

THE RIGHT TO BE OFFENDED: THE GREATEST OF ALL UNENUMERATED RIGHTS

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I. INTRODUCTION

Hateful and offensive speech, purposefully directed toward others, is reprehensible to a moral and just people. Upstanding citizens often debate how society should address such vile expressions of hate.¹ In America, this debate involves balancing the First Amendment's protection of free speech against the government's ability to enforce legal prohibitions on certain speech deemed hateful or offensive to others.² At the center of this debate are laws known as hate speech legislation.³

This passionately contested issue is not unique to America, but across the globe, this free speech debate occurs in nearly every developed country.⁴ Internationally, advocates for hate speech legislation have won the debate, resulting in many foreign governments regulating what authorities consider hate speech.⁵ In America, the advocates for hate speech legislation have not been as successful;⁶ however, America has recently been more accepting of laws that have a similar effect as

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¹ See *infra* Part IV.A.

² See SAMUEL WALKER, *HATE SPEECH: THE HISTORY OF AN AMERICAN CONTROVERSY* 1-2 (1994). The author explains that the issue with hate speech "is whether offensive words, about or directed toward historically victimized groups, should be subject to criminal penalties." *Id.* at 1. The author also states that the First Amendment "protects both the words people consider important and those they find offensive." *Id.* at 2.

³ *Id.* at 4. "The hate speech issue first arose in the 1920s and continues to influence American law and policy." *Id.*

⁴ See generally Michel Rosenfeld, *Hate Speech in Constitutional Jurisprudence: A Comparative Analysis*, 24 *CARDOZO L. REV.* 1523 (2003) (comparing thoughts about hate speech from countries around the world).

⁵ *Id.* at 1523.

⁶ *Id.*

hate speech laws.⁷ Such laws are known as hate crimes legislation.⁸ In recent decades, many states have enacted hate crimes legislation,⁹ and President Obama even signed a federal hate crimes bill in 2009.¹⁰

As Part III of this Article explains, hate crimes legislation is merely an indirect method for regulating free speech, but advocates for such legislation argue the laws are necessary to reduce violence and to protect people from being offended.¹¹ This Article challenges both lines of reasoning.¹² First, Part III argues that additional restrictions on free speech are not effective for reducing physical violence.¹³ Second, regarding language that offends others, the debate boils down to this: In a free society, is a person's right to free speech superior to another person's desire not to be offended?¹⁴ Part IV argues that free speech rights are superior.¹⁵

Implied within the First Amendment's guarantee of free speech is the reality that some speech may offend others.¹⁶ Stated another way, the right to be offended, or the right to offend others, is an unenumerated

⁷ Bob Unruh, *Senate Vote for 'Hate Crimes' Sparks Warning: 'The People Will Not Remain Silent Forever'*, WORLDNETDAILY (July 18, 2009), <http://www.wnd.com/2009/07/104278/> (stating that in 2009, President Obama lobbied for the Local Law Enforcement Hate Crimes Prevention Act).

⁸ WALKER, *supra* note 2, at 155 (explaining that many states have enacted hate crimes laws as a way to address hate speech).

⁹ See Bob Unruh, *Holder: 'Gays' Protected, Ministers Not: Attorney General's Testimony on 'Hate Crimes'*, WORLDNETDAILY (July 3, 2009), <http://www.worldnetdaily.com/2009/07/102919> (noting that currently forty-five states have enforceable hate crimes laws in place).

¹⁰ Chelsea Schilling, *Obama Signs 'Hate-Crimes' Bill Into Law: 'It's a Very Sad Day for America and for Religious Liberties'*, WORLDNETDAILY (Oct. 28, 2009), <http://www.wnd.com/2009/10/114305/>.

¹¹ See *infra* Part III.

¹² See *infra* Parts III-IV.

¹³ See *infra* Part III.A.

¹⁴ See *infra* Part III.B.

¹⁵ See *infra* Part IV.

¹⁶ See WALKER, *supra* note 2, at 2. "Uninhibited free speech is not easy: this precious freedom comes at a price, for the First Amendment also protects offensive words. It protects both the words people consider important and those they find offensive." *Id.*

ated right protected by the First Amendment.¹⁷ Americans should be thankful they have the right to be offended, and to offend others, because it is that unenumerated right that keeps free speech truly free.¹⁸ And, because of that, the right to be offended is the greatest of all unenumerated rights.¹⁹

Unenumerated rights are rights not expressly granted in the Constitution but are constitutionally protected anyway.²⁰ The Ninth Amendment protects unenumerated rights by stating that “[t]he enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.”²¹ The right to privacy is an example of an unenumerated right.²² Although the Constitution does not expressly grant the right to privacy, the Supreme Court has held it is an unenumerated right protected by the Constitution.²³ Similarly, the Constitution does not expressly grant the right to offend, although it is implicit in the First Amendment’s guarantee of free speech; therefore, the right to offend is also an unenumerated right.²⁴ And one person’s right to offend is another’s right to be offended.²⁵ Parts III and IV explain that this unenumerated right to be offended is the greatest of all unenumerated rights because it precludes government from subjectively regulating free speech.²⁶ Most advocates for hate speech and hate crimes legislation have noble intentions of eliminating bigotry, but this

¹⁷ *See id.* If the First Amendment protects offensive words then it protects the right to be offended and to offend others. *See id.*

¹⁸ *See generally id.* “[The First Amendment] protects both the words people consider important and those they find offensive. The First Amendment guarantees freedom for both the ideas that people cherish and the thoughts they hate.” *Id.*

¹⁹ *See infra* notes 20-27 and accompanying text (describing why offensive words are considered an unenumerated right).

²⁰ *See* ERWIN CHERMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 946-47 (3d ed. 2009) (explaining that rights listed in the Constitution are enumerated rights, and that the Constitution also protects those rights not listed, which are unenumerated rights).

²¹ *See* U.S. CONST. amend. IX.

²² CHERMERINSKY, *supra* note 20, at 945 (stating that the right to privacy is not explicitly listed in the Constitution but that it is implicit in several of the Bill of Rights).

²³ *Id.*

²⁴ *See supra* notes 16-19 and accompanying text.

²⁵ *See supra* note 17 and accompanying text.

²⁶ *See infra* Parts III-IV.

Article argues that such laws are not prudent methods for free societies to address such despicable expressions of hate.²⁷

This Article begins with Part II outlining the legislative history of free speech in America, including the landmark cases involving hate speech and hate crimes legislation.²⁸ Next, this Article explains that there is no significant difference between hate speech and hate crimes laws²⁹ and that both are extremely dangerous because they empower the government to regulate, subjectively, the free speech of all Americans.³⁰ Finally, this Article concludes by illustrating how such laws diminish individual liberty and freedom by providing specific examples from other nations that have enacted this type of legislation.³¹ Such examples provide evidence that America's newly found acceptance of regulating speech, under the guise of hate crimes legislation, will eventually reduce individual liberties and erode various constitutional freedoms.³²

II. AMERICA'S HISTORY OF HATE SPEECH AND HATE CRIMES LEGISLATION

America's approach is drastically different from the international community when it comes to regulating speech deemed hateful or offensive.³³ Nearly every other advanced nation has enforced hate speech legislation for decades.³⁴ In America, however, the interests of free speech have won out, resulting in a rejection of content-based speech regulations, such as hate speech laws.³⁵

A series of Supreme Court cases shaped America's current stance regarding this debate between free speech rights and regulating

²⁷ See *infra* Parts III-IV.

²⁸ See *infra* Part II.

²⁹ See *infra* Part III.

³⁰ See *infra* Part IV.A.

³¹ See *infra* Part IV.D.

³² See *infra* Part IV.C-D.

³³ WALKER, *supra* note 2, at 1. "Almost every country prohibits hate speech directed at racial, religious, or ethnic groups. The United States, by contrast, has developed a strong tradition of free speech that protects even the most offensive forms of expression." *Id.* (footnote omitted).

