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Neutral on its Face, Dignitary Harm at its Core

Bethany Gump Jones

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NEUTRAL ON ITS FACE, DIGNITARY HARM AT ITS CORE

A paper about the dignity harm caused by “neutral laws of general applicability” in the gender debate.

*Bethany Gump Jones**

ABSTRACT

In recent years, it has become increasingly prominent for religious and political leaders to be accused of violating hate-speech laws by voicing their religious convictions. These hate-speech laws prohibit incitement to hatred or speech that causes another to be insulted. Proponents of these laws wrap their intentions in human dignity—a significant bedrock of human rights. As litigation in Europe over its hate-speech laws increase, American opinion pieces have started empathizing with the use of these laws in America. Before we restrict our First Amendment rights any further, the consequence of these laws must be examined.

Hate-speech laws raise several problems. Most importantly, instead of protecting the dignity of all, these laws bolster the voices of the supposedly less-resilient groups in exchange for silencing the speech of certain religious groups. This exchange is an impossible one if we are to protect human dignity because there is no definition of hate-speech that does not contravene the dignity of another. This Note ends with a discussion on how American jurisprudence correctly protects the “thought that we hate.”

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INTRODUCTION

Freedom of thought and freedom of speech are liberties Americans often take for granted. In our pluralistic society, these freedoms are at the heart of diversity and tolerance. Today, the American melting pot includes so many various religions that, to protect this pluralism we so enjoy, these freedoms must be protected. But these freedoms are under attack from numerous different sources—think guerrilla warfare. Some who hold beliefs that are becoming increasingly dominant do not want to share the public square with any disagreeing beliefs. While the desire for approval is understandable, to protect pluralism the public square must be capable of sharing multiple disagreeing viewpoints. But is this conclusion reflected by our laws?

Several international agreements focus on protecting human dignity.¹ While widely accepted, this right is often flouted as countries criminalize certain speech. For example, several countries have created “hate-speech” laws: laws that threaten to incriminate individuals who express disagreement with dominant values.² When this is done, whose dignitary interests are being protected? Every law created infringes upon someone’s conduct. Do hate-speech laws cross the line and infringe on a protected right? Gay-rights activists answer in the negative—they

1. See, e.g., G.A. Res. 217 (III) A, Universal Declaration of Human Rights (Dec. 10, 1948); see also International Covenant on Civil and Political Rights, Dec. 16, 1966, S. TREATY DOC. NO. 95–20, 999 U.N.T.S. 171.

2. See, e.g., Loi du 29 juillet 1881 sur la liberté de la presse [Press Act of July 29, 1881], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], July 30, 1881, p. 4202.

claim a right to censor disapproval.³ But what about the dignitary interests of religious believers who disapprove of same-sex relations? Do they enjoy freedom of conscience when they are forbidden to speak of their religious views because it theoretically incites others to hatred of homosexuals or people who are transgender? These are the questions this Note seeks to answer.

Two of the most common targets of hate-speech laws are those most visible in the public square: politicians and pastors.⁴ Their frequent presence in the public square gives gay-rights activists ample opportunities to accuse them of “hate-speech.” This Note will focus on these targets by first surveying the laws and cases where European politicians and pastors have encountered hate-speech attacks. Then, this Note reviews whether hate-speech laws have been successful in their endeavor to protect human dignity. After reviewing what arguments gay-rights activists rely on to promote hate-speech laws, I conclude that hate-speech laws can never protect the dignity of all. Finally, I end with a discussion of American jurisprudence and the benefits of American First Amendment rights and restrictions. In conclusion, I find that it is impossible to protect the dignitary interest of any through hate-speech laws because there is no definition of hate-speech that does not contravene the dignity of another.

I. THE LAWS AND CASES AT ISSUE

Under the European Convention on Human Rights (“ECHR”) people have the freedom to manifest their religion (Article 9) and freedom of expression, which includes the freedom to impart information and ideas without interference by a public authority (Article 10).⁵ However, the following European countries have enacted laws that are inconsistent with these protections by ratifying so called hate-speech laws.

1. *The Netherlands*

The Netherlands not only falls under the protections of the ECHR, but it also protects freedom of expression under Article 7 of the Dutch constitution.⁶ However, “this right is not absolute” according to Assistant Professor of Constitutional Law at the Open University in

3. See generally TALKING ABOUT INCLUSIVE HATE CRIMES, GAY & LESBIAN ALLIANCE AGAINST DEFAMATION & MOVEMENT ADVANCEMENT PROJECT, (Arizona Together et al. eds., 2009).

4. See PAUL COLEMAN, CENSORED loc. 644 (2016) (ebook).

5. Jim Murdoch, *Protecting the Right to Freedom of Thought, Conscience, and Religion Under the European Convention on Human Rights*, COUNCIL OF EUR. (2012), <https://rm.coe.int/16806f14e0> [<https://perma.cc/FVJ8-7VDR>].

6. See GW. [Constitution] art. 7.

the Netherlands, Tom Herrenberg.⁷ The Dutch Criminal Code contains several provisions that limit freedom of expression; these laws are applied against defamation, slander, and insult and include a prohibition against incitement to religious hatred and discrimination (hate-speech).⁸ In 1996, a member of the Dutch parliament personally encountered these limitations.

Leen van Dijke was a member of the Dutch parliament when he gave an interview with the weekly magazine, *Nieuwe Revu*, expressing his religious views on homosexuality.⁹ “Why would stealing, for example committing social welfare fraud, be less of a sin than going against the seventh commandment,” he commented, “[y]es, why should someone in a homosexual relationship be better than a thief?”¹⁰ In his defense to media critics, Van Dijke explained that he was simply conveying what he believed to be a common Christian tenet, “that all sin is equal.”¹¹ His comments were submitted to the Attorney General and eventually the trial court found him guilty under 137(c) and 137(e) of the Dutch Criminal Code,¹² which criminalizes both intentional insults and words or actions which are reasonably seen as insulting toward a group of people based on their homosexuality.¹³ The appeals court acquitted Van Dijke, finding that freedom of religion can play a role in determining whether a statement, in and of itself offensive, is insulting.¹⁴ The Supreme Court affirmed the appeals court, explaining that Van Dijke’s expression of his religion protected him from criminal charges.¹⁵

In 2001, a Muslim imam joined Leen van Dijke in a similar accusation. On May 3, 2001, Muslim imam¹⁶ Khalil El Moumni received

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7. Sarah Souli, *The Netherlands’ Burgeoning Free Speech Problem*, THE NEW REPUBLIC (Mar. 13, 2019), <https://newrepublic.com/article/153305/netherlands-burgeoning-free-speech-problem> [https://perma.cc/6J82-49V4].
 8. Art. 131 SR (Neth.); Art. 137c SR (Neth.); Art. 137d SR (Neth.); Art. 137e SR (Neth.).
 9. *Dutch MP Fined for Critical Comment on Homosexuality*, OBSERVATORY ON INTOLERANCE & DISCRIMINATION AGAINST CHRISTIANS IN EUR., <https://www.intoleranceagainstchristians.eu/index.php?id=12&case=782> [https://perma.cc/2AJJ-8JV8].
 10. *Id.*
 11. *Id.*
 12. COLEMAN, *supra* note 4, at loc. 820.
 13. Art. 137 (Neth.), *supra* note 8.
 14. COLEMAN, *supra* note 4, at loc. 820.
 15. *Id.*
 16. An imam is a Muslim religious leader who leads prayers at a mosque. Huda, *What Is the Role of the Imam in Islam?*, LEARN RELIGIONS (Jan.

major public backlash after expressing his views of what the Quran says about homosexual practices.¹⁷ During a television interview, El Moumni declared that “homosexuality was sinful, a disease, and a degenerate influence in the Dutch society in its threat to reproduction.”¹⁸ In response, members of the Dutch parliament belonging to the Labour and Liberal parties asked the government to deport El Moumni out of the country.¹⁹ The government refused, explaining that El Moumni had not broken any laws.²⁰

2. ENGLAND

Until 2014 in England and Wales, Section 5 of the Public Order Act (“POA”) forbade words or behavior that, among other possibilities, insult someone.²¹ In the English case *Brutus v. Cozens*, it was said that to be insulting, the conduct must be more than just “vigorous, distasteful, unmannerly, objectionable or even offensive.”²² Even with this heightened standard, seven preachers and one medical doctor were accused of violating the country’s hate-speech laws between 2001 and 2019.²³

26, 2019), <https://www.learnreligions.com/role-of-the-imam-2004527> [<https://perma.cc/ZBK3-UYM8>].

17. See Matthew Kane, *Lost Cause? A Post-Gay Examination of the Politics of Homosexuality, Islam, and Difference in the Netherlands*, in 425 INDEPENDENT STUDY PROJECT COLLECTION 1, 22 (2005).
18. *Id.*
19. Gert Hekma, *Imams and Homosexuality: A Post-Gay Debate in the Netherlands*, 5 SEXUALITIES 237, 237 (2002).
20. *Id.*
21. Public Order Act 1986, c. 5 (Eng.), <http://www.legislation.gov.uk/ukpga/1986/64/section/5/2014-02-01> [<https://perma.cc/GC9M-C62W>].
22. See *Brutus v. Cozens* [1973] AC 854 (HL) 862 (Eng.).
23. See *Street Preacher Convicted by Magistrates for Displaying a Sign Saying Homosexuality Is Immoral*, THE CHRISTIAN INST. (July 7, 2006), https://web.archive.org/web/20100510150230/http://www.christian.org.uk/rel_liberties/cases/harry_hammond.htm [<https://perma.cc/W24Z-KDJ2>] [hereinafter *Street Preacher Convicted by Magistrates*]; Heidi Blake, *Christian Preacher Arrested for Saying Homosexuality Is a Sin*, TELEGRAPH (May 2, 2010), <https://www.telegraph.co.uk/news/religion/7668448/Christian-preacher-arrested-for-saying-homosexuality-is-a-sin.html> [<https://perma.cc/LE9A-FHKV>]; Steve Doughty, *Payout for Anti-Gay Preacher Over Arrest: Landmark Ruling in Christian’s Battle for Free Speech*, DAILY MAIL (Dec. 10, 2010, 3:30 PM), <https://www.dailymail.co.uk/news/article-1337292/Payout-anti-gay-preacher-Anthony-Rollins-Landmark-ruling-free-speech-battle.html> [<https://perma.cc/SY6H-7M9Y>]; *Police Compensate Street Preacher After Arrest for Preaching Biblical Condemnation of Homosexuals*, NAT’L SECULAR SOC’Y (Mar. 31, 2014),

