

# THE RHETORIC OF LEGAL BACKFIRE

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**Abstract:** This Article focuses on legal backfire claims. A claim of legal backfire constitutes the position that a law produces or will produce results directly contrary to one or more of those intended. Legal backfire claims are pervasive, yet potentially misleading and harmful argumentation used primarily to undermine existing law (or policy) or to forestall the enactment of new law. This Article analyzes many examples of legal backfire to suggest that the concept is often a rhetorical strategy for opposing the promulgation of new law or policy or for attempting to have existing law rolled back, and that actual legal backfires are much more rare (or at least unproven) than use of the rhetoric would suggest. This Article also addresses a much more basic problem: the challenges to effective lawmaking and the limitations of techniques to evaluate the effects of law make an accurate assessment of law problematic. Ultimately, this Article suggests that lawmakers should proceed with caution when dealing with legal backfire claims because critics of laws almost invariably author these claims, the claims are rhetorically charged, and the claims themselves are extraordinary.

## INTRODUCTION

Critics of hate crime legislation claim that the laws "may inflame prejudice rather than eradicate it."<sup>1</sup> The Endangered Species Act, some analysts assert, has destroyed some of the very creatures the Act intended to protect.<sup>2</sup> Consumer protection laws are said to increase

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<sup>1</sup> Jeffery Rosen, *Foreword*, 97 MICH. L. REV. 1323, 1324 (1999) (describing JAMES B. JACOBS & KIMBERLY POTTER, *HATE CRIMES: CRIMINAL LAW & IDENTITY POLITICS* (1998)).

<sup>2</sup> Albert Gidari, *The Endangered Species Act: Impact of Section 9 on Private Landowners*, 24 ENVTL. L. 419, 424 (1994); John Charles Kunich, *Species & Habitat Conservation: The Fallacy of Deathbed Conservation Under the Endangered Species Act*, 24 ENVTL. L. 501, 561 & n.220 (1994) (citing Robert J. Smith, *The Endangered Species Act: Saving Species or Stopping Growth?*, 15 REGULATION: THE CATO REV. OF BUS. & GOVT. REG 83, 85 (Winter 1992)); see also Jeffrey J. Rachlinski, *Protecting Endangered Species Without Regulating Private Landowners: The*

prices and confuse consumers instead of arming them with legal rights.<sup>3</sup>

These are examples of a pervasive, yet potentially misleading and harmful mode of argumentation, I shall call "legal backfire" rhetoric, used primarily to undermine existing law (or policy) or to forestall the enactment of new law. A claim of legal backfire constitutes the position that a law produces or will produce results directly contrary to one or more of those intended.<sup>4</sup> The inventory of purported legal backfires is almost endless.<sup>5</sup> So is the list of sources of the claim, in-

*Case of Endangered Plants*, 8 CORNELL J.L. & PUB. POL'Y 1, 6-7 (1998) (reporting and refuting other commentators' assertions that the Endangered Species Act has backfired).

<sup>3</sup> See *infra* notes 177-180 and accompanying text.

<sup>4</sup> Professor Sunstein has discussed "regulatory strategies . . . that achieve an end precisely opposite to the one intended or to the only public-regarding justification that can be brought forward in their support." Cass R. Sunstein, *Paradoxes of the Regulatory State*, 57 U. CHI. L. REV. 407, 407 (1990). *The Rhetoric of Legal Backfire* broadens the inquiry and contests some of Sunstein's claims. See *infra* notes 185-191 and accompanying text.

<sup>5</sup> Additional examples of claims of legal backfire, in no particular order, include: The Environmental Protection Agency's actions to regulated coal-burning power plants is "so inept that some of the nation's most populous areas will end up with a worse environment than would have resulted if the new policy had never been put into effect." BRUCE A. ACKERMAN & WILLIAM T. HASSLER, *CLEAN COAL/DIRTY AIR* 2 (1981). Toxic waste laws that require cleaning up dumps before use of the land "drive[s] industry out to virgin fields, where it encounters no such costs." PHILIP K. HOWARD, *THE DEATH OF COMMON SENSE: HOW LAW IS SUFFOCATING AMERICA* 8 (1994). The Highway Beautification Act "thwarts highway beautification." Craig J. Albert, *Your Ad Goes Here: How the Highway Beautification Act of 1965 Thwarts Highway Beautification*, 48 U. KAN. L. REV. 463, 467 (2000). Demands of equality by gays sets back their cause. Robin West, *Integrity and Universality: A Comment on Ronald Dworkin's Freedom's Law*, 65 FORDHAM L. REV. 1313, 1329 (1997). Trial judges' admonitions to juries to disregard tainted evidence causes them to focus on that evidence. Regina Schuller, *Expert Evidence and Hearsay*, 19 LAW & HUM. BEHAV. 345, 349 (1995). The U.S. welfare system "has produced dependency, unwillingness to work, increased nonmarital births, drug abuse and crime." Peter Edelman, *Missing Bobby, Searching for America's Heart*, by Robin Toner, N.Y. TIMES, Apr. 29, 2001, § 7 (Book Review), at 25. Boot camps for juvenile offenders, which mimic aspects of military basic training in lieu of incarceration, result in greater instead of lesser recidivism. Jayson Blair, *Ideals & Trends; Boot Camps: An Idea Whose Time Came and Went*, N.Y. TIMES, Jan. 2, 2000, § 4, at 3. Flexible spending accounts, instead of "hold[ing] down medical costs . . . encourage[] extra medical spending." David E. Rosenbaum, *When Laws Shoot Themselves in the Foot*, N.Y. TIMES, Aug. 29, 1999, § 4, at 2. "The government prohibition on cigarette advertising on television, designed to decrease smoking, may have increased smoking . . ." Sunstein, *supra* note 4, at 429. Remarkably, even the 55 mile-per-hour speed limit is not sacrosanct. A joint study by the Department of Transportation and the Federal Highway Administration reported that lowering speed limits increased the number of accidents. Effects of Raising & Lowering Speed Limits, Report No. FHWA-RD-92-084 (U.S. Dep't of Transp., Fed. Highway Admin., 1992), available at <http://www.ibiblio.org/rdu/sl-irrel/index.html>, discussed in Eric Peters, *Demise of 'Double Nickel' Speed Limit Sought*, WASH. TIMES, Sept. 15, 1995, at E13. The Federal

cluding special interest groups, lawyers, legal theorists, legislators, administrators and journalists, of all political stripes.<sup>6</sup>

If all of the assertions of legal backfire were to be believed, our law and policy makers would be doing a very poor job, to put it mildly. In this Article, however, I analyze many examples of "legal backfire" to suggest that the concept is often a rhetorical strategy for opposing the promulgation of new law or policy or for attempting to have existing law rolled back and that actual legal backfires are much more rare (or at least unproven) than use of the rhetoric would suggest.<sup>7</sup> In fact, I will show that true legal backfires may be so infrequent and use of the rhetoric so common that backfire allegations should be met presumptively with suspicion rather than credence.

If I am correct about the suspiciousness of backfire rhetoric, this leads to the question of why so few laws or policies, in place or suggested, have been immune from the "legal backfire" allegation. There are many reasons to be discussed in this Article.

First, legal backfire argumentation is very effective rhetoric. Although simple and direct, it appears to close off debate. Unlike the allegation that a law creates unintended costs, which invites a debate about costs and benefits, the legal backfire claim leaves little room for rebuttal (except, of course, based on the factual accuracy of the assertion).<sup>8</sup> Backfire rhetoric is also dramatic and ironic, thereby capturing the attention of the listener. Backfire arguments also appeal to the emotions because of their complete and utter renunciation of the opposing position's methods for achieving a goal, and are a source of

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Communication Commission's fairness doctrine decreased instead of increased the broadcasting of diverse viewpoints. See *infra* notes 44–72 and accompanying text. The fuel economy standards imposed on automobile manufacturers increased rather than decreased our dependence on foreign oil. See *infra* notes 73–98 and accompanying text.

More generally, attempts to invigorate citizens' sense of responsibility through law may cause them to "recoil from responsibility." Meir Dan-Cohen, *Responsibility and the Boundaries of the Self*, 105 HARV. L. REV. 959, 1001–1002 (1992); see also Sunstein, *supra* note 4, at 408 (referring to the "omnipresence of regulatory paradoxes").

<sup>6</sup> See *infra* note 104 and accompanying text.

<sup>7</sup> This article does not focus on the common law, although many of the points probably apply. In addition, I am interested in whether a law has backfired with respect to one or more of its goals, not whether the law's purposes were meritorious in the first place.

<sup>8</sup> For example, critics of the Endangered Species Act assert that the law deters development at great cost to society. CHARLES C. MANN & MARK L. PLUMMER, *NOAH'S CHOICE: THE FUTURE OF ENDANGERED SPECIES* 25–26, 175 (1995). Supporters can rebut the charge by asserting that the benefits of the law in preserving species outweighs the costs. Such an argument cannot be made, of course, in response to the criticism that the Endangered Species Act has backfired.

emotional release for authors of the backfire claim in an impassioned atmosphere.<sup>9</sup>

Second, the dearth of persuasive empirical or other evidence that analyzes the success or failure of a law invites critics to raise the level of rhetoric about the harmfulness of a law. Relatedly, the multiplicity of goals of a law allows critics to seize upon at least one goal difficult or impossible to measure instrumentally and therefore a prime candidate for a backfire claim. In fact, often the highest aspiration of a law is the most difficult to evaluate accurately and therefore an excellent target of backfire critics.<sup>10</sup>

Third, crafting laws is an uncertain science. Lawmakers face many challenges pertaining to both creating the appropriate substance of the law and navigating through the processes of lawmaking.<sup>11</sup> Substantive concerns include minimizing hurdles to implementation and enforcement of the law, choosing the appropriate target groups, assessing the possibility of changed circumstances, and avoiding the creation of loopholes. Process issues include dealing with special interests, evaluating the role of public opinion, and adopting appropriate strategies of political compromise.<sup>12</sup> The range of potential factors that might lead to a backfire confers on critics of a law lots of ammunition to try to support their position that a law has backfired and encourages critics to make the argument in the first place.

If legal backfire rhetoric is omnipresent and persuasive, but often inaccurate, it also can be a hindrance to effective lawmaking. Repeated claims of backfire contribute to an anti-regulatory environment that may be unjustified and unhelpful. Serious issues may be short-changed by undocumented claims of legal backfire, which by their number and rhetorical force can poison the atmosphere against creative and effective lawmaking. Indiscriminate legal backfire arguments also undermine lawmakers' and the public's faith in particular laws that may be serving a salutary purpose. Finally, the strategy deters lawmakers from carefully reviewing difficult issues of social policy and

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<sup>9</sup> Cf. Ray Vaughan, *State of Extinction: The Case of the Alabama Sturgeon and Ways Opponents of the Endangered Species Act Thwart Protection for Rare Species*, 46 ALA. L. REV. 569, 584-95 (1995) (describing the vitriolic nature of right-wing assaults on the Endangered Species Act).

<sup>10</sup> For example, hate crime laws seek to punish perpetrators, but another goal is to reduce prejudice. The difficulty of measuring the effect of such laws on racial issues allows critics to counter that the laws only increase resentment and hate. See *infra* Part IV.

<sup>11</sup> On all of this, see *infra* Part II C.

<sup>12</sup> See *infra* Part II C.

instigates "quick-fixes," which ultimately may be very unsatisfactory responses to problems.

The point here is not that I can prove that there are *no* legal backfires nor that I believe there are none. One claim of legal backfire often heard, for example, involves the United States' economic embargo of Cuba that was supposed to lead to the demise of the Castro regime.<sup>13</sup> Along with others, I suspect that, instead, the policy is "the one thing that keeps [Castro] in power, keeping up [Cuba's] police state" by creating a "nationalistic aura" around Castro's rule.<sup>14</sup> Despite my personal hunch, however, I would urge treating this backfire claim exactly as any other. As with any other law or policy facing serious criticism, the government should engage in a comprehensive review of its policy towards Cuba that takes into account the backfire claim, but it should not be swayed solely by the rhetoric of legal backfire.

I also do not want to argue against people being zealous advocates or to cast aspersions on the motives of backfire claimants.<sup>15</sup> In fact, a supportable backfire claim obviously may be the most pertinent argument against adopting or continuing a law.<sup>16</sup> Moreover, the variety of motives for a backfire claim appear to run the gamut from economic self-interest, to philosophical differences with a law, to conflicting value preferences. Few seem to have been made in bad faith, simply to deceive the listener. In other words, my aim is not to stifle healthy dialogue about the merits of laws, but to ask law and pol-

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<sup>13</sup> James Brooke, *Embargo Seen as Aid To Castro; Canada, Too*, N.Y. TIMES, Oct. 15, 2000, § 1, at 9.

<sup>14</sup> See *id.* at 9 (quoting Canadian foreign minister Lloyd Axworthy). Similar allegations were made about the European Union's recent diplomatic sanctions against Austria for including a far-right party in its government. Instead of provoking a change in Austria's policy, the sanctions created a "nationalistic fervor." See, e.g., *Austria Hails EU Decision to Lift Sanctions*, ARIZ. REPUBLIC, Sept. 13, 2000, at A12.

<sup>15</sup> "Whether market rules are perfect or not, the good ends of economic activity are best achieved if players play to win." ARTHUR ISAK APPLBAUM, *ETHICS FOR ADVERSARIES: THE MORALITY OF ROLES IN PUBLIC & PROFESSIONAL LIFE* 193 (1999); see also Cynthia R. Farina, *Faith, Hope, and Rationality or Public Choice and the Perils of Occam's Razor*, 28 FLA. ST. U. L. REV. 109, 118 (2000) ("we too readily allow bad policy to be equated with bad motives").

<sup>16</sup> More generally, critical arguments ensure that all sides are heard and that lawmakers produce the best law. See APPLBAUM, *supra* note 15, at 198.

icy makers carefully to evaluate the support for backfire arguments and not to be taken in solely by the rhetoric.<sup>17</sup>

Part I of this Article sets forth and discusses three prominent examples of claimed legal backfires and evaluates the merits of the arguments. I conclude that the claims are seriously deficient. Part II explains why backfire arguments are so pervasive. Part III enumerates the dangers of relying on assertions of legal backfire. Part IV illustrates how lawmakers can utilize the learning of the first three parts, by focusing on one purported legal backfire involving recent hate-crime legislation. How should lawmakers react to arguments that hate crime laws increase intolerance and prejudice and therefore constitute legal backfires? I conclude that they should be very wary of the claims.

## I. THE NATURE OF LEGAL BACKFIRE RHETORIC

### A. *Examples of Alleged Legal Backfires*

In this subsection, I have selected three prominent examples of the use of legal backfire rhetoric. One contributed to the demise of a law, two may help induce the same consequence. Each involves regulation by an administrative agency but, as the rest of the paper shows, the kinds of problems that led critics to cry backfire are by no means limited to agency administration. These selections show the nature of a legal backfire argument, the breadth of its use, and the sources and force of the rhetoric.

