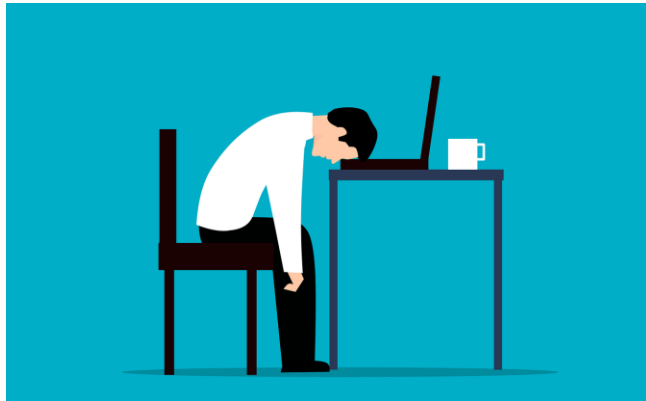


Harassment and Threats Against DSS Employees

Kristi Nickodem
Assistant Professor of Public Law and Government

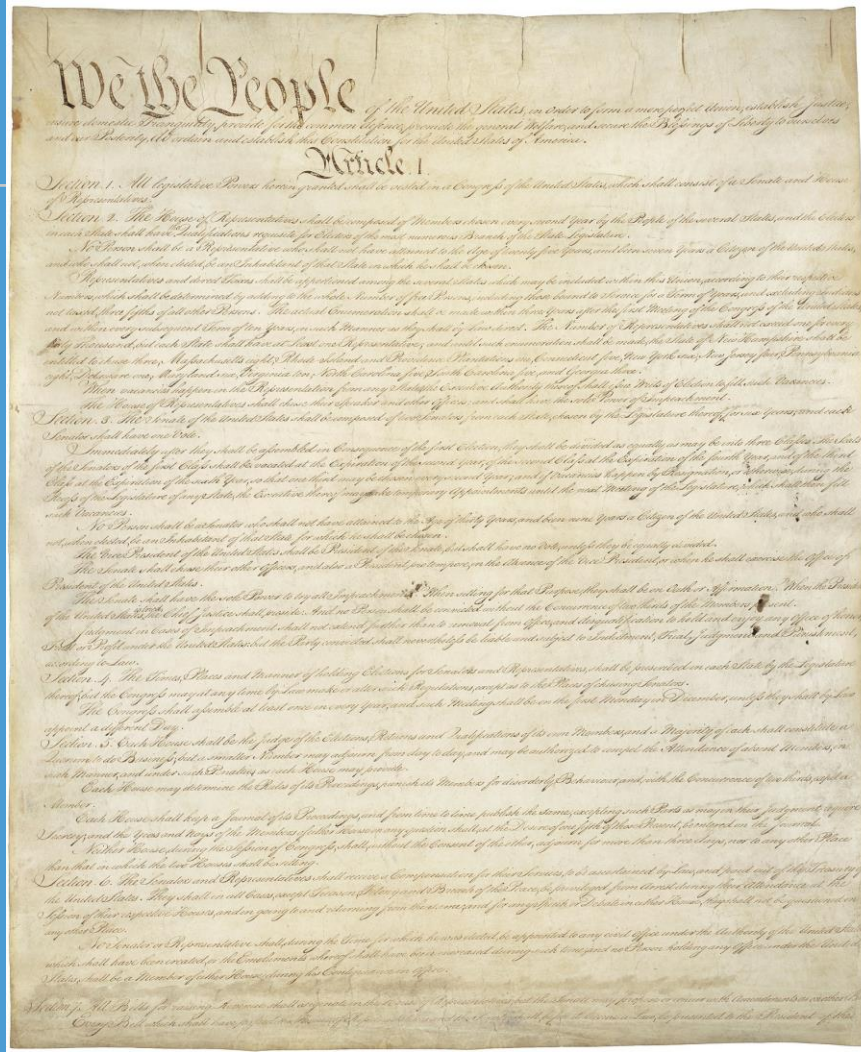
What's happening to government employees?



- **Disturbing emails and texts**
- **Stalking**
- **Threats of violence**
- **Defamation**
- **Attacks on social media**

The First Amendment

“Congress shall make no law...abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.”