³⁴ *Id.*

³⁵ *Id.*

speech deemed hateful or offensive.³⁶ To begin with, the Court, through multiple cases, has held the First Amendment's guarantee of free speech is not absolute.³⁷ The government can infringe upon the right to free speech when such expression concerns areas of unprotected or less-protected speech.³⁸ Those limited areas of regulated speech involve the encouragement of imminent violence, obscenity, fighting words, and defamation, along with a few other select categories of speech.³⁹ Laws regulating the content of speech not falling within those narrow categories must pass strict scrutiny,⁴⁰ which has resulted in the Court consistently striking down hate speech legislation.⁴¹

In the 1992 case *R.A.V. v. St. Paul*, the Court invalidated legislation aimed solely at preventing speech deemed hateful or offensive.⁴² The Court struck down that hate speech ordinance because it unconstitutionally regulated the content of certain speech.⁴³ The Court explained the challenged law only addressed selective types of speech, making such laws subject to the whims and political preferences of the majority in power.⁴⁴ Because of the subjective nature of the ordinance, the Court reasoned there was nothing preventing future legislatures from prohibiting content-related speech in a variety of other areas based

³⁶ See *infra* notes 39, 42, 53 and accompanying text.

³⁷ See *infra* note 39 and accompanying text.

³⁸ See *infra* note 39 and accompanying text.

³⁹ See *Miller v. California*, 413 U.S. 15, 23-24 (1973) (holding obscene speech is unprotected speech); *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (holding speech involving imminent threats is unprotected speech); *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 264 (1964) (holding speech involving defamation is unprotected speech); *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572-73 (1942) (holding speech involving fighting words is unprotected speech).

⁴⁰ See *CHEMERINSKY*, *supra* note 20, at 1214. “[S]trict scrutiny is generally used for content-based restrictions . . .” *Id.*

⁴¹ See *infra* notes 42-45 and accompanying text.

⁴² *R.A.V. v. City of St. Paul*, 505 U.S. 377, 392-93 (1992).

⁴³ *Id.*

⁴⁴ See *id.* The Court explained that the City of St. Paul was too selective with what types of specific language constituted hate speech. *Id.* at 393-94. The Court stated, “Selectivity of this sort creates the possibility that the city is seeking to handicap the expression of particular ideas.” *Id.* at 394. The Court recognized that current city legislatures might view certain expressions as offensive; however, this subjectivity might lead to future legislatures regulating other forms of expression and speech, and that subjectivity makes the legislation unconstitutional. *Id.* at 395.

upon the prerogatives of those in power.⁴⁵ The Court, therefore, recognized the subjective nature of hate speech laws and the danger of such regulations in the hands of an overpowering legislature.⁴⁶

Advocates for hate speech legislation took the Court's decision in *R.A.V.* as communicating a different message, however.⁴⁷ That message was that it was more acceptable to the Court to attack the perpetrator's speech and motivations after criminal conduct occurred rather than attacking only content-based speech in the absence of any illegal activity.⁴⁸ With that in mind, advocates for hate speech legislation turned their efforts to implementing hate crimes legislation.⁴⁹ Hate crimes laws add extra punishment onto criminal acts of violence if, after the violent acts occur, authorities find such acts to have been motivated by hateful or offensive speech and thought.⁵⁰ Such laws are simply an indirect route to the ultimate goal of regulating speech deemed hateful or offensive.⁵¹ Consequently, advocates for hate speech legislation began supporting hate crimes legislation as a way to regulate hate speech without laws that specifically focus on the content of speech.⁵²

⁴⁵ See Anthony S. Winer, *The R.A.V. Case and the Distinction Between Hate Speech Laws and Hate Crime Laws*, 18 WM. MITCHELL L. REV. 971, 976-78 (1992).

⁴⁶ See *supra* note 44 and accompanying text.

⁴⁷ See Winer, *supra* note 45, at 972-78. The author explains that the Court's opinion in *R.A.V.* only settled the issue regarding the constitutionality of hate speech laws, but did not address the issue of hate crimes laws. *Id.* at 974-78. As a result, advocates for hate speech laws moved their focus to enacting hate crimes laws because they assumed the Court would be more accepting of hate crimes legislation. *Id.*

⁴⁸ *Id.* at 972-78.

⁴⁹ Thomas W. Simon, Comment, *Fighting Racism: Hate Speech Detours*, 26 IND. L. REV. 411, 431 (1993).

⁵⁰ See WALKER, *supra* note 2, at 155. "Hate crimes laws took several forms. Some created new crimes relating to racial assaults or desecration of religious property. Others enhanced penalties for criminal acts that involved race, religion, or some other protected class. Thus a felonious assault might incur a harsher penalty if the attack was racially motivated." *Id.*

⁵¹ See *id.* One way to determine the motivation for someone's actions is to investigate into his or her past speech and speech-related conduct for evidence of hateful motivation. See, e.g., John Hagan et al., *Reasonable Grounds Evidence Involving Sexual Violence in Darfur*, 35 LAW & SOC. INQUIRY 881, 899 (2010) (noting that words used during assaults provide insight into the motivations of attackers). Therefore, criminalizing certain speech and speech-related conduct enhanced existing criminal penalties under hate crimes laws. See WALKER, *supra* note 2, at 155.

⁵² See Winer, *supra* note 45, at 975.

States eventually began enacting hate crimes legislation, and the Supreme Court heard its first case concerning such laws in *Wisconsin v. Mitchell*, which involved a law that enhanced existing criminal penalties and sentences once the government determined the perpetrator acted out of hateful motivation.⁵³ The Court unanimously upheld the Wisconsin law, sending the message that, although hate speech laws are unconstitutional, hate crimes laws are acceptable.⁵⁴ Forty-five states have enacted various forms of hate crimes legislation since *Wisconsin v. Mitchell*.⁵⁵

The Court has created a perplexing environment where hate speech laws are unconstitutional, but hate crimes laws that focus on the criminal's motivation, which the state determines by analyzing speech-related expression, are constitutional.⁵⁶ In *R.A.V.*, the Court seemed to recognize the dangers of subjective hate speech legislation and the problems facing a free society when the government is delegated such power;⁵⁷ yet, in *Mitchell*, the Court seemed oblivious to the fact that hate crimes legislation poses the same problems and the same free speech concerns.⁵⁸ The question, therefore, becomes whether there is a tangible difference between hate speech and hate crimes legislation.

III. HATE SPEECH AND HATE CRIMES LAWS ARE ANALOGOUS AND BOTH CREATE SIMILAR PERIL FOR A FREE SOCIETY

Hate speech is the manifestation of hate expressed verbally, in writing, or through any other form of communication.⁵⁹ Hate speech laws focus specifically on regulating hateful or offensive language, making it illegal to use such forms of communication.⁶⁰ For example, a person can violate a hate speech ordinance simply by engaging in certain speech or expressive communication, without any other act in-

⁵³ *Wisconsin v. Mitchell*, 508 U.S. 476, 479-82 (1993).

⁵⁴ *See id.* at 477, 482-83.

⁵⁵ Unruh, *supra* note 9.

⁵⁶ *See supra* notes 50-55 and accompanying text.

⁵⁷ *See supra* notes 42-46 and accompanying text.

⁵⁸ *See supra* notes 53-54 and accompanying text.

⁵⁹ Richard Delgado & Jean Stefancic, *Four Observations About Hate Speech*, 44 WAKE FOREST L. REV. 353, 361-62 (2009).

⁶⁰ Winer, *supra* note 45, at 976-77.

volved.⁶¹ Therefore, such laws are strictly content-based regulations on free speech, and because most content-based regulations on speech are unconstitutional, hate speech laws are unenforceable in America.⁶²

Hate crimes legislation, on the other hand, imposes additional penalties onto existing criminal penalties once the government finds evidence that the criminal activity in question was spurred by hateful motivation.⁶³ And, the government determines if such motivation exists by investigating into the suspect's past speech and speech-related activities.⁶⁴ Through hate crimes legislation, what were once impermissible regulations on speech have now become permissible when presented as a scheme for enhancing existing criminal penalties for what the government perceives as a hate-related motive.⁶⁵

Advocates for hate crimes legislation argue that such laws are distinguishable from unconstitutional hate speech laws because they require additional physical conduct, beyond mere speech, on behalf of the suspect.⁶⁶ Since the government enforces hate crimes laws after that criminal conduct has occurred, advocates argue these laws focus on conduct only and not the content of speech.⁶⁷ That argument is not very convincing, however, once analyzing how governments enforce hate crimes legislation because such analysis demonstrates that the effects of hate speech and hate crimes laws are virtually the same.⁶⁸

When the state investigates criminal activity under hate crimes legislation, it decides whether an increase to existing criminal penalties is warranted based on the actor's prior speech and thoughts.⁶⁹ In other words, the state investigates into the suspect's recent history to determine if his or her past expressions of speech provide evidence that the

⁶¹ *Id.* at 974.