#### 1. The Endangered Species Act

In order to protect and preserve endangered species, Congress sought in the Endangered Species Act<sup>18</sup> (ESA) "to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved . . . ."<sup>19</sup> Such conservation

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<sup>17</sup> See *id.* at 200–201 (the lack of careful monitoring of politics and government creates a "disanalogy" between it and "the U.S. courtroom"); JEREMY BENTHAM, HANDBOOK OF POLITICAL FALLACIES 139–226 (Harold A. Larrabee ed., 1952) (tactics to rebuff reform include "fallacies of confusion").

<sup>18</sup> 16 U.S.C. §§ 1531–1544 (2002).

<sup>19</sup> *Id.* § 1531(b).

benefits society because of the "esthetic, ecological, educational, historical, recreational, and scientific value" of endangered species.<sup>20</sup>

The Department of Interior's Fish and Wildlife Service [FWS] implements the law for land, which is the focus here.<sup>21</sup> The FWS must identify and "list" species in need of protection because endangered or threatened.<sup>22</sup> Although the ESA charges the FWS to promulgate recovery plans for listed species to increase a species' chance of survival<sup>23</sup> and to designate "critical habitat," which protects such habitat against federal activity,<sup>24</sup> the heart of the legal backfire claim involves the Act's regulation of private land.<sup>25</sup> Before listing a species as endangered or threatened, the FWS must notify the public of its intention to do so through publication in the Federal Register and in local newspapers.<sup>26</sup> The ESA then protects listed animals from activity on privately owned land that is harmful to them, including private land development or harvesting of the land.<sup>27</sup>

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<sup>20</sup> *Id.* § 1531(a)(3).

<sup>21</sup> The FWS also administers fresh water. The Department of Commerce's National Marine and Fisheries Service (NMFS) implements the law for the sea. See Vaughan, *supra* note 9, at 571.

<sup>22</sup> *Id.* at 571-72. The Act defines "endangered species" as "any species which is in danger of extinction throughout all or a significant portion of its range." *Id.* (quoting 16 U.S.C. § 1532(6)). The Act defines "threatened species" as "any species which is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range." *Id.* at 572 (quoting 16 U.S.C. § 1532(20)).

<sup>23</sup> 16 U.S.C. § 1533(f); see also Jeffrey J. Rachlinski, Book Review, *Noah by the Numbers: An Empirical Evaluation of the Endangered Species Act*, 82 CORNELL L. REV. 356, 368 (1997); Vaughan, *supra* note 9, at 573.

<sup>24</sup> Vaughan, *supra* note 9, at 572 (citing 16 U.S.C. § 1532(5)(A)). The FWS designates critical habitat to protect it from federal agencies. See Rachlinski, *supra* note 23, at 368 (citing 16 U.S.C. §§ 1533(a)(3)(A) and 1532(5)). The FWS should designate such habitat at time of listing, but it has designated critical habitat for only a small number of listed species. See *id.* at 371.

<sup>25</sup> See *id.* at 6.

<sup>26</sup> See *id.* (citing 16 U.S.C. § 1533 (1994)); Vaughan, *supra* note 9, at 572 (citing 50 C.F.R. § 17.11 (1993) (wildlife); see also 50 C.F.R. § 17.12 (1993) (plants)).

<sup>27</sup> Rachlinski, *supra* note 2, at 7. Landowners who violate the ESA are subject to fines or imprisonment. See Charles C. Mann & Mark L. Plummer, *The Butterfly Problem*, 269 THE ATLANTIC, Jan., 1992, at 47. Generally, protection of plant life on private land is left to state law. See Rachlinski, *supra* note 2, at 2-3.

Specifically, section 9 of the ESA makes illegal on privately held land "taking" an "endangered species." Vaughan, *supra* note 9, at 574 (citing 16 U.S.C. § 1538(a)(1)(B)-(C)). Taking means "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct." *Id.* at 574 (citing 16 U.S.C. § 1532(19)). The statute does not define "harm." See *id.* at 574-75. However, the FWS has promulgated a regulation defining "harm" as "an act which actually kills or injures wildlife," adding that

The ESA may well be the prime target of opponents of environmental causes.<sup>28</sup> Not surprisingly, critics claim that the Act is a legal backfire. Not only do critics assert that the private-land provisions excessively stifle development and therefore unfairly limit landowners' rights, which are clear *costs* of the legislation,<sup>29</sup> opponents also claim that these provisions actually accelerate the demise of endangered species.<sup>30</sup> The primary asserted cause of this legal backfire is that the Act creates incentives for private landowners, who have notice that the government will soon restrict potentially profitable uses of their land, to avoid the Act's impact.<sup>31</sup> Landowners can do so in several ways. They can destroy or modify the subject species' habitat on their land or remove the species from their land (or worse) before the protections become effective.<sup>32</sup> Landowners can also fight the prospective

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"such an act may include significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering." *Id.* at 575 (quoting 50 C.F.R. § 17.3 (1993)). Section 9 therefore forbids development or harvesting activities on private land when the activity harms endangered species. See Rachlinski, *supra* note 23, at 358; see also Michael Vivoli, Note, "Harm"ing Individual Liberty: Assessing the U.S. Supreme Court's Decision in *Babbitt v. Sweet Home*, 32 CAL. W. L. REV. 275, 293 (1996).

Section 9 does not apply the "taking" prohibition to *threatened* species. Vaughan, *supra* note 9, at 574 (citing 16 U.S.C. § 1538(a)(1)). However, the section does make illegal violation of regulations pertaining to threatened species. *Id.* (citing 16 U.S.C. § 1538(a)(1)(G)). Such regulations include prohibitions on "taking" threatened species. *Id.* (citing 50 C.F.R. § 17.31(a) (1993); 50 C.F.R. § 17.71 (a) (1993); Sweet Home Chapter of Communities for a Great Or. v. Babbitt, 1 F.3d 1, 1 (D.C. Cir. 1993)).

<sup>28</sup> See Rachlinski, *supra* note 2, at 1; Vaughan, *supra* note 9, at 584-604.

<sup>29</sup> MANN & PLUMMER, *supra* note 8, at 25-26, 175; Rachlinski, *supra* note 23, at 357-58 (discussing MANN & PLUMMER). Mann and Plummer claim that the Act fails in part because its drafters sought to save all species regardless of the costs—the so-called "Noah Principle." Rachlinski, *supra* note 23, at 362-64 (citing MANN & PLUMMER, *supra* note 8, at 213-15); see also Mann & Plummer, *supra* note 27, at 47.

<sup>30</sup> Kunich, *supra* note 2, at 561 & n.220 (citing Smith, *supra* note 2, at 85); see also MANN & PLUMMER, *supra* note 8, at 187-88, 196-97 (reporting such criticism as accurate); Gidari, *supra* note 2, at 424 ("Because of the habitat modification restrictions now imposed under section 9, landowners are taking pains to manage their lands so that protected, or potentially protectable, species do not occupy the site."); Rachlinski, *supra* note 2, at 2 (reporting such criticisms but not supporting them).

<sup>31</sup> "Because section 9 can convert a 'worthwhile private endeavor' into a 'potential crime,' it gives landowners 'great incentive to ensure that an official endangered species never appears on their property.'" Rachlinski, *supra* note 23, at 364 (quoting MANN & PLUMMER, *supra* note 8, at 187).

<sup>32</sup> One critic explains:

[T]he biology-is-law application of section 9 has resulted in unintended consequences and has had a perverse effect on efforts to conserve species. Be-

listing before the FWS, in court, and in the court of public opinion, thereby draining resources from the FWS that could otherwise be used to protect additional species.<sup>33</sup> Even after the FWS lists a species, the ESA may backfire, critics claim, because the government inadequately enforces the law.<sup>34</sup> Despite the Act's serious penalty provisions, the ESA's budget is low and few FWS agents police landowner activity.<sup>35</sup> As a result, landowners can destroy endangered and threatened species almost with impunity. One vocal opponent of the Act actually supported such criminal activity on the theory that "[w]hen landowners find an endangered animal on their property . . . the best solution under current law is to 'shoot, shovel, and shut up.'"<sup>36</sup>

Has the Endangered Species Act backfired because of the private-land restrictions? Although one Congressman claimed to have government confirmation of a large-scale backfire, nothing more than a few anecdotes ultimately supported his assertion.<sup>37</sup> Other critics also mainly rely on anecdotes to support their allegations of perverse in-

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cause of the habitat modification restrictions now imposed under section 9, landowners are taking pains to manage their lands so that protected, or potentially protectable, species do not occupy the site.

Gidari, *supra* note 2, at 424. Professor Rachlinski has reported such assertions in two articles. Rachlinski, *supra* note 2, at 6-7; Rachlinski, *supra* note 23, at 364-65.

<sup>33</sup> Rachlinski, *supra* note 2, at 6; Vaughan, *supra* note 9, at 586-87.

<sup>34</sup> See Rachlinski, *supra* note 2, at 6.

<sup>35</sup> Vaughan, *supra* note 9, at 577-78, 596-98. In addition, the Reagan and Clinton administrations have been lax in investigating violations of the Act. *Id.* at 598-99.

<sup>36</sup> Mark Sagoff, *Muddle or Muddle Through? Takings Jurisprudence Meets the Endangered Species Act*, 38 WM. & MARY L. REV. 825, 826 (1997) (quoting Chuck Cushman, executive director of the American Land Rights Association of Washington State, quoted in Martin van der Werf, *Endangered Species Act 'Gotta Be Fixed,' Foe Says*, ARIZ. REPUBLIC, July 1, 1995, at B1). Some people simply ignore the regulations. See *id.* at 854 (citing Eric Pryne, *Private Land vs. Habitat Protection*, SEATTLE TIMES, Apr. 13, 1995, at A1.).

Another related claim of backfire of the ESA involves the ineffectiveness of the Act as compared to voluntary conservation. For example, lack of funding has delayed the listing of species so that voluntary conservation efforts consistent with landowners' interests might have been more effective. See Rachlinski, *supra* note 23, at 364-66 (discussing criticism).

<sup>37</sup> *Hearing on the Endangered Species Act*, 104th Cong., 1st Sess. (1995) (testimony of Rep. Lamar Smith). Smith claimed that "[o]fficials at the Texas Parks and Wildlife Department contend that adding the golden-cheeked warbler and black-capped vireo to the endangered species list has encouraged the rapid destruction of their habitat." *Id.* While disturbing if true, this is hardly proof of an overall backfire or even the diminution of these species.

centives created by the Act.<sup>38</sup> Often-repeated stories, for example, involve landowners clear-cutting the timber on their land to avoid creating habitat for endangered species.<sup>39</sup> Still other critics rely on anecdotes to prove that the ESA generally has turned would-be conservationists against wildlife.<sup>40</sup> Although one commentator suggested that such avoidance behavior and attitudinal changes constituted a trend,<sup>41</sup> taken as a whole such stories prove only that the ESA's landowner restrictions may create perverse incentives and attitudinal changes under certain circumstances and with certain people. They hardly prove that more species are being destroyed than saved as the result of the private land-use restrictions of the Act.

In fact, to date, despite the FWS's production of hosts of data on the ESA, the Act's effectiveness remains much of a mystery.<sup>42</sup> Still, the best empirical study to date suggests that the ESA creates incentives for private landowners to *increase* their efforts to protect endangered species.<sup>43</sup> The allegation of a legal backfire has not been sustained.

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<sup>38</sup> Rachlinski, *supra* note 23, at 361-62 (discussing critics). Another writer admitted that only anecdotes supported his claim of backfire. See J.B. Ruhl, *The Endangered Species Act and Private Property: A Matter of Timing and Location*, 8 CORNELL J.L. & PUB. POL'Y 37, 50 (1998).

<sup>39</sup> Gidari, *supra* note 2, at 439-40 & nn.79-82 (citing Rob Taylor, *Preserving Forests May Pay Off; Landowners Would Benefit from Plan to Protect Wildlife*, SEATTLE POST-INTELLIGENCER, Oct. 13, 1993, at B1); Mike Vivoli, *Shoot, Shovel & Shut Up*, WASH. TIMES, Nov. 27, 1992, at F1 (clear cutting of timber to avoid creating habitat for the spotted owl). Ross Perot's construction company cleared more than one hundred acres to allow development that otherwise would have constituted habitat for the golden-cheeked warbler. For more on the Ross Perot anecdote, see MANN & PLUMMER, *supra* note 8, at 196-97. See also Mann & Plummer, *supra* note 27, at 47 ("Endangered Species Act works against people's incentives, not with them.").

<sup>40</sup> See Ike C. Sugg, *Caught in the Act: Evaluating the Endangered Species Act, Its Effects on Man and Prospects for Reform*, 24 CUMB. L. REV. 1, 46 (1994) (ESA "simply discourages voluntary efforts to conserve listed species on private land."). Sugg cites the experience of a landowner who founded a conservation group and created habitat for bald eagles on his land. *Id.* at 46-47. The government then forbade him from entering his land by truck. *Id.*; see also John A. Baden, *Creating Positive Rewards for Species Preservation*, SEATTLE TIMES, Oct. 20, 1993, at B7.

<sup>41</sup> See Kunich, *supra* note 2, at 561 & n.220 (citing Smith, *supra* note 2, at 85); see also Gidari, *supra* note 2, at 424.

<sup>42</sup> See Ruhl, *supra* note 38, at 37-38. "[S]pecies-by-species analyses with which to evaluate landowner behaviors by type of landowner, type of land use, and magnitude of impact are not widely available." *Id.* at n.3.

<sup>43</sup> Professor Rachlinski compared the record of plant preservation in states that protect plant life on private land with those that do not (the ESA does not protect plant life from private landowners). Rachlinski, *supra* note 2, at 2-3. He found that plants on private land generally suffer greater risks to their survival in states without regulation. *Id.* Rachlin-

## 2. The Fairness Doctrine

As part of its charge from Congress to "to make available . . . to all the people of the United States a rapid, efficient, nation-wide, and world-wide wire and radio communication service,"<sup>44</sup> the Federal Communications Commission (FCC), in a series of decisions and reports, promulgated the fairness doctrine.<sup>45</sup> The FCC reasoned that broadcasters, enjoying a limited resource, must operate in the public interest, which requires a full airing of all viewpoints on controversial issues.<sup>46</sup>

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ski therefore concluded that "restrictions on private landowners benefit endangered and threatened species." *Id.* at 32. He also surmised that a backfire would occur only when a habitat is already vanishing; when landowners can keep habitat that they destroyed from reappearing; when the cost of so doing is less than the costs of complying with the regulations; and when landowners have knowledge of the facts. *Id.* at 7.

In another study, Rachlinski demonstrated that critics mistakenly rely on misleading statistics that seemingly suggest the failure of the ESA. For example, critics point to the fact that, since the passage of the Act, 721 species have been added to the list of endangered species and only 21 species have been removed. Rachlinski, *supra* note 23, at 366. Rachlinski pointed out, however, that "one must ask how many more would have been endangered or even extinct if the Act had never become law." *Id.* Relying on the FWS's own data of the status of species, Rachlinski reports that "endangered and threatened species are better off with the Act than . . . without it." *Id.* at 383. But Rachlinski's conclusions are clouded because the FWS's designation of species are subjective: "It is not clear when an increase in population size constitutes 'improvement' or how long a population must remain constant to be considered 'stable.' Ultimately these designations represent the subjective judgment of the FWS, and may only imperfectly reflect a given species' true condition." *Id.* at 368.

