



# HORIZON FORUM

PHILANTHROPY | EQUITY | DIALOGUE

## **HATE SPEECH: A SURVEY OF LEGAL, ACADEMIC, & COMMUNITY FOUNDATION PERSPECTIVES**

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POLICY BRIEF #1 IN THE SERIES:

*The Hate Speech Debate: Implications for the Philanthropic  
and Grantmaking Community*

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August 2021



## HORIZON FORUM

Horizon Forum is a fiscally sponsored project of the Proteus Fund, a 501(c)(3). The initiative aims to strategically engage with sector leaders in philanthropy to ensure their charitable missions are insulated from extremism, bigotry, and hate activity.

Horizon Forum's primary activity consists of hosting semi-annual dialogues with stakeholders and researchers familiar with the institutional landscape of philanthropy and unique challenges of self-regulation therein. It also partners with peer institutions and university-based research centers to provide public facing thought leadership and data-based recommendations for stakeholders. Finally, the program also provides direct services for foundations, assisting them in establishing processes and policies for vetting grantees and ensuring they protect their mission to nurture the public good and "do no harm" with their philanthropy.

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## POLICY BRIEF SERIES 2021

This series, *The Hate Speech Debate: Implications for the Philanthropic and Grantmaking Community*, is the product of a Horizon Forum convening which gathered a group of nearly 30 stakeholders across community foundations, government, and academia in early March 2021 to advance the national conversation on how to meet the challenge of hate and extremist funding taking place indirectly in small quarters of the philanthropic sector. The titles in the series are:

- Hate Speech: A Survey of Legal, Academic, and Community Foundation Perspectives
- Curbing Hate Speech: What Philanthropy Can Learn from Adjacent Sectors
- Philanthropy’s Current Approach to Addressing the Problem of Hate Funding

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## EXECUTIVE SUMMARY

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As discussions about extremism, disinformation, and hate speech become more prominent in the public sphere, community foundations and other grant makers are assessing how they are impacted by the current cultural and political moment. For fields like philanthropy, straddling the boundaries between public and private life, the stakes could not be higher. Most recently, the Chronicle of Philanthropy reported that charitable donations from 351 organizations to recognized hate groups exceeded fifty-two million dollars between 2011 and 2018.<sup>1</sup> In recent years, similar reports have documented even higher numbers of hate-funding being derived from philanthropic institutions.<sup>2</sup>

While most stakeholders are committed to ensuring their funds do not support harmful activities, the challenges of defining and acting against hate speech are often fraught and highly contested. Hate speech is still defined as a form of expression by the Supreme Court, making it technically protected by law, leaving the private and public sector to manage the question on their own.

The Horizon Forum symposium, entitled “The Hate Speech Debate: What it Means for Philanthropy” hosted legal, academic, and advocacy experts to share the ways in which hate speech is defined and managed within their respective sectors. This brief captures that conversation and provides the varied perspectives on this complex issue as they apply to grant making institutions. It begins by looking at the difficulties of defining hate speech across the legal and academic sectors, the contrast of American and global hate speech norms, and the specific challenges philanthropy encounters as it seeks define hate speech for the sector. The brief then turns to address the question of whether the oppositional hate speech vs. free speech framing of the issue is constructive. Finally, it concludes with a discussion of key recommendations for grantmaking institutions.

### KEY RECOMMENDATIONS

(For a full description of key recommendations, see page 10)

1. Don't rely on the IRS to define hate for your institution.
2. Approach hate speech as a community safety and inclusion issue.
3. Convene internal learning sessions within your organization.
4. Develop a “delimiting definition” of hate speech for your organization.

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<sup>1</sup> Theis, Michael. “[‘Hate Groups’ Received Millions From 351 Charities and Foundations, Chronicle Review Finds.](#)” *Chronicle Review*. February 3, 2021.

<sup>2</sup> Fadel, Leila. “[Mainstream Charities Are Unwittingly Funding Anti-Muslim Hate Groups, Report Says.](#)” *NPR*. May 7, 2019; Kotch, Alex. “[America’s Biggest Christian Charity Funnels Tens of Millions to Hate Groups.](#)” *Sludge*. March 18, 2019.



