USING STATE CONSTITUTIONS TO FIND AND ENFORCE CIVIL LIBERTIES

by
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In many circumstances, a litigant challenging action by a state (or by a local subdivision of the state) can succeed by invoking the state's constitution, even where a federal constitutional challenge would fail. That is so because the Federal Constitution establishes a minimum quantum of rights that state governments must confer on their citizens, but the state's citizens can choose, in their state constitution, to give themselves more rights than this minimum. In some states, however, the citizens and their courts have chosen to adopt the federal guaranteed minimum, mostly as a matter of convenience and efficiency. Other states rely on federal rights by default and invoke the state constitution only if it amplifies the Federal Bill of Rights. Still other states have adopted a list of factors to consider in deciding whether to apply an independent interpretation of the state constitution. Oregon, however, always begins a rights-based challenge to state action with the state constitution, under the theory that, until the state's law, fully implemented—including its constitutional law—can be said to have deprived a citizen of one of the rights in the Federal Constitution made applicable to the states by incorporation into the Fourteenth Amendment, the state has not violated that amendment and there simply is no federal issue.

Oregon free speech law provides a good example of a state's independent, state-constitution-based interpretation of a right that is in both the State and Federal Constitution. Laws or state actions that implicate expression, allegedly contrary to Oregon's free speech guarantee (article I, section 8 of the Oregon Constitution), are divided into three categories. Laws that focus on, and expressly prohibit or inhibit, expression per se—that is, laws that impose a sanction for expression regardless of whether the expression causes harm—are per se unconstitutional unless they fall within an exception to the free speech guarantees that was well settled at the time the constitution was adopted, such as perjury or solicitation. Laws that focus on harm, even harm that

[*] Judge, Oregon Court of Appeals. This Essay is an edited version of remarks made at Lewis and Clark Law School, Portland, Oregon, on October 29, 2010, at the ACLU Northwest Civil Liberties Conference. The remarks were my contribution to a panel discussion and were intended to present a general introduction to state constitutional civil liberties for an audience consisting of interested members of the public, law students, and lawyers, almost none of whom were familiar with (much less specialists in) the subject. I make no claim that this Essay contains original research or insights. Further, any insights, opinions, or conclusions are my own and should not be attributed to the Court of Appeals or any of my colleagues on that court.

results from expression, are presumptively constitutional, unless they sweep so broadly as to encompass clearly privileged expression and cannot be judicially narrowed. Examples include laws that punish credible and imminent threats of unprivileged physical violence. Finally, laws that do not mention speech, but that, in a particular situation, are enforced so as to inhibit or punish speech (for example, enforcing a trespass law on public property so as to prohibit otherwise lawful picketing) can be challenged only on an as-applied basis, and are invalidly enforced only when the objective of the enforcement is to stifle speech and not to prevent some regulable harm.

I. INTRODUCTION

Imagine that you are an attorney representing the proprietor of a so-called "adult entertainment" establishment in some Oregon city. Your client's establishment features, to put it bluntly, live sex shows. After local police authorities witness one of these shows, they arrest your client for violating an Oregon statute providing that "[i]t is unlawful for any person to knowingly . . . present a live public show in which the participants engage in . . . sexual conduct."[1] At trial, you argue that the police have violated your client's rights under the First Amendment to the United States Constitution. You will lose; the United States Supreme Court has held that publicly performed sexual activity is not within the universe of constitutionally protected expression.[2]

That is the bad news for your client. The good news is that he will undoubtedly prevail in a post-conviction proceeding alleging inadequate assistance of counsel, and thereafter he might even prevail in a malpractice action against you. That is because, if you had argued that the police violated your client's rights under article I, section 8 of the Oregon Constitution,[3] you would have won; the Oregon Supreme Court, in *State v. Ciancanelli*, has held that live sex shows *are* a form of constitutionally protected expression.[4]

[1] OR. REV. STAT. § 167.062(3) (2009).

[2] Arcara v. Cloud Books, Inc., 478 U.S. 697, 705 (1986).

[3] OR. CONST. art. I, § 8 ("No law shall be passed restraining the free expression of opinion, or restricting the right to speak, write, or print freely on any subject whatever; but every person shall be responsible for the abuse of this right.").

[4] 121 P.3d 613, 636 (Or. 2005).