<sup>44</sup> 47 U.S.C. § 151 (1934) (current version at 47 U.S.C. § 151 (2001)).

<sup>45</sup> For example, in 1949 the commission produced a report highlighting the importance of "providing and maintaining a climate of fairness and equal opportunity for the expression of contrary views." *In re Editorializing by Broadcast Licensees*, 13 F.C.C. 1246, 1254 (1949). That report nicely capsulized the goals of the fairness doctrine:

In the absence of a duty to present all sides of controversial issues, overt editorialization by station licensees could conceivably result in serious abuse. But where, as we believe to be the case under the Communications Act, such a responsibility for a fair and balanced presentation of controversial public issues exists, we cannot see how the open espousal of one point of view by the licensee should necessarily prevent him from affording a fair opportunity for the presentation of contrary positions . . . .

*Id.* The report changed broadcasters to cover public issues and to reflect opposing views. See *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 377 (1969). In 1964, the FCC issued a "Fairness Primer," which underscored the fairness doctrine's application to "controversial issues of public importance." Applicability of the Fairness Doctrine in the Handling of Controversial Issues of Public Importance [Fairness Primer], 29 Fed. Reg. 10,416, 10,416 (1964).

<sup>46</sup> *In re Application of Great Lakes Broad. Co.*, 3 F.R.C. Ann. Rep. 32, *modified in* *Great Lakes Broad. Co. v. Fed. Radio Comm'n*, 37 F.2d 993 (D.C. Cir. 1930).

In 1959 Congress amended Section 315(a) of the Communications Act of 1934, to support the FCC's perception of the fairness obligation. The section underscored broadcasters' obligation "to operate in the public interest and to afford reasonable opportunity for the discussion of conflicting views on issues of public importance."<sup>47</sup> In 1967, the FCC promulgated rules to fill out the content of the fairness doctrine such as the duties of a broadcaster to notify a person who was the subject of a personal attack of its content and to offer free reply time.<sup>48</sup> In 1969, the Supreme Court held that the fairness doctrine's regulation of broadcasters did not violate the First Amendment, primarily because of the scarcity of airwaves.<sup>49</sup>

The fairness doctrine was controversial from the beginning because it regulated the airwaves and because compliance took its toll on the pocketbooks of broadcasters.<sup>50</sup> Not surprisingly, predictions of a legal backfire soon surfaced, which culminated in the FCC's issuance of its "Fairness Report" during the anti-regulatory environment of the Reagan years.<sup>51</sup> Despite earlier factual findings by the FCC that the fairness doctrine "enhanc[ed] the flow of diverse viewpoints to the public,"<sup>52</sup> the Fairness Report concluded just the opposite. According to the report, the fairness doctrine stifled the airing of controversial views by creating incentives for broadcasters to avoid all controversial programming and with it the risk of having to offer free time to respondents or of facing costly litigation and penalties, including the possible loss of license.<sup>53</sup> In addition, the report found that, in

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<sup>47</sup> Act of September 14, 1959, 1, 73 Stat. 557 (amending 47 U.S.C. § 315(a) (1934) (current version at 47 U.S.C. § 315(a) (2001))).

<sup>48</sup> 47 C.F.R. 73.1920 (1967) (repealed 2000). The obligation to air opposing perspectives without compensation, if necessary, began in 1963. See *In re Responsibility Under the Fairness Doctrine*, 40 F.C.C. 576, 576 (1963).

<sup>49</sup> *Red Lion Broad. Co.*, 395 U.S. at 390 ("It is the right of the viewers and listeners, not the right of the broadcasters, which is paramount.").

<sup>50</sup> Gayle S. Ecabert, *The Demise of the Fairness Doctrine: A Constitutional Reevaluation of Content-Based Broadcasting Regulations*, 56 U. CIN. L. REV. 999, 1000-01, 1010 (1988).

<sup>51</sup> *In re Inquiry into Section 73.1910 of the Commission's Rules and Regulations Concerning the General Fairness doctrine Obligations of Broadcast Licensees*, 102 F.C.C. 2d 142 (1985) [hereinafter *Inquiry*].

<sup>52</sup> *In re the Handling of Public Issues Under the Fairness Doctrine and the Public Interest Standards of the Communications Act*, 48 F.C.C. 2d 1, 7 (1974).

<sup>53</sup> *Inquiry*, *supra* note 51, at 167, 188-96; see also Richard Samson, Note, *Repeal of the Fairness Doctrine: Prologue to a Farce*, 41 RUTGERS L. REV. 663, 663 (1989) ("[F]ierce opponents . . . [asserted] that the 'chilling effect' of the policy has effected precisely the result it was intended to prevent.").

light of the "explosive growth in various communications technologies" available in the marketplace, the public would not suffer from the lack of diverse perspectives.<sup>54</sup>

Although the FCC did not repeal the fairness doctrine at this time, the handwriting was on the wall. In 1987, after the Court of Appeals for the District of Columbia held that the doctrine was not codified by Section 315(a),<sup>55</sup> Congress sent President Reagan a bill that would have made the doctrine federal law.<sup>56</sup> Reagan vetoed the bill, allowing the FCC to kill the doctrine, which is exactly what it did. In a remand from the D.C. Court of Appeals in another case that directed the FCC to consider a broadcaster's claim that the fairness doctrine impinged on its free-speech protections, the FCC concluded in part that the fairness doctrine unconstitutionally "chilled" rather than promoted speech because it discouraged broadcasters from airing controversial issues.<sup>57</sup> As elaborated by the FCC:

[A]lthough the [fairness] doctrine was adopted to promote robust discussion of controversial issues, the enforcement of the doctrine has actually had the net effect of reducing rather than enhancing, the discussion of controversial issues of public importance and, therefore violated the constitutional principles announce by the Supreme Court. . . . Consequently, while the doctrine was intended to enhance First Amendment principles, the FCC determined that, in fact, it had the exact opposite result.<sup>58</sup>

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<sup>54</sup> Inquiry, *supra* note 51, at 197.

<sup>55</sup> *Telecomm. Research & Action Ctr. v. FCC*, 801 F.2d 501, 517-18 (D.C. Cir. 1986), *reh'g denied*, 806 F.2d 1115 (D.C. Cir. 1986).

<sup>56</sup> S. Res. 742, 100th Cong., 133 CONG. REC. 8438 (1987).

<sup>57</sup> *In re Syracuse Peace Council*, 2 F.C.C.R. 5043, 5049-50 (1987), *reconsideration denied*, 3 F.C.C.R. 2035 (1988); see also Charles W. Logan, Jr., *Getting Beyond Scarcity: A New Paradigm for Assessing the Constitutionality of Broadcasting Regulation*, 85 CALIF. L. REV. 1687, 1703 (1997).

<sup>58</sup> Press Release, Federal Communications Commission, Mass Media Action: FCC Ends Enforcement of Fairness Doctrine, Report No. MM-263 (Aug. 4, 1987) (on file with author) [hereinafter FCC News]. The FCC had declined to entertain a Syracuse television station's claim that the fairness doctrine impinged on its free speech rights. The station had refused to broadcast opposition to a nuclear power plant after the station had aired support for the plant. The Court of Appeals remanded the case, holding that the FCC had acted arbitrarily and capriciously by failing to consider the broadcaster's assertion. See *Meredith Corp. v. FCC*, 809 F.2d 863, 865-869 (D.C. Cir. 1987).

Was the FCC's determination of a legal backfire substantiated by the facts? The Commission's decision was based on the record in one case, comments from interested parties, and its 1985 Fairness Report, which the FCC termed "a comprehensive study of the administration and effects of the doctrine on broadcast journalists."<sup>59</sup> Still, these materials failed to shed much light on the fairness doctrine's actual effect on stations' broadcast decisions. Much of the FCC's case against the fairness doctrine centered on whether the increase in outlets for broadcasting diminished the problem of "spectrum scarcity" so that the First Amendment could no longer justify the regulation of broadcaster's speech.<sup>60</sup> When the FCC turned to the question of whether broadcasters aired more or less controversial issues as a result of the fairness doctrine, it largely relied on the Fairness Report, which, in turn, focused not on empirical evidence but on the presumed economic incentive for broadcasters to avoid controversial views.<sup>61</sup> Moreover, the FCC failed to account for the possibility that broadcasters would resist the strategy of offering bland, uninteresting programming because such programming would yield lower ratings and revenues. Even less persuasive were the surveys of self-interested broadcasters, who were asked how the fairness doctrine affected them and who testified in large measure about the rather vague "climate of timidity and fear" created by the fairness doctrine.<sup>62</sup>

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<sup>59</sup> FCC News, *supra* note 58.

<sup>60</sup> *Id.* In addition, a member of the FCC asserted that the increase in broadcasters would solve the problem of bias: "With over 11,000 broadcasters, the chance of bias not being countered . . . [is] small . . ." *Id.* Separate Statement of Chairman Dennis R. Patrick Proponents of the fairness doctrine countered, citing concerns about "concentrations of ownership" and the "First Amendment rights of the audience." Tom Shales, *Regulation Dropped by a Renegade FCC*, ITHACA J., Aug. 10, 1987, at 10A; see also Rhonda Brown, *Ad Hoc Access: The Regulation of Editorial Advertising on Television and Radio*, 6 YALE L. & POL'Y REV. 449, 459-59 (1988) (Senate committee found the FCC's fairness doctrine "findings 'factually flawed'").

<sup>61</sup> See *supra* note 53, and accompanying text; see also *Syracuse Peace Council*, 2 F.C.C.R. at 5049. The Fairness Report notes the "substantial danger that many broadcasters are inhibited" by the fairness doctrine. Inquiry, *supra* note 51, at 167.

<sup>62</sup> Inquiry, *supra* note 51, at 171. The FCC seemed troubled by the "self serving" nature of the broadcasters' testimony, but failed to respond very persuasively. For example, it stated that the evidence was "more probative than the statements of persons who, by necessity, have to second-guess the broadcaster's state of mind." *Id.* at 180. In the *Syracuse Peace Council* decision, the FCC reported "over 60 reported instances" of inhibition. *Syracuse Peace Council*, 2 F.C.C.R. at 5050; see also Samson, *supra* note 53, at 670 (citing Inquiry, *supra* note 51, at 180-81).

Moreover, information began to surface that the fairness doctrine did not inhibit broadcasters. For example, some legislators expressed outrage over the FCC's decision because it conflicted with Congress's intent to preserve the doctrine, because the networks continued a ban on paid editorials during network programming even after the repeal,<sup>63</sup> and because the FCC's backfire allegation was unsupported.<sup>64</sup> In fact, one legislator called the assertion of the chilling effect of the fairness doctrine "an issue that doesn't exist."<sup>65</sup> In addition, television network officials, who had opposed the doctrine, then predicted its repeal would have little effect. One executive of a leading network opined, "in all honesty I cannot think of an instance in which the fairness doctrine ever inhibited us."<sup>66</sup> Another broadcaster stated: "This will have no effect on the day-to-day operations of ABC news."<sup>67</sup> Admittedly anecdotal, as admissions against interest, these statements at minimum called into question the fairness doctrine's effect.

During the mid-nineties, efforts to revive the fairness doctrine were in limbo.<sup>68</sup> Proponents continued to press for reinstatement of the doctrine, with little success.<sup>69</sup> As might be expected, assertions about the effect of repeal of the fairness doctrine soon sounded the rhetoric of backfire too, with one Senator claiming that repeal did not produce the airing of more factious issues.<sup>70</sup> Instead, the Senator asserted, broadcasters produced more entertainment shows at the ex-

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<sup>63</sup> Brown, *supra* note 60, at 469-70 (networks feared that editorials would conflict with programming and offend the audience).

<sup>64</sup> See Mark A. Conrad, *The Demise of the Fairness Doctrine: A Blow for Citizen Access*, 41 FED. COMM. L.J. 161, 182 (1989) (judges reviewing the FCC's *Syracuse Peace Council* decision "perplexed" by the Commission's failure to explain its basis for finding that the [fairness doctrine's] net effect was to reduce the coverage of controversial issues."); Shales, *supra* note 60, at 10A.

<sup>65</sup> Shales, *supra* note 60, at 10A (quoting Rep. John Dingell).

<sup>66</sup> Peter J. Boyer, *Praise and Denunciation Greets Ruling by FCC*, N.Y. TIMES, Aug. 5, 1987, at C26 (quoting Lawrence K. Grossman, then president of NBC News).

<sup>67</sup> *Id.* (quoting ABC spokesperson, Julie Hoover).

<sup>68</sup> See Judith Michaelson, *Effort to Revive Broadcasting's Fairness Doctrine Raises Static*, L.A. TIMES, Nov. 17, 1993, at A5.

<sup>69</sup> See *id.*

<sup>70</sup> *Id.* (quoting chairman of the Commerce, Science and Transportation Committee, Sen. Ernest Hollings).

pense of public issues.<sup>71</sup> As of this writing, the possibility of the resurrection of the fairness doctrine appears slim.<sup>72</sup>

### 3. CAFE Standards

In the early 1970s, long gasoline lines and a dramatic increase in gas prices because of the Organization of Petroleum Exporting Countries' oil embargo<sup>73</sup> convinced Congress to pass the Energy Policy and Conservation Act (EPCA),<sup>74</sup> for the purpose of decreasing United States' dependence on foreign oil.<sup>75</sup> The EPCA imposed "corporate average fuel economy" (CAFE) standards on automobile manufacturers of cars sold in the United States.<sup>76</sup> CAFE set forth minimum fuel efficiency standards for a manufacturer's entire fleet of vehicles sold in the U.S.<sup>77</sup> CAFE required the Secretary of Transportation to set the "maximum feasible average fuel economy level" by considering, among other things, technology, economics, other motor vehicle fuel efficiency standards, and the U.S.'s energy conservation needs.<sup>78</sup> Congress itself set the initial CAFE standard at 18 miles per gallon for 1978 models<sup>79</sup> and 27.5 for 1985 and later.<sup>80</sup> The EPCA treated light

<sup>71</sup> *Id.* But see Thomas W. Hazlett & David W. Sosa, "Chilling" the Internet? Lessons from FCC Regulation of Radio Broadcasting, 4 MICH. TELECOMM. & TECH. L. REV. 35, 41 (1997) ("[E]xplosion in news, talk and public affairs formats in both AM and FM is powerful evidence that the FCC's previous efforts to regulate broadcast content did indeed result in a 'chilling effect.'").

<sup>72</sup> See Michaelson, *supra* note 68, at A5.

<sup>73</sup> See DAVID BOREN ET AL., ENERGY POLICY: A NEW WAR BETWEEN THE STATES? 8, 13, 26 (1975).

<sup>74</sup> Energy Policy and Conservation Act of 1975, Pub. L. No. 94-163, 89 Stat. 871 (codified as amended at 49 U.S.C. §§ 32901-32919 (2002)).

<sup>75</sup> Automobile Fuel Economy and Research and Development: Hearings on S. 307, S. 499, S. 633, and Amendment 15, S.654, and S. 783 Before the Senate Comm. on Commerce, 94th Cong., 3-4 (1975).