In October 2001, Harry Hammond was preaching in Bournemouth town center and holding a sign bearing the words, “Jesus Gives Peace, Jesus is Alive, Stop Immorality, Stop Homosexuality, Stop Lesbianism, Jesus is Lord.”²⁴ The sign caused some passersby to become angry and violent towards Mr. Hammond.²⁵ In response, police constables requested that Mr. Hammond put the sign away and leave.²⁶ Upon refusing, he was arrested and accused of violating Section 5 of the POA.²⁷ For a section 5 offense to be triggered, the words or behavior or some other visible representation must be threatening, abusive, insulting, or amount to disorderly behavior.²⁸ Mr. Hammond was convicted by magistrates who found that he knew that insult, distress, and disturbance were likely to be caused but refused to put away the sign or leave when requested.²⁹ Although Mr. Hammond appealed his case to the High Court, the magistrates declined to reverse, declaring that, while they considered his rights under the European Convention on Human Rights, they found that there was a pressing social need to restrict his freedom of expression in order to prevent disorder.³⁰ Mr. Hammond passed away in 2002, but the executors of his estate were granted permission to continue the appeal.³¹ After a hearing in 2004, the Divisional Court dismissed the appeal.³²

Next is Stephen Green.³³ In 2006, Mr. Green attended a Gay Pride festival in Cardiff, Wales where he handed out religious leaflets.³⁴ Mr. Green was arrested because the leaflets contained biblical quotes about

<https://www.secularism.org.uk/news/2014/03/police-compensate-street-preacher-after-arrest-for-preaching-biblical-condemnation-of-homosexuals> [<https://perma.cc/DN4V-YRCU>] [hereinafter NAT’L SECULAR SOC’Y]; Heather Clark, *Preachers Found Guilty of Violating UK ‘Crime & Disorder Act’ After Arrests for ‘Anti-Social’ Opposition to Islam, Homosexuality*, CHRISTIAN NEWS (Feb. 28, 2017), <https://christiannews.net/2017/02/28/preachers-found-guilty-of-violating-uk-crime-disorder-act-after-arrests-for-anti-social-opposition-to-islam-homosexuality/> [<https://perma.cc/V5WG-XNL6>].

24. *Street Preacher Convicted by Magistrates*, *supra* note 23.
25. *Id.*
26. *Fairfield v. United Kingdom*, 24790 Eur. Ct. H.R. 1 (2005).
27. *Id.* at 1–2.
28. *Id.* at 3–4.
29. *Id.* at 2.
30. *Id.*
31. *Id.*
32. *Id.*
33. Blake, *supra* note 23.
34. *Id.*

homosexuality.³⁵ Although Mr. Green was charged and committed for trial, the case against him was dropped by the Crown Prosecution Service before trial began.³⁶

Anthony Rollins was a 45-year old preacher who, prior to his arrest, spoke as a member of a Christian mission for 12 years.³⁷ In June 2008, he was handing out leaflets in the Birmingham city center and quoting passages from the Bible.³⁸ One of those quotes was from 1 Corinthians condemning the “unrighteous,” including fornicators, idolaters, adulterers, effeminate, and “abusers of themselves with mankind.”³⁹ Mr. Rollins expounded on these quotes by explaining that “effeminate” meant homosexuals.⁴⁰ A passerby, offended by what Mr. Rollins was saying, called the police who, without question, arrested and held Mr. Rollins in custody for nearly four hours.⁴¹ He was charged with breaching Section 5 of the POA, which outlaws the unreasonable use of abusive language likely to cause distress.⁴² The charges were dropped before the case came to trial.⁴³ Subsequently, Mr. Rollins sued West Midlands Police for wrongful arrest, unlawful imprisonment, assault and battery, and the infringement of his human rights.⁴⁴ Judge Lance Ashworth at Birmingham county court ruled in favor of Mr. Rollins, stating that what the police did was “done unthinkingly.”⁴⁵

Dale McAlpine preached Christianity in Workington, Cumbria for many years.⁴⁶ On April 20, 2010, Mr. McAlpine was handing out leaflets that explained the Ten Commandments when a woman began to debate him about his faith.⁴⁷ During the exchange, Mr. McAlpine explained

35. *Christian Street Preacher Case Dismissed by Judge*, THE CHRISTIAN INST. (Mar. 23, 2010), <https://www.christian.org.uk/news/christian-street-preacher-case-dismissed-by-judge/> [<https://perma.cc/D28G-P8BC>].

36. *Id.*

37. Doughty, *supra* note 23.

38. *Id.*

39. *Id.*

40. *Id.*

41. Brian Hutt, *Street Preacher Who Spoke Out Against Homosexuality Wins Wrongful Arrest Case*, CHRISTIAN TODAY (Dec. 10, 2010, 5:00 PM), <https://www.christiantoday.com/article/street.preacher.who.spoke.out.against.homosexuality.wins.wrongful.arrest.case/27225.htm> [<https://perma.cc/6TGQ-MGJQ>].

42. *Id.*

43. *Id.*

44. *Id.*

45. Doughty, *supra* note 23.

46. Blake, *supra* note 23.

47. *Id.*

that he quietly listed homosexuality among a number of sins referenced in 1 Corinthians, including blasphemy, fornication, adultery, and drunkenness.⁴⁸ After the woman walked away, she was approached by a police community support officer (“PCSO”).⁴⁹ The PCSO then approached Mr. McAlpine and told him a complaint had been made against him and that he could be arrested for using racist or homophobic language.⁵⁰ Mr. McAlpine said that he told the PCSO, “I am not homophobic but sometimes I do say that the Bible says homosexuality is a crime against the Creator.”⁵¹ He claims that the PCSO then identified himself as a homosexual and as the Lesbian, Gay, Bisexual and Transgender liaison officer for Cumbria police.⁵² Mr. McAlpine replied: “It’s still a sin,” and then began a 20-minute sermon mentioning drunkenness and adultery, but not homosexuality.⁵³ Three uniformed police officers arrived during the sermon, arrested Mr. McAlpine, and put him in the back of their police van.⁵⁴

Mr. McAlpine, like Mr. Rollins and Mr. Hammond, was charged under Sections 5 of the POA which outlaws the unreasonable use of abusive language likely to cause distress.⁵⁵ He was released on bail on the condition that he not preach in public.⁵⁶ After the Crown Prosecutorial Services (“CPS”) watched the video that caught the entire interaction, CPS explained that there was not sufficient evidence to prosecute Mr. McAlpine under Section 5 of the POA and thus all charges were dropped.⁵⁷

In 2011, Christian street preacher John Craven was arrested under Section 4A of the 1986 POA, which criminalizes the use of insulting words with the intention of causing harassment, alarm or distress.⁵⁸ Unlike Section 5, which requires intention to use threatening or abusive words or behavior, Section 4A requires intention to cause harassment,

48. *Id.*

49. *Id.*

50. *Id.*

51. *Id.*

52. *Id.*

53. *Id.*

54. *Id.*

55. *Id.*

56. *Id.*

57. *Charge Against ‘Gay Sin’ Preacher Dropped*, BBC NEWS (May 17, 2010), http://news.bbc.co.uk/2/hi/uk_news/england/cumbria/8687395.stm [https://perma.cc/KCB5-XS8H].

58. NAT’L SECULAR SOC’Y, *supra* note 23.

alarm or distress.⁵⁹ Mr. Craven was preaching on the street when two teenage boys approached him and asked what he thought of homosexuals.⁶⁰ He responded by quoting the Bible and adding an explanation that “whilst God hates sin He loves the sinner.”⁶¹ After the teenagers told a police officer they felt insulted by Mr. Craven’s comments, Mr. Craven was arrested by police for a public order offense.⁶² He was held in custody for over 19 hours before being released without charge.⁶³

In July 2016, street preachers Michael Overd and Michael Stockwell were arrested for violating the Crime and Disorder Act (“CDA”), which prohibits speech causing “intentional harassment, alarm or distress” that is “religiously aggravated,” because they stated that those who are not Christians are on the path to destruction.⁶⁴ U.K. prosecutor Ian Jackson said that it was wrong for the preachers to include homosexuals in a list of sinners that included drunkards and thieves, arguing that doing so “must be considered to be abusive and is a criminal matter.”⁶⁵ But attorney Michael Phillips of the Christian Legal Centre noted to the court that the men were simply citing 1 Corinthians 6:9-10, which reads, “Know ye not that the unrighteous shall not inherit the Kingdom of God? Be not deceived: Neither fornicators, nor idolaters, nor adulterers, nor effeminate, nor abusers of themselves with mankind, nor thieves, nor covetous, nor drunkards, nor revilers, nor extortioners, shall inherit the kingdom of God.”⁶⁶ The Justices declared Overd and Stockwell guilty of violating the CDA.⁶⁷ However, one year later, their

59. *Id.* Section 5 of the Public Order Act 1986 was subsequently amended by Parliament; as a result of the reform of Section 5, the College of Policing has issued new guidance telling officers that they are not allowed to arrest people simply because others find their words or behavior insulting. *Id.*

60. *Street Preacher Held by Police for 19 Hours gets £13,000*, THE CHRISTIAN INST. (Mar. 31, 2014), <https://www.christian.org.uk/news/street-preacher-held-by-police-for-19-hours-gets-13000/> [<https://perma.cc/4UYP-FGRD>].

61. *Id.*

62. *Id.*

63. Paul Coleman, *Europe’s Free Speech Problem: A Cautionary Tale*, *Public Discourse*, J. WITHERSPOON INST. (July 5, 2016), <https://www.thepublicdiscourse.com/2016/07/17113/> [<https://perma.cc/UL2K-CT9T>].