How is that possible? Doesn't the Supremacy Clause of the United States Constitution tell us that "[t]his Constitution . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding"?[5] In this Essay, I will explain how a guarantee of rights in the Oregon Constitution can trump the analogous guarantee in the United States Constitution, and how Oregon courts justify always treating the state constitutional claim before the federal one. By way of example, I will then sketch the contours of the free speech guarantee of the Oregon Constitution as it has been construed by the Oregon Supreme Court.

II. SUPREMACY, SHMUPREMACY; OR, OF FLOORS AND CEILINGS

Perhaps the best way to illustrate the relationship between analogous state and federal constitutional rights is spatial. For that purpose, the right to be free in one's person and property from unreasonable physical intrusion—"privacy" in its basic sense—provides the best example.

Imagine a parcel of property, in the middle of which stands a home. Surrounding the home is a cultivated and well-maintained lawn, a shed for gardening tools, and a garage. Surrounding the cultivated lawn and outbuildings is an area of uncultivated and unoccupied timberland. The boundary between this entire parcel of property and the surrounding public land is marked by a low fence and "Private Property—No Trespassing" signs. Now imagine that a local police officer, with neither a search warrant nor any suspicion whatsoever that the landowner possesses or has done anything unlawful, steps over the fence and stumbles upon an unoccupied car on a dirt road. The car is in the timber; it is outside of the lawn area containing the house and outbuildings (the "curtilage"), but inside of the area marked "No Trespassing."

The Fourth Amendment to the United States Constitution[6] has been construed by the United States Supreme Court to mean that people have a constitutionally protected privacy interest in their homes and curtilage, but not in the land outside of this cultivated area.[7] The Fourth Amendment, in other words erects an imaginary but impenetrable barrier at the boundary between the curtilage and the rest of the world, and everything within that barrier is an area of individual freedom from unwanted scrutiny, protected against government intrusion, while everything outside of it is fair game—even land that is conspicuously

[5] U.S. CONST. art. VI.

[6] U.S. CONST. amend. IV ("The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause . . . .").

[7] Hester v. United States, 265 U.S. 57, 59 (1924); Oliver v. United States, 466 U.S. 170, 183 & n.14, 184 (1984).

posted with "No Trespassing" signs. Under the Fourth Amendment, then, the police can look inside the car, open its trunk, and look inside the glove compartment without having violated the property owner's constitutional right to be free from unreasonable search.

The Oregon Supreme Court, on the other hand—invoking local custom, geography, and topography—has construed article I, section 9 of the Oregon Constitution[8] to mean that the people of the state have a constitutionally protected right to freedom from unwanted scrutiny in their homes, their curtilage, *and* their uncultivated, fenced, and posted property.[9] As a result, the Oregon Constitution erects another imaginary, impenetrable barrier protecting the territory within it from state government intrusion, and that territory is larger than the territory protected by the Fourth Amendment barrier. The Fourth Amendment, in other words, tells the states[10] that they have to provide their citizens with *at least* a certain quantum of protection; to mix metaphors, it establishes a floor beneath which the state cannot fall, but does not establish a ceiling. The states remain free to provide their citizens with more protection than the minimum guaranteed by the Federal Constitution. Thus, the local police officers in my hypothetical situation must leave the automobile unsearched. More to the point, if they do search it, then under the exclusionary rule,[11] anything that they discover within it cannot be used in a criminal prosecution against the car's owner.

As with the Fourth Amendment, so with the First (and the others as well). The First Amendment creates a "space" within which individuals are free to speak and write what they please, immune from government restraint. Article I, section 8 of the Oregon Constitution creates a larger "space." The live sex show impresario in Oregon is outside of the First Amendment protective bubble, but within the larger one created by article I, section 8.[12]

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[8] OR. CONST. art. I, § 9 ("No law shall violate the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable search, or seizure; and no warrant shall issue but upon probable cause . . . .").

[9] State v. Dixson, 766 P.2d 1015, 1024 (Or. 1988).

[10] The Fourth Amendment is incorporated into the Fourteenth Amendment and is thereby applicable against the states. Wolf v. Colorado, 338 U.S. 25, 27–28 (1949).

[11] Mapp v. Ohio, 367 U.S. 643, 657 (1961).