<sup>76</sup> See J. Yost Conner, Jr., Note, Revisiting CAFE: Market Incentives to Greater Automobile Efficiency, 16 VA. ENVTL. L.J. 429, 430 (1997).

<sup>77</sup> See ROBERT W. CRANDALL ET AL., REGULATING THE AUTOMOBILE 121 n.3 (1986) (describing formula as "harmonic weighted" for a manufacturer's entire fleet).

<sup>78</sup> 49 U.S.C. § 32902(f). For an example of another fuel efficiency standard, see the "Gas Guzzler Tax," 26 U.S.C. § 4064 (2002), which taxes manufacturers for vehicles falling below a miles per gallon standard set by the Environmental Protection Agency. 26 U.S.C. § 4064.

<sup>79</sup> Implementation of Corporate Average Fuel Economy (CAFE) Standards: Hearing Before the Subcomm. on Energy & Power of the House Comm. on Commerce, 104th Cong. 7 (1995) (testimony of Barry Felrice, Associate Administrator for Safety Performance Standards, National Highway Traffic Safety Administration, DOT) [hereinafter *Implementation of CAFE Hearing of 1995*].

<sup>80</sup> See 49 U.S.C. § 32902(b).

trucks, minivans, and sport utility vehicles differently, with Congress again preempting the Secretary's discretion and setting the CAFE standard at 20.7 in 1996.<sup>81</sup>

Many analysts have measured the effects of CAFE by setting forth "import dependence curves," which subtract the U.S.'s own oil production from overall oil consumption.<sup>82</sup> According to this measure, the U.S. imported about 40% of its oil in 1977, with a slow decline to 25% by 1985. After 1985, however, the U.S. import of oil has steadily increased up to more than 50% in 1994, with projections even higher for the beginning of the new millennium.<sup>83</sup> Such statistics have led to the belief among critics that CAFE standards have not contributed to a reduction in oil imports.<sup>84</sup>

In fact, critics contend that CAFE has backfired and attribute the increase in the U.S.'s dependence on foreign oil, at least in part, to several causes related to CAFE.<sup>85</sup> First, as the energy crisis eased and drivers lost the incentive to purchase fuel efficient vehicles, they began to buy light trucks and sports utility vehicles, which have relaxed CAFE standards.<sup>86</sup> Some critics even intimated that drivers turned to these vehicles because of the undesirable characteristics of high

<sup>81</sup> *Implementation of CAFE Hearing of 1995*, *supra* note 79 (testimony of Felrice). Light trucks are given special treatment by Congress because farmers and ranchers were their principal purchasers. *National Security & Strategies for Reducing Oil Imports: Hearing Before the House Comm. on Resources*, 109th Cong. (2000) (testimony of Daniel F. Becker, Director Global Warming & Energy Program, Sierra Club); *see also* Conner, *supra* note 76, at 443 n.101. CAFE imposes civil penalties on manufacturers who fail to comply. 49 U.S.C. § 32912(b).

<sup>82</sup> *Implementation of CAFE Hearing of 1995*, *supra* note 79, at 19 (testimony of Andrew H. Card, Jr., President & CEO, Am. Auto. Mfrs. Ass'n.).

<sup>83</sup> *Miscellaneous Energy Policy and Conservation Act Bills: Hearing Before the Senate Comm. On Energy and Natural Resources*, 105th Cong. 7-10 (1997) (testimony of Sen. Daniel K. Akaka, graph included).

<sup>84</sup> *See Implementation of CAFE Hearing of 1995*, *supra* note 79 (testimony of Diane K. Steed, President, Coalition for Vehicle Choice).

<sup>85</sup> "[I]n 1994 oil imports were 45% compared to 35% in 1973." *Implementation of CAFE Hearing of 1995*, *supra* note 79, at 19 (testimony of Card).

<sup>86</sup> *Motor Vehicle Fuel Efficiency Act of 1989: Hearing Before the Subcomm. of the Senate Comm. on Commerce, Science, & Transportation*, 101st Cong. 313 (1989) (testimony of BMW) [hereinafter 1989 Hearings]; Conner, *supra* note 76, at 439. SUVs and light trucks comprise 50% of the new vehicle market. *See National Security and Strategies for Reducing Oil Imports: Hearing Before the House Comm. on Resources* (testimony of Becker). As of early 2001, "[f]ederal figures show the fuel economy of the nation's fleet of cars and light trucks is at its lowest level in two decades, due largely to the increasing popularity of light trucks, a category that includes pickups, sport-utility vehicles and minivans." Jim VandeHei, *GOP Warns GM, Auto Industry About Fuel-Efficiency Standards*, WALL ST. J., June 21, 2001, at A4.

efficiency automobiles.<sup>87</sup> Second, consumers increased their vehicle miles traveled (VMT)<sup>88</sup> as their "cost per mile" of driving decreased due to a decrease in the real cost of fuel<sup>89</sup> and the greater fuel efficiency of their cars.<sup>90</sup> CAFE's great mistake, opponents alleged, was targeting manufacturers instead of consumers because "driving is much more influential on the national fuel consumption than the measured MPG rating of any car or fleet of cars."<sup>91</sup> Because CAFE does not require consumers to bear the costs of greater consumption of oil, the law was bound to fail.<sup>92</sup> Third, because CAFE caused automakers to raise their prices, some drivers kept or purchased old, inefficient cars instead of new ones.<sup>93</sup> Fourth, CAFE "inhibited" automakers from improving fuel efficiency beyond the CAFE standards

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<sup>87</sup> See 1989 Hearings, *supra* note 86, at 312 (testimony of BMW).

<sup>88</sup> VMT consists of the total number of miles traveled by all vehicles. OFFICE OF TECHNOLOGY ASSESSMENT, U.S. CONGRESS, IMPROVING AUTOMOBILE FUEL ECONOMY: NEW STANDARDS, NEW APPROACHES 39 (1991). Driver behavior and the number of drivers on the road determine the VMT. *Id.* at 41.

<sup>89</sup> See Implementation of CAFE Hearing of 1995, *supra* note 79, at 17 (testimony of Card); 1989 Hearings, *supra* note 86, at 164 fig.1 (testimony of Hal Bracken, Group Vice President, Customer Relations & U.S. Products, Toyota Motor Sales, U.S.A.).

<sup>90</sup> Although critics apparently have not focused on the fact that fuel efficiency reduces the cost of driving and, therefore, contributes to an increase in vehicle miles traveled, this is the logical extension of their argument that, as costs go down, driving increases. See 1989 Hearings, *supra* note 86, at 313 (testimony of BMW) ("If anything, the improved fuel economy induced more driving.").

The vehicle miles traveled increased 127% between 1970 and 1997. *Clean Air & Wetlands Budget Hearing: Hearing Before the Senate Comm. on Environment & Public Works*, 109th Cong. (2000) (testimony of Robert Perciasepe, Assistant Administrator, Office of Air and Radiation, U.S. Environmental Protection Agency). The *New York Times* reports that the number of miles traveled by vehicles declined in 2000 after 20 years of increases. Economists and other transportation experts believe that increases in fuel prices have caused the decrease. Matthew L. Wald, *Despite More Cars, Miles Fall For the First Time in 20 Years*, N.Y. TIMES, Apr. 2, 2001, at A12.

<sup>91</sup> *Auto Fuel Efficiency Standards: Hearing Before the Subcomm. on Energy Conservation & Power of the House Comm. on Energy & Commerce*, 98th Cong. 175 (1983) (testimony of Martin L. Anderson, Executive Officer, Future of the Auto. Program, Mass. Inst. of Tech.); see also *id.* at 176 ("most international policies related to fuel consumption have been directed at consumer behavior"); *infra* notes 172-175 and accompanying text.

<sup>92</sup> See Implementation of CAFE Hearing of 1995, *supra* note 79, at 19 (testimony of Card); Conner, *supra* note 76, at 439; see also 1989 Hearings, *supra* note 86, at 312 (testimony of BMW).

<sup>93</sup> 1989 Hearings, *supra* note 86, at 312 (testimony of BMW); Conner, *supra* note 76, at 439-440; see also Implementation of CAFE Hearing of 1995, *supra* note 79, at 15 (testimony of Felrice).

"for fear that such improved performance might become a new, onerous benchmark for future requirements."<sup>94</sup>

Nevertheless, supporters maintain that "there can be no doubt about the energy conservation effects of improved fuel economy levels."<sup>95</sup> Supporters point to the improvement in the average fuel economy levels of new passenger car fleets between 1975 and 1993 and show that, although vehicle miles traveled increased by over 60% between 1975 and 1993, drivers consumed 2% less fuel traveling those miles.<sup>96</sup> Moreover, notwithstanding the U.S.'s increased dependence on foreign oil, supporters insist that without CAFE our need would be even greater.<sup>97</sup> The appropriate test of CAFE is not whether the U.S. uses more imported oil after CAFE's promulgation, but whether the rate of increase in oil imports slowed because of the law. Despite loss of faith even by early supporters and drafters of CAFE,<sup>98</sup> the assertion that CAFE has diminished the rate of increase has never been disproved, contradicted, or even directly addressed by opponents.

### B. Summary

Subsection A of this section sets forth three prominent examples of legal backfire assertions. These instances of backfire are hardly isolated.<sup>99</sup> In fact, claims of legal backfire are very common.<sup>100</sup>

Critics of a law employing the legal backfire strategy assert not that a law's costs outweigh its benefits or that a law did not accomplish its goals, but that a law achieves a result *directly contrary to one of the principal short or long-term goals intended*.<sup>101</sup> It is not that the Endan-

<sup>94</sup> 1989 Hearing, *supra* note 86, at 268 (comments of American Suzuki Motor Corp.). "Although its supporters assert that [CAFE] is the best approach to improving automobile fuel efficiency, in fact it would undermine fuel efficiency goals in several ways." *Id.*

<sup>95</sup> Implementation of CAFE Hearing of 1995, *supra* note 79, at 7 (testimony of Felrice) (from 16.2 to 28.2 mpg).

<sup>96</sup> *Id.*; see also 1989 Hearings, *supra* note 86, at 75 (testimony of James J. MacKenzie, Senior Assoc., Climate, Energy & Pollution Program, World Resources Inst.) (since 1973 VMT increased 33%, but gasoline use increased only by 10%).

<sup>97</sup> Implementation of CAFE Hearing of 1995, *supra* note 79, at 7 (testimony of Felrice); *id.* at 25 (testimony of Clarence M. Ditlow, Director, Center for Auto Safety, that CAFE "reduced oil consumption by 3 million barrels per day").

<sup>98</sup> See *id.* at 3 (testimony of Rep. John D. Dingell ("with the benefit of . . . experience I think it is appropriate for us to ask whether [CAFE] is functioning as it should . . . or whether there should be a change in the basic statute").

<sup>99</sup> See *supra* note 5 and accompanying text.

<sup>100</sup> See *supra* note 5 and accompanying text.

<sup>101</sup> Critics who claim a legal backfire also often focus on the costs of a law, of course.

gered Species Act impedes development, a cost of the law to be weighed against its benefits, but that it actually contributes to the destruction of endangered species and is therefore bankrupt.<sup>102</sup>

Not surprisingly, the examples discussed above show that parties whose oxes are being gored by a law, such as landowners, broadcasters, and automakers, often author the claim of backfire. But the sources of such claims are by no means limited to affected groups. Those philosophically opposed to a law may originate or take up a claim.<sup>103</sup> Moreover, backfire claimants represent the entire political spectrum and diverse occupations, including lobbyists, lawmakers, journalists, lawyers, and legal theorists.<sup>104</sup> Finally, critics employ various modes of communicating backfire claims, including through the media, in hearings, and in debates.

What is striking about most legal backfire claims is the absence of persuasive proof of the assertions one way or the other, notwithstanding the allure of the arguments. A backfire claim helped defeat the fairness doctrine despite limited knowledge concerning the doctrine's instrumental effects.<sup>105</sup> The futures of the Endangered Species Act and CAFE standards are also in jeopardy in part because of backfire claims, despite the empirical indeterminacy of the effect of these laws.<sup>106</sup> The attractiveness and rhetorical power of backfire claims, despite their inconclusiveness, are the subjects of Parts II and III.

## II. THE ALLURE OF LEGAL BACKFIRE RHETORIC

For too many reasons, legal backfire arguments are pervasive. This section sets forth the major reasons. First and most important, backfire rhetoric is persuasive, more convincing than it should be. Second, backfire arguments are easy to make. Typically, the lack of empirical evidence or convincing theoretical proof of the effect of a

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<sup>102</sup> See *supra* notes 19–43 and accompanying text.

<sup>103</sup> For example, legal theorists have claimed that the unconscionability doctrine, which polices the fairness of contract terms, backfires. They contend that, although ineffectual, the doctrine allows privileged parties to assert the fairness of contract law and therefore to preserve unfair terms. See, e.g., Duncan Kennedy, *Distributive and Paternalist Motives in Contract and Tort Law, With Special Reference to Compulsory Terms and Unequal Bargaining Power*, 41 MD. L. REV. 563, 622 (1982).

<sup>104</sup> For example, conservatives claimed the fairness doctrine backfired and liberals asserted the repeal was itself a backfire. See *supra* notes 69–70 and accompanying text.

<sup>105</sup> See *supra* notes 44–72 and accompanying text.

<sup>106</sup> See Part I A.

law allows a backfire adherent to author the claim with relative impunity. Third, assertions of backfire are easy to support. Claimants can select from a whole range of problems with promulgating successful laws. Of course, these latter two factors—lack of evidence one way or the other and myriad hurdles to effective lawmaking—also allow for more general criticisms of a law, for example, that it is ineffectual or its costs outweigh its benefits. These factors particularly add strength to the rhetorical appeal of a backfire argument by making the assertion seem more credible and understandable. In short, backfire arguments are effective, easy to make and support, and hard to refute.

### A. *The Rhetorical Appeal of Backfire Arguments*

Although lawmakers should depend on moral, economic, social, and institutional reasons, among others, for creating, revising, or expunging a law, the nature of the language chosen by supporters and critics to convey their ideas may also influence decision makers.<sup>107</sup> "[L]anguage shapes thought . . . [the] choice of words can therefore have political and social consequences . . . ."<sup>108</sup>

Backfire rhetoric is a good example. By pronouncing the worst possible outcome for a law, the rhetoric is dramatic and ironic—the Endangered Species Act is supposed to save endangered species, but it is killing them.<sup>109</sup> Backfire rhetoric is also forceful in that it conveys the feeling that there is nothing left to debate. The fairness doctrine shuts off dialogue about controversial issues instead of promoting discussion, so the law must be expunged.<sup>110</sup> Backfire proponents also gain credibility by identifying with the goals and hence the values of a law's supporters: "We are all on the same side. We want to protect consumers too, but this law simply will drive up prices and reduce their choices."<sup>111</sup> Cost/benefit arguments, on the other hand, devalue opponents' goals by focusing on their costs.

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<sup>107</sup> See Robert A. Hillman, "Instinct With an Obligation" and the "Normative Ambiguity of Rhetorical Power," 56 OHIO ST. L.J. 775, 810 (1995); see also *id.* at 811 ("[A]n important ingredient or catalyst in achieving legal change is the availability and use of some powerful rhetoric to propel courts confidently toward new methods and approaches.").

