while interferences with political speech should be strictly interpreted, presenting the Muslim community *as a whole* in a disturbing light was likely to give rise to feelings of hostility.

⁴⁵ J. Pratt, “Scandinavian Exceptionalism in an Era of Penal Excess: Part II: Does Scandinavian Exceptionalism Have a Future?” *British Journal of Criminology* 48, no. 3 (2008): 285.

⁴⁶ Halla-aho was initially (from 2007) an Independent on the TF list and joined the party in 2010.

⁴⁷ S. Keskinen, “Pelkkiä ongelmia? Maahanmuutto poliittisen keskustelun kohteena,” in *En ole rasisti*, 33–46; S. Keskinen, “Troublesome Differences – Dealing with Gendered Violence, Ethnicity, and ‘Race’ in the Finnish Welfare State,” *Journal of Scandinavian Studies in Criminology and Crime Prevention* 12, no. 2 (2011): 153; Horsti and Nikunen, “The Ethics of Hospitality.”

⁴⁸ D. Arter, “Taking the Gilt off the Conservatives’ Gingerbread: The April 2011 Finnish General Election,” *West European Politics* 34, no. 6 (2011): 1284.

⁴⁹ He also became chairman of Parliament’s Administrative Affairs Committee (contentious, as the committee deals with immigration affairs and Halla-aho’s views were well-known by then).

⁵⁰ After the Supreme Court’s judgment, Halla-aho did eventually resign from the position of chairman.

It could thus be argued that taking Halla-aho's bait, though consistent with Finnish criminal justice policy and allowed (perhaps even required) under human rights law, turned out to be counterproductive in practice. This claim, that "unpopular judicial decisions provoke political reactions that undercut their effectiveness," is often made with regard to progressive legal mobilizations in general.⁵¹ Even theorists who support hate speech laws in principle note that hate speech prosecutions can result in "bullhorn, justification and martyr effects."⁵² In other words, long trials provide a bullhorn for agitators to spread their message and to inflame tensions between communities; if the case fails, the accused can claim the statements were protected and thus justified by the court. If the prosecution is successful, the convicted can "become martyrs for the cause of free speech, portraying themselves as victims of a government that oppresses the 'honest' voice of 'real' citizens and patriots."⁵³ Bleich thus argues that "judicious enforcement" is essential for hate speech laws to work as intended.⁵⁴ However, judging "judiciousness" can be difficult, especially when the accused is a politician seeking publicity for political gain.⁵⁵

It is undeniable that the controversy around Halla-aho's blog gave him a bullhorn to use to turn himself into a household name and promote his political agenda (in addition to the baits, his other posts also created debate; one resulted in the Green Women's League reporting him to the police).⁵⁶ Understandably, the media furore around his prosecution encouraged many to read his blog where his policy recommendations, especially on criminal justice and immigration, were elaborated on in detail. Halla-aho also quickly released a book of his blog entries,⁵⁷ which sold out in just three days, and his writings have subsequently been subject to much critical and academic analysis.⁵⁸ The publicity around his statements raised not just Halla-aho's profile but the salience of immigration issues, supporting his political campaign, which in turn boosted the prominence of the TF, the party he was associated with.⁵⁹ The extensive reporting on Halla-aho's views in the traditional media followed in the wake of growing

⁵¹ Keck, "Beyond Backlash," 152. See also Rosenberg, *The Hollow Hope*.

⁵² Bleich, *The Freedom to Be Racist*, 28.

⁵³ Ibid.

⁵⁴ E. Bleich, "The Rise of Hate Speech and Hate Crime Laws in Liberal Democracies," *Journal of Ethnic and Migration Studies* 37, no. 6 (2011): 929.

⁵⁵ See J. van Spanje and T. Weber, "Political Trials and Their Effects on Public Opinion: A Survey Experiment," Paper prepared for the 2010 APSA Annual Meetings, Washington, DC, 2010; J. van Spanje and C. de Vreese, "The Good, the Bad and the Voter: The Impact of Hate Speech Prosecution of a Politician on Electoral Support for his Party," *Party Politics* (published electronically February 12, 2013), DOI: 10.1177/1354068812472553.

⁵⁶ M. Maasilta, "Johdanto," in *Maahanmuutto, media ja eduskuntavaalit*, ed. M. Maasilta (Tampere: Tampere University Press, 2012), 7–22.

⁵⁷ J. Halla-aho, *Kirjoituksia uppoavasta lännestä* (Helsinki: Jussi Halla-aho, 2009).

⁵⁸ V. Hytönen (ed.), *Mitä Jussi Halla-aho tarkoittaa?* (Turku: Savukeidas, 2010); J. Förbom, *Hallan vaara. Merkintöjä maahanmuuton puhetavoista* (Helsinki: Into Kustannus, 2010); M. Mattlar, "Retoriikkaa ja rikostutkintoja – maahanmuuttokriitikko Jussi Halla-aho marginalisoitui häiriköksi," in *Journalismikritiikin vuosikirja 2010*, ed. K. Kyrölä (Tampere: Journalismin tutkimusyksikkö, Tampereen yliopisto, 2010), 53–60; S. Keskinen, "Maahanmuuttokeskustelu ei ole yhden miehen varassa," in *Journalismikritiikin vuosikirja 2010*, 61–4.