[12] A state constitution, of course, cannot restrain a federal governmental agent acting under the authority of federal law. A further complication arises when the state constitution is construed to provide *less* protection than a federal analog, as happened when state courts modeled their confrontation clause jurisprudence on the United States Supreme Court's, as explained in *Ohio v. Roberts*, 448 U.S. 56 (1980), only to have the Supreme Court provide a more rights-generous interpretation in *Crawford v. Washington*, 541 U.S. 36 (2004). That left such states falling below the floor, in which case defendants in state court had to rely on federal law.

III. FIRST THINGS FIRST

To say that a state remains free to interpret its constitution so as to confer on the state's citizens more rights than the minimum guaranteed by the United States Constitution is not to say that all states do so. Some states have decided categorically to interpret state constitutional provisions in "lockstep" with analogous federal provisions.[13] Others, such as Washington, have developed a list of factors to be considered in deciding whether to vary from federal interpretations.[14] Still others use what has been described as an "interstitial model," under which state courts rely on the federal doctrine by default and invoke the state constitution only if it "offers a means of supplementing or amplifying federal rights."[15]

This symposium is in Oregon, however, and as the state's public relations sloganeers like to say, "Things are different here." As Justice Hans Linde explained in *Sterling v. Cupp*,

> The proper sequence is to analyze the state's law, including its constitutional law, before reaching a federal constitutional claim. This is required, not for the sake either of parochialism or of style, but because the state does not deny any right claimed under the federal Constitution when the claim before the court in fact is fully met by state law.[16]

In other words: individual claims grounded in the Bill of Rights do not apply against the states by their own force.[17] The First Amendment, for example, directs that "*Congress* shall make no law . . . ."[18] The Fourteenth Amendment, however, states that "[n]o *State* shall . . . deprive any person of life, liberty, or property, without due process of law . . . ."[19] In a series of cases beginning with *Palko v. Connecticut*, the U.S. Supreme Court held that the "liberty" that states could not deprive people of included various liberties guaranteed to all persons in the Bill of Rights—or, to use the term of art, most amendments in the Bill of Rights were "incorporated" into the Fourteenth Amendment.[20]

That being the case, no violation of the Federal Constitution occurs, according to the Oregon courts, until the state, through its laws—*all* of its laws, including its constitutional law—has denied to a person the right to,

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[13] Robert F. Williams, *State Courts Adopting Federal Constitutional Doctrine: Case-by-Case Adoptionism or Prospective Lockstepping?*, 46 WM. & MARY L. REV. 1499, 1519 (2005).

[14] State v. Gunwall, 720 P.2d 808, 811 (Wash. 1986).

[15] Robert F. Utter, *Swimming in the Jaws of the Crocodile: State Court Comment on Federal Constitutional Issues when Disposing of Cases on State Constitutional Grounds*, 63 TEX. L. REV. 1025, 1028 (1985).

[16] Sterling v. Cupp, 625 P.2d 123, 126 (Or. 1981).

[17] Barron v. Mayor of Baltimore, 32 U.S. (7 Pet.) 243, 247–51 (1833).

[18] U.S. CONST. amend. I (emphasis added).

[19] U.S. CONST. amend. XIV (emphasis added).

[20] Palko v. Connecticut, 302 U.S. 319, 324–26 (1937).

for example, free speech. We simply do not know if there has been a violation of the First Amendment until we know that Oregon law, including Oregon Constitutional law, fully vindicated in state court, has, in fact, denied anything to anybody.[21]

IV. OREGON FREE EXPRESSION LAW: SPEECH *PER SE*, SPEECH-CAUSED HARM, HARM *PER SE*

Oregon's law of free speech provides a good example of a state's development of constitutional doctrine independently of federal law. Article I, section 8 of the Oregon Constitution provides, "No law shall be passed restraining the free expression of opinion, or restricting the right to speak, write, or print freely on any subject whatever; but every person shall be responsible for the abuse of this right."[22] Note at the outset that there are significant textual differences between this guarantee and the free speech guarantee in the First Amendment ("Congress shall make no law . . . abridging the freedom of speech, or of the press . . . ."). [23] On the one hand, Oregon's guarantee appears to be more speech-protective than federal law: it protects expression "on any subject whatever." That phrase discourages Oregon courts from excluding entire categories of speech such as "fighting words"[24] or pornography[25] from constitutional protection, as the United States Supreme Court has done.[26] On the other hand, the Oregon guarantee provides no special protection for the press, and it contains a clause allowing the state to impose accountability on those who abuse the right.[27] Thus, even if Oregon courts required textual

[21] *Sterling*, 625 P.2d at 126; Hans A. Linde, *First Things First: Rediscovering the States' Bills of Rights*, 9 U. BALT. L. REV. 379, 393–94 (1980); Wallace P. Carson, Jr., *"Last Things Last": A Methodological Approach to Legal Argument in State Courts*, 19 WILLAMETTE L. REV. 641, 647–50 (1983).