⁶² *See id.* at 971-72.

⁶³ *See supra* notes 50-51 and accompanying text.

⁶⁴ *See infra* notes 72-75 and accompanying text.

⁶⁵ *See supra* notes 50-51 and accompanying text.

⁶⁶ *See Winer, supra* note 45, at 975.

⁶⁷ *See id.*

⁶⁸ *See infra* Parts IV.C-D.

⁶⁹ Keith N. Hylton, *Implications of Mill's Theory of Liberty for the Regulation of Hate Speech and Hate Crimes*, 3 U. CHI. L. SCH. ROUNDTABLE 35, 42-43 (1996).

crime was motivated by what the state considers unacceptable speech and thought, and if so, the state adds further punishment.⁷⁰

For example, if a murder occurs on the streets of Chicago and police apprehend a suspect, the authorities will determine if hatred toward a certain demographic motivated the suspect's actions by investigating into his or her past expressions, both verbal and written, for evidence of hateful motivation.⁷¹ That investigation can include such things as delving into what the accused regularly listened to, watched, read, the context of past conversations with family and friends, and a variety of other speech-related activities.⁷² The state can then use that speech-related evidence to establish its opinion as to what the actor was thinking when committing the crime.⁷³ Moreover, if the state is under the opinion that certain material influenced the criminal, then hate crimes laws might even allow the state to regulate or shut down the sources of that material, regardless of whether that material was intended to encourage hate or violence.⁷⁴ This example demonstrates that under hate crimes legislation, the government's focus is still on the content of past speech and speech-related activities,⁷⁵ which the Supreme Court has held unconstitutional.⁷⁶ Even some advocates for hate speech and hate crimes legislation admit the line separating the two categories

⁷⁰ See *supra* notes 50-51 and accompanying text.

⁷¹ See Winer, *supra* note 45, at 975; see also 720 ILL. COMP. STAT. 5/12-7.1 (2011) (Illinois hate crime law). In his article, Winer states, "It is not possible to violate a hate crime law . . . merely by saying something, writing something, or engaging in purely expressive behavior—a violent criminal act must have first occurred." Winer, *supra* note 45, at 975. The implication is that once the violent criminal act occurs, the authorities will then proceed to look at past expressions of speech to infer hateful motivation. See *id.*

⁷² See Bob Unruh, *Senators Get 705,000-Plus Letters Opposing 'Hate Crimes'*, WORLDNETDAILY (June 22, 2009), <http://www.wnd.com/2009/06/101814/>.

⁷³ See *How 'Hate Crimes' Work in the Real World*, WORLDNETDAILY (June 1, 2009), <http://www.wnd.com/2009/06/99887/>; see also Unruh, *supra* note 72.

⁷⁴ *Congressman: 'Deviancy' Protected by 'Hate Crimes'*, WORLDNETDAILY (May 13, 2009), <http://www.wnd.com/2009/05/97957/> (explaining that if someone who hears a pastor preaching biblical doctrine against homosexuality later attacks someone based on his or her sexual orientation, the pastor's sermon could be viewed as hate speech under hate crimes laws).

⁷⁵ See Unruh, *supra* note 72.

⁷⁶ See *supra* notes 40-46 and accompanying text.

of laws is unclear.⁷⁷ Regardless of what category the law falls under, authorities still investigate into the content of the suspect's past speech,⁷⁸ and therefore, both hate speech and hate crimes laws produce the same chilling effect on free speech over time.⁷⁹ Consequently, neither category of laws deserves a place within the American system of justice.⁸⁰ If authorities are concerned with illegal conduct, then they should criminalize that conduct and not the speech that led up to it because criminalizing speech is inconsistent with America's constitutional freedoms.⁸¹ Since hate crimes laws are an indirect method for regulating hate speech,⁸² the subsequent uses of the phrase "hate crimes laws" in this Article will encompass both categories of laws (i.e., hate speech and hate crimes laws).

A. *Violent Conduct Motivated by Hate Is Already Illegal*

Advocates for hate crimes legislation defend their position by arguing it is not about regulating offensive speech, but rather, preventing attacks motivated by hate and eliminating intimidation through unacceptable forms of communication.⁸³ They invalidate their arguments in support of such laws, however, by admitting the laws only apply after the criminal conduct has occurred.⁸⁴ If the perpetrator already acted and his or her conduct is already considered illegal, meaning there are existing laws criminalizing such actions, then what is the need for additional laws under the category of hate crimes?⁸⁵

⁷⁷ Hylton, *supra* note 69, at 54.

⁷⁸ See *supra* notes 50-51 and accompanying text.

⁷⁹ See Unruh, *supra* note 72.

⁸⁰ See *infra* Part V.

⁸¹ See WALKER, *supra* note 2, at 14. The author explains that America has a "strong commitment to free speech" because "ideas have no force in the world without advocates." *Id.* In other words, America should keep free speech free and criminalize only the physical, not verbal, manifestations of hate. See *id.*

⁸² See *supra* notes 50-51 and accompanying text.

⁸³ See J. Angelo Corlett & Robert Francescotti, *Foundations of a Theory of Hate Speech*, 48 WAYNE L. REV. 1071, 1088 (2002).

⁸⁴ See *supra* notes 66-67 and accompanying text.

⁸⁵ See *infra* note 86 and accompanying text. If there are already laws on the books criminalizing certain physical acts, then hate crimes laws cannot be intended to also criminalize those acts because that would be redundant. Memorandum from Laura W. Murphy, Dir. ACLU Wash. Legislative Office, on Guidance for Members of Congress and Staff on Free Speech and Related Public Safety Concerns in the Aftermath of the

The ACLU explains, “There are already numerous federal, state and local criminal statutes prohibiting threatening communications and violent behavior.”⁸⁶ Authorities use those existing criminal laws to prosecute violators to the full extent of the law, without the need for additional speech-related legislation focused on a person’s motivation.⁸⁷ No matter how convincing, and emotionally satisfying, the arguments for content-based speech regulations are, all American jurisdictions already have criminal laws addressing the physical manifestations of hateful motivation.⁸⁸ No additional benefit to society results from laws that criminalize speech and, ultimately, a person’s thoughts.⁸⁹ Hate crimes legislation simply empowers the government to venture into a dangerous area that involves regulating speech and thought.⁹⁰ And no reasonable student of history would think delegating the government that power is beneficial to a free society.⁹¹

Moral and just people do not find it acceptable to violently harm or intimidate another human being, and doing so because of the victim’s race, ethnicity, religion, or sexual orientation is equally despicable.⁹² However, laws against such behavior already exist.⁹³ More importantly, those existing criminal laws are colorblind, treating all humans equally as humans.⁹⁴ Hate crimes laws transform existing criminal laws from a

Arizona Shootings to Members of Congress (Jan. 13, 2011) [hereinafter Murphy Memo], available at http://www.aclu.org/files/assets/ACLU_Memorandum_To_Congress_Regarding_Guidance_on_Free_Speech_and_Related_Concerns.pdf. Thus, the purpose of hate crimes laws must be to criminalize the motivation for those acts as determined by the suspect’s prior speech and thoughts. *Id.*

⁸⁶ Murphy Memo, *supra* note 85.

⁸⁷ See Winer, *supra* note 45, at 975; *How ‘Hate Crimes’ Work in the Real World*, *supra* note 73.

⁸⁸ *How ‘Hate Crimes’ Work in the Real World*, *supra* note 73.

⁸⁹ See *infra* Part III.B.

⁹⁰ See *infra* Part IV.C.

⁹¹ See *infra* Part IV.

⁹² Murphy Memo, *supra* note 85.

⁹³ Winer, *supra* note 45, at 975.