64. Clark, *supra* note 23.

65. Heather Clark, *UK Prosecutor During Trial That Found Preachers Guilty: ‘Jesus Is Only Way to God Cannot Be Truth’*, CHRISTIAN NEWS (Feb. 28, 2017), <https://christiannews.net/2017/02/28/prosecutor-during-trial-that-found-preachers-guilty-jesus-is-only-way-to-god-cannot-be-truth/> [<https://perma.cc/4AQ6-9SST>].

66. *Id.*

67. *Id.*

convictions were reversed at Bristol Crown Court.⁶⁸ According to the judge, it could not be proven that the offense was religiously aggravated.⁶⁹

Finally, in October 2019, a British court ruled that Dr. David Mackereth could be fired from his job as a healthcare worker because he believed that God created mankind in his image as male and female.⁷⁰ He would not agree that a man may meaningfully claim to be a woman.⁷¹ The court ruled that “belief in Genesis 1:27 . . . and conscientious objection to transgenderism . . . are incompatible with human dignity.”⁷² Dr. Mackereth was fired.⁷³ “In its ruling, the tribunal panel found that Dr. Mackereth had not been discriminated against or harassed under the Equality Act.”⁷⁴ While the panel found that Christianity is protected under the Act, the court then found that Dr. Mackereth’s specific beliefs were not.⁷⁵

3. Sweden

In 2002, the Sweden Penal Code was updated to reflect its new hate-speech law: “[a] person who, in a disseminated statement or communication, threatens or expresses contempt for a national, ethnic or other such group of persons with allusion to race, color, national or ethnic origin or religious belief, or sexual orientation, shall be [punished].”⁷⁶ The law requires that the discriminatory motives of the actor be taken into consideration by courts.⁷⁷

68. *Christian Preachers Win Appeals Over Shopping Centre Sermon*, BBC NEWS (June 29, 2017), <https://www.bbc.com/news/uk-england-bristol-40448925> [<https://perma.cc/4JYD-XJ2Q>].

69. *Id.*

70. Iliana Magra, *He Opposed Using Transgender Clients’ Pronouns. It Became a Legal Battle.*, N.Y. TIMES (Oct. 3, 2019), <https://www.nytimes.com/2019/10/03/world/europe/christian-transgender-uk.html> [<https://perma.cc/7RLX-5AD8>]; see also Jeffrey Cimmino, *UK tribunal Declares Christian Doctor’s Beliefs About Gender ‘Incompatible with Human Dignity’*, WASH. EXAMINER (Oct. 2, 2019), <https://www.washingtonexaminer.com/news/uk-tribunal-declares-christian-doctors-beliefs-about-gender-incompatible-with-human-dignity> [<https://perma.cc/H85Y-TAH8>].

71. Cimmino, *supra* note 70.

72. *Id.*

73. *Id.*

74. Magra, *supra* note 70.

75. *Id.*

76. VICTORIA KAWESA, LEGAL STUDY ON HOMOPHOBIA AND DISCRIMINATION ON GROUNDS OF SEXUAL ORIENTATION AND GENDER IDENTITY 25 (Skaraborgs Institute for Research & Development, 2014).

77. *Id.* at 26.

In 2003, Pastor Ake Green became the first person accused of violating this new law.⁷⁸ In a sermon, Pastor Green said that homosexuals are “a cancerous tumor on the body of society.”⁷⁹ Pastor Green appealed to the intermediate court of appeals in Sweden and won.⁸⁰ The Supreme Court of Sweden later affirmed the finding that Pastor Green’s remarks did not constitute incitement to hatred and instead his sermon was protected by freedom of speech and religion.⁸¹

4. *Belgium*

In 2003, Belgium amended its 1993 Anti-Discrimination Act to prohibit both direct and indirect discrimination based on sexual orientation at all levels of occupational hierarchy.⁸² In a 2008 magazine interview, Bishop André-Mutien Léonard was accused of breaking this law.⁸³

In an interview that appeared in 2008 in *TéléMoustique*, a weekly magazine in Belgium,⁸⁴ Bishop André-Mutien Léonard stated that marriage is “by definition, a stable union between a man and a woman. Homosexuality is an ‘abnormal’ psychological state.”⁸⁵ These views are by no means a new understanding but instead are standard Christian beliefs for 2,000 years.⁸⁶ In response, the Belgian Socialist party called his comments “aggressive and intolerant.”⁸⁷ The centrist Humanist

78. *Pastor Cleared Over Anti-Gay Sermon*, IRISH TIMES (Feb. 12, 2005), <https://www.irishtimes.com/news/pastor-cleared-over-anti-gay-sermon-1.414439> [<https://perma.cc/7RLX-5AD8>].

79. *Id.*

80. *Ake Green Case Detail*, BECKET (Oct. 31, 2005), <https://www.becketlaw.org/case/ake-green/> [<https://perma.cc/FZ9C-X5XW>].

81. *Id.*

82. *Belgium: Discrimination Based on Sexual Orientation in the Field of Employment*, EQUAL RIGHTS TRUST (May, 2008), https://www.equalrightstrust.org/ertdocumentbank/Microsoft%20Word%20-%20Belgium%20-%20sexual%20orientation%20-%20employment%20-%20law%20_Piper_.pdf [<https://perma.cc/NP44-4EBD>].

83. *See Charlemagne, A Bishop Speaks His Mind*, THE ECONOMIST (April 5, 2017), <https://www.economist.com/certain-ideas-of-europe/2007/04/05/a-bishop-speaks-his-mind> [<https://perma.cc/6XH8-PTE4>].

84. Jenna Murphy, *Belgian Bishop Cleared of Anti-Homosexual ‘crime’*, CATHOLIC ONLINE (June 6, 2008), <https://www.catholic.org/news/international/europe/story.php?id=28157> [<https://perma.cc/LZH9-8LJK>].

85. Charlemagne, *supra* note 83.

86. *Id.*

87. *Id.*

Democratic Centre party said he had ignored his duty, given the nature of his public position, to be “a man of dialogue” who should shun all temptation to divide people into different moral categories.⁸⁸ Worse than the negative public reaction from political parties, Bishop Léonard was charged with homophobia under the country’s 2003 Anti-Discrimination Act.⁸⁹ After reading the interview in question, the Belgian courts ruled that, though the Bishop’s comments may have been hurtful to homosexuals, they were not severe enough to be considered slander or discrimination.⁹⁰

5. *Spain*

In 2015, Spain amended its Criminal Code such that Article 510 prohibits incitement to violence.⁹¹ The law forbids provoking discrimination against groups due to any reason related to “sex, orientation or sexual identity, . . . [or] gender.” Those found guilty of violating the law are imprisoned for one to four years.⁹²

On Good Friday, which commemorates the day Jesus was crucified⁹³, Bishop Juan Antonio Reig Plà of the diocese of Alcalá de Henares gave a sermon about the death of the soul as a result of sin.⁹⁴ Referring to various kinds of sins, including adultery, theft, and failure to pay wages to workers, Bishop Reig Plà added homosexual behavior to the list.⁹⁵ With regard to homosexual behavior, Bishop Reig Plà said:

One must not corrupt people, not even with false messages. I would like to say a word to those people carried away by so many ideologies that end up failing to properly guide human sexuality. They think that since their childhood they have had an attraction to people of their same sex and, sometimes, to prove it they

88. *Id.*

89. Murphy, *supra* note 84.

90. *Id.*

91. *Final report on Spain adopted on 5 December 2017 by ECRI at its Seventy-Fourth Plenary Meeting*, EUROPEAN COMMISSION AGAINST RACISM AND INTOLERANCE [ERCI] §§ 1.2–3, (Feb. 21, 2018), https://rm.coe.int/090000168077e57e#_Toc504053521 [<https://perma.cc/GEE7-MK74>].

92. *See* C.P. art 510(1)(a), B.O.E. n. 281 Mar. 31, 2015 (Spain).

93. Justin Brookman, *The Constitutionality of the Good Friday Holiday*, 73 N.Y.U. L. REV. 193, 193 (1998).

94. Matthew Hoffman, *Liberal Outrage in Spain: Homosexual Groups Seek Prosecution of Bishop Over Sermon on Homosexuality*, LIFE SITE NEWS (Apr. 18, 2012, 7:45 PM), <https://www.lifesitenews.com/news/liberal-outrage-in-spain-homosexual-groups-seek-prosecution-of-bishop-over> [<https://perma.cc/MWC2-XEN3>].

95. *Id.*

become corrupt and prostitute themselves or go to homosexual nightclubs. I assure you that (there) they find hell.⁹⁶

A number of activist groups created a media storm and filed criminal complaints with Spain's General Prosecutor and the Prosecutor of Madrid, alleging that the bishop "incited discrimination and hate," even though the sermon reflected the Catholic Church's teaching.⁹⁷ A judge in Alcala de Henares dismissed the lawsuit⁹⁸ and instead, the city government requested that the Spanish diocese have Bishop Reig Plà transferred.⁹⁹ The diocese declined, saying that when such an effort is made formally by a political institution, "[t]he result is a sad and intolerable violation of human rights and of the principle of the separation of Church and state."¹⁰⁰

Two years later, Cardinal-elect Fernando Sebastian Aguilar joined Bishop Reig Plà as a defender in the attack against pastors.¹⁰¹ A Spanish Prosecutor agreed to investigate Cardinal-elect Aguilar after a national homosexual group launched a legal action against him, accusing him of hate-speech for calling homosexuality a "defective way of expressing sexuality."¹⁰² Aguilar told the Spanish newspaper *Diario Sur* that sex "has a structure and a purpose, which is procreation. A homosexual who can't achieve procreation is failing."¹⁰³ Members of Colegas, the homosexual group behind the complaint, said that the Cardinal-elect's words "clearly incit[e] hate and discrimination," a crime they say violated their constitutional guarantees.¹⁰⁴ The investigation was quietly dropped.¹⁰⁵

96. *Id.*

97. *Id.*

98. Robert Shine, *Government Investigation Opened into Spanish Diocese's Conversion Therapy Program*, NEW WAYS MINISTRY (Apr. 10, 2019), <https://www.newwaysministry.org/2019/04/10/government-investigation-opened-into-spanish-dioceses-conversion-therapy-program/> [<https://perma.cc/T4UK-APWD>].

