

Unpopular Speech and the Heckler's Veto

with a special guest appearance by Social Media



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Presented to

TEXAS CITY ATTORNEYS ASSOCIATION

SUMMER CONFERENCE

HYATT REGENCY RIVERWALK

San Antonio, Texas

June 19-21, 2019

Foundational Values



Freedom of Speech is a foundational value that the First Amendment protects against governmental intrusion.

“Congress shall make no law . . . abridging the freedom of speech”

This protection against government restriction on speech applies to states and to local government through the 14th Amendment.

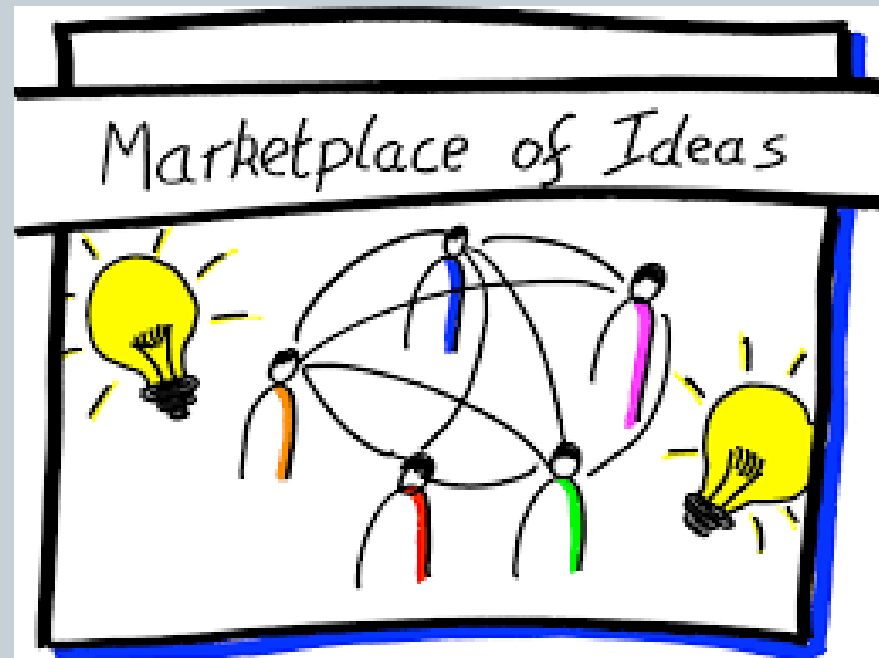
Unpopular Speech?



Respond to offensive, objectionable, or otherwise unpopular speech with more speech.

Marketplace of Ideas

Marketplace of Ideas



Marketplace of Ideas



Marketplace of Ideas



[T]he ultimate good desired is better reached by **free trade in ideas**—that the best test of truth is the power of the thought to get itself **accepted in the competition of the market** That at any rate is the theory of our Constitution. . . . [W]e should be eternally vigilant against attempts to check the expression of opinions that we loathe and believe to be fraught with death, **unless they so imminently threaten immediate interference with the lawful and pressing purposes of the law that an immediate check is required to save the country.**

Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

Silence!



But the government is not the only actor that can inhibit speech, and private restriction on speech does not violate constitutional protections.

This is more obviously so when those who would inhibit speech are acting as individuals or as a group of protestors.

Rather than participate in the marketplace of ideas, many create noise to drown out unwanted speech.

Silence!



Such protestors attempt to silence speech and remove it from the marketplace—to destroy competing ideas.

An objector's attempt to use this de facto power to cancel objectionable speech has become known as the “heckler's veto.”

Recent Examples of the Heckler's Veto



1. Jim Webb declined to accept an award from his alma mater because of protests over comments in a 38-year-old magazine article.

In March 2017, former U. S. Senator Jim Webb was to be honored by his alma mater, the U.S. Naval Academy, with the Distinguished Graduate Award. However, his selection for the award was met with protests, in response to which he declined to accept the award. In his words, from a press release, his selection for this award “has been protested by a small but vociferous group of women graduates based on a magazine article that I wrote 38 years ago.” In a 1979 article, he wrote that women should not be in combat.

Recent Examples of the Heckler's Veto



2. Condoleezza Rice withdrew from Rutgers University commencement after protests.

Former Secretary of State Condoleezza Rice had been invited to give the commencement address at Rutgers University on May 18, 2014. Some students and faculty members protested that choice because they did not agree with the Iraq war during the Bush administration. The university did not rescind the invitation, but Ms. Rice decided to withdraw, releasing a statement that “‘Commencement should be a time of joyous celebration for the graduates and their families,’ the statement said. ‘Rutgers’ invitation to me to speak has become a distraction for the university community at this very special time.’”

Recent Examples of the Heckler's Veto



3. Rioters at UC Berkeley forced cancellation of Milo Yiannopolous speech.

On February 21, 2017, Milo Yiannopoulos was scheduled to speak at the University of California, Berkeley, as “the last stop of a tour aimed at defying what he calls an epidemic of political correctness on college campuses.” But, as reported by a San Francisco local news outlet, his speech did not take place:

As the gathered crowd [of protesters] got more agitated, masked “black bloc” activists began hurling projectiles including bricks, lit fireworks and rocks at the building and police.

Some used police barriers as battering rams to attack the doors of the venue, breaching at least one of the doors and entering the venue on the first floor. (cont'd)

Recent Examples of the Heckler's Veto



(3. Berkeley/Yiannopolous, cont'd)

In addition to fireworks being thrown up onto the second-floor balcony, fires were lit outside the venue, including one that engulfed a gas-powered portable floodlight.

The area on Upper Sproul Plaza grew thick with smoke, and later tear gas, as the protest intensified.

At about 6:20 p.m., UC campus police announced that the event had been cancelled. Officers ordered the crowd to disperse, calling it an unlawful assembly.

From this report, it is unclear whether the event was cancelled by the university or by Yiannopolous, but it is clear the cancellation was forced by the violent actions of those who did not like his views.

Recent Examples of the Heckler's Veto



4. After threats of violence, UC Berkeley cancelled Ann Coulter's speech.

Students who belonged to the Young America's Foundation at the University of California, Berkeley, invited Ann Coulter to speak on April 27, 2017. However, because there were **threats of violence**, the university cancelled the event.

The YAF sued, claiming that the school applies its “**High-Profile Speaker Policy**” unfairly in such a way that it “prevent[s] speakers with certain viewpoints.”

Recent Examples of the Heckler's Veto



(4. Berkeley/Coulter, cont'd)

The 'High-Profile Speaker Policy' required that events be held during normal class hours, in locations that were not convenient for the majority of Berkeley students. Groups were also subject to exorbitant security fees for certain students. The complaint also alleges that Berkeley offered to have Coulter speak during the 'dead week' between the end of classes and examinations where many students would be off campus and unable to attend.