## DEFINING HATE SPEECH

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Unfortunately, identifying an agreed upon definition of hate speech has eluded experts and practitioners across the world. Professor Alexander Brown, a political theorist, argues that as a general concept, hate speech cannot be defined coherently but rather is treated differently across sectors and managed accordingly by practitioners in various professional spaces.<sup>3</sup> In practice, US law does not have a hate speech exception to the First Amendment, unless the speech act contains an immediate, direct threat of violence, in which case it should be noted that the speech act becomes redefined as an illegal act of intimidation, incitement, or harassment and is no longer considered an act of expression. For example, in the 2003 decision *Virginia v. Black*, the US Supreme Court held that speech becomes unprotected intimidation when it is “a type of true threat, where a speaker directs a threat to a person or group of persons with the intent of placing the victim in fear of bodily harm or death.”<sup>4</sup> Given this threshold, the act of defining, much less prohibiting or punishing, derogatory and intimidating speech is nearly impossible in a US court of law.

In another important case, *Brandenburg v. Ohio (1969)*, the US Supreme Court distinguished between mere advocacy of lawless behavior and incitement to “imminent lawless action”. For speech to lose its protected status, the Court ruled that there had to be evidence that the language in question was being used to encourage *immediate*

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lawlessness and that illegal action was likely to take place. In effect, SCOTUS held that laws perpetrating discrimination on the basis of viewpoint violate the First Amendment even when the rationale for the suppression is to prevent any criminal violence that hateful speech might inspire.<sup>5</sup> Hate groups have exploited these high thresholds for criminalizing speech and the lack of a governmental definition of hate speech to operate as nonprofits under the cover of advocacy and education.

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<sup>3</sup> Brown, A. (2017a). What is Hate Speech? Part 1: The Myth of Hate. *Law and Philosophy*, 36, 419–468.

<sup>4</sup> “[Virginia v. Black](#).” Global Freedom of Expression. Columbia University. February 6, 2020.

<sup>5</sup> Howard, Jeffrey W. “[Free Speech and Hate Speech](#).” *Annual Review of Political Science*. 2019. 22.



The US context stands in stark contrast with international norms and laws around hate speech and incitement. A 2008 European Union Council Framework Decision specifies that hate speech will be sanctioned and punitive measures could be taken against individuals or groups engaged in hate speech.<sup>6</sup> Though details differ, legislation of this sort exists in a majority of democracies across the globe, including Australia, Canada, India, South Africa, Mexico and New Zealand.<sup>7</sup> France, for example, bars incitement to racial discrimination, hatred, or violence on basis of race, origin, ethnic group, religion or national identity. In the United Kingdom it is similarly a criminal offense to use language that is “threatening, abusive, insulting” or “likely to cause harassment, alarm, or distress.”<sup>8</sup>

The Horizon Forum has found that discussions defining hate speech in the philanthropic sector are similarly varied. There was consensus among the foundations around the point that having a delimiting definition is essential to prevent harm and fulfill the social mission of philanthropy to “do good.” That is, rather than attempting to identify a strict rubric to categorize various types of speech and activity, a delimiting definition can serve as a flexible guideline through which foundations can navigate the problem. This is particularly relevant to foundations as they are faced with increasing calls for transparency and accountability regarding grant decisions, especially in their attempt to reduce bias and inequity. A definition is therefore useful in providing public clarity, and internal and external consistency. However, participants also raised concerns that too broad of a definition would get entrapped in so-called “gray areas” such as conventional religious and conservative positions on marriage, family, and gender.

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Participants suggested a variety of approaches to develop such a definition. One proposal was to form a list of negative attributes, such as inciting violence or advocating for discriminatory policies toward a group. If an organization receiving funding

displayed five or more of the named activities or behaviors, they would no longer be eligible for funds. Another approach was to develop a set of nested exclusionary criteria going from violent rhetoric on one end to implicit threats on the other. Yet another

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<sup>6</sup> [“Comparing Hate Speech Laws in The U.S. And Abroad.”](#) *NPR*. March 3, 2011.

<sup>7</sup> Howard, Jeffrey W. [“Free Speech and Hate Speech.”](#) *Annual Review of Political Science*. 2019. 22.

<sup>8</sup> Turley, Jonathan. [“No, the U.S. Does Not Need European-Style Hate Speech Laws.”](#) *USA Today*. November 8, 2019.



suggestion was to have, at the very minimum, a “do no harm” approach. In this way, a foundation would not be required to formulate an exact definition of what “hate” is, but it would make an unequivocal and explicit declaration that it will not fund anything that harms communities and people, and that includes dehumanizing language and marginalization. A definition would also help articulate to donors and community members where a foundation stands as it relates to not supporting organizations that are involved in hate speech or hateful activities.