99. *Diocese Rejects Transfer of Spanish Bishop Over Gay Remarks*, CATHOLIC NEWS AGENCY (May 16, 2012), <https://www.catholicnewsagency.com/news/diocese-rejects-transfer-of-spanish-bishop-over-gay-remarks> [<https://perma.cc/V3MS-Z6AU>].

100. *Id.*

101. See Peter Baklinski, *Spanish Prosecutor to Investigate Cardinal-Elect for Calling Homosexuality 'Defective'*, LIFE SITE NEWS (Feb. 7, 2014), <https://www.lifesitenews.com/news/spanish-prosecutor-to-investigate-cardinal-elect-for-calling-homosexuality> [<https://perma.cc/93WR-FRX9>].

102. *Id.*

103. *Id.*

104. *Id.*

105. Coleman, *supra* note 63.

6. *France*

French law prohibits hate-speech, defined as “inciting hatred or violence against a person or group of persons because of their sex, sexual orientation, gender identity, or disability.”¹⁰⁶ In cases pertaining to comments about the sexual orientation of a person, this indictment is punishable by one year’s imprisonment and a fine of 45,000 euros.¹⁰⁷ Notably, any explicit requirement of intent is absent in France’s, England’s, Austria’s, and Hungary’s hate-speech laws.¹⁰⁸ Therefore, if it can be proven that a listener is stirred up to hatred although that was never the intent of the speaker, the speaker is nonetheless guilty.¹⁰⁹ Finally, the Law of the Freedom of the Press in France also makes it a criminal offense to defame or publicly insult a person or group of people based on their status as a homosexual.¹¹⁰ In France, an insult is said to be “any offensive phrase, expression of contempt or verbal abuse which contains no facts.”¹¹¹ Interestingly, France’s Library of Congress page explains that, “freedom of speech is limited for the sake of protecting human dignity.”¹¹²

In March 2014, French politician and former housing minister Christine Boutin referenced the book of Leviticus during a magazine interview.¹¹³ She stated, “homosexuality is an abomination. But not the

106. Nicolas Boring, *Limits on Freedom of Expression: France*, LIBRARY OF CONGRESS (June 2019), https://www.loc.gov/law/help/freedom-expression/france.php#_ftnref29 [<https://perma.cc/7JXF-PA2G>].

107. *Id.*; Nancy Lefèvre, *The ‘Boutin Affair: A Half-Hearted Judgment for Freedom of Expression*, EVANGELICAL FOCUS (Feb. 14, 2018), http://evangelicalfocus.com/blogs/3263/The_Boutin_affair_a_halfhearted_judgment_for_freedom_of_expression [<https://perma.cc/UYN5-BMBR>].

108. *See generally* U.N. Comm. on the Elimination of Racial Discrimination, *General Recommendation No. 35: Combating racist hate speech*, ¶ 16, U.N. Doc. CERD/C/GC/35 (Sep. 26, 2013) (stating that European countries should explicitly consider intent).

109. *See* ARTICLE 19, RESPONDING TO ‘HATE SPEECH’: COMPARATIVE OVERVIEW OF SIX EU COUNTRIES 10–11 (Free Word Centre, 2018) (outlining the common European test for hate-speech, which includes intent, and stating there is no requirement for European states to limit forms of expression); Nadim Houry, *France’s Creeping Terrorism Laws Restricting Free Speech*, JUST SECURITY (May 30, 2018) <https://www.justsecurity.org/57118/frances-creeping-terrorism-laws-restricting-free-speech/> [<https://perma.cc/BY2W-EXP2>] (stating that French courts do not examine intent in terrorism hate-speech cases).

110. Boring, *supra* note 106.

111. Lefèvre, *supra* note 107.

112. Boring, *supra* note 106.

113. Lefèvre, *supra* note 107.

person. The sin is never acceptable, but the sinner is always forgiven.”¹¹⁴ In response, a penal tribunal in Paris convicted Ms. Boutin of “hate-speech” that violates France’s “anti-racist” laws.¹¹⁵ The Court of Appeals of Paris affirmed the decision and ordered Ms. Boutin pay a fine of more than 5,500 USD, as well as 2,000 euros in damages to each of the three gay associations.¹¹⁶ In 2018, the highest court in France, the Court of Cassation, overruled the lower courts’ decisions¹¹⁷ and found that “the incriminating comment, if it is offensive, nevertheless does not contain, even in implicit form, an appeal to or exhortation to hatred or to violence with regard to homosexuals.”¹¹⁸ However, the Court indicated that while Ms. Boutin’s statements did not satisfy the criminal classification of “offensive,” the conviction could have been upheld under the criminal classification of “insult.”¹¹⁹ However, Ms. Boutin was freed from all charges because the statute of limitations expired.¹²⁰

7. *Switzerland*

Switzerland’s Criminal Code does not expressly include any group to whom one must not incite violence against.¹²¹ Instead, Article 259 simply prohibits any person from publicly inciting others to violence.¹²² This broad-stated law was used by a gay rights activist group against a Catholic Bishop in 2015.¹²³

114. *Id.*

115. Jeanne Smits, *French Court Fines Politician for Using Word from Bible to Describe Homosexuality*, LIFE SITE NEWS (Nov. 4, 2016), <https://www.lifesitenews.com/news/french-court-fines-politician-for-using-word-from-bible-to-describe-homosex> [https://perma.cc/7CL2-GJ8A].

116. *Id.*

117. Geoffroy Clavel, *La Cour de Cassation Annule la Condamnation de Christine Boutin pour sa Sortie sur “L’homosexualité est une Abomination,”* HUFFINGTON POST (France) (Jan. 1, 2018), https://www.huffingtonpost.fr/2018/01/09/la-cour-de-cassation-annule-la-condamnation-de-christine-boutin-pour-sa-sortie-sur-lhomosexualite-est-une-abomination_a_23328775/ [https://perma.cc/DNB9-33KR].

118. Lefèvre, *supra* note 107.

119. *Id.*

120. *Id.*

121. See SCHWEIZERISCHES STRAFGESETZBUCH [STGB] [CRIMINAL CODE] Dec. 21, 1937, SR 757 (1938), as amended Feb. 1, 2020, AS 2465 (1992), art. 259 (Switz.).

122. *Id.*

123. Lucy Draper, *Swiss Gay Group Files Criminal Complaint Against Catholic Bishop for Old Testament Speech*, NEWSWEEK (Aug. 10, 2015), <https://www.newsweek.com/swiss-gay-group-files-criminal-complaint-against-catholic-bishop-331393> [https://perma.cc/2D2P-8DBU].

The next culprit of expressing religious views of homosexual marriage is Vitus Huonder, a 73-year old Catholic Bishop of the city of Chur in eastern Switzerland.¹²⁴ While at a religious forum in Germany on August 2, 2015, the bishop quoted two passages from the biblical book Leviticus: “[i]f a man also lie with mankind, as he lieth with a woman, both of them have committed an abomination: they shall surely be put to death; their blood shall be upon them.”¹²⁵ In response to applause, he continued: “[b]oth of these passages alone suffice to clarify unambiguously the Church’s position on homosexuality.”¹²⁶ Pink Cross, the umbrella association for Swiss gay groups, along with two private individuals filed complaints to the Graubünden prosecutor in eastern Switzerland accusing the bishop of “inciting people to crime or violence.”¹²⁷ In a statement, Bastian Baumann, Director of Pink Cross, said: “[w]e believe in freedom of expression, and taking quotes from the bible is fine. But then he said the words should be applied to real life, which is the equivalent of calling for the death penalty for gay people. We were worried about that.”¹²⁸ In October 2015, the cantonal court decided to close all three of the complaints filed against Huonder.¹²⁹ The cantonal prosecutor found that the necessary conditions were not met for the cases to go before a court or for a possible sentence.¹³⁰ While Pink Cross appealed the prosecutor’s decision, the court dismissed the appeal.¹³¹ The group announced that it would not take the case to federal court.¹³²

8. Finland

According to the Committee of Ministers of the Council of Europe, the term “hate-speech” covers all forms of expression that spread, incite, promote or justify racial hatred, xenophobia, antisemitism or other forms of hatred based on intolerance.¹³³ Under the Criminal Code

124. *Id.*

125. *Id.*

126. *Id.*

127. *Court Drops Case Against Bishop Who Denounced Gays*, SWISSINFO.CH (May 10, 2016), <https://www.swissinfo.ch/eng/court-drops-case-against-bishop-who-denounced-gays/42168512> [<https://perma.cc/YT6C-T7ZU>].

128. Draper, *supra* note 123.

129. *Court Drops Case Against Bishop Who Denounced Gays*, *supra* note 127.

130. *Id.*

131. *Id.*

132. *Id.*

133. *Ministry Launches Against Hate Campaign to Combat Hate Speech*, MINISTRY OF JUS. FIN. (Apr. 2, 2019, 11:29 AM), https://oikeusministerio.fi/en/article/-/asset_publisher/vihapuheen-vastainen-against-hate-kampanja-kaynnistyy [<https://perma.cc/UP6K-PJJ4>].

of Finland, a harsher sentence may be imposed when the motive for the act is the victim's, among other characteristics, sexual orientation or gender identity.¹³⁴ If hate-speech is targeted at a single individual, it can constitute defamation or menace; if it is targeted at a group of individuals, it can be considered ethnic agitation.¹³⁵

In September 2019, Finnish congresswoman Päivi Räsänen, a Christian Democrat, shared Romans 1:24-27, a Bible scripture, on Facebook to criticize Finland's state church for participating in LGBT Pride festivities.¹³⁶ That particular Biblical quote condemns homosexual relations.¹³⁷ In response, police investigated whether this Facebook post constituted a "hate crime"¹³⁸ under Section 10 of the Criminal Code of Finland for "ethnic agitation."¹³⁹ A few months later, the State General Prosecutor announced that the police would also investigate a booklet congresswoman Räsänen wrote entitled, "Male and Female He Created Them."¹⁴⁰ Although the booklet was printed in 2004, it was included in the case against congresswoman Räsänen because it was still "available online."¹⁴¹ According to the Prosecutor General of Finland, "there is reason to believe that because of the defamation of homosexuals by the violation of their human dignity, Ms Räsänen is guilty of incitement to hatred against a group."¹⁴² No further updates have been published at the time of this writing.