Christine Rousselle, "Berkeley Sued Over Ann Coulter Speech Cancellation," *Townhall* (April 24, 2017) <https://townhall.com/tipsheet/christinerousselle/2017/04/24/breaking-berkeley-sued-over-ann-coulter-speech-n2317492> (last accessed April 09, 2018)

Recent Examples of the Heckler's Veto



5. University of Alabama imposed such high security fees that the Yiannopoulos speech was almost cancelled, but then it dropped the fee.

The College Republicans at the University of Alabama sponsored an appearance by Milo Yiannopolous on October 10, 2016.

The initial estimate of security costs was \$800 - \$1,200, but after protests, the costs were increased to \$4,600 - \$4,800.

The costs later rose to almost \$7,000.

After the College Republicans challenged the increased security, the university eliminated the fee entirely.

Recent Examples of the Heckler's Veto



6. Parade organizers cancelled the annual Rose Festival Parade in Portland, Oregon in 2017 because of threats.

Since 2007, a coalition of local businesses and community organizations in Portland, Oregon, has held a Rose Festival Parade on 82nd Avenue to help improve the perception of that area of the city.

What would have been the 11th annual parade, scheduled for Saturday, April 29, 2017, was cancelled following an **anonymous email threat** to disrupt the event because members of the Multnomah County Republican Party were to be marching in the parade's 67th spot.

That email is copied in full below (bold print added):

Recent Examples of the Heckler's Veto



(6. Portland/Rose Festival Parade, cont'd)

This is the email the parade organizers received:

-----Original Message-----

From: thegiver@riseup.net [mailto:thegiver@riseup.net]

Sent: Saturday, April 22, 2017 7:29 PM

Subject: Don't make us shutdown the parade

Importance: High

Greetings,

Trump supporters and 3% militia are encouraging people to bring signs that bring hateful rhetoric to the parade and appears you allowed them to register and have a place in the march!

Recent Examples of the Heckler's Veto



(6. Portland/Rose Festival Parade, cont'd)

You have two options:

1. Let them march (Here is their event page <https://www.facebook.com/events/1863379970571888/>)
2. Cancel their registration and ensure they do not march

Recent Examples of the Heckler's Veto



(6. Portland/Rose Festival Parade, cont'd)

If you choose option 1 then we will have **two hundred or more people rush into the parade into the middle and drag and push those people out** as we will not give one inch to **groups who espouse hatred toward lgbt, immigrants, people of color or others**. In case the message was not clear to you this is a sanctuary city and state and **we will not allow these people to spread their views** in East Portland. You have seen how much power we have downtown and that **the police cannot stop us** from shutting down roads so please consider your decision wisely. Let us know your decision by tuesday by emailing back. We will also wheatpaste fliers across the march route naming sponsors and holding them accountable for backing an event with this type of rhetoric which **may endanger future parades ability to get sponsors**. We will also begin emailing groups who are participating in the march to inform them **you are allowing a group of bigots to march in the parade.**

Recent Examples of the Heckler's Veto



(6. Portland/Rose Festival Parade, cont'd)

This is non-negotiable we already have two events setup ourselves and we will have enough people tools and tactics to shut down a parade in fact this is a walk in the park for us:

<https://www.facebook.com/events/942770902532416/>

<https://www.facebook.com/events/1901987176708736/>

We promise there will be no harm to anyone but we will shut this down and prevent them from marching using non-violent passive blocking of their movement.

Recent Examples of the Heckler's Veto



(6. Portland/Rose Festival Parade, cont'd)

IMPORTANT: This e-mail message is not intended to be binding or relied upon and, without limitation on the foregoing, shall not create, waive or modify any right, obligation or liability, or be construed to contain or be an electronic signature, to constitute a notice, approval, waiver or election, or to form, modify, amend or terminate any contract. The information contained in this message is confidential and is intended only for the named addressee(s). This message may be protected by the attorney/client privilege. If the reader of this message is not an intended recipient (or the individual responsible for the delivery of this message to an intended recipient), please be advised that any re-use, dissemination, distribution or copying of this message is prohibited. If you have received this message in error, please reply to the sender that you have received the message in error and then delete it. Thank you.

[end of email]

Recent Examples of the Heckler's Veto



Notice that the explicit threat is to use “two hundred or more [protesting] people” to “drag and push those [objectionable] people out.”

That is a threat to be taken seriously, despite the closing promise not to harm anyone.

This was an extremely effective heckler's veto that came simply by way of an anonymous email.

The next two slides are screenshots the protesting organization's **Facebook** pages that were linked in the email.

Recent Examples of the Heckler's Veto



facebook

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Past

Cancelled! Defend
Portland from Fascists
at the Avenue Of
Roses Parade

+ Create Event



APR 29 Cancelled! Defend Portland from Fascists at the Avenue Of Roses Parade

Public · Hosted by Direct Action Alliance

★ Interested

...

🕒 Saturday, April 29, 2017 at 9:00 AM - 12:00 PM PDT
about 11 months ago

📍 Montavilla City Park
NE 82ND Ave, Portland, Oregon 97220

Show Map

About

Discussion

Details

<https://www.facebook.com/events/301147526984524/?ti=as>

!!!Due to the parade cancellation there is going to be an alternative event with a different location and time. DAA will not be hosting it but we'll spread word once it is up. Please keep Saturday morning open!!!

Fascists plan to march through the streets of Portland in the Avenue of Roses Parade on 82nd.

The fascists know that we'll keep shutting their marches down, they are now planning to march within other parades to protect their message of hate and white supremacy - it WON'T work.

Nazis will not march through Portland unopposed.

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Recent Examples of the Heckler's Veto



facebook

Sign Up

Join or Log Into Facebook

Events

Events

Calendar

Birthdays

Discover

Past

Shut down fascism! No nazis in Portland!

+ Create Event

This event was canceled
You cannot share this event, but you can still post.



APR 29 Shut down fascism! No nazis in Portland!
Public · Hosted by Oregon Students Empowered

Saturday, April 29, 2017 at 9:00 AM PDT

Montavilla City Park
Portland, Oregon 97220

Show Map

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3%ers and nazis are planned on infiltrating the Avenue of roses Parade a couple days after the counter event was made a letter was sent to the organizers of the parade saying remove these fascists who directly harm POC, immigrants and the LGBT community from marching or we will come into the parade and shut them out and the organizers canceled the event and blamed it on "threats of violence", we are sad that he organizer shut down the parade for everyone rather than kicking out the fascists.

Now, Patriot prayer a "organization" that views nazism as patriotism has created a event called "march for free speech 82nd ave" which sounds just a like the alt right "free speech rally" where nazis from all over the country came together and spewed hate speech and gave nazi salutes. We will not let nazis and fascists march in Portland, we will defend our city! We exnert anyone against fascism and nazism to show up and shut it

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Government suppression of speech



None of those incidents appeared to involve municipalities, yet they illustrate some problems facing municipalities.