An important consequence of treating a rights claim under the state constitution, without invoking federal constitutional law, is that the state court's decision rests entirely on what the Supreme Court has termed "adequate and independent" state law grounds, and for that reason is not reviewable by the Supreme Court. Michigan v. Long, 463 U.S. 1032, 1040 (1983). The prudent judge who wants to avoid Supreme Court review should include in the opinion a plain statement that the case rests entirely on state law and that any citations to federal cases indicate only that such cases are helpful and not precedential.

[22] OR. CONST. art. I, § 8.

[23] U.S. CONST. amend. I.

[24] *See* City of Eugene v. Lincoln, 50 P.3d 1253, 1258 (Or. Ct. App. 2002) ("fighting words" are not unprotected under article I, section 8).

[25] *See* State v. Henry, 732 P.2d 9, 17 (Or. 1987) (obscenity is not unprotected under article I, section 8).

[26] *See* Chaplinsky v. New Hampshire, 315 U.S. 568, 573 (1942) (excluding "fighting words" from First Amendment protection); Miller v. California, 413 U.S. 15, 36–37 (1973) (excluding obscenity from First Amendment protection).

[27] Wheeler v. Green, 593 P.2d 777, 788 (Or. 1979) (Article I, section 8 does not preclude imposing damages for abuse of speech, but does preclude imposing

differences to justify independent interpretation—which they do not—article I, section 8 would qualify for such treatment.

Oregon's independent free expression jurisprudence stems from some almost parenthetical sentences in *State v. Robertson*, a 1982 case.[28] Those phrases were parsed and restated in somewhat more accessible form four years later, in *State v. Plowman*:

> In *State v. Robertson* . . . , this court established a framework for evaluating whether a law violates Article I, section 8. First, the court recognized a distinction between laws that focus on the *content* of speech or writing and laws that focus on the pursuit or accomplishment of *forbidden results*. The court reasoned that a law of the former type, a law "written in terms directed to the substance of any 'opinion' or any 'subject' of communication," violates Article I, section 8, "unless the scope of the restraint is wholly confined within some historical exception that was well established when the first American guarantees of freedom of expression were adopted and that the guarantees then or in 1859 demonstrably were not intended to reach."
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> Laws of the latter type, which focus on forbidden results, can be divided further into two categories. The first category focuses on forbidden effects, but expressly prohibits expression used to achieve those effects. The coercion law at issue in *Robertson* was of that category. Such laws are analyzed for overbreadth: "When the proscribed means include speech or writing, however, even a law written to focus on a forbidden effect . . . must be scrutinized to determine whether it appears to reach privileged communication or whether it can be interpreted to avoid such 'overbreadth.'"
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> The second kind of law also focuses on forbidden effects, but without referring to expression at all. Of that category, this court wrote: "If [a] statute [is] directed only against causing the forbidden effects, a person accused of causing such effects by language or gestures would be left to assert (apart from a vagueness claim) that the statute could not constitutionally be applied to his particular words or other expression, not that it was drawn and enacted contrary to article I, section 8."[29]

Since *Robertson* and *Plowman*, article I, section 8, case law has evolved and matured, mostly by virtue of application outside of the original criminal law context. The basic contours—and it is only the basic contours that this Essay will attempt to sketch—remain relatively unchanged.[30]

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punitive damages.). Except for permitting damages in tort for defamation, the scope of the Abuse Clause remains enigmatic.

[28] State v. Robertson, 649 P.2d 569, 578–79 (Or. 1982).

[29] State v. Plowman, 838 P.2d 558, 562–63 (Or. 1992) (quoting *Robertson*, 649 P.2d at 576, 579) (alteration in original) (citations and footnote omitted).

