SACRAMENTO OFFICE:
P.O. Box 276600
Sacramento, CA 95827-6600
916.857.6900 · FAX 916-857-6902
www.pacificjustice.org

U.S. House of Representatives, Committee on the Judiciary, Subcommittee on Crime,

Terrorism and Homeland Security

Hearing on HR 1592 – "Local Law Enforcement Hate Crimes Prevention Act of 2007"

April 17, 2007

Testimony of Brad W. Dacus, Esq.

Founder and President, Pacific Justice Institute

Sacramento, California

Honorable Members of the Subcommittee on Crime, Terrorism and the Judiciary,

I would like to offer a legal perspective on the pending hate crimes legislation, HR 1592.

The Pacific Justice Institute, an organization I am privileged to lead, focuses on the defense of religious and civil liberties. From that vantage point, we encounter a bevy of not just theoretical, but very practical, real-life problems engendered by this type of legislation.

The Committee has already been apprised of the federalism concerns implicated by the legislation. I would like to focus briefly on another problem with this legislation—the alarming potential, as evidenced by actual cases and situations, for well-intentioned hate crimes legislation to squelch free speech, particularly religious free speech. This has been particularly evident in California, which has taken a very aggressive approach to hate-crimes enforcement.

I. California: Case Studies in Censorship

Historically, both Congress and our judiciary have been vigilant to balance the rights of competing and even opposing speech rights of a wide diversity of individuals and groups, even when the views expressed are unpopular and perhaps even divisive. The Supreme Court summed up this hallmark of our Constitutional system well in its landmark decision *Tinker v. Des Moines School District*, 393 U.S. 503 (1969). In that decision, the Court upheld the rights of students to wear black armbands in protest of the Vietnam War, against governmental concerns that such expression would disturb the peace and order of the school. The court stated as follows:

> [I]n our system, undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression. Any departure from absolute regimentation may cause trouble. Any variation from the majority's opinion may inspire fear. **Any word spoken, in class, in the lunchroom, or on the campus, that deviates from the views of another person may start an argument or cause a disturbance. But our Constitution says we must take this risk,** and our history says that it is this sort of hazardous freedom—this kind of openness—that is the basis of our national strength and of the independence and vigor of Americans who grow up and live in this relatively permissive, often disputatious, society. (internal citation omitted, emphasis added)
>
> *Tinker*, 393 U.S. at 508-9.

Unfortunately, recent developments, particularly in California, where the Pacific Justice Institute is based, demonstrate that the rationale behind hate-crimes laws and similar efforts to provide greater protections to one group over another is undermining basic Constitutional protections, including free expression and freedom of religion.

A. *Harper v. Poway School District*

The law of unintended consequences—or perhaps intended consequences cleverly disguised—is starkly illustrated by the ongoing case *Harper v. Poway Unified School District*, 445 F.3d 1166 (9th Cir. 2006), which originated in Southern California and was recently considered by the U.S. Supreme Court.

In *Harper*, a student responded to the pro-homosexual "Day of Silence," which was being heavily promoted on his high school campus, by wearing a t-shirt which expressed his religious viewpoint that homosexuality was "shameful." Instead of allowing a differing viewpoint, which was being peacefully expressed, school officials pulled aside Harper, demanded that he change his expression or face suspension. An Assistant Principal even suggested to Harper that he should leave his faith in the car while at school, in order not to offend homosexual students. *Harper*, at 1173.

Incredibly, the federal courts in California upheld the schools' actions. In one of the most sweeping, speech-restricting opinions I have ever read, Judge Reinhardt of the Ninth Circuit baldly asserted that Harper's free speech rights—which were undeniably strong under *Tinker* and related Supreme Court cases—were nevertheless trumped by the need to protect homosexual students from questioning their identity.

Not surprisingly, Judge Reinhardt's decision cited to California's "hate violence" educational statute, Cal. Educ. Code §§ 201, 220, et seq. as justification for stifling a peaceful but politically incorrect opposing viewpoint. Even though there were no allegations of violence against Harper, the court concocted a theory of "psychological assault" against homosexual students which, it reasoned, were just as harmful—and therefore just as subject to censorship and sanction.

California has shown that this is where hate crimes legislation inevitably leads. Once enacted, it is very difficult to "stop the train" or to limit its reach to actual crimes. Rather, it is used as a justification for all manner of restrictions, particularly against people of faith who raise religious objections to behavior they consider immoral. In fact, Judge Gould of the Ninth Circuit followed this exact line of reasoning in labeling religious opposition to homosexuality—even when expressed peacefully on a t-shirt—as "hate speech" which he equated with "a burning cross" (such as the KKK would employ) or "a call for genocide." *Harper v. Poway Unified Sch. Dist.*, 455 F.3d 1052, 1053-54 (9th Cir. 2006) (denial of rehearing en banc) (Gould, J., concurring).