⁵⁹ J. Rahkonen, "Satumaan tango soi taas: Mikä selittää perussuomalaisten rakettimeista nousua?" *Yhteiskuntapolitiikka*, 75, no. 5 (2010): 547; Maasilta, "Johdanto."

populist commentary in the “new” media where Halla-aho had already gained a following of “immigration critics” through his blog and where he portrays himself as an unjustly persecuted advocate of freedom of expression.⁶⁰ The prosecution of Halla-aho combined freedom of speech, immigration, and crime, a combination sure to attract media interest. The interpretation of the legislation used against him, the (dis)proportionality of his punishment, and the (il)legitimacy of Halla-aho’s views on the criminality of immigrants thus received wide coverage for years.

After the verdicts of the lower courts, some commentators on Halla-aho’s side argued (somewhat inconsistently) both that the courts had justified Halla-aho’s polemical views (the comments about Somalis, for which he was acquitted) and that he was (nonetheless) also a martyr for free speech (because he was found guilty of disturbing religious peace).⁶¹ However, after the Supreme Court’s final findings of guilt on both charges, the free speech martyr narrative became the overriding theme for Halla-aho and his supporters. The judgment provided “proof” that minorities, unlike ethnic Finns, were indeed more protected by elitist prosecutors and courts than the “native population” of ordinary Finns (whom Halla-aho portrayed himself as representing).⁶² In that sense, the Supreme Court gave Halla-aho exactly what he wanted to turn himself into a defender of free speech, despite the dubious contribution of his comments to political debate. Populist politicians in particular thrive on representing themselves as the honest voice of the people, persecuted by undemocratic elites.⁶³ Though the arguments about double standards are disingenuous — the white Finnish majority is far less, if at all, in need of protection from vilification than minorities — the judgment gave Halla-aho the opportunity to dismiss the findings as unjust and label them just a “personal interpretation of a few individuals.”⁶⁴

It would be hard to avoid the bullhorn and martyr effects altogether — as many have noted, they are probably part and parcel of any hate speech prosecution.⁶⁵ However, especially where the accused is a politician, prosecutions can raise questions about the possibly politically motivated nature of the prosecution.⁶⁶ Halla-aho’s case was particularly difficult in this regard because several factors

⁶⁰ M. Maasilta, “Perinteinen ja sosiaalinen media ruokkivat toinen toisiaan,” in *Maahanmuutto, media ja eduskuntavaalit*, 23–51; Horsti and Nikunen, “The Ethics of Hospitality.”

⁶¹ O. Lintula, M. Tanni, and H. Luoto, “Halla-ahon tuomiosta,” *Sananvapauden puolesta* (blog) (30 October 2010), <http://www.sananvapaudenpuolesta.fi/index.php?sivu=julk1010>. Accessed 25 May 2014.

⁶² N. Lipsanen, “Korkein oikeus vahvisti kaksoisstandardin,” *Lipsanen & Ruso* (blog) (8 June 2012), <http://lr.domnik.net/2012/06/halla-aho-korkein-oikeus/>. Accessed 22 July 2014.

⁶³ D. Albertazzi and D. McDonnell, “Introduction: The Sceptre and the Spectre,” in *Twenty-First Century Populism*, ed. D. Albertazzi and D. McDonnell (Basingstoke: Palgrave Macmillan, 2008), 4.

⁶⁴ See J. Halla-aho, “Tiedote 11.6.2012,” (11 June 2012), http://yle.fi/tvuutiset/uutiset/upics/liitetiedostot/halla_aho_tiedote_110612.pdf. Accessed 25 May 2014.

⁶⁵ See e.g. Bleich, *The Freedom to Be Racist*. This widespread doubt is also expressed by Justice McLachlin’s (dissenting) opinion in the Canadian case *R v Keegstra* (3 SCR 697 (1990)): “Not only does the criminal process attract extensive media coverage and confer on the accused publicity for his dubious causes, it may even bring him sympathy.”

⁶⁶ About political trials, motivated by the desire to punish political opposition, considered a betrayal of liberal principles, see E. A. Posner, “Political Trials in Domestic and International Law,” *Duke Law Journal* 55, no. 1 (2005): 75.

enabled countermobilization around claims of political motivations. Some relate to the law and its interpretation. The baits were cleverly set and pushed the case far away from the core meaning of “inciting hatred.” The Supreme Court’s broad view of punishable expression, based on knowledge about the content of the statement, not intention to incite, is genuinely contentious. Nor did the judgment actually bring much clarity to the limits of s.11:10, despite finding Halla-aho guilty.⁶⁷ Moreover, the combination of charges of in *Halla-aho* — incitement and disturbing religious peace — was also questionable as it linked the progressively oriented incitement argument to widespread criticisms of the use of retrograde “blasphemy law” (i.e., s.17:10). Many consider s.17:10 anachronistic in a largely secular state.⁶⁸ The provision has been particularly (in)famous since a 1960s prosecution against a well-known author and is associated with censorship.⁶⁹ In many jurisdictions blasphemy laws have recently been abolished (notably in the UK⁷⁰), but in Finland, it was controversially extended to all registered religions.⁷¹ The combination of charges thus served to weaken the progressive message intended by the prosecution.