[30] I have taught Oregon Constitutional Law at all three Oregon law schools, and article I, section 8, usually occupies at least three weeks of class time—sometimes

The first step in analyzing an article I, section 8 issue is to categorize the type of government action that is being brought to bear on the disputed expression. For purposes of this analysis, I will refer to government action by the generic term "law," but that term encompasses statutes, administrative regulations, local ordinances, the actions of individual law enforcement agents, and any other official government action. Further, for convenience, I will usually refer to the activity that the law purports to regulate as "speech" or "expression," without distinguishing between speech, printing, dancing, mime, or other forms of expression.

The cases identify three distinct types of laws. The first type is sometimes characterized as laws focusing on "speech *per se*." A law falls into this category if it restrains expression by specifying what cannot be expressed, regardless of the consequences. An example would be a law that contained a list of prohibited words or expressive actions, such as the statute that the court declared to be unconstitutional in *State v. Henry*.[31] That statute prohibited the dissemination of material if:

> (a) It depict[ed] or describe[d] in a patently offensive manner sadomasochistic abuse or sexual conduct;
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> (b) The average person applying contemporary state standards would find the work, taken as a whole, appeal[ed] to the prurient interest in sex; and
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> (c) Taken as a whole, it lack[ed] serious literary, artistic, political or scientific value. [32]

Such speech *per se* laws are distinguished from a second type: "speech harm" laws, that is, laws that, by their terms, specify the accomplishment or attempt to accomplish harm, and also specify that the harm can be accomplished through expression. An example would be a law that prohibits credible threats, including verbal threats, of imminent physical harm, when the threats create reasonable apprehension in the hearer. Oregon's anti-stalking statute,[33] as construed by the Oregon Supreme Court, is an example.[34] The third category consists of "harm *per se*" or "speech-neutral" laws that do not themselves refer to expressive activity, but that, in the particular case before the court, have been *enforced* in such a way as to constrain expression. An example is a law prohibiting trespass on county property, enforced in such a way as to interfere with a political demonstration.[35]

more. The reading for that unit consists of several hundred pages. This Essay is an overview and nothing more.

[31] State v. Henry, 732 P.2d 9, 9–10 (Or. 1987).

[32] OR. REV. STAT. § 167.087 (1987) (repealed 2007).

[33] OR. REV. STAT. § 163.732 (2009).

[34] State v. Rangel, 977 P.2d 379, 385–86 (Or. 1999).

[35] *E.g.*, City of Eugene v. Lincoln, 50 P.3d 1253, 1255 (Or. Ct. App. 2002).

Distinguishing laws in the first category from laws in the second can prove complicated. For example, in *State v. Moyer*, the Oregon Court of Appeals split over how to characterize section 260.402 of the Oregon Revised Statutes, a law providing, in part, that "[n]o person shall make a contribution to any other person, relating to a nomination or election of any candidate or the support or opposition to any measure, in any name other than that of the person who in truth provides the contribution."[36] Ultimately, the Oregon Supreme Court held that the law fell into the first category.[37] One generally reliable method for distinguishing the two types of law is to pose the following question: Does a person violate the law when the prohibited expression does not cause, or attempt to cause, harm? Can the offense occur regardless of its impact, or lack of impact, on those who perceive the expression? Thus, the law in *Moyer* was a speech *per se* law because a person violates the law even if there are no resulting consequences—even if nobody is deceived and no election results are affected. Or, to invoke a classic example, a law making it a crime to shout "Fire!" in a crowded theater would fall into the first category, because a person would violate the law even if there *was* a fire, or the person was an actor who shouted the word as part of the play's dialogue.[38] The law makes uttering the words a crime—period. If, however, the law—as in the actual example by Justice Holmes—made it a crime to "falsely shout[] fire in a theatre and *caus[e] a panic*,"[39] the law would fall into the second category because it specifies the harm caused by the speech.

