# HATE SPEECH AND THE FIRST AMENDMENT

*"Congress shall make no law…abridging the freedom of speech, or of the press."*[1]

The foundation for the United States' stance on protecting almost all speech, and thus allowing most forms of hate speech, including antisemitism and Holocaust denial, is rooted in the First Amendment, or more precisely, in the Supreme Court's interpretation of it.

The American Supreme Court does not balance freedom of speech with other constitutional rights but guards it as an almost absolute right. In cases involving antisemitic and racist hate speech, American courts have generally ruled that restricting hate speech would violate free speech rights.

Still, some limitations have been set in place throughout the years.

The First Amendment protects citizens from governmental restrictions on speech. Therefore, any laws prohibiting either behavior or expressions related to racial, religious, or gender bias are considered by the Supreme Court as prohibiting certain *content* or a certain *viewpoint*. Thus, they are deemed to violate the First Amendment.

However, laws against certain *modes* of prohibited expression that veer into action, such as those causing violence or public disorder, may be deemed not to violate the First Amendment. This is the "content neutrality principle." Any restrictions on speech made by law must be "content neutral," point of view neutral, and based on the mode of expression.

The Supreme Court has recognized that the distinction between these types of speech is "not a precise one," but the question is whether the prohibition of any speech is based on the message it conveys, given that the government cannot show preference towards a specific viewpoint or perspective.[2]

For example, in 1992, the Supreme Court ruled that a law that prohibited the use of language or symbols based on race, color, or creed was unconstitutional because it was content based.[3] It emphasized that the prohibition must be neutral as to the person's viewpoint, but that free speech protections do not extend to *action*, and therefore words that veer into calling for violence may be prohibited.

1 The First Amendment was ratified on December 15, 1791. Freedom of speech protection has been extended from Federal laws also to prohibiting the states from enacting any such laws, by the Supreme Court's interpretation of the Fourteenth Amendment on July 9, 1868.

2 Leslie Gielow Jacobs, "Clarifying the Content-Based/Content Neutral and Content/ Viewpoint Determinations," *McGeorge School of Law Scholarly Articles* Rev. 595 (2003), https://scholarlycommons.pacific.edu/cgi/viewcontent.cgi?article=1052&context=facultyarticles.

3 R.A.V. v. City of St. Paul Minnesota, 505 U.S. 377 (1992), https://www.thefire.org/supreme-court/rav-v-city-st-paul-minnesota.

The Court developed further enhancements to the contours of protected free speech over the years.

A Supreme Court case from 1969 involved a Klu Klux Klan rally filmed by a local news crew in Ohio. The state law prohibited "the publication of any hateful or violent showing," and the organizer was convicted. But the Supreme Court held that a state may only prohibit speech that "is directed to inciting imminent lawless action."[4] It is not enough that the speaker is calling to break the law. It must also be proven that such speech (1) poses an imminent danger of unlawful action, that (2) the speaker has the *intention* to incite such action, and (3) there is the *likelihood* that this will be the consequence of that speech—certainly, a very high bar.

One may therefore express in the United States blatantly racist, antisemitic, anti-immigrant, xenophobic, and transphobic statements in public and even call to break the law, but unless it is proven that one *intended* to incite lawless action and that such action was likely on account of one's expression, one remains free to do so.

The imminent lawless action test has remained fundamental in determining what types of speech can be prohibited. In 1992[5] and 2003,[6] two Supreme Court cases involved cross burnings used to intimidate the African American community. The Court held that states may prohibit cross burning only if they are done with a "specific intent to inspire fear of bodily harm,"[7] despite the well-known history of cross burning being used as an intimidation tactic against Black communities.

In 2017, the Supreme Court ruled on the latest hate speech case. The case involved a rock group of Asian-Americans called "The Slants." "Slants" is a derogatory term used against Asians, but the band had said it wished to "self-own" the insult by appropriating it, like the way some had done with the N-word in the Black community. The Slants also requested to trademark the name, but the Federal Patent and Trademark Office rejected their claim since the term was disparaging to racial groups.[8]

The Supreme Court ruled in favor of the rock group and declared that the Trademark Office could not deny a trademark on this basis. So, freedom of speech is so vigorously protected in the US that one is free to trademark, and thus profit from, a disparaging racial term.

Most hate speech is now disseminated via social media. Consequently, current hate speech case law and research focus more on online hate speech. In this respect, the US free speech perspective is encountering several new challenges; chief among them, matters of jurisdiction.