These legitimate concerns about legal weaknesses were compounded by other concerns that enabled counterframing of the prosecution as driven by partisan motivations and of Halla-aho as a victim persecuted by hypocritical elites seeking to suppress criticism against themselves and their policies. One of these was the allegation that the prosecutor general’s office was engaging in selective (and even personally motivated) prosecutions, targeting Halla-aho as his political career was taking off.⁷² Halla-aho had written similar comments online about both Islam and paedophilia⁷³ and immigrants and crime⁷⁴ before his political aspirations were evident, but no prosecution had been undertaken at the time. The role of the prosecutor to whom the baits were addressed also highlighted the problematic power of experts and the multiple hats they sometimes wear. Mika Illman, named in Halla-aho’s post and whose colleagues at the prosecutor general’s office took the bait, is not only known for his track record on mobilizing hate speech laws but one of the leading academic authorities on incitement to hatred⁷⁵ and a member of the Ministry of Justice’s working group on reforming hate speech laws.⁷⁶ Such multiple roles are not unusual in the small legal circles of Finland, but they did give some credibility to claims that hate speech prosecutions can, at the very least, appear to

⁶⁷ Electronic Frontier Finland, “Lain tulee suojata sananvapautta paremmin,” (15 June 2012), <http://www.effi.org/uutiset/120615-effi-lain-tulee-suojata.html>. Accessed 22 July 2014.

⁶⁸ Lintula, Tanni, and Luoto, “Halla-ahon tuomiosta.”

⁶⁹ Even if religious sentiments still need protection, s.17:10 is no longer necessary, as s.11:10 also covers religiously motivated hatred. Neuvonen, *Sananvapauden sääntely*, 421–22.

⁷⁰ Regarding England and Wales, see R. Sandberg and N. Doe, “The Strange Death of Blasphemy,” *Modern Law Review* 71, no. 6 (2008): 971; see also Temperman, “Blasphemy, Defamation.”

⁷¹ See also Heinze, “Viewpoint Absolutism,” 559.

⁷² S. Hankamäki, “Viimeinen voitelu,” *J. Sakari Hankamäki* (blog) (19 August 2009), <http://jukkahankamaki.blogspot.com/2009/08/viimeinen-voitelu.html>; T. Vihavainen, “Maallinen ja taivaallinen totuus,” *Vihavainen* (blog) (13 June 2012), <http://timo-vihavainen.blogspot.com.au/2012/06/maallinen-ja-taivaallinen-totuus.html>. Accessed 22 July 2014.

⁷³ Halla-aho, “Scripta” (19 May 2005).

⁷⁴ Halla-aho, “Scripta” (22 September 2005).

⁷⁵ See Illman, *Hets mot folkgrupp*.

⁷⁶ Electronic Frontier Finland, “Lain tulee suojata.”

be politically motivated witch hunts aiming to suppress populist politicians' voices and their critical views of the authorities.⁷⁷

Such criticisms over the political nature of prosecution against Halla-aho tapped into a longstanding shadow of silencing tendencies in Finnish legal and political culture, including the use of criminal punishment against individual citizens. Though Finland is lauded abroad for its human rights record, including for upholding freedom of the press,⁷⁸ at the same time it has received a large number of adverse judgments from the ECtHR on Article 10 cases, especially compared to other Nordic countries.⁷⁹ Often the ECtHR has found that Finnish authorities, notably the Supreme Court, have excessively limited freedom of expression by upholding criminal convictions. For instance, journalists who have written about politicians have been improperly convicted of defamation or invasion of privacy.⁸⁰ The sheer number of cases suggests that the Supreme Court has not always been successful in balancing freedom of expression with other rights. Some commentators condemned Halla-aho's conviction as part of this disquieting trend.⁸¹ The long historical roots of this cultural tendency are often discussed — most obviously, it is connected to the political pressures of the twentieth century and the shadow of “Finlandization” (the infamous self-censorship of the Finnish political and media elite vis-à-vis the Soviet Union during the Cold War),⁸² but it is also sometimes linked to Finland's Hegelian political legacy, which is less accepting of critique of authorities than liberal ideology.⁸³ All this facilitated the counterframing of Halla-aho as another unjustly silenced victim of institutions seeking to curb his freedom of expression for political reasons.⁸⁴

Against this backdrop, it is possible to see how these factors could partly destabilize the intended message of the prosecution and enable effective countermobilization.⁸⁵ Not all of the issues could have been avoided. For instance, media outlets are prone to take an interest in reporting “anything that ‘breaks the routine’ in political arenas.”⁸⁶ The first hate speech prosecution of a politician is clearly newsworthy in that sense (and in any case, the media coverage of Halla-aho was not uniformly on his side).⁸⁷ More important, however, the legitimacy of the

⁷⁷ Hankamäki, “Viimeinen voitelu”; Vihavainen, “Maallinen ja taivaallinen.”