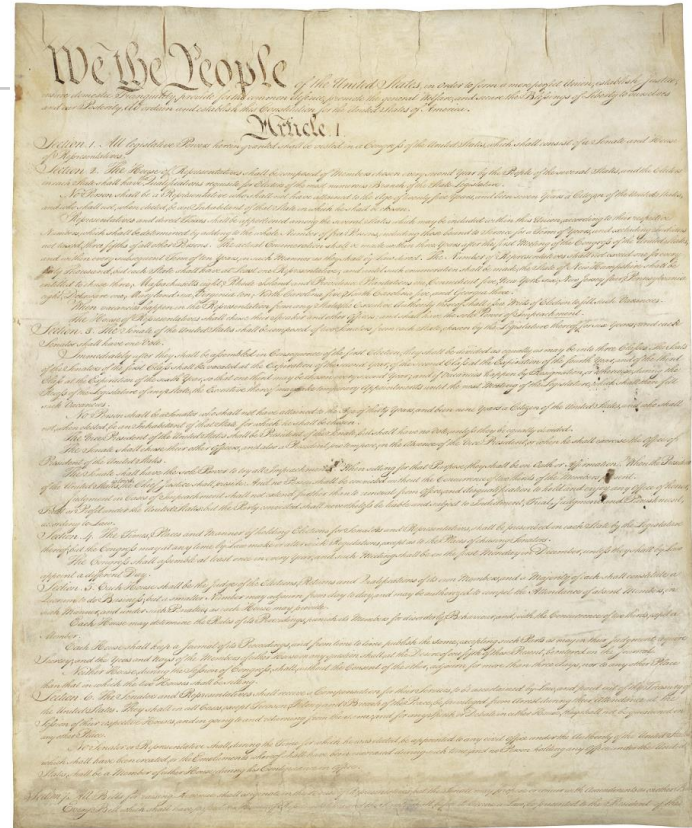
**Are First Amendment
rights unlimited?**

**Does the First
Amendment protect all
speech, anywhere, any
time?**

Type of Speech

The Supreme Court has ruled that some forms of speech have “low” First Amendment value and can be more heavily restricted or prohibited:

- Defamation (false speech)
- True threats
- Fighting words
- Obscenity
- Child pornography
- Commercial advertising



Imposing Limitations on Expressive Activity on Government Property

“The State, no less than a private owner of property, has power to preserve the property under its control for the use to which it is lawfully dedicated.”

Adderley v. Florida,
385 U.S. 39 (1966)

“[T]he First Amendment does not guarantee access to property simply because it is owned or controlled by the government.”

United States Postal Service v. Greenburgh Civic Associations,
453 U.S. 114 (1981)

“Nothing in the Constitution requires the Government freely to grant access to all who wish to exercise their right to free speech on every type of Government property without regard to the nature of the property or to the disruption that might be caused by the speaker's activities.”

Cornelius v. NAACP Legal Defense Educ. Fund, Inc.,
473 U.S. 788 (1985)



First Amendment Forum Analysis

- Restrictions on speech on government property.
- A “forum” can be an area of physical property or an intangible “space” (like a website or social media page).
- Different levels of judicial scrutiny apply to restrictions in each forum.

Framework for Free Speech Analysis on Government Property

1. Does the First Amendment protect the expressive activity at issue?
2. What is the nature of the “forum” where expressive activity is being regulated?
3. Does the regulation satisfy the standard of judicial review associated with that forum?

Traditional Public Forums

An area of public property traditionally open for public assembly, expression, protest, solicitation, and debate, or “which has immemorially been held in trust for the use of the public and, time out of mind, has been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions.”

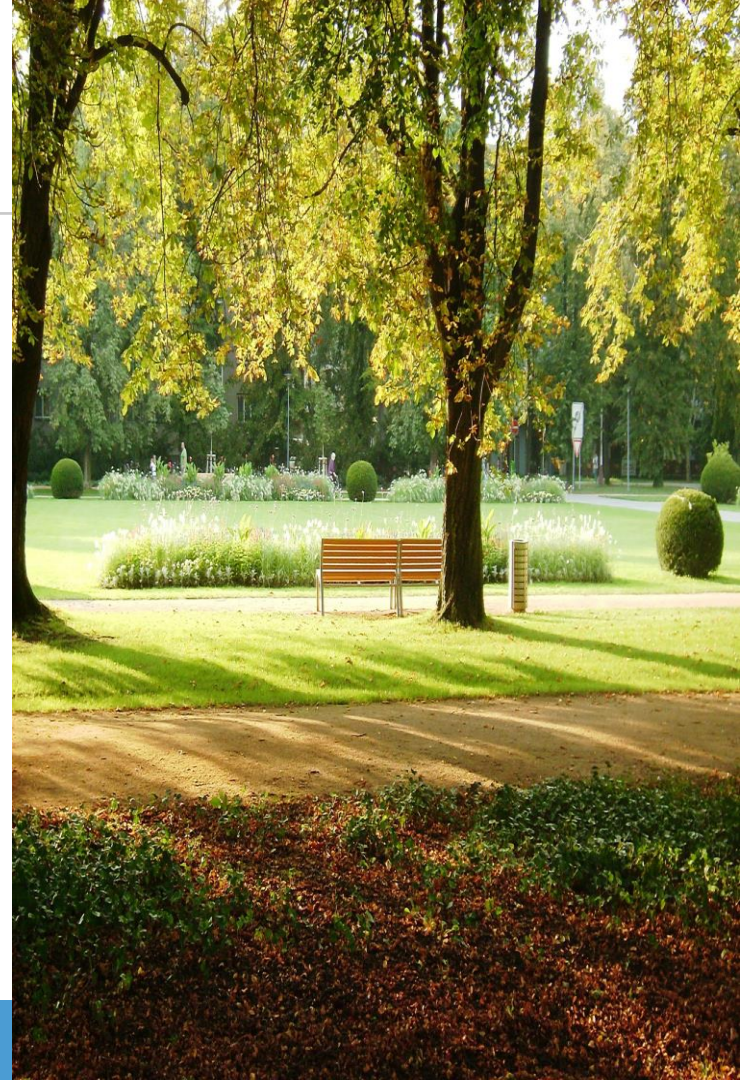
Perry Ed. Assn. v. Perry Local Educators’ Ass’n, 460 U.S. 37 (1983).