There are two important clarifications about this dichotomy between speech *per se* laws and speech-harm laws. First, if the only harm that a law seeks to prevent is *hearing* or otherwise perceiving the prohibited expression, that law falls into the first category. Thus, lawmakers cannot arbitrarily create a speech-harm law (which, we shall see, is presumptively constitutional) by recasting a speech *per se* law (which is presumptively unconstitutional) simply by rephrasing a direct prohibition ("It is a felony to say X") into a more indirect one ("It is a felony to cause a person to hear X").[40] Second, to qualify as a speech-harm statute, the law must expressly name the harm, and it must operate only when the named harm occurs or is attempted; lawmakers are not permitted to *presume* that certain expressions *necessarily* cause harm, or, in the terms of First Amendment analysis, they are not permitted to regulate expression based

[36] State v. Moyer, 230 P.3d 7, 12 (Or. 2010) (quoting OR. REV. STAT. § 260.402 (2003)).

[37] *Id.* at 14.

[38] The example comes from Hans A. Linde, *"Clear and Present Danger" Reexamined: Dissonance in the* Brandenburg *Concerto*, 22 STAN. L. REV. 1163, 1170 (1970).

[39] Schenck v. United States, 249 U.S. 47, 52 (1919) (emphasis added) ("The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic.").

[40] State v. Moyle, 705 P.2d 740, 746 (Or. 1985).

on its presumed "secondary effect,"[41] unless that effect is stated and its occurrence is a necessary predicate for enforcement.[42] As the court explained in *City of Portland v. Tidyman*, striking down an ordinance imposing limits on where "adult" businesses could locate:

> [T]he problem with the city's asserted "concern with the effect of speech," is that the operative text of the ordinance does not specify adverse effects that constitute the "nuisance" attributable to the sale of "adult" materials and therefore does not apply only when these adverse effects are shown to occur or imminently threaten to occur. Rather, the ordinance makes a one-time legislative determination that retailing substantial quantities of sexually oriented pictures and words within the proscribed area will have adverse effects that retailing other pictures and words would not have, and that it therefore can be restricted as a "nuisance" by a law describing the materials rather than the effects. By omitting the supposed adverse effects as an element in the regulatory standard, the ordinance appears to consider the "nuisance" to be the characteristics of the "adult" materials rather than secondary characteristics and anticipated effects of the store. Such lawmaking is what Article I, section 8, forbids.[43]

Identifying speech-neutral laws that are enforced against speech, and distinguishing them from speech *per se* or speech-harm laws, presents no real difficulties. If the law does not mention or necessarily imply speech, but its enforcement has restrained speech, the law is in the third category.

Categorizing a disputed law is only the first step. It is a necessary step, however, because laws in each category are subjected to a different analysis. A law that restrains speech *per se* is presumptively unconstitutional. To overcome the presumption, the law's defenders must establish that its

> restraint is wholly confined within some historical exception that was well established when the first American guarantees of freedom of expression were adopted and that the guarantees then or in 1859 demonstrably were not intended to reach. Examples are perjury, solicitation or verbal assistance in crime, some forms of theft, forgery and fraud and their contemporary variants.[44]

[41] City of Renton v. Playtime Theatres, Inc., 475 U.S. 41, 47 (1986).

[42] In what might be considered an exception to this rule, the Oregon Supreme Court has held that a child pornography statute can be presumed to cause harm, because the statute prohibited paying only for actual photographic or film depictions of children. The court reasoned that the very existence of that pornography necessarily implicated harm to the child depicted therein. State v. Stoneman, 920 P.2d 535, 542–43 (Or. 1996).

[43] City of Portland v. Tidyman, 759 P.2d 242, 247–8 (Or. 1988) (footnote omitted).

[44] State v. Robertson, 649 P.2d 569, 576 (Or. 1982).

Historical exceptions beyond those given as examples do not, of course, announce themselves as such, and even the named exceptions have modern analogues that may or may not qualify as "contemporary variants." In *Moyer*, for example, the Oregon Supreme Court labored to find that the statute prohibiting giving misleading information to an election official was a contemporary variant of fraud.[45] Further, to qualify as an historical exception, the law had to be "well established"[46] at the time of constitution-making, not merely in existence. Thus, the Oregon Supreme Court has held that the English Waltham Black Act, which prohibited making threats to commit certain felonies, was not sufficiently well established to serve as justification for a contemporary statute prohibiting harassment.[47] As for the exception to the exception—laws that existed in the eighteenth century but were the sort of politically repressive speech restraints that the First Amendment or article I, section 8 were intended to negate—no case has arisen.

