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Lawful Speech Versus "Free Speech": What is Lawful Speech?

Introduction

Lawful speech is speech that remains protected unless and until, through lawful process, it is adjudicated to fall within a recognized constitutional exception.

In a constitutional system, speech is presumed lawful unless it is proven unlawful through established legal procedures, and remedies must correspond to that determination. The Constitution does not grant speech rights. It restricts state action. "Congress shall make no law... abridging the freedom of speech."

Accordingly, the question is not whether speech is harmful, offensive, or destabilizing, but whether the state has lawfully determined it to be unprotected and has employed a constitutionally appropriate remedy in response.

Proposition 1: Presumption

Speech is presumed lawful until proven otherwise.

This presumption is foundational. Without it, the state may silence first and justify later, converting unresolved allegations into enforceable truth. The Constitution entrusts courts with the power to resolve disputes, not to suppress them. When speech is restrained before falsity or unlawfulness is adjudicated, the rule of law itself is weakened, regardless of who ultimately proves correct. One of the strongest principles in First Amendment jurisprudence is the prohibition on prior restraint.

Courts may:

- punish unlawful speech after proof
- award damages
- issue narrow, post-adjudication remedies

Courts may not:

- forbid speech in advance because it might be unlawful
- silence categories of future expression
- resolve factual disputes by preventing discussion

This principle does not exist to protect liars. It exists to prevent courts from becoming pre-emptive arbiters of truth.

The Supreme Court has repeatedly reaffirmed this presumption in the context of modern communication. In [*Packingham v. North Carolina*](#) (2017), the Court affirmed that social media platforms function as central venues for lawful expression, rejecting the idea that the risk of unwanted online contact justifies broad exclusion from expressive forums. Speculative harm, the Court made clear, cannot substitute for adjudication.

Likewise, in [*Reno v. ACLU*](#) (1997), the Court held that online speech receives full First Amendment protection, rejecting heightened suppression based on fear of exposure or misuse. The decision reinforces the foundational rule that internet speech is presumed lawful absent a recognized constitutional exception.

Proposition 2: Process

The determination that speech is unlawful must be made through adversarial process, with notice, evidence, and findings.

This requirement rejects:

- ex parte silencing
- "credible fear" as a substitute for adjudication
- emotional distress as a proxy for falsity, threat, or illegality

Process is not a technicality. It is the mechanism by which the Constitution distinguishes protected speech from punishable conduct.

The Supreme Court reaffirmed this principle in [*Counterman v. Colorado* \(2003\)](#), holding that subjective fear alone cannot determine unlawfulness. By requiring proof of mens rea in true-threat cases, the Court made clear that process-not perception-separates protected speech from punishable conduct.

Lower courts have applied the same logic in the context of online expression. In [*United States v. Cassidy* \(D. Md. 2011\)](#), the court rejected criminal liability based on repeated public online speech that caused distress, emphasizing that expression may not be suppressed without proper constitutional findings. The decision illustrates the danger of substituting judicial discomfort for adversarial process.

Proposition 3: Categorization

Only speech that falls within recognized constitutional exceptions may be restrained, and only to the extent of that exception.

This is where defamation, true threats, and harassment directed to a person properly reside. Critically:

- speech about someone is not the same as speech to someone
- repetition does not transform protected speech into unlawful conduct
- offensiveness does not create a constitutional exception

The Supreme Court has repeatedly rejected attempts to collapse emotional harm or offensiveness into illegality. In [*Snyder v. Phelps* \(2011\)](#), the Court held that even deeply upsetting speech remains protected where it does not fall within a recognized exception, making clear that distress alone cannot justify suppression.

Harassment law is legitimate when it:

- targets conduct
- stops unwanted direct contact
- prevents credible threats
- addresses stalking behavior

Harassment law may incidentally affect speech when regulating conduct, but it may not be used to suppress public expression as such. It becomes illegitimate when it:

- restrains public speech
- substitutes distress for proof

- blocks future speech about disputed facts
- freezes one narrative before adjudication

Courts have consistently enforced this distinction. In [*State v. Drahot*](#) (*Neb. 2010*), the court overturned a harassment conviction based on repeated, offensive emails to a person with no prior relationship, reaffirming that persistence and insult do not remove constitutional protection. Similarly, in [*People v. Marquan M.*](#) (*N.Y. 2014*), New York's highest court invalidated a cyberbullying statute for overbreadth, rejecting vague definitions that swept protected online speech into criminal liability.

Even where some regulation is permitted, the government may not favor one side of a dispute. That means:

- silencing criticism while allowing praise is unconstitutional
- freezing one narrative while another remains public is unconstitutional
- protecting the “more sympathetic” party's speech is unconstitutional

Courts cannot decide whose story may be told before determining which speech is unlawful.

Proposition 4: Remedy

Remedies must correspond to the nature and scope of the unlawful speech and must not suppress lawful expression.

This is where injunctions most often fail. The problem is not the availability of injunctive relief, but the use of broad, speech-suppressive orders untethered to adjudicated wrongdoing. A lawful system:

- punishes or remedies specific unlawful acts
- does not silence future, hypothetical speech

- does not resolve factual disputes by forbidding discussion

The Supreme Court has long made clear that courts may not resolve disputes by suppressing speech in advance. In [*Organization for a Better Austin v. Keefe*](#) (1971), the Court reversed an injunction prohibiting public criticism of a private individual, holding that reputational or emotional harm does not justify prior restraint.

As a general rule, the government may not regulate speech based on:

- what it says
- whom it criticizes
- which viewpoint it expresses

When courts restrict speech because it is:

- upsetting
- embarrassing
- accusatory
- reputation-damaging

they engage in content-based regulation, triggering the highest level of constitutional scrutiny. This matters acutely in harassment and HRO contexts, where speech is often restrained because of its message rather than its mechanics.

Even where some regulation is permitted, remedies must be narrowly tailored. In [*McCullen v. Coakley*](#) (2014), the Court emphasized that speech restrictions must burden no more expression than necessary to serve a legitimate interest.

When the government regulates speech, it must:

- target only unprotected expression
- do so with precision
- avoid suppressing lawful speech

Orders that prohibit:

- "posting about" a person
- "indirect contact" through public platforms
- speech "likely to reach" the petitioner

almost always fail this test, because they:

- suppress protected speech
- extend far beyond proven unlawful conduct
- chill lawful discussion, reporting, and self-defense

Overbreadth is not a technical defect. It is a constitutional injury.

Summary

In a constitutional system, the distinction between lawful regulation and unlawful suppression turns not on discomfort or perceived harm, but on process and remedy.

Speech remains protected unless and until it is adjudicated to fall within a recognized exception, and even then, the government's response must be narrowly tailored to address only proven unlawful

conduct. When courts collapse the boundary between speech and conduct, they transform unresolved disputes into enforceable truths.

The rule of law depends not on preventing all risk, but on preserving the mechanisms that determine when speech may lawfully be restrained and when it must remain free.

Resources Used In This Article

- [Packingham v. North Carolina](#)
- [Reno v. ACLU](#)
- [Counterman v. Colorado](#)
- [United States v. Cassidy](#)
- [Snyder v. Phelps](#)
- [Organization for a Better Austin v. Keefe](#)
- [McCullen v. Coakley](#)