Examples: Streets, sidewalks, parks, public squares.

Content-based
restrictions are presumed
unconstitutional.



Time, place, and manner
restrictions are allowed if they
are (i) narrowly tailored to
further a substantial
government interest, and (ii)
leave ample channels of
communication available.



Nonpublic Forums

Public property that has not been traditionally used or designated for use as a forum for expressive activity.

Examples:

- Government employees' offices (usually)
- Lobbies of government buildings (depending on policy/practice)
- Courthouses
- Military bases

Restrictions must be:

- **Viewpoint neutral.** Cannot suppress expression merely because the government opposes the speaker's view.
- **Reasonable** in light of the purpose served by the forum.



Designated Public Forums

Areas the government has *intentionally* opened (“designated”) for expressive activity, even if the area was not traditionally used for such purposes.

- Opened to same (or similar) broad spectrum of expressive activity as a traditional public forum
- Examples:
 - University meeting facilities open for use by student groups
 - City-leased theatre designed for expressive activities
 - School auditorium used by community groups

Same standard of judicial review as a traditional public forum



Limited Public Forums

Subcategory of designated public forums that are either:

- Only open for use **only by certain groups** or
- Dedicated solely to the discussion of **certain subjects**.

Same standard of judicial review as a nonpublic forum

- Examples:
 - Public meetings, in many instances
 - Public hearings
 - Public libraries

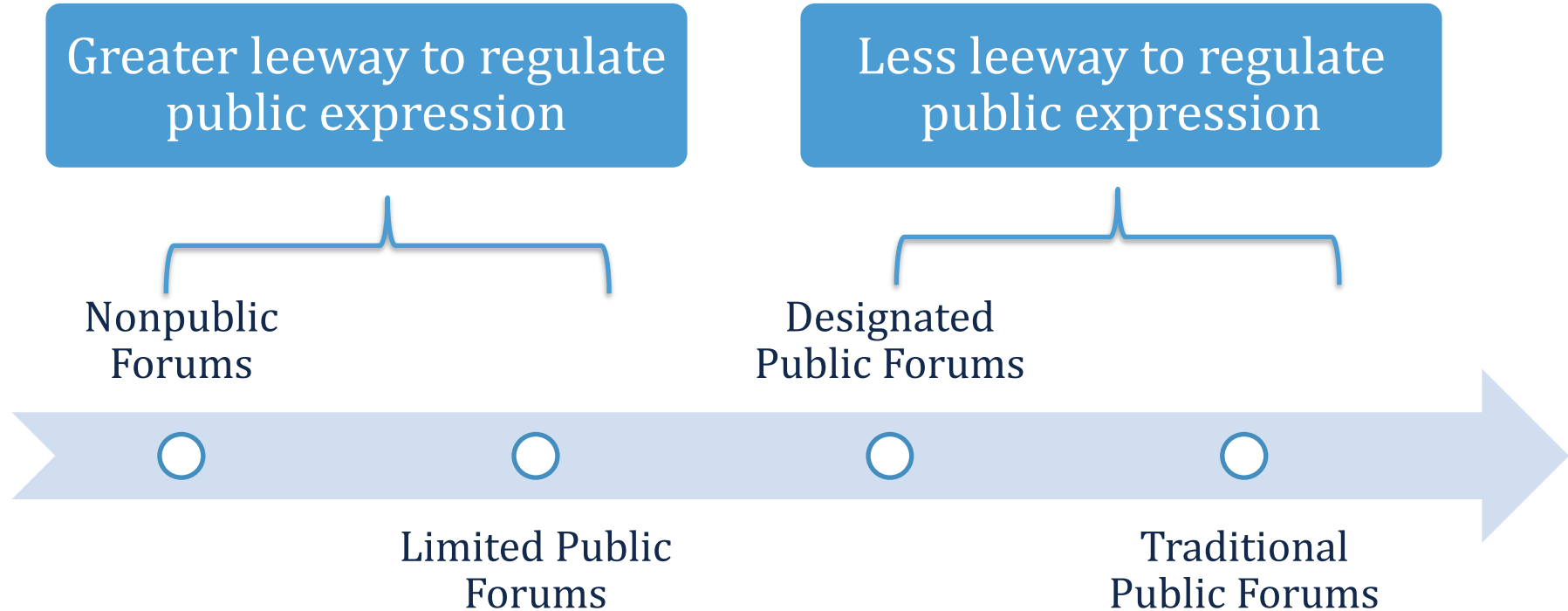


TYPE OF FORUM

TEST FOR EVALUATING RESTRICTIONS

Traditional Public Forum Designated Public Forum	<ul style="list-style-type: none">• Restrictions on the time, place, and manner of speech are permissible, so long as those regulations are:<ul style="list-style-type: none">• Content-neutral,• Narrowly tailored to serve a significant government interest, and• Leave open ample alternative channels of communication.• Content-based restrictions on First Amendment activities are subject to strict scrutiny. The government must show that the regulation is necessary to serve a compelling government interest, and narrowly tailored such that it is the least restrictive means of achieving that interest.• Viewpoint-based restrictions are prohibited.
Limited Public Forum Nonpublic Forum	<ul style="list-style-type: none">• Restrictions on First Amendment activity are permitted so long as they are:<ul style="list-style-type: none">• Viewpoint-neutral, and• Reasonable in light of the purpose served by the forum.• Viewpoint-based restrictions are prohibited.