⁷⁸ Freedom House, *Freedom of the Press: 2013 Freedom of the Press Data*, (2013), <http://www.freedomhouse.org/report-types/freedom-of-the-press>; Reporters Without Borders, *Press Freedom Index 2011-2012* (25 January 2012), <http://en.rsf.org/press-freedom-index-2011-2012,1043.html>. Accessed 22 July 2014.

⁷⁹ P. Tiilikka, *Sananvapaus, yksilönsuoja ja lähdesuoja Ruotsissa, Norjassa ja Alankomaissa sekä Euroopan ihmisoikeustuomioistuimen ratkaisukäytännössä* (Helsinki: Oikeusministeriö, 2010); R. Neuvonen, “Median, tuomioistuinten vai poliitikkojen sananvapaus?” in *Journalismikritiikin vuosikirja 2010*, 33–41.

⁸⁰ See ECtHR judgments *Flinkkilä and others v. Finland*, *Soila v. Finland*, *Iltalehti and Karhuvaara v. Finland*, *Tuomela and others v. Finland* and *Jokitaipale and others v. Finland*, all 6 April 2010.

⁸¹ T. Aarni, “Halla-aho, sananvapaus ja Suomen oikeuslaitos,” *Uusi Suomi* (8 June 2012), <http://tuomasaarni.puheenvuoro.uusisuomi.fi/108077-halla-aho-sanavapaus-ja-suomen-oikeuslaitos>. Accessed 22 July 2014.

⁸² Neuvonen, “Median, tuomioistuinten,” 33.

⁸³ T. Pulkkinen, “Snellmanin perintö suomalaisessa sananvapaudessa,” in *Sananvapaus*, ed. K. Nordenstreng, (Helsinki: WSOY, 1996), 194–209.

⁸⁴ Aarni, “Halla-aho, sananvapaus.”

⁸⁵ Rosenberg, *The Hollow Hope*.

⁸⁶ G. Mazzoleni, “Populism and the Media,” in *Twenty-First Century Populism*, 50.

⁸⁷ Maasilta, “Perinteinen ja sosiaalinen,” 31–33.

prosecution suffered from a perceived lack of impartiality. Even some nonracist websites have published Halla-aho's post in full in the name of supporting his freedom of expression (Halla-aho himself was required by the courts to remove the offending parts of his post).⁸⁸ The continued availability of the text, of course, highlights the difficulty of controlling the online world as a medium for disseminating racist ideas; more pertinently, it also shows that insofar as the aim of the prosecution was to stigmatize Halla-aho's intolerant discourse, it has instead led some who would not support his policies to undertake a principled protest against the perceived overreach of the criminal law and the silencing of criticism (however stereotypical and offensive).⁸⁹ Although this issue might have been reduced by avoiding the blasphemy charge, it could be argued there is also legitimate room for debate about the scope of the incitement law — and that taking the baits revealed the law's arguably overbroad reach. That suspicion of overreach undermined faith in the outcome.

The Political Ramifications through a Comparison

It thus far been argued that Halla-aho's conviction turned out to be, at best, an ambiguous progressive legal victory. The meteoric political rise Halla-aho and the TF have enjoyed since the blog entry was first published seems to prove the point of van Spanje and Weber, who suggest that hate speech prosecutions are risky precisely because they may *increase* the legitimacy of polemic statements (though officially marginalizing them), especially in jurisdictions where high-profile prosecutions (especially of politicians) are relatively new.⁹⁰ For many, the electoral outcomes since 2008 are a sign that Finland is about to follow countries like the Netherlands or Denmark, where populist right-wing anti-immigration rhetoric has taken a firm hold.⁹¹ Halla-aho remains Finland's dominant anti-immigration politician, and immigration has become a lasting theme in Finnish politics, which suggests that Halla-aho and the TF managed to associate themselves with (initially) latent voter concerns over immigration and disenchantment with existing parties.⁹² However, the political context of a hate speech prosecution is likely to be more complex. While some voters may be encouraged to vote for a politician whose profile is increased by the prosecution, others would likely be turned off by the accusation of racism.⁹³ Though a comprehensive political analysis is beyond the scope of this paper, this final section examines the political consequences of the prosecution through a comparison.

Halla-aho's prosecution linked him with (far more notorious) right-wing politicians, such as Jean Marie Le Pen in France, Nick Griffin in the UK, and Geert

⁸⁸ For instance, see J. Keronen, "Jussi Halla-ahon tuomioon johtanut kirjoitus," *Helvetin Puutarha* (blog) (8 June 2012), <http://keronen.blogspot.com.au/2012/06/jussi-halla-ahon-tuomioon-johtanut.html>. Accessed 22 July 2014.