Laws that focus on harm that can be accomplished by speech are presumptively constitutional, subject to the condition that they not be overbroad. Such a law is overbroad if, in the process of prohibiting harm, it incidentally also prohibits what the court has called "privileged communication."[48] Privileged communication, obviously, does not equate with "constitutionally protected expression," or the rule would become tautological: the legislature can constitutionally enact statutes that regulate speech unless the statute regulates speech that cannot constitutionally be regulated. Still, the court has never explained in general terms what privileged communication means. It has, however, provided examples, and from them we can glean what the phrase might mean. In *Robertson*, the court provided some instances of clearly protected speech that could demonstrate the overbreadth of a statute criminalizing threats "to expose or publicize some asserted fact that would tend to subject some person to hatred, contempt, or ridicule."[49] The court explained:

> [O]ne man tells another: "If you don't quit making love to my wife, I'm going to tell your wife," or someone proposes to disclose an airline pilot's secret illness if he does not get medical attention, or a politician's embarrassing past if he does not withdraw his candidacy from office. The dissenters in the Court of Appeals added illustrations in which a journalist advises a public official that he will disclose private facts showing an official's financial interest in a pending measure if the official does not refrain from voting on the measure, or in which "one appellate judge might tell another, 'Change your opinion, or I shall dissent and expose your complete

[45] State v. Moyer, 230 P.3d 7, 17 (Or. 2010).
[46] *Robertson*, 649 P.2d at 576.
[47] State v. Moyle, 705 P.2d 740, 744 (Or. 1985).
[48] *Robertson*, 649 P.2d at 579.
[49] *Id.* at 580.

> ignorance of this area of the law.'" Indeed, they might have added [to] that a prosecutor's plea-bargaining attempts to induce a defendant to plead guilty to one charge in order to avoid prosecution on other charges . . . .
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> Some of the examples, particularly hypothetical statements addressed to minors or to family members, are offered to show that the legislature could not possibly have meant to outlaw them, but that is not to the point. The question of overbreadth is not even whether the statute covers situations in which the actual disclosure would be privileged expression, but whether the hypothetical demand backed by the threat of such a disclosure would be so privileged. The examples of such demands drawn from a political context and involving consequences directly relevant to the demanded act plainly would be an exercise of free speech or writing.[50]

Thus, it appears that a statute focused on harm but expressly restraining speech as a means of achieving that harm is overbroad to the extent that the statute's terms also restrain speech that is so obviously regulable that no reasonable person could believe that the government could restrain it. A perfect example would be a statute that prohibits coercing a person into refraining from activity that the person may lawfully undertake by telling the person that physical danger will otherwise ensue. That statute would, for example, prohibit a physician from telling a patient that, if she does not quit smoking and lose weight, she will become diabetic.

Just as the general rule that speech *per se* laws are unconstitutional has an exception (well-established historical laws) and an exception to the exception (well-established historical laws that free speech guarantees were designed to negate), so too with the presumption that speech-harm laws are constitutional. The exception is speech-harm laws that are overbroad; the exception to the exception is overbroad speech-harm laws that can be judicially narrowed consistently with what must have been the legislature's intention.[51] That is how the Supreme Court saved the harassment statute in *State v. Moyle*.[52] The statute, section 166.065(1) of the Oregon Revised Statutes, provided:

> A person commits the crime of harassment if, with intent to harass, annoy or alarm another person, the actor:
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> . . . .
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> Subjects another to alarm by conveying a telephonic or written threat to inflict serious physical injury on that person or to commit a felony involving the person or property of that person or any

[50] *Id.* (citation omitted).

[51] *Id.* at 576 ("A narrowing construction similarly may save a statute attacked as 'overbroad[.]'").

[52] *Moyle*, 705 P.2d at 748.