<sup>108</sup> RICHARD A. POSNER, LAW AND LITERATURE: A MISUNDERSTOOD RELATION 311 (1988).

<sup>109</sup> See *supra* notes 18–43 and accompanying text.

<sup>110</sup> See *supra* notes 44–72 and accompanying text.

<sup>111</sup> See GARTH S. JOWETT & VICTORIA O'DONNELL, PROPAGANDA AND PERSUASION 290–291 (3d ed. 1999); DOUGLAS WALTON, AD HOMINEM ARGUMENTS 28–31 (1998). "It hardly

Notwithstanding their identification with the goals of a law's supporters, backfire arguments constitute emotional appeals that emphasize the absolute wrong-headedness of the methods a law employs to reach its goals.<sup>112</sup> As such, backfire rhetoric naturally calls into question the knowledge and skills of a law's supporters. Such emotional arguments may be very difficult to refute both because of the reluctance of debaters to confront them—"[I]t is very difficult to disagree with an emotional and horrifying story"—and because of their impact on the audience.<sup>113</sup>

Backfire arguments also tell a good story and therefore capture the attention of the audience. What could be more interesting than a tale about a law that does exactly the opposite of what it is supposed to do? Yet, backfire argumentation is deceptively simple and focused. As with good advertising, the backfire argument reduces to a core idea embodied in an interesting slogan:<sup>114</sup> Consumer protection legislation increases prices and hurts consumers. The Fairness Doctrine stifles speech. These are catchy sound bites, attractive to the media, which then sends them out to the public who may take them as authoritative.<sup>115</sup> To substantiate their position, critics often supplement these sound bites with anecdotes or statistics, often taken out of context or otherwise unreliable, which makes the backfire claim even more appealing and even less reliable.<sup>116</sup>

### B. *The Lack of Convincing Empirical Evidence or Theoretical Proof*

Critics who adopt the powerful rhetoric of backfire are often reinforced by the lack of meaningful empirical or theoretical proof on

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needs saying that we share with the proponents of hate crime laws the goal of a tolerant society . . . ." See generally JACOBS & POTTER, *supra* note 1 (predicting a backfire because of the "conflict-generating tendency of identity politics").

<sup>112</sup> Cf. DAVID G. MYERS, *EXPLORING SOCIAL PSYCHOLOGY* 122-251 (2d ed. 2000) (discussing reason and emotion as the content of messages); Vaughan, *supra* note 9, at 584-95 (describing the vitriolic nature of right-wing assaults on the Endangered Species Act).

<sup>113</sup> Daniel M. Filler, *Making the Case for Megan's Law: A Study in Legislative Rhetoric*, 76 IND. L.J. 315, 350 (2001).

<sup>114</sup> See STEVEN D. STARK, *WRITING TO WIN: THE LEGAL WRITER* 61-70 (1999).

<sup>115</sup> See, e.g., Filler, *supra* note 113, at 324-25 ("Legislative debate is an opportunity for representatives to both inform the media and the public, and to shape public opinion.").

<sup>116</sup> See *id.* at 353-54 (discussing the unreliable statistics on child abduction); see also *supra* Part I and *infra* notes 123, 197-198 and accompanying text.

the effects of a law.<sup>117</sup> Put simply, critics are undaunted by the prospect of being corrected by hard facts or indisputable theories.

Empirical studies of the effects of laws are difficult, costly, often indeterminate, and, therefore, rare, but this is not the place to analyze all of the pitfalls of empirical work.<sup>118</sup> Perhaps one example will do. In order to investigate the frequent assertion of sellers and lessors of consumer goods that regulation only increases prices and reduces choice, I sought to measure the effects of New York's Motor Vehicle Retail Leasing Act (MVRLA) on the price of auto leases in New York.<sup>119</sup> The MVRLA, enacted in 1994, extends to consumer lessees certain disclosure and substantive protections, including respectively disclosure of the basis for calculating early termination charges and for computing excess wear and damage liability,<sup>120</sup> and barring the lessee from contracting away her right to assert legal remedies against the lessor.<sup>121</sup> Laws comparable to the MVRLA in other jurisdictions made comparison of the price of leases in states with and without leasing regulations problematic. Instead, I sought to compare lease prices in New York before and after the enactment of the MVRLA. Substantial methodological problems involving how to account for other possible reasons for changes in lease prices impeded this analysis too. For example, prices may fluctuate because of changes in federal law affording similar protections,<sup>122</sup> changes in the demand for cars, changes in the popularity of leasing versus purchasing automobiles, and inflation and other federal monetary policy decisions. I have interviewed several automobile dealers and finance companies and sent out questionnaires regarding the effect of the MVRLA. But these data consist of self-serving opinions of questionable reliability.

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<sup>117</sup> See generally Lee Epstein & Gary King, *Empirical Research and the Goals of Legal Scholarship: The Rules of Inference*, 69 U. CHI. L. REV. 1 (2002); John Monahan & Laurens Walker, *Empirical Questions Without Empirical Answers*, 1991 WIS. L. REV. 569 (1991); Peter H. Schuck, *Why Don't Law Professors Do More Empirical Research?*, 39 J. LEGAL EDUC. 323 (1989).

<sup>118</sup> See *supra* note 117.

<sup>119</sup> N.Y. PERS. PROP. § 330-353 (McKinney's 1999).

<sup>120</sup> *Id.* §§ 337 5, 343 2.

<sup>121</sup> *Id.* § 337 14 (d), (f).

<sup>122</sup> See, e.g., Consumer Leasing Act of 1976, 15 U.S.C. § 1601; U.C.C. § 2A (1998); Kenneth J. Rojc & Thomas K. Juffernbruch, *State Laws Response to the New Regulation M*, 53 BUS. LAW. 1027, 1027-40 (1998).

Suffice it to say, then, that empirical studies of this nature are rare and persuasive ones even more infrequent.<sup>123</sup> Without convincing evidence one way or another, critics can lambaste disfavored laws with claims of backfire almost with impunity. In fact, often combatants engage in backfire wars, with one side claiming the evidence demonstrates a backfire, and the other side insisting the evidence proves the law's success.<sup>124</sup> Typically, neither side's evidence is very persuasive. For example, one commentator has asserted that the warranty of habitability, a law designed to protect residential lessees, drives landlords out of the housing market and therefore decreases available housing and raises rents for lower income persons.<sup>125</sup> But the evidence is dated and unreliable because it is based largely on opinion and predictions.<sup>126</sup> Proponents of the warranty of habitability in turn claim that the evidence proves that enforcement does not drive up rents or reduce housing.<sup>127</sup> But proponents' evidence is equally unpersuasive, allowing critics of the warranty to mount a counter-attack.<sup>128</sup>

Compounding the confusion, legal backfire rhetoric is also a facile strategy because of the complexity of law. Particular laws have both proximate and long-term, and practical and aspirational purposes and goals, some of which are especially conducive to the legal backfire attack.<sup>129</sup> For example, one direct goal of hate crime legislation is to

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<sup>123</sup> See Sunstein, *supra* note 4, at 409 ("empirical assessments of the consequences of regulation remain in a primitive state"). Because empirical work is so thin, the occasional published study may gain more attention than warranted, especially if it includes "precise quantification" that suggests "objective fact." Lisa Heinzerling, *Regulatory Costs of Mythic Proportions*, 107 YALE L.J. 1981, 1986 (1998).

<sup>124</sup> See *supra* notes 85-98 and accompanying text.

<sup>125</sup> Sunstein, *supra* note 4, at 422-23 (citing Werner Z. Hirsch et al., *Regression Analysis of the Effects of Habitability Law upon Rent: An Empirical Observation on the Ackerman-Komesar Debate*, 63 CAL. L. REV. 1098, 1139 (1975)).

<sup>126</sup> Hirsch states that although results of empirical studies of housing supply and demand would "be informative as to the costs and benefits of habitability laws, such estimation is beyond the scope" of the article. Hirsch et al., *supra* note 125, at 1124.

<sup>127</sup> See, e.g., *Robinson v. Diamond Hous. Corp.*, 463 F.2d 853, 860 (D.C. Cir. 1972) (relying on a Yale Law Journal study that housing code enforcement does not increase rents); Anthony T. Kronman, *Paternalism and the Law of Contracts*, 92 YALE L.J. 763, 773-74 (1983).

<sup>128</sup> See *Robinson*, 463 F.2d at 860, criticized in Hirsch et al., *supra* note 125, at 1130; see also Gaylene J. Styve et al., *Perceived Condition of Confinement: A National Evaluation of Juvenile Boot Camps and Traditional Facilities*, 24 LAW & HUM. BEHAV. 297, 297 (2000) (perception of juvenile offenders is that boot camps provide "a more positive environment," countering criticism of other studies suggesting boot camps create hostile environment).

<sup>129</sup> Purposes and goals may, of course, change over time too.

punish hate crime mongers.<sup>130</sup> A long-term, and aspirational goal is to demonstrate symbolically society's view of the evil of such crimes and to change people's thinking about them.<sup>131</sup> The latter goal, difficult, perhaps impossible, to evaluate with respect to success or failure, leaves open the counter argument that the law only increases resentment and hate.<sup>132</sup>

In the absence of persuasive empirical evidence, backfire warriors sometimes turn to other more theoretical modes of proof. To support the claim of backfire, recall that opponents of the fairness doctrine applied what is essentially an economic analysis of the incentives of broadcasters.<sup>133</sup> For another example, consider Article 2 of the Uniform Commercial Code dealing with sales of goods. Consistent with Karl Llewellyn's view of the importance of facilitating commerce by incorporating contextual realities in resolving disputes about the parties' intentions, Article 2 directs court to interpret agreements with an eye towards any applicable trade custom and the parties' dealings.<sup>134</sup> Critics of this approach rely on economic analysis to support their claim that Article 2's contextual orientation ironically backfires be-

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A very common phenomenon, and one very familiar to the student of history, is this. The customs, beliefs, or needs of a primitive time establish a rule or a formula. In the course of centuries the custom, belief, or necessity disappears, but the rule remains. The reason which gave rise to the rule has been forgotten, and ingenious minds set themselves to inquire how it is to be accounted for. Some ground of policy is thought of, which seems to explain it and to reconcile it with the present state of things; and then the rule adapts itself to the new reasons which have been found for it, and enters on a new career.

OLIVER WENDELL HOLMES, *THE COMMON LAW* 5 (Little, Brown & Co. 1881).

<sup>130</sup> See *infra* Part IV.

<sup>131</sup> See *infra* Part IV.

<sup>132</sup> See *infra* Part IV. For another example, the proximate goal of the Clean Air Act is to reduce auto emissions by setting limits for new cars. A more long-term aspiration is to improve the public's health by cleaning the air. Although the reduction in emissions can be measured, it will be very difficult to determine the extent to which the air became cleaner and health improved as the result of new-car emission reduction. As a result, critics can claim that the Clean Air Act only encouraged the use of old cars, thereby increasing air pollution and damaging health. See Sunstein, *supra* note 4, at 418. For still another example, boot camps for juvenile offenders are meant to keep juveniles out of jail, decrease costs of juvenile penal rehabilitation, and decrease recidivism. Reports are surfacing that boot camps have backfired at least with respect to the rehabilitation goal. See, e.g., Rod Smith, *Toward a More Utilitarian Juvenile Court System*, 10 U. FLA. J.L. & PUB. POL'Y 237, 244-45 (1999).

<sup>133</sup> See *supra* notes 53, 61 and accompanying text.

<sup>134</sup> See, e.g., Omri Ben-Shahar, *Formalism in Commercial Law: The Tentative Case Against Flexibility in Commercial Law*, 66 U. CHI. L. REV. 781, 781 (1999).

cause it creates incentives for parties to be inflexible and uncooperative.<sup>135</sup> Critics reason that under Article 2 a party incurs significant costs by being flexible—i.e., by not insisting on performance according to the express contract terms.<sup>136</sup> By agreeing to late performance, for example, a party creates a “course of performance” and therefore loses not only the immediate benefits of performance on time but also the right to enforce the time-for-performance term in future performances of the same contract.<sup>137</sup> This extra cost would not exist in a legal regime that enforced contracts as written regardless of a party’s acceptance of late performance. Hence, to avoid such extra costs, parties must be more rigid under Article 2 than under a law that ignored the parties’ course of performance.<sup>138</sup>

Although a very interesting academic argument, the “rigidity” theory should not alone constitute the basis for sustaining a claim of a legal backfire. Determining the incentive effects of Article 2’s contextual approach requires a richer analysis of people’s behavior. The costs of rigidity are likely to be high—consider, for example, the costs associated with alienating the party who requests to perform late—and a low-cost alternative exists, namely acceding to the request while reserving the right to performance on time in the future.<sup>139</sup> Further, parties may voluntarily accede to a defective performance in part because they believe that people *should* be flexible and cooperate and in part because they believe that the benefits of being flexible (which include future accommodations of their own needs by the other party) outweigh the costs.<sup>140</sup> Not only will parties therefore likely re-

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<sup>135</sup> See *id.*

<sup>136</sup> See *id.*

<sup>137</sup> See *id.*

<sup>138</sup> See *id.*

<sup>139</sup> A verbal protest should do. See U.C.C. § 2-208(1) (“any course of performance accepted or acquiesced in *without objection* shall be relevant to determine the meaning of the agreement”) [emphasis added]. Moreover, courts do not appear to make many errors in determining when to establish a course of performance. See Robert A. Hillman, *More in Defense of UCC Methodology*, 62 LA. L. REV. (forthcoming 2002). But see Lisa Bernstein, *Merchant Law in a Merchant Court: Rethinking the Code’s Search for Immanent Business Norms*, 144 U. PA. L. REV. 1765, 1813 (1996) (it will be “difficult” for parties to “negate the influence” of their conduct on how courts interpret contracts).

<sup>140</sup> Robert A. Hillman, *Court Adjustment of Long-Term Contracts: An Analysis Under Modern Contract Law*, 1987 DUKE L.J. 1, 5-6; see also Victor P. Goldberg, *Relational Contract: Price Adjustment in Long-Term Contracts*, 1985 WIS. L. REV. 527, 532; Robert A. Hillman, *The Limits of Behavioral Decision Theory in Legal Analysis: The Case of Liquidated Damages*, 85 CORNELL L. REV. 717, 724-25 (2000).

main flexible under Article 2, but the costs to the parties of an alternative legal approach might be much higher. Consider the costs of entering legally enforceable contract modifications in a regime that ignored course of performance. For example, parties would have to plan and draft a new express contract each time they sought to alter the time for performance by a few days or face the possibility of judicial error in assessing their oral agreement to that effect. Without a writing or consideration, which is not necessary to modify a sales contract (but which is a primary source of evidence of an intention to contract), courts may be prone to make such mistakes.

At this point, the reader may wonder how a critic claiming a backfire can convince lawmakers if she lacks empirical proof and policy analysis is unpersuasive. That is just the point. Without convincing proof of some kind, the backfire claimant's argument is hollow and lawmakers should therefore be wary of it. This does not mean that lawmakers should ignore the argument. Instead, as I develop more fully in Part IV, lawmakers simply should be on guard to resist giving it more credence than it deserves.