⁸⁹ Heinze, "Viewpoint Absolutism," 569, identifies "out-citizenizing" as one of the most serious objections to prosecutions of mere opinions.

⁹⁰ Van Spanje and Weber, "Political Trials," 18–19.

⁹¹ D. Arter, "The Breakthrough of Another West European Populist Radical Right Party? The Case of the True Finns," *Government and Opposition* 45, no. 4 (2010): 484.

⁹² Such concerns were identified by E. Kestilä, "Is There Demand for Radical Right Populism in the Finnish Electorate?" *Scandinavian Political Studies* 29, no. 3 (2006): 169.

⁹³ Van Spanje and de Vreese, "The Good, the Bad."

Wilders in the Netherlands, all of whom have been prosecuted for similar offenses. All three of the above are (or were⁹⁴) leaders of populist anti-immigration parties that, like the TF, exploit voters' dissatisfaction with and suspicion of mainstream parties, the political system, and political elites and mobilize voters concerned about globalization trends, such as increased immigration.⁹⁵ Le Pen, as leader of the French Front National, was a serial offender, convicted several times for statements concerning the Holocaust and for inciting racial hatred on account of statements made about Muslims in France.⁹⁶ Griffin of the British National Party had been convicted in 1998 for distributing material likely to incite racial hatred, but he was acquitted of charges related to inciting racial hatred in 2006.⁹⁷ Unlike Halla-aho, Le Pen and Griffin and their parties have a long-established and extremist anti-immigration profile, and they operate in countries with long immigration histories that are used to mobilizing the law to stamp down on manifestations of racial hatred.⁹⁸ Moreover, unlike in Halla-aho's case, the processes against Le Pen and Griffin were not straightforwardly linked to a sudden surge of anti-immigrant sentiment followed by immediate electoral gain.

In terms of meteoric political rise coinciding with being prosecuted for hate speech, Halla-aho's situation most resembles that of the controversial Dutch figure Wilders. Though Wilders is based in a multicultural country, it is one that has, like Finland, only recently started to experience a strong political rise of anti-immigration parties (following September 11, the rise and fall of anti-immigration politician Pim Fortuyn and the murder of filmmaker Theo van Gogh).⁹⁹ Halla-aho, branded as the "Finnish Geert Wilders" by the far-right/Islamophobic *Gates of Vienna* blog, has modelled many of his policy proposals after Wilders, focusing on arguments about immigrants and their alleged criminality.¹⁰⁰ Wilders was prosecuted in 2009 under Dutch hate speech laws. The case involved anti-Islamic comments made in various articles and Wilders' short film *Fitna*, in which he had, for instance, labelled Islam a "fascist religion" and Dutch-Moroccan youths "truly violent."

⁹⁴ Le Pen has been succeeded by his daughter Marine Le Pen as FN leader. See N. Mayer, "From Jean-Marie to Marine Le Pen: Electoral Change on the Far Right," *Parliamentary Affairs* 66, no. 1 (2013): 160.

⁹⁵ About France, see P. Fysh and J. Wolfreys, "Le Pen, the National Front, and the Extreme Right in France," *Parliamentary Affairs* 45, no. 3 (1992): 309, and Mayer, "From Jean-Marie"; about the UK see N. Copey, "Changing Course or Changing Clothes? Reflections on the Ideological Evolution of the British National Party, 1999–2006," *Patterns of Prejudice* 41, no. 1 (2007): 61; about the Netherlands, S. van Kessel, "Explaining the Electoral Performance of Populist Parties: The Netherlands as a Case Study," *Perspectives on European Politics and Society* 12, no. 1 (2011): 68.

⁹⁶ Bleich, *The Freedom to Be Racist*, 34.

⁹⁷ Copey, "Changing Course," 72.

⁹⁸ About France's hate speech statistics, *Commission nationale consultative des droits de l'homme, La lutte contre le racisme, l'antisémitisme et la xénophobie. Année 2012* (Paris: CNCDH, 2013). See also Home Office, Office for National Statistics and Ministry of Justice, *An Overview of Hate Crime in England and Wales* (London: Home Office, 2013).

⁹⁹ E. Vasta, "From Ethnic Minorities to Ethnic Majority Policy: Multiculturalism and the Shift to Assimilationism in the Netherlands," *Ethnic and Racial Studies* 30, no. 5 (2007): 713; H. Entzinger, "Immigration: Open Borders, Closing Minds," in *Discovering the Dutch: On Culture and Society of the Netherlands*, ed. E. Besamusca and J. Verheul (Amsterdam: Amsterdam University Press, 2010), 231–41.

¹⁰⁰ *Gates of Vienna*, "The Finnish Geert Wilders," (18 September, 2009), <http://gatesofvienna.blogspot.com/2009/09/finnish-geert-wilders.html>. Accessed 22 July 2014.