> member of that person's family, which threat reasonably would be expected to cause alarm[.][53]

The court noted that the literal application of the statute could criminalize obviously protected or privileged speech, including:

> [T]elephonic or written threats by the disenfranchised to break down the courthouse door to register to vote; political dissenters threatening "Death to the oppressors." Other hypothetical examples in political or industrial settings could be: demonstrators posting or carrying placards showing caricatures of political officials or corporation presidents hung in effigy; telephone threats made to non-striking workers, "If you cross that picket line, I'll break your neck."[54]

To salvage the statute, the court interpreted it to apply only to credible threats to commit violent felonies against the hearer or a family member, causing actual and reasonable alarm.[55]

Speech-neutral statutes have received relatively little attention from Oregon courts. Obviously, such statutes cannot be declared facially unconstitutional on free speech grounds, because, by definition, they do not state or imply a restraint of speech. Instead, such laws are challenged only as applied.[56] *City of Eugene v. Lincoln*[57] is instructive. At issue in that case was the criminal conviction of a person who, as part of an animal-rights demonstration outside of a rodeo, had violated a Eugene ordinance which provided, "A person commits the crime of criminal trespass in the second degree if the person enters or remains unlawfully in or upon premises."[58] To "[e]nter or remain unlawfully" was defined to mean "[t]o fail to leave premises that are open to the public after being lawfully directed to do so by the person in charge."[59] The ordinance neither mentioned nor implied speech or other expressive activity. To determine the constitutionality of the defendant's conviction, the court reasoned:

> Those who enforce and execute the law, like those who make it, must target regulable harm and not expression *per se* apart from harm. We must therefore decide, in this as-applied challenge, whether the city's enforcement of the criminal trespass statute against defendant had as its objective the prevention of some harm within its power to prevent or whether its objective was to prevent protected speech.[60]

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[53] OR. REV. STAT. § 166.065(1) (1981).
[54] *Moyle*, 705 P.2d at 747.
[55] *Id.* at 748–49.
[56] *Robertson*, 649 P.2d at 576.
[57] City of Eugene v. Lincoln, 50 P.3d 1253 (Or. Ct. App. 2002).
[58] EUGENE, OR., CITY CODE § 4.807 (enacted April 13, 1987; amended July 25, 2005).
[59] *Lincoln*, 50 P.3d at 1255 (quoting EUGENE, OR., CITY CODE § 4.805).
[60] *Id.* at 1257.

Thus, the court applied the same rationale underlying the dichotomy between speech *per se* laws and speech-harm laws, and reversed the conviction on the ground that the evidence showed that the city's enforcement was an attempt to regulate the speech incident to the demonstration and not any harm that the speech might have caused.

Such are the rough contours, then, of Oregon free expression law. One additional rule deserves mention. Although the court, again, has had little occasion to elaborate the rule, one case establishes that a government body may enact a law limiting the speech of a public official to the extent that the speech is incompatible with the speaker's official function. Thus, in *In re Lasswell*, the court rejected an article I, section 8 challenge to the disciplinary rule governing prosecutorial conduct that prohibited extrajudicial comments on pending cases, despite the fact that the rule was directed toward speech *per se*.[61] The court explained:

> [T]he rule addresses the incompatibility between a prosecutor's official function, including his responsibility to preserve the conditions for a fair trial, and speech that, though privileged against other than professional sanctions, vitiates the proper performance of that function under the circumstances of the specific case. In short, a lawyer is not denied freedom to speak, write, or publish; but when one exercises official responsibility for conducting a prosecution according to constitutional standards, one also undertakes the professional responsibility to protect those standards in what he or she says or writes. We conclude that [the rule] survives the accused's constitutional challenge if it is narrowly interpreted so as to limit its coverage, in the words of article I, section 8, to a prosecutor's "abuse" of the right "to speak, write, or print freely on any subject whatever."[62]

The court has not applied the "incompatibility exception" outside of the context of the disciplinary rules governing lawyers and judges.[63]

V. CONCLUSION

In their own constitutions, the citizens of states are free to confer on themselves a greater quantum of rights, vis-à-vis their own government, than the minimum guaranteed by the United States Constitution. In Oregon, examination of state constitutional guarantees always precedes federal inquiries, because, until it can be determined that the state's laws, including its constitutional law fully implemented, denies to some person the federally guaranteed liberty embodied in the Due Process Clause, no federal claim arises. Oregon free speech law, construing article I, section 8 of the Oregon Constitution, provides a good example of how a state

[61] *In re* Lasswell, 673 P.2d 855 (Or. 1983).

[62] *Id.* at 857 (quoting OR. CONST. art. I, § 8).

[63] *In re* Fadeley, 802 P.2d 31, 39–40 (Or. 1990) (upholding rule of judicial conduct prohibiting judicial candidates from directly raising funds).

can develop a coherent body of state constitutional law independently of any federal constitutional analog.