The transnational aspect of the internet has made American law less relevant in regulating online hate speech. Twitter and other online platforms are already obliged to comply with the laws of countries outside the US. Some countries, such as Germany and France, claim broad jurisdictional reach when it comes to hate speech. For example, Germany's online hate

4 Brandenburg v. Ohio, 395 U.S. 444 (1969), https://supreme.justia.com/cases/federal/us/395/444/.
5 R.A.V. v. City of St. Paul Minnesota, https://supreme.justia.com/cases/federal/us/505/377/.
6 Virginia v. Black, 538 U.S. 343 (2003), https://supreme.justia.com/cases/federal/us/538/343/.
7 Ibid.
8 Matal v. Tam - 137 S. Ct. 1744 (2017), Harvard Law Review, https://harvardlawreview.org/2017/11/matal-v-tam/.

speech law applies to any social media networks with two million or more registered users in Germany.[9] According to German law, these platforms can incur fines of up to 50 million euros if they do not remove offensive posts within 24 hours, and they must release periodic compliance reports.[10] French law also lists several reporting and monitoring obligations for social media companies with more than 10 million users per month in France.[11]

US companies operating across Europe, such as Twitter, Google, and Facebook must also comply with European Union law, specifically the Digital Services Act. It stipulates that internet service providers must act expeditiously to remove access to illegal content (per European legal standards) once it has been reported.[12]

Moreover, since US social media companies are either publicly traded companies (like Google's parent company Alphabet Inc., and Facebook and Instagram's Meta Platforms Inc.) or private companies (like Twitter, since late October 2022) and are not federal or state entities, they are not required under the First Amendment to provide free speech to their users. Federal authorities are forbidden from limiting free speech (such as federally-funded universities and governmental bodies), but private entities are entitled to constrict speech.

As a person may kick someone out of his house for speaking hatefully, so may a social media platform. Conversely, companies may *choose* to provide broader free speech platforms to their users – but then risk the legal exposure of violating hate speech laws in jurisdictions outside the US.

Since these platforms also operate outside the US and in most countries around the world, it is more prudent for their terms of service and hate speech policies to resemble the European view. Indeed, Facebook, Twitter, and YouTube's policies are closer to the European hate speech prohibition model than the US's.

Before buying Twitter, Elon Musk had called himself a "free speech absolutist" and, after taking control of the company, he tweeted, "The bird is freed." The European Internal Market Commissioner's responded: "In Europe, the bird will fly by our rules."[13]

After a few months at the helm, free speech absolutism rang a bit differently. "By 'free speech,' I simply mean that which matches the law," Musk said. Certainly, a quixotic free speech ethos is

9 The Network Enforcement Act (Netzwerkdurchsetzungsgesetz, NetzDG; German: Gesetz zur Verbesserung der Rechtsdurchsetzung in sozialen Netzwerken), passed on June 30, 2017, and entered into effect in January 2018. English translation available at: https://www.bmj.de/DE/Themen/FokusThemen/NetzDG/NetzDG_EN_node.html.

10 Although a court ruling in March 2022 ruled the German law violated European Union data protection laws. "German Court Rules against Online Hate-Speech Law," *Reuters*, March 1, 2022, https://www.reuters.com/world/europe/german-court-rules-against-online-hate-speech-law-2022-03-01/.

11 Florence G'Sell, "A French Perspective on Elon Musk's Twitter," *LawFare Blog*, January 3, 2023, https://www.lawfareblog.com/french-perspective-elon-musks-twitter.

12 The Digital Services Act, https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52020PC0825&from=en.

13 Wilhelmine Preussen, "EU Commissioner to Elon Musk: Twitter Will Play by Our Rules," *Politico*, October 28, 2022, https://www.politico.eu/article/eu-commissioner-to-musk-twitter-will-play-by-our-rules/.

no match for the European Union's strict internet hate speech laws.[14] Simply put, US companies operating in Europe must adhere to European regulations.[15] Twitter must also adhere to its own, albeit changeable, terms of service.

Indeed, after only a short time at Twitter, Musk had to remove a swastika posted by Kanye West swiftly and publicly.