Ultimately, participants agreed that although there is no “one size fits all” approach for defining hate speech — concrete action to prevent the flow of dollars to hate groups should not be stalled. Foundations can and should develop internal guidelines to use as a benchmark for due diligence procedures. Irrespective of how specific, or not, a foundation may be in describing its criteria, definitions, etc., the final decision about funding rests on a foundation’s judgement. Philanthropic organizations regularly expect to answer questions about their judgements – why some funds and grants are approved, and others are not. The current situation around hate speech is no different. Participants agreed that a foundation must be willing and able to say: in our judgment, if this this grant is made it would support or enable activity that would harm our community and we will therefore not support it.

## A Sample Definition of Hate

Amalgamated Foundation defines hate in the following way:

**““Hateful Activities” [is] defined to mean activities that incite or engage in violence, intimidation, harassment, threats, or defamation targeting an individual or group based on their actual or perceived race, color, religion, national origin, ethnicity, immigration status, gender, gender identity, sexual orientation, or disability.”**



## HATE SPEECH VS. FREE SPEECH – A LOSING FRAME?

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Contrary to popular belief and perhaps popular sentiment, in the United States hate speech is not illegal. As mentioned above, only speech that incites imminent criminal activity or consists of specific threats of violence targeted against a person or group is legally banned. In other words, American law considers speech as something that can *cause* harm, but not as something that is *itself* harmful. Experts consulted for this study have suggested that the very framing of hate speech as a problem of free speech may not only be unhelpful and unconstructive, but also counterproductive for grantmaking institutions. While it may be the Supreme Court's duty to uphold the strictest interpretations of the Constitution, civil society and private sector institutions can and should establish their own guidelines for how they relate to, promote, or engage in various social, cultural, and political activity.

Academic voices have weighed in on the issue through philosophical interrogations and sociological studies, falling generally into two camps. One camp holds that hate speech *causes* harm. It leads to a “loss of the social assurance to which people all entitled,” while it equally advances a “rival vision of a society where intolerance and

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discriminatory practices are acceptable.”<sup>9</sup> The other camp holds that hate speech itself *is* harmful. It is an act that constitutes harm in and of itself.<sup>10</sup> Here, a comparison to environmental law is instructive: for example, littering may cause harm to the environment eventually vs. littering is harmful in and of itself.

Academic experts have also posed questions around the moral right to freedom of expression and the correlation between speech and violence. They have argued that while free speech and the right to expression is a core principle of modern democracy, it is not the only one. Rather, rights grounded in public safety, such as the freedom from

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<sup>9</sup> Waldron, Jeremy. *The Harm in Hate Speech*. Cambridge (Massachusetts): Harvard University Press, 2014.

<sup>10</sup> Heinze, Eric. *Hate Speech and Democratic Citizenship*. Oxford: Oxford University Press, 2016.





intimidation or harassment, are equally part of the fabric of our social contract. They argue that the collective commitments and principles of social equality, dignity, and security likewise balance the principle of freedom of expression. Judith Butler, Professor of Comparative Literature at the University of California at Berkeley, states that if free speech takes precedence over every other constitutional and community principle, then “we have agreed in advance to have our community sundered, racial and sexual minorities demeaned, [and] the dignity of trans people denied.”<sup>11</sup> She continues, to state that “we are, in effect, willing to be wrecked by this principle of free speech, considered more important than any other value.”<sup>12</sup>

Sociological and anthropological approaches to hate speech center the lived experiences of the victims of hate speech. The interdisciplinary field of hate studies, which investigates the “human capacity to define, and then dehumanize or demonize, an ‘other,’” holds that hate speech both constitutes harm, and causes harm by leading to acts of violence.<sup>13</sup> By prioritizing the human and social impact, these approaches present a more granular and practical understanding of hate speech with a particular focus to power relations, which are of key importance in the conversation. In her article on a systemic discrimination approach to hate speech, freedom of speech expert and Professor of Politics and Public Policy at the University of Queensland Katharine Gelber argues that hate speech is a fundamentally social phenomenon that harms its targets, harms the group to which the

target is perceived to belong, and through that, harms society generally.<sup>14</sup> This is because hate speech can place the ability of the victim to speak at risk, which in turn risks their participation in public discourse. This means they are denied an equal opportunity to participate in self-governance and democratic deliberation.

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**Not only can hate speech harm social and political discourse, academic and independent research demonstrates a clear correlation between hate rhetoric and actual physical acts of violence against targeted communities, including mass shootings and lynchings.**

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<sup>11</sup> Butler, Judith. “[Limits on Free Speech?](#)” *Academe Blog*. December 7, 2017.

<sup>12</sup> Ibid.

<sup>13</sup> “[Hate Studies](#).” Bard Center for the Study of Hate. February 16, 2021.

<sup>14</sup> Gelber, Katharine. “[Differentiating Hate Speech: A Systemic Discrimination Approach](#).” *Critical Review of International Social and Political Philosophy*. 2019. 1-22.



