

Free Speech and Hate Speech: What are the Intersections?

Disclaimer: This document is not intended to be legal advice, but rather used as a guide to understand the limits of criminalizing hate speech in Oregon and in the United States. This document does not reflect the beliefs or values of the Civil Rights Unit. It is a compilation of information based on existing law.

Constitutional Protections for Free Speech

The United Statesⁱ and Oregonⁱⁱ Constitutions grant freedom of speech protections to protect individuals from interference and reprisal by the **government**, not from interference or reprisal by private entities or from people who disagree with what you say.

But what does this mean?

Given the complexities in defining what is *protected* and *free* speech, is it much easier to share what is **unprotected** speech. Unprotected speech—where the government *may* intervene—can include:

- Perjury (lying under oath)
- Sharing insider trade informationⁱⁱⁱ
- Slander (defamatory^{iv} statement that is oral)
- Libel^v (defamatory statement that is written)
- “True threats” as defined by the United States Supreme Court and the 9th Circuit Court of Appeals^{vi}
- Incitement to violence/panic/riot/lawless action^{vii} that is:
 - Imminent^{viii} and
 - Likely^{ix}.
- Graffiti that damages someone else’s property
- Misinformation in commercial speech (e.g.- corporations providing misleading information, fraudulent statements, or false claims in a way that will harm consumers)
- Child pornography^x
- Piracy and plagiarism^{xi}

Why isn't hate speech on this list?

Hate speech refers to abusive language specifically targeting a person or persons because of their race, color, national origin, ethnicity, religion, gender, gender identity, sexual orientation, or disability. In Oregon, hate speech constitutes a “bias incident” under [ORS 147.380](#) when the speech relates to actual or perceived race, color, national origin, religion, gender identity, sexual orientation, or disability.

Hate speech and bias incidents are not crimes. Law enforcement does not have the authority to interrupt, silence, or arrest a person for perpetrating hate speech or bias incidents. However, in many cases, hate speech and bias incidents perpetrated in certain environments constitute a Civil Rights Violation—such as if it happens at work, in a healthcare setting, at school, in a business or library, or even at home. Private entities, such as social media platforms^{xii}, private employers, and schools, may have terms of use that prohibit certain speech, including hate speech; these prohibitions are generally *not* in violation of the U.S. and Oregon’s constitutions.

Hate speech and bias incidents can always be [reported to Oregon’s statewide Bias Response Hotline](#), and there may be next step options available for the targeted person.

What about Mass Flyering?

Many towns and neighborhoods in Oregon are being targeted in mass flyering campaigns, where anti-Jewish and additional offensive messaging litters doorsteps, car windshields, mailboxes, and driveways. Some towns have anti-flyering ordinances that prohibit *any and all* flyering, including lost dog posters, political candidate informationals, business grand opening announcements, garage sales notices, and targeted/hateful messages. Those ordinances are not criminal offenses, but can result in fines for the person distributing them. Reporting to law enforcement is important to collect the evidence and investigate if the flyering may be criminal under Oregon’s Bias Crime in the Second Degree statute ([ORS 166.155](#)). This conduct can also be [reported to Oregon’s statewide Bias Response Hotline](#) for tracking data, support, safety planning, and additional resources.

Additional Information and Resources

Defending the Indefensible

The people of the United States and Oregon included strong free speech protections in the federal and state constitutions. By doing so, the people have chosen to “defend the indefensible” and protect—as free speech—hate speech from government interference. Part of the analysis is who decides where we draw the line? If government officials, who are inherently political figures elected to office often based upon their political affiliation, are in charge of setting standards and determining discretion regarding what speech is not allowable, these restrictions will change depending on the political actor in office, and that power to silence or censor will be weaponized against dissidents.^{xiii}

Free Speech Supreme Court Cases

The Oregon Supreme Court and the United States Supreme Court have repeatedly protected hate speech as free speech. There are entire law school classes that discuss free speech cases, but here are two cases you may want to know:

Skokie

One of the most famous free speech cases is known as *Skokie*, or National Socialist Party of America (NSPA) v. Village of Skokie, 432 U.S. 43 (1977). The NSPA, a neo-Nazi group, regularly held white power demonstrations while wearing their swastika-emblazoned armbands and spreading racial and religious hatred, primarily against Jewish people and non-Whites. The Village of Skokie filed for an injunction and set up ordinances intending to prevent the demonstration and the subsequent hate speech. Ultimately, the USSC ruled that that “if a State seeks to impose a restraint on First Amendment rights, it must provide strict procedural safeguards, including immediate appellate review. ... Absent such review, the State must instead allow a stay. The order of the Illinois Supreme Court constituted a denial of that right.”^{xiv}

Johnson

In Oregon, *State v. Johnson*, 345 Or. 190, 191 P.3d 665, was a 2008 decision of the Oregon Supreme Court striking one section of Oregon’s Harassment statutes under ORS 166.065(1)(a)(B), which provides:

A person commits the crime of harassment if the person intentionally:

(a) Harasses or annoys another person by:

(B) Publicly insulting such other person by abusive words or gestures in a manner intended and likely to provoke a violent response.

Defendant Johnson yelled homophobic and anti-Black/African American slurs at two crime victims while tailgating them for five minutes through traffic, never verbally threatening or committing actual violence, but attempting to incite one of the victims to violence. The ORSC found that “even speech that is intended and likely to produce violence may not be criminalized unless the violence is imminent.” The Court noted that the law, as it stands, “sweeps too much protected speech within its reach to survive a ... challenge.” While defendant Johnson’s “expression may have been offensive ... the state may not suppress all speech that offends with the club of criminal law.... Even when the legislature seeks to prevent violence produced by speech, it has to take care that it does not do so by criminalizing protected speech.”^{xv}

For additional reading and listening about free speech:

ACLU’s At Liberty Podcast, [Ask an Expert: What Is Free Speech?](#)

American Civil Liberties Union of Oregon [Backgrounder Free Speech Paper](#)
[Free Speech at Oregon State](#)

Pew Research Center's [Americans and ‘Cancel Culture’: Where Some See Calls for Accountability, Others See Censorship, Punishment](#)

The Race Beat: The Press, the Civil Rights Struggle, and the Awakening of a Nation
by Gene Roberts and Hank Klibanoff

ⁱ The First Amendment to the United States Constitution says that:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or ***abridging the freedom of speech***, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

ⁱⁱ And Article I § 8 of the Oregon Constitution says that:

No law shall be passed restraining the free expression of opinion, or restricting the right to speak, write, or print freely on any subject whatever; but every person shall be responsible for the abuse of this right.

ⁱⁱⁱ <https://www.mtsu.edu/first-amendment/article/819/securities-and-exchange-commission>

^{iv} Meaning damaging the good reputation of someone through false statements. This is not a legal definition.

^v [https://www.law.cornell.edu/wex/new_york_times_v_sullivan_\(1964\)](https://www.law.cornell.edu/wex/new_york_times_v_sullivan_(1964)); also [New York Times v. Sullivan Podcast](#)

^{vi} *Watts v. United States*, 394 U.S. 705 (1969), <https://supreme.justia.com/cases/federal/us/394/705/>; *United States v. Keyser*, 704 F.3d 631, 638 (9th Cir. 2012); *United States v. Bagdasarian*, 652 F.3d 1113, 1118 (9th Cir. 2011)

^{vii} [Brandenburg v. Ohio](#) (1969), <https://supreme.justia.com/cases/federal/us/395/444/>

^{viii} “directed at inciting or producing imminent lawless action,” [Brandenburg v. Ohio](#) (1969)

^{ix} “likely to incite or produce such action,” [Brandenburg v. Ohio](#) (1969)

^x *Alliance for Community Media v. FCC*, <https://law.justia.com/cases/federal/appellate-courts/F3/56/105/623915/>

^{xi} <https://news.winona.edu/insights/the-nature-of-free-speech-and-responsible-speech/>

^{xii} For more information about social media platforms’ terms of use, see our [Anti-Doxing Guide](#).

^{xiii} American Civil Liberties Union At Liberty Podcast | Ask an Expert: What Is Free Speech?

<https://www.aclu.org/podcast/ask-an-expert-what-is-free-speech>

^{xiv} <https://www.law.cornell.edu/supremecourt/text/432/43>

^{xv} <https://law.justia.com/cases/oregon/supreme-court/2008/s055085.html>