Forum Analysis



How do we know what type of forum is at issue?

- Look to history and tradition
- Analyze the government's **intent** for the forum (policy, practice, nature of the property)



[This Photo](#) by Unknown Author is licensed under [CC BY-NC](#)

Examples of Analyzing Government Intent: Lobbies

- ***Claudio v. U.S.***, 836 F. Supp. 1219 (E.D.N.C. 1993), *aff'd*, 28 F.3d 1208 (4th Cir. 1994)
 - Main entrance lobby of a federal building was a nonpublic forum.
- ***United States v. Gilbert***, 920 F.2d 878 (11th Cir. 1991)
 - Interior of a federal government building was a nonpublic forum.
- ***Freedom Found. v. Washington Dep't of Ecology***, 426 F. Supp. 3d 793 (W.D. Wash. 2019), *aff'd*, 840 F. App'x 903 (9th Cir. 2020)
 - Department of Ecology lobby was a nonpublic forum.
- ***Fams. Achieving Indep. & Respect v. Nebraska Dep't of Soc. Servs.***, 111 F.3d 1408 (8th Cir. 1997)
 - Lobby of state-operated DSS was a nonpublic forum.

Email and Social Media



Blocking Emails

PROCEED WITH CAUTION.

A total block on a sender's emails impacts two rights that are protected under the First Amendment: **speech** and **petition**.



The right of **petition** protects an individual's right to bring complaints about public policy directly to officers of the government.



Blocking Emails

Free Speech Analysis

- Government email system: likely a **nonpublic forum**
- Restrictions on speech must be
 - (1) reasonable in light of the purpose of the forum, and
 - (2) viewpoint-neutral.
- Blocked solely for expressing a viewpoint that is critical of the government or critical of an employee/official = unconstitutional.
- Generally applicable restrictions on speech do not necessarily constitute viewpoint discrimination when the primary **purpose** of the restriction is to stop **disruptive** behavior.



Blocking Emails

Right of Petition Analysis

- Indefinite ban on contacting local government officials via email—or a ban that applies broadly to contacting *all* county or municipal employees—may be an overly broad restriction on the right to petition.
- Consider a more **narrowly tailored** way to address the issue without instituting a permanent block.
 - Could technological workarounds help prevent certain staff from having to view certain emails?
 - Could the ban be time-limited and only apply to a single employee or group of employees?
 - Are alternative methods of petition via email available (e.g. to a different employee or official)?



Spambots

- Is spam even protected speech?
- Flagging/blocking -- likely a reasonable, viewpoint-neutral restriction in a nonpublic forum.
- If no evidence of **intent** to suppress a particular message or **retaliate** against a particular speaker--likely does not constitute a First Amendment violation.

Blocking Users or Deleting Comments on Social Media

Threshold question:

Is it a “**personal**” page/account, or an “**official**” page/account?

Factors to consider:

- Was a government official using the social media page as “an important tool of governance,” as opposed to merely providing personal updates?
- Were official's title and public office contact information on the page?
- Is the page being used to communicate about official responsibilities or government business?
- Are any government employees or resources are being used to operate the account?



Be careful to delineate between personal and official!

Blocking Users or Deleting Comments on Social Media

Depends on where activity is occurring

- Posted on a private citizen's **own** page?
- Posted on a government employee or official's **personal** page or via a direct message to the official or employee's **personal** account?
- Posted to a government agency's page (or the "**official**" page of a government official)?



Blocking Users or Deleting Comments on Social Media

Davison v. Randall, 912 F.3d 666 (4th Cir. 2019):

- **Held that interactive portions of a government-operated social media page constitute a public forum for First Amendment purposes.**
- This includes any area of the page in which the public can post comments, reply to posts, and “like” comments and posts.
- Local governments cannot selectively block users or delete comments on the page based on **viewpoint**.
- County could consider imposing reasonable, viewpoint-neutral, generally applicable policies about the type of comments that are allowed on its social media page(s).



First Amendment Audits

What are First Amendment “audits”?

- Nationwide social media/internet-based movement
- Individuals asserting a First Amendment right to enter and remain on government-owned property and to film public officials and employees.



Is there a right to film?

The First, Third, Fifth, Seventh, Ninth, Tenth, and Eleventh Circuit have all recognized a First Amendment “right to record” public officials carrying out their duties in public places, *at least in the context of police activity in traditional public forums.*

*Sharpe v. Winterville Police
Department*

(4th Cir. Feb. 7, 2023)

Right to livestream police during a
traffic stop

Is there a right to film?