### *C. The Illusiveness of Achieving Instrumental Goals*

Crafting laws is an uncertain science. Laws may fail to achieve their purposes for hosts of reasons.<sup>141</sup> What follows is not an inventory and analysis of all of the things that can go wrong, a discussion beyond the scope of this paper. Instead, I briefly present many of the lawmaking problems, involving both substantive imprecision and process constraints, that critics have implicated in their claims of backfire. This catalog of reasons for claimed backfires shows that critics have no trouble finding ammunition for their backfire claims, which helps account for the number of such claims.

#### **1. Substantive Imprecision**

One hurdle for lawmakers is drafting laws that are not too difficult to implement or enforce. For example, the drafters of the Endangered Species Act failed to find a way to alert landowners to the listing of species without allowing them lawfully to destroy habitats

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<sup>141</sup> See Lynn M. LoPucki, *Legal Culture, Legal Strategy, and the Law in Lawyers' Heads*, 90 *Nw. U. L. Rev.* 1498, 1555 (1996) (different "legal cultures" construe laws differently).

prior to the effectiveness of the law.<sup>142</sup> Another challenge for the same lawmakers was to devise methods of policing landowner activity within the constraints of limited budgetary resources.<sup>143</sup> It was not difficult for critics to emphasize these problems with the ESA in making their claims of backfire.

Lawmakers also inadvertently may create legal loopholes and perverse incentives. For example, under our tax laws, flexible spending accounts allow workers to withhold money from their pay to cover their medical costs for the calendar year.<sup>144</sup> Workers pay no income tax on money withheld, but they forfeit the money if they do not spend it by the end of the year.<sup>145</sup> Workers therefore may go on "spending binges" prior to the end of the year to exhaust their accounts. Critics therefore contend that the "use-it-or-lose-it" loophole encourages excessive medical spending, even though a goal of the accounts was to achieve precisely the opposite effect.<sup>146</sup>

In addition, lawmakers may target inappropriate audiences. For example, we saw that critics claim that lawmakers directed CAFE at the wrong parties.<sup>147</sup> In economic parlance, dependence on foreign oil constitutes a "negative externality" of oil consumption because the group that consumes the oil, car drivers, does not incur the cost of dependence directly.<sup>148</sup> Lawmakers seeking to diminish this dependency cost should therefore direct the law at car drivers so that these consumers of oil "internalize the externality," meaning they bear the cost they impose on others.<sup>149</sup> But the law does not require consumers to purchase fuel-efficient automobiles nor does it deter increases in consumers' vehicle miles traveled by, for example, heavily taxing sales of gasoline.<sup>150</sup> Such moves may have been too politically controversial, but the end result is that critics can claim a legal backfire.

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<sup>142</sup> See *supra* notes 31–32 and accompanying text.

<sup>143</sup> See *supra* note 35 and accompanying text.

<sup>144</sup> Rosenbaum, *supra* note 5, § 4, at 2.

<sup>145</sup> *Id.*

<sup>146</sup> *Id.* For other examples, the Highway Beautification Act ironically created incentives for landowners "to build as many lawful billboards as possible." Albert, *supra* note 5, at 498. The "best available technology" strategy of pollution control may deter industry from innovating. Sunstein, *supra* note 4, at 420–21.

<sup>147</sup> See *supra* notes 85–98 and accompanying text.

<sup>148</sup> Conner, *supra* note 76, at 441; see also G. Henry M. Schuler, *Transportation Fuels, in U.S. ENERGY IMPERATIVES FOR THE 1990s: LEADERSHIP, EFFICIENCY, ENVIRONMENTAL RESPONSIBILITY, AND SUSTAINED GROWTH* 143, 147 (Donald L. Guertin et al. eds., 1992).

<sup>149</sup> See Conner, *supra* note 76, at 441.

<sup>150</sup> See *supra* notes 91–92 and accompanying text.

Lawmakers may also have too much faith in their ability to change people's attitudes and beliefs. Lawmakers can create appropriate incentives only if they can understand and predict human behavior.<sup>151</sup> Without sufficient care by the drafters, laws inadvertently may impinge on the values of targeted groups or create emotional reactions, such as fear or resentment. Predicting behavior is a heady challenge for lawmakers and leaves them open to the claim that they got it wrong, even wrong enough to create a legal backfire. If critics are correct, for example, the United States economic embargo of Cuba only shores up the Castro regime by increasing its citizens' nationalism.<sup>152</sup> Instead of protecting cyclists, helmet laws may alarm them enough about the dangers of bicycling to lead them to some other even more dangerous activity.<sup>153</sup>

Lawmakers may also fail to foresee changing circumstances and create regrettably inflexible laws. In some instances, the environment may be changing so rapidly that lawmaking is inadvisable. A good example pertains to the scope provision of revised Article 2 of the UCC. The revisers have wrestled long and hard with the problem of whether and to what extent sale-of-goods law should apply to transactions involving combined goods and computer programs.<sup>154</sup> Such transactions are not uncommon, of course, because many goods now contain computers and computer programs, including automobiles, medical equipment, even alarm clocks. Under current Article 2, the question is whether the "predominant purpose" of the transaction was the sale of goods.<sup>155</sup> After myriad drafts attempting to refine the test to accord with modern technological realities, the drafters determined to preserve existing law because of the fear that codifying a new approach

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<sup>151</sup> See generally *infra* Part IV. The importance of understanding behavior applies, of course, not only to understanding the general citizenry, but also to people administering the law. See Sunstein, *supra* note 4, at 413-16. "A stringent standard—one that forbids balancing or calls for regulation to or beyond the point of 'feasibility'—makes regulators reluctant to act." *Id.* at 416.

<sup>152</sup> See *supra* note 14 and accompanying text.

<sup>153</sup> James A. Henderson, Jr. & Jeffrey J. Rachlinski, *Product-Related Risk and Cognitive Biases: The Shortcomings of Enterprise Liability*, 6 ROGER WILLIAMS U. L. REV. 213, 249 (2000).

<sup>154</sup> Ann Lousin, *Proposed UCC 2-103 of the 2000 Version of the Revision of Article 2*, 54 SMU L. REV. 913, 913-14, 916-19 (2001).

<sup>155</sup> See U.C.C. § 2-102; *Bonebrake v. Cox*, 499 F.2d 951, 959 (8th. Cir. 1974).

might lead to greater rather than less confusion (a legal backfire) as technology continues to develop.<sup>156</sup>

## 2. Process Hurdles

Special interests may have flexed too much muscle during the process of creating a law.<sup>157</sup> For example, credit card companies have long lobbied for narrowing the protection of bankruptcy debtors who fail to pay off their credit card bills. Debtors facing bankruptcy, on the other hand, have more difficulty organizing and have been under represented in the deliberations.<sup>158</sup> Based on a "massive effort" by the credit card companies "propelled by major political contributions,"<sup>159</sup> new bankruptcy law revisions make bankruptcy discharges more

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<sup>156</sup> The revisers floated a comment that provides in part: "As goods containing computer programs evolve, it is likely that the courts' approach to disputes about the goods will also evolve. It would be premature at this point to mandate any one particular approach in this evolving area. Thus, this section takes no position on this matter." American Law Institute Discussion Forum, Mar. 9, 2001, formerly reachable on Internet at <http://www.ali.org/forum/forum1.htm> (no longer available because of continuing revisions).

A related problem involves the difficulty of attempting to create a legal solution for problems inherent in complex systems that contain many interdependent elements:

People's incomplete and inaccurate understanding of risk confounds efforts to identify the system of products liability that would best encourage appropriate patterns of product design, production, marketing, use and consumption. Liability rules affect all of these elements and they all interact with one another. Given these realities, the regulator's task seems hopeless.

Henderson & Rachlinski, *supra* note 153, at 213-14 (commenting on the potential backfire of enterprise liability).

<sup>157</sup> "Laws do not spring forth from a groundswell of public opinion, but rather are the product of lobbying by interested ('interest') groups that must mobilize support among politicians." JACOBS & POTTER, *supra* note 1, at 66. In fact, Sunstein points out that the "public choice" literature suggests the absence of true legal backfires because special interests desire the seemingly perverse outcome. Sunstein, *supra* note 4, at 429-30. For example, "the purpose of minimum wage legislation might not be to help the poor, but rather to immunize union members from competition by people who are willing to work for low wages by limiting entry into the labor market." *Id.* at 430.

<sup>158</sup> See, e.g., William S. Blatt, *Interpretive Communities: The Missing Element in Statutory Interpretation*, 95 NW. U. L. REV. 629, 638 (2001) ("large and diffuse" interests "are under represented" because they "have difficulty organizing" due to the free-rider problem).

<sup>159</sup> The *Miami Herald* reports that "[m]embers of a coalition representing Visa, MasterCard and banking industry groups gave more than \$5 million to the two major political parties and their candidates in 1999 and 2000, a 40 percent increase from the previous presidential election, according to the Center for Responsive Politics." Harriet Johnson Brackey, *Wiping Out Debt To Get Tougher*, MIAMI HERALD, Mar. 15, 2001, at 1C.

difficult to achieve.<sup>160</sup> Some evidence suggests, however, that the irresponsible distribution of credit cards by the companies caused most of the rise in bankruptcy filings and that most debtors in bankruptcy have suffered a legitimate financial crisis.<sup>161</sup> If true, the new revisions may backfire by creating greater debtor pain in contravention of bankruptcy law's fresh start policy.

Public opinion can also deter effective lawmaking. The role public opinion should play in fashioning laws is, of course, very controversial. Obviously lawmakers should repel fleeting sentiments that result from publicity over particular notorious occurrences such as an unusual gruesome crime. On the other hand, when public opinion consists of sustained, tangible alterations of perspectives, lawmakers should not, and probably cannot, ignore it because it reflects people's values<sup>162</sup> and likely enters the subconscious of the lawmakers.<sup>163</sup> Still, lawmakers face the challenge of attempting to distinguish fleeting from sustained opinion and evaluating when the latter legitimately supports particular legislation. Is public opinion unjust or illogical? Was it formed on the basis of the pertinent facts? Did interest groups or the media harbor too much influence? Critics of hate crime laws, for example, insist that lawmakers have yielded to uninformed public opinion in creating these crimes and therefore predict a legal backfire.<sup>164</sup>

Political compromise may constitute a necessity of lawmaking, but it can also diminish laws so that they fail to serve their purpose or even backfire. For example, the Highway Beautification Act may thwart highway beautification because of the curious compromises made with industry: "The law gave billboard operators a five-year period in which to continue to operate nonconforming signs . . . and then, incredibly, [gave them a right] to compensation after that five-year period ended," so that "the rational response . . . [was] to build as many lawful billboards as possible."<sup>165</sup> The Environmental Protec-

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<sup>160</sup> Harriet Johnson Brackey, *Senate OK's Overhaul of U.S. Bankruptcy Law: Bill Limits Shield on Homes of Debtors*, MIAMI HERALD, Mar. 16, 2001, at 1A.

<sup>161</sup> See TERESA A. SULLIVAN, ET AL., AS WE FORGIVE OUR DEBTORS: BANKRUPTCY AND CONSUMER CREDIT IN AMERICA 178-79, 188-89 (1989).

<sup>162</sup> See Robert A. Hillman, *The "New Conservatism" in Contract Law and the Process of Legal Change*, 40 B.C. L. REV. 879, 885-86 (1999); see also William Blatt, *The American Dream in Legislation: The Role of Popular Symbols in Wealth Tax Policy*, 51 TAX L. REV. 287, 331 (1996).

<sup>163</sup> See Hillman, *supra* note 162, at 885.

<sup>164</sup> See *infra* Part IV.

<sup>165</sup> Albert, *supra* note 5, at 496, 498.

tion Agency decided to apply emissions regulation only to new cars in part because of politics, thereby encouraging the use of old cars and, according to critics, greater pollution.<sup>166</sup> The reason lawmakers directed CAFE at car manufacturers and not drivers, which critics argue created a backfire, also may have been political expediency.<sup>167</sup>

Laws also may fail because of inadequate funding, for example, resulting from the lack of an adequate commitment or a political compromise. The Highway Beautification Act provided for states to receive federal funds to compensate private billboard owners for a portion of their lost revenue due to state regulation.<sup>168</sup> Critics cite the Federal government's lack of follow-through in appropriating sufficient funds as another reason the Highway Beautification Act has "thwarted" rather than promoted the elimination of billboards.<sup>169</sup>

### 3. Summary on the Illusiveness of Achieving Instrumental Goals

None of the profusion of reasons for difficulties in lawmaking discussed above comes close to proving that any law backfired. The range of potential factors that might lead to a legal backfire, however, clearly affords critics of a law abundant potential explanations that appear to substantiate their claims. The plethora of factors therefore helps to account for the multitude of backfire allegations—with all of the potential supporting explanations, critics are not reticent to unleash a backfire claim.

Critics of a law can also latch on to more than one explanation for a legal backfire to help increase the claim's appeal.<sup>170</sup> Consider once again the allegation that the CAFE standards have backfired. Critics have a whole arsenal of reasons to support the claim.<sup>171</sup> As mentioned, they can point out that CAFE is directed at the wrong parties.<sup>172</sup> In addition, CAFE fails to account for consumers' fickleness concerning oil prices. Although in the early 1980s consumers expressed concern about fuel efficiency, by 1982 consumers sought larger, fuel inefficient cars "as the memory of the gasoline lines of

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<sup>166</sup> CRANDALL ET AL., *supra* note 77, at 89–90.

<sup>167</sup> See *Implementation of CAFE Hearing of 1995*, *supra* note 79, at 4 (testimony of Felrice).

<sup>168</sup> See Albert, *supra* note 5, at 500–06.

<sup>169</sup> *Id.*

<sup>170</sup> See *supra* note 92 and accompanying text.

<sup>171</sup> See *supra* note 92 and accompanying text.

<sup>172</sup> See *supra* note 92 and accompanying text.

1979 fade[d]."<sup>173</sup> Nor did CAFE's drafters foresee consumers' love affair with light trucks, including minivans, SUVs, and trucks, which, under a major loophole in the law, enjoy a lower CAFE standard: "[I]n contrast to the passenger car fleet, which is using less fuel than in 1975, the light truck fleet is using twice as much fuel—35 billion gallons in 1993, compared to 18 billion in 1975."<sup>174</sup> Finally, CAFE lawmakers did not predict that as oil prices dropped and cars became fuel efficient, people would drive a sufficiently greater number of miles possibly to offset any gains in fuel efficiency, and then some.<sup>175</sup>

Each of these problems with CAFE standards may have lessened the beneficial effects of the law or even contributed to a legal backfire. The point is that although a backfire may be uncertain, the host of difficulties in creating the law contributes to a perception that the law indeed may have backfired.

### III. THE COSTS OF LEGAL BACKFIRE RHETORIC

In this Part, I show that the prominence of legal backfire rhetoric is a cause for concern. Overuse of the strategy contributes to a general anti-regulatory environment and to the potential subversion of beneficial laws. In addition, backfire claims distract lawmakers from careful consideration of difficult policy issues and contribute to unsatisfactory responses to important legal issues.