9. *Other Countries' Laws*

Although no cases have yet been instigated as a result of the expression of religious beliefs, Austria and Hungary also have hate-

134. *Id.*

135. *Id.*

136. Dale Hurd, *Christian Speech a Hate Crime? Politician Endures Interrogation for Posting Bible Verse*, CBN NEWS (Nov. 7, 2019), <https://www1.cbn.com/cbnnews/cwn/2019/october/christian-speech-a-hate-crime-politician-faces-police-interrogation-for-posting-bible-verse> [<https://perma.cc/M266-VVHR>].

137. *Id.*

138. Caleb Parke, *Finnish Politician Under 'Hate Crime Investigation' for Sharing Bible Verse on Facebook*, FOX NEWS (Sept. 5, 2019), <https://www.foxnews.com/world/bible-verse-lgbt-hate-crime-investigation> [<https://perma.cc/5XMZ-65ZK>].

139. *Finnish Christian MP Denounced for Quoting Bible Now Investigated for 15 Year Old Booklet on Homosexuality*, EVANGELICAL FOCUS (Nov. 5, 2019), http://evangelicalfocus.com/europe/4870/Case_against_Finnish_Christian_politician_continues_as_police_opens_investigation_about_15year_old_booklet_on_homosexuality [<https://perma.cc/TZL3-MWCJ>].

140. *Id.*

141. *Id.*

142. *Id.*

speech laws. In Austria, Section 283 of the Criminal Code punishes a person who incites hatred against any group, including a group defined by sexual orientation.¹⁴³ Moreover, the law prohibits a person from, “verbally harass[ing] such groups in a manner violating their human dignity”¹⁴⁴ In Hungary, Section 332 of the Criminal Code stipulates that “any person who . . . incites . . . hatred against . . . certain societal groups . . . on the grounds of . . . sexual orientation is guilty of a felony punishable by imprisonment not exceeding three years.”¹⁴⁵ As the laws indicate, or rather do not indicate, any requirement of intent is absent in Austria’s and Hungary’s hate-speech laws. Therefore, like France and England, if it can be proven that a listener is stirred up to hatred although that was never the intent of the speaker, the speaker is nonetheless guilty.¹⁴⁶

With the above collection of European cases threatening the ability of religious and political leaders to voice their religious views of homosexuality, the next inquiry is whether these laws have been effective in accomplishing their purpose. That inquiry first poses the question of what is the purpose of these hate-speech laws?

II. HAVE HATE-SPEECH LAWS WORKED?

Repressive governments have strict censorship, free societies do not. But what if strict censorship is enacted in a free and democratic society? Even taking the way European hate-speech laws are being applied now, are they beneficial? If the goal of these laws is to silence anyone who questions the propriety of homosexuality, then one would conclude that, by referencing the cases above, these laws are an excellent first step. However, European governments are—evidently—having a very difficult time distinguishing between what speech is detrimental and what is not; only one of the 17 cases cited above actually ended in an indictment.¹⁴⁷ Does this mean that hate-speech laws pose no inhibition to the religious? Quite the opposite. The European hate-speech laws are being used to intimidate and harass people of faith. So then, if the goal is to protect the dignity of all, are the laws working? Again, as I explain below, the answer must be no. But what is dignity and why does it play a role in this discussion?

143. STRAFGESETZBUCH [STGB] [PENAL CODE] § 283 (Austria).

144. *Id.*

145. 2012. évi C. 332 törvény a Büntető Törvénykönyvről (Act C of 2012 on the Criminal Code) (Hung.).

146. Houry, *supra* note 109.

147. *See* *Fairfield v. the United Kingdom*, 24790 Eur. Ct. H.R. 1 (2005) (ending in an affirmation of indictment for petitioner); *see also* Parke, *supra* note 138 (discussing the ongoing case of Finnish politician Räsänen).

1. *The Historical Significance of Dignity*

The concept of human dignity as the bedrock for all other rights is ancient.¹⁴⁸ Thus, it is not surprising that proponents of hate-speech laws claim that dignity is the cornerstone for such laws.¹⁴⁹ As France's Library of Congress stated, "freedom of speech is limited for the sake of protecting human dignity."¹⁵⁰

The notion of human dignity started in the Renaissance and is mainly attributed to Francesco Petrarca.¹⁵¹ His writings inspired other Renaissance writers, including Bartolomeo Facio, Giannozzo Manetti, and Giovanni Pico della Mirandola.¹⁵² These Renaissance thinkers considered dignity a creation of God; however, their ideas reflected a personal autonomy such that a person's autonomy was no longer viewed in light of man's status as a creature subject to God.¹⁵³ Accordingly, the Renaissance thinkers began to emphasize the role of passions and emotions over reason, and the importance of developing one's own unique self in the midst of an influential society.¹⁵⁴ German political philosopher Samuel von Pufendorf further developed this idea by describing man's dignity as "embodying a privileged position in this world and humankind's rational nature as engendering equality."¹⁵⁵ Prussian German philosopher Immanuel Kant added to this framework by describing dignity "as a quality of intrinsic, absolute value, above any price, and thus excluding any equivalence."¹⁵⁶ The concept of human dignity as it applies to political rights was embellished by Pierre-Joseph Proudhon, who theorized that justice can be accomplished through man's ability to reason, and that justice is "the respect of human dignity in [a] person."¹⁵⁷ In affirmation of Proudhon's theory, Russian philosopher Peter Kropotkin considered human dignity the basis for morality and justice.¹⁵⁸ Less than 30 years after

148. Roberto Andorno, *Human Dignity and Human Rights*, in HANDBOOK OF GLOBAL BIOETHICS 45 (Henk A. M. J. ten Have & Bert Gordijn, eds., 2014).

149. Alexander Tsesis, *Dignity and Speech: The Regulation of Hate Speech in a Democracy*, 44 WAKE FOREST L. REV. 497, 502 (2009).

150. Boring, *supra* note 106.

151. John C. Knechtle, *When to Regulate Hate Speech*, 110 PENN ST. L. REV. 539, 560 (2006).

152. *Id.*

153. *Id.*

154. Andorno, *supra* note 148, at 47.

155. *Id.*

156. *Id.*

157. *Id.*

158. *Id.*

Kropotkin's passing, the Universal Declaration of Human Rights was adopted.¹⁵⁹

The Universal Declaration of Human Rights ("UDHR"), which was adopted by the United Nations General Assembly on December 10, 1948, was the result of World War II.¹⁶⁰ Though non-binding, many of its provisions have wide recognition and are considered part of customary international law and therefore universally obligatory.¹⁶¹ It is the UDHR's dignitary protections that act as the origin for hate-speech laws.¹⁶²

The first recital in the UDHR reads, "[w]hereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world"¹⁶³ The UDHR affirms this commitment in Article 1, which states that, "[a]ll human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood."¹⁶⁴

Strengthening their commitment to protecting the dignity of their people, the UN General Assembly, by unanimous consent, adopted the International Covenant on Civil and Political Rights ("ICCPR") in 1966.¹⁶⁵ The agreement begins by recognizing the "inherent dignity and . . . the equal and inalienable rights of all members of the human family"¹⁶⁶ Articles 18, 19, and 26 are of particular importance as they pertain to dignity and religious liberties.¹⁶⁷

159. Martin A. Miller & Paul Avrich, Peer Alekseyevich Kropotkin, ENCYC. BRITANNICA (Feb. 4, 2020), <https://www.britannica.com/biography/Peter-Alekseyevich-Kropotkin> [<https://perma.cc/DE5Q-Z785>]; *Universal Declaration of Human Rights: History of the Document*, UNITED NATIONS, <https://www.un.org/en/sections/universal-declaration-of-human-rights/history-document/index.html> [<https://perma.cc/DCD3-A5Y9>].

160. *Id.*

161. The Universal Declaration of Human Rights and its Relevance to the European Union, European Parliamentary Research Service (2018).

162. See Robin Edger, *Are Hate Speech Provisions Anti-Democratic?: An International Perspective*, 26 AM. U. INT'L L. REV. 119, 126–127 (2010).

163. G.A. Res. 217, *supra* note 1, at pmbl.

164. *Id.* at art. 1.

165. Christian Tomuschat, *International Covenant on Civil and Political Rights*, UNITED NATIONS AUDIOVISUAL LIBRARY OF INTERNATIONAL LAW (2008), <https://legal.un.org/avl/ha/iccpr/iccpr.html> [<https://perma.cc/9LFY-8QDP>].

166. International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171. at pmbl.

167. *Id.* at art. 18, 19, 26.

Article 18 assures the right to freedom of thought, conscience, and religion for all.¹⁶⁸ Article 19 guarantees the right of people to hold opinions and the freedom to express those opinions.¹⁶⁹ And finally, Article 26 forbids any person or entity from discriminating against anyone based on, among other variables, that person's religion.¹⁷⁰

The UDHR and the ICCPR are not alone in recognizing the priority of human dignity. The International Covenant on Economic, Social and Cultural Rights, the UN Convention on the Rights of the Child, the UN Convention on the Elimination of All Forms of Racial Discrimination, the UN Convention on the Elimination of All Forms of Discrimination against Women, and the UN Convention against Torture also refer to "... the inherent dignity ... of all members of the human family [as] the foundation of freedom, justice and peace in the world... ." ¹⁷¹ The list could go on.

Similarly, in the United Kingdom where there is no written Constitution, the courts have referenced human dignity in dealing with equality cases.¹⁷² For example, in *Ghaidan v. Godin-Mendoza*, Baroness Hale of Richmond stated, "[t]reating some as automatically having less value than others not only causes pain and distress to that person but also violates his or her dignity as a human being" ¹⁷³

Even in recent years, scholars continue to affirm the concept of dignity as the basis of human rights. In commemoration of the 70th anniversary of the UDHR, the J. Reuben Clark Law School's International Center for Law and Religion Studies, under the auspices of the European Academy of Religion, convened a conference in Punta del Este, Uruguay, in December 2018.¹⁷⁴ The conference was a culmination of previous conferences exploring the UDHR's commitment to protecting human dignity as it relates to freedom of religion and expression.¹⁷⁵ Conference participants ranged from law professors to political leaders.¹⁷⁶ Participant Silvio Ferrari, Professor of Canon Law

168. *Id.* at art. 18.