Open questions:

- Filming other government employees (not police)?
- Filming in other types of forums?
- Rights of third parties who happen to be filmed in the process?
- Filming on government property where safety or privacy of third parties is at issue?



Filming in Government Buildings?

Publicly Accessible ≠ Public Forum for First Amendment Purposes

- “Publicly owned or operated property does not become a ‘public forum’ simply because members of the public are permitted to come and go at will.”
- “There is little doubt that in some circumstances the Government may ban the entry on to public property that is not a ‘public forum’ of all persons except those who have legitimate business on the premises.”

United States v. Grace, 461 U.S. 171 (1983)

Key Points

- Filming public officials engaging in public duties on public property is likely protected activity under the First Amendment
 - **BUT** existing law largely focuses on police in traditional public forums
- The government can impose **reasonable, viewpoint-neutral** restrictions on First Amendment activity in limited public forums and nonpublic forums.
- Compliance with confidentiality laws may require a county to take reasonable measures to prohibit filming in a department of social services or local health department.
- Policy, practice, and signage are all important.
- Train employees on responding to auditors.

Responding to First Amendment “Audits” in the Local Government Context



LOCAL GOVERNMENT LAW BULLETIN

NO. 141 | NOVEMBER 2022

Responding to First Amendment “Audits” in the Local Government Context

Kristi A. Nickodem and Kristina Wilson

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Trespass



WARNING

NO

TRESPASSING

Second-Degree Trespass

- Individual enters or remains on the premises of another without authorization and after being asked to leave by a person in charge of the premises, a lawful occupant, or another authorized person.

Trespass in a Building Open to the Public?

Myth:

Government buildings cannot be the premises “of another” since they open to the public and in some sense belong to the public.

Reality:

Government buildings belong to the *government*, but if held open to the public, the law implies the government’s consent for the public to enter.

Implied Consent Can Be Revoked

Explicit Revocation:

State v. Nickens, 262 N.C. App. 353 (2018).

- Defendant began to shout and swear at DMV employees in DMV lobby.
- A DMV License and Theft Bureau inspector instructed the defendant to leave and attempted to escort her off the property.
- Order for the defendant to leave explicitly revoked any implied consent because the DMV inspector was a lawful occupant and an “authorized person” for purposes of the second-degree trespass statute.

Implied Consent Can Be Revoked

Implicit Revocation:

1. Individual's **conduct** is sufficient to render the implied consent void
 - Substantially disrupting normal operations after being asked to desist or leave
 - Engaging in unlawful conduct
2. Individual **exceeds the scope** of the implied consent
 - Entering areas marked as “private,” “restricted,” “employees only,” etc.
 - Does public generally have access to an area without appointment or invitation?

Civil No-Contact Orders



No-Contact Orders: Workplace Violence Prevention vs. 50C Order

- Civil action in district court
- Court can enter a **temporary** order (not exceeding 10 days) or a “**permanent**” order (no longer than **one year** but can be renewed for good cause).
- Both types of orders can include restrictions on the respondent’s ability to contact the victim.
- No showing of physical injury is required to obtain either type of order.
- **Big difference: who can obtain the order.**

Workplace Violence Prevention No-Contact Orders – Chapter 95, Article 23

An **employer** may file a civil action in district court seeking a no-contact order **on behalf of an employee** who has suffered “unlawful conduct” from any individual that can reasonably be construed to be carried out, or to have been carried out, at the employee's workplace.

“Unlawful conduct” includes:

- attempting to cause bodily injury or intentionally causing bodily injury,
- willfully, and on more than one occasion, following, being in the presence of, or otherwise harassing the employee without legal purpose and **with the intent to place the employee in reasonable fear for the employee's safety**, or
- willfully threatening to physically injure the employee in a manner and under circumstances **that would cause a reasonable person to believe that the threat is likely to be carried out and that actually causes the employee to believe that the threat will be carried out.**

Workplace Violence Prevention No-Contact Orders

- Must **consult with the employee** before seeking the order to determine whether there are any safety concerns related to the employee's participation in the process.
- **Cannot retaliate** if employee refuses to participate.
- **Court may grant one or more of the following forms of relief:**
 1. Order the respondent not to visit, assault, molest, or otherwise interfere with the employer or the employer's employee at the employer's workplace, or otherwise interfere with the employer's operations.
 2. Order the respondent to cease stalking the employer's employee at the employer's workplace.
 3. Order the respondent to cease harassment of the employer or the employer's employee at the employer's workplace.
 4. Order the respondent not to abuse or injure the employer, including the employer's property, or the employer's employee at the employer's workplace.
 5. Order the respondent not to contact by telephone, written communication, or electronic means the employer or the employer's employee at the employer's workplace.
 6. Order other relief deemed necessary and appropriate by the court.

50C Civil No-Contact Orders

A person may seek a 50C civil no-contact order in district court based on allegations of stalking or nonconsensual sexual contact.


Stalking

On more than one occasion, **following** or otherwise **harassing** another person without legal purpose with the intent to do any of the following:

- Place the person in reasonable fear either for the person's safety or the safety of the person's immediate family or close personal associates.
- Cause that person to suffer substantial emotional distress by placing that person in fear of death, bodily injury, or continued harassment and that in fact causes that person substantial emotional distress.