⁹⁴ See WALKER, *supra* note 2, at 155. The author states that hate crimes laws “enhanced penalties for criminal acts that involved race . . . or some other protected class.” *Id.* That implies that the existing criminal law code, prior to hate crimes legislation, criminalized acts simply because they were illegal acts. See *id.* Thus, the criminal law code did not take into account race or ethnicity. See *id.* In other words, the criminal law code was colorblind prior to hate crimes laws that added further

system that treats all humans as equals into one that assigns punishment based on what authorities feel is the self-worth of certain groups when compared to other groups.⁹⁵ Such laws have no place within American society.

B. Defeating Bigotry by Exposing It

Those who oppose hate crimes laws do not support, or find acceptable, hateful speech, derogatory comments, or intimidating forms of communication.⁹⁶ Rather, they take into account the realities of life and human nature, including the human rights catastrophes that can easily occur when a government is delegated too much power over an inherently subjective area of the law.⁹⁷ One unfortunate reality of human nature is that there will always be indecent human beings among us who espouse hateful and offensive comments. Another unfortunate reality is that government, when attempting to legislate morality and to control certain behaviors, has a tendency to overreach its authority, resulting in the infringement of individual rights and freedoms.⁹⁸

Beyond inadvertently creating and empowering an oppressive government, there are other reasons for opposing hate crimes laws in America.⁹⁹ First, there is the irony of all hate speech legislation, which is that by prohibiting certain speech considered intolerant, the proponents of that prohibition are demonstrating their intolerance for other viewpoints.¹⁰⁰ Second, speech that might be offensive to others should enjoy First Amendment protection because it exposes false, bigoted, and uncivilized ideas for what they are.¹⁰¹ A society with free speech and expression fosters diverse viewpoints where competing hypotheses conflict with one another, and that environment ultimately results in a

criminal penalties based on the race, color, ethnicity, nationality, and religion of the victim. *See id.*

⁹⁵ *See id.*

⁹⁶ *See infra* note 97 and accompanying text.

⁹⁷ *See infra* Part IV.

⁹⁸ *See infra* Part IV.

⁹⁹ *See infra* notes 101-07 and accompanying text.

¹⁰⁰ Kim M. Watterson, Note, *The Power of Words: The Power of Advocacy Challenging the Power of Hate Speech*, 52 U. PITT. L. REV. 955, 955 (1991).

¹⁰¹ *Hate Speech on Campus*, AM. CIV. LIBERTIES UNION (Dec. 31, 1994), <http://www.aclu.org/free-speech/hate-speech-campus>.

society with increased awareness and knowledge.¹⁰² “[T]he First Amendment . . . presupposes that right conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selection.”¹⁰³ Third, while hate speech regulations may be emotionally attractive, “verbal purity is not social change.”¹⁰⁴ Laws that criminalize bigoted speech are only placing a Band-Aid over the symptom, when the real problem is bigotry itself.¹⁰⁵ Society can only defeat bigotry through the free exchange of diverse and open viewpoints.¹⁰⁶

The unenumerated right to be offended sets a threshold preventing government from infringing upon First Amendment rights through attempts at regulating speech and thought.¹⁰⁷ As long as others maintain the right to offend you, you can rest assured that you will always have your full freedom of speech rights under the First Amendment.¹⁰⁸ Even the ACLU agrees that the idea of banning certain speech for the sake of not offending others is misguided legislation.¹⁰⁹ According to the ACLU, the best revenge is more speech, not less speech, and when hate is out in the open, people can see the problem and confront it with more debate, not less.¹¹⁰

Many well-intentioned, intellectual elites, who support hate crimes legislation, desire a society where bigotry involving race, ethnicity, and religion do not exist, but hate crimes laws will exacerbate racial, ethnic, and religious tensions by making these divisive issues the focus of any random crime.¹¹¹ Laws focusing on a person’s speech and thought turn every illegal act into a debated issue involving possible bigotry, when the illegal act may have simply been a random act of

¹⁰² Hylton, *supra* note 69, at 37.

¹⁰³ *United States v. Associated Press*, 52 F. Supp. 362, 372 (S.D.N.Y. 1943).

¹⁰⁴ *Hate Speech on Campus*, *supra* note 101.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ See *supra* notes 20-26 and accompanying text.

¹⁰⁸ See *Hate Speech on Campus*, *supra* note 101. According to the ACLU, “the right of free speech is indivisible: When one of us is denied this right, all of us are denied.” *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ See *supra* notes 94-95 and accompanying text.

violence.¹¹² If we as Americans hope to reach the day where we consider ourselves equal as humans, then it is imperative that we recognize crimes against all humans are equally evil, and our criminal justice system should reflect that viewpoint with colorblind laws.¹¹³

IV. THE PERIL OF HATE CRIMES LEGISLATION

Hate crimes laws are detrimental to a free society because under such laws, everything in our personal lives can become evidence against us.¹¹⁴ This includes the books we read, the websites we visit, the movies we own, and the conversations we have with friends and family.¹¹⁵ Hate crimes legislation delegates to the government the ability to determine our thought process during a certain moment in time by investigating into our personal lives and to interpret our belongings, conversations, habits, and forms of expression.¹¹⁶ The gradual enforcement of hate crimes legislation will eventually lead to chilling effects on free speech for all Americans, regardless of whether a person is accused of a crime or not.¹¹⁷ Simply by having enforceable hate crimes laws in place, a few highly publicized cases are all that are necessary to intimidate every citizen into submission because such cases will demonstrate that the government can use anything a person owns, views, or says against him or her.¹¹⁸

A. *The Subjective Nature of Hate Crimes Laws*

What citizens and government officials consider hateful or offensive speech is highly subjective.¹¹⁹ Everyone has different levels of tolerance, and what one considers offensive speech, another may consider as expressing an alternative viewpoint.¹²⁰ Advocates for hate crimes legislation not only disagree over how to regulate hateful or offensive speech, but they cannot even agree on a single definition of hate

¹¹² See *supra* notes 94-95 and accompanying text.

¹¹³ See *infra* notes 242-44 and accompanying text.

¹¹⁴ See *How 'Hate Crimes' Work in the Real World*, *supra* note 73.

¹¹⁵ See *id.*

¹¹⁶ See *id.*

¹¹⁷ See *id.*

¹¹⁸ See *id.*

¹¹⁹ See *supra* notes 44-46 and accompanying text.

¹²⁰ See Watterson, *supra* note 100, at 964.

speech nor what speech to include within that definition.¹²¹ This alone provides a huge warning that hate crimes legislation is a terrible idea because of its inherently subjective nature.¹²² If Americans allow their government to decide upon a definition of hate speech for the purpose of enforcing regulations, they will be at the mercy of the prerogatives and agendas of those in power.¹²³

A few advocates do recognize the challenges and problems legislatures face in determining what speech to include or exclude under such laws.¹²⁴ Many other advocates, however, do not seem aware of the danger that exists with the subjectivity involved in defining hateful or offensive speech.¹²⁵ Some of those naïve advocates have suggested that coming up with a definition is simple if we just think rationally about what hate crimes are.¹²⁶ According to one advocate for hate crimes legislation, if society can simply think outside of the box then authorities can easily “take a position regarding the way things *ought to be*.”¹²⁷ History proves, however, that it is unwise to delegate the government enough authority to decide the boundaries of something as subjective as hate speech and then allow that government to enforce upon society the way it feels “things *ought to be*.”¹²⁸ Human history is complete with tragedies from various governments imposing upon their people the way they feel things ought to be.

With their various opinions on what to consider as hate speech, the supporters of such laws illuminate just how dangerously subjective this area of the law is.¹²⁹ For example, professors at San Diego State University admit that hate speech laws should not restrict all speech that harms, but that the communicated harm must qualify as significant.¹³⁰

¹²¹ See Corlett & Francescotti, *supra* note 83, at 1080-81; Watterson, *supra* note 100, at 964-65.

¹²² See *supra* notes 44-46 and accompanying text.

¹²³ See *supra* notes 44-46 and accompanying text.

¹²⁴ See, e.g., Simon, *supra* note 49, at 421-24 (describing a number of definitions that can be used for hate speech).

¹²⁵ See *infra* notes 126-35 and accompanying text.

¹²⁶ See Watterson, *supra* note 100, at 959-61.

¹²⁷ *Id.* at 961.

¹²⁸ *Id.*

¹²⁹ See *infra* notes 157-66 and accompanying text.