#### A. *The Development of an Anti-Regulatory Environment*

Legal backfire rhetoric contributes to an anti-regulatory environment that may not be justified or helpful. The question of the appropriate recipe of freedom and regulation in our law is, of course, very controversial. On any given issue, lawmakers should resolve whether to regulate or to defer to market forces based on a careful review of the nature of the problem, the applicable norms and principles, and the possibility of market failures. As a general matter, however, because of superior resources, industry critics of regulation can best gather whatever information is obtainable about the effects of a

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<sup>173</sup> John Holusha, *Bigger Cars' Worries Detroit*, N.Y. TIMES, Feb. 21, 1982, at § 1, part 1, at 26; see also Everett M. Ehrlich, *The Problem of Oil-Import Dependence*, in ENERGY-POLICY ANALYSIS AND CONGRESSIONAL ACTION 9, 9-10 (Raymond C. Scheppach & Everett M. Ehrlich, eds., 1982).

<sup>174</sup> *Implementation of CAFE Hearing of 1995*, *supra* note 79, at 8 (testimony of Felrice).

<sup>175</sup> See *1989 Hearings*, *supra* note 86, at 313 (testimony of BMW).

law, control its dissemination, and frame the debate to focus on the "economic costs and constraints" of regulation.<sup>176</sup> Legal backfire arguments constitute one important component of this strategy. Constant and rhetorically charged claims of legal backfire, can influence lawmakers directly, such as by skewing their perspectives on the nature, quality, and degree of opposition to a law, or indirectly, such as by influencing public opinion or by fanning the flames of additional opponents of the legislation. In short, backfire rhetoric tends to create an atmosphere that is not conducive to serious and objective consideration of important issues.

Take for example, the issue of consumer protection, which arises in many guises including product and property warranties, minimum wage laws, and product safety laws. Almost invariably, the response of counterposing interests has been to raise the red flag of backfire. As mentioned previously, the warranty of habitability, if critics are to be believed, only diminishes the availability of housing.<sup>177</sup> Minimum wage laws increase unemployment (thereby decreasing overall income) by making labor too expensive.<sup>178</sup> Mandatory disclosure laws "lull" consumers into taking greater risks.<sup>179</sup> Although on examination each of these assertions seem less than persuasive, consistent and well-publicized barbs about the backfire of each and every consumer protection law can only poison the atmosphere against consumer protection in general.<sup>180</sup>

Needless to say, input, discussion, and debate about the efficacy of proposed or enacted laws constitute the foundation of effective government and I do not mean to suggest stifling dialogue about the quality of law. Instead, I want to urge participants to contribute responsibly and not to engage in what sometimes amounts to little more than scare tactics, and to exhort lawmakers to move cautiously when confronted with backfire claims.

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<sup>176</sup> Joan Claybrook & David Bollier, *The Hidden Benefits of Regulation: Disclosing the Auto Safety Payoff*, 3 YALE J. ON REG. 87, 120-21 (1985).

<sup>177</sup> See *supra* notes 124-126 and accompanying text.

<sup>178</sup> Sunstein, *supra* note 4, at 422, relying on FINIS WELCH, MINIMUM WAGES: ISSUES AND EVIDENCE (1978).

<sup>179</sup> *Id.* at 428-29, relying on W. Kip Viscusi, *Consumer Behavior and the Safety Effects of Product Safety Regulation*, 28 J.L. & ECON. 527, 544, 546 (1985).

<sup>180</sup> For example, critics of disclosure laws admit there may be many reasons for consumers to take on greater risk. Viscusi, *supra* note 179, at 546; see also *infra* notes 188-189, and accompanying text (minimum wage laws do not invariably produce greater unemployment).

### B. The Defeat of Beneficial Law

The second problem with backfire rhetoric obviously flows from the first. The ease of use and the powerful effect of legal backfire rhetoric can mislead lawmakers and undermine their faith in existing law that may be serving a salutary purpose. As we have seen, legal backfire rhetoric helped bring down the FCC's long-standing Fairness Doctrine, and contributes to the assault on the Endangered Species Act and CAFE standards.<sup>181</sup> Such laws are no doubt controversial and some may be unwise or even backfire. In the absence of convincing proof, however, decision makers should be wary of legal backfire arguments lest they abandon legislation that benefits or would have benefited society. This is especially true of legislators, whose processes do not require the same careful perusal of facts and framing of issues as a court or administrative proceeding.<sup>182</sup>

Legal backfire rhetoric not only can turn lawmakers against beneficial laws, it also can provide lawmakers with a convenient after-the-fact rationalization for a decision made on other, more controversial, grounds. For example, the fairness doctrine fell from grace during the anti-regulatory environment of the Reagan years.<sup>183</sup> The FCC began to view the airwaves as no different from any other commercial resource that should be governed by market forces.<sup>184</sup> Although this perspective may have been the FCC's primary or only reason for extinguishing the fairness doctrine, the FCC saw the need to disarm fairness doctrine supporters by claiming that the fairness doctrine ac-

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<sup>181</sup> See *supra* Part I; see also Katharine Q. Seelye, *Bush is Choosing Industry Insiders to Fill Several Environmental Positions*, N.Y. TIMES, May 12, 2001, at A10; Vaughan, *supra* note 9, at 600 ("industry and business groups are seeking substantial amendments to the ESA in order to weaken it for all projects").

<sup>182</sup> See EDWARD H. LEVI, AN INTRODUCTION TO LEGAL REASONING 5-6 (1949).

<sup>183</sup> See Inquiry *supra* note 51 and accompanying text.

<sup>184</sup> See David Chang, *Selling The Market-Driven Message: Commercial Television, Consumer Sovereignty and the First Amendment*, 85 MINN. L. REV. 451, 480 (2000). "[A] focus on [economic] markets reveals that direct regulation of programming is virtually always an unnecessary intrusion into broadcasters' rights of free speech, and that the [Federal Communications] Commission can attain truly sensible goals without overseeing stations' editorial decisions." *Id.* at 457 (quoting THOMAS KRATTENMAKER & LUCAS POWE, JR., REGULATING BROADCAST PROGRAMMING 45 (1994)); see also Conrad, *supra* note 64, at 184 (FCC at time of the decision was expressly "pro-industry [and] anti-regulatory"). "[T]elevision is just another appliance. It's a toaster with pictures." Conrad, *supra* note 64, at 184 (quoting former FCC Chairman Mark Fowler). *Id.* at 184-85.

tually reduced the airing of controversial issues, a claim that they could not sustain with empirical proof.

### C. *The Tendency to Induce "Quick Fixes"*

We have seen that legal backfire argumentation is dramatic and forceful. Lawmakers and analysts therefore may overreact by abandoning a careful review of a problem and by instigating quick, but dramatic solutions, which ultimately may prove very unsatisfactory. For example, in an interesting and provocative article, Professor Sunstein's stated goal was to discuss "regulatory strategies . . . that achieve an end precisely opposite to the one intended or to the only public-regarding justification that can be brought forward in their support."<sup>185</sup> Although many of his examples of "regulatory strategy" backfires lack persuasive substantiation, Sunstein nonetheless makes some rather dramatic suggestions.<sup>186</sup>

For example, Sunstein claims generally that "[R]edistributive regulation will have complex distributive consequences, and the group particularly disadvantaged by the regulation will typically consist of those who are already most disadvantaged."<sup>187</sup> More specifically, he asserts that "[a]n important consequence of the minimum wage is to increase unemployment by raising the price of marginal labor; and those at the bottom of the ladder—the most vulnerable members of society—are the victims."<sup>188</sup> Sunstein's support for these propositions

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<sup>185</sup> Sunstein, *supra* note 4, at 407. Although Sunstein distinguishes "strategies whose costs exceed their benefits" from "regulatory strategies . . . that achieve an end precisely opposite to the one intended," many of Sunstein's examples do not constitute legal backfires, at least the way I have defined them. *See id.* For example, Sunstein discusses the Environmental Protection Agency's decision to impose emission controls solely on new automobiles, thereby "prolong[ing] the use of old, dirty vehicles." *Id.* at 418. Although such a strategy may have *retarded* the Clean Air Act's goal of reducing pollution, it did not produce a result "precisely opposite to the one intended," for example, greater pollution. *See CRANDALL ET AL., supra* note 77, at 91–93 (relied on by Sunstein).

<sup>186</sup> For example, Sunstein asserts that the EPA's "'scrubbing' strategies for new sources of sulfur dioxide" to reduce coal-burning pollution actually led to the continuance of old, highly polluting methods, thereby "aggravating in many parts of the country the very problem it was designed to solve." Sunstein, *supra* note 4, at 418. But Sunstein relies on one book whose authors merely *predict* that the rules will worsen the environment and that other means could have achieved the goals more cheaply. *See ACKERMAN & HASSLER, supra* note 5, at 11–12.

<sup>187</sup> Sunstein, *supra* note 4, at 423. Sunstein also writes that "efforts to redistribute resources through regulation will . . . have a serious perverse result." *Id.*

<sup>188</sup> *Id.* at 422. Sunstein mentions a few qualifications. First, minimum wage laws and other redistributive regulations may benefit the poor if part of a broader effective welfare

is slim,<sup>189</sup> and recent studies tend to rebut the assertion that "a rise in the minimum wage invariably leads to a fall in employment."<sup>190</sup> Sunstein nonetheless advocates a powerful palliative, admonishing Congress not to "attempt to redistribute resources through regulation."<sup>191</sup>

#### D. *The Tendency to Distract*

Backfire claims also distract lawmakers and analysts from pursuing more pressing issues concerning a law. We have seen that legal decision makers confront a host of issues, including the feasibility of and appropriate strategies for implementing a law, assessing a law's costs and benefits, and evaluating its normative justifications. For example, should lawmakers have directed CAFE standards at automobile manufacturers or drivers? Does the Endangered Species Act unfairly restrict property owners and stifle development? Is the Fairness Doctrine unconstitutional? Lawmakers have enough to worry about without having to deal with an often speculative claim of legal backfire. Unfortunately, we have seen that backfire claims often become the focus when lawmakers do their work.<sup>192</sup>

#### IV. APPLICATION—DO HATE CRIMES LAWS INCREASE HATE?

In light of the previous discussion, how should lawmakers react when opponents of a law sound the alarm of legal backfire? To respond to this question with greater specificity, I consider one final example of an alleged legal backfire, namely hate crime legislation.

Because of a perceived dramatic increase in crimes involving violence against minority groups in the 1980s and 1990s, Congress and

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system. *Id.* Second, such laws and regulations may transform society's "preferences and beliefs," although he doubts that they do and observes the absence of empirical evidence on the effects of redistributive laws on public opinion. *Id.* at 424. More generally, Sunstein undermines many of his claims of backfire by calling for better evidence of the magnitude of his "regulatory paradoxes." Sunstein, *supra* note 4, at 431 ("[T]he minimum wage might well be justified if its effect is the unemployment of only a few additional people.").

<sup>189</sup> Sunstein cites only FINIS WELCH, *MINIMUM WAGES: ISSUES AND EVIDENCE* (1978). The publisher, the American Enterprise Institute, is a conservative "think tank."

<sup>190</sup> DAVID CARD & ALAN B. KRUEGER, *MYTH AND MEASUREMENT: THE NEW ECONOMICS OF THE MINIMUM WAGE* 389 (1995). Card and Krueger delineate the flaws in earlier studies and explain the authors' statistical analysis of data collected from fast-food restaurants. *Id.* In a 50-state survey, minimum wage hikes increased wages without negatively affecting employment rates. *Id.*

<sup>191</sup> Sunstein, *supra* note 4, at 432.

<sup>192</sup> See *infra* sections I–III and accompanying text.

state legislatures promulgated "hate crime" laws that in one common permutation increase sentences for crimes "motivated . . . by racial, ethnic, national origin, [or] sexual orientation prejudice."<sup>193</sup> Notwithstanding the laudatory goals of such laws, they have created significant controversy over, among other things, whether hate crimes have increased,<sup>194</sup> whether hate crime laws are justified under any theory of punishment,<sup>195</sup> whether they impinge on free speech, and what they accomplish.<sup>196</sup> All of these are serious and important arguments about the costs and benefits of hate crime laws that are worthy of further study. Here, I focus on an additional argument of critics, that hate crime laws "will actually do harm" because they will backfire.<sup>197</sup>

Critics assert that hate crime laws will backfire both with respect to their proximate goals of punishing and deterring wrongdoers and to their long-term goal of reducing prejudice in society.<sup>198</sup> Concerning the goals of punishing and deterring wrongdoers,<sup>199</sup> an important focus of critics of the legislation is on the requirement that prosecutors prove the motive behind an attack, namely that the perpetrator of a crime intentionally sought the victim because of race or other difference.<sup>200</sup> The requirement of proving motivation leads to many ques-

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<sup>193</sup> JACOBS & POTTER, *supra* note 1, at 40. Other categories are substantive crimes; civil rights statutes; and reporting statutes. *Id.* at 29.

<sup>194</sup> See *infra* notes 221-222 and accompanying text.

<sup>195</sup> "In what way is a crime committed against an individual, because of the individual's personal characteristics, deserving of greater punishment than a similar crime committed against another individual?" Craig L. Uhrich, *Hate Crime Legislation: A Policy Analysis*, 36 Hous. L. Rev. 1467, 1505 (1999). Commentators have contributed several justifications, including the "expressive value of punishment," the greater culpability of perpetrators, the greater harm to victims, the vulnerability of victims, and the greater immorality of hate crimes; see also Anthony M. Dillof, *Punishing Bias: An Examination of the Theoretical Foundations of Bias Crime Statutes*, 91 Nw. U. L. Rev. 1015, 1016-18 (1997); Frederick M. Lawrence, *The Punishment of Hate: Toward a Normative Theory of Bias-Motivated Crimes*, 93 MICH. L. REV. 320, 321 (1994). See generally Sara Sun Beale, *Federalizing Hate Crimes: Symbolic Politics, Expressive Law, or Tool for Criminal Enforcement*, 80 B.U. L. Rev. 1227, 1229 n.5 (2000) (compiling authors' perspectives).

<sup>196</sup> See, e.g., Uhrich, *supra* note 195, at 1476-77.

<sup>197</sup> Marc Fleisher, *Down the Passage Which We Should Not Take: The Folly of Hate Crime Legislation*, 2 J.L. & Pol'y 1, 1-2 (1994).

<sup>198</sup> See JACOBS & POTTER, *supra* note 1, at 8, 130 (mentioning goals).

<sup>199</sup> The theories supporting enhanced punishment of hate crime mongers coincide with general theories of punishment, namely retribution, incapacitation, rehabilitation, and deterrence. See generally Uhrich, *supra* note 195, at 1489-1521.