The statements are reminiscent of Halla-aho's: provocative, but steering away from direct and obvious incitement. The Public Prosecution Service was eventually compelled to act by the Dutch Court of Appeal following a formal complaint. As with Halla-aho, it has been argued that the ongoing prosecution of Wilders, far from ruining the electoral chances of the party he leads (Party for Freedom or Partij voor de Vrijheid, PVV), in fact boosted its support.¹⁰¹ In the 2010 parliamentary elections the PVV went from 9 to 24 seats, making it the third largest party in the Dutch Parliament.¹⁰²

Despite the fact that both Wilders and the PVV and Halla-aho and the TF experienced great electoral gain at the time of the hate speech prosecutions, suggesting that the legal mobilization of hate speech law enhanced their popularity, the contexts of the cases suggest also interesting differences between them. Some of these relate to their respective parties and their leadership. Unlike the PVV, a new party heavily focused around Wilders' persona and his brand of anti-immigration/anti-Islamism, the TF is in fact a successor party to the long-standing populist Finnish Rural Party (1959–1995).¹⁰³ The TF is led by a politician who, like Wilders, is charismatic and powerful (as are most leaders of populist parties), but this politician is not Halla-aho, but Timo Soini.¹⁰⁴ Soini's version of populism differs from mere anti-immigration, and indeed he does not belong to the anti-immigration wing of his party. The TF parliamentary group generally is a motley crew, containing "veterans from the Vennamo [former leader] era, young female MPs primarily concerned with social policy questions, single-issue campaigners, persons with a national reputation from the world of sport and entertainment and a significant anti-immigrant faction."¹⁰⁵ It is, of course, this latter group, led by Halla-aho, whose ideas have attracted disenchanted voters worried about immigration. However, the party overall, as led by Soini, is not xenophobic or right-wing in the same way as the PVV (nor like its Danish counterpart, the Danish People's Party, with which it is also often compared¹⁰⁶).

The PVV is tightly controlled by Wilders, and its *raison d'être* and electoral fortunes are firmly tied to the leader's stance on immigration, Islam, and multiculturalism.¹⁰⁷ In contrast, such criticisms are not broadly resonant in the less multicultural Finnish context. While anti-immigration is unquestionably a part of the attraction of the TF for some voters, the party's electoral success is built on a long tradition of anti-establishment populism and a receptive political scene in which

¹⁰¹ Van Spanje and de Vreese, "The Good, the Bad."

¹⁰² The PVV initially supported the new government (which needed its backing). About the election, J. J. M. van Holsteyn, "The Dutch Parliamentary Election of 2010," *West European Politics* 34, no. 2 (2011): 412.

¹⁰³ Suomen maaseudun puolue, SMP. See further D. Arter, "Analysing 'Successor Parties': The Case of the True Finns," *West European Politics* 35, no. 4 (2012): 803.

¹⁰⁴ About Soini's crucial role, see E. Kestilä-Kekkonen and P. Söderlund, "Party, Leader, or Candidate? Dissecting the Right-Wing Populist Vote in Finland," *European Political Science Review* (published electronically 23 January 2014), DOI: 10.1017/S1755773913000283.

¹⁰⁵ Arter, "Taking the Gilt," 1291.

¹⁰⁶ Keskinen, "Pelkkiä ongelmia?"

¹⁰⁷ van Kessel, "Explaining the Electoral Performance."

the TF represented itself as the unspoiled alternative to the main governing parties that were tainted by scandals related to old boy networks and structural corruption.¹⁰⁸ Both the PVV and the TF are Eurosceptic, but this is central to the TF, which objected to the Eurozone bailouts.¹⁰⁹ The lengthy history of Finnish populism (up until recently *without* strong anti-immigrant sentiment¹¹⁰) as well as recent analyses of the wide-ranging voter base of the TF suggest that its success cannot be explained by its immigration platform alone.¹¹¹ In fact, arguably, the TF has flourished precisely because its leadership (Soini) is *not* explicitly xenophobic. This allows the party to be highly critical of immigration policy, attracting anti-immigration voters, without alienating voters who would reject extremist leadership. This is compatible with the argument that the most successful anti-immigration parties are often those built on an alternative legacy.¹¹² In Ivarsflaten's terms, they have a "reputational shield," which allows the party to fend off accusations of racism and enhances its credibility.¹¹³

Halla-aho could eventually try to become the leader of the TF and, emulating Wilders, shape the party in the more radical right-wing anti-immigration mould.¹¹⁴ However, such a move might risk alienating the party's support base, voters drawn to the broader anti-establishment, pro-change legacy Soini has cultivated since becoming leader in 1997.¹¹⁵ As Halla-aho's profile is, after his conviction, more radical than that of the TF in general, he could be prompted to leave the TF, taking his supporters with him, like Wilders, who went on to establish the PVV when he was expelled from the mainstream conservative-liberal People's Party for Freedom and Democracy (VVD). Again, however, Halla-aho's public profile, despite his intense popularity among his "immigration critic" supporters, is polarizing, and he might find his new party's prospects of gaining political power are much reduced without the broader appeal of the TF. Unlike Halla-aho, who is a newcomer to politics, Wilders, having started his political career in the 1990s, was already a well-known and experienced politician with "legitimacy and visibility" by the time he was prosecuted.¹¹⁶ Halla-aho, in contrast, became a household name *because of* the drawn-out

¹⁰⁸ Arter, "Taking the Gilt." About the 2011 election, V. Pernaa, "Vaalikamppailu mediassa," in *Muutosvaalit 2011*, ed. S. Borg (Helsinki: Oikeusministeriö, 2012), 29–42; S. Borg, "Perussuomalaiset," in *Muutosvaalit 2011*, 191–210.