169. *Id.* at art. 19.

170. *Id.* at art. 26.

171. Conor O'Mahony, *There Is No Such Things as a Right to Dignity*, 10 INT'L J. CONST. L. 551, 552 (2012).

172. Benjamin Mueller, *Britain's Unwritten Constitution Suddenly Looks Fragile*, N.Y. TIMES (Oct. 1, 2019) <https://www.nytimes.com/2019/08/31/world/europe/uk-johnson-constitution-brexit.html> [<https://perma.cc/9USP-MGQS>].

173. *Ghaidan v Godin-Mendoza*, 2 AC 557, 605 (2004).

174. DECLARATION ON HUMAN DIGNITY FOR EVERYONE EVERYWHERE (International Center for Law and Religion Studies ed.) [hereinafter DECLARATION].

175. *Id.*

176. *Id.*

at the University of Milan and Founder and Honorary Lifetime President of the International Consortium for Law and Religion Studies, explained, “[w]e cannot speak of human rights without referring to human dignity”¹⁷⁷ The conference participants unanimously agreed that human dignity provides a common starting point for discussions on human rights and a communicative bridge when those rights appear to be in conflict.¹⁷⁸

This simple idea—human dignity for everyone everywhere—is evidently the central idea of human rights.¹⁷⁹ Yet of all the rights to which everyone is entitled, dignity is perhaps the most difficult to understand and to put into a tangible form.

2. *What is Dignity?*

As explained above, human dignity has been expressly invoked as a foundational principle in a variety of international agreements, laws of numerous European countries, and constitutional documents of a significant number of countries around the world, including at least 15 European countries.¹⁸⁰ However, in spite of widespread international agreement on the importance of the principle, there is a significant degree of confusion regarding what it demands of law-makers and adjudicators, and there has been considerable inconsistency in its formulation and application in constitutional law.¹⁸¹

The first Article of UDHR provides insight into what its drafters thought dignitary rights meant: “[a]ll human beings are born free and equal in dignity and rights. They are endowed with reason and **conscience**”¹⁸² ICCPR Articles 18 and 19 echo a similar conclusion: that all have the right to freedom of thought, “**conscience**,” and religion and a right to hold and express their opinions.¹⁸³

Conor O’Mahony, in his paper *There is no such thing as a right to dignity*, analyzes the use of human dignity on an international scale and concluded that, “[e]very human being has an inherent dignity by virtue of his or her humanity, irrespective of external characteristics including (but not limited to) sex, age, race or ethnicity, religious or political

177. *Id.*

178. *Id.*

179. *Punta del Este Declaration on Human Dignity for Everyone Everywhere — Introduction*, HUMAN DIGNITY FOR EVERYONE EVERYWHERE, <https://www.dignityforeveryone.org/introduction/> [<https://perma.cc/8JLW-V2WQ>].

180. O’Mahony, *supra* note 171, at 553.

181. *Id.* at 551.

182. G.A. Res. 217, *supra* note 1, at art. 1.

183. International Covenant on Civil and Political Rights, *supra* note 166, at art. 18, 19.

belief, nationality, status, sexual orientation, or mental or physical condition.”¹⁸⁴ Notably, some of these classifications, like religious and political beliefs, are chosen by an individual; i.e. a person is not always born into these beliefs in the same way people are born into their race and nationality.

Therefore, the UDHR, ICCPR, and O’Mahony all conclude the same: dignity includes the freedom of conscience and the freedom of thought. These dignitary interests require tolerance and understanding for the thoughts of others with whom one disagrees. Not only are individuals obligated to act in a tolerant and understanding manner, but also governments must do the same in law and in practice in order to comply with UDHR and ICCPR. But does that tolerance and understanding fit into a picture that restricts free speech? Is it possible to enforce dignitary protections while allowing both sides of any debate to enter the public square?

3. *Dignity and Free Speech*

Gay-rights activists have interpreted the dignitary rights protected in the UDHR and ICCPR to forbid speech that offends them, but not those who disagree with them, such as a religious person who feels insulted at hearing a gay-rights campaign speech. This activism is thus no neutral campaign to protect the dignitary interests of all, but is instead a pointed attack to propagate one set of thoughts over another.

There is no corresponding attack from the other side. There have been no recorded cases of religious individuals filing any kind of litigation against those who support homosexual relations or being transgendered.¹⁸⁵ In fact, there have been no claims by those who hold religious beliefs condemning homosexual or transgender relations against those who disagree with them to force them to agree with their religious beliefs or rituals.¹⁸⁶ Therefore, the clash in the law is not between those who agree with Articles 18 and 19 of the ICCPR and those that do not, the clash is between those who agree with freedom of conscience and expression and those who do not. Do dignitary interests protect the right to freedom from insults or the right to freedom of conscience? That is the clash.

What is the extent of dignitary protections in countries like England, France, Austria, and Hungary if one can be imprisoned for “accidentally causing another to hate” a certain group? And why can the speaker who has not voiced hatred for a group be responsible for creating hate in other listeners? The UDHR and ICCPR strictly and

184. O’Mahony, *supra* note 171, at 555.

185. See James Kirchick, *The Struggle for Gay Rights Is Over*, THE ATLANTIC (June 28, 2019), <https://www.theatlantic.com/ideas/archive/2019/06/battle-gay-rights-over/592645/> [perma.cc/FXR3-XPQ2].

186. See *id.*

explicitly protect the dignitary interests of all.¹⁸⁷ Simply understood, those dignitary interests require tolerance and understanding. What level of tolerance and understanding do hate-speech laws enforce for those who have religious texts teaching them that the practice of homosexuality is condemned by a Superior Being?

Several countries have effectively adopted a new understanding of dignity by forbidding citizens to disagree with the louder segment of the population. These countries have imposed the view that those who believe in a religion that teaches against homosexual practices cannot simultaneously uphold the dignity of a homosexual.¹⁸⁸ Take for example Mr. Hammond in England who was convicted for using “threatening, abusive, or insulting” words or conduct because he held a sign in public that read, “Stop Homosexuality. Jesus is Lord.”¹⁸⁹ England thereby redefined dignity to silence disagreement as opposed to encouraging tolerance and understanding. I pose that gay-rights activists have caused dignitary harm to Mr. Hammond and the many others who have gone through litigation as a result of similar accusations by violating their freedom of conscience and freedom of discrimination based on religion.

At the heart of all laws forbidding hate-speech is protecting the dignity of the offended.¹⁹⁰ However, what these laws have *not* sought to protect is the dignity of the speaker. Could it be that, by creating hate-speech laws, legislatures have not actually protected any dignity right but have instead violated the right of the speaker? I think the answer to this is a resounding yes.

III. WHY HATE-SPEECH LAWS DO NOT PROTECT DIGNITY

Can regulation of conscience and the protection of dignity be logically reconciled? Put another way: can a law that bans speech that harms someone’s dignity, as understood above, still maintain the dignity inherent to all people? No. Although hate-speech law activists may promise the laws will protect the equality of all people, this is impossible.

1. *The Inevitable Partisan Influence and its Effect on Dignitary Protections*

Our freedom of conscience means freedom to choose, and choices inherently create division. One group of people may believe that one choice is wrong and another choice is right, while another group of

187. See G.A. Res. 217, *supra* note 1; see also International Covenant on Civil and Political Rights, *supra* note 166.

188. See, e.g., Public Order Act 1986, *supra* note 21.

189. *Street Preacher Convicted by Magistrates*, *supra* note 23.

190. See Jeremy Waldron, *Dignity and Defamation: The Visibility of Hate*, 123 HARV. L. REV. 1596, 1612 (2010).

people will believe the converse. This choice is protected internationally by dozens of constitutions, laws, and adjudicated cases.¹⁹¹ When people choose to subscribe to a certain religion, they are deciding that all other choices that are in competition with this choice are wrong. This could mean not subscribing to any religion (which is arguably its own religion— but that is a topic for another paper), or it could mean subscribing to a different religion. This freedom of choice is not only inherent to all humans, but it is also protected by the multiple international agreements and national laws that recognize the right of conscience.¹⁹²

In fact, the freedom to choose in matters like politics and religion is a freedom people have historically exercised, whether or not it is legally allowed or protected. For example, members of the persecuted churches in China choose to practice Christianity even though it is explicitly outlawed.¹⁹³ This example demonstrates that people will inherently make choices regarding their religious beliefs, whether or not laws exist to enable this freedom of conscience. Governments have tried for centuries to suppress disfavored beliefs.¹⁹⁴ They have never succeeded. Now, governments face the difficult question of whether freedom of conscience is actually a human imperative that should be repressed because of the alleged harm it can cause.

However, the same governments that must make this choice are comprised of individuals from multiple decision-making camps; this means that governments can only make decisions as objectively as those who hold government positions. It is important to point out that those who have the power to enact laws and those who experience the repercussions of a “malfunctioning-law” are two different groups with hardly any, if any, overlap. Even if those in power create hate-speech laws in a good faith effort to help those perceived as weak, these laws are likely based on stereotypes and do not take into consideration the interests of those not in power. Therefore, any application of hate-speech inevitably agrees with only one side of the proverbial political fence.

A public square that only permits entrance to groups who are widely accepted is a continuation of the harm that brought us to this debate in the first place. Historically, it was the religious elite that were

191. See, e.g., G.A. Res. 217, *supra* note 1.

192. See, e.g., *id.*

193. Lily Kuo, *In China, They're Closing Churches, Jailing Pastors — and Even Rewriting Scripture*, THE GUARDIAN (Jan. 13, 2019, 3:00 PM), <https://www.theguardian.com/world/2019/jan/13/china-christians-religious-persecution-translation-bible> [perma.cc/Y8QD-DJ6D].