Harassment (G.S. 14-277.3A(b)(2))

Knowing conduct, including written or printed communication or transmission, telephone, cellular, or other wireless telephonic communication, facsimile transmission, pager messages or transmissions, answering machine or voice mail messages or transmissions, and electronic mail messages or other computerized or electronic transmissions directed at a specific person that **torments, terrorizes, or terrifies** that person and that serves no legitimate purpose.



50C Civil No-Contact Orders

The court may grant one or more of the following forms of relief:

- Order the respondent not to visit, assault, molest, or otherwise interfere with the victim.
- Order the respondent to cease stalking the victim, including at the victim's workplace.
- Order the respondent to cease harassment of the victim.
- Order the respondent not to abuse or injure the victim.
- Order the respondent not to contact the victim by telephone, written communication, or electronic means.
- Order the respondent to refrain from entering or remaining present at the victim's residence, school, place of employment, or other specified places at times when the victim is present.
- Order other relief deemed necessary and appropriate by the court.

See G.S. Chapter 50C.



Potential Criminal Charges

North Carolina Laws that Criminalize Certain Threats and Harassment

- **Communicating threats.** G.S. 14-277.1 – Person willfully threatens to physically injure another person or that person’s child, sibling, spouse, or dependent or willfully threatens to damage another’s property, and the person communicates that threat in a manner that would make a reasonable person believe it is likely to be carried out and the threat is believed by the other person.
- **Harassing phone calls.** G.S. 14-196 – Includes harassing telephone calls, using threatening language on the telephone, or repeated telephone calls to harass.
- **Cyberstalking.** G.S. 14-196.3 – Includes using e-mail or other electronic communication to threaten bodily harm or physical injury, or repeated use of e-mail/other electronic communication to harass.
 - Exception for “peaceable, nonviolent, or nonthreatening activity intended to express political views or to provide lawful information to others.”
 - May not be construed “to impair any constitutionally protected activity, including speech, protest, or assembly.”
- **Stalking.** G.S. 14-277.3A – Generally requires willful harassment or other “course of conduct directed at a specific person without legal purpose” that the defendant knows or should know will cause the person to fear for their own safety or that of their family or close personal associates, or cause the person to suffer substantial emotional distress due to fear of death, bodily injury, or continued harassment.

Witness Intimidation

- **G.S. 14-226. Intimidating or interfering with witnesses.**
 - Applies to threats, menaces, or any other manner of intimidation towards a person who is summoned or acting as a witness in state court.
 - Applies to any attempt to prevent or deter a person from acting as a witness in court.
 - Class G Felony

NC Criminal Law Blog Post:

<https://nccriminallaw.sog.unc.edu/witness-intimidation/>

We the People

of the United States, in order to form a more perfect Union, establish Justice, insure domestic Tranquillity, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.

Article I.

Section 1. All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

Section 2. The House of Representatives shall be composed of Members chosen every second Year by the People of the several States, and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature.

No Person shall be a Representative who shall not have attained to the Age of twenty five Years, and seven Years a Citizen of the United States, and who, when elected, shall not be an Inhabitant of that State in which he shall be chosen.

Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and including Indians not taxed, three fifths of all other Persons. The actual Enumeration shall be made within three Years after the first Meeting of the Congress of the United States, and within every subsequent Term of ten Years, in such Manner as they shall direct. The Number of Representatives shall not exceed one for every thirty thousand, but each State shall have at least one Representative, and until such Enumeration shall be made, the State of New Hampshire shall be entitled to three Representatives, Massachusetts eight, Rhode Island and Providence Plantations one, Connecticut five, New York five, Pennsylvania eight, Delaware one, Maryland one, Virginia ten, North Carolina five, South Carolina five, and Georgia three.

When increased Apportionment in the Representatives, having no Electors, is made, the Electors shall be added to the whole Number of Electors.

The House of Representatives shall choose their Speaker and other Officers, and shall have the sole Power of Impeachment.

Section 3. The Senate of the United States shall be composed of two Senators from each State, chosen by the Legislature thereof, for six Years, and each Senator shall have one Vote.

Immediately after they shall be assembled in Congress, on the first Election, they shall be divided as equally as may be into three Classes. The Seats of the Senators of the first Class shall be vacated at the Expiration of their first Term, of the second Class at the Expiration of the second Term, and of the third Class at the Expiration of the third Term, so that one third may be chosen every second Year; and if Vacancies happen by Resignation, or otherwise, during the Course of any Term, the State of which they were Representatives, or Senators, shall fill such Vacancies.

No Person shall be a Senator who shall not have attained to the Age of thirty Years, and seven Years a Citizen of the United States, and who shall, when elected, be an Inhabitant of that State in which he shall be chosen.

The Vice President of the United States shall be President of the Senate, but shall have no Vote, unless he is equally elected.

The Senate shall have the Power to try all Impeachments, and when the President is tried, the Chief Justice shall preside. The Senate shall have the sole Power to confirm or reject all Appointments, and to impeach and convict Judges of the United States.