In 2022, West, a rapper and producer, began discussing and posting antisemitic remarks and images, including his admiration for Hitler. In October, he accused "Jewish media" and "Jewish Zionists" of canceling his shows.[16] This continued during an interview with Tucker Carlson on Fox News in early October, talking about bizarre conspiratorial ideas, including that black people were the real "Jewish race."[17]

A few days later, West posted that he would go "death con 3 on JEWISH PEOPLE" on Twitter.[18] He repeated ideas of Jewish control and manipulation during interviews in the days that followed. In December, he said on the Alex Jones Show that "I see good things about Hitler"[19] and tweeted an image of a swastika inside a Star of David.[20] He was suspended from Twitter, and his financial fallout was quick in coming.[21] Balenciaga, Gap, Adidas, and other companies severed ties with him, and his billionaire status was decimated in a matter of a few tumultuous weeks.[22] West's behavior then inspired related antisemitic incidents, including protestors displaying a banner that read, "Kanye is right about the Jews."[23]

To be sure, had West uttered some of his latest statements while visiting Paris, Vienna, or Berlin, for example, he could have been charged with those countries' hate speech laws and

14 "European Commission authorities have expressed concerns and insisted that Musk's Twitter comply with the Digital Services Act (DSA). Recently, Thierry Breton, the European Commissioner for the Internal Market, warned Musk that his company could face penalties of up to 6% of its global revenue or even a ban throughout Europe if it violates the Digital Service Act." Ibid.

15 Elon Musk (@elonmusk), "The Extreme Antibody Reaction from those who Fear Free Speech Says it All," *Twitter*, April 26, 2022, https://twitter.com/elonmusk/status/1519020176884305920.

16 Remi Tumin, "Kanye West Faces Costly Fallout: A Timeline," *The New York Times*, December 19, 2022, https://www.nytimes.com/article/kanye-west-timeline.html.

17 Anne Merlan, "Watch the Disturbing Kanye Interview Clips that Tucker Carlson Didn't Put on Air," *Vice News*, October 11, 2022, https://www.vice.com/en/article/3ad77y/kanye-west-tucker-carlson-leaked-footage-antisemitism-fake-children.

18 "Twitter, Instagram Block Kanye West over Antisemitic Posts," *Associated Press*, October 11, 2022, https://apnews.com/article/twitter-inc-entertainment-music-ba5c710ec59d195fe4d83cb2c9343589.

19 "Ye says 'I See Good Things about Hitler' on Conspiracy Theorist Alex Jones' Show," *NPR*, December 2, 2022, https://www.npr.org/2022/12/02/1140218872/ye-antisemitism-alex-jones-podcast.

20 John Yoon, "Kanye West is Suspended from Twitter after Posting a Swastika," *The New York Times*, December 2, 2022, https://www.nytimes.com/2022/12/02/business/media/kanye-west-twitter-suspension.html?searchResultPosition=2.

21 Tumin, "Kanye West Faces Costly Fallout."

22 Chris Isidore, "Kanye West No Longer a Billionaire, Says Forbes," *CNN*, October 25, 2022, https://edition.cnn.com/2022/10/25/business/kanye-west-ye-billionaire/index.html.

23 Michael Starr, "'Kanye is Right About the Jews' Banner Hung Over LA Highway," *The Jerusalem Post*, October 23, 2022, https://www.jpost.com/diaspora/antisemitism/article-720336.

possibly imprisoned. Denying the Holocaust and glorifying Nazism is prohibited in several Western countries.[24]

However, this is not the case under US law, as mentioned above.

But the Kanye West case does illustrate America's unique approach to handling antisemitism and racism. While the legal system staunchly protects the First Amendment right to racist, antisemitic speech, large segments of civil society find it abhorrent.

West is legally protected to spew his antisemitic views, but it has rendered him with pariah status in a commercial, capitalistic controlled setting. In a country so diverse in its ethnicities, religions, and nationalities, no company can afford to associate in the slightest with West's antisemitic notions.

It could be argued that cultural norms in the US have become stricter, particularly because of the legal system's continued allowing of hate speech. In my opinion, there appears to be an inverse correlation between the leniency of hate speech laws and cultural acceptance at large. Because there are no laws against hate speech, there is little social tolerance for it, and companies quickly disassociate with problematic utterances.

In my opinion, the political correctness that is reviled by the political right may have come to deter what is not deterred by the American legal system, to course-correct and perhaps over-correct such a broad permissiveness. Perhaps because of this legal freedom to say almost anything, "virtue signaling" in America has become more necessary on the part of the liberal left.

At any rate, in its dedicated pursuit of free speech, the US Supreme Court, in my view, tramples on other rights in the process. Providing one person with the right to free speech may violate another person's right to live in an environment free of discrimination or the right to equal treatment. While the European Court of Human Rights balances between the various rights, the US Supreme Court does not. It recognizes only a few rights (the Second Amendment right to bear arms is another example) and then protects them almost absolutely.

***— Adv. Talia Naamat***

24 Nikolay Koposov, *Memory Laws, Memory Wars: The Politics of the Past in Europe and Russia* (Cambridge: Cambridge University Press, 2017).