¹⁰⁹ Borg, "Perussuomalaiset"; Rakkonen, "Satumaan tango."

¹¹⁰ Arter, "Taking the Gilt."

¹¹¹ H. Paloheimo, "Populismi puoluejärjestelmän vedenjakajana," in *Muutosvaalit 2011*, 324–46; Arter, "Analysing 'Successor Parties'"; Borg, "Perussuomalaiset." See also Perussuomalaiset, *Suomalaiselle sopivin. Perussuomalaiset r.p:n eduskuntavaaliohjelman 2011* (25 February 2011).

¹¹² E. Ivarsflaten, "Reputational Shields: Why Most Anti-Immigrant Parties Failed in Western Europe, 1980–2005," Nuffield College Working Papers in Politics, 2006-W10 (2006); M. J. Goodwin, "Forever a False Dawn? Explaining the Electoral Collapse of the British National Party (BNP)," *Parliamentary Affairs* (published electronically 1 March 2013), DOI: 10.1093/pa/gss062.

¹¹³ Ivarsflaten, "Reputational Shields."

¹¹⁴ H. Kaarto, "Halla-aho pitää ovea auki puheenjohtajaisaan," *Helsingin Sanomat* (18 November 2012), <http://www.hs.fi/politiikka/Halla-aho+pit%C3%A4%C3%A4+ovea+auki+puheenjohtajaisaan/a1305619046007>. Accessed 22 July 2014.

¹¹⁵ Borg, "Perussuomalaiset."

¹¹⁶ Van Spanje and de Vreese, "The Good, the Bad," 12. About Wilders' approach to sustaining electoral success, see S. L. de Lange and D. Art, "Fortuyn versus Wilders: An Agency-Based Approach to Radical Right Party Building," *West European Politics* 34, no. 6 (2011): 1229.

prosecution process against him, and he remains firmly associated with the case now. This association between Halla-aho and his criminal prosecution is perhaps stronger than in the case of Wilders because Halla-aho was the first and so far only Finnish politician charged with hate speech, whereas Dutch hate speech laws had been applied to politicians many times before Wilders was charged.¹¹⁷

One of the most significant contrasts between the cases is that, unlike Halla-aho, Wilders was in fact eventually acquitted of all charges against him, including that of inciting hatred and discrimination (though it was found his statements were indeed borderline and on the very edge of legal acceptability).¹¹⁸ The acquittal was framed as a triumph for free speech.¹¹⁹ In contrast, Halla-aho's final conviction by the Supreme Court, despite its shortcomings, officially labelled him an extremist.¹²⁰ Being branded a criminal is more serious for Halla-aho (and the TF) than it would have been for Wilders, whose party's profile revolves around and depends on Wilders' provocative persona and anti-immigration stance. Unlike Wilders, who has consistently cultivated his image as a radical outsider by courting controversy, Halla-aho has sought to leave the prosecution behind him as a member of Parliament.¹²¹ Though it is hard to predict the future of populist politicians and parties — they are prone to ups and downs because of the volatility of their supporters¹²² — the comparison between Wilders and Halla-aho shows that despite the many dangers of a hate speech prosecution, the eventual outcome of the case does carry consequences.

The effects of the mobilization of hate speech law on the broader political picture are still unfolding. Many have argued that in the aftermath of the politicization of immigration since 2008, the hard-talking populism of the TF, especially on immigration and refugees, has infected mainstream parties.¹²³ This is not surprising as successful anti-immigration parties often affect other parties' stances on immigration, and the contagion effect can reach parties across the political spectrum.¹²⁴ Mainstream media also now give much more space to individuals with more extreme views on immigration.¹²⁵ At the same time,

¹¹⁷ More than 20 Dutch politicians have been prosecuted in recent decades. About the Janmaat case, see van Spanje and Weber, "Political Trials."

¹¹⁸ Verdict of the Amsterdam district court as regards the Wilders trial, LJN: BQ9001, *Wilders*, verdict 23 June, 2011.

¹¹⁹ See R. A. Kahn, "The Acquittal of Geert Wilders and Dutch Political Culture," University of St. Thomas Legal Studies Research Paper, No. 11–31 (2011), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1956192. Accessed 22 July 2014.