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Judgment in Cases of Impeachment shall not extend further than to removal from Office, and disqualification to hold and enjoy any Office of Honor, Trust, or Profit under the United States; but the Party convicted shall nevertheless be liable and subject to Indictment, Trial, Judgment, and Punishment, according to Law.

Section 4. The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of choosing Senators.

The Congress shall assemble at least once in every Year, and such Meeting shall be on the first Monday in December, unless they shall by Law appoint a different Day.

Section 5. Each House shall be the Judge of the Elections, Returns and Qualifications of its own Members, and the Privilege of Speech shall not be questioned in any House.

Section 6. Each House shall be the Judge of the Elections, Returns and Qualifications of its own Members, and the Privilege of Speech shall not be questioned in any House.

Each House may determine the Rules of its Proceedings, punish its Members for disorderly Behaviour, and, with the Concurrence of two thirds, expel a Member.

Each House shall keep a Journal of its Proceedings, and from time to time publish the same, excepting such Parts as may in their Judgment require Secrecy; and the Yeas and Nays of the Members of either House on any Question shall, at the Request of one fifth of the Members, be recorded on the Journal.

Neither House, during the Session of Congress, shall, without the Consent of the other, adjourn for more than three days, nor to any other Place than that in which the two Houses shall be sitting.

Section 7. The Senate and House of Representatives shall receive a Compensation for their Services, to be ascertained by Law, and paid out of the Treasury of the United States. They shall in all Cases, except Impeachments, have the Privilege of Speech, and shall not be questioned in any House.

Section 8. No Member of either House shall, during the Session, be appointed to any civil Office under the United States, which shall have been created, or the Emolument whereof shall have been increased during such Session, nor shall he hold any Office under the United States.

Section 9. All Bills for raising Revenue shall originate in the House of Representatives; but the Senate may propose or concur with Amendments as to the Matter of such Bills.

Section 10. No Title of Nobility shall be granted by the United States; and no Person holding any Office under the United States shall accept of any Title of Nobility from any Foreign State.

Section 11. The President may grant Reprieves and Pardons for all Crimes and Misdemeanors except Impeachments.

First Amendment Implications

- Courts will evaluate some of these criminal laws differently when applied to **pure speech**.
- State v. Shackelford, 264 N.C. App. 542 (2019):**
 - N.C. Court of Appeals determined that North Carolina's stalking statute was unconstitutional as applied to the defendant's repeated posts on social media about a woman with whom he fantasized having a romantic relationship.
- Speech vs. conduct (e.g. following, monitoring, surveilling, or threatening a person)
- Speech directed at individual (one-to-one) as opposed to speech about individual

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[illegible]

Section 3. The Senate of the United States shall be composed of two Senators from each State, chosen by the Legislature thereof, for six years; and each Senator shall have one vote.

Immediately after they shall be assembled in consequence of the first election, they shall be divided as equally as may be into three classes, the first of the members of the first class, shall be elected at the expiration of the same year, the second class at the expiration of the fourth year, and the third class at the expiration of the sixth year, and that any of them may be chosen more than once, and that such a portion of the representatives, as may be chosen during the term of the first expiration of any class, the Governor may, at his discretion, if he thinks proper, and the said members of the Legislature, and the said members of the Legislature, shall be sworn to the Constitution of the State.

No Person shall be admitted who shall not have attained to the Age of thirty years, and been nine years a Citizen of the United States, and who shall not have resided in an habitation of that State for which he shall be chosen.

The Vice President of the United States, shall be President of the Senate, which he shall have no vote, unless they be equally divided.
He shall, with the Senate, have power to grant Reprieves and Pardons, and also a Power to suspend in the absence of the Vice President, or when he shall deem it proper

The Church & had chosen their own officers, and were in possession of the same.

The Senate shall have the sole Power to try all Cases of Impeachment. And no Person shall be convicted without the Concurrence of two thirds of the Members present.

Judgment in cases of Disparagement shall not extend further than is removed from the said disparaging person or persons
 But in Negatives the said Disparagement shall nevertheless be made and subject to such Award, Trial, Judgment and Disposition

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Each House may determine the Rules of its Proceedings, punish its Members for disorderly Behaviour, and, with the Concurrence of two thirds, expel a

First Amendment Implications

True threats of violence do not receive First Amendment protection.