¹³⁰ Corlett & Francescotti, *supra* note 83, at 1091-92.

They continue by stating, “[M]ild unpleasantries do not warrant legal sanction.”¹³¹ Once again, there is no objective standard for determining what the government considers “mild unpleasantries.”¹³² Most reasonable people can agree that today’s common racial, sexist, and religious slurs are hateful or offensive forms of speech,¹³³ but that is not where the subjectivity of hate crimes legislation is dangerous. Rather, it becomes dangerous when political leaders have the power to amend and modify what are no longer considered “mild unpleasantries”¹³⁴ and can then determine how and when certain unacceptable speech becomes “significant.”¹³⁵

Once Americans delegate this subjective authority to the government, it is nearly impossible to reverse, and the government is then free to make changes and modifications to hate crimes laws over time.¹³⁶ Reasonable people can agree on certain hateful or offensive terms directed toward African Americans or Jews;¹³⁷ however, what about situations that are not as clear? Concerning those gray areas, lobbyists could embark upon Washington, D.C., attempting to add any number of groups and organizations to protected status under hate crimes legislation.¹³⁸

During February 2011, Wisconsin experienced month-long protests and near riots because its governor enacted legislation designed to reduce the collective bargaining rights of teachers’ unions.¹³⁹ Many union supporters protested by stating that unions help the “poor peo-

¹³¹ *Id.* at 1092.

¹³² *Id.*

¹³³ See WALKER, *supra* note 2, at 1. The author explains that many inappropriate and offensive slurs are familiar to most people. *Id.*

¹³⁴ See Corlett & Francescotti, *supra* note 83, at 1092.

¹³⁵ See *id.*

¹³⁶ See *infra* Part IV.B.

¹³⁷ See *supra* note 133 and accompanying text.

¹³⁸ Tommy Christopher, *Lobbying a Hate Crimes Bill with Real Grassroots Activists*, POL. DAILY, <http://www.politicsdaily.com/2009/05/01/lobbying-an-inclusive-hate-crimes-bill-with-real-grassroots-acti/> (last visited May 1, 2012) (explaining that as soon as Congress passed a federal hate crimes bill in 2009, activists were already lobbying members of Congress to include additional groups under the bill).

¹³⁹ *State Democrats Absent for Vote as Wisconsin Budget Protests Swell*, CNN.COM (Feb. 17, 2011), http://articles.cnn.com/2011-02-17/us/wisconsin.budget_1_budget-plans-state-democrats-legislation?_s=PM:US.

ple,” and assist “working class Americans.”¹⁴⁰ Many union supporters feel that unions are the only way the common American can fight back against evil and corrupt employers.¹⁴¹ With such strong pro-union passions, it would only be a matter of time until unions leveraged their political influence to lobby for the inclusion of union members under the protection of hate crimes legislation.¹⁴² Moreover, with the millions of dollars in contributions that unions provide to political parties,¹⁴³ it takes no stretch of the imagination to follow this money toward a successful lobbying attempt at modifying hate crimes legislation to include union members as a protected class against offensive speech.¹⁴⁴ But this is merely one of multiple possible scenarios.

Future conflicts arising between groups that support alternative sexual lifestyles and religious organizations provide another scenario where one group may lobby for additional protections under hate crimes legislation.¹⁴⁵ Such conflicts might involve whether the institution of marriage should include same-sex couples.¹⁴⁶ More jurisdictions are recognizing same-sex marriages; however, the religious teachings of Christianity and Islam both speak out against homosexual marriage.¹⁴⁷

¹⁴⁰ Sally Kohn, *Watching Uproar Over Wisconsin Protests, It's Time to Remember How Unions Make Our Lives Better*, FOX NEWS.COM (Mar. 10, 2011), <http://www.foxnews.com/opinion/2011/03/10/watching-uproar-wisconsin-protests-time-remember-unions-make-lives-better/>.

¹⁴¹ *See id.*

¹⁴² *Cf.* Christopher, *supra* note 138. The writer explains that members of the National Transgender Center for Equality lobbied Congress for “the inclusion of transgender people in the final [hate crimes] bill.” *Id.* If that group was sufficiently organized to lobby Congress for inclusion under a hate crimes bill, then well-established union organizations such as the National Labor Relations Board would have no problems also lobbying for such purposes. *Cf. id.*

¹⁴³ Gerald J. Miller, Comment, *Collective Bargaining vs. the First Amendment: Court-Ordered Remedies for the Political Use of Mandatory Union Fees*, 18 U.C. DAVIS L. REV. 555, 555-58 (1985).

¹⁴⁴ *See supra* note 142 and accompanying text.

¹⁴⁵ *See infra* note 146 and accompanying text.

¹⁴⁶ *See* Ben Schuman, Note, *Gods & Gays: Analyzing the Same-Sex Marriage Debate from a Religious Perspective*, 96 GEO. L.J. 2103, 2104 (2008).

¹⁴⁷ Anthony R. Reeves, *Sexual Identity as a Fundamental Human Right*, 15 BUFF. HUM. RTS. L. REV. 215, 235 (2009).

Once hate speech legislation is enacted in America, it is not a question of if but when lobbyists for the gay and lesbian community will bring an action under such laws to silence certain religious speech opposing same-sex marriages.¹⁴⁸ This scenario is not hypothetical either; rather, it is already occurring around the world in countries that currently enforce hate speech legislation.¹⁴⁹

Differences in various religious doctrines provide another example of possible issues concerning what constitutes hateful or offensive speech.¹⁵⁰ For example, a principle tenet of Christianity is that accepting Jesus Christ is the only way to heaven.¹⁵¹ According to some Muslims, however, the placement of any person above Mohammed can be a capital offense.¹⁵² Will it be five, ten, or twenty years after enacting hate speech legislation that one religious group lobbies the legislature to consider the other a promoter of intolerant and offensive hate speech?¹⁵³

Another possibility is that a secular administration may, on its own and in response to increasing religious tension, consider any absolute religious viewpoint as unacceptable hateful or offensive speech.¹⁵⁴

¹⁴⁸ See Christopher, *supra* note 138. A federal hate crimes bill currently protects “victims of crimes based on . . . sexual orientation,” along with various other groups. *Id.* Once protected, a group can then attempt to use its protected-class status to silence those whom that group disagrees with. See *infra* Part IV.D.

¹⁴⁹ See *infra* Part IV.D.

¹⁵⁰ See *infra* notes 151-52 and accompanying text.

¹⁵¹ *John* 14:6 (New International Version). “Jesus answered, ‘I am the way and the truth and the life. No one comes to the Father except through me.’” *Id.*

¹⁵² See David A. Jordan, Comment, *The Dark Ages of Islam: Ijtihad, Apostasy, and Human Rights in Contemporary Islamic Jurisprudence*, 9 WASH. & LEE RACE & ETHNIC ANC. L.J. 55, 55 (2003) (explaining that a moderate Muslim leader was charged with blasphemy and sentenced to death for suggesting that Mohammed “was merely a historical figure, open to criticism”). In other words, claiming that Mohammed is anything less than the greatest prophet of Allah, or below any other religious figure, is a capital offense in some Muslim nations. See *id.*

¹⁵³ See Canwest News Serv., *UN Anti-Blasphemy Measures Have Sinister Goals, Observers Say*, CANADA.COM (Nov. 24, 2008), <http://www.canada.com/topics/news/world/story.html?id=9b8e3a6d-795d-440f-a5de-6ff6e78c78d5> (explaining that this type of lobbying has occurred within the United Nations, leading to a resolution known as the Combating Defamation of Religions).

¹⁵⁴ See *infra* Part IV.D.

Countries that have existing hate speech regulations, combined with a hostile religious atmosphere, have already considered such a policy, and the United Nations has even promoted such a policy for international law.¹⁵⁵ These examples are all possible scenarios never discussed, or maybe never even contemplated, by those advocating for hate speech legislation in America. But one only needs to glance at the international news to find examples of these exact situations occurring around the world under various hate speech laws.¹⁵⁶

To demonstrate further the subjective nature of hate crimes laws, some advocates have opined that hate speech should also include symbolism.¹⁵⁷ They suggest this because some groups might consider the display of certain symbols as an expression of antipathy toward others based on group identification.¹⁵⁸ Those same advocates also suggest that “speciesist” language could fall under the regulation of hate speech laws.¹⁵⁹ “[I]t might be argued that language minimizing the rights of non-human animals creates and sustains social attitudes and practices that are hostile and cruel toward the animals. So we may wish to include the category, *species membership*, to allow that certain forms of ‘speciesist’ language qualify as hate speech.”¹⁶⁰ These unbelievable suggestions foreshadow America’s frightening and absurd future under hate crimes laws.¹⁶¹

¹⁵⁵ See *supra* note 153 and accompanying text.