¹²⁰ His resignation from the position of chairman of Parliament's Administrative Affairs Committee was driven by political and media pressure. Yleisradio, "Eduskuntaryhmät haluavat Halla-ahon pois hallintovaliokunnasta," *Yle Uutiset* (13 June 2012), http://yle.fi/uutiset/eduskuntaryhmat_haluavat_halla-ahon_pois_hallintovaliokunnasta/6179609. Accessed 22 July 2014.

¹²¹ Yleisradio, "Päivän kansanedustajana."

¹²² Arter, "Breakthrough." Wilders' PVV experienced this in the 2012 Dutch parliamentary elections.

¹²³ A. Rastas, "Rasismen kiistäminen suomalaisessa maahanmuuttokeskustelussa," in *En ole rasisti*, 47–64; Keskinen, "Pelkkiä ongelmia?"; Pernaa, "Vaalikamppailu"; Borg, "Perussuomalaiset."

¹²⁴ J. van Spanje, "Contagious Parties: Anti-Immigration Parties and Their Impact on Other Parties' Immigration Stances in Contemporary Western Europe," *Party Politics* 16, no. 5 (2010): 563.

¹²⁵ M. Maasilta, "Epilogi," in *Maahanmuutto, media ja eduskuntavaalit*, 159–62.

media and public awareness of the issues around hate speech, including the potential consequences of intolerant expression, has improved.¹²⁶ Unlike in the Netherlands, where the acquittal of Wilders sanctioned the continued use of inflammatory language, the TF has faced pressure by other parties and from some segments of the public to stamp out intolerant language.¹²⁷ Soini and the TF have been pushed to censure the racists among the party's MPs, so as to promote a non-bigoted image and retain broad electoral appeal.¹²⁸ This raised consciousness is a change from the past, when occasional racist expression by politicians was brushed aside.¹²⁹ Although this heightened consciousness does not prevent anyone from holding intolerant views (and may simply encourage the use of more coded language), awareness of the possible consequences of expressing openly racist views does subtly change the atmosphere of public discourse. It would thus be too sweeping to conclude at this point that the effects of the legal mobilization on political discourse were straightforwardly negative.¹³⁰

Conclusion

Hate speech prosecutions remain topical in many jurisdictions where the laws against public expressions of intolerance are repeatedly tested, debated, and occasionally revised, often because of controversial cases. Considering the trend in some countries towards criminal prosecutions as the main or only avenue of pursuing hate speech cases (as, for instance, the debates in Australia around dismantling some of the hate speech provisions suggests), the problems around mobilizing such laws require attention. In the sphere of criminal law, fairness to the accused must feature prominently. It remains a matter of dispute whether statements that are merely offensive and rely on defamatory stereotypes, even if grossly so, should be punishable. This article has shown how mobilizing the law in difficult cases can play into the hands of the accused who carefully and deliberately provoke the authorities, hoping for a fight in which they can be proved right, no matter what the outcome. Though no hate speech provision can be worded so as to avoid drawing a line, the case against Halla-aho shows how borderline cases are particularly open to challenges regarding the legitimacy of mobilizing criminal law against individuals. Issues related to the wording and interpretation of the norms were compounded by the cultural context suspicious of silencing attempts and the timing of the case, which coincided with the emergence of a political scene receptive to the political positions communicated by Halla-aho.

Good intentions do not guarantee good outcomes. The criminal cases against Halla-aho and Wilders highlight the importance of a receptive environment for the effective harnessing of criminal law to promote equality. Both examples confirm that pursuing hate speech cases against politicians is a risky strategy, as the

¹²⁶ Ibid.

¹²⁷ While the TF (predictably) supports changing hate speech laws (Perussuomalaiset, *Suomalaiselle sopivin*), other parties have resisted this.

¹²⁸ For commentary, Maasilta, "Perinteinen ja sosiaalinen."

¹²⁹ About politicians' inflammatory language since 1990, M. Salo, *Suomi suomalaisille: Argumentit maahanmuuttoa vastaan Suomessa vuosina, 1990-2003* (Turku: Siirtolaisuusinstituutti, 2005).

¹³⁰ See also Keck, "Beyond Backlash," 182.

political (as well as the legal) outcome can be difficult to predict. In a setting where popular suspicion of elites, dissatisfaction with existing political options, and latent demand for discussion about immigration coincide, mobilizing a hate speech prosecution against an anti-immigration politician can in fact create political opportunities for apt political actors to exploit. However, the comparison between Wilders/PVV and Halla-aho/TF also suggests that even where the conditions of a hate speech prosecution are not ideal and where it seems, at first glance, that the prosecution has simply enhanced the popularity of the politicians involved, the effects of the legal mobilization can be more complex and may sow the first seeds for a gradual transformation of public discourse. The case against Halla-aho warns, if not against taking the bait, at least against thinking that a prosecution, or even a conviction that formally condemns the message and affirms tolerance towards minorities, would magically remove racism and intolerance from political discourse. Any prosecution can only be one element in a continuing social movement against intolerance. Recognizing this can help think of individual cases in a more long-term way, as part of an overall strategy against prejudice in which mobilizing the criminal law can only be a small part of the answer.

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