Cities must exercise caution in responding to these situations or in passing regulatory ordinances:

“When a government official is complicit in suppressing protected speech, it undermines the 1st Amendment by silencing the very political discourse the Amendment is meant to protect.”

“The Troubling Resurgence of the ‘Heckler’s Veto’,” FIRE: Foundation for Individual Rights in Education, Jan. 26, 2005, <https://www.thefire.org/media-coverage/the-troubling-resurgence-of-the-hecklers-veto/>

Municipal Involvement by Police Response



The term “heckler’s veto” has been recognized in court opinions since at least 1966 in *Brown v. State of Louisiana*, 383 U.S. 131, 133 n.1 (1966), although the concept has deeper roots.

The term “heckler’s veto” is attributed to Professor Harry Kalven, Jr., of the University of Chicago Law School, in his book, *The Negro and the First Amendment* (Univ. of Chicago Press) (1966), based on lectures he delivered at the Ohio State Law Forum in April 1964.

The 1951 case of *Feiner v. New York*, 340 U.S. 315 (1951), for example, provides a helpful introduction to the framework for analyzing the heckler’s veto, even though that term was not used.

Municipal Involvement by Police Response



a. Arresting the speaker

Irving Feiner was convicted of disorderly conduct arising from his 1949 open-air address in the City of Syracuse, New York.

During that address, the “[t]he crowd was restless and there was some pushing, shoving and milling around.” *Feiner*, 340 U.S. at 317.

Feiner “was speaking in a ‘loud, high-pitched voice.’ He gave the impression that he was endeavoring to arouse the Negro people against the whites, urging that they rise up in arms and fight for equal rights.” *Id.*

The Supreme Court described the crowd’s response to the speaker, and the police response to the situation:

Municipal Involvement by Police Response



The statements before such a mixed audience ‘**stirred up a little excitement.**’ Some of the onlookers made remarks to the police about their inability to handle the crowd and **at least one threatened violence if the police did not act.** There were others who appeared to be favoring petitioner's arguments. Because of the feeling that existed in the crowd both for and against the speaker, the **officers finally ‘stepped in to prevent it from resulting in a fight.’** One of the officers approached the petitioner, not for the purpose of arresting him, but to get him to break up the crowd. He asked petitioner to get down off the box, but the latter refused to accede to his request and **continued talking.** The officer waited for a minute and then **demande d that he cease talking.** Although the officer had thus twice requested petitioner to stop over the course of several minutes, petitioner not only ignored him but **continued talking. During all this time, the crowd was pressing closer around petitioner and the officer.** Finally, the officer told petitioner he was **under arrest** and ordered him to get down from the box, reaching up to grab him. Petitioner stepped down, announcing over the microphone that ‘the law has arrived, and I suppose they will take over now.’ In all, the officer had asked petitioner to get down off the box three times over a space of four or five minutes. Petitioner had been speaking for over a half hour.

Id. at 317-18 (bold print added).

Municipal Involvement by Police Response



To review:

- Speaker's statements on racial issues "stirred up a little excitement"
- At least one onlooker threatened violence if the police did not act
- Officers stepped in to prevent the excitement from "resulting in a fight"
- Officer asked speaker to get off the box
- Speaker refused and continued talking
- Officer waited a minute and then demanded that speaker cease talking
- Speaker ignored him and continued talking
- Crowd was pressing closer around the speaker and the officer
- Officer arrested speaker

Municipal Involvement by Police Response



In condensed form:

- controversial statements
- protestors threaten violence
- police arrest speaker

Municipal Involvement by Police Response



To put it another way, with a little modification:

- Unpopular speech
- Protest
- Speaker is silenced

This is the heckler's veto.

Municipal Involvement by Police Response



The Supreme Court affirmed Feiner's conviction for disorderly conduct, agreeing with the "trial judge[']s . . . conclusion that the police officers were justified in taking action to prevent a breach of the peace." *Id.* at 319.

The majority opinion noted that Feiner "was thus neither arrested nor convicted for the making or the content of his speech. Rather, it was the reaction which it actually engendered." *Id.* at 319-20.

Municipal Involvement by Police Response



In the first of two dissenting opinions in *Feiner*, Justice Black begins by characterizing Feiner's speech as "unpopular" (a term that typically does not suggest a breach of the peace):

The record before us convinces me that petitioner, a young college student, has been sentenced to the penitentiary for the **unpopular views** he expressed on matters of public interest while lawfully making a street-corner speech in Syracuse, New York.

Id. at 321-22 (Black, J., dissenting) (internal footnotes omitted; bold print added).

Municipal Involvement by Police Response



Justice Black went on to assert that the majority's opinion approves what later came to be called the heckler's veto:

Here petitioner was “asked” then “told” then “commanded” to stop speaking, but a man making a lawful address is certainly not required to be silent merely because an officer directs it. . . . In my judgment, today's holding means that as a practical matter, **minority speakers can be silenced in any city.**

Id. at 327-28 (bold print added).

Municipal Involvement by Police Response



b. Silencing the speaker by threat of arrest

Police officers are sworn to protect the peace, and cities and states can prosecute offenders for breaches of the peace and disorderly conduct.

While the arrest of the speaker passed Supreme Court muster in *Feiner* in 1951, each speaker's conduct and each official response must be evaluated on its own.

And even the threat of an arrest can silence a speaker.

Municipal Involvement by Police Response



In Zachary, Louisiana, mid-November 2006, street preacher John T. Netherland positioned himself in a grassy public easement between the street and the parking lot of a restaurant, the Sidelines Grill, and he began:

. . . quoting Biblical scripture in a loud voice, including I Corinthians 5:9, saying “Know ye not that the unrighteous shall not inherit the Kingdom of God? Neither fornicators, idolaters, adulterers, effeminate, abusers of themselves with mankind, covetous, thieves, revelers, none of these shall enter into the Kingdom of God.” He states that he was speaking from a grassy public easement between the Sidelines parking lot and the road. The City claims that Netherland was standing in the parking lot yelling at Sidelines customers that they were fornicators and whores and they were condemned to Hell for going inside the establishment.

(quotation continues)

Municipal Involvement by Police Response



(cont'd)

The police were called and Netherland was eventually threatened with arrest if he did not stop. He left the scene and later sued for damages, declaratory relief, and injunctive relief

Netherland v. Eubanks, 302 Fed. Appx. 244, 245-46 (5th Cir. 2008).

Municipal Involvement by Police Response



Police were called to the scene because of complaints that Netherland was disturbing the peace, in violation of the City's disturbing the peace ordinance, quoted here in part:

(a) Disturbing the peace is the doing of any of the following in such a manner as would **foreseeably disturb or alarm the public:**

...

(2) Addressing any **offensive, derisive, or annoying words to any other person** who is lawfully in any street, or other public place; or call him by any **offensive or derisive name**, or make any **noise or exclamation** in his presence and hearing with the **intent to deride, offend, or annoy him**, or to prevent him from pursuing his lawful business, occupation, or duty....