¹⁵⁶ See *infra* Part IV.D.

¹⁵⁷ Corlett & Francescotti, *supra* note 83, at 1083.

¹⁵⁸ See *id.*

¹⁵⁹ *Id.* at 1081.

¹⁶⁰ *Id.* The authors discuss how difficult it is to define hate speech and what might fall under the protection of hate speech laws. *Id.* at 1081-82. They argue that if hate speech laws protect groups based on character traits such as race, sex, ethnicity, religion, and sexual orientation then it is possible to argue that nonhuman character traits, such as animal traits, can become a category under hate speech protection also. *Id.* at 1082. The assumption seems to be that animal rights activist groups, such as People for the Ethical Treatment of Animals (PETA), may be able to lobby successfully for the inclusion of “speciesist” language because such language is directed at the nonhuman character traits of animals and that may motivate acts of violence toward those animals. See *id.* Whether or not the authors actually advocate for this position is irrelevant. What is relevant is that these proponents of such laws admit that this is a possibility because of the inherent subjectivity of defining what falls under the protection of hate speech laws. *Id.*

¹⁶¹ See *infra* Part V.

Those who think these scenarios could never happen in America are only fooling themselves.¹⁶² Advocates for such laws admit that legislatures must continually amend hate crimes legislation to keep the laws up to date with society.¹⁶³ They also admit the possibility exists that future forms of oppression will develop, requiring the government to include new groups under the protection of hate crimes laws.¹⁶⁴ And the previously mentioned examples involving union members and religious organizations seem extremely realistic compared to scenarios that advocates dream up to defend their legislative proposals.¹⁶⁵ For example, proponents of hate speech legislation presented the following scenario:

Suppose that at some future time, a large portion of the population comes to believe that people with protruding navels are intellectually and morally inferior to those who lack this characteristic; as a result, those with protruding navels become systematically oppressed Although this situation is highly unlikely to occur, the point remains that if it were to occur, the term “hate speech” would seem to apply to the negative remarks directed toward the “outies.”¹⁶⁶

¹⁶² Alyssa Farah, ‘How Hate Crimes Laws Forced Me into Exile’: Pro-Family Activist Stages Own Disappearance, *WORLDNETDAILY* (Apr. 20, 2009), <http://www.wnd.com/2009/04/95296/> (noting that such laws have been passed in other countries such as Brazil).

¹⁶³ See Corlett & Francescotti, *supra* note 83, at 1082 (explaining that if new forms of oppression arise, then the government would need to modify the current laws).

¹⁶⁴ *Id.*

¹⁶⁵ See *infra* note 166 and accompanying text.

¹⁶⁶ Corlett & Francescotti, *supra* note 83, at 1082. Professors J. Angelo Corlett and Robert Francescotti provide this as an example of possible future discrimination that subsequent generations may be forced to confront and attempt to correct by amending hate speech and hate crimes laws. *Id.* Yet, it seems that a better scenario would be to allow free speech to prevent this possible future form of discrimination from arising in the first place through open and honest debate, which is the best method for preventing bigotry. See *supra* Part III.B. It seems not to cross the minds of the proponents for hate speech legislation that, if this unbelievable scenario were to occur, maybe it would be because hate speech legislation became a self-fulfilling prophecy. Josephine Chow, Comment, *Sticks and Stones Will Break My Bones, but Will Racist Humor?: A Look Around the World at Whether Police Officers Have a Free Speech Right to Engage in Racist Humor*, 14 *LOY. L.A. INT’L & COMP. L.J.* 851, 862 (1992) (“[H]ate

Those advocates continue by stating the definition of hate speech should include speech against members of *any* recognizable group.¹⁶⁷ If advocates for hate speech legislation foresee scenarios where such laws protect people with “outies,” then it takes no stretch of the imagination to visualize the day when hate speech legislation protects currently recognized groups such as union members, pro-life advocates, pro-choice advocates, Muslims, and Christians.¹⁶⁸ That could result in any hateful or offensive speech, directed toward those groups, falling under the penalties of hate speech laws, allowing the government to silence the speaker through incarceration and fines.¹⁶⁹ Eventually, government could regulate free speech to such an extent that there would be nothing free to say.¹⁷⁰

Often, advocates will justify hate crimes legislation by providing examples of situations that they say will never fall under the regulation of hate speech.¹⁷¹ It is ironic that one example regularly used to illustrate the supposed benign effects of hate crimes legislation is that burning the American flag will never fall under the penalties of such laws.¹⁷² According to such reasoning, Americans apparently have nothing to worry about regarding the dangers of hate crimes laws because if they ever decide to burn the American flag the government will not prosecute them for espousing hate.¹⁷³ This does little to ease the concerns of

speech acts as a self-fulfilling prophecy.”). For example, maybe future forms of discrimination and hate arise because people stop communicating with each other out of fear of being persecuted under hate speech laws. *See How ‘Hate Crimes’ Work in the Real World*, *supra* note 73 (noting the chilling effect of hate crimes laws). In other words, bigotry, prejudice, and hate might form within society through the void created by hate speech laws precluding open and honest debate. *See supra* Part III.B. When free speech is chilled, people might drift into isolation and that is when hate can begin to fester. *See supra* Part III.B.

¹⁶⁷ Corlett & Francescotti, *supra* note 83, at 1082.

¹⁶⁸ *See supra* notes 139-54 and accompanying text.

¹⁶⁹ *See supra* note 166 and accompanying text. If hate speech laws could apply to people with “outies” and, therefore, subject those espousing hateful “outie” speech to incarceration, then the same can happen to those espousing hateful and offensive speech to other groups listed above. *See supra* notes 139-54 and accompanying text.

¹⁷⁰ *See How ‘Hate Crimes’ Work in the Real World*, *supra* note 73 (noting the chilling effect of hate crimes laws).

¹⁷¹ *See infra* note 172-78 and accompanying text.

¹⁷² *See Hylton*, *supra* note 69, at 44; Watterson, *supra* note 100, at 981-82.

¹⁷³ *See Hylton*, *supra* note 69, at 44; Watterson, *supra* note 100, at 981-82.

Americans who fear that hate crimes legislation will eventually spawn a governmental monster reminiscent of Big Brother in George Orwell's *1984*.¹⁷⁴

Professor Keith Hylton postulates that it is not hate speech to burn the American flag while protesting the U.S. government because the person burning the flag is engaging "in non-hate, speech-related conduct."¹⁷⁵ Another advocate suggests that burning the American flag is distinguishable from hate speech because there is no victim when a flag is burned and "it does not erode anyone's sense of self or inflict real damage."¹⁷⁶ These advocates seem unable to recognize the subjective nature of their own arguments.¹⁷⁷ Reasonable Americans are justified in believing that burning the American flag is hateful or offensive speech.¹⁷⁸ Such undeveloped arguments in support of hate speech legislation only prove the inherent subjectivity of such laws.¹⁷⁹

Professors J. Angelo Corlett and Robert Francescotti recognize the dangerously subjective nature of hate speech legislation and propose suggestions for eliminating the subjectivity involved.¹⁸⁰ One proposal is to employ a "reasonable person" standard to determine whether something is really hate speech or not.¹⁸¹ Under this proposal, a person is guilty of hate speech if he or she makes a comment that a reasonable person would consider harmful or offensive.¹⁸²

That proposal is not practical.¹⁸³ For example, just who should this reasonable person be: a 1930s German-Jew, a 1960s black man residing in Alabama, a Wisconsin union worker, a homosexual, a Christian, or a Muslim? If the reasonable person encompasses everyone,

¹⁷⁴ See generally GEORGE ORWELL, 1984 (Alfred A. Knopf 1992) (1949).