The *Harper* decision sparked alarm throughout the legal community from a broad spectrum of legal scholars who were appalled that a federal appellate court was so willing to stifle free speech rights in order to favor a minority group perceived to need protection

from disagreement or dissent, cleverly labeled as psychological harm. See, e.g., "Sorry, Your Viewpoint is Excluded from First Amendment Protection," http://volokh.com/archives/archive_2006_04_16-2006_04_22.shtml#1145577196 (Prof. Eugene Volokh). While the decision has now been vacated by the Supreme Court, the litigation is ongoing. Meanwhile, other school districts in California have used the case as an excuse to stifle student speech in similar contexts, as I will explain next.

B. Backlash against the Slavic community in Sacramento

The organization I lead, Pacific Justice Institute, has represented students in situations very similar to Harper. Sacramento has a large population of immigrants from the former Soviet bloc, many of whom fled religious persecution. Last spring, a number of Slavic students were concerned about the Day of Silence and its blatant assault on their values. They determined to voice their views, like Harper, through t-shirts that peacefully expressed their religious beliefs disagreeing with homosexual behavior. As a result, more than a dozen students were suspended. Some of the Slavic students were physically assaulted because of their politically unpopular views; others were cursed, shown obscene gestures and intimidated—even by teachers.

Surprisingly—or perhaps not—the Slavic students were singled out for punishment, not only in the school context, but in the court of public opinion. In response to coverage of this and related incidents in the *Sacramento Bee*, it has been saddening to see the vitriol and hate that has been spewed at the Slavic community. Numerous online comments posted by SacBee readers have been racially and ethnically charged. A few examples in response to an article dated August 6, 2006, comments included the following: "They can send these bigots back to Russia on the first leaky

boat." "If they can't celebrate diversity then they should move." "If these people want to be Americans, they'd better realize what that means. It means accepting us queers." "They should be deported to some place like Cuba, Vietnam, Venzuela, [sic] or China where people havn't [sic] forgotten how to handle insane sects who embrace ideas from the Dark Ages. . . . Hate mongering is not protected speech – it's a crime." .

Tolerance, it seems, is becoming a one-way street. How, in such a professedly diverse city as the capitol of California, could there be such bigotry and intolerance of a politically unpopular viewpoint? It appears to flow in part from biased policy judgments, expressed through hate crimes laws and other means, that some minorities are better than other minority or even majority groups and therefore deserve heightened legal status. This viewpoint was stated by Judge Reinhardt in the Harper decision as follows: "There is, of course, a difference between a historically oppressed minority group that has been the victim of serious prejudice and discrimination and a group that has always enjoyed a preferred social, economic and political status." *Harper*, at 1183, n. 28. In other words, backlash against individuals expressing a religious viewpoint can be ignored so long as it can be reasoned that they are not "historically oppressed," as groups like homosexuals are deemed to be. This is exactly what is happening in Sacramento, as the "hate crimes" rationale is being applied selectively in accordance with the prevailing winds of political correctness. This approach is not only dividing a city, but the pendulum has swung so far in the direction of protecting a few minority groups that the political losers—in this case the Slavic community and like-minded evangelicals—are beginning to legitimately fear for their freedoms to continue expressing their viewpoints in the public square.

Indeed, several of the comments posted on the Sacramento Bee's reader forum, read by thousands of individuals, have gone so far as to suggest that Slavic religious leaders be held criminally responsible for any violence which might be directed toward the gay community—even though the only assaults of which we are aware to this point have been directed *toward* the Slavic community, including a recent arson of a Slavic church in the Sacramento area.

If the public calls for prosecution of religious, politically-incorrect viewpoints seems far-fetched, consider the following examples, also from California.

C. *American Family Ass'n v. City and County of San Francisco*

In *AFA v. City and County of San Francisco*, 277 F.3d 1114 (9th Cir. 2002), the Ninth Circuit upheld the legality of resolutions passed by the San Francisco Board of Supervisors which cast blame on religious groups for hate crimes such as the murder of Mathew Shepard in Wyoming. In breathtaking disregard for free speech and the "marketplace of ideas," San Francisco took official action urging local media outlets not to carry advertisements from the American Family Association's "Truth in Love" campaign, which iterated the group's Biblical opposition to homosexual conduct.