Zachary Code Ordinance § 58-93.2, quoted in *Netherland*, 302 Fed. Appx. at 245 (bold print added).

Municipal Involvement by Police Response



The district court found that the ordinance was unconstitutional on its face, and it granted a preliminary injunction against the City enforcing the ordinance.

On the City's appeal, however, the Fifth Circuit vacated the injunction and remanded for reconsideration “[b]ecause the district court did not consider any limiting construction of the Ordinance before finding it facially unconstitutional”

Netherland, 302 Fed. Appx. at 245.

Municipal Involvement by Police Response



What does it take to silence a speaker?

Municipal Involvement by Police Response



What does it take to silence a speaker?

Arrest . . . OR . . . Simple Threat of Arrest?

Municipal Involvement by Police Response



What does it take to silence a speaker?

Arrest . . . OR . . . Simple Threat of Arrest?

Compare *Feiner* with *Netherland*

Municipal Involvement by Police Response



Mr. Netherland was more compliant than Mr. Feiner had been and left before being arrested.

This time, the threat of arrest was enough to silence the speaker.

And since the threat of arrest came in response to complaints, it might be characterizable as a heckler's veto.

Municipal Involvement by Police Response



The Fifth Circuit did not call it a heckler's veto, but there was no need to address it from that perspective because the court was able to dispose of the case on other grounds.

Courts must focus on what constitutes disturbing the peace under a given ordinance or statute.

And municipalities should focus on that in the first instance, before a matter ever gets to court.

Municipal Involvement by Police Response



Prohibitions against disturbing the peace are supposed to be content neutral, but there is a divergence: what disturbs the peace in some settings will not do so in others.

If a crowd does not want to hear what a speaker has to say, then the crowd may get unruly, and we return to *Feiner*.

Listeners' reaction to speech is not a content-neutral basis for regulation. . . . Speech cannot be financially burdened, any more than it can be punished or banned, simply because it might offend a hostile mob.

Forsyth County v. Nationalist Movement, 505 U.S. 123, 134-35 (1992).

Municipal Involvement by Police Response



The police must preserve order when unpopular speech disrupts it; “[d]oes it follow that the police may silence the rabble-rousing speaker? Not at all. The police must permit the speech and control the crowd; there is no heckler’s veto.”

Ovadal v. City of Madison, Wisconsin, 416 F.3d 531, 537 (7th Cir. 2005) (“*Ovadal I*”) (citing *Hedges v. Wauconda Cmty. Unit Sch. Dist. No. 118*, 9 F.3d 1295, 1299 (7th Cir.1993)).

Municipal Involvement by Police Response



Cities must strike a balance in using their police power so that they do not violate the rights that they are obligated to protect.

Indeed, the protection against hecklers' vetoes even forbids statutory schemes that would allow a disapproving citizen to silence a disagreeable speaker by complaining on other, apparently neutral, grounds.

Frye v. Kansas City, Missouri, Police Dept., 375 F.3d 785, 793 (8th Cir. 2004) (Beam, J., Dissenting) (citing *Reno v. ACLU*, 521 U.S. 844, 880 (1997)).

Municipal Involvement by Police Response



But if the speaker is disturbing the peace or creating a danger without reference to the content of his speech, police may stop his speech without violating his constitutionally protected rights.

Such was the case when street preacher Ralph Ovadal took his message to pedestrian sidewalks that were on overpasses above a freeway.

It might have looked something like one of these:



Municipal Involvement by Police Response



Ovadal's demonstrations there "had a noticeable effect on traffic below[,] and police "forced Ovadal to move from the overpasses on the grounds that his activities were causing a traffic hazard for the motorists below him."

Ovadal v. City of Madison, Wisconsin, 469 F.3d 625, 627 (7th Cir. 2006) ("*Ovadal II*").

Mr. Ovadal argued that he was being subjected to a heckler's veto, but the Seventh Circuit held that his removal from the overpasses was content-neutral and constitutional.

Id. at 629, 631.

Municipal Involvement by Police Response



In another recent case, a group of street preachers calling themselves “Bible Believers” attended a festival in Dearborn, Michigan, a festival that is known to draw a very large crowd of Muslims.

The preachers mixed with the crowd and spoke a message directed at Islam, which many found to be offensive.

The crowd became violent, and the sheriff’s deputies determined that the Bible Believers were causing the problem.

A deputy chief informed one of the leaders of the Bible Believers that the group “would be cited for disorderly conduct if they did not immediately leave the Festival. . . . [The preacher] complied, and the Bible Believers were escorted out of the Festival by more than a dozen officers.”

Bible Believers v. Wayne County, Mich., 805 F.3d 228, 240 (6th Cir. 2015).

Municipal Involvement by Anti-Harassment Policies



Efforts to silence what some consider objectionable has become institutionalized through speech codes and the rise of “safe spaces” and so-called “free speech zones” on college campuses.

In some instances, unpopular speech has been characterized as “hate speech” or harassment and legal restrictions have been imposed or attempted on that basis.

Municipal Involvement by Anti-Harassment Policies



Does the marketplace of ideas have room for fighting words?

Municipal Involvement by Anti-Harassment Policies



Does the marketplace of ideas have room for fighting words?

The content-based restriction contained in speech codes is an attempt to use the “**fighting words**” **concept** from *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571 (1942), and expand it into **a challenge to the “marketplace of ideas” concept.**

Municipal Involvement by Anti-Harassment Policies



Scholars with the Newseum Institute's First Amendment Center have explained:

Many speech codes sought to end hate speech, which code proponents said should receive limited or no First Amendment protection. Supporting this view were many academics who subscribed to so-called “critical race” theory. **Critical-race theorists contend that existing First Amendment jurisprudence must be changed because the marketplace of ideas does not adequately protect minorities.** They charge that hate speech subjugates minority voices and prevents them from exercising their own First Amendment rights.

David L. Hudson, Jr., and Lata Nott, “Hate Speech & Campus Speech Codes,” NewseumInstitute.org, March 2017, <http://www.newseuminstitute.org/first-amendment-center/topics/freedom-of-speech-2/free-speech-on-public-college-campuses-overview/hate-speech-campus-speech-codes/> (bold print added)

Municipal Involvement by Anti-Harassment Policies



Speech codes that arose **on campuses** during the 1980s and 1990s largely were held to be unconstitutional, but they might have been reborn in the form of anti-harassment policies.

Some universities dropped their broad, wide-ranging policies . . . in favor of more narrowly crafted anti-harassment or code-of-conduct policies. Whatever the terminology used, many universities still regulate various forms of hate speech.
...

Many of the provisions that used to be called speech codes are being wrapped into anti-harassment policies[.]

Id. (internal quotation marks omitted) (quoting First Amendment expert and law professor Robert Richards of the University of Pennsylvania).

