

Hello, this is Leslie Gielow Jacobs. I'm a Professor at the University of the Pacific, McGeorge School of Law and Director of its Capital Center for Law and Policy. The topic of this In Brief is "hate speech."

Most countries in Europe criminalize hate speech, meaning, speech that incites hatred against an identifiable group. People have been fined for using insulting words, publishing offensive cartoons, and broadcasting songs with hateful lyrics.

Not so in the United States. United States law does not define hate speech because it is not a type of speech that the government - federal, state, or local - can make illegal. We have a free speech guarantee much like the guarantees in a number of European constitutions, but we have a Supreme Court that has, for almost a century, interpreted the scope of the guarantee differently.

The United States Constitution, as interpreted by the Supreme Court, draws a sharp line between speech that incites violence or other unlawful acts, and speech that incites hateful thoughts or opinions. There's no constitutional right to urge someone to commit a crime. There is a constitutional right to urge someone to have an opinion, however hateful or otherwise awful it may be.

The theory is that it's more dangerous to allow the government, any government, to pick and choose among private opinions, than to let everything out into the open for discussion and debate. The way to get rid of hate speech, according to the Constitution, is "more speech" by the government and other citizens, condemning the hate speech and expressing other opinions.

So hate speech is protected when people say it over the internet, in private places, and in public places like sidewalks, parks, and plazas that the public regularly uses and that have traditionally been open for people to communicate one-on-one, in impromptu gatherings, or in scheduled protests. In these places, open to all sorts of people with all sorts of opinions, the government can't deny access to any particular people because of the opinions they express in their speech or on their signs.

A famous case that illustrates the difference between United States law and Europe involves an American Nazi group's efforts to march through the town of Skokie, Illinois, home to many holocaust survivors. Although the town tried in a number of ways to prevent the march, because it would be so hurtful, the courts consistently said no. By contrast, in European countries, such as Austria and Germany, people who sell Nazi paraphernalia or deny the holocaust, have gone to jail for years.

But must the government here permit all speech anywhere? Of course not. The government does not have to permit hate speech on most of the property it owns, which exists to perform government businesses like office buildings, agencies, courthouses, and public school classrooms. So long as it denies all private people access to the speech and doesn't single out particular opinions, then it can restrict the speech. Even in parks and on sidewalks, the government can set rules for speech, so long as they do not advantage or disadvantage particular types of opinions.

Rules that affect what we call the time, place, or manner of speech, not the opinion, are okay so long as they don't go too far. Cities can say no to marches after 9pm in a residential neighborhood, or no music in parks so loud that people can't enjoy peace and quiet in their homes.

Also, the government can arrest and prosecute people who go beyond hate speech and engage in unlawful conduct - like pushing, shoving, blocking entrances, trespassing on private property. These types of rules don't depend upon the opinion of the person doing them so long as the police enforce the law without looking at the opinion, they can do it.

Greater punishment for hate crimes is okay too. That is, the government can enhance the punishment for a crime, for example battery or murder, based on the hateful motivation of the perpetrator. The reason once again is that the government is punishing conduct, not speech.

The government can discriminate against hate speech in its own speech. Government bodies, government officials can condemn expressions of hate through proclamations, or public pronouncements, or public appearances or speeches. The recent removal of the confederate flags and statues of confederate war heroes in public places shows governments changing their opinion about the messages they want to send and they're allowed to do that. In a recent case, the Supreme Court held that Texas's specialty license plate designs, even though private groups submitted them, sent a government message and so Texas could refuse to display the Sons of the Confederate Veterans flag logo because the state deemed it to be hate speech.

But trademarks, even though the government gives them out, are private speech, and so the government can't deny a mark such as the "slants" mark proposed by an Asian American band because other people understand it to be hate speech. It's right at this line when the government runs a program that includes private speakers that its power to prohibit hate speech goes hazy. But in the private media, on the internet, and in speeches, demonstrations or protest, the constitutional rule is clear. The government must permit the expression of hateful opinions, about people and about groups, until the speaker crosses the line into breaking the law or urging other people to do so.

This is the end of this In Brief on the topic of hate speech. This is Professor Leslie Gielow Jacobs of McGeorge School of Law in Sacramento. Thanks for your interest.