Even though there was no evidence linking AFA or any similar groups to violence against homosexuals, the Ninth Circuit held that San Francisco's allegation of a link constituted a sufficient "secular purpose" to insulate the City from an Establishment Clause violation. Thus, the City was free to openly condemn religious organizations and their viewpoints, even going so far as to pressure media outlets into turning down their advertisements, based on hate crimes not committed or even condoned by the organizations which ended up on the receiving end of the City's official condemnation.

II. Religious disagreements transformed into "hate crimes"

Lest it be thought that the problems with "hate crimes" labeling and legislation are limited to the issue of sexual orientation, it should be noted that prosecution of religious "hate crimes" also engenders significant First Amendment conflicts.

A. Pastor Audie Yancey

In a recent situation in Southern California, Pacific Justice Institute was called to defend a pastor named Audie Yancey, who had been summoned before a local "Human Relations Task Force" for distributing religious tracts. The tracts depicted the 9/11 terrorist acts and stated, "Remember 9/11: In the name of Allah, they brought destruction and death to thousands. In the name of Jesus Christ, you can have eternal life."

It is hard to imagine a situation more in line with the Supreme Court's long list of leafleting precedents, from World War II-era decisions such as *Martin v. Struthers*, 319 U.S. 141 (1943) down to the more recent *Watchtower Bible and Tract Society of New York, Inc. v. Village of Stratton*, 536 U.S. 150 (2002). Yet, Pastor Yancey was accused of "hate speech" against Muslims (it was wrongly assumed that "they" referred generally to Muslims). Thankfully, we were able to successfully defend the pastor against these charges, but it is alarming to think that some officials believe that, under the pretext of preventing "hate speech," they can interrogate a clergyman concerning purely religious statements. Ironically, Pastor Yancey served twenty years in the Marine Corps. His sacrifices were not for the purpose of diminishing the most basic freedoms we enjoy.

B. Hindu American Foundation report

Even more recently—February 18, 2007—a disturbing report was issued by the Hindu American Foundation called "Hyperlink to Hinduphobia: Online Hatred,

Extremism and Bigotry Against Hindus." (www.hafsite.org/hatereport) The report, which was distributed to all members of Congress, latches onto the buzz surrounding "hate crimes" and attempts to characterize peaceful, mainstream Christian efforts to proselytize Hindus as hate speech. The report wildly speculates that efforts to convert Hindus, including those which express the belief that Hinduism is demonic, could prompt a crazed gunman to attack a crowded Hindu temple in America. (HAF report, p. 6.) A review of the websites targeted by the HAF report as "hate speech" reveals that many, if not all, express purely theological and philosophical disagreements with Hinduism.

More alarming than the sensationalist rhetoric is the HAF's willingness to sacrifice free speech for the elimination of so-called "hate." The HAF report quotes approvingly Christopher Wolf, formerly for the Anti-Defamation League, who penned a 2004 article titled, "A Gay and Lesbian Guide to Legal Hate." In that article, Mr. Wolf wrote, "When one witnesses the anti-Semitic, racist, homophobic and Holocaust-denying websites that are proliferating, and the hate-mongers who are capitalizing on the Internet as a tool to spread their messages, a natural response is, 'There ought to be a law!'" HAF Report, p. 10. The HAF report proceeds to note that many European nations do, in fact, restrict "hate" on the Internet, and the report concludes by urging Internet hosting providers to "[t]ake the initiative in removing those websites from their servers which wantonly promote, in whatever way, hatred and intolerance towards Hinduism and its adherents or any other religion." HAF Report, p. 33. It bears repeating that HAF seems to think anything other than glowing affirmation of Hinduism constitutes "hate."

Fortunately, Mr. Wolf and the HAF have not yet succeeded in passing a law which restricts expression that they consider "hate speech." Unfortunately, their efforts

are nearing fruition with the consideration of HR 1529. We decry attempts by some religious groups to use the vehicle of "hate speech" or so-called "hate crimes" to silence diverse and differing viewpoints. This approach runs counter to every notion of tolerance, diversity and free expression which undergirds the American experience.

III. Conclusion

Given the foregoing examples, including open advocacy that certain religious viewpoints be squelched or criminally sanctioned, the concerns about HR 1529 are real. My testimony today, in focusing primarily on situations originating in California, does not even begin to address the countless examples from Europe, Canada, and Australia where freedom of speech has been subordinated in the last few years to protections against so-called "hate crimes," many of which involved no physical injury whatsoever. A decision by Congress to inject the federal government into the culture wars and fundamental theological disputes can only engender further divisiveness and limitations on free speech. Let us not forget that the road to hell is paved with good intentions. I urge you not to allow natural feelings of sympathy for crime victims to lead you to enact this sweeping legislation which will sacrifice fundamental constitutional rights on the altar of political expediency.