Municipal Involvement by Anti-Harassment Policies



As tempting as it might be to want to protect people from harassment, local governments should be cautious about following that lead.

Consider this poster on the side of D.C. Metro cars and on the walls of Metro stations:



Municipal Involvement by Anti-Harassment Policies



The text reads:

You have the right to be safe waiting for and riding Metro. You don't have to put up with inappropriate comments, touching, gestures, or actions. Help Metro protect you and other passengers. If you witness or experience harassment, report it to the nearest Metro employee.

David Post, "Heckler's veto, anyone?" The Volokh Conspiracy (Dec. 17, 2015)
https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/12/17/hecklers-veto-anyone/?utm_term=.61930388fb7b

Municipal Involvement by Anti-Harassment Policies



Most of us might agree with the quoted text about having “the right to be safe waiting for and riding Metro.”

D.C. Metro is within its authority to use signs to promote safety, a proper public policy that does not violate constitutional protections.

But this poster goes further, asserting that we “don’t have to put up with inappropriate comments, touching, gestures, or actions.”

We might wish we didn’t have to put up with those things, but we probably do—at least to some extent.

Municipal Involvement by Anti-Harassment Policies



Like the train it's on, the text on this poster begins to move down the track toward a destination—namely, insulation not only against unwanted touching, but also against unwanted comments, gestures, or other actions.

If anyone doubts that this is where the policy is headed, it is exclaimed in big letters, all caps, bold, red-on-yellow:

IF IT'S UNWANTED, IT'S HARASSMENT.

Municipal Involvement by Anti-Harassment Policies



Imagine that a Metro passenger witnesses some of the following in a Metro car or station:

- three people praying and reading the Bible
- a man reciting Islamic prayers on a prayer rug in the aisle
- a man wearing a shirt that says “Black Lives Matter”
- a man wearing a shirt that says “Blue Lives Matter”
- a man wearing a shirt that says “White Lives Matter”
- a woman wearing a shirt promoting abortion rights
- a man wearing a shirt that says “Abortion is Murder!”

Municipal Involvement by Anti-Harassment Policies



- a woman wearing a shirt promoting legalization of prostitution
- a woman actually soliciting sex
- a man and a woman kissing
- a person wearing a shirt promoting “trans” rights
- a man wearing a shirt that says “You don’t have to stay gay.”
- a man wearing a shirt promoting the right to die
- a teenage girl wearing a shirt that says “TRUMP: MAKE AMERICA GREAT AGAIN!”

Municipal Involvement by Anti-Harassment Policies



- a woman breast-feeding
- a man wearing a shirt with a Nazi swastika
- two men kissing
- a man wearing a shirt with a Hindu swastika
- a man staring at a woman who appears not to know him
- a woman patting people she appears not to know on their shoulders
- a man making repeated thrusting hand gestures while saying “F*** [Trump or Obama or fill-in-the-blank]”

Municipal Involvement by Anti-Harassment Policies



It's easy to believe that some Metro passengers could be offended by one or more of these actions or expressions.

Based on the Metro sign, a person who is offended and doesn't to see, hear, or feel any of those can consider it harassment and "report it to the nearest Metro employee."

This invitation to report perceived harassment appears to tilt the balance toward the person who takes offense.

Municipal Involvement by Anti-Harassment Policies



But the constitutional implications arise in the context of Metro's response to those reports.

If Metro responds by asking the “offending” person to stop the behavior or leave, that might violate constitutional protections (depending, of course, on the exact nature of the action).

Municipal Involvement by Anti-Harassment Policies



A local government's attempt to protect people from harassment can easily go too far.

Protected speech is not transformed into “fighting words” by the peculiar sensibilities of the listener. . . . If First Amendment rights are subject to a middle schooler’s “heckler’s veto,” the level of discourse might be limited to that which would be suitable for a sandbox.

People in Interest of R.C., 411 P.3d 1105, 1109 n.3 (Colo. Ct. App. 2016) (internal citations and quotation marks omitted) (juvenile disorderly conduct case).

Municipal Involvement by Denial of Parade Permits



The **anticipation of violence** might prompt some cities to deny parade permits.

If an ordinance permits a law enforcement authority the discretion to deny a permit for “any reason” that “raises public safety concerns” that ordinance would likely be held unconstitutional for granting a heckler’s veto, as the Eleventh Circuit held in *Burk v. Augusta-Richmond County*, 365 F.3d 1247, 1257 (11th Cir. 2004).

Note Judge Barker’s concurring opinion, contending that the ordinance requiring permit for public demonstrations in groups of five or more, and granting the Sheriff discretion to deny a permit “for ‘any reason’ that in his own mind raises public safety concerns[,]” effectively “grants the Sheriff the authority to enforce a ‘heckler’s veto.’” *Id.* at 1258-59.

Municipal Involvement by Denial of Parade Permits



Similar to *Burk*, the Fifth Circuit in *Beckerman v. City of Tupelo, Miss.*, 664 F.2d 502, 509 (5th Cir. 1981), held unconstitutional an ordinance that authorized the chief of police to deny a parade permit if he determined that issuing the permit would probably “provoke disorderly conduct” or create a disturbance.

The court characterized that provision as sanctioning the heckler’s veto.

Municipal Involvement by Denial of Parade Permits



However, the Fourth Circuit upheld an ordinance of the Town of Pelion, South Carolina, that prohibited the Ku Klux Klan from participating in a Christmas parade because of fear of violence. Critical to that decision was this observation:

Under the facts presented in this case, a “heckler’s veto” is not involved, because the real threat was believed to be presented by Klan members rather than by spectators.

Christian Knights of Ku Klux Klan Invisible Empire, Inc. v. Stuart, 934 F.2d 318 (Table) at *2 (4th Cir. 1991).

Municipal Involvement by Denial of Parade Permits



The issue of prospective violence was ultimately overruled in *Iranian Muslim Org. v. City of San Antonio*, 615 S.W.2d 202, 206-07 (Tex. 1981), where city officials had decided to deny parade permits to Iranian students—who had sought to protest the Shah of Iran—out of fear of violence toward the demonstrators.

The lower courts upheld that decision to deny the permit, but the Supreme Court reversed, noting that it constituted a heckler's veto, and holding:

Such fears are not a constitutionally permissible factor to be considered in regulating demonstrations.

Id.

Municipal Involvement by Denial of Parade Permits



As the District of Columbia Circuit has stated:

The First Amendment forbids the government to silence speech based on the reaction of a hostile audience, unless there is a ‘clear and present danger’ of grave and imminent harm. . . . Otherwise, a vocal minority (or even majority) could prevent the expression of disfavored viewpoints—a result contrary to the central purpose of the First Amendment’s guarantee of free expression.