¹⁷⁵ Hylton, *supra* note 69, at 44.

¹⁷⁶ Watterson, *supra* note 100, at 981-82.

¹⁷⁷ See *supra* notes 45-47 and accompanying text.

¹⁷⁸ *Texas v. Johnson*, 491 U.S. 397, 397 (1989) (explaining that during the 1984 Republican National Convention protestors burned an American flag and that several Americans attending the convention "were seriously offended by the flag burning").

¹⁷⁹ See *supra* notes 172-78 and accompanying text.

¹⁸⁰ Corlett & Francescotti, *supra* note 83, at 1093.

¹⁸¹ *Id.*

¹⁸² *Id.*

¹⁸³ See *infra* note 185 and accompanying text.

eventually there will be no legally protected speech because all speech may presumably hurt or offend every type of reasonable person.¹⁸⁴ On the other hand, if one type of reasonable person is subjectively picked out of the multiple possibilities then it is no longer a reasonable person as defined by the objective nature of the standard and the law.¹⁸⁵

Regulating hate speech, according to Professor Hylton, can eventually degenerate into “a series of self-serving efforts by various ethnic or racial groups to regulate the speech of others.”¹⁸⁶ He continues by explaining the possibility exists that “almost anything an individual does can be considered conduct that has a harmful external effect, and that therefore government is free to regulate almost all speech-related conduct.”¹⁸⁷ In that situation, the government has potentially unlimited power to regulate behavior.¹⁸⁸

The solution to solving hate and bigotry is not to delegate unlimited power to the government in the form of subjective regulations on freedom of speech.¹⁸⁹ A better solution is to let the ignorant bigot offend you and then be thankful that you still have your rights and freedoms so that you can respond effectively to educate that person.¹⁹⁰ You may rightfully think that person is a bigot, but his actions and words will pale in comparison to what a government is capable of once it can

¹⁸⁴ See *infra* notes 186-88 and accompanying text.

¹⁸⁵ See andré douglas pond cummings, “Lions and Tigers and Bears, Oh My” or “Redskins and Braves and Indians, Oh Why”: *Ruminations on McBride v. Utah State Tax Commission, Political Correctness, and the Reasonable Person*, 36 CAL. W. L. REV. 11, 29-30 (1999). The writer explains that when one demographic, a white male for example, tries to apply a reasonable person standard, his perspective will be “slanted heavily toward the white male bias.” *Id.* at 29. The writer continues by stating, “The very use of the objective, reasonable person standard is by historical definition, sexist and racist.” *Id.* at 29-30. The implication being that when one person, or a group of people, tries to apply an objective reasonable person standard to racial, cultural, or ethnic issues, the very nature of those issues makes it impossible for that person to stay objective and not stray into a subjective form of thought and judgment. See *id.*

¹⁸⁶ Hylton, *supra* note 69, at 45.

¹⁸⁷ *Id.* at 38.

¹⁸⁸ *Id.* at 39.

¹⁸⁹ See *supra* notes 107-10 and accompanying text.

¹⁹⁰ See *infra* notes 244-48 and accompanying text.

subjectively regulate and criminalize speech and thought.¹⁹¹ When one citizen no longer has the right to offend another, the First Amendment freedoms for all citizens eventually disappear.¹⁹²

B. Political Correctness Run Amuck Forewarns What Americans Can Expect Under Hate Crimes Laws

The social manipulation of language through political correctness and the legislative manipulation of language through hate crimes regulations have many similarities.¹⁹³ Both concepts concern what society, and especially what those in positions of political power, consider acceptable speech.¹⁹⁴ Similar to hate speech, what authorities consider politically incorrect is subjective and relative to who is in power,¹⁹⁵ and over the decades, what falls under politically incorrect speech has grown significantly.¹⁹⁶ Thus, we can use the evolution of political correctness to gain a glimpse as to what Americans can expect under sweeping hate crimes laws.¹⁹⁷

The origin of the concept Americans call political correctness dates back to 1920s Europe.¹⁹⁸ Antonio Gramsci and Georg Lukacs established the Institute for Social Research, which they formed as a Marxist think tank with the goal of spreading Marxism throughout Western society.¹⁹⁹ At that institute, these Marxists developed a concept known as “critical theory.”²⁰⁰ Critical theory combined Marxist economic and political philosophy with the psychological theories and

¹⁹¹ See *infra* Part IV.C-D.

¹⁹² See *infra* note 247 and accompanying text.

¹⁹³ See *infra* notes 209-16 and accompanying text.

¹⁹⁴ See *infra* notes 209-16 and accompanying text.

¹⁹⁵ See *infra* notes 209-16 and accompanying text.

¹⁹⁶ Agustin Blazquez with Jaums Sutton, *Political Correctness: The Scourge of Our Times*, NEWSMAX.COM (Apr. 8, 2002), <http://archive.newsmax.com/archives/articles/2002/4/4/121115.shtml>.

¹⁹⁷ See *infra* notes 209-16 and accompanying text.

¹⁹⁸ Bill Lind, *The Origins of Political Correctness*, ACCURACY ACADEMIA (Feb. 5, 2000), <http://www.academia.org/the-origins-of-political-correctness/>.

¹⁹⁹ *Id.*

²⁰⁰ *Id.*

2012]

Wahl

411

strategies of Sigmund Freud.²⁰¹ The idea was to create a form of Marxism acceptable to Western culture.²⁰²

Critical theory is a concept for criticizing something to the point where, over time, society eventually considers the criticized item as evil and wrong even if it is not.²⁰³ When used on language and speech, this tactic criticizes certain words, phrases, and thoughts until society seeks replacement language.²⁰⁴ That replacement language becomes the acceptable, or the more politically correct, term because it avoids future criticism.²⁰⁵

Critical theory was introduced into Western society, including America.²⁰⁶ Americans eventually recognized this technique for gradually manipulating language and, unaware of its Marxist roots and potential damaging effects, gave it the innocent, albeit sarcastic, label of “political correctness.”²⁰⁷ This concept spread throughout America, growing with influence, and today, society constantly discusses what is or is not politically correct language.²⁰⁸

For example, the Obama Administration declared the phrases “war on terrorism” and “jihadists” are no longer acceptable for use by the U.S. government because they are politically incorrect terms.²⁰⁹ However, those terms were acceptable for describing world events just a mere five years prior.²¹⁰ In a similar fashion, a future administration may decide that pro-life speech is now hate speech because it is against women’s rights, and therefore, offensive to women.²¹¹ Moreover, a fu-

²⁰¹ *Id.*

²⁰² Blazquez with Sutton, *supra* note 196; Lind, *supra* note 198.

²⁰³ Lind, *supra* note 198.

²⁰⁴ Blazquez with Sutton, *supra* note 196; Lind, *supra* note 198.

²⁰⁵ Blazquez with Sutton, *supra* note 196; Lind, *supra* note 198.

²⁰⁶ Blazquez with Sutton, *supra* note 196.

²⁰⁷ See Lind, *supra* note 198.

²⁰⁸ See Blazquez with Sutton, *supra* note 196.

²⁰⁹ See *White House: ‘War on Terrorism’ is Over*, WASH. TIMES (Aug. 6, 2009), http://www.washingtontimes.com/news/2009/aug/06/white-house-war-terrorism-over/?page=1&feat=home_headlines.

²¹⁰ See *id.* (explaining how those words used to be acceptable terms prior to the Obama Administration).

²¹¹ See Christopher P. Keleher, Comment, *Double Standards: The Suppression of Abortion Protestors’ Free Speech Rights*, 51 DEPAUL L. REV. 825, 895 (2002)

ture administration may decide that language in opposition to those entering the country illegally is hate speech because it is offensive to foreigners.²¹²

As these examples demonstrate, what falls under politically correct speech or hateful and offensive speech is relative to whom is in power at any given time.²¹³ On September 12, 2001, Americans would have thought it absurd that the U.S. government would consider the terms “war on terrorism” or “jihadist” politically incorrect, but that became reality ten years later.²¹⁴ What will become reality in America tomorrow under sweeping hate crimes legislation? Ronald Reagan once said, “Freedom is never more than one generation away from extinction.”²¹⁵ That is especially true when Americans elect the wrong people into office and then empower unscrupulous government officials with the ability to criminalize hateful or offensive speech and thought.²¹⁶

C. Hate Crimes Legislation Detrimentially Affects Individual Liberty and Freedom

Missouri police arrested Nicholas John Profitt for throwing rocks at a house of worship and damaging its front door.²¹⁷ Because this occurred in a state that enforced hate crimes legislation, the issue became what was going through Profitt’s head leading up to the rock-throwing incident.²¹⁸ Was it bigotry or just a random act of vandal-

(explaining that some abortion supporters also support “restrictions on pro-life speech,” and that some pro-choice advocates only “believe in free speech when it advances their goals”).