194. See *id.*

viewed as the top-most class of status and pride.¹⁹⁵ Their status was the goal everyone was working to achieve.¹⁹⁶ Over time, society realized that this was wrong and agreed that everyone was worthy of living in a class that was deemed respectable.¹⁹⁷ But, people disagree with other people. Republicans disagree with Democrats and Jews disagree with Muslims. And they all want to be viewed as the “most-right.” And thus, these disagreeing classes try to legislate their beliefs in an effort to legalize their “rightness.” So, while historically it was the religious elite that held the most political influence, gay-rights activist groups are fighting to hold that place today.

It is as if the historical dominance of religious status creates a hatred in and of itself. The historically inferior groups want that dominant spot in the public square, and they are willing to swing the pendulum in the opposite direction in order to get it. In the past, it was indeed the religious majorities that persecuted and defiled the minority beliefs and practices.¹⁹⁸ This was wrong, and should be acknowledged as such, but it does not justify retribution. It should instead create an opportunity to learn and do better.

Hate-speech laws are not the answer and Europe provides a fantastic case study of this reality. These laws demand that the dignity of religious individuals be oppressed; their views have no place in the public square. But people will always have opposing views. Religions have always held that same-sex marriages are wrong,¹⁹⁹ and many people will continue to agree with this position. The fact that opposing views can be tolerated, heard, and analyzed in the public square is the very thing that makes a country tolerant and understanding to all. Hate-speech is inherently subjective and rarely, if ever, attracts consensual agreement.²⁰⁰ Geoffrey Stone, Professor and former Dean for the University of Chicago Law School and leading First Amendment

195. See Derek Thompson, *Elite Failure Has Brought Americans to the Edge of an Existential Crisis*, THE ATLANTIC (Sept. 9, 2019), <https://www.theatlantic.com/ideas/archive/2019/09/america-without-family-god-or-patriotism/597382/> [perma.cc/4JFA-WPPE].

196. See *id.*

197. See *id.*

198. *Religion and the Founding of the American Republic*, LIBRARY OF CONGRESS, <https://www.loc.gov/exhibits/religion/rel01.html> [perma.cc/GYB9-LE22].

199. See, e.g., William N. Eskridge Jr., *It's Not Gay Marriage vs. the Church Anymore*, N.Y. TIMES (Apr. 25, 2015), <https://www.nytimes.com/2015/04/26/opinion/sunday/its-not-gay-marriage-vs-the-church-anymore.html> [perma.cc/58QQ-KTPE].

200. Chris Allen, *When Free Speech Becomes Hate Speech*, FAIR OBSERVER (July 30, 2019), <https://www.fairobserver.com/region/europe/free-speech-hate-speech-laws-uk-radical-right-news-17262/> [perma.cc/4R65-VC63].

scholar summarized this well: “[t]he fundamental point is that free speech as a principle is about distrust of the wisdom of those who would decide what you can say and what you can hear. And I don’t trust anyone to make that decision for our society.”²⁰¹

2. *The Hypocrisy Hate-Speech Laws Promise*

Hate-speech laws premised on the protection of dignity are necessarily hypocritical. Consider an example from the survey above: Finnish congresswoman Päivi Räsänen subscribes to the Lutheran Church and thus subscribes to the teachings of the Bible.²⁰² It is conceded that congresswoman Räsänen has this freedom of choice—she is legally protected to choose a religion to follow. However, congresswoman Räsänen is not truly free to subscribe to the Lutheran belief if she is forbidden from voicing those beliefs in public, even though those who espouse contrary views are free to publicly communicate their views. It is the totality of a person’s words and actions that reflect any particular belief and what a religion requires. It, therefore, cannot be logically reconciled that congresswoman Räsänen would have the freedom to choose to subscribe herself to a religion,²⁰³ and yet not practice it.

Let us analyze the best argument for stifling these freedoms congresswoman Räsänen wants to exercise. The press release of the Office of the Prosecutor General of Finland states that, “[a]ccording to the Prosecutor General, there is reason to believe that because of the defamation of homosexuals by the violation of their human dignity, Ms Räsänen is guilty of incitement to hatred against a group.”²⁰⁴ According to the Prosecutor’s standard, congresswoman Räsänen’s indictment is contingent upon whether her statement of a moral opinion is defamation that thus incites hatred of homosexuals. Depending on the country in which you reside, the answer may be affirmative: expressing moral opinions that disagree with the practice of homosexuality is defamation and thus a violation of dignity.

In Jeremy Waldron’s book, *The Harm in Hate Speech*, Waldron defined hate-speech as a form of group defamation, especially against

201. Jay Nordlinger, *Speech for All*, NATIONAL REV. (Feb. 7, 2020, 6:30 AM), <https://www.nationalreview.com/2020/02/free-speech-chicago-principles-geoffrey-stone/> [https://perma.cc/66UU-73L6].

202. See Rod Dreher, *The Persecution of Päivi Räsänen*, THE AMERICAN CONSERVATIVE (Nov. 15, 2019, 11:24 AM), <https://www.theamericanconservative.com/dreher/the-persecution-of-paivi-rasanen/> [https://perma.cc/3CMV-RSQ5].

203. This act in and of itself is the exercise of two protected dignitary interests: freedom of conscience and freedom from discrimination due to her religious belief. See DECLARATION, *supra* note 174.

204. *Finnish Christian MP Denounced for Quoting Bible Now Investigated for 15 Year Old Booklet on Homosexuality*, *supra* note 139.

vulnerable minority groups.²⁰⁵ So it appears that Waldron and the Finnish Prosecutor General agree, at least in part, that hate-speech is defined as defamation. However, even under a definition of hate-speech that criminalizes group defamation, congresswoman Räsänen's quote from the Bible cannot be interpreted as hate-speech inciting others to hatred.

According to Black's Law Dictionary, defamation is "[m]alicious or groundless harm to the reputation or good name of another by the making of a *false statement* to a third person."²⁰⁶ A government dedicated to religious freedom cannot treat quotes from the Bible as *false statements* causing *malicious harm*. The Bible is the foundation of deeply held religious beliefs which are in keeping with the historical statements of the document.²⁰⁷ Thus, references to the Bible cannot be malicious because the authors' intent in writing the historical statements found in the Bible was the expression of a religious belief. To treat the Bible as defamation makes Christianity illegal.

With that said, I must clarify that not all speech should be legalized. Speech should be prohibited if it causes a direct and concrete physical harm (this idea is discussed more thoroughly in the subsequent section). Similarly, laws that criminalize the use of words that threaten death or other physical harm should continue to be outlawed as such threats cause direct, concrete harm. However, quoting from the Bible does not lead to direct, concrete harm and thus is not hate-speech.

Many countries have endorsed the definition of hate-speech that encompasses defamation. For example, the German Penal Code prohibits, "assaults . . . [on] human dignity . . . by insulting, maliciously maligning, or **defaming** segments of the population."²⁰⁸ In France, the Law of the Freedom of the Press also makes it a criminal offense to defame or publicly insult a person or group of people based on their status as a homosexual.²⁰⁹ Waldron explains the foundation for these laws by stating, "[l]ibel and defamation generally are never organized to protect people from being offended: they are organized to protect the dignity and reputation of the persons themselves, not to impose an aura of untouchability around their convictions."²¹⁰ While Waldron concedes

205. Waldron, *supra* note 190, at 1600.

206. *Defamation*, BLACK'S LAW DICTIONARY (11th ed. 2019) (emphasis added).

207. *E.g.*, J. Michael Medina, *The Bible Annotated: Use of the Bible in Reported American Decisions*, 12 N. ILL. U. L. REV. 187, 187–88 (1991).

208. Strafgesetzbuch [StGB] [Penal Code], §130, para. 1, sentence 2, https://www.gesetze-im-internet.de/englisch_stgb/englisch_stgb.html (Ger.) (emphasis added).

209. Press Act of July 29, 1881, Appendix to the Penal Code art. 23 (Fr.).

210. Waldron, *supra* note 190, at 1613.

that this distinction is “a delicate one,”²¹¹ I pose that it is an impossible one. However, I respect Waldron’s concern: how are the fundamental elements of justice and dignity in a well-ordered society supposed to co-exist when people are free to insult the very thing that creates someone’s existence;²¹² to many, their status as a homosexual is a “core area of personality.”²¹³ Waldron echoes Edmund Burke’s observation when he said, “[t]o make us love our country, our country ought to be lovely.”²¹⁴ And how can it be lovely when there are insults flying constantly every which way against a group of people?

Again, Waldron and the dozens of international agreements agree that, “...all are equally human and have the dignity of humanity, . . . that all deserve protection from the most egregious forms of violence, exclusion, and subordination.”²¹⁵ Where Waldron and I diverge is that he concludes that “hate speech or group defamation involves the express denial of these fundamentals so far as some group in society is concerned.”²¹⁶ He poses that,

[t]here is security in such public knowledge for the proper pride — holding one’s head upright — that we associate with human dignity. . . . A person’s dignity is not just a decorative fact about him or her. It is a matter of status, and as such, it is in large part normative: it is something about a person that commands respect from others and from the state. Moreover, one holds a certain status not just when one happens to have a given set of rights or entitlements, but also when the *recognition* of those rights or entitlements is basic to how one is treated.²¹⁷

So, the argument is that the insult or defamation of a group is a violation of their dignitary rights because it creates a society that eliminates their right to be recognized with pride. These ethics appear to be neutral, but they are not.

Where is the recognition of the religious person’s dignitary rights and entitlements when the very meaning of their existence is outlawed? If, for example, congresswoman Räsänen is free to choose a religion, but not free to publicly practice it, her freedom of religion is not truly recognized. Most importantly, Waldron’s position is not, and probably

211. *Id.*

212. *Id.* at 1620.

213. Sionaidh Douglas-Scott, *The Hatred of Protected Speech: A Comparison of the American and European Approaches*, 7 WM. & MARY BILL RTS. J. 305, 323 (1999).

214. Waldron, *supra* note 190, at 1624.

215. *Id.* at 1626 (citing JOHN RAWLS, *POLITICAL LIBERALISM* 36, 214 & 227 (1996))

216. *Id.* at 1626–27.