Steffan v. Aspin, 8 F.3d 57, 69 (D.C. Cir. 1993) (internal citations omitted) (describing prohibition of heckler’s veto), judgment vacated by order for en rehearing Jan. 7, 1994, substitute opinion sub nom. *Steffan v. Perry*, 41 F.3d 577 (D.C. Cir. 1994).

Municipal Involvement Through Security Fees



In some situations, local governments can charge for the **cost of providing security**, but it must be imposed on a **content-neutral basis**.

In *Forsyth County v. Nationalist Movement*, the Supreme Court addressed an “assembly and parade ordinance that permits a government administrator to vary the fee for assembling or parading to reflect the estimated cost of maintaining public order.” 505 U.S. 123, 124 (1992).

Municipal Involvement Through Security Fees



In a rural Georgia county with a “troubled racial history[,]” a civil rights “March Against Fear and Intimidation” was held on January 17, 1987, consisting of some **90 civil rights demonstrators**.

The marchers were met by about **400 counterdemonstrators**, affiliated with the Ku Klux Klan, greatly outnumbering police officers.

The counterdemonstrators shouted racial slurs and threw rocks and beer bottles, “**forc[ing] the parade to a premature halt[.]**” *Id.* at 125 (emphasis added).

Municipal Involvement Through Security Fees



The civil rights parade organizers returned the following weekend, January 24, and the parade “developed into the largest civil rights demonstration in the South since the 1960’s[,]” involving some 20,000 civil rights marchers, about 1,000 counterdemonstrators, and “more than 3,000 state and local police and National Guardsmen. . . . The **demonstration cost over \$670,000 in police protection,** of which Forsyth County apparently paid a small portion.” *Id.* at 125-26.

Municipal Involvement Through Security Fees



As a result of those two demonstrations, Forsyth County enacted an ordinance that “required the [parade] permit applicant to defray these [security] costs by paying a fee, the amount of which was to be fixed ‘from time to time’ by the Board.” *Id.* at 126.

Municipal Involvement Through Security Fees



Two years later, the Nationalist Movement sought a permit for a demonstration on Martin Luther King, Jr. Day in Forsyth County, and the county imposed a **\$100 fee**.

The group did not pay the fee, and it did not hold the rally, instead filing suit seeking an injunction against the ordinance as unconstitutional.

Municipal Involvement Through Security Fees



The Supreme Court described the constitutional problem with the ordinance:

The decision how much to charge for police protection or administrative time—or even whether to charge at all—is left to the **whim of the administrator**. There are **no articulated standards** either in the ordinance or in the county's established practice. The administrator is not required to rely on any Objective factors. He need not provide any explanation for his decision, and that **decision is unreviewable. Nothing in the law or its application prevents the official from encouraging some views and discouraging others through the arbitrary application of fees.** The First Amendment prohibits the vesting of such unbridled discretion in a government official.

Id. at 133 (internal footnotes omitted).

Municipal Involvement Through Security Fees



In a 5-4 decision, the Court held:

[T]he provision of the Forsyth County ordinance relating to fees is invalid because it **unconstitutionally ties the amount of the fee to the content of the speech** and lacks adequate procedural safeguards; no limit on such a fee can remedy these constitutional violations.

Id. at 137.

Municipal Involvement Through Security Fees



The Connecticut Supreme Court reached a different outcome, on different grounds, in *Morascini v. Comm'r of Pub. Safety*, 675 A.2d 1340, 1349-50 (Conn. 1996), holding as constitutional a Connecticut statute requiring an event operator to pay fee to cover cost of police protection for events where the police chief determines that such protection is necessary, reasoning that it is not a heckler's veto.

Where does Social Media fit into this?



Social media has expanded into an electronic de facto public forum, where people express all varieties of speech.

Of course, some of that speech is unpopular (from the viewpoint of some who disagree).

Using complaints on social media to identify unpopular speech and characterize it as “hate speech” is an effective way to employ the heckler’s veto in the virtual world.

Where does Social Media fit into this?



There is no need for actually showing up to protest, as in the 2017 case of the Portland Rose Festival Parade, where a threatening email stopped a parade before it began. That email contained links to two Facebook pages of the protest group, showing what could happen if the parade organizers ignored the warning.

Social media can expand the reach of protest messages and elicit additional support for the protest—i.e., opposition to the “unpopular” speech or speakers.

Social media companies have responded by removing “offensive” posts and shutting down access for those who have been deemed to be hate mongers.

But this has caused some problems.

Where does Social Media fit into this?

“This week’s decision by Facebook, Spotify, Apple, and YouTube to take down material posted by conspiracy theorist Alex Jones and remove his Infowars channel points to an acute dilemma faced by all social media platforms today in reconciling their commitments to both freedom of speech and to social responsibility toward the democracies that shelter them.”

Francis Fukuyama, “Social Media and Censorship,” *The American Interest* (Aug. 8, 2018)



PLATFORM OR PUBLISHER?

Social Media and Censorship

FRANCIS FUKUYAMA

The idea that the big internet platforms are not media companies has never really been tenable, and the contradictions in their public protestations of neutrality have become ever more apparent over time.

This week’s decision by Facebook, Spotify, Apple, and YouTube to take down material posted by conspiracy theorist Alex Jones and remove his Infowars channel points to an acute dilemma faced by all of the social media platforms today in reconciling their commitments to both freedom of speech and to social responsibility toward the democracies that shelter them. They can reconcile these objectives over the long term if they (and we) do two things: first, accept the fact that they are media companies with an obligation to curate information on their platforms, and second, accept the fact that they need to get smaller.

Where does Social Media fit into this?



[View](#)

Welcome to 2018, the Year of Censored Social Media

The limitations of selective censorship and the need for better regulation will soon be apparent.

By [Leonid Bershidsky](#)

January 3, 2018, 1:00 AM CST

(Headline only. Article beings on next page.)

Where does Social Media fit into this?



Bloomberg Opinion

“This year, don’t count on the social networks to provide its core service: an uncensored platform for every imaginable view. The censorship has already begun, and it’ll only get heavier.”

Leonid Beshidsky, “Welcome to 2018, the Year of Censored Social Media,” *Bloomberg* (Jan. 3, 2018)



All thumbs. Photographer: Chris Ratcliffe/Bloomberg

Leonid Bershidsky is a Bloomberg Opinion columnist covering European politics and business. He was the founding editor of the Russian business daily Vedomosti and founded the opinion website Slon.ru.

This year, don't count on the social networks to provide its core service: an uncensored platform for every imaginable view. The censorship has already begun, and it'll only get heavier.

A 2017 law in Germany obliging social networks to delete hate speech as soon as it's reported or face massive fines went into effect on Jan. 1 -- and immediately claimed its first "victim."

Where does Social Media fit into this?



One extreme example appears to be a mistake resulting from an aggressive hate-speech-finding algorithm. Or was this a human decision?

The Intersect

Facebook censored a post for ‘hate speech.’ It was the Declaration of Independence.