<sup>200</sup> Fleisher, *supra* note 197, at 2. A typical statute subjects defendants to additional punishment when the victim was "intentionally selected . . . because of the race, religion,

tions: "If a white mugs a black and delivers a slur in the process, is it a 'hate crime' or an ordinary mugging with a gratuitous slur attached?"<sup>201</sup> Critics believe that sorting out such issues will "complicate" the trial and actually "impede" justice by making convictions and punishment of perpetrators less likely.<sup>202</sup>

Perhaps even more serious, critics of hate crime laws see the makings of a legal backfire with respect to the long-term goal of increasing social harmony. As a general matter, critics argue that "[t]he new hate crime laws . . . redefine the crime problem as yet another arena for conflict between races, genders, and nationality groups."<sup>203</sup> Critics believe the laws will "contribute to splintering our society" by creating an exaggerated view of the frequency of such crimes.<sup>204</sup> Critics also claim that hate crime statistics create the impression that non-criminals share the sentiments of perpetrators, such as when spokespersons cite violence against black churches as evidence of widespread bigotry in society.<sup>205</sup> Moreover, theorists assert that hate crime laws will create controversy and conflict over what prejudices should constitute hate crimes and what incidents should be prosecuted.<sup>206</sup> As a result of these problems with hate crime laws, critics claim that instead of reducing intolerance, hate crime legislation will exacerbate it.<sup>207</sup> In addition, instead of increasing society's confidence in our sys-

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color, disability, sexual orientation, national origin or ancestry of that person." *Id.* at 4, quoting WIS. STAT. § 939.645 (1990); see also JACOBS & POTTER, *supra* note 1, at 40-41.

<sup>201</sup> John Leo, *The Politics of Hate*, U.S. NEWS & WORLD REPORT, Oct. 9, 1989, at 24, quoted in JACOBS & POTTER, *supra* note 1, at 4.

<sup>202</sup> See JACOBS & POTTER, *supra* note 1, at 8, 109. In addition, critics predict that, because of outrage in the victim's community, prosecutors will be unable to resist filing unwarranted charges, or that prosecutors will turn bias crimes against the people they were designed to protect. *Id.* at 134 (discussing "black racism"); see *id.* at 109.

<sup>203</sup> *Id.* at 5.

<sup>204</sup> *Id.* at 132. Hate crime laws might promote a "balkanization of society instead of promoting "our common civic culture." *Id.* at 132 (quoting JIM SLEEPER, IN DEFENSE OF CIVIC CULTURE at 2 (Washington, D.C. Progressive Foundation, 1993)).

<sup>205</sup> *Id.* at 135-36.

<sup>206</sup> *Id.* at 132-34, 137-42. For example, they supply several anecdotes of "jurisdiction politicking" about what should be included as a hate crime. *Id.* at 133.

<sup>207</sup> See JACOBS & POTTER, *supra* note 1, at 10.

Our concern is that rewriting criminal law to take into account the racial, religious, sexual, and other identities of offenders and victims will undermine the criminal law's potential for bolstering social solidarity. By redefining crime as a facet of intergroup conflict, hate crime laws encourage citizens to think of themselves as members of identity groups and encourage identity groups to think of themselves as victimized and besieged, thereby hardening

tem of criminal justice, hate crime laws may undermine it.<sup>208</sup> For critics, the only logical conclusion is to repeal hate crime statutes,<sup>209</sup> or at least to define hate crimes as narrowly as possible.<sup>210</sup>

How should lawmakers react to the claims that hate crime laws will diminish justice and increase intolerance? Because of the propensity of critics of laws to author legal backfire claims of this nature, because of their rhetorical appeal, and because of their extraordinary nature, lawmakers should proceed with caution and should resist overreacting to the backfire claims. Analysts should begin by gathering and evaluating whatever hard evidence exists on whether hate crime laws are likely to impede or promote the conviction of wrongdoers and increase or reduce the divisions in society. As with other backfire claims, however, this process likely will be inconclusive, at best.<sup>211</sup> Lawmakers should also consider and evaluate the economic, psychological, sociological, or, for that matter, any other type of policy reasoning that sheds light on these backfire claims.<sup>212</sup>

Critics of hate crime laws seem most persuasive when they discuss the difficulties of implementing the laws. For example, *can* juries effectively sort out whether a crime was racially motivated?<sup>213</sup> This issue obviously impacts on whether the laws can achieve justice in individual cases, but it is also pertinent to the question of the effect of hate crime laws on intolerance. After all, serious injustices in the results of

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each group's sense of resentment. That in turn contributes to the balkanization of American society, not to its unification.

*Id.* at 131; *see also id.* at 132.

<sup>208</sup> *Id.* at 3; *see also id.* at 147.

<sup>209</sup> *Id.* at 147 ("We do not believe that across-the-board sentence enhancement for hate crimes can be justified.").

<sup>210</sup> *Id.* at 146-47.

<sup>211</sup> *See id.* at 9. "Practically nothing is known about the incidence of hate crimes . . ." *Id.*; *see also id.* at 47-48, 59, *infra* notes 221-222, *supra* Section II B. Although I focus on certain instrumental effects of hate crime laws, the reader should not discount other issues pertaining to whether to retain the laws. For example, even if hate crime laws exacerbate negative identity politics, perhaps they should be retained if they deter perpetrators or ameliorate the psychological effect on victims or the damage to their communities. For a discussion of the latter two justifications for hate crime laws, see Lawrence, *supra* note 195, at 342-43, 347. The evidence on the deterrence effect of hate crime laws is slim. One study appears to suggest a moderate decline in hate crimes in one city after hate crime legislation. 1992-1996 San Diego Hate Crimes Registry Executive Summaries, *available at* <http://www.adl.org/> (July 2000) (17 percent decline in such crimes in San Diego in 1996).

<sup>212</sup> *See supra* Part II.

<sup>213</sup> *See supra* notes 199-202 and accompanying text.

hate crime cases can only increase resentment and suspicion that the laws cater to unfounded minority demands. Still, the requirement in criminal law (and, for that matter, in other areas of the law) of determining a person's motive is more common and less onerous than critics like to admit. For example, juries in theft cases must determine whether the defendant intended "to permanently deprive [the victim] of the property" and in murder cases routinely determine (when raised) whether a defendant's motive was self-defense.<sup>214</sup> Moreover, the criminal justice system's approbation of judicial and prosecutorial discretion demonstrates that the system "deliberately create[s] opportunities for the exercise of discretion in determining the appropriate punishment for an offender based on offender motivation."<sup>215</sup> In fact, there may be nothing new at all in hate crime laws' strategy of increasing the punishment of perpetrators with 'bigoted' motives."<sup>216</sup> Without more, allegations that determining motive is too difficult and will lead to incorrect results and resentment in the community, and that the motive inquiry somehow sets hate crime laws apart from ordinary criminal justice administration, should not compel repeal of hate crime laws.

Other backfire claims seem even less compelling. The core of the claim that hate crime laws are likely to increase bigotry is based on the supposed lack of need for the laws in the first place.<sup>217</sup> According to critics, instead of reacting to an epidemic of hate crimes, lawmakers succumbed to interest group pressure and transient public opinion in

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<sup>214</sup> JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 121 (3d ed. 2001) ("A defendant's motive is often relevant in the criminal law."); see also *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989) (applying mixed-motive analysis in employment discrimination cases); *Wisconsin v. Mitchell*, 508 U.S. 476, 485-87 (1993) (considering motive in sentencing); RESTATEMENT (SECOND) OF CONTRACTS § 71 cmt. b (1979) (providing that consideration requires a motive to extract something from one's exchange partner).

<sup>215</sup> Carol S. Steiker, Book Review, *Punishing Hateful Motives: Old Wine in a New Bottle Revives Calls for Prohibition*, 97 MICH. L. REV. 1857, 1869 (1999).

<sup>216</sup> *Id.* at 1868 ("[I]t is and has always been commonplace . . . to punish what we now call 'hate crimes' more than ordinary assaults or murder, even before a single hate crime law was ever passed.").

<sup>217</sup> "[T]here is no reliable evidence from which to conclude that the incidence of [hate] crimes is greater now than previously, or that the incidence is increasing." JACOBS & POTTER, *supra* note 1, at 6.

an environment in which lawmakers had little to lose in supporting the laws.<sup>218</sup>

By supporting hate crime legislation, [politicians] could please the advocacy groups without antagonizing any lobbyists on the other side (there were none) and without making hard budgetary choices. The hate crime laws provided an opportunity to denounce two evils—crime and bigotry—without offending any constituencies or spending any money. . . .

Hate crime legislation provides politicians the opportunity to say to [the general voting population]: "we condemn prejudice and bigotry in the strongest and most solemn way. Moreover, in condemning prejudice, we affirm our own prejudice-free character and assert a moral claim to your support."<sup>219</sup>

Certainly, people generally impatient with legal regulation who believe that hate crime laws are unnecessary are likely to resent the laws and perhaps even to resent those whom the laws are designed to protect.<sup>220</sup> Moreover, if there were little need for hate crime laws and lawmakers precipitously adopted the laws simply to suit lobbyists or fleeting public opinion, the likelihood that the end-product would be unsatisfactory and therefore fail or even backfire would obviously increase. In addition to supplying a rather bleak and one-sided picture of the legislative process, however, the evidence supporting these allegations is not convincing. Critics' principal support for the lack of an epidemic of hate crimes is based not on empirical evidence but on a historical review of the prevalence of intolerance in our society over the long term.<sup>221</sup> In short, there is no epidemic because intolerance has *always* been a significant problem. If this assertion is correct, how-

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<sup>218</sup> "Fundamentally, the hate crime laws are symbolic statements requested by advocacy groups for material and symbolic reasons and provided by politicians for political reasons." *Id.* at 65.

<sup>219</sup> *Id.* at 67-68.

<sup>220</sup> *See id.*

<sup>221</sup> *See id.* at 59-63. Jacobs and Potter report on the hate crime statistics generated by the FBI, but conclude that the "data are all but useless for discerning trends, because of the variation in the number of states and police departments reporting." *Id.* at 59. *But see* Christopher Chorbha, *The Danger of Federalizing Hate Crimes: Congressional Misconceptions and the Unintended Consequences of the Hate Crimes Prevention Act*, 87 VA. L. REV. 319, 341 (2001) ("[I]t is irresponsible to claim that hate crimes are on the rise, and a more accurate and optimistic conclusion would be that hate crimes are on a steady decline.").

ever, it only demonstrates that the time is long overdue to try *something* to deal with the problem. In fact, however, although far from definitive, some evidence appears to show that intolerance *has* increased.<sup>222</sup> Such statistics tend to dispel the notion that lawmakers chose a politically expedient route in creating hate crime laws instead of responding to at least a perceived real problem. At any rate, critics have failed to sustain the argument that hate crime laws will backfire because there is no need for them.

Even assuming an increase in hate crimes, will hate crime laws only contribute to greater intolerance because of resentment from the very groups the laws seek to influence? Such animosity could come in many forms. For example, jailed perpetrators might join prison hate groups that reinforce each other's dismal perspectives.<sup>223</sup> Citizens with parochial viewpoints might wrongly believe hate crime laws are unnecessary and resent them or even commit offenses to protest the mainstream perspective.<sup>224</sup> Interest groups might resent their exclusion from the protections of a hate crime law or decry the failure of prosecutors to treat an incident as a hate crime.<sup>225</sup> But this is all speculation, at best supported by a few lonely, albeit sensational, anecdotes.<sup>226</sup> In fact, it is just as likely that hate crime laws will benefit

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<sup>222</sup> See LU-IN WANG, HATE CRIMES LAW §§ 1:1, :2, :3 (Release #7 November 2000); Kendall Thomas, *Beyond the Privacy Principle*, in AFTER IDENTITY: A READER IN LAW AND CULTURE 277, 286 (Dan Danielsen & Karen Engle eds., 1995); Lawrence, *supra* note 195, at 342 n.85; Uhrich, *supra* note 195, at 1473. Jacobs and Potter, however, effectively debunk some of the media's, politicians', and scholars' proof of a hate crime epidemic. See JACOBS & POTTER, *supra* note 1, at 45-64.

Allegations of racial harassment have burgeoned in the past ten years. Fred Tasker, *Nooses as Racial Threats Still a Disturbing Reality: Bigotry, 1991 Law Prompt a Rapid Rise In Lawsuits*, MIAMI HERALD, Mar. 2, 2001, at 1A. The newspaper reports an increase from 9,757 to 47,175 allegations from the 1980s to the 1990s and concludes that "[t]he explosion of lawsuits seems to contradict the belief among many sociologists that race relations in America are slowly getting better." *Id.* at 1A.

<sup>223</sup> Uhrich, *supra* note 195, at 1493-94. "A hate criminal with the textbook psychological profile of extreme prejudice is likely to increase his or her violent activity upon release from prison." *Id.* at 1494; see also JACOBS & POTTER, *supra* note 1, at 68.

<sup>224</sup> JACOBS & POTTER, *supra* note 1, at 68.

<sup>225</sup> See *supra* notes 222-224 and accompanying text.

<sup>226</sup> Granted, some of the anecdotes are headline worthy and emotional. But that is part of the problem, especially when an incident actually has little to do with hate crime laws. For example, Jacobs and Potter devote two pages to the racial disharmony caused by the attack on a white, female jogger in Central Park by several young blacks and Hispanics. JACOBS & POTTER, *supra* note 1, at 140-142. The hysteria, however was not caused by hate crime laws. Jacobs and Potter only insinuate that a hate crime prosecution would have "exacerbated tensions." See *id.* at 142.

society, if in no other way than by demonstrating symbolically that hate crimes are a particular anathema, which society will no longer tolerate.<sup>227</sup> In addition, it is just as plausible that supporters of hate crime laws, including such diverse groups as "African Americans, Jews, Asians, Christians, Muslims, victims, immigrants, gays, educators, and the police,"<sup>228</sup> will find greater common ground by pursuing their mutual concern.<sup>229</sup> Without some persuasive evidence of a backfire, then, hate crime laws should not be repealed simply because critics raise the specter of a legal backfire. Lawmakers should turn their attention to other vexing issues presented by hate crimes legislation, such as their definition, justification, constitutionality, and deterrence value.

### CONCLUSION

Although this Article focuses on legal backfire claims, it touches upon a much more basic problem: The challenges to effective law-making and the limitations of techniques to evaluate the effects of law make an accurate assessment of law problematic. Among the many questions raised by this observation, this Article has dealt with the issue of how lawmakers should react to legal backfire claims. Because critics of laws almost invariably author legal backfire claims, because the claims are rhetorically charged, and because the claims are rather extraordinary—a law *has produced a result directly contrary to that intended*—lawmakers should proceed with caution.

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<sup>227</sup> See *id.* at 91, 130; Alan Schwartz, *The Default Rule Paradigm and the Limits of Contract Law*, 3 S. CAL. INTERDISC. L.J. 389, 413 (1993) ("The 'transformative function' of a legal rule is to change preferences: rules can teach what good actions or states of affairs are."); Andrew E. Taslitz, *Condemning the Racist Personality: Why the Critics of Hate Crimes Legislation are Wrong*, 40 B.C. L. REV. 739, 742, 781 (hate crime laws allow society to see victims as individuals).

<sup>228</sup> Brian Levin & Jack Levin, Book Review, 566 ANNALS AM. ACAD. POL. & SOC. SCI. 190 (1999).

<sup>229</sup> "As for the presumed divisiveness of hate crime legislation, just the opposite is true: coalitions for hate crime laws have arisen across a broad spectrum of groups and ideologies . . . ." *Id.*