²¹² See David McGhee, Comment, *Reopening Liberty’s Arms: Steps Toward Open Immigration*, KAN. J.L. & PUB. POL’Y, Fall 1994, at 127, 131-32 (explaining that some people are “increasingly pointing their fingers at illegal immigrants as the source of fiscal woes,” and that statements “against illegal immigration can only incite more hate crimes”).

²¹³ See *supra* notes 209-12 and accompanying text.

²¹⁴ See *supra* note 209 and accompanying text.

²¹⁵ RONALD REAGAN, *Encroaching Control: The Peril of Ever-Expanding Government*, in *A TIME FOR CHOOSING: THE SPEECHES OF RONALD REAGAN, 1961-1982*, at 19, 38 (Alfred A. Baltizer & Gerald M. Bonetto eds., 1983).

²¹⁶ See *infra* Part IV.D.

²¹⁷ *How ‘Hate Crimes’ Work in the Real World*, *supra* note 73.

²¹⁸ *Id.*

ism?²¹⁹ The court added three years to Profitt's maximum sentence, for a total of seven years, because that act of vandalism was against a group protected by hate crimes legislation, and as a result, his misdemeanor was elevated to a class D felony.²²⁰

No reasonable person would ever promote vandalism, throwing rocks, or interfering with a person's right to worship, but the dangerous implications this scenario has on the First Amendment freedoms for all Americans must be exposed.²²¹ Authorities were able to increase Profitt's punishment based on what they assumed were his thoughts at the time of his criminal act.²²² That indefensible act of vandalism came with a possible four years in prison, while Profitt's *mere thoughts* came with an additional three years.²²³ As Profitt's experience demonstrates, hate crimes laws are effectively "thought crimes" laws, which violate our freedoms of speech and conscience.²²⁴ The Hollywood production of George Orwell's *1984* is no longer a fictional two-hour break from reality.²²⁵ Americans are now living through the opening credits of that prophetic movie while the intellectually elite among us are determined to push the fast forward button by ushering in more hate crimes legislation.

D. The Detrimental Effects of Hate Crimes Legislation on Religious Freedom

The detrimental results that such laws have on First Amendment freedoms may be most apparent in regards to religious freedom.²²⁶ Canada and Sweden provide examples of legislation used to issue fines and even incarcerate church pastors, and ordinary Christian citizens, for expressing biblical values.²²⁷ Christian ministries in Canada that provide messages over public airways have had their broadcasts either se-

²¹⁹ *Id.*

²²⁰ *Id.*

²²¹ See *infra* notes 222-23 and accompanying text.

²²² *How 'Hate Crimes' Work in the Real World*, *supra* note 73.

²²³ *Id.*

²²⁴ Hylton, *supra* note 69, at 42.

²²⁵ See 1984 (Umbrella-Rosenblum Films Production 1984).

²²⁶ See *infra* notes 227-32 and accompanying text.

²²⁷ Farah, *supra* note 162.

verely regulated or completely shut down under laws that preclude religious opinions on a wide range of issues.²²⁸

In Brazil, government pressure forced Julio Severo into exile for being an outspoken and prominent activist promoting biblical teachings.²²⁹ Mr. Severo explains that Brazil does not yet criminalize Christianity, but through hate crimes legislation the government does regulate what biblical principles may be preached.²³⁰ The laws in Brazil have begun diluting religion to the point where it no longer becomes religion with any meaning.²³¹ According to Mr. Severo:

Brazil grants freedom to preach Christianity, provided that the sermons avoid negative mentions of state-protected behaviors and cultural trends. . . . The Brazilian government is establishing more and more categories of protected behaviors, banning negative mentions. So Brazilian preachers need to get updated on the latest political changes and preach a Gospel according to the state interests.²³²

This is the frightening reality of both hate speech and hate crimes legislation around the world.²³³ The intellectually elite in America, however, are racing to support, defend, and implement these same laws in the hopes it will eliminate bigotry and unveil a utopian society.²³⁴ Rather than establishing paradise by legislating morality, hate crimes laws will become a tool for reducing freedoms, imposing unpopular agendas, and spreading immorality.²³⁵ Hate speech regulations may be what Jesus Christ foresaw when He said that eventually

²²⁸ Bob Unruh, *Dobson Editing Radio Show to Avoid 'Hate Crimes' Laws: Focus Working to Meet Demands of 'Human Rights Laws'*, WORLDNETDAILY (Mar. 28, 2008), <http://www.wnd.com/2008/03/60196/>.

²²⁹ Farah, *supra* note 162.

²³⁰ *Id.*

²³¹ *See id.*

²³² *Id.*

²³³ *See supra* notes 226-32 and accompanying text.

²³⁴ *See supra* Part IV.A.

²³⁵ *See supra* notes 209-16, 227-32 and accompanying text.

2012]

Wahl

415

“you will be hated by all nations because of me,”²³⁶ and “[i]f they persecuted Me, they will persecute you.”²³⁷

V. CONCLUSION

Under hate crimes legislation, the days of open debates and free discussions of various viewpoints will be over and replaced with government intervention to silence and suppress dissenting opinions.²³⁸ Advocates for hate crimes legislation argue such laws are necessary to combat crimes motivated by hate; however, those advocates fail to recognize that such laws become a dangerous weapon in the hands of political groups with hidden agendas making them capable of silencing those they do not agree with regarding political and religious topics.²³⁹ A better way to address hate speech is to allow bigots to express themselves and then combat hate with loving, enlightening, and educated speech.²⁴⁰ In other words, more speech is the only way to reach nirvana, not regulated speech through misguided hate crimes legislation.

Hate crimes legislation also transforms America’s colorblind criminal laws into a set of laws with various punishments depending on the race, ethnicity, and religion of the victim.²⁴¹ When classifications place certain citizens in preferred groups, empowering those groups with the ability to silence others not in preferred groups, it will only facilitate an environment for increasing divisiveness, tension, and hostility.²⁴² “Wherever equality is the theme, men live together in peace. Wherever inequality is the practice, grievances and complaints fester.”²⁴³ Criminal law should remain unbiased, colorblind, and designed for equal treatment for all humans regardless of race, ethnicity, sexual orientation, or religion.

²³⁶ See *Matthew* 24:9 (New International Version).

²³⁷ *John* 15:20 (New International Version).

²³⁸ See *supra* Part IV.

²³⁹ See Farah, *supra* note 162.

²⁴⁰ See *infra* notes 244-48 and accompanying text.

²⁴¹ See *supra* notes 92-95 and accompanying text.

²⁴² See *supra* Part IV.A.

²⁴³ WILLIAM O. DOUGLAS, *WE THE JUDGES: STUDIES IN AMERICAN AND INDIAN CONSTITUTIONAL LAW FROM MARSHALL TO MUKHERJEA* 425 (1956).

The Founding Fathers' intended the First Amendment to protect speech no matter how offensive the content, and when the right to be offended no longer exists, neither does the right to free speech.²⁴⁴ That is why the right to be offended is the greatest of all unenumerated rights.²⁴⁵ The ACLU agrees.²⁴⁶ According to the ACLU, "the right of free speech is indivisible: When one of us is denied this right, all of us are denied."²⁴⁷ Rather than protecting someone from being offended by regulating free speech, the preferred policy is to facilitate additional speech.²⁴⁸ I, for one, appreciate, cherish, and support my unenumerated right to be offended by you.

²⁴⁴ See *Hate Speech on Campus*, *supra* note 101.

²⁴⁵ See *supra* notes 20-26 and accompanying text.

²⁴⁶ See *Hate Speech on Campus*, *supra* note 101.

²⁴⁷ *Id.*

²⁴⁸ *Id.*