State v. Taylor, 379 N.C. 589 (2021)

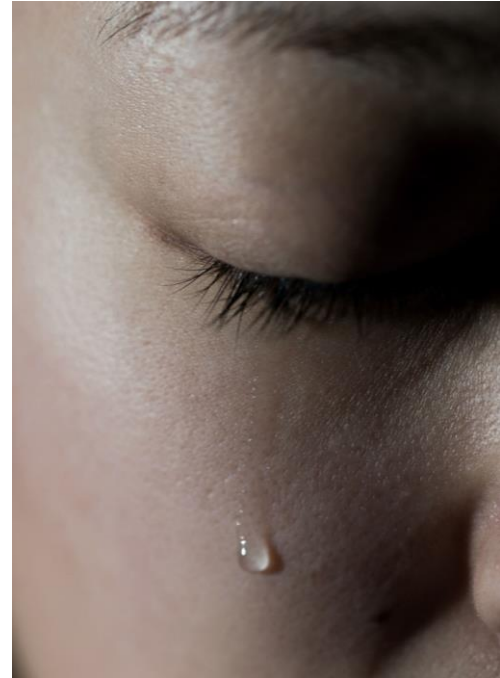
- North Carolina Supreme Court considered a defendant's First Amendment challenge to his conviction for threatening to kill a court officer.
- Defendant posted disturbing comments on Facebook about the local district attorney after she declined to institute a criminal prosecution following the death of a child.
- The Court defined a true threat as “an **objectively threatening** statement communicated by a party which possesses the **subjective intent to threaten** a listener or identifiable group.”

Potential Civil Claims

Intentional Infliction of Emotional Distress (IIED)

- Plaintiff must allege:
 - (1) **extreme and outrageous conduct**
 - (2) which is intended to cause and does cause
 - (3) **severe emotional distress** to another.

Norton v. Scotland Mem'l Hosp., Inc., 250 N.C. App. 392, 397 (2016).
- Conduct that is “so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community.”



Defamation

Must prove three elements:

Defendant made false, defamatory statements of or concerning the plaintiff.

The false, defamatory statements about the plaintiff were published to a third person.

The publication of the false, defamatory statements caused injury to the plaintiff's reputation.

Libel Per Se

- A **written** publication which, when considered alone without explanatory circumstances:
 - (1) charges that a person has committed an infamous crime;
 - (2) charges a person with having an infectious disease;
 - (3) tends to impeach a person in that person's trade or profession; or
 - (4) otherwise tends to subject one to ridicule, contempt or disgrace.





Slander Per Se

- An **oral** communication to a third person which amounts to
- (1) an accusation that the plaintiff committed a crime involving moral turpitude;
- (2) an allegation that impeaches the plaintiff in his trade, business, or profession; or
- (3) a claim that the plaintiff has a “loathsome disease.”

“Actual Malice” Standard for Defamation

Public Official



**Higher Burden of
Proof**

Must prove statement was made:

- (1) With knowledge that it was false, **or**
- (2) With reckless disregard of whether it was false or not.

Applies to government employees who have, or appear to the public to have, substantial responsibility for or control over the conduct of governmental affairs

Practical Tips

Practical Tips

- Policies and signage
- Train employees on “frontline” response
- Document contemporaneously
- Encourage open communication from employees
- Involve law enforcement when needed
- Others?

Duty to Protect Employees: *Workplace Safety*

Duty to Provide a Safe Workplace

- An employer has a **duty** to provide a safe working environment under the federal Occupational Safety and Health Act.
- Applies to employers through federal OSHA or through an OSHA-approved state program.
- **General Duty Clause:**
 - N.C.G.S. 95-129: “Each employer shall furnish to each of his employees conditions of employment and a place of employment free from recognized hazards that are causing or are likely to cause death or serious injury or serious physical harm to his employees.”

General Duty Clause

Secretary of Labor v. Integra Health Management, Inc. (2019)

Employee fatality due to **third-party** violence

- OSHA issued “serious” citation on the basis of a General Duty Clause violation---employees were exposed to the hazard of being physically assaulted by clients with a history of violent behavior.
- **ALJ and OSHRC upheld the citation.**

Abatement measures

- Creating a written workplace violence prevention program;
- Putting procedures in place to communicate any incidence of workplace violence to all employees who could potentially be exposed;
- Providing additional training on how employees can respond to a workplace violence incident;
- Providing employees with a reliable way to summon assistance when needed; and
- Establishing liaisons with local law enforcement agencies.

Duty to Protect Employees: *Workplace Harassment*



Title VII of the Civil Rights Act of 1964

Prohibits
discrimination
and
harassment on
the basis of:

- Race
- Color
- National origin
- Sex (including pregnancy, sexual orientation, and gender identity), and
- Religion.

Includes sexual harassment

Third-Party Harassment

An employer is liable under Title VII for the actions of **third parties** creating a hostile work environment if the employer:

- **knew or should have known of the harassment**, and
- **failed to take prompt remedial action** reasonably calculated to end the harassment.

Freeman v. Dal-Tile Corp., 750 F.3d 413 (4th Cir. 2014)



“An employer may not avoid Title VII liability for third-party harassment by adopting a ‘see no evil, hear no evil’ strategy.”

Third-Party Harassment

An employer can avoid liability by proving:

- 1) it **reasonably** tried to prevent and promptly correct the harassing behavior; and
- 2) the employee **unreasonably** failed to take advantage of any preventive or corrective opportunities provided by the employer.

Complying with the First Amendment while protecting employees



- Is this speech actually protected?
- In what forum is the speech happening?
- Is this mere criticism, or is safety at risk?
- Is there a narrowly tailored way to prevent the harassment at issue?
- Is this pure speech or does it involve conduct?
- Are civil remedies available (and if so, worth pursuing)?
- Are criminal charges possible (and if so, worth pursuing)?

Questions?