Text:

At first glance, the Vindicator’s Facebook promotion did not seem designed to make waves.

The small newspaper, based out of Liberty, a Texas town of 9,175 outside of Houston, planned to post the Declaration of Independence on Facebook in 12 daily installments leading up to the Fourth of July — 242 years since the document was adopted at the Second Continental Congress in 1776.

But on the 10th day, the Vindicator’s latest installment was removed by Facebook. The company told the newspaper that the particular passage, which included the phrase “merciless Indian Savages,” went against its “standards on hate speech,” the newspaper wrote.

Eli Rosenberg, “Facebook censored a post for ‘hate speech.’ It was the Declaration of Independence[.]” *The Washington Post* (July 5, 2018).

Where does Social Media fit into this?



Facebook apologizes to Franklin Graham for temporary ban

By [Napp Nazworth](#), Christian Post Reporter



Franklin Graham, president of the Billy Graham Evangelistic Association and the international Christian relief organization Samaritan's Purse, delivers a keynote address during the opening session of the World Summit in Defense of Persecuted Christians at the Mayflower Hotel in Washington, D.C. on May 10, 2017. | (Photo: Billy Graham Evangelistic Association)

Facebook apologized to Rev. Franklin Graham for temporarily banning his page over a 2016 post about transgender bathroom use and Bruce Springsteen.

Where does Social Media fit into this?



Censorship Pushing Conservatives Off Twitter

Home > Political Islam > Sharia Governance > Blasphemy > Censorship Pushing Conservatives Off Twitter

BY *SHIREEN QUDOSI* Saturday, December 15, 2018



Twitter CEO and co-founder Jack Dorsey in New Delhi, India. (Photo: Prakash Singh/ AFP / Getty Images)

Sweeping censorship across social media and subscriber-content sites has pushed conservatives out of these sites and sent them searching for more tolerant digital platforms. The latest story in the news points to increased bans and discrimination against conservative views on Twitter. However, shockingly, Twitter isn't simply censoring conservative speech, it's also enforcing foreign laws from sharia-based countries.

Where does Social Media fit into this?



YouTube has also been accused of censoring speech.

In 2017, talk show host Dennis Prager, through his video lecture entity, Prager University, sued Google and YouTube for discriminating against his videos based on ideological content.

PragerU Takes Legal Action Against Google and YouTube for Discrimination

Press Release

[VIEW FULL LAWSUIT COMPLAINT HERE](#)

“This is speech discrimination plain and simple, censorship based entirely on unspecified ideological objection to the message or on the perceived identity and political viewpoint of the speaker”

- 36th Governor of California Pete Wilson

Browne, George, Ross LLP

(cont'd)

Where does Social Media fit into this?



(cont'd)

The lawsuit cites more than 50 PragerU videos which have either been “restricted” or “demonetized” by Google/YouTube. The PragerU videos range on various subjects presenting a conservative point of view, and include a video by noted Harvard Law professor Alan Dershowitz on the founding of Israel. PragerU previously compiled a complete list of their restricted videos [here](#), which includes: “Why America Must Lead,” “The Ten Commandments: Do Not Murder,” “Why Did America Fight the Korean War,” and “The World’s Most Persecuted Minority: Christians.”

In correspondence cited in the filing, Google/YouTube made it clear that the censorship of certain videos was because they were deemed “inappropriate” for younger audiences.

The Prager lawsuit argues that YouTube:

“is arguably the largest public forum for the expression and exchange of ideas and speech that has ever been available to the public in California, the United States, and ultimately the world—one to which Google/YouTube invite the public to express themselves in all manner of speech, and to engage with such speech through viewing and commenting.”

Prager University v. Google Inc., No. 17-CV-06064-LHK in the Northern District of California Dkt. 1 (Complaint, filed 10/23/17) at p. 6, ¶ 11.

(cont'd)

Where does Social Media fit into this?



PragerU argued that Google/YouTube should be treated as a public forum under *Marsh v. Alabama*, 326 U.S. 501 (1946) (“The more an owner, for his advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by the statutory and constitutional rights of those who use it.”)

The district court disagreed that *Marsh* extended this far and dismissed the lawsuit.

PragerU has appealed that decision to the Ninth Circuit Court of Appeals.

Where does Social Media fit into this?



Such actions have led to discussions about government regulation.

COMMENTARY

JUNE 20, 2018 / 9:41 AM / 6 MONTHS AGO

Commentary: How to 'fix' social media without censorship

David Kaye

8 MIN READ



The Cambridge Analytica/Facebook scandal may have changed the way millions of people perceive the risks to privacy when they go online. But it could have obscured an equally profound digital age debate: widespread resistance to internet companies' role as the global speech police of the digital age. The future of free speech depends on getting this debate right.

Where does Social Media fit into this?



Municipalities are using social media, some very extensively.

Local Government Live Streaming

How Local Governments Can Build A Strong Social Media Presence

Alex Hilleary • May 10, 2018

This post talks addresses how local governments can build a strong social media presence to better engage with residents. It's part of our series on [local government live streaming](#).

Social media, when used correctly, is an incredibly effective communication tool.

Still, many municipalities that run social media accounts struggle to understand what to do with them. A social presence is important, but it's tough to build an engaging audience.

Below are five best practices that will help your city build a stronger social media presence.

Where does Social Media fit into this?



16 Ingenious Ways Local Governments Use Social Media

MAY 15, 2018 | RACHEL KEYSER | LOCAL GOVERNMENT RESOURCES

Social media has long been an integral part of daily life. We have never been so easily connected as now, and the benefits span far beyond seeing your friends' Christmas photos and not-so-funny memes. From marketing, to journalism, to fundraising, social media has revolutionized professional industries.

For local governments, it can hold even greater prizes. Social media is part of a foundation for a new type of democracy and community participation.

If you're not already on the bandwagon, it's not a matter of if, it's a matter of when. For the rest—from the occasional Facebook poster to the obsessive Twitter manager—there's probably still a lot more to do in order to harness the full power of social media.