217. *Id.* at 1627 (emphasis added).

cannot be, consistently applied. Those who criticize traditional Christianity (or Judaism or Islam) deny the dignity of believers of those faiths, but they are never prosecuted. Therefore, hate-speech laws are necessarily hypocritical²¹⁸—they choose one side that’s right, and another that’s wrong. Every moral standard discredits one worldview in exchange for another. There is no neutral, objective moral standard to decide what behavior constitutes hate-speech and what behavior does not. “Far from being totems of tolerance or inclusion, European speech restrictions are symptomatic of institutional malaise.”²¹⁹ For example, the German hate-speech laws have created a blueprint for regulating online speech for authoritarian governments in Russia and Vietnam, not a reduction in hatred or political extremism.²²⁰ Likewise, speech restrictions in the United Kingdom and Germany have not magically erased European divisions over immigration or the European Union.²²¹

Let us think about this inconsistency from another angle: by protecting one group of vulnerable citizens, hate-speech laws inherently create another group of vulnerable citizens. To create hate-speech laws that protect one vulnerable, minority group is to merely favor one group over another. Vulnerable minority groups are classes that hold beliefs that another, majority group disagrees with.²²² The moment one “vulnerable” minority is protected, another group is oppressed. I touched on this earlier by mentioning the historical superiority of the religious; previously in America, traditional Christian principles were prioritized at the expense of all other moral beliefs.²²³ I argued above that gay-rights activists are attempting to swing the pendulum the opposite direction by prioritizing their principles at the expense of the thoughts and beliefs of the religious. For example, if the homosexual group is now protected from hate-speech, religious minorities are now vulnerable because they are neither free to stand up for themselves nor free to express their beliefs. And thus, to protect the newly oppressed

218. “Hypocrisy is the act of professing virtues that one does not hold.” Jack Goldsmith, *International Human Rights Law & the United States Double Standard*, 1 GREEN BAG 2D 365 (1998).

219. Will Collins, *Europe Has Proven Hate Speech Laws Don’t Work*, INTELLECTUAL TAKEOUT (Nov. 14, 2019), <https://www.intellectuالتakeout.org/article/europe-has-proven-hate-speech-laws-dont-work> [https://perma.cc/6VJY-CYXA].

220. *Id.*

221. *Id.*

222. See Rob Henderson, *Facts About Minority Opinion vs. Majority Rule*, PSYCHOLOGY TODAY (July 30, 2018), <https://www.psychologytoday.com/us/blog/after-service/201807/facts-about-minority-opinion-vs-majority-rule>.

223. See Thompson, *supra* note 195.

group, new hate-speech laws must be created to protect those individuals.

This cycle would never end and thus, freedom of conscience and expression would soon evaporate with the dignity which once existed. To create hate-speech laws is an attempt at creating a group of people that think the same, talk the same, believe the same. And that will never happen. Human nature includes decision-making, and each and every decision is indicative of a value preference. To legislate a mandatory value preference is to outlaw dignity because dignity demands the freedom of conscience.

I do not need to claim that all speech is beneficial or even useful. But when a government starts to censor speech, they criminalize incivility without encouraging civility and the cycle of inconsistency just keeps turning.

In conclusion, under European hate-speech laws, “members of supposedly oppressed groups are allowed much greater freedom to speak than others are, and speech about supposedly oppressed groups is rigorously regulated while speech about supposedly dominant groups is not.”²²⁴ Professor Dent, in his note *Blatantly Unconditional and Blatantly Political*, concludes that, “[t]his is ironic; for saying that certain minorities are less resilient and less able than others to withstand the rigors of free public debate, proponents of this view could be accused of manifesting . . . bias in violation of [hate-speech laws].”²²⁵ I could not have said it better myself.

IV. SINCE HATE-SPEECH LAWS ARE NOT WORKING, WHAT IS NEXT?

In recent months, opinion pieces in both *The New York Times*²²⁶ and *The Washington Post*²²⁷ have suggested that it is time to “rethink” the First Amendment’s protections of free speech that Americans enjoy. These articles propose that it is time to create more protections for the most vulnerable citizens.²²⁸ However, these articles forget that the

224. George W. Dent Jr., *Model Rule 8.4(g): Blatantly Unconditional and Blatantly Political*, 32 NOTRE DAME J.L. ETHICS & PUB. POL’Y 135, 161 (2018).

225. *Id.*

226. Andrew Marantz, *Free Speech is Killing Us*, N.Y. TIMES (Oct. 4, 2019), <https://www.nytimes.com/2019/10/04/opinion/sunday/free-speech-social-media-violence.html> [<https://perma.cc/GXV3-N8ZN>].

227. Richard Stengel, *Why America Needs a Hate Speech Law*, WASH. POST (Oct. 29, 2019), <https://www.washingtonpost.com/opinions/2019/10/29/why-america-needs-hate-speech-law/> [<https://perma.cc/Q6W5-JKZV>].

228. Marantz, *supra* note 226.

United States Supreme Court has already addressed when our First Amendment right of freedom of speech can be limited.

In 1919, *Schenck v. United States* introduced the “clear and present danger” standard the Supreme Court uses to determine whether a citizen’s First Amendment freedom of speech could be limited.²²⁹ The Court concluded that if there was a “clear and present danger” based on the actor’s words, then the speech was not allowed.²³⁰ The 1969 Supreme Court case *Brandenburg v. Ohio* further refined the approach explaining that “the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.”²³¹ *Brandenburg* is now the standard applied by the Court to issues related to free speech limitations.²³²

In my opinion, the United States Supreme Court hit the nail on the head. In order to limit freedom of conscious and speech, there must be evidence of a clear and present danger. Feeling insulted because an individual does not agree with your choice is not evidence of a clear and present danger.

More recently, the Supreme Court in *Gentile v. State Bar of Nevada* stressed that the First Amendment requires skepticism about speech restrictions that invite “discriminatory enforcement.”²³³ “The government may not regulate [messages] based on hostility—or favoritism—towards the underlying message expressed.”²³⁴ “The government must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction.”²³⁵ “If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.”²³⁶ Stated succinctly, “[s]peech may not

229. *Schenck v. U.S.*, 249 U.S. 47, 52 (1919).

230. *Id.*

231. *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969).

232. Douglas E. Plocki, *Harm Advocacy Theory: Where to Draw the Line between Free Speech and Criminal Advocacy*, 12 GEO. MASON UNIV. C.R. L. J. 29, 42 (2001).

233. Dent, *supra* note 224 at 149 (2018) (citing *Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1051 (1991)). I thank Professor Dent for his gathering of these Supreme Court cites in his article, *Model Rule 84(g): Blatantly Unconditional and Blatantly Political*.

234. *R.A.V. v. City of St. Paul*, 505 U.S. 377, 386 (1992).

235. *Rosenberger v. Rector*, 515 U.S. 819, 829 (1995).

236. *Texas v. Johnson*, 491 U.S. 397, 414 (1989); *see also Snyder v. Phelps*, 562 U.S. 443 (2011) (forbidding curbs on public speech, even if it is “outrageous,” including a sign saying “God Hates Fags”); *City of St. Paul*,

be banned on the ground that it expresses ideas that offend.”²³⁷ Incorporating Justice Holmes’s famed phrase, the Court in *Matal v. Tam* concluded “[s]peech that demeans on the basis of race, ethnicity, gender, religion, age, disability, or any other similar ground is hateful; but the proudest boast of our free speech jurisprudence is that we protect the freedom to express ‘the thought that we hate.’”²³⁸ As this survey of the Supreme Court conclusions show, the arguments in the recent New York Times and Wall Street Journal articles are not likely to be accepted by the Court.

The cases in Europe and the effect of their hate-speech laws should be our guide. It would be foolish not to treat the European realities as an experiment from which to observe and learn. The speech restrictions in Europe have not magically erased European divisions over decisions that well-meaning humans may disagree—like religion. Hate-speech laws have not created peace and they have not furthered the protections that dignity requires; but American jurisprudence achieves this goal far better than European hate-speech laws. American laws encourage civility without criminalizing incivility—and this should be our guide. The U.S. Constitution and referenced Supreme Court conclusions protect dignity by protecting the freedom of conscience and freedom of speech. Yes, this may create a society that in essence allows insults to be thrown about. But protection from insults and defamation is not related to protection of dignity, unless there is a direct and concrete physical threat of harm. That is the only line that can keep dignity intact while still harnessing speech.

CONCLUSION

Dignity is not the right to be free from insults or the right to belong to a class that the majority views as right. What the majority views as “right” is guaranteed to change over time. But our dignity is not changeable and thus cannot be protected by a moving target.

Dignity respects the autonomy of others to be free to choose their religion and choose which rules of life they deem to be right. This is the freedom of conscience and expression that the UDHR and ICCPR protect. This freedom applies to both the same-sex couple and the heterosexual couple. This freedom cannot be changed. Each side is free to disagree with each other and even to do so disrespectfully. Dignity supersedes the respect we receive from others because it is dignity that created the right to disagree. Dignity creates the space for each member in a society to choose which social class they deem to be “more-right”—

505 U.S. at 391 (1992) (striking down law that prohibited “arous[ing] anger, alarm, or resentment in others on the basis of race, color, creed, religion or gender”); *Brandenburg v. Ohio*, 395 U.S. 444 (1969).

237. *Matal v. Tam*, 137 S. Ct. 1744, 1751 (2017).

238. *Id.* at 1764.

and that is acceptable because that is an exercise in the freedom of conscience. But to try to forcefully create an equilibrium is an exercise in idealistic futility. People will disagree because people are inherently built with a conscience, and each conscience may produce different guides. Protecting the fundamental qualities of what it means to be human is to protect dignity. And attempting to force people to agree, as Europe demonstrates, will never work. One side will always fight to be right because that is human nature. And thus, we should wrap our arms around that nature by allowing that tension to exist while protecting what truly matters: freedom of conscience, freedom of expression, and freedom to be free from threats of imminent lawless action—not freedom from hearing disagreeing viewpoints. Freedom of conscience, freedom to insult, freedom to disagree is the protection of dignity. And a country that is free to disagree is what makes a country lovely.