Not only can hate speech harm social and political discourse, academic and independent research demonstrates a clear correlation between hate rhetoric and actual physical acts of violence against targeted communities, including mass shootings and lynchings.<sup>15</sup> In 2018, the Pittsburgh synagogue shooter, who killed eleven worshippers at a refugee-themed Shabbat service, shared the anti-Semitic “great replacement” conspiracy that Jews sought to bring immigrants into the United States, and render whites a minority.<sup>16</sup> The great replacement trope was also espoused by the New Zealand shooter, who killed forty-nine Muslims at a mosque and sought to broadcast the attack on YouTube.<sup>17</sup> The Charleston church shooter who murdered nine black clergy and worshippers actively circulated among racist communities online that led him to believe that the goal of white supremacy required violent action.<sup>18</sup> In Germany, scholars observed a correlated rise in anti-refugee attacks, such as arson and assault following spikes in anti-refugee hate-mongering posts.<sup>19</sup>

Community foundation and other grant making institutions are encouraged to think beyond the hate speech vs. free speech framework. Participants agreed that framing the autonomy of an individual to express themselves in contrast to the common good is a problematic and unproductive binary. It obscures the role of hate speech in maintaining and advancing systemic inequity. Perhaps most importantly, the oppositional frame is out of line with the social function of community foundations. Philanthropy aspires to promote the social good – to improve, heal, repair, and advance the wellbeing of people. Participants thus agreed that understanding, preventing, and rectifying the cumulative human and social impact and effect of hate speech is a better and more robust framing and approach than comparing hate speech to free speech. Again, the analogy to environmental harm is useful: the degradation of the ecological environment happens over time and is irreversibly harmful, so too it is with the cumulative impact of hate speech. It damages the social environment in which it is perpetuated. The climate of fear and risk that develops, particularly for vulnerable and targeted communities, leads to long-term human and social harm. One participant reflected, “Why are we entangled within this conversation to start with when our ethos is to spread good? What have we done wrong?”

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<sup>15</sup> [“Hate Speech on Social Media: Global Comparisons.”](#) Council on Foreign Relations. June 7, 2019.

<sup>16</sup> Roose, Kevin. [“On Gab, an Extremist-Friendly Site, Pittsburgh Shooting Suspect Aired His Hatred in Full.”](#) *The New York Times*. October 28, 2018.

<sup>17</sup> Evans, Robert. [“Shitposting, Inspirational Terrorism, and the Christchurch Mosque Massacre.”](#) *Bellingcat*. March 15, 2019.

<sup>18</sup> Berman, Mark. [“Prosecutors Say Dylann Roof 'Self-Radicalized' Online, Wrote Another Manifesto in Jail.”](#) *The Washington Post*. April 28, 2019.

<sup>19</sup> Müller, Karsten, and Carlo Schwarz. [“Fanning the Flames of Hate: Social Media and Hate Crime.”](#) SSRN. December 7, 2017.



# CONCLUDING RECOMMENDATIONS FOR GRANTMAKING INSTITUTIONS

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## DON'T RELY ON THE IRS TO DEFINE HATE FOR YOUR INSTITUTION.

Because the act of defining, much less prohibiting or punishing, derogatory and intimidating speech is nearly impossible in a US court of law, grantmaking institutions should not rely upon the IRS for defining hate groups, hate speech, or hate activity.

## APPROACH HATE SPEECH AS A COMMUNITY SAFETY AND INCLUSION ISSUE.

Following academic and advocacy discussions surrounding the issue, foundation leaders should recognize that hate speech is best understood as an issue of safety, harm, and discrimination, rather than an issue of free speech or political expression. While legal conversations around the subject may be complex and obfuscating, taking steps to prevent hate activity being funded in their respective community should not be delayed.

## CONVENE INTERNAL LEARNING SESSIONS WITHIN YOUR ORGANIZATION.

In order to develop long-term policies and due diligence procedures to prevent hate funding in their foundation, leaders should convene a task force dedicated to shared learning on the subject of hate speech and hate funding. Such a task force can help mobilize consensus and support for anti-hate policy development, while also providing a space to tackle complex conversations.

## DEVELOP A "DELIMITING DEFINITION" OF HATE SPEECH FOR YOUR ORGANIZATION.

Just as other sectors, such as social media and higher education, have defined hate for their own fields, so too should the philanthropic sector define the parameters of what is and is not acceptable discourse in their community. Rather than attempting to identify a strict rubric to categorize various types of speech and activity, a "delimiting definition" can serve as a flexible guideline through which foundations can navigate the problem.