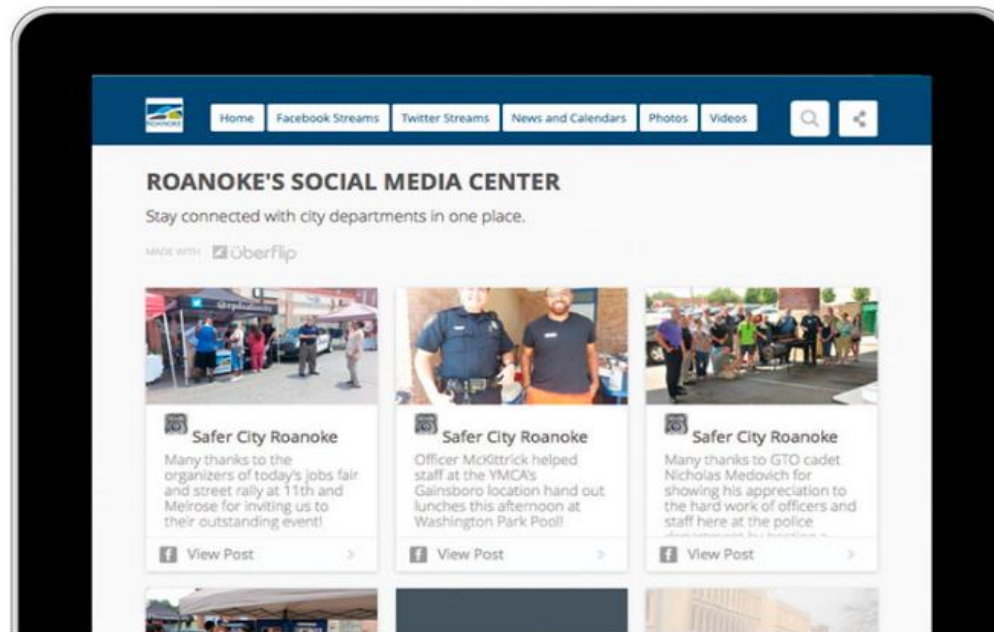
Where does Social Media fit into this?



The City That Incorporated Social Media Into Everything

In Roanoke, Va., Facebook, Twitter and all their social-network cousins have a home in every government agency.

SEPTEMBER 2015



(Roanoke.Uberflip.com)

Where does Social Media fit into this?



Social media presents some legal issues for municipalities.
For example:

Recognizing the Consequences of Hiding Social Comments

OCTOBER 1, 2018 BY KRISTY DALTON — [LEAVE A COMMENT](#)



This article originally appeared in the "GovGirl on Social" column in Government Technology Magazine.

text on next page:

Where does Social Media fit into this?



It's a fairly common practice for government agencies to "hide" social media comments for violating their social media policy, rather than delete them. There is a sense that hiding comments isn't as bad as permanently removing them. But hiding is actually far worse and can have unintended implications for government.

Citizens have a right to disagree with what your agency does and even to be downright angry, thanks to the First Amendment of the U.S. Constitution. Freedom of speech gives citizens the right to express opinions without fear of persecution or censorship by government. First Amendment protections also extend to certain statements made on social media. Therefore, your social media policy should be crystal clear about any circumstances that would give your agency the right to remove comments, such as the use of profanity, discriminating remarks or threats. It's common for governments to have a comment moderation policy such as this.

WHY IS HIDING COMMENTS DIFFERENT FROM DELETING THEM?

Where does Social Media fit into this?



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Legal Issues Associated with Social Media

What legal issues do public agencies face relating to their use of social media? This paper chronicles a number of them. It also offers “dos and don’ts” advice for reaping the benefits of social media while minimizing the pitfalls.

What legal issues do public agencies face relating to their use of social media? This paper chronicles a number of them. It also offers “dos and don’ts” advice for reaping the benefits of social media while minimizing the pitfalls.

A version of this paper was delivered to the May 2010 City Attorneys Spring Conference.

Where does Social Media fit into this?



But wait!

What does this have to do with unpopular speech and the heckler's veto?

Where does Social Media fit into this?



Paper from the ILG (California):

Another implication of social media is that conversations are occurring in different places and among different people. No longer is the concept of a “community” something that is defined by location.

There are a number of implications—both positive and negative—for public officials. The legal issues represent one such set of implications. Issues to be aware of include:

- 1) First Amendment issues relating to government restrictions on speech,

* * *

Where does Social Media fit into this?



First Amendment Issues

Public Forum Issues for Blogs, Facebook and Interactive Sites

One motivation for public agencies to use social media is that they can be effective mechanisms for sharing important information. However, part of their popularity lies in their interactive capabilities: indeed, the ability to get feedback and energize online communities is one of the emerging powers of Web 2.0 applications.

Thus, while a public agency can control what its part of the conversation says, there are limited options for managing what others might say. Moreover, trying to so do may risk litigation under the civil rights laws.

Where does Social Media fit into this?



The degree to which public agencies can control what gets posted on a website, blog or social media site turns on what courts call a “public forum” analysis. The first question is what kind of public forum has a public agency created? There are three possible answers:

- 1) A traditional public forum,
- 2) A designated public forum, and
- 3) A nonpublic forum.

“Traditional public forums” are places like streets, sidewalks, and parks which have been by tradition or public agency action been devoted to assembly and debate. A nonpublic forum is a place that is not by tradition or designation a forum for members of the public to communicate with each other.

Where does Social Media fit into this?



A “designated public forum” involves a situation in which a public agency intentionally opens a nonpublic forum for public discourse. There is a subcategory of a designated public forum that is called a “limited public forum” that refers to a type of nonpublic forum that the public agencies have intentionally opened to certain groups or to certain topics.

* * *

A threshold issue is whether a public agency has opened its website or other communications vehicle to others to post materials of their choosing. If not, then the website is not a public forum and the agency does not violate First Amendment rights when it excludes content.

Where does Social Media fit into this?



If a public agency does allow others to post materials of their choosing on a website, blog or social media site, then a credible argument can be made that the agency has **created a designated public forum.** This would mean that the agency cannot exclude (or delete) material based on its content unless that restriction served a compelling state interest that is narrowly tailored to achieving that interest.

Even if the agency created only a “limited public forum” for certain groups or to certain topics, it cannot delete posts simply because they are critical of the agency, its officials or employees or the agency otherwise dislikes what the posts say.

Where does Social Media fit into this?



Strategies to Minimize First Amendment Missteps

Social media site settings are another opportunity to minimize missteps. On Facebook, for example, a public agency has choices on how to set its page up. On a "fan page," an agency may select settings so that only authorized staff can start a new topic. This helps limit topics to ones that are related to agency business.

* * *

Although factually and technically a public agency could take these actions to "control" comments posted, the question is under what circumstances it would be lawful to do so. A potential example is deleting comments because they contain profanity. The United States Supreme Court has recognized that some forms of profanity are protected speech.

Where does Social Media fit into this?



Suppose a City website contains a section where people can comment about the city's policies.

Person no. 1 posts a comment that the city should not be favoring a certain group of people [fill in the blank].

Person no. 2 responds that the comment from Person no. 1 constitutes "hate speech."

Where does Social Media fit into this?



What should the City do?

If the City removes the comment, is it violating the First Amendment rights of Person no. 1?

If the City removes the comment, would the City be giving in to the heckler's veto?

Cities need to have social media policies that cover these situations, and analyze these issues in light of First Amendment protections.

Conclusion



As noted at the outset, speech that is popular with some is unpopular with others.

The government must protect the rights of speakers and protestors.

In both the tangible world and the virtual world, municipalities must proceed with care in balancing the interests of speakers with those of protestors and must maintain the peace while avoiding an endorsement of the heckler's veto.

END